

**NUCLEAR REGULATORY COMMISSION  
ISSUANCES**

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

---

January 1, 2021 – June 30, 2021

---

Volume 93  
Pages 1 - 251



Prepared by the  
Office of Administration  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(301-415-0955)

## COMMISSIONERS

Kristine L. Svinicki, Chairman\*  
Christopher T. Hanson, Chairman \*\*  
Jeff Baran  
Annie Caputo\*\*\*  
David A. Wright

---

Margaret M. Doane, Executive Director for Operations

Marian L. Zabler, General Counsel

---

E. Roy Hawkens, Chief Administrative Judge,  
Atomic Safety & Licensing Board Panel

\* Kristine L. Svinicki resigned from the Commission on January 20, 2021.

\*\* Christopher T. Hanson was appointed Chairman on January 20, 2021.

\*\*\* Annie Caputo's term as a Commissioner expired on June 30, 2021.

## ATOMIC SAFETY AND LICENSING BOARD PANEL

E. Roy Hawkens,\* *Chief Administrative Judge*  
Paul S. Ryerson,\* *Associate Chief Administrative Judge (Legal)*  
Dr. Sue H. Abreu,\* *Associate Chief Administrative Judge (Technical)*

### Members

|                        |                           |                         |
|------------------------|---------------------------|-------------------------|
| Dr. Gary S. Arnold*    | Dr Yassin A. Hassan       | Dr. Alice C. Mignerey   |
| Dr. Anthony J. Baratta | Dr. Thomas J. Hirons      | Dr. Sekazi K. Mtingwa   |
| G. Paul Bollwerk, III* | Dr. Jeffrey D.E. Jeffries | Dr. William W. Sager    |
| Michael C. Farrar      | Dr. William E. Kastenber  | Ronald M. Spritzer*     |
| William J. Froehlich*  | Dr. Michael F. Kennedy    | Nicholas G. Trikourous* |
| Michael M. Gibson*     | Lawrence G. McDade        | Dr. Craig M. White      |

---

\* *Full-time panel members*



## PREFACE

This is the ninety-third volume of issuances (1–251) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from January 1, 2021, to June 30, 2021.

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.

The hardbound edition of the Nuclear Regulatory Commission Issuances is a final compilation of the monthly issuances. It includes all of the legal precedents for the agency within a six-month period. Any opinions, decisions, denials, memoranda and orders of the Commission inadvertently omitted from the monthly softbounds and any corrections submitted by the NRC legal staff to the printed softbound issuances are contained in the hardbound edition. Cross references in the text and indexes are to the NRCI page numbers which are the same as the page numbers in this publication.

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.

Available from

U.S. Government Publishing Office  
PO Box 979050  
St. Louis, MO 63197-9000  
<https://bookstore.gpo.gov/customer-service/order-methods>

A year's subscription consists of 12 softbound issues,  
4 indexes, and 2-4 hardbound editions for this publication.

Single copies of this publication  
are available from  
National Technical Information Service  
5301 Shawnee Rd  
Alexandria, VA 22312

Errors in this publication may be reported to the  
Office of Administration  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(301-415-0955)

## CONTENTS

### Issuances of the Nuclear Regulatory Commission

|                                                         |     |
|---------------------------------------------------------|-----|
| DTE ELECTRIC COMPANY                                    |     |
| (Fermi 2)                                               |     |
| Docket 50-341-LA                                        |     |
| Memorandum and Order, CLI-21-5, February 18, 2021 ..... | 131 |
| ENTERGY NUCLEAR OPERATIONS, INC.                        |     |
| (Indian Point Nuclear Generating Station, Unit 1)       |     |
| Docket 50-003-LT-3                                      |     |
| Memorandum and Order, CLI-21-1, January 15, 2021 .....  | 1   |
| ENTERGY NUCLEAR INDIAN POINT 2, LLC                     |     |
| (Indian Point Nuclear Generating Station, Unit 2)       |     |
| Docket 50-247-LT-3                                      |     |
| Memorandum and Order, CLI-21-1, January 15, 2021 .....  | 1   |
| ENTERGY NUCLEAR INDIAN POINT 3, LLC                     |     |
| (Indian Point Nuclear Generating Station, Unit 3)       |     |
| Docket 50-286-LT-3                                      |     |
| Memorandum and Order, CLI-21-1, January 15, 2021 .....  | 1   |
| FIRSTENERGY COMPANIES                                   |     |
| (Three Mile Island Nuclear Station, Unit 2)             |     |
| Docket 50-320-LT                                        |     |
| Memorandum and Order, CLI-21-2, January 15, 2021 .....  | 70  |
| Memorandum and Order, CLI-21-8, June 22, 2021 .....     | 237 |
| HOLTEC INTERNATIONAL                                    |     |
| (HI-STORE Consolidated Interim Storage Facility)        |     |
| Docket 72-1051-ISFSI                                    |     |
| Memorandum and Order, CLI-21-4, February 18, 2021 ..... | 119 |
| Memorandum and Order, CLI-21-7, April 28, 2021 .....    | 215 |
| (Indian Point ISFSI)                                    |     |
| Docket 72-51-LT-2                                       |     |
| Memorandum and Order, CLI-21-1, January 15, 2021 .....  | 1   |
| HOLTEC DECOMMISSIONING INTERNATIONAL, LLC               |     |
| (Indian Point ISFSI)                                    |     |
| Docket 72-51-LT-2                                       |     |
| Memorandum and Order, CLI-21-1, January 15, 2021 .....  | 1   |
| INTERIM STORAGE PARTNERS LLC                            |     |
| (WCS Consolidated Interim Storage Facility)             |     |
| Docket 72-1050-ISFSI                                    |     |
| Memorandum and Order, CLI-21-9, June 22, 2021 .....     | 244 |

|                                                                                     |     |
|-------------------------------------------------------------------------------------|-----|
| JOSEPH SHEA                                                                         |     |
| (Order Prohibiting Involvement in NRC-Licensed Activities<br>Immediately Effective) |     |
| Docket IA-20-008-EA                                                                 |     |
| Memorandum and Order, CLI-21-3, January 15, 2021 .....                              | 89  |
| SOUTHERN NUCLEAR OPERATING COMPANY, INC.                                            |     |
| (Vogtle Electric Generating Plant, Unit 3)                                          |     |
| Docket 52-025-LA-3                                                                  |     |
| Memorandum and Order, CLI-21-6, March 15, 2021 .....                                | 145 |
| TMI-2 SOLUTIONS, LLC                                                                |     |
| (Three Mile Island Nuclear Station, Unit 2)                                         |     |
| Docket 50-320-LT                                                                    |     |
| Memorandum and Order, CLI-21-2, January 15, 2021 .....                              | 70  |
| Memorandum and Order, CLI-21-8, June 22, 2021 .....                                 | 237 |

**Issuances of the Atomic Safety and Licensing Boards**

|                                                                                     |     |
|-------------------------------------------------------------------------------------|-----|
| INTERIM STORAGE PARTNERS LLC                                                        |     |
| (WCS Consolidated Interim Storage Facility)                                         |     |
| Docket 72-1050-ISFSI                                                                |     |
| Memorandum and Order, LBP-21-2, January 29, 2021 .....                              | 104 |
| JOSEPH SHEA                                                                         |     |
| (Order Prohibiting Involvement in NRC-Licensed Activities<br>Immediately Effective) |     |
| Docket IA-20-008-EA                                                                 |     |
| Order, LBP-21-1, January 28, 2021 .....                                             | 101 |
| TENNESSEE VALLEY AUTHORITY                                                          |     |
| (Enforcement Action)                                                                |     |
| Dockets EA-20-006, EA-20-007                                                        |     |
| Memorandum and Order, LBP-21-3, March 25, 2021 .....                                | 153 |
| VIRGINIA ELECTRIC AND POWER COMPANY                                                 |     |
| (North Anna Power Station, Units 1 and 2)                                           |     |
| Dockets 50-338-SLR, 50-339-SLR                                                      |     |
| Memorandum and Order, LBP-21-4, March 29, 2021 .....                                | 179 |

**Indexes**

|                             |      |
|-----------------------------|------|
| Case Name Index .....       | I-1  |
| Legal Citations Index ..... | I-3  |
| Cases .....                 | I-3  |
| Regulations .....           | I-19 |



|                      |      |
|----------------------|------|
| Statutes .....       | I-35 |
| Others .....         | I-37 |
| Subject Index .....  | I-39 |
| Facility Index ..... | I-79 |



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Kristine L. Svinicki**, Chairman  
**Jeff Baran**  
**Annie Caputo**  
**David A. Wright**  
**Christopher T. Hanson**

**In the Matter of**

**Docket Nos. 50-003-LT-3**  
**50-247-LT-3**  
**50-286-LT-3**  
**72-51-LT-2**

**ENTERGY NUCLEAR OPERATIONS, INC.,**  
**ENTERGY NUCLEAR INDIAN POINT 2, LLC,**  
**ENTERGY NUCLEAR INDIAN POINT 3, LLC,**  
**HOLTEC INTERNATIONAL, and HOLTEC**  
**DECOMMISSIONING INTERNATIONAL, LLC**  
**(Indian Point Nuclear Generating Station,**  
**Units 1, 2, and 3 and ISFSI)**

**January 15, 2021**

**LICENSE TRANSFER PROCEEDINGS**

The Staff may issue its approval or denial of a license transfer application during a pending adjudicatory proceeding but the Staff's order and related issuances remain subject to the Commission's authority to modify, condition, or rescind them, based on the results of proceeding.

**DECOMMISSIONING FUNDING**

Site-specific decommissioning cost estimates submitted by a license transfer applicant may be based on plausible assumptions and forecasts because cost

estimates are necessarily uncertain, particularly at the early stages of a decommissioning project.

#### **LICENSE TRANSFER PROCEEDINGS; EXEMPTIONS**

An exemption request that was filed separately from the license transfer application falls within the scope of the proceeding where the decommissioning cost estimates set forth in the license transfer application depend upon the exemption being granted.

#### **CONTENTION ADMISSIBILITY; DECOMMISSIONING COSTS**

The mere possibility that additional contamination may be discovered during decommissioning — without any specific information regarding its scope or the remediation costs — is not enough to raise a genuine dispute with an applicant's decommissioning cost estimates.

#### **DECOMMISSIONING COSTS**

The NRC conducts a threshold review to ensure that the prospective licensee has based its cost estimates on plausible assumptions and forecasts. These estimates will not be inadequate even if the possibility is not insignificant that things will turn out less favorably than expected.

#### **DECOMMISSIONING COSTS**

If future legal or technical developments call into question cost estimates for spent-fuel management or waste disposal, NRC regulations require the licensee to notify the NRC, and the NRC will review whether the licensee needs to adjust its financial assurance accordingly.

#### **DECOMMISSIONING FUNDING PLANS**

An applicant's financial assurance estimates will be acceptable if they are grounded in assumptions and forecasts that were plausible when the estimates were submitted.

#### **DECOMMISSIONING FUNDING PLANS**

The NRC's rules do not require an applicant to update its decommissioning funding plans due to temporary changes in market conditions.

**DECOMMISSIONING FUNDING PLANS; FINANCIAL QUALIFICATIONS**

Potential financial recoveries not relied upon as part of the decommissioning funding plan are relevant to whether the applicants could provide additional financial assurance if the decommissioning trusts prove insufficient.

**DECOMMISSIONING FUNDING PLANS; DECOMMISSIONING COSTS**

NRC rules require a license undergoing decommissioning to update the NRC annually on its decommissioning costs and provide additional financial assurance, if necessary, to cover the estimated cost of completing decommissioning.

**CATEGORICAL EXCLUSION**

License transfers are categorically excluded from the requirement to prepare an environmental assessment because a license transfer does not permit the transferee to operate the facility in a different manner than previously permitted. Therefore, absent special circumstances, a license transfer will not present environmental impacts different from those already considered in relevant generic or site-specific analyses.

**CONTENTION ADMISSIBILITY; MANAGEMENT CHARACTER**

To be admitted as a contention, a claim of deficient character must have a direct and obvious relationship between the character issues and the licensing action in dispute. Admissible contentions challenging management character or integrity have generally been based upon the activities of high-ranking officers or directors of the licensed organization who would have some direct authority over the activities authorized by the license.

**MEMORANDUM AND ORDER**

This proceeding concerns an application to transfer control of the Nuclear Regulatory Commission (NRC) licenses for the Indian Point Energy Center (Indian Point), including the general license for the facility's independent spent fuel storage installation (ISFSI), from the current plant owners and license holders to

subsidiaries of Holtec International (Holtec).<sup>1</sup> After completing its review, the NRC Staff approved an exemption requested in the application and issued an order approving the license transfer.<sup>2</sup>

NRC regulations allow the Staff to issue its approval or denial of a license transfer application, consistent with its findings in its Safety Evaluation Report, during a pending adjudicatory proceeding.<sup>3</sup> But the application “will lack the agency’s final approval until and unless the Commission concludes the adjudication” in the Applicants’ favor.<sup>4</sup> The Staff’s order and related issuances therefore remain subject to our authority to modify, condition, or rescind them, based on the results of this proceeding.

Based on the NRC Staff’s approval of the license transfer application, ownership of Indian Point Units 1 and 2 would be transferred from Entergy Nuclear Indian Point 2, LLC, to Holtec Indian Point 2, LLC (Holtec IP2), while ownership of Indian Point Unit 3 would be transferred from Entergy Nuclear Indian Point 3, LLC, to Holtec Indian Point 3, LLC (Holtec IP3).<sup>5</sup> The authority of Entergy Nuclear Operations, Inc. (Entergy) to conduct licensed activities at all three units would be transferred to Holtec Decommissioning International, LLC (HDI).<sup>6</sup>

We consider today three separate petitions for leave to intervene and requests for a hearing on the proposed license transfer from the State of New York; the Town of Cortlandt, Village of Buchanan, and Hendrick Hudson School Dis-

---

<sup>1</sup> See Indian Point Nuclear Generating Unit Nos. 1, 2, and 3; Consideration of Approval of Transfer of Control of Licenses and Conforming Amendments, 85 Fed. Reg. 3947 (Jan. 23, 2020) (Hearing Notice); Application for Order Consenting to Transfers of Control of Licenses and Approving Conforming License Amendments (Application), attached (Encl. 1) to Letter from A. Christopher Bakken III, Entergy Nuclear Operations, Inc., to NRC Document Control Desk (Nov. 21, 2019) (Cover Letter). The cover letter and application are available together under ADAMS accession number ML19326B953.

<sup>2</sup> See Letter from Richard V. Guzman, NRC, to Andrea L Sterdis, Holtec Decommissioning International, LLC (Nov. 23, 2020) (ML20309A577); Letter from Richard V. Guzman, NRC, to A. Christopher Bakken III, Entergy Nuclear Operations, Inc. (Nov. 23, 2020) (ML20297A321).

<sup>3</sup> 10 C.F.R. § 2.1316(a); see also Atomic Energy Act of 1954, as amended (AEA) § 189a., 42 U.S.C. § 2239(a)(2)(A) (permitting issuance of license amendment on an immediately effective basis, upon a determination that the amendment involves no significant hazards consideration, notwithstanding the pendency of a hearing request).

<sup>4</sup> See *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-19-11, 90 NRC 258, 262 (2020) (quoting *Vermont Yankee Nuclear Power Corp. and AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 83 (2000)).

<sup>5</sup> Application at 1.

<sup>6</sup> *Id.* Holtec IP2 and Holtec IP3 will be direct, wholly owned subsidiaries of Nuclear Asset Management Company, LLC, which is itself a direct, wholly owned subsidiary of Holtec Power, Inc. HDI is also a direct, wholly owned subsidiary of Holtec Power. And Holtec Power is a direct, wholly owned subsidiary of Holtec International. *Id.* at 5.

trict (together, Local Petitioners); and Riverkeeper, Inc.<sup>7</sup> We also consider a letter from Safe Energy Rights Group, Inc. (SEnRG) that requests a hearing.<sup>8</sup> In addition, we consider a motion by New York to amend its petition based on circumstances related to the Coronavirus Disease 2019 (COVID-19) public health emergency.<sup>9</sup> We also consider two motions by Riverkeeper, one to supplement the basis for its sole contention, and the other seeking a waiver of our regulations to require a Commission decision on Riverkeeper's hearing request prior to the Staff's decision on the license transfer application.<sup>10</sup> Entergy; Entergy Nuclear Indian Point 2, LLC; Entergy Nuclear Indian Point 3, LLC; Holtec; and HDI (together, Applicants) oppose all four hearing requests, and the three motions.<sup>11</sup>

For the reasons stated below, we deny each of the hearing requests, as well as the motions filed by New York and Riverkeeper.

## I. BACKGROUND

### A. The License Transfer Application and Related Submissions

Based on the approval of their license transfer application, Entergy and Holtec

---

<sup>7</sup> See Petition of the State of New York for Leave to Intervene and for a Hearing (Feb. 12, 2020) (ML20043E118) (New York Petition); Town of Cortlandt, Village of Buchanan, and Hendrick Hudson School District's Petition for Leave to Intervene and Hearing Request (Feb. 12, 2020) (ML20043F054) (Town, Village, and District Petition); Petition of Riverkeeper, Inc. to Intervene and for a Hearing (Feb. 12, 2020) (ML20043F530) (Riverkeeper Petition).

<sup>8</sup> Letter from Courtney M. Williams, SEnRG, to NRC Hearing Docket, Request for Hearing on Indian Point License Transfer, NRC-2020-0021 (Feb. 11, 2020) (ML20042C984) (SEnRG Letter).

<sup>9</sup> See Motion for Leave to Amend Contentions NY-2 and NY-3 (Mar. 24, 2020) (ML20084Q191) (New York Motion).

<sup>10</sup> See Motion of Riverkeeper, Inc. to Supplement the Basis of its Contention With New Evidence Not Previously Available (Oct. 20, 2020) (ML20296A283) (Riverkeeper Motion to Supplement); Motion of Riverkeeper, Inc. for Full Adjudication of its Pending Contention Prior to Any Decision by NRC on the License Transfer (Nov. 6, 2020) (ML20311A660) (Riverkeeper Motion for Waiver).

<sup>11</sup> See Applicants' Answer Opposing Petition for Leave to Intervene and Hearing Request Filed by the State of New York (Mar. 9, 2020) (ML20069K756) (Applicants' Answer to New York Petition); Applicants' Answer Opposing Petition for Leave to Intervene and Hearing Request Filed by the Town of Cortlandt, Village of Buchanan, and Hendrick Hudson School District (Mar. 9, 2020) (ML20069K761); Applicants' Answer Opposing Riverkeeper, Inc.'s Petition to Intervene and for a Hearing (Mar. 9, 2020) (ML20069L613); Applicants' Answer Opposing Safe Energy Rights Group's Letter Requesting a Hearing (Mar. 9, 2020) (ML20069K765); Applicants' Answer to the State of New York's Motion for Leave to Amend Contentions NY-2 and NY-3 (Apr. 20, 2020) (ML20111A329); Applicants' Answer Opposing Riverkeeper's November 6, 2020 Motion (Nov. 12, 2020) (ML20317A329); Applicants' Answer Opposing Riverkeeper, Inc.'s Motion to Supplement the Basis of its Contention (Nov. 12, 2020) (ML20317A296). The NRC Staff, which is not required to participate in this proceeding, did not respond to either the hearing requests or New York's motion.

plan to execute a Membership Interest Purchase and Sale Agreement that will result in HDI assuming responsibility for the Indian Point units.<sup>12</sup> Because the license transfers will not occur until after Entergy has permanently ceased operations at Indian Point and removed all fuel from its reactors, however, HDI's licensed activities will be limited. Specifically, HDI's activities will be limited to possessing and disposing of radioactive material, maintaining the Indian Point facility in a safe condition, decommissioning and decontaminating the facility, and maintaining the facility's ISFSI until it can be decommissioned.<sup>13</sup>

To complete these activities, HDI will enter into an agreement with Holtec IP2 and Holtec IP3 under which these entities will fund HDI's work at Indian Point.<sup>14</sup> HDI will, in turn, enter into an agreement with Comprehensive Decommissioning International, LLC to serve as the general contractor at Indian Point.<sup>15</sup> Under the agreement, Comprehensive Decommissioning International will conduct day-to-day activities at the site, including decommissioning and spent fuel management activities, subject to HDI's oversight and control.<sup>16</sup>

HDI plans to complete transferring spent fuel to Indian Point's ISFSI as soon as practicable and promptly begin decontaminating and dismantling structures at the site, apart from the ISFSI.<sup>17</sup> HDI estimates that it will complete radiological decommissioning so that the non-ISFSI portions of the site can be released for unrestricted use within fifteen years of the license transfers. For its decommissioning approach, HDI plans to use the DECON model, which involves four periods of work: (1) pre-shutdown planning/engineering and regulatory reviews, (2) plant deactivation and preparation for storage, (3) a period of plant safe storage with concurrent operations in the spent-fuel pool until the pool inventory is zero, and (4) decontamination and dismantlement of the radioactive portions of the facility, leading to license termination.<sup>18</sup>

HDI, Holtec IP2, and Holtec IP3 intend to fund decommissioning at Indian Point through the nuclear decommissioning trusts established for the Indian Point units, which Holtec IP2 and Holtec IP3 will own under the terms of the

---

<sup>12</sup> Application at 1-2.

<sup>13</sup> Cover Letter at 1-2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 3. HDI holds a majority interest in Comprehensive Decommissioning International, while Kentz USA, a subsidiary of SNC-Lavalin Group, holds a minority interest. *Id.* at 2.

<sup>16</sup> *Id.* at 3.

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

<sup>18</sup> See Application at 4 (stating that HDI plans to use the DECON model); see also "Revised Analyses of Decommissioning for the Reference Pressurized Water Reactor Power Station" (Final Report), NUREG/CR-5884, vol. 1 (Nov. 1995), at ch. 3 (ML14008A187) (NUREG/CR-5884) (describing the DECON model generally).



Entergy-Holtec transfer agreement.<sup>19</sup> These entities expect that the trusts, which as of October 31, 2019, totaled approximately \$2.1 billion, will fully fund decommissioning activities at Indian Point. Accordingly, they intend to rely solely on the trusts to meet NRC requirements that a prospective licensee be financially qualified to carry out its proposed activities and provide financial assurance to cover estimated decommissioning costs.<sup>20</sup>

HDI outlined its plans for decommissioning Indian Point in a Post-Shutdown Decommissioning Activities Report (PSDAR) that it submitted separate from the license transfer application.<sup>21</sup> As part of its PSDAR, HDI included a Decommissioning Cost Estimate (DCE) for Units 1, 2, and 3.<sup>22</sup> According to HDI, the DCE demonstrates that the trusts will be sufficient to fund all required decommissioning activities at Indian Point. In addition, HDI estimates that the trusts will be adequate to fund site restoration and spent fuel management activities at Indian Point. But because these latter activities do not fall under the NRC's definition of decommissioning and under NRC rules a licensee cannot use a decommissioning trust to pay for non-decommissioning costs,<sup>23</sup> HDI has requested an exemption to allow it to use a portion of the Indian Point trusts for these activities.<sup>24</sup>

HDI estimates that it will spend approximately \$598 million for decommissioning and other activities at Indian Point Unit 1, \$702 million at Unit 2, and \$1002 million at Unit 3.<sup>25</sup> In the DCE, HDI provides site-specific estimates

---

<sup>19</sup> Cover Letter at 2-3.

<sup>20</sup> See 10 C.F.R. §§ 50.33(f), 50.75, 72.30. Access to the decommissioning trusts would allow Holtec IP2 and Holtec IP3 to provide financial assurance using the prepayment method described in 10 C.F.R. § 50.75(e)(1)(i) and 10 C.F.R. § 72.30(e)(1).

<sup>21</sup> See "Post-Shutdown Decommissioning Activities Report" (PSDAR) and "DECON Site-Specific Decommissioning Cost Estimate" (DCE), attached to Letter from Andrea L. Sterdis, HDI, to NRC Document Control Desk (Dec. 19, 2019). The PSDAR, DCE, and cover letter are available at ML19354A698.

<sup>22</sup> *Id.*

<sup>23</sup> See 10 C.F.R. § 50.82(a)(8)(i)(A) (withdrawals from the decommissioning trust fund may be made only for "expenses for legitimate decommissioning activities consistent with the definition of decommissioning in § 50.2"). As defined in 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) [r]elease of the property for unrestricted use and termination of the license; or (2) [r]elease of the property under restricted conditions and termination of the license."

<sup>24</sup> See "HDI Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv)" (Exemption Request), attached to Letter from Andrea L. Sterdis, HDI, to NRC Document Control Desk (Feb. 12, 2020) (ML20043C539). HDI states that without an exemption, "it would be forced to provide additional funding that would not be recoverable from the trust fund until the [Indian Point] operating licenses are terminated." *Id.* at 11 (unnumbered).

<sup>25</sup> Application, Attachment D, Encl. 1 at 1-4 (unnumbered).

for these activities through the expected license termination date.<sup>26</sup> As part of its estimates, HDI includes an 18% contingency allowance to address “inherent uncertainty in the estimated quantities, unit rates, productivity, pricing, and schedule durations” relevant to its activities.<sup>27</sup> HDI also assumes that funds remaining in the decommissioning trusts will grow at a 2% annual real rate of return.<sup>28</sup> HDI estimates that approximately \$263 million will remain in the trusts after it has completed all required activities at Indian Point.<sup>29</sup>

While HDI will be responsible for decommissioning Indian Point, Holtec IP2 will own Indian Point Units 1 and 2, with Holtec IP3 owning Unit 3.<sup>30</sup> As owners, Holtec IP2 and Holtec IP3 will hold title to the spent nuclear fuel at Indian Point and accede to Entergy’s rights and obligations under the Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Waste (Standard Contract).<sup>31</sup> Under the Standard Contract, Holtec IP2 and Holtec IP3 expect to recover their spent fuel management costs resulting from the Department of Energy’s (DOE) breach of its contractual obligation to dispose of fuel that is currently stored at Indian Point.<sup>32</sup> These costs are projected to total approximately \$632 million.<sup>33</sup>

## **B. Financial Qualifications and Financial Assurance**

Under the Atomic Energy Act of 1954, as amended, and our associated regulations, no power reactor or ISFSI license can be transferred without the NRC’s prior written consent.<sup>34</sup> The NRC will approve a license transfer if it finds the

---

<sup>26</sup> DCE at 100-05.

<sup>27</sup> *Id.* at 93-95. The exception is ISFSI decommissioning costs, for which HDI has included a 25% contingency allowance. Holtec states that each contingency allowance is “an integral part of the cost to complete the [Indian Point] decommissioning and is expected to be fully consumed.” *Id.* at 95.

<sup>28</sup> *See* DCE at 100-05 n.3; *see also* Exemption Request at 3 (unnumbered) (“A 2% annual real rate of return on the [decommissioning trust] funds as allowed by 10 CFR 50.75(e)(1)(i) is used in the analyses.”).

<sup>29</sup> DCE at 100-05.

<sup>30</sup> Application at 1.

<sup>31</sup> *See id.* at 20. The text of the Standard Contract can be found at 10 C.F.R. § 961.11. The Standard Contract establishes the terms and conditions under which DOE will make available nuclear waste disposal services to the owners and generators of spent nuclear fuel and high-level radioactive waste. *Id.* § 961.1.

<sup>32</sup> Application at 20.

<sup>33</sup> DCE at 100-05, tbls.5-1a, 5-1b, and 5-1c, col. 3, “50.54(bb) Spent Fuel Management Cost.”

<sup>34</sup> *See* Atomic Energy Act § 184, 42 U.S.C. § 2234 (providing that “[n]o license granted [under the Atomic Energy Act] shall be transferred . . . directly or indirectly, through transfer of control

*(Continued)*

proposed transferee to be qualified to hold the license and the transfer is otherwise consistent with applicable law, regulations, and Commission orders.<sup>35</sup> The license transfer review is limited to specific matters, including the financial and technical qualifications of the proposed transferee.<sup>36</sup>

As part of its financial qualifications showing, an applicant must provide reasonable assurance that sufficient funds will be available to decommission the facility and carry out activities under the license.<sup>37</sup> NRC regulations outline several acceptable methods of providing financial assurance for decommissioning. The prepayment method, which Holtec IP2 and Holtec IP3 plan to use, involves depositing funds into an account kept segregated from the licensee's assets and outside of the licensee's administrative control in an amount sufficient to pay decommissioning costs at the time the licensee expects to permanently cease operations.<sup>38</sup> A licensee that has set aside prepaid funds based on a site-specific decommissioning cost estimate that involves a safe storage period may take credit for projected earnings on decommissioning funds, up to a 2% annual real rate of return, through the projected decommissioning period.<sup>39</sup>

When evaluating a license transfer applicant's ability to meet financial obligations related to decommissioning, the NRC "will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected."<sup>40</sup> We accept financial assurance based on plausible assumptions and forecasts because, particularly at the early stages of a decommissioning project, cost estimates are necessarily uncertain. This observation is as true for the site-specific cost estimates submitted by a license transfer applicant as it is for the site-specific estimates submitted by a current licensee that is preparing for and entering the decommissioning process. We see no reason to require that an applicant's

---

of any license to any person, unless the Commission shall . . . give its consent in writing"); 10 C.F.R. §§ 50.80(a), 72.50(a) (implementing this provision with respect to power reactor and ISFSI licenses).

<sup>35</sup> 10 C.F.R. § 50.80(c).

<sup>36</sup> *See id.* § 50.80(b)(1)(i).

<sup>37</sup> *See id.* §§ 50.33(f), 50.33(k)(1), 50.75, 50.80(b)(1)(i), 50.82(a), 72.30(b)-(c). Because power reactor operations will have permanently ceased at Indian Point prior to the proposed license transfer, the Applicants need not demonstrate financial qualifications to cover reactor operating costs. *See id.* § 50.33(f)(2); Application at 2, 17.

<sup>38</sup> *See* 10 C.F.R. § 50.75(e)(1)(i); Application at 17-18. Other methods of demonstrating financial assurance include, for example, a surety bond, a letter of credit, insurance, or a parent company guarantee. 10 C.F.R. § 50.75(e)(1)(iii).

<sup>39</sup> 10 C.F.R. § 50.75(e)(1)(i). Because this provision refers to a real rate of return, as opposed to a nominal rate, a licensee must adjust the rate for inflation.

<sup>40</sup> *See North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999).

cost estimates be more detailed, more certain, or more conservative than the site-specific estimates submitted by current NRC licensees, who may rely on plausible assumptions when preparing their estimates.

## II. DISCUSSION

### A. Intervention Requirements

To intervene in an NRC licensing proceeding, a petitioner must show standing and proffer at least one admissible contention.<sup>41</sup> To show standing, a petitioner must show a concrete and particularized injury (actual or threatened) to an interest within the “zone of interests” protected by the Atomic Energy Act. The petitioner must further show that the alleged injury would be fairly caused by the proposed licensing action and is capable of being redressed by a favorable decision. Moreover, an organization that seeks representational standing must demonstrate how at least one of its members may be affected by the licensing action (often as a result of the member’s activities on or near the site), must identify that member by name and address, and must show, preferably by affidavit, that the organization is authorized to request a hearing on behalf of that member.<sup>42</sup>

NRC regulations in 10 C.F.R. § 2.309(f)(1) specify the requirements for an admissible contention. For each contention, a petitioner must explain the contention’s basis and provide supporting facts or expert opinion on which the petitioner intends to rely in litigating the contention, together with references to specific sources or documents on which the petitioner intends to rely. To be admissible, a contention must fall within the scope of the proceeding and be material to the findings that the NRC must make for the proposed licensing action. The petitioner must identify the specific portions of the application that the petitioner disputes, along with the supporting reasons for each dispute. Or, if a 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. We long have emphasized that these contention admissibility requirements are strict.<sup>43</sup> They are intended to ensure that adjudicatory hearings are triggered only by substantive safety or environmental

---

<sup>41</sup> See 10 C.F.R. § 2.309(a), (d), (f); Hearing Notice, 85 Fed. Reg. at 3949 (referencing requirements for intervention).

<sup>42</sup> See *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000) (and authority cited therein).

<sup>43</sup> See, e.g., *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999) (explaining why the NRC tightened its contention admissibility standards in 1989).

issues that raise a supported dispute with the application on a matter material to the NRC's decision on the challenged action.

## **B. Petitions of New York and the Local Petitioners**

Indian Point is located within the jurisdictional boundaries of New York State, the Town of Cortlandt, the Village of Buchanan, and the Hendrick Hudson School District. Accordingly, under our rules of practice, both New York and the Local Petitioners may be granted a hearing with no further demonstration of standing if they submit at least one admissible contention.<sup>44</sup>

New York proposes three contentions in this proceeding. In Contention 1, New York argues that HDI's cost estimates are inadequate because HDI impermissibly assumes that the decommissioning trusts will grow at a 2% annual real rate of return.<sup>45</sup> In Contention 2, New York makes nine distinct arguments that HDI has underestimated various costs associated with license termination, site restoration, and spent fuel management activities.<sup>46</sup> In Contention 3, New York argues that neither HDI, Holtec IP2, nor Holtec IP3 has shown it is financially qualified to carry out NRC-licensed activities at Indian Point.<sup>47</sup> Finally, in its motion to amend its contentions, New York argues that market downturns related to the COVID-19 public health emergency further call into question whether the decommissioning trusts will provide sufficient funding to complete required activities at Indian Point and whether HDI, Holtec IP2, and Holtec IP3 are financially qualified to hold the Indian Point licenses.<sup>48</sup>

The Local Petitioners propose two contentions. In Contention I, they argue that HDI bases its cost estimates on untenable assumptions, that Holtec and its subsidiaries are financially and technically unqualified to decommission Indian Point, and that HDI's exemption request creates an incentive for the company to cut corners during decommissioning.<sup>49</sup> In Contention II, the Local Petitioners argue that the NRC cannot approve the license transfer application without completing an environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*<sup>50</sup>

As we explain below, both New York's and the Local Petitioners' contentions are inadmissible. Because New York's and the Local Petitioners' contentions overlap substantially, we address their contentions together in this section.

---

<sup>44</sup> 10 C.F.R. § 2.309(h)(1), (2).

<sup>45</sup> New York Petition at 4-8.

<sup>46</sup> *Id.* at 8-54.

<sup>47</sup> *Id.* at 54-68.

<sup>48</sup> New York Motion at 2-12.

<sup>49</sup> Town, Village, and District Petition at 10-32.

<sup>50</sup> *Id.* at 32-42.

### 1. *New York's Contention 1*

New York argues that HDI fails to provide reasonable assurance that funds will be available to decommission Indian Point because HDI impermissibly assumes a 2% annual rate of return on the decommissioning trusts.<sup>51</sup> New York states that, without the benefit of the 2% rate of return, the current trust balances are approximately \$200 million less than HDI's own decommissioning cost estimates.<sup>52</sup> According to New York, HDI therefore fails to show adequate decommissioning financial assurance.<sup>53</sup>

New York argues that under the NRC's rules an applicant can rely on a 2% return rate only if it has provided a site-specific estimate of decommissioning funding that is based on a period of safe storage.<sup>54</sup> New York notes that HDI bases its cost estimates on the DECON decommissioning model, which according to New York does *not* include a period of safe storage. New York contrasts the DECON model with the SAFSTOR model, which — as its name implies — includes a safe storage period.<sup>55</sup>

As support for its argument, New York cites the 1996 Generic Environmental Impact Statement for License Renewal of Nuclear Plants (License Renewal GEIS), which describes the DECON and SAFSTOR models. New York cites a section of the License Renewal GEIS stating that DECON is a decommissioning approach wherein “decontamination [and] dismantlement [are performed] as rapidly after reactor shutdown as possible to achieve termination of the nuclear license.”<sup>56</sup> New York compares this statement with a description of SAFSTOR as a decommissioning model involving “a period of safe storage of the stabilized and defueled facility followed by final decontamination [and] dismantlement and license termination.”<sup>57</sup>

New York also cites the *Federal Register* notice for a 2002 rulemaking concerning decommissioning trust provisions.<sup>58</sup> In the notice, the NRC states that a

---

<sup>51</sup> New York Petition at 4-8.

<sup>52</sup> *Id.* at 6.

<sup>53</sup> 10 C.F.R. § 50.75(b)(1).

<sup>54</sup> New York Petition at 5-6 (citing 10 C.F.R. § 50.75(e)(1)(i)).

<sup>55</sup> *Id.* at 6.

<sup>56</sup> *Id.* (citing “Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Main Report,” NUREG-1437, vol. 1, § 7.2.2.1 (May 1996) (ML14024A360) (License Renewal GEIS)). The Staff updated the License Renewal GEIS in 2013. “Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Main Report” (Final Report), NUREG-1437, rev. 1, vols. 1-3 (June 2013) (ML13106A241, ML13106A242, ML13106A244) (2013 License Renewal GEIS).

<sup>57</sup> *Id.* (citing License Renewal GEIS § 7.2.2.2).

<sup>58</sup> *Id.* at 8 (citing Decommissioning Trust Provisions; Final Rule, 67 Fed. Reg. 78,332, 78,338 (Dec. 24, 2002) (Decommissioning Trust Rule)).

2% return rate “can be used when a site-specific estimate is explicitly based on deferred dismantlement.”<sup>59</sup> New York argues that because the DECON model involves dismantling a reactor as rapidly as possible after shutdown, rather than after “deferred dismantlement,” the 2% return rate does not apply when using this model.<sup>60</sup>

In its reply brief, New York further argues that finding the DECON model qualifies for a 2% return rate would render meaningless the language in section 50.75(e)(1)(i), which provides acceptable ways to demonstrate financial assurance for decommissioning. Section 50.75(e)(1)(i) states that the 2% return rate may be used “provided that the site-specific estimate is based on a period of safe storage that is specifically described in the estimate.”<sup>61</sup> If the rate is available for the DECON model, New York argues, as a practical matter it would be available for *all* decommissioning models, rendering the “provided” clause in the rule meaningless.<sup>62</sup>

We find that New York does not raise a genuine dispute with the application. The description of the DECON model in the License Renewal GEIS states explicitly that the model includes a “period of safe storage.”<sup>63</sup> While the SAF-STOR model includes an “extended period of safe storage,” section 50.75(e)(1) does not limit use of the 2% return rate to licensees proposing an extended storage period. Furthermore, even though the DECON model involves dismantling reactor components “as rapidly after reactor shutdown as possible,” that does not mean that the licensee will begin dismantling reactor components immediately. A licensee or applicant could propose a decommissioning approach that involves immediate dismantlement — for example, if an applicant proposes a license transfer that coincides with the end of a prior licensee’s safe storage period — but the DECON model does not mandate such an approach.

This interpretation does not render language in section 50.75(e)(1)(i) meaningless, as New York argues. To rely on a 2% return rate, a licensee or applicant must not only show that its decommissioning model involves a period of safe storage, but it must provide a “site-specific estimate” of decommissioning costs that includes “a period of safe storage that is specifically described.”<sup>64</sup> A licensee or applicant that certifies to the generic formula amount for decommissioning

---

<sup>59</sup>Decommissioning Trust Rule, 67 Fed. Reg. at 78,338.

<sup>60</sup>New York Petition at 7-8; Reply in Support of the State of New York’s Petition for Leave to Intervene and for a Hearing (Mar. 23, 2020) at 4-5 (New York Reply).

<sup>61</sup>New York Reply at 3.

<sup>62</sup>*Id.*

<sup>63</sup>License Renewal GEIS § 7.2.2.1. *See also* NUREG/CR-5884, § 3.3 (describing the DECON model’s safe-storage period and stating that “the safe storage of the laid-up plant and the [spent nuclear fuel] pool storage operations of Period 3 continue until the pool has been emptied”).

<sup>64</sup>10 C.F.R. § 50.75(e)(1)(i).

funding would not be able to rely on the 2% return rate for any safe storage period. A licensee or applicant that proposes a variant of the DECON model, or a decommissioning model not listed specifically in the License Renewal GEIS, that omits a period of safe storage also would not be able to assume a 2% real rate of return. While the GEIS discusses decommissioning models that are generally acceptable to the NRC, it does not foreclose licensees and applicants from proposing variants of the listed models, or entirely different models, to satisfy regulatory requirements.

New York's reliance on the 2002 *Federal Register* notice is also unpersuasive. In the comment response that New York cites, the NRC addressed whether licensees certifying to generic formulas could continue using a 2% return rate into a SAFSTOR period.<sup>65</sup> The NRC stated that they could not, but it also explained that licensees *could* continue using the rate when "a site-specific estimate is explicitly based on deferred dismantlement."<sup>66</sup> Read in context, the NRC was rejecting a proposal that licensees certifying to generic formulas be allowed to use the 2% return rate, rather than stating that its use is limited to the SAFSTOR model. In any event, because the DECON model includes a period of deferred dismantlement, New York does not show how this language forecloses HDI's reliance on the 2% return rate.<sup>67</sup>

In its application, HDI provides a site-specific estimate of decommissioning costs that is based on the DECON model.<sup>68</sup> HDI's reliance on the 2% return rate in this instance is consistent with both the language of section 50.75(e)(1)(i) and with prior cases where the NRC has allowed an applicant or licensee to rely on a 2% rate of return in connection with the DECON model.<sup>69</sup> Because New York does not raise a genuine dispute over whether HDI permissibly relies on a 2% return rate in connection with its cost estimates, we find Contention 1 inadmissible.

---

<sup>65</sup> Decommissioning Trust Rule, 67 Fed. Reg. at 78,338.

<sup>66</sup> *Id.*

<sup>67</sup> See License Renewal GEIS § 7.2.2.1 (explaining that "decontamination and dismantlement of the radioactive portions of the plant" is the *fourth* stage of the DECON model); see also NUREG/CR-5884, § 3.3 (referring to this fourth stage as "deferred dismantlement").

<sup>68</sup> DCE at 55-56.

<sup>69</sup> See, e.g., Holtec Decommissioning International, LLC; Pilgrim Nuclear Power Station; Exemption, 84 Fed. Reg. 70,754 (Dec. 23, 2019); Holtec Decommissioning International, LLC; Oyster Creek Nuclear Generating Station; Exemption, 84 Fed. Reg. 30,247 (June 26, 2019); "Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 185 to Facility Operating License No. DPR-39 and Amendment No. 172 to Facility Operating License No. DPR-48" (May 4, 2009) (ML090930063).



## 2. *New York's Contention 2.A*

Under the NRC's rules, a licensee may withdraw funds from a decommissioning trust only for decommissioning activities.<sup>70</sup> HDI, however, seeks to use approximately \$133 million of Indian Point's trust funds for site restoration activities and \$632 million for spent fuel management activities.<sup>71</sup> HDI bases its cost estimates on the assumption that the NRC will grant an exemption allowing it to use funds for these purposes. Although HDI did not include an exemption request with its application, it submitted such a request on February 12, 2020, the same day New York filed its petition to intervene in this proceeding.<sup>72</sup>

New York argues that, by relying on an exemption that has not been granted, HDI fails to show it is financially qualified to hold the Indian Point licenses and fund necessary activities at the site.<sup>73</sup> According to New York, until HDI obtains a final, non-appealable order granting the exemption, it must establish its financial qualifications and funding sources through other means.<sup>74</sup>

As a threshold matter, we address whether Contention 2.A raises an issue within the scope of this license transfer proceeding. The Applicants argue that the NRC's review of its exemption request is a licensing action distinct from its license transfer request and that New York's contention thus falls outside the scope of this proceeding.<sup>75</sup> The Applicants cite an order in the *Vermont Yankee* license transfer proceeding, where an Atomic Safety and Licensing Board found that the licensee's request for an exemption to use trust funds for non-decommissioning purposes was outside the scope of the proceeding.<sup>76</sup> New York, on the other hand, argues that by premising its license transfer application on

---

<sup>70</sup> See 10 C.F.R. § 50.82(a)(8)(i)(A) (stating that “[d]ecommissioning 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”); see also *id.* § 50.2 (defining “decommission”).

<sup>71</sup> Application, Attach. D at 2-4 (unnumbered); Exemption Request at tbls.1-3.

<sup>72</sup> In October 2020, New York filed a letter to the Staff and the Commission with comments opposing HDI's exemption request. Supplemental Comments in Opposition to Holtec's February 12, 2020 Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv) (Oct. 7, 2020) (ML20281A635). New York's letter, which was served on the parties to this proceeding and filed after the deadline for submitting hearing requests, did not address the standards for contention admissibility. The Staff considered New York's comments in the context of its decision on HDI's exemption request, consistent with the Staff's treatment of other comments it received.

<sup>73</sup> New York Petition at 12-17.

<sup>74</sup> *Id.* at 13, 15.

<sup>75</sup> Applicants' Answer to New York Petition at 29-30.

<sup>76</sup> *Id.* (citing *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-15-24, 82 NRC 68, 78 (2015), *vacated as moot*, CLI-16-8, 83 NRC 463 (2016)). When vacating for mootness, we neither approve nor disapprove a Board's ruling; we therefore took no position on the Board's decision. CLI-16-8, 83 NRC at 470.

an exemption it has not yet obtained, HDI has effectively conceded that the exemption is within the scope of the current proceeding.<sup>77</sup>

We agree that HDI's exemption request is within the scope of this proceeding. HDI is seeking an exemption so that it can use trust funds for activities other than radiological decommissioning. HDI refers to these activities in its application and PSDAR, and it provides cost estimates for these activities in its DCE. Accordingly, the exemption request is intertwined with, and constitutes an integral part of, the license transfer application; New York's exemption-related arguments therefore fall within the scope of this proceeding.<sup>78</sup>

The Board's order in *Vermont Yankee* does not support the Applicants' position. In *Vermont Yankee*, the trust-related exemption took effect independent of the NRC's decision on the licensee's amendment request; in fact, the Staff had granted the exemption while its review of the licensee's amendment request was still pending.<sup>79</sup> By contrast, the trust-related exemption HDI seeks here cannot take effect unless the NRC approves the license transfer application. HDI's exemption request is therefore comparable to two other exemption requests the Board addressed in *Vermont Yankee*. The Board found those exemption requests to be *within* the scope of the license-amendment proceeding because they were "completely dependent on the [license-amendment request]" and "cannot take effect unless and until the [request] is approved."<sup>80</sup> We find that HDI's exemption request and the license transfer application are similarly related.

For an issue within the scope of a proceeding to be an admissible contention, a petitioner also must satisfy the other requirements in section 2.309(f), including the requirement that it raise a genuine dispute with the applicant.

New York argues that an applicant cannot rely on a prospective exemption to support its cost estimates, but it does not provide support for this argument. In our license transfer adjudications, we have long held that financial assurance will be acceptable "if it is based on plausible assumptions and forecasts."<sup>81</sup> Moreover, the Staff has previously granted exemption requests that were similar

---

<sup>77</sup> New York Petition at 13.

<sup>78</sup> An exemption request is not among the listed actions subject to a hearing opportunity under section 189a. of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A). Where a requested exemption raises questions that are material to a proposed licensing action and bear directly on whether the proposed action should be taken, however, a petitioner may propose exemption-related arguments in the licensing proceeding. See *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-16-12, 83 NRC 542, 549 (2016) (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 (2012)).

<sup>79</sup> *Vermont Yankee*, LBP-15-24, 82 NRC at 73-74 & nn.18, 19.

<sup>80</sup> *Id.* at 82.

<sup>81</sup> *Seabrook*, CLI-99-6, 49 NRC at 222.

to HDI's request.<sup>82</sup> Accordingly, to the extent New York argues generally that an applicant cannot rely on an exemption to support its cost estimates, the State does not raise a genuine dispute with the application.

Nor does New York raise a genuine dispute with HDI's exemption request. HDI did not submit its request until the same day New York filed its petition, and the State therefore could not have been expected to challenge the merits of the request in its petition. To the extent New York asserts there is a genuine issue about whether the NRC should grant HDI an exemption, however, the State had the opportunity to move to amend its contention, or submit a new contention, based on the exemption request.<sup>83</sup> New York has not done so.

New York also argues that the NRC should not grant HDI's exemption request unless Holtec IP2 and Holtec IP3 commit to using DOE recoveries under the Standard Contract either to replenish trust funds or defray decommissioning and site restoration expenses.<sup>84</sup> According to New York, these recoveries could thereby "serve as the collateral necessary for the additional financial assurance required."<sup>85</sup> New York states that when the Staff granted a similar exemption to the licensee for Vermont Yankee, it conditioned the exemption on the licensee replenishing the trust with DOE recoveries.<sup>86</sup>

New York does not show, however, that its arguments present a genuine dispute regarding the adequacy of either the exemption request, the DCE, or the license transfer application. New York cites financial assurance requirements for the annual status reports a licensee must provide, but these requirements do not apply to a licensee's initial estimates of decommissioning funding needs in its PSDAR.<sup>87</sup> Furthermore, although the NRC conditioned the Vermont Yankee exemption on the licensee using a portion of its DOE recoveries to replenish trust funds, New York does not raise a genuine issue over whether a similar condition is necessary here. The Staff imposed the condition on the Vermont Yankee licensee based on the particular facts involved in that review, and New York does not show that the same or similar issues may arise in connection with HDI's request.

Because New York does not raise a genuine dispute over whether HDI prop-

---

<sup>82</sup> See Applicants' Answer to New York Petition at 28 nn.120-24 (citing five examples of the Staff granting similar exemptions).

<sup>83</sup> 10 C.F.R. § 2.309(c).

<sup>84</sup> New York Petition at 13-14, 16.

<sup>85</sup> *Id.* at 17 (citing 10 C.F.R. § 50.82(a)(8)(vi) and (vii)(C)).

<sup>86</sup> New York Reply at 24 (citing "Safety Evaluation by the Office of Nuclear Reactor Regulation and Office of Nuclear Material Safety and Safeguards Related to Request for Direct and Indirect Transfers of Control of Renewed Facility Operating License No. DPR-28 and the General License for the Independent Spent Fuel Storage Installation" (Oct. 11, 2018) at 13 (ML18242A639)).

<sup>87</sup> 10 C.F.R. § 50.82(a)(4)(i), (a)(8)(vi), (vii)(C).

erly relied on an exemption when developing its cost estimates, Contention 2.A is inadmissible.

### **3. *New York's Contention 2.B and Local Petitioners' Contention 1.A***

New York and the Local Petitioners argue that HDI has not fully considered the cost of remediating additional contamination that may be found at Indian Point. First, they argue that HDI's cost estimates are inadequate because HDI has not accounted for numerous credible contamination scenarios. Second, they argue that although HDI's cost estimates include a contingency allowance to cover unforeseen events, HDI has not shown the contingency will be enough to cover the scenarios they identify.

#### *a. Additional Contamination*

New York and the Local Petitioners initially argue that, because HDI has not yet fully characterized the Indian Point site and evaluated all potential contamination scenarios, the license transfer application and DCE are necessarily inadequate.<sup>88</sup> These arguments do not, however, raise a material dispute with the application because the NRC does not require site characterization to be completed at this stage in the decommissioning process. Rather, a licensee need not provide site characterization results to the NRC until it submits its license termination plan. This plan, which a licensee must submit at least two years before its proposed license termination date, will include site characterization results and updated cost estimates for the remaining decommissioning activities.<sup>89</sup> Accordingly, to the extent New York and the Local Petitioners challenge HDI's cost estimates because site characterization has not yet been completed, we reject those arguments as impermissible challenges to the NRC's regulations.<sup>90</sup>

New York and the Local Petitioners also identify specific contamination scenarios they assert may exist at Indian Point but which HDI has not considered

---

<sup>88</sup> New York Petition at 18, 20-21; Declaration of Timothy B. Rice (Feb. 7, 2020) ¶¶ 4, 17-19, 25-27 (Rice Declaration); Declaration of George W. Heitzman (Feb. 5, 2020) ¶¶ 15, 17 (Heitzman Declaration); Declaration of Daniel J. Evans (Feb. 4, 2020) ¶ 24 (Evans Declaration); *see also* Town, Village, and District Petition at 17 (citing 10 C.F.R. § 50.82(a)(4)(i) and arguing that HDI was required to more fully characterize the Indian Point site to inform its cost estimates).

<sup>89</sup> 10 C.F.R. § 50.82(a)(9)(ii)(A), (F); *see also* PSDAR at 13 (committing to submitting a license termination plan to the NRC at least two years before the anticipated date of partial site release). Interested persons may seek an adjudicatory hearing challenging the license termination plan, including the licensee's site characterization results and its updated DCE.

<sup>90</sup> *See* 10 C.F.R. § 2.335(a).

in developing its cost estimates. Four of these scenarios involve asserted radiological contamination: (1) leakage of contaminated water from the spent-fuel pools at Unit 1; (2) leakage of tritiated water from the spent-fuel pool at Unit 2; (3) subsurface contamination in the soils, fill, groundwater, and bedrock around buildings; and (4) contamination involving the floor-drain systems in Units 1 and 2.<sup>91</sup> In addition, New York and the Local Petitioners argue that various incidents may have resulted in non-radiological contamination that HDI has failed to account for in its cost estimates. These scenarios involve the following: (5) potential contamination related to “a significant number of non-radiological spills, fires, and other contamination-releasing incidents”; (6) contamination resulting from approximately 258 petroleum spills at Indian Point since 1986; (7) the effects of a large transformer fire at Unit 2, which resulted in the loss of approximately 10,000 gallons of dielectric fluid; (8) a transformer fire at Unit 3 that also resulted in the loss of dielectric fluid and which was extinguished with firefighting foam containing hazardous substances; and (9) the likelihood that, given Indian Point’s age, its buildings have coatings, paint, tiles, and other components that contain hazardous substances.<sup>92</sup> Finally, the Local Petitioners argue that HDI’s cost estimates are inadequate because they fail to consider the potential costs associated with a radiological accident at Indian Point.<sup>93</sup>

New York and the Local Petitioners argue that the costs associated with remediating undiscovered contamination can be substantial. New York refers to the decommissioning experiences at Maine Yankee and Connecticut Yankee, where it states that the discovery of additional contamination required expensive characterization and remediation.<sup>94</sup> New York states that unless the NRC requires Holtec IP2 and Holtec IP3 to provide additional financial assurance as a condition of approving its license transfer application, HDI could experience

---

<sup>91</sup> *Id.* at 21-23; Rice Declaration ¶¶ 4, 13-22, 25, 28; Heitzman Declaration ¶¶ 9-13; *see also* Town, Village, and District Petition at 17-18 (arguing that HDI’s cost estimates do not consider radiologically contaminated groundwater associated with the Unit 1 and Unit 2 spent-fuel pools that was discovered in 2005).

<sup>92</sup> New York Petition at 23-25; Heitzman Declaration ¶¶ 10, 12, 15, and Exhibit D at 2, 8; Declaration of Warren K. Brewer (Feb. 11, 2020) ¶¶ 24-26 (Brewer Declaration); Evans Declaration ¶ 25. New York also cites a March 26, 2012, Department of Environmental Conservation consent order to support its arguments regarding contamination related to the fire at Unit 2. New York Petition at 23 n.64. The Local Petitioners do not refer to any specific scenarios involving non-radiological contamination, but rather argue that because Holtec has not completed a full site characterization at Indian Point, it has likely overlooked the existence of such contamination. Town, Village, and District Petition at 18-19.

<sup>93</sup> Town, Village, and District Petition at 20.

<sup>94</sup> New York Petition at 25-26.

significant cost overruns that may delay or prevent it from decommissioning Indian Point.<sup>95</sup>

Regarding their arguments that HDI has not adequately considered radiological contamination, neither New York nor the Local Petitioners point to any specific information that Entergy or Holtec allegedly failed to consider when preparing the license transfer application. Entergy, the current licensee for Indian Point, has submitted extensive groundwater-monitoring information to the NRC, and neither New York nor the Local Petitioners argue that the Applicants overlooked any of this information.<sup>96</sup> Furthermore, HDI states that it based its cost estimates in part “on a review of [Indian Point] 1, 2 & 3 decommissioning records required by 10 CFR 50.75(g), and the draft Historical Site Assessment (HSA) prepared for [Entergy].”<sup>97</sup> The HSA discusses all the radiological contamination sources New York and the Local Petitioners identify — including contamination involving groundwater, subsurfaces, and floor-drain systems<sup>98</sup> — and neither petitioner identifies any likely contamination source that the HSA overlooks or mischaracterizes.

New York and the Local Petitioners also argue that HDI underestimates the *extent* of groundwater contamination and cite several instances where the discovery of additional contamination at other sites increased decommissioning costs.<sup>99</sup> But the mere possibility of additional contamination — without any specific information regarding its scope or the remediation costs expected at Indian Point — is not enough to call into question HDI’s cost estimates. Here, New York and the Local Petitioners have not raised a genuine issue as to whether HDI’s assumptions regarding radiological contamination are plausible. If uncertain events, such as the discovery of significant new contamination, result in cost increases, the Indian Point licensee will need to update its cost estimates when it submits its annual status report. And, if any such event affects the licensee’s ability to either complete decommissioning or safely manage spent fuel, the licensee will need to provide additional financial assurance.<sup>100</sup>

New York and the Local Petitioners also argue that HDI has failed to adequately consider non-radiological contamination at Indian Point related to spills, fires, and building components. Here too, however, the HSA discusses these

---

<sup>95</sup> *Id.* at 26.

<sup>96</sup> See Indian Point Groundwater Contamination, <https://www.nrc.gov/info-finder/reactors/ip/ip-groundwater-leakage.html> (last visited July 17, 2020).

<sup>97</sup> DCE at 63 (referring to Historical Site Assessment for Indian Point Energy Center, Technical Support Document (TSD) No. 19-002, rev. 2 (Apr. 30, 2019)).

<sup>98</sup> HSA at 41-49.

<sup>99</sup> New York Petition at 25-26; Town, Village, and District Petition at 18-19.

<sup>100</sup> 10 C.F.R. § 50.82(a)(8)(vi). Any cost increases related to a significant radiological accident, a scenario the Local Petitioners raise, would likewise be reflected in the updated DCE.

very events, and New York and the Local Petitioners do not identify any specific deficiency with the HSA's analysis. New York suggests that, because HDI did not attach the HSA to the license transfer application or its PSDAR, the State lacked the opportunity to test the thoroughness of the assessment.<sup>101</sup> The HSA is publicly available, however, with a copy maintained on a New York state-agency website.<sup>102</sup> Under the NRC's rules of practice, both New York and the Local Petitioners had an obligation to review this information and, to the extent they disagreed with the HSA's analysis, set forth their disagreement in their petitions.<sup>103</sup> Because they did not do so, their arguments do not raise a genuine dispute with the application.

*b. Contingency Allowance*

New York also challenges HDI's 18% contingency allowance for decommissioning and related work at Indian Point.<sup>104</sup> New York argues that remediating newly discovered contamination at Indian Point falls outside the scope of HDI's decommissioning plans and that the contingency allowance is not intended to cover such "out-of-scope" work.<sup>105</sup> New York argues alternatively that if these allowances are intended to cover such work, the amount of the resulting contingency allowance — 18% of decommissioning costs — is unreasonably low.<sup>106</sup>

We do not agree with New York's claim that HDI's contingency allowance fails to account for the discovery of additional contamination. The DCE states that HDI's contingency allowance accounts for "estimate uncertainty," which is a function of various factors that include "[e]xpected site conditions (physical and radiological)."<sup>107</sup> The DCE also states that HDI has included an "uncertainty allowance" in its baseline cost and schedule "to cover ill-defined work scope or elements of costs and schedules expected to be incurred, which cannot be explicitly foreseen or estimated because of a lack of complete, accurate or detailed information."<sup>108</sup> These statements, which appear under the "Contingency"

---

<sup>101</sup> New York Reply at 13.

<sup>102</sup> See <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7BF1279F3E-2BEB-4066-8911-25EF3F1318C2%7D>.

<sup>103</sup> See *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010)).

<sup>104</sup> New York Petition at 17-20; Brewer Declaration ¶¶ 16-17.

<sup>105</sup> New York Petition at 19-20.

<sup>106</sup> *Id.* at 20.

<sup>107</sup> DCE at 93.

<sup>108</sup> *Id.* at 94.

discussion in the DCE, show that the contingency allowance is intended to cover costs associated with the discovery of additional contamination.<sup>109</sup>

We also reject New York's argument that if the allowance is intended to cover such costs, it is unreasonably low. New York states that the contingency allowances in Entergy's PSDAR from 2010, which excluded out-of-scope work, were only slightly lower than HDI's (16.9% on average, according to New York, as compared to HDI's 18%).<sup>110</sup> This difference does not, however, raise a genuine dispute over whether HDI's allowance is unreasonably low. Because Entergy assigned *no* value to out-of-scope work — finding there were insufficient data to do so — it would be speculative to conclude that, had Entergy done so, the resulting contingency allowance would have differed materially from HDI's allowance.<sup>111</sup> Furthermore, while not dispositive, HDI's contingency allowance falls within the range of allowances that have been commonly added to site-specific decommissioning cost estimates.<sup>112</sup>

The Local Petitioners also challenge HDI's contingency allowance.<sup>113</sup> They argue that because the PSDAR neither contains the risk-simulation analysis HDI used to develop its contingency nor identifies the "discrete risk events" underlying that analysis, the PSDAR lacks sufficient information to show how HDI decided on a contingency allowance of 18%.<sup>114</sup> The Local Petitioners also argue that HDI's contingency allowance is not a "genuine contingency" because

---

<sup>109</sup> The contingency is not intended to address *all* work that might be considered "out-of-scope," but it appears broad enough that it would generally cover the additional contamination scenarios New York and Local Petitioners describe in their petitions.

<sup>110</sup> New York Petition at 20; Brewer Declaration ¶ 16 (citing "Preliminary Decommissioning Cost Analysis for the Indian Point Energy Center, Unit 3," at 6-7 (Dec. 2010) (ML103550608); "Preliminary Decommissioning Cost Analysis for the Indian Point Energy Center, Unit 1" at 7-8 and "Preliminary Decommissioning Cost Analysis for the Indian Point Energy Center, Unit 2" at 6-7, attached as Encl. 1 and Encl. 2 to Letter from J.E. Pollock, Indian Point Energy Center, to NRC Document Control Desk (Oct. 23, 2008) (ML083040378)).

<sup>111</sup> See Letter from J.E. Pollock, Indian Point Energy Center, to NRC Document Control Desk, (Oct. 23, 2008), Encl. 2 at 8 (ML083040378) ("This cost study does not add any additional costs to the estimate for financial risk, since there is insufficient historical data from which to project future liabilities.").

<sup>112</sup> See, e.g., Crystal River Nuclear Generating Station Unit 3 Site Specific Decommissioning Cost Estimate (May 2018), app. C, tbl.C (last page) (ML18178A181) (18.2% contingency allowance); Fort Calhoun Station Site-Specific Decommissioning Cost Estimate (attached to PSDAR) (Feb. 2017), app. C, tbl.C (last page) (ML17089A59) (16.33% contingency allowance); Three Mile Island Unit 1 Site-Specific Decommissioning Cost Estimate (12.9% contingency allowance), § 6.1, at 19 (April 2019) (ML19095A010) (16.33% contingency allowance); Decommissioning Cost Analysis for the Monticello Nuclear Generating Plant, app. D, tbl.D (last page) (Oct. 2014) (ML16005A105) (16.94% contingency allowance).

<sup>113</sup> Town, Village, and District Petition at 21-22.

<sup>114</sup> *Id.* at 21.



HDI itself has stated that it expects the contingency allowance to be “fully consumed” during the decommissioning process.<sup>115</sup> According to the Local Petitioners, because HDI has not included a genuine contingency allowance in its cost estimates, it is unable to show that it has accounted for unforeseen conditions or expenses that may arise during decommissioning, as required by the NRC’s rules.<sup>116</sup>

Although the Local Petitioners argue that HDI has not provided enough information to show how it arrived at its 18% contingency allowance, HDI summarizes its methodology in its DCE.<sup>117</sup> The Local Petitioners argue that HDI should have included its risk-simulation analysis with the license transfer application or listed the discrete risk events underlying its analysis, but the Local Petitioners cite no legal basis for their argument.<sup>118</sup> In fact, there is no NRC requirement that an applicant include this information as part of its application.

We likewise find no merit in the Local Petitioners’ argument that HDI’s contingency allowance is not a “genuine contingency” because HDI expects it to be fully consumed. The Local Petitioners do not provide adequate support for their arguments. They cite 10 C.F.R. § 50.82(a)(8)(i)(B), but that provision applies to withdrawals from the decommissioning trust fund, not to an applicant’s cost estimates.<sup>119</sup> In addition, they make no more than a conclusory argument that HDI, Holtec IP2, and Holtec IP3 cannot meet the NRC’s financial qualification standards.<sup>120</sup> The Local Petitioners therefore fail to raise a genuine issue as to whether the license transfer application lacks necessary information.

#### **4. New York’s Contention 2.C**

New York argues that while HDI based its cost estimates on “current and/or assumed” requirements, including the NRC’s 25-millirem/year license termination standard, HDI will foreseeably be required to comply with more stringent state law requirements, which will increase decommissioning costs. Specifically, New York argues that HDI fails to account for obligations flowing from the fol-

---

<sup>115</sup> *Id.* at 21-22 (citing DCE at 95).

<sup>116</sup> *Id.* at 22 (citing 10 C.F.R. § 50.82(a)(8)(i)(B)). The Local Petitioners also argue that the lack of a genuine contingency allowance prevents Holtec from adequately demonstrating that it possesses the financial qualifications necessary to safely decommission Indian Point. *Id.* (citing 42 U.S.C. § 2232(a) and 10 C.F.R. § 50.80(c)(1)).

<sup>117</sup> DCE at 93-95.

<sup>118</sup> Town, Village, and District Petition at 21.

<sup>119</sup> *See id.* at 22 (citing 10 C.F.R. § 50.82(a)(8)(i)(B), which applies to withdrawals from a decommissioning trust fund, not to an applicant’s cost estimates).

<sup>120</sup> *See id.* (stating that “by failing to account for unexpected costs, Holtec has not adequately demonstrated that it possesses the financial qualifications necessary to safely decommission [Indian Point]”).

lowing: (1) the 2000 Con Edison-to-Entergy asset purchase and sale agreement for Units 1 and 2 and the contemporaneous Public Service Commission orders approving that transaction; (2) applicable New York State Department of Environmental Conservation (DEC) remedial standards and guidance values; and (3) a contractual obligation owed to the New York State Energy Research and Development Authority to remediate the leased Indian Point outfall structure.<sup>121</sup> According to New York, because HDI does not account for these obligations, it likely underestimates site restoration costs, thereby failing to comply with NRC rules.<sup>122</sup> New York states that the need to comply with stricter state law remedial standards has led to significant cost increases at other plants, such as Connecticut Yankee.<sup>123</sup>

Although New York argues that HDI's site restoration obligations will involve work beyond that described in the PSDAR and DCE, whether HDI will need to complete such work — and the extent of any such work — will likely depend on the outcome of various contractual, administrative, or judicial proceedings. For example, an attachment to the license transfer application refers to a “State Agreement” involving New York's DEC that will apparently address cleanup standards at Indian Point.<sup>124</sup> New York does not state that this agreement has been finalized or cite any documentation suggesting that the matters it identifies in its Petition, and which it claims will result in additional site restoration obligations for HDI, have been resolved.

Because the scope of HDI's state-related site restoration obligations is currently uncertain, we are unable to find that New York has raised a genuine issue over whether the license transfer application needed to address these prospective obligations.<sup>125</sup> At the license transfer stage, the NRC conducts a threshold review to ensure that the prospective licensee has based its cost estimates on plausible assumptions and forecasts. These estimates will not be inadequate even if “the possibility is not insignificant that things will turn out less favorably than expected.”<sup>126</sup> Accordingly, even if the prospective obligations New York identifies may require Holtec IP2 or Holtec IP3 to supplement financial assurance in the future, New York has not shown there is a genuine issue about whether these obligations currently render HDI's cost estimates implausible.<sup>127</sup>

---

<sup>121</sup> *Id.* at 28-31.

<sup>122</sup> *Id.* at 27 (citing 10 C.F.R. §§ 50.33(f), 50.75(b), 50.75(e)(1)(i)).

<sup>123</sup> *Id.* at 32.

<sup>124</sup> Application, Attach. B at 63-64 (Section 8.1(h)), 101 (Section 11.1(282)).

<sup>125</sup> See Applicants' Answer to New York Petition at 48-49.

<sup>126</sup> See *Seabrook*, CLI-99-6, 49 NRC at 222.

<sup>127</sup> Furthermore, if, due to intervening obligations, the remaining decommissioning funds prove insufficient to cover decommissioning costs, the licensee must commit in its annual status report to providing additional financial assurance to cover the remaining costs. 10 C.F.R. § 50.82(a)(8)(vi).

Therefore, these prospective obligations do not in themselves support admitting Contention 2.C.

Furthermore, New York has not raised a genuine issue on whether such obligations would fall outside HDI's 18% contingency allowance. New York argues that HDI has likely underestimated the cost of complying with state law requirements at the site restoration phases, but the DCE states that its contingency allowance accounts for factors that include uncertainty in "Stakeholder/regulatory requirements."<sup>128</sup> This category appears to cover the types of prospective obligations to which New York refers. Because New York does not address this language in the DCE, it fails to raise a genuine dispute over whether the contingency will cover the obligations specified in Contention 2.C.

New York also argues more generally that HDI's cost estimates are inadequate because HDI "fails to explain what state-law standards will guide the scope of [its site restoration] work, or what the work will actually entail."<sup>129</sup> The PSDAR states, however, that HDI will decommission Indian Point to meet the NRC's unrestricted release criteria,<sup>130</sup> and New York does not point to any requirement that an applicant additionally discuss state law standards that might apply to certain site restoration activities. Furthermore, although HDI does not specifically describe its anticipated site restoration activities in its application, the DCE states that HDI relied on the NRC's guidance in NUREG/CR-5884 when developing its cost estimates.<sup>131</sup> That guidance includes Appendix L, "Estimated Non-Radioactive Demolition and Site Restoration Costs for the Reference PWR Power Station," which lists the primary activities and costs associated with site restoration work.

In conclusion, we find that these arguments do not provide a basis for admitting Contention 2.

##### **5. *New York's Contention 2.D***

New York argues that HDI fails to address likely costs related to two aging natural-gas pipelines near Unit 3, its spent fuel pool, and other radiation-containing structures.<sup>132</sup> According to New York, HDI's contractors will not be able to safely conduct activities in or around Unit 3 until HDI has rigorously evaluated the structural integrity of the pipelines. New York suggests that HDI has not conducted such an evaluation, and New York states that the guidance

---

<sup>128</sup> DCE at 93.

<sup>129</sup> New York Petition at 27.

<sup>130</sup> PSDAR at 37.

<sup>131</sup> DCE at 91 (referring to NUREG/CR-5884).

<sup>132</sup> New York Petition at 33-37.

in the Generic Environmental Impact Statement on Decommissioning (Decommissioning GEIS),<sup>133</sup> upon which HDI relies in portions of the PSDAR, does not address potential impacts associated with such pipelines.<sup>134</sup>

HDI bases its estimates on its PSDAR, which states that HDI's decommissioning planning will include a review of existing Indian Point policies, programs, and procedures.<sup>135</sup> In its Answer to New York's Petition, the Applicants state that "[Indian Point's] existing policies, programs, and procedures address industrial operation of and safety issues related to the gas pipelines,"<sup>136</sup> and New York does not dispute this statement in its reply brief.<sup>137</sup> The PSDAR further states that HDI will conduct job-hazard analyses at the decommissioning planning stage, which would likewise be expected to address pipeline-safety issues.<sup>138</sup> Accordingly, even though the guidance in the Decommissioning GEIS does not explicitly refer to environmental impacts associated with pipeline-safety issues, New York has not raised a genuine dispute over whether HDI's financial analysis overlooks these issues.<sup>139</sup>

Apart from whether HDI has considered pipeline safety as a general matter, New York points to two specific scenarios it asserts HDI has failed to consider. New York states that explosives are often used to soften reactor containment structures but that the proximity of the aging pipelines may rule out this approach at Unit 3 and raise decommissioning costs.<sup>140</sup> New York also argues that HDI fails to address limitations on moving heavy equipment and debris near the pipelines.<sup>141</sup> Related to this second scenario, New York further claims that HDI has not shown it will implement policies designed to protect the pipelines from damage involving the movement of heavy equipment or debris.<sup>142</sup>

Here too, New York has not raised a genuine dispute with the license transfer application. New York does not identify any section of the application or supporting documents stating that HDI intends to use explosives when dismantling the containment structures at Indian Point. New York also does not

---

<sup>133</sup> "Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities" (Final Report), NUREG-0586, Supplement 1, vols. 1-2 (Nov. 2002) (ML023470327 (package) (Decommissioning GEIS)).

<sup>134</sup> New York Petition at 34.

<sup>135</sup> PSDAR at 8.

<sup>136</sup> Applicants' Answer to New York Petition at 59.

<sup>137</sup> In fact, New York chose not to respond to the Applicants' Answer or address this basis for Contention 2 further in its reply.

<sup>138</sup> PSDAR at 8-9.

<sup>139</sup> See 10 C.F.R. § 2.309(f)(1)(vi).

<sup>140</sup> New York Petition at 33; Brewer Declaration ¶ 14.

<sup>141</sup> New York Petition at 33-34; Brewer Declaration ¶ 14.

<sup>142</sup> New York Petition at 33-34.

dispute HDI's statement that the use of explosives is not among the "standard construction-based techniques" it will employ during demolition of the reactor containments.<sup>143</sup> With respect to New York's argument that HDI fails to address limitations on moving heavy equipment near the pipelines, the PSDAR states that "[a]ll dismantlement, demolition, and waste staging activities are envisioned to be conducted within the operational area of the site."<sup>144</sup> HDI refers to the "operational area" at Indian Point as the Protected Area and Security Owner-Controlled Area.<sup>145</sup> New York does not challenge HDI's statement that demolition-related activities will be limited to this area or explain why (setting aside the use of explosives) activities within this area would be likely to raise pipeline-safety concerns.<sup>146</sup> Thus, New York does not raise a genuine dispute with the license transfer application related to the demolition scenarios it identifies.

New York further argues that, if HDI anticipates using the existing dock at Indian Point to move large components by barge, it must ensure that dredging or river-transportation-related activities do not adversely affect the pipelines where they cross under the Hudson River.<sup>147</sup> This argument does not, however, identify any specific deficiency in the application or supporting documents. New York does not, for example, identify any portion of the PSDAR that arguably should have addressed the possibility of barge traffic related to decommissioning nor assert that the DCE fails to account for this possibility.

Moreover, New York has not supported its underlying claim in Contention 2.D, which is that HDI's cost estimates are inadequate.<sup>148</sup> To be admissible, a contention must be supported by reference to facts or expert opinion, and it must also be material to the findings the NRC must make to support the action that is involved in the proceeding.<sup>149</sup> Here, New York does not provide that support, such as quantifying the increased costs resulting from the pipeline-safety restrictions it argues HDI failed to consider. New York therefore does not raise an issue as to whether HDI's cost estimates are materially inaccurate.

Finally, New York argues that, to the extent HDI has failed to analyze safety, engineering, or logistical issues associated with the pipelines, it has not established that the company or its contractors are technically and financially qualified

---

<sup>143</sup> Applicants' Answer to New York Petition at 55-56 (citing PSDAR at 39).

<sup>144</sup> PSDAR at 24.

<sup>145</sup> Applicants' Answer to New York's Petition at 56.

<sup>146</sup> New York does not argue that the pipelines of concern are within Indian Point's "operational area," but rather states that they are within 400 feet of Unit 3. New York Petition at 34.

<sup>147</sup> *Id.* at 37.

<sup>148</sup> *See id.* at 33.

<sup>149</sup> 10 C.F.R. § 2.309(f)(1)(iv), (v).

to decommission Indian Point.<sup>150</sup> While we agree that an inadequate analysis of pipeline-related costs could potentially be relevant to HDI's qualifications, for the reasons stated above we find that New York has not raised a genuine dispute regarding that analysis.

For these reasons, we find that these arguments do not support admitting Contention 2.D.

#### **6. *New York's Contention 2.E and Local Petitioners' Contention 1.A***

New York and the Local Petitioners argue that HDI unreasonably assumes DOE will begin transferring spent nuclear fuel from Indian Point by 2030 and complete removing this fuel by 2061.<sup>151</sup> They claim HDI's assumption is unreasonable because DOE has not started constructing a spent fuel storage facility, Congress has not funded such construction, and DOE presently has no statutory authority to accept spent fuel for storage.<sup>152</sup> New York and the Local Petitioners also refer to a DOE strategy assessment in which DOE projects that a permanent spent-fuel repository will not be available until "at least 2048."<sup>153</sup> In addition, they refer to the Generic Environmental Impact Statement for the Continued Storage Rule (Continued Storage GEIS), which states that the "most likely" timeframe for the permanent disposal of spent fuel involves sixty years of continued onsite storage following reactor shutdown.<sup>154</sup> According to New York and the Local Petitioners, HDI's unreasonable assumptions render its cost estimates inadequate because they fail to address the likelihood HDI will need to maintain spent fuel at Indian Point longer than anticipated.

We first address New York and the Local Petitioners' challenge to HDI's estimate that DOE will begin transferring spent fuel from Indian Point in 2030. HDI bases its estimate on the same DOE strategy assessment that New York and the Local Petitioners cite but instead focuses on DOE's projection that an interim (as opposed to a permanent) storage facility will be available by 2025.<sup>155</sup>

---

<sup>150</sup> New York Petition at 34.

<sup>151</sup> New York Petition at 37-40; Town, Village, and District Petition at 12-16.

<sup>152</sup> New York Petition at 38-39; Town, Village, and District Petition at 12-13.

<sup>153</sup> New York Petition at 39 n.134 (citing U.S. Department of Energy, "Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste" (Jan. 2013), at 2, 7); Town, Village, and District Petition at 12.

<sup>154</sup> New York Petition at 39 n.135 (citing "Generic Environmental Impact for Continued Storage of Spent Nuclear Fuel" (Final Report), NUREG-2157, vol. 1 (Sept. 2014), at p. xxx (ML14196A105) (Continued Storage GEIS)). The Local Petitioners do not cite the Continued Storage GEIS directly, but rather the *Federal Register* notice for the continued-storage rule, which refers to the Continued Storage GEIS as the regulatory basis for the rule. Town, Village, and District Petition at 13 (citing Continued Storage of Spent Nuclear Fuel; Final Rule, 79 Fed. Reg. 56,238, 56,245 (Sept. 19, 2014)).

<sup>155</sup> DCE at 64.

HDI then adjusts the start date for transfers to an interim storage facility outward by five years, resulting in a projected start date in 2030.<sup>156</sup>

We find that New York and the Local Petitioners have not raised a genuine issue about whether HDI's projected start date for spent fuel transfer is plausible. The NRC currently has two separate applications for privately owned interim storage facilities before the agency.<sup>157</sup> While these applications are still under review, we find the assumption that by 2030 a storage facility to receive spent fuel from Indian Point will be available is plausible.<sup>158</sup> We have found financial assurance to be acceptable if it is based on plausible assumptions and forecasts, even if "the possibility is not insignificant that things will turn out less favorably than expected."<sup>159</sup>

We also find that New York and the Local Petitioners have not raised a genuine issue regarding HDI's estimate that all spent fuel will be removed from Indian Point by 2061. Even if DOE's projection that a permanent spent-fuel repository will not be available until at least 2048 is accurate, spent fuel could be moved to an interim storage facility before then. New York and the Local Petitioners therefore have not shown that removing all fuel by 2061 is implausible.

In any event, the Continued Storage GEIS supports HDI's conclusion that it will be able to remove all spent fuel from Indian Point by 2061. In that GEIS, the Staff found that safe storage of spent fuel in a geologic repository is technically feasible using currently available technology, with no major breakthroughs in science or technology needed. The Staff also found that "25 to 35 years . . . [is] a reasonable period for repository development."<sup>160</sup> The Staff issued the GEIS in 2014, meaning that it estimated a repository would be available between 2039 to 2049. Accordingly, even accounting for some delay in repository development, HDI's estimate that all spent fuel will be removed from Indian Point by 2061

---

<sup>156</sup> *Id.*

<sup>157</sup> See Letter from John McKirgan, NRC, to Jeffrey D. Isakson, Interim Storage Partners LLC, "Interim Storage Partners LLC's Application for a Specific Independent Spent Fuel Storage Installation License for the Waste Control Specialists Consolidated Interim Storage Facility for Spent Nuclear Fuel — Revised Review Schedule" (July 1, 2019) (ML19182A107); Letter from John McKirgan, NRC, to Kimberly Manzione, Holtec International, "Holtec International's Application for a Specific Independent Spent Fuel Storage Installation License for the Hi-Store Consolidated Interim Storage Facility for Spent Nuclear Fuel — Revised Review Schedule" (July 1, 2019) (ML19182A147).

<sup>158</sup> New York states that HDI relies on an assumption that DOE will take "illegal action" by transferring spent fuel without authorization. New York Reply at 16. The alternative, and more plausible, interpretation of HDI's statements is that it expects that DOE will receive authorization to transfer spent fuel.

<sup>159</sup> See *Seabrook*, CLI-99-6, 49 NRC at 222.

<sup>160</sup> See Continued Storage GEIS app. B, at B-2, B-8 to B-9.

is plausible when measured against the GEIS, and we find that New York and the Local Petitioners have not established a genuine dispute in this area.<sup>161</sup>

New York and the Local Petitioners further argue that, assuming there are delays in either beginning or completing spent-fuel removal from Indian Point, HDI will experience cost overruns that call into question its cost estimates.<sup>162</sup> Because we find that the Petitioners have not raised a genuine dispute over whether HDI's estimates of the start and end dates for spent-fuel removal are plausible, however, we need not reach their arguments regarding cost overruns. In any event, if HDI learns that its timelines for removing spent fuel from Indian Point are no longer plausible, it will need to notify the NRC of the delays through its financial assurance status reports and provide additional financial assurance, if necessary, to cover the estimated costs resulting from the delays.<sup>163</sup>

### **7. *New York's Contention 2.F***

New York argues that HDI's cost estimates are inadequate because the spent fuel at Indian Point is currently stored in casks that DOE has not approved for offsite transportation.<sup>164</sup> New York states that, under the terms of the Standard Contract, HDI will be required to repackage this fuel in DOE-approved casks before it is transported to a storage facility.<sup>165</sup> New York first argues that in its cost estimates HDI failed to make any provision for repackaging spent fuel.<sup>166</sup> New York then claims that repackaging costs "could total hundreds of millions of dollars" if HDI must transfer spent fuel to other plants for repackaging or construct a dry-transfer station at Indian Point.<sup>167</sup>

---

<sup>161</sup> New York also cites HDI's statement that its storage period "generally aligns" with the GEIS, which identifies a sixty-year storage period as the "most likely" timeframe for removing spent fuel. New York Reply at 17 (citing Applicants' Answer to New York Petition at 63). But HDI's statement that its storage period "generally aligns" with the GEIS does not mean HDI is proposing a storage period extending through 2081, as New York infers. Rather, HDI's proposed storage period extends only through 2061. *See, e.g.*, Application at Attach. D; DCE at 64, 97.

<sup>162</sup> New York Petition at 40; Brewer Declaration ¶ 32; *see also* Town, Village, and District Petition at 13-15.

<sup>163</sup> 10 C.F.R. § 50.82(a)(8)(vi).

<sup>164</sup> New York Petition at 40-44.

<sup>165</sup> HDI does not dispute this statement. Applicants' Answer to New York Petition at 67.

<sup>166</sup> *See, e.g.*, New York Petition at 43 (arguing that because HDI's estimates "fail to include costs associated with repackaging spent nuclear fuel, the license transfer application and supporting PSDAR appear to assume that DOE will take possession of the spent nuclear fuel at Indian Point as packaged, in non-DOE casks."). The Local Petitioners also briefly argue that HDI has failed to account for the cost of repackaging spent fuel for delivery to DOE. Town, Village, and District Petition at 14-15. Our discussion of New York's Contention 2.F below also applies to the Local Petitioners' argument on repackaging costs.

<sup>167</sup> New York Petition at 44; Brewer Declaration ¶ 30.



New York argues alternatively that, if DOE changes the Standard Contract so that licensees can package spent fuel in non-DOE casks, HDI may need to reimburse DOE for any payments DOE previously made to Indian Point licensees for packaging spent fuel.<sup>168</sup> According to New York, these reimbursements could potentially exceed \$130 million.<sup>169</sup> New York argues that HDI unreasonably omits any discussion of these potential reimbursements from its DCE.

To the extent New York argues that HDI has not accounted for any repackaging costs, we find the State does not raise a genuine dispute with the license transfer application. The application and supporting information show that HDI has considered the costs of transferring spent fuel into transportation casks. For example, the cost estimates at pages 108, 110, and 112 of the DCE include entries for “WBS Code 01.02.10.02.03.02,” which covers “Transfer of fuel and/or nuclear material away from the ISFSI — Spent Fuel Management Costs.” These cost estimates total approximately \$80 million. New York does not specifically challenge this information or provide a reason to conclude that the casks into which HDI plans to transfer spent fuel would be ineligible for DOE pickup under the Standard Contract.

Although New York also argues that HDI may need to transport fuel to another plant or construct an onsite dry-transfer station to support repackaging, we find these arguments do not present a genuine dispute with HDI’s cost estimates. New York appears to assume that the multi-purpose canisters in which the spent fuel at Indian Point is loaded will be incompatible with the casks DOE approves for offsite transportation.<sup>170</sup> Thus, New York argues, HDI could not transfer its canisters from existing storage casks to DOE-approved transportation casks (an activity that HDI addresses in its DCE) but would need to reload the spent fuel into canisters that are compatible with the DOE casks (an activity that HDI does not address). Because DOE has not yet identified which casks will be approved for transportation of spent fuel, however, it would be premature to conclude that the multi-purpose canisters at Indian Point will be incompatible with these casks. Accordingly, New York’s claim that HDI may need to transport spent fuel to another plant or construct a dry-transfer station cannot form a basis for admitting a contention.

New York further argues that, based on recent filings with the NRC, it appears that HDI plans to replace the current fuel-handling crane at Unit 3 with a single-failure-proof crane designed for direct loading of dry-storage casks.<sup>171</sup> New York states that a similar crane-construction project at Unit 2 cost approximately \$20 million and there is no reason to believe a similar project at Unit

---

<sup>168</sup> New York Petition at 41-44.

<sup>169</sup> *Id.* at 44; Brewer Declaration ¶ 31.

<sup>170</sup> *See* DCE at 65 (referring to multi-purpose canisters).

<sup>171</sup> New York Petition at 45.

3 would cost less.<sup>172</sup> New York argues that because neither the PSDAR nor DCE discusses this project, HDI has underestimated the costs associated with spent-fuel management at Indian Point.

The Applicants state that certain activities related to the crane are already underway and that these activities are being funded by Entergy from sources outside the decommissioning trusts.<sup>173</sup> They argue that HDI therefore did not need to factor these activities into its cost estimates. As for post-transfer activities associated with the crane, the Applicants argue that HDI considered the related costs and assigned them to the “Management of fuel, fissile and other nuclear materials” category in Table 6-1c of its DCE.<sup>174</sup> This category lists approximately \$106 million in estimated costs. Because New York does not dispute that funds in this category would cover any post-transfer activities related to installation of the crane or challenge the adequacy of this specific estimate, these claims do not support admitting New York’s Contention 2.F.

Finally, we are not persuaded by New York’s argument that if DOE agrees to remove spent fuel from reactor sites without requiring repackaging, DOE will seek to recover past payments to licensees for the original packaging of the fuel. New York provides no basis for presuming that DOE will identify a valid contractual claim, pursue that claim, and succeed in requiring licensees to bear additional packaging-related costs. Nor would these matters be appropriate for resolution in an NRC adjudicatory hearing. If future legal developments call into question HDI’s cost estimates for spent-fuel management or waste disposal, HDI will need to notify the NRC, and the NRC will review whether HDI needs to adjust its financial assurance accordingly.<sup>175</sup>

#### **8. *New York’s Contention 2.G***

New York argues that HDI’s cost estimates fail to account for mixed waste currently stored at Unit 1.<sup>176</sup> According to New York, this waste consists of approximately 600 cubic feet of material contaminated with polychlorinated biphenyls (PCBs). New York states that, depending on the characteristics of this waste, HDI may need to transfer the waste to a qualified facility for stabilization or thermal desorption.<sup>177</sup> Because HDI’s cost estimates do not address

---

<sup>172</sup> *Id.*; Brewer Declaration ¶ 29.

<sup>173</sup> Applicants’ Answer to New York Petition at 69.

<sup>174</sup> *Id.* at 69 & n.295 (citing DCE at 111 (WBS Code 01.02.02.01.04)).

<sup>175</sup> See generally 10 C.F.R. § 50.82(a)(8).

<sup>176</sup> New York Petition at 45-47.

<sup>177</sup> See Declaration of Alyse L. Peterson (Feb. 10, 2020) ¶¶ 7-11 (Peterson Declaration).

this waste, New York argues, HDI has failed to show adequate decommissioning funding.<sup>178</sup>

The Applicants argue that, when developing its cost estimates, HDI did not consider the costs associated with this specific type of mixed waste because those costs will be assumed by Entergy, which plans to dispose of the waste before the license transfer.<sup>179</sup> The Applicants refer to a declaration New York submitted in support of its petition that discusses Entergy's efforts to dispose of this waste.<sup>180</sup>

In its reply brief, New York does not challenge the Applicants' claim that Entergy, rather than HDI, will pay for disposing of PCB-contaminated material at Indian Point.<sup>181</sup> Because New York's own declaration supports the Applicants' claim that HDI will not be liable for these disposal costs, we find that New York has not raised a material dispute with the application. Contention 2.G is therefore inadmissible.

### **9. *New York's Contention 2.H***

New York argues that the PSDAR and DCE are inadequate because HDI allots only one year per unit for reactor-internals and pressure-vessel segmentation.<sup>182</sup> New York states that, by underestimating the time it will spend on these activities, HDI accordingly underestimates decommissioning costs. New York argues that delays at the segmentation stages could increase overall decommissioning costs to an extent that calls into question the adequacy of HDI's funding. For example, New York argues that such delays could raise program-management costs alone by as much as \$110 million a year and potentially exceed the funding surplus HDI currently projects.<sup>183</sup>

New York argues that segmentation of a pressurized water reactor (PWR) like those at Indian Point is more complex — and should thus take longer — than segmentation of a boiling water reactor (BWR), which itself typically takes longer than a year.<sup>184</sup> New York states that HDI itself has proposed segmentation timelines longer than a year for a BWR. As examples, New York states that HDI originally projected a timeline of slightly less than two years for the Pilgrim

---

<sup>178</sup> New York Petition at 46.

<sup>179</sup> Applicants' Answer to New York Petition at 71-72.

<sup>180</sup> *Id.* at 72 (citing Peterson Declaration ¶¶ 7, 9, 10).

<sup>181</sup> See New York Reply at 18 (moving directly from argument on Contention 2.F to Contention 2.H).

<sup>182</sup> New York Petition at 48-52.

<sup>183</sup> *Id.* at 52; Brewer Declaration ¶ 19.

<sup>184</sup> New York Petition at 50; Brewer Declaration ¶ 21.

BWR and it projected a three-year timeline for the Oyster Creek BWR.<sup>185</sup> New York argues that HDI fails to explain why it is reasonable to rely on a shorter timeline for the more complex segmentation projects at Indian Point.

New York also argues that HDI's recent extension of its timeline for segmentation activities at Pilgrim from approximately two years to three-and-a-quarter years shows that a similar extension is likely at Indian Point.<sup>186</sup> Furthermore, New York asserts that HDI's management of multiple reactor sites in decommissioning increases the potential for delays at Indian Point due to the risk that resources will be diverted to other sites.<sup>187</sup>

We find that New York has not raised a genuine dispute as to whether HDI will complete segmentation activities for each unit within one year, the period relied upon in the PSDAR and DCE. New York does not offer any expert opinion or facts suggesting it will be infeasible to segment the reactor vessels at Indian Point within one year. Although one of New York's declarants states that segmenting a PWR is more complex than a BWR, this does not in itself raise a genuine dispute over whether it will be feasible to segment a PWR within one year. The declarant does not identify any technical, safety, or legal restrictions that would potentially call into question HDI's segmentation timelines. For example, the declarant does not cite radiation-exposure limits or occupational safety-and-health standards that might render a one-year timeline infeasible.<sup>188</sup>

Nor does New York provide any support from which we might conclude there is a genuine dispute regarding whether other factors render Holtec's timelines infeasible. New York claims there is "a limited supply of qualified subcontractors" available for decommissioning work, but it does not cite any specific information to support its claim.<sup>189</sup> New York also points to delays in segmentation activities at several other reactor sites, but it does not identify the factors underlying these delays or provide how these factors are likely to delay activities at Indian Point.<sup>190</sup> For example, although New York's declarant had an oversight role related to the decommissioning of the two Zion PWR units, which experienced delays in segmentation activities, he does not address the source of

---

<sup>185</sup> New York Petition at 50; Brewer Declaration ¶ 21.

<sup>186</sup> New York Petition at 51.

<sup>187</sup> *Id.*; Brewer Declaration ¶ 10.

<sup>188</sup> *See, e.g.*, Brewer Declaration ¶ 21 (stating that "[g]enerally, the segmentation of the reactor vessel internals and reactor vessel for a boiling water reactor is less time-consuming than for a pressurized water reactor," but without specifying the technical considerations supporting this conclusion or stating that segmenting a PWR in one year is technically infeasible).

<sup>189</sup> New York Petition at 51; Brewer Declaration ¶ 10. Mr. Brewer states that "[t]here are limited resources in terms of trained and experienced personnel for performing specialty tasks such as segmentation of reactor vessel internals and reactor vessels." He does not, however, define any such limitations or compare them to the resource needs at Indian Point.

<sup>190</sup> New York Petition at 50; Brewer Declaration ¶ 22.

these delays or explain how they may be relevant to Indian Point.<sup>191</sup> Without additional information to support New York's arguments, we are unable to find that there is a genuine issue as to whether the delays at other sites render HDI's timelines implausible.<sup>192</sup>

For these reasons, we find that Contention 2.H is inadmissible because it does not raise a genuine dispute with the application.

#### **10. New York's Contention 2.I**

New York argues that HDI may be planning to use decommissioning trust funds reserved for Unit 3 to pay for activities at other Indian Point units.<sup>193</sup> New York notes that the DCE assigns labor costs to Unit 3 for several years after that unit's scheduled demolition in 2027.<sup>194</sup> New York argues that using Unit 3 funds for other purposes would conflict with NRC rules limiting withdrawals from decommissioning trusts.<sup>195</sup>

In their answer, the Applicants state that although Unit 3 is scheduled to be demolished in 2027, decommissioning activities at Unit 3 will continue beyond that year, along with spent fuel management and site restoration activities.<sup>196</sup> The Applicants state that these activities explain the labor costs New York identifies and that funds allocated to Unit 3 will not be diverted to other units.<sup>197</sup> In its reply brief, New York does not challenge the Applicants' explanation of why HDI has assigned labor costs to Unit 3 for several years after 2027. New York ends its arguments regarding Contention 2 with Basis H, and it does not provide further argument regarding Basis I.<sup>198</sup>

We find that New York has not established a genuine dispute with the application. Based on the PSDAR and DCE, the labor costs listed for Unit 3 after 2027 refer to decommissioning, spent fuel management, and site restoration activities involving that unit.<sup>199</sup> In other words, the information regarding labor

---

<sup>191</sup> Brewer Declaration ¶ 22; *see also* *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006) (holding that an expert opinion that merely states a conclusion, without providing a reasoned basis or explanation for that conclusion, is not enough to support admitting a contention).

<sup>192</sup> *See, e.g., Seabrook*, CLI-99-6, 49 NRC at 222.

<sup>193</sup> New York Petition at 53-54.

<sup>194</sup> *Id.* at 53 (citing DCE at 84).

<sup>195</sup> *Id.* at 54; Brewer Declaration ¶¶ 6-7.

<sup>196</sup> Applicants' Answer to New York Petition at 82.

<sup>197</sup> *Id.*

<sup>198</sup> New York Reply at 19.

<sup>199</sup> *See* PSDAR at 12-13 (describing post-demolition activities involving Indian Point units, including Unit 3); DCE at 58, tbl.2-1 (listing projected start and end dates for such activities by unit).

costs that New York seeks is in the application. Contention 2.I is therefore inadmissible.

### ***11. New York's Contention 2.J***

New York moves to amend Contention 2 with an argument that market declines in response to the COVID-19 public health emergency may have significantly reduced the value of the Indian Point decommissioning trusts.<sup>200</sup> Even if the trust funds are invested conservatively, New York argues, they may have declined by over \$210 million since the Applicants submitted the license transfer application.<sup>201</sup> New York argues that these losses call into question whether HDI, Holtec IP2, and Holtec IP3 will have enough funding for decommissioning activities and spent-fuel management at Indian Point.<sup>202</sup>

But New York does not demonstrate that this argument meets the standards for late-filed contentions. For a new contention to be admissible after the deadline for initial intervention petitions has passed, the petitioner must show that the information supporting the contention differs materially from information that was previously available.<sup>203</sup> The petitioner must also show that the new information raises a genuine dispute with the applicant on a material issue of law or fact.<sup>204</sup>

Even though the market fluctuations related to the COVID-19 public health emergency constitute “new” information, New York does not explain how this information differs materially from previously available information. As we have stated in the license transfer context, an applicant’s financial assurance estimates will be acceptable if they are grounded in assumptions and forecasts that were plausible when the estimates were submitted.<sup>205</sup> Here, New York does not argue that recent market conditions show HDI’s estimates were implausible in December 2019, when HDI submitted its cost estimates. New York therefore does not show that the new information is material to evaluating those estimates or, from the standpoint of challenging the DCE, materially different from the information available when it filed its petition.

Instead, New York appears to argue that Holtec should be required to update its cost estimates based on recent market conditions.<sup>206</sup> This argument does not, however, raise a material dispute with the application because New York

---

<sup>200</sup> New York Motion at 1-4, 7-10.

<sup>201</sup> *Id.* at 5, 9; Supplemental Declaration of Chiara Trabucchi (Mar. 23, 2020) ¶¶ 4, 13-16, tbls.1-3.

<sup>202</sup> New York Motion at 3, 11.

<sup>203</sup> 10 C.F.R. § 2.309(c)(1)(ii).

<sup>204</sup> *Id.* § 2.309(f)(1)(vi).

<sup>205</sup> *Seabrook*, CLI-99-6, 49 NRC at 222.

<sup>206</sup> New York Motion at 3, 11.

does not identify any requirement that an applicant update its cost estimates in response to market conditions. While under the NRC’s rules an applicant must update its cost estimates in certain situations, New York does not argue (and we do not find) that any of these situations are presented here.<sup>207</sup>

New York further argues that, because HDI proposes relying on the Indian Point trusts to fund decommissioning and related activities at Indian Point, and because the trusts may recently have declined significantly in value, they may be insufficient to fund those activities. This argument, however, challenges neither HDI’s cost estimates nor its commitment to provide funding sufficient to meet those estimates.<sup>208</sup> Rather, it challenges the financial qualifications of HDI, Holtec IP2, and Holtec IP3 — that is, the companies’ ability to fund decommissioning and related activities — and it repeats arguments that New York raises under Contention 3. Accordingly, we will address these arguments in the context of that contention, which relates specifically to financial qualifications.<sup>209</sup>

We therefore deny New York’s motion to amend Contention 2.

## ***12. New York’s Contention 3***

New York argues that HDI, Holtec IP2, and Holtec IP3 have not shown they are financially qualified to support decommissioning and other activities at Indian Point.<sup>210</sup> According to New York, the companies’ financial qualifications cannot be predicated solely on access to the Indian Point trusts. Rather, New York argues that the companies must show they are “healthy corporate entities with access to the financial resources necessary to procure additional financial assurance.”<sup>211</sup>

---

<sup>207</sup> For example, under the NRC’s rules a licensee must provide site-specific decommissioning cost estimates within two years of permanently ceasing operations, and it must provide updated cost estimates in its license termination plan. 10 C.F.R. § 50.82(a)(4)(i), 50.82(a)(8)(iii), 50.82(a)(9)(ii)(F); *see also* “Assuring the Availability of Funds for Decommissioning Nuclear Reactors,” Regulatory Guide 1.159, rev. 2 (Oct. 2011), at 12 (ML112160012) (discussing updates to cost estimates).

<sup>208</sup> A transfer of the Indian Point licenses cannot be completed unless the proposed transferees have provided financial assurance that is adequate to cover decommissioning activities at the site. 10 C.F.R. § 50.75(e)(1).

<sup>209</sup> In its reply brief, New York focuses on its claim that the economic downturn calls into question whether HDI, Holtec IP2, and Holtec IP3 are financially qualified to hold the Indian Point licenses (the issue raised in Contention 3), rather than on whether HDI’s financial assurance estimate is adequate (the issue raised in Basis J of Contention 2). Reply in Support of New York State’s Motion for Leave to Amend Contentions NY-2 and NY-3 at 3-8.

<sup>210</sup> New York Petition at 54-67; Declaration of Chiara Trabucchi (Feb. 7, 2020) ¶¶ 28-29 (Trabucchi Declaration).

<sup>211</sup> New York Petition at 56.

These arguments do not support admitting Contention 3. New York does not identify any NRC requirement that prevents an applicant from relying on a single funding source to establish that it is financially qualified to decommission a site. In any event, while in the license transfer application Holtec proposes relying on the Indian Point trusts — the value of which exceeded HDI’s cost estimates — to fund decommissioning and related activities at Indian Point, the financial qualifications of Holtec IP2 and Holtec IP3 are broader, because they include potential DOE recoveries under the Standard Contract.<sup>212</sup> Under the Standard Contract, Holtec IP2 and Holtec IP3 expect to recover from DOE the costs they will incur as a result of the DOE’s breach of its obligations to dispose of Indian Point’s spent nuclear fuel.<sup>213</sup>

The DCE lists approximately \$560 million in spent fuel management costs for the three Indian Point units between 2021 and 2062.<sup>214</sup> While Holtec IP2 and Holtec IP3 have not relied on the potential recoveries of these costs to provide financial assurance (and while the costs are, at this point, only estimates), these potential recoveries are nonetheless relevant to whether the companies could provide additional financial assurance if the decommissioning trusts prove insufficient.<sup>215</sup> New York does not dispute that potential DOE recoveries could be used to provide additional financial assurance.<sup>216</sup> The financial qualifications of Holtec IP2 and Holtec IP3 do not, therefore, rest solely on their access to the decommissioning trusts, as New York asserts.

New York also argues that Holtec IP2 and Holtec IP3 must show they currently have access to the funds necessary to complete required activities and that HDI’s funding cannot be contingent on an exemption request.<sup>217</sup> New York cites 10 C.F.R. § 50.33(f) to support its argument, but this section states merely that the applicant must provide “information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out, in accordance

---

<sup>212</sup> See Application at 3 and Encl. 1 at 2.

<sup>213</sup> See *id.*, Encl. 1 at 20.

<sup>214</sup> DCE at 70, 73, 76.

<sup>215</sup> For example, Holtec IP2 and Holtec IP3 could potentially use the recoveries to obtain funds for prepayment or an external sinking fund, or use the recoveries to obtain a surety bond, letter of credit, or insurance — all of which would be permissible forms of financial assurance. 10 C.F.R. § 50.75(e)(1)(i)-(iii).

<sup>216</sup> In Contention 2.A, New York states that “Holtec nowhere commits to return such recoveries to the trust funds or otherwise ensure their availability to [HDI, Holtec IP2, and Holtec IP3] if and when additional license termination, site restoration, or spent fuel management funds are needed.” New York Petition at 16. The lack of a current commitment to use DOE recoveries for these purposes is not dispositive, however, because the NRC could effectively require Holtec IP2 and Holtec IP3 to apply a portion of these recoveries to cover estimated decommissioning costs. 10 C.F.R. § 50.82(a)(8)(vi).

<sup>217</sup> New York Petition at 56.



with regulations in this chapter, the activities for which the permit or license is sought.” This section does not prohibit an applicant from relying on anticipated funding sources as a means of establishing its financial qualifications. Furthermore, the NRC’s financial assurance standard at 10 C.F.R. § 50.75(e)(1)(i) defines “prepayment” — the form of financial assurance HDI proposes using — as “the deposit made preceding the start of operation or the transfer of a license under § 50.80 into an account segregated from licensee assets[.]” The NRC’s rules therefore do not require a license transfer applicant to prepay for decommissioning costs at the time it submits its application, as New York argues.<sup>218</sup>

New York further argues that decommissioning trusts are not intended as the first line of defense against inadequate decommissioning funding, as HDI is proposing. Rather, according to New York, a financial assurance instrument is intended as “*a second line of defense*[ ],” to be called upon “if the financial operations of the licensee are insufficient . . . to ensure that sufficient funds are available to carry out decommissioning.”<sup>219</sup> This language is not relevant here, however, because it relates to licensees with ongoing operations that might provide funding for, or divert funding from, decommissioning activities. The Indian Point units, in contrast, will all have ceased operations before the completion of this proposed license transfer. In any event, 10 C.F.R. § 50.75 specifies the methods by which a licensee can provide financial assurance for decommissioning activities, and neither this rule nor any other NRC rule requires a licensee at the decommissioning stage to supplement its financial assurance method with a showing that its operations will generate additional funding. Nor does 10 C.F.R. § 50.33(f) state that the NRC’s review of a licensee’s financial qualifications will be limited to factors such as revenue, gross income, or net worth. In brief, the NRC rules upon which New York relies do not provide support for its contention.

New York also argues that, because HDI, Holtec IP2, and Holtec IP3 lack funding independent of the decommissioning trusts, they would be poorly positioned to manage cost overruns that HDI can be expected to experience during

---

<sup>218</sup> The Staff has previously approved license transfer requests involving reactors in decommissioning where the applicant relied on its anticipated access to trust funds to show it was financially qualified to conduct decommissioning activities. See “Safety Evaluation by the Office of Nuclear Reactor Regulation and Office of Nuclear Material Safety and Safeguards Related to Request for Direct Transfer of Control of Renewed Facility Operating License No. DPR-16 and the General License for the Independent Spent Fuel Storage Installation” (June 20, 2019) at 7-13 (ML19095A457); “Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Request for Direct Transfer of Control of Renewed Facility Operating License No. DPR-35 and the General License for the Independent Spent Fuel Storage Installation” (Aug. 22, 2019) at 7-15 (ML19170A250).

<sup>219</sup> New York Petition at 57 (citing Financial Assurance Requirements for Decommissioning Nuclear Power Reactors; Final Rule, 63 Fed. Reg. 50,465, 50,474 (Sept. 22, 1998) (emphasis added by New York)).

the decommissioning of Indian Point.<sup>220</sup> New York points to decommissioning obligations HDI has assumed, or proposes to assume, at the Pilgrim, Oyster Creek, and Palisades sites. In New York's view, if HDI experiences unforeseen delays at any of these sites, it could delay work and increase costs at Indian Point. This "cascading delay," New York states, could "adversely affect HDI's day-to-day finances and compromise its ability to function as a going concern."<sup>221</sup>

While delays at other sites for which HDI has decommissioning responsibilities could cause delays at Indian Point, they could also have no such effect, or they could potentially allow HDI to expedite work at Indian Point. New York has not supported, through facts or expert opinion, its argument that delays at other sites are reasonably likely to have the effect it suggests and that this effect calls into question whether HDI, Holtec IP2, and Holtec IP3 are financially qualified to decommission Indian Point. New York's declarants, for example, do not explain why delays at other HDI sites are reasonably likely to compromise the companies' financial ability to decommission Indian Point; they only state that this scenario is possible.<sup>222</sup> That is not enough to admit a contention in this proceeding.<sup>223</sup>

In addition, New York makes several arguments that are not directly related to financial qualifications. New York argues that Holtec's plan to decommission multiple sites simultaneously presents a risk that "trust reimbursements for decommissioning work performed at separate units will be commingled into a single revenue stream," reducing funds available for work at Indian Point.<sup>224</sup> New York also argues that certain information related to the financial structure of Holtec and its subsidiaries should be made publicly available or at least reviewed by the NRC.<sup>225</sup> New York's other arguments relate to potential bankruptcies, the investment guidelines HDI will set for assets in the decommissioning trusts, and past behavior of Holtec officials.<sup>226</sup>

---

<sup>220</sup> *Id.* at 61-62.

<sup>221</sup> *Id.* at 60-61; Brewer Declaration ¶ 10.

<sup>222</sup> See Brewer Declaration ¶ 10 ("With decommissioning of several plants at multiple sites the possibility exists that a delay in a project can result from events at one of the other projects or sites.") (emphasis added).

<sup>223</sup> 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, 312 (2000) ("Absent strong support for a claim that difficulties at other plants run by a corporate parent will affect the plant(s) at issue before the Commission, we are unwilling to use our hearing process as a forum for a wide-ranging inquiry into the corporate parent's general activities across the country.").

<sup>224</sup> New York Petition at 61.

<sup>225</sup> *Id.* at 61-63; Trabucchi Declaration ¶¶ 21-23.

<sup>226</sup> New York Petition at 65-68; Trabucchi Declaration ¶¶ 13-15, 26-32, 35, 43. New York also  
(Continued)

These arguments, however, do not support admitting Contention 3, which focuses on the financial qualifications of HDI, Holtec IP2, and Holtec IP3. The NRC's rules prohibit the commingling scenario New York describes,<sup>227</sup> and the bankruptcy scenario New York raises is speculative as it is based on the assumption that Holtec's subsidiaries will lack sufficient funds to conduct day-to-day operations.<sup>228</sup> While New York also claims that certain financial information related to Holtec and its subsidiaries should have been made publicly available, the State could have requested access to this information to support its hearing request and Contention 3, but it did not do so.<sup>229</sup> Regarding Holtec's investment guidelines, New York does not identify any NRC requirement that Holtec submit these guidelines as part of its application. Finally, New York has not shown that its claims regarding past misconduct of Holtec officials are material to the adequacy of Holtec's subsidiaries' financial qualifications or present a genuine dispute with any specific aspect of the license transfer application. To be admitted as a contention, a claim of deficient character must have "some direct and obvious relationship between the character issues and the licensing action in dispute," and New York has not described such a relationship here.<sup>230</sup>

We also consider New York's motion to amend Contention 3. New York argues that the economic downturn related to the COVID-19 public health emergency calls into question whether HDI, Holtec IP2, and Holtec IP3 are financially qualified to carry out the activities for which they seek NRC licenses. New York states that Holtec's subsidiaries base their financial qualifications solely on the decommissioning trust funds available as of October 31, 2019.<sup>231</sup> According to New York, recent economic data since that date show that the trust funds may have declined in value by more than \$210 million, raising an issue as to how the subsidiaries will provide the financial assurance required by the NRC's rules.<sup>232</sup>

---

refers to several arguments it made in Contentions 1 and 2, including its claims regarding whether HDI can claim a 2% return rate on decommissioning trust funds, unforeseen project delays, Holtec's plan to decommission multiple sites simultaneously, the potential discovery of additional radiological and non-radiological contamination at Indian Point, and HDI's assumption that DOE will begin accepting spent nuclear fuel in 2030. We have addressed these arguments in the context of our rulings on Contentions 1 and 2, and we will not address them further here.

<sup>227</sup> 10 C.F.R. § 50.82(a)(8)(i).

<sup>228</sup> New York Petition at 64; Trabucchi Declaration ¶ 14.

<sup>229</sup> Hearing Notice, 85 Fed. Reg. at 3950.

<sup>230</sup> *Oyster Creek*, CLI-19-6, 89 NRC at 477 (quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365 (2001)). Riverkeeper raises similar arguments about the past behavior of Holtec officials. We discuss these below. See Section C, *infra*.

<sup>231</sup> New York Motion at 9, 11.

<sup>232</sup> *Id.*

Over time, market fluctuations that may temporarily affect the value of decommissioning trusts are to be expected, and some fluctuations could potentially be significant enough to raise a dispute about the adequacy of the decommissioning funding presented in the license transfer application. New York, however, has not supported with facts or expert opinion its claim that the COVID-19-related economic downturn will be of sufficient severity and duration to prevent Holtec's subsidiaries from relying on the trust funds to provide financial assurance through prepayment, the financial assurance method specified in the application. Accordingly, even if HDI, Holtec IP2, and Holtec IP3 based their financial qualifications solely on access to the trust funds, New York has not shown there is a genuine dispute over whether those qualifications are sufficient to support the decommissioning of Indian Point.<sup>233</sup>

In any event, if the NRC approves the license transfer application, the financial qualifications of HDI, Holtec IP2, and Holtec IP3 will not be limited to the decommissioning trusts. HDI projects that it will spend approximately \$560 million managing spent fuel at the three Indian Point units between 2021 and 2062. Holtec IP2 and Holtec IP3 — which if the application is approved will accede to Entergy's rights under the Standard Contract — could seek to recover spent fuel management costs from DOE, and the prospect of these recoveries could potentially allow HDI to secure funding that would make up for any shortfall in the decommissioning trusts. New York does not argue that such recoveries are unlikely. To the contrary, New York acknowledges that the recoveries could be used to replenish trust funds.<sup>234</sup> New York also does not identify any limitation on Holtec IP2 and Holtec IP3 using the prospect of future DOE recoveries to secure additional financial assurance, should the trust funds be insufficient to meet the NRC's requirements.

For these reasons, we find that New York has not shown the new information upon which it relies in its motion is “materially different from information previously available” or that it presents a genuine dispute regarding the financial qualifications of HDI, Holtec IP2, or Holtec IP3.<sup>235</sup> We therefore deny New York's motion to amend Contention 3.

---

<sup>233</sup>The NRC's decommissioning regulatory regime, moreover, accounts for a certain level of financial uncertainty. If the NRC approves the license transfer application, HDI will need to submit decommissioning-funding status reports annually. 10 C.F.R. § 50.82(a)(8)(v)-(vi). If any annual report shows that the decommissioning trust balances will not cover the estimated costs of decommissioning Indian Point, HDI will need to provide additional financial assurance to cover those costs.

<sup>234</sup>New York Petition at 14.

<sup>235</sup>10 C.F.R. §§ 2.309(c)(1)(ii), (f)(1)(vi).

### 13. *Local Petitioners' Contention 1.B*

The Local Petitioners argue that Holtec's corporate structure, HDI's lack of assets or revenue streams, and HDI's lack of decommissioning experience show that the companies do not possess the qualifications necessary to safely decommission Indian Point.<sup>236</sup> They first argue that the "web of corporate ownership" that will be affiliated with decommissioning Indian Point "raises several red flags."<sup>237</sup> The Local Petitioners claim that Holtec's use of limited-liability corporations (LLCs) raises the concern that "these entities could simply declare bankruptcy and walk away, having squandered the only resource set aside to decommission" Indian Point.<sup>238</sup> They further claim that Holtec's "layers of ownership and operational authority creates an opportunity to siphon millions of dollars from the trust fund."<sup>239</sup>

These concerns do not form a basis for an admissible contention. The Local Petitioners do not identify any specific facts or support their arguments with expert opinion to indicate that the scenarios they describe are plausible. They also do not explain why a licensee's corporate structure as an LLC renders it more likely to experience financial stresses that might result in bankruptcy. Moreover, the NRC's rules contain provisions designed to avoid the depletion scenarios raised by the Local Petitioners. As discussed above, if estimated decommissioning costs exceed remaining decommissioning funds, the licensee must, in its annual financial assurance status report, "include additional financial assurance to cover the estimated cost of completion."<sup>240</sup> The licensee must also specify how much it has spent on decommissioning activities, both cumulatively and during the previous year, and it must identify the difference between the estimated cost and the actual cost of work performed during the previous year. The NRC therefore can track whether a licensee's actual costs exceeded those that were predicted. The Local Petitioners do not address these provisions or explain why they would be insufficient to avoid the scenarios they raise.

The Local Petitioners also argue that there is no guarantee that HDI, Holtec IP2, or Holtec IP3 could obtain funding to cover cost overruns that might occur during the decommissioning of Indian Point.<sup>241</sup> The Local Petitioners initially raise the possibility of cost overruns in their Contention 1.A, however, for the reasons stated above, we find they have not raised a genuine issue regarding whether any of the cost-overrun scenarios they describe will occur. As the

---

<sup>236</sup> Town, Village, and District Petition at 22-28.

<sup>237</sup> *Id.* at 24.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 24-25.

<sup>240</sup> 10 C.F.R. § 50.82(a)(8)(vi).

<sup>241</sup> Town, Village, and District Petition at 24, 26.

Indian Point licensee, HDI will be required to update the NRC annually on its decommissioning costs and provide additional financial assurance, if necessary, to cover the estimated cost of completing decommissioning. Based on these annual reports, the NRC could impose conditions on the licenses of HDI, Holtec IP2, or Holtec IP3; these conditions could potentially require that specific funding — for example, recoveries from DOE under the Standard Contract — be pledged as financial assurance.

The Local Petitioners further argue, as New York did in its Contention 3, that HDI has not shown it is independently qualified to become the Indian Point licensee because it “rests its financial qualification exclusively on the trust fund.”<sup>242</sup> Like New York, however, they do not cite any NRC requirement that prevents an applicant from relying on a single funding source to establish that it is financially qualified to decommission a site. And while HDI has proposed relying on the trusts to fund decommissioning and related activities at Indian Point, the financial qualifications of HDI, Holtec IP2, and Holtec IP3 are broader because they include potential recoveries from DOE under the Standard Contract.

Finally, the Local Petitioners argue that HDI’s lack of experience decommissioning nuclear reactor sites results in overly optimistic cost projections.<sup>243</sup> But it is not enough for the Local Petitioners to describe HDI’s projections as “overly optimistic.” They must identify specific deficiencies in those projections and show that they raise a genuine dispute with the license transfer application. While the Local Petitioners also argue that HDI’s inexperience is relevant to the NRC’s evaluation of its technical qualifications, the Local Petitioners do not cite any specific facts or opinions to support their argument, and as a result this argument does not meet the NRC’s standards for contention admissibility.<sup>244</sup>

#### ***14. Local Petitioners’ Contention 1.C***

The Local Petitioners argue that HDI’s request for an exemption to use trust funds for non-decommissioning purposes creates an incentive to cut corners so that it obtains the largest possible payout when Indian Point is fully retired.<sup>245</sup> They also argue that, if the NRC approves the license transfer application, the agency should impose conditions requiring additional funds to restore Indian

---

<sup>242</sup> *Id.* at 26.

<sup>243</sup> *Id.* at 27.

<sup>244</sup> Town, Village, and District Petition at 26-27.

<sup>245</sup> *Id.* at 29. The Local Petitioners also state, however, that “[o]ut of an abundance of caution” they are not actually alleging that HDI will cut corners; rather, their view is “that the prudent exercise of discretion suggests that” allowing HDI to use trust funds for activities other than decommissioning “is not in the public interest.” *Id.*

Point that would guarantee that Holtec will meet its tax obligations to the local community and would require that Holtec return to the local community any trust funds remaining after Indian Point's decommissioning is completed.<sup>246</sup> The Local Petitioners cite *Vermont Yankee* as an example of a license transfer proceeding where the NRC approved a trust agreement under which remaining trust funds would be returned to the community.<sup>247</sup> In addition, the Local Petitioners argue that the NRC should require Holtec to provide additional financial assurance — parental guarantees, letters of credit, performance bonds, or other instruments — based on the “reasonably foreseeable cost overruns” they identify in their petition.<sup>248</sup>

Although the Local Petitioners argue that HDI's exemption request creates an incentive to minimize withdrawals from the decommissioning trusts, they do not explain why the exemption, if granted, would create any additional incentive beyond a licensee's ordinary interest in conserving financial resources. Nor do the Local Petitioners argue that such an incentive would be a basis for denying either the license transfer application or HDI's exemption request.<sup>249</sup> The Local Petitioners' remaining arguments involve claims that the NRC should impose various conditions if the agency approves the license transfer application. Their argument that the NRC should impose license conditions based on cost overruns HDI may experience is unpersuasive because they have not shown those asserted overruns are reasonably likely to occur. The Local Petitioners' other arguments are viewed more properly as opinions regarding actions the NRC should take, as opposed to claims that raise a genuine issue regarding whether the license transfer application is adequate. Although the Local Petitioners state that other NRC licenses have included the conditions they propose, they do not cite any rule suggesting that the Entergy-Holtec license transfer application is deficient because it lacks analogous commitments. Accordingly, the Local Petitioners' arguments do not present an admissible contention.<sup>250</sup>

---

<sup>246</sup> *Id.* at 30.

<sup>247</sup> *Id.* (citing *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-24, 82 NRC 68, 73 (2015)).

<sup>248</sup> *Id.* at 31.

<sup>249</sup> HDI submitted its exemption request on the same day the Local Petitioners filed their petition. To the extent the Local Petitioners identified any deficiency in the exemption request, they could have moved to amend their petition to challenge the request specifically. 10 C.F.R. § 2.309(c).

<sup>250</sup> See 10 C.F.R. § 2.309(f)(1)(vi) (stating that a petitioner must “show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact”); *Oconee*, CLI-99-11, 49 NRC at 334 (noting that “a petitioner may not demand an adjudicatory hearing . . . to express generalized grievances about NRC policies”).

## 15. *Local Petitioners' Contention 2*

The Local Petitioners argue that the license transfer application does not include enough information to support an assessment of environmental impacts as required by NEPA.<sup>251</sup> While the Local Petitioners acknowledge that our NEPA regulations categorically exclude license transfer applications from an environmental review, they assert that special circumstances exist in this case that should render the categorical exclusion inapplicable.<sup>252</sup> The Local Petitioners also assert that the “environmental issues posed by the decommissioning operation,” which are referenced in the PSDAR, are not bounded by prior generic or site-specific environmental impact statements pertinent to site decommissioning “so these issues require further consideration by the Commission.”<sup>253</sup> We find that neither of these assertions raises a genuine dispute of material fact within the scope of this proceeding and therefore find Contention 2 inadmissible.

Our NEPA regulations categorically exclude certain license transfer approvals from the usual licensing requirement for an environmental assessment. This categorical exclusion exists because the NRC found in numerous environmental assessments that there are no significant environmental effects linked to license transfers.<sup>254</sup> No significant environmental effects exist because a license transfer does not permit the transferee to operate the facility in a different manner than previously permitted. The NRC has therefore determined that, absent special circumstances, a license transfer will not present environmental impacts different from those already considered in relevant generic or site-specific NEPA analyses, and there is no need for further environmental analysis.<sup>255</sup>

The Local Petitioners assert that special circumstances exist in this case because the license transfer application references a separately filed exemption request to allow the use of the decommissioning trust fund for purposes other than radiological decommissioning.<sup>256</sup> The Local Petitioners contend that we cannot, consistent with NEPA, rely on the categorical exclusion in 10 C.F.R. § 51.22(c)(21) to omit analysis of the potential environmental effects of granting the exemption request. They further assert that the exemption request is integral to the license transfer application, yet “neither Holtec nor the Commission has conducted *any analysis* of the environmental impacts of granting an exemption from the restriction of the use of decommissioning trust funds, nor has Holtec

---

<sup>251</sup> Town, Village, and District Petition at 32.

<sup>252</sup> *See id.* at 32, 36-37; 10 C.F.R. § 51.22(c).

<sup>253</sup> Town, Village, and District Petition at 32.

<sup>254</sup> *See* Streamlined Hearing Process for NRC Approval of License Transfers, Final Rule, 63 Fed. Reg. 66,721, 66,728 (Dec. 3, 1998) (License Transfer Rule).

<sup>255</sup> *See id.*

<sup>256</sup> Town, Village, and District Petition at 36-37, 39-40.



or the Commission analyzed the foreseeable environmental consequences of a shortfall in the trust fund.”<sup>257</sup>

Local Petitioners have not shown special circumstances exist warranting departure from the categorical exclusion in 10 C.F.R. § 51.22(c)(21) for license transfers.<sup>258</sup> The Local Petitioners do not point to anything in the license transfer application or exemption request that suggests approval would authorize a substantive change in any licensed activities that have been previously subjected to NEPA review or show additional NEPA review is warranted due to a significant and material change in environmental conditions previously considered for Indian Point. Although the Local Petitioners claim that there has been a previously unevaluated “increase in the frequency and intensity of extreme weather events as a result of climate change,” they provide no supporting data or analysis for that claim, nor do they explain how the asserted increase in extreme weather might change previously determined environmental impacts.<sup>259</sup> In short, we see no basis in these arguments to depart from application of the categorical exclusion for certain license transfers in 10 C.F.R. § 51.22(c)(21).

Even though the categorical exclusion for certain license transfers in 10 C.F.R. § 51.22(c)(21) applies, an environmental review of HDI’s exemption request is nevertheless required because our NEPA rules include no categorical exclusion that would allow for approval of the request without an environmental assessment.<sup>260</sup> Consistent with our rules, HDI included an environmental analysis in its exemption request, which it filed on the same day the Local Petitioners requested a hearing.<sup>261</sup> The environmental analysis concludes there would be no significant environmental impacts from granting the exemption.<sup>262</sup>

HDI’s environmental analysis addresses the Local Petitioners’ concern that

---

<sup>257</sup> *Id.* at 36 (emphasis in original).

<sup>258</sup> The Local Petitioners have not requested a waiver of 10 C.F.R. § 51.22(c)(1). *See* 10 C.F.R. § 2.335(a), (b); *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 125 n.70 (1995).

<sup>259</sup> *See* Town, Village, and District Petition at 22. The NRC most recently evaluated the effects of climate change and sea level rise at Indian Point and the surrounding environment in 2018. *See* “Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3” (Final Report), NUREG-1437, Supplement 38, vol. 5 (Apr. 2018), at 5-53 to 5-63 (ML18107A759) (Indian Point SEIS). The Local Petitioners have not disputed that evaluation, which the PSDAR incorporates by reference. *See* PSDAR at 19.

<sup>260</sup> *See Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-16-17, 84 NRC 99, 128-30 (2016). As we have explained in the context of New York’s Contention 2.A, HDI’s exemption request is within the scope of this proceeding because it is integrally related to the license transfer application. *See* Section 2, *supra*.

<sup>261</sup> *See* Exemption Request at 11-13.

<sup>262</sup> *Id.*

there could be a shortfall in the funds available for decommissioning if the exemption is granted. HDI's analysis states that if the exemption is granted, no environmental impacts are expected due to a projected funding shortfall because NRC regulations require adequate and additional decommissioning funds to be provided in such an event.<sup>263</sup> The Local Petitioners did not seek to amend their initial hearing request to dispute HDI's analysis.<sup>264</sup> As a result, the contention before us — that no environmental analysis of the proposed exemption request has been performed — gives rise to no dispute of law or material fact within the scope of this proceeding and thus does not meet our contention admissibility standards.<sup>265</sup>

We also find inadmissible the Local Petitioners' claim that the PSDAR does not comply with 10 C.F.R. § 50.82(a)(4)(i) "because it does not address the reasonably foreseeable potential impacts of climate change on spent fuel management."<sup>266</sup> This claim misapprehends the scope of this proceeding as well as the regulatory significance of the PSDAR, which does not amend the NRC license and is not a major federal action subject to NEPA review.<sup>267</sup>

The PSDAR's purpose is to provide a "general overview for the public and the NRC of the licensee's proposed decommissioning activities."<sup>268</sup> By rule, the PS-

---

<sup>263</sup> *Id.*, Encl. 1 at 8-9. We consider HDI's approach, which credits the effectiveness of NRC's regulatory framework in mitigating, or avoiding altogether, certain environmental impacts, to be reasonable under NEPA. In this case, the NRC's regulatory framework requires a decommissioning licensee to file annual status reports, which NRC can use to monitor withdrawals from the trust fund. *See* 10 C.F.R. § 50.82(a)(8)(v). If the fund were to decrease at a much faster rate than projected, the NRC could take action to protect the fund, including revoking the exemption in full or in part. These and other provisions in our regulations thereby provide reasonable assurance that a facility will not be abandoned but either be fully decommissioned or maintained in a safe condition with no additional environmental impacts beyond those described in existing environmental impact statements. *See, e.g.*, 10 C.F.R. § 50.82(a)(8)(vi) (requiring the provision of additional financial assurance in the event annual reports show insufficient funds to cover the estimated cost of completing decommissioning); Decommissioning GEIS at 5-1 (noting that if decommissioning is not completed, then the license will not be terminated and the licensee will be required to comply with NRC requirements governing safe operations, the environmental impacts of which have been previously considered).

<sup>264</sup> *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 24-25 (2001) (explaining that petitioners have an "ironclad obligation" to search the public record for information supporting their contentions).

<sup>265</sup> Our regulations require the Local Petitioners to initially base their NEPA contentions on the applicant's environmental analysis. *See* 10 C.F.R. § 2.309(f)(2). The Staff completed its review of HDI's environmental analysis and published its environmental assessment on November 10, 2020. Nuclear Regulatory Commission, Environmental Assessment and Finding of No Significant Impact; Issuance, 85 Fed. Reg. 71,664 (Nov. 10, 2020).

<sup>266</sup> Town, Village, and District Petition at 41.

<sup>267</sup> *See Vermont Yankee*, CLI-16-17, 84 NRC at 124-26.

<sup>268</sup> *See Decommissioning of Nuclear Power Reactors; Final Rule*, 61 Fed. Reg. 39,278, 39,281 (July 29, 1996) (Decommissioning Rule).

DAR does not and cannot authorize any decommissioning activities that would result in environmental impacts that exceed those previously determined.<sup>269</sup> In a PSDAR, a licensee must provide its reasons for concluding that the environmental impacts associated with planned decommissioning activities are bounded by previously issued, relevant site-specific or generic environmental impact statements.<sup>270</sup> If a licensee contemplates performing a decommissioning activity with impacts not enveloped by previous environmental impact analyses, the licensee must submit a license-amendment request with a supplemental environmental report evaluating the additional impacts.<sup>271</sup> Any violation of this restriction is subject to NRC enforcement action.<sup>272</sup>

In this case, the PSDAR states that the environmental impacts of decommissioning Indian Point are bounded by those described in the Decommissioning GEIS and other previously issued environmental impact statements.<sup>273</sup> If the Local Petitioners have grounds to assert that the impacts of planned decommissioning, site restoration, and spent fuel management activities at Indian Point exceed those referenced in the PSDAR, their recourse would be a petition for enforcement action to address a potential violation of our rules associated with representations made in the PSDAR.<sup>274</sup>

In addition, we are unpersuaded by the Local Petitioners' argument that this case involves an impermissible segmentation of a larger federal licensing action into smaller component parts — the license transfer application, the exemption request, and the PSDAR — to avoid NEPA review.<sup>275</sup> As explained above, the license transfer application and exemption request were considered together, and the environmental effects of each proposed action were fully considered. Our regulations require an analysis of the environmental effects of the exemption request, which HDI prepared and the Staff independently reviewed. And although their consideration lies outside the scope of this proceeding, the impacts of decommissioning activities have been previously subjected to review in several environmental impact statements referenced in the PSDAR.<sup>276</sup> The

---

<sup>269</sup> See 10 C.F.R. § 50.82(a)(6)(ii).

<sup>270</sup> 10 C.F.R. § 50.82(a)(4)(i). Section 5 of the PSDAR sets forth the reasons for HDI's conclusion that the environmental impacts of decommissioning Indian Point are bound by prior environmental impact statements. PSDAR at 19-41.

<sup>271</sup> See *Vermont Yankee*, CLI-16-17, 84 NRC at 123-24; Decommissioning GEIS at 1-11, 2-3; Decommissioning Rule, 61 Fed. Reg. at 38,283, 39,286.

<sup>272</sup> *Exelon Generation Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-19-6, 89 NRC 465, 480 (2019).

<sup>273</sup> PSDAR at 19.

<sup>274</sup> See 10 C.F.R. § 2.206.

<sup>275</sup> See Town, Village, and District Petition at 37.

<sup>276</sup> See PSDAR at 19 (citing Decommissioning GEIS; "Generic Environmental Impact Statement

(Continued)

Local Petitioners have not explained why these analyses are insufficient under NEPA or how further environmental review would shed additional light on the license transfer decision in this case. We therefore find this aspect of the Local Petitioners' second contention inadmissible.

In sum, the Local Petitioners have not shown special circumstances justifying departure from the categorical exclusion in 10 C.F.R. § 51.22(c)(21) as it applies to the license transfer application. While the Local Petitioners are correct that the exemption request referenced in the application and later submitted to the NRC is subject to an environmental review, they did not challenge any specific part of the environmental analysis HDI provided in support of the exemption request. Finally, the Local Petitioners' challenges to the environmental information referenced in the PSDAR are outside the scope of this proceeding. We therefore conclude that the Local Petitioners have not submitted an admissible contention.

### C. Riverkeeper's Petition

Riverkeeper's contention is that the application fails to demonstrate that the proposed transferees — HDI, Holtec IP2, and Holtec IP3 — would be qualified to hold the licenses for Indian Point and therefore the application does not meet the requirements in 10 C.F.R. § 50.80(c).<sup>277</sup> Riverkeeper asserts the proposed transferees have not shown the requisite "character, competence, and integrity, as well as the necessary candor, truthfulness, and willingness to abide by NRC regulatory requirements."<sup>278</sup> As explained below, we find this contention inadmissible.<sup>279</sup>

A contention challenging the character or integrity of a licensee's managers may be admissible in specific circumstances; however, we have imposed strict limits on such contentions to ensure our hearing process does not become a forum to litigate historical events that have no direct bearing on the challenged licensing action.<sup>280</sup> We have, for example, been generally unwilling to admit contentions based solely on the past activities of a parent corporation because those

---

in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Facilities" (Final Report), NUREG-1496, vols. 1-3 (July 1997) (ML042310492, ML042320379, ML042330385); "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3" (Final Report), NUREG-1437, Supplement 38, vol. 1 (Dec. 2010) (ML103350405); Indian Point SEIS; 2013 License Renewal GEIS).

<sup>277</sup> See Riverkeeper Petition at 9.

<sup>278</sup> *Id.*

<sup>279</sup> Because Riverkeeper's contention is inadmissible, we need not address Riverkeeper's standing.

<sup>280</sup> See *Millstone*, CLI-01-24, 54 NRC at 366.

activities do not bear directly on the conduct of those who will be responsible to conduct licensed activities in compliance with NRC requirements.<sup>281</sup> Admissible contentions challenging management character or integrity have generally been based upon the activities of high-ranking officers or directors of the licensed organization who would have some direct authority over the activities authorized by the license.<sup>282</sup>

Riverkeeper asserts no wrongdoing by the officers or directors of HDI, Holtec IP2, or Holtec IP3, who would be directly responsible for ensuring compliance with NRC requirements if the license transfer is granted. Riverkeeper instead bases its contention on prior activities by the proposed transferees' ultimate parent corporation, Holtec, and its Chief Executive Officer (CEO).<sup>283</sup> Riverkeeper asserts that those activities are pertinent to this case because the license transfer application attaches the resume of Holtec's CEO and states that Holtec has "developed a mature nuclear safety culture and policies that will be integrated with existing [Indian Point] site polices."<sup>284</sup> Riverkeeper does not explain what specific Holtec policies it considers to be problematic if the license transfer is granted; rather, it describes past examples of conduct by Holtec and its CEO that it considers evidence of Holtec's "lack of candor to regulatory agencies."<sup>285</sup> However, the examples Riverkeeper provides are not directly related to this license transfer proceeding and do not provide sufficient factual support for its contention that the proposed transferees are not qualified.

First, Riverkeeper cites two prior NRC enforcement cases to support its contention that did not involve the proposed transferees, their officers, or directors. In the first case, Holtec performed a screening evaluation to determine whether it could change the design of one of its spent fuel canisters under 10 C.F.R. § 72.48(c) without first obtaining NRC approval and mistakenly concluded that no NRC approval was required.<sup>286</sup> The Staff identified the mistake during a routine NRC inspection in 2018 and notified Holtec. Holtec promptly corrected the issue.<sup>287</sup> The Staff found no aggravating circumstances and gave credit to Holtec for "the absence of recent escalated enforcement action" against it, as

---

<sup>281</sup> See *FitzPatrick*, CLI-00-22, 52 NRC at 312.

<sup>282</sup> See, e.g., *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111 (1995).

<sup>283</sup> See Riverkeeper Petition at 13-19.

<sup>284</sup> *Id.* at 12 (quoting Application, Encl. 1 at 6).

<sup>285</sup> *Id.* at 14.

<sup>286</sup> See Letter from Michael C. Layton, NRC, to K.P. Singh, Holtec International (Nov. 29, 2018), Encl. 2 at 13-14, 17-18 (ML18306A853).

<sup>287</sup> See Letter from George Wilson, NRC, to K.P. Singh, Holtec International (Apr. 24, 2019), at 2-3 (ML19072A128).

well as for “Holtec’s prompt and comprehensive correction of the violation.”<sup>288</sup> In the second case, Southern California Edison Company (SCE) failed to report a spent-fuel canister-loading problem at the San Onofre Nuclear Generating Station to the NRC Operations Center within 24 hours of its occurrence.<sup>289</sup> Riverkeeper implies Holtec should have reported the incident apparently because it had contracted with SCE to implement the spent-fuel-loading project. However, our regulations required SCE — the licensee responsible for ensuring the safe loading and movement of the spent-fuel canister in its facility — to make the required report.<sup>290</sup> We see nothing in the record of either enforcement case to suggest that Holtec — much less the proposed license transferees in this proceeding — lacked candor or willingness to comply with NRC requirements.

Riverkeeper next cites a March 23, 2010, report by the Office of the Inspector General (OIG) for the Tennessee Valley Authority (TVA) to support its contention. The report found that a TVA employee, while negotiating with Holtec on behalf of TVA for spent fuel storage services in 2001, was at the same time negotiating with Holtec for employment and received more than \$50,000 “for his assistance in obtaining the TVA contract for [Holtec].”<sup>291</sup> The report also found that TVA paid Holtec unreasonably high prices for certain equipment and that Holtec “may have misled” TVA regarding equipment pricing.<sup>292</sup> Based on the report, Riverkeeper asserts that Holtec’s CEO is untrustworthy and Holtec may overcharge HDI for spent fuel storage services at Indian Point, which could in turn reduce funds available for facility decommissioning.<sup>293</sup>

Riverkeeper has shown no direct link between the matters described in the TVA OIG Report and the qualifications of the proposed transferees to safely decommission Indian Point. Riverkeeper does not contend that any officers or directors of the proposed transferees were involved in the matters that gave rise to the TVA OIG Report, for example, and acknowledges that Holtec took corrective actions in response to the TVA OIG Report nearly a decade ago.<sup>294</sup> These

---

<sup>288</sup> *Id.*

<sup>289</sup> See Letter from Troy W. Pruett, NRC, to Doug Bauder, SCE (Dec. 19, 2018), Encl. 2 at 16-17 (ML18341A172).

<sup>290</sup> See 10 C.F.R. § 72.75(d)(1).

<sup>291</sup> Memorandum from John E. Brennan, TVA OIG, to William R. McCollum, Jr., and Ralph E. Rodgers, TVA (Mar. 23, 2010), at 2, [https://publicwatchdogs.org/wp-content/uploads/2019/07/2010.23.03\\_Redacted\\_Holtec-TVA-OIG-Report.pdf](https://publicwatchdogs.org/wp-content/uploads/2019/07/2010.23.03_Redacted_Holtec-TVA-OIG-Report.pdf).

<sup>292</sup> *Id.* at 7.

<sup>293</sup> Riverkeeper Petition at 17.

<sup>294</sup> See *id.* at 16. As corrective actions, Holtec appointed a corporate governance officer and independent monitor, implemented a new code of conduct and training for company personnel, added three new independent board members, and agreed to monitoring of its operations for a year. See Tennessee Valley Authority, Office of the Inspector General, “Semiannual Report” (Oct. 1, 2010 — Mar. 31, 2011), at 8, 35, <https://oig.tva.gov/reports/semi50.pdf>.

previously addressed problems concerning Holtec’s dealings with TVA are not probative of the integrity or technical competence of the proposed transferees to comply with our requirements; they are therefore outside the scope of this proceeding.<sup>295</sup> Accordingly, we find Riverkeeper’s assertion that the proposed transferees cannot be trusted based on the contents of the TVA OIG Report inadmissible.

Riverkeeper next cites a 2014 tax-credit application by Holtec to the State of New Jersey to support its contention that the proposed transferees lack integrity. Riverkeeper notes that, according to media reports, Holtec did not initially disclose on its 2014 application to New Jersey that it had been temporarily prohibited from contracting with TVA in 2010.<sup>296</sup> Holtec explained the omission was inadvertent and asked the State to correct the record, but Riverkeeper disputes that explanation and claims it is “scarcely credible” that Holtec’s CEO, who signed the application and who was involved in the TVA contracting case in 2010, made a mistake in not disclosing the debarment.<sup>297</sup> But whether Holtec’s CEO made a mistake on the tax-credit application and whether it was material to the State of New Jersey’s decision are outside the scope of this proceeding, which is to determine whether HDI, Holtec IP2, and Holtec IP3 are qualified to hold NRC licenses.<sup>298</sup> Riverkeeper has not shown a direct and obvious link between Holtec’s tax-credit application and the qualifications of the proposed transferees.

Finally, Riverkeeper asserts that Holtec made misrepresentations to the NRC in a separate, currently pending license application to construct and operate a consolidated interim-storage facility (CISF) in New Mexico.<sup>299</sup> Riverkeeper relies on a June 19, 2019, letter from the New Mexico Commissioner of Public Lands to Holtec in support of its contention; the letter asserts that Holtec’s CISF application does not accurately describe the mineral estate beneath the proposed CISF site.<sup>300</sup> We have referred a similar, character contention in the

---

<sup>295</sup> See, e.g., *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-9, 21 NRC 1118, 1137 (1985) (finding that the previously corrected inadequacies of prior management, who no longer would be responsible for licensed activities, were not probative of the integrity of current company management).

<sup>296</sup> Riverkeeper Petition at 17.

<sup>297</sup> *Id.* at 17-18.

<sup>298</sup> A New Jersey task force is looking into the matter. See Nancy Solomon and Jeff Pillets, *A False Answer, a Big Political Connection and \$260 Million in Tax Breaks* (May 23, 2019), available at <https://www.propublica.org/article/holtec-international-george-norcross-tax-breaks> (last visited July 2, 2020). If the task force yields findings that bear on Holtec’s applications pending before the NRC or on its licensed activities, we will consider the findings and respond as appropriate.

<sup>299</sup> Riverkeeper Petition at 18-19.

<sup>300</sup> The New Mexico Commissioner of Public Lands addressed her June 19, 2019, letter to Holtec  
(Continued)

Holtec CISF proceeding — which Holtec disputes — to the Licensing Board for a determination of its admissibility because it may relate directly to siting issues pertinent to that application.<sup>301</sup> In this proceeding, however, Riverkeeper has shown no direct link between the description of the mineral rights underlying Holtec’s proposed CISF site in New Mexico and the decommissioning of Indian Point or the qualifications of HDI, Holtec IP2, or Holtec IP3.

After filing its hearing request, Riverkeeper filed a motion on October 20, 2020, to supplement the basis for its contention, claiming a media report and court filings from late June 2020 indicate Holtec is under criminal investigation by New Jersey for statements Holtec made in its tax credit application.<sup>302</sup> However, this does not appear to be new or materially different information from that contained in Riverkeeper’s hearing request, which also asserted Holtec was under investigation by New Jersey for statements made in its tax credit application.<sup>303</sup> Moreover, as discussed above, New Jersey’s investigation of Holtec is not directly linked to the qualifications of the proposed transferees, and Riverkeeper’s motion presents no new information that changes our analysis.<sup>304</sup> We therefore deny this aspect of Riverkeeper’s motion.<sup>305</sup>

Riverkeeper also claimed in its motion that new information shows wrongdoing by one of the proposed transferees, HDI. According to Riverkeeper, HDI intentionally violated local permitting requirements in the decommissioning of Oyster Creek.<sup>306</sup> Riverkeeper based this assertion on a complaint by Lacey Township to the New Jersey Superior Court in May 2020, together with subsequent State and Federal court filings. However, when read together, these do not show a judicial finding that HDI intentionally violated local permitting requirements. Rather, they show that HDI and Lacey Township had a legal dispute

---

and copied the NRC Chairman. The Secretary of the Commission then added the letter to the adjudicatory docket for the Holtec CISF licensing proceeding. *See* Letter from Denise L. McGovern, NRC, to Stephanie Garcia Richard, State of New Mexico (July 2, 2019) (ML19183A429).

<sup>301</sup> *See Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC 167, 211 (2020).

<sup>302</sup> Riverkeeper Motion to Supplement at 1.

<sup>303</sup> Riverkeeper cited a May 23, 2019, media report in its hearing request, which stated New Jersey had undertaken an investigation of Holtec’s tax credit application and that the investigation could lead to criminal penalties. *See* note 298, *supra*.

<sup>304</sup> *See* Section II.C, *supra*.

<sup>305</sup> Riverkeeper’s motion also briefly asserts that Holtec may be experiencing financial impacts from the loss of tax credits initially awarded but later withdrawn by New Jersey. *See* Riverkeeper Motion to Supplement at 1, 4-5. To the extent Riverkeeper seeks to raise this as a new contention regarding the financial qualifications of the proposed transferees, it has not adequately explained why this issue could not have been raised earlier or how it relates to the financial qualifications of the proposed transferees. Therefore, it does not meet our contention admissibility standards. *See* 10 C.F.R. § 2.309(c), (f)(1)(iii)-(v).

<sup>306</sup> *See* Riverkeeper Motion to Supplement at 3-5.



over whether local permits were required for certain construction activities at Oyster Creek and whether the Atomic Energy Act preempts local permitting decisions. Riverkeeper has not shown how these legal disputes regarding Lacey Township's permitting authority relate to its original contention or raise a material issue within the scope of this license transfer proceeding.<sup>307</sup> We therefore deny this aspect of Riverkeeper's motion.

Riverkeeper also filed a motion on November 6, 2020, which requested that we waive our regulations that allow the Staff to make a decision on a license transfer application prior to a decision on pending adjudications and that we fully resolve Riverkeeper's hearing request and contention before the Staff's decision on the license transfer application.<sup>308</sup> The Staff approved the license transfer on November 23, 2020, in accordance with 10 C.F.R. § 2.1316, which directs the Staff to issue its approval or denial of a license transfer application notwithstanding the pendency of a hearing. Were we to have resolved Riverkeeper's motion prior to the Staff's approval of the license transfer, we would have denied it because the motion did not meet our standards for granting a waiver of 10 C.F.R. § 2.1316. The standards for waiver of a regulation are set forth in 10 C.F.R. § 2.335(b) and require a showing of special circumstances such that application of the rule at issue would not serve the purposes for which it is intended. The purpose of 10 C.F.R. § 2.1316(a), along with the other requirements of 10 C.F.R. Part 2, Subpart M, is to ensure timely decisionmaking in all license transfer cases, even those cases where a hearing may be pending, because license transfer transactions are typically time sensitive and do not involve technical changes to facility operations or license requirements governing safety.<sup>309</sup> Riverkeeper urged that we grant their motion because this case involves a reactor that will undergo decommissioning.<sup>310</sup> However, Riverkeeper's motion did not show that the transfer involves any changes to technical requirements governing facility operations during decommissioning. Riverkeeper's motion thus does not satisfy the standards for a waiver and we decline to treat this case differently from other license transfer cases involving power reactors.<sup>311</sup>

---

<sup>307</sup> See 10 C.F.R. § 2.309(f)(1)(iv).

<sup>308</sup> See Riverkeeper Motion for Waiver at 1-6.

<sup>309</sup> See License Transfer Rule, 63 Fed. Reg. at 66,721-22. While 10 C.F.R. § 2.1316 may result in Staff approval of a transfer prior to the resolution of all pending hearing requests, the Commission retains authority to take appropriate action in the event a hearing is granted and ultimately reveals a need to modify or rescind the Staff's decision. See *Pilgrim*, CLI-19-11, 90 NRC at 262-63.

<sup>310</sup> See Riverkeeper Motion for Waiver at 5. Riverkeeper's motion also argued that resolution of its contention after the transfer is approved could lead to inefficiency and uncertainty. *Id.* at 4-5. However, the fact that a hearing on a contention might occur is not a basis to waive the rule that authorizes the Staff to issue its approval or denial under those very circumstances.

<sup>311</sup> See, e.g., *Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power  
(Continued)

Regardless, because the license transfer has been approved by the Staff and we find that Riverkeeper has not submitted an admissible contention, the motion is moot.<sup>312</sup>

In summary, Riverkeeper's contention that the proposed transferees lack the requisite character to hold an NRC license largely cites examples of conduct by their ultimate parent corporation and its CEO in matters outside the scope of this proceeding. For each example, there is either no indication of wrongdoing, corrective actions were taken several years ago, or the disputed facts are under review in an appropriate venue. Riverkeeper has provided no examples of conduct by the proposed transferees, their officers, or directors in support of its contention. Accordingly, we find Riverkeeper's contention inadmissible.

#### **D. Safe Energy Rights Group's Letter**

In a one-page letter submitted in February 2020, SEnRG requests a hearing on behalf of "the 20 million people living and working within the 50 mile radius" of Indian Point so that they can express "grave concerns" about the proposed transferees' ability to safely decommission the facility.<sup>313</sup> But SEnRG does not address the requisite factors for establishing standing to intervene in an NRC adjudicatory hearing. The letter includes no supporting affidavits from any of SEnRG's members and does not address SEnRG's organizational interests. Therefore, SEnRG has not demonstrated standing to intervene on behalf of any of its members or on behalf of itself as an organization.

SEnRG also has not submitted an admissible contention. SEnRG asserts the application should be denied because the proposed transferees are shell companies with no "seed capital." SEnRG asserts that the proposed transferees would rely on an exemption from our decommissioning funding rules to

---

Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 286 & n.1 (2000) (granting hearing requests although the Staff had issued orders approving both license transfers and the companies had closed on the sale of the two nuclear reactor plants); *Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488 (2001) (declining, following a hearing on the merits, to disturb the Staff's approval of the license transfers); *Vermont Yankee*, CLI-00-17, 52 NRC at 83 (intervention petitions were pending before the Commission although the Staff had issued order approving the transfer); *Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 257 n.8 (2008) (decision on intervention petitions issued after Staff had issued order approving transfer).

<sup>312</sup>Riverkeeper's motion for a waiver of 10 C.F.R. § 2.1316(a) is, in effect, a request for a pre-emptive stay of the Staff's licensing decision, something our license transfer regulations do not contemplate. Rather, our regulations allow requests for a stay of the Staff's licensing decision after it is issued. See 10 C.F.R. § 2.1327. Riverkeeper did not address the standards for obtaining a stay in its motion, nor did it request a stay of the Staff's licensing decision after it was issued.

<sup>313</sup>SEnRG Letter at 1.

pay for waste handling and then “request reimbursement from the Treasury for those expenses,” which “amounts to double payment for activities that are not even among the allowed ‘decommissioning activities.’”<sup>314</sup> But SEnRG does not address how its concerns meet our contention admissibility standards and does not specifically dispute information in the application regarding HDI’s financial qualifications. SEnRG also asserts that the PSDAR omits mention of the Algonquin Pipeline and fails to include a plan for remediating contaminated water beneath the site.<sup>315</sup> SEnRG does not explain why that information should be considered within the scope of this proceeding, which does not involve approving the PSDAR or any decommissioning plans, but instead is to determine whether the proposed transferees are financially and technically qualified to hold the Indian Point licenses. Accordingly, we find SEnRG has not raised a genuine, material dispute within the scope of this proceeding.

### III. CONCLUSION

For the reasons outlined in this decision, we *deny* the requests for hearing and petitions to intervene, as well as subsequent motions filed by New York and Riverkeeper, and *terminate* this proceeding.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 15th day of January 2021.

---

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

### **Commissioner Baran, Dissenting in Part**

In this license transfer proceeding for the Indian Point Energy Center, the State of New York submitted three contentions challenging Holtec's financial qualifications. The Town of Cortlandt, Village of Buchanan, and Hendrick Hudson School District (together, Local Petitioners) submitted two contentions — one challenging Holtec's financial qualifications and another arguing that NRC did not meet its obligations under the National Environmental Policy Act. The majority decision finds all five contentions inadmissible and denies the requests for a hearing. In my view, the majority decision takes an overly strict approach to contention admissibility and inappropriately delves into and decides the merits of aspects of the contentions. It also downplays the importance of the financial qualifications review at the time of license transfer. Therefore, I respectfully dissent in part. I would admit aspects of New York's Contention 2 and Local Petitioners' Contention 1 and grant their requests to pursue those contentions at a hearing.

#### **I. BACKGROUND**

NRC regulations require a license transfer applicant like Holtec to demonstrate its financial and technical qualifications.<sup>1</sup> As the Indian Point reactors are permanently shut down, Holtec must demonstrate that it has the financial qualifications both to complete radiological decommissioning and to manage spent fuel until it is removed from the site. Because the exemption issued by the NRC Staff allows Holtec to withdraw funds from the decommissioning trust funds for non-radiological site restoration, those site restoration costs are also relevant to our review.

Holtec's wholly owned subsidiary Holtec Decommissioning International, LLC (HDI) relies solely on the funding in the Indian Point decommissioning trust funds to demonstrate its financial qualifications. As of October 31, 2019, the trust funds totaled approximately \$2.1 billion. In its license transfer application, HDI estimates that it will spend approximately \$598 million for decommissioning, spent fuel management, and site restoration activities at Indian Point Unit 1, \$702 million at Unit 2, and \$1.002 billion at Unit 3. These estimates include an 18% contingency allowance for decommissioning and site restoration activities. Based on its projected 15-year work schedule and an assumption that assets in the decommissioning trust funds will grow at a 2% annual real rate of return, HDI estimates that approximately \$263 million will remain in the decommissioning trust funds after it has completed work at Indian Point.

---

<sup>1</sup> See 10 C.F.R. § 50.82(a)(8)(i)(B) and (C); 10 C.F.R. § 50.80(b)(1)(i).

## II. NEW YORK'S CONTENTION 2.B AND LOCAL PETITIONERS' CONTENTION 1.A

New York and the Local Petitioners argue that HDI has not demonstrated adequate financial assurance because it has underestimated decommissioning, spent fuel management, and site restoration costs. They contend that HDI's cost estimate "unreasonably fails to account for the substantial likelihood that [HDI] will discover additional contamination once work has begun."<sup>2</sup> New York and the Local Petitioners also argue that the contingency allowance included in HDI's cost estimate to cover unforeseen events is insufficient to cover likely additional contamination.

### A. Additional Contamination

New York and the Local Petitioners identify several types of radiological and non-radiological contamination they contend are likely to be present at Indian Point but that HDI did not address in its cost estimates. They argue that the costs of cleaning up the undiscovered contamination could be substantial and "are likely to cause a shortfall in the decommissioning, site restoration, and/or spent fuel management funding," which "could imperil the Holtec LLCs' ability to complete the project."<sup>3</sup>

New York supports these arguments with detailed expert declarations. One declarant, Daniel Evans, is a Professional Engineer and Director of the Bureau of Hazardous Waste and Radiation Management within the New York State Department of Environmental Conservation (DEC). He has more than 23 years of experience in the investigation and cleanup of contaminated sites.<sup>4</sup> Based on his extensive experience, his professional judgment is that it is "likely that contamination exists in locations [at Indian Point] that will not become accessible until the physical plant is removed" and that the potential contamination was "notably absent" from HDI's decommissioning cost estimate.<sup>5</sup> For example, he opines that "it is likely that previously undetected PCB contamination will be found during the course of site investigation at Indian Point and that the contamination will need remediation."<sup>6</sup> Mr. Evans contends that "[t]he presence of

---

<sup>2</sup> New York Petition at 17; *see also* Town, Village, and District Petition at 16 (contending that "Holtec has failed to account for several significant, unanalyzed cost overrun scenarios").

<sup>3</sup> New York Petition at 12, 26.

<sup>4</sup> Evans Declaration ¶¶ 1, 3, 4.

<sup>5</sup> *Id.* ¶ 24.

<sup>6</sup> *Id.* ¶ 25.

PCBs and other hazardous constituents such as lead and halogenated solvents will be a significant and costly environmental cleanup obligation.”<sup>7</sup>

Another declarant, George Heitzman, is a Professional Engineer with more than 36 years of experience in environmental remediation, primarily in hazardous waste cleanup.<sup>8</sup> In his work for the New York DEC, he has toured Indian Point and “observed portions of the operational area of the Indian Point site where petroleum and PCBs have been released into the environment during facility operations and emergency events such as transformer fires.”<sup>9</sup> He discusses the “at least 258 spills of petroleum, transformer dielectric fluid and unknown material [that] have occurred at Indian Point,” including 65 spills that DEC “was unable to completely investigate and/or remediate.”<sup>10</sup> In his expert opinion, the numerous petroleum spills “that have yet to be fully remediated demonstrates the significant uncertainty regarding the full extent of contamination at Indian Point.”<sup>11</sup> He also discussed a specific transformer fire that resulted in the release of dielectric fluid, firefighting foam, and contaminated water, which “may have escaped into fractures in the shallow bedrock beneath the plant.”<sup>12</sup> Mr. Heitzman states that, in DEC’s experience, “the presence of transformer oil and firefighting foam contaminants in fractured bedrock and groundwater has a high potential to be difficult and expensive to remediate.”<sup>13</sup> According to Mr. Heitzman, HDI’s cost estimate assumes that demolition will require excavation of three feet below grade to remediate non-radiological contamination, but many non-radiological contaminants “are known to migrate in the environment to significantly greater depths than three feet.”<sup>14</sup> He concludes that HDI’s three-foot excavation assumption “is inadequate and faulty from an engineering and remedial perspective.”<sup>15</sup>

A third declarant, Timothy Rice, has been a DEC health physicist for more than 25 years and has done radiological environmental characterization and remediation work at four nuclear power plant sites in New York, including Indian Point.<sup>16</sup> His experience at the former Cintichem reactor and High-Flux Beam Reactor at Brookhaven National Laboratory inform his professional judgment that “the discovery of previously unanticipated radiological environmental contamination” at a decommissioning nuclear reactor can result in multi-year schedule

---

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

<sup>8</sup> Heitzman Declaration ¶¶ 1, 2.

<sup>9</sup> *Id.* ¶ 1.

<sup>10</sup> *Id.* ¶ 10.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* ¶ 12.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* ¶ 14.

<sup>15</sup> *Id.* ¶ 15.

<sup>16</sup> Rice Declaration ¶¶ 1, 2.

delays and significant cost overruns.<sup>17</sup> Mr. Rice states that “based on more than twenty years of investigating numerous radiological incidents at Indian Point that have contaminated structures and spread radiological contamination through drainage systems and groundwater at the site,” it is his “professional opinion that Holtec will likely uncover significant additional radiological contamination that will increase the scope, remedial needs and cost of the decommissioning process at Indian Point.”<sup>18</sup>

These declarations support the conclusion that New York and the Local Petitioners have presented a disputed material question of fact for a hearing. NRC’s current regulations do not require HDI to perform a full site characterization at this stage of the decommissioning process. But that does not bar New York and the Local Petitioners from taking issue with the level of detail in HDI’s cost estimates.

## **B. Contingency Allowance**

New York also challenges the adequacy of HDI’s 18% contingency allowance. According to New York, the contingency allowance “appears to assign virtually no value to costs associated with out-of-scope risks, including the likely discovery of additional radiological and non-radiological contamination.”<sup>19</sup> Arguing that the 18% contingency allowance is unreasonably low, New York points to the Indian Point contingency allowances in Entergy’s Post-Shutdown Decommissioning Activities Report (PSDAR) from 2010. Entergy’s contingency allowances excluded out-of-scope work and still averaged 16.9%, which is only slightly lower than HDI’s 18% contingency allowance.<sup>20</sup> In addition, New York contends that “HDI never describes which risks or uncertainties, if any, are accounted for in the uncertainty allowance or risk allowance categories” of the contingency allowance.<sup>21</sup>

To help support its claim, New York offers the declaration of Warren Brewer, who has a master’s degree in nuclear engineering from the Massachusetts Institute of Technology, over 40 years of experience in the nuclear industry, and over 30 years of experience in decommissioning cost estimating and planning.<sup>22</sup> He contends that “[t]here is no explanation in the LTA [license transfer application], PSDAR, or DCE [decommissioning cost estimate] that would explain why an

---

<sup>17</sup> *Id.* ¶¶ 26, 27.

<sup>18</sup> *Id.* ¶ 4.

<sup>19</sup> New York Petition at 19.

<sup>20</sup> *Id.* at 20; Brewer Declaration ¶ 16.

<sup>21</sup> New York Petition at 19.

<sup>22</sup> Brewer Declaration ¶¶ 1, 2.

additional one percent contingency is sufficient to account for these other risks” of “discrete events or uncertainties in scope or regulations.”<sup>23</sup>

The Local Petitioners similarly challenge HDI’s contingency allowance.<sup>24</sup> According to the Local Petitioners, the PSDAR does not disclose the risk-simulation analysis HDI used to develop its contingency allowance or the “discrete risk events” underlying that analysis. They contend that, as a result, there is insufficient information to show how HDI determined that a contingency allowance of 18% would be adequate.<sup>25</sup>

The core argument of New York and the Local Petitioners is that HDI did not explain the underlying assumptions behind the 18% contingency factor it used in its decommissioning cost estimate. This challenge is well supported. The Standard Review Plan for decommissioning cost estimates indicates that the NRC reviewer should check for a “description of how the contingency costs are calculated.”<sup>26</sup> In this case, HDI summarized its methodology in the DCE, but it did not identify any of the underlying assumptions or factors that went into its risk-simulation analysis. It also did not outline the discrete risk events underlying its analysis. As a result, it is not possible to meaningfully assess HDI’s contingency analysis.

Thus, there is a factual dispute about whether the 18% contingency factor is reasonable and sufficient. HDI asserts that it is. On the other hand, New York points out that, while HDI’s contingency allowance apparently covers a broader scope of contingencies than Entergy’s cost estimate, the HDI contingency factor is only 1.1% higher and “less in total dollars than the 16.9 percent contingency in Entergy’s 2010 estimates.”<sup>27</sup> Moreover, NRC’s generic minimum formula for deriving decommissioning cost estimates includes a 25% contingency allowance.<sup>28</sup> A hearing is required to resolve this factual question.

For these reasons, the issues raised in New York’s Contention 2.B and Local Petitioners’ Contention 1.A are admissible.

---

<sup>23</sup> *Id.* ¶ 16.

<sup>24</sup> Town, Village, and District Petition at 21-22.

<sup>25</sup> *Id.* at 21.

<sup>26</sup> See “Standard Review Plan for Decommissioning Cost Estimates for Nuclear Power Reactors” (Final Report), NUREG-1713 (Dec. 2004) at 27 (ML043510113) (Decommissioning Cost Estimate SRP).

<sup>27</sup> Brewer Declaration ¶ 16.

<sup>28</sup> See Decommissioning Cost Estimate SRP at 18-19. Likewise, NRC expects licensees to use a specific contingency factor of 25% for ISFSI decommissioning (which HDI did). See “Consolidated Decommissioning Guidance, Financial Assurance, Recordkeeping, and Timeliness” (Final Report), NUREG-1757, vol. 3, rev. 1 (Feb. 2012), at 4-11 (ML12048A683).



### III. NEW YORK'S CONTENTION 2.C

New York also argues that HDI's cost estimates do not account for more stringent state law standards and requirements, which will increase decommissioning and site restoration costs. According to New York, HDI did not account for obligations flowing from: (1) the 2000 Con Edison-to-Entergy asset purchase and sale agreement for Units 1 and 2 and the Public Service Commission orders approving that transaction; (2) applicable DEC remediation standards; and (3) a contractual obligation owed to the New York State Energy Research and Development Authority to remediate the leased Indian Point outfall structure.<sup>29</sup> For example, New York contends that, under DEC guidelines, radioactively contaminated soils must be remediated to a 10 millirem annual dose limit from all reasonable pathways to qualify for unrestricted release, not the 25 millirem assumed in HDI's cost estimate. New York argues that this discrepancy materially undermines the reasonableness of HDI's cost estimates.<sup>30</sup> In his declaration, Warren Brewer opines that these "State requirements beyond those assumed by Holtec . . . could require greater expenditures for site restoration work, thus decreasing the amount of funds available for the completion of license termination work."<sup>31</sup> Similarly, George Heitzman contends that the cost estimates do not reflect the scope of work necessary "for site restoration to greenfield conditions," which is the standard required by a condition of the 2001 license transfer to Entergy.<sup>32</sup>

In response, Holtec argues that there is no basis for the State to impose stricter site cleanup requirements than those established by NRC. Holtec also contends that New York is raising issues outside the scope of this proceeding and that its argument is effectively a collateral attack on NRC regulations.

Holtec's arguments are not persuasive. States have authority to set site restoration standards, not NRC. Furthermore, because HDI received an exemption allowing it to use decommissioning trust fund assets to pay for site restoration, higher site restoration costs could impact the overall adequacy of the trust fund to cover decommissioning and spent fuel management activities. By pointing to specific state law standards and obligations HDI would be required to meet, New York raises a genuine dispute with the application as to whether HDI will be required to do substantially more site restoration work than is assumed in its cost estimates. The issues raised in New York's Contention 2.C are therefore admissible.

---

<sup>29</sup>New York Petition at 28-31.

<sup>30</sup>*Id.* at 27 (citing 10 C.F.R. §§ 50.33(f), 50.75(b), 50.75(e)(1)(i)).

<sup>31</sup>Brewer Declaration ¶ 15.

<sup>32</sup>Heitzman Declaration ¶¶ 19, 20.

#### IV. NEW YORK'S CONTENTION 2.H

New York further argues that HDI's decommissioning cost estimate is inadequate because it assumes that it will take only one year per unit for reactor-internals and pressure-vessel segmentation.<sup>33</sup> According to New York, this schedule is "unreasonably short" and creates the potential for project delays that "could increase project costs by tens or even hundreds of millions of dollars, leading to a funding shortfall."<sup>34</sup>

Supported by the declaration of Warren Brewer, New York contends that segmentation of a pressurized water reactor (PWR) like those at Indian Point is more complex and should be expected to take longer than segmentation of a boiling water reactor (BWR).<sup>35</sup> New York provides examples of BWR segmentation timelines proposed by HDI that exceed one year, including almost two years for the Pilgrim reactor and three years for the Oyster Creek reactor.<sup>36</sup> New York contends that HDI has not explained why it is reasonable to assume a shorter timeline for the more complex segmentation projects at Indian Point. New York states that a recent HDI extension of the Pilgrim segmentation schedule from two years to 3.25 years "further undermines its aggressive schedule" at Indian Point.<sup>37</sup>

In my view, New York has raised a genuine dispute as to whether HDI will complete segmentation activities for each unit within one year, as the decommissioning cost estimate assumes. Although New York has not conclusively demonstrated that it will take longer than one year to complete this work, it is not required to do so at this stage of the proceeding. New York has presented a credible case that HDI's segmentation timeline and cost estimate are overly optimistic. This open factual question will need to be resolved at a hearing. The issues raised in New York's Contention 2.H are therefore admissible.

#### V. CONCLUSION

For these reasons, I would *grant in part* the State of New York's request for a hearing and admit the specified portions of New York's Contention 2; and *grant in part* the Local Petitioners' request for a hearing and admit the specified portions of the Local Petitioners' Contention 1. With respect to Riverkeeper's November 6, 2020, motion, I agree with the majority that the motion is moot

---

<sup>33</sup>New York Petition at 48-52.

<sup>34</sup>*Id.* at 48-49.

<sup>35</sup>New York Petition at 50; Brewer Declaration ¶ 21.

<sup>36</sup>New York Petition at 50; Brewer Declaration ¶ 21.

<sup>37</sup>New York Petition at 51.

but do not join the discussion of whether Riverkeeper meets the standards for granting a waiver of 10 C.F.R. § 2.1316.

### **Commissioner Hanson, Dissenting in Part**

I join in part and respectfully dissent in part from the majority's decision in this proceeding. I am troubled by the inordinately high standards we continue to impose on petitioners in license transfer proceedings. Here, as in other recent proceedings, the majority relies on the prospective licensee's presumed compliance with future regulatory obligations — for example, the requirement that a licensee supplement its financial assurance in certain circumstances — as a basis for finding that New York and the Local Petitioners do not raise a genuine dispute with the license transfer application. As a result, the majority imposes standards that far exceed those provided in our regulations for contention admissibility and ultimately frustrate the opportunity for interested parties to request a hearing at this stage in the proceeding. While I appreciate that our regulations provide a holistic framework to assure that licensees have, and maintain, sufficient funding for decommissioning activities, the agency's reliance on future obligations to dismiss well-supported concerns at the license transfer stage undercuts the purpose of our regulatory structure and fails to provide accountability to the public.

I agree with the majority that the hearing requests of Riverkeeper and SEnRG should be denied, along with the motions of New York and Riverkeeper. However, I would grant the hearing requests of New York and Local Petitioners, in part. New York has met the standards for admission of Contention 2, based on concerns regarding additional contamination, the adequacy of the contingency allowance, and the reactor vessel segmentation timeline.<sup>1</sup> Local Petitioners, based on claims of additional contamination and adequacy of the contingency allowance in Contention 1, have also met these standards.<sup>2</sup> I would therefore admit the specified portions of New York's Contention 2 and Local Petitioners' Contention 1 for the reasons described below.

As a basis for disputing the cost estimates provided by the Applicants for license termination, site restoration, and spent fuel management activities, New York provides a substantial discussion of potential sources of contamination at Indian Point supported by expert opinion.<sup>3</sup> New York and its experts discuss the extent of this contamination and the probability that there may be sources of

---

<sup>1</sup> See Petition of the State of New York for Leave to Intervene and for a Hearing (Feb. 12, 2020) (ML20043E118) (New York Petition).

<sup>2</sup> See Town of Cortlandt, Village of Buchanan, and Hendrick Hudson School District's Petition for Leave to Intervene and Hearing Request (Feb. 12, 2020) (ML20043F054) (Town, Village, and District Petition).

<sup>3</sup> See New York Petition at 21-25; Declaration of Timothy B. Rice (Feb. 7, 2020) ¶¶ 4, 13-22, 25, 28; Declaration of George W. Heitzman (Feb. 5, 2020) ¶¶ 9-15, and Exhibit D at 2, 8; Declaration of Warren K. Brewer (Feb. 11, 2020) ¶¶ 24-26.

contamination yet to be identified at the site.<sup>4</sup> Local Petitioners also dispute the adequacy of the application to account for certain potential sources of existing contamination at the Indian Point site and offer examples of increased cost and delay caused by unanticipated contamination at other decommissioning sites.<sup>5</sup>

The majority dismisses these well supported claims of potential and existing contamination as insufficient to demonstrate a genuine dispute with the application. In the majority's view, even if additional contamination exists, or the extent is larger than anticipated, the adequacy of the license transfer application is not called into question because the NRC's regulatory structure will assure that sufficient funds are available for decommissioning.

While I recognize that a full site characterization is not required at this stage in the proceeding, and I do not suggest that the Applicants need to perform one at this time, I find that New York and Local Petitioners raise a factual dispute sufficient to support a hearing on the issue of existing contamination. Even though cost estimates are uncertain by nature, we are obligated to acknowledge claims from interested persons that call these estimates into question. Our contention admissibility requirements are not intended to reach the merits of the dispute, but merely to assure that a genuine dispute on a material fact within the scope of the proceeding exists. Therefore, I would admit New York's Contention 2 and Local Petitioners' Contention 1 on this basis.

Further, New York and Local Petitioners make similar claims regarding the sufficiency of the contingency allowance provided in the application.<sup>6</sup> The application describes the methodology used to calculate the contingency allowance, but New York and the Local Petitioners take issue with the lack of detail, particularly the inputs used.<sup>7</sup> Although the majority notes that there is no requirement for this level of detail to be provided as part of the application, I agree with New York and Local Petitioners that it is difficult to meaningfully ascertain the contingency allowance value without it. Even though 18% is similar to the contingency allowances provided in other license transfers, I remain unconvinced that this is an adequate basis to reject a concern raised by an interested party that meets our contention admissibility standards. Therefore, I would admit New York's Contention 2 and Local Petitioners' Contention 1 on this additional basis, finding that they have raised a genuine dispute on a material issue within the scope of the proceeding.

New York also disputes the timeframe for reactor vessel internals and reactor

---

<sup>4</sup> See New York Petition at 25-26.

<sup>5</sup> See Town, Village, and District Petition at 17-20.

<sup>6</sup> See New York Petition at 17-20; Brewer Declaration ¶¶ 16-17; see also Town, Village, and District Petition at 21-22.

<sup>7</sup> See *id.*

pressure vessel segmentation provided in the application.<sup>8</sup> In support of its proposed contention, New York provides expert testimony and numerous examples of segmentation activities at other sites that took longer than the year allocated by the Applicants.<sup>9</sup> New York further discusses the potential for schedule delays caused by the timeline and related cost overruns.<sup>10</sup> The majority finds that New York has not shown the Applicants' timeline for segmentation is infeasible. However, New York has supported its claims with facts and expert opinion that call into question the estimated timeline for segmentation activities at Indian Point and explain how these delays could impact the cost estimates provided in the application. New York is only required to raise a genuine dispute on a material fact within the scope of the proceeding at this contention admissibility stage, and I find that it has done so here. Therefore, I would admit New York's Contention 2 on this additional basis.

I agree with the majority and would not admit Contention 2 on the other bases provided in New York's petition and subsequent motion, but I would like to clarify my perspectives on site restoration costs related to state law standards and costs associated with gas pipelines at Indian Point. New York argues as a basis for Contention 2 that the Applicants have failed to consider additional costs that might ensue from the application of state law standards and requirements for site restoration.<sup>11</sup> The Applicants argue that this is inadmissible as outside the scope of the proceeding and not within the NRC's jurisdiction.<sup>12</sup> On this latter point, I disagree. While the NRC would ordinarily not address such matters within a license transfer proceeding, here the Applicants have requested an exemption to use the Decommissioning Trust Fund for site restoration activities. This brings such concerns within the scope of the proceeding. However, as described in the order, the state law standards cited by New York are preliminary, meaning that they are still the subject of various contractual, administrative, or judicial proceedings. It is on this basis that I find New York's argument does not support admitting Contention 2. Had the standards and obligations been settled, I may have supported a different outcome.

Finally, one of the bases provided by New York for Contention 2 addresses potential hidden decommissioning costs caused by gas pipelines on the Indian Point site.<sup>13</sup> New York presents a few scenarios associated with the pipelines

---

<sup>8</sup> See New York Petition at 48-52.

<sup>9</sup> See *id.* at 50; Brewer Declaration ¶ 21.

<sup>10</sup> See *id.* at 52; Brewer Declaration ¶ 19.

<sup>11</sup> See New York Petition at 27-32.

<sup>12</sup> See Applicants' Answer Opposing Petition for Leave to Intervene and Hearing Request Filed by the State of New York (Mar. 9, 2020) at 44-45 (ML20069K756) (Applicants' Answer to New York Petition).

<sup>13</sup> See New York Petition at 33-37.

that could cause delay or increase the cost associated with decommissioning, and states that the application fails to address this site-specific aspect of Indian Point.<sup>14</sup> However, the Applicants' answer disputes the potential scenarios put forth by New York and points to various places in the application and the PSDAR that address the gas pipelines at the site.<sup>15</sup> New York does not dispute these claims and is in fact altogether silent on this basis in its reply brief.<sup>16</sup> While site-specific features such as pipelines can be important in the consideration of decommissioning cost estimates, New York's silence on the matter ultimately fails to raise a genuine dispute, and this basis is inadmissible for that reason.

---

<sup>14</sup> *See id.* at 33-34; Brewer Declaration ¶ 14.

<sup>15</sup> *See Applicants' Answer to New York Petition* at 55-56.

<sup>16</sup> *See Reply in Support of the State of New York's Petition for Leave to Intervene and for a Hearing* (Mar. 23, 2020).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Kristine L. Svinicki**, Chairman  
**Jeff Baran**  
**Annie Caputo**  
**David A. Wright**  
**Christopher T. Hanson**

In the Matter of

Docket No. 50-320-LT

**FIRSTENERGY COMPANIES and  
TMI-2 SOLUTIONS, LLC**  
(Three Mile Island Nuclear Station,  
Unit 2)

January 15, 2021

**LICENSE TRANSFER**

A license transfer application must provide “reasonable assurance . . . that funds will be available to decommission the facility.” 10 C.F.R. §§ 50.33(k)(1), 50.80(b)(1)(i); *see also id.* § 72.30(b)-(c) (regarding ISFSI decommissioning). But a license transfer proceeding does not approve a method of decommissioning, authorize decommissioning, or terminate the license of the facility involved.

**LICENSE TRANSFER**

The level of assurance required for financial assurance of license transferees is not equivalent to the “extremely high assurance [required for] the safety of reactor design, construction and operation.” *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 221-22 (1999). Rather, in such cases we “will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected.” *Id.* at 222.



## **CONTENTIONS**

Where contentions appear to have been “cut and pasted” from those offered by a different petitioner for a different proceeding, it is especially important to ensure that petitioners demonstrate a genuine material dispute with the particular application in question in order to grant a hearing. *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323 (2012).

## **DECOMMISSIONING FUNDING**

Licensees in active decommissioning, under specific conditions, may take a 2% credit for a return on prepaid funds, “through the projected decommissioning period.” 10 C.F.R. § 50.75(e)(1)(i). In order to take a 2% credit for earnings throughout decommissioning, the cost estimate must be based on a period of safe storage specifically described in the decommissioning cost estimate (DCE). That period will vary for each plant depending on the age, type, and amount of fuel in the pool.

## **DECOMMISSIONING FUNDING**

A limited liability corporation is treated the same as other corporations with respect to meeting NRC requirements.

## **MEMORANDUM AND ORDER**

This proceeding involves the November 12, 2019, application by GPU Nuclear, Inc., Metropolitan Edison Company, Jersey Central Power & Light Company, and Pennsylvania Electric Company (together, the FirstEnergy Companies) and TMI-2 Solutions, LLC (TMI-2 Solutions) (together with the FirstEnergy Companies, Applicants) to transfer the possession-only License for Three Mile Island Nuclear Station, Unit 2 (TMI-2) from the FirstEnergy Companies to TMI-2 Solutions.<sup>1</sup> Eric Epstein and Three Mile Island Alert, Inc. filing jointly, (together, TMIA) filed a petition to intervene and a request for a hearing (Peti-

---

<sup>1</sup> See Letter from John Sauger, President and Chief Nuclear Officer, TMI-2 Solutions, LLC and Gregory H. Halnon, President and Chief Nuclear Officer, GPU Nuclear, Inc., to NRC Document Control Desk (Nov. 12, 2019) (ADAMS accession no. ML19325C690 (package)) (together with attachments and enclosures, License Transfer Application).

tion).<sup>2</sup> The Applicants oppose the Petition.<sup>3</sup> The NRC Staff is not participating in this proceeding.

## I. BACKGROUND

### A. The License Transfer Application

In March 1979, after only four months' operation, TMI-2 experienced a partial meltdown and ceased operations.<sup>4</sup> Between 1985 and 1990, 99% of the fuel was removed, and the reactor fuel and core debris were shipped to the Department of Energy's Idaho National Laboratory.<sup>5</sup> Since that time the plant has been held in post-defueled monitored storage (PDMS). TMI-2 is adjacent to Three Mile Island, Unit 1 (TMI-1), which operated for more than forty-five years before it permanently shut down in September 2019.<sup>6</sup> The two facilities are not owned by the same entities. A 2015 Post-Shutdown Decommissioning Activities Report (PSDAR) for TMI-2 assumed that TMI-2 would be held in safe storage until 2041, or seven years after TMI-1 was expected to shut down in 2034.<sup>7</sup>

The application requests to transfer ownership of TMI-2 from the FirstEnergy Companies to TMI-2 Solutions. The transfer would allow TMI-2 to be decommissioned years ahead of the current projection.<sup>8</sup> The application states

---

<sup>2</sup> Petition of Eric Joseph Epstein and Three Mile Island Alert, Inc. for Leave to Intervene and for a Hearing (Apr. 15, 2020) (Petition). The Commonwealth of Pennsylvania, Department of Environmental Protection petitioned to intervene but later withdrew its request after settling with the Applicants. See Commonwealth of Pennsylvania, Department of Environmental Protection's Notice of Withdrawal of its Petition for Leave to Intervene and Request for an Extension of Time to File a Hearing Request (Aug. 10, 2020).

<sup>3</sup> See Applicants' Answer Opposing Petition for Leave to Intervene and Hearing Request Filed by Eric Joseph Epstein and Three Mile Island Alert, Inc. (May 11, 2020) (Answer to TMIA); see also Reply of Eric Joseph Epstein and Three Mile Island Alert, Inc. to Applicant's Answer Opposing Petition for Leave to Intervene and Hearing Request (May 18, 2020) (TMIA Reply).

<sup>4</sup> See generally NRC Office of Public Affairs, Backgrounder, "Three Mile Island Accident" (ML-040280573) (Backgrounder). See also Letter from Gregory H. Halnon, GPU Nuclear, Inc. to NRC Document Control Desk (Dec. 12, 2019), Attach. 1, "Post-Shutdown Decommissioning Activities Report," Three Mile Island Nuclear Power Station, Unit 2, NRC Possession Only License No. DPR-73, Rev. 3 (Dec. 2019), at 2 (ML20013E589 (package)) (PSDAR).

<sup>5</sup> Backgrounder at 3-4.

<sup>6</sup> See Letter from Michael P. Gallagher, Vice President, Exelon Generation Co., to NRC Document Control Desk (Sept. 26, 2019), at 1 (ML19269E480).

<sup>7</sup> See Letter from Gregory H. Halnon, GPU Nuclear, Inc., to NRC Document Control Desk (Dec. 4, 2015), Attach. 1 at 12 (ML15338A222).

<sup>8</sup> License Transfer Application, Attach. 1 at 2; *id.*, Encl. 7, "Schedule of Planned Decommissioning."  
(Continued)

that TMI-2 Solutions will initially maintain the site in PDMS for approximately four to five years while it completes preparatory work.<sup>9</sup> According to the application, the proposed accelerated schedule would complete decommissioning approximately sixteen and a half years after the license transfer.<sup>10</sup> But the application acknowledges that additional licensing actions must be taken before TMI-2 Solutions could commence dismantling the site.<sup>11</sup>

TMI-2 Solutions is an indirect wholly owned subsidiary of EnergySolutions, Inc.<sup>12</sup> The proposed license transfer would take place pursuant to an Asset Purchase and Sale agreement (Purchase Agreement) entered among the Applicants on October 15, 2019.<sup>13</sup>

The application estimates that radiological decommissioning of TMI-2 by 2037 will cost \$1.06 billion (in 2019 dollars).<sup>14</sup> The cost estimate for accelerated decommissioning was derived by using GPU Nuclear's 2018 Decommissioning Cost Estimate (DCE) and adjusting it based on TMI-2's expected methods, schedule, and past experience.<sup>15</sup> The application states that, upon closing of the transfer, the funds in the TMI-2 nuclear decommissioning trust fund will be transferred to a tax-qualified nuclear decommissioning trust fund established by TMI-2 Solutions in an amount not less than \$800 million.<sup>16</sup> In addition, TMI-2 Solutions will have access to "additional decommissioning funding assurance instruments worth up to \$100 million" and a Parent Guarantee from

---

ing Activities," at 1 (TMI-2 Solutions Decommissioning Schedule). The current Post-Shutdown Decommissioning Activities Report anticipates that decommissioning will be completed and the license terminated in 2053. *See* PSDAR at 4.

<sup>9</sup> License Transfer Application, Attach. 1 at 2; *see also id.*, Encl. 7, TMI-2 Solutions Decommissioning Schedule, at 1.

<sup>10</sup> License Transfer Application, cover letter at 3.

<sup>11</sup> *See, e.g., id.* at 2; *id.*, Attach. 1 at 2, 10; *id.*, Encl. 7, TMI-2 Solutions Decommissioning Schedule, at 1.

<sup>12</sup> *Id.*, cover letter at 2.

<sup>13</sup> *See* License Transfer Application, Attach. 1, Encl. 1B, "Asset Purchase and Sale Agreement by and Among GPU Nuclear, Inc., Metropolitan Edison Company, Pennsylvania Electric Company, Jersey Central Power & Light Company, and TMI-2 Solutions, LLC" (Oct. 15, 2019) (Purchase Agreement).

<sup>14</sup> License Transfer Application, Attach. 1 at 9.

<sup>15</sup> *See* License Transfer Application, Attach. 1, Encl. 7, TMI-2 Solutions Decommissioning Schedule, at 5; *see also* Letter from Gregory H. Halnon, GPU Nuclear, to NRC Document Control Desk (Mar. 28, 2019), Encl. 1, "2018 Decommissioning Cost Estimate For FirstEnergy, Three Mile Island, Unit 2" (Dec. 12, 2018) (ML19087A153).

<sup>16</sup> License Transfer Application, Attach. 1 at 2, 11; *see also* Purchase Agreement at 53, §7.1.4.

EnergySolutions.<sup>17</sup> In December, 2019, the Applicants submitted an updated PSDAR, which included an updated DCE.<sup>18</sup>

TMI-2 Solutions plans to decommission the facility in two phases and to segregate the decommissioning funds into a “Phase I Subaccount” and a “Phase 2 Subaccount.”<sup>19</sup> The application provides that if the Phase I Subaccount funds are exhausted before completion of the Phase I activities, TMI-2 Solutions will draw on the additional financial assurance instruments and the Parent Guarantee from EnergySolutions before drawing on the Phase 2 Subaccount.<sup>20</sup>

The application anticipates that all Class A low-level radioactive waste (LLRW) will be disposed of pursuant to an “Irrevocable Disposal Capacity Easement” at the EnergySolutions LLRW disposal facility in Clive, Utah.<sup>21</sup> In addition, the DCEs include the costs for recovering and packaging the debris material that is still on site after the Department of Energy (DOE) removed the majority of the spent nuclear fuel and damaged core from the site.<sup>22</sup> The DCE does not include the cost of storing the packaged debris material until DOE accepts it for disposal.<sup>23</sup> The application states that “if necessary,” TMI-2 Solutions will submit an exemption request that would allow it to use nuclear decommissioning trust funds for debris material storage.<sup>24</sup>

## **B. Legal Requirements for License Transfer; Financial Qualifications Review**

Under the Atomic Energy Act of 1954, as amended (AEA), and associated regulations, the NRC must give prior written consent for a power reactor license transfer.<sup>25</sup> A license transfer application must include information on “the

---

<sup>17</sup> License Transfer Application, Attach. 1 at 10-11. The “additional funding instruments” will consist of “(i) a Back-Up & Provisional Nuclear Decommissioning Trust, segmented into a Back-Up Trust Account and a Provisional Trust Account; (ii) an Irrevocable Letter of Credit; (iii) an Irrevocable Disposal Capacity Easement; [and] (iv) a Financial Support Agreement.” *Id.* at 11.

<sup>18</sup> See PSDAR, Encl. 1A, “Decommissioning Cost Estimate.”

<sup>19</sup> License Transfer Application, Attach. 1 at 11; see also *id.* Encl. 3B, “Form of Tax-Qualified Nuclear Decommissioning Trust Agreement,” at 6 (Trust Agreement); *id.*, Encl. 7, TMI-2 Solutions Decommissioning Schedule, at 1-2.

<sup>20</sup> License Transfer Application, Attach. 1 at 11; see also *id.*, Encl. 3B, Trust Agreement, at 6.

<sup>21</sup> License Transfer Application, Attach. 1 at 12; see also *id.*, Encl. 4B, “Additional Financial Assurance & Performance Instruments,” at 1-2 (Additional Financial Assurance Instruments).

<sup>22</sup> License Transfer Application, Attach. 1 at 11-12. The Application estimates that DOE has removed 99% of such debris material. *Id.*

<sup>23</sup> *Id.* at 12.

<sup>24</sup> *Id.*

<sup>25</sup> See AEA § 184, 42 U.S.C. § 2234 (providing that no license granted under the AEA “shall be  
(Continued)

identity and technical and financial qualifications of the proposed transferee as would be required by [applicable regulations as] if the application were for an initial license.”<sup>26</sup> A license transfer will be approved if the NRC determines that the proposed transferee is qualified to hold the license and that the proposed transfer is consistent with applicable law, regulations, and orders.<sup>27</sup>

The Petition focuses on TMI-2 Solutions’ ability to pay all costs associated with decommissioning. A license transfer application must provide “reasonable assurance . . . that funds will be available to decommission the facility.”<sup>28</sup> The application also must provide information sufficient to demonstrate the “financial qualification of the applicant to carry out . . . the activities” for which the license is sought.<sup>29</sup> A license transfer proceeding does not approve a method of decommissioning, authorize decommissioning, or terminate the license of the facility involved.

NRC regulations outline acceptable methods of demonstrating financial assurance of decommissioning funding, including the prepayment method.<sup>30</sup> Prepayment refers to prepaid funds deposited in an account segregated from the licensee’s assets and outside of the licensee’s administrative control (such as a trust, escrow account, or government fund), in an amount that “would be sufficient to pay decommissioning costs at the time permanent termination of operations is expected.”<sup>31</sup> A licensee that has set aside prepaid decommissioning funds “based on a site-specific [decommissioning] cost estimate . . . may take credit for projected earnings on the prepaid decommissioning trust funds, up to a 2[%] annual real rate of return from the time of the future funds’ collection through the projected decommissioning period.”<sup>32</sup>

Our financial assurance requirements, combined with our procedures for review of a license transfer application, help ensure that a license is not transferred to an entity that will be financially unable to maintain and decommission the facility. But the level of assurance required for financial assurance of license transferees is not equivalent to the “extremely high assurance [required for] the

---

transferred . . . directly or indirectly, through transfer of control of any license to any person, unless the Commission . . . shall give its consent in writing”); 10 C.F.R. § 50.80(a) (implementing the AEA provision as to power reactors).

<sup>26</sup> 10 C.F.R. § 50.80(b)(1)(i) (referencing 10 C.F.R. §§ 50.33, 50.34).

<sup>27</sup> *Id.* § 50.80(c).

<sup>28</sup> *See id.* §§ 50.33(k)(1), 50.80(b)(1)(i); *see also id.* § 72.30(b)-(c) (regarding ISFSI decommissioning).

<sup>29</sup> *See id.* § 50.33(f).

<sup>30</sup> *See id.* § 50.75(e)(1).

<sup>31</sup> *Id.* § 50.75(e)(1)(i).

<sup>32</sup> *Id.*

safety of reactor design, construction and operation.”<sup>33</sup> Rather, in such cases we “will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected.”<sup>34</sup> “Thus, the mere casting of doubt on some aspects of proposed funding plans is not by itself sufficient to defeat a finding of reasonable assurance.”<sup>35</sup>

Although we do not require a license transfer applicant to provide absolute certainty in its financial assurances, our review of its financial ability to decommission a facility on the site does not end after approval of the transfer.<sup>36</sup> A licensee in decommissioning must continue to demonstrate annually, until the license is terminated, that funding for decommissioning (and, where applicable, spent fuel management) remains adequate.<sup>37</sup> The NRC’s examination of a transfer applicant’s financial qualifications therefore is an initial review conducted in light of its current financial picture and plausible financial projections.

## II. DISCUSSION

### A. TMIA’s Petition to Intervene

In its Petition, TMIA proposes three contentions relating to the general claim that the license application does not provide adequate financial assurance that the site can be adequately decommissioned. Two of Three Mile Island Alert, Inc.’s members provided statements in support of standing.<sup>38</sup> Patricia Longnecker and Joyce Corradi both state that they live within ten miles of the site and are concerned that they would be at risk if a shortfall in decommissioning funds were to result in the incomplete cleanup of the site and radiological contamination of the land and the Susquehanna River.<sup>39</sup>

We will grant a hearing to a petitioner who both demonstrates standing and offers at least one contention that meets the admissibility standards in our regulations.<sup>40</sup> An admissible contention must have factual support, be within the

---

<sup>33</sup> *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 221-22 (1999).

<sup>34</sup> *Id.* at 222.

<sup>35</sup> *Id.*

<sup>36</sup> *See, e.g., Exelon Generation Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-19-6, 89 NRC 465, 475-76 (2019).

<sup>37</sup> *See* 10 C.F.R. § 50.82(a)(8)(v).

<sup>38</sup> Petition, Attach., Declaration of Joyce Corradi (Apr. 13, 2020) (Corradi Decl.); Petition, Attach., Declaration of Patricia Longnecker (Apr. 15, 2020) (Longnecker Decl.).

<sup>39</sup> Corradi Decl. at 2, Longnecker Decl. at 2.

<sup>40</sup> *See* 10 C.F.R. § 2.309(a), (d), (f)(1).

scope of the proceeding, raise a matter material to the findings the NRC must make in deciding whether to grant the license, and raise a genuine dispute with the application.<sup>41</sup> The petitioner must identify the specific portions of the application that the petitioner disputes; or, if a petitioner claims that the application is missing information required by law, the petitioner must identify each omission and provide supporting reasons for the petitioner's belief.<sup>42</sup> The admissibility rules are intended to ensure that adjudicatory hearings are held only on factually supported, substantive safety or environmental disputes over matters material to the NRC's decision to approve the challenged application. We do not reach the issue of standing because we find that none of TMIA's contentions is admissible.

As an initial matter, we observe that much of TMIA's contentions appears to be identical to those sponsored by different petitioners in a different proceeding — principally, from the State of New York's petition in the Indian Point license transfer proceeding.<sup>43</sup> As a result, TMIA's contentions frequently include claims and references to matters that are not relevant to the TMI-2 site or to this application.<sup>44</sup> We have previously held that, where contentions were initially drafted by a different petitioner for a different proceeding, it is especially important to ensure that petitioners demonstrate a genuine material dispute with the particular application in question in order to grant a hearing.<sup>45</sup> This order focuses on TMIA's claims that are relevant to TMI-2.<sup>46</sup>

---

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* § 2.309(f)(1)(vi).

<sup>43</sup> See Petition of the State of New York for Leave to Intervene and for a Hearing (Feb. 12, 2020) (ML20043E118) (New York Petition in Indian Point). Applicants point out several points where TMIA's contentions were copied from the *Indian Point* license transfer proceeding. See Answer to TMIA at 6, 24-25, 40-41, 48 n.207, 50, 73.

<sup>44</sup> For example, Applicants here do not seek to transfer a Part 72 Independent Spent Fuel Storage Installation (ISFSI) license, because there is no ISFSI on the site. Yet TMIA argues at several points that the application fails to comply with 10 C.F.R. § 72.30(b), which pertains to ISFSIs, and repeatedly references, without explanation, DOE's license renewal application for the TMI-2 ISFSI in Idaho. See, e.g., Petition, Part II, Contentions at 1, 6, 9, 27, 29, 30, 32, 34, 36, 38. (TMIA separately paginated the contentions portion of its petition to intervene; we will therefore cite this portion as "Petition, Contentions at \_\_\_"). TMIA also argues that the DCE does not include the cost of "site restoration." See Petition at 20; *id.*, Contentions at 7, 9, 12, 32, 41, 45, 46. But unlike the *Indian Point* applicants, TMI-2 Solutions does not seek an exemption to use decommissioning trust funds for such restoration. Our regulations do not require that the licensee undertake non-radiological site restoration, and the use of decommissioning funds to do so is normally prohibited. See 10 C.F.R. §§ 50.2 (definition of "decommission"), 50.82(a)(8)(i)(A) (withdrawals from trust must be for "legitimate decommissioning activities").

<sup>45</sup> *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323 (2012).

<sup>46</sup> TMIA filed documents on the NRC's electronic docket system after briefing was closed, in-  
(Continued)

## B. TMIA's Contentions

### 1. Contention 1: Credit for Trust Fund Earnings

TMIA's primary argument in Contention 1 is that the cash flow analyses in TMI-2 Solutions' PSDAR and DCE "impermissibly assume an annual [2%] real rate of return on nuclear decommissioning trust monies."<sup>47</sup> TMIA relies on 10 C.F.R. § 50.75(e)(1)(i), which provides, in pertinent part, as follows:

A licensee that has prepaid funds based on a site-specific estimate under § 50.75(b)(1) of this section may take credit for projected earnings on the prepaid decommissioning trust funds, using up to a 2 percent annual real rate of return from the time of future funds' collection through the projected decommissioning period, provided that the site-specific estimate is based on a period of safe storage that is specifically described in the estimate. This includes the periods of safe storage, final dismantlement, and license termination.<sup>48</sup>

TMIA argues that the TMI-2 Solutions' decommissioning plan does not "contemplate a period of safe storage," because TMI-2 Solutions will proceed immediately to decommissioning.<sup>49</sup> Moreover, TMIA argues that when the NRC promulgated the final decommissioning trust fund rule in 2002, it expressly rejected the argument that licensees should be able to take a 2% earnings credit during the dismantlement period.<sup>50</sup>

We find that TMIA's claim that the cash flow analysis cannot assume a 2% real rate of return on decommissioning trust funds does not raise an admissible contention. Petitioners both misinterpret the applicable regulation and inaccu-

---

cluding a letter to the Commission, two copies of a lawsuit filed by the State of Ohio against FirstEnergy company affiliates, and news articles relating to the FirstEnergy companies. See Letter from Kay Pickering and Thomas Bailey, Three Mile Island Alert, Inc., to the Commissioners (Sept. 10, 2020) (ML20266G413); Complaint & Demand for Jury Trial, State v. FirstEnergy Corp. (Ohio Ct. C.P.) (filed on the NRC docket on Sept. 23, 2020) (ML20269A340); Complaint & Demand for Jury Trial, State v. FirstEnergy Corp. (Ohio Ct. C.P.) (filed on the NRC docket on Oct. 5, 2020) (ML20269A526); John Funk, *FirstEnergy fires CEO, 2 other top executives in wake of \$61 million political bribery scandal*, Utility Dive, Oct. 31, 2020 (ML20305A420); Jim McKinnon, *Ratings service downgrades FirstEnergy over CEO firing, Ohio bribery investigation*, The Columbus Dispatch (Oct. 31, 2020) (ML20306A378). Because these filings were not accompanied by a motion for leave to file or any other pleading explaining their significance to TMIA's petition we do not consider them.

<sup>47</sup> Petition, Contentions at 1.

<sup>48</sup> *Id.* at 3; 10 C.F.R. § 50.75(e)(1)(i).

<sup>49</sup> Petition, Contentions at 3.

<sup>50</sup> *Id.* at 8; see Final Rule, Decommissioning Trust Provisions, 67 Fed. Reg. 78,332, 78,338 (Dec. 24, 2002).



rately describe the DCE. The contention therefore fails to raise a genuine dispute with the application.

If TMIA means to argue that *no* licensee would be allowed to take a 2% credit for earnings on its prepaid decommissioning funds once it starts active decommissioning, the regulation contradicts that interpretation. Section 50.75 allows licensees in active decommissioning, under specific conditions, to take a 2% credit for a return on prepaid funds, “through the projected decommissioning period.”<sup>51</sup>

To the extent that TMIA interprets the reference to “safe storage” in section 50.75(e) to mean that a licensee may only take credit for earnings through decommissioning if it has chosen “SAFSTOR” decommissioning, it is also incorrect.<sup>52</sup> The regulation does not use the terms “SAFSTOR” or “DECON”; these are general terms used to describe approaches to decommissioning. As explained in the Revised Analyses of Decommissioning for the Reference Pressured Water Reactor Power Station, both DECON and SAFSTOR typically involve “a period of plant safe storage.”<sup>53</sup> After the initial period of safe storage, however, plants undergoing SAFSTOR enter a period of “extended safe storage” of the facility during which there is no spent fuel in the pool.<sup>54</sup> The regulation does not require that the licensee keep the facility in safe storage for any particular period of time. Instead, the regulation requires that in order to take a 2% credit for earnings throughout decommissioning, the cost estimate must be based on a period of safe storage specifically described in the DCE. That period will vary for each plant depending on the age, type, and amount of fuel in the pool.

TMIA’s argument that the Applicants do not propose a period of safe storage for TMI-2 also misconstrues the application. TMI-2 is currently in safe storage — PDMS — and has been for twenty-seven years.<sup>55</sup> The PSDAR additionally anticipates that this period will continue while “all necessary engineering and licensing actions” prerequisite to DECON are completed.<sup>56</sup> Therefore, TMIA’s Contention 1 does not raise a material dispute with the application.

---

<sup>51</sup> 10 C.F.R. § 50.75(e)(1)(i).

<sup>52</sup> Petition, Contentions at 3-4, 7.

<sup>53</sup> “Revised Analyses of Decommissioning for the Reference Pressured Water Reactor Power Station, Effects of Current Regulatory and Other Considerations on the Financial Assurance Requirements of the Decommissioning Rule and on Estimates of Occupational Radiation Exposure,” NUREG/CR-5884 (Nov. 1995), at 1.2 (ML14008A187). The report explains that the first 3 steps of both approaches are 1) pre-shutdown planning, 2) plant deactivation, and 3) safe storage while the spent fuel pool is emptied. *Id.* Under DECON, the fourth step is dismantlement and license termination. *Id.*

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

<sup>55</sup> PSDAR at 3.

<sup>56</sup> *Id.* at 4.

## 2. *Contention 2: Inadequate Decommissioning Financial Assurance*

In Contention 2, TMIA argues that TMI-2 Solutions does not “show adequate decommissioning financial assurance and/or adequate funding for spent nuclear fuel management in violation of 10 C.F.R. §§ 50.33(f) and (k)(1), 50.40(b), 50.54(bb), 50.75(b)(1) and (e)(1)(i), 50.80(b)(1)(i), 50.82(a)(8)(vii), and 72.30(b) because TMI-2 Solutions’ Amended PSDAR and [DCE] underestimate[] license termination, site restoration and spent fuel management costs.”<sup>57</sup> Specifically, TMIA argues that the decommissioning trust funds will be inadequate because the Applicants’ DCE is deficient in five particular areas (designated as “bases” in the Petition).

### a. *Basis A: Likelihood of Greater Contamination at the Site*

In Contention 2, Basis A, TMIA argues that the PSDAR and cost estimate fail to account for the likely existence of greater contamination at the TMI-2 site than that for which the DCE currently accounts.<sup>58</sup> TMIA argues that to avoid the risk of unknown costs, TMI-2 Solutions should have performed a site characterization to ensure that there is no unknown contamination.<sup>59</sup> In support, TMIA provides various exhibits<sup>60</sup> and also cites experiences at other decommissioning reactors where discovery of additional contamination increased decommissioning costs.<sup>61</sup>

We disagree that TMI-2 Solutions must conduct a site survey prior to filing its license transfer application or submitting its PSDAR. TMIA cites no regulation requiring TMI-2 to conduct such a survey before it develops its DCE. Rather, our regulations require a site characterization to be submitted with the license termination plan “at least two years before termination of the license.”<sup>62</sup> The PSDAR confirms that TMI-2 Solutions intends to conduct the site characterization in accordance with agency guidance.<sup>63</sup>

---

<sup>57</sup> Petition, Contentions at 9.

<sup>58</sup> *Id.* at 13-21.

<sup>59</sup> *Id.* at 15-16.

<sup>60</sup> Exhibit A, “Incident Chronology at TMI from NRC: 1979-2020” (undated) (ML20106F218) (Exhibit A); Exhibit C, “Chronology of Health Problems at Three Mile Island” (undated) (ML20106F220) (Exhibit C); Exhibit D, “Leaks, release & exposures at TMI” (undated) (ML20106F221) (Exhibit D); Exhibit E, “Fires and Fire-Related Challenges at the Three Mile Island Nuclear Generating Station” (undated) (ML20106F222) (“Exhibit E”).

<sup>61</sup> Petition, Contentions at 20-21.

<sup>62</sup> See 10 C.F.R. § 50.82(a)(9)(i), (ii)(A).

<sup>63</sup> The PSDAR provides that TMI-2 will conduct a site characterization as part of its license termination plan, which will be prepared in accordance with “Standard Format and Content of

(Continued)

TMIA's claim that the likely existence of additional contamination may result in cost overruns and inadequate decommissioning funds is factually unsupported. The documents that TMIA submitted as exhibits do not support the claim that there is, or is likely to be, unknown contamination at the TMI-2 site. These exhibits consist of lists of past incidents or claims, many of which involve TMI-1. For example, the chronology of incidents in Exhibit A, where they relate to TMI-2, relate to incidents that occurred before the post-accident cleanup was finished and TMI-2 was placed in PDMS.<sup>64</sup> Exhibit D is an unattributed and undated list of incidents of worker exposures during the TMI-2 cleanup and incidents of releases and exposures occurring at TMI-1, but neither of these type of incidents support the claim that there is unknown contamination at the TMI-2 site. And Exhibits C and E do not relate to radiological leaks or discharges.<sup>65</sup>

TMIA's argument that the DCE "assigns no value to out-of-scope risk" such as "fuel location, hot spots, flooding, staffing, overhead, and waste disposal" is also unavailing.<sup>66</sup> TMI-2's cost estimate clearly accounts for low-level waste disposal and labor costs.<sup>67</sup> In addition, this claim does not address the contingency provided in the DCE for unforeseen costs and therefore fails to dispute the application.<sup>68</sup>

We also find unpersuasive TMIA's argument that the amount of damaged fuel already removed from the reactor is in question. TMIA disputes "the amount of damaged fuel that has been removed from TMI-2."<sup>69</sup> The only support TMIA cites for this claim is a twenty-seven-year-old statement by a nuclear physicist

---

License Termination Plans for Nuclear Power Reactors," Regulatory Guide 1.179, rev. 2 (July 2019) (ML19128A067) (Reg. Guide 1.179). See PSDAR at 7. As described in Regulatory Guide 1.179, the LTP will develop the final radiological survey plan and survey methods using the guidance in "Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM)," NUREG-1575, rev. 1 (Aug. 2000) (ML003761445). See Reg. Guide 1.179 at 6-7.

<sup>64</sup> Exhibit A consists of 77 pages, but references to TMI-2 end on page 18. The chronology continues with accounts of legal challenges, news items, studies, inspections, and incidents occurring at TMI-1 or at the ISFSI in Idaho, which are not part of the license transfer proceeding. Neither the Board nor the Commission is expected to search through voluminous documents in search of assertions that would support TMIA's claims, and we decline to do so here. See, e.g., *Seabrook*, CLI-12-5, 75 NRC at 332; *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999).

<sup>65</sup> Exhibit C discusses lawsuits and studies concerning the health effects of the TMI-2 accident. Exhibit E lists incidents where fires occurred or fire hazards that were discovered at either TMI-1 or TMI-2, but none of the incidents appear to have caused a radiological discharge.

<sup>66</sup> Petition, Contentions at 15.

<sup>67</sup> DCE at 3.

<sup>68</sup> See DCE at 3.

<sup>69</sup> Petition, Contentions at 17 (citing Petition, Exhibit B, Declaration of Dr. Michio Kaku (ML-20106F219) (Kaku Decl.)). Although the Kaku Declaration is not dated, TMIA's Petition states that it dates from August 1993. Petition at 17.

that discusses disposal options for contaminated wastewater from the shutdown reactor.<sup>70</sup> The statement does not discuss the amount of damaged fuel that has been removed from TMI-2 or appear to support TMIA's claims in Contention 2.<sup>71</sup>

TMIA further cites its Exhibit D to show that in the past, "[r]adioactive steam was . . . released directly into the atmosphere" and "[r]adioactive water was released directly into the Susquehanna River."<sup>72</sup> But these claims are neither supported nor relevant. As discussed above, Exhibit D is a list of purported incidents, only some of which relate to TMI-2. Further, Exhibit D does not state that radioactive water was released into the Susquehanna River.<sup>73</sup> And TMIA does not explain how incidents where radioactive steam was released into the atmosphere would cause additional cleanup costs today.

TMIA further argues that additional contamination will likely be discovered once decommissioning starts because this has been the case at other decommissioning reactors. TMIA points to Maine Yankee Atomic Power Station, where, it claims, "the amount of asbestos-containing material . . . was nearly triple the originally estimated amount," and the Haddam Neck Nuclear Plant, where tritium and strontium-90 contamination was discovered "deep underground" and required extensive excavation.<sup>74</sup> However, these examples do not support a finding that similar conditions are likely to exist at TMI-2.

We therefore conclude that Basis A is factually unsupported and fails to raise a genuine dispute with the application.

*b. Basis B: Costs to Repackage Debris Material*

TMIA claims in Contention 2, Basis B that the DCE improperly excludes costs to "repackage spent fuel for transport" or to reimburse DOE for money "DOE paid or will pay to licensees for license packaging costs."<sup>75</sup> TMIA also argues that the DCE therefore "fails to demonstrate adequate funding for spent fuel management" as required by 10 C.F.R. §§ 50.54(bb) and 50.82(a)(8)(vii)(B) and (C).<sup>76</sup>

---

<sup>70</sup> See Kaku Decl.

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

<sup>72</sup> Petition, Contentions at 18 (citing Petition, Exhibit D, "Leaks, release & exposures at TMI").

<sup>73</sup> See Exhibit D at 1 (stating that in 1980, the Susquehanna Valley Alliance "successfully prevented GPU/[Metropolitan Edison] from dumping 700,000 gallons of radioactive water into the Susquehanna River").

<sup>74</sup> Petition, Contentions at 20.

<sup>75</sup> *Id.* at 22-28; see also TMIA Reply at 10-12.

<sup>76</sup> Petition, Contentions at 22-28.

As an initial matter, this basis does not address the portions of the application that account for debris material packaging costs.<sup>77</sup> Further, TMIA's claim that repackaging will be necessary is factually unsupported. The application states that there are no loaded spent fuel canisters at the TMI-2 site. TMI-2 Solutions will have to recover and package the remaining debris material during Phase 1.<sup>78</sup> And TMIA does not offer support for its claim that the canisters TMI-2 Solutions selects for packaging would be incompatible with transportation casks DOE will ultimately provide when it removes the debris material from the site.<sup>79</sup> Therefore, TMIA's claims regarding repackaging costs do not support an admissible contention.

*c. Basis C: Mixed Waste Disposal*

In Basis C, TMIA claims that the DCE and PSDAR underestimate the costs related to disposal of mixed waste.<sup>80</sup> TMIA further argues that the PSDAR and DCE do not account for the costs associated with mixed waste disposal, in violation of 10 C.F.R. § 50.75(b) and (e)(1)(i).<sup>81</sup> For example, radiologically contaminated lead shielding is mixed waste. TMIA argues that TMI-2 Solutions does not acknowledge that there is already mixed waste on the site, and the decommissioning cost estimate fails to account for the disposal of "mixed waste

---

<sup>77</sup> See License Transfer Application, cover letter at 2 ("TMI-2 Solutions will be responsible for developing NRC compliant storage and/or disposal plans for any Debris Material until title to the Debris Material is transferred to the U.S. Department of Energy); see also *id.*, Attach. 1, at 10 (recovery and packaging of debris material will be part of "Phase 1" of the project, which will conclude in 2029 and cost a projected \$563 million); see also *id.*, Encl. 7, TMI-2 Solutions Decommissioning Schedule, at 6; see also PSDAR at 10.

<sup>78</sup> PSDAR at 7.

<sup>79</sup> TMIA's argument that TMI-2 Solutions will eventually have to reimburse DOE for its costs relating to repackaging fuel and its reliance on *System Fuels, Inc. v. United States*, 818 F.3d 1302 (Fed. Cir. 2016) appear to be identical to the arguments made by the State of New York in the Indian Point License Transfer proceeding. Compare Petition at 22-25 with New York Petition in Indian Point, at 40-43. *System Fuels* held that a spent fuel owner suing the DOE for breach of the standard contract for spent fuel storage could recover its costs incurred in loading spent fuel into storage canisters. 818 F.3d at 1306-07. The court rejected DOE's argument that because, under the contract, the expense of loading fuel into a *transportation* container falls on the spent fuel owner, DOE should not have to reimburse the costs of loading the fuel into *storage* containers. The court acknowledged that if, in the future, DOE were to accept fuel in its current package, it could be entitled to reimbursement for the costs it already paid to load the fuel into storage canisters. *Id.* at 1307. But the court called DOE's argument "speculative." *Id.*

<sup>80</sup> Petition, Contentions at 11, 29-31.

<sup>81</sup> *Id.* at 30-31.

currently stored at Unit 2.”<sup>82</sup> TMIA further asserts that the cost estimate does not account for disposal of Class B, Class C, and greater-than-Class-C LLRW.<sup>83</sup>

To support this claim, TMIA provides a letter from the Pennsylvania Department of Environmental Protection directed to the NRC concerning conditions at the site.<sup>84</sup> The letter asks several questions regarding decommissioning at the site, including one question concerning the disposal of lead shielding.<sup>85</sup> However, the Pennsylvania letter simply poses questions, rather than providing factual support, and we note that the Applicants responded directly to the Pennsylvania Department of Environmental Protection in a letter addressing each of its concerns, including the subject of mixed waste.<sup>86</sup> According to that response, mixed waste is expected to be shipped to the EnergySolutions disposal facility in Clive, Utah, which is permitted to accept mixed waste.<sup>87</sup> The application also discusses shipping LLRW to the Clive facility.<sup>88</sup> TMIA does not dispute these statements in its petition or reply brief. Therefore, we conclude that Basis C lacks factual support and does not raise a genuine dispute with the application.

*d. Basis D: Likely Delays*

In Basis D, TMIA argues that TMI-2 Solutions “projects an unreasonably short timeframe for the normalization process referred to as for Phase 1” of the project, because there could be unaccounted-for delays.<sup>89</sup> TMIA states that the history of decommissioning nuclear plants in the United States shows that “delays and cost overruns are the norm rather than the exception.”<sup>90</sup>

However, TMIA’s claim offers no support — such as an expert declaration — for its claim that either the ten years allotted for Phase 1 or the sixteen and

---

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

<sup>83</sup> *Id.* at 31.

<sup>84</sup> *Id.* at 30-31; see Letter from Patrick McDonnell, Pennsylvania Department of Environmental Protection, to Kristine Svinicki, NRC (Apr. 6, 2020) (ML20100K717) (PADEP Letter).

<sup>85</sup> PADEP Letter at 2.

<sup>86</sup> Letter from Gregory H. Hanlon, GPU Nuclear, to Patrick McDonnell, Pennsylvania Department of Environmental Protection (Apr. 13, 2020) (attached as Commonwealth of Pennsylvania Department of Environmental Protection for Leave to Intervene and Request for Extension of Time to File Hearing Request (Apr. 15, 2020), (Exhibit B)).

<sup>87</sup> *Id.* at 5.

<sup>88</sup> See License Transfer Application, Attach. 1 at 3 n.1 (“Final disposition of LLRW from the TMI-2 site will depend on the waste characteristics identified and comparison with waste acceptance criteria for the Clive facility or other disposal options.”); see also *id.* at 12.

<sup>89</sup> Petition, Contentions at 32. We observe that the License Transfer Application and the PSDAR refer to Phase 1 as “Source Term Reduction.” See License Transfer Application, Attach. 1, Encl. 7, TMI-2 Solutions Decommissioning Schedule, at 4; PSDAR at Encl. 1B, Fig. 1B-2.

<sup>90</sup> Petition, Contentions at 34.

a half years allotted for overall completion of decommissioning is unreasonably short.<sup>91</sup> In addition, the application and PSDAR do describe each project activity and provide a graphic illustration of when each activity is expected to start and finish.<sup>92</sup> TMIA does not address the specific activities described in that schedule or explain why they could not be performed in the time allotted. TMIA offers only a general assertion that other decommissioning projects have taken longer or experienced delays.<sup>93</sup>

In addition, TMIA does not support its claim that delays will materially affect the cost estimate and cause a deficiency in the decommissioning trust fund. While it is certainly possible that the projected schedule may slip from that reflected in the current PSDAR, TMIA has not provided a basis to find that such a delay would materially impact the Applicants' estimates. Moreover, delays in the schedule that increase costs would be captured in the licensee's annual financial assurance status reports.<sup>94</sup> If the status report reveals that the delay would cause a funding shortfall, TMI-2 Solutions could be required to provide additional financial assurance.<sup>95</sup> Accordingly, we find that this basis lacks factual support and does not raise a genuine dispute with the application.

*e. Basis E: Market Fluctuations*

In Basis E TMIA argues that the decommissioning trust fund is inadequate and has likely lost value because the COVID-19 public health emergency has caused a steep decline in the securities market.<sup>96</sup> TMIA argues that the application thus fails to satisfy the requirements of 10 C.F.R. §§ 50.33(f), 50.33(k)(1), 50.54(bb), 50.75(b)(1), 50.75(e)(1)(i), and 72.30.<sup>97</sup>

But TMIA does not raise a genuine dispute with the information in the application. The Purchase Agreement includes a condition that the decommissioning

---

<sup>91</sup> See PSDAR at Encl. 1B, Fig. 1B-2; License Transfer Application, Attach. 1, Encl. 7, TMI-2 Solutions Decommissioning Schedule, at 4. Under the schedule, Phase 1 and Phase 2 overlap.

<sup>92</sup> License Transfer Application, Attach. 1, Encl. 7, TMI-2 Solutions Decommissioning Schedule, at 4.

<sup>93</sup> Petition, Contentions at 34.

<sup>94</sup> See 10 C.F.R. § 50.82(a)(8)(v).

<sup>95</sup> See *id.* § 50.82(a)(8)(vi).

<sup>96</sup> Petition, Contentions at 36-37; see also *id.* at 45, 48-49 (same argument made in support of Contention 3).

<sup>97</sup> *Id.* at 36. In its reply brief, TMIA attempts, without explanation, to incorporate in its entirety the arguments concerning market volatility made by the New York Attorney General in the Indian Point License Transfer proceeding. TMI Reply at 13 (citing Motion for Leave to Amend Contentions NY-2 and NY-3 (Mar. 24, 2020), at 3-12 (ML20084Q191)). We decline to analyze which, if any, of New York's arguments apply to TMIA's claims, whether those arguments are within the scope of TMIA's reply brief, or whether they are timely made. *Seabrook*, CLI-12-5, 75 NRC at 332.

trust fund must be worth a minimum of \$800 million at the time of closing.<sup>98</sup> Moreover, the Applicants have provided additional assurances in the form of an escrow account and a letter of credit. TMIA does not address these assurances. Additionally, TMIA’s claim that “recent economic data indicates that trusts have declined in value” is unsupported because TMIA does not cite data or an expert declaration to support this assertion.<sup>99</sup> Therefore, these claims do not support an admissible contention.

### **3. Contention 3: Transferee is Not Financially Qualified**

TMIA argues in Contention 3 that the application does not establish that TMI-2 Solutions is financially qualified under 10 C.F.R. §§ 50.33(f), 50.40(b), 50.80(b), 50.82(a), and 72.30(b) to be the license transferee.<sup>100</sup> It offers several theories why TMI-2 cannot meet the financial qualifications standards.

TMIA argues that TMI-2 Solutions is inherently financially unsound because it is a limited liability company whose sole purpose is to decommission TMI-2. TMIA argues that “[f]inancial assurance models typically assume facility owners are revenue-generating concerns.”<sup>101</sup> It further argues that TMI-2 Solutions is a “fictional company” and that the Commission should require the Applicants to provide additional forms of financial assurance.<sup>102</sup> TMIA also asserts that the limited liability corporate structure of TMI-2 Solutions “encourages riskier behavior and induces companies to underreport liabilities,” which undermines the Commission’s ability to evaluate TMI-2 Solutions’ financial qualifications.<sup>103</sup>

We have rejected similar arguments in previous proceedings.<sup>104</sup> In doing so,

---

<sup>98</sup> Answer to TMIA at 50, *see also* License Transfer Application, Attach. 1, Encl. 1B ¶ 7.1.4.

<sup>99</sup> Although New York’s Motion in *Indian Point* was supported by an expert declaration, much of that declaration concerned information specific to the trust provisions for the Indian Point facility. *See* Supplemental Declaration of Chiara Trabucchi (Mar. 23, 2020) ¶¶ 9-12 (ML20084Q197). And, as we note above, we reject TMIA’s attempt to adopt wholesale New York’s arguments and supporting information. We also observe that according to the Applicants — at least at the time they filed their response to TMIA’s petition — the decommissioning trust fund had not declined in value. Answer to TMIA at 50.

<sup>100</sup> Petition, Contentions at 38-49.

<sup>101</sup> *Id.* at 41.

<sup>102</sup> *Id.* at 42-43. In Contention 3, TMIA also reiterates claims that we have already discussed, for example, that “market volatility” due to the COVID-19 public health emergency has “likely significantly eroded the principal” of the trust and that Applicants cannot take credit for earnings on the trust funds during active decommissioning. *Id.* at 44-45.

<sup>103</sup> *Id.* at 47.

<sup>104</sup> *Vermont Yankee Nuclear Power Corp. and AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 172-73 (2000); *Northern States Power Co.* (Monticello) (Continued)



we explained that a limited liability corporation is treated the same as other corporations with respect to meeting NRC requirements and that the Commission has issued reactor licenses to limited liability corporations for decades.<sup>105</sup> TMIA does not cite any law, regulation, or guidance suggesting that a limited liability corporation is inherently incapable of holding an NRC license.<sup>106</sup> Moreover it does not cite any legal support for its argument that the license holder decommissioning a reactor must have some other, ongoing business concern that would generate income independent of the decommissioning trust fund. TMIA does not provide factual or expert support for its claim that the limited liability corporate form encourages riskier behavior.

TMIA additionally asserts that the investment guidelines for the trusts are permissive and create investment risk.<sup>107</sup> It also states that the trustee is “authorized to appoint and indemnify foreign custodians” to hold foreign securities.<sup>108</sup> But TMIA does not explain or support its assertion that the trust’s investment guidelines are permissive, and it does not cite any law or regulation that would prevent the decommissioning trust fund trustee from foreign investment.

We disagree with TMIA’s argument that if there is a decommissioning short-fall, TMI-2 Solutions would not be able to provide the additional financial assurances our regulations require. TMIA argues that “there is little reason to believe [that] banks, insurers, or other purveyors of third-party financial assurance instruments . . . would offer such instruments at a price accessible to limited liability entities saddled with environmental cleanup obligations.”<sup>109</sup> But this argument does not address information in the application; specifically, that TMI-2 Solutions will have access to “additional decommissioning funding assurance instruments worth up to \$100 million” and a Parent Guarantee from EnergySolutions.<sup>110</sup> Insofar as TMIA argues that third-party institutions would not provide insurance for this venture, its argument is factually unsupported.

---

Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 57 (2000); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000).

<sup>105</sup> *Vermont Yankee*, CLI-00-20, 52 NRC at 173; *Monticello*, CLI-00-14, 52 NRC at 57; *Oyster Creek*, CLI-00-6, 51 NRC at 208.

<sup>106</sup> According to the Applicants, there are “ten different LLCs currently licensed by the NRC to operate [thirty-eight] nuclear plants.” Answer to TMIA at 59.

<sup>107</sup> Petition, Contentions at 47.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 40-41.

<sup>110</sup> See License Transfer Application, Attach. 1, at 10-11. The “additional funding instruments” will consist of “(i) a Back-Up & Provisional Nuclear Decommissioning Trust, segmented into a Back-Up Trust Account and a Provisional Trust Account; (ii) an Irrevocable Letter of Credit; (iii) an Irrevocable Disposal Capacity Easement; [and] (iv) a Financial Support Agreement.” *Id.* at 11.

Finally, TMIA argues that “the granting of an eventual exemption to allow the use of trust fund monies for non-decommissioning purposes” could have adverse tax consequences, and TMIA asserts that NRC Staff should “request and review any private letter rulings” from the IRS concerning tax treatment of the decommissioning trust fund’s earnings.<sup>111</sup> However, the TMI-2 application does not request such an exemption.<sup>112</sup> TMIA therefore does not raise a genuine dispute with the application. To the extent that TMIA proposes this basis in case the Applicants were to request such an exemption in the future, it is speculative and unsupported.

### III. CONCLUSION

Based on the forgoing, we conclude that Petitioners have not presented an admissible contention. We *deny* their hearing request, and we *terminate* the proceeding.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, MD  
this 15th day of January 2021.

---

<sup>111</sup> Petition, Contentions at 44.

<sup>112</sup> See New York Petition in Indian Point at 63.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Kristine L. Svinicki**, Chairman  
**Jeff Baran**  
**Annie Caputo**  
**David A. Wright**  
**Christopher T. Hanson**

In the Matter of

Docket No. IA-20-008-EA

**JOSEPH SHEA**  
**(Order Prohibiting Involvement in**  
**NRC-Licensed Activities**  
**Immediately Effective)**

January 15, 2021

**STANDARD OF REVIEW**

When reviewing a Board's decision to set aside the immediate effectiveness of an enforcement order, the Commission will defer to the Board's factual findings absent clear error or an abuse of discretion and review the Board's application of legal standards *de novo*.

**ENFORCEMENT ORDERS; IMMEDIATE EFFECTIVENESS**

A person may challenge the immediate effectiveness of an enforcement order by producing evidence that the order is based on mere suspicion, unfounded allegations, or error. The NRC Staff then bears the burden of persuading the Board that adequate evidence supports the grounds for the immediately effective order.

### **ENFORCEMENT ORDERS; IMMEDIATE EFFECTIVENESS**

The NRC Staff must show adequate evidence of each element of its proposed violation to sustain the immediate effectiveness of an enforcement order.

### **IMMEDIATE EFFECTIVENESS; BURDEN OF PERSUASION**

The NRC Staff's burden to show adequate evidence is akin to probable cause, i.e., the Staff must show that a reasonable person would have cause to think, based on something more than uncorroborated suspicion or accusation, that a violation occurred.

### **EMPLOYEE PROTECTION; DELIBERATE MISCONDUCT**

Evidence to show that an individual's conduct caused his or her employer to be in violation of the Employee Protection Rule is not *per se* adequate to also show a violation of the Deliberate Misconduct Rule.

### **DELIBERATE MISCONDUCT**

A Deliberate Misconduct Rule violation requires some showing, with either direct or circumstantial evidence, that the individual charged knew that his or her conduct would constitute a violation or cause a licensee to be in violation of some other NRC requirement. The individual's state of mind is therefore an element of the violation charged.

### **EMPLOYEE PROTECTION RULE**

A violation of the Employee Protection Rule can be shown with evidence that a protected activity was a contributing factor to an adverse personnel action, absent clear and convincing evidence that the employer would have taken the same unfavorable personnel action notwithstanding the protected activity.

## **MEMORANDUM AND ORDER**

Today we review the Atomic Safety and Licensing Board's decision to set aside the immediate effectiveness of the NRC Staff's enforcement order in this case.<sup>1</sup> For the reasons described below, we affirm the Board's decision.

---

<sup>1</sup> See LBP-20-11, 92 NRC 409 (2020).

## I. BACKGROUND

On August 24, 2020, following an investigation into whether a former corporate employee of the Tennessee Valley Authority (TVA), Beth Wetzel, had been the subject of employment discrimination for engaging in protected activity, the Staff issued an immediately effective order banning Joseph Shea from engaging in NRC-licensed activities for a period of five years.<sup>2</sup> The order states that Mr. Shea engaged in deliberate misconduct in violation of 10 C.F.R. § 50.5, the NRC’s Deliberate Misconduct Rule, when he “played a significant role in the decisionmaking process” that led to adverse employment actions against Ms. Wetzel that were motivated, at least in part, by Ms. Wetzel’s protected activity.<sup>3</sup> The order states that Mr. Shea’s deliberate misconduct caused TVA to be in violation of 10 C.F.R. § 50.7, the NRC’s Employee Protection Rule, which prohibits discrimination by a licensee against an employee for raising nuclear safety concerns, participating in proceedings for the administration or enforcement of requirements under the Atomic Energy Act or Energy Reorganization Act, or engaging in certain other protected activities. Based on its finding that Mr. Shea violated the Deliberate Misconduct Rule and based on his broad sphere of influence within TVA as a senior executive, the Staff made the order immediately effective.<sup>4</sup>

Mr. Shea answered the Staff’s order and requested a hearing.<sup>5</sup> Mr. Shea included with his answer a motion to set aside the immediate effectiveness of the order on the grounds that the Staff had not presented adequate evidence to justify its immediate effectiveness.<sup>6</sup> In particular, Mr. Shea argued that the Staff failed to show that he had violated the Deliberate Misconduct Rule because it had not provided evidence that he acted with knowledge that his actions would cause TVA to violate the Employee Protection Rule.<sup>7</sup> Mr. Shea provided with

---

<sup>2</sup> See Order Prohibiting Involvement in NRC-Licensed Activities Immediately Effective (Aug. 24, 2020), at 1-2 (ADAMS accession no. ML20219A676) (Enforcement Order); NRC Office of Investigations Report of Investigation 2-2019-015 (redacted) (Jan. 21, 2020) (ROI), attached to NRC Staff Answer to Motion to Set Aside the Immediate Effectiveness of the Order and Answer to the Request for a Hearing (Sept. 28, 2020) (Staff Answer). The redacted ROI, which is attached to the Staff Answer, also includes excerpts from several ROI exhibits.

<sup>3</sup> Enforcement Order at 2, 3.

<sup>4</sup> See *id.* at 3-4; 10 C.F.R. § 2.202(a)(5).

<sup>5</sup> See Joseph Shea’s Motion to Set Aside the Immediate Effectiveness of an Order Banning Him From Engaging in NRC-Licensed Activities, Answer, and Request for Hearing (Sept. 22, 2020) (Shea Motion).

<sup>6</sup> See *id.* at 23-25.

<sup>7</sup> See *id.* at 23-44; 10 C.F.R. § 2.202(c)(2)(i). Mr. Shea’s hearing request on the merits of the Enforcement Order — i.e., whether the Enforcement Order should be sustained — is not before us

(Continued)

his motion documentary evidence of consultations he undertook with the TVA Office of the General Counsel (OGC) and the TVA Executive Review Board (ERB) regarding his decision to terminate Ms. Wetzel.<sup>8</sup>

Specifically, Mr. Shea provided evidence that Ms. Wetzel's supervisor, Erin Henderson, filed a complaint against Ms. Wetzel and other TVA employees for engaging in a pervasive and sustained pattern of harassment by raising unfounded allegations of retaliation against Ms. Henderson.<sup>9</sup> Mr. Shea also provided emails between himself and Ms. Wetzel as evidence that Ms. Wetzel made unfounded accusations against Ms. Henderson to Mr. Shea directly.<sup>10</sup> Mr. Shea showed that he referred this email exchange with Ms. Wetzel to TVA OGC and TVA human resources for advice on how to respond and that, as a result, the emails from Ms. Wetzel were added to the ongoing TVA OGC investigation of Ms. Henderson's harassment complaint.<sup>11</sup> Mr. Shea presented evidence that the TVA OGC investigation concluded that Ms. Wetzel had raised a pattern of unfounded allegations against Ms. Henderson and thereby violated TVA standards of conduct and Federal law.<sup>12</sup> Mr. Shea also presented evidence that, after receiving the results of the TVA OGC investigation, his proposal to terminate Ms. Wetzel was reviewed by a group of TVA executives and other officials not involved in the underlying investigation or personnel action, including an outside auditor (the TVA ERB), and these officials agreed that termination of Ms. Wetzel would not violate the Employee Protection Rule.<sup>13</sup>

In response, the Staff presented documents to show that Ms. Wetzel engaged in protected activities by raising concerns of a chilled work environment to the NRC, participating in a Department of Labor proceeding, and participating in the TVA OGC investigation into Ms. Henderson's harassment complaint.<sup>14</sup> The Staff presented Ms. Henderson's harassment complaint as evidence that Mr. Shea knew Ms. Wetzel had engaged in protected activity.<sup>15</sup> The Staff also

---

today. The Board retains jurisdiction over that request. Today, we affirm only the Board's decision that the Staff has not, prior to the conduct of a hearing on the merits, shown adequate evidence to make its Enforcement Order immediately effective.

<sup>8</sup> See Shea Motion, Attach. 3 & 4.

<sup>9</sup> *Id.* at 6-7.

<sup>10</sup> *Id.* at Attach. 1 & 2.

<sup>11</sup> *Id.* at 9, Attach. 1.

<sup>12</sup> *Id.* at 11 (citing ROI, Ex. 14).

<sup>13</sup> *Id.* at 12-13, Attach. 3.

<sup>14</sup> See Staff Answer at 7-8 (citing Affidavit of Alejandro Echavarría in Support of NRC Staff's Response to Joseph Shea's Request to Set Aside the Immediate Effectiveness of the Order Prohibiting Involvement in NRC-Licensed Activities (Sept. 28, 2020), ¶¶ 11, 21 (Echavarría Affidavit)). The Echavarría Affidavit, as well as the affidavit of Ian A. Gifford, Program Manager, NRC Office of Enforcement, are attached to the Staff Answer.

<sup>15</sup> *Id.* at 6, 8-9; ROI, Ex. 10 at 1-8.

referred to a dialogue between Ms. Wetzel and Mr. Shea about approval of her travel vouchers in a series of emails, in which Ms. Wetzel alleged that Ms. Henderson had “demonstrated a longstanding pattern of using TVA processes as punitive and retaliatory tools,” to show that Mr. Shea knew Ms. Wetzel had raised concerns about her supervisor.<sup>16</sup> The Staff argued that Mr. Shea took adverse action against Ms. Wetzel by first placing her on administrative leave and later terminating her employment.<sup>17</sup>

Using the evidentiary framework for proof of an Employee Protection Rule violation, the Staff next offered evidence to explain why Mr. Shea could not show by clear and convincing evidence that adverse action against Ms. Wetzel was taken because she had engaged in a “sustained pattern of disrespectful behavior” toward Ms. Henderson.<sup>18</sup> Specifically, the Staff provided testimony from one participant in the ERB who had concerns that terminating Ms. Wetzel without first providing her an opportunity to respond to charges of misconduct seemed unusual.<sup>19</sup> The Staff also provided documents of investigations by the TVA Employee Concerns Program into the work environment in Ms. Henderson’s work group, which did not show any evidence that employees feared retaliation for raising nuclear safety concerns but did conclude that Ms. Henderson’s behaviors could be viewed as precursors to a chilled work environment.<sup>20</sup> The Staff argued that this evidence undercut Mr. Shea’s assertion that Ms. Wetzel had made unfounded allegations against Ms. Henderson and that, therefore, Mr.

---

<sup>16</sup> *Id.* at 9 (citing Echavarria Affidavit ¶20; ROI, Ex. 11 at 13-14).

<sup>17</sup> *Id.* at 9 (citing Affidavit of Ian A. Gifford in Support of NRC Staff’s Response to Joseph Shea’s Request to Set Aside the Immediate Effectiveness of the Order Prohibiting Involvement in NRC-Licensed Activities (Sept. 28, 2020), ¶6 (Gifford Affidavit); Echavarria Affidavit ¶23).

<sup>18</sup> *Id.* at 10-11. The evidentiary framework for proof of an Employee Protection Rule violation is set forth in the *Watts Bar* case. *See Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160 (2004). Under *Watts Bar*, if the Staff shows by a preponderance of evidence that an employee’s protected activity was a contributing factor — i.e., played at least some role — in an unfavorable personnel decision, a reasonable inference arises that the Employee Protection Rule was violated. *See id.* at 194, 196-97. This inference may be negated by the employer if it proves with clear and convincing evidence that it would have taken the same adverse action regardless of the protected activity. *See id.* at 192-93. This evidentiary framework, which the Staff followed in presenting its evidence to sustain the immediate effectiveness of the Enforcement Order, is unique to the Employee Protection Rule, and imposes a high burden on employers so that nuclear whistleblowers are encouraged to come forward with safety-related information. *Id.* at 193.

<sup>19</sup> Staff Answer at 11 (citing Echavarria Affidavit ¶¶15-17; ROI, Ex. 24 at 64). In his reply to the Staff Answer, Mr. Shea asserted that, prior to the Staff Answer and its attached exhibits, he was unaware of the concerns raised by an ERB participant. *See Joseph Shea’s Reply to the NRC Staff Answer* (Oct. 5, 2020), at 17.

<sup>20</sup> *See* Staff Answer at 10 (citing Gifford Affidavit ¶6; ROI, Ex. 7 at 11, 23).

Shea's stated non-discriminatory reasons for terminating Ms. Wetzel were not sufficiently supported.<sup>21</sup>

The Staff's answer to Mr. Shea's motion also briefly addressed its assertion that Mr. Shea violated the Deliberate Misconduct Rule. The Staff asserted that because Mr. Shea knew the requirements of the Employee Protection Rule, and because "retaliation in violation of 10 C.F.R. § 50.7 is, by its nature, an intentional act," Mr. Shea had violated the Deliberate Misconduct Rule.<sup>22</sup>

The Board, with one judge dissenting, granted Mr. Shea's motion to set aside the immediate effectiveness of the Staff's order.<sup>23</sup> The Board found that Mr. Shea had met his initial burden to show the order was not based on adequate evidence of a Deliberate Misconduct Rule violation but on "mere suspicion, unfounded allegations, or error."<sup>24</sup> The Board further found that the Staff had not shown adequate evidence supporting each element of the Deliberate Misconduct Rule violation upon which the Staff's order is based.<sup>25</sup> Specifically, it found that the Staff had not presented any evidence that Mr. Shea, at the time he made decisions adverse to Ms. Wetzel's employment, knew that his decisions would cause TVA to be in violation of the Employee Protection Rule.<sup>26</sup> Judge Froehlich dissented and asserted that the majority applied an incorrect legal standard by insisting the Staff "present evidence of Mr. Shea's state of mind and his intent and that he recognized his actions were improper" when "[a]ll that is required to be shown is that Mr. Shea fully understood or should have understood his responsibility to comply with the [whistleblower protection statute] and Commission regulations."<sup>27</sup>

## II. DISCUSSION

Our decision today on whether to sustain the immediate effectiveness of the Staff's enforcement order against Mr. Shea is not a decision on the merits of the order. The charge that Mr. Shea violated the Deliberate Misconduct Rule by causing TVA to violate the Employee Protection Rule is serious and will be separately evaluated by the Board based on evidence presented during the pending adjudicatory hearing on this matter.<sup>28</sup> The question before us today is

---

<sup>21</sup> *Id.* at 10-11.

<sup>22</sup> *Id.* at 11-12.

<sup>23</sup> *See* LBP-20-11, 92 NRC at 422, 424-30.

<sup>24</sup> 10 C.F.R. § 2.202(c)(2)(vi); *see* LBP-20-11, 92 NRC at 420.

<sup>25</sup> LBP-20-11, 92 NRC at 420-22.

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

<sup>27</sup> *Id.* at 424-25 (Froehlich, J., Dissenting).

<sup>28</sup> *See* Licensing Board Order (Dec. 2, 2020) (unpublished) (Notice of Hearing).



limited to whether the Board's decision to set aside the immediate effectiveness of the Staff's order was based on the correct legal framework and whether the Board's factual finding based on the evidence presented at this stage of the proceeding involved clear error or an abuse of discretion.

#### A. Legal Standards

The Board's decision to stay the immediate effectiveness of the Staff's enforcement order is automatically referred to us for review and has no effect pending further order of the Commission.<sup>29</sup> Accordingly, we review the Board's decision to determine whether it applied the correct legal standards. We defer to the Board's factual findings absent clear error or an abuse of discretion. We review the Board's application of legal standards *de novo*.

The pertinent legal standards in this case are set forth in 10 C.F.R. § 2.202, which governs the issuance and dispute of immediately effective enforcement orders, and the Deliberate Misconduct Rule, which forms the basis for the Staff's decision to pursue enforcement action against Mr. Shea.<sup>30</sup> Under 10 C.F.R. § 2.202(c)(2)(vi), Mr. Shea may challenge the immediate effectiveness of the order by producing evidence that the order is based on "mere suspicion, unfounded allegations, or error." The Staff then bears the burden of persuading the Board that "adequate evidence supports the grounds for the immediately effective order and immediate effectiveness is warranted."<sup>31</sup> When an immediate effectiveness determination is challenged,

the Staff must satisfy a two-part test: it must demonstrate that adequate evidence — i.e., reliable, probative, and substantial (but not preponderant) evidence — supports a conclusion that (1) the [asserted wrongdoer] violated a Commission requirement, *and* (2) the violation was "willful," *or* the violation poses a risk to "the public health, safety, or interest" that requires immediate action.<sup>32</sup>

The Staff's burden to show adequate evidence justifying an immediately effective order is not heavy. At this stage, the Staff does not need to prove that a violation of the Deliberate Misconduct Rule more likely than not occurred to sustain the order's immediate effectiveness. Rather, the Staff's burden is

---

<sup>29</sup> 10 C.F.R. § 2.202(c)(2)(viii).

<sup>30</sup> See Enforcement Order at 2-3; 10 C.F.R. § 50.5.

<sup>31</sup> 10 C.F.R. § 2.202(c)(2)(vi).

<sup>32</sup> *Safety Light Corp.* (Bloomsburg, Pennsylvania Site), LBP-05-2, 61 NRC 53, 61 (2005) (quoting 10 C.F.R. § 2.202(a)(1), (a)(5)); see Hearings on Challenges to the Immediate Effectiveness of Orders; Final Rule, 80 Fed. Reg. 63,409, 63,411 (Oct. 20, 2015) (quoting *Safety Light* as the two-part test that the Staff must meet when an immediate effectiveness determination is challenged).

akin to probable cause, i.e., the Staff must show that a reasonable person would have cause to think, based on something more than uncorroborated suspicion or accusation, that a violation of the Deliberate Misconduct Rule occurred.<sup>33</sup>

The Staff must show adequate evidence of each element of its proposed Deliberate Misconduct Rule violation to sustain the immediate effectiveness of its order. Providing adequate evidence that a violation of the Employee Protection Rule occurred is only one element of the violation. The Staff must also present adequate evidence that Mr. Shea, at the time he allegedly retaliated against Ms. Wetzel, had actual knowledge that his conduct would cause TVA to be in violation of the Employee Protection Rule.<sup>34</sup> In order to address the actual knowledge element of a Deliberate Misconduct Rule violation, the Staff must provide evidence, either circumstantial or direct, that speaks to Mr. Shea's state of mind at the time he took adverse action against Ms. Wetzel.<sup>35</sup>

## **B. Analysis**

The Board found that Mr. Shea met his initial burden to challenge the immediate effectiveness of the Staff's order under 10 C.F.R. § 2.202(c)(2)(i).<sup>36</sup> In particular, the Board found that Mr. Shea produced evidence that internal TVA reviews determined that Ms. Wetzel had engaged in a pattern of harassment against her supervisor in violation of TVA policy and Federal law and that Mr. Shea's decision to terminate Ms. Wetzel would not violate the Employee Protection Rule.<sup>37</sup> In the Board's view, Mr. Shea supported his assertion that his decision to place Ms. Wetzel on administrative leave and later terminate her employment was not deliberate misconduct designed to violate the Employee Protection Rule. Therefore, the Board concluded that Mr. Shea made an adequate showing that the Staff's order was not based on adequate evidence but on mere suspicion and unfounded allegations.<sup>38</sup> Based on this record, we see no error in the Board's conclusion that Mr. Shea met his initial burden to challenge the immediate effectiveness of the Staff's order.

The Board next reviewed whether the Staff provided adequate evidence that

---

<sup>33</sup> See Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,196 (May 12, 1992).

<sup>34</sup> See 10 C.F.R. § 50.5(c); LBP-20-11, 92 NRC at 416-18, 419-20 n.70.

<sup>35</sup> See, e.g., *David Geisen*, CLI-10-23, 72 NRC 210, 220-22, 226 (2010) (holding that enforcement action against an individual under the Deliberate Misconduct Rule turns on the individual's state of mind, which may be inferred through circumstantial evidence).

<sup>36</sup> LBP-20-11, 92 NRC at 420.

<sup>37</sup> See *id.* at 412-13, 420 n.72.

<sup>38</sup> *Id.* at 420.

Mr. Shea violated each element of the Deliberate Misconduct Rule.<sup>39</sup> At oral argument, the Board questioned the Staff regarding its theory of the case and its basis for asserting that Mr. Shea knew — even though internal TVA documentation suggested otherwise — that his decisions regarding Ms. Wetzel’s employment would cause TVA to violate the Employee Protection Rule. Specifically, Judge Gibson asked the Staff if the TVA OGC investigation and ERB were not legitimate processes but mere “window dressing” designed to obscure Mr. Shea’s true intention to retaliate against Ms. Wetzel.<sup>40</sup> The Staff responded that it did consider the TVA OGC investigation to be “window dressing.”<sup>41</sup> Counsel for Mr. Shea in turn responded that the Staff’s assertion of “window dressing” was unsupported by any evidence and therefore argued that the Staff’s immediate effectiveness determination was based on mere suspicion.<sup>42</sup>

In its decision, the Board agreed that the Staff had based its immediate effectiveness determination on mere suspicion and not on adequate evidence that a Deliberate Misconduct Rule violation occurred.<sup>43</sup> The Board correctly noted that the adequate evidence standard does not impose a high burden of persuasion but that Mr. Shea’s knowledge of the requirements of the Employee Protection Rule was, by itself, insufficient to prove that he intended his conduct to violate the rule.<sup>44</sup> The Board found that the Staff presented no evidence that either the TVA OGC or ERB reviews were conducted in bad faith or to cover Mr. Shea’s alleged intention to cause a violation of the Employee Protection Rule (although it acknowledged this could be a valid line of inquiry at hearing).<sup>45</sup> Accordingly, the Board concluded that the immediate effectiveness of the Staff’s order could not be sustained because the Staff had not established with adequate evidence a violation of the Deliberate Misconduct Rule.<sup>46</sup>

We agree with the Board’s conclusion. The Board appropriately differentiated the legal framework for demonstrating a violation of the Employee Protection Rule from the framework for demonstrating a violation of the Deliberate Misconduct Rule and applied these frameworks in the context of Mr. Shea’s challenge to the immediate effectiveness of the Staff’s order.<sup>47</sup> Adequate evidence of a Deliberate Misconduct Rule violation requires some showing, with either direct or circumstantial evidence, that an individual knew that his or her

---

<sup>39</sup> *See id.* at 420-22.

<sup>40</sup> Tr. at 109.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 110-11.

<sup>43</sup> LBP-20-11, 92 NRC at 420.

<sup>44</sup> *Id.* at 416, 417-18.

<sup>45</sup> *Id.* at 421.

<sup>46</sup> *Id.* at 422.

<sup>47</sup> *See id.* at 419 n.67.

conduct would constitute a violation or cause a licensee to be in violation of some other NRC requirement.<sup>48</sup> By contrast, a violation of the Employee Protection Rule can be shown with sufficient evidence that a protected activity was a contributing factor to an adverse personnel action, absent clear and convincing evidence that the employer would have taken the same unfavorable personnel action notwithstanding the protected activity.<sup>49</sup> As the Board discerned, the legal elements of these two violations differ, and evidence sufficient to show that Mr. Shea's conduct caused TVA to be in violation of the Employee Protection Rule is not *per se* sufficient to also show a violation of the Deliberate Misconduct Rule.<sup>50</sup>

In his dissenting opinion, Judge Froehlich explained that he would have sustained the immediate effectiveness of the order because the Staff showed adequate evidence that Mr. Shea's conduct violated the Employee Protection Rule and "adequate evidence has been submitted to show (for purposes of an immediately effective order) that the termination of Ms. Wetzel was a deliberate violation."<sup>51</sup> Judge Froehlich noted that the Staff's order was based on a Deliberate Misconduct Rule violation; however, he states that the majority applied an incorrect legal standard by insisting the Staff "present evidence of Mr. Shea's state of mind and his intent and that he recognized his actions were improper" when "[a]ll that is required to be shown is that Mr. Shea fully understood or should have understood his responsibility to comply with the [whistleblower protection statute] and Commission regulations."<sup>52</sup>

We disagree with the dissent's analysis. As explained above, the Staff's order to Mr. Shea — an unlicensed individual — is based on a violation of the

---

<sup>48</sup> See *id.* at 416-17, 419 n.67; 10 C.F.R. § 50.5(a)(1), (c); see also *David Geisen*, CLI-10-23, 72 NRC at 242-43 (recognizing staff is permitted to show its case through circumstantial evidence).

<sup>49</sup> See *Watts Bar*, CLI-04-24, 60 NRC at 187.

<sup>50</sup> In a footnote differentiating the legal elements of a Deliberate Misconduct Rule violation from the legal elements of an Employee Protection Rule violation, the Board stated that "[t]he standards for 10 C.F.R. § 50.5 do not permit 'reasonable' inferences, but require actual knowledge," and that 10 C.F.R. § 50.7 imposes a "lower evidentiary burden" on the Staff than does 10 C.F.R. § 50.5. LBP-20-11, 92 NRC at 419 n.67. We understand these statements to mean that the elements of an Employee Protection Rule violation, which may be proven using the burden-shifting evidentiary framework established by *Watts Bar*, are different from those for a Deliberate Misconduct Rule violation, to which the evidentiary framework set forth in *Watts Bar* does not apply. See CLI-04-24, 60 NRC at 192-94, 196-97. We do not interpret the Board's footnote as attempting to establish a new standard regarding the Staff's burden of proof for a Deliberate Misconduct Rule or Employee Protection Rule violation or concluding that only direct evidence can be used to prove Mr. Shea's state of mind. Under both the Employee Protection Rule and the Deliberate Misconduct Rule either direct or circumstantial evidence may be used to show a violation.

<sup>51</sup> LBP-20-11, 92 NRC at 424-26 (Froehlich, J., Dissenting).

<sup>52</sup> *Id.* at 424-25 (Froehlich, J., Dissenting).

Deliberate Misconduct Rule, not the Employee Protection Rule.<sup>53</sup> Mr. Shea's state of mind is therefore an element of the violation charged and must be shown with adequate evidence to sustain the immediate effectiveness of the Staff's order.<sup>54</sup> The majority opinion correctly applied this legal standard.

In summary, the Board appropriately applied the correct legal standards in this case, and its review of the evidence was reasonably rooted in the record available to it at this stage of the proceeding. Mr. Shea provided evidence that he based his decisions with respect to Ms. Wetzel's employment on legal advice from TVA OGC and an independent review from the TVA ERB. The Staff provided evidence to dispute whether Mr. Shea's stated reasons could ultimately be proven by clear and convincing evidence; however, such evidence goes primarily to whether a violation of the Employee Protection Rule occurred and is not *per se* evidence of a Deliberate Misconduct Rule violation. The Board found that the Staff had presented no direct or circumstantial evidence at this stage in the proceeding that Mr. Shea intended to misuse TVA's decisionmaking processes to retaliate against Ms. Wetzel. Therefore, the Board correctly concluded that the immediate effectiveness of the order could not be sustained because the Deliberate Misconduct Rule violation upon which the order was based had not been adequately established at this stage of the proceeding.

### III. CONCLUSION

For the reasons described above we *affirm* the Board's decision to set aside the immediate effectiveness of the Staff's enforcement order.

---

<sup>53</sup> The Staff's decision to base its order on an alleged violation of the Deliberate Misconduct Rule squares with our regulatory and enforcement framework because the Deliberate Misconduct Rule applies directly to individuals, including unlicensed individuals, whereas the Employee Protection Rule prohibits discrimination by a licensee, an applicant for a license, or a contractor or subcontractor thereof. Compare 10 C.F.R. § 50.5(a), (b), with 10 C.F.R. § 50.7(a). The Deliberate Misconduct Rule, not the Employee Protection Rule, puts unlicensed individuals on notice that intentionally causing a licensee to violate NRC requirements may subject them to direct NRC enforcement action. See Revision to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,665 (Aug. 15, 1991).

<sup>54</sup> See Section II.A, *supra*. To be clear, Mr. Shea's state of mind is relevant to the first prong of the *Safety Light* test, which requires the Staff to demonstrate adequate evidence of a violation of a Commission requirement — in this case, the Deliberate Misconduct Rule.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 15th day of January 2021.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**William J. Froehlich**, Chairman  
**Michael M. Gibson**  
**Dr. Gary S. Arnold**

In the Matter of

Docket No. IA-20-008-EA  
(ASLBP No. 20-968-04-EA-BD01)

**JOSEPH SHEA**  
(Order Prohibiting Involvement In  
NRC-Licensed Activities  
Immediately Effective)

January 28, 2021

**ORDER**  
(Granting Joint Motion for Termination of  
Enforcement Proceeding)

On August 24, 2020, following an investigation into whether a former corporate employee of the Tennessee Valley Authority had been the subject of employment discrimination for engaging in protected activity, the NRC Office of Enforcement (NRC Staff) issued an immediately effective order banning Joseph Shea from engaging in NRC-licensed activities for a period of five years.<sup>1</sup> Mr. Shea answered the NRC Staff's immediately effective order and requested a

---

<sup>1</sup> See Order Prohibiting Involvement in NRC-Licensed Activities Immediately Effective (Aug. 24, 2020) at 1-2 (ADAMS Accession No. ML20219A676); NRC Office of Investigations Report of Investigation 2-2019-015 (Jan. 21, 2020) (redacted) (unnumbered attachment 3 to NRC Staff Answer to Motion to Set Aside the Immediate Effectiveness of the Order and Answer to the Request for a Hearing (Sept. 28, 2020)).

hearing.<sup>2</sup> Mr. Shea included with his answer a motion to set aside the immediate effectiveness of the order on the grounds that the NRC Staff had not presented adequate evidence to justify its immediate effectiveness.<sup>3</sup> The Board granted Mr. Shea's motion and found that he had met his initial burden to show the order was not based on adequate evidence and, in accordance with the agency's rules, referred its ruling to the Commission.<sup>4</sup> The Commission affirmed the Board's decision and held that the NRC Staff had not, prior to the conduct of a hearing on the merits, shown adequate evidence to make its enforcement order immediately effective.<sup>5</sup>

By letter dated January 22, 2021, the NRC Staff informed Mr. Shea that it had rescinded the enforcement order in its entirety.<sup>6</sup> On January 22, 2021, the NRC Staff and Mr. Shea filed a joint motion with the Board to terminate this enforcement proceeding.<sup>7</sup> Citing the Commission's issuance of CLI-21-3 and the NRC Staff's rescission of its August 24, 2020 enforcement order, Mr. Shea and the NRC Staff agree "that there is no longer a live controversy in this proceeding."<sup>8</sup> The parties assert the issues in the case are moot and "no further litigation concerning the merits of the order is warranted."<sup>9</sup>

Because the underlying August 24, 2020 enforcement order which initiated this proceeding has been rescinded in its entirety, this case is now moot. The January 22, 2021 joint motion to terminate this proceeding is granted. This proceeding is terminated.

---

<sup>2</sup> See Joseph Shea's Motion to Set Aside the Immediate Effectiveness of an Order Banning Him from Engaging in NRC-Licensed Activities, Answer, and Request for Hearing (Sept. 22, 2020).

<sup>3</sup> See *id.* at 23-25.

<sup>4</sup> LBP-20-11, 92 NRC 409, 422 (2020); see 10 C.F.R. § 2.202(c)(2)(viii).

<sup>5</sup> CLI-21-3, 93 NRC 89, 90 (2021).

<sup>6</sup> Letter from George A. Wilson, NRC, to Joseph Shea (Jan. 22, 2021) (ADAMS Accession No. ML21021A351).

<sup>7</sup> Joint Motion for Termination of Enforcement Proceeding (Jan. 22, 2021) (ADAMS Accession No. ML21022A238).

<sup>8</sup> *Id.* at 1.

<sup>9</sup> *Id.* at 2.



It is so ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD

William J. Froehlich, Chairman  
ADMINISTRATIVE JUDGE

Michael M. Gibson  
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
June 23, 2021

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Paul S. Ryerson**, Chairman  
**Nicholas G. Trikouros**  
**Dr. Gary S. Arnold**

In the Matter of

**Docket No. 72-1050-ISFSI**  
**(ASLBP No. 19-959-01-ISFSI-BD01)**

**INTERIM STORAGE PARTNERS LLC**  
**(WCS Consolidated Interim**  
**Storage Facility)**

**January 29, 2021**

This proceeding concerns ISP's application for a license to construct and operate a consolidated interim storage facility for spent nuclear fuel in Andrews County, Texas. The Board considered two motions by Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (collectively "Fasken"): (1) to reopen the record; and (2) for leave to file a new contention out of time. In LBP-21-2, the Board denied both motions and determined that Fasken did not proffer an admissible contention.

**RULES OF PRACTICE: REOPENING OF RECORD**

To reopen a closed record, a petitioner must file a motion demonstrating that its new contention (1) is timely; (2) addresses a significant safety or environmental issue; and (3) demonstrates that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. The petitioner must attach an affidavit that separately addresses each of these criteria, with a specific explanation of why each criterion has been

satisfied. An exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.

**RULES OF PRACTICE: MOTIONS TO REOPEN THE RECORD**

The Commission considers reopening a closed record to be an extraordinary action and places an intentionally heavy burden on parties seeking to reopen the record. The Commission mandates that the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention.

**RULES OF PRACTICE: MOTIONS TO REOPEN THE RECORD  
(ACCOMPANYING AFFIDAVIT(S))**

The supporting affidavit or affidavits must be from experts in the disciplines appropriate to the issues raised or from competent individuals with knowledge of the facts alleged.

**RULES OF PRACTICE: MOTIONS TO REOPEN THE RECORD  
(TIMELINESS)**

Contentions must be based on documents or other information available at the time the petition is to be filed. On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report.

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

The contention admissibility requirements are strict by design and result from the Commission's decision to raise the threshold bar for what is admissible. An admissible contention must (1) demonstrate that the issue raised in the contention is within the scope of the proceeding; (2) demonstrate that the issue is material to the findings the NRC must make to support the action involved in the proceeding; and (3) provide sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact.

**RULES OF PRACTICE: AMENDMENT OF CONTENTIONS**

Licensing Boards do not entertain arguments that are advanced for the first time in a reply brief.

**MEMORANDUM AND ORDER**  
**(Denying Motions to Reopen and for Leave to File)**

Before the Board in this closed proceeding are two motions by Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (collectively, “Fasken”): (1) to reopen the record;<sup>1</sup> and (2) for leave to file a new contention out of time.<sup>2</sup> Interim Storage Partners LLC (ISP) and the NRC Staff oppose.<sup>3</sup>

We deny the motions.

**I. BACKGROUND**

This proceeding concerns ISP’s application for a license to construct and operate a consolidated interim storage facility for spent nuclear fuel in Andrews County, Texas. The factual background and prior proceedings before this Licensing Board are set forth in our Memoranda and Orders of August 23, 2019 (LBP-19-7), November 18, 2019 (LBP-19-9), and December 13, 2019 (LBP-19-11),<sup>4</sup> in which the Board ultimately denied all hearing requests.

After the Board closed the record, and while appeals of the Board’s rulings were pending before the Commission, Fasken submitted three new filings:

First, on January 21, 2020, Fasken moved to reopen the record to amend its Contention 4, which the Board had ruled inadmissible in LBP-19-7.<sup>5</sup>

Second, on February 12, 2020, Fasken appealed the NRC Staff’s denial of its request for access to certain non-public information.<sup>6</sup> Fasken claimed it needed

---

<sup>1</sup> Fasken Motion to Reopen the Record (July 6, 2020) [hereinafter Motion to Reopen].

<sup>2</sup> Fasken Motion for Leave to File New and/or Amended Contention (July 6, 2020) [hereinafter Motion for Leave].

<sup>3</sup> ISP’s Answer Opposing Fasken’s Second Motion to Reopen the Record and Motion for Leave to File New Contention “5” (July 31, 2020) [hereinafter ISP Answer]; NRC Staff Answer in Opposition to Fasken’s Motions to Reopen the Record and File New Contention (July 31, 2020) [hereinafter NRC Staff Answer]. Fasken also submitted a combined reply. Fasken Combined Reply to NRC Staff’s and ISP’s Oppositions to Motion for Leave to File New Contention and Motion to Reopen the Record (Aug. 7, 2020) [hereinafter Combined Reply].

<sup>4</sup> LBP-19-7, 90 NRC 31, 32 (2019); LBP-19-9, 90 NRC 181, 185-86 (2019); LBP-19-11, 90 NRC 358, 367-68 (2019).

<sup>5</sup> See LBP-19-7, 90 NRC at 93; Fasken Motion to Reopen the Record for Purposes of Considering and Admitting an Amended Contention Based on New Information Provided by ISP in Response to NRC Requests for Additional Information (Jan. 21, 2020).

<sup>6</sup> Appeal of Staff Denial of Petitioners Request for SUNSI Information Related to ISP’s Responses to RAIs (Feb. 12, 2020).

the non-public information to decide whether to try to amend a second contention that the Board had ruled inadmissible.<sup>7</sup>

Third, on July 6, 2020, Fasken again moved to reopen the record, this time to assert a new contention (Fasken New Contention 5) challenging aspects of the NRC Staff's Draft Environmental Impact Statement (DEIS).<sup>8</sup>

On December 4, 2020 (in CLI-20-13) and December 17, 2020 (in CLI-20-14 and CLI-20-15), the Commission affirmed the Board's rulings.<sup>9</sup> In CLI-20-14, the Commission also considered and denied the first two submissions that Fasken had filed after the Board denied its hearing request.<sup>10</sup> The Commission referred, for the Board's initial consideration, Fasken's third such submission: that is, Fasken's motions to reopen the record and for leave to file New Contention 5.<sup>11</sup>

## II. FASKEN NEW CONTENTION 5

On May 4, 2020, the NRC made the DEIS for ISP's license application publicly available.<sup>12</sup> On May 22, 2020, at Fasken's request, the Secretary of the Commission extended the deadline for filing new or amended contentions based on the DEIS until July 6, 2020.<sup>13</sup>

Hence, on July 7, 2020 at 12:01 a.m. (technically one minute after the deadline), Fasken filed a second motion to reopen the record, together with a motion for leave to file Fasken New Contention 5.<sup>14</sup> New Contention 5 states:

ISP's application fails to adequately, accurately, completely and consistently consider the cumulative impacts of transporting high-level radioactive waste and spent nuclear fuel to and the socioeconomic benefits of the proposed . . . project, which precludes a proper analysis under NEPA, and further nullifies ISP's ability to satisfy NRC's siting evaluation factors now and anticipated in the future and is in further violation of NRC regulations.<sup>15</sup>

---

<sup>7</sup> *See id.* at 3.

<sup>8</sup> Motion to Reopen at 4-6.

<sup>9</sup> CLI-20-13, 92 NRC 457, 458, 462 (2020); CLI-20-14, 92 NRC 463, 490 (2020); CLI-20-15, 92 NRC 491, 510 (2020). In CLI-20-14, the Commission dismissed the appeal of one ruling without reaching the merits; *see* CLI-20-14, 92 NRC at 466 n.10.

<sup>10</sup> CLI-20-14, 92 NRC at 472, 478.

<sup>11</sup> *Id.* at 465, 489.

<sup>12</sup> "Environmental Impact Statement for Interim Storage Partners LLC's License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Andrews County, Texas" (Draft Report for Comment) (May 2020) (ADAMS Accession No. ML20122A220) [hereinafter DEIS].

<sup>13</sup> Commission Order (May 22, 2020) at 1 (unpublished) [hereinafter Commission Extension].

<sup>14</sup> Motion to Reopen at 1; Motion for Leave at 1.

<sup>15</sup> Motion for Leave at 11.

### III. MOTION TO REOPEN THE RECORD

To reopen a closed record, a petitioner must file a motion that demonstrates (1) its new contention is timely based upon the availability of new information; (2) the contention addresses a significant safety or environmental issue; and (3) a materially different result would be or would have been likely had the newly proffered evidence been considered initially.<sup>16</sup> The petitioner must attach an affidavit from “experts in the disciplines appropriate to the issues raised” or from “competent individuals with knowledge of the facts alleged” that separately addresses each of these criteria, explaining how each criterion has been satisfied.<sup>17</sup> Moreover, the evidence in any such affidavit must meet the admissibility standards in 10 C.F.R. § 2.337.<sup>18</sup> In other words, the affidavit must be of such quality as to be admissible into evidence at an evidentiary hearing.

The Commission considers “reopening the record for any reason to be ‘an extraordinary’ action,”<sup>19</sup> and places “an intentionally heavy burden on parties seeking to reopen the record.”<sup>20</sup> The Commission’s rules mandate that “the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention.”<sup>21</sup> Fasken fails to carry this intentionally heavy burden.

Both ISP and the NRC Staff assert that Fasken has not satisfied a threshold requirement. They claim that Fasken’s motion to reopen the record is not accompanied by an appropriate affidavit.<sup>22</sup>

To support its motion, Fasken attaches an affidavit by its lawyer, Mr. Kanner.<sup>23</sup> But 10 C.F.R. § 2.326(b) does not generally call for the affidavit of a petitioner’s lawyer. On the contrary, when the rules for reopening a closed record were proposed, commentators expressed concern that “affidavits of lawyers repeating allegations of undisclosed principals should not be sufficient.”<sup>24</sup> In response, the Commission codified the requirement that the supporting affidavit

---

<sup>16</sup> 10 C.F.R. § 2.326(a)(1)-(3). An “exceptionally grave” issue may be considered at the discretion of the presiding officer even if untimely presented. *Id.* § 2.326(a)(1).

<sup>17</sup> *Id.* § 2.326(b).

<sup>18</sup> *Id.*

<sup>19</sup> *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-15-19, 82 NRC 151, 156 (2015) (quoting Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986)).

<sup>20</sup> *Id.* at 155.

<sup>21</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005).

<sup>22</sup> NRC Staff Answer at 30; ISP Answer at 11-12.

<sup>23</sup> Motion to Reopen, attach. 1, Aff. of Allan Kanner (July 6, 2020) [hereinafter Kanner Affidavit].

<sup>24</sup> Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,537 (May 30, 1986).

must be from either “competent individuals with knowledge of the facts alleged” or “experts in the disciplines appropriate to the issues raised.”<sup>25</sup>

For the most part, Mr. Kanner claims no personal knowledge. Rather, he summarizes an affidavit submitted by Mr. Taylor, Fasken’s vice president, and purports to incorporate by reference the arguments in Fasken’s Motion for Leave.<sup>26</sup> Neither affidavit separately addresses each criterion in 10 C.F.R. § 2.326(a), as required by 10 C.F.R. § 2.326(b).

We do not question whether Mr. Kanner is a qualified lawyer. But, because Mr. Kanner claims neither technical expertise nor personal knowledge of critical facts, we likely would not admit most or all of Mr. Kanner’s affidavit as evidence at an evidentiary hearing under 10 C.F.R. § 2.337. It is questionable, therefore, whether Mr. Kanner’s affidavit can properly support a motion to reopen the record under 10 C.F.R. § 2.326(b).

We need not rely on this possible pleading defect to deny Fasken’s motion, however, because Fasken fails to carry the heavy burden to reopen a closed record for more substantial reasons.

Most importantly, Fasken’s motion is not timely. Fasken submitted its new contention challenging the DEIS essentially within the extended deadline permitted by the Commission.<sup>27</sup> But New Contention 5 and Fasken’s associated motion to reopen the record are based on statements in the DEIS that do not differ materially from information that was publicly available in ISP’s application materials much earlier.<sup>28</sup> This precludes granting Fasken’s motion.

Under 10 C.F.R. § 2.309(f)(2), “[o]n issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant’s environmental report.”<sup>29</sup> Petitioners such as Fasken have “an ironclad obligation”<sup>30</sup> to examine the relevant application documents to uncover information that might prompt a contention.

Also under 10 C.F.R. § 2.309(f)(2), the NRC expects a petitioner “to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility.”<sup>31</sup> Fasken may not seize

---

<sup>25</sup> *Id.*; 10 C.F.R. § 2.326(b).

<sup>26</sup> Kanner Affidavit at 8.

<sup>27</sup> *See* Commission Extension at 1.

<sup>28</sup> In Exhibit 2 to its Motion for Leave, Fasken lists excerpts from the Environmental Report and the DEIS but fails to explain how they support any of the claims raised in New Contention 5. *See* Motion for Leave at 14.

<sup>29</sup> 10 C.F.R. § 2.309(f)(2).

<sup>30</sup> *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999).

<sup>31</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC  
(Continued)

upon publication of the NRC staff's DEIS as an excuse to raise challenges to ISP's license application that Fasken could have timely raised in 2018, but did not.<sup>32</sup>

Fasken's fundamental claim is that the DEIS fails to adequately consider "the cumulative impacts of transporting high-level radioactive waste and spent nuclear fuel to and the socioeconomic benefits" of ISP's proposed storage facility.<sup>33</sup> For example, Fasken claims that the DEIS contains insufficient information concerning "transportation routes, safety risks[,] and environmental impacts and potential legal issues involving liabilities and responsibilities for risk in transporting the nuclear waste across the nation via rails, barges and/or heavy-haul trucks."<sup>34</sup>

But Fasken fails to show that its claims are based on new and materially different information. On the contrary, the representative route utilized in the DEIS is comparable to one of the routes analyzed in ISP's Environmental Report<sup>35</sup> and is identical to one of the representative routes analyzed in NUREG-2125, the study relied upon in the DEIS.<sup>36</sup> Indeed, other petitioners challenged the use of representative transportation routes in their 2018 hearing requests,<sup>37</sup> but Fasken did not.<sup>38</sup>

Fasken also claims that the DEIS "for the first time relies on and cites to data in the [Department of Energy (DOE)] Yucca 2008 transportation analysis" concerning the evaluation of the use of barges for spent nuclear fuel.<sup>39</sup> But Fasken does not show how the information and conclusions in the DEIS are different from the information and conclusions presented in ISP's Environmental Report. ISP's Environmental Report analyzes barge shipments as part of the evaluation of the radiological impacts of transportation and concludes that "barge and heavy haul shipments were not major contributors to overall collective dose."<sup>40</sup>

---

306, 313 (1999) (citing *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041, 1050 (1983)).

<sup>32</sup> Hearing requests concerning ISP's license application were due October 29, 2018. LBP-19-7, 90 NRC at 43.

<sup>33</sup> Motion for Leave at 11.

<sup>34</sup> Motion to Reopen at 5.

<sup>35</sup> WCS Consolidated Interim Spent Fuel Storage Facility Environmental Report, Docket No. 72-1050 (rev. 3 Nov. 2019) at 1-1, 4-11 (ADAMS Accession No. ML20052E152 (package)) [hereinafter Environmental Report].

<sup>36</sup> DEIS at 4-13 (citing NUREG-2125, Spent Fuel Transportation Risk Assessment (Jan. 2014) (ADAMS Accession No. ML14031A323)).

<sup>37</sup> See LBP-19-7, 90 NRC at 87-89.

<sup>38</sup> Petition of Permian Basin Land and Royal Organization and Fasken Land and Minerals for Intervention and Request for Hearing (Oct. 29, 2018).

<sup>39</sup> Motion for Leave at 6, 18.

<sup>40</sup> Environmental Report at 4-11; § 4.2.6.



Likewise, Fasken claims that the DEIS's cumulative transportation impact analyses fail to adequately consider (as relevant to potential accidents) the regional characteristics within a fifty-mile radius of the proposed facility and the occurrence of earthquakes in the area.<sup>41</sup> But Fasken fails to show how the analysis of accidents in ISP's Environmental Report<sup>42</sup> differs materially from the analysis in the DEIS.<sup>43</sup>

Purportedly in support of New Contention 5, Fasken makes some related (and some perhaps marginally related) additional claims. All are premised on information that was available to Fasken long before publication of the DEIS.

For example, Fasken claims that the DEIS improperly omits an analysis of "the responsibility and costs for coordinating transportation, payments for needed infrastructure improvements and providing necessary emergency training for first responders along the unknown transportation routes."<sup>44</sup> But ISP's Environmental Report did not present such an analysis either. Fasken could have asserted this claim at the outset of the proceeding, but did not.

Similarly, Fasken's claim that the DEIS fails to consider the potential impacts of terrorist attacks and sabotage<sup>45</sup> is untimely because ISP's Environmental Report did not consider them either (because the NRC requires no such analysis for facilities outside the Ninth Circuit<sup>46</sup>). And Fasken does not attempt to explain how its criticism of ISP's site selection process<sup>47</sup> could be premised on new information. Again, Fasken asserts claims that other petitioners made at the outset of this proceeding, but Fasken did not.<sup>48</sup>

In short, Fasken fails to demonstrate that any information supporting New Contention 5 is materially new. For this reason alone, we must deny Fasken's motion to reopen the record.<sup>49</sup>

---

<sup>41</sup> Motion for Leave at 19-21.

<sup>42</sup> Environmental Report at 4-12 to 4-22.

<sup>43</sup> DEIS at 4-17 to 4-24.

<sup>44</sup> Motion for Leave at 15.

<sup>45</sup> *Id.* at 21-22.

<sup>46</sup> *AmerGen Energy Co. (Oyster Creek Nuclear Generating Station)*, CLI-07-8, 65 NRC 124, 129 (2007) (upheld by *N.J. Dep't of Env'tl. Prot. v. NRC*, 561 F.3d 132, 140-43 (3d Cir. 2009)).

<sup>47</sup> Motion for Leave at 22.

<sup>48</sup> *See* Petition of [Joint Petitioners] to Intervene, and Request for an Adjudicatory Hearing (Nov. 13, 2018) at 118 [hereinafter Joint Petition].

<sup>49</sup> Under 10 C.F.R. § 2.326(a)(1), the Board has discretion to consider an "exceptionally grave" issue even if untimely presented. We do not exercise that discretion here. Although, in its Combined Reply, for the first time Fasken makes passing reference to New Contention 5 presenting an exceptionally grave issue (*see* Combined Reply at 3, 10), it never supports that characterization. We do not entertain arguments advanced for the first time in a reply brief. *Nuclear Management Co. (Palisades Nuclear Plant)*, CLI-06-17, 63 NRC 727, 732 (2006). Moreover, the Commission

(Continued)

Moreover, we conclude that Fasken's motion does not address a significant safety or environmental issue. As explained *infra*, in our discussion of contention admissibility, New Contention 5 does not raise a genuine dispute on *any* material issue of fact or law. Thus, these same claims cannot possibly meet the higher standard of presenting a *significant* issue that must be adjudicated by reopening this closed proceeding.

Finally, Fasken does not demonstrate that, if its motion to reopen the record were granted, a materially different result would be likely. Because Fasken's New Contention 5 is not admissible, as explained *infra*, no materially different result would have occurred had it been considered initially.

#### **IV. MOTION FOR LEAVE TO FILE CONTENTION OUT OF TIME**

Even if we were to allow Fasken to reopen the record, we would necessarily deny its motion for leave to file New Contention 5 out of time. Fasken's motion for leave fails for the same reasons as Fasken's motion to reopen the record: it is not based on new information. Additionally, we conclude that Fasken New Contention 5 is not admissible.

Again, we agree that Fasken New Contention 5 was timely submitted in the sense that (for all practical purposes) it was filed within the timeframe prescribed by the Secretary for contentions challenging the DEIS.<sup>50</sup> But the Secretary's extension did not alter Fasken's obligation to show that New Contention 5 is based on new, previously unavailable information that differs materially from information that was previously available.<sup>51</sup> As explained *supra*, Fasken makes no such showing.

#### **V. ADMISSIBILITY OF FASKEN NEW CONTENTION 5**

Fasken's failure to satisfy either the requirements for reopening a closed record or for proffering a contention out of time, without more, necessarily requires us to reject Fasken New Contention 5.<sup>52</sup> In addition, the contention does

---

considers the exception a narrow one, to be granted rarely and only in extraordinary circumstances. *See, e.g., Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 500-01 (2012).

<sup>50</sup> We decline to deny Fasken's motion because it was one minute late, as ISP urges. *See* ISP Answer at 25. We remind counsel, however, that generally NRC filing deadlines are strictly enforced.

<sup>51</sup> 10 C.F.R. § 2.309(c).

<sup>52</sup> *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 124 (2009).

not satisfy the admissibility requirements in 10 C.F.R. § 2.309(f)(1).<sup>53</sup> Fasken urges that we not attach importance to “procedural issues,”<sup>54</sup> but the Commission instructs otherwise.

Although the NRC’s contention admissibility requirements are not intended to be a “fortress to deny intervention,”<sup>55</sup> they are “strict by design.”<sup>56</sup> These requirements are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”<sup>57</sup> They arise from the Commission’s “conscious effort to raise the threshold bar for an admissible contention.”<sup>58</sup> Rather than expend agency time and resources on litigating vague and unsupported claims, the Commission chose to provide evidentiary hearings only to those who “proffer at least some minimal factual and legal foundation in support of their contentions.”<sup>59</sup> Failure to satisfy any of the NRC’s pleading requirements requires a licensing board to reject a contention.<sup>60</sup>

Although a petitioner need not prove its contention at this stage, mere notice pleading of proffered contentions is insufficient.<sup>61</sup> A petitioner must read the relevant portions of the license application or amendment request, state the applicant’s or licensee’s position and the petitioner’s opposing view, and explain why it disagrees with the applicant or licensee.<sup>62</sup>

Among other things, an admissible contention must (1) demonstrate that the issue raised in the contention is within the scope of the proceeding;<sup>63</sup> (2) demonstrate that the issue is material to the findings the NRC must make to support the action involved in the proceeding;<sup>64</sup> and (3) provide sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact.<sup>65</sup> This must include references to specific portions of the

---

<sup>53</sup> 10 C.F.R. § 2.309(f)(1)(i)-(vi).

<sup>54</sup> Combined Reply at 10.

<sup>55</sup> *Oconee*, CLI-99-11, 49 NRC at 335.

<sup>56</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

<sup>57</sup> Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004).

<sup>58</sup> *Oconee*, CLI-99-11, 49 NRC at 334.

<sup>59</sup> *Id.*

<sup>60</sup> See *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

<sup>61</sup> *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

<sup>62</sup> Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170-71 (Aug. 11, 1989).

<sup>63</sup> 10 C.F.R. § 2.309(f)(1)(iii).

<sup>64</sup> *Id.* § 2.309(f)(1)(iv). To show that a dispute is “material,” a petitioner must show that its resolution would make a difference in the outcome of the proceeding. See *Oconee*, CLI-99-11, 49 NRC at 333-34.

<sup>65</sup> 10 C.F.R. § 2.309(f)(1)(vi).

disputed document and the supporting reasons for each dispute.<sup>66</sup> If a petitioner claims that a document fails to contain relevant information that is legally required, it must identify each such alleged failure and the reason why the missing information is needed.<sup>67</sup>

Fasken New Contention 5 does not satisfy these requirements.

Fasken's principal and overarching claim is that the DEIS should identify specific transportation routes. Fasken claims that "the use of 'representative routes' simply will not do."<sup>68</sup>

Fasken argues that "the transportation of nuclear waste to the proposed [facility] has a clear physical, functional, and temporal nexus to the project"<sup>69</sup> and that storage and transportation are inextricably linked actions.<sup>70</sup> Fasken contends that an analysis of the "exact number of shipments to [the proposed facility]; expected numbers of start clean/stay clean shipments (return to sender) and the number of shipments from [the facility] to a permanent repository based on [the] operational lifespan of [the facility] is necessary to make a best estimate of risks to communities in the transportation corridor."<sup>71</sup>

According to Fasken, the DEIS "materially mislead[s] the public as to the ownership and responsibility, as well as the radiological risks and socio-economic impacts, of transporting nuclear waste from decommissioned sites to the proposed ISP site."<sup>72</sup> As a result, according to Fasken, "extrapolations based on prior facilities and the use of 'representative routes' . . . prevent[s] a proper assessment of cost and benefit scenarios in the ISP DEIS."<sup>73</sup>

However, Fasken does not explain why, under NEPA or the NRC's environmental regulations, the DEIS must provide a more thorough analysis of hypothetical future shipping routes. Admissible contentions must identify a deficiency in the environmental analysis and may not merely offer "suggestions" of other ways the analysis could have been done.<sup>74</sup>

Most importantly, Fasken does not explain — or even address — why the Board should reach a different result than we reached with respect to a virtually identical claim in this very proceeding, and which the Commission affirmed in CLI-20-14. In LBP-19-7, we ruled inadmissible Joint Petitioners Contention 1,

---

<sup>66</sup> *Id.*

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

<sup>68</sup> Motion for Leave at 14.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 25.

<sup>72</sup> *Id.* at 12.

<sup>73</sup> *Id.* at 14.

<sup>74</sup> See *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323 (2012) (citation omitted).

which claimed that ISP's Environmental Report's transportation impact analysis was inadequate because it used representative routes and failed to divulge and analyze specific transportation routes.<sup>75</sup> Much like Fasken, Joint Petitioners contended that there must be "complete disclosure of all probable transportation routes, along with quantities of [spent nuclear fuel] and the likely radioisotopic contents" to be shipped.<sup>76</sup>

In LBP-19-7, we rejected Joint Petitioners' claim that there must be complete disclosure of all probable transportation routes because petitioners failed to raise a genuine dispute concerning the adequacy of ISP's analysis of representative routes.<sup>77</sup> Moreover, we concluded that — whenever actual routes might be chosen in the future — their selection would be the responsibility of the spent fuel owners, not ISP.<sup>78</sup> We further concluded that any more specific analysis would properly be the subject of an application for a transportation license, not ISP's application to construct a storage facility.<sup>79</sup>

In CLI-20-14, the Commission affirmed our ruling. The Commission agreed with the Board that "the actual routes that may one day be used to transport waste to the proposed [facility] are not currently known and are not the subject of an NRC approval in this proceeding."<sup>80</sup> Fasken's demand for an analysis of actual transportation routes is not admissible for the same reasons.

Fasken's related claims all depend on acceptance of its fundamental and mistaken claim that hypothetical future transportation routes must be more fully disclosed and analyzed. Some are inadmissible for other reasons as well.

For example, Fasken claims that adequate socioeconomic and cost-benefit analyses "hinge on the responsibility and costs for coordinating transportation, payments for needed infrastructure improvements and providing necessary emergency training for first responders" along actual transportation routes.<sup>81</sup> However, evaluation of the costs of emergency response and infrastructure upgrades is not even within the scope of this Part 72 proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii). Identifying actual transportation routes will eventually require separate reviews and approvals by the NRC, the Department of Transportation, and applicable States or Tribes.<sup>82</sup> ISP will also need to coordinate with local law enforcement and emergency responders. Such coordination is not relevant at this point in the licensing process.

---

<sup>75</sup> LBP-19-7, 90 NRC at 87-89 (ruling Joint Petitioners Contention 1 inadmissible).

<sup>76</sup> Joint Petition at 43.

<sup>77</sup> LBP-19-7, 90 NRC at 88-89.

<sup>78</sup> *Id.* at 60-61, 91.

<sup>79</sup> *Id.* at 88-89.

<sup>80</sup> CLI-20-14, 92 NRC at 479.

<sup>81</sup> Motion for Leave at 15.

<sup>82</sup> *See* 10 C.F.R. Parts 71, 73; 49 C.F.R. Parts 107, 171-80, 390-97.

Likewise, to the extent that Fasken contends that the DEIS transportation impacts analysis must consider the possibility of “terrorist attacks” and “sabotage,” the Commission has held that, except for licensing actions within the Ninth Circuit, the NRC is not required to consider terrorism in its NEPA analysis.<sup>83</sup> Fasken’s claims concerning the possibility of a terrorist attack are therefore outside the scope of this proceeding.

Finally, Fasken’s belated claims concerning ISP’s site selection process ignore our discussion in LBP-19-7 of similar claims that were made in Sierra Club Contention 11 and fail to anticipate the Commission’s affirmance (in CLI-20-15) of our ruling that Sierra Club Contention 11 was not admissible.<sup>84</sup> As we ruled in LBP-19-7 (and as the Commission affirmed), Part 51 sets forth no specific site selection criteria.<sup>85</sup> The criteria need only be reasonable, and it is permissible for the NRC to accord substantial weight to the preference of the applicant.<sup>86</sup> Sierra Club’s criticisms of ISP’s site selection process did not raise a genuine dispute under these standards,<sup>87</sup> and Fasken’s do not either.

The various claims set forth in Fasken New Contention 5 fail to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi). Fasken New Contention 5 is not admitted.

## VI. ORDER

For the reasons stated:

- A. Fasken’s motion to reopen the record is *denied*.
- B. Fasken’s motion for leave to file its Contention 5 is *denied*.
- C. Fasken Contention 5 is *not admitted*.
- D. No contention having been admitted, and no proffered contention pending, this adjudicatory proceeding remains *terminated*.

---

<sup>83</sup> CLI-20-14, 92 NRC at 488-89; *Oyster Creek*, CLI-07-8, 65 NRC at 129, *petition for review denied*, *N.J. Dep’t of Env’tl. Prot.*, 561 F.3d at 140-43.

<sup>84</sup> Motion for Leave at 22.

<sup>85</sup> LBP-19-7, 90 NRC at 75.

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

<sup>87</sup> *Id.* at 76.

It is so ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD

Paul S. Ryerson, Chairman  
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros  
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
January 29, 2021





UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Christopher T. Hanson**, Chairman  
**Jeff Baran**  
**Annie Caputo**  
**David A. Wright**

**In the Matter of**

**Docket No. 72-1051-ISFSI**

**HOLTEC INTERNATIONAL**  
**(HI-STORE Consolidated Interim**  
**Storage Facility)**

**February 18, 2021**

**CONTENTION ADMISSIBILITY**

The Commission generally defers to a board's determination whether a contention has sufficient factual support.

**APPEALS**

Simply reiterating arguments made before the board is not sufficient to support an appeal.

**CONTENTION ADMISSIBILITY**

The board did not place an unjustified burden on petitioners when it required them to show a basis for assuming that site characterization tests were performed incorrectly or to explain how claimed departures from established procedures could affect the analysis or conclusions in the environmental report.

**CONTENTION ADMISSIBILITY**

Old information repackaged in a new report is not "new information" on which a contention may be filed after the deadline.

## MEMORANDUM AND ORDER

Today we address Sierra Club's appeal of the Atomic Safety and Licensing Board's decision on remand dismissing four timely submitted contentions and a fifth contention filed after the Board's original ruling.<sup>1</sup> For the reasons described below, we deny the appeal.

### I. BACKGROUND

Holtec has applied for a license to build and operate a consolidated interim storage facility (CISF) in southeastern New Mexico.<sup>2</sup> The proposed license would allow Holtec to store up to 8,680 metric tons of uranium (MTUs) (500 loaded canisters) in the Holtec HI-STORE CISF for a period of forty years.<sup>3</sup> The Environmental Report analyzes the environmental impacts of possible future expansions of the project of up to 100,000 MTU storage capacity.<sup>4</sup>

This is our second occasion to hear appeals in this licensing matter. At the outset of the proceeding, six different petitioners or groups of petitioners, including Sierra Club, sought to intervene and requested a hearing. As relevant here, the Board found that Sierra Club had established standing but did not offer an admissible contention.<sup>5</sup> Sierra Club appealed with respect to ten of the dismissed contentions.

In CLI-20-4, we affirmed the Board's finding of standing and its decision to dismiss six of Sierra Club's contentions, but we concluded that the Board had not considered all aspects of four of Sierra Club's proposed contentions concerning the hydrogeology of the site.<sup>6</sup> We therefore remanded the four contentions, in part, to the Board for further consideration.<sup>7</sup> We also remanded a new Sierra

---

<sup>1</sup> See Sierra Club's Brief in Support of Appeal of Atomic Safety and Licensing Board Decision Denying Admissibility of Contentions in Licensing Proceeding (July 13, 2020) (Sierra Club Appeal); LBP-20-6, 91 NRC 239 (2020).

<sup>2</sup> See Letter from Kimberly Manzione, Holtec International, to Michael Layton, NRC (Mar. 30, 2017) (enclosing application documents including safety analysis report and environmental report) (ADAMS accession no. ML17115A431 (package)). Holtec has since revised the application: Environmental Report on the HI-STORE CIS Facility, rev. 7 (Aug. 2019) (ML19309E337) (Environmental Report); and Licensing Report on the HI-STORE CIS Facility, rev. 0H (Mar. 30, 2019) (ML19163A062) (Safety Analysis Report).

<sup>3</sup> See Proposed License for Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste SNM-1051, at 1 (ML17310A223) (Proposed License).

<sup>4</sup> Environmental Report at 1-7.

<sup>5</sup> See LBP-19-4, 89 NRC 353, 366-67, 383-426 (2019).

<sup>6</sup> CLI-20-4, 91 NRC 167, 177-93 (2020).

<sup>7</sup> *Id.* at 189-91.

Club contention (Contention 30) that was based on a recently released report from the Nuclear Waste Technical Review Board (NWTRB) concerning issues related to spent fuel transportation.<sup>8</sup> Because Contention 30 was filed after the Board's decision in LBP-19-4, we instructed the Board to consider on remand whether Contention 30 met the Commission's reopening standards.<sup>9</sup>

On remand, the Board dismissed the five contentions. Sierra Club appealed. Holtec and the NRC Staff oppose the appeal.<sup>10</sup>

## II. DISCUSSION

To be admitted for hearing, a proposed contention must set forth with particularity the matters to be raised, be within the scope of the hearing, be material to the findings the agency must make in taking the requested action, be factually supported, and show that a genuine dispute exists with the application.<sup>11</sup>

We generally defer to a Board on whether a contention has sufficient factual support to be admitted for hearing, and we review contention admissibility rulings only where an appeal points to an error of law or abuse of discretion.<sup>12</sup>

### A. Groundwater Contentions

Sierra Club argued in Contentions 15, 16, 17, and 19 that the Environmental Report had not accounted for various groundwater impacts and had not adequately characterized the hydrogeology of the site.<sup>13</sup> We remanded these contentions for the Board to consider the narrow issue of whether they raised admissible issues concerning site characterization. Moreover, the Board examined each contention and found that none raised a genuine dispute with Holtec's application. Specifically, the Board found that the contentions did not address

---

<sup>8</sup> *Id.* at 193-94. *See also* Sierra Club's Motion to File a New Late-Filed Contention (Oct. 23, 2019) (Motion to File Contention 30); Attach., U.S. Nuclear Waste Technical Review Board, "Preparing for Nuclear Waste Transportation — Technical Issues that Need to Be Addressed in Preparing for a Nationwide Effort to Transport Spent Nuclear Fuel and High-Level Radioactive Waste" (Sept. 2019) (NWTRB Report) (ML19297D141 (package)).

<sup>9</sup> CLI-20-4, 91 NRC at 194.

<sup>10</sup> Holtec International's Brief in Opposition to Sierra Club's Appeal of LBP-20-06 (Aug. 7, 2020) (Holtec Answer); NRC Staff's Answer in Opposition to Sierra Club's Appeal of LBP-20-6 (Aug. 7, 2020) (Staff Answer).

<sup>11</sup> *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi).

<sup>12</sup> CLI-20-4, 91 NRC 173; *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-20-1, 91 NRC 79, 85 (2020).

<sup>13</sup> Sierra Club Appeal at 4-5.

or account for information that was in the Environmental Report. Further, the Board found three of the four contentions lacked adequate factual support.

### ***1. Contention 15: Presence of Shallow Groundwater***

Sierra Club argued in Contention 15 that Holtec did not support the claim in section 3.5.2.1 of the Environmental Report that “shallow alluvium is likely non-water bearing at the Site.”<sup>14</sup> But on remand, the Board held that Contention 15 did not address the Environmental Report’s discussion of the groundwater monitoring wells that Holtec drilled to investigate the presence of groundwater.<sup>15</sup> The Board found that Sierra Club was incorrect that Holtec’s conclusion was “based entirely on the absence of water in a single monitoring well observed in 2007.”<sup>16</sup> The Board pointed to Holtec’s 2017 Geotechnical Data Report, which included boring logs for five groundwater monitoring wells and showed that no groundwater was encountered in the shallow alluvium.<sup>17</sup> The Board observed that while the Geotechnical Data Report indicated that the wells were completed below the alluvium, the wells were monitored for groundwater throughout the drilling.<sup>18</sup>

On appeal, Sierra Club argues that its expert countered this information by explaining that a monitoring well was required and that “a momentary observation of no water is not sufficient to determine that groundwater does not exist.”<sup>19</sup> But Sierra Club reiterates the same arguments raised before the Board.<sup>20</sup> It does not show that the Board erred in its interpretation of the law or abused its discretion in reaching its conclusion that Sierra Club did not raise a genuine dispute with the application. Accordingly, we defer to the Board’s ruling with respect to Contention 15.

---

<sup>14</sup> Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Sept. 14, 2018), at 60 (Sierra Club Petition).

<sup>15</sup> LBP-20-6, 91 NRC at 243.

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

<sup>17</sup> *Id.* (citing Letter from Kimberly Manzione, Holtec International, to Jose Cuadrado, NRC (Dec. 21, 2017) (transmitting responses to requests for supplemental information), Attach. 5, GEI Consultants, Geotechnical Data Report, HI-STORE CISF Phase 1 Site Characterization (Dec. 2017) (ML17362A097 (Package))).

<sup>18</sup> *Id.* at 243-44.

<sup>19</sup> Sierra Club Appeal at 9; *see also* Sierra Club Petition, Attach., Sierra Club Standing Declarations and Expert Declarations (Sept. 13, 2018), Declaration of George Rice (Sept. 6, 2018), at 2-4 (Rice Decl.).

<sup>20</sup> *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017).

## 2. *Contention 16: Presence of Brine*

In Contention 16, Sierra Club argued that the Environmental Report “does not contain any information as to whether brine continues to flow in the subsurface under the site.”<sup>21</sup> Sierra Club acknowledged that the Environmental Report states that brine disposal facilities once operated near the site and that in 2007, brine was detected in a water sample taken from the south side of the site.<sup>22</sup> Sierra Club provided the declaration of an expert, George Rice, who opined that the Environmental Report should determine whether “brine is moving along perched zones in the alluvial materials, or along the alluvium/Dockum interface.”<sup>23</sup>

On remand, the Board found that the contention lacked factual support because brine disposal facilities, and the site where brine was located, are on the far side of the site and downgradient of the proposed CISF.<sup>24</sup> In addition, the Board found that Mr. Rice’s declaration did not provide any facts suggesting that brine may exist beneath the proposed facility. Instead, the Board observed that the declaration did not meet the contention admissibility requirements because it only posed questions, such as “do the seeps and springs continue to flow?”<sup>25</sup>

On appeal, Sierra Club argues that the presence of brine in the 2007 sample should be enough to warrant further investigation of whether brine exists in the area of the proposed facility.<sup>26</sup> But Sierra Club’s argument that more information is needed on brine in the groundwater points to no Board error of law or abuse of discretion. The application acknowledges brine in the shallow groundwater. Both the Safety Analysis Report and Environmental Report state that shallow groundwater in the area has been affected by brine discharges from potash refining and oil and gas production, and they further describe historical discharges of brine into the playa lakes surrounding the site.<sup>27</sup> The application also explains that the water table is below the excavation depth of the facility.<sup>28</sup> We therefore defer to the Board’s conclusion that this contention lacked sufficient factual support to raise a genuine dispute with the application.

---

<sup>21</sup> Sierra Club Petition at 62.

<sup>22</sup> *Id.* at 63 (citing Environmental Report § 3.5.2.1).

<sup>23</sup> Rice Decl. at 6.

<sup>24</sup> LBP-20-6, 91 NRC at 245.

<sup>25</sup> *Id.* (citing *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 324 (2007)).

<sup>26</sup> Sierra Club Appeal at 10.

<sup>27</sup> *See* Safety Analysis Report § 2.5 at 2-98; Environmental Report § 3.5.2.1 at 3-52 (describing brine discharges to the Laguna Plata, Laguna Toston, and Laguna Gatuna ending in 2001); *id.* § 3.5.2.1 at 3-51 (describing 2007 piezometer sampling that identified brine in the groundwater).

<sup>28</sup> *See* Safety Analysis Report § 2.5 at 2-98; *see also id.* § 1.0.1 at 1-5 (maximum excavation depth will be approximately 25 feet).

### **3. *Contention 17: Fractured Rock***

In Contention 17, Sierra Club argued that the Environmental Report and Safety Analysis Report did not discuss the “presence and implications of fractured rock beneath the Holtec site.”<sup>29</sup>

The Board found the contention unsupported because both documents discuss the presence of fractured rock.<sup>30</sup> The Board pointed out that Mr. Rice’s declaration acknowledges that fractures were reported in the monitoring wells’ drilling logs and in the Geotechnical Data Report.<sup>31</sup> The Board therefore found that the contention was factually unsupported.<sup>32</sup> In addition, it found that aside from its inadmissible claims that contaminants could leak from the spent fuel storage containers, Sierra Club had not set forth a “significant dispute” with the application concerning the presence of fractured rock.<sup>33</sup>

On appeal, Sierra Club argues that the Environmental Report and Safety Analysis Report do not “discuss the nature and extent of these fractures” and “that is why both documents are deficient.”<sup>34</sup> But this claim does not describe any Board error — it reiterates arguments Sierra Club made before the Board. This is not sufficient to sustain an appeal.<sup>35</sup> We therefore defer to the Board.

### **4. *Contention 19: Packer Tests/Hydraulic Conductivity***

In Contention 19, Sierra Club argued that the Environmental Report did not contain sufficient information to determine whether packer tests were performed correctly.<sup>36</sup> Packer tests were used to determine the extent of hydraulic connectivity in the Santa Rosa Formation underlying the proposed site.<sup>37</sup> In his supporting declaration, Mr. Rice argued that the tests did not conform to the methods given in the U.S. Bureau of Reclamation’s Field Manual (which the Geotechnical Data Report used).<sup>38</sup> Mr. Rice claimed three insufficiencies: (1) the applicant did “not appear to have cleaned the hole” prior to conducting the

---

<sup>29</sup> Sierra Club Petition at 63-65.

<sup>30</sup> LBP-20-6, 91 NRC at 245-46.

<sup>31</sup> *Id.* at 246.

<sup>32</sup> *Id.*

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

<sup>34</sup> Sierra Club Appeal at 11.

<sup>35</sup> See *Turkey Point*, CLI-17-12, 86 NRC at 219.

<sup>36</sup> Sierra Club Petition at 66.

<sup>37</sup> See Rice Decl. at 8.

<sup>38</sup> *Id.*

tests; (2) there was no description of the water used in the tests; and (3) the “test duration appear[ed] to be too short.”<sup>39</sup>

The Board found that Mr. Rice’s declaration offered “mere speculation” that the packer tests were done incorrectly. It held that the fact that the Geotechnical Data Report is silent on some details did “not provide grounds to assume” that the tests were performed improperly.<sup>40</sup> And it observed that the geotechnical work described in the report was performed under a quality assurance program.<sup>41</sup> The Board therefore concluded that the contention lacked factual support and did not raise a genuine dispute with the application.<sup>42</sup>

On appeal, Sierra Club argues that the Board placed an “unjustified burden” on its expert because Mr. Rice could not conduct his own test and “does not have access, absent the discovery mechanisms available after a contention is admitted, to the information the [Board] claims he must have to form an admissible contention.”<sup>43</sup>

We find persuasive the Staff’s argument that Sierra Club has not explained “how the asserted departures would ultimately have any significance for any analysis or conclusion” in the Environmental Report.<sup>44</sup> We agree with the Staff that Sierra Club has not demonstrated a genuine dispute with the application on a material issue, and, consequently, we find that Sierra Club has not shown legal error by the Board. Thus, we defer to the Board’s finding that Contention 19 was not admissible.

## **B. Contention 30: NWTRB Report**

Sierra Club argued in Contention 30 that the NWTRB Report showed that the project is infeasible because “the transportation of nuclear waste cannot be technically accomplished within the 40-year period of the initial license Holtec is seeking.”<sup>45</sup> Sierra Club argued that the report showed that if spent fuel from all nuclear plants were repackaged into smaller, standardized canisters, the fuel could be removed by 2070, but if the fuel is not repackaged, “some of the hottest spent nuclear fuel would not be cool enough to meet transportation requirements until 2100.”<sup>46</sup> Sierra Club claimed that Holtec’s Environmental Report must consider other unresolved issues identified in the report, including possible damage

---

<sup>39</sup> *Id.*

<sup>40</sup> LBP-20-6, 91 NRC at 246.

<sup>41</sup> *Id.* at 247.

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

<sup>43</sup> Sierra Club Appeal at 11-12.

<sup>44</sup> *Id.* at 14.

<sup>45</sup> Motion to File Contention 30 at 1.

<sup>46</sup> *Id.*

to waste containers during shipment and the need for new transportation container designs.<sup>47</sup> The motion to admit Contention 30 was accompanied by the declaration of Sierra Club's expert, Robert Alvarez.<sup>48</sup> Following our remand of Contention 30 to the Board, Sierra Club filed a motion to reopen the record and admit the contention, along with an affidavit addressing our reopening standards.<sup>49</sup>

The Board rejected the contention for the following reasons: (1) Contention 30 was inadmissible because it did not raise a genuine dispute with Holtec's application; (2) Sierra Club had not met the standard for showing good cause for filing a new contention after the deadline; and (3) Sierra Club had not met the standard for reopening a closed record. As discussed below, Sierra Club does not show that the Board erred with respect to any of them.

### ***1. Admissibility***

The Board found that Contention 30 did not raise a genuine dispute with Holtec's application because "[c]ontrary to Sierra Club's claims, the findings in the NWTRB Report do not contradict Holtec's plans."<sup>50</sup> Specifically, the Board found that while the NWTRB Report found that "some technical issues must be resolved 'before the nation's entire inventory can be transported,' it agrees that not all such issues 'must be resolved before the first of the waste can be transported.'"<sup>51</sup> The Board found that the report "most certainly does not support the conclusion that 8,680 MTU could not be moved" during the forty-year term of Holtec's initial license request.<sup>52</sup>

The Board explained that the NWTRB's responsibility under the Nuclear Waste Policy Act Amendments of 1987 is to "evaluate the technical and scientific validity" of the Department of Energy's activities under the Act.<sup>53</sup> The NWTRB does not license private spent fuel transportation systems, and it is not tasked with evaluating the technical viability of private spent fuel storage ventures. The Board also observed that the commercial viability of the proposed facility is not within the scope of this proceeding.<sup>54</sup> Therefore, to the extent

---

<sup>47</sup> *Id.* at 1-2.

<sup>48</sup> *See* Declaration of Robert Alvarez in Support of Motion of Intervenor Sustainable Energy and Economic Development Coalition for Leave to File Late-Filed Contention (Oct. 23, 2019) (Alvarez Decl.).

<sup>49</sup> Sierra Club's Motion to Reopen the Record (May 4, 2020) (Motion to Reopen).

<sup>50</sup> LBP-20-6, 91 NRC at 252.

<sup>51</sup> *Id.* (internal citation omitted) (quoting NWTRB Report at xxiii).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 252-53 (quoting NWTRB Report at 1).

<sup>54</sup> *Id.* at 252.



that the waste transportation issues identified in the report might impede the future expansion of Holtec's facility to the 100,000 MTU capacity discussed in the Environmental Report, they are not material to the findings the NRC must make in licensing this facility.

The Board also found that other issues raised in Contention 30, such as the suitability of NRC-approved casks for transportation of high-burnup fuel, were outside the scope of the proceeding. The Board reasoned that Holtec's application is for a Part 72 storage facility license, not a Part 71 transportation license.<sup>55</sup> Insofar as Contention 30 questioned the safety of NRC-approved transportation packages, the Board found that the contention ran afoul of 10 C.F.R. § 2.335, which prohibits challenges to regulations in an adjudicatory proceeding without a waiver.<sup>56</sup>

On appeal, Sierra Club argues that the Board ruled on the merits of Contention 30 rather than its admissibility and that it shifted the burden to Sierra Club to rebut all of Holtec's allegations.<sup>57</sup> But Sierra Club does not point to any merits ruling and provides no examples where the Board shifted the burden to Sierra Club. We note that the Board did not dismiss the contention due to its lack of factual support but because it did not challenge material in the license application and raised issues outside the scope of the proceeding. We therefore defer to the Board's ruling on the admissibility of Contention 30.

## ***2. New Contention Filed After the Deadline***

The Board found that Sierra Club had not shown good cause for filing Contention 30 after the deadline because the information on which the contention was based was not new.<sup>58</sup> Although the NWTRB Report had been released within a month before Sierra Club filed Contention 30, the Board found that the information in the report "was either previously available or not materially different from the information that was previously available."<sup>59</sup> According to the Board, the report aggregated publicly available information that the DOE had gathered from 2012 to 2018.<sup>60</sup> The Board further observed that the supporting declaration of Mr. Alvarez "merely repeats conclusions in the NWTRB Report" and noted that "his Declaration also demonstrates that Sierra Club Contention

---

<sup>55</sup> *Id.* at 253.

<sup>56</sup> *Id.* at 254.

<sup>57</sup> Sierra Club Appeal at 14.

<sup>58</sup> LBP-20-6, 91 NRC at 250-52.

<sup>59</sup> *Id.* at 250.

<sup>60</sup> *Id.* at 250-51.

30 is based on facts and theories that were available long before the contention was filed.”<sup>61</sup>

On appeal, Sierra Club argues that the Board imposed an unrealistic standard requiring a prospective intervenor to “be aware of, understand and digest, and have expert support for every bit of information in the vast universe of possible sources of information.”<sup>62</sup> It argues that even if all the information in the NWTRB Report was previously available in some form, “the report was the first source to put that information together in a way that informs the issues in this case.”<sup>63</sup>

We have previously rejected the argument that old information repackaged in a new report is new information.<sup>64</sup> In *Prairie Island Nuclear Generating Plant*, we reversed a board’s finding that a “safety culture” contention was timely based on a section in a Safety Evaluation Report that listed prior adverse findings against the applicant, some of which dated back many years.<sup>65</sup> We rejected the *Prairie Island* Board’s reasoning that the Safety Evaluation Report provided the “final ‘piece of the puzzle’” that allowed the petitioner to formulate its contention.<sup>66</sup>

Sierra Club provides no reason to revisit our ruling in *Prairie Island*. It does not explain its argument that the NWTRB Report put information together in a way that supported the claims in Sierra Club’s contention even though the individual reports and studies cited therein did not. We are also unpersuaded by Sierra Club’s suggestion that the studies and reports cited in the NWTRB Report were too obscure for Sierra Club to be aware of them prior to the issuance of the report. As the Board pointed out, Sierra Club’s expert’s declaration cites NWTRB conclusions concerning high-burnup fuel dating to 2016 and also cited his own work raising the same issues dating back to 2013.<sup>67</sup> Therefore, Sierra Club’s expert was aware of the challenges DOE faces in creating a permanent repository well before the NWTRB collected them in its report. We find no error in the Board’s ruling that the motion to admit Contention 30 was untimely.

### 3. *Reopening*

As we noted in our remand to the Board, the Board terminated this proceed-

---

<sup>61</sup> *Id.* at 251.

<sup>62</sup> Sierra Club Appeal at 14.

<sup>63</sup> *Id.*

<sup>64</sup> See *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 494-96 (2010).

<sup>65</sup> *Id.* at 485-86.

<sup>66</sup> *Id.* at 493.

<sup>67</sup> See LBP-20-6, 91 NRC at 251 (citing Alvarez Decl. at 1).

ing when it denied all petitions to intervene.<sup>68</sup> The Board therefore considered whether the motion met the criteria for reopening a closed record found in 10 C.F.R. § 2.326; that is, the motion must (1) be timely, (2) address a significant safety or environmental issue, (3) demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially, and (4) be accompanied by affidavits that set forth the bases for the movant’s claim that each of the foregoing criteria have been satisfied.<sup>69</sup>

The Board found that Contention 30 did not meet the reopening standards because Sierra Club did not supply the necessary affidavit with its motion to admit the contention initially. Rather, Sierra Club submitted a motion and affidavit addressing the reopening criteria in May 2020, following our remand.<sup>70</sup> The Board stated that it did not interpret our remand as an invitation to Sierra Club to submit a motion to reopen that should have accompanied its motion to file Contention 30 in October 2019.<sup>71</sup> The Board further noted that the motion to reopen would fail because it was not timely.<sup>72</sup>

On appeal, Sierra Club argues that its failure to file a motion to reopen and accompanying affidavit with its original motion to admit Contention 30 could not be a bar to reopening, because otherwise we would not have bothered to remand the matter to the Board.<sup>73</sup> But we directed the Board to consider the reopening standards when we remanded the contention.<sup>74</sup> Moreover, the rules permit that even an untimely motion may be granted where it raises an “exceptionally grave” issue.<sup>75</sup> In remanding the motion to admit the contention despite the absence of a motion and affidavit addressing the reopening standards, we declined to pre-judge the issues. We therefore find no error in the Board’s ruling with respect to the reopening standards.

### III. CONCLUSION

For the foregoing reasons, we deny Sierra Club’s appeal of LBP-20-6.

---

<sup>68</sup> See CLI-20-4, 91 NRC at 193.

<sup>69</sup> See 10 C.F.R. § 2.326(a), (b).

<sup>70</sup> See Motion to Reopen.

<sup>71</sup> See LBP-20-6, 91 NRC at 249.

<sup>72</sup> *Id.* at 250.

<sup>73</sup> Sierra Club Appeal at 13.

<sup>74</sup> CLI-20-4, 91 NRC at 194.

<sup>75</sup> See 10 C.F.R. § 2.326(a)(1).

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 18th day of February 2021.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Christopher T. Hanson**, Chairman  
**Jeff Baran**  
**Annie Caputo**  
**David A. Wright**

**In the Matter of**

**Docket No. 50-341-LA**

**DTE ELECTRIC COMPANY**  
**(Fermi 2)**

**February 18, 2021**

**APPEALS**

The Commission's regulations allow a petitioner whose hearing request has been wholly denied to appeal as of right.

**APPELLATE REVIEW**

The Commission generally defers to the Board on questions pertaining to the sufficiency of factual support for the admission of a contention.

**NO SIGNIFICANT HAZARDS DETERMINATION**

The no significant hazards consideration determination is a procedural determination that can only be made by the NRC Staff or the Commission and cannot be challenged in an adjudicatory proceeding.

**NO SIGNIFICANT HAZARDS DETERMINATION**

The Board did not err in finding that a challenge to the NRC Staff's no significant hazards consideration determination was outside the scope of the license amendment proceeding.

## **APPEALS**

The purpose of an appeal is to point out errors made in the Board's decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board.

## **INTERVENTION**

The Commission has consistently interpreted section 189a. of the Atomic Energy Act of 1954 to require that a petitioner both show an interest in a proceeding and put forward concrete issues that are appropriate for adjudication. Therefore, a petitioner must show both that it has standing to intervene and that it has proposed at least one admissible contention.

## **MEMORANDUM AND ORDER**

Citizens' Resistance at Fermi 2 (CRAFT) has appealed the Atomic Safety and Licensing Board's decision denying its petition to intervene and request for hearing in this license amendment proceeding.<sup>1</sup> For the reasons described below, we affirm the Board's decision.

### **I. BACKGROUND**

This proceeding involves an application by DTE Electric Company (DTE) to amend the Fermi 2 license to eliminate a license condition requiring the removal of spent fuel storage racks containing Boraflex and allow for the installation of neutron-absorbing inserts into the Fermi 2 spent fuel pool.<sup>2</sup> Spent fuel in the Fermi 2 spent fuel pool is stored in two types of high-density storage racks using two different types of neutron-absorbing material, Boraflex and Boral.<sup>3</sup> Neutron-absorbing materials such as Boraflex and Boral serve an important safety function in maintaining subcriticality in spent fuel pools by absorbing more neutrons than are produced by the spent fuel, thereby maintaining the

---

<sup>1</sup> Notice of Appeal of LBP-20-07 by Petitioner Citizens' Resistance at Fermi 2 (CRAFT) And Brief in Support of Appeal (Aug. 3, 2020) (Appeal); *see* LBP-20-7, 92 NRC 1 (2020).

<sup>2</sup> *See* Letter from Paul Fessler, DTE Energy Co., to NRC Document Control Desk (Sept. 5, 2019), Encl. 1 at 3 (ADAMS accession no. ML19248C679) (LAR).

<sup>3</sup> *See* LAR, Encl. 1 at 3.

pool in a condition that does not allow for self-sustaining fission reactions.<sup>4</sup> But over time these neutron-absorbing materials can degrade, leading to a reduction in their neutron-absorbing capability.<sup>5</sup>

During the Fermi 2 license renewal process in 2014, DTE committed to eliminating its reliance on Boraflex for neutron absorption prior to the period of extended operation by removing the existing Boraflex racks and replacing them with Boral racks.<sup>6</sup> DTE noted that “[i]f, based on further analyses and subject to any necessary NRC approvals, DTE identifies an alternative to implementation of the rack replacement . . . that can be completed in a timely manner, this commitment will be revised accordingly.”<sup>7</sup> DTE’s commitment was memorialized in License Condition 2.C.(26)(c).<sup>8</sup>

In 2019, DTE submitted the license amendment request at issue in this proceeding. The license amendment proposes an alternative to the approach prescribed in License Condition 2.C.(26)(c). Instead of removing the racks containing Boraflex and replacing them with racks containing Boral, DTE proposes to leave the Boraflex in place and install neutron-absorbing inserts — NETCO SNAP-IN® rack inserts — into the existing Boraflex racks.<sup>9</sup> The NETCO SNAP-IN® rack inserts would fully replace the neutron absorption function performed by the Boraflex.<sup>10</sup> On the basis of this alternative approach, DTE seeks to modify the Fermi 2 license to eliminate License Condition 2.C.(26)(c).<sup>11</sup> DTE also seeks approval of a new criticality safety analysis and an associated revision of technical specification requirements based on the new criticality safety analysis.<sup>12</sup>

The NRC Staff published a notice of opportunity to request a hearing on

---

<sup>4</sup> See “Monitoring of Neutron-Absorbing Materials in Spent Fuel Pools,” NRC Generic Letter 2016-01 (Apr. 2016), at 2-3 (ML16097A169) (Generic Letter). Subcriticality is achieved when the “estimated ratio of neutron production to neutron absorption and leakage,” or *k*-effective, is less than 1.0. 10 C.F.R. § 50.68; see *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 252 n.4 (2000).

<sup>5</sup> See Generic Letter at 2-4 (describing operating experience relating to the effects of aging-related degradation on neutron-absorbing materials such as Boraflex).

<sup>6</sup> Letter from Vito A. Kaminskas, DTE Energy Co., to NRC Document Control Desk (Sept. 24, 2015), at 2 (ML15268A454).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> See Fermi 2 Renewed Facility Operating License No. NPF-43 (Dec. 15, 2016), at 8 (ML16270-A526).

<sup>9</sup> See LAR, Encl. 1 at 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

DTE's license amendment request in January 2020.<sup>13</sup> CRAFT filed a petition to intervene, proffering eight contentions.<sup>14</sup> DTE and the Staff opposed the petition to intervene on the grounds that CRAFT had not established standing and none of CRAFT's contentions were admissible.<sup>15</sup>

In LBP-20-7, the Board held that CRAFT's petition to intervene did not offer an admissible contention. Because it found that none of CRAFT's contentions were admissible, the Board did not make a determination on whether CRAFT had demonstrated standing.<sup>16</sup> CRAFT has filed the instant appeal, which DTE and the Staff oppose.<sup>17</sup>

## II. DISCUSSION

Our regulations allow a petitioner whose hearing request has been wholly denied to appeal as of right.<sup>18</sup> We generally defer to the Board on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion.<sup>19</sup> Likewise, we generally defer to the Board on questions pertaining to the sufficiency of factual support for the admission of a contention.<sup>20</sup>

CRAFT appeals the Board's denial of seven of its eight proffered contentions.<sup>21</sup> As explained below, CRAFT's appeal does not demonstrate Board error.

---

<sup>13</sup> Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information and Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information, 85 Fed. Reg. 728, 729-32 (Jan. 7, 2020).

<sup>14</sup> See Petition of Citizens' Resistance at Fermi 2 (CRAFT) for Leave to Intervene and for a Hearing on DTE's License Amendment Request to Invalidate a License Extension Condition by a License Amendment Request (Mar. 9, 2020), at 9-20 (Petition to Intervene).

<sup>15</sup> Applicant's Answer Opposing Petition for Leave to Intervene and Hearing Request Filed by Citizens' Resistance at Fermi 2 (CRAFT) (Apr. 3, 2020); NRC Staff's Answer Opposing CRAFT's Hearing Request (Apr. 3, 2020).

<sup>16</sup> See LBP-20-7, 92 NRC at 12.

<sup>17</sup> DTE Electric Company's Answer Opposing Citizens' Resistance at Fermi 2's (CRAFT's) Appeal of LBP-20-7 (Aug. 28, 2020) (DTE Answer to Appeal); NRC Staff's Brief in Opposition to CRAFT's Appeal of LBP-20-7 (Aug. 28, 2020).

<sup>18</sup> 10 C.F.R. § 2.311(c).

<sup>19</sup> See, e.g., *Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC 167, 173 (2020); *Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-17-5, 85 NRC 87, 91 (2017).

<sup>20</sup> *Holtec International*, CLI-20-4, 91 NRC at 173.

<sup>21</sup> See Appeal at 12-16.



## A. CRAFT's Contentions

In several of its contentions, CRAFT objected to the Staff's no significant hazards consideration determination on DTE's license amendment request.<sup>22</sup> As the Board observed, however, this determination is a procedural one that "can only be made by the NRC Staff or the Commission" and cannot be challenged in an adjudicatory proceeding.<sup>23</sup> Accordingly, the Board did not err in finding that CRAFT's challenges to the Staff's no significant hazards consideration determination are not admissible in this proceeding.<sup>24</sup> Further, as explained below, we find that CRAFT has not demonstrated the Board committed an error of law or abuse of discretion in denying admission of its seven appealed contentions.

### 1. Contention 1

In Contention 1, CRAFT argued that there is the "potential for a significant increase in the probability or consequences of an accident previously evaluated" if the license amendment request is granted.<sup>25</sup> The Board found that, to the extent CRAFT intended this argument as a challenge to the Staff's no significant hazards consideration determination — specifically, the Staff's determination that the proposed license amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated and would not create the possibility of a new or different kind of accident — it was beyond the scope of the proceeding.<sup>26</sup> CRAFT also argued that because License Condition 2.C.(26)(c)<sup>27</sup> calls for the removal and replacement of Boraflex material in the

---

<sup>22</sup> See, e.g., Petition to Intervene at 9-10, 13, 17; Citizens' Resistance at Fermi 2 (CRAFT) Combined Reply to NRC Staff Answer Opposing CRAFT's Leave to Intervene and Request for a Hearing and Applicant's Answer Opposing Petition for Leave to Intervene and Hearing Request Filed by Citizens' Resistance at Fermi 2 (CRAFT) (Apr. 10, 2020), at 20 (Reply); Tr. at 14.

<sup>23</sup> LBP-20-7, 92 NRC at 13 (quoting *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 844 (1987)); see also 10 C.F.R. § 50.58(b)(6); Memorandum from Annette L. Vietti-Cook, Office of the Secretary, to E. Roy Hawken, Chief Administrative Judge, Atomic Safety and Licensing Board Panel (Mar. 18, 2020).

<sup>24</sup> See LBP-20-7, 92 NRC at 15, 17-18, 20 (dismissing Contentions 1, 3, and 7 as impermissible challenges to Staff's no significant hazards consideration determination).

<sup>25</sup> Petition to Intervene at 9.

<sup>26</sup> LBP-20-7, 92 NRC at 15-16.

<sup>27</sup> CRAFT referred in Contention 1 and other contentions to "License Condition No. 3," which the Board interpreted as a mistaken reference to License Condition 2.C.(26)(c), the license renewal condition that calls for the Boraflex rack replacement. See LBP-20-7, 92 NRC at 15 n.73. In its appeal, CRAFT has amended its references to "License Condition No. 3" to refer to "License Condition 2.C.(26)(c)," signaling its apparent agreement with the Board's interpretation. See Appeal at 5, 6, 13. Therefore, for the sake of clarity, we refer to License Condition 2.C.(26)(c) in place of the original references to "License Condition No. 3" in CRAFT's Petition and other pleadings.

spent fuel pool, by not physically removing the Boraflex from the pool, DTE would be out of compliance with its license.<sup>28</sup> Observing that the Atomic Energy Act of 1954, as amended (AEA), explicitly authorizes the NRC to amend operating licenses, the Board found this argument, an apparent challenge to the AEA and NRC’s regulations, also beyond the scope of the proceeding.<sup>29</sup> More broadly, the Board found that Contention 1 was not supported by an adequate factual basis and did not show a genuine dispute with DTE’s application.<sup>30</sup>

In its appeal, CRAFT does not address the Board’s reasoning in dismissing Contention 1. Instead, CRAFT largely repeats and expands upon the arguments raised in its petition to intervene. For example, CRAFT reasserts that DTE will be out of compliance with License Condition 2.C.(26)(c) if it does not physically remove the “degraded” Boraflex from the spent fuel pool.<sup>31</sup> But CRAFT then acknowledges that, should the license amendment be granted, DTE would no longer have to satisfy this requirement.<sup>32</sup> CRAFT also asserts that DTE and the NRC have not considered “all failure modes for Boraflex degradation that could lead to a spent fuel fire and potential for failure” when spent fuel is transferred to dry cask storage, as well as “aging and failure modes that alter regular movement of fuel rods and cooling . . . includ[ing] cracking, embrittlement, swelling, structural failures[,] and chemical reactions.”<sup>33</sup> CRAFT states, “Boraflex panels are known for degrading and shedding silica into [spent fuel pool] water from gaps and localized washout of Boron.”<sup>34</sup>

CRAFT does not explain how these arguments, which appear to expand upon concerns about Boraflex degradation raised by CRAFT in several places in its petition to intervene, demonstrate Board error in dismissing Contention 1.<sup>35</sup> To the extent CRAFT suggests that the Board failed to address the “inadequacy of analysis” of possible impacts from Boraflex degradation, we note that the Board considered this concern in connection with Contention 2 and found it inadmissible because CRAFT had not supported its claim that leaving Boraflex in place

---

<sup>28</sup> Petition to Intervene at 9-10.

<sup>29</sup> CRAFT did not seek a waiver to challenge the NRC’s regulations governing the license amendment process. LBP-20-7, 92 NRC at 16. *See Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-20-1, 91 NRC at 79, 93 (2020) (“Our rules of procedure do not permit parties to challenge NRC regulations during adjudicatory proceedings absent a waiver . . .”).

<sup>30</sup> LBP-20-7, 92 NRC at 16.

<sup>31</sup> Appeal at 13.

<sup>32</sup> *Id.*

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

<sup>34</sup> *Id.*

<sup>35</sup> For example, CRAFT raises concerns in its petition to intervene about “cumulative longitudinal degradation” and “corrosion and degradation” in its restatement of Contention 1 and under Contentions 2, 4, and 5. *See* Petition to Intervene at 10, 13, 14-15; *see also* Reply at 5, 20 (addressing similar concerns in connection with Contentions 1, 2, 4, 5, and 6).

would cause the impacts CRAFT stated could occur.<sup>36</sup> In its appeal, CRAFT refers for the first time to two reports concerning surveillance methodologies for identifying Boraflex degradation.<sup>37</sup> These reports cannot supply the factual support found lacking by the Board. The purpose of an appeal “is to point out errors made in the Board’s decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board.”<sup>38</sup> CRAFT has not pointed to any errors in the Board’s ruling on Contention 1.

## 2. Contention 2

CRAFT argued in Contention 2 that allowing DTE to leave Boraflex in place in the Fermi 2 spent fuel pool would cause “corrosion [that] leads to degradation and can result in unanticipated consequences and unaccounted for debris.”<sup>39</sup> CRAFT asserted that this corrosion must be and has not been examined and considered as a potential problem in connection with the eventual loading of the spent fuel at Fermi 2 into dry cask storage.<sup>40</sup> In support of its contention, CRAFT pointed to examples of problems licensees at other facilities had with the use of Boraflex as a neutron-absorbing material.<sup>41</sup>

The Board dismissed Contention 2 because CRAFT did not provide evidence for its claim that leaving the Boraflex racks in place could lead to corrosion and debris in the Fermi 2 spent fuel pool and CRAFT did not specify the hazards that it expected would result from such debris.<sup>42</sup> The Board found that the premise of Contention 2 that “[t]here have been problems at other U.S. nuclear power plants revolving around Boraflex” did not establish the existence of a material dispute with the application because it was, in fact, the reason why the NRC required that DTE replace the Fermi 2 Boraflex racks as a condition of license renewal and why DTE now seeks to install NETCO SNAP-IN® racks.<sup>43</sup>

On appeal, CRAFT does not challenge the Board’s determination that its contention did not satisfy our admissibility standards. Instead, CRAFT reframes

---

<sup>36</sup> See LBP-20-7, 92 NRC at 16.

<sup>37</sup> See Appeal at 13 (discussing NRC reports “Boraflex, RACKLIFE, and BADGER: Description and Uncertainties” (Sept. 2012) (ML12216A307) and “Initial Assessment of Uncertainties Associated with BADGER Methodology” (Sept. 2012) (ML12254A064)).

<sup>38</sup> *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 504 (2007) (quoting *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006)).

<sup>39</sup> Petition to Intervene at 10.

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* at 10-11; Reply at 20-21.

<sup>42</sup> See LBP-20-7, 92 NRC at 17.

<sup>43</sup> See *id.* at 17 (quoting Petition to Intervene at 10).

its original claim, stating that the Board did not adequately analyze the potential of corrosion to cause degradation of the Boraflex material or the consequences of “unaccounted debris” in the spent fuel pool. For the first time, CRAFT argues that “[a]ddressing all failure modes must be a part of the examination before moving forward.”<sup>44</sup> CRAFT also asserts that the Board “must acknowledge the potential for a spent fuel pool fire if [the] pool cannot be kept sub-critical.”<sup>45</sup> The role of the Board, however, is to determine whether CRAFT has submitted an admissible contention.<sup>46</sup>

CRAFT’s claim that the continued presence of Boraflex will lead to a fire in the Fermi 2 spent fuel pool and its claim that “all failure modes” must be examined in association with the transfer of spent fuel to dry cask storage do not demonstrate Board error.<sup>47</sup> Moreover, CRAFT’s references to several NRC information notices and a generic letter are identified for the first time in CRAFT’s appeal and therefore cannot remedy correct the deficiency in factual support identified by the Board.<sup>48</sup> In sum, CRAFT has not shown that the Board erred in dismissing Contention 2.

### 3. *Contention 3*

In Contention 3, CRAFT claimed that “the credit for Boraflex as a neutron absorbing material as required by [License Condition 2.C.(26)(c)], the effective neutron multiplication factor, k-effective, is less than or equal to 0.95, if the spent fuel pool . . . is fully flooded with unborated water does not leave conservative margin to stay subcritical.”<sup>49</sup> CRAFT stated that with “DTE propos[ing] to play on the margin to stay subcritical with less than or equal to 0.95 being subcritical and measurement of 1.00 being supercritical,” such an approach is

---

<sup>44</sup> Appeal at 13-14.

<sup>45</sup> *Id.* at 14.

<sup>46</sup> See 10 C.F.R. § 2.309(f)(1)(v), (vi).

<sup>47</sup> See *Shieldalloy*, CLI-07-20, 65 NRC at 504.

<sup>48</sup> See Appeal at 14 (citing NRC Information Notices 87-43, 97-70, 98-38, and [20]12-13, and NRC Generic Letter 96-04). However, NRC Information Notices 97-70 and 98-38 do not address Boraflex or neutron-absorbing materials and appear to be concerned with entirely different topics. See, e.g., “Potential Problems with Fire Barrier Penetration Seals,” NRC Information Notice 97-70 (Sept. 1997), <https://www.nrc.gov/reading-rm/doc-collections/gen-comm/info-notices/1997/in97070.html>; “Metal-Clad Circuit Breaker Maintenance Issues Identified by NRC Inspections,” NRC Information Notice 98-38 (Oct. 1998), <https://www.nrc.gov/reading-rm/doc-collections/gen-comm/info-notices/1998/in98038.html>.

<sup>49</sup> Petition to Intervene at 11, 14.

not conservative.<sup>50</sup> CRAFT concluded that “the proposed change does involve a significant reduction in a margin of safety and should not be allowed.”<sup>51</sup>

The Board ruled that, to the extent that CRAFT intended to challenge the criticality analysis in DTE’s application for taking credit for Boraflex as a neutron absorber, Contention 3 did not raise an admissible issue.<sup>52</sup> The Board noted that DTE’s requested license amendment proposes the reverse — to substitute the neutron-absorbing function of Boraflex with inserts that would provide adequate neutron-absorbing capability on their own.<sup>53</sup> In addition, the Board found inadmissible CRAFT’s arguments that the method described in DTE’s application is insufficiently conservative for ensuring subcriticality (i.e., k-effective less than or equal to 0.95).<sup>54</sup> The Board noted that this method is prescribed by NRC regulation, and CRAFT did not seek a waiver to allow it to challenge this regulation.<sup>55</sup>

On appeal, CRAFT reasserts its argument that the Fermi 2 spent fuel pool does not have a conservative margin for subcriticality and contends that the Board did not acknowledge this concern.<sup>56</sup> CRAFT specifies that its concern stems from an “incomplete assumption” in DTE’s analysis “that says the [spent fuel pool] reactivity is prevented by Boral” because DTE has not modeled the “‘as-built design’ of the current [spent fuel pool].”<sup>57</sup> But CRAFT does not explain why such modeling is required or provide support for this claim. Moreover, CRAFT does not challenge the Board’s characterization of its contention or the reasons for the Board’s determination on its admissibility. Further, CRAFT states that it “agree[s] with NRC margins of safety.”<sup>58</sup> Accordingly, CRAFT has not shown that the Board erred in dismissing Contention 3.

#### **4. Contention 4**

CRAFT claimed in Contention 4 that “the more prudent course of action to ensure subcriticality in the spent fuel pool is to remove spent fuel from the

---

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 14.

<sup>52</sup> LBP-20-7, 92 NRC at 17.

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

<sup>54</sup> *Id.* at 17-18.

<sup>55</sup> *Id.* at 17 (finding that CRAFT violated 10 C.F.R. § 2.335(a) for challenging an NRC regulation without seeking a waiver). *See* 10 C.F.R. § 50.68(b) (prescribing that “the k-effective of the spent fuel storage racks loaded with fuel of the maximum fuel assembly reactivity must not exceed 0.95” if flooded with unborated water).

<sup>56</sup> Appeal at 14.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 14-15.

pool and reduce the density” of the pool.<sup>59</sup> The Board found these issues to be beyond the scope of the license amendment proceeding.<sup>60</sup> The Board also found that the issues raised in Contention 4 were not material to the NRC’s review of DTE’s application, were unsupported by an adequate factual basis, and did not articulate a genuine dispute with the application.<sup>61</sup>

On appeal, CRAFT does not discuss the Board’s reasoning or show that the Board erred in dismissing Contention 4. Instead, CRAFT presses its argument that the Board must admit Contention 4 because “more prudent methods” of spent fuel storage in the form of dry cask storage “are available . . . and have been considered an option before.”<sup>62</sup> Although CRAFT disagrees with the Board’s determination that Contention 4 is inadmissible, it has not demonstrated that the Board erred in reaching this conclusion.

### 5. *Contention 5*

In Contention 5, CRAFT expressed concerns about the lack of an analysis of “loading complications for the lifting of 125 tons” from the transfer of spent fuel due to damaged Boraflex racks “adher[ing] to the fuel assemblies” and claimed that there are historical concerns about the rating of the spent fuel crane due to missing welds.<sup>63</sup> CRAFT also repeated the arguments raised in Contention 2 that DTE would be out of compliance with its license by not physically removing the Boraflex material and that “[c]umulative longitudinal degradation to the spent fuel has not been evaluated for corrosion and degradation which could lead to failure in the spent fuel pool and potential for failure when transferred” to dry cask storage.<sup>64</sup> The Board dismissed Contention 5, finding it raised issues outside the scope of the proceeding, was not material to the NRC’s review of the license amendment request, was not supported by an adequate factual basis, and did not raise a genuine dispute with the license amendment application.<sup>65</sup>

In its appeal, CRAFT reiterates its concerns that the Fermi 2 spent fuel crane is unsafe for the purpose of transferring spent fuel from the Fermi 2 spent fuel pool, but CRAFT does not address the Board’s ruling that the safety profile of the spent fuel crane is not an issue that falls within the scope of this license amendment proceeding.<sup>66</sup> CRAFT also does not address the Board’s finding

---

<sup>59</sup> Petition to Intervene at 11.

<sup>60</sup> LBP-20-7, 92 NRC at 18.

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

<sup>62</sup> Appeal at 15.

<sup>63</sup> Petition to Intervene at 14-15.

<sup>64</sup> *Id.* at 14.

<sup>65</sup> LBP-20-7, 92 NRC at 19.

<sup>66</sup> *See* Appeal at 15-16.

that CRAFT failed to provide any factual support for its concern that damaged Boraflex racks can adhere to fuel assemblies and cause complications for the safe transfer of spent fuel out of the spent fuel pool.<sup>67</sup> Therefore, we find no error in the Board’s determination that these arguments are inadmissible. Likewise, for the reasons explained above, we find no error in the Board’s conclusion that CRAFT’s concerns about Boraflex degradation and DTE’s compliance with License Condition 2.C.(26)(c) do not support admission of this contention.

## 6. *Contention 6*

CRAFT claimed in Contention 6 that a “Fermi 2 specific analysis on the spent fuel pool at Fermi 2 as currently loaded” must be performed before DTE’s license amendment request is considered.<sup>68</sup> The Board dismissed Contention 6 for not satisfying the contention admissibility criteria, including that the contention raise issues within the scope of the proceeding.<sup>69</sup>

On appeal, CRAFT argues that the Board’s ruling ignored its call for an analysis of the Fermi 2 spent fuel pool “as it is currently overloaded with more than twice as was designed (4608 assemblies instead of 2300 fuel assemblies).”<sup>70</sup> CRAFT claims that it has raised concerns that the NRC has accepted calculations from DTE “that do not reflect the current actual spent fuel pool.”<sup>71</sup> CRAFT does not, however, explain how these concerns fall within the scope of DTE’s license amendment request. If CRAFT’s reference to “DTE calculations” is intended as a challenge to DTE’s revised criticality safety analysis, CRAFT has not provided factual support for its claim that these calculations are inaccurate.<sup>72</sup> Therefore, we find no basis for overturning the Board’s ruling on Contention 6.

## 7. *Contention 7*

In Contention 7, CRAFT argued that “the proposed use of Global Nuclear Fuel-3 [GNF3], an experimental, higher enriched and longer burn-up fuel,” has

---

<sup>67</sup> See LBP-20-7, 92 NRC at 19.

<sup>68</sup> Petition to Intervene at 16.

<sup>69</sup> See LBP-20-7, 92 NRC at 19-20.

<sup>70</sup> Appeal at 16.

<sup>71</sup> *Id.*

<sup>72</sup> See *id.* CRAFT appears to misunderstand both the design capacity of the Fermi 2 spent fuel pool and its physical capacity under the current rack configuration (which the LAR does not seek to change). See LAR, Encl. 1 at 3, 7 (stating that current physical capacity of the spent fuel pool is 3590 fuel assemblies); DTE Answer to Appeal at 21 & nn.112-13 (noting that the spent fuel pool is designed with a storage capacity limited to no more than 4608 fuel assemblies (citing Fermi 2 Renewed Facility Operating License No. NPF-43, Technical Specification 4.3.3)).

not been adequately evaluated as it pertains to the method for ensuring sub-criticality in the spent fuel pool and sought the “accelerated removal of highly irradiated spent fuel from the spent fuel pool at Fermi 2.”<sup>73</sup> The Board dismissed Contention 7 because CRAFT had not demonstrated how the potential use of that fuel bore any relationship to DTE’s license amendment request.<sup>74</sup> CRAFT’s appeal does not provide a basis for disturbing the Board’s decision. CRAFT does not challenge the Board’s rationale for rejecting its contention, but instead argues that “[t]he NRC has not gone through [a] proper Petition for Rule Change on the use of Higher Burnup fuel” and that the use of such fuel will result in its placement in the spent fuel pool without performing validation and verification of its impact on criticality.<sup>75</sup> Neither the NRC’s approval of GNF3 fuel nor its use at Fermi 2 is the subject of the instant license amendment proceeding. Accordingly, we affirm the Board’s determination that this contention is inadmissible.

In sum, we find that the Board considered the record and reasonably determined that CRAFT’s Contentions 1 through 7 did not meet our contention admissibility standards. We find no error of law or abuse of discretion and defer to the Board’s judgment on the inadmissibility of these contentions.<sup>76</sup>

## **B. CRAFT’s Standing**

The Board declined to rule on whether CRAFT had established standing because it found that CRAFT had not proposed an admissible contention.<sup>77</sup> CRAFT argues on appeal that the Board erred in declining to make this determination.<sup>78</sup> Specifically, CRAFT argues that the Board “conflated standing and a subtle merits determination to reach the anomalous conclusion that because CRAFT had no admissible contentions, it was ‘unnecessary’ to rule on standing.”<sup>79</sup> By declining to rule on its standing, CRAFT asserts, the Board “denied CRAFT due

---

<sup>73</sup> Petition to Intervene at 16-17.

<sup>74</sup> LBP-20-7, 92 NRC at 20. The Board also found inadmissible CRAFT’s statements under the heading of Contention 7 that CRAFT “does not agree with the NRC staff analysis that the three standards of 10 C.F.R. § 50.92(c) are satisfied” and “does not accept NRC staff determination [of no] significant hazards consideration.” As explained above, the Board correctly found that CRAFT’s challenges to these findings are not justiciable in an adjudicatory proceeding such as this one. *See* 10 C.F.R. § 50.58(b)(6).

<sup>75</sup> Appeal at 16-17.

<sup>76</sup> Because CRAFT did not appeal the Board’s ruling on Contention 8, we make no determination on whether the Board erred in dismissing that contention.

<sup>77</sup> *See* LBP-20-7, 92 NRC at 12.

<sup>78</sup> Appeal at 9-12.

<sup>79</sup> *Id.*



process under the AEA and the Fifth Amendment.”<sup>80</sup> In addition, CRAFT argues that it has established representational standing to participate in this proceeding on behalf of its members, several of whom reside within fifty miles and two of whom reside within five miles of Fermi 2.<sup>81</sup>

The Commission has consistently interpreted section 189a. of the AEA to require that a petitioner both show an interest in a proceeding and put forward concrete issues that are appropriate for adjudication.<sup>82</sup> Therefore, our rules for intervention state that a petitioner must show both that it has standing to intervene and that it has proposed at least one admissible contention.<sup>83</sup> As explained above, the Board correctly found that CRAFT’s Contentions 1 through 7 were not admissible. The Board also declined to admit CRAFT’s Contention 8, a ruling that CRAFT has not challenged.<sup>84</sup> The Board’s finding that CRAFT did not propose at least one admissible contention was not, as CRAFT suggests, a *de facto* finding that CRAFT had not established standing or an improper conflation of CRAFT’s standing and the merits of the case.<sup>85</sup> On the contrary, the Board carefully considered the information CRAFT provided in support of its claim of standing in light of relevant caselaw. In a separate analysis, the Board considered whether CRAFT’s contentions met our requirements for admissibility and determined they did not, a determination which we uphold today. Accordingly, we do not find that the Board committed an error of law or abuse of discretion in declining to decide whether CRAFT had established standing. Further, because we uphold the Board’s ruling on the admissibility of CRAFT’s contentions, we likewise need not reach the question of whether CRAFT has established standing to participate in this proceeding.

---

<sup>80</sup> *Id.* at 11-12; *see* AEA § 189a., 42 U.S.C. § 2239(a) (“[T]he Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding . . .”).

<sup>81</sup> Appeal at 7-8 (citing Petition to Intervene, Encl., Decl. of Hedwig Kaufman (Mar. 7, 2020); *id.*, Encl., Decl. of Martin Kaufman (Mar. 7, 2020).

<sup>82</sup> *See, e.g., Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 191-92 (1973), *aff’d*, CLI-73-12, 6 AEC 241, 241-42 (1973); Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) (“[T]he right to intervention under section 189a for a member of the public is explicitly conditioned upon a ‘request’ that properly ‘shall include a statement of the facts supporting each contention together with references to the sources and documents on which the intervenor relies to establish those facts.’”); *cf. Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), ALAB-208, 7 AEC 959, 964-65 (1974) (rejecting argument that petitioners had statutory entitlement to intervene under AEA section 189a. upon establishing nothing more than their standing).

<sup>83</sup> *See* 10 C.F.R. § 2.309(a).

<sup>84</sup> *See* LBP-20-7, 92 NRC at 21; *see generally* CRAFT Appeal. An argument made before the Board but not “reiterate[d] or explain[ed]” on appeal is considered abandoned. *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001).

<sup>85</sup> *See* Appeal at 10-12.

### III. CONCLUSION

For the foregoing reasons, we *affirm* the Board's decision in LBP-20-7.  
IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 18th day of February 2021.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Christopher T. Hanson**, Chairman  
**Jeff Baran**  
**Annie Caputo**  
**David A. Wright**

**In the Matter of**

**Docket No. 52-025-LA-3**

**SOUTHERN NUCLEAR OPERATING  
COMPANY, INC.  
(Vogtle Electric Generating Plant,  
Unit 3)**

**March 15, 2021**

**MOTION TO REOPEN**

A motion to reopen will be granted only if it is timely filed, addresses a significant safety or environmental issue, and demonstrates that a materially different result would have been likely had the new information been considered initially.

**CONTENTIONS, ADMISSIBILITY**

New or amended contentions set forth in a motion to reopen must also meet contention admissibility requirements; however, the evidentiary support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements.

**MEMORANDUM AND ORDER**

Today we address a motion by the Blue Ridge Environmental Defense League and its chapter Concerned Citizens of Shell Bluff (BREDL) to reopen the pro-

ceeding on the application of Southern Nuclear Operating Company, Inc. (SNC) for an amendment to the Vogtle Electric Generating Plant Unit 3 (Vogtle Unit 3) combined license.<sup>1</sup> Both SNC and the NRC Staff oppose the motion.<sup>2</sup> For the reasons set forth below, we deny the motion.

## I. BACKGROUND

On February 7, 2020, SNC applied for an amendment to its license for Vogtle Unit 3, a Westinghouse Electric Company Advanced Passive 1000 (AP1000) reactor and requested an exemption from regulations governing the AP1000 design.<sup>3</sup> SNC proposed to change a requirement that the Vogtle Unit 3 auxiliary and annex buildings be constructed with a three-inch minimum seismic gap between them.<sup>4</sup> As built, the two buildings are closer together than three inches over a limited area.<sup>5</sup> Specifically, a variation in a thirteen-foot section of the auxiliary building wall leaves a minimum gap of 2-3/16 inches between the auxiliary building and the annex building. SNC performed a technical evaluation and determined that the smaller gap would still ensure the two buildings do not interact during an earthquake and would thus satisfy the same safety function as a three-inch gap.<sup>6</sup> After completing its review of SNC's technical evaluation, the Staff approved SNC's amendment request on August 4, 2020.<sup>7</sup>

BREDL requested a hearing on SNC's application and proposed two contentions.<sup>8</sup> The Board found BREDL had standing to intervene but that both

---

<sup>1</sup> Motion to Reopen Proceeding and Request to Amend Contention by the Blue Ridge Environmental Defense League and its Chapter Concerned Citizens of Shell Bluff Regarding Southern Nuclear Operating Company's Request for a License Amendment and Exemption for Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements, LAR-20-001 (Dec. 7, 2020) (BREDL Motion).

<sup>2</sup> Southern Nuclear Operating Company's Answer Opposing BREDL's Motion to Reopen the Record and Request to Amend Contention (Dec. 17, 2020) (SNC Answer); Staff Answer Opposing Motion to Reopen and Amended Contention (Dec. 17, 2020) (Staff Answer).

<sup>3</sup> See Letter from Brian H. Whitley, SNC, to NRC Document Control Desk (Feb. 7, 2020), Encl. 1 (Application), Encl. 2 (ADAMS accession no. ML20038A939).

<sup>4</sup> Application at 4-5.

<sup>5</sup> *Id.* at 3-4.

<sup>6</sup> *Id.* at 6-9.

<sup>7</sup> See Letter from Cayetano Santos, NRC, to Brian H. Whitley, SNC (Aug. 4, 2020) (ML20132-A032 (package)).

<sup>8</sup> Petition for Leave to Intervene and Request for Hearing by the Blue Ridge Environmental Defense League and its Chapter Concerned Citizens of Shell Bluff Regarding Southern Nuclear Operating Company's Request for a License Amendment and Exemption for Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements, LAR-20-001 (May 11, 2020) (BREDL Petition).

of its proposed contentions were inadmissible.<sup>9</sup> Accordingly, the Board denied BREDL's hearing request and terminated the adjudicatory proceeding.<sup>10</sup>

On appeal, BREDL challenged the Board's finding that proposed Contention 2 was inadmissible.<sup>11</sup> BREDL asserted in Contention 2 that the foundation of the nuclear island — a concrete basemat upon which the containment, shield building, and auxiliary building are constructed — is settling and may have caused the reduction of the required three-inch seismic gap between the auxiliary and annex buildings.<sup>12</sup> BREDL called for a halt to construction at Vogtle Unit 3 until the effects of settlement on other structures could be fully investigated.<sup>13</sup> The Board found proposed Contention 2 inadmissible because it raised issues outside the scope of the proceeding, did not raise a genuine dispute with the license amendment application, and was not supported by specific facts or expert opinion.<sup>14</sup> We affirmed the Board's decision.<sup>15</sup>

In our decision affirming the Board, we noted that BREDL had also filed a motion to reopen the proceeding with an amended Contention 2, which we would address separately.<sup>16</sup> Although we often refer such motions to the Board, we will rule on them where we consider it appropriate.<sup>17</sup> Due to the similarity between the amended Contention 2 set forth in BREDL's motion to reopen and those previously found inadmissible, we find referral to the Board unnecessary, and we deny the motion for the reasons explained below.

## II. DISCUSSION

### A. Legal Standards for Reopening

A motion to reopen will be granted only if it is timely filed, addresses a significant safety or environmental issue, and demonstrates that a materially different result would have been likely had the new information been considered

---

<sup>9</sup> LBP-20-8, 92 NRC 23, 42-45, 47-52 (2020).

<sup>10</sup> *Id.* at 53.

<sup>11</sup> *See* Blue Ridge Environmental Defense League's Notice of Appeal and Brief in Support of Appeal from the Atomic Safety and Licensing Board Decision Denying Admissibility of Contentions in License Amendment Proceeding (Sept. 4, 2020).

<sup>12</sup> *See* BREDL Petition at 13-15.

<sup>13</sup> *Id.* at 12-13.

<sup>14</sup> LBP-20-8, 92 NRC at 50-51.

<sup>15</sup> CLI-20-18, 92 NRC 530, 531 (2020).

<sup>16</sup> *Id.* at 531 n.1.

<sup>17</sup> *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 23-24 (2006).

initially.<sup>18</sup> In addition, the motion must be accompanied by an affidavit given by “competent individuals with knowledge of the facts alleged or by experts in the disciplines appropriate to the issues raised,” which sets forth the factual and/or technical bases for the claim that these criteria have been met.<sup>19</sup> New or amended contentions set forth in a motion to reopen must also meet our contention admissibility requirements; however, the evidentiary support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements.<sup>20</sup>

## B. Motion to Reopen

BREDL’s motion to reopen sets forth an amended Contention 2, which asserts that the seismic gap between the auxiliary and annex buildings has narrowed “due to the unanticipated and unmeasured sinking of the Vogtle Unit 3 foundation” and that the reduction in the seismic gap cannot be characterized as a “static dimension change” or “simple construction error.”<sup>21</sup> The Board previously found virtually identical assertions inadmissible because they were unsupported by specific facts and therefore did not raise a genuine dispute with the evaluation of foundation settlement contained in SNC’s application.<sup>22</sup> However, BREDL argues it now has new information obtained through a Freedom of Information Act (FOIA) request, showing an “exceptionally grave issue” regarding the ability of Vogtle Unit 3 to withstand an earthquake.<sup>23</sup>

---

<sup>18</sup> 10 C.F.R. § 2.326(a).

<sup>19</sup> *Id.* § 2.326(b).

<sup>20</sup> *See id.* §§ 2.309(c), (f), 2.326(d); *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-17-7, 85 NRC 111, 116 (2017).

<sup>21</sup> BREDL Motion at 11; *see also id.* at 18.

<sup>22</sup> LBP-20-8, 92 NRC at 50-51. The Board’s decision, which we previously affirmed, also found Contention 2 inadmissible because it raised issues outside the scope of the proceeding. *Id.* at 52; *see also* CLI-20-18, 92 NRC at 533-34, 536.

<sup>23</sup> BREDL Motion at 3, 11-14. *See* FOIA NRC-2020-000234, Interim Response Form 464 (Sept. 22, 2020); FOIA NRC-2020-000234, Interim Response Records (Sept. 22, 2020) (ML20272-A119 (package)); FOIA NRC-2020-000234, Final Response Form 464 (Nov. 6, 2020); FOIA NRC-2020-000234, Final Response Records (Nov. 6, 2020) (ML20315A080 (package)). BREDL’s motion and accompanying declaration make several claims about the Staff’s response to its FOIA request. *See, e.g.*, BREDL Motion at 10, 19-20 (stating that the Staff has not provided information located in the Westinghouse electronic reading room); Declaration of Arnold Gundersen to Support the Motion to Reopen Proceeding and Request to Amend Contention by the Blue Ridge Environmental Defense League and its Chapter Concerned Citizens of Shell Bluff Regarding Southern Nuclear Operating Company’s Request for a License Amendment and Exemption for Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements, LAR-20-001 (Dec. 7, 2020), ¶¶ 10.3, 10.6 (Gundersen Declaration) (questioning the Staff’s FOIA timeliness and redactions). To the extent

(Continued)

Specifically, BREDL cites information from an internal briefing paper dated April 23, 2020, prepared by the Staff. This internal briefing paper includes statements by the Staff that the seismic gap between the auxiliary and annex buildings is “small” and “can reduce further due to settlement,” that “[t]here is no settlement data between these two structures,” and that “the predicted settlement is significantly different [than] what has been observed.”<sup>24</sup> BREDL argues that these and other statements in the document are evidence that “supports and amplifies” BREDL’s previously rejected contentions, which also questioned the ability of Vogtle Unit 3 to withstand an earthquake and more broadly asserted that the site and the reactor are unsafe.<sup>25</sup> BREDL argues that had the Staff provided the Board these preliminary views, the Board would have found SNC’s application deficient “due to the lack of data, an incomplete application, or a lack of substantial analyses” regarding foundation settlement and would have admitted Contention 2 for evidentiary hearings.<sup>26</sup>

However, the referenced Staff statements are not final positions, rather, they

---

that BREDL seeks to challenge the Staff’s response to BREDL’s FOIA request, such challenges are outside the scope of this proceeding and inadmissible. Challenges to the Staff’s response to a FOIA request are governed under a separate appeal process. *See* 10 C.F.R. § 9.29.

<sup>24</sup> FOIA NRC-2020-000234, Final Response Records at 1.

<sup>25</sup> BREDL Motion at 3, 13, 19; Gundersen Declaration ¶¶ 10, 29.

<sup>26</sup> BREDL Motion at 3, 12. BREDL’s pleadings in this case contain various assertions of impropriety by the Staff. For example, BREDL claims that the new information it obtained through FOIA shows that the Staff knew of information supporting Contention 2 but did not provide it during a pre-hearing conference before the Board on contention admissibility. *Id.* at 11-12. BREDL also claims that our regulations at 10 C.F.R. § 13.34(h) required the Staff to make the April 23, 2020, briefing paper available to BREDL. *Id.* at 10, 20. However, the regulation BREDL cites is inapplicable to a licensing proceeding. BREDL was not entitled to discovery of predecisional Staff documents to support contention preparation. *See Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 416 (2007)*. Accordingly, BREDL has not shown impropriety on this basis.

BREDL also claims that the Staff and SNC made assertions to the Board that are disproven by documents BREDL received in response to its FOIA request. BREDL Motion at 19. BREDL does not specify which assertions have been disproven or provide citations to pages where the FOIA documents contradict positions asserted before the Board, however. To the extent BREDL considers the Staff’s internal briefing paper to justify BREDL’s claim, we note that the Staff resolved the preliminary issues set forth in that paper before the Board received pleadings or heard arguments on contention admissibility.

Finally, after the Staff and SNC answered BREDL’s motion to reopen, BREDL filed a reply that raises previously investigated claims of impropriety by the Staff in matters predating and unrelated to this proceeding. *See Reply of the Blue Ridge Environmental Defense League and its Chapter Concerned Citizens of Shell Bluff to Answers of NRC Staff and Southern Nuclear Operating Company to Motion to Reopen LAR 20-001 (Dec. 28, 2020)*, at 3. Because our rules provide BREDL no right of reply, and because the investigation BREDL cites is unrelated to this proceeding, we do not consider BREDL’s reply further. *See* 10 C.F.R. § 2.323(c).

reflect preliminary issues that the Staff identified and ultimately resolved during its safety review.<sup>27</sup> The Staff identified these issues after a preliminary review of documents and data that SNC made available to the Staff through an electronic reading room maintained by Westinghouse. The Staff planned to audit information in the electronic reading room and found that “important figures were illegible, certain data was not available in a useful format for audit purposes, and certain information required clarification from SNC.”<sup>28</sup> The Staff addressed these issues by reviewing additional information in the electronic reading room and holding three teleconferences with SNC and Westinghouse to better understand the data presented.<sup>29</sup> As a result, by the time BREDL filed its hearing request and well before the Board heard arguments on contention admissibility, the Staff had “completely resolved” and no longer held the preliminary views described in the April 23, 2020, briefing paper.<sup>30</sup>

The Staff documented resolution of these issues in an audit report and in its final safety evaluation report.<sup>31</sup> The safety evaluation report concludes that actual and predicted values for foundation settlement at Vogtle Unit 3 are within the acceptable limits of the AP1000 design control document.<sup>32</sup> The safety evaluation report also states that “settlement will be well controlled within the acceptable settlement limits throughout the entire construction sequence and through plant operation” and that “the differential settlement of the foundations of the Nuclear Island and the Annex Building will not adversely affect the seismic gap between these two structures by reducing the currently available gap, especially at the area of nonconformance.”<sup>33</sup>

In summary, BREDL claims that the Staff’s internal briefing paper contains new information that supports BREDL’s original contentions. However, the paper BREDL cites represents the Staff’s initial concerns and not its final position. The Staff resolved the issues identified in its paper after auditing settlement data and concluding that SNC’s request to change the seismic gap between the auxiliary and annex buildings could be safely approved. BREDL’s motion does not dispute the Staff’s analysis or set forth any independent factual or legal basis

---

<sup>27</sup> Staff Answer at 6-10; SNC Answer at 10-20.

<sup>28</sup> Staff Answer at 7 (citing FOIA NRC-2020-000234, Interim Response Records at 49-52, 93-96).

<sup>29</sup> *Id.* at 7-8.

<sup>30</sup> *Id.* at 8 (citing FOIA NRC-2020-000234, Interim Response Records at 17); Memorandum from Cayetano Santos, NRC, to Victor Hall, NRC, “Audit Report for Vogtle Electric Generating Plant Unit 3, Request for License Amendment and Exemption: Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements (LAR 20-001)” (May 26, 2020), Encl. (ML20141L698) (Audit Report).

<sup>31</sup> See Audit Report, Encl.; Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 182 to the Combined License No. NPF-91 (Aug. 4, 2020) (ML20132A078) (SER).

<sup>32</sup> SER at 3-6.

<sup>33</sup> *Id.* at 6.



for BREDL's claims of a significant safety issue. Therefore, we find that the internal briefing paper does not provide the missing factual basis for BREDL's Contention 2 or raise a significant safety issue that would warrant reopening this proceeding.

### **III. CONCLUSION**

For the reasons given above, we deny BREDL's motion to reopen.  
IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 15th day of March 2021.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**Paul S. Ryerson**, Chairman  
**E. Roy Hawkens**  
**Dr. Sue H. Abreu**

**In the Matter of**

**Docket Nos. EA-20-006**  
**EA-20-007**  
**(ASLBP No. 21-969-01-EA-BD01)**

**TENNESSEE VALLEY AUTHORITY**  
**(Enforcement Action)**

**March 25, 2021**

In this proceeding concerning an enforcement action against the Tennessee Valley Authority the Board finds that Erin Henderson does not have standing to intervene and fails to meet the requirements for discretionary intervention. Accordingly, the Board denies Ms. Henderson's hearing request.

**RULES OF PRACTICE: STANDING TO INTERVENE**  
**(ENFORCEMENT ACTIONS)**

In addressing hearing requests, the Commission interprets "adversely affected by" to include only adverse effects that implicate the purposes of the statutes the NRC enforces.

**RULES OF PRACTICE: STANDING TO INTERVENE (ZONE OF**  
**INTERESTS)**

To satisfy the zone-of-interests test, a party must show an injury that is directly related to environmental or radiological harm.

**RULES OF PRACTICE: DISCRETIONARY INTERVENTION**

The Commission considers discretionary intervention to be an extraordinary procedure, permitted only when justified according to the six-factor analysis in 10 C.F.R. § 2.309(e).

**RULES OF PRACTICE: LITIGABILITY OF ISSUES  
(ENFORCEMENT)**

As the Commission has explained, third parties may request hearings on NRC enforcement orders because “conceivably” the enforcement order might actually worsen the safety situation, but the Commission expects such situations should be very rare. *See Alaska Department of Transportation and Public Facilities, CLI-04-26, 60 NRC 399, 406 n.28 (2004)* (quoting *Bellotti v. NRC, 725 F.2d 1380, 1383 (D.C. Cir. 1983)*).

**LICENSING BOARD(S): SCOPE OF REVIEW (INTERVENTION  
PETITIONS)**

Licensing boards do not entertain arguments that are advanced for the first time in a reply brief.

**LICENSING BOARD(S): SCOPE OF REVIEW (INTERVENTION  
PETITIONS)**

Licensing boards should not make arguments for the litigants that were never made by the litigants themselves.

**ENFORCEMENT ACTION: SCOPE OF PROCEEDINGS**

Notices of violations do not trigger hearing opportunities. In contrast, both orders and civil penalties may be challenged in a hearing. 10 C.F.R. §§ 2.202, 2.205.

**MEMORANDUM AND ORDER  
(Denying Erin Henderson’s Hearing Request)**

In this enforcement proceeding, the NRC has imposed a civil penalty of \$606,942 on the Tennessee Valley Authority (TVA) for alleged violations of

the NRC’s employee protection regulation.<sup>1</sup> TVA denies the alleged violations,<sup>2</sup> and the Board has granted its request for an evidentiary hearing.<sup>3</sup>

Also before the Board is a hearing request from Erin Henderson,<sup>4</sup> a TVA employee who is not the subject of the TVA Order. Atomic Safety and Licensing Boards exist only for the purposes specified in section 191 of the Atomic Energy Act of 1954, as amended.<sup>5</sup> Consistent with Commission guidance, a majority of the Board reads the right to a hearing before this Board less broadly than our dissenting colleague, whose rationale includes arguments that Ms. Henderson never advanced.<sup>6</sup> Because Ms. Henderson does not have standing to demand a hearing, and has not shown why the Board should authorize discretionary intervention in TVA’s hearing, we deny her request.

## I. BACKGROUND

### A. Factual Background

Although the parties disagree about motivation and intent, the essential facts are not otherwise in dispute.

Ms. Henderson filed a complaint against two other TVA employees — Michael McBrearty and Beth Wetzel — alleging that they had exhibited inappropriate and unprofessional workplace behavior toward her.<sup>7</sup> After an internal investigation, TVA concluded that both employees had engaged in “intolerable

---

<sup>1</sup> In the Matter of Tennessee Valley Authority, Chattanooga, TN, 85 Fed. Reg. 70,203 (Nov 4, 2020) [hereinafter TVA Order]; TVA Order for Civil Penalty (Oct. 29, 2020) (ADAMS Accession No. ML20297A544); TVA Order for Civil Penalty, Appendix (Oct. 29, 2020) (ADAMS Accession No. ML20297A552) [hereinafter TVA Order Appendix].

<sup>2</sup> Tennessee Valley Authority’s Answer and Request for Hearing (Nov. 30, 2020) [hereinafter TVA Answer].

<sup>3</sup> Licensing Board Order (Notice of Hearing) (Jan. 21, 2021) (unpublished); Licensing Board Order (Initial Scheduling Order) (Jan. 14, 2021) (unpublished).

<sup>4</sup> Erin Henderson’s Request for a Hearing of the NRC Staff’s October 29, 2020 Order or, in the Alternative, Discretionary Intervention (Nov. 30, 2020) [hereinafter Henderson Hearing Request]; Erin Henderson’s Reply to NRC Staff Answer to Erin Henderson’s Request for Hearing or in the Alternative Discretionary Intervention (Dec. 30, 2020) [hereinafter Henderson Reply].

<sup>5</sup> Atomic Energy Act of 1954 § 191, 42 U.S.C. § 2241.

<sup>6</sup> As the Commission has cautioned, licensing boards should not “make arguments for the litigants that were never made by the litigants themselves.” *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 149 & n.74 (2015) (citing *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 353-54 (2009); *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 565-71 (2009)).

<sup>7</sup> TVA Order Appendix at 1, 3.

and inappropriate behavior.”<sup>8</sup> It placed Mr. McBrearty on paid administrative leave and terminated the employment of Ms. Wetzel.<sup>9</sup>

The NRC Staff claims, however, that Ms. Henderson’s complaint was really a “pretext” to punish Mr. McBrearty and Ms. Wetzel for raising safety concerns.<sup>10</sup> The NRC Staff therefore contends that Ms. Henderson’s complaint was an adverse action that caused TVA to violate 10 C.F.R. § 50.7, which prohibits NRC licensees such as TVA from discriminating against employees who raise safety concerns.

## **B. Procedural History**

After investigating these events,<sup>11</sup> the NRC Staff issued the TVA Order, which assessed TVA four violations and imposed a \$606,942 civil penalty.

Initially, the NRC Staff also asserted that, when she filed her internal TVA complaint, Ms. Henderson engaged in deliberate misconduct in violation of 10 C.F.R. § 50.5. Therefore, although it did not subject her to a civil penalty, the NRC Staff issued her a notice of violation under 10 C.F.R. § 2.201.<sup>12</sup> The notice of violation publicly identified Ms. Henderson by name and warned that “additional deliberate violations could result in more significant enforcement action or criminal penalties.”<sup>13</sup>

In response, Ms. Henderson submitted her first hearing request, asking for a hearing before the Commission on her notice of violation.<sup>14</sup> The NRC Staff opposed this request.<sup>15</sup> Thereafter, however, the NRC Staff advised Ms. Henderson that, “[u]pon further review of the facts of your case,” it was rescinding her notice of violation.<sup>16</sup> As a result, Ms. Henderson’s first hearing request became moot.<sup>17</sup>

But Ms. Henderson also submitted a second hearing request — for a hearing on the TVA Order — in order “to protect at least some of her rights, and

---

<sup>8</sup> TVA Answer at 2.

<sup>9</sup> TVA Order, 85 Fed. Reg. at 70,203.

<sup>10</sup> TVA Order Appendix at 2, 4.

<sup>11</sup> See TVA Order, 85 Fed. Reg. at 70,203.

<sup>12</sup> IA-20-009, Notice of Violation, Nuclear Regulatory Commission Office of Investigations Report Nos. 2-2018-033 and 2-2019-015 (Aug. 24, 2020) (ADAMS Accession No. ML20218A584).

<sup>13</sup> *Id.* at 2.

<sup>14</sup> Erin Henderson’s Request for a Hearing at 25 (Sept. 13, 2020) [hereinafter Henderson Notice of Violation Hearing Request].

<sup>15</sup> NRC Staff Answer to Erin Henderson’s Request for Hearing (Oct. 8, 2020).

<sup>16</sup> NRC Staff Commission Notification in the Matter of Erin Henderson (Enforcement Action) Docket No. IA-20-009 (Jan. 22, 2021).

<sup>17</sup> Commission Order, *Erin Henderson*, No. IA-20-009-EA (Mar. 12, 2021) (unpublished).

to remedy some of her reputational harms.”<sup>18</sup> Ms. Henderson claims the TVA Order has harmed her reputation and chilled her willingness and the willingness of other TVA employees to complain about inappropriate workplace behavior.<sup>19</sup> Ms. Henderson’s second hearing request remains pending before this Board. Although the NRC Staff did not oppose TVA’s hearing request on the TVA Order, it opposes Ms. Henderson’s request for a hearing on the TVA Order.<sup>20</sup>

The TVA Order does not name Ms. Henderson or impose a penalty on her, although she is identified by her former position (Director of Corporate Nuclear Licensing) in the appendix to the order.<sup>21</sup> Specifically (although none of the participants are identified by their names), the appendix to the TVA Order explains Ms. Henderson’s involvement in two of the alleged violations by TVA.

Although it identifies her only by her former position, Violation 1 alleges Ms. Henderson filed a complaint against Mr. McBrearty because he engaged in protected activity:

Contrary to [10 C.F.R. § 50.7(a)], on March 9, 2018, TVA discriminated against a former Sequoya employee for engaging in protected activity. Specifically, the former Sequoya employee engaged in protected activity by raising concerns regarding a chilled work environment, filing complaints with the Employee Concerns Program (ECP), and by raising concerns regarding the response to two non-cited violations. After becoming aware of this protected activity, the former Director of Corporate Nuclear Licensing (CNL) filed a formal complaint against the former employee. The filing of a formal complaint triggered an investigation by the TVA Office of the General Counsel (TVA OGC). This action was based, at least in part, on the former employee engaging in protected activity.<sup>22</sup>

Although it likewise identifies her only by her former position, Violation 3 alleges Ms. Henderson filed a complaint against Ms. Wetzel because she engaged in protected activity:

Contrary to [10 C.F.R. § 50.7(a)], on March 9, 2018, TVA discriminated against a former corporate employee for engaging in protected activity. Specifically, the former corporate employee engaged in protected activity by raising concerns of a chilled work environment. After becoming aware of this protected activity, the

---

<sup>18</sup> Henderson Hearing Request at 2.

<sup>19</sup> *Id.* at 5-8.

<sup>20</sup> See NRC Staff Answer to Erin Henderson’s Request for Hearing (Dec. 23, 2020) [hereinafter NRC Staff Answer]. TVA does not oppose Ms. Henderson’s request for a hearing on the TVA Order. See TVA’s Answer to Erin Henderson’s Request for a Hearing or, in the Alternative, Discretionary Intervention (Dec. 28, 2020).

<sup>21</sup> See TVA Order Appendix at 1-4.

<sup>22</sup> TVA Order Appendix at 1.

former Director of CNL filed a formal complaint against the former employee. The filing of a formal complaint triggered an investigation by the TVA OGC that resulted in the former employee being placed on paid administrative leave followed by termination. This action was based, at least in part, on the former employee engaging in a protected activity.<sup>23</sup>

The Board conducted an oral argument on Ms. Henderson's second hearing request, by telephone, on February 17, 2021.<sup>24</sup>

## II. DISCUSSION

Ms. Henderson's hearing request presents two issues:

1. Do Ms. Henderson's claims entitle her to a hearing before this Atomic Safety and Licensing Board? In other words, could Ms. Henderson independently challenge the TVA Order even if TVA did not?

2. If Ms. Henderson's claims do not entitle her to a hearing, should the Board permit her to intervene as a party in TVA's hearing as a matter of discretion?

The answer to both questions is no.

Ms. Henderson may demand a hearing if she has been "adversely affected by" the order against TVA.<sup>25</sup> This language in the *Federal Register* notice to which she responded is identical to the language in 10 C.F.R. § 2.202(a)(3). That regulation, in turn, is identical to the standard in section 189a(1)(A) of the Atomic Energy Act, which provides a hearing opportunity to "any other person adversely affected by" an enforcement "order."<sup>26</sup> The Commission interprets this statutorily derived language to include only adverse effects that implicate the purposes of the statutes the NRC enforces.<sup>27</sup> As we show below, Ms. Henderson's assertion of reputational injury and a "chilling" claim do not qualify.

---

<sup>23</sup> *Id.* at 3. The NRC Staff alleges that TVA further violated 10 C.F.R. § 50.7 by placing Mr. McBrearty on paid administrative leave (Violation 2) and by terminating Ms. Wetzel's employment (Violation 4). *Id.* at 2-3, 4.

<sup>24</sup> Tr. at 30-106.

<sup>25</sup> TVA Order, 85 Fed. Reg. at 70,204. The NRC Staff challenges only Ms. Henderson's standing, and not whether she has submitted an admissible contention. See NRC Staff Answer at 12 n.48.

<sup>26</sup> Atomic Energy Act § 189a(1)(A), 42 U.S.C. § 2239(a)(1)(A).

<sup>27</sup> See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996) ("In order to establish standing to intervene in a proceeding, a petitioner must demonstrate that (1) it has suffered a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute; (2) that the injury can fairly be traced to the

(Continued)



In ruling on her alternative request for discretionary intervention, the Board applies the six-factor test in 10 C.F.R. § 2.309(e). The Commission considers discretionary intervention to be “an extraordinary procedure” and, insofar as we are aware, it has never upheld a request for discretionary intervention in an enforcement proceeding.<sup>28</sup> Our analysis of the six relevant factors does not lead us to conclude that Ms. Henderson’s request should be the first.

### A. Reputational Injury

If Ms. Henderson has been “adversely affected by” the TVA Order, within the meaning of 10 C.F.R. § 2.202(a)(3) and section 189a(1)(A) of the Atomic Energy Act, she has standing to request a hearing.<sup>29</sup> Although the NRC Staff argues otherwise,<sup>30</sup> we conclude that Ms. Henderson’s reputation may have suffered during the course of this ongoing enforcement proceeding.<sup>31</sup>

But has Ms. Henderson suffered reputational injury “by” the TVA Order that is before the Board? That may be a closer question. Ms. Henderson is not named in the relevant order, or subject to its provisions, although she is identified in the appendix by her former position.

Surely other aspects of the TVA enforcement proceeding have played a larger role in her alleged reputational injury. As Ms. Henderson pointed out in her first hearing request — that is, for a hearing before the Commission on her (now rescinded) notice of violation — her notice of violation explicitly named her and “is part of the Commission’s permanent publicly available record[;]” moreover, “the NRC took the additional step of widely publicizing the outcome in a press release.”<sup>32</sup> In her first hearing request, Ms. Henderson therefore claimed “there

---

challenged action; and (3) that the injury is likely to be redressed by a favorable decision.” (emphasis added)); accord, e.g., *Entergy Nuclear Operations, Inc., and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 258 & n.16 (2008) (citing *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 408-09, *reconsideration denied*, CLI-07-22, 65 NRC 525 (2007); *Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000); *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 & n.5 (1999)).

<sup>28</sup> See *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 716 & n.12 (2006) (quoting Changes to Adjudicatory Process, 69 Fed. Reg. 2,181, 2,201 (Jan. 14, 2004)).

<sup>29</sup> 10 C.F.R. § 2.309(d); *Yankee Nuclear*, CLI-96-1, 43 NRC at 6.

<sup>30</sup> NRC Staff Answer at 5; Tr. at 68 (Kirkwood).

<sup>31</sup> See *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105 (1976) (discussing the existence of reputational injury, the Appeal Board acknowledged that a petitioner need only show that the interest “may” be affected).

<sup>32</sup> Henderson Notice of Violation Hearing Request at 27 (footnotes omitted).

is no question that the [notice of violation] in Ms. Henderson's case amounts to reputational injury."<sup>33</sup>

Likewise, even in this proceeding, Ms. Henderson blames much of her reputational injury on the "broad publication"<sup>34</sup> of her alleged misconduct in NRC's press release and in "repeated articles in widely circulated newspapers,"<sup>35</sup> rather than directly on the enforcement order that this Board has authority to review. Indeed, both the NRC's press release and most of the articles she cites in support were published months *before* issuance of the TVA Order.<sup>36</sup> She is also concerned about what "any cursory internet search" will show about her job history.<sup>37</sup>

Of course, this Board cannot withdraw a press release, erase the internet, or even edit the TVA Order's explanatory appendix. The scope of the Board's hearing on the TVA Order is limited to "whether this Order should be sustained."<sup>38</sup>

In any event, assuming without deciding that Ms. Henderson suffered reputational injury "by" the enforcement order imposing a civil penalty on TVA, such claims do not give rise to standing before this Board. As Ms. Henderson correctly states, the relevant "question is whether the asserted harm arguably falls within the zone of interests of the Atomic Energy Act."<sup>39</sup>

It is said "a good reputation is more valuable than money."<sup>40</sup> However, a good reputation is not an interest that is protected by the Atomic Energy Act, as squarely held by both the Commission and the former Appeal Board. We are bound to follow their precedents.<sup>41</sup>

In *North Anna*, the Appeal Board held that reputational injury "is not even arguably within the 'zone of interests' to be protected or regulated by the Atomic Energy Act."<sup>42</sup> It found no legislative history or other authority that might provide "even a wobbly underpinning" for such a suggestion, "even as a secondary purpose" of the health and safety provisions of the Act.<sup>43</sup>

---

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

<sup>34</sup> Henderson Hearing Request at 7; Tr. at 43 (Walsh).

<sup>35</sup> Henderson Reply at 3.

<sup>36</sup> *See* Henderson Hearing Request at 6 nn.20-21.

<sup>37</sup> *Id.* at 7.

<sup>38</sup> TVA Order, 85 Fed. Reg. at 70,205.

<sup>39</sup> Henderson Hearing Request at 8.

<sup>40</sup> John Bartlett, *Familiar Quotations* 125 (Emily Morison Beck, ed., Little, Brown and Co., 14th ed. 1968) (attributed to Publilius Syrus (85-43 B.C.E.), Maxim 108).

<sup>41</sup> *See Palisades*, CLI-08-19, 68 NRC at 260 n.23.

<sup>42</sup> *North Anna*, ALAB-342, 4 NRC at 104.

<sup>43</sup> *Id.* at 106.

More recently, in *Palisades*, the Commission again confirmed that reputational injury is not within the zone of interests of the Atomic Energy Act.<sup>44</sup> The Commission held that the Appeal Board “correctly ruled”<sup>45</sup> in *North Anna* that “there is no relationship at all between the legislative purpose underlying the safety provisions of the Atomic Energy Act and [Petitioner’s] interest in protecting its reputation.”<sup>46</sup>

Ms. Henderson’s attempt to distinguish this controlling authority is not persuasive.<sup>47</sup> The clear and unequivocal holding in *North Anna* is that reputation is “not even arguably” within the zone of interests protected by the Atomic Energy Act.<sup>48</sup> Ms. Henderson’s effort to narrow the holdings in *North Anna* and *Palisades* (or to create an exception to them), based on the source of reputational harm, has no discernible statutory basis.<sup>49</sup>

We are not insensitive to the frustration that Ms. Henderson might feel arising from her inability to participate as a party in this proceeding. But the same might be said of numerous unsuccessful petitioners — in enforcement *and* licensing proceedings — who are unable to satisfy the zone-of-interests test. The Commission’s adoption of that test for determining whether a petitioner has established standing reasonably cabins the scope of hearings in a manner that comports with governing statutes, fosters safety interests, conserves agency re-

---

<sup>44</sup> *Palisades*, CLI-08-19, 68 NRC at 266.

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

<sup>46</sup> *Id.* (quoting *North Anna*, ALAB-342, 4 NRC at 107).

<sup>47</sup> Henderson Reply at 6-7; Tr. at 53-54 (Walsh).

<sup>48</sup> *North Anna*, ALAB-342, 4 NRC at 104; see Tr. at 87-88 (Kirkwood).

<sup>49</sup> The dissent’s discussion of standing appears to equate administrative standing with Article III standing. See Dissent at pp. 172-77. But as the Commission has stated, “[i]n determining whether a person is an ‘interested person’ for purposes of a section 189a(1)(A) standing determination, we are not strictly bound by judicial standing doctrines.” *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009). Thus, although the Commission applies contemporaneous judicial concepts of standing when assessing whether a petitioner has established standing, see *id.*, that approach does not proscribe the Commission from also considering whether the injury alleged by a petitioner is “to an interest arguably within the zone of interests protected by the governing statute.” *Id.*; see also *id.* at 917 n.27 (stating that, in assessing standing, the Commission “look[s] to judicial standing doctrines simply as guidance, and as a useful barometer of standing jurisprudence”). It is well established that the NRC has broad discretion regarding the adoption and implementation of procedural rules governing its hearings. See, e.g., *Citizens Awareness Network v. NRC*, 391 F.3d 338, 352 (1st Cir. 2004) (“[A]gencies have broad authority to formulate their own procedures — and the NRC’s authority in this respect has been termed particularly great.”).

sources, and promotes adjudicatory efficiency.<sup>50</sup> We are not at liberty to ignore it.<sup>51</sup>

## B. Chilling Effect

Alternatively, Ms. Henderson tries to bring her “chilling effect” claim within the ambit of the Atomic Energy Act. It is true the NRC is concerned about actions or events that might result in “a perception that the raising of *safety concerns* to the employer or to the NRC is being suppressed or is discouraged.”<sup>52</sup>

But Ms. Henderson does not claim that she was retaliated against or harassed for raising nuclear safety concerns. Rather, she claims the TVA Order could discourage the nuclear workforce from complaining (as she did) about being “subjected to an unprofessional, hostile environment.”<sup>53</sup>

Ms. Henderson contends that (1) the TVA Order has the potential to silence employees who are being subjected to an unprofessional, hostile work environment; (2) their silence will empower “bad actors” who act unprofessionally and fail to treat other employees with respect; (3) such bad behavior will be detrimental to a respectful workplace environment; and (4) a respectful workplace environment, “where trust and respect permeate an organization,” is critical to maintaining a safety conscious work environment.<sup>54</sup> Therefore, Ms. Henderson argues, her “chilling effect” claim “directly implicates public health and safety.”<sup>55</sup>

We disagree. Ms. Henderson tries to link her “chilling effect” claim to nuclear safety through an extended chain of causation that is entirely conjectural. Because she fails to show her “chilling effect” claim is “*directly* related to environmental or radiological harm,”<sup>56</sup> it does not fall within the zone of interests of the Atomic Energy Act. As the Commission has explained, third parties

---

<sup>50</sup> Cf. *Envirocare of Utah v. NRC*, 194 F.3d 72, 75-78 (D.C. Cir. 1999) (holding that the Commission can permissibly deny the hearing request of a petitioner who satisfies Article III standing requirements provided the Commission’s interpretation of its jurisdictional statute, 42 U.S.C. § 2239(a)(1)(A), is reasonable).

<sup>51</sup> Ms. Henderson’s inability to participate as a party does not deprive her of an opportunity to make her views known in this proceeding. As discussed *infra* Part II.C, pursuant to NRC regulations she can (1) request to participate as an amicus; (2) request to provide an oral limited appearance statement; and (3) submit a written limited appearance statement.

<sup>52</sup> Office of Enforcement, NRC, Allegation Manual § 5.2.i (Dec. 22, 2016) (emphasis added) (ADAMS Accession No. ML17003A227).

<sup>53</sup> Henderson Hearing Request at 9.

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

<sup>55</sup> *Id.*

<sup>56</sup> See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 336 (2002) (emphasis added).

may request hearings on NRC enforcement orders because “conceivably” the enforcement order might actually worsen the safety situation, but the Commission expects such situations should be very rare.<sup>57</sup>

In her reply, Ms. Henderson raises an entirely different argument. She points out, for the first time, that the regulation on which the TVA Order is based — 10 C.F.R. § 50.7 — is grounded not only on the nuclear safety concerns underlying the Atomic Energy Act, “but also on the Energy Reorganization Act of 1974.”<sup>58</sup>

We do not entertain arguments that are advanced for the first time in a reply brief.<sup>59</sup> The Commission “will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had an opportunity to address.”<sup>60</sup>

Regardless, the Energy Reorganization Act provides protection for whistleblowers and establishes “the right to defend against a whistleblower discrimination charge.”<sup>61</sup> Thus, that Act and its implementing regulation, 10 C.F.R. § 50.7, (1) protect employees who raise safety concerns,<sup>62</sup> and (2) authorize a defense for licensees who are the subjects of civil penalties.<sup>63</sup> Those provisions do not contemplate the protection of employees who (like Ms. Henderson) only raise concerns about an unprofessional or hostile work environment.<sup>64</sup>

### C. Discretionary Intervention

The Commission has directed that discretionary intervention is an “extraordinary procedure.”<sup>65</sup> Ms. Henderson does not show why she is more deserving of discretionary intervention than numerous other individuals.

Corporate licensees, such as TVA, can only act through their individual officers and employees. Whenever a corporate licensee is accused of wrongdoing, such individuals will almost always feel they have a personal stake in the out-

---

<sup>57</sup> *Alaska Department of Transportation and Public Facilities*, CLI-04-26, 60 NRC 399, 406 n.28 (2004) (quoting *Bellotti v. NRC*, 725 F.2d 1380, 1383 (D.C. Cir. 1983)). Ms. Henderson’s “chilling effect” claim, with its lengthy and speculative chain of causation, also fails to allege a concrete and particularized injury sufficient to satisfy standing.

<sup>58</sup> Henderson Reply at 4.

<sup>59</sup> *Nuclear Management Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

<sup>60</sup> *USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 (2006).

<sup>61</sup> *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 192 (2004).

<sup>62</sup> See 10 C.F.R. § 50.7(a).

<sup>63</sup> See *id.* § 50.7(d).

<sup>64</sup> See *Watts Bar*, CLI-04-24, 60 NRC at 185-87.

<sup>65</sup> *Siemaszko*, CLI-06-16, 63 NRC at 716 (quoting *Changes to Adjudicatory Process*, 69 Fed. Reg. at 2,201).

come, even when they have not been subjected to an NRC enforcement order or civil penalty themselves.

Indeed, NRC Staff counsel represented that alleged individual wrongdoers, in addition to the licensee, can often reasonably be identified in notices of violations.<sup>66</sup> This is particularly true in cases alleging employee discrimination<sup>67</sup> and is necessary to provide licensees with sufficient notice of alleged wrongdoing.<sup>68</sup>

The Commission has determined that such persons should not be routinely admitted as parties to hearings on enforcement orders when they are not, themselves, subjected to any penalty. Rather, discretionary intervention is permitted only when justified by a six-factor analysis set forth in 10 C.F.R. § 2.309(e)(1). Ms. Henderson’s request for discretionary intervention fails this test.

*Factor 1* — “[t]he extent to which the requestor’s/petitioner’s participation

---

<sup>66</sup> Tr. at 81-82 (Kirkwood).

<sup>67</sup> See, e.g., Letter to Bruce Kenyon, Northeast Nuclear Energy Co., from Hubert J. Miller, NRC Regional Administrator, EA 98-325, Notice of Violation, NRC Office of Investigations Report Nos. 1-96-002, 1-96-007, and 1-97-007, at 2-3 (Apr. 6, 1999) (“The three violations described in the enclosed Notice involved actions by plant management. Violation A. involves actions by a former Millstone Vice President for Nuclear Engineering Services. Violation B. involves actions by the former Millstone Vice President for Nuclear Engineering Services and two former Directors of the Engineering Department. Violation C. involves actions by a former Director of Nuclear Engineering and a former Manager of Nuclear Design Engineering.”) (ADAMS Accession No. ML003673788); Letter to R.P. Powers, American Electric Power Co. (AEP), from J.E. Dyer, NRC Regional Administrator, EA-99-329, Notice of Violation, NRC Office of Investigations Report No. 3-1998-041, at 1 (May 5, 2000) (“Contrary to [10 C.F.R. 50.7(a)], . . . American Electric Power Company (AEP) through the actions of the acting AEP Nuclear Engineering Structural Design Manager, discriminated against an engineer employed by its contractor, Cataract, Inc., for having engaged in protected activities.”) (ADAMS Accession No. ML003712002); Letter to Lew W. Meyers, FirstEnergy Nuclear Operating Co., from J.E. Dyer, NRC Regional Administrator, EA 99-012, Notice of Violation and Proposed Imposition of Civil Penalty - \$110,000, NRC Office of Investigations Report Number 3-98-007, at 1 (May 20, 1999) (“Based upon the evidence developed, OI determined that the Perry Radiation Protection Manager (RPM) discriminated against an RPS for engaging in protected activities within the scope of 10 CFR 50.7.”) (ADAMS Accession No. ML20207B125); Letter to John P. Stetz, Centerior Service Co., from A. Bill Beach, NRC Regional Administrator, EA 96-253, Notice of Violation and Proposed Imposition of Civil Penalty — \$160,000 U.S. Department Of Labor (DOL) Administrative Law Judge (ALJ) Recommended Decision and Order (Case No. 96-ERA-6), at 2 (Oct. 9, 1996) “[T]he discrimination involved actions by the then-Director of the Perry Nuclear Services Department.”) (ADAMS Accession No. ML20128N001); Letter to Mano Nazar, Florida Power & Light Co., from George A. Watson, NRC OE, EA-18-066, EA-19-045, St. Lucie Plant — Notice of Violation and Proposed Imposition of Civil Penalty — \$232,000 (NRC Investigation Report Numbers 2-2017-024 and 2-2019-009) encl. 1, at 1 (Notice of Violation and Proposed Imposition of Civil Penalty) (Sept. 12, 2019) (“A Florida Power and Light Regional Vice President—Operations deliberately discriminated against a Framatome (formerly known as Areva) contract employee for engaging in a protected activity in March of 2017.”) (ADAMS Accession No. ML19234A332).

<sup>68</sup> Tr. at 81-82 (Kirkwood).

may reasonably be expected to assist in developing a sound record” — is both the first and most important factor.<sup>69</sup> It weighs heavily against discretionary intervention by Ms. Henderson.

In *Pebble Springs*, the Commission ruled that petitioners ought to contribute on “substantial issues of law or fact that will not otherwise be properly raised or presented.”<sup>70</sup> Here, TVA counsel represents that Ms. Henderson’s contentions “overlap entirely” with the issues that are already going to be litigated by TVA.<sup>71</sup> Ms. Henderson’s own counsel conceded at oral argument that her ultimate objective is a ruling “in Ms. Henderson’s favor, finding that Violations 1 and 3 are unfounded, or otherwise unsupported by law.”<sup>72</sup> Rather than contribute on an issue that would not otherwise be presented, Ms. Henderson and TVA want exactly the same thing.

*Factor 2* — “[t]he nature and extent of the requestor’s/petitioner’s property, financial or other interests in the proceeding” — also does not favor intervention by Ms. Henderson.<sup>73</sup> Although Ms. Henderson might have a reputational interest in the outcome of the hearing on the TVA Order, as TVA counsel again concedes the issue underlying her interest (that is, whether the TVA Order should be upheld) is “already going to be litigated in TVA’s proceeding regardless of whether [Ms.] Henderson is found to have standing.”<sup>74</sup> In other words, TVA’s litigation strategy will be, *inter alia*, to demonstrate that Ms. Henderson did nothing wrong. If TVA prevails, Ms. Henderson’s interest will be vindicated.

*Factor 3* — which is “[t]he possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest” — similarly does not favor intervention.<sup>75</sup> Again, the key point for purposes of this balancing test is that, as TVA recognizes, Ms. Henderson’s contentions are “material to the potential findings” and “overlap entirely” with issues that TVA intends to litigate.<sup>76</sup> If TVA prevails, Ms. Henderson’s interest will be vindicated.

*Factor 4* — “[t]he availability of other means whereby the requestor’s/petitioner’s interest will be protected” — also weighs heavily against discretionary intervention by Ms. Henderson.<sup>77</sup> Importantly, because they share some of the same lawyers, Ms. Henderson can be expected to work closely with TVA’s

---

<sup>69</sup> 10 C.F.R. § 2.309(e)(1)(i); see *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976).

<sup>70</sup> *Pebble Springs*, CLI-76-27, 4 NRC at 617.

<sup>71</sup> TVA Answer at 4.

<sup>72</sup> Tr. at 44 (Walsh).

<sup>73</sup> 10 C.F.R. § 2.309(e)(1)(ii).

<sup>74</sup> TVA Answer at 4.

<sup>75</sup> 10 C.F.R. § 2.309(e)(1)(iii).

<sup>76</sup> TVA Answer at 4.

<sup>77</sup> 10 C.F.R. § 2.309(e)(2)(i).

counsel. She likely will be called as a key fact witness. If she wishes, she can ask to file an amicus brief, without being a party, as well as request permission to submit a written or oral limited appearance statement.<sup>78</sup>

*Factor 5* — “[t]he extent to which the requestor’s/petitioner’s interest will be represented by existing parties” — likewise weighs against discretionary intervention.<sup>79</sup> Ms. Henderson’s interest will, as a practical matter, be represented by TVA. Ms. Henderson’s interest in vacating the TVA Order coincides with TVA’s interest in vacating the TVA Order.

*Factor 6* is “[t]he extent to which the requestor’s/petitioner’s participation will inappropriately broaden the issues or delay the proceeding.”<sup>80</sup> This factor would not appear to weigh significantly against intervention by Ms. Henderson (because TVA’s issues and Ms. Henderson’s issues “overlap entirely”).<sup>81</sup>

Finally, in deciding whether to permit discretionary intervention, the Board is mindful of the Commission’s longstanding policy that notices of violations do not trigger hearing opportunities.<sup>82</sup> This Commission position undoubtedly reflects how it prefers to allocate the agency’s resources.

In the early 2000s, for example, a Discrimination Task Group was chartered to consider recommendations for improving the NRC’s handling of employee protection matters.<sup>83</sup> After two rounds of public meetings at six locations around the country, the Discrimination Task Group published a draft report on which it accepted public comment. Ultimately, the Task Group did not recommend extending hearing opportunities to recipients of notices of violations, a Senior Management Review Team agreed, and the Commission did not further pursue the issue.<sup>84</sup>

Notices of violations name their recipients and can have real potential consequences, as demonstrated by the warning in Ms. Henderson’s own (now rescinded) notice. It would appear contrary to the Commission’s decision not to expand hearing opportunities, beyond those provided by statute, to permit Ms. Henderson’s participation as a party in the hearing on TVA’s civil enforcement order, which does not specifically name Ms. Henderson or penalize her in any

---

<sup>78</sup> See *id.* § 2.315(a), (d).

<sup>79</sup> *Id.* § 2.309(e)(2)(ii).

<sup>80</sup> *Id.* § 2.309(e)(2)(iii).

<sup>81</sup> TVA Answer at 4.

<sup>82</sup> The regulations governing notices of violations, demands for information, and requests for enforcement action do not provide for hearing opportunities. 10 C.F.R. §§ 2.201, 2.204, 2.206. In contrast, both orders and civil penalties may be challenged in a hearing. *Id.* §§ 2.202, 2.205.

<sup>83</sup> SECY-02-0166, Policy Options and Recommendations for Revising the NRC’s Process for Handling Discrimination Issues, at 1 (Sept. 12, 2002) (ADAMS Accession Nos. ML022120479, ML022120535 (package)); *id.* attach. 1 (Discrimination Task Group Report) (ADAMS Accession No. ML022120514) [hereinafter Task Group Report].

<sup>84</sup> See Task Group Report at 63.



way. Now that the NRC Staff has rescinded Ms. Henderson's own notice of violation — which she acknowledges to be the cause of much (perhaps most) of her claimed injury — to single out Ms. Henderson for participation as a party in the hearing on TVA's alleged violations would seem especially ironic.<sup>85</sup>

### III. ORDER

Ms. Henderson's hearing request is *denied*.

Under 10 C.F.R. § 2.311, any appeal to the Commission from this Memorandum and Order must be taken within twenty-five (25) days after service.

It is so ORDERED.

THE ATOMIC SAFETY AND  
LICENSING BOARD

Paul S. Ryerson, Chairman  
ADMINISTRATIVE JUDGE

E. Roy Hawkens  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
March 25, 2021

---

<sup>85</sup> Moreover, to grant Ms. Henderson's hearing request could convert discretionary intervention from an "extraordinary procedure" into a common occurrence in the context of future enforcement proceedings. *See supra* notes 65, 67.

### **Judge Abreu, Dissenting**

The majority focuses on the “zone-of-interests” test as the reason to deny Ms. Henderson standing to pursue redress for her alleged injuries. I respectfully disagree. Ms. Henderson’s request for a hearing is based on the TVA Enforcement Order provision that “TVA and any other person adversely affected by this Order may request a hearing on this Order within 30 days of the date of the Order.”<sup>1</sup> She asserts that she is “adversely affected” by the allegedly erroneous assertions that are causing her harm and identifies the statements in the Order with which she disagrees.<sup>2</sup> Ms. Henderson cites two injuries caused by alleged errors in the Enforcement Order: reputational harm and a chilling effect on her willingness to raise concerns or file complaints.<sup>3</sup> Under the plain language of 10 C.F.R. § 2.202(a)(3), Ms. Henderson, as an “other person adversely affected by the order,” is entitled “to demand a hearing on all or part of the order” to rebut the Staff’s allegations against her.<sup>4</sup> The zone-of-interests test is not needed to determine the nexus of the harm.

Moreover, even if the zone-of-interests test were to apply, I agree with Ms. Henderson that she has set forth sufficient allegations to show that she satisfies the test.<sup>5</sup> Further, I find that Ms. Henderson has pled an admissible contention,<sup>6</sup> which the Staff has not disputed. Therefore, she has satisfied all the requirements to grant her hearing request, even if she must also satisfy the zone-of-interests test.

### **A. The Petition**

The Staff has abandoned its enforcement action against Ms. Henderson,<sup>7</sup> but she requests a hearing before a neutral adjudicator to defend herself against the Staff’s assertions in its Enforcement Order against TVA that identifies her as

---

<sup>1</sup> TVA Order for Civil Penalty (Oct. 29, 2020) (ADAMS Accession No. ML20297A544) [hereinafter TVA Order]; TVA Order for Civil Penalty, Appendix (Oct. 29, 2020) (ADAMS Accession No. ML20297A552) [hereinafter TVA Order Appendix].

<sup>2</sup> Erin Henderson’s Request for a Hearing of the NRC Staff’s October 29, 2020 Order or, in the Alternative, Discretionary Intervention at 3-4 (Nov. 30, 2020) [hereinafter Henderson Hearing Request]; Erin Henderson’s Reply to NRC Staff Answer to Erin Henderson’s Request for Hearing or in the Alternative Discretionary Intervention at 2 (Dec. 30, 2020) [hereinafter Henderson Reply].

<sup>3</sup> Henderson Hearing Request at 6-9; Henderson Reply at 5.

<sup>4</sup> 10 C.F.R. § 2.202(a)(3).

<sup>5</sup> Henderson Hearing Request at 8-10; Henderson Reply at 2-11.

<sup>6</sup> 10 C.F.R. § 2.309(f)(1); Henderson Hearing Request at 10-20.

<sup>7</sup> NRC Staff Commission Notification in the Matter of Erin Henderson (Enforcement Action) Docket No. IA-20-009 (Jan. 22, 2021).

a wrongdoer.<sup>8</sup> Ms. Henderson seeks to set the record straight on the damaging claims that the Staff has set forth against her.<sup>9</sup>

She is uniquely identified in the Order by position title, employer, and the dates involved, narrowing this description to her and her alone.<sup>10</sup> The Order identifies the Director, Corporate Nuclear Licensing (Director of CNL) at Sequoyah in March 2018, May 2018, and January 2019, as being involved in all four violations described.<sup>11</sup> That position was held by Ms. Henderson at those times.<sup>12</sup>

Violations 1 and 3 of the Enforcement Order state that “[t]he NRC staff determined that [the Sequoyah Director of CNL’s] filing the formal complaint that triggered an investigation is considered an adverse action in this case. When an investigation is so closely related to a personnel action that it could be a pretext for gathering evidence to retaliate, it is an adverse action.”<sup>13</sup>

Any statement by the NRC that a nuclear industry manager’s actions are the basis for a serious violation of NRC regulations is sufficient to cause a serious reputational injury.<sup>14</sup> Here, two violations directly make such assertions against Ms. Henderson. When the person identified is a manager in a role responsible for compliance with NRC regulations, the harm is even greater. An enforcement order is intentionally a public punishment for serious infractions and is intended to deter those who might consider violating the agency’s regulations.<sup>15</sup> Irrespective of the Henderson Notice of Violation (NOV)<sup>16</sup> and the Staff’s press releases,<sup>17</sup> the Staff’s statements in Violations 1 and 3 alone are sufficient to cause Ms. Henderson harm. Ms. Henderson has shown that her reputation as a nuclear worker has been damaged by the Enforcement Order, and the Staff’s other public communications have compounded the harm.<sup>18</sup>

---

<sup>8</sup> Henderson Hearing Request at 1-3.

<sup>9</sup> *Id.* at 26-28.

<sup>10</sup> TVA Order at 3; TVA Order Appendix at 2; *see* Tr. at 67, 81-82 (Kirkwood).

<sup>11</sup> TVA Order Appendix at 5-7.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 2-4.

<sup>14</sup> *Id.*

<sup>15</sup> *See* Henderson Reply at 5 & n.19 (citing Revisions to Procedures to Issue Orders: Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,665 (Aug. 15, 1991)).

<sup>16</sup> IA-20-009, Notice of Violation, Nuclear Regulatory Commission Office of Investigations Report Nos. 2-2018-033 and 2-2019-015 (Aug. 24, 2020) (ADAMS Accession No. ML20218A584). This notice was later rescinded. NRC Staff Commission Notification in the Matter of Erin Henderson (Enforcement Action) Docket No. IA-20-009 (Jan. 22, 2021).

<sup>17</sup> Henderson Hearing Request at 6-7 & n.21.

<sup>18</sup> *Id.* at 5-7. As of the date of this order, the Staff has not issued a press release concerning the rescission of the NOV previously issued to Ms. Henderson.

The Enforcement Order did not need to specifically identify Ms. Henderson's position. But the Staff chose to provide sufficient information to identify her.<sup>19</sup> At oral argument, the Staff asserted that it needed to identify her with sufficient specificity in the Order to adequately support the bases for the violations,<sup>20</sup> but this assertion is directly contradicted by the fact that the Order did not specifically identify the individuals who were alleged to have suffered retaliation.<sup>21</sup> The Staff could have identified her as "a corporate manager," just as the Staff identified others as "a former Sequoyah employee" and "a former corporate employee."<sup>22</sup> The Staff also fails to acknowledge that it is familiar with the use of non-public communications with licensees. The Staff could have provided specific details using non-public means, but instead chose to communicate the information via public routes that could cause reputational harm.

Ms. Henderson's claim of a chilling effect on her willingness to raise concerns or file complaints is also based on her argument that the Staff has made erroneous assertions as the bases for the violations.<sup>23</sup> She claims that the Staff's assertion that her formal complaint was a "pretext" to the investigation and was considered an adverse action now makes her "no longer . . . secure in raising concerns or filing complaints."<sup>24</sup> Despite the majority's summary dismissal of the concern, the NRC's own guidance establishes that it can be a serious matter.

The NRC Allegation Manual defines a "chilling effect" as "[a] condition that occurs when an event, interaction, decision, or policy change results in a perception that the raising of safety concerns to the employer or to the NRC is being suppressed or is discouraged."<sup>25</sup> That well fits the situation in which Ms. Henderson finds herself. Ironically, here the NRC's action is causing the "chill" that could reduce the willingness of Ms. Henderson and other managers to raise concerns.

Employee harassment concerns, the subject of Ms. Henderson's formal complaint, are relevant to the work environment. All employees, even managers, should be free to file truthful complaints of employee harassment. To have it otherwise could lead to a workplace in which communications are stifled and workers feel unsafe. Good regulatory compliance is more likely in a positive workplace free of harassment. Such an environment is more likely to encourage

---

<sup>19</sup> TVA Order Appendix at 2-4.

<sup>20</sup> Tr. at 67 (Kirkwood).

<sup>21</sup> TVA Order Appendix at 1-4.

<sup>22</sup> *Id.* at 1-2 (identifying "a former Sequoyah employee" without more specificity); *id.* at 3-4 (identifying "a former corporate employee" without more specificity).

<sup>23</sup> Henderson Hearing Request at 8-9.

<sup>24</sup> *Id.* at 7.

<sup>25</sup> Office of Enforcement, NRC, Allegation Manual § 5.2.i (Dec. 22, 2016) (ADAMS Accession No. ML17003A227).

the reporting of issues that are specifically safety related. In fact, this is the very reason for the NRC's concern that the work environment not suffer from a "chilling effect."

Violations 2 and 4 are based on that same chilling effect, which shows how important any chilling effect is to the NRC.<sup>26</sup> That an NRC action creates the same chilling effect matters no less than when a licensee does so. Both have the potential to reduce communication and employee performance essential to safety. And safety is integral to all NRC licensed activities. Ms. Henderson traces the chilling effect on her and other managers to the same allegedly erroneous statements in the Enforcement Order that are the basis for her reputational injury.<sup>27</sup> As noted above, Ms. Henderson seeks to participate in this proceeding to ensure that her side of the story is told, to show that the NRC's assertions about her complaint are not correct, and to obtain the redress she believes she deserves. Despite the majority's assertion,<sup>28</sup> Ms. Henderson *did* present supporting arguments in her petition.

Ms. Henderson contends that the Staff's actions causing her harm are unlawful because the Staff failed to comply with 10 C.F.R. § 50.7, the regulatory basis for the Enforcement Order.<sup>29</sup> Section 50.7 prohibits various entities, including Commission licensees, from discriminating against an employee for engaging in certain protected activities. But it also provides that "actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds."<sup>30</sup>

Ms. Henderson argues that section 50.7(d) authorizes the very conduct that the Enforcement Order cites as improper because, she claims, her conduct was motivated by permissible justifications (i.e., "nondiscriminatory grounds"), and therefore she should not have been accused of unlawful action in the Staff's order.<sup>31</sup> As Ms. Henderson puts it, "the facts clearly show that [she] had ample nonprohibited justifications for filing her Complaint against Mr. McBrearty . . . and to include Ms. Wetzel as a potential co-conspirator."<sup>32</sup> The substance of

---

<sup>26</sup> See TVA Order Appendix at 2, 4.

<sup>27</sup> Henderson Hearing Request at 8.

<sup>28</sup> See Majority at p. 155.

<sup>29</sup> Henderson Hearing Request at 10.

<sup>30</sup> 10 C.F.R. § 50.7(d) (emphasis added). The regulation goes on to explain that "[t]he prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations." *Id.*

<sup>31</sup> Henderson Hearing Request at 10.

<sup>32</sup> *Id.* at 11.

Ms. Henderson's allegations is that her specific injuries directly result from the Staff's alleged failure to correctly apply section 50.7.

**B. Under the Plain Language of Section 2.203(a)(3), Ms. Henderson's Hearing Demand Must Be Granted**

Under the plain language of 10 C.F.R. § 2.202(a)(3), Ms. Henderson is an "other person adversely affected by the order," and, as such, is entitled "to demand a hearing on all or part of the order" to rebut the Staff's allegations against her.<sup>33</sup> Rather than being a mere third party who might claim an indirect injury from the Enforcement Action, Ms. Henderson is directly harmed by the Staff's assertions in the Enforcement Action.<sup>34</sup> Ms. Henderson claims that the erroneous statements in the Enforcement Order have harmed her reputation and have caused her to be hesitant to report personnel issues (the "chilling effect").<sup>35</sup> Consequently, she has properly alleged a direct harm from the language of the Enforcement Order.

Moreover, Ms. Henderson has met the three-part judicial test for standing applied in NRC proceedings: injury, causation, and redressability.<sup>36</sup> Essentially, if she has injuries that are traceable to the order and are redressable, she has met the requirements for standing.<sup>37</sup> The majority did not decide whether damage to

---

<sup>33</sup> 10 C.F.R. § 2.202(a)(3).

<sup>34</sup> Henderson Hearing Request at 4-9.

<sup>35</sup> *Id.* at 3, 9.

<sup>36</sup> *See* 10 C.F.R. § 2.309(d); Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,220-21 (Jan. 14, 2004).

<sup>37</sup> Henderson Hearing Request at 4-7. Section 2.309(d) requires Ms. Henderson to provide the basis for her right to be part of the proceeding; her interest in the proceeding; and the possible effect of the proceeding on her interest. 10 C.F.R. § 2.309(d)(1). She met the first requirement by citing the TVA Order's provision for those "adversely affected" and showing she has been injured by the TVA Order, *see* Henderson Hearing Request at 1-2, 4-8, the next, by her statements about wanting to defend her reputation and remove the stigma that causes the chilling effect, *see id.*, and the last by her request that the Board's favorable decision could require the Staff to rescind the erroneous statements that cause the harm. *Id.* at 8.

The majority is concerned about different types of standing determinations. Majority at p. 161 & n.49. But this is just a distraction from whether Ms. Henderson has demonstrated standing based on the facts unique to this case. The Commission has flexibility in determining standing and may use somewhat more- or less-restrictive criteria than courts, but those criteria must still be reasoned based on the facts of the case. *See Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 75-79 (D.C. Cir. 1999); *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914-18 (2009). The case before us presents just the sort of circumstance where standing has been demonstrated regardless of how it is characterized, and zone of interests is not necessary to evaluate a nexus between the claimed harm and a statute at issue.

Ms. Henderson's reputation is an injury for standing purposes.<sup>38</sup> When Article III courts have been faced with allegations of a government action causing a reputational injury that is redressable, they have found that the injury is sufficient to establish standing. The majority provides no valid reason why we should not do the same.

In *McBryde v. Committee to Review*, the D.C. Circuit found the harm to a judge's reputation from a public reprimand for misconduct was a sufficient injury for him to establish standing.<sup>39</sup> Similarly, in *Sullivan v. Committee on Admissions*, the D.C. Circuit found that the District Court's determination that an attorney had violated Canons of Ethics "plainly reflects adversely on his professional reputation. In a sense, Appellant's posture is not unlike that of an accused who is found guilty but with penalties suspended. We conclude this gives him standing to appeal."<sup>40</sup> And, in *Meese v. Keene*, the Court found that government action labeling an individual's showing of films as "political propaganda" caused "risk of injury to [Keene's] reputation" that was traceable to the government's action.<sup>41</sup> Because the injury in *Meese* could be redressed by enjoining the government's action, the Court found that this reputational harm was sufficient to establish standing to contest the action.<sup>42</sup> In all three cases, the government actions were not retracted and were found to have sufficiently raised the harm of a damaged reputation. The same could be said for the TVA Enforcement Action relative to Ms. Henderson. And because the agency "applies contemporaneous judicial concepts of standing,"<sup>43</sup> Ms. Henderson's injury is caused by the Staff's assertions in the Enforcement Order and is redressable by this Board.

Section 2.202(a)(3) unequivocally grants Ms. Henderson the right, within twenty (20) days of the date of the order, "to demand a hearing on all or part of the order."<sup>44</sup> Given that Ms. Henderson alleges a direct, judicially recognized injury caused by the Staff's alleged failure to correctly apply 10 C.F.R. § 50.7, the zone-of-interests test does not apply. The Commission's summary of the zone-of-interests test in *Quivira Mining Co.* states that "[w]here the plaintiff

---

<sup>38</sup> See Majority Part II.A.

<sup>39</sup> *McBryde v. Comm. to Review Cir Council Conduct & Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52 (D.C. Cir. 2001); see also *Foretich v. United States*, 351 F.3d 1198, 1214 (D.C. Cir. 2003) (determining that "reputational injury that derives directly from government action will support Article III standing to challenge that action").

<sup>40</sup> *Sullivan v. Comm. on Admissions and Grievance of the U.S. Dist. Ct. for D.C.*, 395 F.2d 954, 956 (D.C. Cir. 1967).

<sup>41</sup> *Meese v. Keene*, 481 U.S. 465, 466 (1987).

<sup>42</sup> *Id.* at 465-77.

<sup>43</sup> *Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 71 (1994).

<sup>44</sup> 10 C.F.R. § 2.203(a)(3).

itself is *not* itself the subject of the contested regulatory action, the [zone of interests] test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit."<sup>45</sup> But here, when Ms. Henderson's conduct *is* the subject of the disputed agency action, and she challenges the legality of that action, there is no need to apply the zone-of-interests test to determine the nexus of the harm.<sup>46</sup>

### **C. Even assuming the Zone-of-Interests Test Applies, Ms. Henderson Satisfies Its Requirements**

The Supreme Court has construed the zone-of-interests test liberally, stating that it is "not meant to be especially demanding."<sup>47</sup> Even if the zone-of-interests test is applied in this case, Ms. Henderson has satisfied this "not . . . especially demanding" standard. The Supreme Court has explained that the zone-of-interests test is not determined by the statute's overarching purpose, but instead "by reference to the particular provision of law upon which the plaintiff relies."<sup>48</sup> The analysis is not based on the purpose of the entire act, but only on

---

<sup>45</sup> *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 12 (1998) (citing *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)) (emphasis added).

<sup>46</sup> Going forward, as the Commission analyzes the use of the zone-of-interests test, it may wish to consider reviewing the current Supreme Court stance that the test is no longer considered part of the standing analysis, but instead is part of the determination of the proximity of the cause of action to the statute involved by the plaintiff, *see Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1302-03, 1307 (2017), and consider whether the requirement that a contention must be within the scope of the proceeding adequately addresses the issue. 10 C.F.R. § 2.309(f)(1)(iii). If not, the Commission may wish to consider amending regulations to add the zone-of-interests test with guidance for when it should be applied. As a distinguished commentator pointed out, "the Court has not provided any authoritative text to illuminate [the test's] scope or purpose." 13.A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3531.7 (3d ed. 2020) (Zone of Protected Interests) (stating "[t]he lack of clear defining principles in turn has led to occasional frustration, seeming changes in character, and uncertain application" of the zone-of-interests test, which can be said equally about NRC cases). Because the Commission "applies contemporaneous judicial concepts of standing," *Sequoyah*, CLI-94-12, 40 NRC at 71, and the Court has shifted from its 1970s' era approach to today's use of the zone-of-interests test to evaluate the relationship of the action to the invoked statute, the Commission might also consider whether *North Anna* and *Palisades* cases' use of the zone-of-interests test as part of the standing analysis should be seen as precedential.

<sup>47</sup> *Clarke*, 479 U.S. at 399; *see also Howard R.L. Cook & Tommy Shaw Found. ex rel. Black Emp. of Library of Cong., Inc. v. Billington*, 737 F.3d 767, 771 (D.C. Cir. 2013) (stating "the zone of interests requirement poses a low bar").

<sup>48</sup> *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997).



the specific provision invoked by the plaintiff.<sup>49</sup> “The plaintiff must establish that the injury he complains of . . . falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.”<sup>50</sup>

As previously explained, violations cited in the Enforcement Order are based on 10 C.F.R. § 50.7, the employee protection regulations.<sup>51</sup> These regulations are grounded in section 211 of the Energy Reorganization Act of 1974 (ERA), as amended.<sup>52</sup> Ms. Henderson has made clear that she is challenging the Staff’s action under section 50.7.<sup>53</sup> Thus, if the zone-of-interests test were applied here, the “relevant statute” is primarily the ERA and the relevant regulation implementing the ERA, i.e., 10 C.F.R. § 50.7.

Ms. Henderson maintains that her conduct on which the Staff’s Enforcement Order is based is in fact allowed by section 50.7(d) because it was motivated by permissible justifications (i.e., “nondiscriminatory grounds”).<sup>54</sup> Therefore, she argues, she should not have been accused of unlawful action in the Staff’s order. The obvious purpose of section 50.7(d) is to provide protection for actions “taken by an employer, *or others*, which adversely affect an employee” but which are predicated upon nondiscriminatory grounds.<sup>55</sup> Ms. Henderson is one of the “others” to whom this provision applies and for whose benefit it was created. Her alleged injuries are the direct result of the Staff’s alleged failure to correctly apply that provision. Therefore, Ms. Henderson’s alleged injuries fall squarely within the zone of interests protected by section 50.7(d) and which that provision was intended to prevent.

In his dissent in *Dresden*, Commissioner Baran discussed the zone-of-interests test and explained that he would have found the petitioner union’s claim — i.e., that the enforcement order would harm its members and reduce safety — was a protected interest, rather than finding the case moot, as did the majority.<sup>56</sup> Here too, there is a clear connection between the protection of public health and safety and Ms. Henderson’s claim that the Staff’s Order fails to properly apply section 50.7(d). Protecting the right to discipline employees on nondiscrimina-

---

<sup>49</sup> *Id.* at 163 (citing *Ass’n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 155-56 (1970)).

<sup>50</sup> *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 883 (1990); *see also Air Courier Conf. v. Postal Workers*, 498 U.S. 517, 523-24 (1991).

<sup>51</sup> TVA Order at 2.

<sup>52</sup> 10 C.F.R. § 50.7(a).

<sup>53</sup> Henderson Hearing Request at 2.

<sup>54</sup> *Id.* at 2, 12.

<sup>55</sup> 10 C.F.R. § 50.7(d).

<sup>56</sup> *Exelon Generation Co., LLC* (Dresden Nuclear Power Station, Units 2 and 3), CLI-16-6, 83 NRC 147, 160-62 (2016).

tory grounds preserves supervisors' ability to discipline employees who pose a threat to public health and safety.

Ms. Henderson argues that this Order has "serious potential to silence individuals who are being harassed."<sup>57</sup> She observes that "rather than file a complaint and risk career-threatening reputational injury, individuals will instead keep silent, thus empowering bad actors."<sup>58</sup> She further notes that "the Commission has recognized such a workplace, where people are permitted to act unprofessionally and not treat others with respect, directly impacts public health and safety."<sup>59</sup> She observes that "[i]n the nuclear industry, zero tolerance for bullying and harassment is essential to ensure a Respectful Work Environment (one of the Commission's own established Positive Traits of a Nuclear Safety Culture) where trust and respect permeate an organization and are critical to maintaining a safety conscious work environment."<sup>60</sup>

Furthermore, there is a sufficient relationship between the ERA and the AEA that place Ms. Henderson's allegations squarely within the zone of interests protected by the AEA. The agency, in promulgating section 50.7, invoked its authority under the ERA, but the agency applies the regulation under its authority derived from both the ERA and AEA.<sup>61</sup> As stated above, the zone-of-interests test should not be applied in Ms. Henderson's case, but if it is, Ms. Henderson's claims are directly relevant to 10 C.F.R. § 50.7, which is related to the ERA and the AEA.

The majority states that the *North Anna* "Appeal Board held that reputation 'is not even arguably within the "zone of interests" protected or regulated by the Atomic Energy Act,"<sup>62</sup> without explaining why *North Anna* applies to Ms. Henderson's claims.<sup>63</sup> That Appeal Board ruling was based on the particular facts of the case and did not establish that reputational injury could never be

---

<sup>57</sup> Henderson Hearing Request at 9.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (citation omitted).

<sup>60</sup> *Id.* (citation omitted).

<sup>61</sup> The regulation on which the Order is based is grounded in the AEA and in the Energy Reorganization Act of 1974, as amended. *See* 10 C.F.R. § 50.7 (stating that "[t]he protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act"); *see also Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 185 (2004) (the Commission explained that it invoked both the AEA and the ERA as authority when promulgating section 50.7).

<sup>62</sup> Majority at p. 160 (quoting *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 104 (1976)).

<sup>63</sup> *Id.*; *see North Anna*, ALAB-342, 4 NRC at 102, 107. The Appeal Board determined that the contractor's "financial and reputational losses," were sufficient as an injury-in-fact, though not within the Atomic Energy Act's zone of interests. *Id.* at 104.

within the zone of interests of any NRC proceeding.<sup>64</sup> Ms. Henderson's claims here are distinctly different from those in the *North Anna* operating licensing proceeding. There, a contractor sought to intervene based on potential "reputational and economic" losses that the contractor might incur were a problem with the power plant to arise after it began operating.<sup>65</sup> Similarly, the majority cited the *Palisades* license transfer case in support of its denial of standing to Ms. Henderson.<sup>66</sup> *Palisades*, however, was not an enforcement action and the petitioners' reputational injuries there were remote.<sup>67</sup> Both *North Anna* and *Palisades* concerned third parties who were seeking intervention in operating licensing and license transfer proceedings. In contrast, the case before us concerns an enforcement action that involves employee protection, 10 C.F.R. § 50.7. Ms. Henderson's injuries are a direct result of the NRC Staff's Enforcement Action in which she is identified.

#### **D. Contention Admissibility**

Ms. Henderson now has only one contention that simply asserts "[t]he facts do not support the Staff's conclusion in Violations 1 and 3 that Ms. Henderson's Complaint was filed for prohibited reasons."<sup>68</sup> She addresses the six-section 2.309(f)(1) contention admissibility requirements and provides sufficient information to fulfill each.<sup>69</sup> The Staff did not oppose the contention, and in fact, did not reference any part of her contention admissibility discussion at all.<sup>70</sup>

Accordingly, I would find that Ms. Henderson has met the requirements for standing and contention admissibility and would grant Ms. Henderson's request.

#### **E. Discretionary Intervention**

Because Ms. Henderson has met the requirements for standing and contention admissibility, her request for discretionary intervention need not be analyzed. But if I were to analyze it, I would note that the harm she alleges and her need for an administrative route to defend herself would weigh heavily in favor of granting her request.

---

<sup>64</sup> See generally *North Anna*, ALAB-342, 4 NRC at 98.

<sup>65</sup> *Id.* at 108.

<sup>66</sup> Majority at p. 161 (citing *Entergy Nuclear Operations, Inc., and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 266 (2008)).

<sup>67</sup> *Palisades*, CLI-08-19, 68 NRC at 266. The group of unions who petitioned to intervene in this license transfer were concerned about a plant's reputation affecting the interests of the workers.

<sup>68</sup> Henderson Hearing Request at 10; Tr. at 41-42 (Walsh).

<sup>69</sup> 10 C.F.R. § 2.309(f)(1); Henderson Hearing Request at 10-20.

<sup>70</sup> See generally NRC Staff Answer.

The majority does not find that any of the six factors for discretionary intervention favor Ms. Henderson.<sup>71</sup> In analyzing the factors, the majority states that Ms. Henderson's contention is material to the case,<sup>72</sup> yet decides that her admission to the proceeding would not contribute to the record. Most perplexing is that the majority finds that Ms. Henderson's interests can be adequately protected by means other than being admitted to the proceeding and that her interests will be adequately represented by TVA.<sup>73</sup> According to the majority, "weigh[ing] heavily against her" are that Ms. Henderson and TVA currently have the same counsel, that she will likely be a fact witness, and that she might be allowed to submit an amicus brief.<sup>74</sup>

Ms. Henderson has no other administrative route to seek redress. Having an opportunity to defend her reputation as a nuclear worker is important. Her interests are not necessarily protected just because her case overlaps with TVA's. If she is not admitted as a party to a proceeding, she is not at the table to defend herself. Reliance on her employer for that protection does not guarantee that her interests will be adequately addressed.

TVA's attorney must act in TVA's best interest, regardless of how that impacts Ms. Henderson. TVA's attorney noted at oral argument that he had ethical concerns that likely would cause him to have to withdraw from representing Ms. Henderson if she were not a party.<sup>75</sup> If he represents TVA alone, he could be faced with an option that is optimal for TVA, but not beneficial for Ms. Henderson. Admitting her as a party eliminates that problem.

Ms. Henderson's admission to the proceeding is not likely to inappropriately delay or expand the proceeding. Allowing discretionary intervention is rare, but this is just the sort of unique case that would justify its use if no other path for admission to the proceeding were available. As the Commission said in *Pebble Springs*, "we would expect [the] practice [of applying the discretionary intervention factors] to develop . . . through attention to the concrete facts of particular situations."<sup>76</sup>

Ms. Henderson should be made a party to the proceeding based on her demonstration of standing and provision of an admissible contention, but in the alternative, the unique situation in which Ms. Henderson finds herself, given the facts presented, also justifies her request for a hearing as a matter of discretion.

---

<sup>71</sup> Majority at pp. 163-66.

<sup>72</sup> *Id.* at p. 165.

<sup>73</sup> *Id.* at p. 165.

<sup>74</sup> *Id.* at pp. 165-66.

<sup>75</sup> Tr. at 60-62 (Walsh).

<sup>76</sup> *Pebble Springs*, CLI-76-27, 4 NRC at 617.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:**

**G. Paul Bollwerk, III, Chairman  
Nicholas G. Trikouros  
Dr. Gary S. Arnold**

**In the Matter of**

**Docket Nos. 50-338-SLR  
50-339-SLR  
(ASLBP No. 21-970-01-SLR-01)**

**VIRGINIA ELECTRIC AND POWER  
COMPANY  
(North Anna Power Station, Units 1  
and 2)**

**March 29, 2021**

In this proceeding concerning a subsequent license renewal (SLR) application by Virginia Electric and Power Company (VEPCO) for the North Anna Power Station, Units 1 and 2, while concluding that petitioners Beyond Nuclear, Inc., Sierra Club, and Alliance for a Progressive Virginia (collectively Petitioners) have established their standing to intervene, the Licensing Board denies their hearing request, determining that (1) Petitioners' sole contention challenging the VEPCO Environmental Report (ER) as failing to discuss the 2011 Mineral, Virginia earthquake's environmental significance does not fulfill the 10 C.F.R. § 2.309(f)(1) contention admissibility standards; and (2) Petitioners' 10 C.F.R. § 2.335 waiver request to permit their contention to be considered in this adjudication, notwithstanding the exclusion by appendix B to 10 C.F.R. Part 51, subpart A of such a seismic accident impacts issue, does not meet the requirements for obtaining a waiver.

**LICENSE APPLICATION: LICENSE RENEWAL  
(ENVIRONMENTAL INFORMATION)**

**NEPA: GENERIC ISSUES (LICENSE RENEWAL)**

An application for either an initial or subsequent renewal of the 10 C.F.R. Part 50 operating license for an existing nuclear power plant is governed by the provisions of 10 C.F.R. Part 54. The environmental contents of an application are described in 10 C.F.R. § 54.23, which provides that the application must “include a supplement to the [ER] that complies with the requirements of subpart A of 10 C.F.R. Part 51.” The information required for such a supplement is outlined in section 51.53(c), which also provides in paragraph (3)(i) that “[t]he [ER] for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to subpart A of this part.” 10 C.F.R. § 51.53(c)(3)(i). Other Part 51 provisions extend this impacts analysis exemption for Category 1 issues to the Staff’s draft and final environmental impact statements (EISs) as well. *See id.* §§ 51.71(d), 51.95(c)(1).

**NEPA: GENERIC ISSUES (LICENSE RENEWAL)**

As appendix B to subpart A of Part 51 makes clear, “[t]he Commission has assessed the environmental impacts associated with granting a renewed operating license for a nuclear power plant . . . [and] Table B-1 summarizes the Commission’s findings on the scope and magnitude of environmental impacts” as required by NEPA. *Id.* pt. 51, subpart A, app. B. Table B-1, in turn, indicates that the “[d]ata supporting this table are contained in NUREG-1437, Revision 1, ‘Generic Environmental Impact Statement ([GEIS]) for License Renewal of Nuclear Plants (June 2013)’” and that for Category 1 items, “[t]he generic analysis of the issue may be adopted in each plant-specific review.” *Id.* tbl. B-1 nn.1-2.

**NEPA: GENERIC ISSUES (LICENSE RENEWAL)**

**RULES OF PRACTICE: WAIVER OF RULE OR REGULATION**

Commission caselaw establishes that an adjudicatory challenge based on an applicant’s failure to deal appropriately with a Category 1 item constitutes an attack on an agency rule, making a section 2.335(b) waiver the sole vehicle for raising such an issue in an adjudication. *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 20 & n.26 (2007) (*citing Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11-13 (2001)).

**NEPA: GENERIC ISSUES (LICENSE RENEWAL)**

A Category 2 item is a Table B-1 listing designating those items for which “the analysis reported in the [GEIS] has shown that . . . additional plant specific review is required.” 10 C.F.R. pt. 51, subpart A, app. B, tbl. B-1 n.2.

**NEPA: GENERIC ISSUES (LICENSE RENEWAL); SEVERE ACCIDENT MITIGATION ALTERNATIVES (SAMAs)**

**RULES OF PRACTICE: WAIVER OF RULE OR REGULATION**

As a Category 2 finding, unless analyzed previously, severe accident mitigation alternatives (SAMAs) for each facility applying for renewal of its operating license must be investigated as part of the environmental assessment process. But under section 51.53(c)(3)(ii)(L), which the Commission has described as affording the “functional equivalent” of the Category 1 issue preclusion established by section 51.53(c)(3)(i), a license renewal contention regarding the adequacy of a previously considered SAMA environmental analysis cannot be litigated absent a section 2.335(b) waiver. *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 211-12 (2013), *pet. for review denied sub nom., NRDC v. NRC*, 823 F.3d 641 (D.C. Cir. 2016).

**SEISMIC AND GEOLOGIC CRITERIA: PLANT DESIGN (STANDARD FOR DETERMINING ADEQUACY)**

Under 10 C.F.R. Part 100, the term “design-basis earthquake” is considered synonymous with the term “safe shutdown earthquake” (SSE). 10 C.F.R. pt. 100, app. A, § III(c) n.1. An SSE, in turn, is defined as “the earthquake which produces the maximum vibratory ground motion for which” functionality still can be assured for the reactor structures, systems, and components (SSCs) that maintain coolant pressure boundary integrity, safe shutdown and shutdown maintenance capabilities, and the capability to prevent or mitigate accident consequences that otherwise would result in potential Part 100 guideline-comparable offsite exposures. *Id.* § III(c).

**SEISMIC AND GEOLOGIC CRITERIA: PLANT DESIGN (STANDARD FOR DETERMINING ADEQUACY)**

The operating basis earthquake (OBE) is defined as the earthquake that “produces the vibratory ground motion for which those features of the nuclear power plant necessary for continued operation without undue risk to health and safety of the public are designed to remain functional.” *Id.* § III(d). Section V(a)(2) of

appendix A, which indicates that the maximum vibratory ground acceleration for an OBE must be at least one-half of the SSE maximum vibratory ground acceleration, requires that if vibratory ground motion exceeding the OBE occurs, plant shutdown is mandated and the licensee must demonstrate to the agency prior to resuming operations that no functional damage occurred to those plant features that defined the OBE. *See id.* § V(a)(2).

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

As the Commission noted recently, to establish representational standing,

[u]nder section 2.309(d)(1) . . . the hearing request must state (1) the name, address, and telephone number of the petitioner; (2) the nature of the petitioner’s right under the AEA to be made a party to the proceeding; (3) the nature and extent of the petitioner’s property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order that may be issued in the proceeding on the petitioner’s interest. In addition, an organization seeking to represent its members must show that at least one member has standing and has authorized the organization to represent her and to request a hearing on her behalf. Further, the interests that the representative organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor requested relief must require an individual member to participate in the organization’s legal action.

While we will construe the hearing request in the petitioner’s favor, the petitioner has the burden of demonstrating that the standing requirements are met.

*Southern Nuclear Operating Co., Inc.* (Vogtle Electric Generating Plant, Unit 3), CLI-20-6, 91 NRC 225, 237-38 & n.83 (2020) (footnote omitted) (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015)).

**RULES OF PRACTICE: STANDING TO INTERVENE  
(REQUIREMENT FOR INDEPENDENT PRESIDING OFFICER  
DETERMINATION)**

While Petitioners’ standing has not been contested, an independent Board determination is required about whether each has fulfilled these requirements to establish standing to intervene in this proceeding. *See* 10 C.F.R. § 2.309(d)(2); *see also Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-19-5, 89 NRC 483, 491 (2019), *aff’d on other grounds*, CLI-20-11, 92 NRC 335 (2020).



### **RULES OF PRACTICE: STANDING (PROXIMITY PRESUMPTION)**

The proximity presumption, which in the power reactor context excuses those otherwise meeting the requirements for standing from making a specific showing of injury in fact so long as they reside, work, or otherwise have regular contacts within a 50-mile radius of the facility in question, has been applied in SLR proceedings. See *Peach Bottom*, LBP-19-5, 89 NRC at 490-91; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-3, 89 NRC 245, 258-59 (2019), *appeal dismissed and referred ruling aff'd*, CLI-20-3, 91 NRC 133 (2020).

### **RULES OF PRACTICE: WAIVER OF RULE OR REGULATION**

In a license renewal proceeding, the provision governing whether a contention regarding a Table B-1, Category 1 issue can be accepted for further litigation declares that “no rule or regulation of the Commission, or any provision thereof . . . is subject to attack by way of . . . any adjudicatory proceeding” in the absence of a waiver granted in accordance with paragraphs (b) through (d) of that section. 10 C.F.R. § 2.335(a). Further, section 2.335(b) states that the “sole ground” for a “waiver or exception” from a regulation is 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 the rule or regulation was adopted.” *Id.* § 2.335(b).

### **RULES OF PRACTICE: WAIVER OF RULE OR REGULATION**

Long-standing Commission precedent — the so-called *Millstone* test — establishes the specific requirements governing when a section 2.335 waiver can be granted, mandating a finding that each of the following four factors has been met:

- (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.

*Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 207-08 & n.36 (2013) (citing *Dominion Nuclear Connecticut*,

*Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005)).

**RULES OF PRACTICE: WAIVER OF RULE OR REGULATION**

Ultimately, however, a determination about whether these criteria have been fulfilled so as to warrant a waiver is the sole province of the Commission. *See* 10 C.F.R. § 2.335(c), (d). A licensing board's role thus is limited to deciding whether a petitioner's waiver request has made a prima facie showing regarding each of these factors. A determination that a prima facie showing is lacking means the licensing board "may not further consider the matter," while a board conclusion that a sufficient showing has been made as to each of the four factors requires that the board "certify the matter directly to the Commission," which itself may then grant or deny the waiver or make whatever other determination it deems appropriate. *Id.*

**RULES OF PRACTICE: WAIVER OF RULE OR REGULATION  
(PRIMA FACIE SHOWING)**

A prima facie showing within the meaning of section 2.335(d) "is one that is 'legally sufficient to establish a fact or case unless disproved.'" *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 22 (1988) (quoting *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981)).

**RULES OF PRACTICE: WAIVER OF RULE OR REGULATION**

Absent the grant of a section 2.335 waiver, challenges to Category 1 generic determinations in an adjudication such as this one are precluded. *See Limerick*, CLI-13-7, 78 NRC at 207 ("When we engage in a rulemaking, we are 'carving out' issues from adjudication for generic resolution. Therefore, to challenge the generic application of a rule, a petitioner seeking waiver must show that there is something extraordinary about the subject matter of the proceeding such that the rule should not apply.").

**RULES OF PRACTICE: WAIVER OF RULE OR REGULATION**

In terms of the purposes of the 1996 GEIS and the 2013 Revised GEIS, *see* 1 Office of Nuclear Regulatory Research (RES), NRC, [GEIS], NUREG-1437, Main Report, Final Report (May 1996) (ADAMS Accession No. ML-040690705); 1 NRR, NRC, [GEIS], NUREG-1437, Main Report, Final Report

(rev. 1 June 2013) (ADAMS Accession No. ML13106A241), federal courts have acknowledged the legitimacy of (1) avoiding new analyses of generic Category 1 issues as counterproductive to administrative efficiency and decision; and (2) the agency's regulatory determination, at least in the absence of a valid section 2.335 rule waiver petition, to direct consideration of purported new and significant environmental impact information regarding Category 1 issues proffered by members of the public to the EIS public comment process in 10 C.F.R. §§ 51.73 and 51.74 or the section 2.802 rulemaking petition process rather than the Part 2 adjudicatory process. *See Mass. v. United States*, 522 F.3d 115, 119-21 (1st Cir. 2008); *see also NRDC*, 823 F.3d at 647.

#### **RULES OF PRACTICE: WAIVER OF RULE OR REGULATION**

While the Commission has noted that reliance on section 51.53(c)(3)(iv) new and significant information is not enough to negate the requirement in an adjudication to proffer a valid section 2.335 waiver petition to obtain consideration of that information, *see Vt. Yankee*, CLI-07-3, 65 NRC at 20-21, it also is apparent that by its very nature purported new and significant information is likely to be the basis for any successful waiver petition, *see Limerick*, CLI-13-7, 78 NRC at 210-11; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001).

#### **NEPA: GENERIC ISSUES (LICENSE RENEWAL)**

As the Commission has observed, the designation of a Category 1 issue "reflects the NRC's expectations that our NEPA obligations have been satisfied with reference to our previously conducted environmental analysis in the GEIS." *Limerick*, CLI-13-7, 78 NRC at 212-13.

#### **RULES OF PRACTICE: SCOPE AND TYPE OF PROCEEDING (LICENSE RENEWAL)**

The integrity of SSCs is a current licensing basis issue and so beyond challenge in this license renewal adjudication. *See Turkey Point*, CLI-01-17, 54 NRC at 7.

#### **NEPA: NRC RESPONSIBILITIES**

The Board's negative determination regarding Petitioners' waiver request does not negate the NRC Staff's responsibility (1) in conducting its "hard look" licensing review of the VEPCO ER to assess whether new and significant infor-

mation exists that requires additional consideration; or (2) per 10 C.F.R. § 51.73, to consider whether any information provided by public comments as part of the environment review process for VEPCO's SLR application merits further analysis as new and significant information. *See Limerick*, CLI-13-7, 78 NRC at 216-17.

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

When a hearing requestor seeks admission of a contention submitted as part of a timely intervention petition, that contention must satisfy the six admissibility factors set forth in section 2.309(f)(1). Those factors require the proponent of a contention to

- (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 . . . ; 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.

10 C.F.R. § 2.309(f)(1)(i)-(vi). These six criteria aim to “focus litigation on concrete issues and result in a clearer and more focused record for decision.” Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) [hereinafter 2004 Part 2 Changes].

#### **RULES OF PRACTICE: CONTENTIONS (BURDEN TO SATISFY ADMISSIBILITY CRITERIA)**

The petitioner bears the burden to satisfy each of the criteria, *see Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 329 (2015) (“[I]t is Petitioners’ responsibility, not the Board’s, to formulate contentions and to provide ‘the necessary information to satisfy the basis requirement’ for admission.” (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998))), and a failure to comply with any of the requirements constitutes grounds for rejecting a proposed contention,

*see* 2004 Part 2 Changes, 69 Fed. Reg. at 2221; *see also* *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). Moreover, when a petitioner neglects to provide the requisite support for its contentions, the board may not cure the deficiency by supplying the information. *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991) (licensing board cannot supply missing information supporting a contention).

## **TECHNICAL ISSUES DISCUSSED**

The following technical issues are discussed: design-basis earthquake; operating basis earthquake; seismic and structural design; safe shutdown earthquake.

## **MEMORANDUM AND ORDER (Denying Intervention Petition and Terminating Proceeding)**

Having previously obtained an initial twenty-year extension of its 10 C.F.R. Part 50 operating licenses for Units 1 and 2 at the North Anna Power Station, by application dated August 24, 2020, licensee Virginia Electric and Power Company (VEPCO) now seeks a second twenty-year renewal.<sup>1</sup> In a December 14, 2020 hearing request, Beyond Nuclear, Inc., Sierra Club, and Alliance for a Progressive Virginia (collectively Petitioners) contest the Environmental Report (ER) portion of VEPCO's subsequent license renewal (SLR) application. Petitioners have submitted a single contention challenging the VEPCO ER because it fails to discuss the environmental significance of the 2011 Mineral, Virginia earthquake. Further, acknowledging that such a seismic accident impacts issue is otherwise precluded from consideration in this proceeding by appendix B to 10 C.F.R. Part 51, subpart A, Petitioners also seek a 10 C.F.R. § 2.335(b) waiver of that regulatory exclusion.<sup>2</sup> Both VEPCO and the Nuclear Regulatory Commission (NRC) Staff oppose Petitioners' hearing request, asserting there is

---

<sup>1</sup> *See* Letter from Mark D. Sartain, Vice President–Nuclear Engineering and Fleet Support, VEPCO, to NRC Document Control Desk, encls. (Aug. 24, 2020) (ADAMS Package Accession No. ML-20246G703).

<sup>2</sup> *See* Hearing Request and Petition to Intervene by [Petitioners] and Petition for Waiver of 10 C.F.R. §§ 51.53(c)(3)(i), 51.71(d), and 51.95(c)(1) to Allow Consideration of Category 1 NEPA Issues (Dec. 14, 2020) at 13-37 [hereinafter Hearing Petition]; *see also* VEPCO, Appendix E, Applicant's Environmental Report, Subsequent Operating License Renewal Stage, North Anna Power Station Units 1 and 2 (Aug. 2020) (ADAMS Accession No. ML20246G698) [hereinafter ER].

no basis for further adjudicatory consideration of either the contention or the waiver request.<sup>3</sup>

For the reasons set forth below, while finding Petitioners have established their representational standing to intervene, we conclude they have failed to demonstrate that either their waiver petition or their contention meets the applicable waiver or contention admissibility standards. Accordingly, their hearing petition must be denied and this proceeding terminated.

## I. BACKGROUND

### A. Procedural Background

Submitted in response to an October 15, 2020 *Federal Register* hearing opportunity notice regarding the VEPCO SLR application,<sup>4</sup> Petitioners' single contention asserts that the ER fails to satisfy the NRC's regulations implementing the National Environmental Policy Act (NEPA). Specifically, the contention claims that the ER does not address the environmental impacts of operating the North Anna facility during the extended SLR term under the significant risk of exceeding the two reactors' design-basis earthquake (DBE). According to the contention, this risk of a beyond DBE was demonstrated by the 2011 Mineral, Virginia earthquake that surpassed both units' design basis, the epicenter for which was located a short distance from the facility. *See* Hearing Petition at 13-14. In addition, Petitioners recognize the contention would be barred from consideration in this SLR proceeding because it involves a "Category 1" issue listed in Table B-1 of Part 51, subpart A to appendix B of the agency's NEPA implementation provisions. Consequently, pursuant to section 2.335(b) they seek a waiver of sections 51.53(c)(3)(i), 51.71(d), and 51.95(c)(1) to permit consideration of their contention in this adjudication. *See id.* at 30.

By memorandum dated December 17, 2020, the Secretary of the Commission referred Petitioners' hearing request to the Chief Administrative Judge,<sup>5</sup> who, in turn, on December 21, 2020, assigned the intervention petition to this Licensing Board to rule on standing and contention admissibility matters and preside at any

---

<sup>3</sup> *See* Applicant's Answer Opposing Request for Hearing, Petition to Intervene, and Petition for Waiver Submitted by [Petitioners] (Jan. 8, 2021) at 2-3 [hereinafter VEPCO Answer]; NRC Staff Answer to Hearing Request, Petition to Intervene, and Petition for Waiver Filed by [Petitioners] (Jan. 8, 2021) at 2 [hereinafter Staff Answer].

<sup>4</sup> *See* [VEPCO], North Anna Power Station, Units 1 and 2, 85 Fed. Reg. 65,438 (Oct. 15, 2020).

<sup>5</sup> *See* Memorandum from Annette L. Vietti-Cook, NRC Secretary, to E. Roy Hawkens, Chief Administrative Judge (Dec. 17, 2020).

hearing.<sup>6</sup> While not contesting Petitioners' representational standing to intervene in this proceeding, in their January 8, 2021 answers to Petitioners' hearing request, both VEPCO and the Staff assert that Petitioners' single contention is inadmissible and that their waiver request fails to meet the requisite standards in section 2.335. *See* VEPCO Answer at 3 & n.5; Staff Answer at 2. Petitioners' January 15 reply maintains that their waiver request should be granted and their contention admitted.<sup>7</sup>

In a series of issuances, the Board scheduled an initial prehearing conference to consider the efficacy of Petitioners' hearing request.<sup>8</sup> A virtual conference was conducted on February 4, 2021, during which the Board heard oral argument from the participants on the sufficiency of Petitioners' waiver and contention admissibility claims.<sup>9</sup>

## **B. Environmental Review Process Regarding an SLR Application**

An application for either an initial or subsequent renewal of the 10 C.F.R. Part 50 operating license for an existing nuclear power plant is governed by the provisions of 10 C.F.R. Part 54.<sup>10</sup> The environmental contents of such an application are described in 10 C.F.R. § 54.23, which provides that the application must "include a supplement to the [ER] that complies with the requirements of subpart A of 10 CFR Part 51." The information required for such a supplement is outlined in section 51.53(c),<sup>11</sup> which also provides in paragraph (3)(i) that "[t]he

---

<sup>6</sup> *See* [VEPCO], Establishment of Atomic Safety and Licensing Board, 85 Fed. Reg. 85,683 (Dec. 29, 2020).

<sup>7</sup> Reply by [Petitioners] to Oppositions to Hearing Request and Waiver Petition (Jan. 15, 2021) at 1-2 [hereinafter Petitioners Reply].

<sup>8</sup> *See* Licensing Board Memorandum and Order (Initial Prehearing Conference Scheduling and Procedures) (Jan. 19, 2021) (unpublished); Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference) (Jan. 25, 2021) (unpublished); Licensing Board Memorandum (Licensing Board Questions/Areas of Interest and Public Call-In Access Information for Oral Argument) (Jan. 29, 2021) (unpublished).

<sup>9</sup> *See* Tr. at 1-98; *see also* Licensing Board Memorandum and Order (Adopting Transcript Corrections for Initial Prehearing Conference) (Feb. 25, 2021) (unpublished).

<sup>10</sup> An initial and subsequent renewal each add an additional 20 years to the original 40-year term of a Part 50 reactor operating license, so that in the case of the North Anna facility, if the VEPCO SLR application is granted, the Units 1 and 2 operating license terms would run until April 1, 2058, and August 21, 2060, respectively. *See* Staff Answer at 3.

<sup>11</sup> In their hearing petition, noting a then-pending case before the United States Court of Appeals for the District of Columbia Circuit concerning the question whether this section is applicable only to an initial license renewal application, Petitioners assert the Commission case under review upholding section 51.53(c)'s applicability to an SLR proceeding is wrongly decided and request a formal ruling by this Board on the same question to preserve the issue for judicial review. *See* Hearing Petition

*(Continued)*

[ER] for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to subpart A of this part.” 10 C.F.R. § 51.53(c)(3)(i). Other Part 51 provisions extend this impacts analysis exemption for Category 1 issues to the Staff’s draft and final environmental impact statements (EISs) as well. *See id.* §§ 51.71(d), 51.95(c)(1).

As appendix B to subpart A of Part 51 makes clear, “[t]he Commission has assessed the environmental impacts associated with granting a renewed operating license for a nuclear power plant . . . [and] Table B-1 summarizes the Commission’s findings on the scope and magnitude of environmental impacts” as required by NEPA. *Id.* pt. 51, subpart A, app. B. Table B-1, in turn, indicates that the “[d]ata supporting this table are contained in NUREG-1437, Revision 1, ‘Generic Environmental Impact Statement ([GEIS]) for License Renewal of Nuclear Plants (June 2013)’” and that for Category 1 items, “[t]he generic analysis of the issue may be adopted in each plant-specific review.” *Id.* tbl. B-1 nn.1-2. Commission caselaw establishes that an adjudicatory challenge based on an applicant’s failure to deal appropriately with a Category 1 item constitutes an attack on an agency rule, making a section 2.335(b) waiver the sole vehicle for raising such an issue in an adjudication.<sup>12</sup>

Among its listings, Table B-1 specifically identifies summary environmental impact findings relating to “Postulated Accidents,” including “Design-basis accidents” and “Severe accidents.”<sup>13</sup> *Id.* pt. 51, subpart A, app. B. tbl. B-1. The agency impacts finding regarding a design-basis accident is not only classified as a Category 1 item, but is summarized as being “SMALL. The NRC staff has concluded that the environmental impacts of design-basis accidents are of small

---

at 26-27 & n.8 (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-20-3, 91 NRC 133 (2020)); *see also Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-20-11, 92 NRC 335, 342-44 (2020) (adhering to *Turkey Point* ruling regarding section 51.53(c)’s applicability to an SLR proceeding). Although the District of Columbia Circuit case was recently dismissed as “incurably premature,” *see Friends of the Earth v. NRC*, 851 Fed. App’x 212, 213 (D.C. Cir. 2021) (per curiam), as Petitioners also recognize, *see* Hearing Petition at 27, the Commission’s *Turkey Point* decision is binding precedent that the Board must follow in this proceeding.

<sup>12</sup> *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 20 & n.26 (2007) (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11-13 (2001)).

<sup>13</sup> The Table B-1 summary impact findings are based on the generic analysis of design-basis and severe accidents provided in the referenced GEIS, which was originally promulgated in 1996 and was updated in 2013. *See* 1 Office of Nuclear Regulatory Research (RES), NRC, [GEIS], NUREG-1437, Main Report, Final Report (May 1996) (ADAMS Accession No. ML040690705) [hereinafter 1996 GEIS]; 1 NRR, NRC, [GEIS], NUREG-1437, Main Report, Final Report (rev. 1 June 2013) (ADAMS Accession No. ML13106A241) [hereinafter 2013 Revised GEIS].



significance to all plants.”<sup>14</sup> *Id.* In contrast, severe accidents are classified as a Category 2 item, which is a Table B-1 listing designating those items for which “the analysis reported in the [GEIS] has shown that . . . additional plant specific review is required.” *Id.* n.2. And the Table B-1 summary impacts finding for such accidents states:

SMALL. The probability-weighted consequences of atmospheric release, fallout onto open bodies of water, releases to groundwater, and societal and economic impacts from severe accidents are small for all plants. However, alternatives to mitigate severe accidents must be considered for all plants that have not considered such alternatives.

*Id.*<sup>15</sup>

---

<sup>14</sup> Table B-1 defines the significance level of a “SMALL” impacts designation as

[f]or the issue, environmental effects are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute of the resource. For the purposes of assessing radiological impacts, the Commission has concluded that those impacts that do not exceed permissible levels in the Commission’s regulations are considered small as the term is used in this table.

10 C.F.R. pt. 51, subpart A, app. B, tbl. B-1 n.3.

<sup>15</sup> As the basis for its findings regarding design-basis accidents, including seismic-generated events, the 1996 GEIS states that

[b]ecause of the requirements that continuous acceptability of the consequences and aging management programs be in effect for license renewal, the environmental impacts as calculated for design-basis accidents should not differ significantly from initial licensing assessments over the life of the plant, including the license renewal period. In addition, any refurbishment necessary to prepare for license renewal would be done in a fashion consistent with the limits set for design-basis accidents and would not alter their consequences. Accordingly, the design of the plant relative to design-basis accidents during the extended license period is considered to remain acceptable and the environmental impacts of those accidents will not be examined further in this section.

1996 GEIS at 5-11 to -12. And with respect to the impacts of severe accidents arising from seismic hazards, under the heading of “Probabilistic Assessment of Severe Accidents,” the 1996 GEIS states:

NRC’s earthquake design standards have been conservatively developed to ensure protection of the public health and safety from earthquakes whose magnitudes are well above the most likely earthquake magnitude when considering the collective earthquakes history for specific plant sites in the United States. Therefore, earthquakes exceeding NRC seismic design standards are extremely unlikely. However, in the unlikely event of such an earthquake, there would be substantial damage to older residential structures, commercial structures, and high-hazard facilities such as dams whose seismic design standards are below nuclear seismic design standards. The societal impact due to the non-nuclear losses alone from an earthquake larger than the design basis of a nuclear plant, including property damage, injuries, and fatalities, would be major. . . . However, . . . the commission expects that the reactor accident contribution to the losses from large beyond design basis earthquakes

*(Continued)*

Also, as the final sentence of this Category 2 finding indicates, unless analyzed previously, severe accident mitigation alternatives (SAMAs) for each facility applying for renewal of its operating license must be investigated as part of the environmental assessment process.<sup>16</sup> But under section 51.53(c)(3)(ii)(L), which the Commission has described as affording the “functional equivalent” of the Category 1 issue preclusion established by section 51.53(c)(3)(i), a license renewal contention regarding the adequacy of a previously considered SAMA environmental analysis cannot be litigated absent a section 2.335(b) waiver.<sup>17</sup>

For the North Anna SLR application, the environmental evaluation of seismic events is found in two contexts. The first is the ER’s discussion of postulated accidents, including design-basis accidents and severe accidents relative to the 2013 Revised GEIS, and the possible existence of “new and significant information” regarding such accidents, of which VEPCO concluded there was none. *See* ER at E-4-84 to -87. The second is the ER’s consideration of SAMAs and, once again, the possible existence of new and significant information regarding such

---

would be small relative to the non-nuclear losses. While this in itself does not mean the reactor consequences from such an earthquake would be small, the commission concludes that even with potentially high consequences from a beyond design basis earthquake, the extremely low probability of such earthquake yields a small risk from beyond design basis earthquakes at existing nuclear power plants.

*Id.* at 5-17 to -18. The 1996 GEIS thus concluded that “the risk from . . . beyond design basis earthquakes at existing nuclear power plants is small . . . .” *Id.* at 5-18.

Thereafter, in the 2013 Revised GEIS the Commission made no change in its analysis of the impacts of either design-basis or severe seismic accidents, *see* 3 NRR, NRC, [GEIS], NUREG-1437, Appendices, Final Report at B-29 to -30 (rev. 1 June 2013) (ADAMS Accession No. ML13106A244) [hereinafter 2013 Revised GEIS Appendices], while observing that

[c]hanges in potential seismic hazards are not within the scope of the license renewal environmental review, except, where appropriate, during the analysis of [SAMAs], because any such changes would not be the result of continued operation of the nuclear power plant. Seismic design issues are considered during site-specific safety reviews and, more specifically, are addressed on an ongoing basis through the reactor oversight process and other NRC safety programs, such as the Generic Issues Program, which are separate from the license renewal process. When new seismic hazard information becomes available, the NRC evaluates the new information, through the appropriate program, to determine if any changes are needed at one or more existing plants.

2013 Revised GEIS at 3-52.

<sup>16</sup>Because there had not been a SAMA analysis done at the time the original Part 50 operating licenses were issued for North Anna Units 1 and 2, such an analysis was performed by VEPCO and reviewed by the Staff as part of the initial license renewal proceeding for the North Anna facility. *See* NRR, NRC, [GEIS], NUREG-1437, at 5-4 (Supp. 7 Nov. 2002) (ADAMS Accession No. ML023380542) [hereinafter North Anna GEIS Supp.].

<sup>17</sup>*Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 211-12 (2013), *pet. for review denied sub nom., NRDC v. NRC*, 823 F.3d 641 (D.C. Cir. 2016).

alternatives. Based on a probabilistic risk assessment (PRA) model, however, VEPCO concluded no such information existed. *See id.* at E-4-88 to -92.

### **C. Design-Basis Seismic Events and the 2011 Mineral Earthquake and Its Aftermath**

Relative to both their section 2.335 waiver request and their contention, Petitioners focus on the purported failure of VEPCO's ER

to address the environmental significance of a 2011 earthquake within several miles of the North Anna reactors, whose ground motion exceeded the design basis for the reactors and thereby called into question all previous assurances by the NRC that the environmental impacts of operating North Anna Units 1 and 2 are small.

Hearing Petition at 2. Under 10 C.F.R. Part 100, the term "design-basis earthquake" (DBE) is considered synonymous with the term "safe shutdown earthquake" (SSE). 10 C.F.R. pt. 100, app. A, § III(c) n.1. An SSE, in turn, is defined as "the earthquake which produces the maximum vibratory ground motion for which" functionality still can be assured for the reactor structures, systems, and components (SSCs) that maintain coolant pressure boundary integrity, safe shutdown and shutdown maintenance capabilities, and the capability to prevent or mitigate accident consequences that otherwise would result in potential Part 100 guideline-comparable offsite exposures. *Id.* § III(c).

The earthquake in question, which the United States Geological Survey reported as having a Richter scale magnitude of 5.8, occurred on August 23, 2011, with its epicenter near Mineral, Virginia, approximately 10 miles from the North Anna facility. Operating at 100 percent power, both North Anna facility units tripped shortly after the earthquake, which also caused a loss of offsite power. Both units were stabilized following the earthquake and were taken to safe shutdown conditions, while the loss of offsite power caused the activation of four emergency diesel generators and an alternate diesel generator to provide power to the facility until offsite power was restored. Because the spectral and peak ground accelerations for the facility's DBE/SSE and operating basis earthquake (OBE) were exceeded at certain frequencies for a short time period, NRC regulations required that the North Anna units remain shut down until VEPCO demonstrated to the agency that no functional damage occurred to those features necessary for continued safe operation.<sup>18</sup>

---

<sup>18</sup> *See* NRR, NRC, Technical Evaluation by [NRR] Related to Plant Restart after the Occurrence of an Earthquake Exceeding the Level of the Operating Basis and Design Basis Earthquakes at  
(Continued)

To this end, VEPCO provided a September 17, 2011 report indicating that subject to completion of some near-term monitoring, testing, and inspection activities, both units were ready for restart, albeit with the understanding that additional long-term seismic monitoring and evaluation activities were to be undertaken as well.<sup>19</sup> This was followed by a September 30, 2011 Staff confirmatory action letter (CAL) reiterating VEPCO's commitment not to restart the facility until NRC had finished its review of the circumstances surrounding the seismic event and authorized continued operation.<sup>20</sup> And with the completion of various agency earthquake-associated inspection activities,<sup>21</sup> noting only minor, non-functional damage to non-safety-related equipment that would not preclude safe facility operation, on November 11, 2011, the Staff authorized restart of the North Anna units. *See* Staff Technical Evaluation at PDF9-PDF10. In doing so, however, the Staff did not require VEPCO to update the DBE for its North Anna facility. *See* Staff Answer at 10. The Staff, however, did leave in place its CAL relative to the long-term earthquake-associated activities identified by VEPCO, which included implementing a Seismic Margin Management Plan (SMMP) and revising the North Anna facility's Updated Final Safety Analysis Report (UFSAR).<sup>22</sup> Also, the Staff noted VEPCO's commitment to evaluating

---

PDF1-PDF2 (Nov. 11, 2011) (ADAMS Accession No. ML11308B406) [hereinafter Staff Technical Evaluation]. Because of this document's organization, page references employ its portable document format (PDF) pagination.

The OBE earthquake is defined as the earthquake that "produces the vibratory ground motion for which those features of the nuclear power plant necessary for continued operation without undue risk to health and safety of the public are designed to remain functional." 10 C.F.R. pt. 100, app. A, § III(d). Section V(a)(2) of appendix A, which indicates that the maximum vibratory ground acceleration for an OBE must be at least one-half of the SSE maximum vibratory ground acceleration, requires that if vibratory ground motion exceeding the OBE occurs, plant shutdown is mandated and the licensee must demonstrate to the agency prior to resuming operations that no functional damage occurred to those plant features that defined the OBE. *See id.* § V(a)(2).

<sup>19</sup> *See* Letter from E.S. Grecheck, Vice President–Nuclear Development, VEPCO, to NRC Document Control Desk at 6 (Sept. 17, 2011) (Summary Report of August 23, 2011 Earthquake Response and Restart Readiness Determination Plan) (ADAMS Accession No. ML11262A151); *id.* encl. 8 (Near-Term Actions to be Completed Prior to Unit Restart); *id.* encl. 9 (Long Term Actions to be Completed after Unit Restart).

<sup>20</sup> *See* Letter from Victor M. McCree, Administrator, NRC Region II, to David Heacock, President & Chief Nuclear Officer (CNO), VEPCO, at 1-2 (Sept. 30, 2011) (Commitments to Address Exceeding Design Bases Seismic Event) (ADAMS Accession No. ML11273A078).

<sup>21</sup> *See* Staff Technical Evaluation at PDF10-PDF11. Those inspection activities included an augmented inspection team review begun on August 30, 2011, to evaluate VEPCO's response to a potential beyond DBE event and an additional inspection team effort instituted on October 5, 2011, to assess VEPCO's earthquake-related inspection program and its restart readiness. *See id.*

<sup>22</sup> *See* Letter from Eric J. Leeds, Director, NRC NRR, to David A. Heacock, President & CNO, VEPCO, encl. (Nov. 11, 2011) ([VEPCO] Long-Term Actions Associated with [2011 Mineral] Earthquake) (ADAMS Accession No. ML11311A201).

further the need for modifications to the plant as well as the facility's DBE.<sup>23</sup> Thereafter, in a December 24, 2015 determination, the Staff found that VEPCO had completed these long-term activities, including establishing the SMMP to ensure seismic margins are maintained by evaluating all plant modifications for the effects of the 2011 Mineral earthquake and revising the facility's UFSAR.<sup>24</sup>

Additionally, the 2011 Mineral earthquake's implications were assessed by VEPCO and the NRC in another context, that of responding to the March 11, 2011 earthquake and resulting tsunami at Japan's Fukushima Dai-ichi Nuclear Power Station. As part of its post-accident lessons-learned assessment, the Staff on March 12, 2012, issued a 10 C.F.R. § 50.54(f) request that, among other things, asked licensees to evaluate their site seismic hazards using current methodologies and guidance to develop a ground motion response spectrum (GMRS).<sup>25</sup> Because the reevaluated North Anna seismic hazard, as characterized by the facility's GMRS, was found to exceed its DBE, the NRC requested that VEPCO complete a seismic probabilistic risk assessment (SPRA) focusing on seismic hazards to determine whether plant enhancements were necessary.<sup>26</sup>

A report summarizing VEPCO's SPRA was submitted to the NRC on March 28, 2018.<sup>27</sup> In synthesizing the conclusions of the eight-member peer review team that assessed the SPRA's technical elements, including the seismic hazard input, the summary report indicated that the SPRA evaluation

---

<sup>23</sup> See Letter from Eric J. Leeds, Director, NRC NRR, to David A. Heacock, President & CNO, VEPCO, at 1-2 (Nov. 11, 2011) (Technical Evaluation of Restart Readiness Determination Plan) (ADAMS Accession No. ML11308B405).

<sup>24</sup> See Letter from William M. Dean, Director, NRC NRR, to David A. Heacock, President & CNO, VEPCO, encl. 1, at 3, 7 (Dec. 24, 2015) (Closure of [CAL] Regarding North Anna Power Station, Unit Nos. 1 and 2) (ADAMS Accession No. ML15015A575).

<sup>25</sup> See Letter from Eric J. Leeds, Director, NRC NRR, & Michael R. Johnson, Director, NRC Office of New Reactors, to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status, encl. 1, at 5-6 (Mar. 12, 2012) (Recommendation 2.1: Seismic) (ADAMS Accession No. ML12053A340). As the Staff observed, "[a] response spectrum is a plot of the maximum responses (acceleration, velocity or displacement) of idealized single-degree-of-freedom oscillators as a function of the natural frequencies of the oscillators for a given dampening value" that "typically represents the first part of the development of the SSE for a site characterization of the regional and local seismic hazards." Staff Answer at 12 n.55; see 10 C.F.R. pt. 100, app. A, § III(l).

<sup>26</sup> See Letter from Tekia Govan, Project Manager, NRC NRR, to David A. Heacock, President & CNO, VEPCO, encl. at 4, 9 (Apr. 20, 2015) (Staff Assessment by [NRR] Related to Seismic Hazard Evaluation and Screening Report) (ADAMS Accession No. ML15057A249).

<sup>27</sup> See Letter from Daniel G. Stoddard, Senior Vice President & CNO, VEPCO, to NRC Document Control Desk, attach. (Mar. 28, 2018) (North Anna Power Station Units 1 and 2, Seismic Probabilistic Risk Assessment in Response to 10 CFR 50.54(f) Letter with Regard to [Near-Term Task Force (NTTF) Recommendation] 2.1 Seismic, Summary Report) (ADAMS Accession No. ML18093A445).

focused on the implications of the Mineral, VA earthquake, an update to the earthquake catalog that is the basis for the estimate of earthquake recurrence rates, and the evaluation of new information available in the literature to determine if there was a basis for making revisions to the SSC model or the addition of new, local seismic sources that would contribute to the ground motion hazard at the North Anna site. The evaluation of the Mineral, VA earthquake[,] which included discussions/input from experts in the field [and] a literature review[,] concluded there was no basis to revise or amend the SSC model for the North Anna [probabilistic seismic hazard analysis].

*Id.* at 84. In its April 25, 2019 report regarding the VEPCO SPRA, the Staff concluded “that the results and risk insights provided by the SPRA support the NRC’s determination that no further response or regulatory actions are required,” noting as well that VEPCO’s “actions and experience gained after the 2011 Mineral Earthquake provide additional assurance regarding North Anna’s ability to handle a beyond design basis seismic event.”<sup>28</sup> Subsequently, in a June 9, 2020 letter, the Staff acknowledged that VEPCO had completed the post-Fukushima actions sought by the agency regarding the North Anna facility. This included providing seismic and other information sought by the agency’s March 12, 2012 section 50.54(f) request for information, which the Staff indicated showed implementation of the safety enhancements that were mandated by the agency’s Fukushima lessons-learned regulatory changes and that would be the subject of agency operational oversight through the ongoing Reactor Oversight Process (ROP).<sup>29</sup>

## II. STANDING

As the Commission noted recently, to establish representational standing,

[u]nder section 2.309(d)(1) . . . the hearing request must state (1) the name, address,

---

<sup>28</sup> Letter from Louise Lund, Director, NRC NRR, to Daniel G. Stoddard, Senior Vice President & CNO, VEPCO, at 1, 5 (Apr. 25, 2019) (Staff Review of Seismic Probabilistic Risk Assessment Associated with Reevaluated Seismic Hazard Implementation of the [NTTF] Recommendation 2.1: Seismic EPID NO. L-2018-JLD-0003) (ADAMS Accession No. ML19052A522) [hereinafter Staff SPRA Review Letter].

<sup>29</sup> See Letter from Robert J. Bernardo, Project Manager, NRC NRR, to Daniel G. Stoddard, Senior Vice President & CNO, VEPCO, at 1, 8 (June 9, 2020) (Documentation of the Completion of Required Actions Taken in Response to the Lessons Learned from the Fukushima Dai-Ichi Accident) (ADAMS Accession No. ML20139A077). The ROP is the agency’s “program to inspect, measure, and assess the safety and security performance of operating commercial nuclear power plants, and to respond to any decline in their performance.” [ROP], <https://www.nrc.gov/reactors/operating/oversight.html> (last updated Mar. 24, 2021).

and telephone number of the petitioner; (2) the nature of the petitioner's right under the AEA to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest. In addition, an organization seeking to represent its members must show that at least one member has standing and has authorized the organization to represent her and to request a hearing on her behalf. Further, the interests that the representative organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor requested relief must require an individual member to participate in the organization's legal action.

While we will construe the hearing request in the petitioner's favor, the petitioner has the burden of demonstrating that the standing requirements are met.<sup>30</sup>

And while Petitioners' standing has not been contested, an independent Board determination is required about whether each has fulfilled these requirements to establish standing to intervene in this proceeding.<sup>31</sup>

In this instance, Petitioners rely on the proximity presumption as a principal element in establishing their representational standing. This presumption, which in the power reactor context excuses those otherwise meeting the requirements for standing from making a specific showing of injury in fact so long as they reside, work, or otherwise have regular contacts within a 50-mile radius of the facility in question, has recently been applied by several licensing boards in SLR proceedings.<sup>32</sup> Member affidavits supplied with Petitioners' hearing request showed that each has at least one member residing within 50 miles of the North Anna facility who has met the other standing requirements specified above.<sup>33</sup> We thus conclude that each of the Petitioners has established its representational standing to intervene in this proceeding.

---

<sup>30</sup> *Southern Nuclear Operating Co., Inc.* (Vogtle Electric Generating Plant, Unit 3), CLI-20-6, 91 NRC 225, 237-38 & n.83 (2020) (footnote omitted) (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015)).

<sup>31</sup> See 10 C.F.R. § 2.309(d)(2); see also *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-19-5, 89 NRC 483, 491 (2019), *aff'd on other grounds*, CLI-20-11, 92 NRC 335 (2020).

<sup>32</sup> See *Peach Bottom*, LBP-19-5, 89 NRC at 490-91; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-3, 89 NRC 245, 258-59 (2019), *appeal dismissed and referred ruling aff'd*, CLI-20-3, 91 NRC 133 (2020).

<sup>33</sup> See Hearing Petition, attach. 1B (affidavit of Beyond Nuclear, Inc. member residing approximately 14 miles from the North Anna facility); *id.*, attach. 1G (affidavit of Sierra Club member residing approximately 30 miles from the North Anna facility); *id.*, attach. 1K (affidavit of Alliance for a Progressive Virginia member residing approximately 38 miles from the North Anna facility). The distance measurements provided above are Google Maps-based calculations.

### III. PETITIONERS' 10 C.F.R. § 2.335(b) WAIVER PETITION

#### A. Standards for Obtaining a Waiver Under 10 C.F.R. § 2.335(b)

As the discussion in section IV below indicates, the six basic requirements for an admissible contention set forth in section 2.309(f)(1) generally are of paramount importance in determining whether the issue statements posed by an intervention petition can be accepted for further litigation. Nonetheless, as the background discussion in section I.B above also makes clear, in a license renewal proceeding such as this one involving a dispute over the efficacy of an applicant's ER discussion regarding a Table B-1, Category 1 issue, of equal import is whether that challenge merits a section 2.335 waiver. That provision declares that "no rule or regulation of the Commission, or any provision thereof . . . is subject to attack by way of . . . any adjudicatory proceeding" in the absence of a waiver granted in accordance with paragraphs (b) through (d) of that section. 10 C.F.R. § 2.335(a). Further, section 2.335(b) states that the "sole ground" for a "waiver or exception" from a regulation is 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 the rule or regulation was adopted." *Id.* § 2.335(b).

Long-standing Commission precedent — the so-called *Millstone* test — establishes the specific requirements governing when a section 2.335 waiver can be granted, mandating a finding that each of the following four factors has been met:

- (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.<sup>34</sup>

Ultimately, however, a determination about whether these criteria have been fulfilled so as to warrant a waiver is the sole province of the Commission. *See* 10 C.F.R. § 2.335(c), (d). A licensing board's role thus is limited to deciding whether a petitioner's waiver request has made a prima facie showing regarding

---

<sup>34</sup> *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 207-08 & n.36 (2013) (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005)).



each of these factors. A determination that a prima facie showing is lacking means the licensing board “may not further consider the matter,” while a board conclusion that a sufficient showing has been made as to each of the four factors requires that the board “certify the matter directly to the Commission,” which itself may then grant or deny the waiver or make whatever other determination it deems appropriate.<sup>35</sup> *Id.*

#### **B. Petitioners’ Waiver Petition Fails to Meet the Section 2.335(b) Standards**

Petitioners’ sole contention, entitled “Failure to Address Environmental Impacts of Reactor Accidents Caused or Contributed to by Earthquakes,” asserts that VEPCO’s ER does not satisfy “NEPA or NRC implementing regulations 10 C.F.R. §§ 51.53(c)(2) and 51.45(a), because it does not address the environmental impacts of operating North Anna Units 1 and 2 during the extended [SLR] term under the significant risk of an earthquake that exceeds the design basis for the reactors.” Hearing Petition at 13. As support for this proposition, Petitioners point to the 2011 Mineral earthquake. This seismic event, they assert, disproves the assumption underlying the agency’s determination in issuing and initially renewing the North Anna Units 1 and 2 Part 50 operating licenses “that the reactors could be operated safely and without significant adverse environmental impacts because their SSCs were built to a design basis of sufficient rigor to protect against likely earthquakes.” *Id.* And Petitioners maintain as well that because this supposition is no longer valid, a new EIS is required to analyze both the additional risk during the SLR term of operation and the cumulative effects of earthquakes upon facility SSCs that may be compromised by long-term aging. *See id.* at 13-14.

As we noted in section I.B above, the Commission has codified generic determinations for certain environmental issues, identified as Category 1 issues, for license renewal proceedings. Moreover, as we also observed there, absent the grant of a section 2.335 waiver, challenges to Category 1 generic determinations in an adjudication such as this one are precluded.<sup>36</sup> And because their sole contention involves a Category 1 issue, Petitioners request a section 2.335 waiver

---

<sup>35</sup> A prima facie showing within the meaning of section 2.335(d) “is one that is ‘legally sufficient to establish a fact or case unless disproved.’” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 22 (1988) (quoting *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981)).

<sup>36</sup> *See Limerick*, CLI-13-7, 78 NRC at 207 (“When we engage in a rulemaking, we are ‘carving out’ issues from adjudication for generic resolution. Therefore, to challenge the generic application of a rule, a petitioner seeking waiver must show that there is something extraordinary about the subject matter of the proceeding such that the rule should not apply.”).

of section 51.53(c)(3) and “other NRC regulations that would apply Category 1 exclusions to any analysis of reactor accident impacts caused by or contributed to by an earthquake.”<sup>37</sup> Hearing Petition at 27. Given this need for a section 2.335(b) waiver, below we analyze the *Millstone* four-factor test to determine if Petitioners have made the required prima facie showing that warrants Board certification to the Commission of the issue whether the referenced regulatory requirements should be waived.

***1. Millstone Factor 1: Whether Strict Application of the Rule Would Not Serve the Purposes for Which the Rule Was Adopted***

Concerning the first *Millstone* factor, Petitioners recognize that the statement of considerations for the 1996 GEIS indicated its purposes included “increasing efficiency, saving costs, and improving the quality of both generic and site-specific environmental analyses.” *Id.* at 32 (citing Final Rule for Environmental Review of Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,467 (June 5, 1996)). Petitioners nonetheless assert that

[a]pplication of the Category 1 exclusions in this proceeding would defeat the Commission’s purpose of ensuring NEPA compliance and improving the quality of site-specific license renewals reviews, by barring consideration of new and significant information regarding the environmental impacts of operating North Anna Units 1 and 2 in [an SLR] term.

*Id.* at 33. Further, according to Petitioners, this new and significant information is the occurrence of the first-ever earthquake to exceed the North Anna facility’s DBE, an event that “has not been considered in any previous site-specific or generic environmental study.” *Id.* Petitioners also claim that this beyond DBE event disproved the assumption under which the NRC approved the original and initially renewed operating licenses for the North Anna units, i.e., “that the reactors could be operated safely and without significant adverse environmental impacts because their [SSCs] were designed and built with sufficient rigor to protect against likely earthquakes,” such that the “environmental implications of the 2011 [earthquake] are significant as a matter of law.” *Id.*

---

<sup>37</sup> In support of their waiver claim, Petitioners cite sections “51.53(c)(3)(i), 51.71(d), and 51.95(c)(1),” Hearing Petition at 30, a reference the NRC Staff claims is insufficient because it does not include Table B-1 as well, *see* Staff Answer at 26. Given that Table B-1 does not appear to be self-executing as an issue preclusion mechanism, we find this argument unconvincing, while also observing that to the degree Petitioners’ waiver arguments could be interpreted to encompass the need for a SAMA re-analysis otherwise precluded by section 51.53(c)(3)(ii)(L), they have not made a section 2.335 waiver request regarding that provision.

In terms of the purposes of the 1996 GEIS and the 2013 Revised GEIS, federal courts have acknowledged the legitimacy of (1) avoiding new analyses of generic Category 1 issues as counterproductive to administrative efficiency and decision; and (2) the agency's regulatory determination, at least in the absence of a valid section 2.335 rule waiver petition, to direct consideration of purported new and significant environmental impact information regarding Category 1 issues proffered by members of the public to the EIS public comment process in 10 C.F.R. §§ 51.73 and 51.74 or the section 2.802 rulemaking petition process rather than the Part 2 adjudicatory process.<sup>38</sup> In Petitioners' view, however, these agency purposes cannot justify the lack of any generic or site-specific review of the applicable environmental impacts of the 2011 Mineral seismic event given the overarching purpose of the GEIS rulemakings — ensuring compliance with NEPA's requirements under Part 51 through quality environmental analyses — is not being served.

As the Commission has observed, the designation of a Category 1 issue “reflects the NRC's expectations that our NEPA obligations have been satisfied with reference to our previously conducted environmental analysis in the GEIS.” *Limerick*, CLI-13-7, 78 NRC at 212-13. Yet, in the context of the adjudicatory process, section 2.335 and the associated *Millstone* waiver standards provide the mechanism to permit consideration of the question whether, to ensure a quality environmental analysis will be generated, some aspect of or information regarding an otherwise-precluded Category 1 issue, like the seismic impacts issue here, merits further NEPA analysis. Nonetheless, regardless of whether Petitioners have satisfied this first *Millstone* standard, Petitioners' failure to meet the remaining *Millstone* standards, as we detail below, requires that we reject their section 2.335 waiver request that an additional environmental analysis of beyond-design-basis seismic impacts be included in the VEPCO ER.

## **2. *Millstone Factor 2: Whether Special Circumstances, Previously Not Considered, Exist with Respect to This License Renewal Review***

Regarding the second *Millstone* factor, Petitioners assert that special circumstances exist that previously were not considered because the NRC has not

---

<sup>38</sup> See *Mass. v. United States*, 522 F.3d 115, 119-21 (1st Cir. 2008); see also *NRDC*, 823 F.3d at 647. In this regard, while the Commission has noted that reliance on section 51.53(c)(3)(iv) new and significant information is not enough to negate the requirement in an adjudication to proffer a valid section 2.335 waiver petition to obtain consideration of that information, see *Vt. Yankee*, CLI-07-3, 65 NRC at 20-21, it also is apparent that by its very nature purported new and significant information is likely to be the basis for any successful waiver petition, see *Limerick*, CLI-13-7, 78 NRC at 210-11; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001).

prepared an EIS or GEIS analyzing the environmental significance of the 2011 Mineral beyond DBE at North Anna Units 1 and 2. *See* Hearing Petition at 34. Disputing this, VEPCO and the Staff assert that Petitioners have not made any showing that the 2011 Mineral earthquake would not be encompassed by the existing GEIS findings regarding severe accidents, including beyond DBE events, or by the existing North Anna SAMA analysis.<sup>39</sup>

As was outlined in section I.B above, in both the 1996 GEIS and 2013 Revised GEIS rulemaking processes, the NRC addressed the issue of environmental impacts associated with both design-basis and severe, i.e., beyond-design-basis, accidents and associated seismic events at domestic nuclear facilities, including North Anna.<sup>40</sup> This included the 2013 revised GEIS expanding the scope of the severe accident evaluation in the 1996 GEIS by utilizing more recent technical information, such as core damage frequencies associated with, among other things, seismic events. *See supra* note 40. Additionally, VEPCO's site-specific ER for its SLR application addresses the NEPA requirement to identify and consider any post-GEIS new and significant information about environmental impacts, both as it relates to Category 1 design-basis accidents and to Category 2 severe accident-associated SAMAs, which included consideration of a seismic PRA that took into account the 2011 Mineral earthquake. *See* ER at E-4-84 to -92.

Thus, the environmental consequences of design-basis and severe accidents, including the risk of a beyond DBE, have been addressed by the pertinent eval-

---

<sup>39</sup> *See* VEPCO Answer at 22-23 (referencing Commission observation that *Millstone* factor two requires demonstration of a circumstance that was "not considered either explicitly, or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived" (quoting *Millstone*, CLI-05-24, 62 NRC at 560)); Staff Answer at 32-33.

<sup>40</sup> *See* 1996 GEIS at 5-11 to -12 (impacts assessment of design-basis and severe accidents); *id.* at 5-17 to -18 (impacts assessment of DBEs concluding that "even with potentially high consequences from a beyond [DBE], the extremely low probability of such [an] earthquake yields a small risk from beyond [DBEs] at existing nuclear power plants"); 2013 Revised GEIS at 1-25 to -28 (addressing and rejecting comments asserting 1996 GEIS discussion of design-basis and severe accidents impacts was incorrect); *id.* at 1-32 to -34 (addressing impacts associated with Fukushima earthquake and tsunami and resulting severe accident); *id.* at 3-49 to -52, 4-30 (regarding geologic environment changes, noting that except for the SAMA analysis, potential seismic hazards changes are not within the scope of the license renewal environmental review because they would not be the result of continued operation of the nuclear power plant); *id.* at 4-158 to -160 (explaining reduction in environmental impacts based on the use of new design-basis and severe accident information obtained since the 1996 GEIS analysis outweighs any increased impacts resulting from this same information so that the impact findings in the 1996 GEIS remain valid); 2013 Revised GEIS Appendices at E-4 to -6 (analyzing continued validity of 1996 GEIS severe accident findings in light of Fukushima earthquake and tsunami and need to reassess 1996 GEIS design-basis and severe accident impact assessments); *id.* at E-10 to -24 (analyzing updated information regarding potential internal and external event impacts associated with accidents, including seismic events).

uations. In contrast, Petitioners have not identified any “special circumstances” that were not considered explicitly or through bounding analyses in these appraisals. As a result, the second *Millstone* factor has not been satisfied with the requisite prima facie showing.

**3. *Millstone Factor 3: Whether Special Circumstances Exist That Are Unique to North Anna Units 1 and 2***

With respect to the third *Millstone* factor, Petitioners contend that their waiver request presents special circumstances that are unique “because the seismic design of North Anna is based on an assessment of an earthquake whose impacts are unique to the North Anna site.” Hearing Petition at 34. Moreover, according to Petitioners, the 2011 Mineral earthquake’s occurrence “irrefutably disproves, uniquely for North Anna, the 1996 License Renewal GEIS’ conclusion that the environmental impacts of design-basis accidents are small because ‘design and performance criteria’ for all operating reactors are ‘acceptable.’” *Id.* (quoting 1996 GEIS at xliii.)

Initially we note, as the Staff observed,<sup>41</sup> that (1) the risk from severe accident externally initiated events, and specifically seismic hazards, are not unique to North Anna or to license renewal; and (2) while the probability of a plant undergoing a beyond-design-basis event is low, any plant can experience such a happenstance.<sup>42</sup> In this regard, the 2013 Revised GEIS determined the environmental effects of seismically induced severe accidents using calculations from fourteen nuclear power units, which required the assumption that beyond DBEs are possible. *See* 2013 Revised GEIS Appendices at E-18 to -19 (tables E-4 and E-5). It thus is evident that the potential for a beyond DBE is not unique to North Anna, but is an essential assumption associated with the design and licensing of all nuclear power plants.

Nor have Petitioners provided any specific technical information to establish how the 2011 Mineral earthquake has any bearing on the GEIS conclusions regarding the environmental impacts of design-basis and severe accidents as small. Instead, Petitioners treat the 2011 Mineral earthquake, a beyond DBE event, as an essentially a fortiori occurrence that would establish uniqueness for purposes of the third *Millstone* factor in this and presumably any other instance in which a beyond DBE might occur at a facility. Such an approach, however, hardly seems consistent with identifying the requisite “unique” circumstance.

---

<sup>41</sup> *See* Tr. at 36 (Ghosh-Naber).

<sup>42</sup> Relative to seismic events, section (V)(a)(2) of appendix A of Part 100 anticipates that a facility’s OBE may be exceeded without causing a severe accident, directing in such a circumstance the actions that must be completed prior to resuming operation after such an incident. *See supra* note 18.

Petitioners thus have not satisfied the third *Millstone* factor requiring a prima facie demonstration that special circumstances exist that are unique to North Anna Units 1 and 2.

**4. *Millstone Factor 4: Whether a Waiver of the Category 1 Findings Is Necessary to Reach a Significant Safety or Environmental Issue***

In seeking to show their waiver petition fulfills the fourth *Millstone* factor, Petitioners assert that the 2011 Mineral beyond DBE establishes that North Anna earthquake-related accident impacts must be considered significant “as a matter of law” because the occurrence of the earthquake upended the central conclusion of the original North Anna EIS and the 1996 GEIS that “environmental impacts of most reactor accidents will be small.” Hearing Petition at 35. In particular, Petitioners challenge the findings and analysis in the 1996 GEIS for design-basis accidents by asserting that the sole grounds for the GEIS conclusion of insignificant impacts is the assumption underlying NRC safety regulations that reactors will operate within their design bases.<sup>43</sup> Petitioners maintain that because this “key assumption has been refuted” by the 2011 Mineral beyond DBE, neither VEPCO nor the Staff can lawfully conclude that the environmental impacts of operating North Anna for a second renewal term are insignificant. *Id.*; see also Petitioners Reply at 7-9. This, Petitioners assert, constitutes a significant environmental analysis deficiency that the Staff must rectify by evaluating the probability of more beyond DBEs at the North Anna facility, the consequences of such events, and the cost-effectiveness of avoidance or mitigation measures, including upgrading safety equipment. See Hearing Petition at 37.

As we have noted previously, both the 1996 GEIS and the 2013 Revised GEIS did assess the environmental impacts of design-basis accidents and severe accidents induced by seismic events.<sup>44</sup> See *supra* note 40. Petitioners, on the

---

<sup>43</sup> See Hearing Petition at 34 (“All plants have had a previous evaluation of the environmental impacts of design-basis accidents[.]” (quoting 1996 GEIS at xliii)); see also *id.* (challenging the 1996 GEIS conclusion (at xliii) that the environmental impacts of design-basis accidents are small because “design and performance criteria” for all operating reactors are “acceptable”).

<sup>44</sup> In this regard, the 2013 Revised GEIS made the following findings:

Given the discussion in Appendix E of this document, the staff concludes that the reduction in environmental impacts from the use of new information (since the 1996 GEIS analysis) outweighs any increases resulting from this same information. As a result, the findings in the 1996 GEIS remain valid. Therefore, design-basis accidents remain a Category 1 issue, and although the probability-weighted consequences of severe accidents are SMALL for all plants, severe accidents remain a Category 2 issue to the extent that only alternatives to mitigate severe accidents must be considered for all plants that have not previously considered such alternatives.

. . . Alternatives to mitigate severe accidents still must be considered for all plants that

(Continued)

other hand, do not demonstrate the 2011 Mineral beyond DBE posed any unanalyzed environmental impacts that would challenge the conclusion in either GEIS that the environmental impacts from design-basis accidents are small for North Anna. Instead, Petitioners rely principally on the claim that the 1996 GEIS conclusion about the low environmental impacts of design-basis accidents is no longer applicable. This is the case, they maintain, because the 2011 Mineral earthquake disproved the assumption upon which that finding was grounded, i.e., that because a reactor's design is based on the agency's deterministic rules, that design is adequate to prevent or mitigate the effects of likely accidents. See Petitioners Reply at 7-8. As a result, Petitioners maintain, the NRC "must re-examine how the occurrence of a beyond-design-basis earthquake at North Anna would affect the basis for its original findings of no significant impact for design-basis accidents, including the deterministic portion of those findings." *Id.* at 9.

As VEPCO points out, however, Petitioners' analysis misinterprets the scope of the GEIS conclusions about the small earthquake-related environmental impacts, which are not based solely on the plant's design basis. Rather, the GEIS small impact conclusions span both design-basis and severe accidents and, recognizing the possibility that external events may cause a facility's design-basis to be exceeded, analyzes such a happenstance as a severe accident, "the probability of [which] is so low." VEPCO Answer at 21-22 (quoting *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 372 (2015)).

Lacking merit as well as a basis for showing a significant safety or environmental issue is Petitioners' expressed concern that the licensing assumption for the North Anna units, i.e., that the facility's safe, environmentally sound operation is established by the rigorous design and assembly of the facility's SSCs, was "breached" by the 2011 Mineral beyond DBE and thus, "as a matter of law," requires an additional environmental analysis as part of the SLR process. Tr. at 49-50 (Curran). As we have indicated previously, *see supra* section III.B.2, the 1996 GEIS and the 2013 Revised GEIS looked at design-basis and severe accidents broadly and determined their environmental impacts were small. Further, the ER for the VEPCO SLR application discusses possible post-2013 Revised GEIS new and significant information and finds that nothing has been identified to require a new analysis that would change the previous conclusions both as to design-basis accidents and severe accident-associated SAMAs. At the same

---

have not considered such alternatives; however, as discussed further in Appendix E, those plants that have already had a SAMA analysis considered by the NRC as part of an EIS, supplement to an EIS, or EA, need not perform an additional SAMA analysis for license renewal.

2013 GEIS at 4-160; *see* 2013 Revised GEIS Appendices at E-10 to -27, E-43 to -48.

time, even apart from the fact that the integrity of SSCs is a current licensing basis issue and so beyond challenge in this adjudication,<sup>45</sup> as the discussion in section III.B.1 above makes apparent, whether as a licensing or an operational matter,<sup>46</sup> the safety impact of the 2011 Mineral earthquake already has been fully assessed by VEPCO and the Staff. This assessment included (1) a post-incident review, which encompassed SMMP establishment and implementation to ensure the maintenance of adequate seismic margins;<sup>47</sup> and (2) a Fukushima-associated appraisal, which involved a state-of-the-art SPRA that explicitly considered the 2011 Mineral earthquake. Each of these evaluations, which resulted in a finding that the design basis for the facility remained suitable to support continued operation, is fully consistent with the 1996 GEIS and 2013 Revised GEIS conclusions about the environmental impacts of seismic design-basis and severe accidents,<sup>48</sup> as well as the VEPCO ER's discussion about new and significant information.<sup>49</sup>

---

<sup>45</sup> See *Turkey Point*, CLI-01-17, 54 NRC at 7.

<sup>46</sup> Petitioners have asserted that neither the VEPCO/Staff post-incident review of the 2011 Mineral earthquake nor their Fukushima-related appraisal have any relevance in assessing Petitioners' waiver request because these were "operational" rather than "licensing" activities, only the latter being the type that have NEPA environmental impact analysis implications. See Tr. at 56, 93-94 (Curran). This, in our view, draws too fine a distinction. To be sure, there is an operational aspect to both assessments. At the same time, as was suggested during the February 4 oral argument, see Tr. at 63-64 (Ghosh-Naber), if VEPCO or the Staff had determined either of these assessments required a license amendment or a Staff-initiated order mandating a change in the North Anna facility's DBE, then a licensing process with an appropriate NEPA analysis would have been required. The fact that under the agency's procedural rules Petitioners' involvement in such a regulatory process prior to a determination to undertake a licensee-initiated license amendment or Staff-initiated order arguably would involve submitting a 10 C.F.R. § 2.206 petition in lieu of a section 2.309 hearing petition does not make it any less a licensing process. See *Millstone*, CLI-05-24, 62 NRC at 63; see also 10 C.F.R. § 2.309(b)(4)(ii) (providing schedule for submitting a hearing petition in proceeding in which no *Federal Register* or agency website notice of agency action is published).

<sup>47</sup> As the UFSAR for the North Anna facility indicates, an evaluation of existing plant structures, piping systems and pipe supports, and equipment impacted by the ground motion generated by the 2011 Mineral earthquake showed that these items intended to fulfill the plant's existing DBE requirements had not suffered any damage or deformation. See North Anna Power Station, [UFSAR], chap. 3, at 3.7-55 to -61 (rev. 52 Sept. 29, 2016) (ADAMS Accession No. ML17033B500). At the same time, to ensure that any new plant components that had not been subjected to the 2011 Mineral earthquake could withstand such an event, under the SMMP any new equipment is qualified to seismic margins consistent with that event. See *id.* at 3.7-54 to -55. A similar approach was taken regarding seismic qualification for the 10 C.F.R. Part 52 combined operating license for North Anna Unit 3. See *Dominion Virginia Power* (North Anna Power Station, Unit 3), CLI-17-8, 85 NRC 157, 176-82 (2017).

<sup>48</sup> As was observed at the oral argument, while referencing the GEIS severe accident analysis, the crux of Petitioners' challenge apparently is to the GEIS design-basis accident analysis. See Tr. at 24-25 (Lighty).

<sup>49</sup> See ER at E-4-84 to -87.



In contrast, Petitioners provide no technical analysis or other relevant supporting information questioning the efficacy of any of these VEPCO and Staff evaluations, including the existing GEIS analyses,<sup>50</sup> advocating instead for an essentially “per se” approach in which the 2011 Mineral beyond DBE event at the facility has the effect of legally mandating a new environmental impact analysis for an SLR application for that facility.<sup>51</sup> Lacking the information necessary to determine that such an event, in and of itself,<sup>52</sup> creates a significant safety or environmental issue that warrants consideration as part of this SLR adjudicatory proceeding, we must conclude that Petitioners have not made the prima facie showing needed to satisfy the fourth *Millstone* factor.<sup>53</sup>

For Petitioners’ proposed contention to be eligible for consideration in this proceeding, Petitioners must obtain a waiver under 10 C.F.R. § 2.335(d). For the

---

<sup>50</sup> During oral argument, in response to a Board member’s question about whether the 1996 GEIS and 2013 Revised GEIS severe accident analyses covered greater than design-basis events that, while having a core damage frequency of zero, nonetheless resulted in radiological releases, *see* Tr. at 80 (Trikouros), Petitioners’ counsel suggested that the NEPA analysis triggered by the 2011 Mineral beyond DBE might need to include a discussion of other issues without core damage implications, such as added wear on increasingly fragile facility safety equipment caused by operating beyond the seismic design basis, *see* Tr. at 85-86 (Curran). Of course, neither the Board’s observations, *see infra* note 57, nor those of counsel unsupported by any documentary or expert opinion information can provide the technical basis supporting the grant of Petitioners’ section 2.335(b) waiver petition or, concomitantly, the admission of their contention.

<sup>51</sup> The legalistic “per se” nature of Petitioners’ challenge is apparent given the method used to comply with the requirement that a waiver petition “must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding to which the application of the regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted.” 10 C.F.R. § 2.335(b). The affidavit supporting the hearing petition was executed not by a technical or scientific expert, but by Petitioners’ counsel, and makes no factual representations independent of what are set forth in the Staff and VEPCO documents in the agency’s ADAMS document management system as they relate to this proceeding. *See* Hearing Petition, attach. 2 (affidavit of Diane Curran).

<sup>52</sup> *Cf. Limerick*, CLI-13-7, 78 NRC at 214-15 (noting that accepting assertion that passage of time required SAMA analysis to be redone, a circumstance that could be applicable to any initial renewal or SLR application, so as to justify a section 51.53(c)(3)(ii)(L) waiver “would ‘necessarily swallow the rule’” (citation omitted)).

<sup>53</sup> While Petitioners several times cite the decision of the United States Court of Appeals for the Third Circuit in *Limerick Ecology Action v. NRC*, 869 F.2d 719 (3d Cir. 1989), as supporting different aspects of their petition, *see* Hearing Petition at 5, 9, 28, 36, as a general matter that case provides limited, if any, basis for their request for further NEPA consideration of the 2011 Mineral earthquake. In contrast to the policy statement-precluded severe accident mitigation design alternatives (SAMDA) analysis at issue there, *see Limerick Ecology Action*, 869 F.2d at 741 (finding agency’s preclusion of SAMDA NEPA analysis pursuant to a policy statement improper), the 1996 GEIS and the 2013 Revised GEIS, with their consideration of design-basis and severe seismic and other accidents, as well as Table B-1 and the other Part 51 provisions at issue here, were the subjects of an agency rulemaking process.

reasons set forth above, the Board concludes that, having failed to make a prima facie showing consistent with the four-factor *Millstone* test that a waiver can be granted, Petitioners' waiver request cannot be certified to the Commission for a merits determination about whether a waiver is warranted so as to make their contention eligible for consideration in this adjudication.<sup>54</sup>

#### IV. ADMISSIBILITY OF PETITIONERS' CONTENTION

As we observed in section III.A above, even if Petitioners' waiver request were found sufficient to warrant certification to the Commission, to be litigable their contention would still need to satisfy the admissibility criteria in 10 C.F.R. § 2.309(f)(1). Yet, as we explain below, their contention is wanting in that regard, which is an additional basis for denying their hearing request.

##### A. Contention Admissibility Standards under 10 C.F.R. § 2.309(f)(1)

When a hearing requestor, such as Petitioners here, seeks admission of a contention submitted as part of a timely intervention petition, that contention must satisfy the six admissibility factors set forth in section 2.309(f)(1). Those factors require the proponent of a contention to

- (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 . . . ; and

---

<sup>54</sup> The Board's finding in this regard is based on the showing made by Petitioners in support of their section 2.335(b) waiver request that, consistent with their "per se" approach, did not include any relevant technical information in support of their challenge to the adequacy of the VEPCO ER's discussion of seismic environmental impacts associated with the 2011 Mineral earthquake. Nonetheless, the Board's determination regarding Petitioners' waiver request does not negate the Staff's responsibility (1) in conducting its "hard look" licensing review of the VEPCO ER to assess whether new and significant information exists that requires additional consideration; or (2) per 10 C.F.R. § 51.73, to consider whether any information provided by public comments as part of the environment review process for VEPCO's SLR application merits further analysis as new and significant information. See *Limerick*, CLI-13-7, 78 NRC at 216-17.

(vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

10 C.F.R. § 2.309(f)(1)(i)-(vi).

These six criteria aim to “focus litigation on concrete issues and result in a clearer and more focused record for decision.” Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) [hereinafter 2004 Part 2 Changes]. The petitioner bears the burden to satisfy each of the criteria,<sup>55</sup> and a failure to comply with any of the requirements constitutes grounds for rejecting a proposed contention.<sup>56</sup> Moreover, when a petitioner neglects to provide the requisite support for its contentions, the board may not cure the deficiency by supplying the information.<sup>57</sup>

#### **B. Petitioners’ Contention Fails to Meet the Section 2.309(f)(1) Contention Admissibility Standards**

Petitioners’ single contention, “Failure to Address Environmental Impacts of Reactor Accidents Caused or Contributed to by Earthquakes,” alleges that

[VEPCO’s ER] fails to satisfy NEPA or NRC implementing regulations 10 C.F.R. §§ 51.53(c)(2) and 51.45(a), because it does not address the environmental impacts of operating North Anna Units 1 and 2 during the extended SLR term under the significant risk of an earthquake that exceeds the design basis for the reactors.

Hearing Petition at 13. As we outline below, this contention is inadmissible for failing to satisfy one or more of the requirements in section 2.309(f)(1)(iii)-(vi).

With their principal focus on the 2011 Mineral beyond DBE, Petitioners attempt to call into question “all previous assurances by the NRC that the environmental impacts of operating North Anna Units 1 and 2 are small.” *Id.* at 2. Petitioners’ central argument in support of their contention is that VEPCO’s ER “contains no discussion of earthquake or other accident impacts” and so fails to satisfy NEPA and the NRC’s regulations implementing NEPA by not

---

<sup>55</sup> See *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 329 (2015) (“[I]t is Petitioners’ responsibility, not the Board’s, to formulate contentions and to provide the necessary information to satisfy the basis requirement’ for admission.” (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998))).

<sup>56</sup> See 2004 Part 2 Changes, 69 Fed. Reg. at 2221; see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

<sup>57</sup> See *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991) (licensing board cannot supply missing information supporting a contention).

“addressing the probability and consequences of accidents caused or contributed to by earthquakes during a second license renewal term.” *Id.* at 13, 18. And they extend their criticism to the agency, noting as part of the contention’s basis that “[n]o North Anna-specific licensing actions were taken by NRC in relation to the 2011 earthquake.” *Id.* at 17. This, they maintain, meant there were “no rights of public participation in the decision-making process” associated with the agency’s assessment of the 2011 Mineral earthquake, as well as no “environmental analyses of the earthquake’s environmental impacts and implications under NEPA.” *Id.* And while acknowledging the ER section in which, based on a seismic PRA that took into account the 2011 Mineral earthquake, VEPCO concluded there was no new and significant information meriting an additional SAMA analysis, Petitioners nonetheless contend this assessment is merely a summary finding that fails to provide any detailed earthquake-related risk or consequence analyses from the PRA. *See id.* at 19 (citing ER at E-4-89 to -92).

As VEPCO asserts, Petitioners’ claims in support of their contention could be read as taking on the mantle of either a contention of omission, i.e., that the ER is devoid of any discussion of a particular issue that must be addressed, or a contention of sufficiency/adequacy, i.e., that the ER discussion of a particular issue somehow lacks important substantive information or analysis.<sup>58</sup> *See* VEPCO Answer at 32-33. Belying either asserted deficiency, however, is the VEPCO ER’s incorporated-by-reference discussion from the 2013 Revised GEIS regarding the impact of design-basis and severe accidents,<sup>59</sup> including those induced by seismic events, along with the ER’s discussion of that subject in the context of its no new and significant information findings. *See supra* note 40; ER at E-4-84 to -92. Thus, consistent with 10 C.F.R. § 51.53(c)(3)(i), (iii), the ER did consider the environmental effects of design-basis and beyond-design-basis earthquakes in the SLR term and determined, in the context of section 51.53(c)(3)(iv)’s mandate, that there was no post-2013 Revised GEIS new and significant information to incorporate into the ER that would change the GEIS conclusion that the environmental impacts of design-basis and severe

---

<sup>58</sup> A principal example of the latter would be Petitioners’ claim that the ER’s SAMA analysis is insufficient, *see* Hearing Petition at 37, which does not appear to account sufficiently for the ER Appendix E review of whether, based on a PRA model that takes into account the 2011 Mineral earthquake, any new and significant information required changes to the SAMA analysis done in support of the North Anna facility’s initial license renewal application, *see* ER at E-4-89.

<sup>59</sup> To the degree that Petitioners attempt to challenge the incorporation by reference of the GEIS discussion of design-basis and severe accidents into the ER as part of the basis for their contention, *see* Hearing Petition at 18-19, such an assertion fails to establish a material factual dispute under section 2.309(f)(1)(vi). *See Peach Bottom*, LBP-19-5, 89 NRC at 502-03, *aff’d*, CLI-20-11, 92 NRC at 343-44.

accidents would be small. *See* ER at E-4-84 to -87.<sup>60</sup> In the face of these environmental impact determinations, Petitioners' generalized claims of missing or inadequate discussion, unsupported by any relevant technical analysis,<sup>61</sup> fails

---

<sup>60</sup>This, of course, is simply the final link in an analytical chain that includes the incorporated-by-reference 2013 Revised GEIS, which reached the same conclusion relative to the 1996 GEIS, as did the earlier NRC Staff site-specific analysis of design-basis and severe accidents for North Anna prepared in conjunction with the initial license renewal application for the North Anna units. *See* 2013 Revised GEIS at 4-160; North Anna GEIS Supp. at 5-1 to -4.

<sup>61</sup>The best that Petitioners offer in this regard are references to agency documents that are alleged to support (1) assertions about the generic uncertainties surrounding aging SSCs, including reactor pressure vessel embrittlement, irradiation-assisted stress corrosion cracking of reactor internals, concrete structures and containment degradation, and electrical cable qualification and condition assessment, as well as the harvesting of decommissioned reactor components that purportedly have not been resolved by the agency; and (2) a claim that the VEPCO ER is deficient because it fails to address the environmental impacts of operating the North Anna facility with aging equipment, including a purported deficiency in the safety portion of the VEPCO SLR application for failing to adequately analyze the significance of 2011 Mineral earthquake ground motion values relative to the facility's aging equipment. *See* Hearing Petition at 14, 19-25 (citing Memorandum from Mark A. Satorius, NRC Executive Director for Operations (EDO), to NRC Commissioners, Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor [SLR], SECY-14-0016 (Jan. 31, 2014) (ADAMS Accession No. ML14050A306) [hereinafter SECY-14-0016]); 1-5 RES, NRC, Expanded Materials Degradation Assessment (EMDA), NUREG/CR-7153, ORNL/TM-2013/532 (Oct. 2014) (ADAMS Accession Nos. ML14279A321, ML14279A331, ML14279A349, ML14279A430, ML14279A461) [hereinafter EMDA]).

According to the Staff, however, Petitioners mischaracterized the nature of SECY-14-0016, the referenced Staff recommendation to institute an SLR rulemaking that the Commission rejected in favor of alternatives such as updated guidance and generic communications. *See* Staff Answer at 51-52 (citing Memorandum from Annette L. Vietti-Cook, Secretary, to Mark A. Satorius, EDO, Staff Requirements — SECY-14-0016 — Ongoing Staff Activities to Assess Regulatory Considerations for Power Reactor [SLR] at 1 (Aug. 29, 2014) (ADAMS Accession No. ML14241A578)). Further, the Staff asserts that, while quoting the joint NRC/Department of Energy five-volume EMDA report's concerns about degradation research needs during the post-60-year reactor operation period, Petitioners failed to acknowledge the revised agency guidance regarding aging effects management during the SLR period that was relied upon by VEPCO in its SLR application. *See id.* at 50-51 (citing NRR, NRC, Standard Review Plan for Review of [SLR] Applications for Nuclear Power Plants (SRP-SLR), Final Report, NUREG-2192 (July 2017) (ADAMS Accession No. ML17188A158); 1-2 NRR, NRC, Generic Aging Lessons Learned for [SLR] (GALL-SLR) Report, Final Report, NUREG-2191 (July 2017) (ADAMS Accession Nos. ML17187A031 and ML17187A204); VEPCO, North Anna Power Station Units 1 and 2, Application for [SLR] at 2-6, 3-1, app. B at B-1 (Aug. 2020) (ADAMS Accession No. ML20246G696)). And, according to the Staff, Petitioners' concern about the lack of consideration of the 2011 Mineral earthquake in connection with the application's analysis of safety equipment improperly tries to bring the Staff's reactor restart DBE assessment into question, as well as impermissibly challenges the current licensing basis of the North Anna facility. *See id.* at 52-53 & n.256 (quoting *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 272 n.209 (2009) ("[A] challenge to the adequacy  
(Continued)

to cross the threshold of providing sufficient factual or expert opinion support or of establishing a material dispute with the application, as required by section 2.309(f)(1)(v)-(vi).

Finally, Petitioners claim that the ER needed to include a discussion of cumulative impacts, including the effects of earthquakes, on purported Staff-identified aging problems associated with SSCs operating during the SLR term to avoid “significant knowledge gaps and uncertainties in predicting long-term aging behavior.” Hearing Petition at 14, 29 (citing SECY-14-0016, at 1; EMDA Report). But by improperly conflating a reactor *safety* issue, i.e., the cumulative effect of earthquakes on aging SSCs, with the requirement to consider cumulative *environmental* impacts under 10 C.F.R. § 51.53(c)(3)(ii)(O),<sup>62</sup> Petitioners demand an analysis that is not required by the agency’s environmental regulations.<sup>63</sup> As such, this claim is neither material to the findings the NRC must make nor does it establish a genuine dispute with the application under section 2.309(f)(1)(iv) and (vi).

We thus find Petitioners’ contention inadmissible.

---

of the acceptance criteria (or any other component of the current licensing basis) is not within the scope of the license renewal proceeding.”).

We agree with the Staff that these purported concerns fail to support the contention’s admissibility under section 2.309(f)(1)(iii), (iv), and (vi) as outside the scope of the proceeding, lacking materiality, and failing to establish a genuine dispute with the application.

<sup>62</sup> Section 51.53(c)(3)(ii)(O) states that “[a]pplicants shall provide information about other past, present, and reasonably foreseeable future actions occurring in the vicinity of the nuclear plant that may result in a cumulative effect.”

<sup>63</sup> To support this argument, Petitioners reference the licensing board decision in *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC 31, 106 & n.510 (2019), *aff’d*, CLI-20-14, 92 NRC 463, 479 (2020) (indicating petitioners’ cumulative impacts contention among those dismissed by licensing board and not appealed), for the proposition that “[a]n EIS also must include an evaluation of the cumulative impacts of a proposed action.” See Hearing Petition at 9. In *WCS*, in considering whether a proffered contention concerning cumulative impacts was admissible for hearing, the licensing board, quoting *Colo. Env’tl. Coal. v. Dombeck*, 185 F.3d 1162, 1176 (10th Cir. 1999), noted that the petitioners had stated correctly that “[u]nder NEPA, an EIS ‘must analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts of ‘past, present, and reasonably foreseeable future actions.’” *WCS*, LBP-19-7, 90 NRC at 106 (quoting Joint Petitioners’ Petition at 138). Such a cumulative environmental impacts analysis is included in the VEPCO ER, however. Consistent with section 51.53(c)(3)(ii)(O) and agency guidance on ER preparation for license renewal applications, see RES, NRC, Preparation of [ERs] for Nuclear Power Plant License Renewal Applications, Regulatory Guide 4.2, Supp. 1, at 47-49 (rev. 1 June 2013) (ADAMS Accession No. ML13067A354), the VEPCO ER provides a discussion of cumulative impacts over the SLR term with regard to land use and visual resources, air quality and noise, geology and soils, water resources, ecological resources, historic and archaeological resources, socioeconomics, human health, and waste management. See ER at E-4-62 to -79. Petitioners offer no explanation about why, under the NRC’s environmental regulations, a “cumulative impacts” analysis must include a discussion of the cumulative safety impacts of earthquakes on aging SSCs.

## V. CONCLUSION

For the reasons set forth above in section II.B, Petitioners have provided an adequate showing to establish their representational standing in this SLR proceeding for VEPCO's North Anna facility. Nonetheless, for the reasons described in sections III.B and IV.B above, we find Petitioners have failed to justify (1) certifying to the Commission the matter of whether to grant a waiver of the 10 C.F.R. Part 51 provisions that otherwise exclude environmental consideration of the 2011 Mineral, Virginia beyond DBE as part of the adjudicatory process associated with VEPCO's SLR application; and (2) admitting their contention challenging the ER's purported failure under Part 51 to assess properly the environmental impacts of the 2011 Mineral seismic event. Accordingly, Petitioners' hearing request cannot be granted.

---

For the foregoing reasons, it is this twenty-ninth day of March 2021, ORDERED, that:

1. The December 14, 2020 hearing request of petitioners Beyond Nuclear, Inc., the Sierra Club, and Alliance for a Progressive Virginia is *denied* and this proceeding is *terminated*.
2. In accordance with the provisions of 10 C.F.R. § 2.311, as this memorandum and order rules upon an intervention petition, any appeal to the Commission from this memorandum and order must be taken within 25 days after this issuance is served.

THE ATOMIC SAFETY AND  
LICENSING BOARD

G. Paul Bollwerk, III, Chairman  
ADMINISTRATIVE JUDGE

Nicholas G. Trikourous  
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
March 29, 2021





UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Christopher T. Hanson**, Chairman  
**Jeff Baran**  
**Annie Caputo**  
**David A. Wright**

**In the Matter of**

**Docket No. 72-1051-ISFSI**

**HOLTEC INTERNATIONAL**  
**(HI-STORE Consolidated Interim**  
**Storage Facility)**

**April 28, 2021**

**MOTIONS TO REOPEN: NEW AND MATERIALLY DIFFERENT  
INFORMATION**

The identity of mineral leaseholder, revealed for the first time in public comments on the draft environmental impact statement, was not new and materially different information on which a new contention was based when the contention argued that general principals of New Mexico oil and gas law would preclude development of the proposed facility on the site. The fact that the mineral estate was owned by New Mexico and could be leased was acknowledged in the application.

**MOTIONS TO REOPEN: TIMELINESS AND GOOD CAUSE**

The reopening standard provides that a new contention must be timely, but the standard for admitting new contentions after the deadline is more specific and requires the contention's proponent to establish "good cause" for why the contention was not raised at the outset of the proceeding. *Compare* 10 C.F.R. § 2.326(d), 10 C.F.R. § 2.309(c).

#### **MOTIONS TO REOPEN: EXCEPTIONALLY GRAVE ISSUE**

Appellant's unexplained assertion that a contention raises exceptionally grave issues of "national economics and security, regional employment, sinkholes, subsidence, and seismicity" was not sufficient to waive the timeliness requirement for a motion to reopen the record.

#### **CONTENTION ADMISSIBILITY: FILING AFTER THE DEADLINE**

Good cause is the sole factor to be considered when evaluating whether to review the admissibility of a new or amended contention filed after the deadline and the three factors in 10 C.F.R. § 2.309(c) are the standard for establishing good cause. That is, the new contention is based on previously unavailable information that is materially different from information previously available, and the new contention is timely filed based on the availability of the previously unavailable information. There is no alternative test to challenge the Staff's environmental document simply because that document contains "new data or new conclusions" if that new information does not meet the standards of 10 C.F.R. § 2.309(c).

#### **APPEALS**

Citing generally to pleadings before the Board is not sufficient to show Board error.

#### **APPEALS: PREJUDICIAL PROCEDURAL ERROR**

Board did not err in refusing to hear expert testimony during prehearing oral argument on contention admissibility. Oral argument is an opportunity for the Board to ensure it understands the participants' legal positions.

#### **MOTIONS TO REOPEN**

Once the record of a proceeding is closed, jurisdiction passes to the Commission to hear any motion to reopen. Although the Commission often refers such motions back to the Board, it will rule itself where appropriate. Because the reopening motion and proposed contentions are similar to those already on appeal, a referral back to the Board is not necessary.

## MEMORANDUM AND ORDER

Today we address an appeal by Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, Fasken) of the Atomic Safety and Licensing Board's decision denying Fasken's motion to reopen the record and admit an amended contention.<sup>1</sup> We also address Fasken's motion to reopen the record and admit its proposed Contention 3.<sup>2</sup> For the reasons described below, we deny both the appeal and the motion to reopen.

### I. BACKGROUND

Holtec International (Holtec) has applied for a license to build and operate a consolidated interim storage facility (CISF) in southeastern New Mexico.<sup>3</sup> The proposed license would allow Holtec to store up to 8,680 metric tons of uranium (MTUs) (500 loaded canisters) in the Holtec HI-STORE CISF for a period of forty years.<sup>4</sup> The Environmental Report analyzes the environmental impacts of possible future expansions of the project of up to 100,000 MTU storage capacity.<sup>5</sup>

---

<sup>1</sup> See Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Combined Notice of Appeal and Petition for Review of Atomic Safety Licensing Board's Denial of Motion for Leave to File Amended Contention and Motion to Reopen the Record (Sept. 28, 2020) (Fasken Appeal); Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Combined Reply to Oppositions to Their Notice of Appeal and Petition for Review of Atomic Safety Licensing Board's Denial of Motion for Leave to File Amended Contention and Motion to Reopen the Record (Nov. 3, 2020) (Fasken Reply); LBP-20-10, 92 NRC 235 (2020). Fasken has also participated in this proceeding under the name Fasken Oil and Ranch; because both the parties and the Board have made no distinction between these entities, we refer to them simply as "Fasken."

<sup>2</sup> See Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion to Reopen the Record (Nov. 5, 2020) (Third Motion to Reopen); Fasken Land and Minerals Ltd.'s and Permian Basin Land and Royalty Owners Motion for Leave to File New Contention No. 3 (Nov. 5, 2020) (Contention 3).

<sup>3</sup> See Letter from Kimberly Manzione, Holtec International, to Michael Layton, NRC (Mar. 30, 2017) (enclosing application documents including safety analysis report and environmental report) (ADAMS accession no. ML17115A431 (package)). We note that the application has been revised several times since it was first submitted, and Fasken does not specify to which versions of the application it references. In this order we cite the current revisions, Environmental Report on the HI-STORE CIS Facility, rev. 8 (Aug. 2020) (ML20295A485) (ER); and Licensing Report on the HI-STORE CIS Facility, rev. 0J (Sept. 15, 2020) (ML20295A428) (SAR), unless otherwise noted. Because the sections and subsections where information is located stay the same across versions while page numbers change, we cite these documents by section number.

<sup>4</sup> See Proposed License for Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste SNM-1051, at 1 (ML17310A223) (Proposed License).

<sup>5</sup> ER § 1.0.

## A. Earlier Rulings

At the outset of this proceeding, six different petitioners or groups of petitioners sought to intervene and requested a hearing. In May 2019, the Board denied the hearing requests and terminated the proceeding after concluding that the petitioners had not met our hearing standards.<sup>6</sup> In that ruling, the Board found that Fasken had demonstrated standing but its proposed contention was not admissible.<sup>7</sup> Fasken appealed.<sup>8</sup>

On August 1, 2019 — while its appeal was pending — Fasken filed a motion for leave to file a new contention, Contention 2, concerning the mineral rights to the site of the proposed facility.<sup>9</sup> Fasken argued in Contention 2 that both the safety and environmental sections of Holtec’s application included materially misleading and inaccurate statements suggesting that Holtec could control or restrict mineral development at the site.<sup>10</sup> Fasken argued that a June 19, 2019, letter from New Mexico Public Lands Commissioner Stephanie Garcia Richard to Holtec shows that these statements are not true.<sup>11</sup> Fasken further argued that because Holtec cannot restrict mineral development, it cannot satisfy the Part 72 siting evaluation factors, including the requirement to examine the frequency and severity of natural and anthropogenic events that could affect the facility’s safe operation.<sup>12</sup>

In April 2020, we affirmed the Board’s ruling with respect to Fasken’s original hearing request, and we remanded Contention 2 to the Board.<sup>13</sup> Shortly before the remand, in March 2020, the NRC Staff released its draft environ-

---

<sup>6</sup> See LBP-19-4, 89 NRC 353, 358 (2019).

<sup>7</sup> *Id.* at 366-67, 383-426.

<sup>8</sup> Fasken and PBLRO Notice of Appeal and Petition for Review (June 3, 2019).

<sup>9</sup> See Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to File a New Contention (Aug. 1, 2019) (Original Contention 2).

<sup>10</sup> Original Contention 2 at 4-5 (citing SAR §§ 2.1.4, 2.6.4; ER §§ 2.4.2, 3.1.1, 8.1.3). Fasken did not include a motion to reopen the proceeding with its original Contention 2. Fasken later filed a motion to reopen on September 3, 2019, but withdrew it without explanation on September 12, 2019. Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019 (Sept. 3, 2019); Fasken and PBLRO’s Withdrawal of Their “Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019” (Sept. 12, 2019).

<sup>11</sup> See Letter from Denise McGovern, NRC, to Stephanie Garcia Richard, New Mexico Commissioner of Public Lands (July 2, 2019), Attach., Letter from Stephanie Garcia Richard, New Mexico Commissioner of Public Lands, to Krishna P. Singh, Holtec International (June 19, 2019) (ML19183A429) (stating that New Mexico owns the mineral estate under Holtec’s site and does not agree to limit mineral extraction).

<sup>12</sup> Original Contention 2 at 6-10; see also 10 C.F.R. § 72.90(b).

<sup>13</sup> CLI-20-4, 91 NRC 167, 176, 210-11 (2020). In CLI-21-4, 93 NRC 119 (2021), we affirmed the Board with respect to its rulings related to another petitioner, Sierra Club.

mental impact statement (DEIS).<sup>14</sup> In May 2020, Fasken moved to reopen the record and amend Contention 2 based on the DEIS.<sup>15</sup>

In June 2020, the Board issued LBP-20-6, which, among other rulings, dismissed Contention 2 as Fasken had originally submitted it.<sup>16</sup> The Board found that Fasken did not meet the reopening standards in its original Contention 2 and, moreover, Fasken would not have been able to meet the less stringent requirements for filing a late contention even had the record been open when the contention was filed.<sup>17</sup> Specifically, the Board found that the motion was not timely because the Environmental Report acknowledged that New Mexico owned mineral rights at the site.<sup>18</sup> The Board also pointed to Holtec's response to a Staff request for additional information (RAI) available months before Fasken filed its new contention, which stated that New Mexico held mineral rights to the site.<sup>19</sup> The Board deferred ruling on the recently filed Amended Contention 2.<sup>20</sup>

## **B. LBP-20-10**

In September 2020, the Board dismissed Amended Contention 2, in which Fasken argued that:

Holtec's application fails to adequately, accurately, completely and consistently describe the control of subsurface mineral rights and oil and gas and mineral extraction operations beneath and in the vicinity of the proposed Holtec CISF site, which precludes a proper analysis under NEPA and further nullifies Holtec's

---

<sup>14</sup> "Environmental Impact Statement for the Holtec International's License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel and High Level Waste" (Draft Report for Comment), NUREG-2237 (Mar. 2020) (ML20069G420) (DEIS).

<sup>15</sup> Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Motion for Leave to File Amended Contention No. 2 (May 11, 2020) (Amended Contention 2); Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Motion to Reopen the Record (May 11, 2020) (Second Motion to Reopen); *see also* Order of the Secretary (Apr. 7, 2020) (unpublished) (granting extension of time to file contentions based on the DEIS until May 11, 2020).

<sup>16</sup> LBP-20-6, 91 NRC 239 (2020). Most of LBP-20-6 related to rulings on Sierra Club's contentions.

<sup>17</sup> *Id.* at 255-56.

<sup>18</sup> *Id.*; *see also* Environmental Report on the Hi-Store CIS Facility, rev. 6 (Jan. 2019), § 3.1.2 at 3-2 (ML19163A146) (revision current when Fasken filed its original Contention 2).

<sup>19</sup> LBP-20-6, 91 NRC at 256; *see also* Letter from Kimberly Manzione, Holtec International, to Jill Caverly, NRC (Mar. 15, 2019), Attach. 9, Potash Mining Lease Partial Relinquishment Agreement (Dec. 6, 2016) (ML19081A083).

<sup>20</sup> LBP-20-6, 91 NRC at 256.

ability to satisfy NRC's siting evaluation factors now and anticipated in the future and is in further violation of NRC regulations.<sup>21</sup>

Fasken argued that the DEIS relies on insufficient data, omits material information, reaches improper conclusions, and misrepresents the extent to which Holtec can control or limit mineral development on the site.<sup>22</sup> Fasken further argued that outstanding RAIs concerning oil and gas production, potash mining, subsidence, sinkholes, and seismicity near the site warranted suspension of the license review until Holtec provided its response.<sup>23</sup>

The Board found that Amended Contention 2 was not timely and therefore did not meet the reopening standards. In addition, it held that, even had Fasken met the reopening standards, Amended Contention 2 was inadmissible because Fasken did not show that there was a genuine dispute over an issue material to the findings that the NRC must make in considering the application.<sup>24</sup>

In its appeal, Fasken argues that it either met the reopening standards, or in the alternative, the reopening standards should be waived because Fasken raises an "exceptionally grave" issue.<sup>25</sup> Fasken also claims that the Board erred in fact and law and abused its discretion. The NRC Staff and Holtec oppose the appeal.<sup>26</sup>

### C. Third Motion to Reopen and Contention 3

Fasken filed its third motion to reopen on November 5, 2020, while its appeal of LBP-20-10 was pending. Fasken argues that new and materially different information has come to light in the form of recently submitted public comments on the DEIS from oil and gas developers, New Mexico Public Lands Commissioner Richard, and other entities concerning the effect of the project on mineral development in the vicinity of the CISF.<sup>27</sup> Among the commenters is

---

<sup>21</sup> Amended Contention 2 at 10-11; *see* LBP-20-10, 92 NRC at 253. Fasken states that it does not challenge LBP-20-6. *See* Fasken Appeal at 5.

<sup>22</sup> Amended Contention 2 at 13-14.

<sup>23</sup> *Id.* at 20-28.

<sup>24</sup> LBP-20-10, 92 NRC at 249-51 (citing 10 C.F.R. § 2.309(f)(1)(iv), (vi)).

<sup>25</sup> *See* Fasken Appeal at 25-27.

<sup>26</sup> NRC Staff's Answer in Opposition to Fasken Oil and Ranch, Ltd.'s and Permian Basin Land and Royalty Owners' Petition for Review of LBP-20-10 (Oct. 23, 2020); Holtec International's Answer in Opposition to Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Appeal of LBP-20-10 (Oct. 26, 2020) (Holtec Answer).

<sup>27</sup> *See* Contention 3 at 1-2, Ex. 1 at 19-23 (Exhibit 1 consists of several documents including Letter from David R. Scott, XTO Energy, Inc. to Office of Nuclear Material Safety and Safeguards, NRC (Sept. 22, 2020) (ML20268C261) (XTO Comments on DEIS)). The Staff publicly released the comments on October 4, 2020, thirty-one days prior to Fasken's motion.

XTO Energy, Inc., which asserts that it holds an oil and gas lease from New Mexico for 2,120.6 acres of land, including the proposed site, and that Holtec's proposed project would interfere with XTO's contractual rights to use the surface to develop minerals at the site.<sup>28</sup> Fasken also claims that the RAI responses referenced in Amended Contention 2, which were publicly released in October 2020, contain new information supporting Contention 3.<sup>29</sup>

## II. DISCUSSION

### A. Reopening Standards

A motion to reopen the record to admit a new contention must satisfy both the standards of 10 C.F.R. § 2.326 relating to motions to reopen and the standards of 10 C.F.R. § 2.309(c) for admitting new contentions filed after the deadline stated in the notice of opportunity to request a hearing.<sup>30</sup> The reopening standard provides that a new contention must be timely, but the standard for admitting new contentions after the deadline is more specific and requires that the contention's proponent establish "good cause" for why the contention was not raised at the outset of the proceeding. Section 2.309(c) provides that "good cause" requires that a new contention must be based on information that was "not previously available," which is "materially different" from previously available information, and that the contention is timely based on when the new, materially different information became available.<sup>31</sup> With respect to environmental contentions, our regulations specify that participants "shall file [environmental] contentions based on the applicant's environmental report" and that new or amended environmental contentions may be filed on a DEIS where that document contains information that is "materially different from information previously available."<sup>32</sup>

When determining whether a new contention is timely for the purposes of reopening a record, we look to whether the contention could have been raised earlier — that is, whether the information on which it is based was previously available or

---

<sup>28</sup> Contention 3, Ex. 1, XTO Comments on DEIS at 2. *See also* e-mail from Deanna Archuleta, XTO Energy, Inc. to Holtec-CISFEIS Resource, NRC, Attach., Oil and Gas Lease (May 10, 1951) (Oil and Gas Lease).

<sup>29</sup> *See* Letter from Kimberly Manzione, Holtec International, to Jose Cuadrado, NRC (Sept. 16, 2020) (ML20260H139 (package)) (RAI Part 5, Response Set 2) (public release date Oct. 21, 2020).

<sup>30</sup> *See* 10 C.F.R. § 2.326(d), *see also* *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 338 (2011) (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668 (2008)).

<sup>31</sup> *See* 10 C.F.R. § 2.309(c).

<sup>32</sup> *See id.* § 2.309(f)(2).

whether it is materially different from what was previously available, and whether it has been submitted in a timely fashion based on the information's availability.<sup>33</sup>

To be admitted for hearing, a proposed contention must set forth with particularity the matters to be raised, be within the scope of the hearing, be material to the findings the agency must make in taking the requested action, be factually supported, and show that a genuine dispute exists with the application.<sup>34</sup> We generally defer to a board as to whether a contention has sufficient factual support to be admitted for hearing and review contention admissibility rulings only where an appeal points to an error of law or abuse of discretion.<sup>35</sup>

## **B. Appeal of LBP-20-10**

### ***1. Motion to Reopen***

#### ***a. Timeliness of Motion***

In remanding Contention 2, we directed the Board to consider whether the reopening standards were met.<sup>36</sup> Fasken argues that its motion to reopen was timely, or, in the alternative, that it raised exceptionally grave environmental and safety issues.<sup>37</sup>

In Amended Contention 2, Fasken argued that it had good cause for late filing because the data relied on and conclusions drawn in the DEIS differed from that in the Environmental Report.<sup>38</sup> Specifically, Fasken claimed that whereas the Environmental Report stated that the proposed CISF would have “minimal potential” for cumulative impacts to geology and soils, the DEIS found a “small cumulative impact” to geology and soils and that the project would have a “moderate cumulative impact” to the environment.<sup>39</sup> Fasken further argued that the DEIS inaccurately states that any oil and gas production near the site would

---

<sup>33</sup> *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 498 (2012).

<sup>34</sup> See 10 C.F.R. § 2.309(f)(1)(i)-(vi).

<sup>35</sup> See CLI-20-4, 91 NRC at 173; *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-20-1, 91 NRC 79, 85 (2020).

<sup>36</sup> See CLI-20-4, 91 NRC at 211.

<sup>37</sup> Fasken also argues that its motion to reopen was accompanied by an appropriate affidavit, as required by regulation. See Fasken Appeal at 26-27; 10 C.F.R. § 2.326(b). But the Board, while expressing skepticism whether the affidavit executed by Fasken's lawyer accompanying its motion met the requirements, did not rest its reopening ruling on the absence of an adequate affidavit. See LBP-20-10, 92 NRC at 242. We therefore need not consider whether Fasken's affidavit was sufficient to support a motion to reopen.

<sup>38</sup> Amended Contention 2 at 4-5; see also Fasken Appeal at 6, 11.

<sup>39</sup> Amended Contention 2 at 12; see ER § 5.2.1; DEIS at 5-10 to 5-11.



be 3,050 feet deep or deeper.<sup>40</sup> Fasken pointed out that this statement contradicts Holtec's Safety Analysis Report, which stated that drilling would occur at depths greater than 5,000 feet, and the Environmental Report, which Fasken characterizes as representing that Holtec could prevent any mineral extraction under the site.<sup>41</sup>

The Board found that Amended Contention 2 and the associated motion to reopen were not timely. To the extent Amended Contention 2 challenged the DEIS's description of the ownership and control of mineral rights, mineral development, and geology, the Board held that the contention was not based on new information.<sup>42</sup> The Board pointed out that the contention claimed "material omissions, inadequacies and inconsistencies contained in Holtec's licensing application documents" and thus by its own terms claimed deficiencies in the application, rather than in the DEIS.<sup>43</sup> The Board observed that the "closest Fasken comes" to providing new information was its reference to Commissioner Richard's June 19, 2019, letter concerning New Mexico's ownership of the mineral rights.<sup>44</sup> But the Board concluded that Commissioner Richard's letter did not provide new information and pointed to a letter that Fasken's vice president had sent to the NRC on the same subject nearly a year before it filed its original Contention 2.<sup>45</sup>

To the extent that Amended Contention 2 challenged the DEIS's analysis of cumulative impacts to geology and soils, the Board held that the Staff's cumulative impacts determination did not constitute new information relating to the issues the contention raised.<sup>46</sup> The cumulative impacts analysis concluded that the proposed project would have a small incremental effect on geology and soils, which when added to the impact from other past, present, and reasonably foreseeable future activities, would result in a moderate impact.<sup>47</sup> The Board observed that the DEIS's estimate of the CISF's incremental impact to geology and soils was the same as Holtec's evaluation in the Environmental Report

---

<sup>40</sup> Amended Contention 2 at 14-15, Ex. 4, Amended Declaration of Stonnie Pollock (May 11, 2020), at 2 (Pollock Declaration).

<sup>41</sup> *Id.* at 17; *see* SAR § 2.6.4; ER § 2.4.2 ("By agreement with the applicable third parties, the oil drilling and phosphate extraction activities have been proscribed at and around the site and would not affect the activities at the site.").

<sup>42</sup> LBP-20-10, 92 NRC at 242-47.

<sup>43</sup> *Id.* at 243.

<sup>44</sup> *Id.* at 244.

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

<sup>46</sup> *Id.* at 244-45.

<sup>47</sup> DEIS § 5.4. The DEIS explains that "cumulative effects . . . can result from individually minor but collectively significant actions taking place over a period of time." DEIS at 5-1. The DEIS considers potash mining, oil and gas production, other nuclear facilities, wind and solar farms, and other facilities in its cumulative impact analysis. *Id.* at 5-2 to 5-2.

— that is, that the impact would be “minimal,” or small.<sup>48</sup> Fasken could have challenged the Environmental Report’s conclusion that the CISF’s impact to geology and soils would be minimal, but it did not.<sup>49</sup> Therefore, the Board found that the DEIS conclusion regarding cumulative effects made no material difference to Fasken’s contention.<sup>50</sup>

Fasken’s appeal points to no Board error in its finding that the motion to reopen and amended contention were untimely. First, we are not persuaded by Fasken’s argument that it established good cause under an alternative test articulated in a 2010 Board decision, *Calvert Cliffs 3*.<sup>51</sup> Fasken argues that *Calvert Cliffs 3* holds that either new data or new conclusions in the DEIS would constitute materially different information justifying raising a new contention and the Holtec DEIS did both.<sup>52</sup> However, the *Calvert Cliffs 3* Board did not establish a new timeliness test; it was simply quoting the language in the regulation at that time.<sup>53</sup> The relevant language was revised in 2012 to clarify that good cause is “the sole factor to be considered when evaluating whether to review the admissibility of a new or amended contention”<sup>54</sup> and that the three factors now found in 2.309(c) are the standard for establishing good cause.<sup>55</sup> In the statements of consideration for the 2012 final rule, the Commission noted that the similarities between former § 2.309(c)(1) and 2.309(f)(2) had resulted in doctrinal confusion concerning the proper way to evaluate pleadings filed out of time.<sup>56</sup> The 2012 final rule resolved the ambiguity and eliminated any alternative approaches to evaluating new or amended environmental contentions filed after the initial deadline.<sup>57</sup>

---

<sup>48</sup> LBP-20-10, 92 NRC at 245. The Board found no material difference between Holtec’s use of the term “minimal” and the Staff’s term “small” in the characterization of the project’s impact to geology and soils. *Id.*

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

<sup>50</sup> *Id.*

<sup>51</sup> *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-10-24, 72 NRC 720, 729-30 (2010).

<sup>52</sup> Fasken Appeal at 11-12, 17-19.

<sup>53</sup> See Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2182, 2240 (Jan. 14, 2004). We observe that as an unreviewed Board decision, *Calvert Cliffs 3* would not constitute binding precedent on other boards. See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 558 (2013); *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998).

<sup>54</sup> Amendments to Adjudicatory Process Rules and Related Requirements, Proposed Rule, 76 Fed. Reg. 10,781, 10,783 (Feb. 28, 2011).

<sup>55</sup> See Amendments to Adjudicatory Process Rules and Related Requirements, Final Rule, 77 Fed. Reg. 46,562, 46,572 (Aug. 3, 2012).

<sup>56</sup> *Id.* at 46,571.

<sup>57</sup> *Id.*

On appeal, Fasken reiterates its timeliness claims without confronting the Board's rulings. For example, Fasken argues that the DEIS used a six-mile radius around the site to discuss cumulative impacts rather than the fifty-mile radius used in the application and that it could not have anticipated that the Staff would limit the area in which impacts are discussed before the DEIS was released.<sup>58</sup> The Board found, however, that the application used a six-mile radius to discuss land use around the site and a larger fifty-mile radius in its cumulative impacts analysis.<sup>59</sup> The Board found that the DEIS therefore used a subset of information already provided, and it found that Fasken identified no new information related to cumulative impacts.<sup>60</sup> On appeal, Fasken does not challenge the Board's explanation and accordingly does not demonstrate that the Board erred. We therefore defer to the Board's finding.

Further, Fasken insists that its "underlying briefs supporting Amended Contention 2 . . . identify with particularity material differences in both information reliance and conclusions drawn when compared with Holtec's [Environmental Report], [Safety Evaluation Report] and/or outstanding RAI responses."<sup>61</sup> But aside from generally pointing to its filings before the Board, Fasken does not explain what these specific disputes are, how the Board erred in addressing its arguments or whether it claims that the Board failed to respond to them, or why these disputes could not have been raised earlier.<sup>62</sup>

*b. Exceptionally Grave Issue*

We are not persuaded by Fasken's argument that it raised an exceptionally grave issue with the application, which would warrant waiving the timeliness requirement.<sup>63</sup> Fasken first raised this claim during oral argument, apparently in response to the Board's question in a pre-hearing order.<sup>64</sup> The Board denied Fasken's argument and found that the contention was not admissible.<sup>65</sup>

On appeal, Fasken asserts that its contention comprises exceptionally grave issues of "national economics and security, regional employment, sinkholes[,] subsidence, and seismicity."<sup>66</sup> But Fasken does not explain how the facility could

---

<sup>58</sup> Fasken Appeal at 6, 17, 19, 26.

<sup>59</sup> See LBP-20-10, 92 NRC 245.

<sup>60</sup> *Id.*

<sup>61</sup> Fasken Appeal at 15.

<sup>62</sup> See *id.* at 15 & n.59.

<sup>63</sup> See 10 C.F.R. § 2.326(a)(1).

<sup>64</sup> See Tr. at 423 (Mr. Kanner); see also Order (Concerning Oral Argument) (July 20, 2020), at 2 (unpublished).

<sup>65</sup> LBP-20-10, 92 NRC at 247.

<sup>66</sup> See Fasken Appeal at 27-28.

have an exceptionally grave impact on national economics, national security, or regional employment. In addition, it does not point to any information in its contention concerning sinkholes, subsidence, or seismicity that is materially different from information already considered by the Staff in the DEIS.<sup>67</sup>

Whether to waive the timeliness requirement for an exceptionally grave issue is up to the discretion of the Presiding Officer.<sup>68</sup> We have cautioned that this exception is a narrow one, to be granted “rarely and only in truly extraordinary circumstances.”<sup>69</sup> In our view, the Board’s decision was reasonable and not an abuse of discretion.

## ***2. Admissibility of Amended Contention 2***

We further find that Fasken has not shown that the Board erred in ruling that Amended Contention 2 was not admissible. Exhibit 2 to Fasken’s motion to admit Amended Contention 2 is a list of “Facts Petitioners Intend to Rely On to Support New and Amended Contentions,” which included cites and excerpts from the DEIS, Holtec’s Safety Analysis Report and Environmental Report, and from several outstanding RAIs.<sup>70</sup> But this list did not include an explanation of whether Fasken was contesting the accuracy of the excerpted information or relying on the information to support its contention. Fasken also attached the declaration of a petroleum geologist, Stonnie Pollock, who provided his opinion on the potential for mineral extraction within the vicinity of the site, the possibility that oil and gas could occur at depths shallower than 3,050’ below the surface, and the dangers of improperly plugged and abandoned wells.<sup>71</sup>

The Board concluded that Amended Contention 2 was inadmissible for lack of a genuine dispute over an issue material to the findings that the NRC must make in considering the application.<sup>72</sup> The Board found that Fasken did not specify which of the Staff’s conclusions in the DEIS that it disputed, did not identify any misleading statement in the DEIS, and did not explain how alleged inaccuracies might affect a material issue.<sup>73</sup> With respect to Fasken’s claim that the DEIS misstates the mineral ownership under the site, the Board found that the DEIS acknowledges that the State of New Mexico and the Bureau of Land

---

<sup>67</sup> See *Pilgrim*, CLI-12-21, 76 NRC at 501.

<sup>68</sup> See 10 C.F.R. § 2.326(a)(1).

<sup>69</sup> *Pilgrim*, CLI-12-21, 76 NRC at 501 n.67 (quoting Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986)).

<sup>70</sup> See Amended Contention 2, Ex. 2, Facts Petitioners Intend to Rely On to Support New and Amended Contentions (May 11, 2020).

<sup>71</sup> See Pollock Declaration.

<sup>72</sup> LBP-20-10, 92 NRC at 249-51 (citing 10 C.F.R. § 2.309(f)(1)(iv), (vi)).

<sup>73</sup> *Id.* at 250-52.

Management own the mineral rights beneath and surrounding the site.<sup>74</sup> With respect to its claim that oil and gas could be extracted from a shallower depth than stated in the DEIS, the Board found that Fasken’s expert did not explain “how the existence of wells at any depth is material to the NRC Staff’s assessment of environmental and cumulative impacts.”<sup>75</sup>

The Board also denied Fasken’s arguments that the DEIS was necessarily deficient because there were several RAIs still outstanding that related to regional drilling activities, orphaned and abandoned wells, potash mining, and seismicity.<sup>76</sup> The Board found that the outstanding RAIs pertained to the safety review, rather than the environmental review, and none of the conclusions in the DEIS was based on information that Holtec had not yet provided.<sup>77</sup> The Board found that petitioners “must do more than rest on the mere existence of RAIs as the basis for their contention.”<sup>78</sup>

We are not persuaded by Fasken’s claim on appeal that Amended Contention 2 raised a genuine dispute of material fact. First, Fasken argues that its Amended Contention 2 disputed the DEIS’s supposed reliance on “a proposed but not-yet-accepted ‘land use restriction of condition’ at the Holtec site.”<sup>79</sup> Although Fasken made such an argument in Amended Contention 2, neither Fasken’s appeal nor the contention cites to where the DEIS relied on such an agreement. On the contrary, the DEIS acknowledged at several points — including in the sections cited in Fasken’s Exhibit 2 — that continued mineral development was possible near and even underneath the site.<sup>80</sup> Fasken asserts that it raised “multiple genuine disputes of material facts,” while citing generally to its motion, supporting exhibits, and reply brief.<sup>81</sup> This argument is not sufficient to show Board error. The Board explained why it found that none of Fasken’s assertions

---

<sup>74</sup> *Id.* at 251 (citing DEIS § 3.2.1 and DEIS Figure 3.2-2).

<sup>75</sup> *Id.* at 252.

<sup>76</sup> *Id.* at 253.

<sup>77</sup> *Id.* (citing NRC Staff Answer in Opposition to Fasken Land and Minerals, Ltd.’s and Permian Basin Land and Royalty Owners’ Motions to Amend Contention 2 and Reopen the Record (June 4, 2020), at 22).

<sup>78</sup> *Id.* (citing *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-15-8, 81 NRC 500, 506 n.47 (2015); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999)).

<sup>79</sup> Fasken Appeal at 20 n.65 (citing Amended Contention 2 at 14).

<sup>80</sup> *See, e.g.*, DEIS § 3.2.4, “Mineral Extraction Activities”; § 4.2.1.1 at 4-4 to 4-5 (“All oil and gas production zones in the area of the proposed CISF occur beneath the Salado Formation at depths greater than 914m [3,000 ft] . . . . Future oil and gas development (e.g., drilling and fracking) beneath the proposed project area will likely continue to occur at depths greater than 930 m [3,050 ft.]”).

<sup>81</sup> Fasken Appeal at 21.

raised a material dispute and Fasken has not shown with specificity where the Board erred.

### **3. Whether the Board Abused Its Discretion**

Fasken makes two claims that the Board abused its discretion and made prejudicial procedural errors regarding Amended Contention 2.

First, Fasken argues that the Board abused its discretion and made a prejudicial procedural error when it declined to hear testimony from Fasken's expert during oral argument on Fasken's motions to reopen and admit Amended Contention 2.<sup>82</sup> Fasken's expert affiant, Stonnie Pollack, was present online during oral argument, but the Board declined to hear testimony from him.<sup>83</sup> The Board's order scheduling oral argument stated that the argument was intended to address legal and procedural aspects of Fasken's motions and was not an evidentiary hearing.<sup>84</sup> Accordingly, the Board only allowed attorneys representing the parties to speak.

As we have held previously, oral argument is an opportunity for the Board to ensure it understands the participants' legal positions, and participants do not have a right to oral argument on contention admissibility.<sup>85</sup> Fasken does not claim that either Holtec or the Staff were allowed to present expert evidence during oral argument or that the Board treated it differently from the other participants. We therefore find that the Board did not abuse its discretion by declining to hear testimony from Mr. Pollack at oral argument.

Fasken next argues that the Board prejudiced Fasken by allowing Holtec to update its Environmental Report after the issuance of the DEIS.<sup>86</sup> We are not persuaded by this claim. As an initial matter, this argument is new on appeal and we could reject it on that ground alone.<sup>87</sup> But more substantively, Fasken does not cite any regulation or case law that holds that it is improper for the applicant to update the Environmental Report after the DEIS is released.<sup>88</sup>

In addition, the Board has no control over whether or when an applicant updates its application. The Staff, rather than the Board, determines whether an application is accepted for review, and the Board does not supervise the

---

<sup>82</sup> See *id.* at 23-24, Fasken Reply at 3-5.

<sup>83</sup> See Tr. 456-57.

<sup>84</sup> See Order (Concerning Oral Argument) (July 20, 2020) (unpublished); see also Order (Scheduling Oral Argument) (June 25, 2020) (unpublished).

<sup>85</sup> *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 191 (2008).

<sup>86</sup> Fasken Appeal at 24-25.

<sup>87</sup> See, e.g., *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006).

<sup>88</sup> See Holtec Answer at 22-23.

Staff's review.<sup>89</sup> And updating and revising an application is a normal part of our dynamic licensing process.<sup>90</sup> For these reasons, we disagree with Fasken's argument that the Board abused its discretion by allowing Holtec to update its application.

For the foregoing reasons, we deny Fasken's appeal of LBP-20-10.

### C. Contention 3

After the Board dismissed the last pending contention in LBP-20-10, jurisdiction over this matter, including jurisdiction over Fasken's third motion to reopen, passed to the Commission.<sup>91</sup> Although we often refer motions to reopen to the Board we will rule on them where appropriate.<sup>92</sup> Due to the similarity between Contention 3 and its corresponding motion to reopen and the motions and contentions currently before us on appeal, we find that a referral here is unnecessary.

In proposed Contention 3, Fasken makes three claims. Its principal argument in Contention 3, as in Contention 2 and Amended Contention 2, is that the project will interfere with mineral development and that mineral development cannot proceed safely alongside the CISF. Fasken also claims in Contention 3 that the Staff did not independently investigate information in the application to verify its reliability before including it in the DEIS. Finally, Fasken claims that the Staff did not adequately consult with and include the viewpoints of State and local governments, industry, and communities. Specifically, proposed Contention 3 states:

The Holtec DEIS, [Environmental Report,] and [Safety Analysis Report] inappropriately rely on misleading and speculative information and assertions and glaring material omissions as to land use, land rights and land restrictions at, under and around the proposed site; lack any independent investigation and analysis by the NRC, which preclude[s] proper assessments under NEPA and NRC regulations, including but not limited to siting evaluation factors presently and in the foreseeable

---

<sup>89</sup> *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004).

<sup>90</sup> The Commission follows a "dynamic" licensing process that allows an application to be modified or improved as the Staff goes forward. See *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349-50 (1998); *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395 (1995).

<sup>91</sup> See *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 701 (2012).

<sup>92</sup> See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 23-24 (2006).

future; and fail to incorporate the major opposing viewpoints of State and local agencies and communities, contrary to the principles of consent-based siting.<sup>93</sup>

Fasken argues that these claims are supported by new information that only came to light in the public comments on the DEIS, which were published on October 5, 2020, and in Holtec's RAI responses that were released October 21, 2020.<sup>94</sup> The Staff and Holtec oppose the motion to reopen.<sup>95</sup>

We find that these claims are untimely because Fasken does not point to information in the public comments or RAI responses that is materially different from previously available information. We further find that Contention 3 does not raise a significant environmental issue that would make a material difference in this proceeding.

### ***1. Timeliness of Mineral Rights and Development Claims***

Fasken's claims in Contention 3 about mineral rights and mineral development are not based on or supported by any previously unavailable information that is materially different from information available in the application and DEIS. As the Board held with respect to Amended Contention 2, the DEIS acknowledges that New Mexico owns the mineral rights under the site and the DEIS accounts for the effects of future development. In fact, the Environmental Report has acknowledged New Mexico's ownership of the mineral rights since its first iteration in March 2017.<sup>96</sup> Holtec's first Environmental Report also stated that "[f]urther oil and gas development is not allowed by the New Mexico Oil

---

<sup>93</sup> Contention 3 at 15. The contention and motion to reopen was accompanied by the affidavit and declaration of Tommy E. Taylor, a petroleum engineer who is the Assistant General Manager of Fasken Oil and Ranch, Ltd. and Senior Vice President of Fasken Management, LLC. *See* Contention 3, Ex. 3, Affidavit and Declaration of Tommy E. Taylor (Nov. 5, 2020), at 1-2 (Taylor Affidavit). We deny the motion because it is untimely and does not raise a significant environmental issue, and therefore we do not consider whether the affidavit met the reopening standards.

<sup>94</sup> *Id.* at 2-6.

<sup>95</sup> NRC Staff's Answer in Opposition to Fasken Oil and Ranch, Ltd. and Permian Basin Land and Royalty Owners' Motions to Reopen the Record and File New Contention 3 (Nov. 30, 2020) (Staff Answer to Contention 3); Holtec International's Answer Opposing Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Motion to Reopen the Record and Motion for Leave to File New Contention No. 3 (Nov. 30, 2020) (Holtec Answer to Contention 3). Fasken filed a reply to the Staff's and Holtec's Answers. Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Combined Reply to NRC Staff's and Holtec International's Oppositions to Motions for Leave to File New Contention No. 3 and Motion to Reopen the Record (Dec. 7, 2020). However, our rules do not allow for a reply except where expressly permitted by the Secretary or presiding officer, and we do not consider Fasken's reply further. *See* 10 C.F.R. § 2.323(c).

<sup>96</sup> *See* Environmental Report on the HI-STORE CIS Facility, rev. 0 (Mar. 2017), § 3.1.2 (ML-17139C535).



Conservation Division due to the presence of potash ore on the [s]ite.”<sup>97</sup> Holtec clarified this statement in the fifth revision of its Environmental Report in March 2019 to state that the site is within the Secretary of the Interior’s Designated Potash Area, which precludes drilling through the potash deposits to reach underlying oil and gas deposits.<sup>98</sup> The time for Fasken to dispute these specific assertions in the application or the DEIS — such as the effect of the site’s location within the Designated Potash Area — was when those assertions were made.

The public comments on which Fasken relies also provide no materially different information to support Contention 3 than information previously available. Fasken points to XTO’s comments that XTO has the right to use as much of the surface of the site as is reasonably necessary to produce its minerals because, under New Mexico law, the surface estate is subordinate to the mineral estate.<sup>99</sup> Fasken argues that it did not know XTO’s identity, the terms of its lease, or its “intent in terms of oil and gas development” around the property before it saw XTO’s public comment.<sup>100</sup> But as XTO’s comments show, and Fasken’s own pleadings acknowledge, the right of subsurface-estate leaseholders to use the surface estate is not new information, it is a general principle of New Mexico oil and gas law.<sup>101</sup> Further, as Commissioner Richard’s comments indicate,

---

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

<sup>98</sup> Environmental Report on the HI-STORE CIS Facility, rev. 5 (Mar. 2019), § 3.1.1 (ML19095-B800). Because drilling for oil and gas through potash deposits is harmful to the potash and dangerous to miners, the Secretary of the Interior has established by order “drill islands” which enable oil and gas developers to drill around the potash deposits within the designated area. *See* Department of the Interior, Oil, Gas, and Potash Leasing and Development Within the Designated Potash Area of Eddy and Lea Counties, NM, 77 Fed. Reg. 71,814 (Dec. 4, 2012). Section 8 of the order provides the legal description of the Designated Potash Area, which includes public and non-public lands.

<sup>99</sup> *See* Contention 3, Ex. 1, XTO Comments on DEIS at 3 (citing *McNeill v. Burlington Res. Oil & Gas Co.*, 143 N.M. 740, 748 (N.M. 2008)). Under the terms of XTO’s lease from New Mexico, a copy of which was attached to its comments, XTO may use the surface for “pipelines, telephone and telegraph lines, tanks, power houses, stations, gasoline plants, and fixtures for producing, treating, and caring for [oil and gas], and housing and boarding employees.” XTO Comments on DEIS at 3 (quoting Oil and Gas Lease at 1 (unnumbered)).

<sup>100</sup> *See* Contention 3 at 8. We note that Fasken also does not show why it could not have discovered XTO’s identity before the public comments were released, given that the names of leaseholders of New Mexico minerals is public information.

<sup>101</sup> *See, e.g.*, Contention 3 at 22; Taylor Affidavit at 4; Contention 3, Ex. 1, XTO Comments on DEIS at 3; *see also* Contention 3, Ex. 4 (Nov. 5, 2020). Exhibit 4 consists of public comments on the DEIS and includes letters from the New Mexico State Legislature, the New Mexico Department of Homeland Security and Emergency Management, the New Mexico Environment Department, New Mexico Governor Michelle Lujan Grisham, Commissioner Richard of the New Mexico Department of Public Lands, and COG Operating LLC, which operates an oil well on the site.

the terms of New Mexico Land Office leases are established by statute.<sup>102</sup> The principles of New Mexico oil and gas law are not new information, and Fasken does not claim that there is anything unusual in the terms of XTO's lease that was not available to Fasken prior to seeing XTO's comments.<sup>103</sup>

Public comments arguing that there are no legal impediments to shallow drilling do not constitute new information that is materially different from information previously available. Both XTO and Commissioner Richard argued that the DEIS relies on supposed "depth restrictions" that would prevent oil and gas extraction from shallower than 930 meters (3,050 feet).<sup>104</sup> These comments mischaracterize the DEIS, which does not rely on legal or contractual depth restrictions for its conclusion that oil and gas development will only occur, if at all, thousands of feet beneath the surface.<sup>105</sup> And even if the DEIS had made such a statement, the time for Fasken to challenge it would have been when the DEIS was released, not after other entities identified it in public comments.

We are also not persuaded by Fasken's arguments that Holtec's September 2020 RAI responses contain information that is materially different from information previously available. The only information Fasken cites from the RAI response that is plausibly new is that Holtec for the first time in its RAI response (and in contemporaneous revisions of its environmental report and safety analysis report) identifies the uppermost oil-and-gas bearing formation under the site as the Yates formation.<sup>106</sup> Fasken argues that this is significant because the Yates formation "usually requires vertical drilling."<sup>107</sup> But the only support Fasken provides for the claim that the Yates formation must be drilled vertically is the statement of its affiant, Mr. Taylor, who testifies that "vertical wells . . . are more affordable than horizontal wells."<sup>108</sup> However, Fasken does not explain why the identification of the formation as the "Yates formation" is materially different information from what was in the DEIS. In addition, Holtec points out that the Yates formation is part of the larger Artesia Group, which has been identified in the environmental report since the fifth revision of that

---

<sup>102</sup> See Contention 3, Ex. 4, Commissioner Richard's Comments at 4.

<sup>103</sup> See Taylor Affidavit at 2, Contention 3 at 6 (stating that members of PBLRO have been drilling and extracting oil in the region for more than eighty years).

<sup>104</sup> See Contention 3, Ex. 4, Commissioner Richard's Comments at 4; Contention 3, Ex. 1, XTO Comments on DEIS at 4 (citing DEIS at 4-4, 4-5, 4-6, 4-7).

<sup>105</sup> See DEIS at 3-6 to 3-9, 4-4 to 4-5.

<sup>106</sup> Contention 3 at 21; see also RAI Part 5, Response Set 2 at 29, 49; ER § 3.1.1; SAR §§ 2.1.4 at 2-11, 2.6.4 at 2-127.

<sup>107</sup> Contention 3 at 21; see *id.* Ex. 3, Taylor Affidavit at 4.

<sup>108</sup> See Contention 3, Ex. 3, Taylor Affidavit at 4. (Yates is "best reached vertically and not horizontally" because "drilling and completion of vertical wells and wells at shallow depths is much less costly with less mechanical risk as compared to drilling deep targets.")

document in March 2019.<sup>109</sup> Further, nothing in Mr. Taylor’s affidavit suggests that the Yates formation’s presence above 3,050 feet is new information that could not have been raised upon publication of the DEIS.

## 2. *Significant Environmental Issue*

Fasken’s claims regarding mineral development at the site do not meet the reopening requirement to present a significant environmental or safety issue.<sup>110</sup> As previously stated, XTO’s and Commissioner Richard’s comments that the DEIS relies on depth restrictions that would prevent oil and gas extraction from shallower than 930 meters (3,050 feet) are incorrect.<sup>111</sup> Neither Fasken nor the public comments cite any portion of the DEIS that states that mineral development is limited by depth restrictions imposed by law or contract. Rather, the DEIS considers that future mineral development will take place in the strata where the minerals are known to exist. That is, the DEIS discusses the likelihood that potash will be developed, if at all, in the Salado formation, and oil and gas will be developed, if at all, in deeper strata where those resources are known to exist.<sup>112</sup> The Staff’s environmental analysis appropriately discusses reasonable outcomes, rather than theoretical possibilities such as the discovery of oil and gas at shallower depths.<sup>113</sup>

Fasken does not show such drilling presents any hazard to the facility (or vice versa) that has not been analyzed in the Safety Evaluation Report or the DEIS. Although Mr. Taylor testifies that the Yates formation “occurs between the surface and 3050 [feet] (usually found at 2500 [feet])” he does not state that the Yates formation occurs between the surface and 3,050 feet under the proposed CISF, and he does not opine that oil and gas exist in paying quantities in shallower strata or above the potash.<sup>114</sup> Therefore, his affidavit simply raises the possibility that oil extraction could take place several hundred feet closer to — but still thousands of feet below — the surface. Fasken has not shown what difference it would make to the environmental analysis if oil and gas were extracted from shallower depths.

---

<sup>109</sup> See Holtec Answer to Contention 3 at 10; see also Environmental Report on the HI-STORE CIS Facility (Mar. 2019), Fig. 3.3.11 (ML19095B800).

<sup>110</sup> 10 C.F.R. § 2.326(a)(2).

<sup>111</sup> See Contention 3, Ex. 4, Commissioner Richard’s Comments at 4; Contention 3, Ex. 1, XTO Comments on DEIS at 4 (citing DEIS at 4-4, 4-5, 4-6, 4-7).

<sup>112</sup> See DEIS at 3-6 to 3-9, 4-4 to 4-5.

<sup>113</sup> See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) (“NEPA . . . does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts.”).

<sup>114</sup> Contention 3, Ex. 3, Taylor Affidavit at 4.

Fasken also does not show how new information in Holtec's RAI responses supports its proposed contention.<sup>115</sup> On the contrary, the RAI responses support and clarify the information in Holtec's environmental report. In RAI 2-8, the Staff asked Holtec to explain "why having oil and gas exploration and production activities near the proposed facility would not pose a hazard" as Holtec claimed in its safety analysis report.<sup>116</sup> The Staff observed that, according to the SAR, two "drill islands" are located within 400 meters and 800 meters of the proposed site, from which horizontal drilling beneath the site could potentially induce subsidence or sinkholes in the event of casing failure.<sup>117</sup> Holtec's response explained why drilling under the site, at the anticipated depth of 3,050 feet, would not create any hazard to the CISF:

Currently, there are no horizontal wells that travel beneath the Site. Any new wells with horizontal legs that travel beneath the site would first be drilled offsite vertically to a depth greater than 3,050 ft, as this is the shallowest oil or gas formation in the vicinity of the site. Once a wellbore starts travelling horizontally, it stays within its own strata (within the production zone). Because of this, horizontal drilling does not create any additional risk of fluid transfer across multiple strata which is the greatest concern for dissolution of salts and land subsidence. If a horizontal well were to collapse at a depth greater than 3,050 ft, there would be no noticeable effect at the ground surface. Therefore, as long as the vertical portion of the wellbore is maintained properly and in accordance with the current regulations (described above), a well with horizontal legs does not create any additional hazards to the Facility when compared with vertical wells.<sup>118</sup>

Rather than supporting Fasken's contention, this RAI response supports the Staff's findings that potential future mineral development does not present a hazard to the facility.

### **3. *Public Comments in Opposition to the Project***

Fasken does not demonstrate that consideration of the comments on the DEIS showing public opposition to the CISF would result in a materially different result to the proceeding, as required by the reopening standards.<sup>119</sup> Fasken argues that various comments "highlight the unsuitability of the proposed site" and raise

---

<sup>115</sup> Contention 3 at 5; *see also* RAI Part 5, Response Set 2.

<sup>116</sup> Letter from Jose Cuadrado, NRC to Kim Manzione, Holtec International (Nov. 14, 2019), Attach., First Request for Additional Information, Part 5 (Nov. 14, 2019), at 3-4 (citing SAR § 2.1.4) (ML19322C260).

<sup>117</sup> *See id.*

<sup>118</sup> *See* RAI Part 5, Response Set 2, Attach. 1 at 25.

<sup>119</sup> 10 C.F.R. § 2.326(a)(3).

“technical issues that the NRC must resolve to properly review and analyze the environmental impacts.”<sup>120</sup> Fasken also argues that the high volume of public comments in opposition to the project shows that the project violates the concept of consent-based siting, as recommended by the Blue Ribbon Commission for nuclear waste management facilities.<sup>121</sup> But there is no legal requirement to follow a consent-based siting process for Holtec’s proposed CISF, nor is Holtec required to show public support for the project to get its license. And Fasken did not show how the comments could lead to a materially different result. The DEIS describes the scoping process and public participation activities that the Staff conducted at the outset of its environmental review.<sup>122</sup> The receipt of comments is a normal step in the NRC’s NEPA process, and the Staff must address all public comments in preparing the Final EIS. We therefore conclude that this portion of Fasken’s new contention does not meet the reopening standards.

#### **4. Consultation and Independent Investigation Claims**

In addition, Fasken argues that other public comments show that the NRC did not consult adequately with state and local agencies<sup>123</sup> and that it should have consulted with the oil and gas industry.<sup>124</sup> Fasken also claims that the Staff did not conduct an “independent investigation” of the matters discussed in the DEIS but relied too much on the information in the application.<sup>125</sup> But Fasken has not pointed to any new information that is materially different from what was available when the Staff issued the DEIS. Fasken could have raised its argument that the Staff should consult with the oil and gas industry when the DEIS was released, if not sooner. Similarly, its claim that the Staff did not independently investigate the application material before incorporating it into the DEIS was ripe when the DEIS was released. Furthermore, the numerous RAIs the Staff posed to Holtec during its review on both environmental and safety matters belies Fasken’s claim that the Staff uncritically relied on the information in Holtec’s application.

Therefore, we conclude that Fasken has not met the reopening standards for the claims it seeks to raise in Contention 3 and we deny its motion.

---

<sup>120</sup> See Contention 3 at 3-4.

<sup>121</sup> *Id.* at 5 (citing Blue Ribbon Commission on America’s Nuclear Future, Report to the Secretary of Energy (Jan. 2012) (ML120970375)), 18, 28-29, 32.

<sup>122</sup> DEIS § 1.4.1.

<sup>123</sup> Contention 3 at 4-5.

<sup>124</sup> *Id.* at 33-34.

<sup>125</sup> *Id.* at 28; see 10 C.F.R. § 51.70(b).

### **III. CONCLUSION**

For the foregoing reasons, we deny Fasken's appeal of LBP-20-10, and we deny its motion to reopen the record.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 28th day of April 2021.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Christopher T. Hanson**, Chairman  
**Jeff Baran**  
**Annie Caputo**  
**David A. Wright**

**In the Matter of**

**Docket No. 50-320-LT**

**FIRSTENERGY COMPANIES and  
TMI-2 SOLUTIONS, LLC  
(Three Mile Island Nuclear Station,  
Unit 2)**

**June 22, 2021**

**JURISDICTION**

After the Staff issues the action provided for in the notice of opportunity for hearing and the Commission issues its final adjudicatory decision, the Commission no longer retains jurisdiction to consider further adjudicatory filings. Instead, the available avenue to raise new concerns is through a request for enforcement action under 10 C.F.R. § 2.206. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 67 (1992).

**ABEYANCE OF PROCEEDING**

Holding a proceeding in abeyance is disfavored in NRC proceedings. *See Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 38 (2001) (“Our decision furthers the Administrative Procedure Act’s directive that an agency ‘within a reasonable time, shall set and complete proceedings required to be conducted . . . and shall make its decision.’”).

## **MOTIONS TO REOPEN**

### **STAYS OF LICENSE TRANSFER**

After an adjudication has been terminated, but before a final decision is rendered on the underlying licensing request, the regulations provide that petitioners may raise new issues through a motion to reopen. The regulations also provide the opportunity to stay a license transfer.

### **CLEAN WATER ACT**

A new certification under section 401 of the Clean Water Act “is required for any license or permit that authorizes an activity that may result in a discharge.” 40 C.F.R. § 121.2.

## **MEMORANDUM AND ORDER**

Today we address a March 15, 2021, motion by Eric Epstein, Chairman of Three Mile Island Alert, to hold in abeyance the license transfer of Three Mile Island Unit 2.<sup>1</sup> For the reasons discussed below, we find that we no longer have jurisdiction over the Motion and we therefore dismiss it.

### **I. BACKGROUND**

In November 2019, GPU Nuclear, Inc., Metropolitan Edison Company, Jersey Central Power & Light Company, and Pennsylvania Electric Company (together, the FirstEnergy Companies) and TMI-2 Solutions, LLC (TMI-2 Solutions) (together with the FirstEnergy Companies, Applicants) applied to transfer the possession-only license for Three Mile Island Nuclear Station, Unit 2 (TMI-2) from the FirstEnergy Companies to TMI-2 Solutions.<sup>2</sup> The NRC published a notice of opportunity to request a hearing on the application in March 2020.<sup>3</sup> Eric Epstein and Three Mile Island Alert, Inc. (together, TMIA) filed a petition to

---

<sup>1</sup> Motion to Hold in Abeyance the Proposed License Transfer to TMI-2 Solutions, LLC (Mar. 15, 2021) (Motion).

<sup>2</sup> See Letter from John Sauger, TMI-2 Solutions, LLC and Gregory H. Halnon, GPU Nuclear, Inc., to NRC Document Control Desk (Nov. 12, 2019) (ADAMS accession no. ML19325C690 (package)) (together with attachments and enclosures, License Transfer Application).

<sup>3</sup> Three Mile Island Nuclear Station, Unit No. 2; Consideration of Approval of Transfer of License and Conforming Amendment, 85 Fed. Reg. 17,102 (Mar. 26, 2020).



intervene and request for a hearing.<sup>4</sup> In December 2020, the Staff issued an order approving the license transfer, and, after the Applicants completed their transaction, the Staff issued a conforming license amendment.<sup>5</sup> We denied TMIA's petition to intervene and request for hearing and terminated the proceeding in January 2021.<sup>6</sup>

In its Motion, TMIA asks the Commission to hold in abeyance the license transfer until the Applicants "provide and submit proof of adherence to the Clean Water Act (CWA), Section 401, and receive approval from the agencies charged with its implementation."<sup>7</sup> TMIA claims that the Applicants, the NRC, the Pennsylvania Department of Environmental Protection, and the Susquehanna River Basin Commission did not comply with section 401 of the CWA with the license transfer of TMI-2 and that those deficiencies should be cured prior to the license transfer.<sup>8</sup> The Staff and Applicants oppose the Motion.<sup>9</sup>

## II. DISCUSSION

Initially, we must determine if we have jurisdiction to consider this Motion in our adjudicatory process. As we have described in previous cases, after the Staff issues the action provided for in the notice of opportunity for hearing and we issue our final adjudicatory decision, we no longer retain jurisdiction to consider further adjudicatory filings.<sup>10</sup> Instead, the available avenue to raise new concerns

---

<sup>4</sup> Petition of Eric Joseph Epstein and Three Mile Island Alert, Inc. for Leave to Intervene and for a Hearing (Apr. 15, 2020) (TMIA Petition).

<sup>5</sup> Order Approving Transfer of License and Draft Conforming License Amendment (EA-20-136) (Dec. 2, 2020) (ML20279A366) (package); Letter from Theodore B. Smith, NRC, to John Sauger, TMI-2 Solutions, LLC (Dec. 18, 2020) (ML20352A381).

<sup>6</sup> CLI-21-2, 93 NRC 70 (2021).

<sup>7</sup> Motion at 3.

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

<sup>9</sup> Applicants' Answer Opposing Motion to Hold in Abeyance the Proposed License Transfer to TMI-2 Solutions, LLC (Apr. 12, 2021); NRC Staff's Answer in Opposition to TMIA's Motion (Apr. 12, 2021). TMIA replied to the Staff's and Applicant's answers. Eric Joseph Epstein and Three Mile Island Alert, Inc. Responses to Applicants and Staff's Answer Opposing the Motion to Hold in Abeyance the Proposed License Transfer to TMI-Solutions, LLC (Apr. 19, 2021) (Reply).

<sup>10</sup> *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 67 (1992) (explaining that the NRC action on the underlying licensing request had "closed out the Notice of Opportunity for a Hearing" published in the *Federal Register*); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 24 (2006) (providing that the Commission retains jurisdiction to reopen a closed proceeding until the licensing action that is the subject of the proceeding has been taken); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 35-36 (Continued)

is through a request for enforcement action under 10 C.F.R. § 2.206.<sup>11</sup> Because the Staff has already issued the license transfer and conforming amendment in this case, and we resolved all pending adjudicatory matters in CLI-21-2, there is no longer an ongoing adjudicatory proceeding. We therefore dismiss the Motion for lack of jurisdiction.

While our lack of jurisdiction is sufficient grounds to deny the Motion, we also note that TMIA's Motion did not address any of our requirements for reopening a closed record or for staying a license transfer. In its Reply, TMIA seeks to hold the proceeding in abeyance rather than attempting to meet the requirements for reopening a closed record or staying a license transfer. TMIA argues that an abeyance motion is appropriate by citing a previous instance where the Licensing Board in *Hydro Resources* granted an abeyance motion.<sup>12</sup>

But the *Hydro Resources* case involved an ongoing adjudication as opposed to the present case, where the adjudication has been terminated. Further, although the *Hydro Resources* Board agreed to hold the proceeding in abeyance because the applicant was no longer pursuing operations at a portion of its site, and concluded it would have been a waste of resources to continue the litigation, we overturned the Board's decision in *Hydro Resources*.<sup>13</sup> After describing why holding a proceeding in abeyance is disfavored in NRC proceedings, we stated that "[o]ur decision furthers the Administrative Procedure Act's directive that an agency 'within a reasonable time, shall set and complete proceedings required to be conducted . . . and shall make its decision.'"<sup>14</sup> Here the decision has been made, the proceeding has been terminated, and the license transfer issued.

After an adjudication has been terminated, but before a final decision is rendered on the underlying licensing request, our regulations provide that petitioners may raise new issues through a motion to reopen. A motion to reopen will be granted only if it is timely filed, addresses a significant safety or environmental issue, and demonstrates that a materially different result would have been likely had the new information been considered initially.<sup>15</sup> The motion must also be accompanied by an affidavit, which sets forth the factual or technical bases for

---

(2006). To be clear, this holding does not foreclose the filing of post-hearing motions within the timeframes provided in 10 C.F.R. Part 2.

<sup>11</sup> *Comanche Peak*, CLI-92-12, 36 NRC at 67.

<sup>12</sup> Reply at 2 (citing *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-99-40, 50 NRC 273 (1999), *reversed sub nom. Hydro Resources, Inc.* (P.O. Box 15910 Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31 (2001)).

<sup>13</sup> See *Hydro Resources*, LBP-99-40, 50 NRC at 275; *Hydro Resources*, CLI-01-4, 53 NRC at 38.

<sup>14</sup> *Hydro Resources*, CLI-01-4, 53 NRC at 43 (quoting 5 U.S.C. § 558(c)).

<sup>15</sup> *Southern Nuclear Operating Co., Inc.* (Vogtle Electric Generating Plant, Unit 3), CLI-21-6, 93 NRC 145, 147-48 (2021) (citing 10 C.F.R. § 2.326(a)). An exceptionally grave issue may be considered in the discretion of the presiding officer even if the motion is untimely. 10 C.F.R. § 2.326(a)(1).

the claim that these criteria have been met.<sup>16</sup> Our regulations also provide the opportunity to stay a license transfer. An application to stay a license transfer must be filed within five days of the notice of the Staff action and must meet the remaining requirements in 10 C.F.R. § 2.1327.<sup>17</sup>

Because TMIA's Motion did not address the requirements for a motion to reopen or for a stay application, we would deny the Motion even if we retained jurisdiction over the matter. In its Reply, TMIA addresses some of the factors for a motion to reopen.<sup>18</sup> However, TMIA also asserts that applying the Commission's standards for a motion to reopen "would distort the intent and substance" of the Motion and TMIA does not "raise or ask for the admittance of a contention after the record has closed for a proceeding."<sup>19</sup> Our rules do not allow for a motion to hold a closed proceeding in abeyance. Further, TMIA does not meet the requirements for a motion to reopen the record or for a stay application.

Finally, TMIA's argument that the Applicants and NRC did not comply with the CWA does not provide a basis to hold this proceeding in abeyance. The Environmental Protection Agency regulations implementing the CWA state that a certification under section 401 "is required for any license or permit that authorizes an activity that may result in a discharge."<sup>20</sup> And "discharge" in this part of the regulations means "a discharge from a point source into a water of the United States."<sup>21</sup> The License Transfer Application did not request any new discharges or changes to any existing discharges; it changed the ownership of licensed activities but made no changes to operations or processes.<sup>22</sup> Because

---

<sup>16</sup> 10 C.F.R. § 2.326(b).

<sup>17</sup> A stay application must contain: "(1) A concise summary of the action which is requested to be stayed; and (2) A concise statement of the grounds for a stay, with reference to the factors specified in paragraph (d) of this section." 10 C.F.R. § 2.1327(b). Paragraph (d) states that

"[i]n determining whether to grant or deny an application for a stay, the Commission will consider: (1) Whether the requestor will be irreparably injured unless a stay is granted; (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits; (3) Whether the granting of a stay would harm other participants; and (4) Where the public interest lies."

*Id.* § 2.1327(d).

<sup>18</sup> Reply at 12-16.

<sup>19</sup> *Id.* at 12.

<sup>20</sup> 40 C.F.R. § 121.2.

<sup>21</sup> *Id.* § 121.1(f).

<sup>22</sup> *See, e.g.*, License Transfer Application, Attach. 1 at 14 ("The changes conform the License and technical specifications to reflect the proposed transfer of authority and responsibility for licensed activities under the License to TMI-2 Solutions. The proposed license amendment does not involve

*(Continued)*

this license transfer does not authorize an activity that could result in a new discharge, the CWA does not require a certification under section 401.

### III. CONCLUSION

We deny the Motion because the Commission no longer retains jurisdiction in this matter. The Motion also does not meet the requirements to reopen the record or to stay the license transfer. Further, the NRC is not required by the CWA to receive a certification under section 401 for this action. As the record for this adjudication is now closed, and the license transfer has been issued, the available avenue to raise new concerns is through a request for enforcement action under 10 C.F.R § 2.206.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 22d day of June 2021.

---

any change in the design or licensing basis, plant configuration, the status of TMI-2, or the requirements of the License.”); *id.* (“[T]he proposed transfer will not result in any change in the types, or any increase in the amounts, of any effluents that may be released off-site, and will not cause any increase in individual or cumulative occupational radiation exposure.”)

### **Additional Views of Commissioner Baran**

I agree with my colleagues that Three Mile Island Alert's motion to hold in abeyance the license transfer of Three Mile Island Unit 2 should be denied because (1) it does not meet the requirements to reopen the record or to stay the license transfer and (2) the license transfer does not authorize an activity that could result in a new discharge under the Clean Water Act requiring a certification under section 401. I write separately because I do not join my colleagues in denying the motion on the basis of a lack of Commission jurisdiction to reopen the case. A finding that the Commission lacks jurisdiction to consider the motion implies that the Commission lacks adjudicatory authority to do so. Although the Commission has established specific avenues for reopening an adjudication in regulation, I do not believe that the Commission lacks authority to hear a motion that does not follow the specific paths laid out in the regulation. The Commission has broad authority in Atomic Energy Act adjudications. In exercising this authority, the Commission has decided that it will generally not entertain motions that do not meet the requirements established in Part 2. However, in my view, this is not a jurisdictional limitation.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Christopher T. Hanson**, Chairman  
**Jeff Baran**  
**Annie Caputo**  
**David A. Wright**

**In the Matter of**

**Docket No. 72-1050-ISFSI**

**INTERIM STORAGE PARTNERS LLC**  
**(WCS Consolidated Interim Storage**  
**Facility)**

**June 22, 2021**

**MOTIONS TO REOPEN**

To prevail on a motion to reopen, the movant must show that: (1) the motion is timely; (2) the motion addresses a significant safety or environmental issue; and (3) a materially different result would be or would have been likely had the newly proffered evidence been considered initially. The movant must also meet the standards for contention admissibility as well as the standards for filing new contentions after the initial deadline for hearing requests.

**ERROR**

Reiteration of a claim considered and dismissed by the Board, without more, is insufficient to show Board error.

**ABUSE OF DISCRETION**

The Board did not abuse its discretion when, consistent with the Commission's instructions, it compared the admissibility of Petitioner's contention to other similar contentions previously found inadmissible in the proceeding.

## MEMORANDUM AND ORDER

This order addresses the petition for review of Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, Fasken), in which Fasken appeals the Board's denial of its motions to reopen the proceeding and to admit a new Contention 5.<sup>1</sup> For the reasons stated below, we deny the petition for review.

### I. BACKGROUND

This proceeding involves the application of Interim Storage Partners LLC (ISP) for a license to construct and operate a consolidated interim storage facility (CISF) in Andrews County, Texas. ISP is a joint venture between Waste Control Specialists LLC (WCS) and Orano CIS LLC formed to design, build, and operate the WCS CISF.<sup>2</sup> The proposed CISF would be located within the existing Waste Control Specialists site in Andrews County, Texas.<sup>3</sup>

The NRC Staff published notice of the opportunity to request a hearing on ISP's application and Fasken timely filed a hearing request in October 2018.<sup>4</sup> The Board denied Fasken's hearing request because although Fasken had standing to intervene, it had not submitted an admissible contention.<sup>5</sup> On appeal, we affirmed the Board's decision and referred to the Board Fasken's motions to reopen the proceeding and to admit a new Contention 5, which Fasken filed while its appeal was pending and after the Board had terminated the proceeding.<sup>6</sup> We instructed the Board to consider whether Fasken's motions met our standards

---

<sup>1</sup> LBP-21-2, 93 NRC 104 (2021).

<sup>2</sup> "WCS Consolidated Interim Storage Facility System Safety Analysis Report," rev. 2 (July 2018), at 1-2 (ADAMS accession no. ML18221A408 (package)).

<sup>3</sup> *Id.*

<sup>4</sup> See Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018), *as corrected by* 83 Fed. Reg. 44,680 (Aug. 31, 2018); Petition of Permian Basin Land and Royalty Organization and Fasken Land and Minerals for Intervention and Request for Hearing (Oct. 29, 2018; dated Sept. 28, 2018).

<sup>5</sup> LBP-19-7, 90 NRC 31, 39 (2019).

<sup>6</sup> See Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion to Reopen the Record (July 6, 2020); Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners Motion for Leave to File New and/or Amended Contention (July 7, 2020; dated July 6, 2020) (Contention 5). The Staff and ISP opposed Fasken's motions to reopen the proceeding and to admit Contention 5. See Interim Storage Partners LLC's Answer Opposing Fasken's and PBLRO's Second Motion to Reopen the Record and Motion for Leave to File New Contention "5" (July 31, 2020); NRC Staff's Answer in Opposition to Fasken Oil and Ranch, Ltd.'s and Permian Basin Land and Royalty Owners' Motions to Reopen the Record and File New Contention 5 (July 31, 2020).

for reopening a closed proceeding, whether Fasken had good cause for filing Contention 5 after the deadline, and whether Contention 5 was admissible.<sup>7</sup>

The Board found that Fasken's motions did not meet the standards for reopening a closed proceeding, filing a new contention after the initial deadline, or setting forth an admissible contention.<sup>8</sup> Fasken petitioned for review of the Board's decision.<sup>9</sup> The Staff and ISP oppose the petition for review.<sup>10</sup>

## II. DISCUSSION

Fasken's filing is not associated with its initial hearing request; therefore, we treat it as a petition for discretionary review under 10 C.F.R. § 2.341 and not an appeal as of right under 10 C.F.R. § 2.311.<sup>11</sup> When considering whether to grant a petition for review of a Board decision on contention admissibility and whether to reopen a closed proceeding, we give the Board's judgment substantial deference.<sup>12</sup> We will defer to the Board's decision where we find no error of law or abuse of discretion.<sup>13</sup> As discussed below, Fasken has not shown that the Board erred or abused its discretion and therefore has not raised a substantial question warranting review.

### A. Legal Standards

To prevail on a motion to reopen, the movant must show that: (1) the motion is timely; (2) the motion addresses a significant safety or environmental issue; and (3) a materially different result would be or would have been likely had the newly proffered evidence been considered initially.<sup>14</sup> The movant must also

---

<sup>7</sup> CLI-20-14, 92 NRC 463, 490 (2020).

<sup>8</sup> LBP-21-2, 93 NRC at 108-16.

<sup>9</sup> Fasken Land and Minerals, Ltd.'s and Permian Basin Land and Royalty Owners' Combined Notice of Appeal and Petition for Review of Atomic Safety Licensing Board's Denial of Motion for Leave to File New Contention No. 5 and Motion to Reopen the Record (Feb. 23, 2021) (Petition).

<sup>10</sup> Interim Storage Partners LLC's Answer Opposing Fasken's Petition for Review of LBP-21-2 (Mar. 22, 2021); NRC Staff's Answer in Opposition to Fasken Oil and Ranch, Ltd.'s and Permian Basin Land and Royalty Owners' Petition for Review of LBP-21-2 (Mar. 22, 2021).

<sup>11</sup> See *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 385 (2012).

<sup>12</sup> See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 119 (2009).

<sup>13</sup> See *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 220 (2011); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009).

<sup>14</sup> 10 C.F.R. § 2.326(a)(1)-(3). "[A]n exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented." *Id.* § 2.326(a)(1).



meet the standards for contention admissibility as well as the standards for filing new contentions after the initial deadline for hearing requests.<sup>15</sup> Together, these requirements impose a higher standard for admitting a new contention after the Board has terminated a proceeding than would otherwise apply.<sup>16</sup>

## B. LBP-20-10

Fasken moved to reopen this proceeding based on information in the Staff's Draft Environmental Impact Statement (DEIS).<sup>17</sup> Fasken claimed that the DEIS contained new information that, when compared to ISP's application, justified a new Contention 5:

ISP's application fails to adequately, accurately, completely and consistently consider the cumulative impacts of transporting high-level radioactive waste and spent nuclear fuel to and the socioeconomic benefits of the proposed CISF project, which precludes a proper analysis under [the National Environmental Policy Act (NEPA)], and further nullifies ISP's ability to satisfy NRC's siting evaluation factors now and anticipated in the future and is in further violation of NRC regulations.<sup>18</sup>

The Board noted that the "principal and overarching claim" of Contention 5 is that the analysis of representative transportation routes for the shipment of waste to and from the proposed CISF "prevent[s] a proper assessment of cost and benefit scenarios" and is, therefore, inadequate under NEPA.<sup>19</sup>

The Board found that Fasken's challenge to the use of representative routes was not based on new and materially different information in the DEIS.<sup>20</sup> Further, Fasken could have raised it at the outset of the proceeding because ISP's environmental report, like the DEIS, used representative waste shipment routes to evaluate the impacts of waste transportation.<sup>21</sup> The Board noted that our hear-

---

<sup>15</sup> See *id.* § 2.309(c)(1), (f)(1)(i)-(vi).

<sup>16</sup> See *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-17-7, 85 NRC 111, 116 (2017); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005).

<sup>17</sup> "Environmental Impact Statement for Interim Storage Partners LLC's License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Andrews County, Texas" (Draft Report for Comment), NUREG-2239 (May 2020) (ML20122A220) (DEIS).

<sup>18</sup> Contention 5 at 11.

<sup>19</sup> LBP-21-2, 93 NRC at 114 (quoting Contention 5 at 14).

<sup>20</sup> *Id.* at 109-11.

<sup>21</sup> *Id.* at 110. The Board's decision refers to Revision 3 of ISP's environmental report. We refer instead to Revision 2 of ISP's environmental report, published in August 2018, because it

(Continued)

ing standards required Fasken to file this NEPA challenge in its initial hearing request based on ISP's environmental report; however, Fasken did not do so.<sup>22</sup> Therefore, the Board found that Fasken's challenge to the use of representative transportation routes was untimely.

The Board found that the remaining aspects of Contention 5 were also untimely because they could have been raised based on information in ISP's environmental report. For example, Fasken claimed that the DEIS did not adequately evaluate the environmental impacts of waste transportation via barges or heavy haul trucks.<sup>23</sup> However, the Board found that ISP's environmental report analyzed those impacts and Fasken did not challenge ISP's analysis in its hearing request.<sup>24</sup> Fasken claimed that the DEIS did not address the costs that States, Tribes, and local governments might incur for emergency-response training and equipment if waste is shipped to the proposed CISF.<sup>25</sup> But the Board found that ISP's environmental report also omitted that information and Fasken did not challenge the omission.<sup>26</sup> Fasken further claimed that the DEIS failed to adequately consider how regional characteristics within a fifty-mile radius of the proposed CISF, such as the occurrence of sinkholes and earthquakes, might relate to accident analyses.<sup>27</sup> However, the Board found that ISP's environmental report evaluated accident scenarios and Fasken did not challenge the adequacy of that analysis.<sup>28</sup> Because Fasken could have raised these challenges in its October 2018 hearing request, the Board found that Contention 5 was untimely.<sup>29</sup>

The Board further found that Contention 5 did not raise a significant safety or environmental issue.<sup>30</sup> According to the Board, Contention 5 was "virtually identical" to a contention that the Board had previously found inadmissible.<sup>31</sup> That contention, like Contention 5, asserted that reliance on representative transportation routes was inadequate under NEPA.<sup>32</sup> The Board previously found

---

was available to Fasken in advance of the October 2018 deadline for submitting its initial hearing request. Like Revision 3, Revision 2 of ISP's environmental report includes the analyses and information Fasken sought to challenge in Contention 5. *See* ISP, "WCS Consolidated Interim Spent Fuel Storage Facility Environmental Report," rev. 2 (July 2018), § 4.2.6 (ML18221A405 (package)) (2018 Environmental Report).

<sup>22</sup> LBP-21-2, 93 NRC at 110 (citing 10 C.F.R. § 2.309(f)(2)).

<sup>23</sup> Contention 5 at 18.

<sup>24</sup> *See* LBP-21-2, 93 NRC at 110; 2018 Environmental Report § 4.2.6 at 4-12, 4-13, 4-22, tbl.4.2-8.

<sup>25</sup> Contention 5 at 15-16.

<sup>26</sup> LBP-21-2, 93 NRC at 111.

<sup>27</sup> Contention 5 at 19-21.

<sup>28</sup> *See* LBP-21-2, 93 NRC at 111; 2018 Environmental Report §§ 4.2.6.2, 4.2.8.

<sup>29</sup> LBP-21-2, 93 NRC at 111-12.

<sup>30</sup> *Id.* at 112.

<sup>31</sup> *Id.* at 114-15.

<sup>32</sup> *Id.*

such assertions did not state a genuine dispute with ISP's application or raise an issue within the scope of the proceeding, and we affirmed those findings on appeal.<sup>33</sup> The Board concluded that Contention 5, insofar as it raised similar claims, was also inadmissible and therefore could not meet the higher standards for reopening a proceeding.<sup>34</sup>

The Board found that Contention 5 would be inadmissible for other reasons as well. According to the Board, Fasken's claim that the costs of transportation-related emergency response and infrastructure upgrades had been inadequately described in ISP's environmental report and the DEIS was not only untimely, but it also fell outside the scope of the proceeding.<sup>35</sup> The Board also found that Fasken's claim that the DEIS must consider the possibility of terrorist attacks fell outside of the scope of the proceeding because we do not require an environmental analysis of terrorist attacks for facilities located outside the jurisdiction of the United States Court of Appeals for the Ninth Circuit.<sup>36</sup> And the Board found that Fasken's claims pertaining to ISP's site selection were similar to another inadmissible contention raised by a different petitioner at the outset of the proceeding and did not raise a genuine dispute with ISP's application.<sup>37</sup> Accordingly, the Board concluded that Contention 5 did not meet our contention admissibility or reopening standards.<sup>38</sup>

### C. Fasken's Petition for Review

Fasken claims that the Board erred in finding that Contention 5 was not based on new and materially different information in the DEIS; abused its discretion by narrowing and comparing Contention 5 to other contentions previously found inadmissible in the proceeding; ignored violations of NEPA regulations and NRC siting regulations; and encouraged "prejudicial procedures."<sup>39</sup> We find each of these claims unpersuasive.

Fasken argues that the Board erred in finding that Contention 5 was not based on materially new and different information and cites differences in wording

---

<sup>33</sup> CLI-20-14, 92 NRC at 480.

<sup>34</sup> LBP-21-2, 93 NRC at 112.

<sup>35</sup> *Id.*, 93 NRC at 109, 115.

<sup>36</sup> *Id.*, 93 NRC at 116 (citing CLI-20-14, 92 NRC at 488-89; *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007), *review denied*, *N.J. Dep't of Env'tl. Prot. v. NRC*, 561 F.3d 132, 140-43 (3d Cir. 2009)). The proposed CISF would be located in Andrews County, Texas, outside of the jurisdiction of the Ninth Circuit.

<sup>37</sup> LBP-21-2, 93 NRC at 116.

<sup>38</sup> *Id.* at 109-10, 116.

<sup>39</sup> Petition at 13-21.

between the DEIS and ISP's environmental report.<sup>40</sup> However, Fasken does not explain how the differences it cites are significant under our contention admissibility or reopening standards or address the Board's reasons for finding those differences insufficient to justify Fasken's untimely filing of Contention 5.<sup>41</sup> Accordingly, we find no Board error on this basis.

Fasken asserts that the Board improperly narrowed Contention 5 to a claim about representative transportation routes, then "glosse[d] over Fasken's nuanced challenges to inadequate transportation analyses."<sup>42</sup> The Board's close examination of each supporting basis for Contention 5 undercuts this assertion.<sup>43</sup> We also disagree with Fasken's claim that the Board abused its discretion when it compared the admissibility of Contention 5 to other contentions found inadmissible in this proceeding.<sup>44</sup> The Board's comparisons followed our instruction to consider the admissibility of Contention 5 consistent with our ruling on similar contentions.<sup>45</sup>

Fasken next claims that the Board ignored violations of NEPA and NRC siting regulations by finding Contention 5 inadmissible.<sup>46</sup> Fasken does not point to specific legal standards that the Board failed to follow or consider; rather, Fasken repeats its claim that the DEIS does not comport with NEPA and NRC siting regulations without explaining how the Board erred in finding the claim inadmissible.<sup>47</sup> Fasken's reiteration of a claim considered and dismissed by the Board, without more, is insufficient to show Board error.<sup>48</sup>

Fasken also claims that the Board improperly interpreted "congressional intent and agency authority under [the Nuclear Waste Policy Act] and [the Atomic Energy Act]" and asserts that uncertainty regarding whether the Department of Energy or private entities might store spent fuel at the CISF places Fasken at a disadvantage in framing its contentions.<sup>49</sup> These assertions do not point to any specific legal standards the Board failed to follow or otherwise show error in the Board's application of our contention admissibility or reopening standards. Accordingly, we find no Board error on this basis.

---

<sup>40</sup> *Id.* at 14-17.

<sup>41</sup> *See* LBP-21-2, 93 NRC at 109 n.28.

<sup>42</sup> Petition at 14.

<sup>43</sup> *See* LBP-21-2, 93 NRC at 109-16.

<sup>44</sup> Petition at 13-14 & n.57.

<sup>45</sup> *See* CLI-20-14, 92 NRC at 489.

<sup>46</sup> Petition at 18-19.

<sup>47</sup> *See id.* at 2, 18-19.

<sup>48</sup> *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017).

<sup>49</sup> Petition at 19-20.

Finally, Fasken claims that the Board prejudicially favored ISP in this proceeding. Fasken does not claim that the Board acted prejudicially in the specific decision for which Fasken requests review. Rather, Fasken states that the Board has generally allowed ISP “great latitude” in updating its application in response to requests for information by the Staff yet “relentlessly placed form over substance when considering challenges by potential intervenors.”<sup>50</sup> This claim includes no factual or legal support and mistakenly rests on the inaccurate premise that ISP required the Board’s approval to update its application.<sup>51</sup> Further, it shows no error in the Board’s application of our hearing standards. We therefore find it without merit.

### III. CONCLUSION

For the reasons described above, we *deny* Fasken’s petition for review.  
IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 22d day of June 2021.

---

<sup>50</sup> *Id.* at 20.

<sup>51</sup> See *Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-21-7, 93 NRC 215, 228-29 (2021).



## CASE NAME INDEX

DTE ELECTRIC COMPANY  
OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket No. 50-341-LA;  
CLI-21-5, 93 NRC 131 (2021)

ENTERGY NUCLEAR INDIAN POINT 2, LLC  
LICENSE TRANSFER; MEMORANDUM AND ORDER; Docket No. 50-247-LT-3; CLI-21-1, 93 NRC  
1 (2021)

ENTERGY NUCLEAR INDIAN POINT 3, LLC  
LICENSE TRANSFER; MEMORANDUM AND ORDER; Docket No. 50-286-LT-3; CLI-21-1, 93 NRC  
1 (2021)

ENTERGY NUCLEAR OPERATIONS, INC.  
LICENSE TRANSFER; MEMORANDUM AND ORDER; Docket No. 50-003-LT-3; CLI-21-1, 93 NRC  
1 (2021)

FIRSTENERGY COMPANIES  
LICENSE TRANSFER; MEMORANDUM AND ORDER; Docket No. 50-320-LT; CLI-21-2, 93 NRC 70  
(2021); CLI-21-8, 93 NRC 237 (2021)

HOLTEC DECOMMISSIONING INTERNATIONAL, LLC  
LICENSE TRANSFER; MEMORANDUM AND ORDER; Docket No. 72-51-LT-2; CLI-21-1, 93 NRC 1  
(2021)

HOLTEC INTERNATIONAL  
INDEPENDENT SPENT FUEL STORAGE INSTALLATION; MEMORANDUM AND ORDER; Docket  
No. 72-1051-ISFSI; CLI-21-4, 93 NRC 119 (2021); CLI-21-7, 93 NRC 215 (2021)  
LICENSE TRANSFER; MEMORANDUM AND ORDER; Docket Nos. 50-003-LT-3, 50-247-LT-3,  
50-286-LT-3, 72-51-LT-2; CLI-21-1, 93 NRC 1 (2021)

INTERIM STORAGE PARTNERS LLC  
INDEPENDENT SPENT FUEL STORAGE INSTALLATION; MEMORANDUM AND ORDER; Docket  
No. 72-1050-ISFSI; CLI-21-9, 93 NRC 244 (2021)  
INDEPENDENT SPENT FUEL STORAGE INSTALLATION; MEMORANDUM AND ORDER  
(Denying Motions to Reopen and for Leave to File); Docket No. 72-1050-ISFSI (ASLBP No.  
19-959-01-ISFSI-BD01); LBP-21-2, 93 NRC 104 (2021)

JOSEPH SHEA  
ENFORCEMENT; MEMORANDUM AND ORDER; Docket No. IA-20-008-EA; CLI-21-3, 93 NRC 89  
(2021)  
ENFORCEMENT; ORDER (Granting Joint Motion for Termination of Enforcement Proceeding); Docket  
No. IA-20-008-EA (ASLBP No. 20-968-04-EA-BD01); LBP-21-1, 93 NRC 101 (2021)

SOUTHERN NUCLEAR OPERATING COMPANY, INC.  
OPERATING LICENSE AMENDMENT; MEMORANDUM AND ORDER; Docket No. 52-025-LA-3;  
CLI-21-6, 93 NRC 145 (2021)

TENNESSEE VALLEY AUTHORITY  
ENFORCEMENT; MEMORANDUM AND ORDER (Denying Erin Henderson's Hearing Request);  
Docket Nos. EA-20-006, EA-20-007 (ASLBP No. 21-969-01-EA-BD01); LBP-21-3, 93 NRC 153  
(2021)

## CASE NAME INDEX

### TMI-2 SOLUTIONS, LLC

LICENSE TRANSFER; MEMORANDUM AND ORDER; Docket No. 50-320-LT; CLI-21-2, 93 NRC 70 (2021); CLI-21-8, 93 NRC 237 (2021)

### VIRGINIA ELECTRIC AND POWER COMPANY

SUBSEQUENT OPERATING LICENSE RENEWAL; MEMORANDUM AND ORDER (Denying Intervention Petition and Terminating Proceeding); Docket Nos. 50-338-SLR, 50-339-SLR (ASLBP No. 21-970-01-SLR-01); LBP-21-4, 93 NRC 179 (2021)



**LEGAL CITATIONS INDEX**  
**CASES**

- Air Courier Conf. v. Postal Workers*, 498 U.S. 517, 523-24 (1991)  
plaintiff must establish that the injury he complains of falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint; LBP-21-3, 93 NRC 153, 175 (2021)
- Alaska Department of Transportation and Public Facilities*, CLI-04-26, 60 NRC 399, 406 n.28 (2004)  
third parties may request hearings on NRC enforcement orders because conceivably the enforcement order might worsen the safety situation, but NRC expects such situations to be very rare; LBP-21-3, 93 NRC 153, 162-63 (2021)
- AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007),  
*review denied*, *N.J. Dep't of Env'tl. Prot. v. NRC*, 561 F.3d 132, 140-43 (3d Cir. 2009)  
NRC requires no analysis of potential impacts of terrorist attacks and sabotage for facilities outside the Ninth Circuit; CLI-21-9, 93 NRC 244, 249 (2021); LBP-21-2, 93 NRC 104, 111, 116 (2021)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668 (2008)  
motion to reopen the record must satisfy the standards for reopening, contention admissibility, and admitting new contentions filed after the deadline; CLI-21-7, 93 NRC 215, 221 (2021)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009)  
Commission will defer to the board's decision where it finds no error of law or abuse of discretion; CLI-21-9, 93 NRC 244, 246 (2021)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 272 n.209 (2009)  
challenge to adequacy of acceptance criteria or other component of current licensing basis is not within the scope of a license renewal proceeding; LBP-21-4, 93 NRC 179, 211-12 n.61 (2021)
- Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 716 & n.12 (2006)  
request for discretionary intervention has never been granted in an enforcement proceeding; LBP-21-3, 93 NRC 153, 159, 163 (2021)
- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991)  
licensing board cannot supply missing information supporting a contention; LBP-21-4, 93 NRC 179, 209 (2021)
- Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 155-56 (1970)  
analysis of the zone-of-interests test is not based on purpose of the entire act, but only on the specific provision invoked by plaintiff; LBP-21-3, 93 NRC 153, 174-75 (2021)
- Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349-50 (1998)  
NRC follows a dynamic licensing process that allows an application to be modified or improved as NRC Staff goes forward; CLI-21-7, 93 NRC 215, 229 n.90 (2021)
- Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1302-03, 1307 (2017)  
zone-of-interests test of standing is no longer considered part of the standing analysis, but instead is part of the determination of the proximity of the cause of action to the statute involved by the plaintiff; LBP-21-3, 93 NRC 153, 174 n.46 (2021)
- Bellotti v. NRC*, 725 F.2d 1380, 1383 (D.C. Cir. 1983)  
third parties may request hearings on NRC enforcement orders because conceivably the enforcement order might worsen the safety situation, but NRC expects such situations to be very rare; LBP-21-3, 93 NRC 153, 162-63 (2021)

## LEGAL CITATIONS INDEX

### CASES

- Bennett v. Spear*, 520 U.S. 154, 163 (1997)  
analysis of the zone-of-interests test is not based on purpose of the entire act, but only on the specific provision invoked by plaintiff; LBP-21-3, 93 NRC 153, 174-75 (2021)
- Bennett v. Spear*, 520 U.S. 154, 175-76 (1997)  
zone-of-interests test is not determined by the statute's overarching purpose, but instead by reference to the particular provision of law upon which plaintiff relies; LBP-21-3, 93 NRC 153, 174 (2021)
- Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914-18 (2009)  
Commission has flexibility in determining standing and may use somewhat more- or less-restrictive criteria than courts, but those criteria must still be reasoned based on facts of the case; LBP-21-3, 93 NRC 153, 172 n.37 (2021)
- Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009)  
in determining whether a person is an interested person for purposes of a section 189a(1)(A) standing determination, NRC is not strictly bound by judicial standing doctrines; LBP-21-3, 93 NRC 153, 161 n.49 (2021)
- Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 917 n.27 (2009)  
in assessing standing, NRC looks to judicial standing doctrines simply as guidance, and as a useful barometer of standing jurisprudence; LBP-21-3, 93 NRC 153, 161 n.49 (2021)
- Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-10-24, 72 NRC 720, 729-30 (2010)  
Commission is not persuaded of board error by argument that petitioner established good cause under an alternative test; CLI-21-7, 93 NRC 215, 224 (2021)
- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 252 n.4 (2000)  
subcriticality is achieved when the estimated ratio of neutron production to neutron absorption and leakage, or k-effective, is less than 1.0; CLI-21-5, 93 NRC 131, 133 n.4 (2021)
- Citizens Awareness Network v. NRC*, 391 F.3d 338, 352 (1st Cir. 2004)  
agencies have broad authority to formulate their own procedures, and NRC's authority in this respect has been termed particularly great; LBP-21-3, 93 NRC 153, 161 n.49 (2021)
- Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)  
where plaintiff itself is not itself the subject of the contested regulatory action, the zone-of-interests test denies a right of review if plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit; LBP-21-3, 93 NRC 153, 173-74 (2021)  
zone-of-interests test is not meant to be especially demanding; LBP-21-3, 93 NRC 153, 174 (2021)
- Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1176 (10th Cir. 1999)  
environmental impact statement must analyze not only direct impacts of a proposed action, but also indirect and cumulative impacts of past, present, and reasonably foreseeable future actions; LBP-21-4, 93 NRC 179, 210 n.63 (2021)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999)  
neither the board nor the Commission is expected to search through voluminous documents for support for petitioner's claims; CLI-21-2, 93 NRC 70, 81 n.64 (2021)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 408-09, *reconsideration denied*, CLI-07-22, 65 NRC 525 (2007)  
to establish standing, petitioner must demonstrate that it has suffered a distinct and palpable harm that can fairly be traced to the challenged action and is likely to be redressed by a favorable decision; LBP-21-3, 93 NRC 153, 158-59 n.27 (2021)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 416 (2007)  
petitioner is not entitled to discovery of predecisional Staff documents to support contention preparation; CLI-21-6, 93 NRC 145, 149 n.26 (2021)

## LEGAL CITATIONS INDEX

### CASES

- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 353-54 (2009)  
licensing boards should not make arguments for the litigants that were never made by the litigants themselves; LBP-21-3, 93 NRC 153, 155 n.6 (2021)
- Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-20-1, 91 NRC 79, 85 (2020)  
Commission generally defers to a board on whether a contention has sufficient factual support to be admitted for hearing; CLI-21-4, 93 NRC 119, 121 (2021); CLI-21-7, 93 NRC 215, 222 (2021)  
Commission reviews contention admissibility rulings only where an appeal points to an error of law or abuse of discretion; CLI-21-4, 93 NRC 119, 121 (2021); CLI-21-7, 93 NRC 215, 222 (2021)
- Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-20-1, 91 NRC at 79, 93 (2020)  
NRC rules of procedure do not permit parties to challenge NRC regulations during adjudicatory proceedings absent a waiver; CLI-21-5, 93 NRC 131, 136 n.29 (2021)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 565-71 (2009)  
licensing boards should not make arguments for the litigants that were never made by the litigants themselves; LBP-21-3, 93 NRC 153, 155 n.6 (2021)
- Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 125 n.70 (1995)  
to show special circumstances exist warranting departure from the categorical exclusion for license transfers, petitioners must request a waiver of section 51.22(c)(1); CLI-21-1, 93 NRC 1, 47 n.258 (2021)
- Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395 (1995)  
NRC follows a dynamic licensing process that allows an application to be modified or improved as NRC Staff goes forward; CLI-21-7, 93 NRC 215, 229 n.90 (2021)
- David Geisen*, CLI-10-23, 72 NRC 210, 220-22, 226 (2010)  
enforcement action against an individual under the Deliberate Misconduct Rule turns on the individual's state of mind, which may be inferred through circumstantial evidence; CLI-21-3, 93 NRC 89, 96 n.35 (2021)
- David Geisen*, CLI-10-23, 72 NRC 210, 242-43 (2010)  
individual's state of mind may be inferred through circumstantial evidence; CLI-21-3, 93 NRC 89, 97-98 (2021)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 35-36 (2006)  
Commission retains jurisdiction to reopen a closed proceeding until the licensing action that is the subject of the proceeding has been taken; CLI-21-8, 93 NRC 237, 239-40 n.10 (2021)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 119 (2009)  
Commission gives the board's judgment on contention admissibility and whether to reopen a closed proceeding substantial deference on appeal; CLI-21-9, 93 NRC 244, 246 (2021)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 124 (2009)  
failure to satisfy either the requirements for reopening a closed record or for proffering a contention out of time requires rejection of the contention; LBP-21-2, 93 NRC 104, 111-12 n.49 (2021)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001)  
NRC's contention admissibility requirements are strict by design; LBP-21-2, 93 NRC 104, 113 (2021)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365 (2001)  
claim of deficient character must have some direct and obvious relationship between the character issues and the licensing action in dispute; CLI-21-1, 93 NRC 1, 41 (2021)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 366 (2001)  
contention challenging character or integrity of a licensee's managers may be admissible in specific circumstances but strict limits on such contentions have been imposed; CLI-21-1, 93 NRC 1, 50 (2021)

## LEGAL CITATIONS INDEX

### CASES

- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005)  
section 2.335 waiver can be granted if four factors have been met; LBP-21-4, 93 NRC 179, 198 (2021)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560 (2005)  
rule waiver factor two requires demonstration of a circumstance that was not considered either explicitly, or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived; LBP-21-4, 93 NRC 179, 202 n.39 (2021)
- Dominion Virginia Power* (North Anna Power Station, Unit 3), CLI-17-8, 85 NRC 157, 176-82 (2017)  
any new equipment is qualified to seismic margins consistent with recent events; LBP-21-4, 93 NRC 179, 206 n.47 (2021)
- DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 149 & n.74 (2015)  
licensing boards should not make arguments for the litigants that were never made by the litigants themselves; LBP-21-3, 93 NRC 153, 155 n.6 (2021)
- DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-17-7, 85 NRC 111, 116 (2017)  
evidentiary support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements; CLI-21-6, 93 NRC 145, 148 (2021); CLI-21-9, 93 NRC 244, 247 (2021)
- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004)  
NRC Staff, not the board, determines whether an application is accepted for review, and the board does not supervise Staff's review; CLI-21-7, 93 NRC 215, 228-29 (2021)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999)  
to show that a dispute is material, petitioner must show that its resolution would make a difference in the outcome of the proceeding; LBP-21-2, 93 NRC 104, 113 (2021)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)  
contention admissibility requirements are intended to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-21-2, 93 NRC 104, 113 (2021)  
contention admissibility requirements are strict by design; CLI-21-1, 93 NRC 1, 10 (2021)  
contention admissibility requirements are the Commission's conscious effort to raise the threshold bar for an admissible contention; LBP-21-2, 93 NRC 104, 113 (2021)  
petitioner may not demand an adjudicatory hearing to express generalized grievances about NRC policies; CLI-21-1, 93 NRC 1, 45 n.250 (2021)  
rather than expend agency time and resources on litigating vague and unsupported claims, NRC chose to provide evidentiary hearings only to those who proffer at least some minimal factual and legal foundation in support of their contentions; LBP-21-2, 93 NRC 104, 113 (2021)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999)  
NRC's contention admissibility requirements are not intended to be a fortress to deny intervention; LBP-21-2, 93 NRC 104, 113 (2021)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999)  
petitioners must do more than rest on the mere existence of requests for additional information as the basis for their contention; CLI-21-7, 93 NRC 215, 227 (2021)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999)  
petitioners have an ironclad obligation to examine relevant application documents to uncover information that might prompt a contention; LBP-21-2, 93 NRC 104, 109 (2021)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983)  
NRC expects petitioner to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility; LBP-21-2, 93 NRC 104, 109-10 (2021)
- Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), ALAB-208, 7 AEC 959, 964-65 (1974)  
right to intervention under AEA section 189a for a member of the public is explicitly conditioned upon a request that properly shall include a statement of the facts supporting each contention together with references to the sources and documents on which the intervenor relies to establish those facts; CLI-21-5, 93 NRC 131, 143 n.82 (2021)

## LEGAL CITATIONS INDEX

### CASES

- Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 498 (2012)  
timeliness of new contention for reopening a record is based on whether it could have been raised earlier or is materially different from what was previously available and has been submitted in a timely fashion; CLI-21-7, 93 NRC 215, 221-22 (2021)
- Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 500-01 (2012)  
board's discretion to consider an untimely, exceptionally grave issue is granted rarely and only in extraordinary circumstances; LBP-21-2, 93 NRC 104, 111 n.49 (2021)
- Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 501 (2012)  
new contention that poses concerns about national economics, security, and regional employment doesn't explain how ISFSI poses exceptionally grave impacts; CLI-21-7, 93 NRC 215, 226 (2021)  
new contention that poses concerns about sinkholes, subsidence, or seismicity doesn't provide information that is materially different from information already considered by NRC Staff in the DEIS; CLI-21-7, 93 NRC 215, 226 (2021)
- Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 501 n.67 (2012)  
exception to contention timeliness requirement is a narrow one, to be granted rarely and only in truly extraordinary circumstances; CLI-21-7, 93 NRC 215, 226 (2021)
- Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016)  
failure to satisfy any of NRC's pleading requirements requires a licensing board to reject a contention; LBP-21-2, 93 NRC 104, 113 (2021)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 191 (2008)  
oral argument is an opportunity for the board to ensure it understands participants' legal positions, and participants do not have a right to oral argument on contention admissibility; CLI-21-7, 93 NRC 215, 228 (2021)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 372 (2015)  
GEIS small impact conclusions span both design-basis and severe accidents and analyze such a happenstance as a severe accident, the probability of which is so low; LBP-21-4, 93 NRC 179, 205 (2021)
- Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 329 (2015)  
it is petitioners' responsibility, not the board's, to formulate contentions and provide necessary information to satisfy the basis requirement for admission; LBP-21-4, 93 NRC 179, 209 n.55 (2021)
- Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-19-11, 90 NRC 258, 262 (2020)  
license transfer application will lack NRC's final approval until and unless the Commission concludes the adjudication in applicants' favor; CLI-21-1, 93 NRC 1, 4 (2021)
- Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-19-11, 90 NRC 258, 262-63 (2020)  
when NRC Staff has approved a license transfer prior to resolution of issues in a proceeding, the Commission has authority to modify or rescind the Staff's decision; CLI-21-1, 93 NRC 1, 55 n.309 (2021)
- Entergy Nuclear Operations, Inc., and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 257 n.8 (2008)  
decision on intervention petitions was issued after NRC Staff had issued order approving license transfer; CLI-21-1, 93 NRC 1, 56 n.311 (2021)
- Entergy Nuclear Operations, Inc., and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 258 & n.16 (2008)  
to establish standing, petitioner must demonstrate that it has suffered a distinct and palpable harm that can fairly be traced to the challenged action and is likely to be redressed by a favorable decision; LBP-21-3, 93 NRC 153, 158-59 n.27 (2021)
- Entergy Nuclear Operations, Inc., and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 260 n.23 (2008)  
good reputation is not an interest protected by the Atomic Energy Act, and NRC is bound to follow precedents; LBP-21-3, 93 NRC 153, 160 (2021)

## LEGAL CITATIONS INDEX

### CASES

- Entergy Nuclear Operations, Inc., and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 266 (2008)  
reputational injury is not within the zone of interests of the Atomic Energy Act; LBP-21-3, 93 NRC 153, 161 (2021)  
there is no relationship at all between the legislative purpose underlying the safety provisions of the Atomic Energy Act and petitioner's interest in protecting its reputation; LBP-21-3, 93 NRC 153, 161, 176 (2021)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 20 & n.26 (2007)  
adjudicatory challenge based on applicant's failure to deal appropriately with a Category 1 item constitutes an attack on an agency rule, making a section 2.335(b) waiver the sole vehicle for raising such an issue; LBP-21-4, 93 NRC 179, 190 (2021)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 20-21 (2007)  
reliance on section 51.53(c)(3)(iv) new and significant information is not enough to negate the requirement in an adjudication to proffer a valid section 2.335 waiver petition to obtain consideration of that information; LBP-21-4, 93 NRC 179, 201 n.38 (2021)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-16-8, 83 NRC 463, 470 (2016)  
when vacating for mootness, Commission neither approves nor disapproves a Board's ruling; CLI-21-1, 93 NRC 1, 15 n.76 (2021)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-15-24, 82 NRC 68, 73-74 & nn.18, 19 (2015), *vacated as moot*, CLI-16-8, 83 NRC 463 (2016)  
NRC Staff may grant an exemption while its review of licensee's amendment request is still pending; CLI-21-1, 93 NRC 1, 16 (2021)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-15-24, 82 NRC 68, 78 (2015), *vacated as moot*, CLI-16-8, 83 NRC 463 (2016)  
licensee's request for an exemption to use trust funds for non-decommissioning purposes was outside the scope of the proceeding; CLI-21-1, 93 NRC 1, 15 (2021)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-15-24, 82 NRC 68, 82 (2015), *vacated as moot*, CLI-16-8, 83 NRC 463 (2016)  
decommissioning trust-related exemption that is completely dependent on the license-amendment request cannot take effect unless NRC approves the license transfer application; CLI-21-1, 93 NRC 1, 16 (2021)
- Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 338 (2011)  
motion to reopen the record must satisfy the standards for reopening, contention admissibility and admitting new contentions filed after the deadline; CLI-21-7, 93 NRC 215, 221 (2021)
- Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-16-12, 83 NRC 542, 549 (2016)  
where a requested exemption raises questions that are material to a proposed licensing action and bear directly on whether the proposed action should be taken, petitioner may propose exemption-related arguments in the licensing proceeding; CLI-21-1, 93 NRC 1, 16 n.78 (2021)
- Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-16-17, 84 NRC 99, 123-24 (2016)  
if a licensee contemplates performing a decommissioning activity with impacts not enveloped by previous environmental impact analyses, licensee must submit a license amendment request with a supplemental environmental report evaluating the additional impacts; CLI-21-1, 93 NRC 1, 49 (2021)
- Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-16-17, 84 NRC 99, 124-26 (2016)  
PSDAR does not amend the NRC license and is not a major federal action subject to NEPA review; CLI-21-1, 93 NRC 1, 48 (2021)

## LEGAL CITATIONS INDEX

### CASES

- Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-16-17, 84 NRC 99, 128-30 (2016)  
environmental review of license transferee's exemption request is required because NEPA rules include no categorical exclusion that would allow for approval of the request without an environmental assessment; CLI-21-1, 93 NRC 1, 47 n.260 (2021)
- Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-24, 82 NRC 68, 73 (2015)  
NRC approved a trust agreement under which remaining trust funds would be returned to the community; CLI-21-1, 93 NRC 1, 45 (2021)
- Envirocare of Utah v. NRC*, 194 F.3d 72, 75-78 (D.C. Cir. 1999)  
NRC can permissibly deny a hearing request of a petitioner who satisfies Article III standing requirements provided the Commission's interpretation of its jurisdictional statute, 42 U.S.C. § 2239(a)(1)(A), is reasonable; LBP-21-3, 93 NRC 153, 161-62 & n.50 (2021)
- Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 75-79 (D.C. Cir. 1999)  
Commission has flexibility in determining standing and may use somewhat more- or less-restrictive criteria than courts, but those criteria must still be reasoned based on the facts of the case; LBP-21-3, 93 NRC 153, 172 n.37 (2021)
- Exelon Generation Co., LLC* (Dresden Nuclear Power Station, Units 2 and 3), CLI-16-6, 83 NRC 147, 160-62 (2016)  
petitioner union's claim that enforcement order would harm its members and reduce safety was a protected interest; LBP-21-3, 93 NRC 153, 175 (2021)
- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 207 (2013)  
absent the grant of a section 2.335 waiver, challenges to Category 1 generic determinations in an adjudication are precluded; LBP-21-4, 93 NRC 179, 199 n.36 (2021)
- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 207-08 & n.36 (2013)  
section 2.335 waiver can be granted if four factors have been met; LBP-21-4, 93 NRC 179, 198, 199 (2021)
- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 210-11 (2013)  
purported new and significant information is likely to be the basis for any successful rule waiver petition; LBP-21-4, 93 NRC 179, 201 n.38 (2021)
- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 211-12 (2013), *pet. for review denied sub nom., NRDC v. NRC*, 823 F.3d 641 (D.C. Cir. 2016)  
license renewal contention regarding adequacy of a previously considered SAMA environmental analysis cannot be litigated absent a section 2.335(b) waiver; LBP-21-4, 93 NRC 179, 192 (2021)
- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 212-13 (2013)  
designation of a Category 1 issue reflects NRC's expectations that its NEPA obligations have been satisfied with reference to its previously conducted environmental analysis in the GEIS; LBP-21-4, 93 NRC 179, 201 (2021)
- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 214-15 (2013)  
accepting an assertion that passage of time required SAMA analysis to be redone could be applicable to any initial renewal or SLR application so as to justify a section 51.53(c)(3)(ii)(L) waiver, necessarily swallowing the rule; LBP-21-4, 93 NRC 179, 207 n.52 (2021)
- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 216-17 (2013)  
NRC Staff must conduct its hard-look licensing review of the environmental report to assess whether new and significant information exists that requires additional consideration; LBP-21-4, 93 NRC 179, 208 n.54 (2021)  
NRC Staff must consider whether any information provided by public comments as part of the environment review process merits further analysis as new and significant information; LBP-21-4, 93 NRC 179, 208 n.54 (2021)

## LEGAL CITATIONS INDEX

### CASES

- Exelon Generation Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-19-6, 89 NRC 465, 475-76 (2019)  
NRC review of license transferees financial ability to decommission a facility on the site does not end after approval of the transfer; CLI-21-2, 93 NRC 70, 76 (2021)
- Exelon Generation Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-19-6, 89 NRC 465, 477 (2019)  
claim of deficient character must have some direct and obvious relationship between the character issues and the licensing action in dispute; CLI-21-1, 93 NRC 1, 41 (2021)
- Exelon Generation Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-19-6, 89 NRC 465, 480 (2019)  
performing a decommissioning activity with impacts not enveloped by previous environmental impact analyses without supplementing its environmental analysis is subject to NRC enforcement action; CLI-21-1, 93 NRC 1, 49 (2021)
- Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-20-11, 92 NRC 335, 342-44 (2020)  
NRC must follow precedents on question of applicability of 10 C.F.R. 51.53(c) to subsequent license renewal; LBP-21-4, 93 NRC 179, 189-90 n.11 (2021)
- Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-19-5, 89 NRC 483, 490-91 (2019), *aff'd on other grounds*, CLI-20-11, 92 NRC 335 (2020)  
proximity presumption excuses those otherwise meeting the requirements for standing from making a specific showing of injury in fact so long as they reside, work, or otherwise have regular contacts within a 50-mile radius of the facility; LBP-21-4, 93 NRC 179, 197 (2021)
- Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-19-5, 89 NRC 483, 491 (2019), *aff'd on other grounds*, CLI-20-11, 92 NRC 335 (2020)  
even if petitioners' standing has not been contested, an independent board determination is required about whether each has fulfilled the requirements to establish standing to intervene; LBP-21-4, 93 NRC 179, 197 (2021)
- Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), LBP-19-5, 89 NRC 483, 502-03 (2019), *aff'd on other grounds*, CLI-20-11, 92 NRC 335, 343-44 (2020)  
challenge to environmental report's incorporation by reference to 2013 Revised GEIS regarding impact of design-basis and severe accidents as part of the basis for a contention fails to establish a material factual dispute; LBP-21-4, 93 NRC 179, 210 n.59 (2021)
- Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)  
although petitioner need not prove its contention at the admission stage, mere notice pleading is insufficient; LBP-21-2, 93 NRC 104, 113 (2021)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7 (2001)  
integrity of structures, systems, and components is a current licensing basis issue and so beyond challenge in a subsequent license renewal adjudication; LBP-21-4, 93 NRC 179, 205-06 (2021)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11-13 (2001)  
adjudicatory challenge based on applicant's failure to deal appropriately with a Category 1 item constitutes an attack on an agency rule, making a section 2.335(b) waiver the sole vehicle for raising such an issue; LBP-21-4, 93 NRC 179, 190 (2021)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001)  
purported new and significant information is likely to be the basis for any successful rule waiver petition; LBP-21-4, 93 NRC 179, 201 n.38 (2021)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 24-25 (2001)  
petitioners have an ironclad obligation to search the public record for information supporting their contentions; CLI-21-1, 93 NRC 1, 48 (2021)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015)  
hearing requests are construed in petitioner's favor, but petitioner has the burden of demonstrating that the standing requirements are met; LBP-21-4, 93 NRC 179, 197 (2021)



## LEGAL CITATIONS INDEX

### CASES

- Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-20-3, 91 NRC 133 (2020)  
NRC must follow precedents on question of applicability of 10 C.F.R. 51.53(c) to subsequent license renewal; LBP-21-4, 93 NRC 179, 189-90 n.11 (2021)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-3, 89 NRC 245, 258-59 (2019), *appeal dismissed and referred ruling aff'd*, CLI-20-3, 91 NRC 133 (2020)  
proximity presumption excuses those otherwise meeting the requirements for standing from making a specific showing of injury in fact so long as they reside, work, or otherwise have regular contacts within a 50-mile radius of the facility; LBP-21-4, 93 NRC 179, 197 (2021)
- Florida Power and Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017)  
reiteration of the same arguments on appeal as raised before the board does not show board error or abuse of discretion; CLI-21-4, 93 NRC 119, 122, 124 (2021); CLI-21-9, 93 NRC 244, 250 (2021)
- Foretich v. United States*, 351 F.3d 1198, 1214 (D.C. Cir. 2003)  
reputational injury that derives directly from government action will support Article III standing to challenge that action; LBP-21-3, 93 NRC 153, 173 n.39 (2021)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111 (1995)  
admissible contentions challenging management character or integrity have generally been based on activities of high-ranking officers or directors of the licensed organization who would have some direct authority over the activities authorized by the license; CLI-21-1, 93 NRC 1, 51 (2021)
- Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993)  
admissible contentions challenging management character or integrity have generally been based on activities of high-ranking officers or directors of the licensed organization who would have some direct authority over the activities authorized by the license; CLI-21-1, 93 NRC 1, 51 (2021)
- GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000)  
organization seeking representational standing must demonstrate how at least one of its members may be affected by the licensing action, identify that member by name and address, and show, preferably by affidavit, that the organization is authorized to request a hearing on behalf of that member; CLI-21-1, 93 NRC 1, 10 (2021)  
petitioner must show that the alleged injury would be fairly caused by the proposed licensing action and is capable of being redressed by a favorable decision; CLI-21-1, 93 NRC 1, 10 (2021)  
to show standing, petitioner must show a concrete and particularized injury to an interest within the zone of interests protected by the Atomic Energy Act; CLI-21-1, 93 NRC 1, 10 (2021)
- GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)  
contention that licensee transferee is inherently financially unsound because it is a limited liability company whose sole purpose is decommissioning is inadmissible; CLI-21-2, 93 NRC 70, 86-87 (2021)
- Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC 167, 173 (2020)  
Commission generally defers to boards on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion; CLI-21-5, 93 NRC 131, 134 (2021)  
Commission generally defers to boards on questions pertaining to the sufficiency of factual support for the admission of a contention; CLI-21-5, 93 NRC 131, 134 (2021)
- Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-21-7, 93 NRC 215, 228-29 (2021)  
applicant does not require board approval to update its application; CLI-21-9, 93 NRC 244, 251 (2021)
- Howard R.L. Cook & Tommy Shaw Found. ex rel. Black Emp. of Library of Cong., Inc. v. Billington*, 737 F.3d 767, 771 (D.C. Cir. 2013)  
zone-of-interests requirement poses a low bar; LBP-21-3, 93 NRC 153, 174 (2021)
- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-99-40, 50 NRC 273 (1999), *reversed sub nom. Hydro Resources, Inc.* (P.O. Box 15910 Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31 (2001)  
abeyance motion is only appropriate where an ongoing adjudication is involved; CLI-21-8, 93 NRC 237, 240 (2021)

## LEGAL CITATIONS INDEX

### CASES

- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-99-40, 50 NRC 273, 275 (1999)  
board agreed to hold proceeding in abeyance where applicant was no longer pursuing operations at a portion of its site but decision was overturned; CLI-21-8, 93 NRC 237, 240 (2021)
- Hydro Resources, Inc.* (P.O. Box 15910 Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 38 (2001)  
agency within a reasonable time shall set and complete proceedings required to be conducted and shall make its decision; CLI-21-8, 93 NRC 237, 240 (2021)  
Commission overturned board's decision to hold proceeding in abeyance; CLI-21-8, 93 NRC 237, 240 (2021)  
holding a proceeding in abeyance is disfavored by NRC; CLI-21-8, 93 NRC 237, 240 (2021)
- Hydro Resources, Inc.* (P.O. Box 15910 Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 43 (2001)  
agency within a reasonable time, shall set and complete proceedings required to be conducted and shall make its decision; CLI-21-8, 93 NRC 237, 240 (2021)
- Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC 31, 106 (2019), *aff'd*, CLI-20-14, 92 NRC 463, 479 (2020)  
environmental impact statement must analyze not only direct impacts of a proposed action, but also indirect and cumulative impacts of past, present, and reasonably foreseeable future actions; LBP-21-4, 93 NRC 179, 210 n.63 (2021)
- Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC 31, 106 & n.510 (2019), *aff'd*, CLI-20-14, 92 NRC 463, 479 (2020)  
environmental impact statement must include an evaluation of the cumulative impacts of a proposed action; LBP-21-4, 93 NRC 179, 210 n.63 (2021)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001)  
argument made before the board but not reiterated or explained on appeal is considered abandoned; CLI-21-5, 93 NRC 131, 143 n.84 (2021)
- Limerick Ecology Action v. NRC*, 869 F.2d 719, 741 (3d Cir. 1989)  
agency's preclusion of severe accident mitigation design alternative NEPA analysis pursuant to a policy statement was improper; LBP-21-4, 93 NRC 179, 207 n.53 (2021)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005)  
NEPA does not call for certainty or precision, but an estimate of anticipated (not unduly speculative) impacts; CLI-21-7, 93 NRC 215, 233 n.113 (2021)  
NRC Staff's environmental analysis appropriately discusses reasonable outcomes, rather than theoretical possibilities; CLI-21-7, 93 NRC 215, 233 (2021)
- Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 883 (1990)  
plaintiff must establish that the injury he complains of falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint; LBP-21-3, 93 NRC 153, 175 (2021)
- Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 385 (2012)  
filing that is not associated with initial hearing request is treated as a petition for discretionary review and not an appeal as of right; CLI-21-9, 93 NRC 244, 246 (2021)
- Mass. v. United States*, 522 F.3d 115, 119-21 (1st Cir. 2008)  
federal courts have acknowledged legitimacy of avoiding new analyses of generic Category 1 issues as counterproductive; LBP-21-4, 93 NRC 179, 201 (2021)
- McBryde v. Comm. to Review Cir Council Conduct & Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52 (D.C. Cir. 2001)  
harm to a judge's reputation from a public reprimand for misconduct was a sufficient injury for him to establish standing; LBP-21-3, 93 NRC 153, 173 (2021)
- McNeill v. Burlington Res. Oil & Gas Co.*, 143 N.M. 740, 748 (N.M. 2008)  
under New Mexico law, the surface estate is subordinate to the mineral estate; CLI-21-7, 93 NRC 215, 231 (2021)
- Meese v. Keene*, 481 U.S. 465, 465-67 (1987)  
where injury could be redressed by enjoining the government's action, the reputational harm was sufficient to establish standing to contest the action; LBP-21-3, 93 NRC 153, 173 (2021)

## LEGAL CITATIONS INDEX

### CASES

- Meese v. Keene*, 481 U.S. 465, 466 (1987)  
government action labeling an individual's showing of films as political propaganda caused risk of injury to his/her reputation that was traceable to the government's action; LBP-21-3, 93 NRC 153, 173 (2021)
- Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-9, 21 NRC 1118, 1137 (1985)  
previously corrected inadequacies of prior management, who no longer are responsible for licensed activities, are not probative of the integrity of current company management; CLI-21-1, 93 NRC 1, 52-53 & n.295 (2021)
- N.J. Dep't of Envtl. Prot. v. NRC*, 561 F.3d 132, 140-43 (3d Cir. 2009)  
NRC requires no analysis of potential impacts of terrorist attacks and sabotage for facilities outside the Ninth Circuit; LBP-21-2, 93 NRC 104, 111, 116 (2021)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323 (2012)  
admissible contentions must identify a deficiency in the environmental analysis and may not merely offer suggestions of other ways the analysis could have been done; LBP-21-2, 93 NRC 104, 114 (2021)  
where contentions were initially drafted by a different petitioner for a different proceeding, petitioners must demonstrate a genuine material dispute with the particular application in question to be granted a hearing; CLI-21-2, 93 NRC 70, 77 (2021)
- NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 332 (2012)  
neither the board nor the Commission is expected to search through voluminous documents for support for petitioner's claims; CLI-21-2, 93 NRC 70, 81 n.64, 85 n.97 (2021)
- Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 & n.5 (1999)  
to establish standing, petitioner must demonstrate that it has suffered a distinct and palpable harm that can fairly be traced to the challenged action and is likely to be redressed by a favorable decision; LBP-21-3, 93 NRC 153, 158-59 n.27 (2021)
- North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 221-22 (1999)  
level of financial assurance required of license transferees for decommissioning is not equivalent to the extremely high assurance required for the safety of reactor design, construction, and operation; CLI-21-2, 93 NRC 70, 75-76 (2021)
- North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999)  
financial assurance will be acceptable if it is based on plausible assumptions and forecasts; CLI-21-1, 93 NRC 1, 16, 24, 29 (2021)  
in license transfer context, applicant's financial assurance estimates will be acceptable if they are grounded in assumptions and forecasts that were plausible when the estimates were submitted; CLI-21-1, 93 NRC 1, 36 (2021)  
mere casting of doubt on some aspects of proposed decommissioning funding plans is not by itself sufficient to defeat a finding of reasonable assurance; CLI-21-2, 93 NRC 70, 76 (2021)  
NRC will accept financial assurances of decommissioning funding based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected; CLI-21-1, 93 NRC 1, 9 (2021); CLI-21-2, 93 NRC 70, 76 (2021)  
without additional information to support state's arguments, there is no genuine issue as to whether delays at other sites render applicant's timelines implausible; CLI-21-1, 93 NRC 1, 35 (2021)
- Northern States Power Co.* (Monticello Nuclear Generating Plant, Units 1 and 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 57 (2000)  
contention that license transferee is inherently financially unsound because it is a limited liability company whose sole purpose is decommissioning is inadmissible; CLI-21-2, 93 NRC 70, 86-87 (2021)
- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 191-92 (1973), *aff'd*, CLI-73-12, 6 AEC 241, 241-42 (1973)  
petitioner must show an interest in a proceeding and put forward concrete issues that are appropriate for adjudication; CLI-21-5, 93 NRC 131, 143 n.82 (2021)

## LEGAL CITATIONS INDEX

### CASES

- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 485-86, 493-96 (2010)  
old information repackaged in a new report is not new information; CLI-21-4, 93 NRC 119, 128 (2021)
- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010)  
petitioners have an obligation to review publicly available information and, to the extent they disagree with applicant's analysis, set forth their disagreement in their petitions; CLI-21-1, 93 NRC 1, 21 (2021)
- NRDC v. NRC*, 823 F.3d 641, 647 (D.C. Cir. 2016)  
federal courts have acknowledged legitimacy of avoiding new analyses of generic Category 1 issues as counterproductive; LBP-21-4, 93 NRC 179, 201 (2021)
- Nuclear Management Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)  
NRC will not entertain arguments advanced for the first time in a reply brief; LBP-21-2, 93 NRC 104, 111 n.49 (2021); LBP-21-3, 93 NRC 153, 163 (2021)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981)  
prima facie showing within the meaning of section 2.335(d) is one that is legally sufficient to establish a fact or case unless disproved; LBP-21-4, 93 NRC 179, 199 n.35 (2021)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 336 (2002)  
chilling effect claim that is not directly related to environmental or radiological harm does not fall within the zone of interests of the Atomic Energy Act; LBP-21-3, 93 NRC 153, 162 (2021)
- Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976)  
extent to which requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record is both the first and most important factor in considering discretionary intervention; LBP-21-3, 93 NRC 153, 164-65 (2021)  
petitioners seeking discretionary intervention ought to contribute on substantial issues of law or fact that will not otherwise be properly raised or presented; LBP-21-3, 93 NRC 153, 165 (2021)  
practice of applying the discretionary intervention factors is expected to develop through attention to the concrete facts of particular situations; LBP-21-3, 93 NRC 153, 178 (2021)
- Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 286 & n.1 (2000)  
hearing requests were granted although NRC Staff had issued orders approving both license transfers and the companies had closed on the sale of the two nuclear reactor plants; CLI-21-1, 93 NRC 1, 55-56 n.311 (2021)
- Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000)  
to establish standing, petitioner must demonstrate that it has suffered a distinct and palpable harm that can fairly be traced to the challenged action and is likely to be redressed by a favorable decision; LBP-21-3, 93 NRC 153, 158-59 n.27 (2021)
- Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 312 (2000)  
absent strong support for a claim that difficulties at other plants run by a corporate parent will affect the plant(s) at issue, Commission is unwilling to use its hearing process for a wide-ranging inquiry into the corporate parent's general activities across the country; CLI-21-1, 93 NRC 1, 40 n.223 (2021)  
NRC generally has been unwilling to admit contentions based solely on past activities of a parent corporation if those activities do not bear directly on the conduct of those who will be responsible to conduct licensed activities in compliance with NRC requirements; CLI-21-1, 93 NRC 1, 50-51 (2021)

## LEGAL CITATIONS INDEX

### CASES

- Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488 (2001)  
Commission declined, following a hearing on the merits, to disturb the Staff's approval of license transfers; CLI-21-1, 93 NRC 1, 56 n.311 (2021)
- PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-15-8, 81 NRC 500, 506 n.47 (2015)  
petitioners must do more than rest on the mere existence of requests for additional information as the basis for their contention; CLI-21-7, 93 NRC 215, 227 (2021)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 324 (2007)  
declaration does not meet contention admissibility requirements where it only poses questions; CLI-21-4, 93 NRC 119, 123 (2021)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)  
failure to comply with any of the contention admissibility requirements is grounds for rejecting a contention; LBP-21-4, 93 NRC 179, 209 (2021)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 (2012)  
where a requested exemption raises questions that are material to a proposed licensing action and bear directly on whether the proposed action should be taken, petitioner may propose exemption-related arguments in the licensing proceeding; CLI-21-1, 93 NRC 1, 16 n.78 (2021)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005)  
standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention; LBP-21-2, 93 NRC 104, 108 (2021); LBP-21-2, 93 NRC 104, 108 (2021)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 23-24 (2006)  
Commission often refers motions to reopen to the board, but will rule on them where appropriate; CLI-21-6, 93 NRC 145, 147 (2021); CLI-21-7, 93 NRC 215, 229 (2021)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 24 (2006)  
Commission retains jurisdiction to reopen a closed proceeding until the licensing action that is the subject of the proceeding has been taken; CLI-21-8, 93 NRC 237, 239 n.10 (2021)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313 (1999)  
NRC expects petitioner to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility; LBP-21-2, 93 NRC 104, 109-10 (2021)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 22 (1988)  
prima facie showing within the meaning of section 2.335(d) is one that is legally sufficient to establish a fact or case unless disproved; LBP-21-4, 93 NRC 179, 199 n.35 (2021)
- Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 12 (1998)  
where plaintiff itself is not itself the subject of the contested regulatory action, the zone-of-interests test denies a right of review if plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit; LBP-21-3, 93 NRC 153, 173-74 (2021)
- Safety Light Corp.* (Bloomsburg, Pennsylvania Site), LBP-05-2, 61 NRC 53, 61 (2005)  
adequate evidence is reliable, probative, and substantial (but not preponderant) and supports a conclusion that the asserted wrongdoer violated a Commission requirement, and the violation was willful or poses a risk to the public health, safety, or interest that requires immediate action; CLI-21-3, 93 NRC 89, 95 (2021)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994)  
NRC applies contemporaneous judicial concepts of standing; LBP-21-3, 93 NRC 153, 173, 174 n.46 (2021)

## LEGAL CITATIONS INDEX

### CASES

- Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 504 (2007)  
claim that continued presence of Boraflex will lead to a fire in the spent fuel pool and that all failure modes must be examined in association with the transfer of spent fuel to dry cask storage do not demonstrate Board error; CLI-21-5, 93 NRC 131, 138 (2021)  
purpose of an appeal is to point out errors made in the board's decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the board; CLI-21-5, 93 NRC 131, 137 (2021)
- Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 558 (2013)  
unreviewed board decision do not constitute binding precedent on other boards; CLI-21-7, 93 NRC 215, 224 n.53 (2021)
- Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 220 (2011)  
Commission will defer to the board's decision where it finds no error of law or abuse of discretion; CLI-21-9, 93 NRC 244, 246 (2021)
- Southern Nuclear Operating Co., Inc.* (Vogtle Electric Generating Plant, Unit 3), CLI-20-6, 91 NRC 225, 237-38 & n.83 (2020)  
hearing request is construed in petitioner's favor, but petitioner has the burden of demonstrating that the standing requirements are met; LBP-21-4, 93 NRC 179, 197 (2021)
- Southern Nuclear Operating Co., Inc.* (Vogtle Electric Generating Plant, Unit 3), CLI-21-6, 93 NRC 145, 147-48 (2021)  
motion to reopen will be granted only if it is timely filed, addresses a significant safety or environmental issue, and demonstrates that a materially different result would have been likely had the new information been considered initially; CLI-21-8, 93 NRC 237, 240 (2021)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998)  
it is petitioners' responsibility, not the board's, to formulate contentions and provide necessary information to satisfy the basis requirement for admission; LBP-21-4, 93 NRC 179, 209 n.57 (2021)
- Sullivan v. Comm. on Admissions and Grievance of the U.S. Dist. Ct. for D.C.*, 395 F.2d 954, 956 (D.C. Cir. 1967)  
Court's determination that an attorney had violated Canons of Ethics plainly reflects adversely on his professional reputation; LBP-21-3, 93 NRC 153, 173 (2021)
- System Fuels, Inc. v. United States*, 818 F.3d 1302, 1306-07 (Fed. Cir. 2016)  
spent fuel owner suing DOE for breach of the standard contract for spent fuel storage could recover its costs incurred in loading spent fuel into storage canisters; CLI-21-2, 93 NRC 70, 83 n.79 (2021)
- System Fuels, Inc. v. United States*, 818 F.3d 1302, 1307 (Fed. Cir. 2016)  
if, in the future, DOE were to accept spent fuel in its current package, it could be entitled to reimbursement for the costs it already paid to load the fuel into storage canisters; CLI-21-2, 93 NRC 70, 83 n.79 (2021)
- Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-17-5, 85 NRC 87, 91 (2017)  
Commission generally defers to boards on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion; CLI-21-5, 93 NRC 131, 134 (2021)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160 (2004)  
evidentiary framework for proof of an Employee Protection Rule violation is set forth; CLI-21-3, 93 NRC 89, 93 n.18 (2021)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 185 (2004)  
Commission invoked both the AEA and the ERA as authority when promulgating section 50.7; LBP-21-3, 93 NRC 153, 176 n.61 (2021)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 185-87 (2004)  
provisions of 10 C.F.R. 50.7(a), (d) do not contemplate protection of employees who only raise concerns about an unprofessional or hostile work environment; LBP-21-3, 93 NRC 153, 163 (2021)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 187 (2004)  
violation of the Employee Protection Rule can be shown with sufficient evidence that a protected activity was a contributing factor to an adverse personnel action, absent clear and convincing

## LEGAL CITATIONS INDEX

### CASES

- evidence that the employer would have taken the same unfavorable personnel action notwithstanding the protected activity; CLI-21-3, 93 NRC 89, 98 (2021)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 192 (2004)  
Energy Reorganization Act provides protection for whistleblowers and establishes the right to defend against a whistleblower discrimination charge; LBP-21-3, 93 NRC 153, 163 (2021)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 192-93 (2004)  
inference that the Employee Protection Rule was violated may be negated by the employer if it proves with clear and convincing evidence that it would have taken the same adverse action regardless of the protected activity; CLI-21-3, 93 NRC 89, 93 n.18 (2021)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 192-94, 196-97 (2004)  
elements of an Employee Protection Rule violation may be proven using the burden-shifting evidentiary framework are different from those for a Deliberate Misconduct Rule violation; CLI-21-3, 93 NRC 89, 98 n.50 (2021)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 193 (2004)  
high burden is imposed on employers so that nuclear whistleblowers are encouraged to come forward with safety-related information; CLI-21-3, 93 NRC 89, 93 n.18 (2021)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 194, 196-97 (2004)  
if NRC Staff shows by a preponderance of evidence that an employee's protected activity was a contributing factor in an unfavorable personnel decision, a reasonable inference arises that the Employee Protection Rule was violated; CLI-21-3, 93 NRC 89, 93 n.18 (2021)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-15-19, 82 NRC 151, 155 (2015)  
intentionally heavy burden is placed on parties seeking to reopen the record; LBP-21-2, 93 NRC 104, 108 (2021)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-15-19, 82 NRC 151, 156 (2015)  
Commission considers reopening the record for any reason to be an extraordinary action; LBP-21-2, 93 NRC 104, 108 (2021)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 67 (1992)  
after NRC Staff issues the action provided for in the notice of opportunity for hearing and the Commission issues its final adjudicatory decision, it no longer retains jurisdiction to consider further adjudicatory filings; CLI-21-8, 93 NRC 237, 239 n.10 (2021)  
available avenue to raise new concerns after the Commission issues its final adjudicatory decision is through a request for enforcement action; CLI-21-8, 93 NRC 237, 239-40 (2021)  
NRC action on the underlying licensing request closes out the Notice of Opportunity for a Hearing published in the *Federal Register*; CLI-21-8, 93 NRC 237, 239 n.10 (2021)
- USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 (2006)  
Commission will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had an opportunity to address; LBP-21-3, 93 NRC 153, 163 (2021)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006)  
new argument on appeal could be rejected on that ground alone; CLI-21-7, 93 NRC 215, 228 (2021)  
purpose of an appeal is to point out errors made in the board's decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the board; CLI-21-5, 93 NRC 131, 137 (2021)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006)  
expert opinion that merely states a conclusion, without providing a reasoned basis or explanation for that conclusion, is not enough to support admitting a contention; CLI-21-1, 93 NRC 1, 34-35 & n.191 (2021)
- Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 844 (1987)  
no significant hazards consideration determination can only be made by the NRC Staff or the Commission and cannot be challenged in an adjudicatory proceeding; CLI-21-5, 93 NRC 131, 135 (2021)

## LEGAL CITATIONS INDEX

### CASES

- Vermont Yankee Nuclear Power Corp. and AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 83 (2000)  
intervention petitions were pending before the Commission although NRC Staff had issued order approving license transfer; CLI-21-1, 93 NRC 1, 56 n.311 (2021)  
license transfer application will lack NRC's final approval until and unless the Commission concludes the adjudication in applicants' favor; CLI-21-1, 93 NRC 1, 4 (2021)
- Vermont Yankee Nuclear Power Corp. and AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 172-73 (2000)  
contention that license transferee is inherently financially unsound because it is a limited liability company whose sole purpose is decommissioning is inadmissible; CLI-21-2, 93 NRC 70, 86 (2021)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 701 (2012)  
after the board dismisses the last pending contention, jurisdiction over the matter, including jurisdiction over motions to reopen, passes to the Commission; CLI-21-7, 93 NRC 215, 229 (2021)
- Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 104 (1976)  
reputation is not even arguably within the zone of interests protected by the Atomic Energy Act; LBP-21-3, 93 NRC 153, 161, 176 (2021)  
reputational injury is not within the protected zone of interests even as a secondary purpose of the health and safety provisions of the Atomic Energy Act; LBP-21-3, 93 NRC 153, 160 (2021)
- Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105 (1976)  
petitioner need only show that its interest may have been affected; LBP-21-3, 93 NRC 153, 159 n.31 (2021)
- Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 106 (1976)  
reputational injury is not even arguably within the zone of interests to be protected or regulated by the Atomic Energy Act; LBP-21-3, 93 NRC 153, 160 (2021)
- Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 107 (1976)  
there is no relationship at all between the legislative purpose underlying the safety provisions of the Atomic Energy Act and petitioner's interest in protecting its reputation; LBP-21-3, 93 NRC 153, 161 (2021)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)  
hearing opportunity will be provided only where adverse effects implicate the purposes of the statutes that NRC enforces; LBP-21-3, 93 NRC 153, 158 n.27, 159 (2021)  
to establish standing, petitioner must demonstrate that it has suffered a distinct and palpable harm that can fairly be traced to the challenged action and is likely to be redressed by a favorable decision; LBP-21-3, 93 NRC 153, 158-59 n.27 (2021)



## LEGAL CITATIONS INDEX REGULATIONS

- 10 C.F.R. 2.201  
notices of violations, demands for information, and requests for enforcement action do not provide for hearing opportunities; LBP-21-3, 93 NRC 153, 166 n.82 (2021)  
NRC Staff may issue a notice of violation for deliberate misconduct; LBP-21-3, 93 NRC 153, 156 (2021)
- 10 C.F.R. 2.202  
enforcement orders and civil penalties may be challenged in a hearing; LBP-21-3, 93 NRC 153, 166 n.82 (2021)
- 10 C.F.R. 2.202(a)(1)  
adequate evidence is reliable, probative, and substantial (but not preponderant) and supports a conclusion that the asserted wrongdoer violated a Commission requirement, and the violation was willful or poses a risk to the public health, safety, or interest that requires immediate action; CLI-21-3, 93 NRC 89, 95 (2021)
- 10 C.F.R. 2.202(a)(3)  
licensee employee may demand a hearing if she has been adversely affected by an order against licensee; LBP-21-3, 93 NRC 153, 158, 159 (2021)  
other person adversely affected by enforcement order is entitled to demand a hearing on all or part of the order to rebut NRC Staff's allegations against her; LBP-21-3, 93 NRC 153, 168, 173 (2021)
- 10 C.F.R. 2.202(a)(5)  
adequate evidence is reliable, probative, and substantial (but not preponderant) and supports a conclusion that the asserted wrongdoer violated a Commission requirement, and the violation was willful or poses a risk to the public health, safety, or interest that requires immediate action; CLI-21-3, 93 NRC 89, 95 (2021)  
based on a finding of deliberate misconduct, NRC Staff may make an enforcement order immediately effective; CLI-21-3, 93 NRC 89, 91 (2021)
- 10 C.F.R. 2.202(c)(2)(i)  
NRC Staff must provide evidence to show a violation of the Deliberate Misconduct Rule; CLI-21-3, 93 NRC 89, 91 (2021)
- 10 C.F.R. 2.202(c)(2)(vi)  
immediately effective enforcement order cannot be based on mere suspicion, unfounded allegations, or error; CLI-21-3, 93 NRC 89, 94 (2021)  
NRC Staff bears the burden of persuading the board that adequate evidence supports the grounds for the immediately effective order and immediate effectiveness is warranted; CLI-21-3, 93 NRC 89, 95 (2021)  
target of enforcement order may challenge the immediate effectiveness of the order by producing evidence that the order is based on mere suspicion, unfounded allegations, or error; CLI-21-3, 93 NRC 89, 95 (2021)
- 10 C.F.R. 2.202(c)(2)(viii)  
board decision to stay immediate effectiveness of NRC Staff's enforcement order is automatically referred to the Commission for review and has no effect pending further order of the Commission; CLI-21-3, 93 NRC 89, 95 (2021); LBP-21-1, 93 NRC 101, 102 (2021)
- 10 C.F.R. 2.204  
notices of violations, demands for information, and requests for enforcement action do not provide for hearing opportunities; LBP-21-3, 93 NRC 153, 166 n.82 (2021)

**LEGAL CITATIONS INDEX**  
**REGULATIONS**

- 10 C.F.R. 2.205  
enforcement orders and civil penalties may be challenged in a hearing; LBP-21-3, 93 NRC 153, 166 n.82 (2021)
- 10 C.F.R. 2.206  
available avenue to raise new concerns after the Commission issues its final adjudicatory decision is through a request for enforcement action; CLI-21-8, 93 NRC 237, 239-40, 241 (2021)  
notices of violations, demands for information, and requests for enforcement action do not provide for hearing opportunities; LBP-21-3, 93 NRC 153, 166 n.82 (2021)  
to assert that impacts of planned decommissioning, site restoration, and spent fuel management activities exceed those referenced in the PSDAR, a petition for enforcement action may be filed; CLI-21-1, 93 NRC 1, 49 (2021)
- 10 C.F.R. 2.309(a)  
admissible contention must have factual support, be within the scope of the proceeding, raise a matter material to the findings the NRC must make in deciding whether to grant the license, and raise a genuine dispute with the application; CLI-21-2, 93 NRC 70, 76-77 (2021)  
intervention petitioner must show standing and proffer at least one admissible contention; CLI-21-1, 93 NRC 1, 10 (2021); CLI-21-2, 93 NRC 70, 76 (2021); CLI-21-5, 93 NRC 131, 143 (2021)
- 10 C.F.R. 2.309(c)  
evidentiary support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements; CLI-21-6, 93 NRC 145, 148 (2021)  
extension of filing deadline does not alter petitioner's obligation to show that a new contention is based on new, previously unavailable information that differs materially from information that was previously available; LBP-21-2, 93 NRC 104, 112 (2021)  
good cause is the sole factor to be considered when evaluating whether to review the admissibility of a new or amended contention; CLI-21-7, 93 NRC 215, 224 (2021)  
good cause requires that a new contention be based on information that was not previously available, is materially from previously available information, and is timely based on when the new information became available; CLI-21-7, 93 NRC 215, 221 (2021)  
motion to reopen the record must satisfy the standards for reopening, contention admissibility and admitting new contentions filed after the deadline; CLI-21-7, 93 NRC 215, 221 (2021)  
new contention must explain why the issue could not have been raised earlier and how it relates to the financial qualifications of the proposed transferees; CLI-21-1, 93 NRC 1, 54 (2021)  
new contention submitted after the deadline must establish good cause for late filing; CLI-21-7, 93 NRC 215, 221 (2021)  
petitioner may move to amend its contention or submit a new contention; CLI-21-1, 93 NRC 1, 17 (2021)  
to the extent that petitioners identified any deficiency in the exemption request, they could have moved to amend their petition to challenge the request specifically; CLI-21-1, 93 NRC 1, 45 n.249 (2021)
- 10 C.F.R. 2.309(c)(1)  
motion to reopen must meet standards for contention admissibility as well as standards for filing new contentions after the initial deadline for hearing requests; CLI-21-9, 93 NRC 244, 246-47 (2021)
- 10 C.F.R. 2.309(c)(1)(ii)  
for a new contention to be admissible after the deadline for initial intervention petitions has passed, petitioner must show that information supporting the contention differs materially from information that was previously available; CLI-21-1, 93 NRC 1, 36 (2021)
- 10 C.F.R. 2.309(d)  
admissible contention must have factual support, be within the scope of the proceeding, raise a matter material to the findings the NRC must make in deciding whether to grant the license, and raise a genuine dispute with the application; CLI-21-2, 93 NRC 70, 76-77 (2021)  
intervention petitioner must show standing and proffer at least one admissible contention; CLI-21-1, 93 NRC 1, 10 (2021); CLI-21-2, 93 NRC 70, 76 (2021)
- 10 C.F.R. 2.309(d)(1)  
interests that representative organization seeks to protect must be germane to its own purpose and neither the asserted claim nor requested relief must require an individual member to participate in the legal action; LBP-21-4, 93 NRC 179, 197 (2021)

**LEGAL CITATIONS INDEX**  
**REGULATIONS**

- petitioner must provide the basis for her right to be part of the proceeding, her interest in the proceeding, and the possible effect of the proceeding on her interest; LBP-21-3, 93 NRC 153, 172 n.37 (2021)
- to establish representational standing, hearing request must state name, address, and telephone number of petitioner, nature of petitioner's right under the AEA to be a party nature and extent of the petitioner's property, financial, or other interest and possible effect of any issued decision or order on petitioner's interest; LBP-21-4, 93 NRC 179, 196-97 (2021)
- 10 C.F.R. 2.309(d)(2)  
even if petitioners' standing has not been contested, an independent board determination is required about whether each has fulfilled the requirements to establish standing to intervene; LBP-21-4, 93 NRC 179, 197 (2021)
- 10 C.F.R. 2.309(e)  
discretionary intervention is considered an extraordinary procedure; LBP-21-3, 93 NRC 153, 159 (2021)
- 10 C.F.R. 2.309(e)(1)  
discretionary intervention is permitted only when justified by a six-factor analysis; LBP-21-3, 93 NRC 153, 164-66 (2021)  
persons should not be routinely admitted as parties to hearings on enforcement orders when they are not, themselves, subjected to any penalty; LBP-21-3, 93 NRC 153, 164 (2021)
- 10 C.F.R. 2.309(e)(1)(i)  
extent to which requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record is both the first and most important factor in discretionary intervention; LBP-21-3, 93 NRC 153, 164-65 (2021)
- 10 C.F.R. 2.309(e)(1)(ii)  
nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding is considered for discretionary intervention; LBP-21-3, 93 NRC 153, 165 (2021)
- 10 C.F.R. 2.309(e)(1)(iii)  
possible effect of any decision or order that may be issued in the proceeding on requestor's/petitioner's interest is considered for discretionary intervention; LBP-21-3, 93 NRC 153, 165 (2021)
- 10 C.F.R. 2.309(e)(2)(i)  
availability of other means whereby requestor's/petitioner's interest will be protected is considered for discretionary intervention; LBP-21-3, 93 NRC 153, 165 (2021)
- 10 C.F.R. 2.309(e)(2)(ii)  
extent to which the requestor's/petitioner's interest will be represented by existing parties is considered for discretionary intervention; LBP-21-3, 93 NRC 153, 166 (2021)
- 10 C.F.R. 2.309(e)(2)(iii)  
extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding is considered for discretionary intervention; LBP-21-3, 93 NRC 153, 166 (2021)
- 10 C.F.R. 2.309(f)  
evidentiary support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements; CLI-21-6, 93 NRC 145, 148 (2021)  
for an issue within the scope of a proceeding to be admissible, petitioner must raise a genuine dispute with applicant; CLI-21-1, 93 NRC 1, 16 (2021)  
intervention petitioner must show standing and proffer at least one admissible contention; CLI-21-1, 93 NRC 1, 10 (2021); CLI-21-2, 93 NRC 70, 76 (2021)
- 10 C.F.R. 2.309(f)(1)  
admissible contention must fall within the scope of the proceeding and be material to the findings that NRC must make for the proposed licensing action; CLI-21-1, 93 NRC 1, 10 (2021)  
admissible contention must have factual support, be within the scope of the proceeding, raise a matter material to the findings the NRC must make in deciding whether to grant the license, and raise a genuine dispute with the application; CLI-21-2, 93 NRC 70, 76-77 (2021)  
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-21-1, 93 NRC 1, 10 (2021)  
petitioner must explain a contention's basis and provide supporting facts or expert opinion on which petitioner intends to rely, together with references to specific sources or documents; CLI-21-1, 93 NRC 1, 10 (2021)

## LEGAL CITATIONS INDEX

### REGULATIONS

- petitioner must identify specific disputed portions of the application along with the supporting reasons for each dispute; CLI-21-1, 93 NRC 1, 10 (2021)
- 10 C.F.R. 2.309(f)(1)(i)-(vi)  
contentions must satisfy the six admissibility criteria; CLI-21-4, 93 NRC 119, 121 (2021); CLI-21-7, 93 NRC 215, 222 (2021); LBP-21-4, 93 NRC 179, 208-209 (2021)  
late-filed contention must satisfy the admissibility requirements; LBP-21-2, 93 NRC 104, 112-13 (2021)  
motion to reopen must meet standards for contention admissibility as well as standards for filing new contentions after the initial deadline for hearing requests; CLI-21-9, 93 NRC 244, 246-47 (2021)
- 10 C.F.R. 2.309(f)(1)(iii)  
admissible contention must demonstrate that the issue raised in the contention is within the scope of the proceeding; LBP-21-2, 93 NRC 104, 113 (2021)  
evaluation of costs of emergency response and infrastructure upgrades is not within the scope of a Part 72 proceeding; LBP-21-2, 93 NRC 104, 115 (2021)
- 10 C.F.R. 2.309(f)(1)(iii)-(v)  
new contention must explain why the issue could not have been raised earlier and how it relates to the financial qualifications of the proposed transferees; CLI-21-1, 93 NRC 1, 54 (2021)
- 10 C.F.R. 2.309(f)(1)(iv)  
admissible contention must be supported by reference to facts or expert opinion and material to findings NRC must make to support the action involved in the proceeding; CLI-21-1, 93 NRC 1, 27 (2021); LBP-21-2, 93 NRC 104, 113 (2021)  
contention that ISFSI application fails to describe control of subsurface mineral rights and oil and gas and mineral extraction operations beneath and in the vicinity of proposed site is inadmissible; CLI-21-7, 93 NRC 215, 220 (2021)  
legal disputes with local permitting authority raise a material issue within the scope of a license transfer proceeding; CLI-21-1, 93 NRC 1, 55 (2021)  
new contention that poses concerns about national economics and security, regional employment, sinkholes, subsidence, or seismicity doesn't explain how ISFSI poses exceptionally grave impacts or is material to NRC Staff's assessment; CLI-21-7, 93 NRC 215, 226 (2021)
- 10 C.F.R. 2.309(f)(1)(v)  
admissible contention must be supported by reference to facts or expert opinion and material to findings NRC must make to support the action involved in the proceeding; CLI-21-1, 93 NRC 1, 27 (2021)  
role of the board is to determine whether petitioner has submitted an admissible contention; CLI-21-5, 93 NRC 131, 138 (2021)
- 10 C.F.R. 2.309(f)(1)(vi)  
admissible contention must include references to specific portions of the disputed document and the supporting reasons for each dispute; LBP-21-2, 93 NRC 104, 113-114 (2021)  
admissible contention must provide sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact; LBP-21-2, 93 NRC 104, 113 (2021)  
challenge to environmental report's incorporation by reference to 2013 Revised GEIS regarding impact of design-basis and severe accidents as part of the basis for a contention fails to establish a material factual dispute; LBP-21-4, 93 NRC 179, 210 n.59 (2021)  
claim that a document fails to contain relevant information that is legally required must identify each such alleged failure and the reason why the missing information is needed; LBP-21-2, 93 NRC 104, 114 (2021)  
contention that ISFSI application fails to describe control of subsurface mineral rights and oil and gas and mineral extraction operations beneath and in the vicinity of proposed site is inadmissible; CLI-21-7, 93 NRC 215, 220 (2021)  
contention that licensee's decommissioning cost analysis fails to address pipeline-safety issues does not raise a genuine dispute; CLI-21-1, 93 NRC 1, 26 (2021)  
for a new contention to be admissible after the deadline for initial intervention petitions has passed, petitioner must show that the new information raises a genuine dispute with applicant on a material issue of law or fact; CLI-21-1, 93 NRC 1, 36, 45 n.250 (2021)  
intervention petitioner must identify specific disputed portions of the application or missing information required by law and provide supporting reasons for petitioner's belief; CLI-21-2, 93 NRC 70, 77 (2021)

## LEGAL CITATIONS INDEX

### REGULATIONS

- new contention that poses concerns about national economics and security, regional employment, sinkholes, subsidence, or seismicity doesn't explain how ISFSI poses exceptionally grave impacts or is material to NRC Staff's assessment; CLI-21-7, 93 NRC 215, 226 (2021)
- role of the board is to determine whether petitioner has submitted an admissible contention; CLI-21-5, 93 NRC 131, 138 (2021)
- 10 C.F.R. 2.309(f)(2)
- intervention petitioners must initially base their NEPA contentions on applicant's environmental analysis; CLI-21-1, 93 NRC 1, 48 n.265 (2021); CLI-21-7, 93 NRC 215, 221 (2021); CLI-21-9, 93 NRC 244, 248 (2021); LBP-21-2, 93 NRC 104, 109 (2021)
- new or amended environmental contentions may be filed based on a DEIS where that document contains information that is materially different from information previously available; CLI-21-7, 93 NRC 215, 221 (2021)
- NRC expects petitioner to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility; LBP-21-2, 93 NRC 104, 109 (2021)
- 10 C.F.R. 2.309(h)(1)
- state and local petitioners may be granted a hearing with no further demonstration of standing if they submit at least one admissible contention; CLI-21-1, 93 NRC 1, 11 (2021)
- 10 C.F.R. 2.311
- filing that is not associated with initial hearing request is treated it as a petition for discretionary review and not an appeal as of right; CLI-21-9, 93 NRC 244, 246 (2021)
- 10 C.F.R. 2.311(c)
- petitioner whose hearing request has been wholly denied is allowed to appeal as of right; CLI-21-5, 93 NRC 131, 134 (2021)
- 10 C.F.R. 2.315(a), (d)
- petitioner denied party status can ask to file an amicus brief, without being a party, as well as request permission to submit a written or oral limited appearance statement; LBP-21-3, 93 NRC 153, 166 (2021)
- 10 C.F.R. 2.323(c)
- appellant has no right of reply to the answer to its motion; CLI-21-6, 93 NRC 145, 149 n.26 (2021)
- reply to answer to motion to reopen is not allowed except where expressly permitted by the Secretary or presiding officer; CLI-21-7, 93 NRC 215, 230 n.95 (2021)
- 10 C.F.R. 2.326
- motion to reopen the record must satisfy the standards for reopening, contention admissibility and admitting new contentions filed after the deadline; CLI-21-7, 93 NRC 215, 221 (2021)
- 10 C.F.R. 2.326(a)
- motion to reopen must be timely, address a significant safety or environmental issue, demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially; CLI-21-4, 93 NRC 119, 128 (2021); CLI-21-6, 93 NRC 145, 147-48 (2021); CLI-21-8, 93 NRC 237, 240 n.15 (2021)
- 10 C.F.R. 2.326(a)(1)
- exceptionally grave issue may be considered at the discretion of the presiding officer even if untimely presented; CLI-21-4, 93 NRC 119, 129 (2021); LBP-21-2, 93 NRC 104, 108 n.16, 111 n.49 (2021); CLI-21-8, 93 NRC 237, 240 n.15 (2021); CLI-21-9, 93 NRC 244, 246 n.14 (2021)
- exceptionally grave issue with a license application would warrant waiving the timeliness requirement; CLI-21-7, 93 NRC 215, 225 (2021)
- waiver of timeliness requirement for an exceptionally grave issue is up to discretion of the presiding officer; CLI-21-7, 93 NRC 215, 226 (2021)
- 10 C.F.R. 2.326(a)(1)-(3)
- to reopen a closed record, petitioner must file a motion that demonstrates its new contention is timely, addresses a significant safety or environmental issue, and would produce a materially different result; LBP-21-2, 93 NRC 104, 108 (2021); CLI-21-9, 93 NRC 244, 246 (2021)
- 10 C.F.R. 2.326(a)(2)
- contention that project will interfere with mineral development and that mineral development cannot proceed safely alongside the ISFSI is inadmissible; CLI-21-7, 93 NRC 215, 233 (2021)

**LEGAL CITATIONS INDEX**  
**REGULATIONS**

- 10 C.F.R. 2.326(a)(3)  
consideration of the comments on the DEIS showing public opposition to the ISFSI would not result in a materially different result to the proceeding, as required by the reopening standards; CLI-21-7, 93 NRC 215, 234 (2021)
- 10 C.F.R. 2.326(b)  
affidavit support is required for motions to reopen; CLI-21-7, 93 NRC 215, 222 (2021)  
motion to reopen must be accompanied by affidavits setting forth bases for movant's claim; CLI-21-4, 93 NRC 119, 129 (2021); CLI-21-6, 93 NRC 145, 148 (2021); CLI-21-8, 93 NRC 237, 240-41 (2021)  
motion to reopen must be accompanied by an affidavit given by competent individuals with knowledge of the facts alleged or by experts in the disciplines appropriate to the issues raised; CLI-21-6, 93 NRC 145, 148 (2021); LBP-21-2, 93 NRC 104, 108-109 (2021)
- 10 C.F.R. 2.326(d)  
evidentiary support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements; CLI-21-6, 93 NRC 145, 148 (2021)  
motion to reopen the record must satisfy the standards for reopening, contention admissibility, and admitting new contentions filed after the deadline; CLI-21-7, 93 NRC 215, 221 (2021)
- 10 C.F.R. 2.335  
contention that questioned safety of NRC-approved transportation packages challenges regulations without seeking a waiver; CLI-21-4, 93 NRC 119, 127 (2021)
- 10 C.F.R. 2.335(a)  
challenge to applicant's cost estimates where site characterization has not yet been completed is rejected as impermissible challenges to NRC's regulations; CLI-21-1, 93 NRC 1, 18 (2021)  
no NRC rule or regulation is subject to attack by way of any adjudicatory proceeding in the absence of a waiver; LBP-21-4, 93 NRC 179, 198 (2021)  
to show special circumstances exist warranting departure from the categorical exclusion for license transfers, petitioners must request a waiver of section 51.22(c)(1); CLI-21-1, 93 NRC 1, 47 n.258 (2021)
- 10 C.F.R. 2.335(b)  
rule waiver petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding to which the application of the regulation would not serve the purposes for which it was adopted; LBP-21-4, 93 NRC 179, 207 (2021)  
seismic accident impacts issue is precluded from consideration in a subsequent license renewal proceeding absent a waiver of 10 C.F.R. 51.53(c)(3)(i), 51.71(d), and 51.95(c)(1) to allow consideration of Category 1 NEPA Issues; LBP-21-4, 93 NRC 179, 188 (2021)  
standards for obtaining a rule waiver are discussed; LBP-21-4, 93 NRC 179, 198-99 (2021)  
to show special circumstances exist warranting departure from the categorical exclusion for license transfers, petitioners must request a waiver of section 51.22(c)(1); CLI-21-1, 93 NRC 1, 47 n.258 (2021)  
waiver of a regulation requires a showing of special circumstances such that application of the rule at issue would not serve the purposes for which it is intended; CLI-21-1, 93 NRC 1, 55 (2021); LBP-21-4, 93 NRC 179, 198 (2021)
- 10 C.F.R. 2.335(c), (d)  
determination about whether criteria for rule waiver have been fulfilled is the sole province of the Commission; LBP-21-4, 93 NRC 179, 199 (2021)
- 10 C.F.R. 2.335(d)  
prima facie showing within the meaning of section 2.335(d) is one that is legally sufficient to establish a fact or case unless disproved; LBP-21-4, 93 NRC 179, 199 (2021)
- 10 C.F.R. 2.337  
evidence in any affidavit accompanying a motion to reopen must be of such quality as to be admissible into evidence at an evidentiary hearing; LBP-21-2, 93 NRC 104, 108 (2021)
- 10 C.F.R. 2.341  
filing that is not associated with initial hearing request is treated as a petition for discretionary review; CLI-21-9, 93 NRC 244, 246 (2021)

**LEGAL CITATIONS INDEX**  
**REGULATIONS**

- 10 C.F.R. 2.1316  
NRC Staff may issue its approval or denial of a license transfer application notwithstanding the pendency of a hearing; CLI-21-1, 93 NRC 1, 55 (2021)  
when NRC Staff has approved a license transfer prior to resolution of issues in a proceeding, the Commission has authority to modify or rescind the Staff's decision; CLI-21-1, 93 NRC 1, 55 n.309 (2021)
- 10 C.F.R. 2.1316(a)  
motion for a waiver of this regulation is, in effect, a request for a preemptive stay of NRC Staff's licensing decision, something license transfer regulations do not contemplate; CLI-21-1, 93 NRC 1, 56 n.312 (2021)  
NRC Staff may issue its approval or denial of a license transfer application, consistent with its findings in its Safety Evaluation Report, during a pending adjudicatory proceeding; CLI-21-1, 93 NRC 1, 4 (2021)  
purpose of regulation is to ensure timely decisionmaking in all license transfer cases, even those cases where a hearing may be pending; CLI-21-1, 93 NRC 1, 55 n.308 (2021)
- 10 C.F.R. 2.1327  
application to stay a license transfer must be filed within 5 days of the notice of the Staff action and must meet the remaining requirements in this regulation; CLI-21-8, 93 NRC 237, 241 (2021)  
requests for a stay of NRC Staff's licensing decision is allowed after the decision is issued; CLI-21-1, 93 NRC 1, 56 n.312 (2021)
- 10 C.F.R. 2.1327(b)  
stay application must contain a concise summary of the requested action to be stayed and a concise statement of the grounds for a stay, with reference to the factors specified in paragraph (d) of this section; CLI-21-8, 93 NRC 237, 241 (2021)
- 10 C.F.R. 2.1327(d)  
grant of a stay is based on consideration of the four factors in this regulation; CLI-21-8, 93 NRC 237, 241 (2021)
- 10 C.F.R. 9.29  
challenges to NRC Staff's response to a FOIA request are governed under a separate appeal process; CLI-21-6, 93 NRC 145, 148-49 n.23 (2021)
- 10 C.F.R. 13.34(h)  
regulation is inapplicable to a licensing proceeding and petitioner is not entitled to discovery of predecisional Staff documents to support contention preparation; CLI-21-6, 93 NRC 145, 149 n.26 (2021)
- 10 C.F.R. 50.2  
"decommission" means to remove a facility or site safely from service and reduce residual radioactivity to a level that permits release of the property for unrestricted or restricted use and termination of the license; CLI-21-1, 93 NRC 1, 7 n.23 (2021)
- 10 C.F.R. 50.5  
employee engages in deliberate misconduct when he plays a significant role in the decisionmaking process that leads to adverse employment actions; CLI-21-3, 93 NRC 89, 91 (2021)  
engaging in deliberate misconduct is a violation of this regulation; LBP-21-3, 93 NRC 153, 156 (2021)  
legal elements of a Deliberate Misconduct Rule violation are differentiated from the legal elements of an Employee Protection Rule violation; CLI-21-3, 93 NRC 89, 98 n.50 (2021)
- 10 C.F.R. 50.5(a)  
Deliberate Misconduct Rule applies directly to individuals, including unlicensed individuals, whereas Employee Protection Rule prohibits discrimination by a licensee, license applicant, or contractor or subcontractor thereof; CLI-21-3, 93 NRC 89, 99 n.53 (2021)
- 10 C.F.R. 50.5(a)(1)  
adequate evidence of retaliation against an employee must show that employer's conduct would cause it to be in violation of the Employee Protection Rule; CLI-21-3, 93 NRC 89, 97-98 (2021)
- 10 C.F.R. 50.5(b)  
Deliberate Misconduct Rule applies directly to individuals, including unlicensed individuals, whereas Employee Protection Rule prohibits discrimination by a licensee, license applicant, or contractor or subcontractor thereof; CLI-21-3, 93 NRC 89, 99 n.53 (2021)

**LEGAL CITATIONS INDEX**  
**REGULATIONS**

- 10 C.F.R. 50.5(c)  
adequate evidence of retaliation against an employee must show that employer's conduct would cause it to be in violation of the Employee Protection Rule; CLI-21-3, 93 NRC 89, 96, 97-98 (2021)
- 10 C.F.R. 50.7  
discrimination by a licensee against an employee for raising nuclear safety concerns, participating in proceedings for the administration or enforcement of requirements under the Atomic Energy Act or Energy Reorganization Act, or engaging in certain other protected activities is prohibited; CLI-21-3, 93 NRC 89, 91 (2021)  
legal elements of a Deliberate Misconduct Rule violation are differentiated from the legal elements of an Employee Protection Rule violation; CLI-21-3, 93 NRC 89, 98 n.50 (2021)  
NRC licensees are prohibited from discriminating against employees who raise safety concerns; LBP-21-3, 93 NRC 153, 156 (2021)  
retaliation against an employee for protected activities is, by its nature, an intentional act; CLI-21-3, 93 NRC 89, 94 (2021)
- 10 C.F.R. 50.7(a)  
Deliberate Misconduct Rule applies directly to individuals, including unlicensed individuals, whereas Employee Protection Rule prohibits discrimination by a licensee, license applicant, or contractor or subcontractor thereof; CLI-21-3, 93 NRC 89, 99 n.53 (2021)  
employee protection regulations are grounded in section 211 of the Energy Reorganization Act of 1974 (ERA), as amended; LBP-21-3, 93 NRC 153, 175, 176 n.61 (2021)  
employees who raise safety concerns are protected from discrimination; LBP-21-3, 93 NRC 153, 163 (2021)  
licensee may not discriminate against an employee for engaging in protected activity; LBP-21-3, 93 NRC 153, 157 (2021)  
provisions do not contemplate protection of employees who only raise concerns about an unprofessional or hostile work environment; LBP-21-3, 93 NRC 153, 163 (2021)
- 10 C.F.R. 50.7(d)  
actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds; LBP-21-3, 93 NRC 153, 171 n.30 (2021)  
employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations; LBP-21-3, 93 NRC 153, 171 n.30 (2021)  
provisions do not contemplate protection of employees who only raise concerns about an unprofessional or hostile work environment; LBP-21-3, 93 NRC 153, 163 (2021)  
purpose of regulation is to provide protection for actions taken by an employer, or others, which adversely affect an employee but which are predicated upon nondiscriminatory grounds; LBP-21-3, 93 NRC 153, 175 (2021)  
those who authorize a defense for licensees who are the subjects of civil penalties are protected from retaliation; LBP-21-3, 93 NRC 153, 163 (2021)
- 10 C.F.R. 50.33  
license transfer application must include information on identity and technical and financial qualifications of a proposed licensee transferee as would be required if the application were for an initial license; CLI-21-2, 93 NRC 70, 75 (2021)
- 10 C.F.R. 50.33(f)  
applicant is not prohibited from relying on anticipated funding sources as a means of establishing its financial qualifications; CLI-21-1, 93 NRC 1, 38-39 (2021)  
applicant must provide information sufficient to demonstrate its financial qualification to carry out required activities for which the permit or license is sought; CLI-21-1, 93 NRC 1, 38 (2021)  
contention that decommissioning trust fund is inadequate and has likely lost value because the COVID-19 public health emergency has caused a steep decline in the securities market is inadmissible; CLI-21-2, 93 NRC 70, 85 (2021)  
license transfer applicant must provide reasonable assurance that sufficient funds will be available to decommission the facility and carry out activities under the license; CLI-21-1, 93 NRC 1, 9 (2021)  
license transfer application must provide information sufficient to demonstrate the financial qualification of applicant to carry out the activities; CLI-21-2, 93 NRC 70, 75 (2021)



## LEGAL CITATIONS INDEX

### REGULATIONS

- NRC's review of licensee's financial qualifications are not limited to factors such as revenue, gross income, or net worth; CLI-21-1, 93 NRC 1, 39 (2021)
- prospective licensee must be financially qualified to carry out its proposed activities and provide financial assurance to cover estimated decommissioning costs; CLI-21-1, 93 NRC 1, 7 (2021)
- radioactively contaminated soils must be remediated to a 10 millirem annual dose limit from all reasonable pathways to qualify for unrestricted release; CLI-21-1, 93 NRC 1, 63 (2021)
- 10 C.F.R. 50.33(f)(2)
- if power reactor operations have permanently ceased prior to a proposed license transfer, applicants need not demonstrate financial qualifications to cover reactor operating costs; CLI-21-1, 93 NRC 1, 9 n.37 (2021)
- 10 C.F.R. 50.33(k)(1)
- contention that decommissioning trust fund is inadequate and has likely lost value because the COVID-19 public health emergency has caused a steep decline in the securities market is inadmissible; CLI-21-2, 93 NRC 70, 85 (2021)
- license transfer applicant must provide reasonable assurance that sufficient funds will be available to decommission the facility and carry out activities under the license; CLI-21-1, 93 NRC 1, 9 (2021); CLI-21-2, 93 NRC 70, 75 (2021)
- 10 C.F.R. 50.34
- license transfer application must include information on identity and technical and financial qualifications of a proposed licensee transferee as would be required if the application were for an initial license; CLI-21-2, 93 NRC 70, 75 (2021)
- contention that the license transferee improperly excludes decommissioning cost estimates for repackaging spent fuel for transport is inadmissible; CLI-21-2, 93 NRC 70, 82 (2021)
- 10 C.F.R. 50.54(f)
- following Fukushima Dai-ichi accident, NRC Staff asked licensees to evaluate their site seismic hazards using current methodologies and guidance to develop a ground motion response spectrum; LBP-21-4, 93 NRC 179, 195 (2021)
- 10 C.F.R. 50.54(bb)
- contention that decommissioning trust fund is inadequate and has likely lost value because the COVID-19 public health emergency has caused a steep decline in the securities market is inadmissible; CLI-21-2, 93 NRC 70, 85 (2021)
- 10 C.F.R. 50.58(b)(6)
- no significant hazards consideration determination can only be made by the NRC Staff or the Commission and cannot be challenged in an adjudicatory proceeding; CLI-21-5, 93 NRC 131, 135, 142 n.74 (2021)
- 10 C.F.R. 50.68
- subcriticality is achieved when the estimated ratio of neutron production to neutron absorption and leakage, or k-effective, is less than 1.0; CLI-21-5, 93 NRC 131, 133 n.4 (2021)
- 10 C.F.R. 50.68(b)
- challenge to a method prescribed by NRC regulation without seeking a waiver is not allowed; CLI-21-5, 93 NRC 131, 139 n.55 (2021)
- k-effective of spent fuel storage racks loaded with fuel of the maximum fuel assembly reactivity must not exceed 0.95 if flooded with unborated water; CLI-21-5, 93 NRC 131, 139 n.55 (2021)
- 10 C.F.R. 50.75
- licensee is not required at the decommissioning stage to supplement its financial assurance method with a showing that its operations will generate additional funding; CLI-21-1, 93 NRC 1, 39 (2021)
- methods by which licensee can provide financial assurance for decommissioning activities are specified; CLI-21-1, 93 NRC 1, 39 (2021)
- prospective licensee must be financially qualified to carry out its proposed activities and provide financial assurance to cover estimated decommissioning costs; CLI-21-1, 93 NRC 1, 7, 9 (2021)
- 10 C.F.R. 50.75(b)
- claim that costs related to disposal of mixed waste are underestimated is inadmissible for lack factual support; CLI-21-2, 93 NRC 70, 83 (2021)
- radioactively contaminated soils must be remediated to a 10 millirem annual dose limit from all reasonable pathways to qualify for unrestricted release; CLI-21-1, 93 NRC 1, 63 (2021)

## LEGAL CITATIONS INDEX

### REGULATIONS

- 10 C.F.R. 50.75(b)(1)  
contention that decommissioning trust fund is inadequate and has likely lost value because the COVID-19 public health emergency has caused a steep decline in the securities market is inadmissible; CLI-21-2, 93 NRC 70, 85 (2021)  
contention that license transfer applicant's decommissioning cost estimates are based on untenable assumptions does not raise a genuine dispute with the application; CLI-21-1, 93 NRC 1, 12 (2021)
- 10 C.F.R. 50.75(e)(1)  
acceptable methods of demonstrating financial assurance of decommissioning funding, including the prepayment method are outlined; CLI-21-2, 93 NRC 70, 75 (2021)  
transfer of licenses cannot be completed unless proposed transferees have provided financial assurance that is adequate to cover decommissioning activities at the site; CLI-21-1, 93 NRC 1, 37 n.208 (2021)
- 10 C.F.R. 50.75(e)(1)(i)  
access to decommissioning trusts would allow license transfer applicants to provide financial assurance using the prepayment method; CLI-21-1, 93 NRC 1, 7 n.20 (2021)  
annual real rate of return on decommissioning trust funds of 2% may be used in the site-specific decommissioning cost estimate analyses; CLI-21-1, 93 NRC 1, 8 n.28 (2021)  
applicant can rely on a 2% return rate only if it has provided a site-specific estimate of decommissioning funding that is based on a period of safe storage; CLI-21-1, 93 NRC 1, 12 (2021)  
because this provision refers to a real rate of return, as opposed to a nominal rate, licensee must adjust the rate for inflation; CLI-21-1, 93 NRC 1, 9 n.39 (2021)  
claim that costs related to disposal of mixed waste are underestimated is inadmissible for lack factual support; CLI-21-2, 93 NRC 70, 83 (2021)  
claim that licensee's cash flow analysis cannot assume a 2% real rate of return on decommissioning trust funds does not raise an admissible contention; CLI-21-2, 93 NRC 70, 70 (2021)  
contention that decommissioning trust fund is inadequate and has likely lost value because the COVID-19 public health emergency has caused a steep decline in the securities market is inadmissible; CLI-21-2, 93 NRC 70, 85 (2021)  
decommissioning funds must be sufficient to pay decommissioning costs at the time permanent termination of operations is expected; CLI-21-2, 93 NRC 70, 75 (2021)  
financial assurance prepayment method involves depositing funds into an account kept segregated from licensee's assets and outside of licensee's administrative control in an amount sufficient to pay decommissioning costs at the time the licensee expects to permanently cease operations; CLI-21-1, 93 NRC 1, 9 (2021)  
licensee may take credit for projected earnings on the prepaid decommissioning trust funds; CLI-21-2, 93 NRC 70, 78 (2021)  
"prepayment" financial assurance standard is defined; CLI-21-1, 93 NRC 1, 39 (2021)  
prepayment refers to prepaid funds deposited in an account segregated from the licensee's assets and outside of the licensee's administrative control; CLI-21-2, 93 NRC 70, 75 (2021)  
radioactively contaminated soils must be remediated to a 10 millirem annual dose limit from all reasonable pathways to qualify for unrestricted release; CLI-21-1, 93 NRC 1, 63 (2021)
- 10 C.F.R. 50.75(e)(1)(iii)  
methods of demonstrating financial assurance include a surety bond, a letter of credit, insurance, or a parent company guarantee; CLI-21-1, 93 NRC 1, 9 n.38 (2021)
- 10 C.F.R. 50.80(a)  
no power reactor or ISFSI license can be transferred without NRC's prior written consent; CLI-21-1, 93 NRC 1, 8-9 n.34 (2021)  
NRC must give prior written consent for a power reactor license transfer; CLI-21-2, 93 NRC 70, 74-75 n.25 (2021)
- 10 C.F.R. 50.80(b)(1)(i)  
license transfer applicant must demonstrate its financial and technical qualifications; CLI-21-1, 93 NRC 1, 58 (2021)  
license transfer applicant must provide reasonable assurance that sufficient funds will be available to decommission the facility and carry out activities under the license; CLI-21-1, 93 NRC 1, 9 (2021); CLI-21-2, 93 NRC 70, 75 (2021)

**LEGAL CITATIONS INDEX**  
**REGULATIONS**

- license transfer application must include information on identity and technical and financial qualifications of a proposed licensee transferee as would be required if the application were for an initial license; CLI-21-2, 93 NRC 70, 75 (2021)
- license transfer review is limited to specific matters, including financial and technical qualifications of the proposed transferee; CLI-21-1, 93 NRC 1, 9 (2021)
- 10 C.F.R. 50.80(c)
- contention challenging character or integrity of a licensee's managers may be admissible in specific circumstances but strict limits on such contentions have been imposed; CLI-21-1, 93 NRC 1, 50 (2021)
- license transfer will be approved if NRC determines that the proposed transferee is qualified to hold the license and that the proposed transfer is consistent with applicable law, regulations, and orders; CLI-21-2, 93 NRC 70, 75 (2021)
- NRC will approve a license transfer if it finds the proposed transferee to be qualified to hold the license and the transfer is otherwise consistent with applicable law, regulations, and Commission orders; CLI-21-1, 93 NRC 1, 9 (2021)
- 10 C.F.R. 50.82(a)
- license transfer applicant must provide reasonable assurance that sufficient funds will be available to decommission the facility and carry out activities under the license; CLI-21-1, 93 NRC 1, 9 (2021)
- 10 C.F.R. 50.82(a)(4)(i)
- claim that license transfer applicant is required to more fully characterize the site to inform its cost estimates does not raise a material dispute with the application; CLI-21-1, 93 NRC 1, 18 (2021)
- claim that PSDAR does not comply with requirements because it does not address reasonably foreseeable potential impacts of climate change on spent fuel management is inadmissible; CLI-21-1, 93 NRC 1, 48 n.265 (2021)
- financial assurance requirements for annual status reports that licensee must provide do not apply to licensee's initial estimates of decommissioning funding needs in its PSDAR; CLI-21-1, 93 NRC 1, 17 (2021)
- in a PSDAR, licensee must provide its reasons for concluding that the environmental impacts associated with planned decommissioning activities are bounded by previously issued, relevant site-specific or generic environmental impact statements; CLI-21-1, 93 NRC 1, 49 (2021)
- licensee must provide site-specific decommissioning cost estimates within 2 years of permanently ceasing operations and provide updated cost estimates in its license termination plan; CLI-21-1, 93 NRC 1, 37 n.207 (2021)
- licensee need not provide site characterization results to NRC until it submits its license termination plan; CLI-21-1, 93 NRC 1, 18 n.88 (2021)
- 10 C.F.R. 50.82(a)(6)(ii)
- PSDAR does not and cannot authorize any decommissioning activities that would result in environmental impacts that exceed those previously determined; CLI-21-1, 93 NRC 1, 269 (2021)
- 10 C.F.R. 50.82(a)(8)
- if future legal developments call into question applicant's cost estimates for spent-fuel management or waste disposal, applicant will need to notify NRC; CLI-21-1, 93 NRC 1, 32 (2021)
- 10 C.F.R. 50.82(a)(8)(i)(A)
- licensee is not required to undertake nonradiological site restoration, and the use of decommissioning funds to do so is normally prohibited; CLI-21-2, 93 NRC 70, 77 n.44 (2021)
- withdrawals from decommissioning trust fund may be made only for expenses for legitimate decommissioning activities consistent with the definition of decommissioning in § 50.2; CLI-21-1, 93 NRC 1, 7 n.23, 15 n.70 (2021); CLI-21-2, 93 NRC 70, 77 n.44 (2021)
- 10 C.F.R. 50.82(a)(8)(i)(B)
- license transfer applicant must demonstrate its financial and technical qualifications; CLI-21-1, 93 NRC 1, 58 (2021)
- provision applies to withdrawals from the decommissioning trust fund, not to an applicant's cost estimates; CLI-21-1, 93 NRC 1, 23 n.119 (2021)
- 10 C.F.R. 50.82(a)(8)(i)(C)
- license transfer applicant must demonstrate its financial and technical qualifications; CLI-21-1, 93 NRC 1, 58 (2021)

**LEGAL CITATIONS INDEX**  
**REGULATIONS**

- 10 C.F.R. 50.82(a)(8)(iii)  
licensee must provide site-specific decommissioning cost estimates within 2 years of permanently ceasing operations and provide updated cost estimates in its license termination plan; CLI-21-1, 93 NRC 1, 37 n.207 (2021)
- 10 C.F.R. 50.82(a)(8)(v)  
claim that delays will materially affect the cost estimate and cause a deficiency in the decommissioning trust fund is inadmissible; CLI-21-2, 93 NRC 70, 85 (2021)  
delays in the decommissioning schedule that increase costs would be captured in the licensee's annual financial assurance status reports; CLI-21-2, 93 NRC 70, 85 (2021)  
licensee in decommissioning must continue to demonstrate annually, until the license is terminated, that funding for decommissioning and, where applicable, spent fuel management remains adequate; CLI-21-2, 93 NRC 70, 76 (2021)  
NRC requires a decommissioning licensee to file annual status reports, which NRC can use to monitor withdrawals from the trust fund; CLI-21-1, 93 NRC 1, 48 n.263 (2021)
- 10 C.F.R. 50.82(a)(8)(v)-(vi)  
if NRC approves a license transfer application, transferee will need to submit decommissioning-funding status reports annually; CLI-21-1, 93 NRC 1, 42 n.233 (2021)
- 10 C.F.R. 50.82(a)(8)(vi)  
additional financial assurance must be provided if annual reports show insufficient funds to cover the estimated cost of completing decommissioning; CLI-21-1, 93 NRC 1, 48 n.263 (2021)  
financial assurance requirements for annual status reports that licensee must provide do not apply to licensee's initial estimates of decommissioning funding needs in its PSDAR; CLI-21-1, 93 NRC 1, 17 (2021)  
if discovery of significant new contamination affects licensee's ability to either complete decommissioning or safely manage spent fuel, licensee will need to provide additional financial assurance; CLI-21-1, 93 NRC 1, 20 (2021)  
if its timelines for removing spent fuel are no longer plausible, licensee must notify NRC of the delays through its financial assurance status reports and provide additional financial assurance, if necessary, to cover the estimated costs resulting from the delays; CLI-21-1, 93 NRC 1, 30 (2021)  
if remaining decommissioning funds prove insufficient to cover decommissioning costs due to intervening obligations, licensee must commit in its annual status report to providing additional financial assurance to cover the remaining costs; CLI-21-1, 93 NRC 1, 24 n.127 (2021)  
if the status report reveals that a delay would cause a funding shortfall, licensee could be required to provide additional financial assurance; CLI-21-2, 93 NRC 70, 85 (2021)  
licensee must, in its annual financial assurance status report, include additional financial assurance to cover estimated cost of completion; CLI-21-1, 93 NRC 1, 43 (2021)  
NRC could effectively require license transferees to apply a portion of recoveries from DOE to cover estimated decommissioning costs; CLI-21-1, 93 NRC 1, 38 n.216 (2021)
- 10 C.F.R. 50.82(a)(8)(vii)(B) & (C)  
contention that the license transferee improperly excludes decommissioning cost estimates for repackaging spent fuel for transport is inadmissible; CLI-21-2, 93 NRC 70, 82 (2021)
- 10 C.F.R. 50.82(a)(8)(vii)(C)  
financial assurance requirements for annual status reports that licensee must provide do not apply to licensee's initial estimates of decommissioning funding needs in its PSDAR; CLI-21-1, 93 NRC 1, 17 (2021)
- 10 C.F.R. 50.82(a)(9)(i)  
site characterization is to be submitted with the license termination plan at least 2 years before termination of the license; CLI-21-2, 93 NRC 70, 80 (2021)
- 10 C.F.R. 50.82(a)(9)(ii)(A)  
licensee must submit its license termination plan at least 2 years before its proposed license termination date, which must include site characterization results and updated cost estimates for remaining decommissioning activities; CLI-21-1, 93 NRC 1, 18 n.89 (2021)  
site characterization is to be submitted with the license termination plan at least 2 years before termination of the license; CLI-21-2, 93 NRC 70, 80 (2021)

**LEGAL CITATIONS INDEX**  
**REGULATIONS**

- 10 C.F.R. 50.82(a)(9)(ii)(F)  
licensee must provide site-specific decommissioning cost estimates within 2 years of permanently ceasing operations and provide updated cost estimates in its license termination plan; CLI-21-1, 93 NRC 1, 37 n.207 (2021)
- 10 C.F.R. 50.92(c)  
no significant hazards consideration determination can only be made by NRC Staff or the Commission and cannot be challenged in an adjudicatory proceeding; CLI-21-5, 93 NRC 131, 142 n.74 (2021)
- 10 C.F.R. 51.22(c)  
special circumstances must exist to render categorical exclusion of license transfer applications from an environmental review inapplicable; CLI-21-1, 93 NRC 1, 46 (2021)
- 10 C.F.R. 51.22(c)(21)  
petitioners have not shown special circumstances justifying departure from the categorical exclusion; CLI-21-1, 93 NRC 1, 50 (2021)  
to show special circumstances warranting departure from the categorical exclusion for license transfers, petitioners must request a waiver of section 51.22(c)(1); CLI-21-1, 93 NRC 1, 46 (2021)
- 10 C.F.R. 51.45(a)  
contention that environmental report does not address environmental impacts of operating units during subsequent license renewal term under the significant risk of an earthquake that exceeds the design basis for the reactors is inadmissible; LBP-21-4, 93 NRC 179, 199 (2021)
- 10 C.F.R. 51.53(c)(2)  
contention that environmental report does not address environmental impacts of operating units during subsequent license renewal term under the significant risk of an earthquake that exceeds the design basis for the reactors is inadmissible; LBP-21-4, 93 NRC 179, 199 (2021)
- 10 C.F.R. 51.53(c)(3)(i)  
license renewal contention regarding adequacy of a previously considered SAMA environmental analysis cannot be litigated absent a section 2.335(b) waiver; LBP-21-4, 93 NRC 179, 192 (2021)  
operating license renewal application is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to Subpart A of Part 51; LBP-21-4, 93 NRC 179, 189-90 (2021)  
seismic accident impacts issue is precluded from consideration in a subsequent license renewal proceeding absent a waiver of regulations to allow consideration of Category 1 NEPA issues; LBP-21-4, 93 NRC 179, 188 (2021)
- 10 C.F.R. 51.53(c)(3)(ii)(L)  
regulation affords the functional equivalent of the Category 1 issue preclusion established by section 51.53(c)(3)(i); LBP-21-4, 93 NRC 179, 192 (2021)
- 10 C.F.R. 51.53(c)(3)(ii)(O)  
applicants must provide information about other past, present, and reasonably foreseeable future actions occurring in the vicinity of the nuclear plant that may result in a cumulative effect; LBP-21-4, 93 NRC 179, 212 n.62 (2021)  
contention improperly conflates a reactor safety issue with requirement to consider cumulative environmental impacts; LBP-21-4, 93 NRC 179, 212 (2021)
- 10 C.F.R. 51.70(b)  
claims that NRC Staff did not conduct an independent investigation of matters discussed in the DEIS but relied too much on information in the application is inadmissible; CLI-21-7, 93 NRC 215, 235 (2021)
- 10 C.F.R. 51.71(d)  
impacts analysis exemption for Category 1 issues in subsequent license renewal proceedings is extended to NRC Staff's draft and final environmental impact statements; LBP-21-4, 93 NRC 179, 190 (2021)  
seismic accident impacts issue is precluded from consideration in a subsequent license renewal proceeding absent a waiver of regulations to allow consideration of Category 1 NEPA issues; LBP-21-4, 93 NRC 179, 188 (2021)
- 10 C.F.R. 51.73  
NRC Staff must consider whether any information provided by public comments as part of the environment review process merits further analysis as new and significant information; LBP-21-4, 93 NRC 179, 208 n.54 (2021)

**LEGAL CITATIONS INDEX**  
**REGULATIONS**

- 10 C.F.R. 51.95(c)(1)  
impacts analysis exemption for Category 1 issues in subsequent license renewal proceedings is extended to NRC Staff's draft and final environmental impact statements; LBP-21-4, 93 NRC 179, 190 (2021)  
seismic accident impacts issue is precluded from consideration in a subsequent license renewal proceeding absent a waiver of regulations to allow consideration of Category 1 NEPA issues; LBP-21-4, 93 NRC 179, 188 (2021)
- 10 C.F.R. Part 51, Subpart A, Appendix B, tbl. B-1 n.2  
severe accidents are classified as a Category 2 item for which additional plant-specific review is required; LBP-21-4, 93 NRC 179, 190-91 & n.14 (2021)  
summary of impacts finding for severe accidents is provided; LBP-21-4, 93 NRC 179, 191 (2021)
- 10 C.F.R. Part 51, Subpart A, Appendix B, tbl. B-1 n.3  
radiological impacts that do not exceed permissible levels in the Commission's regulations are considered small as the term is used in this table; LBP-21-4, 93 NRC 179, 190 (2021)
- 10 C.F.R. 54.23  
environmental contents of subsequent license renewal application must include a supplement to the environmental report that complies with the requirements of Subpart A of 10 C.F.R. Part 51; LBP-21-4, 93 NRC 179, 189 (2021)
- 10 C.F.R. Part 71  
identifying actual routes for transportation of spent fuel will eventually require separate reviews and approvals by NRC, the Department of Transportation, and applicable states or tribes; LBP-21-2, 93 NRC 104, 115 (2021)
- 10 C.F.R. 72.30  
contention that decommissioning trust fund is inadequate and has likely lost value because COVID-19 public health emergency has caused a steep decline in the securities market is inadmissible; CLI-21-2, 93 NRC 70, 85 (2021)  
prospective licensee must be financially qualified to carry out its proposed activities and provide financial assurance to cover estimated decommissioning costs; CLI-21-1, 93 NRC 1, 7 (2021)
- 10 C.F.R. 72.30(b)  
regulation applies only to decommissioning independent spent fuel storage installation; CLI-21-2, 93 NRC 70, 77 n.44 (2021)
- 10 C.F.R. 72.30(b)-(c)  
license transfer application must provide reasonable assurance that funds will be available to decommission the facility; CLI-21-1, 93 NRC 1, 9 (2021); CLI-21-2, 93 NRC 70, 75 (2021)
- 10 C.F.R. 72.30(e)(1)  
access to decommissioning trusts would allow license transfer applicants to provide financial assurance using the prepayment method; CLI-21-1, 93 NRC 1, 7 n.20 (2021)
- 10 C.F.R. 72.48(c)  
performance of a screening evaluation to determine whether design of spent fuel canisters could be changed without first obtaining NRC approval was a violation; CLI-21-1, 93 NRC 1, 51 (2021)
- 10 C.F.R. 72.50(a)  
no power reactor or ISFSI license can be transferred without NRC's prior written consent; CLI-21-1, 93 NRC 1, 8-9 n.34 (2021)
- 10 C.F.R. 72.75(d)(1)  
licensee responsible for ensuring safe loading and movement of spent-fuel canister in its facility must make required report; CLI-21-1, 93 NRC 1, 52 (2021)
- 10 C.F.R. 72.90(b)  
if licensee cannot restrict mineral development, it cannot satisfy Part 72 siting evaluation factors; CLI-21-7, 93 NRC 215, 218 (2021)
- 10 C.F.R. Part 73  
identifying actual routes for transportation of spent fuel will eventually require separate reviews and approvals by NRC, the Department of Transportation, and applicable states or tribes; LBP-21-2, 93 NRC 104, 115 (2021)

**LEGAL CITATIONS INDEX**  
**REGULATIONS**

- 10 C.F.R. 961.1  
standard contract establishes terms and conditions under which DOE will make available nuclear waste disposal services to the owners and generators of spent nuclear fuel and high-level radioactive waste; CLI-21-1, 93 NRC 1, 8 n.31 (2021)
- 10 C.F.R. Part 100, Appendix A, § III(c)  
safe shutdown earthquake is defined; LBP-21-4, 93 NRC 179, 194 n.18 (2021)
- 10 C.F.R. Part 100, Appendix A, § III(c) n.1  
“design-basis earthquake” is considered synonymous with “safe shutdown earthquake”; LBP-21-4, 93 NRC 179, 193 (2021)
- 10 C.F.R. Part 100, Appendix A, § III(d)  
operating basis earthquake is defined; LBP-21-4, 93 NRC 179, 194 n.18 (2021)
- 10 C.F.R. Part 100, Appendix A, § III(l)  
ground motion response spectrum is defined; LBP-21-4, 93 NRC 179, 195 n.25 (2021)
- 10 C.F.R. Part 100, Appendix A, § V(a)(2)  
if vibratory ground motion exceeding the operating basis earthquake occurs, plant shutdown is mandated and the licensee must demonstrate to NRC prior to resuming operations that no functional damage occurred; LBP-21-4, 93 NRC 179, 194 n.18 (2021)
- 40 C.F.R. 121.1(f)  
“discharge” means a discharge from a point source into a water of the United States; CLI-21-8, 93 NRC 237, 241 (2021)
- 40 C.F.R. 121.2  
new certification under Clean Water Act section 401 is required for any license or permit that authorizes an activity that may result in a discharge; CLI-21-8, 93 NRC 237, 241 (2021)
- 49 C.F.R. Parts 107, 171-80, 390-97  
identifying actual routes for transportation of spent fuel will eventually require separate reviews and approvals by NRC, the Department of Transportation, and applicable states or tribes; LBP-21-2, 93 NRC 104, 115 (2021)





**LEGAL CITATIONS INDEX**  
**STATUTES**

Administrative Procedure Act, 5 U.S.C. § 558(c)  
agency within a reasonable time shall set and complete proceedings required to be conducted and shall make its decision; CLI-21-8, 93 NRC 237, 240 (2021)

Atomic Energy Act, 184, 42 U.S.C. § 2234  
no power reactor or ISFSI license can be transferred without NRC's prior written consent; CLI-21-1, 93 NRC 1, 8-9 n.34 (2021); CLI-21-2, 93 NRC 70, 74-75 n.25 (2021)

Atomic Energy Act, 189a, 42 U.S.C. § 2239(a)  
NRC shall grant a hearing upon the request of any person whose interest may be affected by the proceeding; CLI-21-5, 93 NRC 131, 142-43 (2021)  
petitioner must show an interest in a proceeding and put forward concrete issues that are appropriate for adjudication; CLI-21-5, 93 NRC 131, 143 n.80 (2021)

Atomic Energy Act, 189a(1)(A), 42 U.S.C. § 2239(a)(1)(A)  
exemption request is not among the listed actions subject to a hearing opportunity; CLI-21-1, 93 NRC 1, 16 n.78 (2021)  
hearing opportunity will be provided to any other person adversely affected by an enforcement order; LBP-21-3, 93 NRC 153, 159 (2021)  
issuance of license amendment on an immediately effective basis is permitted on a determination that the amendment involves no significant hazards consideration, notwithstanding the pendency of a hearing request; CLI-21-1, 93 NRC 1, 4 n.3 (2021)

Atomic Energy Act, 191, 42 U.S.C. § 2241  
licensing boards exist only for the purposes specified in this section; LBP-21-3, 93 NRC 153, 155 (2021)

Clean Water Act, 401  
new certification is required for any license or permit that authorizes an activity that may result in a discharge; CLI-21-8, 93 NRC 237, 240 (2021)



**LEGAL CITATIONS INDEX  
OTHERS**

- 13.A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3531.7 (3d ed. 2020)  
lack of clear defining principles has led to occasional frustration, seeming changes in character, and  
uncertain application of the zone-of-interests test, which can be said equally about NRC cases;  
LBP-21-3, 93 NRC 153, 174 n.46 (2021)



## SUBJECT INDEX

### ABEYANCE OF PROCEEDING

board agreed to hold proceeding in abeyance where applicant was no longer pursuing operations at a portion of its site but decision was overturned; CLI-21-8, 93 NRC 237 (2021)  
holding a proceeding in abeyance is disfavored by NRC; CLI-21-8, 93 NRC 237 (2021)  
motion for abeyance is only appropriate where an ongoing adjudication is involved; CLI-21-8, 93 NRC 237 (2021)

### ACCIDENTS

GEIS small-impact conclusions span both design-basis and severe accidents and analyze severe accidents among others, the probability of which is so low; LBP-21-4, 93 NRC 179 (2021)

### ACCIDENTS, SEVERE

contention that there is potential for a significant increase in the probability or consequences of an accident previously evaluated if the license amendment request is granted is inadmissible; CLI-21-5, 93 NRC 131 (2021)  
seismic accident impacts issue is precluded from consideration in a subsequent license renewal proceeding absent a waiver of 10 C.F.R. 51.53(c)(3)(i), 51.71(d), and 51.95(c)(1) to allow consideration of Category 1 NEPA Issues; LBP-21-4, 93 NRC 179 (2021)  
severe accidents are classified as a Category 2 items for which additional plant-specific review is required; LBP-21-4, 93 NRC 179 (2021)  
summary of impacts finding for severe accidents is provided in pt. 51, subpart A, app. B, tbl. B-1; LBP-21-4, 93 NRC 179 (2021)

See also Fukushima Accident

### ADMINISTRATIVE PROCEDURE ACT

agency within a reasonable time, shall set and complete proceedings required to be conducted and shall make its decision; CLI-21-8, 93 NRC 237 (2021)

### AFFIDAVITS

motion to reopen must be accompanied by affidavit from competent individuals with knowledge of the facts alleged or by experts in the disciplines appropriate to the issues raised, setting forth factual and/or technical bases for the claim that these criteria have been met; CLI-21-6, 93 NRC 145 (2021); LBP-21-2, 93 NRC 104 (2021)  
motion to reopen must be accompanied by affidavits setting forth bases for movant's claim; CLI-21-4, 93 NRC 119 (2021); CLI-21-8, 93 NRC 237 (2021)  
rule waiver petition must be accompanied by affidavit that identifies the specific subject-matter aspects of the proceeding to which the application of the regulation would not serve the purposes for which it was adopted; LBP-21-4, 93 NRC 179 (2021)

### AGREEMENTS

NRC approved a trust agreement under which remaining trust funds would be returned to the community; CLI-21-1, 93 NRC 1 (2021)

### AMENDMENT OF CONTENTIONS

new or amended environmental contentions may be filed based on a DEIS where that document contains information that is materially different from information previously available; CLI-21-7, 93 NRC 215 (2021)  
petitioner may move to amend its contention or submit a new contention; CLI-21-1, 93 NRC 1 (2021)

## SUBJECT INDEX

to the extent that petitioners identified any deficiency in applicants exemption request, they could have moved to amend their petition to challenge the request specifically; CLI-21-1, 93 NRC 1 (2021)

### APPEALS

appellant has no right of reply to the answer to its motion; CLI-21-6, 93 NRC 145 (2021)  
argument made before the board but not reiterated or explained on appeal is considered abandoned; CLI-21-5, 93 NRC 131 (2021)  
challenges to NRC Staff's response to a FOIA request are governed under a separate appeal process; CLI-21-6, 93 NRC 145 (2021)  
filing that is not associated with initial hearing request is treated it as a petition for discretionary review and not an appeal as of right; CLI-21-9, 93 NRC 244 (2021)  
new argument on appeal could be rejected on that ground alone; CLI-21-7, 93 NRC 215 (2021)  
petitioner whose hearing request has been wholly denied is allowed to appeal as of right; CLI-21-5, 93 NRC 131 (2021)  
purpose of an appeal is to point out errors made in the board's decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the board; CLI-21-5, 93 NRC 131 (2021)  
reiteration of the same arguments on appeal as raised before the board does not show board error or abuse of discretion; CLI-21-4, 93 NRC 119 (2021)

### APPELLATE REVIEW

Commission generally defers to a board on whether a contention has sufficient factual support to be admitted for hearing; CLI-21-4, 93 NRC 119 (2021)  
Commission generally defers to boards on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion; CLI-21-4, 93 NRC 119 (2021); CLI-21-5, 93 NRC 131 (2021); CLI-21-7, 93 NRC 215 (2021); CLI-21-9, 93 NRC 244 (2021)  
Commission gives the Board's judgment on contention admissibility and whether to reopen a closed proceeding substantial deference on appeal; CLI-21-9, 93 NRC 244 (2021)  
Commission is not persuaded of board error by argument that petitioner established good cause under an alternative test; CLI-21-7, 93 NRC 215 (2021)  
reiteration of a claim considered and dismissed by the board, without more, is insufficient to show board error; CLI-21-9, 93 NRC 244 (2021)

### APPLICANTS

prospective licensee must be financially qualified to carry out its proposed activities and provide financial assurance to cover estimated decommissioning costs; CLI-21-1, 93 NRC 1 (2021)

### APPROVAL OF LICENSE

license transfer application will lack NRC's final approval until and unless the Commission concludes the adjudication in applicants' favor; CLI-21-1, 93 NRC 1 (2021)  
license transfer will be approved if NRC determines that the proposed transferee is qualified to hold the license and that the proposed transfer is consistent with applicable law, regulations, and orders; CLI-21-2, 93 NRC 70 (2021)  
NRC Staff may issue its approval or denial of a license transfer application, consistent with its findings in its Safety Evaluation Report, during a pending adjudicatory proceeding; CLI-21-1, 93 NRC 1 (2021)  
requests for a stay of NRC Staff's licensing decision is allowed after the decision is issued; CLI-21-1, 93 NRC 1 (2021)

### ATOMIC ENERGY ACT

good reputation is not an interest that is protected by the AEA and Commission is bound to follow precedents; LBP-21-3, 93 NRC 153 (2021)  
hearing opportunity will be provided to any other person adversely affected by an enforcement order; LBP-21-3, 93 NRC 153 (2021)  
licensing boards exist only for the purposes specified in section 191; LBP-21-3, 93 NRC 153 (2021)  
NRC must give prior written consent for a power reactor license transfer; CLI-21-2, 93 NRC 70 (2021)  
NRC shall grant a hearing upon the request of any person whose interest may be affected by the proceeding; CLI-21-5, 93 NRC 131 (2021)  
there is no relationship between the legislative purpose underlying the safety provisions of the Act and petitioner's interest in protecting its reputation; LBP-21-3, 93 NRC 153 (2021)

## SUBJECT INDEX

### ATTORNEYS

those who authorize a defense for licensees who are the subjects of civil penalties are protected from retaliation; LBP-21-3, 93 NRC 153 (2021)

### BREACH OF CONTRACT

spent fuel owner suing DOE for breach of the standard contract for spent fuel storage could recover its costs incurred in loading spent fuel into storage canisters; CLI-21-2, 93 NRC 70 (2021)

### BURDEN OF PERSUASION

NRC Staff bears the burden of persuading the board that adequate evidence supports the grounds for an immediately effective order and immediate effectiveness is warranted; CLI-21-3, 93 NRC 89 (2021)

### CATEGORICAL EXCLUSION

environmental review of license transferee's exemption request is required because NEPA rules include no categorical exclusion that would allow for approval of the request without an environmental assessment; CLI-21-1, 93 NRC 1 (2021)

section 51.53(c)(3)(ii)(L) affords the functional equivalent of the Category 1 issue preclusion established by section 51.53(c)(3)(i); LBP-21-4, 93 NRC 179 (2021)

special circumstances must exist to render categorical exclusion of license transfer applications from an environmental review inapplicable; CLI-21-1, 93 NRC 1 (2021)

to show special circumstances exist warranting departure from the categorical exclusion for license transfers, petitioners must request a waiver of section 51.22(c)(1); CLI-21-1, 93 NRC 1 (2021)

### CIVIL PENALTIES

enforcement orders and penalties may be challenged in a hearing; LBP-21-3, 93 NRC 153 (2021)

### CLEAN WATER ACT

"discharge" means a discharge from a point source into a water of the United States; CLI-21-8, 93 NRC 237 (2021)

new certification is required for any license or permit that authorizes an activity that may result in a discharge; CLI-21-8, 93 NRC 237 (2021)

### CLIMATE CHANGE

contention that PSDAR does not address reasonably foreseeable potential impacts of climate change on spent fuel management is inadmissible; CLI-21-1, 93 NRC 1 (2021)

### COMPUTER MODELING

applicant's reliance on the 2% return rate in connection with the DECON model has been allowed; CLI-21-1, 93 NRC 1 (2021)

### CONSERVATISMS

contention that credit for Boraflex as a neutron absorbing material if the spent fuel pool is fully flooded with unborated water does not leave conservative margin to stay subcritical is inadmissible; CLI-21-5, 93 NRC 131 (2021)

### CONTENTIONS

on issues arising under the National Environmental Policy Act, participants shall file contentions based on applicant's environmental report; CLI-21-1, 93 NRC 1 (2021); LBP-21-2, 93 NRC 104 (2021); CLI-21-7, 93 NRC 215 (2021)

petitioners have an ironclad obligation to examine the relevant application documents to uncover information that might prompt a contention; LBP-21-2, 93 NRC 104 (2021)

### CONTENTIONS, ADMISSIBILITY

absent grant of a section 2.335 waiver, challenges to Category 1 generic determinations in an adjudication are precluded; LBP-21-4, 93 NRC 179 (2021)

admissibility requirements are intended to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-21-2, 93 NRC 104 (2021)

admissibility requirements are the Commission's conscious effort to raise the threshold bar for an admissible contention; LBP-21-2, 93 NRC 104 (2021)

admissible contention must be supported by reference to facts or expert opinion and material to findings NRC must make to support the action involved in the proceeding; CLI-21-1, 93 NRC 1 (2021)

admissible contention must have factual support, be within the scope of the proceeding, raise a matter material to the findings the NRC must make in deciding whether to grant the license, and raise a genuine dispute with the application; CLI-21-1, 93 NRC 1 (2021); CLI-21-2, 93 NRC 70 (2021); CLI-21-4, 93 NRC 119 (2021); LBP-21-2, 93 NRC 104 (2021)

## SUBJECT INDEX

admissible contention must include references to specific portions of the disputed document and the supporting reasons for each dispute; LBP-21-2, 93 NRC 104 (2021)

admissible contention must provide sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact; LBP-21-2, 93 NRC 104 (2021)

admissible contentions challenging management character or integrity have generally been based on activities of high-ranking officers or directors of the licensed organization who would have some direct authority over the activities authorized by the license; CLI-21-1, 93 NRC 1 (2021)

admissible contentions must identify a deficiency in the environmental analysis and may not merely offer suggestions of other ways the analysis could have been done; LBP-21-2, 93 NRC 104 (2021)

admissible contentions must meet six pleading requirements; CLI-21-7, 93 NRC 215 (2021)

although petitioner need not prove its contention at the admission stage, mere notice pleading is insufficient; LBP-21-2, 93 NRC 104 (2021)

argument that proposed use of experimental, higher enriched and longer burn-up fuel has not been adequately evaluated as to the method for ensuring subcriticality in the spent fuel pool is inadmissible; CLI-21-5, 93 NRC 131 (2021)

argument that the environmental report does not contain any information as to whether brine continues to flow in the subsurface under the site is inadmissible; CLI-21-4, 93 NRC 119 (2021)

argument that there is the potential for a significant increase in the probability or consequences of an accident previously evaluated if the license amendment request is granted is inadmissible; CLI-21-5, 93 NRC 131 (2021)

board will not entertain arguments advanced for the first time in a reply brief; LBP-21-2, 93 NRC 104 (2021)

board's discretion to consider an untimely, exceptionally grave issue is granted rarely and only in extraordinary circumstances; LBP-21-2, 93 NRC 104 (2021)

challenge to adequacy of acceptance criteria or other component of current licensing basis is not within the scope of a license renewal proceeding; LBP-21-4, 93 NRC 179 (2021)

challenge to applicant's cost estimates where site characterization has not yet been completed is rejected as impermissible challenges to NRC's regulations; CLI-21-1, 93 NRC 1 (2021)

challenge to environmental report's incorporation by reference to 2013 Revised GEIS regarding impact of design-basis and severe accidents as part of the basis for a contention fails to establish a material factual dispute; LBP-21-4, 93 NRC 179 (2021)

claim that a document fails to contain relevant information that is legally required must identify each such alleged failure and the reason why the missing information is needed; LBP-21-2, 93 NRC 104 (2021)

claim that allowing applicant to leave Boraflex in place in the spent fuel pool would cause corrosion that leads to degradation and can result in unanticipated consequences and unaccounted for debris is inadmissible; CLI-21-5, 93 NRC 131 (2021)

claim that application fails to consider cumulative impacts of transporting high-level radioactive waste and spent nuclear fuel to and the socioeconomic benefits of the proposed project is inadmissible; LBP-21-2, 93 NRC 104 (2021)

claim that continued presence of Boraflex will lead to a fire in the spent fuel pool and that all failure modes must be examined in association with the transfer of spent fuel to dry cask storage do not demonstrate Board error; CLI-21-5, 93 NRC 131 (2021)

claim that costs related to disposal of mixed waste are underestimated is inadmissible for lack factual support; CLI-21-2, 93 NRC 70 (2021)

claim that decommissioning trust fund is inadequate and has likely lost value because COVID-19 public health emergency has caused a steep decline in the securities market is inadmissible; CLI-21-2, 93 NRC 70 (2021)

claim that delays will materially affect the cost estimate and cause a deficiency in the decommissioning trust fund is inadmissible; CLI-21-2, 93 NRC 70 (2021)

claim that environmental report and safety analysis report did not discuss the presence and implications of fractured rock beneath the site is inadmissible; CLI-21-4, 93 NRC 119 (2021)

claim that environmental report did not address environmental impacts of operating units during subsequent license renewal term under the significant risk of an earthquake that exceeds the design basis for the reactors is inadmissible; LBP-21-4, 93 NRC 179 (2021)



## SUBJECT INDEX

claim that environmental report did not contain sufficient information to determine whether packer tests were performed correctly is inadmissible; CLI-21-4, 93 NRC 119 (2021)

claim that ISFSI application fails to describe control of subsurface mineral rights and oil and gas and mineral extraction operations beneath and in the vicinity of proposed site is inadmissible; CLI-21-7, 93 NRC 215 (2021)

claim that license transfer applicant is required to more fully characterize the site to inform its cost estimates does not raise a material dispute with the application; CLI-21-1, 93 NRC 1 (2021)

claim that license transferee is inherently financially unsound because it is a limited liability company whose sole purpose is decommissioning is inadmissible; CLI-21-2, 93 NRC 70 (2021)

claim that licensee's cash flow analysis cannot assume a 2% real rate of return on decommissioning trust funds does not raise an admissible contention; CLI-21-2, 93 NRC 70 (2021)

claim that project is infeasible because transportation of nuclear waste cannot be technically accomplished within the 40-year period of the initial license is inadmissible; CLI-21-4, 93 NRC 119 (2021)

claim that PSDAR does not comply with requirements because it does not address reasonably foreseeable potential impacts of climate change on spent fuel management is inadmissible; CLI-21-1, 93 NRC 1 (2021)

claim that questioned safety of NRC-approved transportation packages challenges regulations without seeking a waiver; CLI-21-4, 93 NRC 119 (2021)

claim that the license transferee improperly excludes decommissioning cost estimates for repackaging spent fuel for transport is inadmissible; CLI-21-2, 93 NRC 70 (2021)

claim that the more prudent action to ensure subcriticality in the spent fuel pool is to remove spent fuel from the pool and reduce the density of the pool is inadmissible; CLI-21-5, 93 NRC 131 (2021)

Commission generally defers to a board on whether a contention has sufficient factual support to be admitted for hearing; CLI-21-4, 93 NRC 119 (2021)

Commission gives the Board's judgment on contention admissibility and whether to reopen a closed proceeding substantial deference on appeal; CLI-21-9, 93 NRC 244 (2021)

Commission reviews contention admissibility rulings only where an appeal points to an error of law or abuse of discretion; CLI-21-4, 93 NRC 119 (2021); CLI-21-7, 93 NRC 215 (2021)

concerns about lack of analysis of loading complications in lifting 125 tons from the transfer of spent fuel due to damaged Boraflex racks adhering to the fuel assemblies is inadmissible; CLI-21-5, 93 NRC 131 (2021)

contention challenging character or integrity of a licensee's managers may be admissible in specific circumstances but strict limits on such contentions have been imposed; CLI-21-1, 93 NRC 1 (2021)

contention improperly conflates a reactor safety issue with requirement to consider cumulative environmental impacts; LBP-21-4, 93 NRC 179 (2021)

contention that applicant did not support its claim in environmental report that shallow alluvium is likely non-water bearing at the site is inadmissible; CLI-21-4, 93 NRC 119 (2021)

contention that credit for Boraflex as a neutron absorbing material if the spent fuel pool is fully flooded with unborated water does not leave conservative margin to stay subcritical is inadmissible; CLI-21-5, 93 NRC 131 (2021)

contention that license transfer applicant's decommissioning cost estimates are based on untenable assumptions does not raise a genuine dispute with the application; CLI-21-1, 93 NRC 1 (2021)

contention that licensee's decommissioning cost analysis fails to address pipeline-safety issues does not raise a genuine dispute; CLI-21-1, 93 NRC 1 (2021)

contention that project will interfere with mineral development and that mineral development cannot proceed safely alongside the ISFSI is inadmissible; CLI-21-7, 93 NRC 215 (2021)

contention that PSDAR and cost estimate fail to account for the likely existence of greater contamination at the site than that for which the decommissioning cost estimate currently accounts is inadmissible; CLI-21-2, 93 NRC 70 (2021)

declaration does not meet contention admissibility requirements where it only poses questions; CLI-21-4, 93 NRC 119 (2021)

environmental analysis of terrorist attacks for facilities located outside jurisdiction of the Ninth Circuit is not required; CLI-21-9, 93 NRC 244 (2021)

evaluation of costs of emergency response and infrastructure upgrades is not within the scope of a Part 72 proceeding; LBP-21-2, 93 NRC 104 (2021)

## SUBJECT INDEX

evidentiary support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements; CLI-21-6, 93 NRC 145 (2021)

exception to contention timeliness requirement is a narrow one, to be granted rarely and only in truly extraordinary circumstances; CLI-21-7, 93 NRC 215 (2021)

exceptionally grave issue may be considered in the discretion of the presiding officer even if motion to reopen is untimely; CLI-21-8, 93 NRC 237 (2021); CLI-21-9, 93 NRC 244 (2021)

expert opinion that merely states a conclusion, without providing a reasoned basis or explanation for that conclusion, is not enough to support admitting a contention; CLI-21-1, 93 NRC 1 (2021)

extension of filing deadline does not alter petitioner's obligation to show that a new contention is based on new, previously unavailable information that differs materially from information that was previously available; LBP-21-2, 93 NRC 104 (2021)

failure to comply with any of the contention admissibility requirements is grounds for rejecting a contention; LBP-21-4, 93 NRC 179 (2021)

failure to satisfy any of NRC's pleading requirements requires a licensing board to reject a contention; LBP-21-2, 93 NRC 104 (2021)

failure to satisfy either the requirements for reopening a closed record or for proffering a contention out of time requires rejection of the contention; LBP-21-2, 93 NRC 104 (2021)

federal courts have acknowledged legitimacy of avoiding new analyses of generic Category 1 issues as counterproductive; LBP-21-4, 93 NRC 179 (2021)

for a new contention to be admissible after the deadline for initial intervention petitions has passed, petitioner must show that information supporting the contention differs materially from information that was previously available; CLI-21-1, 93 NRC 1 (2021)

for an issue within the scope of a proceeding to be an admissible, petitioner must raise a genuine dispute with applicant; CLI-21-1, 93 NRC 1 (2021)

good cause is the sole factor to be considered when evaluating whether to review the admissibility of a new or amended contention; CLI-21-7, 93 NRC 215 (2021)

higher standards are imposed for admitting a new contention after the board has terminated a proceeding than would otherwise apply; CLI-21-9, 93 NRC 244 (2021)

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-21-1, 93 NRC 1 (2021)

integrity of structures, systems and components is a current licensing basis issue and so beyond challenge in a subsequent license renewal adjudication; LBP-21-4, 93 NRC 179 (2021)

intervention petitioner must identify specific disputed portions of the application or missing information required by law and provide supporting reasons for petitioner's belief; CLI-21-2, 93 NRC 70 (2021)

it is petitioners' responsibility, not the board's, to formulate contentions and provide necessary information to satisfy the basis requirement for admission; LBP-21-4, 93 NRC 179 (2021)

late-filed challenge to the use of representative transportation routes is untimely; CLI-21-9, 93 NRC 244 (2021)

late-filed contention must satisfy the admissibility requirements; LBP-21-2, 93 NRC 104 (2021)

legal disputes with local permitting authority raise a material issue within the scope of a license transfer proceeding; CLI-21-1, 93 NRC 1 (2021)

license renewal contention regarding adequacy of a previously considered SAMA environmental analysis cannot be litigated absent a section 2.335(b) waiver; LBP-21-4, 93 NRC 179 (2021)

licensing board cannot supply missing information supporting a contention; LBP-21-4, 93 NRC 179 (2021)

motion to reopen must meet standards for contention admissibility as well as standards for filing new contentions after the initial deadline for hearing requests; CLI-21-9, 93 NRC 244 (2021)

neither the board nor the Commission is expected to search through voluminous documents for support of petitioner's claims; CLI-21-2, 93 NRC 70 (2021)

NEPA challenge filed in initial hearing request must be based on licensee's environmental report; CLI-21-9, 93 NRC 244 (2021)

new contention must explain why the issue could not have been raised earlier and how it relates to the financial qualifications of the proposed transferees; CLI-21-1, 93 NRC 1 (2021)

## SUBJECT INDEX

new contention that poses concerns about national economics, security, and regional employment doesn't explain how ISFSI poses exceptionally grave impacts; CLI-21-7, 93 NRC 215 (2021)

new contention that poses concerns about sinkholes, subsidence, or seismicity doesn't provide information that is materially different from information already considered by NRC Staff in the DEIS; CLI-21-7, 93 NRC 215 (2021)

no NRC rule or regulation is subject to attack by way of any adjudicatory proceeding in the absence of a waiver; LBP-21-4, 93 NRC 179 (2021)

no significant hazards consideration determination can only be made by the NRC Staff or the Commission and cannot be challenged in an adjudicatory proceeding; CLI-21-5, 93 NRC 131 (2021)

NRC expects petitioner to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility; LBP-21-2, 93 NRC 104 (2021)

NRC requires no analysis of potential impacts of terrorist attacks and sabotage for facilities outside the Ninth Circuit; LBP-21-2, 93 NRC 104 (2021)

NRC rules of procedure do not permit parties to challenge NRC regulations during adjudicatory proceedings absent a waiver; CLI-21-5, 93 NRC 131 (2021)

NRC's contention admissibility requirements are not intended to be a fortress to deny intervention; LBP-21-2, 93 NRC 104 (2021)

NRC's contention admissibility requirements are strict by design; LBP-21-2, 93 NRC 104 (2021)

old information repackaged in a new report is not new information; CLI-21-4, 93 NRC 119 (2021)

participants do not have a right to oral argument on contention admissibility; CLI-21-7, 93 NRC 215 (2021)

petitioner must explain a contention's basis and provide supporting facts or expert opinion on which petitioner intends to rely, together with references to specific sources or documents; CLI-21-1, 93 NRC 1 (2021)

petitioner must identify specific disputed portions of the application along with the supporting reasons for each dispute; CLI-21-1, 93 NRC 1 (2021)

petitioner must read the relevant portions of the license application or amendment request, state the applicant's or licensee's position and the petitioner's opposing view, and explain why it disagrees with the applicant or licensee; LBP-21-2, 93 NRC 104 (2021)

petitioners have an ironclad obligation to search the public record for information supporting their contentions; CLI-21-1, 93 NRC 1 (2021)

petitioners have an obligation to review publicly available information and, to the extent they disagree with applicant's analysis, set forth their disagreement in their petitions; CLI-21-1, 93 NRC 1 (2021)

petitioners must do more than rest on the mere existence of requests for additional information as the basis for their contention; CLI-21-7, 93 NRC 215 (2021)

purpose of an appeal is to point out errors made in the board's decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the board; CLI-21-5, 93 NRC 131 (2021)

rather than expend agency time and resources on litigating vague and unsupported claims, NRC chose to provide evidentiary hearings only to those who proffer at least some minimal factual and legal foundation in support of their contentions; LBP-21-2, 93 NRC 104 (2021)

requirements are strict by design; CLI-21-1, 93 NRC 1 (2021)

seismic accident impacts issue is precluded from consideration in a subsequent license renewal proceeding absent a waiver of 10 C.F.R. 51.53(c)(3)(i), 51.71(d), and 51.95(c)(1) to allow consideration of Category 1 NEPA Issues; LBP-21-4, 93 NRC 179 (2021)

standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention; LBP-21-2, 93 NRC 104 (2021)

to show that a dispute is material, petitioner must show that its resolution would make a difference in the outcome of the proceeding; LBP-21-2, 93 NRC 104 (2021)

where a requested exemption raises questions that are material to a proposed licensing action and bear directly on whether the proposed action should be taken, petitioner may propose exemption-related arguments in the licensing proceeding; CLI-21-1, 93 NRC 1 (2021)

where contentions were initially drafted by a different petitioner for a different proceeding, petitioners must demonstrate a genuine material dispute with the application in question to be granted a hearing; CLI-21-2, 93 NRC 70 (2021)

## SUBJECT INDEX

### CONTENTIONS, LATE-FILED

board's discretion to consider an untimely, exceptionally grave issue is granted rarely and only in extraordinary circumstances; LBP-21-2, 93 NRC 104 (2021)

challenge to the use of representative transportation routes is untimely; CLI-21-9, 93 NRC 244 (2021)

exception to contention timeliness requirement is a narrow one, to be granted rarely and only in truly extraordinary circumstances; CLI-21-7, 93 NRC 215 (2021)

exceptionally grave issue may be considered in the discretion of the presiding officer even if motion to reopen is untimely; CLI-21-8, 93 NRC 237 (2021)

exceptionally grave issue with a license application would warrant waiving the timeliness requirement; CLI-21-7, 93 NRC 215 (2021)

extension of filing deadline does not alter petitioner's obligation to show that a new contention is based on new, previously unavailable information that differs materially from information that was previously available; LBP-21-2, 93 NRC 104 (2021)

failure to satisfy either the requirements for reopening a closed record or for proffering a contention out of time requires rejection of the contention; LBP-21-2, 93 NRC 104 (2021)

for a new contention to be admissible after the deadline for initial intervention petitions has passed, petitioner must show that information supporting the contention differs materially from information that was previously available; CLI-21-1, 93 NRC 1 (2021)

good cause is the sole factor to be considered when evaluating whether to review the admissibility of a new or amended contention; CLI-21-7, 93 NRC 215 (2021)

good cause requires that a new contention be based on information that was not previously available, is materially different from previously available information, and is timely based on when the new information became available; CLI-21-7, 93 NRC 215 (2021)

higher standards are imposed for admitting a new contention after the board has terminated a proceeding than would otherwise apply; CLI-21-9, 93 NRC 244 (2021)

late-filed contention must satisfy the admissibility requirements; LBP-21-2, 93 NRC 104 (2021)

motion to reopen the record must satisfy the standards for reopening, contention admissibility and admitting new contentions filed after the deadline; CLI-21-7, 93 NRC 215 (2021)

new contention must explain why the issue could not have been raised earlier and how it relates to the financial qualifications of the proposed transferees; CLI-21-1, 93 NRC 1 (2021)

new contention submitted after the deadline must establish good cause for late filing; CLI-21-7, 93 NRC 215 (2021)

new or amended environmental contentions may be filed based on a DEIS where that document contains information that is materially different from information previously available; CLI-21-7, 93 NRC 215 (2021)

old information repackaged in a new report is not new information; CLI-21-4, 93 NRC 119 (2021)

petitioner may move to amend its contention or submit a new contention; CLI-21-1, 93 NRC 1 (2021)

standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention; LBP-21-2, 93 NRC 104 (2021)

timeliness of new contention for reopening a record is based on whether it could have been raised earlier or is materially different from what was previously available and has been submitted in a timely fashion; CLI-21-7, 93 NRC 215 (2021)

### CONTRACTS

standard contract establishes terms and conditions under which DOE will make available nuclear waste disposal services to owners and generators of spent nuclear fuel and high-level radioactive waste; CLI-21-1, 93 NRC 1 (2021)

See also Breach of Contract

### COSTS

evaluation of costs of emergency response and infrastructure upgrades is not within the scope of a Part 72 proceeding; LBP-21-2, 93 NRC 104 (2021)

if power reactor operations have permanently ceased prior to a proposed license transfer, applicants need not demonstrate financial qualifications to cover reactor operating costs; CLI-21-1, 93 NRC 1 (2021)

if, in the future, DOE were to accept spent fuel in its current package, it could be entitled to reimbursement for costs it already paid to load fuel into storage canisters; CLI-21-2, 93 NRC 70 (2021)

See also Decommissioning Costs

## SUBJECT INDEX

### CRITICALITY CONTROL

- argument that proposed use of experimental, higher enriched, and longer burn-up fuel has not been adequately evaluated as to the method for ensuring subcriticality in the spent fuel pool is inadmissible; CLI-21-5, 93 NRC 131 (2021)
- claim that continued presence of Boraflex will lead to a fire in the spent fuel pool and that all failure modes must be examined in association with the transfer of spent fuel to dry cask storage do not demonstrate Board error; CLI-21-5, 93 NRC 131 (2021)
- claim that the more prudent course of action to ensure subcriticality in the spent fuel pool is to remove spent fuel from the pool and reduce the density of the pool is inadmissible; CLI-21-5, 93 NRC 131 (2021)
- contention that allowing applicant to leave Boraflex in place in the spent fuel pool would cause corrosion that leads to degradation and can result in unanticipated consequences and unaccounted-for debris is inadmissible; CLI-21-5, 93 NRC 131 (2021)
- contention that credit for Boraflex as a neutron absorbing material if the spent fuel pool is fully flooded with unborated water does not leave conservative margin to stay subcritical is inadmissible; CLI-21-5, 93 NRC 131 (2021)
- k-effective of spent fuel storage racks loaded with fuel of the maximum fuel assembly reactivity must not exceed 0.95 if flooded with unborated water; CLI-21-5, 93 NRC 131 (2021)
- subcriticality is achieved when the estimated ratio of neutron production to neutron absorption and leakage, or k-effective, is less than 1.0; CLI-21-5, 93 NRC 131 (2021)

### CUMULATIVE IMPACTS ANALYSIS

- applicants must provide information about other past, present, and reasonably foreseeable future actions occurring in the vicinity of the nuclear plant that may result in a cumulative effect; LBP-21-4, 93 NRC 179 (2021)
- contention improperly conflates a reactor safety issue with requirement to consider cumulative environmental impacts; LBP-21-4, 93 NRC 179 (2021)
- environmental impact statement must include an evaluation of the cumulative impacts of a proposed action; LBP-21-4, 93 NRC 179 (2021)

### CURRENT LICENSING BASIS

- challenge to adequacy of acceptance criteria or other component of current licensing basis is not within the scope of a license renewal proceeding; LBP-21-4, 93 NRC 179 (2021)
- integrity of structures, systems and components is a CLB issue and so beyond challenge in a subsequent license renewal adjudication; LBP-21-4, 93 NRC 179 (2021)

### DEADLINES

- application to stay a license transfer must be filed within 5 days of the notice of the Staff action and must meet the remaining requirements in 10 C.F.R. 2.132; CLI-21-8, 93 NRC 237 (2021)

### DECOMMISSIONING

- claim that PSDAR does not comply with requirements because it does not address reasonably foreseeable potential impacts of climate change on spent fuel management is inadmissible; CLI-21-1, 93 NRC 1 (2021)
- delays in the decommissioning schedule that increase costs would be captured in the licensee's annual financial assurance status reports; CLI-21-2, 93 NRC 70 (2021)
- if a licensee contemplates performing an activity with impacts not enveloped by previous environmental impact analyses, licensee must submit a license amendment request with a supplemental environmental report evaluating the additional impacts; CLI-21-1, 93 NRC 1 (2021)
- licensee is not required to keep the facility in safe storage for any particular period of time; CLI-21-2, 93 NRC 70 (2021)
- section 72.30(b) applies only to decommissioning independent spent fuel storage installation; CLI-21-2, 93 NRC 70 (2021)
- to assert that impacts of planned decommissioning, site restoration, and spent fuel management activities exceed those referenced in the PSDAR, a petition for enforcement action may be filed; CLI-21-1, 93 NRC 1 (2021)
- without additional information to support state's arguments, there is no genuine issue as to whether delays at other sites render applicant's timelines implausible; CLI-21-1, 93 NRC 1 (2021)

## SUBJECT INDEX

### DECOMMISSIONING COSTS

annual real rate of return on decommissioning trust funds of 2% may be used in the site-specific decommissioning cost estimate analyses; CLI-21-1, 93 NRC 1 (2021)

challenge to applicant's cost estimates where site characterization has not yet been completed is rejected as impermissible challenges to NRC's regulations; CLI-21-1, 93 NRC 1 (2021)

claim that costs related to disposal of mixed waste are underestimated is inadmissible for lack factual support; CLI-21-2, 93 NRC 70 (2021)

claim that delays will materially affect the cost estimate and cause a deficiency in the decommissioning trust fund is inadmissible; CLI-21-2, 93 NRC 70 (2021)

contention that license transfer applicant's decommissioning cost estimates are based on untenable assumptions does not raise a genuine dispute with the application; CLI-21-1, 93 NRC 1 (2021)

contention that licensee's decommissioning cost analysis fails to address pipeline-safety issues does not raise a genuine dispute; CLI-21-1, 93 NRC 1 (2021)

contention that PSDAR and cost estimate fail to account for the likely existence of greater contamination at the site than that for which the decommissioning cost estimate currently accounts is inadmissible; CLI-21-2, 93 NRC 70 (2021)

contention that the license transferee improperly excludes decommissioning cost estimates for repackaging spent fuel for transport is inadmissible; CLI-21-2, 93 NRC 70 (2021)

if future legal developments call into question applicant's cost estimates for spent-fuel management or waste disposal, applicant will need to notify NRC; CLI-21-1, 93 NRC 1 (2021)

licensee must submit its license termination plan at least 2 years before its proposed license termination date, which must include site characterization results and updated cost estimates for remaining decommissioning activities; CLI-21-1, 93 NRC 1 (2021)

prospective licensee must be financially qualified to carry out its proposed activities and provide financial assurance to cover estimated decommissioning costs; CLI-21-1, 93 NRC 1 (2021)

section 50.82(a)(8)(i)(B) applies to withdrawals from the decommissioning trust fund, not to an applicant's cost estimates; CLI-21-1, 93 NRC 1 (2021)

### DECOMMISSIONING FUND DISBURSEMENTS

decommissioning trust-related exemption that is completely dependent on the license-amendment request cannot take effect unless NRC approves the license transfer application; CLI-21-1, 93 NRC 1 (2021)

licensee is not required to undertake nonradiological site restoration, and use of decommissioning funds to do so is normally prohibited; CLI-21-2, 93 NRC 70 (2021)

licensee's request for an exemption to use trust funds for non-decommissioning purposes was outside the scope of the proceeding; CLI-21-1, 93 NRC 1 (2021)

NRC approved a trust agreement under which remaining trust funds would be returned to the community; CLI-21-1, 93 NRC 1 (2021)

NRC requires a decommissioning licensee to file annual status reports, which NRC can use to monitor withdrawals from the trust fund; CLI-21-1, 93 NRC 1 (2021)

section 50.82(a)(8)(i)(B) applies to withdrawals from the decommissioning trust fund, not to an applicant's cost estimates; CLI-21-1, 93 NRC 1 (2021)

withdrawals from decommissioning trust fund may be made only for expenses for legitimate decommissioning activities consistent with the definition of decommissioning in § 50.2; CLI-21-1, 93 NRC 1 (2021)

withdrawals from decommissioning trust must be for legitimate decommissioning activities; CLI-21-2, 93 NRC 70 (2021)

### DECOMMISSIONING FUNDING

acceptable methods of demonstrating financial assurance of decommissioning funding, including the prepayment method are outlined; CLI-21-2, 93 NRC 70 (2021)

access to decommissioning trusts would allow license transfer applicants to provide financial assurance using the prepayment method; CLI-21-1, 93 NRC 1 (2021)

additional financial assurance must be provided if annual reports show insufficient funds to cover the estimated cost of completing decommissioning; CLI-21-1, 93 NRC 1 (2021)

applicant can rely on a 2% return rate only if it has provided a site-specific estimate of decommissioning funding that is based on a period of safe storage; CLI-21-1, 93 NRC 1 (2021)

## SUBJECT INDEX

- applicant's reliance on the 2% return rate in connection with the DECON model has been allowed; CLI-21-1, 93 NRC 1 (2021)
- claim that licensee's cash flow analysis cannot assume a 2% real rate of return on decommissioning trust funds does not raise an admissible contention; CLI-21-2, 93 NRC 70 (2021)
- contention that decommissioning trust fund is inadequate and has likely lost value because COVID-19 public health emergency has caused a steep decline in the securities market is inadmissible; CLI-21-2, 93 NRC 70 (2021)
- financial assurance prepayment method involves depositing funds into an account kept segregated from licensee's assets and outside of licensee's administrative control in an amount sufficient to pay decommissioning costs at the time the licensee expects to permanently cease operations; CLI-21-1, 93 NRC 1 (2021)
- financial assurance requirements for annual status reports that licensee must provide do not apply to licensee's initial estimates of decommissioning funding needs in its PSDAR; CLI-21-1, 93 NRC 1 (2021)
- funds must be sufficient to pay decommissioning costs at the time permanent termination of operations is expected; CLI-21-2, 93 NRC 70 (2021)
- if NRC approves a license transfer application, transferee will need to submit decommissioning-funding status reports annually; CLI-21-1, 93 NRC 1 (2021)
- level of financial assurance required of license transferees for decommissioning is not equivalent to the extremely high assurance required for the safety of reactor design, construction, and operation; CLI-21-2, 93 NRC 70 (2021)
- license transfer applicant must provide reasonable assurance that sufficient funds will be available to decommission the facility and carry out activities under the license; CLI-21-1, 93 NRC 1 (2021); CLI-21-2, 93 NRC 70 (2021)
- licensee in decommissioning must continue to demonstrate annually, until the license is terminated, that funding for decommissioning and, where applicable, spent fuel management remains adequate; CLI-21-2, 93 NRC 70 (2021)
- licensee is not required at the decommissioning stage to supplement its financial assurance method with a showing that its operations will generate additional funding; CLI-21-1, 93 NRC 1 (2021)
- licensee may take credit for projected earnings on the prepaid decommissioning trust funds; CLI-21-2, 93 NRC 70 (2021)
- licensee must, in its annual financial assurance status report, include additional financial assurance to cover estimated cost of completion; CLI-21-1, 93 NRC 1 (2021)
- mere casting of doubt on some aspects of proposed decommissioning funding plans is not by itself sufficient to defeat a finding of reasonable assurance; CLI-21-2, 93 NRC 70 (2021)
- methods by which licensee can provide financial assurance for decommissioning activities are specified in 10 C.F.R. 50.75; CLI-21-1, 93 NRC 1 (2021)
- NRC could effectively require license transferees to apply a portion of recoveries from DOE to cover estimated decommissioning costs; CLI-21-1, 93 NRC 1 (2021)
- NRC review of licensee transferees financial ability to decommission a facility on the site does not end after approval of the transfer; CLI-21-2, 93 NRC 70 (2021)
- NRC will accept financial assurances of decommissioning funding based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected; CLI-21-2, 93 NRC 70 (2021)
- prepayment refers to prepaid funds deposited in an account segregated from the licensee's assets and outside of the licensee's administrative control; CLI-21-2, 93 NRC 70 (2021)
- to take a 2% credit for earnings throughout decommissioning, the cost estimate must be based on a period of safe storage specifically described in the decommissioning cost estimate; CLI-21-2, 93 NRC 70 (2021)
- DEFINITIONS**
- "decommission" means to remove a facility or site safely from service and reduce residual radioactivity to a level that permits release of the property for unrestricted or restricted use and termination of the license; CLI-21-1, 93 NRC 1 (2021)
- "design-basis earthquake" is considered synonymous with "safe shutdown earthquake"; LBP-21-4, 93 NRC 179 (2021)

## SUBJECT INDEX

“discharge” means a discharge from a point source into a water body of the United States; CLI-21-8, 93 NRC 237 (2021)

“prepayment” financial assurance standard is defined; CLI-21-1, 93 NRC 1 (2021)

### DELAY

claim that delays will materially affect the cost estimate and cause a deficiency in the decommissioning trust fund is inadmissible; CLI-21-2, 93 NRC 70 (2021)

delays in the decommissioning schedule that increase costs would be captured in the licensee’s annual financial assurance status reports; CLI-21-2, 93 NRC 70 (2021)

if its timelines for removing spent fuel are no longer plausible, licensee must notify NRC of the delays through its financial assurance status reports and provide additional financial assurance, if necessary, to cover the estimated costs resulting from the delays; CLI-21-1, 93 NRC 1 (2021)

without additional information to support state’s arguments, there is no genuine issue as to whether delays at other sites render applicant’s timelines implausible; CLI-21-1, 93 NRC 1 (2021)

### DELAY OF PROCEEDING

extent to which the requestor’s/petitioner’s participation will inappropriately broaden the issues or delay the proceeding is considered for discretionary intervention; LBP-21-3, 93 NRC 153 (2021)

### DELIBERATE MISCONDUCT

based on a finding of deliberate misconduct, NRC Staff may make an enforcement order immediately effective; CLI-21-3, 93 NRC 89 (2021)

elements of an Employee Protection Rule violation may be proven using the burden-shifting evidentiary framework and are different from those for a Deliberate Misconduct Rule violation; CLI-21-3, 93 NRC 89 (2021)

employee engages in deliberate misconduct when he plays a significant role in the decisionmaking process that leads to adverse employment actions; CLI-21-3, 93 NRC 89 (2021)

enforcement action against an individual under the Deliberate Misconduct Rule turns on the individual’s state of mind, which may be inferred through circumstantial evidence; CLI-21-3, 93 NRC 89 (2021)

engaging in deliberate misconduct is a violation of 10 C.F.R. 50.5; LBP-21-3, 93 NRC 153 (2021)

legal elements of a Deliberate Misconduct Rule violation are differentiated from the legal elements of an Employee Protection Rule violation; CLI-21-3, 93 NRC 89 (2021)

NRC Staff may issue a notice of violation for deliberate misconduct; LBP-21-3, 93 NRC 153 (2021)

NRC Staff must provide evidence to show a violation of the Deliberate Misconduct Rule; CLI-21-3, 93 NRC 89 (2021)

rule applies directly to individuals, including unlicensed individuals, whereas the Employee Protection Rule prohibits discrimination by a licensee, an applicant for a license, or a contractor or subcontractor thereof; CLI-21-3, 93 NRC 89 (2021)

### DEMAND FOR HEARING

other person adversely affected by enforcement order is entitled to demand a hearing on all or part of the order to rebut Staff’s allegations against her; LBP-21-3, 93 NRC 153 (2021)

### DEMAND FOR INFORMATION

hearing opportunities are not provided; LBP-21-3, 93 NRC 153 (2021)

### DENIAL OF LICENSE

NRC Staff may issue its approval or denial of a license transfer application, consistent with its findings in its Safety Evaluation Report, during a pending adjudicatory proceeding; CLI-21-1, 93 NRC 1 (2021)

### DEPARTMENT OF ENERGY

if, in the future, DOE were to accept spent fuel in its current package, it could be entitled to reimbursement for the costs it already paid to load the fuel into storage canisters; CLI-21-2, 93 NRC 70 (2021)

spent fuel owner suing DOE for breach of the standard contract for spent fuel storage could recover its costs incurred in loading spent fuel into storage canisters; CLI-21-2, 93 NRC 70 (2021)

standard contract establishes terms and conditions under which DOE will make available nuclear waste disposal services to the owners and generators of spent nuclear fuel and high-level radioactive waste; CLI-21-1, 93 NRC 1 (2021)

### DISCOVERY AGAINST NRC STAFF

challenges to NRC Staff’s response to a FOIA request are governed under a separate appeal process; CLI-21-6, 93 NRC 145 (2021)



## SUBJECT INDEX

- petitioner is not entitled to discovery of predecisional Staff documents to support contention preparation; CLI-21-6, 93 NRC 145 (2021)
- DISCRIMINATION**
- discrimination by a licensee against an employee for raising nuclear safety concerns, participating in proceedings for the administration or enforcement of requirements under the Atomic Energy Act or Energy Reorganization Act, or engaging in certain other protected activities is prohibited; CLI-21-3, 93 NRC 89 (2021)
- employees who raise safety concerns are protected from discrimination; LBP-21-3, 93 NRC 153 (2021)
- DOSE LIMITS**
- radioactively contaminated soils must be remediated to a 10 millirem annual dose limit from all reasonable pathways to qualify for unrestricted release; CLI-21-1, 93 NRC 1 (2021)
- DRAFT ENVIRONMENTAL IMPACT STATEMENT**
- claims that NRC Staff did not conduct an independent investigation of matters discussed in the DEIS but relied too much on information in the application is inadmissible; CLI-21-7, 93 NRC 215 (2021)
- consideration of the comments on the DEIS showing public opposition to the ISFSI would not result in a materially different result to the proceeding, as required by the reopening standards; CLI-21-7, 93 NRC 215 (2021)
- new or amended environmental contentions may be filed based on a DEIS where that document contains information that is materially different from information previously available; CLI-21-7, 93 NRC 215 (2021)
- DRY CASK STORAGE**
- claim that continued presence of Boraflex will lead to a fire in the spent fuel pool and that all failure modes must be examined in association with the transfer of spent fuel to dry cask storage do not demonstrate Board error; CLI-21-5, 93 NRC 131 (2021)
- DRY STORAGE CASKS**
- performance of a screening evaluation to determine whether design of spent fuel canisters could be changed without first obtaining NRC approval was a violation; CLI-21-1, 93 NRC 1 (2021)
- EARTHQUAKES**
- “design-basis earthquake” is considered synonymous with “safe shutdown earthquake”; LBP-21-4, 93 NRC 179 (2021)
- if vibratory ground motion exceeding the operating basis earthquake occurs, plant shutdown is mandated and the licensee must demonstrate to NRC prior to resuming operations that no functional damage occurred; LBP-21-4, 93 NRC 179 (2021)
- seismic accident impacts issue is precluded from consideration in a subsequent license renewal proceeding absent a waiver of 10 C.F.R. 51.53(c)(3)(i), 51.71(d), and 51.95(c)(1) to allow consideration of Category 1 NEPA Issues; LBP-21-4, 93 NRC 179 (2021)
- ECONOMIC ISSUES**
- new contention that poses concerns about national economics, security, and regional employment doesn’t explain how ISFSI poses exceptionally grave impacts; CLI-21-7, 93 NRC 215 (2021)
- EFFECTIVENESS**
- See Immediate Effectiveness
- EMERGENCY RESPONSE**
- evaluation of costs of emergency response and infrastructure upgrades is not within the scope of a Part 72 proceeding; LBP-21-2, 93 NRC 104 (2021)
- EMPLOYEE PROTECTION**
- adequate evidence of retaliation against an employee must show that employer’s conduct would cause it to be in violation of the Employee Protection Rule; CLI-21-3, 93 NRC 89 (2021)
- elements of an Employee Protection Rule violation may be proven using the burden-shifting evidentiary framework and are different from those for a Deliberate Misconduct Rule violation; CLI-21-3, 93 NRC 89 (2021)
- evidentiary framework for proof of an Employee Protection Rule violation is set forth; CLI-21-3, 93 NRC 89 (2021)
- high burden is imposed on employers so that nuclear whistleblowers are encouraged to come forward with safety-related information; CLI-21-3, 93 NRC 89 (2021)

## SUBJECT INDEX

if NRC Staff shows by a preponderance of evidence that an employee's protected activity was a contributing factor in an unfavorable personnel decision, a reasonable inference arises that the Employee Protection Rule was violated; CLI-21-3, 93 NRC 89 (2021)

inference that the Employee Protection Rule was violated may be negated by the employer if it proves with clear and convincing evidence that it would have taken the same adverse action regardless of the protected activity; CLI-21-3, 93 NRC 89 (2021)

legal elements of a Deliberate Misconduct Rule violation are differentiated from the legal elements of an Employee Protection Rule violation; CLI-21-3, 93 NRC 89 (2021)

rule prohibits discrimination by a licensee, an applicant for a license, or a contractor or subcontractor thereof; CLI-21-3, 93 NRC 89 (2021)

### EMPLOYMENT

employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations; LBP-21-3, 93 NRC 153 (2021)

new contention that poses concerns about national economics, security, and regional employment doesn't explain how ISFSI poses exceptionally grave impacts; CLI-21-7, 93 NRC 215 (2021)

### ENERGY REORGANIZATION ACT

protection for whistleblowers and the right to defend against a whistleblower discrimination charge are provided; LBP-21-3, 93 NRC 153 (2021)

### ENFORCEMENT ACTIONS

action against an individual under the Deliberate Misconduct Rule turns on the individual's state of mind, which may be inferred through circumstantial evidence; CLI-21-3, 93 NRC 89 (2021)

### ENFORCEMENT ORDERS

based on a finding of deliberate misconduct NRC Staff may make an enforcement order immediately effective; CLI-21-3, 93 NRC 89 (2021)

Energy Reorganization Act provides protection for whistleblowers and establishes the right to defend against a whistleblower discrimination charge; LBP-21-3, 93 NRC 153 (2021)

immediate effectiveness of enforcement order cannot be based on mere suspicion, unfounded allegations, or error; CLI-21-3, 93 NRC 89 (2021)

licensee employee may demand a hearing if she has been adversely affected by an order against licensee; LBP-21-3, 93 NRC 153 (2021)

NRC Staff's rescission of enforcement order renders the case moot; LBP-21-1, 93 NRC 101 (2021)

orders and civil penalties may be challenged in a hearing; LBP-21-3, 93 NRC 153 (2021)

other person adversely affected by enforcement order is entitled to demand a hearing on all or part of the order to rebut Staff's allegations against her; LBP-21-3, 93 NRC 153 (2021)

target of enforcement order may challenge the immediate effectiveness of the order by producing evidence that the order is based on mere suspicion, unfounded allegations, or error; CLI-21-3, 93 NRC 89 (2021)

third parties may request hearings on NRC enforcement orders because conceivably the enforcement order might actually worsen the safety situation, but NRC expects such situations to be very rare; LBP-21-3, 93 NRC 153 (2021)

those who authorize a defense for licensees who are the subjects of civil penalties are protected from retaliation; LBP-21-3, 93 NRC 153 (2021)

### ENFORCEMENT PROCEEDINGS

chilling effect claim that is not directly related to environmental or radiological harm does not fall within the zone of interests of the Atomic Energy Act; LBP-21-3, 93 NRC 153 (2021)

Commission has flexibility in determining standing and may use somewhat more- or less-restrictive criteria than courts, but those criteria must still be reasoned based on the facts of the case; LBP-21-3, 93 NRC 153 (2021)

persons should not be routinely admitted as parties to hearings on enforcement orders when they are not, themselves, subjected to any penalty; LBP-21-3, 93 NRC 153 (2021)

petitioner need only show that its interest may have been affected; LBP-21-3, 93 NRC 153 (2021)

request for discretionary intervention has never been granted in an enforcement proceeding; LBP-21-3, 93 NRC 153 (2021)

## SUBJECT INDEX

- to establish standing, petitioner must demonstrate that it has suffered a distinct and palpable harm that can fairly be traced to the challenged action and is likely to be redressed by a favorable decision; LBP-21-3, 93 NRC 153 (2021)
- ENVIRONMENTAL ANALYSIS**
- admissible contentions must identify a deficiency in the analysis and may not merely offer suggestions of other ways the analysis could have been done; LBP-21-2, 93 NRC 104 (2021)
- designation of a Category 1 issue reflects NRC's expectations that its NEPA obligations have been satisfied with reference to its previously conducted environmental analysis in the GEIS; LBP-21-4, 93 NRC 179 (2021)
- ENVIRONMENTAL EFFECTS**
- radiological impacts that do not exceed permissible levels in the Commission's regulations are considered small as the term is used in Part 51, Subpart A, Appendix B, tbl. B-1; LBP-21-4, 93 NRC 179 (2021)
- summary of impacts finding for severe accidents is provided in pt. 51, subpart A, app. B. tbl. B-1; LBP-21-4, 93 NRC 179 (2021)
- ENVIRONMENTAL IMPACT STATEMENT**
- impacts analysis exemption for Category 1 issues in subsequent license renewal proceedings is extended to NRC Staff's draft and final EISs; LBP-21-4, 93 NRC 179 (2021)
- NEPA does not call for certainty or precision, but an estimate of anticipated (not unduly speculative) impacts; CLI-21-7, 93 NRC 215 (2021)
- NRC Staff must analyze not only direct impacts of a proposed action, but also indirect and cumulative impacts of past, present, and reasonably foreseeable future actions; LBP-21-4, 93 NRC 179 (2021)
- NRC Staff must include an evaluation of the cumulative impacts of a proposed action; LBP-21-4, 93 NRC 179 (2021)
- See also Draft Environmental Impact Statement; Generic Environmental Impact Statement
- ENVIRONMENTAL ISSUES**
- contention improperly conflates a reactor safety issue with requirement to consider cumulative environmental impacts; LBP-21-4, 93 NRC 179 (2021)
- intervention petitioners must initially base their NEPA contentions on applicant's environmental analysis; CLI-21-1, 93 NRC 1 (2021); CLI-21-9, 93 NRC 244 (2021)
- new contention that poses concerns about sinkholes, subsidence, or seismicity doesn't provide information that is materially different from information already considered by NRC Staff in the DEIS; CLI-21-7, 93 NRC 215 (2021)
- new or amended environmental contentions may be filed based on a DEIS where that document contains information that is materially different from information previously available; CLI-21-7, 93 NRC 215 (2021)
- on issues arising under the National Environmental Policy Act, participants shall file contentions based on applicant's environmental report; CLI-21-7, 93 NRC 215 (2021); LBP-21-2, 93 NRC 104 (2021)
- ENVIRONMENTAL REPORT**
- adjudicatory challenge based on applicant's failure to deal appropriately with a Category 1 item constitutes an attack on an agency rule, making a section 2.335(b) waiver the sole vehicle for raising such an issue; LBP-21-4, 93 NRC 179 (2021)
- challenge to ER's incorporation by reference to 2013 Revised GEIS regarding impact of design-basis and severe accidents as part of the basis for a contention fails to establish a material factual dispute; LBP-21-4, 93 NRC 179 (2021)
- contention that ER did not contain sufficient information to determine whether packer tests were performed correctly is inadmissible; CLI-21-4, 93 NRC 119 (2021)
- contention that ER does not address environmental impacts of operating units during subsequent license renewal term under the significant risk of an earthquake that exceeds the design basis for the reactors is inadmissible; LBP-21-4, 93 NRC 179 (2021)
- contention that ER does not contain any information as to whether brine continues to flow in the subsurface under the site is inadmissible; CLI-21-4, 93 NRC 119 (2021)
- environmental contents of subsequent license renewal application must include a supplement to the ER that complies with the requirements of Subpart A of 10 C.F.R. Part 51; LBP-21-4, 93 NRC 179 (2021)
- NRC must follow precedents on question of applicability of 10 C.F.R. 51.53(c) to subsequent license renewal; LBP-21-4, 93 NRC 179 (2021)

## SUBJECT INDEX

NRC Staff must conduct its hard-look licensing review of the ER to assess whether new and significant information exists that requires additional consideration; LBP-21-4, 93 NRC 179 (2021)  
operating license renewal application is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to subpart A of Part 51; LBP-21-4, 93 NRC 179 (2021)  
severe accidents are classified as a Category 2 item for which additional plant-specific review is required; LBP-21-4, 93 NRC 179 (2021)

### ENVIRONMENTAL REVIEW

NRC Staff must conduct its hard-look licensing review of the environmental report to assess whether new and significant information exists that requires additional consideration; LBP-21-4, 93 NRC 179 (2021)  
NRC Staff must consider whether any information provided by public comments as part of the environment review process merits further analysis as new and significant information; LBP-21-4, 93 NRC 179 (2021)  
NRC Staff's environmental analysis appropriately discusses reasonable outcomes, rather than theoretical possibilities; CLI-21-7, 93 NRC 215 (2021)  
PSDAR does not amend the NRC license and is not a major federal action subject to NEPA review; CLI-21-1, 93 NRC 1 (2021)  
review of license transferee's exemption request is required because NEPA rules include no categorical exclusion that would allow for approval of the request without an environmental assessment; CLI-21-1, 93 NRC 1 (2021)  
severe accidents are classified as a Category 2 item for which additional plant-specific review is required; LBP-21-4, 93 NRC 179 (2021)  
special circumstances must exist to render categorical exclusion of license transfer applications from an environmental review inapplicable; CLI-21-1, 93 NRC 1 (2021)

### EQUIPMENT

any new equipment is qualified to seismic margins consistent with recent events; LBP-21-4, 93 NRC 179 (2021)

### ERROR

Commission is not persuaded of board error by argument that petitioner established good cause under an alternative test; CLI-21-7, 93 NRC 215 (2021)  
reiteration of a claim considered and dismissed by the board, without more, is insufficient to show board error; CLI-21-9, 93 NRC 244 (2021)

### EVIDENCE

adequate evidence is reliable, probative, and substantial (but not preponderant) and supports a conclusion that the asserted wrongdoer violated a Commission requirement, and the violation was willful or poses a risk to the public health, safety, or interest that requires immediate action; CLI-21-3, 93 NRC 89 (2021)  
adequate evidence of retaliation against an employee must show that employer's conduct would cause it to be in violation of the Employee Protection Rule; CLI-21-3, 93 NRC 89 (2021)  
affidavit accompanying a motion to reopen must contain evidence of such quality as to be admissible at an evidentiary hearing; LBP-21-2, 93 NRC 104 (2021)  
enforcement action against an individual under the Deliberate Misconduct Rule turns on the individual's state of mind, which may be inferred through circumstantial evidence; CLI-21-3, 93 NRC 89 (2021)  
evidentiary support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements; CLI-21-6, 93 NRC 145 (2021)  
individual's state of mind may be inferred through circumstantial evidence; CLI-21-3, 93 NRC 89 (2021)  
NRC Staff must provide evidence to show a violation of the Deliberate Misconduct Rule; CLI-21-3, 93 NRC 89 (2021)  
without additional information to support state's arguments, there is no genuine issue as to whether delays at other sites render applicant's timelines implausible; CLI-21-1, 93 NRC 1 (2021)

### EXCEPTIONS

exception to contention timeliness requirement is a narrow one, to be granted rarely and only in truly extraordinary circumstances; CLI-21-7, 93 NRC 215 (2021)

## SUBJECT INDEX

### EXEMPTIONS

decommissioning trust-related exemption that is completely dependent on the license-amendment request cannot take effect unless NRC approves the license transfer application; CLI-21-1, 93 NRC 1 (2021)

environmental review of license transferee's exemption request is required because NEPA rules include no categorical exclusion that would allow for approval of the request without an environmental assessment; CLI-21-1, 93 NRC 1 (2021)

exemption request is not among the listed actions subject to a hearing opportunity; CLI-21-1, 93 NRC 1 (2021)

impacts analysis exemption for Category 1 issues in subsequent license renewal proceedings is extended to NRC Staff's draft and final environmental impact statements; LBP-21-4, 93 NRC 179 (2021)

licensee's request for an exemption to use trust funds for non-decommissioning purposes was outside the scope of the proceeding; CLI-21-1, 93 NRC 1 (2021)

NRC Staff may grant an exemption while its review of licensee's amendment request is still pending; CLI-21-1, 93 NRC 1 (2021)

where a requested exemption raises questions that are material to a proposed licensing action and bear directly on whether the proposed action should be taken, petitioner may propose exemption-related arguments in the licensing proceeding; CLI-21-1, 93 NRC 1 (2021)

### EXTENSION OF TIME

extension of filing deadline does not alter petitioner's obligation to show that a new contention is based on new, previously unavailable information that differs materially from information that was previously available; LBP-21-2, 93 NRC 104 (2021)

### FINALITY

after NRC Staff issues the action provided for in the notice of opportunity for hearing and the Commission issues its final adjudicatory decision, it no longer retains jurisdiction to consider further adjudicatory filings; CLI-21-8, 93 NRC 237 (2021)

### FINANCIAL ASSURANCE

acceptable methods of demonstrating financial assurance of decommissioning funding, including the prepayment method are outlined; CLI-21-2, 93 NRC 70 (2021)

access to decommissioning trusts would allow license transfer applicants to provide financial assurance using the prepayment method; CLI-21-1, 93 NRC 1 (2021)

additional financial assurance must be provided if annual reports show insufficient funds to cover the estimated cost of completing decommissioning; CLI-21-1, 93 NRC 1 (2021)

applicant can rely on a 2% return rate only if it has provided a site-specific estimate of decommissioning funding that is based on a period of safe storage; CLI-21-1, 93 NRC 1 (2021)

applicant is not prohibited from relying on anticipated funding sources as a means of establishing its financial qualifications; CLI-21-1, 93 NRC 1 (2021)

applicant's reliance on the 2% return rate in connection with the DECON model has been allowed; CLI-21-1, 93 NRC 1 (2021)

because 10 C.F.R. 50.75(e)(1)(i) refers to a real rate of return, as opposed to a nominal rate, licensee must adjust the rate for inflation; CLI-21-1, 93 NRC 1 (2021)

financial assurance prepayment method involves depositing funds into an account kept segregated from licensee's assets and outside of licensee's administrative control in an amount sufficient to pay decommissioning costs at the time the licensee expects to permanently cease operations; CLI-21-1, 93 NRC 1 (2021)

if discovery of significant new contamination affects licensee's ability to either complete decommissioning or safely manage spent fuel, licensee will need to provide additional financial assurance; CLI-21-1, 93 NRC 1 (2021)

if its timelines for removing spent fuel are no longer plausible, licensee must notify NRC of the delays through its financial assurance status reports and provide additional financial assurance, if necessary, to cover the estimated costs resulting from the delays; CLI-21-1, 93 NRC 1 (2021)

in license transfer context, applicant's financial assurance estimates will be acceptable if they are grounded in assumptions and forecasts that were plausible when the estimates were submitted; CLI-21-1, 93 NRC 1 (2021)

## SUBJECT INDEX

level of financial assurance required of license transferees for decommissioning is not equivalent to the extremely high assurance required for the safety of reactor design, construction, and operation; CLI-21-2, 93 NRC 70 (2021)

license transfer applicant must provide reasonable assurance that sufficient funds will be available to decommission the facility and carry out activities under the license; CLI-21-1, 93 NRC 1 (2021)

license transfer application must provide reasonable assurance that funds will be available to decommission the facility; CLI-21-2, 93 NRC 70 (2021)

licensee is not required at the decommissioning stage to supplement its financial assurance method with a showing that its operations will generate additional funding; CLI-21-1, 93 NRC 1 (2021)

licensee may take credit for projected earnings on the prepaid decommissioning trust funds; CLI-21-2, 93 NRC 70 (2021)

methods by which licensee can provide financial assurance for decommissioning activities are specified in 10 C.F.R. 50.75; CLI-21-1, 93 NRC 1 (2021)

methods of demonstrating financial assurance include a surety bond, a letter of credit, insurance, or a parent company guarantee; CLI-21-1, 93 NRC 1 (2021)

NRC will accept financial assurances based on plausible assumptions and forecasts, even though things may turn out less favorably than expected; CLI-21-1, 93 NRC 1 (2021); CLI-21-2, 93 NRC 70 (2021)

“prepayment” financial assurance standard is defined; CLI-21-1, 93 NRC 1 (2021)

prospective licensee must be financially qualified to carry out its proposed activities and provide financial assurance to cover estimated decommissioning costs; CLI-21-1, 93 NRC 1 (2021)

requirements for annual status reports that licensee must provide do not apply to licensee’s initial estimates of decommissioning funding needs in its PSDAR; CLI-21-1, 93 NRC 1 (2021)

transfer of licenses cannot be completed unless proposed transferees have provided financial assurance that is adequate to cover decommissioning activities at the site; CLI-21-1, 93 NRC 1 (2021)

**FINANCIAL ASSURANCE PLAN**

claim that license transfer applicant is required to more fully characterize the site to inform its cost estimates does not raise a material dispute with the application; CLI-21-1, 93 NRC 1 (2021)

licensees plan will be acceptable if it is based on plausible assumptions and forecasts; CLI-21-1, 93 NRC 1 (2021)

**FINANCIAL QUALIFICATIONS**

contention that license transferee is inherently financially unsound because it is a limited liability company whose sole purpose is decommissioning is inadmissible; CLI-21-2, 93 NRC 70 (2021)

if power reactor operations have permanently ceased prior to a proposed license transfer, applicants need not demonstrate financial qualifications to cover reactor operating costs; CLI-21-1, 93 NRC 1 (2021)

license transfer application must include information on identity and technical and financial qualifications of a proposed licensee transferee as would be required if the application were for an initial license; CLI-21-2, 93 NRC 70 (2021)

license transfer application must provide information sufficient to demonstrate the financial qualification of applicant to carry out the activities; CLI-21-2, 93 NRC 70 (2021)

prospective licensee must be financially qualified to carry out its proposed activities and provide financial assurance to cover estimated decommissioning costs; CLI-21-1, 93 NRC 1 (2021)

transfer review is limited to specific matters, including financial and technical qualifications of the proposed transferee; CLI-21-1, 93 NRC 1 (2021)

**FINANCIAL QUALIFICATIONS REVIEW**

NRC review of license transferees financial ability to decommission a facility on the site does not end after approval of the transfer; CLI-21-2, 93 NRC 70 (2021)

NRC’s review of licensee’s financial qualifications is not limited to factors such as revenue, gross income, or net worth; CLI-21-1, 93 NRC 1 (2021)

**FIRES**

claim that continued presence of Boraflex will lead to a fire in the spent fuel pool and that all failure modes must be examined in association with the transfer of spent fuel to dry cask storage do not demonstrate Board error; CLI-21-5, 93 NRC 131 (2021)

**FLOODS**

k-effective of spent fuel storage racks loaded with fuel of the maximum fuel assembly reactivity must not exceed 0.95 if flooded with unborated water; CLI-21-5, 93 NRC 131 (2021)

## SUBJECT INDEX

### FREEDOM OF INFORMATION ACT

challenges to NRC Staff's response to a FOIA request are governed under a separate appeal process; CLI-21-6, 93 NRC 145 (2021)

### FUEL

See High-Burnup Fuel

### FUKUSHIMA ACCIDENT

following the accident, NRC Staff asked licensees to evaluate their site seismic hazards using current methodologies and guidance to develop a ground motion response spectrum; LBP-21-4, 93 NRC 179 (2021)

### GENERIC ENVIRONMENTAL IMPACT STATEMENT

challenge to environmental report's incorporation by reference to 2013 Revised GEIS regarding impact of design-basis and severe accidents as part of the basis for a contention fails to establish a material factual dispute; LBP-21-4, 93 NRC 179 (2021)

small-impact conclusions span both design-basis and severe accidents and analyze severe accidents among others, the probability of which is so low; LBP-21-4, 93 NRC 179 (2021)

### GENERIC ISSUES

absent the grant of a section 2.335 waiver, challenges to Category 1 generic determinations in an adjudication are precluded; LBP-21-4, 93 NRC 179 (2021)

federal courts have acknowledged legitimacy of avoiding new analyses of generic Category 1 issues as counterproductive; LBP-21-4, 93 NRC 179 (2021)

### GEOLOGIC CONDITIONS

contention that environmental report and safety analysis report did not discuss the presence and implications of fractured rock beneath the site is inadmissible; CLI-21-4, 93 NRC 119 (2021)

new contention that poses concerns about sinkholes, subsidence, or seismicity doesn't provide information that is materially different from information already considered by NRC Staff in the DEIS; CLI-21-7, 93 NRC 215 (2021)

### GOOD CAUSE

Commission is not persuaded of board error by argument that petitioner established good cause under an alternative test; CLI-21-7, 93 NRC 215 (2021)

new contention must be based on information that was not previously available, is materially different from previously available information, and is timely based on when the new information became available; CLI-21-7, 93 NRC 215 (2021)

new contention submitted after the deadline must establish good cause for late filing; CLI-21-7, 93 NRC 215 (2021)

### HEARING REQUESTS

exemption request is not among the listed actions subject to a hearing opportunity; CLI-21-1, 93 NRC 1 (2021)

hearing opportunity will be provided only where adverse effects implicate the purposes of the statutes that NRC enforces; LBP-21-3, 93 NRC 153 (2021)

notices of violations, demands for information, and requests for enforcement action do not provide for hearing opportunities; LBP-21-3, 93 NRC 153 (2021)

third parties may request hearings on NRC enforcement orders because conceivably the enforcement order might actually worsen the safety situation, but NRC expects such situations to be very rare; LBP-21-3, 93 NRC 153 (2021)

### HEARING RIGHTS

Energy Reorganization Act provides protection for whistleblowers and establishes the right to defend against a whistleblower discrimination charge; LBP-21-3, 93 NRC 153 (2021)

enforcement orders and civil penalties may be challenged in a hearing; LBP-21-3, 93 NRC 153 (2021)

hearing opportunity will be provided to any other person adversely affected by an enforcement order;

LBP-21-3, 93 NRC 153 (2021)

licensee employee may demand a hearing if she has been adversely affected by an order against licensee; LBP-21-3, 93 NRC 153 (2021)

NRC shall grant a hearing upon the request of any person whose interest may be affected by the proceeding; CLI-21-5, 93 NRC 131 (2021)

## SUBJECT INDEX

- petitioner may not demand an adjudicatory hearing to express generalized grievances about NRC policies; CLI-21-1, 93 NRC 1 (2021)
- target of enforcement order may challenge the immediate effectiveness of the order by producing evidence that the order is based on mere suspicion, unfounded allegations, or error; CLI-21-3, 93 NRC 89 (2021)
- HIGH-BURNUP FUEL
  - argument that proposed use of experimental, higher enriched, and longer burn-up fuel has not been adequately evaluated as to the method for ensuring subcriticality in the spent fuel pool is inadmissible; CLI-21-5, 93 NRC 131 (2021)
- HYDROGEOLOGY
  - contention arguing that the environmental report does not contain any information as to whether brine continues to flow in the subsurface under the site is inadmissible; CLI-21-4, 93 NRC 119 (2021)
  - contention that applicant did not support its claim in the environmental report that shallow alluvium is likely non-water bearing at the site is inadmissible; CLI-21-4, 93 NRC 119 (2021)
- IMMEDIATE EFFECTIVENESS
  - based on a finding of deliberate misconduct, NRC Staff may make an enforcement order immediately effective; CLI-21-3, 93 NRC 89 (2021)
  - issuance of license amendment on an immediately effective basis is permitted on a determination that the amendment involves no significant hazards consideration, notwithstanding the pendency of a hearing request; CLI-21-1, 93 NRC 1 (2021)
  - NRC Staff cannot base immediate effectiveness of enforcement order on mere suspicion, unfounded allegations, or error; CLI-21-3, 93 NRC 89 (2021)
  - NRC Staff must provide evidence to show a violation of the Deliberate Misconduct Rule; CLI-21-3, 93 NRC 89 (2021)
  - target of enforcement order may challenge the immediate effectiveness of the order by producing evidence that the order is based on mere suspicion, unfounded allegations, or error; CLI-21-3, 93 NRC 89 (2021)
- IMMEDIATE EFFECTIVENESS REVIEW
  - board decision to stay immediate effectiveness of NRC Staff's enforcement order is automatically referred to the Commission for review and has no effect pending further order of the Commission; CLI-21-3, 93 NRC 89 (2021)
  - NRC Staff bears the burden of persuading the board that adequate evidence supports the grounds for the immediately effective order and immediate effectiveness is warranted; CLI-21-3, 93 NRC 89 (2021)
- INCORPORATION BY REFERENCE
  - challenge to environmental report's incorporation by reference to 2013 Revised GEIS regarding impact of design-basis and severe accidents as part of the basis for a contention fails to establish a material factual dispute; LBP-21-4, 93 NRC 179 (2021)
- INDEPENDENT SPENT FUEL STORAGE INSTALLATION
  - contention that applicant did not support its claim in the environmental report that shallow alluvium is likely non-water bearing at the site is inadmissible; CLI-21-4, 93 NRC 119 (2021)
  - if licensee cannot restrict mineral development, it cannot satisfy Part 72 siting evaluation factors; CLI-21-7, 93 NRC 215 (2021)
- INDEPENDENT SPENT FUEL STORAGE INSTALLATION PROCEEDINGS
  - contention that application fails to consider cumulative impacts of transporting high-level radioactive waste and spent nuclear fuel to and the socioeconomic benefits of the proposed project is inadmissible; LBP-21-2, 93 NRC 104 (2021)
  - contention that ISFSI application fails to describe control of subsurface mineral rights and oil and gas and mineral extraction operations in beneath and the vicinity of proposed site is inadmissible; CLI-21-7, 93 NRC 215 (2021)
  - evaluation of costs of emergency response and infrastructure upgrades is not within the scope of a Part 72 proceeding; LBP-21-2, 93 NRC 104 (2021)
  - new contention that poses concerns about national economics, security, and regional employment doesn't explain how ISFSI poses exceptionally grave impacts; CLI-21-7, 93 NRC 215 (2021)
  - new contention that poses concerns about sinkholes, subsidence, or seismicity doesn't provide information that is materially different from information already considered by NRC Staff in the DEIS; CLI-21-7, 93 NRC 215 (2021)



## SUBJECT INDEX

### INJURY IN FACT

government action labeling an individual's showing of films as political propaganda caused risk of injury to his/her reputation that was traceable to the government's action; LBP-21-3, 93 NRC 153 (2021)

harm to a judge's reputation from a public reprimand for misconduct was a sufficient injury for him to establish standing; LBP-21-3, 93 NRC 153 (2021)

petitioner must show that the alleged injury would be fairly caused by the proposed licensing action and is capable of being redressed by a favorable decision; CLI-21-1, 93 NRC 1 (2021)

reputational injury that derives directly from government action will support Article III standing to challenge that action; LBP-21-3, 93 NRC 153 (2021)

### INTENT

retaliation against an employee for protected activities is, by its nature, an intentional act; CLI-21-3, 93 NRC 89 (2021)

### INTEREST

nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding is considered for discretionary intervention; LBP-21-3, 93 NRC 153 (2021)

### INTERPRETATION

hearing request is construed in petitioner's favor, but petitioner has the burden of demonstrating that the standing requirements are met; LBP-21-4, 93 NRC 179 (2021)

### INTERVENTION

NRC's contention admissibility requirements are not intended to be a fortress to deny intervention; LBP-21-2, 93 NRC 104 (2021)

persons should not be routinely admitted as parties to hearings on enforcement orders when they are not, themselves, subjected to any penalty; LBP-21-3, 93 NRC 153 (2021)

### INTERVENTION, DISCRETIONARY

availability of other means whereby requestor's/petitioner's interest will be protected is considered; LBP-21-3, 93 NRC 153 (2021)

discretionary intervention is an extraordinary procedure; LBP-21-3, 93 NRC 153 (2021)

discretionary intervention is permitted only when justified by a six-factor analysis; LBP-21-3, 93 NRC 153 (2021)

exceptionally grave issue may be considered at the discretion of the presiding officer even if untimely presented; LBP-21-2, 93 NRC 104 (2021)

extent to which requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record is both the first and most important factor in discretionary intervention; LBP-21-3, 93 NRC 153 (2021)

extent to which the requestor's/petitioner's interest will be represented by existing parties is considered; LBP-21-3, 93 NRC 153 (2021)

extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding is considered; LBP-21-3, 93 NRC 153 (2021)

nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding are considered; LBP-21-3, 93 NRC 153 (2021)

petitioners ought to contribute on substantial issues of law or fact that will not otherwise be properly raised or presented; LBP-21-3, 93 NRC 153 (2021)

request for discretionary intervention has never been granted in an enforcement proceeding; LBP-21-3, 93 NRC 153 (2021)

### INTERVENTION PETITIONS

hearing request is construed in petitioner's favor, but petitioner has the burden of demonstrating that the standing requirements are met; LBP-21-4, 93 NRC 179 (2021)

NRC will grant a hearing to a petitioner who both demonstrates standing and offers at least one contention that meets the admissibility standards; CLI-21-1, 93 NRC 1 (2021); CLI-21-2, 93 NRC 70 (2021); CLI-21-5, 93 NRC 131 (2021)

petition shall include a statement of the facts supporting each contention together with references to the sources and documents on which intervenor relies to establish those facts; CLI-21-5, 93 NRC 131 (2021)

petitioner must identify specific disputed portions of the application or missing information required by law and provide supporting reasons for petitioner's belief; CLI-21-2, 93 NRC 70 (2021)

## SUBJECT INDEX

petitioner must show an interest in a proceeding and put forward concrete issues that are appropriate for adjudication; CLI-21-5, 93 NRC 131 (2021)

### INTERVENTION RULINGS

Commission generally defers to boards on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion; CLI-21-5, 93 NRC 131 (2021)  
even if petitioners' standing has not been contested, an independent board determination is required about whether each has fulfilled the requirements to establish standing to intervene; LBP-21-4, 93 NRC 179 (2021)

role of the board is to determine whether petitioner has submitted an admissible contention; CLI-21-5, 93 NRC 131 (2021)

### LICENSE AMENDMENTS

decommissioning trust-related exemption that is completely dependent on the license-amendment request cannot take effect unless NRC approves the license transfer application; CLI-21-1, 93 NRC 1 (2021)  
if a licensee contemplates performing a decommissioning activity with impacts not enveloped by previous environmental impact analyses, licensee must submit a license amendment request with a supplemental environmental report evaluating the additional impacts; CLI-21-1, 93 NRC 1 (2021)

issuance on an immediately effective basis is permitted on a determination that the amendment involves no significant hazards consideration, notwithstanding the pendency of a hearing request; CLI-21-1, 93 NRC 1 (2021)

NRC Staff may grant an exemption while its review of licensee's amendment request is still pending; CLI-21-1, 93 NRC 1 (2021)

See also Operating License Amendment Proceedings

### LICENSE APPLICATIONS

applicant does not require board approval to update its application; CLI-21-9, 93 NRC 244 (2021)

NRC follows a dynamic licensing process that allows an application to be modified or improved as NRC Staff goes forward; CLI-21-7, 93 NRC 215 (2021)

NRC Staff, not the board, determines whether an application is accepted for review, and the board does not supervise Staff's review; CLI-21-7, 93 NRC 215 (2021)

### LICENSE TERMINATION PLANS

licensee must submit its license termination plan at least 2 years before its proposed license termination date, which must include updated cost estimates for remaining decommissioning activities; CLI-21-1, 93 NRC 1 (2021)

licensee need not provide site characterization results to NRC until it submits its license termination plan; CLI-21-1, 93 NRC 1 (2021)

site characterization is to be submitted with the license termination plan at least 2 years before termination of the license; CLI-21-1, 93 NRC 1 (2021); CLI-21-2, 93 NRC 70 (2021)

### LICENSE TRANSFER APPLICATIONS

applicant is not prohibited from relying on anticipated funding sources as a means of establishing its financial qualifications; CLI-21-1, 93 NRC 1 (2021)

applicant must include information on identity and technical and financial qualifications of a proposed licensee transferee as would be required if the application were for an initial license; CLI-21-2, 93 NRC 70 (2021)

applicant must provide information sufficient to demonstrate the financial qualification of applicant to carry out the activities; CLI-21-2, 93 NRC 70 (2021)

applicant must provide reasonable assurance that sufficient funds will be available to decommission the facility and carry out activities under the license; CLI-21-1, 93 NRC 1 (2021); CLI-21-2, 93 NRC 70 (2021)

application will lack NRC's final approval until and unless the Commission concludes the adjudication in applicants' favor; CLI-21-1, 93 NRC 1 (2021)

decommissioning trust-related exemption that is completely dependent on the license-amendment request cannot take effect unless NRC approves the license transfer application; CLI-21-1, 93 NRC 1 (2021)

NRC Staff may issue its approval or denial of a license transfer application, consistent with its findings in its Safety Evaluation Report, during a pending adjudicatory proceeding; CLI-21-1, 93 NRC 1 (2021)

special circumstances must exist to render categorical exclusion of license transfer applications from an environmental review inapplicable; CLI-21-1, 93 NRC 1 (2021)

## SUBJECT INDEX

- to show special circumstances exist warranting departure from the categorical exclusion for license transfers, petitioners must request a waiver of section 51.22(c)(1); CLI-21-1, 93 NRC 1 (2021)
- LICENSE TRANSFER PROCEEDINGS**
- applicant's financial assurance estimates will be acceptable if they are grounded in assumptions and forecasts that were plausible when the estimates were submitted; CLI-21-1, 93 NRC 1 (2021)
- application will lack NRC's final approval until and unless the Commission concludes the adjudication in applicants' favor; CLI-21-1, 93 NRC 1 (2021)
- claim that license transfer applicant is required to more fully characterize the site to inform its cost estimates does not raise a material dispute with the application; CLI-21-1, 93 NRC 1 (2021)
- contention that license transfer applicant's decommissioning cost estimates are based on untenable assumptions does not raise a genuine dispute with the application; CLI-21-1, 93 NRC 1 (2021)
- legal disputes with local permitting authority raise a material issue within the scope of a license transfer proceeding; CLI-21-1, 93 NRC 1 (2021)
- licensee's request for an exemption to use trust funds for non-decommissioning purposes was outside the scope of the proceeding; CLI-21-1, 93 NRC 1 (2021)
- motion for a waiver of 10 C.F.R. 2.1316(a) is, in effect, a request for a preemptive stay of NRC Staff's licensing decision, which regulations do not contemplate; CLI-21-1, 93 NRC 1 (2021)
- NRC Staff is not required to participate in a license transfer proceeding; CLI-21-1, 93 NRC 1 (2021)
- LICENSE TRANSFERS**
- application to stay a license transfer must be filed within 5 days of the notice of the Staff action and must meet the remaining requirements in 10 C.F.R. 2.132; CLI-21-8, 93 NRC 237 (2021)
- if NRC approves a license transfer application, transferee will need to submit decommissioning-funding status reports annually; CLI-21-1, 93 NRC 1 (2021)
- level of financial assurance required of license transferees for decommissioning is not equivalent to the extremely high assurance required for the safety of reactor design, construction, and operation; CLI-21-2, 93 NRC 70 (2021)
- license transfer review is limited to specific matters, including financial and technical qualifications of the proposed transferee; CLI-21-1, 93 NRC 1 (2021)
- no power reactor or ISFSI license can be transferred without NRC's prior written consent; CLI-21-1, 93 NRC 1 (2021); CLI-21-2, 93 NRC 70 (2021)
- NRC regulations provide the opportunity to stay a license transfer; CLI-21-8, 93 NRC 237 (2021)
- NRC review of licensee transferees financial ability to decommission a facility on the site does not end after approval of the transfer; CLI-21-2, 93 NRC 70 (2021)
- prospective licensee must be financially qualified to carry out its proposed activities and provide financial assurance to cover estimated decommissioning costs; CLI-21-1, 93 NRC 1 (2021)
- transfer cannot be completed unless proposed transferees have provided financial assurance that is adequate to cover decommissioning activities at the site; CLI-21-1, 93 NRC 1 (2021)
- transfer will be approved if NRC determines that the proposed transferee is qualified to hold the license and that the proposed transfer is consistent with applicable law, regulations, and orders; CLI-21-2, 93 NRC 70 (2021)
- LICENSEE CHARACTER**
- claim of deficient character must have some direct and obvious relationship between character issues and the licensing action in dispute; CLI-21-1, 93 NRC 1 (2021)
- LICENSEE EMPLOYEES**
- actions taken by an employer, or others, that adversely affect an employee may be predicated on nondiscriminatory grounds; LBP-21-3, 93 NRC 153 (2021)
- discrimination by a licensee against an employee for raising nuclear safety concerns, participating in proceedings for the administration or enforcement of requirements under the Atomic Energy Act or Energy Reorganization Act, or engaging in certain other protected activities is prohibited; CLI-21-3, 93 NRC 89 (2021)
- employee engages in deliberate misconduct when he plays a significant role in the decisionmaking process that leads to adverse employment actions; CLI-21-3, 93 NRC 89 (2021)
- employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations; LBP-21-3, 93 NRC 153 (2021)

## SUBJECT INDEX

NRC licensees are prohibited from discriminating against employees who raise safety concerns; LBP-21-3, 93 NRC 153 (2021)

section 50.7(a) provisions do not contemplate protection of employees who only raise concerns about an unprofessional or hostile work environment; LBP-21-3, 93 NRC 153 (2021)

### LICENSEES

those who authorize a defense for licensees who are the subjects of civil penalties are protected from retaliation; LBP-21-3, 93 NRC 153 (2021)

### LICENSING BOARDS, AUTHORITY

boards exist only for the purposes specified in AEA section 191; LBP-21-3, 93 NRC 153 (2021)

boards should not make arguments for the litigants that were never made by the litigants themselves; LBP-21-3, 93 NRC 153 (2021)

exceptionally grave issue may be considered at the discretion of the presiding officer even if untimely presented; LBP-21-2, 93 NRC 104 (2021)

licensing board cannot supply missing information supporting a contention; LBP-21-4, 93 NRC 179 (2021)

NRC Staff, not the board, determines whether an application is accepted for review, and the board does not supervise Staff's review; CLI-21-7, 93 NRC 215 (2021)

role of the board is to determine whether petitioner has submitted an admissible contention; CLI-21-5, 93 NRC 131 (2021)

### LICENSING BOARDS, JURISDICTION

after the board dismisses the last pending contention, jurisdiction over the matter, including jurisdiction over motions to reopen, passes to the Commission; CLI-21-7, 93 NRC 215 (2021)

### MANAGEMENT CHARACTER AND COMPETENCE

absent strong support for a claim that difficulties at other plants run by a corporate parent will affect the plant(s) at issue, Commission is unwilling to use its hearing process for a wide-ranging inquiry into the corporate parent's general activities across the country; CLI-21-1, 93 NRC 1 (2021)

admissible contentions challenging management character or integrity have generally been based on activities of high-ranking officers or directors of the licensed organization who would have some direct authority over the activities authorized by the license; CLI-21-1, 93 NRC 1 (2021)

contention challenging character or integrity of a licensee's managers may be admissible in specific circumstances but strict limits on such contentions have been imposed; CLI-21-1, 93 NRC 1 (2021)

previously corrected inadequacies of prior management, who no longer are responsible for licensed activities, are not probative of the integrity of current company management; CLI-21-1, 93 NRC 1 (2021)

See also Licensee Character

### MATERIAL INFORMATION

to show that a dispute is material, petitioner must show that its resolution would make a difference in the outcome of the proceeding; LBP-21-2, 93 NRC 104 (2021)

### MATERIALITY

admissible contention must demonstrate that the issue is material to the findings the NRC must make to support the action involved in the proceeding; LBP-21-2, 93 NRC 104 (2021)

### MINING ACTIVITIES

contention that ISFSI application fails to describe control of subsurface mineral rights and oil and gas and mineral extraction operations beneath and in the vicinity of proposed site is inadmissible; CLI-21-7, 93 NRC 215 (2021)

contention that project will interfere with mineral development and that mineral development cannot proceed safely alongside the ISFSI is inadmissible; CLI-21-7, 93 NRC 215 (2021)

if licensee cannot restrict mineral development, it cannot satisfy Part 72 siting evaluation factors; CLI-21-7, 93 NRC 215 (2021)

under New Mexico law, the surface estate is subordinate to the mineral estate; CLI-21-7, 93 NRC 215 (2021)

### MOOTNESS

NRC Staff's rescission of enforcement order renders the case moot; LBP-21-1, 93 NRC 101 (2021)

when vacating for mootness, Commission neither approves nor disapproves a board's ruling; CLI-21-1, 93 NRC 1 (2021)

## SUBJECT INDEX

### MOTIONS TO REOPEN

affidavit accompanying motion to reopen must set forth factual or technical bases for the claim that reopening criteria have been met; CLI-21-8, 93 NRC 237 (2021)

after an adjudication has been terminated, but before a final decision is rendered, petitioners may raise new issues through a motion to reopen; CLI-21-8, 93 NRC 237 (2021)

after the board dismisses the last pending contention, jurisdiction over the matter, including over motions to reopen, passes to the Commission; CLI-21-7, 93 NRC 215 (2021)

Commission often refers motions to reopen to the board, but will rule on them where appropriate; CLI-21-6, 93 NRC 145 (2021); CLI-21-7, 93 NRC 215 (2021)

evidence in any affidavit accompanying a motion to reopen must be of such quality as to be admissible in an evidentiary hearing; LBP-21-2, 93 NRC 104 (2021)

evidentiary support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements; CLI-21-6, 93 NRC 145 (2021)

exceptionally grave issue may be considered in the discretion of the presiding officer even if motion to reopen is untimely; CLI-21-8, 93 NRC 237 (2021); CLI-21-9, 93 NRC 244 (2021)

failure to satisfy either the requirements for reopening a closed record or for proffering a contention out of time requires rejection of the contention; LBP-21-2, 93 NRC 104 (2021)

motion must be accompanied by affidavits setting forth bases for movant's claim; CLI-21-4, 93 NRC 119 (2021)

motion must be timely, address a significant safety or environmental issue, and demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially; CLI-21-4, 93 NRC 119 (2021); CLI-21-6, 93 NRC 145 (2021); CLI-21-8, 93 NRC 237 (2021); CLI-21-9, 93 NRC 244 (2021)

petitioner must satisfy the standards for reopening, contention admissibility, and admitting new contentions filed after the deadline; CLI-21-7, 93 NRC 215 (2021); CLI-21-9, 93 NRC 244 (2021)

reply to answer to motion to reopen is not allowed except where expressly permitted by the Secretary or presiding officer; CLI-21-7, 93 NRC 215 (2021)

supporting affidavit must be from either competent individuals with knowledge of the facts alleged or experts in the disciplines appropriate to the issues raised; CLI-21-6, 93 NRC 145 (2021); LBP-21-2, 93 NRC 104 (2021)

See also Reopening a Record

### NATIONAL ENVIRONMENTAL POLICY ACT

NEPA does not call for certainty or precision, but an estimate of anticipated (not unduly speculative) impacts; CLI-21-7, 93 NRC 215 (2021)

### NO SIGNIFICANT HAZARDS DETERMINATION

determination can only be made by the NRC Staff or the Commission and cannot be challenged in an adjudicatory proceeding; CLI-21-5, 93 NRC 131 (2021)

issuance of license amendment on an immediately effective basis is permitted on a determination that the amendment involves no significant hazards consideration, notwithstanding the pendency of a hearing request; CLI-21-1, 93 NRC 1 (2021)

### NONPARTIES

petitioner denied party status can ask to file an amicus brief, without being a party, or request permission to submit a written or oral limited appearance statement; LBP-21-3, 93 NRC 153 (2021)

### NOTICE OF VIOLATION

hearing opportunities are not provided; LBP-21-3, 93 NRC 153 (2021)

NRC Staff may issue a notice for deliberate misconduct; LBP-21-3, 93 NRC 153 (2021)

### NOTICE PLEADING

although petitioner need not prove its contention at the admission stage, mere notice pleading is insufficient; LBP-21-2, 93 NRC 104 (2021)

### NRC POLICY

petitioner may not demand an adjudicatory hearing to express generalized grievances about NRC policies; CLI-21-1, 93 NRC 1 (2021)

### NRC PROCEEDINGS

agency within a reasonable time shall set and complete proceedings required to be conducted and shall make its decision; CLI-21-8, 93 NRC 237 (2021)

## SUBJECT INDEX

See also Abeyance of Proceeding; Delay of Proceeding; Enforcement Proceedings; Independent Spent Fuel Storage Installation Proceedings; License Transfer Proceedings; Operating License Amendment Proceedings; Pendency of Proceedings; Subsequent Operating License Renewal Proceedings

### NRC REVIEW

review of licensee transferees financial ability to decommission a facility on the site does not end after approval of the transfer; CLI-21-2, 93 NRC 70 (2021)

review of licensee's financial qualifications are not limited to factors such as revenue, gross income, or net worth; CLI-21-1, 93 NRC 1 (2021)

### NRC STAFF

Staff bears the burden of persuading the board that adequate evidence supports the grounds for the immediately effective order and immediate effectiveness is warranted; CLI-21-3, 93 NRC 89 (2021)

Staff is not required to participate in a license transfer proceeding; CLI-21-1, 93 NRC 1 (2021)

Staff, not the board, determines whether an application is accepted for review, and the board does not supervise Staff's review; CLI-21-7, 93 NRC 215 (2021)

See also Discovery Against NRC Staff

### NRC STAFF REVIEW

claims that NRC Staff did not conduct an independent investigation of matters discussed in the DEIS but relied too much on information in the application is inadmissible; CLI-21-7, 93 NRC 215 (2021)

license transfer review is limited to specific matters, including financial and technical qualifications of the proposed transferee license; CLI-21-1, 93 NRC 1 (2021)

no significant hazards consideration determination can only be made by NRC Staff or the Commission and cannot be challenged in an adjudicatory proceeding; CLI-21-5, 93 NRC 131 (2021)

NRC follows a dynamic licensing process that allows an application to be modified or improved as NRC Staff goes forward; CLI-21-7, 93 NRC 215 (2021)

Staff may grant an exemption while its review of licensee's amendment request is still pending; CLI-21-1, 93 NRC 1 (2021)

Staff must conduct its hard-look licensing review of the environmental report to assess whether new and significant information exists that requires additional consideration; LBP-21-4, 93 NRC 179 (2021)

Staff must consider whether any information provided by public comments as part of the environment review process merits further analysis as new and significant information; LBP-21-4, 93 NRC 179 (2021)

Staff's environmental analysis appropriately discusses reasonable outcomes, rather than theoretical possibilities; CLI-21-7, 93 NRC 215 (2021)

### NUCLEAR REGULATORY COMMISSION, AUTHORITY

agencies have broad authority to formulate their own procedures and NRC's authority in this respect has been termed particularly great; LBP-21-3, 93 NRC 153 (2021)

Commission has flexibility in determining standing and may use somewhat more- or less-restrictive criteria than courts, but those criteria must still be reasoned based on the facts of the case; LBP-21-3, 93 NRC 153 (2021)

determination about whether criteria for rule waiver have been fulfilled is the sole province of the Commission; LBP-21-4, 93 NRC 179 (2021)

NRC can permissibly deny a hearing request of a petitioner who satisfies Article III standing requirements provided the Commission's interpretation of its jurisdictional statute, 42 U.S.C. § 2239(a)(1)(A), is reasonable; LBP-21-3, 93 NRC 153 (2021)

NRC could effectively require license transferees to apply a portion of recoveries from DOE to cover estimated decommissioning costs; CLI-21-1, 93 NRC 1 (2021)

### NUCLEAR REGULATORY COMMISSION, JURISDICTION

after the board dismisses the last pending contention, jurisdiction over the matter, including jurisdiction over motions to reopen, passes to the Commission; CLI-21-7, 93 NRC 215 (2021)

Commission no longer retains jurisdiction to consider further adjudicatory filings after NRC Staff issues the action provided for in the notice of opportunity for hearing and the Commission issues its final adjudicatory decision; CLI-21-8, 93 NRC 237 (2021)

Commission often refers motions to reopen to the board, but will rule on them where appropriate; CLI-21-6, 93 NRC 145 (2021); CLI-21-7, 93 NRC 215 (2021)

## SUBJECT INDEX

### OPERATING LICENSE AMENDMENT PROCEEDINGS

argument that there is the potential for a significant increase in the probability or consequences of an accident previously evaluated if the license amendment request is granted is inadmissible; CLI-21-5, 93 NRC 131 (2021)

### OPERATIONS

if power reactor operations have permanently ceased prior to a proposed license transfer, applicants need not demonstrate financial qualifications to cover reactor operating costs; CLI-21-1, 93 NRC 1 (2021)

### OPINIONS

expert opinion that merely states a conclusion, without providing a reasoned basis or explanation for that conclusion, is not enough to support admitting a contention; CLI-21-1, 93 NRC 1 (2021)

### ORAL ARGUMENT

participants do not have a right to oral argument on contention admissibility; CLI-21-7, 93 NRC 215 (2021)

### PENDENCY OF PROCEEDINGS

issuance of license amendment on an immediately effective basis is permitted on a determination that the amendment involves no significant hazards consideration, notwithstanding pendency of a hearing request; CLI-21-1, 93 NRC 1 (2021)

NRC Staff may issue its approval or denial of a license transfer application, consistent with its findings in its Safety Evaluation Report, during a pending adjudicatory proceeding; CLI-21-1, 93 NRC 1 (2021)

### PERMITS

legal disputes with local permitting authority raise a material issue within the scope of a license transfer proceeding; CLI-21-1, 93 NRC 1 (2021)

new certification is required for any license or permit that authorizes an activity that may result in a discharge; CLI-21-8, 93 NRC 237 (2021)

### POLICY STATEMENTS

agencys preclusion of severe accident mitigation design alternative NEPA analysis pursuant to a policy statement was improper; LBP-21-4, 93 NRC 179 (2021)

See also NRC Policy

### POST-SHUTDOWN DECOMMISSIONING ACTIVITIES REPORT

claim that PSDAR does not comply with requirements because it does not address reasonably foreseeable potential impacts of climate change on spent fuel management is inadmissible; CLI-21-1, 93 NRC 1 (2021)

contention that PSDAR and cost estimate fail to account for the likely existence of greater contamination at the site than that for which the decommissioning cost estimate currently accounts is inadmissible; CLI-21-2, 93 NRC 70 (2021)

licensee must provide its reasons for concluding that the environmental impacts associated with planned decommissioning activities are bounded by previously issued, relevant site-specific or generic environmental impact statements; CLI-21-1, 93 NRC 1 (2021)

PSDAR does not amend the NRC license and is not a major federal action subject to NEPA review; CLI-21-1, 93 NRC 1 (2021)

PSDAR does not and cannot authorize any decommissioning activities that would result in environmental impacts that exceed those previously determined; CLI-21-1, 93 NRC 1 (2021)

### PRECEDENTIAL EFFECT

NRC must follow precedents on question of applicability of 10 C.F.R. 51.53(c) to subsequent license renewal; LBP-21-4, 93 NRC 179 (2021)

unreviewed Board decision do not constitute binding precedent on other boards; CLI-21-7, 93 NRC 215 (2021)

### PRIMA FACIE SHOWING

within the meaning of section 2.335(d), prima facie showing is one that is legally sufficient to establish a fact or case unless disproved; LBP-21-4, 93 NRC 179 (2021)

### PROTECTED ACTIVITY

discrimination by a licensee against an employee for raising nuclear safety concerns, participating in proceedings for the administration or enforcement of requirements under the Atomic Energy Act or Energy Reorganization Act, or engaging in certain other protected activities is prohibited; CLI-21-3, 93 NRC 89 (2021)

## SUBJECT INDEX

- employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations; LBP-21-3, 93 NRC 153 (2021)
- licensee may not discriminate against an employee for engaging in protected activity; LBP-21-3, 93 NRC 153 (2021)
- section 50.7(a) provisions do not contemplate protection of employees who only raise concerns about an unprofessional or hostile work environment; LBP-21-3, 93 NRC 153 (2021)
- those who authorize a defense for licensees who are the subjects of civil penalties are protected from retaliation; LBP-21-3, 93 NRC 153 (2021)
- PROXIMITY PRESUMPTION**
- petitioners are excused from making a specific showing of injury in fact so long as they reside, work, or otherwise have regular contacts within a 50-mile radius of the facility; LBP-21-4, 93 NRC 179 (2021)
- PUBLIC COMMENT**
- consideration of the comments on the DEIS showing public opposition to the ISFSI would not result in a materially different result to the proceeding, as required by the reopening standards; CLI-21-7, 93 NRC 215 (2021)
- NRC Staff must consider whether any information provided by public comments as part of the environment review process merits further analysis as new and significant information; LBP-21-4, 93 NRC 179 (2021)
- PUBLIC HEALTH**
- contention that decommissioning trust fund is inadequate and has likely lost value because COVID-19 public health emergency has caused a steep decline in the securities market is inadmissible; CLI-21-2, 93 NRC 70 (2021)
- QUALIFICATIONS**
- See Financial Qualifications; Technical Qualifications
- RADIOACTIVE RELEASES**
- radiological impacts that do not exceed permissible levels in the Commission's regulations are considered small as the term is used in Part 51, Subpart A, Appendix B, tbl. B-1; LBP-21-4, 93 NRC 179 (2021)
- RADIOACTIVE WASTE DISPOSAL**
- if future legal developments call into question applicant's cost estimates for spent-fuel management or waste disposal, applicant will need to notify NRC; CLI-21-1, 93 NRC 1 (2021)
- standard contract establishes terms and conditions under which DOE will make available nuclear waste disposal services to the owners and generators of spent nuclear fuel and high-level radioactive waste; CLI-21-1, 93 NRC 1 (2021)
- RADIOLOGICAL CONTAMINATION**
- contention that PSDAR and cost estimate fail to account for likely existence of greater contamination at the site than that for which the decommissioning cost estimate currently accounts is inadmissible; CLI-21-2, 93 NRC 70 (2021)
- if discovery of significant new contamination affects licensee's ability to either complete decommissioning or safely manage spent fuel, licensee will need to provide additional financial assurance; CLI-21-1, 93 NRC 1 (2021)
- REASONABLE ASSURANCE**
- license transfer applicant must provide reasonable assurance that sufficient funds will be available to decommission the facility and carry out activities under the license; CLI-21-1, 93 NRC 1 (2021); CLI-21-2, 93 NRC 70 (2021)
- mere casting of doubt on some aspects of proposed decommissioning funding plans is not by itself sufficient to defeat a finding of reasonable assurance; CLI-21-2, 93 NRC 70 (2021)
- REDRESSABILITY**
- petitioner must show that the alleged injury would be caused by the proposed licensing action and is capable of being redressed by a favorable decision; CLI-21-1, 93 NRC 1 (2021)
- where injury could be redressed by enjoining the government's action, the reputational harm was sufficient to establish standing to contest the action; LBP-21-3, 93 NRC 153 (2021)



## SUBJECT INDEX

### REFERRAL OF RULING

board decision to stay immediate effectiveness of NRC Staff's enforcement order is automatically referred to the Commission for review and has no effect pending further order of the Commission; CLI-21-3, 93 NRC 89 (2021)

### REGULATIONS, INTERPRETATION

because 10 C.F.R. 50.75(e)(1)(i) refers to a real rate of return, as opposed to a nominal rate, licensee must adjust the rate for inflation; CLI-21-1, 93 NRC 1 (2021)

section 50.82(a)(8)(i)(B) applies to withdrawals from the decommissioning trust fund, not to applicant's cost estimates; CLI-21-1, 93 NRC 1 (2021)

section 72.30(b) applies only to decommissioning independent spent fuel storage installation; CLI-21-2, 93 NRC 70 (2021)

### REOPENING A RECORD

Commission considers reopening the record for any reason to be an extraordinary action; LBP-21-2, 93 NRC 104 (2021)

consideration of the comments on the DEIS showing public opposition to the ISFSI would not result in a materially different result to the proceeding, as required by the reopening standards; CLI-21-7, 93 NRC 215 (2021)

exceptionally grave issue may be considered at the discretion of the presiding officer even if untimely presented; LBP-21-2, 93 NRC 104 (2021)

intentionally heavy burden is placed on parties seeking to reopen the record; LBP-21-2, 93 NRC 104 (2021)

petitioner must file a motion that demonstrates its new contention is timely, addresses a significant safety or environmental issue, and would produce a materially different result; LBP-21-2, 93 NRC 104 (2021)

standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention; LBP-21-2, 93 NRC 104 (2021)

See also Motions to Reopen

### REPLY BRIEFS

board will not entertain arguments advanced for the first time in a reply brief; LBP-21-2, 93 NRC 104 (2021); LBP-21-3, 93 NRC 153 (2021)

### REPLY TO ANSWER TO MOTION

appellant has no right of reply to the answer to its motion; CLI-21-6, 93 NRC 145 (2021)

reply is not allowed except where expressly permitted by the Secretary or presiding officer; CLI-21-7, 93 NRC 215 (2021)

### REPORTING REQUIREMENTS

delays in the decommissioning schedule that increase costs would be captured in licensee's annual financial assurance status reports; CLI-21-2, 93 NRC 70 (2021)

financial assurance requirements for annual status reports that licensee must provide do not apply to licensee's initial estimates of decommissioning funding needs in its PSDAR; CLI-21-1, 93 NRC 1 (2021)

if future legal developments call into question applicant's cost estimates for spent-fuel management or waste disposal, applicant will need to notify NRC; CLI-21-1, 93 NRC 1 (2021)

if NRC approves a license transfer application, transferee will need to submit decommissioning-funding status reports annually; CLI-21-1, 93 NRC 1 (2021)

licensee must, in its annual financial assurance status report, include additional financial assurance to cover estimated cost of completion; CLI-21-1, 93 NRC 1 (2021)

licensee responsible for ensuring safe loading and movement of spent-fuel canister in its facility must make required report; CLI-21-1, 93 NRC 1 (2021)

NRC requires a decommissioning licensee to file annual status reports, which NRC can use to monitor withdrawals from the trust fund; CLI-21-1, 93 NRC 1 (2021)

### REPUTATION

Court's determination that an attorney had violated Canons of Ethics plainly reflects adversely on his professional reputation; LBP-21-3, 93 NRC 153 (2021)

good reputation is not an interest that is protected by the Atomic Energy Act and NRC is bound to follow precedents; LBP-21-3, 93 NRC 153 (2021)

## SUBJECT INDEX

government action labeling an individual's showing of films as political propaganda caused risk of injury to his/her reputation that was traceable to the government's action; LBP-21-3, 93 NRC 153 (2021)

harm to a judge's reputation from a public reprimand for misconduct was a sufficient injury for him to establish standing; LBP-21-3, 93 NRC 153 (2021)

reputational injury that derives directly from government action will support Article III standing to challenge that action; LBP-21-3, 93 NRC 153 (2021)

where injury could be redressed by enjoining the government's action, the reputational harm was sufficient to establish standing to contest the action; LBP-21-3, 93 NRC 153 (2021)

### REQUEST FOR ACTION

available avenue to raise new concerns after the Commission issues its final adjudicatory decision is through a request for enforcement action; CLI-21-8, 93 NRC 237 (2021)

hearing opportunities are not provided; LBP-21-3, 93 NRC 153 (2021)

to assert that impacts of planned decommissioning, site restoration, and spent fuel management activities exceed those referenced in the PSDAR, a petition for enforcement action may be filed; CLI-21-1, 93 NRC 1 (2021)

### REQUEST FOR ADDITIONAL INFORMATION

petitioners must do more than rest on the mere existence of requests for additional information as the basis for their contention; CLI-21-7, 93 NRC 215 (2021)

### REVIEW

See Appellate Review; Environmental Review; Financial Qualifications Review; Immediate Effectiveness Review; NRC Review; NRC Staff Review; Standard of Review

### REVIEW, DISCRETIONARY

filing that is not associated with initial hearing request is treated it as a petition for discretionary review and not an appeal as of right; CLI-21-9, 93 NRC 244 (2021)

### RULES OF PRACTICE

admissible contention must have factual support, be within the scope of the proceeding, raise a matter material to the findings the NRC must make in deciding whether to grant the license, and raise a genuine dispute with the application; CLI-21-1, 93 NRC 1 (2021); CLI-21-2, 93 NRC 70 (2021); CLI-21-4, 93 NRC 119 (2021)

admissible contention must include references to specific portions of the disputed document and the supporting reasons for each dispute; LBP-21-2, 93 NRC 104 (2021)

admissible contention must provide sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact; LBP-21-2, 93 NRC 104 (2021)

admissible contentions must meet six pleading requirements; CLI-21-7, 93 NRC 215 (2021)

agencies have broad authority to formulate their own procedures and NRC's authority in this respect has been termed particularly great; LBP-21-3, 93 NRC 153 (2021)

availability of other means whereby requestor's/petitioner's interest will be protected is considered for discretionary intervention; LBP-21-3, 93 NRC 153 (2021)

available avenue to raise new concerns after the Commission issues its final adjudicatory decision is through a request for enforcement action; CLI-21-8, 93 NRC 237 (2021)

based on a finding of deliberate misconduct, NRC Staff may make an enforcement order immediately effective; CLI-21-3, 93 NRC 89 (2021)

challenges to NRC regulations during adjudicatory proceedings are not permitted absent a waiver; CLI-21-5, 93 NRC 131 (2021)

claim that a document fails to contain relevant information that is legally required must identify each such alleged failure and the reason why the missing information is needed; LBP-21-2, 93 NRC 104 (2021)

contention admissibility requirements are intended to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-21-2, 93 NRC 104 (2021)

contention admissibility requirements are not intended to be a fortress to deny intervention; LBP-21-2, 93 NRC 104 (2021)

contention admissibility requirements are strict by design; LBP-21-2, 93 NRC 104 (2021)

discretionary intervention is considered an extraordinary procedure and is permitted only when justified by a six-factor analysis; LBP-21-3, 93 NRC 153 (2021)

## SUBJECT INDEX

exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented; CLI-21-9, 93 NRC 244 (2021)

extent to which petitioner's interest will be represented by existing parties is considered for discretionary intervention; LBP-21-3, 93 NRC 153 (2021)

extent to which petitioner's participation may reasonably be expected to assist in developing a sound record is both the first and most important factor in discretionary intervention; LBP-21-3, 93 NRC 153 (2021)

extent to which petitioner's participation will inappropriately broaden the issues or delay the proceeding is considered for discretionary intervention; LBP-21-3, 93 NRC 153 (2021)

for a new contention to be admissible after the deadline for initial intervention petitions has passed, petitioner must show that information supporting the contention differs materially from information that was previously available; CLI-21-1, 93 NRC 1 (2021)

for an issue within the scope of a proceeding to be an admissible, petitioner must raise a genuine dispute with applicant; CLI-21-1, 93 NRC 1 (2021)

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-21-1, 93 NRC 1 (2021)

interests that representative organization seeks to protect must be germane to its own purpose and neither the asserted claim nor requested relief must require an individual member to participate in the legal action; LBP-21-4, 93 NRC 179 (2021)

intervention petitioner must show standing and proffer at least one admissible contention; CLI-21-1, 93 NRC 1 (2021)

late-filed contention must satisfy the admissibility requirements; LBP-21-2, 93 NRC 104 (2021)

motion to reopen must be accompanied by an affidavit given by competent individuals with knowledge of the facts alleged or by experts in the disciplines appropriate to the issues raised, setting forth factual and/or technical bases for the claim that these criteria have been met; CLI-21-6, 93 NRC 145 (2021)

motion to reopen must be timely, address a significant safety or environmental issue, demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially; CLI-21-4, 93 NRC 119 (2021); CLI-21-6, 93 NRC 145 (2021)

motion to reopen must satisfy the standards for reopening, contention admissibility, and admitting new contentions filed after the deadline; CLI-21-7, 93 NRC 215 (2021); CLI-21-9, 93 NRC 244 (2021)

nature and extent of the petitioner's property, financial or other interests in the proceeding are considered for discretionary intervention; LBP-21-3, 93 NRC 153 (2021)

new contention submitted after the deadline must establish good cause for late filing; CLI-21-7, 93 NRC 215 (2021)

petitioner may move to amend its contention or submit a new contention; CLI-21-1, 93 NRC 1 (2021)

petitioner must explain a contention's basis and provide supporting facts or expert opinion on which petitioner intends to rely, together with references to specific sources or documents; CLI-21-1, 93 NRC 1 (2021)

petitioner must identify specific disputed portions of the application along with the supporting reasons for each dispute; CLI-21-1, 93 NRC 1 (2021)

petitioner whose hearing request has been wholly denied is allowed to appeal as of right; CLI-21-5, 93 NRC 131 (2021)

prima facie showing within the meaning of section 2.335(d) is one that is legally sufficient to establish a fact or case unless disproved; LBP-21-4, 93 NRC 179 (2021)

section 2.335 waiver can be granted if four factors have been met; LBP-21-4, 93 NRC 179 (2021)

to establish representational standing, hearing request must state name, address, and telephone number of petitioner, nature of petitioner's right under the AEA to be a party, nature and extent of petitioner's property, financial, or other interest, and possible effect of any issued decision or order on petitioner's interest; LBP-21-4, 93 NRC 179 (2021)

to reopen a closed record, petitioner must file a motion that demonstrates its new contention is timely, addresses a significant safety or environmental issue, and would produce a materially different result; LBP-21-2, 93 NRC 104 (2021)

## SUBJECT INDEX

### SAFETY

there is no relationship at all between the legislative purpose underlying the safety provisions of the Atomic Energy Act and petitioner's interest in protecting its reputation; LBP-21-3, 93 NRC 153 (2021)

### SAFETY EVALUATION REPORT

NRC Staff may issue its approval or denial of a license transfer application, consistent with its findings in its SER, during a pending adjudicatory proceeding; CLI-21-1, 93 NRC 1 (2021)

### SAFETY ISSUES

contention improperly conflates a reactor safety issue with requirement to consider cumulative environmental impacts; LBP-21-4, 93 NRC 179 (2021)

contention that licensee's decommissioning cost analysis fails to address pipeline-safety issues does not raise a genuine dispute; CLI-21-1, 93 NRC 1 (2021)

### SECURITY

new contention that poses concerns about national economics, security, and regional employment doesn't explain how ISFSI poses exceptionally grave impacts; CLI-21-7, 93 NRC 215 (2021)

### SEISMIC ANALYSIS

following the Fukushima accident, NRC Staff asked licensees to evaluate their site seismic hazards using current methodologies and guidance to develop a ground motion response spectrum; LBP-21-4, 93 NRC 179 (2021)

### SEISMIC DESIGN

any new equipment is qualified to seismic margins consistent with recent events; LBP-21-4, 93 NRC 179 (2021)

### SEISMIC ISSUES

ground motion response spectrum is discussed; LBP-21-4, 93 NRC 179 (2021)

new contention that poses concerns about sinkholes, subsidence, or seismicity doesn't provide information that is materially different from information already considered by NRC Staff in the DEIS; CLI-21-7, 93 NRC 215 (2021)

See also Earthquakes

### SEISMIC RISK

contention that environmental report does not address environmental impacts of operating units during subsequent license renewal term under the significant risk of an earthquake that exceeds the design basis for the reactors is inadmissible; LBP-21-4, 93 NRC 179 (2021)

### SEVERE ACCIDENT MITIGATION ALTERNATIVES ANALYSIS

accepting an assertion that passage of time required SAMA analysis to be redone could be applicable to any initial renewal or subsequent license renewal application so as to justify a section 51.53(c)(3)(ii)(L) waiver, necessarily swallowing the rule; LBP-21-4, 93 NRC 179 (2021)

license renewal contention regarding adequacy of a previously considered SAMA environmental analysis cannot be litigated absent a section 2.335(b) waiver; LBP-21-4, 93 NRC 179 (2021)

### SEVERE ACCIDENT MITIGATION DESIGN ALTERNATIVES ANALYSIS

agency's preclusion of SAMDA NEPA analysis pursuant to a policy statement was improper; LBP-21-4, 93 NRC 179 (2021)

### SHIPPING CONTAINERS

contention that questioned safety of NRC-approved transportation packages challenges regulations without seeking a waiver; CLI-21-4, 93 NRC 119 (2021)

### SHUTDOWN

if power reactor operations have permanently ceased prior to a proposed license transfer, applicants need not demonstrate financial qualifications to cover reactor operating costs; CLI-21-1, 93 NRC 1 (2021)

if vibratory ground motion exceeding the operating basis earthquake occurs, plant shutdown is mandated and the licensee must demonstrate to NRC prior to resuming operations that no functional damage occurred; LBP-21-4, 93 NRC 179 (2021)

### SITE CHARACTERIZATION

claim that license transfer applicant is required to more fully characterize the site to inform its cost estimates does not raise a material dispute with the application; CLI-21-1, 93 NRC 1 (2021)

contention that environmental report and safety analysis report did not discuss the presence and implications of fractured rock beneath the site is inadmissible; CLI-21-4, 93 NRC 119 (2021)

## SUBJECT INDEX

- licensee need not provide site characterization results to NRC until it submits its license termination plan; CLI-21-1, 93 NRC 1 (2021)
- SITE CHARACTERIZATION PLANS**  
plan is to be submitted with the license termination plan at least 2 years before termination of the license; CLI-21-2, 93 NRC 70 (2021)
- SITE REMEDIATION**  
radioactively contaminated soils must be remediated to a 10 millirem annual dose limit from all reasonable pathways to qualify for unrestricted release; CLI-21-1, 93 NRC 1 (2021)
- SITE RESTORATION**  
licensee is not required to undertake nonradiological site restoration, and the use of decommissioning funds to do so is normally prohibited; CLI-21-2, 93 NRC 70 (2021)  
to assert that impacts of planned decommissioning, site restoration, and spent fuel management activities exceed those referenced in the PSDAR, a petition for enforcement action may be filed; CLI-21-1, 93 NRC 1 (2021)
- SITE SCREENING**  
if licensee cannot restrict mineral development, it cannot satisfy Part 72 siting evaluation factors; CLI-21-7, 93 NRC 215 (2021)
- SOCIOECONOMIC IMPACTS**  
contention that application fails to consider cumulative impacts of transporting high-level radioactive waste and spent nuclear fuel to and the socioeconomic benefits of the proposed project is inadmissible; LBP-21-2, 93 NRC 104 (2021)
- SPECIAL CIRCUMSTANCES**  
to render categorical exclusion of license transfer applications from an environmental review inapplicable, special circumstances must exist; CLI-21-1, 93 NRC 1 (2021)  
to show special circumstances exist warranting departure from the categorical exclusion for license transfers, petitioners must request a waiver of section 51.22(c)(1); CLI-21-1, 93 NRC 1 (2021)
- SPENT FUEL ASSEMBLIES**  
concerns about lack of analysis of loading complications in lifting 125 tons from the transfer of spent fuel due to damaged Boraflex racks adhering to the fuel assemblies is inadmissible; CLI-21-5, 93 NRC 131 (2021)
- SPENT FUEL MANAGEMENT**  
claim that PSDAR does not comply with requirements because it does not address reasonably foreseeable potential impacts of climate change on spent fuel management is inadmissible; CLI-21-1, 93 NRC 1 (2021)  
if discovery of significant new contamination affects licensee's ability to either complete decommissioning or safely manage spent fuel, licensee will need to provide additional financial assurance; CLI-21-1, 93 NRC 1 (2021)  
if future legal developments call into question applicant's cost estimates for spent-fuel management or waste disposal, applicant will need to notify NRC; CLI-21-1, 93 NRC 1 (2021)  
if its timelines for removing spent fuel are no longer plausible, licensee must notify NRC of the delays through its financial assurance status reports and provide additional financial assurance, if necessary, to cover the estimated costs resulting from delays; CLI-21-1, 93 NRC 1 (2021)  
licensee in decommissioning must continue to demonstrate annually, until the license is terminated, that funding for decommissioning and, where applicable, spent fuel management remains adequate; CLI-21-2, 93 NRC 70 (2021)  
plants undergoing SAFSTOR enter a period of extended safe storage of the facility during which there is no spent fuel in the pool; CLI-21-2, 93 NRC 70 (2021)  
spent fuel owner suing DOE for breach of the standard contract for spent fuel storage could recover its costs incurred in loading spent fuel into storage canisters; CLI-21-2, 93 NRC 70 (2021)  
to assert that impacts of planned decommissioning, site restoration, and spent fuel management activities exceed those referenced in the PSDAR, a petition for enforcement action may be filed; CLI-21-1, 93 NRC 1 (2021)

## SUBJECT INDEX

### SPENT FUEL POOLS

- contention that allowing applicant to leave Boraflex in place in the spent fuel pool would cause corrosion that leads to degradation and can result in unanticipated consequences and unaccounted for debris is inadmissible; CLI-21-5, 93 NRC 131 (2021)
- contention that continued presence of Boraflex will lead to a fire in the spent fuel pool and that all failure modes must be examined in association with the transfer of spent fuel to dry cask storage do not demonstrate board error; CLI-21-5, 93 NRC 131 (2021)
- contention that credit for Boraflex as a neutron absorbing material if the spent fuel pool is fully flooded with unborated water does not leave conservative margin to stay subcritical is inadmissible; CLI-21-5, 93 NRC 131 (2021)
- contention that proposed use of experimental, higher enriched, and longer burn-up fuel has not been adequately evaluated as to the method for ensuring subcriticality in the spent fuel pool is inadmissible; CLI-21-5, 93 NRC 131 (2021)
- contention that the more prudent course of action to ensure subcriticality in the spent fuel pool is to remove spent fuel from the pool and reduce the density of the pool is inadmissible; CLI-21-5, 93 NRC 131 (2021)
- contention that there is the potential for a significant increase in the probability or consequences of an accident previously evaluated if the license amendment request is granted is inadmissible; CLI-21-5, 93 NRC 131 (2021)
- k-effective of spent fuel storage racks loaded with fuel of the maximum fuel assembly reactivity must not exceed 0.95 if flooded with unborated water; CLI-21-5, 93 NRC 131 (2021)
- subcriticality is achieved when the estimated ratio of neutron production to neutron absorption and leakage, or k-effective, is less than 1.0; CLI-21-5, 93 NRC 131 (2021)

### SPENT FUEL STORAGE

- licensee is not required to keep the facility in safe storage for any particular period of time; CLI-21-2, 93 NRC 70 (2021)
- performance of a screening evaluation to determine whether design of spent fuel canisters could be changed without first obtaining NRC approval was a violation; CLI-21-1, 93 NRC 1 (2021)
- period of safe storage will vary for each plant depending on the age, type, and amount of fuel in the pool; CLI-21-2, 93 NRC 70 (2021)
- See also Independent Spent Fuel Storage Installation

### STANDARD OF PROOF

- adequate evidence is reliable, probative, and substantial (but not preponderant) and supports a conclusion that the asserted wrongdoer violated a Commission requirement, and the violation was willful or poses a risk to the public health, safety, or interest that requires immediate action; CLI-21-3, 93 NRC 89 (2021)
- elements of an Employee Protection Rule violation may be proven using the burden-shifting evidentiary framework and are different from those for a Deliberate Misconduct Rule violation; CLI-21-3, 93 NRC 89 (2021)
- evidentiary framework for proof of an Employee Protection Rule violation is set forth; CLI-21-3, 93 NRC 89 (2021)
- if NRC Staff shows by a preponderance of evidence that an employee's protected activity was a contributing factor in an unfavorable personnel decision, a reasonable inference arises that the Employee Protection Rule was violated; CLI-21-3, 93 NRC 89 (2021)
- inference that the Employee Protection Rule was violated may be negated by the employer if it proves with clear and convincing evidence that it would have taken the same adverse action regardless of the protected activity; CLI-21-3, 93 NRC 89 (2021)

### STANDARD OF REVIEW

- Commission defers to a board's factual findings absent clear error or an abuse of discretion, but reviews the board's application of legal standards de novo; CLI-21-3, 93 NRC 89 (2021)
- Commission generally defers to boards on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion; CLI-21-4, 93 NRC 119 (2021); CLI-21-5, 93 NRC 131 (2021); CLI-21-7, 93 NRC 215 (2021); CLI-21-9, 93 NRC 244 (2021)
- reiteration of the same arguments on appeal as raised before the board does not show board error or abuse of discretion; CLI-21-4, 93 NRC 119 (2021)

## SUBJECT INDEX

### STANDING TO INTERVENE

analysis of the zone-of-interests test is not based on the purpose of the entire act, but only on the specific provision invoked by the plaintiff; LBP-21-3, 93 NRC 153 (2021)

chilling effect claim that is not directly related to environmental or radiological harm does not fall within the zone of interests of the Atomic Energy Act; LBP-21-3, 93 NRC 153 (2021)

Commission has flexibility in determining standing and may use somewhat more- or less-restrictive criteria than courts, but those criteria must still be reasoned based on facts of the case; LBP-21-3, 93 NRC 153 (2021)

even if petitioners' standing has not been contested, an independent board determination is required; LBP-21-4, 93 NRC 179 (2021)

harm to a judge's reputation from a public reprimand for misconduct was a sufficient injury for him to establish standing; LBP-21-3, 93 NRC 153 (2021)

hearing request is construed in petitioner's favor, but petitioner has the burden of demonstrating that the standing requirements are met; LBP-21-4, 93 NRC 179 (2021)

lack of clear defining principles has led to occasional frustration, seeming changes in character, and uncertain application of the zone-of-interests test; LBP-21-3, 93 NRC 153 (2021)

NRC applies contemporaneous judicial concepts of standing, but is not bound by them; LBP-21-3, 93 NRC 153 (2021)

NRC can permissibly deny a hearing request of a petitioner who satisfies Article III standing requirements provided NRC's interpretation of its jurisdictional statute, 42 U.S.C. § 2239(a)(1)(A), is reasonable; LBP-21-3, 93 NRC 153 (2021)

NRC looks to judicial standing doctrines simply as guidance, and as a useful barometer of standing jurisprudence; LBP-21-3, 93 NRC 153 (2021)

petitioner must demonstrate that it has suffered a distinct and palpable harm that can fairly be traced to the challenged action and is likely to be redressed by a favorable decision; LBP-21-3, 93 NRC 153 (2021)

petitioner must show a concrete and particularized injury to an interest within the zone of interests protected by the Atomic Energy Act; CLI-21-1, 93 NRC 1 (2021)

petitioner need only show that its interest may have been affected; LBP-21-3, 93 NRC 153 (2021)

proximity presumption excuses those otherwise meeting the requirements for standing from making a specific showing of injury in fact so long as they reside, work, or otherwise have regular contacts within a 50-mile radius of the facility; LBP-21-4, 93 NRC 179 (2021)

reputational injury that derives directly from government action will support Article III standing to challenge that action; LBP-21-3, 93 NRC 153 (2021)

state and local petitioners may be granted a hearing with no further demonstration of standing if they submit at least one admissible contention; CLI-21-1, 93 NRC 1 (2021)

where injury could be redressed by enjoining the government's action, the reputational harm was sufficient to establish standing to contest the action; LBP-21-3, 93 NRC 153 (2021)

where plaintiff itself is not itself the subject of the contested regulatory action, the zone-of-interests test denies a right of review if plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit; LBP-21-3, 93 NRC 153 (2021)

zone-of-interests test is no longer considered part of the standing analysis, but instead is part of the determination of the proximity of the cause of action to the statute involved by the plaintiff; LBP-21-3, 93 NRC 153 (2021)

zone-of-interests test poses a low bar and is not meant to be especially demanding; LBP-21-3, 93 NRC 153 (2021)

### STANDING TO INTERVENE, ORGANIZATIONAL

organization seeking representational standing must demonstrate how at least one of its members may be affected by the licensing action, identify that member by name and address, and show, preferably by affidavit, that the organization is authorized to request a hearing on behalf of that member; CLI-21-1, 93 NRC 1 (2021)

### STANDING TO INTERVENE, REPRESENTATIONAL

hearing request must state name, address, and telephone number of petitioner, nature of petitioner's right under the AEA to be a party, nature and extent of petitioner's property, financial, or other interest, and

## SUBJECT INDEX

- possible effect of any issued decision or order on petitioner's interest; CLI-21-1, 93 NRC 1 (2021); LBP-21-4, 93 NRC 179 (2021)
- interests that representative organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor requested relief must require an individual member's participation in the legal action; LBP-21-4, 93 NRC 179 (2021)
- STATE GOVERNMENT
  - government petitioners may be granted a hearing with no further demonstration of standing if they submit at least one admissible contention; CLI-21-1, 93 NRC 1 (2021)
- STATE STATUTES
  - under New Mexico law, the surface estate is subordinate to the mineral estate; CLI-21-7, 93 NRC 215 (2021)
- STAY
  - application must contain a concise summary of the requested action to be stayed and a concise statement of the grounds for a stay, with reference to the factors specified in 10 C.F.R. 2.132(d); CLI-21-8, 93 NRC 237 (2021)
  - application to stay a license transfer must be filed within 5 days of the notice of the Staff action and must meet the remaining requirements in 10 C.F.R. 2.132; CLI-21-8, 93 NRC 237 (2021)
  - motion for a waiver of 10 C.F.R. 2.1316(a) is, in effect, a request for a preemptive stay of NRC Staff's licensing decision, something license transfer regulations do not contemplate; CLI-21-1, 93 NRC 1 (2021)
  - NRC regulations provide the opportunity to stay a license transfer; CLI-21-8, 93 NRC 237 (2021)
  - requests for a stay of NRC Staff's licensing decision is allowed after the decision is issued; CLI-21-1, 93 NRC 1 (2021)
- STRUCTURAL INTEGRITY
  - integrity of structures, systems and components is a current licensing basis issue and so beyond challenge in a subsequent license renewal adjudication; LBP-21-4, 93 NRC 179 (2021)
- SUBSEQUENT OPERATING LICENSE RENEWAL APPLICATION
  - application is not required to contain analyses of the environmental impacts of the license renewal issues; LBP-21-4, 93 NRC 179 (2021)
  - environmental contents of application must include a supplement to the environmental report that complies with the requirements of Subpart A of 10 C.F.R. Part 51; LBP-21-4, 93 NRC 179 (2021)
- SUBSEQUENT OPERATING LICENSE RENEWAL PROCEEDINGS
  - accepting an assertion that passage of time required SAMA analysis to be redone could be applicable to any initial renewal or SLR application so as to justify a section 51.53(c)(3)(ii)(L) waiver, necessarily swallowing the rule; LBP-21-4, 93 NRC 179 (2021)
  - adjudicatory challenge based on applicant's failure to deal appropriately with a Category 1 item constitutes an attack on an agency rule, making a section 2.335(b) waiver the sole vehicle for raising such an issue; LBP-21-4, 93 NRC 179 (2021)
  - challenge to adequacy of acceptance criteria or other component of current licensing basis is not within the scope of a license renewal proceeding; LBP-21-4, 93 NRC 179 (2021)
  - contention that environmental report does not address environmental impacts of operating units during SLR term under the significant risk of an earthquake that exceeds the design basis for the reactors is inadmissible; LBP-21-4, 93 NRC 179 (2021)
  - impacts analysis exemption for Category 1 issues in SLR proceedings is extended to NRC Staff's draft and final environmental impact statements; LBP-21-4, 93 NRC 179 (2021)
  - integrity of structures, systems and components is a current licensing basis issue and so beyond challenge in an SLR adjudication; LBP-21-4, 93 NRC 179 (2021)
  - license renewal contention regarding adequacy of a previously considered SAMA environmental analysis cannot be litigated absent a section 2.335(b) waiver; LBP-21-4, 93 NRC 179 (2021)
  - NRC must follow precedents on question of applicability of 10 C.F.R. 51.53(c) to subsequent license renewal; LBP-21-4, 93 NRC 179 (2021)
  - seismic accident impacts issue is precluded from consideration in an SLR proceeding absent a waiver of 10 C.F.R. 51.53(c)(3)(i), 51.71(d), and 51.95(c)(1) to allow consideration of Category 1 NEPA Issues; LBP-21-4, 93 NRC 179 (2021)



## SUBJECT INDEX

### TECHNICAL QUALIFICATIONS

information on qualifications of a proposed license transferee is as would be required if the application were for an initial license; CLI-21-2, 93 NRC 70 (2021)

license transfer review is limited to specific matters, including financial and technical qualifications of proposed transferee; CLI-21-1, 93 NRC 1 (2021)

### TERRORISM

NRC requires no analysis of potential impacts of terrorist attacks and sabotage for facilities outside the Ninth Circuit; LBP-21-2, 93 NRC 104 (2021); CLI-21-9, 93 NRC 244 (2021)

### TESTING

contention that environmental report did not contain sufficient information to determine whether packer tests were performed correctly is inadmissible; CLI-21-4, 93 NRC 119 (2021)

### TIME LIMITS

agency 'within a reasonable time shall set and complete proceedings required to be conducted and shall make its decision; CLI-21-8, 93 NRC 237 (2021)

### TRANSPORTATION OF RADIOACTIVE MATERIALS

contention that project is infeasible because transport cannot be technically accomplished within the 40-year period of the initial license is inadmissible; CLI-21-4, 93 NRC 119 (2021)

### TRANSPORTATION OF SPENT FUEL

contention that application fails to consider cumulative impacts of transporting high-level radioactive waste and spent nuclear fuel to and the socioeconomic benefits of the proposed project is inadmissible; LBP-21-2, 93 NRC 104 (2021)

contention that the license transferee improperly excludes decommissioning cost estimates for repackaging spent fuel for transport is inadmissible; CLI-21-2, 93 NRC 70 (2021)

identifying actual routes will eventually require separate reviews and approvals by NRC, the Department of Transportation, and applicable states or tribes; LBP-21-2, 93 NRC 104 (2021)

if, in the future, DOE were to accept spent fuel in its current package, it could be entitled to reimbursement for the costs it already paid to load the fuel into storage canisters; CLI-21-2, 93 NRC 70 (2021)

late-filed challenge to the use of representative transportation routes is untimely; CLI-21-9, 93 NRC 244 (2021)

### VACATION OF DECISION

when vacating for mootness, Commission neither approves nor disapproves a Board's ruling; CLI-21-1, 93 NRC 1 (2021)

### VIOLATIONS

adequate evidence is reliable, probative, and substantial (but not preponderant) and supports a conclusion that the asserted wrongdoer violated a Commission requirement, and the violation was willful or poses a risk to the public health, safety, or interest that requires immediate action; CLI-21-3, 93 NRC 89 (2021)

adequate evidence of retaliation against an employee must show that employer's conduct would cause it to be in violation of the Employee Protection Rule; CLI-21-3, 93 NRC 89 (2021)

elements of an Employee Protection Rule violation may be proven using the burden-shifting evidentiary framework and are different from those for a Deliberate Misconduct Rule violation; CLI-21-3, 93 NRC 89 (2021)

engaging in deliberate misconduct is a violation of 10 C.F.R. 50.5; LBP-21-3, 93 NRC 153 (2021)

evidentiary framework for proof of an Employee Protection Rule violation is set forth; CLI-21-3, 93 NRC 89 (2021)

if NRC Staff shows by a preponderance of evidence that an employee's protected activity was a contributing factor in an unfavorable personnel decision, a reasonable inference arises that the Employee Protection Rule was violated; CLI-21-3, 93 NRC 89 (2021)

inference that the Employee Protection Rule was violated may be negated by the employer if it proves with clear and convincing evidence that it would have taken the same adverse action regardless of the protected activity; CLI-21-3, 93 NRC 89 (2021)

performance of a screening evaluation to determine whether design of spent fuel canisters could be changed without first obtaining NRC approval was a violation; CLI-21-1, 93 NRC 1 (2021)

See also Notice of Violation

## SUBJECT INDEX

### WAIVER OF RULE

adjudicatory challenge based on applicant's failure to deal appropriately with a Category 1 item constitutes an attack on an agency rule, making a section 2.335(b) waiver the sole vehicle for raising such an issue; LBP-21-4, 93 NRC 179 (2021)

determination about whether criteria for rule waiver have been fulfilled is the sole province of the Commission; LBP-21-4, 93 NRC 179 (2021)

license renewal contention regarding adequacy of a previously considered SAMA environmental analysis cannot be litigated absent a section 2.335(b) waiver; LBP-21-4, 93 NRC 179 (2021)

motion for a waiver of 10 C.F.R. 2.1316(a) is, in effect, a request for a preemptive stay of NRC Staff's licensing decision, which license transfer regulations do not contemplate; CLI-21-1, 93 NRC 1 (2021)

purported new and significant information is likely to be the basis for any successful rule waiver petition; LBP-21-4, 93 NRC 179 (2021)

rule waiver factor two requires demonstration of a circumstance that was not considered either explicitly, or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived; LBP-21-4, 93 NRC 179 (2021)

rule waiver petition must be accompanied by an affidavit that identifies the specific subject-matter aspects of the proceeding to which the application of the regulation would not serve the purposes for which it was adopted; LBP-21-4, 93 NRC 179 (2021)

section 2.335 waiver can be granted if four factors have been met; LBP-21-4, 93 NRC 179 (2021)

seismic accident impacts issue is precluded from consideration in a subsequent license renewal proceeding absent a waiver of 10 C.F.R. 51.53(c)(3)(i), 51.71(d), and 51.95(c)(1) to allow consideration of Category 1 NEPA issues; LBP-21-4, 93 NRC 179 (2021)

sole ground for a waiver or exception from a regulation is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation would not serve the purposes for which it was adopted; LBP-21-4, 93 NRC 179 (2021)

standards for obtaining a rule waiver are discussed; LBP-21-4, 93 NRC 179 (2021)

to show special circumstances exist warranting departure from the categorical exclusion for license transfers, petitioners must request a waiver of section 51.22(c)(1); CLI-21-1, 93 NRC 1 (2021)

### WASTE DISPOSAL

claim that costs related to disposal of mixed waste are underestimated is inadmissible for lack factual support; CLI-21-2, 93 NRC 70 (2021)

See also Radioactive Waste Disposal

### WHISTLEBLOWERS

employees who raise safety concerns are protected from discrimination; CLI-21-3, 93 NRC 89 (2021); LBP-21-3, 93 NRC 153 (2021)

Energy Reorganization Act provides protection for whistleblowers and establishes the right to defend against a whistleblower discrimination charge; CLI-21-3, 93 NRC 89 (2021); LBP-21-3, 93 NRC 153 (2021)

high burden is imposed on employers so that nuclear whistleblowers are encouraged to come forward with safety-related information; CLI-21-3, 93 NRC 89 (2021)

NRC licensees are prohibited from discriminating against employees who raise safety concerns; LBP-21-3, 93 NRC 153 (2021)

retaliation against an employee for protected activities is, by its nature, an intentional act; CLI-21-3, 93 NRC 89 (2021)

### WITNESSES, EXPERT

expert opinion that merely states a conclusion, without providing a reasoned basis or explanation for that conclusion, is not enough to support admitting a contention; CLI-21-1, 93 NRC 1 (2021)

motion to reopen must be accompanied by an affidavit given by competent individuals with knowledge of the facts alleged or by experts in the disciplines appropriate to the issues raised, setting forth factual and/or technical bases for the claim that these criteria have been met; CLI-21-6, 93 NRC 145 (2021); LBP-21-2, 93 NRC 104 (2021)

### WORK ENVIRONMENT

provisions of 10 C.F.R. 50.7(a), (d) do not contemplate protection of employees who only raise concerns about an unprofessional or hostile work environment; LBP-21-3, 93 NRC 153 (2021)

## SUBJECT INDEX

### ZONE OF INTERESTS

analysis of the zone-of-interests test is not based on the purpose of the entire act, but only on the specific provision invoked by the plaintiff; LBP-21-3, 93 NRC 153 (2021)

chilling effect claim that is not directly related to environmental or radiological harm does not fall within the zone of interests of the Atomic Energy Act; LBP-21-3, 93 NRC 153 (2021)

good reputation is not an interest that is protected by the Atomic Energy Act and Commission is bound to follow precedents; LBP-21-3, 93 NRC 153 (2021)

interest test of standing is no longer considered part of the standing analysis, but instead is part of the determination of the proximity of the cause of action to the statute involved by the plaintiff; LBP-21-3, 93 NRC 153 (2021)

interest test of standing poses a low bar and is not meant to be especially demanding; LBP-21-3, 93 NRC 153 (2021)

lack of clear defining principles has led to occasional frustration, seeming changes in character, and uncertain application of the zone-of-interests test; LBP-21-3, 93 NRC 153 (2021)

where plaintiff itself is not itself the subject of the contested regulatory action, the zone-of-interests test denies a right of review if plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit; LBP-21-3, 93 NRC 153 (2021) See also Management Character and Competence



## FACILITY INDEX

FERMI 2; Docket No. 50-341-LA  
OPERATING LICENSE AMENDMENT; February 18, 2021; MEMORANDUM AND ORDER; CLI-21-5,  
93 NRC 131 (2021)

HI-STORE CONSOLIDATED INTERIM STORAGE FACILITY; Docket No. 72-1051-ISFSI  
INDEPENDENT SPENT FUEL STORAGE INSTALLATION; February 18, 2021; MEMORANDUM  
AND ORDER; CLI-21-4, 93 NRC 119 (2021)

INDEPENDENT SPENT FUEL STORAGE FACILITY; April 28, 2021; MEMORANDUM AND  
ORDER; CLI-21-7, 93 NRC 215 (2021)

INDIAN POINT NUCLEAR GENERATING STATION, Units 1, 2, and 3 and ISFSI; Docket Nos.  
50-003-LT-3, 50-247-LT-3, 50-286-LT-3, 72-51-LT-2  
LICENSE TRANSFER; January 15, 2021; MEMORANDUM AND ORDER; CLI-21-1, 93 NRC 1 (2021)

NORTH ANNA POWER STATION, Units 1 and 2; Docket Nos. 50-338-SLR, 50-339-SLR  
SUBSEQUENT OPERATING LICENSE RENEWAL; March 29, 2021; MEMORANDUM AND ORDER  
(Denying Intervention Petition and Terminating Proceeding); LBP-21-4, 93 NRC 179 (2021)

THREE MILE ISLAND NUCLEAR STATION, Unit 2; Docket No. 50-320-LT  
LICENSE TRANSFER; January 15, 2021; MEMORANDUM AND ORDER; CLI-21-2, 93 NRC 70  
(2021)

LICENSE TRANSFER; June 22, 2021; MEMORANDUM AND ORDER; CLI-21-8, 93 NRC 237 (2021)

VOGTLE ELECTRIC GENERATING PLANT, Unit 3; Docket No. 52-025-LA-3  
OPERATING LICENSE AMENDMENT; March 15, 2021; MEMORANDUM AND ORDER; CLI-21-6,  
93 NRC 145 (2021)

WCS CONSOLIDATED INTERIM STORAGE FACILITY; Docket No. 72-1050-ISFSI  
INDEPENDENT SPENT FUEL STORAGE INSTALLATION; January 29, 2021; MEMORANDUM AND  
ORDER (Denying Motions to Reopen and for Leave to File); LBP-21-2, 93 NRC 104 (2021)

INDEPENDENT SPENT FUEL STORAGE INSTALLATION; June 22, 2021; MEMORANDUM AND  
ORDER; CLI-21-9, 93 NRC 244 (2021)