

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

In the Matter of)
Southern Nuclear Operating Company, Inc.) Docket No. 52-011
Early Site Permit for Plant Vogtle ESP Site)
_____)

MOTION TO FILE SUPPLMENTAL AUHTORITY

Pursuant to 10 C.F.R. § 2.323 and § 2.346, Center for a Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy, Atlanta Women’s Action for New Directions, and Blue Ridge Environmental Defense League (“Petitioners”), hereby move to file the attached supplemental authority, Riverkeeper v. U.S. Environmental Protection Agency, 2007 U.S. App. LEXIS 1642, ___ F.3d ___, (2d Cir. January 25, 2007), which is highly pertinent and critical to Petitioners’ Reply to Southern Nuclear Operating Company’s Answer to Petition for Intervention (“Petitioner’s Reply”).

Petitioners’ motion should be granted based on the following grounds: (1) the supplemental authority is directly pertinent to Petitioners’ Reply concerning Proposed Contention EC 1.2 and Proposed Contention EC 1.3; (2) the supplemental authority was not available until after Petitioners submitted their Reply on January 24, 2007; and (3) the Commission has authority to allow Petitioners to file supplemental authority.

The supplemental authority is directly pertinent to Petitioners’ Reply concerning Proposed Contention EC 1.2 and EC 1.3. Contention EC 1.2 asserts that the Environmental Report (“ER”) fails to identify and consider direct, indirect, and cumulative impacts of the

proposed cooling system intake and discharge structures on aquatic resources. Petition for Intervention at 10. In Southern Nuclear Operating Company's ("SNC") Answer in Response to Petition for Intervention, SNC argues that that it need not analyze the impacts of the intake structure on aquatic species because it intends to comply with EPA's "Requirements Applicable to Cooling Water Intake Structures for Phase II Existing Facilities Under Section 316(b) of the [Clean Water] Act," 40 C.F.R. § 125.94, which requires that cooling water intake structures "reflect the best technology available for minimizing adverse environmental impact." SNC Answer at 21-22. *See also* ER § 5.3.1.1 ("The [intake structure] proposed for the new units at VEGP will be in compliance with Section 316(b) of the Clean Water Act.").

According to SNC, the ER need not analyze the potential impacts of the proposed cooling intake structure:

Regulation 40 CFR 125.94(a)(1)(i) indicates that if a facility's flow is commensurate with a closed-cycle recirculating system, the facility has met the applicable performance standards and is not required to demonstrate that it meets impingement mortality and entrainment performance standards. Power plants with closed-cycle, re-circulating cooling systems, such as the systems proposed for the new units at VEGP, meet the rule's performance standards because they are "deemed to satisfy any applicable impingement mortality and entrainment standard for all waterbodies." The design of the new cooling water intake system (CWIS) will be compliant with the EPA's regulation for Cooling Water Intake Structures (and, by extension, represents the "Best Available Technology" for reducing impacts to aquatic communities).

ER § 5.3.1.2. Thus, SNC asserts:

EC 1.2's allegations related to the ER's reliance on Clean Water Act ("CWA") permits and CWA performance standards are immaterial to the findings that NRC must make because EPA has already decided, by notice and comment rulemaking, that the type of cooling system technology proposed for the ESP facility is the "best technology available."

SNC Answer at 21.

Proposed Contention EC 1.3 challenges the dismissal of alternative cooling technology, dry cooling, without adequate analysis required under 10 C.F.R. § 51.45(b)(3). Petition for

Intervention at 14. As with the discussion of impacts of the proposed cooling structure, the ER dismisses dry cooling on the basis of EPA's *Regulations Addressing Cooling Water Intake Structures at New Facilities*, 66 Fed. Reg. 65,256 (Dec. 18, 2001). ER § 9.4.1.1. Likewise, SNC's Answer relies heavily on EPA's previous rulemaking on cooling water intake structures. See SNC Answer at 28 ("EPA has already gone to great lengths to explain why dry cooling should not be further considered.").

Petitioners' contend that "[a]lthough EPA determined in its regulations what constitutes 'best available technology' for the purpose of CWA Section 316, this has nothing whatsoever to do with the actual impacts of the proposed action. . . . NRC guidance provides for independent review of such findings in the agency's NEPA analysis." Reply at 11-12. Further, Petitioners argue that SNC improperly excluded the dry cooling alternative because of the presence of extremely sensitive biological resources in the Savannah River. Petition to Intervene at 15. Even if EPA's regulation applied as suggested by SNC, it expressly states that "dry cooling is appropriate in areas with limited water available for cooling or where the source of cooling water is associated with extremely sensitive biological resources." *Id.*

Regardless of whether SNC may rely on EPA's regulation, 40 C.F.R. § 125.94, in lieu of conducting an impacts or alternatives analysis, that option is no longer available. On January 25, 2007, the Second Circuit Court of Appeals ruled that the EPA had misapplied the "best technology available" standard of CWA § 316(b) in promulgating 40 C.F.R. § 125.94 and remanded the regulation to EPA for further consideration. Riverkeeper v. U.S. Environmental Protection Agency, 2007 U.S. App. LEXIS 1642. Thus, SNC relies on an invalid regulation when it claims that "EPA has already decided, by notice and comment rulemaking, that the type of cooling system technology proposed for the ESP facility is the 'best technology available.'"

SNC Answer at 21. As a result, the supplemental authority, Riverkeeper v. U.S. EPA, is directly pertinent to Proposed Contentions EC 1.2 and EC 1.3 and Petitioners' Reply.

Petitioners filed their Reply in this matter on January 24, 2007. The Second Circuit decision in Riverkeeper v. U.S. EPA was issued on January 25, 2007, the day following the deadline for filing Petitioners' Reply. Thus the supplemental authority was not available to the Petitioners until after the submission of their Reply.

The Board has authority to allow Petitioners to file this supplemental authority because accepting a new authority on matters already briefed, when there is good cause shown, is a minor procedural matter.¹ 10 C.F.R. § 2.346(a), (c), and (j). This motion is being filed within 10 days of the occurrence—the January 25, 2007 Second Circuit decision—giving rise to this motion and is therefore timely. 10 C.F.R. § 2.323(a). Proposed Contentions EC 1.2 and 1.3 remain unchanged by this motion. It merely provides new authority. Therefore, there is no need to amend Proposed Contentions EC 1.2 or EC 1.3, or to file an amended or new contention. Further, fairness, accuracy, and a sound and complete record compel consideration of this new authority.

¹ “Minor procedural matter” is not defined in any Nuclear Regulatory Commission rules or regulations but the Commission has recognized this term to include ruling on requests for hearings. *See* Delegation to Commission Secretary, 47 Fed. Reg. 47,802 (Oct. 28, 1982). Thus, taking notice of supplemental, relevant precedent certainly qualifies as a minor procedural matter.

Respectfully submitted this 2nd day of February, 2007,

[Original signed by L. Sanders]

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NUCLEAR REGULATORY COMMISSION

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SOUTHERN NUCLEAR OPERATING) Docket No. 52-011-ESP
COMPANY)
)
(Early Site Permit for the Vogtle ESP Site))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MOTION TO FILE SUPPLEMENTAL AUTHORITY have been served upon the following persons by Electronic Information Exchange and/or electronic mail.

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Dated this 5th day of January, 2007

[Original signed by L. Sanders]

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