UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

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

In the Matter of	Docket No. 52-011-ESP
SOUTHERN NUCLEAR OPERATING CO.	ASLBP No. 07-850-01-ESP-BD01
(Early Site Permit for Vogtle ESP Site)	January 15, 2008

MEMORANDUM AND ORDER
(Ruling on Dispositive Motion and Associated Motions to Strike and to Supplement the Record Regarding Environmental Contention 1.3)

Before the Licensing Board in this 10 C.F.R. Part 52 proceeding regarding the application of Southern Nuclear Operating Company (SNC) for an early site permit (ESP) for two new units at the site of its existing two-unit Vogtle Electric Generating Plant (VEGP) is an SNC motion requesting summary disposition be entered in its favor relative to Joint Intervenors Environmental Contention (EC) 1.3.[1] This issue statement concerns the consideration of dry cooling as a design alternative to the wet cooling tower system proposed in the ESP. The NRC staff supports the SNC dispositive motion, while Joint Intervenors oppose the request. Additionally, both the staff and SNC have filed motions to strike portions of the Joint Intervenors response to the SNC motion or, in SNC's case, to file a reply to the Joint Intervenors response,

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

which Joint Intervenors oppose. SNC also has lodged an unopposed motion to supplement the record relative to several matters raised in the Joint Intervenors answer to its dispositive motion.

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

I. BACKGROUND

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

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

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

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

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

> EC 1.3 – ER DRY COOLING SYSTEM ALTERNATIVES DISCUSSION FAILS TO ADDRESS AQUATIC SPECIES IMPACTS
>
> CONTENTION: The ER fails to satisfy 10 C.F.R. § 51.45(b)(3) because its analysis of the dry cooling alternative is inadequate to address the appropriateness of a dry cooling system given the presence of extremely sensitive biological resources.

Id. at 280.

Following the admission of this contention (as well as issue statement EC 1.2, which has been the subject of a separate SNC dispositive motion that we likewise address today, see LBP-08-2, 67 NRC __ (Jan. 15, 2008), the staff provided and has periodically supplemented the hearing file for this proceeding established in accord with 10 C.F.R. § 2.1203, and the parties have made the mandatory disclosures required by section 2.336 relative to this contention.[3] See Tr. at 199-207, 256-58. In establishing an initial schedule for this proceeding based on the planned staff issuance of both the draft and final environmental impact statements (DEIS and FEIS) and its safety evaluation report (SER), the Board provided an opportunity for the filing of new or amended contentions relating to either of these documents, as well as for filing for summary disposition regarding any admitted contention or new/amended contention. See Licensing Board Memorandum and Order (Prehearing Conference and Initial Scheduling Order) (May 7, 2007) at 3-5 & app. A (unpublished) [hereinafter Initial Scheduling Order].

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

Subsequently, the staff issued its SER (albeit with open items) and its DEIS on August 30 and September 10, respectively. See Office of New Reactors (NRO), U.S. Nuclear Regulatory Commission (NRC), Safety Evaluation of the [ESP] Application in the Matter of [SNC], for the Vogtle [ESP] Site (Aug. 2007); 1 NRO, NRC, [DEIS] for an [ESP] at the [VEGP] Site, NUREG-1872 (Sept. 2007) [hereinafter DEIS]. Although the Board had established a time frame within which to do so, see Initial Scheduling Order app. A, at 1, Joint Intervenors did not submit any new or amended contentions relative to either of these documents. Thereafter, in accordance with the terms of the Board's initial schedule, id., on October 17, 2007, SNC filed a motion, accompanied by a statement of material facts purportedly not at issue and supporting affidavits, requesting that summary disposition be entered in its favor in connection with EC 1.3. See [SNC] Motion for Summary Disposition on Intervenors' Contention EC 1.3 (Oct. 17, 2007) [hereinafter SNC 1.3 Dispositive Motion]; [SNC] Statement of Undisputed Facts in Support of Applicant's Motion for Summary Disposition of Intervenor[s'] [EC] 1.3 (Oct. 17, 2007) [hereinafter SNC 1.3 Statement of Undisputed Facts]. Also in accordance with the Board's initial schedule, on October 29, the staff filed a response endorsing the SNC summary disposition motion. See NRC Staff Answer to [SNC] Motion for Summary Disposition of [EC 1.3] (Oct. 29, 2007) [hereinafter Staff 1.3 Answer]. This was followed on November 13 by the Joint Intervenors answer to the SNC motion, which included a statement of purported material facts at issue and a supporting affidavit, asserting that summary disposition was inappropriate in this instance. See Joint Intervenors' Answer Opposing [SNC] Motion to Dismiss as Moot, or in the Alternative, for Summary Disposition of Joint Intervenor[s'] Contention 1.3 (Nov. 7, 2007) [hereinafter Joint Intervenors 1.3 Answer].

Thereafter, on November 21 and 23, 2007, respectively, the staff and SNC submitted motions requesting that portions of the Joint Intervenors November 13, 2007 answer to the SNC

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

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

Regarding SNC's Motion for Summary Disposition of EC 1.3 (Dec. 5, 2007) at 1; Intervenors' Answer in Response to SNC and NRC Staff Motions to Strike Portions of Intervenors' Answer to Motion For Summary Disposition of EC 1.3 (Dec. 6, 2007) [hereinafter Joint Intervenors Response to 1.3 Motions to Strike].

II. ANALYSIS

A. Summary Disposition Standards

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

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

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

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

While the Joint Intervenors admitted contention and associated bases quite properly addressed the SNC ER, rather than the staff DEIS, see 10 C.F.R. § 2.309(f)(2) (contentions must be based on documents/information available when hearing petition to be filed), as SNC notes in a related filing in this proceeding, "the Board may consider environmental contentions made against an applicant's ER as challenges to an agency's subsequent DEIS." [SNC] Motion for Summary Disposition of Intervenors' [EC] 1.2 (Cooling System Impacts on Aquatic Resources) at 4 (citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998) (approving a Board decision to treat an intervenor's contentions addressing the ER as challenges to the FEIS)); see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001) (discussing such a substitution with the superseding DEIS), petition for review denied, CLI-04-4, 59 NRC 31, 40-41 (2004). This is appropriate, however, only so long as the DEIS analysis or discussion at issue is essentially in para materia with the ER analysis or discussion that is the focus of the contention. If it is not, an intervenor attempting to litigate an issue based on

expressed concerns about the DEIS may need to amend the admitted contention or, if the information in the DEIS is sufficiently different from that in the ER that supported the contention's admission, submit a new contention.[5] See 10 C.F.R. § 2.309(f)(2); see also Duke Energy, CLI-02-28, 56 NRC at 383.

In the context of a summary disposition motion, this question about the need to amend or file a new contention becomes relevant when there is a dispute, as there is here, see infra page 10, about whether an admitted issue statement (or a relevant portion of such an issue statement) is a contention of omission -- i.e., a contention challenging a portion of the application, such as the ER, because it fails in toto to address a required subject matter -- rather than a contention of inadequacy -- i.e., one that asserts the pertinent portion of the application contains a discussion or analysis of a relevant subject that is inadequate in some material respect. See Private Fuel Storage, LBP-01-23, 54 NRC at 171-72 (dividing all contentions into "a challenge to the application's adequacy based on the validity of the information that is in the application; a challenge to the application's adequacy based on its alleged omission of relevant information; or some combination of these two challenges."); see also Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 & n.7 (2006). In Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-04-9, 59 NRC 286 (2004), in connection with intervenor contentions of omission charging that an application was missing certain design information, the Licensing Board rejected as improper an intervenor attempt to use those same contentions, once the information had been provided in a subsequent applicant filing, to then challenge the quality of the

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

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

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

In reaching a determination about whether this contention is properly classified as one of omission or inadequacy, we note initially that the text of EC 1.3, which declares that the SNC ER "fails to satisfy 10 C.F.R. § 51.45(b)(3) because its analysis of the dry cooling alternative is inadequate to address the appropriateness of a dry cooling system given the presence of extremely sensitive biological resources," (emphasis added) and the Board's description of the contention as one "concerning the need for an additional discussion of dry cooling as an alternative cooling system," LBP-07-3, 65 NRC at 261, 280, certainly suggest it is one aimed at "inadequacy" rather than "omission." Moreover, as Joint Intervenors point out, "there was already information in the record regarding dry-cooling alternatives," Joint Intervenors 1.3 Answer at 15, specifically ER section 9.4.1.1, see [SNC] [ESP] Application for the [VEGP],

Part 3, [ER] at 9.4-2 (rev. 1 Nov. 13, 2006) (ADAMS Accession No. ML063210565) [hereinafter ER].

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

C. SNC and Staff Motions to Strike

In addition to resolving the question of the status of EC 1.3 as a contention of omission or inadequacy, prior to assessing the merits of the SNC motion relative to the summary disposition standards in section II.A above, we also find it appropriate to address the procedural validity of the SNC and staff motions to strike portions of the Joint Intervenors summary disposition answer. A major premise of both those motions is the assertion that, in claiming in their response that the DEIS discussion of a hybrid wet/dry system should be expanded, Joint Intervenors sought improperly to expand the scope of the admitted contention without amending their issue statement.[6] See Staff 1.3 Motion to Strike at 3-4; SNC 1.3 Motion to Strike at 2-5. Additionally, SNC contends that parts of the affidavit of Powers Engineering principal Bill Powers submitted in support of the Joint Intervenors response should be dismissed to the extent he (1) challenges the discussion in the affidavit of SNC Principal Engineer James W. Cutchens provided in support of the SNC dispositive motion regarding purported adverse construction and land use impacts of a dry cooling system on the VEGP site; and (2) asserts that a dry cooling system would not require significant changes to the AP1000 standard turbine building design. See SNC 1.3 Motion to Strike at 7-9.

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

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

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

[7] Of course, in accord with the procedures we have established in this case, a reply would have been due within seven days after the submission of the Joint Intervenors summary disposition motion response rather than the ten days generally provided for a motion. Compare Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 18, 2006) at 5 n.4

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(Initial Prehearing Order) (Dec. 18, 2006) at 5 (unpublished); see also Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 78 (2004) (request to file reply to summary disposition answer granted).

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

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[7](...continued)
(unpublished) with 10 C.F.R. § 2.323(a). If SNC and the staff needed additional time for their replies, however, the appropriate mechanism for obtaining that relief would have been a time extension motion, perhaps filed in conjunction with their request for leave to file a reply.

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

[8] In this regard, Joint Intervenors also argue that if an issue was first raised by the movant in a summary disposition motion, discussion of that issue in a response should not be stricken. See Joint Intervenors Response to 1.3 Motion to Strike at 2. While a movant's discussion of a matter in its summary disposition motion does aid the Board in understanding whether the issue is within the scope of the contention, at least to the degree it suggests the parties had notice of the matter, such a discussion does not necessarily establish that the matter is within the scope of a contention given that the movant's discussion may also be

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D. Analysis of Summary Disposition Request

With these precepts in mind, we turn to the substance of the SNC motion, considering whether SNC has shown that there exists no genuine issue as to any material fact in connection with EC 1.3, as well as the relevance of the arguments proffered both in support of, and in opposition to, the SNC dispositive motion regarding the proper scope of the admitted contention.

1. SNC Position

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

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[8](...continued)
outside the scope of the contention. Nonetheless, if a movant discusses a matter in its statement of undisputed facts, it would not be untoward for the Board to view with skepticism any later argument by that movant that a response regarding that issue is outside the scope of the contention, particularly given the onus that is placed upon an opposing party to respond to such a statement. See 10 C.F.R. § 2.710(a) ("All material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party.").

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

SNC maintains using dry cooling in Georgia's hot, humid summers would result in both average and upper limit backpressures well outside the acceptable range for the 1193 megawatt (MW) triple-pressure turbines SNC proposes be used, requiring that electrical output be reduced by approximately ten percent. See id. at 14-18. Further, according to SNC, to achieve backpressures in an acceptable range for using dry cooling would require extensive and costly design changes. See id. at 17. Moreover, SNC asserts using dry cooling would result in substantial land use impacts associated with constructing more than 300 cooling modules, including removing a large number of additional trees and possibly a pond, as well as add costs in excess of $700 million. See id. at 18-19. Finally, SNC contends that using dry cooling would be contrary to the NRC's policy to strongly encourage standardization for the next generation of nuclear power plants, including, to the extent practicable, balance of plant systems such as a cooling system. See id. at 19-20. As a consequence, SNC declares any

further discussion of dry cooling is unnecessary in light of the NEPA rule of reason that does not require an extended analysis of alternatives that are technically incompatible with, as well as more economically and environmentally costly than, the proposed project.

2. Staff Position

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

3. Joint Intervenors Position

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

In this regard, based on Mr. Powers' affidavit, Joint Intervenors contest the SNC suggestion that only lower backpressure turbines can be used, instead declaring that simpler

and less expensive high backpressure turbines can be utilized. See id. at 5. They also point to statements by Mr. Powers declaring that the standardized AP1000 design is compatible with either a wet or dry cooling system and could be accommodated without an entire rework of the AP1000. Id. at 5, 10. Further, relying on Mr. Powers' supporting affidavit, Joint Intervenors contend that the flawed evaluation of the only viable dry cooling system proffered by SNC will result in a ACC design oversized by 100 units or more. See id. at 9-10. Additionally, they assert that the SNC claim that an ACC design needed to permit effective and efficient operation of the additional Vogtle units is academic fails to account for current dry cooling systems at operating natural gas and coal-fired electrical generating facilities in Texas, Wyoming, and South Africa. See id. at 9, 14. Finally, Joint Intervenors contend SNC's assertion that use of a dry cooling system for the AP1000 runs contrary to the Commission's COL design standardization policy is incorrect because a facility's cooling system falls outside the scope of standardization as described by the NRC. See id. at 3-4.

4. Board Ruling

Regarding this contention of inadequacy, see supra section II.B, after reviewing the information provided by the parties in their summary disposition-related filings, including the various supporting affidavits,[9] relative to the ER/DEIS consideration of the feasibility of dry cooling as a viable alternative to wet cooling and the impact of the proposed facilities' cooling systems on extremely sensitive biological resources, we find that the presentations of the supporting technical affiants of SNC and Joint Intervenors engender a myriad of disputed material factual issues. These include the type of turbines that can be used; the adequacy of

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

current dry cooling system design for use in facilities like the proposed Vogtle plants; the impact of the climate in the vicinity of the VEGP on the efficacy of wet and dry system cooling; and the potential financial, environmental, and/or performance impacts upon facility design, construction, and/or operation of using a dry rather than a wet cooling system. We thus conclude that, at this juncture, disputes over a number of material facts exist such that entering summary disposition in favor of SNC regarding EC 1.3 would be inappropriate.

Moreover, contrary to SNC's suggestion, we are unable to conclude that the general Commission policy of encouraging standardization relative to the new round of COL applications precludes further litigation regarding Joint Intervenors NEPA-based issue statement EC 1.3. Initially, we note that the AP1000 design certification document referenced by SNC in its motion to supplement the record, see SNC 1.3 Motion to Supplement at 2,[10] declares that "[t]he circulating water system and cooling tower are subject to site specific modification or optimization" and "[t]he Combined License applicant will determine the final system configuration." Westinghouse Electric Company LLC, AP1000 Design Control Document at 10.4-12 (rev. 15 2005) (ADAMS Accession No. ML053460410). Also, as the staff quite properly recognizes, "the NRC's policy of standardization of site specific systems does not conflict with its duty under NEPA to consider reasonable alternatives, including cooling system design alternatives that have the potential to mitigate adverse environmental impacts." Staff 1.3 Answer at 8 n.10. As the staff also points out, see id., in its existing draft policy statement regarding the conduct of new reactor proceedings, the Commission itself states that it

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

"encourages [COL] applicants to standardize the balance of their plants insofar as is practicable." 72 Fed. Reg. 32,139, 32,142 (June 11, 2007). In this instance, this exhortation to utilize practicality in employing a standardized design, as well as the NEPA standard of reasonableness relative to the consideration of alternatives and the AP1000 design document, provide confluent bases for further consideration of this contention.

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

[11] In this regard, the outcome of any adjudication regarding EC 1.3 seemingly bears a relationship to the adjudication regarding EC 1.2. The Board's eventual findings relative to

(continued...)

wet/dry cooling system as a NEPA alternative is precluded as outside the scope of that contention as admitted.

III. CONCLUSION

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

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

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[11](...continued)
EC 1.2 regarding cooling system impacts, including "the adequacy of the baseline information provided by [the agency's environmental statement] relative to the portion of the Savannah River that encompasses the project area associated with the intake/discharge structures for both the existing and proposed Vogtle facilities," LBP-07-3, 65 NRC at 259, may have a direct bearing upon its evaluation of whether, given these species' presence, the agency's NEPA discussion of dry cooling is adequate.

material fact relating to genuine issues, and so deny the SNC motion for summary disposition with regard to that contention.[12]

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

1. The unopposed November 23, 2007 SNC motion to supplement the record regarding its October 17, 2007 summary disposition motion is granted.

2, The October 17, 2007 motion of applicant SNC for summary disposition regarding Joint Intervenors issue statement EC 1.3 is denied, consistent with the Board's ruling on the scope of the contention as it relates to the matter of hybrid dry/wet cooling systems that is outlined in section II.D.4 of this decision.

3. The November 21, 2007 NRC staff motion to strike portions of the Joint Intervenors EC 1.3 answer to the SNC summary disposition motion and the November 23, 2007 motion by

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

SNC to strike portions of the Joint Intervenors EC 1.3 answer to its dispositive motion or, in the alternative, to file a reply to that answer are denied.

THE ATOMIC SAFETY
AND LICENSING BOARD[13]

/RA/

G. Paul Bollwerk, III
CHAIRMAN

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA by E. Roy Hawkens for:/

James F. Jackson
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 15, 2008

[13] Copies of this memorandum and order were sent this date by the agency's E-Filing system to counsel for (1) applicant SNC; (2) the Joint Intervenors; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON DISPOSITIVE MOTION AND ASSOCIATED MOTIONS TO STRIKE AND TO SUPPLEMENT THE RECORD REGARDING ENVIRONMENTAL CONTENTION 1.3) (LBP-08-3) have been served upon the following persons by Electronic Information Exchange.

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LB MEMORANDUM ORDER (RULING ON DISPOSITIVE MOTION AND ASSOCIATED MOTIONS TO STRIKE AND TO SUPPLEMENT THE RECORD REGARDING ENVIRONMENTAL CONTENTION 1.3) (LBP-08-3)

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[Original signed by R. L. Giitter]
Office of the Secretary of the Commission

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