

October 6, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO "JOINT INTERVENORS'  
MOTION TO ADMIT NEW CONTENTION"

INTRODUCTION

Pursuant to 10 C.F.R § 2.323(c) and the general schedule provided in the Atomic Safety and Licensing Board ("Board") Order of July 14, 2008,<sup>1</sup> the Staff of the Nuclear Regulatory Commission ("Staff") hereby responds to "Joint Intervenors' Motion to Admit New Contention" (September 22, 2008) ("Motion"). For the reasons stated below, the Staff does not oppose the admissibility, in part, of the contention proffered in the Motion.

BACKGROUND

In the Motion, the Joint Intervenors<sup>2</sup> seek admission of a new contention, designated as Proposed Contention EC 6.0. The proposed contention challenges the adequacy of the Staff's Final Environmental Impact Statement ("FEIS") under the National Environmental Policy Act ("NEPA"). As proposed, the contention reads as follows:

The discussion of potential impacts associated with dredging and use of the Savannah River Federal navigation channel is

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<sup>1</sup> See *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Memorandum and Order (Revised General Schedule), slip op. (July 14, 2008).

<sup>2</sup> 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.

inadequate and fails to comply with NEPA because it relies on the Army Corps of Engineers (the "Corps") to analyze these impacts in the future. As a result, the staff's conclusion that impacts would be moderate runs counter to the evidence in the hearing record. Additionally, the FEIS wholly fails to address impacts of navigation on the Corps' upstream reservoir operations, an important aspect of the problem.

Motion at 2. In support of the proposed contention, the Intervenor submitted, *inter alia*, the Declaration of Donald Hayes (Sept. 21, 2008) ("Hayes Decl.") and the Declaration of Shawn Paul Young (Sept. 22, 2008) ("Young 2008 Decl.").

As bases for the proposed contention, the Joint Intervenor identify several different challenges to the Staff's FEIS. As a general matter, the Joint Intervenor argue that the FEIS contains "substantially different data and conclusions" from those presented in Southern Nuclear Operating Company's ("SNC", "the applicant") Environmental Report ("ER") or the Staff's Draft Environmental Impact Statement ("DEIS"). Motion at 2.

In support of the proposed contention, the Joint Intervenor first assert that use of the Federal navigation channel is necessary in order to barge components to the Vogtle Early Site Permit ("ESP") site for construction of the proposed Units 3 and 4. Motion at 3. The Joint Intervenor then argue that environmental impacts from the use of the Federal navigation channel are therefore direct impacts of the proposed construction of the new units, and they assert that the construction at the Vogtle site and expansion of the Federal navigation are "connected" actions under NEPA. Motion at 4-5. The Joint Intervenor next challenge the Staff's FEIS conclusion with respect to the impacts of dredging the Federal navigation channel, arguing that the conclusion is "inadequately supported" and that dredging of the Federal navigation channel has "potentially significant" environmental impacts. Motion at 5-6. The Joint Intervenor also contend that the FEIS inappropriately relied on "prospective evaluations and certifications of the Corps" and that the Staff had a duty to establish its own impact determination as well as to consult with the Corps pursuant to NEPA. Motion at 7, 9-10.

Finally, the Joint Intervenors argue that operation of the Federal navigation channel “requires the Corps to release water from storage in upstream reservoirs to augment river flow” and that the FEIS fails to consider impacts on upstream reservoirs from such releases. Motion at 8-9.

The Staff submits that certain arguments presented in support of the contention are either untimely or do not otherwise comply with the admissibility requirements of 10 C.F.R. Part 2. However, the Staff does not oppose the admissibility, in part, of the contention, if limited to certain supporting bases as described below.

### DISCUSSION

Under the Commission’s rules of practice, contentions must meet the admissibility requirements of 10 C.F.R. § 2.309. In doing so, new or amended contentions must comply with the applicable factors described in 10 C.F.R. §§ 2.309(c) and (f)(2).<sup>3</sup> Accordingly, before responding to the specific arguments in support of the contention summarized above, the Staff will first address the timeliness of the contention.<sup>4</sup>

#### *A. Timeliness*

The text of the contention challenges the adequacy of the Staff’s analysis of “potential impacts associated with dredging and use of the Savannah River Federal navigation channel[.]” Motion at 2. Furthermore, the bases presented in the Motion itself likewise appear to be limited to the potential impacts of dredging the Federal navigation channel. However, the Hayes

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<sup>3</sup> See, e.g., *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 277 n.25 (2007) (noting standards for “contentions regarding FEIS data or conclusions that differ significantly from the ER or DEIS”).

<sup>4</sup> The Staff herein addresses the timeliness only of the content of the proposed contention. As noted in a letter from Joint Intervenors’ counsel dated September 24, 2008, although the Board’s general schedule provided a deadline of September 22, 2008, for filing of new contentions, the Motion was served on the Staff on September 23, 2008. See Letter from Lawrence Sanders to Administrative Judges (Sept. 24, 2008). However, the Staff does not object to the Motion based on those procedural grounds. See Joint Intervenors’ Unopposed Motion to File “Motion to Admit New Contention” Out-of-Time (Sept. 29, 2008), at 3.

Declaration refers not only to dredging of the Federal navigation channel, but also to dredging activities associated with excavation of the cooling water intake channel and with dredging a barge slip. Hayes Decl. ¶¶ 6, 10. The Hayes Declaration states that with respect to “each” of those activities, “the FEIS fails to address and/or adequately analyze” the potential impacts. Hayes Decl. ¶ 6. Similarly, the Young 2008 Declaration refers to impacts of “the proposed dredging required for construction of the New Units (*including* dredging required to re-open the shipping channel),” suggesting that the Joint Intervenors do not consider their proposed contention to be limited to the topic of potential impacts of dredging the Federal navigation channel. Young 2008 Decl. ¶¶ 11-12 (emphasis added).<sup>5</sup>

The Staff discussed and analyzed the impacts of the intake channel excavation and construction of the barge slip at the Vogtle ESP site in the DEIS. See DEIS at 4-3, 4-8, 4-15, 4-16, 4-24, 4-25, 4-28, 4-34, 4-35. The Motion and its supporting Declarations do not assert that the Staff’s analysis of those impacts changed between the DEIS and the FEIS.<sup>6</sup> Accordingly, the Joint Intervenors had the opportunity to file a contention concerning that analysis following the publication of the DEIS, but chose not to do so. To the extent the proposed new contention seeks to challenge the Staff analysis of those two activities, it should be rejected for failing to demonstrate compliance with the requirements set forth in § 2.309(f)(2).

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<sup>5</sup> Furthermore, the Staff notes that many portions of the Young 2008 Declaration do not address impacts from dredging activities, but appear to be directed instead at the FEIS’s overall analysis of “the potential effects of the New Units on fishery resources of the Savannah River.” Young 2008 Decl. ¶ 5. In particular, the Declaration raises challenges to the FEIS’s analysis of entrainment, impingement, and thermal discharge impacts to aquatic resources. See, e.g., Young 2008 Decl ¶¶ 6, 14-15, 17. Indeed, the Declaration explicitly refers to the “opinions and conclusions set forth in previous affidavits I have submitted in connection with SNC’s ESP application, supporting Intervenors’ previously admitted environmental contentions[.]” Young 2008 Decl ¶ 6. To the extent the Young 2008 Declaration is directed to issues to be litigated in connection with the already-admitted contentions, particularly Environmental Contention 1.2, it is outside the proper scope of the Motion. Accordingly, that the Staff has not responded specifically to those assertions in this Answer should not be understood as conceding their validity or relevance for purposes of the already-admitted contentions.

<sup>6</sup> See FEIS at 4-3, 4-8, 4-9, 4-16, 4-17, 4-25, 4-26, 4-27, 4-28, 4-30, 4-37.

However, to the extent the contention seeks to challenge the Staff's analysis in the FEIS solely of the potential impacts of dredging the Federal navigation channel, the Staff does not contest the Joint Intervenors' assertion, see Motion at 1-2, that the contention satisfies the timeliness criteria of § 2.309(f)(2).<sup>7</sup>

*B. Contention Admissibility Under § 2.309(f)(1)*

A new or amended contention must also meet the admissibility requirements specified in § 2.309(f)(1).<sup>8</sup> As explained below, after considering the contention and its supporting bases, the Staff does not oppose the admissibility, in part, of the contention under the requirements of § 2.309(f)(1). However, the Staff submits that several of the Motion's stated bases for the contention do not support the contention's admissibility and should be rejected because they fail to demonstrate that a genuine dispute exists with the FEIS on a material issue of law or fact.

§ 2.309(f)(1)(vi).

1. "Connected" Action

The Joint Intervenors' central argument is that dredging of the Savannah River Federal navigation channel is necessary for construction of Units 3 and 4 to take place at the Vogtle site, and that impacts of the dredging thus are direct impacts of the proposed NRC action. Motion at 3-5 (Bases 2 & 3). For that reason, Joint Intervenors assert that construction of Units 3 and 4 at the Vogtle site and the potential expansion of the Federal navigation channel must be viewed as "connected" actions under NEPA. Motion at 5. However, this argument lacks legal and factual support and does not support the admissibility of the contention.

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<sup>7</sup> The Staff notes that the Motion does not directly address the standards for late filings pursuant to § 2.309(c)(2). *But see Shaw Areva MOX Servs. (Mixed Oxide Fuel Fabrication Facility)*, LBP-07-14, 66 NRC 169, 210 n.95 (2007) (addressing relationship between § 2.309(c) and (f)(2) for admitted parties).

<sup>8</sup> The Staff has described the contention admissibility requirements of § 2.309(f)(1) in detail in previous pleadings in this proceeding, and thus does not restate them here. See, e.g., NRC Staff Answer to Petition for Intervention (Jan. 10, 2007) at 11-13.

First, the potential dredging of the Federal navigation channel is not part of the NRC's Federal action in issuing an ESP, because the dredging action is outside the jurisdiction of the NRC. As the FEIS states, dredging of the Federal navigation channel would not be carried out by the NRC or by SNC, but by the Corps, pursuant to its statutory mandate. See FEIS at 7-20; see *also* Rivers and Harbors Act of 1899, 33 U.S.C.A. 403 (2008). In contrast to the limited dredging-related activities identified by SNC and evaluated by the Staff in Chapter 4 of the FEIS - such as modification of the barge slip - the dredging of the Federal channel is not an activity for which SNC would request and obtain a permit from the Corps.

NEPA does not require the NRC to analyze as a "connected" action an undertaking (or potential undertaking) that is under the jurisdiction of another Federal agency, where the other agency's decision on the action under its own jurisdiction would not determine, or be determined by, the NRC's Federal action. See *Cal. Trout v. Schaefer*, 58 F.3d 469, 473-474 (9th Cir. 1995); *North Carolina v. City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1991); *cf. Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1117-19 (9th Cir. 2000), *cert. denied* 534 U.S. 815 (2001) (upholding Corps decision to limit its NEPA review to portion of project under its control and jurisdiction, where non-federal portion could proceed independently and each portion had "independent utility"). The Corps, not the NRC, has the authority to determine whether the Federal navigation channel will be dredged, and the authority to determine what environmental review is required for such an activity. As such, NEPA does not require that impacts associated with the potential Corps channel-dredging action be analyzed as direct impacts of the NRC's proposed licensing action. See *also City of Shoreacres v. Waterworth*, 420 F.3d 440, 449-50, 451-54 (5th Cir. 2005) (discussing why Corps approval of dredge-and-fill permit for port construction likely would not require including NEPA consideration of potential future deepening of ship navigation channel; such activity would be the result of action by another Federal entity over which the Corps had no control). Accordingly, Joint Intervenors are

incorrect that the NRC's issuance of an ESP and the Corps' potential channel-dredging activities must be viewed as "connected" actions under NEPA.

Furthermore, the Joint Intervenors' Motion itself appears to acknowledge that it is unclear whether dredging of the Federal navigation channel ultimately will be necessary to permit barge transportation to the Vogtle site. The Motion initially states that "construction [of Units 3 and 4] cannot proceed until the Federal navigation channel is expanded[.]" Motion at 5. However, the Motion subsequently states that "much of the time there is sufficient flow in the Savannah River for commercial navigation, [but] this is by no means guaranteed." *Id.* at 9.<sup>9</sup> This acknowledgement – that commercial navigation is not necessarily precluded by Savannah River flows "much of the time" – undercuts the contention's claim that issuance of the ESP would be "irrational, or at least unwise" were dredging of the navigation channel not to occur. *Id.* at 4 (citing *Save the Yaak Comm. v. Block*, 840 F.2d 714, 720 (9th Cir. 1988)).

In any event, the FEIS does not assert or assume that construction at the Vogtle ESP site could not (or would not) occur without dredging of the Federal navigation channel. The FEIS analysis indicates that components for construction of Units 3 and 4 would be delivered to the site by barge. *See, e.g.*, FEIS at 4-26. However, the FEIS does not state that future construction at the ESP site is contingent on dredging of the navigation channel (or completion of a specific plan to do so). Nor has NRC designated the Corps' implementation of such dredging as a term or condition of the ESP.

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<sup>9</sup> The Motion also states that "Even with dredging the Federal navigation channel, a 5,800 cfs flow from Thurmond Reservoir is needed to provide a 9 foot navigation channel," and states that "discharge from Thurmond Dam has been limited under the Drought Contingency plan since June 2007, and is currently capped at 3,600 cfs." Motion at 8, 9. However, the Motion also cites the FEIS for the proposition that average Savannah River discharge is 8,800 cfs. *Id.* at 9. The Motion does not explain why these flow variations support the Joint Intervenors' conclusion that barge traffic is inevitably precluded absent Corps dredging or augmented releases from Thurmond Dam.

Nevertheless, the Staff has discussed those potential impacts in Chapter 7 of the FEIS, in the context of disclosing potential cumulative impacts from other activities that, even if not certain to occur, may be reasonably foreseeable. NEPA does not require an agency to consider the environmental effects that speculative or hypothetical projects might have on a proposed project. See *Northcoast Env'tl. Ctr. v. Glickman*, 136 F.3d 660, 668 (9th Cir. 1998), citing *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); see also *Sierra Club v. Marsh*, 976 F.2d 763, 767-68 (1st Cir. 1992). In interpreting *Kleppe*, the Commission has determined that for a NEPA analysis to be necessary, a future action "must at least constitute a 'proposal' pending before the agency" and "must be in some way interrelated with the action that the agency is actively considering[.]" See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295 (2002).

The Motion does not assert that a proposal to dredge the Federal navigation channel is pending before the NRC; nor does it indicate that a concrete dredging plan is pending before the Corps. Accordingly, the Motion does not support the Joint Intervenors' claim that future potential dredging of the Federal navigation channel is required to be analyzed as a direct impact of the proposed action in the ESP FEIS. In short, while the Staff chose to analyze the impacts of potential dredging by the Corps in its discussion of cumulative impacts, the Staff's decision to do so does not mean that the present (ESP) and potential (Corps) Federal actions are dependent on one another, nor does NEPA require them to be evaluated as a single overarching action in the FEIS.<sup>10</sup> Consequently, this stated basis does not support the admissibility of the proposed contention.

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<sup>10</sup> Joint Intervenors cite *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985) for the proposition that actions are "connected" if they are "inextricably intertwined." Motion at 5. In that case, the Ninth Circuit found that the construction of a road and the timber sales facilitated by that road were connected actions, as one would not proceed without the other. *Thomas*, 753 F.2d at 758-59. In contrast, as discussed above, the Corps has an independent statutory mandate to maintain the navigation channel in (continued. . .)

## 2. Adequate Support for FEIS Conclusion

The Joint Intervenors next challenge the adequacy of the Staff's FEIS conclusion with respect to the impacts of dredging the Federal navigation channel, arguing that the conclusion is "inadequately supported" and that dredging of the Federal navigation channel has "potentially foreseeable and environmentally significant" impacts. Motion at 5-7 (Bases 4 & 5).

The Motion argues that the FEIS analysis of potential channel dredging does not identify specific methodologies used by the Staff and contains inadequate detail. Motion at 5-6. The Motion also asserts that the impacts could be "environmentally significant." *Id.* at 6. The Motion, relying in part on the Hayes Declaration and the Young 2008 Declaration, states a number of potential impacts of channel dredging. *Id.* at 6-7. The Hayes Declaration identifies concerns with benthic habitat destruction, water quality impairment, sediment resuspension, and sediment placement and management, and it also estimates the size of the potential sediment disturbance. See Hayes Decl. ¶¶ 7-11. The Young 2008 Declaration refers to impacts on specific aquatic species and benthic organisms, disruption of food web dynamics and spawning success, impacts to water quality, resuspension of contaminants, as well as impacts to freshwater mussels. See Young 2008 Decl. ¶¶ 11-13. The Young 2008 Declaration also suggests that the dredging would have "very large and severely negative impacts" on aquatic species. Young 2008 Decl. ¶ 11.

As defined and limited by the proposed basis stated in Bases 4 and 5 of the Motion (Motion at 5-7) and the portions of the Declarations noted above, the Staff does not oppose the admissibility, in part, of the contention under the requirements of § 2.309(f)(1).

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(. . .continued)

the Savannah River, regardless of whether any ESP is issued for the Vogtle site. Joint Intervenors likewise have not asserted that construction at Vogtle would be the only reason that the Corps would undertake dredging of the channel, or that such dredging would be "automatically triggered" by approval of an ESP.

### 3. Staff and Corps Determinations

The Joint Intervenors also contend that the FEIS inappropriately relied on “prospective evaluations and certifications of the Corps of Engineers” and that the Staff had a duty to establish its own impact determination as well as to consult with the Corps pursuant to NEPA. Motion at 7-8, 9-10 (Bases 6 & 8). For reasons substantially similar to those described above in Section B.1, these claims do not demonstrate a genuine dispute with the FEIS on a material issue of law or fact and do not support the admissibility of the contention. § 2.309(f)(1)(vi).

For the reasons previously stated, the NRC’s ESP review and the potential Corps action are not “connected” actions, and the Staff was not required to evaluate the impacts of potential dredging by the Corps as direct impacts of the NRC action. See, e.g., *Cal. Trout*, 58 F.3d at 473-474. Because the dredging project was incompletely defined, FEIS at 7-20, and did not constitute a proposal pending before the agency, it was neither legally required nor reasonable for the Staff to conduct a detailed NEPA analysis. See *McGuire*, CLI-02-14, 55 NRC at 295. Nevertheless, because the potential need for dredging of the channel was raised in public comments on the DEIS, and to disclose a reasonably foreseeable cumulative impact, the Staff discussed the qualitative impacts that would be anticipated from the project. In doing so, it was reasonable for the Staff to base its analysis on the limited information then available concerning the possible future Corps action. See *Crouse Corp. v. Interstate Commerce Comm’n*, 781 F.2d 1176, 1193-96 (6th Cir. 1986), *cert. denied* 479 U.S. 890 (1986); *Sierra Club*, 976 F.2d at 767-68. In short, because the Corps and not the NRC has the authority to determine both whether the Federal navigation channel will be dredged and what environmental review would then be required, it was appropriate for the Staff to leave a more comprehensive analysis to the NEPA review that the Corps would be required to conduct for its own, independent, Federal action.

The Motion asserts that such reliance on the Corps' review is inconsistent with the 1975 Memorandum of Understanding ("MOU") between the Corps, U.S. Army, and NRC. Motion at 7. According to the Motion, the MOU "expressly provides that the NRC must exercise primary responsibility in conducting environmental reviews – including analysis of dredging impacts." *Id.* The MOU identified by the Intervenor<sup>11</sup> indicates that the Corps may participate in the preparation of NRC EISs, including with respect to topics including dredging activities, "when such assistance is appropriate." 40 Fed. Reg. at 37,111. However, neither that MOU nor the Staff guidance in NUREG-1555, Environmental Standard Review Plan (1999) ("ESRP") specify that the "dredging activities" at issue should encompass future potential dredging by the Corps that is neither the subject of a permit application to the Corps nor required by the NRC licensing action that is the subject of the EIS. Accordingly, the MOU guidance is consistent with the Commission's reasoning in *McGuire* - that NEPA requires detailed analysis of projects that are "ripe," rather than merely contemplated actions. See *McGuire*, CLI-02-14, 55 NRC at 295.

In its Order dated September 24, 2008, the Board specifically requested that the Staff discuss the relevance, if any, of the recently-revised MOU between the NRC and the Corps.<sup>12</sup> The revised MOU<sup>13</sup> states that it was developed "to streamline the respective regulatory processes associated with the authorizations required to construct and operate nuclear power plants." 73 Fed. Reg. at 55,547. Like the 1975 MOU, the 2008 MOU continues to acknowledge

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<sup>11</sup> The Motion cites an ESRP reference to 40 Fed. Reg. 60,115, but that Federal Register citation concerns an MOU between the NRC and the Environmental Protection Agency. The MOU to which the Motion apparently intended to refer, between the Corps, U.S. Army, and NRC, was published at 40 Fed. Reg. 37,110 (Aug. 25, 1975).

<sup>12</sup> See *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Memorandum and Order (Scheduling Guidance and Information Request Relating to Motion to Admit New Contention), slip op. at 2-3 (Sept. 24, 2008).

<sup>13</sup> See Notice of Availability of Memorandum of Understanding Between U.S. Army Corps of Engineers and U.S. Nuclear Regulatory Commission on Environmental Reviews Related to the Issuance of Authorizations to Construct and Operate Nuclear Power Plants, 73 Fed. Reg. 55,546 (Sept. 25, 2008).

NRC as the lead agency for preparation of the EIS for the issuance of NRC licenses. *Id.* In discussing the relative roles and responsibilities of the two agencies, the MOU notes that “Proposed nuclear power plants may require one or more permits from the Corps[.]” *Id.* The MOU indicates the agencies’ intent to “Work together and with applicants and other stakeholders, as appropriate, including before complete applications *for the necessary authorizations* are filed.”<sup>14</sup> *Id.* at 55,548 (emphasis added). In discussing coordination on the “purpose and need of the energy project,” the MOU endorses early coordination “on the scope of the NEPA analysis for all activities under Federal purview” but notes that “The Corps will complete an independent permit decision in carrying out its regulatory responsibilities.” *Id.* In short, like the 1975 MOU, the revised MOU does not explicitly address the situation where Federal navigation channel dredging activities are not actually proposed by the applicant as part of the NRC’s licensing action, the activities would be conducted by the Corps under its independent jurisdiction, and the activities may not ultimately prove to be necessary.

Consequently, the issuance of the 2008 MOU does not change the Staff view discussed above that Basis 6 of the Motion does not support the admissibility of the proposed new contention.<sup>15</sup> The Staff submits that the proposed contention is inadmissible to the extent it challenges the adequacy of the FEIS based solely on its acknowledgment of future NEPA review by the Corps of the potential Federal navigation channel dredging project.

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<sup>14</sup> The MOU also notes that the agencies may develop additional guidance to enable “the Corps’ permit documentation” to be prepared concurrently with the NEPA process. 73 Fed. Reg. at 55,548.

<sup>15</sup> In any event, the MOU specifies that it “is intended only to improve the working relationships of the participating agencies in connection with expeditious decisions with regard to nuclear power plant authorizations and is not intended to, nor does it create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any person or party against the United States, its agencies, its officers, or any other person.” *Id.* at 55,549. The MOU further emphasizes that “the terms of this MOU are not intended to be enforceable by any party other than the signatories hereto.” *Id.*

Furthermore, the Motion's assertion (in Basis 8) that the Staff failed to consult with the Corps as required by NEPA is not supported by the record. The Staff contacted several representatives of the Corps during its review,<sup>16</sup> and a representative of the Corps did submit written comments on the DEIS; the Staff response to those (and related) comments was provided in Appendix E to the FEIS. See FEIS at B-5, E-8. Basis 8 of the Motion repeats the Motion's earlier criticism of the analysis of dredging in the FEIS, calling it "vague and insufficient." Motion at 10. However, without having referenced the interaction with the Corps noted above, the Motion does not clearly explain either a specific failure to consult or its consequence for the Staff analysis.<sup>17</sup> Therefore, Basis 8 does not demonstrate why a genuine dispute exists with the FEIS on a material issue of law or fact, § 2.309(f)(1)(vi), and does not support the contention's admissibility.

#### 4. Impacts to Upstream Reservoirs

Finally, the Joint Intervenors argue that if the Federal navigation channel is not dredged, the Corps would have to schedule releases of water from storage in upstream reservoirs in order to permit barge traffic. Motion at 8-9 (Basis 7). The Motion asserts that environmental impacts of such releases should therefore have been analyzed in the FEIS. *Id.*

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<sup>16</sup> The Staff notes that a letter dated February 26, 2007, from Mark Notich to William Lynch of the Corps (Savannah District) discussing the Staff's January 2007 meeting with representatives from the Corps was inadvertently not included in the list of project correspondence in Appendix C to the FEIS. That letter (ML070310063) was made available in the Staff's initial hearing file disclosure in this proceeding. See Letter from Jonathan Rund to Administrative Judges (April 11, 2007), Attachment 1 at 38 (Document 0-424).

<sup>17</sup> In the case cited by the Joint Intervenors, *Warm Springs Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980), the court found that a violation of NEPA consultation requirements did not require reversal where the lead agency preparing the EIS had made a good faith effort to comply with NEPA and no prejudice resulted from the agency's failure to obtain written comments from an agency that had potentially relevant expertise concerning an impact of the dam construction project under consideration. *Id.* at 1022-23.

However, as noted previously, the Motion states that “much of the time there is sufficient flow in the Savannah River for commercial navigation, [but] this is by no means guaranteed.” *Id.* at 9. Although the Motion states that discharges from Thurmond Dam have recently been limited under the Drought Contingency Plan and are “currently capped at 3600 cfs,” Joint Intervenors also state that the FEIS identifies average Savannah River discharge as 8800 cfs. *Id.* at 9. Accordingly, the Joint Intervenors do not assert that current flow conditions in the river are necessarily inconsistent with future transportation of components to the Vogtle ESP site by barge, with or without scheduled water releases from Thurmond Dam or dredging of the Savannah River navigation channel. Consequently, the Motion does not support the assertion that a lack of discussion in the FEIS of the impacts from such speculative water releases thereby represents a material omission. This basis thus fails to demonstrate a material dispute of fact or law as required by § 2.309(f)(1)(vi). Accordingly, the Staff submits that the final sentence of Proposed Contention EC 6.0 is inadmissible.

#### CONCLUSION

For the aforementioned reasons, the Staff does not oppose the admissibility, in part, of Proposed Contention EC 6.0, if limited to the specific supporting basis discussed above.

Respectfully submitted,

/signed (electronically) by/  
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this 6<sup>th</sup> day of October, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
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SOUTHERN NUCLEAR OPERATING CO. )  
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(Early Site Permit for Vogtle ESP Site) )

Docket No. 52-011-ESP

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO 'JOINT INTERVENORS' MOTION TO ADMIT NEW CONTENTION'" have been served upon the following persons by Electronic Information Exchange this 6<sup>th</sup> day of October, 2008:

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