

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. 52-011-ESP
)	
Southern Nuclear Operating Company)	ASLBP No. 07-850-01-ESP-BD01
)	
(Early Site Permit for Vogtle ESP Site))	October 6, 2008
)	

**SOUTHERN NUCLEAR OPERATING COMPANY’S ANSWER TO JOINT
INTERVENORS’ MOTION TO ADMIT NEW CONTENTION**

Pursuant to 10 C.F.R. § 2.309(h)(1), Southern Nuclear Operating Company (“SNC”), applicant for an Early Site Permit (“ESP”) in the above-referenced proceeding, submits this Answer to Joint Intervenors’ Motion to Admit New Contention (“Motion”), filed on September 23, 2008.¹ Joint Intervenors² have failed to satisfy either the contention admissibility standards set forth in 10 C.F.R. § 2.309(f)(1) or the new contention/timeliness requirements of 10 C.F.R. §§ 2.309(f)(2) and (c). The proposed contention is fatally defective in terms of admissibility because it raises issues that are beyond the scope of the proceeding, fails to raise an issue material to the Board’s decision, and fails to demonstrate that a genuine dispute exists on a material issue of law or fact. With respect to the nontimely nature of the Motion, the information upon which the proposed contention is based does not differ significantly from what was previously available to Joint Intervenors in SNC’s Environmental Report (“ER”) or in the Draft

¹ Joint Intervenors’ Motion was later accompanied by a Motion for Leave to File Out-of-Time, dated September 29, 2008.

² 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.

Environmental Impact Statement (“DEIS”), which was issued more than a year ago.³ For these reasons – and as discussed more fully below – Joint Intervenors’ Motion to Admit New Contention must be denied in its entirety.

I. BACKGROUND

On August 14, 2006, SNC submitted an ESP application in accordance with 10 C.F.R. Part 52 which included an ER. On December 11, 2006, Joint Intervenors (then Joint Petitioners) filed a Petition for Intervention seeking to have admitted seven contentions related to the ER, designated EC 1.1, 1.2, 1.3, 2, 3, 4, and 5. On March 12, 2007, the Atomic Safety and Licensing Board (“ASLB” or “Board”) admitted two contentions, EC 1.2 and 1.3. *See* March 12, 2007 Memorandum and Order (Ruling on Standing and Contentions).

Following the Nuclear Regulatory Commission (“NRC”) Staff’s publication of its DEIS on September 10, 2007, and based on information contained therein, SNC filed Motions for Summary Disposition of EC 1.2 and 1.3.⁴ The Board granted in part SNC’s Motion for Summary Disposition of EC 1.2 but found that genuine issues of material fact existed on certain issues raised by EC 1.2 and 1.3. *See* January 15, 2008 Memorandum and Order (Ruling on Dispositive Motion and Associated Motions to Strike Regarding Environmental Contention 1.2) at 32; 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) at 17-18. These issues are narrowly defined by the Board and will be subject to a hearing

³ As explained below, Joint Intervenors’ Motion is nontimely for two independent reasons: (i) it should have been filed within 30 days of the availability of the DEIS, and (ii) it nonetheless was not filed within 30 days of the availability of the Final Environmental Impact Statement (“FEIS”).

⁴ The NRC Staff filed responses supporting SNC’s Motions for Summary Disposition of EC 1.2 and 1.3. *See* NRC Staff Answer to [SNC] Motion for Summary Disposition of [EC] 1.2 (October 30, 2007), and NRC Staff Answer to [SNC] Motion for Summary Disposition of [EC] 1.3 (October 29, 2007).

scheduled for January 12-14, 2009. *See* July 14, 2008 Memorandum and Order (Revised General Schedule).

On August 14, 2008, the Staff notified the parties of the availability of the Final Environmental Impact Statement (“FEIS”). *See* August 14, 2008 Letter from Patrick Moulding, NRC Staff Counsel to Administrative Judges (notifying parties of availability of FEIS). Forty days thereafter, Joint Intervenors filed a Motion to Admit New Contention on September 23, 2008.⁵ Proposed EC 6.0 alleges:

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

Joint Intervenors’ Motion to Admit New Contention, (September 23, 2008) at 2. EC 6.0 concerns the impacts of the Corps’ dredging of the Savannah River Federal navigation channel as well as its implementation of the Savannah River Drought Contingency Plan. *See* Motion at 3-9.

II. LEGAL STANDARDS

To intervene in a proceeding, a party must specify the contentions it seeks to have litigated. *See* 10 C.F.R. § 2.309(a). At that initial stage, contentions arising under the National Environmental Policy Act (“NEPA”) must be based on the applicant’s ER. 10 C.F.R. § 2.309(f)(2). A petitioner may amend or file new contentions, however, “if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or

⁵ On the morning of September 23, 2008, counsel for Joint Intervenors transmitted via email a copy of the Motion to counsel for SNC, citing problems with the NRC’s e-filing system the night of September 22, 2008.

conclusions in the applicant's documents." *Id.* (emphasis added).⁶ "A contention filed late is excused only when the 'information on which the amended or new contention is based was not previously available.'" *In the Matter of System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), 2007 WL 595086 *1 (N.R.C. 2007).

New contentions will only be admitted "provided that [the information] is truly new and materially different and provided that the petitioner acts promptly." *See In the Matter of Entergy Nuclear Vermont Yankee (Vermont Yankee Nuclear Power Station)*, 63 N.R.C. 568, 573 (2006) (rejecting petitioner's attempt to "stretch the timeliness clock" because new contentions were based on information that was previously available and petitioners failed to identify precisely what information was "new" and "different."); *see also In the Matter of Exelon Generation Co., Inc. (Early Site Permit for Clinton ESP Site)*, 62 N.R.C. 134, 140 (2005) (new information is not "materially different" if it does not raise a genuine issue of law or fact). When the DEIS provides the "triggering event" for filing new/late-filed or amended contentions, this Board established that such contentions must be filed within thirty days of that event. *See* May 7, 2007 Memorandum and Order (Prehearing Conference and Initial Scheduling Order) at 3; *see also* 10 C.F.R. § 2.332(a) (authorizing presiding officer to "enter a scheduling order that establishes limits for the time to file motions"). Similarly, if significantly different information appeared for the first time in the FEIS, any new or amended contentions should be submitted within 30 days of the availability of the FEIS.

⁶ "Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that: (i) The information upon which the amended or new contention is based was not previously available; (ii) The information upon which the amended or new contention is based is materially different than information previously available; and (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information." 10 C.F.R. § 2.309(f)(2)(i)-(iii).

If a proposed contention is not filed “within thirty days of the event that provides the triggering basis for submitting a new/late-filed or amended contention,” as required by the Board’s Scheduling Order,⁷ then it is considered “nontimely.” *See* 10 C.F.R. § 2.309(c). NRC regulations provide that “nontimely requests and/or petitions and contentions will not be entertained” absent a determination by the Board that they should be admitted, based on a balancing of eight factors.⁸ 10 C.F.R. § 2.309(c) (emphasis added). Further, the petitioner “shall address” those factors in its nontimely filing. 10 C.F.R. § 2.309(c)(2) (emphasis added).

Additionally, even if an intervenor’s effort to file a new contention is considered timely, the contention cannot be admitted unless it also satisfies all of the standard admissibility requirements in 10 C.F.R. § 2.309(f)(1). Accordingly, the new contention must, *inter alia*,

...

- (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;
- [and]
- (vi) [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner

⁷ This is analogous to the requirement in 10 C.F.R. § 2.309(f)(2)(iii) that the amended or new contention be “submitted in a timely fashion based on the availability of the subsequent information.”

⁸ These factors include: “(i) Good cause, if any, for the failure to file on time; (ii) The nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding; (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding; (iv) The possible effect of any order that may be entered in the proceeding on the requestor’s/petitioner’s interest; (v) The availability of other means whereby the requestor’s/petitioner’s interest will be protected; (vi) The extent to which the requestor’s/petitioner’s interests will be represented by existing parties; (vii) The extent to which the requestor’s/petitioner’s participation will broaden the issues or delay the proceeding; and (viii) The extent to which the requestor’s/petitioner’s participation may reasonably be expected to assist in developing a sound record.” 10 C.F.R. § 2.309(c)(1).

believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1); *see* In the Matter of *Amergen Energy Co.* (License Renewal for Oyster Creek Nuclear Generating Station), 63 N.R.C. 391 (2006) (recognizing that to add a new contention, a petitioner must make the showing required in 10 C.F.R. § 2.309(f)(2) and satisfy the admissibility requirements in 10 C.F.R. § 2.309(f)(1)).

The requirements in 10 C.F.R. § 2.309(f)(1) impose a “strict” standard for the admission of contentions. *See In the Matter of Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), 54 NRC 349, 358 (2001). They are intended to focus hearings on “real, concrete issues” which are susceptible to resolution in an adjudicatory context. Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,189-90 (Jan. 14, 2004); *see In the Matter of Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), 49 NRC 328, 334. Importantly, “boards admit contentions, not bases: “[I]t is the admissibility of the contention, not the basis, that must be determined.”” *In the Matter of Duke Energy Carolinas, LLC* (William States Lee III Units 1 & 2), LBP-08-17 (2008), *citing In the Matter of Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), 60 NRC 548, 557 (2004).

III. JOINT INTERVENORS HAVE FAILED TO DEMONSTRATE THAT EC 6.0 SATISFIES THE GENERAL ADMISSIBILITY REQUIREMENTS OF 10 C.F.R. § 2.309(f)(1).

Environmental contentions are based on issues arising under NRC's NEPA obligation. *See* 10 C.F.R. § 2.309(f)(2). Accordingly, for EC 6.0 to be within the scope of this proceeding, the contention must be based on a requirement of NEPA. Moreover, the contention must be material to the findings the Board must make to support the issuance of the ESP and be

supported by evidence. *See* 10 C.F.R. § 2.309(f)(1). However, because the Corps' potential dredging is not caused by or connected to the decision before the Board of whether or not to grant an ESP, and for the additional reasons addressed below, EC 6.0 is beyond the scope of this proceeding. Additionally, none of Joint Intervenors' bases raise issues that are material to the findings this Board must make or provide sufficient information to show that a genuine dispute exists on a material issue of law or fact.

A. The NRC's proposed action is the grant of an ESP.

"The proposed Federal action is issuance, under the provisions of 10 CFR Part 52, of an ESP for the VEGP site" by the NRC. FEIS at 1-4. In its EIS, the NRC Staff has taken a "hard look" at "the environmental impacts of the proposed action at the VEGP site, including the environmental impacts associated with construction and operation of reactors at the site, the impacts of construction and operation of reactors at alternative sites, the environmental impacts of alternatives to granting the ESP, and the mitigation measures available for reducing or avoiding adverse environmental effects." *Id.* The NRC's grant of an ESP to SNC will do nothing to authorize the Corps to dredge the Federal navigation channel.⁹ Thus, the issues raised by EC 6.0 are not material to the findings this Board must make.

B. The Corps has an independent responsibility to maintain the Federal navigation channel.

The Corps of Engineers is authorized by the Rivers and Harbors Act of 1950 to develop and maintain a navigation channel nine feet deep and ninety feet wide from Augusta to the Savannah Harbor. *See* Pub. L. No. 81-516, § 101, 64 Stat. 163 (1950). That Act "adopted and authorized" a number of projects "to be prosecuted under the direction of the Secretary of the

⁹ Although the ER supporting SNC's application for an EIS is comprehensive and addresses the environmental impacts of construction of the proposed facilities, the NRC's definition of "construction" does not include transportation of components over public transportation routes to the site. *See* 10 C.F.R. § 50.10.

Army and Supervision of the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated.” *Id.*¹⁰ One such project was “Savannah River, Georgia and South Carolina; Senate Document Numbered 6, Eighty-first Congress.” *Id.* at 165. According to Senate Document 6, the Chief of Engineers—

recommends modification of the existing project for Savannah River below Augusta, Ga., to provide for a channel 9 feet deep and 90 feet wide between the upper end of Savannah Harbor and the present head of navigation at Augusta, Ga., the improvement to be based upon the low-flow conditions resulting from the reregulation of the outflow from the Clark Hill development, and to be secured by dredging and open-river regulating works, generally in accordance with the plan of the district engineer and with such modifications thereof as in the discretion of the Secretary of the Army and the Chief of Engineers may be advisable. . . .

S. Doc. No. 6 at 1 (1949).¹¹ If the Corps takes steps to maintain the navigability of the Savannah River, it does so under its independent authority as outlined above. Again, the NRC’s grant of an ESP to SNC will do nothing to authorize the Corps to dredge the Federal navigation channel.

C. The Corps has an independent responsibility to comply with NEPA.

Notably, the Corps has already completed an EIS regarding the maintenance of the Savannah River navigation channel. That document assesses the impact of dredging to aquatic resources and concludes that the overall impacts would not be significant. *Final Environmental Impact Statement, Operation and Maintenance of Navigation Project Savannah River Below Augusta*, U.S. Army Corps of Engineers, at 19-20 (September 1976). In fact, the documents attached to Joint Intervenors’ Motion clearly establish that the Corps will comply with its NEPA

¹⁰ Those projects were made subject to the procedures established by Section 1 of the Rivers and Harbors Act of 1945. That measure includes requirements with respect to the Corps’ interactions with Congress, states, and in the case of western states, the Department of the Interior. *See* Pub. L. No. 79-14, § 1, 59 Stat. 10 (1945).

¹¹ In 1958, Congress directed the Secretary of the Army to “cause surveys to be made” at the “Savannah River, with a view to providing nine-foot navigation to Augusta, Georgia.” Pub. L. No. 85-500, § 112, 72 Stat. 297, 304 (1958). That statute, however, did not purport to alter the 1950 authorization.

obligations in connection with any possible future maintenance of the navigation channel. *See* Motion, March 27, 2008 email from Jason Okane to Jeffrey King. If the Corps were to determine that, in discharging its authorized duties to maintain navigation on the Savannah River, additional dredging is appropriate, the Corps may elect to supplement that earlier EIS. Alternatively, the Corps could determine that a new environmental assessment or impact statement is called for. Either way, the U.S. Army Corps of Engineers will have to satisfy its own, independent NEPA obligations, irrespective of whether an ESP is issued for Plant Vogtle. Joint Intervenors apparently agree with this. *See* Motion at 8.

With respect to upstream reservoirs, both the Corps' 1989 Drought Contingency Plan referenced by the Joint Intervenors and the 2006 Drought Contingency Plan Draft Update discuss management of the upstream reservoirs in detail. Both documents confirm that no upstream flow regime is dedicated to navigation support. Further, while the Corps' 1976 Savannah River EIS indicates that Clarks Hill (Thurmond) Dam is designed for a minimum release of 5800 cfs at Augusta for navigation purposes, the 1989 Drought Plan indicates that minimum flows from Thurmond Dam are now based on the flow required by downstream water users and specifies four action levels for minimum flow releases. The 2006 Draft Update confirms that there is no upstream flow regime defined to support navigation. Moreover, both the 1989 Plan and the 2006 Update, have already been subject to their own NEPA reviews. *See* Motion at *Drought Plan Attachment*, iii (identifying Finding of No Significant Impact for Plan as appendix K), and U.S. Army Corps of Engineer's Draft Environmental Assessment and Finding of No Significant Impact: Drought Contingency Plan Update Savannah River Basin, May 2006, *available at* <http://www.sas.usace.army.mil/Draft%20SRB%20Drought%20EA%20May%2006.pdf> (visited Oct. 6, 2008). For this reason, and those discussed below, the NRC Staff is not required to

consider the Corps' action in its NEPA analysis. *See, e.g., Quechan Indian Tribe v. U.S. Dep't of the Interior*, 547 F. Supp. 2d 1033, 1043 (D. Ariz. 2008) (concluding that Bureau of Reclamation was not required to include analysis of impacts of proposed oil refinery in its NEPA process "because the refinery is subject to a separate NEPA process.")

D. The NRC's action of issuing the ESP and the Corps' potential action of maintaining the Federal navigation channel are not "connected actions."

Joint Intervenors attempt to "connect" the NRC's action of issuing the ESP with the Corps' potential, not yet defined action of maintaining the Federal navigation channel and thereby bring it within the scope of this proceeding. *See* Motion at 4-5. However, Joint Intervenors provide no evidentiary basis to connect these actions. *Id.* Instead, they simply conclude through an unsupported allegation that "this construction cannot proceed until the Federal navigation channel is expanded." *Id.* at 5. Joint Intervenors must do more than make allegations or conclusory statements. *See In the Matter of Gulf States Util. Co. (River Bend Station, Unit 1)*, 40 N.R.C. 43, 51 (1994).

In any event, the Corps' potential action of dredging the Federal navigation channel is not a "connected action" within the meaning of NEPA. *See* 40 C.F.R. § 1508.25. "Actions are connected if they: (i) [a]utomatically trigger other actions which may require environmental impact statements; (ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously; or (iii) [a]re interdependent parts of a larger action and depend on the larger action for their justification." *Id.* The Commission has interpreted the case law concerning "connected actions" to require that "to bring NEPA into play, a possible future action must at least constitute a 'proposal' pending before the agency (i.e., ripeness), and must be in some way interrelated with the action that the agency is actively considering (i.e., nexus)." *In the Matter of Duke Energy Corp.*, (Mcquire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1

and 2), 55 N.R.C. 278, 295 (2002). Moreover, courts have applied an “independent utility” test. *See Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1118 (9th Cir. 2000). When each project could have been completed with or without the other, then each is considered to have “independent utility.” *Id.*

The Corps’ potential dredging is not a connected action that must be considered in the NRC’s EIS because it is not automatically triggered by the NRC’s action, it can proceed with or without the NRC’s action, and it does not depend on the NRC’s action for justification. Where the two actions in question are “separate questions,” and each could go forward without the other, there is no requirement that they be evaluated together for the purposes of NEPA. *See Duke Energy Corp.*, 55 NRC at 297. Critically, Joint Intervenors have provided no evidence that dredging by the Corps would not have independent utility. *See Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1230 (10th Cir. 2008) (finding that EIS for project to build gas pipeline need not consider development of new gas wells because the pipeline would not automatically trigger and can exist without future well development. “[T]he fact that the existence of pipeline may encourage additional gas wells, and probably will serve any additional wells, does not mean necessarily that additional wells are connected actions.”); *see also Quechan* 547 F. Supp. 2d at 1043 (finding that Bureau of Reclamation’s Title Transfer project and third party’s proposed oil refinery were not “connected actions” because the Title Transfer did not automatically trigger the refinery project; the refinery project could proceed with or without the Title Transfer (on private property) and the Title Transfer and refinery were not interdependent parts of a larger action).

As a result, NRC is not required to treat the impacts of the Corps' possible future dredging or reservoir operations as if they were part of the NRC action at hand, namely, the issuance of the ESP.

E. Because the Corps' dredging of the Federal navigation channel is unknown and incompletely defined, the NRC is not required to include it in its "cumulative impacts" analysis.

Although the impacts of some unconnected actions might be considered in a cumulative impacts analysis, the NRC Staff is not required to include impacts from the Corps' potential future dredging in its FEIS for the grant of an ESP. The Supreme Court has held that the requirement to include a cumulative impacts analysis does not enlarge the scope of analysis under NEPA. *See U.S. Dept. of Tranp. V. Public Citizen*, 541 U.S. 752, 769-70 (2004). NRC is only required to consider the environmental impacts of future actions that are reasonably foreseeable, not speculative and indefinite. *See City of Oxford, GA v. Fed'l Aviation Admin.*, 428 F.3d 1346, 1353-54 (11th Cir. 2005) (holding that the agency was not required under NEPA to consider possible cumulative impact of actions that were speculative, including highway widening for which no plan had been established). The NRC, in other words, must "make an informed judgment, and [] estimate future impacts . . . if trends are ascertainable," but it is "not required to engage in speculation or contemplation about [] future plans." *Forty Most Asked Questions Concerning CEQ 's NEPA Regulations*, Council on Environmental Quality, 46 Fed. Reg. 18,026 (Mar. 23, 1981). Nor is it required to discuss effects that are remote or speculative. *See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978).

The Corps' dredging plan is uncertain and speculative, i.e., it is neither "concrete" nor reasonably certain, as the Commission required in *Duke Energy*. 55 NRC at 295. As the FEIS

states, “the dredging project is incompletely defined, the amount of material to be removed is unknown, and the locations of the dredged material disposal areas have not been identified.” FEIS at 7-20. Thus, the NRC’s forecast that cumulative impacts from construction, including dredging of the navigation channel “could be MODERATE,” FEIS at 7-20, is appropriate. The NRC is not simply “concluding” that cumulative impacts will be moderate; rather, it is acknowledging that cumulative impacts could be moderate and recognizing that the Corps, “[p]rior to any authorization for dredging in the Savannah River . . . would be required by NEPA to assess the impact of dredging on the river biota.” FEIS at 7-20. In addition, because there are no plans to dredge the river, NRC has no basis upon which to assess the environmental impacts of such an action, other than pure speculation. Therefore, because the Corps’ action is remote and unrelated to NRC’s action, its impacts are not considered sufficiently foreseeable and is not required to be considered in a cumulative impacts analysis.

The United States District Court for Maryland has rejected a strikingly similar claim that an undefined, and as yet unapproved, dredging project that was subject to a later NEPA analysis was required to be evaluated as a cumulative impact. *See Hart & Miller Islands Area Env’tl. Group, Inc. v. U.S. Army Corps of Eng’rs*, 505 F. Supp. 732, 754 (D. Md. 1980). The issue in that case is similar to the one being raised by Joint Intervenors, and the court held that an impact statement for a diked dredged soil disposal facility need not consider the cumulative impact of the dredging of an access channel and the deepening of a harbor that were not yet approved. The court determined they were speculative proposals that could be considered and approved later when they were actually proposed. *Id.*

Finally, the NRC has no control over the parameters of the Corps’ action, and therefore is not required to consider the cumulative impacts from the Corps’ potential action. *See, e.g.,*

Quechan Indian Tribe, 547 F. Supp. 2d at 1043, citing *Public Citizen*, 541 U.S. at 770 (agency had no duty under NEPA to consider the environmental impacts of a proposed refinery because the agency had no authority over the existence, location or construction of the proposed refinery, and therefore had no ability to prevent the refinery’s environmental effects), citing *Natl. Wildlife Fed’n v. Fed. Energy Regulatory Comm’n*, 912 F.2d 1471, 1478 (D.C. Cir. 1990) (“an EIS need not delve into the possible effects of a hypothetical project, but need only focus on the impact of the particular proposal at issue and other pending or recently approved proposals that might be connected to or act cumulatively with the proposal at issue”).

Regardless, it is clear that NRC has handled the discussion of possible impacts from the Corps’ independent dredging operation properly. In circumstances where information is not complete or available to an agency, “the regulations implementing NEPA...direct[] that the agency ‘make clear that such information is lacking.’” *Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1188 (N.D. Cal. 2004), citing 40 C.F.R. § 1502.22. Furthermore, under NEPA, courts “defer to an agency’s determination of the scope of its cumulative effects review.” *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1071 (9th Cir. 2002), citing *Kleppe v. Sierra Club*, 427 U.S. 390, 413-14 (1976). Therefore, because NRC addresses the incomplete and remote nature of the Corps’ possible future dredging in the EIS, its cumulative effects analysis is nonetheless sufficient. The NRC’s approach in the FEIS is consistent with the approach discussed in NEPA regulations. See 40 C.F.R. § 1502.22 (where there is “incomplete or unavailable information,” an EIS may be “based upon theoretical approaches or research methods generally accepted in the scientific community”).¹² In the event the Corps’ NEPA

¹² Notwithstanding the NRC Staff’s failure to oppose Bases 4 and 5 of the contention, the lack of specificity concerning the plans for any possible dredging effectively preclude any meaningful analysis of the project in this proceeding. For that reason Bases 4 and 5 should not be admitted. See *City of Oxford, GA v. Fed’l Aviation Admin.*,

analysis produces new information that is relevant to the NEPA analysis for the proposed units, that information can be evaluated for its significance in any COLA proceeding referencing the ESP.¹³

F. The Memorandum of Understanding between the Corps and the NRC is not relevant to this issue.

Joint Interveners' reliance on a Memorandum of Understanding ("MOU") between the Corps and the NRC for the Regulation of Nuclear Power Plants, 40 Fed. Reg. 60115 (Dec. 31, 1975), does not raise an issue that is material to the findings the NRC must make to support issuance of an ESP. Motion at 7. As the Board observed, a new MOU ("2008 MOU") was signed between the Corps and the NRC related to the issuance of authorizations to construct and operate nuclear power plants. *See* 73 Fed. Reg. 55546 (Sept. 25, 2008); *see also* September 24, 2008 Memorandum and Order (Scheduling Guidance and Information Request Relating to Motion to Admit New Contention) at 2. The 2008 MOU clearly states that while "[b]oth parties anticipate that the Corps will act as a cooperating agency in most circumstances . . . there may be some circumstances where both agencies will be better served by a different form of coordination. This MOU does not preclude such arrangements." 73 Fed. Reg. at 55547.

To this point, the MOU contemplates authorization from the Corps to the applicant, rather than the Corps' independent, federal responsibility to maintain navigation of the Federal navigation channel. *See id.* The "role and responsibility" of the Corps with respect to the issuance of authorizations to construct and operate nuclear power plants is defined as follows: "The Corps administers a regulatory program to protect the Nation's aquatic resources, including

428 F.3d 1346, 1353-54 (11th Cir. 2005); *Hart & Miller Islands Area Envtl. Group, Inc. v. U.S. Army Corps of Eng'rs*, 505 F. Supp. 732, 754 (D. Md. 1980)

¹³ In that event, the Board may rely on the Corps' NEPA analysis in fulfilling its NEPA obligations. *See Okanogan Highlands Alliance v. Williams*, 1999 WL 1029106 at *4-*5 (D. Or. 1999) (in assessing impacts agency may rely on other specialized agencies with jurisdiction to enforce related permits and measures), *aff'd on other grounds*, 236 F.3d 468 (9th Cir. 2000).

wetlands, under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the CWA. Proposed nuclear power plants may require one or more permits from the Corps under these statutes.” *Id.* If the Corps maintains the Federal navigation channel, it is because of the Congressional authorization in the Rivers and Harbors Act of 1950, not through a permit issued to the applicant. *See* Pub. L. No. 81-516, § 101, 64 Stat. 163 (1950).¹⁴

For the foregoing reasons, Joint Intervenors have failed to demonstrate that EC 6.0 is within the scope of this proceeding or raises an issue material to the findings the NRC must make. Furthermore, Joint Intervenors fail to establish any genuine issue of material law or fact. Therefore, EC 6.0 fails to satisfy the general admissibility requirements in 10 C.F.R. § 2.309(f)(1).

IV. JOINT INTERVENORS’ MOTION TO ADMIT EC 6.0 IS NONTIMELY

A. Joint Intervenors Have Failed to Satisfy the Requirements of 10 C.F.R. § 2.309(f)(2).

Joint Intervenors’ Motion to Admit EC 6.0 should be dismissed as nontimely because the FEIS does not contain any data or conclusions that differ significantly from either the ER or the DEIS. *See* 10 C.F.R. § 2.309(f)(2). This contention should have been submitted in a timely fashion over a year ago, at the latest, in response to the content of the ER and/or DEIS. In order for EC 6.0 to be considered as timely now, the information in the FEIS on which it is based must not have been previously available. *See System Energy Resources, Inc.*, 2007 WL 595086 (N.R.C. 2007).¹⁵

¹⁴ While a Corps permit to the applicant may be required for work on the facility barge slip, this was most clearly raised in the ER and DEIS. *See* ER at 2.5-10, and DEIS at 4-3,-8,-25

¹⁵ This standard is analogous to the requirement to supplement an EIS based on new information. In that context, courts and Boards have held that the new information would have to present “a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.” *In the Matter of Hydro*

In an attempt to meet this standard, Joint Intervenors allege that the “FEIS reveals, for the first time, that substantial dredging of the Federal navigation channel will likely be needed to allow barge traffic for construction of VEGP Units 3 and 4.” Motion at 2. This is wrong. Joint Intervenors are forced to acknowledge that the ER and the DEIS “mention the Federal navigation channel,” but nevertheless attempt to argue that the discussion of the Federal navigation channel in the FEIS “differ[s] significantly” from the statements in the ER and DEIS. Motion at 3. However, Joint Intervenors do not explain the nature of the purportedly significant difference – because there is no difference. Specifically, EC 6.0 is plainly based on the navigation of the Savannah River and this issue was clearly raised in the DEIS and ER:

Southern plans to use the Savannah River navigation channel to support delivery of large components and modules for construction of VEGP Units 3 and 4. A barge slip was installed approximately 90 m downstream of the CWIS for VEGP Units 1 and 2 to support the unloading of major equipment. The Savannah River navigation channel is operated and maintained by the Savannah District of the USACE. Southern has contacted the USACE and would work with them to develop a strategic plan to support the transport of equipment on the Savannah River.

DEIS at 4-48.

SNC plans to utilize the Savannah River Navigation channel to support delivery of large components and modules for construction of Units 3 and 4. . . . The Savannah River Navigation channel has not had significant use in many years and has not been maintained since 1978. Close coordination with the Corps will be necessary.

ER at 2.5-10.

It is not necessary to speculate about whether these passages were clear enough on their faces to put Joint Intervenors on notice of the “navigation issue.” The issues raised by EC 6.0 are identical to those raised in their comments submitted on the DEIS. *See* FEIS, Appendix E, E-

Res., Inc., (2929 Coors Road, Suite 101, Albuquerque, NM 87120), 50 N.R.C. 3, 14 (1999), *citing Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987) (concluding that a supplemental EIS was not required because the new information did not present a “seriously different” picture of impacts). Joint Intervenors cannot carry this burden. In no way does the FEIS present such a “seriously different picture” of impacts from the ER or the DEIS.

56 (Comment on DEIS of Sara Barczak of Southern Alliance for Clean Energy). Specifically, the Southern Alliance for Clean Energy, one of the Joint Intervenors, submitted the following comments on the DEIS:

The **dredging of the Savannah River that would be needed to allow for delivery of the necessary construction materials, reactor components, etc. was not fully analyzed** especially in light of the drought conditions that exist and may worsen.

The NRC did not look at how **lower river flows downstream of Vogtle would impact possible navigation upstream** to the plant nor what the then required dredging would do to water quality, sensitive species, etc. This needs to be done before the final EIS is issued.

FEIS, Appendix E, E-56 (emphasis added). Significantly, the Commission has explicitly stated that providing comments on the scope of an EIS is not a proxy for filing a timely contention. In *In the Matter of Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), the Commission stated:

The Board was correct in finding no good cause for Utah's late contention. Commenting on the scope of EIS does not substitute for raising a timely contention. It is essential to efficient case management that intervenors file contentions on the basis of the applicant's environmental report and not delay their contentions until after the staff issues its environmental analysis. In the interest of expedition, our rules require the filing of contentions as early as possible. Utah did not do this and the Board rightly refused to allow Utah to bring up old grievances late in the hearing process.

59 N.R.C. 31, 45 (2004).

As their comments conclusively demonstrate, the discussions in the ER and DEIS were sufficient to put Joint Intervenors on notice that dredging of the Federal navigation channel by the Corps was possible. While the FEIS responds to comments by the Joint Intervenors regarding the possibility of the Corps dredging the navigation channel of the river pursuant to its statutory authority, the information clearly does not differ significantly from the information available to the Joint Intervenors at the time they filed their comments on the DEIS. *See Hydro*

Res., Inc., 53 N.R.C. 31, *citing* 40 C.F.R. § 1503.4 (“An FEIS typically is issued after comments on the DEIS have been received and reviewed. That the FEIS, in response to comments received, may supplement, refine, or otherwise adapt the project alternatives is not only reasonable but expected.”). As the Supreme Court has stated, publication of the DEIS should “provide[] a springboard for public comment.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). “That the description in the DEIS was sufficient to provide a ‘springboard for public comment’ would appear evident from the comments received” *Nat’l Comm. for the New River, Inc. v. Fed. Energy Regulatory Comm’n*, 373 F. 3d 1323, 1328 (D.C. Cir. 2004) (internal citation omitted).

Contrary to Joint Intervenors’ assertion, the DEIS does discuss use of the Federal navigation channel for the delivery of equipment and components, and Joint Intervenors were clearly aware of the possibility that dredging the channel might be needed to support that activity. Similarly, any concerns regarding impacts of navigation on upstream reservoirs or claims that the Staff should have consulted with the Corps are likewise not based on significantly different, previously-unavailable information. For example, the ER states that:

The entire 312-mi length of the Savannah River is regulated by a series of three U.S. Army Corps of Engineers (USACE) multipurpose projects, forming a chain along the Georgia–South Carolina border 120 mi long. The three lakes, from upstream to downstream, are:

- Hartwell Lake and Dam, with 2,550,000 acre-feet of gross storage
- Richard B. Russell Lake and Dam, with 1,026,000 acre-feet of gross storage
- J. Strom Thurmond (also known as Clarks Hill) Lake and Dam, with 2,510,000 acre-feet of gross storage

Of the 6,144 sq mi drainage basin above Thurmond Dam, 3,254 sq mi (53 percent) are between Thurmond and Russell Dams, 812 sq mi (13 percent) are between Russell and Hartwell Dams, and 2,088 sq mi (34 percent) are above the Hartwell Dam (USACE 1996).

ER at 2.3-

The availability of the information in the ER and DEIS is sufficient to put Joint Intervenors on notice that dredging of the navigation channel might be a possibility makes their contention a year late. *See System Energy Resources, Inc.*, 2007 WL 595086 at *1. For instance, in an attempt to assert that the FEIS contains new information, and cited as a basis for their contention, Joint Intervenors cite to FEIS 2-105 which states: “All of the major components for VEGP Units 1 and 2 were delivered to the site by barge using the Savannah River navigation channel.” Without any evidentiary support, Joint Intervenors wrongly conclude that this statement means that barging is the only option for the delivery of components for the construction of the proposed units. Putting aside the problem that this citation does not support Joint Intervenors’ claim, this statement plainly does not differ from the DEIS. In fact, the DEIS is identical: “All of the major components for VEGP Units 1 and 2 were delivered to the site by barge using the Savannah River navigation channel.” DEIS 2-104. Joint Intervenors’ other bases are similarly flawed – they are not based on any information that was not previously available in either the ER or the DEIS.¹⁶

To the extent that Joint Intervenors had concerns regarding the use of the navigation channel, a contention should have been submitted when the ER, or at the latest the DEIS, was issued. They could have been amended later if the analysis in the FEIS was significantly different. *See In the Matter of Duke Power Co.*, (Cawtaba Nuclear Station, Units 1 and 2), 17 N.R.C. 1041, 1049 (1983) (“[T]he Commission expects that the filing of an environmental

¹⁶ For instance, Joint Intervenors’ claims that impacts from the use of the Federal navigation channel and potential impacts of the Corps’ dredging the Federal navigation channel should have been included in the FEIS and could and should have been raised following publication of the DEIS. Similarly, any concerns regarding impacts of navigation on upstream reservoirs or claims that the Staff should have consulted with the Corps are likewise not based on significantly different, previously-unavailable information.

concern based on the ER will not be deferred because the Staff may provide a different analysis in its DES.) Accordingly, EC 6.0 does not satisfy the requirement in 10 C.F.R. § 2.309(f)(2) that the information upon which the contention is based “differ[s] significantly from the data or conclusions” in the DEIS or the ER.¹⁷

Thus, because EC 6.0 is not based on significantly different information than what was previously available in the ER or DEIS, it was not submitted in a timely fashion. As the Board has stated, “to be considered timely any motion to admit a new/late-filed or to amend an admitted contention must be filed within thirty days of the event that provides the triggering basis for submitting a new/late-filed or amended contention.” May 7, 2007 Memorandum and Order (Prehearing Conference and Initial Scheduling Order) at 3 (emphasis added). The applicable thirty-day period has long passed in this proceeding. Joint Intervenors could and should have raised the issues in EC 6.0 in response to the ER; but in any event, no later than publication of the DEIS more than a year ago.

Aside from the key fact that the information upon which EC 6.0 is based was available long ago in the ER and DEIS, and further ignoring Joint Intervenors’ difficulty with the NRC’s electronic docket on September 22, 2008, there is yet another factor that should not be overlooked in ruling on the untimeliness of EC 6.0. Namely, the proposed contention was not filed within thirty days of the “triggering event” which Joint Intervenors themselves allege gives rise to the new contention: the availability of the FEIS. As indicated in the Board’s July 14, 2008 Revised General Schedule, the Final EIS notice of availability was expected on August 22, 2008. Based on that date, the Board calculated September 22, 2008, as the date amended/new

¹⁷ Although Joint Intervenors’ Motion and supporting Declarations include discussions of expansion of the barge slip, this is not part of their contention. As stated above, Boards admit contentions, not bases. Regardless, the DEIS also puts Joint Intervenors on notice regarding proposed expansion of the barge slip. *See, e.g.*, DEIS at 4-3, -8, -25.

contentions based on the Final EIS were due. However, all parties were given actual notice of the availability of the Final EIS on August 14, 2008. *See* August 14, 2008 Letter from Patrick Moulding, NRC Staff Counsel to Administrative Judges. Thus, Joint Intervenors' Motion was due on September 14, 2008.¹⁸

B. Joint Intervenors Have Failed to Satisfy the Requirements of 10 C.F.R. § 2.309(c).

NRC regulations provide that “nontimely requests and/or petitions and contentions will not be entertained” absent a determination by the Board that they should be admitted, based on a balancing of a list of factors to be considered. 10 C.F.R. § 2.309(c) (emphasis added). Joint Intervenors' filing is, at best, over a year late to be based on the DEIS and they have failed to address any of the relevant factors in their filing.

First, Joint Intervenors fail to provide “good cause” for their late filing. 10 C.F.R. § 2.309(c)(1)(i). This factor is entitled to the most weight. *See In the Matter of State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), 38 N.R.C. 289, 296 (1993). Without good cause, Joint Intervenors; “demonstration on the other factors must be particularly strong.” *In the Matter of Tex. Util. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), 36 N.R.C. 62, 73 (1992) (internal citations omitted). Joint Intervenors have offered no good cause for filing their Motion over a year late.

In addition, “other means whereby the [intervenors'] interest will be protected” are clearly available. 10 C.F.R. § 2.309(c)(1)(v). Joint Intervenors will have the opportunity to raise the very issues alleged in their Motion through participation in the Army Corps of Engineers'

¹⁸ In its January 15, 2008 Memorandum and Order (Ruling on Dispositive Motion and Associated Motions to Strike Regarding Environmental Contention 1.2) the Board stated that the DEIS was issued on September 10, 2007, the date the NRC Staff sent a letter of availability to the parties. SNC used this date of availability to recalculate the due date for motions to admit new contentions and motions for summary disposition based on the DEIS.

own NEPA process. Similarly, Joint Intervenors' fail to address how their interests may not be represented by the existing parties in the proceeding. *Id.* § (c)(1)(vi). In fact, the NRC Staff has an obligation to comply with NEPA.¹⁹ Finally, Joint Intervenors' Motion seems likely to delay the schedule for the hearing if the new contention is admitted. *Id.* § (c)(1)(vii). None of these factors is addressed in Joint Intervenors' nontimely filing. Thus, Joint Intervenors' nontimely Motion to Admit New Contention should not be entertained by this Board.

V. CONCLUSION

Proposed EC 6.0 fails to satisfy the late-filing requirements of 10 C.F.R. §§ 2.309(f)(2) and (c). Moreover, EC 6.0 fails to satisfy the substantive requirements for contentions in 10 C.F.R. § 2.309(f)(1). Thus, the contention should not be admitted by the Board. Additionally, SNC respectfully requests that Joint Intervenors' nontimely filing not be allowed to delay the current schedule, i.e., that the schedule outlined in the Board's July 14, 2008 Revised General Schedule remain in effect.

Respectfully submitted,

(Original signed by M. Stanford Blanton)

M. Stanford Blanton, Esq.
C. Grady Moore, III, Esq.
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, AL 35203-2015
Telephone: (205) 251-8100
Facsimile: (205) 226-8798

¹⁹ While NRC Staff participation would obviously not prevent Joint Intervenors from raising contentions with a timely filing, this is a specific consideration when evaluating a nontimely filing.

COUNSEL FOR SOUTHERN NUCLEAR
OPERATING COMPANY

Kathryn M. Sutton, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 739-5738
Facsimile: (202) 739-3001

CO-COUNSEL FOR SOUTHERN NUCLEAR
OPERATING COMPANY

Dated this 6th day of October, 2008.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

)	
In the Matter of)	Docket No. 52-011-ESP
Southern Nuclear Operating Company)	ASLBP No. 07-850-01-ESP-BD01
(Early Site Permit for Vogtle ESP Site))	October 6, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of SOUTHERN NUCLEAR OPERATING COMPANY'S ANSWER TO JOINT INTERVENORS' MOTION TO ADMIT NEW CONTENTION in the above captioned proceeding have been served by electronic mail as shown below, this 6th day of October, 2008, and/or by e-submittal.

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(Email: gpb@nrc.gov)

Administrative Judge
Dr. Nicholas G. Trikouros
Atomic Safety and Licensing Board
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: ngt@nrc.gov)

Administrative Judge
Dr. James Jackson
Atomic Safety and Licensing Board
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: jackson538@comcast.net)

Office of the Secretary
ATTN: Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: HEARINGDOCKET@nrc.gov)

Emily Krauss
Law Clerk
Atomic Safety and Licensing Board
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
(E-mail: eik1@nrc.gov)

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: ocaamail@nrc.gov)

Ann P. Hodgdon, Esq.
Patrick A. Moulding, Esq.
Kathryn L. Winsberg, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
(E-mail: aph@nrc.gov, pam@nrc.gov,
klw@nrc.gov)

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, LLP
1726 M Street, NW
Suite 600
Washington, D.C. 20036
(E-mail: dcurran@harmoncurran.com)

Mary Maclean D. Asbill, Esq.
Lawrence D. Sanders, Esq.
Turner Environmental Law Clinic
Emory University School of Law
(E-mail: masbill@law.emory.edu
lsanders@law.emory.edu)

* And upon any other persons designated on the official service list compiled by the Nuclear Regulatory Commission in this proceeding.

(Original signed by M. Stanford Blanton)

M. Stanford Blanton
Counsel for Southern Nuclear Operating Company