UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

G. Paul Bollwerk, III, Chairman
Nicholas G. Trikouros
Dr. James 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)	October 14, 2008

JOINT INTERVENORS' REPLY TO NRC STAFF'S ANSWER TO JOINT INTERVENORS' MOTION TO ADMIT NEW CONTENTION AND SOUTHERN NUCLEAR OPERATING COMPANY'S ANSWER TO JOINT INTERVENORS' MOTION TO ADMIT NEW CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(2) and the general schedule provided by the Atomic Safety and Licensing Board (the "Board") Order of July 14, 2008,[1] Joint Intervenors[2] submit this Reply to Nuclear Regulatory Commission Staff's ("the Staff") Answer to Joint Intervenors' Motion to Admit New Contention (the "Staff Answer") and Southern Nuclear Operating Company's ("SNC") Answer to Joint Intervenors' Motion to Admit New Contention (the "SNC Answer"), each filed on October 6, 2008. As set forth in the Joint Intervenors' Motion to Admit New Contention, dated September 22, 2008 (the "Motion"), Joint Intervenors' seek to admit a single new contention ("EC 6.0")

[1] *See Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Memorandum and Order (Revised General Schedule), slip op. (July 14, 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.

challenging the adequacy of the discussion of navigation-related impacts in the Final Environmental Impact Statement (the "FEIS") for an Early Site Permit (an "ESP") at the Vogtle Electric Generating Plant Site (the "VEGP Site").

As further explained in this Reply, the Motion amply satisfied both the general requirements for admission of contentions set forth in §2.309(f)(1), and the additional requirements for admission of new contentions - namely, that new contentions submitted after release of a final environmental impact statement address "data or conclusions ... that differ significantly from the data or conclusions in the applicant's documents" - set forth in 10 C.F.R. § 2.309(f)(2).[3] Accordingly, Joint Intervenors request that the Board grant the Motion and admit proposed contention EC 6.0 for adjudication.

I. PROPOSED CONTENTION EC 6.0 COMPLIES WITH THE NUCLEAR REGULATORY COMMISSION'S STRICT RULES OF PLEADING

Both the SNC Answer and the Staff Answer dispute the factual and legal merits of the Motion, but do not contend that EC 6.0 fails to satisfy the pleading requirements set forth in the rules of practice. Neither claims that the Motion does not include "a specific statement of the legal or factual issue sought to be raised," failed to provide "a brief explanation of [the contention's] basis," or did not include "a concise statement of the alleged facts or expert opinions" that support EC 6.0. 10 C.F.R § 2.309(f)(1); *See also Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), 65 N.R.C. 237, 252 (2006) (discussing pleading requirements).

[3] As explained below, SNC's claim that the Motion is untimely has no merit. As a result, SNC is incorrect that Joint Intervenors must also satisfy the eight additional balancing factors of 10 C.F.R. § 2.309(c) for "nontimely" filings. *See Entergy Nuclear Vermont Yankee L.L.C.* (Vermont Yankee Nuclear Station), 62 N.R.C. 813, 819 (2005). Notably, the Staff does not contest the timeliness of the Motion. Staff Answer at 5.

Instead of discussing pleading requirements, the SNC and the Staff use their Answers as platforms to litigate the merits of EC 6.0, and merely couch their arguments in terms of the magic words, "scope," "materiality," and "basis". In doing so, they fail to recognize that "[w]hether or not the contention is true is left to litigation on the merits in the licensing proceeding." *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 551 n.5 (1983), citing *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980). If an applicant believes that it can readily disprove a contention admissible on its face, the proper course is to move for summary disposition following its admission, not to assert a lack of specific basis at the pleading stage. *Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2070-2071 (1982). *See also Gulf States Utilities Co.* (River Bend Stations, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994).

The Nuclear Regulatory Commission's (the "NRC") rules for pleading contentions are "strict by design" and require more than notice pleading. *Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Units 1 and 3), CLI-01-24, 54 NRC 349, 358 (2001). At the same time, "the 'raised threshold' for contentions must be reasonably applied and is not to be mechanically construed." *Sacramento Municipal Utility District* (Ranch Seco Nuclear Generating Station), 38 NRC 200, 206 (1993) quoting *Consumers Power Co.* (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 12 (1974). A Board Panel recently summarized the standards for admission of contentions:

> A petitioner is not, however, required . . . to prove its case at the contention stage, and need not proffer facts in formal affidavit or evidentiary form sufficient to withstand a summary disposition motion. But a protestant does not become entitled to an evidentiary hearing merely

> on request, or on a bald or conclusory allegation that . . . a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate. In other words, a petitioner must present sufficient information to show a genuine dispute and reasonably indicating that a further inquiry is appropriate. Some sort of minimal basis indicating the potential validity of the contention is required.

Crow Butte Resources (License Amendment for the North Trend Expansion Project), 67 N.R.C. 241, 292 (N.R.C. Apr. 29, 2008) (internal quotations and citations omitted). By ignoring the technical requirements for pleading contentions and instead contesting the merits of EC 6.0, the Answers actually demonstrate "that a genuine dispute exists in regard to a material issue of law or fact." *See* 10 C.F.R. §2.309(f)(1)(iv).

A. Proposed Contention EC 6.0 is within the Scope of this Proceeding and Seeks to Raise Issues Material to its Outcome.

The scope of any licensing proceeding is defined by the NRC in its "Notice of Opportunity for Hearing." *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 411-12 (1991), appeal denied on other grounds, CLI-91-12, 34 NRC 149 (1991). In connection with this proceeding, the NRC's Notice of Hearing defines the scope as "[w]hether, in accordance with the requirements of subpart A of 10 CFR part 51[4], the ESP should be issued as proposed." 71 FR 60195-01 (October 12, 2006). As proposed, the ESP includes a site redress plan that "allows for specific construction activities to be conducted". FEIS at 4-1. And, in accordance with SNC's Environmental Report (the "ER"), these construction activities include shipment by barge of AP1000 modular components. ER, Revision 0, at 3.9-5. EC 6.0 seeks to litigate the treatment of navigation issues required in connection with this shipment by barge. Accordingly, it falls neatly within the scope of the proceeding.

[4] Subpart A of 10 CFR part 51 contains NRC's regulations implementing NEPA.

EC 6.0 not only falls within the scope, it is also material to "the findings the NRC must make to support" the issuance of the ESP. *See* 10 CFR 2.309(f)(1)(iv). The practicality and viability of the entire project depend upon shipment of large equipment and components. The ER presumes that some such equipment and components will be transported by barge. ER, Revision 1, 4.1.1.1 ("Heavy equipment and reactor components will be barged up the Savannah River"). Because construction cannot occur until these parts have been shipped, the impacts related to this shipment are material to the NRC's decision to issue the ESP permit.

B. Contention EC 6.0 Raises Material Issues of Law and Fact Which are in Dispute

As previously discussed, the contention filing stage is not the proper forum to litigate the merits of a proposed contention and, as a result, "the factual support necessary to show that a genuine dispute exists need not be in formal evidentiary form, nor be as strong as that necessary to withstand a summary disposition motion." *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994). The Staff and SNC attempt to hold Joint Intervenors to a summary disposition standard as a condition to admit EC 6.0; however "[w]hat is required is 'a minimal showing that material facts are in dispute, thereby demonstrating that an "inquiry in depth" is appropriate.'" *Id*. (citing Final Rule, Rules of Practice for Domestic Licensing Proceedings – Proceedural Changes in the Hearing Process, 54 Fed. Reg. 33, 168, 33, 171 (Aug. 11, 1989), quoting *Connecticut Bankers Association v. Board of* Governors, 627 F.2d 245 (D.C. Cir. 1980)). Rather than accepting SNC's and the Staff's invitation to engage in an argument on the merits, this Reply briefly addresses several of the factual and legal disputes raised in the Answers to show the need for further "inquiry in depth." *Id*.

Before turning to the issues in dispute, it is important to mention some of the facts that are apparently not in dispute. First, neither SNC nor the Staff disputes that dredging the Federal navigation channel could adversely impact aquatic species and water quality. Second, although both the SNC and Staff claim that the extent of the navigation project is undefined, neither denies that it could involve 100 or more barge trips. Third, there is no dispute that the Army Corps of Engineers (the "Corps") does not currently manage the upstream reservoirs to support navigation. Finally, none of the parties contends that providing sufficient river flow to support navigation could impact other authorized purposes of the Federal reservoir projects. In fact, there is little dispute that navigation related to Units 3 and 4 construction permitted by the Limited Work Authorization (the "LWA") has potential impacts on the environment.

Instead, SNC's and the Staff's argument appears to hinge on the contention that the above mentioned issues are not the NRC's concern as a matter of law. However, as explained below, the impacts discussed in EC 6.0 arises under NEPA (and the NRC's regulations implementing NEPA codified in 10 C.F.R. Part 51). Accordingly, the NRC was required to take a "hard look" at these impacts. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998).

1. <u>The ESP issuance and associated Corps navigation activities are "connected" actions under the CEQ regulations.</u>

The Council on Environmental Quality (the "CEQ") has implemented regulations providing guidance on the environmental impacts an agency must consider under NEPA. *See* 40 C.F.R. Part 1500. The CEQ regulations direct agencies to consider connected, cumulative, and similar actions in every environmental impact statement. 40 C.F.R. §1508.25. The hearing record indicates that construction authorized under the LWA

and Corps navigation activities are connected actions under the CEQ regulations for two reasons: (1) because the NRC action "cannot or will not proceed" as contemplated without support from the Corps (40 CFR §1508.25 (a)(1)(ii)); (2) because they are "independent parts of a larger action and depend on the larger action for their justification" (40 CFR §1508.25(a)(1)(3)).

The ESP includes an LWA that permits SNC to begin construction activities at the VEGP Site, including constructing a new barge slip and transporting reactor components to the Site. ER at 3.9-6. Using the long-dormant Federal navigation channel requires that the Corps *both* dredge the navigation channel *and* modify reservoir operations to support navigation.[5] The FEIS presumes that these Corps actions will occur in conjunction with SNC's LWA activities. Considering that (a) commercial shipping on the Federal navigation channel ceased in 1979 (FEIS 4-27), (b) the Corps has not maintained the channel for navigation (*Id*.), and (c) current Corps reservoir operations do not support navigation, it is reasonable to attribute navigation impacts to the NRC authorization of LWA activities. Undertaking the LWA actions without dredging the Federal navigation channel and adjusting the navigation flows would be "irrational, or at least unwise". *Save the Yaak Comm. v. Block*, 840 F.2d 714, 720 (9th Cir. 1988). Accordingly, the NRC is obligated to consider the impacts of each of the actions.

The NRC is not relieved of its independent duty under NEPA to evaluate these impacts, merely because another agency has jurisdiction over a portion of the proposal. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), 20 NRC 848,

[5] The Staff mistakenly assumes 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." Staff Answer at 13 (emphasis added). However, transportation by barge of the components for new units 3 and 4 will likely require *both* dredging *and* release of water from storage in upstream reservoirs.

867 (1984) (NRC should consider water quality impacts even though Delaware River Compact Commission has exclusive jurisdiction over water allocations). When NRC has overlapping jurisdiction with another agency, "there is no basis for requiring NRC to evaluate the impacts solely attributed to" that other agency. *Id*. at 874. However, when there is no "rational method of separating and determining" the impacts attributable to each agency, NRC's analysis must "consider the total environmental impacts" of the shared portions of the project. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), 15 NRC 1423, 1473, 1475 (1982).

Under the specific circumstances of this matter, neither the ESP nor the navigation-related actions have "independent utility." The navigation channel has been dormant for nearly 30 years. It is always possible that commercial navigation on the Savannah River will restart at some point in the future and the Corps will dredge the Federal navigation channel and revise its reservoir operations as a result; however, as both the SNC Answer and the Staff Answer point out, the Corps has no plans to dredge the river. Likewise, while constructing Units 3 and 4 without barging components to the VEGP Site may be possible, SNC (and the FEIS) presume that barging will be the method of transportation. Given these facts, the Staff and SNC cannot show that either the ESP or the planned navigation activities has "independent utility." Based on the hearing record, this ESP is absolutely *dependent* on the Corps.

2. <u>The discussion of dredging in the cumulative impacts section of the FEIS, also required under the CEQ regulations and NEPA, is inadequate.</u>

Dredging – if not definitively required by construction of Units 3 and 4 – is a reasonably foreseeable possibility. Accordingly, as discussed above, NEPA requires the

NRC to take a "hard look" at the dredging impacts in the cumulative impacts analysis. *See* 40 C.F.R. §1508.7 ("A cumulative impact is the impact on the environment which results from the incremental impact of the action when added to past, present and *reasonably foreseeable future actions* …" (emphasis added)). Although dredging was briefly discussed in the cumulative impacts analysis of the FEIS, the Staff failed to conduct this requisite "hard look." Instead, the Staff wrongly deferred all analysis to the Corps. *See generally* NUREG-1555, 4.2.2-4.5 (providing that while NEPA permits the NRC to consider existing assessments prepared by the Corps in its environmental impact analysis, where no such assessments exist, the NRC must establish its own impact determination). Surprisingly, after refusing to conduct any analysis, the Staff then asserted the wholly unsupported conclusion that the dredging impacts "could be MODERATE." FEIS at 7-20.

The fact that a detailed assessment of the dredging impacts was not conducted in the FEIS is without contention: (a) the FEIS provides that "a detailed assessment has not been conducted" (FEIS at 7-20), and (b) SNC admits that "NRC has no basis upon which to assess the environmental impacts of [dredging], other than pure speculation" (SNC Answer at 13). SNC tries to justify this lack of assessment by arguing semantics and referencing cases with facts substantially different than those of the Vogtle ESP proceeding. Neither tactic is successful – SNC cannot simply argue away the lack of analysis required under NEPA.

First, SNC asserts that the Staff did not reach a conclusion regarding dredging impacts, as evidenced by the Staff's use of the word "could" in the phrase "could be MODERATE." Staff Answer at 13. Such an argument is illogical. Environmental

impact conclusions are simply future predictions, and the use of qualifying words is therefore appropriate. If anything, the use of qualifiers underscores the fact that the Staff's conclusion, while definitive, is not based on the hearing record or any substantive analysis.

In addition, SNC's argument that the Staff did not reach a conclusion regarding dredging impacts is directly opposed to their Conditional Operating License ("COL") application. In that application, SNC states that the FEIS "did not identify any significant environmental issues that were not resolved" in connection with construction activities. *Vogtle Electric Generating Plant, Units 3 & 4,* Part 3 – Applicant's Environmental Report – Combined License Stage, Revision 0, page 4-1. SNC cannot have it both ways – arguing in this proceeding that dredging impact issues are not resolved, and then stating in the COL application that they are.[6] If SNC is correct that navigation issues are unresolved in the FEIS, then they must be addressed in a COL proceeding referencing the ESP.

Second, SNC mistakenly relies on factually distinguishable cases for support. The court in *Hart & Miller Islands*, in addressing a similar environmental impact statement issue, stated that a "brief description [of dredging impacts] strikes the court as reasonable[,]" especially in light of the fact that "other methods" of transporting the spoil would not require dredging. *Hart & Miller Islands Area Envtl. Group, Inc. v. Army Corps of Eng'rs*, 505 F.Supp. 732, 753 (D. Md. 1980). In making this statement, the court noted that the State of Maryland's subsequent decision to employ a means obviating the need for dredging mooted the challenge to the EIS. *Id* at 753. Unlike *Hart*

[6] This statement rests on the logical assumption that the Staff not reaching a conclusion regarding dredging impacts would necessarily constitute non-resolution of a significant environmental issue in the COL.

& Miller Islands, where the probability of dredging was merely speculative, here the probability of dredging is a near certainty. Specifically, the FEIS concludes that "most areas of the navigation channel . . . would likely need to be dredged." FEIS at 7-20. And, in *Hart & Miller Islands*, the FEIS considered a no-dredge alternative; in this proceeding there is no such consideration. Moreover, the FEIS incorrectly cites the uncertainty of the *extent* (amount of material to be removed and location of disposal of dredged material), as opposed to the *likelihood* of dredging as a basis for not providing a detailed assessment. *Id.*. Because in this proceeding dredging is a nearly certain action, NEPA mandates that the FEIS contain a detailed assessment of the impacts. *See Id.*

3. <u>In preparing the FEIS, NEPA requires the NRC to consult with the Corps.</u>

Prior to issuing an FEIS, NEPA requires a federal agency "consult with and *obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.*" 42 USC §4332 (2)(C)(emphasis added). Despite the fact that the Corps has jurisdiction over the Federal navigation channel and upstream reservoirs that are integral to SNC's plans, the section of the FEIS dedicated to "Related Federal Projects and Consultation" does not even mention the Corps. FEIS at 2-123. In its answer, the Staff claims that they "contacted several representatives of the Corps during its review," but this is not supported by the hearing record. The best the Staff can offer is a single letter to the Corps, which apparently did not garner a response, and a two-paragraph e-mail comment on the Draft Environmental Impact Statement (the "DEIS"). The NEPA "rule of reason" demands something more of the Staff.

"Consultation" constitutes more than informal verbal communication between Staff and the Corps. NEPA requires formal, written agency comment. "By requiring agency comment to be submitted in a form that will allow copies to be made available (and to) accompany the proposal," the statute imposes on the proposing agency a duty to obtain written comments. *Warm Springs Task Force v. Gribble*, 621 F.2d 1017, 1022 (9th Cir. 1980).[7] Requiring "copies," therefore, of comments is possible only when submitted in written form. "There would be no 'copies' of oral comments to be made available or to accompany the proposal otherwise." *Id*. NEPA requires that NRC staff actually "obtain" written comments and input from the Corps. The letter from the Staff to the Corps refers to a January 2007 meeting with the Corps, but without any record of the nature or content of the discussions, this letter alone does not meet the consultation requirement. Likewise, a list of Corps "organizational contacts" in an appendix to the FEIS is not equivalent to consultation. FEIS at B-5.

Moreover, the only comment received from the Corps placed the Staff on notice that navigation, particularly dredging, was an issue that must be considered in the FEIS:

> Transportation of construction materials by barge was not mentioned in the EIS. The Savannah River Below Augusta (SRBA) is not maintained for navigation therefore dredging would likely be required to provide viable commercial navigation for the construction of units 3 and 4. Existing channel depths are not adequate to provide adequate draft depths for barges carrying heavy construction components. Has Southern considered the environmental impact of dredging the reach to restore adequate draft depths for navigation?

[7] The Staff correctly notes that the court in *Warm Springs Task Force* did not require reversal after finding a violation of the consultation requirement, but fails to show why the consultation requirement should be excused here. Unlike *Warm Springs Task Force*, the agency in this case has not issued a final decision.

E-mail Comments from Jason Ward, Army Corps of Engineers (November 28, 2007) (ML073330916). Despite its brevity, the Corps e-mail clearly reveals an expectation that "environmental impacts of dredging" be addressed in the FEIS. The Staff's response:

> Prior to any authorization of dredging of Savannah River navigation channel, the Corps of Engineers would be required by NEPA to assess the environmental impact of such dredging on the river.

FEIS at E-57. In other words, the Staff determined – without consulting the Corps – that impacts from dredging the Federal navigation channel are solely the Corps' responsibility. Regardless of which agency is correct as a matter of law, the Staff did not meet its consultation obligation.

II. JOINT INTERVENORS' MOTION IS TIMELY

Joint Intervenors' Motion to Admit New Contention is timely because it is based on information – namely that construction of Units 3 and 4 will require over 100 feet of dredging and alteration of upstream reservoir operations – that was not previously available in either the ER or the DEIS. Joint Intervenors' comment letter regarding dredging impacts in no way negates this conclusion. Moreover, Joint Intervenors' submission of this contention in accordance with the Boards' general scheduling order qualifies it as timely.

A. The FEIS Contains the First Disclosure of the Extent of Dredging.

In order for a new contention to be considered timely, it must be based on information that was previously unavailable. 10 C.F.R. §2.309(f)(2)[8]. According to SNC, EC 6.0 is untimely because "Joint Intervenors were clearly aware of the possibility that dredging the channel might be needed to support" barging equipment to the VEGP

[8] These standards are much stricter than the standards regarding submission of public comment, as further explained in the next subsection.

Site. SNC Answer at 19. However, a contention based on mere awareness would not meet the strict standards for admitting contentions under the NRC regulations. These regulations prohibit contentions based upon speculation, and instead require that an intervenor set forth its contentions with particularity and provide a basis for such contentions. *See* 10 CFR. §2.309(f)(1)(ii) ("A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised … For each contention, the request or petition must … provide a brief explanation of the basis for the contention); *See also Pa'ina Hawaii, LLC,* (Materials License Application), CLI-08-03, 67 NRC 151, 168 (2008) ("there must be an "*explanation* for the basis" of a contention"); and *Maine Yankee Atomic Power Co*. (Main Yankee Atomic Power Station), LBP-82-4, 15 NRC 199, 206 (1982) (petitioner must "set forth the reasons (basis) for each contention"). Joint Intervenors were unable to meet NRC's strict pleading requirement until the full extent of the requisite dredging was revealed. *See Dominion Nuclear Connecticut, Inc.*, CLI-01-24, 54 NRC 349, 359 (2001) ("Our contention rule is strict by design."). In other words, the extent of the dredging first disclosed in the FEIS formed the basis of EC 6.0.

In the SNC Answer, SNC claimed that Joint Intervenors were "wrong" in asserting that the FEIS was the first document in the record to disclose that *substantial* dredging of the Federal navigation channel would likely be required in connection with construction activities at the VEGP Site. SNC Answer at 17. Yet, in making this allegation, SNC did not point to a single reference to the extent of dredging in either the ER or the DEIS – because no such reference exists. Fleeting references to SNC's "plans" to use the Federal navigation channel, or to work with the Corps to develop "a strategic

plan to support the transport of equipment," were insufficient to put Joint Intervenors on notice of plans to dredge more than 100 miles of the Federal navigation channel. *See* DEIS at 4-48. Additionally, these references did not provide an adequate basis for Joint Intervenors, under the above-mentioned strict pleading standards of the NRC, to file a proper contention. *See Pa'ina Hawaii, LLC* ("It would be an inappropriate use of adjudicatory and other NRC resources to allow petitioners to trigger time-consuming hearings or gratuitous analyses based merely on generalized, poorly supported scenarios.").

In contrast to the DEIS and ER, the FEIS states that "most areas of the navigation channel above rkm 56 (RM 35) would likely need to be dredged." FEIS at 7-20. This statement reveals, for the first time, the massive extent of dredging required. If the project required minimal or no dredging, then there would be little concern over the potential impacts of dredging, and therefore no basis for a new contention. By contrast, extensive dredging, finally proposed in the FEIS, raises significant concerns and provides a basis for the new contention. If either the ER or the DEIS gave any indication of the scope of the intended dredging, then Joint Intervenors would have raised their contention earlier.

Similarly, Joint Intervenors had no basis for concern about impacts to upstream reservoirs until they learned, through their own efforts (and after issuance of the ER and DEIS), that SNC was contemplating "100+ barge trips." *Email from Jason D O'Kane, Project Manager, Coastal Branch, Regulatory Division, Savannah District, USACE, to Jeffrey K King, SAS* (Mar. 27, 2008, 3:24 PM). Again, it is the massive extent of the proposal that gives rise to the Joint Intervenors' concerns. If the ER or DEIS had

disclosed that only one or two barge shipments were required, Joint Intervenors would have little concern for impacts on Corps reservoirs. Moreover, had the DEIS or ER disclosed that SNC expected the Corps to provide navigation support for over 100 barge loads, Joint Intervenors would have asserted their new contention at that time. However, neither the ER nor DEIS disclosed the number of barge trips required in connection with construction of VEGP Units 3 and 4. Thus, the ER and DEIS did not put Joint Intervenors on notice of this potential impact and provided no basis for Joint Intervenors to assert a new contention.

B. Joint Intervenors' Submission of a Comment Letter Concerning Dredging Impacts Does Not Make EC 6.0 Untimely.

SNC's reliance on *Private Fuel Storage*, to support its conclusion that Joint Intervenors' submission of comments regarding dredging precluded them from making a timely new contention, is misplaced. SNC Answer at 18. In *Private Fuel Storage*, the State of Utah did not "establish or even contend that the staff DEIS contains new or different data or conclusions" *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), 52 N.R.C. 216, 223 (2000)(internal quotes and citations omitted). As a result, Utah's proposed contention was rejected because it "could have been filed with the State's initial environmental contentions challenging the" ER. *Id*. Unlike Utah in *Private Fuel Storage*, proposed contention EC 6.0 is timely because it challenges new information in the FEIS that was not previously available. Joint Intervenors' comment letter neither excuses nor precludes Joint Intervenors from making this timely contention.

Under the circumstances, Joint Intervenors took every necessary and appropriate step to bring the navigation impacts to the Staff's attention. "Persons challenging an agency's compliance with NEPA must 'structure their participation so that it ... alerts the

agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004) (quoting, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)). Based on the vague reference to barging in the DEIS, one of the Joint Intervenors discerned that navigation impacts, including dredging, may be problematic and alerted the Staff to these concerns in a comment letter. When the FEIS alluded to the extent of the dredging and confirmed that these fears were indeed justified, Joint Intervenors moved to assert a new contention based upon the inadequacy of the FEIS's treatment of the issue. Nothing more was required of Joint Intervenors under NEPA or the NRC's rules and regulations.

C. Joint Intervenors' Adherence to the Board's General Scheduling Order Does Not Make EC 6.0 Untimely.

Finally, SNC's assertion that Joint Intervenors' motion was not timely because it was not filed within thirty days of the availability of the FEIS is without merit. The Board's initial scheduling order provided specific dates for a sequence of pre-hearing events, including the opportunity to assert new contentions after publication of the FEIS. *See Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Memorandum and Order (Prehearing Conference and Initial Scheduling Order) (May 7, 2007). Each subsequent revision to the hearing schedule retained this feature and specified a date-certain for Joint Intervenors to file new or amended contentions. *See e.g. Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Memorandum and Order (Revised General Schedule), slip op. (July 14, 2008). Joint Intervenors' motion to admit EC 6.0 was timely filed on September 22, 2008, the date

specified in the Revised General Schedule.[9] *See Entergy Nuclear* (Vermont Yankee Nuclear Power Station), 62 N.R.C. 813, 819 (2005) (New contention filed within time frame ordered by the Board is deemed timely for the purposes of 10 C.F.R. § 2.309(f)(2)(iii)).[10]

CONCLUSION

Proposed contention EC 6.0 raises the issue of the extent of the NRC's duties under NEPA when issuing an ESP (or COL). This important issue is both within the scope of, and material to, this proceeding. Therefore, Joint Intervenors respectfully request that the Board admit contention EC 6.0, as proposed, for adjudication.

[9] Although the Board's Revised General Schedule required new contentions to be filed by September 22, 2008, technical difficulties prevented Joint Intervenors from filing this new contention until September 23, 2008. See *Letter from Lawrence Sanders to Administrative Law Judges* (September 24, 2008). Joint Intervenors have filed an unopposed motion requesting that the Board accept Joint Intervenors' Motion to Admit New Contention one day late. See *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Unopposed Motion to File "Motion to Admit New Contention" Out-of-Time, (September 29, 2008).

[10] Even if SNC were correct that Intervenors' motion was due within 30 days of a "triggering event," the August 14, 2008 Staff letter to the Board was not the "triggering event" in this case. If anything, the "triggering event" occurred on the date that the "Notice of Availability" was published in the Federal Register, August 21, 2008. *See* 73 FR 49496. If the new contention was due 30 days from the Notice of Availability, it was due on September 22, 2008 (30 days from August 21 was a Sunday and therefore the motion was due the following day).

Respectfully submitted this 14th day of October, 2008,

[Original signed by L. Sanders]

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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 JOINT INTERVENORS' REQUEST TO IMPLEMENT ALTERNATIVE SCHEDULE OR TO HOLD A PRE-HEARING CONFERENCE TO DISCUSS THE GENERAL SCHEDULE were served upon the following persons by Electronic Information Exchange and/or electronic mail.

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