

October 23, 2008

Board Notification 2008-01

MEMORANDUM TO: Atomic Safety and Licensing Board
and All Parties

FROM: [Executed in Accord with 10 CFR § 2.304(d) by]
Mark D. Notich, Senior Project Manager */RA/*
Division of Site and Environmental Reviews
Office of New Reactors

SUBJECT: SUPPLEMENTAL INFORMATION POTENTIALLY RELEVANT AND
MATERIAL TO THE LICENSING BOARD PROCEEDING IN THE
MATTER OF SOUTHERN NUCLEAR OPERATING COMPANY
(EARLY SITE PERMIT FOR VOGTLE ESP SITE)

In conformance with the Commission's policy on notification of the Atomic Safety and Licensing Board (ASLB) of new, relevant, and material information, this memorandum provides the information discussed below.

In the process of preparing its testimony for the contested hearing in this proceeding, the NRC staff ("Staff") has become aware of information that the Staff believes warrants notification of the ASLB and parties. The Staff is providing this notification because the information at issue relates to the Staff's analysis in NUREG-1872, *Final Environmental Impact Statement for an Early Site Permit (ESP) at the Vogtle Electric Generating Plant Site* (Aug. 2008) ("FEIS") and may be relevant to the litigation of the admitted contentions.

In the FEIS, the Staff's analysis of aquatic ecology includes a discussion of fish species present in the middle Savannah River. See FEIS Section 2.7.2. In FEIS Table 2-7, the Staff identifies the Atlantic Sturgeon (*Acipenser oxyrinchus oxyrinchus*) as one such species. FEIS at 2-79. In the FEIS's subsequent discussion of threatened and endangered aquatic species known to occur on or in the vicinity of the Vogtle site, the Staff states that the Atlantic Sturgeon is considered a "species of concern" but that "no candidate species" for Federally-listed status are present. FEIS at 2-89. This description did not change from that presented in the Staff's Draft Environmental Impact Statement ("DEIS"). See DEIS at 2-77, 2-87.

While preparing its testimony concerning the admitted contentions, the Staff has learned that during the Staff's environmental review, the Atlantic Sturgeon's Federal listing status was changed from "species of concern" to "candidate species." See 71 Fed. Reg. 61022, 61023 (Oct. 17, 2006). As stated by the National Marine Fisheries Service (NMFS), such a designation "does not confer any procedural or substantive protections of the [Endangered Species Act (ESA)] on the candidate species."¹ *Id.* The change in the Atlantic Sturgeon's status thus implicates no statutory requirement under the ESA. However, the Staff does

¹ NMFS states that a "candidate" is defined as "any species being considered by the Secretary [of Commerce or Interior] for listing as an endangered or a threatened species, but not yet the subject of a proposed rule." 71 Fed. Reg. at 61022 (quoting 50 C.F.R. 424.02). "Species of concern" are species about which the NMFS has "some concerns regarding status and threats, but for which insufficient information is available to indicate a need to list the species under the ESA." *Id.* (referencing 69 Fed. Reg. 19975; April 15, 2004).

consider the distinction between Federal “species of concern” and “candidate species” in its environmental review guidance, including NUREG-1555, “Environmental Standard Review Plan” (1999) (“ESRP”). See ESRP Section 2.4.2.

The list of Federally-protected species that the NMFS provided to the Staff by letter dated October 24, 2006, identified the Atlantic Sturgeon as a “species of concern,” rather than as a “candidate species.”² Although that was the designation presented in the DEIS, and the change in status occurred prior to the Staff’s issuance of that document in September 2007, the Staff did not receive public comments on the DEIS that concerned this species’ designation. Accordingly, the Staff remained unaware of the change in status when it issued the FEIS.

The Staff is presently evaluating the significance of this information. Moreover, the Staff intends to discuss this matter in its pre-filed testimony on the admitted contentions.

This information is being brought to the attention of the ASLB and all parties, as it may be relevant and material to issues pending before the ASLB.

Docket No. 52-011-ESP

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Accession Number: ML082960508

² See Letter from Walt Wilson, Fisheries Biologist to NRC Submitting a List of Federally Protected Species Under the Jurisdiction of NMFS for the States of Alabama and Georgia (ML063200127); FEIS at 2-89, 2-134.

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