

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

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

In the Matter of

SOUTHERN NUCLEAR OPERATING CO.

(Early Site Permit for Vogtle ESP Site)

Docket No. 52-011-ESP

ASLBP No. 07-850-01-ESP-BD01

October 24, 2008

MEMORANDUM AND ORDER
(Ruling on Motion to Admit New Contention)

Before the Licensing Board is a motion dated September 22, 2008, by which Joint Intervenors¹ seek the admission of a new contention relating to the pending application of Southern Nuclear Operating Company (SNC) for a 10 C.F.R. Part 52 early site permit (ESP) for two additional reactors at the Vogtle Electric Generating Plant (VEGP) site near Waynesboro, Georgia. See Joint Intervenors' Motion to Admit New Contention (Sept. 22, 2008) at 1-2 [hereinafter Joint Intervenors Motion]. The new contention challenges the adequacy of the discussion in the NRC staff's final environmental impact statement (FEIS) for the Vogtle ESP regarding the impacts of potential United States Army Corps of Engineers (USACE) dredging in the Savannah River in connection with the construction of the new VEGP units. In an

¹ 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.

October 6, 2008 answer to Joint Intervenors motion, applicant SNC asserts that Joint Intervenors new contention is inadmissible because it meets neither the timeliness standards of 10 C.F.R. § 2.309(c), (f)(2), nor the general contention admissibility standards of section 2.309(f)(1). See [SNC]'s Answer to Joint Intervenors' Motion to Admit New Contention (Oct. 6, 2008) at 1 [hereinafter SNC Answer]. In its October 6, 2008 answer, the NRC staff does not oppose the admissibility of the new contention in part, but asks the Board to reject certain aspects of the contention as failing to meet either the timeliness or the general admissibility requirements of section 2.309. See NRC Staff Answer to "Joint Intervenors' Motion to Admit New Contention" (Oct. 6, 2008) at 3 [hereinafter Staff Answer].

For the reasons set forth below, the Board finds that the proposed new contention, as delineated in this issuance, is admissible consistent with the timeliness and substantive admissibility standards of 10 C.F.R. § 2.309(c) and (f).

I. BACKGROUND

On August 15, 2006, SNC applied to the Nuclear Regulatory Commission (NRC) for an ESP under 10 C.F.R. Part 52 for an additional two reactor units at its existing VEGP site. In March 2007, this Board found that in a December 2006 hearing petition seeking to challenge certain aspects of the SNC ESP application, Joint Intervenors had established their standing and proffered two admissible contentions so as to be admitted as parties to the contested portion of this proceeding. See LBP-07-3, 65 NRC 237, 278-79 (2007).

By subsequent orders dated May 7, 2007, and February 1, March 13, July 3, and July 14, 2008, the Board established and revised the general schedule for this proceeding. See Licensing Board Memorandum and Order (Prehearing Conference and Initial Scheduling Order) (May 7, 2007) (unpublished); Licensing Board Memorandum and Order (Revised General

Schedule) (Feb. 1, 2008) (unpublished); Licensing Board Memorandum and Order (Revised General Schedule) (Mar. 13, 2008) (unpublished); Licensing Board Memorandum and Order (Revised General Schedule) (July 3, 2008) (unpublished); Licensing Board Memorandum and Order (Revised General Schedule) (July 14, 2008) (unpublished) [hereinafter Revised General Schedule]. Under the most recent July 14 schedule, any new or amended environmental contentions based on the staff's FEIS were due to be filed by September 22, 2008. See Revised General Schedule, App. A, at 2.

On September 23, 2008, Joint Intervenors submitted via e-mail and the agency's E-Filing system a motion, dated September 22, 2008, to admit a new environmental contention, denominated as EC 6.0, based on purported additional information contained in the FEIS. As set forth in Joint Intervenors motion, contention EC 6.0 declares:

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 at 2. Joint Intervenors also interpose eight items of foundational support for this contention:

1. The FEIS contains substantially different data and conclusions from the SNC environmental report (ER) or the staff's draft environmental impact statement (DEIS).
2. Using the federal navigation channel to barge components to the VEGP site is necessary for construction of Units 3 and 4.

3. Environmental impacts stemming from the use of the federal navigation channel are direct impacts of the proposed construction of Units 3 and 4 that must be addressed in the FEIS.
4. The staff's conclusion, as set forth in the "Cumulative Impacts" chapter of the FEIS, that the large-scale dredging from Savannah Harbor to the VEGP site could have moderate impacts is inadequately supported.
5. Dredging the federal navigation channel has potentially significant impacts on the environment.
6. The staff abdicated its duty independently to assess potential impacts of dredging in the FEIS.
7. Navigation requires release of significant amounts of water from upstream reservoirs, which is not addressed in the FEIS.
8. The NRC staff failed to consult with the USACE, as required by the National Environmental Policy Act (NEPA).

See id. at 2-10.

With respect to the submission of this contention, although the certificate of service accompanying the motion, likewise dated September 22, 2008, indicated the motion seeking admission of the contention was served "by Electronic Information Exchange and/or electronic mail," id. at 12, the motion and the accompanying attachments did not reach the Office of the Secretary, the Board, or the other parties until the morning of September 23, 2008, via an e-mail. In a September 24, 2008 follow-up letter to the Board, counsel for Joint Intervenors attributed the filing of the contention admission motion after the September 22 deadline to difficulties with the agency's E-Filing system and informed the Board that Joint Intervenors were prepared to submit a motion for leave to file the motion to admit a new contention out-of-time.

See Letter from Lawrence D. Sanders, Counsel for Joint Intervenors, to Licensing Board (Sept. 24, 2008) [hereinafter E-Filing Letter]. In response, the Board issued an order dated September 25, 2008, that offered Joint Intervenors the opportunity to file a motion addressing the timeliness factors of 10 C.F.R. § 2.309(c)(1) and/or (f)(2) by September 29, 2008, and instructed SNC and the staff to file answers to such a motion, as well as to Joint Intervenors initial motion, by October 7, 2008. See Licensing Board Memorandum and Order (Response to Joint Intervenors Letter Regarding E-Filing) (Sept. 25, 2008) at 1-2 (unpublished). On September 29, 2008, Joint Intervenors filed a motion to file out-of-time in which they again described the circumstances associated with missing the September 22 deadline and asserted that “[n]either [SNC nor staff] counsel opposed Joint Intervenors request for relief from the E-Filing requirements to the extent the failure to file and serve the motion in a timely manner was due to Joint Intervenor’s inability to file or serve the motion electronically.” Joint Intervenors’ Unopposed Motion to File “Motion to Admit New Contention” Out-of-Time (Sept. 29, 2008) at 3 [hereinafter Motion to File Out-of-Time].

On October 6, 2008, SNC and the staff filed responses to Joint Intervenors contention admission motion. SNC opposes the contention as both untimely and failing to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). On the issue of timeliness, SNC argues that contention EC 6.0 is based on information that “does not differ significantly” from what was in the SNC ER or the Staff DEIS and that Joint Intervenors have failed to satisfy the timeliness factors of 10 C.F.R. § 2.309(c)(1) and (f)(2). SNC Answer at 1-2. SNC also asserts that contention EC 6.0 is inadmissible under 10 C.F.R. § 2.309(f)(1) because it is outside the scope of the proceeding, is not material to the findings NRC must make, and does not provide sufficient information to show that a genuine dispute exists on a material issue of law or fact. See id. at 1. The staff, in its response, does not oppose the admission of

contention EC 6.0 on timeliness grounds with regard to the potential impacts of dredging the federal navigation channel, but submits that the contention is untimely to the extent it addresses dredging associated with an intake channel and barge slip. See Staff Answer at 4-5. The staff also opposes certain of Joint Intervenors foundational support items as failing to demonstrate a genuine dispute with the FEIS on a material issue of law or fact. Id. at 5. On October 14, 2008, Joint Intervenors filed a reply addressing the SNC and staff timeliness and contention admissibility arguments, asserting they have met both standards so as to warrant the admission of their new contention. See Joint Intervenors' Reply to NRC Staff's Answer to Joint Intervenors' Motion to Admit New Contention and [SNC]'s Answer to Joint Intervenors' Motion to Admit New Contention (Oct. 14, 2008) at 2 [hereinafter Joint Intervenors Reply].

II. ANALYSIS

A. New Contentions

1. Section 2.309(f)(2) Standards Governing the Admission of New Contentions

Two sections of the Commission's 10 C.F.R. Part 2 rules of practice seemingly address the admissibility of contentions filed after initial intervention petitions are due or have been timely filed, specifically 10 C.F.R. § 2.309(c)(1) and (f)(2). Section 2.309(f)(2) addresses new contentions (and amendments to admitted contentions), particularly "[o]n issues arising under [NEPA]," filed after the initial intervention petition is submitted that are based on new information, while section 2.309(c) addresses "[n]ontimely filings."

Under section 2.309(f)(2), new contentions and amendments to contentions based on NEPA can be filed in response to data or conclusions in the staff's DEIS or FEIS "or any supplements relating thereto, that differ significantly from the data or conclusions in the

applicant's documents." A new contention is only admissible under section 2.309(f)(2) 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.

2. Application of Section 2.309(f)(2) Standards to Joint Intervenors Contention EC 6.0

In submitting contention EC 6.0, Joint Intervenors have satisfied the section 2.309(f)(2) factors. Their motion indicates that the probability of dredging over 100 miles of the Savannah River federal navigation channel was first raised in the FEIS. Contrary to the SNC argument that Joint Intervenors should have been aware of the possibility of dredging at least by the time one of the Joint Intervenors filed a comment on the DEIS that mentioned dredging, see SNC Answer at 18, we find in connection with section 2.309(f)(2)(i) that the full probability and extent of dredging were not addressed until the FEIS.

Additionally, with respect to section 2.309(f)(2)(ii), we conclude that the FEIS discussion of the likely need to dredge "most areas of the navigation channel above [river kilometer (rkm)] 56 ([river mile (RM)] 35)" at "normal river flow," 1 Office of New Reactors, NRC, [FEIS] for an [ESP] at the [VEGP] Site, NUREG-1872 § 7.5.1, at 7-20 (Aug. 2008) (ADAMS Accession No. ML082240145) [hereinafter FEIS], is materially different from any earlier discussions in the SNC ER and the staff DEIS. Those documents, by indicating the river has not been maintained for navigation for approximately thirty years, only suggest that some dredging might be necessary under some flow conditions. See [SNC], [ESP] Application for the [VEGP], Part 3,

[ER] § 2.5.2.2, at 2.5-10 (rev. 2 Apr. 2007) (ADAMS Accession No. ML081020177) [hereinafter ER]; 1 Office of New Reactors, NRC, [DEIS] for an [ESP] at the [VEGP] Site, NUREG-1872 § 4.5.4.1, at 4-48 (Sept. 2007) (ADAMS Accession No. ML072410045) [hereinafter DEIS].

As to the section 2.309(f)(2)(iii) factor, Joint Intervenors have admitted to missing the Board's September 22, 2008 deadline by a day,² but we find the one-day delay excusable and not a basis for precluding their motion from being considered ab initio under section 2.309(f)(2). Although Joint Intervenors have been successfully utilizing the agency's E-Filing system since this proceeding began, as was described in Joint Intervenors September 24 letter, see E-Filing Letter at 1-2, an apparent change in the network configuration at the university where their counsel is employed caused their filing not to go through despite counsel's earlier efforts to ensure that the system changes would not impact his ability to interact successfully with the agency's E-Filing system.³ Moreover, counsel seemingly attempted to follow the Board's earlier directions regarding a course of action in the event of an E-Filing problem, see Licensing Board Memorandum and Order (Procedures to Address Problems Submitting and Serving Documents Via E-Filing) (Jan. 24, 2008) at 1-2 (unpublished), but apparently was thwarted when he

² SNC also argues that Joint Intervenors motion was untimely because it was filed more than 30 days after what SNC asserts was the actual FEIS availability date of August 14, 2008, when the NRC staff advised the Board and the other parties that the FEIS was being issued. See SNC Answer at 21-22. The motion was filed in accordance with the terms of the Board's July 14, 2008 revised general schedule. Under similar circumstances, a licensing board has held that any ambiguity in a notice setting a filing date should be construed in favor of the party seeking to rely on the notice. See Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC __, __ (slip op. at 13-14) (Sept. 12, 2008). We find the same principal applicable here relative to Joint Intervenors reliance on the deadline in the Board's revised general schedule.

³ We note that to help avoid problems similar to those experienced by Joint Intervenors counsel, the agency has plans to establish on its E-Filing website a "practice" site that will allow anyone wishing to use the E-Filing system to test their connectivity by sending a test submission.

included attachments with the filing that exceeded the permitted size of attachments to an e-mail generated using the university system. Under the circumstances, we conclude that Joint Intervenors have provided a showing sufficient to establish their compliance with section 2.309(f)(2)(iii).⁴

Thus, since the FEIS was the triggering event for filing contention EC 6.0, and Joint Intervenors provided good cause for filing their motion to admit the contention one day beyond the time frame established by the Board for filing new contentions based on the FEIS, we conclude Joint Intervenors motion to admit a new contention was timely under section 2.309(f)(2).

We also note that, notwithstanding the discussion in the DEIS of USACE control of water release from upstream reservoirs, see 1 DEIS § 2.6.1.1, at 2-18, because of the likely relationship between flow regulation and dredging (for example, the possibility that flow regulation might mitigate the impacts of dredging), we consider contention EC 6.0 is also timely under section 2.309(f)(2) to the extent it challenges the staff's discussion of the release of water from upstream reservoirs to support navigation. To the extent the contention contests the staff's impacts analysis of dredging of the barge slip and intake channel, however, we agree with the staff, see Staff Answer at 4, that such a challenge is not timely. The DEIS specifically discusses

⁴ Although Joint Intervenors September 29 motion to file out of time indicates that its request is not opposed by SNC and the staff, consistent with the authority that suggests the Board must address the section 2.309(c)(1) timeliness factors "[e]ven if all of the parties are inclined to waive the tardiness" of the filing, Commonweath Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 252-53 (1986) (quoting Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 (1985)), we likewise have assessed the timeliness of Joint Intervenors motion independent of the parties' apparent acquiescence in the timeliness of its filing relative to the September 22 service problems encountered by Joint Intervenors counsel.

these activities, see 1 DEIS § 4.3.1, at 4-8, and thus any contentions relating to barge slip and intake channel dredging should have been raised in response to the DEIS, at the latest.

B. Nontimely Contentions

1. Section 2.309(c)(1) Standards Governing Nontimely Contentions

Recent licensing board decisions have held that if a new contention meets the section 2.309(f)(2) standards, it is timely and therefore need not satisfy the nontimely filing requirements of 10 C.F.R. § 2.309(c)(1).⁵ However, because the case law in place prior to the 2004 rulemaking that first adopted the section 2.309(f)(2) standards would have required an analysis of most of the section 2.309(c)(1) factors, and the Commission has not yet endorsed the newer cases approach to section 2.309(f)(2), out of an abundance of caution, we will also examine the section 2.309(c) factors in this instance.⁶

⁵ See, e.g., Shaw Areva MOX Servs. (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 210 n.95 (2007) (noting that new or amended contentions based on construction activities or plan or design changes by the applicant “should be governed by the basic provisions of 10 C.F.R. § 2.309(f)(2) rather than by the more restrictive elements of 10 C.F.R. § 2.309(c)”; Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234 & n.7 (2006) (cautioning that “[f]ailure to satisfy any of [the 10 C.F.R. § 2.309(f)(2)] requirements will mandate the rejection of [intervenor’s] contention as nontimely” unless intervenor can satisfy section 2.309(c)); Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 174 (2006) (cautioning petitioner that “should [it] file an energy alternatives contention that is not based on new information, i.e., data or conclusions that differ significantly from data or conclusions in [applicant’s] ER or the [generic environmental impact statement], the contention can only be admitted upon a favorable balancing of the factors found in 10 C.F.R. § 2.309(c)” (emphasis in original)); Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571-75 (2006) (separating “[t]imely new contentions under 10 C.F.R. § 2.309(f)(2)” and “[n]ontimely additional contentions under 10 C.F.R. § 2.309(c)”; Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 (2005) (“Given that we have just held that [intervenor’s] new contention is ‘timely’ under 10 C.F.R. § 2.309(f)(2)(iii), it appears contradictory to rule that NEC must now also satisfy the eight additional balancing factors of 10 C.F.R. § 2.309(c) for ‘nontimely’ filings.”).

⁶ We note that in its comments on the 2004 rulemaking, the Commission stated that “§ 2.309(f)(2) will control the admission of amended and new contentions based upon issuance of the NRC staff’s EIS.” Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, (continued...))

In deciding under 10 C.F.R. § 2.309(c)(1) whether to admit a contention submitted after the time for initial intervention petitions has passed, a licensing board must balance five factors:⁷ (1) good cause, if any, for failure to file on time; (2) availability of other means whereby the petitioner's interest will be protected; (3) extent to which the petitioner's interests will be represented by existing parties; (4) extent to which the petitioner's participation will broaden the issues or delay the proceeding; and (5) extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

Relative to these factors, we note that the first factor -- good cause for failure to file on time -- carries the most weight, and if good cause is lacking, a compelling showing must be made as to the remaining four factors to outweigh the lack of good cause. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Arguably, the same information relevant to whether a contention is admissible under section 2.309(f)(2) -- for example, if a new or amended NEPA contention is based on data or conclusions in the NRC staff's DEIS or FEIS that differ significantly from the applicant's ER -- is also relevant to the good cause factor under 10 C.F.R. § 2.309(c). See, e.g., MOX, LBP-07-14, 66 NRC at 210 n.95 (noting that petitioner would have "per se 'good cause'" for new contentions filed "within a reasonable period . . . of the new developments which triggered them"). In particular, 10 C.F.R. § 2.309(f)(2)(i) and (iii) address timeliness factors that had been analyzed

2004). This statement also supports application of only the section 2.309(f)(2) factors to contention EC 6.0. The case law on this issue has not relied on the distinction between environmental and safety contentions; therefore, we will address the section 2.309(c)(1) factors in addition to the section 2.309(f)(2) factors.

⁷ Section 2.309(c) actually lists eight factors. However, section 2.309(c)(1)(ii)-(iv) mirrors the standing requirements of section 2.309(d)(1)(ii)-(iv). As Joint Intervenors standing has already been established earlier in this proceeding, see LBP-07-3, 65 NRC at 250-51, we consider section 2.309(c)(ii)-(iv) to have been met and will address only section 2.309(c)(i), (v)-(viii).

under the good cause prong of the pre-2004-revision rule regarding admissibility of late-filed contentions, namely when information became available to support the new or amended contention and how much time elapsed between when the information became available and when the intervenors filed the new or amended contention. See, e.g., Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 221 (2000).

2. Application of Section 2.309(c)(1) Factors to Joint Intervenors Contention EC 6.0 Relative to their contention EC 6.0, a balancing of the section 2.309(c) timeliness factors supports the admission of Joint Intervenors issue statement.⁸

We find Joint Intervenors timeliness showing under section 2.309(f)(2) also establishes good cause for their late filing under section 2.309(c)(1)(i), including filing the contention on September 23 instead of September 22 as specified in the Board's revised general schedule.

Of the other four section 2.309(c)(1) factors, two -- representation of petitioner's interests by other parties and assistance in developing a sound record -- favor Joint Intervenors. Since Joint Intervenors are the only parties challenging the SNC application that have been admitted to this proceeding, there are no other parties that can represent Joint Intervenors interests. See 10 C.F.R. § 2.309(c)(1)(vi). Also supporting admission is the factor focusing on their ability to assist in developing a strong record, which among the four non-"good cause" factors has been

⁸ Both SNC and the staff have questioned the extent to which Joint Intervenors have addressed the application of the section 2.309(c)(1) timeliness factors. See SNC Answer at 22-23, Staff Answer at 5 n.7. Although Joint Intervenors did not directly discuss these items in their initial motion, they did address the section 2.309(f)(2) timeliness factors, which (as we note above) relate to the section 2.309(c)(1) good cause factor, in both their initial motion and their reply and did address some of the other factors in the context of their discussion of missing the September 22 deadline in their September 29 motion to file out-of-time. See Joint Intervenors Motion at 2-3; Motion to File Out-of-Time at 2-3; Joint Intervenors Reply at 13-18. Particularly in light of the possible confusion created by the recent case law on the relationship between sections 2.309(c)(1) and 2.309(f)(2), see supra notes 5-6 and accompanying text, we find that Joint Intervenors have addressed the relevant factors sufficiently to warrant admission of their potentially nontimely contention.

given more weight in the balance. See PFS, LBP-00-27, 52 NRC at 224. As reflected in the affidavits accompanying their motion, Joint Intervenors participation with regard to contention EC 6.0 may reasonably be expected to assist in developing a sound record through potential testimony, particularly that of Dr. Donald F. Hayes, who appears to have considerable experience regarding dredging. See 10 C.F.R. § 2.309(c)(1)(viii).

In assessing the extent to which admitting contention EC 6.0 will broaden the issues or delay the proceeding in accord with section 2.309(c)(1)(vii), the other of the four non-“good cause” factors that has been given more weight in the balance, see PFS, LBP-00-27, 52 NRC at 224, we find this factor disfavors Joint Intervenors, albeit not significantly. Admitting contention EC 6.0 would necessarily broaden the issues in the contested hearing to include dredging, which was not part of either of Joint Intervenors previously admitted contentions. And some delay would result from admitting the contention, namely postponing the evidentiary hearing on contested and uncontested environmental issues, now scheduled for mid-January 2009. Nonetheless, under the existing revised general schedule, the delay in conducting an evidentiary hearing on environmental matters would only be until mid-March 2009, see Revised General Schedule, App. A, at 6, a date that, given the delay already encountered awaiting the staff’s final safety evaluation report (SER), will not appreciably increase the overall time necessary to reach a determination regarding both the contested and mandatory portions of this proceeding. Accordingly, postponing resolution of the existing environmental issues to include contention EC 6.0 would not result in a delay to the overall proceeding that would make this a significant negative factor relative to the admissibility of this contention under section 2.309(c)(1).⁹

⁹ Contemporaneous with this memorandum and order, we are issuing a revised general schedule that provides revised dates for various activities relating to the three admitted
(continued...)

The last factor we consider, 10 C.F.R. § 2.309(c)(1)(v), also disfavors Joint Intervenors on the late-filing balance. Dredging of the Savannah River federal navigation channel apparently would involve an environmental analysis by USACE, see Joint Intervenors Motion, unnumbered attach. at 1 (E-mail from Jason D. O’Kane, USACE, to Jeffrey K. King, USACE (Mar. 27, 2008); see also 33 C.F.R. §§ 230.6, 230.7, and possibly a public hearing as well, see 33 C.F.R. §§ 327.4, 327.8; see also Notice of Availability of Memorandum of Understanding Between [USACE] and [NRC] on Environmental Reviews Related to the Issuance of Authorizations to Construct and Operate Nuclear Power Plants, 73 Fed. Reg. 55,546, 55,548 & n.4 (Sept. 25, 2008). Thus, Joint Intervenors are not necessarily without other comparable means to protect their interests with regard to dredging. Nonetheless, as the September 12, 2008 memorandum of understanding (MOU) between NRC and USACE indicates, the two agencies would likely participate in each other’s proceedings on the dredging issue. See 73 Fed. Reg. at 55,548 (each agency will participate in any public hearings held by the other). In light of the MOU and the lesser emphasis that generally is placed on this factor, we find section 2.309(c)(1)(v) adds only slightly to the balance against admitting the contention.

Accordingly, in making the final balance of all of these factors as outlined above, we conclude Joint Intervenors contention EC 6.0 satisfies the section 2.309(c)(1) criteria for admissibility of nontimely contentions.

environmental contentions as well as the mandatory hearing on environmental and safety matters, all of which, consistent with the contingencies established in our July 2008 schedule, will be held in a period of approximately ten days in mid-March 2009. See Licensing Board Memorandum and Order (Revised General Schedule) (Oct. 24, 2008) at 1 (unpublished).

C. Contention Admissibility

1. Standards Governing Contention Admissibility

The timeliness analysis above does not end this matter, for it is well-established that should an intervenor show it has met the standards for a new or late-filed contention, it must still meet the section 2.309(f)(1) contention admissibility standards. The Board has discussed these standards at length in a prior decision in this case and will not do so here. See LBP-07-3, 65 NRC at 252-54.

2. Application of Section 2.309(f)(1) Standards to Joint Intervenors Contention EC 6.0

Joint Intervenors contention EC 6.0 also satisfies the criteria of section 2.309(f)(1). The contention clearly satisfies 2.309(f)(1)(i)-(ii) and (v). Joint Intervenors have provided a specific statement of the issue of law or fact to be raised (i.e., FEIS compliance with NEPA relative to recently identified dredging in the Savannah River associated with the construction of the new VEGP units), a brief explanation of the basis for the contention, and sufficient expert opinion in the form of the affidavits of Dr. Hayes and Dr. Shawn P. Young, which provide support for the contention by identifying specific statements in the FEIS they assert are insufficient and specifying reasons for challenging those statements.

SNC maintains, however, that contention EC 6.0 is inadmissible under section 2.309(f)(1)(iii)-(v) as outside the scope of this proceeding and as raising issues that are not material to the findings the Board must make because NRC is not required under NEPA to assess the environmental impacts of dredging the Savannah River federal navigation channel. See SNC Answer at 6-15. The staff makes essentially the same arguments to challenge some of Joint Intervenors foundational support under the genuine dispute criterion of 10 C.F.R. § 2.309(f)(1)(vi). See Staff Answer at 5-8, 10-13. We thus address Joint Intervenors asserted

grounds supporting contention admission separately under the scope, materiality, and genuine dispute criteria of section 2.309(f)(1).

Initially, we find items 4 and 5, which challenge the adequacy of the FEIS cumulative impacts analysis, to be within the scope of and material to this proceeding, and to present a genuine dispute on a material issue of law or fact. NEPA requires agencies to analyze cumulative impacts, see Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 57, 60 (2001), which are defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions,” 40 C.F.R. § 1508.7. As evidenced by the staff’s inclusion of a dredging discussion in the FEIS cumulative impacts analysis section, see 1 FEIS § 7.5.1, at 7-20 (as well as its non-opposition to admitting contention EC 6.0 on these items, see Staff Answer at 9), the dredging of the Savannah River federal navigation channel to accommodate barge shipments for construction of Vogtle Units 3 and 4 and the associated environmental impacts are at least reasonably foreseeable. Thus, the impacts of dredging the river are cumulative impacts NRC must address under NEPA. As a consequence, items 4 and 5, which address the adequacy of the cumulative impacts analysis, are sufficient to establish a genuine dispute adequate to warrant further inquiry. Joint Intervenors contention EC 6.0 is therefore admissible under 10 C.F.R. § 2.309(f)(1) as supported by items 4 and 5.

Item 7 raises the issue of USACE’s regulation of water flow from upstream reservoirs. As discussed above, see supra p. 9, we have found the contention to be timely with regard to this item because flow regulation and dredging will likely be interrelated. We also find this item is both within the scope of and material to this proceeding, as well as sufficient to show the existence of a material issue of law or fact, as an analysis of the cumulative impacts of dredging to permit navigation to the VEGP site likely will need to include an analysis of the relationship

between USACE flow regulation and the need for dredging. Thus, contention EC 6.0 is admissible under 10 C.F.R. § 2.309(f)(1) as supported by item 7.

The other aspects of the contention do not fare so well in terms of admissibility. Item 1 is essentially an argument for the timeliness of contention EC 6.0 and so does not really provide foundational support for the contention. Items 2 and 3 depend on the connectedness of NRC's issuance of an ESP for Vogtle Units 3 and 4 and USACE's decision to dredge the Savannah River to re-open the federal navigation channel. Because Contention EC 6.0 is adequately supported by items 4, 5, and 7, items 2 and 3 are unnecessary to the admissibility determination, and thus a ruling on the connectedness of those actions is also unnecessary at this time. Finally, items 6 and 8, which allege an NRC failure to carry out its NEPA procedural duties, are likewise unnecessary to resolving contention EC 6.0. Because we admit the contention, the Board will assess Joint Intervenors concerns regarding the adequacy of the staff's analysis of the impacts of dredging and, as appropriate, supplement the FEIS based on the record garnered through the adjudicatory process. See Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-05-28, 62 NRC 721, 731 (2005). Furthermore, we fully expect USACE will participate in the hearing, particularly in light of the 2008 MOU between NRC and the Corps. See 73 Fed. Reg. at 55,548. Thus, any remedy Joint Intervenors might be entitled to relative to these items is effectively mooted by our action admitting their contention for litigation on the merits.

III. CONCLUSION

For the reasons set forth above, we find Joint Intervenors new contention EC 6.0 (1) has been timely submitted in accord with 10 C.F.R. § 2.309(c)(1), (f)(2); and (2) is admissible under the provisions of 10 C.F.R § 2.309(f)(1) to the extent that issue statement contests the staff's FEIS cumulative impacts analysis of dredging the Savannah River federal navigation channel and related water flow regulation from upstream reservoirs. As modified to include an appropriate title and, consistent with the scope of our admissibility determination, see LBP-07-3,

65 NRC at 255, a specific statement of the challenge it poses to the staff FEIS, the admitted contention is set forth in Appendix A to this decision.

For the foregoing reasons, it is this twenty-fourth day of October 2008, ORDERED, that the September 22, 2008 motion of Joint Intervenors to admit a new contention EC 6.0 is granted, subject to the limitations on the scope of contention EC 6.0 set forth above.

THE ATOMIC SAFETY
AND LICENSING BOARD¹⁰

/RA/
G. Paul Bollwerk, III
Administrative Judge

/RA/
Nicholas G. Trikouros
Administrative Judge

/RA/
James F. Jackson
Administrative Judge

Rockville, Maryland

October 24, 2008

¹⁰ Copies of this memorandum and order were sent this date by the agency's E-Filing system to counsel for (1) applicant SNC; (2) Joint Intervenors; and (3) the staff.

APPENDIX A

NEW ADMITTED CONTENTION

3. EC 6.0 – FINAL ENVIRONMENTAL IMPACT STATEMENT (FEIS)
FAILS TO PROVIDE ADEQUATE DISCUSSION OF IMPACTS
ASSOCIATED WITH DREDGING THE SAVANNAH RIVER
FEDERAL NAVIGATION CHANNEL

Because Army Corps of Engineers (Corps) dredging of the Savannah River Federal navigation channel has potentially significant impacts on the environment, the NRC staff's conclusion, as set forth in the "Cumulative Impacts" chapter of the FEIS, that such impacts would be moderate is inadequately supported. Additionally, the FEIS fails to address adequately the impacts of the Corps' upstream reservoir operations as they support navigation, an important aspect of the problem.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON MOTION TO ADMIT NEW CONTENTION) have been served upon the following persons by Electronic Information Exchange.

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

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gpb@nrc.gov

Administrative Judge
Nicholas G. Trikouros
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: nqt@nrc.gov

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

Ann P. Hodgdon, Esq.
Kathryn L. Winsberg, Esq.
Marcia Carpentier, Esq.
Sara Brock, Esq.
Sarah Price, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: aph@nrc.gov; klw@nrc.gov;
mxc7@nrc.gov; seb2@nrc.gov;
sarah.price@nrc.gov

Kenneth C. Hairston, Esq.
M. Stanford Blanton, Esq.
Peter D. LeJeune, Esq.
Balch & Bingham LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203-2014
E-mail: kchairston@balch.com;
sblanton@balch.com; plejeune@balch.com

Docket No. 52-011-ESP
LB MEMORANDUM AND ORDER (RULING ON MOTION TO ADMIT NEW CONTENTION)

Moanica M. Caston, Esq.
Southern Nuclear Operating Company, Inc.
40 Inverness Center Parkway
P.O. Box 1295, Bin B-022
Birmingham, AL 35201-1295
E-mail: mcaston@southernco.com

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036
E-mail: dcurran@harmoncurran.com

Kathryn M. Sutton, Esq.
Steven P. Frantz, Esq.
Paul M. Bessette, Esq.
Mary Freeze, Admin. Assist.
Morgan, Lewis & Bockius, LLP
Co-Counsel for Southern Nuclear Operating
Company, Inc.
1111 Pennsylvania Ave., NW
Washington, DC 20004
E-mail: ksutton@morganlewis.com
sfrantz@morganlewis.com
pbessette@morganlewis.com
mfreeze@morganlewis.com

Margaret Parish
Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: map4@nrc.gov

Lawrence D. Sanders, Esq.
Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
E-mail: masbill@law.emory.edu;
lawrence.sanders@emory.edu

C. Grady Moore, III, Esq.
Balch & Bingham, LLP
1901 6TH Avenue, Suite 2600
Birmingham, AL 35203
E-mail: gmoore@balch.com

Docket No. 52-011-ESP

LB MEMORANDUM AND ORDER (RULING ON MOTION TO ADMIT NEW CONTENTION)

Charles R. Pierce
Southern Company Services, Inc.
600 North 18th Street, BIN B056
Birmingham, AL 35291-0300
E-mail: crpierce@southernco.com

Pillsbury Winthrop Shaw Pittman, LLP
2300 N. Street, N.W.
Washington, DC 20037-1128
Robert B. Haemer, Esq.
Maria Webb, Paralegal
E-mail:
<mailto:David.Lewis@pillsbury.comrobert.haemer@pillsburylaw.com>;

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
Counsel for Westinghouse Electric Company,
LLC
Barton Z. Cowan
E-mail: teribart61@aol.com

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

Dated at Rockville, Maryland
this 24th day of October 2008