

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:)	
)	
U.S. Department of Energy)	January 15, 2009
)	
(License Application for Geologic Repository)	Docket No. 63-001
at Yucca Mountain))	
)	

**ANSWER OF THE U.S. DEPARTMENT OF ENERGY TO THE
NATIVE COMMUNITY ACTION COUNCIL PETITION TO INTERVENE
AS A FULL PARTY**

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309 and 10 C.F.R. Part 63, and the Advisory Pre-Application Presiding Officer (PAPO) Board Order of June 17, 2008, the U.S. Department of Energy (DOE or the Department) hereby files its Answer to “Native Community Action Acouncil [sic] (NCAC) Petition to Intervene as a Full Party” (Petition), filed on December 22, 2008.¹ The Petition responds to the U.S. Nuclear Regulatory Commission’s (NRC or Commission) Notice of Hearing and Opportunity to Petition for Leave to Intervene on an Application for Authority To Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, published in the *Federal Register* on October 22, 2008 (73 Fed. Reg. 63,029) (Hearing Notice). The Hearing Notice concerns DOE’s License Application

¹ DOE is filing this Answer in advance of the deadline set by the Commission in its Hearing Notice. DOE recognizes, however, that Petitioners have the full time allotted by the Hearing Notice to file their replies. DOE's early filing does not affect the deadlines set by the Commission.

for authorization to construct a geologic repository at Yucca Mountain, Nevada for the disposal of spent nuclear fuel and high-level radioactive waste.

To be admitted as a party to this proceeding, under 10 C.F.R. § 2.309, NCAC must:

(1) be in substantial and timely compliance with the Licensing Support Network (LSN) requirements imposed by 10 C.F.R. § 2.1003 at the time of its request for participation in the proceeding as provided in 10 C.F.R. § 2.1012(b)(1), and comply with all orders of the Pre-License Application Presiding Officer (PAPO) regarding electronic availability of documents;

(2) demonstrate legal standing to intervene in the proceeding pursuant to 10 C.F.R. § 2.309; and

(3) submit at least one admissible contention in accordance with 10 C.F.R. § 2.309(f)(1). In addition to the NRC's contention admissibility requirements in 10 C.F.R. § 2.309(f), environmental contentions must also meet the requirements of 10 C.F.R. § 51.109 and 10 C.F.R. § 2.326. As shown below, NCAC: (1) is not in substantial and timely compliance with its LSN obligations; (2) has failed to demonstrate legal standing to intervene in this proceeding; and (3) has failed to submit at least one admissible contention.² Therefore, the Petition must be denied.³

² Among DOE's other objections to the Petition, NCAC failed to submit a certificate of service with its Petition. In accordance with 10 C.F.R. § 2.305(c)(4), the Board may reject the Petition for failure to include a signed certificate of service stating the names and addresses of the persons served and the method and date of service. The Board may also, in its discretion, reject the Petition in full as unreliable, in accordance with 10 C.F.R. § 2.319(e). In addition, NCAC's Petition fails to comply with the Advisory PAPO Board Case Management Orders relating to format, dated June 20, 2008 and September 29, 2008.

³ DOE's Answer to Nevada's Petition contains a "Background" section summarizing the Yucca Mountain site, proposed repository operation, the applicable NRC regulatory framework, and the NRC Staff's technical review and the hearing process. DOE has omitted that section from this Answer in the interest of brevity.

II. COMPLIANCE WITH LSN REQUIREMENTS

As a threshold matter, a petitioner seeking to participate in the licensing proceeding must demonstrate that it is in compliance with the NRC's LSN requirements⁴. Specifically, 10 C.F.R. § 2.1012(b) states that:

A person, including a potential party given access to the [LSN] under this subpart, may not be granted party status under [10 C.F.R.] § 2.309 or status as an interested governmental participant under [10 C.F.R.] § 2.315, if it cannot *demonstrate substantial and timely compliance* with the requirements of [10 C.F.R.] § 2.1003 at the time it requests participation in the HLW licensing proceeding under § 2.309 or § 2.315.

Emphasis added.

Section 2.1012(c) additionally provides that the "Presiding Officer *shall not* make a finding of substantial and timely compliance pursuant to paragraph (b) of this section for any

⁴ 10 C.F.R. § 2.1003 (a) requires that "each other potential party, interested governmental participant or party shall make available [on the LSN] no later than ninety days after the DOE certification of compliance under 2.1009(b) – an electronic file including bibliographic header for all documentary material...generated by, or at the direction of, or acquired by, a potential party, interested governmental participant or party."

Each potential party, interested governmental participant or party is required thereafter to "continue to supplement its documentary material made available to the other participants via the LSN with any additional material created after the time of initial certification in accordance with [§ 2.1003(a)(1) through § 2.1003(a)(4)] until the discovery period in the proceeding has concluded." 10 C.F.R. § 2.1003(e).

10 C.F.R. § 2.1009 prescribes the following additional LSN requirements:

- (a) Each potential party, interested government participant, or party shall –
- (1) Designate an official who will be responsible for the administration of its responsibility to provide electronic files of documentary material;
 - (2) Establish procedures to implement the requirements of § 2.1003;
 - (3) Provide training to its staff on the procedures for implementation of the responsibility to provide electronic files of documentary material;
 - (4) Ensure that all documents carry the submitter's unique identification number;
 - (5) Cooperate with the advisory review process established by the NRC under § 2.1011(d).
- (b) The responsible official designated under paragraph (a)(1) of this section shall certify to the [PAPO] that the procedures [specified above] have been implemented and that . . . the documentary material specified in 2.1003 has been identified and made electronically available. The initial certification must be made [within 90 days of the DOE certification of compliance.]

Each potential party also is "responsible for obtaining the computer system necessary to comply with the requirements for electronic document production and service." 10 C.F.R. § 2.1011(a).

person who is not in compliance with all applicable orders of the [PAPO Board].” 10 C.F.R. § 2.1012(c) (emphasis added).⁵

Further, 10 C.F.R. § 2.309(a) states that, in ruling on a petition to intervene in this proceeding, the presiding officer shall consider “any failure of the petitioner to participate as a potential party in the pre-license application phase” governed by 10 C.F.R. Part 2, Subpart J.⁶

The Board should deny NCAC’s Petition because NCAC has not demonstrated that it is in substantial and timely compliance with the foregoing requirements. NCAC did not participate in the pre-license application phase of this proceeding. NCAC did not make the required certification to the PAPO Board within 90 days after DOE’s initial LSN certification. NCAC did not make any monthly supplemental productions and certifications as required by the PAPO Board’s Second Case Management Order. NCAC has not made any documentary material available on the LSN. And, insofar as DOE can ascertain, NCAC has not obtained the computer system necessary to comply with electronic document production on the LSN.

NCAC’s failure to make documentary material available is particularly remarkable in light of the fact that NCAC describes itself in its Petition as an “independent research

⁵ The PAPO Board has issued a series of Case Management Orders that impose certain requirements regarding privilege claims for documentary material on the LSN. One of those orders also requires each participant to supplement its LSN production each month with newly created or discovered documentary material, and to file a certification with the PAPO Board when the monthly supplement is made. Revised Second Case Management Order § VI(A) (July 6, 2007).

⁶ Compliance with LSN requirements is crucial to the efficient conduct of this proceeding, insofar as the LSN is designed to enable “the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding.” Final Rule, Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, 54 Fed. Reg. 14,925, 14,926 (Apr. 14, 1989) (amending hearing rules for adjudication on application for a license to receive and possess HLW and establishing basic LSN procedures) (Final Rule, Documents Related to the Licensing of Geologic Repository). It also is intended to facilitate the sharing of information between DOE, the NRC Staff, and the admitted parties throughout the licensing process. *See* Final Rule, Licensing Proceeding for a High-Level Radioactive Waste Geologic Repository: Licensing Support Network, Submissions to the Electronic Docket, 69 Fed. Reg. 32,836, 32,840 (June 14, 2004) (“[A]n LSN participant does have an obligation to maintain its existing LSN collection intact and available for the balance of the construction authorization proceeding.”) (Final Rule, LSN, Submissions to the Electronic Docket).

organization.” Petition at 13. Yet, it has not made available on the LSN any such research that allegedly supports its safety contention, much less any non-supporting information.

Coincidental with its Petition, NCAC did submit a “Certification of Electronically Available Documentary Material.” That submittal, however, does not demonstrate that NCAC is in substantial and timely compliance.

In the first place, the certification is facially inadequate. The certification was not made to the PAPO Board as required by § 2.1009(b). Also, the certification fails to state, as required by § 2.1009(a)(1), that NCAC has designated an official “who will be responsible for administration of its responsibility to provide electronic files of documentary material.” Rather, it states merely that NCAC has designated Ian Zabarte “as the responsible party for the administration of documentary material.” NCAC Certification ¶ 1.

Also, the certification is facially incorrect. The certification purports to attest that the documentary material specified in § 2.1003 has been identified and made electronically available. *Id.* ¶ 5. Yet, NCAC has made no documents available on the LSN.

Furthermore, the certification and NCAC’s Petition are wholly conclusory and provide no factual information to demonstrate NCAC’s LSN compliance. In light of NCAC’s failure to comply with its LSN obligations in the pre-license application phase and the inaccuracy of its purported certification, the Board ought not to accept NCAC’s naked assertion of its compliance. NCAC’s bare assertion does not demonstrate that it has actually complied with its LSN obligations. It appears in light of all the circumstances that NCAC’s certification is a pro forma submission that is not backed by a substantial, good-faith effort to comply. The Board should thus deny the Petition on this basis.⁷

⁷ 10 C.F.R. § 2.1012(b)(1) is clear that a potential party “may not be granted” party status or participate under 10 C.F.R. § 2.315(c) if it cannot demonstrate substantial and timely compliance “at the time it requests

III. LEGAL STANDING

NCAC asserts organizational and representational standing to intervene in the proceeding. As discussed below, NCAC has failed to demonstrate standing on either basis, because, among other things, its allegations of injury are vague and hypothetical, and fail to adequately demonstrate any link between the injuries claimed and the NRC licensing action. Furthermore, NCAC has failed to demonstrate that it is entitled to discretionary intervention. Accordingly, the Petition must be denied.

A. Applicable Legal Standards

1. Standing as of Right

To intervene as of right in an NRC licensing proceeding, a petitioner must demonstrate legal standing. The standing requirement is grounded in section 189a of the AEA of 1954, 42 U.S.C. § 2239(a)(1)(A), which requires the Commission, “[i]n any proceeding under the [AEA], for the granting, suspending, revoking, or amending of any license....” to provide “a hearing upon the request of any person whose interest may be affected by the proceeding....”

Accordingly, the Commission’s hearing rules provide that the Licensing Board shall consider the following factors when deciding whether to grant standing to a petitioner: (1) the nature of the

participation.” 10 C.F.R. § 2.1012(b)(2) makes clear that the time to cure any such failure to meet LSN requirements is *after* party status or the right to participate has been “denied,” and not in any such Reply.

The NCAC may not “cure” this or any other defect in its Petition, in its Reply pursuant to 10 C.F.R. § 2.309(h)(2). It is well recognized that “[r]eplies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it.” *Nuclear Mgmt Co., L.L.C.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)(citing cases); *see Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004)(citing Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004)). Replies cannot be used to “expand the scope of the arguments set forth in the original hearing request,” nor should they be used to introduce new bases for contentions submitted with the original petition. *See Nuclear Mgmt Co., L.L.C.*, CLI-06-17, 63 NRC at 732. Additionally, the Advisory PAPO Board explicitly stated that “[r]eplies shall be limited to addressing points that have been raised in answers.” *U.S. Dep’t of Energy* (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), LBP-08-10, 67 NRC __ (slip op. at 9) (June 20, 2008).

DOE reserves the right to move to strike any portions of any Replies that fail to adhere to these limitations or to seek other relief as appropriate.

requestor's/petitioner's right under the AEA to be made a party to the proceeding; (2) the nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest. 10 C.F.R. § 2.309(d)(ii)-(iv); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998).

To determine whether a petitioner's "interest" provides a sufficient basis for intervention, the Commission has long relied on "current judicial concepts of standing." *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998), *aff'd sub nom. Envirocare of Utah, Inc. v. U.S. Nuclear Regulatory Comm'n*, 194 F.3d 72 (D.C. Cir. 1999) (citing *Portland Gen. Elec. Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); *Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)). To demonstrate standing in NRC licensing proceedings under section 189a, a petitioner, thus, must allege: (i) a particularized injury; (ii) that is fairly traceable to the challenged action; and (iii) is likely to be redressed by a favorable decision. *Quivira Mining Co.*, CLI-98-11, 48 NRC at 6 (citing *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992)). These requirements, which have their origin in Article III, § 2 of the Constitution, are discussed further below.

Similarly, the Commission also applies "prudential" principles of standing. The Commission requires that a petitioner allege "such a personal stake in the outcome of the controversy as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues." *Sequoyah Fuels Corp. and Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994) (internal quotation marks omitted) (quoting *Duke Power Co.*

v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72 (1978)). A petitioner, in other words, must assert his own legal interests, not the interests of others. *See, e.g., Fla. Power and Light Co.* (St. Lucie, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (affirming a Licensing Board’s refusal to admit a petitioner attempting to intervene on the basis of alleged injury to workers at a nuclear plant, reiterating that “the petitioner must himself fulfill the requirement for standing”); *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381 (1978) (denying standing to an individual who attempted to intervene by alleging injury to her son who attended medical school in the vicinity of a proposed nuclear facility). The requirement that a party seeking review be himself among the injured—as opposed to merely citing an injury to a cognizable interest—is intended to “prevent[] the [hearing] from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders.” *United States v. Students Challenging Regulatory Action Procedures*, 412 U.S. 669, 687 (1973) (*SCRAP*); *see also Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972); *Lujan*, 504 U.S. at 562-63.

Finally, the Commission requires that the petitioner’s interest fall “within the ‘zone of interests’ protected or regulated by the governing statute” at issue. *Bennett v. Spear*, 520 U.S. 154 (1997); *Reyblatt v. NRC*, 105 F.3d 715, 721 (D.C. Cir. 1997); *Quivira Mining Co.*, CLI-98-11, 48 NRC at 6 (citing *Gulf States Utils. Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985)). In short, “the petitioner must establish that the injury he complains of (his aggrievement or the adverse effect upon him) falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.” *Quivira Mining Co.*, CLI-98-11, 48 NRC at 17. The Commission, in applying this test, has noted that its “principal concern is to ensure that parties participating in [NRC]

adjudicatory proceedings have interests that are cognizable” under the applicable statutes— typically the AEA and NEPA. *Id.*

The required elements of legal standing – (1) injury-in-fact; (2) causation; (3) redressability; and (4) within the zone of interests – are discussed further below.

a. Injury-in-Fact

To establish injury-in-fact, a petitioner must assert injuries that are “distinct and palpable, particular and concrete, as opposed to being conjectural or hypothetical.” *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 (1998) (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103 (1998)); *Warth v. Seldin*, 422 U.S. 490, 508-509 (1975); *see also Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 72 (citations omitted). Although the injury need not already have occurred, “when future harm is asserted, it must be “threatened,” “certainly impending,” and “real and immediate.” *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-01-15, 53 NRC 344, 349 (2001), *aff’d*, CLI-01-18, 54 NRC 27 (2001) (quoting *Cabot Performance Materials* (Reading, Pennsylvania), LBP-00-13, 51 NRC 284, 289 (2000); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 124 (1983) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 493 (1974)); *see also Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979). As such, a petitioner must allege that “he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances [in the future] in which he could be affected by the agency’s action.” *Int’l Uranium (USA) Corp.*, LBP-01-15, 53 NRC at 349 (quoting *SCRAP*, 412 U.S. at 688-89). “A claimed violation of law does not create a presumption of standing, without some showing that the violation could harm the petitioner.” *Int’l Uranium (USA) Corp.* (Source Material License Amendment License No. SUA-1358), CLI-01-18, 54 NRC at 30. Moreover, “unsupported general references to radiological consequences are insufficient to establish a basis for injury” for purposes of

standing. *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 130 (1992).

Accordingly, standing does not exist when the threat of alleged injury is abstract, hypothetical, or speculative. *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 72; *see also Int'l Uranium (USA) Corp.*, CLI-98-6, 47 NRC at 117. For example, the Commission has refused to admit petitioners who attempted to intervene in a licensing proceeding for the export of weapons-grade plutonium on the basis of concerns about accidents or terrorist attacks during transport of the materials. The Commission found that the petitioners had failed to provide anything “beyond mere speculations about an unsupported and undefined potential threat,” and that because “[p]etitioners’ claims of potential injury are so speculative . . . they do not amount to cognizable harm for purposes of standing.” *U.S. Dep’t of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 365-66 (2004). Licensing Boards similarly have rejected, as too speculative, standing claims based on alleged potential injuries resulting from contamination of food grown near nuclear power plants, *see Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1448-49 (1982), and a postulated terrorist attack on a nuclear facility concurrent with the petitioner’s presence in the vicinity of the facility. *See Tenn. Valley Auth.* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 27 (2002).

b. Causation

A petitioner must also establish that the injuries alleged are “fairly traceable to the proposed action.” *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 75. In this case, that proposed action is limited to the NRC authorization, pursuant to 10 C.F.R. Part 63, for DOE to construct a geologic repository for the disposal of SNF and HLW at a GROA at Yucca Mountain. Specifically, “the assertion of an injury without also establishing the causal link to the challenged

[agency action] is insufficient to establish [] standing to intervene.” *Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149, 155 (1998). If a petitioner cannot show that an alleged injury “flows directly from the challenged action,” it must show that the injury flows indirectly from the challenged action and that the “chain of causation is plausible.” *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 75; *see, e.g., Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), LBP-98-27, 48 NRC 271, 276-77 (1998) (holding that the petitioner had failed to establish a “plausible nexus” between the challenged decommissioning action and the asserted injury, given the permanent shutdown and defueling of the reactors and petitioner’s failure to affirmatively demonstrate how the licensing action “could plausibly lead to the offsite release of radioactivity”), *aff’d*, CLI-99-04, 49 NRC 185 (1999). The relevant inquiry is thus whether petitioner can demonstrate that one of its cognizable interests will be adversely affected by one of the possible outcomes of the proceeding. *Nuclear Eng’g Co., Inc.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

c. Redressability

A petitioner is further required to show that “its actual or threatened injuries can be cured by some action of the tribunal.” *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 14 (2001). Furthermore, “it must be ‘likely,’ as opposed to merely ‘speculative’ that the injury will be ‘redressed by a favorable decision.’” *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 76 (quoting *Lujan*, 504 U.S. at 561). If the NRC cannot take action that would redress the injury being claimed by a petitioner, the petitioner lacks an essential element of the requisite standing to request a hearing. *Westinghouse Elec. Corp.* (Nuclear Fuel Export License for Czech Republic-Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331-32 (1994). The Commission, like a court, will deny standing if it finds that it

cannot provide relief that will remedy the injury to the petitioner because, *inter alia*, the agency's action would not necessarily redress the alleged injury, or the necessary relief depends upon the actions of third parties that are not assured. *See, e.g., id.* at 332 (holding that where an alleged injury does not stem directly from the challenged governmental action, but instead involves predicting the actions of third parties not before the agency, the difficulty of showing redressability is particularly great).

d. Zone of Interests

Under federal and NRC case law, “to establish standing to intervene, a petitioner must not only demonstrate injury in fact, but also that the asserted injury is arguably within the zone of interests protected or regulated by the statute at issue.” *Quivira Mining Co.*, CLI-98-11, 48 NRC at 8. “Merely because one may be injured by a particular agency action . . . ‘does not necessarily mean one is within the zone of *interests to be protected by a given statute.*’” *Id.* at 11 (quoting *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 524 (1991)) (emphasis in original). The U.S. Supreme Court, which initially applied the zone of interest test in *Ass’n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 152-53 (1970), has described the purpose of the test as follows:

[T]he “zone of interest” test is a guide for deciding whether, in view of Congress’ evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Clarke v. Sec. Indus. Ass’n, 479 U.S. 388, 399-400 (1987). While a petitioner need not show a specific congressional intent to protect or otherwise benefit him or his class, there must be “some

indication” that the petitioner’s interest is arguably among those interests protected by the relevant statute. *Quivira Mining Co.*, CLI-98-11, 48 NRC at 10.

In NRC licensing actions, the AEA and NEPA typically are the “relevant statutes” that define the applicable “zone of interests.” The AEA – the Commission’s enabling statute – “concentrates on the licensing and regulation of nuclear materials for the purpose of protecting public health and safety and the common defense and security.” *Id.* at 14. Accordingly, the Commission has linked the notion of “injury” to a petitioner to the potential for radiological health and safety harm associated with the proposed action. *See, e.g., Cleveland Elec. Illuminating Co.*, CLI-93-21, 38 NRC at 95-96; *Va. Elec. and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-06 (1976).

The Commission has stated that “[t]he [AEA] expressly authorizes [it] to accord protection from radiological injury to both health and property interests.” *Gulf States Utils.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC at 48 (citing AEA §§ 103b, 161b, 42 U.S.C. §§ 2133(b), 2201(b)). The AEA, however, “does not encompass economic harm that is not directly related to environmental or radiological harm.” *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 336 (2002) (citations omitted). Consequently, the “bare mention[] of health and safety cannot be used to establish standing when the essence of [petitioner’s] concern is economics, not safety.” *Id.* at 337 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)).

In considering whether a NEPA-based contention is within the zone of interests cognizable in an NRC proceeding, it is important to recognize that NEPA is a procedural statute whose principal purpose is “to insure a fully informed and well-considered decision.” *Vt. Yankee*

Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978) (NRDC); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989). NEPA’s “twin aims” are: (1) to ensure that the agency takes a “hard look” at the environmental consequences of the proposed action, and (2) to make information on the environmental consequences available to the public. *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1285 (1st Cir. 1996), *cert. denied sub nom.*, *Loon Mountain Recreation Corp. v. Dubois*, 521 U.S. 1119 (1997). While “NEPA does protect some economic interests . . . it only protects against those injuries that result from environmental damage.” *Quivira Mining Co.*, CLI-98-11, 48 NRC at 10 (quoting *Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station)*, CLI-92-2, 35 NRC 47, 56 (1992)). A petitioner who suffers only economic injury unrelated to any environmental damage has no standing to bring a challenge under NEPA. *Id.* at 8.

2. Standing of Organizations

a. Standing of an Organization in its Own Right

An organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representative capacity (by demonstrating harm to the interests of its members). *Yankee Atomic Elec. Co.*, CLI-98-21, 48 NRC at 195 (citing *Ga. Inst. of Tech.*, CLI-95-12, 42 NRC at 115). To intervene in a proceeding in its own right, an organization must allege—just as an individual petitioner must allege—that it will suffer an immediate or threatened injury to its organizational interests that can be fairly traced to the proposed action and be redressed by a favorable decision. *See Ga. Inst. of Tech.*, CLI-95-12, 42 NRC at 115. The Commission considers an organization, like an individual, as a “person” (as that term is defined in 10 C.F.R. § 2.4, and as the Commission has used it in making standing determinations under 10 C.F.R. § 2.309). *See Consumers Energy Co.*, CLI-07-18, 65 NRC at 411.

Therefore, an organizational petitioner must show a “risk of ‘discrete institutional injury to itself, other than the general environmental and policy interests of the sort the [federal courts and NRC] repeatedly have found insufficient for organizational standing.’” *Id.* at 411-12 (quoting *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001)) (emphasis in original). In *Sierra Club v. Morton*, the U.S. Supreme Court held that a “special interest in the conservation and the sound maintenance of the national parks, game refuges, and forests of the country” was insufficient to provide organizational standing to a petitioner. 405 U.S. at 730. The Court stated that:

[A] mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved’ . . . [I]f a ‘special interest’ in this subject were enough to entitle [petitioner] to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide ‘special interest’ organization, however small or short-lived.

Id. at 739.

Similarly, an organization’s assertion “that it has an interest in state and federal environmental laws and in the land, water, air, wildlife, and other natural resources that would be affected” is insufficient to establish standing. *Int’l Uranium (USA) Corp.*, CLI-01-21, 54 NRC at 251-52 (finding that petitioners “showed no discrete institutional injury to itself, other than general environmental and policy interests of the sort [the Commission] repeatedly [has] found insufficient for organizational standing”). Equally insufficient for standing purposes is a petitioner’s:

- mere academic interest in a proceeding. *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), LBP-03-3, 57 NRC 45, 52 (2003); *see also Int’l Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), LBP-98-21, 48 NRC 137, 141 (1998);

- interest in presenting “sound science” to a licensing board. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 176 (1998), *aff’d*, CLI-98-13, 48 NRC 26 (1998);
- interest in disseminating information on nuclear non-proliferation. *See Transnuclear, Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1 (1994);
- interest in environmental and consumer protection. *See Consumers Energy Co.*, CLI-07-18, 65 NRC at 411-12 (finding that petitioner’s interest in promoting the “economic use of energy, including nuclear energy, and to promote the public interest, environmental protection, and consumer protection” was insufficient to provide standing);
- interest in promoting compliance with federal and state laws and regulations. *See Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-02-3, 55 NRC 35, 39 (2002) (citing *Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations*, CLI-77-24, 6 NRC 525, 531 (1997)); or
- interest in promoting the “development of sound energy policy.” *Edlow Int’l C.* (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976); *see also Sacramento Mun. Util. Dist.*, CLI-92-2, 35 NRC at 59 (finding that petitioner’s institutional interest in disseminating information “regarding the need for future energy sources in California” is insufficient for standing purposes).

b. Representational Standing

To invoke representational standing, an organization must: (1) show that at least one of its members has standing in his or her own right (*i.e.*, by demonstrating geographic proximity in cases where the presumption applies, or by demonstrating injury-in-fact within the zone of protected interests, causation, and redressability); (2) identify that member by name and address; and (3) show, “preferably by affidavit,” that the organization is authorized by that member to request a hearing on behalf of the member. *Consumers Energy Co.*, CLI-07-18, 65 NRC at 408-10; *see also N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *Gen. Pub. Utils. Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000). Where the affidavit of the

member is devoid of any statement that he or she wants and has authorized the organization to represent his or her interests, the presiding officer should not infer such authorization. *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984). Indeed, the Commission has held that “[t]he failure both to identify the member(s) [petitioners] purport to represent and to provide proof of authorization therefore precludes [petitioners] from qualifying as intervenors.” *Consumers Energy Co.*, CLI-07-18, 65 NRC at 410.

3. Discretionary Intervention

Pursuant to 10 C.F.R. § 2.309(e), a presiding officer may consider a request for discretionary intervention where a party lacks standing to intervene as of right under § 2.309(d)(1). Discretionary intervention may be granted only when at least one petitioner has established standing, and at least one contention has been admitted for hearing. 10 C.F.R. § 2.309(e); *see also PPL Susquehanna LLC*, (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 21 n.14 (2007). In addition to addressing the factors in 10 C.F.R. § 2.309(d)(1), a petitioner who seeks intervention as a matter of discretion (if standing as of right is not shown), must address in its initial petition the six factors set forth in 10 C.F.R. § 2.309(e), which the presiding officer will consider and balance.

The petitioner has the burden to establish that the factors in favor of intervention outweigh those against intervention. *See Nuclear Eng’g*, ALAB-473, 7 NRC at 744-45 (requiring discretionary intervenor to show “that it is both willing and able to make a valuable contribution to the full airing of the issues . . . in this proceeding”). Factors weighing in *favor* of allowing intervention include: (1) the extent to which its participation would assist in developing a sound record; (2) the nature of petitioner’s property, financial or other interests in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding. *See* 10 C.F.R. § 2.309(e)(1)(i)-(iii). Conversely, factors weighing *against* allowing

intervention include: (1) the availability of other means whereby the petitioner's interest will be protected; (2) the extent to which petitioner's interest will be represented by existing parties; and (3) the extent to which petitioner's participation will inappropriately broaden the issues or delay the proceeding. *See* 10 C.F.R. § 2.309(e)(2)(i)-(iii).

Of the six factors, primary consideration is given to the first factor—assistance in developing a sound record. *See Portland Gen. Elec. Co.*, CLI-76-27, 4 NRC at 616; *see also Gen. Pub. Utils. Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 160 (1996); Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2201 (Jan. 14, 2004) (The extent to which a petitioner's participation will inappropriately broaden the issues or delay the proceeding also is accorded greater weight).

In assessing a particular petitioner's ability to contribute to the development of a sound record, NRC tribunals have focused on the petitioner's showing of *significant ability to contribute on substantial issues of law or fact that will not otherwise be properly raised or presented*; the specificity of such ability to contribute on those substantial issues of law or fact; justification of time spent on considering the substantial issues of law or fact; the ability to provide additional testimony, particular expertise, or expert assistance; and specialized education or pertinent experience. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 33 (1981) (emphasis added) (citing cases); *see also Fla. Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 15-17 (1990), *aff'd*, ALAB-952, 33 NRC 521, 532 (1991).

Historically, NRC tribunals have granted discretionary intervention only sparingly. *See, e.g., Va. Elec. & Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-363, 4 NRC 631, 633 (1976) (finding the petitioner "well equipped to make a 'genuinely significant'

contribution” on the safety issue in question – integrity of steam generator and reactor coolant pump supports – because it had fabricated the supports for the facility in question and sought to present related design and construction information). This is a clear indication that petitioners pursuing this procedural path bear a substantial burden. As the Commission has noted, this *sui generis* proceeding—which is “time-limited by statute”—has the potential to be “one of the most expansive proceedings in agency history” and “unusually complex.” *U.S. Dep’t of Energy* (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), CLI-08-14, 67 NRC __ (slip op. at 5-6) (June 17, 2008). Numerous governmental entities (including the State of Nevada and numerous Affected Units of Local Government or AULGs) have sought to participate formally in this proceeding. Collectively, those entities have submitted thirteen petitions to intervene and over three hundred proposed contentions raising a broad spectrum of safety and environmental issues. Consequently, the likelihood that discretionary intervention will bring “significant” additional expertise and resources to bear on “substantial” issues of law or fact not otherwise adequately raised or presented is low. *Portland Gen. Elec. Co.*, CLI-76-27, 4 NRC at 616-17. Thus, given the unique and complex nature of this proceeding, and the “rigorous schedule” governing its completion, any grant of discretionary intervention must rest on a very compelling showing. *Cf. Wilderness Soc’y v. Morton*, 479 F.2d 1261, 1263 (D.C. Cir. 1972) (Tamm, J., concurring) (citing need to be wary of permissive intervention, “lest the manageable lawsuit become an unmanageable cowlick”).

4. Standing of Affected Indian Tribes to Participate as Parties to the Proceeding under 10 C.F.R. § 2.309

As a general matter, a Federally-recognized Indian Tribe that wishes to be a party in this licensing proceeding must affirmatively demonstrate standing. The presumption of standing

codified at 10 C.F.R. § 2.309(d)(2)(iii) is limited to “any affected Federally-recognized Indian Tribe” as defined in Parts 60 and 63. Part 63 defines an “Affected Indian Tribe” as follows:

[A]ny Indian Tribe within whose reservation boundaries a repository for high-level radioactive waste or spent fuel is proposed to be located; or whose Federally-defined possessory or usage rights to other lands outside of the reservation’s boundaries arising outside of Congressionally-ratified treaties or other Federal law may be substantially and adversely affected by the location of the facility if the Secretary of the Interior finds, on the petition of the appropriate government officials of the Tribe, that the effects are both substantial and adverse to the Tribe.

10 C.F.R. § 63.2. Section 2.309(d)(2)(iii) explicitly states: “All other petitions for intervention in [this] proceeding must be reviewed under the provisions of paragraphs (a) through (f) of this section [i.e., the general standing provisions discussed above].” 10 C.F.R. § 2.309(d)(2)(iii).

NCAC is not, and does not claim to be, a Tribe. Even if it were, NCAC has made no showing that it is a Federally-recognized AIT under the NWPA that is entitled to standing as a matter of right pursuant to § 2.309(d)(2)(iii). NCAC is thus obligated to make a full demonstration of legal standing to be admitted as a party in this proceeding.

B. DOE’s Answer Regarding Petitioner’s Legal Standing

As explained in this section, NCAC has failed to demonstrate legal standing to intervene in this proceeding in that it has failed to: (1) demonstrate it is entitled to organizational standing; (2) make the showing required for representational standing; or (3) request and meet the standard for discretionary intervention.

1. NCAC Has Failed to Demonstrate That It Is Entitled to Organizational Standing

NCAC describes itself as a “non-profit corporation composed of a Board of Directors from Native American communities down-wind from the Nevada Test Site.” NCAC Pet. at 3. While it refers to unspecified “members” in its Petition (Petition at 3), and states that it has a

“longstanding interest in protecting... the Newe and Nuwuvi⁸ from radiation health effects” (Petition at 5), it never identifies its members, nor does it describe who exactly it purports to be representing, other than itself, in this proceeding. NCAC makes a passing reference to 10 C.F.R. § 2.309(d)(2)(iii) (the provision governing standing of “any affected Federally-recognized Indian Tribe”) (Petition at 4), but NCAC does not claim that it is an Affected Indian Tribe (AIT) under the NWPA. NCAC is not even a Federally-recognized Indian Tribe and therefore cannot be an AIT. Nor does NCAC claim that it is the authorized governing representative of the Timbisha Shoshone Tribe, the one AIT. Indeed, two other entities have filed petitions claiming to represent that AIT.

Further, NCAC has not alleged that it will suffer an immediate or threatened injury to its organizational interests that is traceable to the proposed licensing action that can be redressed by a favorable decision. Its general assertions of “numerous concrete and specific injuries in fact” (Petition at 5) are vague and unsupported, and do not meet the fundamental requirement that allegations of injury be “distinct and palpable, particular and concrete,” not “conjectural or hypothetical.” *Int’l Uranium (USA) Corp.*, CLI-98-6, 47 NRC at 117. NCAC’s vague allegations of injury include unsupported claims that:

- Unspecified Native American communities will “experience adverse health consequences.” Petition at 3;
- Unspecified NCAC members “will individually and collectively sustain substantial permanent injury to their health and property interests.” Petition at 4;
- “radiation health effects [will] injure them individually and collectively.” Petition at 5;
- communities will experience “radioactive contamination of the land.” Petition at 5;

⁸ The Petition states that “Newe” is the language of the Western Shoshone and translates as “the people,” and “Nuwuvi” is the language of the Southern Paiute and also means “the people.” Petition at 4, n.1 and 5, n.2.

- “[u]se of water by the DOE denies . . . property interests and places an unreasonable burden . . . to access water resources or otherwise impairs [community] water rights.” Petition at 11; and
- communities will experience a “significant increase in exposure risk.” Petition at 13.

These broad and unparticularized allegations of harm fail to identify or explain the injuries NCAC itself will allegedly experience from the Yucca Mountain repository. They are precisely the type of “unsupported general references to radiological consequences [that] are insufficient to establish a basis for injury” for standing purposes. *Sacramento Mun. Util. Dist.*, LBP-92-23, 36 NRC at 130.

Furthermore, NCAC may not base standing merely on its alleged “interest” in Yucca Mountain or radiological issues. It claims a “longstanding interest in protecting the high quality of life, health and safety of this and future generations of Newe and Nuwuvi” Petition at 4. However, an organization’s “mere ‘interest in a problem,’ *no matter how longstanding* the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient” to render the organization adversely affected by the proceeding. *Sierra Club v. Morton*, 405 U.S. at 739 (emphasis added). NCAC’s claim that it is an “independent research organization” (Petition at 13), in addition to being unsupported, fails to demonstrate the necessary “discrete institutional injury to itself, other than general environmental and policy interests of the sorts the [federal courts and NRC] repeatedly have found insufficient for organizational standing.” *Consumers Energy Co.*, CLI-07-18, 65 NRC at 411-12.

2. NCAC Has Failed to Demonstrate That It Is Entitled to Representational Standing

NCAC has also failed to establish standing on behalf of any purported members of its organization, because it has not made any of the required showings for representational standing. *Consumers Energy Co.*, CLI-07-18, 65 NRC at 408-10 (setting forth requirements of

representational standing). In the section where it provides its name and address, NCAC identifies a Board Member of the organization. Petition at 3. It does not, however, allege, much less demonstrate, that the Board Member, or any one of its other members, has standing in their own right. NCAC also fails to show, by affidavit or otherwise, that it is authorized by any of its members to intervene on their behalf. These failures preclude NCAC from intervening in this proceeding on the basis of representing any of its purported members. *See Nuclear Management Co. (Monticello Nuclear Generating Plant)*, LBP-05-31, 62 NRC 735, 745 (2005) (finding that organization that just provided return address for the organization and the name of the executive director did not meet the requirements for representational or any other type of standing).

3. NCAC Has Failed to Request and Failed to Show That It Should Be Granted Discretionary Intervention

NCAC does not explicitly request discretionary intervention, and its Petition fails to address, as required by 10 C.F.R. § 2.309(e), all six factors required for a grant of discretionary intervention. As discussed, discretionary intervention has been granted by NRC tribunals sparingly. *See, e.g., Va. Elec. & Power Co. (North Anna Power Station, Units 1 and 2)*, ALAB-363, 4 NRC 631, 633 (1976) (finding the petitioner “well equipped to make a ‘genuinely significant’ contribution” on the safety issue in question – integrity of steam generator and reactor coolant pump supports – because it had fabricated the supports for the facility in question and sought to present related design and construction information); *see also Andrew Siemaszko*, CLI-06-06, 63 NRC 708, 716-717 (2006) (Commission notes that discretionary intervention is an extraordinary procedure and only eight petitions have ever been granted, without reversal, during the thirty years the six factor test has been applied); Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2201 (Jan. 14, 2004) (“discretionary intervention is an extraordinary

procedure, and will not be allowed unless there are compelling factors in favor of such intervention.”).

There is no such compelling basis where the petitioner, as here, does not request that relief and its petition fails to address the required factors. With respect to those factors:

First, NCAC has failed to show how its participation in this proceeding will assist in the development of a sound record. Petition at 4. It does not allege, and there is no evidence in the Petition, that it has particular expertise, specialized education, or pertinent experience that will enable it to contribute to the development of the record. Indeed, NCAC’s failure to make documentary material available on the LSN indicates that it lacks any information of value to this proceeding.

Second, the nature of NCAC’s property, financial or other interests in the proceeding is unclear, and thus NCAC has not demonstrated that this factor should favor allowing intervention.

Third, by failing to allege any specific and concrete injury that it will experience or causally linking such injury to the licensing action, NCAC has failed to demonstrate the effect of any decision or order that may be issued in this proceeding on its interests.

Fourth, although it refers briefly and without explanation to its “unique beliefs, values and customs” (Petition at 4), NCAC fails to explain why the official representative for the AIT recognized by the U.S. Department of the Interior (DOI) cannot adequately represent its interests.

Fifth, as explained above, the official representative of the AIT recognized by DOI can be expected to adequately represent NCAC’s purported interests.

Sixth, NCAC’s participation is likely to inappropriately broaden the issues or delay the proceeding. As discussed below, NCAC’s three proffered contentions are vague and

unsubstantiated. Furthermore, NCAC has already demonstrated its unwillingness or inability to comply with NRC requirements governing this proceeding, including but not limited to, failure to comply with LSN requirements and PAPO Board orders during the lengthy pre-license application phase and its failure to comply with the Case Management Orders of June 20, 2008 and September 29, 2008.²

In short, because NCAC has not demonstrated either organizational or representational standing, and because it has not satisfied the criteria for discretionary intervention, its Petition must be denied.

IV. ADMISSIBILITY OF CONTENTIONS

A. Applicable Legal Standards and Relevant NRC Precedent

1. Petitioner Must Submit at Least One Admissible Contention to be Admitted as a Party

To be admitted as a party in the Yucca Mountain licensing proceeding, a petitioner must proffer at least one admissible contention. *See* 10 C.F.R. §§ 2.309(a), 2.309 (d)(2)(iii). The NRC will deny a petition to intervene from a petitioner who has complied with the LSN requirements and has demonstrated standing to intervene, but who has not proffered at least one admissible contention. *See generally, Fla. Power & Light Co.*, CLI-01-17, 54 NRC at 5. As the Commission has observed, “[i]t is the responsibility of the Petitioner to provide the necessary

² NCAC has, in each of its contentions, failed to comply with the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) and the requirements of the June 20, 2008 and September 29, 2008 Case Management Orders. The June 20, 2008 and September 29, 2008 Case Management Orders establish format requirements for proffered contentions, with which failure to comply could provide a basis for rejection of proffered contentions in the event a party significantly and in bad faith ignores these requirements.

Contrary to these Orders, NCAC has not separately addressed each of the six requirements of 10 C.F.R. § 2.309 (f)(1)(i)-(vi). Specifically, for each of its three proffered contentions, NCAC fails to discuss the criterion of § 2.309(f)(1)(iii), which requires it to explain whether the issue is within the scope of the proceeding. Additionally, it has not labeled its contentions with the three-letter designation, descriptor, and number, choosing instead to use its own designations. It also ignored the requirement that each contention provide a short and descriptive title unique to each contention.

With respect to the September 29, 2008 Case Management Order, NCAC has failed to comply with the requirement that each contention begin on a new page.

information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of this proceeding.” *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998). “A contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions.” *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998). Finally, “government entities seeking to litigate their own contentions are held to the same pleading rules as everyone else.” *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 568 (2005).

2. Petitioner in this Proceeding Has a Heightened Obligation to Proffer Well Pled and Adequately Supported Contentions Given the Availability of the LSN

As the Commission has noted, this proceeding involves a number of “unique facts and circumstances” – one of those being the development of the LSN as a substitute for traditional document discovery. In developing this system, the NRC sought both to streamline the discovery process *and* to facilitate submittal of well-pled contentions:

Another efficiency the [LSN] provides is reducing the effort consumed in carrying out document discovery and allowing more effort to be spent in case preparation. Because access to these documents is provided *before* the application is docketed, each party can focus on formulating meaningful contentions before the licensing hearing begins. *There should be no excuse for poorly crafted contentions, and the licensing board can reduce hearing delays by readily rejecting or otherwise disposing of unfocused or unsupported contentions.* Likewise, the [LSN] rule places tighter restrictions on amending or adding contentions late in the hearing processes because the [LSN] affords the parties an opportunity to raise and resolve issues earlier than what traditionally has been possible.

SECY-95-153, Memorandum from James M. Taylor, Executive Director of Operations, to the Commissioners, “Licensing Support System Senior Management Team Recommendations on

Direction of the Licensing Support System,” June 14, 1995, *available at* LEGACY ADAMS Accession No. 9506280652 (emphasis added).

In issuing the final LSN rule nearly a decade later, the Commission noted that “the history of the LSN and its predecessor . . . makes it apparent it was the Commission’s expectation that the LSN, among other things, would provide potential participants with the opportunity to frame focused and meaningful contentions” and avoid potential discovery-related delays. Final Rule, LSN, Submissions to the Electronic Docket, 69 Fed. Reg. at 32,843. The Commission added that “[t]hese objectives are still operational.” *Id.* In fact, in a recent adjudicatory order related to this proceeding, the Commission reaffirmed these objectives:

The use of the LSN was intended, among other things, to “enabl[e] the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding.”

U.S. Dep’t of Energy (High-Level Waste Repository: Pre-Application Matters), CLI-08-12, 67 NRC __ (slip op. at 8) (June 17, 2008).

And in fact, DOE’s production of documentary material on the LSN fulfilled those objectives. DOE first made documentary material available on the LSN in 2004, when it publicly released approximately 1.3 million documents. Transcript of Record at 540, *U.S. Dep’t of Energy* (High-Level Waste Repository: Pre-Application Matters), ASLBP No. 04-8239-01-PAPO (July 12, 2005). DOE made another 2.1 million documents publicly available on the LSN in April, 2007—more than a year before it submitted the LA. Policy Issue Information Memorandum, SECY-07-0130, August 7, 2007, *available at* ADAMS No. ML071930440 at 5. DOE regularly added documents to the LSN each month thereafter, and in October, 2007, DOE certified that all its extant documentary material was available on the LSN. The Department of

Energy submitted its Certification of Compliance on October 19, 2007. DOE has since then updated its LSN production each month with new documentary material that it has generated, received, or identified. *See e.g.*, The Department of Energy’s Certification of Licensing Support Network Supplementation (November 1, 2007); *see also* Revised Second Case Management Order, ASLBP No. 04-829-01-PAPO (July 6, 2007) at 21 (requiring monthly supplemental production on LSN of documentary material created or discovered after party’s initial LSN certification).

Altogether, DOE has made more than 3.5 million documents available on the LSN. *U.S. Dep’t of Energy* (High-Level Waste Repository: Pre-Application Matters), LBP-08-01, 67 NRC ___ (slip op. at 11) (January 4, 2008) (stating that “it is not disputed that DOE has made available a massive amount of documentary material—3.5 million documents, amounting to over 30 million pages, including redacted versions of some privileged documents and privilege logs for hundreds of others.”). That production includes documents that DOE cites and relies upon in the LA. It includes extensive underlying calculations, data, and other material on which those documents are based. Further, as required by regulation, it also includes documents with information that does not support the information DOE intends to cite or rely upon in the licensing proceeding. 10 C.F.R. § 2.1001 (definition of “documentary material”).

DOE’s extensive production substantially heightens the Petitioner’s ability—and its *corresponding obligation*—to proffer focused and adequately supported contentions in this proceeding. As the Commission observed in rejecting a challenge to DOE’s initial LSN certification, “potential parties had access to millions of DOE documents upon which to begin formulating meaningful contentions” during the period following that certification, as contemplated by the Commission’s regulations. *U.S. Dep’t of Energy*, CLI-08-12, 67 NRC ___

(slip op. at 9). Indeed, because of DOE's early production of documentary material on the LSN starting 4 years before LA submittal, every potential party has had an even greater opportunity than the regulations contemplate to use those materials to develop contentions.

3. Proffered Contentions Must Meet All of the Contention Admissibility Requirements of 10 C.F.R. § 2.309(f)(1) as Well as the Requirements of the Applicable June 20, 2008 and September 29, 2008 Case Management Orders

Section 2.309(f)(1) requires a petitioner to “set forth with particularity the contentions sought to be raised,” and to satisfy the following six criteria: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the licensing action that is the subject of the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi). *A failure to comply with any one of the six admissibility criteria is grounds for rejecting a proffered contention. See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2221 (emphasis added); *see also* *Private Fuel Storage*, CLI-99-10, 49 NRC at 325.

The purpose of these six criteria is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.” Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2202. The current contention admissibility standards are “strict by design,” *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *recons. denied*, CLI-02-1, 55 NRC 1 (2002), and were intended to “raise the threshold for the admission of contentions.” Rules of Practice for Domestic Licensing

Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168 (Aug. 11, 1989); *see also Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). As explained above, the availability of the LSN further raises this threshold for the admission of a contention in this proceeding. In revising its Part 2 rules in 2004, the Commission reiterated that the standards are “necessary to ensure that hearings cover only genuine and pertinent issues of concern and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues.” Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2189-90 (stating that the NRC “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing”); *id.* at 2202.

Strict application of these contention admissibility criteria in this proceeding is critically important. The vast number of contentions submitted and the “rigorous schedule” imposed by the NWSA and Appendix D to Part 2 present unprecedented challenges to the conduct of a timely, effective, and focused adjudication. Recognizing these challenges, the Advisory PAPO Board, with the Commission’s express approval, issued its Case Management Order “to help both potential parties and licensing boards address the admissibility of contentions in any HLW proceeding effectively and efficiently.” *U.S. Dep’t of Energy* (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), LBP-08-10, 67 NRC __ (slip op. at 3) (June 20, 2008) (Case Management Order).¹⁰ That Order imposes numerous format requirements for proffered contentions. Failure to adhere to these format requirements may provide an additional basis for rejection of proffered contentions should a potential party significantly and in bad faith ignore these requirements. *Id.* at 3, 5-9.

¹⁰ A second case management order was issued. *See U.S. Dep’t of Energy* (Regarding Contention Formatting and Tables of Contents), LBP-08-10, 67 NRC __ (September 29, 2008).

The six contention admissibility criteria set forth in § 2.309(f)(1), and the related pleading requirements contained in the Case Management Order, are discussed further below.

a. Petitioner Must Specifically State the Issue of Law or Fact to Be Raised

Section 2.309(f)(1)(i), the first admissibility criterion, requires that a petitioner “provide a specific statement of the issue of law or fact to be raised or controverted,” by “articulat[ing] at the outset the specific issues [it] wish[es] to litigate as a prerequisite to gaining formal admission as [a party].” *Duke Energy Corp.*, CLI-99-11, 49 NRC at 338. To be admissible, a contention “must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application].” *Dominion Nuclear Conn., Inc.*, CLI-01-24, 54 NRC at 359-60. Section 2.309(f)(1)(i) “bar[s] contentions where petitioners have only ‘what amounts to generalized suspicions, hoping to substantiate them later.’” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 424 (2003) (quoting *Duke Energy Corp.*, CLI-99-11, 49 NRC at 337-39). Elaborating further on this requirement, the June 20, 2008, Case Management Order for this proceeding requires “narrow, *single-issue* contentions” that are “sufficiently specific as to define the relevant issues for eventual rulings on the merits, and not require” extensive narrowing or clarification by the parties or boards. *U.S. Dep’t of Energy*, LBP-08-10, 67 NRC __ (slip op. at 6) (emphasis added).

b. Petitioner Must Briefly Explain the Basis for the Contention

Section 2.309(f)(1)(ii) requires that a petitioner provide “a brief explanation of the basis for the contention.” *See also* Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170. This includes “sufficient foundation” to “warrant further exploration.” *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 428 (1990) (footnote omitted). A petitioner’s explanation serves to define the

scope of a contention, as “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.” *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *petitions denied in part, granted in part, Mass. v. U.S. Nuclear Regulatory Comm’n*, 924 F.2d 311 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991). The Board, however, must determine the admissibility of the contention itself, not the admissibility of individual “bases.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 n.45 (2002).

c. Petitioner Must Demonstrate that the Issue Raised in the Contention is Within the Scope of the Proceeding

Section 2.309(f)(1)(iii) requires that a petitioner demonstrate “that the issue raised in the contention is within the scope of the proceeding.” The scope of the proceeding is defined by the Commission’s Notice of Hearing and the NRC regulations governing review and approval of the Application. *See, e.g., Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). Contentions are necessarily limited to issues that are germane to the specific application pending before the Board. *Yankee Atomic Elec. Co.*, CLI-98-21, 48 NRC at 204 n.7. Any contention that falls outside the specified scope of this proceeding – as discussed further below – must be rejected. *See, e.g., Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 639 (2004).

A contention that challenges an NRC rule is outside the scope of this proceeding because, absent a waiver, “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding....” 10 C.F.R. § 2.335(a). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. *See Fla. Power & Light Co.*, LBP-01-6, 53 NRC at 159, *aff’d on other grounds*, CLI-01-17, 54 NRC 3. For instance, any direct or

indirect challenge to the current EPA standard or NRC implementing rule is a collateral attack and is outside the scope of the proceeding.

In addition, any contention that collaterally attacks applicable statutory requirements or the basic structure of the NRC regulatory process must also be rejected by the Board as outside the scope of the proceeding. *Carolina Power & Light* (Shearon Harris Nuclear Power Plant Units 1), LBP-07-11, 65 NRC 41, 57-58 (citing *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974)). Accordingly, a contention that simply states the petitioner's views about what the regulatory policy should be does not present a litigable issue. See *Philadelphia Elec. Co.*, ALAB-216, 8 AEC at 20-21, 21 n.33. Similarly, challenges to the adequacy of the NRC Staff's safety review process, including the contents of its SER, are outside the scope of this proceeding. "The NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications." *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC __ (slip op. at 13-14) (Nov. 6, 2008).

Furthermore, asserting that generalized "uncertainties" exist in postclosure models or data, without showing in any way, how or why those uncertainties call into question the conclusions reached by DOE, or findings the NRC must make in its review of the LA, is not a sufficient basis for an admissible contention. To merely assert the existence of such uncertainties, without specifying their impact on a finding NRC must make in its issuance of the construction authorization, amounts to an improper challenge to Part 63, which explicitly recognizes that such uncertainties exist and cannot be eliminated. The Commission, in the Statements of Consideration accompanying Part 63, expressly rejected requests made by several commenters to define an acceptable level of uncertainty in Part 63, finding it "neither practical

nor appropriate.” Final Rule, Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, NV, 66 Fed. Reg. 55,732, 55,747-48 (Nov. 2, 2001). The Commission “decided to adopt EPA's preferred criterion of ‘reasonable expectation’ for purposes of judging compliance with the postclosure performance objectives [since] ... a standard of ‘reasonable expectation’ allows it the necessary flexibility to account for the inherently greater uncertainties in making long-term projections of a repository's performance.” *Id.* at 55,740.

The following examples from 10 C.F.R. § 63.101 are illustrative of the reasonable expectation standard:

- “Proof that the geologic repository will conform with the objectives for postclosure performance is not to be had in the ordinary sense of the word because of the uncertainties inherent in the understanding of the evolution”
- “[W]hat is required is reasonable expectation, making allowance for the ...uncertainties involved, that the outcome will conform with the objectives for postclosure....”
- “[D]emonstration of compliance must take uncertainties and gaps in knowledge into account so that the Commission can make the specified finding....”

10 C.F.R. § 63.304 describes the characteristics of reasonable expectation by stating that reasonable expectation:

- Requires less than absolute proof because absolute proof is impossible to attain for disposal due to the uncertainty of projecting long-term performance;
- Accounts for the inherently greater uncertainties in making long-term projections of the performance of the Yucca Mountain disposal system;
- Does not exclude important parameters from assessments and analyses simply because they are difficult to precisely quantify to a high degree of confidence; and
- Focuses performance assessments and analyses on the full range of defensible and reasonable parameter distributions rather than only upon extreme physical situations and parameter values.

In addition, 10 C.F.R. § 63.305(c) makes clear that, in the context of reasonable expectation, conservative means the use of cautious but reasonable assumptions consistent with present knowledge.

Given the obligation of the Commission under section 801(b) of the Energy Policy Act of 1992 (EPACT) to modify its technical requirements and criteria under section 121(b) of the NWPA to be consistent with the radiological protection standards promulgated by the Environmental Protection Agency (EPA) under section 801(a) of EPACT, the proper application of the reasonable expectation standard must take into account the statements by EPA in promulgating the standards required by EPACT.¹¹ These statements make clear that, while reasonable assurance and reasonable expectation are similar concepts, the evaluation of the Yucca Mountain repository requires a different level and type of technical proof than required for reactors and other situations licensed by NRC in the past.¹² Reasonable expectation recognizes that, in the context of the Yucca Mountain repository, “unequivocal numerical proof of compliance is neither necessary nor likely to be obtained,”¹³ and while some “sources of uncertainty can be addressed, or at least accounted for while in other [data or model] areas our knowledge may be too limited to even characterize the uncertainty, much less explicitly account

¹¹ See Final Rule, Public Health and Environmental Radiation Protection Standards for Yucca Mountain, NV, 66 Fed. Reg. 32,074, 32,101-03 (June 13, 2001) (section III.B.2.c titled “What Level of Expectation Will Meet Our Standards?”); see also Proposed Rule, Public Health and Environmental Radiation Protection Standards for Yucca Mountain, NV, 70 Fed. Reg. 49,014, 49,020-21 (August 22, 2005) (section I.A.1.c titled “What is “Reasonable Expectation?”); Final Rule, Public Health and Environmental Radiation Protection Standards for Yucca Mountain, NV, 73 Fed. Reg. 61,256, 61,271-73 (October 15, 2008) (section III.A.4 titled “How Did We Consider Uncertainty and Reasonable Expectation?”).

¹² See Final Rule, Public Health and Environmental Radiation Protection Standards for Yucca Mountain, NV, 66 Fed. Reg. at 32,101.

¹³ Proposed Rule, Public Health and Environmental Radiation Protection Standards for Yucca Mountain, NV, 70 Fed. Reg. at 49,021.

for it.”¹⁴ Identifying postclosure uncertainties, without specifying their impact on whether the reasonable expectation standard is met, does not provide an adequate basis to admit a contention.

Therefore, in formulating its contentions, the initial burden is on the petitioner to explain the implications of alleged uncertainties and show why, if true, they exceed the range of acceptable (and unavoidable) uncertainties clearly reflected in the regulations, particularly the reasonable expectation standard set forth in 10 C.F.R. § 63.101. Any contention attempting to shift that burden to the applicant is an improper challenge to 10 C.F.R. § 2.309. *See Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Power Station)*, LBP-06-23, 64 NRC 257, 358-59 (2006). DOE’s responses to specific contentions identify where these pleading requirements have been violated.

d. Petitioner Must Demonstrate That Each Contention Raises a Material Issue

Section 2.309(f)(1)(iv) requires that a petitioner “[d]emonstrate 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.” Emphasis added. As the Commission has observed, “[t]he dispute at issue is ‘material’ if its resolution would ‘make a difference in the outcome of the licensing proceeding.’” *Duke Energy Corp.*, CLI-99-11, 49 NRC at 333-34; *see also* Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,172. Thus, each contention must be one that, if proven, would entitle the petitioner to relief. *Yankee Atomic Elec. Co. (Yankee Power Station)*, CLI-96-7, 43 NRC 235, 244 (1996). The Case Management Order states that this criterion “requires citation to a statute or regulation that,

¹⁴ Final Rule, Public Health and Environmental Radiation Protection Standards for Yucca Mountain, NV, 73 Fed. Reg. at 61,271 n.22.

explicitly or implicitly, has not been satisfied by reason of the issue raised in the contention.”

U.S. Dep’t of Energy, LBP-08-10, 67 NRC __ (slip op. at 7).

The “findings the NRC must make to support” the issuance of a construction authorization for a geologic repository are set forth in 10 C.F.R. § 63.31. To authorize construction of the repository, the NRC must determine that:

- there is reasonable assurance that the types and amounts of radioactive materials described in the application can be received and possessed in a geologic repository operations area of the design proposed without unreasonable risk to the health and safety of the public;
- there is reasonable expectation that the materials can be disposed of without unreasonable risk to the health and safety of the public; and
- there is reasonable assurance that the activities proposed in the application will not be inimical to the common defense and security.

In short, the NRC must determine the validity of DOE’s conclusions concerning the ability of the repository design to limit exposure to radioactivity, both during the construction and operation phase of the repository (*i.e.*, preclosure phase) and during the phase after the repository has been filled, closed, and sealed (*i.e.*, postclosure phase).

In making these determinations, the NRC must evaluate DOE’s compliance with the applicable provisions of Part 63, including, among other things, whether DOE has described the proposed geologic repository as specified in § 63.21, and whether the site and design comply with the Part 63 performance objectives and requirements. Proposed safety contentions that fail to raise issues that are material to these findings are inadmissible. For example, Part 63 permits DOE to use probabilistic analyses to calculate potential postclosure radiation doses, 10 C.F.R. § 63.102(j), and to report those doses as *mean* doses. *See* 10 C.F.R. § 63.303. Therefore, contentions that either independently or cumulatively, fail to demonstrate an increase in the mean dose *above regulatory limits* are immaterial and inadmissible because they would not “make a

difference in the outcome of the licensing proceeding.” *Duke Energy Corp.*, CLI-99-11, 49 NRC at 333-34.

e. Petitioner Must Demonstrate that Each Contention is Supported by Adequate Factual Information and/or Expert Opinion

Section 2.309(f)(1)(v) requires a petitioner to present the factual information or expert opinions necessary to support its contention adequately, and failure to do so requires the Board to reject the contention. *See also Yankee Atomic Elec. Co.*, CLI-96-7, 43 NRC at 262 (in referencing 10 C.F.R. § 2.714, the predecessor to 10 C.F.R. § 2.309, the Commission stated that petitioners must present “claims rooted in fact, documents, or expert opinions”). A petitioner is “obligated to put forward and support contentions when seeking intervention, based on the application and information available” by examining the application and publicly available information. *Consumers Energy Co.*, CLI-07-18, 65 NRC at 414 n.46.

As explained above, the LSN heightens a petitioner’s already “ironclad” obligation to furnish adequate support because “early access to . . . documents in an electronically searchable form [has] allow[ed] for a thorough and comprehensive technical review of the license application by all parties and potential parties to the HLW licensing proceeding.” Final Rule, LSN, Submissions to the Electronic Docket, 69 Fed. Reg. at 32,837. Thus, where a petitioner neglects to provide the requisite support for its contentions, the Board may not—and in this case absolutely should not—make assumptions of fact that favor the petitioner or supply information that is lacking. *See Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

Vague references to documents are not permissible. A petitioner must identify specific portions of the documents on which it relies. *See Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-89-03, 29 NRC 234, 240-41 (1989). Moreover, the mere incorporation of

massive documents by reference is unacceptable. *See Tenn. Valley Auth.* (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209, 216 (1976). Consistent with these requirements, the Case Management Order directs petitioners to ensure that documentary references “be as specific as reasonably possible.” *U.S. Dep’t of Energy*, LBP-08-10, 67 NRC __ (slip op. at 7). Additionally, it requires that supporting documents (with the exception of readily available legal authorities, copyright-restricted material, and LSN documentary material), be electronically attached to the petition. In citing LSN documents, petitioners must include the LSN accession number as well as the title, date, and relevant pages of the document.

A petitioner also must explain the significance of any factual information upon which it relies. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003). With respect to factual information or expert opinion proffered in support of a contention, “the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention.” *Private Fuel Storage*, LBP-98-7, 47 NRC at 181, *aff’d on other grounds*, CLI-98-13, 48 NRC 26. Any supporting material provided by a petitioner, including those portions thereof not relied upon, is subject to Board scrutiny, “both for what it does and does not show.” *See Yankee Atomic Elec. Co.*, LBP-96-2, 43 NRC 61, 90 (1996), *rev’d in part on other grounds and remanded*, CLI-96-7, 43 NRC 235 (1996). The Board should examine documents to confirm that they support the proposed contention(s). *See Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-04, 31 NRC 333 (1990). A petitioner’s imprecise reading of a document cannot be the basis for a litigable contention. *See Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 300 (1995).

Furthermore, “an expert opinion that merely states a conclusion (*e.g.*, the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing *a reasoned basis or explanation* for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion” alleged to provide a basis for the contention. *See USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (emphasis added) (quoting *Private Fuel Storage*, LBP-98-7, 47 NRC at 181). Conclusory statements cannot provide “sufficient” support for a contention, simply because they are proffered by an alleged expert. *See USEC*, CLI-06-10, 63 NRC at 472. In summary, a contention “will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits’, but instead only ‘bare assertions and speculation.’” *Fansteel, Inc.*, CLI-03-13, 58 NRC at 203 (quoting *Gen. Pub. Utils. Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 208 (2000)).

f. Petitioner Must Demonstrate that the Contention Raises a Genuine Dispute With Respect to a Material Issue of Law or Fact

With regard to the final requirement, that a petitioner “provide sufficient information to show . . . a genuine dispute . . . with the applicant . . . on a material issue of law or fact, 10 C.F.R. § 2.309(f)(1)(vi), the Commission has stated that the petitioner must “read the pertinent portions of the license application, . . . state the applicant’s position and the petitioner’s opposing view,” and explain why it disagrees with the applicant. Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *Dominion Nuclear Conn., Inc.*, CLI-01-24, 54 NRC at 358.

In claiming that the Application fails to address adequately a material issue, a petitioner must “explain why the application is deficient.” Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *Ariz. Pub.*

Serv. Co., CLI-91-12, 34 NRC at 156. An allegation that some aspect of a license application is “inadequate” or unacceptable does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect. See *Fla. Power & Light Co.* (Turkey Point Plant, Unit Nos. 3 and 4), LBP-90-16, 31 NRC 509, 521, 521 n.12 (1990). Put another way, a contention that does not *directly controvert a position taken by the applicant in the application* is subject to dismissal. See *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992) (emphasis added). For example, if a petitioner submits a contention of omission, but the allegedly missing information is, in fact, contained in the license application, then the contention does not raise a genuine dispute.

4. Environmental Contentions Addressing DOE’s Final Environmental Impact Statement and its Supplements Must Also Meet the Requirements of 10 C.F.R. § 51.109 and 10 C.F.R. § 2.326

In its Hearing Notice, the Commission reaffirmed that proposed environmental contentions are subject to substantially heightened admissibility standards.¹⁵ In addition to the NRC’s contention admissibility requirements in 10 C.F.R. § 2.309(f), environmental contentions must also meet the requirements of 10 C.F.R. § 51.109 and the requirements of 10 C.F.R.

¹⁵ In February of 2002, DOE issued the *Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada* (DOE/EIS-0250F, February 2002) (2002 FEIS). On April 8, 2004, DOE announced in a Record of Decision (2004 ROD) the selection of the mostly rail alternative analyzed in the 2002 FEIS for transporting spent nuclear fuel and high-level radioactive waste nationally and within Nevada. 69 Fed. Reg. 18,557. DOE also announced in the 2004 ROD that it had selected the Caliente rail corridor in which to examine possible alignments for construction of a rail line in Nevada. In July 2008, DOE issued the *Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada* (DOE/EIS-0250F-S1) (Repository SEIS), the *Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada – Nevada Rail Transportation Corridor* (DOE/EIS-0250F-S2) (Nevada Rail Corridor SEIS), and the *Final Environmental Impact Statement for a Rail Alignment for the Construction and Operation of a Railroad in Nevada to a Geologic Repository at Yucca Mountain, Nye County, Nevada* (DOE/EIS-0369) (Rail Alignment EIS). On October 10, 2008, DOE issued a Record of Decision (2008 ROD) announcing its decision to construct and operate a railroad along a rail alignment within the Caliente corridor. 73 Fed. Reg. 60,247.

§ 2.326. These two sections impose the following admissibility standards on environmental contentions:

1. Contentions must allege that it is not practicable to adopt the DOE EIS for one of two reasons:

“(1)(i) The action proposed to be taken by the Commission differs from the action proposed in the license application submitted by [DOE]; and (ii) the difference may significantly affect the quality of the human environment;¹⁶ or

(2) Significant and substantial new information or new considerations render such [EIS] inadequate.” 10 C.F.R. § 51.109(c).
2. The contention must address a “significant” environmental issue. 10 C.F.R. § 2.326(a)(2).
3. The contention must demonstrate that, if true, “a materially different result would be or would have been likely” 10 C.F.R. § 2.326(a)(3).
4. The contention must be supported by affidavits that set forth the factual and/or technical basis for the movant’s claims and must be given by competent individuals with knowledge of the facts or by experts in the appropriate disciplines. 10 C.F.R. § 2.326(b).¹⁷

To present an NEPA admissible contention, a petitioner cannot simply repeat the comment it made to DOE on the draft EIS, but must demonstrate, through affidavits that comply with the requirements of 10 C.F.R. §§ 51.109 and 2.326, why the EIS, including DOE's response to the comment fails to comply with NEPA. *City of Los Angeles v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478, 488 (D.C. Cir. 1990) (stating that simple disagreement with an agency's findings or its methods is not sufficient to render an EA [or EIS] inadequate under NEPA). Accordingly, a potential intervenor must demonstrate that DOE has failed to take a “‘hard look’ at environmental consequences.” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). An EIS

¹⁶ Because the action proposed to be taken by the NRC does not differ from the action proposed in DOE's application, this first factor has no relevance to this proceeding and will not be discussed further.

¹⁷ In addition, evidence in the affidavits must meet NRC admissibility standards and each criteria in 10 C.F.R. § 2.326 must be addressed separately.

is adequate under this standard if it “contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.” *Churchill County v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992).

These additional admissibility standards are discussed in greater detail below.

a. The 10 C.F.R. § 51.109 Criteria

Given the *sui generis* nature of this proceeding, neither the Commission nor its boards have applied § 51.109 in the context of an adjudication. Nevertheless, existing Commission decisions and federal case law under NEPA provide guidance with respect to how the criteria under § 51.109 should be applied in this proceeding.

First, the Commission has made clear that its adjudicatory boards should not “automatically assume” that a proffered environmental contention—though cognizable as a “new consideration” under the D.C. Circuit’s decision in *NEI*—contains “significant and substantial information” that, if true, would render the DOE EIS and its supplements “inadequate” under NEPA. Letter from Bradley W. Jones, Esq., Assistant Gen. Counsel, U.S. Nuclear Regulatory Comm’n, to Martin G. Malsch, Esq., “Request By Nevada For Reconsideration and Clarification of Notice of Denial,” March 20, 2008, *available at* ADAMS Accession No. ML080810175 (Jones Letter). This approach is consistent with well-established NEPA principles, as applied by the federal courts, under which reviewing courts have held that the identification of a deficiency in an EIS does not necessarily render that EIS “inadequate.” For example, the D.C. Circuit so held in denying Nevada’s challenge to the transportation-related portions of DOE’s 2002 FEIS. *Nevada v. DOE*, 457 F.3d 78, 93 (D.C. Cir. 2006) (rejecting alleged inadequacies in the FEIS relating to environmental impacts on cultural resources, flood plains and archaeological and historic impacts and stating “we do not think that the inadequacies to which Nevada points make

the FEIS inadequate” or render DOE’s selection of the Caliente Corridor “arbitrary and capricious”). The D.C. Circuit in this prior proceeding emphasized that courts “will not ‘flyspeek’ an agency’s environmental analysis, looking for any deficiency no matter how minor.” *Id.* (citing *Fuel Safe Wash. v. Fed. Energy Regulatory Comm’n*, 389 F.3d 1313, 1323 (10th Cir. 2004); *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988)).

The Commission, for its part, has indicated that this same standard applies in its licensing proceedings. As the Commission explained:

NEPA’s twin goals are to inform the agency and the public about the environmental effects of a project. At NRC licensing hearings, petitioners may raise contentions seeking correction of *significant inaccuracies and omissions* in the [applicant’s environmental report (“ER”) or agency’s EIS]. Our boards do not sit to ‘flyspeek’ environmental documents or to add details or nuances. If the ER (or EIS) on its face “comes to grips with all important considerations” nothing more need be done.¹⁸

Sys. Energy Res., Inc. (Early Site Permit for Grand Gulf Site), CLI-05-4, 61 NRC 10, 13 (2005) (quoting *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 71 (2001)) (emphasis added). A petitioner’s claim must “suggest *significant environmental oversights* that warrant further inquiry at an evidentiary hearing.” *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005) (emphasis added). Thus, as the D.C. Circuit recognized in *Nuclear Energy Inst., Inc. v. Env’tl. Protection Agency*, there must be significant “substantive defects” in the FEIS. 373 F.3d 1251, 1314 (D.C. Cir. 2004) (*NEI*).

¹⁸ See also *Duke Energy Corp.*, CLI-03-17, 58 NRC at 431 (“NRC adjudicatory hearings are not EIS editing sessions. Our busy boards do not sit to parse and fine-tune EISs.”). The Commission’s admonition against the “flyspecking” and “fine-tuning” of EISs is particularly apt here, given that DOE has “primary responsibility” for consideration of environmental matters under the NWPA. Final Rule, NEPA Review Procedures for Geologic Repositories for High-Level Waste, 54 Fed. Reg. 27,864, 27,865 (July 3, 1999) (codified at 10 C.F.R. § 51.109). In contrast, under the NWPA, the NRC’s NEPA-related responsibility in this proceeding is limited to determining whether adoption of DOE’s EIS, as supplemented, is “practicable.” *Id.*

Under NEPA, an EIS is not inadequate merely because a reviewing court or other adjudicatory tribunal might have reached a different conclusion. As the U.S. Supreme Court has explained, “[n]either the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions.” *Kleppe v. Sierra Club*, 427 U.S. at 410 n.21. The NRC has indicated that it would adhere to this same tenet in deciding whether to adopt DOE’s EIS. Specifically, in promulgating 10 C.F.R. § 51.109, the NRC stated that “the adoption of the [DOE] statement does not necessarily mean that NRC would independently have arrived at the same conclusions on matters of fact or policy.” Proposed Rule, NEPA Review Procedures for Geologic Repositories for High-Level Waste, 53 Fed. Reg. 16,131, 16,142 (May 5, 1988). Thus, in accordance with 10 C.F.R. § 51.109(d), insofar as the presiding officer determines that NRC adoption of DOE’s EIS is “practicable” under § 51.109(c), “such adoption shall be deemed to satisfy all responsibilities of the Commission under NEPA and no further consideration under NEPA or this subpart shall be required.”

In this proceeding, DOE submits that boards should apply § 51.109 consistent with the above referenced well established NEPA case law and decisions of the Commission.

b. The 10 C.F.R. § 2.326 Criteria and Procedures

Section 51.109(a)(2) directs the presiding officer, “to the extent possible,” to use the “criteria and procedures that are followed in ruling on motions to reopen under § 2.326.” In its Hearing Notice, the Commission reiterated that a presiding officer should, to the extent possible, apply the reopening procedures and standards set forth in § 2.326. *See* Hearing Notice, 73 Fed. Reg. at 63,031.

By explicitly directing presiding officers to use the criteria and procedures contained in § 2.326, the Commission reaffirmed its longstanding intent to avoid, in accordance with the

NWPA, “the wide-ranging independent examination of environmental concerns that is customary in NRC licensing proceedings.” Proposed Rule, NEPA Review Procedures for Geologic Repositories for High-Level Waste, 53 Fed. Reg. at 16,136; *see also* Final Rule, 54 Fed. Reg. 27,864, 27,865 (July 3, 1999) (codified at 10 C.F.R. § 51.109) (“[W]e believe it to be a fair reading of Congressional intent that NRC can adequately exercise its NEPA responsibility with respect to a repository by relying upon DOE’s environmental impact statement.”).

Specifically, the Commission has noted that the test for reopening a closed record—the same test to be applied by the Board in ruling on the admissibility of environmental contentions in this proceeding—is a “stiff test” that imposes a “strict” burden. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 22, 25 (2006); *see also Fla. Power & Light Co.* (Turkey Point, Units 3 and 4), LBP-87-21, 25 NRC 958, 963-64 (stating that “a party seeking to reopen the record has a ‘heavy burden’ to bear”) (quoting *Ka. Gas and Elec. Co.* (Wolf Creek Station, Unit No. 1), 7 NRC 320, 338 (1978)). Parties seeking to reopen a closed record must raise a “significant” safety or environmental issue and demonstrate that “a materially different result [is] ‘likely’ as a result of the new evidence.” *Private Fuel Storage*, CLI-06-3, 63 NRC at 25. In applying this test, the Commission has further noted that “[n]ew information is not enough, *ipso facto*, to reopen a closed hearing record,” and that “the information must be significant and plausible enough to require reasonable minds to inquire further.” *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005).

The Commission has further noted that the supporting material required by § 2.326(b) “must be set forth with a degree of particularity *in excess of* the basis and specificity requirements contained in 10 C.F.R. [§ 2.309] for admissible contentions. Such supporting

information must be more than mere allegations; it must be tantamount to evidence.” *Long Island Lighting Co.* (Seabrook Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93 (1989) (quoting *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), *aff’d sub nom. San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm’n*, 751 F.2d 1287 (D.C. Cir. 1984), *aff’d on reh’g en banc*, 789 F.2d 26 (1986), *cert. denied*, 479 U.S. 923 (1986)). An intervenor’s mere “belief” is insufficient to satisfy § 2.326(b). *Fla. Power & Light Co.*, LBP-87-21, 25 NRC at 963.

In short, “the Commission expects its adjudicatory boards to enforce the [§ 2.326] requirements rigorously—*i.e.*, to reject out-of-hand reopening motions that do not meet those requirements within their four corners.” *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 432 (1989) (citing *La. Power & Light Co.* (Waterford Steam Electric, Unit 3), CLI-86-1, 23 NRC 1 (1986); *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233 (1986), *aff’d sub nom. Ohio v. U.S. Nuclear Regulatory Comm’n*, 814 F.2d 258 (6th Cir. 1987)).

In the *Private Fuel Storage* decision (CLI-06-3) discussed above, the Commission applied the § 2.326 standard in ruling on a motion to reopen the record (after the Commission had rendered its final adjudicatory decision and authorized license issuance) to litigate a proposed environmental contention. The Commission’s ruling is illustrative and underscores the heavy burden imposed by § 2.326.¹⁹ For example, the Commission emphasized “a high threshold” for reopening a record as established by “longstanding NRC regulations and precedent.” *Private Fuel Storage*, CLI-06-3, 63 NRC at 22; *see also id.* at 25 (stating that the

¹⁹ In recently denying a motion to reopen the record, the Commission emphasized the “deliberately heavy” burden associated with § 2.326. *See AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC __ (slip op. at 13-14) (Nov. 6, 2008) (“The burden of satisfying the reopening requirements is a heavy one, and proponents of a reopening motion bear the burden of meeting all of [these] requirements.”) (internal quotation marks and citations omitted).

NRC does “not lightly reopen [its] adjudicatory proceedings”). The Commission found that the intervenor had failed to meet substantive and evidentiary requirements of § 2.326, stating that “we cannot say on the current record that a materially different result in our licensing proceeding is so ‘likely’ that we must reopen the adjudicatory proceeding for additional hearings and findings.” *Id.* at 26-27. Consequently, the Commission rejected the intervenor’s request that the entire project be placed on hold.

In the context of the Yucca Mountain proceeding, the requirement that the petitioner must demonstrate that a materially different outcome would likely result means that the contention, if true, would severely impact the EIS such that it could not be adopted unless formally supplemented by NRC or DOE.

In summary, given the considerably heightened admissibility standards applicable here, DOE submits that in this proceeding a presiding officer should admit *environmental* contentions in this proceeding only under very limited circumstances. Under 10 C.F.R. §§ 51.109(c) and 2.326, an environmental contention must present *evidence* concerning a “significant” environmental issue. Under those same provisions, that information must be so “substantial” as to demonstrate that the alleged inadequacy in the DOE EISs is “likely” to dictate a “materially different result.” As the Commission explained in *Private Fuel Storage*, this means that any “new information” proffered by a petitioner must present a “*seriously* different picture of the environmental landscape,” such that it would “be likely to change the outcome of the proceeding or affect the licensing decision in a material way.” CLI-06-3, 63 NRC at 19, 28.

B. DOE’s Answer Regarding the Admissibility of Petitioner’s Proposed Contentions

1. Ownership and Control – NCAC Contention 1

Pursuant to 10 CFR § 63.121(a)(1)(part of Subpart E) the geologic repository operations area (GROA) is required to be located in and on lands that are either acquired lands under the jurisdiction and control of DOE, or lands permanently withdrawn and reserved for its use. Also, 10 CFR § (a)(2) [sic] requires such lands to be held free and clear of all such encumbrances including easements, if significant, such as: (iii) All other rights . . ., or otherwise. This contention alleges non-compliance with this regulatory provision and therefore raises a material issue within the scope of the licensing proceeding.

RESPONSE

This contention alleges, incorrectly, that DOE cannot meet these land ownership and control requirements because, based on the Ruby Valley Treaty of 1863, the United States does not have ownership and control of the lands on which DOE proposes to construct and operate the GROA. Petition at 7–9. NCAC is mistaken and, as discussed below, this contention is inadmissible.

a. Statement of Issue of Law or Fact to be Controverted

Without prejudice to other positions taken by DOE, DOE expresses no legal objection based on this requirement.

b. Brief Explanation of Basis

Without prejudice to other positions taken by DOE, DOE expresses no legal objection based on this requirement.

c. Whether the Issue is Within the Scope of the Proceeding

This contention falls outside the scope of the proceeding because the Licensing Board does not have the legal authority or jurisdiction to determine whether NCAC owns the land on which the GROA is proposed to be located.

In accordance with 10 C.F.R. § 63.31(a)(3)(ii), the NRC must determine whether the “site” complies with the requirements set forth in 10 C.F.R. Subpart E, specifically, as applicable here, 10 C.F.R. § 63.121(a):

(a) Ownership of Land

(1) The [GROA] must be located in and on lands that are either acquired lands under the jurisdiction and control of DOE, or lands permanently withdrawn and reserved for its use.

(2) These lands must be held free and clear of all encumbrances, if significant, such as: (i) Rights arising under the general mining laws; (ii) Easements for right-of-way; and (iii) All other rights arising under lease, rights of entry, deed, patent, mortgage, appropriation, prescription, or otherwise.

10 C.F.R. § 63.121(a)(1)–(2).

This contention incorrectly alleges that DOE cannot meet these land ownership and control requirements because, based on the Ruby Valley Treaty of 1863, the United States does not have ownership and of the lands control on which DOE proposes to construct and operate the GROA. Petition at 7–9. NCAC is mistaken. The resolution of this issue is already described in the NEPA Administrative Record:

. . . The Western Shoshone Tribe maintains that the Ruby Valley Treaty of 1863 gives them rights to 97,000 square kilometers (37,000 square miles) in Nevada, which includes the Yucca Mountain region. A legal dispute with the Federal Government led to a monetary award as payment for the land. However, the Western Shoshone have not accepted this award and maintain that there is no settlement. The U.S. Treasury is holding the monies in an interest-bearing account. In 1985, the U.S. Supreme Court ruled that even though the money has not been distributed[,] the

United States has met its obligations with the [Indian Claims] Commission's final award and the payment of the award into an interest-bearing trust account in the United States Treasury (DIRS 148197-United States v. Dann 1985, all [470 U.S. 39]).

In July 2004, President George W. Bush and Congress approved payment to the Western Shoshone Tribe of more than \$145 million in compensation and accrued interest based on the 1872 value of 97,000 square kilometers (37,000 square miles) (Public Law 108-270; 118 Stat. 805). Under provisions of the law, payment by the United States Government *officially subsumed* Western Shoshone claims to 97,000 square kilometers of land in Nevada, Utah, California, and Idaho, based on the Ruby Valley Treaty of 1863. The law will distribute approximately \$145 million in funds that the Indian Land Claims Commission awarded the Tribe. There are approximately 6,000 eligible tribal members, and the law sets aside a separate revenue stream for educational purposes.

Final Supplemental EIS for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada (Repository SEIS) Vol. I at 3-8 (June 2008) (emphasis and brackets added).²⁰ In short, contrary to NCAC's claim, the Western Shoshone Nation has no rights to the land at issue here, which includes the proposed Yucca Mountain site. Recently, moreover, the Federal Circuit expressly held that the Treaty of Ruby Valley, which was a treaty of peace and amity, did not convey title to any of the lands described in it to the West Shoshone. *W. Shoshone Nat'l Council v. United States*, 279 F. App'x 980, 987 (Fed. Cir. 2008) (holding that "the Treaty of Ruby Valley did not recognize that the Western Shoshone held fee title in the disputed territory"), *aff'g* 73 Fed. Cl. 59 (Fed. Cl. 2006), *cert denied*, ___ S.Ct. ___ (January 12, 2009).

²⁰ The Administrative Record further states that "[o]n March 4, 2005, the Western Shoshone National Council filed a lawsuit against the United States, DOE, and the U.S. Department of the Interior in the federal district court in Las Vegas, Nevada. The complaint sought an injunction to stop federal plans for the use of Yucca Mountain as a repository based on the five established uses of the land within the boundaries of the 1863 Ruby Valley Treaty. On May 17, 2005, the U.S. District Court rejected a request from the Western Shoshone National Council for a preliminary injunction to stop DOE from applying for a license for the Yucca Mountain Project. The District Court dismissed the case for lack of jurisdiction in a judgment entered on November 1, 2005." Repository SEIS, Vol. I at 3-8. An appeal was not taken from this decision.

The Licensing Board does not have the legal authority or jurisdiction to reconsider this federal law. The Commission previously acknowledged its lack of authority to address such claims in the Statements of Consideration for both Part 63 and the Yucca Mountain Review Plan. With respect to the Part 63 rulemaking, the Commission addressed precisely the same issue that NCAC seeks to raise in this contention:

Comment: A number of commenters stated that under the Treaty of Ruby Valley of 1863, the Western Shoshone Nation never ceded the Yucca Mountain site to the United States and that title to the land therefore remains with the Western Shoshone Nation. These commenters further argue that all activities conducted by the United States at the Yucca Mountain site that are not within the specific privileges granted the United States under the Treaty of Ruby Valley constitute an illegal occupation of Western Shoshone territory and a violation of Western Shoshone sovereignty.

Response: The NRC is aware that the Western Shoshone National Council disputes the claim of the United States to have legal title to land that includes the Yucca Mountain site. *However, there are Federal court decisions which have addressed these land claim issues and which are binding on both DOE and NRC.* Section 63.121 requires that, before NRC licensing of a waste repository at the Yucca Mountain site, DOE must establish that the GROA and the site are located in and on land that is either acquired land under the jurisdiction and control of DOE or lands permanently withdrawn and reserved for DOE's use.

Final Rule, Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada, 66 Fed. Reg. 55,732, 55,766 (Nov. 2, 2001) (emphasis added); *see also* Yucca Mountain Review Plan, NUREG-1804, Revision 2, 68 Fed. Reg. 45,086, 45,100 (July 31, 2003) (quoting Statements of Consideration for 10 C.F.R. Part 63).

Accordingly, the Licensing Board must dismiss this contention as outside the scope of the proceeding. As the Commission observed in promulgating Part 63, "binding" federal court decisions govern the outcome of the dispute between the various representatives of the Timbisha Shoshone and the United States government; and the Licensing Board itself is bound by the

Commission's determination. Thus, the Board does not have the legal authority to evaluate this claim about the land on which the GROA will be located.

d. Whether the Issue is Material to the Findings that the NRC Must Make

For the reasons this contention is outside the scope of the proceeding, this contention also fails to raise a material issue. Accordingly, the Licensing Board must dismiss it.

e. Statement of Alleged Facts or Expert Opinion Supporting Petitioner's Position and Supporting References

Without prejudice to other positions taken by DOE, DOE expresses no legal objection based on this requirement.

f. Existence of a Genuine Dispute on a Material Issue of Law or Fact, With Supporting References to the License Application

For the same reasons discussed above concerning NCAC's failure to raise an issue within the scope of this proceeding, this contention also does not show a genuine dispute on a material issue of law or fact. Federal law provides that the Western Shoshone no longer have rights to land on which the Yucca Mountain site is located. This federal law is "binding" on DOE and the NRC. *See, e.g.*, Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, 66 Fed. Reg. at 55,766. Therefore, NCAC cannot attempt to re-litigate its alleged treaty rights in this forum, and the contention must be dismissed.

2. Water – NCAC Contention 2

Pursuant to 10 CFR § 63.121(d)(1) the DOE is to obtain such water rights as may be needed to accomplish the proposed repository; and 10 CFR § 63.121(d)(2) water rights are included in the additional controls to be established. Water right [sic] are a reserved property interest not ceded to the US by the Treaty of Ruby Valley, 12 Statute 689-692 and are a shared right in privity with other NCAC members. NCAC challenges the availability of water as insufficient to meet the needs of DOE since no lawful entitlement accrues to the US or the State of Nevada for use by the DOE.

RESPONSE

This safety contention has two distinct bases concerning DOE's efforts to obtain water rights to accomplish the purpose of the GROA. First, this contention argues that the Ruby Valley Treaty did not cede the Western Shoshone Nation's jurisdiction over water rights. Petition at 10–11. Based upon this flawed legal argument, NCAC asserts that DOE cannot comply with the applicable NRC regulations because the U.S. government and Nevada cannot give DOE rights to use water at the GROA. *Id.* Second, the contention argues that the Application is “materially incomplete” because it “fails to consider the Western Shoshone Nation's jurisdiction over the water rights within Newe Sogobia or the needs of the Newe individually or collectively.” *Id.* at 11. As explained below, this contention is inadmissible because these allegations lack supporting basis in law, fall outside the scope of this proceeding, and fail to raise a genuine dispute on a material issue of law or fact.

a. Statement of Issue of Law or Fact to be Controverted

Without prejudice to other positions taken by DOE, DOE expresses no legal objection based on this requirement.

b. Brief Explanation of Basis

As explained below, the regulations cited by NCAC in support of this contention—10 C.F.R. § 63.121(b) and (d)—do not require that the Application consider the Western Shoshone Nation’s alleged jurisdiction or the alleged needs of the Newe individually or collectively. Rather, these regulations require that DOE establish certain ownership and control interests in land and water. Therefore, § 63.121 does not support the basis for this contention as a matter of law.

c. Whether the Issue is Within the Scope of the Proceeding

As a threshold matter, this contention fails to separately address whether this contention is within the scope of the proceeding. NCAC has the burden to set forth with particularity the contention sought to be raised, and to satisfy each of the six requirements contained in § 2.309(f)(1). Because NCAC failed to separately address each of the six requirements, the contention should be dismissed.

Even if the Licensing Board overlooks this flaw, the contention is not within the scope of the licensing action.

(1) Challenging the U.S. Government’s and Nevada’s Jurisdiction Over Water Rights for the GROA Does Not Raise an Issue within the Scope of the Proceeding

As its first basis, NCAC contends that the Western Shoshone Nation retains jurisdiction over water rights in the GROA. Petition at 10. To support this basis, it relies upon the Treaty of Ruby Valley. *Id.* NCAC argues that DOE cannot meet the applicable water requirements because the Ruby Valley Treaty preserves the Western Shoshone Nation’s jurisdiction over water rights in the GROA. *Id.* NCAC is mistaken. The resolution of this issue is already discussed in the NEPA Administrative Record:

. . . The Western Shoshone Tribe maintains that the Ruby Valley Treaty of 1863 gives them rights to 97,000 square kilometers (37,000 square miles) in Nevada, which includes the Yucca Mountain region. A legal dispute with the Federal Government led to a monetary award as payment for the land. However, the Western Shoshone have not accepted this award and maintain that there is no settlement. The U.S. Treasury is holding the monies in an interest-bearing account. In 1985, the U.S. Supreme Court ruled that even though the money has not been distributed[,] the United States has met its obligations with the [Indian Claims] Commission's final award and the payment of the award into an interest-bearing trust account in the United States Treasury (DIRS 148197-United States v. Dann 1985, all [470 U.S. 39]).

In July 2004, President George W. Bush and Congress approved payment to the Western Shoshone Tribe of more than \$145 million in compensation and accrued interest based on the 1872 value of 97,000 square kilometers (37,000 square miles) (Public Law 108-270; 118 Stat. 805). Under provisions of the law, payment by the United States Government *officially subsumed* Western Shoshone claims to 97,000 square kilometers of land in Nevada, Utah, California, and Idaho, based on the Ruby Valley Treaty of 1863. The law will distribute approximately \$145 million in funds that the Indian Land Claims Commission awarded the Tribe. There are approximately 6,000 eligible tribal members, and the law sets aside a separate revenue stream for educational purposes.

Final Supplemental EIS for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada (Repository SEIS), Vol. I at 3-8 (June 2008) (emphasis and brackets added).²¹ Recently, moreover, the Federal Circuit expressly held that the Treaty of Ruby Valley, which was a treaty of peace and amity, did not convey title to any of the lands described in it to the West Shoshone. *W. Shoshone Nat'l Council v. United States*, 279 F. App'x 980, 987 (Fed. Cir. 2008) (holding that "the Treaty of

²¹ The Administrative Record further states that "[o]n March 4, 2005, the Western Shoshone National Council filed a lawsuit against the United States, DOE, and the U.S. Department of the Interior in the federal district court in Las Vegas, Nevada. The complaint sought an injunction to stop federal plans for the use of Yucca Mountain as a repository based on the five established uses of the land within the boundaries of the 1863 Ruby Valley Treaty. On May 17, 2005, the U.S. District Court rejected a request from the Western Shoshone National Council for a preliminary injunction to stop DOE from applying for a license for the Yucca Mountain Project. The District Court dismissed the case for lack of jurisdiction in a judgment entered on November 1, 2005." Repository SEIS, Vol. I at 3-8. An appeal was not taken from this decision.

Ruby Valley did not recognize that the Western Shoshone held fee title in the disputed territory”), *aff’g* 73 Fed. Cl. 59 (Fed. Cl. 2006), *cert denied*, ___ S.Ct. ___ (January 12, 2009). In short, contrary to NCAC’s claim, the Western Shoshone Nation has no rights to the water at issue here because it has no rights to the land under the Ruby Valley Treaty of 1863.

Nor does the Licensing Board have the legal authority or jurisdiction to reconsider this federal law. The Commission previously acknowledged its lack of authority to address similar claims in the Statements of Consideration for both Part 63 and the YMRP:

Comment: A number of commenters stated that under the Treaty of Ruby Valley of 1863, the Western Shoshone Nation never ceded the Yucca Mountain site to the United States and that title to the land therefore remains with the Western Shoshone Nation. These commenters further argue that all activities conducted by the United States at the Yucca Mountain site that are not within the specific privileges granted the United States under the Treaty of Ruby Valley constitute an illegal occupation of Western Shoshone territory and a violation of Western Shoshone sovereignty.

Response: The NRC is aware that the Western Shoshone National Council disputes the claim of the United States to have legal title to land that includes the Yucca Mountain site. *However, there are Federal court decisions which have addressed these land claim issues and which are binding on both DOE and NRC.*

Final Rule, Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada, 66 Fed. Reg. 55,732, 55,766 (Nov. 2, 2001) (emphasis added); *see also* Yucca Mountain Review Plan, NUREG-1804, Revision 2, 68 Fed. Reg. 45,086, 45,100 (July 31, 2003) (quoting Statements of Consideration for 10 C.F.R. Part 63).

Accordingly, the Licensing Board must dismiss this contention as outside the scope of the proceeding. As the Commission observed in promulgating the regulations that govern this proceeding, “binding” final federal court decisions govern the outcome of the dispute between the Western Shoshone Nation and the United States government; and this Licensing Board itself

is bound by the Commission's determination. Thus, the Licensing Board does not have the legal authority to evaluate NCAC's claim about the water rights at issue here.

Furthermore, this basis of the contention is also outside the scope of this proceeding because NRC does not have the legal authority to adjudicate DOE's efforts to obtain water rights.

In accordance with 10 C.F.R. § 63.31(a)(3)(ii), the NRC must determine whether the "site" complies with the requirements set forth in 10 C.F.R. Subpart E, specifically, as applicable here, 10 C.F.R. § 63.121. Section 63.121 requires DOE to obtain the water rights needed to accomplish the purpose of the GROA, and to include water rights in the additional controls that DOE must establish to prevent adverse human actions that could significantly reduce the GROA's ability to achieve isolation. 10 C.F.R. § 63.121(b), (d).

To meet these requirements, DOE has been pursuing water applications from the State of Nevada. SAR at 5.8-8. DOE filed water appropriation requests with the Office of Nevada State Engineer on July 22, 1997, for permanent rights to 430 acre-ft of water annually. *Id.* The Nevada State Engineer denied the permit applications. *Id.* The United States has filed an action seeking declaratory and injunctive relief, and that litigation is currently pending before the U.S. District Court for the District of Nevada. *Id.*; see also *United States v. Nevada*, CV-S-00268-RLH-(LRL).

The NRC's role here is to determine whether DOE has obtained sufficient water rights to accomplish the GROA's purpose. But the NRC does not have the authority or jurisdiction to determine *how* DOE obtains these water rights. Indeed, decisions about water rights will be made by a tribunal other than the NRC (that is, a federal district court based upon an appeal from

a decision by the Nevada State Engineer). Therefore, this is not the proper forum to address whether or not DOE should receive a water permit to construct and operate the GROA.

The Commission previously acknowledged its lack of authority to address similar claims in the Statements of Consideration for Part 63:

Comment—Commenters were concerned about whether DOE must conform to State water law to obtain water rights (one commenter indicated DOE is required, under State water law, to show beneficial use in order to obtain water). A commenter viewed § 63.121 as giving DOE the right to take water rights in order to achieve waste isolation and stated that the rule must acknowledge the responsibilities of the Federal Government for compensation when initiating takings.

Response—Section 63.121(c)(1) requires DOE to obtain such water rights as may be needed to accomplish the purpose of the GROA. . . . *Whether DOE is subject to State law in obtaining any water rights that may be needed for this purpose is a matter to be determined by DOE and the State. The NRC does not have the authority to require that DOE conform to State law.*

Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada, 66 Fed. Reg. at 55,767 (emphasis added). Accordingly, the NRC does not have the authority to address Petitioner’s claim.

Finally, as a matter of policy, Licensing Boards should reject contentions that attempt to litigate an issue that is “primarily the responsibility of other federal or state/local regulatory agencies.” *See PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 27 (2007). Such contentions expand the scope of the proceeding and significantly divert limited NRC resources. As set forth above, the decision about DOE’s water permit requests will be determined by a federal court, based on an appeal from a state regulatory agency.

**(2) The Application Sufficiently Describes DOE’s Activities
Relating to Water Rights**

The second basis for this contention states as follows:

This contention challenges the DOE application as materially incomplete because it fails to consider the Western Shoshone Nation’s jurisdiction over the water rights within Newe Sogobia or the needs of the Newe individually or collectively. The DOE fails to comply with the legal requirements of 10 C.F.R. § 63.121(b) and (d).

Petition at 11.

But the regulations cited by NCAC in support of this basis—10 C.F.R. § 63.121(b) and (d)—do not require that the Application consider the Western Shoshone Nation’s alleged jurisdiction or the needs of the Newe individually or collectively. Rather, as discussed above, these regulations require that DOE establish certain ownership and control of interests in land and water. Therefore, § 63.121 does not support this basis for the contention.

d. Whether the Issue is Material to the Findings that the NRC Must Make

For the reasons this contention is outside the scope of the proceeding, this contention also fails to raise a material issue.

e. Statement of Alleged Facts or Expert Opinion Supporting Petitioner’s Position and Supporting References

Without prejudice to other positions taken by DOE, DOE expresses no legal objection based on this requirement.

f. Existence of a Genuine Dispute on a Material Issue of Law or Fact, With Supporting References to the License Application

For the same reasons discussed above concerning NCAC’s failure to raise an issue within the scope of this proceeding, this contention also does not show a genuine dispute on a material issue of law or fact.

3. NEPA Requirements – NCAC Contention 3

DOE's 2008 FSEIS and 2002 FEIS are inadequate because they fail to reasonably identify post-closure impacts to human health that are culturally appropriate to members of the NCAC. This deficiency is significant, and if it were to be addressed in a satisfactory manner, the disclosure of the radiological impact to the Newe would be materially disproportionate and significant.

RESPONSE

In this contention, NCAC states that the 2002 FEIS and the Repository SEIS are inadequate because NCAC believes that, based on lifestyle and dietary differences that the DOE failed to study, Newe and Nuwuvi of the NCAC will bear a disproportionate burden of the risk of radiological exposure. Petition at 13-14.

All NEPA contentions must demonstrate that they meet the criteria of 10 C.F.R § 51.109 and 10 C.F.R. § 2.326, as well as the standards for contentions of 10 C.F.R. § 2.309. NCAC fails to meet (or even attempt to meet) the express requirements of 10 C.F.R. §§ 2.326 and 51.109 in requesting that this contention be admitted in this proceeding. Specifically, as set forth in Section IV.A.4., NCAC must (1) raise a significant environmental issue; and (2) demonstrate that its contention, if proven to be true, would or would likely result in a materially different outcome in this proceeding. Moreover, its environmental contention must be supported by the affidavit of a qualified witness that sets forth the factual and/or technical basis supporting the claim that these two criteria have been met, including "with a specific explanation of why it has been met." 10 C.F.R. § 2.326(b). As noted in Section IV.A.4., above, "the Commission expects its adjudicatory boards to enforce the [section 2.326] requirements rigorously – *i.e.*, to reject out-of-hand reopening motions that do not meet those requirements within their four corners." *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2) ALAB-915, 29 NRC 427, 432 (1989).

NCAC fails to address any of the mandatory requirements of §§ 51.109 and 2.326 in its contention and fails to include a supporting expert affidavit as required by § 51.109(a)(2). The burden imposed by § 2.326 can only be met by an affidavit submitted in support of each proposed NEPA contention that sets forth the factual and/or technical basis supporting the claim that the criteria of 10 C.F.R. § 2.326(a) have been met. Indeed, § 2.326 requires the affidavit to separately address each of the criteria “with a specific explanation of why it has been met.” And finally, the evidence offered in the supporting affidavit must be admissible under NRC admissibility standards. NCAC’s NEPA contention contains no analysis or other information to satisfy the requirements of demonstrating that these criteria have been met. The contention is limited to a series of conclusory statements devoid of any analysis or factual underpinnings, and NCAC has totally failed to meet the requirement to provide an affidavit to support its NEPA contention. Because NCAC has failed to submit any affidavit to support its contention and has made no attempt to address the criteria of 10 C.F.R. §§ 51.109 and 2.326 the contention should be rejected.

a. Statement of Issue of Law or Fact to be Controverted

Without prejudice to other positions taken by DOE, DOE expresses no legal objection based upon this requirement.

b. Brief Explanation of Basis

Without prejudice to other positions taken by DOE, DOE expresses no legal objection based upon this requirement.

c. Whether the Issue is Within the Scope of the Proceeding

The contention does not address the requirement that NCAC demonstrate that the contention is within the scope of the proceeding.

d. Whether the Issue is Material to the Findings that the NRC Must Make

This contention fails to raise a material issue because, as demonstrated in Section f. below, DOE did consider the dietary and lifestyle differences mentioned in the Petition and because the NCAC's unsupported belief regarding disproportionate burdens is insufficient to raise a material issue under NEPA.

e. Statement of Alleged Facts or Expert Opinion Supporting Petitioner's Position and Supporting References

This contention presents only unsupported argument and is unaccompanied by any expert opinion. The study mentioned in the contention "The Assessment of Radiation Exposure in Native American Communities from Nuclear Weapons Testing in Nevada" (2000) is not identified by an LSN number and is not attached, contrary to the direction of the Advisory PAPO Board in its June 20, 2008 Case Management Order. The contention also fails to meet the affidavit requirements of 10 C.F.R. §§ 51.109 and 2.326 as discussed above.

f. Existence of a Genuine Dispute on a Material Issue of Law or Fact, With Supporting References to the License Application

For the reasons stated in section e. above, this contention fails to raise a genuine dispute on any material issue of law or fact because the contention is not supported by any facts. The one reference mentioned, a 2000 document that is not identified by an LSN number and is not attached to the Petition, is described in the Petition as relating to exposure from radioactive fallout from weapons testing, not the potential impacts from the Yucca Mountain repository. The unsupported statements that the RMEI lifestyle and diet "do not adequately replicate Native American lifestyle" (Petition at 12), and that the NCAC "believes that, based on lifestyle differences that the DOE failed to study, Newe and Nuwuvi will bear a disproportionate burden of risk of radiological exposure" (*id.* at 13-14), do not render DOE's NEPA analysis inadequate.

DOE did consider the “lifestyle differences” mentioned in the Petition as part of its Environmental Justice Impact Analysis. This analysis concluded that there would not be any high and adverse impacts to the members of the public, that no subsections of the population had been identified that would be disproportionately impacted, and that no unique exposure pathways, sensitivities or cultural practices had been identified that would result in exposure to disproportionately high and adverse impacts. *E.g.*, Repository SEIS, Vol. I at 4-96; 2002 FEIS, Vol. III, at CR7-617, -618, -731, -733 (addressing food such as wild game and pinon nuts). NCAC may disagree with DOE’s conclusion, but simple disagreement with an agency’s findings or its methods is not, however, sufficient to render an EA [or EIS] inadequate under NEPA. *City of Los Angeles v. Nat’l Highway Traffic Safety Admin.*, 912 F.2d 478, 488 (D.C. Cir. 1990). NCAC’s unsupported belief regarding alleged disproportionate burdens is thus insufficient to raise a material issue under NEPA.

V. CONCLUSION

NCAC is not in substantial and timely compliance with its LSN obligations, has failed to demonstrate legal standing to intervene in this proceeding, and has not submitted at least one admissible contention. Accordingly, its Petition must be denied.

Respectfully submitted,

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Dated in Washington, D.C.
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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:)	
)	
U.S. Department of Energy)	January 15, 2009
)	
(License Application for Geologic Repository at Yucca Mountain))	Docket No. 63-001
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the “ANSWER OF THE U.S. DEPARTMENT OF ENERGY TO NATIVE COMMUNITY ACTION COUNCIL PETITION TO INTERVENE AS A FULL PARTY” have been served on the following persons this 15th day of January, 2009 by the Nuclear Regulatory Commission’s Electronic Information Exchange.

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