

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

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

In the Matter of

SOUTHERN NUCLEAR OPERATING CO.

(Early Site Permit for Vogtle ESP Site)

Docket No. 52-011-ESP

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

January 26, 2009

MEMORANDUM AND ORDER
(Ruling on In Limine Motions)

Pending before the Licensing Board are motions filed by applicant Southern Nuclear Operating Company (SNC) and the NRC staff seeking to strike portions of prefiled testimony and associated exhibits submitted by Joint Intervenors¹ relating to the three contentions — Environmental Contention (EC) 1.2, [Environmental Report (ER)] Fails to Identify and Consider Cooling System Impacts on Aquatic Resources; EC 1.3, ER Dry Cooling System Alternatives Discussion Fails to Address Aquatic Species Impacts; and EC 6.0, Final Environmental Impact Statement Fails to Provide Adequate Discussion of Impacts Associated with Dredging the Savannah River Federal Navigation Channel — that are scheduled to be the subject of an evidentiary hearing beginning on Monday, March 16, 2009. The Board's rulings on these motions are set forth below, as well as administrative directives regarding further party filings to address these determinations and other matters.

¹ Joint Intervenors include the Center for a Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy, Atlanta Women's Action for New Directions, and Blue Ridge Environmental Defense League.

I. In Limine Motion Rulings

- A. SNC and Staff Motions to Exclude Portions of Prefiled Direct Testimony of Barry W. Sulkin and Exhibits JTI000031, JTI000003, and JT000005 Regarding Contention EC 1.2

DISCUSSION: [SNC] Motion In Limine to Strike Testimony and Exhibits Filed by Joint Intervenors (Jan. 14, 2009) at 2 [hereinafter SNC Motion In Limine]; NRC Staff Motion In Limine to Exclude Portions of Testimony and Exhibits Filed by Joint Intervenors (Jan. 14, 2009) at 3-5 [hereinafter Staff Motion In Limine]; Joint Intervenors' Response to Motions In Limine to Exclude Portions of Testimony and Exhibits (Jan. 21, 2009) at 6-10.

RULING: SNC and the staff request that the Board exclude portions of the prefiled direct testimony of Barry W. Sulkin, as well as portions of Joint Intervenors exhibits JTI000003, JTI000005, and JTI000031 referring to cumulative water usage as it relates to water users other than SNC's two existing and two proposed Vogtle units. Joint Intervenors oppose the SNC and staff motions regarding portions of Mr. Sulkin's testimony, specifically the requests to exclude Questions 27 and 28 and their corresponding answers. Joint Intervenors do not oppose SNC and staff requests to strike references to municipal withdrawals in Answer 24 and Question 25.

As SNC and the staff note, the Board's January 15, 2008 memorandum and order ruling on SNC's November 2007 summary disposition motion regarding contention EC 1.2 defined the scope of the contention to exclude arguments regarding the degree to which the staff's draft environmental impact statement (DEIS) gave appropriate consideration to the cumulative impacts of water withdrawals by users other than the existing and proposed Vogtle units. See LBP-08-2, 67 NRC __, __ (slip op. at 25-26) (Jan. 15, 2008) . Joint Intervenors, however, assert that they are offering the contested portions of Mr. Sulkin's testimony to challenge the methodology used for calculating cumulative impacts from Vogtle Units 1-4 rather than to argue

that the final environmental impact statement (FEIS) specifically should have considered water withdrawals by certain other users.

After reviewing the prefiled direct testimony and exhibits at issue, we conclude Joint Intervenors concerns about methodology are clear without the portions at issue, which, per our January 15, 2008 order, go into matters that are outside the scope of contention EC 1.2 as admitted. We therefore grant the SNC and staff motions in limine with respect to the testimony and exhibits related to contention EC 1.2 to the following extent:

1. Regarding Mr. Sulkin's prefiled direct testimony:
 - a. The last sentence of Answer 24 (beginning "Moreover, the flow at") is stricken.
 - b. In Question 25, the phrase "due to increasing municipal withdrawals" at the end of the question is stricken.
 - c. Questions 27 and 28 and their corresponding answers are stricken.
 - d. In Answer 29, the fourth and fifth sentences (beginning "The ESP FEIS reports the D-Area Powerhouse" and "Similarly, the ESR FEIS says the Urquhart Station") and the last sentence (beginning "Nor can I explain") are stricken.
2. Regarding Exhibit JTI000003, paragraph 28 is stricken.
3. Regarding Exhibit JTI000005, paragraph 17 is stricken.
4. Regarding Exhibit JTI000031,
 - a. Paragraphs 12, 22, 23, and 24 are stricken.
 - b. In paragraph 11, the fourth sentence (beginning "The DEIS fails to account for municipal") is stricken.

B. SNC and Staff Motions to Exclude Portions of Prefiled Direct Testimony of William Powers and Exhibits JTI000031 and JTI000035 Regarding Contention EC 1.3

DISCUSSION: SNC Motion In Limine at 2-3; Staff Motion In Limine at 3-6; Joint Response to Licensing Board Request for Clarification Regarding In Limine Motions (Jan. 23, 2009) at 2 [hereinafter Clarification Request Response].²

RULING: With regard to contention EC 1.3, SNC and the staff seek to exclude references to parallel or hybrid wet/dry alternative cooling systems. As SNC and the staff note, the Board's January 15, 2008 memorandum and order ruling on SNC's November 2007 summary disposition motion regarding contention EC 1.3 limited the contention to the subject of dry cooling as an alternative to wet cooling and precluded further litigation on the subject of hybrid wet/dry cooling systems. See LBP-08-3, 67 NRC __, __ (slip op. at 19-20) (Jan. 15, 2008). Joint Intervenors do not contest the motions in limine relative to this contention. Accordingly, we grant the SNC and staff in limine motions regarding contention EC 1.3 relating to the portions of Mr. Powers' testimony and Joint Intervenors exhibits as follows:

1. Regarding Mr. Powers' prefiled direct testimony:
 - a. The portion of the last sentence of Answer 18 reading "a parallel dry-wet cooling system for reactor 3 and" is stricken.
 - b. The references in Answers 27 and 35 to a parallel wet-dry system are stricken such that the relevant portions of those answers read "there would be relatively little differential in the MW output of wet or dry AP 1000 alternatives."
 - c. Question 34 and its corresponding answer are stricken.

² After receiving the SNC and staff motions in limine and Joint Intervenors response to those motions, the Board issued a January 22, 2009 memorandum and order requesting clarification from the parties on certain items concerning contentions EC 1.3 and EC 6.0. See Licensing Board Memorandum and Order (Request for Clarification Regarding In Limine Motions) (Jan. 22, 2009) (unpublished). On January 23, 2009, the staff filed the parties' joint response to the Board's January 22 order.

2. Regarding Exhibit JTI000031, paragraph 26, the phrase “or hybrid wet/dry” is stricken from the first sentence. In the second sentence, the words “either” and “or hybrid” are stricken.
3. Regarding Exhibit JTI000035:
 - a. In paragraph 9, the third sentence, beginning “For example, Dominion Resources is currently proposing” is stricken. Also, in the fifth sentence, the words “either” and “or parallel dry-wet cooling” are stricken.
 - b. In paragraph 20, the ninth sentence, beginning “This MW differential can be further reduced by utilizing” is stricken. Also, in the tenth sentence, the punctuation/words “ , dry”, “parallel”, and “-wet” are stricken (so that the concluding portion of the sentence reads “output of the wet or dry AP1000 alternatives.”
 - b. In paragraph 22, the phrase “as well as several types of parallel dry-wet cooling system designs” at the end of the third sentence is stricken.

Additionally, the sentence containing the stricken portion of Exhibit JTI000035 refers to an “Attachment E,” which Joint Intervenors appear to have filed as Exhibit JTI000038. To the extent Exhibit JTI000038 addresses parallel wet/dry cooling system designs, that discussion is outside the scope of this proceeding. The exhibit, however, is also referenced in a portion of Exhibit JTI000035 that we find to be within the scope of this proceeding. Accordingly, consistent with the parties’ joint response, see Clarification Request Response at 2, we strike only pages 39 through 43 of Exhibit JTI000038.

- C. SNC and Staff Motions to Exclude Portions of Prefiled Direct Testimony of Donald F. Hayes and Shawn P. Young and Exhibits JTI000041 and JTI000005 Regarding Contention EC 6.0

DISCUSSION: SNC Motion In Limine at 3-4; Staff Motion In Limine at 6-9; Clarification Request Response at 2.

RULING: SNC and the staff requested that the Board exclude portions of the prefiled direct testimony of Donald F. Hayes and Shawn P. Young and certain of Joint Intervenors exhibits as being outside the scope of contention EC 6.0 as admitted. First, asserting the contention concerns the impacts of dredging, they seek to exclude references to the impacts of

barge traffic or navigation. Second, they seek to exclude references to the impacts of dredging the barge slip and intake channel for proposed Vogtle Units 3 and 4. Finally, the staff asks the Board to recognize a joint stipulation concerning portions of Dr. Hayes's and Dr. Young's testimony, as well as exhibits JTI000005 and JTI000041,³ in which the parties agree that those portions refer only to dredging of the Savannah River federal navigation channel (FNC) and not to dredging of the barge slip or intake channel. Joint Intervenors do not contest the in limine motions for this contention.

As admitted, contention EC 6.0 concerns the cumulative impacts of dredging the Savannah River FNC to accommodate barge shipments for construction of proposed Vogtle Units 3 and 4. See Licensing Board Memorandum and Order (Ruling on Motion to Admit New Contention) (Oct. 24, 2008) at 16 (unpublished). The contention as admitted does not cover the impacts of barge traffic or navigation separate from the FNC dredging. Additionally, as the Board noted in its October 24, 2008 memorandum and order, any challenge to the SNC and staff analyses of the impacts of dredging the barge slip and intake channel is outside the scope of contention EC 6.0 as admitted. See id. at 9-10.

The Board therefore grants the SNC and staff in limine motions regarding contention EC 6.0 to the extent described below:

1. Regarding Answer 16 in Dr. Hayes's prefiled direct testimony, the balance of the answer after the first sentence is stricken.
2. Regarding Dr. Young's prefiled direct testimony:
 - a. The second paragraph of Answer 32 (beginning "Further, beyond the dredging") is stricken.

³ The staff in limine motion actually refers to paragraphs 7 and 10 of exhibit JTI000045. As the parties stated in their joint response to the Board's January 22 request for clarification regarding the in limine motions, the references to JTI000045 should have been to JTI000041. See Clarification Request Response at 2.

- b. In Questions 29 and 30, the phrase “of the federal navigation channel” should be inserted after “proposed dredging.”
 - c. In Question 32, the phrase “regarding the dredging impacts” should be modified to read “regarding the federal navigation channel dredging impacts.”
3. Regarding Exhibit JTI000041:
- a. All of paragraph 8, except for the first sentence, is stricken. Thus, as modified, paragraph 8 should read: The extent of dredging impacts set forth in paragraph 7 of this declaration depends partially on the size and duration of the dredging operations and the areas of benthic habitat that will be disturbed.
 - b. The first sentence of paragraph 9 is stricken.
 - c. References to dredging other than FNC dredging are stricken from paragraph 10. In the first sentence, the phrase “these dredging projects, particularly” is stricken. In the second sentence, the phrase “and the on-site impacts as SMALL” is stricken. In the last sentence, the phrase “or the SMALL ranking suggested for the on-site activities” is stricken.
4. Regarding Exhibit JTI000005, paragraph 11, the phrase “for construction of the New Units (including dredging required” is stricken, along with the “)” after the word “channel”, so that the beginning of the sentence as modified reads “Although the proposed dredging required to re-open the shipping channel will likely have”.

Additionally, in his response to Question 16 in his prefiled direct testimony, Dr. Hayes references an email, which Joint Intervenors have filed as Exhibit JTI000039, that is not referenced in either the remainder of Dr. Hayes’s testimony or any other testimony Joint Intervenors have filed. Similarly, in response to Question 32 of his prefiled direct testimony, Dr. Young references Exhibit JTI000030, which is not referenced in either the remainder of his testimony or any other testimony Joint Intervenors have filed. As a consequence, Exhibits JTI000039 and JTI000030 are stricken as well.

II. Administrative Matters

With the rulings above, certain revisions to and exclusions from Joint Intervenors prefiled direct testimony and exhibits are required.⁴ Accordingly, the Board requests that on or before Monday, February 2, 2009, Joint Intervenors submit revised versions of their prefiled direct testimony and any applicable exhibits that omit all of the text that we have stricken by the above rulings.⁵ The Board notes that this is not an opportunity to rephrase, add to, or otherwise alter previously submitted prefiled direct testimony, but should only be used to eliminate stricken testimony. The revised prefiled direct testimony should be designated as "Revised Prefiled Direct Testimony" in the heading. Revised exhibits should be re-designated with a letter R in place of the first zero in the exhibit number, such that, for example, a revised version of Joint Intervenors exhibit JTI000001 would be designated JTIR00001. Joint Intervenors also should provide Board law clerk Wen Bu (e-mail address: wen.bu@nrc.gov) with a revised electronic copy (preferably in Word format) of their prefiled exhibit list reflecting these changes (including the deletion of any prefiled exhibits that have been stricken).

The Board also requests that by that same date, Joint Intervenors re-file the testimony of Shawn P. Young and Barry W. Sulkin as separate documents associated with the separate contentions they address. Thus, Dr. Young's testimony should be filed as two documents, one

⁴ The parties should be aware that the original versions of the various items at issue from which information is to be stricken in accordance with this order remain in the record of this proceeding for the purpose of any subsequent appeal.

⁵ A "clean" version of the revised prefiled testimony should be provided, with the questions and answers renumbered in any instance in which a preceding question was deleted. For those exhibits (e.g., Exhibit JTI000035) for which particular words, phrases, or paragraphs have been stricken, the refiled "clean" version should be in "redline," showing the particular portions of the exhibit that have been stricken. For those exhibits (e.g., Exhibit JTI000038) for which whole pages have been stricken, the refiled "clean" version may be either a "redline" version or a version that has the stricken pages eliminated.

addressing contention EC 1.2 and the other addressing contention EC 6.0, while Mr. Sulkin's testimony should be filed as two documents, one addressing contention EC 1.2 and the other addressing contention EC 1.3.⁶ The re-filed testimony of Dr. Young, as well as the revised testimony of Mr. Powers (reflecting the above rulings on the SNC and staff in limine motions), should incorporate the revisions brought to the Board's attention in Joint Intervenors January 21, 2009 filing.⁷ See Joint Intervenors' Revised Exhibit List, Initial Position Statement and Prefiled Direct Testimony and Corrected Exhibit JT1000025 (Jan. 21, 2009) at 4-5.

Additionally, the Board requests that on or before Monday, February 2, 2009, the staff re-file its prefiled direct testimony as separate files without a cover page. The Board also prefers that any additional prefiled evidentiary exhibits that are submitted not include a cover page, but simply provide the prefiled exhibit number on the first page of the exhibit.

Finally, in accord with the Board's November 13, 2008 memorandum and order, the parties' prefiled rebuttal testimony should be submitted on or before Friday, February 6, 2009. The parties are reminded that the purpose of rebuttal testimony is to respond to the prefiled direct testimony propounded by the other parties to the proceeding, not for witnesses to put forth new testimony of their own or to reintroduce testimony or exhibits that the Board in this or any of its previous rulings has indicated should not be submitted. In limine motions, if any, regarding the prefiled rebuttal testimony shall be filed on or before Wednesday, February 11, 2009, with any responses filed on or before Tuesday, February 17, 2009. In such motions, the parties should be as specific as possible regarding the particular wording, sentences, or

⁶ To the degree necessary to provide appropriate context and make the prefiled testimony a self-contained submission, Joint Intervenors can repeat background and qualification information in both sets of prefiled testimony.

⁷ Any revisions to prefiled testimony require that the testimony, as corrected, be refiled in toto. See Licensing Board Memorandum and Order (Contested Evidentiary Hearing Administrative Matters) (Dec. 15, 2008) at 6 (unpublished).

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NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
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COMPANY)
)
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON IN LIMINE MOTIONS) have been served upon the following persons by Electronic Information Exchange.

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Docket No. 52-011-ESP
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Docket No. 52-011-ESP
LB MEMORANDUM AND ORDER (RULING ON IN LIMINE MOTIONS)

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[Original signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 26th day of January 2009