

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. 52-011-ESP
)	
Southern Nuclear Operating Company)	ASLBP No. 07-850-01-ESP-BD01
)	
(Early Site Permit for Vogtle ESP Site))	February 11, 2009

**SOUTHERN NUCLEAR OPERATING COMPANY'S
MOTION IN LIMINE**

Applicant, Southern Nuclear Operating Company (“SNC”), makes this motion in limine to exclude from evidence references in Joint Intervenors’ rebuttal testimony relative to Environmental Contention 1.2 (“EC 1.2”), Environmental Contention 1.3 (“EC 1.3”), and Environmental Contention 6.0 (“EC 6.0”), as described below. SNC has consulted with counsel for the Joint Intervenors and NRC Staff regarding the subject matter of this motion. Counsel for Joint Intervenors does not consent to this motion with two exceptions specified below. NRC Staff supports this motion as to the rebuttal testimony of Mr. Sulkin, filed with respect to EC 1.2 and Dr. Young filed with respect to EC 1.2. With respect to Mr. Powers’ rebuttal testimony on EC 1.3, the Staff generally agrees with this motion in that references to the hybrid wet/dry cooling system proposed for North Anna Unit 3 are beyond the scope of the contention; however, the Staff has specified in its own motion the portions of the testimony and exhibits that it moves to exclude. The Staff takes no position with regard to the rebuttal testimony of Dr. Hayes filed with respect to EC 6.0.

Environmental Contention 1.2

The rebuttal testimony of Mr. Barry W. Sulkin concerning EC 1.2 at questions 9, 11 and 14 discusses matters outside the scope of EC 1.2. These questions and responses again concern cumulative entrainment and impingement impacts based on upstream withdrawals. As this Board has previously ruled, the issue of current or future impacts of withdrawals by other water users is not within the scope of EC 1.2. *See* Memorandum and Order (Ruling on Dispositive Motion and Associated Motions to Strike Regarding [EC] 1.2), at 26 and n.17 (January 15, 2008); *see also* Memorandum and Order (Ruling on In Limine Motions), at 3 (January 26, 2009).

In addition, the rebuttal testimony of Dr. Shawn Young concerning EC 1.2 at question 14 is not “directed to the initial statements and testimony” as required by 10 C.F.R. § 2.1207(a)(2). Rather, question 14 concerns Dr. Young’s opinion on the effect of construction of dams on shortnose sturgeon. The Joint Intervenors have agreed to exclude this response.

Accordingly, the discussion in Mr. Sulkin’s rebuttal testimony concerning EC 1.2 referencing water withdrawals by other upstream users should be excluded from the record as follows:

A9: The first sentence of the last paragraph;

A11: The second paragraph and the last sentence of the final paragraph;

A14: The entire question and answer.

Likewise, the discussion of the effect of construction of dams on the decline of shortnose sturgeon in Dr. Young’s rebuttal testimony should be excluded as follows:

A14: The entire question and answer.

Environmental Contention 1.3

EC 1.3 states that the “analysis of the dry cooling alternative [in the ER] is inadequate to address the appropriateness of a dry cooling system given the presence of extremely sensitive biological resources.” Memorandum and Order, at app. A (March 12, 2007).

The rebuttal testimony of William Powers concerning EC 1.3 references the proposed hybrid wet-dry cooling system for Dominion’s North Anna 3 Nuclear Plant. Similar references have already been excluded from evidence pursuant to the Atomic Safety and Licensing Board’s Order of January 26, 2009. Memorandum and Order (Ruling on In Limine Motions), at 4-5. As this Board has already ruled, such evidence “is precluded as outside the scope of [Contention EC 1.3] as admitted.” Memorandum and Order (Ruling on Dispositive Motion and Associated Motions to Strike and to Supplement the Record Regarding Environmental Contention 1.3), at 19-20 (January 15, 2008).

In its Order of January 15, 2008, the Board stated:

In several instances, in addressing the viability of dry cooling as a counterpoint to wet cooling, Joint Intervenors made reference to the utility of a wet/dry hybrid system as a potential alternative. As a review of the Joint Intervenors original contention and its supporting bases makes clear, see Intervention Petition at 14-15 (only referencing ER discussion regarding dry cooling), their concern was with the adequacy of the ER discussion of dry cooling as a reasonable alternative, not the adequacy of the separate discussion in the SNC ER of a hybrid wet/dry cooling system as a alternative to a wet system. . . . Accordingly, assuming EC 1.3 goes to hearing, Joint Intervenors will be free to present arguments and evidence regarding the merits of dry cooling and the impact of a wet cooling system upon “extremely sensitive biological resources,” but *any attempt to introduce into this litigation the subject of viability of a hybrid wet/dry cooling system as a NEPA alternative is precluded as outside the scope of that contention as admitted.*

Id. (emphasis added).

The references to the wet-dry system in Mr. Powers' rebuttal testimony are likewise outside the scope of EC 1.3. The Joint Intervenors' attempt to justify their position on dry cooling by relying on hybrid wet-dry cooling systems ignores not only the Board's ruling quoted above but also the fact that in such a system a wet cooling system is to be built to work in conjunction with the dry cooling system in order to provide an alternative to the dry cooling system during the significant parts of the year when the dry cooling system will be inefficient or unavailable. *See* JTI000051, at 3-10 (exclusive use of the dry cooling system would only occur "under favorable meteorological conditions"). A dry cooling system alone would have no such alternative cooling system. Consequently, hybrid wet-dry systems, in particular the hybrid system proposed for North Anna, do not establish the viability of a dry system alone and, consequently, are outside the scope of the contention.

Accordingly, the following portions of Mr. Powers' testimony and exhibits cited therein should be excluded:

- A2: The entire answer after the first three sentences and the following portions of Exhibit JTI000050 (page 3-10, the section entitled "Unit 3 Normal Cooling" and page 3-12, the first paragraph of the section entitled "Heat Dissipation Systems");
- A4: The last sentence of the first paragraph and Exhibit JTI000049;
- A5: The reference to JTI000049;
- A6: The third, fourth, fifth and sixth sentences and Exhibit JTI000051;
- A7: The first and third sentences; and
- A8: The last sentence.

Joint Intervenors have agreed to exclude references in Exhibit JTI000049 specifically to "hybrid" cooling (i.e. slides 1, 2, 15, 18 and 22).

Environmental Contention 6.0

The rebuttal testimony of Dr. Donald Hayes concerning EC 6.0 contains discussion of matters Dr. Hayes himself identifies as outside the area of his expertise. Twice, in A9 and again in A10, Dr. Hayes plainly states: “I cannot opine on potential biological impacts,” and “I am not qualified to opine on biological impacts.” Notwithstanding this clear, self-imposed limitation on Dr. Hayes’ expertise, in questions and responses 12, 13 and 14, Dr. Hayes is asked to offer his opinion as to the sufficiency of the Staff’s analysis of “impacts.” Because the term “impacts” in those questions and in his testimony appears to be short for “impacts on the Savannah River ecosystem,” as described in Q11, it is outside his self-described scope of expertise and must be excluded. His testimony concerning water quality impacts, or regarding other non-biological impacts of disposal of dredge material, would remain. Also, Dr. Hayes’ testimony in the last paragraph of A16 concerns additional dredging of a docking area for a presumed “sediment barge” or for the “sediment scow.” This newly alleged aspect of dredging or, alternatively, this newly alleged impact from disposing of dredge spoil, was never raised in direct testimony; therefore, it does not constitute rebuttal in accordance with 10 C.F.R. § 2.1207(a)(2). Further, as this Board has previously ruled, challenges to the Staff’s analysis of impacts associated with the barge slip and intake canal are beyond the scope of EC 6.0. Memorandum and Order (Ruling on Motion to Admit New Contention), at 9-10 (October 24, 2008). Dr. Hayes’ new speculation about other dredging outside the Federal navigation channel is likewise beyond the scope of EC 6.0.

Accordingly, Dr. Hayes’ testimony concerning the Staff’s analysis of, or SNC witness testimony on, ecosystem impacts should be excluded from the record as follows:

A12: The first, third and fourth sentences;

A13: The first and last sentences;

A14: The third and fifth sentences;

A15: The first sentence.

Further, Dr. Hayes' discussion of dredging outside the Federal navigation channel should be excluded as follows:

A16: The last paragraph.

Respectfully submitted,

(Original signed by M. Stanford Blanton)

M. Stanford Blanton, Esq.
C. Grady Moore, III, Esq.
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, AL 35203-2015
Telephone: (205) 251-8100
Facsimile: (205) 226-8798

COUNSEL FOR SOUTHERN NUCLEAR
OPERATING COMPANY

Kathryn M. Sutton, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 739-5738
Facsimile: (202) 739-3001

CO-COUNSEL FOR SOUTHERN
NUCLEAR OPERATING COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that copies of SOUTHERN NUCLEAR OPERATING COMPANY'S MOTION IN LIMINE in the above captioned proceeding have been served by electronic mail as shown below, this 11th day of February, 2009, and/or by e-submittal.

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(Email: gpb@nrc.gov)

Administrative Judge
Dr. Nicholas G. Trikouros
Atomic Safety and Licensing Board
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: ngt@nrc.gov)

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

Office of the Secretary
ATTN: Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: HEARINGDOCKET@nrc.gov)

Emily Krauss
Law Clerk
Atomic Safety and Licensing Board
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
(E-mail: eik1@nrc.gov)

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

Ann P. Hodgdon, Esq.
Patrick A. Moulding, Esq.
Kathryn L. Winsberg, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
(E-mail: aph@nrc.gov, pam@nrc.gov,
klw@nrc.gov)

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, LLP
1726 M Street, NW
Suite 600
Washington, D.C. 20036
(E-mail: dcurran@harmoncurran.com)

Mary Maclean D. Asbill, Esq.
Lawrence D. Sanders, Esq.
Turner Environmental Law Clinic
Emory University School of Law
(E-mail: masbill@law.emory.edu
lsanders@law.emory.edu)

* And upon any other persons designated on the official service list compiled by the Nuclear Regulatory Commission in this proceeding.

(Original signed by M. Stanford Blanton)

M. Stanford Blanton
Counsel for Southern Nuclear Operating
Company