

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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NRC STAFF'S ANSWER TO "JOINT INTERVENORS' PETITION FOR REVIEW  
OF THE FIRST PARTIAL INITIAL DECISION (CONTESTED PROCEEDING)"

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July 27, 2009

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OF THE FIRST PARTIAL INITIAL DECISION (CONTESTED PROCEEDING)"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to the Joint Intervenor's<sup>1</sup> petition for review of the Atomic Safety and Licensing Board's ("Board") First Partial Initial Decision (Contested Proceeding), LBP-09-07, 69 NRC \_\_\_\_ (June 22, 2009) (slip op.), ("Decision").<sup>2</sup> For the reasons set forth herein, the Staff submits that the Petition should be denied on the grounds that the Joint Intervenor's have not met the criteria set forth in 10 C.F.R. § 2.341(b)(4)(i)-(v) for Commission review.

BACKGROUND

This proceeding concerns the application for an early site permit (ESP) filed on August 14, 2006, by Southern Nuclear Operating Company ("Southern," "SNC," or "Applicant"). The Applicant submitted an application pursuant to 10 C.F.R. Part 52, Subpart A, in which it

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<sup>1</sup> Joint Intervenor's 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.

<sup>2</sup> Joint Intervenor's' Petition for Review of The First Partial Initial Decision (Contested Proceeding) (July 15, 2009) ("Petition").

requested an ESP for a site within the existing Vogtle Electric Generating Plant ("VEGP") site near Waynesboro, Georgia ("Application"). On December 11, 2006, five organizations timely filed a joint petition for leave to intervene, which contained several contentions that they sought to litigate in this proceeding challenging the Environmental Report ("ER") filed as part of the Application. These organizations are 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 ("Joint Intervenors").<sup>3</sup>

On March 12, 2007, the Licensing Board issued its "Memorandum and Order (Ruling on Standing and Contentions)," in which the Board determined that the petitioners had demonstrated their standing to intervene in this matter, and that two of their contentions satisfied the Commission's requirements for admission as contested issues. *See Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237 (2007).* The Board admitted two contentions, EC (environmental contention) 1.2 and EC 1.3.<sup>4</sup> EC 1.2, as admitted, was restated by the Board as follows:

The ER fails to identify and consider direct, indirect, and cumulative impingement/entrainment and chemical and thermal effluent discharge impacts of the proposed cooling system intake and discharge structures on aquatic resources.

*Vogtle ESP*, LBP-07-3, 65 NRC at 280.

In September 2007, the Staff published NUREG-1872, the "Draft Environmental Impact Statement for an Early Site Permit (ESP) at the Vogtle Electric Generating Plant Site" ("DEIS"). On October 17, 2007, the Applicant filed a motion seeking summary disposition of Joint

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<sup>3</sup> "Petition for Intervention submitted by Center for a Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy ("SACE"), Atlanta Women's Action for New Direction ("WAND"), and Blue Ridge Environmental Defense Fund ("BREDL") (December 11, 2006).

<sup>4</sup> EC 1.3 was one of the three contentions ultimately addressed at the evidentiary hearing in this proceeding and on which the Board ruled in the Decision; however, the Petition does not challenge the Decision with respect to EC 1.3.

Intervenors' Contention EC 1.2. The Staff filed a response in support of that motion, while the Joint Intervenors' answer opposed the motion. Subsequently, both the Applicant and the Staff moved to strike portions of the Joint Intervenors' answer, asserting that it improperly sought to expand the scope of EC 1.2 by referring to cumulative impacts of water withdrawals by facilities on the Savannah River other than the existing and proposed Vogtle facilities.<sup>5</sup> The Joint Intervenors opposed the motions.<sup>6</sup>

On January 15, 2008, the Licensing Board ruled on the motion for summary disposition. *See Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site)*, LBP-08-2, 67 NRC 54 (2008). While it found that summary disposition was not warranted, the Board determined that part of the contention was moot, and it also addressed the parties' filing regarding the scope of the contention with respect to cumulative impacts. The Board held that with regard to chemical discharges, EC 1.2 was a contention of omission, and that this portion of the contention was now moot. *Id.* at 65, 82-83. Consequently, the Board revised Contention 1.2 to read as follows:

The ER fails to identify and adequately consider direct, indirect and cumulative impingement/entrainment and thermal effluent discharge impacts of the proposed cooling system intake and discharge structures on aquatic resources.

*Id.* at 83-84. Moreover, after consideration of the parties' filings regarding the motions to strike, the Board also confirmed in its ruling that based on the Joint Intervenors' description of EC 1.2 in the initial intervention petition, the contention's reference to "cumulative" impacts of the intake

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<sup>5</sup> Southern Nuclear Operating Company's Motion to Strike Portions of, or In the Alternative For Leave to Reply to, Joint Intervenors' Answer to Motion for Summary Disposition of EC 1.2 (Nov. 23, 2007); NRC Staff's Motion to Strike Portions of Joint Intervenors' Answer Opposing Summary Disposition of EC 1.2 (Nov. 21, 2007).

<sup>6</sup> Intervenors' Answer in Response to SNC and NRC Staff Motions to Strike Portions of Intervenors' Answer to Motion for Summary Disposition of EC 1.2 (Dec. 6, 2007).

and discharge structure was limited to the impacts of the existing and proposed Vogtle units. *Id.* at 77-78.

On September 22, 2008, following the Staff's issuance of NUREG-1872, the "Final Environment Impact Statement for an Early Site Permit (ESP) at the Vogtle Electric Generating Plant Site" ("FEIS"), the Joint Intervenors filed a motion to admit a new contention. On October 24, 2008, the Board admitted the new contention as environmental contention 6 ("EC 6.0" or "EC 6"). EC 6.0, as admitted, was restated by the Board as follows:

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

*See Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), ML082980417 (Oct. 24, 2008) (unpublished order) (slip op. at Appendix A) ("New Contention Ruling").

In preparation for the evidentiary hearing, the parties submitted initial position statements and pre-filed direct testimony and exhibits on January 9, 2009, followed by rebuttal position statements and pre-filed rebuttal testimony and exhibits on February 6, 2009. In response to the Joint Intervenors' filings concerning contention EC 1.2, both Southern and the Staff filed *in limine* motions to exclude portions of the pre-filed direct and rebuttal testimony and associated exhibits as outside the scope of the contention.<sup>7</sup> The Board granted these motions

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<sup>7</sup> Southern Nuclear Operating Company's Motion In Limine to Strike Testimony and Exhibits Filed by Joint Intervenors (Jan. 14, 2009); NRC Staff Motion *In Limine* to Exclude Portions of Testimony and Exhibits Filed by Joint Intervenors (Jan. 14, 2009); Southern Nuclear Operating Company's Motion In Limine (Feb. 11, 2009); NRC Staff Motion *In Limine* to Exclude Portions of Rebuttal Testimony and Exhibits Filed by Joint Intervenors (Feb. 11, 2009).



in part, excluding specified portions that concerned cumulative impacts of water withdrawals by users other than the existing and proposed Vogtle units.<sup>8</sup>

An evidentiary hearing with respect to the three admitted contentions was held in Augusta, Georgia, on March 16-19, 2009, in accordance with a notice of hearing published in the *Federal Register*. 72 Fed. Reg. 15,913 (Apr. 3, 2007). On June 22, 2009, the Board issued its first partial initial decision,<sup>9</sup> in which it resolved all outstanding contested issues. Decision at 158-159. After conducting a hearing on the merits and having considered all the evidence in the record, the Board found that the Staff and Southern had carried their respective burdens of proof to demonstrate the adequacy of the ER, DEIS, and FEIS in accordance with 10 C.F.R. Part 51. *Id.* at 2.

## DISCUSSION

### I. The Petition Does Not Warrant Commission Review of the Board's Decision.

The Board's decision in LBP-09-07 disposed of all three of Joint Intervenors' admitted contentions. See *id.* at 156-159. Therefore, a petition for Commission review is authorized by 10 C.F.R. § 2.341(b).

Section 2.341(b)(1) provides for discretionary Commission review of "a full or partial initial decision by a presiding officer." When a petition for review is authorized under § 2.341(b)(1), the Commission looks to the following five considerations, detailed in § 2.341(b)(4), in deciding whether to grant review:

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<sup>8</sup> See *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), ML090260734 (Jan. 26, 2009) (unpublished order) (slip op. at 2-3); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), ML090540779 (Feb. 23, 2009) (unpublished order) (slip op. at 2-3).

<sup>9</sup> The Board's decision in LBP-09-07 addressed only the "contested" issues in the proceeding. The Board has stated that it anticipates issuing its separate partial initial decision on "uncontested" issues by August 17, 2009.

- (i) a clearly erroneous finding of material fact;
- (ii) a necessary legal conclusion is without precedent or is a departure from or contrary to established law;
- (iii) the appeal raises a substantial and important question of law or policy;
- (iv) the proceeding involved a prejudicial procedural error; or
- (v) any other consideration the Commission determines to be in the public interest.

The burden is on Joint Intervenors, as petitioners, to clearly identify the error in the Board's decision and thus demonstrate that Commission review is warranted. See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297-98 (1994). To warrant review with respect to questions of law, a petition must show that a Board's legal rulings are "a departure from or contrary to established law." *Tennessee Valley Auth.* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 190 (2004). With respect to Board findings of fact, the Commission's standard regarding "clear error" is quite high. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003) ("*PFS*"). The Commission will not overturn a board's factual findings simply because it might have reached a different result or because the record could support a view sharply different from that of the Board. See *Watts Bar*, CLI-04-24, 60 NRC at 189; *PFS*, CLI-03-8, 58 NRC at 26 (quoting *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995)). Rather, there is clear error only if the Board's findings are "not even plausible in light of the record viewed in its entirety." *PFS*, CLI-03-8, 58 NRC at 26 (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985)). Thus, the Commission will reject or modify a licensing board's findings only if, after accounting for appropriate deference to the "primary fact finder," the Commission is "convinced that the record *compels* a different result." *General Public Utilities Nuclear* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 473 (1987) ("*TMI*") (emphasis added). As explained below, Joint Intervenors have not met their burden to demonstrate that Commission review is warranted.

A. The Board Did Not Err in Its Ruling on Contention EC 1.2.

With respect to EC 1.2, the Joint Intervenors assert that the Board's ruling meets three of the above criteria in 10 C.F.R. 2.341(b)(4) for Commission review.<sup>10</sup> They allege that (1) the Board erred as a matter of law in excluding evidence and testimony regarding cumulative impacts of withdrawals other than those relating to the existing and proposed Vogtle facilities, (2) that the Board unfairly denied them the opportunity to place evidence in the record on that topic, and (3) that "the scope of a cumulative impacts analysis" is a question that will be raised in future new reactor proceedings. Petition at 7 (citing 10 C.F.R. § 2.341(b)(4)(ii), (v), and (iii), respectively). The Staff discusses these arguments *seriatim*.

1. The Board Properly Defined the Scope of EC 1.2 by Reference to the Bases Stated in the Petition to Intervene.

As admitted by the Licensing Board, Contention EC 1.2 concerns "direct, indirect and cumulative impingement/entrainment and thermal effluent discharge impacts of the proposed cooling system intake and discharge structures on aquatic resources." *Vogtle ESP*, LBP-08-2, 67 NRC at 83-84. The Joint Intervenors claim that the Board improperly excluded portions of their testimony and evidence regarding cumulative impacts of water withdrawals on the Savannah River other than those relating to the existing and proposed Vogtle facilities. Petition at 8-9. They assert that "[b]y definition, a cumulative impacts analysis includes all past, present and reasonably foreseeable future actions" and that the impacts of other withdrawals "must be given adequate consideration in a cumulative impacts analysis." Petition at 9.

However, the Joint Intervenors have confused the question of what is generally within the scope of "a cumulative impacts analysis" with the narrower question of which cumulative impacts were properly raised and admitted within the scope of their *contention*. For the reasons

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<sup>10</sup> 10 C.F.R. § 2.341(b)(4)(ii), (iii), and (v). The Petition does not assert that any of the Board's factual findings were clearly erroneous, nor that prejudicial procedural error occurred. 10 C.F.R. § 2.341(b)(4)(i), (iv).

described in its ruling on the Applicant's summary disposition motion, the Board properly construed the scope of EC 1.2 based on its determination of what the Joint Intervenors pled in their petition to intervene. LBP-08-2, 67 NRC at 77-78.

As the Commission has explained, the scope of an admitted contention is defined by its admitted bases. *Crow Butte Resources, Inc.* (North Trend Expansion Area), CLI-09-12, 69 NRC \_\_\_ (June 25, 2009) (slip op. at 23-24); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002). In its ruling on the Applicant's summary disposition motion, the Board reviewed the intervention petition and supporting bases with respect to EC 1.2 and found that the Joint Intervenors "failed to provide the other parties with notice that the issue of the impacts of cumulative withdrawals was intended to include anything other than the existing and proposed Vogtle units." LBP-08-02, 67 NRC at 78.<sup>11</sup> Recognizing that a purpose of the bases of a contention is "to put the other parties on notice as to what issues they will have to defend against or oppose," the Board found the impacts of such other withdrawals to be outside the scope of the contention. *Id.* (quoting *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988)). Accordingly, the Board did not misconstrue the National Environmental Policy Act of 1969 ("NEPA") definition of cumulative impacts. Rather, it properly interpreted that term *within the context of the contention* as limited to the facilities and associated impacts the Joint Intervenors had actually identified in their petition. The Board's continued awareness and

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<sup>11</sup> In their Petition, the Joint Intervenors cite a sentence from their intervention petition asserting that "the ER does not evaluate cumulative impacts from the new effluent discharge combined with the existing discharge *and other sources of pollution in the area*." Petition at 8, 12 (emphasis added in the Petition). However, in its ruling on summary disposition motions, the Board specifically examined this sentence and stated that "[w]hat these other sources might be is never explained, and the sentences that follow only discuss 'the existing discharge' and 'the existing thermal plume.'" [Citing the intervention petition at 13.] This is certainly not enough to give SNC and the Staff notice that Joint Intervenors meant anything other than the existing Vogtle units when discussing cumulative impacts and water withdrawals." LBP-08-02, 67 NRC at 78 n.17. The Board also noted that the Joint Intervenors had chosen not to amend the contention. *Id.* at 77-78.

understanding of this distinction is apparent in the Decision. See Decision at 86 n.32 (“Not every impact to which Joint Intervenors might seek to attach that label [of cumulative impact] is necessarily within the contention’s scope”).

When reviewing Board contention admissibility decisions, the Commission gives “substantial deference” to the Board, and will only reverse due to “error of law or abuse of discretion.” *AmerGen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006); see also *U.S. Dept. of Energy* (High Level Waste Repository), CLI-09-14, 69 NRC \_\_ (June 30, 2009) (slip op. at 4). Here, in its decision to admit Contention EC 1.2 and in its subsequent rulings regarding the contention’s scope, the Board properly determined that the aspects of cumulative impacts in dispute in Contention EC 1.2 were those associated with the existing and proposed Vogtle facilities. Thus there was no error in the Board’s determination to limit testimony and evidence to those matters. As such, the Petition’s assertion that the Board misapplied the NEPA definition of cumulative impacts (see Petition at 9-12) is incorrect, and Joint Intervenors’ arguments concerning what consideration of other facilities is required in the EIS to satisfy NEPA’s “hard look” (see *id.*) are simply beyond the scope of the contention.

2. The Board’s Consideration of Evidence Was Fair and Consistent.

In conjunction with their claim that the Board erred in interpreting the scope of the contention, Joint Intervenors assert that they were not allowed to respond to arguments made by the Applicant and Staff and also that statements by the other parties with respect to “other withdrawals” opened the door for Joint Intervenors’ response. Petition at 12-13, 14. The Joint Intervenors also allege that the Decision includes findings on which the Joint Intervenors were denied the opportunity to introduce evidence. *Id.* at 13. However, because the Petition inaccurately characterizes the scope of the contention, it fails to demonstrate error or unfairness in the Board’s evidentiary rulings and findings.

The Board interpreted the scope of the contention consistently throughout the proceeding. In its rulings, while holding that the contention did not include consideration of cumulative impacts of water withdrawals from other water users, the Board found that the contention did encompass testimony by the parties (including the Joint Intervenors) regarding which river flow levels at the ESP site should be evaluated in the impact analysis, as well as regarding the current “baseline” from which cumulative impacts to aquatic resources from the proposed and existing Vogtle units were assessed.<sup>12</sup> The Board recognized that testimony on those issues could properly be directed to the adequacy of the Staff’s methodology for calculating the cumulative impacts of water withdrawals from the existing and proposed Vogtle units, as well as to the relevance of the Staff’s consideration of sampling data from studies of aquatic biota conducted when the reactors at the Savannah River Site (SRS) facility across the river from the Vogtle site were in operation.<sup>13</sup> Thus, although the Joint Intervenors cite examples of statements that they claim “opened the door” to consideration of cumulative impacts from other ongoing water withdrawals, those statements were directed to the particular topics described above, consistent with the Board’s longstanding interpretation of the contention.<sup>14</sup>

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<sup>12</sup> See, e.g., LBP-07-3, 65 NRC at 259 (“In admitting this contention [EC 1.2], we note that litigation regarding its merits may involve the question of the adequacy of the information provided by SNC relative to the portion of the Savannah River that encompasses the project area associated with the intake/discharge structures for both the existing and proposed Vogtle facilities.”); LBP-08-2, 67 NRC at 69, 71-73, 76-78; see also Decision at 28-29.

<sup>13</sup> See *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), ML090260734 (Jan. 26, 2009) (unpublished order) (slip op. at 2-3) (“We conclude [that] Joint Intervenors concerns about methodology [used for calculating cumulative impacts from Vogtle Units 1-4] are clear without the portions [of testimony] at issue...that are outside the scope of [the] contention[.]”); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), ML090540779 (Feb. 23, 2009) (unpublished order) (slip op. at 3) (The portions excluded “do not affect Joint Intervenors argument concerning current aquatic baselines versus aquatic baselines at the time of the SRS studies.”).

<sup>14</sup> For example, the portions of Staff testimony and findings cited in the Petition related narrowly to the comparative consideration of data from past SRS studies as an indicator of impacts to be expected (continued. . .)

Accordingly, the portions of the Decision that the Petition criticizes were merely an acknowledgement that the evidentiary record concerning the river flows considered and the existing ecological health of the river in the site vicinity – matters on which all parties were permitted to present evidence – supported the Board’s findings concerning those cumulative impacts that were within the scope of the contention. Decision at 85-90.<sup>15</sup> The Board properly determined that the analysis of those cumulative impacts in the FEIS was reasonable and met NEPA requirements. In its *in limine* rulings, its consideration of testimony and evidence, and its findings in the Decision, the Board was consistent and fair in its development of the record concerning Contention EC 1.2. In view of the Board’s authority to regulate hearing procedure, see, e.g., 10 C.F.R. § 2.233(b), Board decisions on evidentiary issues are usually reviewed for abuse of discretion. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2007). For the reasons above, the Petition has not demonstrated any abuse of the Board’s discretion.

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(. . .continued)

from the existing and proposed Vogtle facilities. See Petition at 8 n.40. Moreover, in a portion of the Decision specifically criticized by the Joint Intervenors in the Petition, the Board considered statements in the testimony of the Joint Intervenors’ witness regarding the SRS studies. See Petition at 13 (citing Decision at 88 n.33, describing testimony of Joint Intervenor witness Dr. Young).

<sup>15</sup> Indeed, consistent with the Board’s previous rulings on *in limine* motions, the Board recognized the Joint Intervenors’ attempts in proposed findings to raise the issue of other water withdrawals as “essentially a reframing of Joint Intervenors arguments regarding the ‘low baseline’ and ‘special species’ status of certain aquatic creatures,” arguments that the Board addressed in detail elsewhere in its decision. Decision at 86, see also Decision at 48-51, 62-67. Moreover, the Board found that the record supported the Staff’s finding that there would be no detectable impact on fish populations attributable to operation of the proposed Units 3 and 4. *Id.* at 63; see also, e.g., *id.* at 50 n.21 (“Nor...can we conclude that the [proposed] facility would contribute a significant added source of mortality so as to make such an analysis [of past cause(s) of the population decline of a particular species] potentially relevant.”); *id.* at 88 (“...the record does not support [Joint Intervenors’] assertion that some kind of special species/low baseline designation is appropriate here relative to any of the aquatic species at issue, including those considered rare.”). Thus, even if the Board erred in limiting the scope of the contention, the Petition does not demonstrate that effecting a broader interpretation of “cumulative impacts” would have been material to the decision. *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 466 n.25 (1982) (“We have no obligation to rule on every discrete point adjudicated below, so long as we are able to render a decision on other grounds that effectively dispose of the appeal.”).

3. The Board's Proper Interpretation of Cumulative Impacts With Respect to Contention EC 1.2 Does Not Have Generic Implications.

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The Joint Intervenors also assert that there is an "important question" warranting Commission review because the Board's interpretation of "cumulative impacts" will have implications in other future proceedings that concern the adequacy of a cumulative impacts analysis. Petition at 13-14 (citing 10 C.F.R. § 2.341(b)(4)(iii)). As explained above, the scope of cumulative impacts at issue for the purpose of this contested proceeding was determined by the Board's examination of the intervention petition. The Board's appropriate limitation on the cumulative impacts to be considered in EC 1.2 did not deviate from the proper understanding of the range of "cumulative impacts" that are to be discussed in the FEIS pursuant to NEPA. Accordingly, the Board's interpretation of the scope of a proceeding-specific contention does not have generic implications for other new reactor licensing proceedings. Thus, contrary to the Joint Intervenors' assertion, this criterion does not provide a basis for Commission review of the Board's decision.

Accordingly, for the reasons stated above, the Petition has failed to demonstrate that Commission review of the Decision is warranted with respect to Contention EC 1.2.

B. The Board Did Not Err in Its Ruling on Contention EC 6.0.

With respect to EC 6.0, the Joint Intervenors assert that the Board's ruling meets two of the above criteria in 10 C.F.R. § 2.341(b)(4).<sup>16</sup> Petition at 15. However, as explained below, neither claim merits Commission review.

As admitted, EC 6.0 reflects the Joint Intervenors' concerns that the FEIS fails to provide adequate support for the Staff's findings regarding the impacts of potential dredging of the

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<sup>16</sup> 10 C.F.R. § 2.341(b)(4)(ii), (iii). The Petition does not assert that any of the Board's factual findings were clearly erroneous, that prejudicial procedural error occurred, or that other considerations in the public interest warrant review. 10 C.F.R. § 2.341(b)(4)(i), (iv), (v).



Savannah River Federal navigation channel (FNC). In the Petition, the Joint Intervenor allege that the Commission has deferred its NEPA obligations to another agency (here the U.S. Army Corps of Engineers (“USACE” or “Corps”)) for future analysis of dredging impacts and that the FEIS was required to address “direct, indirect, and cumulative” impacts of potential dredging of the FNC. *Id.* at 14-15, 17-18. However, these claims mischaracterize the basis for the Board’s factual and legal findings, in particular by ignoring the Board’s finding that “the staff’s conclusion that the cumulative impacts as a result of dredging the federal navigation channel could be MODERATE is a reasonable, adequately supported, conservative conclusion[.]” Decision at 139. As explained below, while the Joint Intervenor allege legal errors, the Petition fails to support these claims, much less show how the evidentiary record as reflected in the Board’s factual findings “compels a different result.” *TMI*, ALAB-881, 26 NRC at 473.

1. The Board Did Not Conclude That Future NEPA Analysis by the USACE Was Sufficient to Satisfy the NRC’s NEPA Responsibilities.

In their Petition, the Joint Intervenor allege that the Board “concluded that studies which may be conducted by the Corps sometime in the future were enough to satisfy the staff’s current obligation to assess environmental impacts of dredging the federal navigation channel under NEPA.” Petition at 18. The Petitioners also claim that the Board improperly invoked the “rule of reason” which tempers the NEPA “hard look” requirement. *Id.* at 16. These allegations, however, reflect a misunderstanding of the Board’s factual and legal findings as stated in the Decision.<sup>17</sup>

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<sup>17</sup> The Joint Intervenor cite *Wyo. Outdoor Council v. U.S. Army Corps*, 351 F.Supp.2d 1232 (D. Wyo 2005) in support of their suggestion that, contrary to legal precedent, the Staff has been allowed to “circumvent NEPA responsibility.” Petition at 21. However, the Joint Intervenor’s position is not supported by the Board’s Decision, and the facts of *Wyo. Outdoor Council* are distinguishable from the case *sub judice*. In *Wyo. Outdoor Council*, a USACE EIS addressed cumulative impacts to non-wetland resources by stating that their effects would be evaluated “as needed prior to issuing authorization.” *Wyo. Outdoor Council*, 351 F.Supp.2d at 1242. The Court found that the USACE had improperly limited the scope of its cumulative impacts analysis to the wetlands which were subject to its permitting authority, ignoring impacts to other non-wetland resources. The Court held that the USACE must “assess (continued. . .)

As the Board found, the Staff satisfied the requirements of NEPA by including in the FEIS an assessment of the cumulative impacts from potential dredging of the FNC; after considering that assessment, the Board found that the Staff's conclusion as to the possible impacts was "reasonable, adequately supported, [and] conservative...given the limited information available regarding the nature and extent of any dredging." Decision at 139. Although the Joint Intervenors allege that "the staff has performed no meaningful NEPA analysis to date" (Petition at 18), this is contrary to the evidentiary record established in this matter, and is contrary to the findings of the Board. Specifically, the Board found that, for the purposes of analyzing the impacts of potential dredging of the FNC, the Staff considered the scope of potential dredging, the anticipated impacts to freshwater mussels and fish from dredging and resuspension of contaminated sediments, and the potential effects from management and disposal of dredged material. Decision at 139-148. The Board concluded that "the evidentiary record amply supports the staff's conclusion that the cumulative impacts associated with dredging could be MODERATE." *Id.* at 139.

The Joint Intervenors argue that the EIS is inadequate because when no assessment of aquatic impacts from another permitting agency is available – here the USACE – the NRC must establish its own impact determination. Petition at 19-20. As the Board's finding quoted above makes clear, the Staff did make its own impact determination, and the Board found that the determination was reasonable, conservative, and supported by the record. The Board analyzed

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(. . .continued)

cumulative impacts" to these resources "to such a degree as to assure this Court that its issuance of a FONSI [Finding of No Significant Impact] was not arbitrary and capricious." *Id.* at 1243. By contrast, here the NRC staff *did* assess the potential impacts on aquatic resources of the potential dredging of the Savannah River FNC, reaching a conclusion that the Board agreed was "reasonable, adequately supported, [and] conservative[.]" Decision at 139.

all of the factual arguments presented by the Joint Intervenors, and did not find that any of these arguments disturbed the Staff's conclusions. Decision at 139-150.<sup>18</sup>

In order for a petition for review to be granted, the Joint Intervenors must do more than merely assert that a Board decision was wrong; instead, the Joint Intervenors must directly confront the Board's reasoning. See *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 533 (1986) (quoting *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 84 n.128 (1985) ("[I]t is not enough simply to declare flatly that a particular Board ruling was in error. Rather, it is incumbent upon the appellant to confront directly the reasons assigned for the challenged ruling and to identify with particularity the infirmities purportedly inherent in those reasons.")). In the Petition, the Joint Intervenors mistakenly assert that the Staff failed to reach its own impact conclusion and that the Board thus found "deferral" of NEPA analysis to be sufficient; the Petition does not contradict the Board's detailed factual findings with respect to the Staff's conclusion.<sup>19</sup> As shown in the record of this proceeding, the Staff did reach a conclusion on all potential impacts of dredging of the FNC, and the Board made explicit factual findings that the Staff's assessment

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<sup>18</sup> The Petition also appears to criticize the Board's finding that the Staff's analysis was adequate despite "limited information" about potential dredging for which no plan was available. Petition at 22. As the Board explained, however, Council on Environmental Quality ("CEQ") regulations state that even where impacts need to be analyzed, if the agency lacks complete information for an analysis, the agency should clearly state that the information is lacking. Decision at 153-54 & n.52 (citing 40 C.F.R. § 1502.22). "NEPA gives agencies broad discretion to keep their inquiries within appropriate and manageable boundaries." *Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 103 (1998). The Board found that the record clearly explained what information relating to the potential dredging was unavailable and why. Decision at 153-54 & n.52. Moreover, the Board noted that the cost of obtaining additional information to further inform the Staff's impacts analysis "likely would be exorbitant" and is not required for conformance with 40 C.F.R. § 1502.22. *Id.* at 154-55 n.52.

<sup>19</sup> The Board specifically addressed its reasons for finding that the Joint Intervenors had not provided sufficient information to rebut evidence submitted by the Staff and Southern regarding impacts to freshwater mussels (Decision at 141-43) and fish (*id.* at 143-44) or the impacts from snag removal (*id.* at 144-46), sediment contamination (*id.* at 146-47) and disposal of dredged material (*id.* at 147-48). Thus, the Joint Intervenors failed to provide evidence to support a finding that, contrary to the Staff's conclusion, potential impacts would be greater than MODERATE.

was reasonable and supported by the record.<sup>20</sup> The Board appropriately concluded that this assessment satisfied the NEPA “hard look” requirement. Decision at 153, 155, 157.

Accordingly, the Petition fails to confront the reasoned basis for the Decision and thus does not warrant Commission review.

2. Joint Intervenors Have Not Demonstrated How any Alleged Error was Material to the Board’s Decision.

In their Petition, the Joint Intervenors criticize the Board’s ruling on EC 6.0 because first, they claim the Board did not find that impacts from dredging had to be analyzed as a direct impact, and second, they claim the Board erred in concluding that the Commission’s NEPA obligations can be fulfilled by deference to a future Corps analysis. Petition at 15. Further, the Joint Intervenors allege that the Board erred in concluding that “only a cumulative impacts analysis was necessary,” in violation of Council on Environmental Quality (CEQ) regulations.<sup>21</sup> *Id.* at 17. As noted above, the Petition asserts in general terms that “the staff has performed no meaningful NEPA analysis to date.” *Id.* at 18. But, as the Board found, the evidentiary record reflects appropriate consideration of all identifiable potential impacts of any future dredging project, such as the amount of material required to be dredged, possible relocation of mussel species, impacts to fish, sediment contamination, and disposal of dredged material. Decision at 139-148. The Joint Intervenors have not shown how or why the Staff’s analysis and conclusion

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<sup>20</sup> The Joint Intervenors also appear to assert that the Board relied on the “testimony of dredging experts” in deciding to “defer to future Corps analysis[.]” Petition at 23 & n.113. The Board considered the testimony of numerous witnesses – including, as reflected in the findings cited in the Petition, those from the Joint Intervenors (Dr. Hayes and Dr. Young), the USACE, the Staff, and Southern. As described above, however, the Board then found that the Staff’s FEIS assessment and conclusion regarding potential dredging impacts was reasonable and adequately supported. Contrary to the Petition’s claim, the Board did not allow the Staff to “delegate its NEPA obligations” (*id.* at 23); the Board agreed that the testimony from the expert witnesses only served to support the Staff’s conclusion in the FEIS.

<sup>21</sup> While the CEQ Regulations are not binding on the Commission, the Commission gives the regulations substantial deference. *Dominion Nuclear North Anna* (Early Site Permit for North Anna ESP site), CLI-07-27, 66 NRC 215, 222 n. 21 (2007).

regarding possible impacts from dredging could change if characterized as “direct” as opposed to “cumulative” impacts, or if future USACE NEPA review and possible mitigation measures were not discussed.<sup>22</sup>

After reviewing the evidence and testimony presented by the Joint Intervenors, the Staff, and Southern regarding the impacts of potential dredging of the Savannah River FNC, the Licensing Board found that the Staff addressed all known potential dredging impacts in the FEIS and thereby fulfilled its obligations under NEPA. As the Board noted, absent an actual plan to dredge, the Staff was limited to a discussion of potential impacts and possible mitigation measures and the conservative assumption that the channel would be dredged to a depth of nine feet and a width of ninety feet. Decision at 139.<sup>23</sup> The Board found that none of the Joint Intervenors’ factual assertions was sufficient to disturb the Staff’s MODERATE finding; therefore, it is unclear how the Joint Intervenors’ argument that the impacts should be characterized as direct, indirect, and cumulative compels any different Staff finding. The Joint Intervenors have not shown, either in the record or in the Petition, that there are potential

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<sup>22</sup> Furthermore, the Joint Intervenors have not disputed the Board’s finding that no plan or proposal for dredging of the FNC was before the USACE. Decision at 139. Nor have they challenged the Board’s finding that heavy components could be transported to the site by means other than use of barges via the FNC. Decision at 128-129.

<sup>23</sup> The Joint Intervenors also cite *Ohio Valley Envtl. Coalition v. Hurst*, 604 F. Supp. 2d 860 (S.D. W.Va. 2009) to suggest that the Staff’s impacts conclusion relied on the “presumed success of mitigation by other agencies,” contrary to the requirements of NEPA. Petition at 21. However, the facts of *Ohio Valley* are distinguishable from the case *sub judice*. In *Ohio Valley*, the Army Corps of Engineers, in issuing a nationwide permit for the discharge of excess material from coal mining into valleys and streams, issued an Environmental Assessment (EA) containing what the Court termed a “conclusory” impacts determination. *Ohio Valley*, 604 F.Supp.2d at 887. The Court found that the Corps’ cumulative impacts analysis was limited to an implicit concession “that the permit would cause significant cumulative environmental impacts” and that the Corps failed to discuss the nature of those impacts, instead relying “exclusively on the presumed success of compensatory mitigation[.]” *Id.* Citing *Nat’l Parks & Conservation Ass’n v. Babbitt* (241 F.3d 722, 734 (9<sup>th</sup> Cir. 2001), the Court noted that “the ‘mere listing’ of mitigation measures and processes, without any analysis, cannot support a cumulative impacts determination.” In the instant case, as discussed above and documented in the Decision, the Staff did discuss the potential impacts of dredging and concluded that the impacts could be MODERATE. Decision at 139-150. While the Staff explained that the USACE procedures included possible mitigation measures, the Staff presented analysis to support its own cumulative impacts conclusion, rather than a “mere listing” of such measures. *Id.*

impacts that could have been analyzed that were omitted from the FEIS. It is not enough for the Joint Intervenors to say that the Board's ruling was incorrect; they must show how this incorrect ruling compels a different result. *Shearon Harris*, ALAB-837, 23 NRC at 533. Consequently, the Joint Intervenors have failed to demonstrate error in the Board's Decision.

3. Joint Intervenors Have Not Identified Any Question That Has Significant Generic Implications.

Finally, the Joint Intervenors allege that the question of the "staff's ability to delegate its current NEPA obligations to the Corps" will "likely arise in numerous licensing and permitting proceedings going forward" (Petition at 23), and thereby request Commission review under 10 C.F.R. § 2.341(b)(4)(iii). However, as explained in this response (see discussion at 13-18, *supra*), the Board determined that the Staff's reasonable consideration of a range of potential impacts met its obligation under NEPA; that finding contradicts the Petition's claim that the Staff deferred or "delegated" its obligation to perform an analysis of potential impacts as required by NEPA. In any event, the Petition fails to explain why such a question might arise in other proceedings or have other generic implications. Such an unsupported assertion cannot form the basis for a determination that Commission review is warranted.

Accordingly, for the reasons stated above, the Petition has failed to demonstrate that Commission review of the Decision is warranted with respect to Contention EC 6.0.

CONCLUSION

For the reasons set forth above, the Commission should deny Joint Intervenor's Petition for review of LBP-09-07.

Respectfully submitted,

**/signed (electronically) by/**

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Dated at Rockville, Maryland  
This 27<sup>th</sup> day of July, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO 'JOINT INTERVENORS' PETITION FOR REVIEW OF THE FIRST PARTIAL INITIAL DECISION (CONTESTED PROCEEDING)" in the above-captioned proceeding have been served on the following persons by Electronic Information Exchange this 27<sup>th</sup> day of July, 2009:

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