UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	Docket No. 52-011-ESP
SOUTHERN NUCLEAR OPERATING CO.	
(Early Site Permit for Vogtle ESP Site)	August 3, 2009

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

Pursuant to 10 C.F.R. § 2.341(b)(3), Joint Intervenors[1] submit this response to (1) NRC Staff's Answer to "Joint Intervenors' Petition for Review of the First Partial Initial Decision (Contested Proceeding)" (the "Staff Answer"), and (2) Southern Nuclear Operating Company's Answer Opposing Petition for Review (the "SNC Answer"), each filed on July 27, 2009. As explained below, neither the Staff Answer nor the SNC Answer (collectively, the "Answers") demonstrate that Joint Intervenors' Petition for Review[2] fails to satisfy 10 C.F.R. § 2.341(b). Accordingly, Joint Intervenors continue to maintain that the substantial questions raised in their Petition for Review warrant review by the Commission.

I. COMMISSION REVIEW SHOULD BE GRANTED BECAUSE JOINT INTERVENORS RAISED A SUBSTANTIAL QUESTION OF LAW REGARDING THE SCOPE AND MEANING OF CUMULATIVE IMPACTS.

Pursuant to 10 C.F.R. § 2.341(b)(4), Joint Intervenors were required to raise a "substantial question" regarding a "necessary legal conclusion" in their Petition for Review. This burden was met. Specifically, Joint Intervenors raised that the Board committed an error of law by restricting environmental contention 1.2 ("EC 1.2") to a contention questioning the

[1] 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.
[2] Joint Intervenors' Petition for Review of the First Partial Initial Decision (Contested Proceeding) (July 15, 2009).

adequacy of the cumulative impacts analysis as it relates exclusively to the impacts of the proposed and existing Vogtle units, and disregarding the impacts of all other reasonably foreseeable actions.

The Board's incorrect narrowing of EC 1.2 utilizes a much more restrictive interpretation of the term cumulative impacts than that set forth by 40 C.F.R. § 1508.7. As the regulation provides, in unambiguous terms, cumulative impacts include the impacts of all "past, present and reasonably foreseeable future actions."[3] When Joint Intervenors used the term cumulative impacts in their contention, the plain meaning of that term should have been attached.[4]

The Staff claims that the Board's limitation on the meaning of cumulative impacts to just those impacts from the proposed and existing Vogtle units "did not deviate from the proper understanding of the range of 'cumulative impacts.'"[5] This is simply not the case. The Board's decision to restrict the scope of EC 1.2 discussion impermissibly inhibited Joint Intervenors' ability to raise issues concerning any reasonably foreseeable impacts on the biota of the Savannah River other than those occurring at Plant Vogtle. Even the impacts of the Savannah River Site, a facility located directly across the river from Plant Vogtle, were excluded from the scope of EC 1.2. NEPA's "rule of reason" cannot justify the Board's decision to exclude impacts of a user in such close proximity.

Further, the Board's decision to limit the record to impacts of just Plant Vogtle is more than harmless error. After its holding that artificially narrowed the scope of the cumulative impacts definition, the Board then concluded that, *based on the record*, it could not rule in favor

---

[3] 40 C.F.R. § 1508.7

[4] Furthermore, as Joint Intervenors stated in their Petition for Review, Joint Intervenors' challenge to the cumulative impacts analysis in the Environmental Report (and later the Final Environmental Impact Statement ("FEIS")), specifically the failure to "evaluate cumulative impacts from the new effluent discharge combined with the existing discharge and *other sources of pollution in the area*" necessarily referred to the inadequate analysis of the impacts of all reasonably foreseeable actions in the area. Petition for Intervention (Dec. 11, 2006) at 13 (emphasis added).

[5] Staff Answer at 12.

of Joint Intervenors regarding the adequacy of the cumulative impacts analysis.[6] This conclusion is unsurprising given the fact that that the Board intentionally excluded from the record any evidence giving weight to Joint Intervenors' contention. A decision based on evidence from one side only is necessarily biased and unfair.[7]

Joint Intervenors raised a substantial question of law. The Staff and SNC seem to argue in their Answers that this substantial question should be resolved in their favor;[8] however, this is beside the point. 10 C.F.R. § 2.341(b)(4) clearly states that a petition for review must simply *raise* the question. Because such a question was raised, irrespective of the Staff and SNC's position on the matter, the Commission should exercise its discretion to grant review.

II. COMMISSION REVIEW SHOULD BE GRANTED BECAUSE JOINT INTERVENORS HAVE RAISED SUBSTANTIAL QUESTIONS REGARDING THE NECESSARY ANALYSIS OF DREDGING IMPACTS.

As noted above, in a petition for review, petitioners are required only to raise a "substantial question" regarding a "necessary legal conclusion."[9] Joint Intervenors met this burden. Specifically, Joint Intervenors raised that the Board committed an error of law by concluding that the analysis of dredging impacts, which the Staff in the FEIS and the Board in the Decision expressly concede is contingent upon future environmental evaluations to be performed by the Corps, was sufficient to satisfy NEPA.[10]

---

[6] See generally Decision at 4.111-4.117.

[7] Notably, neither the Staff nor SNC argue in their Answers that exclusion of Joint Intervenors' evidence was harmless. In fact, neither party discusses that the Decision repeatedly makes reference to the intentionally restricted record. By focusing only on whether the Board committed an error in excluding evidence based on a limited contention, their arguments ignore the obvious: if the Board had not incorrectly limited the scope of the cumulative impacts definition, Joint Intervenors would have introduced evidence to counter both parties' arguments and the Board's conclusions regarding the impacts of other actions on the Savannah River.

[8] See Staff Answer at 7, 12; see generally SNC Answer at 5-15.

[9] 10 C.F.R. § 2.341(b)(4).

[10] Petition for Review at 18-24; See Decision at 4.264 and 5.3, FEIS at 7-20 ("Specifics of the [dredging] project would be provided in the [Corp]'s assessment to fulfill the NEPA requirement.")

In the Decision, the Board stated that much of the evidence regarding dredging impacts had yet to be assembled and would later be evaluated by the Corps.[11] However, the Board also found that based on a "preponderance of the evidence" available, the dredging impacts "would likely not be greater than MODERATE."[12] The Board cannot have it both ways: on one hand, implying that the evidence is highly speculative and therefore inconclusive;[13] and on the other hand, backing the Staff's conclusion that "the impacts could be 'up to' MODERATE, and could even be SMALL" as "a conservative assessment of the potential impacts" based on an assumption that another agency may put in place certain mitigation measures.[14]

While SNC, the Staff, and the Board suggest that the agency's NEPA obligations could be fulfilled by simply listing the missing information in the FEIS,[15] this ignores the clear regulations requiring *sufficient* analysis at the time of permitting, which were promulgated by the Commission to ensure compliance with NEPA.[16] Moreover, 40 C.F.R. § 1502.22 does not excuse this lack of information gathering.[17]

Further, both parties' attempts to convert Joint Intervenors' legal argument into a factual one, by suggesting that Joint Intervenors have failed to assert sufficient errors in the record, are misplaced.[18] Joint Intervenors do not, at this time, debate the sufficiency of the factual record *per se*, but instead argue that the Board's conclusion was based on an incorrect deferral to

---

[11] See, e.g., Decision at 4.264 and 5.3 (stating that if dredging is necessary, then more information will be provided by the Corps and more studies will be conducted).
[12] Decision at 4.231; see also, e.g., Decision at 5.3.
[13] See Decision at 4.231, 5.3.
[14] See Decision at 4.218.
[15] See SNC Answer at 22, Staff Answer at 15 n.18, Decision at 4.262.
[16] See NUREG-1555, Petition for Review at 18-20.
[17] The regulation provides that an agency is excused from gathering information only if the costs of obtaining it are exorbitant or if the means for obtaining the information are unknown. See 10 C.F.R. § 1502.22. Contrary to the Board's assertion, neither party introduced any evidence indicating that the cost of assessing the dredging impacts would be exorbitant – a high threshold considering the overall cost of the project totals approximately $14 billion. See Decision at 4.262 n.52. Further, the means for obtaining this information are well known and have been conducted in the past by both the Commission and the Corps.
[18] See SNC Answer at 17; Staff Answer at 15.

another agency.[19] While underlying the Joint Intervenors' argument is the premise that the evidence relied on by the Board was incomplete and highly speculative,[20] Joint Intervenors' argument is ultimately that the Board cannot evade its NEPA obligations by promising a more in-depth and complete analysis by the Corps.[21]

III. CONCLUSION

Joint Intervenors have raised substantial questions concerning the Decision regarding both EC 1.2 and EC 6.0. For the foregoing reasons, Joint Intervenors respectfully request that the Commission grant review.

Submitted this 3rd day of August 2009,

/signed (electronically) by/

Lawrence D. Sanders
Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
(404) 712-8008
Email: lsanders@law.emory.edu

[19] Petition for Review at 18-23.
[20] The speculative nature of the information was implied by the Board throughout its Decision. See, e.g., Decision at 5.3 ("The [S]taff's review . . . satisfied its obligation under NEPA . . . given the information it had when the FEIS was issued."), Decision at 4.207 citing Staff EC 6.0 Rebuttal Testimony at 3 ("Despite the limited information available, 'based on the [s]taff's familiarity with previous dredging projects, the [s]taff determined that a qualitative analysis to identify the types of potential environmental impacts likely to occur with such a project was appropriate.'"), Decision at 4.209 ("Given that there was a limited amount of information available regarding the possibility of dredging the channel, the [S]taff had to assume certain conditions in order to perform its analysis.").
[21] Petition for Review at 18-24.

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
SOUTHERN NUCLEAR OPERATING COMPANY	)	Docket No. 52-011-ESP
	)	
	)	
(Early Site Permit for the Vogtle ESP Site)	)	August 3, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **JOINT INTERVENORS' REPLY TO NRC STAFF AND SNC'S ANSWER TO JOINT INTERVENORS' PETITION FOR REVIEW OF THE FIRST PARTIAL INITIAL DECISION (CONTESTED PROCEEDING)** were served upon the following persons by Electronic Information Exchange and/or electronic mail.

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

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

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

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

Emily Krauss, Law Clerk
Wen Bu, Law Clerk
E-mail: eik1@nrc.gov
Wxb3@nrc.gov

Office of the Secretary of the Commission
ATTN: Docketing and Service
Mail Stop 0-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D-21
Washington, DC 20555-0001
Kathryn L. Winsberg, Esq.
Ann P. Hodgdon, Esq.
Patrick A. Moulding, Esq.
Jody C. Martin, Esq.
Sarah A. Price, Esq.
Joseph Gilman, Paralegal
E-mail: klw@nrc.gov, ann.hodgdon@nrc.gov, patrick.moulding@nrc.gov, jody.martin@nrc.gov; sap1@nrc.gov, jsg1@nrc.gov

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

Steven P. Frantz, Esq.
Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Mary Freeze, Admin. Assist.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
E-mail: sfrantz@morganlewis.com; ksutton@morganlewis.com; pbessette@morganlewis.com; mfreeze@morganlewis.com

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

M. Stanford Blanton, Esq.
Peter D. LeJeune, Esq.
C. Grady Moore, III, Esq.
Kenneth C. Hairston, Esq.
Leslie Garrett Allen, Esq.
Balch & Bingham LLP
1710 Sixth Avenue North
Birmingham, AL 35203-2014
E-Mail: sblanton@balch.com; plejeune@balch.com; kchairston@balch.com; gmoore@balch.com, lgallen@balch.com

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

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

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

Dated: August 3, 2009

/signed (electronically) by/

Lawrence D. Sanders
Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
(404) 712-8008
Email: lsanders@law.emory.edu