

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Nicholas G. Trikourous
Dr. James Jackson

In the Matter of)	
)	Docket Nos. 52-025 and 52-026
Southern Nuclear Operating Company, Inc.)	
)	ASLBP No. 09-873-01-COL-BD01
Vogtle Electric Generating Plant,)	
Units 3 and 4)	August 13, 2009
_____)	

**JOINT INTERVENORS' REPLY TO NRC STAFF'S AND SNC'S ANSWER OPPOSING
MOTION TO ADMIT NEW CONTENTION**

The Atomic Safety and Licensing Board (“Board”) resolved Joint Intervenors’¹ navigation-related contention, EC 6.0, within the early site permit (“ESP”) proceeding under circumstances markedly different than the navigation-related contention of this combined operating license (“COL”) proceeding now before this Board. After the record for the ESP proceeding was closed and the ESP Board was in deliberation, SNC formally requested that the U.S. Army Corps of Engineers (“Corps”) resume maintenance dredging of the Savannah River Federal Navigation Channel (“navigation channel”). The ESP Board acknowledged Joint Intervenors’ right to pursue a navigation-related contention in subsequent proceedings if SNC pursued barging as the method of transporting large components to the Vogtle site. Joint Intervenors proposed new contention, NEPA-1, should be admitted because SNC has now

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

submitted a formal request that the Corps take necessary actions to allow use of the navigation channel.

1. Dredging-Related Impacts Must Be Considered During the Vogtle COL Proceeding Because of the Significant Change in Circumstances Since the ESP Proceeding Regarding the Likelihood of Dredging the Navigation Channel.

To the extent that the decision in the Vogtle ESP proceeding resolved the issue of navigation-related impacts of construction of the proposed units, that resolution was circumscribed by the highly contingent and indeterminate nature of the impacts at that time. In applying NEPA's "Rule of Reason," the Vogtle ESP Board repeatedly referred to the fact that SNC had not yet determined whether it would seek to use the navigation channel and the limited information available about the scope of the project or the magnitude of the potential impacts. Recognizing that SNC's determination to use the navigation channel was a condition precedent to any navigation-related environmental impacts of construction, the ESP Board found that the Staff's qualitative analysis was reasonable and adequate.² Now that SNC has decided to pursue use of the navigation channel to transport large components to the Vogtle site, the qualitative analysis of navigation-related impacts is no longer adequate or reasonable, and the ESP decision does not preclude litigation of NEPA-1 in the COL proceeding.

The Vogtle ESP Decision and underlying reasoning rested heavily on the fact that SNC had not submitted a permit application or request that the Corps maintain the navigation channel. As the ESP Board noted:

The staff was limited to a discussion of potential impacts and possible mitigation measures and an assumption that the channel would be dredged to a depth of nine feet and a width of ninety feet. As of the date of the evidentiary hearing and of this decision, as far as the Board is aware there has been no change in the amount

² See Decision at 4.227 ("Based on the staff's qualitative review...the Board finds 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 *given the limited information available* regarding the nature and extent of any dredging.") (emphasis added).

of information available regarding SNC's intent with respect to dredging – SNC has not made a formal request that USACE resume maintenance dredging, nor has SNC filed a permit application with USACE.³

Clearly, the ESP Board regarded submission of a request to the Corps as a significant event.

Unbeknownst to the ESP Board during its deliberations, SNC had indeed submitted such a request to the Corps on April 14, 2009—26 days after the close of the evidentiary hearing and 69 days prior to the issuance of the ESP decision.

The ESP Board's repeated and frequent discussion of the lack of any decision to pursue using the navigation channel for transportation demonstrates that a formal request to the Corps to resume maintenance dredging would constitute new and significant information. Underscoring the ill-defined nature of the proposal at the time, the ESP Decision begins its discussion of the navigation contention (EC 6.0) with SNC's options for transporting large components to the Vogtle site. At the outset, the ESP decision considers three options for using the navigation channel that "assume that SNC will decide to barge at least some of the construction components for Vogtle Units 3 and 4."⁴ After discussing the navigation options, the ESP Decision notes that "SNC could forego barging altogether and decide to transport its components solely by rail or truck."⁵ The ESP Decision further notes that "the staff also assumed that there would be other options that SNC could pursue."⁶

³ Decision at 4.228.

⁴ Decision at 4.203. See also Decision at 4.187 ("If SNC makes the determination that it will transport at least some of the construction components by barge. . ."); Decision at 4.192 ("Alternatively, assuming SNC decides that it will transport at least some of the construction components by barge, it might choose to request that USACE conduct maintenance dredging pursuant to USACE's current authority to dredge the federal navigation channel. SNC indicated that this would be the preferred option if dredging were determined to be necessary."); Decision at 4.199 ("Finally, assuming SNC were to decide that it will transport at least some of the construction components by barge, it might choose to apply for a permit from USACE for SNC to perform the federal navigation channel dredging.).

⁵ Decision at 4.203.

⁶ Decision at 4.206 (The staff "believe[d] that large components could be barged during periods of naturally occurring high flow without dredging" and "assumed that there were other available transportation options besides barging -- road and rail transportation, for example.")

As with the discussion of transport options, the ESP Decision's discussion of the Staff's analysis of navigation impacts in the FEIS likewise stresses that, at the time, "little information was available as to what SNC's plans were in terms of transporting its components via barge and any dredging of the river that would be required to enable transportation."⁷ Based on its informal discussions with SNC and the Corps, including the fact that the Staff was informed "that SNC had not made any formal request for dredging the federal navigation channel, the Staff "did not believe that dredging for the Federal navigation channel was expected to occur."⁸ As a result, the Staff determined that a qualitative analysis of potential impacts of navigation was appropriate under the circumstances.⁹

The Staff's analysis of potential navigation impacts was limited to a qualitative analysis due to the limited information about SNC's transportation plans. Because "there was a limited amount of information regarding the possibility of dredging the navigation channel, the staff had to assume certain conditions in order to perform its analysis."¹⁰ Thus, in the FEIS and its testimony at the evidentiary hearing, "the staff outlined the types of impacts that might result from dredging the federal navigation channel or disposing of the dredged material and mitigating measures to minimize such impacts."¹¹ Similarly, "the staff cautioned that these mitigation measures were discussed 'as examples only and not as specific recommendations . . . because there was (and is) no formal request or permit application to dredge the Federal navigation channel before the Corps for its review.'"¹²

While the ESP Board concluded that the Staff's conclusion that dredging-related impacts "could be MODERATE" was reasonable and adequately supported, this finding was qualified,

⁷ Decision at 4.205.

⁸ Decision at 4.205.

⁹ Decision at 4.207.

¹⁰ Decision at 4.209.

¹¹ Decision at 4.210.

¹² Decision at 4.217.

“given the limited information available regarding the nature and extent of any dredging.”¹³ Moreover, the ESP Board’s conclusion was based, in part, on the fact that more information would become available when SNC decided to pursue using the navigation channel. Rather than deciding that the Staff’s analysis was adequate for all purposes, the ESP Board concluded that “more studies *at this stage* are not necessary.”¹⁴ As a result, the ESP Decision expressly reserves the possibility of Joint Intervenors raising a new navigation-related contention “if and when a decision is made to dredge the navigation channel.”¹⁵ Upon learning of SNC’s letter seeking Corps actions to facilitate using the navigation channel, the Joint Intervenors timely filed their petition to admit NEPA-1 for litigation during the COL stage of the licensing process.

2. Conclusion

For the foregoing reasons, Joint Intervenors’ motion should be granted, and NEPA-1 should be admitted for litigation in the Vogtle COL proceeding.

Respectfully submitted this 13th day of August, 2009.

/signed (electronically) by/
Lawrence D. Sanders, Esq.
Mindy A. Goldstein
Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
(404) 712-8008
Email: lawrence.sanders@emory.edu
mindy.goldstein@emory.edu

¹³ Decision at 4.227.

¹⁴ Decision at 4.239 (emphasis added).

¹⁵ Decision at 4.259

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **JOINT INTERVENORS' REPLY TO NRC STAFF'S AND SNC'S ANSWER OPPOSING MOTION TO ADMIT NEW CONTENTION** 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

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
Washington, DC 20555-0001

Administrative Judge
G. Paul Bollwerk, III, Chair
E-mail: gpb@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D-21
Washington, DC 20555-0001

Administrative Judge
Nicholas G. Trikouros
E-mail: ngt@nrc.gov

Kathryn L. Winsberg, Esq.
Ann P. Hodgdon, Esq.
Sara Brock, Esq.
Patrick A. Moulding, Esq.

Administrative Judge
James F. Jackson
E-mail: jxj2@nrc.gov;
jackson538@comcast.net

Sarah Price, Esq.
Carol H. Lazar, Esq.
Joseph Gilman, Paralegal
Emily Krauss
E-mail: klw@nrc.gov; aph@nrc.gov;
seb2@nrc.gov; jsg1@nrc.gov;
patrick.moulding@nrc.gov;
sap1@nrc.gov; Carol.Lazar@nrc.gov;

Law Clerk: Wen Bu
E-mail: wen.bu@nrc.gov

Emily.Krauss@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

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

Kathryn M. Sutton, Esq.
Steven P. Frantz, Esq.
Paul M. Bessette, Esq.
Diane A. Eckert, Admin. Assist.
Morgan, Lewis & Bockius, LLP
Co-Counsel for Southern Nuclear Operating
Co., Inc.
1111 Pennsylvania Ave., NW
Washington, DC 20004
E-mail: ksutton@morganlewis.com;
sfrantz@morganlewis.com;
pbessette@morganlewis.com;
deckert@morganlewis.com

Kenneth C. Hairston, Esq.
M. Stanford Blanton, Esq.
Peter D. LeJeune, Esq.
Balch & Bingham LLP
1710 Sixth Avenue North
Birmingham, AL 35203-2014
E-mail: kchairston@balch.com;
sblanton@balch.com;
plejeune@balch.com

OGC Mail Center
E-Mail: OGCMailCenter@nrc.gov

C. Grady Moore, III, Esq.
Balch & Bingham, LLP
1901 6th Avenue, Suite 2600
Birmingham, AL 35203
E-mail: gmoore@balch.com

Robert B. Haemer, Esq.
Pillbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1122
E-mail: robert.haemer@pillsburylaw.com

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

Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
Lawrence Sanders, Esq.
Mindy Goldstein, Esq.
E-mail: lsande3@emory.edu;
magolds@emory.edu

Dated: August 13, 2009

_____/signed electronically)by/_____
Lawrence D. Sanders, Esq.
Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
(404) 712-8008
Email: lawrence.sanders@emory.edu