

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.

(Vogtle Electric Generating Plant, Units 3 and 4)

Docket Nos. 52-025-COL and 52-026-COL

ASLBP No. 09-873-01-COL-BD01

September 24, 2009

MEMORANDUM AND ORDER
(Ruling on Motion to Admit New Contention)

Pending with the Licensing Board in this 10 C.F.R. Part 52 combined license (COL) proceeding is Joint Intervenors¹ July 23, 2009 motion to admit a new contention, denominated as NEPA-1, that raises a concern about the NRC staff's analysis of environmental impacts of potential dredging of the Savannah River to facilitate transporting components by barge to construct proposed Units 3 and 4 at the existing Vogtle Electric Generating Plant (VEGP) site. See Joint Intervenors' Motion to Admit New Contention (July 23, 2009) [hereinafter New Contention Motion]. Both applicant Southern Nuclear Operating Co. (SNC) and the staff oppose the admission of this new contention. See [SNC] Answer Opposing Motion to Admit New Contention (Aug. 6, 2009) [hereinafter SNC Answer]; NRC Staff's Answer to Joint Intervenors' Motion to Admit New Contention (Aug. 6, 2009) [hereinafter Staff Answer].

¹ Joint Intervenors include the 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.

For the reasons set forth below, we deny the motion to admit a new contention, albeit with some observations that may allow Joint Intervenors to better gauge when the admissibility of a new contention regarding a staff analysis of the National Environmental Policy Act of 1969 (NEPA) impacts of Savannah River dredging is likely to be ripe for consideration in the first instance.

I. BACKGROUND

In our March 2009 initial prehearing conference order ruling on standing and the admissibility of contentions, see LBP-09-3, 69 NRC __, __-__ (slip op. at 2-6) (Mar. 3, 2009), referred rulings declined, CLI-09-13, 69 NRC __ (June 25, 2009), and appeals denied, CLI-09-16, 70 NRC __ (July 31, 2009), we outlined the procedural history of this proceeding through the time of that decision to grant Joint Intervenors November 2008 hearing petition, and so will not repeat that account here. Subsequently, one event has transpired that is procedurally relevant to the motion now pending with the Board.

In a June 2009 decision, the Licensing Board conducting the 10 C.F.R. Part 52 early site permit (ESP) proceeding regarding the site for proposed Vogtle Units 3 and 4 addressed the merits of an environmental contention (EC), labeled EC 6.0, Final Environmental Impact Statement (FEIS) Fails to Provide Adequate Discussion of Impacts Associated with Dredging the Savannah River Federal Navigation Channel.² With EC 6.0, Joint Intervenors asserted that the staff's FEIS NEPA analysis of potential Savannah River dredging failed to contain sufficient information about the extent and duration of any dredging, the impacts on water quality, the disposal of any dredged material, and the impacts on aquatic biota as a result of any dredging.

² Albeit separately constituted, see [SNC]; Establishment of Atomic Safety and Licensing Board, 73 Fed. Reg. 74,532 (Dec. 8, 2008), this Board has the same members as the Vogtle ESP Board.

Finding that the staff properly concluded on the basis of the record before it that the environmental impacts of dredging were likely to be MODERATE, the Vogtle ESP Licensing Board resolved this issue statement in favor of SNC and the staff, a determination that is now the subject of a pending petition for review filed by Joint Intervenors before the Commission. See Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-09-7, 69 NRC __, __-__, __-__ (slip op. at 8-9, 113-56) (June 22, 2009), petition for review pending.

II. ANALYSIS

With their July 23 motion, Joint Intervenors seek the admission of the following new contention:

NEPA-1: Channel maintenance (including snagging, dredging, and management of dredge spoil material) of the Savannah River Federal Navigation Channel ("the channel"), to support movement of heavy equipment and components for the construction of Units 3 and 4 at the Vogtle Electric Generating Plant has potentially significant environmental impacts that have not been fully evaluated. Due to (1) Southern Nuclear Operating Company's recent determination that channel maintenance will be necessary, as manifested by its April 14, 2009, letter to the U.S. Army Corps of Engineers ("Corps") formally requesting the Corps to begin such maintenance, and (2) funding requests for channel maintenance by Senators Chambliss and Isakson, the channel maintenance project is now reasonably foreseeable. Thus, NEPA requires the staff to conduct an impacts analysis on this channel maintenance.

New Contention Motion at 2. In their motion, Joint Intervenors contend that by reason of (1) a May 2009 e-mail from an SNC representative to a senior United States Army Corps of Engineers (USACE) official; and (2) recent congressional funding requests for fiscal year 2010 from the two United States Senators from the State of Georgia, as referenced in the contention, a USACE maintenance project to dredge the existing Savannah River federal navigation channel has become reasonably foreseeable such that those impacts must be evaluated by the

staff as part of its NEPA analysis in the context of this COL proceeding. See id. at 3-4. Moreover, according to Joint Intervenors, the fact that there is now evidence that SNC has decided to pursue the use of the navigation channel for transporting large components to the VEGP site constitutes a significant change in circumstances that warrants the admission of contention NEPA-1 as it challenges the adequacy of the existing staff NEPA analysis associated with the VEGP site. See Joint Intervenors' Reply to NRC Staff's Answer Opposing Motion to Admit New Contention (Aug. 13, 2009) at 2 [hereinafter New Contention Reply].

For their part, SNC and the staff have interposed various objections to admitting contention NEPA-1, asserting, among other things, that the new contention (1) lacks any "significant new information" so as to authorize its admission consistent with the NRC regulatory provisions governing the COL status of NEPA issues resolved in an ESP proceeding, SNC Answer at 3-4 (quoting 10 C.F.R. § 52.39(c)(v) (emphasis omitted)); (2) fails to meet the contention admissibility and timeliness requirements of 10 C.F.R. § 3.309(f)(1)(iv), (2)(ii), respectively, in that it does not provide any information that is "materially different" from previously available information; see SNC Answer at 8-9; Staff Answer at 6-9; (3) does not provide sufficient substantive information from which the Board can determine the basis of the contention or whether it creates a genuine dispute as to a material issue of law or fact under 10 C.F.R. § 2.309(f)(1)(ii), (iv), (vi), see SNC Answer at 9; Staff Answer at 8; and (4) has not been shown to have been timely filed consistent with (a) the late-filing provisions of 10 C.F.R. § 2.309(c)(2), and (b) the Board's initial prehearing order directive that new contentions be submitted within thirty days of the time the information that is the basis of the new contention becomes available, see Staff Answer at 8-10.

From its wording, it seems apparent that the contention Joint Intervenors seek to interpose here is one of omission, i.e., that the staff NEPA impacts analysis lacks a discussion

of Savannah River federal navigation channel maintenance. In that regard, however, the staff has not yet issued its draft supplemental environmental impact statement (DSEIS) relating to this COL proceeding. Moreover, what, if anything, the staff has to say about this subject likely will not be known for several months.³ An issue asserting that the staff's analysis is wanting thus is, at this juncture, premature. Whether, when it issues its DSEIS, the staff will have omitted anything of substance from its environmental analysis relative to dredging is a matter that should be raised, in the first instance, when that staff critique is first made available for public consideration.

As Joint Intervenors have pointed out, see New Contention Reply at 1, the Vogtle ESP Board indicated in its June 2009 partial initial decision on EC 6.0 that there might well come a time when a properly framed contention regarding the environmental impacts associated with Savannah River dredging could become an appropriate subject for consideration in the context of this COL proceeding. See Vogtle ESP, LBP-09-7, 69 NRC at __ (slip op. at 152-53). In that decision, the Board observed that such an opportunity might arise in this proceeding when the staff issues its "supplemental EIS that will address any new and significant information identified by SNC." Id. at 152.

To be sure, "the travails of the post-initial intervention contention admission process," LBP-09-3, 69 NRC at __ (slip op. at 18), under the agency's procedural rules governing the submission of new and late-filed contentions generally provide little consolation for those who, for whatever reason, fail to act promptly in the face of what can reasonably be characterized as new information or changed circumstances. Nonetheless, given that the apparent focus of any

³ Although we had anticipated some information from the staff last week regarding its environmental review schedule, see Letter from Patrick A. Moulding, NRC Staff Counsel, to Licensing Board at 1 (Aug. 31, 2009), we have been advised that we and the other parties now are not likely to receive that information before October 9, 2009, see Letter from Ann P. Hodgdon, NRC Staff Counsel, to Licensing Board at 1 (Sept. 18, 2009).

new environmental contention relating to the Vogtle COL application is, at this point, upon the staff's NEPA analysis, it seems apparent that any challenge in this proceeding, procedural or otherwise,⁴ to the need for, or adequacy of, any staff analysis of the impacts of Savannah River dredging, should await the staff's issuance of its promised NEPA supplement.⁵

III. CONCLUSION

Information proffered by Joint Intervenor suggests that the probability of maintenance dredging of the Savannah River to aid in the transport of large reactor components to the site of the two additional proposed Vogtle reactor units may have increased marginally relative to the situation reflected in the recent partial initial decision in the Vogtle ESP proceeding. Nonetheless, given that any staff NEPA analysis of dredging impacts in the context of this COL proceeding, which is the focus of Joint Intervenor's proposed new contention NEPA-1, is in all likelihood a number of months away, we decline to admit their proposed contention, albeit

⁴ To the degree Joint Intervenor's contention NEPA-1 might be considered an attempt to frame a legal contention regarding the staff's obligation, at some point, to prepare an additional analysis of dredging impacts, given the current situation, in which a staff analysis has been provided, albeit in the context of factual circumstances that may change as more information becomes available and in a procedural posture in which the staff analysis is, by the staff's own admission, subject to further, appropriate supplementation in this COL proceeding, see Vogtle ESP, LBP-09-7, 69 NRC at __ (slip op. at 155-56), we find no basis at this juncture for admitting such a contingent legal issue.

⁵ As the Vogtle ESP board also observed, see id. at __ (slip op. at 153), if the USACE dredging approval process moves forward, that process potentially will include a separate opportunity for public input regarding the environmental impacts of any proposed Savannah River dredging. Again, however, any issue -- procedural, legal, or otherwise -- regarding the timing associated with, and the staff's use of, such a USACE NEPA analysis in the context of the staff's own NEPA analysis likewise is a matter that should await the initial issuance of the staff's analysis.

without prejudice to any future new contention timely filed (and adequately supported) in accordance with the guidance provided in section II above.

For the foregoing reasons, it is this twenty-fourth day of September 2009, ORDERED, that Joint Intervenor's July 23, 2009 motion to admit new contention NEPA-1 is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD⁶

/RA/
G. Paul Bollwerk, III
CHAIRMAN

/RA/
Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/
James F. Jackson
ADMINISTRATIVE JUDGE

Rockville, Maryland

September 24, 2009

⁶ Copies of this memorandum and order were sent this date by the agency's E-Filing system to counsel for (1) applicant SNC; (2) Joint Intervenor; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
SOUTHERN NUCLEAR OPERATING)	Docket No. 52-025-COL
COMPANY)	and 52-026-COL
)	
(Vogtle))	
)	
(Combined Operating License))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (RULING ON MOTION TO ADMIT NEW CONTENTION) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 24th day of September 2009