

September 28, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
TENNESSEE VALLEY AUTHORITY) Docket No. 50-391-OL
)
(Watts Bar Nuclear Plant, Unit 2))

NRC STAFF'S ANSWER TO PETITIONERS'
AMENDED CONTENTION 7 REGARDING TVA AQUATIC STUDY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the U.S. Nuclear Regulatory Commission ("Staff") submits its answer to the "Petitioners' Amended Contention 7 Regarding TVA Aquatic Study" ("Amended Contention") filed by Southern Alliance for Clean Energy ("SACE"), Tennessee Environmental Council ("TEC"), We the People, Inc. ("WTP"), Sierra Club, and Blue Ridge Environmental Defense League ("BREDL") (collectively, "Petitioners") on September 3, 2009.¹ In their Amended Contention, Petitioners seek to challenge a 1998 TVA study entitled "Aquatic Environmental Conditions in the Vicinity of Watts Bar Nuclear Plant During Two Years of Operation, 1996-97" ("1998 Aquatic Study"). Amended Contention at 2-4. As explained below, the Petitioners' Amended Contention does not satisfy the Commission's

¹ In a September 10, 2009 filing, the Staff addressed the § 2.309(f)(2) timeliness factors for amended contentions. The Staff continues to oppose, on timeliness grounds, this Amended Contention for the reasons stated in its Response in Opposition to Motion For Leave to Amend Contention 7 Regarding TVA Aquatic Study. This filing addresses the § 2.309(f)(1) contention admissibility factors. Also, the Staff reiterates its opposition to the late intervention of the Sierra Club, BREDL, TEC, and WTP for the reasons stated in its Response in Opposition to Motion to Permit Late Addition of Co-Petitioners, filed on August 21, 2009.

standards for contention admissibility under 10 C.F.R. § 2.309(f)(1) because it does not raise a genuine dispute with the application. The Amended Contention, therefore, is inadmissible.

DISCUSSION

I. Legal Standards for Contention Admissibility

10 C.F.R. § 2.309(f)(1) provides the legal standards for contention admissibility. These standards, in relevant part, require a petitioner to: “[P]rovide sufficient evidence to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. . . . or if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief.” 10 C.F.R. § 2.309(f)(1)(vi).² Boards have repeatedly explained that this means a petitioner must make “a minimal showing that material facts are in dispute, thereby demonstrating that an ‘inquiry in depth’ is appropriate.” *Crow Butte Resources, Inc.* (License

² The standards for contention admissibility were addressed at length in the Staff’s August 7th Answer to Petition to Intervene. In brief, § 2.309(f)(1) require a contention to satisfy the following requirements:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted,...
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief . . .

10 C.F.R. § 2.309(f)(1).

Amendment for the North Trend Expansion Project), LBP-08-06, 67 NRC 241, 292 (2008) (internal citations omitted); *see also Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 359 (2006) (same). As the Commission stated, a contention must “reasonably [indicate] that a further inquiry is appropriate” in order to be admissible. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996) (internal citations omitted); *see also Crow Butte*, LBP-08-06, 67 NRC at 292 (same).

II. Petitioners Fail to Satisfy 10 C.F.R. § 2.309(f)(1)

The Staff already addressed the admissibility of Petitioners’ proposed contention 7 in its Answer to Petition to Intervene and Request for Hearing (“Answer”) filed on August 7, 2009.³ The Staff opposed the admission of Petitioners’ initial contention 7, and to the extent that Petitioners’ Amended Contention raises issues similar to that of their proposed contention 7, the Staff hereby incorporates by reference its Answer.⁴

In this pleading, the Staff focuses on Petitioners’ argument that the 1998 Aquatic Study is outdated. Petitioners argue that since the data from the 1998 Aquatic Study is “twelve years old”, the National Environmental Protection Act (“NEPA”) compels TVA to update the study before concluding that entrainment impacts are insignificant. Amended Contention at 3. Petitioners further argue that TVA’s impingement analysis is outdated and needs updating. *Id.* at 4. As demonstrated below, Petitioners do not show a genuine dispute because they do not establish that NEPA requires TVA to update the 1998 Aquatic Study (*i.e.* they do not show an omission of information required by law). 10 C.F.R. § 2.309(f)(1)(vi).

³ Answer at 36-44.

⁴ The Staff notes that in their initial proposed contention, Petitioners alleged that TVA failed to take direct measurements of entrainment for Watts Bar Unit 1. Petition to Intervene and Request for Hearing at 34. In their amended contention, however, Petitioners explicitly remove this basis. Amended Contention at 3 (“The Aquatic Study reports that TVA did conduct entrainment measurements, and thus Petitioners no longer make that assertion.”).

Courts hold that NEPA requires an agency to update old data only when the continuing validity of that data is thrown into question. See, e.g. *Northwest Env'tl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1143 (9th Cir. 2006). The United States Court of Appeals for the Ninth Circuit recently addressed this issue in a challenge to the Forest Service's NEPA work. *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005). In that case, the court, *inter alia*, overturned a Forest Service EIS that relied upon thirteen-year-old habitat and six-year-old fish data to predict impacts on the Westslope Cutthroat Trout. *Id.* at 1030-31. But the court did not treat reliance upon old data as *per se* impermissible. *Id.* at 1031 ("*We do not suggest that all data relied upon by the agency be immediate*, but here the data about the habitat of the Westslope Cutthroat Trout was too outdated to carry the weight assigned to it." (emphasis added)). Instead, the court explained that evidence of the current habitat conditions, and any degradation or improvement in the last thirteen years, is relevant, and that the Forest Service erred by failing to include that data in its EIS. *Id.* The Ninth Circuit later clarified that, consistent with the *Lands Council* decision, a challenger cannot just allege outdated data, but must show *why* the data are invalid. See *Northwest Env'tl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1143 (9th Cir. 2006) ("NWEA [Northwest Environmental Advocates] argues that the Corps used outdated bathymetric data in its model, thus falling below NEPA standards. . . . NWEA contends that bank-to-bank bathymetric surveys are necessary to produce the requisite data and that the Corps last conducted one in 1958. *However, NWEA does not demonstrate why bank-to-bank surveys are necessary.* Furthermore, the Corps has conducted annual cross-line surveys over the entire length of the project area and surveyed most of the shallow-water areas of the estuary more recently around 1980." (emphasis added)). A successful NEPA challenge to an applicant's environmental report (ER), therefore, must allege more than just stale data.

Here, the Petitioners do not show a genuine dispute with the application because they do not establish that the data from the 1998 Aquatic Study are invalid. Without establishing the

invalidity of the 1998 Aquatic Study, Petitioners fail to show an omission of information required by law. 10 C.F.R. § 2.309(f)(1)(vi). Petitioners base their claim on the assertion that the aquatic health in the Tennessee River has "declined markedly" since TVA performed the study 1998 Aquatic Study. Amended Petition at 3. Petitioners' expert relies upon a decline in the Reservoir Fish Assemblage Index (RFAI)⁵ to support the claim. Young Declaration at 5. But this overstates the change in TVA's RFAI scores. As reported in Table C-3 of TVA's 2007 Final Supplemental Environmental Impact Statement ("2007 FSEIS"),⁶ the downstream of Watts Bar Nuclear Plant RFAI score was 44 in 1997 and 42 in 2005.⁷ Moreover, the upstream RFAI score was 41 in 1998 and 47 in 2005.⁸ Therefore, the table cited by the Petitioners does not support the Amended Contention's assertion that the aquatic health of the Tennessee River has "declined markedly" (Amended Contention at 3) since 1998. Instead, the tabulated RFAI scores from 1999, 2000, 2001, 2002, 2003, 2004, and 2005 show an aquatic environment that looks, for the most part, *unchanged* since TVA measured entrainment and impingement in its 1998 Aquatic Study. This distinguishes this case from *Lands Council* because the agency in that case relied on thirteen-year-old habitat data and six-year-old fish data, whereas TVA, through its RFAI scores, has more recent information about the reservoir fish health.

⁵ As mentioned in the Staff's Answer, TVA indicates that the RFAI comes from its combined reservoir, stream, fish tissue and bacteriological studies. Answer at 38 n.25. Notably, the Petitioners do not challenge the validity of TVA's RFAI methodology.

⁶ Final Supplemental Environmental Impact Statement, Completion and Operation of Watts Bar Nuclear Plant Unit 2, Rhea County, Tenn. (June 2007) (encl. to Letter from M. Bajestani to NRC, "Watts Bar Nuclear Plant (WBN) – Unit 2 – Final Supplemental Environmental Impact Statement for the Completion and Operation of Unit 2," (Feb 15, 2008), *available at* ADAMS Accession No. ML080510469.

⁷ 2007 FSEIS at 151. Furthermore, the 1993-2005 average RFAI score downstream was 46 (roughly a 5 percent change from 1997). This record, therefore, does not show that the river has "declined markedly."

⁸ *Id.* The 1993-2005 average RFAI score upstream was 43 (roughly a 5 percent change from 1998). This record, therefore, does not show a "markedly" declining ecosystem.

Petitioners, therefore, have not demonstrated what a further inquiry would accomplish⁹ because they do not show that the Tennessee River's ecosystem has declined since the 1998 Aquatic Study. In short, Petitioners fail to connect the dots between the data provided in the 1998 Aquatic Study, the RFAI scores reflecting essentially no change, and the bare assertion of an unknown decline in the ecosystem. Amended Contention 7 does not show a genuine dispute with the application, and is thus inadmissible.

CONCLUSION

For the reasons discussed above, the Petitioners' Amended Contention 7 regarding the 1998 Aquatic Study should be ruled inadmissible.

Signed (electronically) by

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⁹ Cf. *Crow Butte*, LBP-08-06, 67 NRC at 292 (petitioners must show that an "inquiry in depth is appropriate" (internal citations omitted)).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO PETITIONERS' AMENDED CONTENTION 7 REGARDING TVA AQUATIC STUDY," dated September 28, 2009, have been served upon the following by the Electronic Information Exchange, this 28th of September, 2009:

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