UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	**Docket Nos. 52-025-COL and 52-026-COL**
Southern Nuclear Operating Company	)	
	)	
(COL Application for Vogtle Electric Generating Plant, Units 3 and 4)	)	**November 20, 2009**

SOUTHERN NUCLEAR OPERATING COMPANY'S ANSWER OPPOSING PETITION OF VINCE DRESCHER, KENNETH WARD, JOHN C. HORN, JR., WILLIAM S. BASHLOR AND JAMES EDDIE PARTAIN TO INTERVENE AND ADMIT NEW CONTENTION

In accordance with 10 C.F.R. § 2.309(h), and the Atomic Safety and Licensing Board's ("Board" or "ASLB") Order dated November 3, 2009,[1] Southern Nuclear Operating Company ("SNC" or "Applicant") hereby answers and opposes the "Petition to Intervene and Admit New Contention" ("Petition") by Vince Drescher, Kenneth Ward, John C. Horn, Jr., William S. Bashlor and James Eddie Partain ("Petitioners") submitted on October 30, 2009. As explained below, Petitioners' proposed contention is inadmissible because (i) the issue raised has already been resolved by the Board in the Early Site Permit ("ESP") proceeding and (ii) Petitioners have not identified any "significant new information" that would have a material impact on the Board's decision, as required by 10 C.F.R. §§ 52.39(c)(1)(v) and 51.107(b). Accordingly, and

[1] *See* Memorandum and Order (Schedule for Further Filings Relative to Intervention Petition; E-Filing Reminder), *Southern Nuclear Operating Co.*, Docket Nos. 52-025-COL, 52-026-COL (Nov. 3, 2009). The Board's Order recites that this response is filed pursuant to 10 C.F.R § 2.309(h), as opposed to § 2.323. Accordingly, as with the response to Joint Intervenors' original Petition addressed in the Board's December 2, 2008 Initial Prehearing Order, SNC does not understand the page limitations applicable to responses to motions to apply to this response to an initial Petition to Intervene.

for the additional reasons discussed below, the proposed contention fails to satisfy the admissibility requirements of 10 C.F.R. §§ 2.309(f)(1) and 2.309(c). Because Petitioners have not proffered one admissible contention, the Petition must be denied in its entirety.[2]

I. BACKGROUND

On March 28, 2008, SNC submitted an application to the NRC for a Combined License ("COL") for Vogtle Units 3 and 4 ("COLA").[3] The COLA incorporates by reference SNC's ESP which was issued on August 17, 2009.[4] More than a year ago – on September 16, 2008 – the NRC published a Notice of Hearing for the COLA, stating that any person who wished to participate as a party must file a petition for leave to intervene by November 17, 2008, in accordance with 10 C.F.R. § 2.309(b).[5]

Petitioners filed their Petition on October 30, 2009, based upon a U.S. Army Corps of Engineers ("ACE") notice published October 2, 2009, announcing the availability of a draft Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI"). The draft EA and FONSI addresses a proposal by the ACE to temporarily revise its Drought Contingency Plan ("DCP") for responding to severe (Level 3) droughts. Under the proposed contingency plan revision, minimum releases from Thurmond Dam, during severe droughts in September through February, would be reduced to 3100 cfs.[6] This change would simply extend the existing ACE

[2] *See* 10 C.F.R. § 2.309(a).

[3] Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 24,616 (May 5, 2008).

[4] Second and Final Partial Initial Decision (Mandatory/Uncontested Proceedings), *Southern Nuclear Operating Co.*, Docket Nos. 52-025-COL and 52-026-COL (Aug. 17, 2009) ("Second PID").

[5] *See* Southern Nuclear Operating Company *et al.*, Notice of Hearing and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 53,446 (Sept. 16, 2008) ("Hearing Notice").

[6] U.S. Army Corps of Engineers' Draft Environmental Assessment and Finding of No Significant Impact for the Savannah River Basin Fall/Winter Flow Reduction (Sept. 2009), at 6 ("draft EA and FONSI").

contingency plan for responding to severe droughts previously announced in October of 2008.[7] The ACE draft EA and FONSI concludes that impacts of the temporary revision would be insignificant. On the basis of this draft EA contemplating an insignificant, temporary revision to the ACE's existing DCP, Petitioners seek to have NEPA-1 admitted.

II. ARGUMENT

As fully explained below, proposed contention NEPA-1 is not admissible; therefore, the Petition to Intervene must be denied.[8] The issue raised by NEPA-1, the proper flow rate at which to analyze water use impacts, was expressly resolved in the ESP proceeding. The ACE's draft EA and FONSI does not change this. Accordingly, NEPA-1 is not admissible under 10 C.F.R. §§ 51.107 and 52.39. As a result, the contention does not raise a genuine dispute as to a material issue within the scope of this COLA proceeding. Similarly, Petitioners cannot raise a material dispute regarding the adequacy of the NRC Staff's analysis of new and significant information in the draft supplemental environmental impact statement ("SEIS") for the COLA because that document has not been issued. NEPA-1 is therefore inadmissible as it does not meet the requirements of 10 C.F.R § 2.309(f)(1)(iii),(iv) and (vi). Moreover, the petition is untimely and does not meet the balancing test of 10 C.F.R. § 2.309(c). For these reasons, the Petition must be denied in its entirety.

A. No Petitioner Except Mr. Ward Has Demonstrated Standing to Participate in this Proceeding.

The Petitioners appear to base standing on their proximity to the Vogtle site and general statements in their declarations that "they would be harmed" if the resources of the Savannah

[7] *See* ESP Contested Hearing, Exhibit NRC000039; U.S. Army Corps of Engineers' Draft Environmental Assessment and Finding of No Significant Impact for the Temporary Deviation of the Drought Contingency Plan for the Savannah River Basin (Oct. 2008) ("2008 EA").

[8] *See* 10 C.F.R. § 2.309(a) (requiring at least one admissible contention for a party to intervene).

River were "adversely affected or diminished."[9] Based on the residence addresses provided in their declarations, however, it appears that only Mr. Ward resides within fifty miles of the Vogtle site.[10] Therefore, only Mr. Ward meets the "proximity presumption" of standing.[11] The other petitioners provide only cursory descriptions of their purported interest in this proceeding. Their generic description of interest fails to satisfy the requisite "concrete and particularized injury" standard. Therefore, they have not established standing to intervene.[12]

B. Petitioners Have Failed to Proffer an Admissible Contention.

1. Petitioners seek to re-litigate an issue, via NEPA-1, that was fully resolved in the ESP proceeding, thereby rendering the proposed contention inadmissible.

A fundamental principle of 10 C.F.R. Part 52 is that issues resolved in an ESP proceeding are final and may not be relitigated, *i.e.*, they are outside the scope of the COLA proceeding.[13] As the Commission stated in its Final Policy Statement on the Conduct of New Reactor Licensing Proceedings, "applicants for a license should not have to litigate each such issue more than once."[14] Specifically, if a COLA references an ESP, then "the Commission shall treat as resolved those matters resolved in the [ESP] proceeding . . . ."[15] An issue is "resolved" for the COL proceeding if "the appropriate agency official makes a determination concerning the issue

[9] *See* October 30, 2009 Declarations of Vince Drescher, William S. Bashlor, John C. Horn, Jr., Kenneth Ward, James Eddie Partain, and Paula L. Feldman.

[10] According to Google Earth's mapping tool, measuring the distance from the Petitioners' residence addresses to Plant Vogtle, Messrs. Drescher, Horn, Bashlor and Partain live 75, 53, 80 and 63 miles away from Plant Vogtle, respectively.

[11] *See In re Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), 68 N.R.C. 43, 60 (2008).

[12] *Id.* at 59.

[13] 10 C.F.R. § 52.39.

[14] *Final Policy Statement on the Conduct of New Reactor Licensing Proceedings*, 73 Fed. Reg 20,963, 20,969 (April 17, 2008).

[15] 10 C.F.R. § 52.39(a)(2).

in dispute" in connection with an ESP referenced in the COLA.[16] The Commission has explained that the ESP EIS "resolves numerous issues within certain bounding conditions," and that these issues "have issue preclusion" at the COL stage.[17] The purpose of this provision is to "ensure that an issue that was resolved can remain resolved."[18]

Thus, in the COLA proceeding, any contention raising an environmental issue must be based on either (i) an issue that was not resolved in the ESP or (ii) "significant new information" relating to an issue that was resolved in the ESP.[19] New information is not automatically "significant."[20] Regulatory Guide 1.206 states the process for identifying "new and significant" information for a license renewal application is the same as found in NRC Regulatory Guide 4.2.[21] Regulatory Guide 4.2 explains that "new and significant" information is (i) information that identifies a significant environmental issue ***that was not previously considered or documented***, or (ii) any information that *was not considered in the analysis* ***and would lead to an impact finding different from that previously documented***.[22]

As a threshold matter, the analyses and conclusions in the EIS, the hearing records and the Board's decisions in both the contested and mandatory hearings on the ESP clearly establish that the issue NEPA-1 proposes to raise was resolved for the purpose of this COLA proceeding. The record and findings in the ESP proceeding plainly show that the reduction in the release rate

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[16] *See Va. Elec. & Power Co. D/B/A Dominion Va. Power and Old Dominion Elec. Coop.* (North Anna, Unit 3), 68 N.R.C. 294, 306 (Aug. 15, 2008).

[17] 72 Fed. Reg. 49,252, 49,431 (Aug. 28, 2007).

[18] *Id.*

[19] *See* 10 C.F.R. §§ 52.39(c)(1)(v); 51.107(b)(2),(3).

[20] *See* Reg. Guide 1.206, Page C.111.3-2.

[21] *Id. See* Reg. Guide 4.2, Supp. 1, Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses, Chapter 5 (September 2000). Reg. Guide 4.2 involves the environmental review process for license renewal, which NRC Staff analogized to the "relationship between the environmental review of an ESP application and that of a COL application referencing the ESP." *Id*.

[22] Reg. Guide 4.2-S-4 (emphasis added).

from Thurmond Dam to 3100 cfs for the fall and winter months was raised by both the Joint Intervenors and the NRC Staff in the ESP proceeding in connection with the adequacy of the NRC Staff's analysis of aquatic impacts, was the subject of extensive questioning by the Board in both the contested and mandatory hearings, was considered by the NRC Staff in the EIS, and was addressed by the Board in its findings.[23] The Board expressly found that the evidence established that NRC Staff had provided a reasonable analysis of water use impacts, adequately explained how they reached their determination, and therefore satisfied NEPA.[24]

In support of ESP Contention EC 1.2, Joint Intervenors in that proceeding argued, in part, that the Staff had not considered sufficiently low flows, and presented evidence that releases from Thurmond Dam had been reduced by the ACE to 3100 cfs in late 2008 and for the first few months of 2009.[25] In its decision resolving EC 1.2, the Board found that, "notwithstanding Dr. Young's protestations that flows lower than 3800 cfs were not considered. . . *the FEIS does consider flows of 3000 and 2000 cfs*, as well as 8830, 4200, 4000, and 3800 cfs."[26] The Board also noted that "while both the staff and Joint Intervenors calculated withdrawal percentages for a range of postulated flow rates, the record supports the conclusion that based on the annual average flow, even under recent drought conditions, the withdrawal fraction projected for Vogtle Units 3 and 4 would not exceed the EPA five percent guideline."[27] Thus, the Board concluded that the Staff's river flow analysis was adequate and that Joint Intervenors' reliance upon the very-low flow conditions as a basis for challenging the Staff's impact assessment was misplaced,

[23] ESP Contested Hearing, Transcript at 743, 744, 773-774, 799-800, 817.

[24] *See* First Partial Initial Decision (Contested Proceeding), *Southern Nuclear Operating Co.*, Docket No. 52-011-ESP (June 22, 2009), ¶ 4.116 ("First PID"); Second PID, ¶ 4.32.

[25] ESP Contested Hearing, Transcript at 816-817; ESP Contested Hearing, Exhibit JTI000021.

[26] First PID, ¶ 4.44 (emphasis added).

[27] *Id*., ¶ 4.47 n.15.

noting that these conditions are "unlikely to occur or be of any extended duration," and are "so rare and temporary as to not destabilize the water supply."[28]

The Board's findings were based on extensive testimony and documentary evidence regarding Savannah River flow rates *including periods when the ACE reduced the releases from Thurmond Dam to 3100 cfs*. For example, the ESP hearing record establishes that, at the time of the ESP hearing, the ACE had already implemented its 2008 temporary DCP deviation and already lowered the minimum releases to 3100 cfs.[29] The Staff testimony concluded that consideration of 3100 cfs was bounded by the 3000 cfs already considered in the FEIS.[30]

The contested hearing also included testimony and evidence from the parties regarding the relationship between flows recorded at Thurmond Dam and the Vogtle site.[31] As the Staff explained under questioning from the Board, even when the flows from Thurmond Dam were at 3100 cfs, flows at the site exceeded 3800 cfs.[32] Similarly, in the mandatory hearing, the Board considered the then-recent drought conditions and resulting restrictions in the amounts of water being released from the Thurmond Dam.[33] The NRC Staff provided data showing that flow rate has very rarely dropped below 3800 cfs at the Vogtle site, even during periods of significant drought, including the most recent drought of record.[34] The Board found that "[d]ata from the

[28] *Id.*, ¶¶ 4.116, 4.47 and 4.44.

[29] ESP Contested Hearing, Transcript at 743; *see also* ESP Contested Hearing, Exhibit NRC000001 at E-44; ESP Contested Hearing, Exhibit NRC000039 at 1; ESP Contested Hearing, Exhibit SNC000016; ESP Contested Hearing, Exhibit JTI000021; Second PID, ¶ 4.18.

[30] ESP Contested Hearing, Transcript at 743, 773-774.

[31] *Id.* at 743-744, 773-774, 817.

[32] *Id.* at 744, 799-800.

[33] Second PID, ¶¶ 4.3, 4.18

[34] *Id.*, ¶¶ 4.18, 4.32.

Waynesboro flow gauge located near the site shows that even with the historically low release rate of 3100 cfs from Thurmond Dam, the flow at the VEGP site rarely fell below 3800 cfs."[35]

The Board also found that "the staff's consideration of flow rates as low as 3000 cfs and 2000 cfs provided valuable context when considering severe drought conditions," recognizing that those low flow rates would be unlikely at the site.[36] The Board concluded that the 3800 cfs was "well-supported as a conservative, yet reasonable, flow-rate for the staff's evaluation," notwithstanding the evidence in the record that the ACE had temporarily reduced the flow rate at Thurmond Dam to 3100 cfs.[37]

Thus, the ESP proceeding included consideration of flow rates of 3100 cfs and lower, and of the ACE's 2008 DCP revision which included a minimum release of 3100 cfs from Thurmond Dam. The Board determined that, notwithstanding the temporary reduction in flow rate, the Staff "included adequate conservatism in choosing 3800 cfs as the river flow on which the NEPA evaluation would be based."[38] Importantly, the Board expressly resolved in the ESP proceeding that, even when flows at Thurmond are reduced to 3100 cfs, the Staff's analysis of impacts was appropriate. Accordingly, the Board has already considered and resolved precisely the issue raised in NEPA-1.

2. The information upon which NEPA-1 is based is not "significant new information," further demonstrating its inadmissibility.

As explained above, where an issue has been resolved in an ESP incorporated into the COLA, an environmental contention may only be admitted in the COLA proceeding if it is based on "significant new information." NEPA-1 asserts that revision of the ACE DCP to temporarily

[35] *Id.*, ¶ 4.18.

[36] *Id.*, ¶ 4.32.

[37] *Id.*

[38] *Id.*

reduce the minimum releases during Drought Level 3 from the Thurmond Dam to 3100 cfs[39] (and then only for certain months of the year) constitutes "new and significant" information that calls into question the completeness or adequacy of the ESP FEIS' analysis of water use impacts.[40] But the Board has already considered precisely this issue. Petitioners fail to demonstrate that *any* "significant new information has been identified" with respect to this previously-resolved issue of the appropriate flow rate at which to measure aquatic impacts, including consideration of temporary reductions in the flow rate to 3100 cfs. Petitioners are therefore barred from re-litigating the issue in this proceeding as it was fully resolved in the ESP proceeding.[41]

As demonstrated by the record in the ESP proceeding discussed above, the temporary reduction of the minimum Thurmond releases to 3100 cfs under consideration by the ACE is not new. Moreover, even if the ACE 2009 draft EA were deemed to be new information, it is clearly not "significant:"

> For new information to be "significant," it must be material to the issue being considered, **that is, it must have the potential to affect the finding or conclusions of the NRC staff's evaluation of the issue.** The COL applicant

[39] Petitioners also claim that the ACE has proposed to restrict releases to "as low as 2600 cfs." Petition at 4. There is no basis for the assertion that impacts must be based on a flow of 2600 cfs, however, because while the ACE considered adjusting the minimum discharge to 2600 as Alternative 2, the ACE selected Alternative 1 which adjusts the minimum discharge to 3100 cfs. Draft EA and FONSI at 6-7.

[40] The proposed environmental contention reads as follows:

> NEPA-1. The potentially significant adverse impacts of Vogtle Units 3 and 4 on the Savannah River have not been fully or adequately evaluated in light of the proposal of the United States Army Corps of Engineers ("USACE") to reduce discharges from the Thurmond Dam to 3100 cubic feet per second ("cfs"), and as low as 2,600 cfs, [sic] from mid-September through mid-February in any future years when necessary to avoid Level 4 drought conditions in the Thurmond Reservoir. The cumulative impacts of such flow restrictions (and the assumed potentially recurrent Level 3 drought conditions that underly [sic] the USACE's proposal), combined with the proposed Vogtle plant expansion, constitutes significant new information not considered in the ESP FEIS, and could reduce river flows to levels that would adversely affect the river.

[41] *See* 10 C.F.R. § 52.39.

> need only provide information about a previously resolved environmental issue if it is both new and significant.[42]

Petitioners' claim that the "potentially significant adverse impacts of Vogtle Units 3 and 4 on the Savannah River have not been fully or adequately evaluated" in light of the ACE proposed temporary reduction of Thurmond Dam releases from 3,600 cfs to 3,100 cfs during Drought Level 3 conditions,[43] is plainly contradicted by the hearing record and Board rulings in the ESP proceeding. Temporary reduction of Drought Level 3 minimum releases to 3100 cfs is not new.

Moreover, the ACE *contingency* planning efforts, of course, do not affect the frequency of Level 3 drought conditions in the Savannah River. As the ACE states, "[t]his EA was developed so that the [ACE] would be prepared to conserve water in the reservoirs again in the fall/winter should the system again reach Level 3 conditions."[44] Moreover, the draft EA affirmatively states that the present drought is expected to end before Vogtle Units 3 and 4 could become operational and therefore, "that additional use would not occur within the timeframe that is under consideration . . . ." [45] The revision to the contingency plan obviously does not create or extend actual drought conditions, and therefore does not make reduction of flows more or less likely than the Board found to be the case in the ESP proceeding.

Finally, the 2009 ACE draft EA does not present any significant environmental issue that was not previously considered by this Board in connection with the 2008 reductions in Thurmond Dam releases. As explained above, the Board expressly considered the reduction in releases from Thurmond Dam to 3100 cfs during late 2008 and early 2009. The draft EA

[42] 72 Fed. Reg. 49,352, 49,431 (Aug. 28, 2007) (emphasis added).

[43] Petition at 3.

[44] Draft EA and FONSI at 11.

[45] *Id.* at 78.

addresses temporarily reducing releases from the Thurmond Dam from 3,600 cfs to 3,100 cfs "during the fall/winter (mid-September through mid-February) *when the [ACE's] reservoirs on the Savannah River are in Level 3 drought conditions*."[46] This information is not materially different than that already considered and resolved by this Board. Petitioners make no suggestion, nor is it the case, that this information would affect the ASLB's NEPA conclusions, given that these exact flows were already considered and deemed bounded by the analysis in the EIS.[47]

In this regard, it is not surprising that Petitioners' expert witness raises no material issue in her declaration that was not considered by the Staff and the Board in the ESP proceeding. Contrary to Ms. Feldman's statements in Paragraphs 7 through 9[48] of her declaration, the ACE's draft EA and FONSI does not increase the likelihood of future severe droughts. Paragraphs 11, 13 and 14[49] of the declaration seek merely to the challenge the Board's resolution of the impacts from consumptive water use. Similarly, Paragraphs 16 through 20 discuss potential downstream impacts – impacts that have already been considered by this Board. Petitioners present no "significant, new information" to support admission of NEPA-1.

3. NEPA-1 does not meet the requirements of 10 C.F.R. § 2.309(f)(1).

NEPA-1 must also satisfy the requirements of 10 C.F.R. § 2.309(f)(1), by raising and supporting a genuine dispute as to an issue that is within the scope of this proceeding and material to a finding that the Commission must make on the COLA.[50] However, because the

[46] *Id.* at 6 (emphasis added).

[47] ESP Contested Hearing, Transcript at 743, 773-774. There is no small irony in Petitioners' claim that a Finding of No Significant Impact is "new and **significant**" information.

[48] Paragraphs 1 through 6 of Ms. Feldman's declaration are for background/summary.

[49] The declaration does not include a Paragraph 12.

[50] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

issue raised by NEPA-1 was resolved in the ESP proceeding, and no significant new information has been identified, it is plainly outside the scope of this proceeding, is not material to the findings the Board must make relative to the COLA, and therefore does not create a dispute of fact or law as required by 10 C.F.R. § 2.309(f)(1)(iii),(iv) and (vi).[51] Petitioners' assertion that NEPA-1 is within the scope of the COLA proceeding because it "raises an issue whether the NRC has complied with applicable NEPA requirements"[52] ignores the fact that the very issue raised by the Petitioners was finally resolved in the ESP proceeding and is not subject to litigation in the COLA.[53] Petitioners cannot create a genuine dispute of fact or law by asserting that issues clearly resolved in the ESP were not resolved.[54]

Similarly, Petitioners cannot create a genuine dispute of fact or law by alleging a defect in the NRC Staff's SEIS for the COL. The draft SEIS has not yet been published. To the extent NEPA-1 is interpreted as a challenge to the adequacy of the Staff's analysis of "new and significant information," which, if applicable, would be included in the draft SEIS for the COLA, Petitioners' challenge does not present a litigable issue at this time. As the Board has noted, a challenge to a document that has not yet been published is not admissible.[55]

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[51] An issue is "material" only if resolution of the dispute would make a difference in the outcome of the proceeding. *See In re Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), 64 N.R.C. 257, 354 (2006).

[52] Petition at 4.

[53] *See* 10 C.F.R. §§ 52.39(c)(1)(v); 51.107(b)(2),(3).

[54] *See In re Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP), 65 N.R.C. 237, 254 (2007) ("Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed." (citing *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), 38 N.R.C. 200, 247-48 (1993), *review declined*, 39 N.R.C. 91 (1994))); *In re Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), 67 N.R.C. 421, 433 (2008), *aff'd*, 68 N.R.C. 231 (2008).

[55] As the Board has already noted in rejecting a COLA contention asserting that a request that the ACE conduct navigation channel maintenance constitutes "new and significant information," the NRC Staff has not yet published the draft SEIS for the COLA and, therefore, a contention challenging its "new and significant" analysis is premature. Memorandum and Order (Ruling on Motion to Admit New Contention), *Southern Nuclear Operating Co.*, Docket Nos. 52-025-COL and 52-026-COL (Sept. 24, 2009).

4. The Petition is a nontimely filing that does not satisfy the requirements of 10 C.F.R. § 2.309(c).

Because the Notice of Hearing in this proceeding required Petitions to Intervene to be filed by November 17, 2008, the Petition is a "nontimely filing," which must satisfy 10 C.F.R. § 2.309(c)(1)(i) through (vii) in order to be admitted. Petitioners attempt to justify their late filing on the October 2, 2009 draft EA temporarily revising the DCP for the period September 2009 to February 2010. However, the ACE publicly announced **over a year** ago that it was temporarily reducing the Drought Level 3 discharge rate from the Thurmond Dam to 3100 cfs.[56] This information was sufficiently publicly available that both the NRC Staff and Joint Intervenors presented evidence about it at the ESP hearing in March 2009.

Petitioners therefore fail to articulate "good cause" as required by 10 C.F.R. § 2.309(c)(1)(i). This is the "first and most important, balancing factor."[57] The mere publication by ACE of an additional draft EA and FONSI for 2009 does not support nontimely admission of the contention when (i) materially-identical information was available over a year ago, and (ii) this issue was resolved in the ESP proceeding.[58] The Petition simply does not provide an adequate basis to support admission of NEPA-1 as a "nontimely" filing.

[56] *See* ESP Contested Hearing, Exhibit NRC000039 at 1.

[57] *In re Entergy Nuclear Vermont Yankee* (Vermont Yankee Nuclear Power Station), 63 N.R.C. 568, 580 (May 25, 2006).

[58] Neither does the 2009 draft EA and FONSI satisfy the "materially different" requirement of 10 C.F.R. § 2.309(f)(2) relative to new or amended contentions "filed after the initial filing." *See In re Tennessee Valley Authority* (Watts Bar Unit 2), LBP-09-26, slip op. at 60 (Nov. 19, 2009).

III. CONCLUSION

The issue raised by NEPA-1 was resolved in the ESP proceeding. Petitioners fail to demonstrate any "significant new information" sufficient to allow admission of NEPA-1 into the COL proceeding. The contention therefore fails to satisfy the admissibility requirements for COL contentions. For the foregoing reasons, SNC respectfully requests that the Board deny the Petition.

Respectfully submitted,

Signed (electronically) by M. Stanford Blanton

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Dated this 20th day of November, 2009.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of SOUTHERN NUCLEAR OPERATING COMPANY'S ANSWER OPPOSING PETITION OF VINCE DRESCHER, KENNETH WARD, JOHN C. HORN, JR., WILLIAM S. BASHLOR AND JAMES EDDIE PARTAIN TO INTERVENE AND ADMIT NEW CONTENTION in the above-captioned proceeding have been served by electronic mail as shown below, this 20th day of November, 2009, and/or by e-submittal.

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(Original signed by M. Stanford Blanton)

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Dated this 20th day of November, 2009.