UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR A SUSTAINABLE COAST, *et al.*,	)	
Petitioners,	)	
v.	)	No. 09-1262
UNITED STATES NUCLEAR REGULATORY COMMISSION, and the UNITED STATES OF AMERICA	)	
Respondents.	)	

RESPONDENTS' MOTION TO DISMISS PETITION FOR REVIEW

Pursuant to Federal Rule of Appellate Procedure 27 and Local Rule 27(g), the Nuclear Regulatory Commission (NRC) and the United States of America move to dismiss the petition for review for lack of jurisdiction. In deciding this motion, the Court need only consider one straightforward issue:

> *May petitioners seek judicial review of federal agency action while simultaneously pursuing an appeal at the agency level?*

The answer to this question is no. Petitioners may not challenge the same agency action in two forums at once. Agency action is not "final," and is not judicially reviewable, if it is still under review at the agency when petitioners seek judicial review.

The petition for review in this case challenges several NRC decisions and orders culminating in NRC's issuance of an Early Site Permit (ESP) and Limited Work Authorization (LWA) to Southern Nuclear Operating Company (Southern) for proposed Units 3 and 4 of the Vogtle Electric Generating Plant. These would be new nuclear power reactors to be built and operated at a site where Southern already operates two reactors.

Before they filed their petition for review in this Court, petitioners filed a separate administrative appeal with the Commission, asking it to review rulings by NRC's hearing tribunal, the Atomic Safety and Licensing Board (Licensing Board). The Licensing Board had rejected petitioners' contentions under the National Environmental Policy Act (NEPA).

Petitioners' administrative appeal remains pending before the NRC Commissioners. If petitioners prevail on that appeal, the Commission could take a number of actions in response, including suspending the ESP and LWA. In short, petitioners could still receive at the agency level the same relief they request from this Court in the current lawsuit.

Having asked the Commission to review and reverse Licensing Board decisions authorizing issuance of the ESP, petitioners cannot simultaneously come to this Court to seek the same relief. NRC's internal review process is not yet final, and petitioners' lawsuit therefore should be dismissed as premature. If petitioners are dissatisfied with the Commission's ultimate resolution of their challenge, they can file suit in this Court at that time.

Background

In 2006, Southern filed an application with NRC for an ESP under 10 C.F.R. Part 52. Southern seeks early approval of a site for two new reactors at the existing Vogtle Electric Generating Plant site near Waynesboro, Georgia.

An ESP would allow Southern to resolve site-related environmental, safety, and emergency planning issues before choosing a nuclear reactor design or deciding to build a facility on that site. If granted, an ESP would essentially allow Southern to "bank" the site for the future construction of new nuclear power facilities within 10-20 years. *See* 10 C.F.R. § 52.26(a) (2009). *See*

generally Nuclear Information & Resource Service v. NRC, 969 F.2d 1169, 1171 (D.C. Cir. 1992) (*en banc*).

Due to an NRC rule change in 2007, ESP applicants like Southern can also request an LWA, which would allow a narrow set of construction activities at the site, including placement of backfill and retaining walls, and installation of foundations. *See* 10 C.F.R. § 52.10(a) (2009); 72 Fed. Reg. 57,416 (Oct. 9, 2007).

ESP holders can reference the ESP if they apply to NRC for a combined operating license, which, if granted, would subsume the ESP. *See* 10 C.F.R. §§ 52.26(d), 52.73(a) (2009). *See generally Nuclear Information & Resource Service,* 969 F.2d at 1171-72. A combined license would authorize the licensee to construct and operate a nuclear power plant at the site, within specific conditions, for 40 years. *See* 10 C.F.R. § 52.104 (2009).

In response to NRC's 2006 notice of hearing and opportunity to petition for leave to intervene in the Vogtle ESP proceeding, petitioners, a coalition of citizen and environmental groups, jointly filed an intervention petition challenging aspects of the ESP application and NRC staff's analysis of it. *See Southern Nuclear*

Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-03, 65 NRC 237, 2007 WL 2195473 (2007).

Petitioners filed no additional contentions after Southern later amended its ESP application to request an LWA. *See* 72 Fed. Reg. 64,686 (Nov. 16, 2007) (Notice of Hearing).

The Licensing Board rejected some of petitioners' challenges to the ESP at the outset and rejected others after holding an evidentiary hearing. The Board issued a series of decisions culminating in *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-09-07, ___ NRC ___ (June 22, 2009). *See also* Pet. for Rev. at 1-2 (listing decisions).

Petitioners sought Commission review of the Licensing Board's rulings on two contentions. *See Joint Intervenors' Petition for Review of the First Partial Initial Decision (Contested Proceeding)* (July 15, 2009).[1] Then, although the Commission had not yet decided the pending administrative appeal, petitioners also filed in this Court.

---

[1] The Addendum attached to this Motion includes the Petition for Review to the Commission, the Commission's Order extending its time to review that Petition, and the LWA Notice of Hearing. Petitioners have filed the underlying Licensing Board decisions.

Argument

1. Petitioners' appeal to the Commission renders the initial Licensing Board decision non-final for judicial review.

The Administrative Procedure Act (APA) provides that an initial agency decision made by a hearing officer "becomes the decision of the agency without further proceedings *unless there is an appeal to*, or review on motion of, *the agency. . . .*" *Aluminum Co. of America v. ICC*, 761 F.2d 746, 748 (D.C. Cir. 1985) (quoting 5 U.S.C. § 557(b)).

Thus, "if there is an administrative appeal, the initial decision of the administrative law judge is not the 'final agency decision.'" *United States v. Alexander*, 743 F.2d 472, 477 (7th Cir. 1984). And "[t]his court is ordinarily without jurisdiction to review an agency action that is not final." *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002). Indeed, the Hobbs Act – which governs judicial review of NRC licensing decisions – expressly limits such review to "final" agency orders. *See* 28 U.S.C. § 2342.

The Supreme Court has held that, under the Hobbs Act, as under the APA, seeking reconsideration of an agency decision deprives the agency decision of finality and deprives a reviewing court of jurisdiction:

> [B]oth the APA and the Hobbs Act embrace a tolling rule: The timely filing of a motion to reconsider renders the underlying order non final for purposes of judicial review. In consequence, pendency of reconsideration renders the underlying decision not yet final, and it is implicit in the tolling rule that a party who has sought rehearing cannot seek judicial review until the hearing has concluded.

INS v. Stone, 514 U.S. 386, 392 (1995) (citing *ICC v. Locomotive Engineers*, 482 U.S. 270 (1987)).

In explaining this principle, the Supreme Court pointed to this Court's decision in *Outland v. CAB*, 284 F.2d 224, 227 (D.C. Cir. 1960), which held that agency orders appealed within the agency are not final because of the "possibility that the order complained of will be modified in a way which renders judicial review unnecessary." *Id.*

More recently, in *Acura of Bellevue v. Reich*, 90 F.3d 1403 (9th Cir. 1996), *cert. denied*, 519 U.S. 1119 (1997), the Ninth Circuit cited *Outland* and another case from this Court, *Bellsouth Corp. v. FCC*, 17 F.3d 1487 (D.C. Cir. 1994), in holding that there is "no qualitative difference between a motion for reconsideration and an appeal to a superior agency authority for purposes of finality," because "the initial agency decision may be modified or reversed in

both types of administrative review." *Acura,* 90 F.3d at 1407-08. *See also Beverly Enterprises, Inc. v. Herman*, 50 F. Supp. 2d 7, 12 n.4 (D.D.C. 1999).

That is the case here. Petitioners' decision to challenge the Licensing Board's ESP decision on appeal to the Commission renders NRC's decision to issue the ESP non-final and outside this Court's jurisdiction.

2. The requirement to complete any administrative appeals before invoking judicial review is rooted in sound policy.

Several persuasive reasons support the rule that any agency appeals, once taken, must be completed before judicial review can begin:

- Having two bodies simultaneously review an agency action would waste government resources. *See Bellsouth Corp.*, 17 F.3d at 1489 ("Even a modicum of concern for judicial economy militates strongly against concurrent review").

- A successful appeal to a higher agency authority may obviate the need for judicial review. *See Outland*, 284 F.2d at 227-28.

- Simultaneous review creates the possibility that the agency and the court could issue conflicting rulings. *See Acura*, 90 F.3d at 1409.

- Judicial review during an ongoing agency appeal could interfere with the agency's right to reconsider and refine its position during its administrative proceedings. *Id.*

Here, there is simply no need for the Commission and this Court to simultaneously review the Licensing Board's decision to authorize issuance of the ESP. To permit such review would needlessly waste time and money, risk subjecting the parties to confusing, potentially conflicting rulings, and interfere with the Commission's right to apply its expert judgment in review of decisions of its own Licensing Board. Moreover, the Commission could grant relief – setting aside or modifying the ESP – that would make the Court's review unnecessary.

In summary, "[h]aving chosen to invoke the agency appeals process," petitioners cannot provide "sufficient justification for bypassing agency expertise and concurrently invoking the jurisdiction of the federal courts." *Acura,* 90 F.3d at 1408.

3. Petitioners also failed to exhaust administrative remedies regarding the LWA before filing with this court.

Insofar as the Petition for Review challenges NRC's issuance of the LWA separate and apart from the ESP, it should be dismissed

as a matter of law for failure to exhaust available agency remedies to challenge LWAs.[2] Petitioners sat on their hands when given a specific opportunity to object to Southern's LWA application, *see* 72 Fed. Reg. 64,686, and filed no LWA-related contentions in the then-pending Licensing Board adjudication. In the absence of any "objection made at the time appropriate under [NRC's] practice," this Court should not consider disturbing the LWA now. *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (explaining exhaustion doctrine).

4. Even when the Commission decides the pending administrative appeal, the Petition for Review will remain "incurably premature," requiring dismissal.

Petitioners may argue that the Court can simply wait for the Commission to issue a decision on the appeal pending with the agency. Or, perhaps, before this Court rules on our motion to dismiss, the Commission will have decided the now-pending administrative appeal. But dismissal of the current lawsuit would still be the correct result.

---

[2] Petitioners recently filed their Statement of Issues in this Court. It does not suggest a separate, LWA-based challenge, as none of the issues reference the LWA.

The Hobbs Act requires the filing of a petition for review with the Court "after" entry of the agency's "final" order. *See* 28 U.S.C. § 2344. It "imposes a jurisdictional bar to judicial consideration of petitions filed prior to entry of the agency orders to which they pertain." *Small Bus. in Telecomms. v. FCC*, 251 F.3d 1015, 1024 (D.C. Cir. 2001) (citing *Western Union Tel. Co. v. FCC*, 773 F.2d 375, 378 (D.C. Cir. 1985)). This is because such petitions purport to challenge not-yet-final agency orders. These petitions are "incurably premature" and must be dismissed. *See Riffin v. Surface Transp. Bd.*, 331 Fed. Appx. 751, 752 (D.C. Cir. 2009) (citing authorities).

The petition for review filed with this Court challenged various Licensing Board decisions. *See* Pet. for Rev. at 1-2. But because of the pending Commission appeal, those decisions were not "final" at the time petitioners sought review in this Court.

This Court's precedent firmly establishes that this petition for review is fatally flawed for failure to challenge a final Commission order. Thus, the petition for review must be dismissed.

Conclusion

This motion's outcome depends solely on the Court's application of the jurisdictional requirement of finality, as expressed in the APA and the Hobbs Act. Taken together, the relevant statutory language, case law, and practical policy considerations call for dismissing the prematurely-filed petition for review for lack of jurisdiction.

Respectfully submitted,

____/s/_____
CHARLES R. SCOTT
Attorney
U.S. Department of Justice
Environment & Natural
Resources Division
P.O. Box 23795
L'Enfant Plaza Station
Washington, D.C. 20026
Office of the General Counsel
202-514-4786
charles.scott@usdoj.gov

____/s/_____
JOHN F. CORDES
Solicitor

___/s/_____
SEAN D. CROSTON
Attorney
U.S. Nuclear Regulatory
Commission
Office of the General Counsel
Mail Stop O15 D21
Washington, D.C. 20555
301-415-2585
sean.croston@nrc.gov

Dated: December 11, 2009

Center for a Sustainable Coast, et al.
v.
U.S. Nuclear Regulatory Commission, et al.

No. 09-1262

ADDENDUM
to
RESPONDENTS' MOTION TO DISMISS PETITION FOR REVIEW

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)	July 15, 2009

JOINT INTERVENORS' PETITION FOR REVIEW OF THE FIRST PARTIAL INITIAL DECISION (CONTESTED PROCEEDING)

July 15, 2009

Lawrence Sanders
Mindy Goldstein
Counsel for Joint Intervenors

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Statutes

Regulations

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)	July 15, 2009

JOINT INTERVENORS' PETITION FOR REVIEW OF THE FIRST PARTIAL INITIAL DECISION (CONTESTED PROCEEDING)

STATEMENT OF THE ISSUE

Pursuant to 10 C.F.R. §§ 2.1212 and 2.341, 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 (collectively, "Joint Intervenors"), each of which has intervened in the above-captioned Early Site Permit ("ESP") proceeding, hereby petition this Commission to review the First Partial Initial Decision (Contested Hearing) served June 22, 2009 (the "Decision") by the Atomic Safety and Licensing Board (the "Board"). As explained below, the Decision, in which the Board erroneously resolved environmental contentions 1.2 and 6.0 ("EC 1.2" and "EC 6.0", respectively) on the merits in favor of the Nuclear Regulatory Commission staff (the "staff") and Southern Nuclear Operating Company ("SNC"), constitutes a departure from established law, raises important questions of law and policy, and relies on a record that unfairly omits Joint Intervenors' concerns regarding cumulative impacts. In accordance with 10 C.F.R. § 2.341(b)(4), these substantial issues and errors warrant review.

PROCEDURAL BACKGROUND

On August 14, 2006, SNC submitted an ESP application to the Commission for two additional reactors at the existing Vogtle Electric Generating Plant ("VEGP") site near

Waynesboro, Georgia. In response to this application, the Commission published a notice of hearing and opportunity to petition for leave to intervene.[1] Pursuant to this notice, on December 11, 2006, Joint Intervenors (then Joint Petitioners) filed a request for hearing and petition to intervene in the ESP proceeding, seeking to admit seven environmental contentions.[2] On March 12, 2007, the Board issued a Memorandum and Order concluding that each of the Joint Intervenors had established the requisite standing to intervene in the ESP proceeding, and admitted a narrow version of EC 1.2 for hearing.[3]

Then, on October 17, 2007, SNC filed a motion seeking summary disposition of EC 1.2 in its favor on the merits;[4] the staff endorsed SNC's request.[5] Joint Intervenors filed an answer to the SNC dispositive motion on November 13, 2007, asserting that summary disposition was inappropriate in this instance.[6] In response to Joint Intervenors' answer, both SNC and the staff filed motions to strike parts of Joint Intervenors' response, alleging that the answer improperly expanded the scope of the contention. Joint Intervenors opposed these motions.[7]

On January 15, 2008, the Board, agreeing with Joint Intervenors, upheld the contention against the motion for summary disposition,[8] but limited the scope.[9] Specifically, the Board found that issues concerning cumulative impacts of water withdrawals by facilities on the

---

[1] 71 Fed. Reg. 60,195 (Oct. 12, 2006).
[2] See Petition for Intervention (Dec. 11, 2006).
[3] Board Memorandum and Order (Ruling on Standing and Contentions) (Mar. 12, 2007) ("Initial Ruling on Contentions") at 45, Appendix A. A narrow version of EC 1.3 was also admitted. However, EC 1.3 is not the subject of this petition for review and accordingly will not be discussed herein.
[4] See SNC Motion for Summary Disposition on Intervenors' EC 1.2 (Cooling System Impacts on Aquatic Resources) (Oct. 17, 2007); see also SNC Statement of Undisputed Facts in Support of Applicant's Motion for Summary Disposition of Intervenors' EC 1.2 (Cooling System Impacts on Aquatic Resources) (Oct. 17, 2007).
[5] See NRC Staff Answer to SNC's Motion for Summary Disposition of EC 1.2 (Oct. 29, 2007).
[6] See Joint Intervenors Answer Opposing SNC's Motion for Summary Disposition of EC 1.2 (Nov. 13, 2007) ("JTI Answer").
[7] See Intervenors Answer In Response To SNC and NRC Staff Motions TO Strike Portions Of Intervenors Answer To Motion for Summary Disposition of EC 1.2 (Dec. 6, 2007).
[8] See In re S. Nuclear Operating Co., (Early Site Permit for Vogtle ESP Site), 67 NRC 54, 2008 NRC LEXIS 83, ASLBP (Jan. 15, 2008).
[9] Id. at 83.

Savannah River other than the existing and proposed Vogtle facilities were outside the scope of EC 1.2.[10]

Then, on August 14, 2008, the staff issued the Final Environmental Impact Statement for an ESP at the VEGP site (the "FEIS").[11] In light of the new information disclosed in the FEIS, on September 23, 2008, Joint Intervenors submitted a motion (dated September 22, 2008) to admit a new environmental contention, designated EC 6.0.[12] In an October 24, 2008 Memorandum and Order, the Board admitted EC 6.0.[13]

As admitted and limited by the Board, the contentions provided:

> **EC 1.2.** The FEIS fails to identify and consider direct, indirect, and cumulative impingement/entrainment and thermal effluent discharge impacts of the proposed cooling system intake and discharge structures on aquatic resources.[14]
> **EC 6.0.** Because Army Corps of Engineers (the "Corps") dredging of the Savannah River Federal navigation channel has potentially significant impacts on the environment, the NRC staff's conclusion, as set forth in the "Cumulative Impacts" chapter of the FEIS, that such impacts would be moderate is inadequately supported. Additionally, the FEIS fails to address adequately the impacts of the Corps' upstream reservoir operations as they support navigation, an important aspect of the problem.[15]

In preparation for the 10 C.F.R. Part 2, subpart L, informal evidentiary hearing on these environmental contentions, Joint Intervenors, SNC, and the staff filed initial position statements and pre-filed direct testimony, on January 9, 2009. In response to Joint Intervenors' filing, SNC and the staff filed in limine motions to strike portions of Joint Intervenors' pre-filed direct testimony and associated exhibits.[16] The Board granted the motions in part, and struck certain portions of the pre-filed direct testimony and exhibits, including EC 1.2 testimony and exhibits

---

[10] Id. at 78.
[11] See NRC000001.
[12] See Joint Intervenors' Motion to Admit New Contention (Sept. 22, 2008) ("Motion to Admit EC").
[13] See Board Memorandum and Order (Ruling on Motion to Admit New Contention) (Oct. 24, 2008) ("Ruling on New Contention") (unpublished) at 9, Appendix A.
[14] Initial Ruling on Contentions at 45, Appendix A.
[15] Ruling on New Contention at Appendix A.
[16] SNC's Motion In Limine To Strike Testimony And Exhibits Filed By Joint Intervenors (Jan. 14, 2009); Staff Motion In Limine To Exclude Portions Of Testimony And Exhibits Filed By Joint Intervenors (Jan. 14, 2009).

regarding "cumulative water usage as it relates to water users other than SNC's two existing and two proposed Vogtle units."[17]

Then, on February 6, 2009, the parties filed their response statements and pre-filed rebuttal testimony. On February 11, 2009, SNC and the staff filed in limine motions to strike portions of Joint Intervenors' pre-filed rebuttal testimony and associated exhibits.[18] The Board granted the motions in part, and stuck certain portions of the pre-filed rebuttal testimony exhibits, again including EC 1.2 testimony and exhibits concerning the cumulative impacts of water withdrawals by users other than SNC's two existing and two proposed Vogtle units.[19]

On March 16-19, 2009, the Board held evidentiary hearings in Augusta, Georgia, on EC 1.2 and EC 6.0.[20] After the hearing, on April 8, 2009, the Board closed the evidentiary record for the contested portion of the ESP proceeding.[21]

Then, pursuant to 10 C.F.R. § 2.1209 and the general schedule set forth in Appendix A to the Board's November 13, 2008 Memorandum and Order,[22] on April 24, 2009, Joint Intervenors, SNC, and the staff filed their proposed findings of fact and conclusions of law regarding EC 1.2 and EC 6.0.[23] Each party similarly filed reply findings of fact and conclusions of law on May 8, 2009.[24] On June 22, 2009, the Board issued its Decision, ruling on the merits of each contention in favor of the staff and SNC.

---

[17] Board Memorandum and Order (Ruling on In Limine Motions) (Jan. 26, 2009).
[18] SNC's Motion In Limine (Feb. 11, 2009); Staff Motion In Limine To Exclude Portions Of Rebuttal Testimony And Exhibits Filed By Joint Intervenors (Feb. 11, 2009).
[19] See Board Memorandum and Order (Ruling on In Limine Motions) (Feb. 23, 2009) (unpublished) at 3-6.
[20] See Official Transcript of Proceedings Nuclear Regulatory Commission ("Tr.") at 506-1660.
[21] See Board Memorandum and Order (Transcript Corrections; Closing the Record of Contested Proceeding) (Apr. 8, 2009) at 1–2 .
[22] Board Memorandum and Order (Revised General Schedule) (Nov. 13, 2008).
[23] See Joint Intervenor's Proposed Findings of Fact and Conclusions of Law (Apr. 24, 2009) ("JTI Proposed Findings"); SNC Proposed Findings of Fact and Conclusions of Law Regarding Environmental Contentions (Apr. 24, 2009); Staff's Proposed Findings of Fact and Conclusions of Law Concerning Contested Environmental Matters (Apr. 24, 2009) ("Staff Proposed Findings").
[24] See Joint Intervenors' Reply to NRC Staff Proposed Findings (May 8, 2009) ("JTI Reply to Staff Proposed Findings"); SNC Reply Findings of Fact and Conclusions of Law Regarding Environmental Contentions (May 8,

LEGAL STANDARD FOR REVIEW OF BOARD DECISIONS

Partial initial decisions of the Board, including the Decision issued in the underlying ESP proceeding, constitute "final orders" and are accordingly subject to appellate review.[25] Participants in a proceeding before the Board have the right to petition the Commission for such appellate review on any issue which they placed in controversy or sought to place in controversy during the proceeding.[26]

Commission review of partial initial decisions is discretionary.[27] In determining whether to grant, as a matter of discretion, a petition for review, 10 C.F.R. §2.341(b)(4) requires the Commission to give due weight to the existence of a substantial question with respect to several considerations, including:

> (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
> (iii) A substantial and important question of law, policy, or discretion has been raised;
> (v) Any other consideration which the Commission may deem to be in the public interest.[28]

In the interest of efficiency, the Commission has broadly interpreted the range of "substantial questions" a petitioner may raise. In fact, petitioners are encouraged to assert "any claims of error that relate to the subject matter of the partial initial decision, whether the specific issue was admitted for the hearing or not, and without regard to whether the issue was originally

---

2009) ("SNC Reply Findings"); Staff's Reply Findings of Fact and Conclusions of Law Concerning Contested Environmental Matters (May 8, 2009).

[25] In re Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-301, 2 N.R.C 853, 854 (1975) (holding that partial initial decisions which do not yet authorize construction activities nevertheless may be significant and, therefore, are subject to appellate review).

[26] See generally In re Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 A.E.C. 1175, aff'd, CLI-75-1, 1 NRC 1 (1975).

[27] 10 C.F.R. § 2.341(b)(4); accord In re Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), CLI-04-4, 59 N.R.C. 31, 35 (2004).

[28] 10 C.F.R. §2.341(b)(4)(ii), (iii), and (v). See also In re Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), 59 NRC 351 (2000).

designated a separate "contention" or a "basis" for a contention."[29] In asserting such claims, the petition for review must contain:

> (i) A concise summary of the decision or action of which review is sought;
> (ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not, why they could not be raised;
> (iii) A concise statement why in the petitioner's view the decision or action is erroneous; and
> (iv) A concise statement why Commission review should be exercised.[30]

Upon granting a petition for review, the Commission must consider the admitted claims and the underlying Board decision. And, after giving the decision the probative force it "intrinsically commands," the Commission may reject the Board's findings and conclusions if the "record compels a different result."[31] Moreover, the Commission may reject the underlying decision if the Board failed "to articulate in reasonable detail the basis for the course of action chosen."[32]

DISCUSSION

I. 10 C.F.R. § 2.341(b)(2)(i): SUMMARY OF THE DECISIONS REGARDING EC 1.2 AND EC 6.0 OF WHICH REVIEW IS SOUGHT

Regarding EC 1.2, the Board entered judgment on the merits in the favor of the staff and SNC. In reaching this decision, the Board ruled that the staff's conclusion in the FEIS that impacts associated with operation of Units 3 and 4, *including cumulative impacts*, would be SMALL was supported by the record.[33]

---

[29] In re Private Fuel Storage, 59 N.R.C. at 353.
[30] 10 C.F.R. § 2.341(b)(2).
[31] In re Niagara Mohawk Power Co. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 N.R.C. 347, 357 (1975).
[32] In re Public Serv. Co. of New Hampshire (Seabrook Station, Units 1 & 2), 6 N.R.C. 33, 41 (1977) (internal quotations omitted); accord Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 851, (U.S. App. D.C. 1970) (providing the Board must clearly articulate reasons for its decision without unreasonable discrimination, identify crucial facts, and assure the agency's policies effectuate general standards).
[33] Decision at 5.1.

Regarding EC 6.0, the Board entered judgment on the merits in favor of the staff and SNC. In reaching this decision, the Board concluded

> (1) [the staff's review process and discussion of potential dredging-related impacts satisfied its obligation under NEPA] . . . given the information that it had when the FEIS was issued; [and] (3) if SNC determines that dredging will be necessary to transport heavy construction components to the VEGP site and it decides either to request that [the Corps] resume maintenance dredging or to request a permit, more information likely will be provided and more studies likely will be conducted, and this information likely will be incorporated into any environmental review document produced by [the Corps], which would become available and inform a [Corps] decision on the dredging or the staff's NEPA decision relating to this SNC ESP application, or the pending SNC [combined license] application for Vogtle Units 3 and 4, depending on its availability.[34]

II. THE BOARD'S DECISION TO ENTER JUDGMENT FOR EC 1.2 IN FAVOR OF THE STAFF AND SNC SHOULD BE REVIEWED BY THE COMMISSION.

As further explained below, the Board's decision to exclude Joint Intervenors' evidence and testimony in support of EC 1.2 regarding cumulative impacts of withdrawals other than those relating to the existing and proposed Vogtle facilities was incorrect as a matter of law. Accordingly, this petition for review should be granted pursuant to 10 C.F.R. § 2.341(b)(4)(ii). Further, as the scope of a cumulative impacts analysis is an important question that will be recurrently raised in forthcoming ESP and combined license ("COL") proceedings, this petition for review should be granted pursuant to 10 C.F.R. § 2.341(b)(4)(iii). Additionally, the Board unfairly denied Joint Intervenors the opportunity to place evidence in the record regarding withdrawals other than those from the proposed and existing Votgle Units. Thus, as a matter of equity and pursuant to 10 C.F.R. § 2.341(b)(4)(v), this petition for review should be granted.[35]

---

[34] Id. at 5.3.
[35] See 10 C.F.R. § 2.341(b)(2)(iii)

A. 10 C.F.R. 2.341(b)(2)(ii): Joint Intervenors have repeatedly asserted that the staff's cumulative impacts analysis fails to take into account impacts related to other withdrawals.

Joint Intervenors have repeatedly challenged the deficient consideration of the impacts of "other facilities currently operating along the river"[36] in connection with the proposed and existing Vogtle units.[37] Initially, in their Petition for Intervention, Joint Intervenors challenged SNC's environmental report ("ER") because it failed to "evaluate impacts from the new effluent discharge combined with the existing discharge and *other sources of pollution in the area.*"[38] Despite this assertion, the Board held that Joint Intervenors' discussion of withdrawals other than those associated with the proposed and existing Vogtle units was outside the scope of EC 1.2.[39]

Although both the staff and SNC proceeded to discuss these "other withdrawals" throughout the ESP proceeding,[40] arguments, testimony, and evidence proffered by Joint Intervenors in their summary disposition answer,[41] their prefiled direct testimony and supporting affidavits,[42] and prefiled rebuttal testimony[43] were nevertheless excluded from the record and, therefore, removed from the Board's consideration.[44]

---

[36] Decision at 4.112.
[37] See 10 C.F.R. §2.341(b)(2)(ii).
[38] Petition for Intervention (Dec. 11, 2006) at 13. (emphasis added).
[39] See Board Memorandum and Order (Ruling on Dispositive Motion and Associated Motions to Strike Regarding EC 1.2) (Jan. 15, 2008) ("Ruling on Motion to Strike EC 1.2") at 25.
[40] See, e.g., SNC Reply Findings at 11-13 (stating, "the FEIS clearly demonstrates the staff's consideration of past impacts of the SRS"); Staff Proposed Finding at 34 (citing past river sampling, "which indicates that historic operations of the SRS intake did not have discernable impact on fish species"); see also SNC's Initial Statement of Position on Intervenors' EC1.2 (Jan. 9, 2009) at 17; ESP Hearing Tr. at 698-99 (March 16, 2009); Staff Initial Statement of Position on Joint Intervenors' Contentions EC 1.2, EC 1.3, and EC 1.6 (Jan. 9, 2009) at 19-20, 24-25 and Attach. 2 at 17.
[41] JTI Answer at 18-19 (providing that "The DEIS does not address cumulative impacts adequately").
[42] See Prefiled Direct Testimony of Barry W. Sulkin in Support of EC 1.2 (Jan. 9, 2009) (statement concerning the failure of the cumulative impacts analysis to analyze "the total impact of all the withdrawals combined with the new Units" stricken from record); Affidavit of Young in Support of JTI Answer (Nov. 13, 2007), JTI000003 (statement regarding cumulative impacts of "other withdrawals occurring in the Savannah River" stricken from record); Declaration of Young in Support of Joint Intervenors' Petition for Intervention (Dec. 11, 2006), JTI000005 (statement regarding "cumulative impacts from the multitude of water users in the Middle Savannah River Basin" stricken from record); Affidavit of Sulkin in Support of JTI Answer (Nov. 9, 2007) at ¶¶ 4, 22-24, JTI000031 (statements regarding "future increases of withdrawals from the Savannah River" stricken from record).

B. 10 C.F.R.§ 2.341(b)(4)(ii): The Board's decision to exclude Joint Intervenors' testimony and evidence regarding certain impacts is contrary to established law.

The Board's exclusion of Joint Intervenors' testimony and evidence regarding the cumulative impacts of other withdrawals on the Savannah River is contrary to NEPA and the corresponding NRC regulations. By definition, a cumulative impacts analysis includes all past, present and reasonably foreseeable future actions.[45] The withdrawals on the Savannah River other than those relating to the existing and proposed Vogtle sites remain relevant as past and present actions, and their impacts must be given adequate consideration in a cumulative impacts analysis. The Board erred in excluding Joint Intervenors' evidence and testimony on this matter.

1. NEPA requires a "hard look" at all collectively significant impacts.

As Joint Intervenors, SNC, and the staff have all previously noted, the National Environmental Policy Act of 1969 ("NEPA")[46] and the corresponding NRC regulations[47] require the Commission to take a "hard look" at the cumulative impacts of a proposed action. The purpose of NEPA is to require a sufficiently detailed statement of relevant environmental considerations that were given a 'hard look' by the agency, and thereby to permit informed public comment and agency decision-making on the proposed action."[48] Although this "hard look" is tempered by a "rule of reason," the rule does not wholly negate an agency's obligation to address cumulative impacts within its environmental impact statement.[49] Rather, while the rule of reason may limit the scope of the cumulative impacts analysis, NEPA nevertheless

---

[43] Prefiled Rebuttal Testimony of Barry W. Sulkin Concerning Contention EC 1.2 (Feb. 6, 2009) (statements regarding the "impossib[ility] to say anything definitive about the cumulative impacts of entrainment without knowing something about the current withdrawal rates at the SRS, D-Area Powerhouse, as well as other major withdrawals in the Savannah River Basin" stricken from record).
[44] See Ruling on Motion to Strike EC 1.2 at 25; Memorandum and Order (Ruling on In Limine Motions) (Jan. 26, 2009) at 3; Memorandum and Order (Ruling on In Limine Motions) (Feb. 23, 2009) at 3.
[45] See 40 C.F.R. § 1508.7.
[46] 42 U.S.C. §§ 4321 et seq.
[47] 10 C.F.R. Parts 51 and 52.
[48] Lands Council v. Powell, 395 F.3d 1019, 1027 (9th Cir. 2005).
[49] 40 C.F.R. § 1508.25.

requires analysis of cumulative impacts that are reasonably foreseeable or have some likelihood of occurring.[50]

40 C.F.R. § 1508.7 defines "cumulative impact" as "the impact on the environment which results from the incremental impact of past, present, and reasonably foreseeable future actions. . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." Courts have applied this statutory definition broadly.[51] Any past action, even those actions which ceased years prior to the proposed action, must be evaluated and their present impacts taken into consideration in a cumulative impacts analysis.[52] By looking at all the impacts together, an agency can appreciate that the cumulative impact of actions is often greater than the sum of all individual impacts. Even the addition of one more small action "may represent the straw that breaks the back of the environmental camel."[53]

2. Well-established law requires consideration of the impacts concerning withdrawals other than the existing and proposed Vogtle units.

In their Petition for Intervention, Joint Intervenors structured EC 1.2 to include a challenge to the adequacy of the cumulative impacts analysis in the FEIS. By definition, a

[50] See In re Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 A.E.C. 831, 836 (1973); see also 40 C.F.R. § 1508.25 (defining the "scope" of an environmental impact statement as including, "cumulative actions, which when viewed without other proposed actions have cumulatively significant impacts and therefore should be discussed in the same impact statement.").

[51] See, e.g., Ohio Valley Environmental Coalition v. Hurst, 604 F. Supp. 2d 860 (S.D. W. Va. 2009); Grand Canyon Trust v. FAA, 290 F.3d 339 (D.C. Cir. 2002); Mountaineers v. U.S. Forest Service, 445 F. Supp. 2d 1235 (D. Wash. 2006).

[52] Ohio Valley Environmental Coalition, 604 F. Supp. 2d at 885 (holding that the present impact of a past action is relevant to a cumulative analysis). See also Land Council, 395 F.3d at 1028 (providing that "the general rule under NEPA is that, in assessing cumulative effects, the environmental impact statement must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment").

[53] Grand Canyon Trust, 290 F.3d at 343, quoting Hanly v. Kleindienst, 471 F.2d 823, 831 (2d Cir. 1972).

cumulative impacts analysis requires consideration of "the incremental impact of an action, when added to other past, present, and reasonably foreseeable future actions."[54]

The Board misunderstood the import of this definition. In trying to justify its seemingly arbitrary narrowing of the scope of "cumulative impacts" to exclude consideration of all actions other than those occurring at Plant Vogtle,[55] the Board stated

> the fact that, as the staff recognized in the FEIS, there are various existing facilities making withdrawals from the river does not, under the NEPA rule of reason, automatically compel an *extensive analysis* of how each facility withdrawing water upstream of the proposed Vogtle Units 3 and 4 interacts with the Savannah River environment.[56]

While this may be true, NEPA and the rule of reason require consideration of cumulative impacts in the FEIS, and thus at least *some consideration* of the impacts of surrounding facilities is required. The degree of this consideration has been discussed by several courts. Consistently, these courts have found that, more than being perfunctory, environmental impacts statements must provide a "useful analysis of the cumulative impacts of past, present, and future projects."[57] Thus, "[c]onsideration of cumulative impacts requires some quantified or detailed information . . . general statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided."[58] However, Joint Intervenors were not permitted to discuss the extent of the staff's cumulative impacts analysis. Rather, because the Board incorrectly limited the scope of the definition of cumulative impacts, all discussion by Joint Intervenors of the impacts of neighboring facilities – no matter how foreseeable – was completely prohibited.

---

[54] 40 C.F.R. §1508.7.
[55] See Decision at 2.8.
[56] See Decision at 4.113. (emphasis added).
[57] See, e.g., Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 810 (9th Cir. 1999) (citing City of Carmel-By-The-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1160 (9th Cir. 1997)).
[58] Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1075 (9th Cir. 2002) (citing Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1379-80 (9th Cir. 1998)).

Indeed, by using the term "cumulative impacts," EC 1.2 on its face questioned the adequacy of the impacts analysis of nearby facilities; based on use of that term alone, Joint Intervenors should have been permitted to discuss the impacts of all foreseeable sources of pollution in the vicinity of Plant Vogtle. However, Joint Intervenors did not exclusively rely on the statutory definition of cumulative impacts. Rather, Joint Intervenors expressly pleaded that "[t]he ER does not evaluate cumulative impacts from the new effluent discharge combined with the existing discharge *and other sources of pollution in the area.*"[59] Despite their use of the term "cumulative impacts" and Joint Intervenors' statements in their Petition for Intervention supporting this definition, the Board nevertheless limited the scope of EC 1.2 to exclude from consideration withdrawals from sources other than Plant Vogtle.[60] Such exclusion was incorrect as a matter of law.[61]

Even assuming, for the sake of argument, that the Board's limitation of the scope of EC 1.2 was initially correct, both the staff and SNC repeatedly discussed "other withdrawals" throughout the ESP proceeding,[62] and such discussion necessarily opened the door for Joint Intervenors' response.[63] The Board's continual refusal to allow Joint Intervenors to respond to arguments made by the staff and SNC is a disconcerting departure from clearly established law.[64]

Finally, and perhaps most egregiously, after refusing to introduce Joint Intervenors' testimony and evidence regarding "other withdrawals" despite Joint Intervenors' initial pleading

---

[59] Petition for Intervention at 13. (emphasis added).
[60] See Ruling on Motion to Strike EC 1.2 at 25.
[61] See 10 C.F.R. § 2.341(b)(4)(ii).
[62] See n.40.
[63] See In re Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), 50-293-LR, 2008 NRC LEXIS 69, ASLBP (Mar. 24, 2008) (The NRC Atomic Safety and Licensing Board denied an in limine motion to exclude evidence that by itself appeared to be irrelevant because it was relevant when considered in combination with other evidence – the determination of whether evidence is admissible needs to take the record into consideration as a whole as opposed to the contested evidence in isolation).
[64] See, e.g., id.

and repeated attempts to respond to the staff and SNC testimony, the Board held that, *based on the record*, Joint Intervenors' argument that the withdrawals of other facilities – including the SRS – could be significant, remained unsubstantiated. For example, the Board noted,

> on the record before us [we are not] able to agree with Joint Intervenors apparent suggestion that SRS impingement and entrainment impacts were, and continue to be, a primary source of very significant negative impacts for the Savannah River environs at issue here so that the SRS facility, in combination with the existing VEGP facility and the additional 'straw' afforded by the proposed new units, will result in serious environmental damage.[65]

The Board further held:

> Finally, we see no basis for a ruling in Joint Intervenors favor on the question of the adequacy of the staff's analysis of the cumulative impacts associated with impingement/entrainment/thermal discharge given that Joint Intervenors concerns rest in large measure upon a view of the ecological health of the Savannah River that fails to account for or recognize that cooling water needs of the former SRS production reactors, albeit substantial, have not been a factor impacting the river for a number of years.[66]

Such conclusions are remarkable, given that Joint Intervnors were repeatedly denied the opportunity to introduce into the record any testimony or evidence to the contrary. The Board cannot rest its Decision on a record that purposefully excluded any input from Joint Intervenors regarding the impacts of SRS or other Savannah River actors.

C. 10 C.F.R. § 2.341(b)(4)(iii): The scope of a cumulative impacts analysis is an important question that will be raised in numerous ESP and COL proceedings going forward.

The adequacy of the cumulative impacts analysis in an FEIS is an issue that will arise in numerous ESP and COL proceedings. Future petitioners, applicants, and the staff need to have a clear understanding of the extent of analysis required. The Commission's review of the Decision

---

[65] Decision at n.33.

[66] Id. at 4.116. See also id. at 4.115 ("Thus, whether viewed in terms of rare or populous species, we are unable to find *on this record* that there has been 'a stone left unturned' such that the NEPA cumulative impacts analysis in this instance is deficient in assessing whether the proposed new units will provide the proverbial 'straw' about which Joint Intervenors are concerned.")

will give these parties the clarification needed to ensure the NEPA "hard look" requirement is satisfied.

D. 10 C.F.R § 2.341(b)(4)(v): As a matter of fairness, Joint Intervenors should have had the opportunity to raise questions regarding the adequacy of the cumulative impacts analysis as it relates to withdrawals other than those from the proposed and existing Vogtle units.

As a matter of fairness, Joint Intervenors should have had the opportunity to raise issues concerning the staff's cumulative impacts analysis as it relates to withdrawals other than those from the proposed and existing Vogtle units. Notably, both the staff and the SNC had the opportunity to discuss the impacts of SRS and other facilities on the Savannah River.[67] Based on the evidence and testimony introduced by the staff and SNC regarding these impacts, the Board held that the record did not support Joint Intervenors' argument that the impacts of Units 3 and 4, when viewed in connection with the impacts of surrounding facilities, could be significant.[68] Equity demands that Joint Intervenors be given an opportunity to introduce evidence to support their argument.[69]

E. 10 C.F.R. § 2.341(b)(2)(iv): Summary

Because of the foregoing reasons, as set forth in 10 C.F.R. § 2.341(b)(4)(ii), (iii), and (v), the Commission should grant this petition for review.

III. THE BOARD'S DECISION TO ENTER JUDGMENT FOR EC 6.0 IN FAVOR OF THE STAFF AND SNC SHOULD BE REVIEWED BY THE COMMISSION.

In entering judgment for the staff and SNC and holding EC 6.0 resolved without further analysis, the Board erred as a matter of law.[70] First, the Board erred in determining that the direct impacts of dredging need not be considered in the FEIS, which is contrary to the plain

[67] See n.40; see also FEIS at 7-5.
[68] Decision at n.33; see also Decision at 4.116.
[69] See generally Ohio Valley Coalition v. Hurst, 604 F. Supp. 2d 860 (S.D.W. Va. 2009).
[70] See Decision at 5.3, 6.1(B).

language of 40 C.F.R. § 1508, promulgated to ensure compliance with NEPA.[71] Second, the Board erred in concluding that the Commission's NEPA obligations are fulfilled by deference to a non-existent analysis that may be performed by the Corps sometime in the future.[72] Because the determinations on both of these issues run counter to regulations and established law, and these issues will likely be raised in future proceedings, the Commission should exercise is discretion pursuant to 10 C.F.R. §§ 2.341(b)(4)(ii) and (iii) to review the Decision.[73]

A. 10 C.F.R. § 2.341(b)(4)(ii): The Board's conclusion that the direct impacts of dredging need not be considered is contrary to established law.

The Board erred in concluding that only a cumulative impacts analysis of dredging was necessary, and the Board's refusal to consider the direct impacts of dredging runs counter to established law. Pursuant to 40 C.F.R. §1508.25, actions connected to the proposed agency action, as well as all direct, indirect, and cumulative impacts, must be included in the environmental impact statement. Accordingly, the Commission should exercise its discretion to review the Decision.[74]

1. 10 C.F.R. § 2.341(b)(2)(ii): Joint Intervenors have repeatedly asserted that NEPA requires consideration of all impacts of dredging.

Throughout the ESP proceeding, Joint Intervenors raised the issue of the staff's failure to consider *all* impacts of dredging, including direct impacts, in the ER and later in the FEIS.[75] This issue was first raised in Joint Intervenors' Motion to Admit a New Contention.[76] It was then raised in both Joint Intervenors' Re-revised Initial Written Statement of Position and Pre-

[71] See Decision at 5.3; section III.A., supra.
[72] See Decision at 5.3; section III.B., supra.
[73] 10 C.F.R. §§ 2.341(b)(4)(ii) and (iii); see also 10 C.F.R. § 2.341(b)(2)(iii)
[74] 10 C.F.R. §2.341(b)(4)(ii).
[75] See 10 C.F.R. § 2.341(b)(2)(ii).
[76] See Joint Intervenors' Motion to Admit a New Contention at 4-5.

filed Direct Testimony[77] and Joint Intervenors' Revised Response Statement and Pre-filed Rebuttal Testimony.[78] Finally, the issue was raised in both Joint Intervenors' Proposed Findings of Fact and Conclusions of Law[79] and the Joint Intervenors' Reply to NRC Staff's and Southern Nuclear Operating Company's Proposed Findings of Fact and Conclusions of Law.[80]

2. NEPA requires a "hard look" at connected actions and their direct impacts.

NEPA requires an agency to take a "hard look" at the possible environmental impacts of a proposed action.[81] As previously explained, this "hard look" is tempered by a "rule of reason." Although the "rule of reason" allows for exclusion from consideration those impacts that are mere possibilities unlikely to occur as a result of the proposed activity, it does not excuse an agency from addressing impacts of connected actions, reasonable alternatives, and the direct, indirect, and cumulative impacts of these actions and alternatives in an environmental impact statement.[82]

3. Well-established law requires consideration of dredging as a connected action, as well as the direct, indirect, *and* cumulative impacts of such an action.

The Board stated in the Decision "each type of action and each type of impact has its own independent significance."[83] Despite this pronouncement, the Board arbitrarily concluded that a direct impacts analysis of dredging was not required simply because a cumulative impacts analysis had already been conducted.[84] Such a conclusion not only runs counter to the Board's own language quoted above, but also runs counter to clearly established law. 40 C.F.R.

---

[77] See Joint Intervenors' Re-Revised Initial Written Statement of Position and Pre-Filed Direct Testimony (Feb. 13, 2009) ("JTI Re-Revised Statement") at 19-22 .
[78] See Joint Intervenors' Revised Response Statement and Pre-Filed Rebuttal Testimony (Mar. 2, 2009) ("JTI Revised Response") at 31-34 .
[79] See JTI Proposed Findings at 33-36.
[80] See Joint Intervenors' Reply to Staff Proposed Findings (May 8, 2009) ("JTI Reply to Staff Proposed Findings") at 13-17 .
[81] See La. Energy Servs., L.P. (Claiborne Enrichment Ct.), CLI-98-3, 47 N.R.C. 77, 87-88 (1998).
[82] 40 C.F.R. § 1508.25.
[83] See Decision at 4.225.
[84] See id.

§1508.25 provides that "agencies shall consider 3 types of actions, 3 types of alternatives, *and* 3 types of impacts." (emphasis added). Actions that must be considered include "connected actions," and impacts that must be considered include "direct, indirect, and cumulative impacts."[85] Thus, if dredging is an action connected to issuance of the ESP, the regulations require all three types of impacts arising from dredging to be considered.[86] Accordingly, the Board was obligated to consider whether dredging was in fact a connected action prior to determining the impact analysis necessary.[87]

This obligation to consider direct, indirect, and cumulative impacts of connected actions cannot be dismissed through mischaracterization of Joint Intervenors' argument. The Board mistakenly claimed Joint Intervenors asserted that a "direct impacts analysis should have been performed in lieu of a cumulative impacts analysis."[88] Instead, what Joint Intervenors repeatedly argued was that *all* impacts must be considered.[89]

Dredging the federal navigation channel and the issuance of the ESP are connected actions. Thus, the Board erred in concluding that only a cumulative impacts analysis was necessary when the Counsel on Environmental Quality ("CEQ") regulations require analysis of direct, indirect, and cumulative impacts of such an action.

---

[85] See 40 C.F.R. §1508.25.
[86] See generally id.; see also Decision at 4.223, "an agency EIS must consider the direct, indirect, and cumulative impacts of an action."
[87] Regardless of whether dredging is defined as a connected action, it must necessarily be considered under both direct and indirect impacts analysis. As defined in the Decision, this analysis includes actions "caused by the federal action, and occurring at the same time and place as that action" and those that are "reasonably foreseeable." See Decision at 4.223.
[88] See Decision at 4.225.
[89] See Motion to Admit EC (Sept. 22, 2008) at 4-5, JTI Re-Revised Statement at 19-21, JTI Revised Response(Mar. 2, 2009) at 31-34 , JTI Proposed Findings (Apr. 24, 2009) at 33-36.

B. 10 C.F.R. § 2.341(b)(4)(ii): The Board erred in concluding that the staff's NEPA obligations could be satisfied by future environmental impacts analysis that may be conducted by the Corps.

The Board erred when it concluded that studies which may be conducted by the Corps sometime in the future were enough to satisfy the staff's current obligation to assess environmental impacts of dredging the federal navigation channel under NEPA.[90] As discussed below, and as previously argued by Joint Intervenors, deference to a non-existent impacts analysis is contrary to established caselaw, the Commission's own regulations promulgated to ensure compliance with NEPA, and the Memorandum of Understanding between the Corps and the Commission governing cooperation during agency actions. Further, the extent and manner of agency deference is likely to be raised in numerous proceedings going forward. The Decision is thus appropriate for review by the Commission under 10 C.F.R. §2.341(b)(4)(ii) and (iii).

1. 10 C.F.R. § 2.341(b)(2)(ii): Joint Intervenors have repeatedly made arguments that the staff's NEPA obligations could not be satisfied by future Corps analysis.

Joint Intervenors have repeatedly made arguments against the improper deference in the FEIS by the staff to future analysis by the Corps regarding impacts relating to dredging of the federal navigation channel.[91] Further, Joint Intervenors have previously argued that due to this deference, the staff has performed no meaningful NEPA analysis to date.[92] Additionally, Joint

[90] See Decision at 4.264 and 5.3 ("[I]f SNC determines that dredging will be necessary . . . more information will likely be provided and more studies will likely be conducted, and this information likely will be incorporated into any environmental review document produced by USACE.").

[91] See Motion to Admit EC (Sept. 22, 2008) at p. 7 (deference is not correct where an environmental impact statement does not already exist); JTI Re-Revised Statement at pp. 20-22 (NRC's NEPA obligations cannot be satisfied by reliance on a non-existing impact analysis to be performed by another agency); JTI Revised Response at p. 32 (deference to the Corps by NRC is incorrect as a matter of law); see also Bailey Pre-Filed Direct Testimony for EC 6.0 (stating that the Corps has yet to complete an environmental study).

[92] See JTI Reply to Staff Proposed Findings at ¶ 49. See also FEIS at 7-20 ("Specifics of the project would be provided by the Corps' assessment to fulfill the NEPA requirement"); Joint Intervenors' Reply to Staff's Answer to Motion to Admit EC and SNC's Answer to Motion to Admit EC (Oct. 14, 2009) at p. 9 (there is no contention that a detailed assessment of the dredging impacts was not conducted).

Intervenors have argued that there has been no meaningful consultation between the staff and the Corps as required by NEPA.[93]

2. The Commission's regulations expressly prohibit the staff from deferring to future Corps' analysis.

The staff's deference to the Corps for a future impacts analysis is incorrect as a matter of law. According to the NRC's Environmental Standard Review Plan, promulgated in an effort to "provide[] guidance to the staff in implementing provisions of 10 C.F.R. 51," there must be sufficient analysis at the time of permitting in order to fulfill the staff's NEPA obligations.[94]

Specifically, Section 4.2.2 of the Environmental Standard Review Plan provides that there must be a review and "identification of the proposed construction activities or hydrologic alterations resulting from proposed construction activities that could have impacts on water use," including the input regarding Federal project activities that would be affected by the construction of the proposed plant.[95] In order to fulfill NEPA obligations, the regulations do provide that the Commission may consider existing environmental assessments from other authorities.[96] However, the regulations do not allow deference to another agency where an analysis has yet to be completed: "When *no such assessment of aquatic impacts is available* from the permitting

[93] See e.g. Motion to Admit EC at p. 7 (the staff did not consult with or obtain comments from the Corps).
[94] See NUREG-1555.
[95] See id. at 4.2.2 at p. 1-5. The Environmental Standard Review Plan further goes on to list "the physical effects of hydrologic alterations" as a category of data that should be obtained prior to permitting. Id. at 4.2.2-3. See also, e.g., id. at 4.2.1-2 (listing information regarding dredging impacts as a data and information need under hydrologic alterations); id. at 4.3.2-7 (listing "potential disturbances of benthic areas by . . . direct dredging, including the area that may be affected by resulting siltration and turbidity" as an area to be assessed under Aquatic Ecosystems Review Procedures).
[96] Id. at 4.2.2-4,5 ("If an environmental assessment of aquatic impacts *is available* from the permitting authority, the NRC will consider the assessment in its determination of the magnitude of the environmental impacts of striking an overall benefit-cost balance." (emphasis added). Further, if an existing environmental impact assessment is used, there must be "[d]ocumentation of adequate consultation with the appropriate permitting authorities is required."). See also id. at 4.3.1-5, 4.3.2-5 (Sections regarding Terrestrial and Aquatic Ecosystems, each of which list the Memorandum of Understanding between the U.S. Army Corps of Engineers and the U.S. Nuclear Regulatory Commission for the Regulation of Nuclear Power Plants, 40 Fed. Reg. 37110 (Aug. 18, 1975) ("1975 MOU"). as providing guidance with regard to the proper procedure between the Commission and the staff.

authority, the *NRC* (possibly in conjunction with the permitting authority and other agencies having relevant expertise) *will establish its own impact determination.*"[97]

3. Case law expressly prohibits the staff from deferring to future Corps' analysis.

There is also clear case law prohibiting an agency from handing over its NEPA obligations. The D.C. Circuit found that the "only agency" in a position to assess the entire environmental impacts of a proposed project under NEPA is "the agency with the overall responsibility for the proposed federal action-the agency to which NEPA is specifically directed. The Atomic Energy Commission, abdicating entirely to other agencies' certifications, neglects the mandated balancing analysis."[98] In accordance with the D.C. Circuit's reasoning, the staff needed to fully consider the impacts of dredging in the FEIS without depending upon a possible Corps analysis. Furthermore, in cases such as this ESP proceeding, where a permitting agency is not upholding the entirety of its NEPA obligations, court review may be appropriate. The D.C. Circuit has deemed it appropriate to review the agency decision, stating that "[i]ndeed, the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts."[99]

Recent rulings continue to support Joint Intervenors' assertion that deferral of a thorough NEPA analysis is inappropriate. In Wyo. Outdoor Council v. U.S. Army Corps, the Corps argued in relation to a cumulative impacts assessment that they could not know specific impacts until the project was proposed, and they attempted to pass responsibility to other agencies issuing different permits related to the project.[100] The present case is strikingly similar, as the staff has

[97] Id. at 4.2.2-5. (emphasis added).
[98] Calvert's Cliffs' Coordinating Comm, Inc., et al. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1123 (D.C. Cir. 1971) (holding the Atomic Energy Commission cannot create rules that defer to the water quality assessment and standards of other agencies, because this does not satisfy the AEC's NEPA requirements).
[99] Id. at 1114.
[100] 351 F. Supp. 2d 1232, 1242 (D. Wyo. 2005).

made an assessment about dredging impacts based on "limited information" and then deferred to the Corps for a more detailed analysis.[101] The District Court rejected the Corps' effort to circumvent NEPA responsibility;[102] the Commission should reject the staff's effort as well.

As yet another example, in Ohio Valley Envtl. Coalition v. Hurst, the Corps decided that cumulative impacts for a project would be minimal, basing that finding on the presumed success of mitigation by other agencies.[103] The Court held that the Corps wrongfully depended on the "belief" that future assessments would ensure minimal cumulative impacts.[104] By failing to take the requisite "hard look" at the nature of the environmental impacts itself, "[T]he Corps' determination was conclusory and [] the Corps failed to consider the relevant factors in its NEPA analysis."[105] In this ESP proceeding, the staff has made the same fatal mistake.

As these cases illustrate, it is unacceptable for an agency performing a NEPA assessment to either fail to perform an adequate evaluation or to evade a NEPA responsibility by deferring to another agency.

4. The Memorandum of Understanding between the Commission and the Corps expressly prohibits the staff from deferring to future Corps analysis.

Moreover, in the Memorandum of Understanding (MOU) between the Corps and the Commission, dated August 18, 1975, the obligation of the Commission to assess dredging impacts is clearly established.[106] The MOU states, "U.S.N.R.C. will serve as 'lead Agency,' exercising the primary responsibility in conducting environmental reviews and in preparing environmental statements for nuclear power plants covered by this Memorandum of

[101] Decision at 4.207, 4.219.
[102] Wyo. Outdoor Council, 351 F. Supp. 2d at 1243.
[103] 604 F. Supp. 2d 860, 887 (S.D. W. Va. 2009).
[104] Id. at 887; "'Although . . . 'certainty as to the cumulative effects of resource development projects require prophecy beyond the capabilities of both scientists and courts,' the Corps must at least 'mention and discuss foreseeable [cumulative impacts] problems.'" (quoting Wyo. Outdoor Council, 351 F. Supp. 2d at 1243).
[105] Id. at 888; see also, e.g., id. at 887 (also finding the Corps' cumulative impacts determination conclusory, "because it relied on an unsupported belief in the success of mitigation measures").
[106] 1975 MOU.

Understanding."[107] However, "the [Corps] . . . will participate with the [NRC] in the preparation of [EISs]" by helping to draft material for sections covering "[d]redging activities and disposal of dredged materials."[108] Accordingly, per MOU guidance and during the entire Vogtle permitting process, the staff had the obligation to fully consider the impacts of dredging rather than relying on a *possible* future Corps review. The Board erred in allowing the staff to delegate its clear responsibility to the Corps.

5. In spite of clearly established law to the contrary, the Decision errantly allows deferral to a possible future Corps environmental analysis of the dredging issue.

Despite unambiguous obligations, the Decision is replete with references where the Board supports the staff's decision to defer to future Corps analysis and mitigation. For example, there are references in the Decision that only "limited information" was available to the staff. [109] The Board did not find this lack of information troublesome, because of the belief that more project-specific information would be made available to the Corps if the Corps eventually conducted an environmental impacts analysis.[110] The Board justified the deferral by relying on the Corps statement "that it will be required under NEPA to perform an environmental review of an application for a permit submitted by SNC."[111] The Decision also relied on the Corps to assess future mitigation measures, providing that "the staff believed that any adverse environmental impacts as a result of dredging of disposal of dredged material would be mitigated

[107] Id. at 37111. This language was subsequently reiterated in a 2008 MOU, which also makes the NRC lead agency in preparing environmental statements in cases such as the present one; "[a]s the agency with the approval/disapproval authority for the licensing of the nuclear power plants, the NRC shall serve as the lead agency for the preparation of the EIS." Memorandum of Understanding between the U.S. Army Corps of Engineers and the U.S. Nuclear Regulatory Commission, 73 Fed. Reg. 55546-01 (Sept. 12, 2008) ("2008 MOU").
[108] 1975 MOU at 37111.
[109] Decision at 4.207, 4.227, and 4.248.
[110] Decision at 4.202, and 4.248.
[111] Decision at 4.214 and 5.3.

or minimized through appropriate steps taken by USACE."[112] As previously stated, such a delegation of duty is not permitted, and reliance on possible future actions is misplaced.

The Board also justified its decision to defer to future Corps analysis by relying on the testimony of dredging experts, given in response to cross-exam questions. [113] As clearly delineated above, the law regarding the staff's inability to delegate its NEPA obligations is clear. Testimony by scientists does not change or negate established law that the staff must comply with its NEPA requirements.

6. 10 C.F.R. § 2.341(b)(4)(iii): The staff's ability to delegate its NEPA obligations to the Corps in the event dredging is required in connection with a permit or license application is an important issue that will likely be raised in numerous proceedings going forward.

The staff's ability to delegate its current NEPA obligations to the Corps, with the hope that the Corps will conduct an adequate analysis sometime in the future, is an important question of law. This question will likely arise in numerous licensing and permitting proceedings going forward. Future petitioners, applicants, and the staff all need to have a clear understanding of whether and to what extent dredging impacts must be considered in an FEIS. To be sure, the Commission has previously recognized the significance of this issue, which is evident from the MOUs the Commission entered into with the Corps in 1975 and again in 2008.[114]

C. 10 C.F.R. § 2.341(b)(2)(iv): Summary

The Board's Decision is erroneous as a matter of law. The erroneous conclusions made by the Corps are inapposite to regulations and established law, and will continue to surface in

[112] Decision at 4.214; see also Decision at 4.218, 4.219 (providing "[Staff and SNC] both argue that even assuming such an analysis were required, the staff's review is sufficient to satisfy NEPA requirements because USACE will ultimately identify potential impacts and potential mitigation measures that will ensure any impacts are not greater than MODERATE"), 4.239, 4.247, 4.248, 4.249, 4.250, 4.264, and 5.3.
[113] See, e.g., Decision at 4.239, 4.241, 4.247, 4.248, 4.249 and 4.250.
[114] 1975 MOU; 2008 MOU.

future proceedings. For the foregoing reasons, as set forth in 10 C.F.R. § 2.341(b)(4)(ii) and (iii), Joint Intervenors respectfully request that the Commission exercise review.

IV. CONCLUSION

For the foregoing reasons, Joint Intervenors respectfully request the Commission grant this Petition for Review.

Submitted this 15th day of July 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

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)	)	July 15, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **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: July 15, 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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

ORDER

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 filed a petition for review of the Atomic Safety and Licensing Board's First Partial Initial Decision in the contested portion of this proceeding (LBP-09-7). The Board subsequently issued its Second and Final Partial Initial Decision in the mandatory/uncontested portion of this proceeding (LBP-09-19).

Pursuant to my authority under 10 C.F.R. § 2.346(e), the time within which the Commission may rule on the petition for review of LBP-09-7 is extended until further order of the Commission. Pursuant to my authority under 10 C.F.R. § 2.346(f), the time within which the Commission may review LBP-09-19 on its own motion also is extended until further order of the Commission.

IT IS SO ORDERED.

For the Commission

Andrew L. Bates **/RA/** for

[SEAL]

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 3rd day of September, 2009.

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER OF THE SECRETARY EXTENDING TIME FOR COMMISSION REVIEW OF LBP-09-19 have been served upon the following persons by Electronic Information Exchange.

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

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

Administrative Judge
James Jackson
E-mail: jackson538@comcast.net

Wen Bu, Law Clerk
E-mail: wxb3@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

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@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

Southern Nuclear Operating Company, Inc.
40 Inverness Center Parkway
P.O. Box 1295, Bin B022
Birmingham, AL 35201-1295
Moanica M. Caston, Esq.
E-mail: mcaston@southernco.com

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

Docket No. 52-011-ESP
ORDER OF THE SECRETARY EXTENDING TIME FOR COMMISSION REVIEW OF LBP-09-19

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

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

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

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

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

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

Docket No. 52-011-ESP
ORDER OF THE SECRETARY EXTENDING TIME FOR COMMISSION REVIEW OF LBP-09-19

Atlanta Women's Action for New Directions (WAND), Blue Ridge Environmental Defense League (BREDL), Center for Sustainable Coast (CSC), Savannah Riverkeeper and Southern Alliance for Clean Energy (SACE)

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

[Original signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 3rd day of September 2009

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–011]

Southern Nuclear Operating Company; Supplementary Notice of Hearing and Opportunity To Petition for Leave To Intervene on an Early Site Permit for the VOGTLE ESP Site

This proceeding concerns the application dated August 14, 2006, filed by Southern Nuclear Operating Company (SNC, the Applicant), pursuant to subpart A of 10 CFR part 52 for an early site permit (ESP). The ESP application seeks approval for use of the existing Vogtle Electric Generating Plant site near Waynesboro, Georgia, for the possible construction of two new nuclear reactors. On October 12, 2006, a notice of hearing and opportunity for leave to intervene was published by the United States Nuclear Regulatory Commission (NRC, the Commission) in the **Federal Register** (71 FR 60195) in this proceeding. That notice specified that the Director, Office of Nuclear Regulator Regulation, NRC, will propose findings on issues pursuant to the Atomic Energy Act of 1954, as Amended, and the National Environmental Policy Act of 1969, as Amended (NEPA). The notice also specified the scope of the hearing to be conducted by the designated Atomic Safety and Licensing Board (Board) and provided an opportunity for persons whose interests may be affected by the proceeding to petition for leave to intervene.

In response to the notice of hearing and opportunity to petition for leave to intervene, on December 11, 2006, the 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 (collectively the Joint Petitioners) filed a timely request for hearing and petition to intervene contesting the SNC ESP application. On December 13, 2006, the Commission referred the petition to the Atomic Safety and Licensing Board Panel to conduct any subsequent adjudication. On December 15, 2006, the Chief of the Atomic Safety and Licensing Board Panel designated, for the purpose of conducting the proceeding, the following Board, G. Paul Bollwerk, III (Chair), Dr. Nicholas G. Trikouros, and Dr. James Jackson (71 FR 77071; December 22, 2006). In a March 12, 2007, issuance, finding that each of the Joint Petitioners had established the requisite standing to intervene in this proceeding and that they had submitted two admissible contentions concerning the SNC ESP application, the Board admitted them as parties to this proceeding. *See* Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP–07–3, 65 NRC 237 (2006).

On August 16, 2007, SNC submitted to the NRC a supplement to its ESP application requesting authorization to engage in selected construction activities as defined by 10 CFR 50.10. As described by SNC, these activities would generally involve the "placement of engineered backfill and preparation of the Nuclear Island foundation base slab forms and reinforcing steel." In light of the request for this additional authorization, the Commission herein supplements the findings and considerations set forth in the original notice of hearing on October 12, 2006, as follows:

The NRC staff will complete a detailed technical review of the application, including the supplement requesting authority to perform selected construction activities as defined by 10 CFR 50.10, and will document its findings in a safety evaluation report (SER) and an environmental impact statement (EIS). In addition, the Commission will refer a copy of the application to the Advisory Committee on Reactor Safeguards (ACRS) in accordance with 10 CFR 52.23, and the ACRS will report on those portions of the application that concern safety. In addition to the findings set forth in the initial notice of hearing, upon receipt of the ACRS report and completion of the NRC staff's SER and EIS, the Director, Office of New Reactors, NRC, will propose findings on the following additional issues:

Supplementary Issues Pursuant to the Atomic Energy Act of 1954, as Amended

(1) Whether the applicable standards and requirements of the Act, and the Commission's regulations applicable to the activities for which the Applicant seeks authorization have been met (Safety Issue 3); (2) whether the Applicant is technically qualified to engage in the activities authorized (Safety Issue 4); and (3) whether issuance of the ESP, granting the Applicant's requested authorization, will provide reasonable assurance of adequate protection to public health and safety and will not be inimical to the common defense and security (Safety Issue 5).

Supplementary Issue Pursuant to the National Environmental Policy Act (NEPA) of 1969, as Amended

Whether, in accordance with the requirements of subpart A of 10 CFR part 51, the ESP should authorize the Applicant to conduct the requested construction activities.

If, as related to the additional issues outlined above, the hearing is contested as defined by 10 CFR 2.4, the Board, in addition to the directions in the original notice of hearing, will consider Safety Issues 3, 4, and 5 and the issue pursuant to NEPA set forth above.

If, as to the additional issues outlined above, the hearing is not a contested proceeding as defined in 10 CFR 2.4, the Board, in addition to the direction given in the original notice of hearing, will determine without conducting a de novo review: Whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate to support affirmative findings on Safety Issues 3, 4, and 5, as proposed to be made by the Director, Office of New Reactors; and whether the review conducted by the Commission staff pursuant to NEPA has been adequate.

Regardless of whether the proceeding is contested or uncontested, the Board, in addition to complying with the provisions of the original notice of hearing, will: (1) Determine whether the requirements of section 102(2)(A), (C), and (E) of NEPA and subpart A of 10 CFR part 51 have been met, with respect to the activities to be authorized; (2) independently consider the balance among the conflicting factors with respect to the activities to be authorized which is contained in the record of the proceeding, with a view to determining the appropriate action to be taken; and (3) determine whether the redress plan submitted by the Applicant will adequately redress the activities to be authorized.

In accordance with 10 CFR 2.309, any person whose interest may be affected by this proceeding and who desires to participate as a party with respect to the supplementary issues must file a written petition for leave to intervene and must specify the contentions which the person seeks to have litigated in the hearing. A petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding, provided however parties that have already been admitted to the proceeding not need address the factors enumerated in 10 CFR 2.309(d)(1)–(2). If

not already a party to the proceeding, the petition must specifically state: (1) The name, address and telephone number of the petitioner; (2) the nature of the petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial or other interest in the proceeding; and (4) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.

Each contention must contain a specific statement of the issue of law or fact to be raised or controverted. A petitioner must also provide the following information with respect to each contention: (1) A brief explanation of the basis for the contention; (2) a concise statement of the alleged facts or expert opinions which support the 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 petitioner intends to rely to support its position on the issue; and (3) sufficient information to show that a genuine dispute exists with the applicant 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. For each contention, the petition must demonstrate that the issue raised in the contention is within the scope of this proceeding and that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in this proceeding. A petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

A petition for leave to intervene must be filed in accordance with the December 15, 2006, issuance of the Chief of the Atomic Safety and Licensing Board Panel establishing procedures for submitting documents using the NRC Electronic Information Exchange or E-Submittal process. The accession number for the issuance is ML063520200. The issuance is also available through the NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp.*

If any new participant to this proceeding believes they are unable to participate in this proceeding utilizing the electronic document formatting and/or filing processes outlined in the December 15, 2006, issuance, they may file a request for an exemption from the Licensing Board in conjunction with its first filing in this proceeding. Pursuant to the December 15, 2006, issuance, the provisions of 10 CFR 2.302(g)(2) and (3) of the Commission's proposed rule on electronic document filing and formatting shall govern such an exemption request (70 FR 74950, 74960; December 16, 2005). Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

All such petitions must be filed no later than 60 days from the date of publication of this notice in the **Federal Register**. Non-timely filings will not be entertained absent a determination by the Board that the petition should be granted based upon a balancing of the factors specified in 10 CFR 2.309(c)(i)–(viii).

This supplementary notice does not affect the status of any person previously admitted as a party to this proceeding or provide any additional opportunity to any person to intervene on the basis of, or to raise matters encompassed within, the issues specified for hearing in the original notice of hearing published in the **Federal Register** on October 12, 2006 (71 FR 60195).

A copy of the SNC ESP application is available for public inspection at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records are accessible from the Agency-wide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* The accession number for the application is ML071710055. The accession number for the August 16, 2007, supplement to the application is ML072330242. Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC Public Document Room staff by telephone at 1–800–397–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov.* The application is also available to local residents at the Burke County Library in Waynesboro, Georgia, and is available on the NRC Web page at *http://www.nrc.gov/reactors/new-licensing/esp/vogtle.html.*

Dated at Rockville, Maryland, this 9th day of November 2007.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E7–22413 Filed 11–15–07; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

WTO Dispute Settlement Proceeding Regarding Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative ("USTR") is providing notice that pursuant to a request of the European Communities, the Dispute Settlement Body of the World Trade Organization ("WTO") has established a compliance panel under the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement") concerning the dispute *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("zeroing")—Recourse to Article 21.5 of the DSU by the European Communities.* That request may be found at *http://www.wto.org* contained in a document designated as WT/DS294/25. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceeding, comments should be submitted on or before December 21, 2007.

ADDRESSES: Comments should be submitted (i) electronically, to *FR0715@ustr.eop.gov, Attn:* "EC Zeroing (21.5)" in the subject line, or (ii) by fax, to Sandy McKinzy at 202–395–3640, with a confirmation copy sent electronically to the e-mail address above.

CERTIFICATE OF SERVICE

I hereby certify that, on December 11, 2009, a copy of foregoing "RESPONDENTS' MOTION TO DISMISS PETITION FOR REVIEW" and the attached addendum was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system, and parties may access the filing through that system.

/s/
SEAN D. CROSTON