

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

LBP-10-1

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman  
Nicholas G. Trikouros  
Dr. James F. Jackson

In the Matter of

SOUTHERN NUCLEAR OPERATING CO.

(Vogtle Electric Generating Plant, Units 3 and 4)

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

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

January 8, 2010

MEMORANDUM AND ORDER  
(Ruling on Petition to Intervene)

Pending before the Licensing Board is an October 30, 2009 petition filed by Vince Drescher, Kenneth Ward, John C. Horn, Jr., William S. Bashlor, and James Eddie Partain (hereinafter Joint Petitioning Individuals or JPI), seeking to intervene in this 10 C.F.R. Part 52 combined license (COL) proceeding and to have admitted one new contention, NEPA-1. See Amended Petition of Vince Drescher, Kenneth Ward, John C. Horn, Jr., William S. Bashlor and James Eddie Partain to Intervene and Admit New Contention (Nov. 2, 2009) [hereinafter JPI Amended Petition].<sup>1</sup> Both applicant Southern Nuclear Operating Company (SNC) and the NRC staff oppose the JPI petition to intervene. See [SNC] Answer Opposing Petition of Vince Drescher, Kenneth Ward, John C. Horn, Jr., William S. Bashlor and James Eddie Partain to Intervene and Admit New Contention (Nov. 20, 2009) [hereinafter SNC Answer]; NRC Staff's

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<sup>1</sup> The JPI initially filed a petition to intervene on October 30, 2009. They later filed the amended petition, which they represent is identical to the original petition except that it includes a certification by JPI counsel as specified in 10 C.F.R. § 2.323(b). See Letter from Barry S. Neuman, Counsel for [JPI], to Administrative Judges (Nov. 2, 2009).

Answer to Petition to Intervene and Admit New Contention (Nov. 20, 2009) [hereinafter Staff Answer].

For the reasons set forth below, we conclude that (1) only Mr. Ward has established standing to intervene in this proceeding; and (2) JPI contention NEPA-1 is inadmissible because the issue of future flow restrictions at Thurmond Dam under a proposed United States Army Corp of Engineers (USACE) environmental assessment that covers a time period prior to the operation of proposed Vogtle Units 3 and 4 is not material to this proceeding. Accordingly, we deny the JPI petition to intervene.

#### I. BACKGROUND

On March 28, 2008, SNC applied to the Nuclear Regulatory Commission (NRC) for a COL that would authorize SNC to construct and operate two Westinghouse AP1000 reactors, Vogtle Units 3 and 4, at its existing Vogtle Electric Generating Plant (VEGP) site. SNC previously filed an early site permit (ESP) application for the VEGP site, which resulted in the issuance of an ESP, and an associated limited work authorization, on August 26, 2009. See Notice of Issuance of Early Site Permit and Limited Work Authorization for the Vogtle Electric Generating Plant ESP Site, 74 Fed. Reg. 44,879, 44,880 (Aug. 31, 2009). In accord with 10 C.F.R. § 52.73(a), the current COL application references the ESP. See Southern Nuclear Operating Company, et al.; Notice of Hearing and Opportunity To Petition for Leave To Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the Vogtle Electric Generating Plant Units 3 and 4, 73 Fed. Reg. 53,446, 53,447 (Sept. 16, 2008). In response to a September 16, 2008 notice of hearing and opportunity to petition for leave to intervene, id. at 53,446, five organizations – the Atlanta Women’s Action for New

Directions, Blue Ridge Environmental Defense League, Center for a Sustainable Coast, Savannah Riverkeeper, and Southern Alliance for Clean Energy (Joint Intervenors) – jointly petitioned for leave to intervene in the Vogtle COL proceeding. On March 5, 2009, this Board granted Joint Intervenors petition and admitted one contention, SAFETY-1, regarding the on-site storage of low-level radioactive waste associated with proposed Units 3 and 4.<sup>2</sup> See LBP-09-3, 69 NRC 139 (2009), referred rulings declined, CLI-09-13, 69 NRC \_\_ (June 25, 2009), and appeals denied, CLI-09-16, 70 NRC \_\_ (July 31, 2009).

On October 30, 2009, the JPI filed another, separate petition to intervene, which was followed on November 2, 2009, by an essentially identical “amended” petition to intervene. The JPI seek to have admitted for litigation a single National Environmental Policy Act (NEPA)-related contention, designated NEPA-1, which reads as follows:

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

JPI Amended Petition at 3-4.

In accord with a November 3, 2009 Board memorandum and order setting a schedule for further filings related to the JPI petition in lieu of the response times provided in

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<sup>2</sup> Relative to this admitted safety contention, also pending before us is Joint Intervenors motion to amend that contention, which we address in a separate order today. See Licensing Board Memorandum and Order (Ruling on Motion to Amend Contention) (Jan. 8, 2010) (unpublished).

10 C.F.R. § 2.309(h), see Licensing Board Memorandum and Order (Schedule for Further Filings Relative to Intervention Petition; E-Filing Reminder) (Nov. 3, 2009) (unpublished), SNC and the staff filed responses opposing the petition on November 20, 2009. See SNC Answer at 1-2; Staff Answer at 1. Pursuant to a further Board order granting their request for an extension of time to file a reply, see Licensing Board Order (Granting Time Extension Motion) (Nov. 5, 2009) (unpublished), on December 4, 2009, the Joint Petitioning Individuals submitted a reply to SNC's and the staff's answers. See [JPI] Reply in Support of Petition to Intervene and Admit New Contention (Dec. 4, 2009) [hereinafter JPI Reply].

## II. ANALYSIS

### A. Joint Petitioning Individuals Standing

#### 1. Standards Governing Standing

As we noted in our ruling admitting Joint Intervenors as parties to this proceeding, see LBP-09-3, 69 NRC at 149, in determining whether an individual or organization is an "interested person" under section 189a of the Atomic Energy Act (AEA) of 1954, 42 U.S.C. § 2239(a)(1)(A), that has standing "as of right" such that it can be granted party status in a proceeding in accord with 10 C.F.R. § 2.309(d), the Commission applies contemporaneous judicial standing concepts that require a participant to establish that (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the AEA, 42 U.S.C. § 2011 et seq., NEPA, 42 U.S.C. § 4321 et seq.); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Further, in proceedings involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been

considered sufficient to establish standing. See PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC \_\_, \_\_ (slip op. at 6) (Jan. 7, 2010); Calvert Cliffs 3 Nuclear Project, LLC (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC \_\_, \_\_ (slip op. at 4-5) (Oct. 13, 2009). The proximity presumption applies when petitioners live within fifty miles of the proposed facility or when they have “frequent contacts” with the area affected by the proposed facility. Calvert Cliffs, CLI-09-20, 70 NRC at \_\_ (slip op. at 4-5); see Bell Bend, CLI-10-7, 71 NRC at \_\_ (slip op. at 6). To establish the requisite proximity, however, a petitioner must clearly indicate where he lives and/or what contact he has with the site. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42, 47 (1991) (no standing when petitioner alleged proximity but failed to state his physical address or elaborate on the extent of his activities in the area). Additionally, to establish standing based on “frequent contacts,” the petitioner must show that it “‘frequently engages in substantial business and related activities in the vicinity of the facility,’ engages in ‘normal, everyday activities’ in the vicinity, has ‘regular’ and ‘frequent contacts’ in an area near a licensed facility, or otherwise has visits of a ‘length’ and ‘nature’ showing ‘an ongoing connection and presence,’” but standing is not presumed “where contact has been limited to ‘mere occasional trips to areas located close to reactors.” Consumers Energy Co. (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-21, 65 NRC 519, 523-24 (2007) (footnotes omitted); see also PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC \_\_, \_\_ - \_\_ (slip op. at 15) (Aug. 10, 2009) (no proximity-based standing when petitioner failed to supply “more specific information regarding the frequency, nature, and length of his contacts” within the proximity zone), aff’d, CLI-10-7, 71 NRC at \_\_ (slip op. at 7); Tennessee Valley Auth. (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 26 (2002) (no proximity-based standing when petitioner

“demonstrate[d] only occasional contact with the zone of harm”). Ultimately, it is the petitioner's responsibility to "provide enough detail to allow the Board to distinguish a casual interest from a substantial one." Bell Bend, CLI-10-7, 71 NRC at \_\_\_ (slip op. at 7).

With this general background in mind, we turn to the standing claims of the individual petitioners.

2. Kenneth Ward

Mr. Ward asserts that he lives “less than fifty miles” from of the VEGP site. JPI Amended Petition, Declaration of Kenneth Ward ¶ 2 (Oct. 26, 2009). Based on the home address provided in his declaration in support of the JPI petition, see id. ¶ 1, it appears Mr. Ward lives within thirty miles of the site (as verified using the Google Maps distance measurement tool in accord with 10 C.F.R. § 2.337(f)).<sup>3</sup> Accordingly, Mr. Ward has established his standing to intervene in this proceeding.

3. Vince Drescher, John C. Horn, Jr., William S. Bashlor, and James Eddie Partain

Messrs. Drescher, Horn, Bashlor, and Partain do not claim to live within fifty miles of the VEGP site.<sup>4</sup> Instead, they assert standing based on “actively us[ing] and enjoy[ing] the Savannah River for recreational purposes, including fishing,” within fifty miles of the VEGP site. JPI Amended Petition at 3; see also JPI Reply at 3-4. In their declarations in support of the petition, Messrs. Drescher, Horn, Bashlor, and Partain state that they fish “regularly” in locations downstream of the VEGP site, including Blue Springs, where Route 301 crosses the Savannah

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<sup>3</sup> Although neither SNC nor the staff has contested Mr. Ward’s standing, regardless of whether there is a challenge to a petitioner’s standing, given the jurisdictional nature of standing under the AEA, the Board has an independent obligation to make a standing determination. Cf. Summers v. Earth Island Inst., 129 S. Ct. 1142, 1152 (2009) (court must make independent assessment of Article III standing claims).

<sup>4</sup> According to the JPI, Mr. Bashlor resides within 53 miles of the site. See JPI Amended Petition at 2; JPI Reply at 2 n.3. The JPI make no representation about the distance from the VEGP site at which the other individual petitioners reside.

River (verified as approximately twenty-one miles from the VEGP site based on a check on Google Maps), and Clyo (verified as approximately fifty-four miles from the VEGP site based on a check on Google Maps). Id., Declaration of Vince Drescher ¶ 2 (Oct. 26, 2009) [hereinafter Drescher Decl.]; id., Declaration of William S. Bashlor ¶ 2 (Oct. 30, 2009) [hereinafter Bashlor Decl.]; id., Declaration of John C. Horn, Jr. ¶ 2 (Oct. 27, 2009) [hereinafter Horn Decl.]; id., Declaration of James Eddie Partain ¶ 2 (Oct. 26, 2009) [hereinafter Partain Decl.]. Alternatively, the petitioners argue that they meet the traditional standing requirements of injury-in-fact, causation, and redressability. See JPI Amended Petition at 3; JPI Reply at 4-8. They claim an injury to their interests in continuing to use the Savannah River, particularly for fishing, downstream of the VEGP site. They further assert that a failure to analyze the impacts of Vogtle Units 3 and 4 on water quality at a lower river flow rate would cause that injury and would be redressed by requiring the NRC to consider those impacts in this COL proceeding. See id.

According to the staff, the JPI do not indicate how frequently or for what duration Messrs. Drescher, Horn, Bashlor, and Partain travel to areas within fifty miles of the VEGP site to fish so as to establish standing based on the proximity of these activities to the Vogtle facility. See Staff Answer at 9-10. Additionally, SNC and the staff both argue that the JPI have not sufficiently explained how Messrs. Drescher, Horn, Bashlor, and Partain meet the traditional standing requirements. See SNC Answer at 4; Staff Answer at 11-12. In particular, the staff asserts that the JPI have not stated a specific injury-in-fact “fairly traceable” to proposed Vogtle Units 3 and 4 or “how impacts attributable to the Vogtle COL application would adversely affect their recreational fishing interests.” Staff Answer at 11.

The Board concludes that Messrs. Drescher, Horn, Bashlor, and Partain have not established the requisite injury-in-fact on which to base standing to intervene in this proceeding. Although the petitioners claim to have fished on the Savannah River “regularly,” this does not

necessarily convey the same meaning as the term “frequently” that is referenced in Commission standing cases. One who performs an act “regularly” does so “in a regular, orderly, . . . or methodical way,” Webster’s Third New International Dictionary 1913 (Philip B. Gove ed. in chief, 1976) (unabridged) (definition of “regularly”), while one who does something “frequently” does so “at frequent or short intervals,” “frequent” being defined as “often or habitually,” id. at 909 (definitions of “frequently” and “frequent”). Thus, an individual who fishes once a year, every year, might be considered to do so “regularly,” but not necessarily “frequently.” This case thus is distinguishable from the Commission’s ruling in Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323-24 (1999), that a petitioner who had “frequently” visited an area allegedly affected by the proposed action for recreational purposes had shown injury in the standing context. Petitioners bear the burden of providing sufficient relevant, specific information, whether by good faith estimate or otherwise, to establish the basis for their standing claims. See id. at 325 (intervenors who fail to provide specific information regarding proximity or frequency of contacts only complicate matters for themselves); see also Bell Bend, CLI-10-07, 71 NRC at \_\_\_ (slip op. at 7) (“a petitioner’s lack of specificity concerning the nature, extent, and duration of his contacts with the area surrounding the proposed site is a sufficient basis to reject a claim of standing”); id. at \_\_\_ (slip op. at 8-9) (affirming licensing board finding that petitioner’s claim that he “routinely pierces” 50-mile radius around reactor site is too vague to support standing). In this instance, we find the information provided by the JPI, both in their initial petition and in their reply pleading responding to the staff’s challenge to their proximity standing showing, to be wanting.<sup>5</sup>

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<sup>5</sup> While the nature of the activities undertaken within the affected area undoubtedly impacts the amount of detail that must be provided to establish whether the activity is sufficiently “frequent,” see Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 45 (1990) (“regular” commute that takes petitioner past plant entrance once or twice a week  
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Moreover, and unlike the petitioner in PFS who specifically indicated that he planned to visit the relevant area “in the future with some frequency,” CLI-99-10, 49 NRC at 323 (emphasis added), the petitioners here have not specified any intent to continue fishing at particular locations along the Savannah River in the future with a rate of recurrence that, notwithstanding our responsibility to construe the JPI petition in a light most favorable to them, see Georgia Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995), we could consider “frequent.” Even if a party seeking standing has some intent to return to an area, when such intentions are not supported by “concrete plans” or a “specification of when” future visits would take place, they do not support a finding of injury in the standing context. Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151 (2009) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992)).

Finally, we agree with SNC and the staff that these individuals, having failed in their attempt to invoke the proximity presumption, likewise have failed under traditional standing precepts to show how impacts attributable to the SNC COL application would adversely affect their recreational fishing interests as they might seek to pursue those interests, whether inside

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<sup>5</sup>(...continued)  
sufficient to establish standing), in describing a discretionary recreational activity such as fishing, providing more, rather than less, detail would generally be prudent.

We would add that to the degree our focus on the distinction between “frequently” and “regularly” might seem overly formalistic/legalistic, we believe it highlights the importance of making a more detailed factual showing (rather than relying on conclusory adjectives and adverbs) in situations such as this one in which a standing claim rests upon the nature of a petitioner’s activities purportedly near to, or bearing some connection with, the reactor facility at issue. Without question, a large number of individuals who do not reside within a 50-mile radius of the VEGP site undertake a variety of activities (e.g., going to work or school, shopping, attending meetings or religious services, visiting friends and relatives) within that distance from the reactor site. The degree to which those activities are sufficient to afford standing in a reactor licensing proceeding, as a question that “will require the Board to weigh the information provided,” Bell Bend, CLI-10-7, 71 NRC at \_ (slip op. at 7), undoubtedly is a matter that benefits from more, rather than less, factual information.

or outside the fifty-mile presumption zone. To whatever degree their attempt to demonstrate their standing under the traditional precepts, which is asserted to be based on the sufficiency of the discussion in the affidavits of the individual petitioners and their technical consultant regarding the purported impacts of the proposed USACE flow rate reduction plan, might suffice to show “causation” and “redressability,” we find it insufficient to establish the requisite “injury-in-fact” for each of the individual petitioners.

Thus, Messrs. Drescher, Horn, Bashlor, and Partain have failed to meet their burden to demonstrate their standing to intervene in this proceeding.<sup>6</sup>

B. Admissibility of JPI Petition Under Criteria for Petitions/Contentions Filed After Initial Petition Filing Deadline

1. Standards Governing Petitions/Contentions Filed After Initial Filing Deadline

The JPI intervention petition was submitted long after the date initially established for filing hearing requests in this proceeding. As a consequence, as is reflected in the discussion in the JPI intervention petition, see JPI Amended Petition 9-10, two portions of 10 C.F.R. § 2.309 potentially are implicated. One is section 2.309(c), which concerns the admission of “nontimely” petitions and contentions. Under section 2.309(c), whether a “nontimely” petition and its associated contentions should be considered is based upon a balancing of eight factors:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

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<sup>6</sup> We note also that the NRC's regulations provide for the possibility of discretionary intervention in circumstances when one petitioner has standing as of right and has proffered at least one admissible contention, but other petitioners have not demonstrated their standing. See 10 C.F.R. § 2.309(e). In this instance, however, even putting aside the fact that, as we discuss in section II.C below, we find that the JPI have not proffered an admissible contention, the petitioners did not request discretionary intervention in the event any of them were found to lack standing as of right.

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

Of the section 2.309(c) factors, the first factor regarding good cause for the failure to file timely is the most important element in that, absent a demonstration of good cause under this factor, a compelling showing must be made on the other factors if a nontimely petition is to be granted or a nontimely contention is to be admitted. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Moreover, among the remaining four non-standing elements in this balance (i.e., factors (v) through (viii)), factors five and six generally are given less weight than factors seven and eight. See id. at 244-45.

Also potentially relevant to the admissibility of the JPI hearing petition is 10 C.F.R.

§ 2.309(f)(2), which provides:

The petitioner may amend those contentions or file new contentions [on issues arising under NEPA] if there are data or conclusions in the NRC draft or final environmental impact statement [(EIS)], environmental assessment [(EA)], or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that –

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available;
- and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

In this instance, given that the petitioners have addressed the admissibility of their intervention request under both the section 2.309(c)(1) and (f)(2) standards, see JPI Amended Petition at 9-10, we do likewise.

2. Application of 10 C.F.R. §§ 2.309(c), (f)(2) to JPI Petition

Regardless of whether the JPI petition and contention NEPA-1 are considered under section 2.309(c)(1) or (f)(2), our analysis of these factors favors the petitioners. Looking first to section 2.309(c)(1), the good cause factor in particular favors the petitioners because they filed their petition within thirty days of what they have asserted is the trigger date for their new filing – that is, within thirty days of the availability of the document they contend contains new and significant information so as to form the basis for their contention.<sup>7</sup> Additionally, because one of the petitioners has standing, standing-related factors two through four favor the petitioners. Although the petitioners also could participate in the USACE comment process relating to the proposed EA regarding river flow reduction and thus do have some alternative means for protecting their interests, for the purpose of factor five that process is not analogous to participation in an NRC adjudicatory proceeding and therefore does not weigh heavily against the petitioners' intervention in this proceeding. With respect to factor six, the presence of the Joint Intervenors in this proceeding, particularly when the Joint Intervenors have previously

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<sup>7</sup> According to the petitioners and SNC, the USACE document upon which the JPI base their petition and its single contention was published on October 2, 2009. See JPI Amended Petition at 4; SNC Answer at 2.

raised river flow rate issues, does weigh against the petitioners. Regarding factor seven, although admitting the JPI and their NEPA-related contention would broaden the issues in dispute, because we are at this early stage in the proceeding, this does not weigh heavily against the petitioners. Finally, relative to factor eight, the JPI have filed an expert declaration with their petition, see JPI Amended Petition, Declaration of Paula L. Feldman, P.E. (Oct. 29, 2009) [hereinafter Feldman Decl.], indicating that they can assist, through expert opinion, in the development of a sound record, making this a factor that weighs in favor of admission as well. Upon balancing these factors, we find that, particularly in light of the fact the petitioners have shown good cause for their nontimely filing, the scales tilt in favor of allowing the JPI late-filed petition.

As to the section 2.309(f)(2) factors, given that the staff's draft or final EIS regarding the SNC COL application has not been issued so as to provide the petitioners with a basis for framing their contention, we must look to the three other factors specified in that provision in assessing the admissibility of their issue statement. In this regard, under the first element, it is apparent that the particular USACE draft EA that is the focus of the JPI contention was not available previously. Further, although, as we detail in section II.C below, we do not consider that document to be "material" in the context of our assessment of the substantive admissibility of this issue statement, relative to the second factor under section 2.309(f)(2), we conclude that the potential difference in temporal coverage -- as compared to the previous USACE EA regarding a temporary river flow level deviation<sup>8</sup> -- makes the October 2009 USACE draft EA

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<sup>8</sup> See JPI Reply, attach. B at 5 ([USACE] Savannah District, Draft Environmental Assessment and Finding of No Significant Impact, Temporary Deviation, Drought Contingency Plan, Savannah River Basin (Oct. 2008)) [hereinafter USACE 2008 Draft EA]. The 2008 draft EA specified a temporary deviation during the timeframe between November 1, 2008, and February 28, 2009. See id. By contrast, the 2009 draft EA covers a timeframe of mid-September through mid-February without specifying a year, although it is tied to the

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“materially different” from other information previously available.<sup>9</sup> Additionally, given our earlier directive that any new or amended contention should be submitted within thirty days of the occurrence or circumstance under which the contention arises, see Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 2, 2008) at 6 n.6 (unpublished), the petitioners October 30, 2009 hearing submission focusing on the October 2, 2009 USACE draft EA would be considered timely based on the public availability of the USACE document. As a consequence, we do not consider the section 2.309(f)(2) factors to be a bar to the admission of JPI contention NEPA-1.

Finally, we note that, because an analysis of section 2.309(c) and section 2.309(f)(2) both afford the same result, we need not resolve the question of which of these standards is applicable.

C. Admissibility of JPI Contention NEPA-1 Under 10 C.F.R. § 2.309(f)(1)

For the JPI intervention petition to be granted, it also must proffer a contention that meets the general admissibility requirements of 10 C.F.R. § 2.309(f)(1). Having discussed the requirements of 10 C.F.R. § 2.309(f)(1) at length in a prior decision in this proceeding, we will not repeat that information here. See LBP-09-3, 69 NRC at 152-54.

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<sup>8</sup>(...continued)

“duration of the present drought.” JPI Amended Petition, attach. C at 6 ([USACE] Savannah District, Draft Environmental Assessment and Finding of No Significant Impact, Fall/Winter Flow Reduction, Savannah River Basin (Sept. 2009)) [hereinafter USACE 2009 Draft EA]; see also infra note 11.

<sup>9</sup> In this regard, we observe that materiality in the context of section 2.309(f)(2) differs from materiality in the context of section 2.309(f)(1). Whereas the former relates to the magnitude of the difference between previously available information and currently available information, the latter relates to the impact of the information on the proceeding at hand. Accordingly, in finding the USACE draft EA to be materially different from previously available information in the context of section 2.309(f)(2), we are not opining on whether a contention based on the temporary deviation proposed in the draft EA would be material in the context of section 2.309(f)(1)(iv), (vi).

We conclude that JPI contention NEPA-1 is not material to the findings the Board must make in this proceeding. See 10 C.F.R. § 2.309(f)(1)(iv). The petitioners base their contention on a draft EA and finding of no significant impact from the USACE on a proposed “temporary deviation” to its existing Drought Contingency Plan that would restrict the Savannah River’s flow at Thurmond Dam to 3100 cubic feet per second (cfs) in the period between mid-September and mid-February when Level 3 drought conditions exist “for the duration of the present drought.” USACE 2009 Draft EA at 6. By its terms, however, the draft EA does not apply to the time period in which the proposed Vogtle Units 3 and 4 would be operational:

The [USACE] is aware that Georgia Power would like additional water from the Savannah River for the proposed expansion of Plant Vogtle, near Waynesboro, Georgia. That proposed withdrawal may occur at some point in the future, but the present drought is expected to end before that plant could become operational. Therefore, that additional use would not occur within the timeframe that is under consideration in this EA.

Id. at 78.<sup>10</sup> Certainly, the information now before us, including the information provided by the JPI, see JPI Reply, attach. A (CBS Atlanta, Officials: Georgia Drought Over (June 10, 2009), <http://www.cbsatlanta.com/news/19712975/detail.html>) (most recent drought conditions ended in June 2009), provides no basis to question this statement of the draft EA’s scope and applicability.<sup>11</sup>

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<sup>10</sup> SNC’s projected construction completion dates for proposed Vogtle Units 3 and 4 are April 2016 and April 2017, respectively, see [SNC], Vogtle Electric Generating Plant, Units 3 & 4, COL Application, Part 1, General and Financial Information, at 1-17 (rev. 2 Dec. 2009), available at <http://www.nrc.gov/reactors/new-reactors/col/vogtle/documents.html>, with the units beginning to operate sometime thereafter.

<sup>11</sup> Also in this regard, the Board notes the contrast between USACE’s lack of action on its current draft EA and its actions following the issuance of a draft EA for a similar “temporary deviation” to its Drought Contingency Plan a year ago. As the petitioners indicated, USACE had a “temporary deviation plan” reducing Thurmond Dam releases to 3100 cfs between November 1, 2008, and February 28, 2009. See JPI Reply at 10; see also USACE 2008 Draft EA at 5. That draft EA was apparently issued in October 2008, and a news release on

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Because we find that the issue of potentially reduced Thurmond Dam release rates during the period analyzed in the USACE 2009 draft EA is not material to this proceeding, it is unnecessary for the Board to decide at this time whether contention NEPA-1 would be admissible under the other criteria in section 2.309(f)(1).<sup>12</sup>

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<sup>11</sup>(...continued)

November 24, 2008, announced that USACE was in fact implementing the plan. See [USACE], Savannah District, News Release: Army Corps of Engineers to reduce outflows from Savannah River reservoirs (Nov. 24, 2008), available at <http://www.sas.usace.army.mil/NR%2008-41.pdf>. The present draft EA, which was published on October 2, 2009, proposes a 3100 cfs release rate starting in September 2009 but, to the best of the Board's knowledge, has not been followed by any USACE documentation indicating that the proposed EA has been adopted.

<sup>12</sup> This is not to say that a contention like that now before us that was submitted in such a situation would necessarily be admissible. The JPI contention also raises a number of other issues that seemingly are problematic given the current posture of this proceeding. Under the agency's Part 52 regulations, when a COL application references an ESP, neither the applicant nor the staff needs to address environmental issues resolved in the ESP proceeding unless "new and significant" information arises on those issues. See 10 C.F.R. §§ 51.50(c), 51.92(e)(6)-(7). As a consequence, environmental contentions at the COL stage are generally only admissible where they either raise issues that were not resolved at the ESP stage or raise issues resolved at the ESP stage "for which new and significant information has been identified." 10 C.F.R. § 51.107(b)(2), (3); see also id. § 52.39(c)(v). In this context, to the extent petitioners intend their contention to encompass (1) the asserted need to preserve river flow rates equal to or above 7Q10 flow rates, (2) the choice of gauge locations along the Savannah River at which it is appropriate to measure flow rates, and (3) the existence of impacts further downstream at flow rates already addressed in the ESP proceeding, see JPI Amended Petition at 8, 9; Feldman Decl. at 6-7, 8-10, they must account for (1) the fact that aquatic impacts were already addressed in both the staff's final EIS and the contested and mandatory portions of the evidentiary hearing before the licensing board in the ESP proceeding, see Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-09-7, 69 NRC \_\_, \_\_ - \_\_ (slip op. at 42-47) (June 22, 2009) (contested hearing), petition for review denied, CLI-10-5, 71 NRC \_\_, \_\_ - \_\_ (slip op. at 12-22) (Jan. 7, 2010); Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-09-19, 70 NRC \_\_, \_\_ - \_\_ (slip op. at 13-26) (Aug. 17, 2009) (mandatory hearing); and (2) the need to cite information that was not available before or during the ESP proceeding as support for their assertions regarding anything besides the potential for lower future flow rates due to USACE action at Thurmond Dam.

### III. CONCLUSION

For the reasons set forth above, we conclude that (1) of the Joint Petitioning Individuals, only Kenneth Ward has established standing to intervene in this COL proceeding; and (2) because the petitioners currently have not put forth an admissible contention so as to be entitled to party status in this proceeding, we must dismiss their hearing request.

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For the foregoing reasons, it is this eighth day of January 2010, ORDERED, that:

1. Joint Petitioning Individuals October 30, 2009 hearing request is denied.

2. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon an intervention petition, any appeal to the Commission from this memorandum and order must be taken within ten (10) days after it is served.

THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RA/*

\_\_\_\_\_  
G. Paul Bollwerk, III  
ADMINISTRATIVE JUDGE

*/RA/*

\_\_\_\_\_  
Nicholas G. Trikouros  
ADMINISTRATIVE JUDGE

*/RA/*

\_\_\_\_\_  
James F. Jackson  
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 8, 2010

Concurring Opinion of Bollwerk, J.:

Although I agree fully with the analysis and result reached by the Licensing Board in section II.B.2 of its decision relative to the various factors set forth in 10 C.F.R. § 2.309(c), (f)(2) as they apply to the Joint Petitioning Individuals (JPI) hearing request and associated contention NEPA-1, I nonetheless feel compelled to write separately to suggest that the existing uncertainty associated with the applicability of these two section 2.309 paragraphs merits Commission consideration at the earliest opportunity.

To understand the interplay between these two provisions requires an explanation of their history. Prior to the extensive February 2004 changes in the Nuclear Regulatory Commission's (NRC) rules of practice, the admissibility of a "nontimely" hearing petition submitted after the time specified in the original hearing opportunity notice was assessed by balancing what are now factors one and five through eight of section 2.309(c)(1). 10 C.F.R. § 2.714(a)(1)(i)-(v) (2004).<sup>1</sup> The same generally was true for what then was often referred to as a "late-filed" contention, i.e., a new or amended contention submitted after the deadline specified in the original hearing opportunity notice, that did not raise matters based on data or conclusions in the staff's draft or final environmental impact statement (EIS), environmental assessment (EA), or any supplements relating to an EIS or EA.<sup>2</sup> See Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 (1998). Under

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<sup>1</sup> The 2004 edition of the Code of Federal Regulations (CFR), cited herein, was the last published version to contain the agency's rules of practice prior to the extensive changes that became effective in February 2004. Citations herein to the currently effective, post-2004 revised rule are to the 2009 CFR edition.

<sup>2</sup> Under the pre-2004 rules as they existed subsequent to a 1989 amendment to section 2.714, see Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172, 33,180 (Aug. 11, 1989), for a new or amended contention that was based on data or conclusions in the staff's draft or final EIS, EA, or any supplements relating to an EIS or EA, the required inquiry was into whether, in addition to meeting the substantive admissibility criteria then found in section 2.714(b)(2), the issue statement was based on EIS or EA information that "differ[ed] significantly" from the data or conclusions in the applicant's environmental report. 10 C.F.R. § 2.714(b)(2)(iii) (2004). This NEPA-related provision was retained in the 2004 rule change. See id. § 2.309(f)(2) (2009).

those pre-2004 rules, the admissibility of the JPI petition would, at a minimum, have been subject to review under what are now section 2.309(c)(1) factors one and five through eight. See Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 321 (1999).

With the adoption of existing sections 2.309(c)(1) and (f)(2) in 2004, the admissibility standards for “nontimely” hearing petitions filed after the initial hearing opportunity notice date, as well as “late-filed” new and amended contentions associated with timely petitions filed before that notice filing deadline, arguably became both more and less clear. Under section 2.309(f)(2), the admissibility of a new or amended contention that does not involve the staff’s draft or final EIS, an EA, or any EIS or EA supplements, such as JPI contention NEPA-1, seemingly is governed by, at a minimum, the three section 2.309(f)(2) factors set forth above in section II.B.1 of the Board’s decision. See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004) (new section 2.309(f)(2) incorporates substance of section 2.714(b)(2)(iii) regarding all new or amended environmental contentions, while all other new or amended contentions must satisfy section 2.309(f)(2)(i)-(iii) factors). At the same time, however, as is illustrated in a recent Commission-issued hearing notice for a potential enrichment facility, the provisions of section 2.309(c)(1) are deemed to apply to any “nontimely” petition or new or amended contention, see GE-Hitachi Global Laser Enrichment LLC (GLE Commercial Facility), CLI-10-4, 71 NRC \_\_, \_\_ (slip op. at 7-8) (Jan. 7, 2010) (“non-timely” intervention petitions/contentions, amended petitions, and supplemental petitions will not be entertained absent determination that petition should be granted and/or contentions should be admitted based upon balancing of section 2.309(c)(1)(i)-(viii) factors), with language in the Commission’s statement of considerations accompanying the 2004 rule providing some support for the proposition that an assessment of the section 2.309(c) factors is appropriate relative to

the admission of such a new or amended submission, see 69 Fed. Reg. at 2202 (if safety evaluation report information bears upon existing contention or suggests new contention, section 2.309(c) should be used to evaluate the effect of new or amended contention admission upon a proceeding).

Subsequent to the 2004 rule change, licensing boards have taken different approaches in determining which of these provisions are applicable to a petition and/or new or amended contentions submitted after the hearing opportunity notice deadline. One approach is that first set forth in the Vermont Yankee power uprate proceeding, Entergy Nuclear Vermont Yankee, LLC, (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 (2005). This line of authority, which appears to be the path followed by the majority of boards that have considered the issue,<sup>3</sup> holds that a new or amended contention that is found to be “timely” in accord with section 2.309(f)(2) need not be assessed under the section 2.309(c) factors, which are considered to apply only to otherwise “nontimely” submissions. Presumably, under the Vermont Yankee approach, when (as here) the new contention is provided in conjunction with a new hearing petition, the timeliness of each new contention would likewise accrue to the petition such that, once those contentions are found to be timely under section 2.309(f)(2), there is no need to consider the section 2.309(c)(1) factors with respect to those contentions.<sup>4</sup> In contrast,

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<sup>3</sup> See, e.g., Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572-74 (2006); Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 744-45 & n.12 (2006); Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 265 n.5 (2007); Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC \_\_, \_\_ - \_\_ (slip op. at 95-97) (July 8, 2009), aff'd in part and rev'd in part as to other matters, CLI-10-2, 71 NRC \_\_ (Jan. 7, 2010).

<sup>4</sup> This can be contrasted with the common approach under the pre-2004 rules under which, in analyzing what is now the first factor in section 2.309(c)(1) regarding “good cause,” the fact that a petition or new/amended contention was filed after the hearing opportunity notice deadline because the document or other item relied upon as the submission trigger was not

(continued...)

consistent with the long-standing use of the term “nontimely,” other boards have chosen to assess such new or amended issue submissions under both the section 2.309(c)(1) and (f)(2) standards. See Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), No. 52-011-ESP, Licensing Board Memorandum and Order (Ruling on Motion to Admit New Contention) (Oct. 24, 2008) at 6-14 (unpublished); Tennessee Valley Authority (Bellefonte Nuclear Power Plant Units 3 and 4), Nos. 52-014-COL & 52-015-COL, Licensing Board Memorandum and Order (Ruling on Request to Admit New Contention) (Oct. 14, 2008) at 4-7 (unpublished).

Given the nature of the COL process up to this point, which is perhaps best described as proceeding by “fits and starts” as a result of the changes in both the individual facility license applications and the underlying generic certified designs (perchance not totally unexpected, given the relative newness of both the scientific/engineering and licensing processes involved), it does not seem untoward to anticipate that a significant number of petitions and contentions will be proffered for admission into COL proceedings well after the initial deadline for the submission of intervention requests. Clarity about what “lateness” factors should be applied thus is important, both to keep the application of these factors from becoming a trap for the unwary and to forestall litigants and presiding officers from analyzing unnecessarily a multitude of factors if only a discrete subset of those elements actually needs to be considered.

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<sup>4</sup>(...continued)  
available was considered “good cause” for the late filing. See Private Fuel Storage (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 47-48, aff’d, CLI-99-10, 49 NRC 318 (1999).

It also should be observed that, in contrast to the pre-2004 practice, the application of any timeliness provisions, whether under section 2.309(c)(1) and/or (f)(2), seemingly will accrue to each of the individual contentions that are filed with the petition rather than to the petition as a whole, reflecting the fact that under the 2004 Part 2 revisions, contentions are now required to be included with, rather than being submitted sometime subsequent to the filing of, the intervention petition. Compare 10 C.F.R. § 2.714(b)(1) (2004) with id. § 2.309(f)(1) (2009).

The interpretation adopted by the licensing board in the Vermont Yankee power uprate proceeding, which has much to commend itself as a matter of law and logic, appears on its way to becoming the accepted reading of these agency rules of practice. And notwithstanding (1) the lack of any explanation in the Commission's extensive statement of considerations that accompanied the 2004 rulemaking suggesting the prior meaning of the term "nontimely" in section 2.309(c) was being changed; and (2) the fact that the Vermont Yankee interpretation appears to narrow appreciably the requirement to consider factors that, at least prior to the 2004 rule change, were generally identified by the Commission as important in assessing the admissibility of a petition or contention filed after the initial hearing opportunity notice filing deadline,<sup>5</sup> it may well be the interpretation the Commission considers appropriate. But whatever interpretation the Commission ultimately finds to be correct, those involved in the agency's litigation process would benefit from near-term Commission consideration and clarification of the appropriate application of these two provisions to "nontimely" petitions and new/amended contentions.

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<sup>5</sup> Certainly, under the pre-2004 rules, the applicability of the section 2.309(c)(1) standards to post-hearing opportunity notice petitions and new/amended contentions could have procedural significance in a particular instance and was the subject of controversy in Commission rulings. Compare Public Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-83-23, 18 NRC 311, 312 (1983) (majority opinion of Chairman Palladino and Commissioners Roberts and Bernthal) (emphasizing requirement to apply in the late-filing balance what is now the seventh section 2.309(c)(1) factor -- broadening the issues or delaying the proceeding -- along with other four factors), with id. at 312-14 (dissenting opinion of Commissioner Asselstine, joined by Commissioner Gilinsky) (asserting application of what is now the seventh section 2.309(c)(1) factor to late-filed contentions is "manifestly unfair to the public participants in our proceedings").

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (RULING ON PETITION TO INTERVENE) (LBP-10-1) have been served upon the following persons by Electronic Information Exchange.

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Docket No. 52-025 and 52-026-COL  
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Dated at Rockville, Maryland  
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