

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Gary S. Arnold
Dr. Thomas J. Hirons

In the Matter of

Northern States Power Co.

(Prairie Island Nuclear Generating Plant, Units
1 and 2)

Docket Nos. 50-282-LR and 50-306-LR

ASLBP No. 08-871-01-LR-BD01

February 25, 2010

ORDER

(Granting Motion for Leave to File New Contentions and Denying Their Admission)

This proceeding concerns an application by Northern States Power Company (NSPM or Applicant) to renew its operating licenses for the Prairie Island Nuclear Generating Plant, Units 1 and 2 (PINGP), for an additional 20 years. On December 5, 2008, this Licensing Board granted a hearing request by the Prairie Island Indian Community (PIIC or Intervenor) and admitted seven of PIIC's contentions challenging NSPM's application.¹ Since then, all seven of those contentions have been either settled or dismissed as moot.² On December 14, 2009,

¹ Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC 905 (2008).

² On January 28, 2010, the Board admitted a new PIIC contention based on information contained in the NRC Staff's Safety Evaluation Report (SER). See Licensing Board Order (Narrowing and Admitting PIIC's Safety Culture Contention) (Jan. 28, 2010) (unpublished) [hereinafter Order Admitting Safety Culture Contention]. The NRC Staff and Applicant have sought interlocutory review of this decision. See Northern States Power Company's Petition for Interlocutory Review of an Order Admitting a Safety Culture Contention (Feb. 12, 2010); NRC Staff's Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision Admitting Late-Filed and Out of Scope Safety Culture Contention (Feb. 12, 2010).

PIIC filed a motion for leave to file three new environmental contentions,³ all of which are opposed by Applicant and NRC Staff.⁴ This order grants PIIC's motion for leave and sets forth the Board's ruling on the admissibility of PIIC's three new contentions.

I. New Contentions

We begin with some general observations about PIIC's new contentions. First, the Intervenor prefaces its contentions with a description of the "risks and costs" that PIIC believes it has borne as a result of PINGP's "51-year legacy of broken promises and promoting the plant at the expense of our Tribe."⁵ According to PIIC, these costs include fears about health and safety, destruction of cultural resources, rising water temperatures, radiation in surface water and groundwater, financial burdens, and health risks to visitors staying at the local Treasure Island Resort and Casino.⁶ The Board does not intend to minimize any of these concerns. However, we wish to remind PIIC that the current role of this Licensing Board is limited: to consider PIIC's motion for leave to file new contentions and to rule on the admissibility of those

³ Prairie Island Indian Community's Motion for Leave to File New Contentions on NRC's Draft Supplemental Environmental Impact Statement (Dec. 14, 2009) [hereinafter PIIC Contentions]. These contentions, unlike PIIC's previous safety contention, were properly filed as part of a motion for leave. *Id.* at 1. In addition, PIIC states that it consulted with counsel for Applicant and Staff prior to filing this motion, in accordance with 10 C.F.R. § 2.323(b). *Id.* at 1 n.2. We acknowledge PIIC's effort to comply with the regulatory requirements. Nonetheless, we reiterate the instruction provided in our January 28, 2010, order: going forward, we expect that all motions will include "a certification . . . that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful." Order Admitting Safety Culture Contention at 4; see also 10 C.F.R. § 2.323(b).

⁴ Northern States Power Company's Answer Opposing the PIIC's New Environmental Contentions (Dec. 24, 2009) [hereinafter NSPM Answer]; NRC Staff's Answer to the Prairie Island Indian Community's Motion for Leave to File New Contentions on NRC's Draft Supplemental Environmental Impact Statement (Dec. 24, 2009) [hereinafter NRC Staff Answer].

⁵ PIIC Contentions at 3.

⁶ *Id.* at 3-7.

contentions under the criteria at 10 C.F.R. § 2.309(f)(1). With respect to the introductory information that PIIC provides, we will consider it only to the extent it bears on the admissibility of PIIC's contentions.

As to the contentions themselves, all three allege inadequacies in the environmental justice analysis contained in the NRC Staff's draft supplemental Environmental Impact Statement (DSEIS).⁷ PIIC argues that, as a minority population in the vicinity of PINGP, it will be forced to endure the environmental impacts of license renewal more heavily than the general population. Therefore, we find it useful to briefly summarize the NRC's policy on environmental justice.⁸ Under this policy, as part of its environmental review, the NRC Staff must take a "hard look" at all "[d]isproportionately high and adverse impacts of a proposed action that fall heavily on a particular community."⁹ The Commission's responsibility to address environmental justice flows directly from its obligations under the National Environmental Policy Act (NEPA).¹⁰ There is no independent requirement to analyze impacts on low-income and minority populations. In other words, "disproportionately high and adverse impacts" on low-income and minority communities are to be assessed no differently than all other "significant impacts to the physical or human environment" that are otherwise subject to scrutiny under NEPA.¹¹ Accordingly, the Commission has articulated the following standard for environmental justice contentions:

⁷ Office of Nuclear Reactor Regulation, Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Prairie Island Nuclear Generating Plant, Units 1 and 2, Draft Report for Comment, NUREG-1437 (Supp. 39 Oct. 2009) (ADAMS Accession No. ML093170484) [hereinafter DSEIS].

⁸ See Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (Aug. 24, 2004).

⁹ Id.

¹⁰ Id. at 52,048.

¹¹ Id. at 52,047.

[A]dmissible contentions in this area allege, with the requisite documentary basis and support as required by 10 CFR Part 2, that the proposed action will have significant adverse impacts on the physical or human environment that were not considered because the impacts to the community were not adequately evaluated.¹²

With this standard in mind, we now turn to the substance of PIIC's three new environmental contentions.¹³

A. New Contention 1

PIIC's first new contention alleges:

The draft SEIS discusses numerous methods of mitigating the impacts identified in the draft. However, the NRC does not require the Applicant to adopt any of these mitigating activities. Consistent with the NRC policies on environmental justice, underscored by the NRC's trust responsibilities in regard to Native American tribes, the NRC should require the Applicant to implement these mitigating techniques.¹⁴

As a basis for this contention, PIIC points to the NRC Staff's acknowledgment in its DSEIS that "there may be the potential for disproportionate impacts to the PIIC."¹⁵ Given this acknowledgment, PIIC contends, the NRC Staff should require Applicant to implement all of the mitigation measures identified in the DSEIS. PIIC derives this requirement from a Commission statement that the Staff should "take care to mitigate or avoid special impacts attributable to the special character" of a low-income or minority community.¹⁶ To fulfill this obligation, PIIC asserts, "the NRC should require the Applicant to implement all of the mitigation strategies described in the draft SEIS, as identified in Exhibit A to this pleading."¹⁷ Additionally, PIIC

¹² Id.

¹³ Because the contention admissibility criteria are fully addressed in our decision admitting PIIC's intervention petition, there is no need to repeat that discussion here. See Prairie Island, LBP-08-26, 68 NRC at 914-18.

¹⁴ PIIC Contentions at 8.

¹⁵ Id. at 10 (quoting DSEIS at 4-35).

¹⁶ Id. at 10 (quoting 69 Fed. Reg. at 52,041).

¹⁷ Id. at 11. Exhibit A, which PIIC did not serve on the Board until it submitted its reply on December 31, 2010, lists various impacts and mitigation measures identified in the DSEIS.

highlights one particular environmental impact – transportation impacts from steam generator refurbishment activities – and faults the NRC Staff for concluding that these impacts are of “short duration and are not expected to be high.”¹⁸ PIIC also cites the NRC’s trust responsibility to Native American tribes as a reason the NRC must “ensure the mitigation of potential environmental impacts to the Community.”¹⁹ Finally, PIIC asserts that its contention arises from new “data or conclusions” in the DSEIS – namely, the environmental justice analysis – and therefore satisfies the criteria for new contentions at 10 C.F.R. § 2.309(f)(2).²⁰

Both Staff and Applicant argue that New Contention 1 is untimely.²¹ They point out that the Commission’s regulations require petitioners to file NEPA contentions in the early stages of an adjudicatory proceeding. Namely, 10 C.F.R. § 2.309(f)(2) states that “the petitioner shall file contentions based on the applicant’s environmental report [ER].” Subsequently, an intervenor may file new or amended NEPA contentions only “if there are data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant’s documents.”²² According to Staff and Applicant, the DSEIS contains no such data or conclusions. Indeed, they argue, many of the mitigation measures

¹⁸ Id. at 12 (quoting DSEIS at 3-9).

¹⁹ Id. at 13.

²⁰ Id. at 9. In its reply brief, Intervenor attempts to raise an additional argument that was missing from the original contention. Namely, PIIC argues that NEPA requires the NRC to “evaluate environmental justice impacts from a cumulative perspective.” Prairie Island Indian Community’s Reply in Support of Motion for Leave to File New Contentions on NRC’s Draft Supplemental Environmental Impact Statement (Dec. 31, 2009) at 6 [hereinafter PIIC Reply]. Commission case law does not permit an intervenor to expand a contention in its reply brief; accordingly, we will not consider this element of PIIC’s contention. See Nuclear Mgmt Co. (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); La. Energy Servs., LP (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004).

²¹ NSPM Answer at 15-24; NRC Staff Answer at 12-13.

²² 10 C.F.R. § 2.309(f)(2).

contained in the DSEIS, and cited by PIIC in Appendix A, were fully described in Applicant's ER and should have been the subject of a contention in PIIC's initial petition to intervene.²³ As to any mitigation strategies identified for the first time in the DSEIS, the Staff argues, "PIIC should have challenged the ER's treatment of mitigation in these instances when it filed its original contentions. Its attempt to challenge them now is untimely."²⁴ Because PIIC neglects to address the factors for non-timely contentions, found at 10 C.F.R. § 2.309(c), Staff and Applicant insist that the Board decline to consider the admissibility of New Contention 1.

The Board finds it unnecessary to parse through the DSEIS and determine which mitigation strategies "differ significantly" from those identified in the ER. Whether or not New Contention 1 is timely, it is clearly inadmissible because it fails to raise a genuine dispute on a material issue of law or fact.²⁵ The Intervenor, in demanding that the Staff require Applicant to mitigate certain impacts, misunderstands the requirements of NEPA. NEPA is a procedural statute, requiring that federal agencies take a "hard look" at the environmental consequences of their actions.²⁶ It compels agencies to identify environmental impacts and to consider possible mitigation strategies. It does not, however, obligate agencies to pursue any specific strategy.

²³ NSPM Answer at 17; NRC Staff Answer at 13. Applicant's Answer, in fact, contains six pages comparing the mitigation measures discussed in the ER to those discussed in the DSEIS, NSPM Answer at 17-22, and concludes that "in every instance, the PIIC could have challenged the discussion of mitigation measures based on the ER," *id.* at 17.

²⁴ NRC Staff Answer at 13.

²⁵ 10 C.F.R. § 2.309(f)(1)(vi). We could, however, find New Contention 1 non-timely based solely on PIIC's failure to attach Appendix A, which contains information vital to our understanding of the contention. While this failure might amount to an honest oversight, we are baffled by PIIC's continued failure to serve Exhibit A upon the Board until 17 days after filing the contention, and 16 days after both Staff and Applicant counsel advised PIIC of the missing exhibit. *See* NSPM Answer at 1 n.1, 23; NRC Staff Answer at 1 n.1. In its reply, PIIC offers no explanation for this delay, and we do not overlook it lightly. *See* PIIC Reply at 4 n.11. We expect any party – particularly one represented by legal counsel – to comply with all procedural requirements set forth in our orders and the Commission's regulations.

²⁶ *See, e.g., Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

As the Supreme Court has affirmed, “NEPA itself does not mandate particular results, but simply prescribes the necessary process.”²⁷ The Commission has confirmed this view, stating that under NEPA, “[t]he NRC’s obligation is to assess the proposed action for significant impacts to the physical or human environment.”²⁸ The Intervenor makes much of a few Commission statements – including its statement that the NRC will “take care to mitigate or avoid special impacts”²⁹ – that PIIC claims suggest a requirement to implement mitigation strategies. We do not read these statements to impose any substantive obligation on the NRC Staff. Rather, to comply with NEPA, the NRC must only “determine and discuss whether there are any mitigative measures that could be taken to reduce the impact.”³⁰ New Contention 1 is premised on a flawed interpretation of NEPA law. We cannot admit a contention alleging that “the NRC should require the applicant to implement . . . mitigating techniques.”³¹

Moreover, while PIIC characterizes New Contention 1 as an environmental justice contention, most of the impacts identified in Exhibit A fall outside the Staff’s environmental justice review. PIIC identifies various measures intended to mitigate the impacts of “heat shock” and “entrainment and impingement,” for example, but makes no attempt to argue that such impacts fall disproportionately on the PIIC. As Applicant points out, the Staff’s mere recognition

²⁷ Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

²⁸ 69 Fed. Reg. at 52,047.

²⁹ Id. at 52,041 (quoting Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 156 (2002)).

³⁰ Id. at 52,042 (quoting Division of Waste Management, Office of Nuclear Material Safety and Safeguards, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, NUREG-1748, at C-6 (Aug. 2003) (ADAMS Accession No. ML032450279)).

³¹ PIIC Contentions at 8. PIIC also contends that that mitigation measures are required pursuant to the NRC’s trust responsibility to Native American tribes. Id. at 13. But PIIC provides no statement of law supporting this assertion. According to the NRC Staff, “[a]s long as the NRC complies with its statutory duties, it fulfills its trust responsibilities,” and in the instant case, “any trustee responsibilities that it has with respect to PIIC are fully discharged.” NRC Staff Answer at 10. In its reply, PIIC does not dispute this assertion.

of a “potential” for disproportionate impacts “does not mean that every impact will – or even has the potential to – affect the PIIC in a disproportionately high and adverse manner.”³² Thus, PIIC fails to demonstrate a genuine dispute with the Staff’s analysis. PIIC does identify one impact – transportation impacts from steam generator refurbishment activities – that the NRC Staff acknowledges “could disproportionately affect the [PIIC].”³³ PIIC disagrees with the Staff’s conclusion that “these impacts are of short duration and are not expected to be high.”³⁴ PIIC contends that these impacts “appreciably exceed[] the environmental impact on the larger community” because they will affect the PIIC as well as visitors to PIIC’s resort, and because they raise safety and economic concerns.³⁵ Such conclusory statements hardly amount to “sufficient information to show that a genuine dispute exists,” which an intervenor is required to provide under 10 C.F.R. § 2.309(f)(1)(vi). Nor do these statements provide the “alleged facts or expert opinions” required to support Intervenor’s position.³⁶ PIIC fails to proffer adequate support for its claim that the NRC failed to properly characterize the environmental impacts or take the “hard look” required by NEPA.³⁷ Accordingly, the Board finds New Contention 1 inadmissible for its failure to comply with 10 C.F.R. § 2.309(f)(1)(v) and (vi).

³² NSPM Answer at 17.

³³ PIIC Contentions at 12 (citing DSEIS at 3-9).

³⁴ Id. (quoting DSEIS at 3-9).

³⁵ Id. at 12-13.

³⁶ 10 C.F.R. § 2.309(f)(1)(v).

³⁷ Although PIIC has failed to substantiate its claim regarding transportation impacts from refurbishment activities, the fact remains that the NRC Staff has characterized these impacts as “SMALL to MODERATE.” DSEIS at 3-9. Accordingly, NSPM has committed

to work with PIIC to coordinate and implement appropriate measures to mitigate transportation impacts, . . . including (1) using NSPM’s private access road for heavy duty truck traffic related to the project, so that it minimizes interference with traffic entering the PIIC casino and reservation property; (2) using local law enforcement to control traffic during PINGP shift changes; and (3) staggering the refurbishment work schedule if necessary.

B. New Contention 2

PIIC's second new contention alleges:

The Environmental Report submitted by Northern States Power Company and Supplement 39 to Generic Environmental Impact Statement for License Renewal for Nuclear Plants, regarding Prairie Island Nuclear Generating Plants Units 1 and 2 issued by the NRC Staff on November 13, 2009 fail to satisfy the requirements of NEPA, 42 U.S.C. § 4332 et seq., and NRC regulations implementing NEPA, because the ER and DSEIS do not adequately address the adequacy of monitoring for tritium in the groundwater.³⁸

Citing two recent NSPM Radiological Environmental Monitoring Program (REMP) reports,³⁹ PIIC notes that elevated tritium levels have been detected in certain wells on the PINGP site – specifically, at sites P-10, MW-7 and MW-8.⁴⁰ PIIC acknowledges that tritium levels remain below the Environmental Protection Agency (EPA) safe drinking water standard, but faults the Applicant and NRC Staff for neglecting to identify the exact source of tritium leaks.⁴¹ PIIC points to a history of tritium in the PIIC's drinking water supply, as was detected in the late 1980s and early 1990s, and maintains that "Community members are still concerned about the health impacts."⁴² PIIC criticizes the DSEIS for stating that "there was no tritium detected in Red Wing's drinking water" and for concluding that well data "showed no radiological effects from

NSPM Answer at 29 n.19. The Board appreciates Applicant's apparent willingness to work with PIIC and expects that Applicant will follow through on this commitment.

³⁸ PIIC Contentions at 13.

³⁹ Letter from Michael D. Wadley, Site Vice President, PINGP, to NRC Document Control Desk (May 13, 2008) (ADAMS Accession No. ML081370083) [hereinafter 2007 REMP Report]; Letter from Thomas J. Palmisano, Site Vice President, PINGP, to NRC Document Control Desk (May 7, 2007) (ADAMS Accession No. ML071350517) [hereinafter 2006 Annual REMP Report].

⁴⁰ Id. at 14.

⁴¹ Id. at 13-14.

⁴² Id. at 17.

plant operation.”⁴³ PIIC acknowledges that radiological releases are a Category 1 issue,⁴⁴ exempt from site-specific review in a license renewal proceeding. PIIC notes, however, that the NRC Staff has proposed a revision to the Generic Environmental Impact Statement (GEIS), which would re-characterize them as a Category 2 issue.⁴⁵ PIIC also lists a number of nuclear industry documents, which describe “improved methods for locating, monitoring and evaluating groundwater” and for identifying additional discharge pathways.⁴⁶ On this basis, PIIC requests that NSPM install additional monitoring wells, conduct more frequent sampling, share real-time tritium data with the PIIC, discontinue discharge of liquid waste into the landlocked area, investigate the surface around wells P-10, MW-7, and MW-8, and identify the source and quantity of all tritium emissions.⁴⁷

First and foremost, we find New Contention 2 inadmissible because it presents a challenge to NRC regulations.⁴⁸ The Commission conducted a generic review of the environmental impacts of license renewal and concluded that “the significance of radiation exposures to the public attributable to operation after license renewal will be small at all sites.”⁴⁹ Based on this conclusion, Part 51 of the NRC regulations identifies radiological exposure as a

⁴³ Id. at 14.

⁴⁴ DSEIS Appendix A at A-103.

⁴⁵ Id.

⁴⁶ Id. at 16-17.

⁴⁷ Id. at 17-18.

⁴⁸ See 10 C.F.R. § 2.335(a) (stating that “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding”).

⁴⁹ Division of Regulatory Applications, Office of Nuclear Regulatory Research, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437, at 4-95 (May 1996) (ADAMS Accession No. ML040690705).

Category 1 issue, exempt from plant-specific review.⁵⁰ Accordingly, pursuant to 10 C.F.R. § 51.71(d), the NRC Staff need not address these impacts – which include the impacts of tritium releases – in its environmental impact statement.⁵¹ The NRC has concluded generically that such releases will be well below regulatory limits, and PIIC does not dispute this assessment.⁵² Certainly, PIIC establishes no “special circumstances” requiring that the Commission waive application of the rule in this proceeding, nor have they requested such a waiver.⁵³ Instead, PIIC suggests that a proposed revision of the GEIS, which identifies radiological impacts as a Category 2 issue, somehow brings New Contention 2 within the scope of this proceeding.⁵⁴ We do not evaluate contentions on the basis of proposed rules. As long as Part 51 identifies radiological impacts as a Category 1 issue,⁵⁵ we will consider them as such, and a contention challenging the discussion of tritium impacts in the DSEIS falls outside the scope of this proceeding.

To the extent PIIC proffers New Contention 2 as an environmental justice contention, we find that PIIC fails to “provide sufficient information to show . . . a genuine dispute.”⁵⁶ PIIC disagrees with the NRC Staff’s conclusion, in its discussion of environmental justice, that well

⁵⁰ 10 C.F.R. Part 51, App. B, Table B-1.

⁵¹ Id. § 51.71(d) states that the DSEIS “will rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 in appendix B to subpart A of this part.”

⁵² PIIC Contentions at 16; see also Letter from Prairie Island Indian Community to NRC Division of Administrative Services (Sept. 22, 2008) at 5 (ADAMS Accession No. ML083200029) (in which PIIC states, “We understand that the levels of tritium found in our groundwater are below the US Environmental Protection Agency (EPA) standard of 20,000 pCi/L”).

⁵³ See NRC Staff Answer at 17-19; 10 C.F.R. § 2.335(b).

⁵⁴ PIIC Contentions at 14.

⁵⁵ 10 C.F.R. Part 51, App. B, Table B-1.

⁵⁶ 10 C.F.R. § 2.309(f)(1)(vi).

data for 2007 “showed no radiological effects from plant operation.”⁵⁷ But PIIC’s only support for its position consists of a statement that tritium was detected in PIIC’s drinking water 20 years ago.⁵⁸ PIIC offers no “facts or expert opinions” indicating unsafe levels today.⁵⁹ In fact, PIIC references two recent REMP reports concluding that current tritium levels, while elevated, fall well below applicable drinking water standards.⁶⁰ PIIC does complain that tritium monitoring sites are located too far from PIIC’s boundary with the PINGP site, rendering them unable to detect tritium in PIIC’s drinking water.⁶¹ But this complaint rings hollow, given Applicant’s assertions that “PIIC is located north of the PINGP property line,” away from the normal groundwater flow, and that “multiple sampling wells sit between those with elevated tritium findings and the PIIC site . . . , none of which have registered elevated tritium findings.”⁶² Ultimately, PIIC fails to provide adequate support for the notion that radiological impacts will be “disproportionately high and adverse” on the PIIC, which would require the Staff to analyze them with greater scrutiny.⁶³ Accordingly, we do not find an admissible environmental justice contention.

⁵⁷ PIIC Contentions at 14 (quoting DSEIS at 4-40).

⁵⁸ Id. at 17.

⁵⁹ 10 C.F.R. § 2.309(f)(1)(v).

⁶⁰ PIIC Contentions at 14-15.

⁶¹ Id. at 15.

⁶² NSPM Answer at 41 (citing PINGP, Application for Renewed Operating Licenses, App. E, Environmental Report, at 2-2, 2-5 to 2-6 (Apr. 2008) (ADAMS Accession No. ML081130673); 2007 Annual REMP Report at E-11, E-3). PIIC does not dispute these assertions in its reply, but merely reiterates that “the precise point and purpose of monitoring wells on the PIIC-PINGP boundary is to detect tritium that may be migrating towards the PIIC.” PIIC Reply at 16.

⁶³ The Applicant argues that, even with adequate support, New Contention 2 could not be admitted as an environmental justice contention, because “it would still fundamentally be an impermissible challenge to the NRC’s generic conclusion that offsite radiological impacts are small for all plants.” NSPM Answer at 37 n.31. The NRC regulations state, however, that environmental justice must be “addressed in individual license renewal reviews.” 10 C.F.R. Part

Moreover, we find New Contention 2 inadmissible because it challenges NSPM's tritium monitoring program. Although styled as an environmental justice contention, PIIC's contention calls for additional monitoring sites, more regular sampling, and real-time reporting of tritium data.⁶⁴ As discussed in our analysis of New Contention 1, these types of substantive remedies are not available under NEPA, a purely procedural statute.⁶⁵ Even if we treat New Contention 2 as a safety contention, attacking the adequacy of Applicant's radiological monitoring program, it still falls outside the scope of this proceeding. In a license renewal proceeding, an intervenor may not raise issues subject to the Commission's ongoing regulatory oversight, but only those issues related to the detrimental effects of aging.⁶⁶ To the extent PIIC's contention questions the adequacy of Applicant's current radiological monitoring program – a program subject to ongoing NRC review – it falls outside the scope of this adjudication.⁶⁷

Even if PIIC's contention did fall within scope, it is untimely. Certainly those elements of PIIC's contention that explicitly attack Applicant's ER should have been filed with PIIC's initial

51, App. B, Table B-1 n.6. We understand that the obligation to consider environmental justice is not limited by generic findings for the population at large. Indeed, the NRC's policy on environmental justice is premised on the notion that impacts "on certain populations may be different from impacts on the general population due to a community's distinct cultural characteristics or practices." 69 Fed. Reg. at 52,040 (emphasis added). Thus, had PIIC provided adequate support for its tritium-related concerns, we could not rule out the possibility of finding an admissible environmental justice contention.

⁶⁴ PIIC Contentions at 15, 18.

⁶⁵ See supra text accompanying notes 26-31.

⁶⁶ See, e.g., Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 637-38 (2004) ("Our license renewal inquiry is narrow. It focuses on 'the potential impacts of an additional 20 years of nuclear power plant operation,' not on everyday operational issues. Those issues are 'effectively addressed and maintained by ongoing agency oversight, review, and enforcement.'" (internal citations omitted)).

⁶⁷ As Applicant points out, this conclusion follows the reasoning of at least two other licensing boards faced with similar contentions. NSPM Answer at 36. See Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-07-12, 66 NRC 113, 130 n.81 (2007); Nuclear Mgmt Co., LLC (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 754 (2005).

petition to intervene.⁶⁸ As to those elements challenging the DSEIS, PIIC does not base its contention on any “data or conclusions” in the DSEIS “that differ significantly from the data or conclusions in the applicant’s documents.”⁶⁹ Rather, the information underlying New Contention 2 was available well before issuance of the DSEIS. The 2006 and 2007 Annual REMP Reports, which document elevated tritium levels at certain PINGP monitoring sites, became available to the public in May 2007 and May 2008, respectively.⁷⁰ PIIC admits that it knew of this information at least as early as September 2008.⁷¹ Thus, PIIC should have filed New Contention 2 with its initial petition to intervene, or at least “in a timely fashion based on the availability of the subsequent information.”⁷² Instead, PIIC opted to file its contention more than 15 months later, claiming that it is based on “new data and conclusions” in the DSEIS. This course of action contravenes the Commission’s expectation that petitioners “examine the

⁶⁸ Indeed, the contention alleges that “the ER . . . do[es] not adequately address the adequacy of the monitoring for tritium in the groundwater.” PIIC Contentions at 13 (emphasis added).

⁶⁹ 10 C.F.R. § 2.309(f)(2). We disagree, however, with the Staff and Applicant’s insistence that, in addition to the requirements of 10 C.F.R. § 2.309(f)(2), Intervenor must address the criteria for non-timely contentions at 10 C.F.R. § 2.309(c). See NSPM Answer at 7 & n.5; NRC Staff Answer at 20. The Commission just recently stated that “our rules of procedure explicitly allow the filing of new contentions on the basis of the draft or final environmental impact statement where that document contains information that differs ‘significantly’ from the information that was previously available. . . . In such a case, the ‘late-filing’ standards are no bar to the admission of properly-supported contentions.” Crow Butte Res., Inc. (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, 69 NRC 331, 351 & n.104 (2009).

⁷⁰ See supra note 39.

⁷¹ As Applicant points out, “the PIIC’s own scoping comments for the DSEIS filed on September 22, 2008, specifically point to the discussion of the elevated tritium findings contained in the 2007 Annual REMP Report.” NSPM Answer at 38-39; Letter from Prairie Island Indian Community to NRC Division of Administrative Services (Sept. 22, 2008) at 5-8 (ADAMS Accession No. ML083200029) (in which PIIC references the 2007 Annual REMP Report, but alleges that “[t]here was no REMP made available to PIIC for 2006”).

⁷² 10 C.F.R. § 2.309(f)(2)(iii). This Board has directed that a new contention “shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within 30 days of the date when the document on which it is based first becomes available.” Licensing Board Memorandum and Order (Prehearing Conference Call Summary and Initial Scheduling Order) (Feb. 18, 2009) at 4 (unpublished).

publicly available material and set forth their claims and the support for their claims at the outset” of a proceeding.⁷³ Accordingly, we find that New Contention 2 presents a non-timely challenge to the license application. Because PIIC neglects to address the factors at 10 C.F.R. § 2.309(c), we decline to consider whether New Contention 2 meets the non-timely criteria.

We find New Contention 2 inadmissible for its failure to meet the standards set forth in 10 C.F.R. § 2.309(f)(1)(iii), (v), and (vi), as well as the criteria for new contentions at 10 C.F.R. § 2.309(f)(2).

C. New Contention 3

PIIC’s third new contention alleges:

The Environmental Report submitted by Northern States Power Company and Supplement 39 to Generic Environmental Impact Statement for License Renewal for Nuclear Plants, Regarding Prairie Island Nuclear Generating Plant Units 1 and 2 issued by the NRC Staff on November 13, 2009 fail to satisfy the requirements of NEPA, 42 U.S.C. § 4332 et seq., and NRC regulations implementing NEPA, because the ER and DSEIS do not adequately estimate dose exposures for all individuals who live within 3 kilometers of all sources of emission in the facility.⁷⁴

In this contention, PIIC attacks the DSEIS for its failure to calculate dose estimates “from all cumulative doses for individuals residing within 3 kilometers.”⁷⁵ According to PIIC, such calculations are required by NEPA under “Subpart H of 40 C.F.R.”⁷⁶ PIIC asserts that “Community members who reside within 3 kilometers of the PINGP will be exposed to doses from multiple sources, with higher doses under certain meteorological conditions.”⁷⁷ Finally,

⁷³ AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 271-72 (2009) (quoting LES, CLI-04-25, 60 NRC at 224-25).

⁷⁴ PIIC Contentions at 18.

⁷⁵ Id. at 19.

⁷⁶ Id.

⁷⁷ Id.

PIIC contends that the DSEIS must examine “worse case scenarios,” and that such an examination “is critical for a complete and thorough environmental justice analysis.”⁷⁸

New Contention 3 does not meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1). To begin, we reiterate that the NRC Staff is not required to consider radiological impacts in an individual license renewal proceeding – even for individuals that live close to the facility. The Commission has generically determined such impacts to be small, and PIIC cites no “special circumstances” justifying a rule waiver.⁷⁹ To the extent New Contention 3 concerns environmental justice, PIIC does not present any support for an argument that it will endure “disproportionately high and adverse” radiological impacts. Moreover, PIIC provides no relevant statement of law requiring the NRC Staff to calculate dose estimates for all individuals “who reside within 3 kilometers of the PINGP.”⁸⁰ PIIC provides only a vague reference to “Subpart H of 40 C.F.R.,” which Applicant and NRC Staff take to mean “40 C.F.R. Part 61, Subpart H” – a regulation wholly inapplicable to facilities licensed by the NRC.⁸¹ Finally, to the extent New Contention 3 faults the NRC Staff for its failure to consider “worst case scenarios,” we note simply that NEPA does not require such an analysis.⁸²

Therefore, we find this contention to be inadmissible. New Contention 3 fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v) and (vi).

⁷⁸ Id.

⁷⁹ See supra text accompanying notes 44-55.

⁸⁰ PIIC Contentions at 19.

⁸¹ See NSPM Answer at 47; NRC Staff Answer at 30-31. As Applicant and NRC Staff explain, 40 C.F.R. Part 61, Subpart H, imposes standards for the emission of radionuclides from Department of Energy (DOE) facilities and applies only to facilities owned or operated by DOE. Id. In its reply, PIIC apparently acknowledges the inapplicability of this regulation. See PIIC Reply at 17 n.45.

⁸² See, e.g., Private Fuel Storage, LLC (Independent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348-49 (2002) (citing Robertson, 490 U.S. at 354).

II. Conclusion

For the forgoing reasons, we GRANT PIIC's motion for leave to file new contentions based on the DSEIS, and DENY the admission of each of PIIC's newly proffered contentions.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD⁸³

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

/RA, by Edward R. Hawkens for/

Dr. Thomas J. Hirons
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 25, 2010

⁸³ Copies of this order were sent this date by the agency's E-Filing system to counsel for all parties.

DOCKET NOS. 50-282 AND 50-306-LR
LB ORDER (GRANTING MOTION FOR LEAVE TO FILE NEW CONTENTIONS AND
DENYING THEIR ADMISSION)

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[Original signed by Evangeline S. Ngbea]
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Dated at Rockville, Maryland
this 25th day of February 2010