NUCLEAR REGULATORY COMMISSION ISSUANCES

OPINIONS AND DECISIONS OF THE NUCLEAR REGULATORY COMMISSION WITH SELECTED ORDERS

July 1, 2008 - September 30, 2008

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PREFACE

This is Book I of the sixty-eighth volume of issuances (1–459) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from July 1, 2008, to September 30, 2008.

Atomic Safety and Licensing Boards are authorized by Section 191 of the Atomic Energy Act of 1954. These Boards, comprised of three members, conduct adjudicatory hearings on applications to construct and operate nuclear power plants and related facilities and issue initial decisions which, subject to internal review and appellate procedures, become the final Commission action with respect to those applications. Boards are drawn from the Atomic Safety and Licensing Board Panel, comprised of lawyers, nuclear physicists and engineers, environmentalists, chemists, and economists. The Atomic Energy Commission (AEC) first established Licensing Boards in 1962 and the Panel in 1967.

Between 1969 and 1990, the AEC authorized Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission in facility licensing proceedings. In 1972, that Commission created an Appeal Panel, from which were drawn the Appeal Boards assigned to each licensing proceeding. The functions performed by both Appeal Boards and Licensing Boards were transferred from the AEC to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974. Appeal Boards represented the final level in the administrative adjudicatory process to which parties could appeal. Parties, however, were permitted to seek discretionary Commission review of certain board rulings. The Commission also could decide to review, on its own motion, various decisions or actions of Appeal Boards.

On June 29, 1990, however, the Commission voted to abolish the Atomic Safety and Licensing Appeal Panel, and the Panel ceased to exist as of June 30, 1991. Since then, the Commission itself reviews Licensing Board and other adjudicatory decisions, as a matter of discretion. *See* 56 Fed. 29 & 403 (1991).

The Commission also may appoint Administrative Law Judges pursuant to the Administrative Procedure Act, who preside over proceedings as directed by the Commission.

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Issuances are referred to as follows: Commission—CLI, Atomic Safety and Licensing Boards-LBP, Administrative Law Judges—ALJ, Directors' Decisions—DD, and Decisions on Petitions for Rulemaking—DPRM.

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or to have any independent legal significance.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

In the Matter of **Docket Nos. 52-022-COL**
52-023-COL

PROGRESS ENERGY CAROLINAS, INC.
(Shearon Harris Nuclear Power
Plant, Units 2 and 3) **July 23, 2008**

RULES OF PRACTICE: RESPONSIBILITIES OF STAFF

STAFF REQUESTS FOR ADDITIONAL INFORMATION

The mere fact that the Staff asks an applicant for more information does not make an application incomplete.

RULES OF PRACTICE: SCOPE OF PROCEEDING

Docketing decisions are not challengeable in an adjudicatory proceeding. Instead, in adjudicatory proceedings ''it is the license application, not the NRC staff review, that is at issue.'' *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998).

RULES OF PRACTICE: SCOPE OF PROCEEDING

Petitioners may not attack Commission regulations in adjudicatory proceedings. 10 C.F.R. § 2.335(a).

NRC: STATEMENT OF POLICY ON CONDUCT OF NEW REACTOR LICENSING PROCEEDINGS

RULES OF PRACTICE: COL PROCEEDINGS: SCOPE OF PROCEEDING

Issues concerning a design certification application should be resolved in the design certification rulemaking and not in an individual COL proceeding. When a contention is raised in a COL proceeding that challenges information in the design certification rulemaking, licensing boards ''should refer such a contention to the staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible.'' Final Policy Statement on the Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008). If an applicant later decides not to reference a certified design, and instead proceeds with a site-specific design, any admissible issues would have to be addressed in the licensing adjudication.

MEMORANDUM AND ORDER

On June 23, 2008, the North Carolina Waste Awareness and Reduction Network (NC WARN) filed with the Secretary of the Commission a motion to immediately suspend the hearing notice in this proceeding. NC WARN also asked for expedited consideration of its motion. On July 2, 2008, the NRC Staff filed a response in opposition to the motion, and the Applicant filed a response in opposition to the motion on July 3, 2008. For the reasons specified below, NC WARN's motion is denied.[1]

In its motion, NC WARN requests that the Commission immediately suspend the hearing notice until: (1) the Applicant responds to data requests and other schedule issues concerning the Harris Lake and its water levels, alternative water sources, the impacts on aquatic species, and transportation impacts; and (2) the Commission completes its design certification review of the AP1000 reactor, Revision 16, and any resulting modifications are incorporated into the design and operational practices at the Shearon Harris Nuclear Power Plant Units 2 and 3.

NC WARN first argues that the NRC should suspend the hearing notice because the COL application is not complete. NC WARN states that information regarding the water levels at Harris Lake and information concerning an intake

[1] The NRC has received several e-mail requests supporting NC WARN's motion. For the reasons discussed in this Memorandum and Order, these requests are also denied. Requests have been received from the Mayor of the Town of Carrboro, North Carolina, North Carolina State Senator Ellie Kinnaird, and Vinnie DeBenedetto.

on the Cape Fear River are missing. As support, NC WARN cites an April 17, 2008 letter from the NRC Staff to the Applicant that lists specific issues that may ''introduce uncertainty into the review schedule.'' NC WARN argues that this letter shows that the COL application is incomplete and that the notice of hearing should be suspended until the application is complete enough for the NRC Staff to establish a review schedule.

The Commission, however, disagrees with this interpretation. The NRC Staff did not state the application was incomplete or that they were unable to establish a review schedule. In fact, in the April 17, 2008 letter, the NRC Staff docketed the application, thus finding that the application was sufficient enough to commence review.[2] Subsequently, in a May 16, 2008 letter, the NRC Staff established a schedule for reviewing the Shearon Harris COL application. The mere fact that the Staff is asking for more information does not make an application incomplete.[3] If the Petitioners believe the Application is incomplete in some way, they may file a contention to that effect. Indeed, the very purpose of NRC adjudicatory hearings is to consider claims of deficiencies in a license application; such contentions are commonplace at the outset of NRC adjudications.[4] Accordingly, this claim does not provide a basis for suspending the hearing notice.

NC WARN's second argument is that the NRC should delay the notice of hearing for this COL application until the completion of the certified design rulemaking for the AP1000, Revision 16. According to NC WARN, it is impossible to hold a fair hearing until the completion of the design certification rulemaking because of the interconnections between the design and the rest of the COL application.

A specific provision of Part 52, however, allows applicants to reference a certified design that has been docketed but not approved,[5] and Petitioners may not

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[2] This docketing decision is not challengeable in an adjudicatory proceeding. Instead, in adjudicatory proceedings ''it is the license application, not the NRC staff review, that is at issue.'' *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998).

[3] *See, e.g.,* Notice of Acceptance for Docketing of an Application for Combined License for Shearon Harris Units 2 and 3, 73 Fed. Reg. 21,995 (Apr. 23, 2008) (noting that the docketing of an application does not preclude the NRC Staff from requesting additional information from the applicant).

[4] *See, e.g., AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188 (2006) (deciding two petitions to intervene and requests for hearing); *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-01-21, 54 NRC 33, *petition for review denied,* CLI-01-25, 54 NRC 368 (2001) (deciding two petitions to intervene and requests for hearing); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998), *aff'd in part,* CLI-98-13, 48 NRC 26 (1998) (deciding five petitions to intervene and requests for hearing).

[5] 10 C.F.R. § 52.55(c).

challenge Commission regulations in licensing proceedings.[6] Thus, although the Commission anticipated that applicants would first seek to have designs certified before submitting COLs which reference those designs, the NRC's regulations, nonetheless, allow an applicant — at its own risk — to submit a COL application that does not reference a certified design.

The Commission discussed this very situation in its Final Policy Statement on the Conduct of New Reactor Licensing Proceedings.[7] In that policy statement the Commission stated that issues concerning a design certification application should be resolved in the design certification rulemaking and not in a COL proceeding. When a contention is raised in a COL proceeding that challenges information in the design certification rulemaking, licensing boards ''should refer such a contention to the Staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible.''[8] If an applicant later decides not to reference a certified design, and instead proceeds with a site-specific design, any admissible issues would have to be addressed in the licensing adjudication.

Accordingly, there is no basis to hold this notice of hearing in abeyance pending completion of the design certification rulemaking. In sum, in accordance with 10 C.F.R. Part 52, Petitioners have sufficient information to formulate contentions before the August 4, 2008 deadline.

IT IS SO ORDERED.

For the Commission

ANDREW L. BATES
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 23d day of July 2008.

[6] 10 C.F.R. § 2.335(a).
[7] 73 Fed. Reg. 20,963 (Apr. 17, 2008).
[8] *Id.* at 20,972.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Paul B. Abramson
Dr. Anthony J. Baratta

In the Matter of **Docket No. 50-219-LR**
(ASLBP No. 06-844-01-LR)
(License Renewal)

AMERGEN ENERGY COMPANY, LLC
(Oyster Creek Nuclear Generating Station) **July 24, 2008**

RULES OF PRACTICE: REOPENING OF RECORD

Reopening the record is an ''‘extraordinary action’'' (51 Fed. Reg. 19,535, 19,538 (May 30, 1986)). The standards for reopening are strict and demanding. Otherwise, ''‘there would be little hope’ of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings'' (*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 555 (1978)). Proponents of motions seeking to reopen the record therefore bear a ''heavy burden'' (*Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983) (quoting *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978)).

RULES OF PRACTICE: REOPENING OF RECORD

Movants must satisfy a multifactor test (10 C.F.R. §§ 2.326(a) and 2.326(d)) that is governed by prescribed evidentiary requirements (*id.* § 2.326(b)).

RULES OF PRACTICE: REOPENING OF RECORD

Additionally, where a motion to reopen the record seeks to admit a new contention that has not previously been in controversy among the parties, section 2.326(d) requires the movant to show that a balancing of the factors of 2.309(c)(1) (to the extent they are relevant to the particular filing) weighs in favor of reopening.

RULES OF PRACTICE: REOPENING OF RECORD

Section 2.326(b) demands particularized support for motions that seek to reopen the record. *See Private Fuel Storage, L.L.C.,* CLI-05-12, 61 NRC at 350 (''a party seeking to reopen a closed record to raise a new matter faces an elevated burden to lay a proper foundation for its claim''). Such motions must be accompanied by ''affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria [in section 2.326(a)] have been satisfied'' (10 C.F.R. § 2.326(b)). Moreover, section 2.326(b) requires that ''[e]vidence contained in affidavits must meet the [regulatory] admissibility standards'' (*ibid.*) — that is, it must be ''relevant, material, and reliable'' (*id.* § 2.337(a)).

RULES OF PRACTICE: REOPENING OF RECORD

In evaluating a motion to reopen the record, a licensing board properly evaluates the evidentiary material submitted by the parties. *See Private Fuel Storage, L.L.C.,* CLI-05-12, 61 NRC at 350 (a licensing board properly considers the movant's ''new allegations and [the nonmovant's] contrary evidence in determining whether there was a real issue at stake warranting a reopened hearing''); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 222 (1990) (Commission weighed the competing evidence in concluding that a ''motion to reopen [did] not present a question of safety significance'').

RULES OF PRACTICE: REOPENING OF RECORD

When considering a motion to reopen the record, a licensing board need not formally reopen the record in order to assess the relative worth of the parties' competing evidence. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Station), ALAB-138, 6 AEC 520, 523 (1973) (In denying a motion to reopen the record, the tribunal will necessarily have supplemented the record

with, for example, the ''affidavits, letters or other materials accompanying the motion and the responses thereto. The 'hearing record,' however, has not been reopened'').

RULES OF PRACTICE: REOPENING OF RECORD

It is well established that discovery is not permitted for the purpose of developing a motion to reopen the record or to assist a petitioner in the framing of contentions. *See Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 351 (1998); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985); *see also Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 432-33 (1989).

RULES OF PRACTICE: ROLE OF LICENSING BOARD

Neither law nor logic supports an assertion that a licensing board is foreclosed from considering docketed licensing material that has been submitted to the board and that, on its face, appears to be relevant to the disposition of a pending motion.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

''There is a difference between contentions that, on the one hand, allege that a license application suffers from an improper omission, and contentions that, on the other hand, raise a specific substantive challenge to how particular information or issues have been discussed in a license application'' (*AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 (2006)). As with all contentions of omission, if the applicant supplies the missing information — or, as relevant here, if the applicant performs the omitted analysis — the contention is moot (*Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002)).

RULES OF PRACTICE: REOPENING OF RECORD (NEW CONTENTIONS, LICENSE RENEWAL PROCEEDING)

To satisfy the requirement in section 2.326(a)(2), the affidavit must provide sufficient information to support a *prima facie* showing that (1) a deficiency exists in the license renewal application, and (2) the deficiency presents a significant safety issue.

RULES OF PRACTICE: REOPENING OF RECORD (NEW CONTENTIONS, LICENSE RENEWAL PROCEEDING)

When a newly proffered contention (and its underlying evidence) is unrelated to the contention adjudicated by the licensing board, rather than showing that the newly proffered evidence would likely have materially altered the board's disposition of the contention, the movant must show that the evidence supporting their contention would likely have materially affected the outcome of the license renewal proceeding. That is, they must show a likelihood that its contention would be resolved in its favor such that the license renewal application would be denied or conditioned. *See Private Fuel Storage, L.L.C.,* CLI-05-12, 61 NRC at 350 (to reopen a closed record to introduce a new issue, the movant has the burden of ''showing that the new information will 'likely' trigger a 'different result' '').

RULES OF PRACTICE: REOPENING OF RECORD (NEW CONTENTIONS, LICENSE RENEWAL PROCEEDING)

A decision by the NRC Staff to revise the Final Safety Evaluation Report to account for an applicant's confirmatory analysis would not, standing alone, be a materially different result that justifies reopening the record, because it would neither change the outcome of the renewal proceeding nor impose a different licensing condition on an applicant.

RULES OF PRACTICE: REOPENING OF RECORD

Although the term ''likely'' in section 2.326(a)(3) is not defined, we construe it — consistent with its commonly understood meaning — to be synonymous with ''probable'' or ''more likely than not.'' *See Webster's Third New International Dictionary of the English Language Unabridged* 1310 (1976); *cf.* 51 Fed. Reg. at 19,536-37 (in selecting a ''likelihood'' standard, the Commission indicated that a ''would have been reached'' standard is too strict, and a ''might have been reached'' standard is too lax).

RULES OF PRACTICE: REOPENING OF RECORD

It is not surprising that a movant who has failed to provide an adequate foundation to support the existence of a significant safety issue also is unable to ''demonstrate that a materially different result . . . would have been likely had [their] newly proffered evidence been considered initially'' (10 C.F.R. § 2.326(a)(3)). *See Seabrook,* CLI-90-10, 32 NRC at 223 (''Because this matter as presented is devoid of safety significance, we see no likelihood whatsoever —

let alone a demonstration — that a materially different result would . . . have been likely had the newly proffered evidence been considered initially'').

RULES OF PRACTICE: REOPENING OF RECORD

Failure by a movant to address all the reopening requirements in a motion to reopen ''is reason enough to deny [the motion].'' *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008). *See also Seabrook,* ALAB-915, 29 NRC at 432 (''the Commission expects its adjudicatory boards to enforce [reopening requirements] rigorously — i.e., to reject out-of-hand reopening motions that do not meet those requirements within their four corners'').

MEMORANDUM AND ORDER
(Denying Citizens' Motion to Reopen the Record and to Add a New Contention)

On April 18, 2008, the Intervenors in this case — six organizations hereinafter referred to collectively (per their suggestion) as Citizens[1] — filed a motion seeking to reopen the record and to add a new contention challenging the license renewal application submitted by AmerGen Energy Company, LLC (''AmerGen'') for the Oyster Creek Nuclear Generating Station (''Oyster Creek''). On May 27, 2008, while their April 18 motion remained pending, Citizens filed another motion seeking to supplement the basis of the contention proffered in their April 18 motion. Given the procedural posture of this case, if Citizens' May 27 motion is to be granted, it must — like the April 18 motion — satisfy the regulatory requirements for reopening the record.

Reopening the record is an extraordinary action. A licensing board may grant a motion to reopen only if the demanding requirements in 10 C.F.R. § 2.326 are satisfied. We conclude that Citizens' April 18 and May 27 motions fail to satisfy the regulatory requirements for reopening the record. We therefore deny their motions to reopen.

[1] The six organizations are Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; and New Jersey Environmental Federation.

I. BACKGROUND

On July 22, 2005, AmerGen submitted a license renewal application for Oyster Creek seeking a 20-year extension for the current license, which expires on April 9, 2009. Citizens challenged the application, and this Board admitted a single contention challenging the frequency of AmerGen's proposed plan to perform ultrasonic tests in the sand bed region of the drywell shell. In September 2007, we held a 2-day evidentiary hearing on the admitted contention. At the end of the hearing, we closed the record. *See* Tr. at 878 (Sept. 25, 2007).

On December 18, 2007, this Board issued an initial decision resolving Citizens' contention in AmerGen's favor (LBP-07-17, 66 NRC 327 (2007)). On January 14, 2008, Citizens filed an appeal with the Commission challenging our decision. That appeal remains pending.

On April 3, 2008, the NRC Staff informed the Commission that it was reviewing an analytic approach, called the ''Green's function'' method, which historically has been used by licensees to calculate cumulative usage factors (''CUF'') related to metal fatigue, and which may not be sufficiently conservative in some instances. *See* Board Notification 2008-01, Notification of Information in the Matter of Oyster Creek Nuclear Generating Station License Renewal Application (Apr. 3, 2008) [hereinafter April 3 Commission Notification]. The Staff advised the Commission that the CUF for Oyster Creek's recirculation nozzle had been calculated using the Green's function method (*ibid.*). The Staff further indicated that, incident to its review of AmerGen's license renewal application, it would direct AmerGen to ''perform a confirmatory analysis consistent with the methodology in Section III of the ASME Code'' (*ibid.*; *infra* note 3). The Staff told the Commission that the ''safety significance of using the [Green's function] is low based on the risk assessments performed by the Staff,'' but the Staff nevertheless provided the Commission with this information ''because this may be an issue of public interest'' (April 3 Commission Notification).[2]

Shortly thereafter, on April 11, 2008, the NRC Staff issued a draft Regulatory Issue Summary (''RIS'') addressed to all reactor plant licensees informing them that use of the Green's function methodology ''could be nonconservative if not correctly applied'' (NRC [RIS] 2008-xx, ''Fatigue Analysis of Nuclear Power Plant Components'' at 1 (Apr. 11, 2008) [hereinafter April 11 RIS]) (published in Proposed Generic Communication; Fatigue Analysis of Nuclear Power Plant Components, 73 Fed. Reg. 24,094 (May 1, 2008)). According to the RIS:

> The Green's function approach involves performing a detailed stress analysis of a

[2] The application of the Green's function to determine the CUF of the Oyster Creek's recirculation nozzle is not relevant to the issue resolved by this Board in LBP-07-17 and that is pending before the Commission on appeal (April 3 Commission Notification).

> component to calculate its response to a step change in temperature. This detailed analysis is used to establish an influence function, which is subsequently used to calculate the stresses caused by the actual plant temperature transients. This methodology has been used to perform fatigue calculations and as input for on-line fatigue monitoring programs.

April 11 RIS at 2. The RIS states that the ''Green's function methodology is not in question'' (*ibid.*). Rather, the concern animating issuance of the RIS relates to use of a ''simplified input for applying the Green's function in which only one value of stress is used for the evaluation of the actual plant transients'' (*ibid.*). This simplified analytic methodology ''may provide acceptable results for some applications; however, it also requires a great deal of judgment by the analyst to ensure that the simplification still provides a conservative result'' (*ibid.*). Accordingly, states the RIS, recent license renewal applicants who have used the simplified Green's function methodology have been asked by the NRC Staff to ''perform confirmatory analyses to demonstrate that the simplified Green's function analyses provide acceptable results'' (*ibid.*).[3]

On April 18, 2008, Citizens filed a motion with the Commission seeking to reopen the record in the Oyster Creek case and to file a new contention. *See* Motion by [Citizens] to Reopen the Record and for Leave to File a New Contention, and Petition to Add a New Contention (Apr. 18, 2008) [hereinafter Citizens' Motion to Reopen]. Citizens argued that the Commission should admit the following new contention:

> The predictions of metal fatigue for the recirculation nozzles at Oyster Creek are not conservative. A confirmatory analysis using a conservative method is required to establish whether these nozzles could exceed allowable metal fatigue limits during any extended period of reactor operation.

Reply by [Citizens] to AmerGen's Opposition to Their Petition to Add a New Contention at 3 (May 5, 2008) [hereinafter Citizens' May 5 Reply to AmerGen].[4]

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[3] Consistent with the NRC Staff's representation to the Commission (April 3 Commission Notification), the Staff on April 29, 2008, issued to AmerGen a request for additional information regarding the fatigue analysis performed on the Oyster Creek recirculation outlet nozzle. In particular, the Staff directed AmerGen to perform a reanalysis of the CUF to confirm the result of the Green's function evaluation. *See* NRC Request for Additional Information Related to Oyster Creek Generating Station License Renewal Application (Apr. 29, 2008). As discussed *infra* in text, AmerGen complied with the Staff's request and provided the result of the reanalysis on May 1, 2008.

[4] Although Citizens originally submitted a more expansive contention consisting of three discrete challenges (Citizens' Motion to Reopen at 12), the affidavits accompanying the Answers submitted by AmerGen and the NRC Staff established that two of those challenges were insubstantial (Citizens'

(Continued)

Citizens argued that their newly proffered contention: (1) satisfied the standards in 10 C.F.R. § 2.326 for reopening the record; (2) satisfied the standards in 10 C.F.R. § 2.309(f)(2) for timeliness; and (3) satisfied the standards in 10 C.F.R. § 2.309(f)(1) for contention admissibility. *See* Citizens' Motion to Reopen at 5-18.

On April 28, 2008, AmerGen and the NRC Staff filed answers opposing Citizens' motion to reopen the record. They argued that Citizens: (1) failed to satisfy the reopening standards in section 2.326; (2) failed to satisfy the timeliness standards in section 2.309(f)(2) for newly proffered contentions; and (3) failed to satisfy the contention admissibility standards in section 2.309(f)(1). *See* AmerGen's Answer Opposing Citizens' Motion to Reopen Record and Petition to Add a New Contention at 7-30 (Apr. 28, 2008) [hereinafter AmerGen's April 28 Answer]; NRC Staff's Response in Opposition to Citizens' Motion to Reopen the Record and for Leave to File and Add a New Contention at 6-23 (Apr. 28, 2008) [hereinafter NRC Staff's April 28 Answer].[5]

By order dated May 9, 2008, the Commission referred to this Board for appropriate action Citizens' April 18 motion to reopen the record, the answers to that motion filed by AmerGen and the NRC Staff, and Citizens' replies and motion for leave to file a reply. *See* Commission Order, *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Docket No. 50-219-LR (May 9, 2008) (unpublished).

Meanwhile, on May 1, 2008, AmerGen responded to the NRC Staff's April 29 request for additional information (''RAI'') regarding the need to perform a reanalysis of the CUF for the recirculation outlet nozzle to confirm the result of the original evaluation that used a Green's function. *See supra* note 3; Letter from Alex S. Polonsky to Dale E. Klein dated May 5, 2008 Notifying Commission of AmerGen's Filing Enclosed RAI Responses on Metal Fatigue Analysis (May 1, 2008) [hereinafter AmerGen May 5 Letter]. In its RAI response, AmerGen informed the Staff that it had performed a confirmatory fatigue analysis of the

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May 5 Reply to AmerGen at 3). Citizens therefore revised their newly proffered contention as indicated above in text.

[5] On May 5, 2008, Citizens replied to AmerGen's April 28 answer, *see* Reply by [Citizens] to AmerGen's Opposition to their Petition to Add a New Contention (May 5, 2008), and on May 6, 2008, Citizens moved for leave to reply to the NRC Staff's opposition to Citizens' request to reopen the record. *See* Motion for Leave to File a Reply to the NRC Staff's Opposition to Citizens' Motion to Reopen (May 6, 2008). Citizens included with their latter filing a reply to the NRC Staff. *See* Reply by [Citizens] to the NRC Staff's Opposition to their Motion to Reopen (May 6, 2008) [hereinafter Citizens' May 6 Reply]. The NRC Staff filed a pleading opposing Citizens' request to reply. *See* NRC Staff's Response in Opposition to Citizens' Motion for Leave to File a Reply to the NRC Staff's Opposition to Citizens' Motion to Reopen (May 15, 2008) [hereinafter NRC Staff's Opposition to Citizens' Request to Reply]. In the interest of ensuring our decision is based on a full record, we grant Citizens' motion to file a reply. *See* 10 C.F.R. § 2.323(c).

Oyster Creek recirculation nozzle in accordance with the methodology in section III of the ASME Code. *See* Enclosure to AmerGen May 5 Letter, RAI Response at 2. AmerGen's response included a table containing information from the original analysis, a table containing information from the new analysis, notes describing how the two analyses differed, and a summary of fatigue usage results comparing the cumulative usage factor results from the two analyses. *See id.* at 2-7. AmerGen reported that the ''new analysis confirms that the results of the original analysis are conservative and remain acceptable'' (*id.* at 4). AmerGen provided the Commission, this Board, and the parties to this proceeding with a copy of the May 1 RAI response under cover of a May 5, 2008 letter. *See* AmerGen May 5 Letter.

On May 21, 2008, this Board issued an order that (1) took note of the May 1 RAI response enclosed in AmerGen's May 5 letter, and (2) observed that AmerGen had failed to explain to this Board the relevance of the RAI response to this proceeding. *See* Order, *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), ASLBP No. 06-844-01-LR (May 21, 2008) (unpublished) [hereinafter May 21 Board Order]. This Board directed the parties to submit by May 27 ''an affidavit authored by an appropriate expert that discusses with particularity the significance of [AmerGen's May 1 RAI response], accompanied by a pleading that explains the impact (if any) of that Response on the proper disposition of Citizens' motion to reopen the record and add a new contention'' (*id.* at 2).

In compliance with the Board's May 21 order, AmerGen and the NRC Staff each filed a pleading accompanied by an affidavit stating that AmerGen's RAI response confirms that Citizens cannot satisfy the standards for reopening the record, that Citizens' newly proffered contention is untimely and does not satisfy the standards for admitting a late-filed contention, and that Citizens' contention fails to satisfy the standards for contention admissibility. *See* AmerGen's Response to May 21 Board Order (May 27, 2008); NRC Staff's Explanatory Pleading and Affidavit (May 27, 2008).

Citizens likewise filed a pleading accompanied by an affidavit in compliance with this Board's May 21 order. Citizens argued that this Board ought not consider AmerGen's RAI response, because (1) AmerGen failed *ab initio* to present that material to the Board in the form of a proper pleading, and (2) it would be fundamentally unfair to consider AmerGen's RAI response without providing Citizens with an opportunity to respond after being given access to the data underlying the fatigue analyses and any documents that were referenced by those analyses to support their assumptions. *See* Citizens' Response to Board Order and Motion to Supplement the Basis of Their Contention at 2-4 (May 27, 2008) [hereinafter Citizens' May 27 Response and Motion to Supplement]. Citizens stated that even if this Board considers the RAI response without the benefit of an additional response from Citizens, we should conclude that the response

fails to undermine their motion to reopen the record and to add a new contention (*id.* at 5-7). Finally, Citizens moved to supplement the basis of their newly proffered contention, arguing that the RAI response demonstrates the original fatigue calculation was not adequately conservative. This new basis, argued Citizens, confirms the need to reopen the record and to add a new contention. *See id.* at 7-10.

On June 5 and June 6, 2008, respectively, the NRC Staff and AmerGen filed responses opposing Citizens' motion to supplement the basis of their newly proffered contention. *See* NRC Staff's Answer to Citizens' Motion to Supplement the Basis of Their Contention (June 5, 2006) [hereinafter NRC Staff's Answer to Motion to Supplement]; AmerGen's Answer Opposing Citizens' Motion to Supplement (June 6, 2008) [hereinafter AmerGen's Answer to Motion to Supplement].[6]

II. ANALYSIS

A. The Legal Standards in 10 C.F.R. § 2.326 Governing Motions to Reopen the Record Are, by Design, Strict and Demanding

Citizens' April 18 motion, which seeks to reopen the record and to admit a newly proffered contention,[7] and their May 27 motion, which seeks to supplement the basis of their newly proffered contention,[8] must — if they are to be granted — satisfy the requirements for reopening the record. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 22 (1978) (the requirements for reopening the record apply to ''each issue to be reopened'').

Reopening the record is an '' 'extraordinary action' '' (51 Fed. Reg. 19,535,

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[6] On June 5, 2008, Citizens filed a motion asking this Board to strike the May 27 pleadings of AmerGen and the NRC Staff, arguing that the pleadings exceeded the scope of this Board's May 21 order. *See* Citizens' Motion to Strike and for Other Appropriate Relief (June 5, 2008) [hereinafter Citizens' Motion to Strike]. AmerGen and the NRC Staff oppose Citizens' motion. *See* AmerGen's Answer Opposing Citizens' Motion to Strike (June 16, 2008) [hereinafter AmerGen's June 16 Answer]; NRC Staff's Answer to Citizens' Motion to Strike NRC Staff Response to the May 21 Board Order (June 16, 2008) [hereinafter NRC Staff's June 16 Answer]. For the reasons discussed *infra* note 21, we deny Citizens' motion to strike.

[7] Citizens' April 18 motion to reopen seeks to admit the following new contention: ''The predictions for metal fatigue for the recirculation nozzles at Oyster Creek are not conservative. A confirmatory analysis is required to establish whether these nozzles could exceed allowable metal fatigue limits during any extended period of reactor operation'' (Citizens' May 5 Reply to AmerGen at 3).

[8] Citizens' May 27 motion seeks to supplement the basis of their newly proffered contention by arguing that AmerGen's May 1 RAI response confirms that the metal fatigue predictions are ''non-conservative in some respects and non-compliant with the ASME code'' (Citizens' May 27 Response and Motion to Supplement at 9).

19,538 (May 30, 1986)). The standards for reopening are strict and demanding. Otherwise, '' 'there would be little hope' of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings'' (*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 555 (1978)). Proponents of motions seeking to reopen the record therefore bear a ''heavy burden'' (*Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983) (quoting *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978)). They must satisfy a multifactor test (10 C.F.R. §§ 2.326(a) and 2.326(d)) that is governed by prescribed evidentiary requirements (*id.* § 2.326(b)).

''A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied'' (10 C.F.R. § 2.326(a)):

> (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
>
> (2) The motion must address a significant safety or environmental issue; and
>
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

Ibid.

Additionally, where — as here — a motion to reopen the record seeks to admit a new contention that has not previously been in controversy among the parties, section 2.326(d) requires the movant to show that a balancing of the following factors (to the extent they are relevant to the particular filing) weighs in favor of reopening:

> (i) Good cause, if any, for the failure to file on time;
>
> (ii) The nature of the . . . petitioner's right . . . to be made a party to the proceeding;
>
> (iii) The nature and extent of the . . . 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 . . . petitioner's interest;
>
> (v) The availability of other means whereby the . . . petitioner's interest will be protected;
>
> (vi) The extent to which the . . . petitioner's interests will be represented by existing parties;
>
> (vii) The extent to which the . . . petitioner's participation will broaden the issues or delay the proceeding; and
>
> (viii) The extent to which the . . . petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1).

Section 2.326(b) demands particularized support for motions that seek to reopen the record. *See Private Fuel Storage, L.L.C.,* CLI-05-12, 61 NRC at 350 (''a party seeking to reopen a closed record to raise a new matter faces an elevated burden to lay a proper foundation for its claim''). Such motions must be accompanied by ''affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria [in section 2.326(a)] have been satisfied'' (10 C.F.R. § 2.326(b)). Moreover, section 2.326(b) requires that ''[e]vidence contained in affidavits must meet the [regulatory] admissibility standards'' (*ibid.*) — that is, it must be ''relevant, material, and reliable'' (*id.* § 2.337(a)). In evaluating a motion to reopen the record, a licensing board properly evaluates the evidentiary material submitted by the parties. *See Private Fuel Storage, L.L.C.,* CLI-05-12, 61 NRC at 350 (a licensing board properly considers the movant's ''new allegations and [the non-movant's] contrary evidence in determining whether there was a real issue at stake warranting a reopened hearing''); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 222 (1990) (Commission weighed the competing evidence in concluding that a ''motion to reopen [did] not present a question of safety significance'').

As shown below, we find that Citizens' motions of April 18 and May 27 must be denied, because they fail to provide the evidentiary support required by 10 C.F.R. § 2.326(b) to satisfy the demanding standards in 10 C.F.R. §§ 2.326(a)(2) and 2.326(a)(3).[9]

B. Citizens' April 18 Motion Fails to Satisfy the Stringent Requirements in 10 C.F.R. §§ 2.326(a)(2) and 2.326(a)(3) for Reopening the Record

1. Citizens' April 18 Motion to Reopen Fails to Demonstrate that the Newly Proffered Contention Raises a Significant Safety Issue, 10 C.F.R. § 2.326(a)(2)

a. A movant who seeks to reopen the record must, *inter alia,* proffer a contention that raises a ''significant safety . . . issue'' (10 C.F.R. § 2.326(a)(2)). *See also Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-940, 32 NRC 225, 243 (1990); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986). A

[9] When considering a motion to reopen the record, a licensing board need not formally reopen the record in order to assess the relative worth of the parties' competing evidence. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973) (In denying a motion to reopen the record, the tribunal will necessarily have supplemented the record with, for example, the ''affidavits, letters or other materials accompanying the motion and the responses thereto. The 'hearing record,' however, has not been reopened'').

movant's assertion that a new contention presents a significant safety issue must be supported by affidavits that ''set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied'' (10 C.F.R. § 2.326(b)). ''Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised'' (*ibid.*).[10]

Here, for Citizens to satisfy the requirement in section 2.326(a)(2), their affidavit must provide sufficient information to support a *prima facie* showing that (1) a deficiency exists in the license renewal application, and (2) the deficiency presents a significant safety issue.[11] We conclude that Citizens' April 18 motion fails on both scores.

Regarding the putative deficiency of the original CUF analysis in the license renewal application, Citizens' expert, Dr. Hopenfeld, opines that ''I expect that the simplified method has under-estimated the CUF of the recirculation nozzle at Oyster Creek'' (Citizens' Motion to Reopen, Declaration of Dr. Joram Hopenfeld ¶ 7 (Apr. 15, 2008) [hereinafter Hopenfeld Decl.]). But Dr. Hopenfeld's ''expect[ation]'' that the original CUF is underestimated is fairly characterized as speculation. The record establishes (and Citizens do not dispute) that the Green's function methodology — which was used to perform the original CUF analysis at Oyster Creek — ''is not in question'' (April 11 RIS at 2). Rather, the NRC Staff determined that the use of simplified input in the Green's function methodology *could,* if not correctly applied, result in a calculated CUF that

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[10] The Dissent relies on *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 364 (1973), for the proposition that a movant seeking to reopen the record ''need not present *additional* affidavits to restate what information the Staff has found self-evident'' regarding a significant safety issue (Dissenting Opinion, note 6) (emphasis in original). As a matter of law, we believe the Dissent's view is tenuous in light of the 1986 regulatory amendment that mandates the submission of ''affidavits that set forth the factual and/or technical bases for the movant's claim'' that the reopening criteria have been satisfied (10 C.F.R. § 2.326(b)). *Accord* 51 Fed. Reg. at 19,535 (regulatory history states that ''the Commission is requiring that motions to reopen be accompanied by affidavits setting forth with particularity the bases for the movant's claim''). In any event, the Dissent's view on this matter is not relevant, because nothing in this record, and nothing discussed in the Dissenting Opinion, shows that the putative nonconservative CUF for the Oyster Creek recirculation nozzle presents a significant safety issue.

We have reviewed the education, experience, and qualifications of the individuals offering ''expert'' opinions on behalf of the litigants, and we conclude these individuals qualify as experts for purposes of this proceeding. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 431-32 (1989); *see also Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27-28 & n.14 (2004).

[11] Although section 2.326(a)(2) states only that the motion ''must address a significant safety . . . issue,'' we believe it is implicit that the motion must identify a deficiency in the license renewal application that gives rise to a significant safety issue. Citizens do not appear to disagree, arguing that the metal fatigue calculation for the Oyster Creek recirculation nozzle is deficient, and that this deficiency presents a significant safety issue. *See* Citizens' Motion to Reopen at 7.

is nonconservative (*id.* at 1). The NRC Staff therefore quite sensibly directed AmerGen to recalculate the recirculation nozzle CUF to confirm that the original calculation was adequately conservative. That the Staff has taken what appear to be prudent steps to confirm that AmerGen has conducted an adequate time-limited aging analysis for the Oyster Creek recirculation nozzle does not of itself establish the existence of a deficiency in the license renewal application that warrants reopening the record. Rather, this supports a conclusion that the Staff is endeavoring to do its job.

Citizens nevertheless assert that, because a confirmatory analysis of a metal fatigue analysis using the Green's function at a different facility (the Vermont Yankee facility) for a different nozzle (a feedwater nozzle) indicated a CUF that was 40% higher than the earlier analysis, a similar ''confirmatory analysis at Oyster Creek is likely to find that the metal fatigue of the recirculation outlet nozzle would go beyond its allowable limits during the proposed period of extended operation'' (Citizens' Motion to Reopen at 7) (citing Hopenfeld Decl. ¶ 9). However, Citizens provide no factual evidence or expert testimony showing that the analysis used at Oyster Creek employing the Green's function was improperly performed so as to result in a deficient, nonconservative CUF for the recirculation nozzle. This omission — that is, this failure to provide the evidentiary support required by section 2.326(b) regarding an alleged deficiency in AmerGen's license renewal application — is fatal to Citizens' effort to present a ''significant safety . . . issue'' (10 C.F.R. § 2.326(a)(2)).

In this regard, AmerGen cogently states that Citizens' failure to show a connection between the revised CUF results for the Vermont Yankee feedwater nozzle and the expected results for the Oyster Creek recirculation nozzle is understandable, because ''the analyses would involve different plant designs, different components, and, as the [April 2008 RIS] explains, each individual fatigue calculation is a complex analysis involving a great deal of judgment by the analyst'' (AmerGen's April 28 Answer at 28). Citizens' reliance on the CUF reanalysis at the Vermont Yankee facility thus falls short of satisfying their obligation under 10 C.F.R. § 2.326(b) to provide factual or technical support to show a deficiency in the CUF computation, let alone satisfying their obligation to show that such a deficiency in this case raises a significant safety issue.

Nor can Citizens satisfy their burden of showing that the alleged nonconservatism in the CUF computation gives rise to a significant safety issue by making the generalized claim that their issue relates to a ''safety-critical component'' (Citizens' Motion to Reopen at 1). Binding case law establishes that a movant who seeks to reopen the record does *not* show the existence of a significant safety issue by merely showing that a plant component ''perform[s] safety functions and thus ha[s] safety significance'' (*Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487 (1990)).

As the NRC Staff correctly states, the ''relevant issue is not the safety

significance of the components per se, but rather the safety significance of the alleged probable non-conservatism as it relates to these components'' (NRC Staff's April 28 Answer at 7 n.14). Citizens have provided no factual or technical information to support a conclusion that the putative deficiency in calculating the recirculation nozzle CUF will present a significant safety issue. Rather, they have assumed that the CUF analysis for the recirculation nozzle at Oyster Creek is nonconservative. From this assumption they have concluded — without adequate expert testimony or analysis — that the putative nonconservative CUF will result in a failure of the nozzle that will cause safety-significant harm. Citizens' argument, which asserts a speculative conclusion derived from a conjectural assumption, fails to present a significant safety issue.

Citizens point to a statement in a newspaper article attributed to an NRC spokesperson that breakage of a recirculation nozzle '' 'could lead to a severe accident' '' (Citizens' Motion to Reopen at 7-8) (quoting Todd Bates, *NRC Wants Nuclear Plant's Water Nozzles Rechecked,* Asbury Park Press, Apr. 7, 2008). Contrary to Citizens' understanding, however, this statement — which simply acknowledges the unremarkable truism that ''*breakage*'' of certain components in a nuclear facility ''*could*'' have severe consequences — does not demonstrate that Citizens' newly proffered contention raises a significant safety issue. The salient inquiry is not whether *breakage* of a recirculation nozzle *could* lead to a severe accident. It is, instead, whether Citizens have adequately shown, with the evidence required by 10 C.F.R. § 2.326(b), that the alleged errors in analysis of the CUF for the Oyster Creek recirculation nozzle are linked to a significant safety issue incident to those alleged errors. The answer to the latter inquiry is ''no.''[12]

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[12] According to Dr. Hopenfeld, Citizens' newly proffered contention presents a significant safety issue because it is likely that a reanalysis of the recirculation nozzle CUF ''that complies with the ASME Code would predict that the CUF would become greater than one [thus exceeding the ASME Code] during the proposed period of extended operation'' (Hopenfeld Decl. ¶ 9). But Dr. Hopenfeld fails to provide adequate support for the notion that a reanalysis of the CUF that complies with the ASME Code will likely exceed 1; indeed, his assertion is negated by a sworn affidavit from AmerGen's expert (*infra* Part II.B.1(b)). Nor does Dr. Hopenfeld testify as to the consequence of the CUF exceeding 1. As a result, Citizens fail adequately to provide the ''factual and/or technical bases'' (10 C.F.R. § 2.326(b)) showing that their motion addresses a significant safety issue. At a minimum, for Citizens to have shown, with the evidence required by section 2.326(b), that the alleged deficiency presents a significant safety issue, Dr. Hopenfeld would have needed to explain, for example, the meaning of the CUF, why exceeding a CUF of 1 is not permitted unless authorized by the NRC Staff, the types of failures of the recirculation nozzle that might occur if the CUF exceeds 1 and the spectrum of their likelihood, and the events that might occur if the recirculation nozzle failed incrementally or catastrophically. Citizens' failure to include a properly supported ''specific explanation'' (*ibid.*) of why their newly proffered contention presents a ''significant safety . . . issue'' (*id.* § 2.326(a)(2)) mandates that their motion to reopen be denied.

(Continued)

We thus conclude that Citizens fail to satisfy the burden imposed by section 2.326(a)(2) of showing, with the quantum of evidence required by section 2.326(b), that their motion reveals a deficiency in the license renewal application that presents a significant safety issue. *See* AmerGen's April 28 Answer at 14-16. Their April 18 motion to reopen the record must therefore be denied.

b. Although our determination that Citizens' April 18 motion to reopen fails to satisfy 10 C.F.R. § 2.326(a)(2) is sufficient by itself to deny the motion, we also conclude that Citizens' newly proffered contention, by its own terms, has been rendered moot by AmerGen's May 1 RAI response and, for this reason as well, fails to present a significant safety issue. *See* NRC Staff's Explanatory Pleading and Affidavit at 4; AmerGen's Response to May 21 Board Order at 6.[13]

The new contention advanced in Citizens' April 18 motion is a contention of omission — that is, it ''alleges the [improper] omission of particular information or an issue from an application'' (*Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002)). Specifically, Citizens assert the absence from AmerGen's license renewal application of a confirmatory analysis predicting metal fatigue for the recirculation outlet nozzle at Oyster Creek. Citizens thus contend that AmerGen should be required to perform a ''confirmatory analysis using a conservative method . . . to establish whether [that nozzle] could exceed allowable metal

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Moreover, our review of the expert opinion provided by the NRC Staff (*see infra* Part II.B.2) also supports our conclusion that a significant safety issue is not presented on this record. *See Private Fuel Storage, L.L.C.,* CLI-05-12, 61 NRC at 350; *Seabrook,* CLI-90-10, 32 NRC at 222.

[13] Citizens argue that this Board should ignore AmerGen's RAI response, because it was submitted to this Board under cover of AmerGen's May 5 letter, which ''was not an authorized pleading and therefore AmerGen should not be permitted to gain any advantage from it'' (Citizens' May 27 Response and Motion to Supplement at 2-3). We are unpersuaded by Citizens' argument. AmerGen's RAI response was official, docketed material relating to AmerGen's license renewal request and, more particularly, relating to AmerGen's performance of a confirmatory fatigue analysis of the Oyster Creek recirculation nozzle. Neither law nor logic supports Citizens' assertion that this Board is foreclosed from considering docketed licensing material that has been submitted to the Board and that, on its face, appears to be relevant to the disposition of a pending motion.

Nevertheless, to provide the parties with a fair opportunity to explain this document and its import, we directed them to submit an affidavit authored by an appropriate expert discussing the significance of AmerGen's RAI response, accompanied by a pleading explaining the impact of that material on Citizens' motion to reopen the record and to add a new contention (May 21 Board Order at 2). To the extent that AmerGen's submission of its RAI response to this Board under cover of a May 5 letter was ''procedurally deficient'' (Citizens' May 27 Response and Motion to Supplement at 3), AmerGen's submission of a pleading in compliance with our May 21 order corrected that deficiency. Moreover, Citizens' submission of a pleading discussing the import of the RAI response obviated any potential procedural prejudice.

fatigue limits'' during the renewal period (Citizens' May 5 Reply to AmerGen at 3).[14]

As with all contentions of omission, if the applicant supplies the missing information — or, as relevant here, if the applicant performs the omitted analysis — the contention is moot (*McGuire/Catawba*, CLI-02-28, 56 NRC at 383). In the instant case, on May 1, 2008, AmerGen provided the NRC Staff with docketed, licensing material stating that, in compliance with the Staff's request, it ''performed confirmatory fatigue analysis of the Oyster Creek . . . recirculation outlet nozzle in accordance with the ASME Code . . . . This new analysis confirms that the results of the original analysis [that used the Green's function methodology] are conservative and remain acceptable'' (Enclosure to AmerGen May 5 Letter, RAI Response at 2).

Thereafter, in response to this Board's order of May 21, 2008, AmerGen filed the affidavit of a qualified expert corroborating that ''AmerGen's confirmatory evaluation of the recirculation outlet nozzle showed that the maximum CUF with environmental effects included . . . is 0.1366 for 60 years'' (Affidavit of Gary Stevens ¶ 9 (May 27, 2008) [hereinafter Stevens Affidavit] (attached to AmerGen's Response to May 21 Board Order (May 27, 2008)). This newly analyzed CUF, stated AmerGen, is ''far lower than the previously calculated value of 0.9781 and below the acceptable limit of 1.0 by nearly an order of magnitude'' (AmerGen's Response to May 21 Board Order at 5; *accord* NRC Staff's Explanatory Pleading and Affidavit at 3-4).

Thus, AmerGen has, as requested by Citizens' newly proffered contention, performed a ''confirmatory analysis using a conservative method . . . to establish whether [the Oyster Creek recirculation nozzle] could exceed allowable metal fatigue limits'' (Citizens' May 5 Reply to AmerGen at 3). Because AmerGen has cured the omission alleged in Citizens' newly proffered contention, the April 18 motion to reopen the record in order to add a new contention has been rendered moot. And because Citizens' motion is moot and, thus, no longer raises a litigable controversy, it fails, definitionally and functionally, to present a significant safety issue.[15]

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[14] As this Board previously has explained in this proceeding ''[t]here is a difference between contentions that, on the one hand, allege that a license application suffers from an improper omission, and contentions that, on the other hand, raise a specific substantive challenge to how particular information or issues have been discussed in a license application'' (*AmerGen Energy Corp., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 (2006)). As shown above in text, the plain language of Citizens' newly proffered contention reveals that it is a contention of omission alleging that AmerGen should perform a confirmatory analysis.

[15] That Citizens' newly proffered contention in their April 18 motion is moot also means that the motion must be denied on the ground that the contention is inadmissible, because insofar that it fails

(Continued)

2. *Citizens' April 18 Motion to Reopen Also Fails to Demonstrate That Consideration of Its Evidence Would Likely Result in a Materially Different Outcome in the License Renewal Process, 10 C.F.R. § 2.326(a)(3)*

A motion to reopen the record must also ''demonstrate that a materially different result . . . would have been likely had the newly proffered evidence been considered initially'' (10 C.F.R. § 2.326(a)(3)), and this demonstration must be supported by sufficient evidence (*id.* § 2.326(b)). In cases where the newly discovered evidence relates to a contention that already has been decided adversely to the movant, the movant must demonstrate that the outcome of the adjudication would likely have been materially different had the tribunal considered the new evidence in the first instance. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 21-23 (2006).

Here, however, Citizens' newly proffered contention (and its underlying evidence) is unrelated to the contention that this Board adjudicated in LBP-07-17 and that is being considered by the Commission on appeal (*supra* note 2). Accordingly, rather than showing that their newly proffered evidence would likely have materially altered this Board's disposition of the contention in LBP-07-17, Citizens must show that the evidence supporting their contention would likely have materially affected the outcome of the license renewal proceeding. That is, they must show a likelihood that their contention would be resolved in their favor such that AmerGen's license renewal application would be denied or conditioned. *See Private Fuel Storage, L.L.C.,* CLI-05-12, 61 NRC at 350 (to reopen a closed record to introduce a new issue, the movant has the burden of ''showing that the new information will 'likely' trigger a 'different result' '').

We have no difficulty concluding that Citizens fail to show a ''likelihood that a different result [would] be reached if the information [underlying their newly proffered contention] is considered'' (51 Fed. Reg. at 19,537).[16]

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to raise a live controversy, it fails to raise a ''genuine dispute . . . on a material issue of law or fact'' (10 C.F.R. § 2.309(f)(1)(vi)).

The Commission has instructed that, at least in a case with an open record, when a contention of omission is rendered moot, the intervenor may be permitted to timely file a new contention arising from the new information (*McGuire/Catawba,* CLI-02-28, 56 NRC at 383-84). Assuming *arguendo* that the same principle pertains here, Citizens' May 27 motion seeks to use the new information from AmerGen's May 1 RAI response in support of their motion to reopen. As we show *infra* Part II.C, Citizens' effort is unavailing.

[16] Although the term ''likely'' in section 2.326(a)(3) is not defined, we construe it — consistent with its commonly understood meaning — to be synonymous with ''probable'' or ''more likely than not.'' *See Webster's Third New International Dictionary of the English Language Unabridged* 1310 (1976); *cf.* 51 Fed. Reg. at 19,536-37 (in selecting a ''likelihood'' standard, the Commission indicated

(Continued)

First, for essentially the reasons discussed *supra* Part II.B.1(a), we find that Citizens' ''evidence,'' which fails to present a significant safety issue, also fails to show a likelihood that consideration of their new contention would result in the denial or conditioning of AmerGen's license renewal application. This finding alone suffices to deny Citizens' motion. *See Private Fuel Storage, L.L.C.,* CLI-05-12, 61 NRC at 355 (affirming licensing board's denial of motion to reopen, because the ''new contention is much too thinly supported to conclude that taking it to a hearing would 'likely' cause a different result'').

Additionally, Citizens' assertion that consideration of their evidence will materially affect the outcome of this proceeding is belied by AmerGen's May 1 RAI response containing the result of its reanalysis of the recirculation nozzle's CUF. *See Private Fuel Storage, L.L.C.,* CLI-05-12, 61 NRC at 350 (Commission states that licensing board, in denying motion to reopen, properly considered all the evidence when determining whether movant's new information would likely trigger a different result in the proceeding). The reanalysis results indicated a CUF of 0.1366, compared to the CUF of 0.9781 that was calculated using a Green's function. As AmerGen's expert affiant attested, the reanalysis confirms that the fatigue evaluations calculated for purposes of license renewal ''provide reasonable assurance that components will not operate beyond their allowable metal fatigue limits during the proposed period of extended operation'' (Stevens Affidavit ¶ 9). *Accord* Affidavit of John R. Fair ¶ 6 (May 27, 2008) [hereinafter Fair May 27 Affidavit] (attached to NRC Staff's Explanatory Pleading and Affidavit (May 27, 2008) (attesting that AmerGen's reanalysis ''still shows the CUF of the recirculation outlet nozzle is projected to remain within acceptable limits for the period of extended operation'')). The fact that the results from AmerGen's original CUF analysis and its confirmatory analysis both comport with the ASME Code requirement is consistent with our conclusion that, on this record, Citizens fail to demonstrate that consideration of their newly proffered contention would likely cause a materially different outcome in this proceeding.[17]

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that a ''would have been reached'' standard is too strict, and a ''might have been reached'' standard is too lax). But even assuming *arguendo* that the ''likelihood'' standard were less rigorous than a ''probability'' standard — for example, if it were defined as a more lenient ''substantial possibility'' standard — we would still find that Citizens failed to satisfy their burden under section 2.326(a)(3).

Significantly, our prior conclusion (*supra* Part II.B.1(b)) that the new contention proffered in Citizens' April 18 motion has been rendered moot also negates the possibility that Citizens could show that a ''materially different result . . . would have been likely had the newly proffered evidence been considered initially'' (10 C.F.R. § 2.326(a)(3)).

[17] Because Citizens failed to provide an adequate foundation to support the existence of a significant safety issue (*supra* note 12), it is not surprising that they failed to ''demonstrate that a materially different result . . . would have been likely had [their] newly proffered evidence been considered initially'' (10 C.F.R. § 2.326(a)(3)). *See Seabrook,* CLI-90-10, 32 NRC at 223 (''Because this

(Continued)

Finally, we conclude that the testimony provided by the NRC Staff expert, John Fair, also supports our conclusion that Citizens fail to satisfy 10 C.F.R. § 2.326(a)(3). In order to demonstrate that their newly proffered evidence would likely cause a materially different result in this proceeding, we believe Citizens must provide evidence showing that some significant safety consequence would arise from the asserted error in CUF computation that would result in the denial or conditioning of AmerGen's license. Citizens fail to make such a showing, and Mr. Fair's affidavit explains their inability to do so. Mr. Fair attests that, based on risk assessments performed at the Pacific Northwest National Laboratory, coupled with the NRC Staff's study of those assessments, the ''potential under-prediction of the reactor vessel recirculation nozzle CUF [at Oyster Creek] does not present a significant safety concern'' (Affidavit of John R. Fair ¶ 9 (Apr. 28, 2008) [hereinafter Fair April 28 Affidavit]) (attached to NRC Staff's April 28 Answer)). This is so, he explains, because even if the CUF exceeded the ASME Code fatigue limit of 1.0, the likely consequence would be the initiation of a ''small, 1/8 inch deep, fatigue crack . . . [resulting in a small leak] that would be detected and repaired'' (*id.* ¶ 7).[18] Mr. Fair's expert opinion and its underlying technical support are not contradicted in the material before us. They buttress our conclusion that Citizens fail to show a significant safety consequence arising from their newly proffered contention, as well as our derivative conclusion that, on this record, Citizens fail to demonstrate that consideration of their newly proffered contention would ''likely'' cause a materially different outcome in this proceeding (10 C.F.R. § 2.326(a)(3)).[19]

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matter as presented is devoid of safety significance, we see no likelihood whatsoever — let alone a demonstration — that a materially different result would . . . have been likely had the newly proffered evidence been considered initially''). That Citizens have not had the opportunity to examine the analysis underlying AmerGen's confirmatory CUF (*see infra* note 23) does *not* obviate their burden under section 2.326(a)(3) to ''demonstrate'' the likelihood of a materially different result. Moreover, if Citizens had satisfied their burden of raising a significant safety issue, we see no reason why their inability to examine the underlying analysis would have prevented an expert from analyzing what could happen and showing the likelihood of a materially different outcome based on a solid technical foundation — if such a foundation existed.

[18] AmerGen's license renewal application includes the recirculation outlet nozzle in its list of reactor vessel fatigue monitoring locations (Oyster Creek License Renewal Application, Table 4.3.1-2 (July 26, 2005) (ADAMS Accession No. ML052080185). Additionally, this component is included in the ASME Section XI Inservice Inspection, Subsections IWB, IWC, and IWD aging management program, which provides for component inspections to detect crack initiation and growth (*id.,* Table 3.1.2.1.5).

[19] To be clear, we do not understand Mr. Fair to be suggesting that the CUF of the Oyster Creek recirculation nozzle exceeds the ASME Code limit of 1.0. *See* NRC Staff's Opposition to Citizens' Request to Reply at 5. If the record supported the conclusion that an applicable standard were being violated, Citizens would have a stronger case for arguing the existence of a significant safety issue.

(Continued)

Citizens thus fail to satisfy their burden under section 2.326(a)(3) of demonstrating that their evidence is likely to materially affect the licensing decision. Our consideration of the affidavits and facts submitted by AmerGen and the NRC Staff fortifies our conclusion that, on this record, a materially different result is not likely. Citizens' April 18 motion to reopen the record must therefore be denied.

* * * *

In sum, Citizens' April 18 motion to reopen the record must be denied because it fails to provide the evidentiary support required by 10 C.F.R. § 2.326(b) to satisfy the demanding regulatory standards in 10 C.F.R. §§ 2.326(a)(2) and 2.326(a)(3).[20]

We now turn to Citizens' May 27 motion to supplement the basis of their newly proffered contention.

C. Citizens' May 27 Motion to Supplement the Basis of Their Newly Proffered Contention Fails to Satisfy the Reopening Requirements in 10 C.F.R. § 2.326

1. Citizens' May 27 motion seeks to supplement the basis of their newly proffered contention. Specifically, Citizens challenge the adequacy of the confirmatory analysis reported in AmerGen's May 1 RAI response, arguing that the RAI response confirms that the original metal fatigue prediction is improperly ''non-conservative in some respects and non-compliant with the ASME code'' (Citizens' May 27 Response and Motion to Supplement at 9). As previously stated (*supra* text accompanying note 8), because the new basis proffered by Citizens alters the issue presented for this Board's consideration, Citizens' May 27 motion — if it is to be granted — must satisfy the requirements in 10 C.F.R. § 2.326 for reopening the record. We conclude that Citizens' May 27 motion fails to provide the evidentiary support required by 10 C.F.R. § 2.326(b) to satisfy the demanding reopening standards.[21]

Cf. Vermont Yankee, ALAB-138, 6 AEC at 528-29 (an applicant's failure to comply with applicable standards may have consequential import in evaluating whether to grant a motion to reopen the record). Rather, we understand Mr. Fair to be explaining that, based on studies by national laboratories and the NRC Staff, Citizens' claim regarding the putative nonconservative CUF is not a significant safety concern and would not give rise to a significant safety consequence.

[20] Because we conclude that Citizens' April 18 motion fails to satisfy the requirements in sections 2.326(a)(2) and 2.326(a)(3), we need not — and do not — consider whether it satisfies the other two requirements for reopening the record, i.e., sections 2.326(a)(1) and 2.326(d).

[21] On June 5, 2008, Citizens filed a motion to strike the May 27 pleadings of AmerGen and the NRC Staff that addressed AmerGen's RAI responses (*supra* note 6). Citizens argued that the pleadings exceeded the scope of this Board's May 21 order, and that a failure by this Board to strike those pleadings would deprive Citizens of a meaningful opportunity to respond to the allegedly new material.

(Continued)

Citizens assert that AmerGen's May 1 RAI response reveals that AmerGen was not consistent in its use of conservative assumptions for the confirmatory analysis, and because the metal fatigue calculation is ''sensitive to the assumptions used by the analyst,'' the confirmatory CUF may not be adequately conservative (Citizens' May 27 Response and Motion to Supplement at 6). In particular, Citizens allege that AmerGen took the nozzle cladding into account in the original analysis, but that the cladding was ''neglected'' in the confirmatory analysis, which allegedly ''appears to be the main cause of the decrease in the calculated CUF'' (*ibid.*). Had the analysis taken nozzle cladding into account, assert Citizens, ''[i]t is . . . highly likely that . . . the recalculated CUF_{EN} would exceed 1.0'' (*ibid.*). Citizens therefore claim that the confirmatory analysis cannot be used to establish that the original analysis is conservative. *See id.* at 5-7.

But Citizens' May 27 motion fails to satisfy section 2.326(a)(2), because it fails to provide an adequate factual or technical predicate to show that (1) AmerGen's reanalysis was flawed, resulting in a deficiency in AmerGen's license renewal application, or (2) any alleged deficiency is linked to a significant safety issue.

First, Citizens fail to provide adequate expert support for the proposition that the asserted shortcomings in AmerGen's reanalysis — in particular, its treatment of the nozzle cladding — resulted in a deficiency in AmerGen's license renewal application. In this regard, they effectively ignore the unequivocal, and undisputed, representation of AmerGen's expert that the confirmatory CUF analysis on the Oyster Creek recirculation nozzle was performed ''in accordance with the ASME Code, Section III, Subsection NB-3200 methodology, utilizing all six components of stress in the analysis'' (Enclosure to AmerGen May 5 Letter, RAI Response at 2). *Accord* Stevens Affidavit ¶ 9 (AmerGen expert attests that the confirmatory analysis was ''performed using ASME Code, Section III, Subsection NB-3200 methodology''); *id.* ¶ 10 (''the stainless steel nozzle cladding was considered absent for the fatigue calculation [in the confirmatory analysis, as permitted in NB-3122.3 of Section III of the ASME Code''); Enclosure to AmerGen May 5 Letter, RAI Response at 3 (same).

In the absence of evidence showing that an analytic procedure in the ASME Code is flawed, or that AmerGen failed to comply with that procedure, we conclude that Citizens' attack on AmerGen's confirmatory analysis is insubstantial

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See Citizens' Motion to Strike at 2-4. We agree with AmerGen and the NRC Staff that Citizens' motion is baseless. Specifically, we conclude that, contrary to Citizens' assertion: (1) the pleadings filed by AmerGen and the NRC Staff fall comfortably within the scope of our May 21 order; and (2) Citizens received a reasonable opportunity to explain the impact of the RAI responses on their motion to reopen the record and, accordingly, they cannot fairly claim that they will suffer an injustice if their motion to strike is denied. *See* AmerGen's June 16 Answer at 3-4, 6-7; NRC Staff's June 16 Answer at 1-3.

and fails to show the existence of a deficiency in the license renewal application for purposes of reopening the record.[22]

Citizens also fail to link an alleged inadequacy in the confirmatory analysis with a significant safety issue. The Second Hopenfeld Declaration assails what it perceives to be potential inadequacies in the reanalysis (Citizens' May 27 Response and Motion to Supplement, Second Declaration of Dr. Joram Hopenfeld ¶¶ 4-6, 8-12 (May 23, 2008) [hereinafter Second Hopenfeld Decl.]). But, for essentially the reasons discussed *supra* Part II.B.1, there is insufficient support for the proposition that these putative inadequacies would cause a nozzle failure resulting in safety-significant harm. Because Citizens fail to provide the factual or technical support required in 10 C.F.R. § 2.326(b) to demonstrate the existence of a significant safety concern pursuant to 10 C.F.R. § 2.326(a)(2), their request to reopen the record to supplement their newly proffered contention must be denied.[23]

Citizens' May 27 motion also fails to demonstrate that their newly proffered evidence regarding alleged deficiencies in the confirmatory analysis would ''likely'' lead to a materially different result in the Oyster Creek license renewal proceeding. *See* 10 C.F.R. § 2.326(a)(3). As stated above, the Second Hopenfeld Declaration fails to provide meaningful factual or technical support for the notion that the analytic procedures in the ASME Code are flawed, that AmerGen failed to comply with those procedures, or that the confirmatory CUF (or the original CUF) for the Oyster Creek recirculation nozzle exceeds the ASME Code limit. Because the record is essentially bereft of evidence showing that Citizens' May 27 motion is likely to lead to a materially different result in this license renewal

[22] Citizens' bare assertion that the original analysis for the recirculation nozzle is ''non-compliant with the ASME Code'' (Citizens' May 27 Response and Motion to Supplement at 9) is inadequate to support admission of a contention (10 C.F.R. § 2.309(f)(1)(v)), much less to support reopening of the record. Moreover, because both the original and confirmatory analyses indicate that the recirculation nozzle meets ASME Code requirements, Citizens bear the burden of making a sufficient showing that both analyses are inadequate and that their inadequacy raises a significant safety issue. This they have failed to do.

[23] Citizens assert that AmerGen should be required to disclose information ''underlying [the confirmatory analyses] and any documents that were referenced by the analyses to support the assumptions made'' (Citizens' Motion to Strike at 7). *Accord* Citizens' May 27 Response and Motion to Supplement at 4. This assertion lacks merit. It is well established that discovery is not permitted for the purpose of developing a motion to reopen the record or to assist a petitioner in the framing of contentions. *See Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 351 (1998); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985); *see also Seabrook,* ALAB-915, 29 NRC at 432-33.

proceeding, the motion fails to satisfy section 2.326(a)(3) and, accordingly, it must be denied.[24]

In addition to the foregoing shortcomings that are fatal to Citizens' May 27 motion, we observe that before Citizens' motion could have been granted, Citizens must also have demonstrated both that it is timely (10 C.F.R. § 2.326(a)(1)) and that it satisfies the balancing test in 10 C.F.R. § 2.309(c)(1) as required by section 2.326(d). Citizens' May 27 motion fails to address these requirements, ''which is reason enough to deny it'' (*AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008). *See also Seabrook,* ALAB-915, 29 NRC at 432 (''the Commission expects its adjudicatory boards to enforce [reopening requirements] rigorously — i.e., to reject out-of-hand reopening motions that do not meet those requirements within their four corners'').

Because Citizens have not demonstrated that their May 27 motion satisfies any, much less all, of the reopening requirements in 10 C.F.R. § 2.326, their motion must be denied.

2. Our denial of Citizens' motion to reopen the record does not foreclose them from pursuing future relief. In this regard, we note that the NRC Staff has represented that it will review AmerGen's ''confirmatory analysis and report the results of its review in a supplement to the Safety Evaluation Report Related to the License Renewal of Oyster Creek Generating Station'' (Fair May 27 Affidavit ¶ 5). *See Calvert Cliffs,* CLI-98-25, 48 NRC at 350 (the NRC Staff is required to ''consider and resolve all safety questions regardless of whether any hearing takes place''). To the extent the Staff's publication of its review of AmerGen's confirmatory analysis reveals new, material information that Citizens can demonstrate satisfies the stringent reopening requirements in 10 C.F.R. § 2.326, Citizens would be free to file a motion with the Commission to reopen the record. Alternatively, Citizens would be free to file a request to ''modify, suspend, or revoke [AmerGen's] license, or for any other action as may be proper'' (10 C.F.R. § 2.206(a)). *Cf.* CLI-08-13, 67 NRC at 400 (''A license renewal may be set aside (or appropriately conditioned) even after it has been issued, upon subsequent administrative or judicial review'').

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[24] Dr. Hopenfeld opines that the differences in assumptions between the original and confirmatory analyses ''are material to the outcome of the fatigue analysis and if accepted by the NRC they would represent a material change to the Final Safety Evaluation Report'' (Second Hopenfeld Decl. ¶ 5). This statement appears to misconstrue the ''materially different result'' standard in 10 C.F.R. § 2.326(a)(3). A decision by the NRC Staff to revise the Final Safety Evaluation Report to account for AmerGen's confirmatory analysis would not, standing alone, be a materially different result that justifies reopening the record, because it would neither change the outcome of this renewal proceeding nor impose a different licensing condition on AmerGen.

But on the present record, Citizens fail to show a factual or technical predicate adequate to satisfy the demanding requirements in section 2.326 for reopening the record.[25]

III. CONCLUSION

For the foregoing reasons, we: (1) *deny* Citizens' April 18 motion to reopen the record and to admit a new contention (*supra* Part II.B); (2) *deny* Citizens' May 27 motion to supplement the basis of their contention (*supra* Part II.C); (3) *grant* Citizens' motion to file their May 6 Reply (*supra* note 5); and (4) *deny* Citizens' motion to strike the May 27 pleadings of AmerGen and the NRC Staff addressing AmerGen's RAI response (*supra* note 21).

It is so ORDERED.[26]

THE ATOMIC SAFETY AND
LICENSING BOARD*

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 24, 2008

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[25] Although we do not presume to direct the NRC Staff in the performance of its duties, we nevertheless observe that it might reasonably be expected that the Staff — in the course of reviewing the adequacy of AmerGen's confirmatory analysis — would scrutinize the data and information underlying the analysis, including any documents that were referenced by the analysis to support the assumptions made. And in light of the concerns raised in this proceeding, it cannot be gainsaid that the public interest would be served if the Staff's supplement to the Safety Evaluation Report reporting its review of AmerGen's confirmatory analysis were sufficiently detailed to allay any public apprehension regarding the ability of the recirculation nozzle to function safely and reliably during the renewal period. *Cf.* CLI-08-13, 67 NRC at 400 (Commission states it is ''confident that the review of the metal fatigue issue that the NRC Staff initiated will result in a full consideration of the issue and appropriate licensing action once all the facts are known and reviewed'').

[26] Copies of this Memorandum and Order were sent this date by Internet e-mail to counsel for: (1) Citizens; (2) AmerGen; (3) the NRC Staff; and (4) New Jersey.

*Judge Baratta has filed a Dissenting Opinion that immediately follows this Memorandum and Order.

Dissent of Judge Baratta

In contrast to the Majority, I find that Citizens have met the stringent burdens of 10 C.F.R. § 2.326 and the motion to reopen should be granted. Citizens have proffered admissible evidence of new information that raises a significant safety issue, an issue of grave importance that the Board would have considered in the now closed Oyster Creek proceeding.

Before turning to a discussion of how Citizens have met the reopening standards under 10 C.F.R. § 2.326, I wish to comment on a point where I feel the Majority errs. They have concluded without adequate discussion that Citizens' contention is a contention of omission, i.e., one that alleges a failure on the part of the Applicant to include necessary information in the application, and has therefore been rendered moot. A thorough reading of Citizens' contention as set forth in both their April 18 and May 27 motions reveals that, because the contention cannot properly be answered by AmerGen's submission of information, it is not a contention of omission. Rather, the contention can be more appropriately characterized as a challenge to the adequacy of the methodology used in the application, encompassing not only the failure to include the proper information but also the failure to utilize the correct conservative methodology.[1] The affidavits provided by both AmerGen and Citizens reflect two competing views of the adequacy of the ''missing information.'' As these issues are in dispute between the participants, the Majority is mistaken in claiming that the proffered contention has been rendered moot. Additionally, it is premature at this juncture to render an advanced contention moot where no hearing has been established, no contention has been admitted, and the scope of the possible contention has not been determined.

A. The Proffered Contention Raised by Citizens Meets the Standards for Reopening the Oyster Creek Proceeding as Set Forth in 10 C.F.R. § 2.326

1. I now turn to the central issue, whether Citizens have satisfied the reopening standards set forth in 10 C.F.R. § 2.326.

Although not necessary to the Majority, given their conclusion that Citizens' motion fails to meet the second and third factors under the reopening standard in section 2.326(a), I note initially my conclusion that the new contention meets

[1] In my view, it would be appropriate for the Board to reframe the contention to promote efficiency and simplicity. Quoting *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 236 n.10 (2006), the ''Board has discretion to reframe contention 'for purposes of clarity, succinctness, and a more efficient proceeding.' '' (*Andrew Siemaszko,* CLI-06-16, 63 NRC 708, 720 (2006); *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), LBP-84-40A, 20 NRC 1195, 1199 (1984)).

the standards of 10 C.F.R. § 2.326(a)(1) as well as the standard for late-filed contentions set forth in 10 C.F.R. § 2.309(f)(2). As delineated by the Majority, Citizens must demonstrate that their contention has met the stringent standards for reopening expressed by 10 C.F.R. § 2.326. For a newly proffered contention to be timely, including as in this case, one not previously considered by this Board, the contention must meet the timeliness standards of section 2.326(a)(1) as well as 10 C.F.R. § 2.309(c).

The Staff argues that Citizens failed to act diligently in filing the new contention, claiming they should have formulated and proffered their contention in the summer of 2006 following receipt of AmerGen's response to a Staff RAI concerning the calculation of fatigue usage factors. *See* NRC Staff's April 28 Answer at 10. The Staff RAI states however that:

> Section 4.3.4 of the license renewal application discusses the evaluation of the effects; of the reactor coolant environment on the fatigue life of components and piping. Table 4.3.4-1 provides the overall environmental fatigue multipliers for the components analyzed. Provide the calculation of the environmental factors for the RPV inlet and outlet nozzles and the feedwater nozzle. Explain how each parameter used in the calculation was determined.

NRC Request for Additional Information Related to Oyster Creek Generating Station License Renewal Application (Apr. 29, 2008). In their response to the RAI, AmerGen states, ''[t]he environmental fatigue calculations for the recirculation inlet and outlet nozzles and the feedwater nozzle are contained in Structural Integrity Associates Calculation No. OC-05Q-314, Revision 0, 'Environmental Fatigue Calculations for RPV Locations' (proprietary)'' (Response to RAI Dated March 30, 2006 Related to Oyster Creek License Renewal Application at 6 (May 1, 2006) (ADAMS Accession No. ML061240217)). AmerGen goes on to describe the use of bounding environmental fatigue multipliers used to account for the use of hydrogen water chemistry. *See id.* at 6-7. Nowhere in that discussion does AmerGen mention the use of the Green's Function methodology or the application of the methodology to determine the fatigue usage factor for the recirculation line nozzle. Only in a footnote to the results of the calculation does AmerGen make a reference to any methodology. There, AmerGen states that the calculations were performed using an ''updated ASME Code fatigue methodology'' (*id.* at 8 n.1). It is difficult to see how such a vague reference or discussion that fails to mention any specific methodology, let alone the one in question, could, as the Staff seems to suggest, serve as the event upon which Citizens or any intervenor could have based a contention such as the one proffered here by Citizens.

It is even more difficult to accept AmerGen's argument that the contention should be based on the 2005 Oyster Creek License Renewal Application (LRA). In the LRA, AmerGen states that ''[s]tressed-based fatigue monitoring consists

of computing a 'real-time' stress history for a given component from actual temperature, pressure, and flow histories via a finite element based Green's Function approach'' (Oyster Creek License Renewal Application at 4-25 (July 26, 2005)). No detail of how the temperature, pressure, and flow histories are used is provided or how the Green's Function method is applied is given in the LRA. Instead, the LRA simply states that the approach used an ''appropriate ASME Code, Section III fatigue analysis methodology'' (*ibid.*).

It is not until January 8, 2008, that there is any discussion in the public record concerning possible problems with the manner in which the Green's Function methodology is used. At a public meeting held by the Staff in connection with the ongoing Entergy Vermont Yankee LRA, the Staff questioned the use of the simplified Green's Function methodology as applied to the Vermont Yankee LRA. *See* Hopenfeld Decl. ¶ 4. During the presentations, Entergy's expert noted that the same methodology as used to calculate the cumulative usage factors (CUFs) in the Vermont Yankee LRA was also used in the Oyster Creek LRA (*ibid.; see also* Presentation to NRC Staff Regarding Reactor Pressure Vessel Nozzle Environmental Fatigue Analyses for License Renewal at 20 (Jan. 8, 2008)).

It is not until the memo of April 3, 2008, that CUFs for Oyster Creek, calculated using the Green's Function methodology, are called into question. In the memo to the Commission, the Staff identifies that the approach used in the Oyster Creek LRA is possibly nonconservative. *See* April 3 Commission Notification.

Shortly thereafter, on April 18, 2008, Citizens filed a motion with the Commission seeking to reopen the record in the Oyster Creek case and to file a new contention. In their motion, Citizens argued that the Commission should admit the following new contention:

> The predictions of metal fatigue for the recirculation nozzles at Oyster Creek are not conservative. A confirmatory analysis using a conservative method is required to establish whether these nozzles could exceed allowable metal fatigue limits during any extended period of reactor operation.

Citizens' Motion to Reopen at 12. The proffered contention was filed promptly upon public availability of the Commission's notification, despite the fact that the document was not placed in the Oyster Creek docket.

Timeliness as measured under the NRC regulations is from the point at which new information is discovered relevant to the question. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483 (1990). As the Commission has recognized, although an intervenor may have less resources and ability than other participants, they share the same burden of uncovering relevant information that is publicly available. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983). Here, Citizens have met this obligation by discovering the new information (the

April 3d memo to the Commission) regarding the possible nonconservative nature of the CUFs through a diligent search. Since the CUFs were only called into question on April 3d, Citizens' motion, filed within 15 days, must be considered timely.[2]

Finally, even if we were to accept the arguments of the Staff and AmerGen that the motion is not timely, ''if the problem raised presents a sufficiently grave threat to public safety, a board should reopen the record to consider it even if it is not newly discovered and could have been raised in timely fashion'' (*Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 365 n.10 (1973)).[3]

2. Relative to section 2.326(a)(2), the proffered contention raises a significant safety issue that should be heard by this Board. The Majority errs in finding Citizens' evidence insufficient to raise an issue of safety significance. My colleagues erroneously conclude:

> A movant's assertion that a new contention presents a significant safety issue must be supported by affidavits that ''set forth the factual and/or technical bases'' for the [allegation] (10 C.F.R. § 2.326(b)). . . . [T]heir affidavit must provide sufficient information to support a *prima facie* showing that (1) a deficiency exists in the license renewal application, and (2) the deficiency presents a significant safety issue.

Majority at pp. 16-17. They therefore conclude that Citizens' April 18 motion fails,[4] while disregarding the fact that case law does not support their assertion. The Majority's decision erroneously hinges on the evidence presented by Citizens in

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[2] For filing new contentions, Boards have generally established a deadline of 30 days to be timely after the receipt of new information. *See, e.g., Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (2006); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226, 231 (2000).

[3] Section 2.326 of 10 C.F.R. allows for reopening of the record even if untimely in section 2.326(a)(1) where it states, ''[h]owever, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.''

[4] It is unclear why the Majority has considered the April 18 motion by Citizens and the May 27 supplement to the motion as separate motions to reopen. *See* Majority at pp. 16, 25. In an order dated May 21, 2008, the Board asked the parties to submit affidavits and explanatory pleadings regarding AmerGen's letter to the NRC Chairman and the impact it would have on Citizens' motion to reopen the record. *See* Licensing Board Order (Directing Parties to Submit Explanatory Pleadings and Affidavits) at 1-2 (May 21, 2008) (unpublished). In response to this Board's order, Citizens filed a motion to supplement the basis of their contention, explaining the legal impact the letter had on their motion to reopen. *See* Citizens' May 27 Response and Motion to Supplement (May 27, 2008). For the purposes of this decision, Citizens' motion to supplement the basis of their contention should be considered an addendum to the April 18 motion.

support of their contention, namely the declaration of their expert Dr. Hopenfeld, which cites to the Staff's findings and AmerGen's methodology. *See* Hopenfeld Decl. What the Majority fails to reconcile, while citing to Citizens' lack of factual support by way of affidavits, is that the Staff's findings coupled with the Applicant's admissions, as critiqued by Dr. Hopenfeld, are sufficient to support the newly proffered contention.[5] Although the standard for reopening a proceeding is stringent and requires strict evidentiary proof, previous Boards have recognized the difference in situations where the Staff itself presented the new information upon which the intervenor relies as support for a new contention. Specifically, as a past Board has stated:

> While [detailed affidavits are generally required], we believe that there is no need for, and no purpose served by, such an affidavit when the evidence presented by the motion is a letter issued by the staff or the applicant which on its face raises a serious safety question. We should not require an intervenor to retain its own expert to attest to the findings of the staff's or the applicant's experts. Those findings, embodied in a letter, can often stand alone. To be sure, if the seriousness or relevance of the matter raised by the letter is not apparent, an intervenor would need to reinforce the letter with an affidavit of the type suggested by the applicant.

Vermont Yankee, ALAB-124, 6 AEC at 364.[6] In this case, Citizens cite a statement attributed to an NRC spokesperson who stated that if a recirculation nozzle breaks, ''it could lead to a severe accident, it would be a challenging situation for the control room operators'' (Citizens' Motion to Reopen at 7-8) (citing Statement of Todd Bates, NRC Wants Nuclear Plant's Water Nozzles Rechecked, Asbury Park

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[5] The Majority asserts that Citizens have failed to make a prima facie showing. While I disagree, I feel that neither the Applicant nor the Staff have provided sufficient evidence of a technical nature to contradict the assertions and evidence put forth by Citizens.

[6] Although this case was established previous to the regulation codification in 1986, the Commission stated in its statement of consideration that:

> The present rule is not, except where noted, intended to wipe out NRC case law concerning motions to reopen. . . . Nevertheless, to avoid confusion, the Commission is specifically adopting the NRC case law requirement that affidavits be given by competent individuals with knowledge of the facts or experts in the disciplines appropriate to the issues raised.

51 Fed. Reg. 19,535, 19,537 (1986). I rely on this case only to point out that Citizens need not present *additional* affidavits to restate what information the Staff has found self-evident. Indeed, in this case, Citizens have presented an affidavit of an expert, no different from that of the affidavit of Staff's expert, which attests to the safety significance of the new information and its effect on the outcome of the proceeding. The fact remains that Citizens have presented a declaration of an expert, as well as citations in the petition, that clearly and reliably demonstrate the existence of a significant safety issue. The regulations were codified to reflect the Commission's desire to discourage frivolous motions for reopening put forth by petitioners without *any* affidavits or factual support, not to prevent reopening in a case where competent evidence has been put forth by motion and affidavit, representing a significant safety issue that would have been considered in the previous proceeding.

Press, April 7, 2008). In disregarding the import of that statement, my colleagues state that:

> [t]he salient inquiry is not whether *breakage* of a recirculation nozzle *could* lead to a severe accident. It is, instead, whether Citizens have adequately shown, with the evidence required by 10 C.F.R. § 2.326(b), that the alleged errors in analysis of the CUF for the Oyster Creek recirculation nozzle are linked to a significant safety issue incident to those alleged errors. The answer to the latter inquiry is ''no.''

Majority at p. 19. I find the Majority's statement totally unpersuasive for several reasons. First, in a report to Congress in 1995, the NRC was required to identify information on abnormal occurrences which the Commission determined to be ''significant from the standpoint of public health and safety'' (60 Fed. Reg. 35,566, 35,567 (July 10, 1995)). The NRC reported that ''[t]he accident scenarios of primary concern are the main steam line break and the *recirculation line break,* which are normally referred to as loss-of-coolant accidents'' (*ibid.* (emphasis supplied)). Are my colleagues now questioning the safety significance of a recirculation line break? Secondly, the studies performed by the Staff of metal fatigue acknowledge that a component that has a CUF greater than 1.0 is of concern. Even Mr. Fair, the Staff's expert, clearly understood that an obvious consequence of fatigue failure of the nozzle is a loss-of-coolant accident since he addresses it in his affidavit. *See* Fair April 28 Affidavit.

The Majority's view that Citizens have not met the standards for reopening is extreme and based on a far too narrow reading of the record before us. Citizens have raised technical concerns proffered by an expert about an analysis of the CUF for the Oyster Creek recirculation nozzle that is linked to a significant safety issue that will result from those alleged errors. The whole basis for the time-limited aging analysis (''TLAA'') required for license renewal is the analysis of the structures, systems, and components (''SSCs'') deemed safety critical to see if they can perform their function throughout the period of extended operation. If offering evidence that this analysis is flawed is insufficient to warrant further investigation, then what is?

As my colleagues correctly note, case law establishes that a petitioner seeking to reopen the record does not show the existence of a significant safety issue by showing merely that a plant component ''perform[s] safety functions and thus ha[s] safety significance'' (*Seabrook Station,* CLI-90-6, 31 NRC at 487). However, Citizens have presented ''relevant, material, and reliable'' evidence, as required by 10 C.F.R. § 2.337(a), of a significant safety issue by means of an expert affidavit, Staff reports, and statements by the Commission and the NRC.

Additionally, unlike my colleagues I do not find convincing the statements of NRC expert John Fair, attesting that a nonconservative CUF for the recirculation nozzle will likely *not* cause safety-significant harm. Mr. Fair's statement is based

in part on the ''NRC Office of Nuclear Regulatory Research'' (''RES'') risk study indicating that a fatigue failure of piping is not a significant contributor to the core-melt frequency. *See* SECY-95-245 (Completion of the Fatigue Action Plan) (Sept. 25, 1995). Core damage frequency (''CDF'')[7] was the measure used to assess the safety significance of the concern. The RES risk study result is due to contributing reasons in the risk assessment including the fact that, while fatigue cracks may occur if the CUF exceeds 1.0, the cracks may not propagate through the pressure boundary and lead to leakage or failure of the component and, even if failure of the component did occur, safety systems, such as the emergency core cooling system (''ECCS''), could mitigate the consequences. The Staff did not recommend further action to address environmental fatigue at operating plants because the risk study indicated that the environmental fatigue issue was not a significant safety concern. However, as noted by Mr. Fair, ''SECY-95-245 indicated that the Staff would consider the need to evaluate a sample of components with high fatigue usage for any proposed period of extended operation'' (Fair April 28 Affidavit ¶ 6).

Mr. Fair recounts that the Staff developed GSI-190, '' 'Fatigue Evaluation of Metal Components for 60-year Plant Life,' in order to assess the issue of the fatigue life of components in reactor water environments for the license renewal period of extended operation'' (*id.* ¶ 7). In a memorandum to W. Travers from A. Thadani, ''Closeout of Generic Safety Issue 190, 'Fatigue of Metal Components for 60-Year Plant Life,' December 26, 1999 (ADAMS Accession No. ML031480383),'' it was recommended that applicants ''address the effects of the environment on the fatigue life of components as aging management programs for license renewal because of the potential for an increased frequency of pipe leaks as plants continue to operate'' (*ibid.*).

I believe this is precisely what Citizens are seeking to litigate, namely that the CUF be conservatively estimated using an accepted method, and that, if found to be questionable, then the appropriate aging management plan be appropriately modified consistent with the regulations.

Unfortunately, my colleagues and the Staff do not appear to agree. Rather, they give insufficient consideration to one of the fundamental principles underlying nuclear safety when they accept the notion that if a fatigue crack were to develop in the recirculation line nozzle and result in a small break loss of coolant accident, then the likelihood of core damage is small since the emergency core cooling system could easily cool the core and prevent core damage. To the contrary, the conclusion that fatigue cracking of the recirculation nozzle is not a safety significant event is a grave error.

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[7] SECY-95-245 used the term core-melt frequency, which is the same as core damage frequency (CDF). CDF is the frequency of the combinations of initiating events, hardware failures, and human errors leading to the core becoming uncovered with reflooding of the core not imminent.

Such a conclusion is not consistent with a basic tenet of nuclear safety, defense in depth.[8] As an attachment to SECY-98-144[9] states, ''most of NRC's regulations were developed without the benefit of quantitative estimates of risk. The perceived benefits of the deterministic and prescriptive regulatory requirements were based mostly on experience, testing programs and expert judgment, considering factors such as engineering margins and the principle of *defense-in-depth*'' (SECY-98-144 (Staff Requirements — White Paper on Risk-Informed and Performance-Based Regulation) (Mar. 1, 1999) (emphasis supplied)). The paper notes, however, that the PRA policy statement requires that the use of PRA be done ''in a manner that complements the NRC's deterministic approach and supports the NRC's traditional *defense-in-depth* philosophy'' (*ibid.* (emphasis supplied)). It further states that, ''[t]he concept of defense-in-depth has always been and will continue to be a fundamental tenet of regulatory practice in the nuclear field, particularly regarding nuclear facilities'' (*id.* ¶ 6). The paper concludes that:

> [s]tated succinctly, a risk-informed, performance-based regulation is an approach in which risk insights, engineering analysis and judgment including the principle of defense-in-depth and the incorporation of safety margins, and performance history are used, to (1) focus attention on the most important activities, (2)establish objective criteria for evaluating performance, (3) develop measurable or calculable parameters for monitoring system and licensee performance, (4) provide flexibility to determine how to meet the established performance criteria in a way that will encourage and reward improved outcomes, and (5) focus on the results as the primary basis for regulatory decision-making.

Ibid.

I am concerned that the position taken by my colleagues and the Staff on Citizens' motion is not consistent with NRC policy and in particular with the concept of defense-in-depth. Defense-in-depth requires the use of multiple layers to ensure safety. In its most general form, defense-in-depth has three layers or levels. The first is prevention achieved in part through the use of high reliability

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[8] SECY 98-144 defines defense in depth as:

> an element of the NRC's Safety Philosophy that employs successive compensatory measures to prevent accidents or mitigate damage if a malfunction, accident, or naturally caused event occurs at a nuclear facility. The defense-in-depth philosophy ensures that safety will not be wholly dependent on any single element of the design, construction, maintenance, or operation of a nuclear facility. The net effect of incorporating defense-in-depth into design, construction, maintenance, and operation is that the facility or system in question tends to be more tolerant of failures and external challenges.

SECY-98-144 (Staff Requirements — White Paper on Risk-Informed and Performance-Based Regulation) (Mar. 1, 1999) (emphasis supplied).

[9] SECY-98-144 promulgates an enclosure that is the basis for a white paper that defines the terms and Commission expectations for risk-informed and performance-based regulation.

components and the use of safety margins. The second level is protection through the use of protection systems to detect abnormal conditions. The third level, mitigation, relies on the use of engineered safety systems such as the ECCS.

The Staff assessment ignores the first level and relies on the second and third level thus defeating the whole concept of defense-in-depth. I cannot agree and consider that if the concept of Risk-Informed, Performance-Based regulation is to have any meaning, then all of its components, including defense-in-depth, must be considered.

From this I conclude that, without a clear understanding of what the CUF is for the recirculation nozzle, one cannot meet the first level of defense-in-depth and that relying on the ECCS to ensure safety introduces an unacceptable nonconservatism that is inconsistent with established Commission policy and nuclear safety regulation.

Finally, I find the Majority employs a conclusory analysis in analyzing whether under 10 C.F.R. § 2.326(a)(3) the motion demonstrated that a materially different result would occur. As explained by the Commission in the statement of considerations for 10 C.F.R. § 2.326(a)(3):

> The actual inquiry to be performed falls between the two standards. The ''would'' standard may be read to imply that an ultimate conclusion must be reached before all evidence is considered. The ''might'' standard implies that reopening could be ordered even where a board is uncertain whether or not the new evidence is important. The inquiry should be, and has been, the likelihood that a different result will be reached if the information is considered.

51 Fed. Reg. 19,535-01, 19,537 (May 30, 1986). The Majority bases its conclusion that the outcome would likely not be materially different if the new information were considered by comparing the ''evidence'' submitted by Citizens and both AmerGen and the NRC Staff.[10] *See* Majority at p. 23. This leads the Majority to conclude that the evidence by AmerGen and the Staff ''fortifies our conclusion that, on this record, a materially different result is not likely'' (*id.* at p. 25). The Majority does not explain how or why this would be so, and fails to take into account the full basis of Citizens' contention in reaching its conclusion.

In that regard, my colleagues appear to want a complete finite element analysis of the nozzle by Citizens that would show the CUF is greater than 1 for the 60

[10] ''It is clear that neither we nor a licensing board may base a decision on factual material which has not been introduced into evidence. This rule is both traditional and just. It would have been unfair to the parties on the opposite side of the case for the Licensing Board to have given probative weight to extra-record material because that would have deprived them of an opportunity to impeach it by cross-examination or to rebut it with other evidence. For the same reason, we may not rely on it.'' *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 352 (1978) (internal citations omitted).

year life. While highly desirable, it is impossible for Citizens at this point in the proceeding to perform an analysis to determine the CUF since it would require access to proprietary information that at this stage of the proceeding they are not now entitled to. Citizens did in fact request a copy of the AmerGen analysis but AmerGen declined to provide it since discovery is not permitted in the present circumstances. *See* Citizens' May 27 Response and Motion to Supplement at 3 n.1. As a consequence, Citizens must base their motion on what is available in the public record, which they have done. To require more of an intervenor would make it virtually impossible to ever reopen a proceeding no matter how safety significant an issue raised in a contention might be and turn 10 C.F.R. § 2.326 into an academic exercise. A situation that I am sure my colleagues would not support. Citizens have used the publicly available information to call into question the reanalysis performed by AmerGen. In their pleading, Citizens point out that ''to be certain that an analysis is conservative, the analyst should ensure that each assumption going into the analysis is justified by the actual conditions'' (Second Hopenfeld Decl. ¶ 4). Citizens show that ''in the original analysis, the nozzle cladding was taken into account . . . while in the reanalysis it was neglected'' (*ibid.*). From a technical standpoint, more analysis would most likely be needed in order to determine what effect this could have on the calculation of the CUF.

Additional analysis would likely result in a change in the outcome of the prior proceeding based on Citizens' new evidence for the following reasons. The cladding is added to the base metal because of its corrosion resistance and it adds material to the thickness of the nozzle. Thus, it would increase the load carrying capability of the nozzle. If that were the sole effect, then omitting the cladding, as was done by AmerGen, would increase the calculated stress increasing the CUF resulting in a conservative calculation. However, the loads on the nozzle are caused by abrupt changes in the fluid temperature inside the nozzle. These changes cause the materials to expand or contract. Since the cladding is a different material than the base metal, it has a different coefficient of thermal expansion and will expand and contract a different amount compared to the base metal. This adds to the stress in the nozzle, increasing the usage factor. Omitting the cladding would result in a nonconservative estimate of the CUF. But, without a detailed analysis both with and without the cladding, one cannot a priori determine the effect that dominates and thus one does not know necessarily if the new finite element analysis is conservative or nonconservative. Indeed, since the original analysis included the cladding, it is not possible to judge whether the new analysis is more or less conservative than the original analysis. Citizens rightly point out that ''key assumptions must . . . be carefully justified to prevent the CUF_{EN} analysis [from] becoming an outcome-driven exercise'' (Citizens' May 27 Motion Response and Motion to Supplement at 7).

I conclude that the new information proffered by Citizens' evidence has properly raised an issue of serious safety significance that would likely lead

to a different outcome in the proceeding had it been considered previously, namely by providing the basis for adding requirements into the license relative to the AmerGen's aging management plan, such as periodic inspections of the recirculation line nozzles for cracks.[11]

It is unclear how the Majority can conclude that the new information raising a matter of serious safety significance can be of such a nature that it would not have had a material outcome on the prior proceeding.[12] The Commission, in its final statement in the ECCS rulemaking proceeding explained:

> Protection of the public health and safety from radiological effects is a statutory responsibility of the AEC under the Atomic Energy Act and has always been foremost in its Regulatory program. Protection against a highly unlikely loss-of-coolant accident has long been an essential part of the defense-in-depth concept used by the nuclear power industry and the AEC to assure the safety of nuclear power plants.

Rulemaking Hearing: Acceptance Criteria for Emergency Core Cooling Systems for Light-Water-Cooled Nuclear Power Reactors, CLI-73-39, 6 AEC 1085, 1091 (1973). At the very least, the license renewal should be granted, conditioned on AmerGen performing an analysis that includes the cladding and demonstrating that this new analysis produces a CUF that is less than or equal to the analysis in question. Only then can we be sure that the CUF has been bounded.

Lastly, as my colleagues correctly point out ''Citizens must also have demonstrated both that [their motion] is timely (10 C.F.R. § 2.326(a)(1)) and that [they satisfy] the balancing test in 10 C.F.R. § 2.309(c)(1) as required by section 2.326(d)'' (Majority at p. 28). Section 2.309(c)(1) requires the movant to show that a balancing of the following factors (to the extent they are relevant to the particular filing) weighs in favor of reopening:

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

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[11] The nozzle is currently in the AmerGen's AMP and monitored under it. *See* Safety Evaluation Report at 747 (August 2006) (ADAMS Accession No. ML062300330).

[12] It is self-evident that the addition of a condition on a license to operate would constitute a ''materially different result'' warranting reopening. In *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1 and 2), LBP-82-117B, 16 NRC 2024, 2032 (1982), the Board found that the record on the new information presented was sparse and that ''[h]ad further information been made available before the close of the hearing, we would have incorporated it into the record.'' The Board decided to reopen the case to explore the new information presented by Intervenors, deciding that if the new information were to prove a grave safety threat, then a condition on the license would have to result (*ibid.*).

(iii) The nature and extent of the . . . 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 . . . petitioner's interest;

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

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

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

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

10 C.F.R. § 2.309(c)(1). Having already addressed the timeliness issue associated with factor (i), *see supra* pp. 30-33, I turn to the remaining factors.

Since Citizens already are participants in this proceeding, they clearly satisfy factors (ii), (iii), and (vi). Relative to item (iv), it is apparent that Citizens' interest in this proceeding, i.e., in seeing that the LRA for Oyster Creek is granted only if there is such assurance that the facility would be operated consistent with aging requirements, would be affected by an order issued relative to the CUF matter.

The underlying concept of license renewal is the need to perform a time-limited aging analysis (''TLAA''). TLAA is performed on every structure, system, and component (''SSC'') subject to the requirement. That does not, however, demand that the TLAA must ''demonstrate'' that the SSCs are all found to be acceptable throughout the license extension. Rather, it simply requires that a TLAA adequately identify the components that may fail to perform their function due to aging during the period of extended operation. The analysis enables the Licensee to develop an aging management plan (''AMP'') which lays out how those potential problem components will be managed, reviewed, and, if needed, corrected during the period of extended operation. The methods employed can range from future testing and monitoring, inspection and analysis, to the extreme of complete replacement; all of which could also be required as an outcome of an adjudicatory proceeding in front of the licensing boards.

In this case, the subject component has come into question because of a high fatigue usage factor and a questionable analysis. Citizens correctly question whether the usage factor has been conservatively determined. Thus, we are still at the stage of performing the TLAA. The outcome will be determined once a sound, conservative analysis is performed. Thus the impact on the petitioners' interest may simply be the production of an acceptable analysis by AmerGen that shows the CUF to be less than 1.0 or that the CUF is greater than 1.0. In the former case, the case would be ripe for summary disposition. In the latter case, the applicant would then need to submit a modification to the AMP for the

component that might simply include additional inspections, making it ripe for summary disposition.

Additionally, as to factor (vii), given that the existing Oyster Creek license does not expire until April 2009, and the current plant licensing would remain in effect pending final outcome of any hearing, *see* 10 C.F.R. § 54.31(c), the impact of granting the reopening motion and admitting the contention would most certainly be minimal since a reanalysis and summary disposition motion should be able to be done in 30 to 60 days. Regarding factor (viii), it is clear that placing the analysis and its conclusions in the record will provide a much improved record documenting this serious issue.

Finally, regarding factor (v), the protection afforded to the petitioner's interest by the increased scrutiny that the CUF analysis would receive as a result of admission of the new contention cannot be obtained in any other way. In *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n.108 (1985), the Appeal Board cautioned the NRC Staff's involvement in a proceeding is not synonymous with protection of Intervenor's rights and interests afforded by the hearing process under the balancing test now incorporated in 10 C.F.R. § 2.309. The Appeal Board noted:

> In *Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167 (1983) . . . we determined that the participation of the NRC staff in a licensing proceeding was not tantamount to participation by a private intervenor. By analogy, the availability of staff review outside the hearing process generally does not constitute adequate protection of a private party's rights when considering factor two.

Ibid.

As correctly outlined by the Majority, the standards for reopening the record are indeed demanding. But, 10 C.F.R. § 2.326 was enacted with the goal of maintaining the ''finality'' of the hearing process while still enabling participants to bring to light new post-hearing information concerning significant safety situations. Citizens have shown they have met the standards for reopening, in a timely motion addressing a serious safety issue. To deny Citizens' motion and eliminate their access to the only means that will allow them to confront what appears to be a significant safety issue would be a grave error.

Cite as 68 NRC 43 (2008) **LBP-08-13**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

In the Matter of **Docket Nos. 50-247-LR**
50-286-LR
(ASLBP No. 07-858-03-LR-BD01)

ENTERGY NUCLEAR OPERATIONS, INC.
(Indian Point, Units 2 and 3) **July 31, 2008**

In this proceeding regarding the License Renewal Application (''LRA'') of Entergy Nuclear Operations, Inc. (''Entergy'' or ''Applicant''), to renew the operating license for the Indian Point Energy Center (''IPEC'' or ''Indian Point''), for 20 years beyond the current expiration date of September 9, 2013, for Unit 2 (''IP2'') and December 12, 2015, for Unit 3 (''IP3''), the Licensing Board — ruling on petitions to intervene filed by seven different petitioners — concludes that three petitioners have demonstrated standing and proffered at least one admissible contention and are admitted as parties to the proceeding; that three petitioners that were not admitted as parties have the option to participate in the proceeding as interested governmental entities; and that one petitioner failed to proffer an admissible contention and has been dismissed from the proceeding.

RULES OF PRACTICE: STANDING TO INTERVENE

A petitioner must provide basic information supporting its claim to standing in order to satisfy the requirements of 10 C.F.R. § 2.309(d)(1)(ii)-(iv). This information must include (1) the nature of the petitioner's right to be made a

party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest. In addition, the NRC generally follows judicial concepts of standing, which require that a petitioner ''(1) allege a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision,'' commonly referred to as '' 'injury in fact,' causality, and redressability.''

RULES OF PRACTICE: STANDING TO INTERVENE (ORGANIZATIONAL STANDING)

In order for organizations to demonstrate standing to intervene, they must allege that the challenged action will cause a cognizable injury to the organization's interests or to the interests of its members.

RULES OF PRACTICE: STANDING TO INTERVENE (ORGANIZATIONAL STANDING)

When seeking to intervene as the representative for its members, an organization must identify a member by name and address, show how that member would be affected by the licensing action, and demonstrate that the member has authorized the organization to request a hearing on his or her behalf.

RULES OF PRACTICE: STANDING TO INTERVENE (PRESUMPTION BASED ON GEOGRAPHIC PROXIMITY)

The NRC applies a proximity presumption, whereby a petitioner is presumed to have standing to intervene without the need specifically to plead injury, causation, and redressability if the petitioner lives within 50 miles of the nuclear power reactor.

RULES OF PRACTICE: STANDING TO INTERVENE (STATE OR LOCAL GOVERNMENT ENTITY)

A State or local governmental entity that wishes to be a party in a proceeding that involves a facility located within its boundaries is automatically deemed to have standing.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

An admissible contention must (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE)

With limited exceptions not applicable in this case, no rule or regulation of the Commission is subject to attack in any adjudicatory proceeding.

RULES OF PRACTICE: CONTENTIONS (ADOPTION)

In order for a petitioner to adopt the contention of another petitioner, it must first demonstrate that it has standing and submit its own admissible contention. The Board will not allow a petitioner who has not submitted an admissible contention to adopt the contentions of other petitioners.

LICENSE RENEWAL: ENVIRONMENTAL ISSUES (SCOPE)

NEPA: GENERIC ISSUES

Part 51 of 10 C.F.R. divides environmental issues for license renewal into generic and site-specific components. The issues that have been dealt with generically are identified as Category 1 issues. Other issues that require site-specific analysis, are identified as Category 2 issues. Category 1 issues are not subject to challenge in a relicensing proceeding because they involve environmental effects that are essentially similar for all plants and need not be assessed repeatedly on a site-specific basis.

LICENSE RENEWAL: ENVIRONMENTAL ISSUES (SCOPE)

NEPA: GENERIC ISSUES

Absent a waiver pursuant to 10 C.F.R. § 2.335, Category 1 issues cannot be addressed in a license renewal proceeding.

LICENSE RENEWAL: ENVIRONMENTAL ISSUES (SCOPE)

Category 2 issues, on the other hand, are not ''essentially similar'' for all plants because they must be reviewed on a site-specific basis; accordingly, challenges relating to these issues are properly part of a license renewal proceeding.

LICENSE RENEWAL: SAFETY ISSUES (SCOPE)

Certain safety issues that were reviewed for the initial license have been closely monitored by NRC inspection during the license term and need not be reviewed again in the context of a license renewal application.

RULES OF PRACTICE: CONTENTIONS (CURRENT LICENSING ISSUES)

The Updated Final Safety Analysis Report (''UFSAR'') is part of the Current Licensing Basis (''CLB'') and must be updated annually. Contentions pertaining to issues dealing with the current operating license, including the UFSAR, are not within the scope of license renewal review.

OPERATING LICENSE PROCEEDINGS: GENERAL DESIGN CRITERIA

The General Design Criteria are not applicable to nuclear power plants with construction permits issued prior to May 21, 1971.

LICENSE RENEWAL: SAFETY ISSUES

RULES OF PRACTICE: RENEWAL OF LICENSES (SCOPE)

Aging management programs (''AMP'') for systems, structures, and components (''SSC'') identified by 10 C.F.R. § 54.4 are within the scope of license renewal proceedings. For those SSCs subject to aging management review that are not CLB issues, discussion of proposed inspection and monitoring details will come before this Board only as they are needed to demonstrate that the Applicant's AMP does or does not achieve the desired goal of providing assurance that the

intended function of relevant SSCs discussed herein will be maintained for the license renewal period.

LICENSE RENEWAL: SAFETY ISSUES

RULES OF PRACTICE: RENEWAL OF LICENSES (AGING MANAGEMENT)

Pursuant to section 54.21(a)(3), each application must contain an Integrated Plant Assessment (''IPA'') for which specified components will, *inter alia,* demonstrate that the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the CLB for the period of extended operation. A commitment to develop a program does not *demonstrate* that the effects of aging will be adequately managed.

NEPA: CONSIDERATION OF ALTERNATIVES

NEPA does not require an applicant to look at every conceivable alternative, but rather requires only consideration of feasible, nonspeculative, reasonable alternatives. The reasonable alternatives for license renewal proceedings are limited to discrete electric generation sources that are feasible technically and available commercially. Section 8.2 of the Generic Environmental Impact Statement (''GEIS'') addresses the need to consider energy conservation for the ''no-action'' alternative.

NEPA: CONSIDERATION OF ALTERNATIVES

The reasonable alternatives to be considered in the Environmental Report for license renewal proceedings are limited to discrete electric generation sources that are feasible technically and available commercially. There is no requirement for an applicant to analyze in detail options that are not discrete, feasible sources of base-load energy.

NEPA: CONSIDERATION OF ALTERNATIVES

Neither the NRC nor the applicant has the mission or authority to implement a general societal interest in energy efficiency. An applicant's decision to exclude renewable energy options from its alternatives analysis is reasonable because these sources are not always available and, with the current technology, cannot meet the goals of the LRA.

LICENSE RENEWAL: ENVIRONMENTAL ISSUES (SAMA)

Whether a SAMA must be analyzed in an ER hinges on whether it could potentially be cost-beneficial. Therefore, a petitioner must, at a minimum, address the approximate relative cost and benefit of the SAMA because without any notion of cost, it is difficult to assess whether a SAMA may be cost-beneficial and thus warrant serious consideration.

LICENSE RENEWAL: ENVIRONMENTAL ISSUES (SAMA)

While the seismic SAMA methodology is outlined in the ER, a petitioner may assume that, because it cannot check all analysis details, the analysis is incomplete or incorrect. This is mere speculation and such speculation is insufficient to support the admissibility of this contention.

LICENSE RENEWAL: ENVIRONMENTAL ISSUES (SAMA)

A petitioner is not required to redo SAMA analyses in order to raise a material issue. Where a petitioner alleges that the SAMA was done, but that the analysis was significantly flawed due to the use of inaccurate factual assumptions, it may be used to support a contention.

LICENSE RENEWAL: ENVIRONMENTAL ISSUES (SCOPE)

NEPA: GENERIC ISSUES

Pursuant to 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 (''Table B-1''), the impact on offsite land use during the license renewal term cannot be assessed generically and, accordingly, it is a Category 2 environmental issue that is within the scope of this proceeding. In conducting its analysis of the impact of the license renewal on land use, an applicant should consider the impact on real estate values that would be caused by license renewal or nonrenewal.

LICENSE RENEWAL: SCOPE

The adequacy of the UFSAR and compliance with the CLB are outside the scope of license renewal proceedings. The proper vehicle to challenge the adequacy of the UFSAR would be a section 2.206 petition, not a challenge to the license renewal.

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE)

Any challenge, explicit or implicit, to a decision by the NRC Staff to grant an exemption from a 1-hour barrier to a 24/30-minute barrier is a direct challenge to the CLB and unrelated to the effects of plant aging and the LRA. Accordingly, it is beyond the scope of a license renewal proceeding.

LICENSE RENEWAL: SCOPE

RULES OF PRACTICE: PETITION FOR RULEMAKING

Part 54 does not require a comprehensive preapplication baseline inspection. If a petitioner believes the current NRC regulations are inadequate, the venue for raising such a concern is a section 2.802 petition to institute a rulemaking action.

LICENSE RENEWAL: SAFETY ISSUES (SCOPE)

It is the burden of an applicant to show that the concrete in the containment structures will maintain its integrity during the extended period of operations, and, if this cannot be done, to develop an AMP that ensures that any indication of degradation is detected and remediated.

LICENSE RENEWAL: SAFETY ISSUES (SCOPE)

Whether an AMP is necessary to manage the cumulative effects of embrittlement of the reactor pressure vessels and associated internals is within the scope of this proceeding.

LICENSE RENEWAL: SAFETY ISSUES (SCOPE)

In evaluating metal fatigue, a component's cumulative usage factor (''CUF'') is the fundamental parameter used to determine whether it will likely develop cracks during the license renewal period and, as a result, be subject to an AMP in accordance with 10 C.F.R. § 54.21(c)(1)(iii). As the threshold parameter of the time-limited aging analysis (''TLAA'') for metal fatigue, an applicant must complete the analysis of the CUFs for the license renewal period and include the results in the LRA. An applicant's commitment to repair or replace the affected locations before exceeding a CUF of 1.0 does not meet the ''demonstration'' requirement of the regulations. While the implementation of the AMP can anticipate future actions as implied by this statement, the actual plan must be

sufficient to demonstrate the specific aging management actions that will take place in the future, and not just that the AMP will be developed in the future.

NEPA: SCOPE

The Commission ruled that NEPA imposes no legal duty on the NRC to consider intentional malevolent acts . . . on a case-by-case basis in conjunction with commercial power reactor license renewal applications.

NEPA: ENVIRONMENT IMPACT STATEMENT

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

Contentions relating to the conclusions that the NRC Staff reaches in its NEPA analysis with regard to the environmental impacts from these radiological releases to groundwater must await future publication of its SEIS.

LICENSE RENEWAL: SCOPE

There is no need for a review of emergency planning issues in the context of license renewal.

LICENSE RENEWAL: ENVIRONMENTAL ISSUES (SCOPE)

NEPA: ENVIRONMENTAL REPORT

Section 51.53(c)(3)(ii)(B) requires an applicant to provide in its ER a site-specific analysis of entrainment, impingement, and heat shock/thermal discharge impacts from its once-through cooling systems. An applicant may meet its obligations by doing one of following: (1) provide a copy of current CWA § 316(b) determination; (2) provide a section 316(a) variance or equivalent State permit and supporting documentation; or (3) assess the impact of proposed action on fish and shellfish resources resulting from heat shock, impingement, and entrainment.

LICENSE RENEWAL: ENVIRONMENTAL ISSUES (SCOPE)

NEPA: GENERIC ISSUES

Spent fuel pool fires are Category 1 environmental issues and, therefore, are addressed generically in the GEIS for license renewals. A petition for rulemaking that addresses issues related to spent fuel pool fires would be a more appropriate

venue to seek relief for resolving generic concerns about spent fuel fires than a site-specific contention in an adjudication.

NEPA: CONSIDERATION OF ALTERNATIVES

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

Presentation of an alternative analysis is, without more, insufficient to support a contention alleging that the original analysis failed to meet applicable requirements.

LICENSE RENEWAL: ENVIRONMENTAL ISSUES (SCOPE)

NEPA: ENVIRONMENTAL REPORT

An applicant is required to address new and significant information for either Category 1 or Category 2 issues in its ER for an LRA.

LICENSE RENEWAL: ENVIRONMENTAL ISSUES (SCOPE)

NEPA: ENVIRONMENTAL JUSTICE

NEPA, which mandates a hard look at the environmental impact of proposed federal actions, is the only legal grounds for an admissible contention relating to Environmental Justice (''EJ'') matters. Under NEPA, the purpose of an EJ review is to insure that the Commission considers and publicly discloses environmental factors peculiar to minority or low-income populations that may cause them to suffer harm disproportionate to that suffered by the general population. The goals of NEPA are to inform federal agencies and the public about the environmental effects of proposed projects.

NEPA: CONSIDERATION OF ALTERNATIVES

An applicant in its ER need only consider the range of alternatives that are capable of achieving the goal of the proposed action. The reasonable alternatives for license renewal proceedings are limited to discrete electric generation sources that are technically feasible and commercially available. Energy conservation, including the demand-side options, are not discrete electric generation sources. NEPA's ''rule of reason'' does not demand an analysis of energy efficiency, because, *inter alia,* conservation measures are beyond the ability of an applicant to implement, and are therefore outside the scope required by a NEPA review of reasonable alternatives.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

General allegations covering the overall adequacy of SSCs, with no mention of potential errors or deficiencies in an applicant's LRA do not support the admissibility of a contention.

NEPA: CONSIDERATION OF ALTERNATIVES

An ER prepared for a license renewal pursuant to 10 C.F.R. § 51.53(c) need not discuss the economic or technical benefits and costs of the proposed action or alternatives except as they are either essential for determining whether an alternative should be included or relevant to mitigation.

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MEMORANDUM AND ORDER
(Ruling on Petitions to Intervene and Requests for Hearing)

I. INTRODUCTION

Pending before the Board are Requests for Hearing and Petitions to Intervene filed by seven Petitioners in response to a Notice of Opportunity for Hearing issued on October 1, 2007,[1] concerning an application by Entergy Nuclear Operations, Inc. (''Entergy'' or ''Applicant'') to renew its operating license for the Indian Point Energy Center (''IPEC'' or ''Indian Point''), for 20 years beyond the current expiration date of September 9, 2013, for Unit 2 (''IP2'') and December 12, 2015, for Unit 3 (''IP3'').[2] Petitions are pending that were filed by the State of New York (''NYS''),[3] the State of Connecticut (''Connecticut''),[4] Riverkeeper, Inc. (''Riverkeeper''),[5] Hudson River Sloop Clearwater (''Clearwater''),[6] the Town of Cortlandt, New York (''Cortlandt''),[7] Connecticut Residents Opposed to Relicensing Indian Point (''CRORIP''),[8] and Westchester County, New York

[1] Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period: Extension of Time for Filing of Requests for Hearing or Petitions for Leave to Intervene in the License Renewal Proceeding, 72 Fed. Reg. 55,834 (Oct. 1, 2007). This notice extended the deadline listed in the original notice, Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period, 72 Fed. Reg. 42,134 (Aug. 1, 2007), for the filing of requests for hearing or petitions for leave to intervene in the proceeding from October 1, 2007, to November 30, 2007.

[2] Indian Point is located in Buchanan, New York, on the Hudson River, approximately 35 miles north of New York City.

[3] New York State Notice of Intention to Participate and Petition to Intervene (Nov. 30, 2007) [hereinafter NYS Petition].

[4] Petition for Leave to Intervene, Request for Hearing and Contentions of Richard Blumenthal, Attorney General of Connecticut, for the License Renewal Proceeding for Indian Point Nuclear Generating Unit Nos. 2 and 3, DPR-26 and DPR 64 (Nov. 30, 2007) [hereinafter Connecticut Petition].

[5] Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant (Nov. 30, 2007) [hereinafter Riverkeeper Petition].

[6] Hudson River Sloop Clearwater Inc's Petition to Intervene and Request for Hearing (Dec. 10, 2007) [hereinafter Clearwater Petition].

[7] Town of Cortlandt Request for Hearing and Petition to Intervene (Nov. 29, 2008) [hereinafter Cortlandt Petition].

[8] Connecticut Residents Opposed to Relicensing of Indian Point and Its Designated Representative's Petition to Intervene and Request for Hearing (Dec. 11, 2007) [hereinafter CRORIP Petition].

(''Westchester'').[9] In addition, five petitioners who sought to be admitted have been dismissed from the proceeding.[10] Entergy and the NRC Staff filed Answers addressing these Petitions.[11] Each Petitioner filed a Reply.[12]

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[9] Westchester County's Notice of Intention to Participate and Petition to Intervene (Dec. 7, 2007) [hereinafter Westchester Petition].

[10] Petitions to Intervene were filed by the Village of Buchanan, New York, the City of New York, the New York Affordable Reliable Electricity Alliance, and Friends United for Sustainable Energy (''FUSE''). Those organizations were dismissed early on in this proceeding. Licensing Board Order (Denying the Village of Buchanan's Hearing Request and Petition to Intervene (Dec. 5, 2007) (unpublished); Licensing Board Order (Denying the City of New York's Petition for Leave to Intervene) (Dec. 12, 2007) (unpublished); Licensing Board Order (Denying the New York Affordable Reliable Electricity Alliance's Petition to Intervene) (Dec. 12, 2007) (unpublished); Licensing Board Order (Granting the NRC Staff's Motion to Strike FUSE's Superceding Request for Hearing) (Feb. 1, 2008) (unpublished). In addition, a Petition to Intervene was submitted by Westchester Citizen's Awareness Network, Rockland County Conservation Association, Public Health and Sustainable Energy, the Sierra Club — Atlantic Chapter and Richard Brodsky (collectively ''WestCAN'') on December 10, 2007. We dismiss WestCAN from this proceeding in an Order that accompanies this Memorandum. Licensing Board Order (Striking WestCAN's Request for Hearing) (July 31, 2008) (unpublished).

[11] Answer of Entergy Nuclear Operations, Inc. Opposing New York State Notice of Intention to Participate and Petition to Intervene (Jan. 22, 2008) [hereinafter Entergy NYS Answer]; Answer of Entergy Nuclear Operations, Inc. Opposing Petition for Leave to Intervene, Request for Hearing and Contentions of Richard Blumenthal, Attorney General of Connecticut (Jan. 22, 2008) [hereinafter Entergy Connecticut Answer]; Answer of Entergy Nuclear Operations, Inc. Opposing Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene (Jan. 22, 2008) [hereinafter Entergy Riverkeeper Answer]; Answer of Entergy Nuclear Operations, Inc. Opposing Hudson River Sloop Clearwater Inc's Petition to Intervene and Request for Hearing (Jan. 22, 2008) [hereinafter Entergy Clearwater Answer]; Answer of Entergy Nuclear Operations, Inc. Opposing Town of Cortlandt Request for Hearing and Petition to Intervene (Jan. 22, 2008) [hereinafter Entergy Cortlandt Answer]; Answer of Entergy Nuclear Operations, Inc. Opposing Request for Hearing, Petition to Intervene and Petition for Waiver of Connecticut Residents Opposed to Relicensing of Indian Point (Jan. 22, 2008) [hereinafter Entergy CRORIP Answer]; Answer of Entergy Nuclear Operations, Inc. Opposing Westchester County's Notice of Intention to Participate and Petition to Intervene (Jan. 22, 2008) [hereinafter Entergy Westchester Answer]. NRC Staff's Response to Petitions for Leave to Intervene Filed by (1) Connecticut Attorney General Richard Blumenthal, (2) Connecticut Residents Opposed to Relicensing of Indian Point, and Nancy Burton, (3) Hudson River Sloop Clearwater, Inc., (4) the State of New York, (5) Riverkeeper, Inc., (6) the Town of Cortlandt, and (7) Westchester County at 26 (Jan. 22, 2008) [hereinafter NRC Staff Answer].

[12] New York State Reply in Support of Petition to Intervene (Feb. 22, 2008) [hereinafter NYS Reply]; Reply of Richard Blumenthal, Attorney General of Connecticut to Entergy's and NRC Staff's Answers to Hearing Request and Petition to Intervene with Respect to Indian Point License Renewal Proceeding (Feb. 8, 2008) [hereinafter Connecticut Reply]; Riverkeeper, Inc.'s Reply to Entergy's and NRC Staff's Responses to Hearing Request and Petition to Intervene (Feb. 15, 2008) [hereinafter Riverkeeper Reply]; Hudson River Sloop Clearwater Inc's Reply to Entergy and the [NRC] Responses to Clearwater Petition to Intervene and Request for Hearing (Feb. 8, 2008) [hereinafter Clearwater

(Continued)

A petitioner who seeks leave to intervene as a party in an adjudicatory proceeding must (1) establish standing, and (2) proffer at least one admissible contention.[13] For the reasons discussed below, we *grant* the Requests for Hearing and Petitions to Intervene of NYS, Riverkeeper, and Clearwater, because we conclude that they have each established standing and have proffered at least one admissible contention. We *deny* the Requests for Hearing and Petitions to Intervene of CRORIP, Cortlandt, Connecticut, and Westchester. Although each has established standing, we conclude that they have failed to proffer an admissible contention. However, Cortlandt, Westchester, and Connecticut may participate in the hearing as interested governmental entities pursuant to 10 C.F.R. § 2.315(c).

II. STANDING ANALYSIS

A. Standards Governing Standing

A petitioner must provide basic information supporting its claim to standing in order to satisfy the requirements of 10 C.F.R. § 2.309(d)(1)(ii)-(iv). This information must include (1) the nature of the petitioner's right to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest. In addition, the NRC generally follows judicial concepts of standing,[14] which require that a petitioner ''(1) allege a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision,'' commonly referred to as '' 'injury in fact,' causality, and redressability.''[15]

In order for organizations to demonstrate standing to intervene, they must allege that the challenged action will cause a cognizable injury to the organization's

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Reply]; Town of Cortlandt's Reply to (1) NRC Staff's Response to Town of Cortlandt's Request for Hearing and Leave to Intervene and (2) Answer of Entergy Nuclear Operations, Inc. Opposing Town of Cortlandt's Request for Hearing and Leave to Intervene (Feb. 8, 2008) [hereinafter Cortlandt Reply]; Connecticut Residents Opposed to Relicensing of Indian Point (CRORIP) and Nancy Burton's Reply to Answers of NRC Staff and Entergy Nuclear Operations, Inc. Opposing Request for Hearing, Petition to Intervene and Petition for Waiver (Feb. 8, 2008) [hereinafter CRORIP Reply]; Westchester County's Reply (Feb. 8, 2008) [hereinafter Westchester Reply]. The participants in this proceeding also filed numerous supplemental briefs pursuant to unpublished Board Orders.

[13] *See* 10 C.F.R. § 2.309(a).

[14] *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998).

[15] *Id.* (citing *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 102-04 (1998); *Kelley v. Selin,* 42 F.3d 1501, 1508 (6th Cir. 1995)).

interests or to the interests of its members.[16] When seeking to intervene as the representative for its members, an organization must identify a member by name and address, show how that member would be affected by the licensing action, and demonstrate that the member has authorized the organization to request a hearing on his or her behalf.[17] In addition, the NRC applies a so-called proximity presumption, whereby a petitioner is presumed to have standing to intervene without the need specifically to plead injury, causation, and redressability if the petitioner lives within 50 miles of the nuclear power reactor.[18] Meanwhile, a State or local governmental entity that wishes to be a party in a proceeding that involves a facility located within its boundaries is automatically deemed to have standing.[19]

B. Rulings on Standing

Neither Entergy nor the NRC Staff has challenged the standing of the Petitioners whose Requests for Hearing and Petitions to Intervene are currently before the Board. Each organization seeking to intervene in this proceeding has demonstrated institutional injury to the organization itself and also demonstrated that it is authorized to represent members who individually have standing. Accordingly, the Board finds that each Petitioner has demonstrated standing to intervene in this proceeding.

III. CONTENTION ANALYSIS

A. Standards Governing Contention Admissibility

Pursuant to 10 C.F.R. § 2.309(f), an admissible contention must (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support

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[16] *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 52 (2007).

[17] *Id.*

[18] *See, e.g., Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146-50 (2001) (applying the presumption in an operating license renewal proceeding); *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (observing that the presumption applies in proceedings for nuclear power plant ''construction permits, operating licenses, or significant amendments thereto'').

[19] 10 C.F.R. § 2.309(d)(2)(i)-(ii).

the petitioner's position and upon which the petitioner intends to rely at hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.[20]

The purpose of the contention rule is to ''focus litigation on concrete issues and result in a clearer and more focused record for decision.''[21] The Commission has stated that it ''should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.''[22] The Commission has emphasized that the rules on contention admissibility are ''strict by design.''[23] Failure to comply with any of these requirements is grounds for the dismissal of a contention.[24]

The application of these requirements has been further developed as summarized below:

1. Brief Explanation of the Basis for the Contention

A ''brief explanation of the basis for the contention'' is a necessary prerequisite of an admissible contention.[25] ''[A] petitioner must provide some sort of minimal basis indicating the potential validity of the contention.''[26] The brief explanation helps define the scope of a contention — the reach of a contention necessarily hinges upon its terms and its stated bases.[27]

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[20] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[21] Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004); *see also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 553-54 (1978); *Business and Professional People for the Public Interest v. AEC,* 502 F.2d 424, 428 (D.C. Cir. 1974); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974).

[22] 69 Fed. Reg. at 2202.

[23] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied,* CLI-02-1, 55 NRC 1 (2002).

[24] 69 Fed. Reg. at 2221; *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

[25] 10 C.F.R. § 2.309(f)(1)(ii).

[26] Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

[27] *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002); *see also Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC,* 924 F.2d 311 (D.C. Cir. 1991), *cert. denied,* 502 U.S. 899 (1991).

2. Within the Scope of the Proceeding

A petitioner must demonstrate that the ''issue raised in the contention is within the scope of the proceeding,''[28] which is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board.[29] Any contention that falls outside the specified scope of the proceeding must be rejected.[30]

3. Materiality

In order to be admissible, a petitioner must demonstrate that the contention asserts an issue of law or fact that is ''material to the findings the NRC must make to support the action that is involved in the proceeding.'' That is, the Petitioner must demonstrate that the subject matter of the contention would impact the grant or denial of a pending license application.[31] ''Materiality'' requires that the petitioner show why the alleged error or omission is of possible significance to the result of the proceeding.[32] This means that there must be some significant link between the claimed deficiency and either the health and safety of the public, or the environment.[33]

4. Concise Allegation of Supporting Facts or Expert Opinion

Contentions must be supported by ''a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . together with references to the specific sources and documents on which [it] intends to rely to support its position.''[34] It is the obligation of the petitioner to present the factual information and expert opinions necessary to support its

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[28] 10 C.F.R. § 2.309(f)(1)(iii).

[29] *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

[30] *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

[31] 10 C.F.R. § 2.309(f)(1)(iv).

[32] *Portland Cement Association v. Ruckelshaus,* 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied sub nom. Portland Cement Association v. Administrator, Environmental Protection Agency,* 417 U.S. 921 (1974).

[33] *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75-76 (1996), *rev'd in part on other grounds,* CLI-96-7, 43 NRC 235 (1996).

[34] 10 C.F.R. § 2.309(f)(1)(v).

contention adequately.[35] Failure to do so requires that the contention be rejected.[36]

Determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits.[37] The petitioner does not have to prove its contention at the admissibility stage.[38] The contention admissibility threshold is less than is required at the summary disposition stage.[39] Nevertheless, while a ''Board may appropriately view [p]etitioners' support for its contention in a light that is favorable to the [p]etitioner,''[40] a petitioner must provide some support for his contention, either in the form of facts or expert testimony.

''Mere 'notice pleading' is insufficient . . . . A petitioner's issue will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.' ''[41] Further, if a petitioner neglects to provide the requisite support for its contentions, the Board should not make assumptions of fact that favor the petitioner, or supply information that is lacking.[42] Any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny.[43]

Likewise, providing any material or document as the foundation for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention.[44]

In short, the information, facts, and expert opinions provided by the petitioner will be examined by the Board to confirm that the petitioner does indeed supply

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[35] *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds,* CLI-95-10, 42 NRC 1 (1995), *and aff'd in part,* CLI-95-12, 42 NRC 111 (1995).

[36] *Palo Verde,* CLI-91-12, 34 NRC at 155.

[37] *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982).

[38] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004).

[39] *See* 10 C.F.R. § 2.710(c). ''[A]t the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.'' 54 Fed. Reg. at 33,171.

[40] *Palo Verde,* CLI-91-12, 34 NRC at 155.

[41] *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)).

[42] *Georgia Tech,* LBP-95-6, 41 NRC at 305. *See also Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

[43] *Yankee Nuclear,* LBP-96-2, 43 NRC at 90.

[44] *See Fansteel,* CLI-03-13, 58 NRC at 204.

adequate support for the contention.[45] But at the contention admissibility stage, all that is required is that the petitioner provide an expert opinion or ''some alleged fact, or facts, in support of its position.''[46]

5. Genuine Dispute Regarding Specific Portions of Application

All contentions must ''show that a genuine dispute exists'' with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute.[47] Any contention that fails directly to controvert the application, or that mistakenly asserts that the application does not address a relevant issue, may be dismissed.[48]

6. Challenges to NRC Regulations

In addition to the requirements set out above, with limited exceptions not applicable in this case, ''no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.''[49] By the same token, any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the Commission's regulatory process must be rejected.[50] Additionally, the adjudicatory process is not the proper venue for the evaluation of a petitioner's own view regarding the direction regulatory policy should take.[51]

Applying the above-stated standards, our rulings on the various contentions are outlined in Parts VI through XII below.

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[45] *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded,* CLI-90-4, 31 NRC 333 (1990).

[46] 54 Fed. Reg. at 33,170. ''This requirement does not call upon the intervener to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.'' *Id.*

[47] 10 C.F.R. § 2.309(f)(1)(vi).

[48] *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined,* CLI-94-2, 39 NRC 91 (1994).

[49] 10 C.F.R. § 2.335(a); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

[50] *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing *Peach Bottom,* ALAB-216, 8 AEC at 20-21).

[51] *Peach Bottom,* ALAB-216, 8 AEC at 20.

IV. CONTENTION ADOPTION

Several petitioners in this proceeding seek to ''adopt'' or ''incorporate'' the contentions of other petitioners.[52] While the regulations allow for a petitioner to adopt the contentions of another petitioner,[53] they do not address specifically whether a petitioner may adopt another petitioner's contention without demonstrating that it has standing and submitting at least one admissible contention of its own. However, the Commission addressed this issue in a prior Indian Point proceeding.[54] In that case, the Commission allowed two petitioners, each of whom had proffered an admissible contention of its own, to adopt the other's contentions.[55] However, the Commission cautioned that it would not accept incorporation by reference of another petitioner's issues where the adopting petitioner had not independently met the requirements for admission as a party by demonstrating standing and submitting at least one admissible issue of its own.[56] While in that case the Commission did not rule on contention adoption by petitioners who had not offered any admissible contentions, based on the clear statement of the Commission's view, we conclude that in order for a petitioner to adopt the contention of another petitioner, it must first demonstrate that it has standing and submit its own admissible contention.

The issue of contention adoption was addressed by a Licensing Board in a more recent decision during a license renewal proceeding for the Vermont Yankee facility.[57] We do not, however, believe the facts and issues in that case are germane to those currently before the Board. In that case, two petitioners, each of which had submitted an admissible contention, sought to adopt the contentions of a third petitioner, and of each other.[58] The applicant opposed the adoption of the contentions because it believed that the petitioners should have addressed the criteria for nontimely contentions in their filings, while the NRC Staff did not oppose the adoption ''so long as each party demonstrates an independent ability to

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[52] *See infra* pp. 161-62, 191, 201-03, 206, 214-15, & note 932.

[53] 10 C.F.R. § 2.309(f)(3).

> If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

[54] *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 132-33 (2001).

[55] *Id.* at 131-32.

[56] *Id.* at 133.

[57] *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 206-08 (2006).

[58] *Id.* at 206.

litigate any contention for which it becomes the primary sponsor.''[59] The Board, in ruling that the petitioners could adopt the contentions, found unpersuasive the Commission's dicta in the earlier *Indian Point* decision that an adopting party must demonstrate an independent ability to litigate.[60] That Board did not address, however, the fundamental point relevant here, that a petitioner must demonstrate standing and present its own admissible contention to adopt the contentions of other petitioners.

Furthermore, we note that if a petitioner were not required to demonstrate standing and submit at least one admissible contention (to independently secure standing as a party to the proceeding) before being allowed to adopt the contentions of others, our hearing process would be unworkable. In the immediate proceeding for instance, all of the millions of citizens living within a 50-mile radius of Indian Point — who could demonstrate standing by virtue of their proximity to the plant — would be able to become parties to this proceeding without putting in the time and effort necessary to submit an admissible contention. If only a few score of such petitioners sought to adopt contentions, our proceeding would be significantly impacted. Allowing the admission of numerous, minimally involved parties would make conducting a fair and efficient proceeding impossible. Accordingly, the Board will not allow a petitioner who has not submitted an admissible contention to adopt the contentions of other petitioners.

V. SCOPE OF NUCLEAR POWER GENERATING FACILITY, RELICENSING PROCEEDINGS

The scope of proceedings challenging technical issues in the context of relicensing proceedings for nuclear powered electrical generating facilities is ''limited to a review of the plant structures, and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analysis.''[61] In addition, review of environmental issues in this proceeding is limited by 10 C.F.R. §§ 51.71(a) and 51.95(c) to site-specific environmental impacts.

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[59] *Id.*

[60] *Id.* at 207-08.

[61] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000) (citing 10 C.F.R. §§ 54.21(a) and (c), 54.4; Nuclear Power Plant License Renewal; Revisions, Final Rule, 60 Fed. Reg. 22,461 (May 8, 1995)).

A. Environmental Review Pursuant to Part 51

Part 51 of 10 C.F.R. divides environmental issues for license renewal into generic and site-specific components. The issues that have been dealt with generically are identified as Category 1 issues. Other issues that require site-specific analysis are identified as Category 2 issues. Category 1 issues are not subject to challenge in a relicensing proceeding because they ''involve environmental effects that are essentially similar for all plants [and] need not be assessed repeatedly on a site-specific basis.''[62] Absent a waiver pursuant to 10 C.F.R. § 2.335, these Category 1 issues cannot be addressed in a license renewal proceeding.[63] Category 2 issues, on the other hand, are not ''essentially similar'' for all plants because they must be reviewed on a site-specific basis; accordingly, challenges relating to these issues are properly part of a license renewal proceeding.[64]

B. Part 54, Technical Review for Reactor Relicensing

Previously, the Commission determined that the safety issues relevant to reactor relicensing are significantly different from, and defined more narrowly than, those relevant during the original licensing proceedings that authorize facility construction and operation. Under that determination, certain safety issues that were reviewed for the initial license have been closely monitored by NRC inspection during the license term and need not be reviewed again in the context of a license renewal application.[65] The impacts of other matters, such as metal fatigue, corrosion, embrittlement, etc., are directly related to the detrimental results of aging. Part 54 of 10 C.F.R. is designed to provide a thorough review of these impacts during the relicensing proceeding to ensure that they will be adequately managed so that the plant can be safely operated during the extended period of operation. These safety issues are the focus of the NRC Staff's technical review of the application for license renewal.[66]

The Current Licensing Basis (''CLB'') refers to all of the Commission requirements applicable to a licensed nuclear power facility. More specifically, the CLB

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[62] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11 (2001).

[63] *Id.* at 12.

[64] *Id.* at 11.

[65] Nuclear Power Plant License Renewal, Final Rule, 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991); *Turkey Point,* CLI-01-17, 54 NRC at 7.

[66] *See* 10 C.F.R. §§ 54.21, 54.29.

> includes the plant-specific design basis information documented in the plant's most recent Final Safety Analysis Report, and any orders, exemptions, and licensee commitments that are part of the docket for the plant's license, i.e., responses to NRC bulletins, generic letters, and enforcement actions, and other licensee commitments documented in NRC safety evaluations or licensee event reports.[67]

Ongoing NRC oversight programs are the mechanisms through which compliance with the CLB is monitored and ensured. The CLB need not be reviewed again and is not subject to attack in a license renewal proceeding.[68]

VI. NEW YORK STATE CONTENTIONS

A. NYS-1

> THE LICENSE RENEWAL APPLICATION (LRA) VIOLATES 10 C.F.R. § 54.13 BECAUSE IT IS NEITHER COMPLETE NOR ACCURATE AND THUS, IN ORDER TO PROTECT THE DUE PROCESS AND 42 U.S.C. § 2239 RIGHTS OF THE INTERVENORS, THE BOARD SHOULD SUSPEND THE HEARING UNTIL THE APPLICANT FILES AN AMENDED APPLICATION IN COMPLIANCE WITH 10 C.F.R. § 54.13.[69]

1. Background — NYS-1

NYS-1 alleges that 10 C.F.R. § 54.13 requires the License Renewal Application (''LRA'') be complete and accurate in order to meet the ''timely renewal'' provision of the Administrative Procedure Act,[70] and also asserts that the Applicant is using an incomplete LRA to ''sap the limited resources'' of petitioners because they will be compelled to file initial contentions and then be required to file a series of amended contentions to keep up with changes in the LRA.[71] According to NYS, the LRA does not include new and significant earthquake information; the plants were built using General Design Criteria (''GDC'') that were never adopted by the NRC; there are no aging management programs (''AMP'') for Non-Environmentally-Qualified Low-Voltage Cables, or Non-Environmentally-Qualified Medium-Voltage Cables or transformers; there is no aging management program for components with a cumulative usage factor over 1.0; referenced sources that provide a basis for the LRA are not available to the public; and the

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[67] *Turkey Point,* CLI-01-17, 54 NRC at 9.
[68] *Id.* at 9-10.
[69] NYS Petition at 36.
[70] *Id.* at 42 (citing 56 Fed. Reg. at 64,962-63).
[71] *Id.* at 44.

Environmental Report (''ER'') ignores information regarding the increased risk of terrorist activities, does not consider viable alternatives to renewal, and ignores the adverse impact on the economy if the license is renewed.[72]

Entergy responds generally that NYS does not comprehend the requirements applicable to license renewal applicants under the regulations, or the extent of the NRC Staff's review of the LRA.[73] Entergy also asserts that it is not required to compile its CLB into a ''discrete compendium.''[74] Entergy dismisses any issues regarding the design and construction of the facilities, or its compliance with the GDC, as outside the scope of a license renewal proceeding. Finally, Entergy submits that NYS's proposal to suspend the hearing process is essentially ''an impermissible and unfounded motion to stay the proceeding'' that should be rejected.[75]

The NRC Staff responds that NYS-1 improperly challenges the NRC Staff's determination to accept the LRA for docketing, which is outside the scope of the proceeding, impermissibly challenges the Commission's regulatory process, is a generalized assertion of what NYS believes the Commission's policies should be, and pertains to the CLB, which is outside the scope of this proceeding.[76] Additionally, the NRC Staff avers that an applicant for license renewal is not required to compile the CLB nor establish its current compliance with the CLB.[77]

In its Reply, NYS maintains that 10 C.F.R. § 2.309(f)(1)(vi) allows for contentions to be filed based on the ''absence of required data.''[78] NYS states that neither Entergy nor the NRC Staff has addressed the issue of whether deficiencies in the LRA exist.[79] Also, Entergy did not dispute that several cases cited in NYS's Petition hold that when a contention challenging the completeness of the LRA meets the specificity requirement, it is a valid contention.[80] Furthermore, NYS suggests that Entergy and the NRC Staff mischaracterize NYS-1 in order to contest it.[81] Finally, NYS clarifies that the contention does not suggest that an applicant must compile the CLB in a single document, as Entergy and the NRC Staff suggest, but rather it deals with the basic issue of whether a discernable CLB for Indian Point exists at all.[82]

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[72] *See id.* at 36-38.
[73] Entergy NYS Answer at 36.
[74] *Id.* at 38.
[75] *Id.* at 39.
[76] NRC Staff Answer at 26.
[77] *Id.* at 28.
[78] NYS Reply at 8.
[79] *Id.* at 9.
[80] *Id.*
[81] *Id.* at 10.
[82] *Id.* at 12.

2. *Board Decision — NYS-1*

In this broad contention NYS asks a fundamental question, that is, whether the CLB for the Indian Point facility is ascertainable at this point.[83] While this may not be an unreasonable request for a petitioner seeking to challenge the relicensing of a nuclear facility,[84] the Commission made clear in its Part 54 rulemaking that ''[c]ompilation of the CLB is unnecessary to perform a license renewal review.''[85] Moreover, while we agree with NYS that the CLB has not been compiled, and that a systematic review of the LRA is much more difficult as a result, we also agree with Entergy and the NRC Staff that the CLB for Indian Point is, in fact, ascertainable by following the definition provided in 10 C.F.R. § 54.3(a). Furthermore, the CLB — and questions regarding its ascertainability — are current operation issues which are outside the scope of this proceeding.[86]

NYS asserts in both its Petition and Reply that it is ''not asking the Board to review or even comment upon the Staff's decision to accept the application.''[87] Rather, as articulated by NYS, the contention is focused on the numerous deficiencies that NYS believes exist within the LRA.[88] NYS states that under 10 C.F.R.

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[83] As noted in Part V above, *supra* pp. 67-68, the term ''current licensing basis,'' or CLB, is defined in 10 C.F.R. § 54.3(a) as:

> [T]he set of NRC requirements applicable to a specific plant and a licensee's written commitments for ensuring compliance with and operation within applicable NRC requirements and the plant-specific design basis (including all modifications and additions to such commitments over the life of the license) that are docketed and in effect. The CLB includes the NRC regulations contained in 10 CFR parts 2, 19, 20, 21, 26, 30, 40, 50, 51, 52, 54, 55, 70, 72, 73, 100 and appendices thereto; orders; license conditions; exemptions; and technical specifications. It also includes the plant-specific design-basis information defined in 10 CFR 50.2 as documented in the most recent final safety analysis report (FSAR) . . . and the licensee's commitments remaining in effect that were made in docketed licensing correspondence such as licensee responses to NRC bulletins, generic letters, and enforcement actions, as well as licensee commitments documented in NRC safety evaluations or licensee event reports.

[84] We find it troubling that in today's electronic age it is not possible for petitioners to get onto the NRC's public site or the ADAMS document management system and find the CLB for each plant clearly laid out in a folder with hyperlinks to each separate document. If the NRC must compile this information to continually monitor the compliance of a facility with the regulations, then presumably someone has already done so. If the CLB has not been compiled in one easy to access location, how can the public be assured that the NRC is adequately monitoring the facility? We believe that in the 13 years since the last revisions to the Final Rule on License Renewal technology has advanced to a point where it would be possible for the NRC to make this information available to the public. This simple act would foster a level of transparency that would be very helpful in the license renewal process.

[85] 60 Fed. Reg. at 22,473.

[86] *See* 10 C.F.R. § 54.30(b); 56 Fed. Reg. at 64,951; *Turkey Point,* CLI-01-17, 54 NRC at 8-9.

[87] NYS Petition at 308; NYS Reply at 10.

[88] The Commission has stated that the issue in adjudications is not the adequacy of the NRC Staff's review of the application but rather ''whether the license application raises health and safety

(Continued)

§ 2.309(f)(1)(vi) a contention can be admitted if it shows that the ''application fails to contain information on a relevant matter as required by law'' and has proffered contentions which attempt to do so.

The Board finds that NYS-1 must be *denied* as too broad and that NYS must deal with each ''deficiency'' in the LRA in a separate, specific, and well-supported contention. While in this contention NYS has identified several areas in which it alleges Entergy's application is deficient, it does not supply supporting facts or expert testimony in this contention sufficient to raise a genuine issue.[89]

The Board also will address here one point made by NYS in its Reply. NYS asserted that Entergy has not acted in a manner that promotes efficiency and suggests that a better prepared LRA would prevent petitioners from incurring unnecessary expenses.[90] In support of its claim NYS points to a conversation in which representatives of Entergy told the NRC Staff that it would be amending the LRA to take the same approach regarding metal fatigue that it took in previous license renewal proceedings.[91] This information directly affects NYS-26.[92] According to NYS, this means that Entergy had the information needed for an amendment prior to submitting its LRA, and, as NYS suggests, ''knew or should have known that its proposed manner of dealing with CUF's for the Indian Point reactors was not satisfactory.''[93] This caused NYS to waste time and money preparing a contention for an area that Entergy knew would be an issue that it would attempt to cure with a license amendment. We agree with NYS that equitable principles would indicate that Entergy should have provided this information in the original LRA. Nevertheless, NYS does not point to any regulation that required Entergy to do so. Entergy's submission of information in its LRA that it knew would be changed, is not, in our minds, an appropriate position for a responsible applicant and litigant to take. But, standing alone, this is neither an appropriate subject for a contention nor a subject for action by this Board.

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concerns.'' *Curators of the University of Missouri,* CLI-95-8, 41 NRC 386, 395-96 (1995). As the Licensing Board in *Calvert Cliffs* pointed out, the focus of a case is on ''the adequacy of the application as it has been accepted and docketed for licensing review.'' *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 242 (1998). Furthermore, the Commission stated that the ''determination that an application is sufficient for purposes of timely renewal would not be litigable. Sufficiency is essentially a matter for the staff to determine based on the required contents of an application established in §§ 54.19, 54.21, 54.22, and 54.23.'' 56 Fed. Reg. at 64,963.

[89] We note, however, that deficiencies identified in this general contention are addressed later in the NYS Petition in more directed and specific contentions.

[90] *See* NYS Reply at 13-15.

[91] *Id.* at 14.

[92] *See infra* Part VI.Z.3.

[93] NYS Reply at 14-15.

B. NYS-2

THE LICENSE RENEWAL APPLICATION FOR IP2 AND IP3 FAILS TO COMPLY WITH THE REQUIREMENTS OF 10 C.F.R. §§ 54.21 AND 54.29(a)(1) AND (2) SINCE INFORMATION FROM SAFETY ANALYSES AND EVALUATIONS PERFORMED AT THE NRC'S REQUEST ARE NOT IDENTIFIED OR INCLUDED IN THE UFSAR AND THUS IT IS NOT POSSIBLE TO DETERMINE WHICH SYSTEMS AND COMPONENTS IMPORTANT FOR SAFETY REQUIRE AGING MANAGEMENT OR WHAT TYPE OF AGING MANAGEMENT THEY REQUIRE.[94]

1. Background — NYS-2

NYS-2 alleges that the LRA for IP2 and IP3 does not comply with 10 C.F.R. §§ 54.21, 54.29(a)(1) and (2).[95] NYS contends that Entergy has performed safety analyses and evaluations at the NRC Staff's request which are not identified or included in the Updated Safety Analysis Report (''UFSAR'') as required by 10 C.F.R. § 50.71(e), making it impossible for petitioners to determine which systems, structures, and components (''SSC'') require AMPs.[96] NYS lists seven different areas where safety analyses were performed by Entergy in response to generic letters from the NRC Staff and demonstrates how that information was, or was not, reflected within the UFSAR.[97]

Entergy opposes the admission of NYS-2, claiming that any deficiencies in the UFSARs for IP2 and IP3 are issues pertaining to the CLB and thus beyond the scope of the proceeding.[98] Furthermore, Entergy argues that its responses to the various NRC bulletins and generic letters raised by NYS have been docketed and are available to the public.[99]

The NRC Staff opposes the admission of NYS-2 for the same reason as Entergy — the UFSAR's alleged deficiencies are not subject to review in this license renewal proceeding as they are a current issue dealing with the CLB.[100] The NRC

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[94] NYS Petition at 48.

[95] *Id.* at 51.

[96] *Id.*

[97] *See id.* at 59-72. These include among other things: a design change to the reactor coolant pump insulation type to prevent corrosion; evaluations of postulated breaks in piping that result in drainage of water from the refueling cavity; changes to the inspection program for various single phase systems; expansion of the inspection program for boric acid corrosion to include 350 mechanical connections; installation of two separate and diverse reactor coolant system water level monitoring systems; addition of a control room indicator to monitor residual heat removal flow conditions; and revising procedures to de-energize two open motor-operated valves. *Id.*

[98] Entergy NYS Answer at 41.

[99] *Id.*

[100] NRC Staff Answer at 29.

Staff also concurs with Entergy that the responses to various generic letters and bulletins are adequately available to the public.[101]

In its Reply, NYS maintains that neither the NRC Staff nor Entergy has contested the core allegation of NYS-2 — that ''neither unit is in compliance with 10 C.F.R. 50.71(e), nor that some of the non-compliance relates to items for which aging management programs may be required, nor that the UFSAR is a part of the CLB . . . .''[102] NYS notes that NRC Staff has imposed severe penalties on licensees in the past for failing to have an updated UFSAR.[103]

2. Board Decision — NYS-2

The UFSAR is part of the CLB[104] and must be updated annually.[105] As discussed above,[106] contentions pertaining to issues dealing with the current operating license, including the UFSAR, are not within the scope of license renewal review. Accordingly, pursuant to 10 C.F.R. § 2.309(f)(1)(iii), NYS-2 is *inadmissible* because it is outside the scope of the proceeding.

NYS and its expert, David Lochbaum, list numerous generic letters sent by the NRC to Entergy (or the owner of the Indian Point facility at that time), and the responses thereto,[107] and allege that they were not properly incorporated into the UFSAR in an attempt to show that it is deficient. However, these generic letters and the responses thereto are docketed, and are available to the public for review (as NYS has done). Furthermore, these do not speak to the fundamental issue that the UFSAR is part of the CLB for the plant and is therefore outside the scope of this proceeding. The proper avenue for challenging the adequacy of the UFSAR would be to seek an enforcement action under 10 C.F.R. § 2.206. NYS has not demonstrated a deficiency in the UFSAR, nor how any alleged deficiency would impact the validity of Indian Point's AMPs. Accordingly, NYS has not, in this contention, raised a genuine issue regarding a material matter within the scope of this proceeding.

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[101] *Id.* at 30.

[102] NYS Reply at 16.

[103] *Id.* at 18 (citing Letter from James L. Caldwell, NRC Regional Administrator, to Dennis L. Koehl, Site Vice President, Point Beach Nuclear Plant, at 2 (Jan. 29, 2007) (ADAMS Accession No. ML070290711)).

[104] 10 C.F.R. § 54.3(a).

[105] 10 C.F.R. § 50.71(e)(4).

[106] *See supra* Part V.B.

[107] Declaration of David Lochbaum at 7-12 (Nov. 27, 2007) [hereinafter Lochbaum Declaration].

C. NYS-3

THE LRA DOES NOT COMPLY WITH THE REQUIREMENT OF 10 C.F.R. §§ 54.29(a)(1) AND (2) FOR IP2 AND IP3 BECAUSE IT IS NOT POSSIBLE TO ASCERTAIN IF ALL RELEVANT EQUIPMENT, COMPONENTS AND SYSTEMS THAT ARE REQUIRED TO HAVE AGING MANAGEMENT HAVE BEEN IDENTIFIED OR TO DETERMINE WHETHER THE AGING MANAGEMENT REQUIREMENTS FOR LICENSE RENEWAL HAVE BEEN MET.[108]

1. Background — NYS-3

NYS-3 alleges that the UFSAR does not comply with the relevant GDC as required by 10 C.F.R. § 54.35. Instead, NYS suggests that Indian Point complies with design criteria proposed decades ago by a nuclear industry trade group, the Atomic Industrial Forum (''AIF''), that were never approved or codified by the NRC.[109] Thus, according to NYS, the UFSAR may be in compliance with AIF's proposed design criteria but not the NRC's actual design criteria. NYS asserts that the provisions of the two criteria are substantially different, with the AIF's being less stringent according to NYS.[110]

Entergy opposes the admission of NYS-3 arguing that it is outside the scope of a license renewal proceeding, does not have the required factual and expert support, and does not show that there is a genuine dispute on a material issue of law or fact.[111] Entergy contests NYS's claim that the LRA is deficient because it does not identify the SSCs which are subject to aging management review (''AMR'') under 10 C.F.R. § 54.21, and notes specifically where in the LRA a description of all of the AMPs, the commitments to make enhancements, and evaluations of time-limited aging analyses (''TLAA'') can be found.[112] Also, according to Entergy a challenge to compliance with the GDC is outside the scope of the proceeding and the NRC's GDC do not apply to IP2 and IP3.[113]

The NRC Staff states that it opposes the admission of NYS-3 because the Commission has found that ''meeting the intent of the GDC is accomplished

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[108] NYS Petition at 72.

[109] *Id.* at 72-73.

[110] *Id.* at 74-77.

[111] Entergy NYS Answer at 42.

[112] *Id.* at 42.

[113] *Id.* at 43 n.193. Entergy states that the GDC in Appendix A to 10 C.F.R. Part 50 are not applicable to plants, like Indian Point, with construction permits issued before May 21, 1971. *Id.* (citing NRR Office Instruction No. LIC-100, Rev. 100-a, Control of Licensing Bases for Operating Reactors at 2.13 (Mar. 2, 2001) (ADAMS Accession No. ML010660227); Staff Requirements Memorandum, SECY-92-223 — Resolution of Deviations Identified During the Systematic Evaluation Program at 1 (Sept. 18, 1992) (ADAMS Accession No. ML003763736) [hereinafter SRM SECY-92-223]).

through existing regulatory processes . . . . [D]ifferences between proposed and codified design criteria [are] not a concern for operating plants [and] [w]hether or not a plant was issued a construction permit based on plant-specific criteria or final criteria presents no issue'' for license renewal proceedings.[114]

In its Reply, NYS maintains that Entergy and the NRC Staff do not dispute that IP2 and IP3 were built to comply with the design criteria proposed by AIF, or that these design criteria are materially different from the Atomic Energy Commission's draft GDC which were in effect when the plants were built.[115] NYS disputes Entergy's characterization of the contention as a challenge to the CLB. Instead, NYS posits that NYS-3 argues the following: given that Entergy is complying with design criteria that are not actually applicable to IP2 and IP3, Entergy ''is unable to verify that it has found all relevant systems and components for which aging management is required.''[116] Additionally, NYS represents that the contention does not claim Entergy must comply with the final GDC from 1971, but rather that it must adhere to the draft GDC published in 1967.[117] NYS asserts that it is the 1967 draft GDC that is binding on plants built prior to 1971. Finally, NYS notes that the former owners of IP2 and IP3 asserted in 1980 that each unit complied with the 1971 final GDC.[118]

2. Board Decision — NYS-3

The Commission has stated that the GDC are not applicable to nuclear power plants with construction permits issued prior to May 21, 1971.[119] The Commission added that ''current regulatory processes are sufficient to ensure that plants continue to be safe and comply with the intent of the GDC. Backfitting the GDC would provide little or no safety benefit while requiring an extensive commitment of resources.''[120] In making this determination, the Commission put its imprimatur on the GDC prepared by AIF and used in building the Indian Point facility. The initial draft of the GDC has no bearing on the license renewal process or aging management. The differences between the UFSAR and the GDC are meaningless in the license renewal process. The UFSAR would control because it is the latest analysis, and the adequacy of the UFSAR is not part of the license renewal

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[114] NRC Staff Answer at 32 (citing *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), DD-05-2, 62 NRC 389, 396 (2005)).

[115] NYS Reply at 19.

[116] *Id.* at 20.

[117] *Id.* at 21.

[118] *Id.* at 23.

[119] NRR Office Instruction No. LIC-100, Rev. 100-a, Control of Licensing Bases for Operating Reactors at 2.13 (Mar. 2, 2001) (ADAMS Accession No. ML010660227); SRM SECY-92-223 at 1.

[120] SRM SECY-92-223 at 1.

process. As we noted in NYS-2,[121] challenges to the adequacy of the UFSAR must be brought pursuant to 10 C.F.R. § 2.206. Thus, the Board finds that this contention is outside the scope of this proceeding and therefore *inadmissible*.

D. NYS-4

THE ENVIRONMENTAL REPORT FAILS TO COMPLY WITH THE PROVISIONS OF 10 C.F.R. § 51.53(c)(1) BECAUSE IT FAILS TO PROVIDE A SEPARATE ''ENVIRONMENTAL REPORT'' FOR EACH LICENSE FOR WHICH AN EXTENSION IS SOUGHT.[122]

1. Background — NYS-4

NYS-4 alleges that the LRA does not comply with 10 C.F.R. § 51.53(c)(1) because it does not provide a separate ER for each reactor.[123] NYS bases the contention on the representation that IP2 and IP3 have been treated separately throughout their existence in that they have their own licenses, technical specifications, FSARs and UFSARs, amendment applications, enforcement histories, and, until recently, ownership.[124] But for purposes of the LRA, they are treated as one entity. According to NYS this ''severely distorts the environmental analysis'' because the energy alternative analysis assumes that any alternative must supply as much energy as both plants, and NYS suggests that alternative energy can replace at least one reactor.[125] NYS also argues that the evaluation of offsite land-use impacts in the ER does not look at the impact if only one unit is extended, thereby distorting the results of that analysis.[126]

Entergy opposes the admission of NYS-4 because, in its view, the contention lacks factual or legal foundation, and does not establish a genuine dispute on a material issue of law or fact.[127] Entergy argues that NYS misunderstands 10 C.F.R. § 51.53(c)(1), and suggests that the regulation merely requires that an ER be prepared in a document separate from the rest of the LRA.[128] Entergy asserts that NYS does not provide NEPA case law supporting its claim, whereas, Entergy argues, its approach is consistent with NRC practice and precedent.[129]

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[121] *See* discussion *supra* p. 73.
[122] NYS Petition at 77.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 78.
[126] *Id.* at 79.
[127] Entergy NYS Answer at 44.
[128] *Id.* at 44-45.
[129] *Id.* at 45-48.

The NRC Staff states that it opposes the admission of NYS-4 because NYS does not provide legal support for its interpretation of 10 C.F.R. § 51.53(c)(1).[130] The NRC Staff submits that the ER must only consider the impacts of, and alternatives to, the ''proposed action,'' which, in this instance, is the license renewal of the two units at Indian Point.[131]

In its Reply, NYS supports its interpretation of 10 C.F.R. § 51.53(c)(1), highlighting that the regulation refers to a nuclear power plant in the singular and calls for the ER to be a ''separate document.''[132] NYS asserts that Entergy and the NRC Staff are ignoring the plain language of the regulation along with the fact that both units have been treated separately since they were built. NYS points out that neither Entergy nor the NRC Staff has addressed the point of the contention, which is that, by combining the two units, the ER does not address the alternative of only renewing the license for one unit.[133] NYS contends that Entergy's assertion regarding NEPA case law is ''both counterfactual and misplaced in light of NEPA's intent.''[134] Furthermore, NYS argues that Entergy's position is not supported by NRC precedent.[135]

2. Board Decision — NYS-4

The Board reads 10 C.F.R. § 51.53(c)(1) to require each applicant to submit an ER with its LRA as a separate document — separate from the LRA. Given that there is only a single LRA for IP2 and IP3, the regulation merely requires Entergy to submit a single ER for IP2 and IP3. The ''proposed action'' which the ER must describe under 10 C.F.R. § 51.53(c)(2) is the approval of the LRA in toto and the granting of a license renewal to Entergy for IP2 and IP3 — it is not the approval of the LRA for a specific unit. This does not, however, mean that the ER is beyond challenge, and it may have its adequacy challenged by petitioners, which NYS has done in other contentions.[136] This contention is *inadmissible* because it fails to establish a genuine dispute on a material issue as required by 10 C.F.R. § 2.309(f)(1)(vi).

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[130] NRC Staff Answer at 33.
[131] *Id.* at 33-34.
[132] NYS Reply at 24.
[133] *Id.* at 26.
[134] *Id.* at 27.
[135] *Id.* at 28-29.
[136] *See, e.g.,* NYS-9 through NYS-17 and NYS-29.

E. NYS-5

THE AGING MANAGEMENT PLAN CONTAINED IN THE LICENSE RENEWAL APPLICATION VIOLATES 10 C.F.R. §§ 54.21 AND 54.29(a) BECAUSE IT DOES NOT PROVIDE ADEQUATE INSPECTION AND MONITORING FOR CORROSION OR LEAKS IN ALL BURIED SYSTEMS, STRUCTURES, AND COMPONENTS THAT MAY CONVEY OR CONTAIN RADIOACTIVELY-CONTAMINATED WATER OR OTHER FLUIDS AND/OR MAY BE IMPORTANT FOR PLANT SAFETY.[137]

1. Background — NYS-5

NYS-5 alleges that the LRA does not satisfy 10 C.F.R. §§ 54.21 and 54.29(a) because the LRA does not provide for adequate inspection and monitoring for corrosion or leaks in all buried SSCs that may contain radioactively contaminated water or other fluids and therefore it does not demonstrate that the effects of aging will be adequately managed for the period of extended operation.[138] NYS maintains that buried SSCs are within the scope of 10 C.F.R. §§ 54.4, 54.21 and, accordingly, are within the scope of this proceeding. These SSCs include underground pipes, tanks, and transfer canals that may contain radioactive water.[139] NYS alleges that there is no adequate prevention program designed to replace such SSCs prior to a leak occurring, and that there is no adequate monitoring to determine if and when leakage occurs.[140] The contention also applies to IP1's buried SSCs that will be used for IP2 and IP3 during the extended period of operations.[141]

It is NYS's claim that corrosion jeopardizes the integrity of these SSCs and their ability to perform their intended safety function.[142] Expert opinion provided by NYS points out that the inspection period called for in Entergy's LRA and AMP will be ineffective in preventing or providing early detection of these leaks and, for this reason, these documents are deficient because neither provides an evaluation of the baseline conditions of the buried systems or their many welded joints, nor does it stipulate potential corrosion rates within the facility.[143] In support of this contention, NYS provides numerous examples of inadvertent radiological releases from underground leaks at reactors including Indian Point,

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[137] NYS Petition at 80.
[138] *Id.*
[139] *Id.* at 81-82.
[140] *Id.* at 80.
[141] *Id.* at 80-81.
[142] *Id.* at 81-82.
[143] Declaration of Rudolf H. Hausler at 12-15, 17-18, 23-24.

noting that the breaches in these systems have gone undetected for extended periods, and have only been discovered by happenstance.[144]

Entergy opposes admission of NYS-5 on the grounds that it is outside the scope of the proceeding, not adequately supported, and fails to establish a genuine dispute on a material issue of law or fact.[145] In its opposition, Entergy uses a recent Licensing Board decision in *Pilgrim* to support its position that monitoring for leakage from buried pipes and systems is outside of the scope of license renewal.[146] Entergy asserts that these concerns are covered by ongoing monitoring programs not within the scope of license renewal proceedings.[147] Entergy claims that NYS has not demonstrated how the cited examples of radiological releases at various plants, including Indian Point, pertain to buried systems within the scope of license renewal, nor does it explain how the current AMPs proposed by Entergy would not ensure their intended functions during the period of extended operation.[148]

In regards to the adequacy of its AMP, Entergy suggests that its inspection program in the Appendix B.1.6 of the LRA is consistent with the recommendations in the Generic Aging Lessons Learned (GALL) Report,[149] which specifically address leak prevention as a program element.[150] Entergy also points to other programs listed in the LRA dealing with aging management of buried components that are not challenged by NYS.[151] Furthermore, Entergy represents that baseline conditions of the buried SSCs are established continuously through ongoing maintenance and inspection activities that are outside the scope of this license renewal proceeding.[152]

Entergy postulates that NYS is incorrect in stating that the LRA does not commit to inspections for the buried SSCs of IP1 that are still being used for IP2 and IP3, and refers to section 1.2 of LRA as support for this position.[153] Lastly, Entergy asserts that NYS makes inaccurate statements in its support for NYS-5, and clarifies that management of the transfer canals is not described

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[144] *See* NYS Petition at 84-89.

[145] Entergy NYS Answer at 49.

[146] *Id.* (citing *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), Docket No. 50-293-LR, Licensing Board Order (Denying Pilgrim Watch's Motion for Reconsideration) (Jan. 11, 2008) (unpublished)).

[147] *Id.* at 50.

[148] *Id.* at 51.

[149] NUREG-1801, Rev. 1, ''Generic Aging Lessons Learned (GALL) Report'' (Sept. 2005) [hereinafter GALL Report].

[150] Entergy NYS Answer at 52.

[151] *Id.* at 52-53.

[152] *Id.* at 53.

[153] *Id.* at 53-54.

in the same AMP as buried pipes but in LRA Appendix B.1.36, Structures Monitoring Program, and B.1.41, Water Chemistry Control — Primary and Secondary Program.[154]

The NRC Staff opposes the admission of NYS-5 without a specific reference to the relevant criteria of 10 C.F.R. § 2.309, but implies that NYS's contention is not within the scope of the proceeding in that it raises operational issues, and fails to raise a genuine dispute by not alleging any specific deficiency in Entergy's AMP.[155] Repeating the position it took in *Pilgrim* that monitoring is not a proper contention for license renewal, the NRC Staff concludes that monitoring buried pipes and tanks is a current operating issue which is addressed in the CLB and may not be challenged in license renewal proceedings. The NRC Staff contends that NYS's position on inspections is overbroad and lacks specificity.[156] The NRC Staff echoes Entergy's claims that NYS has not demonstrated how its cited examples of radiological releases pertain to this specific contention and has not shown why Entergy's AMP is deficient.[157] Finally, the NRC Staff claims that NYS failed to mention the existing inspections and monitoring that take place at IPEC, and disagrees with NYS's assertion that the LRA does not discuss preventative measures and internal investigations by pointing to various instances where these areas are addressed in the LRA.[158]

In its Reply, NYS provides an overview of the Licensing Board's Orders in *Pilgrim* to differentiate NYS-5 from the contention in *Pilgrim.*[159] NYS notes that its contention, NYS-5, focuses on preventing contamination from future leaks which have not occurred, but may occur during the renewal term, while the *Pilgrim* contention focused on ongoing monitoring of existing leaks.[160] NYS also asserts that the Licensing Board in *Oyster Creek* admitted a contention based on the same proposition as NYS-5.[161]

NYS disputes the NRC Staff's assertion that the LRA deals with the preventative measures and inspections. It posits that none of the programs that the NRC Staff listed address the inadequacies that NYS's expert, Dr. Rudolph Hausler, raises about the LRA.[162] Finally, NYS highlights that a recent *Pilgrim* document submitted by Entergy, entitled ''Buried Piping and Tanks Inspection Program

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[154] *Id.* at 54-55.

[155] NRC Staff Answer at 34-35.

[156] *Id.* at 36.

[157] *Id.* at 37.

[158] *Id.* at 37-38.

[159] *See* NYS Reply at 30-36.

[160] *See id.* at 36.

[161] *Id.* at 37-38 (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188, 211-12 (2006)).

[162] *See id.* at 38-39.

and Monitoring Program,'' actually addresses many of the issues raised by Dr. Hausler regarding this proceeding and ''purports to implement an entirely new and much broader buried pipe inspection program than the program contained in the LRA.''[163]

2. Board Decision — NYS-5

NYS-5 focuses on the prevention of contamination from leaks from buried SSCs that convey or contain radioactively contaminated water or other fluids which have yet to occur — leaks which may occur during the period of license renewal — and the inadequacy of the AMP to detect and prevent contamination from such leaks.[164] AMPs for SSCs identified by 10 C.F.R. § 54.4 are within the scope of license renewal proceedings, and NYS has provided sufficient information to raise reasonable questions regarding the adequacy of Entergy's AMP for the relevant buried SSCs to establish a genuine dispute with the Applicant. Based on this, the Board *admits* NYS-5 to the extent that it pertains to the adequacy of Entergy's AMP for buried pipes, tanks, and transfer canals that contain radioactive fluid which meet 10 C.F.R. § 54.4(a) criteria. The questions to be addressed at hearing include, *inter alia,* whether, and to what extent, inspections of buried SSCs containing radioactive fluids, a leak prevention program, and monitoring to detect future excursions are needed as part of Entergy's AMP for these components.

While CLB issues are not part of this proceeding, those SSCs subject to AMR are not CLB issues and are within the scope of this proceeding. NYS has identified numerous SSCs, i.e., buried pipes, tanks, and transfer canals, associated with nine critical systems that fall within the scope of Part 54. NYS has raised sufficient questions as to whether Entergy's proposed plan provides sufficient detail to demonstrate that these SSCs will continue to perform their intended function during the period of extended operations.

As it relates to this contention, discussion of proposed inspection and monitoring details will come before this Board only as they are needed to demonstrate that the Applicant's AMP does or does not achieve the desired goal of providing assurance that the intended function of relevant SSCs discussed herein will be maintained for the license renewal period, and specifically, to detect, prevent, or mitigate the effects of future inadvertent radiological releases as they might affect the safety function of the buried SSCs and potentially impact public health. We find that NYS-5 does not challenge the program for inspections and monitoring

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[163] NYS Reply at 41-42.

[164] Neither Entergy nor the NRC Staff challenges NYS's representation that the buried SSCs which convey or contain radioactively contaminated water or other fluids, which are the focus of NYS-5, are SSCs within the scope of Part 54 as defined by 10 C.F.R. § 54.4.

of buried pipes and tanks that are ongoing at Indian Point, but rather focuses on the potential need of the Applicant to include related activities in its AMP for the extended period of operations in order to demonstrate the adequacy of its aging management in accordance with 10 C.F.R. § 54.21(c)(1)(iii).

In regards to IP1, Entergy referenced a generic statement contained in section 1.2 of the LRA to the effect that IP1 SSCs that interface with the operation of IP2 and IP3 were considered in the scoping process and a commitment that their aging effects will be adequately managed for the period of extended operation. However, no other details were provided to (1) define the relevant IP1 components that fall under section 54.21; (2) demonstrate that the IP2/IP3 AMP for buried pipes (contained in the LRA) pertains to IP1 SSCs that are relied upon for the proposed extended operations; and (3) delineate the extent of the proposed aging management activities that will be conducted on the IP1 SSCs. Based on this, the Board concludes that there remains a material dispute as to the existence and adequacy of the AMP for IP1-buried SSCs that are being used by IP2 and IP3 during the license renewal period, and that this dispute is subject to further litigation under this admitted contention.

F. NYS-6

THE LICENSE RENEWAL APPLICATION FOR IP2 AND IP3 FAILS TO COMPLY WITH THE REQUIREMENTS OF 10 C.F.R. §§ 54.21(a) AND 54.29 BECAUSE APPLICANT HAS NOT PROPOSED A SPECIFIC PLAN FOR AGING MANAGEMENT OF NON-ENVIRONMENTALLY-QUALIFIED INACCESSIBLE MEDIUM-VOLTAGE CABLES AND WIRING FOR WHICH SUCH AGING MANAGEMENT IS REQUIRED.[165]

1. Background — NYS-6

NYS-6 alleges that the LRA fails to comply with 10 C.F.R. §§ 54.21(a) and 54.29 because it lacks a specific plan for the aging management of Non-environmentally-qualified (''Non-EQ'') Inaccessible Medium-Voltage Cables and Wiring.[166] As the Board understands this contention, the gist of NYS-6 is that the failure to have a proper AMP for these cables and wires can impact ''(a) the integrity of the reactor coolant pressure boundary; (b) the capability to shut down the reactor and maintain it in a safe shutdown condition; or (c) the capability to prevent or mitigate the consequences of accidents that could result in potential offsite exposures . . . .''[167] NYS contends that the AMP for the cables set out at

[165] NYS Petition at 92.
[166] *Id.*
[167] *Id.* at 92-93.

LRA B.1.23 is inadequate.[168] NYS also discusses various reports, NUREGs, and NRC generic letters that it contends support its contention.[169]

In opposing the admission of NYS-6, Entergy asserts that NYS has ''largely ignored the aging management of Non-EQ Inaccessible Medium-Voltage Cables set forth in the LRA, and has proffered baseless, and frequently inaccurate, claims about the LRA's treatment of this issue.''[170] Entergy suggests that the LRA does fully address the Non-EQ Inaccessible Medium-Voltage Cables and includes an AMP for them.[171] Entergy asserts that NYS has failed to show that this AMP is not in compliance with NRC Regulations or guidance.[172] Additionally, Entergy points to several sections of the LRA, which it argues address the concerns raised by NYS.[173] Entergy urges the Board to reject NYS's claim that the LRA and the AMP for these cables do not abide by certain reports, NUREGs, and NRC generic letters. Entergy states that it has followed the guidelines where relevant and asserts that the LRA is consistent with all NRC-imposed requirements.[174]

The NRC Staff opposes this contention because it concludes that NYS ''incorrectly asserts that information was omitted from the LRA.''[175] The NRC Staff points out that ''an applicant may satisfy 10 C.F.R. § 54.21(a)(3) by committing to develop a program that meets the GALL Report — and the LRA explicitly makes this commitment.''[176] Along with other assurances from Entergy in the LRA that there will be no exceptions to the GALL Report taken and that the AMP will be implemented before the extension period, the NRC Staff finds that Entergy sufficiently addressed the issue in the LRA.

In its Reply, NYS responds to the NRC Staff's point regarding Entergy's commitment to develop an AMP. NYS argues that such a commitment does

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[168] *Id.* at 94. The plan calls for these cables to be tested at least once every 10 years to provide an indication of the conductor insulation. It also includes inspections for water accumulation in manholes at least once every 2 years. However, according to NYS, the LRA fails to adequately identify which cables are encompassed by the AMP. *Id.* (citing LRA B.1.23).

[169] *See id.* at 94-100. NYS specifically indicates that based on NUREG-1800, Rev. 1, ''Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants'' (Sept. 2005) [hereinafter SRP-LR], the GALL Report, NRC Generic Letter 2007-01: ''Inaccessible or Underground Power Cable Failures That Disable Accident Mitigation Systems or Cause Plant Transients'' at 1 (Feb. 7, 2007), as well as the study conducted by the Sandia National Laboratory, ''Aging Management Guidelines for Commercial Nuclear Power Plants — Electrical Cable and Terminations,'' SAND96-0344 (Sept. 1996), Entergy's AMP for these cables is inadequate.

[170] Entergy NYS Answer at 57.

[171] *Id.* at 57-58.

[172] *Id.* at 58.

[173] *See id.* at 58-60.

[174] *See id.* at 61-63.

[175] NRC Staff Answer at 39.

[176] *Id.* at 39-40 (citing LRA at B-81).

not meet the requirements of 10 C.F.R. §§ 54.21(a), 54.29 ''because it illegally removes from Board . . . review a component of the AMP that Entergy is required to subject to such review.''[177] And while the LRA discusses what Entergy will do in the future, NYS notes that it ''did not contain a copy of the actual aging management plan for Non-EQ, Inaccessible, Medium Voltage Cables.''[178] NYS maintains that the sections in the LRA referenced by Entergy do not in fact accomplish its stated goal of identifying the location and extent of Non-EQ Inaccessible Medium-Voltage Cables.[179]

2. Board Decision — NYS-6

The Board decision for NYS-6 has been consolidated with our decision for NYS-7, which involves a closely related subject.[180]

G. NYS-7

THE LICENSE RENEWAL APPLICATION FOR IP2 AND IP3 FAILS TO COMPLY WITH THE REQUIREMENTS OF 10 C.F.R. §§ 54.21(a) AND 54.29 BECAUSE APPLICANT HAS NOT PROPOSED A SPECIFIC PLAN FOR AGING MANAGEMENT OF NON-ENVIRONMENTALLY QUALIFIED INACCESSIBLE LOW-VOLTAGE CABLES AND WIRING FOR WHICH SUCH AGING MANAGEMENT IS REQUIRED.[181]

1. Background — NYS-7

Much along the lines of its claims related to NYS-6, in NYS-7 the Petitioner alleges that the LRA fails to comply with 10 C.F.R. §§ 54.21(a), 54.29 because it lacks a proposed AMP for Non-EQ Inaccessible Low-Voltage Cables and is missing ''a discussion of how the methodology used to select those systems for which aging management would be provided excluded low-voltage cables.''[182]

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[177] NYS Reply at 43. In addition, NYS points out that the NRC Staff's position is inconsistent with the position it took in a similar instance in *Vermont Yankee.* In that case, the NRC Staff objected to the applicant's commitment in its LRA to perform evaluations in the future, though before the extension period, insisting that the analyses had to be part of the LRA. *Id.* at 47 (citing Summary of Telephone Conference Call Held on August 17, 2007, Between the U.S. Nuclear Regulatory Commission and Entergy Nuclear Operations, Inc. Pertaining to the Vermont Yankee Nuclear Power Station License Renewal Application (Sept. 26, 2007) (ADAMS Accession No. ML072630124)).

[178] *Id.* at 44.

[179] *Id.* at 48-49.

[180] *See infra* Part VI.G.2.

[181] NYS Petition at 100.

[182] *Id.* at 101.

Entergy opposes the admission of NYS-7 and suggests that NYS ''presents a number of baseless claims that ignore the information presented by the Applicant in the LRA.''[183] According to Entergy, the LRA ''fully complies with NRC regulations and guidance for low-voltage cables.''[184] Entergy points to sections in the LRA that deal with electrical components and insulated cables, including low-voltage cables. Entergy asserts that it is not required to identify specific cable locations in license renewal proceedings ''because the bounding approach for insulated electrical cables includes all systems regardless of the function of that system. This bounding approach is discussed in the LRA . . . .''[185]

The NRC Staff opposes admission of the contention because ''it fails to identify an omission from the application.''[186] Furthermore, the NRC Staff states that ''neither 10 C.F.R. § 54.21(a) nor § 54.29 require an applicant to propose a specific plan for inaccessible low-voltage non-EQ cables.''[187] Also, the NRC Staff claims that, even though not required, the LRA does address the issue in the AMP for non-EQ cables.[188]

In its Reply, NYS maintains that there was not an AMP for Non-EQ Inaccessible Low-Voltage Cables in the LRA, that these cables are relied upon for safety-related systems, and that ''failure to properly manage the aging of such cables could compromise the safe and reliable operation'' of IP2 and IP3.[189] NYS asserts that Entergy's claim that low-voltage cables are included in sections of the LRA that do not use the term ''low-voltage'' is ''an assertion supported by nothing more than rhetoric of its counsel.''[190] Also, NYS maintains that Entergy's and the NRC Staff's reliance on Appendix B.1.25 of the LRA and the GALL Report is misplaced because these sections apply to accessible cables and not the inaccessible cables which are the focus of the contention.[191]

2. Board Decision — NYS-6 and NYS-7

The NRC Staff represents that an applicant may satisfy 10 C.F.R. § 54.21(a)(3) by committing to develop a program that meets the requirements of the GALL

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[183] Entergy NYS Answer at 65.
[184] *Id.*
[185] *Id.* at 67.
[186] NRC Staff Answer at 43.
[187] *Id.*
[188] *Id.*
[189] NYS Reply at 55.
[190] *Id.*
[191] *Id.* at 57.

Report and that Entergy's LRA makes such a commitment.[192] The NRC Staff notes that ''because the actual AMP has not been submitted, any statements about what it will or will not contain . . . would be to engage in speculation . . . .''[193] We disagree.

Pursuant to section 54.21(a)(3) each application must contain an Integrated Plant Assessment (''IPA'') for which specified components will, *inter alia,* ''demonstrate that the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the CLB for the period of extended operation.'' We do not comprehend how a commitment to develop a program can *demonstrate* that the effects of aging will be adequately managed. While we accept at face value Entergy's representation that it fully intends to develop an AMP consistent with the GALL Report, that commitment does not demonstrate, now, that the effects of aging will be adequately managed. If the presumptive intent of the Applicant were enough, there would be no role for the hearing process — an applicant could vitiate hearing opportunities simply by committing ''to do everything required of it.''[194] Putative intervenors must have the opportunity to challenge the adequacy of the AMP in the context of the hearing process before the license is issued.

NYS-6 and NYS-7 are *admitted.*

H. NYS-8

THE LRA FOR IP2 AND IP3 VIOLATES 10 C.F.R. §§ 54.21(a) AND 54.29 BECAUSE IT FAILS TO INCLUDE AN AGING MANAGEMENT PLAN FOR EACH ELECTRICAL TRANSFORMER WHOSE PROPER FUNCTION IS IMPORTANT FOR PLANT SAFETY.[195]

1. Background — NYS-8

NYS-8 alleges that the LRA violates 10 C.F.R. §§ 54.21(a) and 54.29 because it does not include an AMP for each electrical transformer whose proper function is

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[192] NRC Staff Answer at 39-40. The NRC Staff specifically notes that Entergy's LRA states that the Non-EQ Inaccessible Medium-Voltage Cable Program ''will be consistent with the program attributes described in NUREG-1801, Section XI.E3.'' *Id.* at 40 (citing LRA at B-81). This, in the NRC Staff's view, is adequate.

[193] *Id.* at 40.

[194] Contentions pointing out deficiencies in an application are not subject to rejection as ''speculative'' for assuming that the deficiencies may not be corrected. As has been noted recently, a defect in an application can give rise to a valid ''contention of omission'' that is not subject to rejection as speculative. *See Shaw Areva MOX Services* (Mixed Oxide Fuel fabrication Facility), LBP-07-14, 66 NRC 169, 205-06 (2007) and LBP-08-11, 67 NRC 460, 502-03 (2008) (concurring opinion).

[195] NYS Petition at 103.

important for plant safety. NYS argues that the management of these transformers is within the scope of license renewal proceedings because transformers perform their safety function without moving parts and without a change in configuration or properties.[196] As supported by expert opinion,[197] NYS represents that failure to properly manage these electrical transformers may compromise (1) the integrity of the reactor coolant pressure boundary; (2) the capability to shut down the reactor and maintain it in a safe shutdown condition; or (3) the ability to prevent or mitigate the consequences of accidents.[198] Additionally, NYS points out that the NRC Staff has identified transformers for which AMPs should be provided, but which are not in the LRA.[199]

Entergy opposes admission of NYS-8 because, in its view, NYS failed to provide sufficient factual foundation for the contention; the contention is outside the scope of the proceeding; and the contention fails to establish a genuine dispute with the Applicant on a material issue of law or fact. In its opposition, Entergy represents that only certain transformers are within the scope of the proceeding, specifically the safety-related transformers necessary for compliance with 10 C.F.R. §§ 50.48, 50.63.[200] Because NRC license renewal regulations require AMPs only for passive components that perform an intended function under 10 C.F.R. § 54.4, Entergy maintains that consideration of other transformers is outside the scope of license renewal.[201] Specifically, Entergy argues that transformers are listed as active components not subject to AMR[202] and, as active machines, are managed by the ongoing Maintenance Rule Program in accordance with 10 C.F.R. § 50.65.[203] In response to NYS's point, Entergy asserts that the transformer support structures (which NYS believes require an AMP) ''are managed in accordance with the Structures Monitoring Program, discussed in LRA Appendix B.1.36.''[204]

The NRC Staff opposes the admission of NYS-8 without reference to any of the 10 C.F.R. § 2.309 criteria, by contending that 10 C.F.R. § 54.21(a)(1)(i) does not require AMR for transformers.[205] The NRC Staff's position is rooted on the

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[196] *Id.; see also* 10 C.F.R. §§ 54.4(a), 54.21(a)(1)(i).

[197] Declaration of Paul Blanch at 5-6 (Nov. 28, 2007).

[198] NYS Petition at 104.

[199] *Id.* at 105.

[200] Entergy NYS Answer at 69.

[201] *Id.*

[202] *Id.* at 70 (citing NEI 95-10, App. B, Rev. 6, ''Industry Guideline for Implementing the Requirements of 10 C.F.R. Part 54 — The License Renewal Rule''). This guideline was endorsed by NRC Regulatory Guide 1.188, Rev. 1, at 4.

[203] *Id.*

[204] *Id.* at 71 (citing LRA § 2.4.3; *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 341 (1999)).

[205] NRC Staff Answer at 45.

premise that this equipment is similar to the components excluded from AMR in 10 C.F.R. § 54.21(a)(1)(i), i.e., switchgears, transistors, batteries, power inverters, battery chargers, and power supplies. Given that the regulation is clear that this list is not inclusive of all structures and components that are excluded from AMR, the NRC Staff hypothesizes that electric transformers should also be excluded based on their similarity with the listed components.[206] The NRC Staff argues that its position is consistent with the conclusions in the Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants (''SRP-LR''), which interprets 10 C.F.R. § 54.21(a)(1)(i) as excluding transformers, just as the regulations exclude other power-supply-related structures and components.[207] As clarification, the NRC Staff opines that NYS misunderstood its comments towards Entergy and, rather than requiring an AMP, notes that transformers for offsite power are typically subject to AMR, but not necessarily an AMP.[208]

In its Reply, NYS argues that the NRC Staff's interpretation that transformers are outside the scope is incorrect and not binding on the Board because its arguments are not based on law but on regulatory guidance.[209] NYS asks the Board to ''reject the arguments put forth by Staff and Entergy that electrical transformers whose functions are important to plant safety are outside the scope of Rule 54.''[210] NYS also emphasized that failure to properly manage the aging of electrical transformers could result in public exposures exceeding 10 C.F.R. Part 100 limits due to consequences beyond those of the Design Basis Accidents from the loss of all station power.[211]

2. Board Decision — NYS-8

Transformers (necessary for compliance with 10 C.F.R. §§ 50.48 and 50.63) nominally perform their safety-related function without moving parts and without a change in configuration or properties. Accordingly, 10 C.F.R. § 54.21(a)(1) defines this component as a piece of equipment subject to AMR. While similar to other items that are excluded from AMR, the absence of this visible and obvious component from the exclusion list cannot automatically be considered an oversight or a natural result of the incomplete list of examples presented in the regulations.

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[206] *Id.*

[207] *Id.* (citing SRP-LR at 2.1-23).

[208] *Id.*

[209] NYS Reply at 59 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-03-17, 58 NRC 221, 240-41 (2003)).

[210] *Id.* at 60-61.

[211] *Id.* at 58.

Entergy states that industry guidance lists transformers as active components, and alleges that this equipment performs its function with a change in configuration or properties.[212] The Applicant does not provide any supporting justification for its opinion. Moreover, NEI documents, like NEI 95-10, and other regulatory guidance documents, are merely suggestions with no legal authority to supercede the plain language of the regulatory criteria that requires AMR for a structure or component that performs its safety functions without moving parts and without a change in configuration or properties.[213]

Neither Entergy nor the NRC Staff has provided any legally binding justification to exclude transformers from AMR beyond an apparent similarity to other components that have been excluded by 10 C.F.R. § 54.21(a)(1)(i), nor, as mentioned, has either party provided any explanation on how a transformer changes its configuration or properties in performing its functions.

Based on this, the Board finds that NYS has shown that this contention is within the scope of the proceeding and has established a genuine dispute of material fact, and *admits* NYS-8 to the extent that it questions the need for an AMP for safety-related electrical transformers that are required for compliance with 10 C.F.R. §§ 50.48 and 50.63. We note that 10 C.F.R. § 54.21(a)(1)(i) lists components that require AMPs and also excludes other components that do *not* require AMPs. In addressing this contention, the Board will require, *inter alia,* representations from the parties to help us determine whether transformers are more similar to the included, or to the excluded, component examples. While the Petitioner also contends that the transformer support structures are within the scope of license renewal proceedings,[214] it does not recognize, as pointed out by Entergy, that these passive structures are managed by the Structures Monitoring Program.[215] The Board *rejects* this aspect of NYS-8.

I. NYS-9

THE ENVIRONMENTAL REPORT (§§ 7.3 AND 7.5) FAILS TO EVALUATE ENERGY CONSERVATION AS AN ALTERNATIVE THAT COULD DISPLACE THE ENERGY PRODUCTION OF ONE OR BOTH OF THE INDIAN POINT REACTORS AND THUS FAILS TO CARRY OUT ITS OBLIGATIONS UNDER 10 C.F.R. § 51.53(c)(2).[216]

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[212] Entergy NYS Answer at 70.

[213] *McGuire/Catawba,* LBP-03-17, 58 NRC at 240-41.

[214] NYS Petition at 104.

[215] Entergy NYS Answer at 71.

[216] NYS Petition at 106.

1. Background — NYS-9

NYS-9 alleges that Entergy violates its obligations under 10 C.F.R. § 51.53(c)(2), because its ER lacks an analysis of energy conservation alternatives that evaluate both the benefits and costs of denial of a license extension for either or both units.[217] NYS contends that Entergy unreasonably limits the alternatives to the continued operation of either IP2 or IP3 to alternatives that are able to replace the full base-load capacity of approximately 2158 gross MWe.[218] At a minimum, NYS contends that energy conservation should also be analyzed for the ''no-action'' alternative.[219]

Studies cited by NYS represent that the energy produced by one or both units can be replaced by energy conservation by 2015.[220] Allowing Indian Point to remain an energy option, according to NYS, ''inhibits the implementation of environmentally preferable energy conservation.''[221] NYS argues that implementing ''energy efficiency programs is the equivalent of generating energy . . . . [and] have significantly less adverse environmental impacts than the extension of the operating license[s].''[222] NYS goes on to detail a plan initiated by the Governor of NYS in April 2007 to achieve a 15% reduction in energy consumption by 2015 using energy conservation alone.[223]

Entergy opposes admission of NYS-9 because it fails to provide facts or expert opinion, and fails to establish a genuine dispute with the Applicant on a material issue of law or fact.[224] Entergy argues that the ER needs to look only at reasonable alternatives and given that the ''goal of the proposed action is the renewal of the operating licenses that allow production of approximately 2158 MWe of base-load power,'' the ER does not have to consider in detail alternatives that do not meet this goal.[225] The Applicant posits that this position is supported by the Generic Environmental Impact Statement for License Renewal of Nuclear Plants (''GEIS''), which states that the NRC has concluded that a reasonable set of

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[217] *Id.*

[218] *Id.*

[219] *Id.* at 108.

[220] *Id.* at 107.

[221] *Id.* at 108.

[222] *Id.* at 109.

[223] *Id.* at 110-17.

[224] Entergy NYS Answer at 74.

[225] *Id.* at 76. Entergy posits that this interpretation is consistent with the Licensing Board's ruling in the *Monticello* license renewal proceeding and with controlling Commission precedent. *Id.* (citing *Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 753 (2005); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 156-58, *aff'd,* CLI-05-29, 62 NRC 801 (2005), *aff'd sub nom. Environmental Law & Policy Center v. NRC,* 470 F.3d 676 (7th Cir. 2006)).

alternatives for license renewal should be limited to discrete electric generation sources that are feasible and available.[226]

Even though the concept of energy conservation does not meet the GEIS criteria as a discrete energy source, Entergy provides a brief analysis of utility-sponsored conservation in its ER. It concludes that it is unrealistic to replace the generation capacity at the site solely with conservation.[227] Entergy also asserts that when a private entity and not a federal agency is sponsoring the project, significant weight should be given to the preferences of the sponsor in the consideration of alternatives.[228]

The NRC Staff in opposing the admission of NYS-9 states that ''energy conservation is outside the scope of required NEPA alternatives analysis.''[229] The NRC Staff supports its position by referencing the GEIS statement that the reasonable set of alternatives is limited to discrete electric generation sources that are feasible technically and viable commercially.[230] The NRC Staff also cites *Clinton* as an indication that the Commission does not believe energy conservation is a reasonable alternative that would advance the goals of a nuclear energy project,[231] and, based on this, the NEPA ''rule of reason'' does not require an applicant to include an analysis of conservation as an alternative.[232]

In its Reply, NYS responds to Entergy and the NRC Staff's Answers regarding NYS-9 through NYS-11 collectively, claiming that these three contentions challenge the adequacy of the ER's analysis of the ''no-action'' alternative.[233] NYS asserts that while the NRC Staff and Entergy focus on the GEIS, *Monticello,* and *Clinton,* they ignore ''relevant NRC regulations regarding the appropriate treatment for the 'no-action' alternative.''[234] These include sections 8.1 and 8.2 of the GEIS, which ''indicate that, when considering the 'no-action' alternative, the ER must provide a detailed analysis of renewable energy resources and energy conservation.''[235] NYS asserts that the Licensing Board's decision in *Monticello* was not, as suggested by Entergy, based on the contention being ''inherently

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[226] *Id.* at 75 (citing NUREG-1437, Vol. 1, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants'' § 8.1 (May 1996) (ADAMS Accession No. ML040690705) [hereinafter GEIS]).

[227] *Id.* at 78.

[228] *Id.* at 77-78 (citing *Monticello,* LBP-05-31, 62 NRC at n.83).

[229] NRC Staff Answer at 47.

[230] *Id.* (citing GEIS § 8.1).

[231] *Id.* (citing *Exelon Generating Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 805, 807 (2005), *aff'g* LBP-05-19, 62 NRC 134 (2005)).

[232] *Id.*

[233] NYS Reply at 61.

[234] *Id.*

[235] *Id.* at 62.

inadmissible, but instead was based expressly on the failure of the intervener to provide any substantial supporting evidence for its contention.''[236] NYS argues that its contention is supported by sufficient evidence to distinguish it from the contention that was rejected in *Monticello.*

2. Board Decision — NYS-9

The Board disagrees with NYS's argument that Entergy's alternatives analysis for the defined goal of producing 2158 MWe of base-load power generation is deficient by ignoring energy conservation, and finds this portion of NYS-9 *inadmissible.* However, the Board finds that NYS has demonstrated that there is a material dispute with the Applicant regarding the omission of energy conservation from its ''no-action'' alternative analysis and *admits* this portion of NYS-9. In its Petition, NYS addressed the need for an applicant to discuss energy conservation for both the alternatives analysis and for the ''no-action'' alternative.[237] For the alternatives analysis, the Commission has affirmed that NEPA does not require it to look at every conceivable alternative,[238] but rather requires only consideration of feasible, nonspeculative, reasonable alternatives.[239] It is clear from Commission decisions that the Applicant in the alternatives analysis in its ER need only consider the range of possibilities that are capable of achieving the goals of the proposed action.[240] In the instant case, this action is to relicense IPEC to generate approximately 2158 MWe of base-load energy for an additional 20 years of operation.

Consistent with the GEIS,[241] this Board agrees that the reasonable alternatives for license renewal proceedings are limited to discrete electric generation sources that are feasible technically and available commercially. Ignoring the feasibility question and its lack of commercial availability, energy conservation is clearly not discrete electric generation of any sort. This position is supported on an even broader basis in *Clinton,* where the Commission held that NEPA does not require

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[236] *Id.* at 63.

[237] NYS Petition at 106, 108.

[238] *Monticello,* LBP-05-31, 62 NRC at 753 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 551 (1978)).

[239] *Id.* (citing *Natural Resources Defense Council, Inc. v. Morton,* 458 F.2d 827, 834, 837 (D.C. Cir. 1972); *City of Carmel-by-the-Sea v. Department of Transportation,* 123 F.3d 1142, 1155 (9th Cir. 1997); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 65 (1991)).

[240] *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 144-45 (1993).

[241] GEIS § 8.1.

an analysis of conservation or efficiency as an alternative to an early site permit.[242] As affirmed by the Commission, NEPA's ''rule of reason'' does not demand an analysis of energy efficiency, because, *inter alia,* conservation measures are beyond the ability of an applicant to implement, and are therefore outside the scope required by a NEPA analysis of reasonable alternatives.[243] In summary, the Board agrees that it is not necessary for Entergy to look at energy conservation in its alternatives analysis for license renewal.

That said, the Board notes that the statements in the GEIS and in *Clinton* relate specifically to the alternatives analysis, while NYS-9 also raises the issue of whether there is a need for an applicant to discuss energy conservation as part of the ''no-action'' alternative in its ER.[244] While both section 8.1 of the GEIS and *Clinton* are silent relative to this aspect of NYS-9, the Board concludes that section 8.2 of the GEIS addresses the need to consider energy conservation for the ''no-action'' alternative in stating that denial of an LRA may, in some cases, lead to energy conservation measures, whose environmental impacts, in turn, would be included in the ''no-action'' alternative.

In summary, NYS has provided a concise statement of alleged facts, and established a genuine dispute with the Applicant on a material issue, specifically, the need for Entergy to consider energy conservation for the ''no-action'' alternative in its ER. The Board *admits* NYS-9 in this narrow aspect of NYS's argument related to the ''no-action'' alternative. We *reject* those portions of NYS-9 that allege ER deficiencies due to Entergy's lack of considering energy conservation in its alternatives analysis for the defined goal of producing 2158 MWe of base-load generation. As clarified by the referenced Commission precedents, energy conservation is not within the range of reasonable alternatives related to the scope and goals of the proposed license renewal, and is not a discrete electric generation source that is feasible technically and available commercially. For these reasons, the Board finds that the portion of NYS-9 relating to the alternatives analyses is *inadmissible,* but the position of NYS-9 relating to the ''no-action'' alternative is *admissible.*

J. NYS-10

IN VIOLATION OF THE REQUIREMENTS OF 10 C.F.R. § 51.53(c)(3)(iii) AND OF THE GEIS § 8.1, THE ER (§ 8.3) TREATS ALL ALTERNATIVES TO LICENSE RENEWAL EXCEPT NATURAL GAS OR COAL PLANTS AS UNREASONABLE AND PROVIDES NO SUBSTANTIAL ANALYSIS OF THE

[242] *Clinton,* CLI-05-29, 62 NRC at 806-07.

[243] *Id.* at 807-08.

[244] *See* NYS Petition at 108; *see also* NYS Reply at 61-62, 65, 70-71.

POTENTIAL FOR OTHER ALTERNATIVES IN THE NEW YORK ENERGY MARKET.[245]

1. Background — NYS-10

NYS-10 alleges that Entergy does not comply with the requirements of 10 C.F.R. § 51.53(c)(3)(iii) and section 8.1 of the GEIS by eliminating analysis of all alternatives in the ER except natural gas or coal plants as unreasonable because the other alternatives cannot generate the base-load supply of 2158 MWe of electricity.[246] NYS notes that the GEIS states that a reasonable set of alternatives includes wind energy, photovoltaic (''PV'') cells, solar thermal energy, hydroelectricity, geothermal energy, incineration of wood waste and municipal solid waste (''MSW''), energy crops, oil, advanced light water reactors (''LWR''), and delayed retirement of existing nonnuclear plants.[247] The stated foundation for NYS-10 is that Entergy has rejected alternative technologies as not feasible technically even though the GEIS declared that all alternatives must be evaluated for each license renewal proceeding.[248] NYS argues that Entergy violates 10 C.F.R. § 51.53(c)(2) by using the need for power as a justification for rejecting other possible alternatives. To support its contention, NYS represents how alternative energy options could potentially be used to generate the base-load electricity currently supplied by IP2 and IP3.[249]

NYS proposes two alternatives not considered in the ER: ''(1) repowering existing power plants to increase their efficiency, increase their power output and reduce their pollution, and (2) enhancing existing transmission lines,''[250] and claims that Entergy's arguments against wind power are ''outdated.''[251]

In opposing the admission of NYS-10, Entergy stands by its position in the ER that it has considered these energy alternatives and appropriately eliminated each one as unreasonable because each alternative is not a feasible technology for generating 2158 MWe of base-load electricity.[252] In response to NYS's criticism of its analysis of wind power, Entergy asserts that like solar power, wind power is not always available and cannot provide the necessary amount of power.[253] Entergy reads the GEIS as limiting the alternatives analysis to single and discrete

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[245] NYS Petition at 120.
[246] *Id.*
[247] GEIS § 8.1.
[248] NYS Petition at 121 (citing GEIS § 8.1).
[249] *See id.* at 123-37.
[250] *Id.* at 122.
[251] *Id.* at 126.
[252] Entergy NYS Answer at 81 (quoting ER at 8-50).
[253] *Id.* at 81-82.

sources of energy and thus it concludes that it is not required to consider several alternatives in combination with each other.

The NRC Staff does not oppose the admission of NYS-10 ''to the extent that it challenges the adequacy of the analysis of renewable energy alternatives provided in Section 8 of the ER.''[254] The NRC Staff adds that it opposes ''the admission of any assertion that the ER should consider 'demand-side' alternatives such as energy efficiency and conservation,'' or other alternatives like repowering existing power plants or enhancing transmission lines that are beyond the ability of Entergy to implement.[255]

NYS replied collectively to Entergy and the NRC Staff's answers regarding NYS-9 through NYS-11, because, in its opinion, these three contentions challenge the adequacy of the ER's analysis of the ''no-action'' alternative. However, unlike in NYS-9, nowhere in its Petition for NYS-10 did NYS allude directly to the ''no-action'' alternative, but focused solely on the need to address other energy sources in its alternatives analysis.

2. Board Decision — NYS-10

NYS claims that Entergy's ER is deficient for not providing detailed analysis of other alternatives to license renewal besides natural gas or coal-fired plants. The Board finds that this is a direct attack on NRC Regulations and is not within the scope of the license renewal proceeding. Specifically, as noted in the Board decision on NYS-9,[256] the Commission has concluded for the alternatives analysis that NEPA does not require it to look at every conceivable alternative,[257] but rather requires only consideration of feasible, nonspeculative, and reasonable alternatives.[258]

Accordingly, the Commission has determined that the Applicant, in its ER, need only consider the range of alternatives that are capable of achieving the goals of the proposed action which, in the instant case, is the generation of approximately 2158 MWe of base-load energy for an additional 20 years.[259] Consistent with GEIS § 8.1, this Board considers the reasonable alternatives for license renewal proceedings to be limited to discrete electric generation sources that are feasible technically and available commercially. We find that there is no legal requirement (nor has NYS proffered any) for the Applicant to analyze in

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[254] NRC Staff Answer at 48.

[255] *Id.* at 48-49.

[256] *See supra* Part VI.I.2.

[257] *Monticello,* LBP-05-31, 62 NRC at 753 (citing *Vermont Yankee,* 435 U.S. at 551).

[258] *Id.* (citing *City of Carmel-by-the-Sea,* 123 F.3d at 1155; *Shoreham,* CLI-91-2, 33 NRC at 65).

[259] *See Hydro Resources,* CLI-01-4, 53 NRC at 55; *Rancho Seco,* CLI-93-3, 37 NRC at 144-45.

detail options that are not discrete, feasible sources for 2158 MWe of base-load energy.

NYS presents several different alternatives that it asserts should have been analyzed by Entergy in the ER.[260] However, NYS fails to show that any one of these alternatives would produce the base-load supply of electricity that would equal that produced by the relicensing of IP2 and IP3. The evidence offered by NYS suggests that it would be possible for a comprehensive system, combining the various energy sources offered and incorporating greater energy efficiency, to make up for the loss of 2158 MWe of electricity that would occur if Indian Point were not relicensed. Nonetheless, the Applicant is required to analyze only discrete energy sources as alternatives[261] — a claim that cannot be made for any of the alternatives provided by NYS.

Exclusive of these arguments, Entergy does, in fact, address alternatives in ER §§ 7.5, 8.3, which summarized various possibilities including wind, solar, hydropower, geothermal, wood energy, municipal solid waste, other biomass-derived fuels, oil, fuel cells, delayed retirement, utility-sponsored conservation, purchased/imported power, and a combination of alternatives. The Applicant also provides reasons why it did not further analyze each of these alternatives in the same manner as it did for coal generation, natural gas generation, nuclear generation from another plant, and imported power.[262]

We understand NYS's argument in terms of the wording of GEIS § 8.1. The beginning of the section states that ''all reasonable alternatives to a proposed action'' must be considered under NEPA and that the NRC ''will conduct a full analysis of alternatives at individual license renewal reviews.''[263] The GEIS defines the ''reasonable set of alternatives'' that need detailed review, however, as the discrete electric generation sources discussed above. This lays out the alternatives that need to be analyzed, and we find that Entergy has analyzed the alternatives for which such analysis is required. Thus, NYS has failed to establish a genuine dispute on this issue.

The NRC Staff does not oppose the admission of NYS-10 based on the inadequacy of Entergy's analysis of renewable energy alternatives provided in its ER. However, it provides no viable argument which supports its alleged requirement for Entergy to further analyze renewable energy options in its ER.

In passing, we note that we admitted NYS-9 based exclusively on its challenge to the ''no-action'' alternative analysis, and rejected any part of the contention

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[260] These include: (1) repowering existing power plants, (2) enhancing existing transmission lines, (3) various renewable sources of energy — wind, solar, etc., (4) energy efficiency. NYS Petition at 122-37.

[261] GEIS § 8.1; *Monticello,* LBP-05-31, 62 NRC at 753.

[262] ER § 8.3.

[263] GEIS § 8.1.

that asks for conservation to be included in the alternatives analysis. Here, we are faced with a contention that, in the initial Petition, only focused on the alternatives analysis and did not ask us to look at the ''no-action'' alternative analysis.[264]

In summary, NYS challenges the adequacy of the alternatives analysis in the ER. Given that the energy options raised by NYS are not ''single, discrete, feasible electric generation sources'' that are capable of producing 2158 MWe of base-load electricity, we must *reject* the contention as falling outside the license renewal proceeding and for failing to establish a genuine dispute on a material issue of law or fact.

K. NYS-11

CONTRARY TO THE REQUIREMENTS OF NEPA AND 10 C.F.R. PART 51, THE ER FAILS TO FULLY CONSIDER THE ADVERSE ENVIRONMENTAL IMPACT THAT WILL BE CREATED BY LEAVING IP2 AND/OR IP3 AS AN ENERGY OPTION BEYOND 2013 AND 2015.[265]

1. Background — NYS-11

NYS-11 alleges that the ER fails to consider the adverse environmental impact of renewing the license as required by NEPA and 10 C.F.R. Part 51.[266] NYS contends that as long as IP2 or IP3 remain operational, the incentive to utilize energy conservation and renewable energy is diminished, which, in turn, reduces the likelihood of implementing these options.[267] NYS-11 contends that the ER does not thoroughly analyze the environmental costs and benefits of IP2 or IP3 in contrast with energy conservation because it dismisses demand-side management options as irrelevant and infeasible without considering the evidence showing that renewable energy sources are capable of displacing all the energy that IP2 and IP3 can generate over the next 20 years.[268]

NYS asserts that NEPA and 10 C.F.R. Part 51 lay out the purpose of the environmental review, namely, ''to determine whether there are alternatives that will achieve the goal of the proposal with less environmental damage, not whether it will be to the economic advantage of the proponent of the proposal to implement

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[264] No judgment, one way or another, should be made on how the Board would have addressed this issue if it was based on the needs for the ''no-action'' alternative. The Petitioner first applied the ''no-action'' alternative as a basis for this contention in its Reply, which the Board considers to be a new contention and therefore inadmissible.

[265] NYS Petition at 138.

[266] *Id.*

[267] *Id.*

[268] *Id.* at 138-39.

such alternatives.''[269] NYS states that it is the NRC that must decide whether the proposed license renewal is the preferable course of action, and is not constrained by what the Applicant wishes to do.[270]

Entergy posits that NYS-11 is ''essentially . . . Contentions 9 and 10 recast as an additional contention.''[271] It reaffirms its position from NYS-9 and NYS-10 that ''the energy alternatives analysis in the ER is consistent with the GEIS governing NRC precedent.''[272] In response to NYS's argument that renewing the licenses will create a disincentive for energy conservation and the use of renewable energy, Entergy points out that it has ''no legal or other obligation to shut down IP2 and/or IP3 to help NYS meet its energy conservation goals.''[273]

The NRC Staff opposes the admission of NYS-11 because, in its view, the contention seeks to ''require [Entergy] to consider not whether alternatives might exist, but whether its operation of the facility would lead other decision-makers to put aside other energy options.''[274] The NRC Staff also argues that NYS fails to present factual support for this assertion.[275]

In its Reply, NYS responds specifically to the argument made by the NRC Staff that there is no evidence that renewing the licenses would have an adverse environmental impact. NYS asserts that it has identified in its Petition ''substantial adverse environmental impacts associated with allowing Indian Point to operate.''[276] NYS adds that Entergy ''devotes two chapters and dozens of pages to an analysis of the adverse impacts of allowing Indian Point to operate.''[277] NYS asserts that the Applicant has misread its contention. It asserts that NYS-11 is not arguing that IP2 and IP3 should be shut down, but rather that the ER failed to discuss how its closure might encourage other environmentally preferable options.[278]

2. Board Decision — NYS-11

The Board finds that *Clinton*[279] and *Monticello*[280] are controlling in this in-

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[269] *Id.*
[270] *Id.* at 139.
[271] Entergy NYS Answer at 84.
[272] *Id.* (citing GEIS § 8-1; *Monticello,* LBP-05-31, 62 NRC at 753).
[273] *Id.* at 85 (citing *Clinton,* CLI-05-29, 62 NRC at 806).
[274] NRC Staff Answer at 49.
[275] *Id.* at 49-50.
[276] NYS Reply at 74 (citing NYS Petition at 140-73, 245-96).
[277] *Id.* (citing ER §§ 6, 8).
[278] *Id.* at 75.
[279] *Clinton,* CLI-05-29, 62 NRC 801.
[280] *Monticello,* LBP-05-31, 62 NRC 735.

stance. The main thrust of NYS-11, in terms of differentiating it from NYS-9 and NYS-10, is that the ER does not consider the proposition that, so long as Indian Point remains open, the incentive for energy conservation and the creation of renewable energy sources is diminished.[281] However, the Commission in *Clinton* stated that ''neither the NRC nor [the applicant] has the mission (or authority) to implement a general societal interest in 'energy efficiency.' ''[282] While this specific statement deals only with energy efficiency, the Board makes no practical distinction between energy efficiency and energy conservation, an approach consistent with the Commission's grouping of energy efficiency, energy conservation, and other demand-side management options.[283]

Entergy presented renewable energy options in its ER,[284] but eliminated them due to their inability to provide 2158 MWe of base-load power on a consistent basis. The Board finds that Entergy's decision to exclude renewable energy options is reasonable because these sources are not always available and, with the current technology, cannot meet the goals of the LRA, a conclusion that is in line with the GEIS and *Monticello.*[285]

The Petitioner makes no specific reference to the ''no-action'' alternative in NYS-11. As we discussed in our decision to admit a limited version of NYS-9, an applicant need not analyze conservation and energy efficiency as alternatives outside of the ''no-action'' alternative analysis.

For the reasons stated above, the Board finds that NYS-11 is *inadmissible* because the issues raised are outside the scope of this proceeding, and are a direct challenge to the regulations.[286] Additionally, while we agree with NYS that it is the NRC that must comply with NEPA, and that the NRC is not constrained by the content of the Applicant's ER, the NRC Staff's determination is not ripe for review at this point, and must await publication of the NRC Staff's Final Environmental Impact Statement (''FEIS'').

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[281] NYS Petition at 138.

[282] *Clinton,* CLI-05-29, 62 NRC at 806. The Seventh Circuit upheld this decision stating that:

> Because [the Applicant] was a private company engaged in generating energy for the wholesale market, the Board's adoption of baseload energy generation as the purpose behind the [proposed action] was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The adopted purpose was broad enough to permit consideration of a host of energy generating alternatives. Moreover, it was reasonable for the Board to conclude that NEPA did not require consideration of energy efficiency alternatives when [the Applicant] was in no position to implement such measures.

Envtl. Law & Policy Ctr., 470 F.3d at 684 (citations omitted).

[283] *Clinton,* CLI-05-29, 62 NRC at 806.

[284] ER at 8-50.

[285] *See* GEIS § 8.1; *see also Monticello,* LBP-05-31, 62 NRC at 753.

[286] 10 C.F.R. § 2.335(a).

L. NYS-12

ENTERGY'S SEVERE ACCIDENT MITIGATION ALTERNATIVES (SAMA) FOR INDIAN POINT 2 AND INDIAN POINT 3 DOES NOT ACCURATELY REFLECT DECONTAMINATION AND CLEAN UP COSTS ASSOCIATED WITH A SEVERE ACCIDENT IN THE NEW YORK METROPOLITAN AREA AND, THEREFORE, ENTERGY'S SAMA ANALYSIS UNDERESTIMATES THE COST OF A SEVERE ACCIDENT IN VIOLATION OF 10 C.F.R. § 51.53(c)(3)(ii)(L)[287]

1. Background — NYS-12

NYS-12 asserts that the cost formula contained in the MELCOR Accident Consequence Code System (''MACCS2'') computer program used by Entergy underestimates the costs associated with a severe accident because the code uses decontamination and cleanup costs based on large-sized particles.[288] NYS argues that a ''severe accident resulting in the dispersion of radionuclides from a nuclear power plant likely will result in the dispersion of small-sized radionuclides'' that are more expensive to remove and clean up than large-sized radionuclide particles.[289] Therefore ''the result would be a significantly higher cost value for an accident at Indian Point.''[290] NYS states that this means the SAMA analysis in the LRA did not accurately determine which mitigation measures are cost-effective.[291] NYS maintains that the SAMA analysis should ''incorporate the analytical framework contained in the 1996 Sandia National Laboratories report concerning site restoration costs as well as recent studies examining the cost consequences in the New York metropolitan area.''[292]

Entergy opposes the admission of NYS-12 because, in its view, NYS ''inappropriately seeks to litigate the acceptability of using the MACCS2 code . . . .''[293] Entergy also asserts that the Licensing Board in *Pilgrim* rejected the arguments of

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[287] NYS Petition at 140.

[288] *Id.*

[289] *Id.* at 141.

[290] *Id.*

[291] *Id.* at 141-42.

[292] *Id.* at 142 (citing D. Chanin and W. Murfin, ''Site Restoration: Estimation of Attributable Costs from Plutonium-Dispersal Accidents,'' SAND96-0957, Unlimited Release, UC-502 (May 1996) [hereinafter Sandia Report]; Beyea, Lyman, von Hippel, *Damages from a Major Release of* ^{137}*Cs into the Atmosphere of the United States,* Science and Global Security, Vol. 12 at 125-36 (2004); Lyman, *Chernobyl on the Hudson? The Health and Economic Impacts of a Terrorist Attack at the Indian Point Nuclear Power Plant,* Union of Concerned Scientists (Sept. 2004).

[293] Entergy NYS Answer at 86.

a petitioner who presented a generic challenge to the MACCS2 code,[294] and that many of NYS's criticisms of the MACCS2 code are not supported by documents or expert opinion. Entergy also argues that its use of the code ''is consistent with NRC-endorsed guidance.''[295] Furthermore, Entergy suggests that NYS has failed to point to specific parts of the LRA that it finds to be deficient or not in compliance with NRC Regulations.[296] Instead, Entergy maintains that NYS merely refers to three documents that should be used to ''determine the present and future value of decontamination costs, sans any supporting rationale or discussion.''[297]

The NRC Staff also opposes the admission of NYS-12. The NRC Staff argues that NYS has failed to establish the relevance of the Sandia Report on which it relies.[298] The NRC Staff represents that the Sandia Report deals with dispersion of plutonium from a nuclear weapon, while the release at issue in this proceeding is from a severe accident at a nuclear power plant.[299] Additionally, the NRC Staff faults NYS for not including a factual foundation for its challenge to the MACCS2 code, alleging that NYS has failed to ''show how the Sandia Report is superior, or how the MACCS2 code is defective.''[300]

In its Reply, NYS notes that expert testimony is not required under 10 C.F.R. § 2.309(f) where the regulations require either expert testimony or a concise statement of facts.[301] NYS states that the Board should reject the challenges to the Sandia Report presented by NRC Staff and Entergy because the Sandia Report addresses the underestimation of economic costs of a severe nuclear reactor accident, as well as accidents involving nuclear weapons.[302] While admitting that the Sandia Report's focus is on plutonium dispersal from nuclear weapons, NYS maintains that it still is ''one of the most, if not the most, comprehensive existing practical guides to radioactivity dispersion and decontamination costs,'' and must be considered by the Board.[303] NYS disputes Entergy's claims that NYS-12 is a generalized attack on the MACCS2 code, arguing instead that it ''focuses on particular aspects of the MACCS2 code that misrepresent the post-accident

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[294] *Id.* at 87-88 (citing *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 340 (2006); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-07-13, 66 NRC 131, 142-43 (2007)).

[295] *Id.* at 87.

[296] *Id.* at 88-89.

[297] *Id.* at 89.

[298] NRC Staff Answer at 50.

[299] *Id.* at 50-51.

[300] *Id.* at 51.

[301] NYS Reply at 76.

[302] *Id.* at 77 (citing Sandia Report at 2-10).

[303] *Id.* at 78.

consequences of a severe accident, thus distorting the SAMA analysis of the damages such an accident would cause.''[304]

2. Board Decision — NYS-12

The Board finds that NYS-12 is neither a challenge to the acceptability of using the MACCS2 computer program nor a direct challenge to MACCS2 itself.[305] Rather, the contention challenges the cost data for decontamination and cleanup used by MACCS2. NYS thus raises questions of material fact about the Applicant's SAMA analysis that were not addressed by Entergy or the NRC Staff in their Answers to NYS's Petition.

The NYS challenge is based on statements in the Sandia Report such as: ''Data on recovery from nuclear explosions that have been publicly available since the 1960s appear to have been misinterpreted, which has led to long-standing underestimates of the potential economic costs of severe reactor accidents.''[306] As cited by NYS, the Sandia Report also questions the appropriateness of decontamination factors (estimates of the effectiveness of cleanup measures) used in severe reactor accidents. Based on this information, NYS is not challenging the use of MACCS2 itself, but is questioning whether ''specific inputs'' and ''assumptions''[307] made in MACCS2 SAMA analyses are correct for the area surrounding Indian Point. While Entergy and the NRC Staff are correct in that the primary motivation for the Sandia Report is to achieve accurate cleanup and contamination cost estimates for plutonium dispersal incidents from nuclear weapons, the report also examines the basis for such cleanup costs in severe reactor accidents. While NYS has not pointed to specific incorrect inputs or assumptions made by Entergy in its SAMA analysis, to be able to do so would require an unreasonable degree of familiarity with MACCS2 on the part of NYS. Questions raised in this contention relating to cleanup and decontamination costs based on the validity of assumptions used with the code should appropriately be resolved at the hearing.[308] Therefore, NYS-12 is *admitted.*

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[304] *Id.* at 79.

[305] Entergy concedes that while the code itself would not be subject to challenge in this proceeding, it would be possible to make a particularized challenge to specific input parameters in the code or how the Applicant uses the code. Tr. at 265.

[306] Sandia Report at 2-10.

[307] Entergy NYS Answer at 88.

[308] *See* discussion of *McGuire/Catawba infra* pp. 104-05. Unlike the situation in *McGuire/Catawba* where the Petitioner presented no notion of cost, and therefore did not demonstrate that a particular SAMA should have been done, here a SAMA was done but NYS alleges that the analysis was flawed because of invalid assumption used with the code.

M. NYS-13

THE ER SAMA ANALYSIS FOR IP3 IS DEFICIENT BECAUSE IT DOES NOT INCLUDE THE INCREASED RISK OF A FIRE BARRIER FAILURE AND THE LOSS OF BOTH CABLE TRAINS OF IMPORTANT SAFETY EQUIPMENT IN EVALUATING A SEVERE ACCIDENT.[309]

1. Background — NYS-13

NYS-13 asserts that the SAMA analysis in Entergy's ER does not properly consider ''the risk of electrical circuits important for safety failing to perform their function due to loss of redundant trains by fire and does not compare the costs of those larger consequences against the cost of mitigating the accident by upgrading the cable and equipment enclosures to meet the requirements . . . .''[310] NYS contends that Entergy's position that the fire hazard in the SAMA analysis has been conservatively modeled is incorrect, because Entergy fails to consider the loss of redundant cable trains due to the use of only 24- or 30-minute fire protection barriers instead of the 1-hour barrier required in Appendix R of 10 C.F.R. Part 50.[311]

Entergy opposes admission of NYS-13 because it asserts that it is a challenge to the CLB ''under the guise'' of a SAMA contention and, because challenges to the CLB are outside the scope of the proceeding.[312] Entergy also notes that the NRC Staff granted Entergy an exemption for IP3 from the requirements of section III.G.2 of 10 C.F.R. Part 50, Appendix R, and that decision cannot be reviewed as part of an LRA proceeding.[313] Entergy asserts that NYS fails to offer sufficient factual or expert support to show that the SAMA analysis is deficient or that those deficiencies are material in that they would ''alter the results of [Entergy's] SAMA evaluation.''[314] Entergy cites the Commission's decision in *McGuire/Catawba* to support its assertion that a petitioner must approximate the relative cost and benefit of a challenged SAMA in order to get an adjudicatory hearing.[315] Entergy argues that NYS has not shown that the SAMA would be cost-beneficial. Finally, Entergy asserts that the contention is ''fatally flawed because it does nothing to controvert the methodology or assumptions set forth in

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[309] NYS Petition at 146.

[310] *Id.*

[311] *Id.* at 147.

[312] Entergy NYS Answer at 92.

[313] *Id.* at 93 n.404.

[314] *Id.* at 92.

[315] *Id.* at 94 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 7-8 n.14 (2002)).

the ER.''[316] The NRC Staff shares the same objections as Entergy to the admission of NYS-13.[317]

In its Reply, NYS explains that NYS-13 is a challenge to the SAMA analysis in the ER in that it fails to consider the ''adverse impact of a severe accident involving the loss of redundant safe shutdown electrical trains due to fire at IP3 and the failure to consider measures to mitigate those impacts.''[318] NYS argues that because the ER does not analyze this severe accident, there is no ''analysis of the cost of eliminating this risk compared to the cost of the risk.''[319] NYS refers to the NRC Staff's and Entergy's suggestion that NYS prove that its SAMA is cost-beneficial as ''preposterous'' because the question should be ''whether the proposed accident scenario is possible.''[320] Otherwise the burden would shift from an applicant to a petitioner to ''prove whether a severe accident and its consequences can be feasibly and economically mitigated.''[321] NYS makes the point that the burden of proving this would be prohibitive on petitioners who would need access to plant information and expensive computer codes.

2. Board Decision — NYS-13

The Board *rejects* NYS-13 because NYS has not provided any information indicating the potential costs associated with the upgrade in fire protection. Given that the Commission decision in *McGuire/Catawba*[322] requires a petitioner to proffer *some* indication of what the differences might be if a proposed SAMA is performed, this Board must *reject* this contention.

NYS maintains that the questions for SAMA admissibility are, and should be, whether a proposed accident scenario is plausible and whether there is a technically feasible mitigation measure to address the consequences. While the Board recognizes that the two postulated criteria are logical, and that NYS has met these criteria, the Board is bound by the Commission's decision in *McGuire/Catawba* and must, therefore, *reject* this contention. For this contention to be admitted it is not enough for the Petitioner to demonstrate that there is a realistic basis to assume that a fire could last longer than 30 minutes and that such a fire could make it impossible to achieve a hot shutdown.[323]

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[316] *Id.* at 95.
[317] Staff Answer at 52-53.
[318] NYS Reply at 81.
[319] *Id.*
[320] *Id.* at 83.
[321] *Id.* at 84.
[322] *McGuire/Catawba,* CLI-02-17, 56 NRC at 11-12.
[323] NYS Petitioner at 147-48.

The Petitioner failed to provide any indication of the potential result if the suggested SAMA was performed or of the costs of the proposed accident mitigation. This is not to say that a petitioner must perform the SAMA, as seemingly suggested by Entergy, or that the petitioner has the burden of proof to show whether a particular severe accident and its consequences can be effectively mitigated. Rather, to comply with the Commission's direction in *McGuire/Catawba,* a petitioner must at least present *some* notion of a difference in the results and provide at least some ballpark consequence and implementation costs should the SAMA be performed.

Whether a SAMA must be analyzed in an ER hinges on whether it could potentially be cost-beneficial. Therefore, the Petitioner must, at a minimum, address the approximate relative cost and benefit of the SAMA because ''without any notion of cost, it is difficult to assess whether a SAMA may be cost-beneficial and thus warrant serious consideration.''[324] As noted, Entergy and the NRC Staff posit that NYS-13 is essentially attacking the NRC Staff's approval of Entergy's exemption request for a reduction in fire protection, which is an attack on the CLB. In its Reply, NYS asserts that, if the Applicant's and the NRC Staff's position were accepted, any SAMA challenge would automatically be a challenge to the CLB.[325]

The Board rejects Entergy's and the NRC Staff's position (as NYS is clearly challenging the SAMA and not the CLB). SAMAs are procedural analyses promulgated consistent with NRC Regulations to implement NEPA. These analyses are performed to assure that the NRC Staff has considered the cost-effectiveness of mitigating severe accidents in its FEIS. As an analysis process, in and by itself, SAMAs do not change a CLB.

In summary, the Board finds that NYS-13 is not attacking the CLB but the adequacy of Entergy's SAMA, and that NYS-13 is within the scope of license renewal proceedings. The Board *rejects* the contention, however, as not providing sufficient factual information to establish a genuine dispute, because it failed to provide any estimate of the consequences and implementation costs for its proffered SAMA.

N. NYS-14

THE LICENSE RENEWAL APPLICATION AND SAMA ANALYSIS ARE INCOMPLETE AND INSUFFICIENTLY ANALYZE ALTERNATIVES FOR MITIGATION OF SEVERE ACCIDENTS, IN THAT THEY (A) FAIL TO INCLUDE MORE RECENT INFORMATION REGARDING THE TYPE, FREQUENCY, AND SEVERITY OF POTENTIAL EARTHQUAKES AND (B) FAIL TO IN-

[324] *McGuire/Catawba,* CLI-02-17, 56 NRC at 12.

[325] NYS Reply at 82.

CLUDE AN ANALYSIS OF SEVERE ACCIDENT MITIGATION ALTERNATIVES THAT COULD REDUCE THE EFFECTS OF AN EARTHQUAKE DAMAGING IP1 AND ITS SYSTEMS, STRUCTURES, AND COMPONENTS THAT SUPPORT IP2 AND IP3 ALL IN VIOLATION OF 10 C.F.R. § 51.53(c)(3)(ii)(L).[326]

1. Background — NYS-14

NYS-14 alleges that even though IP1 is no longer in use, IP2 and IP3 continue to depend on some of its SSCs.[327] NYS-14 further alleges that the seismic data in the Safety Analysis Report for IP1 is over 20 years old and does not include the new data that have been gathered over the last 20 years which ''disclose a substantially higher likelihood of significant earthquake activity in the vicinity of IP1 that could exceed the earthquake design for the facility.''[328] NYS asserts that the LRA and the SAMA analysis ''do not take account of the greater present day knowledge regarding the earthquake likelihood and its consequences'' and thus do not ''adequately evaluate either the likelihood or the consequences of a severe accident at IP1.''[329]

In opposing the admission of NYS-14, Entergy asserts that it is not a challenge to the SAMA analysis but rather is a challenge to the CLB of IP1, specifically to the adequacy of its seismic design.[330] According to Entergy, challenges to the CLB such as this are outside the scope of the license renewal proceeding. Entergy maintains that IP1 is only relevant in the proceeding ''to the extent that its systems and components interface with, and in some cases would support, the continued operation of Units 2 and 3, such that the effects of aging on those Unit 1 systems or components must be considered under 10 C.F.R. Part 54.''[331] Entergy asserts that the seismic design of IP1 is a CLB issue and not material to aging management.[332] Additionally, Entergy points out that the issues raised by NYS were considered by the NRC over 30 years ago.[333] In opposing NYS-14 as a SAMA contention, Entergy asserts that NYS does not point to any specific deficiencies in the SAMA analysis with the requisite particularity or documentary and expert support.[334]

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[326] NYS Petition at 149.

[327] *Id.* at 150.

[328] *Id.* at 151.

[329] *Id.* at 154.

[330] Entergy NYS Answer at 97.

[331] *Id.* at 98-99.

[332] *Id.* at 99.

[333] *Id.* (citing *Consolidated Edison Co. of New York* (Indian Point, Units 1, 2 and 3), ALAB-436, 6 NRC 547 (1977); *see also* Transcript of Meeting of Advisory Committee on Reactor Safeguards, Joint Subcommittee on Indian Point/Seismic Activity (June 16, 1978)).

[334] *Id.* at 101-02.

The NRC Staff opposes the admission of NYS-14 because it contends that NYS has not shown that there is a material issue in dispute and that NYS does not understand how the probability risk assessment (''PRA'') is performed.[335] The NRC Staff asserts that NYS fails to show that including the new seismic data would have changed the SAMA analysis. Thus, according to the NRC Staff, NYS does not demonstrate that there is a material issue at hand.[336] The NRC Staff explains that to the extent that IP2 and IP3 depend on certain SSCs from IP1, those SSCs are included in the PRA. According to the NRC Staff, NYS fails to identify any SSCs that were not included in the PRA that should have been.[337]

In its Reply, NYS points out that neither the NRC Staff nor Entergy has disputed any of its allegations.[338] In response to the NRC Staff's assertion that NYS did not allege that the new seismic information would change the SAMA analysis results, NYS suggests that the contention should be admitted based on 10 C.F.R. § 2.309(f)(1)(vi), which allows for contention admission ''based on the failure of the LRA to include necessary information.''[339] NYS asserts that the NRC Staff's position would shift the burden of proof onto NYS to establish that the SAMA analyses are inaccurate, rather than on Entergy to establish that they are accurate.[340] NYS maintains that NYS-14 is adequately supported and specific, and essentially shows that ''the failure of the SAMA analysis of earthquake hazards for IP1, IP2, and IP3 to consider newer information that demonstrates . . . both the likelihood and consequences of an earthquake in this area substantially greater than considered in the SAMA analysis.''[341] NYS also disputes Entergy's position that NYS-14 is a challenge to the CLB. NYS claims that the contention takes the LRA as it is and ''focuses on the deficiencies in the SAMA analysis that relies on the outdated seismic data.''[342]

2. Board Decision — NYS-14

As NYS-14 and NYS-15 are very similar in nature, the Board has consolidated its analysis of the admissibility of these two contentions.[343]

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[335] NRC Staff Answer at 54.
[336] *Id.*
[337] *Id.* at 54-55.
[338] NYS Reply at 86.
[339] *Id.* at 88.
[340] *Id.*
[341] *Id.* at 89.
[342] *Id.*
[343] *See infra* Part VI.O.2.

O. NYS-15

THE SEVERE ACCIDENT MITIGATION ALTERNATIVES (SAMA) ANALYSIS FOR INDIAN POINT 2 (ER pages 4-64 to 4-67) AND INDIAN POINT 3 (ER pages 4-68 to 4-71) ARE INCOMPLETE, AND INSUFFICIENTLY ANALYZE ALTERNATIVES FOR MITIGATION OF SEVERE ACCIDENTS IN VIOLATION OF 10 C.F.R. § 51.53(c)(3)(ii)(L).[344]

1. Background — NYS-15

NYS-15 raises the same issues for IP2 and IP3 that are raised in NYS-14 for IP1. In NYS-15, the Petitioner alleges that the ''SAMA analysis fails to include more recent information regarding the type, frequency and severity of potential earthquakes and fails to include an analysis of [SAMAs] that could reduce the effect of such earthquakes.''[345] NYS also reviews new seismological findings that have accumulated since the IP2 and IP3 licenses were granted, states that the most recent seismic data reported in the UFSAR for these reactors is over 25 years old, and remarks on the summary nature of the seismic data taken from the Individual Plant Examination of External Events (''IPEEE'') Program for IP2 and IP3.[346] NYS then contends that because the LRA, IPEEE, and SAMA analyses ''do not sufficiently document that they have taken into account the greater knowledge regarding the earthquake likelihood and its consequences,'' these analyses do not adequately evaluate the likelihood or consequences of a severe seismic accident at IP2 or IP3.[347] Stating that the foundation of the pertinent SAMA analysis is the likelihood of a severe accident, NYS concludes that ''the SAMA analysis is fatally flawed in that it does not support a conclusion either that it was conservatively done or that the risks and consequences of reasonably possible severe earthquake induced accidents have been properly evaluated.''[348]

Entergy opposes the admission of this contention claiming that (1) it raises CLB issues that are outside the scope of this proceeding and not material for license renewal,[349] (2) the seismic portion of its SAMA analysis is consistent with NRC and industry guidance in NEI 05-01, Revision A;[350] and (3) in accord with NEI 05-01, Entergy has utilized results from the IPEEE for IP2 and IP3.[351] Additionally, Entergy states that a 2004 NRC response to concerns about IPEC

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[344] NYS Petition at 155.
[345] *Id.*
[346] *Id.* at 155-56.
[347] *Id.* at 157-58.
[348] *Id.* at 159.
[349] Entergy NYS Answer at 105-06.
[350] *Id.* at 106.
[351] *Id.* at 106-07 (citing ER at 4-51).

seismic hazard analysis covered most, if not all, of the NYS issues in this proceeding,[352] that the NRC response noted the IPEEE analysis for IP2 and IP3 included Lawrence Livermore National Laboratory revised hazard estimates and response spectra documented in NUREG-1488, and that the NRC concluded that ''it is unlikely for potential earthquakes in the area to cause any damages to the Indian Point nuclear facilities.''[353]

The NRC Staff opposes the contention because it fails to demonstrate that new information about seismic activity would change the SAMA analysis and result in the identification of additional cost-beneficial mitigation alternatives.[354] Furthermore, the NRC Staff argues that it is outside the scope of the proceeding to the extent that it challenges the UFSAR and the IPEEE, and that it raises issues covered by the CLB.[355]

In its Reply, NYS repeats its allegation that Entergy's SAMA analyses were never updated to reflect the last 30 years of seismic experience in eastern North America.[356] Also, NYS argues that Entergy's SAMA analyses included a seismic hazard analysis and therefore that analysis is within the scope of 10 C.F.R. Part 51 for license renewal proceedings.[357] Additionally, NYS states the ER failed to ''discuss or disclose the actual assumptions or inputs regarding seismic events that went into calculating the Core Damage Factor (''CDF'') numbers.''[358]

2. Board Decision — NYS-14/15

Entergy did include seismic SAMA analysis in its ER. NYS argues, however, that Entergy's analysis is based on outdated seismic data used in granting the original licenses. According to NYS, data generated since the original licensing of the Indian Point facility indicate that the likelihood and consequences of earthquakes were significantly underestimated when the original licenses were granted.[359] NYS asserts that because of this greater risk, SAMAs that could reduce the effects of earthquake damages should have been undertaken as part of the license renewal process. NYS alleges that the LRA fails to address a relevant

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[352] *Id.* at 107 (citing Letter from C. Holden, NRC to A. Matthiessen, Riverkeeper, Attach. at 3 (Dec. 15, 2004) (ADAMS Accession No. ML042990090) [hereinafter NRC 2004 Riverkeeper Response]).

[353] *Id.* (quoting NRC 2004 Riverkeeper Response at 4).

[354] NRC Staff Answer at 55.

[355] *See id.* at 55-56.

[356] NYS Reply at 91.

[357] *Id.*

[358] *Id.* at 92.

[359] NYS Petition at 154; Declaration of Lynn R. Sykes at 2 (Nov. 29, 2007); Declaration of Leonardo Seeber at 1-2 (Nov. 29, 2007).

matter — the effect of the new seismic data on Entergy's SAMA analysis. NYS argues that it is not attacking the CLB, which is precluded in an LRA, but rather, that it is attacking the adequacy of the SAMA analysis.[360]

However, NYS does not explain why ''the most recent information'' is sufficiently different from the earlier data to make a material change in the conclusions of the seismic SAMA. Likewise NYS does not suggest feasible alternatives to address risks posed by the new data, nor does it estimate the cost of the increased margin of safety that would result from any severe accident mitigation action. Similarly, while NYS questions whether the seismic SAMA analysis is conservative, it does not demonstrate to what degree the assumptions used by Entergy in the ER are not conservative. While the seismic SAMA methodology is outlined in the ER, NYS assumes that, because it cannot check all analysis details, the analysis is incomplete or incorrect. This is speculation and such speculation is insufficient to support the admissibility of this contention. Accordingly, the Board *rejects* NYS-14 and NYS-15 because NYS has failed to present facts or expert opinion that raise a genuine dispute on a material issue.

P. NYS-16

ENTERGY'S ASSERTION, IN ITS SAMA ANALYSIS FOR IP2 AND IP3, THAT IT ''CONSERVATIVELY'' ESTIMATED THE POPULATION DOSE OF RADIATION IN A SEVERE ACCIDENT, IS UNSUPPORTED BECAUSE ENTERGY'S AIR DISPERSION MODEL WILL NOT ACCURATELY PREDICT THE GEOGRAPHIC DISPERSION OF RADIONUCLIDES RELEASED IN A SEVERE ACCIDENT AND ENTERGY'S SAMA WILL NOT PRESENT AN ACCURATE ESTIMATE OF THE COSTS OF HUMAN EXPOSURE.[361]

1. Background — NYS-16

NYS-16 contends that Entergy assumed a scenario in its SAMA analysis for IP2 in which no one within a 50-mile radius of the plant would be evacuated, and used this scenario to show that it conservatively estimated the population dose of radiation.[362] NYS alleges that the accuracy of this analysis depends on whether the air dispersion model used by Entergy ''accurately portrays the geographic areas that will be most affected within the 10 mile Emergency Planning Zone around the plant that actually would be evacuated during a severe accident.''[363] NYS similarly questions the ability of Entergy's air dispersion model to correctly predict the

[360] NYS Reply at 89.
[361] NYS Petition at 163.
[362] *Id.*
[363] *Id.* at 163-64.

geographic dispersion and concentration of radionuclides in the area between the 10-mile and 50-mile radius around the plant, noting that the geographic density of the potentially affected population varies greatly in this area, and that Entergy used the model to reject sixty-one of sixty-eight SAMAs.[364]

Entergy uses the MAACS2 code that incorporates a straight-line Gaussian plume model, called ATMOS, to predict atmospheric dispersion. NYS alleges that this model is not as accurate as newer EPA-approved models, that the EPA has not authorized the use of ATMOS to show compliance with the Clean Air Act, and that the EPA has not authorized the use of a straight-line steady state Gaussian plume model beyond 50 kilometers (i.e., 31 miles) because its accuracy decreases with distance from the source of release.[365] According to NYS, ATMOS ''does not account for changes in wind speed or direction during the simulation time period nor can it incorporate differences in terrain that will affect the way in which the release will travel.''[366] NYS also questions Entergy's population projection for 2035, pointing out that the U.S. Census estimate of the population of Manhattan in 2006 is larger than Entergy's 2035 projection.[367]

Entergy opposes the admission of NYS-16 because, in its view, it is an inappropriate challenge to the MACCS2 code, for which ATMOS is a module.[368] As Entergy argued in its response to NYS-12,[369] it asserts here that a contention challenging the MACCS2 code is inadmissible under the reasoning set forth in the *Pilgrim* decision.[370] Additionally, Entergy contends that NYS failed to show that using a different code would materially change the SAMA analysis.[371] Entergy also maintains that NYS has failed to identify a specific deficiency in the SAMA analysis.[372] The NRC Staff opposes the admission of the contention because NYS fails to show that the MACCS2 code is deficient.[373] The NRC Staff also looks to the *Pilgrim* case to support its position that a contention that challenges the MACCS2 code is inadmissible.[374]

In its Reply, NYS asserts that Entergy is misguided in claiming that an attack on the MACCS2 code is an impermissible attack on NRC Regulations simply because using the MACCS2 code is consistent with a NRC-endorsed guidance

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[364] *Id.* at 165.
[365] *Id.*
[366] *Id.* at 166.
[367] *Id.* at 164 n.37.
[368] Entergy NYS Answer at 110.
[369] *See* discussion *supra* pp. 100-102.
[370] Entergy NYS Answer at 111.
[371] *Id.* at 112.
[372] *Id.*
[373] NRC Staff Answer at 56.
[374] *See id.* at 56-58.

document.[375] NYS concedes that NRC Regulations cannot be challenged here. However, it asserts it may challenge NRC guidance documents, which it does in this contention.[376] NYS points out that there is no NRC Regulation requiring applicants to use the MACCS2 code or requiring the use of ATMOS as the air dispersion model within MACCS2.[377] NYS makes clear that its challenge is not to the MACCS2 code's probabilistic modeling but ''only to its incorporation of an outdated model to compute those meteorological probabilities.''[378] NYS states that it would not contest the use of the MACCS2 code if Entergy were to use an accurate air dispersion model.[379] In terms of Entergy's and the NRC Staff's reliance on the *Pilgrim* decision, NYS differentiates its contention from that of the petitioner in *Pilgrim,* which it maintains was far broader than NYS-16.[380] While the petitioner in *Pilgrim* challenged any use of the MACCS2 code and the probabilistic method it uses, NYS is challenging only the adequacy of the air dispersion model within the code ''to provide accurate information from which the probabilities can be computed.''[381]

2. Board Decision — NYS-16

The Board *admits* NYS-16 to the extent that it challenges whether the population projections used by Entergy are underestimated. And also, within the framework of the bounding assumptions and conservative inputs used in MACCS2 SAMA analyses, we *admit* NYS-16 to the extent that it challenges whether the ATMOS module in MACCS2 is being used beyond its range of validity — beyond 31 miles (50 kilometers) — and, whether use of MACCS2 with the ATMOS module leads to nonconservative geographical distribution of radioactive dose within a 50-mile radius of IPEC. The first of these is a question of model input data material to the making of accurate SAMA analyses. The answer to the second could materially affect the costs of various mitigation alternatives because the potentially exposed population rapidly increases with distance between 31 miles and 50 miles from IPEC. The answer to the third could substantially change costs

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[375] NYS Reply at 94-95.

[376] *See id.* at 94-95. NYS points to a Licensing Board decision in *McGuire/Catawba* to support its position. The Board found that challenges to the standards in regulatory guides are permissible because they are not NRC rules or regulations but ''are to be regarded as the views of only one party — the Staff — although they are entitled to considerable *prima facie* weight.'' *McGuire/Catawba,* LBP-03-17, 58 NRC at 241.

[377] NYS Reply at 94.

[378] *Id.* at 96.

[379] *Id.*

[380] *Id.* at 98-100.

[381] *Id.* at 99.

because of very large geographic variations of population density within 50 miles of IPEC.

While Entergy argues that NYS failed to show that using a different code would materially change the SAMA analyses and failed to identify a specific deficiency in the SAMA analysis, we disagree. A petitioner is not required to redo SAMA analyses in order to raise a material issue. Here — unlike the situation in *McGuire/Catawba,* where the petitioner presented no ''notion of cost'' and therefore did not demonstrate that a particular SAMA should have been done[382] — NYS-16 alleges that the SAMA was done, but that the analysis was significantly flawed due to the use of inaccurate factual assumptions.

Q. NYS-17

THE ENVIRONMENTAL REPORT FAILS TO INCLUDE AN ANALYSIS OF ADVERSE IMPACTS ON OFF-SITE LAND USE OF LICENSE RENEWAL AND THUS ERRONEOUSLY CONCLUDES THAT RELICENSING OF IP2 AND IP3 ''WILL HAVE A SIGNIFICANT POSITIVE IMPACT ON THE COMMUNITIES SURROUNDING THE STATION'' (ER SECTION 8.5) AND UNDERSTATES THE ADVERSE IMPACT ON OFF-SITE LAND USE (ER SECTIONS 4.18.4 AND 4.18.5) IN VIOLATION OF 10 C.F.R. PART 51, SUBPART A, APPENDIX B.[383]

1. Background — NYS-17

NYS-17 asserts that the ER is deficient because it ignores the positive impact on land use and land values from the denial of the LRA (the adjacent lands would experience economic recovery because, NYS claims, the site will be available for unrestricted use by 2025) and overstates the offsite benefits of renewal.[384] Furthermore, NYS asserts that the current spent fuel pools will not be able to contain the additional spent fuel generated during the renewal period, and thus dry cask storage is required.[385] This will have additional impacts on adjacent lands that are not analyzed in the ER.[386] The ER, according to NYS, only looks at tax and population-driven land-use impacts and ignores the impact of relicensing on the adjacent lands.[387]

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[382] *McGuire/Catawba,* CLI-02-17, 56 NRC at 12.
[383] NYS Petition at 167.
[384] *Id.* at 168.
[385] *Id.*
[386] *Id.* at 169.
[387] *Id.*

In opposing the admission of NYS-17 Entergy insists that the analysis in the ER is consistent with the GEIS and applicable NRC guidance documents.[388] These documents, Entergy maintains, require that an applicant in a license renewal proceeding need only analyze impacts from population growth related to the plant or from the public services that local governments provide to encourage development using the tax payments from the plant.[389] Entergy asserts that it provided a proper assessment in the ER and that NYS does not allege any specific deficiencies with that portion of the ER.[390] Entergy also contends that ''there is no regulatory requirement or guidance document which calls for an analysis of *property values* for purposes of license renewal,'' nor does NYS point to one for support.[391] Entergy also responds to NYS's claims regarding spent fuel storage by stating that under the ''Waste Confidence Rule''[392] an applicant does not need to discuss any aspect of spent fuel storage.[393]

The NRC Staff, in opposing the admission of NYS-17, points to Reg. Guide 4.2, which explains that ''only tax revenue changes were intended to be considered Category 2 issues.''[394] In addition, the NRC Staff points to the statement in the GEIS that population-driven changes to land use will be small in license renewal proceedings to show that tax-driven changes are the only land-use issues that must be considered during a license renewal.[395]

NYS disagrees with Entergy's interpretation of the GEIS and Reg. Guide 4.2, according to which an applicant only needs to address land-use impacts from plant-related population growth or use of the plant's tax payments by the local government to encourage development.[396] NYS also makes the point that regulatory guides are not substitutes for regulations and that Regulatory Guide 4.2 does not relieve Entergy of its requirements under NRC Regulations.[397] NYS maintains that its expert, Dr. Stephen C. Sheppard, has presented a report,[398]

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[388] Entergy NYS Answer at 114 (citing GEIS § 4.7.4; Regulatory Guide 4.2, Supp. 1, ''Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses'' § 4.17.2 (Sept. 2000) (ADAMS Accession No. ML003710495) [hereinafter Reg. Guide 4.2]).

[389] *Id.* at 114-15.

[390] *Id.*

[391] *Id.* (emphasis in original).

[392] 10 C.F.R. § 51.23(a).

[393] Entergy NYS Answer at 117-18.

[394] NRC Staff Answer at 59 (citing Reg. Guide 4.2 § 4.17.2).

[395] *Id.* (citing GEIS § 4.7.4.2).

[396] NYS Reply at 103.

[397] *Id.* at 103-04.

[398] Declaration of Stephen C. Sheppard (Nov. 29, 2007) [hereinafter Sheppard Declaration]. The report attached to the Declaration is titled, *Potential Impacts of Indian Point Relicensing on Property Values.*

undisputed by Entergy, that describes the clear and significant impact that nuclear power plants have on residential property values, especially for those close to the plant.[399] In terms of Entergy's usage of the ''Waste Confidence Rule,'' NYS asserts that it only addresses spent fuel after a license term has expired and does not affect any requirements to analyze spent fuel storage during the license term.[400] NYS also disagrees with the NRC Staff's position that only tax revenue changes were intended to be Category 2 issues. NYS makes the point that had a petitioner suggested that the plain words of the regulation were a mistake, as the NRC Staff has done here, the NRC Staff would insist that the Board reject the argument.

2. Board Decision — NYS-17

An LRA must be accompanied by an ER which includes an assessment of the impact of the proposed action on ''land-use . . . within the vicinity of the plant.''[401] Pursuant to 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 (''Table B-1''), the impact on offsite land use during the license renewal term cannot be assessed generically and, accordingly, it is a Category 2 environmental issue that is within the scope of this proceeding. Table B-1 indicates that the impact of license renewal on offsite land use can be ''small, moderate or large.''[402] In its ER, the Applicant concluded that the land-use impact from license renewal would be small.[403]

NYS contends that Entergy's analysis was flawed because it did not consider the positive impacts on land values in the Indian Point area that would accrue if the licenses for IP2 and IP3 were not renewed.[404] In support of its claim, NYS submitted the Sheppard Declaration to demonstrate that the value of residential property within 2 miles of the Indian Point facility would increase by almost $600 million if the LRA was denied.[405] Neither Entergy nor the NRC Staff has challenged Dr. Sheppard's conclusion regarding the increase in land value. Rather each claims that Entergy's analysis is adequate because the only Category 2 land-use issue that needs to be considered in license renewal proceedings is the potential for tax-driven land-use changes.[406] We disagree.

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[399] NYS Reply at 104-05.

[400] *Id.* at 108.

[401] 10 C.F.R. § 51.53(c)(3)(ii)(i).

[402] Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants, 10 C.F.R. Part 51, Subpart A, App. B, Table B-1 [hereinafter Table B-1].

[403] ER § 4.18.4.

[404] NYS Petition at 167-69.

[405] Sheppard Declaration at 6.

[406] Entergy NYS Answer at 115; NRC Staff Answer at 59.

In conducting its analysis of the impact of the license renewal on land use, Entergy should have considered the impact on real estate values that would be caused by license renewal or nonrenewal. NRC Regulations do not limit consideration to tax-driven land-use changes. Table B-1 merely notes that ''significant changes in land use may be associated with population and tax-revenue changes resulting from license renewal.'' It does not limit consideration to tax-driven land-use changes. Accordingly, we *admit* NYS-17 as a contention of omission.

R. NYS-18

THE LICENSE RENEWAL APPLICATION FOR IP2 AND IP3 FAILS TO COMPLY WITH THE REQUIREMENTS OF 10 C.F.R. § 50.71(e) BECAUSE INFORMATION FROM SAFETY ANALYSES AND EVALUATIONS PERFORMED AT THE NRC'S REQUEST ARE NOT IDENTIFIED OR INCLUDED IN THE UFSAR.[407]

1. Background — NYS-18

NYS-18 alleges that the LRA fails to comply with 10 C.F.R. § 50.71(e) because the UFSAR does not identify or include information from safety analyses and evaluations performed after receiving generic letters from the NRC Staff.[408] NYS asserts that LRA does not comply with 10 C.F.R. § 50.71(e), the UFSAR is out of date, and fails to ''contain the detail necessary to even correctly describe and identify all the systems for which aging management is required.''[409] Therefore, ''Entergy is unable to provide reasonable assurance that it has a [CLB] or that its plant is in compliance with its [CLB].''[410] NYS-18 is the safety-based analogue to NYS-2, and NYS provides the same supporting evidence for the contention as it did for NYS-2.[411]

Entergy opposes the admission of NYS-18 on the same grounds that it opposed NYS-2.[412] The NRC Staff also opposes the contention's admission, arguing that the adequacy of Entergy's FSAR and its compliance with the CLB are outside the scope of a license renewal proceeding.[413] The NRC Staff maintains that NYS has

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[407] NYS Petition at 174.
[408] *See id.* at 175-76.
[409] *Id.* at 176.
[410] *Id.*
[411] *See id.* at 177-97.
[412] Entergy NYS Answer at 119.
[413] NRC Staff Answer at 60.

not identified any deficiencies in the LRA or the AMPs that would be due to the deficiencies it alleges exist in the FSAR.[414]

In its Reply, NYS responds collectively to Entergy and the NRC Staff's Answers to NYS-18 through NYS-22.[415] NYS maintains that Indian Point does not have an ascertainable CLB, and thus consideration of its safety contentions is not prohibited by 10 C.F.R. § 54.30(b).[416] These contentions, according to NYS, do not allege a failure to comply with the CLB, but rather a failure to comply with specific safety regulations.[417] If 10 C.F.R. § 54.30(b) is not applicable, then NYS contends that the requirements of 10 C.F.R. § 54.33(a) are applicable. Therefore, NYS asserts that it can challenge whether the applicant follows the conditions laid out in 10 C.F.R. § 50.54, as well as whether the renewed license will comply with the regulations set forth in 10 C.F.R. § 54.35.[418] Thus, NYS contends that the ''license renewal analysis is not limited to plant aging.''[419]

2. Board Decision — NYS-18

The Board decision for NYS-18 has been consolidated with the Board decision for NYS-19.[420]

S. NYS-19

IP2 AND IP3 DO NOT PROVIDE REASONABLE ASSURANCE OF ADEQUATE PROTECTION FOR THE PUBLIC HEALTH AND SAFETY AS REQUIRED BY 10 C.F.R. § 50.57(a)(3) BECAUSE THEY ARE NOT DESIGNED TO MEET THE LEGALLY RELEVANT GENERAL DESIGN CRITERIA AND THUS ALSO VIOLATE 10 C.F.R. §§ 54.33(a), 54.35 AND 50.54(h).[421]

1. Background — NYS-19

NYS-19 alleges that IP2 and IP3 do not provide reasonable assurance of adequate protection for the public health and safety because the UFSARs are not

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[414] *Id.* at 60-61.

[415] NYS Reply at 110.

[416] *Id.*

[417] *Id.* at 111.

[418] *Id.* ''During the term of a renewed license, licensees shall be subject to and shall continue to comply with all Commission regulations contained in 10 CFR parts 2, 19, 20, 21, 26, 30, 40, 50, 51, 52, 54, 55, 70, 72, 73, and 100.'' 10 C.F.R. § 54.35.

[419] NYS Reply at 112.

[420] *See infra* Part VI.S.2.

[421] NYS Petition at 198.

in compliance with the relevant GDC as required under section 54.35, but only comply, at best, with design criteria proposed by AIF.[422] NYS-19 is the safety-based analogue to NYS-3, and NYS provides the same supporting evidence for the contention as it did for NYS-3.[423]

Entergy opposes the admission of this contention on the same grounds as it opposed NYS-3.[424] The NRC Staff also opposes the admission of NYS-19, arguing that the Commission has stated that facilities like Indian Point, that have construction permits issued before the Final GDC's effective date, do not need to comply with the GDC.[425] The NRC Staff maintains that the Draft GDC were not binding requirements on Indian Point.[426] Furthermore, the NRC Staff asserts that requirements regarding the design of a facility are part of the CLB which is not subject to challenge in this proceeding.[427]

In addition to its collective response regarding NYS-18 through NYS-22, the Petitioner specifically addresses two of the NRC Staff's objections to NYS-19. NYS asserts that the notion that the Draft GDC were not binding requirements is ''demonstrably false as the Staff routinely issues violation notices to older plants based on violations of the Draft GDC.''[428] Additionally, NYS does not agree with the NRC Staff's assertion that licensees were permitted to comply with the AIF criteria and not the Draft GDC, pointing to the NRC Staff's minimal support for this assertion.[429]

2. Board Decision — NYS-18/19

The heart of NYS's argument hinges on the status of Indian Point's CLB. At Oral Argument, NYS asserted that it was presenting NYS-18 and NYS-19 (as well as NYS-20 through NYS-22) with the understanding that these contentions could be admissible only if the CLB were deemed not ascertainable, thereby lifting the restrictions imposed on petitioners from bringing these types of contentions under 10 C.F.R. § 54.30.[430] Given that the Board has concluded that the CLB is

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[422] *Id.* at 198-99.

[423] *See id.* at 198-202.

[424] Entergy NYS Answer at 119.

[425] NRC Staff Answer at 61-62 (citing SRM SECY-92-223).

[426] *Id.* at 62.

[427] *Id.* at 63.

[428] NYS Reply at 114.

[429] *Id.* NYS points out that the only support NRC Staff offers is a reference letter from AIF. *Id.* (citing NRC Staff Answer at 62 n.52).

[430] Tr. at 367-68.

ascertainable,[431] we find that all of these five contentions are outside the scope of the proceeding.

Specifically, NYS-18 alleges that the Indian Point LRA is deficient because it does not demonstrate compliance with 10 C.F.R. § 50.71(e), in that information from safety evaluations and analyses that have been performed at the NRC's request have not been included in the UFSAR. However, as noted by the Applicant and the NRC Staff, the adequacy of the UFSAR and compliance with the CLB are outside the scope of this license renewal proceeding.[432] As noted in the Board's decision on NYS-2, the proper vehicle to challenge the adequacy of the UFSAR would be a section 2.206 petition, not a challenge to the license renewal.[433]

NYS attempts to overcome this obstacle by claiming that because of the deficiencies in the UFSAR, it is impossible to identify the systems for which aging management is required.[434] NYS offers the Lochbaum Declaration in support of this contention. In his Declaration, Mr. Lochbaum discusses several NRC bulletins and generic letters, along with Indian Point's responses to the NRC.[435] Based on this review, he concludes that Indian Point's UFSARs are inadequate, and that as a result, it is impossible to ascertain the adequacy of the AMPs for Indian Point.[436]

What Mr. Lochbaum does not do, however, is identify any portion of an AMP for Indian Point that is deficient. Entergy's responses to the NRC bulletins and generic letters are available for review and, to the degree that they have been reviewed by Mr. Lochbaum, he has not identified any aging management issue that has not been addressed. As was the case with NYS-2, this contention is a challenge to the CLB and as such is outside the scope of this proceeding. Accordingly, NYS-18 must be *rejected.*

NYS-19 is a reprise of NYS-3 and like NYS-2, NYS-3, and NYS-18, is an attack on the CLB. Accordingly, it is *rejected* as being outside the scope of the proceeding. Furthermore, while NYS alleges that there is inadequate assurance that the public health and safety will be protected, it does not demonstrate why utilization of the AIF's 1967 GDC would compromise the public health and safety. NYS notes that there are differences between the AIF's version of the GDC and the GDC later adopted by the NRC, and alleges that ''in a number of instances the differences are substantial.''[437] However, NYS does not raise a material issue

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[431] *See* discussion *supra* Part VI.A.2.

[432] Entergy NYS Answer at 41, 119; NRC Staff Answer at 60.

[433] *See* discussion *supra* Part VI.B.2.

[434] NYS Petition at 176.

[435] Lochbaum Declaration at 7-12.

[436] *Id.* at 13.

[437] NYS Petition at 202.

regarding how those differences would compromise safety. Thus, even if NYS-19 were within the scope of this proceeding, it would still be *inadmissible*.

T. NYS-20

IP3 DOES NOT PROVIDE REASONABLE ASSURANCE OF ADEQUATE PROTECTION FOR THE PUBLIC HEALTH AND SAFETY AS REQUIRED BY 10 C.F.R. § 50.57(a)(3) AND IS NOT IN COMPLIANCE WITH 10 C.F.R. PART 50, APPENDIX R BECAUSE IT FAILS TO MAINTAIN A FIRE BARRIER WITH A ONE HOUR RATING AND THUS ALSO IS IN VIOLATION OF 10 C.F.R. §§ 54.33(a), 54.35 AND 50.54(h).[438]

1. Background — NYS-20

NYS alleges in this contention that IP3 fails to maintain a fire barrier with a 1-hour rating in violation of Appendix A, Criterion 3, and Appendix R, Section G.2, of 10 C.F.R. Part 50.[439] NYS-20 is the safety-based analogue to NYS-13 and the Petitioner provides much of the same supporting evidence for this contention as it did for NYS-13.[440] Also, NYS questions the approach and calculations that the NRC Staff used for down-rating the duration for the fire barrier in granting Entergy its exemption from a 1-hour barrier rating to a 24/30-minute barrier.[441]

Entergy opposes the admission of NYS-20 because it claims it is outside the scope of the proceeding and is not material to the required NRC findings.[442] Entergy argues that fire-protection issues are not related to aging management, and that the Petitioner fails to identify any deficiency in the LRA.[443] Entergy asserts that NYS's supporting evidence is insufficient to satisfy 10 C.F.R. § 2.309(f)(1)(v), and therefore does not establish a genuine dispute.[444] Entergy describes the contention as a ''direct and impermissible challenge to the adequacy of the CLB for IP3 as it relates to fire protection,''[445] and, pointing out similarities between this contention and NYS-13, incorporates its response to the previous contention.[446]

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[438] *Id.* at 203.
[439] *Id.*
[440] *See id.* at 203-06.
[441] *Id.* at 205.
[442] Entergy NYS Answer at 120.
[443] *Id.*
[444] *Id.*
[445] *Id.* at 121.
[446] *Id.* at 120.

The NRC Staff also opposes the admission of NYS-20, alleging that 10 C.F.R. § 50.12 permits the NRC to grant exemptions; therefore, NYS's argument that the granting of the exemption violates the regulations is an impermissible challenge to the regulations.[447] The NRC Staff maintains that NYS does not address specific portions of, or alleged omissions in, the LRA and fails to show that ''any portion of the fire protection exemption has not been adequately considered in the LRA, and it therefore fails to raise an appropriate issue for consideration in this proceeding.''[448]

In its collective response to NYS-18 through NYS-22, NYS asserts that these safety contentions are within the scope of the proceeding because, as is well documented in NYS-2 and NYS-3, they are not immune from challenge in the proceeding pursuant to the provisions of 10 C.F.R. § 54.30(b) because Indian Point does not have an ascertainable CLB.[449] NYS contends that, because 10 C.F.R. § 54.30(b) is the only Commission regulation that limits the scope of safety contentions, its allegations in NYS-20 are within the scope of the LRA proceedings.[450] NYS further states that if the Board finds that 10 C.F.R. § 54.30(b) is not applicable, then the requirements of 10 C.F.R. § 54.33(a) are applicable. In this regard, NYS argues that it is able to challenge the proposed license renewal based on the Applicant's failure to meet the conditions of 10 C.F.R. § 50.54, which require, *inter alia,* an updated UFSAR and a commitment to comply with the legally relevant GDC, Appendix R fire protection standards.[451] NYS argues that neither Entergy nor the NRC Staff has rebutted NYS's argument that IPEC has no ascertainable CLB, but that each party merely took the position that NYS-18 to NYS-22 have nothing to do with plant aging. To the contrary, NYS claims it has shown that the scope of license renewal analysis is not limited to just plant aging.[452]

NYS also specifically addresses the NRC Staff's argument regarding 10 C.F.R. § 50.12. NYS contends that the ''only such waivers that can be challenged are those, like this one, that are without sufficient technical support to withstand scrutiny and that, if allowed to stand, will illegally compromise the public health and safety.''[453]

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[447] NRC Staff Answer at 64.
[448] *Id.* at 65.
[449] NYS Reply at 110.
[450] *Id.*
[451] *Id.* at 111.
[452] *Id.* at 111-12.
[453] *Id.* at 114.

2. Board Decision — NYS-20

The Board finds NYS-20 is *inadmissible*. The Board finds that any challenge, explicit or implicit, that NYS proffers relating to the NRC Staff's decision to grant Entergy the exemption from a 1-hour barrier to a 24/30-minute barrier is a direct challenge to IPEC's CLB and unrelated to the effects of plant aging and the LRA. Accordingly, NYS-20 is beyond the scope of the proceeding, and the Petitioner has not demonstrated that the issue is material to the findings the NRC must make in this proceeding.

U. NYS-21

INDIAN POINT 1 DOES NOT PROVIDE REASONABLE ASSURANCE OF ADEQUATE PROTECTION FOR THE PUBLIC HEALTH AND SAFETY AS REQUIRED BY 10 C.F.R. § 50.57(a)(3) AND THE UFSAR INSUFFICIENTLY ANALYZES THE PLANT'S CAPABILITY TO WITHSTAND A DESIGN BASIS AND SAFE SHUTDOWN EARTHQUAKE BECAUSE IT FAILS TO INCLUDE MORE RECENT INFORMATION REGARDING THE TYPE, FREQUENCY, AND SEVERITY OF POTENTIAL EARTHQUAKES IN VIOLATION OF 10 C.F.R. §§ 50.54(h), 54.33(a), 54.35 AND 10 C.F.R. PART 100, APPENDIX A.[454]

1. Background — NYS-21

NYS-21 alleges that the UFSAR for IP1 does not adequately analyze the plant's capability to withstand a design basis and safe shutdown earthquake because it fails to include more recent information regarding the type, frequency, and severity of potential earthquakes.[455] NYS asserts that to reduce the risk from earthquakes to IP1, ''it is necessary to fully evaluate the new data and the IP1 design to determine whether improvements are needed to assure that critical components of the facility can withstand the effects of an earthquake.''[456] NYS-21 is the safety-based analogue to NYS-14, and NYS provides supporting evidence for the contention similar to that provided for NYS-14.[457]

Entergy opposes the admission of NYS-21 on the same grounds as it objected to NYS-14.[458] Entergy asserts that it is an impermissible challenge to the seismic design of IP1, which is not an aging management issue and is outside the scope of a license renewal proceeding.[459] The NRC Staff also opposes the admission of

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[454] NYS Petition at 207.
[455] *See id.* at 207-08.
[456] *Id.* at 208-09.
[457] *See id.* at 207-09.
[458] Entergy NYS Answer at 122.
[459] *Id.* at 123.

NYS-21 because, among other reasons, NYS has not shown that ''the IP1 spent fuel pool is part of the current licensing action, or that it has not been adequately considered in the LRA, to the extent that it may impact IP2 and IP3.''[460] The NRC Staff maintains that NYS has not shown that the new seismic data should be considered in this proceeding. The Staff asserts that the issues raised in this contention are reviewed in the ongoing review process and are outside the limited scope of license renewal proceedings.[461] The NRC Staff contends that NYS has failed to provide adequate evidence that IP2 and IP3 share or use components from IP1.

2. Board Decision — NYS-21

The Board decision for NYS-21 has been consolidated with the Board decision for NYS-22.[462]

V. NYS-22

IP2 AND IP3 DO NOT PROVIDE REASONABLE ASSURANCE OF ADEQUATE PROTECTION FOR THE PUBLIC HEALTH AND SAFETY AS REQUIRED BY 10 C.F.R. § 50.57(a)(3) AND THE UFSARS FOR IP2 AND IP3 INSUFFICIENTLY ANALYZE EACH UNIT'S CAPABILITY TO WITHSTAND A DESIGN BASIS AND SAFE SHUTDOWN EARTHQUAKE BECAUSE THEY FAIL TO INCLUDE MORE RECENT INFORMATION REGARDING THE TYPE, FREQUENCY AND SEVERITY OF POTENTIAL EARTHQUAKES IN VIOLATION OF 10 C.F.R. §§ 54.33(a), 54.35 AND 10 C.F.R. PART 100, APPENDIX A.[463]

1. Background — NYS-22

NYS-22 alleges that the UFSARs for IP2 and IP3 insufficiently analyze the capability of the plants to withstand a design basis and safe shutdown earthquake because they do not include the more recent seismic data regarding the type, frequency, and severity of potential earthquakes.[464] NYS-22 is the safety-based analogue to NYS-15, and NYS provides supporting evidence for the contention that is similar to what it provided for NYS-15.[465]

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[460] NRC Staff Answer at 67.
[461] *Id.*
[462] *See infra* Part VI.V.2.
[463] NYS Petition at 209.
[464] *See id.* at 209-10.
[465] *See id.* at 209-17.

Entergy objects to the admission of NYS-22 for the same reasons it opposed NYS-15.[466] Entergy maintains that the contention impermissibly challenges the adequacy of the seismic designs of IP2 and IP3, which is an issue covered by the CLB.[467] NYS also does not identify a specific and material deficiency in the LRA, according to Entergy.[468] The NRC Staff also opposes admission of the contention, maintaining that the contention is a challenge to the CLB, and not subject to review during license renewal.[469]

In addition to its collective response regarding NYS-18 through NYS-22, NYS specifically addresses the NRC Staff's argument asserting that NYS-22 is a challenge to the CLB. NYS contends that the NRC Staff did not address the evidence NYS presented that the UFSAR is legally deficient and the CLB cannot be ascertained.[470] Thus, NYS argues, ''any earthquake analysis done based on the UFSAR and CLB is flawed from the outset.''[471] NYS also points out that both NYS-21 and NYS-22 ''identify very specific information that was not included in the earthquake analyses done for these plants . . . .''[472]

2. Board Decision — NYS-21/22

As noted in the Board decision on NYS-18/19,[473] NYS's arguments in NYS-18 through NYS-22 hinge on the status of Indian Point's CLB. NYS asserted that it was presenting NYS-18 to NYS-22 with the understanding that these five contentions could be admissible only if the CLB were deemed not ascertainable, thereby lifting the restrictions on petitioners from bringing these types of contentions imposed by 10 C.F.R. § 54.30.[474] Because the Board has decided that the CLB is in fact ascertainable,[475] we find that NYS-21 and NYS-22 are outside the scope of the proceeding. Hence they are *inadmissible*.[476]

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[466] Entergy NYS Answer at 124.
[467] *Id.* at 124-25.
[468] *Id.* at 125.
[469] *See* NRC Staff Answer at 69-71.
[470] NYS Reply at 115.
[471] *Id.*
[472] *Id.*
[473] *See* discussion *supra* Part VI.S.2.
[474] Tr. at 367-68.
[475] *See supra* Part VI.A.2.
[476] 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi).

W. NYS-23

THE LICENSE RENEWAL APPLICATION FOR IP2 AND IP3 FAILS TO COMPLY WITH THE REQUIREMENTS OF 10 C.F.R. § 54.21(a) BECAUSE THE APPLICANT HAS NOT PROPOSED COMPREHENSIVE BASELINE INSPECTIONS TO SUPPORT ITS RELICENSING APPLICATION AND PROPOSED 20-YEAR LIFE EXTENSIONS.[477]

1. Background — NYS-23

NYS-23 contends that 10 C.F.R. § 54.21 requires a preapplication audit and inspection of the facilities by Entergy and the NRC Staff in order to identify the SSCs that are subject to AMR and to determine their functionality.[478] NYS further asserts that the NRC Staff should require Entergy, during the relicensing review, to perform a comprehensive baseline inspection of both reactors.[479] According to NYS, this inspection would establish the state of the reactors and their SSCs and would disclose any degradation.[480] NYS suggests that the inspection program, proposed by Entergy in the LRA, is ''vague and ill-defined.''[481]

Entergy, in opposing admission of NYS-23, states that it completed an IPA for IP2 and IP3 that complies with NRC Regulations.[482] Entergy also highlights the sections of the LRA that address these concerns and states that NYS does not dispute any of the results of the IPA.[483] Entergy disagrees with NYS's suggestion that it must undertake another inspection program before relicensing, claiming that such an additional program is not required under the regulations.[484] Entergy maintains that Appendix B of the LRA contains an adequate discussion of the inspection programs related to license renewal and that nothing more is required.[485]

The NRC Staff opposes admission of the contention because, in its view, NYS's opinion of what is appropriate is not what is required by regulation.[486] According to the NRC Staff, there is no regulation requiring an applicant to perform a preapplication audit or inspection beyond the IPA, which is called for in Part 54.[487]

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[477] NYS Petition at 217.
[478] *Id.*
[479] *Id.* at 218.
[480] *Id.* at 219.
[481] *Id.*
[482] Entergy NYS Answer at 126.
[483] *Id.*
[484] *Id.*
[485] *Id.* at 127.
[486] NRC Staff Answer at 72.
[487] *Id.* at 73.

In its Reply, NYS makes the point that the NRC Staff and Entergy oppose the contention because it is not required under the regulations, but NYS is asking for a comprehensive baseline inspection as a ''basic engineering principle.''[488] NYS contends that Entergy misconstrues the contention in that it incorrectly states that NYS asserted that an IPA had not been done.[489] NYS represents that its concern is with the inspections that will be done in the future.[490] NYS argues that those inspections ''are only as good as the baseline against which they are measured and the results are tracked and trended for rate of degradation.''[491] Furthermore, NYS asserts that the design life for a plant is not arbitrary and ''has significant safety implication for extended plant operations.''[492] Finally, in terms of materiality, NYS maintains that at this juncture it must establish only that it is entitled to ''cognizable relief'' and ''show that a more comprehensive inquiry is warranted'' — it does not need to prove its contention.[493]

2. Board Decision — NYS-23

The Board *rejects* this contention because it is outside the scope of this license renewal proceeding. Part 54 does not require the type of comprehensive baseline inspection desired by NYS, no matter how sensible such a requirement might seem. LRA §§ 2.1 to 2.5 describe the scoping and screening results of the IPAs required by section 54.21, and LRA Appendix B provides a discussion of license renewal inspection programs. NYS has not pointed to specific facts to support the conclusion that the IPAs in the LRA — the only plant inspection program required by the regulations — are inadequate. Entergy has done what the regulations require. If NYS believes the current NRC Regulations are inadequate, the venue for raising such a concern is a section 2.802 petition to institute a rulemaking action.

X. NYS-24

THE LICENSE RENEWAL APPLICATION FOR IP2 AND IP3 FAILS TO COMPLY WITH THE REQUIREMENTS OF 10 C.F.R. § 54.21(a)(1)(i) BECAUSE THE APPLICANT HAS NOT CERTIFIED THE PRESENT INTEGRITY OF THE CONTAINMENT STRUCTURES AND HAS NOT COMMITTED TO AN

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[488] NYS Reply at 115.

[489] *Id.*

[490] *Id.*

[491] *Id.* at 115-16.

[492] *Id.* at 117.

[493] *Id.* at 117-18 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998)).

ADEQUATE AGING MANAGEMENT PROGRAM TO ENSURE THE CONTINUED INTEGRITY OF THE CONTAINMENT STRUCTURES DURING THE PROPOSED LIFE EXTENSIONS.[494]

1. Background — NYS-24

NYS-24 alleges that the LRA fails to comply with 10 C.F.R. § 54.21(a)(1)(i) because Entergy has not conducted enhanced inspections to assess the integrity of the containment structures.[495] NYS asserts that the LRA ''discloses significant concerns regarding the continuing integrity of the containment structures''[496] based on the fact that the water/cement (''w/c'') ratios for the containment structures at IP2 and IP3 are outside the NRC's currently acceptable range.[497] Given that the material properties of concrete are directly related to the w/c ratio, NYS asserts that Entergy's AMP is inadequate, as stated in its expert witness' Declaration,[498] due to the lack of enhanced inspections needed to monitor integrity of the containment structures.

Entergy opposes admission of NYS-24 on the grounds that it is vague, presents an issue that is outside the scope of a license renewal proceeding, and does not demonstrate a genuine dispute on a material issue of law or fact.[499] Entergy asserts that NYS's arguments regarding the integrity of the containment structures are outside the scope of this proceeding to the extent that they address ongoing inspections and the current integrity of these structures.[500] Entergy posits that NYS's plea for the NRC to exercise its regulatory discretion to implement enhanced inspections demonstrates that this contention is outside the scope of the proceeding. Entergy agrees that certain issues relating to the integrity of the containment structures are within the scope of license renewal proceedings, but represents that these issues are adequately discussed in the LRA, and that all components subject to AMR are listed in the LRA as well.[501] While NYS references the GALL Report for the acceptable range for w/c ratios of 0.35 to 0.45, Entergy reverses its arguments on previous contentions by stating that the GALL Report is merely guidance and is not an NRC Regulation that is binding on the Applicant.[502] Instead, Entergy points out that the containment structures for

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[494] NYS Petition at 221.
[495] *Id.*
[496] *Id.*
[497] *Id.* at 222.
[498] *See* Declaration of Dr. Richard T. Lahey, Jr. at 12-13 (Nov. 2007) [hereinafter Lahey Declaration].
[499] Entergy NYS Answer at 130.
[500] *Id.* at 131.
[501] *Id.* at 132.
[502] *Id.* at 133-34.

IP2 and IP3 meet the broader American Concrete Institute (''ACI'') specification range which allow w/c ratios up to 0.576.[503]

The NRC Staff opposes admission of NYS-24 to the extent that NYS is requesting that the NRC exercise regulatory authority to require inspections of the concrete.[504] Such a request, in the Staff's view, reflects a concern with a current operating or compliance issue which is not subject to review in a license renewal proceeding.[505] Further, the NRC Staff argues that NYS-24 is vague and unsupported. The NRC Staff, like Entergy, asserts that the LRA shows that the concrete is in compliance with the ACI specifications.[506] While the NRC Staff admits that the w/c ratios are outside the range established in the GALL Report, it does not believe that NYS has provided support to require enhanced inspection.[507]

In its Reply, NYS asserts that, while the NRC Staff's argument that NYS-24 raises a current operating issue, the NRC does not actually address the issue in its review of current operating issues.[508] NYS argues that this contention questions the adequacy of Entergy's AMP for the concrete containment structure, i.e., the Applicant's program for future operations during the license renewal period.[509] NYS makes the point that enhanced inspections are required where, as in the case of Indian Point, the w/c ratios are outside the range listed by NRC Staff in the GALL Report.[510]

2. Board Decision — NYS-24

In NYS-24, the Petitioner has provided facts and expert opinion that question the integrity of the concrete in the containment structure by providing statements, not refuted by the Applicant or the NRC Staff, that the w/c ratio, while meeting ACI recommendations, exceeds the current recommended range provided by the GALL Report. The contention is neither vague nor unsupported, as Entergy and the NRC Staff assert. While NYS does not explain why Entergy's acceptance of w/c ratios up to 0.576 (as allowed by ACI) are not appropriate, it is undisputed that the engineering properties of the resulting concrete directly depend on this ratio. Further, we find that it is not NYS's but Entergy's burden to show that the concrete in the containment structures with w/c ratios as high as 0.576 will maintain its integrity during the extended period of operations, and, if this cannot

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[503] *Id.* at 133.
[504] NRC Staff Answer at 74.
[505] *Id.*
[506] *Id.*
[507] *Id.*
[508] NYS Reply at 118.
[509] *Id.*
[510] *Id.* at 120.

be done, to develop an AMP that ensures that any indication of degradation is detected and remediated. As suggested by NYS, enhanced inspections may be one component of such a plan.

In summary, the Board finds NYS has provided sufficient information to show that a genuine dispute exists that is within the scope of the proceeding relating to the continuing integrity of the containment structures based on the high w/c ratio. NYS-24 is *admitted* in order to determine what effect, if any, the w/c ratio will have on the integrity of the containment structure, whether an additional AMP is necessary, and also, what those AMPs must include.

Y. NYS-25

ENTERGY'S LICENSE RENEWAL APPLICATION DOES NOT INCLUDE AN ADEQUATE PLAN TO MONITOR AND MANAGE THE EFFECTS OF AGING DUE TO EMBRITTLEMENT OF THE REACTOR PRESSURE VESSELS (''RPVs'') AND THE ASSOCIATED INTERNALS.[511]

1. Background — NYS-25

NYS-25 contends that the LRA fails to include an adequate plan to monitor and manage the effects of aging due to embrittlement of the reactor pressure vessels (''RPV'') and the associated internals as required by 10 C.F.R. § 54.21(a), and does not include an evaluation of TLAA as required by 10 C.F.R. § 54.21(c).[512] NYS claims that a thorough review of the effects of embrittlement is essential in preventing a core meltdown and radioactive release.[513] NYS contends that the LRA does not document ''that Entergy performed any age-related accident analyses, or that it took embrittlement into account when it assessed the effect of transient loads.''[514] NYS asserts that the possibility of embrittlement of the RPV requires AMR under 10 C.F.R. § 54.4.[515] According to NYS, Entergy has failed to present any experiments or analysis ''to justify that the embrittled RPV internal structures will not fail . . . .''[516]

Entergy opposes the admission of NYS-25 because it maintains that, contrary to the assertions made by NYS, the LRA already adequately deals with embrittlement of RPVs and the associated internals.[517] Entergy claims that NYS fails to address

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[511] NYS Petition at 223.
[512] *Id.*
[513] *Id.* at 224.
[514] *Id.*
[515] *Id.* at 225.
[516] *Id.* at 226.
[517] Entergy NYS Answer at 135.

or refer to the areas of the LRA that deal with these issues.[518] Entergy believes that the expert support relied on by NYS makes bare assertions about what should be considered in the LRA without providing adequate support to justify admission of the contention.[519] Entergy also asserts that it is in compliance with 10 C.F.R. § 50.61, thus any challenge to its control of embrittlement is unsupported.[520]

The NRC Staff opposes the admission of NYS-25 because the contention does not identify any error, omission, or deficiency in the LRA.[521] The NRC Staff focuses on NYS's argument regarding TLAAs and asserts that NYS does not explain why or how Entergy's TLAA fails to show that the SSCs will perform their intended functions.[522] The NRC Staff further contends that the LRA does provide analysis on reactor vessel neutron embrittlement, and that NYS does not address any deficiency with that analysis.[523]

In its Reply, NYS asserts that Entergy has failed to establish the stability of the components of IP2 and IP3 in the LRA.[524] The experiments that were done, according to NYS, ''indicate that damage caused by irradiation embrittlement is a significant concern; one that must be considered before any decision on renewing the licenses . . . is made.''[525] NYS also contends that Entergy is incorrect in stating that NYS has not controverted a position taken by Entergy in its LRA. NYS points to the sections in its expert's Declaration that identify the sections of the LRA addressing embrittlement and his conclusion that ''embrittlement and/or fatigued incore bolts, structures, and their associated welds, when subjected to significant transient loads, may fail and result in an uncoolable core geometry subsequent to postulated accidents.''[526] NYS also believes that the contention is admissible as it has demonstrated that Entergy has not addressed several issues, namely, that the LRA fails to show (1) that any age-related accident analyses where performed; (2) whether embrittlement was taken into account in assessing the effect of the transient loads; and (3) how embrittled RPVs would respond in the case of a loss of coolant accident (''LOCA'').[527]

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[518] *Id.* at 136.
[519] *Id.*
[520] *See id.* at 139-41.
[521] NRC Staff Answer at 76.
[522] *Id.*
[523] *Id.*
[524] NYS Reply at 122.
[525] *Id.*
[526] *Id.* (citing Lahey Declaration at 6).
[527] *Id.* at 123 (citing Lahey Declaration at 6-7).

2. Board Decision — NYS-25

NYS submits that ''embrittlement of the RPVs and their associated internals is one of the most important age-related phenomena . . . [and that] [f]ailure to carefully consider the effects of embrittlement could result in a meltdown of the core . . . .''[528] This claim is supported by the Declaration of Dr. Richard Lahey, a Professor of Engineering at Rensselaer Polytechnic Institute, who is of the opinion that components in the Indian Point reactors have serious embrittlement issues that are not adequately addressed in Entergy's LRA. Specifically, Dr. Lahey indicates that a ''degradation in ductility'' (embrittlement) will adversely affect the reactor's ability to withstand pressurized thermal shock transients and that Entergy's LRA only briefly, in sections A.2.2 and A.3.2, mentions thermal shocks and does not demonstrate that the Applicant took embrittlement into account when addressing the effect of these transient loads.[529] Dr. Lahey states that Entergy fails to document in its LRA ''any experiments or analysis to justify that the embrittled RPV internal structures will not fail and that a coolable core geometry will be maintain[ed] subsequent to a [Design Basis Accident] LOCA.''[530] According to Dr. Lahey ''[t]his is a serious and unacceptable omission by Entergy because embrittled structures are known not to tolerate shock loads well.''[531]

Whether an AMP is necessary to manage the cumulative effects of embrittlement of the RPVs and associated internals is within the scope of this proceeding. The Lahey Declaration focuses on specific portions of Entergy's LRA that are, in Dr. Lahey's professional judgment, deficient. NYS has raised a genuine issue to be resolved at an evidentiary hearing. NYS-25 is *admitted.*

Z. NYS-26/26A

ENTERGY'S LICENSE RENEWAL APPLICATION DOES NOT INCLUDE AN ADEQUATE PLAN TO MONITOR AND MANAGE THE EFFECTS OF AGING DUE TO METAL FATIGUE ON KEY REACTOR COMPONENTS.[532]

1. Background — NYS-26/26A

NYS-26 was included in NYS's Petition.[533] Entergy submitted an Answer opposing the contention in its entirety, and the NRC Staff submitted an Answer

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[528] NYS Petition at 224 (quoting Lahey Declaration at 3).
[529] Lahey Declaration at 3-8.
[530] *Id.* at 7.
[531] *Id.*
[532] NYS Petition at 227.
[533] *Id.* at 227-33.

that did not oppose admitting the majority of NYS-26.[534] On March 4, 2008, the NRC Staff sent a letter to the Board in which it stated that Entergy had submitted LRA Amendment 2 to the Commission on January 22, 2008.[535] Based on LRA Amendment 2, the NRC Staff indicated it now found NYS-26 to be moot, and declared it now opposed the admission of NYS-26 in its entirety.[536] Based on the changed circumstances — the change in position of the NRC Staff based on the submission of LRA Amendment 2 — and in accordance with a Board Order,[537] NYS filed a supplement — NYS-26A — on April 4, 2008,[538] that did not alter the language of the original contention, but supplied additional support for its admissibility in response to LRA Amendment 2. Entergy and the NRC Staff responded on April 21, 2008.[539] NYS replied on May 1, 2008,[540] and on May 22, 2008, NYS filed a supplemental citation in support of admitting NYS-26A.[541]

2. Original Contention: NYS-26

NYS-26 alleges that the ''LRA does not include an adequate plan to monitor and manage the effects of aging due to metal fatigue on key reactor components that are subject to an [AMR], pursuant to 10 C.F.R. § 54.21(a), and an evaluation of TLAA, pursuant to 10 C.F.R. § 54.21(c).''[542] The focus of this contention is NYS's assertion that Entergy has not presented an AMP to address the potential for key reactor components to crack and/or fail due to metal fatigue. The clear

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[534] Entergy NYS Answer at 141-49; NRC Staff Answer at 77-78.

[535] Entergy Letter NL-08-021, Letter from Fred R. Dacimo, Entergy Vice President, License Renewal, to NRC Docket Control Desk (Jan. 22, 2008) (ADAMS Accession No. ML080290659) [hereinafter LRA Amendment 2].

[536] Letter from David E. Roth and Kimberly A. Sexton, Counsel for the NRC Staff, to the Licensing Board (Mar. 4, 2008) [hereinafter NRC Staff LRA Amendment 2 Letter].

[537] Licensing Board Order (Scheduling Briefing Regarding the Effect of License Amendment 2 on Pending Contentions) (Mar. 18, 2008) (unpublished) [hereinafter License Amendment 2 Briefing Order].

[538] Petitioner State of New York's Request for Admission of Supplemental Contention No. 26-A (Metal Fatigue) (Apr. 7, 2008) [hereinafter NYS Supplemental 26A].

[539] Answer of Entergy Nuclear Operations, Inc. Opposing the State of New York's Request for Admission of Supplemental Contention 26-A (Metal Fatigue) (Apr. 21, 2008) [hereinafter Entergy Supplemental 26A Answer]; NRC Staff's Response to New York State's Request for Admission of Supplemental Contention 26-A (Metal Fatigue) (Apr. 21, 2008) [hereinafter NRC Staff Supplemental 26A Response].

[540] Petitioner State of New York's Reply to Entergy's Answer and NRC Staff's Response to New York's Supplemental Contention No. 26-A (Metal Fatigue) (May 1, 2008) [hereinafter NYS Supplemental 26A Reply].

[541] New York State's Supplemental Citation in Support of Admission of Contention 26A (May 22, 2008) [hereinafter NYS Supplemental Citation].

[542] NYS Petition at 227.

potential for such cracking and failure is, according to NYS, indicated by the cumulative usage factors (''CUF'') presented in the LRA that exceed the critical value of 1.0 for several components, in particular, the pressurizer surge line piping, the reactor coolant system piping charging system nozzle for IP2, and the pressurizer surge line nozzle for IP3.[543] By not assessing the excessive CUF values, NYS maintains that Entergy has not adequately shown that the TLAA for metal fatigue will be valid throughout the license extension period.[544] Furthermore, while Entergy provides three potential options to resolve the excessive CUF values,[545] NYS contends that merely providing an ''impermissibly vague 'plan to develop a plan' '' does not properly manage the effects of aging.[546]

Entergy initially opposed admission of NYS-26 for lacking specificity, failing to supply factual support or expert opinion, and failing to establish a genuine dispute on a material issue of law or fact.[547] In opposing NYS-26, Entergy dismissed it as nothing more than a string of assertions that ''fail to identify any valid safety concern or specific deficiency in the LRA.''[548] Specifically, Entergy argued that NYS had not provided factual support for its allegations, and maintained that the contention does not establish a genuine dispute on a material issue because NYS failed to show that the approach outlined in the LRA to deal with metal fatigue — LRA § 4.3.3 — is unacceptable.[549] Entergy also stated that section 4.3.3 of the LRA demonstrates that its proposed program is adequate, consistent with NRC guidance and regulations, and is on schedule to be completed at least 2 years before the license renewal period begins.[550]

The NRC Staff did not initially oppose admission of NYS-26 to ''the limited extent that it challenges how the LRA demonstrates that it satisfies the elements of 10 C.F.R. § 54.21(c)(1)(iii) for the CUF.''[551] However, the NRC Staff did object to NYS's suggestion that Entergy will use arbitrary assumptions in any refined CUF analyses as unsupported speculation, and to NYS's request for immediate action by Entergy to replace existing components with CUFs greater than 1.0

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[543] *Id.* at 227-28.

[544] *Id.* at 232.

[545] *Id.* at 230-31. The options are (a) refine the fatigue analysis; (b) manage the effects of aging due to fatigue under a program approved by the NRC; or (c) repair or replace affected locations before the CUF exceeds 1.0.

[546] *Id.* at 232.

[547] Entergy NYS Answer at 142.

[548] *Id.*

[549] *Id.* at 143.

[550] *Id.* at 144-48.

[551] NRC Staff Answer at 77-78.

which the NRC Staff declared was a current operating issue that is outside the scope of the proceeding.[552]

In its Reply, NYS noted that the NRC Staff did not challenge NYS-26 to the extent that it addresses Entergy's approach to satisfying 10 C.F.R. § 54.21(c)(1)(iii), and further noted that Entergy's Amendment to the LRA does not invalidate the contention but rather confirms its validity.[553]

3. LRA Amendment 2

LRA Amendment 2 — submitted to the Commission on January 22, 2008 — included, *inter alia,* specific commitments to manage fatigue using the existing Fatigue Monitoring Program under 10 C.F.R. § 54.21(c)(1)(iii) rather than a program for which details would be submitted in the future.[554] LRA Amendment 2 also provided additional information relating to the CUF calculations and quality assurance. Specifically, in LRA Amendment 2, Entergy abandoned one of the options for aging management (the proposal to inspect key reactor components that have a CUF greater than 1.0), defined an approach to perform a refined fatigue analysis to account for the effects of reactor water environment, and committed to repairing or replacing affected components before they exceed a CUF of 1.0 in accordance with NRC Regulations and guidance (i.e., the GALL Report).[555]

In its March 4 letter, the NRC Staff stated without further elaboration that LRA Amendment 2 cured the deficiencies cited in NYS-26 and that the NRC Staff now opposed the admission of the contention.[556] The March 4 letter from the NRC Staff was received by the Board just prior to Oral Argument. Given the short period of time between the NRC Staff's change in position and Oral Argument, the Board authorized NYS — if it concluded that LRA Amendment 2 did not cure all deficiencies noted in the original NYS-26 — to file an amended contention that would take into consideration the change in circumstances caused by LRA Amendment 2 and the NRC Staff's change of position. This amended contention was to be filed by April 7, 2008, Entergy and the NRC Staff were to answer NYS's amended contention by April 21, 2008,[557] and NYS was to submit its reply by May 1, 2008.[558]

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[552] *Id.* at 78.

[553] NYS Reply at 125-27.

[554] NRC Staff LRA Amendment 2 Letter at 1 (citing LRA Amendment 2, Attach. 1).

[555] Entergy Supplemental 26A Answer at 8.

[556] NRC Staff LRA Amendment 2 Letter at 2.

[557] License Amendment 2 Briefing Order at 2.

[558] Licensing Board Order (Granting Riverkeeper, Inc.'s Motion and Amending Briefing Schedule) at 3 (Apr. 9, 2008) (unpublished).

4. Supplemental Contention: NYS-26A

In its amendment designated ''Supplemental Contention 26-A'' (NYS-26A),[559] NYS did not withdraw its original NYS-26; instead, NYS took the position that LRA Amendment 2 did not cure the basic defect identified in the original contention, and that Entergy failed to submit an adequate AMP for metal fatigue in accordance with 10 C.F.R. § 54.21(c)(1)(iii).[560] Further, NYS states that Entergy's application, including LRA Amendment 2, does not provide details on the analytical methods and assumptions it proposed to use to calculate the TLAA for metal fatigue required for the LRA, and failed to meet regulations by delaying these calculations until after approval of its LRA.[561] Finally, according to NYS, Entergy continues to rely on a vague AMP which merely commits to either repairing or replacing key components when the CUFs become greater than 1.0, without providing any other details, e.g., the criteria governing the adoption of remedial action for affected components.[562]

Entergy opposes NYS-26A as lacking adequate factual or legal support, and for failure to establish a genuine dispute.[563] In addition to addressing NYS's assertion that certain reactor components are ''already fatigue limited,''[564] Entergy asserts that it meets the requirements of 10 C.F.R. § 54.21 by using a methodology for its CUF calculations that has been approved by the American Society of Mechanical Engineers (''ASME'') and the NRC Staff, by applying factors derived for carbon/low-alloy steels and stainless steels from NUREG/CR-6583 and NUREG/CR-5704 respectively, and by using plant-specific operational history data as governed by Entergy's Part 50, Appendix B Quality Assurance program.[565] Entergy goes on to challenge NYS's inferences that it will adjust the calculation inputs to obtain a preordained result by pointing out that performing corrective action for components with an existing CUF above 1.0 is an operational issue addressed by its CLB, and states that there is no regulatory requirement to

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[559] NYS addressed the three requirements of 10 C.F.R. § 2.309(f)(2) for filing a new or amended contention, and met the Board's directive to submit any additional pleading based on LRA Amendment 2 by April 7, 2008. NYS Supplemental 26A at 6-8. Entergy did not oppose NYS's proposed amendment as nontimely. Entergy Supplemental 26A Answer at 4. In its answer, the NRC Staff was silent on the matter as well.

[560] NYS Supplemental 26A at 2, 4.

[561] *Id.* at 5.

[562] *Id.* at 6.

[563] Entergy Supplemental 26A Answer at 4.

[564] While Entergy thoroughly addresses this allegation, NYS simply notes in its Reply that it is reasonable to assume that, given the high CUF values approaching 0.9 at the time of extended operations, that some CUF values would likely approach 1.0 before extended operations. NYS Supplemental 26A Reply at 2 n.1.

[565] Entergy Supplemental 26A Answer at 8.

implement any action now for those components whose CUFs are projected to exceed 1.0 during the period of extended operation.[566]

The NRC Staff also opposes admitting NYS-26A, positing that delaying the CUF calculations and the development of an AMP is consistent with regulations and Staff guidance.[567] The NRC Staff notes that Entergy commits to refining the CUF calculations at least 2 years prior to entering the period of extended operation.[568] The NRC Staff also uses the GALL Report to support its position that recalculating CUFs is an acceptable option and claims that there is no regulatory authority to demand that an applicant immediately repair or replace components that will have a CUF above 1.0.[569]

Supported by its expert witness, NYS replies that Entergy's proposed plan for recalculating the CUFs does not define the assumptions it will use in this reanalysis, does not describe how it will implement the methodology for each of the two reactors at Indian Point, and does not provide any detail on what it will do if the recalculated CUFs are greater than 1.0 for any of the key reactor components.[570] NYS describes Entergy's involvement with its License Renewal proceedings for *Vermont Yankee,* where a similar CUF issue was admitted as a contention.[571] NYS claims that the experience in *Vermont Yankee* supports its allegation that the mere disclosure of the type of recalculations that will be performed still results in multiple issues when the assumptions and actual analyses are not provided in the LRA.[572]

5. NYS Supplemental Citation in Support of Admission of NYS-26A

On May 14, 2008, the NRC Staff posted on the ADAMS system a summary of a telephone conference between Entergy and the NRC Staff that was held on

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[566] *Id.* at 9-13.

[567] NRC Staff Supplemental 26A Response at 5.

[568] *Id.* at 7. It is interesting to note, however, that the NRC Staff does not address the fact that Entergy had committed to refining the CUF calculation only for the locations identified in LRA Tables 4.3-13 and 4.3-14 but had deleted its initial commitment to perform these calculations for the other locations listed in NUREG/CR-6260, ''Application of NUREG/CR-5999 Interim Fatigue Curves to Selected Nuclear Power Plant Components'' (Feb. 1995) (ADAMS Accession No. ML031480219), without providing justification for this change in position, LRA Amendment 2, Attach. 1 at 5, Attach. 2 at 15, and is silent on the need for expanded CUF analyses whenever key components indicate a CUF greater than 1.0.

[569] NRC Staff Supplemental 26A Response at 10. The NRC Staff goes on to assert that any allegation by NYS that some components currently have a CUF greater than 1.0 is an operational issue which should be addressed under 10 C.F.R. § 2.206.

[570] NYS Supplemental 26A Reply at 2-3.

[571] *Vermont Yankee,* LBP-06-20, 64 NRC at 183-87.

[572] NRC Staff Supplemental 26A Response at 4-6.

April 3, 2008, regarding, *inter alia,* the amount of information Entergy would be required to produce as part of its LRA.[573] In response, NYS submitted a supplemental pleading in which it claims that the NRC Staff summary ''reveals that Entergy, with the acquiescence of the NRC Staff, does not intend to allow the details of how it will address metal fatigue issues to be made part of this license renewal proceeding.''[574]

6. Board Decision — NYS-26/26A

The Board concludes that NYS has raised a genuine issue with regard to whether the LRA contains an adequate AMP for metal fatigue of key reactor components and, for reasons explained herein, *admits* that portion of NYS-26/26A relating to the calculation of the CUFs, and the adequacy of the resulting AMP for those components with CUFs greater than 1.0.[575]

Calculation of the CUFs is a TLAA for metal fatigue which must be included in an LRA in accordance with 10 C.F.R. § 54.21(c)(1). In evaluating metal fatigue, a component's CUF is the fundamental parameter used to determine whether it will likely develop cracks during the license renewal period and, as a result, be subject to an AMP in accordance with 10 C.F.R. § 54.21(c)(1)(iii). The Board finds that, as the threshold parameter of the TLAA for metal fatigue, an applicant must complete the analysis of the CUFs for the license renewal period and include the results in the LRA. Any reanalysis or refinements of the CUF calculations would also be governed by the same TLAA requirements.[576]

We reason that the recalculation of the CUFs is not an option for the AMP. CUFs are threshold values that determine whether such a program is needed for license renewal. Likewise, there is no technical or logistical reason why these calculations cannot be completed as part of the LRA. The regulations support this logic by dictating that the analysis of these factors be completed before the need for an AMP is determined and included in the LRA.

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[573] NRC Summary of April 3, 2008, Telephone Conference Between Entergy and NRC Staff (May 8, 2008) (ADAMS Accession No. ML081190059).

[574] NYS Supplemental Citation at 1.

[575] The Board rejects NYS's suggestion that Entergy will use arbitrary assumptions in any refined CUF analyses as unsupported speculation.

[576] Before later changing its opinion, the NRC Staff did not accept Entergy's commitment in *Vermont Yankee* to complete the evaluation of TLAA prior to entering the period of extended operations, but required Entergy to calculate the CUF for its LRA in order to meet the requirements of 10 C.F.R. § 54.21(c)(1). Summary of Telephone Conference Call Held on August 17, 2007, Between the U.S. Nuclear Regulatory Commission and Entergy Nuclear Operations, Inc., Pertaining to the Vermont Yankee Nuclear Power Station License Renewal Application (Oct. 25, 2007) (ADAMS Accession No. ML072630124).

Initially Entergy proposed three options as its AMP to address 10 C.F.R. §§ 51.21(a)(3) and 54.21(c)(1)(iii), including the option of refining the CUF calculations to ''determine valid CUFs less than 1 when accounting for the effects of reactor water environment.''[577] However, Entergy's proposal to perform the modified calculations in the future, albeit in accordance with specified guidance, is unacceptable because these calculations are not a component of an AMP, but are the fundamental fatigue analyses for time-limited aging that 10 C.F.R. § 54.21(c) requires to be included in the LRA.

Even if the refined CUF analyses were considered part of the AMP — the Board believes they are not — Entergy's proposal would fall short of the obligations required by section 54.21(c)(1)(iii). Specifically, Entergy has not provided the details of the approach and assumptions used in the analyses, how the calculations will be verified, or a summary of the resulting CUFs for each location, including the representative locations identified by NUREG/CR-6260.[578] In LRA Amendment 2, Entergy commits to performing the work using a time-tested analytical method and, in accordance with ASME codes, applying parameters consistent with the GALL Report, deriving analysis factors from unspecified formulae in various NUREGs, and applying its Part 50, Appendix B Quality Assurance program to govern this activity.[579] However, the potential range of possible calculations that might result from the application of this approach does not meet the demonstration requirements of section 54.21(c)(1)(iii) for an AMP.

In regards to the corrective action portion of its AMP, Entergy's commitment to ''repair or replace the affected locations before exceeding a CUF of 1.0''[580] does not meet the ''demonstration'' requirement of the regulations.

Entergy and the NRC Staff erroneously conclude that Entergy's future commitments meet the intent of section 54.21(c)(1)(iii) in that the ''effects of aging on the intended function(s) *will* be adequately managed for the period of extended operations.''[581] While the implementation of the AMP can anticipate future actions as implied by this statement, the actual plan must be sufficient to demonstrate the specific aging management actions that will take place in the future, and not just that the AMP will be developed in the future. Entergy's lack of CUF calculations and brief description of potential corrective options (i.e., ''repair or replace the affected locations''[582]) falls short of the regulatory standard.

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[577] LRA § 4.3.3.

[578] *See* NUREG/CR-6260.

[579] Entergy Supplemental 26A Answer at 10-12.

[580] LRA Amendment 2, Attach. 2 at 15.

[581] Entergy Supplemental 26A Answer at 11; NRC Staff Supplemental 26A Response at 7 (citing 10 C.F.R. § 54.21(c)(1)(iii)) (emphasis added by Applicant and the NRC Staff).

[582] LRA Amendment 2, Attach. 2 at 15.

The regulatory guidance allowing for postponement of program details relates to those portions of the plan that depend upon the future actions, performance data or the like, that is impossible to perform or obtain prior to submittal of the LRA and can only be performed or obtained up to and during the period of extended operations. In such situations, the applicant must defer the specificity of its program to a future date when this information becomes available. This is not what faces us here.

Once the CUF calculations are completed at the LRA stage, the Applicant can decide which option it will use to manage aging for the critical components and to define the plan at this time. Entergy may wish to postpone the effort to a future date, but it has not provided any justification to support such a course. Thus, although Entergy does not have to implement the selected option at this time, it must perform the threshold CUF calculations needed to define its chosen course, and choose its course.

The NRC Staff is correct in pointing out that new commitments developed for license renewal are an acceptable licensing basis.[583] Consistent with this approach, as the example from the SRP-LR provided by the NRC Staff in its answer to NYS-26A suggests,[584] it is appropriate and reasonable for the Applicant to delay initiating corrective actions until the time when the CUF for a key component approaches 1.0. For the LRA, however, the regulations require a TLAA, like the CUF calculations, and an AMP *demonstrating* that aging effects will be managed during the period of extended operation. Neither of these requirements can be met by delaying the refined CUF calculations to some future date, or by merely committing to develop a plan at some undefined time after the renewal license is granted.

In its answer to NYS-26A, the NRC Staff uses a quote from the GALL Report defining an acceptable AMP for metal fatigue corrective actions as one that includes ''repair of the component, replacement of the component, and a more rigorous analysis'' to support its position that refined CUF calculations are a viable option which ''are treated no differently than repair or replacement.''[585] Besides the fact that the NUREG has no force of law, the NRC Staff arguably has misread the language in this section. The conjunction ''and'' before ''more rigorous analysis'' refers to additional actions that must take place for any component that is repaired or replaced, and not to the *refinement/reanalysis* of the initial CUF calculations that are the subject of interest in this contention.

In this contention, NYS further argues that components with CUF greater than 1.0 through the extended period of operations should be replaced immediately.[586]

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[583] NRC Staff Supplemental 26A Response at 5 (citing 56 Fed. Reg. at 64,945-46).

[584] *Id.* at 6.

[585] *Id.* at 9-10 (quoting the GALL Report at X.M-1 — X.M-2).

[586] NYS Petition at 232.

While it may be prudent to do so, there is nothing in the regulations that requires Entergy to implement that action at this point, or at any other specific time in the future. To the contrary, none of the arguments presented to date indicate that the effects of aging on the SSCs cannot be adequately managed by delaying the repair or replacement of the key components until a time when it is needed, as indicated by the CUF values approaching 1.0. Such an approach is consistent with the regulatory language in section 54.21(c)(1).

In summary, this Board *admits* NYS-26/26A to the limited extent that it asserts that the LRA is incomplete without the calculations of the CUFs as threshold values necessary to assess the need for an AMP, that Entergy's AMP is inadequate for lack of the final values, and that the LRA must specify actions to be carried out by the Applicant during extended operations to manage the aging of key reactor components susceptible to metal fatigue. In doing so, the Board recognizes the requirement for inclusion of the actual CUF calculations in the LRA to meet the TLAA regulations, 10 C.F.R. § 54.21(a)(3), and to provide the specificity needed to achieve the demonstration required of an AMP, 10 C.F.R. § 54.21(c)(1)(iii). Moreover, consistent with a recent ruling in *Vermont Yankee,*[587] this Board recognizes that an AMP that merely summarizes options for future plans does not meet the specific requirement for demonstrating that the effects of aging will be adequately managed for the period of extended operations as required by Part 54.

AA. NYS-27

THE NRC SHOULD REVIEW IN THIS RELICENSING PROCEEDING THE SAFETY OF THE ON-SITE STORAGE OF SPENT FUEL AND THE CONSEQUENCES OF A TERRORIST ATTACK ON ANY OF THE THREE SPENT FUEL POOLS AT INDIAN POINT.[588]

1. Background — NYS-27

NYS-27 asserts that the NRC should review the safety of the onsite storage of spent fuel and the consequences of a terrorist attack on any of the three spent fuel pools at Indian Point.[589] NYS contends that NEPA requires the NRC to consider every significant aspect of the environmental impact of a proposed action. NYS points to the Ninth Circuit decision in *San Luis Obispo Mothers*

[587] *Vermont Yankee,* LBP-06-20, 64 NRC at 186-87.
[588] NYS Petition at 234.
[589] *Id.*

for Peace v. NRC,[590] which held that NEPA requires the NRC to study how the actions of applicants and the NRC affect the risk of terrorism.[591] NYS maintains that the spent fuel pools at Indian Point are not enclosed by leak-tight containment structures, and that this deficiency would increase the radiation dispersed in case of an attack.[592] NYS contends that it has exposed the fallacy of the NRC's position (that an attack on the spent fuel pools is unlikely and would not produce significant environmental impacts); that the issue is material to the environmental and safety findings that the NRC must make; and that the NRC should not issue the license without critically examining the real possibility of a terrorist attack on a reactor so close to New York City.[593]

Entergy opposes admission of this contention because the ''Commission and its Licensing Boards have consistently held that the NRC Staff does not need to consider, as part of its safety or environmental review, terrorist attacks on nuclear power plants seeking renewed licenses, including the spent fuel pool.''[594] Entergy argues that the Commission has ''expressly rejected'' the notion that the Ninth Circuit's decision in *Mothers for Peace* requires a review of the environmental costs of an act of terrorism during a license renewal proceeding.[595] Entergy also claims that NYS-27 is an impermissible challenge to NRC Regulations, specifically 10 C.F.R. Part 51, and asserts that the proper forum for NYS to address its concerns would be the rulemaking process, not an adjudicatory proceeding.[596]

The NRC Staff opposes the contention's admission because the Commission ''has clearly ruled that NEPA does not require consideration of the environmental impact of terrorist acts in a license renewal proceeding.''[597] The NRC Staff also incorporates its response to Clearwater's Contention EC-6.[598]

In its Reply, NYS points out that neither the NRC Staff nor Entergy refutes NYS's assertions that there will be significant and devastating impacts if the radioactive material stored in the spent fuel pools is released.[599] NYS also suggests that neither party addresses the question of whether terrorism is a credible

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[590] 449 F.3d 1016 (9th Cir. 2006), *cert. denied, Pacific Gas & Electric Co. v. San Luis Obispo Mothers for Peace,* 127 S. Ct. 1124 (2007).

[591] NYS Petition at 242.

[592] *Id.* at 243.

[593] *Id.*

[594] Entergy NYS Answer at 150 (citations omitted).

[595] *Id.* at 151.

[596] *Id.* at 152-53.

[597] NRC Staff Answer at 79.

[598] *See* discussion *infra* p. 207; NRC Staff Answer at 101-02.

[599] NYS Reply at 130.

threat to the facility.[600] NYS argues that the analysis in, and conclusions of, the GEIS are flawed and outdated in its severe accident analysis and that Entergy has not contradicted any of the evidence and analysis provided by NYS regarding the GEIS.[601] NYS further contends that the adverse environmental impacts resulting from an attack on the spent fuel pools are different than those that the GEIS analyzed because the GEIS looked at a release from inside a containment structure, and the spent fuel pools are outside the containment structures.[602] Furthermore, NYS points out that the Environmental Protection Agency (''EPA'') has asked the NRC to include an analysis of the impacts of terrorism in a license renewal Environment Impact Statement, thereby contradicting the NRC Staff's and Entergy's argument that the consequences of terrorist acts do not need to be considered.[603]

2. Board Decision — NYS-27

Subsequent to *Mothers for Peace,* which said that under NEPA the NRC must consider the environmental consequences of a terrorist attack, the Commission asserted in *Oyster Creek* that it ''is not obligated to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question.''[604] The Commission determined that '' '[t]errorism contentions are, by their very nature, directly related to security and are therefore, under our [license renewal] rules, unrelated to ''the detrimental effects of aging.'' Consequently, they are beyond the scope of, not ''material'' to, and inadmissible in, a license renewal proceeding.' ''[605] Furthermore, the Commission has found that NEPA ''imposes no legal duty on the NRC to consider intentional malevolent acts . . . on a case-by-case basis in conjunction with commercial power reactor license renewal applications.''[606]

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[600] *Id.*

[601] *Id.* at 131-32.

[602] *Id.* at 134.

[603] *Id.* at 135 (citing Letter from Grace Musumeci, Chief, Environmental Review Section, U.S. Environmental Protection Agency, Region 2, to Chief, Rules and Directives Branch, Division of Administrative Services, NRC (Oct. 10, 2007) (ADAMS Accession No. ML072960360).

[604] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-29 (2007) (citing *United States v. Stauffer Chemical Co.,* 464 U.S. 165, 173 (1984); *United States v. Mendoza,* 464 U.S. 154, 160 (1984)).

[605] *Id.* at 129 (quoting *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 364 (2002)).

[606] *McGuire/Catawba,* CLI-02-26, 56 NRC at 365 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); *accord Dominion Nuclear*

(Continued)

Based on *Oyster Creek,* we find that NYS-27 is beyond the scope of this proceeding, and *inadmissible.* While the Board understands the unique nature of the Indian Point facility given its proximity to New York City, we are nonetheless bound by the Commission's ruling in *Oyster Creek* ''that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities.''[607] Accordingly, we must *reject* NYS-27.

BB. NYS-28

RADIONUCLIDES LEAKING FROM THE IP1 AND IP2 SPENT FUEL POOLS ARE CONTAMINATING GROUNDWATER AND THE HUDSON RIVER, AND NEPA REQUIRES THAT THE NRC EXAMINE THE ENVIRONMENTAL IMPACTS OF THESE LEAKS IN THE CONTEXT OF THIS LICENSE RENEWAL PROCEEDING.[608]

1. Background — NYS-28

NYS-28 contends that because radionuclides are leaking from the spent fuel pools at IP1 and IP2, thereby contaminating groundwater and the Hudson River, the NRC Staff must examine the environmental impacts of these leaks as part of its NEPA review.[609] NYS argues that leaks of radionuclides, which Entergy acknowledges have occurred from the spent fuel pools at Indian Point, are neither a Category 1 nor a Category 2 issue and, accordingly, the NRC must assess those impacts in the context of a license renewal proceeding.[610] NYS contends that residual contamination will continue even when all the spent fuel is removed, that an inability to inspect a large portion of the liner will prevent Entergy from precluding other leaks, and that the full extent of the impact is unknown.[611]

According to NYS, Entergy's argument that the NRC examined tritium contamination of groundwater in the GEIS does not invalidate this contention, because (1) the 1996 GEIS review was not an inquiry into leaks from spent fuel pools; (2) radionuclides other than tritium were detected at Indian Point; (3) leakage of radionuclides is occurring not only into the groundwater but also into the Hudson River; and (4) the levels of contamination are higher than acceptable levels at

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Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002)).

[607] *Oyster Creek,* CLI-07-8, 65 NRC at 129.

[608] NYS Petition at 245.

[609] *Id.*

[610] *Id.* at 247-48.

[611] *Id.* at 250-251 (citing Declaration of Timothy B. Rice at 7-8 (Nov. 26, 2007)).

various locations onsite.[612] Additionally, NYS suggests that a plant operator who cannot prevent multiple leaks of radionuclides should not be considered to be qualified for a license extension, because the NRC must ensure that each applicant will operate the plant in a manner that is safe for the public and the environment before it grants an extension to the license.[613] In sum, it is NYS's position that the extent of the leaks far exceeds what the NRC reviewed on a generic basis in the GEIS and that the uniqueness of the site and hydrogeologic pathways to the Hudson River mean that these impacts are significant and must be reviewed under NEPA in this proceeding.

Entergy opposes admission of NYS-28, claiming that it raises issues that are outside the scope of license renewal proceedings, lacks factual support or expert opinion, and fails to establish a genuine dispute on a material issue of law or fact.[614] Entergy asserts that while there have been leaks into the groundwater that may have gone into the Hudson River, the site does not use the groundwater onsite and the groundwater is not associated with any drinking water pathway; therefore, Entergy argues EPA limits on drinking water are not applicable.[615] Entergy points out that NYS has not disputed the radiological findings in the ER that found that NRC dose limits have not been exceeded.[616]

Entergy also states that its 2-year hydrogeologic investigation into the groundwater impacts, as discussed in section 5.1 of the ER, was completed after the LRA was submitted and the report summarizing its findings and conclusions was issued on January 11, 2008, with copies sent to the NRC, New York State Department of Environmental Conservation (''NYSDEC''), and the New York Public Service Commission.[617] Entergy reports that the results from this investigation are consistent with the previous site data and do not indicate any potential adverse environmental or health risk.[618] Finally, Entergy contends that, based on the information in the ER and in the Investigation Report, all of NYS's issues in NYS-28 are either moot, invalid, or outside the scope of this proceeding.[619] The Investigation Report claims that the leaks in the spent fuel pool of IP2 have been identified, repaired, and stopped; that any potential for leaks from the IP1 spent fuel pool will be permanently terminated in 2008 when Entergy removes the spent

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[612] *Id.* at 252.

[613] *Id.* at 250.

[614] Entergy NYS Answer at 154.

[615] *Id.* at 156-57.

[616] *Id.* at 157.

[617] Hydrogeological Site Investigation Report, Indian Point Energy Center, Buchanan, New York (Jan. 11, 2008) [hereinafter Investigation Report].

[618] Entergy NYS Answer at 159.

[619] *Id.* at 161-64.

fuel and drains the pool; and that there are no known leaks from IP3's spent fuel pool.[620]

The NRC Staff opposes admission of NYS-28 on the grounds that it is an impermissible challenge to NRC Regulations, is beyond the scope of the proceeding, and fails to identify a genuine dispute.[621] The challenge to the regulations relates specifically to attacks by NYS on the GEIS, and on the decision made by the Commission that, in license renewal proceedings, the radiological impacts on the environment can be dealt with generically and that the impact is small.[622] The NRC Staff also contends that NYS's expert does not raise any issues of fact in support of the contention.[623]

In its Reply, NYS argues that Entergy's ER fails to address the potential environmental impacts from the leaking spent fuel pools and fails to analyze mitigation measures to address these leaks.[624] NYS contends that contrary to the assertion made by the NRC Staff that NYS-28 challenges the GEIS, the contention actually does not assert that the spent fuel leaks are a Category 1 issue or a Category 2 issue but rather are an environmental impact that has not been addressed in the GEIS.[625] NYS objects to the NRC Staff's assertion that the contention does not raise issues of fact by referencing portions of its petition that presented, for instance, concentrations of tritium at levels 30 times the drinking water standard and strontium-90 at 14 times the standard,[626] information that is inconsistent with the claims by Entergy in its ER of only low concentration detections. NYS urges that Entergy's assertion that the EPA's drinking water limits are inapplicable is erroneous by pointing out that these limits are often used as a benchmark for comparison purposes, and that Entergy itself uses them both in the ER and in the Investigation Report.[627] NYS asserts that as a matter of law, ''Entergy does not have the right to decide the current and future uses of groundwater for the residents of New York State.''[628] Also, NYS disputes Entergy's claim that the impact of the new information is not significant, maintaining that Entergy's conclusion is based only on short-term risks and does not properly evaluate the long-term effects of the leaks.[629]

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[620] *Id.* at 162.
[621] NRC Staff Answer at 79.
[622] *Id.* at 79.
[623] *Id.* at 80.
[624] NYS Reply at 136.
[625] *Id.* at 138.
[626] *Id.* at 140.
[627] *Id.* at 141.
[628] *Id.* (citing Environmental Conservation Law §§ 17-0101, 17-0301, 17-0303, 17-0809; N.Y. Comp. Codes R. & Regs. tit. 6, Parts 701, 703).
[629] *Id.* at 143-45.

2. Board Decision — NYS-28

In NYS-28 it is implied that the NRC Staff has not addressed the environmental impacts of the radionuclides leaking from the IP1 and IP2 spent fuel pools as part of its NEPA requirements. The Board finds that such a claim must be *rejected* because it is impossible for the Board to judge what NRC may or may not do in its Supplemental Environmental Impact Statement (''SEIS'') for the Indian Point LRA proceedings — a document that is months away from publication. With similar situations in other contentions, the Board was able to determine that the contention related primarily to the quantity and quality of information that Entergy provided in its ER.[630] However, for this contention, NYS does not refer to Entergy's ER until the last page of its Petition, and then only briefly to address Entergy's position that leaks from the spent fuel pools are not within the scope of the proceeding because the NRC examined tritium contamination of groundwater in section 4.8.2 of the GEIS.[631]

NYS aggressively challenges Entergy's ER in its Reply. But the issues raised by NYS in its Reply (i.e., attacks on the lack of information and analyses in Entergy's ER) are significantly different than the issues raised in its initial contention (i.e., that NEPA requires NRC to examine the environmental impacts of the detected radionuclide leaks), and the allegations in the Reply are ones that could and should have been raised in its initial Petition. As new information, the Board did not consider the arguments presented for the first time in NYS's Reply.

Even if the Board were to consider NYS's new allegations raised in its Reply, we note that the Applicant has, in section 5.0 of its ER, characterized these radiological leaks as new information, but goes on to posit that these leaks are not significant because Entergy defines the impacts as SMALL based on the total dose exposure.[632] Contentions relating to the conclusions that the NRC Staff reaches in its NEPA analysis with regard to the environmental impacts from these radiological releases to groundwater must await future publication of its SEIS.

In *denying* the admissibility of this contention we note that it is very similar to Riverkeeper EC-3 and Clearwater EC-1, both of which we admit and will consolidate.[633] We admit those contentions because they focus on alleged deficiencies in the ER, and refuse to admit NYS-28 because it focuses on the NRC Staff review that has yet to occur. We note, however, that NYS can adopt Riverkeeper EC-3 and Clearwater EC-1 in order to further participate in the litigation of the issues raised in this contention.

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[630] *See, e.g., infra* Part VI.DD.

[631] NYS Petition at 252.

[632] Entergy NYS Answer at 156-57; Tr. at 439-40.

[633] *See infra* Part XIII.

CC. NYS-29

THE ENVIRONMENTAL REPORT FAILS TO ADDRESS EMERGENCY PREPAREDNESS AND EVACUATION PLANNING FOR INDIAN POINT, AND THUS VIOLATES THE REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT.[634]

1. Background — NYS-29

NYS-29 contends that the ER violates NEPA and NRC Regulations by failing to address the environmental impacts of emergency preparedness and evacuation planning.[635] NYS asserts that the NRC's conclusion that the analysis of evacuation plans is not a site-specific issue that must be addressed in the ER is a violation of NEPA and is contrary to NRC's own basis for the GEIS.[636] NYS points out that evacuation planning is not categorized as a separate issue in the GEIS, but is part of postulated accidents, and specifically, design basis accidents, a Category 1 issue, and severe accidents, a Category 2 issue for which NYS alleges emergency and evacuation planning must be analyzed.[637] Specifically, NYS contends that while the GEIS does discuss emergency planning, and uses it for calculating the risk of an accident, it does not ''directly address the mechanisms, efficacy, and effectiveness of actual evacuation plans.''[638] With the aid of expert opinion expressed in a report by James Lee Witt and the Declaration of Raymond C. Williams, NYS makes several points regarding the inadequacy of emergency evacuation plans specific to Indian Point.[639]

Entergy opposes the admission of NYS-29 on the grounds that it raises issues not within the scope of the proceeding, poses an impermissible challenge to Commission regulations, runs counter to controlling Commission legal precedent, and fails to establish a genuine dispute on a material issue of fact or law.[640] Entergy claims that the language of 10 C.F.R. § 50.47 directs that emergency

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[634] NYS Petition at 253.

[635] *See id.* at 253-55 (citing 10 C.F.R. § 50.47 and 10 C.F.R. Part 51).

[636] *Id.* at 256.

[637] *Id.* at 257-59.

[638] *Id.* at 258.

[639] *Id.* at 259-61, 264-69. According to the information provided by NYS, traffic studies have shown the road system to be inadequate to handle an evacuation; population density has made the consequences of ineffective protective strategies more serious; first responders will flee the vicinity because they believe the evacuation plans cannot work; the planning process has outdated and ineffective aspects; there is inadequate public outreach and education; communications systems and hazard assessment technologies are outdated; and local and state officials will not certify the evacuation plans.

[640] Entergy NYS Answer at 165.

planning is outside the scope of license renewal proceedings.[641] Entergy also points to language in *Turkey Point* and *Millstone*[642] to support its position that the Petitioner, by attempting to challenge emergency planning in this proceeding, is impermissibly challenging NRC Regulations. Entergy adds that 10 C.F.R. § 51.53(c)(3)(i) incorporates the findings of the GEIS into Part 51 and therefore the ER does not need to analyze Category 1 issues.[643] Entergy also states that NYS does not identify any specific deficiencies in the ER and that emergency and evacuation plans are reviewed periodically and are thus part of the ongoing regulatory process.[644]

The NRC Staff opposes the admission of NYS-29 because, in its view, the Commission has explicitly determined that emergency preparedness is outside the scope of the license renewal process.[645] The NRC Staff argues that ''neither NEPA nor the Commission's regulations in 10 C.F.R. Part 51 require consideration of emergency preparedness in an [ER] submitted in support of [an LRA] — nor has [NYS] cited any legal authority to support this claim, as required.''[646]

In its Reply, NYS maintains that neither the NRC Staff nor Entergy has refuted NYS's assertions regarding the deficiencies of the evacuation plan.[647] NYS contends that because it has submitted a contention with enough evidence of the deficiencies in the ER on the evacuation planning issue it has met the requirements of 10 C.F.R. § 2.309.[648] NYS also attempts to clarify that NYS-29 is an environmental contention, not a safety contention, and thus the main issue in this contention is whether the ER ''fully analyzes and identifies mitigation measures should there be an off-site radiological emergency release.''[649] NYS maintains that the law requires the ER to consider alternatives to mitigate severe accidents and that Entergy has failed to ''consider any of the problems identified

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[641] *Id.* at 165-66. [Entergy referenced 10 C.F.R. § 50.47(a)(1)(ii) which the Board believes should be section 50.47(a)(1)(i).]

[642] *Id.* at 166 (citing *Turkey Point,* CLI-01-17, 54 NRC at 10 (''Issues like emergency planning — which already are the focus of ongoing regulatory processes — do not come within NRC safety review at the license renewal stage . . . .''); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560-61 (2005) (''Emergency planning is, by its very nature, neither germane to age-related degradation nor unique to the period covered by the . . . license renewal application. Consequently, it makes no sense to spend the parties' and our own valuable resources litigating allegations of *current* deficiencies in a proceeding that is directed to *future*-oriented issues of aging'')).

[643] Tr. at 458.

[644] Entergy NYS Answer at 167.

[645] NRC Staff Answer at 82 (citing 56 Fed. Reg. at 64,967).

[646] *Id.* at 84.

[647] NYS Reply at 147.

[648] *Id.*

[649] *Id.* at 148.

with the current emergency planning or ways to fix those problems in order to mitigate the consequences of a severe accident at Indian Point.''[650] NYS contends that the Commission noted in *Turkey Point* that the environmental analyses in the GEIS will be reviewed every 10 years, and points out that they are currently over 12 years old.[651] NYS noted during Oral Argument that the GEIS is now ''stale'' and that NYS is being ''asked to look at conclusions reached a decade-plus ago on issues of grave safety and mitigation with respect to the environmental impacts of [a] nuclear facility.''[652]

2. Board Decision — NYS-29

The Board *rejects* NYS-29 for being outside the scope of the proceeding. The Commission has stated that ''there is no need for a licensing review of emergency planning issues in the context of license renewal. . . . [C]urrent requirements . . . provide reasonable assurance that an acceptable level of emergency preparedness exists at any operating reactor at any time in its operating lifetime.''[653] The Commission emphasized that it ''has amended 10 C.F.R. § 50.47 to clarify that no new finding on emergency preparedness will be made as part of a license renewal decision.''[654] As a result, the NRC Regulation dealing with emergency plans, 10 C.F.R. § 50.47(a)(1)(i), provides that no finding relating to emergency planning is necessary for issuance of a renewed nuclear power reactor operating license. This language places consideration of emergency plans outside the scope of this proceeding and is supported by NRC case law.[655]

Although a contention discussing emergency planning was admitted in *Pilgrim,* it related to the adequacy of a SAMA and did not deal directly with emergency planning.[656] The case law deals with emergency preparedness and evacuation

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[650] *Id.* at 150.

[651] *Id.* at 153.

[652] Tr. at 455.

[653] 56 Fed. Reg. at 64,966-67.

[654] *Id.* at 64,967.

[655] *See Millstone,* CLI-05-24, 62 NRC at 560-61; *Turkey Point,* CLI-01-17, 54 NRC at 9-10.

[656] In *Pilgrim,* the Petitioner

> supported its call for further analysis by raising relevant and significant questions about the input data that appears (from the Application) to have been used in the Pilgrim SAMA analysis regarding (1) the evacuation time estimates . . . and it . . . supported arguments to the effect that including more realistic input data might change the SAMA analysis, with information indicating, to the level necessary for contention admissibility, that these particular data may be materially incorrect.

Pilgrim, LBP-06-23, 64 NRC at 338-39. In this instance, NYS has not provided the requisite support to cause us to conclude that NYS-29 is an environmental contention that can be admitted under the limited scope of license renewal proceedings.

planning contentions in the context of safety and not NEPA issues; however, NYS has not demonstrated that the impacts from the insufficiencies alleged in Entergy's emergency plan affect the outcome of any specific NEPA-related issue, e.g., a SAMA as in *Pilgrim.*

At Oral Argument, NYS acknowledged that section 50.47 sets forth the requirements regarding emergency planning,[657] but argued that by addressing the issue in the GEIS, the NRC agreed that ''[e]vacuation planning is at the heart, essentially a mitigation measure with respect to accidents at a nuclear power plant [and] that was a significant environmental impact.''[658] Thus, because the NRC dealt with emergency planning as an environmental issue, NYS urges that it can bring forth environmental contentions dealing with emergency planning issues in this license renewal proceeding.

The Board does not believe that the inclusion of emergency planning in the GEIS opens it up for a challenge in license renewal proceedings and would instead posit that this fact supports the determination that emergency planning is a Category 1 environmental issue that is dealt with on a generic, not site-specific, basis.[659]

DD. NYS-30 and NYS-31

NYS-30: NEPA REQUIRES THAT THE NRC REVIEW THE ENVIRONMENTAL IMPACTS OF THE OUTMODED ONCE-THROUGH COOLING WATER INTAKE SYSTEM USED AT INDIAN POINT, WHICH CAUSES SIGNIFICANT HEAT SHOCK/THERMAL DISCHARGE IMPACTS.[660]

NYS-31: NEPA REQUIRES THAT THE NRC REVIEW THE ENVIRONMENTAL IMPACTS OF THE OUTMODED ONCE-THROUGH COOLING WATER INTAKE SYSTEM USED AT INDIAN POINT, WHICH CAUSES MASSIVE IMPINGEMENT & ENTRAINMENT OF FISH & SHELLFISH.[661]

1. Background — NYS-30 and NYS-31

NYS-30 and NYS-31 allege that, under NEPA, the NRC Staff must review the

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[657] Tr. at 451.

[658] Tr. at 451-52.

[659] At Oral Argument, NYS acknowledged that emergency planning was deemed a generic issue for license renewals by the Commission. ''So, number one, yes, generically it was addressed as saying it is generic for all. We believe it is not generic for all, and we believe we have laid that out.'' Tr. at 454. Essentially, NYS is challenging the Commission's determination that emergency planning is a Category 1 issue.

[660] NYS Petition at 271.

[661] *Id.* at 281.

environmental impacts of the once-through cooling water intake system used at Indian Point that causes significant heat shock on aquatic biota in the Hudson River and massive impingement and entrapment of fish.[662] According to NYS, NRC Regulations require applicants whose plants use a once-through cooling system to provide in their ER a current copy of a Clean Water Act (''CWA'') § 316(b) determination, showing that their intake structure incorporates the best technology available to minimize adverse environmental impacts,[663] or alternatively, a CWA § 316(a) waiver or the equivalent state permit and supporting documents.[664] According to NYS, Entergy has not demonstrated, and cannot demonstrate, its section 316 determinations are current because a closed-cycle cooling intake system represents the best technology available.[665] Furthermore, NYS alleges that Entergy has not received a CWA § 316(a) waiver.[666]

NYS believes that the heat source impacts and damage done to fish in the Hudson River from the once-through cooling system warrant denial of the license renewal or, in the alternative, conditioning the license renewal on the construction and use of closed-cycle cooling water intake systems.[667] NYS maintains that the ER does not provide an estimate of the actual number of fish impinged or entrained, and that this omission means the ER fails to acknowledge the significant and obvious environmental impacts on the ecosystem in the Hudson River.[668]

Entergy opposes the admission of NYS-30 and NYS-31 because, in its view, these contentions raise issues that are outside the scope of license renewal proceedings, lack the factual or expert opinion support, and fail to establish a genuine dispute on a material issue of law or fact.[669] Entergy asserts that it provided in the ER a copy of its current State Pollutant Discharge Elimination System (''SPDES'') permit, which is the equivalent state permit required by 10 C.F.R. § 51.53(c)(3)(ii)(B).[670] Entergy maintains that, even though it was not required to address heat shock, entrainment, or impingement in its ER (because it included its current state permit that is equivalent to a CWA § 316 determination), it provided the information, including potential impacts of the open-cycle cooling system and a discussion of alternatives.[671] Entergy also suggests that, by law, the NRC

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[662] *Id.* at 271, 281-85.

[663] *Id.* at 274-75 (citing 10 C.F.R. § 51.53(c)(3)(ii)(B)).

[664] *Id.* at 275 (citing 10 C.F.R. § 51.53(c)(3)(ii)(B)).

[665] *Id.* NYS maintains that the NYSDEC has determined that the closed-cycle cooling system is the best technology available for minimizing adverse environmental impacts. *Id.*

[666] *Id.*

[667] *Id.* at 271-72, 281.

[668] *Id.* at 287.

[669] Entergy NYS Answer at 168, 193.

[670] *Id.* at 176, 194.

[671] *Id.* at 184, 196.

cannot override the determination made by the State of New York in its SPDES permit nor consider its validity.[672] According to Entergy, NYS's premise that the SPDES permit is not current or effective is undercut by recent NRC decisions that have said that an administratively extended state-issued permit satisfies the 10 C.F.R. § 51.53(c)(3)(ii)(B) requirements.[673] In regard to heat shock, Entergy maintains that NYS-30 should not be admitted because NYS does not point to any actual deficiencies with the thermal analysis presented in the ER.[674] Instead, Entergy suggests that NYS is attacking the NRC Regulations and asking the NRC to apply the New York State Criteria Governing Thermal Discharges,[675] which the Applicant asserts are outside the NRC's jurisdiction.[676]

Entergy also contends that NYS-30 and NYS-31 do not include adequate factual and expert opinion support.[677] Specifically, Entergy alleges that NYS's expert for thermal discharges (NYS-30) actually supports Entergy's position, and that the two experts for impingement and entrainment (NYS-31) are not qualified to give the expert opinions they provided and that their conclusions are ''improperly speculative.''[678] Finally, Entergy argues that the contentions are not material because they cannot affect the outcome of the proceeding.[679]

The NRC Staff does not oppose the admission of these contentions to the limited extent that NYS-30 challenges the adequacy of the heat shock analysis, and that NYS-31 challenges the impingement and entrainment analysis, provided in the ER.[680] However, at the Oral Argument, the NRC Staff alerted the Board and NYS that it had changed its position and would oppose the admission of these contentions in their entirety.[681] The NRC Staff explained that, in its initial reading of the LRA and the ER, it was not clear that Entergy had met the requirements of CWA § 316.[682] However, in its continuing review of the LRA, the ER, and the

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[672] *Id.* at 179-80. Entergy currently has a draft SPDES permit from NYSDEC because the adjudicatory proceeding regarding the permit is pending. *Id.* at 182.

[673] *Id.* at 181 (citing *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 383-84 (2007)).

[674] *Id.* at 183.

[675] N.Y. Comp. Codes R. & Regs. tit. 6, Part 704.

[676] Entergy NYS Answer at 183; Entergy asserts that its thermal analysis in the ER actually uses the thermal requirements approved by the NYSDEC under N.Y. Comp. Codes R. & Regs. tit. 6, Part 704. *Id.* at 184.

[677] *See id.* at 185-90, 195.

[678] *Id.* at 185, 201-03.

[679] *Id.* at 191, 203-04.

[680] Staff Answer at 85, 87.

[681] Tr. at 467.

[682] Tr. at 468.

pleadings, the NRC Staff decided that Entergy has demonstrated that it does meet the CWA § 316 requirements.[683]

In its Reply, NYS points to the licensing history of IP2 and IP3 to support its position that these contentions are within the scope of the proceeding, that having a closed-cycle cooling system is a necessity, and that the NRC has the authority to require Entergy to use them.[684] NYS asserts that given that the SPDES permit renewal process is ongoing, the 1987 SPDES permit that Entergy submitted in its LRA does not satisfy the Clean Water Act. NYS uses NYSDEC's rejection of two draft EISs previously submitted by IPEC's owner as its justification.[685] NYS calls Entergy's attacks on NYS's expert witnesses ''baseless'' and claims that they are an ''attempt to misdirect the substantive arguments in the case, contrary to the evidentiary and historical record.''[686]

2. NYS's Response to the NRC Staff's Change in Position

With leave of the Board, NYS filed a response to the NRC Staff's change in position on April 7, 2008.[687] As mentioned, the NRC Staff initially did not object to the Board admitting NYS-30 and NYS-31 to the limited extent that the analysis of heat shock, impingement, and entrainment provided by Entergy in its ER was not adequate to meet the requirements of section 51.53(c)(3)(ii)(B). However, the NRC Staff announced its change in position at Oral Argument, and now recommends that the Board reject this contention as being outside the scope of the proceeding. In its response, NYS alleges that the NRC Staff's change in position has no merit because these contentions are within the scope of the proceeding.[688] NYS goes on to repeat many of the same arguments that it used in its original pleading, rather than focusing on the reasons that the NRC Staff used in changing its position, i.e., that the ER does have a sufficient description of the considerations that went into NYS's equivalent section 316 determinations. NYS argues that the NRC Staff's change in position is procedurally invalid because the informal, last-minute notice to the Board of this change does not comply with

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[683] *Id.*

[684] NYS Reply at 156, 165. The license for IP2 was amended in September 1973. That amendment also required that the economic and environmental impacts of alternatives to a closed-cycle cooling system be evaluated and that a interim plan to ''minimize the effects from the thermal discharges, and from impingement and entrainment impacts'' be developed. *Id.* at 156. The NRC similarly amended IP3's license in April 1976. *Id.*

[685] *Id.* at 158, 168.

[686] *Id.* at 169.

[687] Petitioner State of New York's Response to NRC Staff's Change in Position to New York's Contentions 30 and 31 (Apr. 7, 2008) [hereinafter NYS-30 and NYS-31 Response].

[688] *Id.* at 2.

NRC rules of procedure, and contend that the NRC Staff should have filed a motion to amend its January 22, 2008 response.[689]

Entergy and the NRC Staff responded on April 21, 2008. Entergy claims that NYS did not address the validity of the NRC Staff's updated position that NYS's SPDES permit is an equivalent CWA § 316 determination because it could not reasonably dispute that NYSDEC's SPDES permit is valid and, as a matter of New York State law, contains the equivalent CWA § 316 determination.[690] Rather, according to Entergy, NYS simply restates its Reply, repeating prior arguments, and offering nothing new to support the admissibility of NYS-30 and NYS-31.[691] As such, Entergy argues that NYS still fails to furnish adequate factual or legal support to establish a genuine dispute on a material issue.[692] Entergy goes on to specifically discuss why the NRC Staff's position change was procedurally proper and correct, and discusses how NYS's criticisms of Entergy's position regarding section 51.53(c)(3)(ii)(B) are unsupported by New York State or NRC law.[693]

The NRC Staff presents many of the same arguments as Entergy.[694] The NRC Staff discusses how the 1987 SPDES permit is both current and valid,[695] describes how the CWA prohibits the NRC from requiring closed-cycle cooling in this instance,[696] and asserts that its change in position was not procedurally defective.[697]

3. Board Decision — NYS-30 and NYS-31

NYS-30 and NYS-31 contend that the NRC is required under NEPA to review the environmental impacts of the once-through cooling water intake system used at Indian Point, and states that this system causes (1) significant heat shock/thermal discharge impacts; and (2) massive impingement and entrainment of fish and shellfish, respectively. The Board assumes that the focus of these contentions is the quantity and quality of information that Entergy provided in its ER, as

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[689] *Id.* at 7-8.

[690] Entergy Nuclear Operations, Inc.'s Reply to Riverkeeper, Inc.'s and State of New York's Responses to NRC Staff's Change in Position Regarding Aquatics Contentions at 2 (Apr. 21, 2008).

[691] *Id.* at 6.

[692] *Id.* at 2.

[693] *Id.* at 8-10.

[694] NRC Staff's Reply to State of New York and Riverkeeper, Inc.'s Responses to the Staff's Change in Position on New York Contentions 30 and 31 and Riverkeeper Contention EC-1 at 3-6 (Apr. 21, 2008).

[695] *Id.* at 4-6.

[696] *Id.* at 6-7.

[697] *Id.* at 7-8.

is evidenced by the contention support presented by NYS in its Petition,[698] and not the adequacy of the NRC review, which is not yet complete. Even with this assumption, for reasons explained herein, the Board *rejects* NYS-30 and NYS-31 because they are outside the scope of the proceeding because they are attacks on NRC Regulations, specifically 10 C.F.R. § 51.53(c)(3)(ii)(B).

Section 51.53(c)(3)(ii)(B) requires an applicant to provide in its ER a site-specific analysis of entrainment, impingement, and heat shock/thermal discharge impacts from its once-through cooling systems.[699] The applicant may meet its obligations by doing one of following: (1) provide a copy of current CWA § 316(b) determination; (2) provide a section 316(a) variance or equivalent State permit and supporting documentation; or (3) assess the impact of proposed action on fish and shellfish resources resulting from heat shock, impingement, and entrainment.

In this case, Entergy has done two of the three. Entergy explains that its ER contains a copy of its existing SPDES permit, including supporting documentation.[700] NYS acknowledges that Entergy's SPDES is a valid discharge permit issued by the State of New York,[701] and it is undisputed that the governing SPDES permit was included in Entergy's ER. In addition, Entergy argues that its ER also includes an extensive assessment of ecological studies that have been conducted over the past three decades as they relate to the impacts from heat shock, impingement, and entrainment.[702] Nowhere in NYS's pleadings does it refute the presence of this information or contend that these assessments do not meet the third option in section 51.53(c)(3)(ii)(B).

From a review of the history relating to the validity of Entergy's SPDES permit, it is clear that (1) the EPA delegated NYSDEC authority to administer the CWA surface water permitting program; (2) in the process of doing so, EPA confirmed that New York law is equivalent to CWA requirements (including the section 316 provisions); (3) with the equivalency designation by EPA, creating and enforcing water quality standards rests with NYS; (4) NYSDEC can only grant an SPDES discharge permit to a holder that meets CWA § 316 provisions; (5) in accordance with CWA § 511(c)(2), as implemented by the Memorandum of Understanding between the agencies,[703] the NRC is prohibited from determining whether nuclear facilities are in compliance with CWA limitations, assessing discharge limitations, or imposing additional alternatives to further minimize

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[698] NYS Petition at 278-80, 285, 287-89.

[699] Table B-1.

[700] Entergy NYS Answer at 180.

[701] NYS Petition at 288-89; Tr. at 470.

[702] Entergy NYS Answer at 184, 197.

[703] Federal Water Pollution Control Act Amendments of 1972, Second Memorandum of Understanding and Policy Statement Regarding Implementation of Certain NRC and EPA Responsibilities, 40 Fed. Reg. 60,115 (Dec. 31, 1975).

impacts on aquatic ecology that are subject to the CWA; and (6) the NRC has promulgated regulations, specifically 10 C.F.R. § 51.53(c)(3)(ii)(B), to implement these specific CWA requirements that help assure that the Commission does not second-guess the conclusions in CWA-equivalent state permits, or impose its own effluent limitations — thermal or otherwise. Therefore, by holding a valid SPDES permit, Entergy has met its specific obligations by providing in its ER the ''equivalent state permits and supporting documentation'' required by the NRC Regulations.

The history of IPEC's SPDES permit is complex.[704] In 1992, Entergy filed a timely application to renew its 1987 permit with NYSDEC.[705] This renewal application is still under review by NYSDEC. In its ongoing proceeding, NYSDEC must decide the merits of Entergy's 1992 renewal application for its SPDES permit, including the need, if any, to alter its cooling system and/or update discharge limits. As with the existing 1987 SPDES permit, the final decision from New York State's licensing process will be binding on the Commission, given that the NRC is barred from altering any discharge limitation imposed by the EPA-approved governing body.

The Board is aware that a draft SPDES permit was prepared by the NYSDEC staff in 2003, and this draft permit is currently being reviewed in the ongoing NYSDEC proceeding.[706] The existing permit does not expire until NYSDEC makes a final decision on Entergy's 1992 renewal application, and, therefore, Entergy currently holds a valid CWA-equivalent permit issued by NYSDEC. As discussed above, the Board is prohibited by section 511 of the CWA from modifying the prescribed discharge limits that are delineated in IPEC's existing SPDES permit.

The Commission recently reinforced the need for Licensing Boards to defer to the State's ruling on once-through cooling as reflected in these equivalent permits.[707] It would be futile for the Board to review any of the CWA determinations, given that it is not possible for the Commission to implement any changes

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[704] In 1982, NYSDEC issued the SPDES permit for IPEC which incorporated the Hudson River Settlement Agreement (''HRSA''), and renewed this permit in 1987 with the HRSA as a condition. While the HRSA expired in 1991, its substantive conditions were continued by consent orders, the last of which was approved in 1998.

[705] Consistent with CWA § 402(b)(1)(B), NYS-issued SPDES permits must be renewed every 5 years.

[706] The 2003 draft permit is now before NYSDEC-appointed Administrative Law Judges. Once completed, that proceeding will result in a proposed decision being forwarded to the NYSDEC Commissioner for issuance of a final SPDES permit decision.

[707] *Vermont Yankee,* CLI-07-16, 65 NRC at 387.

that might be deemed appropriate. As a result, the Board *rejects* NYS-30 and NYS-31.[708]

NYS claims that Entergy's ER fails to provide a ''current'' discussion and analysis of the aquatic impacts caused by once-through cooling.[709] The Board finds that: (1) in the context of the regulations, ''current'' is synonymous with ''most recent''; (2) Entergy has met its regulatory burden by providing its most recent SPDES permit issued by the controlling CWA authority, NYSDEC; and (3) a timely renewal application for this permit was submitted by Entergy and is presently under review by NYSDEC. At this time, it is not within the Board's purview to evaluate the completeness or adequacy of the consent orders as it affects the currency of the existing SPDES permit.

While the current SPDES permit is over 20 years old, its age is a direct result of the lengthy review process being conducted by NYSDEC. Once that proceeding is completed, Entergy's SPDES permit will be updated by NYSDEC to include its assessment of the cooling system impacts. While the NYSDEC proceeding continues, the Board does not have the option of looking behind the existing SPDES permit to make an independent CWA determination. The Commission has recently reaffirmed that the Board must take permit determinations at face value and is prohibited from undertaking any independent analysis of the permit's limits.[710] This position is consistent with the legislative intent to implement the CWA in a way that avoided duplication and unnecessary delays.[711]

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[708] The Board takes note that the prohibition against the Commission modifying CWA limits does not relieve the Commission from addressing the impacts from IPEC's once-through cooling system (i.e., relating to heat shock, impingement, and entrainment) in the NRC's NEPA analysis. Compliance with the CWA limits imposed by a designated permitting state is not ''a substitute for, and does not negate the requirements for NRC to weigh all environmental effects of the proposed action.'' 10 C.F.R. § 51.71 n.3 (in this case, the proposed action is the renewal of Entergy's operating license for an additional 20-year period). While the NRC Staff must still weigh all the impacts in its SEIS for IPEC's license renewal, the Commission must incorporate the analysis of aquatic impact, *in toto,* from NYSDEC's assessment, as reflected in the SPDES permit that it grants to Entergy. As stated in *Seabrook,* the permitting agency for the CWA determines the cooling system required at a facility, and the NRC Staff factors the impacts that result from the use of that system into its NEPA analysis. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 28 (1978). Accordingly, meeting the submittal requirements of section 51.53(c)(3)(ii)(B) does not excuse Entergy from providing in its ER the descriptions and discussions required by section 51.53(c)(2) relating to environmental impacts from the proposed action (i.e., renewing Entergy's IP2 and IP3 operating license for an additional 20-year period) and its alternatives. While Entergy must discuss the environmental impacts of the proposed action and its alternatives in its ER, in the process, it must incorporate directly the water quality limits of the existing SPDES permit into this discussion.

[709] NYS-30 and NYS-31 Response at 3.

[710] *Vermont Yankee,* CLI-07-16, 65 NRC at 387-88 (citing *Carolina Power and Light Co.* (H.B. Robinson, Unit 2), ALAB-569, 10 NRC 557, 562 (1979)).

[711] *Id.* at 389.

In summary, the Board finds that these contentions are attacks on 10 C.F.R. § 51.53(c)(3)(ii)(B) because Entergy has provided its most current SPDES permit and supporting documentation. By New York State law, the SPDES permit must address all aspects of the CWA including provisions in section 316. While the existing permit was issued over 20 years ago, the responsibility for its age rests with the lengthy NYSDEC adjudicatory process over which the Applicant has no control. Any deficiencies that might have occurred as a result of this extended review period will be cured once the NYSDEC acts on the renewed permit application. Until then, the NRC is barred by the CWA from requiring different limitations than those that exist in IPEC's governing permit.

EE. NYS-32

NEPA REQUIRES THAT THE NRC REVIEW THE ENVIRONMENTAL IMPACTS OF THE OUTMODED ONCE-THROUGH COOLING WATER INTAKE SYSTEM USED AT INDIAN POINT, WHICH HARMS ENDANGERED SPECIES AND CANDIDATE THREATENED SPECIES.[712]

1. Background — NYS-32

NYS-32 alleges that NEPA requires the NRC to review the potential environmental impacts to endangered species and candidate threatened species from the once-through cooling system.[713] NYS asserts that section 7 of the Endangered Species Act (''ESA'') requires the NRC to ensure that, if it grants a license, its action will not jeopardize the existence of a regulated species.[714] As supported by its expert witness, Dr. Roy A. Jacobson, Jr., NYS alleges that the shortnose sturgeon, an endangered species, has become impinged on the intake screens at Indian Point, and the NRC is thus required to determine if granting the license extension will jeopardize its continued existence.[715] Additionally, according to NYS, Entergy violates ESA § 9 because it does not possess an incidental takings permit for the shortnose sturgeon that do become impinged in the facility's intake structure.[716] NYS also alleges that the intake structures impinge the Atlantic sturgeon, which is a candidate for listing as a threatened species.[717] NYS points out that under NRC Regulations, the impact of the extended license period on

[712] NYS Petition at 290.
[713] *Id.*
[714] *Id.*
[715] *Id.* at 291 (citing Declaration of Roy A. Jacobson, Jr. at 14-15 (Nov. 29, 2007) [hereinafter Jacobson Declaration]).
[716] *Id.* at 290.
[717] *Id.*

threatened or endangered species is a Category 2 environmental issue that must be considered in the LRA.[718] According to NYS, under the ESA, the burden is placed on both Entergy and the NRC to ensure that granting the license extension would not jeopardize an endangered species.[719] NYS contends that the NRC must either demonstrate that no jeopardy to the endangered species exists, deny the license extension, or significantly modify operations at Indian Point.[720] NYS then provides factual statements that support its argument regarding the adverse impacts to the shortnose sturgeon from impingement on the intake structure at Indian Point.[721]

Entergy opposes admission of NYS-32, claiming that it raises issues that are outside the scope of license renewal proceedings, lacks the factual or expert opinion support, and fails to demonstrate a genuine dispute on a material issue of law or fact.[722] In support of its opposition, Entergy asserts that the ER includes the required analysis of impacts to threatened and endangered species.[723] Entergy states that it has addressed all of the threatened and endangered species in the vicinity of Indian Point and that NYS does not allege that the assessment in the ER is deficient.[724] Entergy maintains that shortnose sturgeon are not susceptible to impingement or entrainment, and that the population has actually grown during the operation of Indian Point.[725] Entergy also argues that it is not required to demonstrate in the ER that it complies with the ESA, thus any allegation of noncompliance by Entergy with the ESA is outside the scope of this proceeding.[726] Entergy also contends that it does in fact comply with the ESA because it received a biological opinion under ESA § 7(b) that concluded that the once-through cooling system would not jeopardize the continued existence of the shortnose sturgeon.[727]

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[718] *Id.* at 291 (citing Table B-1).

[719] *Id.*

[720] *Id.* at 292.

[721] *Id.* at 293-96. NYS asserts that Entergy is impinging shortnose sturgeon, an endangered species, without an incidental takings permit in violation of the ESA. Entergy admits in its ER that the nuclear power plants do impinge shortnose sturgeon. National Marine Fisheries Service (''NMFS'') issued a Biological Opinion Report for nearby power plants that detailed mitigation measures employed there but not at IPEC. The other plants, unlike Indian Point, also have an adaptive management clause allowing NMFS to require further mitigation measures if the impact on the shortnose sturgeon is greater than expected. Furthermore, Atlantic sturgeon is now a candidate species as NMFS has begun a review to see if it should be listed as threatened or endangered.

[722] Entergy NYS Answer at 207.

[723] *Id.* at 207-09.

[724] *Id.* at 208.

[725] *Id.* at 209.

[726] *Id.*

[727] *See id.* at 209-11.

The NRC Staff also opposes the admission of NYS-32, arguing that NYS fails to allege sufficient facts to support its claim that Entergy is taking a threatened or endangered species with the once-through cooling intake system.[728] The NRC Staff also maintains that NYS has not adequately supported its position that the shortnose surgeon has in fact been impinged.[729]

In its Reply, NYS rejects the NRC Staff's assertion that NYS did not provide evidence in its Petition, and states that it is apparent that the NRC Staff failed to look at the documentation NYS included in its Petition.[730] In response to Entergy's reliance on the biological opinion, NYS points out that it is 29 years old and is ''simply not relevant to the incidental take permit issue, nor does it provide an exemption to the incidental take requirements for shortnose sturgeon.''[731] NYS notes that, during the State's review of the SPDES permit for Indian Point, the operators of the facility represented that they needed an incidental take permit from National Marine Fisheries Service (''NMFS'').[732] NYS also asserts that Entergy is wrongfully dismissing the taking of an endangered species which is in fact a clear violation of the ESA.[733]

2. Board Decision — NYS-32

This contention is *inadmissible.* In NYS-32, the Petitioner states that endangered shortnose sturgeon become impinged on the intake screens of the once-through cooling system for IP2 and IP3, and that the NRC has an obligation under ESA to ensure that its proposed action — granting a 20-year license renewal — will not jeopardize the continued existence of an endangered species. As a Category 2 issue in the GEIS, NYS contends that the impact of an additional 20 years of operation on shortnose sturgeon and Atlantic sturgeon, a candidate threatened species, needs to be addressed.

NYS does not refer to Entergy's ER until the last page of its Petition and then only to point out that the Applicant admits that the shortnose sturgeon is impinged on the intake screens at Indian Point and that it does not possess an incidental takings permit for this impingement.[734] While NYS's expert, Dr. Jacobson, states that the Applicant is violating the ESA whenever this occurs,[735] NYS does not attack Entergy's ER, but objects to NRC's inaction by stating that ''the NRC must

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[728] NRC Staff Answer at 88.
[729] *Id.*
[730] NYS Reply at 172-73.
[731] *Id.* at 176.
[732] *Id.*
[733] *Id.* at 177.
[734] NYS Petition at 296.
[735] *Id.* at 291 (citing Jacobson Declaration at 14-15).

make certain findings to ensure that no jeopardy of the species exists,''[736] and, if NYS is correct in its assessment of the impact on the shortnose sturgeon, NRC must ''either deny the license extension, or significantly modify the operations [at Indian Point].''[737] Whatever validity there might be in its arguments, NYS has failed to address these issues as deficiencies in Entergy's ER, the only relevant document at this point in the proceeding.

NYS does challenge Entergy's ER in its Reply. The Board finds that the issues raised by NYS in its Reply — attacks on the lack of information and analyses in Entergy's ER — are significantly different than the arguments raised in its Petition — that NEPA requires NRC to examine the environmental impacts to the endangered shortnose sturgeon. Likewise, these arguments could and should have been raised in its Petition and, having not been raised in the Petition could only be introduced into this proceeding pursuant to 10 C.F.R. § 2.309(c). For these reasons, the Board has not considered the new arguments presented in the Reply.

Even if the Board were to consider NYS's allegations presented for the first time in its Reply — that Entergy's ER failed to adequately analyze environmental impacts to endangered species and does not analyze mitigation measures — this contention would still not be admissible because Entergy has done what is required of it by assessing the impacts of operations during the license renewal period on threatened and endangered species in sections 4.10.5 and 4.10.6 of its ER. The Board notes that NYS fails to allege in either its Petition, or its Reply, that Entergy's ER does not comply with 10 C.F.R. § 51.53(c)(3)(ii)(E). Whether Entergy should do more is outside the scope of this proceeding.

Viewing the contention as an attack on Entergy's ER, the Board finds that the Applicant has provided the required information in the ER for the NRC to assess whether operation of the Indian Point plant for an additional 20 years would jeopardize the shortnose sturgeon.

VII. STATE OF CONNECTICUT CONTENTIONS

In its Petition to Intervene, Connecticut submits two contentions and indicates that it wishes to adopt the NYS contentions discussed in section VI above.[738] The two contentions submitted by Connecticut include a spent fuel pool contention that is similar to NYS-27, and an emergency planning contention comparable to NYS-29. For the reasons discussed below, both of the contentions submitted by Connecticut are *inadmissible* under the contention admissibility standards of 10 C.F.R. § 2.309(f)(1). In addition, because Connecticut has not submitted an

[736] *Id.* at 292.

[737] *Id.*

[738] Connecticut Petition at 1-3.

admissible contention of its own, it is barred from adopting the contentions of any other party.[739] The Connecticut petition to adopt is therefore *denied.* Connecticut may, however, participate in this proceeding as an interested State pursuant to 10 C.F.R. § 2.315(c).

A. Connecticut EC-1 — Spent Fuel Pool

1. Background — Connecticut EC-1

Connecticut EC-1 contends that the majority of the radioactive material at Indian Point is located not within reactor containment but in spent fuel pools that are far more vulnerable to accident and terrorist attack.[740] Citing to reports authored by the Department of Energy (''DOE'') and the NRC, Connecticut argues that a fire or attack affecting the spent fuel pools could potentially result in radioactive releases leading to human fatalities and large-scale contamination of land.[741] For this reason, Connecticut asserts, the issue is material and must be considered as part of the license renewal process.[742]

Entergy opposes admission of Connecticut EC-1, arguing that it (1) is outside the scope of the proceeding and not material to the relicensing decision; (2) does not represent a genuine dispute with the Applicant on a material issue of fact or law; (3) contravenes Commission legal precedent; and (4) represents a collateral attack on the Commission's Part 51 regulations.[743] To the extent that the contention reflects terrorism concerns, Entergy argues that the Commission precedent in *Oyster Creek* controls and renders the contention inadmissible.[744] Furthermore, Entergy says, the contention is an attack on Part 51 in that it challenges the findings of the GEIS, which contain the conclusion that the risk of intentional attack is small and adequately covered by analyses for other types of plant accidents.[745] In addition, to the extent the contention alleges that accidents other than terrorism need to be considered, Entergy notes that the Commission has recently upheld decisions in *Vermont Yankee* and *Pilgrim* which held that such a contention is not within the scope of license renewal proceedings.[746] Finally,

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[739] *See supra* Part IV.

[740] Connecticut Petition at 13. Entergy has proposed moving some of the spent fuel in the pools to dry cask storage to make room in the pools for additional spent fuel that would result from an additional 20 years of operation. *Id.* at 14.

[741] *Id.* at 15.

[742] *Id.* at 14, 16.

[743] Entergy Connecticut Answer at 30.

[744] *Id.* at 30-32 (citing *Oyster Creek,* CLI-07-8, 65 NRC at 128-30).

[745] *Id.* at 32.

[746] *Id.* at 33 (citing *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13 (2007)).

Entergy says, the contention itself is not specific, contains ''vague references to documents,'' does not challenge the ER, and fails to demonstrate that a genuine dispute exists.[747]

For the same reasons presented by Entergy, the NRC Staff argues that Connecticut EC-1 is outside the scope of a license renewal proceeding and is therefore inadmissible.[748] The NRC has chosen to address spent fuel storage generically through rulemaking, the Staff says, because it is a common issue at all plants.[749] Connecticut presents no new information that would cause the issue to be reopened, the NRC Staff continues, and the issue therefore remains outside the scope of this proceeding.[750]

2. Board Decision — Connecticut EC-1

For the reasons presented in the discussion of NYS-27,[751] the Board finds that those aspects of Connecticut EC-1 that deal with terrorism are outside the scope of a license renewal proceeding and are therefore *inadmissible.* The Commission in *Oyster Creek* has made its position clear: terrorism is unrelated to the general category of aging issues that license renewal proceedings are meant to address.[752] Furthermore, the licensing decision in this proceeding is not related to any change in the risk of terrorist attack, and the terrorism issue is therefore not material.[753] To the extent that Connecticut EC-1 addresses accidents rather than terrorist events, the Board agrees with Entergy and the NRC Staff that the issue of spent fuel storage pools has been dealt with in the GEIS for license renewal. The Commission has addressed this issue in the *Vermont Yankee* and *Pilgrim* proceedings, and Connecticut has not presented any information that would distinguish this contention from those submitted and rejected in prior proceedings. For all these reasons, Connecticut EC-1 is *rejected.*

B. Connecticut EC-2 — Evacuation Protocols

1. Background — Connecticut EC-2

Connecticut EC-2 contends that the emergency evacuation plan for the area

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[747] *Id.*
[748] NRC Staff Answer at 103-04.
[749] *Id.* at 104.
[750] *Id.* at 104-05.
[751] *See* discussion *supra* Part VI.AA.2.
[752] *Oyster Creek,* CLI-07-8, 65 NRC at 128-29.
[753] *Id.* at 130.

around the Indian Point plant is inadequate.[754] Further, Connecticut argues that safe evacuation of such a densely populated area may not be possible and supports this claim with a citation to the work of a former head of the Federal Emergency Management Agency.[755] According to Connecticut, the NRC is required under NEPA to evaluate evacuation protocols as part of the license renewal process,[756] and

> [i]t is unacceptable for the NRC to say that emergency planning is the domain of the Federal Emergency Management Agency (''FEMA'') and thereby decline to examine the environmental impacts resulting from the need to evacuate citizens from the EPZ or the impacts of a deficient evacuation plan and process. The emergency evacuation plan is a central and critical element of the NRC's reactor permit and regulatory program. Thus, the NRC's review of the potential impacts resulting from operation of two nuclear reactors, three spent fuel pools, and dry cask storage facility for an additional 20 years must include an analysis of the impacts of the emergency evacuation plan for Indian Point, and whether it is meaningful and effective.[757]

Entergy opposes the admission of Connecticut EC-2, arguing that it

> (1) constitutes an impermissible challenge to the Commission's regulations, contrary to 10 C.F.R. § 2.335(a); (2) raises issues that are neither within the scope of this proceeding or material to the Staff's license renewal findings, contrary to 10 C.F.R. § 2.309(f)(1)(iii)-(iv); (3) directly contravenes controlling Commission legal precedent; and (4) fails to establish a genuine dispute with the Applicant on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).[758]

According to Entergy, NRC Regulations preclude consideration of emergency plans in license renewal proceedings because they are already covered by ongoing regulatory review.[759] Therefore, Entergy argues that EC-2 constitutes an impermissible challenge to Commission regulations.[760] Despite Connecticut's assertions about the NRC's responsibilities under NEPA, Entergy argues that the contention as presented fails to challenge the ER or to establish a genuine dispute with the

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[754] Connecticut Petition at 16.
[755] *Id.*
[756] *Id.* at 17.
[757] *Id.* at 18.
[758] Entergy Connecticut Answer at 35.
[759] *Id.* (citing 10 C.F.R. § 50.47(a)(1)(ii)).
[760] *Id.* at 36.

Applicant.[761] For these reasons, according to Entergy, the contention should be rejected.

The NRC Staff also opposes admission of Connecticut EC-2, arguing that it is outside the scope of the proceeding and represents an impermissible challenge to the regulations.[762] According to the NRC Staff, emergency planning is not related to age-related degradation.[763] Furthermore, the NRC Staff says, both the text of the relevant regulations and Commission precedent indicate that emergency planning issues do not need to be considered in license renewal proceedings.[764] For these reasons, the NRC Staff asserts that Connecticut EC-2 should be rejected.

2. Board Decision — Connecticut EC-2

For the same reasons presented in the discussion of NYS-29,[765] the Board *rejects* EC-2 because emergency planning issues are outside the scope of this proceeding. In particular, 10 C.F.R. § 50.47 states that ''[n]o finding under this section is necessary for issuance of a renewed nuclear power reactor operating license.''[766]

In our discussion of NYS-29, the Board observed that this statement was inserted intentionally by the Commission in order remove any ambiguity as to whether consideration of emergency planning was required at the license renewal stage.[767] As we have noted elsewhere,[768] the scope of a license renewal proceeding is limited to the detrimental effects of aging on plant structures, systems, and components,[769] and to the environmental issues listed in 10 C.F.R. § 51.53(c)(ii) and designated as Category 2 in the GEIS.[770] The majority of emergency planning issues do not fall into these categories, and are dealt with as part of the ongoing regulatory review of reactor operations.

It is true that a contention related to emergency planning was admitted in the *Pilgrim* case. However, that contention was different in scope than Connecticut EC-2, and touched on the adequacy of a SAMA analysis in the context of environmental review during license renewal proceedings.[771] Connecticut has

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[761] *Id.*

[762] NRC Staff Answer at 106.

[763] *Id.*

[764] *Id.* (citing 10 C.F.R. § 50.47(a) and *Millstone,* CLI-05-24, 62 NRC at 565).

[765] *See supra* Part VI.CC.2.

[766] 10 C.F.R. § 50.47(a)(1)(i).

[767] *See* discussion *supra* Part VI.CC.2.

[768] *See supra* Part V.

[769] 10 C.F.R. § 54.21; *see supra* Part V.

[770] 10 C.F.R. § 51.53(c)(3)(ii)(A)-(L); Table B-1.

[771] *See* 10 C.F.R. § 51.53(c)(3)(ii)(L) (SAMA analysis requirement); *Pilgrim,* LBP-06-23, 64 NRC

(Continued)

presented a different contention than that admitted in *Pilgrim.* Connecticut EC-2 is a broad-based, general contention targeting an area that has been designated by the Commission as outside the scope of a license renewal proceeding. For this reason, the Board is obliged to *reject* it.

VIII. RIVERKEEPER CONTENTIONS

A. Riverkeeper TC-1/TC-1A

INADEQUATE TIME LIMITED AGING ANALYSES AND FAILURE TO DEMONSTRATE THAT AGING WILL BE MANAGED SAFELY.[772]

1. Background — Riverkeeper TC-1/TC-1A

Riverkeeper TC-1, which is similar to NYS-26, was included with River-

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at 338-41 (ruling on admissibility of SAMA contention, which included a question about evacuation time estimates along with other questions related to inputs into the SAMA analysis).

[772] Riverkeeper Petition at 7. The full contention states:

> Entergy's LRA fails to satisfy 10 C.F.R. § 54.21(c)(1) in the following respects:
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> 1. Tables 4.3-13 and 4.3-14 identify four representative reactor coolant components for which Entergy's evaluation of Time Limited Aging Analyses (''TLAAs'') is facially non-compliant with the standard of 10 C.F.R. § 54.21(c)(i)-(ii) for avoiding a demonstration, under 10 C.F.R. § 54.21(c)(iii), that it will adequately manage the effects of aging on the intended functions of the components during the license renewal term. For these four components — pressurizer surge line piping (IP2 & IP3), the RCS piping charging system nozzle (IP2), and pressurizer surge line nozzles (IP3) — the environmentally adjusted cumulative usage factor (''CUF'') estimated by Entergy exceeds the regulatory threshold for submitting an aging management program. Yet, Entergy has failed to broaden its TLAA analysis beyond the scope of the representative components identified in Tables 4.3-13 and 4.3-14 to identify other components whose CUF may be greater than one; nor has it submitted any demonstration that it will adequately manage the aging of components with a CUF greater than one. Therefore Entergy's LRA does not satisfy 10 C.F.R. §§ 54.21(c) or (c)(iii).
>
> 2. Entergy's list of components with CUFs of less than one in Tables 4.3-3 and 4.3-14 is incomplete, because Entergy's methods and assumptions for identifying those components are unrealistic and inadequate.
>
> 3. For a number of other components subject to the license renewal regulations, which are listed in Tables 4.3-3 through 4.3-12, Entergy has also failed to perform complete TLAAs. The TLAAs for these components are incomplete because they omit consideration of the exacerbating effects of environmental conditions on the fatigue of metal components. Therefore Entergy has failed to satisfy 10 C.F.R. § 54.21(c)(1)(i)-(ii). Nor has Entergy submitted an aging management program for these components, as required by 10 C.F.R. § 54.21(c)(1)(iii).

Id. at 7-8.

keeper's Petition.[773] Entergy opposed its admission in its entirety, while the NRC Staff did not initially oppose admitting portions of the contention.[774] Riverkeeper filed its Reply on February 2, 2008.[775] Thereafter, on March 4, 2008, the NRC Staff sent a letter to the Board in which it stated that Entergy had submitted LRA Amendment 2 on January 22, 2008, and that, based on this submittal, the NRC Staff asserted that Riverkeeper's TC-1 was moot and that the NRC Staff now opposed admitting any portion of it. Based on this new development, Riverkeeper filed a timely request to amend its contention (Riverkeeper TC-1A),[776] which was answered by Entergy,[777] and the NRC Staff,[778] and to which Riverkeeper replied.[779]

Using arguments similar to those made by NYS in its contention 26/26A, Riverkeeper, in its Petition, alleges that Entergy's LRA fails to comply with 10 C.F.R. § 54.21(c)(1) because its metal fatigue analyses are insufficient.[780] As supported by the Declaration of its expert witness, Dr. Joram Hopenfeld,[781] Riverkeeper points to four components of the reactor coolant system which have environmentally adjusted CUFs that are higher than the relevant regulatory thresholds.[782] Furthermore, according to Riverkeeper, Entergy has failed to broaden its TLAA beyond the scope of the representative components identified in the LRA to identify other components whose CUFs might be greater than 1.0.[783] In addition, Riverkeeper alleges that some of Entergy's TLAAs are incomplete because the CUF calculations fail to satisfy 10 C.F.R. § 54.21(c)(1)(i)-(ii), which requires Entergy to demonstrate in its LRA that (1) required TLAAs remain valid for the license renewal period and (2) the analyses have been projected to the end of that period.[784] Riverkeeper cites 10 C.F.R. § 54.21(c)(1)(i)-(iii), which requires

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[773] *Id.* at 7-15.

[774] Entergy Riverkeeper Answer at 29-43; NRC Staff Answer at 115-18.

[775] Riverkeeper Reply at 2-12.

[776] Riverkeeper, Inc.'s Request for Admission of Amended Contention 6 (Mar. 5, 2008) [hereinafter Riverkeeper TC-1A].

[777] Answer of Entergy Nuclear Operations, Inc. to Riverkeeper's Request for Admission of Amended Contention TC-1 (Concerning Environmentally Assisted Metal Fatigue) (Mar. 31, 2008) [hereinafter Entergy TC-1A Answer].

[778] NRC Staff's Response to Riverkeeper, Inc.'s Request for Admission of Amended Contention TC-1 [''TC-1A''] (Metal Fatigue) (Apr. 21, 2008) [hereinafter NRC Staff TC-1A Response].

[779] Riverkeeper, Inc.'s Reply to Entergy's and NRC Staff's Oppositions to Request for Admission of Amended Contention TC-1 (May 1, 2008) [hereinafter Riverkeeper TC-1A Reply].

[780] Riverkeeper Petition at 7.

[781] *Id.* at 8.

[782] These are the pressurizer surge line piping for Units 2 and 3, the RCS piping charging system nozzle for Unit 2, and the pressurizer surge line nozzles for Unit 3.

[783] Riverkeeper Petition at 12 (citing LRA Tables 4.3-13 and 4.3-14).

[784] *Id.* at 7-8.

Entergy to demonstrate that the effects of aging will be adequately managed during the license renewal period, and alleges that Entergy has failed to fulfill this regulatory requirement. Riverkeeper contends that, rather than demonstrate that the effects of aging will be adequately managed, Entergy has merely submitted a list of future options without specific details.

The first future option offered by Entergy — to refine the fatigue analysis to determine CUFs less than one — Riverkeeper argues is unacceptable because 10 C.F.R. § 54.21(c)(1)(i)-(ii) require that either the LRA demonstrate that the CUFs are less than 1.0 *or* that the LRA include an AMP.[785] According to Dr. Hopenfeld, Entergy will not be able to reduce CUFs significantly, because many CUFs, without the environmental correction that increases their values, already approach unity and will continue to increase with plant age as the number of transients increases.[786] Dr. Hopenfeld also claims that Entergy's existing calculations are unrealistically low in several areas and, purportedly in violation of regulatory guidance,[787] and have not considered environmental effects on component fatigue.[788]

Entergy opposes admission of Riverkeeper's TC-1, claiming that it fails to establish a genuine dispute on a material issue of law or fact and raises issues outside the scope of the proceeding. In regard to the former, Entergy responds that Riverkeeper does not establish a genuine dispute because it ''fails to controvert the acceptability of the approach set forth in LRA Section 4.3.3, 'Effects of Reactor Water Environment on Fatigue Life.' ''[789] Likewise, it is Entergy's position that Riverkeeper TC-1 lacks adequate support because of the conclusory expert opinion and unexplained, vague references to documents.

According to Entergy, it is sufficient for the Environmentally Assisted Fatigue (''EAF'') to be evaluated prior to entering the period of extended operation.[790] It contends that its proposed approach complies with the 10 C.F.R. § 54.21(c)(1)(iii) requirement that applicants demonstrate that the effects of aging will be adequately managed by following the guidance presented in section X.M1 of the GALL Report, which specifies the method to be used to calculate environmentally adjusted CUFs.[791] Following the recommendations in the GALL Report, Entergy committed to carry out a plan, at least 2 years before the beginning of the license

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[785] *Id.* at 12.

[786] *Id.* at 13.

[787] *Id.* at 14-15 (citing the GALL Report at X.M-1 to X.M-2; MRP-47, Rev. 1, Electric Power Research Institute, ''Materials Reliability Program: Guidelines for Addressing Fatigue Environmental Effects in a License Renewal Application'' at 3-4 (2005)).

[788] *Id.*

[789] Entergy Riverkeeper Answer at 31.

[790] *Id.* at 32.

[791] *Id.* at 32-33.

renewal term, that would involve a choice among three options, an approach that is, according to Entergy, consistent with industry practice and has been approved by the NRC at other plants.[792] As discussed below,[793] Entergy notes that it submitted LRA Amendment 2 to define how it will ''refine the fatigue analyses to determine valid CUFs less than 1.0,'' and reiterates a commitment to repairing or replacing affected locations before a CUF of 1.0 is exceeded.[794]

The NRC Staff did not oppose the admission of this contention initially, with one exception. It stated that the issue of CUFs and aging was within the scope of a license renewal, and that the contention was appropriate to the extent that it challenged Entergy's demonstration regarding the methodology of calculating CUFs or the programs used to manage aging for components with CUFs greater than 1.0.[795] However, the NRC Staff objected to the part of the contention that argued for expansion of the list of components or locations for which fatigue analyses must be done. According to the NRC Staff, Riverkeeper did not provide adequate support for this part of the contention.[796]

In its Reply, Riverkeeper argued that (1) Entergy had provided no reason to believe that the recalculated CUFs would be lower than 1.0,[797] and (2) Entergy only committed to performing its reanalysis before the license renewal period began, rather than as a part of the LRA approval process that can be challenged at a hearing.[798] Accordingly, Riverkeeper reasons that Entergy does not resolve these fundamental aspects of the contention and instead merely offers ''vague promises'' to do something about this issue.[799]

2. LRA Amendment 2

The week before Oral Argument, the NRC Staff sent a letter to the Licensing Board indicating that it had changed its position on Riverkeeper TC-1 (and the related NYS-26).[800] On March 6, 2008, NYS and Riverkeeper moved to strike the paragraph of this letter reflecting this change in position, noting that NRC Regulations ''do not provide for this kind of 'sur-opposition.' ''[801] In their Motion,

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[792] *Id.* at 34.

[793] *See infra* Part VIII.A.2.

[794] Entergy Riverkeeper Answer at 36.

[795] NRC Staff Answer at 117.

[796] *Id.*

[797] Riverkeeper Reply at 5.

[798] *Id.* at 6.

[799] *Id.* at 11.

[800] NRC Staff LRA Amendment 2 Letter. *See supra* notes 554, 556 & accompanying text.

[801] Joint Motion to Strike Paragraph One of Staff's ''Pleading'' Letter Dated March 4, 2008, at 1 (Mar. 6, 2008).

the two organizations argued that ''the information upon which [the NRC] Staff relies for its change of position is not relevant to the admissibility of contentions that were required to be filed on the basis of the information available at the time petitions were due,'' and that the proper time to argue that a contention had been rendered moot was after its admission.[802] Furthermore, the two Petitioners objected to the submission of a pleading in letter form, which may leave other parties uncertain how to respond.[803] Based on the information in the Motion and subsequent discussions at Oral Argument,[804] the Board rejected this request and has considered the NRC Staff's change of position.[805]

3. Amended Contention Description (TC-1A)

On March 5, 2008, Riverkeeper filed a motion for leave to amend TC-1 (labeled TC-1A herein) to take LRA Amendment 2 into account.[806] In addition to addressing the timeliness of the amendment submittal, Riverkeeper argues that it does not want to withdraw any portion of Riverkeeper TC-1, but rather ''to amend the basis to Subpart 1 of the contention to address the reasons that Entergy's LRA Amendment 2 does not cure Entergy's failure to demonstrate that it will adequately manage the aging of components with a CUF greater than one.''[807] Specifically, Riverkeeper claims that Entergy ''does not explain why it is likely that CUFs that are now above one are likely to be less than one when re-calculated,'' does not ''address the legal requirement that the LRA application itself is required to demonstrate that CUFs for representative components are less than one,'' and ''fails to address NRC guidance requiring that if CUFs for representative components in the license renewal application are more than one, the applicant must evaluate all components that are subject to the effects of aging.''[808]

Neither Entergy nor the NRC Staff has objected to Riverkeeper TC-1A based on timeliness, but both argue that it is inadmissible based on 10 C.F.R. § 2.309(f)(1) criteria.[809] In addition to hypothesizing that Riverkeeper's real dispute is with the postponement of the immediate implementation of corrective measures, Entergy

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[802] *Id.*

[803] *Id.* at 3.

[804] Tr. at 410-17.

[805] Tr. at 417-18. While it may have been more appropriate for the NRC Staff to submit a motion to the Board clarifying its new position, the new information appropriately could be considered in addressing the admissibility of this contention.

[806] Riverkeeper TC-1A at 1-2.

[807] *Id.* at 3.

[808] *Id.* at 4-5.

[809] Entergy TC-1A Answer at 1; NRC Staff TC-1A Response at 16.

alleges that Riverkeeper TC-1A raises issues beyond the scope of the proceeding and does not establish a genuine dispute. Entergy claims that Riverkeeper (1) has not identified any legal requirement for CUF analysis to be included as part of the LRA; (2) failed to show that Part 54 or the GALL Report requires the Applicant to expand its EAF analyses to include ''all components'' subject to the effects of aging; (3) mistakenly argued that LRA Amendment 2 excludes the six representative locations identified in NUREG/CR-6260; and (4) failed to reference any factual or legal basis for asserting that Entergy's plan for addressing EAF is unacceptably vague and adds little substantive information.[810] In general, Entergy continues to claim that it has satisfied license renewal regulations by committing to revise, before the extended operational period, the calculations to determine if CUFs exceed critical values for key reactor components and to repair or replace these components prior to these values exceeding 1.0.[811]

Using arguments similar to those of Entergy, the NRC Staff recommends that the admission of Riverkeeper's TC-1A be rejected. Specifically, the NRC Staff claims that the Petitioner's assertions that Entergy's LRA is noncompliant with 10 C.F.R. § 54.21(c) has been rendered moot with Entergy's promise to propose aging management pursuant to 10 C.F.R. § 54.21(c)(iii), and that the Applicant has removed any uncertainty in its plans.[812] The NRC Staff provides specifics which, in the Staff's view, demonstrate that Riverkeeper fails to offer regulatory support for its assertions, misunderstands changes in the LRA regarding the list of items to be addressed with CUF analyses, lacks understanding that the reanalysis is a corrective action, misreads NUREG/CR-6260 to be a requirement rather than guidance, and does not provide support for its assertion that the criterion for repair or replacement is vague. Finally, the NRC Staff posits that Riverkeeper refuses to acknowledge that LRA Amendment 2 removes the uncertainty of Entergy's addressing TLAAs for metal fatigue.[813]

In its Reply, Riverkeeper claims that Entergy's and the NRC Staff's arguments presented in their Answers are legally infirm and self-contradictory in many respects.[814] First, Riverkeeper alleges that the Applicant and the NRC Staff have misread 10 C.F.R. § 54.21(c)(1), which requires the LRA to contain the evaluation of TLAAs.[815] According to Riverkeeper, Entergy's and the NRC Staff's argument that a promise to perform these evaluations at a future date effectively renders section 54.21(c)(1)(i)-(ii) ''superfluous.''[816] In addition, Entergy's choice and

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[810] Entergy TC-1A Answer at 7-12.
[811] *Id.* at 8.
[812] NRC Staff TC-1A Response at 6.
[813] *Id.* at 6-13.
[814] Riverkeeper TC-1A Reply at 2.
[815] *Id.*
[816] *Id.* at 3.

application of a method to revise CUF calculations will determine compliance with the regulation and is therefore a material licensing issue that should not be deferred to the post-licensing period.[817] Riverkeeper concludes with the argument that Entergy must provide sufficient information to demonstrate that the aging of equipment is adequately managed during the extended period of operations and that, just as in *Vermont Yankee,* it is not sufficient for an applicant to propose a plan to develop a future plan.[818]

4. Board Decision — Riverkeeper TC-1/TC-1A

The Board rejects Entergy's claim that the LRA contains an adequate AMP for metal fatigue of key reactor components, and *admits* Riverkeeper TC-1 relating to the calculation of the CUFs and the adequacy of the resulting AMP for those components with CUFs greater than 1.0. In addition to incorporating by reference all the reasons put forth in the Board's decision on the admissibility of NYS-26A,[819] the Board notes that many of the arguments proffered by Entergy and the NRC Staff and subsequently addressed by Riverkeeper in its Reply, present us with material disputes that under NRC rules are best litigated in the course of a hearing, including, but not limited to, questions relating to (1) the extent to which an applicant must expand the scope of its TLAAs to meet the recommendations of the GALL Report and NUREG/CR-6260; (2) the extent, if any, that refinement of the CUFs is a valid corrective action and what relationship it has to the repair and replacement options; (3) the scope of commitments to monitor, manage, and correct age-related degradation to meet the regulations; and (4) the degree of detail and specificity with which the repair/replacement decision criteria must be defined.

For the reasons previously presented in NYS-26A and specific reasons presented herein, the Board *admits* Riverkeeper TC-1A. We also note that Riverkeeper TC-1A will be consolidated with NYS-26A.

B. Riverkeeper TC-2 — Flow Accelerated Corrosion (FAC)

ENTERGY'S PROGRAM FOR MANAGEMENT OF FLOW ACCELERATED CORROSION (FAC) — AN AGING PHENOMENON WITH SIGNIFICANT

[817] *Id.* at 3-4.
[818] *Id.* at 8-10 (citing *Vermont Yankee,* LBP-06-20, 64 NRC at 186-87).
[819] *See supra* Part VI.Z.6.

SAFETY IMPLICATIONS — FAILS TO COMPLY WITH 10 C.F.R. § 54.21(a)(3).[820]

1. Background — Riverkeeper TC-2

Riverkeeper TC-2 contends that Entergy's program for the management of Flow Accelerated Corrosion (''FAC'') fails to comply with the requirements of 10 C.F.R. § 54.21(a)(3) to demonstrate that the effects of aging will be adequately managed for the period of extended operation.[821] According to Riverkeeper, by failing to follow the guidance of the SRP-LR, Entergy has not considered all ten recommended elements for an AMP.[822] Riverkeeper concludes that Entergy's program for management of FAC is deficient because the LRA fails to demonstrate that the intended functions of the FAC-vulnerable plant components will be adequately maintained during the license renewal term by not specifying the method and frequency of inspections or the criteria for component repair or replacement.[823]

Riverkeeper also argues that Entergy's AMP is deficient because it relies on the computer code CHECWORKS, which has not been sufficiently benchmarked to Indian Point operating parameters associated with the recent power uprate. Riverkeeper argues that this benchmarking is necessary because CHECWORKS

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[820] Riverkeeper Petition at 15. The full contention states:

> Entergy's program for management of Flow Accelerated Corrosion (FAC) — an aging phenomenon with significant safety implications — fails to comply with 10 C.F.R. § 54.21(a)(3)'s requirement that: ''For each structure and component identified in paragraph (a)(1) of this section, demonstrate that the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the CLB for the period of extended operation.'' Entergy also fails to follow the guidance of NUREG-1800, which requires that an aging management program, including a FAC program for life extension, must address each of the following (1) Scope (2) Preventative actions (3) Parameters monitored or inspected (4) Detection of aging effects (5) Trending (6) Acceptance criteria (7) Corrective actions (8) Confirmation processes (9) Administrative processes (10) Operating experience. NUREG-1800, § A.1.2.3.
>
> Entergy's program for management of FAC is deficient because it has not demonstrated that components in the Indian Point nuclear power plant that are within the scope of the license renewal rule are vulnerable to FAC will be adequately inspected and maintained during the license renewal term. In particular, Entergy's program for management of FAC is deficient because it relies on the computer code CHECWORKS, without sufficient benchmarking of the IP operating parameters. In addition, Entergy's license renewal application fails to specify the method and frequency of component inspections or criteria for component repair or replacement.

Id. at 15-16.

[821] *Id.* at 15.

[822] *Id.* at 16 (citing SRP-LR § A.1.2.3).

[823] *Id.* at 16, 23.

is an empirical program that relies upon plant-specific calibrations to be reliable.[824] As supported by its expert witness, Dr. Joram Hopenfeld, Riverkeeper contends that CHECWORKS can only be reliably used to predict pipe wall thinning if the following conditions are met:

> (a) All relevant locations are benchmarked for relevant plant parameters;
> (b) Relevant plant parameters do not change significantly over time; and
> (c) Benchmark data on relevant plant parameters are collected for a sufficiently long period of time.[825]

In its Petition, Riverkeeper discusses the technical aspects associated with the use of CHECWORKS at Indian Point, including the need to rebenchmark the program because of recent power uprates in order to demonstrate a successful track record of using CHECWORKS at Indian Point over a long period of time. According to Riverkeeper, CHECWORKS has not been successful in predicting failures due to FAC.[826] Riverkeeper argues that, in the absence of adequate benchmarking, ''it is important for Entergy to provide detailed information regarding the method and frequency of component inspections and its criteria for component repair or replacements.''[827] According to Riverkeeper, Entergy has identified the components susceptible to FAC, but has only made vague statements regarding the specifics of its AMP.[828]

Entergy argues that Riverkeeper TC-2 is inadmissible because it raises issues outside the scope of a license renewal proceeding, lacks sufficient factual or expert support, and fails to establish a genuine dispute with the Applicant, and therefore fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi).[829] Entergy also alleges that Riverkeeper TC-2 fails to demonstrate that the LRA is deficient in any material respect.[830] According to Entergy, its FAC program is fully consistent with both 10 C.F.R. § 54.21 and the GALL Report, which recommends the use of predictive codes such as CHECWORKS.[831] Entergy argues that ''[t]he NRC has stated explicitly that '[a]n applicant may reference the GALL Report in a license renewal application to demonstrate that the programs at the applicant's facility correspond to those reviewed and approved in the GALL Report and that no further staff review is

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[824] *Id.* at 16, 20, 21.
[825] *Id.* at 20.
[826] *Id.* at 20-23.
[827] *Id.* at 23.
[828] *Id.*
[829] Entergy Riverkeeper Answer at 44-45.
[830] *Id.* at 45.
[831] *Id.* at 46.

required.' ''[832] Entergy further states that the GALL Report has been referenced in numerous license renewal applications to show that a program complies with 10 C.F.R. § 54.21.[833]

Entergy contends that Appendix B of the LRA explains that (1) each of its AMPs has ten elements, in accordance with the guidance in the SRP-LR; (2) for AMPs comparable with the programs described in the GALL Report, the ten elements have been compared to the elements of the GALL Report program; (3) for plant-specific programs that do not correlate with the GALL Report, the ten elements are addressed in the program evaluation; and (4) essentially, the full ten-element program described in the GALL Report is incorporated by reference in the LRA. Entergy therefore argues that Riverkeeper's assertion that the LRA improperly excludes elements of the FAC program is incorrect, and that Riverkeeper has failed to identify any omission or deficiency in the LRA.[834]

Entergy also argues that a challenge to the adequacy of CHECWORKS is outside the scope of a license renewal proceeding. Such a challenge is ''nothing short of a direct challenge to an NRC approved method,'' Entergy asserts, and is contrary to the requirement that contentions challenge material contained in an LRA.[835] Entergy represents that its ongoing FAC program has already used one set of outage inspection data to calibrate CHECWORKS to IPEC's post-uprate flow conditions.[836] Entergy notes that based on present refueling outage schedules, there will be at least three more sets of inspection data to calibrate CHECWORKS models before the period of extended operation, providing at least 6 years of calibration/benchmarking before entering the period of extended operation.[837] Finally, Entergy argues that the support provided by Riverkeeper's expert is ''vague and conclusory,'' and that documents submitted in support of the contention fail to provide the support that Riverkeeper alleges.[838]

The NRC Staff also opposes admission of Riverkeeper TC-2, arguing that it is ''unduly vague'' and that ''Riverkeeper fails to demonstrate that its concerns about CHECWORKS have any basis or would materially affect the adequacy of the FAC program'' at Indian Point.[839] According to the NRC Staff, Riverkeeper's expert ''provides absolutely no empirical proof, data, or research to back his statements,'' and therefore does not provide an adequate basis for the contention.[840]

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[832] *Id.* (citing GALL Report, Vol. 2, at iii).
[833] *Id.* at 47.
[834] *Id.* at 47-48 (citing LRA, Appendix B, § B.0.1).
[835] *Id.* at 48-49.
[836] *Id.* at 52.
[837] *Id.* at 60.
[838] *Id.* at 52, 54.
[839] NRC Staff Answer at 119.
[840] *Id.* at 120.

In its Reply, Riverkeeper claims that Entergy is wrong when it argues that TC-2 does not challenge the LRA directly. The contention identifies the relevant sections in the LRA, Riverkeeper says, and specifies the ways in which the LRA is deficient.[841] Furthermore, Riverkeeper contends that citation to the GALL Report and industry practice does not demonstrate compliance with binding regulations.[842] According to Riverkeeper, ''Entergy confuses approval of a challengeable NRC Staff program with an unchallengeable NRC regulation.''[843] Finally, Riverkeeper alleges that Entergy is urging the Board to apply a higher level of expert and documentary support than is required at the contention admissibility stage of a proceeding.[844]

2. Board Decision — Riverkeeper TC-2

The Board *admits* Riverkeeper TC-2 because it raises questions regarding the sufficiency of Entergy's AMP to demonstrate that a specific class of components subject to FAC will be managed so that their intended functions will be maintained during the period of extended operations. Specifically, Riverkeeper alleges that Entergy's program is deficient because it has not demonstrated that by simply addressing the elements presented in SRP-LR the relevant steel members will be adequately inspected and maintained during the license renewal term, and that Entergy relies on the computer model CHECWORKS without adequate benchmarking at the uprated power levels used at IPEC since 2005.

Consistent with a recent Licensing Board license renewal decision in *Vermont Yankee,*[845] this Board finds that Riverkeeper TC-2 is within the scope of the license renewal proceeding. We also find that Riverkeeper has presented sufficient facts and expert opinion to raise a genuine dispute regarding a material issue. Though Entergy alleges it has addressed the ten elements of the SRP-LR by committing to develop a program consistent with the GALL Report, Entergy did not state where in its LRA it discusses the details of the AMP elements (e.g., the parameters to be monitored or inspected, detection method for aging effects, trending, acceptance criteria, corrective actions, etc.).

Riverkeeper also alleges that Entergy's reliance on CHECWORKS for predicting the location and timing for wall thinning due to FAC is unsound due to the lack of benchmarking at IPEC's increased power levels. Contrary to the allegations by Entergy, the Board believes this contention is not a challenge to

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[841] Riverkeeper Reply at 13-14.
[842] *Id.* at 14.
[843] *Id.* at 15.
[844] *Id.* at 19.
[845] LBP-06-20, 64 NRC at 192-96.

the use of the model, but rather questions the sufficiency of the benchmarking needed to provide valid results at IPEC once the plant parameters changed with the 3.26% and 4.85% power uprates during 2004 and 2005. The same argument was used for challenging the effect of the 20% uprate at *Vermont Yankee* on the FAC program at that facility.[846] While the maximum power increase at IPEC is much smaller than the uprate levels at Vermont Yankee, Entergy has not provided any information to explain what percent change in plant operating parameters would be small enough not to have a material effect on the CHECWORKS results.

Entergy and the NRC Staff are correct that Riverkeeper's expert, Dr. Joram Hopenfeld, has not provided overwhelming support for his allegation that CHECWORKS needs to be benchmarked for 10 to 15 years to validate the new power levels at the plant since 2005. But neither Entergy nor the NRC Staff has provided any support for the claim that the inspection data that will be collected during refueling outages prior to the license renewal period will be sufficient to benchmark the model. On balance, the Board finds that the Petitioner has adequately supported the position of its expert in questioning the effectiveness of Entergy's AMP.

Without reference to the specific regulatory criteria, the NRC Staff merely states that Riverkeeper TC-2 is unduly vague because it does not identify the specific systems or components that are of concern for FAC. The Board realizes that this portion of Riverkeeper's contention is not well defined, given that it is a challenge to an overall process that has the potential to affect a large group of components. Even so, Riverkeeper related this contention directly to a specific class of components susceptible to FAC, i.e., carbon and low alloy steel components carrying high-energy fluids for more than 2% of the time. Short of listing each of these components in its Petition, there is little more that Riverkeeper could or should do at the contention admissibility stage of the hearing process.

In summary, the Board *admits* Riverkeeper's TC-2 which contends that (1) Entergy's AMP for components affected by FAC is deficient because it does not provide sufficient details (e.g., inspection method and frequency, criteria for component repair or replacement) to demonstrate that the intended functions of the applicable components will be maintained during the extended period of operation; and (2) Entergy's program relies on the results from CHECWORKS without benchmarking or a track record of performance at IPEC's power uprate levels.

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[846] *Id.* at 194.

C. Riverkeeper EC-1

FAILURE TO ADEQUATELY ANALYZE IMPACTS OF COOLING SYSTEM — ENTERGY'S ENVIRONMENTAL REPORT VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT (''NEPA'') AND NRC IMPLEMENTING REGULATIONS 10 C.F.R. § 51.45 AND 10 C.F.R. § 51.53(C)(3)(ii)(B) BECAUSE IT FAILS TO ADEQUATELY ANALYZE THE ADVERSE INPACTS ON AQUATIC RESOURCES FROM HEAT SHOCK, IMPINGEMENT AND ENTRAINMENT CAUSED BY INDIAN POINT'S ONCE-THROUGH COOLING SYSTEM. ENTERGY''S ENVIRONMENTAL REPORT ALSO VIOLATES NEPA AND NRC IMPLEMENTING REGULATIONS 10 C.F.R. § 51.54(B), (C), (D) BECAUSE IT FAILS TO PROVIDE A COMPLETE ANALYSIS OF THE CLOSED CYCLE COOLING ALTERNATIVE FOR REDUCING OR AVOIDING ADVERSE ENVIRONMENTAL EFFECTS AT INDIAN POINT.[847]

1. Background — Riverkeeper EC-1

Riverkeeper EC-1, which is similar to NYS-30 and NYS-31, alleges that Entergy's ER fails to evaluate the environmental impacts of the once-through cooling water intake system used at Indian Point and, as a result, that Entergy's ER violates regulations because it fails to provide a complete analysis of the closed-cycle cooling alternative for minimizing adverse environmental impacts from the Indian Point facility. Specifically, Riverkeeper asserts that Entergy has no valid CWA determination to submit in compliance with 10 C.F.R. § 51.53(c)(3)(ii)(B), because it is operating under an expired SPDES permit issued by NYSDEC covering the period from 1987 to 1992.[848] Therefore, according to Riverkeeper, Entergy must assess the impacts of heat shock, impingement, and entrainment in the ER.[849] Based on the history of this issue, Riverkeeper claims that (1) the NYSDEC, in a draft SPDES permit prepared in 2003, required the installation of closed cycle cooling if the Indian Point operating license is renewed; and (2) the State of New York has taken the position that the expired SPDES permit, while technically current for operation of the plant, does not adequately address the environmental impacts from once-through cooling.[850] For these reasons, Riverkeeper argues that the 1987 SPDES permit cannot be taken as satisfying the requirement for a current CWA § 316(b) determination; therefore, Entergy must submit an analysis that complies with 10 C.F.R. § 51.53(c)(3)(ii)(B), and Riverkeeper alleges that

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[847] Riverkeeper Petition at 24.

[848] *Id.* at 26.

[849] *Id.* at 29. The history of the expired 1987 permit and the associated legal proceeding is set forth in considerable detail in Riverkeeper's Petition at 26-29 and in our discussion of NYS-30 and NYS-31. *See* discussion *supra* pp. 155-56.

[850] Riverkeeper Petition at 28.

it has failed to do so.[851] Riverkeeper also describes the deficiencies in Entergy's analysis of entrainment, impingement, and heat shock provided in its ER.[852] Finally, Riverkeeper argues that Entergy has failed to provide a complete analysis of alternative, closed-cycle cooling systems.[853]

Entergy argues that Riverkeeper EC-1 is inadmissible because it falls outside the scope of a license renewal proceeding, lacks adequate factual or expert support, and fails to establish a genuine, material dispute with the Applicant, and that therefore, the contention does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (v), and (vi) respectively.[854] Entergy argues that it is required only to submit a current CWA § 316(a) and (b) determination, and that it has met this requirement by submitting a current SPDES permit.[855] Entergy argues that Riverkeeper concedes that IPEC's SPDES permit is current as a matter of New York law, and contains provisions implementing the New York State equivalent of section 316(a) and (b).[856] Entergy also challenges the qualifications of Riverkeeper's experts, asserting that they ''are not engineers qualified to assess hydrothermal modeling'' and claims that Riverkeeper has misread Entergy's application and asked for relief that the NRC does not have the legal authority to provide.[857] Finally, Entergy argues that Riverkeeper EC-1 is not material to the license renewal proceeding because the issues involved will be resolved as part of the adjudicatory proceeding for renewing the SPDES permit and, therefore, admitting this contention would create duplicate proceedings.[858]

The NRC Staff initially did not object to admitting Riverkeeper EC-1 to the limited extent that it challenged the adequacy of the analysis for heat shock, impingement, and entrainment provided in the ER.[859] However, the NRC Staff did object to those portions of the contention that dealt with the closed-cycle cooling alternative and the validity of the SPDES permit, which, according to the Staff, ''are beyond the authority of the NRC under the Clean Water Act,'' for the same reasons outlined in the NRC Staff's response to NYS-30 and NYS-31.[860]

At Oral Argument, the NRC Staff alerted all participants in this proceeding that it had modified its position and opposed the admission of this contention in

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[851] *Id.* at 28-29.
[852] *Id.* at 30-52.
[853] *Id.* at 52-54.
[854] Entergy Riverkeeper Answer at 61.
[855] *Id.* at 62.
[856] *Id.*
[857] *Id.*
[858] *Id.* at 63.
[859] NRC Staff Answer at 110.
[860] *Id.*

its entirety.[861] The NRC Staff explained that, in its initial reading of the LRA and the ER, it was not clear that Entergy had met the requirements of CWA § 316.[862] However, in its continuing review of the LRA, the ER, and the pleadings, the NRC Staff concluded that Entergy's SPDES permit did meet the CWA § 316(b) requirement and therefore satisfied 10 C.F.R. § 51.53(c)(3)(ii)(B).[863] For that reason, the NRC Staff now maintains that all of Riverkeeper EC-1 is outside the scope of this proceeding.[864]

In its Reply, Riverkeeper argues that Entergy has inaccurately characterized the materials it submitted in connection with its SPDES permit. In particular, Riverkeeper notes that the Hudson River Settlement Agreement (''HRSA'') and the consent orders were originally part of the supporting documentation for the 1987 SPDES permit and neither were provided in the ER.[865] It is Riverkeeper's position that the HRSA is out of date and no longer reflects the obligations of the various parties and, as a result, the 1987 SPDES permit — although administratively extended — no longer constitutes a valid CWA § 316(a) or (b) determination and cannot be relied upon to satisfy the requirements of 10 C.F.R. § 51.53(c)(3)(ii)(B).[866]

2. Riverkeeper Response to the NRC Staff's Change in Position

Riverkeeper filed a response to the NRC Staff's change in position on April 7, 2008.[867] Riverkeeper continues to assert that the 1987 permit, as extended, and the HRSA do not represent a current CWA § 316(b) determination.[868] Riverkeeper argues that the issue is not whether a given permit is valid in a legal sense, but rather whether there is a current section 316(b) determination — based on a current analysis — that can be used in a NEPA analysis of the Category 2 environmental impacts that the NRC must consider in making its licensing decision.[869] If a current analysis of the facility's impact on the aquatic ecology is not available in such a form, 10 C.F.R. § 51.53(c)(3)(ii)(B) requires applicants to present such an analysis in the ER itself.[870]

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[861] Tr. at 467.
[862] Tr. at 468.
[863] *Id.*
[864] Tr. at 469.
[865] Riverkeeper Reply at 23-24.
[866] *Id.* at 29.
[867] Riverkeeper, Inc.'s Response to the NRC Staff's Change in Position Regarding the Admissibility of Contention EC-1 (Apr. 7, 2008).
[868] *Id.* at 5.
[869] *Id.* at 13.
[870] *Id.* at 14.

Entergy and the NRC Staff replied to Riverkeeper's Response on April 21, 2008. Entergy claims that the Petitioner did not address the validity of the NRC Staff's updated position that Entergy's SPDES permit is an equivalent CWA § 316 determination, because it could not reasonably dispute that the SPDES permit is valid and, as a matter of New York State law, contains the equivalent CWA § 316 determination.[871] According to Entergy, the Petitioner still fails to furnish adequate factual or legal support and does not establish a genuine dispute on a material issue.[872] Entergy specifically discusses how Riverkeeper's criticisms of Entergy's position regarding section 51.53(c)(3)(ii)(B) are unsupported by New York State or NRC law.[873]

The NRC Staff posits many of the same arguments as Entergy in alleging that the contention is inadmissible.[874] The NRC Staff goes on, however, to discuss how the 1987 SPDES permit is both current and valid;[875] describes why, in its view, the CWA prohibits the NRC from requiring closed-cycle cooling;[876] and points out that its change in position was not procedurally defective.[877]

3. Board Decision — Riverkeeper EC-1

As we decided in NYS-30 and NYS-31, the Board *rejects* Riverkeeper's EC-1 because it is outside the scope of the proceeding and constitutes an attack on NRC Regulation 10 C.F.R. § 51.53(c)(3)(ii)(B). NRC Regulations require an applicant to provide in its ER a site-specific analysis of entrainment, impingement, and heat shock/thermal discharge impacts from its once-through cooling systems.[878] Pursuant to 10 C.F.R. § 51.53(c)(3)(ii)(B), an applicant may meet its obligations by doing one of following: (1) provide a copy of current CWA § 316(b) determination; (2) provide a section 316(a) variance or equivalent State permit and supporting documentation; or (3) assess the impact of proposed action on fish and shellfish resources resulting from heat shock, impingement, and entrainment. As discussed in our decision on the admissibility of NYS-30 and NYS-31,

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[871] Entergy Nuclear Operations, Inc.'s Reply to Riverkeeper, Inc.'s and State of New York's Responses to NRC Staff's Change in Position Regarding Aquatics Contentions at 2 (Apr. 21, 2008).

[872] *Id.*

[873] *Id.* at 8-10.

[874] NRC Staff's Reply to State of New York and Riverkeeper, Inc.'s Responses to the Staff's Change in Position on New York Contentions 30 and 31 and Riverkeeper Contention EC-1 at 3-4 (Apr. 21, 2008).

[875] *Id.* at 5-6.

[876] *Id.* at 6-7.

[877] *Id.* at 7-8.

[878] Table B-1.

Entergy has met its obligation.[879] The Applicant has provided a copy of its current CWA determination by submitting its existing SPDES permit and the supporting documentation.[880] Additionally, Entergy provided a detailed description of its assessment of ecological studies that have been conducted over the past three decades as that assessment relates to the impacts from heat shock, impingement, and entrainment.[881] Nowhere does Riverkeeper refute the presence of this information or contend that these assessments do not meet the second option provided by 10 C.F.R. § 51.53(c)(3)(ii)(B).

D. Riverkeeper EC-2

INADEQUATE ANALYSIS OF SEVERE ACCIDENT MITIGATION ALTERNATIVES. ENTERGY'S ANALYSIS OF SEVERE ACCIDENT MITIGATION ALTERNATIVES (''SAMAs'') IN ITS ENVIRONMENTAL REPORT FAILS TO SATISFY NEPA, 42 U.S.C. § 4321-4370f, BECAUSE ITS ANALYSIS OF THE BASELINE OF SEVERE ACCIDENTS IS INCOMPLETE, INACCURATE, NONCONSERVATIVE, AND LACKING IN THE SCIENTIFIC RIGOR REQUIRED BY NEPA.[882]

1. Background — Riverkeeper EC-2

Riverkeeper EC-2 contends that the SAMA analysis in Entergy's ER fails to satisfy NEPA, 42 U.S.C. § 4321-4370f, because its analysis of the baseline of severe accidents is incomplete, inaccurate, nonconservative, and lacking in the scientific rigor required by NEPA.[883] In particular, Riverkeeper argues that Entergy has not provided an adequate analysis of the probability and scope of severe accidents, and of their likely consequences.[884] Riverkeeper alleges that Entergy has failed to consider the contribution to severe accident costs resulting from reactor containment bypass via induced failure of steam generator tubes, fires in the spent fuel pools, and intentional attacks on the reactors or spent fuel pools.[885] Riverkeeper also claims that Entergy underestimates population doses from severe accidents, in part because Entergy uses an unusually low

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[879] *See supra* Part VI.DD.3. Additional discussion on the validity and currency of this permit and the prohibition against the NRC's modifying any of the SPDES discharge limits has been presented in detail in the discussion of NYS-30 and NYS-31 and is not repeated here.

[880] Entergy Riverkeeper Answer at 28.

[881] *Id.* at 82-83.

[882] Riverkeeper Petition at 54.

[883] *Id.*

[884] *Id.* at 54-55.

[885] *Id.* at 55.

source term, fails to address uncertainties due to meteorological variation, and makes inappropriate use of a $2,000 per person-rem dose conversion factor.[886] Riverkeeper contends that Entergy should be required to redo its SAMA analysis ''incorporating complete and accurate inputs and based on rigorous scientific methods.''[887] The contention is supported by Declarations from two experts, Dr. Gordon Thompson and Dr. Edwin S. Lyman, and by reports attached to the experts' Declarations.[888]

According to Riverkeeper, the adequacy of an applicant's SAMAs is Category 2 environmental issues that must be addressed during license renewal on a plant-by-plant basis.[889] According to Riverkeeper, a SAMA analysis must be contained in the ER, and a decision about whether to implement a specific SAMA should be determined on the basis of a cost-benefit analysis.[890] Riverkeeper states that Entergy initially considered 231 SAMA candidates, screened out 163 of these based on unsuitability for the site, rejected 61 because their projected costs exceeded their benefits, and recommended only seven that were potentially worth implementing.[891] Riverkeeper believes this result to be flawed in that it does not take full account of the potential costs of severe accidents, and therefore does not constitute the ''hard look'' at environmental impacts that NEPA requires.[892]

Riverkeeper states that it is aware that some of the accident scenarios it proposes are currently the subject of rulemakings and other adjudications. According to Riverkeeper, the NRC classifies spent fuel pool accidents as Category 1 environmental impacts and deals with them generically in license renewals.[893] Riverkeeper notes that the Commission is currently considering two petitions for rulemaking seeking to overturn this classification, and requests that the Board admit this aspect of Riverkeeper EC-2 and hold it in abeyance pending the completion of the rulemaking process.[894] Riverkeeper also states that it is aware that the NRC has refused to consider the environmental impacts of terrorist attacks outside of the Ninth Circuit, where it is required to do so under *Mothers*

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[886] *Id.*

[887] *Id.* at 56.

[888] *Id.*

[889] *Id.* at 58 (citing Table B-1).

[890] *Id.* at 58-59.

[891] *Id.* at 59-60.

[892] *Id.* at 60.

[893] *Id.* at 62.

[894] *Id.* The petitions for rulemaking have been filed by Massachusetts Attorney General and the State of California. Massachusetts Attorney General; Receipt of Petition for Rulemaking, 71 Fed. Reg. 64,169 (Nov. 1, 2006); State of California; Receipt of Petition for Rulemaking, 72 Fed. Reg. 27,068 (May 14, 2007).

for Peace.[895] Nevertheless, Riverkeeper asks that the Board refer this aspect of Riverkeeper TC-2 to the Commission, with a request for reconsideration of its previous decision in this matter.[896]

Entergy asserts that Riverkeeper EC-2 is inadmissible as a matter of law.[897] Entergy claims that only those SAMA analyses related to managing the effects of aging should be evaluated as part of an LRA, and that other SAMAs should fall under ongoing review of a facility's CLB.[898] Entergy states that both the issue of spent fuel pool fires and the question of terrorist attacks are outside the scope of this proceeding, the first because it is currently subject to rulemaking, and the second because the Commission has stated that the potential impact of terrorism is not litigable in license renewal proceedings.[899] The third of Riverkeeper's accident scenarios — containment bypass via induced failure of steam generator tubes — is not subject to such a categorical ban; however, Entergy says, it is an attempt ''to manipulate the inputs and assumptions underlying Entergy's SAMA analysis, so as to create the false appearance that Entergy has improperly excluded potential cost-beneficial SAMAs.''[900] Doing so, according to Entergy, would in effect impose a requirement that Entergy consider hypothetical, ''worst-case'' scenarios in its SAMA analyses, and Riverkeeper provides no regulatory or factual support to indicate that this is necessary.[901]

The NRC Staff also opposes admission of Riverkeeper EC-2, raising the same issues that Entergy does with respect to the scope of the proceeding and the bar to considering contentions that deal with spent fuel pool fires or intentional acts of terrorism.[902] With respect to other aspects of the contention, the NRC Staff argues that Riverkeeper has failed to demonstrate that any aspect of Entergy's SAMA analysis is insufficient. According to the NRC Staff, the mere fact that other calculations are possible does not invalidate Entergy's analyses.[903]

In its Reply, Riverkeeper argues that the part of its contention dealing with containment bypass via induced failure of steam generator tubes is based on NRC-sponsored studies.[904] Furthermore, Riverkeeper asserts that its analysis is by no means a worst-case scenario. Rather, it relies in large part on Entergy's own analysis, making only limited changes based on findings in studies by

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[895] 449 F.3d 1016; *see also Oyster Creek,* CLI-07-8, 65 NRC at 124.
[896] Riverkeeper Petition at 64.
[897] Entergy Riverkeeper Answer at 103.
[898] *Id.* at 106-07.
[899] *Id.* at 118, 123.
[900] *Id.* at 112.
[901] *Id.* at 112-16.
[902] NRC Staff Answer at 111.
[903] *Id.* at 111-12.
[904] Riverkeeper Reply at 48.

Entergy, previous licensees of the Indian Point reactors, and the NRC Staff.[905] Riverkeeper alleges that Entergy's Answer ignores the process used to generate the alternate analysis, which is presented in one of the documents Riverkeeper submits in support of the contention.[906] Regarding the part of Riverkeeper EC-2 that addresses spent fuel pool fires, Riverkeeper argues that NEPA requires the NRC to ensure that the results of any rulemaking are ''plugged in'' to specific licensing decisions pending before the Commission.[907] According to Riverkeeper, admitting this part of the contention and holding it in abeyance until the rulemaking is resolved would provide a mechanism for doing so.[908]

At Oral Argument, the Board offered Riverkeeper the opportunity to submit a written response to certain technical questions that could not be answered adequately without further consultation with Riverkeeper's experts.[909] Riverkeeper filed its response to that request, which focused on issues related to the source term, on April 7, 2008.[910] The NRC Staff filed its response to this filing on April 21, 2008, at which time it stated that it believed the contention — even as clarified by Riverkeeper's latest filing — was inadmissible.[911]

2. Board Decision — Riverkeeper EC-2

The Board finds that Riverkeeper EC-2 is *inadmissible* in this proceeding. In doing so, we address the contention in three parts: spent fuel pool fires, terrorist attacks, and issues related to containment bypass accidents.

Riverkeeper is correct in noting that spent fuel pool fires are Category 1 environmental issues and, therefore, are addressed generically in the GEIS for license renewals.[912] The Commission reaffirmed this designation in *Vermont Yankee/Pilgrim.*[913] NRC Regulations state that ''no rule or regulation of the Commission, or any provision thereof . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding . . . .''[914] For this

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[905] *Id.*

[906] *Id.*

[907] *Id.* at 54.

[908] *Id.*

[909] Tr. at 632-33.

[910] Riverkeeper, Inc.'s Response to Atomic Safety and Licensing Board Questions Regarding Contention EC-2 (Apr. 7, 2008) [hereinafter Riverkeeper Response to EC-2 Questions].

[911] NRC Staff's Reply to Riverkeeper, Inc.'s Response to the Licensing Board's Questions Regarding Contention EC-2 (SAMAs) (Apr. 21, 2008) [hereinafter NRC Staff Reply to Riverkeeper Response].

[912] Table B-1.

[913] *Vermont Yankee/Pilgrim,* CLI-07-3, 65 NRC at 16.

[914] 10 C.F.R. § 2.335(a).

reason, we find that this aspect of Riverkeeper EC-2 is outside the scope of a license renewal proceeding.

As the Commission noted in *Vermont Yankee/Pilgrim,* a petition for rulemaking that addresses issues related to spent fuel pool fires would be a more appropriate venue to seek relief ''for resolving . . . generic concerns about spent fuel fires than a site-specific contention in an adjudication.''[915] Riverkeeper has requested that we nevertheless admit EC-2 and hold it in abeyance pending resolution of multiple petitions for rulemaking that addresses spent fuel pool fires.[916] We decline to do so. In the event that the petitions are denied, the current rule will remain in force, and any attack on the validity of that rule will be impermissible in this proceeding as a matter of law. In the event that the Commission changes the rule, petitioners will have the opportunity to file new contentions at that time.

With respect to terrorist attacks, the Board has previously discussed its adherence to the Commission precedent established in *Oyster Creek.*[917] The Commission maintains that terrorism is unrelated to the aging issues that license renewal proceedings are meant to address.[918] In addition, the Commission says, license renewals are not related to any change in the risk of terrorist attack, and the terrorism issue is therefore not material to the decision the Board must make in this proceeding.[919] Recognizing this, Riverkeeper has requested that the Board refer this issue to the Commission for reconsideration of its decision in *Oyster Creek.*[920] We decline to do so, finding no justification for the suggested action in Riverkeeper's argument.

Finally, we turn to the question of accidents involving containment bypass via induced failure of steam generator tubes. Entergy notes, correctly, that this aspect of Riverkeeper EC-2 is not categorically outside the scope of a license renewal proceeding.[921] In its Petition, Riverkeeper alleged that Entergy's estimate of accident consequences were too low by a factor of three or more, primarily because Entergy (1) used an unusually low source term; (2) failed to consider uncertainties due to meteorologic variation; and (3) used an inappropriate dose conversion factor that resulted in an underestimate of costs.[922] At Oral Argument, the Board requested additional briefing of the first of these issues.[923]

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[915] *Vermont Yankee/Pilgrim,* CLI-07-3, 65 NRC at 17.

[916] Riverkeeper Petition at 62.

[917] *Oyster Creek,* CLI-07-8, 65 NRC at 128-30; *see also supra* Part VI.AA.2, Part VII.A.2.

[918] *Oyster Creek,* CLI-07-8, 65 NRC at 128-29.

[919] *Id.* at 130.

[920] Riverkeeper Petition at 64.

[921] Entergy Riverkeeper Answer at 112.

[922] Riverkeeper Petition at 68.

[923] Tr. at 632-33.

In its response to the Board's request, Riverkeeper explains its view that Entergy's SAMA analysis for such accidents employs a source term — which Riverkeeper defines as ''a description of the fraction of the radioactive contents of the reactor core that is assumed to be released to the environment during a severe accident'' — that is too low, and that the projected consequences of a severe accident are therefore too low.[924] In particular, Riverkeeper claims that Entergy should have used a source term based on the methodology used in NUREG-1465, which would result in higher projected accident costs, rather than the source term based on the MAAP code.[925] Additionally, Riverkeeper says, Entergy may have used problematic assumptions about the release of radioactive material from the reactor core into containment, from containment into the environment, or both.[926]

While Entergy did not respond, the NRC Staff response is that Riverkeeper has failed to show that Entergy's use of the MAAP code is improper, and that this aspect of Riverkeeper EC-2 is therefore inadmissible.[927] According to the NRC Staff, NUREG-1465 addresses only releases into containment and assumes that containment remains intact but leaks.[928] Therefore, its methodology does not apply in the scenario in which Riverkeeper would like to apply it, that of early energetic containment breach.[929] Furthermore, the NRC Staff says, the MAAP code that Entergy employs does include the scenario raised by Riverkeeper, along with other accident scenarios all weighted in proportion to their probabilities of occurrence.[930]

In light of this additional briefing related to the source term, and considering the contention pleading rules of 10 C.F.R. § 2.309(f)(1), the Board *rejects* this aspect of Riverkeeper EC-2 on the ground that it fails to demonstrate a genuine dispute with the applicant on a material issue of law or fact. We take no position on Entergy's allegation that this aspect of the contention is a request that Entergy be required to consider ''worst-case'' scenarios.[931] It is sufficient that Riverkeeper has failed to make the minimal demonstration, as required by contention admissibility rules, that Entergy's ER analysis fails to meet a statutory or regulatory requirement. Presentation of an alternative analysis is, without more, insufficient to support a contention alleging that the original analysis failed to meet applicable requirements. The same argument applies to Riverkeeper's arguments related to meteorologic variation and the dose conversion factor.

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[924] Riverkeeper Response to EC-2 Questions at 1-2.
[925] *Id.* at 3.
[926] *Id.* at 3-4.
[927] NRC Staff Reply to Riverkeeper Response at 1.
[928] *Id.*
[929] *Id.* at 2.
[930] *Id.*
[931] *See* Entergy Riverkeeper Answer at 112-16.

Because all three parts of Riverkeeper Contention EC-2 are *inadmissible,* the Board *rejects* this contention in its entirety.[932]

E. Riverkeeper EC-3

FAILURE TO ADEQUATELY ANALYZE IMPACTS OF SPENT FUEL POOLS. ENTERGY'S ER FAILS TO SATISFY THE REQUIREMENTS OF NEPA, 42 U.S.C. § 4332 *ET SEQ.,* AND NRC REGULATIONS IMPLEMENTING NEPA, INCLUDING 10 C.F.R. § 51.45(c) AND (e). BECAUSE THE ER DOES NOT ADEQUATELY ASSESS NEW AND SIGNIFICANT INFORMATION REGARDING THE ENVIRONMENTAL IMPACTS OF THE RADIOACTIVE WATER LEAKS FROM THE INDIAN POINT 1 AND INDIAN POINT 2 SPENT FUEL POOLS ON THE GROUNDWATER AND THE HUDSON RIVER ECOSYSTEM.[933]

1. Background — Riverkeeper EC-3

Riverkeeper's EC-3, which is similar to NYS-28 and Clearwater EC-1, contends that Entergy's LRA fails to satisfy NEPA requirements and NRC Regulations implementing NEPA that are contained in 10 C.F.R. Part 51 because its ER does not adequately assess new and significant information regarding the environmental impacts of radionuclide leaks from the IP1 and IP2 spent fuel pools into the groundwater and Hudson River ecosystem.[934] While Riverkeeper admits that Entergy has identified the groundwater contamination in its ER, the Petitioner challenges the Applicant's conclusion that the impacts are small and therefore not significant for purposes of NEPA.[935] Because NRC Regulations do not specifically define ''significant,'' Riverkeeper's assertion is based on the lengthy description of the factors to be considered when determining significance that are presented in the Council on Environmental Quality (''CEQ'') Regulations implementing NEPA.[936] According to Riverkeeper, because it fails to consider these criteria, Entergy's ER is inadequate in several respects including: (1) the claim that the IP2 spent fuel pool is no longer leaking; (2) the conclusion that only low concentrations of radionuclides have been detected in the groundwater; and (3) the current and future impacts of the groundwater contamination on the

[932] NYS expressed its intent to adopt Riverkeeper EC-2. *See* NYS Petition at 311. However, given that this contention has been ruled inadmissible, it cannot be adopted.

[933] Riverkeeper Petition at 74.

[934] *Id.* at 74.

[935] *Id.* at 76.

[936] *Id.* at 77-79.

Hudson River fish and shellfish.[937] As a result of these deficiencies, Riverkeeper contends that it is uncertain whether Entergy's assessment of new and significant information is accurate and complete enough to enable the Commission to determine whether the impacts of the proposed action are of such magnitude that license renewal would be unreasonable.[938]

In its Answer, Entergy opposes the admission of Riverkeeper EC-3 because Riverkeeper (1) has raised issues outside the scope of license renewal by suggesting stricter requirements than imposed by the regulations, (2) fails to provide adequate factual or expert support, and (3) fails to establish a genuine dispute on a material issue of fact or law. Entergy admits that an ER for an LRA is required to address new and significant information for either Category 1 or Category 2 issues.[939] However, as part of its extensive discussion of the merits of this contention, Entergy claims that its ER appropriately characterized the impacts due to spent fuel pool leaks as new but not significant, even though the characterization of the groundwater impacts was ongoing when the ER was submitted.[940] Entergy represents that the hydrogeological investigation of the Indian Point site is now complete,[941] confirms the conclusions in the ER, and included an assessment of the dose exposure to fish and invertebrates in the Hudson River.[942] Entergy discusses the status of the current leaks and the merits of its conclusions regarding the resulting impacts as they relate to the three bases proffered by Riverkeeper.[943]

The NRC Staff also opposed admission of this contention claiming that it raises issues outside the scope of the proceeding and constitutes an impermissible challenge to NRC Regulations by raising an issue that has already been addressed generically by the Commission.[944] The NRC Staff claims that Riverkeeper erroneously asserts deficiencies in Entergy's ''new and significant'' information relating to the radiological leaks from the spent fuel pools, arguing that the Petitioner must show, and has not, that the Applicant's information invalidates the conclusions of the GEIS.[945] Discounting the factual information provided by the Petitioner, the NRC Staff asserts that Riverkeeper's claim that Entergy failed

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[937] *Id.* at 80-86.

[938] *Id.* at 79.

[939] Entergy Riverkeeper Answer at 140.

[940] *Id.* at 140-44.

[941] *Id.* at 145 n.618 (referencing Investigation Report); *see also supra* notes 617-620 & accompanying text.

[942] Entergy Riverkeeper Answer at 147.

[943] *Id.* at 147-50.

[944] NRC Staff Answer at 112.

[945] *Id.* at 113 (citing *Shearon Harris,* LBP-07-11, 66 NRC at 64 n.83; *Pilgrim,* LBP-06-23, 64 NRC at 288).

to assess the resulting impacts of the leaks on Hudson River ecosystem ''lacks a necessary predicate and is, thus, unsupported.''[946]

In its Reply, Riverkeeper asks the Board to disregard the recent Investigation Report, positing that all parties should be required to rely on the LRA and the ER in supporting their positions on contention admissibility, and that it is patently unfair to allow the Applicant the opportunity to cure application deficiencies with attachments to its Answer.[947] Riverkeeper goes on to state that both the NRC Staff and Entergy have failed to show that Riverkeeper EC-3 is inadmissible. Contrary to the assertion that it is challenging a Category 1 issue, Riverkeeper points out that EC-3 never claimed that the leaks are new information regarding a Category 1 issue, but that the leaks represent a previously unanticipated type of environmental impact that is neither Category 1 nor Category 2, and thus must be addressed under 10 C.F.R. § 51.53(c)(3)(iv).[948] Depriving a party of the opportunity to address issues not previously defined in the GEIS would, in Riverkeeper's opinion, violate the NEPA requirement to address all the impacts of a proposed action. The Petitioner goes on at length to discuss the merits of the contention, which it asserts helps to show that the issue statement is within the scope of, and not an attack on, current regulations.[949] Riverkeeper also highlights its factual support for EC-3, specifically for its assertions that the impacts are higher than alleged by Entergy and that the appropriate level of impact has not been assessed in the long-term impacts to the Hudson River ecology.[950]

2. Board Decision — Riverkeeper EC-3

The Board *admits* Riverkeeper EC-3 as it relates to the environmental impacts from the spent fuel pool leaks. Even though the NRC Staff claims that Riverkeeper's allegations are an impermissible challenge to the regulations, Entergy is required to address new and significant information for either Category 1 or Category 2 issues in its ER for an LRA.[951] Leaks from the spent fuel pools are new information which Entergy asserts is not significant because the radiological

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[946] *Id.*

[947] Riverkeeper Reply at 61.

[948] *Id.* at 63.

[949] *Id.* at 63-70.

[950] *Id.* at 70-76. Riverkeeper points out that it used the EPA drinking water standards as a conservative benchmark for comparison purposes, for which they are also used by Entergy and the NRC Staff in their own analyses of the spent fuel leaks; it provided supporting data showing that high levels of tritium, strontium-90, and cesium-137 have been detected in the groundwater; it relied on fish samples to show elevated levels of radionuclides along with internal Entergy memoranda that suggest that further studies on fish contamination were required, etc.

[951] Entergy Riverkeeper Answer at 140.

concentrations are small and the resulting dose exposures to the public are minimal.[952] Riverkeeper, however, contends that the release concentrations are not low and that Entergy has failed to assess the impacts of these levels of releases on the Hudson River ecosystem.[953] Based on factual statements presented by Riverkeeper, it is uncertain whether Entergy's conclusions contained in the ER regarding the significance of the groundwater contamination are sufficient for purposes of satisfying NEPA and NRC Regulations.

There is a genuine issue regarding the significance of the new information, including the data and conclusions presented in the recently submitted hydrogeologic report relating to the radiological leaks from the spent fuel pools that is undisputedly within the scope of the LRA proceedings. We believe that Riverkeeper has raised a genuine issue, within the scope of this proceeding, as to whether Entergy's ER contains sufficient information to aid the Commission in preparation of its EIS. For this reason, the Board *admits* Riverkeeper's contention EC-3 to litigate this material dispute at the hearing. We also note that Riverkeeper EC-3 will be consolidated with Clearwater EC-1.

IX. CLEARWATER CONTENTIONS

A. Clearwater EC-1

FAILURE OF ER TO ADEQUATELY ADDRESS THE IMPACTS OF KNOWN & UNKNOWN LEAKS.[954]

1. Background — Clearwater EC-1

Clearwater EC-1, which is similar to Riverkeeper EC-3 and NYS-28, contends that Entergy's LRA does not comply with NEPA in that its ER fails to address adequately ''new and significant'' information concerning environmental impacts of radioactive substances that are leaking from spent fuel pools. By failing to do so, according to Clearwater, Entergy's ER does not contain the information needed by the Commission to perform its independent analysis required by 10 C.F.R. Part 51.[955]

Clearwater expressly seeks to adopt NYS-28 and shares the concerns of Riverkeeper EC-3. Clearwater repeats much of what was stated by Riverkeeper, including allegations that many of Entergy's conclusions in its ER are not accurate

[952] *Id.* at 144.
[953] Riverkeeper Petition at 74-75.
[954] Clearwater Petition at 18.
[955] *Id.*

(e.g., IP2 is no longer leaking, and only low concentrations of radionuclides have been detected in the groundwater). Clearwater also alleges that Entergy erroneously concluded that the impacts from the leaks would be small and therefore insignificant, and that the ER does not evaluate the impacts of the leaks upon fish in the Hudson River.[956] While not designating them as expert witnesses, Clearwater includes statements attributed to NYSDEC personnel which discuss the potential groundwater flow paths for leaks, the types and concentrations of radionuclides detected in the groundwater, and the fish sampling performed to date.[957] Clearwater concludes by contending, as NYS did, that groundwater leaks have far exceeded anything the NRC reviewed in 1996 during the development of the GEIS, and that the extent of leaks, number of radionuclides released, uniqueness of the site, and pathway to the Hudson River mean that the impacts are significant and reviewable under NEPA in this proceeding.[958]

Entergy opposes the admission of this contention for many of the same reasons it opposed Riverkeeper EC-3 and NYS-28, i.e., that the contention (1) raises issues outside the scope of license renewal by suggesting stricter requirements than those imposed by the regulations; (2) lacks adequate factual or expert support; and (3) fails to establish a genuine dispute on a material issue of law or fact.[959]

Entergy maintains that section 5.0 of the ER appropriately stated that the releases into the environment from the spent fuel leaks were potentially new but not significant per 10 C.F.R. § 51.53(c)(3)(iv).[960] Specifically, Entergy estimated that the total body dose caused by the groundwater contamination is well below the NRC limit, and therefore concluded that the impact would be small and that the discovery was not significant.[961] Entergy notes that the ongoing characterization of the impact to groundwater referenced in its ER has been completed and states that ''at no time did the results of that analysis yield any indication of potential adverse environmental or health risk . . . .''[962] Furthermore, Entergy states that while there have been leaks into the groundwater, the facility does not use the groundwater onsite and the groundwater is not associated with any drinking water pathway; for these reasons, EPA limits on drinking water are not applicable.[963] Entergy also argues that, based on the information in the ER and in the Investigation Report, all of Clearwater's issues in this contention are either moot, invalid, or outside the

[956] *Id.* at 19-20.
[957] *Id.* at 22-23.
[958] *Id.* at 23.
[959] Entergy Clearwater Answer at 34.
[960] *Id.* at 35.
[961] *Id.* at 37-38.
[962] *Id.* at 39; *see supra* notes 617-620 & accompanying text.
[963] Entergy Clearwater Answer at 37.

scope of this proceeding, and that Clearwater has not provided adequate support for Clearwater EC-1.[964]

The NRC Staff asserts that Clearwater EC-1 is inadmissible for the same reasons as NYS-28 and Riverkeeper EC-3, i.e., it is an impermissible challenge to Commission regulations, raises an issue beyond the scope of a license renewal proceeding, lacks specificity, and fails to raise a dispute as to a material issue of law or fact.[965] In addition, the NRC Staff claims that the NYSDEC statements referenced in the contention do not contravene any portion of the LRA, and are beyond the scope of this proceeding in that they deal with issues regarding the current operation of the plants.[966]

In its Reply, Clearwater asserts it has presented serious questions that demonstrate that Entergy's ER is insufficient and that these questions should be resolved at hearing.[967] Clearwater points out that New York State law requires that discharge of waste shall not impair water below its best use — which for groundwater is its use as a potable water supply.[968] Clearwater states its belief that the leaks ''are symptomatic of an aging facility whose components are subject to and showing increasing signs of aging.''[969] In support of the need to address the impacts of the contamination on the Hudson River, Clearwater notes that four municipalities currently take drinking water from the Hudson River and that there is a plan in development to build a large water intake facility to serve Rockland County.[970]

2. Board Decision — Clearwater EC-1

The Board *admits* Clearwater's EC-1. The Petitioner has addressed the regulatory criteria and raised a genuine dispute regarding the significance of the environmental impacts from the spent fuel pool leaks. By using similar arguments to those presented in Riverkeeper's EC-3, Clearwater has presented sufficient information and expert opinion to question whether Entergy's conclusions, contained in the ER regarding the significance of the groundwater contamination, are incomplete and legally insufficient for purposes of satisfying 10 C.F.R. Part 51. Although Entergy estimates that the total body dose caused by the groundwater contamination is well below the NRC limit, there is still the question as to whether

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[964] *See id.* at 42-47.

[965] NRC Staff Answer at 90; *see supra* Parts VI.BB.1, VIII.E.1.

[966] *See* NRC Staff Answer at 90-91.

[967] Clearwater Reply at 4.

[968] *Id.* Clearwater uses Part 701 of New York State's Classification — Surface Waters and Groundwaters, as support. Specifically, it quotes section 701.1 — General Conditions Applying to All Water Classification, and section 701.10 — Class GA Fresh Groundwaters. *Id.*

[969] *Id.*

[970] *Id.* at 4-5.

the maximum groundwater impact (and, in turn, the maximum dose) has been determined for the site. Hence, the contention is not an impermissible challenge to Commission regulations.

There are serious factual differences between the positions of the Applicant and Petitioner regarding the radiological leaks from the spent fuel pools and whether that is within the scope of the LRA proceedings. These disputes need to be resolved through an evidentiary hearing. Clearwater EC-1 is *admitted.* We also note that Clearwater EC-1 will be consolidated with Riverkeeper EC-3.

B. Contention EC-2

ENTERGY'S ENVIRONMENTAL REPORT FAILS TO CONSIDER THE HIGHER THAN AVERAGE CANCER RATES AND OTHER HEALTH IMPACTS IN COUNTIES SURROUNDING INDIAN POINT.[971]

1. Background — Clearwater EC-2

Clearwater EC-2 alleges that Entergy's ER does not adequately address the impact on the health of the local population from the relicensing of IP2 and IP3.[972] Clearwater represents that it has presented data that constitute new and significant information showing higher than average cancer rates among people living in the area around Indian Point.[973] Clearwater suggests that this information justifies the contention's admissibility under 10 C.F.R. § 51.53(c)(3)(iv), even though the radiological impact of continued operation of the facility is a Category 1 issue pursuant to Table B-1.[974] In support of its position, Clearwater relies on a report prepared by Joseph Mangano,[975] which purports to show that the continued operation of Indian Point would raise the risk of exposure to radioactivity.[976] Clearwater contends that Mr. Mangano's research shows that emissions from Indian Point ''are likely causing increased rates of cancer incidence for adjacent populations [and that] his analysis raises critical and troubling empirically based questions about potential negative health impacts caused by the Indian Point facility and demands further study.''[977] Additionally, Clearwater suggests that

[971] Clearwater Petition at 24.

[972] *Id.*

[973] *Id.*

[974] *Id.* at 25.

[975] *Id.* at 26; *see also* Exh. 4, Declaration of Joseph J. Mangano, Attach. A, *Public Health Risks of Extending Licenses of the Indian Point 2 and 3 Nuclear Reactors* (Nov. 26, 2007) [hereinafter Mangano Report].

[976] Clearwater Petition at 26.

[977] *Id.* at 28-29.

Mr. Mangano's work exposes potentially significant environmental justice issues because areas with high minority and poverty levels had higher than expected cancer rates.[978]

Entergy opposes the admission of Clearwater EC-2 for several reasons. First, according to Entergy, the Mangano Report only raises generic issues that are inappropriate challenges to the Commission's regulations.[979] Entergy contends that the issue raised in Clearwater EC-2 is the same issue rejected by the Licensing Board in *McGuire/Catawba,*[980] where that Board found a similar contention raised a Category 1 issue that did not require site-specific consideration in a license renewal proceeding.[981] Entergy argues that because Clearwater fails to provide any support for the notion that these are not Category 1 issues, the contention is outside of the scope of license renewal proceedings. Furthermore, Entergy asserts that its most recent reports regarding radioactive releases show that Indian Point operations did not release more radionuclides than the regulations allow.[982] Finally, Entergy maintains that the contention is based on speculation and does not raise a dispute of a material fact.[983] Entergy criticizes the Mangano Report and associated Declaration for being based on dated information that has been used in support of similar contentions rejected in other proceedings, as well as using various facts not at issue in this proceeding.[984] Entergy points out that ''Mr. Mangano's analyses and hypotheses with respect to health effects previously have been rejected by the NRC, and discredited by the State of New Jersey, Commission on Radiation Protection, Department of Environmental Protection.''[985]

The NRC Staff opposes the admission of Clearwater EC-2 because, in its view, it presents an impermissible challenge to NRC Regulations and does not have adequate factual support.[986] The NRC Staff asserts that Clearwater is challenging the GEIS and 10 C.F.R. Part 51 in contending that Entergy must make a site-specific determination regarding the environmental impacts from radiation exposure during the renewal period, and that a challenge to the regulations is impermissible under 10 C.F.R. § 2.335(b).[987] Furthermore, the NRC Staff maintains that the evidence presented by Clearwater is not new and

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[978] *Id.* at 29.

[979] *See* Entergy Clearwater Answer at 50-55.

[980] *Id.* at 51 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 85-87 (2002)).

[981] *Id.*

[982] *Id.* at 56.

[983] *Id.* at 57.

[984] *Id.*

[985] *Id.* at 57-58 (citations omitted).

[986] NRC Staff Answer at 93.

[987] *Id.* at 93-94.

significant, or relevant.[988] Finally, the NRC Staff argues that the Mangano Report is inadequate, as it does not demonstrate the special circumstances required to permit a ''site-specific reconsideration of the Category 1 determination regarding radiation exposures.''[989] The NRC Staff asserts that Mr. Mangano's assertions are not unique to Indian Point.[990]

2. Board Decision — Clearwater EC-2

The Board finds that Clearwater EC-2 raises a Category 1 environmental issue regarding the radiological impact of the continued operation of the Indian Point facility that is adequately addressed by the GEIS, and is thus outside the scope of this proceeding. Clearwater has not demonstrated any special circumstances at Indian Point that are sufficiently different from those that are present at other nuclear power plants to warrant site-specific treatment. Clearwater EC-2 thus is *rejected.*

C. Contention EC-3

ENTERGY'S ENVIRONMENTAL REPORT CONTAINS A SERIOUSLY FLAWED ENVIRONMENTAL JUSTICE ANALYSIS THAT DOES NOT ADEQUATELY ASSESS THE IMPACTS OF INDIAN POINT ON THE MINORITY, LOW-INCOME AND DISABLED POPULATIONS IN THE AREA SURROUNDING INDIAN POINT.[991]

1. Background — Clearwater EC-3

Clearwater EC-3 alleges that Entergy's ER does not meet the requirements of NEPA because ''its methodology is flawed, and its analysis is incomplete and limited to questionable interpretations and presentation of data.''[992] According to Clearwater, the ER ''fails to acknowledge or describe potential impacts upon the large minority and low-income populations that surround the plant.''[993] Clearwater asserts that the Indian Point facility causes a disparate impact on minority communities for cancer, that subsistence fishermen who fish in the Hudson River are at a disparate risk of cancer from fish contaminated by radiation released into the river by Entergy, and that there is a ''large minority, low-income and disabled

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[988] *Id.* at 94.
[989] *Id.*
[990] *Id.* at 94-95.
[991] Clearwater Petition at 31.
[992] *Id.*
[993] *Id.*

population in special facilities (including hospitals and prisons) within fifty miles [of Indian Point] who will be severely impacted if there is an evacuation from the area . . . .''[994]

Clearwater contends that NEPA mandates that the NRC must consider ''socioeconomic impacts that have a nexus to the environment.''[995] Although the ER acknowledges that minority and low-income populations exist in the vicinity of Indian Point,[996] according to Clearwater, it wrongly concludes that there does not need to be an environmental justice (''EJ'') analysis because there are no offsite impacts.[997] Clearwater argues that this conclusion is mistaken,[998] and maintains that (1) the EJ and demographic methodology is both flawed and incomplete;[999] (2) the ER does not adequately acknowledge the minority and low-income communities near Indian Point or assess the impact of the facility on them;[1000] (3) these populations may be more susceptible than other populations to cancer from emissions from the Indian Point facility;[1001] (4) the ER ignores subsistence fishing in the Hudson River;[1002] (5) low-income populations will be more impacted by an evacuation due to an accident at Indian Point;[1003] (6) residents in special facilities (hospitals, long-term care facilities, prisons) will be more impacted by their inability to be evacuated in the event of an accident at Indian Point;[1004] and (7) the ER ignores EJ issues relating to the impact on Native American populations from the production, use, and storage of radioactive fuel as Native Americans are disproportionately impacted by the nuclear fuel life cycle.[1005]

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[994] *Id.*

[995] *Id.* at 33. Clearwater adds that the Commission acknowledged in the *LES* case that the NRC does consider EJ issues using disparate impact analysis. ''The NRC's goal is to identify and adequately weigh, or mitigate, effects on low-income and minority communities that become apparent only by considering factors peculiar to those communities.'' *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100 (1998). Clearwater also noted that the NRC issued a policy statement that stated that EJ ''is a tool, within the normal NEPA context, to identify communities that might otherwise be overlooked and identify impacts due to their uniqueness as part of the NRC's NEPA review process.'' Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040, 52,047 (Aug. 24, 2001).

[996] Clearwater Petition at 35 (citing ER § 2.6.2).

[997] *Id.* (citing ER § 4.22.5).

[998] *Id.* at 36.

[999] *See id.* at 36-38.

[1000] *See id.* at 38-41.

[1001] *See id.* at 41-42.

[1002] *See id.* at 42-47.

[1003] *See id.* at 47-48.

[1004] *See id.* at 48-53.

[1005] *See id.* at 53-55.

Entergy opposes the admission of Clearwater EC-3 because, in Entergy's view, it is outside the scope of this proceeding to the extent it deals with emergency planning and with issues dealt with in the GEIS.[1006] Entergy asserts that its EJ analysis is guided by the Final Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions,[1007] which concludes that if no significant and adverse impacts are identified in the EJ analysis ''a detailed analysis of disparate impacts is not appropriate.''[1008] Thus, according to Entergy, an EJ contention must show that there are significant environmental impacts and those impacts disproportionately affect EJ populations.[1009] Entergy asserts that Clearwater's Petition fails to identify a significant adverse impact from the relicensing of Indian Point or to provide evidence of a disproportionate impact on EJ populations.[1010] Entergy maintains that the issues raised in Clearwater EC-3, although purported to be EJ issues, are actually emergency planning issues outside the scope of the proceeding because the contention deals with evacuation of EJ populations during an emergency.[1011] Entergy also asserts that Clearwater's concerns regarding the impact on Native American communities are Category 1 issues and inadmissible here.[1012]

The NRC Staff opposes the admission of Clearwater EC-3 because, in its view, the contention does not provide adequate support to demonstrate a genuine dispute regarding the LRA's EJ analysis, and because it raises issues, including evacuation plans and uranium fuel cycle issues, that are outside the scope of the proceeding.[1013] The NRC Staff maintains that Clearwater provides no expert opinion or factual support to substantiate its claim that the ER contained flawed methodology and failed analysis, nor does Clearwater demonstrate how the ER does not meet the EJ requirements.[1014] The NRC Staff also asserts that Clearwater fails to show that there are disproportionate impacts on the EJ communities around Indian Point.[1015] The NRC Staff asserts, as does Entergy, that the EJ concerns raised in Clearwater EC-3 about Native American populations are outside the scope of the proceeding because they are Category 1 issues.[1016]

[1006] Entergy Clearwater Answer at 61.
[1007] *Id.* at 61-62 (citing 69 Fed. Reg. 52,040).
[1008] *Id.* at 62 (citing 69 Fed. Reg. at 52,047).
[1009] *See id.* at 62-63.
[1010] *See id.* at 67-71.
[1011] *Id.* at 64.
[1012] *Id.* at 65.
[1013] NRC Staff Answer at 96.
[1014] *Id.* at 98.
[1015] *Id.*
[1016] *Id.* at 98-99.

In its Reply, Clearwater asserts that if EJ issues are not reviewed in this proceeding they never will be properly addressed.[1017] Clearwater maintains that it has demonstrated in its Petition the disproportionate impacts of the relicensing on EJ communities.[1018] Clearwater also makes the point, in response to objections to its position regarding the effect of waste storage, that relicensing will lead to more waste until there is a permanent waste storage facility.[1019]

2. Board Decision — Clearwater EC-3

NEPA, which mandates a hard look at the environmental impact of proposed federal actions, is the only legal grounds for an admissible contention relating to the EJ matters raised in this contention.[1020] In the context of this proceeding, Petitioners such as Clearwater may properly raise EJ contentions seeking corrections of significant omissions from the Applicant's ER.[1021]

Under NEPA, the purpose of an EJ review is to insure that the Commission ''considers and publicly discloses environmental factors peculiar to minority or low-income populations that may cause them to suffer harm disproportionate to that suffered by the general population.''[1022] The goals of NEPA are to inform federal agencies and the public about the environmental effects of proposed projects.[1023]

Environmental harm is NEPA's core concern. Accordingly, the essence of an EJ claim under NEPA is disparate environmental harm to a minority or low-income population,[1024] and a disparate impact analysis is the principal tool for advancing EJ under NEPA.[1025] Accordingly, to be admissible in this proceeding an EJ contention must point to significant, adverse, environmental impacts that may result from the relicensing of Indian Point that will fall disproportionately on disadvantaged (minority and low-income) populations.[1026]

Clearwater contends that there will be a significant adverse impact in three areas

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[1017] Clearwater Reply at 6.

[1018] *Id.* at 7.

[1019] *Id.*

[1020] *See* 69 Fed. Reg. at 52,044.

[1021] *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005).

[1022] *Id.*

[1023] *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 339 (1989).

[1024] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 153 (2002) (citing *LES,* CLI-98-3, 47 NRC at 106-10).

[1025] *LES,* CLI-98-3, 47 NRC at 100.

[1026] 69 Fed. Reg. at 52,047: *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 262 (2007).

that will disproportionately impact disadvantaged populations and that Entergy's failure to discuss these impacts is a significant omission from the Applicant's ER.

First, Clearwater contends that the continued operation of the Indian Point facility will result in additional cancers that will disproportionately impact poor and minority populations.[1027] Conclusory assertions or mere speculation, however, are insufficient to support the admission of a contention[1028] and, with regard to this allegation, Clearwater has offered nothing other than conclusory assertions and speculation. Clearwater states that the cancer rates in the area surrounding Indian Point are above the national average, but offers no evidence tying the Indian Point facility to any increase in the incidents of cancer. Likewise, Clearwater states that ''[m]inority groups in the four-county region are more vulnerable to the adverse impacts of radiological and nuclear plant-induced chemical pollution in the environment than is the case for the general minority or total population of the United States,''[1029] but does not support this conclusion with facts or expert opinion. The Mangano Report, which is cited by Clearwater in its Petition, simply does not support these conclusions.

Next, Clearwater speculates that the low-income populations in the lower Hudson Valley region who engage in subsistence fishing will be likely to ingest radionuclides and other toxic substances generated by the reactors in greater proportions than the population at large.[1030] But, the Petitioner presents no facts which indicate that any subsistence fisherman has consumed, or will consume, a fish that has been contaminated by radionuclides originating at the Indian Point facility. This speculation does not support the admissibility of a contention.

Finally, Clearwater identifies minority and low-income populations in numerous institutions located near Indian Point who would not be evacuated in the event of a severe accident.[1031] Specifically, Clearwater identifies Sing Sing, a maximum security correctional facility located less than 10 miles from Indian Point that houses more than 1,750 predominately minority inmates.[1032] Clearwater also identifies twenty-five other prisons and jails located within 50 miles of Indian Point.[1033] Clearwater then contends that Entergy's ER is deficient because it does not address the impact of a severe accident at Indian Point on these EJ populations.[1034]

[1027] Clearwater Petition at 41-42.

[1028] *Vogtle,* LBP-07-3, 65 NRC at 253 (citing *Fansteel,* CLI-03-13, 58 NRC at 203).

[1029] Clearwater Petition at 41-42.

[1030] *Id.* at 42.

[1031] *Id.* at 47-53.

[1032] *Id.* at 48.

[1033] *Id.*

[1034] *Id.* at 53.

Both Entergy and the NRC Staff attempt to dismiss this contention as an ''emergency planning issue'' which is outside the scope of a license renewal proceeding.[1035] (The Commission noted in *Millstone* that emergency planning is, by its very nature, not germane to age-related degradation.[1036]) However, Clearwater EC-3 is a Part 51 Environmental Contention brought under NEPA. It is not a Part 54 Safety Contention based on emergency planning. Clearwater has not contended that Entergy's emergency plan is deficient. Rather the Petitioner has contended that Entergy's ER is deficient because it does not supply sufficient information from which the Commission may properly consider, and publicly disclose, environmental factors that may cause harm to minority and low-income populations that would be ''disproportionate to that suffered by the general population.''[1037] We agree.

Clearwater has raised a genuine issue regarding the adequacy of Entergy's ER for Indian Point. As limited above, Clearwater EC-3 is *admitted.*[1038]

D. Clearwater EC-4

INADEQUATE ANALYSIS OF SEVERE ACCIDENT MITIGATION ALTERNATIVES.[1039]

1. Background — Clearwater EC-4

Clearwater EC-4 contends that Entergy's SAMA analysis is ''incomplete, inaccurate and is not adequately based upon scientific and probabilistic analysis.''[1040] Specifically, Clearwater avers that Entergy's SAMA analysis does not adequately consider the impacts of a possible terrorist attack, a radiological event, or an evacuation at Indian Point, particularly the impact on the EJ communities discussed in Clearwater EC-3 and EC-6.[1041] Clearwater also seeks to adopt NYS-

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[1035] NRC Staff Answer at 89; Entergy Clearwater Answer at 63-64.

[1036] *Millstone,* CLI-05-24, 62 NRC at 561.

[1037] *Grand Gulf,* CLI-05-4, 61 NRC at 13.

[1038] NEPA does not require that a federal agency take any particular action. It does, however, require that the federal agency take a ''hard look'' at the environmental impact its proposed action could have before the action is taken, and to document what it has done. As noted above, the goals of NEPA are to inform federal agencies and the public about the environmental effects of proposed projects. *See Robertson,* 490 U.S. at 339.

[1039] Clearwater Petition at 56.

[1040] *Id.*

[1041] *Id.*

12 through NYS-15 pursuant to 10 C.F.R. § 2.309(f)(3), and expresses shared concerns raised by Riverkeeper's EC-2.[1042]

Entergy asserts that Clearwater, without an admissible contention of its own, does not meet the requirements for adopting the contentions of other parties in 10 C.F.R. § 2.309(f)(3).[1043] Entergy also asserts that Clearwater EC-4 is not admissible because it does not provide facts or expert opinion beyond that provided in the contentions of other parties it is attempting to adopt. Entergy also asserts that the contention does not establish a genuine dispute on a material issue of law or fact.[1044]

The NRC Staff opposes the admission of the contention because it is ''conclusory and adds nothing to the other contentions it references and seeks to incorporate.''[1045] The NRC Staff incorporates its answers to NYS-12 through NYS-15, Riverkeeper's EC-2, and Clearwater's EC-3 and EC-6.[1046] Finally, the NRC Staff asserts that Clearwater's attempt to adopt the contentions of other Petitioners does not meet the 10 C.F.R. § 2.309(f)(3) requirements.[1047]

In its Reply, Clearwater provides no response to the Answers of Entergy and the NRC Staff. During Oral Argument, Clearwater stated that it was not attempting to adopt Riverkeeper's EC-2 at this time but reserved the right to do so.[1048] Also during Oral Argument, Clearwater agreed that it had offered no support of its own for this contention but was relying on the factual and expert basis supplied by NYS for NYS-12 through NYS-15 and did refer to its own EC-3 and EC-6.[1049]

2. Board Decision — Clearwater EC-4

Because Clearwater offers no basis and no factual or expert support for the admissibility of EC-4, the Board *rejects* this contention. The Board finds that, because it has established standing and proffered a separate admissible contention of its own, Clearwater is eligible to adopt contentions of other parties under 10 C.F.R. § 2.309(f)(3).[1050] However, Clearwater must meet the requirements of that regulation for specifying who shall have the authority to act for the

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[1042] *Id.*

[1043] Entergy Clearwater Answer at 72.

[1044] *Id.* at 72-73.

[1045] NRC Staff Answer at 100.

[1046] *Id.*; *see* discussion *supra* pp. 101, 104, 107, 109, 184, 198, *infra* p. 207; *see also* NRC Staff Answer at 50-56, 96-99, 101-02, 111-12.

[1047] *Id.*

[1048] Tr. at 707.

[1049] Tr. at 706.

[1050] *See supra* Part IV.

requestor/petitioners with respect to the contentions being adopted. Because Clearwater has agreed that NYS will have such authority,[1051] the Board finds Clearwater may adopt NYS-12.

E. Clearwater EC-5

ENTERGY'S ENVIRONMENTAL REPORT FAILS TO ADEQUATELY CONSIDER RENEWABLE ENERGY AND ENERGY EFFICIENCY ALTERNATIVES TO THE LICENSE RENEWAL OF INDIAN POINT.[1052]

1. Background — Clearwater EC-5

Clearwater EC-5 contends that the LRA does not comply with NEPA because the ER does not ''adequately assess the potential for renewable energy and energy efficiency as an alternative to license renewal of Indian Point.''[1053] Clearwater seeks to adopt NYS-9 through NYS-11 pursuant to 10 C.F.R. § 2.309(f)(3) and agrees that NYS shall have the authority to act for Clearwater with respect to this contention.[1054] Clearwater contends that Entergy's alternatives analysis in the ER is inadequate because it only considers coal, nuclear, and natural gas as alternatives. Clearwater also concurs with NYS that the ER misstates the findings of the GEIS and that the ER fails to consider other reasonable alternatives.[1055] Clearwater goes on to discuss numerous demand-side and supply-side options in the remainder of this contention.[1056]

Entergy opposes the admission of this contention for failing to provide a concise statement of facts or expert opinion and for not establishing a genuine dispute with the Applicant on a material issue. Entergy opines that NRC case law and NEPA only require an applicant to consider only reasonable alternatives in the ER, specifically only those that are feasible, nonspeculative, and for the Indian Point relicensing, that will meet the goal of providing 2158 MWe of

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[1051] Clearwater Petition at 73.

[1052] *Id.* at 56.

[1053] *Id.*

[1054] *Id.* at 57.

[1055] *Id.* at 58.

[1056] *See id.* at 59-65. The various demand-side options that Clearwater looks at include conservation, a peak load reduction program, enabling technology for price-sensitive load management, the Keep Cool Program, the concept of Negawatt whereby the public utilizes consumption efficiently, and off-peak discounted pricing. *Id.* at 59-61. The supply-side options discussed include purchasing power from sources outside the grid, repowering older facilities with new and cleaner power sources, distributed generation of electricity including backup generators at hospitals, photovoltaic systems on rooftops, and combined heat and power systems in industrial plants and at universities, geothermal heat pump systems, and wind power. *Id.* at 61-65.

base-load power.[1057] Additionally, Entergy asserts that where a private entity, and not a federal agency, is sponsoring the project, the consideration of alternatives should give significant weight to the preferences of the sponsor.[1058] According to Entergy, the ER adequately analyzed all of the alternatives raised by Clearwater, but, consistent with Commission precedent, did not consider them in detail, and properly determined that they were not reasonable.[1059] Furthermore, Entergy asserts that Clearwater does not provide adequate support for its contention, nor does it identify specific deficiencies in the ER regarding the alternatives analysis.[1060]

The NRC Staff opposes the admission of the contention because, in its view, Clearwater fails to assert any material issue of law or fact or show that there is a genuine dispute.[1061] The NRC Staff asserts that Clearwater has not shown how Entergy's analysis of alternatives in the ER is inadequate.[1062] Regarding Clearwater's NEPA argument, the NRC Staff incorporates its answer to NYS-9.[1063]

In its Reply, Clearwater maintains that Entergy's ER fails to consider the cumulative capacity of renewable energy resources to compensate for the power generation from Indian Point.[1064] Clearwater goes on to state that Entergy has erred by looking at all potential energy resources individually as if one new 2158 MWe facility were the only viable alternative for replacement energy, and, as a result, did not adequately consider the collective benefits of a mix of energy resources.

2. Board Decision — Clearwater EC-5

The Board *rejects* this contention as a direct attack on NRC Regulations. An applicant in its ER need only consider the range of alternatives that are capable of achieving the goal of the proposed action,[1065] which, in the instant case, is to generate approximately 2158 MWe of base-load energy for an additional 20 years of operation.[1066] Consistent with the GEIS § 8.1, the reasonable alternatives for license renewal proceedings are limited to discrete electric generation sources

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[1057] *See* Entergy Clearwater Answer at 74-76.
[1058] *Id.* at 76 (citing *Monticello,* LBP-05-31, 62 NRC at 753 n.83).
[1059] *See id.* at 76-79.
[1060] *Id.* at 79.
[1061] NRC Staff Answer at 100.
[1062] *Id.*
[1063] *Id.* at 101; *see* discussion *supra* p. 91; *see also* NRC Staff Answer at 47-48.
[1064] Clearwater Reply at 7.
[1065] *See supra* notes 259-261 & accompanying text.
[1066] *See Hydro Resources,* CLI-01-4, 53 NRC at 55; *Rancho Seco,* CLI-93-3, 37 NRC at 144-45.

that are technically feasible and commercially available. Ignoring the feasibility question and the lack of commercial availability, Clearwater has not provided any demonstration that the renewable energy sources it presents in its Petition could provide the 2158 MWe from one discrete source.

Similarly, energy conservation, including the demand-side options presented by Clearwater in its Petition, are not discrete electric generation sources. As discussed in the Board's decision on NYS-9,[1067] the Commission in *Clinton* held that NEPA does not require an analysis of conservation as an alternative,[1068] and, concluded that NEPA's ''rule of reason'' does not demand an analysis of energy efficiency, because, *inter alia,* conservation measures are beyond the ability of an applicant to implement, and are therefore outside the scope required by NEPA for considering reasonable alternatives.

While GEIS § 8.1 includes a discussion of numerous power source options for the alternatives analysis, including the ''no-action'' alternative,[1069] it does not preclude the approach used by Entergy. Specifically, the Petitioner ignored the definitive statement in the last paragraph of section 8.1, which limited the reasonable set of alternatives to a single, discrete, feasible, and commercially viable electric generation source. Section 8.2 of the GEIS states the need to address energy conservation when evaluating the ''no-action'' alternative. Clearwater's contention, however, was limited to the consideration of renewable energy and energy efficiencies in the alternatives analysis with no mention of the requirements for the ''no-action'' alternative.

As required under the Commission's decision in *Clinton,* Entergy has submitted information concerning other alternatives it finds reasonable and feasible to achieving its goals. Because there is no requirement for Entergy to look at every conceivable option, especially one as amorphous as energy conservation, the Applicant has met it obligations under Part 51 for preparation of its ER.

In summary, Clearwater is attacking the regulations by contending Entergy's ER is deficient by not addressing renewable energy sources and energy efficiencies, directly contradicting Commission precedent. Specifically, as clarified by the Commission in *Clinton,* renewable energy and energy efficiency are not within the range of reasonable alternatives related to the scope and goals of the proposed license renewal, and are not discrete electric generation sources that are technically feasible and commercially available. Furthermore, the Commission has made it clear that NEPA's ''rule of reason'' does not demand an analysis of energy efficiency, because, *inter alia,* conservation measures are beyond the ability of an applicant to implement, and are therefore outside the scope required

[1067] *See supra* Part VI.I.2.

[1068] *Clinton,* CLI-05-29, 62 NRC at 805, 807.

[1069] GEIS §§ 8.1, 8.2.

by a NEPA review of reasonable alternatives. For these reasons, the Board finds that it is reasonable for Entergy to have only briefly discussed renewable energy and energy conservation in its ER, and concludes that Clearwater's EC-5 is *inadmissible.*

In addition, Clearwater seeks to adopt NYS-9, -10, and -11 and agrees that NYS would act as the representative for these contentions. Clearwater may adopt NYS-9, but cannot adopt NYS-10 and NYS-11 because these contentions have been found *inadmissible.*

F. Clearwater EC-6

ENTERGY'S ENVIRONMENTAL REPORT FAILS TO CONSIDER THE POTENTIAL HARM TO THE SURROUNDING AREA OF TERRORIST ATTACK ON THE FACILITY INCLUDING ITS SPENT FUEL POOLS, CONTROL ROOMS, THE WATER INTAKE VALVES, COOLING PIPES AND ELECTRICITY SYSTEM.[1070]

1. Background — Clearwater EC-6

Clearwater EC-6 asserts that the LRA does not comply with NEPA in that Entergy's ER does not consider ''the potential for harm that would result from a terrorist or other attack on Indian Point's control rooms, water intake valves and cooling pipes, and the significant and reasonably foreseeable environmental harm that could result from destruction of control and cooling capacities.''[1071] Clearwater claims that a SAMA analysis is needed to deal with this possibility.[1072] Clearwater also maintains that the ER fails to deal with the issues surrounding the spent fuel pools and other insufficiently protected, at-risk features.[1073] Clearwater seeks to adopt NYS-27 under 10 C.F.R. § 2.309(f)(3) and agrees that NYS shall act as the representative for the contention.[1074] Clearwater also shares the concerns expressed in Riverkeeper's EC-2.[1075]

Entergy opposes the admission of Clearwater EC-6 because issues relating to the consideration of terrorism do not need to be considered in license renewal proceedings. To support its position, Entergy relies on *Oyster Creek,* which rejects terrorism-related contentions in license renewal proceedings.[1076] Entergy asserts

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[1070] Clearwater Petition at 65.
[1071] *Id.*
[1072] *Id.*
[1073] *Id.* at 66.
[1074] *Id.*
[1075] *Id.*
[1076] *See* Entergy Clearwater Answer at 82-84.

that the contention also improperly challenges NRC Regulations, specifically 10 C.F.R. Part 51, and the GEIS.[1077]

The NRC Staff opposes the admission of Clearwater EC-6 because, in its view, it is beyond the scope of this proceeding.[1078] The NRC Staff asserts that the Commission has held that this type of contention is outside the scope of license renewal proceedings, and that NEPA does not require the NRC to consider them.[1079] The NRC Staff relies extensively on the Commission's decision in *Oyster Creek.*[1080]

2. Board Decision — Clearwater EC-6

As explained in the Board's ruling on the admissibility of NYS-27, Connecticut EC-1, and Riverkeeper EC-2,[1081] the Commission has specifically determined that the potential environmental impact of a terrorist attack on the Indian Point facility is not within the scope of this proceeding. Accordingly, we must *reject* this contention.

X. CORTLANDT CONTENTIONS

At Oral Argument, Cortlandt withdrew two of its contentions, TC-2, relating to Entergy's leak-before-break analysis, and MC-2, relating to the adequacy of the Indian Point decommissioning trust fund.[1082] Accordingly, we have not considered them in this Memorandum and Order.

A. Cortlandt Technical/Health/Safety Analysis Contention TC-1

> THE LICENSE RENEWAL APPLICATION (''LRA'') DOES NOT PROVIDE SUFFICIENT DETAILED INFORMATION REGARDING TECHNICAL AND SAFETY ISSUES AS REQUIRED BY 10 C.F.R. PART 54.[1083]

1. Background — Cortlandt TC-1

Cortlandt TC-1 contends that Entergy has not provided specific technical infor-

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[1077] *See id.* at 84-85.
[1078] NRC Staff Answer at 101.
[1079] *Id.*
[1080] *Id.* at 102.
[1081] *See supra* Parts VI.AA.2, VII.A.2, VIII.D.2.
[1082] Tr. at 496.
[1083] Cortlandt Petition at 2.

mation in the LRA regarding the Equipment Environmental Qualification (''EQ'') and the FAC Programs required pursuant to 10 C.F.R. Part 54.[1084] In addition, Cortlandt suggests that Entergy has not met its burden, under 10 C.F.R. § 54.21, of justifying the methods used for performing an IPA.[1085] Cortlandt maintains that Entergy fails to provide a specific and particularized FAC Program that defines the ''component and system scope, inspection criteria, methodology, frequency and remediation commitments when acceptance criteria for FAC inspections are not met,'' even though it was required to do so by 10 C.F.R. Part 54 and SRP-LR.[1086] Cortlandt also asserts that it is precluded ''from adequately reviewing the legal or technical integrity of the [Aging Management] Programs'' because of Entergy's noncompliance.[1087]

Entergy opposes the admission of this contention because the Petitioner fails to provide any support for its position that the LRA is materially deficient, and does not show that a genuine material dispute exists.[1088] Entergy argues that Cortlandt has not identified a deficiency in any specific portion of the LRA, and maintains that the references made by Cortlandt to the EQ and FAC Programs are ''broad brush references'' that do not explain how the programs are inadequate.[1089] Entergy claims that Cortlandt misquotes section 54.21, which actually requires an applicant to justify the methods used to identify the SSCs subject to AMR.[1090] Entergy maintains that the LRA and its EQ and the FAC Programs comply with the SRP-LR, regulatory guidance for an LRA, and industry guidelines, which incorporate by reference the program descriptions contained in the GALL Report.[1091]

The NRC Staff also opposes the admission of this contention for being vague and not providing support for its claim that the LRA is insufficient.[1092] The NRC Staff maintains that Cortlandt relies on ''generalized suspicions and vague references to alleged issues at Indian Point and equally unparticularized portions of the LRA for providing a factual basis.''[1093] The NRC Staff asserts that Cortlandt's brief explanation of its bases does not meet the legal requirements for admitting contentions.[1094]

[1084] *Id.*
[1085] *Id.*
[1086] *Id.* at 3.
[1087] *Id.*
[1088] Entergy Cortlandt Answer at 29-30.
[1089] *Id.* at 27.
[1090] *Id.* at 27-28.
[1091] *Id.* at 28.
[1092] NRC Staff Answer at 123.
[1093] *Id.*
[1094] *Id.* (citing 10 C.F.R. § 2.309(f)(1)(v); *Millstone,* CLI-01-24, 54 NRC at 363).

In its Reply, Cortlandt attempts to supplement its contention by submitting additional factual support, but does not provide viable arguments as to why its Petition meets the regulatory requirements. Cortlandt also raises several additional concerns not addressed in its Petition, including safety issues in the temporary storage facilities for spent fuel rods,[1095] its belief that the GEIS is ''patently dated and inadequate,''[1096] its objection that the SEIS will not be available to the public until August 2008,[1097] the risk of a spent fuel fire,[1098] and, the fact that the national nuclear waste repository at Yucca Mountain is well behind schedule.[1099]

2. Board Decision — Cortlandt TC-1

While the Board finds that Cortlandt has provided some foundation for its contention, it has not provided adequate facts or expert opinion to support its position. Rather, Cortlandt has only provided general allegations covering the overall adequacy of everything from the EQ to the FAC, to the IPA, with no mention of potential errors or deficiencies in Entergy's LRA. While it is questionable whether, as alleged by Entergy, conformance with the general requirements of regulatory and industry guidance provides sufficient specificity to demonstrate an adequate AMP, Cortlandt nonetheless has not proffered any justification to back its contention. Therefore, this Board *rejects* Cortlandt TC-1.

B. Cortlandt Technical/Health/Safety Analysis Contention TC-3

> APPLICANT'S LRA DOES NOT SPECIFY AN AGING MANAGEMENT PLAN TO MONITOR AND MAINTAIN ALL STRUCTURES, SYSTEMS, AND COMPONENTS ASSOCIATED WITH THE STORAGE, CONTROL, AND MAINTENANCE OF SPENT FUEL IN A SAFE CONDITION, IN A MANNER SUFFICIENT TO PROVIDE REASONABLE ASSURANCE THAT SUCH STRUCTURES, SYSTEMS, AND COMPONENTS ARE CAPABLE OF FULFILLING THEIR INTENDED FUNCTIONS.[1100]

1. Background — Cortlandt TC-3

Cortlandt TC-3 asserts that the LRA does not offer an AMP to monitor and maintain all SSCs associated with spent fuel to ensure that they are fulfilling

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[1095] Cortlandt Reply at 4.
[1096] *Id.* at 5.
[1097] *Id.*
[1098] *Id.* at 5-6.
[1099] *Id.* at 6.
[1100] Cortlandt Petition at 5.

their intended functions pursuant to 10 C.F.R. § 50.65.[1101] Cortlandt asserts that the spent fuel pool at IP2 is ''compromised'' and that the LRA does not have an AMP that adequately addresses leaks in the spent fuel pool.[1102] Cortlandt also asserts that there have been leaks from Indian Point into the groundwater and the Hudson River. Cortlandt suggests that while Entergy has investigated the source of the leaks, it has not identified or located them.[1103] Cortlandt maintains that the NRC ''will violate its mandate to protect public health and safety if it considers Applicant's LRA for an additional 20 years before considering a comprehensive remediation of the leaks.''[1104]

Entergy opposes the admission of Cortlandt TC-3, claiming that it lacks the specificity required and adequate factual or expert support and because, in Entergy's view, it fails to establish a genuine dispute on a material issue of law or fact.[1105] Entergy asserts that its LRA does include AMPs for ''spent fuel pool structural components, including liner plates and gates, primary and secondary water chemistry control programs, concrete structures including floor slabs, interior walls and ceilings, spent fuel storage racks, and neutron absorbers.''[1106] Additionally, Entergy points out that 10 C.F.R. § 50.65, upon which Cortlandt relies, pertains to ongoing regulatory requirements and thus is outside the scope of this license renewal proceeding. Finally, Entergy states that contrary to Cortlandt's assertion, ''Entergy has identified and characterized known leaks, repaired known leaks from IP2 spent fuel pool, and has established a detailed, workable plan . . . .''[1107]

The NRC Staff opposes the admission of Cortlandt TC-3 for being vague, failing to establish a genuine dispute on a material issue of law or fact, and lacking supporting facts and expert opinions.[1108] Like Entergy, the NRC Staff asserts that Entergy's contention that the LRA does not have an AMP for the spent fuel pools is ''totally erroneous,'' and points to Tables 2.4-3 and 3.5.2-3 and sections 2.4.3 and 3.5.2 of the LRA.[1109] In terms of the support for Cortlandt TC-3, the NRC Staff asserts that Cortlandt only provides a general citation to the LRA and alludes to the status of the spent fuel pools without providing any support for the contention.

[1101] *Id.*
[1102] *Id.* at 6-7.
[1103] *Id.* at 6.
[1104] *Id.* at 7.
[1105] Entergy Cortlandt Answer at 35.
[1106] *Id.* (citing LRA Tables 3.3.2-1-IP2, 3.3.2-1-IP3, 3.5.2-3).
[1107] *Id.* at 36.
[1108] NRC Staff Answer at 128.
[1109] *Id.* at 129.

In its Reply, Cortlandt asserts that the ER does not deal with mitigation measures for the leaks in the spent fuel pools, and that failure to address the issue, according to Cortlandt, ''will likely result in harm to the health and safety of the public or environment.''[1110] Cortlandt maintains that a petitioner need only show that there is a nexus between the omission and the protection of public health and safety, and that by showing that Entergy has failed to provide a ''detailed and workable'' AMP for the spent fuel pools, Cortlandt has submitted an admissible contention.[1111] Cortlandt brings up a new point in its Reply, not included in its Petition, that Entergy did not (as required by 10 C.F.R. § 51.53(c)(3)(ii)) discuss alternatives to spent fuel storage in its LRA or ER even though it knew of the leak.[1112] Cortlandt suggests dry cask storage as an alternative.[1113] In another new argument, not mentioned in the original Petition, Cortlandt asserts that there is a likelihood of fires in the spent fuel pools and that Entergy's failure to address these as safety issues makes the ER inadequate.

2. Board Decision — Cortlandt TC-3

Cortlandt TC-3 is *inadmissible* because the Petitioner has not provided any facts or expert opinion in support of the contention. Cortlandt contends that Entergy has not submitted an AMP which provides reasonable assurance that SSCs associated with the storage, control, and maintenance of spent fuel will remain capable of fulfilling their intended functions during the proposed extended period of operation.[1114] However, Cortlandt offers no analysis of the AMPs included in the LRA, nor does it explain in any way how those plans are deficient. Instead, Cortlandt notes, without citation, that radioactive contamination has been found in numerous monitoring wells at IPEC, that the spent fuel pool at IP2 is ''known to be compromised,'' and that the LRA does not propose an AMP that addresses the leaks.[1115] The LRA, however, does include AMPs for spent fuel structural components,[1116] and Cortlandt does not discuss or even identify any alleged deficiency with these plans.

At Oral Argument, Cortlandt made it clear that in its view, long-term storage in a spent fuel pool is inherently dangerous and, accordingly, no AMP for the long-

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[1110] Cortlandt Reply at 9 (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 89 (2004).

[1111] *Id.*

[1112] *Id.*

[1113] *Id.* at 9-10.

[1114] Cortlandt Petition at 5-6.

[1115] *Id.* at 6.

[1116] LRA Tables 3.3.2-1-IP2, 3.3.2-1-IP3, 3.5.2-3.

term maintenance of spent fuel pools can be adequate.[1117] Without commenting on the validity of Cortlandt's claim, we note that this proceeding is not the appropriate vehicle for such a challenge.[1118] In this proceeding, Cortlandt must identify specific deficiencies in the AMP in order to secure a hearing on the issue. It has not done so. Accordingly, Cortlandt TC-3 is *inadmissible* in this proceeding.

C. Cortlandt Miscellaneous Contention MC-1

IMPACTS TO THE LOCAL ECONOMY IF INDIAN POINT UNITS 2 AND 3 ARE NOT RE-LICENSED.[1119]

1. Background — Cortlandt MC-1

Cortlandt MC-1 asserts that Entergy must consider the potential effect on the economy if the license renewal is not granted.[1120] Cortlandt lists the economic benefits that stem from the plant's operation — including employment, tax payments, and nonprofit programs and projects supported by Entergy.[1121] Cortlandt maintains that the effect on the community if the license is not renewed will be severe and that the NRC must consider them in deciding whether to grant the relicensing.[1122]

Entergy does not dispute the assertions made in Cortlandt MC-1, but argues that the contention is outside the scope of the proceeding, and cites to the Board's rejection of a similar contention brought by the Village of Buchanan in this proceeding.[1123] The NRC Staff also argues that this contention is beyond the scope of a license renewal proceeding. The NRC Staff maintains that 10 C.F.R. § 51.45(c) provides that an applicant in its ER is not required to discuss economic costs or benefits of license renewal ''unless it is necessary to determine inclusion of an alternative or it is relevant to mitigation.''[1124]

Cortlandt did not address these arguments in its Reply.

[1117] Tr. at 503.

[1118] *See* 10 C.F.R. § 2.802.

[1119] Cortlandt Petition at 7.

[1120] *Id.* at 7-8.

[1121] *Id.*

[1122] *Id.* at 8.

[1123] Entergy Cortlandt Answer at 41 (citing Licensing Board Memorandum and Order (Denying the Village of Buchanan's Hearing Request and Petition to Intervene) at 8-9 (Dec. 5, 2007) (unpublished)).

[1124] NRC Staff Answer at 130.

2. Board Decision — Cortlandt MC-1

The Board finds that this contention is *inadmissible* because it is outside the scope of the adjudicatory proceedings for an LRA. Pursuant to 10 C.F.R. § 51.45(c), an ER prepared for a license renewal pursuant to 10 C.F.R. § 51.53(c) need not discuss the economic or technical benefits and costs of the proposed action or alternatives except as they are either essential for determining whether an alternative should be included or relevant to mitigation. Because the Petitioner has not provided any support to show how its alleged benefits related to the two exceptions,[1125] challenging the need to consider the economic benefits of Entergy's LRA is outside the scope of this proceeding and is *rejected.*

D. Cortlandt Miscellaneous Contention MC-3

APPLICANT'S LRA FAILS TO ADDRESS THE CATASTROPHIC CONSEQUENCES OF A POTENTIAL TERRORIST ATTACK ON THE AGING INDIAN POINT NUCLEAR REACTORS.[1126]

1. Background — Cortlandt MC-3

Cortlandt MC-3 asserts that Entergy is required to include in its LRA ''the potential significant impacts on the human environment from a successful terrorist attack at IPEC.''[1127] Cortlandt states that in *Mothers for Peace,* the Ninth Circuit found that the NRC did not satisfy its requirements under NEPA when it refused to consider the environmental impacts of a terrorist attack. Furthermore, according to Cortlandt, the potential for a terrorist attack is new and significant information which, pursuant to 10 C.F.R. § 51.53(c)(3)(iv), must be analyzed in the ER. Cortlandt avers that it is unreasonable for the NRC not to require Entergy to consider the environmental and safety effects of a potential terrorist attack.[1128]

Entergy opposes the admission of Cortlandt MC-3 for raising issues outside the scope of the proceeding, being immaterial to the NRC Staff's license renewal finding, failing to establish a genuine dispute on a material issue of law or fact, directly contravening Commission legal precedent, and collaterally attacking NRC Regulations.[1129] Entergy asserts that the Commission and Licensing Boards

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[1125] The regulation only requires an applicant to discuss the economic benefits in its ER during a license renewal ''if these benefits and costs are either essential for a determination regarding the inclusion of an alternative in the range of alternatives considered or relevant to mitigation.'' 10 C.F.R. § 51.45(c).

[1126] Cortlandt Petition at 10.

[1127] *Id.*

[1128] *Id.* at 11.

[1129] Entergy Cortlandt Answer at 48.

''have consistently held that the NRC Staff does not need to consider, as part of its safety or environmental review, terrorist attacks on nuclear power plants seeking renewed licenses.''[1130] The NRC Staff opposes the admission of the contention because, it asserts, the NRC is not required under NEPA to consider the impact of terrorist attacks.[1131]

In its Reply, Cortlandt asserts that the NRC ''cannot avoid its statutory responsibility under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.''[1132] Cortlandt restates its position that the potential for a terrorist attack is new and significant information that should be included in the ER pursuant to 10 C.F.R. § 51.53(c)(3)(iv). Cortlandt maintains that because Indian Point is in a highly populated and visible area, it is ''particularly vulnerable and a highly attractive terrorist target.''[1133] Cortlandt also contends that NRC's assertion that the risk of an attack is not quantifiable ''does not preclude further consideration under NEPA.''[1134] Finally, Cortlandt cites to a Sandia National Laboratory report, not mentioned in its Petition, that found that a plane crashing into a spent fuel pool would create a fireball leading to a large radioactive release.[1135]

2. Board Decision — Cortlandt MC-3

Cortlandt MC-3 is *inadmissible* as explained above in the Board's decision on NYS-27, Connecticut EC-1, Riverkeeper EC-2, and Clearwater EC-6.[1136] The Commission has determined that the environmental impact of a terrorist attack on Indian Point is not within the scope of this proceeding.

XI. WESTCHESTER COUNTY PETITION

In its Petition Westchester does not offer a single contention, but seeks to support and adopt the NYS contentions discussed in Part VI above.[1137] Because Westchester has not submitted an admissible contention of its own, it is barred

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[1130] *Id.* (citations omitted).

[1131] NRC Staff Answer at 132.

[1132] Cortlandt Reply at 12-13 (citing *Township of Lower Alloways Creek v. Public Service Electric & Gas Co.,* 687 F.2d 732, 741 (3d Cir. 1982)).

[1133] *Id.* at 14.

[1134] *Id.* at 15 (citing *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), LBP-80-8, 11 NRC 297, 307 (1980), *Potomac Alliance v. NRC,* 682 F.2d 1030, 1036-37 (D.C. Cir. 1982)).

[1135] *Id.* at 15-16.

[1136] *See supra* Parts VI.AA.2, Part VII.A.2, VIII.D.2, IX.F.2.

[1137] Westchester Petition at 1.

from adopting the contentions of any other party.[1138] Westchester's request to adopt the NYS contentions is therefore *denied.* Westchester may, however, participate in this proceeding as an interested governmental entity pursuant to 10 C.F.R. § 2.315(c).

XII. CONNECTICUT RESIDENTS OPPOSED TO RELICENSING OF INDIAN POINT (CRORIP) CONTENTIONS

A. CRORIP EC-1

HEALTH RISKS FROM THE CUMULATIVE EFFECTS OF RADIATION EXPOSURE TRACEABLE TO INDIAN POINT ROUTINE AND ACCIDENTAL RELEASES DURING THE PROJECTED RELICENSING TERM ARE SUBSTANTIAL, HAVE NOT BEEN ADEQUATELY ACCOUNTED FOR IN THE LRA AND CONSTITUTE NEW INFORMATION WHICH MUST BE BUT WHICH HAS NOT BEEN ANALYZED UNDER 10 CFR PART 51.[1139]

1. Background — CRORIP EC-1

In its sole contention, CRORIP alleges that the LRA has not adequately taken account of the health risks to local populations from the cumulative effects of radiation exposure from the routine and accidental releases of radiation from Indian Point.[1140] The alleged basis for the contention is that Indian Point released the fifth highest amount of radiation between 1970 and 1993 compared to other nuclear power stations, and that there has been a sixfold increase in the release of fission gases from the fourth quarter of 2001 to the first quarter of 2002.[1141] According to CRORIP, this information ''provide[s] a basis for concern about the potential releases of radiation during the projected relicensing period as the facility ages and cracks and leaks which have been detected currently inevitably worsen over time.''[1142] CRORIP contends that the issue is material to the proceeding because the NRC must decide whether Indian Point can operate safely through the renewal period and, according to CRORIP, ''Indian Point operations beyond the current licensing period will subject the public to undue health and safety risks which have not been adequately analyzed.''[1143] Finally, CRORIP maintains that a statistical link has been established between elevated levels of the fission

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[1138] *See supra* Part IV.
[1139] CRORIP Petition at 4.
[1140] *Id.*
[1141] *Id.*
[1142] *Id.*
[1143] *Id.* at 5.

product strontium-90 in the baby teeth of children living near Indian Point and heightened incidences of cancer and related diseases in the same population and that this information should have been addressed by Entergy in the LRA.[1144]

Entergy argues that the contention is inadmissible as it attempts to raise a generic issue already covered by the GEIS.[1145] Entergy asserts that the Petition and its supporting Declarations do not provide ''any assertion or information showing that the Applicant has not and is not operating Indian Point Units 2 and 3 in accordance with the Commission's requirements with respect to radiological release. . . . [And] there is no basis for concluding that the pending application fails to satisfy NRC requirements for license renewal.''[1146] Entergy points out that this same issue, again supported by Mr. Mangano, was raised and rejected in *McGuire/Catawba,* where that Licensing Board found that the matter is a Category 1 issue that does not require a site-specific analysis and that it is outside the scope of this proceeding.[1147] Entergy also maintains that the contention lacks specificity and is outside the scope of the proceeding in violation of 10 C.F.R. § 2.309(f)(iii). Essentially, Entergy believes this contention ''is nothing more than a challenge to the Commission's permissible doses set by 10 C.F.R. Part 20, which simply cannot be contested in an individual license renewal proceeding such as this.''[1148]

The NRC Staff also opposes the admission of the contention because it is a challenge to a Category 1 issue, which is generic for all applicants and beyond the scope of license renewal proceedings.[1149]

CRORIP's Reply deals largely with the issue of the section 2.335 waiver, which the Board deals with in an accompanying order, and does not need to address here.[1150] The only argument offered by CRORIP in its Reply regarding CRORIP EC-1 being within the scope of the proceeding is to point to its Petition

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[1144] *Id.* (citing the Declaration of Joseph Mangano and the Declaration of Dr. Helen M. Caldicott).

[1145] Entergy CRORIP Answer at 30.

[1146] *Id.*

[1147] *Id.* at 31 (citing *McGuire/Catawba,* LBP-02-4, 55 NRC 49). Entergy also points to another case where CRORIP's designated representative, Nancy Burton proffered a similar contention that was rejected by the Board. *Millstone,* LBP-04-15, 60 NRC at 90-92. On review, the Commission found the contention to impermissibly deal with an operational issue not within the scope of license renewal. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 37 (2006).

[1148] Entergy CRORIP Answer at 43 (citing 10 C.F.R. § 2.335(a); *Turkey Point,* CLI-01-17, 54 NRC at 3).

[1149] NRC Staff Answer at 107.

[1150] Connecticut Residents Opposed to Relicensing of Indian Point (CRORIP) and Nancy Burton's Reply to Answers of NRC Staff and Entergy Nuclear Operations, Inc. Opposing Request for Hearing, Petition to Intervene and Petition for Waiver (Feb. 8, 2008) [hereinafter CRORIP Reply].

for Waiver as ''a clear set of circumstances which are unique to Indian Point and therefore qualify for waiver of the Category 1 rule.''[1151]

2. Board Decision — CRORIP EC-1

The Board finds that CRORIP's contention is outside the scope of this proceeding. It is a direct challenge to the Commission's GEIS for the relicensing of nuclear power generating facilities. As explained in our denial of CRORIP's section 2.335 Petition,[1152] CRORIP has not pointed us to facts that are unique to the Indian Point facility. Likewise, CRORIP has not demonstrated that the application of the regulation here would be inconsistent with its purpose. Having denied the section 2.335 Petition, we find this contention *inadmissible*.

XIII. CONCLUSION

Based on the preceding, the following Petitioners are admitted as Parties to this license renewal proceeding for the IPEC: New York State, Riverkeeper, and Clearwater. While not admitted as Parties to this proceeding pursuant to 10 C.F.R. § 2.309, the State of Connecticut, Westchester County, and the Town of Cortlandt have the option to participate in this proceeding as interested State and local governmental entities, pursuant to 10 C.F.R. § 2.315(c). In addition we note that on December 5, 2007, we dismissed the Village of Buchanan from this proceeding, and on December 12, 2007, we dismissed the City of New York from this proceeding because those governmental bodies had not submitted admissible contentions. However, in those Orders we advised the Village of Buchanan and the City of New York that within 30 days after any contention was admitted in this proceeding each could petition to participate pursuant to 10 C.F.R. § 2.315(c).[1153] We now remind these two local governmental entities of that opportunity to participate, and also remind them of the deadline that we set for the submission of section 2.315(c) Petitions.

The following contentions have been admitted:[1154]

[1151] *Id.* at 30.

[1152] Licensing Board Order (Denying CRORIP's 10 C.F.R. § 2.335 Petition) (July 31, 2008) (unpublished).

[1153] Licensing Board Order (Denying the Village of Buchanan's Hearing Request and Petition to Intervene at 10 (Dec. 5, 2007) (unpublished); Licensing Board Order (Denying the City of New York's Petition for Leave to Intervene) at 9 (Dec. 12, 2007) (unpublished).

[1154] The Admitted Contentions remain as written by the Petitioners/Parties. The brief descriptions of the Admitted Contentions set out in this Conclusion are intended as a summary and do not supercede the Contentions as submitted and admitted.

1. NYS-5 — The LRA does not provide adequate AMP for buried pipes, tanks, and transfer canals that contain radioactive fluid that meet 10 C.F.R. § 54.4(a) criteria. In addition, the LRA is not clear whether an AMP for IP1 buried SSCs that are being used by IP2 and IP3 exists and whether the LRA is adequate if it does exist.

2. NYS-6/7 — Entergy has not proposed an AMP for Non-EQ Inaccessible Medium-Voltage and Low-Voltage Cables and Wiring.

3. NYS-8 — Entergy has not proposed an AMP for each electrical transformer in IP2 and IP3 required for compliance with 10 C.F.R. §§ 50.48 and 50.63. This does not include transformer support structures.

4. NYS-9 — Entergy in its ER has not evaluated energy conservation as part of its ''no action'' alternative analysis.

5. NYS-12 (Adopted by Clearwater) — Entergy's SAMAs for IP2 and IP3 do not accurately reflect decontamination and cleanup costs associated with a severe accident because specific inputs and assumptions made in the MACCS2 code regarding decontamination and cleanup costs may not be correct.

6. NYS-16 — NYS challenges whether the population projections used by Entergy are underestimated. And also, within the framework of the bounding assumptions and conservative inputs used in MACCS2 SAMA analyses, whether the ATMOS module in MACCS2 is being used beyond its range of validity — beyond 31 miles (50 kilometers) — and, whether use of MACCS2 with the ATMOS module leads to nonconservative geographical distribution of radioactive dose within a 50-mile radius of IPEC.

7. NYS-17 — The ER limits consideration of land value to tax-driven land-use changes and does not consider the impact on real estate values caused by license renewal or the positive impacts on land values if the license is not renewed.

8. NYS-24 — The LRA does not include an adequate AMP to ensure the continued integrity of the containment structures during the license renewal period.

9. NYS-25 — The LRA does not include an adequate AMP to monitor and manage the effects of aging due to embrittlement of the RPVs and associated internals.

10. NYS-26A — The LRA does not include an adequate AMP to manage the effects of aging due to metal fatigue on key reactor components,

specifically relating to the calculation of the CUFs and the resulting AMP for components with CUFs greater than 1.0. (Consolidated with Riverkeeper TC-1A.)

11. Riverkeeper TC-1A — The LRA does not include an adequate AMP to manage the effects of aging due to metal fatigue on key reactor components, specifically relating to the calculation of the CUFs and the resulting AMP for components with CUFs greater than 1.0. (Consolidated with NYS-26A.)

12. Riverkeeper TC-2 — The LRA does not include an adequate AMP to manage components subject to FAC.

13. Riverkeeper EC-3 — The ER does not adequately assess new and significant information regarding the environmental impacts of radionuclide leaks from spent fuel pool leaks at Indian Point. (Consolidated with Clearwater EC-1.)

14. Clearwater EC-1 — The ER does not adequately assess new and significant information regarding the environmental impacts of radionuclide leaks from spent fuel pool leaks at Indian Point. (Consolidated with Riverkeeper EC-3.)

15. Clearwater EC-3 — The EJ analysis in the ER does not adequately assess the impacts of Indian Point on the minority, low-income, and disabled populations in the surrounding area.

Having determined that the hearing requests of New York State, Riverkeeper, and Clearwater should be granted, this Board must determine, under 10 C.F.R. § 2.310, the type of hearing procedures to be used for each admitted contention. Given that the timing of initial disclosures and the availability of discovery[1155] are contingent on our determination as to whether Subpart G or Subpart L procedures apply, the parties are instructed to hold such activities in abeyance until the hearing procedure ruling is issued. New York State, Riverkeeper, and Clearwater shall, no later than August 21, 2008, indicate, for each admitted contention, whether each Party wishes to proceed pursuant to Subpart G or Subpart L. This motion should indicate why the contention proponent believes a particular subpart is more appropriate. The NRC Staff and Entergy may reply to these proposals no later than September 15, 2008.

The following contentions have been consolidated pursuant to 10 C.F.R. § 2.316:

1. NYS-26A and Riverkeeper TC-1 — Metal Fatigue

[1155] *See* 10 C.F.R. §§ 2.336, 2.704, and 2.705.

2. Riverkeeper EC-3 and Clearwater EC-1 — Spent Fuel Pool Leaks

We direct the Parties who have submitted consolidated contentions to confer and submit a draft of the Consolidated Contention for the Board's consideration within 21 days of the date of this Order. In addition, at the time the draft of the Consolidated Contention is submitted, the Parties who have submitted these contentions shall advise the Board which Party will take the lead in litigating the Consolidated Contention. If agreement cannot be reached among the Parties, the Board will recast the Consolidated Contention and assign a lead party.

This Memorandum and Order is subject to appeal in accordance with the provisions of 10 C.F.R. § 2.311. Any petitions for review must be filed within 10 days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD[1156]

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Kaye D. Lathrop
ADMINISTRATIVE JUDGE

Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, MD
July 31, 2008

[1156] A copy of this Order was sent this date by E-mail and First Class Mail to: (1) Counsel for the NRC Staff; (2) Counsel for Entergy; (3) Counsel for the State of New York; (4) Counsel for Riverkeeper, Inc.; (5) Manna Jo Green, Representative for Clearwater; (6) Counsel for the State of Connecticut; (7) Counsel for the Town of Cortlandt; (8) Counsel for Westchester County; (9) Counsel for New York City — Economic Development Corporation; (10) Mayor Daniel E. O'Neill, Representative for the Village of Buchanan; (11) Nancy Burton, Representative of CRORIP; and (12) Counsel for WestCAN, RCCA, PHASE, and the Sierra Club–Atlantic Chapter; and Richard Brodsky.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

In the Matter of **Docket No. 30-36974-ML**
(Materials License Application)

PA'INA HAWAII, LLC **August 13, 2008**

The Commission *sua sponte* reviews the legal question whether the National Environmental Policy Act (NEPA) requires the NRC, in an irradiator licensing proceeding, to consider the potential health effects of consuming irradiated food. The Commission concludes that NEPA does not require analysis of the potential impacts of an increase in the supply of irradiated food.

NEPA: ENVIRONMENTAL IMPACT STATEMENT

NEPA does not require an agency to assess every impact or effect of its proposed action, only effects on the environment. To be encompassed by NEPA, there needs to be a reasonably close causal relationship between a change in the physical environment and the effect at issue.

NEPA: ENVIRONMENTAL IMPACT STATEMENT

If a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply, regardless of the gravity of the harm.

NEPA: ENVIRONMENTAL IMPACT STATEMENT

In the context of NEPA, one must examine underlying policies or legislative

intent to draw a manageable line between those causal changes that make an agency responsible for an effect and those that do not.

MEMORANDUM AND ORDER

I. INTRODUCTION

This proceeding stems from an application for an underwater irradiator to be located in Honolulu, Hawaii. The Pa'ina Hawaii irradiator is intended, among other purposes, for the phytosanitary treatment of fresh fruits and vegetables.[1] While the NRC has implemented a categorical exclusion for irradiators,[2] and therefore typically does not prepare an environmental analysis of irradiator facilities, the NRC Staff agreed to prepare an Environmental Assessment (EA) of the Pa'ina irradiator as part of a settlement agreement with Intervenor Concerned Citizens of Honolulu (Concerned Citizens).[3]

Following issuance of the NRC's EA, Concerned Citizens submitted a contention claiming that the EA failed to analyze the potential health effects of consuming irradiated foods. The Atomic Safety and Licensing Board admitted this contention, among others.[4] In CLI-08-4, the Commission noted that ''[w]hether NEPA requires the NRC to consider potential health effects of consuming irradiated food raises the 'kind of broad legal question' appropriate for Commission interlocutory review.''[5] Because Concerned Citizens' claim raised ''a threshold legal question going to the proper scope of this proceeding, and . . . a matter with potential new significant NEPA implications for the NRC,'' the Commission found it appropriate to take *sua sponte* review of this legal question, and we requested briefs from the parties.[6]

For the reasons outlined below, the Commission concludes that it was sufficient for the NRC to credit the food safety determinations of the Food and Drug

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[1] *See* Final Environmental Assessment Related to the Proposed Pa'ina Hawaii, LLC Underwater Irradiator in Honolulu, Hawaii (August 2007) (ADAMS Accession No. ML071150121) (Final EA) at 1, 6-7. Other intended purposes include sterilization of cosmetics, pharmaceutical products, and fruit fly pupae, and as a research tool for the benefit of Hawaii agriculture.

[2] *See* 10 C.F.R. § 51.22(c)(14)(vii).

[3] NRC Staff and Concerned Citizens of Honolulu Joint Motion to Dismiss Environmental Contentions (Mar. 20, 2006) (ADAMS Accession No. ML060820592).

[4] Memorandum and Order (Ruling on Admissibility of Intervenor's Amended Environmental Contentions) (Dec. 21, 2007) (unpublished).

[5] CLI-08-4, 67 NRC 171, 172 (2008), quoting *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-21, 62 NRC 538, 540 (2005).

[6] *Id.*

Administration (FDA), the expert agency tasked by Congress to evaluate whether and under what conditions irradiated foods are safe to consume. In its rulemakings governing whether specific uses of food irradiation are safe, the FDA has considered and continues to consider the precise health concern the intervenors raise — whether consumption of irradiated food may lead to an increased risk of cancer or other health harm. Concerned Citizens' contention provides insufficient basis for the NRC to undertake its own analysis or otherwise second-guess the FDA's regulations and their underlying safety determinations on what is, at bottom, a nonenvironmental food processing and consumer food safety issue, squarely within the FDA's long-held expertise on food toxicity and its statutorily assigned responsibility to evaluate and regulate irradiated food safety.

Before turning to the parties' arguments, we provide below a brief background on the FDA's role in evaluating and authorizing specific uses of food irradiation.

II. BACKGROUND

Under the 1958 Food Additives Amendment to the Federal Food, Drug, and Cosmetic Act, Congress placed the process of food irradiation under the definition of ''food additives,'' and thereby entrusted the FDA with the responsibility to determine whether specific uses of food irradiation are safe. The Act's definition of ''food additive'' encompasses any substance that reasonably may be expected to affect the characteristics of food, including any source of radiation intended to affect food characteristics.[7] Congress made clear that ''[s]ources of irradiation (including radioactive isotopes, particle accelerators and X-ray machines) intended for use in processing food are included in the term 'food additives.' ''[8]

More importantly, the Food Additives Amendment established a regulatory scheme whereby any food that has been ''intentionally subjected to irradiation'' is considered ''adulterated'' and ''unsafe,'' and therefore cannot be marketed legally, unless the FDA Secretary has issued a regulation finding the specific use of the food irradiation safe, and prescribing the conditions under which the irradiation source — the ''food additive'' — may be safely used.[9] In short,

[7] *See* section 201(s) of Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(s).

[8] *See* Final Rule: ''Irradiation in the Production, Processing, and Handling of Food,'' 51 Fed. Reg. 13,376 (Apr. 18, 1986) (quoting S. Rep. No. 85-2422, at 63 (1958)) (Final Rule, Fresh Foods).

[9] *See* Federal Food, Drug, and Cosmetic Act § 402(a)(7) (21 U.S.C. § 342 (a)(7)), § 409(a)(2) (21 U.S.C. § 348(a)(2)).

the Food Additives Amendment creates a ''presumption that a food additive is 'unsafe' '' until demonstrated otherwise.[10]

Notably, for the FDA to determine that a food additive is safe, it must find, after a ''fair evaluation of the data,''[11] that ''there is a *reasonable certainty* in the minds of competent scientists'' that the substance is not harmful under all ''intended conditions of use.''[12] Factors the FDA must consider include (1) the probable consumption of the additive and of any substance formed in or on food because of its use; and (2) the cumulative effect of the additive in the diet, taking into account any chemically or pharmacologically related substance or substances in the diet.[13] A decision on the safety of a food additive must ''give due weight to the anticipated levels and patterns of consumption of the additive.''[14] Moreover, ''no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal.''[15]

If the FDA determines that a food additive is safe under prescribed uses, ''the regulation [authorizing use] is granted *generically*; anyone [e.g., any licensed irradiator facility] can use the additive in conformance with the specified conditions of use permitted under the regulation.''[16] The FDA can revoke a food additive regulation if it changes its conclusions on the safety of the additive, and members of the public can petition the FDA to revoke a regulation authorizing a particular food additive.[17]

We turn now to the arguments on the EA for the Pa'ina irradiator facility.

III. ANALYSIS

At issue is Concerned Citizens' claim that the NRC's EA improperly fails to discuss potential health impacts associated with irradiating food for human

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[10] *Public Citizen v. Foreman,* 631 F.2d 969, 972 (D.C. Cir. 1980); *see also United States v. 29 Cartons of *** An Article of Food, Etc.,* 987 F.2d 33, 35 (1st Cir. 1993).

[11] *See* section 409(c)(3)(A), Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 348(c)(3)(A).

[12] *See* 21 C.F.R. § 170.3(i) (emphasis added).

[13] *See* section 409(c)(5), Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 348(c)(5); *see also* 21 C.F.R. § 570.3(i).

[14] 21 C.F.R. § 570.20(a).

[15] Section 409(c)(3)(A) of Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 348(c)(3)(A).

[16] *See* ''Irradiation of Food and Packaging: An Overview'' (Kim Morehouse and Vanee Komolprasant), U.S. Food and Drug Administration, Office of Food Additive Safety, Center for Food Safety and Applied Nutrition, at 4 (emphasis added), *available at* http://www.fda.gov (posted April 2007).

[17] *See* 21 C.F.R. § 10.30 (Citizen Petition).

consumption.[18] The contention focuses upon potential harm from so-called ''radiolytic products,'' chemical byproducts formed in irradiated foods. In particular, the contention calls attention to ''[a] recently discovered unique class of radiolytic products that are generated from the irradiation of fat-containing food,'' referred to in abbreviated form as ''2-ACB.''[19] The contention explains that since 1998, concerns over irradiated foods have ''focused on the toxicity of 2-ACB.''[20] Concerned Citizens further claims that ''[r]ecent studies have demonstrated that 2-ACB compounds, which are found exclusively in irradiated dietary fats, may promote colon carcinogenesis in animals,'' and that ''[t]hese studies indicate that consumption of irradiated food containing 2-ACB, such as the fruit Pa'ina proposes to process, may increase the risk of humans developing colon cancer.''[21] The contention states that this is a ''new area of toxicity'' that neither the FDA nor the World Health Organization ''has yet examined.''[22]

The NRC Staff did not conduct its own analysis to determine whether there are potential health impacts from consuming irradiated foods. Instead, in responding to public comments, the Final EA notes that irradiation does not make food radioactive, and that the FDA has the role of determining the safety of food irradiation and has authorized irradiation of several particular foods (including fresh fruits and vegetables) after ''determin[ing] that this process is safe'' for the approved items.[23] It also notes that current ''federal rules require irradiated foods to be labeled as such.''[24] The Final EA further states that it does not provide a more detailed response to comments on food irradiation because this issue does not ''relate to the environmental effects'' of the irradiator licensing, and therefore falls outside the scope of the NEPA review.[25]

The Final EA appropriately credits the food safety determinations of the FDA, the federal agency with expertise in food toxicity and overall responsibility in evaluating irradiated food safety.[26] This is particularly the case given that the

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[18] *See* Intervenor Concerned Citizens of Honolulu's Amended Environmental Contentions #3 Through #5 (Sept. 4, 2007) at 29-30 (Amended Contentions) (ADAMS Accession No. ML072530634).

[19] Amended Contentions at 29.

[20] *Id.*

[21] *Id.* at 29-30.

[22] *Id.* at 29.

[23] *See* Final EA at C-8, C-9; *see also id.* at C-19.

[24] *Id.* at C-9.

[25] *Id.* at C-3.

[26] The United States Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS) approves methods for treatment of imported fruits and vegetables (including those moved interstate from Hawaii to the continental United States), to assure that harmful plant pests will not spread to the continental United States. APHIS-approved treatment methods for imported produce may include irradiation. In approving irradiation treatment methods, APHIS relies upon FDA

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FDA's review by law must encompass the same health concerns that the intervenor raises, including potential cumulative dietary impacts from consuming irradiated foods and potential for cancer risk. As the Staff explains, the ''FDA and USDA have regulations specifically addressing the issues raised by the Intervenor here,'' and ''[t]he rulemaking of the FDA . . . fully encompasses all the hazards alleged by the Intervenor.''[27] Assuring that irradiated foods are safe to consume is the raison d'être of the FDA's rulemaking review for specific new uses of food irradiation. Both when it first authorized irradiation of fresh fruits, and in more recent food irradiation rulemakings, the FDA publicly considered the issue of potential harm from radiolytic products that may form in food, and it has made clear its conclusion that it is safe to consume foods that have been approved for irradiation at established dose limits.[28]

Here, the FDA has determined generically by regulation that ionizing radiation to treat fresh fruits is safe if the radiation dose does not exceed 1 kGy (100 krad).[29] By license condition, the Pa'ina facility must conform to FDA regulations.[30] Further, the FDA's regulation authorizing irradiation of fresh fruits represents the agency's determination that there is a ''reasonable certainty'' among scientists that fruit irradiated at the established dose limit is safe to consume.[31] ''[C]onformity

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determinations ''that approved radiation doses do not render foods unsafe to eat.'' *See, e.g.,* Final Rule: ''Treatments for Fruits and Vegetables,'' 71 Fed. Reg. 4451 (Jan. 27, 2006).

[27] NRC Staff's Initial Brief in Response to CLI-08-04 (April 10, 2008) (Staff Initial Brief) at 17. Unlike some other kinds of agency permits or authorizations, the FDA's review does not take into account commercial interests, or whether ''such approval will be beneficial to the producer of the additive,'' but is squarely focused upon assuring that there is ''proof of a reasonable certainty that no harm will result'' from a proposed use of an additive. *See, e.g.,* Final Rule, Fresh Foods, 51 Fed. Reg. at 13,382 (quoting S. Rep. No. 85-2422, at 6 (1958)).

[28] *See* Final Rule, Fresh Foods, 51 Fed. Reg. 13,376, 13,378-80, 13,382-87; *see also generally* Final Rule: ''Irradiation in the Production, Processing, and Handling of Food,'' 70 Fed. Reg. 48,057, 48,065-68 (Aug. 16, 2005) (Final Rule, Molluscan Shellfish); ''U.S. Regulatory Requirements for Irradiating Foods'' at 4, *available at* http://www.fda.gov.

[29] *See* 21 C.F.R. § 179.26; *see also* Final Rule, Fresh Foods, 51 Fed. Reg. 13,376. Specifically, the FDA has approved irradiation of fresh fruits at doses up to 1 kGy for insect disinfestation and for inhibiting growth and maturation. Currently pending before the FDA is a petition to allow for many new uses of food irradiation, including irradiation of both raw and preprocessed fruits at doses up to 4.5 kGy, for control of foodborne pathogens. *See, e.g.,* Notice, Food Irradiation Coalition c/o National Food Processors Assoc.: Filing of Food Additive Petition, 65 Fed. Reg. 493 (Jan. 5, 2000); Food and Color Additive Petitions (posted August 2008), Food and Drug Administration, *available at* http://www.fda.gov, noting pending Food Additive Petition (FAP) 9M4697 (original Docket No. 99F-5522).

[30] Pa'ina Hawaii, LLC Materials License, No. 53-29296-01, at 3.

[31] As the Staff emphasizes, only those indirect effects that can be said to be ''reasonably foreseeable'' need be analyzed under NEPA. *See* Staff Initial Brief at 6 n.25 (citing 40 C.F.R. § 1508.8(b)). Given the nature of the findings the FDA must make before it can issue a regulation generically authorizing a

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of [a] proposed action to federal regulations governing other aspects of that action's interrelationship with the environment'' will ''buttress[ ]'' a finding of no significant impact.[32]

Further, as the Staff claims, Concerned Citizens' contention provides insufficient basis for questioning the FDA's ongoing approval of the use of irradiation for use on irradiated fruits and vegetables.[33] The contention rests largely on the notion that the FDA has not ''yet examined'' the potential for 2-ACB compounds to promote colon cancer, when in fact the FDA has done so, a point the Commission earlier noted when it invited briefs from the parties.[34]

Even if Concerned Citizens' contention presented a compelling reason to question the FDA's safety findings, NEPA would not require the NRC to assess the safety of consuming irradiated foods. As the Final EA correctly points out, this food safety matter is not related to environmental effects of the irradiator, and is therefore not a NEPA issue.

Concerned Citizens argues that the EA must analyze potential health effects associated with Pa'ina's proposal to ''increase the supply of irradiated food for human consumption.''[35] But NEPA does not require an agency to assess ''*every*

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particular use of food irradiation, it was reasonable for the Staff to assume no ''reasonably foreseeable'' significant impacts from consumption of irradiated fruits and vegetables.

[32] *Glass Packaging Institute v. Regan,* 737 F.2d 1083, 1092 (D.C. Cir.), *cert. denied,* 469 U.S. 1035 (1984); *see generally Public Citizen v. Traffic Safety Administration,* 848 F.2d 256, 268 (D.C. Cir. 1988) (agency could presume that increases in emissions that still fell within Clean Air Act limits would be insignificant); *Okanogan Highlands Alliance v. Williams,* 1999 WL 1029106, at *4-*5 (D. Or. Jan. 12, 1999) (in assessing impacts agency may rely on other specialized agencies with jurisdiction to enforce related permits and measures), *aff'd on other grounds,* 236 F.3d 468 (9th Cir. 2000).

[33] Staff's Initial Brief at 19.

[34] CLI-08-4, 67 NRC at 173 n.9. Indeed, as the Licensee points out, Concerned Citizens' food expert, Dr. William Au, participated in a 2005 food irradiation rulemaking where he had the opportunity to present his concerns on potential harm from 2-ACBs in irradiated foods. *See* Applicant Pa'ina Hawaii, LLC's Response to March 27, 2008 Memorandum and Order of NRC (April 10, 2008) at 5 n.4. In that public rulemaking, the FDA considered but found ''incorrect'' Dr. Au's claims that radiolytic products have been insufficiently studied, and considered but found unpersuasive a 2003 study by Raul et al. — highlighted by the Intervenors — on the potential for 2-ACBs to promote colon cancer. *See* Final Rule, Molluscan Shellfish, 70 Fed. Reg. 48,057, 48,066-68 (finding no reason to ''alter the agency's conclusion that the consumption of irradiated fat-containing foods does not present *any* health hazard'') (emphasis added).

[35] Intervenor Concerned Citizens of Honolulu's Opening Brief Re: NRC's Obligation to Analyze Potential Health Impacts of Consuming Irradiated Food from Proposed Irradiator (April 10, 2008) (Intervenor's Brief) at 11, 14; *see also id.* at 12-13; Intervenor Concerned Citizens of Honolulu's Reply Re: NRC's Obligation to Analyze Potential Health Impacts of Consuming Irradiated Food from Proposed Irradiator (Apr. 17, 2008) (Intervenor's Reply) at 6-7.

impact or effect of its proposed action,'' only effects on the environment.[36] To be encompassed by NEPA, there needs to be a ''reasonably close causal relationship between a *change in the physical environment* and the effect at issue.''[37] Increasing the supply of irradiated food for human consumption is no more an environmental effect than increasing the supply of any other processed food that may pose a potential health risk, but one not *causally* related to an actual change in the physical environment. Any number of food processing actions can change food characteristics by inducing chemical or other reactions in food, but that does not make the impact an environmental effect that must be studied under NEPA. NEPA encompasses effects on health only when they are linked to a ''change in the environment.''[38] Otherwise, ''the words 'adverse environmental effects' might embrace virtually any consequence'' of a proposed federal action ''that some one thought 'adverse.' ''[39]

''[A]lthough NEPA states its goals in sweeping terms of human health and welfare, these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment.''[40] That is why a potential harm that is ''solely a matter of human health,'' and not also closely connected to an ''injury to the physical environment'' is not a harm encompassed by NEPA.[41] Unlike, for example, the spraying of pesticides, which affects soil, air, water, in this case fruits that already have been removed from where they are grown — including, potentially, fruits arriving from the mainland United States, thousands of miles away — would be brought inside a building and processed with a source of radiation that does not render the foods radioactive. Concerned Citizens' worry — a possible increased risk of disease that could result from eating the processed food — does not stem from any effect on the physical environment.

''If a harm does not have a sufficiently close connection to the physical

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[36] *Glass Packaging,* 737 F.2d at 1091 (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 772 (1983) (emphasis in original)).

[37] *Metropolitan Edison,* 460 U.S. at 774 (emphasis added); *see also Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Department of Agriculture,* 415 F.3d 1078, 1103-04 (9th Cir. 2005); *Glass Packaging,* 737 F.2d at 1091.

[38] *Metropolitan Edison,* 460 U.S. at 771-72; *accord Ranchers Cattlemen,* 415 F.3d at 1103.

[39] *Glass Packaging,* 737 F.2d at 1091 (quoting *Metropolitan Edison,* 460 U.S. at 772).

[40] *Ranchers Cattlemen,* 415 F.3d at 1103 (quoting *Metropolitan Edison,* 460 U.S. at 773) (emphasis in original).

[41] *Id.* (NEPA zone of interests did not encompass potential increased risk of ''mad cow'' disease from resumed importation of Canadian beef because asserted injury was not ''connect[ed] to injury to the physical environment''); *see also Bicycle Trails Council of Marin v. Babbitt,* 82 F.3d 1445, 1466-67 (9th Cir. 1996); *Ashley Creek Phosphate Co. v. Norton,* 420 F.3d 934,943-44 (9th Cir. 2005) (NEPA does not encompass ''concern that is not tethered to the [physical] environment''), *cert. denied,* 548 U.S. 903 (2006).

environment, NEPA does not apply,'' regardless of the gravity of the harm.[42] Concerned Citizens' health concerns are a consumer food safety matter not causally related to a change in the physical environment.

It simply is not NEPA's purpose to ''transplant specific regulatory burdens from those expert agencies otherwise authorized to redress specific nonenvironmental problems and pointlessly to reimpose those objectives on other unqualified agencies.''[43] The FDA ''already has the specific statutory authority''[44] to evaluate and enforce potential health harms from food irradiation. We note, further, that the FDA has pending before it now similar arguments on potential health impacts of consuming irradiated foods, largely encompassing Concerned Citizens' concerns about radiolytic products, 2-ACBs, and cancer risk. These have been filed in opposition to still-pending petitions requesting the FDA to issue new food additive regulations, authorizing new uses of food irradiation.[45]

If at any time the FDA comes to conclude that there no longer is ''reasonable certainty'' that consuming irradiated fresh fruits and vegetables at the currently approved dose is safe, it could revoke or modify the existing authorization for fresh fruit irradiation, a risk assumed by Pa'ina.[46] Indeed, the FDA's regulation generically authorizing fresh fruit and vegetable irradiation, issued in 1986 and still valid today, is the legally relevant or proximate cause of any potential effects of consuming irradiated fruits, ''lengthen[ing] the causal chain beyond the reach of NEPA.''[47] The NRC has no authority to revoke or change the FDA's generically applicable food additive regulations, to ban the importation of imported irradiated foods, or to prohibit operation of facilities that might use machine sources of radiation (such as electron beam or X-ray machines) to irradiate food. In the context of NEPA, one ''must look at the underlying policies or legislative intent in order to draw a manageable line between those causal changes that make an actor responsible for an effect and those that do not.''[48]

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[42] *Ranchers Cattlemen,* 415 F.3d at 1103 (quoting *Metropolitan Edison,* 460 U.S. at 778).

[43] *Glass Packaging,* 737 F.2d at 1092.

[44] *See id.* (where FDA already had statutory authority to address issue of potential tampering with bottles).

[45] *See* Food and Color Additive Petitions (posted August 2008), Center for Food Safety and Applied Nutrition, Office of Food Additive Safety, *available at* http://www.fda.gov, and under Docket Nos. FAP 1M4727, FAP 3M4744, FAP 9M4695, FAP 9M4696, FAP 9M4697.

[46] Concerned Citizens claims that the Pa'ina facility is ''inextricably linked'' to the contemplated sale of irradiated food. *See* Amended Contentions at 30. But additional uses are already specifically intended for the facility, *see* Final EA at 1, 6-7, and apparently other yet undetermined uses are envisioned. *See* Application for a Material License (June 20, 2005) at 8.

[47] *Metropolitan Edison,* 460 U.S. at 775.

[48] *Id.* at 774.

IV. CONCLUSION

For the reasons outlined above, we *reverse* the Board's admission of Concerned Citizens' contention on the need for a NEPA analysis of the potential impacts of increasing the supply of irradiated food.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of August 2008.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

In the Matter of **Docket No. 50-423-OLA**

DOMINION NUCLEAR CONNECTICUT, INC.
(Millstone Nuclear Power Station, Unit 3) **August 13, 2008**

The Commission affirms an Atomic Safety and Licensing Board decision, which found inadmissible all submitted contentions.

RULES OF PRACTICE: ADJUDICATIONS

A petitioner cannot seek to use a specific adjudicatory proceeding to attack generic NRC regulations and requirements, or express generalized grievances about NRC policies.

RULES OF PRACTICE: CONTENTIONS

Petitioners may not seek to skirt our contention rules by initially filing unsupported contentions, and later recasting or modifying their contentions on appeal with new arguments never raised before the Board.

RULES OF PRACTICE: ADJUDICATIONS

Generic NRC policies and standards, and the nature of the NRC Staff's licensing review, are not subject to challenge in an adjudicatory proceeding.

RULES OF PRACTICE: APPEALS

Petitioners cannot seek on appeal to revive a contention based on new arguments never presented to the Licensing Board.

RULES OF PRACTICE: CONTENTIONS

The mere issuance of RAIs does not mean an application is incomplete for docketing.

MEMORANDUM AND ORDER

This proceeding concerns the application of Dominion Nuclear Connecticut, Inc. (Dominion) for an amendment to its operating license for Millstone Power Station, Unit 3, in Waterford, Connecticut.[1] The amendment will increase the unit's authorized core power level from 3411 to 3650 megawatts thermal. Before us is an appeal by the Connecticut Coalition Against Millstone and Nancy Burton (collectively, CCAM or Petitioners). CCAM appeals LBP-08-9, an Atomic Safety and Licensing Board decision that denied CCAM's petition to intervene and request for hearing.[2] The Board found that Petitioners had standing to intervene, but had not submitted any admissible contention for hearing. Both the NRC Staff and Dominion oppose CCAM's appeal. We affirm the Board's decision, for the reasons the Board itself has given, and for the additional reasons we give below.

I. BACKGROUND

A. Power Uprates

Reactor operating licenses specify the maximum power level of operation, and NRC approval is required to amend a facility operating license to increase the licensed power level. Increasing the power level at a nuclear plant involves what is referred to as a ''power uprate.''[3] The NRC labels or classifies power uprates based on the relative magnitude of the power increase and the methods used

[1] Dominion's License Amendment Request (LAR) package is available in the NRC's ADAMS database under ADAMS Accession No. ML072000384. The NRC Staff approved the uprate on August 12, 2008. The amendment package may be found at Adams Accession No. ML082180137.

[2] Memorandum and Order (Ruling on Petition to Intervene and Request for Hearing), LBP-08-9, 67 NRC 421 (2008) (LBP-08-9).

[3] *See* RS-001, Revision 0, Review Standard for Extended Power Uprates (Dec. 2003), Background (ADAMS Accession No. ML033640024) (Review Standard RS-001).

to achieve the increase.[4] A ''measurement uncertainty recapture power uprate'' typically involves a power level increase of less than 2%, achieved by enhanced techniques for calculating reactor power. A ''stretch power uprate'' typically results in power level increases up to 7% and generally does not involve major plant modifications. An ''extended power uprate'' usually requires significant modifications to major plant equipment, and may be for power level increases as high as 20%. A request for a power uprate requires an amendment to the facility's operating license, and therefore must meet the NRC's regulatory requirements for issuance of a license amendment.[5]

B. Standards Governing Contention Admissibility

To intervene as a party in an adjudicatory proceeding, a petitioner must offer at least one admissible contention.[6] The specific requirements for an admissible contention are outlined in detail in the Board's decision, and we need not repeat them here.[7] The Commission has explained in several earlier decisions why the contention rule, revised in 1989, was made ''strict by design.''[8] The contention standards assure that those admitted to our hearings bring ''actual knowledge of safety and environmental issues that bear'' on the licensing decision, and therefore can litigate issues meaningfully.[9] Threshold contention standards are imposed to avoid circumstances the NRC regularly encountered prior to the 1989 contention rule revision, when licensing boards admitted contentions based on little more than speculation, creating serious delays of months and even years, ''as licensing boards . . . sifted through poorly defined or supported contentions,'' and admitted intervenors who ''often had negligible knowledge of nuclear power issues.''[10] Contention standards also help assure that our hearing process will be appropriately focused upon disputes that can be resolved in the adjudication. Accordingly, a petitioner cannot seek to use a specific adjudicatory proceeding to attack generic NRC regulations and requirements, or ''express generalized grievances about NRC policies.''[11]

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[4] *Id.*

[5] *See* 10 C.F.R. §§ 50.90, 50.92.

[6] 10 C.F.R. § 2.309(a).

[7] *See* LBP-08-9, 67 NRC at 429-33; 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[8] *See, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358-59 (2001); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334-35 (1999).

[9] *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 482 (2006).

[10] *Millstone,* CLI-01-24, 54 NRC at 358.

[11] *Oconee,* CLI-99-11, 49 NRC at 334.

Whether or not any contentions are admitted for hearing, the NRC Staff conducts a full safety review of every license amendment application, and may not approve a proposed amendment until all necessary public health and safety findings have been made.

II. ANALYSIS

Petitioners jointly submitted nine contentions challenging Dominion's request for a power uprate license amendment.[12] The Board found none admissible, and therefore denied their hearing request. NRC regulations permit appeal of a Board decision denying a petition to intervene.[13] Petitioners' appeal argues that all nine of their contentions were admissible and should have been admitted for hearing.

The Commission gives substantial deference to Board conclusions on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion.[14] As discussed below, CCAM's appeal identifies no error of law or abuse of discretion in the Board's decision, and we discern no other reason to reverse the Board's conclusion that all nine contentions lack the necessary minimal factual or legal support. Moreover, as we note repeatedly below, Petitioners' appeal raises numerous new arguments never presented as part of their hearing petition. Petitioners may not seek to skirt our contention rules by initially filing unsupported contentions, and later recasting or modifying their contentions on appeal with new arguments never raised before the Board.[15]

Regarding Petitioners CCAM and Nancy Burton, an additional point bears mention. CCAM, acting through its representative Nancy Burton, has had extensive experience with the NRC's adjudicatory process and its procedural rules, but has had a history of failing to comply with our rules of practice.[16] Because of Ms. Burton's recurring disregard of NRC regulations, the Commission in an earlier proceeding advised her that filings bearing her name that do not meet our procedural requirements would be summarily rejected by the Office

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[12] Connecticut Coalition Against Millstone and Nancy Burton Petition to Intervene and Request for Hearing (Mar. 17, 2008) (Petition). The Petition was filed with pages unnumbered. An electronic version is available on ADAMS at Accession No. ML080840527.

[13] 10 C.F.R. § 2.311(b).

[14] *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 104 (2007); *see also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

[15] *See, e.g., American Centrifuge Plant,* CLI-06-10, 63 NRC at 458; *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004); *see also* 10 C.F.R. § 2.309(f)(2).

[16] *See, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 38 (2006) (and cases cited therein).

of the Secretary and not accepted for docketing.[17] In filing this appeal, Ms. Burton neither followed NRC electronic filing requirements nor sought a timely exemption from those requirements.[18] Accordingly, we might have rejected her appeal summarily for violating NRC procedural regulations.[19] But to make sure Petitioners' already-filed contentions receive a full airing, and given that all participants have filed extensive appellate briefs, we have decided to exercise our discretion to overlook Ms. Burton's mistake and to examine this appeal on the merits.[20]

Because we find the Board's decision comprehensive and well-reasoned, we need not repeat the details of the Board's reasoning, but rather cite to relevant portions of the Board's decision. We consider each of CCAM's nine contentions below.

A. Contention 1

> The proposed power level for which Dominion has applied to uprate Millstone Nuclear Power Station Unit 3 exceeds the NRC's SPU [stretch power uprate] regulatory ''criteria.'' The SPU application fails to satisfy the first NRC ''criterion''

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[17] *Id.*

[18] *See* Dominion Nuclear Connecticut's Brief in Opposition to Appeal of CCAM and Nancy Burton (June 26, 2008) (Dominion Brief) at 4 n.5; *see also* Memorandum from A. Bates to E. Hawkens, ''Request for Hearing Submitted by the Connecticut Coalition Against Millstone and Nancy Burton (Mar. 24, 2008) (noting Ms. Burton's assurance that the exception to E-filing procedures would only be for the hearing petition); Dominion Nuclear Connecticut, Inc., Establishment of Atomic Safety and Licensing Board, 73 Fed. Reg. 18,010 (Apr. 2, 2008) (citing E-filing rule); Order (granting second request for E-filing exemption, but directing that all future filings adhere to regulations) (Apr. 16, 2008) (unpublished). *See generally* 10 C.F.R. §§ 2.304, 2.305. It was not until an unrelated filing currently pending before the Board, submitted over a month after its Appeal, that Petitioners belatedly requested an exemption from the E-filing rule to be applied to its Appeal, ''if necessary.'' Connecticut Coalition Against Millstone and Nancy Burton Motion for Leave to File Their ''Motion for Leave to File New and/or Amended Contentions Based on Receipt of New Information'' Dated July 18, 2008, Nunc Pro Tunc, and for Continuing Waiver of Electronic Filing'' (July 31, 2008), at 4 (July 31 Motion).

We note, further, that the appeal also did not comply with the formatting requirements set forth in 10 C.F.R. §§ 2.311(a) and 2.341(c)(2).

[19] In their July 31 Motion (at 3), Petitioners state, ''[A]pparently, the [Commission] does not mandate E-filing,'' given that we accepted the Appeal for consideration. That is not the case. 10 C.F.R. § 2.302(a).

[20] Petitioners may not, however, continue to ignore our filing requirements. Recently, in fact, the Office of the Secretary rejected summarily Petitioners' motion to file late contentions in this proceeding, given their failure either to comply with our electronic filing requirements or to seek a waiver. *See* E-mail from Hearing Docket to Nancy Burton (July 21, 2008 15:48 EST).

that the NRC has set the power limit for SPUs at ''. . . *up to* 7% . . .'' (emphasis added).[21]

In a nutshell, this contention claims that the power uprate that Dominion requested in its license amendment must be considered and reviewed as an extended power uprate (EPU), and not a stretch power uprate (SPU). Petitioners claim that the ''NRC has set the power limit for a SPU at 7 [percent],'' but that the ''application proposes a power uprate that exceeds 7 [percent] and hence is disqualified'' from consideration as a stretch power uprate.[22] Petitioners' expert noted that a precise 7% increase over Millstone Unit 3's currently authorized output of 3411 thermal megawatts (MWt) would be 3649.7 MWt, but that Dominion had rounded the proposed power level to 3650 MWt.[23] In short, the contention challenges the label or classification of the proposed power uprate, and suggests that there would be a more ''rigorous'' review of the licensing action if it were classified as an EPU.[24]

First, Petitioners are flatly wrong in claiming that the NRC has established a precise regulatory limit or ceiling on power uprates to differentiate between a stretch power uprate and an extended power uprate. NRC guidance — *not* regulations — discusses how power uprates are characterized, but even this guidance outlines several factors and does not limit a stretch power uprate to a precise 7% increase:

> **Stretch power uprates** are *typically* up to 7 percent and are within the design capacity of the plant. The actual value for percentage increase in power a plant can achieve and stay within the stretch power uprate category is plant-specific and depends on the operating margins included in the design of a particular plant. Stretch power uprates involve changes to instrumentation setpoints but do not involve major plant modifications.
>
> **Extended power uprates** are greater than stretch power uprates and have been approved for increases as high as 20 percent. These uprates require significant modifications to major balance-of-plant equipment such as the high pressure turbines, condensate pumps and motors, main generators, and/or transformers.[25]

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[21] Petition at 7.

[22] *Id.; see also id.* at 7-11.

[23] *Id.,* Exhibit A, Arnold Gundersen Declaration ¶ 14.

[24] Petition at 8.

[25] *See* NRC Website www.nrc.gov/reactors/operating/licensing/power-uprates.html, under Types of Power Uprates (emphasis added); *see also* Review Standard RS-001, Background. In accepting Dominion's amendment application, the NRC Staff stated that the application was appropriately characterized as a stretch power uprate because the ''power increase is approximately 7 percent,''

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More importantly, as the Board noted, Petitioners nowhere indicate why ''the fact that the requested power level increase rises 0.3 MWt above the 3649.7 MWt level (which would represent a 7% increase in power) is in any way material to the findings the NRC must make,''[26] or to the adequacy of the analyses in Dominion's application. Further, in preparing its uprate amendment application, Dominion largely utilized RS-001, the NRC review standard for *extended power uprates.*[27] Therefore, it is entirely unclear what Petitioners find incorrect or insufficient about Dominion's amendment application. As Dominion points out, Petitioners made ''no attempt to identify any material dispute with a specific section or any specific material omission from the [license amendment request].''[28] As Dominion argues, Petitioners' contention ''never ma[kes] a showing that classifying the uprate as an SPU is in any way material to whether the [amendment request] should be approved.''[29]

Finally, the focus of a hearing on a proposed licensing action is the adequacy of the application to support the licensing action, not the nature of the NRC Staff's review.[30] And while an extended power uprate likely will be more complex to review (given a more complex proposal generally involving significant modifications to major plant equipment), Petitioners give no reason to suggest that Staff

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and only ''limited plant modifications'' would be required to support the uprate. *See* Letter from Harold Chernoff, NRC, to David Christian, Dominion (Oct. 15, 2007) at 1, ADAMS Accession No. ML072670216.

[26] LBP-08-9, 67 NRC at 436.

[27] *See, e.g.,* LAR, transmittal letter from Gerald Bischof (July 13, 2007) at 1; LAR, Attachment 5, SPU Licensing Report at 1-1 (noting that Dominion utilized ''to the extent possible,'' RS-001, the extended power uprate guidance); LAR, Attachment 1 at 13. In outlining available NRC guidance for SPUs and EPUs, the NRC website section on power uprates notes that because only a limited number of SPUs are expected in the future, the NRC has not developed guidance dedicated to SPUs, and therefore uses RS-001 and previously approved stretch power uprates for guidance. *See* www.nrc.gov/reactors/operating/licensing/power-uprates.html.

On appeal, Petitioners point to where Dominion's application states that the extended power uprate guidance (RS-001) was utilized in preparing the amendment application, ''with a small number of exceptions.'' *See* Notice of Appeal (June 16, 2008) (Appeal) (citing LAR, Attachment 1 at 13). Petitioners therefore claim that the application is deficient because it did not identify these instances. But this generalized argument does not point to any material safety issue for litigation; indeed, RS-001 presents merely guidance and not regulatory requirements. Moreover, this claim was not raised in the hearing petition, but was added as a new claim in Petitioners' reply brief and is therefore impermissibly late. *See, e.g., LES,* CLI-04-35, 60 NRC at 623. In addition, the Staff states that ''the application did identify where it differed from RS-001.'' *See* NRC Staff's Brief in Opposition to CCAM and Ms. Burton's Appeal of LBP-08-09 (June 26, 2008) (Staff Brief) at 17 (citing LAR, Attachment 5 at 1-1, where Dominion notes it ''has included any differences between the information in the review standard and the [Millstone Unit 3] design bases to enhance the NRC review'').

[28] Dominion Brief at 8.

[29] *Id.* at 7-8.

[30] *See Pa'ina Hawaii, LLC,* CLI-08-3, 67 NRC 151, 168 n.73 (2008).

review of stretch power uprates is not also sufficiently rigorous. For the reasons given here and in the Board's decision,[31] Contention 1 is inadmissible.

B. Contention 2

> Dominion's application fails to meet the NRC's second ''criterion'' for a SPU application because Millstone Unit 3 already has had its design margins dramatically and substantially reduced.[32]

Contention 2 ''dispute[s] Dominion's assertions that operating margins in the design of Millstone Unit 3 are adequate to safely achieve the requested 7+ per cent [*sic*] power uprate, given the significant reduction in structural operating margins already in place at Millstone 3 prior to the present application for power uprate.''[33]

We agree with the reasons the Board provided in rejecting this contention.[34] Petitioners nowhere challenge the safety analyses provided in Dominion's application. On appeal, Petitioners state that they are ''aware'' of those analyses, but ''disagree[ ]'' with them, and that their expert is ''aware of Dominion's representations and calculations,'' but ''rejects them as inadequate to protect the public health and safety and the environment.''[35] The Commission reviewed Mr. Gundersen's declaration, but discerns no specific challenge to any relevant analysis in Dominion's amendment application. Petitioners' appeal points to no error in the Board's decision.

C. Contention 3

> When compared to all other Westinghouse Reactors, Millstone Unit 3 is an ''outlier'' or ''anomaly.'' Dominion's proposed uprate is the largest per cent [*sic*] power uprate for a Westinghouse reactor, while Millstone Unit 3 also has the smallest containment for any Westinghouse reactor of roughly comparable output.[36]

Contention 3 challenges the ''integrity and adequacy'' of the Millstone 3 containment ''to function safely with the requested 7+ per cent [*sic*] power uprate in light of'' what Petitioners say are ''structural limitations of the containment, concrete shrinkage and Dominion's history of exceeding its licensed power

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[31] *See* LBP-08-9, 67 NRC at 433-36.
[32] Petition at 11.
[33] *Id.* at 18.
[34] LBP-08-9, 67 NRC at 436-38.
[35] Appeal at 10-11.
[36] Petition at 18.

level.''[37] Petitioners' appeal does not identify any error of law or fact in the Board's analysis.[38] The Board appropriately found Contention 3 inadmissible. We agree fully with the Board's reasoning and conclusion.[39]

D. Contention 4

> Construction problems due to the unique sub-atmospheric containment design, coupled with the impact upon the containment concrete by the operation of the containment building at very high temperature, very low pressure and very low specific humidity, place the calculations used to predict stress on that concrete containment in uncharted analytical areas.[40]

Contention 4 claims that Dominion's license amendment request fails to properly ''assess the long-term impact a 7+ per cent [*sic*] power uprate will have on the concrete containment,'' given the ''high temperature, low pressure, and low specific humidity environment and in light of documented construction challenges.''[41] Petitioners ''dispute Dominion's assertion that the application qualifies for SPU approval,'' and call for ''a more intensive and comprehensive review . . . under EPU standards.''[42]

But again, as the Board correctly notes, the contention simply does not challenge ''any of the containment analysis'' Dominion provided in support of the power uprate amendment application.[43] It vaguely challenges ''calculations used to predict stress'' on the containment, without identifying any calculations or giving any factual basis to question calculations. It suggests that temperatures, pressure, and humidity conditions may be excessive for the containment, but provides no analysis, references, calculations, or any other support for this view.

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[37] *Id.* at 22. Dominion states that the ''history'' of excessive power level operation apparently alluded to in Petitioners' contention was one power excursion instance during testing that lasted a few minutes. *See* Dominion Appeal Brief at 14 n.12.

[38] Petitioners' appeal apparently raises a new argument not in the original petition: that the amendment application ''omits to address the issue of the integrity of the concrete containment integrity.'' *See* Appeal at 12. Petitioners cannot seek to revive a contention based on new arguments never presented to the Licensing Board. *See, e.g., American Centrifuge,* CLI-06-10, 63 NRC at 460. Nor is it clear what Petitioners mean by this claim. The Board pointed out that Dominion's application provides an analysis of the peak calculated containment pressure following various potential events, to demonstrate that the containment has a design limit in excess of the containment pressure, and that Petitioners never challenged this analysis, which goes to whether the Millstone Unit 3 containment will ''perform[ ] its intended function.'' *See* LBP-08-9, 67 NRC at 438.

[39] *Id.* at 438-39.

[40] Petition at 23.

[41] *Id.*

[42] *Id.* at 26.

[43] LBP-08-9, 67 NRC at 440.

Petitioners' expert claims there were a number of difficulties in constructing the Millstone Unit 3 containment, but as the Board noted, Petitioners ''make no connection of these potential issues to the requested power uprate'' application.[44] Moreover, as the Board also noted, Petitioners' expert provides only speculation that Dominion never evaluated long-term aging impacts to the concrete containment.[45] The contention is vague, unsupported, speculative, and as the Board rightly found, inadmissible.[46]

E. Contention 5

> The impact of flow-accelerated corrosion[47] at Dominion's proposed higher power level for Millstone Unit 3 has not been adequately analyzed or addressed.[48]

In Contention 5, Petitioners claim that because ''Dominion exceeded Millstone Unit 3['s] licensed power [level] less than a year ago,'' they are ''concerned that pipe already worn thin by the 7+ per cent [*sic*] power increase might break when power is increased further and that Dominion has not adequately analyzed nor addressed this issue.''[49] The contention further claims that Dominion's application ''is silent on the need to increase Millstone Unit 3's inspection and maintenance staff,'' and that ''[f]low-accelerated corrosion will require increases in staff to undertake more frequent inspection and maintenance of vital systems and components subject to accelerated corrosion.''[50] The claimed material dispute is ''the sufficiency of Dominion's application to assess the adequacy of any actions Dominion might have to mitigate the consequences of flow accelerated corrosion caused by the power uprate at Millstone Unit 3.''[51]

Dominion's application, however, contains an extensive section devoted to flow-accelerated corrosion, outlining its program for selecting piping components for inspection, component reexamination frequency, inspection techniques, scope of inspection of piping systems, criteria for repair/replacement of piping components, description of recent piping component repair/replacement, and a number

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[44] *Id.* at 439.

[45] *Id.* at 440-41 & n.122 (noting evaluations of concrete strength and aging performed during license renewal review).

[46] *Id.* at 439-41.

[47] ''Flow-accelerated corrosion'' is a ''corrosion mechanism occurring in carbon steel components exposed to flowing'' water. *See generally* LAR, Attachment 5, § 2.1.8, at 2.1-76. A flow-accelerated corrosion program therefore addresses potential pipe wall thinning to assure no unacceptable degradation of the integrity of piping systems.

[48] Petition at 26.

[49] *Id.* at 26-27.

[50] *Id.* at 30.

[51] *Id.*

of other subject areas.[52] The contention does not challenge any specific aspect of the application's flow-accelerated corrosion discussion.

Nor, as the Board noted, does the contention provide sufficient basis for concluding that staffing and maintenance staff increases would be necessary, or for concluding that specifics of staffing need to be addressed in the uprate application.[53] Petitioners rely on nothing more than speculation in claiming on appeal that Dominion is ''prepared in advance to NOT adhere to'' agency guidance on adequately managing effects of flow-accelerated corrosion simply because Dominion has a fixed price labor contract for inspections of flow-accelerated corrosion.[54]

Further, as Dominion notes, Petitioners never explained ''how the single power excursion to which they . . . presumably refer[ ] would have any effect on the procedures and methodology used to inspect piping'' for flow-accelerated corrosion.[55] For the reasons outlined here and in the Board's decision,[56] Contention 5 is inadmissible.

F. Contention 6

> Dominion's application for a Millstone Unit 3 7+ per cent [*sic*] cannot be and should not be analyzed as a SPU application insofar as the NRC has not adopted standards nor regulatory requirements for reviewing SPU applications.[57]

Contention 6 claims that ''while the NRC holds nuclear reactor licensees seeking EPUs to standards with identified acceptance criteria, SPU applicants need no [*sic*] demonstrate their applications meet such acceptance criteria.''[58] As

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[52] *See generally* LAR, Attachment 5, § 2.1.8, at 2.1-76 to 2.1-100.

[53] *See* LBP-08-9, 67 NRC at 442.

[54] *See* Appeal at 14.

[55] Dominion Brief at 14. While Petitioners themselves never identify the power excursion to which they refer, both Dominion and the Staff describe an event that occurred during control valve testing, where the plant was operated at 102.1% of licensed power for approximately 4 minutes. *See, e.g.,* Staff Brief at 11 n.5; Dominion Brief at 14 n.12.

Petitioners again impermissibly raise a new claim on appeal — that in the Millstone license renewal proceeding (the renewed license was issued in November 2005), Dominion did not represent that it would seek a 7% power uprate. *See* Appeal at 14. In any event, as Dominion notes, the license amendment application discusses the flow-accelerated program in light of the proposed uprate. *See* Dominion Brief at 13 n.10. Further, the application addresses the impact of the proposed SPU on renewed plant operating license evaluations and license renewal programs. *See* LAR, Attachment 5, at 2.1-86.

[56] *See* LBP-08-9, 67 NRC at 441-43.

[57] Petition at 31.

[58] *Id.* at 32.

in Contention 1, Petitioners argue that the power uprate should be considered an EPU, and that ''a more intensive and comprehensive review must commence under EPU standards.''[59]

As we stated with respect to Contention 1, generic NRC policies and standards and the nature of the NRC Staff's licensing review are not subject to challenge in an adjudicatory hearing.[60] Petitioners identify no error in the Board's reasons for rejecting this contention. For the reasons the Board gave,[61] and for the reasons we give today in connection with Contention 1, Contention 6 is inadmissible.

G. Contention 7

> Dominion has neglected to provide all information to the NRC staff as it has requested and therefore its application for Millstone Unit 3 uprate should be considered to be incomplete and inadequate.[62]

This contention is based merely on the NRC Staff's requests for additional information (RAIs) regarding the stretch power uprate license amendment request. The mere issuance of RAIs does not mean an application is incomplete for docketing.[63] Petitioners' appeal does not identify any error in the Board's reasoning rejecting this contention, and we agree with that reasoning.[64]

H. Contention 8

> The uprate will result in heightened releases of radionuclides and consequent exposures to plant workers and to the public estimated by Dominion to be 9 per cent [*sic*] but likely in excess of 9 per cent [*sic*] above current levels and such increases will result in corresponding 9 per cent [*sic*] (or more) increases of the risk of harmful health effects. Dominion's application for Millstone 3 uprate makes no provision for new shielding or other techniques to mitigate increased radionuclide levels. Since Millstone first went online in 1970, cancer incidences in the communities surrounding Millstone have become the highest in the state for many types of cancer; the Millstone host communities suffer high incidences of fetal distress, stillbirth, premature birth, genetic defects and childhood cancer. Cancer is widespread among current and former Millstone workers. Under these circumstances, Dominion's application is entirely inadequate to assure that the uprate will not endanger plant

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[59] *Id.* at 33.

[60] *See, e.g., Pa'ina Hawaii,* CLI-08-3, 67 NRC at 168 n.73; *Oconee,* CLI-99-11, 49 NRC at 334.

[61] *See* LBP-08-9, 67 NRC at 443-44.

[62] Petition at 33-34.

[63] *See Oconee,* CLI-99-11, 49 NRC at 336-37.

[64] *See* LBP-08-9, 67 NRC at 444.

workers or the public to an unsafe and unacceptable degree. Dominion's application must be rejected.[65]

Contention 8 does not claim that NRC standards for radiological releases will be exceeded because of the power uprate amendment. Instead, it appears to be Petitioners' view that *any* increase in radiological release may cause a significant public health and safety impact. NRC regulations, however, establish what the agency has found to be adequately protective radiological dose limits, and Petitioners may not use an adjudicatory proceeding to challenge this generic regulatory framework.[66] Much of Contention 8 appears rooted in claims that past radiological releases have caused incidences of cancer in the Millstone facility area, and on appeal Petitioners stress that the facility's ''radiological releases are poisoning the community.''[67] This likewise amounts to a challenge to the adequacy of the NRC's current regulations governing radiological releases to the public. A power uprate amendment adjudication is not the forum to address Petitioners' general concern about NRC's regulatory dose limits or past radiological releases at Millstone.

Contention 8 also claims that Dominion's application has made ''no provision for new shielding or other techniques to mitigate increased radionuclide levels.'' But Petitioners provide no support for the view that any specific mitigation is necessary, nor any challenge to the amendment application's discussions of ''shielding adequacy.''[68] The contention overall lacks support and impermissibly challenges NRC regulations. For reasons noted here and in the Board's decision,[69] Contention 8 is inadmissible.[70]

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[65] *See* Petition at 37-38.

[66] *See, e.g., Millstone,* CLI-01-24, 54 NRC at 364.

[67] Appeal at 19.

[68] *See* LAR, Attachment 5, at 2.10-4 to 2.10-9.

[69] LBP-08-9, 67 NRC at 444-46.

[70] On appeal, Petitioners again impermissibly raise entirely new claims never presented to the Board, including that the proposed uprate amendment will lead to ''unacceptably heightened risks of accident and accident consequences,'' that ''there are no [NRC] limits on noble gases,'' and that Dominion has not been ''required . . . to monitor its strontium-90 releases to the atmosphere from Millstone.'' *See* Appeal at 21. These claims are unacceptably late, and in any event, without more, provide insufficient support for Contention 8. Further, the NRC Staff points to the ''substantial regulatory framework'' that ''governs release limits on radioactive gases and requires calculations or measurements of radioactive releases.'' *See* Staff Brief at 16 n.8 (citing 10 C.F.R. § 20.1302). As noted above, NRC regulations are not subject to challenge in an adjudicatory proceeding.

I. Contention 9

> Dominion's application for a 7+ per cent [*sic*] power generation uprate at Millstone Unit 3 will result in significant new releases of radioactive material to the environment and it will result in discharges of significant volumes of water to the Long Island Sound at heightened temperatures, both of which consequences are inadequately addressed in the application.[71]

Contention 9 claims that the power uprate will result in ''significant adverse environmental impacts which have not been adequately analyzed.''[72] Dominion's Supplemental Environmental Report addresses potential thermal discharge effects, effects on sensitive aquatic species, and other aquatic impacts, as well as radiological environmental effects and offsite dose.[73] Petitioners, however, do not challenge any of these specific analyses, and otherwise provide no support for their claims of significant environmental consequences from the power uprate.

On appeal, Petitioners claim that, contrary to the Board's decision, they did contest the amendment application. Specifically, Petitioners state that they ''did contest Dominion's assertion that the higher temperature of the thermal plume would be inconsequential to the marine habitat.''[74] But as Dominion states, Contention 9 never referenced or challenged any portion of the Supplemental Environmental Report's discussions on impacts of the thermal plume, and otherwise had no support for any claim about impacts to marine life.[75]

Petitioners also claim that they ''did contest Dominion's flat-out-wrong assertion that the increased heat released to the Long Island Sound . . . will be within the limits of Millstone's'' National Pollutant Discharge Elimination System (NPDES) permit. While Contention 9 itself never raised any such claim, in their reply brief before the Board Petitioners stated that the Millstone NPDES permit had expired, that there was no valid permit in effect, and ''that the temperature of the releases will exceed allowable limits of a valid NPDES permit.''[76] In addition to being untimely, Petitioners provided no support for this claim. Nor, as the Board found, is the validity of the NPDES permit within the scope of this license amendment proceeding. Indeed, CCAM notes that it is an ''intervening party''

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[71] Petition at 44.

[72] *Id.*

[73] *See generally* LAR, Attachment 2, Supplemental Environmental Report.

[74] Appeal at 22.

[75] Dominion Brief at 19-20.

[76] *See* Connecticut Coalition Against Millstone and Nancy Burton Reply to Responses of NRC Staff and Dominion Nuclear Connecticut, Inc. to Petition to Intervene and Request for Hearing (Apr. 22, 2008) at 35-36.

to the Connecticut Department of Environmental Protection's Millstone NPDES permit renewal proceedings.[77]

For the reasons the Board provided,[78] and those noted here, Contention 9 is inadmissible.

III. CONCLUSION

Both for the reasons identified in LBP-08-9, and those in this decision, we find CCAM and Nancy Burton's contentions inadmissible. The appeal is *denied.* The Commission *affirms* LBP-08-9.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of August 2008.

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[77] *Id.* at 36 n.33. Petitioners for the first time on appeal also raise the claim that Dominion's application lacked an analysis of ''the prospect that its increased radiological emissions will contaminate the human food supply.'' *See* Appeal at 22. Again, the claim is impermissibly late and lacks foundation. To the extent that Petitioners have any basis for claiming that there are current, ongoing excessive radiological releases from the Millstone facility, Petitioners may seek NRC enforcement action under 10 C.F.R. § 2.206. *See, e.g., Millstone,* CLI-06-4, 63 NRC at 37-38.

[78] *See* LBP-08-9, 67 NRC at 446-48.

Cite as 68 NRC 246 (2008) **CLI-08-18**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

In the Matter of **Docket No. PAPO-00**
(ASLBP No. 04-829-01-PAPO)
(Pre-Application Matters)

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository) **August 13, 2008**

RULES OF PRACTICE: HEARING PROCEDURES

The Commission has authority to issue case-specific orders modifying procedural regulations, including milestone schedules. *National Whistleblower Center v. NRC,* 208 F.3d 256 (D.C. Cir. 2000), *cert. denied,* 531 U.S. 1070 (2001).

MEMORANDUM AND ORDER

On April 28, 2008, the State of Nevada requested that the Commission modify the schedule for the filing of petitions to intervene in any proceeding on the Department of Energy's (DOE) application for authorization to construct a geologic repository at Yucca Mountain, Nevada.[1] We decline to modify the schedule as specifically requested by Nevada. As discussed below, however, we grant Nevada, as well as any other petitioner, an additional thirty (30) days in which to file a petition to intervene, or a petition for status as an

[1] State of Nevada's Motion to the Commission to Establish a Reasonable Schedule for the Filing of Contentions on Yucca Mountain (Apr. 28, 2008) (Nevada Motion).

interested government participant, in any proceeding initiated on the Yucca Mountain application. In addition, we propose further modifications to the schedule currently codified in 10 C.F.R. Part 2, Appendix D.

I. DISCUSSION

A. The Nevada Motion

The Nevada Motion requests an extension of time, from 30 days after publication of a notice of hearing,[2] until 180 days after publication of that notice, to file a request for hearing in any proceeding on a construction authorization application for a geologic repository at Yucca Mountain.[3] Nevada cites three principal bases for its request: first, more time is needed to prepare contentions that will satisfy the Commission's pleading standards;[4] second, the NRC Staff previously indicated to Nevada that potential parties would have 10 months to review relevant materials (6 months to review documents on the Licensing Support Network, 3 months during the docketing period, and 30 days following the notice of hearing);[5] and third, allowing more time to frame contentions actually will expedite the proceeding by permitting Nevada to focus and narrow the issues (including time to meet with DOE and the NRC Staff).[6]

DOE, the NRC Staff, and Nye County filed answers to the Nevada Motion. Both DOE and the NRC Staff oppose any extension.[7] Nye County suggests that

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[2] *See* 10 C.F.R. § 2.309(b)(2).

[3] Shortly thereafter, the Nevada congressional delegation wrote to the Secretary of the Commission, similarly requesting that the Commission provide potential parties to the licensing proceeding 180 days after the date the Staff dockets the application and publishes a notice of hearing to submit petitions and contentions. Letter from the Honorable Harry Reid et al. to Annette L. Vietti-Cook (Apr. 30, 2008) (ADAMS Accession No. ML081220486).

[4] Nevada Motion at 4. Nevada notes that it must review more than 110,000 pages of material comprising the license application and supporting material not already available on the Licensing Support Network (LSN). *Id.*

[5] *Id.* at 5-6, citing the transcript of a May 23, 2001 public meeting to discuss the hearing process for a potential repository at Yucca Mountain (ADAMS Accession No. ML012060483). Subsequent to the filing of the Nevada Motion, we affirmed the Pre-License Application Presiding Officer's (PAPO) denial of Nevada's motion to strike DOE's LSN certification of October 19, 2007. CLI-08-12, 67 NRC 386 (2008).

[6] Nevada Motion at 7.

[7] U.S. Department of Energy Answer Opposing the State of Nevada's Motion to Establish a Schedule for Filing Contentions (May 8, 2008); NRC Staff Response to the State of Nevada's Motion to Establish a Reasonable Schedule for the Filing of Contentions on Yucca Mountain (May 8, 2008).

the 180-day period Nevada requests should begin at the date of license application tender, as opposed to the date the application is docketed.[8]

The current schedule for the adjudicatory proceeding on a construction authorization application for a high-level waste repository is codified in 10 C.F.R. Part 2, Appendix D. The schedule was initially promulgated as a model timeline nearly 20 years ago, as part of a negotiated rulemaking.[9] In 1991, the Commission modified the rules, via notice-and-comment rulemaking, with respect to the schedule.[10] At that time, the Commission amended 10 C.F.R. Part 2, Subpart J, to add 10 C.F.R. § 2.1026 and Appendix D, which codified the model schedule (with minor changes), and added some flexibility for the Presiding Officer to handle special circumstances.[11] Since that time, the Appendix D schedule has not been modified.[12]

Considering these longstanding procedural requirements for a high-level waste repository proceeding, we note the following recent developments. In preparation for submission of its application, DOE made information available on the LSN in October 2007, and, as noted above, its LSN certification has been upheld.[13] On June 3, 2008, DOE tendered a license application seeking authorization to construct a geologic repository at Yucca Mountain.[14] The NRC Staff has not yet accepted the application for review and has not yet docketed it in accordance with 10 C.F.R. § 2.101(e)(3). The Staff has stated that it expects to complete the acceptance review in approximately 90 days; that is, in September 2008.[15]

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[8] Nye County Response to State of Nevada's Motion for Schedule for Filing Contentions (May 3, 2008).

[9] Final Rule: ''Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste,'' 54 Fed. Reg. 14,925 (Apr. 14, 1989).

[10] Final Rule: ''Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository,'' 56 Fed. Reg. 7787 (Feb. 26, 1991).

[11] Section 2.1026(b) and (c) provide that the Presiding Officer may grant extensions of time for individual milestones for the participants' filings, and may delay its own issuances for up to 30 days beyond the date of the milestone set in the hearing schedule.

[12] The Commission had the opportunity to revisit the Appendix D schedule when it revised its rules of practice in 2004, but expressly declined to do so. Final Rule: ''Changes to Adjudicatory Process,'' 69 Fed. Reg. 2182, 2199 (Jan. 14, 2004) (declining to extend the 30-day period for filing requests for hearing and petitions to intervene in a proceeding on a high-level waste repository, ''in view of the ample pre-application document disclosures provided by the LSN'').

[13] A proceeding on a high-level waste application is the only NRC adjudicatory proceeding that specifically provides for pre-application discovery.

[14] Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008).

[15] Information on the Staff's acceptance review is available on the NRC's Web site: http://www.nrc.gov/waste/hlw-disposal/licensing/acceptance-safety/acceptance-review.html (last revised June 12, 2008).

This 90-day review period is consistent with the Staff's statements in 2001, cited in the Nevada Motion. As a practical matter, in addition to its many years of participation in pre-application matters, Nevada already has approximately 120 days (i.e., the 90-day acceptance review period plus the 30-day period for filing petitions in response to the Notice of Hearing), to refine its proposed contentions from the date of NRC's official notice of the availability of the application in the *Federal Register.*[16] In these circumstances, we see no basis for granting Nevada the full 180-day extension of time it seeks.

It is true, however, as we recently acknowledged, that if a proceeding is initiated on the DOE application, it has the potential to be one of the most expansive and complex adjudicatory proceedings in agency history.[17] In addition, the 30-day time limit provided for intervention petitions for a high-level waste repository construction authorization proceeding is half the time accorded participants in nearly all other NRC adjudicatory proceedings, most of which are narrower in scope and less complex than we would anticipate a high-level waste repository proceeding to be.[18] We therefore find a modest extension of time reasonable and, indeed, advisable.[19] Should an adjudicatory proceeding commence on the application, Nevada, as well as any other petitioner in that proceeding, is hereby granted a thirty (30) day extension of time in which to file a petition to intervene and request for hearing, or a petition for status as an interested government participant. This 30-day extension will be reflected in any notice of hearing we publish in connection with DOE's construction authorization application.

B. Proposed Revisions to Other Procedural Milestones

In order to provide equitable, proportional extensions of time to other participants in any proceeding that may be commenced, the Commission proposes to revise additional milestones in 10 C.F.R. Part 2, Appendix D. In particular, the Commission plans to double the existing time permitted to file answers and replies, pursuant to 10 C.F.R. § 2.309(h)(1) and (h)(2), to fifty (50) and fourteen

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[16] In addition, the Presiding Officer retains the flexibilities accorded it by 10 C.F.R. § 2.1026.

[17] CLI-08-14, 67 NRC 402, 405 (2008) (noting the ''voluminous body of information upon which a postulated adjudicatory proceeding would be based''). The Advisory PAPO Board has noted the number of contentions could exceed 650, with the bulk of those submitted by the State of Nevada. Memorandum (Advisory Pre-License Application Presiding Officer Board Request to the Commission for Additional Authority) (Mar. 31, 2008) (unpublished), slip op. at 2 & n.2.

[18] *Compare* 10 C.F.R. § 2.309(b)(3) (providing for 60 days to file intervention petitions and hearing requests in NRC proceedings *other than* those for license transfer requests and a construction authorization application for a high-level waste repository).

[19] The Commission has authority to issue case-specific orders modifying procedural regulations, including milestone schedules. *National Whistleblower Center v. NRC,* 208 F.3d 256 (D.C. Cir. 2000), *cert. denied,* 531 U.S. 1070 (2001).

(14) days, respectively. Any party or potential party who is participating in the ongoing matter before the PAPO Board may provide comments on these proposed extensions of time no later than ten (10) days from the date of this Order.

Finally, the Commission proposes to revise certain Appendix D milestones applicable to the Presiding Officer if a proceeding on DOE's application for a geologic repository commences. In particular, the Commission proposes to extend the period for the First Prehearing Conference from eight (8) to sixteen (16) days after the deadline for filing replies, and to extend the period for issuance of the First Prehearing Conference Order from thirty (30) to sixty (60) days after the First Prehearing Conference.[20] The Commission requests that the Atomic Safety and Licensing Board Panel provide comments on the reasonableness of the current and proposed time frames no later than ten (10) days from the date of this Order.

For the reasons set forth above, we *deny* Nevada's request for a 180-day extension of time but *grant* a 30-day extension of time to Nevada and all other hearing petitioners.

IT IS SO ORDERED.[21]

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
This 13th day of August 2008.

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[20] *See* 10 C.F.R. § 2.1021(a), (d).

[21] Pursuant to 10 C.F.R. § 2.101(e)(3), a docket number will be assigned to DOE's application if and when the Staff determines that the application is acceptable for docketing. As an administrative convenience, this Memorandum and Order will be served on the service lists for the PAPO-00 and PAPO-001 dockets.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC., and ENTERGY NUCLEAR PALISADES, LLC (Palisades Nuclear Plant)	**Docket Nos. 50-255-LT-2 72-7-LT**
ENTERGY NUCLEAR OPERATIONS, INC., and ENTERGY NUCLEAR FITZPATRICK, LLC (James A. FitzPatrick Nuclear Power Plant)	**Docket Nos. 50-333-LT-2 72-12-LT**
ENTERGY NUCLEAR OPERATIONS, INC., and ENTERGY NUCLEAR GENERATION COMPANY (Pilgrim Nuclear Power Station)	**Docket No. 50-293-LT-2**
ENTERGY NUCLEAR OPERATIONS, INC., and ENTERGY NUCLEAR VERMONT YANKEE, LLC (Vermont Yankee Nuclear Power Station)	**Docket Nos. 50-271-LT-2 72-59-LT**
ENTERGY NUCLEAR OPERATIONS, INC., ENTERGY NUCLEAR INDIAN POINT 2, LLC, and ENTERGY NUCLEAR INDIAN POINT 3, LLC (Indian Point, Units 1, 2, and 3)	**Docket Nos. 50-003-LT-2 50-247-LT-2 50-286-LT-2 72-51-LT**

ENTERGY NUCLEAR OPERATIONS, INC., and ENTERGY NUCLEAR PALISADES, LLC (Big Rock Point Plant)

Docket Nos. 50-155-LT-2 72-43-LT-2 (Consolidated[1]) August 22, 2008

LICENSE TRANSFERS

Indirect transfers involve corporate restructuring or reorganizations which leave the licensee itself intact as a corporate entity and therefore involve no application for a new operating license. By contrast, a direct license transfer entails a change to operating and/or possession authority.

LICENSE TRANSFERS

If the Staff approves a license transfer application prior to the Commission completing its adjudication, the application will lack the agency's final approval until and unless the Commission concludes the adjudication in the Applicant's favor. In the latter situation, the Commission's procedural rules leave license transfer applicants who have received Staff approval but are still awaiting the results of a Commission adjudication free to act in reliance on the Staff's order. *See generally* 10 C.F.R. § 2.1327. However, they do so at their peril in the event that the Commission later determines that intervenors have raised valid objections to the license transfer application. In such a case, the Commission may require that the license [transfer approval] be rescinded.

RULES OF PRACTICE: STANDING (GENERALLY)

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its interest may be affected by the proceeding, i.e., it must demonstrate ''standing.'' To make such a demonstration, the petitioner must: (1) identify an interest in the proceeding by (a) alleging a concrete and particularized injury (actual or threatened) that (b) is fairly traceable to, and may be affected by, the challenged action (here, the grant of an application to approve a license transfer), and (c) is likely to be redressed by a favorable decision, and (d) lies arguably within the ''zone of interests'' protected by the governing statute(s)

[1] The Commission's Office of the Secretary consolidated these proceedings under the Pilgrim docket umbrella for E-filing purposes and for administrative convenience. *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), Order (Feb. 28, 2008) at 1 (unpublished), ADAMS Accession No. ML080590689. The Office of the Secretary will continue to handle consolidations on a case-by-case basis.

(here the AEA and the National Environmental Policy Act); (2) specify the facts pertaining to that interest.

RULES OF PRACTICE: STANDING (REPRESENTATIONAL)

Any organization seeking ''representational standing'' (i.e., permission to represent the interests of one or more of its members) must also show that at least one of its members may be affected by the Commission's approval of the transfer (such as by the member's domicile, work, or activities on or near the site), must identify that member by name, and must demonstrate that the member has (preferably by affidavit) authorized the organization to represent him or her and to request a hearing on his or her behalf. The member seeking representation must qualify for standing in his or her own right; the interests that the representative organization seeks to protect must be germane to its own purpose; and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action.

RULES OF PRACTICE: STANDING (REPRESENTATIONAL)

The NRC does not automatically assume that an organization member necessarily considers him- or herself potentially aggrieved by a particular outcome of the proceeding (an essential ingredient of standing). The statement indicating exactly how the member is aggrieved is an essential ingredient of a showing of standing.

RULES OF PRACTICE: APPEAL BOARD

Although the Commission abolished the Atomic Safety and Licensing Appeal Board in 1991, its decisions still carry precedential weight.

RULES OF PRACTICE: STANDING (REPRESENTATIVE)

Were the Commission to accept and consider a belatedly submitted ''representative standing'' affidavit attached to a Reply Brief, the applicant would be deprived of the right to challenge the substantive sufficiency of the affidavit.

RULES OF PRACTICE: PLEADINGS

The Commission seeks, wherever possible, to avoid the delays (such as an additional round of pleadings) caused by a petitioner's ''attempt to backstop elemental deficiencies in its original'' petition to intervene.

RULES OF PRACTICE: STANDING

The ''representational standing'' requirements apply to labor unions.

RULES OF PRACTICE: STANDING (THREATENED INJURY)

Damage to a nuclear power facility's reputation does not constitute a threatened injury to the interests of the Local's members who work at the facility.

RULES OF PRACTICE: DISCRETIONARY INTERVENTION

The Commission may consider a petitioner's request for discretionary intervention only if at least one other petitioner has established standing and has presented at least one admissible contention.

RULES OF PRACTICE: STANDING (PROXIMITY-BASED)

Proximity-based standing differs from traditional standing in that the petitioner claiming it need not make an express showing of harm. Rather, proximity standing rests on the presumption that an accident associated with the nuclear facility could adversely affect the health and safety of people working, living, or regularly engaging in activities offsite but within a certain distance of that facility.

RULES OF PRACTICE: STANDING (PROXIMITY-BASED)

LICENSE TRANSFERS

In ruling on claims of proximity standing in license transfer adjudications, the Commission decides the appropriate radius on a case-by-case basis. The Commission determines the radius beyond which it believes there is no longer an obvious potential for offsite consequences by taking into account the nature of the proposed action and the significance of the radioactive source. The initial question is whether the kind of action at issue, when considered in light of the radioactive sources at the plant, justifies a presumption that the licensing action could plausibly lead to the offsite release of radioactive fission products from the reactors. The burden falls on the petitioner to demonstrate this. If the petitioner fails to show that a particular licensing action raises an *obvious potential for offsite consequences,* then the Commission's standing inquiry reverts to a traditional standing analysis of whether the petitioner has made a specific showing of injury, causation, and redressability.

RULES OF PRACTICE: STANDING (ORGANIZATIONAL)

A petitioner's status as an anti-nuclear advocate and a source of information for its community is insufficient, without more, to qualify it for organizational standing.

RULES OF PRACTICE: STANDING

The role as a ''private attorney general'' is not contemplated under section 189a of the Atomic Energy Act.

MEMORANDUM AND ORDER

Today, we find that no petitioner has demonstrated standing.[2] We therefore deny their petitions to intervene and their associated requests, and we terminate these adjudicatory proceedings.

I. INTRODUCTION

On July 30, 2007, Entergy Nuclear Operations, Inc. (ENO, the operating company for the affected facilities) filed with the Nuclear Regulatory Commission (NRC) an ''Application for Order Approving Indirect Transfer of Control of Licenses'' (Application) for the captioned facilities.[3] ENO filed the Application on behalf of itself and the owners of the captioned facilities. ENO subsequently submitted supplementary supporting information on October 31 and December 5, 2007, and on January 24, March 17, April 22, and May 2, 2008.[4] The license

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[2] Because of this finding, we need not reach the question of whether either group has submitted at least one admissible contention, as required under 10 C.F.R. § 2.309(a).

[3] ''Indirect transfers involve corporate restructuring or reorganizations that leave the licensee itself intact as a corporate entity and therefore involve no application for a new operating license.'' *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 459-60 n.14 (1999). By contrast, a direct license transfer entails a change to operating and/or possession authority. *AmerGen Energy Co., LLC* (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 574 (2005) (''Because the Applicant did not propose to change either operating or possession authority, there is no direct license transfer''). *See also Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 161 (2000) (the ''direct license transfer . . . application . . . seeks authorization for the transfer of both ownership and operation'' of the facility).

[4] The Application and supplements are available at ADAMS Accession Nos. ML072220219 (July 30, 2007), ML073100216 (Oct. 31, 2007), ML072250021 (Dec. 5, 2007), ML080670222 (Jan. 24,

(Continued)

transfer applications were approved on July 28, 2008.[5] The ultimate goal of the transfers is to enable Entergy Corporation (the parent company acting through subsidiaries, i.e., ENO and all other captioned companies) to place its wholesale business segment under a new holding company and to distribute the shares of that company directly to the shareholders of Entergy Corporation.[6] Under the plan for restructuring set forth in the application, the entities currently licensed to own and operate the facilities would remain the same, and the facilities would likewise experience no physical or operational changes.

On January 16, 2008, the Commission published in the *Federal Register* a series of ''Notice[s] of Consideration of Approval of Application Regarding Proposed Corporate Restructuring and Opportunity for Hearing.''[7]

On February 5, 2008, in response to these *Federal Register* notices, two groups of petitioners filed timely petitions to intervene, requests for evidentiary hearing, contentions, discovery requests, requests for issuance of protective orders, and requests for the opportunity to supplement contentions related to any information produced under the protective orders. Those petitioners are (i) the Union Locals 369 and 590 of the Utility Workers of America, AFL-CIO (UWUA Locals, or Locals) and (ii) Westchester Citizen's Awareness Network (WestCAN), Rockland County Conservation Association (RCCA), Promoting Health and Sustainable Energy (PHASE), Sierra Club–North East Chapter (Sierra Club), and State Representative Richard Brodsky (collectively ''Petitioners'

2008), ML080810285 (March 17, 2008), ML081230539 (April 22, 2008), and ML081420500 (May 2, 2008).

[5] In the Matter of: Entergy Nuclear Operations, Inc.; Entergy Nuclear Generation Company (Pilgrim Nuclear Power Station); Order Approving Indirect Transfer of Facility Operating License, 73 Fed. Reg. 45,083 (Aug. 1, 2008); In the Matter of Entergy Nuclear Operations, Inc.; Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station); Order Approving Indirect Transfer of Facility Operating License, 73 Fed. Reg. 45,085 (Aug. 1, 2008); In the Matter of Entergy Nuclear Operations, Inc.; Entergy Nuclear Palisades, LLC (Big Rock Point); Order Approving Indirect Transfer of Facility Operating License, 73 Fed. Reg. 45,086 (Aug. 1, 2008); In the Matter of Entergy Nuclear Operations, Inc.; Entergy Nuclear FitzPatrick, LLC (James A. FitzPatrick Nuclear Power Plant); Order Approving Indirect Transfer of Facility Operating License, 73 Fed. Reg. 45,088 (Aug. 1, 2008); In the Matter of Entergy Nuclear Operations, Inc.; Entergy Nuclear Palisades, LLC (Palisades Nuclear Plant); Order Approving Indirect Transfer of Facility Operating License, 73 Fed. Reg. 45,252 (Aug. 4, 2008); In the Matter of Entergy Nuclear Operations, Inc.; Entergy Nuclear Indian Point 2, LLC (Indian Point Nuclear Generating Unit No. 2); Entergy Nuclear Indian Point 3, LLC (Indian Point Nuclear Generating Unit No. 3); Order Approving Indirect Transfer of Facility Operating Licenses, 73 Fed. Reg. 45,253 (Aug. 4, 2008); In the Matter of Entergy Nuclear Operations, Inc.; Entergy Nuclear Indian Point 2, LLC (Indian Point Nuclear Generating Unit No. 1); Order Approving Indirect Transfer of Facility Operating License, 73 Fed. Reg. 45,255 (Aug. 4, 2008).

[6] ENO's December 5, 2007 Submission at 2.

[7] 73 Fed. Reg. 2948-58 (Jan. 16, 2008).

Group'').[8] Additionally, Mr. Tom Gurdziel of Oswego, NY, submitted two sets of comments on January 21, 2008, as permitted by our procedural rules.[9]

The UWUA Locals represent workers at the Pilgrim facility and express concern that the corporate reorganization may adversely affect Pilgrim and its employees. In their petition, the Locals complained that ENO has not explained either why it is abandoning its earlier (July 30th) restructuring plan or why the new (Dec. 5th) structure yields a ''better outcome.''[10] Following the Locals' review of confidential material pursuant to a protective order, they filed amended contentions expressing in more detail their concerns about the effects of the reorganization.

Petitioners' Group is concerned primarily that the restructuring could adversely affect the ''fiscal responsibilities and liability'' of the three Indian Point units.[11]

ENO filed answers opposing both Petitions to Intervene.[12] The Locals filed

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[8] The two petitions to intervene are not rendered moot by the NRC Staff's recent order approving ENO's license transfer application. As we explained in *Vermont Yankee*:

> if the Staff approves the [license transfer] application prior to the Commission completing its adjudication, the application will lack the agency's final approval until and unless the Commission concludes the adjudication in the Applicant's favor. In the latter situation, our procedural rules (10 C.F.R. Part 2, Subpart M) leave license transfer applicants who have received Staff approval but are still awaiting the results of a Commission adjudication free to act in reliance on the Staff's order. *See generally* 10 C.F.R. § 2.1327. However, they do so at their peril in the event that the Commission later determines that intervenors have raised valid objections to the license transfer application. In such a case, the Commission may require that the license [transfer approval] be rescinded.

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 83 (2000) (which we clarify with the addition of the bracketed language). *See also Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 286 n.1 (2000), & CLI-01-14, 53 NRC 488, 508 (2001).

[9] 10 C.F.R. § 2.1305.

[10] Petition of Locals 369 and 590, Utility Workers Union of America, AFL-CIO for Leave to Intervene; Request for Initiation of Hearing Procedures, Preliminary Statement of Contentions, Request for Issuance of Protective Order(s) and Related Production of Data, at 3-4 (Feb. 5, 2008) (UWUA Petition).

[11] Petition of Westchester Citizen's Awareness Network (WestCAN), Rockland County Conservation Association (RCCA), Promoting Health and Sustainable Energy (PHASE), Sierra Club–North East Chapter (Sierra Club) and Richard Brodsky (Brodsky), at 2 (Feb. 5, 2008) (Petition of Petitioners' Group).

[12] Answer of Entergy Nuclear Operations, Inc. Opposing WestCAN, et al. Petition for Leave to Intervene and Request for Hearing Concerning Indirect Transfer of Control of Licenses (Mar. 31, 2008); Answer of Energy Nuclear Operations, Inc. Opposing Petition for Leave to Intervene and Request for Hearing of Locals 369 and 590, Utility Workers Union of America, AFL-CIO (Apr. 8, 2008).

a reply to ENO's answer,[13] but Petitioners' Group did not. The NRC Staff has chosen not to participate as a party. On June 12, 2008, UWUA Local 369 voluntarily withdrew its petition and related requests for relief; therefore, today's decision considers the UWUA Petition only as it relates to UWUA Local 590.[14]

II. DISCUSSION

A. Standing

1. Standards for Standing

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its ''interest may be affected by the proceeding,'' i.e., it must demonstrate ''standing.''[15] To make such a demonstration, the petitioner must:

> (1) identify an interest in the proceeding by
> (a) alleging a concrete and particularized injury (actual or threatened) that
> (b) is fairly traceable to, and may be affected by, the challenged action ([here,] the grant of an application to approve a license transfer), and
> (c) is likely to be redressed by a favorable decision, and
> (d) lies arguably within the ''zone of interests'' protected by the governing statute(s) [here the AEA and the National Environmental Policy Act].
> (2) specify the facts pertaining to that interest.[16]

Moreover, any organization seeking ''representational standing'' (i.e., permission to represent the interests of one or more of its members) must also show that at least one of its members may be affected by the Commission's approval of the transfer (such as by the member's domicile, work, or activities on or near the site), must identify that member by name, and must demonstrate that the member has (preferably by affidavit) authorized the organization to represent him or her and to

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[13] Reply of Locals 369 and 590, Utility Workers Union of America, AFL-CIO to Answer of Entergy Nuclear Operations, Inc. Opposing Petitions for Leave to Intervene, Request for Hearing, and Related Requests for Relief (Apr. 15, 2008) (UWUA Reply).

[14] Notice of Withdrawal of Petition to Intervene of Local 369, Utility Workers Union of America, AFL-CIO (June 12, 2008).

[15] *See* Atomic Energy Act of 1954, as amended (AEA), § 189a, 42 U.S.C. § 2239(a).

[16] *See Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 408-09, *reconsideration denied,* CLI-07-22, 65 NRC 525 (2007); *FitzPatrick,* CLI-00-22, 52 NRC at 293; *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 & n.5 (1999) (and cited authority); 10 C.F.R. § 2.309(d)(1).

request a hearing on his or her behalf.[17] The member seeking representation must qualify for standing in his or her own right; the interests that the representative organization seeks to protect must be germane to its own purpose; and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action.[18]

2. Standing of UWUA Local 590

Local 590 asserts, in support of its claims of standing, that an approval of the indirect license transfer could adversely affect its members and the citizens of the community surrounding the Pilgrim facility — a community that includes those same workers. Local 590 directs our attention to its ''substantial interest in the safe operation and good financial standing'' of Pilgrim. According to the Local, the ''proposed transfer may have a negative impact on the safe operations of [Pilgrim], which would have a corresponding and adverse impact upon the surrounding community.'' The Local also claims that a risk to the reputation of Pilgrim would also constitute a threatened injury to its members' interests.[19] Finally, the Local seeks standing to challenge the license transfer application insofar as it applies to facilities other than Pilgrim.

a. Representational Standing

Local 590 claims representational standing for its members at the Pilgrim facility. Yet the Local's claim suffers from multiple flaws.

(i) INSUFFICIENT ASSERTIONS IN AFFIDAVIT

Local 590 recognized that, in claiming representational standing, it was required under Commission case law to ''demonstrat[e] that [an] individual member has standing to participate, and has authorized the organization to represent his or her interests.''[20] To satisfy this requirement, the Local appended to its reply an ''authorization affidavit'' from Mr. Murray E. Williams, a member of Local

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[17] *See Palisades,* CLI-07-18, 65 NRC at 409; *FitzPatrick,* CLI-00-22, 52 NRC at 293; *Vermont Yankee,* CLI-00-20, 52 NRC at 163; *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000), and cited authority.

[18] *See, e.g., Palisades,* CLI-07-18, 65 NRC at 409; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999), & CLI-98-13, 48 NRC 26, 30-31 (1998), *petition for review held in abeyance, Ohngo Gaudadeh Devia v. NRC,* 492 F.3d 421 (D.C. Cir. 2007).

[19] UWUA Petition at 4, 6-7.

[20] *Id.* at 8, quoting *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, GA), CLI-95-12, 42 NRC 111, 115 (1995).

590.[21] The affidavit indicates that Mr. Williams currently is employed full-time as an engineer at the Pilgrim facility, intends to continue working there indefinitely, lives within 10 miles of the facility, engages in activities that take him within a 5-mile radius of Pilgrim approximately 10 hours per week, and authorizes Local 590 to represent his interests in this proceeding.[22]

The affidavit is insufficient to justify a finding of proximity-based standing. As our now-defunct Atomic Safety and Licensing Appeal Board[23] correctly stated in *Allens Creek,* this agency cannot automatically assume that an organization member necessarily considers him- or herself ''potentially aggrieved by [a particular] outcome of the proceeding (an essential ingredient of standing).''[24] The Williams Affidavit does not contain this ''essential ingredient'' — i.e., precisely how the affiant is aggrieved — whether based on his employment, residence, or activities.

This omission is not merely a matter of failing to cross a ''t'' or dot an ''i.'' Our rules require those seeking NRC hearings to show ''the nature and extent'' of their interest and the ''possible effect'' of the challenged NRC licensing action on that interest.[25] Local 590 seems to assume that living or working near or around a reactor justifies standing in and of itself — even in an indirect license transfer case. It does not. Absent an ''obvious'' potential for harm, it is a petitioner's burden to show how harm will or may occur.[26]

The Williams Affidavit does not meet this burden. In an indirect license transfer case like this one, the plant continues to operate much as before: there is no change in the operator, no change in the direct owner, and no change in the physical plant. In other words, the indirect transfer creates no obvious source of actual or potential harm. It is largely a bookkeeping transaction. The Williams Affidavit, which rests on proximity alone, simply does not explain how

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[21] *See* UWUA Reply, Attachment 1, Affidavit of Murray E. Williams (Apr. 15, 2008) (Williams Affidavit).

[22] Mr. Williams also authorized Local 369 to represent his interests here. We need not consider whether Local 369 may represent the interests of an individual that is not a member, given that Local 369 has withdrawn from this proceeding.

[23] Although the Commission abolished the Atomic Safety and Licensing Appeal Board in 1991, its decisions still carry precedential weight. *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 n.2 (1994), and cited authority.

[24] *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393 (1979).

[25] 10 C.F.R. § 2.309(d).

[26] *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-83 (2005).

the indirect license transfer at issue here will harm Mr. Williams. The affidavit does not show standing.[27]

(ii) UNTIMELY SUBMISSION OF AFFIDAVIT

Even were we to overlook the Williams Affidavit's substantive deficiency described above, we would still reject it as untimely filed.

Local 590 submitted no authorization affidavits with its petition to intervene. After ENO's answer drew the Local's attention to this flaw, it sought to correct it by appending an authorization affidavit to its reply brief. But for the reasons set forth below, our acceptance and consideration of such belatedly submitted evidence regarding standing would deprive ENO of the opportunity to challenge the substantive sufficiency of the affidavit[28] — an opportunity ENO could have exercised had Local 590 submitted a timely affidavit with its petition to intervene. Our regulations provide for only three pleadings that can be filed ''as of right'' regarding standing (and admissibility of contentions).[29] The reply brief, through which the Williams Affidavit was filed, is the *final* of these three. Hence, were we to consider the affidavit, ENO would have no right under our regulations to challenge its adequacy.[30]

We faced a somewhat similar situation last year in the *Palisades* license transfer adjudication, where a petitioner sought to submit authorization affidavits in its petition for reconsideration of our final decision. We rejected the eleventh-hour submission on the ground (among others) that it

> is not acceptable in NRC practice for a petitioner to claim standing based on vague assertions, and when that fails, to attempt to repair the defective pleading with fresh details offered for the first time in a petition for reconsideration.[31]

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[27] *See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188-97 (1999), *petition for review denied sub nom. Dienenthal v. NRC,* 203 F.3d 52 (Table), 2000 WL 158835 (D.C. Cir. 2000) (petitioners claiming standing have the burden of alleging in their pleadings how they may be harmed by a licensing action without any obvious radiological consequences).

[28] ENO has, by filing a Motion to Strike (Apr. 25, 2008), lodged a *procedural* challenge as to the affidavit's timeliness.

[29] 10 C.F.R. § 2.309(h).

[30] *See generally Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (''Allowing new claims in a reply . . . would unfairly deprive other participants of an opportunity to rebut the new claims'' supportive of contentions).

[31] *Palisades,* CLI-07-22, 65 NRC at 527-28.

The same rationale strikes us as equally applicable to authorization affidavits filed with replies, as here.[32]

Consistent with our responsibilities to protect public health and safety and to conduct fair adjudications,[33] we endeavor to resolve those adjudications promptly.[34] To this end, we seek wherever possible to avoid the delays (such as an additional round of pleadings) caused by a petitioner's ''attempt to backstop elemental deficiencies in its original'' petition to intervene.[35] Our observation in *Louisiana Energy Services* (a non-license transfer case) applies equally to license transfer adjudications:

> As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards . . . [is] paramount. There simply would be ''no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements'' and add new bases or new issues that ''simply did not occur to [them] at the outset.''[36]

Finally, to the extent that certain of our past Memoranda and Orders might be read to imply that authorization affidavits may be filed with a reply,[37] we disavow such an interpretation.

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[32] Along similar lines, we have addressed the permissible parameters of a reply outside the standing context. For instance, in *Louisiana Energy Services,* we indicated that petitioners may not use replies as a vehicle to raise new arguments or claims not found in the original contention or be used to cure an otherwise deficient contention. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25, *reconsideration denied,* CLI-04-35, 60 NRC 619 (2004). Likewise, in the *Palisades* license renewal proceeding, we held that:

> Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. . . . [I]f the contention as originally pled did not cite adequate documentary support, a petitioner cannot remediate the deficiency by introducing in the reply documents that were available to it during the time frame for initially filing contentions.

Palisades, CLI-06-17, 63 NRC at 732. *See generally* Final Rule: ''Changes to the Adjudicatory Process,'' 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004) (a reply must be ''narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer'').

[33] *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 24 (1998).

[34] *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 30 (2003); Final Rule: ''Streamlined Hearing Process for NRC Approval of License Transfers,'' 63 Fed. Reg. 66,721, 66,721-22, 66,729 (Dec. 3, 1998).

[35] *Louisiana Energy Services, LP* (National Enrichment Facility), 2004 WL 1505412 (N.R.C.) n.2 (Licensing Board June 1, 2004) (referring to a petitioner's attempt to use a reply to supplement contentions in the petition to intervene).

[36] CLI-04-25, 60 NRC at 225 (quoting *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003)).

[37] *Cf. Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003) (''even

(Continued)

(iii) APPLICABILITY OF ''REPRESENTATIONAL STANDING'' CRITERIA TO UNIONS

The Local also asserts in its reply that unions, by their very nature, are entitled to represent their members in our proceedings (apparently regardless of any failure to satisfy our proximity-based standing requirements).[38] This argument does not withstand serious scrutiny.

We have never addressed *directly* the issue whether unions are, by their nature, exempt from our ''representational standing'' criteria. But both we and one of our Licensing Boards have done so *by implication.* In *FitzPatrick* (a license transfer case), we found that a labor union had satisfied the requirements for representational standing. In so finding, we implied that those requirements do apply to unions.[39] Similarly, the Licensing Board in an early *Palisades* proceeding applied to a union the criteria for representational standing.[40]

Likewise, a number of federal courts have implied that unions are subject to those criteria. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has twice recognized the need to confirm that a union actually has authority to represent the interests of the individual whom the union purports to represent. Most recently, in *International Brotherhood of Teamsters v. Transportation Security Admin.,* the court denied representational standing to a union, in part because it had submitted no proof that the employee it claimed to represent was in fact a union member at the time the case commenced.[41]

Earlier, in *National Maritime Union v. Commander, Military Sealift Command,*[42] the same court considered whether to apply to certain unions the federal courts' own test for representational standing, i.e., whether (i) their members individually would have standing to bring the same claims, (ii) the interests

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after both Fansteel and the NRC Staff pointed out the lack of specificity in Oklahoma's petition [to intervene], Oklahoma made no effort to elaborate or explain its concerns in a Reply Brief''); *Oyster Creek,* CLI-00-6, 51 NRC at 203-04 (''When the [license] transfer Applicants' answer pointed out these defects [immateriality or conclusory presentation], NIRS filed no reply, although Subpart M authorized it to do so''); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 132 (2000) (where we noted the lack of specificity and documentation in a petition for review and then observed, with disapproval, that ''[p]etitioners also did not take advantage of our rule . . . permitting them to reply to the transfer applicants' opposition to standing'').

[38] UWUA Reply at 2 n.1.

[39] *FitzPatrick,* CLI-00-22, 52 NRC at 294 (concerning Nuclear Generation Employees Association).

[40] *Consumers Power Co.* (Palisades Nuclear Plant), LBP-81-26, 14 NRC 247, 253-55 (1981), *rev'd on other grounds,* ALAB-670, 15 NRC 493 (1982). Licensing Board decisions, however, carry no precedential weight. *Aharon Ben-Haim,* CLI-99-14, 49 NRC 361, 364 (1999); *Sequoyah Fuels Corp.,* CLI-95-2, 41 NRC 179, 190 (1995).

[41] *International Brotherhood of Teamsters v. Transportation Security Administration,* 429 F.3d 1130, 1134-35 & n.4 (D.C. Cir. 2005).

[42] 824 F.2d 1228 (D.C. Cir. 1987).

the unions protect by bringing the claims are germane to the unions' purposes, and (iii) neither the claim nor the relief sought requires individual members to participate in the litigation.[43] The court could have determined that the unions were *per se* representatives of their members and therefore entitled to qualify for representational standing. But the court did not do so.

Several United States District Courts have taken the same approach as the D.C. Circuit.[44] Moreover, the United States Supreme Court and other federal courts have applied to unions this same three-pronged test, *supra,* for what they call ''associational standing''[45] — a subcategory of representational standing.[46]

Although this test for representational standing does not contain our own ''authorization'' requirement, we believe that the principle underlying those courts' rulings is equally applicable here — that not even *inherently* representative organizations qualify for automatic standing, but that they must instead satisfy certain requirements before being permitted to represent others.[47] This principle is also consistent with our own jurisprudence regarding the standing of public interest groups — who also, in significant part, exist to represent the interests of their members.[48]

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[43] *Id.* at 1231.

[44] *See Construction & General Laborers' Union No. 230 v. City of Hartford,* 153 F. Supp. 2d 156, 163 (D. Conn. 2001); *Cohen v. Rice,* 800 F. Supp. 999, 1003 n.2 (D. Me. 1992); *National Treasury Employees Union v. Seidman,* 786 F. Supp. 1041, 1045 (D.D.C. 1992).

[45] *See, e.g., Automobile Workers v. Brock,* 477 U.S. 274, 282 (1986), quoting *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343 (1977). *See also United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 552 (1996).

[46] *See Brown Group,* 517 U.S. at 557 (''the notion of associational standing is only one strand'' of the doctrine of representational standing).

[47] The unspoken reason underlying our own and the courts' refusal to grant automatic standing to unions may lie in the fact that unions are formed to represent their members in collective bargaining and other employment-related negotiations, not in administrative or judicial litigation. *See, e.g.,* 2 U.S.C. § 441b(b)(1):

> For the purposes of this section the term ''labor organization'' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

See also Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 723 (1965) (opinion of Goldberg, J., concurring in part and dissenting in part) (''The very purpose and effect of a labor union is to limit the power of an employer to use competition among workingmen to drive down wage rates and enforce substandard conditions of employment'').

[48] *See, e.g., Palisades,* CLI-07-18, 65 NRC at 409-10, *reconsideration denied,* CLI-07-22, 65 NRC 525, 527-28 (2007) (applying standards for representational standing to two public interest groups — Michigan Environmental Council and the Public Interest Research Group in Michigan); *Consumers*

(Continued)

Finally, the fact that the test above for representational or associational standing omits our additional requirement of written authorization does not undermine our own right to impose that requirement. Although we generally follow federal practice when addressing issues of standing,[49] we are not bound to do so.[50] Federal courts have long recognized the right of agencies to tailor their own standing requirements to fit their specific needs.[51] As Judge (later Chief Justice) Burger stated:

> The [Federal Communications] Commission should be accorded broad discretion in establishing and applying rules for . . . public participation, including rules for determining which community representatives are to be allowed to participate. . . .[52]

(iv) REMAINING FLAWS

Local 590's arguments on standing fail for two final reasons. First, the Local's assertion of threatened injury — that the ''proposed transfer may have a negative impact on the safe operations of [Pilgrim]'' — is both cursory and factually unsupported.[53]

Energy Co. (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, *reconsideration denied,* CLI-07-21, 65 NRC 519 (2007) (applying the same to two public interest groups — Don't Waste Michigan and Nuclear Information and Resource Service); *FitzPatrick,* CLI-00-22, 52 NRC at 293-94 (applying the same to Citizens Awareness Network).

The federal courts likewise apply the same standing criteria to unions as they do to public interest groups, trade associations, and other groups. *See, e.g., Brock, supra* (labor union); *Hunt, supra* (a state agency acting as a *de facto* trade association by representing its regulated entities; also *dictum* regarding bar associations); *United States v. AVX Corp.,* 962 F.2d 108, *passim* (1st Cir. 1992) (an environmental organization); *Church of Scientology v. Cazares,* 638 F.2d 1272, 1276-80 (5th Cir. 1981) (a church); *Associated General Contractors of North Dakota v. Otter Tail Power Co.,* 611 F.2d 684, 688-90 (8th Cir. 1079) (a trade association).

[49] The Commission has long looked for guidance to judicial concepts of standing. *See, e.g., USEC Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311 (2005), and cited authority.

[50] *Envirocare of Utah, Inc. v. NRC,* 193 F.3d 72, *passim* (D.C. Cir. 1999). *See also Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976) (''Standing requirements in the federal courts need not be the exclusive model for those applicable to administrative proceedings'').

[51] *See Pebble Springs,* CLI-76-27, 4 NRC at 614-15.

[52] *United Church of Christ v. Federal Communications Commission,* 359 F.2d 994, 1005-06 (D.C. Cir. 1966).

[53] The Commission, in its license transfer jurisprudence, has repeatedly stated that it will not accept cursory arguments regarding standing. *See, e.g., FirstEnergy Nuclear Operating Co.* (Beaver Valley Power Station, Units 1 and 2; Davis-Besse Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-06-2, 63 NRC 9, 16 (2006); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 337 (2002); *Millstone,* CLI-00-18, 52 NRC at 132-33.

Second, damage to Pilgrim's reputation does not constitute a threatened injury to the interests of the Local's members. The Local's argument contravenes Commission precedent. In *North Anna,* the Appeal Board correctly ruled:

> [Petitioner's] asserted ''concern'' for the safety of the facility stems entirely from its interest in protecting its business reputation and avoiding possible damage claims. But we have been pointed to nothing in the terms or legislative history of the Atomic Energy Act which might provide even a wobbly underpinning for a suggestion that the statutory health and safety provisions had — even as a secondary purpose — the furtherance of an interest of that character. Nor do we perceive any basis for presuming the existence of such a legislative design.[54]
>
> * * * *
>
> [T]here is no relationship at all between the legislative purpose underlying the safety provisions of the Atomic Energy Act and [Petitioner's] interest in protecting its reputation and avoiding damage suits.[55]

For all the reasons stated above, we conclude that Local 590 is not entitled to claim representational standing on behalf of its members.[56]

b. Organizational Standing

In addition to claiming representational standing, Local 590 also claims standing on its own behalf regarding the Pilgrim facility.[57] It argues that, as a representative of many Pilgrim employees, Local 590 has an organizational interest in protecting its members' safety, i.e., that ''[its] representational standing . . . falls within [its] organizational purposes.''[58] This is merely the Local's ''representational standing'' argument dressed up in different clothes. We reject it on the same grounds as set forth above.

Reraising another of its arguments regarding representational standing, Local 590 claims that a risk to the reputation of Pilgrim would qualify as a threatened injury to the Local's own organizational interests.[59] We likewise reject that argument on the same grounds as set forth above.

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[54] *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-06 (1976).

[55] *Id.,* ALAB-342, 4 NRC at 107.

[56] For the same reasons, we conclude that Local 590 lacks representational standing on behalf of the community.

[57] UWUA Petition at 4, 7.

[58] *Id.* at 8.

[59] *Id.* at 7.

c. Claim of Standing in Proceedings not Involving Pilgrim

Local 590 claims standing to participate in not only the Pilgrim license transfer proceeding but also the parallel proceedings involving the indirect transfers of the licenses for the Palisades, FitzPatrick, Vermont Yankee, Indian Point, and Big Rock Point facilities. The Local explains that it seeks such standing ''out of an abundance of caution and because [it] do[es] not know how the Commission's review processes will proceed.''[60] Yet the Local presents no reasons, other than those already proffered regarding the Pilgrim facility, as to why it qualifies for standing in these other five proceedings. We believe that the reasons set forth above for denying the Local's claim of standing apply in even stronger terms to its similar claim regarding these other five facilities. This conclusion is consistent with our finding in *Florida Power & Light Co.,* where we concluded that a union in one facility lacked standing to participate in seven other interrelated license transfer proceedings — given (as here) that the union did not represent employees at the other facilities.[61]

d. Discretionary Intervention

Local 590 argues that, even if we find a lack of standing, we should nevertheless grant it discretionary intervention based upon its ''unique perspective and unique experiences,'' which will allow it to ''assist in developing a sound record.''[62] Our regulations provide that we ''may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held.''[63] Because we find today that no petitioner has demonstrated standing, these prerequisites are not present in this proceeding. We therefore deny the Local's request for discretionary intervention.[64]

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[60] *Id.* at 4-5 n.5.

[61] *Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, *et al.*), CLI-06-21, 64 NRC 30, 34-35 (2006).

[62] UWUA Petition at 8, quoting 10 C.F.R. § 2.309(e)(1)(i).

[63] 10 C.F.R. § 2.309(e).

[64] Moreover, the Local's justification for discretionary standing is merely a cursory paraphrase of our own regulatory litmus test for discretionary intervention. *See* UWUA Petition at 8-9, citing 10 C.F.R. § 2.309(e)(1)(i)-(iii), (e)(2), & (e)(2)(iii). The Local provides no supporting details. As we observed in note 52 above, we do not consider cursory arguments regarding standing.

3. Standing of the Members of Petitioners' Group

a. Mr. Richard Brodsky

The Petitioners' Group presents no arguments or affidavits supporting Mr. Brodsky's standing. We therefore find that he has not met his burden under 10 C.F.R. § 2.309(d) to demonstrate standing.

b. Representational Standing

As noted above, an organization seeking representational standing must provide proof that one of its members has actually authorized the organization to represent his or her interests in this proceeding. None of the four organizations comprising the remainder of the Petitioners' Group has done so. Therefore, none has demonstrated representational standing.

Moreover, all organizational members of the Petitioners' Group except Sierra Club base their claims of representational standing upon their own members' proximity to the Indian Point facility[65] despite the fact that their specified proximities fall *far* outside any that we have ruled would justify standing in indirect (or even direct) license transfer adjudications. We explained in the *Peach Bottom* decision how we consider proximity-based standing in license transfer cases:

> In ruling on claims of proximity standing, we decide the appropriate radius on a case-by-case basis. We determine the radius beyond which we believe there is no longer an obvious potential for offsite consequences by taking into account the nature of the proposed action and the significance of the radioactive source.
>
> The initial question we need to address is whether the kind of action at issue, when considered in light of the radioactive sources at the plant, justifies a presumption that the licensing action could plausibly lead to the offsite release of radioactive fission products from the reactors. The burden falls on the petitioner to demonstrate this. If the petitioner fails to show that a particular licensing action raises an *obvious potential for offsite consequences,* then our standing inquiry reverts to a traditional

[65] In *Three Mile Island,* we offered the following description of the basis for ''proximity-based standing'':

> [It] differs from ''traditional standing'' in that the petitioner claiming it need not make an express showing of harm. Rather, ''proximity standing'' rests on the presumption that an accident associated with the nuclear facility could adversely affect the health and safety of people working, living, or regularly engaging in activities offsite but within a certain distance of that facility.

Three Mile Island, CLI-05-25, 62 NRC at 574-75.

standing analysis of whether the petitioner has made a specific showing of injury, causation, and redressability.[66]

ENO's proposed license transfer is an *indirect* one in that it does not involve transfer of either ownership or operating rights to the subject facilities.[67] Nor does it entail any changes in the facilities themselves or in their operation. Given these facts, we can see no ''obvious potential for offsite consequences'' stemming from this *indirect* license transfer. And without such potential consequences, proximity-based standing cannot be demonstrated. Indeed, to date, we have never granted proximity-based standing to a petitioner in an indirect license transfer adjudication.[68]

Petitioners' Group offers no reason for us to depart from this line of adjudicatory precedent. Nor can we think of any.

c. Organizational Standing

WestCAN claims organizational standing based on its assertions that it is an advocate for a nuclear-free Northeast, that it keeps the public informed of events at Indian Point, and that its own office is only 3 miles from the Indian Point facility and also within the ''peak fatality zone'' or ''Plume Exposure Pathway.''[69] As noted above, we see no obvious potential for offsite consequences

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[66] *Peach Bottom,* CLI-05-26, 62 NRC at 580-81 (emphasis added; footnotes, quotation marks, and ellipses omitted).

[67] *See, e.g.,* 73 Fed. Reg. 2951, 2951-52 (Jan. 16, 2008) (Pilgrim).

[68] In the *Millstone* indirect license transfer adjudication (involving no change in the facility, its operation, licensees, personnel, or financing), we concluded that petitioners living within 5-10 miles of the plant *did not qualify* for proximity-based standing. *Millstone,* CLI-00-18, 52 NRC 129. Similarly, in the *Three Mile Island* indirect license transfer case (involving no change in operating or possession authority), we denied proximity-based standing to a petitioner living and working 12 miles from the facility. *Three Mile Island,* CLI-05-25, 62 NRC at 574-76. If the petitioners in those cases do not qualify for proximity-based standing in indirect license transfer cases, then *a fortiori,* RCCA (who claims to have members within a 20-mile radius), PHASE (30-mile radius) and WestCAN (50-mile radius) do not qualify in this indirect licensing case. *See* Petition of Petitioners' Group at 4. *Cf. Peach Bottom,* CLI-05-26, 62 NRC at 580-83 (a direct license transfer adjudication in which we denied proximity-based standing to a petitioner who lived and worked 40 miles from the Oyster Creek facility).

Moreover, with the exception of one case which is quite different from ours, even the petitioners in *direct* license transfer cases where we found proximity-based standing lived within a much smaller radius of their plants — i.e., 6 to 6 1/2 miles (*Vermont Yankee,* CLI-00-20, 52 NRC at 163-64), 5 1/2 miles (*FitzPatrick,* CLI-00-22, 52 NRC at 293; *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 133 (2001)), and 1 to 2 miles (*Oyster Creek,* CLI-00-6, 51 NRC 193) — than the members of RCCA, PHASE, and WestCAN live, work, or engage in recreation.

[69] Petition of Petitioners' Group at 3.

stemming from this indirect license transfer. We therefore conclude that the 3-mile distance between WestCAN's office and the Indian Point facility does not qualify WestCAN for organizational standing here.

Nor does WestCAN's status as an anti-nuclear advocate and a source of information for its community qualify it for organizational standing. Mere involvement in such issues is insufficient to merit intervenor status. Rather, a petitioner must show some risk of ''discrete institutional injury *to itself,* other than the general environmental and policy interests of the sort we repeatedly have found insufficient for organizational standing.''[70] This kind of role as a ''private attorney general'' is not contemplated under section 189a of the Atomic Energy Act.[71]

The remaining three organizational members of the Petitioners' Group proffer similar arguments to those of WestCAN. RCCA claims organizational standing on its own behalf because it has been active since 1936 in environmental issues and because its central office is within 9 miles of the facility and also within the Plume Exposure Pathway.[72] PHASE claims standing on its own behalf because of its advocacy for sustainable energy as a means to protect both the environment and the public health and safety, and also because its central office is within 11 miles of the Indian Point facility and also within the Plume Exposure Pathway.[73] And Sierra Club claims standing in its own right based on its longstanding involvement in environmental conservation, in New York State and elsewhere in the country, and also based on the assertion that one of its regional offices lies within the ''peak ingestion zone.''[74] We reject all these arguments on the same grounds as we rejected those of WestCAN.

d. Petitioners' Group's Request for Discretionary Intervention

All members of the Petitioners' Group request discretionary standing under 10 C.F.R. § 2.309(e), but they do not address the six factors set forth in that regulation.[75] Nor is there a hearing in which the Petitioners' Group could participate.[76] We therefore deny their request for discretionary intervention.

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[70] *Palisades,* CLI-07-18, 65 NRC at 411-12, citing *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001) (emphasis added).

[71] *Palisades,* CLI-07-22, 65 NRC at 526, 529, citing 42 U.S.C. § 2239(a); *Palisades,* CLI-07-18, 65 NRC at 411-12, citing same.

[72] Petition of Petitioners' Group at 4.

[73] *Id.*

[74] *Id.* at 4-5.

[75] *Id.* at 6.

[76] *See* section A.2.d, above.

III. CONCLUSION

We *deny* the two petitions to intervene and their associated requests, and we *terminate* this adjudication.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 22d day of August 2008.

Commissioner Jaczko Concurring in Part and Respectfully Dissenting in Part

While I concur in most of the Commission's Memorandum and Order, I respectfully dissent to section II.A.2.a, which discusses the standing of Union Local 590 of the Utility Workers of America, AFL-CIO (UWUA Local, or Local) to intervene with respect to the indirect transfer of the license for the Pilgrim Nuclear Power Station.

While I acknowledge that the affidavit submitted by the Local is technically deficient for the reasons detailed in the Order, I believe it would be a minor procedural matter well within the authority of the Commission to allow the intevernor an opportunity to provide the missing information. Such a step would certainly serve the larger Atomic Energy Act goal of encouraging public participation in the NRC's licensing process, while causing only minor delay in the proceeding. Displaying this flexibility would be consistent with the approach we have taken to allow licensees to correct, modify, and update license applications.

We should, therefore, give the Local an opportunity to establish that Mr. Williams has standing in his own right, and that the Local, as authorized by Mr. Williams, also has standing as his representative in this proceeding. If that threshold cannot be met, then I would support proceeding as detailed in the Majority's Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

In the Matter of **Docket No. PAPO-00**
(ASLBP No. 04-829-01-PAPO)
(Pre-Application Matters)

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository) **August 22, 2008**

RULES OF PRACTICE: CONTENTIONS

The purpose of NRC adjudicatory hearings is to consider claims of deficiencies in a license application; such contentions are commonplace at the outset of NRC adjudications.

NRC STAFF REVIEW

In conducting its ''acceptance review,'' the NRC Staff does not consider the technical or legal merits of the application; rather, the Staff's preliminary review is simply a screening process — a determination whether the license application contains sufficient information for the NRC to begin its safety review.

MEMORANDUM AND ORDER

On June 3, 2008, the U.S. Department of Energy (DOE) tendered a license application seeking authorization to construct a geologic repository at Yucca

Mountain, Nevada.[1] The next day, the State of Nevada filed a petition requesting that the Commission reject that application.[2] On June 18, 2008, Dr. Jacob Paz filed a petition requesting the same relief.[3]

Nevada raises issues involving DOE's authority to file the application under the Nuclear Waste Policy Act, access to classified information, and various substantive deficiencies in the application itself (for example, issues pertaining to radiation protection standards for a proposed facility, final repository design, drip shields, an aboveground ''aging facility'' for high-level waste, and NRC standards addressing security and material control and accounting).[4] On July 21, 2008, Nevada filed a supplement to the petition, in which it provides additional information to support its claims regarding the final repository design and drip shields, and further argues that certain information was improperly excluded from the license application.[5] Dr. Paz argues that DOE's application should be rejected for its asserted failure to appropriately consider the risks associated with the release of certain heavy metals, in combination with radionuclides, which would be present at the repository.[6] These issues, which raise legal or factual challenges

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[1] Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008).

[2] State of Nevada's Petition to Reject DOE's Yucca Mountain License Application as Unauthorized and Substantially Incomplete (June 4, 2008). By letter, the Nevada congressional delegation has similarly urged that the Commission refuse to docket the application and return it to DOE. Letter to Chairman Klein and Commissioners from Senators Harry Reid and John Ensign, and Representatives Shelley Berkley, Jon Porter, and Dean Heller (June 5, 2008).

[3] Dr. Jacob Paz Petition to Reject DOE's Yucca Mountain License [Application] as an [Incomplete] and [Potential] Non Compliance with Federal Acts and [Regulations] (June 18, 2008).

[4] Both DOE and the NRC Staff filed responses to Nevada's petition. DOE would have the Commission address each of the issues raised in the petition on the merits, and provides substantive arguments in response to the petition. U.S. Department of Energy Response to the State of Nevada's Petition to Reject the Yucca Mountain License Application (June 16, 2008). The Staff also provides substantive comments, but recommends that the Commission decline to consider the petition. NRC Staff Response Opposing Nevada's June 4, 2008 Petition (June 16, 2008). The Nuclear Energy Institute also filed a response opposing Nevada's petition. Response of the Nuclear Energy Institute Opposing the State of Nevada's Petition to Reject DOE's Yucca Mountain License Application (June 16, 2008).

[5] State of Nevada's Supplement to its June 4, 2008 Petition Asking the NRC to Reject DOE's Yucca Mountain License Application as Unauthorized and Substantially Incomplete (July 21, 2008) (Nevada Supplement). DOE filed an opposition to the Nevada Supplement shortly thereafter. U.S. Department of Energy Response to the State of Nevada's Supplemental Pre-Docketing Petition to Reject the Yucca Mountain License Application (July 31, 2008).

[6] Dr. Paz filed a supplement to his petition, to which he attached a paper entitled, ''A Review of Health Risks Due to Complex Mixtures in a Geologic Nuclear Waste Repository.'' The paper provides additional discussion of asserted toxicological interactions between radionuclides and other agents, including heavy metals. Letter, Dr. Jacob Paz to Commissioners (July 28, 2008).

related to the application, are appropriately considered as proposed contentions in the context of a merits hearing on the application.[7]

''Indeed, the very purpose of NRC adjudicatory hearings is to consider claims of deficiencies in a license application; such contentions are commonplace at the outset of NRC adjudications.''[8] When, as here, the hearing process has not even commenced, and the NRC Staff is still considering whether even to accept a pending application for further review, it is not a sensible use of Commission resources to evaluate the Petitioners' legal and factual challenges to the application now. These challenges are premature.

As the NRC Staff points out, our regulations direct how an application for construction authorization for a high-level waste repository will be processed.[9] DOE has tendered its high-level waste repository construction authorization application, but the NRC Staff has not yet accepted it for review and has not yet docketed it in accordance with 10 C.F.R. § 2.101(e)(3). The Director of the Office of Nuclear Material Safety and Safeguards (NMSS Director) will determine whether the tendered application is complete and acceptable for docketing. In conducting this ''acceptance review,'' the Staff does not consider the technical or legal merits of the application; rather, the Staff's preliminary review is simply a screening process — a determination whether the license application contains sufficient information for the NRC to begin its safety review.[10]

The acceptance review is currently under way.[11] Under our rules cited above, the Staff is given the duty to perform the acceptance review of DOE's application, and we see no reason to disturb those ongoing efforts. Should the NMSS Director

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[7] *See generally* 10 C.F.R. § 2.309(f).

[8] *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1 (2008), citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188 (2006) (deciding two petitions to intervene and requests for hearing); *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-01-21, 54 NRC 33, *petition for review denied,* CLI-01-25, 54 NRC 368 (2001) (deciding two petitions to intervene and requests for hearing); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998), *aff'd in part,* CLI-98-13, 48 NRC 26 (1998) (deciding five petitions to intervene and requests for hearing).

[9] 10 C.F.R. § 2.101(e)(3), (e)(8).

[10] *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 NRC 237, 241-42 (2004). Additional detail on the Staff's acceptance review of the application is available on the NRC's Web site: http://www.nrc.gov/waste/hlw-disposal/licensing/acceptance-safety/acceptance-review.html (last revised June 12, 2008).

[11] Commissioner Jaczko, in his Dissent, expresses concern that this Memorandum and Order presumes that DOE's application could be docketed in the absence of the post-10,000-year EPA dose standard. The Commission majority disagrees with Commissioner Jaczko's dissent and emphasizes that this decision should not be read as making a judgment or providing direction as to the overall suitability of the DOE application for docketing. As noted above, the Staff has been provided sufficient discretion to determine whether the application is suitable for docketing.

reject the application, DOE will be informed of this determination, and of the respects in which the application is deficient.[12] In such a case, the Commission will have no application before it for consideration, and the filings by Nevada and Dr. Paz will be moot. Should the application be accepted for review, then the NMSS Director will issue a Notice of Docketing for publication in the *Federal Register,* after which the Staff will begin its detailed technical review. The Commission will also then publish a Notice of Hearing in the *Federal Register,* which will provide an opportunity for interested persons to participate in an adjudicatory proceeding on the application. The matters raised in Nevada's and Dr. Paz's filings would be appropriately raised for consideration in response to such a Notice of Hearing.

For these reasons, both petitions and supplements are dismissed without prejudice to the Petitioners' right to pursue identical claims, but in the form of proposed adjudicatory ''contentions,'' when and if the application is docketed and a Notice of Hearing issues.[13]

IT IS SO ORDERED.[14]

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 22d day of August 2008.

Commissioner Jaczko Respectfully Dissenting, in Part

I concur in the portion of this Memorandum and Order that rejects the Petitions of the State of Nevada and Dr. Jacob Paz as premature. The Environmental Protection Agency (EPA), however, has not yet promulgated final radiation protection standards for the proposed facility. Because I believe the Department of

[12] 10 C.F.R. § 2.101(e)(3).

[13] In its Supplemental Petition, Nevada requests that the Petition and Supplement be referred to the NRC Staff for its consideration in deciding whether to docket the license application. Nevada Supplement at 1. In view of the Staff's response to the Petition, we are satisfied that it has been made aware of the particular issues raised in that filing. By virtue of this Memorandum and Order, we trust that the Staff is aware of the supplement as well.

[14] Pursuant to 10 C.F.R. § 2.101(e)(3), a docket number will be assigned to DOE's application if and when the Staff determines that the application is acceptable for docketing. As an administrative convenience, this Memorandum and Order will be served on the service lists for the PAPO-00 and PAPO-001 dockets.

Energy's (DOE) application for a high-level waste repository at Yucca Mountain should not be docketed in the absence of such EPA final radiation protection standards, I dissent from that portion of this Memorandum and Order which discusses docketing of the application.

Upon receipt of the application, the NRC Staff began a review to determine whether the DOE application is complete and acceptable for docketing, as required under the regulations. 10 C.F.R. § 2.101(e)(3). NRC regulations specify the required contents of an application for a high-level waste repository, including a wide variety of matters relevant to protection from radiation. 10 C.F.R. § 63.21. As set forth in section 63.21(c), the Safety Analysis Report included in the application must contain information pertaining to a variety of matters that appear to relate, in part, to evaluating potential exposures during the postclosure period beyond 10,000 years following disposal, for which no protection standard has been promulgated. *See Nuclear Energy Institute v. Environmental Protection Agency,* 373 F.3d 1251, 1273 (D.C. Cir. 2004).

As described below, these matters will comprise a major focus of the NRC Staff's review of the application, and I believe the application should not be docketed in the absence of a standard with which to measure the ultimate acceptability of the application. For example, the application must include a description of the site, with appropriate attention to matters that might affect the performance of the geological repository (§ 63.21(c)(1)), which is essential to evaluation of exposures in the period beyond 10,000 years after disposal.

The application must also contain information to allow the Staff to evaluate the postclosure performance objectives of 10 C.F.R. § 63.113, which references the limits in section 63.311, which in turn must be consistent with the EPA radiological protection standards that have yet to be promulgated. For example, the application must describe the engineered barrier system, including the design criteria used and their relationships to the postclosure performance objectives specified in section 63.113(b) (§ 63.21(c)(3)(ii)). Similarly, the application must include an assessment to determine the degree to which those features, events, and processes of the site that are expected to materially affect compliance with section 63.113 have been characterized, and the extent to which they affect waste isolation (investigations must determine principal pathways for radionuclide migration from the underground facility) (§ 63.21(c)(9)). The application must also include an assessment of the anticipated response of the geomechanical, hydrogeologic, and geochemical systems to the range of design thermal loadings under consideration (§ 63.21(c)(10)). Further, the application must include an assessment of the ability of the proposed geologic repository to limit radiological exposures to the reasonably maximally exposed individual (RMEI) for the period after permanent closure, as required by section 63.113(b) (§ 63.21(c)(11)). The application must also set forth an assessment of the ability of the proposed geologic repository to limit releases of radionuclides into the accessible environment as

required by section 63.113(c) (§ 63.21(c)(12)), an assessment of the ability of the proposed geologic repository to limit radiological exposures to the RMEI for the period after permanent closure in the event of human intrusion into the engineered barrier system as required by section 63.113(c) (§ 63.21(c)(13)), and an evaluation of the natural features of the geologic setting and design features of the engineered barrier system that are considered barriers important to waste isolation as required by section 63.115 (§ 63.21(c)(14)). Finally, the application must provide an explanation of measures used to support the models used to provide the information required in section 63.21(c)(9)-(14) (§ 63.21(c)(15)). All of these requirements appear to be focused, to some extent, on radiation protection during the postclosure period beyond 10,000 years after disposal.

The above requirements show that a major focus of the NRC Staff review is the capability of the proposed geologic repository to limit radiological exposures in the postclosure period, which includes the period beyond 10,000 years after disposal. The information that must be included in the application, as required above, includes information to address repository performance objectives for this period, which are set forth in section 63.113, and which, in turn, references the limits in section 63.311. The limits in section 63.311, however, must be consistent with the final EPA radiation protection standards, pursuant to the Energy Policy Act of 1992, which requires the NRC to modify its technical requirements and criteria, as necessary, to be consistent with final EPA standards. Energy Policy Act of 1992, § 801(b)(1).

The Memorandum and Order presumes that the NRC Staff could docket the application, and, for the reasons explained above, I believe such a course unwise. In short, we do not know what legally binding radiation protection standard for 10,000 years after disposal will govern the application since such a standard has not been finally promulgated. To review the application based on such uncertainty might well be ineffective and waste resources. This is not to say that the Staff should be precluded from reviewing the significant portions of the application that may be found to be complete and acceptable for docketing; rather, I believe the Staff should proceed with those portions of the review that can be conducted to verify compliance with validly promulgated standards. In light of the foregoing, I believe the most effective and efficient course is for the Staff to defer docketing the DOE application (but continue the review) until EPA has promulgated final radiation protection standards for a high-level waste repository at Yucca Mountain. Accordingly, I respectfully dissent from the portion of the Memorandum and Order discussing docketing.

Cite as 68 NRC 279 (2008) **LBP-08-14**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Thomas S. Moore
Dr. Michael F. Kennedy

In the Matter of **Docket Nos. 50-335-CO**
50-389-CO
(ASLBP No. 08-866-01-CO-BD01)
(Confirmatory Order)

FLORIDA POWER & LIGHT COMPANY
(St. Lucie Nuclear Power Plant, Units 1 and 2) **August 15, 2008**

In this proceeding regarding a request for hearing filed by Saporito Energy Consultants, by and through its president, Thomas Saporito (Petitioner or SEC), seeking to challenge a Confirmatory Order issued by the Nuclear Regulatory Commission Staff (Staff) to Florida Power & Light Company (FPL or Licensee), the Licensing Board concludes that Petitioner has failed to demonstrate that it has standing and has failed to proffer an admissible contention. Accordingly, the Board denies the request for hearing.

RULES OF PRACTICE: STANDING

A petitioner's right to participate in a licensing proceeding stems from section 189a of the Atomic Energy Act. That section provides for a hearing upon the request of any person whose interest may be affected by the proceeding. The Commission's regulations implementing that section of the Atomic Energy

Act (''AEA'') require a licensing board, in ruling on a request for a hearing, to determine whether the petitioner has an interest potentially affected by the proceeding by considering (1) the nature of the petitioner's right under the AEA to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.

RULES OF PRACTICE: STANDING

When assessing whether a petitioner has set forth a sufficient interest to intervene under 10 C.F.R. § 2.309, licensing boards apply judicial concepts of standing. Judicial concepts of standing require the petitioner to show that (1) he or she has personally suffered, or will personally suffer in the future, a distinct and palpable harm that constitutes an injury in fact; (2) the injury fairly can be traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision.

RULES OF PRACTICE: STANDING TO INTERVENE (ENFORCEMENT ACTIONS)

If the petitioner requests a remedy that is beyond the scope of the hearing, then the hearing request must be denied because redressability is an element of standing. Accordingly, it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders. In the context of an enforcement proceeding, Commission precedent teaches that the scope of the proceeding is directly related to the issue of standing, in that an individual or organization requesting a hearing must show that the petitioner would be adversely affected by the enforcement order as it exists, rather than being adversely affected by the existing order as it might be compared to a hypothetical order that the petitioner asserts would be an improvement.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

The Commission's regulations, 10 C.F.R. § 2.309(f)(1), set out the requirements that must be met if a contention is to be admitted in a NRC licensing or enforcement adjudication. An admissible contention must (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action involved in

the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE)

In addition to the contention admissibility standards in section 2.309(f), section 2.335(a) prohibits petitioners from challenging NRC regulations.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

The purpose of the contention rule is to focus litigation on concrete issues and should result in a clearer and more focused record for decision. The Commission has stated that it should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing. The Commission has emphasized that the rules on contention admissibility are ''strict by design.'' Failure to comply with any of these requirements is grounds for the dismissal of a contention.

RULES OF PRACTICE: STANDING TO INTERVENE (ENFORCEMENT ACTIONS)

The issue of standing in an enforcement proceeding and whether a request for hearing raises allegations that are within the scope of the proceeding are closely related. A petitioner requesting a hearing must show that the request is within the scope of the proceeding by demonstrating that the petitioner will be adversely affected by the existing terms of the enforcement order. Any purported adverse effects caused by the Confirmatory Order's failure to include revised or additional provisions sought by a petitioner shall be deemed irrelevant for this purpose. If the petitioner fails to show the adverse effects of the Confirmatory Order, the hearing request will be denied.

RULES OF PRACTICE: STANDING TO INTERVENE (PRESUMPTION BASED ON GEOGRAPHIC PROXIMITY)

Although licensing boards have used a proximity presumption when resolving

issues of standing for cases involving reactor licensing, in a case involving an enforcement order the standing requirement is based on the Confirmatory Order itself, and the petitioner must show that he will be adversely affected by the terms of the Confirmatory Order.

RULES OF PRACTICE: STANDING TO INTERVENE (PRESUMPTION BASED ON GEOGRAPHIC PROXIMITY)

Therefore, something more than proximity to the facility (i.e., a link between the Confirmatory Order and the alleged harm to the individual) is necessary to establish standing.

RULES OF PRACTICE: ENFORCEMENT ACTIONS

The Commission has consistently and unequivocally ruled that petitioners may not seek to enhance the measures outlined in an enforcement order. Additionally, the Commission has held that claims by a nonlicensee to the effect that the root causes or facts underpinning a Confirmatory Order are inaccurate, are not valid claims in a proceeding concerning a Confirmatory Order.

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE)

Challenges to the NRC's authority to engage in administrative dispute resolution (ADR) is beyond the scope of enforcement order proceedings. Supreme Court precedent establishes that agencies have wide latitude in administering their enforcement program. Indeed, the Administrative Dispute Resolution Act of 1996 requires each federal agency to promote the use of ADR.

MEMORANDUM AND ORDER
(Denying Request for Hearing)

I. INTRODUCTION

Before the Licensing Board is a request for hearing seeking to challenge a June 13, 2008, Confirmatory Order[1] issued by the Nuclear Regulatory Commission Staff (Staff) to Florida Power & Light Company (FPL or Licensee). That

[1] Florida Power and Light Company, St. Lucie Nuclear Plant; Confirmatory Order (Effective Immediately), 73 Fed. Reg. 36,131 (June 25, 2008).

Confirmatory Order, which was made effective immediately, imposed a series of actions on FPL that the Staff and FPL agreed were necessary to remedy a violation of NRC access authorization regulations at FPL's St. Lucie Nuclear Plant. The Confirmatory Order provided an opportunity for persons adversely affected by the Order to request a hearing within twenty (20) days. In response to the Order, on July 3, 2008, Saporito Energy Consultants, by and through its president, Thomas Saporito (Petitioner or SEC), filed a timely request for hearing.[2]

Both FPL and the Staff oppose the grant of the request for hearing.[3] For the reasons set forth below, we find that the Petitioner has failed to demonstrate that it has standing and has failed to proffer an admissible contention. Accordingly, we deny the request for hearing.

II. PROCEDURAL HISTORY

FPL is the holder of Operating License Nos. DPR-67 and NPF-16, issued by the NRC, pursuant to 10 C.F.R. Part 50, on March 1, 1976, and April 6, 1983, respectively. The licenses authorize the operation of St. Lucie Nuclear Plant, Units 1 and 2 (St. Lucie or facility), located in Jensen Beach, Florida.

On or about March 10, 2005, two contractors documented their activities pursuant to a work order to indicate that they had used the torque wrench specified in the work order when, in fact, they had used a different torque wrench.[4] This was apparently done to conceal their ''over-torquing'' of a valve.[5] On April 2, 2008, the NRC sent FPL a letter detailing the results of an NRC Office of Investigations inquiry into that matter.[6] The letter documented two apparent violations associated with FPL's initial review and investigation into the matter.[7] The first involved the deliberate creation by a Senior Plant Supervisor, Mechanical Maintenance, of an incomplete condition report. According to the Staff, the condition report

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[2] Request for Hearing and Leave to Intervene (July 2, 2008) (ADAMS Accession No. ML081890119) [hereinafter SEC Request].

[3] Florida Power & Light Company's Answer to Request for Hearing and Petition for Leave to Intervene of Saporito Energy Consultants (July 25, 2008) [hereinafter FPL Answer]; NRC Staff Response to SEC Request for Hearing and Leave to Intervene (July 28, 2008) [hereinafter Staff Answer].

[4] 73 Fed. Reg. at 36,131.

[5] *Id.*

[6] Letter from Kriss M. Kennedy, Director, NRC Division of Reactor Safety, to J.A. Stall, Senior Vice President, FPL (Apr. 2, 2008) (ADAMS Accession No. ML080930372) [hereinafter Kennedy Letter].

[7] *Id.* at 1.

did not document the falsified work order in violation of 10 C.F.R. § 50.9.[8] The Staff found this to be ''material because it concealed the violation of a work procedure and the questionable trustworthiness of the two contract maintenance workers.''[9] For instance, had the condition report been complete and accurate, the Staff indicates that FPL's procedures would have required an evaluation of the two contract workers' suitability for continued unescorted access and possible entry into the Personnel Access Data System (PADS).[10]

The second apparent violation involved ''the Mechanical Maintenance Senior Plant Supervisor's deliberate failure to contact the appropriate site security manager in order to initiate an assessment of the trustworthiness and reliability of the two contract technicians.''[11] By failing to contact the site security manager, FPL did not meet the Access Authorization program objective in 10 C.F.R. § 73.56(b)(1), which provides high assurance that individuals granted unescorted access are trustworthy and reliable, ''and do not constitute an unreasonable risk to the public health and safety, including a potential to commit radiological sabotage.''[12] Had the supervisor acted appropriately and contacted the site security manager, the information would have been considered in evaluating the suitability of two contract workers for continued unescorted access and possible entry into PADS.[13]

The NRC and FPL entered into an alternative dispute resolution (ADR) session on May 16, 2008, mediated by a professional, independent mediator.[14] An agreement was reached between the NRC and FPL at the ADR session, and the Confirmatory Order was issued pursuant to that agreement. The Order requires FPL to perform eleven corrective actions and enhancements (commitments) within

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[8] ''Information provided to the Commission by an applicant for a license or . . . required . . . to be maintained by the applicant or the licensee shall be complete and accurate in all material respects.'' 10 C.F.R. § 50.9(a).

[9] Kennedy Letter at 1.

[10] *Id.* PADS is ''a computer-based system for recording background information on employees who have worked with temporary access authorization at one or more nuclear power facilities. PADS provides a corps of 'pre-approved' nuclear employees whose unescorted access authorization can be granted by successive licensee employers who subscribe to PADS and who access it for a record of the applicant's history in the industry.'' SECY-98-110, Report on Inspection and Programmatic Findings Relating to the Carl C. Drega Incident, Attach. 1, at 4 (May 20, 1998) (ADAMS Accession No. ML992880019).

[11] Kennedy Letter at 2.

[12] *Id.*

[13] *Id.*

[14] 73 Fed. Reg. at 36,131.

6 months of the date of issuance of the Order.[15] The Staff asserts in the Order that the agreed-upon commitments are necessary to ensure that various corrective actions, including conducting future trustworthiness and reliability assessments, will be implemented.[16] The Staff concluded that ''with these commitments the public health and safety are reasonably assured.''[17]

The *Federal Register* notice states that ''[a]ny person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing within 20 days of its issuance.''[18] The notice further specifies the issue to be considered at that hearing, stating ''if a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.''[19] The Staff specified that any person submitting a request for hearing ''shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 C.F.R. § 2.309 (d) and (f).''[20]

On June 10, 2008, FPL consented to issuance of the Confirmatory Order. FPL further agreed that the Confirmatory Order would be effective upon issuance and that FPL was waiving its right to a hearing.[21]

III. REQUEST FOR HEARING

As noted above, the NRC received one request for hearing. The request was submitted by SEC on July 2, 2008.[22] On July 18, 2008, the Commission referred Petitioner's request for hearing to the Atomic Safety and Licensing Board Panel, which established this Licensing Board on July 24, 2008.[23] As NRC regulations provide, the Board will grant a request for hearing to any petitioner who establishes standing and raises at least one admissible contention pursuant to the standards outlined in the NRC's regulations.

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[15] *Id.* at 36,131-32. The eleven commitments encompass training, procedure revision, and reviews.

[16] *Id.* at 36,131.

[17] *Id.* at 36,132.

[18] *Id.* at 36,133.

[19] *Id.*

[20] *Id.* 10 C.F.R. § 2.309(d)(1) states the general requirements for standing and 10 C.F.R. § 2.309(f) addresses contention admissibility requirements.

[21] 73 Fed. Reg. at 36,132. The Order was formally issued and became effective on June 13, 2008.

[22] SEC Request.

[23] Florida Power and Light Co., Establishment of Atomic Safety and Licensing Board, 73 Fed. Reg. 44,290-91 (July 30, 2008).

This case involves a Confirmatory Enforcement Order. Under existing Commission precedent, the scope of this proceeding is exceedingly limited.[24] Pursuant to the holding in *Bellotti v. NRC,*[25] the scope of any hearing in this matter is expressly limited to the issue of ''whether th[e] Confirmatory Order should be sustained.''[26]

IV. STANDARDS GOVERNING STANDING

A petitioner's right to participate in a licensing proceeding stems from section 189a of the Atomic Energy Act. That section provides for a hearing ''upon the request of any person whose interest may be affected by the proceeding.''[27] The Commission's regulations implementing that section of the AEA[28] require a licensing board, in ruling on a request for a hearing, to determine whether the petitioner has an interest potentially affected by the proceeding by considering (1) the nature of the petitioner's right under the AEA to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.[29]

When assessing whether a petitioner has set forth a sufficient interest to intervene under 10 C.F.R. § 2.309, licensing boards apply judicial concepts of standing.[30] Judicial concepts of standing require the petitioner to show that (1) he or she has personally suffered, or will personally suffer in the future, a distinct and palpable harm that constitutes an injury in fact; (2) the injury fairly can be traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision.[31] ''If the petitioner requests a remedy that is beyond the scope of the hearing, then the hearing request must be denied because redressability

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[24] *See Alaska Department of Transportation and Public Facilities,* CLI-04-26, 60 NRC 399, 404 (2004); *see also Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56-57 (2004).

[25] *Bellotti v. NRC,* 725 F.2d 1380 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45-46 (1982).

[26] 73 Fed. Reg. at 36,133.

[27] 42 U.S.C. § 2239(a)(1)(A).

[28] 10 C.F.R. § 2.309(d).

[29] 10 C.F.R. § 2.309(d)(1).

[30] *See Entergy Nuclear Vermont Yankee* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 552 (2004).

[31] *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 102-04 (1998); *Kelley v. Selin,* 42 F.3d 1501, 1508 (6th Cir. 1995)).

is an element of standing.''[32] Accordingly, ''it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders.''[33] In the context of an enforcement proceeding, Commission precedent teaches that the scope of the proceeding is directly related to the issue of standing, in that an individual or organization requesting a hearing must show that the petitioner would be adversely affected by the enforcement order as it exists, rather than being adversely affected by the existing order as it might be compared to a hypothetical order that the petitioner asserts would be an improvement.[34]

V. STANDARDS GOVERNING CONTENTION ADMISSIBILITY

The Commission's regulations, 10 C.F.R. § 2.309(f)(1), set out the requirements that must be met if a contention is to be admitted in an NRC licensing or enforcement adjudication. An admissible contention must (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.[35] In addition to the contention admissibility standards in section 2.309(f), section 2.335(a) prohibits petitioners from challenging NRC regulations.[36] The purpose of the contention rule is to ''focus litigation on concrete issues and [should] result in a clearer and more focused record for decision.''[37] The Commission has stated that it ''should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible

[32] *Alaska Dep't of Transp.,* CLI-04-26, 60 NRC at 405.

[33] *Id.* at 406 n.28.

[34] *Id.* at 406.

[35] *Nuclear Fuel Services, Inc.* (Special Nuclear Facility), LBP-07-16, 66 NRC 277, 285 (2007) (discussing the standards in 10 C.F.R. § 2.309(f)(1)(i)-(vi)).

[36] 10 C.F.R. § 2.335(a); *see Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

[37] Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

to, resolution in an NRC hearing.''[38] The Commission has emphasized that the rules on contention admissibility are ''strict by design.''[39] Failure to comply with any of these requirements is grounds for the dismissal of a contention.[40]

VI. POSITIONS OF THE PARTIES

Thomas Saporito is President of SEC and timely filed the request for hearing. The request is brief — two pages in length — and outlines SEC's grounds for standing and its three proposed contentions.

With respect to standing, SEC states that: (1) Thomas Saporito is a U.S. citizen, and therefore has an ''inherent right under the Act to be made a party to the proceeding,'' (2) its real and personal property ''can be adversely affected'' in the event of a radiological release, which ''could forever compromise the environment where the requestor's/petitioner's reside, live, and do business,'' and finally (3) a decision in SEC's favor ''could substantially protect the interests of the requestor's/petitioner's environment, property, and economic viability.''[41]

SEC's first contention is that ''the 'root-cause' of the licensee's 10 CFR 2.309(d)(1), violation of 10 CFR 73.56(b)(1) . . . have not *been adequately determined* for corrective action.''[42] Therefore, SEC argues, the ''Confirmatory Order regarding this violation is not sufficient to protect public health and safety.''[43] Second, SEC asserts that ''[t]he NRC's *failure* to take enforcement action by imposing a significant civil penalty to the licensee does nothing to protect public health and safety because the licensee will not be adequately deterred for recurrence of this violation in the future.''[44] Third, SEC claims that ''[t]he NRC does not have requisite jurisdiction and/or authority to adjudicate or resolve licensee violations through utilization of an [ADR] program. Therefore, the NRC's reliance and use of such a program in this instance fails to adequately protect public health and safety.''[45]

In its Answer, FPL asserts that SEC has not demonstrated standing nor ''identified any issue within the scope of this proceeding that would affect its

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[38] *Id.* at 2202.

[39] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied,* CLI-02-1, 55 NRC 1 (2002).

[40] 69 Fed. Reg. at 2221; *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

[41] SEC Request at 1-2.

[42] *Id.* at 2.

[43] *Id.*

[44] *Id.*

[45] *Id.*

interest.''[46] Accordingly, FPL concludes none of SEC's proposed contentions is admissible and therefore, SEC's Request must be denied.

Specifically, FPL argues that an essential element of establishing standing is that the injury alleged by the petitioner ''can be redressed within the proceeding as noticed by the NRC.''[47] FPL asserts that the notice of opportunity for hearing is limited to the issue of whether the NRC's Confirmatory Order to FPL should be sustained.[48] FPL states that SEC has failed to demonstrate standing and has not adequately established that any of its concerns can be redressed within the scope prescribed by the NRC in its notice of opportunity for hearing.[49] FPL states that SEC attempts to do exactly what the NRC and the Court of Appeals have found impermissible in previous cases involving NRC enforcement orders by only complaining about the NRC enforcement process and demanding additional sanctions and civil penalties.[50]

In its Answer, the Staff states that SEC's Request should be denied because SEC ''has failed to establish standing, is seeking to litigate concerns that are outside the scope of the issues which may be raised in a hearing on the Order it challenges, and fails to meet the contention admissibility requirements.''[51]

The Staff asserts that while SEC does refer to the requirements of 10 C.F.R. § 2.309(d)(1), SEC ''does not demonstrate how its interests can be affected by the issues before the Commission.''[52] Instead, according to the Staff, SEC's statements attempt to show that due to its proximity to St. Lucie, any problem at the plant could adversely affect its interests.[53] The Staff states that to the extent SEC attempts to base its standing on proximity, it ''has not demonstrated any nexus between the subject of the Order and potential radiological-release.''[54] The Staff argues that SEC has failed to demonstrate any redressable injury-in-fact and therefore, has not demonstrated standing and the SEC Request should be denied.[55]

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[46] FPL Answer at 1.

[47] *Id.* at 4 (citing *Alaska Dep't of Transp.,* CLI-04-26, 60 NRC at 405).

[48] *Id.*

[49] *Id.* at 4-5.

[50] *Id.* at 5.

[51] Staff Answer at 1.

[52] *Id.* at 7.

[53] *Id.* The Staff notes that the address SEC provided in its Request appears to be a post office box located in Jupiter, Florida. *Id.* at 7 n.34. The Staff argues that a ''licensing board has previously found that writing from a post office box and failing to provide a residential home address constituted part of the basis to deny standing in a petition to intervene.'' *Id.* (citing *International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-97-12, 46 NRC 1, 8 (1997), *aff'd,* CLI-98-6, 47 NRC 116 (1998)). On July 27, 2008, SEC filed a Notice of Address Change in which it submitted a different address that appears to be a residence. Petitioner's Notice of Address Change (July 27, 2008).

[54] Staff Answer at 7.

[55] *Id.*

SEC did not file a Reply to the Answers filed by FPL and the Staff.

VII. BOARD RULING ON SEC REQUEST

SEC's Request for Hearing must be denied. The Board finds that SEC has failed to establish standing, seeks to litigate concerns that are outside the scope of the issues that may be raised in a hearing on a Confirmatory Order, and has failed to proffer at least one admissible contention.

The issue of standing in an enforcement proceeding and whether a request for hearing raises allegations that are within the scope of the proceeding are closely related.[56] A petitioner requesting a hearing must show that the request is within the scope of the proceeding by demonstrating that the petitioner will be adversely affected by the existing terms of the enforcement order. Any purported adverse effects caused by the Confirmatory Order's failure to include revised or additional provisions sought by a petitioner shall be deemed irrelevant for this purpose.[57] If the petitioner fails to show the adverse effects of the Confirmatory Order, the hearing request will be denied.[58]

SEC's argument that it has standing because Mr. Saporito lives in the general vicinity of the facility[59] is insufficient to meet the standing requirements. Although Licensing Boards have used a proximity presumption when resolving issues of standing for cases involving reactor licensing,[60] in a case involving an enforcement order, such as this one, the standing requirement is based on the Confirmatory Order itself, and the petitioner must show that he will be adversely affected by the terms of the Confirmatory Order.[61]

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[56] *See Alaska Dep't of Transp.,* CLI-04-26, 60 NRC at 405; *see also NFS,* LBP-07-16, 66 NRC at 285.

[57] *Alaska Dep't of Transp.,* CLI-04-26, 60 NRC at 406.

[58] *See* 10 C.F.R. § 2.309(a) (''[T]he . . . Board designated to rule on the request for hearing and/or petition for leave to intervene will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section'').

[59] As stated in note 53 above, SEC filed a revised address with the Commission on July 27, 2008. The original address submitted, a Post Office address, is insufficient to establish standing. The Board assumes his revised address is his residence and further notes that based on Mapquest (http://www.mapquest.com) the revised address is located approximately 30 miles from the facility. Proximity alone, however, is insufficient to show standing in an enforcement proceeding. *See FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-04-11, 59 NRC 379, 385 (2004).

[60] *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 14-15 (2007); *see also Sequoyah Fuels,* CLI-94-12, 40 NRC at 75 n.22.

[61] *Alaska Dep't of Transp.,* CLI-04-26, 60 NRC at 406.

FPL and the Staff are correct in pointing out that SEC has not sufficiently addressed how it will be adversely affected by the Confirmatory Order. Even though SEC claims that its property will be adversely affected by FPL's operations at St. Lucie,[62] the SEC Request does not show how it will be harmed by the corrective and preventative terms of the Confirmatory Order (i.e., the SEC Request fails to address how the measures instituted by the NRC are contrary to the public health and safety), which, as *Bellotti* and *Alaska Department of Transportation* instruct, is the fundamental issue when determining standing and contention admissibility in a proceeding involving an enforcement order.[63] Therefore, something more than proximity to the facility (i.e., a link between the Confirmatory Order and the alleged harm to the individual) is necessary to establish standing.[64] As described above, this Board finds that SEC has not made the appropriate connection between the Confirmatory Order and any alleged harm.

Additionally, even assuming SEC was able to demonstrate standing, its request for hearing fails because it has not raised an admissible contention. The Commission's regulations, 10 C.F.R. § 2.309(f)(1), list six factors for contention admissibility that must be met for the Board to admit a contention. The scope of the proceeding issue, just as it is intertwined with the standing issue, is also relevant to the issue of contention admissibility.[65] Section 2.309(f)(1)(iii) requires the petitioner to ''[d]emonstrate that the issue raised in the contention is within the scope of the proceeding.''[66] As defined in the *Federal Register* notice, the scope of the hearing and the issue to be considered is whether the Confirmatory Order should be sustained.[67] SEC does not meet this contention admissibility factor because none of its three proposed contentions are within the scope of this proceeding.

Proposed Contentions 1 and 2 are essentially requests that the NRC take additional enforcement action against FPL. As such, these contentions are outside the scope of this proceeding. The Commission has consistently and unequivocally ruled that petitioners may not seek to enhance the measures outlined in an enforcement order.[68] Additionally, the Commission has held that claims by a nonlicensee to the effect that the root causes or facts underpinning a Confirmatory Order

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[62] SEC Request at 1.

[63] *Alaska Dep't of Transp.,* CLI-04-26, 60 NRC at 405 (citing *Bellotti,* 725 F.2d at 1381).

[64] *Id.* at 406 (determining that the injury must be ''*attributable to the Confirmatory Order*'' to establish standing).

[65] *See* 10 C.F.R. § 2.309(f)(1)(iii).

[66] *Id.*

[67] 73 Fed. Reg. at 36,133.

[68] *Alaska Dep't of Transp.,* CLI-04-26, 60 NRC at 405.

are inaccurate, are not valid claims in a proceeding concerning a Confirmatory Order.[69]

Proposed Contention 3 challenges the NRC's authority to engage in ADR. This contention is also beyond the scope of this proceeding.[70] Supreme Court precedent establishes that agencies have wide latitude in administering their enforcement program.[71] Indeed, the Administrative Dispute Resolution Act of 1996[72] requires each federal agency to promote the use of ADR. The Commission has stated: ''In evaluating whether to pursue enforcement relief, and in considering various enforcement remedies, the NRC Staff acts like a prosecutor. Our adjudicatory process is not an appropriate forum for petitioners . . . to second-guess enforcement decisions on resource allocation, policy priorities, or the likelihood of success at hearings.''[73] Consequently, SEC's assertion regarding the authority of the NRC Staff to engage in ADR is not redressable in the instant proceeding and may not be used to confer standing or to meet the requirements for the admission of a contention.

VIII. CONCLUSION

Because SEC's hearing request fails to (1) demonstrate standing as required by 10 C.F.R. § 2.309(d), and (2) fails to proffer an admissible contention as required by 10 C.F.R. § 2.309(f), the Board must deny the hearing request and terminate this proceeding.

For the foregoing reasons, it is on this 15th day of August 2008, ORDERED that:

1. The hearing request of Saporito Energy Consultants by and through its president, Thomas Saporito, regarding the June 13, 2008 Confirmatory Order issued by the NRC Staff to FPL is *denied.*[74]

2. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon

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[69] *Id.* at 408-09.

[70] *See* 10 C.F.R. § 2.309(f)(1)(iii).

[71] *See Heckler v. Chaney,* 470 U.S. 821, 837-38 (1985) (noting that agencies are afforded wide latitude in discharging their enforcement obligations).

[72] 5 U.S.C. §§ 571-584.

[73] *Alaska Dep't of Transp.,* CLI-04-26, 60 NRC at 407.

[74] In dismissing this Hearing Petition the Board reiterates the sentiment expressed by the Licensing Board in *NFS* that ''serious consideration should be given to revising the language of hearing notices in these cases to go beyond the somewhat euphemistic reference to the scope of the proceeding as being 'whether this Confirmatory Order should be sustained.' '' *NFS,* LBP-07-16, 66 NRC at 326 n.339. Putative intervenors should be informed more clearly in the hearing notice of the very limited opportunity to obtain a hearing on such confirmatory orders.

intervention petitions, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD[75]

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Thomas S. Moore
ADMINISTRATIVE JUDGE

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 15, 2008

[75] A copy of this Memorandum and Order was sent this date by the Agency's E-Filing System to: (1) Counsel for the NRC Staff; (2) Counsel for FPL; and (3) Thomas Saporito.

Cite as 68 NRC 294 (2008) **LBP-08-15**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Richard F. Cole
Dr. Alice C. Mignerey

In the Matter of **Docket No. 52-017-COL**
(ASLBP No. 08-863-01-COL)
(Combined License Application)

VIRGINIA ELECTRIC AND POWER COMPANY d/b/a DOMINION VIRGINIA POWER and OLD DOMINION ELECTRIC COOPERATIVE
(North Anna Power Station, Unit 3) **August 15, 2008**

RULES OF PRACTICE: PARTICIPATION BY AN INTERESTED STATE OR LOCAL GOVERNMENT

State agencies may participate as nonparty interested States. 10 C.F.R. § 2.315(c).

COMBINED OPERATING LICENSE: SCOPE

Matters resolved in a proceeding on an ESP application are considered resolved in a subsequent COL proceeding when the COL application references the ESP, subject to certain exceptions. 10 C.F.R. § 52.39(a)(2).

RULES OF PRACTICE: CONTENTIONS; COMBINED OPERATING LICENSE, SCOPE

A safety contention arising from a matter resolved in an ESP proceeding is within the scope of a COL proceeding that references the ESP only if it concerns whether the site characteristics and design parameters specified in the ESP have been met (10 C.F.R. § 52.39(c)(1)(i)), whether a term or condition in the ESP has been met (§ 52.39(c)(1)(ii)), whether a variance from the ESP requested by the COL applicant is unwarranted or should be modified (§ 52.39(c)(1)(iii)), or whether emergency planning matters resolved in the ESP should be revisited (§ 52.38(c)(1)(iv)).

COMBINED OPERATING LICENSE: SCOPE

The Commission's decision to use the term ''resolved'' in 10 C.F.R. § 52.39(a) implies that it intended to grant preclusive effect only when the appropriate agency official makes a determination concerning the issue in dispute. The fact that an issue was mentioned in agency documents is insufficient to show that it was resolved.

RULES OF PRACTICE: CONTENTIONS; COMBINED OPERATING LICENSE, SCOPE

An environmental contention may be admitted during a COL proceeding if it concerns a significant environmental issue that was not resolved in the ESP proceeding, or if it involves the impacts of construction and operation of the facility and significant new information has been identified. 10 C.F.R. § 52.39(c)(1)(v).

COMBINED OPERATING LICENSE: SCOPE

A matter need not be actually litigated in order to be ''resolved'' in an ESP proceeding. If the matter was decided by the Staff in the ESP proceeding, concerns an issue the Staff was required to resolve at that stage, and could have been litigated in the ESP proceeding, the matter is deemed ''resolved'' by the ESP proceeding even if the issue was not actually litigated.

RULES OF PRACTICE: COLLATERAL ESTOPPEL

In general, the rule of collateral estoppel bars parties from relitigating issues actually and necessarily decided in prior litigation between the same parties. The

Appeals Board decided in 1974 that the doctrine of collateral estoppel should be applied in appropriate circumstances in NRC proceedings.

RULES OF PRATICE: NOTICE OF HEARING; EARLY SITE PERMIT, SCOPE

The NRC must have provided adequate notice to potential litigants, through the *Federal Register* notice that provides the public with the opportunity for a hearing, of the issues that were within the scope of the ESP proceeding, and thus might properly be raised in a request for a hearing in that ESP proceeding. Given that the *Federal Register* notice defines the scope of the issues that may properly be raised in a request for a hearing, it also defines the scope of the issues that could reasonably be deemed resolved during an ESP proceeding.

RULES OF PRATICE: NOTICE OF HEARING

Before a participant may be precluded from litigating an issue because it failed to raise the issue in an earlier proceeding, it must have had reasonable notice that such an opportunity existed.

RULES OF PRACTICE: CONTENTIONS OF OMISSION

A contention of omission claims, in the words of 10 C.F.R. § 2.309(f)(1)(vi), that ''the application fails to contain information on a relevant matter as required by law . . . and the supporting reasons for the petitioner's belief.'' For such a contention, a petitioner may satisfy the requirement to provide a specific statement of the legal or factual issue sought to be raised by providing an adequate description of the information it contends should have been included in the application. 10 C.F.R. § 2.309(f)(1)(i).

RULES OF PRACTICE: CONTENTIONS OF OMISSION

For a contention of omission, the petitioner may satisfy the requirement of 10 C.F.R. § 2.309(f)(1)(ii) to provide a brief explanation of the basis of the contention by adequately explaining the basis of its belief that the application omits information necessary to satisfy the governing NRC regulations.

RULES OF PRACTICE: CONTENTIONS OF OMISSION

If a contention challenges the legal sufficiency of the application that is the

subject of the Notice of Hearing and Opportunity to Petition for Leave to Intervene, the contention is within the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii).

RULES OF PRACTICE: CONTENTIONS OF OMISSION

Applicant's plan for storage of low-level radioactive waste was material to the findings the NRC must make to support the action that is involved in the proceeding, because the applicant had requested a license under 10 C.F.R. Part 30 that would authorize it to possess and store the low-level radioactive waste that is the subject of the proposed contention. 10 C.F.R. § 2.309(f)(1)(iv).

RULES OF PRACTICE: CONTENTIONS OF OMISSION; COMBINED OPERATING LICENSE, SCOPE

Applicant's plan for storage of low-level radioactive waste at its facility was material to compliance with the National Environmental Policy Act (NEPA) and the NRC's regulations implementing NEPA, because the environmental report prepared for a Combined Operating License application must address, among other things, the environmental costs of ''management of low-level wastes and high-level wastes related to uranium fuel cycle activities.'' 10 C.F.R. § 51.51(a).

RULES OF PRACTICE: CONTENTIONS OF OMISSION

Petitioner failed to establish the materiality of its contention related to management of low-level radioactive waste by referring to 10 C.F.R. Part 61. The applicant was not seeking a license under Part 61, and it was speculative whether such a license would ever be necessary.

RULES OF PRACTICE: CONTENTIONS OF OMISSION; NEW OR AMENDED CONTENTIONS (NEW INFORMATION)

For a contention of omission, the petitioner's burden under 10 C.F.R. § 2.309(f)(1)(v) is to show the facts necessary to establish that the application omits information that should have been included. The facts relied on need not show that the applicant's facility cannot be safely operated, but rather that the application is incomplete under the governing regulations. If the applicant cures the omission, the contention will become moot. Then, the intervenor must timely file a new or amended contention if it intends to challenge the sufficiency of the new information supplied by the applicant.

RULES OF PRACTICE: CONTENTIONS OF OMISSION

Under 10 C.F.R. § 2.309(f)(1)(vi), when an application is alleged to be deficient, the petitioner must identify the deficiencies and provide supporting reasons for its position that such information is required. Any contention that meets these requirements necessarily presents a genuine dispute with the applicant on a material issue, as required by section 2.309(f)(1)(vi).

REPRESENTATION (PRO SE)

Petitioners that are not represented by counsel will be held to less rigid standards for pleading, although a totally deficient petition will not be admitted.

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

Contention that asked the Licensing Board to determine whether the applicant would be able to obtain permits from and comply with regulatory requirements imposed by other agencies was in substance a request that the Board examine matters outside the NRC's jurisdiction, and therefore the contention was outside the scope of the proceeding.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

Because the NRC's regulations mandate balancing the economic and other benefits of a proposed new reactor against its environmental and other costs, a contention that worldwide uranium supplies will be inadequate to permit the anticipated power production benefits during the license term was potentially material to the licensing proceeding under 10 C.F.R. Part 52. Nevertheless, the Board declined to admit the contention because the Petitioner failed to provide expert opinion, documents, or other sources to support its allegation that worldwide uranium supplies would be inadequate.

MEMORANDUM AND ORDER

(Ruling on Petitioner's Standing and Contentions and NCUC's Request to Participate as a Nonparty Interested State)

Before the Licensing Board is a request by the Petitioner, Blue Ridge Environmental Defense League (BREDL or Petitioner), and its Virginia-based chapter,

People's Alliance for Clean Energy (PACE),[1] for a hearing on the combined license (COL) Application for North Anna Unit 3, which would be located at the North Anna Power Station in Louisa County, Virginia.[2] Additionally, the North Carolina Utilities Commission (NCUC) has submitted a request to participate as a nonparty interested state under 10 C.F.R. § 2.315.[3] Both Virginia Electric and Power Company d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative (Dominion or Applicant) and the Nuclear Regulatory Commission (NRC) Staff oppose the Petitioner's petition for intervention and request for hearing because they do not believe any of the Petitioner's eight contentions meet the standards for contention admissibility.[4]

In this decision, we address the Petitioner's standing to intervene, the NCUC's request to participate as a nonparty interested state, and the admissibility of the Petitioner's eight proffered contentions. For the reasons set forth below, we find that the Petitioner has established its standing to intervene in this proceeding and that the NCUC may participate as a nonparty interested state in this proceeding. We further find that one of the Petitioner's contentions (Contention One) is admissible in part, and the Petitioner has therefore met the necessary prerequisite for the Board to grant a hearing request.[5] We find the remaining contentions to be inadmissible. Therefore, further proceedings in this matter will be limited to BREDL's first contention.

I. BACKGROUND

Prior to filing its COL Application, on September 25, 2003, the Applicant filed an Application with the NRC for an Early Site Permit (ESP) pursuant to 10 C.F.R. § 52.24. Under 10 C.F.R. § 52.21, an ESP is described as a ''partial construction permit,'' whose issuance does not authorize an applicant to construct nuclear power reactors.[6] Instead, an ESP ''focuses on the suitability of a proposed *site,* and is defined as a 'Commission approval . . . for a site or sites for one

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[1] Petition for Intervention and Request for Hearing by [BREDL] (May 9, 2008) [hereinafter Pet.].

[2] *See* Dominion Virginia Power; Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for North Anna Unit 3, 73 Fed. Reg. 12,760 (Mar. 10, 2008).

[3] Request of the [NCUC] for an Opportunity to Participate in Any Hearing and to Be Added to the Official Service List (May 9, 2008) [hereinafter Request to Participate].

[4] *See* Dominion's Answer Opposing Petition for Intervention and Request for Hearing by BREDL (June 3, 2008) [hereinafter Dom. Ans.]; NRC Staff Answer to ''Petition for Intervention and Request for Hearing by [BREDL]'' (June 3, 2008) [hereinafter Staff Ans.].

[5] *See* 10 C.F.R. § 2.309(a), (f)(1).

[6] *See Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-07-9, 65 NRC 539, 550 (2007).

or more nuclear power facilities.' ''[7] Thus, even when an ESP is granted, the Applicant is required to submit a COL application to the NRC for its approval before construction may commence.

In its ESP Application, Dominion sought the NRC's approval to locate additional nuclear power reactors, which would generate up to a total of 9000 megawatts thermal (MWt), at a site near the shore of Lake Anna in Louisa County, Virginia.[8] The Applicant's proposed ESP site was located within the North Anna Power Station site, where two existing nuclear power reactors have operated since 1980.[9]

On November 25, 2003, the NRC published a notice of hearing and opportunity to petition for leave to intervene for the Applicant's ESP Application.[10] BREDL, the Nuclear Information and Resource Service, and Public Citizen (collectively, ESP Intervenors) filed a timely request for hearing and petition to intervene.[11] The ESP Board concluded that the ESP Intervenors had standing and that two of the ESP Intervenors' nine contentions were admissible.[12] One of the two admitted

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[7] *Id.* (quoting 10 C.F.R. § 52.3(b)).

[8] *Id.* at 549.

[9] *See id.* (citing Rev. 9 to North Anna ESP Application at 1-1-1 (Sept. 2006)).

[10] 68 Fed. Reg. 67,489 (Dec. 2, 2003).

[11] Hearing Request and Petition to Intervene by [ESP Intervenors] (Jan. 2, 2004). On May 3, 2004, the ESP Intervenors submitted a supplemental petition renumbering their contentions pursuant to a request from the ESP Board. Contentions of [ESP Intervenors] Regarding Early Site Permit Application for Site of North Anna Nuclear Power Plant (May 3, 2004) [hereinafter ESP Petition].

[12] *See Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 270-72, 276 (2004). The ESP Board admitted Environmental Contentions (ECs) 3.3.2 and 3.3.4. *See id.* EC 3.3.2 dealt with the impacts of an approved site on striped bass in Lake Anna. *See* ESP Petition at 32-40. EC 3.3.4 dealt with the Applicant's failure to provide adequate consideration of the no-action alternative in its Environmental Report (ER). *See id.* at 44-45. The ESP Board did not admit Site Safety Analysis Report (SSA) 2.1 and 2.2, and EC 3.1, 3.2.1, 3.2.2, 3.3.1, and 3.3.3. SSA 2.1 alleged that the ESP Application failed to provide an adequate analysis and evaluation of the major structures, systems, and components of the facility. *See id.* at 2-7. SSA 2.2 claimed that the SSA was inadequate because it did not evaluate the suitability of the site with regard to locating the reactor containment below grade-level. *See id.* at 18-23. EC 3.1 argued that the ER provided an inadequate discussion of severe accident impacts. *See id.* at 12-15. EC 3.2.1 asserted that the ER was deficient because it failed to discuss the environmental implications of the lack of options for permanent disposal of the irradiated fuel that would be generated by the proposed reactors. *See id.* at 15-20. EC 3.2.2 stated that even if the Waste Confidence Decision applied to the ESP proceeding, it should be reconsidered. *See id.* at 20-23. EC 3.3.1 claimed that the ER contained an inadequate discussion of the impacts of new reactors on the water quantity in Lake Anna and downstream. *See id.* at 26-32. Finally, EC 3.3.3 alleged that the ER did not contain a complete or adequate assessment of the potential impacts of the proposed expansion of the North Anna site on public and classified uses of Lake Anna. *See id.* at 41-44.

contentions was subsequently settled,[13] leaving only Contention EC 3.3.2 for the ESP Board to review. On April 22, 2005, the Applicant moved for summary disposition of Contention EC 3.3.2,[14] and on June 16, 2005, the ESP Board granted the motion for summary disposition in part, and denied it in part.[15] Thereafter, the Applicant revised its ESP Application and environmental report[16] and filed a second motion for summary disposition, arguing once again that EC 3.3.2 should be dismissed.[17] The ESP Board granted the Applicant's second motion for summary disposition because it found that EC 3.3.2 was resolved by the Applicant's amendments to its Application.[18]

Once summary disposition was granted, the ESP adjudication became only an uncontested proceeding subject to the mandatory hearing requirements of Atomic Energy Act (AEA) § 189a(1)(A) and 10 C.F.R. § 52.21. In accordance with (1) the ESP's Notice of Hearing;[19] (2) NRC regulations, including 10 C.F.R. §§ 2.104(b) and 51.105(a)(1)-(3); and (3) *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5 (2005), the mandatory hearing Board was required to answer six questions.[20] The Board reviewed material portions of the ESP record and asked the Staff and the Applicant to provide additional evidence so that it would be able to answer the six fundamental questions for uncontested ESP proceedings. Ultimately, the Board determined that the Staff's review of the ESP Application was adequate and that the ESP record was sufficient to support the AEA's safety-related findings necessary for issuance of the ESP.[21] On November 27, 2007, the NRC approved the Applicant's ESP pursuant to 10 C.F.R. § 2.340(f).[22]

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[13] Licensing Board Order (Approving Settlement and Dismissal of Contention EC 3.3.4) (Jan. 6, 2005) (unpublished).

[14] *See* [Applicant's] Motion for Summary Disposition Contention EC 3.3.2 — Impacts on Striped Bass in Lake Anna (Apr. 22, 2005).

[15] *See* Memorandum and Order (Granting in Part and Denying in Part Summary Disposition on Contention EC 3.3.2 — Impacts on Striped Bass in Lake Anna) (June 16, 2005) (unpublished).

[16] *See* Dominion's Second Motion for Summary Disposition Contention EC 3.3.2 — Impacts on Striped Bass in Lake Anna (Aug. 7, 2006) at 3.

[17] *See id.* at 4.

[18] *See Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-06-24, 64 NRC 360, 365 (2006).

[19] *See* Dominion Nuclear North Anna, LLC; Notice of Hearing and Opportunity to Petition for Leave to Intervene; Early Site Permit for the North Anna ESP Site, 68 Fed. Reg. 67,489 (Dec. 2, 2003).

[20] *See* LBP-07-9, 65 NRC at 640-41 (App. A listing the six questions the mandatory hearing Board was required to consider).

[21] *See id.* at 629.

[22] Notice of Issuance of Early Site Permit for Dominion Nuclear North Anna, LLC Located 40 Miles North-Northwest of the City of Richmond, VA, 72 Fed. Reg. 68,202 (Dec. 4, 2007).

On November 26, 2007, the Applicant filed a COL Application to construct and operate an Economic Simplified Boiling Water Reactor (ESBWR) at the North Anna Power Station, pursuant to Subpart C of 10 C.F.R. Part 52.[23] On March 10, 2008, the NRC published a notice of opportunity for hearing on the Application for the COL.[24] On May 9, 2008, the Petitioner timely filed a request for hearing[25] and the NCUC timely filed a request to participate as a nonparty interested state.[26]

II. STANDING

A petitioner's right to participate in a licensing proceeding stems from section 189a of the AEA. That section provides a hearing ''upon the request of any person whose interest may be affected by the proceeding.''[27] The Commission regulations require a licensing board, in ruling on a request for a hearing, to determine whether the petitioner has an interest potentially affected by the proceeding by considering (1) the nature of the petitioner's right under the AEA or the National Environmental Policy Act of 1969 (NEPA) to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.[28]

When assessing whether a petitioner has set forth a sufficient interest to intervene under 10 C.F.R. § 2.309(d), the NRC generally uses judicial concepts of standing.[29] Those require the petitioner to show that (1) he or she has personally suffered or will personally suffer a distinct and palpable harm that constitutes injury in fact; (2) the injury can fairly be traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision.[30] Additionally, the petitioner must meet the ''prudential'' standing requirement by showing that the asserted interest arguably falls within the zone of interests protected by the governing law.[31]

When an organization petitions to intervene in a proceeding, it must demon-

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[23] *See* 73 Fed. Reg. at 12,760.

[24] *See* LBP-07-9, 65 NRC at 550.

[25] *See* Pet.

[26] *See* Request to Participate.

[27] 42 U.S.C. § 2239(a)(1)(A).

[28] 10 C.F.R. § 2.309(d)(1).

[29] *See Entergy Nuclear Vermont Yankee* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 552 (2004).

[30] *See Allen v. Wright,* 468 U.S. 737, 751 (1984).

[31] *See Federal Election Commission v. Akins,* 524 U.S. 11, 20 (1998).

strate either organizational or representational standing. To demonstrate organizational standing, the petitioner must show ''injury in fact'' to the interests of the organization itself.[32] Representational standing requires a demonstration that one or more of its members would otherwise have standing to intervene on their own, and that the identified members have authorized the organization to request a hearing on their behalf.[33]

The Commission has recognized that a petitioner may have standing based entirely upon its geographical proximity to a particular proposed facility.[34] In proceedings involving nuclear power reactors, the Commission has adopted a proximity presumption, whereby standing to intervene without the need to plead injury, causation, and redressability is presumed if the petitioner lives within 50 miles of the nuclear power reactor.[35]

Neither the Applicant nor the NRC Staff challenges BREDL's standing.[36] We must, however, make our own determination whether BREDL has satisfied standing requirements.[37] BREDL's hearing request states that it is a ''regional, community-based non-profit environmental organization working in Virginia [and other states] . . . [to promote] earth stewardship, environmental democracy, social justice, and community empowerment.''[38] BREDL's chapter PACE was founded in 2004 ''to advocate for safe, renewable energy'' in Virginia.[39] To support its claim of representational standing, BREDL alleges that the issuance of a COL to Dominion ''would present a tangible and particular harm to the health and well-being of [its] members living within 50 miles of the site.''[40] The hearing request includes the declarations of eight BREDL members who state that they live within 50 miles of the proposed North Anna Unit 3 reactor site.[41]

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[32] *See Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 183 (2007).

[33] *See id.*

[34] *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

[35] *See, e.g., id.* at 329 (stating that the presumption applies in proceedings for nuclear power plant ''construction permits, operating licenses, or significant amendments thereto'').

[36] *See* Dom. Ans. at 5; Staff Ans. at 18.

[37] *See* 10 C.F.R. § 2.309(d)(3).

[38] Pet. at 2.

[39] *Id.*

[40] *Id.* at 4-5.

[41] *See* Pet., Decl. of Nathan Van Hooser (May 8, 2008); Pet., Decl. of Donal Day (May 8, 2008); Pet., Decl. of Jeffery A. Adams (May 7, 2008); Pet., Decl. of Barbara White (May 8, 2008); Pet., Decl. of Vanthi Nguyen (May 9, 2008); Pet., Decl. of John Cruikshank (May 8, 2008); Pet., Declaration of Jason Halbert (May 7, 2008); Pet., Decl. of Elena B. Day (May 8, 2008) [hereinafter collectively, Declarations].

The declarations also state that the members have authorized BREDL to represent their interests in this proceeding.[42]

Therefore, pursuant to the Commission's 50-mile proximity presumption, we find that BREDL has standing to intervene in this proceeding. Nevertheless, we do not grant PACE standing in its own right because the Declarants fail to mention any affiliation they may have with PACE and do not authorize PACE to be their representative.[43]

With regard to NCUC's request to participate as a nonparty interested state, we find that NCUC may participate in that manner under 10 C.F.R. § 2.315(c), which directs that an interested state that has not been admitted as a party under section 2.309 be provided ''a reasonable opportunity to participate in a hearing.''[44] Mr. Louis S. Watson, Jr., has been designated as NCUC's single representative.

III. RULING ON THE ADMISSIBILITY OF BREDL'S CONTENTIONS

We have two tasks to perform in evaluating BREDL's contentions. First, because Dominion's COL Application for Unit 3 references the ESP for the proposed North Anna Units 3 and 4, we must determine whether one or more of the contentions were resolved in the ESP proceeding. Matters resolved in a proceeding on an ESP application are considered resolved in a subsequent COL proceeding when the COL application references the ESP, subject to certain

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[42] *See* Declarations.

[43] This makes no difference to our resolution of the contentions, however, since all contentions were filed jointly on behalf of BREDL and PACE.

[44] The NRC Staff opposes NCUC's request to participate, *see* NRC Staff Answer to ''Request of the [NCUC] for an Opportunity to Participate in Any Hearing and to Be Added to the Official Service List'' (June 3, 2008); but Dominion does not, *see* Dominion's Answer to Request of [NCUC] to Participate in Hearing (June 3, 2008). The Staff argues that NCUC has not provided sufficient detail concerning its interest in this proceeding, noting that the North Anna site is approximately 100 miles from North Carolina. But NCUC asks only to participate as an interested state, not a party, and therefore we need not decide whether it may be admitted under 10 C.F.R. § 2.309(d)(2). NCUC provides sufficient information to make the lesser showing necessary under 10 C.F.R. § 2.315(c), and we will therefore allow NCUC to participate as a nonparty. Although NCUC is a state agency rather than a state, other licensing boards have allowed state agencies to participate as nonparty interested states. *See, e.g., Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-03-18, 58 NRC 262, 264 (2003); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 37 (1993) (granting nonparty interested state status to state utility commissions under 10 C.F.R. § 2.715(c), the predecessor to 10 C.F.R. § 2.315(c)).

exceptions.[45] Therefore, if an issue was resolved in the ESP proceeding and does not fall within any exception, we may not admit it in this COL proceeding. Second, for any contentions that were not resolved in the earlier ESP proceeding, we must determine whether they are admissible under the standards prescribed in 10 C.F.R. § 2.309(f)(1).

We analyze each of these requirements in general terms in the following two sections. We then apply the requirements of 10 C.F.R. § 2.309(f)(1) to BREDL's specific contentions.

A. The Test for Determining Whether Contentions Were Resolved in the ESP Proceeding

Under NRC regulations, ''if the application for the . . . combined license references an early site permit, the Commission shall treat as resolved those matters resolved in the proceeding on the application for . . . the early site permit.''[46] But section 52.39(a)(2) does not define the type of action that is sufficient to resolve an issue in an ESP proceeding, state who must take the necessary action, or explain the circumstances under which the resolution must take place. Because the term ''resolved'' is not expressly defined in 10 C.F.R. § 52.39(a) or in any other relevant provision of Part 52, we may look to the ordinary meaning of the term.[47] The relevant definition of ''resolve'' is to reach a decision

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[45] *See* 10 C.F.R. § 52.39(a)(2). The exceptions are in paragraphs (b), (c), and (d) of section 52.39. The exceptions that are potentially relevant to this case are those listed in subsection 52.39(c)(1):

> In any proceeding for the issuance of a . . . combined license referencing an early site permit, contentions on the following matters may be litigated in the same manner as other issues material to the proceeding:
>
> (i) The nuclear power reactor proposed to be built does not fit within one or more of the site characteristics or design parameters included in the early site permit;
>
> (ii) One or more of the terms and conditions of the early site permit have not been met;
>
> (iii) A variance requested under paragraph (d) of this section is unwarranted or should be modified;
>
> (iv) New or additional information is provided in the [COL] application that substantially alters the bases for a previous NRC conclusion or constitutes a sufficient basis for the Commission to modify or impose new terms and conditions related to emergency preparedness; or
>
> (v) Any significant environmental issue that was not resolved in the early site permit proceeding, or any issue involving the impacts of construction and operation of the facility that was resolved in the early site permit proceeding for which significant new information has been identified.

10 C.F.R. § 52.39(c)(1).

[46] 10 C.F.R. § 52.39(a)(2).

[47] *See Chapman v. United States,* 500 U.S. 453, 462 (1991).

about or make an official determination concerning an issue.[48] The Commission's choice of this specific term implies that it intended to grant preclusive effect only when the appropriate agency official makes a determination concerning the issue in dispute. The fact that an issue was mentioned in agency documents is insufficient to show that it was resolved.

The ordinary meaning, however, does not explain who must resolve the issue or the circumstances under which the resolution must take place. One possible reading is that a disputed issue has been resolved only when it was litigated and decided by a licensing board or by the Commission in the ESP proceeding. But there is a broader interpretation — that an issue has been resolved when it *could have been litigated* during the ESP proceeding, as well as when it actually was litigated. Under this second reading, if the issue was within the scope of the ESP proceeding as defined in the Notice of Opportunity for a Hearing, and thus could have been litigated during that proceeding, a participant in a subsequent COL proceeding may not raise the issue if the application references the ESP unless one of the exceptions listed in section 52.39 applies.

The NRC Staff and Dominion favor a broad reading of the preclusive effect of section 52.39(a)(2), arguing that actual litigation is not required for an issue to have been resolved in an ESP proceeding.[49] According to the Staff, the preclusive effect of section 52.39 extends not only to issues resolved by a Licensing Board or the Commission, but also to issues the Staff was required to resolve, and did resolve, during the ESP proceeding, even if no one challenged the Staff's determinations. The Staff summarizes its position by stating that,

> for a COL application that references an ESP, § 52.39 precludes consideration of all matters resolved in the ESP proceeding, including determinations on any subject necessary to form the basis for the NRC staff conclusions documented in the Staff safety evaluation report on the ESP application and the environmental impact statement prepared in connection with ESP application.[50]

BREDL has not directly addressed the meaning of section 52.39(a)(2). However, we infer from its Reply that it believes it should be free to litigate in a COL proceeding any issue not actually litigated in the ESP proceeding.[51]

Because the term ''resolved'' as used in section 52.39(a)(2) is not expressly defined and is capable of more than one plausible interpretation, we must determine what meaning would be most consistent with the regulatory scheme as a

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[48] *Webster's Third International Dictionary* 1933 (1976).

[49] Staff Ans. at 16; Dom. Ans. at 6-7.

[50] Staff. Ans. at 16.

[51] Reply of [BREDL] to [Dominion] and NRC Staff Answers to Our Petition for Intervention and Request for Hearing (June 11, 2008) [hereinafter BREDL Reply].

whole and best fulfill the Commission's intent in adopting Part 52. To do so, we examine both the text of, and the Commission's rationale for adopting, the ESP and COL provisions of Part 52.

In 1988, the Commission proposed the ESP and COL regulations as Subparts A and C of new 10 C.F.R. Part 52.[52] In proposing the new Part 52, the Commission stated that it wanted ''to improve reactor safety and streamline the licensing process by encouraging standard designs and by permitting early resolution of environmental and safety issues related to the reactor site and design.''[53] The Commission further explained that Subpart A, which governs ESPs, allows ''a prospective applicant to obtain a permit for one or more pre-approved sites on which future nuclear power stations can be located.''[54] Thus, an ESP may be sought even though an application for a construction permit or COL has not been filed.[55] An ESP is categorized as a ''partial construction permit'' under 10 C.F.R. § 52.1. As previously noted, an ESP does not authorize an applicant to construct a nuclear power reactor. Instead, an ESP focuses on the suitability of a proposed site, and is defined as a ''Commission approval . . . for a site or sites for one or more nuclear power facilities.''[56] The holder of an ESP may not actually commence construction of any reactors on the ESP site without having applied for and received a separate construction permit or combined operating license from the NRC.[57] Thus, even if the ESP is granted, an additional application must be submitted and approved before construction of any new reactors can commence.[58]

Subpart C of Part 52 establishes procedures for the issuance of a combined construction permit and conditional operating license for a nuclear power plant.[59] This is ''essentially a construction permit which also requires consideration and resolution of many of the issues currently considered at the operating license

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[52] Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 53 Fed. Reg. 32,060 (Aug. 23, 1988).

[53] *Id.* at 32,062.

[54] *Id.*

[55] 10 C.F.R. § 52.15(a).

[56] *Id.* § 52.1(a).

[57] *See North Anna ESP Site,* LBP-07-9, 65 NRC at 550-51.

[58] *Id.* However, if the applicant includes a satisfactory site redress plan, an ESP holder may conduct certain site preparation activities under a ''limited work authorization'' granted under 10 C.F.R. § 50.10(e). *See* 10 C.F.R. § 52.25.

[59] Subpart B of Part 52, which concerns standard design certifications, is not directly relevant here, but it is also illustrative of the Commission's intent to streamline the licensing process. Subpart B ''allow[s] a prospective applicant, vendor, or other interested party to obtain Commission approval of a design of a complete nuclear power plant or a major portion of such a plant.'' 53 Fed. Reg. at 32,062. Applicants for COLs or construction permits may then refer to the standard design in their applications, thus simplifying the application process significantly.

stage.''[60] The general requirements for the contents of a COL application are set forth in 10 C.F.R. §§ 52.79 and 52.80. Notably, if a COL application references an ESP, the requirements for the COL application are significantly reduced. Section 52.79(b) governs the contents of a final safety analysis report submitted as part of a COL application that references an ESP. ''The final safety analysis report need not contain information or analyses submitted to the Commission in connection with the early site permit,'' but must either include or incorporate by reference the ESP safety analysis report.[61] The COL application must demonstrate that the design of the chosen reactor falls within the site characteristics and design parameters in the ESP, identify any necessary variances from the ESP, and ''demonstrate that all terms and conditions that have been included in the early site permit, other than those imposed under § 50.36b, will be satisfied by the date of issuance of the combined license.''[62] A safety contention arising from a matter resolved in an ESP proceeding is within the scope of a COL proceeding that references the ESP only if it concerns whether the site characteristics and design parameters specified in the ESP have been met (§ 52.39(c)(1)(i)), whether a term or condition in the ESP has been met (§ 52.39(c)(1)(ii)), whether a variance from the ESP requested by the COL applicant is unwarranted or should be modified (§ 52.39(c)(1)(iii)), or whether emergency planning matters resolved in the ESP should be revisited (§ 52.38(c)(1)(iv)).

The required content of the environmental report for a COL application is also significantly reduced if the COL application references an ESP. The environmental report at the COL stage ''need not contain information or analyses submitted to the Commission in 'Applicant's Environmental Report — Early Site Permit Stage,' or resolved in the Commission's early site permit environmental impact statement.''[63] Instead, the environmental report for the COL stage must, among other things: (1) demonstrate that the design of the chosen reactor falls ''within the site characteristics and design parameters specified'' in the ESP; (2) include information ''to resolve any significant environmental issue that was not resolved in'' the ESP proceeding; and (3) provide ''[a]ny new and significant information for issues related to the impacts of construction and operation of the facility that were resolved in'' the ESP proceeding.[64]

The Commission expected that most safety and environmental issues related to the site would be resolved during the ESP proceeding.[65] An Environmental Impact

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[60] 53 Fed. Reg. at 32,062.
[61] 10 C.F.R. § 52.79(b)(1).
[62] *Id.* § 52.79(b)(3).
[63] *Id.* § 51.50(c)(1).
[64] *Id.* § 51.50(c)(1)(i)-(iii).
[65] *See* 53 Fed. Reg. at 32,066.

Statement (EIS) must be prepared for an ESP.[66] The Commission explained that, because of this requirement, ''only an environmental assessment need be prepared in connection with the application for a combined license'' that references an ESP.[67] An environmental assessment is generally a shorter, less detailed document than an EIS.[68] The Commission also stated that the environmental review conducted during such a COL proceeding ''must focus on the suitability of the site for the design and any other significant environmental issue *not considered in any previous proceeding on the site* or the design.''[69] Thus, the environmental analysis conducted at the COL stage is limited to those issues not taken into account in the EIS prepared for an ESP. However, an environmental contention may be admitted during the COL proceeding if it concerns a significant environmental issue that was not resolved in the ESP proceeding, or if it involves the impacts of construction and operation of the facility and significant new information has been identified.[70]

Taking into account both the relevant language of the regulations and the Commission's evident intent in promulgating those provisions, we agree with the Staff that a matter need not be actually litigated in order to be ''resolved'' in an ESP proceeding. If the matter was decided by the Staff in the ESP proceeding, concerns an issue that the Staff was required to resolve at that stage, and could have been litigated in the ESP proceeding, the matter is deemed ''resolved'' by the ESP proceeding even if the issue was not actually litigated. In reaching this conclusion, we note that 10 C.F.R. § 51.50(c)(1), quoted above, provides that the environmental report (ER) for the COL stage need not contain information or analyses concerning matters that were ''resolved'' in the EIS for the ESP. The EIS is prepared by the NRC Staff and is based, at least in part, on information in the ER. Thus, an issue can be ''resolved'' within the meaning of section 51.50(c)(1) even though there might have been no litigation concerning that issue, if the NRC Staff adequately addressed the matter in an EIS. The term ''resolved'' should be

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[66] 10 C.F.R. § 52.18.

[67] 53 Fed. Reg. at 32,066. The NRC's regulations now require that an EIS be prepared for a COL. 10 C.F.R. § 51.20(b)(2). The Commission explained that ''[i]f there is no new and significant information for matters resolved at the ESP stage, then the staff will rely upon . . . the ESP EIS at the combined license stage and disclose the NRC conclusion for matters covered in the early site permit review. Such matters will not be subject to litigation at the combined license stage.'' Final Rule: ''Licenses, Certifications and Approvals for Nuclear Power Plants,'' 72 Fed. Reg. 49,352, 49,431-32 (Aug. 28, 2007).

[68] *See Sierra Nevada Forest Protection Campaign v. Weingardt,* 376 F. Supp. 2d 984, 990 (E.D. Cal. 2005).

[69] 53 Fed. Reg. at 32,066 (emphasis added).

[70] 10 C.F.R. § 52.39(c)(1)(v).

given the same meaning in section 52.39(a)(2), given that both provisions concern the relationship between ESP and COL proceedings.[71]

Such a reading also gives meaningful effect to the Commission's intent to encourage early resolution of environmental and safety issues related to the reactor site. If section 52.39(a)(2) only applies to issues actually litigated during an ESP proceeding, a participant in an ESP proceeding could pick and choose the issues it would raise, thereby frustrating the goal of the Part 52 regulations to resolve environmental and safety issues related to the reactor site at the ESP stage.

Finally, because NRC case law already limited the authority of licensing boards to revisit issues that had been litigated in earlier proceedings, we cannot plausibly construe the Commission's intent in promulgating section 52.39(a)(2) as limited to achieving only that result. In general, the rule of collateral estoppel bars parties from relitigating issues actually and necessarily decided in prior litigation between the same parties.[72] The Appeals Board decided in 1974 that the doctrine of collateral estoppel should be applied in appropriate circumstances in NRC proceedings.[73] Thus, collateral estoppel was already established in the NRC's case law well before the Part 52 regulations were proposed in 1988. If we were to construe section 52.39(a)(2) as limited to mandating that licensing boards not revisit issues previously litigated and decided in earlier ESP proceedings, it would do no more than restate or modify a rule of law that was already well established in NRC case law. The Commission's statements of intent accompanying the proposed Part 52 show that its intent was not limited to restating or modifying a rule of law that licensing boards already applied.

We hasten to add, however, that in order for an issue to have been resolved during an ESP proceeding, the issue must have been examined and decided by the Staff, not just referred to without reaching a conclusion. Moreover, the issue must be one that was necessary for the Staff to resolve under the regulations governing ESPs (10 C.F.R. Part 52, Subpart A). Mere excursions by the Staff into issues that need not be resolved at the ESP stage are not sufficient to justify precluding parties from litigating those issues in a COL proceeding. Otherwise, a party could be precluded from litigating an issue it had no reason to believe would be resolved in an ESP proceeding.

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[71] *See National Aeronautics and Space Administration v. Federal Labor Relations Authority,* 527 U.S. 229, 235 (1999) (A statutory phrase ''should ordinarily retain the same meaning wherever used in the same statute'').

[72] *See generally* 18 Charles Alan Wright et al., Federal Practice & Procedure §§ 4416, 4419 (2d ed. 2002).

[73] *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210 (1974); *see also Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-107A, 16 NRC 1791, 1808 (1982).

In addition, the NRC must have provided adequate notice to potential litigants, through the *Federal Register* notice that provides the public with the opportunity for a hearing, of the issues that were within the scope of the ESP proceeding, and thus might properly be raised in a request for a hearing in that proceeding. As the Staff notes, ''long-standing Commission precedent establishes that contentions may only be admitted in an NRC licensing proceeding if they fall within the scope of issues set forth in the *Federal Register* notice of hearing and comply with the requirements of'' applicable regulations and case law.[74] Given that the *Federal Register* notice defines the scope of the issues that may properly be raised in a request for a hearing, it also defines the scope of the issues that could reasonably be deemed resolved during an ESP proceeding. Before a participant may be precluded from litigating an issue because it failed to raise the issue in an earlier proceeding, it must have had reasonable notice that such an opportunity existed. If we reached the contrary result, we would run the risk of indirectly depriving ''persons whose interest may be affected by the proceeding'' of the right to a hearing provided in AEA § 189a.[75]

Therefore, we will treat BREDL's contentions as resolved during the ESP proceeding for the North Anna site if (1) the subject of the contention was actually litigated and decided during the ESP proceeding; or (2) the subject of the contention, although not actually litigated, was decided by the Staff, was necessary for the Staff to resolve in the ESP proceeding, and was within the scope of that proceeding as defined in the *Federal Register* notice of opportunity for a hearing. We must treat any contention resolved during the ESP proceeding as resolved in this COL proceeding unless one of the exceptions listed in section 52.39 applies.

B. Standards Governing Contention Admissibility

For any contentions not resolved in the ESP proceeding or to which an exception applies, we must determine whether they are admissible in this COL proceeding. Section 2.309(f)(1) of the Commission's regulations sets out the requirements that must be met if a contention is to be admitted. An admissible contention must: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific

[74] Staff Ans. at 10-11 (citations omitted).

[75] 42 U.S.C. § 2239(a)(1)(A).

sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (vi) provide sufficient information to show that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or, in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.[76]

The purpose of the contention rule is to ''focus litigation on concrete issues and result in a clearer and more focused record for decision.''[77] The Commission has stated that it ''should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.''[78] The Commission has emphasized that the rules on contention admissibility are ''strict by design.''[79] Further, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications.[80] Failure to comply with any of these requirements is grounds for not admitting a contention.[81]

C. Analysis of BREDL's Contentions

1. Contention One

BREDL alleges that Dominion's COL Application fails to address the fact that, ''[a]s of June 30, 2008, no facility in the United States will be licensed and able to accept for disposal, Class B, C or Greater-Than-C radioactive waste from the North Anna nuclear power reactors, including the proposed Unit 3.''[82] BREDL

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[76] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[77] Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004); *see also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* 435 U.S. 519, 553-54 (1978); *Business and Professional People for the Public Interest v. AEC,* 502 F.2d 424, 428 (D.C. Cir. 1974); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974).

[78] 69 Fed. Reg. at 2202.

[79] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied,* CLI-02-1, 55 NRC 1 (2002).

[80] 10 C.F.R. § 2.335(a).

[81] 69 Fed. Reg. at 2221; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

[82] Pet. at 5. A United States Government Accountability Office Report provides some background concerning the present situation, about which there is no dispute. U.S. Government Accountability Office, LOW LEVEL RADIOACTIVE WASTE Status of Disposal Availability in the United States and Other Countries, GAO 08-813T (May 20, 2008) [GAO Report]. The GAO Report explains that an LLRW disposal facility located in Barnwell, South Carolina, currently receives about 99% of the

(Continued)

argues that Dominion should therefore have included in the Application a plan to manage the low-level radioactive waste (LLRW) generated by the new reactor onsite, given that the Barnwell facility in South Carolina that had until recently been receiving LLRW from the existing North Anna reactors no longer accepts LLRW from Virginia and various other states.[83] BREDL states that Dominion has failed to explain adequately in the COL Application ''how NRC regulations for the disposal of so-called 'low-level' radioactive waste will be met in the absence of a disposal facility (dump). This issue must be addressed in order for the [NRC] to grant an operating license with credibility.''[84] BREDL also alleges that Dominion's ER for the COL Application fails to explain ''the ongoing on-site management and potential environmental impact at the reactor site of keeping so-called 'low-level' waste from operations on the site of generation.''[85] In substance, Contention One alleges that Dominion's Final Safety Analysis Report (FSAR) should have explained Dominion's plan for complying with NRC regulations governing the management of LLRW in the absence of an offsite disposal facility, and that Dominion's COL ER should have examined the environmental consequences of retaining LLRW at the North Anna site.[86] The first argument is a safety contention, and the second an environmental contention.

a. Analysis of Contention One Under 10 C.F.R. § 2.309(f)(1)

The first requirement we must consider is whether the contention provides a specific statement of the legal or factual issue to be raised.[87] Contention One is a ''contention of omission, i.e., one that claims, in the words of 10 C.F.R. § 2.309(f)(1)(vi), 'the application fails to contain information on a relevant matter

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nation's Class B and C waste. However, after June 30, 2008, the Barnwell facility will be closed to generators of LLRW except ones located in states that are part of the Atlantic Compact (South Carolina, Connecticut, and New Jersey). LLRW generators in Virginia therefore are no longer able to send their Class B and C waste to the Barnwell facility. The GAO Report also explains that unless an offsite disposal facility becomes available, Greater-than-Class-C waste, if any, will also have to be managed onsite since DOE has not yet developed a disposal facility for that type of waste.

[83] Pet. at 5. We shall refer to this event as the ''partial closure'' of the Barnwell facility.

[84] *Id.*

[85] *Id.* at 6.

[86] Although BREDL refers to ''Class B, C or Greater-Than-C radioactive waste,'' Pet. at 5, we will focus upon Class B and Class C waste because the disposal of Greater-Than-Class-C waste is the responsibility of the federal government. 42 U.S.C. § 2021c(b)(1)(D). Thus, the disposal of Greater-Than-C radioactive waste is not directly affected by the partial closure of the Barnwell facility. Additionally, BREDL does not argue that Dominion lacks an offsite disposal facility for Class A waste.

[87] 10 C.F.R. § 2.309(f)(1)(i).

as required by law . . . and the supporting reasons for the petitioner's belief.' ''[88] In *Pa'ina Hawaii, LLC,* the Board found that a contention satisfied the requirement to provide a specific statement of the legal or factual issue sought to be raised by alleging that the application failed to describe the emergency procedures for a prolonged loss of electricity.[89] The requirement is met here as well because BREDL has adequately described the information it contends should have been included in the COL Application.

BREDL has also provided a brief explanation of the basis of Contention One, thereby satisfying 10 C.F.R. § 2.309(f)(1)(ii). BREDL has noted that at present there is no offsite disposal facility for the Class B and C waste that will be generated by the operation of proposed Unit 3. It has adequately identified, either directly or by quoting statements it attributes to the COL Application, the NRC regulations that govern Dominion's storage of LLRW.[90] Among the provisions cited are 10 C.F.R. Part 20 and 10 C.F.R. Part 50, Appendix I. And BREDL emphasizes that, although Dominion claims it will comply with the NRC regulations, it fails to explain how it will do so in the absence of an offsite disposal facility.[91] In *Pa'ina Hawaii, LLC,* the Board found that the petitioner had adequately explained the basis of its contention by identifying the regulation that allegedly required the applicant to describe its emergency procedures for a prolonged loss of electricity.[92] Here also, the petitioner has adequately explained the basis of its belief that the Application omits information necessary to satisfy the governing NRC regulations.

Contention One is within the scope of this proceeding, as required by section 2.309(f)(1)(iii). The scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board.[93] Any contention that falls outside the specified scope of the proceeding is inadmissible.[94] The Notice of Hearing and Opportunity to Petition for Leave to Intervene for this proceeding[95] explained that the Licensing Board would consider Dominion's Application under Part 52 for a COL for North Anna

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[88] *Pa'ina Hawaii, LLC,* LBP-06-12, 63 NRC 403, 413 (2006), *petition for reconsideration denied,* CLI-06-25, 64 NRC 128 (2006) (dismissing applicant's appeal as untimely).

[89] *Id.*

[90] Pet. at 6-7. As we explain *infra* pp. 320-21, BREDL has attributed to the North Anna COL Application statements that are actually from another application, but the effect of that error is minimal because the North Anna Application contains similar statements.

[91] *Id.* at 5-7.

[92] *See Pa'ina,* LBP-06-12, 63 NRC at 414.

[93] *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

[94] *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

[95] 73 Fed. Reg. 12,760 (Mar. 10, 2008).

Unit 3. Contention One challenges the legal sufficiency of that Application and is therefore within the scope of the proceeding.[96]

To satisfy section 2.309(f)(1)(iv), the petitioner must demonstrate that a contention asserts an issue of law or fact that is ''material to the findings the NRC must make to support the action that is involved in the proceeding,''[97] that is to say, the subject matter of the contention must impact the grant or denial of a pending license application.[98] ''Materiality'' requires the petitioner to show why the alleged error or omission is of possible significance to the result of the proceeding.[99] This means that there must be some significant link between the claimed deficiency and the agency's ultimate determination whether the license applicant will adequately protect the health and safety of the public and the environment.[100]

Dominion's plan for LLRW storage at the North Anna site is ''material to the findings the NRC must make to support the action that is involved in the proceeding.''[101] The NRC Staff states that, as part of its COL Application, Dominion has requested

> a license under 10 C.F.R. Part 30, which would authorize [Dominion] to possess and store the low-level radioactive waste that is the subject of proposed Contention 1 if the Application is ultimately granted. Application, Part 1, at 1. The material would be stored in accordance with the requirements of 10 C.F.R. Part 20. *See, e.g.,* 10 C.F.R. §§ 20.1801, 1802.[102]

Thus, the COL Application seeks NRC authorization for the possession and storage of LLRW in compliance with the standards for protection against radiation in 10 C.F.R. Part 20. If Dominion is unable to find a replacement for the Barnwell facility, Class B and C waste from Unit 3 will have to be stored at the site, and Dominion's plan for providing extended onsite storage will be material to the determinations the NRC Staff must make under Parts 20 and 30. We understand the Staff to have acknowledged as much.[103] Similarly, the COL regulations require the application to address, among other things, ''[t]he kinds and quantities of radioactive materials expected to be produced in the operation and the means

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[96] *See Pa'ina,* LBP-06-12, 63 NRC at 414.

[97] 10 C.F.R. § 2.309(f)(1)(iv).

[98] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80 (1998), *aff'd as to other matters,* CLI-98-13, 48 NRC 26 (1998).

[99] *PFS,* LBP-98-7, 47 NRC at 179.

[100] *Id.* at 180.

[101] 10 C.F.R. § 2.309(f)(1)(iv).

[102] Staff Ans. at 22.

[103] *See id.*; Tr. at 51-53.

for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter.''[104] Thus, the Applicant's plan for managing the radioactive waste that the proposed reactor will generate in compliance with the limits in Part 20 is also material under Part 52.

Contention One is also material to compliance with NEPA and the NRC's regulations implementing NEPA.[105] In particular, the environmental report prepared for a COL application must address, among other things, the environmental costs of ''management of low-level wastes and high-level wastes related to uranium fuel cycle activities.''[106] The analysis must be based on Table S-3, entitled ''Table of Uranium Fuel Cycle Environmental Data,'' but the table ''may be supplemented by a discussion of the environmental significance of the data set forth in the table as weighed in the analysis for the proposed facility.''[107] Also, ''Table S-3 does not include health effects from the effluents described in the Table,'' and that issue, as well as others specifically noted, ''may be the subject of litigation in the individual licensing proceedings.''[108] The NRC's ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants'' explains that ''[t]he environmental impacts of on-site LLW management activities, including interim storage, result principally from exposure to radioactivity. Workers receive external doses from exposure to radiation while handling and packaging the waste materials and from periodic inspections of the packaged materials and any other handling operations required during interim storage.''[109] Thus, the increased need for interim storage of LLRW because of the closure of the Barnwell facility implicates the health of plant employees, an issue that Table S-3 does not resolve. Because the environmental consequences of long-term interim storage of LLRW is a material issue under NEPA and Table S-3 does not resolve all such consequences, Contention One is material to compliance with NEPA and the NRC's implementing regulations.

We disagree, however, with BREDL's theory that, because of the lack of an offsite disposal facility, Dominion might have to comply with the regulations in 10 C.F.R. Part 61, which concern licensing requirements for land disposal of

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[104] 10 C.F.R. § 52.79(a)(3). The information need not be submitted again if it was previously provided to the Commission in connection with an ESP and certain other conditions are satisfied, *id.* § 52.79(b)(1), but the important point is that the information must be supplied to the NRC.

[105] *See* 10 C.F.R. Part 51.

[106] 10 C.F.R. § 51.51(a).

[107] *Id.*

[108] *Id.* § 51.51(b), n.1 to Table S-3.

[109] NUREG-1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants,'' § 6.4.3.2 (May 1996). As discussed *infra* p. 323, this document was cited and relied upon by the NRC Staff in the Final Environmental Impact Statement [FEIS] for the North Anna ESP, and we may therefore consider it here.

radioactive waste.[110] BREDL assumes that, if Dominion cannot find an offsite disposal facility for the LLRW generated by its existing reactors and proposed Unit 3, Dominion might eventually need a permit under Part 61 for the extended onsite storage of LLRW. In BREDL's view, long-term storage onsite is equivalent to disposal. We doubt that this theory is correct. A Part 61 permit for the land disposal of radioactive waste is required for those who ''receive from others, possess and dispose of wastes containing or contaminated with source, byproduct or special nuclear material.''[111] Thus, the Part 61 regulations apply to disposal of LLRW, not to storage, and the possibility that storage may last longer than originally planned would not necessarily constitute disposal. In any event, Dominion is not seeking an authorization for an LLRW disposal facility in this proceeding. Even assuming arguendo that Dominion might someday require a permit under Part 61 for a disposal facility, that issue is too speculative at present and is therefore not ''material to the findings the NRC must make to support the action that is involved in'' the present proceeding.[112] Nevertheless, even though BREDL cannot rely upon the Part 61 regulations, we find for the reasons previously stated that Contention One is material to the findings the NRC must make under other regulations that do apply to Dominion's Application.

Section 2.309(f)(1)(v) requires the petitioner to provide a concise statement of the facts that support its position and upon which the petitioner intends to rely at the hearing. Dominion argues that BREDL has failed to provide ''any facts, expert opinion, or references to documents indicating that onsite storage of waste (if necessary) would pose any significant safety or security risk,'' and that in the absence of such support Contention One must fail.[113] However, ''the pleading requirements of 10 C.F.R. § 2.309(f)(1)(v), calling for a recitation of facts or expert opinion supporting the issue raised, are inapplicable to a contention of omission beyond identifying the regulatively required missing information.''[114] Thus, for a contention of omission, the petitioner's burden is only to show the facts necessary to establish that the application omits information that should have been included. The facts relied on need not show that the facility cannot be safely operated, but rather that the application is incomplete. If the Applicant cures the omission, the contention will become moot.[115] Then, BREDL must timely file a new or amended contention if it intends to challenge the sufficiency of the new

[110] Pet. at 6.

[111] 10 C.F.R. § 61.10.

[112] *Id.* § 2.309(f)(1)(iv).

[113] Dom. Ans. at 16.

[114] *Pa'ina,* LBP-06-12, 63 NRC at 414.

[115] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

information supplied by the Applicant.[116] It is at that point that BREDL will have to show that Dominion's plan for extended onsite storage of Class B and C waste would pose a significant safety or security risk. To require BREDL to make that showing now would require it to challenge the adequacy of a plan that Dominion has not yet provided. We will not impose such an unreasonable burden.

BREDL has met its burden to show that the COL Application omits information necessary for the NRC to authorize onsite management of LLRW absent a replacement for the Barnwell facility. Neither Dominion nor the Staff disputes that Dominion no longer has an offsite disposal facility for Class B or C waste from the North Anna nuclear power reactors. The LLRW previously disposed of at the Barnwell facility will have to be managed onsite if an alternative disposal facility is not available. But the Application fails to explain how Dominion will manage LLRW at the North Anna Power Station in the absence of an offsite land disposal facility.[117] For the reasons previously stated, that information is material to the license requested in the COL Application. BREDL does not allege, and is not required to show, that Dominion is incapable of providing long-term storage for LLRW at the North Anna site in compliance with NRC regulations. It is sufficient that BREDL has shown that the present Application omits the information necessary to demonstrate that capability.[118] Accordingly, Contention One has sufficient factual support, as required by 10 C.F.R. § 2.309(f)(1)(v).

In addition, Dominion's FSAR itself supports BREDL's position that the COL Application should be supplemented to explain how Dominion will manage Class B and C waste without an offsite disposal facility. Section 11.4 of the North Anna FSAR, entitled ''Solid Waste Management System,'' incorporates section 11.4 of the Design Control Document (DCD), which also describes the Solid Waste Management System. Section 11.4.1 of the DCD states:

> On-site storage space for a six-month volume of packaged waste is provided in the radwaste building. Depending on the availability and accessibility of adequate waste repositories in the future, NUREG-0800, Standard Review Plan 11.4 and BTP —

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[116] *Id.*

[117] *See infra* pp. 319-21.

[118] Dominion notes that, in a recent press release, the NRC expressed confidence that ''nuclear power plants . . . have the space, expertise and experience needed to store radioactive wastes for extended periods.'' Dom. Ans. at 16-17 (quoting NRC News Release 08-103, ''NRC Updates Guidance to Licensees for Extended Storage of Low-Level Radioactive Waste'' (May 29, 2008)). Nothing in this ruling is intended to express any disagreement with that statement, nor have we determined that Dominion will be unable to manage the Class B and C waste it generates in compliance with NRC regulations absent a land disposal facility. All that we decide is that the COL Application fails to explain how Dominion will achieve compliance in the absence of a land disposal facility, and that such information should be included in the Application given the uncertainty that Dominion will find a replacement land disposal facility by the time Unit 3 begins operation.

> ETSB11-3 (Reference 11.4-1) Solid Waste Management System, DRAFT Rev. 3 — April 1996, Appendix 11.4-A, Design Guidance for Temporary Storage of Low Level Radioactive Waste provide guidance for construction and management of a temporary storage facility including up to five years waste storage. *This temporary storage facility and an associated overall site waste management plan is intended to allow the station to operate while methods for further waste minimization and volume reduction are considered,* such as the design and construction of additional volume reduction facilities, as necessary, and then the processing of the wastes that may have been stored during the construction of those facilities. Additionally, *the five-year duration is to allow time for the regional state compacts to create additional low-level waste disposal sites. The inclusion of a temporary storage facility and an overall site management plan* per NUREG-0800 Standard Review Plan 11.4 and BTP — ETSB 11-3 (Reference 11.4-1), Draft Rev. 3 — April 1996, Appendix 11.4-A, *may be required* (COL 11.4-4-A).[119]

The DCD thus acknowledges the substance of Contention One — that absent an offsite LLRW land disposal facility, Dominion may need to construct additional waste storage capacity, develop an overall site waste management plan, or both. But Dominion has not explained in the COL Application the specific actions it will take if it lacks a land disposal facility for its Class B and C waste when Unit 3 begins operations. Nor has Dominion attempted to demonstrate in the Application that, absent access to a land disposal site, it can comply with NRC regulations using only its existing facilities. Instead, apart from the paragraph quoted above, the Application assumes the continued availability of a land disposal facility.[120]

Under section 2.309(f)(1)(vi), when an application is alleged to be deficient, the petitioner must identify the deficiencies and provide supporting reasons for its position that such information is required. Any contention that meets these requirements ''necessarily presents a genuine dispute with the Applicant on a material issue in compliance with 10 C.F.R. § 2.309(f)(1)(vi).''[121] BREDL has adequately identified the deficiencies that form the basis of Contention One. BREDL states that Dominion's COL ER ''provides nothing in terms of the ongoing on-site management and potential environmental impact at the reactor site of keeping so-called 'low-level' waste from operations on the site of generation.''[122] BREDL also states that ''[t]he fact that there is not currently a site licensed to take the full range of wastes that North Anna 3 will generate if operated

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[119] GE-Hitachi Nuclear Energy, ''ESBWR Standard Plant Design — Revision 4 to Design Control Document — Tier 1 and Tier 2,'' 11.4-2 (Sept. 28, 2007) (emphasis added). Dominion has cited Table 11.4-1 of the DCD (Dom. Ans. at 17), so we may appropriately consider related information contained in the same part of the document.

[120] *See infra* note 128.

[121] *Pa'ina,* LBP-06-12, 63 NRC at 414.

[122] Pet. at 6.

is not mentioned'' in the FSAR, that the Applicant fails to explain how it will fulfill its plan to comply with applicable regulations in the absence of a licensed disposal site, and that ''[a]bsent any known disposal means, the applicant should at least analyze the impacts of all the possible alternatives for its [LLRW] disposal.''[123] For the same reasons explained above concerning BREDL's compliance with sections 2.309(f)(1)(iv) and (v), BREDL has satisfactorily explained why further information is required concerning Dominion's plans for onsite management of Class B and C waste. BREDL has therefore established a genuine dispute with the Applicant on a material issue.

It is true, as Dominion points out, that in attempting to support Contention One, BREDL has mistakenly quoted language that is not actually in the North Anna COL Application, but is in the COL Application submitted by the Tennessee Valley Authority for new reactors at the Bellefonte site near Scottsboro, Alabama.[124] BREDL is also a participant in the Bellefonte proceeding, and it evidently confused the two applications. Petitioners such as BREDL that are not represented by counsel will be held to less rigid standards for pleading, although a totally deficient petition will not be admitted.[125] BREDL's mistake does not render the petition totally deficient. If BREDL were disputing the accuracy of statements in the North Anna COL Application, we would need to know the precise statements BREDL is contesting. But for a contention of omission, it is sufficient for the petitioner to provide an ''identification of each failure and the supporting reasons for the petitioner's belief.''[126] BREDL has described the information it contends should have been included in the North Anna COL Application and the reasons for its belief.

In addition, BREDL's error is of minimal importance because section 3.5 of the North Anna ER contains a statement identical to the language BREDL quoted from section 3.5 of the Bellefonte COL Application.[127] And the corresponding section of the North Anna FSAR contains text with the same material omission as

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[123] *Id.* at 7.

[124] Dom. Ans. at 14.

[125] *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999); *Public Service Electric & Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487 (1973).

[126] 10 C.F.R. § 2.309(f)(1)(vi).

[127] Section 3.5 of the North Anna COL ER refers to section 3.5 of the ESP ER, which states in relevant part that ''[r]adioactive waste management systems would be designed to minimize releases from reactor operations to values as low as reasonably achievable (ALARA). These systems would be designed and maintained to meet the requirements of 10 CFR 20 and 10 CFR 50, Appendix I.'' This is equivalent to the language BREDL quotes at page 6 of the Petition from the Bellefonte COL ER.

the language BREDL mistakenly quoted from the Bellefonte FSAR.[128] BREDL's point, that the North Anna FSAR relies on an offsite land disposal facility and fails to explain how LLRW will be managed in the absence of such a facility, is valid even though it quoted the wrong FSAR. Given the similar language in the North Anna and Bellefonte documents and the fact that BREDL clearly identified the deficiency that is the basis of Contention One, we will not dismiss BREDL's contention because it mistakenly quoted the wrong documents. BREDL has met the requirement to identify the specific deficiency in the Application and the reasons for its belief.

We therefore conclude that Contention One satisfies the requirements of section 2.309(f)(1). Dominion and the NRC Staff do not contend that Contention One, construed as a safety contention, was resolved in the ESP proceeding. Dominion and the Staff do argue that we may not consider Contention One insofar as it relates to environmental matters because the environmental consequences of the closure of the Barnwell facility were resolved by the Staff in the FEIS.[129] We therefore turn to that issue.

b. Analysis of Contention One Under 10 C.F.R. § 52.39

Dominion and the NRC Staff argue that, in the FEIS prepared for the North Anna ESP, the Staff examined and decided that the environmental impact of the partial closure of the Barnwell facility on the North Anna site would be insignificant. Accordingly, they contend that BREDL may not challenge the COL ER based on its alleged failure to revisit that issue.[130] The Staff's determination in the FEIS, the Staff and Dominion argue, is sufficient to invoke the preclusive effect of 10 C.F.R. § 52.39(a)(2) and prevent us from admitting Contention One as an environmental contention. To resolve this question, we must consider whether the Staff in fact considered and resolved the environmental impact of the partial closure of the Barnwell facility in the FEIS, whether it was required to do so, and whether BREDL could have litigated its disagreement with the Staff's

[128] BREDL's Petition at 7 quotes section 11.4.5 of the Bellefonte FSAR, which states that the purpose of the process control program for radioactive waste management is ''to provide the necessary controls such that the final waste product meets applicable federal regulations . . . , state regulations, and disposal site waste form requirements for burial at a low level waste . . . disposal site that is licensed in accordance with 10 CFR Part 61.'' Section 11.4 of the North Anna FSAR incorporates the same section of the DCD, which states in relevant part that the Solid Waste Management System ''is designed to package the wet and dry types of radioactive solid waste for off-site shipment and disposal, in accordance with the requirements of applicable NRC and DOT regulations.'' DCD at 11.4-1. Thus, both statements assume that radioactive waste will be shipped offsite for disposal.

[129] Staff Ans. at 18; Dom. Ans. at 15-16.

[130] Dom. Ans. at 15; Staff Ans. at 19.

determination in the ESP proceeding.[131] If we give affirmative answers to each of those questions, then the issue was resolved in the ESP proceeding, and we may not consider Contention One to the extent it challenges the COL ER for failing to address it. As the Commission stated in approving the ESP for the North Anna facility, ''in the environmental context, the contents of the FEIS bounds the reach of both issue preclusion and Staff inquiry into new and significant information in a future . . . COL proceeding referencing an ESP granted for the North Anna ESP site.''[132]

Dominion had not selected a final reactor design when it submitted the ESP Application, but was considering seven different designs.[133] The applicant need not have selected a particular reactor design at the ESP stage or applied for a construction permit or COL, but it must include in the application ''[t]he specific number, type, and thermal power level of the facilities, or range of possible facilities, for which the site may be used.''[134] This provides a basis upon which the Staff may evaluate the environmental consequences of reactor construction and operation, and that is what the NRC Staff did in the FEIS for the North Anna ESP. Because there was no final design, the FEIS was based upon a ''plant parameter envelope (PPE), which is a set of values of plant design parameters that an ESP applicant expects will bound the design characteristics of the reactor or reactors that might be built at a selected site.''[135] The FEIS used the PPE to evaluate the environmental impacts of both reactor construction and reactor operation.[136] Similarly, ''[t]he PPE concept was used to provide an upper bound on liquid radioactive effluents, gaseous radioactive effluents, and solid radioactive waste releases.''[137] The FEIS devoted twenty pages to ''Fuel Cycle Impacts and Solid Waste Management.''[138]

The main text of the Draft Environmental Impact Statement (DEIS) examined radioactive waste management but did not directly address the effect of the closure of the Barnwell facility on the North Anna site. However, public comments on the DEIS argued that, because Virginia sources of LLRW would lose access to the Barnwell facility in 2008, the Staff was required to examine the environmental impact of that change. These comments and the Staff's response

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[131] *See supra* p. 310.

[132] *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 259 (2007).

[133] LBP-07-9, 65 NRC at 550.

[134] 10 C.F.R. § 52.17(a)(1)(i).

[135] NUREG-1811, ''Environmental Impact Statement for an Early Site Permit (ESP) at the North Anna ESP Site: Final Report,'' at xxiii-xxiv (Dec. 2007) [hereinafter FEIS].

[136] *Id.* at 4-1 to 4-51, 5-1 to 5-70.

[137] *Id.* at 3-13.

[138] *Id.* at 6-1 to 6-20.

are included in an appendix to the FEIS.[139] The Staff referred to the NRC's Generic Environmental Impact Statement for License Renewal of Nuclear Plants, noting that it can be used as an information source for other licensing purposes.[140] The Generic Environmental Impact Statement acknowledged that ''[l]ong-term storage of [LLRW] at reactor sites has become necessary because of the slow pace of development of new off-site disposal facilities,'' but concluded that in general the environmental impact of long-term interim storage of LLRW generated by nuclear power plants with renewed licenses would be small.[141] The Staff also noted in its response to the public comments that ''[e]xtended storage is . . . covered by the existing regulatory framework.''[142] The Staff therefore determined that no changes would be made to the main text of the FEIS as a result of the comments concerning the partial closure of the Barnwell facility.[143] Thus, the Staff considered the impact of long-term storage of LLRW on the North Anna site, concluded that it would not be significant, and on that basis determined that it did not need to further address that issue in the FEIS.

Because the Staff resolved the issue, we must determine whether it was required to do so in the ESP proceeding. BREDL acknowledges that ''the FEIS did contain a discussion of the environmental impacts of waste disposal,'' but it asserts that ''the discussion was academic because there was no actual proposal to generate waste.''[144] BREDL states that it was not required to litigate the issue raised by Contention One during the ESP proceeding because at the time there was not a ''proposal for major federal action that would have led to the generation of radioactive waste or other significant radiological impacts. The only proposal before the NRC was for the issuance of an ESP that would allow [Dominion] to prepare the North Anna site and conduct 'preliminary construction activities.' ''[145] BREDL would therefore have us conclude that it may litigate Contention One in this proceeding because the discussion of radioactive waste management in the FEIS was merely ''academic.''[146]

BREDL underestimates the environmental issues that the NRC Staff had to consider in the ESP proceeding. An ESP authorizes ''approval of a site for one or more nuclear power facilities.''[147] Thus, Dominion's request was

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[139] *Id.* at 3-236 to 3-237.

[140] *Id.* at 3-237.

[141] NUREG-1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants,'' §§ 6.4.4.5, 6.4.4.6 (May 1996).

[142] FEIS at 3-237.

[143] *Id.*

[144] BREDL Reply at 3.

[145] *Id.* (citing FEIS at 1-8).

[146] *Id.* at 3.

[147] 10 C.F.R. § 52.12.

for the approval of the North Anna site for the construction and operation of additional nuclear power facilities, even though further permitting is necessary for the actual construction and operation of those facilities. The ER submitted with the ESP application ''may address one or more of the environmental effects of construction and operation of a reactor, or reactors, which have design characteristics that fall within the site characteristics and design parameters of the early site permit application,'' and it ''*must address* all environmental effects of construction and operation necessary to determine whether there is any obviously superior alternative to the site proposed.''[148] In Chapter 5 of the ER for its ESP Application, Dominion discussed various environmental consequences of reactor operation at the site, including the radiological impacts of normal operation, environmental impacts of waste, and uranium fuel cycle impacts. Dominion specifically assessed the environmental impacts of solid LLRW from operations and from decontamination and decommissioning.[149]

The DEIS prepared at the ESP stage ''must . . . include an evaluation of the environmental effects of construction and operation of a reactor, or reactors, which have design characteristics that fall within the site characteristics and design parameters for the early site permit application . . . *to the extent addressed in the early site permit environmental report.*''[150] Because the ESP addressed the environmental consequences of radioactive waste management at the North Anna site, the Staff was required to address those consequences in the DEIS. And when the NRC Staff received comments criticizing the failure of the DEIS to take into account the impact of the partial closure of the Barnwell facility, the NRC Staff was required to respond to those comments in the FEIS, as it in fact did.[151] The Staff's resolution of the issue in the FEIS was therefore not merely academic. On the contrary, it was mandated by the regulations governing the preparation of the DEIS and the FEIS.

The last question we must answer is whether BREDL had the opportunity to challenge the Staff's determination in the ESP proceeding. It clearly did. The ''Notice of Hearing and Opportunity to Petition for Leave to Intervene'' for the ESP proceeding made clear that petitioners could challenge the adequacy of the NRC's NEPA compliance.[152] The notice explained that the NRC Staff would prepare an FEIS, and that the Presiding Officer in the proceeding would, among other things,

> (1) Determine whether the requirements of Section 102(2) (A), (C), and (E) of

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[148] *Id.* § 51.50(b)(2) (emphasis added).
[149] ESP ER at 3-5-172 to 3-5-173 (Revision 9).
[150] 10 C.F.R. § 51.75(b) (emphasis added).
[151] *Id.* § 51.91(a)(1).
[152] 68 Fed. Reg. 67,489 (Dec. 2, 2003).

> NEPA and subpart A of 10 CFR part 51 have been complied with in the proceeding; (2) independently consider the final balance among the conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and (3) determine, after considering reasonable alternatives, whether the ESP should be issued, denied, or appropriately conditioned to protect environmental values.[153]

If BREDL believed that the Staff erred when it concluded in the appendix to the FEIS that the partial closure of the Barnwell disposal facility would not have a significant effect, it could have filed an appropriate contention to that effect in the ESP proceeding. Given that the Staff examined and decided whether the partial closure of Barnwell would have a significant environmental impact at the Barnwell site, that the Staff was required to examine and decide this issue, and that BREDL had the opportunity to challenge the Staff's conclusion in the ESP proceeding, the issue has been resolved within the meaning of section 52.39(a)(2).

BREDL has not shown that any of the exceptions in section 52.39 applies. It merely points out that Dominion has now applied for a COL in which it actually proposes to build and operate a new nuclear power plant that will generate radioactive waste.[154] As we have explained, Dominion's plan to operate additional reactors at the North Anna site is not new information, the Staff examined the environmental consequences of the radioactive waste that will be generated by the new reactors in the DEIS and FEIS, and the claim that the partial closure of the Barnwell facility will have a significant environmental impact at the site was rejected by the NRC Staff. Because the FEIS resolved the environmental issue BREDL wants to litigate in this proceeding, its challenge to the COL ER is not properly before us.

We therefore admit Contention One as a safety contention based on the omission of necessary information from the FSAR. We will not admit it as an environmental contention because it was resolved in the ESP proceeding.[155]

2. Contention Two

BREDL's second contention is that ''Unit 3 Would be Built on Top of a

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[153] *Id.* at 67,489.

[154] BREDL Reply at 3.

[155] Contention One presents an issue that is common to numerous nuclear reactors. An equivalent contention has been filed in the Bellefonte proceeding, and similar contentions may be filed in connection with other license applications for new reactors. The Commission might want to consider in a rulemaking questions related to the management of LLRW that are likely to arise in multiple cases, such as whether facilities for the land disposal of Class B and C waste are likely to become available before the reactors that are the subject of currently pending license applications are expected to begin operation.

Seismic Fault.''[156] Dominion argues that we may not consider this contention because it was resolved in the ESP proceeding.[157] Dominion emphasizes that the NRC Staff and the Licensing Board for the ESP proceeding have already determined that the fault to which BREDL refers is not seismically active, and therefore BREDL's claim that Unit 3 will be built in ''an active earthquake zone'' is simply an attempt to revisit an issue previously resolved.[158] Dominion argues that its request for a variance for vibratory ground motion at the North Anna site (NAPS VAR 2.0-4), quoted at length on page 8 of the Petition, is not relevant to the question of whether a seismic fault exists at the site.[159] ''Thus, BREDL provides no basis to reopen the exhaustive characterization of the fault in the ESP proceeding.''[160]

We agree that the seismic fault issue raised in this proposed contention was extensively evaluated and resolved in the ESP proceeding and that BREDL has failed to provide any basis to reopen the issue in this COL proceeding. The NRC Staff's Final Safety Evaluation Report (FSER) dedicated over 100 pages to the subject of ''Geology, Seismology, and Geotechnical Engineering.''[161] ''[T]he Staff examined the geology in the area of the ESP Site and concluded that 'no capable tectonic faults exist in the plant site area (5 mi) that have the potential to cause near-surface displacement' and further that 'no capable tectonic sources have been identified in the [Central Virginia Seismic Zone].' ''[162] The seismic fault issue was also extensively examined during the mandatory hearing conducted by the Licensing Board for the ESP proceeding.[163] The Licensing Board, like the NRC Staff, concluded that the faults found at the North Anna site did not meet the requirements to be classified as ''capable.''[164] According to Dr. Lettis, a Dominion witness at the ESP mandatory hearing, the fault referred to in BREDL's proposed contention has not been active in the last 200 million years.[165]

As we have explained, Commission regulations bar the litigation of matters resolved in ESP proceedings.[166] BREDL has not shown that any of the exceptions

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[156] Pet. at 7.

[157] Dom. Ans. at 19.

[158] *Id.* at 19-22.

[159] *Id.* at 22-23.

[160] *Id.* at 23.

[161] NUREG-1835, ''Safety Evaluation Report for an Early Site Permit (ESP) at the North Anna ESP Site,'' at 2-140 to 2-251 (Sept. 2005) [hereinafter FSER].

[162] LBP-07-9, 65 NRC at 595-96 (quoting FSER at 2-168).

[163] *Id.* at 594-98.

[164] The requirements for a fault to be classified as ''capable'' are contained in Reg. Guide 1.165, ''Identification and Characterization of Seismic Sources and Determination of Safe Shutdown Earthquake Ground Motion'' (Mar. 1997). FSER at 2-178; *see also* LBP-07-9, 65 NRC at 596 n.84.

[165] LBP-07-9, 65 NRC at 597.

[166] 10 C.F.R. § 52.39.

in section 52.39(b), (c), or (d) apply. Dominion's request for a variance for vibratory ground motion is not related to the fault(s) described in the Petitioner's proposed contention. The request for a variance was the result of additional information collected after the ESP spectra for Unit 3 were prepared. The ESP spectra were based on a competent material elevation of 76.2 m (250 ft). Information collected for the COL Application showed the actual elevation of the top of competent material (rock) was 83.3 m (273 ft). Dominion's request for a variance was to use the Safe-Shutdown Earthquake horizontal and vertical spectra for the 273-ft elevation, which is the appropriate elevation for competent material under Unit 3. FSAR Tables 2.0-202 and 2.0-203 show the spectral acceleration values over a range of frequency and the Unit 3 values are generally lower than the ESP values except at the lower frequencies where they vary at the third or fourth decimal place, which is not a significant difference. Therefore, further litigation of the geologic fault issue is foreclosed by section 52.39(a)(2).

Contention Two also includes a general attack on Dominion's credibility.[167] BREDL claims that in 1967 evidence of seismic faults was found at the North Anna site.[168] BREDL further asserts that Virginia Electric and Power Company (VEPCO), Dominion's corporate parent, concealed this fact during proceedings that eventually led to the issuance of construction permits for North Anna Units 1 and 2, the reactors currently in operation at the site.[169] BREDL requests that we

> include and consider all documents in the case filed by North Anna Environmental Coalition during their extensive litigation of this matter and all documents in the NRC's records regarding the construction permits for North Anna Units 1 and 2. The proposed construction of a third reactor in close proximity to two existing nuclear reactors in an active earthquake zone must not be permitted.[170]

To provide the basis of an admissible contention, allegations of management improprieties or lack of integrity must be of more than historical interest. They must relate directly to the currently proposed licensing action.[171] We must therefore determine whether BREDL has established a sufficient relationship between the past misconduct it alleges and the present COL Application.

In March 1969, VEPCO requested construction permits for Units 1 and 2 at

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[167] Pet. at 8-10.

[168] *Id.* at 8.

[169] *Id.* at 8-10.

[170] *Id.* at 10-11.

[171] *Millstone,* CLI-01-24, 54 NRC at 365; *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 120 (1995).

the North Anna Power Station.[172] Those permits were issued in February 1971, and VEPCO subsequently sought construction permits for Units 3 and 4. In August 1973, the NRC advised the Licensing Board that a geologic fault had been discovered at the North Anna site. The Licensing Board convened a proceeding to determine whether the fault required halting construction of Units 1 and 2 or the denial of construction permits for Units 3 and 4. On June 27, 1974, the Licensing Board concluded that the fault was not capable and without safety significance to any of the North Anna reactors.[173] The Appeal Board subsequently affirmed the Licensing Board's determination that the fault at the site had ''been inactive for at least 500,000 years, and perhaps for as long as 200 million years.''[174] That ruling was upheld by the United States Court of Appeals for the District of Columbia Circuit.[175] Accordingly, construction continued on Units 1 and 2 and construction permits were issued for Units 3 and 4, although VEPCO did not actually construct the latter two units.[176]

The NRC conducted a separate proceeding concerning allegations that VEPCO supplied false information and made material omissions concerning the fault at the North Anna site. That case did ''not concern the safety of the North Anna site, but rather whether VEPCO fulfilled its obligation in providing information about that site.''[177] After proceedings before the Licensing Board and the Appeal Board, the Commission upheld some of the allegations that VEPCO made material false statements and omissions concerning the fault. The Commission imposed a $32,000 fine on VEPCO, but it did not revoke VEPCO's license or reopen the safety proceeding.[178]

BREDL fails to connect those events to any issue relevant to this proceeding. Long after the conclusion of the original licensing proceedings concerning North Anna Units 1-4, the Licensing Board in the ESP proceeding revisited the seismic fault issue and concluded once more that it was not seismically active. BREDL has failed to establish any relationship between VEPCO's misconduct many years ago and the findings in the ESP proceeding, nor has it identified any connection between that misconduct and any other issue in the present COL proceeding.

Therefore, we will not admit Contention Two.

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[172] *Virginia Electric & Power Co.* (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976).

[173] *Id.* at 481-82.

[174] *Virginia Electric & Power Co.* (North Anna Power Station, Units 1, 2, 3, and 4), ALAB-256, 1 NRC 10, 17 (1975).

[175] *North Anna Environmental Coalition v. NRC,* 533 F.2d 655 (D.C. Cir. 1976).

[176] CLI-76-22, 4 NRC at 482.

[177] *Id.*

[178] *Id.* at 491-92.

3. Contention Three

BREDL's third contention is that the Unit 3 cooling system will not meet the requirements of section 316 of the Clean Water Act (CWA),[179] and that the water supply will not be sufficient for plant cooling systems.[180] BREDL further states that the Commission must determine whether Unit 3 will ''operate in compliance with federal, state, and local water regulations'' during the expected 40-year operating life of Unit 3.[181]

BREDL's request that we evaluate whether Unit 3 will comply with CWA or state and local permitting requirements is outside the scope of this proceeding. In *Hydro Resources* the Commission made clear that licensing boards should not admit contentions alleging that the applicant must obtain permits from other agencies:

> Whether non-NRC permits are required is the responsibility of bodies that issue such permits, such as the Federal Environmental Protection Agency, . . . or state and local authorities. To find otherwise would result in duplicate regulation as both the NRC and the permitting authority would be resolving the same question, i.e., whether a permit is required. Such a regulatory scheme runs the risk of Commission interference or oversight in areas outside of its domain. Nothing in our statute or rules contemplates such a role for the Commission.[182]

The Commission also explained that an applicant could not rely upon an NRC license to avoid obtaining all other applicable federal, state, or local permits.[183]

Hydro Resources is controlling here, where BREDL asks the Board to decide not only that non-NRC permits will be required for Unit 3, but also whether Dominion will be able to obtain permits from and comply with regulatory requirements imposed by other agencies. If BREDL is concerned that Dominion might not comply with the CWA or state or local requirements, it may communicate such concerns to the agencies that enforce those requirements. To ask that the NRC decide such questions would create precisely the duplicate regulation and interference or oversight in areas outside the NRC's domain that the Commission warned against in *Hydro Resources.* Because the proposed contention pertains to matters outside the NRC's jurisdiction, it is not within the scope of this proceeding.[184]

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[179] 33 U.S.C. § 1326 (providing for regulation of thermal discharges).

[180] Pet. at 11.

[181] *Id.* at 13.

[182] *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120 (1998).

[183] *Id.* at 121.

[184] 10 C.F.R. § 2.309(f)(1)(iii).

BREDL also alleges that the available water supply will not be sufficient for safe reactor operation.[185] Dominion argues that this issue was fully evaluated and resolved in the ESP proceeding, and BREDL has not identified any significant new information that would allow the issue to be revisited.[186] Dominion also states that ''the assertions in Contention Three are simply vague rhetoric unsupported by any expert opinion, references, or other sources demonstrating any genuine material dispute.''[187]

We agree that this issue was resolved in the ESP proceeding. The source of cooling water for both existing reactors at the site is Lake Anna, which was created as a source of cooling water for the North Anna Power Station. The cooling system for Unit 3 will be a closed cycle, combination dry and wet cooling tower system, with makeup water supplied from Lake Anna. The FEIS prepared for the North Anna ESP proceeding evaluated the hydrological and water-use effects of the operation of North Anna Unit 3 on Lake Anna.[188] In the FEIS, the NRC Staff concluded that operation of Unit 3 would have only small hydrological effects on Lake Anna, and that the water-use impacts would also be small except under drought conditions, when the impact would be moderate.[189] The same issues were considered in detail by the Licensing Board for the ESP proceeding.[190]

BREDL now seeks to reargue the substance of the issues already resolved by both the NRC Staff and the Licensing Board for the ESP proceeding: whether the water resources of Lake Anna are adequate to provide cooling water for Unit 3 without severe hydrological or water-use impacts. BREDL has failed to point to any significant new evidence that would authorize us to reopen this issue. Accordingly, we may not admit Contention Three.[191]

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[185] Pet. at 11.

[186] *See* Dom. Ans. at 25.

[187] *Id.* at 30.

[188] FEIS at 5-4 to 5-13.

[189] *Id.* at 5-9, 5-11.

[190] LBP-07-9, 65 NRC at 564-69.

[191] 10 C.F.R. § 52.39. BREDL states in support of Contention Three that ''Virginia has continually granted variances to Dominion under Section 316 of the CWA which allow excessive amounts of thermal pollution to be discharged into waters of the United States.'' Pet. at 11. Dominion argues that BREDL is collaterally estopped from raising thermal impacts to Lake Anna or other waters as a contention because it litigated this issue in the ESP proceeding. *See* LBP-06-24, 64 NRC at 360 (granting summary disposition in favor of Dominion because all parties — including BREDL — agreed that thermal impacts of the proposed wet/dry cooling tower system for Unit 3 would be negligible). We do not read Contention Three as an attempt to revisit the issue of thermal impacts to receiving waters. We interpret BREDL's reference to CWA variances for thermal pollution as an attempt to support the contention that the cooling system for Unit 3 will not meet CWA requirements. However, to the extent Contention Three might be interpreted to allege that the cooling system will cause adverse thermal impacts to Lake Anna or other waters, we agree that the issue was previously resolved and therefore may not be raised in this proceeding.

We also note that BREDL has not provided any technical support for its claim that the water supply will not be sufficient for plant cooling purposes. Accordingly, we could not admit this contention even if it had not been resolved in the ESP proceeding.[192]

We therefore do not admit Contention Three.

4. Contention Four

BREDL states that ''Unit 3 will not meet national emission standards for radionuclides to the atmosphere.''[193] As best we can determine from the one-paragraph argument offered in support of this contention, BREDL claims that Unit 3 will not comply with national emission standards for radionuclides promulgated pursuant to section 112 of the Clean Air Act (CAA).[194] Section 112(c)(2) provides that the Environmental Protection Agency (EPA) Administrator is responsible for establishing national emissions standards for hazardous air pollutants, which are to be based upon EPA's determination of the maximum achievable control technology.

The difficulty with Contention Four, as BREDL acknowledges, is that there is no national emission standard for radionuclides in effect.[195] There is thus no national emission standard with which Dominion could comply. BREDL does not dispute any of the dose calculations presented in Dominion's COL Application, nor does it dispute that those calculated doses comply with all relevant NRC regulations. BREDL suggests, however, that the NRC is required to develop a national emission standard for radionuclides under CAA § 112 because EPA has no standard in force. Section 112 imposes no such duty upon the NRC. On the contrary, CAA § 112(d)(9) provides:

> [n]o standard for radionuclide emissions from any category or subcategory of facilities licensed by the [NRC] . . . is required to be promulgated under this section if the Administrator determines, by rule, and after consultation with the [NRC], that the regulatory program established by the [NRC] pursuant to the Atomic Energy Act for such category or subcategory provides an ample margin of safety to protect the public health.[196]

Pursuant to this provision, the EPA Administrator found that ''the NRC regulatory program for licensed commercial nuclear power reactors provides an ample

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[192] 10 C.F.R. § 2.309(f)(1)(v).

[193] Pet. at 13.

[194] 42 U.S.C. § 7412.

[195] Pet. at 14.

[196] 42 U.S.C. § 7412(d)(9).

margin of safety to protect public health'' and rescinded the National Emissions Standards for Hazardous Air Pollutants from nuclear power reactors licensed by the NRC.[197] Thus, the EPA Administrator determined that the NRC's existing regulatory program is adequate to protect public health.

Furthermore, any claim that the Commission is required to promulgate a more stringent standard for radionuclides would in substance be a challenge to the sufficiency of the NRC's radiation protection standards, which is barred in an adjudicatory proceeding.[198] The prohibition applies not only to a direct challenge to the validity of a regulation, but also to a claim that the NRC should promulgate requirements that are more stringent than those already included in its regulations.[199]

Accordingly, we do not admit Contention Four.

5. Contention Five

Contention Five states that ''[t]he assumption and assertion that uranium fuel is a reliable source of energy is not supported in the combined operating license application.''[200] BREDL cites several statements in Dominion's ER concerning the power generation benefits it expects Unit 3 to provide.[201] BREDL points out that the asserted benefits assume a reliable supply of uranium fuel for the new reactor. According to BREDL, worldwide uranium consumption currently exceeds worldwide uranium production, and therefore the ER is deficient because it ignores this deficit in claiming that Unit 3 will provide power generation benefits to Dominion's service area.

Dominion and the NRC Staff argue that Contention Five is not material to any finding the NRC must make. We disagree because the contention is relevant to the findings the NRC must make under NEPA. The Commission's NEPA regulations provide:

> [I]n a proceeding for the issuance of a combined license for a nuclear power reactor under part 52 of this chapter, the presiding officer will:
>
> (1) Determine whether the requirements of section 102(2)(A), (C), and (E) of NEPA and the regulations in this subpart have been met;

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[197] *See* National Emission Standards for Radionuclide Emissions from Facilities Licensed by the [NRC] and Federal Facilities not Covered by Subpart H, 60 Fed. Reg. 46,206, 46,210 (Sept. 5, 1995).

[198] 10 C.F.R. § 2.335.

[199] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 150-51 (2001).

[200] Pet. at 14.

[201] *Id.* at 16.

(2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; [and]

(3) Determine, after weighing the environmental, economic, technical, and other possible benefits against environmental and other costs, and considering reasonable alternatives, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values.[202]

Thus, the regulations mandate balancing the economic and other benefits of the proposed new reactor against the environmental and other costs that the project may cause. The specific statements in the ER that BREDL challenges concern the anticipated power generation benefits of the proposed new Unit 3.[203] For example, BREDL challenges Dominion's claim that ''[t]he primary benefit of the proposed Unit 3 is the provision of baseload capacity necessary to meet the needs of customers in the region served by [Dominion] . . . and to maintain a reliable, stable supply of electricity within the Dominion Zone.''[204] BREDL argues that these and other benefits asserted by Dominion depend upon a steady supply of uranium fuel, but that the imbalance between the supply and demand for uranium fuel makes such a supply uncertain.[205] Because the power generation benefits Dominion asserts Unit 3 will provide are relevant to the findings required by 10 C.F.R. § 51.107(a)(1)-(3), and because Contention Five questions the likelihood that those benefits will be realized, the contention is potentially ''material to the findings the NRC must make to support the action that is involved in'' the present COL proceeding under Part 52.[206]

Nevertheless, we decline to admit Contention Five because the Petitioner has failed to provide expert opinion, documents, or other sources to support its position that worldwide uranium supplies will be inadequate to permit the anticipated power production from North Anna Unit 3 during the license term. Therefore, BREDL has failed to satisfy the ''support'' requirement of 10 C.F.R. § 2.309(f)(1)(v), and we accordingly do not admit Contention Five.

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[202] 10 C.F.R. § 51.107(a)(1)-(3).

[203] Pet. at 16.

[204] *Id.*

[205] *Id.*

[206] 10 C.F.R. § 2.309(f)(1)(iv). In the North Anna ESP proceeding, the Licensing Board considered the factors listed in 10 C.F.R. § 51.105(a)(1)-(3), which parallel those enumerated in 10 C.F.R. § 51.107(a)(1)-(3). LBP-07-9, 65 NRC at 602-16. In ruling that Contention Five is potentially material to the factors the NRC must consider in this COL proceeding, we do not decide, and need not decide, the extent to which determinations previously made in the North Anna ESP proceeding govern the evaluation of the factors listed in 10 C.F.R. § 51.107(a)(1)-(3). We decide only that Contention Five is potentially relevant to those factors, to the extent they have not already been resolved in the ESP proceeding.

Although BREDL cites several electronic documents that it claims support its position, materials cited by a petitioner as the basis for a contention are subject to scrutiny by the licensing board to determine whether, on their face, they actually support the facts alleged.[207] Here, the electronic documents BREDL relies upon do not support its allegation that future uranium fuel supplies will be inadequate to permit reactor operation during its period of license. In fact, one such document, published by the World Nuclear Association and entitled ''Supply of Uranium,'' contradicts BREDL's factual argument.[208] It explains that ''[m]easured resources of uranium, the amount known to be recoverable from orebodies, are . . . relative to costs and prices,'' and ''[c]hanges in costs and prices, or further exploration, may alter measured resource figures markedly.''[209] In other words, as prices rise or production costs decline, exploration and production are likely to increase. ''Thus, any predictions of the future availability of any mineral, including uranium, which are based on current cost and price data and current geological knowledge are likely to be extremely conservative. . . . Our knowledge of geology is such that we can be confident that identified resources of metal minerals are a small fraction of what is there.''[210]

Even with this very conservative limitation on the knowledge of available mineral resources, BREDL's document reports that ''the world's present measured resources of uranium [5.5 million tons] in the cost category somewhat below present spot prices and used only in conventional reactors, are enough to last for over 80 years.'' The document further states that:

> There was very little uranium exploration between 1985 and 2005, so the significant increase in exploration effort that we are now seeing could readily double the known economic resources. In the two years 2005-06 the world's known uranium resources . . . increased 15%. . . . On the basis of analogies with other minerals, a doubling of price from present levels could be expected to create about a tenfold increase in measured resources, over time, due both to increased exploration and the reclassification of resources regarding what is economically recoverable.[211]

We have also reviewed another webpage cited by BREDL, and again can find no support for its contention.[212] On the contrary, the webpage reports that

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[207] *See* LBP-04-18, 60 NRC at 265. We may examine both the statements in the document that support the petitioner's assertions and those that do not. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 n.30, *rev'd in part on other grounds,* CLI-96-7, 43 NRC 235 (1996).

[208] *See* http://www.world-nuclear.org/info/inf75.html.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *See* http://www.world-nuclear.org/info/inf23.html.

mine production of uranium is already being substantially increased following the recovery in uranium prices since about 2003, with the addition of new mines in Canada and Australia and expected large increases in production. The petitioner does not have to prove its contention at the admissibility stage.[213] But BREDL has not cited any document that, read as a whole, supports its theory that uranium supplies will be insufficient to support the operation of North Anna Unit 3 during its licensed period.

As to BREDL's allegation that Dominion failed to address the adequacy of uranium fuel supply in its Application,[214] Dominion correctly points out that it supplied information concerning uranium fuel supplies in the ESP proceeding and this was incorporated by reference in the Application.[215] Section 10.2 of the ESP ER states:

> Studies performed by U.S. Government agencies, such as the National Defense Stockpile Impact Committee of the Bureau of Industry and Security . . . , and entities such as the World Nuclear Association . . . , have concluded that there are easily accessible, rich deposits of uranium throughout the world and that existing stocks of highly enriched uranium (HEU) in the U.S. and Russia — formerly for military usage — could be converted to fuel for nuclear power plants. Also, the reduction in use of uranium by the newer reactors when compared to the existing reactors would serve to extend the current 50-year supply of uranium available to the nuclear power industry. Therefore, the uranium that would be used to generate power by the new units at the ESP site, while irretrievable, would not be a large or moderate impact with respect to the longterm availability of uranium worldwide.[216]

Similarly, the FEIS concludes that ''[t]he availability of uranium ore and existing stockpiles of highly enriched uranium in the United States and Russia that could be processed into fuel is sufficient.''[217] This information is referenced in section 10.2 of the ER for the COL Application.[218] BREDL provides no significant information to generate a genuine factual dispute with Dominion concerning this issue.

Accordingly, we do not admit Contention Five.[219]

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[213] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004).

[214] Pet. at 15.

[215] Dom. Ans. at 35-36.

[216] Dominion Nuclear North Anna, LLC North Anna Early Site Permit Application Revision 9 to the North Anna ESP Application, Pt. 3, Environmental Report, Ch. 3 at 3-10-20 (Sept. 30, 2006) (internal references omitted).

[217] FEIS at 10-10.

[218] North Anna 3 Combined License Application, Pt. 3, Applicant's Environmental Report — Combined License Stage at 10-7 (Nov. 2007).

[219] *See* 10 C.F.R. § 2.309(f)(1)(v), (vi).

6. Contention Six

Contention Six alleges that the NRC fails to ''execute'' Constitutional Due Process and Equal Protection.[220] BREDL makes no claim that Unit 3 will not comply with the NRC's radiation protection regulations. Instead, BREDL claims that the NRC's regulations are insufficient to satisfy constitutional requirements.[221] BREDL argues that the radiation protection standards in the NRC's rules are unconstitutional because they allegedly do not take into account higher risks for children and women, and because they are allegedly less stringent than other federal regulations.[222] The contention is inadmissible because it challenges the NRC's regulations. We are expressly precluded from hearing such a challenge by 10 C.F.R. § 2.335.

7. Contentions Seven and Eight

Contentions Seven and Eight are closely related. Contention Seven alleges that ''[t]he Environmental Report for the Dominion COLA is deficient because it fails to discuss the environmental implications of the lack of options for permanent disposal of the irradiated (i.e., 'spent') fuel that will be generated by the proposed reactors if built and operated.''[223] BREDL states that ''[w]hile [Dominion] may have intended to rely on the NRC's Waste Confidence decision, issued in 1984 and most recently amended in 1999, that decision is inapplicable because it applies only to plants which are currently operating, not new plants.''[224] According to BREDL, the Commission has given ''no indication that it has confidence that repository space can be found for spent fuel and other high-level radioactive waste from new reactors licensed after December 1999,'' and therefore BREDL argues the ER for the COL was required to address that issue.[225]

Contention Eight is essentially a fallback position for Contention Seven. BREDL alleges that, even if the Waste Confidence Rule applies to new reactors, the Commission should reconsider it ''in light of significant and pertinent unexpected events that raise substantial doubt about its continuing validity, i.e., the increased threat of terrorist attacks against U.S. facilities.''[226]

Neither contention will be admitted because each is an impermissible attempt to relitigate issues resolved in the North Anna ESP proceeding. BREDL and

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[220] Pet. at 17.
[221] *Id.* at 18.
[222] *See id.* at 17-19.
[223] *Id.* at 21.
[224] *Id.* at 22.
[225] *Id.* at 23.
[226] *Id.* at 27.

other petitioners proffered virtually identical contentions in the ESP proceeding, both of which were not admitted by the Licensing Board.[227] The earlier version of Contention Seven, identified as Environmental Contention 3.2.1 in the ESP proceeding, was not admitted by the Licensing Board because ''[t]he matters the Petitioners seek to raise have been generically addressed by the Commission through the Waste Confidence Rule.''[228] The Board also noted that ''when the Commission amended this rule in 1990, it clearly contemplated and intended to include waste produced by a new generation of reactors.''[229] The earlier version of Contention Eight, Environmental Contention 3.2.2, was not admitted because ''[a]bsent a showing of 'special circumstances' under 10 C.F.R. § 2.335(b), which the Petitioners have not made, this matter must be addressed through Commission rulemaking.''[230]

BREDL did not appeal the 2004 contention ruling in the ESP proceeding, and it provides no explanation why it should now be entitled to raise the same issues again. As previously explained, we are prohibited by 10 C.F.R. § 52.39 from revisiting matters resolved in an earlier ESP proceeding. BREDL has not identified an exception to that general rule that would apply here and allow us to revisit contentions that were not admitted in the ESP proceeding. Moreover, even absent section 52.39, we are precluded by collateral estoppel from allowing BREDL to relitigate issues that were decided against it in its earlier administrative litigation with Dominion.[231] Finally, even if we were not barred from considering Contentions Seven and Eight by the earlier litigation, we would not admit them for the same reasons given by the Licensing Board in the ESP proceeding, which we believe to be clearly correct.

Accordingly, we will not admit either Contention Seven or Contention Eight.

IV. CONCLUSION

BREDL has standing to participate in this proceeding, and Contention One is admissible in part. Because BREDL has established one admissible contention, its Petition to Intervene and Request for Hearing will be granted. BREDL's other contentions are not admissible because they fail to satisfy the contention admissibility factors.

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[227] LBP-04-18, 60 NRC at 269.

[228] *Id.*

[229] *Id.*

[230] *Id.* at 270.

[231] *See Catawba,* LBP-82-107A, 16 NRC at 1808.

V. ORDER

For the foregoing reasons, it is, this 15th day of August 2008, ORDERED that:

1. BREDL's Petition to Intervene and Request for a Hearing is GRANTED, and PACE's request to intervene is DENIED.
2. BREDL Contention One is ADMITTED for litigation in this Proceeding.
3. BREDL Contentions Two, Three, Four, Five, Six, Seven, and Eight are DISMISSED.
4. NCUC's Request for an Opportunity to Participate in any Hearing is GRANTED.
5. In accordance with the provisions of 10 C.F.R. § 2.311, 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

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Alice C. Mignerey
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 15, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Eric J. Leeds, Director

In the Matter of **Docket Nos. 50-247**
50-286
(License Nos. DPR-26,
DPR-64)

ENTERGY NUCLEAR OPERATIONS, INC.
(Indian Point, Units 2 and 3) **August 14, 2008**

The Petitioner requested that, pursuant to 10 C.F.R. § 2.206, the NRC immediately suspend the Indian Point licenses until the issues described in the petition are remedied to full compliance with all local, state, and federal laws. The issues identified included: (1) radiological contamination through groundwater leakage from the Indian Point Unit 2 spent fuel pool (SFP), (2) the Licensee's failure to implement a new emergency notification siren system as required by NRC orders, and (3) over seventy safety, security, and enforcement issues identified over the past 6 years of plant operations.

The Petitioner also requested rulemaking concerning 10 C.F.R. Part 54, ''Requirements for Renewal of Operating Licenses for Nuclear Power Plants,'' and requested that the NRC not consider any new license renewal applications until the NRC revises its regulations. The Petitioner asserted that the current regulations in 10 C.F.R. Part 54, are prejudiced and biased, presume that license renewal is a foregone conclusion for all licensees, usurp stakeholder rights protected under the First Amendment of the Constitution, and abridge citizens' rights to due process and equal protection. The Petitioner also requested that the NRC refrain from taking any actions relative to the license renewal of Indian Point until the NRC amends 10 C.F.R. Part 54 as requested.

By letter dated October 29, 2007, the NRC denied the petition for rulemaking because it did not provide any new information that was not previously considered

by the NRC. The denial was published in the *Federal Register* on November 8, 2007 (72 Fed. Reg. 63,141).

The NRC accepted, for review pursuant to 10 C.F.R. § 2.206, the Petitioner's concerns regarding the underground leakage of contaminated water at the Indian Point facility and the failure to implement the new emergency notification siren system in a timely manner. The NRC either denied the remaining issues or found that they did not meet the criteria for acceptance in the 10 C.F.R. § 2.206 process. The NRC consolidated the concern regarding the failure to implement the siren system in a timely manner with a similar issue raised in a separate letter from the Petitioner dated September 28, 2007. This Director's Decision (DD) addresses the issue of underground leakage of contaminated water at the Indian Point facility.

The final DD was issued on August 14, 2008. The final DD addresses the Petitioner's requested actions as follows. The NRC reviewed Entergy's efforts to determine the cause and source of the groundwater contamination conditions, assess the radiological impact on public health and safety and the environment, effect appropriate mitigation and remediation, and implement long-term monitoring to ensure continuing assessment of the condition, including the expected natural attenuation of remaining residual activity. The NRC has found Entergy's response to identified conditions to be reasonable and technically sound. The NRC has reviewed in detail the existence of onsite groundwater contamination, as well as the circumstances surrounding the causes of leakage and previous opportunities for identification and intervention. The NRC's inspection determined that public health and safety have not been, nor are likely to be, adversely affected, and the dose consequence to the public attributable to current onsite conditions associated with groundwater contamination is negligible with respect to conservatively established NRC regulatory limits. The inspection determined that Entergy conformed to all NRC regulatory requirements that were pertinent in this circumstance and applicable to assessing the cause and effect of the groundwater conditions relative to public health and safety and protection of the environment.

Accordingly, the NRC denied the Petitioner's request to suspend the operating licenses of the Indian Point Nuclear Generating Units No. 2 and 3.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated June 25, 2007 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML072140693), Friends United for Sustainable Energy (FUSE, the Petitioner) filed a petition pursuant to Title 10,

sections 2.202, ''Orders,'' 2.206, ''Requests for Action under This Subpart,'' and 2.802, ''Petition for Rulemaking,'' of the *Code of Federal Regulations* (10 C.F.R. §§ 2.202, 2.206, and 2.802) to Chairman Dale E. Klein, Mr. Richard Barkley, and Dr. Pao-Tsin Kuo of the U.S. Nuclear Regulatory Commission (NRC) regarding Indian Point Nuclear Generating Units No. 2 and 3 (Indian Point). The Petitioner requested that the NRC take enforcement actions.

A. Actions Requested

The FUSE petition included a request for rulemaking concerning 10 C.F.R. Part 54, ''Requirements for Renewal of Operating Licenses for Nuclear Power Plants,'' and requested that the NRC not consider any new license renewal applications until the NRC revises its regulations. The petition asserts that the current regulations in 10 C.F.R. Part 54 are prejudiced and biased, presume that license renewal is a foregone conclusion for all licensees, usurp stakeholder rights protected under the First Amendment of the Constitution, and abridge citizens' rights to due process and equal protection. The FUSE petition also requested that the NRC refrain from taking any actions relative to the license renewal of Indian Point until the NRC amends 10 C.F.R. Part 54 as requested.

By letter dated October 29, 2007 (ADAMS Accession No. ML072770603), the NRC denied the petition for rulemaking because it did not provide any new information that was not previously considered by the NRC. The denial was published in the *Federal Register* on November 8, 2007 (72 Fed. Reg. 63,141).

FUSE also requested that, pursuant to 10 C.F.R. § 2.206, the NRC immediately suspend the Indian Point licenses until the issues described in the petition are remedied to full compliance with all local, state, and federal laws. The issues identified by FUSE include: (1) radiological contamination through groundwater leakage from the Indian Point Unit 2 spent fuel pool (SFP), (2) the Licensee's failure to implement a new emergency notification siren system as required by NRC orders, and (3) over seventy safety, security, and enforcement issues identified over the past 6 years of plant operations.

As discussed in the NRC's acknowledgment letter to Mr. Sherwood Martinelli, dated February 1, 2008 (ADAMS Accession No. ML080080297), the NRC accepted, for review pursuant to 10 C.F.R. § 2.206, the FUSE concerns regarding the underground leakage of contaminated water at the Indian Point facility and the failure to implement the new emergency notification siren system in a timely manner. The NRC either denied the remaining issues or found that they did not meet the criteria for acceptance in the 10 C.F.R. § 2.206 process. The NRC consolidated the concern regarding the failure to implement the siren system in a timely manner with a similar issue raised in a separate FUSE petition dated September 28, 2007 (ADAMS Accession No. ML072760602). The agency took this step for three reasons: (1) because of the similarity of the issues, (2) because

FUSE submitted both petitions at approximately the same time, and (3) because FUSE was the principal external stakeholder for both petitions. Therefore, this Director's Decision will address only the underground leakage of contaminated water. The NRC will address separately the failure to implement the new emergency notification siren system in a timely matter through its response to the FUSE petition of September 28, 2007.

The NRC sent a copy of the Proposed Director's Decision to the Petitioner and to Entergy for comment on May 30, 2008 (ADAMS Accession Nos. ML081270022 (Transmittal) and ML081270025 (Proposed Director's Decision)). The Staff did not receive any comments on the Proposed Director's Decision.

B. Petitioner's Basis for the Requested Actions

For the past 3 years, underground leakage of water at the Indian Point facility has been found to be contaminated with radioactive fission products, including tritium, strontium-90, and cesium. The Petitioner stated that Entergy has not been able to identify the times of commencement, source(s), extent, and causes of the leaks, and that the assurances by Entergy and the NRC that there is no immediate danger do not adequately address concerns related to these leaks.

The Petitioner stated that if the Licensee cannot locate the source of the leak, the Licensee cannot repair it. If a leak cannot be located, the effect on the environment increases. The manifest consequence is that the leaks will worsen as the unmitigated and unmanaged problem contributes to an ever more rapid decline of plant stability and integrity. Without proper identification and aging management of the leaks, which will only increase with continued freezing and thawing, the ''passive'' structures, systems, and components of the plant will continue to weaken to the point of critical failure.

The Petitioner expressed concerns that SFP leaks increasingly indicate that the structural integrity is impaired such that during an event involving a strong impact, intense heat, fire, or explosions, the walls and/or floor could cave and/or break apart.

The Petitioner stated that until the SFP leaks are located, repaired, and certified as structurally safe for the purpose intended, the only reasonable action that the NRC can and should take is license suspension. The Petitioner further stated that the suspension should also delay license renewal processing for the Indian Point facility.

C. NRC Petition Review Board's Meeting with the Petitioner

On December 21, 2007, the Office of Nuclear Reactor Regulation's Petition

Review Board and the Petitioner held a conference call to clarify the basis for the petition.

The NRC's acknowledgment letter to the Petitioner, dated February 1, 2008, included the transcript of this meeting. This transcript, treated as a supplement to the petition, is available in ADAMS (Accession No. ML080140267) for inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, MD. Publicly available records are accessible from the ADAMS Public Electronic Reading Room on the NRC Web site at http://www.nrc.gov/reading-rm/adams.html. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR reference staff by telephone at 1-800-397-4209, or 301-415-4737, or by e-mail to pdr@nrc.gov.

II. DISCUSSION

A. Background

On September 1, 2005, Entergy informed the NRC that cracks in a Unit 2 SFP wall had been discovered during excavation work, and that low levels of radioactive contamination were found in water leaking from the cracks. The water contained radionuclides similar to Unit 2 SFP water. Entergy initiated a prompt investigation to determine the extent of the condition and potential impact on health and safety. Initially, Entergy determined that onsite groundwater in the vicinity of the Unit 2 facility was contaminated with tritium as high as 200,000 picocuries per liter of water (about 10 times the Environmental Protection Agency drinking water standard). Subsequently, Entergy initiated a comprehensive groundwater site characterization to investigate the extent of onsite groundwater contamination, identify the sources, and mitigate and remediate the condition. This effort required the establishment of several onsite groundwater monitoring wells to characterize groundwater behavior, flow, direction, and migration pathways.

On September 20, 2005, NRC Region I initiated a special inspection of this matter to examine the Licensee's performance and determine if the contaminated groundwater affected, or could affect, public health and safety. On October 31, 2005, the NRC's Executive Director of Operations (EDO) authorized continuing NRC inspection to assess Licensee performance of onsite groundwater investigation activities, and independently evaluate and analyze data and samples to ensure the effectiveness and adequacy of the Licensee's efforts. Throughout this effort, the NRC coordinated its inspection activities with the New York State Department of Environmental Conservation (DEC), which initiated its own

independent assessment of the groundwater conditions, including observation of NRC's inspection activities.

The NRC issued a special inspection report on March 16, 2006 (ADAMS Accession No. ML060750842), ''Indian Point Nuclear Generating Unit 2 — NRC Special Inspection Report No. 05000247/2005011.'' The report assessed Entergy's performance, achievements, and plans related to radiological and hydrological site characterization; and reported that the onsite groundwater contamination did not, nor was likely to, adversely affect public health and safety. In the report and in subsequent public meetings, the NRC indicated that it would continue to inspect Licensee performance in this area, including independent evaluation and analysis of data, to ensure that Entergy continued to conform to regulatory requirements, and that public health and safety were maintained.

On March 21, 2006, NRC's independent onsite groundwater sample analysis effort first determined that strontium-90 was also a contaminant in the groundwater, a fact subsequently confirmed by Entergy and DEC. This determination resulted in a significant expansion of the onsite groundwater characterization effort since the source of the strontium-90 contaminant was traced to leakage from the Unit 1 SFP. A full sitewide hydrogeologic investigation was subsequently scoped to include Units 1 and 3. The NRC inspection charter objectives were similarly revised to provide the necessary oversight. Offsite groundwater samples have also been obtained since the fall of 2005, and have never detected any offsite groundwater contamination attributable to plant operation.

Since that time, the NRC has continued to inspect and monitor Entergy's activities beyond the limits of normal baseline inspection, as authorized by the EDO. During this period, NRC inspectors closely monitored Entergy's groundwater characterization efforts, and performed independent inspection of radiological and hydrological conditions affecting onsite groundwater. Additionally, from early 2006 through January 2008, the NRC kept interested federal, state, and local government stakeholders informed of current conditions through routine biweekly teleconferences.

B. Status of Current Activities, Plans, and Inspection Results

On January 11, 2008, Entergy submitted the results of its comprehensive groundwater investigation (ADAMS Accession No. ML080320539), and included its plan for remediation and long-term monitoring of the onsite groundwater conditions. In its report, Entergy identified the sources of the groundwater contamination as the Unit 1 and Unit 2 SFPs. While both pools contributed to the tritium contamination of groundwater, leakage from the Unit 1 SFP was determined to be the source of other contaminants such as strontium-90, cesium-137, and nickel-63. Entergy identified its plan to remove all fuel from the Unit 1 SFP to an onsite storage location and drain the SFP system by the end of 2008,

thereby essentially eliminating the source of the groundwater contamination from that facility. Some water is expected to remain in the bottom of the pool to reduce the potential for airborne contamination and provide shielding until the residual sludge is removed in early 2009. In its report of January 11, 2008, Entergy described its plans to repair or mitigate all identified potential leak locations in the Unit 2 SFP system that may have contributed to the onsite tritium-contaminated groundwater in the vicinity of that facility.

Notwithstanding, residual radioactivity is expected to continue to impact onsite groundwater for the duration of licensed activities. Onsite groundwater is expected to continue to be monitored and reported as an abnormal liquid release in accordance with NRC regulatory requirements. No offsite groundwater has been impacted, since the onsite groundwater flow is to the discharge canal and the Hudson River. Accordingly, the Licensee has established a long-term monitoring strategy to evaluate the effect and progress of the natural attenuation of residual contamination, informing and confirming groundwater behavior as currently indicated by the existing site conceptual model, and determining changes in conditions that may indicate new or additional leakage.

Entergy's performance and effectiveness in successfully draining water from the Unit 1 SFP system by the end of 2008, and the quality and effectiveness of its long-term monitoring program, will be the immediate focus of NRC's continuing inspection of Entergy's performance and conformance with regulatory requirements relative to the existing groundwater conditions. Additionally, NRC will continue to inspect the efficacy of the licensee's long-term monitoring program as part of the Reactor Oversight Process pertaining to radiological environmental and effluents inspection activities.

Notwithstanding, radiological significance of the groundwater conditions at Indian Point is currently, and is expected to remain, negligible with respect to impact on public health and safety. The NRC has confirmed with the New York State Department of Health, that drinking water is not derived from groundwater or the Hudson River in the areas surrounding or influenced by effluent release from Indian Point. Accordingly, the only human exposure pathway that merits attention is the possible consumption of aquatic foods from the Hudson River, such as fish and invertebrates. Dose assessment of the potential for exposure from this pathway continues to indicate that the hypothetical maximally exposed individual would be subject to no more than a very small fraction of the NRC regulatory limit for liquid radiological effluent release.

C. Status of Current NRC Inspection Results

1. Upon the initial identification of conditions that provided evidence of an abnormal radiological effluent release affecting groundwater, the Licensee implemented actions that conformed to the radiological survey requirements of 10

C.F.R. § 20.1501, ''General,'' to ensure compliance with dose limits for individual members of the public as specified in 10 C.F.R. § 20.1302, ''Compliance with dose limits for individual members of the public,'' including (1) promptly investigating and evaluating the radiological conditions and potential hazards affecting groundwater conditions, on- and offsite; (2) annually reporting the condition and determining that the calculated hypothetical dose to the maximally exposed member of the public was well below established NRC regulatory requirements for liquid radiological release; (3) confirming, through offsite environmental sampling and analyses, that plant-related radioactivity was not distinguishable from background; (4) initiating appropriate actions to mitigate and remediate the conditions to ensure that NRC regulatory dose limits to members of the public and the environment are not exceeded; and (5) developing the bases for a long-term monitoring program to ensure continuing assessment of groundwater effluent release and reporting of the residual radioactivity affecting the groundwater. The long-term monitoring program will continue to be refined as data are collected and evaluated to verify and validate the effectiveness of expected natural attenuation of the existing groundwater plumes and to ensure the timely detection of new or additional leakage affecting groundwater.

2. The determination of contaminated onsite groundwater conditions at Indian Point was the result of the Licensee's investigation of potential leakage from the Unit 2 SFP initiated in September 2005, and subsequent development and application of a series of groundwater monitoring wells to determine the extent of that condition. No evidence was found that indicated that the events at Indian Point that resulted in the onsite groundwater contamination (identified to the NRC on September 1, 2005) were the result of the Licensee's failure to meet a regulatory requirement or standard, where the cause of the condition was reasonably within the Licensee's ability to foresee and correct, and thus preventable. This determination is based on interviews with Licensee personnel; comprehensive review of pertinent documentation, including previous condition reports, survey records, radiological liquid effluent and environmental monitoring reports, records of historical spills and leaks documented in accordance with 10 C.F.R. § 50.75, ''Reporting and recordkeeping for decommissioning planning,'' and extensive onsite NRC inspection to confirm Licensee conformance with required regulatory requirements.

3. The current contaminated groundwater conditions at Indian Point are the result of leakage associated with the Unit 1 and Unit 2 SFP systems. No other systems, structures, or components were identified as contributors to the continuing onsite contamination of groundwater.

4. Entergy's hydrogeologic site characterization studies provided sufficiently detailed field observations, monitoring, and test data to support the development and confirmation of a reasonable conceptual site model of groundwater flow and transport behavior. An independent analysis of groundwater transport through

fractured bedrock utilizing geophysical well logging data was conducted by the U.S. Geological Survey (USGS). The USGS assessment corroborated the groundwater transport characteristics that were determined by Entergy's contractor.

5. The Entergy hydrogeologic site characterization and conceptual site model provide a reasonable basis to support the determination that the liquid effluent releases from the affected SFP systems migrate in the subsurface to the west, and partially discharge to the site's discharge canal, with the remainder moving to the Hudson River. Current data and information indicate that contaminated groundwater from the site does not migrate offsite except to the Hudson River. This conceptual site model of groundwater behavior and flow characteristics is supported by the results of independent groundwater sampling and analyses conducted by NRC which have not detected any radioactivity distinguishable from background in the established onsite boundary monitoring well locations or in various offsite environmental monitoring locations.

6. Currently, there is no drinking water exposure pathway to humans that is affected by the contaminated groundwater conditions at Indian Point. Potable water sources in the area of concern are not presently derived from groundwater sources or the Hudson River, a fact confirmed by the New York State Department of Health. The principal exposure pathway to humans is from the assumed consumption of aquatic foods (i.e., fish or invertebrates) taken from the Hudson River in the vicinity of Indian Point that has the potential to be affected by radiological effluent releases. Notwithstanding, the most recent sampling and analysis of fish and crabs taken from the affected portion of the Hudson River and designated control locations showed no radioactivity distinguishable from background.

7. The annual calculated exposure to the maximum exposed hypothetical individual, based on application of Regulatory Guide 1.109, ''Calculation of Annual Doses to Man from Routine Release of Reactor Effluents for the Purpose of Evaluation Compliance with 10 CFR Part 50, Appendix I,'' relative to the liquid effluent aquatic food exposure pathway is currently, and expected to remain, less than 0.1% of the NRC's ''As Low As is Reasonably Achievable (ALARA)'' guidelines of Appendix I of Part 50 (3 mrem/yr total body and 10 mrem/yr maximum organ), which is considered to be negligible with respect to public health and safety, and the environment.

8. All identified liner flaws in the Unit 2 SFP, and the initially identified crack affecting the Unit 2 SFP system have been repaired or mitigated. However, not all Unit 2 fuel pool surfaces are accessible for examination. No measurable leakage is discernable from evaporative losses based on Unit 2 fuel pool water makeup inventory data. Unit 1 SFP water is being processed continuously to reduce the radioactive concentration at the source prior to leakage into the groundwater, and actions have been initiated to effect the complete removal of spent fuel and essentially all the water from the Unit 1 SFP system by the end of 2008, thereby

terminating the source of 99.9% of the dose-significant strontium-90 and nickel-63 contaminants (the remaining 0.1% is represented by the Unit 2 and Unit 1 hydrogen-3 (tritium) contaminants). Entergy's selected remediation approach for the contaminated groundwater conditions appears reasonable and commensurate with the present radiological risk.

9. The historical duration of leakage from the Unit 1 and Unit 2 SFP systems that resulted in groundwater contamination is indeterminate. The evidence indicates that the volume of leakage was small compared to the available water inventory, and was much less than the normally expected evaporative losses from SFPs. This conclusion is based on NRC Staff review and assessment of SFP makeup inventory records and applicable leakage collection data, the results of the continuously implemented Radiological Environmental Monitoring Program affecting the Indian Point site, and evaluation of the developed hydrogeologic groundwater transport model. Accordingly, there is no evidence of any significant leak or loss of radioactive water inventory from the site that was discernable in the offsite environment.

10. No releases were observed or detected from Unit 3.

11. The conditions surrounding the leaking Unit 1 SFP are based on a leakage rate of 10 drops per second (about 25 gallons per day) that was identified in 1992. At that time, the Licensee performed a hypothetical bounding dose impact that concluded that this condition resulted in negligible dose impact to the public. At that time, NRC inspectors evaluated this Licensee assessment. This early bounding hypothetical calculation agrees with the dose impact now confirmed by the recently completed hydrogeologic site investigation and NRC's independent assessment. Based on extensive review of the circumstances and inspection records from that period, it appears that the Licensee was in conformance with the standards, policy, and regulatory requirements that prevailed at that time.

III. CONCLUSION

The Petitioner raised issues related to the underground leakage of contaminated water at the Indian Point site. NRC Region 1 Inspection Report No. 05000003/2007010 and 05000247/2007010 issued on May 13, 2008 (ADAMS Accession No. ML081340425), focused on these concerns.

The NRC reviewed Entergy's efforts to determine the cause and source of the groundwater contamination conditions, assess the radiological impact on public health and safety and the environment, effect appropriate mitigation and remediation, and implement long-term monitoring to ensure continuing assessment of the condition, including the expected natural attenuation of remaining residual activity. The NRC has found Entergy's response to identified conditions to be reasonable and technically sound. The NRC has reviewed in detail the existence of

onsite groundwater contamination, as well as the circumstances surrounding the causes of leakage and previous opportunities for identification and intervention. The NRC's inspection determined that public health and safety have not been, nor are likely to be, adversely affected, and the dose consequence to the public attributable to current onsite conditions associated with groundwater contamination is negligible with respect to conservatively established NRC regulatory limits. The inspection determined that Entergy conformed to all NRC regulatory requirements that were pertinent in this circumstance and applicable to assessing the cause and effect of the groundwater conditions relative to public health and safety and protection of the environment.

Based on the above, the Office of Nuclear Reactor Regulation has decided to deny the Petitioner's request to suspend the operating licenses of the Indian Point Nuclear Generating Units No. 2 and 3. The Petitioner's concern regarding underground leakage of contaminated water at the Indian Point facility has been adequately resolved such that no further action is needed.

As provided in 10 C.F.R. § 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. As provided by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR REGULATORY
COMMISSION

Eric J. Leeds, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 14th day of August 2008.

Cite as 68 NRC 351 (2008) **CLI-08-21**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

In the Matter of

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository) **September 8, 2008**

ADVISORY OPINIONS

As a general matter, the Commission disfavors the issuance of advisory opinions.

MEMORANDUM AND ORDER

I. INTRODUCTION

On May 30, 2008, the U.S. Department of Energy (DOE) filed a motion for protective order that would govern access to classified information contained in DOE's application for authorization to construct a geologic repository at Yucca Mountain, Nevada.[1] DOE requests that the Commission approve this Protective Order in anticipation of allowing access to the classified information in its application pertaining to naval spent nuclear fuel.[2]

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[1] U.S. Department of Energy's Partially Unopposed Motion for Protective Order Governing Classified Information (May 30, 2008) (DOE Motion). The DOE Motion also attaches as Exhibit 1 a proposed Protective Order.

[2] Just 4 days after DOE filed its motion, it tendered the construction authorization application. *See* Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008).

For the reasons discussed below, we refer the DOE Motion, proposed Protective Order, and the associated State of Nevada filing to the Pre-License Application Presiding Officer (PAPO) Board for consideration, subject to certain identified limitations.

II. DISCUSSION

DOE styled its motion as ''partially unopposed.''[3] Thereafter, the State of Nevada filed an answer in which it informed the Commission that DOE misstated Nevada's position on the DOE Motion.[4] Specifically, Nevada stated that it authorized DOE to represent that Nevada did not object to the proposed Protective Order, subject to the following qualification:

> Nevada reserves the right to argue (notwithstanding language in the draft order) that DOE, by submitting its application to the NRC, submits to NRC authority and jurisdiction, including NRC authority to order DOE to disclose classified information to cleared representatives of Nevada over the objection of DOE as the originating agency, or to determine that information DOE deems classified is not classified.[5]

It appears, then, that two fundamental points of contention have emerged regarding the proposed Protective Order. First, there is a potential dispute over whether the Commission has the authority to review, and potentially overturn, the classification determinations of other federal agencies — here, DOE and the Department of Defense. Second, there is a potential dispute over whether the Commission has the authority to direct DOE to disclose classified information to cleared representatives of Nevada over DOE's objection as the originating agency.[6] Nevada points out that these issues ''should be deferred until there is an actual controversy over a specific document request . . . .''[7]

We agree. The disputed issues raised in the DOE Motion and the Nevada

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[3] DOE Motion at 2. Specifically, DOE stated, ''DOE has already consulted and received approval on the attached proposed Protective Order's language from the NRC Staff, Churchill County, Esmeralda County, Lander County, Mineral County, and the Nuclear Energy Institute. Lincoln County and Eureka County take no position. The State of Nevada has one concern, with Nye County and the State of California concurring.'' Regarding Nevada's concern, DOE further stated, ''Nevada contends that the NRC can reverse a DOE or Navy determination that a document contains classified information.''

[4] State of Nevada's Response to DOE's Partially Unopposed Motion for Protective Order (June 3, 2008) (Nevada Answer).

[5] Nevada Answer at 2.

[6] *See* Nevada Answer at 2; *see generally* 10 C.F.R. § 2.905(h)(2).

[7] Nevada Answer at 2.

Answer are not ripe for consideration at this time. The NRC Staff's acceptance review of the application is currently under way. Should the Director of the Office of Nuclear Material Safety and Safeguards reject the application, the Commission will have no application before it for consideration, and DOE's Motion will be moot.[8] If, however, the application is accepted for review, and a notice of hearing issues, then access to classified information (Restricted Data or National Security Information), as well as the potential introduction of classified information into the proceeding, would be governed by the procedures in 10 C.F.R. Part 2, Subpart I.[9] Potential disputes of the sort anticipated by Nevada appropriately would be resolved in that context following the commencement of a proceeding.

Moreover, in the absence of an actual dispute over one or more requested documents, a decision now on these anticipated disputes would amount to an ''advisory opinion.'' As a general matter, we disfavor the issuance of advisory opinions, and, indeed, declined to issue one in 2004, in another pre-application Yucca Mountain dispute.[10] We see no reason to depart from our usual policy where, as here, addressing the issues is unnecessary, given the application's current status. Taking on the questions now would constitute a ''mere academic exercise.''[11]

Given the possibility that the disputes identified above may never ripen, and in the interests of adjudicatory efficiency, there is value in developing now a Protective Order for classified information that could be used in an adjudicatory proceeding on the construction authorization application, but that would be silent as to the disputed issues.[12] To that end, we delegate to the PAPO Board the authority to work with DOE, Nevada, the Staff, as well as other potential parties and interested governmental participants, and, if practicable, to approve

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[8] *See generally* 10 C.F.R. § 2.101(e)(3).

[9] *See, e.g.,* 10 C.F.R. §§ 2.905 (governing access to classified information for introduction into a proceeding, or for the preparation of a party's case), 2.907(a) (directing the NRC staff to include a notice of intent to introduce classified information in the notice of hearing, if it would be impracticable to avoid such introduction), 2.907(b) (directing a party filing a response to a notice of hearing to state in its answer its intent to introduce classified information into the proceeding, if it appears to the party that it will be impracticable to avoid such introduction).

[10] *U.S. Department of Energy* (High-Level Waste Repository), CLI-04-32, 60 NRC 469, 473 (2004).

[11] *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 94 (1983).

[12] We expect, for example, that there could be circumstances in which Nevada (or another party, potential party, or interested governmental participant) requests, and DOE grants, access to requested classified information, without controversy.

a Protective Order for use by the Presiding Officer in the Yucca Mountain proceeding, should such a proceeding be commenced.[13]

The Protective Order, however, should be excised of any and all provisions *that would substantively decide* the disputed questions raised above; that is, the NRC's authority to (1) review and/or overturn another federal agency's classification determinations made on information associated with the Yucca Mountain construction authorization application; and (2) direct DOE to disclose classified information to Nevada representatives (holding an appropriate security clearance) over DOE's objection as the originating agency. These issues are appropriately considered in the context of a live controversy.[14]

IT IS SO ORDERED.[15]

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of September 2008.

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[13] The PAPO Board has worked with the parties, potential parties, and interested governmental participants to implement protective orders for several different categories of information. *See U.S. Department of Energy* (High-Level Waste Repository: Pre-Application Matters), Third Case Management Order (unpublished) (Aug. 30, 2007) (approving protective orders governing the following categories of sensitive unclassified information: Naval Nuclear Propulsion Information; Official Use Only Information; Unclassified Controlled Nuclear Information); *U.S. Department of Energy* (High-Level Waste Repository: Pre-Application Matters), Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (unpublished) (July 8, 2005) (implementing a protective order for Employee Concerns Program information). Given its demonstrated experience in this area, the PAPO Board is well situated to provide guidance in this endeavor.

[14] Neither DOE nor Nevada is barred from presenting anew the arguments raised in the DOE Motion and Nevada Answer on the subject of the two disputed questions, should those disputes ripen.

[15] Pursuant to 10 C.F.R. § 2.101(e)(3), a docket number will be assigned to DOE's application if and when the Staff determines that the application is acceptable for docketing. As an administrative convenience, this Memorandum and Order will be served on the service lists for the PAPO-00 and PAPO-001 dockets.

Cite as 68 NRC 355 (2008) **CLI-08-22**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

In the Matter of **Docket No. PAPO-00**
(ASLBP No. 04-829-01-PAPO)
(Pre-Application Matters)

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository) **September 8, 2008**

RULES OF PRACTICE: SUBPART J (DOCUMENTARY MATERIAL)

The Licensing Support Network functions as a mechanism for early collection of all extant documents that normally would be collected later through traditional discovery. We expect full compliance with our Licensing Support Network requirements as set out in Part 2, Subpart J, of our regulations.

REGULATORY INTERPRETATION: GENERAL RULES

The Licensing Support Network is intended to ''provide potential participants with the opportunity to frame focused and meaningful contentions and to avoid the delay potentially associated with document discovery, by requiring parties and potential parties to the proceeding to make all of their Subpart J-defined documentary material available through the [Licensing Support Network] prior to the submission of the [Department of Energy] application.'' ''[We expect] all participants to make a *good faith* effort to have made available all . . . documentary material by the date specified for initial compliance in section 2.1003(a) of the Commission's regulations.''

RULES OF PRACTICE: AMICUS CURIAE BRIEFS (SUBPART J)

Subpart J does not provide for the filing of amicus curiae briefs. Our general rule on amicus briefs, 10 C.F.R. § 2.315(d), as a formal matter applies only to petitions for review filed under 10 C.F.R. § 2.341 or to matters taken up by the Commission *sua sponte,* not to appeals filed, as here, under 10 C.F.R. § 2.1015.

RULES OF PRACTICE: AMICUS CURIAE BRIEFS

Where 10 C.F.R. § 2.315(d) does apply, an amicus brief must be filed by the same deadline as the brief of the party whose side the amicus brief supports, unless the Commission provides otherwise. Permission to file an amicus brief under 10 C.F.R. § 2.315(d) is at the discretion of the Commission.

RULES OF PRACTICE: MOTIONS; AMICUS CURIAE BRIEFS

All motions, including a motion to file an amicus brief, are required to include a certification that the sponsor of the motion has made a sincere effort to contact the other parties and to resolve the issues raised in the motion (10 C.F.R. § 2.323).

MEMORANDUM AND ORDER

The United States Department of Energy (DOE) appeals[1] from the Pre-License Application Presiding Officer (PAPO) Board's denial[2] of DOE's Motion to Strike the State of Nevada's (Nevada's) certification of the availability of its documentary material on the Licensing Support Network (LSN). Nevada opposes DOE's appeal.[3]

Nye County filed a motion for leave[4] to file an amicus curiae brief, together

[1] The Department of Energy's Notice of Appeal from the PAPO Board's April 23, 2008 Order (May 5, 2008) (DOE's Notice); The Department of Energy's Brief on Appeal from the PAPO Board's April 23, 2008 Order (May 5, 2008) (DOE Appeal).

[2] LBP-08-5, 67 NRC 205 (2008).

[3] The State of Nevada's Brief in Opposition to the Department of Energy's Appeal from the PAPO Board's April 23, 2008 Order (May 20, 2008) (Nevada Opposition). The deadline for responses to DOE's Appeal was extended from May 15, 2008, to May 20, 2008, by Order (May 9, 2008) (unpublished).

[4] Nye County Motion for Leave to File Amicus Brief in Support of DOE Appeal from the PAPO Board's April 23, 2008 Order Denying DOE Motion to Strike Nevada LSN Certification (May 20, 2008) (Nye County Amicus Motion).

with its amicus brief,[5] in support of DOE's appeal. Nevada opposed Nye County's amicus motion.[6]

We affirm the PAPO Board's decision to deny DOE's motion to strike. We also deny Nye County's motion for leave to file an amicus curiae brief.

I. DOE'S MOTION TO STRIKE NEVADA'S CERTIFICATION

Subject to certain exclusions, our regulation, 10 C.F.R. § 2.1003, requires other (that is, non-NRC Staff[7]) potential parties, interested governmental participants, and parties to ''make available no later than ninety days after the DOE certification of compliance . . . all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party, interested governmental participant or party.''[8] Our regulations, in 10 C.F.R. § 2.1009, further require potential parties, interested governmental participants, and parties to certify that they have established procedures for implementing the requirements of section 2.1003, that they have trained their personnel to comply with these procedures, and that the documentary material specified in section 2.1003 has been made available.[9] Nevada's certification pursuant to these regulations is the subject of DOE's motion to strike.

The PAPO Board[10] denied DOE's motion to strike Nevada's LSN certification. The Board gave two reasons. First, the Board found that DOE failed to satisfy its burden to show that Nevada had in fact withheld documents it should have provided. The Board found that instead of factual support, DOE provided ''rank speculation and conjecture,'' that the three documents DOE specifically identified as missing from the LSN were in fact not missing, and that in any event, Nevada ''satisfactorily rebutted'' DOE's circumstantial presentation (through a declaration by the Administrator of Technical Programs in Nevada's Agency for Nuclear Projects).[11] Second, the Board found, based upon its interpretation of our regulations (specifically, the three-category definition of documentary material), that ''Nevada is not legally obligated to produce reliance material, including

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[5] Nye County Amicus Brief in Support of DOE Appeal from the PAPO Board's April 23, 2008 Order Denying DOE Motion to Strike Nevada LSN Certification (May 20, 2008) (Nye County Amicus Brief).

[6] State of Nevada's Opposition to Nye County's Motion for Leave to File Amicus Brief in Support of DOE's Appeal (May 30, 2008).

[7] The NRC Staff has 30 days, rather than 90, to provide its documentary material. 10 C.F.R. § 2.1003(a).

[8] 10 C.F.R. § 2.1003(a).

[9] 10 C.F.R. § 2.1009(a)(2) & (b).

[10] LBP-08-5, 67 NRC at 206; Judge Karlin filed a dissenting opinion, 67 NRC at 218-40.

[11] LBP-08-5, 67 NRC at 209-10.

supporting and non-supporting [documentary material], until it has a 'position in the proceeding' by filing contentions.''[12] This has been referred to as the ''no-position'' premise.

On appeal, DOE argues that the Board misinterpreted our regulations, and that its decision should be reversed. According to DOE, Nevada improperly withheld reliance material when it certified its LSN document collection because it assertedly relied on a ''legally incorrect'' conclusion that it could not provide ''reliance'' material until it knows what its position on the issues will be — that is, until after it has filed proposed contentions. Nevada counters that it has provided its documentary material, certifying its document collection as required, and denies that it excluded documentary material based on a ''no-position'' premise. Nevada argues that DOE has the burden, on appeal, of showing that the Board made ''clearly erroneous'' factual findings, that its failure to do so is ''dispositive,'' and that the Commission ''need not reach *any* legal issue.''[13]

For the reasons the Board gave, we agree with the Board that DOE has not met its burden of showing that, in making its LSN certification, Nevada withheld documents it should have provided. We affirm on that basis. We need not consider the Board's second reason (the ''no-position'' premise), and today's ruling neither endorses nor rejects the Board's interpretation on that point.

The LSN functions as a mechanism for early collection of all extant documents that normally would be collected later through traditional discovery, and we remind potential parties that we expect full compliance with our LSN requirements as set out in Part 2, Subpart J, of our regulations. The LSN is intended to ''provide potential participants with the opportunity to frame focused and meaningful contentions and to avoid the delay potentially associated with document discovery, by requiring parties and potential parties to the proceeding to make all of their Subpart J-defined documentary material available through the LSN prior to the submission of the DOE application.''[14] ''[We expect] all participants to make a *good faith effort* to have made available all . . . documentary material by the date specified for initial compliance in section 2.1003(a) of the Commission's regulations.''[15] If the NRC Staff dockets DOE's license application and a hearing ensues, we expect the presiding officer to impose appropriate sanctions for any failure to fully comply with our LSN requirements.[16]

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[12] *Id.* at 214-15.

[13] Nevada Opposition at 17.

[14] Final Rule: ''Licensing Proceeding for a High-Level Radioactive Waste Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket,'' 69 Fed. Reg. 32,836, 32,843 (June 14, 2004).

[15] *Id.* (emphasis added).

[16] *See, e.g.,* 10 C.F.R. § 2.336(e).

II. NYE COUNTY'S AMICUS FILINGS

We decline to grant Nye County's motion to file an amicus curiae brief. Subpart J does not provide for the filing of amicus curiae briefs. Our general rule on amicus briefs, 10 C.F.R. § 2.315(d), as a formal matter applies only to petitions for review filed under 10 C.F.R. § 2.341 or to matters taken up by the Commission *sua sponte,* not to appeals filed, as here, under 10 C.F.R. § 2.1015. Where 10 C.F.R. § 2.315(d) does apply, an amicus brief must be filed by the same deadline as the brief of the party whose side the amicus brief supports, unless the Commission provides otherwise. Permission to file an amicus brief under 10 C.F.R. § 2.315(d) is at the discretion of the Commission. All motions, including a motion for leave to file an amicus brief, are required to include a certification that the sponsor of the motion has made a sincere effort to contact the other parties and to resolve the issues raised in the motion (10 C.F.R. § 2.323).

Nye County's amicus brief supports DOE's position, not Nevada's, so even if it did fit within 10 C.F.R. § 2.315(d) it would have been due by the deadline for DOE's filing rather than, as filed, by the deadline for responses to DOE's filing. Nye County's motion also does not include any certification that it contacted the other parties prior to filing the motion. And there are no extraordinary circumstances making acceptance of Nye County's amicus brief imperative as a matter of fairness or sound decisionmaking. In view of these considerations, Nye County's motion is denied.

III. CONCLUSION

For all of these reasons, we *affirm* the PAPO Board's decision (in LBP-08-5) denying DOE's motion to strike Nevada's initial LSN certification. We *deny* Nye County's motion for leave to file an amicus curiae brief.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of September 2008.

Cite as 68 NRC 361 (2008) **LBP-08-16**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Dr. Anthony J. Baratta
Dr. William W. Sager

In the Matter of **Docket Nos. 52-014-COL**
52-015-COL
(ASLBP No. 08-864-02-COL-BD01)

TENNESSEE VALLEY AUTHORITY
(Bellefonte Nuclear Power Plant,
Units 3 and 4) **September 12, 2008**

In this 10 C.F.R. Part 52 proceeding regarding the application of the Tennessee Valley Authority (TVA) for a combined operating license (COL) to construct and operate two new reactors at the existing Bellefonte nuclear facility site, ruling on a petition filed jointly by three public interest organizations seeking to intervene to contest the TVA COL application, the Licensing Board concludes that, having established the requisite standing and proffering four admissible contentions, two of the petitioners, Blue Ridge Environmental Defense League (BREDL) and the Southern Alliance for Clean Energy (SACE), are admitted as parties to the proceeding. The third petitioner, the Bellefonte Efficiency and Sustainability Team (BEST), having failed to make the requisite standing showing, is not admitted as a party to the proceeding.

RULES OF PRACTICE: STANDING TO INTERVENE

In determining whether an individual or organization should be granted party status in a proceeding based on standing ''as of right,'' the agency has applied

contemporaneous judicial standing concepts that require a participant to establish (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 Atomic Energy Act (AEA), the National Environmental Policy Act of 1969 (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 Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

RULES OF PRACTICE: STANDING TO INTERVENE (PRESUMPTION BASED ON GEOGRAPHIC PROXIMITY)

In cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish the requisite standing elements. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

RULES OF PRACTICE: STANDING TO INTERVENE (REPRESENTATIONAL)

When an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000).

RULES OF PRACTICE: STANDING TO INTERVENE (CONSTRUCTION OF PETITION)

In assessing a petition to determine whether these elements are met, which a presiding officer must do even though there are no objections to a petitioner's standing, the Commission has indicated that we are to ''construe the petition in favor of the petitioner.'' *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

RULES OF PRACTICE: STANDING TO INTERVENE (REPRESENTATIONAL)

Because none of the affidavits submitted in support of a hearing request indicate an organization seeking to intervene represents the interests of the submitter, the organization has failed to establish it has standing. *See Virginia Electric and*

Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 304 (2008).

RULES OF PRACTICE: FILING OF DOCUMENTS (ELECTRONIC TRANSMISSION; TIMELINESS)

Under 10 C.F.R. § 2.306(c)(2), to be considered timely, a document must be submitted to the E-Filing system for docketing and service ''[b]y 11:59 p.m. Eastern Time.'' The agency's regulations further state that a filing will be considered complete ''[b]y electronic transmission when the filer performs the last act that it must perform to transmit a document, in its entirety, electronically.'' 10 C.F.R. § 2.302(d)(1).

RULES OF PRACTICE: FILING OF DOCUMENTS (ELECTRONIC TRANSMISSION; TIMELINESS)

''Hitting the button'' to submit, if the last act for a particular pleading, is all the regulations require to be done by 11:59 p.m. on the due date. Thus, the time an E-Filing submission is received by the system server is not necessarily controlling relative to the timeliness of the filing.

REGULATIONS: INTERPRETATION (SPECIFIC CONTROLS OVER THE GENERAL)

Given the general rule of interpretation that the specific controls over the general, *see* 10 C.F.R. § 2.3(a) (in any conflict between a general rule in Part 2, Subpart C, and a special rule in Part 2, the special rule governs), the language of the Commission's case-specific notice establishing ''11:59 p.m. Eastern Standard Time'' as the filing time for hearing petitions controls over the agency's rule of general applicability for all cases that refers only to ''11:59 p.m. Eastern Time.''

INTERVENTION: HEARING OPPORTUNITY NOTICE (AMBIGUITY)

Considerations not unlike those associated with the concept of *contra proferentem* that applies in construing written instruments, *see* Black's Law Dictionary 328 (7th ed. 1999) (ambiguous provision is construed most strongly against the person who selected the language), lead to the conclusion that any ambiguity relative to the filing date for hearing requests arising from the language of the agency's hearing opportunity notice should be construed in favor of a participant (particularly a pro se participant) who was seeking to comply with the notice.

RULES OF PRACTICE: FILING OF DOCUMENTS (ELECTRONIC TRANSMISSION; TIMELINESS)

Those who wish to make a timely adjudicatory filing via the agency's E-Filing system should leave themselves enough preparation time to ensure they can ''hit the button'' to submit their filing, in its entirety, well before the eleventh hour (and fifty-ninth minute).

RULES OF PRACTICE: CONTENTIONS (SPECIFICITY AND BASIS; SUPPORTING INFORMATION OR EXPERT OPINION; CHALLENGE TO LICENSE APPLICATION; SCOPE OF THE PROCEEDING; MATERIALITY)

Section 2.309(f) of the Commission's rules of practice specifies the requirements that must be met if a contention is to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. *See* 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both ''within the scope of the proceeding'' and ''material to the findings the NRC must make to support the action that is involved in the proceeding.'' *Id.* § 2.309(f)(1)(iii), (iv). Failure to comply with any of these requirements is grounds for dismissing a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *see also Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE; CHALLENGE OF STATUTORY REQUIREMENT; CHALLENGE OF BASIC STRUCTURE OF AGENCY REGULATORY POLICY; CHALLENGE BASED ON REGULATORY POLICY VIEWS)

A contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. *See* 10 C.F.R. § 2.335; *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2,

and 3), CLI-99-11, 49 NRC 328, 345 (1999) (citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974)). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds,* CLI-91-12, 34 NRC 149 (1991). Similarly, an adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 383 (2007) (citing 10 C.F.R. § 2.335(a)); *see also Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds,* CLI-74-32, 8 AEC 217 (1974). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. *See PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 106 (2007) (citing *Peach Bottom,* ALAB-216, 8 AEC at 20-21 & n.33).

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. *See* 10 C.F.R. § 2.309(f)(1)(iii); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 204 (2004) (citing *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 476 (1987) (footnotes omitted)); *see also Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

It is the petitioner's obligation to present factual information and/or expert opinion necessary to support its contention. *See* 10 C.F.R. § 2.309(f)(1)(v); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds,* CLI-95-10, 42 NRC 1, *and aff'd in part,* CLI-95-12, 42 NRC 111 (1995). While a Board may appropriately view a petitioner's supporting information in a light favorable to the petitioner, failure to provide such information regarding a proffered contention requires the contention be rejected. *See Palo Verde,* CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. *See Palo Verde,* CLI-91-12, 34 NRC at 155; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); *Georgia Tech Research Reactor,* LBP-95-6, 41 NRC at 305.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

Simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention. *See Fansteel,* CLI-03-13, 58 NRC at 204-05. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90, *rev'd in part on other grounds,* CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that on its face it does supply an adequate basis for the contention. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded,* CLI-90-4, 31 NRC 333 (1990).

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

To be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning

that the subject matter of the contention must impact the grant or denial of a pending license application. *See* 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *See Yankee Nuclear,* LBP-96-2, 43 NRC at 75-76; *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied,* CLI-03-12, 58 NRC 185, 191 (2003).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the applicant's safety analysis report and the environmental report) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined,* CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

Although licensing boards generally are to litigate a ''contention'' rather than the ''basis'' that provides the issue statement's foundational support, it has been recognized that the reach of a contention necessarily hinges upon its terms coupled with its stated basis. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC,* 924 F.2d 311 (D.C. Cir.), *cert. denied,* 502 U.S. 899 (1991); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002).

RULES OF PRACTICE: EXTENSIONS OF TIME

If there are problems with meeting a filing date, participants should seek an extension of time or, if the time for filing has passed, submit a motion for leave to file out of time.

RULES OF PRACTICE: CONTENTIONS (SEPARATE STATEMENT OF CONTENTION AND BASIS)

The failure to specify the language of a contention and distinguish it from the discussion that might otherwise be considered the basis for the issue statement might be grounds for dismissing the contention. *See* 10 C.F.R. § 2.309(f)(1)(i), (ii) (providing for separate statement of contention and basis).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE; WAIVER OF RULES OR REGULATIONS)

In the absence of a 10 C.F.R. § 2.335 waiver petition, any challenge brought to aspects of a referenced certified design is outside the scope of a combined operating license proceeding. *See* 10 C.F.R. § 52.63(a)(5).

RULES OF PRACTICE: REPRESENTATIVES (NONATTORNEY REPRESENTATIVES); REPLY PLEADINGS (SCOPE)

Even in the face of the Commission's longstanding admonition that a presiding officer should provide latitude to a pro se participant, *see Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999); *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973), a pro se petitioner's decision to provide an expert affidavit, available when it filed its hearing petition, at the time it submitted its reply is one that runs afoul of the Commission's explicit and repeated directive that reply pleadings cannot be used to introduce additional supporting information relative to a contention (as opposed to addressing the arguments raised in response to the petition), *see Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225, *reconsideration denied,* CLI-04-35, 60 NRC 619 (2004).

NEPA: ENVIRONMENTAL ANALYSIS (BASELINE SCOPE)

The Licensing Board in the Vogtle early site permit (ESP) proceeding recently observed:

> [I]n support of their argument the ER is deficient because of its lack of site-specific studies, Joint Petitioners have not demonstrated with any references — nor are we aware of any — that suggest site-specific studies are generally required. Rather, the appropriate scope of the baseline for a project is a functional concept: an applicant must provide enough information and in sufficient detail to allow for an evaluation of important impacts.

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 257 (2007) (citations omitted).

NEPA: ENVIRONMENTAL ANALYSIS (AQUATIC BASELINE)

That is not to say that questions about the adequacy of an applicant's ER discussion regarding the impacts associated with the construction and operation of reactor cooling system intake and discharge structures cannot be based on the adequacy of the applicant's assessment of the state of existing aquatic resources. As the Board in the *Vogtle ESP* proceeding also noted, asserted deficiencies in the ER intake/discharge impact discussion as it is associated with the baseline discussion of aquatic resources, if properly supported, can be admitted for further litigation. *See id.* at 258-59.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

It is the petitioner's responsibility to provide factual or expert support for its contention, which includes the specific sources or documents on which it relies to support its position. A litany of ''facts'' and ''figures'' on various items without citing any specific document, expert opinion, or other source that will support their figures or claims severely undercuts the probative value to which these ''factual'' assertions might otherwise be entitled, essentially reducing them to the type of ''bare assertions and speculation'' that the Commission indicated in *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000), will not support the admission of their contention. *See* 10 C.F.R. § 2.309(f)(1)(v).

NEPA: SUFFICIENCY OF CONTENTIONS (MATERIALITY)

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

In the context of seeking the admission of a NEPA or environmental-based contention, the underlying purpose of NEPA as an information-gathering and disclosure mechanism does require a somewhat different view of the concept of ''materiality'' under section 2.309(f)(1)(iv) than might be applied, strictly speaking, to a contention seeking to establish an AEA health and safety issue. Just because a contention is NEPA-related does not, however, eliminate materiality as an admissibility factor. Thus, an assertion that some analysis, calculation, or survey must be included in an ER or environmental statement is not necessarily sufficient, in and of itself, to require consideration of whether that additional information gathering and disclosure mechanism should be included, particularly

in the absence of any expert or other support suggesting that such inquiry or examination is necessary to provide a reasonably accurate perspective regarding the relevant circumstances. Even in the context of NEPA, ''saying it, does not make is so'' for the purpose of establishing the materiality of a perceived information or analytical omission or deficiency.

RULES OF PRACTICE: REPRESENTATIVES (NONATTORNEY REPRESENTATIVES)

While a presiding officer must take seriously the responsibility, as recognized by the Commission, to afford a reasonable measure of latitude to a pro se intervenor in terms of the mechanics of contention pleading and citation, this does not equate to the principle that all pro se intervenors must be afforded the same measure of latitude without regard to their experience in dealing with the agency's adjudicatory process and procedural rules. When an organization has appeared several times previously, it is not untoward for the presiding officer to expect that there will be a heightened awareness of the agency's pleading rules.

NEED FOR POWER: FORECASTING FUTURE DEMAND

The agency's longstanding approach to electric power demand forecasting has emphasized historical, conservative planning to ensure electricity generating capacity will be available to meet reasonably expected needs. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 410 (1976); *see also Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609-10 (1979).

NEPA: NRC RESPONSIBILITIES; NEED FOR POWER

Notwithstanding TVA's status as a federal entity, it is within NRC's regulatory authority to review TVA's COL application, including its compliance with the agency's NEPA requirements. *See Tennessee Valley Authority* (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-506, 8 NRC 533, 545-47 (1978). Moreover, it is apparent that the issue of the need for power is a part of the agency's COL NEPA review process. *See* 10 C.F.R. § 51.45(c) (ER submitted for agency review must contain analysis of economic, technical, and other benefits), *id.* § 51.50(c) (ER for COL application must include information required by section 51.45(c)). Further, as the Staff's standard review plan for environmental matters makes clear, under the agency's NEPA process the ER is reviewed to ''ensur[e] that the analysis of the need for power and alternatives is reasonable and meets high quality standards.'' NUREG-1555, ''Standard Review Plans for Environmental Reviews for Nuclear Power Plants,'' at 8.4-1 (Oct. 1999).

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MEMORANDUM AND ORDER
(Ruling on Standing, Hearing Petition Timeliness, and Contention Admissibility)

The Tennessee Valley Authority (TVA) has applied to the Nuclear Regulatory Commission (NRC) for a combined operating license (COL) under 10 C.F.R. Part 52 that would authorize TVA to construct and operate two new units employing the Westinghouse Electric Corporation AP1000 advanced passive pressurized power reactor certified design on its existing Bellefonte nuclear facility site, located some 6 miles northeast of Scottsboro, Alabama. By hearing petition dated June 6, 2008, three organizations — the Southern Alliance for Clean Energy (SACE) and the Blue Ridge Environmental Defense League (BREDL) and its Bellefonte Efficiency and Sustainability Team (BEST) chapter — jointly seek to intervene and challenge various aspects of the TVA COL application and the NRC regulatory process for reviewing that application.

For the reasons set forth below, we find that (1) while SACE and BREDL have established their standing to intervene as of right, BEST has not made the requisite showing and so will not be admitted as a party to this proceeding; (2) the joint hearing petition was timely filed; and (3) among their twenty-four proffered contentions, SACE and BREDL have provided four admissible issue statements,

specifically contentions NEPA-B, FSAR-D, NEPA-G, and NEPA-N, so as to be admitted as parties to this contested proceeding for the purpose of litigating these issue statements. Further, finding them novel and associated with matters of potential generic import, we refer to the Commission our rulings (1) admitting contentions FSAR-D and NEPA-G, which raise questions regarding the health and safety and environmental implications associated with the recent closure of the Barnwell, South Carolina low-level waste facility; and (2) denying the admission of contention NEPA-M, which posits the need to provide an environmental impact analysis of the ''carbon footprint'' associated with the construction and operation of the proposed Bellefonte facilities. Finally, we outline certain procedural and administrative directives regarding the litigation of the four admitted contentions.

I. BACKGROUND

A. 10 C.F.R. Part 52 Licensing Process and the TVA COL Application

The 10 C.F.R. Part 50 licensing process that was applied to the 104 commercial nuclear power plants currently operating in the United States requires that an applicant first obtain a construction permit for the facility, followed by an operating license. Both licenses are issued separately and, under section 189a of the Atomic Energy Act (AEA) of 1954, as amended, 42 U.S.C. § 189a, hearing rights accrue separately as to each requested permission. Under the Part 52 licensing process that governs the TVA application for Bellefonte Units 3 and 4, however, an entity may apply for a single COL that authorizes both new reactor construction and operation. Specifically, Subpart C of Part 52 establishes procedures for the issuance of a combined construction permit and conditional operating license for a nuclear power plant and the conduct of the hearing that is afforded for a COL. The COL is ''essentially a construction permit which also requires consideration and resolution of many of the issues currently considered at the operating license stage.'' *See* Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 53 Fed. Reg. 32,060, 32,062 (Aug. 23, 1988). The general requirements for the contents of a COL application are set forth in 10 C.F.R. §§ 52.79-52.80.

Additionally, under Subpart B of Part 52, a COL applicant can reference a certified reactor design for the facility it proposes to construct and operate. If a certified design is referenced in a COL proceeding, in the absence of a petition under 10 C.F.R. § 2.335 seeking a waiver, the Commission will treat the certified design as resolving all matters that could have been raised during the rulemaking process in which the certified design was reviewed and approved.

On October 30, 2007, TVA applied under 10 C.F.R. Part 52 for a COL for two new reactors, Bellefonte Units 3 and 4, that it proposes to construct in accord

with the AP1000 certified design. If authorized, construction is slated to take place at the Bellefonte Nuclear Power Plant site near Scottsboro, Alabama, which is the location of Applicant TVA's partially completed Bellefonte Nuclear Power Plant Units 1 and 2.[1] *See* Notice of Receipt and Availability of Application for a Combined License, 72 Fed. Reg. 66,200 (Nov. 27, 2007). Each of these proposed facilities is intended to be operated at an estimated reactor thermal power level of 3400 megawatts thermal (Mwt) and with a net electrical output of at least 1000 megawatts electric (MWe). *See* [TVA], Bellefonte Nuclear Plant Units 3 & 4, COL Application, Part 3, Environmental Report § 1.1, at 1.1-2 (rev. 0 Oct. 2007) [hereinafter ER].

B. Joint Petitioners Hearing Request/Licensing Board Establishment and Initial Procedures

On February 8, 2008, the Commission published a notice of hearing and opportunity to petition for leave to intervene on the COL application for Bellefonte Units 3 and 4. *See* [TVA], Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for Bellefonte Units 3 and 4, 73 Fed. Reg. 7611 (Feb. 8, 2008). The notice allowed any person whose interest would be affected by the proposed COL to file, in accordance with 10 C.F.R. § 2.309, a request for a hearing and petition for leave to intervene within 60 days of the notice. On April 7, 2008, the Commission issued an order granting in part an April 2, 2008 request filed by petitioner BEST for an extension of time to submit petitions and extending the date for filing by 60 days from the date of its order. *See* [TVA], Notice of Extension of Time for Petition for Leave to Intervene on a Combined License Application for Bellefonte Units 3 and 4, 73 Fed. Reg. 19,904 (Apr. 11, 2008). By joint submission dated June 6, 2008, SACE, BREDL, and BEST (referred to hereinafter collectively as Joint Petitioners) responded to the Commission's hearing opportunity notice by petitioning for a hearing on the TVA COL application for Bellefonte Units 3 and 4. *See* Petition for Intervention and Request for Hearing by [BEST, BREDL, and SACE] (June 6, 2008) [hereinafter Intervention Petition].

Thereafter, on June 18, 2008, this Atomic Safety and Licensing Board was established to adjudicate the contested portion of the Bellefonte COL licensing proceeding.[2] *See* [TVA]; Establishment of Atomic Safety and Licensing Board,

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[1] A publicly available version of the TVA COL application for Bellefonte Units 3 and 4 can be found on the NRC's website at http://www.nrc.gov/reactors/new-reactors/col/bellefonte.html (last visited September 11, 2008).

[2] Consistent with AEA section 189a, in connection with the TVA Bellefonte COL application the agency also must conduct a ''mandatory'' or ''uncontested'' hearing in which it will receive evidence

(Continued)

73 Fed. Reg. 35,714 (June 24, 2008). In a June 18 initial prehearing order, in addition to addressing several administrative matters, the Board requested that Joint Petitioners designate each of their nineteen contentions in one or more of the following categories: (1) Administrative and Financial Information (A/FI), (2) Final Safety Analysis Report (FSAR), (3) Environmental Report (NEPA), (4) Technical Specifications (TS), (5) Emergency Planning (EP), (6) Departures and Exemption Requests (D/ER), (7) License Conditions and Inspections, Tests, Analyses and Acceptance Criteria (LC/ITTAC), (8) Information Incorporated by Reference (IIR), or (9) Miscellaneous (MISC). *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (June 18, 2008) at 2-3 (unpublished) [hereinafter Initial Prehearing Order]. On June 26, 2008, Joint Petitioners timely filed their contention designation supplement in which they denominated twenty-four contentions. *See* Supplement to Petition of June 6, 2008 Providing Alphanumeric Designation of Contentions (June 26, 2008).

Subsequently, on July 1, 2008, TVA and the NRC Staff filed responses to Joint Petitioners hearing request in which, among other things, they both stated their opposition to the admission of any of Joint Petitioners proffered contentions. *See* Applicant's Answer Opposing Petition to Intervene (July 1, 2008) at 1 [hereinafter TVA Answer]; NRC Staff Answer to ''Petition for Intervention and Request for Hearing by [BEST], [BREDL] and [SACE]'' (July 1, 2008) at 1 [hereinafter Staff Answer]. On July 8, 2008, Joint Petitioners filed a reply to the answers of both TVA and the Staff. *See* Reply of [BREDL], Its Chapter [BEST] and [SACE] to NRC Staff Answer to Petition for Intervention and Applicant's Answer Opposing Petition to Intervene, Both Dated July 1, 2008 (July 8, 2008) [hereinafter Joint Petitioners Reply]. On July 11, 2008, Applicant TVA filed a motion to strike portions of Joint Petitioners reply, and on July 15 the Staff filed a response supporting the TVA motion to strike. *See* Applicant's Motion to Strike Portions of Petitioners' Reply (July 11, 2008) [hereinafter TVA Motion to Strike]; NRC Staff Response to ''Applicant's Motion to Strike Portions of Petitioners' Reply'' (July 15, 2008) [hereinafter Staff Response to Motion to Strike]. Joint Petitioners

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from TVA and the NRC Staff regarding matters raised by the presiding officer concerning the conduct of the Staff's safety and environmental reviews. During that mandatory hearing, the presiding officer will explore issues associated with the Bellefonte COL application that are not the subject of this ''contested'' proceeding regarding the Joint Petitioners contentions admitted for litigation, and make a determination concerning the adequacy of the Staff's safety and environmental reviews, as well as certain independent National Environmental Policy Act (NEPA) findings. *See* 10 C.F.R. § 52.97(a)(1). Current Commission policy calls for the Commission itself to conduct the mandatory hearing for the Bellefonte Units 3 and 4 COL application. *See* Memorandum to Luis A. Reyes, Executive Dir. for Operations, Karen D. Cyr, General Counsel, Frank P. Gillespie, Executive Dir., Advisory Comm. on Reactor Safeguards, from Annette L. Vietti-Cook, Secretary of the Comm'n, Staff Requirements — COMDEK-07-0001/COMJSM-07-0001 — Report of the Combined License Review Task Force at 1 (June 22, 2007) (ADAMS Accession No. ML071760109).

did not file a response to the TVA motion to strike, but rather lodged a July 25, 2008 pleading with the Board that they labeled a motion seeking to have the Board admit all portions of their reply filing. *See* Motion to Admit All Portions of Petitioners' Reply by [BREDL], Its Chapter [BEST] and [SACE] (July 25, 2008). The Board thereafter directed that, in lieu of written responses to Joint Petitioners motion, oral responses by Applicant TVA and the Staff would be entertained at the initial prehearing conference on standing and contention admissibility. *See* Licensing Board Memorandum and Order (Applicant and Staff Responses to Joint Petitioners Motion to Admit All Portions of Reply) (July 28, 2008) (unpublished).

In that regard, previously on July 9 and 21, 2008, the Board had issued orders establishing the date, location, and procedures for an initial prehearing conference intended to provide the participants with an opportunity to present oral argument and answer Board questions regarding the adequacy of various aspects of Joint Petitioners hearing request. *See* Licensing Board Memorandum and Order (Prehearing Conference Argument Time Allocations; Entry of Appearance; Electronic Copy of Application; Webstreaming) (July 21, 2008) at 1-2 (unpublished); Licensing Board Memorandum and Order (Initial Prehearing Conference Schedule; Schedule for Additional Briefing Regarding Timeliness Issue; Opportunity for Written Limited Appearance Statements) (July 9, 2008) at 1 (unpublished) [hereinafter Scheduling Order]. In the July 9 order, the Board also requested that the Staff brief the issue of the timeliness of Joint Petitioners petition to intervene, as the Staff had not presented its views on the issue in previous pleadings. *See* Scheduling Order at 2. This the Staff did in a July 14, 2008 filing in which it asserted Joint Petitioners hearing request was untimely. *See* NRC Staff Response to Licensing Board's Request for Additional Briefing Concerning Timeliness of Intervention Petition (July 14, 2008) [hereinafter Staff Timeliness Response]. Thereafter, on July 18, Joint Petitioners filed a response to Staff's view of the timeliness of Joint Petitioners submission. *See* Response of [BREDL], Its Chapter [BEST] and [SACE] to the Licensing Board's July 9th Request for Additional Briefing Concerning the Timeliness of Intervention Petition (July 18, 2008) [hereinafter Joint Petitioners Reply to Staff Timeliness Response].

On July 30, 2008, the Board conducted a 1-day prehearing conference in Scottsboro, Alabama, during which it heard oral presentations from the participants on the issues of standing, the timeliness of Joint Petitioners hearing request, and the admissibility of their two dozen contentions. *See* Tr. at 1-241.

II. ANALYSIS

A. Joint Petitioners Standing

1. Standards Governing Standing

In determining whether an individual or organization should be granted party status in a proceeding based on standing ''as of right,'' the agency has applied contemporaneous judicial standing concepts that require a participant to establish (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, the National Environmental Policy Act of 1969 (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 Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). In this regard, in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish the requisite standing elements. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). Further, when an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000). In assessing a petition to determine whether these elements are met, which a presiding officer must do even though there are no objections to a petitioner's standing, the Commission has indicated that we are to ''construe the petition in favor of the petitioner.'' *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). We apply these rules and guidelines in evaluating each of Joint Petitioners standing presentations.

2. Southern Alliance for Clean Energy (SACE)

DISCUSSION: Intervention Petition at 2-7; TVA Answer at 4 & n.12; Staff Answer at 13-14; Joint Petitioners Reply at 2.

RULING: SACE is a not-for-profit organization whose members oppose the issuance of a COL to TVA for the proposed Bellefonte units. Attached to Joint Petitioners hearing request are the affidavits of five SACE members, each of whom states that SACE is authorized to represent his or her interests in this proceeding. As verified by a check of the home addresses provided in their affidavits relative to the Bellefonte site using Google Earth, four of these members reside within 50 miles of the Bellefonte site, and at least one lives within 46 miles

of the facility. Neither TVA nor the Staff question SACE's standing to participate in this proceeding.

We find these individuals' asserted health, safety, and environmental interests and their agreement to permit SACE to represent their interests are sufficient to establish SACE's representational standing to intervene in this proceeding.

3. Blue Ridge Environmental Defense League (BREDL)

DISCUSSION: Intervention Petition at 2-7; TVA Answer at 4 & n.12; Staff Answer at 10-13; Joint Petitioners Reply at 2.

RULING: BREDL also is a not-for-profit organization whose members oppose the issuance of a COL to TVA for the proposed Bellefonte units. Attached to Joint Petitioners hearing request are the affidavits of forty BREDL members, each of whom states that BREDL is authorized to represent his or her interests in this proceeding. As verified by a check of the home addresses provided in their affidavits relative to the Bellefonte site using Google Earth, thirty-eight members reside within 50 miles of the Bellefonte site, and at least one lives within 7 miles of the facility. BREDL's standing is not contested by TVA or the Staff.

We find these individuals' asserted health, safety, and environmental interests and their agreement to permit BREDL to represent their interests are sufficient to establish BREDL's representational standing to intervene in this proceeding.

4. Bellefonte Efficiency and Sustainability Team (BEST)

DISCUSSION: Intervention Petition at 2-7; TVA Answer at 4-5; Staff Answer at 13; Joint Petitioners Reply at 2-3; Tr. at 17-20, 23-25, 38-39.

RULING: BEST is asserted to be a unitary chapter of BREDL, founded in February 2008, and sharing the same attributes and goals as BREDL. As stated in Joint Petitioners hearing request, ''BREDL is a league of community groups called 'chapters.' BREDL and its chapters are unitary, with a common incorporation, financial structure, board of directors and executive officer.'' Intervention Petition at 3. Both TVA and the Staff assert, however, that BEST has failed to establish either its organizational or representational standing.

BEST has not made any showing of harm to its organizational interests. Moreover, to whatever extent a chapter and its parent organization can have simultaneous representational standing, none of the affidavits from individuals living in the vicinity of the Bellefonte site provided by Joint Petitioners, all of which are in substantially the same form, make any mention of BEST or state that BEST is authorized to represent the affiant's interests. Because none of the affidavits submitted in support of Joint Petitioners hearing request indicate BEST represents the interests of the submitter, BEST has failed to establish it

has standing. *See Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 304 (2008) (BREDL chapter People's Alliance for Clean Energy (PACE) lacks standing because none of affidavits supporting standing mention affiliation with PACE). The BEST request for party status in this proceeding is, therefore, *denied.*

B. Timeliness of Joint Petitioners Hearing Request

DISCUSSION: Intervention Petition at 108; TVA Answer at 2-3; Joint Petitioners Reply at 3-5; Staff Timeliness Response at 1-2; Joint Petitioners Reply to Staff Timeliness Response at 2-4; Tr. at 20-47.

RULING: The original hearing notice issued in this proceeding that directed persons to submit petitions setting forth with particularity the specific contentions they sought to be litigated stated that ''[t]o be timely, filing must be submitted to the [E-Filing system] no later than 11:59 p.m. Eastern Standard Time [(EST)] on the due date.'' 73 Fed. Reg. at 7612. Subsequently, in response to a request from BEST seeking more time to submit hearing petitions, the Commission issued an additional notice in which it declared:

> The Secretary of the Commission has issued an Order granting a 60-day extension for interested persons to file a petition for leave to intervene in the proceeding regarding the application for a Combined Operating License for Bellefonte Units 3 and 4. The 60-day extension runs from the date of the order, April 7, 2008.

73 Fed. Reg. at 19,904.

With regard to the submission of Joint Petitioners hearing request via the agency's E-Filing system,[3] which they are required to do in this proceeding for all their pleadings, *see* 73 Fed. Reg. at 7612, the E-Filing system-generated service e-mails indicate Joint Petitioners hearing request arrived on the agency server at 12:07 a.m. Eastern Daylight Time (EDT) on June 7, 2008, and that the attachments to that petition were sent in a separate submission that arrived in the agency some 48 minutes later, at 12:55 a.m. EDT on June 7. *See* Staff Timeliness Response at 2 (citing TVA Answer at 3 n.7). Both TVA and the Staff object to the timeliness of Joint Petitioners submission under the agency's procedural rules governing

[3] The agency's E-Filing system, which all filers must use (absent an exemption) in COL cases instituted after October 15, 2007, allows for Internet transmission of all participant pleadings into the agency's electronic hearing docket via a form found on the agency's website. Once a submission is received in the E-Filing system, the system generates a notification e-mail to the sender indicating the pleading was received as well as an e-mail containing a web link to the filing that is sent to all individuals on the service list for the proceeding. Once the filing is accessed via the link, it can be viewed, printed, and/or downloaded. *See* Use of Electronic Submission in Agency Hearings, 72 Fed. Reg. 49,139, 49,139, 49,120 (Aug. 28, 2007).

use of the E-Filing system, contending that Joint Petitioners hearing request was submitted late (i.e., after 11:59 p.m. EDT on June 6, 2008) and should be rejected as untimely. TVA and the Staff both point to the time of receipt on the E-Filing system server as evidence that the petition was late-filed.

Under 10 C.F.R. § 2.306(c)(2), to be considered timely, a document must be submitted to the E-Filing system for docketing and service ''[b]y 11:59 p.m. Eastern Time.'' The agency's regulations further state that a filing will be considered complete ''[b]y electronic transmission when the filer performs the last act that it must perform to transmit a document, in its entirety, electronically.'' 10 C.F.R. § 2.302(d)(1).

For their part, consistent with the certificate of service attached to their intervention petition, Joint Petitioners have asserted relative to their hearing petition that their ''last act was hitting that button'' for submission via the E-Filing system website on or before 11:59 p.m. EDT on June 6, 2008. Tr. at 22. Certainly, ''hitting that button'' to submit, if the last act for a particular pleading, is all the regulations require to be done by 11:59 p.m. on the due date. Thus, contrary to Staff's assertion during the oral argument before the Board, *see* Tr. at 36-37. the time an E-Filing submission is received by the system server is not necessarily controlling relative to the timeliness of the filing. Unfortunately for Joint Petitioners, however, the agency's regulations also indicate this ''last act'' principle only applies for the document in question as it has been submitted ''in its entirety.'' In this instance, it is apparent affidavits and other attachments that Joint Petitioners intended should accompany and support their hearing petition were transmitted as part of an additional, separate E-Filing submission for which the ''last act'' did not occur until nearly an hour after 11:59 p.m. ET on June 6. *See* Tr. at 45-47.[4]

Nonetheless, as it turns out under the somewhat peculiar circumstances of this case, Joint Petitioners delay in completing the submission of their hearing request is not fatal to the timeliness of their petition. As the Staff brought to the Board's attention, *see* Staff Timeliness Response at 2 n.4, the original hearing notice indicated that hearing petitions should be submitted by 11:59 p.m. ''Eastern Standard Time.'' In extending the time for filing petitions, the Commission's order, as accurately described in the later *Federal Register* notice, extended the filing date for hearing petitions by 60 days from the date of the order, albeit without making any mention of the time for filing. By the June time frame in which hearing petitions were then due under the extension, daylight savings time

[4] During oral argument before the Board, Joint Petitioners representative who actually submitted the filings indicated that because, contrary to his prior experience with the E-Filing system, there was a significant (and still-unexplained) period of time before he received an e-mail from the E-Filing system indicating the hearing petition had been received by the system, he delayed submission of the second part of the petition with the supporting materials. *See* Tr. at 46-47.

was in effect. In our estimation, this means that, consistent with the language of the original hearing notice stating that the filing was due by 11:59 p.m. EST, a full extension of 60 days, i.e., 1440 hours, from 11:59 p.m. EST on April 7, 2008, would be to 12:59 a.m. EDT on June 7.[5]

If, consistent with the agency's rule governing E-Filing, the original Commission notice or its extension order had stated that any petitions were due by ''11:59 p.m. ET,''[6] a different result might well append here.[7] But in this instance, considerations not unlike those associated with the concept of *contra proferentem* that applies in construing written instruments, *see* Black's Law Dictionary 328 (7th ed. 1999) (ambiguous provision is construed most strongly against the person who selected the language), lead us to conclude that any ambiguity relative to the filing date for hearing requests in this proceeding arising from the language of the agency's hearing opportunity notice should be construed in favor of a participant (particularly a pro se participant) who was seeking to comply with the notice. Accordingly, we find that pursuant to the Commission's February 8 hearing notice as extended by the Commission's April 7 order, Joint Petitioners hearing request and its attachments, having been submitted by 12:59 a.m. EDT on June 7, were timely filed.

In so holding, however, we observe that it is apparent the set of circumstances that aligned in this instance to permit Joint Petitioners ''post-midnight'' filing to be deemed timely are highly unlikely to occur again. This, in turn, strongly suggests that those who wish to make a timely adjudicatory filing via the agency's E-Filing system should leave themselves enough preparation time to ensure they can ''hit the button'' to submit their filing, in its entirety, well before the eleventh hour (and fifty-ninth minute).

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[5] We recognize that by April 7, when the Commission order was issued, EDT was in effect. Nonetheless, since the order said nothing about the time of filing, as opposed to the date of filing, there is nothing to indicate a Commission change in the original filing time.

[6] Given the general rule of interpretation that the specific controls over the general, *see* 10 C.F.R. § 2.3(a) (in any conflict between a general rule in Part 2, Subpart C, and a special rule in Part 2, the special rule governs), we have no difficulty concluding that the language of the Commission's case-specific notice establishing ''11:59 p.m. Eastern Standard Time'' as the filing time for hearing petitions on the Bellefonte COL application controls over the agency's rule of general applicability for all cases that refers only to ''11:59 p.m. ET.''

[7] Even if Joint Petitioners hearing request had been found to be untimely, it is unclear what prejudice Applicant TVA (or the Staff) suffered as a result of Joint Petitioners bifurcated filing, notwithstanding the fact TVA apparently did have a member of its legal team ''on duty'' at midnight on June 6 to review any hearing petition as soon as it was filed and served, *see* Tr. at 26-28. Moreover, having steadfastly maintained their petition was timely filed, these pro se petitioners have made no attempt to argue, in the alternative, that their petition should be admitted under a balancing of the nontimely filing factors specified in 10 C.F.R. § 2.309(c). Nonetheless, under those factors, and in particular an assessment of the all-important first late-filing factor of ''good cause,'' there seemingly would be substantial support for accepting their petition even if it were deemed nontimely. *See supra* note 4.

C. Admissibility of Joint Petitioners Contentions

1. Contention Admissibility Standards

Section 2.309(f) of the Commission's rules of practice specifies the requirements that must be met if a contention is to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. *See* 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both ''within the scope of the proceeding'' and ''material to the findings the NRC must make to support the action that is involved in the proceeding.'' *Id.* § 2.309(f)(1)(iii), (iv). Failure to comply with any of these requirements is grounds for dismissing a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *see also Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

NRC case law has further developed these requirements, as summarized below.

a. Challenges to Regulations/Statutory Requirements/Regulatory Process

A contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. *See* 10 C.F.R. § 2.335; *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999) (citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974)). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds,* CLI-91-12, 34 NRC 149 (1991).

Similarly, an adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 383 (2007) (citing 10 C.F.R. § 2.335(a)); *see also Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds,* CLI-74-32, 8 AEC 217 (1974). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. *See PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 106 (2007) (citing *Peach Bottom,* ALAB-216, 8 AEC at 20-21 & n.33).

b. Challenges Outside Scope of Proceeding

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. *See* 10 C.F.R. § 2.309(f)(1)(iii); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 204 (2004) (citing *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 476 (1987) (footnotes omitted)); *see also Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

c. Need for Adequate Factual Information or Expert Opinion

It is the petitioner's obligation to present factual information and/or expert opinion necessary to support its contention. *See* 10 C.F.R. § 2.309(f)(1)(v); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds,* CLI-95-10, 42 NRC 1, *and aff'd in part,* CLI-95-12, 42 NRC 111 (1995). While a Board may appropriately view a petitioner's supporting information in a light favorable to the petitioner, failure to provide such information regarding a proffered contention requires the contention be rejected. *See Palo Verde,* CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. *See Fansteel, Inc.*

(Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. *See Palo Verde,* CLI-91-12, 34 NRC at 155; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); *Georgia Tech Research Reactor,* LBP-95-6, 41 NRC at 305.

Likewise, simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention. *See Fansteel,* CLI-03-13, 58 NRC at 204-05. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90, *rev'd in part on other grounds,* CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that on its face it does supply an adequate basis for the contention. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded,* CLI-90-4, 31 NRC 333 (1990).

d. Materiality

To be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application. *See* 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *See Yankee Nuclear,* LBP-96-2, 43 NRC at 75-76; *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied,* CLI-03-12, 58 NRC 185, 191 (2003).

e. Insufficient Challenges to the Application

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the applicant's safety analysis report and the environmental report) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(vi). Any contention

that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined,* CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

2. Scope of Contentions

Although licensing boards generally are to litigate a ''contention'' rather than the ''basis'' that provides the issue statement's foundational support, it has been recognized that the reach of a contention necessarily hinges upon its terms coupled with its stated basis. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC,* 924 F.2d 311 (D.C. Cir.), *cert. denied,* 502 U.S. 899 (1991); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002). As outlined below, exercising our authority under 10 C.F.R. §§ 2.316, 2.319, 2.329, we have acted to further define the Joint Petitioners admitted contentions when redrafting would clarify the scope of the contention.

3. Joint Petitioners Contentions

a. MISC-A (formerly a portion of Contention 1): Whether Bellefonte Will Improve the General Welfare, Increase the Standard of Living, or Strengthen Free Competition in Private Enterprise

CONTENTION: NRC fails to enforce the existing regulations required to implement the fundamental purpose of the Atomic Energy Act. Further, granting TVA's Bellefonte COL would not improve the general welfare, increase the standard of living or strengthen free competition in private enterprise.

DISCUSSION: Intervention Petition at 11-12; TVA Answer at 15-16; Staff Answer at 15-17; Joint Petitioners Reply at 9-12; TVA Motion to Strike at 4; Staff Response to Motion to Strike at 2; Tr. at 212, 223, 231-33.

RULING: *Inadmissible,* in that this contention and its foundational support impermissibly challenge the basic structure of the Commission's regulatory program, thereby raising a matter that is not within the scope of this proceeding and failing to establish a genuine dispute on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(iii), (vi); sections II.C.1.a, .b, *supra.*

This contention alleges that the NRC is a flawed agency that lacks independence, performs perfunctory licensing reviews, and fails to enforce its existing

regulations so that granting the COL application for the proposed Bellefonte facilities would not implement the fundamental purpose of the AEA by improving the general welfare, increasing the standard of living, or strengthening free competition in private enterprise. As both the TVA and the Staff point out in opposing this contention, it suffers from numerous fatal deficiencies.[8] Because the contention fails to identify specifically any part of the NRC's enforcement program that has failed in relation to TVA's application, it constitutes no more than a generalized grievance regarding NRC's regulatory program that provides no concrete, specific disputed facts relative to the TVA license application. This generalized challenge to the NRC and its regulatory program is inadmissible in this adjudicatory proceeding.

b. FSAR-A (formerly a portion of Contention 1): Hardware Failures

CONTENTION: Contention/Basis language are not separately designated.[9]

DISCUSSION: Intervention Petition at 12-14; TVA Answer at 16-17; Staff Answer at 16, 18-19; Tr. at 213.

RULING: *Inadmissible,* in that this contention and its foundational support impermissibly challenge the basic structure of the Commission's regulatory program, thereby raising a matter that is not within the scope of this proceeding and failing to establish a genuine dispute on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(iii), (vi); sections II.C.1.a, .b, *supra.*

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[8] One of those deficiencies, as TVA points out in its motion to strike, is the attempt by Joint Petitioners in their reply to expand the scope of their assertions by introducing new information in support of their contention, rather than using the reply to address the arguments made by the Applicant and Staff in response to the hearing petition. *See* TVA Motion to Strike at 2 & n. 3 (citing cases).

Also in this regard, apparently having missed the deadline for filing a response to the TVA motion to strike, Joint Petitioners submitted what they labeled a ''Motion to Admit All Portions of Petitioners' Reply.'' In effect, this motion is Joint Petitioners response to the TVA motion to strike, filed late without an accompanying motion for leave to file out of time. Given its true nature, we *deny* Joint Petitioners motion, although noting that we will analyze the merits of the TVA motion *sua sponte* in each instance it applies rather than simply treat the motion as unopposed. We also express our hope that in the future, if Joint Petitioners have problems with a filing date, in accordance with the Board's initial prehearing order, *see* Initial Prehearing Order at 6, they will seek an extension of time or, if the time for filing has passed, submit a motion for leave to file out of time.

[9] For some of their original contentions, and in providing a redesignation of other contentions in response to the Board's June 18, 2008 initial prehearing order, in several instances Joint Petitioners failed to distinguish between the contention and its basis. While this failure to specify the language of their contention and distinguish it from discussion that might otherwise be considered the basis for their issue statement might be grounds for dismissing the contention, *see* 10 C.F.R. § 2.309(f)(1)(i), (ii) (providing for separate statement of contention and basis), in this instance we do not rely upon this drafting flaw as a reason for rejecting these contentions.

In supporting this contention, Joint Petitioners point to a report by the United States Government Accountability Office regarding the 2002 Davis-Besse facility vessel head hardware problem and a report by the NRC Inspector General regarding enforcement of reactor fire barrier requirements as evidencing serious NRC enforcement failures that require correction before the proposed Bellefonte facilities can be licensed. Again, however, the contention fails to provide any evidence of environmental or safety concerns specific to TVA's COL application and the Bellefonte site, constituting no more than an inadmissible generalized grievance regarding NRC's enforcement and regulatory policies that fails to provide concrete and specific disputed facts relative to the TVA license application. As a generalized challenge to the NRC's regulatory program, this contention is inadmissible in this adjudicatory proceeding.

c. TS-A (formerly a portion of Contention 1): Human Factors

CONTENTION: Contention/Basis language are not separately designated.

DISCUSSION: Intervention Petition at 14-15; TVA Answer at 17-18; Staff Answer at 19; Tr. at 212.

RULING: *Inadmissible,* in that this contention and its foundational support impermissibly challenge the basic structure of the Commission's regulatory program, thereby raising a matter that is not within the scope of this proceeding and failing to establish a genuine dispute on a material issue of law or fact. *See* 10 C.F.R. §§ 2.309(f)(1)(iii), (vi), 2.335; sections II.C.1.a, .b, *supra.*

This contention alleges that human error is a serious factor that must be taken into consideration relative to the AP-1000 reactor design, which is a new configuration that will invariably involve new opportunities for human error. The contention also complains that the application for a new reactor at the Bellefonte site is akin to an ''experiment'' that should not be allowed without further action by the NRC to ensure that human frailty will not be a safety factor.

In addition to being precluded as an impermissible attack on the human factors engineering portions of the AP1000 design control document (DCD), *see* TVA Answer at 17-18 (human factors for AP1000 addressed in the AP1000 DCD in section 3.2 of Tier 1 and Chapter 18 of Tier 2), *see also* 10 C.F.R. § 52.63(a)(5) (in absence of a waiver petition, any challenge brought to aspects of a referenced certified design is outside the scope of this licensing proceeding), this issue statement constitutes an inadmissible generalized grievance regarding NRC's regulatory program because it fails to provide concrete and specific disputed facts relative to the TVA license application.

d. A/FI-A (formerly a portion of Contention 1): Threats to NRC Independent Review

CONTENTION: Contention/Basis language are not separately designated.

DISCUSSION: Intervention Petition at 15-16; TVA Answer at 18-19; Staff Answer at 19-20; Tr. at 213-14, 223.

RULING: *Inadmissible,* in that this contention and its foundational support impermissibly challenge statutory requirements or the basic structure of the Commission's regulatory program, thereby raising a matter that is not within the scope of this proceeding and failing to establish a genuine dispute on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(iii), (vi); sections II.C.1.a, .b, .e, *supra.*

With this contention, Joint Petitioners claim that the 2005 energy bill passed by the Congress with its purported requirement that the NRC compensate applicants for any ''delays'' in the COL application process contravenes NRC independence by placing the agency in conflict with its AEA goal of protecting public health and safety. As it seeks to challenge enacted legislation and the agency's regulatory program and fails to provide any concrete, specific disputed facts relative to the TVA license application, we find this contention cannot be admitted for litigation in this proceeding.

e. MISC-A1 (formerly a portion of Contention 1): Procedural Shell Games

CONTENTION: Contention/Basis language are not separately designated.

DISCUSSION: Intervention Petition at 16-19; TVA Answer at 19-20; Staff Answer at 20-21; Tr. at 214-15.

RULING: *Inadmissible,* in that this contention and its foundational support impermissibly challenge the basic structure of the Commission's regulatory program, thereby raising a matter that is not within the scope of this proceeding and failing to establish a genuine dispute on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(iii), (vi); sections II.C.1.a, .b, *supra.*

This contention contests the impartiality of the adjudicatory process, claiming proceedings such as this one are no more than paper exercises that demonstrate the NRC is not adhering to its own principles of good regulation. Joint Petitioners claim is nothing more than a generalized challenge to the impartiality of the NRC regulatory process associated with hearings that is not subject to admission and litigation in this proceeding.

f. MISC-B (formerly Contention 2): The NRC Fails to Execute Constitutional Due Process and Equal Protection

CONTENTION: Contention/Basis language are not separately designated.

DISCUSSION: Intervention Petition at 19-22; TVA Answer at 20-22; Staff Answer at 21-23; Joint Petitioners Reply at 12; Tr. at 215-16, 223.

RULING: *Inadmissible,* in that this contention and its foundational support raise a matter that is not within the scope of this proceeding and impermissibly challenges Commission regulatory requirements. *See* 10 C.F.R. §§ 2.309(f)(1)(iii), 2.335; sections II.C.1.a, .b, *supra.*

Joint Petitioners allege that NRC regulations are insufficient to protect the constitutional right of due process under the law by allowing citizens to be exposed to impermissible levels of radiation. The contention also states that because women and children have a higher risk of developing cancer from radiation exposure than men, the NRC's radiation standards are insufficient to provide equal protection under the law because they do not take into account those two groups.

As the Licensing Board in the *North Anna* COL proceeding recently noted in dealing with a similar claim, this contention is inadmissible because it challenges the NRC's regulations. *See North Anna COL,* LBP-08-15, 68 NRC at 336. In the absence of a rule waiver request, which Joint Petitioners have not filed, 10 C.F.R. § 2.335 prohibits consideration of this type of contention.

g. FSAR-B (formerly Contention 3): Plant Site Geology Is Not Suitable for Nuclear Reactors, Geologic Issues Are Not Adequately Addressed

> CONTENTION: Criteria for geologic criteria in NRC regulations must be met before a combined license may be issued. These criteria are necessary to prevent the construction and operation of nuclear reactors on unstable ground. Information provided by the license applicant must be comprehensive in order to eliminate specific hazards; these are listed in the relevant federal regulations. Failure to account for any of these factors would create potential risks to public safety and health or result in extended shut-downs with associated costs of alternative power to the electric ratepayer. These data are necessary for the Commission to make a sound decision.

DISCUSSION: Intervention Petition at 22-29; TVA Answer at 22-29; Staff Answer at 23-27; Joint Petitioners Reply at 12-13; Tr. at 47-65, 67-69.

RULING: *Inadmissible,* in that the support for the contention is either inaccurate or inadequate to establish that the issue raised is material to the proceeding or is insufficient to show a genuine dispute on a material factual or legal issue exists so as to warrant admission of the contention. *See* 10 C.F.R. § 2.309(f)(1)(iii), (v), (vi); sections II.C.1.c, .d, .e, *supra.*

For this contention, Joint Petitioners question the adequacy of TVA's site geology analysis by focusing on two items: the possible undetected existence of caves and sinkholes on the Bellefonte site, and the adequacy of the seismic

analysis for the site found in the final safety analysis report (FSAR). Relative to the matter of caves and sinkholes, Joint Petitioners sole support is (1) a statement, attributed without citation to Dr. Thomas Moss, the former director of the Alabama Cave Survey, that there are 1854 caves in Jackson County, Alabama, where the proposed new Bellefonte units would be located, and fifty-eight caves within 5 miles of the Bellefonte site; and (2) references to a United States Geological Survey map found on the University of Alabama Department of Geography website and another statement by Dr. Moss, also attributed without citation, that are purported to establish there are sinkholes within 1 or 2 miles of the Bellefonte site. To whatever degree this information might be sufficient to support the proposition that there are caves and sinkholes in the general vicinity of the Bellefonte site, as TVA and the Staff asserted, this showing is wholly insufficient to create a genuine dispute regarding the matter that is of concern here, i.e., that these geological phenomena exist on the site so as to have some significance relative to the construction and operation of proposed Bellefonte Units 3 and 4.

Certainly, the portion of the FSAR § 2.5 site geology discussion in sections 2.5.4.1.3.1 and 2.5.4.1.3.3 that detail an extensive study of the site subsurface using boreholes and seismic refraction profiles is not wanting for the type of information that Joint Petitioners could have contested in seeking to establish there is a cave/sinkhole problem on the Bellefonte site that warrants further inquiry. In addition to the analysis in these sections, *see* [TVA], Bellefonte Nuclear Plant Units 3 & 4, COL Application, Part 2, Final Safety Analysis Report § 2.5.4.1.3.1, at 2.5-115 to -116 (rev. 0 Oct. 2007) [hereinafter FSAR]; *id.* § 2.5.4.1.3.3, at 2.5-117 to -120, there is the supporting material in (1) Figures 2.5-324, -325, and -327, which show the locations of borings and seismic lines in the vicinity of the proposed reactor footprint; (2) Tables 2.5-225 and -226, which reflect the results of the large number of boreholes drilled into the area of the proposed reactor sites to core into bedrock and give details of cavities found in the subsurface and indicate most are small (less than 0.5 feet in diameter), with the largest beneath the reactor footprint being 4 feet and the largest outside the reactor footprint being 8 feet; (3) Figure 2.5-306, which shows graphically that these small cavities are mostly within 10 to 20 feet of the top of bedrock and absent at greater depth; and (4) Figure 2.5-311, which shows (i) the seismic refraction profiles across the construction zone for the two proposed units that reflect a layer of soil on top of a layer of weathered and fractured bedrock that lies atop competent bedrock at depths of about 15 to 20 feet, and (ii) no large cavities beneath the area where the reactors are to be sited. None of this information was discussed or challenged by Joint Petitioners in an attempt to demonstrate that a genuine dispute exists with the Applicant regarding the issue of cave/sinkhole safety.

As to the matter of seismicity and vibratory ground motion, quoting the statement in NRC Regulatory Guide 1.208 that

> ''[w]hile the most recent characterization of any seismic source accepted by the NRC staff can be used as a starting point for analysis of a new facility, any new information related to a seismic source that impacts the hazard calculations must be evaluated and incorporated into the [probabilistic seismic hazard analysis (PSHA)] as appropriate based on the technical information available.''

Intervention Petition at 25-26 (quoting [NRC], Office of Nuclear Regulatory Research, Regulatory Guide 1.208, A Performance-Based Approach to Define the Site-Specific Earthquake Ground Motion at 5 (Mar. 2007)), Joint Petitioners claim initially that the FSAR earthquake analysis relies improperly on a 1986 East Tennessee Seismic Zone (ETSZ) model developed by the Electric Power Research Institute/Seismicity Owners Group (EPRI/SOG) that requires updating with more recent earthquake data. Additionally, Joint Petitioners claim that (1) the present analysis underestimates the potential for larger earthquakes because of the low weight given larger earthquakes in the EPRI/SOG study by some of the expert teams; (2) the FSAR discussion of EPRI/SOG seismic source model adequacy is based only on the maximum magnitude parameter without including other overall seismic hazard contributors such as probability of activity, source location, and recurrence; (3) the application does not include ''detailed numerical comparisons of the EPRI/SOG hazard'' and newer studies, Intervention Petition at 27; (4) the application's seismic hazard analysis fails to account for two recent large seismic zone earthquakes, a 1973 4.6-magnitude temblor near Knoxville, Tennessee, and a 2003 4.6-magnitude event in Fort Payne, Alabama, located 50 miles east of Scottsboro, Alabama; and (5) an earthquake with a magnitude of 5.0 and higher is possible if a fault lies under the Valley and Ridge region of Southern Appalachia.

With respect to the broad claim that earthquake source and ground motion models have not been updated with new earthquake data subsequent to the mid-1980s EPRI/SOG regional study, this is incorrect because the FSAR shows the application earthquake catalog has been updated to include events through 2005. *See* FSAR §§ 2.5.2.1.1-2.5.2.1.1.1, at 2.5-49 to -50; *id.,* App. 2AA; *see also id.,* Table 2.5-207, at 2.5-211; *id.,* Figure 2.5-232. While it is true that the application analysis was based on the EPRI/SOG study, the application makes clear that TVA tested the EPRI/SOG models with new data to see whether model parameter changes were required and concluded that no change was warranted, with the exception of the New Madrid Seismic Zone and Charleston Seismic Zone source models, which were both updated in the PSHA. *See* FSAR § 2.5.2.4.1.1, at 2.5-61 to -63. Given that the FSAR seismic analysis devotes approximately thirty-nine pages discussing the EPRI/SOG analysis, new data, and revisions to the PSHA and

ground motion response spectrum (GMRS), *see* FSAR §§ 2.5.2.2.1 to 2.5.2.6.3, at 2.5-57 to -96, we see no basis for Joint Petitioners essentially unsupported claim there are no ''detailed numerical comparisons'' of the EPRI/SOG analysis and newer studies. Intervention Petition at 27. Although the differences between the EPRI/SOG analysis and newer studies might have been displayed or highlighted more succinctly and clearly for the reader by Applicant TVA, it is obvious after a thorough reading that detailed comparisons were made. Moreover, Joint Petitioners have not discussed, much less demonstrated, that Applicant TVA's discussion of the most recent seismic data was inaccurate or otherwise flawed.

So too, Joint Petitioners assertion that the model of the East Tennessee Seismic Zone (ETSZ) requires updating from the EPRI/SOG model is belied by the application analysis, which incorporates ETSZ earthquakes, including new data, into the PSHA model that was tested with the new data for sensitivity to changes and found not to warrant a model revision. *See* FSAR § 2.5.2.4.1, at 2.5-61; *id.* § 2.5.2.4.3, at 2.5-70 to -73. Because Joint Petitioners have presented no contrary analysis, there is no genuine dispute in this regard so as to warrant contention admission on this score.

As to Joint Petitioners claim regarding the potential for large earthquake underestimation using the EPRI/SOG model, even putting aside the fact their assertion fails to account for that model's status as an amalgamation from several expert teams that naturally represents a range of independent analyses, their challenge fails as lacking any expert or documentary support. *See* 10 C.F.R. § 2.309(f)(1)(v). At the same time, their complaint regarding the lack of TVA consideration of the effects of larger earthquakes fails to acknowledge, let alone dispute, the application's extended discussion of that topic, including the 2003 Fort Payne earthquake, which is specifically mentioned by name and discussed in the application, *see* FSAR § 2.5.2.1.2.1, at 2.5-54 to -55, and the 1973 event in eastern Tennessee, *see id.* § 2.5.1.1.4.2.4.2, at 2.5-26; *id.,* App. 2AA, Earthquake Catalog at 21 (Event ID No. 958). Joint Petitioners thus are incorrect regarding this omission assertion and, having failed to state how the relevant application analysis is incorrect, have also failed to create a genuine disputed issue. *See* 10 C.F.R. § 2.309(f)(1)(vi).

Regarding Joint Petitioners concern that the discussion of the EPRI/SOG source model analysis was based only on the maximum earthquake magnitude parameters, thereby ignoring other important parameters such as probability of activity, source location, and recurrence, the TVA PSHA does indeed include all of these factors. *See* FSAR § 2.5.2.4.1.1, at 2.5-61 to -63 (source locations); *id.* § 2.5.2.4.1.2, at 2.5-63 to -65 (probability and recurrence); *id.* § 2.5.2.4.1.3, at 2.5-66 to -68 (maximum magnitude). Again, the petition is incorrect in labeling these items as omissions from the application and additionally does not identify possible inadequacies in the relevant analyses that are included so as to establish the requisite genuine disputed issue. *See* 10 C.F.R. § 2.309(f)(1)(vi).

Finally, Joint Petitioners claim that the existence of an undiscovered fault beneath the Valley and Ridge province of southern Appalachia implies that stronger earthquakes than magnitude 5.0 are possible is a speculative assertion that lacks expert opinion or documentary support. As such, it cannot provide grounds for the admission of this contention. *See* 10 C.F.R. § 2.309(f)(1)(v).

Having failed to provide any information that supports the admission of this contention in accord with section 2.309(f)(1), this issue statement must be rejected as inadmissible.

h. MISC-C (formerly Contention 4): Failure to Address Impact of Terrorist Attacks

CONTENTION: Contention/Basis language are not separately designated.

DISCUSSION: Intervention Petition at 29-31; TVA Answer at 29-31; Staff Answer at 27-30; Joint Petitioners Reply at 13; Tr. at 216-18, 223-24.

RULING: *Inadmissible,* in that this contention and its foundational support raise a matter that is not within the scope of this proceeding and fail to present a genuine dispute regarding a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(iii), (vi); sections II.C.1.b, .e, *supra.*

Joint Petitioners allege NEPA requires the NRC address the environmental impacts of a terrorist attack, citing the decision of the United States Court of Appeals for the Ninth Circuit in *San Luis Obispo Mothers for Peace v. NRC,* 449 F.3d 1016 (9th Cir. 2006), *cert. denied,* 549 U.S. 1166 (2007). The contention also declares that the Commission's failure to comply with the Ninth Circuit decision is unreasonable. Both the TVA and the Staff oppose the admission of this contention on the basis that the Commission's policy does not require the NRC Staff to complete a NEPA review for the impacts of terrorism on new reactors.

In various rulings, the Commission has made clear its position that a NEPA analysis is not the vehicle for exploring questions about the potential for a terrorist attack upon a proposed nuclear facility. *See Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 269 & n.16 (2007) (citing cases). The Board is in no position to reconsider these legal rulings by the Commission. In this case being litigated far beyond the boundaries of the Ninth Circuit, we must apply the Commission's case law directives. Consequently, the contention must be dismissed.

i. MISC-D (formerly Contention 5): The Assumption and Assertion That Uranium Fuel Is a Reliable Source of Energy Is Not Supported in the Combined Operating License Application Submitted by TVA (the Applicant) to the U.S. Nuclear Regulatory Commission

CONTENTION: Contention/Basis language are not separately designated.

DISCUSSION: Intervention Petition at 32-34; TVA Answer at 31-34; Staff Answer at 30-33; Joint Petitioners Reply at 13-14; TVA Motion to Strike at 5; Staff Response to Motion to Strike at 2; Tr. at 70-83.

RULING: *Inadmissible,* in that this contention and its foundational support fail to provide expert opinion, documents, or other sources sufficient to supply an adequate basis for the contention and do not present a genuine dispute regarding a material issue of law or fact in accordance with 10 C.F.R. § 2.309(f)(1)(v), (vi); sections II.C.1.c, .e, *supra.*

This contention concerns Joint Petitioners allegations that TVA has failed to discuss and justify the costs and reliability of the uranium fuel supply in accordance with 10 C.F.R. § 50.33(f). In support of this assertion, claiming the long-term supply of uranium is unreliable and demand will be greater than supply, Joint Petitioners rely principally on a report by the World Nuclear Association (WNA) they assert shows worldwide consumption has exceeded worldwide uranium production, creating future cost increases in fueling a nuclear power plant. Joint Petitioners also allege fuel-cycle cost information concerning uranium supply is missing from TVA's application and challenge sections of the TVA COL application where fuel source reliability and accessibility are discussed as based on mere assumptions without proper factual support.

In ruling on this contention, we again find ourselves in agreement with the *North Anna COL* Board in its assessment of a contention in that case that, in most respects, is identical to the issue statement before us. As the *North Anna COL* Board noted relative to the WNA report, ''BREDL has not cited any document that, read as a whole, supports its theory that uranium supplies will be insufficient to support the operation of North Anna Unit 3 during its licensed period.'' *North Anna COL,* LBP-08-15, 68 NRC at 335. The same is true relative to operation of the proposed Bellefonte facilities. Moreover, as was the case with the challenge to the North Anna COL application, *see id.,* although Joint Petitioners claim that the TVA application for Bellefonte Units 3 and 4 fails to provide any discussion of uranium reliability, they fail to cite or suggest any deficiencies with ER § 10.2.2.4, the provision that, in fact, discusses this subject in detail. *See* ER at 10.2-4. As was the case in the *North Anna COL* proceeding, Joint Petitioners failure to provide factual support for their contention or to establish any genuine dispute of fact with

the COL application discussion regarding uranium reliability requires that their contention be dismissed.[10]

j. MISC-E (formerly Contention 6): Whether Bellefonte Will Adequately Limit Atmospheric Emissions of Radionuclides

> CONTENTION: Radionuclide emissions to the atmosphere are regulated as hazardous air pollutants under Title III of the federal Clean Air Act. National Emission Standards for Hazardous Air Pollutants (NESHAP) are subject to maximum achievable control technology standards (MACT). Specifically, the Bellefonte units as proposed by TVA will not meet Clean Air Act standards because: 1) without maximum achievable control technology, routine emissions from the plant would be excessive especially when considered in addition to the existing site-wide radioactive emission levels and 2) the company does not properly account for the higher levels of morbidity and mortality in females and infants caused by low levels of radiation. The question is: Will the Bellefonte reactors meet national emission standards for radionuclides?

DISCUSSION: Intervention Petition at 34-37; TVA Answer at 34-38; Staff Answer at 33-36; Joint Petitioners Reply at 14; Tr. at 218.

RULING: *Inadmissible,* in that this contention and its foundational support raise matters that are not within the scope of this proceeding and are an impermissible challenge to Commission regulatory requirements. *See* 10 C.F.R. §§ 2.309(f)(1)(iii), 2.335; sections II.C.1.a, .b, *supra.*

This contention alleges that the proposed Bellefonte facilities will fail to meet standards for permissible levels of radionuclide emissions under section 112 of the Clean Air Act (CAA), 42 U.S.C. § 7412. Joint Petitioners argue that the NRC has not, but pursuant to this provision should have, implemented maximum achievable control technology (MACT) standards to control radionuclide emissions. The contention also challenges the use of high-efficiency particulate air (HEPA) filters in the heating, ventilation, and air-conditioning (HVAC) system used for the Bellefonte plant, alleging the HEPA filters are inadequate to prevent improper exposure to radionuclide emissions.

As to the first aspect of this contention regarding MACT standards, we find ourselves once again in agreement with the *North Anna COL* Board in its disposition of an identical issue statement in that case. *See North Anna COL,* LBP-08-15, 68 NRC at 331-32. Initially, that Board noted that, as is the case here, the petitioners were not disputing any of the dose calculations presented in

[10] We also find Joint Petitioners reply filing regarding this contention fails to provide any additional relevant information given the study it discusses is improperly introduced for the first time in its reply pleading. *See supra* note 8.

the North Anna COL application or that those calculated doses failed to comply with all relevant NRC regulations. As to the question of whether CAA § 112 required another, national radionuclide emission standard, as that Board noted, CAA § 112(d)(9), 42 U.S.C. § 7412(d)(9), provides that no NRC radionuclide emissions standard need be promulgated under CAA § 112 if the Environmental Protection Agency (EPA) Administrator determines the NRC regulatory program provides an ample margin of safety to protect public health. As that Board also observed, the EPA Administrator has made such a finding, so that no further Commission action under CAA § 112 is required. Nor was that Board willing to admit a claim that the Commission is required to promulgate a more stringent standard for radionuclides, which it found would be a challenge to the agency's rules that, in the absence of a rule waiver petition, would be contrary to 10 C.F.R. § 2.335. We agree with the Board's analysis on all points, as well as its conclusion that this is not an admissible contention.

As to Joint Petitioners challenge to the use and adequacy of HEPA filters in the proposed Bellefonte facilities, as TVA states, the HVAC and the HEPA filters that are a component of that system, are part of the AP1000 certified design. *See* TVA Answer at 37 (gaseous waste system for AP1000 addressed in the AP1000 DCD in Tier 1, section 2.3.1.1, and Tier 2, section 11.3). In the absence of a waiver petition, which has not been submitted here, any challenge brought to aspects of a referenced certified design is outside the scope of this licensing proceeding. *See* 10 C.F.R. § 52.63(a)(5).

This contention thus must be denied.

k. NEPA-A (formerly Contention 7): Excessive Water Use Contrary to TVA's Purpose

> CONTENTION: Thermoelectric stations require large amounts of water. Nuclear reactors need water for steam condensation, service water, emergency core cooling system, and other functions. Nuclear power plant cooling systems discharge large amounts of heated water into the lake or river, water which often contains radioactivity. Such releases are controlled and monitored; therefore, it is by design and not by accident. [Footnote omitted.]

DISCUSSION: Intervention Petition at 37-39; TVA Answer at 38-42; Staff Answer at 36-38; Joint Petitioners Reply at 14; Tr. at 83-92.

RULING: *Inadmissible,* in that this contention and its foundational support raise a matter that is not within the scope of this proceeding and fail to present a genuine dispute regarding a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(iii), (vi); sections II.C.1.b, .e, *supra.*

Joint Petitioners claim the Bellefonte facilities will use an enormous amount of water from the Tennessee River/Guntersville watershed as compared to other

local uses such as public water supply withdrawal. According to Joint Petitioners, the current drought situation in the southeastern states has already raised concerns about the availability of cooling water for existing nuclear facilities such as Browns Ferry and the precarious balance among competing environmental, navigation, power production, and water supply concerns that is maintained by the TVA 2004 Reservoir Operations Policy. Given this claimed situation, Joint Petitioners assert that licensing the Bellefonte units will only exacerbate an already deteriorating situation, which is inconsistent with the principal purposes of the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831, namely ''river navigability, flood control, and agricultural and industrial development.'' Intervention Petition at 39.

Given that the TVA Act provides authorization for TVA to ''produce, distribute, and sell electric power,'' 16 U.S.C. § 831d(1), as well as manage water use in the Tennessee River Basin, and that NRC has no authority to implement the act or enforce any of its provisions, this aspect of the contention involves a concern outside the scope of this proceeding. Additionally, on the question of the impacts of Bellefonte facility water use, Joint Petitioners fail to demonstrate a genuine dispute regarding a material issue of law or fact with the relevant portions of the TVA application. Joint Petitioners cite other figures from the ER, such as the gross daily withdrawal figure of approximately 71 million gallons per day, *see* ER § 2.3.2.2.4, at 2.3-34, but Joint Petitioners do not provide a factual or expert basis for disputing the analysis in ER § 5.2.2.1.1, at 5.2-5 to -6, that concludes the Bellefonte units, even with such a withdrawal rate, will only consume 0.28% of the monthly average river flow so as to result in a small impact on water supply and water use. By the same token, their reliance on the fact that last year, in conformance with its operational parameters, the Browns Ferry facility had to shut down partially due to high Tennessee River water temperatures (as undoubtedly would be the case for the proposed Bellefonte facilities if their water temperature limitations are exceeded) to establish the ER water use analysis is incorrect fails to explain the relevance of that partial shutdown to their concerns regarding the Bellefonte units. We thus agree with TVA and the Staff that this assertion is insufficient to create a genuine dispute as to a material issue of fact or law under 10 C.F.R. § 2.309(f)(1)(vi) so as to warrant admission of this contention.

l. NEPA-B (formerly Contention 8): Impacts on Aquatic Resources Including Fish, Benthic Invertebrates, and General Aquatic Community Structure of the Project Area, Guntersville Reservoir, and the Tennessee River Basin

CONTENTION: The ER does not adequately address the adverse impacts of operating two additional nuclear reactors on the fishery and aquatic resources of

the Tennessee River basin, Guntersville Reservoir, and the vicinity of Bellefonte Nuclear Plant. In particular, the ER does not provide adequate data to sufficiently address: (1) The condition of resident and [potamodromous] fish and freshwater mussels in the vicinity of the proposed intake and discharge points, Town Creek, Guntersville Reservoir, and Tennessee River basin; (2) Aquatic habitat conditions and flow/habitat relationships in both the project area, as well as in the lower-, middle-, and upper-Tennessee River; and (3) Cumulative impacts on aquatic resources from construction and operation of the proposed new intake and discharge.

DISCUSSION: Intervention Petition at 39-45; TVA Answer at 42-49; Staff Answer at 39-45; Joint Petitioners Reply at 14-19; TVA Motion to Strike at 5; Staff Response to Motion to Strike at 2; Tr. at 92-125.

RULING: *Admitted,* as denominated in Appendix A to this decision, in that this contention and its foundational support are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

With this contention and the accompanying supporting explanation, Joint Petitioners question various aspects of the TVA ER discussion regarding aquatic impacts. Specifically, they assert that the ER is deficient because it (1) fails to include an accurate site-specific description of the fish species and their life history stages that utilize the reach of the Tennessee River near the Bellefonte facility; (2) acknowledges but does not assess (a) the effects of upstream reservoirs on upper Tennessee River aquatic resources because upstream reservoirs bear the burden of downstream water withdrawal, (b) the differential effects of Bellefonte facility operations on aquatic resources as a result of the effect of upstream management on Bellefonte, and (c) the significant effect of impoundments on Bellefonte plant operations; (3) fails to assess the impacts of Bellefonte facility operations on aquatic resources in the area given the 30%-plus decline in local species since 1994 identified in the ER; (4) does not include data based on a recent fish survey of the Tennessee River in the area adjacent to the Bellefonte site or the intake and discharge locations that will be used for Units 3 and 4; (5) fails to identify and consider the direct impacts of the proposed intake structure on fish and mussels by estimating the structure's impingement/entrainment mortality level, instead relying improperly on the structure's compliance with Clean Water Act § 316(b), 40 U.S.C. § 1326(b) and the implementing EPA performance standards in 40 C.F.R. § 125.94; (6) does not provide a meaningful basis for evaluating cumulative impacts of the intake structure on aquatic resources because of a lack of recent and proper species sampling at the intake and discharge structures; and (7) does not identify and analyze the direct or cumulative impacts on aquatic species resulting from effluent discharges, including the thermal plume and the effects of the use of a molluskicide.

Initially, in ruling on this contention, we note that we do not include in our assessment the affidavit of Dr. Shawn Paul Young, which was first submitted

by Joint Petitioners in support of their June 8, 2008 reply filing and was one of the subjects of the TVA motion to strike. *See* Joint Petitioners Reply, Attach. 1 (Affidavit of Shawn Paul Young, Ph.D.). During the July 30 prehearing conference, Joint Petitioners representative explained that this affidavit was, in fact, largely completed at the time of, and could have been filed with, their hearing petition. She also indicated that they believed not submitting the affidavit at the time was appropriate because they included much of the substance of the affidavit, including citing the sources used by Dr. Young in support of his position in the pleading, albeit without attributing the discussion to Dr. Young. *See* Tr. at 94-96, 102-03, 120-21. We are cognizant of Joint Petitioners essentially pro se status in this and other agency licensing proceedings. Nonetheless, even in the face of the Commission's longstanding admonition that we provide latitude to such participants, *see Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999); *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973), their decision to provide Dr. Young's affidavit at the time they submitted their reply is one that runs afoul of the Commission's explicit and repeated directive that reply pleadings cannot be used to introduce additional supporting information relative to a contention (as opposed to addressing the arguments raised in response to the petition), *see Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225, *reconsideration denied,* CLI-04-35, 60 NRC 619 (2004). As a consequence, we must assess this contention based on the information in the petition, including any cited materials, without reliance on the explanations and analysis Dr. Young provided in his affidavit, based on his expertise in the field of aquatic ecology.

Looking to the substance of the contention, to the degree it seeks in subparts (1), (4), and (6) a Board affirmation that Applicant TVA must include site-specific studies in support of its ER, we are unwilling to provide such a ruling. As the Licensing Board in the *Vogtle* early site permit (ESP) proceeding recently observed:

> [I]n support of their argument the ER is deficient because of its lack of site-specific studies, Joint Petitioners have not demonstrated with any references — nor are we aware of any — that suggest site-specific studies are generally required. Rather, the appropriate scope of the baseline for a project is a functional concept: an applicant must provide enough information and in sufficient detail to allow for an evaluation of important impacts.

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 257 (2007).

That is not to say, however, that questions about the adequacy of an Applicant's ER discussion regarding the impacts associated with the construction

and operation of reactor cooling system intake and discharge structures cannot be based on the adequacy of the applicant's assessment of the state of existing aquatic resources. As the Board in the *Vogtle ESP* proceeding also noted, asserted deficiencies in the ER intake/discharge impact discussion as it is associated with the baseline discussion of aquatic resources, if properly supported, can be admitted for further litigation. *See id.* at 258-59. In this instance, we conclude that, while most aspects of this contention are not admissible, in at least one instance there is sufficient support to permit it to move forward.

Relative to the inadmissible portions of this contention, in addition to the problem already discussed relative to subparts (1), (4), and (6) as they run afoul of 10 C.F.R. § 2.309(f)(1)(v), we find Joint Petitioners assertions in subpart (2) regarding the need for an assessment of upstream impacts to be lacking under section 2.309(f)(1)(vi) as they are based on a mischaracterization of the discussion in existing ER §§ 2.3.1.2.6, 2.3.1.3, 2.3.1.3.6, and 2.3.3.4.3 regarding upstream impacts on aquatic resources, none of which acknowledges the effects attributed by Joint Petitioners. *See* ER at 2.3-10, -14 to -15, -18, -48. Likewise, as to subpart (7), we find that concern about the lack of analysis of effluent discharges, including the thermal plume and molluskicide, fails to account for the discussion in ER §§ 5.2.2.2.1 and 5.5.1.1.1 regarding chemical impacts, *see* ER at 5.2-6 to -7, 5.5-3, and sections 5.2.2.2.2, 5.3.2, 5.3.2.1, and 5.3.2.2 regarding thermal impacts, *see* ER at 5.2-8, 5.3-5 to -9, and so likewise is inadmissible under section 2.309(f)(1)(vi).

As to subparts (3) and (5), however, we find they constitute the proverbial ''different kettle of fish'' in that Joint Petitioners have provided sufficient information to support the admission of a contention focusing on the sufficiency of the ER analysis of the impacts of the facility intake structure on aquatic species in the vicinity of the Bellefonte Nuclear Plant, including Guntersville Reservoir and Town Creek. In this regard, we find the information in ER § 2.4.2.4 and Table 2.4-7 suggesting that between 30% and 40% of the species identified in 1994 are no longer found in the reservoir provides sufficient factual information to justify a further inquiry into whether the addition of the facility will have significant impacts on an ecosystem that apparently is already undergoing an appreciable alteration. *See* ER at 2.4-17 to -20, 2.4-37 to -39. Nor, given it does not yet have a National Pollutant Discharge Elimination System (NPDES) permit for its intake system, do we find the Applicant's assertions in subpart (5) regarding its compliance with Clean Water Act § 316 to be dispositive of this matter. *See Vogtle ESP,* LBP-07-3, 65 NRC at 258-59.

Accordingly, concluding that this portion of the contention is adequately supported and establishes a genuine material dispute sufficient to warrant further inquiry, we admit contention NEPA-B as denominated in Appendix A to this decision. In admitting this contention, we note that litigation regarding its merits may involve consideration of the adequacy of the baseline information provided

by TVA relative to the portion of the Tennessee River that encompasses the project area associated with the intake structure for the existing, albeit nonoperational, Bellefonte Units 1 and 2, which is to be used as the intake structure for the new Units 3 and 4.

m. NEPA-C (formerly Contention 9): Alternatives to the Proposed Action Lacking

CONTENTION: Contention/Basis language are not separately designated.

DISCUSSION: Intervention Petition at 45-47; TVA Answer at 49-52; Staff Answer at 45-48; Joint Petitioners Reply at 19; Tr. at 130, 137-38, 144-45, 157.

RULING: *Inadmissible,* in that this contention and its foundational support raise a matter that is not within the scope of this proceeding, fail to provide any expert opinion, documents, or other sources sufficient to supply an adequate basis for the contention, and do not present a genuine dispute regarding a material issue of law or fact in accordance with 10 C.F.R. § 2.309(f)(1)(iii), (v), (vi); sections II.C.1.b, .c, .e, *supra.*

The apparent focus of this contention is the Integrated Resource Plan (IRP) developed by TVA in 1995 to analyze its demand for power, power supply, and need for power through 2020, and its relationship to the TVA ER for Bellefonte. Joint Petitioners generalized claims that TVA's pursuit of additional nuclear power is inconsistent with the ''letter and spirit'' of the IRP and that the IRP reflects a ''different energy future'' for the people of the Tennessee Valley are, even if assumed to be true, matters clearly outside the scope of this proceeding. *See* 10 C.F.R. § 2.309(f)(1)(iii). Joint Petitioners additional assertion that TVA has failed to provide them with an updated version of the IRP, as promised in the Bellefonte ER, is also without substance as it is rooted in an apparent misreading of ER § 8.2. After describing the IRP, the ER states ''[t]he information presented in this section constitutes an update of those earlier analyses of need for power as they relate to the present proposal for the [Bellefonte] site,'' ER at 8.2-1, thereby making it clear the ER is the update so that this aspect of the contention fails to raise a genuine dispute. *See* 10 C.F.R. § 2.309(f)(1)(vi). Finally, Joint Petitioners challenge the ER based on a statement in section 9.2.1.3 that indicates TVA is in the process of enhancing its demand side management (DSM) efforts via a new strategic plan adopted in May 2007, *see* ER at 9.2-6, asserting this statement is inadequate as a DSM analysis. Not only do Joint Petitioners fail to support this claim of ER inadequacy with any expert or documentary information, but they fail to make any showing regarding the adequacy of, or even mention, the DSM analysis provided in the balance of this ER section, *see* ER at 9.2-6 to -8, so as to demonstrate a genuine dispute. *See* 10 C.F.R. § 2.309(f)(1)(v), (vi). This contention thus is inadmissible.

n. NEPA-D (formerly Contention 10): TVA's Power and Energy Requirements Forecast Fails to Evaluate Alternatives

> CONTENTION: The Environmental Report does not adequately evaluate alternatives, including the no-action alternative and does not include any adverse information. The issue is whether the Applicant has justified TVA's need for power. Establishing the need for the power plant is key to developing an EIS for the project and its alternatives. NRC must perform (1) a detailed analysis and evaluation of the applicant's power projections and (2) an independent assessment of forecasts of growth in electricity consumption and peakload demand in the utility's service area. [Citation Omitted]

DISCUSSION: Intervention Petition at 47-48; TVA Answer at 52-55; Staff Answer at 48-49; Joint Petitioners Reply at 19-24; TVA Motion to Strike at 5; Staff Response to Motion to Strike at 2; Tr. at 130-31, 146-48, 157-58.

RULING: *Inadmissible,* in that this contention and its foundational support fail to provide expert opinion, documents, or other sources sufficient to supply an adequate basis for the contention and do not present a genuine dispute regarding a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(v), (vi); sections II.C.1.c, .e, *supra.*

With this contention, Joint Petitioners challenge aspects of the ER discussion of both the need for power and the no-action alternative, found in ER chapters 8 and 9, respectively.

Initially, we find Joint Petitioners complaint that the ER discussion of the no-action alternative is deficient is itself wanting, both in its support and as to its showing that there is a genuine dispute on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(v), (vi). In particular, Joint Petitioners fault a portion of the ER no-action alternative discussion, *see* ER § 9.1, at 9.1-1, that indicates this alternative would fail to satisfy the demand for power so as to allow TVA to maintain an adequate reserve margin. According to Joint Petitioners, this shows how the ER lacks a sufficient discussion of ''negative alternatives,'' which they indicate include efficiencies and DSM. As both TVA and the Staff point out, however, this claim fails to discuss, or even recognize, the other portions of ER chapter 9 that provide an extended discussion of the no-action alternative, including items Joint Petitioners have labeled ''negative alternatives,'' such as DSM. *See* ER § 9.1, at 9.1-1 to -2 (providing a brief discussion regarding, and citing to an extended section 9.1 impacts discussion of, various alternatives, including DSM, that TVA would have to implement if the Bellefonte units are not constructed and put into operation). Moreover, as to Joint Petitioners additional stated concern that the ER must provide a discussion of ''positive alternatives,'' which it asserts include solar, wind, and other renewable energy sources, again both TVA and the Staff correctly note that the items on this listing of asserted

alternatives are, in fact, discussed in the ER in the context of the no-action alternative and alternatives to the proposed action generally. *See* ER § 9.1.1, at 9.1-2, *id.* § 9.2.3.3, at 9.2-35 to -36.

In assessing this claim, we also note that, in the face of these TVA and Staff assertions that positive alternatives had been discussed, in their reply brief Joint Petitioners have sought to bolster their claims by introducing an extended discussion, supported by citations to the works of purported experts, challenging the adequacy of the TVA discussion of solar and wind energy as alternatives. As was the case with contention NEPA-B, the TVA motion to strike seeks to have the Board disregard this information as improperly submitted in a reply pleading, a request we likewise find proper under the Commission's clear directive that reply pleadings are not a means for submitting new information in support of a contention.

Finally, regarding the need for power portion of this contention, because Joint Petitioners assertion that there needs to be an independent assessment by the NRC Staff of the Applicant's power projections and service area electricity consumption growth and peakload demand forecasts fails to allege any current deficiency in the ER or the agency's environmental review process, it fails to frame a genuine dispute regarding a material legal or factual issue. *See* 10 C.F.R. § 2.309(f)(1)(vi).

Thus, as to both its need for power and no-action alternative aspects, this contention must also be rejected as inadmissible.

o. NEPA-E (formerly Contention 11): TVA's COLA Power Demand Forecast Fails to Justify Need for New Nuclear Reactors

CONTENTION: Contention/Basis language are not separately designated.

DISCUSSION: Intervention Petition at 49-63; TVA Answer at 55-66; Staff Answer at 50-65; Joint Petitioners Reply at 24-25; TVA Motion to Strike at 6; Staff Response to Motion to Strike at 2; Tr. at 131-33, 134-37, 139-45, 148-55, 158-61, 168-69, 172-76.

RULING: *Inadmissible,* in that this contention and its foundational support lack materiality, fail to provide expert opinion, documents, or other sources sufficient to supply an adequate basis for the contention and do not present a genuine dispute regarding a material issue of law or fact in accordance with 10 C.F.R. § 2.309(f)(1)(iv), (v), (vi); sections II.C.1.c, .d, .e, *supra.*

Seemingly disregarding the section 2.309(f)(1)(i) requirement to provide a ''specific statement of the issue of law or fact to be raised or controverted,'' this fifteen-page issue statement consists of a series of short paragraphs and bullets arranged under nine headings in which Joint Petitioners seek to raise questions about various aspects of the TVA power demand forecasts found in ER §§ 8.2 through 8.4. An expert affidavit is not provided in support of this contention, and

except as noted below, there are no documentary citations or materials provided in support of any of Joint Petitioners discussion. We review each set of assertions under their respective headings below, but before doing so we make several observations regarding contention admissibility.

As we noted in section II.C.1.c, above, it is the petitioner's responsibility to provide factual or expert support for its contention, which includes the specific sources or documents on which it relies to support its position. Throughout this contention, Joint Petitioners provide a litany of ''facts'' and ''figures'' on various items, such as inflation rates, automobile plant output, and the income gap in the state of Tennessee, or make statements about various economic or power production-related matters, such as the possible move offshore of the American aluminum industry or the likelihood of a long-term recession, without citing any specific document, expert opinion, or other source that will support their figures or claims. By doing so, they severely undercut the probative value to which their ''factual'' assertions might otherwise be entitled, essentially reducing them to the type of ''bare assertions and speculation'' that the Commission indicated in *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000), will not support the admission of their contention. *See* 10 C.F.R. § 2.309(f)(1)(v).

Also, in the context of seeking the admission of a NEPA or environmental-based contention such as this one, the underlying purpose of NEPA as an information-gathering and disclosure mechanism does require a somewhat different view of the concept of ''materiality'' under section 2.309(f)(1)(iv) than might be applied, strictly speaking, to a contention seeking to establish an AEA health and safety issue. Just because a contention is NEPA-related does not, however, eliminate materiality as an admissibility factor. Thus, an assertion that some analysis, calculation, or survey must be included in an ER or environmental statement is not necessarily sufficient, in and of itself, to require consideration of whether that additional information gathering and disclosure mechanism should be included, particularly in the absence of any expert or other support suggesting that such inquiry or examination is necessary to provide a reasonably accurate perspective regarding the relevant circumstances. Even in the context of NEPA, ''saying it, does not make is so'' for the purpose of establishing the materiality of a perceived information or analytical omission or deficiency.

Finally, while we must take seriously our responsibility, as recognized by the Commission, to afford a reasonable measure of latitude to a pro se intervenor in terms of the mechanics of contention pleading and citation, we also do not think this equates to the principle that all pro se intervenors must be afforded the same measure of latitude without regard to their experience in dealing with the agency's adjudicatory process and procedural rules. In this instance, BREDL has appeared in agency licensing adjudications several different times. *See, e.g., Shaw Areva MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14,

66 NRC 169, 181 (2007); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 77 (2002). Thus, even for a joint petition that may have involved some delegation or division of responsibilities, *see* Tr. at 131-32, when an organization has appeared several times previously, we think it is not untoward for the Board to expect that there will be a heightened awareness of the agency's pleading rules, which, as we explain below, has not been evident relative to this seemingly detailed but, in fact, essentially unsupported contention.

With this in mind, we turn to each of the discussion portions of the contention.

(i) POWER AND ENERGY REQUIREMENTS

The challenges under this heading relate to the basic assertion that TVA has not included various low/no/negative growth scenarios in its ER power needs assessment that are asserted to be required based on the current-recessionary/high-inflation economic conditions; high oil/fuel and coal costs; the impacts of diminishing oil and bauxite supplies on the power needs of TVA's largest direct-served customers, auto assembly plants and aluminum producers; the impacts of an April 2008 12% TVA rate increase and uncompetitive wholesale prices on energy-intensive industrial customers; congressionally mandated carbon tariffs; and purported TVA solvency problems associated with its existing, and future, nuclear renaissance-related debt.

Regarding the matters denominated under this heading, we agree with Applicant TVA and the Staff that the agency's longstanding approach to electric power demand forecasting has emphasized historical, conservative planning to ensure electricity generating capacity will be available to meet reasonably expected needs. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 410 (1976); *see also Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609-10 (1979). The description of the TVA forecasting process in ER § 8.2.1 indicates that it encompasses both 3- and 25-year planning cycles based on a wide variety of factors including employment, abnormal weather, and competing fuel cost estimates looking toward the 2017-2018 time frame when TVA anticipates the Bellefonte units will be operating commercially. When contrasted with Joint Petitioners narrow focus on perceived near-term economic conditions, i.e., a possible recessionary/inflationary cycle caused by high oil prices (which have themselves moderated at least marginally since their petition was filed), it is apparent the latter fails to provide sufficient support for an admissible contention challenging the TVA analysis. Nor has there been any attempt to establish the materiality of this allegation. The same is true for their allegations regarding the purported demise of the regional automobile assembly and aluminum production industries, future (but not yet adopted) congressional passage of carbon tariffs,

and the alleged (but unexplained) impacts of a recent TVA rate increase and TVA's existing and future debt. These concerns likewise lack the factual or expert support and materiality necessary for contention admission. *See* 10 C.F.R. § 2.309(f)(1)(iv), (v).

(ii) FORECASTS OF ENERGY, CAPACITY, AND LOAD FACTORS

Under this heading, Joint Petitioners make various assertions intended to show that TVA is seeking to address its decreasing system load, which is asserted to cause problems in addressing residential peak loads, by adding to its baseload capacity rather than decreasing the peak loads through energy efficiency/DSM strategies. In this regard, Joint Petitioners contend TVA does not present a perimeter estimate analysis to determine the degree to which the TVA estimate might agree with other available regional estimates regarding electricity price and elasticity demand, energy efficiency and substitution (including onsite power production from renewables, combined heat and power (CHP), and other distributive technologies), and demand scenarios associated with consumer response to power cost changes resulting from new power plant integration into the power system.

On the subject of DSM, energy efficiency, and alternative power production systems/renewables as means of avoiding the need for additional nuclear baseload power production in the TVA service area, Joint Petitioners are dissatisfied with the analysis TVA has provided in sections 8.2.2.1 to 8.2.2.3, and 9.2.2, regarding these subjects. *See* ER at 8.2-5 to -11, 9.2-9 to -39. Instead of confronting directly the substance of these TVA discussions, however, Joint Petitioners general approach in their initial petition was to insist that TVA has ''ignored'' these subjects. Intervention Petition at 51. It has not, and Joint Petitioners failure to address this fact provides grounds for finding this contention inadmissible. *See* section II.C.1.e, above. Nor do we find that their reply brief, which proffers, as Attachment 2, a March 20, 2008 Synapse Energy Economics, Inc. memorandum on energy efficiency impacts and a citation to a Lawrence Berkeley National Laboratory report on energy efficiency benefits, improves their position. Rather, as TVA argued in its motion to strike, this violates the prohibition on using reply pleadings to make additional substantive arguments. *See* TVA Motion to Strike at 6 & n.13 (citing *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)). Also, to the degree Joint Petitioners are requesting various additional analyses by TVA, they have made no showing as to how the analysis might make a material contribution to the ER or the NRC's NEPA analysis. *See* 10 C.F.R. § 2.309(f)(1)(iv).

(iii) ECONOMIC FACTORS AFFECTING GROWTH OF DEMAND

Joint Petitioners seek to gather under this heading an assemblage of economic items that they urge should have been included in the TVA analysis, including

the 2008 Energy Information Administration (EIA) reference case that shows the gross domestic product (GDP) average annual growth rate at 2.6% between 2006 and 2030, as opposed to the TVA use of a gross regional product (GRP) average annual growth rate of 2.8% between 2007 and 2022; the purported 2.2% GDP growth rate in 2007; and the decline in TVA power sales (rather than increasing at 1.9% as TVA estimates), as reflected in the TVA failure to meet projected power sales for 2007 and the first quarter of 2008.

As Applicant TVA points out, the concern that TVA has used growth rates that are too high fails to account for the TVA analysis, which was one of three provided, of GRP growth in the 1.0 to 1.5% range. *See* ER at 8.2-17 (Table 8.2-6). Again, Joint Petitioners failure to address this fact provides the basis for rejecting their contention. *See* section II.C.1.e, above. And as to Joint Petitioners attempt to rely on differences between projected and actual TVA electrical sales over the period beginning a little more than a year before and continuing until just after the Bellefonte application was filed (even assuming these unattributed figures are correct, *but see* TVA Answer at 60 n.265), without some showing suggesting these data reflect an historical trend that would affect materially the long-term analysis in the ER, we find this supposed deficiency insufficient to provide the basis for contention admission. *See supra* p. 406. Nor do we find persuasive Joint Petitioners attempt in their reply pleading to undercut the ER use of the 1.9% power growth figures with an additional citation to the 2008 EIA reference case that indicates ''different assumptions'' would support average annual delivered energy growth rate from 2006 to 2030 in the 0.3 to 1.0% range, given there is no explanation of what the different assumptions are, Joint Petitioners Reply at 25, and the fact this information is being provided for the first time in a reply brief.

(iv) POPULATION FACTORS AFFECTING GROWTH OF DEMAND

Under this heading Joint Petitioners contend that while TVA assumes there will be service area population increases due to corporate headquarter and retiree relocations into the area and Hispanic relocations/births, it fails to estimate employment by major industries by SIC code and personal income. As Applicant TVA indicates, this was in fact done as noted in ER § 8.2.1.1, at 8.2-2, so as to deprive Joint Petitioners concern of any validity as a basis for admitting this contention. *See* section II.C.1.e, above.

(v) PERSONAL INCOME FACTORS AFFECTING GROWTH OF DEMAND

Assembled under this heading are a series of items Joint Petitioners claim raise questions about the 2.1 to 1.6% personal income growth estimates during the planning period that are used by TVA in its ER, including the failure to account for the use of significantly less electricity by the low- and middle-income households that constitute most Tennessee households as evidenced by growing

income inequality; the problem of declining wages relative to inflation; a flat median state income in 2005; 30% eligibility among Tennessee households for federal heating and cooling assistance; and a state poverty rate over the last 5 years that is increasing faster than the national rate. Besides the inscrutable citations to ''US Census Report'' and ''LIHEAP'' that are provided in support of several of the bullets and the fact that some of the statements, such as ''[t]he average growth in wages and salaries continue[s] to fall,'' are provided without any authority citation, this concern lacks any showing of materiality in terms of how or why it would affect the TVA personal income growth estimates. *See* 10 C.F.R. § 2.309(f)(1)(iv), (v); sections II.C.1.c, .d, *supra.*

(vi) ENERGY EFFICIENCY AND SUBSTITUTION

Under this heading, Joint Petitioners assert TVA has not estimated the importance of energy efficiency and substitution, which should have been in a forecast of the effect of these factors on service area power sales and peak demand during the proposed new Bellefonte units' first operational year. According to Joint Petitioners, this should have included generating capacity contributions from customer power production using renewables and CHP, particularly given the certain-to-be-adopted congressional requirement for renewable portfolio standards of 15% or more. Further, declaring that the TVA April 2008 12% rate hike has made TVA electricity prices uncompetitive within the region and that it is certain a carbon tax will be imposed and fuel prices will increase, Joint Petitioners challenge the TVA claim in ER § 8.2.2.2 that the real price of electricity will decline during the forecast period. Additionally, under this heading they seek to identify elements they assert were not identified by TVA, but could have contributed to diminished historic and forecast period growth and demand, including increased energy efficiency due to building and appliance code changes; higher prices/tariffs that encourage conservation and demand reduction; technological breakthroughs, government legislation and subsidies, and large energy efficiency investments that provide greater energy efficiency savings; under-development energy sources or energy conversion systems; energy efficiency improvements resulting in decreased power use because of electricity savings; a qualitative assessment of recent energy efficiency effectiveness improvements given industry restructuring, price changes, business cycles, and weather; regional efforts to promote customer energy efficiency regarding internal power transmission and distribution efficiency and DSM; and significant factors affecting service area electricity demand growth, such as building, appliance, and equipment energy efficiency codes/standards and self-generation economics using renewables, and the use of ground source heat pumps and CHP systems.

Again, this concern is simply another expression of Joint Petitioners unhappiness with the ER discussions of energy efficiency, DSM, and renewables that, for

the reasons discussed previously, *see supra* p. 407, are not adequate to support the contention. *See* section II.C.1.e, above. Nor does potential congressional action on renewable portfolio standards and a carbon tax, both speculative possibilities at this point, provide the basis for a different result. *See* 10 C.F.R. § 2.309(f)(1)(v); section II.C.1.d, *supra.*

(vii) PRICE AND RATE STRUCTURES

Joint Petitioners again challenge the TVA claim that the real price of electricity will decline during the forecast period, and so reinforce higher-than-average use of electricity in its service area, by asserting TVA has not considered the effects of alternative rate structures to moderate load growth or reshape load curves. Under this heading, it sets forth a number of items in support of this claim, including TVA's failure to (1) model and incorporate into the ER DSM forecast changes that may result from implementation of its May 2007 Strategic Plan and a new, under-development seasonal, time-differentiated wholesale rate; (2) include an analysis of the load management promotion capability of present and proposed rate structures; (3) use available DSM tools to forecast the moderating effect of DSM programs on peak loads; (4) provide a qualitative assessment of the effectiveness of energy efficiency improvements; (5) review successful efforts within the relevant region to promote energy efficiency; (6) present significant electricity growth demand-affecting factors such as building, appliance, and energy efficiency codes/standards and self-generation economics using renewables, and the use of ground source heat pumps and CHP systems; (7) account for Tennessee General Assembly passage of updated building codes/standards; (8) account for the development of a Tennessee State Energy Plan recently announced by Governor Bredesen; (9) account for inevitable congressionally mandated improved appliance and equipment standards; (10) consider CHP as a significant power generation source; and (11) determine the effect of an aging existing population on the electrical demand growth rate. Under this heading, Joint Petitioners also assert that NRC must exercise purview over TVA's power demand forecast, as no other external entity has this responsibility, leading to arbitrary TVA rate increases to pay down its $25 billion dollar debt from its failed nuclear program.

A number of the aspects of this portion of the contention are claims relating to Joint Petitioners dissatisfaction with the TVA energy efficiency, DSM, and renewable energy source analyses that we have addressed previously. *See supra* p. 407. Similarly, as TVA notes, in ER § 8.2.2.3, at 8.2-8 to -11, TVA has provided a discussion of price and rate structure impacts on electricity demand that Joint Petitioners have not addressed directly so as to provide a basis for this contention. Nor do we find their concerns about the possible impacts of the as-yet-to-be-completed TVA May 2007 strategic plan or the still-to-be-developed Tennessee State Energy Plan to be a basis for admitting this contention, consistent with 10

C.F.R. § 2.309(f)(1)(vi). *See Vogtle ESP,* LBP-07-3, 65 NRC at 271-72. Also lacking proper support under section 2.309(f)(1)(v) is their apparent assertion that an aging population will decrease electrical demand. Finally, as we discuss in more detail relative to our ruling on contention NEPA-F, *see infra* pp. 412-13, we find their assertion that the NRC must step into the role of public utility commission relative to its assessment of TVA's power demand forecast not to be a valid basis for the admission of a contention.

(viii) POWER SUPPLY

Noting that ER § 8.3 regarding power supply was not made publicly available because of a claim that the information it provides is proprietary, under this heading Joint Petitioners posit a series of queries about whether TVA has provided an analysis of different items it asserts are relevant to power supply, including potential competitors to the proposed Bellefonte project and expected trends and policies likely to encourage development and growth of distributed generation sources and self-generation by consumers. The problem for the Board in assessing this concern, however, is that, given they have not seen ER § 8.3, Joint Petitioners have essentially conceded they have no idea whether or not the deficiencies about which they are concerned even exist. As was discussed during the July 30 oral argument, Joint Petitioners were afforded an opportunity by the Board to gain access to this currently protected material, both for the purpose of assessing it as a source of support for contentions and, if they believed the information that would provide the basis for their contentions was being withheld from public disclosure improperly, for contesting the TVA assertion about its proprietary nature in accord with 10 C.F.R. § 2.390. *See* Tr. at 176-80, *see also* Initial Prehearing Order at 4-5. They, however, have stated that they will not seek access to the material under a Board-approved protective order because all the information in the application denominated as protected is being improperly withheld and so should be available to them without such an order.

Given the Joint Petitioners determination to decline to follow the established procedural avenue available to them to obtain access to, and contest the validity of the withholding of, the information in ER § 8.3, we have no choice but to find this aspect of their issue statement fails for want of adequate factual or expert support. *See* 10 C.F.R. § 2.309(f)(1)(v); section II.C.1.c, *supra.*

(ix) ASSESSMENT OF NEED FOR POWER

Pointing out that a number of the figures and charts for ER § 8.4 also were not made publicly available because of a claim that the information they contain is proprietary, Joint Petitioners under this heading offer reasons why they consider the discussion in this ER section is not adequate to demonstrate TVA's need for additional electricity, including the need for an adequate analysis of the region's

economic forecast and an accounting of energy efficiency and DSM, taking into account increasing use of distributed generation sources and customer-generation, recent dramatic improvements in electricity use due to energy efficiency codes that have resulted in new customers having very different usage rates than previous customers, and TVA's failure to forecast the effects of a prolonged recession on service area electricity demand. From our perspective, however, as we have noted previously in discussing Joint Petitioners concerns about how the TVA ER deals with energy efficiency, DSM, renewables as a source of distributed and customer-generated power, and a possible near-term recession, we find these lacking as the proper basis for an admissible contention. *See supra* pp. 406-07.

In conclusion, having found that the concerns set forth under each of the headings described above failed to provide the support necessary to supply an adequate basis for the admission of this contention, we find this entire issue statement to be inadmissible.

p. NEPA-F (formerly Contention 12): NRC Failed to Justify Need for New Units

CONTENTION: Contention/Basis language are not separately designated.

DISCUSSION: Intervention Petition at 63-65; TVA Answer at 66-68; Staff Answer at 66-70; Joint Petitioners Reply at 25-26; Tr. at 160, 181-94.

RULING: *Inadmissible,* in that this contention and its foundational support impermissibly challenge the basic structure of the Commission's regulatory program, thereby raising a matter that is not within the scope of this proceeding, and fail to present a genuine dispute on a material issue of fact or law. *See* 10 C.F.R. § 2.309(f)(1)(iii), (vi); sections II.C.1.a, .b, .e, *supra.*

Asserting, in line with contention NEPA-E, that TVA has failed to establish its need for the power that would be generated by the two proposed Bellefonte units and that TVA, as an independent federal entity, made the decision to move forward with the Bellefonte COL application without state regulatory oversight or public input, with this contention Joint Petitioners claim it is the responsibility of the NRC to justify the need for the two units. Of course, notwithstanding TVA's status as a federal entity, it is within NRC's regulatory authority to review TVA's COL application, including its compliance with the agency's NEPA requirements. *See Tennessee Valley Authority* (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-506, 8 NRC 533, 545-47 (1978). Moreover, it is apparent that the issue of the need for power relative to the Bellefonte units is a part of the agency's NEPA review process. *See* 10 C.F.R. § 51.45(c) (ER submitted for agency review must contain analysis of economic, technical, and other benefits), *id.* § 51.50(c) (ER for COL application must include information required by section 51.45(c)). Further, as the Staff's standard review plan for environmental matters makes clear, under the agency's NEPA process the ER is reviewed to ''ensur[e] that the analysis of the

need for power and alternatives is reasonable and meets high quality standards.'' NUREG-1555, ''Standard Review Plans for Environmental Reviews for Nuclear Power Plants,'' at 8.4-1 (Oct. 1999) [hereinafter NUREG-1555].

As was the case with contention NEPA-D, because this contention fails to allege any current deficiency in the agency's ongoing NEPA review process, which includes a need for power review, it fails to establish a genuine dispute regarding a material legal or factual issue. *See* 10 C.F.R. § 2.309(f)(1)(vi). And to the degree this contention seeks to have the agency undertake some other review procedure relative to TVA's need for power showing and its determination to submit a COL application for the Bellefonte units, the contention raises the type of challenge to applicable statutory requirements or the agency's basic regulatory structure that are not the appropriate subject of admissible contentions. *See* section II.C.1.a, *supra.*

This contention likewise is inadmissible and so must be rejected.

q. MISC-F (formerly Contention 13): So-Called Low Level Radioactive Waste

> CONTENTION: As of June 30, 2008, no facility in the United States will be licensed and able to accept for disposal, Class B, C or Greater-Than-C radioactive waste from the Bellefonte nuclear and power reactors. The applicant fails to offer a viable plan for how to dispose of Class B, C and Greater than-C so-called ''low-level'' radioactive waste generated in the course of operations, closure and post closure of Bellefonte 3 & 4.

DISCUSSION: Intervention Petition at 65-69; TVA Answer at 68-72; Staff Answer at 70-75; Joint Petitioners Reply at 26-30; TVA Motion to Strike at 6; Staff Response to Motion to Strike at 2; Tr. at 194-210.

RULING: As discussed below, *admitted* as contentions FSAR-D and NEPA-G as denominated in Appendix A to this decision, in that these contentions and their foundational support are sufficient to establish a genuine material dispute adequate to warrant further inquiry. Moreover, as is explained in more detail below, because of the novel, generic aspects of these issue statements, we refer this ruling to the Commission.

This contention is footed in the recent closure of the Barnwell, South Carolina low-level waste disposal facility to all waste other than that from facilities located in Connecticut, New Jersey, and South Carolina, thereby creating the potential that low-level waste from the proposed Bellefonte units would have to be stored onsite until an additional low-level waste disposal facility becomes available that accepts low-level waste generated in Alabama. This contention is another that is very similar to one petitioner BREDL sought to have admitted into the *North*

Anna COL proceeding and that was the subject of a recent admissibility ruling by the Licensing Board assigned to that case.

In *North Anna COL,* LBP-08-15, 68 NRC at 313-25, based on a careful review of the six contention admissibility factors set forth in section 2.309(f)(1)(i)-(iv), the Board concluded the contention (1) was admissible as a safety issue claiming that the North Anna applicant's FSAR had omitted necessary information concerning its plans for onsite management of Class B and C waste; and (2) was not admissible as an environmental contention because the issue could have been, but was not, raised by BREDL in the context of the previously concluded early site permit (ESP) proceeding in which BREDL was an intervening party. Based on a careful review of the contention proffered here in light of that ruling, we find we are in agreement with the *North Anna* Board as to the following:

> 1. The issue of whether TVA might someday require a permit under 10 C.F.R. Part 61 for a disposal facility is too speculative at present and is therefore not ''material to the findings the NRC must make to support the action that is involved in'' the present proceeding, 10 C.F.R. § 2.309(f)(1)(iv); *see* section II.C.1.d, *supra,* and so not litigable in the context of this contention. *See North Anna COL,* LBP-08-15, 68 NRC at 317.
>
> 2. Because the disposal of Greater-Than-Class-C (GTCC) waste is the responsibility of the federal government, *see* 42 U.S.C. § 2021c(b)(1)(D), the disposal of GTCC radioactive waste is not directly affected by the partial closure of the Barnwell disposal facility and so is not an admissible aspect of this contention. *See North Anna COL,* LBP-08-15, 68 NRC at 313 n.86.
>
> 3. This contention is adequately supported and establishes a genuine material dispute adequate to warrant further inquiry into the safety-related matter of whether the TVA FSAR has failed to include necessary information concerning TVA plans for onsite management of Class B and C waste. *See North Anna COL,* LBP-08-15, 68 NRC at 315-20.

As such, we admit this contention as a safety contention, as set forth in Appendix A, and give it the more accurate designation of FSAR-D.

As to the status of this contention as an environmental matter, unlike the *North Anna* proceeding, TVA did not apply for an ESP in this instance. Joint Petitioners thus are not precluded from raising an environmental issue in this proceeding relative to failure of the TVA ER to assess the onsite impacts associated with the potential long-term storage of low-level waste at the Bellefonte site as a result of the recent closure of the Barnwell low-level waste disposal facility. Moreover, for the reasons suggested by the *North Anna COL* Board, we find this issue to be material to this proceeding and not precluded by Table S-3, 10 C.F.R. § 51.51, which provides uranium fuel cycle environmental data. *See North Anna COL,* LBP-08-15, 68 NRC at 316-17. Accordingly, we also admit this issue statement

as an environmental contention,[11] as set forth in Appendix A, with wording reflective of its environmental nature along with the more accurate designation of NEPA-G.[12]

Finally, in admitting these contentions, we would note our agreement with the *North Anna* Board that these issues are likely to be common to numerous nuclear reactors, with similar contentions being filed in connection with other license applications for new reactors. *See id.* at 325 n.155. The Commission thus may wish to consider in a ''low-level waste confidence'' rulemaking questions related to the management and disposal of LLRW that are likely to arise in multiple cases, such as whether facilities for the land disposal of Class B and C waste are likely to become available before the reactors that are the subject of currently pending license applications are expected to begin operation. Indeed, given the potential generic significance of this issue to other COL proceedings and the Commission's expressed interest (albeit in a somewhat different context) in seeing that such issues are afforded common and expeditious consideration, *see* Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,971-72 (2008), we believe this is the type of novel issue that merits direct attention by the Commission at the earliest opportunity. Thus, pursuant to 10 C.F.R. §§ 2.323(f), 2.341(f), the Licensing Board refers its ruling on these contentions to the Commission for its immediate consideration.

r. NEPA-L (formerly Contention 14): Waste Confidence — High Level Nuclear Waste from Irradiated Fuel

> CONTENTION: The Environmental Report for the TVA COLA is deficient because it fails to discuss the environmental implications of the lack of options for permanent disposal of the irradiated (i.e, ''spent'') fuel that will be generated by the proposed reactors if built and operated. Nor has the NRC made an assessment on which TVA can rely regarding the degree of assurance now available that radioactive waste generated by the proposed reactors ''can be safely disposed of [and] when such disposal or off-site storage will be available.'' Final Waste Confidence Decision, 49 Fed. Reg. 34,658 (August 31, 1984), citing *State of Minnesota v. NRC,* 602 F.2d

[11] In admitting these contentions, we are able to conclude they meet the criteria of 10 C.F.R. § 2.309(f)(1) without considering the information from Ms. Diane D'Arrigo that was included in Joint Petitioners reply brief and was properly the subject of the July 11, 2008 TVA motion to strike.

[12] As was noted above, *see supra* p. 376, in an attempt to obtain a better understanding of the exact nature of each of Joint Petitioners contentions, the Board asked them to provide one of nine designations for each of their contentions, based on its relationship to the TVA COL application. In this instance, the label assigned by Joint Petitioners does not reflect the actual nature of the contention, which, in fact, really includes two issue statements. Accordingly, as we suggested we might, *see* Initial Prehearing Order at 3, *see also* section II.C.2, *supra,* we provide the different aspects of this contention with designations that more accurately reflect the matters they raise.

412 (D.C. Cir. 1979). Accordingly, the ER fails to provide a sufficient discussion of the environmental impacts of the proposed new nuclear reactors.

DISCUSSION: Intervention Petition at 69-78; TVA Answer at 72-76; Staff Answer at 75-79; Joint Petitioners Reply at 30; Tr. at 218, 224.

RULING: *Inadmissible,* in that this contention and its foundational support raise a matter that is not within the scope of this proceeding and impermissibly challenge Commission regulatory requirements. *See* 10 C.F.R. §§ 2.309(f)(1)(iii), 2.335; sections II.C.1.a, .b, *supra.*

With this issue statement, Joint Petitioners challenge the application in this proceeding of the Waste Confidence Rule by which the Commission has made a generic determination that (1) spent nuclear fuel can be safety stored at a generating reactor site without significant environmental impacts for at least 30 years beyond the reactor's licensed operation; (2) there is reasonable assurance at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time; and (3) no ER discussion of any environmental impact of spent fuel storage at a reactor is required in, among others, a COL proceeding. *See* 10 C.F.R. § 51.23(a)-(b). Joint Petitioners argue that the rule should not apply to new nuclear power plants or, if it does apply, that it should be reconsidered given the uncertainty about the availability of the second geologic repository that would be needed to store fuel from the new generation of reactors and the post-September 11, 2001 heightened risk of terrorist attacks against commercial nuclear facilities where the fuel will continue to be stored.

Previous decisions, including one in the *North Anna COL* proceeding, have held the Waste Confidence Rule is applicable to all new reactor proceedings and have not entertained contentions challenging the Waste Confidence Rule or seeking its reconsideration. *See North Anna COL,* LBP-08-15, 68 NRC at 336-37; *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 268-70 (2004). As this contention likewise challenges this agency regulation in the absence of a waiver petition, it must be dismissed in accordance with 10 C.F.R. § 2.335.[13]

[13] Also in this regard, as was noted during the July 30 prehearing conference, Joint Petitioners may themselves submit a rulemaking petition requesting an update of the Waste Confidence Rule and it has been reported that the Commission itself is considering conducting an update of that rule. *See* Tr. at 48-49.

s. FSAR-C (formerly portion of Contention 15): Global Warming Impacts Are Omitted from TVA License Application — Severe Weather

> CONTENTION: The risks to nuclear power plants associated with severe weather are not only direct damage to the site and reduced operation and therefore capacity — the risks also originate from the impact of severe weather on the transmission grid and the overall probability of loss of offsite power, and the subsequent duration of such loss. These risks form the base of the calculated risk of station blackout — the primary source of risk of a major reactor accident and have not been addressed by the applicant. [Footnote omitted]

DISCUSSION: Intervention Petition at 78-81; TVA Answer at 76-80; Staff Answer at 79-85; Joint Petitioners Reply at 30; Tr. at 218-19, 224.

RULING: *Inadmissible,* as this contention and its foundational support raise an issue outside the scope of the proceeding, lack materiality, lack sufficient factual or expert opinion support, and fail to establish a genuine dispute on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), (vi); sections II.C.1.b, .c, .d, .e, *supra.*

In this contention, Joint Petitioners allege that with global warming, an onslaught of severe weather will impact the transmission grid and increase the probability of loss of offsite power events, a matter they assert is a primary source of major reactor accident risk that must be addressed in the FSAR. The contention also takes issue with the probabilistic risk assessment (PRA) used by the DCD for the AP1000 reactor. Citing reports asserted to detail the expected increase in global warming-related severe weather and its impacts, Joint Petitioners contend that the analysis used in the AP1000 DCD is based on meteorological data that fail to account for the higher probability of future severe weather and that specific portions of the FSAR must address the increase in severe weather.

Relative to Joint Petitioners concerns regarding the data and analysis that were the basis for the PRA in the AP1000 DCD, as we have indicated previously, *see supra* p. 388, in the absence of a waiver petition, which has not been submitted here, any challenge brought to these aspects of a referenced certified design is outside the scope of this licensing proceeding. *See* 10 C.F.R. § 52.63(a)(5). In connection with Joint Petitioners assertions regarding the need for additional FSAR analysis of severe weather, as TVA and the Staff point out, in addition to failing to contest specifically the validity of any of the severe weather information that is provided in the FSAR, *see* FSAR §§ 2.3.1.2 to 2.3.1.5, at 2.3-5 to -14, the citations and references they give to allegedly supporting information either lack specificity in terms of indicating the portion of the study or report that supports their issue statement; provide information on the number of severe weather events over a period of time without indicating what the expected future impact of global warming impact would be for these events; or seek support relative to weather

events, such as hurricanes, that have limited potential for severe weather impact at the site under review given the proposed Bellefonte facilities' inland location.

t. NEPA-M (formerly portion of Contention 15): Global Warming Impacts Are Omitted from TVA License Application — Carbon Footprint

> CONTENTION: Greenhouse gases rank among the top environmental concerns today. The release of greenhouse gases is part of any major construction operation — as the production of cement, steel, copper and other raw materials and components all contribute to what is generically called the ''carbon-footprint'' though more accurately it would be the ''Greenhouse Gas footprint.'' These emissions from many sources in aggregate are contributing to the destabilization of climate on planet Earth. Specifically, the applicant fails to include any discussion of Green House Gas emissions or ''Carbon Foot-print'' in its environment report.

DISCUSSION: Intervention Petition at 81-84; TVA Answer at 81-83; Staff Answer at 85-88; Joint Petitioners Reply at 30-31; Tr. at 218-19.

RULING: *Inadmissible,* in that this contention and its foundational support fail to present a genuine dispute on a material issue of fact or law. *See* 10 C.F.R. § 2.309(f)(1)(vi); section II.C.1.e, *supra.* Nonetheless, as is explained in more detail below, because of the novel, generic aspects of this issue statement, we refer this ruling to the Commission.

In this contention of omission, Joint Petitioners claim that TVA has failed to include in the Bellefonte COL application any information regarding the project's greenhouse gas emissions or ''carbon foot-print.'' In support of the contention, Joint Petitioners argue that, notwithstanding the billing given nuclear energy as a solution to global warming, the plants should be required to disclose the large amount of carbon releases involved in producing and transporting raw materials and components for, and constructing, the Bellefonte facilities. Also significant in this regard, according to Joint Petitioners, is the large carbon footprint associated with emissions resulting from the uranium fuel cycle, including transportation, fossil-fuel generated power used to run the fuel production processes, and transportation and processing of high- and low-level waste for disposal.

Joint Petitioners contention states that ''the applicant fails to include any discussion of Green House Gas emissions or 'Carbon Foot-print' in its environment[al] report.'' As Applicant TVA points out, however, there is a discussion in ER § 10.3.1.3 and Table 10.3-1, *see* ER at 10.3-1 to -2, 10.3-8, regarding the avoidance of greenhouse gases, in particular carbon dioxide, as a benefit of the Bellefonte facilities relative to other baseload energy sources, such as natural gas

and coal.[14] Thus, the ER does contain a discussion of greenhouse gas effects.[15] Given this discussion, we find that this contention, framed as a contention of omission, fails as an admissible issue statement.

Notwithstanding our finding here on the close question of whether contention NEPA-M is admissible, (1) continued reliance by combined operating license applicants in their environmental reports (ERs) on greenhouse gas avoidance as a benefit of nuclear power plant operation; and (2) the apparent failure of Table S-3 to cover the release values for greenhouse gases such as carbon dioxide, *see Duke Energy Carolinas, LLC* (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2), Initial Prehearing Conference Transcript (Sept. 3, 2008) at 92 (NRC Staff states position that Table S-3 does not cover carbon dioxide) [hereinafter Lee COL Transcript], makes it conceivable that an admissible contention regarding inadequate ER (and, concomitantly, environmental impact statement) analysis of greenhouse gas/carbon footprint impacts relative to other baseload power sources (such as coal and natural gas) will be proffered in the not-too-distant future.[16] As such, the Commission may wish to consider whether this is a matter that should be addressed generically.[17] Indeed, given the potential generic significance of this issue to other COL proceedings (as well as licensing proceedings generally) and the Commission's expressed interest

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[14] In this regard, the ER states:

> Natural gas, and in particular, coal fired electrical generation plants produce significant air pollutant emissions. Fossil fuel air emissions, particularly carbon dioxide, are believed by many in the scientific community to contribute to the greenhouse effect and, consequently, global climate change and global warming. Beyond steam and water vapor, modern nuclear reactors produce virtually no air emissions, and only very minor levels of radioactive emissions. The generation of significant air emissions is avoided by forgoing construction of a comparably sized coal or gasfired alternative, and instead constructing [the proposed Bellefonte units].

ER at 10.3-1 to -2.

[15] In implementing the agency's NEPA requirements in 10 C.F.R. Part 51, the Staff provides guidance to applicants and Staff reviewers through its Environmental Standard Review Plan (ESRP). Neither Part 51 nor the ESRP specifically calls for an evaluation of the ''carbon-footprint'' of a proposed licensing action. With respect to gaseous emissions, the ESRP only seeks an assessment of the direct physical impact of construction-related activities and plant operation on the local community. *See* NUREG-1555, at 5.8.1-3.

[16] It seems apparent from the website information source referenced by Joint Petitioners, *see* Intervention Petition at 83 n.30, as well as at least one additional source referenced on their cited website, *see* http://nuclearinfo.net/Nuclearpower/WebHomeGreenhouseEmissionsOfNuclearPower, that there already is information available suggesting that nuclear facility construction and operation may well have greenhouse gas impacts that potentially would merit consideration in the context of a NEPA cost-benefit analysis providing a comparison to other baseload energy sources.

[17] For their part, both before this Board, *see* Tr. at 48, and the *Lee COL* Board, *see* Lee COL Transcript at 14, 95, the Petitioners indicated they anticipate submitting a rulemaking petition seeking revisions to Table S-3 that, among others, could include consideration of the greenhouse gas impacts associated with the nuclear fuel cycle.

(albeit in a somewhat different context) in seeing that such issues are afforded common and expeditious consideration, *see* 73 Fed. Reg. at 20,971-72, we believe this also is the type of novel issue that merits direct attention by the Commission at the earliest opportunity. Thus, pursuant to 10 C.F.R. §§ 2.323(f), 2.341(f), the Licensing Board refers its ruling on this contention to the Commission for its immediate consideration.

u. NEPA-N (formerly Contention 16): Environmental Report's Inadequate Cost Estimates and Cost Comparisons

CONTENTION: Contention/Basis language are not separately designated.

DISCUSSION: Intervention Petition at 84-92; TVA Answer at 83-86; Staff Answer at 88-95; Joint Petitioners Reply at 31-33; TVA Motion to Strike at 6; Staff Response to Motion to Strike at 2; Tr. at 133-34, 138-39, 145-46, 161-68, 170-72, 176-80.

RULING: *Admissible,* as denominated in Appendix A, in that this contention and its foundational support are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

With this contention, Joint Petitioners seek to establish that the TVA ER fails to provide reasonably current and accurate information regarding the costs of nuclear power, the costs of alternative energy sources, and the financial risks posed by using nuclear power as an energy source. Asserting that in ER § 10.4.2.1.1, TVA uses figures, apparently based on 2003 and 2004 studies, which translate to between $2850 and $3200 per kilowatt (kW) for the full cost to construct each of the proposed Bellefonte AP1000 units, *see* Intervention Petition at 85 (citing ER § 10.4.2.1.1, at 10.4-7), Joint Intervenors insist these figures do not reflect the subsequent serious escalations in real capital costs for a nuclear unit. In this regard, they cite October 2007 testimony before the Florida Public Service Commission by Florida Power and Light Company (FPL) indicating that the cost of a new AP1000 unit (including escalation during construction) at the location of its existing two-unit Turkey Point to be between $5492 and $8041 per kW. Additionally, Joint Petitioners claim that the TVA ER fails properly to evaluate the costs of renewable energy sources, asserting that the costs of solar energy are declining rapidly and the cost of wind generation generally is lower than the estimated AP1000 cost. Joint Petitioners also declare that the ER is deficient because it fails to consider various financial risk factors associated with nuclear reactor construction, including the long lead time for nuclear power plants, which makes the units vulnerable to cancellation (1) because of the economic uncertainty due to fluctuating electrical demand and financial turbulence associated with interest rates, materials cost escalation, and foreign exchange risks; or (2) as technologically outmoded, given the possibility of the declining cost of solar

thermal power and a solution for the transmission issues connected with wind generation.

Relative to the renewable energy cost and financial risk factor aspects of this contention, we find Joint Petitioners have failed to meet their burden to establish admissibility. Putting aside the question of whether the conclusory affidavit of Dr. Arjun Makhijani is sufficient to support Joint Intervenors likewise conclusory claims regarding the ER evaluation of renewable energy costs, which consist of the assertions that the costs of solar-generated electricity are rapidly declining and that wind generation costs are generally less than nuclear, *see* section II.C.1.c, above, their assertions fail to establish a genuine dispute with the ER § 9.2.2 discussion of the cost of wind and solar electrical generation as alternatives to nuclear generation of electricity or with the viability of either of those renewable options as a stand-alone source for the baseload power that would be generated by the proposed Bellefonte facilities. *See* 10 C.F.R. § 2.309(f)(1)(vi). The same is true relative to their assertions regarding the financial risks associated with nuclear power generation, which also seemingly are an attempt to challenge the viability of the financial forecasting found in the ER, which we have already rejected as inadequately supported. *See supra* p. 406.

We do not, however, reach the same conclusion relative to Joint Petitioners assertion, in the context of this NEPA-related contention, regarding the adequacy of the overall cost figures provided in the ER as compared to those in the FPL testimony cited in Joint Petitioners hearing request.[18] The magnitude of that difference, and its potential to affect the cost component of the alternatives analysis relative to combined renewable/fossil-fuel baseload generation sources outlined in ER § 9.2.3.3, is sufficient to demonstrate the potential materiality of that claim.[19] Moreover the similarity between the two projects, both AP1000 designs built on existing sites, is sufficient in our view to demonstrate that a genuine issue exists regarding the difference in the cost estimates for the two sites.

Accordingly, concluding that this portion of the contention has adequate foundational support and establishes a genuine material dispute adequate to warrant

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[18] In their hearing request, Joint Petitioners also reference a July 2007 report of the Keystone Center regarding the nuclear power construction cost estimates as well as an EIA chart showing the average cost per pound of uranium for American power plants between 1994 and 2007. We find the information provided in the former report to be too generic to be useful in this instance, while the latter has not been presented in such a way as to show what impact it would have relative to the nuclear fuel cost information provided in ER § 10.4.2.1.2. *See* 10 C.F.R. § 2.309(f)(1)(iv), (vi).

[19] Although TVA in its July 11 motion to strike has objected to a discussion in Joint Petitioners reply pleading suggesting the combination of renewable energy and so-called hybrid power plants that use natural gas and biogas would provide baseload power generation, they also noted during the July 30 oral argument, *see* Tr. at 155, that the ER discussion of combined renewable/fossil-fuel baseload generation sources is roughly bounding relative to the such a hybrid plant.

further inquiry, we admit contention NEPA-N as denominated in Appendix A to this decision.

In admitting this contention, we note that if litigation over this contention brings into play financial or other information that has been designated as nonpublic, *see* 10 C.F.R. § 2.390, as we have outlined previously in connection with contention NEPA-E, *see supra* p. 411, to obtain access to that information Joint Petitioners would need to request that the Board issue a protective order that permits access to this information on a confidential basis. In the absence of such an order, Joint Petitioners will not be able to obtain such information. Additionally, if Joint Petitioners believe such nonpublic information should be placed on the public record, they have the opportunity to file a timely motion requesting that the Board release the information into the public record, with the caveat that a motion that simply seeks blanket disclosure and does not reflect a detailed review and analysis of the information for which disclosure is sought is unlikely to be successful. Put another way, a motion that seeks Board in camera review of nonpublic information for the purposes of making a determination regarding public disclosure should, with specificity, designate the portions of the information for which disclosure is sought and the reasons why disclosure is appropriate.

v. NEPA-O (formerly Contention 17): Inadequacy of Environmental Report's Analysis of Human Health Impacts of Irradiated Fuel Disposal

CONTENTION: Contention/Basis language are not separately designated.

DISCUSSION: Intervention Petition at 92-95; TVA Answer at 87-91; Staff Answer at 95-101; Joint Petitioners Reply at 33-34; Tr. at 220, 224.

RULING: *Inadmissible,* in that this contention and its foundational support raise a matter that is not within the scope of this proceeding and impermissibly challenge a proposed Commission regulatory requirement. *See* 10 C.F.R. § 2.309(f)(1)(iii); sections II.C.1.a, .b, *supra.*

This contention alleges that the NRC has inadequately characterized the human health impacts of radiation exposure from the high-level waste repository. Although framed as a challenge to an NRC standard, with this issue statement Joint Petitioners actually seek to challenge the pending EPA proposed rule setting standards for offsite releases from radioactive materials that would be stored in the proposed Yucca Mountain high-level waste geologic repository.

As both TVA and the Staff assert, this contention is outside the scope of the proceeding as it is an impermissible challenge to the proposed NRC regulations that would, consistent with section 121 of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10141, adopt EPA's proposed regulations regarding dose standards. Given the EPA standard is an integral part of an ongoing agency rulemaking

process, this Board cannot hear challenges to the EPA's radiation exposure standards, making this contention inadmissible.

w. NEPA-P (formerly Contention 18): Inadequacy of Environmental Report's Reliance on Table S-3 Regarding Radioactive Effluents from the Uranium Fuel Cycle

CONTENTION: Contention/Basis language are not separately designated.

DISCUSSION: Intervention Petition at 95-103; TVA Answer at 91-95; Staff Answer at 101-07; Joint Petitioners Reply at 34; Tr. at 225-31.

RULING: *Inadmissible,* in that this contention and its foundational support raise a matter that is not within the scope of this proceeding and impermissibly challenge both an existing and a proposed Commission regulatory requirement. *See* 10 C.F.R. §§ 2.309(f)(1)(iii), 2.335; sections II.C.1.a, .b, *supra.*

This contention challenges the TVA use of Table S-3 of 10 C.F.R. Part 51, 10 C.F.R. § 51.51 in its ER § 5.7. Supported by the affidavit of Dr. Arjun Makhijani included as Exhibit B to their hearing petition, Joint Petitioners assert that if the NRC used accurate information about high-level waste disposal and depleted uranium (DU) generation impacts in Table S-3, in each instance the environmental impact stated in that table would be ''large'' rather than ''small.'' Additionally, they declare Table S-3 is severely outdated with respect to its purported consideration of GTCC waste as being subject to shallow disposal.

Relative to Joint Petitioners assertions that the impacts reflected by Table S-3 should be ''large'' rather than ''small,'' the first is a variation on their contention NEPA-O claim regarding the adequacy of the proposed EPA rulemaking standard for offsite releases from the Yucca Mountain repository. As we discussed above, *see supra* pp. 422-23, this is essentially a challenge to the pending proposed NRC rule that would, consistent with the strictures of the Nuclear Waste Policy Act, adopt the EPA standard. As such, it is outside the scope of this proceeding. So too, the DU-based challenge to Table S-3 is outside the scope of this proceeding because it contests an existing agency regulation. In the absence of a waiver petition, which has not been submitted here, it must be dismissed in accordance with 10 C.F.R. § 2.335.[20] And the same is true regarding the purported inadequacy of Table S-3's analysis of GTCC waste, which is also a challenge to an existing agency regulatory provision.

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[20] We note relative to this contention that to the degree the information Joint Petitioners seek to rely upon in support of the DU aspect of their contention is rooted in the assertion that DU should be characterized radiologically as GTCC waste, that claim is contrary to a prior Commission characterization of such waste. *See Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-8, 63 NRC 241, 267 (2006) (Commission has indicated DU is classified as Class A waste under current agency regulations), *aff'd,* CLI-06-15, 63 NRC 687 (2006).

Accordingly, we find this contention to be inadmissible.[21]

x. NEPA-Q (formerly Contention 19): Environmental Report's Improper Characterization of Health Effects from the Uranium Fuel Cycle as Small and Failure to Adequately Compare Them to Health Effects of Alternative Energy Sources

CONTENTION: Contention/Basis language are not separately designated.

DISCUSSION: Intervention Petition at 103-06; TVA Answer at 95-98; Staff Answer at 107-10; Joint Petitioners Reply at 34; Tr. at 220.

RULING: *Inadmissible,* in that this contention and its foundational support fail to present a genuine dispute on a material issue of fact or law. *See* 10 C.F.R. § 2.309(f)(1)(vi); section II.C.1.e, *supra.*

With this contention, Joint Petitioners question the adequacy of the ER analysis of cancer deaths and illnesses. Specifically, they assert it is likely the radiation dose analysis in ER § 5.7.5 significantly understates cancer illnesses and mortality relative to natural radiation source exposures. According to Joint Petitioners, by applying risk factors from the National Research Council of the National Academies BEIR VII report and its 2006 risk coefficients, even assuming no major accidents, plant operations would result in a significant number of cancer incidences and deaths — 102 and 52, respectively — in contrast to the 32 fatal cancers estimated in the ER. Joint Petitioners assert this is a ''large'' impact, rather than a ''small'' impact as it is characterized in the ER. Additionally, Joint Petitioners claim that, to the degree the TVA analysis compares cancers caused by natural background to involuntarily imposed radiation from reactor and fuel cycle operations, it is fundamentally improper. Finally, Joint Petitioners declare that the ER is deficient because it fails to compare the cancer incidence and mortality

[21] With regard to this contention, noting they intend to submit a rulemaking petition to seek a generic resolution of the issues raised in this issue statement and, citing *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 101 (1983), and *Massachusetts v. NRC,* 522 F.3d 115 (1st Cir. 2008), Joint Petitioners assert this contention should be admitted and held in abeyance pending the outcome of agency action on its rulemaking petition. We find both cases inapposite as support for the claimed relief. The ''plugged in'' language in *Baltimore Gas & Electric Co.* relied upon by Joint Petitioners is no more than the court's recognition that the Commission should, as appropriate, ''plug in'' any generic rulemaking determination into agency adjudicatory proceedings, while the *Massachusetts* case, at best, stands for the proposition that a participant in an ongoing adjudicatory proceeding that has filed a rulemaking petition should, consistent with 10 C.F.R. § 2.802(d), be provided an opportunity to seek a stay of the adjudication pending a resolution of the rulemaking petition. By the same token, we find no basis for acting, as Joint Petitioners assert we should, to stay further consideration of the GTCC waste portion of their contention pending Department of Energy action on a pending environmental impact statement regarding disposal of GTCC waste.

effects of operating the proposed plant with the health effects of alternative energy-producing technologies, such as wind or solar power, or the alternative of energy conservation.

We find these allegations fail to create a genuine dispute as to a material issue of law or fact. As Applicant TVA points out, the only difference between the ''information in the Application and that in the Petition is that TVA uses a risk estimator of 500 cancer deaths per 10,000 person-Sv (1 million man-rem), while Petitioners claim a value of 570 cancer deaths per million rem.'' TVA Answer at 96. Relative to the BEIR VII report risk estimator utilized by Joint Petitioners, however, while the particular table cited does contain a point estimate for the risk, *see* Intervention Petition at 104 n.41, that table also provides a 95% confidence interval that includes the risk value used by Applicant TVA. As a consequence, there is no meaningful statistical difference between the value used by Applicant TVA and Joint Petitioners, meaning this aspect of the contention fails to pose a genuine dispute for resolution. Also in this regard, we note that while Joint Petitioners make the point that ''[i]n January, the Science Advisory Board of the [EPA] recommended to the EPA that it adopt the BEIR VII report for most cancers,'' *id.,* current National Council on Radiation Protection (NCRP) guidance uses values consistent with those utilized by Applicant TVA, *see* [NCRP], Risk Estimates for Radiation Protection, NCRP Report No. 115, at 112 (1993) (Table 15.1); *see also* International Council on Radiation Protection (ICRP), ICRP Publication No. 103, Recommendations of the ICRP, Annals of the ICRP, Vol. 37/2-4, at 12 (2008).

Finally, as Applicant TVA declares, Joint Petitioners ''have not disputed that the doses from the fuel cycle will be within regulatory limits.'' TVA Answer at 97. Consistent with current Commission regulations indicating that license renewal impacts that do not exceed permissible regulatory levels are to be considered ''small,'' *see* 10 C.F.R. Part 51, Table B-1 n.3, Joint Petitioners assertion that Applicant TVA has mischaracterized the radiation dose impact in its ER analysis, as well as their assertions regarding natural background comparisons (which is essentially a dispute with existing regulatory policy) and cancer incidences associated with alternative energy technologies (about which it fails to provide any information to suggest a comparative difference), fail in this context to create a genuine dispute that would warrant admission of this contention.

III. PROCEDURAL/ADMINISTRATIVE MATTERS

As indicated above, Joint Petitioners BREDL and SACE are admitted as parties to this proceeding because they have established standing and have set forth at least one admissible contention. Below is procedural guidance for further litigating the above-admitted contentions.

A. General Guidance

Given there was no request in Joint Petitioners hearing petition pursuant to 10 C.F.R. § 2.309(g) to conduct this proceeding under the procedures specified in 10 C.F.R. Part 2, Subpart G, unless all parties agree that this proceeding should be conducted pursuant to 10 C.F.R. Part 2, Subpart N, this proceeding will be conducted in accordance with the procedures of 10 C.F.R. Part 2, Subparts C and L. Assuming all the parties currently do not consent to conducting this proceeding under Subpart N, the parties should conduct a conference within 10 days of the date of this issuance to discuss their particular claims and defenses and the possibility of settlement or resolution of any part of this proceeding and to make arrangements for the required disclosures under 10 C.F.R. § 2.336(a).[22]

The Board will oversee the discovery process through status reports and/or conferences, and expects that each of the parties will comply with the process to the maximum extent possible, with the understanding that failing to do so will result in appropriate Board sanctions.[23]

Pursuant to 10 C.F.R. § 2.332(d), the Board is to consider the Staff's projected schedule for completion of its safety and environmental evaluations in developing the hearing schedule. Accordingly, on or before *Monday, September 22, 2008,* the Staff shall submit to the Board through the E-Filing system a written estimate of its projected schedule for completion of its safety and environmental evaluations, including but not limited to its best estimate of the dates for issuance of its open

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[22] Among the items to be discussed is whether the Staff's section 2.336(b) hearing file can be provided electronically via the NRC web site sooner than 30 days from the date of this issuance. In that regard, in accord with section 2.336(b), the Staff should create an electronic hearing file. The Staff shall make available to the parties and the Licensing Board a list that contains the ADAMS accession number, date, and title of each item so as to make the item readily retrievable from the agency's web site, www.nrc.gov, using the ADAMS ''Find'' function. Additionally, the Staff should create (or have created) a separate folder in the agency's Electronic Hearing Docket (EHD) associated with the Bellefonte COL proceeding. Thereafter, the Staff should provide notice to the other parties and the Licensing Board regarding the availability of the Hearing File materials in the EHD.

If the Staff thereafter provides any updates to the hearing file, it should place a copy of those items in the hearing file portion of the Bellefonte COL EHD folder and indicate it has done so in a notification regarding the update that is sent to the Licensing Board and the parties. Additionally, if at any juncture the Staff anticipates placing any nonpublic documents into the hearing file for this proceeding, it should promptly notify the Licensing Board of that intent prior to placing those documents into the Bellefonte COL EHD hearing file folder and await further instructions regarding those documents from the Licensing Board.

[23] In this regard, when a party claims a privilege and withholds information otherwise discoverable under the rules, the party shall expressly make the claim and describe the nature of what is not being disclosed to the extent that, without revealing what is sought to be protected, other parties will be able to determine the applicability of the privilege or protection. The claim and identification of privileged materials must occur within the time provided for disclosing withheld materials. *See* 10 C.F.R. § 2.336(a)(3), (b)(5).

item and final safety evaluation reports and the draft and final environmental impact statements relative to Bellefonte Units 3 and 4.

The Board will then conduct a prehearing conference to discuss initial discovery disclosures, scheduling, and other matters on a date to be established by the Board in a subsequent order. The parties should be prepared to address the following matters at the prehearing conference:

1. Estimates (discussed during their meeting) regarding when this case will be ready to go to hearing and the time necessary to try each of the admitted contentions if they were to go to hearing.

2. Establishing time limits for updating mandatory disclosures under 10 C.F.R. § 2.336(d) and for updating the hearing file under 10 C.F.R. § 2.1203(c).

3. Whether any party intends to assert a privilege or protected status for any information or documents otherwise required to be disclosed herein and, if so, proposals for the submission of privilege logs under 10 C.F.R. § 2.336(a)(3), (b)(5), procedures and time limits for challenges to such assertions, and the development of a protective order and nondisclosure agreement.

4. Whether any of the parties anticipate submitting a motion for summary disposition regarding any of the admitted contentions and the timing and page length of such a motion and responses thereto.

5. Establishing time limits for filing ''timely'' motions for leave to file new or amended contentions under 10 C.F.R. § 2.309(f)(2)(iii), and specifying pleading rules for motions for leave to file new or amended contentions that accommodate both 10 C.F.R. § 2.323 (motions and answers to motions) and 10 C.F.R. § 2.309(h) (answers and replies to contentions).

6. Establishing time limits for various evidentiary hearing-related filings, including:

    a. The final list of potential witnesses for each contention pursuant to 10 C.F.R. § 2.336(a)(1).

    b. Any motion for the use of Subpart G hearing procedures pursuant to 10 C.F.R. § 2.310(d).

    c. Any unanimous request, pursuant to 10 C.F.R. § 2.310(h), to handle any specific contention under 10 C.F.R. Part 2, Subpart N.

    d. Any motion for cross-examination under 10 C.F.R. § 2.1204(b).

    e. The parties' initial written statements of position and written di-

rect testimony with supporting affidavits pursuant to 10 C.F.R. § 2.1207(a)(1), along with consideration of (i) whether the parties should file simultaneously or sequentially, and, if sequentially, which party should file first; and (ii) the timing of filing of written responses, rebuttal testimony, and in limine motions relative to direct or rebuttal testimony.

7. The items outlined in 10 C.F.R. § 2.329(c)(1)-(3).

8. The possibility of settling any of the contentions, in whole or in part, including the status of any current settlement negotiations and the utility of appointing a settlement judge pursuant to 10 C.F.R. § 2.338(b).

9. Whether a site visit would be appropriate and helpful to the Board in the resolution of the contentions.

10. Any other procedural or scheduling matters the Board may deem appropriate.

IV. CONCLUSION

For the reasons set forth above, we find that Joint Petitioners SACE and BREDL have established their standing to intervene and that they put forth four litigable contentions so as to be entitled to party status in this proceeding. The text of their admitted contentions is set forth in Appendix A to this decision. Because Petitioner BEST lacks standing, its request to intervene in this proceeding is denied.

For the foregoing reasons, it is, this twelfth day of September 2008, ORDERED that:

1. The BEST request for party status in this proceeding is *denied* in that the organization has failed to establish its standing to intervene.

2. Having established their standing to participate in this proceeding, relative to the contentions specified in paragraph 3 below, the hearing request of Joint Petitioners SACE and BREDL is *granted* and those Petitioners are admitted as parties to this proceeding.

3. The following Joint Petitioner contentions are *admitted* for litigation in this proceeding: NEPA-B, FSAR-D, NEPA-G, and NEPA-N.

4. The following Joint Petitioner contentions are *rejected* as inadmissible for litigation in this proceeding: MISC-A, FSAR-A, TS-A, A/FI-A, MISC-A1, MISC-B, FSAR-B, MISC-C, MISC-D, MISC-E, NEPA-A, NEPA-C, NEPA-D, NEPA-E, NEPA-F, NEPA-L, FSAR-C, NEPA-M, NEPA-O, NEPA-P, and NEPA-Q.

5. Joint Petitioners July 25, 2008 motion to admit all portions of Joint Petitioners reply is *denied,* and the July 11, 2008 motion to strike of Applicant TVA is *granted* in accordance with the discussion in section II.C.3, above.

6. In accordance with the provisions of 10 C.F.R. §§ 2.323(f), 2.341(f), and the discussion in sections II.C.3.q., .t, above, the Licensing Board *refers* its rulings regarding contentions FSAR-D, NEPA-G, and NEPA-M to the Commission.

7. The parties are to take the actions required by section III, above, in accordance with the schedule established herein.

8. 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[24]

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

William W. Sager
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 12, 2008

[24] Copies of this Memorandum and Order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) Applicant TVA; (2) Joint Petitioners; and (3) the Staff.

APPENDIX A

ADMITTED CONTENTIONS

1. NEPA-B: IMPACTS ON AQUATIC RESOURCES INCLUDING FISH, BENTHIC INVERTEBRATES, AND GENERAL AQUATIC COMMUNITY STRUCTURE OF THE PROJECT AREA AND GUNTERSVILLE RESERVOIR

CONTENTION: The ER does not adequately address the adverse impacts of operating two additional nuclear reactors on the fishery and aquatic resources of the Guntersville Reservoir and the vicinity of Bellefonte Nuclear Plant. In particular, the ER does not provide adequate data to sufficiently address the condition of resident and potamodromous fish and freshwater mussels in the vicinity of the proposed intake point, Town Creek, and Guntersville Reservoir and the cumulative impacts on the aquatic resources in these areas from operation of the proposed new intake.

2. FSAR-D: SO-CALLED LOW-LEVEL RADIOACTIVE WASTE

CONTENTION: As of June 30, 2008, no facility in the United States will be licensed and able to accept for disposal, Class B or C radioactive waste from the Bellefonte nuclear power reactors. The applicant fails to offer a viable plan for how to dispose of Class B or C so-called ''low-level'' radioactive waste generated in the course of operations, closure, and post closure of Bellefonte 3 & 4.

3. NEPA-G: SO-CALLED LOW-LEVEL RADIOACTIVE WASTE

CONTENTION: As of June 30, 2008, no facility in the United States will be licensed and able to accept for disposal, Class B or C radioactive waste from the Bellefonte nuclear power reactors. The applicant fails to assess the potential environmental impacts at the reactor site of keeping onsite Class B or C so-called ''low-level'' radioactive waste generated in the course of operations, closure, and post closure of Bellefonte 3 & 4.

4. NEPA-N: ENVIRONMENTAL REPORT'S INADEQUATE COST ESTIMATES AND COST COMPARISONS

CONTENTION: TVA's cost comparison is inadequate to satisfy the National Environmental Policy Act (''NEPA'') or NRC regulations at 10 C.F.R. § 51.45(c) because it fails to provide reasonably up-to-date and accurate information regarding the estimated electrical generation costs of the proposed new nuclear power plant.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Nicholas G. Trikouros
Dr. William M. Murphy

In the Matter of **Docket Nos. 52-018-COL**
52-019-COL
(ASLBP No. 08-865-03-COL-BD01)
(Combined License Application)

DUKE ENERGY CAROLINAS, LLC
(William States Lee III Nuclear Station, Units 1 and 2) **September 22, 2008**

The Licensing Board finds that Petitioner Blue Ridge Environmental Defense League has standing to intervene, but because it has not submitted an admissible contention, the Board denies Petitioner's hearing request. The Board, however, refers its ruling on Contention Two to the Commission, consistent with the licensing board's treatment of an identical contention in *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361 (2008).

RULES OF PRACTICE: STANDING TO INTERVENE (PROXIMITY)

In addition to the traditional requirements for standing, the Commission recognizes that a petitioner may have standing based upon its geographic proximity to a particular facility. *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). In appropriate circumstances, a petitioner's proximity to the pertinent facility triggers a presumption that it ''has

standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm.'' *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, *aff'd on other grounds,* CLI-01-17, 54 NRC 3 (2001). In reactor license proceedings, that zone is generally deemed to constitute the areas within a 50-mile radius of the site. *Id.* at 149.

RULES OF PRACTICE: STANDING TO INTERVENE (REPRESENTATIONAL STANDING)

An organization that wants to intervene in a representational capacity must (1) demonstrate that the licensing action will affect at least one of its members; (2) identify that member by name and address; and (3) show that it is authorized by that member to request a hearing on his or her behalf. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000). Additionally, the member must qualify for standing in his or her own right, the interests that the organization seeks to protect must be germane to its own purpose, and neither petitioner's contentions nor the requested relief must require an individual member to participate in the proceeding. *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007).

RULES OF PRACTICE: STANDING TO INTERVENE

In determining whether a petitioner has established standing, the Commission has directed us to ''construe the petition in favor of the petitioner.'' *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

RULES OF PRACTICE: CONTENTIONS (CHALLENGES TO COMMISSION REGULATIONS)

Absent a waiver, ''no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.'' 10 C.F.R. § 2.335(a).

RULES OF PRACTICE: CONTENTIONS (CHALLENGES TO COMMISSION REGULATIONS)

A waiver of a Commission regulation ''can be granted only in unusual and compelling circumstances.'' *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 16, *aff'd,* CLI-88-10, 28 NRC

573, 597 (1988), *reconsideration denied,* CLI-89-3, 29 NRC 234 (1989) (internal quotation marks omitted). ''The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted.'' 10 C.F.R. § 2.335(b). The Commission requires that any request for such waiver or exception be accompanied by an affidavit that identifies ''with particularity the special circumstances alleged to justify the waiver or exception requested.'' *Id.*

RULES OF PRACTICE: CONTENTIONS (CHALLENGES TO COMMISSION REGULATIONS)

The NRC has made a generic determination that regulated electric utilities are financially qualified to operate nuclear power plants. By regulation, the Commission has exempted such utilities from NRC review of their financial qualifications to cover operational costs. *See* 10 C.F.R. § 50.33(f); Final Rule: ''Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Review and Hearings for Nuclear Power Plants,'' 49 Fed. Reg. 35,747, 35,747-49 (Sept. 12, 1984). Therefore, a contention that suggests this information should be provided in the application submitted by a regulated electric utility represents an impermissible challenge to Commission regulations.

RULES OF PRACTICE: CONTENTIONS (CHALLENGES TO COMMISSION REGULATIONS)

The NRC regulations implementing the AEA do not require an applicant to address or demonstrate whether the issuance of a COL will improve the general welfare, increase the standard of living, or strengthen free competition in private enterprise. Nor is the NRC required to make such a finding prior to granting a COL. Therefore, contrary to 10 C.F.R. § 2.309(f)(1)(iii) and (iv), these matters are outside the scope of this proceeding and are not material to the findings that the NRC must make to support issuance of a license.

RULES OF PRACTICE: CONTENTIONS

By complying with the six contention requirements in 10 C.F.R. § 2.309(f)(1)(i)-(vi), a petitioner must demonstrate: (1) that a contention raises an issue that is appropriate for a licensing board hearing; and (2) that such a hearing would not likely be a waste of time and resources.

RULES OF PRACTICE: CONTENTIONS

Licensing boards admit contentions, not bases: ''[I]t is the admissibility of the contention, not the basis, that must be determined.'' *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 557 (2004). Nor should boards try to rewrite a petitioner's contention, transforming it into numerous additional contentions that the petitioner has not clearly set forth. ''A contention's proponent, not the licensing board, is responsible for formulating the contention.'' *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 22 (1998).

RULES OF PRACTICE: CONTENTIONS

Licensing boards can and should review materials that purportedly support a petition to intervene or request for hearing to determine whether, at least on their face, they actually support the facts alleged. *See Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 265 (2004).

RULES OF PRACTICE: CONTENTIONS

The Commission has instructed licensing boards not to initiate evidentiary hearings unless the petitioner has specified how an application is deficient. A contention is not admissible where ''the Petitioner's assertion that the application[ ] [is] deficient is simply based upon a failure to read or perform any meaningful analysis of the application[ ].'' *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 95 (2004).

RULES OF PRACTICE: CONTENTIONS

An NRC licensing proceeding is not ''an occasion for far-reaching speculation about unimplemented and uncertain plans'' of applicants or licensees. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 293 (2002).

RULES OF PRACTICE: SCOPE OF REPLY

The proper purpose of a reply is to discuss alleged deficiencies in a petition, not to try to fix them. *See Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

RULES OF PRACTICE: COMBINED LICENSE PROCEEDINGS

Referencing a reactor design for which a design certification application has been docketed but not yet granted is expressly authorized by the Commission's regulations. *See* 10 C.F.R. § 52.55(c). An applicant that avails itself of this procedure does so ''at its own risk.'' *Id.* Should an applicant revise its application as a result of the NRC's review process, a petitioner may submit contentions at that time. Moreover, a petitioner may raise concerns by filing comments on the proposed rule when it is issued. Similarly, if a petitioner had submitted an otherwise admissible contention challenging specific aspects of a design, the licensing board would refer that contention to the NRC Staff for consideration in the design certification rulemaking, and hold the contention in abeyance. *See* Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008).

RULES OF PRACTICE: COMBINED LICENSE PROCEEDINGS

In its Waste Confidence Rule, the Commission has made a determination, on a generic basis, that spent fuel generated by ''any reactor'' can be safely managed and that sufficient repository capacity will be available. 10 C.F.R. § 51.23(a). When the Commission promulgated a revised Waste Confidence Rule in 1990, it expressly stated that its conclusions should apply to ''the spent fuel discharged from any new generation of reactor designs.'' Review and Final Revision of Waste Confidence Decision, 55 Fed. Reg. 38,474, 38,504 (Sept. 18, 1990). The Commission reaffirmed its 1990 findings in a 1999 status report, in which it concluded that ''no significant and unexpected events have occurred . . . that would cast doubt on the Commission's Waste Confidence findings or warrant a detailed reevaluation at this time.'' Status Report on the Review of the Waste Confidence Decision, 64 Fed. Reg. 68,005, 68,007 (Dec. 6, 1999). More recently, in 2007, the Commission amended the Waste Confidence Rule to clarify that the rule encompasses COL applications. *See* Final Rule: ''Licenses, Certifications, and Approvals for Nuclear Power Plants,'' 72 Fed. Reg. 49,352, 49,429 (Aug. 28, 2007) (''The NRC is revising §§ 51.23(b) and (c) to indicate that the provisions of these paragraphs also apply to combined licenses'').

MEMORANDUM AND ORDER

(Ruling on Petition for Intervention and Request for Hearing)

Before the Licensing Board is a petition for intervention and request for hearing filed by the Blue Ridge Environmental Defense League (BREDL). BREDL's petition concerns the application of Duke Energy Carolinas, LLC (Duke or

Applicant) for a combined license (COL) to construct and operate two AP1000 pressurized water reactors at the William States Lee III Nuclear Station (WSL) site in Cherokee County, South Carolina.

Both Duke and the Nuclear Regulatory Commission (NRC) Staff oppose BREDL's petition. We find that BREDL has standing to intervene, but that BREDL has not submitted an admissible contention as required by 10 C.F.R. § 2.309(a). Therefore, we deny BREDL's request for an evidentiary hearing. Consistent with the decision in *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361 (2008), however, we refer our ruling on BREDL Contention Two to the Commission, pursuant to 10 C.F.R. § 2.323(f).

The requests of the South Carolina Office of Regulatory Staff (South Carolina) and the North Carolina Utilities Commission (North Carolina) to participate in any hearing as interested government entities, pursuant to 10 C.F.R. § 2.315(c), are denied as moot. Similarly, Duke's motion to strike portions of BREDL's reply is denied as moot.

I. BACKGROUND

On December 12, 2007, Duke submitted a COL application to the NRC for WSL Units 1 and 2 (Application).[1] The Application incorporates by reference 10 C.F.R. Part 52, Appendix D (which includes the AP1000 pressurized water reactor Design Control Document (DCD) through Revision 15), as amended by Revision 16.[2] The AP1000 DCD Revision 16 remains subject to an ongoing NRC rulemaking.[3]

The NRC accepted the Application for docketing on February 25, 2008, and published a hearing notice on April 28, 2008.[4] The hearing notice required any person whose interests might be affected by this proceeding and who wished to participate as a party to file a petition for leave to intervene within 60 days of the notice, in accordance with 10 C.F.R. § 2.309.[5]

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[1] The Application was supplemented by letters dated January 28, 2008, February 6, 2008, and February 8, 2008. Duke Energy; Notice of Hearing and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 22,978, 22,978 (Apr. 28, 2008).

[2] *Id.*

[3] *Id.* (Docket No. 52-006).

[4] Duke Energy; Acceptance for Docketing of an Application for a Combined License for William States Lee III Units 1 and 2, 73 Fed. Reg. 11,156 (Feb. 29, 2008); 73 Fed. Reg. at 22,978.

[5] 73 Fed. Reg. at 22,979.

BREDL filed a timely petition on June 27, 2008, which contains eleven proffered contentions.[6] Additionally, BREDL's petition is critical of the conditions specified in the hearing notice for access to sensitive information, but BREDL has not asked for any relief concerning such conditions.[7]

On July 22, 2008, the Applicant and the NRC Staff filed timely answers.[8] Neither the Applicant nor the NRC Staff challenges BREDL's standing in this proceeding, but both contend that BREDL has not proffered an admissible contention.[9] On August 8, 2008, BREDL filed a timely reply.[10]

On June 27 and July 28, 2008, respectively, South Carolina and North Carolina filed requests to participate in any hearing as interested government entities, pursuant to 10 C.F.R. § 2.315(c).[11] No other participant has objected.[12]

On August 18, 2008, Duke filed a timely motion to strike portions of BREDL's reply.[13] On August 28, 2008, BREDL filed a timely response to the motion.[14]

The Board heard oral argument on the admissibility of contentions at a prehearing conference held in Gaffney, South Carolina, on September 3, 2008.

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[6] Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (June 27, 2008) [hereinafter BREDL Petition]. BREDL's tenth proposed contention is in two parts, bringing the total to eleven.

[7] *See id.* at 5.

[8] Duke Energy Carolinas, LLC's Answer Opposing Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (July 22, 2008) [hereinafter Duke Answer]; NRC Staff Answer to ''Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League'' (July 22, 2008) [hereinafter NRC Staff Answer].

[9] *See* Duke Answer at 2-3; NRC Staff Answer at 11.

[10] Reply of the Blue Ridge Environmental Defense League to Answers of Duke Energy Carolinas and NRC Staff (Aug. 8, 2008) [hereinafter BREDL Reply].

[11] Request of the South Carolina Office of Regulatory Staff for an Opportunity to Participate in any Hearing and to Be Added to the Official Service List (June 27, 2008); Request of the North Carolina Utilities Commission for an Opportunity to Participate in any Hearing and to Be Added to the Official Service List (July 28, 2008).

[12] *See* Duke Energy Carolinas, LLC's Answer to the South Carolina Office of Regulatory Staff's Request to Participate as an Interested State and to Be Added to the Official Service List (July 22, 2008) at 1; NRC Staff Answer to ''Request of the South Carolina Office of Regulatory Staff for an Opportunity to Participate in Any Hearing and to Be Added to the Official Service List'' (July 22, 2008) at 1; Duke Energy Carolinas, LLC's Answer to the North Carolina Utilities Commission's Request to Participate as an Interested State and to Be Added to the Official Service List (Aug. 1, 2008) at 1; NRC Staff Answer to ''Request of the North Carolina Utilities Commission for an Opportunity to Participate in Any Hearing and to Be Added to the Official Service List'' (Aug. 22, 2008) at 1.

[13] Duke Energy Carolinas, LLC's Motion to Strike Portions of the Blue Ridge Environmental Defense League Reply to the Duke and NRC Staff Answers to BREDL's Petition to Intervene (Aug. 18, 2008).

[14] Answer of the Blue Ridge Environmental Defense League to Duke Energy Carolina's Motion to Strike (Aug. 28, 2008).

II. ANALYSIS

Anyone who wishes to intervene as a party in an adjudicatory proceeding addressing a proposed licensing action must: (1) establish that it has standing; and (2) proffer at least one admissible contention.[15]

A. Standards Governing Standing

A petition to intervene must provide certain basic information supporting the petitioner's claim to standing. The required information includes: (1) the nature of the petitioner's right under the governing statutes to be made a party; (2) the nature of the petitioner's interest in the proceeding; and (3) the possible effect of any decision or order on the petitioner's interest.[16] In determining whether an individual or organization should be granted party status ''as of right,'' the NRC applies judicial standing concepts that require a participant to establish: (1) it has suffered or will suffer ''a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute[s]'' (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) ''the injury is likely to be redressed by a favorable decision.''[17]

In addition to the traditional requirements for standing, the Commission recognizes that a petitioner may have standing based upon its geographic proximity to a particular facility.[18] In appropriate circumstances, a petitioner's proximity to the pertinent facility triggers a presumption that it ''has standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm.''[19] In reactor license proceedings, that zone is generally deemed to constitute the areas within a 50-mile radius of the site.[20]

An organization that wants to intervene in a representational capacity must (1) demonstrate that the licensing action will affect at least one of its members; (2) identify that member by name and address; and (3) show that it is authorized

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[15] 10 C.F.R. § 2.309(a).

[16] *Id.* § 2.309(d)(1).

[17] *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

[18] *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

[19] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, *aff'd on other grounds,* CLI-01-17, 54 NRC 3 (2001).

[20] *Id.* at 149.

by that member to request a hearing on his or her behalf.[21] Additionally, the member must qualify for standing in his or her own right, the interests that the organization seeks to protect must be germane to its own purpose, and neither petitioner's contentions nor the requested relief must require an individual member to participate in the proceeding.[22]

In determining whether a petitioner has established standing, the Commission has directed us to ''construe the petition in favor of the petitioner.''[23]

B. Ruling on Standing

BREDL asserts that it is ''a regional, community-based non-profit environmental education organization founded in 1984 and today has members and projects in Virginia, North Carolina, South Carolina, Tennessee, Alabama and Georgia.''[24] BREDL's stated purposes include encouraging government agencies and the public ''to take responsibility for conserving and protecting our natural resources and protecting public health.''[25]

BREDL claims representational standing by demonstrating an injury-in-fact to five members (BREDL Declarants) who have submitted sworn declarations.[26] Each BREDL Declarant states that he or she is a member of BREDL and has authorized BREDL to represent him or her in this proceeding.[27] All BREDL Declarants state that their homes are within 50 miles of the site and that nuclear reactors in close proximity to their homes ''could pose a grave risk to [their] health and safety.''[28] Neither the Applicant nor the NRC Staff objects to BREDL's representational standing.[29]

All of the BREDL Declarants have established standing to intervene in their own right and have authorized BREDL to represent their interests. We find that BREDL has representational standing in this proceeding.

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[21] *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000).

[22] *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007).

[23] *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

[24] BREDL Petition at 2.

[25] *Id.*

[26] *Id.* at 3-4.

[27] *Id.,* Declaration of Dianne Biggs (June 25, 2008); Declaration of Joseph W. Zdenek (June 25, 2008); Declaration of Mary B. Connolly (June 25, 2008); Declaration of Charles Moss (June 25, 2008); Declaration of Stephen A. Lawrence (June 27, 2008) [hereinafter collectively BREDL Declarations].

[28] BREDL Declarations.

[29] Duke Answer at 2-3; NRC Staff Answer at 11.

C. Standards Governing Contention Admissibility

The Commission's regulations establish the requirements for an admissible contention. An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3)demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and the supporting reasons for this allegation.[30]

In explaining these requirements, the Commission has said that it ''should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.''[31] In other words, by complying with the six contention requirements, a petition must demonstrate: (1) that a contention raises an issue that is appropriate for a licensing board hearing; and (2) that such a hearing would not likely be a waste of time and resources.

Thus, an admissible contention must raise an issue that is both within the scope of the proceeding (normally defined by the hearing notice) and material to the findings the NRC must make to support the action involved.[32] A contention that attacks applicable statutory requirements, challenges the basic structure of the NRC's regulatory process, or merely expresses generalized policy grievances is not appropriate for a licensing board hearing.[33] Absent a waiver, ''no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.''[34] This rule bars contentions that advocate more stringent require-

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[30] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[31] Final Rule: ''Changes to Adjudicatory Process,'' 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

[32] 10 C.F.R. § 2.309(f)(1)(iii)-(iv).

[33] *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 & n.33 (1974).

[34] 10 C.F.R. § 2.335(a). A waiver ''can be granted only in unusual and compelling circumstances.'' *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 16, *aff'd,* CLI-88-10, 28 NRC 573, 597 (1988), *reconsideration denied,* CLI-89-3, 29 NRC 234 (1989) (internal quotation marks omitted). ''The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the

(Continued)

ments than the NRC rules impose or that otherwise seek to litigate a generic determination that the Commission has established by rulemaking, or that raise a matter that is or is about to become the subject of rulemaking.[35]

Likewise, a petitioner must provide some factual or expert opinion support ''indicating the potential validity of the contention.''[36] The Commission's rules ''bar contentions where petitioners have only 'what amounts to generalized suspicions, hoping to substantiate them later.' ''[37] Although a petitioner does not have to prove its contention at the admissibility stage,[38] ''[m]ere 'notice pleading' is insufficient.''[39] A contention ''will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.' ''[40] If a petitioner fails to provide the requisite support for its contentions, the Board may not make assumptions of fact that favor the petitioner, or supply information that is lacking.[41] Simply attaching materials or documents, without explaining their significance, is also insufficient.[42] Moreover, any contention that fails to controvert the application directly, or that mistakenly asserts the application fails to address an issue that the application does address, is defective.[43] A petitioner cannot demonstrate the

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application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted.'' 10 C.F.R. § 2.335(b). The Commission requires that any request for such waiver or exception be accompanied by an affidavit that identifies ''with particularity the special circumstances alleged to justify the waiver or exception requested.'' *Id.*

[35] *See Turkey Point,* LBP-01-6, 53 NRC at 159; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998).

[36] Final Rule: ''Rules of Practice for Domestic Licensing Proceedings, Procedural Changes in the Hearing Process,'' 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

[37] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 424 (2003) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 337-39 (1999)).

[38] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004).

[39] *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

[40] *Id.* (quoting *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)).

[41] *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

[42] *See Fansteel,* CLI-03-13, 58 NRC at 204-05; *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 89, 91, 94 (2004).

[43] *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP 93-23, 38 NRC 200, 247-48 (1993), *review declined,* CLI-94-2, 39 NRC 91 (1994).

existence of a genuine issue of material fact by simply restating information provided in the application and asserting that further analysis is required.[44]

Applying these standards, we conclude that the contentions proffered by BREDL are not admissible.

D. Rulings on Petitioner's Contentions

1. BREDL Contention One

> The NRC cannot hold a fair hearing at this time because the application adopts by reference a design and operational practices that have not been certified by the NRC or accepted by the applicant.[45]

The Application relies upon Appendix D to 10 C.F.R. Part 52 and the AP1000 DCD Revision 16. According to BREDL, the NRC Staff has stated that the certification process for the AP1000 Revision 16 will not be completed before 2011.[46]

BREDL argues that proceedings concerning the Application should be suspended until the AP1000 DCD Revision 16 is finalized.[47] BREDL complains that ''[i]t is fundamentally unfair for the NRC to require Petitioner and other interested parties to perform a review of the application and preparation of contentions when the application is not complete.''[48] BREDL believes that ''[i]t is impossible to conduct a meaningful technical and safety review of the [Application] without knowing the final design of the AP1000 revision 16.''[49] At this juncture, BREDL contends, ''the AP1000 is a 'pig in a poke' which may be modified by either the applicant or the NRC at some point in the future.''[50]

BREDL has not identified a dispute with the Application, but rather asserts that requiring petitioners to file contentions at this time is unfair. The Commission has disagreed. The procedure that Duke has followed here — referencing a reactor

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[44] *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 & n.12 (1990) (stating that an allegation that some aspect of a license application is inadequate or unacceptable does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect).

[45] BREDL Petition at 8.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 8-9.

[49] *Id.* at 9.

[50] *Id.* at 11.

design for which a design certification application has been docketed but not yet granted — is expressly authorized by the Commission's regulations.[51]

As BREDL correctly notes, an applicant that avails itself of this procedure does so '' 'at its own risk.' ''[52] Should Duke revise its Application as a result of the NRC's review process for AP1000 DCD Revision 16, BREDL may submit contentions at that time.[53] Moreover, BREDL may raise concerns relating specifically to the AP1000 amendment by filing comments on the proposed rule when it is issued.[54]

Similarly, if BREDL had submitted an otherwise admissible contention challenging specific aspects of the Revision 16 design, the Board would refer that contention to the NRC Staff for consideration in the design certification rulemaking, and hold the contention in abeyance.[55] But BREDL does not adequately identify any aspect of the pending amendment to the AP1000 design with which it takes issue. As BREDL states: ''Duke was not required to reference a design which has not been granted. This is the basis for the contention.''[56] Because BREDL challenges the Applicant's reliance on a pending design certification fundamentally on procedural grounds, Contention One constitutes an impermissible challenge to NRC regulations that allow the procedure Duke has chosen.[57]

We do not admit BREDL Contention One.

2. BREDL Contention Two

> The applicant fails to analyze the ''carbon-footprint'' of the construction and operation of the William States Lee nuclear reactors 1 & 2 in its environment report.[58]

BREDL claims that Duke should have included in its environmental report (ER) a discussion of greenhouse gases released in the process of the production of raw materials and components, the transportation of these materials and components

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[51] *See* 10 C.F.R. § 52.55(c).

[52] BREDL Reply at 5 n.5 (quoting 10 C.F.R. § 52.55(c)).

[53] Whether the filing of new contentions would be pursuant to the criteria under section 2.309 or section 2.326, depending on the procedural posture of the case at the time new contentions are filed, is an issue currently before the licensing board in the Millstone power uprate proceeding, Docket Number 50-423-OLA.

[54] *See* 5 U.S.C. § 553; 10 C.F.R. §§ 2.804, 2.805.

[55] *See* Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008).

[56] BREDL Reply at 5.

[57] *See* 10 C.F.R. § 2.335.

[58] BREDL Petition at 11.

to the WSL site, and the processes required to build and operate the WSL nuclear power station.[59] BREDL also claims that Duke should have included a discussion of greenhouse gas emissions associated with each step in the uranium fuel chain.[60] Concerned that greenhouse gas emissions from many sources ''are contributing to the destabilization of climate on planet Earth,''[61] BREDL argues that admission of Contention Two ''would aid in the development of a more complete record.''[62]

BREDL has failed, however, to proffer a contention that is appropriate for a hearing in this licensing proceeding. Contrary to 10 C.F.R. § 2.309(f)(1)(vi), proposed Contention Two does not demonstrate a genuine dispute on a material issue of fact or law.

BREDL claims that ''[t]he applicant fails to include any discussion of Green House Gas emissions or 'Carbon Foot-print' in its environment report.''[63] That is not true.

For example, Table 3.6-2 in ER § 3.6.3.1 (Gaseous Effluents) lists the annual emissions from the diesel generators and the diesel-driven fire pumps for the two WSL units, and Table 3.6-3 lists the annual hydrocarbon emissions from the associated diesel fuel oil storage tanks for the units. ER § 4.4.1.6 discusses air quality impacts associated with plant construction. ER Table 4.6-1 discusses measures and controls for air emissions during construction. ER § 5.5 discusses the regulation of air emissions during plant operation. ER § 5.8.1.6 discusses air quality impacts resulting from plant operation. ER §§ 10.4.1.2.4 and 10.4.1.2.5 and ER Table 10.4-2 address the avoidance of air pollutant emissions, including carbon dioxide.

Although not acknowledged by BREDL's petition, the ER also addresses gaseous emissions associated with the entire production process for uranium fuel. ER § 5.7, ''Uranium Fuel Cycle Impacts,'' references Table S-3 in 10 C.F.R. § 51.51. Table S-3 was developed by the Commission to address, on a generic basis, the need to consider the environmental effects of the uranium fuel cycle. Table S-3 summarizes and codifies the NRC's assessment and determinations for evaluating the environmental effects of the uranium fuel cycle, including gaseous emissions.

In light of this information in Duke's ER, Contention Two, which is framed as a contention of omission, is not admissible. We do not admit BREDL Contention Two.

Ordinarily, that would end our analysis. If BREDL wants to challenge the adequacy of Table S-3, which was initially prepared more than 25 years ago, it is

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[59] *Id.* at 12.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 14.
[63] *Id.* at 12.

free to do so through a petition for rulemaking.[64] In fact, BREDL's representative stated at the prehearing conference that it intends to pursue such a petition before the Commission.[65] Nonetheless, just 10 days ago, another licensing board — which faced an identical contention proposed by BREDL — concluded that admissible contentions raising similar issues may well be proffered in other COL proceedings.[66] Thus, while that board likewise ruled BREDL's contention inadmissible, it concluded that the general subject matter of the contention raises novel issues that the Commission may wish to address generically at the earliest opportunity.[67] That board therefore referred its ruling on BREDL's equivalent contention to the Commission for its immediate consideration, pursuant to 10 C.F.R. § 2.323(f).[68]

In the circumstances, we refer our ruling on BREDL Contention Two to the Commission as well, on grounds of fairness and efficiency. Since the issue has already been referred by the *Bellefonte COL* licensing board, we place no additional burden on the Commission, which can address both referrals at the same time.

3. BREDL Contention Three

> Duke's [Application] does not identify the plans for meeting its water requirements with sufficient detail in order to determine if there will be adequate water during adverse weather conditions such as droughts.[69]

BREDL's principal concern, as set forth in its petition, appears to be that ''[t]he availability of cooling water is a significant constraint to the safe shutdown of the proposed reactors and without a clear plan on how that water will be provided, the application is incomplete.''[70] Additionally, based on the unsupported assertion that ''[a]nnual temperatures in the Southeast region are increasing and are projected to continue to do so over a relatively short period of time,''[71] BREDL alleges that the Applicant has failed to fully analyze numerous other operational and environmental impacts of elevated water temperatures.[72] While conceding that the Application addresses water flow, BREDL ''suggest[s] that this is merely the

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[64] *See* 10 C.F.R. § 2.802.
[65] *See* Tr. at 13, 95.
[66] *Bellefonte,* LBP-08-16, 68 NRC at 419-20.
[67] *Id.*
[68] *Id.* at 420.
[69] BREDL Petition at 14.
[70] *Id.*
[71] *Id.* at 15.
[72] *See id.* at 15-16.

'tip of the iceberg' in terms of what the next four to eight decades are likely to hold.''[73] BREDL claims that, when discussing droughts, Duke's ER fails to address ''projected trends for increasing temperatures and more prolonged periods of drought.''[74]

A fundamental defect in Contention Three is that, contrary to 10 C.F.R. § 2.309(f)(1)(v), BREDL provides no meaningful support for its underlying premise: that is, that water temperatures in the region have and will continue to increase. BREDL's sole support in its petition for this conclusion is the personal observation of one individual at a recent NRC public meeting that '' 'it would be good science, to be looking at the new projections for changes in coastline, increased storms, changes in water levels, changes in flood patterns. I don't see it happening and I think this Agency needs to get moving on forcing the licensees to confront these new realities.' ''[75] Save for this single individual's unsubstantiated opinion, every assertion in Contention Three has, as a necessary foundation, assumptions about future increases in water temperatures and drought that are entirely unsupported.

In addition, contrary to 10 C.F.R. § 2.309(f)(1)(vi), BREDL fails to show the existence of a genuine dispute on a material issue of fact. Although BREDL alleges a trend of increasing Southeast regional water temperatures, BREDL does not address the portions of the Application that discuss climate variations. For example, section 2.3.3.1.2 of the Applicant's ER discusses current and historical water temperatures and then compares current surface temperatures to temperatures observed during the 1970s. BREDL does not reference, much less controvert, the conclusion in section 2.3.3.1.2 of the ER that ''[n]o appreciable differences in ambient temperatures or surface water temperatures were noted between the two studies.''[76] BREDL was obligated to ''read the pertinent portions of the license application . . . state the applicant's position and the petitioner's opposing view,'' and explain why it disagrees with the Applicant.[77]

What appears from BREDL's petition to be its principal concern regarding water flow — the availability of cooling water as ''a significant constraint to the safe shutdown of the proposed reactors''[78] — is directly addressed in the FSAR. The AP1000 reactor does not rely on external water supply for safe shutdown.

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[73] *Id.* at 18.

[74] *Id.* at 16.

[75] *Id.* at 20 (quoting Transcript of Public Meeting Regarding Enhancing the Efficiency and Effectiveness of NRC Environmental Review Process at 90-91 (Dec. 6, 2007) (ADAMS Accession No. ML073521491)). In its reply, BREDL inappropriately cites some new, anecdotal information, which would be no more persuasive even if we considered it. *See* BREDL Reply at 9-10.

[76] Application, Rev. 0, Part 3, ER, at 2.3-30.

[77] 54 Fed. Reg. at 33,170.

[78] BREDL Petition at 14.

Rather, the Application specifies that the passive containment cooling system (PCS) functions as the ultimate heat sink to supply cooling water for conditions requiring safety-related cooling.[79] As discussed in section 6.2.2 of Tier 2 of the AP1000 DCD, the PCS allows for safe shutdown without reliance on either an external water supply or offsite power sources. At the prehearing conference, BREDL's representative stated that he did not disagree with these facts.[80]

BREDL's six-page discussion of Contention Three lists what it characterizes as ten additional ''potential negative impacts''[81] of elevated water temperatures, ranging from possible additive and synergistic impacts on the ecosystem to possible effects on Duke's customers from power losses during heat waves.[82] The Applicant and the NRC Staff collectively devote almost fifty pages in their answers to Contention Three — most of them in trying to demonstrate separate and independent grounds for rejecting each and every alleged impact.[83] The Staff, for example, argues that not one of these alleged impacts constitutes ''an admissible basis'' for Contention Three.[84]

The Board need not reach these arguments. First, as noted, each alleged impact of Contention Three rests on assumptions about future temperature increases that BREDL fails to support. Second, licensing boards admit contentions, not bases: ''[I]t is the admissibility of the contention, not the basis, that must be determined.''[85] Nor should we try to rewrite BREDL's Contention Three, transforming it into numerous additional contentions that BREDL has not clearly set forth. ''A contention's proponent, not the licensing board, is responsible for formulating the contention.''[86]

We do not admit BREDL Contention Three.

4. BREDL Contention Four

> The applicant has not demonstrated that it is and [*sic*] financially qualified to engage in the activities authorized by the operating license in accordance with the regulations of 10 CFR § 50.57(a)(4).[87]

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[79] Application, Rev. 0, Part 2, FSAR, at 2.4-54.

[80] *See* Tr. at 43-44.

[81] BREDL Reply at 9.

[82] *See* BREDL Petition at 15-16.

[83] *See* Duke Answer at 27-56; NRC Staff Answer at 17-35.

[84] *See, e.g.,* NRC Staff Answer at 26.

[85] *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 557 (2004).

[86] *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 22 (1998).

[87] BREDL Petition at 20.

BREDL asserts that ''it is very probabl[e] that [the] US has stepped into a recession since the subprime mortgage crisis in 2006.''[88] BREDL infers that ''[t]his is surely bad news for building new nuclear plants in the next few years.''[89] Additionally, BREDL asserts that ''the US dollar is experiencing devaluation which may last for a long time.''[90] BREDL identifies this as a risk ''if a large part of Duke's capital expenditure is out of [the] US, i.e. buying nuclear reactors.''[91] Hence, BREDL fears that Duke's financial analysis may be ''a little too optimistic.''[92]

Contention Four plainly does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1).

First, as written, Contention Four addresses only the Applicant's financial qualifications to engage in activities authorized by ''the operating license.''[93] The NRC has made a generic determination that regulated electric utilities, such as Duke, are financially qualified to operate nuclear power plants. By regulation, the Commission has exempted such utilities from NRC review of their financial qualifications to cover operational costs.[94] Read literally, Contention Four therefore represents an impermissible challenge to Commission regulations.

Second, if construed instead as a challenge to the Applicant's financial qualifications to cover estimated construction costs, Contention Four fails to identify a dispute concerning a material issue of fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi). Section 1.2 of Part 1 of the Application provides financial statements purporting to demonstrate that Duke and its parent holding company possess, or have reasonable assurance of obtaining, the funds necessary to cover such costs. BREDL has not addressed or disputed these conclusions.

Third, BREDL fails to support its contention, contrary to 10 C.F.R. § 2.309(f)(1)(v). BREDL provides unsupported speculation. BREDL attributes certain views to ''our economist Xuan Chi''[95] — a person who is otherwise unidentified and whose affiliations, qualifications, and reasoning process are accordingly unknown. BREDL reports (but supplies no affidavit or other documentation of) Xuan Chi's assertion (citing a public Securities and Exchange Commission filing) that (1) Duke anticipates capital expenditure of $23 billion

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[88] *Id.* at 21.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* at 20.

[94] *See* 10 C.F.R. § 50.33(f); Final Rule: ''Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Review and Hearings for Nuclear Power Plants,'' 49 Fed. Reg. 35,747, 35,747-49 (Sept. 12, 1984).

[95] BREDL Petition at 21.

on future expansion from 2008 to 2012; and (2) Duke expects that exchange rate fluctuations may cause losses of about $145 million.[96] BREDL also reports the mysterious Xuan Chi's conclusion that ''if'' a large part of Duke's capital expenditure is outside of the United States, Duke ''may fall into financial crisis soon.''[97] That is the extent of BREDL's financial analysis. It is insufficient to justify an evidentiary hearing on the Applicant's financial qualifications.[98]

We do not admit BREDL Contention Four.

5. BREDL Contention Five

> The [Application] does not provide reasonable assurance of adequate protection of public health and safety required by 10 CFR. § 50.57(a)(3). The FSAR insufficiently analyzes reactor units' capability to withstand a design-basis and safe shutdown earthquake because they fail to include more recent information regarding the type, frequency and severity of potential earthquakes in violation of 10 CFR PART 100, APPENDIX A.[99]

BREDL presents maps and geologic data[100] in support of the undisputed proposition that ''South Carolina is in an active earthquake zone.''[101] In Contention Five, BREDL asserts that the Application fails to include unspecified ''more recent information regarding the type, frequency and severity of potential earthquakes.''[102] BREDL also claims that unnamed ''[e]xperts at the University of South Carolina maintain that a nuclear power plant in upstate South Carolina should be designed to withstand another Charleston Earthquake,''[103] and that ''[t]his would seem to be at odds with the Duke application.''[104] BREDL argues that admission of Contention Five ''would allow the development of a full record in this matter.''[105]

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[96] *Id.*

[97] *Id.*

[98] Even the opinion of a qualified and properly identified expert will not support a contention if the opinion lacks a reasoned basis or explanation. *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006).

[99] BREDL Petition at 22. In its reply, BREDL acknowledges that the correct citation should be to 10 C.F.R. § 100.23. BREDL Reply at 15-16.

[100] BREDL Petition at 22-27.

[101] *Id.* at 22.

[102] *Id.*

[103] *Id.* at 28. It appears undisputed that Charleston, South Carolina experienced a major earthquake in 1886, which was centered approximately 150 miles from the WSL site.

[104] *Id.*

[105] *Id.*

The Commission has instructed licensing boards, however, not to initiate evidentiary hearings unless the petitioner has specified how an application is deficient. A contention is not admissible where ''the Petitioner's assertion that the application[ ] [is] deficient is simply based upon a failure to read or perform any meaningful analysis of the application[ ].''[106]

Although Contention Five alleges that the Applicant's Final Safety Analysis Report (FSAR) insufficiently analyzes the reactors' capability to withstand earthquakes, contrary to 10 C.F.R. § 2.309(f)(1)(vi) BREDL's petition does not cite to any specific portion of the FSAR. Section 2.5 of the FSAR contains more than 200 pages of geologic, seismic, and geotechnical data and analyses that BREDL has not addressed. Likewise, while BREDL furnishes some historical information about earthquakes in South Carolina, it fails to explain the potential safety significance of that information, especially as it relates to the extensive seismic data and analyses presented in the FSAR.

For example, the FSAR does specifically account for the 1886 Charleston Earthquake. FSAR 2.5.1.1.3.2.1, ''Charleston Tectonic Features,'' expressly acknowledges that the 1886 Charleston Earthquake is the ''largest historical earthquake in the eastern United States.''[107] More broadly, the FSAR includes recent information regarding type, frequency, and magnitude for the WSL site earthquake hazard, including the Charleston seismic source. The WSL site seismic source model includes cataloged earthquakes within a 200-mile radius (greater than Mb 3.0) from 1627 through August 2006.[108] FSAR §§ 2.5.2.2.2.4 and 2.5.2.4.3.1 discuss the use of the most current characterization of the Charleston seismic source. Indeed, the FSAR indicates that the ground motion hazard at the WSL site is dominated by the Charleston seismic source.

In contrast, BREDL offers speculation — based in part on the unexplained analysis of unnamed ''experts'' — that the seismic implications of the Charleston Earthquake ''would seem to be at odds with the Duke application.''[109] BREDL's petition does not demonstrate the existence of a genuine dispute on a material issue of fact, suitable for an evidentiary hearing.[110]

We do not admit BREDL Contention Five.

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[106] *Millstone,* LBP-04-15, 60 NRC at 95.

[107] Application, Rev. 0, Part 2, FSAR, at 2.5-33.

[108] *Id.* at 2.5-84 to 2.5-85; *id.* tbl.2.5.2-201.

[109] BREDL Petition at 28.

[110] We do not consider citations to specific FSAR sections and related new theories that BREDL improperly raises for the first time in its reply. *See* BREDL Reply at 14-15.

6. BREDL Contention Six

> Whether William States Lee III Will Improve the General Welfare, Increase the Standard of Living, or Strengthen Free Competition in Private Enterprise.[111]

BREDL asserts that granting Duke's Application ''would not improve the general welfare, increase the standard of living or strengthen free competition in private enterprise.''[112] BREDL sets forth essentially three reasons for this conclusion. First, BREDL believes that, as a general matter, nuclear power is undesirable: ''The current nuclear renascence [*sic*] is an ill-fated attempt to revive the nuclear dinosaur. The public monies directed to the overweening nuclear industry would be better spent on less costly, cleaner forms of electric power generation.''[113] Second, BREDL believes that ''the Commission itself is critically flawed as a regulatory body.''[114] BREDL sees inadequate Commission oversight manifesting itself in several ways, and contributing to both hardware failures and human error.[115] Third, BREDL is troubled by what it perceives to be the likely consequences of recent federal legislation concerning risk insurance.[116]

Contention Six invokes language from the Atomic Energy Act (AEA), 42 U.S.C. § 2011. The referenced language, however, states general policy for use of nuclear power in the United States. It does not define or address the standards for issuance of a license for a particular nuclear power reactor. Rather, section 103 of the AEA, 42 U.S.C. § 2133, provides such standards, which do not require applicants to improve the general welfare, increase the standard of living, or strengthen free competition.

Likewise, the NRC regulations implementing the AEA do not require an applicant to address or demonstrate whether the issuance of a COL will improve the general welfare, increase the standard of living, or strengthen free competition in private enterprise.[117] Nor is the NRC required to make such a finding prior to granting a COL.[118] Therefore, contrary to 10 C.F.R. § 2.309(f)(1)(iii) and (iv), these matters are outside the scope of this proceeding and are not material to the findings that the NRC must make to support issuance of a license.

Moreover, a petitioner may not demand a hearing to express generalized

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[111] BREDL Petition at 28.
[112] *Id.*
[113] *Id.* at 29.
[114] *Id.*
[115] *Id.* at 29-36.
[116] *Id.* at 32-33.
[117] *See* 10 C.F.R. §§ 52.77-52.80.
[118] *See id.* § 52.97.

grievances about NRC polices or to attack the NRC's general competence.[119] Nor may a petitioner demand a hearing to challenge a federal statute.[120]

We do not admit BREDL Contention Six.[121]

7. BREDL Contention Seven

The NRC Fails to Execute Constitutional Due Process and Equal Protection.[122]

BREDL asserts that the NRC's regulations concerning radiation exposure violate constitutional rights ''by treating different people differently.''[123] BREDL claims that ''[r]egulations limiting carcinogens in other federal agencies are set at much more protective levels,'' which, BREDL argues, also raises constitutional equal protection issues.[124] Finally, BREDL appears to argue that the decision of the United States Supreme Court in *Duke Power Co. v. Carolina Study Group,* 438 U.S. 59 (1978) — which upheld the constitutionality of the Price-Anderson Act against a constitutional due process challenge — should be reconsidered.[125]

BREDL does not claim that the Applicant's proposed facility will not comply with the NRC's regulations. Rather, BREDL claims that the NRC's radiation protection regulations are constitutionally deficient because they allegedly do not take into account higher risks for children and women, and because they are allegedly less stringent than other federal regulations. Licensing boards are expressly precluded by 10 C.F.R. § 2.335(a) from hearing such a challenge to the NRC's regulations. Insofar as Contention Seven asks this Board to reconsider a decision of the United States Supreme Court, we plainly have no authority to do so.

We do not admit BREDL Contention Seven.[126]

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[119] *See, e.g., Vermont Yankee,* CLI-00-20, 52 NRC at 165-66.

[120] *See, e.g., Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 377 (2007).

[121] For like reasons, another licensing board recently declined to admit a similar BREDL contention in another COL proceeding. *See Bellefonte,* LBP-08-16, 68 NRC at 386-87.

[122] BREDL Petition at 36.

[123] *Id.* at 37.

[124] *Id.* at 38.

[125] *Id.* at 38-39.

[126] For like reasons, two other licensing boards recently declined to admit similar BREDL contentions in other COL proceedings. *Bellefonte,* LBP-08-16, 68 NRC at 390; *Virginia Electric & Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 336 (2008).

8. BREDL Contention Eight

> The assumption that uranium fuel is a reliable source of energy is not supported in the combined operating license application submitted by Duke Energy to the U.S. Nuclear Regulatory Commission.[127]

BREDL contends that the Applicant inadequately addresses the reliability of uranium fuel supply. BREDL alleges that ''[w]orldwide uranium consumption . . . has exceeded worldwide uranium production for some time.''[128] While various short-term supplies, such as downblending from nuclear weapons inventories, may cover the shortfall temporarily, BREDL argues that ''none of these are projected to last indefinitely.''[129] BREDL asserts that the Applicant was required to address these issues and support its conclusion that sufficient uranium will be available to supply the proposed new reactors (in addition to the existing worldwide fleet of nuclear power reactors) during the proposed license period. BREDL further asserts that ''if'' Duke has a plan to address uranium supply problems by substituting plutonium fuel (MOX or mixed oxide), the Application should so disclose.[130]

BREDL recently filed a similar contention, with the same supporting references, in two other cases where licensing boards ruled that BREDL failed to adequately support its position that worldwide uranium supplies may be inadequate to fuel new reactors.[131] We agree.

Although BREDL cites an Internet website that purportedly supports its position, licensing boards can and should review such materials to determine whether, at least on their face, they actually support the facts alleged.[132] The sources on which BREDL relies do not support its allegation that future uranium fuel supplies will be inadequate to permit reactor operation during the proposed license period.

One such source, published by the World Nuclear Association and entitled ''Supply of Uranium,'' directly contradicts BREDL's factual argument.[133] It explains that ''[m]easured resources of uranium, the amount known to be economically recoverable from orebodies, are . . . relative to costs and prices,'' and ''[c]hanges in costs or prices, or further exploration, may alter measured resource

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[127] BREDL Petition at 39.

[128] *Id.* at 40.

[129] *Id.* at 41.

[130] *Id.*

[131] *Bellefonte,* LBP-08-16, 68 NRC at 395-96; *North Anna,* LBP-08-15, 68 NRC at 333-35.

[132] *See Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 265 (2004).

[133] *See* Supply of Uranium, http://www.world-nuclear.org/info/inf75.html (June 2008).

figures markedly.''[134] In other words, as prices rise or production costs decline, exploration and production are likely to increase. BREDL's source further states:

> Thus, any predictions of the future availability of any mineral, including uranium, which are based on current cost and price data and current geological knowledge are likely to be extremely conservative. . . . Our knowledge of geology is such that we can be confident that identified resources of metal minerals are a small fraction of what is there.[135]

Moreover, BREDL's own source concludes that, even with this very conservative limitation on the knowledge of available mineral resources, ''the world's present measured resources of uranium . . . are enough to last for over 80 years.''[136]

BREDL's other cited source is no more supportive of Contention Eight.[137] On the contrary, BREDL's cited webpage reports that mine production of uranium is already being substantially increased following the recovery in uranium prices since about 2003, with the addition of new mines in Canada and Australia and expected large increases in production.[138] BREDL has not cited any reference that, read as a whole, supports its theory that uranium supplies will be insufficient to support the operation of Duke's proposed new reactors during their license period.

Additionally, while BREDL cites various portions of the Application where it claims that uranium availability might have been discussed, BREDL fails to reference the portion of the ER where the reliability of the uranium fuel supply is most fully addressed. Specifically, ER § 10.2.2, ''Irreversible and Irretrievable Commitments of Material Resources,'' discusses this issue in detail. That section concludes, among other things, that present measured resources of uranium should last for 70 years, and that the fuel requirements for Duke's proposed two units (0.07% of current worldwide annual usage) should have little effect on the long-term availability of uranium worldwide.[139] Ironically, the ER relies upon information obtained from the same website cited by BREDL. Contrary to 10 C.F.R. § 2.309(f)(1)(vi), BREDL fails to demonstrate a genuine dispute with the Applicant on a material issue of fact.

Finally, insofar as BREDL urges disclosure of MOX fuel plans that Duke is not proposing, the Commission has reminded us that an NRC licensing proceeding is not ''an occasion for far-reaching speculation about unimplemented and uncertain

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[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *See* World Uranium Mining, http://www.world-nuclear.org/info/inf23.html (July 2008).
[138] *Id.*
[139] Application, Rev. 0, Part 3, ER, at 10.2-2.

plans'' of applicants or licensees.[140] BREDL's uncorroborated speculation does not establish a genuine dispute with the Application.

We do not admit BREDL Contention Eight.

9. BREDL Contention Nine

Duke and NRC Fail to Include Adequate Protections from Aircraft Impacts at the WS Lee site.[141]

BREDL asserts that ''[t]he NRC should require that all new reactors built in the U.S. be designed to withstand an airliner impact.''[142] According to BREDL, ''[t]he NRC does not disagree that aircraft present a threat.''[143] Citing proceedings in a pending rulemaking, BREDL quotes the Commission as stating that '''the Commission believes that it is prudent for nuclear power plant designers to take into account the potential effects of the impact of a large commercial aircraft.' ''[144] In BREDL's opinion, however, ''the Commission wrongly decided not to apply this wisdom to the four currently approved standard design certifications, notably the AP1000 Revision 16.''[145] BREDL believes ''[t]he logic employed by the Commission . . . is specious and contrary to the law.''[146]

Contention Nine raises issues that are beyond the scope of a licensing board proceeding, in contravention of 10 C.F.R. § 2.309(f)(1)(iii). Insofar as BREDL advocates stricter requirements than NRC rules require, Contention Nine constitutes an impermissible challenge to the Commission's regulations. Insofar as BREDL is unhappy with the status of pending rulemaking, BREDL's recourse is to submit comments to the Commission on the proposed rule (which BREDL, in fact, has done).[147] In either case, BREDL's dispute is plainly with the Commission, and is not suitable for an evidentiary hearing before this Board.

We do not admit BREDL Contention Nine.

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[140] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 293 (2002).

[141] BREDL Petition at 43.

[142] *Id.*

[143] *Id.* at 44.

[144] *Id.* (quoting Proposed Rule: ''Consideration of Aircraft Impacts for New Nuclear Power Reactor Designs,'' 72 Fed. Reg. 56,287, 56,288 (Oct. 3, 2007)).

[145] *Id.*

[146] *Id.*

[147] *See* Letter from Jim Riccio et al., to Annette Vietti-Cook, Secretary, U.S. Nuclear Regulatory Commission (Dec. 17, 2007) (ADAMS Accession No. ML073530569) (signed by Janet Marsh, Executive Director, BREDL).

10. BREDL Contention Ten A

Failure to Evaluate Whether and in What Time Frame Spent Fuel Generated by Bellefonte Units 3 and 4 [*sic*] Can Be Safely Disposed Of.[148]

BREDL contends that the ER ''is deficient because it fails to discuss the environmental implications of the lack of options for permanent disposal of the [spent] fuel that will be generated by the proposed reactors.''[149] Recognizing that the Commission has addressed this area on a generic basis by regulation, BREDL states: ''While Duke may have intended to rely on the NRC's Waste Confidence decision, issued in 1984 and most recently amended in 1999, that decision is inapplicable because it applies only to plants which are currently operating, not new plants.''[150] According to BREDL, the Commission has given ''no indication that it has confidence that repository space can be found for spent fuel and other high-level radioactive waste from new reactors licensed after December 1999.''[151]

At least six other licensing boards have considered BREDL's position, and have rejected it.[152] We agree with them.

In its Waste Confidence Rule, the Commission has made a determination, on a generic basis, that spent fuel generated by ''any reactor'' can be safely managed and that sufficient repository capacity will be available.[153] When the Commission promulgated a revised Waste Confidence Rule in 1990, it expressly stated that its conclusions should apply to ''the spent fuel discharged from any new generation of reactor designs.''[154] The Commission reaffirmed its 1990 findings in a 1999 status report, in which it concluded that ''no significant and unexpected events have occurred . . . that would cast doubt on the Commission's Waste Confidence findings or warrant a detailed reevaluation at this time.''[155] More recently, in 2007, the Commission amended the Waste Confidence Rule to clarify that the

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[148] BREDL Petition at 45. We assume that BREDL intended to refer to units at the WSL site.

[149] *Id.*

[150] *Id.* at 46.

[151] *Id.* at 47.

[152] *See Bellefonte,* LBP-08-16, 68 NRC at 416; *North Anna,* LBP-08-15, 68 NRC at 336-37; *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 267-68 (2007); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 246-47 (2004); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 268-69 (2004); *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277, 296-97 (2004).

[153] 10 C.F.R. § 51.23(a).

[154] Review and Final Revision of Waste Confidence Decision, 55 Fed. Reg. 38,474, 38,504 (Sept. 18, 1990).

[155] Status Report on the Review of the Waste Confidence Decision, 64 Fed. Reg. 68,005, 68,007 (Dec. 6, 1999).

rule encompasses COL applications such as Duke's.[156] In light of the plain language of the rule and its regulatory history, the Waste Confidence Rule applies to this proceeding. Contention Ten A is therefore an impermissible challenge to the Rule.

We do not admit BREDL Contention Ten A.

11. BREDL Contention Ten B

> Even if the Waste Confidence Decision Applies to This Proceeding, It Should be Reconsidered.[157]

This is a paradigm of an inadmissible contention. BREDL directly asks the Board to reconsider a Commission regulation. We are prohibited from doing so by 10 C.F.R. § 2.335(a).

BREDL voices significant concerns about the Waste Confidence Rule, which BREDL may wish to bring to the Commission's attention directly. BREDL appears to agree. BREDL now says that it ''plans to participate in the pending Nuclear Regulatory Commission rulemaking on waste confidence.''[158]

We do not, however, admit BREDL Contention Ten B in this licensing proceeding, which is limited to Duke's Application concerning the WSL site.

E. Duke's Motion to Strike Portions of BREDL's Reply

Duke invites us to dismember BREDL's reply by striking arguments concerning six of BREDL's eleven contentions. We decline.

The Board's rulings on admissibility focus on the adequacy of BREDL's original petition. The Board is mindful that the proper purpose of a reply is to discuss alleged deficiencies in a petition, not to try to fix them.[159] We agree that BREDL inappropriately included some new information in its reply. As warranted, this has been noted in our analysis. BREDL has not submitted any new information that would change our conclusions even if we considered it.

Duke's motion to strike is therefore denied as moot.[160]

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[156] *See* Final Rule: ''Licenses, Certifications, and Approvals for Nuclear Power Plants,'' 72 Fed. Reg. 49,352, 49,429 (Aug. 28, 2007) (''The NRC is revising §§ 51.23(b) and (c) to indicate that the provisions of these paragraphs also apply to combined licenses'').

[157] BREDL Petition at 51.

[158] BREDL Reply at 20.

[159] *See Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

[160] *See Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), LBP-08-9, 67 NRC 421, 448 n.154 (2008).

III. CONCLUSION

Although BREDL has standing to participate, BREDL's petition for intervention and request for hearing must be denied because no admissible contention has been presented. South Carolina's and North Carolina's unopposed requests to participate in any hearing as interested government entities are therefore denied as moot. Duke's motion to strike portions of BREDL's reply is also denied as moot.

IV. ORDER

For the foregoing reasons, it is this 22d day of September 2008, ORDERED that:

1. BREDL's Petition to Intervene and Request for Hearing is DENIED.
2. South Carolina's unopposed Request for an Opportunity to Participate in any Hearing is DENIED as moot.
3. North Carolina's unopposed Request for an Opportunity to Participate in any Hearing is DENIED as moot.
4. Duke's Motion to Strike Portions of BREDL's Reply is DENIED as moot.
5. In accordance with 10 C.F.R. § 2.323(f), the Board's ruling on BREDL Contention Two is REFERRED to the Commission.

6. In accordance with the provisions of 10 C.F.R. § 2.311, 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[161]

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Dr. William M. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 22, 2008

[161] Copies of this Order were sent this date by the agency's E-filing system to counsel for (1) Applicant Duke Energy Carolinas, LLC; (2) BREDL; (3) the NRC Staff; (4) the South Carolina Office of Regulatory Staff; and (5) the North Carolina Utilities Commission.

CASE NAME INDEX

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Alaska Department of Transportation and Public Facilities, CLI-04-26, 60 NRC 399, 406 (2004)
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Alaska Department of Transportation and Public Facilities, CLI-04-26, 60 NRC 399, 406 n.28 (2004)
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AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006)

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AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-29 (2007)

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AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-34 (2007)

the National Environmental Policy Act does not require the analysis of potential terrorist attacks on a proposed nuclear facility outside the jurisdiction of the Ninth Circuit; LBP-08-21, 68 NRC 567-68 n.12 (2008)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007)

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the National Environmental Policy Act does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities; LBP-08-13, 68 NRC 143 (2008)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 130 (2007)

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AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008)

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AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008)

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AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 468 (2008)

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AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 663 (2008)

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AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188 (2006)
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AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188, 211-12 (2006)
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AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 (2006)
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AmerGen Energy Co., LLC (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 574-76 (2005)

in an indirect license transfer case involving no change in operating or possession authority, petitioners living and working within 12 miles of the plant did not qualify for proximity-based standing; CLI-08-19, 68 NRC 269 n.68 (2008)

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Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1 and 2), LBP-82-117B, 16 NRC 2024, 2032 (1982)

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Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991)

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Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991)

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Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds,* CLI-91-12, 34 NRC 149 (1991)

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Armed Forces Radiobiology Research Institute (Colbalt-60 Storage Facility), ALAB-682, 16 NRC 150, 155 (1982)

it is enough that petitioner has demonstrated a realistic threat of sustaining a direct injury as a result of contaminated groundwater flowing from the site at issue to his property to establish standing; LBP-08-24, 68 NRC 709 (2008)

Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934,943-44 (9th Cir. 2005), *cert. denied,* 548 U.S. 903 (2006)

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Associated General Contractors of North Dakota v. Otter Tail Power Co., 611 F.2d 684, 688-90 (8th Cir. 1079)

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Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998), *motion to vacate denied,* CLI-98-15, 48 NRC 45 (1998)
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Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349-50 (1998)
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Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998)
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Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 351 (1998)
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Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 242 (1998)
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Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45-46 (1982)
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Business and Professional People for the Public Interest v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974)
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Consolidated Edison Co. of New York (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 133 (2001)
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Consumers Energy Co. (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007)
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Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 408-09, *reconsideration denied,* CLI-07-22, 65 NRC 525 (2007)
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Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409, *reconsideration denied,* CLI-07-22, 65 NRC 525 (2007)
any organization seeking representational standing must show that at least one of its members may be affected by the Commission's approval of the transfer, must identify that member by name, and must demonstrate that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf; CLI-08-19, 68 NRC 259 (2008)
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Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409-10, *reconsideration denied,* CLI-07-22, 65 NRC 525, 527-28 (2007)
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Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 411-12, *reconsideration denied,* CLI-07-22, 65 NRC 525 (2007)
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Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-22, 65 NRC 525, 526, 529 (2007)
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Crow Creek Sioux Tribe v. Brownlee, 331 F.3d 912, 916 (D.C. Cir. 2003)
a Tribe does not have standing merely because it has statutory rights in burial remains and cultural artifacts, but rather, to establish standing, the Tribe must show some actual or imminent injury; LBP-08-24, 68 NRC 713 n.106 (2008)

Curators of the University of Missouri (TRUMP-S Project), CLI-95-1, 41 NRC 71, 98 (1995)
NUREGs and Regulatory Guides, by their very nature, serve merely as guidance and cannot prescribe requirements; LBP-08-25, 68 NRC 788 n.29 (2008)

Curators of the University of Missouri (TRUMP-S Project), CLI-95-1, 41 NRC 71, 121 (1995)
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Curators of the University of Missouri (TRUMP-S Project), CLI-95-1, 41 NRC 71, 121-22 (1995)
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Curators of the University of Missouri (TRUMP-S Project), CLI-95-1, 41 NRC 71, 149-50 (1995)
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Curators of the University of Missouri (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395-96 (1995)
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Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003)
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Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 (2001)
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Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365 (2001), *petition for reconsideration denied,* CLI-02-1, 55 NRC 1 (2002)
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Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 NRC 237, 241-42 (2004)
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Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560-61 (2005)
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Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 (2005)
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Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 38 (2006)
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Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 38-39 (2006)
consistent procedural noncompliance from an attorney resulted in direction to the Office of the Secretary to screen all filings bearing that counsel's signature, not to accept or docket them unless they meet all procedural requirements, and to reject summarily any nonconforming pleadings without referring them to the Atomic Safety and Licensing Board Panel or the Commission; CLI-08-29, 68 NRC 903 (2008)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 89 & n.26 (2004)
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Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 89, 91, 94 (2004)
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Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 90, *aff'd,* CLI-04-36, 60 NRC 631 (2004)
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Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 259 (2007)
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Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 265 (2004)
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Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 268-69 (2004)
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Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 268-70 (2004)
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Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 270-72 (2004)
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Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-07-9, 65 NRC 539, 550 (2007)
an early site permit focuses on the suitability of a proposed site, and is defined as a Commission approval for a site or sites for one or more nuclear power facilities; LBP-08-15, 68 NRC 299-300 (2008)
an early site permit is a partial construction permit, whose issuance does not authorize an applicant to construct nuclear power reactors; LBP-08-15, 68 NRC 299 (2008)
Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-07-9, 65 NRC 539, 550-51 (2007)
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requests to suspend proceedings or hold them in abeyance in the exercise of the Commission's inherent supervisory powers over proceedings in the wake of the September 11 terrorist attacks pending the Commission's comprehensive review of anti-terrorist measures at licensed facilities were rejected; CLI-08-23, 68 NRC 485 (2008)
Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-19, 56 NRC 143 (2002)
although Subpart I rules have been used in very few cases to disclose classified information in contested licensing proceedings, in those cases the information was necessary to evaluate challenges to the agency's compliance with security requirements of the Atomic Energy Act, not the National Environmental Policy Act; CLI-08-26, 68 NRC 523 (2008)
Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002)
the National Environmental Policy Act imposes no legal duty on the NRC to consider intentional malevolent acts on a case-by-case basis in conjunction with commercial power reactor license renewal applications; LBP-08-13, 68 NRC 143 (2008)
Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)
if petitioner neglects to provide the requisite support for its contentions, it is not within the board's power to make assumptions of fact that favor the petitioner, nor may the board supply information that is lacking; LBP-08-13, 68 NRC 63 (2008); LBP-08-16, 68 NRC 385 (2008); LBP-08-26, 68 NRC 918 (2008)
petitioners are prohibited from challenging NRC regulations; LBP-08-14, 68 NRC 287 (2008)
Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-03-21, 58 NRC 338, 342 (2003)
a board may appropriately view petitioners' support for its contention in a light that is favorable to the petitioner; LBP-08-26, 68 NRC 917 (2008)
Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 438-42 (2008)
relevant case law on contention admissibility is presented; LBP-08-21, 68 NRC 560 n.4 (2008)
Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 442-43 (2008)
challenges to NRC regulations are inadmissible; LBP-08-21, 68 NRC 587 (2008)
Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 456-57 (2008)
contentions that challenge the Waste Confidence Rule are inadmissible; LBP-08-23, 68 NRC 689 (2008)

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Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004)
NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications; CLI-08-23, 68 NRC 476-77 n.64 (2008)

Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27-28 & n.14 (2004)
boards review the education, experience, and qualifications of the individuals offering expert opinions on behalf of the litigants to determine whether these individuals qualify as experts; LBP-08-12, 68 NRC 17 n.10 (2008)

Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), LBP-05-10, 61 NRC 241 (2005)
the preponderance-of-the-evidence standard applies in a license renewal proceeding; LBP-08-22, 68 NRC 646 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 212 (2001)
license renewal proceedings are limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses; LBP-08-22, 68 NRC 599 (2008); LBP-08-25, 68 NRC 786 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 293 (2002)
NRC licensing proceedings are not occasions for far-reaching speculation about unimplemented and uncertain plans of applicants or licensees; LBP-08-17, 68 NRC 455 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 7-8 n.14 (2002)
petitioner must approximate the relative cost and benefit of a challenged severe accident mitigation alternative in order to get an adjudicatory hearing; LBP-08-13, 68 NRC 103 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 11-12 (2002)
petitioner must proffer some indication of what the differences might be if a proposed severe accident mitigation alternative is performed; LBP-08-13, 68 NRC 104 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 363-64 (2002)
the scope of license renewal proceedings is quite limited under Commission rules and case law; LBP-08-22, 68 NRC 598 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 364 (2002)
terrorism contentions are, by their very nature, directly related to security and are therefore, under NRC license renewal rules, unrelated to the detrimental effects of aging and thus are beyond the scope of, not material to, and inadmissible in a license renewal proceeding; LBP-08-13, 68 NRC 142 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 365 (2002)
the National Environmental Policy Act imposes no legal duty on NRC to consider intentional malevolent acts on a case-by-case basis in conjunction with commercial power reactor license renewal applications; LBP-08-13, 68 NRC 142 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002)
although boards generally are to litigate a ''contention'' rather than the ''basis'' that provides the issue statement's foundational support, the reach of a contention necessarily hinges upon its terms coupled with its stated basis; LBP-08-13, 68 NRC 61 (2008); LBP-08-16, 68 NRC 386 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002)
a contention of omission alleges the improper omission of particular information or an issue from an application; LBP-08-12, 68 NRC 20 (2008)
if applicant supplies the missing information or performs the omitted analysis, a contention of omission is moot; CLI-08-28, 68 NRC 676 n.72 (2008); LBP-08-12, 68 NRC 21 (2008); LBP-08-15, 68 NRC 317 (2008); LBP-08-24, 68 NRC 748 n.325 (2008)

petitioner must timely file a new or amended contention if it intends to challenge the sufficiency of the new information supplied by applicant that cures the deficiency cited in a contention of omission; LBP-08-15, 68 NRC 318 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383-84 (2002)
in a case with an open record, when a contention of omission is rendered moot, the intervenor may be permitted to timely file a new contention arising from the new information; LBP-08-12, 68 NRC 22 n.15 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 424 (2003)
NRC rules bar contentions where petitioners have only what amounts to generalized suspicions that they hope to substantiate later; LBP-08-17, 68 NRC 441 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428 (2003)
unlike federal court practice, the Commission does not accept mere notice pleading in support of an admissible contention; LBP-08-24, 68 NRC 730 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003)
there simply would be no end to NRC licensing proceedings if petitioners could disregard the timeliness requirements and add new bases or new issues that simply did not occur to them at the outset; CLI-08-19, 68 NRC 262 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49 (2002)
a Category 1 issue does not require a site-specific analysis and is outside the scope of a license renewal proceeding; LBP-08-13, 68 NRC 216 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 77 (2002)
although pro se intervenors must be afforded some latitude in their pleadings, the board expects that an organization that has appeared several times previously will have a heightened awareness of the agency's pleading rules; LBP-08-16, 68 NRC 405-06 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 85-87 (2002)
a Category 1 environmental issue that is adequately addressed by the generic environmental impact statement is outside the scope of a license renewal proceeding; LBP-08-13, 68 NRC 195 (2008)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-03-17, 58 NRC 221, 240-41 (2003)
regulatory guidance documents are merely suggestions with no legal authority to supersede the plain language of the regulatory criteria that requires aging management review for a structure or component that performs its safety functions without moving parts and without a change in configuration or properties; LBP-08-13, 68 NRC 88 (2008)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-98-17, 48 NRC 123, 125 (1998)
the scope of license renewal proceedings is quite limited under Commission rules and case law; LBP-08-22, 68 NRC 598 (2008)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)
petitioners cannot seek to use a specific adjudicatory proceeding to attack generic NRC regulations and requirements, or express generalized grievances about NRC policies; CLI-08-17, 68 NRC 233, 242 (2008)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334-35 (1999)
the contention rule is strict by design; CLI-08-17, 68 NRC 233 (2008)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336-37 (1999)
the mere issuance of requests for additional information does not mean an application is incomplete for docketing; CLI-08-17, 68 NRC 242 (2008)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 337-39 (1999)
NRC rules bar contentions where petitioners have only what amounts to generalized suspicions that they hope to substantiate later; LBP-08-17, 68 NRC 441 (2008)

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Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 342 (1999)
expert support is not required for admission of a contention because a fact-based argument may be sufficient on its own; LBP-08-27, 68 NRC 956 (2008)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999)
a contention that attacks a Commission rule, or that seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible; LBP-08-16, 68 NRC 383 (2008)
if petitioners are dissatisfied with the Commission's generic approach to a problem, their remedy lies in the rulemaking process, not in adjudication; LBP-08-23, 68 NRC 689 n.50 (2008)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), LBP-98-33, 48 NRC 381, 385 n.1 (1998)
the proximity presumption extends to petitioners living in or having frequent contacts with an area within a 50-mile radius of a nuclear reactor; LBP-08-18, 68 NRC 539 (2008)

Duke Power Co. v. Carolina Study Group, 438 U.S. 59 (1978)
constitutionality of the Price-Anderson Act has been upheld against a constitutional due process challenge; LBP-08-17, 68 NRC 452 (2008)

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 410 (1976)
NRC's longstanding approach to electric power demand forecasting has emphasized historical, conservative planning to ensure electricity generating capacity will be available to meet reasonably expected needs; LBP-08-16, 68 NRC 406 (2008)

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985)
contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-08-13, 68 NRC 62 (2008); LBP-08-15, 68 NRC 314 (2008); LBP-08-16, 68 NRC 384 (2008); LBP-08-26, 68 NRC 916 (2008)

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983)
although an intervenor may have fewer resources and less ability than other participants, both share the same burden of uncovering relevant information that is publicly available; LBP-08-12, 68 NRC 32 (2008)

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-107A, 16 NRC 1791, 1808 (1982)
relitigation of issues that were decided against petitioner in its earlier administrative litigation is prohibited; LBP-08-15, 68 NRC 337 (2008)
the doctrine of collateral estoppel should be applied in appropriate circumstances in NRC proceedings; LBP-08-15, 68 NRC 310 (2008)

Duncan's Point Lot Owners Association, Inc. v. Federal Energy Regulatory Commission, 522 F.3d 371 (D.D.C. 2008)
procedural violations of the National Historic Preservation Act have resulted in a grant of standing to tribes; LBP-08-24, 68 NRC 715 (2008)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-08-9, 67 NRC 353, 355 (2008)
the purpose of obtaining ''interested state'' status was so that a state could request a suspension of the license renewal proceeding; LBP-08-25, 68 NRC 783 n.13 (2008)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 270 (2006)
the proximity presumption extends to petitioners living in or having frequent contacts with an area within a 50-mile radius of a nuclear reactor; LBP-08-18, 68 NRC 539 (2008)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 338-41 (2006)
a contention related to emergency planning that touches on the adequacy of a severe accident mitigation alternative analysis in the context of environmental review during license renewal proceedings is admissible; LBP-08-13, 68 NRC 165-66 (2008)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 340 (2006)
a generic challenge to the MACCS2 code is inadmissible; LBP-08-13, 68 NRC 101 (2008)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 356 (2006)
failure to adequately present the factual information or expert opinions necessary to support a contention requires that the contention be rejected; LBP-08-26, 68 NRC 917 (2008)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-07-13, 66 NRC 131, 142-43 (2007)
a generic challenge to the MACCS2 code is inadmissible; LBP-08-13, 68 NRC 101 (2008)

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Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-07-28, 66 NRC 275, 275 (2007)
sanctions have been imposed against a party requesting a hearing only when that party has not followed established Commission procedures; LBP-08-18, 68 NRC 542 (2008); LBP-08-19, 68 NRC 547 (2008); LBP-08-20, 68 NRC 552 (2008)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 191 (2008)
oral argument on contention admissibility is not a right; LBP-08-23, 68 NRC 683 (2008)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 192 (2008)
boards have broad discretion to issue procedural orders to regulate the course of proceedings and the conduct of participants, and as a general matter, the Commission declines to interfere with the board's day-to-day case management decisions, unless there has been an abuse of power; CLI-08-29, 68 NRC 901 (2008); LBP-08-23, 68 NRC 683 (2008)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 86 (2008)
commitment of one party to fulfill its statutory duties in the application process is not enough to demonstrate that the issue will be properly addressed; LBP-08-24, 68 NRC 720 (2008)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 102 (2008)
contention challenging cost estimates for site remediation after a severe accident is admissible; LBP-08-26, 68 NRC 925 (2008)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 138 (2008)
applicant's proposal to perform the modified calculations in the future, albeit in accordance with specified guidance, is unacceptable because these calculations are not a component of an aging management plan, but are the fundamental fatigue analyses for time-limited aging required to be included in the license renewal application; LBP-08-25, 68 NRC 827 (2008)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 16 (2007)
spent fuel pool fires are Category 1 environmental issues and are addressed in the generic environmental impact statement for license renewals; LBP-08-13, 68 NRC 185 (2008)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 17 (2007)
a petition for rulemaking that addresses issues related to spent fuel pool fires would be a more appropriate venue to seek relief for resolving generic concerns about spent fuel fires than a site-specific contention in an adjudication; LBP-08-13, 68 NRC 186 (2008)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 377 (2007)
petitioner may not demand a hearing to challenge a federal statute; LBP-08-17, 68 NRC 452 (2008)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 383 (2007)
adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process; LBP-08-16, 68 NRC 384 (2008)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 383-84 (2007)
an administratively extended state-issued permit satisfies the 10 C.F.R. 51.53(c)(3)(ii)(B) requirements; LBP-08-13, 68 NRC 152 (2008)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 387 (2007)
licensing boards must defer to a state's ruling on once-through cooling as reflected in equivalent permits; LBP-08-13, 68 NRC 156 (2008)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 387-88 (2007)
boards must take state permit determinations at face value and are prohibited from undertaking any independent analysis of the permit's limits; LBP-08-13, 68 NRC 157 (2008)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 389 (2007)
legislative intent is to implement the Clean Water Act in a way that avoids duplication and unnecessary delays; LBP-08-13, 68 NRC 157 (2008)

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Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), DD-05-2, 62 NRC 389, 396 (2005)
differences between proposed and codified design criteria are not a concern for operating plants and whether a plant was issued a construction permit based on plant-specific criteria or final criteria presents no issue for license renewal proceedings; LBP-08-13, 68 NRC 75 (2008)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 552 (2004)
when assessing whether petitioner has set forth a sufficient interest to intervene, licensing boards apply judicial concepts of standing; LBP-08-14, 68 NRC 286 (2008); LBP-08-15, 68 NRC 302 (2008); LBP-08-18, 68 NRC 538 (2008)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 552-53 (2004)
intervention petitioner must show that it has personally suffered or will personally suffer in the future a distinct and palpable harm that constitutes injury-in-fact, the injury can be fairly traced to the challenged action, and the injury is likely to be redressed by a favorable decision; LBP-08-18, 68 NRC 538 (2008)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 557 (2004)
it is the admissibility of the contention, not the basis, that must be determined; LBP-08-17, 68 NRC 447 (2008)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 705 (2004)
a licensing board has authority to choose the hearing process most suitable for the contentions before it; LBP-08-24, 68 NRC 759 n.390 (2008)
determination of specific hearing procedures to be used for a proceeding is made on a contention-by-contention basis, and selection of the hearing procedure is dependent on what is most appropriate for the specific contentions before it; LBP-08-24, 68 NRC 758 (2008)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-05-24, 62 NRC 429, 431 (2005)
a contention of omission is rendered moot by applicant's submission to the NRC of its confirmatory analysis; CLI-08-28, 68 NRC 676 n.72 (2008)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 & n.21 (2005)
when new contentions are based on breaking developments of information, they are to be treated as new or amended, not as nontimely; LBP-08-27, 68 NRC 955 (2008)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (2006)
for filing new contentions, boards have generally established a deadline of 30 days to be timely after the receipt of new information; LBP-08-12, 68 NRC 33 n.2 (2008)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 575 (2006)
a newly filed contention must meet the requirements of 10 C.F.R. 2.309(f)(2) as well as the six basic contention admissibility standards set forth in section 2.309(f)(1)(i)-(vi); LBP-08-27, 68 NRC 955 (2008)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 151 (2006)
determining whether a contention is adequately supported by a concise allegation of the facts or expert opinion is distinct from what is required to support petitioner's case at a hearing on the merits; LBP-08-26, 68 NRC 917 (2008)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 186-87 (2006)
an aging management plan that merely summarizes options for future plans does not meet the specific requirement for demonstrating that the effects of aging will be adequately managed for the period of extended operations as required by Part 54; LBP-08-13, 68 NRC 140, 173 (2008)

it is not sufficient for an applicant to propose a plan to develop a future plan; LBP-08-13, 68 NRC 172 (2008)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 206 (2006)

two petitioners, each of which has submitted an admissible contention, may adopt the contentions of a third petitioner, and of each other; LBP-08-13, 68 NRC 65 (2008)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 206-08 (2006)

the issue of contention adoption in a license renewal proceeding is addressed; LBP-08-13, 68 NRC 65 (2008)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 207-08 (2006)

in ruling that petitioners could adopt contentions, a board found unpersuasive the Commission's dicta in an earlier decision that an adopting party must demonstrate an independent ability to litigate; LBP-08-13, 68 NRC 66 (2008)

Envirocare of Utah, Inc. v. NRC, 193 F.3d 72, *passim* (D.C. Cir. 1999)

although the Commission has long looked for guidance to judicial concepts of standing, it is not bound to do so; CLI-08-19, 68 NRC 265 (2008)

Envirocare of Utah, Inc. v. NRC, 194 F.3d 72, 74 (D.C. Cir. 1999)

because federal agencies are neither constrained by Article III nor governed by judicially created standing doctrines, the criteria for establishing administrative standing therefore may permissibly be less demanding than the criteria for judicial standing; LBP-08-24, 68 NRC 702 n.32 (2008)

Environmental Law & Policy Center v. NRC, 470 F.3d 676, 684 (7th Cir. 2006)

the National Environmental Policy Act does not require consideration of energy efficiency alternatives when applicant is in no position to implement such measures; LBP-08-13, 68 NRC 99 n.282 (2008)

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5 (2005)

the mandatory hearing board is required to answer six questions for the uncontested early site permit proceedings; LBP-08-15, 68 NRC 301 (2008)

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 805, 807 (2005), *aff'g* LBP-05-19, 62 NRC 134 (2005)

energy conservation is not a reasonable alternative that would advance the goals of a nuclear energy project; LBP-08-13, 68 NRC 91 (2008)

the National Environmental Policy Act does not require an analysis of conservation as an alternative; LBP-08-13, 68 NRC 205 (2008)

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806 (2005), *aff'g* LBP-05-19, 62 NRC 134 (2005)

neither NRC nor the applicant has the mission or authority to implement a general societal interest in energy efficiency; LBP-08-13, 68 NRC 99 n.282 (2008)

the Commission makes no practical distinction between energy efficiency and energy conservation; LBP-08-13, 68 NRC 99 (2008)

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806-07 (2005), *aff'g* LBP-05-19, 62 NRC 134 (2005)

the National Environmental Policy Act does not require an analysis of conservation or efficiency as an alternative to an early site permit; LBP-08-13, 68 NRC 93 (2008)

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 807-08 (2005), *aff'g* LBP-05-19, 62 NRC 134 (2005)

the National Environmental Policy Act's rule of reason does not demand an analysis of energy efficiency, because conservation measures are beyond the ability of an applicant to implement, and are therefore outside the scope required by a National Environmental Policy Act analysis of reasonable alternatives; LBP-08-13, 68 NRC 93 (2008)

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-07-12, 65 NRC 203, 207-08 (2007)

the Commission expressly rejected the idea that the Staff's review of the ESP application had not been adequate; CLI-08-23, 68 NRC 480 (2008)

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challenges to NRC regulations are inadmissible; LBP-08-21, 68 NRC 587 (2008)
challenges to NRC's Waste Confidence rule are inadmissible; LBP-08-17, 68 NRC 456 (2008)
Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 156-58, *aff'd,* CLI-05-29, 62 NRC 801 (2005), *aff'd sub nom. Environmental Law & Policy Center v. NRC,* 470 F.3d 676 (7th Cir. 2006)
when the goal of a proposed action is renewal of the operating licenses that allow production of approximately 2158 MWe of baseload power, the environmental report does not have to consider in detail alternatives that do not meet this goal; LBP-08-13, 68 NRC 90 (2008)
Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-06-28, 64 NRC 460 (2006), *aff'd,* CLI-07-12, 65 NRC 203 (2007)
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Exelon Generation Co. (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005)
in cases involving uranium mining and other source materials licensing, petitioner must independently establish the requisite elements of standing; LBP-08-24, 68 NRC 704 (2008)
Exelon Generation Co. (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-81 (2005)
how the Commission considers proximity-based standing in license transfer cases is described; CLI-08-19, 68 NRC 269 (2008)
Exelon Generation Co. (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-83 (2005)
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Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)
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Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003)
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Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 205 (2003)
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Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989)
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Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989)
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Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), LBP-08-14, 68 NRC 279 (2008)
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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991)

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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000)

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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3 (2001)

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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7 (2001)

certain safety issues that were reviewed for the initial license have been closely monitored by NRC inspection during the license term and need not be reviewed again in the context of a license renewal application; LBP-08-13, 68 NRC 67 (2008)

if a structure or component is already required to be replaced at mandated, specified time periods, it would fall outside the scope of license renewal review; LBP-08-22, 68 NRC 599 (2008)

in developing 10 C.F.R. Part 54 in the 1980s, the Commission sought to develop a process that would be both efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC Staff to focus its resources on the most significant safety concerns at issue during the renewal term; LBP-08-22, 68 NRC 598 (2008)

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the license renewal process is not meant to duplicate ongoing programs that review safety at operating reactors; LBP-08-25, 68 NRC 788 (2008)

the NRC license renewal safety review is focused upon those potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs; LBP-08-22, 68 NRC 599 (2008)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7-8 (2001)

the relevant matters of concern in a license renewal proceeding are characterized as managing aging-related degradation; LBP-08-22, 68 NRC 601 (2008)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7-10 (2001)

the rationale for reliance on maintenance requirements to manage aging effects of active components is discussed; CLI-08-23, 68 NRC 467 n.10 (2008)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8 (2001)

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applicants for license renewal must demonstrate how their programs will be effective in managing the effects of aging during the proposed period of extended operation at a detailed component and structure level, rather than at a more generalized 'system level; LBP-08-22, 68 NRC 599 (2008)
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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8-9 (2001)
the current licensing basis and questions regarding its ascertainability are current operation issues which are outside the scope of a license renewal proceeding; LBP-08-13, 68 NRC 70 (2008)
Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9 (2001)
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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9-10 (2001)
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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 10 (2001)
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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 10 n.2 (2001)
an issue can be related to plant aging and still not warrant review at the time of a license renewal application, if it is adequately dealt with by regulatory processes on an ongoing basis; LBP-08-22, 68 NRC 599 (2008)
Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11 (2001)
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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11-13 (2001)
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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001)
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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 & n.12 (1990)

an allegation that some aspect of a license application is inadequate or unacceptable does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect; LBP-08-17, 68 NRC 442 (2008)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, *aff'd on other grounds,* CLI-01-17, 54 NRC 3 (2001)

petitioner is presumed to have standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity; LBP-08-17, 68 NRC 438 (2008); LBP-08-18, 68 NRC 539 (2008); LBP-08-26, 68 NRC 911 (2008)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146-50 (2001)

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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 148-49 (2001)

in power reactor license proceedings, proximity within 50 miles of a plant is often enough on its own to demonstrate standing; LBP-08-24, 68 NRC 703 (2008)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 149, *aff'd on other grounds,* CLI-01-17, 54 NRC 3 (2001)

in reactor license proceedings, the zone of possible harm for proximity-based standing is generally deemed to constitute the areas within a 50-mile radius of the site; LBP-08-17, 68 NRC 438 (2008)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 150-51 (2001)

the prohibition against challenges to NRC regulations applies not only to a direct challenge to the validity of a regulation, but also to a claim that NRC should promulgate requirements that are more stringent than those already included in its regulations; LBP-08-15, 68 NRC 332 (2008)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159, *aff'd on other grounds,* CLI-01-17, 54 NRC 3 (2001)

contentions that advocate more stringent requirements than NRC rules impose or that otherwise seek to litigate a generic determination that the Commission has established by rulemaking, or that raise a matter that is or is about to become the subject of rulemaking are barred; LBP-08-16, 68 NRC 383 (2008); LBP-08-17, 68 NRC 441 (2008)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-08-18, 68 NRC 533 (2008)

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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-08-18, 68 NRC 533, 543 (2008)

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Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (1985)

the National Environmental Policy Act does not require a decision whether an environmental impact report is based on the best scientific methodology available, nor does NEPA require resolution of disagreements among various scientists as to methodology; CLI-08-26, 68 NRC 518 n.51 (2008)

General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 476 (1987)

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Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, GA), CLI-95-12, 42 NRC 111, 115 (1995)

an organization claiming representational standing is required to demonstrate that an individual member has standing to participate, and has authorized the organization to represent his or her interests; CLI-08-19, 68 NRC 259 (2008)

for an organizational petitioner to establish standing, it must show immediate or threatened injury to either its organizational interests or to the interest of identified members; LBP-08-24, 68 NRC 702 (2008)

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Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 120 (1995)

a license renewal proceeding is an appropriate occasion for appraising the entire past performance of the licensee; LBP-08-24, 68 NRC 728 (2008)

a license renewal proceeding is an appropriate time to review the adequacy of a licensee's corporate organization and the integrity of its management; LBP-08-24, 68 NRC 753 (2008)

to provide the basis of an admissible contention, allegations of management improprieties or lack of integrity must relate directly to the currently proposed licensing action; LBP-08-15, 68 NRC 327 (2008)

Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 121 (1995)

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Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-23, 42 NRC 215, 217 (1995)

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Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds,* CLI-95-10, 42 NRC 1 (1995), *and aff'd in part,* CLI-95-12, 42 NRC 111 (1995)

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the Commission declined to exercise pendent jurisdiction where the challenged interlocutory issues were not inextricably intertwined with the two immediately appealable issues; CLI-08-27, 68 NRC 657 n.8 (2008)

Glass Packaging Institute v. Regan, 737 F.2d 1083, 1091 (D.C. Cir.), *cert. denied,* 469 U.S. 1035 (1984)

the National Environmental Policy Act does not require an agency to assess every impact or effect of its proposed action, but only effects on the environment; CLI-08-16, 68 NRC 228 (2008)

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Glass Packaging Institute v. Regan, 737 F.2d 1083, 1092 (D.C. Cir.), *cert. denied,* 469 U.S. 1035 (1984)
conformity of a proposed action to federal regulations governing other aspects of that action's interrelationship with the environment will buttress a finding of no significant impact; CLI-08-16, 68 NRC 227 n.32 (2008)
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GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193 (2000)
petitioners in direct license transfer cases who qualified for proximity-based standing lived within 1 to 2 miles of their plant; CLI-08-19, 68 NRC 269 (2008)

GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000)
an organization seeking representational standing to intervene must demonstrate that the interest of at least one of its members will be so harmed, identify that member by name and address, and show that the organization is authorized to request a hearing on behalf of that member; CLI-08-19, 68 NRC 259 (2008); LBP-08-24, 68 NRC 702 (2008)
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GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000)
mere speculation that an applicant will not comply with NRC regulations, in the absence of documentary support, does not amount to an admissible contention; LBP-08-26, 68 NRC 942 n.258 (2008)

GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)
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Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365, 375 (1990)
in statutory construction, the specific prevails over the general; CLI-08-26, 68 NRC 523 (2008)

Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 227-28 (1974)
the ''direct participation of local citizens in nuclear reactor licensing'' is not a right to have all legal arguments on contention admissibility take place near the facility at issue, but rather the right of persons with standing to file contentions in licensing proceedings and litigate admissible contentions; LBP-08-23, 68 NRC 685 n.31 (2008)

Hamlin Testing Laboratories, Inc., 2 AEC 423, 428 (1964)
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Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990)
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Heckler v. Chaney, 470 U.S. 821, 837-38 (1985)
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Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393 (1979)
an affidavit supporting representational standing must describe precisely how the affiant is aggrieved, whether based on employment, residence, or activities; CLI-08-19, 68 NRC 260 (2008)
in ruling on standing, NRC cannot automatically assume that an organization member necessarily considers him- or herself potentially aggrieved by a particular outcome of the proceeding; CLI-08-19, 68 NRC 260 (2008)

Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n.108 (1985)
availability of Staff review outside the hearing process generally does not constitute adequate protection of a private party's rights when considering 10 C.F.R. 2.309(c)(1)(v); LBP-08-12, 68 NRC 42 (2008)

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Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120 (1998)
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Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 121 (1998)
applicant cannot rely upon an NRC license to avoid obtaining all other applicable federal, state, or local permits; LBP-08-15, 68 NRC 329 (2008)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 6 (1999)
the Commission is generally disinclined to upset fact-driven licensing board determinations, particularly where the affidavits or submissions of experts must be weighed; CLI-08-28, 68 NRC 675 (2008)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998), *rev'd on other grounds,* CLI-98-16, 48 NRC 119 (1998)
an organization seeking to intervene in its own right must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act; LBP-08-24, 68 NRC 702 (2008)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 272 (1998), *rev'd on other grounds,* CLI-98-16, 48 NRC 119 (1998)
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Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 275 (1998), *rev'd on other grounds,* CLI-98-16, 48 NRC 119 (1998)
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Hydro Resources, Inc. (Crown Point, New Mexico), LBP-03-27, 58 NRC 408, 413 (2003)
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Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 3 (2000)
the Commission is generally disinclined to upset fact-driven licensing board determinations, particularly where the affidavits or submissions of experts must be weighed; CLI-08-28, 68 NRC 675 (2008)

Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 53 (2001)
the adjudicatory record, the board decision, and any Commission appellate decisions become, in effect, part of the final environmental impact statement; CLI-08-26, 68 NRC 527 n.87 (2008)

Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001)
in the alternatives analysis in its environmental report, applicant need only consider the range of possibilities that are capable of achieving the goals of the proposed action; LBP-08-13, 68 NRC 92, 95, 204 (2008)

Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-04-33, 60 NRC 581, 596 (2004)
calculations for surety bonds are to be estimated to the extent possible, and based on the applicant's experience with generally accepted industry practices including research and development at the site or previous operating experience in the case of a license renewal; LBP-08-24, 68 NRC 756 n.375 (2008)
guidance documents are not legally binding, but are useful in instances where legal authority is lacking; LBP-08-24, 68 NRC 756 n.374 (2008)

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Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-04-33, 60 NRC 581, 597 (2004)
it is neither unreasonable nor inconsistent with regulatory guidance for an applicant that has had experience in the uranium recovery field to draw upon its own prior experience as a basis in estimating restoration cost estimates; LBP-08-24, 68 NRC 756 n.375 (2008)
NRC evaluates applicants' calculations for surety bonds on a case-by-case basis, comparing proposed unit costs with standard industry cost guides as well as consulting with local and state authorities on local and regional costs; LBP-08-24, 68 NRC 756 n.376 (2008)
Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), LBP-04-3, 59 NRC 84, 88 (2004)
Criterion 9 of 10 C.F.R. Part 40, Appendix A requires an applicant to establish a surety arrangement that ensures sufficient funds will be available for decommissioning and decontamination of an NRC-licensed source materials site; LBP-08-24, 68 NRC 755 (2008)
Inquiry into Three Mile Island Unit 2 Leak Rate Data Falsification, LBP-87-15, 25 NRC 671, 690 (1987)
''reasonable assurance'' requires that a case be proved by the ''preponderance of the evidence'' standard common to NRC proceedings, which has been interpreted as requiring only that the record underlying a finding makes it slightly more likely than not; LBP-08-22, 68 NRC 646 (2008)
International Brotherhood of Teamsters v. Transportation Security Administration, 429 F.3d 1130, 1134-35 & n.4 (D.C. Cir. 2005)
representational standing to a union is denied, in part because it had submitted no proof that the employee it claimed to represent was in fact a union member at the time the case commenced; CLI-08-19, 68 NRC 263 (2008)
International Uranium (USA) Corp. (Request for Materials License Amendment), CLI-00-1, 51 NRC 1, 19 (2000)
although NRC guidance documents are entitled to some weight, they do not have the force of a legally binding regulation and, like any guidance document, may be challenged in an adjudicatory proceeding; LBP-08-22, 68 NRC 614 (2008); LBP-08-25, 68 NRC 788 (2008)
International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 n.1 (1998)
proximity alone is not sufficient to establish standing for a intervention on a source materials activity; LBP-08-24, 68 NRC 704 (2008)
International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001)
petitioner must show some risk of discrete institutional injury to itself, other than the general environmental and policy interests of the sort repeatedly found insufficient for organizational standing; CLI-08-19, 68 NRC 270 (2008)
International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001)
petitioner must establish a concrete and particularized injury traceable to the licensed operations; LBP-08-24, 68 NRC 707 (2008)
International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 254 (2001)
mere conclusory allegations about potential harm to petitioner or others is insufficient to confer standing; LBP-08-24, 68 NRC 707 n.63 (2008)
International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-97-12, 46 NRC 1, 8 (1997), *aff'd,* CLI-98-6, 47 NRC 116 (1998)
writing from a post office box and failing to provide a residential home address constitute part of the basis for denying standing in a petition to intervene; LBP-08-14, 68 NRC 289 n.53 (2008)
International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-01-15, 53 NRC 344, 349 (2001)
intervention petitioner must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action; LBP-08-18, 68 NRC 538 (2008)
Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978)
proponents of motions to reopen the record bear a heavy burden; LBP-08-12, 68 NRC 15 (2008)
Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 459-60 n.14 (1999)
indirect transfers involve corporate restructuring or reorganizations that leave the licensee itself intact as a corporate entity and therefore involve no application for a new operating license; CLI-08-19, 68 NRC 255 n.3 (2008)

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Kelley v. Selin, 42 F.3d 1501, 1508 (6th Cir. 1995)
if petitioner requests a remedy that is beyond the scope of the hearing, then the hearing request must be denied because redressability is an element of standing; LBP-08-14, 68 NRC 286 (2008)
judicial concepts of standing require that a petitioner allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-08-13, 68 NRC 59 (2008)

Keystone Shipping Co. v. New England Power Co., 109 F.3d 46, 52 (1st Cir. 1997)
collateral estoppel effect is given to judgment granting a motion to dismiss, when the party against which collateral estoppel is invoked had a full and fair opportunity to oppose the dismissal; LBP-08-23, 68 NRC 688 (2008)

Kungys v. United States, 485 U.S. 759, 778 (1988)
it is a cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant; LBP-08-25, 68 NRC 826 (2008)

Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 491-92 (Ct. Cl. 1967)
continuous and exclusive use of property is sufficient, unless duly extinguished, to establish Indian or aboriginal title; LBP-08-24, 68 NRC 712 n.103 (2008)

Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903)
plenary authority over tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government; LBP-08-24, 68 NRC 712 n.99 (2008)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1159 (1984)
certain minor matters may be left to NRC Staff for post-hearing resolution; LBP-08-25, 68 NRC 828 (2008)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288, *review denied,* CLI-88-11, 28 NRC 603 (1988)
interpretation of a regulation, like interpretation of a statute, begins with the language and structure of the provision itself and the entirety of the provision must be given effect; CLI-08-28, 68 NRC 674 (2008)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-902, 28 NRC 423, 428 (1988)
a licensing board is clearly authorized to dismiss a party who obstructs the discovery process, disobeys board orders, and engages in willful, bad-faith, and prejudicial conduct toward another party; CLI-08-29, 68 NRC 900 (2008)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 65 (1991)
the National Environmental Policy Act does not require consideration of every conceivable alternative but rather requires only consideration of feasible, nonspeculative, reasonable alternatives; LBP-08-13, 68 NRC 92, 95 (2008)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1400 (1984)
the phrase ''inimical to the common defense and security'' refers to several factors including the absence of foreign control over the applicant; LBP-08-24, 68 NRC 747 (2008)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 183 (1991)
for significant hazards consideration determinations, the Staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination; LBP-08-18, 68 NRC 539 (2008)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995)
a board ruling denying a waiver request is interlocutory in nature, and therefore not appealable until the board has issued a final decision resolving the case; CLI-08-27, 68 NRC 656 (2008)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998)
the adjudicatory record, the board decision, and any Commission appellate decisions become, in effect, part of the final environmental impact statement; CLI-08-26, 68 NRC 526-27 n.87 (2008)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100 (1998)
a disparate impact analysis is the principal tool for advancing environmental justice under the National Environmental Policy Act; LBP-08-13, 68 NRC 199 (2008)

NRC's environmental justice goal is to identify and adequately weigh, or mitigate, effects on low-income and minority communities that become apparent only by considering factors peculiar to those communities; LBP-08-13, 68 NRC 197 n.995 (2008)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 106-10 (1998)
the essence of an environmental justice claim under the National Environmental Policy Act is disparate environmental harm to a minority or low-income population; LBP-08-13, 68 NRC 199 (2008)

Louisiana Energy Services, L.P. (National Enrichment Facility), 2004 WL 1505412 (N.R.C.) n.2 (Licensing Board June 1, 2004)
the Commission seeks wherever possible to avoid the delays, such as an additional round of pleadings, caused by petitioner's attempt to backstop elemental deficiencies in its original petition to intervene; CLI-08-19, 68 NRC 262 (2008)

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004), *reconsideration denied,* CLI-04-35, 60 NRC 619, 623 (2004)
a reply is not an opportunity for petitioner to bolster its original contentions with new supporting facts and arguments, but rather it is a chance to amplify issues presented in the initial petition as well as the applicant's and NRC Staff's answers; LBP-08-26, 68 NRC 918 (2008)

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224 (2004)
to the extent petitioner uses its reply brief as an attempt to reinvigorate thinly supported contentions by presenting entirely new arguments, the board should decline to consider it; LBP-08-26, 68 NRC 919 (2008)

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25, *reconsideration denied,* CLI-04-35, 60 NRC 619 (2004)
petitioners may not use replies as a vehicle to raise new arguments or claims not found in the original contention or use them to cure an otherwise deficient contention; CLI-08-19, 68 NRC 262 n.32 (2008)
there simply would be no end to NRC licensing proceedings if petitioners could disregard timeliness requirements and add new bases or new issues that simply did not occur to them at the outset; CLI-08-19, 68 NRC 262 (2008)

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225, *reconsideration denied,* CLI-04-35, 60 NRC 619 (2004)
reply briefs must be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer; LBP-08-26, 68 NRC 919 (2008)
reply pleadings cannot be used to introduce additional supporting information relative to a contention, as opposed to addressing the arguments raised in response to the petition; LBP-08-16, 68 NRC 400 (2008)

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004)
petitioners may not seek to skirt contention rules by initially filing unsupported contentions, and later recasting or modifying their contentions on appeal with new arguments never raised before the board; CLI-08-17, 68 NRC 234 (2008)

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004)
a claim not raised in the hearing petition, but added as a new claim in petitioners' reply brief is considered impermissibly late; CLI-08-17, 68 NRC 237 n.27 (2008)
the brief explanation of the logical underpinnings of a contention does not require a petitioner to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention; LBP-08-26, 68 NRC 915 (2008)

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-05-21, 62 NRC 538, 540 (2005)
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Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-06-8, 63 NRC 241, 267, *aff'd,* CLI-06-15, 63 NRC 687 (2006)
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Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986)
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Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)
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Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)
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Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992)
the person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all of the normal standards for redressability and immediacy; LBP-08-24, 68 NRC 714 (2008)
Lujan v. Defenders of Wildlife, 504 U.S. 555, 572-73 nn.7-8 (1992)
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Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1009 (1973)
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Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56-57 (2004)
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Mapother v. Department of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)
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Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)
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Massachusetts v. United States, 522 F.3d 115, 130 (1st Cir. 2008)
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the argument that a party did not have a full and fair opportunity to litigate an issue in district court because the decision was made pursuant to a motion to dismiss for lack of jurisdiction is rejected; LBP-08-23, 68 NRC 688 n.47 (2008)

Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 723 (1965)
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Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 771-72 (1983)
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Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983)
the National Environmental Policy Act does not require an agency to assess every impact or effect of its proposed action, but only effects on the environment; CLI-08-16, 68 NRC 228 (2008)

Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 773 (1983)
although the National Environmental Policy Act states its goals in sweeping terms of human health and welfare, these goals are ends that Congress has chosen to pursue by means of protecting the physical environment; CLI-08-16, 68 NRC 228 (2008)

Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983)
in the context of the National Environmental Policy Act, one must look at the underlying policies or legislative intent in order to draw a manageable line between those causal changes that make an actor responsible for an effect and those that do not; CLI-08-16, 68 NRC 229 (2008)
to be encompassed by the National Environmental Policy Act, there needs to be a reasonably close causal relationship between a change in the physical environment and the effect at issue because otherwise, the words ''adverse environmental effects'' might embrace virtually any consequence of a proposed federal action that someone thought adverse; CLI-08-16, 68 NRC 228 (2008)

Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 775 (1983)
the Food and Drug Administration's regulation generically authorizing fresh fruit and vegetable irradiation, issued in 1986 and still valid today, is the legally relevant or proximate cause of any potential effects of consuming irradiated fruits, lengthening the causal chain beyond the reach of the National Environmental Policy Act; CLI-08-16, 68 NRC 229 (2008)

Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 778 (1983)
if a harm does not have a sufficiently close connection to the physical environment, the National Environmental Policy Act does not apply, regardless of the gravity of the harm; CLI-08-16, 68 NRC 229 (2008)

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-7, 21 NRC 1104, 1106 (1985)
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Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-80-8, 11 NRC 297, 307 (1980)
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Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 22 (1978)
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Montrose Chemical Corp. v. Train, 491 F.2d 63, 70 (D.C. Cir. 1974)
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Nader v. NRC, 513 F.2d 1045, 1051 (1975)
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Naragansett Indian Tribe v. Warwick Sewer Authority, 334 F.3d 161 (1st Cir. 2003)
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National Aeronautics and Space Administration v. Federal Labor Relations Authority, 527 U.S. 229, 235 (1999)
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National Credit Union Administration v. First National Bank, 522 U.S. 479, 492 (1998)
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National Maritime Union v. Commander, Military Sealift Command, 824 F.2d 1228, 1231 (D.C. Cir. 1987)
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National Whistleblower Center v. NRC, 208 F.3d 256 (D.C. Cir. 2000), *cert. denied,* 531 U.S. 1070 (2001)
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North Anna Environmental Coalition v. NRC, 533 F.2d 655, 665 (D.C. Cir. 1976)
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North Anna Environmental Coalition v. NRC, 533 F.2d 655, 667 (D.C. Cir. 1975)
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a board recommends that serious consideration should be given to revising the language of hearing notices in enforcement cases to go beyond the somewhat euphemistic reference to the scope of the proceeding as being whether the confirmatory order should be sustained; LBP-08-14, 68 NRC 292 n.74 (2008)
Nuclear Management Co., LLC (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 753 (2005)
applicant is required to analyze only discrete energy sources as alternatives; LBP-08-13, 68 NRC 96 (2008)
the National Environmental Policy Act does not require consideration of every conceivable alternative; LBP-08-13, 68 NRC 92, 95 (2008)
when the goal of a proposed action is the renewal of the operating licenses that allow production of approximately 2158 MWe of baseload power, the environmental report does not have to consider in detail alternatives that do not meet this goal; LBP-08-13, 68 NRC 90 (2008)

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Nuclear Management Co., LLC (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 753 n.83 (2005)
when a private entity and not a federal agency is sponsoring a project, significant weight should be given to the preferences of the sponsor in the consideration of alternatives; LBP-08-13, 68 NRC 91 (2008)
Nuclear Management Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 730 (2006)
information first submitted in petitioners' reply constitutes an untimely attempt to supplement a contention; LBP-08-26, 68 NRC 919 (2008)
Nuclear Management Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)
a reply cannot be used to substantively supplement or amend a contention; LBP-08-16, 68 NRC 407 (2008); LBP-08-18, 68 NRC 542 (2008)
allowing new claims in a reply would unfairly deprive other participants of an opportunity to rebut the new claims supportive of contentions; CLI-08-19, 68 NRC 261 (2008)
replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it; CLI-08-19, 68 NRC 262 n.32 (2008); LBP-08-26, 68 NRC 919 (2008)
the initial contention must meet the requirements of 10 C.F.R. 2.309(f)(1)(i)-(vi) and may not be substantively supplemented in a reply; LBP-08-18, 68 NRC 540 (2008)
the proper purpose of a reply is to discuss alleged deficiencies in a petition, not to try to fix them; LBP-08-17, 68 NRC 457 (2008)
Nuclear Management Co., LLC (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139, 141-42 (2007)
the National Environmental Policy Act does not require the analysis of potential terrorist attacks on a proposed nuclear facility outside the jurisdiction of the Ninth Circuit; LBP-08-21, 68 NRC 567-68 n.12 (2008)
Nuclear Management Co., LLC (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 329 (2006)
boards will not consider anything in intervention petitioner's reply that does not focus on the matters raised in the applicant's and NRC Staff's answers; LBP-08-26, 68 NRC 919 (2008)
Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18 (1st Cir. 2007)
to establish an injury in fact, a party merely has to show some threatened concrete interest personal to the party that the National Historic Preservation Act was designed to protect; LBP-08-24, 68 NRC 714 (2008)
Oglala Sioux Tribe v. Army Corps of Engineers, 537 F. Supp. 2d 161 (D.D.C. 2008)
the argument that the Oglala Sioux people continue to raise that the terms of the 1868 Fort Laramie Treaty are still effective has failed; LBP-08-24, 68 NRC 712 n.102 (2008)
Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. Homestake Mining Co., 722 F.2d 1407 (8th Cir. 1983)
the argument that the Oglala Sioux people continue to raise that the terms of the 1868 Fort Laramie Treaty are still effective has failed; LBP-08-24, 68 NRC 712 n.102 (2008)
Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States, 650 F.2d 140 (8th Cir. 1981)
the argument that the Oglala Sioux people continue to raise that the terms of the 1868 Fort Laramie Treaty are still effective has failed; LBP-08-24, 68 NRC 712 n.102 (2008)
Okanogan Highlands Alliance v. Williams, 1999 WL 1029106, at *4-*5 (D. Or. Jan. 12, 1999), *aff'd on other grounds,* 236 F.3d 468 (9th Cir. 2000)
in assessing impacts, an agency may rely on other specialized agencies with jurisdiction to enforce related permits and measures; CLI-08-16, 68 NRC 227 n.32 (2008)
Owner-Operator Independent Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Administration, 494 F.3d 188, 203 (D.C. Cir. 2007)
to show that error was prejudicial, petitioner must indicate with reasonable specificity what portions of the documents it objects to and how it might have responded if given the opportunity and must show that on remand it can mount a credible challenge and was thus prejudiced by the absence of an opportunity to do so before the agency; CLI-08-28, 68 NRC 677 n.76 (2008)
Pa'ina Hawaii, LLC, CLI-08-3, 67 NRC 151, 168 n.73 (2008)
the focus of a hearing on a proposed licensing action is the adequacy of the application to support the licensing action, not the nature of the NRC Staff's review; CLI-08-17, 68 NRC 237, 242 (2008)

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Pa'ina Hawaii, LLC, CLI-08-4, 67 NRC 171, 172 (2008)
it is appropriate for the Commission to take *sua sponte* review of a claim that raises a threshold legal question going to the proper scope of this proceeding, and a matter with potential new significant National Environmental Policy Act implications for NRC; CLI-08-16, 68 NRC 222 (2008)
whether the National Environmental Policy Act requires NRC to consider potential health effects of consuming irradiated food raises the kind of broad legal question appropriate for Commission interlocutory review; CLI-08-16, 68 NRC 222 (2008)

Pa'ina Hawaii, LLC, LBP-06-12, 63 NRC 403, 413 (2006), *petition for reconsideration denied,* CLI-06-25, 64 NRC 128 (2006)
a contention of omission is one that claims that the application fails to contain information on a relevant matter as required by law and provides the supporting reasons for the petitioner's belief; LBP-08-15, 68 NRC 314 (2008)

Pa'ina Hawaii, LLC, LBP-06-12, 63 NRC 403, 414 (2006), *petition for reconsideration denied,* CLI-06-25, 64 NRC 128 (2006)
a contention that challenges the legal sufficiency of the license application is within the scope of the proceeding; LBP-08-15, 68 NRC 315 (2008)
any contention that identifies deficiencies in an application and provides supporting reasons for its position presents a genuine dispute with the applicant on a material issue; LBP-08-15, 68 NRC 319 (2008)
the basis of a contention can be adequately explained by identifying the regulation that requires the applicant to satisfy a particular obligation; LBP-08-15, 68 NRC 314 (2008)
the pleading requirements of 10 C.F.R. 2.309(f)(1)(v), calling for a recitation of facts or expert opinion supporting the issue raised, are inapplicable to a contention of omission beyond identifying the regulatively required missing information; LBP-08-15, 68 NRC 317 (2008); LBP-08-26, 68 NRC 932 n.183 (2008)

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 14 NRC 629 (1981)
although Subpart I rules have been used in very few cases to disclose classified information in contested licensing proceedings, in those cases the information was necessary to evaluate challenges to the agency's compliance with security requirements in the Atomic Energy Act, not the National Environmental Policy Act; CLI-08-26, 68 NRC 523 (2008)

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983)
proponents of motions to reopen the record bear a heavy burden; LBP-08-12, 68 NRC 15 (2008)

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, 577, *review declined,* CLI-84-14, 20 NRC 285 (1984)
the preponderance of the evidence standard applies in a license renewal proceeding; LBP-08-22, 68 NRC 646 (2008)
to prevail on factual issues, the position must be supported by a preponderance of the evidence; CLI-08-26, 68 NRC 521 n.64 (2008)

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 337 (2002)
the Commission will not accept cursory arguments regarding standing; CLI-08-19, 68 NRC 265 (2008)

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 30 (2003)
Commission policy is to resolve adjudications promptly; CLI-08-19, 68 NRC 262 (2008)

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993)
contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-08-16, 68 NRC 383 (2008)

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 37 (1993)
state utility commissions may be allowed to participate as nonparty interested states; LBP-08-15, 68 NRC 304 n.44 (2008)

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Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237 (2002)
some motions are best addressed by the Commission pursuant to its inherent supervisory authority over agency proceedings; CLI-08-23, 68 NRC 476 (2008)
Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 238 (2002)
requests to suspend proceedings or hold them in abeyance in the exercise of the Commission's inherent supervisory powers over proceedings in the wake of the September 11 terrorist attacks pending completion of the Commission's comprehensive review of anti-terrorist measures at licensed facilities were rejected; CLI-08-23, 68 NRC 485 (2008)
Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 239 (2002)
if the post-9/11 security review had resulted in security enhancements for spent fuel storage facilities, those enhancements could be implemented even after the license issued; CLI-08-23, 68 NRC 485 (2008)
Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 240 (2002)
Staff is expected over the period of license renewal to require, as appropriate, any modification to systems, structures, or components that is necessary to ensure adequate protection of the public health and safety, or to bring the facility into compliance with a license or with the rules and orders of the Commission; CLI-08-23, 68 NRC 485 (2008)
Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-12, 58 NRC 185, 191 (2003)
the materiality requirement dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment; LBP-08-16, 68 NRC 385 (2008)
Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002)
intervention petitioners must show deficiencies or errors in the license renewal application and must establish a significant link between such claimed deficiencies and either the health and safety of the public or the environment; LBP-08-24, 68 NRC 725 (2008)
Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-12, 58 NRC 185, 191 (2003)
the materiality requirement dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment; LBP-08-16, 68 NRC 385 (2008)
Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705-07 (1985)
the adjudicatory record, the board decision, and any Commission appellate decisions become, in effect, part of the final environmental impact statement; CLI-08-26, 68 NRC 527 n.87 (2008)
Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-834, 23 NRC 263, 264 (1986)
movants who seek to reopen the record must proffer a contention that raises a significant safety issue; LBP-08-12, 68 NRC 16 (2008)
Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 494 (1986)
key safety issues must be resolved in the hearing, not post-hearing by the Staff and applicant; LBP-08-25, 68 NRC 829 (2008)
Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds,* CLI-74-32, 8 AEC 217 (1974)
the adjudicatory process is not the proper venue for the evaluation of a petitioner's own view regarding the direction regulatory policy should take; LBP-08-13, 68 NRC 64 (2008); LBP-08-16, 68 NRC 384 (2008)

the purpose of the contention rule is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-08-13, 68 NRC 61 (2008); LBP-08-15, 68 NRC 312 n.77 (2008); LBP-08-26, 68 NRC 915 (2008)

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)

any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the Commission's regulatory process must be rejected; LBP-08-13, 68 NRC 64 (2008); LBP-08-26, 68 NRC 916 (2008)

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 & n.33, *aff'd in part on other grounds,* CLI-74-32, 8 AEC 217 (1974)

contentions that attack applicable statutory requirements, challenge the basic structure of the NRC's regulatory process, or merely express generalized policy grievances are not appropriate for a licensing board hearing; LBP-08-16, 68 NRC 384 (2008); LBP-08-17, 68 NRC 440 (2008)

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 n.33 (1974)

the adjudicatory process is not the proper venue to hear any contention that merely addresses petitioner's own views on regulatory policy; LBP-08-26, 68 NRC 916 (2008)

Pit River Tribe v. United States Forest Service, 469 F.3d 768, 787 (9th Cir. 2006)

historic properties of religious and cultural significance are frequently located on ancestral, aboriginal, or ceded lands of Indian tribes, and federal agencies should consider that when complying with the procedures in 10 C.F.R. Part 800; LBP-08-24, 68 NRC 722 n.161 (2008)

Pittsburgh & W. Va. Ry. v. United States, 281 U.S. 479, 486 (1930)

because federal agencies are neither constrained by Article III nor governed by judicially created standing doctrines, the criteria for establishing administrative standing therefore may permissibly be less demanding than the criteria for judicial standing; LBP-08-24, 68 NRC 702 n.32 (2008)

Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied sub nom. Portland Cement Association v. Administrator, Environmental Protection Agency,* 417 U.S. 921 (1974)

''materiality'' requires that petitioner show why the alleged error or omission is of possible significance to the result of the proceeding; LBP-08-13, 68 NRC 62 (2008)

Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976)

standing requirements in the federal courts need not be the exclusive model for those applicable to administrative proceedings; CLI-08-19, 68 NRC 265 (2008)

Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-15 (1976)

federal courts have long recognized the right of agencies to tailor their own standing requirements to fit their specific needs; CLI-08-19, 68 NRC 265 (2008)

Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979)

any contention that falls outside the specified scope of the proceeding must be rejected; LBP-08-13, 68 NRC 62 (2008); LBP-08-15, 68 NRC 314 (2008); LBP-08-16, 68 NRC 384 (2008); LBP-08-26, 68 NRC 916 (2008)

Potomac Alliance v. NRC, 682 F.2d 1030, 1036-37 (D.C. Cir. 1982)

petitioner contends that NRC's assertion that the risk of an attack is not quantifiable does not preclude further consideration under the National Environmental Policy Act; LBP-08-13, 68 NRC 214 (2008)

Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974)

a contention that attacks a Commission rule, or that seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible; LBP-08-16, 68 NRC 383 (2008)

Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 286 n.1 (2000)

license transfer applicants who have received Staff approval but are still awaiting the results of a Commission adjudication are free to act in reliance on the Staff's order but do so at their peril in the event that the Commission later determines that intervenors have raised valid objections to the license transfer application; CLI-08-19, 68 NRC 257 (2008)

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Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000)
- any organization seeking representational standing must show that at least one of its members may be affected by the Commission's approval of the transfer, must identify that member by name, and must demonstrate that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf; CLI-08-19, 68 NRC 259 (2008)
- petitioners in direct license transfer cases who qualified for proximity-based standing lived within a 5-1/2-mile radius of their plant; CLI-08-19, 68 NRC 269 (2008)
- to demonstrate standing, petitioner must identify an interest in the proceeding and specify the facts pertaining to that interest; CLI-08-19, 68 NRC 258 (2008)

Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293-94 (2000)
- the principle regarding the representational standing of unions is also applicable to public interest groups, who also, in significant part, exist to represent the interests of their members; CLI-08-19, 68 NRC 265 n.48 (2008)

Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 294 (2000)
- requirements for representational standing apply to labor unions; CLI-08-19, 68 NRC 263 (2008)

Power Authority of the State of New York (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 296 (2000)
- unlike federal court practice, the Commission does not accept mere notice pleading in support of an admissible contention; LBP-08-24, 68 NRC 730 (2008)

Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 508 (2001)
- license transfer applicants who have received Staff approval but are still awaiting the results of a Commission adjudication are free to act in reliance on the Staff's order but do so at their peril in the event that the Commission later determines that intervenors have raised valid objections to the license transfer application; CLI-08-19, 68 NRC 257 (2008)

Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396, 414 (1961)
- neither the Atomic Energy Act nor the regulations require totally risk-free siting; LBP-08-22, 68 NRC 647 (2008)
- ''reasonable assurance'' should not require a ''compelling reasons'' standard; LBP-08-22, 68 NRC 647 (2008)

PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 104 (2007)
- the Commission gives substantial deference to board conclusions on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion; CLI-08-17, 68 NRC 234 (2008)

PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 106 (2007)
- a contention that simply states petitioner's views about what regulatory policy should be does not present a litigable issue; LBP-08-16, 68 NRC 384 (2008)

PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 9 (2007)
- intervention petitioner must show an obvious potential for offsite consequences from the requested action that would justify recognizing any proximity presumption, much less one extending over 100 miles from the plant site; LBP-08-18, 68 NRC 537 (2008)
- petitioner must show a plausible chain of events that would result in offsite radiological consequences posing a distinct new harm or threat from a purely administrative license amendment; LBP-08-18, 68 NRC 537 (2008)

PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 9-10 (2007)
- contentions that fail to satisfy the pleading requirements of 10 C.F.R. 2.309(f)(1) are inadmissible; LBP-08-18, 68 NRC 538 (2008)

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PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 14 (2007)
the proximity presumption extends to petitioners living in or having frequent contacts with an area within a 50-mile radius of a nuclear reactor; LBP-08-18, 68 NRC 539 (2008)
PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 14-15 (2007)
licensing boards have used a proximity presumption when resolving issues of standing for cases involving reactor licensing; LBP-08-14, 68 NRC 290 (2008)
PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 15 (2007)
petitioner's vague assertion that harm could result from operations at a nuclear power plant and failure to demonstrate that such injury would result from the challenged license amendment are insufficient to establish standing; LBP-08-18, 68 NRC 537 (2008)
PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 19 n.9 (2007)
the better practice for an intervention petitioner is to submit a fully developed showing regarding standing in each proceeding in which it seeks to intervene, regardless of whether it has previously been found to have standing relative to the facility that is the locus of the proceedings; LBP-08-24, 68 NRC 703 (2008)
PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 302 (2007)
it is appropriate for a board to take into account any information from a reply that legitimately amplifies issues presented in the original petition; LBP-08-26, 68 NRC 919 (2008)
it is proper for a reply to respond to the legal, logical, and factual arguments presented in answers, as long as new issues are not raised; LBP-08-26, 68 NRC 919 (2008)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30-31 (1998), *petition for review held in abeyance, Ohngo Gaudadeh Devia v. NRC,* 492 F.3d 421 (D.C. Cir. 2007)
an organization's member seeking representation must qualify for standing in his or her own right, the interests must be germane to the organization's purpose, and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action; CLI-08-19, 68 NRC 259 (2008)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999)
an organization's member seeking representation must qualify for standing in his or her own right, the interests must be germane to the organization's purpose, and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action; CLI-08-19, 68 NRC 259 (2008)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)
failure to comply with any of the contention admission requirements is grounds for the dismissal of a contention; LBP-08-13, 68 NRC 61 (2008); LBP-08-14, 68 NRC 288 (2008); LBP-08-15, 68 NRC 312 (2008); LBP-08-16, 68 NRC 383 (2008); LBP-08-24, 68 NRC 716 (2008); LBP-08-26, 68 NRC 915 (2008)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001)
although NRC guidance documents are entitled to some weight, they do not have the force of a legally binding regulation and, like any guidance document, may be challenged in an adjudicatory proceeding such as this one; LBP-08-22, 68 NRC 614, 648 n.283 (2008)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376 (2001)
requests to suspend proceedings or hold them in abeyance in the exercise of our inherent supervisory powers over proceedings in the wake of the September 11 terrorist attacks pending the Commission's comprehensive review of anti-terrorist measures at licensed facilities were rejected; CLI-08-23, 68 NRC 485 (2008)

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Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 153 (2002)
the essence of an environmental justice claim under the National Environmental Policy Act is disparate environmental harm to a minority or low-income population; LBP-08-13, 68 NRC 199 (2008)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002)
the National Environmental Policy Act imposes no legal duty on NRC to consider intentional malevolent acts on a case-by-case basis in conjunction with commercial power reactor license renewal applications; LBP-08-13, 68 NRC 142 (2008)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004)
petitioner does not have to prove its contention at the admissibility stage; LBP-08-13, 68 NRC 63 (2008); LBP-08-15, 68 NRC 335 (2008); LBP-08-17, 68 NRC 441 (2008); LBP-08-26, 68 NRC 917 (2008)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005)
a board's review of the expert opinion provided by NRC Staff supports the board's conclusion that a significant safety issue is not presented on the record; LBP-08-12, 68 NRC 20 n.12 (2008)
a party seeking to reopen a closed record to raise a new matter faces an elevated burden to lay a proper foundation for its claim; LBP-08-12, 68 NRC 16 (2008)
in evaluating a motion to reopen the record, a licensing board properly considers the movant's new allegations and the nonmovant's contrary evidence in determining whether there was a real issue at stake warranting a reopened hearing; LBP-08-12, 68 NRC 16 (2008)
new information required to reopen a closed hearing record at the last minute must be significant and plausible enough to require reasonable minds to inquire further; CLI-08-28, 68 NRC 668 (2008)
the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention; CLI-08-28, 68 NRC 668 (2008)
to reopen a closed record to introduce a new issue, the movant has the burden of showing that the new information will likely trigger a different result; LBP-08-12, 68 NRC 22, 23 (2008)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005)
if standards for reopening were not strict and demanding, there would be little hope of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings; CLI-08-28, 68 NRC 668 n.38 (2008); LBP-08-12, 68 NRC 15 (2008)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 355 (2005)
a motion to reopen is denied because the new contention is much too thinly supported to conclude that taking it to a hearing would likely cause a different result; LBP-08-12, 68 NRC 23 (2008)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 21-23 (2006)
where newly discovered evidence relates to a contention that already has been decided adversely to the movant, the movant must demonstrate that the outcome of the adjudication would likely have been materially different had the tribunal considered the new evidence in the first instance; LBP-08-12, 68 NRC 22 (2008)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998), *aff'd in part,* CLI-98-13, 48 NRC 26 (1998)
the purpose of NRC adjudicatory hearings is to consider claims of deficiencies in a license application, and such contentions are commonplace at the outset of NRC adjudications; CLI-08-15, 68 NRC 3 (2008); CLI-08-20, 68 NRC 274 (2008)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998)
contentions that advocate more stringent requirements than the NRC rules impose or that otherwise seek to litigate a generic determination that the Commission has established by rulemaking, or that raise a matter that is or is about to become the subject of rulemaking are barred; LBP-08-17, 68 NRC 441 (2008)

in establishing materiality of a contention, petitioner must show why the alleged error or omission is of possible significance to the result of the proceeding; LBP-08-15, 68 NRC 315 (2008); LBP-08-26, 68 NRC 916 (2008)
petitioner does not need to prove its contention at the admission stage; LBP-08-13, 68 NRC 127 (2008)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80 (1998), *aff'd as to other matters,* CLI-98-13, 48 NRC 26 (1998)
the subject matter of a contention must impact the grant or denial of a pending license application; LBP-08-15, 68 NRC 315 (2008); LBP-08-26, 68 NRC 916 (2008)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998), *aff'd as to other matters,* CLI-98-13, 48 NRC 26 (1998)
there must be some significant link between the deficiency claimed in a contention and the agency's ultimate determination whether the license applicant will adequately protect the health and safety of the public and the environment; LBP-08-15, 68 NRC 315 (2008); LBP-08-26, 68 NRC 916 (2008)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226, 231 (2000)
for filing new contentions, boards have generally established a deadline of 30 days to be timely after the receipt of new information; LBP-08-12, 68 NRC 33 n.2 (2008)

Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1 (2008)
the purpose of NRC adjudicatory hearings is to consider claims of deficiencies in a license application, and such contentions are commonplace at the outset of NRC adjudications; CLI-08-20, 68 NRC 274 (2008)

Public Citizen v. Foreman, 631 F.2d 969, 972 (D.C. Cir. 1980)
a food additive is presumed to be unsafe until demonstrated otherwise; CLI-08-16, 68 NRC 224 (2008)

Public Citizen v. Traffic Safety Administration, 848 F.2d 256, 268 (D.C. Cir. 1988)
an agency can presume that increases in emissions that still fall within Clean Air Act limits will be insignificant; CLI-08-16, 68 NRC 227 n.32 (2008)

Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978)
key safety issues must be resolved in the hearing, not post-hearing by NRC Staff and applicant; LBP-08-25, 68 NRC 829 (2008)

Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991)
in determining whether an individual or organization should be granted party status in a proceeding based on standing ''as of right,'' the agency has applied contemporaneous judicial standing concepts; LBP-08-26, 68 NRC 911 (2008)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 16, *aff'd,* CLI-88-10, 28 NRC 573, 597 (1988), *reconsideration denied,* CLI-89-3, 29 NRC 234 (1989)
waiver of a rule can be granted only in unusual and compelling circumstances; LBP-08-17, 68 NRC 440 n.34 (2008)

' Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC,* 924 F.2d 311 (D.C. Cir.), *cert. denied,* 502 U.S. 899 (1991)
although licensing boards generally are to litigate a ''contention'' rather than the ''basis'' that provides the issue statement's foundational support, the reach of a contention necessarily hinges upon its terms coupled with its stated basis; LBP-08-13, 68 NRC 61 (2008); LBP-08-16, 68 NRC 386 (2008)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 431-32 (1989)
boards review the education, experience, and qualifications of the individuals offering expert opinions on behalf of the litigants to conclude that these individuals qualify as experts; LBP-08-12, 68 NRC 17 n.10 (2008)

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Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 432 (1989)
the Commission expects its adjudicatory boards to enforce reopening requirements rigorously; LBP-08-12, 68 NRC 28 (2008)
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 432-33 (1989)
discovery is not permitted for the purpose of developing a motion to reopen the record or to assist a petitioner in the framing of contentions; LBP-08-12, 68 NRC 27 n.23 (2008)
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 433 (1989)
the burden of satisfying the reopening requirements is on the movant; CLI-08-28, 68 NRC 675 (2008)
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-940, 32 NRC 225, 243 (1990)
movants who seek to reopen the record must proffer a contention that raises a significant safety issue; LBP-08-12, 68 NRC 16 (2008)
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 416-17 (1990)
it is not the responsibility of the licensing board to supply the basis information necessary to sustain a contention; LBP-08-24, 68 NRC 742 (2008)
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 28 (1978)
the permitting agency for the Clean Water Act determines the cooling system required at a facility, and the NRC Staff factors the impacts that result from the use of that system into its National Environmental Policy Act analysis; LBP-08-13, 68 NRC 157 n.708 (2008)
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989)
petitioner may not simply incorporate massive documents by reference as the basis for or as a statement of his contentions; LBP-08-21, 68 NRC 570 n.15 (2008)
the Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point; LBP-08-24, 68 NRC 730 (2008)
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483 (1990)
timeliness as measured under NRC regulations is from the point at which new information is discovered relevant to the question; LBP-08-12, 68 NRC 32 (2008)
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487 (1990)
a movant who seeks to reopen the record does not show the existence of a significant safety issue merely by showing that a plant component performs safety functions and thus has safety significance; CLI-08-28, 68 NRC 672 (2008); LBP-08-12, 68 NRC 18, 35 (2008)
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 221 (1990)
proponents of a reopening motion bear the burden of meeting all the requirements for reopening as well as the requirements for late-filed contentions set out in section 2.309(c); CLI-08-28, 68 NRC 669 (2008)
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 222 (1990)
a board's review of the expert opinion provided by NRC Staff supports the board's conclusion that a significant safety issue is not presented on the record; LBP-08-12, 68 NRC 20 n.12 (2008)
the Commission weighs the competing evidence in concluding that a motion to reopen does not present a question of safety significance; LBP-08-12, 68 NRC 16 (2008)
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 223 (1990)
where a matter as presented is devoid of safety significance, there is no likelihood whatsoever that a materially different result would have been likely had the newly proffered evidence been considered initially; LBP-08-12, 68 NRC 23 n.17 (2008)

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Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982)
- any contention that amounts to an attack on applicable regulatory requirements must be rejected; LBP-08-26, 68 NRC 916 (2008)
- any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the Commission's regulatory process must be rejected; LBP-08-13, 68 NRC 64 (2008)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982)
- determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits; LBP-08-13, 68 NRC 63 (2008)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982)
- contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-08-16, 68 NRC 383 (2008)

Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487 (1973)
- petitioners that are not represented by counsel will be held to less rigid standards for pleading, although a totally deficient petition will not be admitted; LBP-08-15, 68 NRC 320 (2008)

Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973)
- the Commission's longstanding policy is for boards to provide latitude to pro se participants in their pleadings; LBP-08-16, 68 NRC 400 (2008)

Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998), *petition for review denied, Envirocare of Utah, Inc. v. NRC,* 194 F.3d 72 (D.C. Cir. 1999)
- the breadth of the applicable zone of interests will vary according to the particular statutory provisions at issue; LBP-08-24, 68 NRC 702 n.33 (2008)

Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 n.2 (1998), *petition for review denied, Envirocare of Utah, Inc. v. NRC,* 194 F.3d 72 (D.C. Cir. 1999)
- although the Commission customarily follows judicial concepts of standing, it is not bound to do so given that it is not an Article III court; LBP-08-24, 68 NRC 701-02 n.32 (2008)

Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Department of Agriculture, 415 F.3d 1078, 1103 (9th Cir. 2005)
- although the National Environmental Policy Act states its goals in sweeping terms of human health and welfare, these goals are ends that Congress has chosen to pursue by means of protecting the physical environment; CLI-08-16, 68 NRC 228 (2008)
- if a harm does not have a sufficiently close connection to the physical environment, the National Environmental Policy Act does not apply, regardless of the gravity of the harm; CLI-08-16, 68 NRC 229 (2008)
- the National Environmental Policy Act encompasses effects on health only when they are linked to a change in the environment; CLI-08-16, 68 NRC 228 (2008)
- the National Environmental Policy Act zone of interests does not encompass potential increased risk of ''mad cow'' disease from resumed importation of Canadian beef because asserted injury was not connected to injury to the physical environment; CLI-08-16, 68 NRC 228 (2008)

Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Department of Agriculture, 415 F.3d 1078, 1103-04 (9th Cir. 2005)
- to be encompassed by the National Environmental Policy Act, there needs to be a reasonably close causal relationship between a change in the physical environment and the effect at issue; CLI-08-16, 68 NRC 228 (2008)

Redland Soccer Club v. Department of the Army, 55 F.3d 827, 854 (3d Cir. 1995), *cert. denied,* 516 U.S. 1071 (1996)
- to overcome deliberative process privilege, petitioners have to show that their need for the information outweighs potential harm to the agency from that disclosure; CLI-08-23, 68 NRC 483 n.103 (2008)

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Reyes-Gaona v. North Carolina Growers Association, 250 F.3d 851, 865 (4th Cir. 2001)
the doctrine of *expressio unis est exclusio alterius* instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded; LBP-08-24, 68 NRC 759 (2008)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 339 (1989)
the goals of the National Environmental Policy Act are to inform federal agencies and the public about the environmental effects of proposed projects; LBP-08-13, 68 NRC 199 (2008)

Rulemaking Hearing: Acceptance Criteria for Emergency Core Cooling Systems for Light-Water-Cooled Nuclear Power Reactors, CLI-73-39, 6 AEC 1085, 1091 (1973)
protection against a highly unlikely loss-of-coolant accident has long been an essential part of the defense-in-depth concept used by the nuclear power industry and the AEC to ensure the safety of nuclear power plants; LBP-08-12, 68 NRC 40 (2008)

Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 144-45 (1993)
applicant in its environmental report need only consider the range of alternatives that are capable of achieving the goal of the proposed action; LBP-08-13, 68 NRC 92, 95, 204 (2008)

Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined,* CLI-94-2, 39 NRC 91 (1994)
any contention that fails to controvert the application directly, or that mistakenly asserts the application fails to address an issue that the application does address, is defective; LBP-08-13, 68 NRC 64 (2008); LBP-08-16, 68 NRC 386 (2008); LBP-08-17, 68 NRC 441 (2008); LBP-08-26, 68 NRC 918 (2008)

Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 249 (1993), *petition for review denied,* CLI-94-2, 39 NRC 91 (1994)
the asserted harm for standing need not be great and a showing for standing has always been considerably less than for demonstrating an acceptable contention; LBP-08-24, 68 NRC 705 (2008)

San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016 (9th Cir. 2006), *cert. denied sub. nom., Pacific Gas and Electric Co. v. San Luis Obispo Mothers for Peace,* 127 S. Ct. 1124 (2007)
NRC is required to consider aircraft attacks by terrorists; LBP-08-21, 68 NRC 567 (2008)
under the National Environmental Policy Act the NRC must consider the environmental consequences of a terrorist attack; LBP-08-13, 68 NRC 141 (2008)

San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1031-32, 1034-35 (9th Cir. 2006)
the value of qualitative analysis and the importance of protecting sensitive, security-related information has been recognized; CLI-08-26, 68 NRC 525 (2008)

Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942)
the trust responsibility imposes a fiduciary duty on NRC, as a federal agency, to the Tribe and its members; LBP-08-24, 68 NRC 742 (2008)

Sequoyah Fuels Corp., CLI-95-2, 41 NRC 179, 190 (1995)
unreviewed licensing board decisions carry no precedential weight; CLI-08-19, 68 NRC 263 (2008)

Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 19-20 (2001)
the Commission declined to exercise pendent jurisdiction where the challenged interlocutory issues were not inextricably intertwined with the two immediately appealable issues; CLI-08-27, 68 NRC 657 (2008)

Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994)
a licensing board's review of a petition for standing is to avoid the familiar trap of confusing the standing determination with the assessment of a petitioner's case on the merits; LBP-08-24, 68 NRC 708 (2008)

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 n.2 (1994)
although the Commission abolished the Atomic Safety and Licensing Appeal Board in 1991, its decisions still carry precedential weight; CLI-08-19, 68 NRC 260 n.23 (2008)

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994)
petitioners are not required to demonstrate their asserted injury with certainty, or to provide extensive technical studies in support of their standing argument; LBP-08-24, 68 NRC 708 (2008)

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vague assertions of possible harm do not amount to a showing of concrete and particularized injury to petitioner's interests that is actual or imminent, not conjectural or hypothetical; LBP-08-18, 68 NRC 537 (2008)

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 74 (1994)

it is enough that petitioner has demonstrated a realistic threat of sustaining a direct injury as a result of contaminated groundwater flowing from the site at issue to his property to establish standing; LBP-08-24, 68 NRC 709 n.73 (2008)

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994)

a determination that an injury is fairly traceable to the challenged action does not depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible; LBP-08-24, 68 NRC 709 (2008)

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)

in power reactor license proceedings, proximity within 50 miles of a plant is often enough on its own to demonstrate standing; LBP-08-24, 68 NRC 703 (2008)

licensing boards have used a proximity presumption when resolving issues of standing for cases involving materials licenses; LBP-08-14, 68 NRC 290 (2008)

the proximity presumption extends to petitioners living in or having frequent contacts with an area within a 50-mile radius of a nuclear reactor; LBP-08-18, 68 NRC 539 (2008)

Shaw AREVA MOX Services (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 181 (2007)

although pro se intervenors must be afforded some latitude in their pleadings, the board expects that an organization that has appeared several times previously will have a heightened awareness of the agency's pleading rules; LBP-08-16, 68 NRC 405-06 (2008)

Shaw AREVA MOX Services (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 183 (2007)

representational standing requires a demonstration that one or more of an organization's members would otherwise have standing to intervene on their own, and that the identified members have authorized the organization to request a hearing on their behalf; LBP-08-15, 68 NRC 303 (2008)

to demonstrate organizational standing, petitioner must show injury in fact to the interests of the organization itself; LBP-08-15, 68 NRC 302-303 (2008)

Shaw AREVA MOX Services (Mixed Oxide Fuel fabrication Facility), LBP-07-14, 66 NRC 169, 205-06 (2007)

a defect in an application can give rise to a valid contention of omission that is not subject to rejection as speculative; LBP-08-13, 68 NRC 87 n.194 (2008); LBP-08-24, 68 NRC 720 n.148 (2008)

Shaw AREVA MOX Services (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 210 n.95 (2007)

when new contentions are based on breaking developments of information, they are to be treated as new or amended, not as nontimely; LBP-08-27, 68 NRC 955 (2008)

Shaw AREVA MOX Services (Mixed Oxide Fuel fabrication Facility), LBP-08-11, 67 NRC 460, 502-03 (2008)

a defect in an application can give rise to a valid contention of omission that is not subject to rejection as speculative; LBP-08-13, 68 NRC 87 n.194 (2008)

Shieldalloy Metallurgical Corp. (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999)

petitioners that are not represented by counsel will be held to less rigid standards for pleading, although a totally deficient petition will not be admitted; LBP-08-15, 68 NRC 320 (2008); LBP-08-16, 68 NRC 400 (2008)

Siegel v. AEC, 400 F.2d 778, 784 (D.C. Cir. 1968)

Congress's intent in limiting foreign control of nuclear materials is to keep such materials in private hands secure against loss or diversion and of denying such materials and classified information to persons whose loyalties are not to the United States; LBP-08-24, 68 NRC 752 n.345 (2008)

Sierra Club v. Morton, 405 U.S. 727 (1972)

for an organizational petitioner to establish standing, it must show immediate or threatened injury to either its organizational interests or to the interest of identified members; LBP-08-24, 68 NRC 702 (2008)

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Sierra Nevada Forest Protection Campaign v. Weingardt, 376 F. Supp. 2d 984, 990 (E.D. Cal. 2005)
an environmental assessment is generally a shorter, less detailed document than an environmental impact statement; LBP-08-15, 68 NRC 309 (2008)

Snoqualmie Indian Tribe v. Federal Energy Regulatory Commission, 2008 WL 4478591 (9th Cir. 2008)
procedural violations of the National Historic Preservation Act have resulted in a grant of standing to tribes; LBP-08-24, 68 NRC 715 (2008)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253 (2007)
conclusory assertions and mere speculation are insufficient to support the admission of a contention; LBP-08-13, 68 NRC 20 (2008)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 257 (2007)
in its environmental report, applicant must provide enough information and in sufficient detail to allow for an evaluation of important impacts; LBP-08-16, 68 NRC 400 (2008)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 262 (2007)
to be admissible in a license renewal proceeding, an environmental justice contention must point to significant, adverse, environmental impacts that may result from the relicensing of a facility that will fall disproportionately on disadvantaged minority and low-income populations; LBP-08-13, 68 NRC 199 (2008)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 267-68 (2007)
challenges to NRC regulations are inadmissible; LBP-08-21, 68 NRC 587 (2008)
challenges to NRC's Waste Confidence rule are inadmissible; LBP-08-17, 68 NRC 456 (2008)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 269 & n.16 (2007)
a National Environmental Policy Act analysis is not the vehicle for exploring questions about the potential for a terrorist attack upon a proposed nuclear facility; LBP-08-16, 68 NRC 394 (2008)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 271-72 (2007)
petitioners' concerns about possible impacts of applicant's as-yet-to-be-completed strategic plan or a still-to-be-developed state energy plan are inappropriate bases for admitting a contention; LBP-08-16, 68 NRC 410-11 (2008)

Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998)
in all proceedings the stakeholders have an interest in efficient and expeditious resolution; CLI-08-23, 68 NRC 485 (2008)

Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998)
a contention's proponent, not the licensing board, is responsible for formulating the contention; LBP-08-17, 68 NRC 447 (2008)
dismissal of a party is an appropriate sanction in extreme cases where the party fails to provide legal and factual support for its arguments and assertions; CLI-08-29, 68 NRC 900 (2008)

Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 24 (1998)
Commission policy is to resolve adjudications promptly; CLI-08-19, 68 NRC 262 (2008)

Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981)
dismissal of a party falls within the spectrum of sanctions available to boards to assist in the management of proceedings, although dismissal should be reserved for severe cases; CLI-08-29, 68 NRC 900 (2008)
in assessing a penalty, boards are to consider, among other things, whether a participant's failure to meet an obligation is an isolated incident or a part of a pattern of behavior; CLI-08-29, 68 NRC 901 (2008)

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-04 (1998)
judicial concepts of standing require that a petitioner allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-08-13, 68 NRC 59 (2008); LBP-08-14, 68 NRC 286 (2008)

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System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005)
applicant's environmental report is deficient because it does not supply sufficient information from which the Commission may properly consider, and publicly disclose, environmental factors that may cause harm to minority and low-income populations that would be disproportionate to that suffered by the general population; LBP-08-13, 68 NRC 201 (2008)
the National Environmental Policy Act does not require that a federal agency take any particular action but it does require that the federal agency take a hard look at the environmental impact its proposed action could have before the action is taken, and to document what it has done; LBP-08-13, 68 NRC (2008)
petitioners in license renewal proceedings may properly raise environmental justice contentions seeking corrections of significant omissions from the applicant's environmental report; LBP-08-13, 68 NRC 199 (2008)
the purpose of an environmental justice review is to ensure that the Commission considers and publicly discloses environmental factors peculiar to minority or low-income populations that may cause them to suffer harm disproportionate to that suffered by the general population; LBP-08-13, 68 NRC 199 (2008)
System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 146-47 (2007)
the National Environmental Policy Act does not require the analysis of potential terrorist attacks on a proposed nuclear facility outside the jurisdiction of the Ninth Circuit; LBP-08-21, 68 NRC 567-68 n.12 (2008)
System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277, 296-97 (2004)
challenges to NRC regulations are inadmissible; LBP-08-21, 68 NRC 587 (2008)
challenges to NRC's Waste Confidence rule are inadmissible; LBP-08-17, 68 NRC 456 (2008)
System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), LBP-07-1, 65 NRC 27 (2007), *aff'd,* CLI-07-14, 65 NRC 216 (2007)
adequacy of Staff review is questioned by a licensing board; CLI-08-23, 68 NRC 473 (2008)
Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361 (2008)
novel issues warrant referral to the Commission for its immediate consideration; LBP-08-17, 68 NRC 436 (2008)
Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 395 (2008)
a contention that fails to provide any document that, read as a whole, supports its theory that uranium supplies will be insufficient to support the operation of the units during the licensed period is inadmissible; LBP-08-21, 68 NRC 574 (2008)
Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 416 (2008)
challenges to NRC's Waste Confidence rule are inadmissible; LBP-08-17, 68 NRC 456 (2008); LBP-08-23, 68 NRC 689 (2008)
Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 420-22 (2008)
challenges to NRC regulations are inadmissible; LBP-08-21, 68 NRC 587 (2008)
part of a contention relating to accuracy of cost data and its potential to affect the cost component of the alternatives analysis in applicant's environmental report is admissible; LBP-08-21, 68 NRC 577 n.26 (2008)
Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 352 (1978)
a licensing board decision may not be based on factual material that has not been introduced into evidence because it deprives opposing parties of an opportunity to impeach it by cross-examination or to rebut it with other evidence; LBP-08-12, 68 NRC 38 n.10 (2008)

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Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 360 (1978), *reconsideration denied,* ALAB-467, 7 NRC 459 (1978)
absent some special statutory standard of proof, factual issues are determined by a preponderance of the evidence; CLI-08-26, 68 NRC 521 n.64 (2008)

Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 204 (2004)
contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-08-16, 68 NRC 384 (2008)

Tesoro Hawaii Corp. v. United States, 405 F.3d 1339, 1346 (Fed. Cir. 2005)
the plain meaning of a regulation controls its interpretation; CLI-08-23, 68 NRC 483 (2008)

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992)
any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed; LBP-08-16, 68 NRC 386 (2008)

Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 94 (1983)
issuance of advisory opinions is generally disfavored by the Commission; CLI-08-21, 68 NRC (2008)

Time Warner Entertainment Co. L.P. v. Everest Midwest Licensee, L.L.C., 381 F.3d 1039, 1051 (10th Cir. 2004)
the plain meaning of a regulation controls its interpretation; CLI-08-23, 68 NRC 483 (2008)

Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732, 741 (3d Cir. 1982)
NRC cannot avoid its statutory responsibility under the National Environmental Policy Act merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment; LBP-08-13, 68 NRC 214 (2008)

U.S. Army (Jefferson Proving Ground Site), LBP-04-1, 59 NRC 27, 29 (2004)
where a petitioner is accorded standing in one proceeding, that petitioner need not make a separate demonstration of standing in another proceeding regarding that same facility and the same parties; LBP-08-24, 68 NRC 703 (2008)

U.S. Department of Energy (High-Level Waste Repository), CLI-04-32, 60 NRC 469, 473 (2004)
issuance of advisory opinions is generally disfavored by the Commission; CLI-08-21, 68 NRC 353 (2008)

U.S. Department of Energy (High-Level Waste Repository), CLI-06-5, 63 NRC 143 (2006)
the plain meaning of a regulation controls its interpretation; CLI-08-23, 68 NRC 483 (2008)

U.S. Department of Energy (High-Level Waste Repository), CLI-06-5, 63 NRC 143, 154 (2006)
the interpretation of a regulation, like the interpretation of a statute, begins with the language and structure of the provision itself and the entirety of the provision must be given effect; CLI-08-28, 68 NRC 674 (2008)

U.S. Enrichment Corp. (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272-73 (2001)
to determine whether an interest is in the zone of interests of a statute, it is necessary first to discern the interests arguably to be protected by the statutory provision at issue, and then to inquire whether the petitioner's interests affected by the agency action are among them; LBP-08-24, 68 NRC 702 (2008)

Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984)
awarding applicant a license now and allowing it to postpone the performance of the necessary analysis-of-record time-limited aging analysis is inconsistent with the language, structure, and intent of the Part 54 regulations and would violate the Intervenor's right under section 189a of the Atomic Energy Act to have a hearing on an issue material to the licensing decision; LBP-08-25, 68 NRC 824 (2008)

Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446 (D.C. Cir. 1984)
under the Atomic Energy Act, petitioners have a right to an adjudicatory hearing on any material public safety-related issue; LBP-08-25, 68 NRC 827 (2008)

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Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1448 (D.C. Cir. 1984)
the Atomic Energy Act's guarantee of a hearing on material issues does not unduly limit the Commission's wide discretion to structure its licensing hearings in the interests of speed and efficiency; CLI-08-28, 68 NRC 677 (2008)

Union of Concerned Scientists v. NRC, 880 F.2d 552, 558 (D.C. Cir. 1989)
''adequate protection'' may be given content through case-by-case applications of technical judgment and that Congress neither defined nor commanded the Commission to define it; LBP-08-22, 68 NRC 645 n.265 (2008); LBP-08-25, 68 NRC 787 n.26 (2008)
reasonable assurance does not denote a specific statistical parameter, but the standard is a flexible one that does not require focus on extreme values or precise quantification of parameters to a high degree of confidence; LBP-08-22, 68 NRC 645 (2008)

United Church of Christ v. Federal Communications Commission, 359 F.2d 994, 1005-06 (D.C. Cir. 1966)
agencies should be accorded broad discretion in establishing and applying rules for public participation, including rules for determining which community representatives are to be allowed to participate; CLI-08-19, 68 NRC 265 (2008)

United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 552 (1996)
a test for representational standing is applied to unions; CLI-08-19, 68 NRC 264 (2008)

United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 557 (1996)
the notion of associational standing is only one strand of the doctrine of representational standing; CLI-08-19, 68 NRC 264 (2008)

United States ex rel. Chunie v. Ringrose, 788 F.2d 638 (9th Cir. 1986)
Native Americans have tribal rights to, and interests in, aboriginal lands; LBP-08-24, 68 NRC 713 (2008)

*United States v. 29 Cartons of *** An Article of Food, Etc.,* 987 F.2d 33, 35 (1st Cir. 1993)
a food additive is presumed to be unsafe until demonstrated otherwise; CLI-08-16, 68 NRC 224 (2008)

United States v. AVX Corp., 962 F.2d 108, *passim* (1st Cir. 1992)
criteria for representational standing are applied to an environmental organization; CLI-08-19, 68 NRC 265 n.48 (2008)

United States v. Chase, 2005 WL 757259 (Jan. 10, 2005 D.C. Super. Ct.)
the term, ''reasonable assurance,'' is interpreted; LBP-08-22, 68 NRC 644 n.261 (2008)

United States v. Dion, 476 U.S. 734, 738 n.4 (1986)
a tribe member may assert treaty rights as an individual member of the tribe; LBP-08-24, 68 NRC 743 n.292 (2008)

United States v. Gemmill, 535 F.2d 1145, 1147 (9th Cir. 1976)
continuous and exclusive use of property is sufficient, unless duly extinguished, to establish Indian or aboriginal title; LBP-08-24, 68 NRC 712 n.103 (2008)

United States v. Mendoza, 464 U.S. 154, 160 (1984)
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United States v. Mitchell, 463 U.S. 206, 224 (1983)
the trust responsibility imposes a fiduciary duty on NRC, as a federal agency, to the Tribe and its members; LBP-08-24, 68 NRC 742 (2008)

United States v. Pend Oreille County Public Utility District No. 1, 585 F. Supp. 606 (D. Wash. 1984)
Native Americans have tribal rights to, and interests in, aboriginal lands; LBP-08-24, 68 NRC 713 (2008)

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)
licensing boards may not make a determination on treaty matters; LBP-08-24, 68 NRC 743 (2008)
the difference between ''aboriginal title'' and ''aboriginal lands is distinguished; LBP-08-24, 68 NRC 712-13 n.103 (2008)

United States v. Sioux Nation of Indians, 448 U.S. 371, 409-11 (1980)
the Tribe's hunting and fishing rights outside of the Pine Ridge Reservation were abrogated by the Black Hills Act of 1877; LBP-08-24, 68 NRC 744 n.299 (2008)

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United States v. Sioux Nation of Indians, 448 U.S. 371, 410-11 (1980)
plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government; LBP-08-24, 68 NRC 712 (2008)

United States v. Stauffer Chemical Co., 464 U.S. 165, 169 (1984)
collateral estoppel applies to another case involving virtually identical facts; LBP-08-24, 68 NRC 703 (2008)

United States v. Stauffer Chemical Co., 464 U.S. 165, 173 (1984)
NRC is not obligated to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question; LBP-08-13, 68 NRC 142 (2008)

United States v. Vogel Fertilizer Co., 455 U.S. 16, 26 (1982)
a regulation is not a reasonable statutory interpretation unless it harmonizes with the statute's 'origin and purpose; LBP-08-24, 68 NRC 752 n.343 (2008)

USEC Inc. (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311 (2005)
the Commission has long looked for guidance to judicial concepts of standing; CLI-08-19, 68 NRC 265 (2008)

USEC Inc. (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006)
the head of any federal agency shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to licensing undertakings on lands to which tribes ascribe cultural or religious significance; LBP-08-24, 68 NRC 722 n.164 (2008)
unlike federal court practice, the Commission does not accept mere notice pleading in support of an admissible contention; LBP-08-24, 68 NRC 730 (2008)

USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006)
petitioners may not seek to skirt contention rules by initially filing unsupported contentions, and later recasting or modifying their contentions on appeal with new arguments never raised before the board; CLI-08-17, 68 NRC 234 (2008)

USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 460 (2006)
petitioners cannot seek to revive a contention based on new arguments never presented to the licensing board; CLI-08-17, 68 NRC 239 n.38 (2008)

USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006)
even the opinion of a qualified and properly identified expert will not support a contention if the opinion lacks a reasoned basis or explanation; LBP-08-17, 68 NRC 449 (2008)

USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 482 (2006)
strict contention standards ensure that those admitted to NRC hearings bring actual knowledge of safety and environmental issues that bear on the licensing decision, and therefore can litigate issues meaningfully; CLI-08-17, 68 NRC 233 (2008)

Ute Indians v. United States, 28 Fed. Cl. 768 (Fed. Cl. 1993)
Native Americans have tribal rights to, and interests in, aboriginal lands; LBP-08-24, 68 NRC 713 (2008)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978)
the National Environmental Policy Act does not require every conceivable alternative but rather requires only consideration of feasible, nonspeculative, reasonable alternatives; LBP-08-13, 68 NRC 92, 95 (2008)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553-54 (1978)
the purpose of the contention rule is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-08-13, 68 NRC 61 (2008); LBP-08-15, 68 NRC 312 n.77 (2008); LBP-08-26, 68 NRC 915 (2008)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 554-55 (1978)
the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention; CLI-08-28, 68 NRC 668 (2008)

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Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 555 (1978)
if standards for reopening were not strict and demanding, there would be little hope of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings; LBP-08-12, 68 NRC 15 (2008)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 360 (1973)
issues that relate to the applicant's quality assurance program must be resolved prior to issuance of the license; CLI-08-28, 68 NRC 672 n.55 (2008)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 364 (1973)
movant seeking to reopen the record need not present additional affidavits to restate what information the Staff has found self-evident regarding a significant safety issue; LBP-08-12, 68 NRC 17 n.10 (2008)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 365 n.10 (1973)
if the problem raised in a late-filed contention presents a sufficiently grave threat to public safety, a board should reopen the record to consider it even if it is not newly discovered and could have been raised in timely fashion; LBP-08-12, 68 NRC 33 (2008)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973)
in denying a motion to reopen the record, the tribunal will necessarily have supplemented the record with, for example, the affidavits, letters, or other materials accompanying the motion and the responses thereto, but the hearing record will not have been reopened; LBP-08-12, 68 NRC 16 (2008)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 528-29 (1973)
applicant's failure to comply with applicable standards may have consequential import in evaluating whether to grant a motion to reopen the record; LBP-08-12, 68 NRC 25 n.19 (2008)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded,* CLI-90-4, 31 NRC 333 (1990)
information, facts, and expert opinions provided by petitioner in support of a contention will be examined by the board to confirm that the petitioner does indeed supply adequate support for the contention; LBP-08-13, 68 NRC 64 (2008); LBP-08-16, 68 NRC 385 (2008); LBP-08-26, 68 NRC 918 (2008)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 83 (2000)
license transfer applicants who have received Staff approval but are still awaiting the results of a Commission adjudication are free to act in reliance on the Staff's order but do so at their peril in the event that the Commission later determines that intervenors have raised valid objections to the license transfer application; CLI-08-19, 68 NRC 257 (2008)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 161 (2000)
a direct license transfer application seeks authorization for the transfer of both ownership and operation of the facility; CLI-08-19, 68 NRC 255 n.3 (2008)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000)
an organization that wants to intervene in a representational capacity must demonstrate that the licensing action will affect at least one of its members, identify that member by name and address, and show that it is authorized by that member to request a hearing on his or her behalf; CLI-08-19, 68 NRC 259 (2008); LBP-08-16, 68 NRC 378 (2008); LBP-08-17, 68 NRC 439 (2008); LBP-08-21, 68 NRC 559 n.2 (2008); LBP-08-26, 68 NRC 911 (2008)

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Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163-64 (2000)
petitioners in direct license transfer cases who qualified for proximity-based standing lived within a 6-1/2-mile radius of their plant; CLI-08-19, 68 NRC 269 (2008)
Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165-66 (2000)
petitioner may not demand a hearing to express generalized grievances about NRC polices or to attack the NRC's general competence; LBP-08-17, 68 NRC 452 (2008)
Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000)
suspension of licensing proceedings is a drastic action that is not warranted absent immediate threats to public health and safety; CLI-08-23, 68 NRC 483 n.104 (2008)
Virginia Electric and Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 304 (2008)
if none of the affidavits submitted in support of petitioners' hearing request indicates that an organization represents the interests of the submitter, the organization has failed to establish that it has standing; LBP-08-16, 68 NRC 379-80 (2008)
Virginia Electric and Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 313 n.86 (2008)
because disposal of Greater-Than-Class-C waste is the responsibility of the federal government, the disposal of GTCC radioactive waste is not directly affected by the partial closure of the Barnwell disposal facility and so is not an admissible aspect of a contention; LBP-08-16, 68 NRC 414 (2008)
Virginia Electric and Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 315-20 (2008)
further inquiry is warranted into the safety-related matter of whether the FSAR has failed to include necessary information concerning applicant's plans for onsite management of Class B and C waste; LBP-08-16, 68 NRC 315-20 (2008)
Virginia Electric and Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 316-17 (2008)
because applicant did not apply for an early site permit, petitioners thus are not precluded from raising an environmental issue relative to failure of applicant's environmental report to assess the onsite impacts associated with the potential long-term storage of low-level waste; LBP-08-16, 68 NRC 316-17 (2008)
Virginia Electric and Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 317 (2008)
whether applicant might someday require a permit under 10 C.F.R. Part 61 for a disposal facility is too speculative and therefore not material to the findings the NRC must make to support the action that is involved; LBP-08-16, 68 NRC 414 (2008)
Virginia Electric and Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 331-32 (2008)
contention that fails to dispute dose calculations presented in the application or that those calculated doses fail to comply with all relevant NRC regulations is inadmissible; LBP-08-16, 68 NRC 396 (2008)
Virginia Electric and Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 335 (2008)
petitioner's failure to cite any document that supports its theory that uranium supplies will be insufficient to support the operation of the facility during its licensed period renders the contention inadmissible; LBP-08-16, 68 NRC 395 (2008); LBP-08-21, 68 NRC 574 (2008)
Virginia Electric and Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 336 (2008)
contention that challenges NRC's regulations is inadmissible; LBP-08-16, 68 NRC 390 (2008)
Virginia Electric and Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 336-37 (2008)
challenges to NRC regulations are inadmissible; LBP-08-21, 68 NRC 587 (2008)
the Waste Confidence Rule is applicable to all new reactor proceedings, and contentions challenging it or seeking its reconsideration are not admissible; LBP-08-16, 68 NRC 416 (2008); LBP-08-17, 68 NRC 456 (2008)

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Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-06 (1976)
damage to applicant's reputation does not constitute a threatened injury to the interests of union members; CLI-08-19, 68 NRC 266 (2008)

Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 107 (1976)
there is no relationship between the legislative purpose underlying the safety provisions of the Atomic Energy Act and petitioner's interest in protecting its reputation and avoiding damage suits; CLI-08-19, 68 NRC 266 (2008)

Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), LBP-84-40A, 20 NRC 1195, 1199 (1984)
boards have discretion to reframe contentions for purposes of clarity, succinctness, and a more efficient proceeding; LBP-08-12, 68 NRC 30 n.1 (2008)

Washington Public Power Supply System (Hanford No. 2 Nuclear Power Plant), ALAB-113, 6 AEC 251, 252 (1973)
key safety issues must be resolved in the hearing, not post-hearing by NRC Staff and applicant; LBP-08-25, 68 NRC 829 (2008)

Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167 (1983)
availability of Staff review outside the hearing process generally does not constitute adequate protection of a private party's rights when considering 10 C.F.R. 2.309(c)(1)(ii); LBP-08-12, 68 NRC 42 (2008)

Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175 (1983)
a request for action under 10 C.F.R. 2.206 is not a substitute for participation in an adjudication; LBP-08-25, 68 NRC 828 (2008)

Weinberger v. Catholic Action League, 454 U.S. 139 (1981)
the National Environmental Policy Act claims are governed by NEPA's own specific nondisclosure provision rather than by more general provisions in the Atomic Energy Act or in NRC regulations; CLI-08-26, 68 NRC 523 (2008)

Weinberger v. Catholic Action League, 454 U.S. 139, 142 (1981)
to the fullest extent possible, all federal agencies shall include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement discussing the environmental impact of the proposed action and possible alternatives; CLI-08-26, 68 NRC 531 (2008)

Winters v. United States, 207 U.S. 564, 567 (1908)
contamination of water on the reservation and depletion of a Tribe's water sources as a result of mining operations is asserted as a violation of the Tribe's Winters Rights, under which it is to receive a sufficient quantity of quality water on the Reservation; LBP-08-24, 68 NRC 743 n.291 (2008)

Winters v. United States, 207 U.S. 564, 567, 573 (1908)
it is essential and necessary that all of the waters of the river flow down the channel uninterruptedly and undiminished in quantity and undeteriorated in quality and are to be fully protected against invasion by other parties; LBP-08-24, 68 NRC 743 n.292 (2008)

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)
in determining standing as of right, NRC applies contemporaneous judicial concepts; LBP-08-16, 68 NRC 378 (2008); LBP-08-17, 68 NRC 438 (2008); LBP-08-21, 68 NRC 559 n.2 (2008); LBP-08-26, 68 NRC 911 (2008)
to establish standing ''as of right,'' petitioner must show that has suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes, the injury is fairly traceable to the challenged action, and the injury is likely to be redressed by a favorable decision; LBP-08-17, 68 NRC 438 (2008)

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996)
contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-08-16, 68 NRC 383 (2008)

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Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998)
for an organizational petitioner to establish standing, it must show immediate or threatened injury to either its organizational interests or to the interest of identified members; LBP-08-24, 68 NRC 702 (2008); LBP-08-26, 68 NRC 911 (2008)
intervention petitioners must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; LBP-08-14, 68 NRC 286 (2008); LBP-08-24, 68 NRC 701 (2008)
NRC generally follows judicial concepts of standing; LBP-08-13, 68 NRC 59 (2008)
Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195-96 (1998)
intervention petitioner's claimed injury must be arguably within the zone of interests protected by the governing statute; LBP-08-24, 68 NRC 701 (2008)
Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75-76 (1996), *rev'd in part on other grounds,* CLI-96-7, 43 NRC 235 (1996)
the materiality requirement dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment; LBP-08-13, 68 NRC 62 (2008); LBP-08-16, 68 NRC 385 (2008)
Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds,* CLI-96-7, 43 NRC 235 (1996)
any supporting material provided by petitioner, including those portions of material that are not relied upon, is subject to board scrutiny; LBP-08-13, 68 NRC 63 (2008); LBP-08-15, 68 NRC 334 n.207 (2008); LBP-08-16, 68 NRC 385 (2008); LBP-08-26, 68 NRC 917 (2008)

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10 C.F.R. 2.3(a)
in any conflict between a general rule in Part 2, Subpart C, and a special rule in Part 2, the special rule governs; LBP-08-16, 68 NRC 382 n.6 (2008)
10 C.F.R. 2.101(e)(3)
a docket number is assigned to an application if and when the Staff determines that the application is acceptable for docketing; CLI-08-20, 68 NRC 275 (2008)
NRC regulations direct how an application for construction authorization for a high-level waste repository will be processed; CLI-08-20, 68 NRC 274 (2008)
NRC Staff must review the construction authorization application to determine whether it is complete and acceptable for docketing; CLI-08-20, 68 NRC 276 (2008)
should the Director of the Office of Nuclear Material Safety and Safeguards reject the high-level waste repository construction authorization application, applicant will be informed of this determination, and of the respects in which the application is deficient; CLI-08-20, 68 NRC 275 (2008)
the Director of the Office of Nuclear Material Safety and Safeguards must determine whether the tendered high-level waste repository construction authorization application is complete and acceptable for docketing; CLI-08-20, 68 NRC 274 (2008)
10 C.F.R. 2.101(e)(8)
NRC regulations direct how an application for construction authorization for a high-level waste repository will be processed; CLI-08-20, 68 NRC 274 (2008)
10 C.F.R. 2.104(b)
the mandatory hearing board is required to answer six questions for the uncontested early site permit proceedings; LBP-08-15, 68 NRC 301 (2008)
10 C.F.R. 2.206
a request for action is not a substitute for participation in an adjudication; LBP-08-25, 68 NRC 828 (2008)
any person may file a petition for an enforcement action to address any perceived post-licensing problems that may present themselves; LBP-08-22, 68 NRC 652 n.295 (2008)
anyone wishing to institute a proceeding to modify, suspend, or revoke a license, or to request other action, may do so through a request for enforcement action; CLI-08-23, 68 NRC 487 n.120 (2008)
petitioner's concerns regarding underground leakage of contaminated water at Indian Point and failure to implement the new emergency notification siren system in a timely manner are addressed; DD-08-2, 68 NRC 340-49 (2008)
the appropriate avenue for resolution of concerns regarding an ongoing operational issue at a facility is via a request for action under this section; CLI-08-23, 68 NRC 486 n.117 (2008)
the proper avenue for challenging the adequacy of the Updated Final Safety Analysis Report would be to seek an enforcement action; LBP-08-13, 68 NRC 77, 119 (2008)
to the extent that petitioners have any basis for claiming that there are current, ongoing excessive radiological releases from a facility, petitioners may seek NRC enforcement action; CLI-08-17, 68 NRC 245 n.77 (2008)
10 C.F.R. 2.206(a)
petitioners are free to file a request to modify, suspend, or revoke a license, or for any other action as may be proper; LBP-08-12, 68 NRC 28 (2008)
10 C.F.R. 2.302(a)
e-filing is mandatory; CLI-08-17, 68 NRC 235 n.19 (2008)

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10 C.F.R. 2.302(d)(1)
a filling will be considered complete by electronic transmission when the filer performs the last act that it must perform to transmit a document, in its entirety, electronically; LBP-08-16, 68 NRC 381 (2008)
10 C.F.R. 2.304, 2.305
the Commission may reject an appeal summarily for violating NRC procedural regulations; CLI-08-17, 68 NRC 235 n.18 (2008)
10 C.F.R. 2.306(c)(2)
to be considered timely, a document must be submitted to the E-Filing system for docketing and service by 11:59 p.m. Eastern Time; LBP-08-16, 68 NRC 381 (2008)
10 C.F.R. 2.309
a petitioner, including a potential party given access to the Licensing Support Network, may not be granted party status if the petitioner cannot demonstrate substantial and timely compliance with the requirements in section 2.1003 at the time of the request for participation in the high-level waste proceeding; CLI-08-25, 68 NRC 499-500 (2008)
any person whose interest may be affected by the high-level waste proceeding and who desires to participate as a party must file a written petition for leave to intervene; CLI-08-25, 68 NRC 499 (2008)
any person whose interest will be affected by a proposed combined operating license may file a request for a hearing and petition for leave to intervene within 60 days of the *Federal Register* notice of opportunity for hearing; LBP-08-16, 68 NRC 375 (2008)
when assessing whether a petitioner has set forth a sufficient interest to intervene, licensing boards apply judicial concepts of standing; LBP-08-14, 68 NRC 286 (2008)
10 C.F.R. 2.309(a)
any person who wishes to intervene as a party in an adjudicatory proceeding addressing a proposed licensing action must establish that it has standing and offer at least one admissible contention; CLI-08-17, 68 NRC 233 (2008); LBP-08-13, 68 NRC 59 (2008); LBP-08-17, 68 NRC 438 (2008); LBP-08-18, 68 NRC 542 (2008); LBP-08-19, 68 NRC 547 (2008); LBP-08-20, 68 NRC 551 (2008); LBP-08-26, 68 NRC 910, 914 (2008)
because no petitioner has demonstrated standing, the Commission need not reach the question of whether either group has submitted at least one admissible contention; CLI-08-19, 68 NRC 255 n.2 (2008)
reference to the term ''hearing'' suggests that it means an evidentiary hearing; LBP-08-23, 68 NRC 684 (2008)
where petitioner has established standing to intervene, but has not submitted an admissible contention, its request for an evidentiary hearing is denied; LBP-08-17, 68 NRC 436 (2008)
10 C.F.R. 2.309(b)(2)
the 30-day hearing petition and contention-filing deadlines set forth in this section have been modified for the high-level waste proceeding; CLI-08-25, 68 NRC 499 (2008)
10 C.F.R. 2.309(b)(3)
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10 C.F.R. 2.309(c)
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10 C.F.R. 2.309(c)(1)
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10 C.F.R. 2.309(c)(1)(ii)-(viii)
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10 C.F.R. 2.309(d)(1)
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10 C.F.R. 2.309(d)(1)(ii)-(iv)
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10 C.F.R. 2.309(d)(2)
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10 C.F.R. 2.309(d)(2)(i)-(ii)
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10 C.F.R. 2.309(d)(2)(iii)
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10 C.F.R. 2.309(d)(3)
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10 C.F.R. 2.309(e)
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10 C.F.R. 2.309(f)(1)(i)
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10 C.F.R. 2.309(f)(1)(i)-(ii)
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10 C.F.R. 2.309(f)(1)(iii)
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10 C.F.R. 2.309(f)(1)(v)
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10 C.F.R. 2.309(f)(2)(i)-(iii)
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10 C.F.R. 2.309(f)(3)
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10 C.F.R. 2.309(h)
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10 C.F.R. 2.309(h)(1) & (h)(2)
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10 C.F.R. 2.309(h)(2)
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10 C.F.R. 2.310(a)
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10 C.F.R. 2.310(d)
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10 C.F.R. 2.311(a)
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10 C.F.R. 2.315
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10 C.F.R. 2.315(a)
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10 C.F.R. 2.315(d)
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10 C.F.R. 2.316
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10 C.F.R. 2.323
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10 C.F.R. 2.323(a)
motions must be initially addressed to the presiding officer when a proceeding is pending; CLI-08-23, 68 NRC 476 (2008)
10 C.F.R. 2.323(b)
a motion to strike was rejected on the grounds that counsel failed to comply with the certification requirements regarding consultation with opposing counsel and also failed to state with particularity the grounds for the motion; CLI-08-29, 68 NRC 902 n.12 (2008)
petitioners must certify that they have attempted to contact the nonmoving participants in order to resolve a dispute prior to filing a motion; CLI-08-23, 68 NRC 475 (2008)
10 C.F.R. 2.323(c)
a moving party has no right to reply except as permitted by the presiding officer; CLI-08-23, 68 NRC 475-76 n.59 (2008)
10 C.F.R. 2.323(e)
a motion for reconsideration may not be filed except with leave of the licensing board, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not reasonably have been anticipated, that renders the decision invalid; LBP-08-23, 68 NRC 681 (2008)
10 C.F.R. 2.323(f)
novel issues warrant referral to the Commission for its immediate consideration; LBP-08-16, 68 NRC 415, 420, 429 (2008); LBP-08-17, 68 NRC 436, 445, 458 (2008)
10 C.F.R. 2.325
applicant has the burden of proving that it has met the reasonable assurance standard by a preponderance of the evidence; LBP-08-25, 68 NRC 788 (2008)
10 C.F.R. 2.326
a presiding officer considering environmental contentions in the high-level waste proceeding should apply NRC reopening procedures and standards in this section to the extent possible; CLI-08-25, 68 NRC 503 (2008)
an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented; LBP-08-12, 68 NRC 33 n.3 (2008)
because petitioners' motion to reopen fails to satisfy the requirements of paragraphs (a)(2) and (a)(3) of this section, the board need not consider whether it satisfies the requirements of paragraphs (a)(1) and (d) for reopening the record; LBP-08-12, 68 NRC 25 n.20 (2008)
it is not applicant's or NRC Staff's burden to defeat a motion to reopen, but rather is petitioner's burden, through its motion to reopen and in its accompanying affidavit, to demonstrate that the motion should be granted; CLI-08-28, 68 NRC 674 (2008)
licensing boards may grant a motion to reopen only if the demanding requirements of this section are satisfied; LBP-08-12, 68 NRC 9 (2008)
the goal of this section is to maintain ''finality'' of the hearing process while still enabling participants to bring to light new post-hearing information concerning significant safety situations; LBP-08-12, 68 NRC 42 (2008)
the standards governing motions to reopen are described; CLI-08-28, 68 NRC 667-68 (2008)
10 C.F.R. 2.326(a)
proponents of motions to reopen the record must satisfy a multifactor test; LBP-08-12, 68 NRC 15 (2008)
10 C.F.R. 2.326(a)(1)
a newly proffered contention submitted after the close of the record must meet timeliness standards as well as the requirements of section 2.309(c); LBP-08-12, 68 NRC 28, 30-31, 40 (2008)
10 C.F.R. 2.326(a)(1)-(3)
motions to reopen a closed record to consider additional evidence will not be granted unless the criteria of this section are satisfied; LBP-08-12, 68 NRC 15 (2008)

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10 C.F.R. 2.326(a)(2)
- a motion to reopen must address a significant safety or environmental issue; CLI-08-23, 68 NRC 486 (2008)
- affidavits must provide sufficient information to support a prima facie showing that a deficiency exists in the license renewal application and the deficiency presents a significant safety issue; LBP-08-12, 68 NRC 17 (2008)
- movants who seek to reopen the record must proffer a contention that raises a significant safety issue; LBP-08-12, 68 NRC 16 (2008)

10 C.F.R. 2.326(a)(3)
- a decision by NRC Staff to revise the Final Safety Evaluation Report to account for applicant's confirmatory analysis would not, standing alone, be a materially different result that justifies reopening the record, because it would neither change the outcome of the renewal proceeding nor impose a different licensing condition on applicant; LBP-08-12, 68 NRC 28 n.24 (2008)
- motions to reopen the record must demonstrate that a materially different result would have been likely had the newly proffered evidence been considered initially; CLI-08-23, 68 NRC 486 (2008); LBP-08-12, 68 NRC 22 nn.16 & 17 (2008)
- that petitioners have not had the opportunity to examine licensee's underlying safety analysis does not obviate petitioners' burden to demonstrate the likelihood of a materially different result; LBP-08-12, 68 NRC 24 (2008)
- the term ''likely'' is construed to be synonymous with ''probable'' or ''more likely than not''; LBP-08-12, 68 NRC 22 n.16 (2008)

10 C.F.R. 2.326(b)
- a dissenting judicial opinion cannot substitute for the affidavit required by this section; CLI-08-28, 68 NRC 672 n.55 (2008)
- a motion to reopen must be supported by affidavits that set forth the factual and/or technical basis for the movants' claim that a significant and material safety or environmental issue exists; CLI-08-23, 68 NRC 486 (2008); LBP-08-12, 68 NRC 15, 16, 17, 22 n.16, 33 (2008)
- affidavits supporting motions to reopen must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised; LBP-08-12, 68 NRC 17 (2008)
- an expert's failure to testify as to the consequence of an alleged safety issue fails to adequately provide the factual and/or technical bases for a motion to reopen; LBP-08-12, 68 NRC 19 n.12 (2008)
- evidence contained in affidavits must be relevant, material, and reliable; LBP-08-12, 68 NRC 16 (2008)
- failure to provide the evidentiary support regarding an alleged deficiency in a license renewal application is fatal to petitioners' effort to present a significant safety issue; LBP-08-12, 68 NRC 17 n.11 (2008)
- the affidavit supporting a motion to reopen must provide sufficient information to support a prima facie showing that a deficiency exists in the license renewal application and the deficiency presents a significant safety issue; LBP-08-12, 68 NRC 33 (2008)

10 C.F.R. 2.326(d)
- where a motion to reopen proposes a contention not previously part of the proceeding, the requirements for late-filed contentions set out in section 2.309(c) must also be satisfied; CLI-08-28, 68 NRC 668 (2008); LBP-08-12, 68 NRC 15 (2008)

10 C.F.R. 2.327(a)
- reference to the term ''hearing'' suggests that it means an evidentiary hearing; LBP-08-23, 68 NRC 684 (2008)

10 C.F.R. 2.328
- except as may be requested under section 181 of the Atomic Energy Act, all hearings will be public unless otherwise ordered by the Commission; LBP-08-23, 68 NRC 684 (2008)

10 C.F.R. 2.329
- licensing boards have authority to further define admitted contentions when redrafting would clarify the scope of the contention; LBP-08-16, 68 NRC 386 (2008)

10 C.F.R. 2.331
- although licensing boards frequently hold oral arguments on contention admissibility, a board may instead elect to dispense with oral argument entirely; LBP-08-23, 68 NRC 683 (2008)

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10 C.F.R. 2.332(d)
the board is to consider the Staff's projected schedule for completion of its safety and environmental evaluations in developing the hearing schedule; LBP-08-16, 68 NRC 426 (2008)
10 C.F.R. 2.335
a claim that the Commission is required to promulgate a more stringent standard for radionuclides is an inadmissible challenge to the agency's rules; LBP-08-15, 68 NRC 332 (2008); LBP-08-16, 68 NRC 397 (2008)
a contention that attacks a Commission rule, or that seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible; LBP-08-16, 68 NRC 383 (2008); LBP-08-21, 68 NRC 587 (2008)
a contention that challenges applicant's reliance on a pending design certification fundamentally on procedural grounds, constitutes an impermissible challenge to NRC regulations that allow the procedure applicant has chosen; LBP-08-17, 68 NRC 443 (2008); LBP-08-21, 68 NRC 569 (2008)
absent a rule waiver request, contentions that challenge NRC regulations are inadmissible; LBP-08-15, 68 NRC 336 (2008); LBP-08-16, 68 NRC 390, 396, 416, 423 (2008)
absent a waiver pursuant to this section, Category 1 issues cannot be addressed in a license renewal proceeding; LBP-08-13, 68 NRC 67 (2008)
contentions that challenge the Waste Confidence Rule are inadmissible; LBP-08-23, 68 NRC 686 (2008)
if a certified design is referenced in a COL proceeding, in the absence of a petition for a waiver under this section, the Commission will treat the certified design as resolving all matters that could have been raised during the rulemaking process in which the certified design was reviewed and approved; LBP-08-16, 68 NRC 374 (2008)
request for waiver is required for contentions that challenges the Commission's regulations; LBP-08-21, 68 NRC 562, 569, 571, 587 (2008)
10 C.F.R. 2.335(a)
absent a waiver, no rule or regulation of the Commission is subject to attack in any adjudicatory proceeding; CLI-08-15, 68 NRC 3-4 (2008); LBP-08-13, 68 NRC 64, 99, 185 (2008); LBP-08-14, 68 NRC 287 (2008); LBP-08-15, 68 NRC 312 (2008); LBP-08-16, 68 NRC 384 (2008); LBP-08-17, 68 NRC 440, 452 (2008); LBP-08-21, 68 NRC 587 (2008); LBP-08-26, 68 NRC 915, 916 (2008)
10 C.F.R. 2.335(b)
a Commission rule or regulation may be waived or an exception made for a particular proceeding; LBP-08-21, 68 NRC 587 (2008)
any request for waiver of or exception to a rule must be accompanied by an affidavit that identifies with particularity the special circumstances alleged to justify the waiver or exception requested; LBP-08-17, 68 NRC 441 n.34 (2008)
contentions that advocate more stringent requirements than the NRC rules impose or that otherwise seek to litigate a generic determination that the Commission has established by rulemaking, or that raise a matter that is or is about to become the subject of rulemaking are barred; LBP-08-17, 68 NRC 441 n.34 (2008)
if petitioner wishes to challenge a generic determination in an adjudicatory proceeding, it must seek and receive a waiver of the rule; LBP-08-26, 68 NRC 929 (2008)
the sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation would not serve the purposes for which the rule or regulation was adopted; LBP-08-17, 68 NRC 441 n.34 (2008); LBP-08-26, 68 NRC 929 n.168 (2008)
10 C.F.R. 2.335(d)
immediate certification to the Commission is provided only when the board finds a prima facie case in favor of a waiver; CLI-08-27, 68 NRC 656 (2008)
10 C.F.R. 2.336
discovery is not available until after a request for hearing or petition to intervene has been granted; CLI-08-28, 68 NRC 676 n.73 (2008)
10 C.F.R. 2.336(a)(3), (b)(5)
claims of privilege and identification of privileged materials must occur within the time provided for disclosing withheld materials; LBP-08-16, 68 NRC 426 n.23 (2008)

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10 C.F.R. 2.336(e)
if NRC Staff dockets DOE's license application and a hearing ensues, the presiding officer may impose appropriate sanctions for any failure to fully comply with Licensing Support Network requirements; CLI-08-22, 68 NRC 358 (2008)
10 C.F.R. 2.337(a)
relevant, material, and reliable evidence of a significant safety issue in the form of expert affidavit, Staff reports, and statements by the Commission and the NRC must be provided to support a motion to reopen; LBP-08-12, 68 NRC 16, 35 (2008)
10 C.F.R. 2.337(f)
the board takes official notice of parts of the license renewal application that were not introduced into evidence because they provide factual information; LBP-08-25, 68 NRC 865, 896 n.122 (2008)
10 C.F.R. 2.341(b)(4)
the criteria to be considered by the Commission for discretionary grant of a petition for review are described; CLI-08-28, 68 NRC 667 (2008)
10 C.F.R. 2.341(c)(2)
the Commission may reject an appeal summarily for noncompliance with the formatting requirements of this section; CLI-08-17, 68 NRC 235 n.18 (2008)
10 C.F.R. 2.341(f)
novel issues warrant referral to the Commission for its immediate consideration; LBP-08-16, 68 NRC 415, 420, 429 (2008)
10 C.F.R. 2.390
if litigation over a contention brings into play financial or other information that has been designated as nonpublic, petitioners must request that the board issue a protective order that permits access; LBP-08-16, 68 NRC 422 (2008)
if petitioners believe that information that would provide the basis for their contentions is being withheld from public disclosure improperly, they may contest applicant's assertion about its proprietary nature; LBP-08-16, 68 NRC 411 (2008)
10 C.F.R. 2.710(c)
the contention admissibility threshold is less than is required at the summary disposition stage; LBP-08-13, 68 NRC 63 (2008)
10 C.F.R. 2.715(c)
state utility commissions may be allowed to participate as nonparty interested states; LBP-08-15, 68 NRC 304 n.44 (2008)
10 C.F.R. 2.802
any person may file a petition for rulemaking to address any perceived post-licensing problems that may present themselves; LBP-08-22, 68 NRC 652 n.295 (2008)
challenges to the adequacy of Table S-3, which was initially prepared more than 25 years ago, may be made through a petition for rulemaking; LBP-08-17, 68 NRC 444-45 (2008)
if petitioner believes that current NRC regulations are inadequate, the venue for raising such a concern is a petition to institute a rulemaking action; LBP-08-13, 68 NRC 126 (2008)
petition for rulemaking is denied because it did not provide any new information that was not previously considered by the NRC; DD-08-2, 68 NRC 341 (2008)
10 C.F.R. 2.802(d)
a participant in an ongoing adjudicatory proceeding that has filed a rulemaking petition should be provided an opportunity to seek a stay of the adjudication pending a resolution of the rulemaking petition; LBP-08-16, 68 NRC 424 n.21 (2008)
the purpose of obtaining ''interested state'' status was so that a state could request a suspension of the license renewal proceeding; LBP-08-25, 68 NRC 783 n.13 (2008)
10 C.F.R. 2.804, 2.805
concerns relating specifically to the AP1000 reactor design amendment may be raised by filing comments on the proposed rule when it is issued; LBP-08-17, 68 NRC 443 (2008)
10 C.F.R. 2.900 *et seq.*
nothing in NRC's procedural hearing rules requires greater disclosure of the agency's environmental analysis; CLI-08-26, 68 NRC 523 (2008)

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10 C.F.R. 2.905
access to classified information for introduction into a proceeding or for the preparation of a party's case is controlled by this section; CLI-08-21, 68 NRC 353 n.9 (2008)
10 C.F.R. 2.905(h)(2)
Commission authority to direct the Department of Energy to disclose classified information to cleared representatives of Nevada over DOE's objection as the originating agency is disputed; CLI-08-21, 68 NRC 352 (2008)
10 C.F.R. 2.907(a)
NRC Staff must include a notice of intent to introduce classified information in the notice of hearing, if it would be impracticable to avoid such introduction; CLI-08-21, 68 NRC 353 n.9 (2008)
10 C.F.R. 2.907(b)
a party filing a response to a notice of hearing must state in its answer its intent to introduce classified information into the proceeding, if it appears to the party that it will be impracticable to avoid such introduction; CLI-08-21, 68 NRC 353 n.9 (2008)
10 C.F.R. Part 2, Subpart J
electronic production, filing, and service of all documents are required in the high-level waste proceeding; CLI-08-25, 68 NRC 499 (2008)
in ruling on a petition to intervene in high-level waste proceeding, the presiding officer shall consider any failure of the petitioner to participate as a potential party in the pre-license application phase; CLI-08-25, 68 NRC 499 (2008)
10 C.F.R. 2.1003
a person denied party or interested governmental participant status may request such status upon a showing of subsequent compliance with the requirements of this section; CLI-08-25, 68 NRC 500 n.1 (2008)
a petitioner, including a potential party given access to the Licensing Support Network, may not be granted party status under section 2.309, or status as an interested governmental participant under section 2.315, if the petitioner cannot demonstrate substantial and timely compliance with the requirements in this section at the time of the request for participation in the high-level waste proceeding; CLI-08-25, 68 NRC 500 (2008)
potential parties other than NRC Staff, interested governmental participants, and parties must make available all documentary material no later than 9 days after the DOE certification of compliance; CLI-08-22, 68 NRC 357 (2008)
10 C.F.R. 2.1003(a)
NRC Staff has 30 days to provide its documentary material; CLI-08-22, 68 NRC 357 (2008)
10 C.F.R. 2.1009(a)(2) & (b)
potential parties, interested governmental participants, and parties must certify that they have established procedures for implementing the requirements of section 2.1003, that they have trained their personnel to comply with these procedures, and that the documentary material specified in section 2.1003 has been made available; CLI-08-22, 68 NRC 357 (2008)
10 C.F.R. 2.1012(b)(1)
a person denied party or interested governmental participant status may request such status upon a showing of subsequent compliance with the requirements of section 2.1003; CLI-08-25, 68 NRC 500 n.1 (2008)
a petitioner, including a potential party given access to the Licensing Support Network, may not be granted party status under section 2.309, or status as an interested governmental participant under section 2.315, if the petitioner cannot demonstrate substantial and timely compliance with the requirements in section 2.1003 at the time of the request for participation in the high-level waste proceeding; CLI-08-25, 68 NRC 499 (2008)
10 C.F.R. 2.1013(c)
service is completed when the filer/sender receives electronic acknowledgment (delivery receipt) that the electronic submission has been placed in the recipient's electronic mailbox; CLI-08-25, 68 NRC 501 (2008)
10 C.F.R. 2.1013(c)(1)
a petition for leave to intervene, and all filings in the high-level waste proceeding, must be filed electronically; CLI-08-25, 68 NRC 500 (2008)

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10 C.F.R. 2.1021(a) & (d)
the Commission extends the period for the First Prehearing Conference from 8 to 16 days after the deadline for filing replies, and to extend the period for issuance of the First Prehearing Conference Order from 30 to 60 days after the First Prehearing Conference; CLI-08-18, 68 NRC 250 (2008)
10 C.F.R. 2.1023(c)(2)
the presiding officer has no authority or duty to resolve uncontested issues in the high-level waste proceeding; CLI-08-25, 68 NRC 503 (2008)
10 C.F.R. 2.1026(b) & (c)
the presiding officer may grant extensions of time for individual milestones for the participants' filings, and may delay its own issuances for up to 30 days beyond the date of the milestone set in the hearing schedule; CLI-08-18, 68 NRC 248 n.11 (2008)
10 C.F.R. 2.1027
in any initial decision on the application for construction authorization for the high-level waste repository, the presiding officer shall make findings of fact and conclusions of law on, and otherwise give consideration to, only material issues put into controversy by the parties and determined to be litigable in the proceeding; CLI-08-25, 68 NRC 503 (2008)
the presiding officer has no authority or duty to resolve uncontested issues in the high-level waste proceeding; CLI-08-25, 68 NRC 503 (2008)
10 C.F.R. 2.1115(b)
the presiding officer is required to issue a written order based on due consideration of the parties' oral arguments and written filings; CLI-08-26, 68 NRC 513 (2008)
10 C.F.R. 2.1204(b)
a board has discretion to allow parties to cross-examine witnesses in Subpart L proceedings if the board deems this practice necessary to establish an adequate record; LBP-08-24, 68 NRC 760 (2008)
parties may file motions with the board to request cross-examination if they choose; LBP-08-24, 68 NRC 760 n.395 (2008)
10 C.F.R. 2.1327
license transfer applicants who have received Staff approval but are still awaiting the results of a Commission adjudication are free to act in reliance on the Staff's order; CLI-08-19, 68 NRC 257 n.8 (2008)
10 C.F.R. Part 2, Appendix D
hearing schedule milestones have been modified for the high-level-waste proceeding; CLI-08-25, 68 NRC 499 (2008)
modifications to the schedule for a hearing on the construction authorization application for a geologic repository at Yucca Mountain, currently codified in this Appendix, are proposed; CLI-08-18, 68 NRC 247 (2008)
10 C.F.R. 20.1201(a)(1)(i)
the total effective dose equivalent for adult occupational exposures is set at 5 rem; CLI-08-26, 68 NRC 517 n.45, 526 (2008)
10 C.F.R. 20.1302
a substantial regulatory framework governs release limits on radioactive gases and requires calculations or measurements of radioactive releases; CLI-08-17, 68 NRC 243 n.70 (2008)
licensee's efforts to maintain compliance with dose limits for individual members of the public in light of radiological effluent release from a cracked spent fuel pool are described; DD-08-2, 68 NRC 346 (2008)
10 C.F.R. 20.1501
licensee's actions to survey an abnormal radiological effluent release affecting groundwater conform to regulatory requirements; DD-08-2, 68 NRC 345-36 (2008)
10 C.F.R. 40.4
''corporation'' is defined as ''The United States Enrichment Corporation or its successor''; LBP-08-24, 68 NRC 751 n.340 (2008)
10 C.F.R. 40.9
applicants must provide complete and accurate information, in recognition of the NRC's need to receive complete, accurate, and timely communications from its applicants, which, in turn, enables the NRC to fulfill its responsibilities to ensure that utilization of radioactive material is consistent with the health and safety of the public and the common defense and security; LBP-08-24, 68 NRC 745 (2008)

violation of this section is subject to civil penalties and sanctions through an enforcement proceeding, but that does not mean that it is necessarily beyond consideration in a license proceeding; LBP-08-24, 68 NRC 745 (2008)
10 C.F.R. 40.9(a)
reliability of scientific evidence is verified by assessing whether the reasoning or methodology underlying the evidence is scientifically valid; LBP-08-24, 68 NRC 739 n.267 (2008)
10 C.F.R. 40.32(d)
NRC Staff is required to consider whether renewing a license would be inimical to the common defense and security or the public health and safety; LBP-08-24, 68 NRC 747 (2008)
prior to granting a license renewal, NRC must ensure that the issuance of the license will not be inimical to the common defense and security or to the health and safety of the public; LBP-08-24, 68 NRC 747 (2008)
10 C.F.R. 40.38
the reach of this section is limited to uranium enrichment facilities, not ISL mining; LBP-08-24, 68 NRC 751 n.340 (2008)
10 C.F.R. Part 40, Appendix A, Criterion 9
applicant is required to establish a surety arrangement that ensures sufficient funds will be available for decommissioning and decontamination of an NRC-licensed source materials site; LBP-08-24, 68 NRC 755 (2008)
10 C.F.R. 50.9
failure to document a falsified work order is a violation; LBP-08-14, 68 NRC 283-84 (2008)
Staff should not abandon all reliance on a license renewal applicant's regulatory obligation to submit complete and accurate information; CLI-08-23, 68 NRC 479 (2008)
10 C.F.R. 50.9(a)
information provided to the Commission by an applicant for a license or required to be maintained by the applicant or the licensee shall be complete and accurate in all material respects; LBP-08-14, 68 NRC 284 n.8 (2008)
10 C.F.R. 50.10(e)
if applicant includes a satisfactory site redress plan, an early site permit holder may conduct certain site preparation activities under a limited work authorization; LBP-08-15, 68 NRC 307 n.58 (2008)
10 C.F.R. 50.33(d)(3)
a corporate applicant must include the state where it is incorporated or organized, the citizenship of its directors and its principal officers, and whether it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; LBP-08-24, 68 NRC 747 n.316 (2008)
10 C.F.R. 50.33(f)
electric utilities are presumed to be financially qualified to operate nuclear power plants and thus the Commission has exempted them from NRC review of their financial qualifications to cover operational costs; LBP-08-17, 68 NRC 448 (2008)
10 C.F.R. 50.47
contention alleging the applicant's environmental report violates the National Environmental Policy Act and NRC regulations by failing to address the environmental impacts of emergency preparedness and evacuation planning is rejected as outside the scope of the proceeding; LBP-08-13, 68 NRC 147-48 (2008)
10 C.F.R. 50.47(a)(1)(i)
no new finding on emergency preparedness will be made as part of a license renewal decision; LBP-08-13, 68 NRC 149, 165 (2008)
10 C.F.R. 50.47(a)(1)(ii)
consideration of emergency plans in license renewal proceedings is precluded because they are already covered by ongoing regulatory review; LBP-08-13, 68 NRC 164 (2008)
10 C.F.R. 50.47(b)(10)
evacuation planning is required only in regard to the 10-mile plume-exposure pathway EPZ; LBP-08-21, 68 NRC 584 (2008)

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10 C.F.R. 50.48
transformers necessary for compliance with this section nominally perform their safety-related function without moving parts and without a change in configuration or properties and thus are subject to aging management review; LBP-08-13, 68 NRC 87 (2008)

10 C.F.R. 50.55a
use of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code in assessing metal fatigue is endorsed; LBP-08-25, 68 NRC 801 (2008)

10 C.F.R. 50.55a(c)
components that are part of the reactor coolant pressure boundary must meet the requirements for Class 1 components in Section III of the ASME Boiler and Pressure Vessel Code; LBP-08-25, 68 NRC 801 (2008)

10 C.F.R. 50.55a(c)(1)
components such as the recirculation outlet nozzle, which is part of the reactor coolant pressure boundary, must meet the requirements for Class 1 components in Section III of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code; CLI-08-28, 68 NRC 663 (2008)

10 C.F.R. 50.55a(g)(4)-(5)
because licensee's construction permit was issued prior to January 1, 1971, licensee is required to implement an in-service inspection program that complies with this section; LBP-08-22, 68 NRC 635 (2008)

10 C.F.R. 50.58(b)(6)
a petition or other request for review of or hearing on Staff's significant hazards consideration determination will not be entertained by the Commission; LBP-08-18, 68 NRC 537, 539, 541 (2008); LBP-08-19, 68 NRC 546, 547 (2008); LBP-08-20, 68 NRC 550 (2008)
for significant hazards consideration determinations, the Staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination; LBP-08-18, 68 NRC 539 (2008); LBP-08-20, 68 NRC 551 n.4 (2008)

10 C.F.R. 50.63
transformers necessary for compliance with this section nominally perform their safety-related function without moving parts and without a change in configuration or properties and thus are subject to aging management review; LBP-08-13, 68 NRC 87 (2008)

10 C.F.R. 50.71(e)
the UFSAR supplement must be included in the next UFSAR update; LBP-08-25, 68 NRC 866, 868 (2008)

10 C.F.R. 50.71(e)(4)
the Updated Final Safety Analysis Report is part of the current licensing basis and must be updated annually; LBP-08-13, 68 NRC 73 (2008)

10 C.F.R. 50.75
condition reports, survey records, radiological liquid effluent and environmental monitoring reports, records of historical spills and leaks must be maintained by licensees; DD-08-2, 68 NRC 346 (2008)

10 C.F.R. 50.90, 50.92
a request for a power uprate requires an amendment to the facility's operating license, and therefore must meet the NRC's regulatory requirements for issuance of a license amendment; CLI-08-17, 68 NRC 233 (2008)

10 C.F.R. 50.92(c)
contentions challenging the standard for significant hazards consideration determinations are inadmissible; LBP-08-20, 68 NRC 550 (2008)

10 C.F.R. 50.109
Staff is expected over the period of license renewal to require, as appropriate, any modification to systems, structures, or components that is necessary to assure adequate protection of the public health and safety, or to bring the facility into compliance with a license, or the rules and orders of the Commission; CLI-08-23, 68 NRC 485 (2008)

10 C.F.R. Part 50, Appendix A, GDC 1
requirement to perform metal fatigue CUFs for reactor components is established; LBP-08-25, 68 NRC 801 (2008)

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10 C.F.R. Part 50, Appendix A, GDC 30
components that are part of the reactor coolant pressure boundary shall be designed, fabricated, erected, and tested to the highest quality standards practical; LBP-08-25, 68 NRC 801 (2008)
the core spray and reactor recirculation outlet nozzles are part of the reactor coolant pressure boundary and are subject to the highest quality standards practical; LBP-08-25, 68 NRC 824 (2008)
10 C.F.R. Part 50, Appendix B
quality assurance requirements apply to license renewal aging management plans; LBP-08-22, 68 NRC 624 (2008)
10 C.F.R. Part 50, Appendix B, § XI
quality assurance programs must include written test procedures that incorporate the requirements and acceptance limits contained in applicable design documents, and, as appropriate, proof tests prior to installation, preoperational tests, and operational tests during nuclear power plant operation, of structures, systems, and components; LBP-08-22, 68 NRC 635 (2008)
10 C.F.R. Part 51
contention alleging the applicant's environmental report violates the National Environmental Policy Act and NRC regulations by failing to address the environmental impacts of emergency preparedness and evacuation planning is rejected as outside the scope of the proceeding; LBP-08-13, 68 NRC 147, 149 (2008)
environmental issues for license renewal are divided into generic and site-specific components; LBP-08-13, 68 NRC 67 (2008)
petitioner presents sufficient information and expert opinion to question whether applicant's conclusions in its environmental report regarding the significance of the groundwater contamination are complete and legally sufficient; LBP-08-13, 68 NRC 189 (2008)
10 C.F.R. 51.14(a)
''finding of no significant impact'' is defined; CLI-08-26, 68 NRC 514 (2008)
the purpose and scope of an environmental assessment are described; CLI-08-26, 68 NRC 514 (2008)
10 C.F.R. 51.20(b)(2)
an environmental impact statement must be prepared for a combined operating license; LBP-08-15, 68 NRC 309 n.67 (2008)
10 C.F.R. 51.22(c)(14)(vii)
irradiators are categorically excluded from the requirement to prepare an environmental analysis; CLI-08-16, 68 NRC 222 (2008)
10 C.F.R. 51.23
contentions challenging NRC's Waste Confidence Rule are inadmissible; LBP-08-21, 68 NRC 586 (2008)
10 C.F.R. 51.23(a)
the Commission has made a determination, on a generic basis, that spent fuel generated by any reactor can be safely managed and that sufficient repository capacity will be available; LBP-08-17, 68 NRC 456 (2008)
the Waste Confidence rule applies to new reactors; LBP-08-21, 68 NRC 586-87 (2008)
10 C.F.R. 51.45(b)(1), (4)
climate change would clearly fall within any reasonable consideration of the concepts expressed in this subsection; LBP-08-24, 68 NRC 732 n.220 (2008)
10 C.F.R. 51.45(c)
an environmental report prepared for a license renewal need not discuss the economic or technical benefits and costs of the proposed action or alternatives except as they are either essential for determining whether an alternative should be included or relevant to mitigation; LBP-08-13, 68 NRC 212 (2008)
an environmental report submitted for agency review must contain analysis of economic, technical, and other benefits; LBP-08-16, 68 NRC 412 (2008)
applicant's environmental report must include an analysis that considers and balances the environmental effects of the proposed action; LBP-08-21, 68 NRC 576 (2008)
the Commission did not intend, and NRC regulations do not require, that costs be considered in applicant's environmental report; LBP-08-21, 68 NRC 576 (2008)

the environmental report should contain sufficient information to aid the Commission in development of an independent analysis of whether any historic or archaeological properties will be affected by the proposed project; LBP-08-26, 68 NRC 922 (2008)
under the National Environmental Policy Act, the Commission is ultimately responsible for evaluating impacts on minority groups, but applicant is required to assist the Commission with that evaluation; LBP-08-26, 68 NRC 931 (2008)
where quantification is not possible, the Commission expects license applicants and NRC Staff to assess pertinent factors in qualitative terms; CLI-08-26, 68 NRC 521 (2008)
10 C.F.R. 51.50(b)(2)
the environmental report submitted with the early site permit application must address all environmental effects of construction and operation necessary to determine whether there is any obviously superior alternative to the site proposed; LBP-08-15, 68 NRC 324 (2008)
10 C.F.R. 51.50(c)
an environmental report for a combined operating license application must include information required by section 51.45(c); LBP-08-16, 68 NRC 412 (2008)
10 C.F.R. 51.50(c)(1)
an issue can be ''resolved'' within the meaning of this section even though there might have been no litigation concerning that issue; LBP-08-15, 68 NRC 309 (2008)
the environmental report at the combined license stage need not contain information or analyses submitted to the Commission in applicant's environmental report or resolved in the Commission's early site permit environmental impact statement; LBP-08-15, 68 NRC 308, 309 (2008) LBP-08-15, 68 NRC 309 (2008)
10 C.F.R. 51.50(c)(1)(i)-(iii)
required content of the environmental report for the combined operating license stage is described; LBP-08-15, 68 NRC 308 (2008)
10 C.F.R. 51.51
contention challenging the applicant's use of Table S-3 of 10 C.F.R. Part 51 in its environmental report is inadmissible; LBP-08-16, 68 NRC 423 (2008)
10 C.F.R. 51.51(a)
the environmental report prepared for a combined license application must address the environmental costs of management of low-level wastes and high-level wastes related to uranium fuel cycle activities; LBP-08-15, 68 NRC 316 (2008)
10 C.F.R. 51.51(b)
health effects from radioactive effluents may be the subject of litigation in individual combined license proceedings; LBP-08-15, 68 NRC 316 (2008)
10 C.F.R. 51.51, Table S-3
unless there is a viable alternative that has an extremely low carbon footprint, the footprint of the nuclear fuel cycle is immaterial to the decision NRC must make, and therefore such a contention fails to create a genuine issue of material fact; LBP-08-21, 68 NRC 579 (2008)
10 C.F.R. 51.53(c)
an environmental report prepared for a license renewal need not discuss the economic or technical benefits and costs of the proposed action or alternatives except as they are either essential for determining whether an alternative should be included or relevant to mitigation; LBP-08-13, 68 NRC 213 (2008)
10 C.F.R. 51.53(c)(1)
contention asserting that applicant failed to provide a separate environmental report for each license for which an extension is sought is dismissed; LBP-08-13, 68 NRC 77 (2008)
10 C.F.R. 51.53(c)(3)(ii)(A)-(L)
the scope of a license renewal proceeding is limited to the detrimental effects of aging on plant structures, systems, and components and to the environmental issues listed in this section and designated as Category 2 in the generic environmental impact statement; LBP-08-13, 68 NRC 165 (2008)
10 C.F.R. 51.53(c)(3)(ii)(B)
applicant must provide in its environmental report a site-specific analysis of entrainment, impingement, and heat shock/thermal discharge impacts from its once-through cooling systems; LBP-08-13, 68 NRC 155, 182 (2008)

applicants whose plants use a once-through cooling system must provide in their environmental report a current copy of a Clean Water Act § 316(b) determination, showing that their intake structure incorporates the best technology available to minimize adverse environmental impacts or a waiver or the equivalent state permit and supporting documents; LBP-08-13, 68 NRC 151, 182 (2008)
as long as the applicant can provide a copy of its current Clean Water Act 316(b) determinations, applicant does not need to assess the impact of the proposed action on fish and shellfish resources resulting from heat shock and impingement and entrainment; LBP-08-26, 68 NRC 926 n.140, 927 n.152 (2008)
meeting the submittal requirements of this section does not excuse applicant from providing in its environmental report the descriptions and discussions required by section 51.53(c)(2) relating to environmental impacts from the proposed action; LBP-08-13, 68 NRC 157 n.708 (2008)
petitioner's challenge to the validity of applicant's SPDES permit is inadmissible because it is considered an attack on this regulation; LBP-08-13, 68 NRC 158 (2008)
10 C.F.R. 51.53(c)(3)(ii)(I)
a license renewal application must be accompanied by an environmental report that includes an assessment of the impact of the proposed action on land use within the vicinity of the plant; LBP-08-13, 68 NRC 115 (2008)
10 C.F.R. 51.53(c)(3)(ii)(K)
applicant must assess whether any historic or archaeological properties will be affected by the proposed project; LBP-08-26, 68 NRC 920 (2008)
expansion of an independent spent fuel storage installation is a project separate from license renewal and thus applicant has no obligation to discuss its potential impacts in its environmental report; LBP-08-26, 68 NRC 922 (2008)
10 C.F.R. 51.53(c)(3)(ii)(L)
a contention related to emergency planning that touches on the adequacy of a severe accident mitigation alternatives analysis in the context of environmental review during license renewal proceedings is admissible; LBP-08-13, 68 NRC 165 (2008)
10 C.F.R. 51.53(c)(3)(iv)
petitioner asserts that the potential for a terrorist attack is new and significant information that should be included in the environmental report; LBP-08-13, 68 NRC 214 (2008)
10 C.F.R. 51.71 n.3
compliance with the Clean Water Act limits imposed by a designated permitting state is not a substitute for, and does not negate the requirements for, NRC's obligation to weigh all environmental effects of a proposed action; LBP-08-13, 68 NRC 157 n.708 (2008)
10 C.F.R. 51.71(a)
review of environmental issues in a license renewal proceeding is limited to site-specific environmental impacts; LBP-08-13, 68 NRC 66 (2008)
10 C.F.R. 51.71(d)
where quantification is not possible, the Commission expects license applicants and NRC Staff to assess pertinent factors in qualitative terms; CLI-08-26, 68 NRC 521 (2008)
10 C.F.R. 51.75(b)
the draft environmental impact statement prepared at the early site permit stage must include an evaluation of the environmental effects of construction and operation of a reactor that has design characteristics that fall within the site characteristics and design parameters for the early site permit application to the extent addressed in the ESP environmental report; LBP-08-15, 68 NRC 324 (2008)
10 C.F.R. 51.91(a)(1)
when NRC Staff received comments criticizing the failure of the draft environmental impact statement to take into account the impact of the partial closure of the Barnwell facility, Staff was required to respond to those comments in the FEIS; LBP-08-15, 68 NRC 324 (2008)
10 C.F.R. 51.95(c)
review of environmental issues in a license renewal proceeding is limited to site-specific environmental impacts; LBP-08-13, 68 NRC 66 (2008)
10 C.F.R. 51.105(a)(1)-(3)
the mandatory hearing board is required to answer six questions for the uncontested early site permit proceedings; LBP-08-15, 68 NRC 301 (2008)

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10 C.F.R. 51.107(a)(1)-(3)
determinations that the licensing board must make in a combined operating license proceeding are described; LBP-08-15, 68 NRC 333 (2008)
power generation benefits that applicant asserts a new unit will provide are relevant to the findings required by this section; LBP-08-15, 68 NRC 333 (2008)
10 C.F.R. 51.109
in addition to meeting NRC's regular contention admissibility requirements in section 2.309(f), environmental contentions addressing any DOE environmental impact statement or supplement must also conform to the requirements and address the applicable factors outlined in this section; CLI-08-25, 68 NRC 502 (2008)
10 C.F.R. 51.109(a)(2)
a presiding officer considering environmental contentions in the high-level waste proceeding should apply NRC reopening procedures and standards in section 2.326 to the extent possible; CLI-08-25, 68 NRC 503 (2008)
the 30-day hearing petition and contention-filing deadlines set forth in this section have been modified for the high-level waste proceeding; CLI-08-25, 68 NRC 499 (2008)
10 C.F.R. 51.109(c)
the presiding officer should treat as a cognizable ''new consideration'' an attack on the Yucca Mountain environmental impact statements based on significant and substantial information that, if true, would render the statements inadequate; CLI-08-25, 68 NRC 502-03 (2008)
the presiding officer in the high-level waste proceeding shall make the environmental findings required by this section, even on uncontested issues, to the extent it is not practicable to adopt the environmental impact statement prepared by the Secretary of Energy; CLI-08-25, 68 NRC 503 (2008)
10 C.F.R. Part 51, Appendix B, Subpart A, Table B-1
offsite radiological impacts are a Category 1 issue, which the Commission has determined to be ''small'' for all nuclear power plants seeking a renewed license; LBP-08-26, 68 NRC 929 (2008)
the impact on offsite land use during the license renewal term cannot be assessed generically and, accordingly, it is a Category 2 environmental issue that is within the scope of a license renewal proceeding; LBP-08-13, 68 NRC 115 (2008)
10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 n.3
license renewal impacts that do not exceed permissible regulatory levels are to be considered ''small''; LBP-08-16, 68 NRC 425 (2008)
10 C.F.R. 52.1
an early site permit is categorized as a partial construction permit; LBP-08-15, 68 NRC 307 (2008)
10 C.F.R. 52.1(a), 52.3(b)
an early site permit focuses on the suitability of a proposed site, and is defined as a Commission approval for a site or sites for one or more nuclear power facilities; LBP-08-15, 68 NRC 299-300 (2008)
10 C.F.R. 52.12
an early site permit authorizes approval of a site for one or more nuclear power facilities; LBP-08-15, 68 NRC 323 (2008)
10 C.F.R. 52.15(a)
an early site permit may be sought even though an application for a construction permit or combined license has not been filed; LBP-08-15, 68 NRC 307 (2008)
10 C.F.R. 52.16
a corporate applicant must include the state where it is incorporated or organized, the citizenship of its directors and its principal officers, and whether it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; LBP-08-24, 68 NRC 747 n.316 (2008)
10 C.F.R. 52.17(a)(1)(i)
applicant need not have selected a particular reactor design at the ESP stage or applied for a construction permit or COL, but it must include in the application the specific number, type, and thermal power level of the facilities, or range of possible facilities, for which the site may be used; LBP-08-15, 68 NRC 322 (2008)

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10 C.F.R. 52.18
an environmental impact statement must be prepared for an early site permit; LBP-08-15, 68 NRC 309 (2008)
10 C.F.R. 52.21
an early site permit is a partial construction permit whose issuance does not authorize an applicant to construct nuclear power reactors; LBP-08-15, 68 NRC 299 (2008)
an uncontested proceeding is subject to the mandatory hearing requirements; LBP-08-15, 68 NRC 301 (2008)
10 C.F.R. 52.25
if applicant includes a satisfactory site redress plan, an early site permit holder may conduct certain site preparation activities under a limited work authorization; LBP-08-15, 68 NRC 307 n.58 (2008)
10 C.F.R. 52.38(c)(1)(iv)
a safety contention arising from a matter resolved in an early site permit proceeding is within the scope of a combined license proceeding that references the ESP if it concerns whether emergency planning matters resolved in the ESP should be revisited; LBP-08-15, 68 NRC 308 (2008)
10 C.F.R. 52.39
litigation of matters resolved in an early site permit proceeding is barred in the combined license proceeding; LBP-08-15, 68 NRC 326 (2008)
10 C.F.R. 52.39(a)(2)
an issue can be ''resolved'' within the meaning of this section even though there might have been no litigation concerning that issue, if the NRC Staff adequately addressed the matter in an environmental impact statement; LBP-08-15, 68 NRC 305, 310 (2008)
matters resolved in an early site permit proceeding are considered resolved in a subsequent combined license proceeding when the COL application references the ESP; LBP-08-15, 68 NRC 305 n.45 (2008); LBP-08-23, 68 NRC 686 (2008)
10 C.F.R. 52.39(c)(1)
matters resolved in an early site permit proceeding are considered resolved in a subsequent combined operating license proceeding when the combined license application references the ESP, but are subject to certain exceptions; LBP-08-15, 68 NRC 305 n.45 (2008)
10 C.F.R. 52.39(c)(1)(i)-(ii)
a safety contention arising from a matter resolved in an early site permit proceeding is within the scope of a combined license proceeding that references the ESP if it concerns whether a term or condition in the ESP has been met; LBP-08-15, 68 NRC 308 (2008)
10 C.F.R. 52.39(c)(1)(iii)
a safety contention arising from a matter resolved in an early site permit proceeding is within the scope of a combined license proceeding that references the ESP if it concerns whether a variance from the ESP requested by the COL applicant is unwarranted or should be modified; LBP-08-15, 68 NRC 308 (2008)
10 C.F.R. 52.39(c)(1)(v)
an environmental contention may be admitted during the combined operating license proceeding if it concerns a significant environmental issue that was not resolved in the early site permit proceeding, or if it involves the impacts of construction and operation of the facility and significant new information has been identified; LBP-08-15, 68 NRC 309 (2008)
10 C.F.R. 52.55(c)
in its combined license application, applicant may reference a reactor design for which a design certification application has been docketed but not yet granted, but does so at its own risk; CLI-08-15, 68 NRC 3 (2008); LBP-08-17, 68 NRC 443 (2008)
10 C.F.R. 52.63(a)(1)
design of the auxiliary building, the spent fuel pools, spent fuel storage racks, spent fuel pool makeup water systems, spent fuel pool cooling water systems, and design basis accidents are all addressed in the AP1000 DC Rule and w are therefore not subject to challenge in the COLA proceeding; LBP-08-21, 68 NRC 571 (2008)
10 C.F.R. 52.63(a)(5)
in the absence of a waiver petition, any challenge brought to aspects of a referenced certified reactor design is outside the scope of the licensing proceeding; LBP-08-16, 68 NRC 388, 397 (2008)

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10 C.F.R. 52.77-52.80
applicants are not required to address or demonstrate whether the issuance of a combined license will improve the general welfare, increase the standard of living, or strengthen free competition in private enterprise; LBP-08-17, 68 NRC 451 (2008)
10 C.F.R. 52.79(a)(3)
combined license applications must address the kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures; LBP-08-15, 68 NRC 316 (2008)
10 C.F.R. 52.79(b)(1)
information on radioactive waste disposal need not be submitted again in a combined license application if it was previously provided to the Commission in connection with an early site permit and certain other conditions are satisfied; LBP-08-15, 68 NRC 316 (2008)
the final safety analysis report need not contain information or analyses submitted to the Commission in connection with the early site permit, but must either include or incorporate by reference the ESP safety analysis report; LBP-08-15, 68 NRC 308 (2008)
10 C.F.R. 52.79(b)(3)
the combined operating license application must demonstrate that the design of the chosen reactor falls within the site characteristics and design parameters in the early site permit, identify any necessary variances from the ESP, and demonstrate that all terms and conditions that have been included in the ESP, other than those imposed under section 50.36b, will be satisfied by the date of issuance of the combined license; LBP-08-15, 68 NRC 308 (2008)
10 C.F.R. 52.97
NRC is not required to make a finding that applicants will improve the general welfare, increase the standard of living, or strengthen free competition prior to granting a COL; LBP-08-17, 68 NRC 451 (2008)
10 C.F.R. 52.97(a)(1)
during that mandatory hearing, the presiding officer explores issues associated with the COL application that are not the subject of the contested proceeding, and makes a determination concerning the adequacy of Staff's safety and environmental reviews, as well as certain independent National Environmental Policy Act findings; LBP-08-16, 68 NRC 376 n.2 (2008)
10 C.F.R. Part 52, Appendix D
a challenge to the single-fire assumption is an impermissible challenge to NRC's regulations; LBP-08-21, 68 NRC 565, 566 (2008)
10 C.F.R. Part 54
a comprehensive baseline inspection is not required, no matter how sensible such a requirement might seem; LBP-08-13, 68 NRC 126 (2008)
10 C.F.R. 54.3
the current licensing basis includes all modifications and additions to such commitments over the life of the license; LBP-08-25, 68 NRC 830 n.94 (2008)
''current licensing basis'' is defined; LBP-08-22, 68 NRC 600 n.44 (2008)
''time-limited aging analysis'' is defined; LBP-08-25, 68 NRC 786 (2008)
10 C.F.R. 54.3(a)
''current licensing basis'' is defined; LBP-08-13, 68 NRC 70 n.83 (2008); LBP-08-25, 68 NRC 786 (2008); LBP-08-26, 68 NRC 940 (2008)
environmentally adjusted cumulative usage factor analyses are time-limited aging analyses; LBP-08-25, 68 NRC 789 (2008)
the Updated Final Safety Analysis Report is part of the current licensing basis and must be updated annually; LBP-08-13, 68 NRC 73 (2008)
''time-limited aging analysis'' is defined; CLI-08-28, 68 NRC 664 n.23 (2008)
10 C.F.R. 54.4
a license renewal application must demonstrate that the effects of aging will be adequately managed so that the direct and indirect safety-related functions enumerated in this section will be maintained consistent with the current licensing basis for the period of extended operation; LBP-08-22, 68 NRC 601 (2008)

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aging management programs for buried structures, systems, and components that convey or contain radioactively contaminated water or other fluids are systems, structures, and components within the scope of license renewal proceedings; LBP-08-13, 68 NRC 82 (2008)

if a component falls within the scope of this section and meets the requirements of 10 C.F.R. 54.21 such that aging of the component is a relicensing issue, applicant may address the issue in one of two ways; LBP-08-26, 68 NRC 937 (2008)

the scope of license renewal proceedings is limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analysis; LBP-08-13, 68 NRC 66 (2008)

10 C.F.R. 54.4(a)

plant systems, structures, and components relevant to license renewal are those that are safety-related, or whose failure could affect safety-related functions, or that are relied on to demonstrate compliance with the NRC's regulations for fire protection, environmental qualification, pressurized thermal shock, anticipated transients without scram, and station blackout; CLI-08-23, 68 NRC 466 n.8 (2008)

10 C.F.R. 54.4(a)(2)

approval of an aging management plan for license renewal includes all nonsafety-related systems, structures, and components whose failure could prevent safety-related systems, structures, and components from performing their safety-related functions; LBP-08-25, 68 NRC 834 (2008); LBP-08-26, 68 NRC 932 (2008)

10 C.F.R. 54.4(a)(3)

the condensate storage system buried pipes are outside the scope of a license renewal proceeding with respect to their ''safety'' functionality, but that does not eliminate the need for consideration of potential leaks from those buried pipes because of their role in fire protection; LBP-08-22, 68 NRC 606 (2008)

10 C.F.R. 54.13

contention requesting that the board should suspend the hearing until the applicant files an amended application is inadmissible; LBP-08-13, 68 NRC 68 (2008)

information provided to the Commission by a license renewal applicant for a renewed license must be complete and accurate in all material respects; CLI-08-23, 68 NRC 481 (2008)

Staff should not abandon all reliance on a license renewal applicant's regulatory obligation to submit complete and accurate information; CLI-08-23, 68 NRC 479 (2008)

10 C.F.R. 54.21

contention alleging that the aging management plan does not provide adequate inspection and monitoring for corrosion or leaks in all buried systems, structures, and components that may convey or contain radioactively contaminated water or other fluids is admissible; LBP-08-13, 68 NRC 79 (2008)

contention asserting that because information from safety analyses and evaluations performed at the NRC's request are not identified or included in the UFSAR, the license renewal application should be denied is inadmissible; LBP-08-13, 68 NRC 72 (2008)

each license renewal application must include an integrated plant assessment identifying structures and components subject to aging management review, an evaluation of time-limited aging analyses, and a final safety analysis report supplement describing the plant's aging management programs; CLI-08-23, 68 NRC 466 (2008)

if an applicant submits an aging management plan that shows how it addresses the recommendations of NUREG-1801, then it will have provided the demonstration required by this section; LBP-08-25, 68 NRC 870 (2008)

impacts of metal fatigue, corrosion, and embrittlement are directly related to the detrimental results of aging and are the focus of the Staff's technical review of the application for license renewal; LBP-08-13, 68 NRC 67 (2008)

licensees should address the effects of the coolant environment on component fatigue life as aging management programs are formulated in support of license renewal; LBP-08-25, 68 NRC 799 (2008)

the scope of a license renewal proceeding is limited to the detrimental effects of aging on plant structures, systems, and components; LBP-08-13, 68 NRC 165 (2008)

the term ''demonstrate'' in is a strong, definitive verb that logically requires an applicant to provide a reasonably thorough description of its aging management plan to show conclusively how this program

will ensure that the effects of aging will be managed for its specific plant; LBP-08-25, 68 NRC 870 (2008)
10 C.F.R. 54.21(a)
a license renewal application must demonstrate that the effects of aging will be managed in such a way that the intended functions of passive and long-lived structures and components will be maintained for the period of extended operation; CLI-08-23, 68 NRC 466 (2008)
license renewal proceedings are limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses; LBP-08-22, 68 NRC 599 (2008)
the license renewal application fails to comply with this section because it lacks a specific plan for the aging management of non-environmentally-qualified inaccessible medium-voltage cables and wiring; LBP-08-13, 68 NRC 83 (2008)
the license renewal application must identify and demonstrate an aging management program for structures and components that perform an intended function, as described in section 54.4; LBP-08-26, 68 NRC 932 (2008)
the scope of license renewal proceedings is limited to a review of the plant structures, systems, and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analysis; LBP-08-13, 68 NRC 66 (2008)
10 C.F.R. 54.21(a)(1)
aging management review does not cover active components because routine surveillance and maintenance programs detect and manage the effects of aging on these components; CLI-08-23, 68 NRC 467 (2008)
an aging management plan is required only for structures and components that perform an intended function without moving parts or without a change in configuration or properties; LBP-08-26, 68 NRC 945-46 (2008)
failure to account for the effects of a pressure shock on reactor vessel internals in the license renewal application is an admissible issue; LBP-08-26, 68 NRC 937 (2008)
systems, structures, and components relevant to aging-related review for license renewal are described; LBP-08-22, 68 NRC 600 (2008)
transformers are subject to aging management review; LBP-08-13, 68 NRC 88 (2008)
10 C.F.R. 54.21(a)(3)
a license renewal application must demonstrate that the effects of aging will be adequately managed so that the direct and indirect safety-related functions enumerated in section 54.4 will be maintained consistent with the current licensing basis for the period of extended operation; LBP-08-22, 68 NRC 601 (2008)
actual cumulative usage factor calculations must be included in the license renewal application to meet the time-limited aging analysis requirements; LBP-08-13, 68 NRC 138 (2008)
applicant is required to demonstrate that the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the CLB for the period of extended operation; LBP-08-26, 68 NRC 940 (2008)
applicant must establish an aging management program that is adequate to provide reasonable assurance that the intended function of the piping subject to flow accelerated corrosion will be maintained in accordance with the current licensing basis for the period of extended operation; LBP-08-25, 68 NRC 856 (2008)
applicant's flow accelerated corrosion programs supply sufficient specificity to meet the demonstration requirement; LBP-08-25, 68 NRC 893 (2008)
applicant's proposed aging management program for the steam dryer will adequately manage the effects of aging during the 20-year license renewal period; LBP-08-25, 68 NRC 895-96 (2008)
contention alleging that the license renewal application fails to supply sufficient details of the aging management program for flow accelerated corrosion to demonstrate that its effects will be adequately managed is admitted; LBP-08-26, 68 NRC 948-49 (2008)
each application must contain an integrated plant assessment for which specified components will demonstrate that the effects of aging will be adequately managed so that the intended function(s) will

be maintained consistent with the current licensing basis for the period of extended operation; LBP-08-13, 68 NRC 86 (2008); LBP-08-25, 68 NRC 786 (2008)
petitioner's contention that applicant's program for management of flow accelerated corrosion fails to comply with this section is admissible; LBP-08-13, 68 NRC 174 (2008)
the level of information that an aging management program must contain in order to satisfy the legal requirements of this section is discussed; LBP-08-25, 68 NRC 785 (2008)
10 C.F.R. 54.21(b)
a license renewal application must be periodically amended to reflect any changes to the plant's current licensing basis made after the license renewal application was submitted; CLI-08-23, 68 NRC 466 (2008)
10 C.F.R. 54.21(c)
a license renewal application that fails to broaden its time-limited aging analysis beyond the scope of representative components to identify other components whose CUF may be greater than 1 does not meet the requirements of this section; LBP-08-13, 68 NRC 166 n.772 (2008)
adequate time-limited aging analyses are a required component of the license renewal application and a necessary prerequisite to license renewal; LBP-08-25, 68 NRC 787 (2008)
calculations to determine valid cumulative usage factors less than 1 when accounting for the effects of reactor water environment are the fundamental fatigue analyses for time-limited aging required to be included in the license renewal application; LBP-08-13, 68 NRC 138 (2008); LBP-08-25, 68 NRC 827 (2008)
each license renewal application must contain an evaluation of time-limited aging analyses, a list of TLAAs, and a demonstration relating to TLAAs; LBP-08-25, 68 NRC 793 (2008)
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10 C.F.R. 54.21(c)(1)
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10 C.F.R. 54.21(c)(1)(i)
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10 C.F.R. 54.21(c)(1)(i)-(ii)
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10 C.F.R. 54.21(c)(1)(i)-(iii)
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10 C.F.R. 54.21(c)(1)(ii)
a license renewal applicant demonstrates compliance with the ASME Code by projecting the fatigue analysis for the nozzle through the extended operating period; CLI-08-28, 68 NRC 664 n.24 (2008)
a license renewal application analysis of metal fatigue that ignored the known and substantial effects of the light-water reactor environment (the Fen) would be insufficient, as both a technical matter and a legal matter; LBP-08-25, 68 NRC 824 (2008)
a list of time-limited aging analyses together with a demonstration that the analyses have been projected to the end of the period of extended operation must be included in the license renewal application; CLI-08-28, 68 NRC 671 (2008)
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if a license renewal applicant seeks to demonstrate that its time-limited aging analysis has been projected to the period of extended operation, it must perform a CUFen calculation, not just a CUF calculation; LBP-08-25, 68 NRC 802 (2008)
10 C.F.R. 54.21(c)(1)(iii)
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applicant's commitment to repair or replace the affected locations before exceeding a cumulative usage factor of 1.0 does not meet the ''demonstration'' requirement of the regulations; LBP-08-13, 68 NRC 138 (2008)
applicant's flow accelerated corrosion program for the period of extended operation will be effective in managing the effects of aging; LBP-08-25, 68 NRC 893 (2008)
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10 C.F.R. 54.23
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10 C.F.R. 54.29
applicant's metal fatigue analyses of the core spray and reactor recirculation outlet nozzles do not comply with relevant requirements and do not provide the reasonable assurance of safety and thus license renewal is not authorized; LBP-08-25, 68 NRC 780 (2008)
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the timing of the performance and submission of time-limited aging analyses is discussed; LBP-08-25, 68 NRC 785 (2008)
10 C.F.R. 54.29(a)
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applicant's use of NUREG/CR-5704 and -6583 in the calculation of the CUFen reanalyses and the confirmatory CUFen analyses is sufficient to provide the reasonable assurance required by this section; LBP-08-25, 68 NRC 806 (2008)
because the CUFen reanalyses for the feedwater, core spray, and reactor recirculation outlet nozzles used a simplified Green's function methodology, they are inconsistent with the ASME Code, cannot be validated, could underestimate the nature and extent of metal fatigue, cannot be the analysis-of-record, and do not satisfy the requirements of this section; LBP-08-25, 68 NRC 822 (2008)
contention alleging that the aging management plan does not provide adequate inspection and monitoring for corrosion or leaks in all buried systems, structures, and components that may convey or contain radioactively contaminated water or other fluids is admissible; LBP-08-13, 68 NRC 79 (2008)
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license renewals cannot be issued unless there is reasonable assurance that licensed activities will be conducted in accordance with any changes made to the plant's current licensing basis ; LBP-08-25, 68 NRC 830 (2008)
the ''reasonable assurance'' standard must be determined on a case-by-case basis; LBP-08-22, 68 NRC 646 (2008)
the future-tense phrase ''will be taken'' is simply a recognition that aging management plans described in the license renewal application are necessarily implemented during the period of extended operation, not an authorization to perform TLAA analyses-of-record in the future; LBP-08-25, 68 NRC 827 (2008)
the term, ''reasonable assurance,'' is interpreted; LBP-08-22, 68 NRC 644, 645, 645 (2008)
10 C.F.R. 54.29(a)(1)
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contention asserting that because information from safety analyses and evaluations performed at the NRC's request are not identified or included in the UFSAR, the license renewal application should be denied is inadmissible; LBP-08-13, 68 NRC 72 (2008)

the relevant matters of concern in a license renewal proceeding relate to managing the effects of the aging of critical systems, structures, and components; LBP-08-22, 68 NRC 601 (2008)
10 C.F.R. 54.29(a)(2)
contention asserting noncompliance of license renewal application because it is not possible to ascertain if all relevant equipment, components, and systems that are required to have aging management have been identified is inadmissible; LBP-08-13, 68 NRC 75 (2008)
10 C.F.R. 54.29(c)(1)
because the CUFen reanalyses for the feedwater, core spray, and reactor recirculation outlet nozzles used a simplified Green's function methodology, they are inconsistent with the ASME Code, cannot be validated, could underestimate the nature and extent of metal fatigue, cannot be the analysis-of-record, and do not satisfy the requirements of this section; LBP-08-25, 68 NRC 822 (2008)
10 C.F.R. 54.30(b)
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10 C.F.R. 54.31
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10 C.F.R. 54.31(c)
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10 C.F.R. 54.33 & 54.35
in the license renewal context, regulations established under Part 50, including compliance with the ASME Code, must be followed during the period of extended operation; CLI-08-28, 68 NRC 664 (2008)
10 C.F.R. 61.10
a permit for the land disposal of radioactive waste is required for those who receive from others, possess, and dispose of wastes containing or contaminated with source, byproduct, or special nuclear material; LBP-08-15, 68 NRC 317 (2008)
10 C.F.R. 63.21
the required contents of an application for a high-level waste repository are specified, including a wide variety of matters relevant to protection from radiation; CLI-08-20, 68 NRC 276 (2008)
10 C.F.R. 63.21(c)
the Safety Analysis Report included in the high-level waste repository application must contain information relating to the evaluation of potential exposures during the post-closure period beyond 10,000 years following disposal; CLI-08-20, 68 NRC 276 (2008)
10 C.F.R. 63.21(c)(1)
the high-level waste repository application must include a description of the site, with appropriate attention to matters that might affect the performance of the geological repository, which is essential to evaluation of exposures in the period beyond 10,000 years after disposal; CLI-08-20, 68 NRC 276 (2008)
10 C.F.R. 63.21(c)(3)(ii)
the high-level waste repository application must describe the engineered barrier system, including the design criteria used and their relationships to the post-closure performance objectives specified in section 63.113(b); CLI-08-20, 68 NRC 276 (2008)
10 C.F.R. 63.21(c)(9)
the high-level waste repository application must include an assessment to determine the degree to which features, events, and processes of the site that are expected to materially affect compliance with section 63.113 have been characterized, and the extent to which they affect waste isolation; CLI-08-20, 68 NRC 276 (2008)
10 C.F.R. 63.21(c)(10)
the high-level waste repository application must include an assessment of the anticipated response of the geomechanical, hydrogeologic, and geochemical systems to the range of design thermal loadings under consideration; CLI-08-20, 68 NRC 276 (2008)

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10 C.F.R. 63.21(c)(11)
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10 C.F.R. 63.21(c)(12)
the high-level waste repository application must set forth an assessment of the ability of the proposed geologic repository to limit releases of radionuclides into the accessible environment; CLI-08-20, 68 NRC 277 (2008)

10 C.F.R. 63.21(c)(13)
the application must set forth an assessment of the ability of the proposed geologic repository to limit radiological exposures to the reasonably maximally exposed individual for the period after permanent closure in the event of human intrusion into the engineered barrier system; CLI-08-20, 68 NRC 277 (2008)

10 C.F.R. 63.21(c)(14)
the high-level waste repository application must set forth an evaluation of the natural features of the geologic setting and design features of the engineered barrier system that are considered barriers important to waste isolation; CLI-08-20, 68 NRC 277 (2008)

10 C.F.R. 63.21(c)(15)
the application must provide an explanation of measures used to support the models used to provide the information required in section 63.21(c)(9)-(14); CLI-08-20, 68 NRC 277 (2008)

10 C.F.R. 63.113(b), (c)
the high-level waste repository application must include an assessment of the ability of the proposed geologic repository to limit radiological exposures to the reasonably maximally exposed individual for the period after permanent closure; CLI-08-20, 68 NRC 276 (2008)

10 C.F.R. 63.113(c)
the high-level waste repository application must set forth an assessment of the ability of the proposed geologic repository to limit releases of radionuclides into the accessible environment; CLI-08-20, 68 NRC 277 (2008)

10 C.F.R. 63.115
the high-level waste repository application must set forth an evaluation of the natural features of the geologic setting and design features of the engineered barrier system that are considered barriers important to waste isolation; CLI-08-20, 68 NRC 277 (2008)

10 C.F.R. 63.311
the limits in this section must be consistent with the final EPA radiation protection standards, pursuant to the Energy Policy Act of 1992, which requires the NRC to modify its technical requirements and criteria, as necessary, to be consistent with final EPA standards; CLI-08-20, 68 NRC 277 (2008)

10 C.F.R. 72.106(b)
the dose limit at the boundary of an independent spent fuel storage installation as a result of any design basis accident is set at 5 rem; CLI-08-26, 68 NRC 517 n.45, 526 (2008)

10 C.F.R. 73.56(b)(1)
a senior plant supervisor's deliberate failure to contact the appropriate site security manager in order to initiate an assessment of the trustworthiness and reliability of the two contract technicians who falsified a maintenance report is a violation; LBP-08-14, 68 NRC 284 (2008)
high assurance must be provided that individuals granted unescorted access are trustworthy and reliable, and do not constitute an unreasonable risk to the public health and safety, including a potential to commit radiological sabotage; LBP-08-14, 68 NRC 283 (2008)

10 C.F.R. 76.33(a)(2)
a corporate applicant must include the state where it is incorporated or organized, the citizenship of its directors and its principal officers, and whether it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; LBP-08-24, 68 NRC 747 n.316 (2008)

10 C.F.R. 110.45(b)
findings the Commission must make to issue a low-level waste import license are discussed; CLI-08-24, 68 NRC 494 (2008)

NRC will not grant an import license for waste intended for disposal unless it is clear that the waste will be accepted by a disposal facility, host state, and compact (where applicable); CLI-08-24, 68 NRC 495 (2008)
21 C.F.R. 10.30
FDA can revoke a food additive regulation if it changes its conclusions on the safety of the additive, and members of the public can petition the FDA to revoke a regulation authorizing a particular food additive; CLI-08-16, 68 NRC 224 (2008)
21 C.F.R. 170.3(i)
to determine that a food additive is safe, FDA must find, after a fair evaluation of the data, that there is a reasonable certainty in the minds of competent scientists that the substance is not harmful under all intended conditions of use; CLI-08-16, 68 NRC 224 (2008)
21 C.F.R. 179.26
ionizing radiation to treat fresh fruits is safe if the radiation dose does not exceed 1 kGy (100 krad); CLI-08-16, 68 NRC 226 (2008)
21 C.F.R. 570.3(i)
to determine that a food additive is safe, FDA must consider the probable consumption of the additive and of any substance formed in or on food because of its use and the cumulative effect of the additive in the diet, taking into account any chemically or pharmacologically related substance or substances in the diet; CLI-08-16, 68 NRC 224 (2008)
21 C.F.R. 570.20(a)
a decision on the safety of a food additive must give due weight to the anticipated levels and patterns of consumption of the additive; CLI-08-16, 68 NRC 224 (2008)
36 C.F.R. 800.1(c)(2)(iii)
federal agencies should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties, and should invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement; LBP-08-24, 68 NRC 714 (2008)
36 C.F.R. 800.2(a)
it is the statutory obligation of the federal agency to fulfill the requirements of section 106; LBP-08-24, 68 NRC 723 n.167 (2008)
36 C.F.R. 800.2(a)(3)
if a document or study is prepared by a nonfederal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines; LBP-08-24, 68 NRC 723 n.167 (2008)
36 C.F.R. 800.2(c)(2)(ii)
a tribe may become a consulting party where its property, potentially affected by a federal undertaking, has religious or cultural significance; LBP-08-24, 68 NRC 714 (2008)
36 C.F.R. 800.2(c)(2)(ii)(A)
a consulting tribe is entitled to a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects; LBP-08-24, 68 NRC 714 (2008)
36 C.F.R. 800.2(c)(2)(ii)(A)-(D), 800.3(f)(2)
in initiating the section 106 process, the agency is required to make a reasonable and good faith effort to identify Indian tribes who may attach religious and cultural significance to historic properties that may be affected by the proposed undertaking and invite them to participate as consulting parties in the section 106 process; LBP-08-24, 68 NRC 722 n.166 (2008)
36 C.F.R. 800.2(c)(2)(ii)(D)
federal agencies are to consult with a tribe if that tribe ascribes cultural or religious significance to properties not on tribal lands; LBP-08-24, 68 NRC 722 n.161 (2008)
36 C.F.R. 1220.14
agency ''records'' are defined; CLI-08-23, 68 NRC 482 (2008)
36 C.F.R. 1222.34(c)
to constitute an agency record, a working file must contain unique information that underlies an agency decision, and it must also have been made available to other agency employees for purposes of helping to reach or support that decision; CLI-08-23, 68 NRC 483 (2008)

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36 C.F.R. 1228.24(b)(5)
nonrecords may be discarded in accordance with instructions in the agency's published records control guidelines; CLI-08-23, 68 NRC 483 n.101 (2008)
40 C.F.R. 1508.8(b)
only those indirect effects that can be said to be reasonably foreseeable need to be analyzed under the National Environmental Policy Act; CLI-08-16, 68 NRC 226 n.31 (2008)
40 C.F.R. 1508.9
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2 U.S.C. § 441b(b)(1)
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5 U.S.C. § 553
concerns relating specifically to the AP1000 reactor design amendment may be raised by filing comments on the proposed rule when it is issued; LBP-08-17, 68 NRC 443 (2008)

Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571-584
each federal agency must promote the use of alternative dispute resolution; LBP-08-14, 68 NRC 292 (2008)

Archaeological Resources Protection Act, 16 U.S.C. § 470aa *et seq.*
criteria and procedures pursuant to which a federal land manager may issue excavation permits for federal lands and requirements for notification to Indian Tribe if permits may result in harm to cultural or religious sites are established; LBP-08-24, 68 NRC 713 n.105 (2008)

Atomic Energy Act, 42 U.S.C. § 2011
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Atomic Emergy Act, 42 U.S.C. § 2021c(b)(1)(D)
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Atomic Energy Act, 103, 42 U.S.C. § 2133
standards for issuance of a license for a particular nuclear power reactor do not require applicants to improve the general welfare, increase the standard of living, or strengthen free competition; LBP-08-17, 68 NRC 451 (2008)

Atomic Energy Act, 182, 42 U.S.C. § 2232
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Atomic Energy Act, 182a, 42 U.S.C. § 2232(a)
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the Commission may issue a license only after finding that it is in accord with the common defense and security and will provide adequate protection to the health and safety of the public; CLI-08-23, 68 NRC 473 (2008); LBP-08-25, 68 NRC 785 (2008)

Atomic Energy Act, 184, 42 U.S.C. § 2234
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Atomic Energy Act, 189a, 42 U.S.C. § 2239(a)
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the role of ''private attorney general'' is not contemplated under this section; CLI-08-19, 68 NRC 270 (2008)
to intervene as of right in any Commission licensing proceeding, petitioner must demonstrate that its interest may be affected by the proceeding; CLI-08-19, 68 NRC 258 (2008)

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Atomic Energy Act, 189a(1)(A), 42 U.S.C. § 2239(a)(1)(A)
- a hearing may be granted upon the request of any person whose interest may be affected by the proceeding; LBP-08-14, 68 NRC 286 (2008); LBP-08-15, 68 NRC 302, 311 (2008); LBP-08-18, 68 NRC 538 (2008); LBP-08-24, 68 NRC 701 (2008); LBP-08-26, 68 NRC 910 (2008)
- an uncontested proceeding is subject to the mandatory hearing requirement; LBP-08-15, 68 NRC 301 (2008)
- postponement of consideration of important and material nuclear safety issues until after the license is issued improperly abridges hearing rights; LBP-08-25, 68 NRC 827 (2008)

Clean Air Act, 112(c)(2), 42 U.S.C. § 7412
- the Environmental Protection Agency Administrator is responsible for establishing national emission standards for hazardous air pollutants, which are to be based upon EPA's determination of the maximum achievable control technology; LBP-08-15, 68 NRC 331 (2008)

Clean Air Act, 112(d)(9), 42 U.S.C. § 7412(d)(9)
- no NRC radionuclide emission standards need to be promulgated under CAA § 112 if the Environmental Protection Agency Administrator determines that the NRC regulatory program provides an ample margin of safety to protect public health; LBP-08-15, 68 NRC 331 (2008); LBP-08-16, 68 NRC 397 (2008)

Clean Water Act, 402(b)(1)(B)
- state-issued SPDES permits must be renewed every 5 years; LBP-08-13, 68 NRC 156 (2008)

Energy Policy Act of 1992, 801(b)(1)
- NRC must modify its technical requirements and criteria for the high-level waste repository as necessary to be consistent with final EPA standards; CLI-08-20, 68 NRC 277 (2008)

Environmental Conservation Law, 17-0101, 17-0301, 17-0303, 17-0809
- applicant does not have the right to decide the current and future uses of groundwater for the residents of a state; LBP-08-13, 68 NRC 145 (2008)

Federal Food, Drug, and Cosmetic Act § 201(s), 21 U.S.C. § 321(s)
- sources of irradiation, including radioactive isotopes, particle accelerators, and X-ray machines, intended for use in processing food are included in the term ''food additives''; CLI-08-16, 68 NRC 223 (2008)

Federal Food, Drug, and Cosmetic Act, 402(a)(7), 21 U.S.C. § 342 (a)(7)
- any food that has been intentionally subjected to irradiation is considered adulterated and unsafe, and therefore cannot be marketed legally, unless the FDA Secretary has issued a regulation finding the specific use of the food irradiation safe, and prescribing the conditions under which the irradiation source (the food additive) may be safely used; CLI-08-16, 68 NRC 223 (2008)

Federal Food, Drug, and Cosmetic Act, 409(c)(3)(A), 21 U.S.C. § 348(c)(3)(A)
- for FDA to determine that a food additive is safe, it must find, after a fair evaluation of the data, that there is a reasonable certainty in the minds of competent scientists that the substance is not harmful under all intended conditions of use; CLI-08-16, 68 NRC 224 (2008)
- no food additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests that are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal; CLI-08-16, 68 NRC 224 (2008)

Federal Food, Drug, and Cosmetic Act, 409(c)(5), 21 U.S.C. § 348(c)(5)
- to determine that a food additive is safe, FDA must consider the probable consumption of the additive and of any substance formed in or on food because of its use and the cumulative effect of the additive in the diet, taking into account any chemically or pharmacologically related substance or substances in the diet; CLI-08-16, 68 NRC 224 (2008)

Federal Records Act, 44 U.S.C. §§ 2101-2118, 2901-2909, 3101-3107, 3301-3324
- this series of statutes governs the creation, management, and disposal of records by federal agencies; CLI-08-23, 68 NRC 482 (2008)

Federal Records Act, 44 U.S.C. § 3301
- agency ''records'' are defined; CLI-08-23, 68 NRC 482 (2008)

Freedom of Information Act, 5 U.S.C. § 552(b)(5)
- intra-agency memoranda developed during the decisionmaking process are protected under the deliberative process privilege; CLI-08-23, 68 NRC 483 n.103 (2008)

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Low-Level Radioactive Waste Policy Amendments Act of 1985, 4(a)(1), 42 U.S.C. § 2021d(a)(1)
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Low-Level Radioactive Waste Policy Amendments Act of 1985, 4(c), 42 U.S.C. § 2021d(c)
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National Historic Preservation Act, 106, 16 U.S.C. § 470f
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S. Rep. No. 85-2422, at 6 (1958)
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contention challenging applicant's failure to consider deliberate and malicious aircraft crashes in its environmental report is inadmissible; LBP-08-21, 68 NRC 554 (2008)

given that the *Federal Register* notice defines the scope of the issues that may properly be raised in a request for a hearing, it also defines the scope of the issues that could reasonably be deemed resolved during an ESP proceeding; LBP-08-15, 68 NRC 294 (2008)

if applicant proceeds with a site-specific reactor design instead of a certified design, any admissible issues would have to be addressed in the licensing adjudication; CLI-08-15, 68 NRC 1 (2008)

if petitioner identifies specific omissions in the combined license application, those omissions should be addressed in a contention to the board which, in turn, should refer such a contention to the Staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible; LBP-08-21, 68 NRC 554 (2008)

in ASLBP proceedings, collateral estoppel may bar a party from relitigating the admissibility of a contention when an earlier board refused to admit the same contention in an earlier proceeding involving the same facility; LBP-09-23, 68 NRC 679 (2008)

in the absence of a 10 C.F.R. 2.335 waiver petition, any challenge brought to aspects of a referenced certified reactor design is outside the scope of a COL proceeding; LBP-08-16, 68 NRC 361 (2008)

inadequacy of environmental report's reliance on Table S-3 regarding radioactive effluents from the uranium fuel cycle is not litigable in a COL proceeding; LBP-08-16, 68 NRC 361 (2008)

issues concerning a reactor design certification application should be resolved in the design certification rulemaking and not in an individual COL proceeding; CLI-08-15, 68 NRC 1 (2008)

licensing boards should refer contention challenging a reactor design certification to the Staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible; CLI-08-15, 68 NRC 1 (2008)

matters resolved in an early site permit proceeding are considered resolved in a subsequent COL proceeding when the COL application references the ESP, subject to certain exceptions; LBP-08-15, 68 NRC 294 (2008)

petitioner's assertions regarding the historical fire protection situation at the existing unit is outside the scope of the combined license proceeding; LBP-08-21, 68 NRC 554 (2008)

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the board is prohibited from considering in a COL proceeding matters that were resolved in an ESP proceeding when the COL application references the ESP; LBP-09-23, 68 NRC 679 (2008)

use of the term ''resolved'' in 10 C.F.R. 52.39(a) implies an intent to grant preclusive effect only when the appropriate agency official makes a determination concerning the issue in dispute; LBP-08-15, 68 NRC 294 (2008)

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the waste confidence rule applies to the spent fuel discharged from any new generation of reactor designs; LBP-08-21, 68 NRC 554 (2008)

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applicant is required to present a cost-benefit analysis (and therefore provide cost estimates) for nuclear power plants and facilities only where the applicant's alternatives analysis indicates that there is an environmentally preferable alternative; LBP-08-21, 68 NRC 554 (2008)
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neither NRC nor applicant has the mission or authority to implement a general societal interest in energy efficiency; LBP-08-13, 68 NRC 43 (2008)
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General Design Criteria are not applicable to nuclear power plants with construction permits issued prior to May 21, 1971; LBP-08-13, 68 NRC 43 (2008)
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a party in the high-level waste proceeding who files a motion must certify that he or she has made a reasonable effort to consult with counsel for the other parties in an effort to resolve the matter in advance of filing the motion; CLI-08-25, 68 NRC 497 (2008)
a tribe may become a consulting party where its property, potentially affected by a federal undertaking, has religious or cultural significance; LBP-08-24, 68 NRC 691 (2008)
all motions are required to include a certification that the sponsor of the motion has made a sincere effort to contact the other parties and to resolve the issues raised in the motion; CLI-08-22, 68 NRC 355 (2008)
ensuring that NRC Staff meets its consultation obligations under section 106 of the National Historic Preservation Act is an issue material to the findings the NRC must make in support of the action involved in a materials license renewal proceeding; LBP-08-24, 68 NRC 691 (2008)
federal agencies are to consult with a tribe if that tribe ascribes cultural or religious significance to properties not on tribal lands; LBP-08-24, 68 NRC 691 (2008)
federal agencies should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties, and should invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement; LBP-08-24, 68 NRC 691 (2008)
without consultation with a tribe, culturally significant resources will go unidentified and unprotected, resulting in development or use of the land that might cause damage to these cultural resources, thereby injuring the protected interests of the tribe; LBP-08-24, 68 NRC 691 (2008)
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burden is on applicant to show that concrete in containment structures will maintain its integrity during the extended period of operations or to develop an aging management plan that ensures that any indication of degradation is detected and remediated; LBP-08-13, 68 NRC 43 (2008)
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a contention of omission claims that the application fails to contain information on a relevant matter as required by law and provides the supporting reasons for the petitioner's belief; LBP-08-15, 68 NRC 294 (2008)
although latitude is to be afforded a pro se intervenor in the mechanics of contention pleading and citation, an organization that has appeared several times previously is expected to have a heightened awareness of the agency's pleading rules; LBP-08-16, 68 NRC 361 (2008)
boards have discretion to reframe contentions for purposes of clarity, succinctness, and a more efficient proceeding; LBP-08-12, 68 NRC 5 (2008)
issues that raise legal or factual challenges related to an application are appropriately considered as proposed contentions in the context of a merits hearing on the application; CLI-08-20, 68 NRC 272 (2008)
the 30-day hearing petition and contention-filing deadlines set forth in this section have been modified for the high-level waste proceeding; CLI-08-25, 68 NRC 497 (2008)
the Commission shall permit intervention by the state and local governmental body in which the geologic repository operations area is located, and by any affected federally recognized Indian tribe if the contention requirements in 10 C.F.R. 2.309(f) are satisfied with respect to at least one contention; CLI-08-25, 68 NRC 497 (2008)
the purpose of NRC adjudicatory hearings is to consider claims of deficiencies in a license application; CLI-08-20, 68 NRC 272 (2008)

where petitioner has established standing to intervene, but has not submitted an admissible contention, its request for an evidentiary hearing is denied; LBP-08-17, 68 NRC 431 (2008)
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CONTENTIONS, ADMISSIBILITY
a board is not to permit incorporation by reference where the effect would be to circumvent NRC-prescribed specificity requirements; LBP-08-24, 68 NRC 691 (2008)
a board may appropriately view petitioners' support for its contention in a light that is favorable to the petitioner; LBP-08-26, 68 NRC 905 (2008)
a challenge to the pending EPA proposed rule setting standards for offsite releases from radioactive materials that would be stored in the proposed Yucca Mountain high-level waste geologic repository is inadmissible; LBP-08-16, 68 NRC 361 (2008)
a contention arising from a matter resolved in an early site permit proceeding is within the scope of a combined license proceeding that references the ESP if it concerns whether emergency planning matters resolved in the ESP should be revisited; LBP-08-15, 68 NRC 294 (2008)
a contention that involves an issue of state law is outside the scope of a materials license renewal proceeding; LBP-08-24, 68 NRC 691 (2008)
a license renewal proceeding is an appropriate occasion for appraising the entire past performance of the licensee; LBP-08-24, 68 NRC 691 (2008)
a litany of ''facts'' and ''figures'' on various items without citation to a specific document, expert opinion, or other supporting source reduces them to bare assertions and speculation that will not support the contention admission; LBP-08-16, 68 NRC 361 (2008)
a matter need not be actually litigated in order to be ''resolved'' in an early site permit proceeding; LBP-08-15, 68 NRC 294 (2008)
a petitioner seeking to reopen the record does not show the existence of a significant safety issue by showing merely that a plant component performs safety functions and thus has safety significance; LBP-08-12, 68 NRC 5 (2008)
a presiding officer considering environmental contentions in the high-level waste proceeding should apply NRC reopening procedures and standards in 10 C.F.R. 2.326 to the extent possible; CLI-08-25, 68 NRC 497 (2008)
a reply cannot be used to substantively supplement or amend a contention; LBP-08-18, 68 NRC 533 (2008)
a safety contention arising from a matter resolved in an early site permit proceeding is within the scope of a combined license proceeding that references the ESP if it concerns whether the site characteristics and design parameters or a term or condition specified in the ESP have been met or whether a variance from the ESP requested by the COL applicant is unwarranted or should be modified; LBP-08-15, 68 NRC 294 (2008)
a Staff request to an applicant for more information does not make an application incomplete; CLI-08-15, 68 NRC 1 (2008)
a statement of petitioner's views about what regulatory policy should be does not present a litigable issue; CLI-08-17, 68 NRC 231 (2008); LBP-08-16, 68 NRC 361 (2008); LBP-08-17, 68 NRC 431 (2008)
absent a waiver pursuant to 10 C.F.R. 2.335, a contention that attacks a Commission rule or that seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible; CLI-08-15, 68 NRC 1 (2008); CLI-08-17, 68 NRC 231 (2008); LBP-08-13, 68 NRC 43 (2008); LBP-08-16, 68 NRC 361 (2008); LBP-08-17, 68 NRC 431 (2008); LBP-08-21, 68 NRC 554 (2008)
absent a waiver pursuant to 10 C.F.R. 2.335, Category 1 issues cannot be addressed in a license renewal proceeding; LBP-08-13, 68 NRC 43 (2008)
adequacy of the seismic analysis for the site found in the Final Safety Analysis Report is not a litigable issue; LBP-08-16, 68 NRC 361 (2008)
adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process; LBP-08-16, 68 NRC 361 (2008)
allegation of failure to include in the combined license application any information regarding the project's greenhouse gas emissions or carbon footprint is inadmissible; LBP-08-16, 68 NRC 361 (2008)
allegation that NRC has inadequately characterized human health impacts of radiation exposure from the high-level waste repository is inadmissible in a combined license proceeding; LBP-08-16, 68 NRC 361 (2008)

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allegation that the environmental report's analysis of cancer deaths and illnesses relative to natural radiation source exposures is inadequate is inadmissible; LBP-08-16, 68 NRC 361 (2008)
allegation that the Final Safety Analysis Report must address the impact of global warming on the transmission grid and the increased probability of loss of offsite power events is inadmissible; LBP-08-16, 68 NRC 361 (2008)
although boards are to provide latitude to pro se participants, petitioner's decision to provide an expert affidavit, available when it filed its hearing petition, at the time it submitted its reply runs afoul of the Commission's directive that reply pleadings cannot be used to introduce additional supporting information relative to a contention; LBP-08-16, 68 NRC 361 (2008)
although boards generally are to litigate a contention rather than the basis that provides the issue statement's foundational support, the reach of a contention necessarily hinges upon its terms coupled with its stated basis; LBP-08-16, 68 NRC 361 (2008)
although boards may appropriately view a petitioner's supporting information in a light favorable to the petitioner, failure to provide such information regarding a proffered contention requires the contention be rejected; LBP-08-16, 68 NRC 361 (2008)
although licensing boards frequently hold oral argument on contention admissibility, a board may instead elect to dispense with oral argument; LBP-09-23, 68 NRC 679 (2008)
although petitioner does not have to prove its contention at the admissibility stage, mere notice pleading is insufficient; LBP-08-17, 68 NRC 431 (2008)
an allegation that some aspect of a license application is inadequate or unacceptable does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect; LBP-08-17, 68 NRC 431 (2008)
an assertion that some analysis, calculation, or survey must be included in an environmental report or impact statement is not necessarily sufficient, in and of itself, to require consideration of whether that additional information gathering and disclosure mechanism should be included; LBP-08-16, 68 NRC 361 (2008)
an environmental contention may be admitted during a COL proceeding if it concerns a significant issue that was not resolved in the early site permit proceeding or if it involves the impacts of construction and operation of the facility and significant new information has been identified; LBP-08-15, 68 NRC 294 (2008)
any challenge to an NRC Staff decision to grant an exemption from a 1-hour barrier to a 24/30-minute barrier is a direct challenge to the current licensing basis and unrelated to the effects of plant aging and the license renewal application; LBP-08-13, 68 NRC 43 (2008)
any contention that fails to controvert the application directly, or that mistakenly asserts the application fails to address an issue that the application does address, is defective; LBP-08-17, 68 NRC 431 (2008)
any purported adverse effects caused by a confirmatory order's failure to include revised or additional provisions sought by petitioner shall be deemed irrelevant; LBP-08-14, 68 NRC 279 (2008)
any supporting material provided by petitioner, including those portions of material that are not relied upon, is subject to Board scrutiny; LBP-08-16, 68 NRC 361 (2008); LBP-08-26, 68 NRC 905 (2008)
applicant's failure to consider deliberate and malicious aircraft crashes in its environmental report is inadmissible in a combined license proceeding; LBP-08-21, 68 NRC 554 (2008)
applicant's failure to disclose ownership by a foreign corporation in its license renewal application constitutes a contention of omission; LBP-08-24, 68 NRC 691 (2008)
applicant's plan for storage of low-level radioactive waste is a litigable issue because it is material to the findings NRC must make to support the action that is involved in a combined license proceeding; LBP-08-15, 68 NRC 294 (2008)
applicants are not required to address or demonstrate whether the issuance of a combined license will improve the general welfare, increase the standard of living, or strengthen free competition in private enterprise; LBP-08-16, 68 NRC 361 (2008); LBP-08-17, 68 NRC 431 (2008)
asserted deficiencies in the environmental report intake/discharge impact discussion as it is associated with the baseline discussion of aquatic resources, if properly supported, can be admitted for further litigation; LBP-08-16, 68 NRC 361 (2008)
availability of Staff review outside the hearing process generally does not constitute adequate protection of a private party's rights when considering 10 C.F.R. 2.309(c)(1)(ii); LBP-08-12, 68 NRC 5 (2008)

because applicant did not apply for an early site permit, petitioners thus are not precluded from raising an environmental issue relative to failure of applicant's environmental report to assess the onsite impacts of potential long-term storage of low-level waste; LBP-08-16, 68 NRC 361 (2008)
because disposal of Greater-Than-Class-C waste is the responsibility of the federal government, the disposal of GTCC radioactive waste is not directly affected by the partial closure of the Barnwell disposal facility and so is not an admissible aspect of a contention; LBP-08-16, 68 NRC 361 (2008)
by complying with the six contention requirements in 10 C.F.R. 2.309(f)(1)(i)-(vi), petitioner must demonstrate that a contention raises an issue that is appropriate for a licensing board hearing and that such a hearing would not likely be a waste of time and resources; LBP-08-17, 68 NRC 431 (2008)
Category 2 issues are not essentially similar for all plants because they must be reviewed on a site-specific basis and thus challenges relating to these issues are properly part of a license renewal proceeding; LBP-08-13, 68 NRC 43 (2008)
challenges to applicant's reliance on a pending reactor design certification fundamentally on procedural grounds constitutes an impermissible challenge to NRC regulations that allow the procedure applicant has chosen; LBP-08-17, 68 NRC 431 (2008)
challenges to Commission regulations are not admissible in agency adjudications; LBP-08-26, 68 NRC 905 (2008)
challenges to NRC's authority to engage in administrative dispute resolution is beyond the scope of enforcement order proceedings; LBP-08-14, 68 NRC 279 (2008)
challenges to NRC's Waste Confidence rule are inadmissible; LBP-08-16, 68 NRC 361 (2008); LBP-08-17, 68 NRC 431 (2008)
challenges to the adequacy of Table S-3, which was initially prepared more than 25 years ago, may be made through a petition for rulemaking; LBP-08-17, 68 NRC 431 (2008)
challenges to the Waste Confidence Rule are inadmissible; LBP-09-23, 68 NRC 679 (2008)
claims about the adequacy of the Staff's safety review are not litigable in licensing proceedings; CLI-08-23, 68 NRC 461 (2008)
claims by a nonlicensee to the effect that the root causes or facts underpinning a confirmatory order are inaccurate are not valid claims in an enforcement proceeding concerning that order; LBP-08-14, 68 NRC 279 (2008)
Commission's rules and longstanding precedent bar discovery in connection with the preparation of proposed contentions; CLI-08-28, 68 NRC 658 (2008)
Commission's rules bar contentions where petitioners have only what amounts to generalized suspicions that they hope to substantiate later; LBP-08-17, 68 NRC 431 (2008)
contention alleging that worldwide uranium supplies will be inadequate is dismissed for failure to provide expert opinion, documents, or other sources to support its allegation; LBP-08-15, 68 NRC 294 (2008)
contention that asks the licensing board to determine whether applicant would be able to obtain permits from and comply with regulatory requirements imposed by other agencies is outside NRC's jurisdiction; LBP-08-15, 68 NRC 294 (2008)
contention that suggests that financial qualifications information should be provided in the application submitted by a regulated electric utility represents an impermissible challenge to Commission regulations; LBP-08-17, 68 NRC 431 (2008)
contention that worldwide uranium supplies will be inadequate to permit the anticipated power production benefits during the license term is potentially material to the licensing proceeding; LBP-08-15, 68 NRC 294 (2008)
contentions alleging deficiencies or errors in an application must indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment; LBP-08-16, 68 NRC 361 (2008)
contentions challenging Staff's significant hazards consideration determination are not appropriate for review in a license amendment proceeding; LBP-08-18, 68 NRC 533 (2008); LBP-08-19, 68 NRC 545 (2008); LBP-08-20, 68 NRC 549 (2008)
contentions must assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application; LBP-08-16, 68 NRC 361 (2008)

contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-08-16, 68 NRC 361 (2008)
contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application; LBP-08-16, 68 NRC 361 (2008)
contentions must include a specific statement of the issue of law or fact to be raised or controverted as well as a brief explanation of the basis for the contention; LBP-08-26, 68 NRC 905 (2008)
contentions must satisfy six pleading requirements to be admissible; LBP-08-13, 68 NRC 43 (2008)
contentions relating to the conclusions that the NRC Staff reaches in its NEPA analysis with regard to the environmental impacts from radiological releases to groundwater must await future publication of its supplemental environmental impact statement; LBP-08-13, 68 NRC 43 (2008)
contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-08-16, 68 NRC 361 (2008); LBP-08-17, 68 NRC 431 (2008)
contentions that fail to directly controvert the application or that mistakenly assert the application does not address a relevant issue can be dismissed; LBP-08-16, 68 NRC 361 (2008)
contentions that fail to provide supporting facts or expert opinion are inadmissible; LBP-08-19, 68 NRC 545 (2008)
contentions that fail to raise a genuine dispute of material fact or law with the applicant are inadmissible; LBP-08-19, 68 NRC 545 (2008)
contentions that fail to satisfy the pleading requirements of 10 C.F.R. 2.309(f)(1) are inadmissible; LBP-08-18, 68 NRC 533 (2008); LBP-08-19, 68 NRC 545 (2008); LBP-08-20, 68 NRC 549 (2008); LBP-08-24, 68 NRC 691 (2008); LBP-08-26, 68 NRC 905 (2008)
contentions that fall outside the specified scope of the proceeding must be rejected; LBP-08-16, 68 NRC 361 (2008); LBP-08-26, 68 NRC 905 (2008)
contentions will be ruled inadmissible if petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation; LBP-08-17, 68 NRC 431 (2008); LBP-08-26, 68 NRC 905 (2008)
defect in an application can give rise to a valid contention of omission and cannot therefore be rejected as unripe; LBP-08-24, 68 NRC 691 (2008)
determining whether a contention is adequately supported by a concise allegation of the facts or expert opinion is distinct from what is required to support petitioner's case at a hearing on the merits; LBP-08-26, 68 NRC 905 (2008)
docketing decisions are not challengeable in an adjudicatory proceeding; CLI-08-15, 68 NRC 1 (2008)
expert support is not required for admission of a contention because a fact-based argument may be sufficient on its own; LBP-08-27, 68 NRC 951 (2008)
facts relied on in support of a contention of omission need not show that applicant's facility cannot be safely operated, but rather that the application is incomplete under the governing regulations; LBP-08-15, 68 NRC 294 (2008)
failure to comply with any of the pleading requirements is grounds for dismissing a contention; LBP-08-16, 68 NRC 361 (2008)
failure to present the factual information or expert opinions necessary to support a contention adequately requires that the contention be rejected; LBP-08-26, 68 NRC 905 (2008)
failure to set forth the significance of an online article makes it inadequate to support the admission of the contention; LBP-08-24, 68 NRC 691 (2008)
failure to specify the language of a contention and distinguish it from the discussion that might otherwise be considered the basis for the issue statement might be grounds for dismissing the contention; LBP-08-16, 68 NRC 361 (2008)
for a contention of omission, petitioner may satisfy the requirement to provide a specific statement of the legal or factual issue sought to be raised by providing an adequate description of the information it contends should have been included in the application; LBP-08-15, 68 NRC 294 (2008)
for systems, structures, and components subject to aging management review, discussion of proposed inspection and monitoring details will come before a board only as they are needed to demonstrate that the intended function of relevant SSCs will be maintained for the license renewal period; LBP-08-13, 68 NRC 43 (2008)

further inquiry is warranted into the safety-related matter of whether the Final Safety Analysis Report has failed to include necessary information concerning applicant's plans for onsite management of Class B and C waste; LBP-08-16, 68 NRC 361 (2008)
general allegations covering the overall adequacy of structures, systems, and components, with no mention of potential errors or deficiencies in an applicant's license renewal application, do not support the admission of a contention; LBP-08-13, 68 NRC 43 (2008)
generalized challenge to the impartiality of the NRC regulatory process associated with hearings is inadmissible; LBP-08-16, 68 NRC 361 (2008)
generic NRC policies and standards and the nature of the NRC Staff's licensing review are not subject to challenge in an adjudicatory proceeding; CLI-08-17, 68 NRC 231 (2008)
given that the *Federal Register* notice defines the scope of the issues that may properly be raised in a request for a hearing, it also defines the scope of the issues that could reasonably be deemed resolved during an ESP proceeding; LBP-08-15, 68 NRC 294 (2008)
if a contention challenges the legal sufficiency of the application that is the subject of the Notice of Hearing and Opportunity to Petition for Leave to Intervene, the contention is within the scope of the proceeding; LBP-08-15, 68 NRC 294 (2008)
if a matter as presented is devoid of safety significance, there is no likelihood whatsoever that a materially different result would have been likely had the newly proffered evidence been considered initially; LBP-08-12, 68 NRC 5 (2008)
if applicant cures the omission, the contention of omission will become moot, and then intervenor must timely file a new or amended contention if it intends to challenge the sufficiency of the new information supplied by applicant; LBP-08-12, 68 NRC 5 (2008); LBP-08-15, 68 NRC 294 (2008)
if applicant proceeds with a site-specific reactor design instead of a certified design, any admissible issues would have to be addressed in the licensing adjudication; CLI-08-15, 68 NRC 1 (2008)
if petitioner believes that current NRC regulations are inadequate, the venue for raising such a concern is a section 2.802 petition to institute a rulemaking action; LBP-08-13, 68 NRC 43 (2008)
if petitioner fails to provide the requisite support for its contentions, the board may not make assumptions of fact that favor the petitioner or supply information that is lacking; LBP-08-16, 68 NRC 361 (2008); LBP-08-17, 68 NRC 431 (2008)
if petitioner identifies specific omissions in the combined license application, those omissions should be addressed in a contention to the board which, in turn, should refer such a contention to Staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible; LBP-08-21, 68 NRC 554 (2008)
if petitioner neglects to provide the requisite support for its contentions, the board may not make assumptions of fact that favor the petitioner or supply information that is lacking; LBP-08-26, 68 NRC 905 (2008)
if the problem raised in a late-filed contention presents a sufficiently grave threat to public safety, a board should reopen the record to consider it even if it is not newly discovered and could have been raised in timely fashion; LBP-08-12, 68 NRC 5 (2008)
in addition to meeting NRC's regular contention admissibility requirements in 10 C.F.R. 2.309(f), environmental contentions addressing any DOE environmental impact statement or supplement in the high-level waste proceeding must also conform to the requirements and address the applicable factors outlined in 10 C.F.R. 51.109; CLI-08-25, 68 NRC 497 (2008)
in adjudicatory proceedings it is the license application, not the NRC Staff review, that is at issue; CLI-08-15, 68 NRC 1 (2008)
in ASLBP proceedings, collateral estoppel may bar a party from relitigating the admissibility of a contention when an earlier board refused to admit the same contention in an earlier proceeding involving the same facility; LBP-09-23, 68 NRC 679 (2008)
in determining ripeness, boards are to consider both the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration; LBP-08-24, 68 NRC 691 (2008)
in the absence of a 10 C.F.R. 2.335 waiver petition, any challenge brought to aspects of a referenced certified reactor design is outside the scope of a combined license proceeding; CLI-08-15, 68 NRC 1 (2008); LBP-08-16, 68 NRC 361 (2008)
inadequacy of environmental report's reliance on Table S-3 regarding radioactive effluents from the uranium fuel cycle is not litigable in a combined license proceeding; LBP-08-16, 68 NRC 361 (2008)

intervention petitioners must show deficiencies or errors in the license renewal application and must establish a significant link between such claimed deficiencies and either the health and safety of the public or the environment; LBP-08-24, 68 NRC 691 (2008)
issues concerning a reactor design certification application should be resolved in the design certification rulemaking; CLI-08-15, 68 NRC 1 (2008)
issues dealing with the current operating license, including the updated Final Safety Analysis Report, are not within the scope of license renewal review; LBP-08-13, 68 NRC 43 (2008)
it is not the responsibility of the licensing board to supply the basis information necessary to sustain a contention; LBP-08-24, 68 NRC 691 (2008)
it is the admissibility of the contention, not the basis, that must be determined; LBP-08-17, 68 NRC 431 (2008)
licensing boards should refer contention challenging a reactor design certification to the Staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible; CLI-08-15, 68 NRC 1 (2008)
material provided in support of a contention will be carefully examined by the board to confirm that on its face it does supply an adequate basis for the contention; LBP-08-16, 68 NRC 361 (2008); LBP-08-17, 68 NRC 431 (2008)
matters resolved in an early site permit proceeding are considered resolved in a subsequent combined license proceeding when the COL application references the ESP, subject to certain exceptions; LBP-08-15, 68 NRC 294 (2008)
mere issuance of Staff requests for additional information does not mean an application is incomplete for docketing; CLI-08-17, 68 NRC 231 (2008)
mere notice pleading is insufficient; LBP-08-26, 68 NRC 905 (2008)
mere reference to general materials on a website is insufficient to provide support for a contention; LBP-08-21, 68 NRC 554 (2008)
movant must show that a balancing of eight factors of 10 C.F.R. 2.309(c)(1), to the extent they are relevant to the particular filing, weighs in favor of reopening; LBP-08-12, 68 NRC 5 (2008)
movant's assertion that a new contention presents a significant safety issue must be supported by affidavits that set forth the factual and/or technical bases for the allegation; LBP-08-12, 68 NRC 5 (2008)
neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention; LBP-08-16, 68 NRC 361 (2008)
neither NRC regulations nor agency policy mandates that the oral argument be conducted in person near the site; LBP-09-23, 68 NRC 679 (2008)
NEPA imposes no legal duty on NRC to consider intentional malevolent acts on a case-by-case basis in conjunction with commercial power reactor license renewal applications; LBP-08-13, 68 NRC 43 (2008)
NEPA is the only legal grounds for an admissible contention relating to environmental justice; LBP-08-13, 68 NRC 43 (2008)
novel issues that the Commission may wish to address generically at the earliest opportunity are appropriately referred to the Commission; LBP-08-16, 68 NRC 361 (2008); LBP-08-17, 68 NRC 431 (2008)
NRC regulations establish what the agency has found to be adequately protective radiological dose limits, and petitioners may not use an adjudicatory proceeding to challenge this generic regulatory framework; CLI-08-17, 68 NRC 231 (2008)
NRC regulations require petitioner to raise contentions related to NEPA as challenges to the applicant's environmental report, which acts as a surrogate for the environmental impact statement during the early stages of a relicensing proceeding; LBP-08-26, 68 NRC 905 (2008)
NRC Staff's revision of the Final Safety Evaluation Report to account for applicant's confirmatory analysis would not, standing alone, be a materially different result that justifies reopening the record, because it would neither change the outcome of the renewal proceeding nor impose a different licensing condition on an applicant; LBP-08-12, 68 NRC 5 (2008)
petitioner does not need to prove its contention at the admissibility stage in the proceeding; LBP-08-26, 68 NRC 905 (2008)

petitioner failed to establish materiality of its contention related to management of low-level radioactive waste by referring to 10 C.F.R. Part 61 because applicant was not seeking a license under Part 61, and it was speculative whether such a license would ever be necessary; LBP-08-15, 68 NRC 294 (2008)
petitioner is not required to redo SAMA analyses in order to raise a material issue; LBP-08-13, 68 NRC 43 (2008)
petitioner may not challenge a federal statute in licensing proceedings; LBP-08-17, 68 NRC 431 (2008)
petitioner may not simply incorporate massive documents by reference as the basis for a statement of his contentions; LBP-08-21, 68 NRC 554 (2008)
petitioner must demonstrate that the issue raised in the contention is within the scope of the proceeding and material to the findings the NRC must make to support the action that is involved; CLI-08-23, 68 NRC 461 (2008); LBP-08-16, 68 NRC 361 (2008); LBP-08-17, 68 NRC 431 (2008); LBP-08-21, 68 NRC 554 (2008); LBP-08-26, 68 NRC 905 (2008)
petitioner must provide factual or expert support for its contention, which includes the specific sources or documents on which it relies to support its position; LBP-08-16, 68 NRC 361 (2008); LBP-08-16, 68 NRC 361 (2008); LBP-08-26, 68 NRC 905 (2008)
petitioner must show why an alleged error or omission is of significance to the result of the proceeding; LBP-08-26, 68 NRC 905 (2008)
petitioner requesting a hearing on a confirmatory order must show that the request is within the scope of the proceeding by demonstrating that the petitioner will be adversely affected by the existing terms of the enforcement order; LBP-08-14, 68 NRC 279 (2008)
petitioner's assertions regarding the historical fire protection situation at the existing unit outside the scope of the combined license proceeding; LBP-08-21, 68 NRC 554 (2008)
petitioner's assumption that, because it cannot check all SAMA analysis details, the analysis is incomplete or incorrect is mere speculation and is insufficient to support the admissibility of its contention; LBP-08-13, 68 NRC 43 (2008)
petitioner's dispute with the combined license application concerning completeness of the AP1000 Design Certification Document is referred to Staff for resolution during the rulemaking on the certification of the AP1000 design and any hearing on the merits is held in abeyance pending the outcome of the rulemaking; LBP-08-21, 68 NRC 554 (2008)
petitioner's failure to cite any document that, read as a whole, supports its theory that uranium supplies will be insufficient to support operation of a reactor unit during its licensed period renders it inadmissible; LBP-08-16, 68 NRC 361 (2008)
petitioners may not seek to enhance the measures outlined in an enforcement order; LBP-08-14, 68 NRC 279 (2008)
petitioners may not seek to skirt contention rules by initially filing unsupported contentions, and later recasting or modifying their contentions on appeal with new arguments never raised before the board; CLI-08-17, 68 NRC 231 (2008)
petitioners' allegation that applicant's environmental report fails to provide reasonably current and accurate information regarding the costs of nuclear power, costs of alternative energy sources, and financial risks posed by using nuclear power as an energy source is admissible; LBP-08-16, 68 NRC 361 (2008)
petitioners' allegation that NRC regulations are insufficient to protect the constitutional right of due process under the law by allowing citizens to be exposed to impermissible levels of radiation is inadmissible; LBP-08-16, 68 NRC 361 (2008)
pleading requirements for a hearing on a confirmatory order are addressed; LBP-08-14, 68 NRC 279 (2008)
pleading requirements for admissible contentions are described; LBP-08-16, 68 NRC 361 (2008)
pleading requirements for contentions are strict by design; CLI-08-17, 68 NRC 231 (2008); LBP-08-14, 68 NRC 279 (2008)
possibility of undetected existence of caves and sinkholes on the proposed reactor site is not a litigable issue in a COL proceeding; LBP-08-16, 68 NRC 361 (2008)
potential for a terrorist attack upon a proposed nuclear facility is not a litigable issue; LBP-08-16, 68 NRC 361 (2008)
presentation of an alternative analysis is, without more, insufficient to support a contention alleging that the original analysis failed to meet applicable requirements; LBP-08-13, 68 NRC 43 (2008)

request for waiver is required for contentions that challenge the Commission's regulations; LBP-08-21, 68 NRC 554 (2008)
requirements are strict by design to ensure that hearings cover only genuine and pertinent issues of concern and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues; LBP-08-24, 68 NRC 691 (2008)
safety issues that were reviewed for the initial license and that have been closely monitored by NRC inspection during the license term need not be reviewed again in the context of a license renewal application; LBP-08-13, 68 NRC 43 (2008)
simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support admission; LBP-08-16, 68 NRC 361 (2008); LBP-08-17, 68 NRC 431 (2008); LBP-08-26, 68 NRC 905 (2008)
spent fuel pool fires are Category 1 issues and therefore are addressed generically in the generic environmental impact statement for license renewals; LBP-08-13, 68 NRC 43 (2008)
Staff's significant hazards consideration determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination; LBP-08-18, 68 NRC 533 (2008)
strict contention standards ensure that those admitted to NRC hearings bring actual knowledge of safety and environmental issues that bear on the licensing decision, and therefore can litigate issues meaningfully; CLI-08-17, 68 NRC 231 (2008)
strict pleading requirements under 10 C.F.R. 2.309(f)(1) must be satisfied; LBP-08-21, 68 NRC 554 (2008)
the adjudicatory process is not the proper venue to hear any contention that merely addresses petitioner's own views on regulatory policy; LBP-08-26, 68 NRC 905 (2008)
the affidavit supporting a motion to reopen a license renewal proceeding must provide sufficient information to support a prima facie showing that a deficiency exists in the application and the deficiency presents a significant safety issue; LBP-08-12, 68 NRC 5 (2008)
the basis of the contention must relate directly to the proposed licensing action and not be based on allegations of improprieties of only historical interest; LBP-08-24, 68 NRC 691 (2008)
the brief explanation of the logical underpinnings of a contention does not require a petitioner to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention; LBP-08-26, 68 NRC 905 (2008)
the Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point; LBP-08-24, 68 NRC 691 (2008)
the fact that an issue was mentioned in agency documents is insufficient to show that it was resolved; LBP-08-15, 68 NRC 294 (2008)
the presiding officer should treat as a cognizable ''new consideration'' an attack on the Yucca Mountain environmental impact statements based on significant and substantial information that, if true, would render the statements inadequate; CLI-08-25, 68 NRC 497 (2008)
the proper purpose of a reply is to discuss alleged deficiencies in a petition, not to try to fix them; LBP-08-17, 68 NRC 431 (2008)
the purpose of the contention rule is to focus litigation on concrete issues and should result in a clearer and more focused record for decision; LBP-08-14, 68 NRC 279 (2008)
the requirement of factual support is not intended to prevent intervention when material and concrete issues exist; LBP-08-27, 68 NRC 951 (2008)
the scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-08-26, 68 NRC 905 (2008)
the subject matter of a contention must impact the grant or denial of a pending license application; LBP-08-26, 68 NRC 905 (2008)
the underlying purpose of NEPA as an information-gathering and disclosure mechanism requires a different view of the concept of ''materiality'' under 10 C.F.R. 2.309(f)(1)(iv) than might be applied to a contention seeking to establish a health and safety issue; LBP-08-16, 68 NRC 361 (2008)
the Waste Confidence Rule is applicable to all new reactor proceedings; LBP-08-16, 68 NRC 361 (2008)
there is a difference between contentions that allege that a license application suffers from an improper omission and contentions that raise a specific substantive challenge to how particular information or issues have been discussed in a license application; LBP-08-12, 68 NRC 5 (2008)

there is no need for a review of emergency planning issues in the context of license renewal; LBP-08-13, 68 NRC 43 (2008)
there must be some link between the deficiency claimed in a contention and the agency's ultimate determination regarding whether the license applicant will adequately protect the health and safety of the public and the environment; LBP-08-26, 68 NRC 905 (2008)
threshold contention standards are imposed to avoid admission of contentions based on little more than speculation and intervenors who have negligible knowledge of nuclear power issues; CLI-08-17, 68 NRC 231 (2008)
to reopen a closed record to introduce a new issue, movant has the burden of showing that the new information will likely trigger a different result; LBP-08-12, 68 NRC 5 (2008)
to satisfy the basis requirement for a contention of omission, petitioner must briefly and adequately explain why it believes that the application omits information necessary to satisfy the governing NRC regulations; LBP-08-15, 68 NRC 294 (2008)
unlike federal court practice, the Commission does not accept mere notice pleading in support of an admissible contention; LBP-08-24, 68 NRC 691 (2008)
waiver of a rule can be granted only in unusual and compelling circumstances; LBP-08-17, 68 NRC 431 (2008)
whether applicant might someday require a permit under 10 C.F.R. Part 61 for a disposal facility is too speculative and therefore not material to the findings the NRC must make to support the action that is involved; LBP-08-16, 68 NRC 361 (2008)
whether applicant will improve the general welfare, increase the standard of living, or strengthen free competition in private enterprise is not a litigable issue in a COL proceeding; LBP-08-16, 68 NRC 361 (2008)
CONTENTIONS, LATE-FILED
a claim not raised in the hearing petition, but added as a new claim in petitioners' reply brief is considered impermissibly late; CLI-08-17, 68 NRC 231 (2008)
a newly proffered contention submitted after the close of the record must meet timeliness standards as well as the requirements of 10 C.F.R. 2.309(c); LBP-08-12, 68 NRC 5 (2008)
a nontimely petition or contention will not be entertained in the high-level waste proceeding unless the Commission, an Atomic Safety and Licensing Board, or a presiding officer designated to rule on the petition determines that the late petition or contention meets the late-filing requirements; CLI-08-25, 68 NRC 497 (2008)
although an intervenor may have fewer resources and less ability than other participants, all share the same burden of uncovering relevant information that is publicly available; LBP-08-12, 68 NRC 5 (2008)
contentions must be based on documents or other information available at the time the petition is to be filed; LBP-08-27, 68 NRC 951 (2008)
for filing new contentions, boards have generally established a deadline of 30 days to be timely after the receipt of new information; LBP-08-12, 68 NRC 5 (2008)
if the problem raised in a late-filed contention presents a sufficiently grave threat to public safety, a board should reopen the record to consider it even if it is not newly discovered and could have been raised in timely fashion; LBP-08-12, 68 NRC 5 (2008)
in the case of the yet-to-issue NRC rules for the high-level waste proceeding, the Commission is dispensing in advance with all late-filing factors except the ''good cause'' factor; CLI-08-25, 68 NRC 497 (2008)
movant's assertion that a new contention presents a significant safety issue must be supported by affidavits that set forth the factual and/or technical bases for the allegation; LBP-08-12, 68 NRC 5 (2008)
new or amended contentions can be filed with leave of the board if the information upon which the amended or new contention is based was not previously available, the information is materially different from information previously available, and the contention has been submitted in a timely fashion based on the availability of the subsequent information; LBP-08-27, 68 NRC 951 (2008)
newly filed contentions must meet the requirements of 10 C.F.R. 2.309(f)(2) as well as the six basic contention admissibility standards set forth in section 2.309(f)(1)(i)-(vi); LBP-08-27, 68 NRC 951 (2008)

nontimely contentions may be accepted only upon a showing of good cause for failure to file in a timely manner and a weighing of a number of factors; LBP-08-27, 68 NRC 951 (2008)
the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention; CLI-08-28, 68 NRC 658 (2008)
timeliness as measured under NRC regulations is from the point at which new information is discovered relevant to the question; LBP-08-12, 68 NRC 5 (2008)
when new contentions are based on breaking developments of information, they are to be treated as new or amended, not as nontimely; LBP-08-27, 68 NRC 951 (2008)
where a motion to reopen proposes a contention not previously part of the proceeding, the requirements for late-filed contentions set out in 10 C.F.R. 2.309(c) must also be satisfied; CLI-08-28, 68 NRC 658 (2008)
where a motion to reopen the record seeks to admit a new contention that has not previously been in controversy among the parties, movant must show that a balancing of the factors of 10 C.F.R. 2.309(c)(1) weighs in favor of reopening; LBP-08-12, 68 NRC 5 (2008)
CONTRA PROFERENTEM
any ambiguity relative to the filing date for hearing requests arising from the language of the agency's hearing opportunity notice should be construed in favor of a participant who was seeking to comply with the notice; LBP-08-16, 68 NRC 361 (2008)
CONTRACTORS
a senior plant supervisor's deliberate failure to contact the appropriate site security manager in order to initiate an assessment of the trustworthiness and reliability of the two contract technicians who falsified a maintenance report is a violation; LBP-08-14, 68 NRC 279 (2008)
if a document or study is prepared by a nonfederal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines; LBP-08-24, 68 NRC 691 (2008)
COOLING SYSTEMS
applicant is required to provide in its environmental report a site-specific analysis of entrainment, impingement, and heat shock/thermal discharge impacts from its once-through cooling systems; LBP-08-13, 68 NRC 43 (2008)
as Class I components, the feedwater, reactor recirculation, and core spray outlet nozzles on a boiling water reactor must be designed, fabricated, erected, and tested to the highest quality standards practical as specified in Part 50, Appendix A, GDC 30; LBP-08-25, 68 NRC 763 (2008)
components that are part of the reactor coolant pressure boundary must meet the requirements of Class 1 components in Section III of the ASME Boiler and Pressure Vessel Code; LBP-08-25, 68 NRC 763 (2008)
See also Reactor Cooling Systems
COST-BENEFIT ANALYSES
an environmental report prepared for a license renewal need not discuss economic or technical benefits and costs of the proposed action or alternatives except as they are either essential for determining whether an alternative should be included or relevant to mitigation; LBP-08-13, 68 NRC 43 (2008)
applicant is required to present a cost-benefit analysis (and therefore provide cost estimates) for nuclear power plants and facilities only where the applicant's alternatives analysis indicates that there is an environmentally preferable alternative; LBP-08-21, 68 NRC 554 (2008)
contention that worldwide uranium supplies will be inadequate to permit the anticipated power production benefits during the license term is potentially material to the licensing proceeding; LBP-08-15, 68 NRC 294 (2008)
to challenge a SAMA analysis, petitioner must, at a minimum, address the approximate relative cost and benefit of the SAMA; LBP-08-13, 68 NRC 43 (2008)
COUNSEL
general counsel for an Indian tribe is not required to submit a declaration stating the basis of his or her authority to represent the tribe; LBP-08-26, 68 NRC 905 (2008)
CRACKING
damage to a nonsafety-related steam dryer could cause a release of loose parts that could have an adverse impact on safety-related equipment and thus it is within the scope of aging management review in a license renewal proceeding; LBP-08-25, 68 NRC 763 (2008)

in evaluating metal fatigue, a component's cumulative usage factor is the fundamental parameter used to determine whether it will likely develop cracks during the license renewal period and thus is subject to an aging management plan; LBP-08-13, 68 NRC 43 (2008)
CROSS-EXAMINATION
a board has discretion to allow parties to cross-examine witnesses in Subpart L proceedings if the board deems this practice necessary to establish an adequate record; LBP-08-24, 68 NRC 691 (2008)
CULTURAL RESOURCES
a federal agency, prior to the issuance of any license, is required to take into account the effect of the federal action on any area eligible for inclusion in the National Register of Historic Places; LBP-08-24, 68 NRC 691 (2008)
a license renewal applicant must assess whether any historic or archaeological properties will be affected by the proposed project; LBP-08-26, 68 NRC 905 (2008)
a tribe may become a consulting party where its property, potentially affected by a federal undertaking, has religious or cultural significance; LBP-08-24, 68 NRC 691 (2008)
federal agencies are to consult with a tribe if that tribe ascribes cultural or religious significance to properties not on tribal lands; LBP-08-24, 68 NRC 691 (2008)
notification and inventory procedures are provided so that Indian cultural objects and burial remains found on federal lands will be repatriated to the appropriate tribe; LBP-08-24, 68 NRC 691 (2008)
preservation of cultural traditions is a protected interest under federal law, and its endangerment or harm qualifies as an injury for the purposes of establishing standing; LBP-08-24, 68 NRC 691 (2008)
to establish an injury in fact, a party merely has to show some threatened concrete interest personal to the party that the National Historic Preservation Act was designed to protect; LBP-08-24, 68 NRC 691 (2008)
without consultation with a tribe, culturally significant resources will go unidentified and unprotected, resulting in development or use of the land that might cause damage to these cultural resources, thereby injuring the protected interests of the tribe; LBP-08-24, 68 NRC 691 (2008)
CULTURAL SENSITIVITY
federal agencies should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties, and should invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement; LBP-08-24, 68 NRC 691 (2008)
CUMULATIVE USAGE FACTOR
analysis of metal fatigue that ignores the known and substantial effects of the light-water reactor environment is insufficient, both as a technical and a legal matter; LBP-08-25, 68 NRC 763 (2008)
applicant's commitment to repair or replace affected locations before exceeding a CUF of 1.0 does not meet the ''demonstration'' requirement of the regulations; LBP-08-13, 68 NRC 43 (2008)
applicant's use of a conservative number of transients in the calculations of the environmentally adjusted CUF is adequate to provide the degree of assurance required by 10 C.F.R. 54.29(a); LBP-08-25, 68 NRC 763 (2008)
conservatism in use of Green's function to determine CUF related to metal fatigue in the recirculation nozzle is discussed; LBP-08-12, 68 NRC 5 (2008)
if applicant's metal fatigue analyses on Class I components do not comply with the ASME Code and do not provide reasonable assurance as required by 10 C.F.R. 54.21(c)(1) and 54.29(a), then a license renewal cannot be issued; LBP-08-25, 68 NRC 763 (2008)
in evaluating metal fatigue, a component's CUF is the fundamental parameter used to determine whether it will likely develop cracks during the license renewal period and thus is subject to an aging management plan; LBP-08-13, 68 NRC 43 (2008)
use of a simplified Green's function methodology for the environmentally adjusted CUF metal fatigue analyses for the core spray and reactor recirculation outlet nozzles is inconsistent with the ASME Code and thus cannot serve as the analysis-of-record and does not satisfy the requirements of 10 C.F.R. 54.21(c)(1) or 54.29(a); LBP-08-25, 68 NRC 763 (2008)
CURRENT LICENSING BASIS
any challenge to an NRC Staff decision to grant an exemption from a 1-hour barrier to a 24/30-minute barrier is a direct challenge to the current licensing basis and unrelated to the effects of plant aging and the license renewal application; LBP-08-13, 68 NRC 43 (2008)

CLB represents an evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety; LBP-08-25, 68 NRC 763 (2008)
contentions pertaining to issues dealing with the current operating license, including the Updated Final Safety Analysis Report, are not within the scope of license renewal review; LBP-08-13, 68 NRC 43 (2008)
during the license renewal term, the current licensing basis incorporates the CLB for the current license, including all licensee commitments, plus any new commitments to monitor, manage, and correct age-related degradation unique to license renewal; LBP-08-25, 68 NRC 763 (2008)
the licensing basis for a nuclear power plant during the renewal term consists of the CLB together with new commitments to monitor, manage, and correct age-related degradation unique to license renewal; LBP-08-25, 68 NRC 763 (2008)
DEADLINES
amicus briefs must be filed by the same deadline as the brief of the party whose side the amicus brief supports, unless the Commission provides otherwise; CLI-08-22, 68 NRC 355 (2008)
for filing new contentions, boards have generally established a deadline of 30 days to be timely after the receipt of new information; LBP-08-12, 68 NRC 5 (2008)
the 30-day hearing petition and contention-filing deadlines set forth in this section have been modified for the high-level waste proceeding; CLI-08-25, 68 NRC 497 (2008)
to be considered timely, a document must be submitted to the E-Filing system for docketing and service by 11:59 p.m. Eastern Time; LBP-08-16, 68 NRC 361 (2008)
DECISIONS
an agency or commission must articulate with clarity and precision its findings and the reasons for its decisions; LBP-08-22, 68 NRC 590 (2008)
DECOMMISSIONING FUNDING
applicant is required to establish a surety arrangement that ensures sufficient funds will be available for decommissioning and decontamination of an NRC-licensed source materials site; LBP-08-24, 68 NRC 691 (2008)
calculations for surety bonds are to be estimated to the extent possible, and based on the applicant's experience with generally accepted industry practices including research and development at the site or previous operating experience in the case of a license renewal; LBP-08-24, 68 NRC 691 (2008)
DEFENSE-IN-DEPTH POLICY
protection against a highly unlikely loss-of-coolant accident has long been an essential part of the defense-in-depth concept used by the nuclear power industry and the AEC to ensure the safety of nuclear power plants; LBP-08-12, 68 NRC 5 (2008)
DEFINITIONS
an early site permit focuses on the suitability of a proposed site, and is defined as Commission approval for a site or sites for one or more nuclear power facilities; LBP-08-15, 68 NRC 294 (2008)
an early site permit is a partial construction permit, whose issuance does not authorize an applicant to construct nuclear power reactors; LBP-08-15, 68 NRC 294 (2008)
''current licensing basis'' is a term of art comprehending the various Commission requirements applicable to a specific plant that are in effect at the time of the license renewal application; LBP-08-25, 68 NRC 763 (2008)
''direct transfers'' entail a change to operating and/or possession authority; CLI-08-19, 68 NRC 251 (2008)
''extended power uprate'' usually requires significant modifications to major plant equipment, and may be for power level increases as high as 20%; CLI-08-17, 68 NRC 231 (2008)
''indirect transfers'' involve corporate restructuring or reorganizations which leave the licensee itself intact as a corporate entity and therefore involve no application for a new operating license; CLI-08-19, 68 NRC 251 (2008)
''measurement uncertainty recapture power uprate'' typically involves a power level increase of less than 2%, achieved by enhanced techniques for calculating reactor power; CLI-08-17, 68 NRC 231 (2008)
''notice pleading'' is a broad standard requiring only a short and plain statement of the claim; LBP-08-26, 68 NRC 905 (2008)

SUBJECT INDEX

''stretch power uprate'' typically results in power level increases up to 7% and generally does not involve major plant modifications; CLI-08-17, 68 NRC 231 (2008)

DELAY OF PROCEEDING

the Commission seeks wherever possible to avoid the delays, such as an additional round of pleadings, caused by a petitioner's attempt to backstop elemental deficiencies in its original petition to intervene; CLI-08-19, 68 NRC 251 (2008)

DELIBERATIVE PROCESS PRIVILEGE

intra-agency memoranda developed during the decisionmaking process are protected under the Freedom of Information Act; CLI-08-23, 68 NRC 461 (2008)

the privilege applies to summaries of information gathered to assist the agency in reaching a ''complex'' and ''significant'' policy decision, where the summaries reflect the judgment or opinion of their compiler; CLI-08-23, 68 NRC 461 (2008)

to overcome privilege, petitioners have to show that their need for the information outweighs potential harm to the agency from that disclosure; CLI-08-23, 68 NRC 461 (2008)

DEPLETED URANIUM

DU is classified as Class A waste under current agency regulations; LBP-08-16, 68 NRC 361 (2008)

DESIGN

See Reactor Design

DISCLOSURE

a dispute over the Commission's authority to direct the Department of Energy to disclose classified information to cleared state representatives over DOE's objection as the originating agency is deferred until there is an actual controversy over a specific document request; CLI-08-21, 68 NRC 351 (2008)

hearings on alternative terrorist scenario claims could not be conducted in a meaningful way without substantial disclosure of classified and safeguards information on threat assessments and security arrangements and without substantial litigation over their significance; CLI-08-26, 68 NRC 509 (2008)

the Commission may withhold from public disclosure any information that is exempt under the Freedom of Information Act; CLI-08-26, 68 NRC 509 (2008)

to overcome deliberative process privilege, petitioners have to show that their need for the information outweighs potential harm to the agency from that disclosure; CLI-08-23, 68 NRC 461 (2008)

DISCOVERY

a board is to decide the motion to reopen on the information before it and has no authority to engage in discovery in order to supplement the pleadings before it; CLI-08-28, 68 NRC 658 (2008)

Commission's rules and longstanding precedent bar discovery in connection with the preparation of proposed contentions; CLI-08-28, 68 NRC 658 (2008)

for the purpose of developing a motion to reopen the record or to assist a petitioner in the framing of contentions, discovery is not permitted; LBP-08-12, 68 NRC 5 (2008)

if litigation over a contention brings into play financial or other information that has been designated as nonpublic, petitioners must request that the board issue a protective order that permits access; LBP-08-16, 68 NRC 361 (2008)

the Licensing Support Network functions as a mechanism for early collection of all extant documents that normally would be collected later through traditional discovery; CLI-08-22, 68 NRC 355 (2008)

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dismissal due to counsel's malfeasance is a logical extension of the board's disciplinary authority to reprimand, censure, or suspend from a proceeding any party or representative who refuses to comply with its directions; CLI-08-29, 68 NRC 899 (2008)

this sanction falls within the spectrum of sanctions available to the boards to assist in the management of proceedings, although dismissal should be reserved for severe cases; CLI-08-29, 68 NRC 899 (2008)

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intra-agency memoranda developed during the decisionmaking process are protected under the deliberative process privilege; CLI-08-23, 68 NRC 461 (2008)
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in assessing impacts, an agency may rely on other specialized agencies with jurisdiction to enforce related permits and measures; CLI-08-16, 68 NRC 221 (2008)
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petitioners who rely on water supplies adjacent to a mining site have a right to a hearing; LBP-08-24, 68 NRC 691 (2008)
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the ''direct participation of local citizens in nuclear reactor licensing'' is not a right to have all legal arguments on contention admissibility take place near the facility at issue, but rather the right of persons with standing to file contentions in licensing proceedings and litigate admissible contentions; LBP-09-23, 68 NRC 679 (2008)
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an evaluation of the natural features of the geologic setting and design features of the engineered barrier system that are considered barriers important to waste isolation must be set forth; CLI-08-20, 68 NRC 272 (2008)
assessment of the ability of the proposed geologic repository to limit radiological exposures to the reasonably maximally exposed individual for the period after permanent closure must be included; CLI-08-20, 68 NRC 272 (2008)

assessment of the anticipated response of the geomechanical, hydrogeologic, and geochemical systems to the range of design thermal loadings under consideration must be included; CLI-08-20, 68 NRC 272 (2008)
explanation of measures used to support the models used to provide the information required must be provided; CLI-08-20, 68 NRC 272 (2008)
the engineered barrier system, including the design criteria used and their relationships to the post-closure performance objectives specified in NRC regulations, must be described; CLI-08-20, 68 NRC 272 (2008)
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a party who files a motion must certify that he or she has made a reasonable effort to consult with counsel for the other parties in an effort to resolve the matter in advance of filing the motion; CLI-08-25, 68 NRC 497 (2008)
a person denied party or interested governmental participant status may request such status upon a showing of subsequent compliance with the requirements of 10 C.F.R. 2.1003; CLI-08-25, 68 NRC 497 (2008)
a presiding officer considering environmental contentions should apply NRC reopening procedures and standards in 10 C.F.R. 2.326 to the extent possible; CLI-08-25, 68 NRC 497 (2008)
any person whose interest may be affected by the high-level waste proceeding and who desires to participate as a party must file a written petition for leave to intervene; CLI-08-25, 68 NRC 497 (2008)
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in ruling on a petition to intervene in high-level waste proceeding, the presiding officer shall consider any failure of the petitioner to participate as a potential party in the pre-license application phase; CLI-08-25, 68 NRC 497 (2008)
in ruling on a petition to intervene in high-level waste proceeding, the presiding officer shall consider the factors in 10 C.F.R. 2.309 on standing to intervene; CLI-08-25, 68 NRC 497 (2008)
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the presiding officer has no authority or duty to resolve uncontested issues; CLI-08-25, 68 NRC 497 (2008)

the presiding officer should treat as a cognizable ''new consideration'' an attack on the Yucca Mountain environmental impact statements based on significant and substantial information that, if true, would render the statements inadequate; CLI-08-25, 68 NRC 497 (2008)
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a license renewal applicant has no obligation to discuss in its environmental report the impacts of a potential expansion of the ISFSI; LBP-08-26, 68 NRC 905 (2008)
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the Commission's rules in 10 C.F.R. § 2.1113 do not provide for supplementing Subpart K presentations; CLI-08-26, 68 NRC 509 (2008)
the presiding officer is allowed to resolve factual and legal disputes in spent fuel storage controversies, including disagreements between experts, on the basis of a brief discovery period and written submissions and oral argument without a full trial-type evidentiary hearing; CLI-08-26, 68 NRC 509 (2008)
under Subpart K and the Nuclear Waste Policy Act, the Commission resorts to full evidentiary hearings on spent fuel storage controversies only when necessary for accuracy; CLI-08-26, 68 NRC 509 (2008)
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intervention petitioners are not required to demonstrate their asserted injury with certainty or to provide extensive technical studies in support of their standing argument; LBP-08-24, 68 NRC 691 (2008)
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to establish an injury in fact, a party merely has to show some threatened concrete interest personal to the party that the National Historic Preservation Act was designed to protect; LBP-08-24, 68 NRC 691 (2008)
to establish an injury in fact, a party merely has to show some threatened concrete interest personal to the party; LBP-08-24, 68 NRC 691 (2008)
to the extent contaminants can plausibly migrate from leach mining operations to the aquifer from which a petitioner obtains his or her water, a petitioner would have a claim of a cognizable injury and could be accorded standing; LBP-08-24, 68 NRC 691 (2008)
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an interested local governmental body that is not a party to the proceeding must be accorded a reasonable opportunity to participate, through a single representative, in the hearing of one or more of the admitted contentions; LBP-08-24, 68 NRC 691 (2008)
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petitioner may not be granted party or interested governmental participant status if petitioner cannot demonstrate substantial and timely compliance with the requirements in 10 C.F.R. 2.1003 at the time of the request for participation in the high-level waste proceeding; CLI-08-25, 68 NRC 497 (2008)
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NRC Staff's revision of the Final Safety Evaluation Report to account for applicant's confirmatory analysis would not, standing alone, be a materially different result that justifies reopening the record, because it would neither change the outcome of the renewal proceeding nor impose a different licensing condition on an applicant; LBP-08-12, 68 NRC 5 (2008)
petitioner is not required to redo SAMA analyses in order to raise a material issue; LBP-08-13, 68 NRC 43 (2008)
petitioner's assumption that, because it cannot check all SAMA analysis details, the analysis is incomplete or incorrect is mere speculation and is insufficient to support the admissibility of its contention; LBP-08-13, 68 NRC 43 (2008)
reasonable alternatives for license renewal proceedings are limited to discrete electric generation sources that are technically feasible and commercially available; LBP-08-13, 68 NRC 43 (2008)
safety issues that were reviewed for the initial license and that have been closely monitored by NRC inspection during the license term need not be reviewed again in this context; LBP-08-13, 68 NRC 43 (2008)
spent fuel pool fires are Category 1 environmental issues and therefore are addressed generically in the generic environmental impact statement for license renewals; LBP-08-13, 68 NRC 43 (2008)
to challenge a SAMA analysis, petitioner must, at a minimum, address the approximate relative cost and benefit of the SAMA; LBP-08-13, 68 NRC 43 (2008)
to reopen a closed record to introduce a new issue, movant has the burden of showing that the new information will likely trigger a different result; LBP-08-12, 68 NRC 5 (2008)
whether a plan is necessary to manage the cumulative effects of embrittlement of the reactor pressure vessels and associated internals is within the scope of this proceeding; LBP-08-13, 68 NRC 43 (2008)
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a renewed license takes effect immediately, with a term of up to 20 years plus the number of years remaining on the initial operating license; CLI-08-23, 68 NRC 461 (2008)

applicants must demonstrate how their programs will be effective in managing the effect of aging during the period of extended operations and identify any additional actions that will need to be taken to manage adequately the detrimental effects of aging; LBP-08-22, 68 NRC 590 (2008)
burden is on applicant to show that concrete in containment structures will maintain its integrity during the extended period of operations or to develop an aging management plan that ensures that any indication of degradation is detected and remediated; LBP-08-13, 68 NRC 43 (2008)
condensate storage system buried pipes are outside the scope of a license renewal proceeding with respect to their ''safety'' functionality, but that does not eliminate the need for consideration of potential leaks from those buried pipes because of their role in fire protection; LBP-08-22, 68 NRC 590 (2008)
even if a particular system falls within the scope of Part 54, not all structures and components comprising that system will necessarily be subject to Part 54 aging management requirements; LBP-08-22, 68 NRC 590 (2008)
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in conducting its analysis of the impact of the license renewal on land use, applicant should consider the impact on real estate values that would be caused by license renewal or nonrenewal; LBP-08-13, 68 NRC 43 (2008)
in evaluating metal fatigue, a component's cumulative usage factor is the fundamental parameter used to determine whether it will likely develop cracks during the license renewal period and thus is subject to an aging management plan; LBP-08-13, 68 NRC 43 (2008)
it is unnecessary and inappropriate to throw open the full gamut of provisions in a plant's current licensing basis to reanalysis during the safety review; LBP-08-22, 68 NRC 590 (2008)
monitoring, and the installation of monitoring wells, is a matter for ongoing operation and maintenance, and not within the scope of matters properly considered in a license renewal; LBP-08-22, 68 NRC 590 (2008)
Part 54 does not require a comprehensive preapplication baseline inspection; LBP-08-13, 68 NRC 43 (2008)
quality assurance programs must include written test procedures that incorporate the requirements and acceptance limits contained in applicable design documents, and, as appropriate, proof tests prior to installation, preoperational tests, and operational tests during nuclear power plant operation, of structures, systems, and components; LBP-08-22, 68 NRC 590 (2008)
quality assurance requirements apply to aging management plans; LBP-08-22, 68 NRC 590 (2008)
regulations established under Part 50, including compliance with the ASME Code, must be followed during the period of extended operation; CLI-08-28, 68 NRC 658 (2008)
relevant plant systems, structures, and components are those that are safety-related, or whose failure could affect safety-related functions, or that are relied on to demonstrate compliance with the NRC's regulations for fire protection, environmental qualification, pressurized thermal shock, anticipated transients without scram, and station blackout; CLI-08-23, 68 NRC 461 (2008)
the Commission may issue a renewed license if it finds that with respect to the structures and components identified under section 54.21(a)(1), there is reasonable assurance of ongoing conformity to the current licensing basis; LBP-08-22, 68 NRC 590 (2008)
the Commission will issue a renewed license if it determines, among other things, that there is reasonable assurance that the plant will operate in accordance with its current licensing basis during the period of extended operation; CLI-08-23, 68 NRC 461 (2008)
See also Operating License Renewal
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a union in one facility lacks standing to participate in other interrelated license transfer proceedings, given that the union did not represent employees at the other facilities; CLI-08-19, 68 NRC 251 (2008)
how the Commission determines proximity-based standing is described; CLI-08-19, 68 NRC 251 (2008)
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if Staff approves a license transfer application prior to the Commission completing its adjudication, the application will lack the agency's final approval until and unless the Commission concludes the adjudication in applicant's favor; CLI-08-19, 68 NRC 251 (2008)
indirect transfers involve corporate restructuring or reorganizations that leave the licensee itself intact as a corporate entity and therefore involve no application for a new operating license; CLI-08-19, 68 NRC 251 (2008)
license transfer applicants who have received Staff approval but are still awaiting the results of a Commission adjudication are free to act in reliance on the Staff's order; CLI-08-19, 68 NRC 251 (2008)
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during the renewal term, this consists of the current licensing basis together with new commitments to monitor, manage, and correct age-related degradation unique to license renewal; LBP-08-25, 68 NRC 763 (2008)
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a licensing board need not formally reopen the record in order to assess the relative worth of the parties' competing evidence; LBP-08-12, 68 NRC 5 (2008)
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in evaluating a motion to reopen the record, a board properly considers the movant's new allegations and the nonmovant's contrary evidence in determining whether there is a real issue at stake warranting a reopened hearing; LBP-08-12, 68 NRC 5 (2008)
the Commission gives substantial deference to board conclusions on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion; CLI-08-17, 68 NRC 231 (2008)
where a board's decision rests in part on facts officially noticed, any party wishing to controvert the facts officially noticed may do so by filing a motion for reconsideration or an appeal from the decision; LBP-08-25, 68 NRC 763 (2008)
where a party merely complains that the board improperly weighed the evidence and identifies no clear board factual or legal error requiring further Commission consideration on appellate review, the Commission is disinclined to second-guess the board's assessment of the party's affidavits; CLI-08-28, 68 NRC 658 (2008)
See also Intervention Rulings; Referral of Ruling
LICENSING BOARD ORDERS
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a board has discretion to allow parties to cross-examine witnesses in Subpart L proceedings if the board deems this practice necessary to establish an adequate record; LBP-08-24, 68 NRC 691 (2008)
a board is clearly authorized to dismiss a party who obstructs the discovery process, disobeys the board orders, and engages in willful, bad-faith, and prejudicial conduct toward another party; CLI-08-29, 68 NRC 899 (2008)
a board is to decide a motion to reopen on the information before it and has no authority to engage in discovery in order to supplement the pleadings before it; CLI-08-28, 68 NRC 658 (2008)
although licensing boards frequently hold oral argument on contention admissibility, a board may instead elect to dispense with oral argument; LBP-09-23, 68 NRC 679 (2008)
boards have broad discretion to issue procedural orders to regulate the course of proceedings and the conduct of participants, and as a general matter, the Commission declines to interfere with the board's day-to-day case management decisions, unless there has been an abuse of power; LBP-09-23, 68 NRC 679 (2008)

boards have discretion to reframe contentions for purposes of clarity, succinctness, and a more efficient proceeding; LBP-08-12, 68 NRC 5 (2008)
boards may choose the hearing process most suitable for the contentions before it; LBP-08-24, 68 NRC 691 (2008)
boards should refer contention challenging a reactor design certification to the Staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible; CLI-08-15, 68 NRC 1 (2008)
dismissal due to counsel's malfeasance is a logical extension of the board's disciplinary authority to reprimand, censure, or suspend from a proceeding any party or representative who refuses to comply with its directions; CLI-08-29, 68 NRC 899 (2008)
if a board finds that the use of a more accurate approach than compliance with regulatory guides is needed to provide reasonable assurance that metal fatigue will be adequately managed during the period of extended operation, then the board is authorized and duty bound to impose such a requirement; LBP-08-25, 68 NRC 763 (2008)
if petitioner fails to provide the requisite support for its contentions, the board may not make assumptions of fact that favor the petitioner or supply information that is lacking; LBP-08-16, 68 NRC 361 (2008); LBP-08-17, 68 NRC 431 (2008) ; LBP-08-24, 68 NRC 691 (2008); LBP-08-26, 68 NRC 905 (2008)
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licensing boards are not foreclosed from considering docketed licensing material that has been submitted to the board and that, on its face, appears to be relevant to the disposition of a pending motion; LBP-08-12, 68 NRC 5 (2008)
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it is the applicant, not NRC Staff, that has the burden of proof in litigation; CLI-08-23, 68 NRC 461 (2008)
motions must be initially addressed to the presiding officer when a proceeding is pending; CLI-08-23, 68 NRC 461 (2008)
the purpose and scope of a proceeding is to allow interested persons the right to challenge the sufficiency of the application; CLI-08-23, 68 NRC 461 (2008)
LICENSING SUPPORT NETWORK
participants must make a good-faith effort to have made available all documentary material by the date specified for initial compliance; CLI-08-22, 68 NRC 355 (2008)
potential participants are afforded the opportunity to frame focused and meaningful contentions and to avoid the delay potentially associated with document discovery, by requiring parties and potential parties to the proceeding to make all of their Subpart J-defined documentary material available prior to submission of the Department of Energy application; CLI-08-22, 68 NRC 355 (2008)
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when boards conduct limited appearance sessions, in which members of the general public may make oral statements to the board, such sessions are generally conducted in person near the site; LBP-09-23, 68 NRC 679 (2008)

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the Commission shall permit intervention by the county, municipality, or other subdivision in which the geologic repository operations area is located if the contention requirements in 10 C.F.R. 2.309(f) are satisfied with respect to at least one contention; CLI-08-25, 68 NRC 497 (2008)
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to participate as a party in a materials license renewal proceeding, intervention petitioner must not only establish standing, but also proffer at least one admissible contention; LBP-08-24, 68 NRC 691 (2008)
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a component's cumulative usage factor is the fundamental parameter used to determine whether it will likely develop cracks during the license renewal period and thus is subject to an aging management plan; LBP-08-13, 68 NRC 43 (2008)

analysis of metal fatigue that ignores the known and substantial effects of the light-water reactor environment is insufficient, as both a technical and a legal matter; LBP-08-25, 68 NRC 763 (2008)
applicant's use of a conservative number of transients in the calculations of the environmentally adjusted cumulative usage factor is adequate to provide the degree of assurance required by 10 C.F.R. 54.29(a); LBP-08-25, 68 NRC 763 (2008)
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if a board finds that the use of a more accurate approach than compliance with regulatory guides is needed to provide reasonable assurance that metal fatigue will be adequately managed during the period of extended operation, then the board is authorized and duty bound to impose such a requirement; LBP-08-25, 68 NRC 763 (2008)
if applicant's metal fatigue analyses on Class I components do not comply with the ASME Code and do not provide reasonable assurance as required by 10 C.F.R. 54.21(c)(1) and 54.29(a), then a license renewal cannot be issued; LBP-08-25, 68 NRC 763 (2008)
license renewal applicant demonstrates compliance with the ASME Code by projecting the fatigue analysis for the nozzle through the extended operating period; CLI-08-28, 68 NRC 658 (2008)
NRC Staff's guidance document NUREG/CR-6909, which prescribes guidance on the calculation of metal fatigue on reactor components in a light water reactor environment, is built upon a larger and more recent database than NUREG/CR-5704 and -6583 but use of the earlier NUREGs is sufficient; LBP-08-25, 68 NRC 763 (2008)
use of a simplified Green's function methodology for the environmentally adjusted cumulative usage factor metal fatigue analyses for the core spray and reactor recirculation outlet nozzles is inconsistent with the ASME Code and thus cannot serve as the analysis-of-record and does not satisfy the requirements of 10 C.F.R. 54.21(c)(1) or 54.29(a); LBP-08-25, 68 NRC 763 (2008)

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if applicant supplies missing information or performs the omitted analysis, a contention of omission is moot; LBP-08-12, 68 NRC 5 (2008)

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a party in the high-level waste proceeding who files a motion must certify that he or she has made a reasonable effort to consult with counsel for the other parties in an effort to resolve the matter in advance of filing the motion; CLI-08-25, 68 NRC 497 (2008)
all motions are required to include a certification that the sponsor of the motion has made a sincere effort to contact the other parties and to resolve the issues raised in the motion; CLI-08-22, 68 NRC 355 (2008)
although NRC regulations do not provide for a motion to suspend a proceeding, the Commission has considered similar requests in the exercise of its inherent supervisory powers over proceedings; CLI-08-23, 68 NRC 461 (2008)
movant has no right to reply except as permitted by the presiding officer; CLI-08-23, 68 NRC 461 (2008)
petitioners' requests that do not fit cleanly within any of the procedures described within the rules of practice are treated as general motions brought under the procedural requirements of 10 C.F.R. 2.323; CLI-08-23, 68 NRC 461 (2008)

MOTIONS FOR RECONSIDERATION
a motion may not be filed except with leave of the licensing board, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not reasonably have been anticipated, that renders the decision invalid; LBP-09-23, 68 NRC 679 (2008)
petitioner may not claim standing based on vague assertions, and when that fails, attempt to repair the defective pleading with fresh details offered for the first time in a petition for reconsideration; CLI-08-19, 68 NRC 251 (2008)
where a board's decision rests in part on facts officially noticed, any party wishing to controvert the facts officially noticed may do so by filing a motion for reconsideration or an appeal from the decision; LBP-08-25, 68 NRC 763 (2008)

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a petitioner seeking to reopen the record does not show the existence of a significant safety issue by showing merely that a plant component performs safety functions and thus has safety significance; LBP-08-12, 68 NRC 5 (2008)
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affidavit support for a motion to reopen must provide a prima facie showing that a deficiency exists in the license renewal application and the deficiency presents a significant safety issue; LBP-08-12, 68 NRC 5 (2008)
affidavit support that sets forth the factual and/or technical basis for the movants' claim that a significant and material safety or environmental issue exists is required; CLI-08-23, 68 NRC 461 (2008); LBP-08-12, 68 NRC 5 (2008)
bare assertions and speculation do not supply the requisite support and a judge's dissenting opinion cannot substitute for the affidavit required to be submitted to the board; CLI-08-28, 68 NRC 658 (2008)
failure by movant to address all reopening requirements in its motion is reason enough to deny the motion; LBP-08-12, 68 NRC 5 (2008)
motions must be accompanied by affidavits of qualified experts presenting the factual and/or technical bases for the claim that there is a significant safety issue, together with evidence that satisfies the admissibility standards; CLI-08-28, 68 NRC 658 (2008)
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proponents of a reopening motion bear a heavy burden of meeting all of the reopening requirements; CLI-08-28, 68 NRC 658 (2008)
reopening a closed record requires, among other things, a showing that the motion is timely; CLI-08-23, 68 NRC 461 (2008)
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NATIONAL ENVIRONMENTAL POLICY ACT
a decision on whether an environmental impact report is based on the best scientific methodology available is not required, nor is the resolution of disagreements among various scientists as to methodology; CLI-08-26, 68 NRC 509 (2008)
a more detailed environmental impact statement is not required unless the contemplated action is a major federal action significantly affecting the quality of the human environment; CLI-08-26, 68 NRC 509 (2008)
a NEPA analysis is not the vehicle for exploring questions about the potential for a terrorist attack upon a proposed nuclear facility; LBP-08-16, 68 NRC 361 (2008)
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an environmental assessment, with its accompanying finding of no significant impact, constitutes an agency's evaluation of the environmental effects of a proposed action unless a more detailed statement is required; CLI-08-26, 68 NRC 509 (2008)
an environmental report prepared for a license renewal need not discuss economic or technical benefits and costs of the proposed action or alternatives except as they are either essential for determining whether an alternative should be included or relevant to mitigation; LBP-08-13, 68 NRC 43 (2008)
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if a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply, regardless of the gravity of the harm; CLI-08-16, 68 NRC 221 (2008)
in conducting its analysis of the impact of the license renewal on land use, applicant should consider the impact on real estate values that would be caused by license renewal or nonrenewal; LBP-08-13, 68 NRC 43 (2008)
in its environmental report, applicant must provide enough information and in sufficient detail to allow for an evaluation of important impacts; LBP-08-16, 68 NRC 361 (2008)
in the context of NEPA, one must examine underlying policies or legislative intent to draw a manageable line between those causal changes that make an agency responsible for an effect and those that do not; CLI-08-16, 68 NRC 221 (2008)
neither NRC nor applicant has the mission or authority to implement a general societal interest in energy efficiency; LBP-08-13, 68 NRC 43 (2008)
notwithstanding TVA's status as a federal entity, it is within NRC's regulatory authority to review TVA's combined license application, including its compliance with the agency's NEPA requirements; LBP-08-16, 68 NRC 361 (2008)
NRC can presume that increases in emissions that still fall within statutory limits will be insignificant; CLI-08-16, 68 NRC 221 (2008)
NRC has no legal duty to consider intentional malevolent acts on a case-by-case basis in conjunction with commercial power reactor license renewal applications; LBP-08-13, 68 NRC 43 (2008)
NRC is not required to assess every impact or effect of its proposed action, only effects on the environment; CLI-08-16, 68 NRC 221 (2008)
NRC is not required to revisit matters related to high-density spent fuel pool coolant loss or other SFP events in combined license proceedings; LBP-08-21, 68 NRC 554 (2008)
NRC regulations require petitioner to raise contentions related to NEPA as challenges to the applicant's environmental report, which acts as a surrogate for the environmental impact statement during the early stages of a relicensing proceeding; LBP-08-26, 68 NRC 905 (2008)

presentation of an alternative analysis is, without more, insufficient to support a contention alleging that the original analysis failed to meet applicable requirements; LBP-08-13, 68 NRC 43 (2008)
reasonable alternatives for license renewal proceedings are limited to discrete electric generation sources that are technically feasible and commercially available; LBP-08-13, 68 NRC 43 (2008)
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a federal agency, prior to the issuance of any license, is required to take into account the effect of the federal action on any area eligible for inclusion in the National Register of Historic Places; LBP-08-24, 68 NRC 691 (2008)
a license renewal applicant must assess whether any historic or archaeological properties will be affected by the proposed project; LBP-08-26, 68 NRC 905 (2008)
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to establish an injury in fact, a party merely has to show some threatened concrete interest personal to the party; LBP-08-24, 68 NRC 691 (2008)

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notification and inventory procedures are provided so that Indian cultural objects and burial remains found on federal lands will be repatriated to the appropriate tribe; LBP-08-24, 68 NRC 691 (2008)
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as long as counsel is an attorney in good standing and a member of the bar, a Notice of Appearance is sufficient in itself for him or her to represent an Indian tribe in a proceeding; LBP-08-26, 68 NRC 905 (2008)
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a party filing a response to a notice of hearing must state in its answer its intent to introduce classified information into the proceeding, if it appears to the party that it will be impracticable to avoid such introduction; CLI-08-21, 68 NRC 351 (2008)
any ambiguity relative to the filing date for hearing requests arising from the language of the agency's hearing opportunity notice should be construed in favor of a participant who was seeking to comply with the notice; LBP-08-16, 68 NRC 361 (2008)
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in the context of the National Environmental Policy Act, one must examine underlying policies or legislative intent to draw a manageable line between those causal changes that make an agency responsible for an effect and those that do not; CLI-08-16, 68 NRC 221 (2008)
it is applicant, not NRC Staff, that has the burden of proof in litigation; CLI-08-23, 68 NRC 461 (2008)
it is neither possible nor necessary for the Staff to verify each and every factual assertion in complex license applications; CLI-08-23, 68 NRC 461 (2008)
safety review for license renewal applications is governed by 10 C.F.R. Part 54, and principally NUREG-1800 and NUREG-1801; CLI-08-23, 68 NRC 461 (2008)
Staff's audit, or sampling, method of verifying a license renewal applicant's aging management programs, together with the other components of its review, enables the Staff to make the safety findings necessary for issuance of a renewed license; CLI-08-23, 68 NRC 461 (2008)
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the safety review of each license renewal application focuses on the adequacy of the applicant's aging management programs and an evaluation of the applicant's time-limited aging analyses; LBP-08-25, 68 NRC 763 (2008)
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notwithstanding TVA's status as a federal entity, it is within NRC's regulatory authority to review TVA's combined license application, including its compliance with the agency's NEPA requirements; LBP-08-16, 68 NRC 361 (2008)

only the Commission on its own initiative may review Staff's final no significant hazards consideration determination; LBP-08-20, 68 NRC 549 (2008)
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the presumption of standing based on geographic proximity applies in proceedings for nuclear power plant construction permits, operating licenses, or significant amendments thereto; LBP-08-13, 68 NRC 43 (2008); LBP-08-15, 68 NRC 294 (2008)
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petitioner's status as an anti-nuclear advocate and a source of information for its community is insufficient, without more, to qualify it for organizational standing; CLI-08-19, 68 NRC 251 (2008)
the principle regarding the representational standing of unions is also applicable of public interest groups, who also, in significant part, exist to represent the interests of their members; CLI-08-19, 68 NRC 251 (2008)
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no protection standard has been promulgated for the high-level waste repository post-closure period beyond 10,000 years following disposal of high-level waste; CLI-08-20, 68 NRC 272 (2008)
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allowing applicant to postpone performance of an analysis-of-record time-limited aging analysis until after the license renewal is issued is inconsistent with the language, structure, and intent of the Part 54 regulations and inconsistent with NRC precedent; LBP-08-25, 68 NRC 763 (2008)
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the term ''likely'' in section 2.326(a)(3) is construed to be synonymous with ''probable'' or ''more likely than not''; LBP-08-12, 68 NRC 5 (2008)
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if a board finds that the use of a more accurate approach than compliance with regulatory guides is needed to provide reasonable assurance that metal fatigue will be adequately managed during the period of extended operation, then the board is authorized and duty bound to impose such a requirement; LBP-08-25, 68 NRC 763 (2008)
NRC Staff's guidance document NUREG/CR-6909, which prescribes guidance on the calculation of metal fatigue on reactor components in a light water reactor environment, is built upon a larger and more recent database than NUREG/CR-5704 and -6583, but use of the earlier NUREGs is sufficient; LBP-08-25, 68 NRC 763 (2008)
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in evaluating a motion to reopen, a licensing board properly considers the movant's new allegations and the nonmovant's contrary evidence in determining whether there is a real issue at stake warranting a reopened hearing; LBP-08-12, 68 NRC 5 (2008)
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agencies should be accorded broad discretion in establishing and applying rules for public participation, including rules for determining which community representatives are to be allowed to participate; CLI-08-19, 68 NRC 251 (2008)
all motions are required to include a certification that the sponsor of the motion has made a sincere effort to contact the other parties and to resolve the issues raised in the motion; CLI-08-22, 68 NRC 355 (2008)
all of the contention admissibility requirements of 10 C.F.R. 2.309(f)(1) must be met for a contention to be admissible; LBP-08-19, 68 NRC 545 (2008); LBP-08-20, 68 NRC 549 (2008)
although a board may appropriately view a petitioner's supporting information in a light favorable to the petitioner, failure to provide such information regarding a proffered contention requires that the contention be rejected; LBP-08-16, 68 NRC 361 (2008)
although boards are to provide latitude to pro se participants, petitioner's decision to provide an expert affidavit, available when it filed its hearing petition, at the time it submitted its reply runs afoul of the

Commission's directive that reply pleadings cannot be used to introduce additional supporting information relative to a contention; LBP-08-16, 68 NRC 361 (2008)
although boards generally are to litigate a contention rather than the basis that provides the issue statement's foundational support, the reach of a contention necessarily hinges upon its terms coupled with its stated basis; LBP-08-16, 68 NRC 361 (2008)
although latitude is to be afforded a pro se intervenor in the mechanics of contention pleading and citation, an organization that has appeared several times previously is expected to have a heightened awareness of the agency's pleading rules; LBP-08-16, 68 NRC 361 (2008)
although petitioner does not have to prove its contention at the admissibility stage, mere notice pleading is insufficient; LBP-08-17, 68 NRC 431 (2008)
although the Commission abolished the Atomic Safety and Licensing Appeal Board in 1991, its decisions still carry precedential weight; CLI-08-19, 68 NRC 251 (2008)
although the Commission customarily follows judicial concepts of standing, it is not bound to do so given that it is not an Article III court; LBP-08-24, 68 NRC 691 (2008)
although the Commission has long looked for guidance to judicial concepts of standing, it is not bound to do so; CLI-08-19, 68 NRC 251 (2008)
amicus briefs must be filed by the same deadline as the brief of the party whose side the amicus brief supports, unless the Commission provides otherwise; CLI-08-22, 68 NRC 355 (2008)
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an admissible contention must raise an issue that is both within the scope of the proceeding, normally defined by the hearing notice, and material to the findings the NRC must make to support the action involved; LBP-08-17, 68 NRC 431 (2008)
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an ambiguous provision is construed most strongly against the person who selected the language; LBP-08-16, 68 NRC 361 (2008)
an entity seeking to intervene on behalf of its members must show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests; LBP-08-16, 68 NRC 361 (2008)
an environmental contention may be admitted during a combined license proceeding if it concerns a significant issue that was not resolved in the early site permit proceeding or if it involves the impacts of construction and operation of the facility and significant new information has been identified; LBP-08-15, 68 NRC 294 (2008)
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an organization seeking to intervene in its own right must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act; LBP-08-24, 68 NRC 691 (2008)
an organization that wants to intervene in a representational capacity must demonstrate that the licensing action will affect at least one of its members, identify that member by name and address, and show that it is authorized by that member to request a hearing on his or her behalf; CLI-08-19, 68 NRC 251 (2008); LBP-08-13, 68 NRC 43 (2008); LBP-08-17, 68 NRC 431 (2008); LBP-08-24, 68 NRC 691 (2008)
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petitioner's proximity to the pertinent facility triggers a presumption that it has standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm; LBP-08-15, 68 NRC 294 (2008); LBP-08-17, 68 NRC 431 (2008); LBP-08-26, 68 NRC 905 (2008)
petitioners in direct license transfer cases who qualified for proximity-based standing lived within a 5-1/2-mile radius of their plant; CLI-08-19, 68 NRC 251 (2008)
petitioners who rely on water supplies adjacent to a mining site have a right to a hearing; LBP-08-24, 68 NRC 691 (2008)
preservation of cultural traditions is a protected interest under federal law, and its endangerment or harm qualifies as an injury for the purposes of establishing standing; LBP-08-24, 68 NRC 691 (2008)
procedural violations of the National Historic Preservation Act have resulted in a grant of standing to tribes; LBP-08-24, 68 NRC 691 (2008)
proximity alone is not sufficient to establish standing for a petitioner's proximity to a source materials activity; LBP-08-24, 68 NRC 691 (2008)
proximity standing rests on the presumption that an accident associated with the nuclear facility could adversely affect the health and safety of people working, living, or regularly engaging in activities offsite but within a certain distance of that facility; CLI-08-19, 68 NRC 251 (2008)
state and local governmental bodies in which the geologic repository operations area is located and any affected federally recognized Indian tribe need not address the standing requirements; CLI-08-25, 68 NRC 497 (2008)
the person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy; LBP-08-24, 68 NRC 691 (2008)
the presiding officer must assess a petition to intervene even if there are no objections to a petitioner's standing; LBP-08-16, 68 NRC 361 (2008)
the proximity presumption applies in proceedings for nuclear power plant construction permits, operating licenses, or significant amendments thereto; LBP-08-13, 68 NRC 43 (2008); LBP-08-15, 68 NRC 294 (2008)
the proximity presumption extends to petitioners living in or having frequent contacts with an area within a 50-mile radius of a nuclear reactor; LBP-08-18, 68 NRC 533 (2008)
the role of ''private attorney general'' is not contemplated under the Atomic Energy Act; CLI-08-19, 68 NRC 251 (2008)
to demonstrate standing, petitioner must identify an interest in the proceeding and specify the facts pertaining to that interest; CLI-08-19, 68 NRC 251 (2008)
to determine whether petitioner has an interest potentially affected by a proceeding, the licensing board considers the nature of the petitioner's right under the Atomic Energy Act to be made a party, the nature and extent of petitioner's property, financial, or other interest in the proceeding, and the possible effect of any decision or order on petitioner's interest; LBP-08-14, 68 NRC 279 (2008)
to establish an injury in fact, a party merely has to show some threatened concrete interest personal to the party that the National Historic Preservation Act was designed to protect; LBP-08-24, 68 NRC 691 (2008)
to the extent contaminants can plausibly migrate from leach mining operations to the aquifer from which a petitioner obtains his or her water, a petitioner would have a claim of a cognizable injury and could be accorded standing; LBP-08-24, 68 NRC 691 (2008)
unless a proposed action involves obvious potential for offsite consequences, such as with construction or operation of reactor or certain major alterations to facility, petitioner must allege some specific injury in fact that will result from the action taken; LBP-08-18, 68 NRC 533 (2008)

vague assertions of possible harm do not amount to a showing of concrete and particularized injury to petitioner's interests that is actual or imminent, not conjectural or hypothetical; LBP-08-18, 68 NRC 533 (2008)
where a petitioner is accorded standing in one proceeding, that petitioner need not make a separate demonstration of standing in another proceeding regarding that same facility and the same parties; LBP-08-24, 68 NRC 691 (2008)
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an organization seeking to intervene in its own right must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act; LBP-08-24, 68 NRC 691 (2008); LBP-08-26, 68 NRC 905 (2008)
for an organizational petitioner to establish standing, it must show immediate or threatened injury to either its organizational interests or to the interest of identified members; LBP-08-24, 68 NRC 691 (2008)
petitioner must show some risk of discrete institutional injury to itself, other than the general environmental and policy interests of the sort repeatedly found insufficient for organizational standing; CLI-08-19, 68 NRC 251 (2008); LBP-08-13, 68 NRC 43 (2008); LBP-08-15, 68 NRC 294 (2008)
petitioner's status as an anti-nuclear advocate and a source of information for its community is insufficient, without more, to qualify it for organizational standing; CLI-08-19, 68 NRC 251 (2008)
STANDING TO INTERVENE, REPRESENTATIONAL
a member must qualify for standing in his or her own right, the interests that the organization seeks to protect must be germane to its own purpose, and neither petitioner's contentions nor the requested relief must require an individual member to participate in the proceeding; CLI-08-19, 68 NRC 251 (2008); LBP-08-15, 68 NRC 294 (2008); LBP-08-17, 68 NRC 431 (2008)
an affidavit supporting representational standing must describe precisely how the affiant is aggrieved, whether based on employment, residence, or activities; CLI-08-19, 68 NRC 251 (2008)
an entity seeking to intervene on behalf of its members must show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests; LBP-08-16, 68 NRC 361 (2008)
an organization must demonstrate that the licensing action will affect at least one of its members, identify the member by name and address, demonstrate that the member has standing, and show that the organization is authorized to request a hearing on that member's behalf; LBP-08-24, 68 NRC 691 (2008); LBP-08-26, 68 NRC 905 (2008)
authorization affidavits for representational standing may not be filed with a reply; CLI-08-19, 68 NRC 251 (2008)
if none of the affidavits submitted in support of a hearing request indicate that an organization seeking to intervene represents the interests of the submitter, the organization has failed to establish it has standing; LBP-08-16, 68 NRC 361 (2008)
in ruling on standing, NRC cannot automatically assume that an organization member necessarily considers him- or herself potentially aggrieved by a particular outcome of the proceeding; CLI-08-19, 68 NRC 251 (2008)
neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action; CLI-08-19, 68 NRC 251 (2008)
organization must identify a member by name and address, show how that member would be affected by the licensing action, and demonstrate that the member has authorized the organization to request a hearing on his or her behalf; CLI-08-19, 68 NRC 251 (2008); LBP-08-13, 68 NRC 43 (2008); LBP-08-15, 68 NRC 294 (2008); LBP-08-17, 68 NRC 431 (2008)
petitioner may not claim standing based on vague assertions, and when that fails, attempt to repair the defective pleading with fresh details offered for the first time in a petition for reconsideration; CLI-08-19, 68 NRC 251 (2008)
requirements apply to labor unions; CLI-08-19, 68 NRC 251 (2008)
the principle regarding the representational standing of unions is also applicable of public interest groups, who also, in significant part, exist to represent the interests of their members; CLI-08-19, 68 NRC 251 (2008)

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STATE GOVERNMENT
a state or local governmental entity that wishes to be a party in a proceeding that involves a facility located within its boundaries is automatically deemed to have standing; LBP-08-13, 68 NRC 43 (2008)
the Commission shall permit intervention by the state governmental body in which the geologic repository operations area is located if the contention requirements in 10 C.F.R. 2.309(f) are satisfied with respect to at least one contention; CLI-08-25, 68 NRC 497 (2008)
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the ''direct participation of local citizens in nuclear reactor licensing'' is not a right to have all legal arguments on contention admissibility take place near the facility at issue, but rather the right of persons with standing to file contentions in licensing proceedings and litigate admissible contentions; LBP-09-23, 68 NRC 679 (2008)
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a board would only be allowed to choose a Subpart G hearing process if issues of motive or intent of the party or eyewitness material to the resolution of the contested matter are in dispute; LBP-08-24, 68 NRC 691 (2008)
petitioner requesting a Subpart G hearing must demonstrate, by reference to the contention and the bases provided and the specific procedures in Subpart G of Part 2, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures; LBP-08-24, 68 NRC 691 (2008)
SUBPART J PROCEEDINGS
the general rule on amicus briefs, 10 C.F.R. 2.315(d), as a formal matter applies only to petitions for review filed under section 2.341 or to matters taken up by the Commission *sua sponte,* not to appeals filed under section 2.1015; CLI-08-22, 68 NRC 355 (2008)
the Licensing Support Network functions as a mechanism for early collection of all extant documents that normally would be collected later through traditional discovery; CLI-08-22, 68 NRC 355 (2008)
SUBPART K PROCEDURES
the Commission's rules in 10 C.F.R. 2.1113 do not provide for supplementing Subpart K presentations; CLI-08-26, 68 NRC 509 (2008)
the presiding officer is allowed to resolve factual and legal disputes in spent fuel storage controversies, including disagreements between experts, on the basis of a brief discovery period and written submissions and oral argument without a full trial-type evidentiary hearing; CLI-08-26, 68 NRC 509 (2008)

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SUBPART L PROCEDURES
a board has discretion to allow parties to cross-examine witnesses in Subpart L proceedings if the board deems this practice necessary to establish an adequate record; LBP-08-24, 68 NRC 691 (2008)
in conducting Subpart L hearings, board members pose questions to the parties' witnesses in those areas that, in the board's judgment, require additional clarification and development; LBP-08-22, 68 NRC 590 (2008)
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although NRC regulations do not provide for a motion to suspend a proceeding, the Commission has considered similar requests in the exercise of its inherent supervisory powers over proceedings; CLI-08-23, 68 NRC 461 (2008)
this drastic action is not warranted absent immediate threats to public health and safety; CLI-08-23, 68 NRC 461 (2008)
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a NEPA analysis is not the vehicle for exploring questions about the potential for a terrorist attack on a proposed nuclear facility; LBP-08-16, 68 NRC 361 (2008)
hearings on alternative terrorist scenario claims could not be conducted in a meaningful way without substantial disclosure of classified and safeguards information on threat assessments and security arrangements and without substantial litigation over their significance; CLI-08-26, 68 NRC 509 (2008)
NEPA imposes no legal duty on the NRC to consider intentional malevolent acts on a case-by-case basis in conjunction with commercial power reactor license renewal applications; LBP-08-13, 68 NRC 43 (2008)
security and mitigation measures the NRC has imposed upon its licensees since September 11, 2001, and national anti-terrorist measures, coupled with the robust nature of SFPs, make the probability of a successful terrorist attack, though numerically indeterminable, very low; LBP-08-21, 68 NRC 554 (2008)
the National Environmental Policy Act does not require NRC to revisit matters related to high-density spent fuel pool coolant loss or other SFP events in combined license proceedings; LBP-08-21, 68 NRC 554 (2008)
the National Environmental Policy Act does not require the analysis of potential terrorist attacks on a proposed nuclear facility; LBP-08-21, 68 NRC 554 (2008)
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a technically accurate projection of the time-limited aging analysis that predicts that the component will fail due to aging during the 20-year period of extended operation will not suffice; LBP-08-25, 68 NRC 763 (2008)
allowing applicant to postpone performance of an analysis-of-record time-limited aging analysis until after the license renewal is issued is inconsistent with the language, structure, and intent of the Part 54 regulations and inconsistent with NRC precedent; LBP-08-25, 68 NRC 763 (2008)
analysis of metal fatigue that ignores the known and substantial effects of the light-water reactor environment is insufficient, as both a technical and a legal matter; LBP-08-25, 68 NRC 763 (2008)
applicant's use of a conservative number of transients in the calculations of the environmentally adjusted cumulative usage factor is adequate to provide the degree of assurance required by 10 C.F.R. 54.29(a); LBP-08-25, 68 NRC 763 (2008)

as the threshold parameter of the TLAA for metal fatigue, applicant must complete the analysis of the cumulative usage factors for the license renewal period and include the results in the license renewal application; LBP-08-13, 68 NRC 43 (2008)
each license renewal application must contain an evaluation of TLAAs, a list of TLAAs, a demonstration relating to TLAAs, and the actual TLAAs; LBP-08-25, 68 NRC 763 (2008)
each license renewal application must demonstrate that the time-limited aging analyses remain valid for the period of extended operation, have been projected to the end of the period of extended operation, or that the effects of aging on the intended function(s) will be adequately managed for the period of extended operation; LBP-08-25, 68 NRC 763 (2008)
even if the TLAAs predict that the component will fail during the period of extended operation, a license renewal can still be granted if applicant demonstrates that the effects of aging will be adequately managed during the PEO; LBP-08-25, 68 NRC 763 (2008)
if applicant's metal fatigue analyses on Class I components do not comply with the ASME Code and do not provide reasonable assurance as required by 10 C.F.R. 54.21(c)(1) and 54.29(a), then a license renewal cannot be issued; LBP-08-25, 68 NRC 763 (2008)
NRC Staff's guidance document NUREG/CR-6909, which prescribes guidance on the calculation of metal fatigue on reactor components in a light water reactor environment, is built upon a larger and more recent database than NUREG/CR-5704 and -6583 but use of the earlier NUREGs is sufficient; LBP-08-25, 68 NRC 763 (2008)
section 54.21(c)(1)(i)-(iii) requires that the applicant make its demonstration that the effects of aging will be adequately managed during the period of extended operation in the application, which is necessarily before the license may be granted; LBP-08-25, 68 NRC 763 (2008)
technical accuracy of the time-limited aging analyses is necessary, but not sufficient, to demonstrate that it remains valid because a technically accurate TLAA that shows that the component will fail during the period of extended operation does not satisfy 10 C.F.R. 54.21(c)(1)(i); LBP-08-25, 68 NRC 763 (2008)
the ''demonstrations'' mandated by 10 C.F.R. 54.21(c)(1)(i) and (ii) require that the TLAAs both be performed in a technically accurate manner and produce a prediction that the component will not fail due to aging during the period of extended operation; LBP-08-25, 68 NRC 763 (2008)
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the statutory conditions for grant of a license renewal are described; LBP-08-25, 68 NRC 763 (2008)
use of a simplified Green's function methodology for the environmentally adjusted cumulative usage factor metal fatigue analyses for the core spray and reactor recirculation outlet nozzles is inconsistent with the ASME Code and thus cannot serve as the analysis-of-record and does not satisfy the requirements of 10 C.F.R. 54.21(c)(1) or 54.29(a); LBP-08-25, 68 NRC 763 (2008)
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the Commission has made a determination, on a generic basis, that spent fuel generated by any reactor can be safely managed and that sufficient repository capacity will be available; LBP-08-17, 68 NRC 431 (2008)
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