ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.C. Cir. No. 12-1106 (Consolidated with D.C. Cir. No. 12-1151)

BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, *et al.*,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,
Respondents

WESTINGHOUSE ELECTRIC COMPANY, LLC, *et al.*,
Intervenors.

Petition for Review of Final Administrative Action of the
United States Nuclear Regulatory Commission

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Table of Contents

TABLE OF CONTENTS……..……i

TABLE OF AUTHORITIES..……...……...…iii

GLOSSARY…….…….……...vi

RELEVANT STATUTES AND REGULATIONS…….....vi

INTRODUCTION AND SUMMARY OF ARGUMENT……..……..1

ARGUMENT……..……..1

I. THE NRC'S LEGAL RATIONALES FOR REFUSING TO ADMIT PETITIONERS' CONTENTION AND SUPPLEMENT THE VOGTLE SEIS ARE ERRONEOUS AND INCONSISTENT WITH NEPA AND NRC REGULATIONS……...…… ……... 4

A. Consideration of the Environmental Implications of the Task Force Report for Vogtle 3 & 4 Was Not Premature or Precluded by the Atomic Energy Act……..……4

1. The AEA does not preclude NEPA……..……..7

2. The fact that the NRC may implement Task Force recommendations in future rulemakings does not excuse NRC from complying with NEPA in the licensing decision for Vogtle 3 & 4……..……..9

B. Petitioners' Contention Satisfies the NRC's Admissibility Criteria……..……..13

1. Petitioners' contention was adequately specific and supported……..……..14

2. NRC's arguments that Petitioners' contention lacked specificity or support are inconsistent with NEPA and NRC admissibility regulations……..……...17

a. Petitioners' contention raised an admissible legal claim based on undisputed facts……..……..17

b. Petitioners were not required to detail every aspect of the Task Force Report that must be addressed……..……..18

c. Petitioners were not required to show their claims were unique to Vogtle 3 & 4……..…….21

d. NRC regulations do not require contentions of omission to dispute specific portions of an EIS or license application……..……22

C. By Adopting the Fukushima Task Force Recommendations and Conceding Their Safety Significance, the NRC has Legally Bound Itself to Supplement the SEIS for Vogtle 3 & 4 to Address the Environmental Implications of the Fukushima Task Force's Conclusions and Recommendations…….....23

II. THE NRC'S LEGAL RATIONALES FOR REFUSING TO SUPPLEMENT THE AP1000 EA ARE ERRONEOUS AND INCONSISTENT WITH NEPA AND NRC REGULATIONS…..…...…..27

CONCLUSION…….……30

CERTIFICATE OF COMPLIANCE….……31

CERTIFICATE OF SERVICE……..32

STATUTORY ADDENDUM……...ADD-1

TABLE OF AUTHORITIES

Cases

Adams v. U.S. EPA, 38 F.3d 43 (1st Cir. 1994)……...29

**California v. Norton*, 311 F.3d 1162 (9th Cir. 2002)……..7, 14, 22

Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109 (D.0C. Cir. 1971)…..20

**Citizens Against Rails-to-Trails v. Surface Transp. Bd.*,
267 F.3d 1144 (D.C. Cir. 2001)……..……..…….....3

**Citizens for Safe Power v. NRC*, 524 F.2d 1291 (D.C. Cir. 1975) ……....7, 8

**City of Idaho Falls v. FERC*, 629 F.3d 222 (D.C. Cir. 2011)……..…..….14

**Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273 (1st Cir. 1996)……..……..20, 29

Flint Ridge Development Corp. v. Scenic Rivers Association of Oklahoma,
426 U.S. 776 (1976)……..…8, 14, 19

Friends of the Clearwater v. Dombeck, 222 F.3d 552 (D. C. Cir. 1983)……20

**Hughes River Watershed Conservancy v. Glickman*,
81 F.3d 437 (4th Cir. 1996)…….……..13, 25

Kelley v. Selin, 42 F.3d 1501 (6th Cir. 1995)……..21

**Limerick Ecology Action v. NRC*, 869 F.2d 849 (3rd Cir. 1989)……..……...7

**Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989)…..…9, 13, 26

Or. Natural Res. Council v. Lyng, 882 F.2d 1417 (9th Cir. 1989)……..25

Public Citizen v. NRC, 573 F.3d 916 (9th Cir. 2009)……..11

Public Service Co. of New Hampshire v. NRC, 582 F.2d 77 (1st Cir.), *cert. denied*,
439 U.S. 1046 (1978)……....7

Sierra Club v. Van Antwerp, 526 F.3d 1353 (11th Cir. 2008)……11

**Town of Winthrop v. FAA*, 535 F.3d 1, 9 (1st Cir. 2008)……..……10

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978)……...9

**Village of Bensenville v. FAA*, 457 F.3d 52, 71-72 (D.C. Cir. 1006)……..…..10

Administrative Decisions

Georgia Power Co., 38 NRC 25 (1993)……..23

Gulf States Utilities Co., 40 NRC 43 (1994)……...19

U.S. Department of Energy, 69 N.R.C. 367, *aff'd*, 69 NRC 580 (2009)……17

Statutes

5 U.S.C. §706(2)(A)…….4, 14, 19-20

42 U.S.C. § 4331(b)(3)……8, 27

Regulations

10 C.F.R. § 2.309(f)……...……16, 18

10 C.F.R. § 2.309(f)(1)(i)……..…17, 18

10 C.F.R. § 2.309(f)(1)(v)……...19

10 C.F.R. § 2.309(f)(1)(vi)……22, 23

10 C.F.R. § 2.326……...16, 18

10 C.F.R. § 51.29 (a) and (c)……...20

10 C.F.R. § 51.92(a)……..16, 20

40 C.F.R. § 1508.27(b)(1)……...12

40 C.F.R. §1508.27(b)(2)……8, 27

Federal Register Notices

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)……..19, 22-23

Final Rule, AP1000 Design Certification Amendment,
76 Fed. Reg. 82,079, 82,081 (Dec. 30, 2011)…….28

Principal authorities denoted by an asterisk.

GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

AEA	Atomic Energy Act
COL	Combined License
EA	Environmental Assessment
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
SAMDA	Severe Accident Mitigation Design Alternative
SEIS	Supplemental Environmental Impact Statement
Southern Co.	Southern Nuclear Operating Company
Westinghouse	Westinghouse Electric Company, LLC

STATUTES, RULES, AND REGULATIONS

All relevant statutes, rules and regulations are included in an addendum to this brief or in the first addendum to Petitioners' Initial brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question of whether, under the National Environmental Policy Act ("NEPA"), recommendations by the U.S. Nuclear Regulatory Commission's ("NRC's") high-level Fukushima Task Force to upgrade the level of basic safety requirements for U.S. nuclear power plants constitutes "new and significant information" that the NRC must address in supplemental environmental analyses for the combined licenses ("COL") for Units 3 and 4 of the Vogtle nuclear power plant ("Vogtle 3 & 4") and the design certification for the underlying AP1000 design. Petitioners have maintained that such supplemental analyses are required as a matter of law and set forth these claims in a well supported contention and in rulemaking comments. The NRC, however, rejected the contention and comments. Adopting various and often conflicting justifications, it has steadfastly refused to consider the Task Force recommendations in a supplemental environmental impact statement ("SEIS") for Vogtle 3 & 4 or a supplemental environmental assessment ("EA") for the AP1000 design.

In first rejecting Petitioners' contention regarding the Task Force recommendations, the NRC asserted that Petitioners' claims were premature. As explained below, this assertion was, at best, disingenuous. NEPA demands consideration of the best available information, and the Task Force

recommendations were obviously available at the time the contention was filed. While the Commission may continue to evaluate the Fukushima accident for some time into the future, it cannot choose to ignore the recommendations of its own experts. The NRC's promise of future studies of the accident itself simply does not transform a timely contention regarding the Task Force recommendations into a premature one.

The NRC also claimed that Petitioners' contention was inadequate because Petitioners' failed to both explain how the Task Force recommendations uniquely impacted Plant Vogtle and point out every aspect of the Task Force Report that must be considered in a supplemental environmental review. NEPA and the NRC's own regulations, however, require Petitioner to do neither.

With little else on the record to explain its decision not to consider the Task Force recommendations in supplemental environmental analyses, in its brief the NRC has now raised, for the first time, various new justifications for failing to supplement both the Vogtle 3 & 4 SEIS and the AP1000 EA. Most surprising of these novel arguments is that the Task Force recommendations concern safety issues and thus fall outside of NEPA review. It appears the NRC is now arguing that – regardless of timing or

specificity – the Task Force recommendations can never constitute "new and significant" information.

It is hard to picture a more significant change to the environmental landscape for nuclear reactor impacts than the Fukushima Task Force's recommendations that in light of the grave and unexpected consequences of the Fukushima accident, the NRC's basic safety regime must be overhauled to ensure a minimal level of protection to public health and safety. As a result, safety measures for mitigation of severe reactor accidents that formerly were voluntary or subject to cost-benefit analysis may now be required, regardless of cost. NEPA requires the NRC to evaluate the impacts of this change. And, perhaps more importantly, the NRC has decided to *postpone* the implementation of a significant portion of the recommendations urged by the Task Force. NEPA also requires the NRC to evaluate the environmental impacts of operating Vogtle 3 & 4 in the absence of these safety measures.

The NRC's decision to issue the Vogtle COL and certify the AP1000 design without first conducting the requisite supplemental environmental analyses was unreasonable and contrary to law. *See Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001) (holding that legal interpretations that NEPA does not apply are reviewed *de*

novo). Accordingly, Petitioners request the Court to vacate the NRC's decisions approving the issuance of COLs for Vogtle 3 & 4 and the underlying AP1000 Rule and order that those approvals may not be granted until the NRC has conducted further proceedings consistent with NEPA. *See* 5 U.S.C. §706(2)(A) (requiring the reviewing court to "hold unlawful and set aside agency action … found to be … not in accordance with law.").

ARGUMENT

I. THE NRC'S LEGAL RATIONALES FOR REFUSING TO ADMIT PETITIONERS' CONTENTION AND SUPPLEMENT THE VOGTLE SEIS ARE ERRONEOUS AND INCONSISTENT WITH NEPA AND NRC REGULATIONS.

A. Consideration of the Environmental Implications of the Task Force Report for Vogtle 3 & 4 Was Not Premature or Precluded by the Atomic Energy Act.

The NRC's primary ground below for denying admission of Petitioners' contention was that the contention was "premature" because it did not raise any concerns unique to the Vogtle site and therefore related to a "generic type of NEPA review" on which the NRC had not yet embarked. CLI-12-07, slip op. at 10-11 (J.A. __). *See also* NRC Br. 41-42. The NRC promised that if "new and significant information comes to light that requires consideration as part of the ongoing preparation of application-specific NEPA documents," it would "assess the significance of that information as appropriate." CLI-12-07, slip op. at 9 (J.A. __). As

Petitioners demonstrated in their opening brief, however, that position is contradicted by the NRC's previously reached decision to adopt and implement the Task Force recommendations, its representation in CLI-12-11 that the environmental implications of a Fukushima-like accident have already been considered in the SEIS for Vogtle, and its public assurances of the "seriousness" with which it takes the "potential ramifications" of the Fukushima accident. Pet. Br. 37 and 39-41 (quoting CLI-12-11, slip op. at 15 (J.A. _)). These actions and statements effectively deprived the NRC of any discretion to avoid supplementation of the Vogtle SEIS and AP1000 EA to address the environmental implications of the Task Force's conclusions and recommendations.

In an 11th hour argument, made for the first time in its brief, the NRC attempts to cast off its non-discretionary NEPA obligation by asserting that the issues raised by the Task Force are not relevant to the environmental review for Vogtle 3 & 4 because they concern Atomic Energy Act ("AEA")-related safety issues rather than NEPA-related environmental issues. NRC Br. 55 n.102 (asserting that the agency's "risk-based safety analysis," including "[p]rioritization and implementation of the [Task Force] recommendations," is "wholly apart from NEPA decisionmaking."). *See also* NRC Br. 54-55 ("Petitioners have not shown that the Task Force

recommendations are *environmentally* 'significant' even if they ultimately 'alter the standards that the NRC deems essential for adequate protection of public health and safety.'"). Intervenors make the same argument. *See* Int. Br. 17, 20, 24, 29.

Given this purported "statutory dichotomy" between the AEA and NEPA, the NRC asserts that it "must have the discretion, in refining its rules for reactor safety, to determine whether such safety improvements actually require an EIS supplement." NRC Br. 55. NRC also reasons that consideration of the Task Force's recommendations need not slow down or interrupt reactor licensing (such as licensing of Vogtle 3 & 4) through compliance with NEPA review procedures. NRC Br. 54-56. Accordingly, based on the newly asserted irrelevance of the Task Force recommendations to environmental impacts, the NRC transforms it previous rationale for dismissing Petitioners' NEPA contention -- that it did not yet have enough information to form any specific conclusions about the environmental implications of the Task Force Report for individual licensing decisions -- to a new rationale that it need *never* address the environmental implications of the Task Force Report in any individual licensing case.

The Commission's new rationale is legally erroneous for a number of reasons. At the outset, without even considering the legal merits of the

argument, the court should disregard it because the NRC did not rely on it in the decisions below. The NRC may not rely on *post hoc* arguments by its lawyers to prop up an otherwise unlawful decision. *California v. Norton,* 311 F.3d 1162, 1175-76 (9th Cir. 2002).

Moreover, the asserted legal dichotomy between safety and environmental issues does not exist; well-established precedents make clear that NEPA requires the consideration of the environmental impacts of significant safety issues. In addition, the fact that the NRC may promulgate regulations implementing the Task Force recommendations in the future does not excuse it from addressing the environmental implications of the Task Force recommendations in the licensing decision for Vogtle 3 & 4.

1. The AEA does not preclude NEPA.

The NRC's newest argument about a "statutory dichotomy" amounts to a claim that the AEA precludes NEPA. To the contrary, as this Court has held, the two statutes must be read "in para (sic) materia." *Citizens for Safe Power v. NRC,* 524 F.2d 1291 (D.C. Cir. 1975). *See also Limerick Ecology Action v. NRC,* 869 F.2d 849, 729 (3rd Cir. 1989) (citing *Public Service Co. of New Hampshire v. NRC,* 582 F.2d 77, 81 (1st Cir.)), *cert. denied,* 439 U.S. 1046 (1978) (compliance with NEPA is required "unless specifically excluded by statute or existing law makes compliance impossible")). *See*

further Flint Ridge Development Corp. v. Scenic Rivers Association of Oklahoma, 426 U.S. 776, 787-88 (1976).

There is no rule that safety issues relevant to the AEA are exempt from NEPA evaluation. Impacts to the "human environment" that must be considered under NEPA (42 U.S.C. § 4331(b)(3)) *include* the risks to human health and safety covered by the AEA. *See* Council on Environmental Quality Regulation, 40 C.F.R. §1508.27(b)(2) (the term "significantly" as used in NEPA requires consideration of "the degree to which the proposed action affects public health or safety."). As this court explained in *Citizens for Safe Power*:

> The Atomic Energy Act was passed years before broader environmental concerns prompted enactment of [NEPA]. Yet many of those same concerns permeated provisions of the first-mentioned legislation and the regulations promulgated in accordance with its mandate. To say that these must be regarded independently of the constantly increasing consciousness of environmental risks reflected in proceedings with reference to NEPA, would make for neither practicality nor sense. Nor can AEA requirements be viewed separate and apart from NEPA considerations.

524 F.2d at 1299.

In *Citizens for Safe Power,* the court found that it was sensible for the NRC to apply conclusions reached in an evidentiary hearing on environmental issues to the review of safety issues under the AEA. *Id.* By the same token, the Task Force's recommendations that NRC safety

requirements should be upgraded in order to provide an adequate level of protection to public health and safety must be evaluated for their environmental significance. It is especially important for the NRC to evaluate the environmental significance of those recommendations for which implementation has been indefinitely postponed, given that the NRC's understanding of severe accident risks has changed in light of the Fukushima accident. *See* Jaczko dissent from CLI-12-02, slip op. at 3-4 (J.A. __).

2. The fact that the NRC may implement Task Force recommendations in future rulemakings does not excuse NRC from complying with NEPA in the licensing decision for Vogtle 3 & 4.

The NRC argues that no "immediate NEPA obligations" are triggered by the Task Force Report because the report is subject to the NRC's "ongoing study of safety issues." NRC Br. 55. Moreover, the NRC claims it will have full discretion to decide whether any regulations that emerge from its study of the Task Force recommendations warrant the supplementation of any EIS. *Id.* (citing *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 373-74 (1989); *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 554-55 (1978)). To the extent this argument is based on the NRC's impermissible distinction between safety and environmental issues, it must be rejected. *See* section I.A.1. above.

In addition, the fact that the NRC may have discretion in deciding whether any future regulations it promulgates in response to the Task Force recommendations have significant impacts does not relieve the NRC of its current non-discretionary duty to consider the environmental impacts of licensing Vogtle 3 & 4 given the new and significant information contained in the Task Force recommendations. The NRC may not ignore available information relevant to the impacts of an individual licensing decision simply because that information may result in a future rulemaking. *Village of Bensenville v. FAA,* 457 F.3d 52, 71-72 (D.C. Cir. 2006); *Town of Winthrop v. FAA,* 535 F.3d 1, 9-13 (1st Cir. 2008) (agency must rely on the "best available information" it has at the time of its decision).

Here, the NRC had more than sufficient information to evaluate in a supplemental SEIS for Vogtle 3 & 4: the Task Force's analysis of the safety implications of the Fukushima accident, a specific list of recommended safety improvements from the Task Force, a technical analysis by the NRC itself that was sufficient to support its decision to adopt most of the recommendations, and a technical analysis by the NRC itself that was sufficient to support its decision to prioritize and postpone implementation of some of the recommendations. In addition, the NRC had enough information to determine that some of the Task Force recommendations

apply to new reactors, including Vogtle 3 & 4. *See e.g.* CLI 12-02 at 81-82; NRC Br. 22 ("The Commission underscored that no plant, including Vogtle, will be exempt from Task Force recommendations …"); *see further* Task Force Report at 71-72 (setting forth the applicability and implementation strategy for new reactors) (J.A. __).

The NRC also contends that any future rulemakings that may result from its ongoing study of the Fukushima Task Force recommendations would improve safety and therefore are unlikely to "translate to environmental degradation requiring a fresh NEPA review." NRC Br. 54 (citing *Public Citizen v. NRC,* 573 F.3d 916, 929 (9th Cir. 2009); *Sierra Club v. Van Antwerp,* 526 F.3d 1353, 1360 (11th Cir. 2008)). This may or may not be true with respect to a future rulemaking, but it does not hold up for an individual licensing decision. If mandatory safety upgrades are applied to Vogtle 3 & 4, for example, they may increase the costs of the plant to the point where the cost-benefit balance tips toward a different technology for producing electricity.

Moreover, supplementation of the Vogtle SEIS would benefit the environmental decision-making process by providing clear identification, in a single NEPA document, of the recommendations that have been implemented, an explanation of how they have been implemented, and a

clear identification of what recommendations remain to be implemented. For this reason, NEPA requires the NRC to analyze the environmental effects of all regulatory changes or proposals, including both adverse and beneficial impacts. *See* 40 C.F.R. § 1508.27(b)(1) (requiring consideration of beneficial impacts).

And finally, the NRC's argument ignores that fact that, despite the Commission's endorsement of most of the Task Force's recommendations to upgrade basic safety requirements, it has yet to implement a considerable number of the Task Force recommendations (NRC Br. 21), and therefore few safety improvements have been imposed or even proposed. As former NRC Chairman Jaczko pointed out in his dissent in the Vogtle licensing decision, it remains uncertain whether and under what conditions the Task Force recommendations will be applied. CLI-12-02, Jackzo dissent from CLI-12-02, slip op. at 4-6 (J.A. __). While the NRC has ordered the agency's technical staff to "strive" to implement these recommendations by 2016, no deadline has been set. NRC Br. 19. Indeed, the NRC anticipates continuing the "lessons-learned process" for "years into the future." NRC Br. 20.

For those Task Force recommendations where no new regulations or license conditions have been proposed, NEPA requires the NRC to identify

them, discuss their significance, and explain how failure to implement them will affect the environmental and safety risks posed by operation of Vogtle 3 & 4. The analysis must include a discussion of the expert advice given by the Task Force to the Commission and explain how the Commission has taken it into consideration. *Hughes River Watershed Conservancy v. Glickman,* 81 F.3d 437, 445 (4th Cir. 1996).[1] The mere act of publicly disclosing specific recommendations postponed by the NRC, with an explanation of the reason for their postponement, may well have the "action-forcing" effect of spurring the agency to complete its work rather than allowing the recommendations to languish unimplemented for years. *See generally Marsh,* 490 U.S. at 371 n. 14.

B. Petitioners' Contention Satisfies the NRC's Admissibility Criteria.

The NRC also argues in its brief that regardless of whether it complied with NEPA in refusing to supplement the SEIS for Vogtle 3 & 4, the Petitioners may not bring that claim before this Court because they did not present an admissible contention to the NRC. NRC Br. 32. Resting

[1] In *Hughes,* the court faulted a federal agency for failing to address opposing expert opinion submitted in comments on a draft EIS. Here, the expert opinion not only comes from within the NRC but was endorsed unanimously by the five Commissioners at the head of the agency. Thus, the NRC is all the more obligated to discuss the significance of the Task Force's report in a supplemental environmental analysis for Vogtle 3 & 4 and the AP1000.

entirely on a misapplication of its own procedural regulations and violations of NEPA, the NRC asserts that its dismissal of the contention must be deferred to as the agency's application of its own regulations. Because the NRC interpreted its regulations in a manner that is "plainly erroneous" (*City of Idaho Falls v. FERC,* 629 F.3d 222, 228 (D.C. Cir. 2011) (cited in NRC Br. 30)) and otherwise not in accordance with law (*Flint Ridge Development Corp.,* 426 U.S. at 787-88; *see also* 5 U.S.C. § 706(2)(A) (requiring a reviewing court to hold unlawful and set aside "agency action … found to be … not in accordance with law.")), such deference is not warranted. [2]

And in any event, the court must reject the NRC's arguments to the extent that they add new claims regarding the admissibility of Petitioners' contention that were not made in either LBP-11-27 or CLI-12-07, the decisions denying the contention. *California,* 311 F.3d at 1175-76.

1. Petitioners' contention was adequately specific and supported.

Petitioners' contention asserts that:

> The EIS for Vogtle fails to satisfy the requirements of NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report, including seismic-flood and environmental justice issues. As required by 10 C.F.R. § 51.92(a) and 40 C.F.R. §

[2] Contrary to the NRC's argument at 36, Petitioners do not challenge the regulations *per se* but rather the lawfulness of the NRC's application of the regulations.

> 1502.9(c), these implications must be addressed in a supplemental Draft EIS.

J.A. __. Petitioners supported the contention by demonstrating that the Task Force's conclusions and recommendations constitute "new and significant information" specifically applicable to Vogtle 3 & 4. As their contention asserted in the supporting basis statement:

> First, the information is "new" because it stems directly from the Fukushima accident, which occurred only five months ago and for which the specific study commissioned by the Commission has only just been issued.
>
> Second, the information is "significant" because it raises an extraordinary level of concern regarding the manner in which the proposed operation of Vogtle Units 3 and 4 "impacts public health and safety." 40 C.F.R. § 1508.27(b)(2). For the first time since the Three Mile Island accident occurred in 1979, a highly respected group of scientist and engineers within the NRC staff has fundamentally questioned the adequacy of the current level of safety provided by the NRC's program for nuclear reactor regulation. Courts have found that an EIS that fails to disclose and respond to expert opinions concerning the hazards of a proposed action, particularly those opinions of the agency's own experts, are "fatally deficient" and run contrary to NEPA's "hard look" requirement. [footnote omitted]. As a result, the NRC must revisit any conclusions in the Vogtle EIS based on the assumption that compliance with NRC safety regulations is sufficient to ensure that environmental impacts of accidents are acceptable. *See* Makhijani Declaration par. 11.

Petitioners' Contention at 10-11 (J.A. __).

Given the Task Force's call for expansion of the "design basis" requirements for reactor licensing, the contention therefore sought reconsideration of the conclusion in the SEIS for Vogtle 3 & 4 that the

radiological impacts of a design basis accident at Vogtle 3 & 4 are "small" because the reactors "will be built to a certified design that has been approved by the NRC under its safety standards." Contention at 12 (J.A.__). Petitioners further supported the contention with the expert declaration of Dr. Makhijani, who confirmed the significance of the Fukushima Task Force's conclusions and recommendations with respect to all pending NRC licensing decisions, including the licensing decision for Vogtle. Makhijani Declaration (J.A. __).

In raising their NEPA claim seeking supplementation of the SEIS for Vogtle 3 & 4, Petitioners thus fully satisfied the NRC's regulations for re-opening the record and gaining admission of a contention.[3] Petitioners submitted a contention that was specific and that addressed the NEPA standard for requiring consideration of "new and significant information." *See* 10 C.F.R. §§ 2.309(f), 2.326, and 51.92(a)(2).

Notwithstanding the detailed explanation provided by Petitioners, the NRC now argues that it reasonably rejected Petitioners' contention because it is "little more than a legal conclusion, bereft of specifics on precisely which 'new and significant environmental implications' petitioners actually

[3] The standard for reopening the record is found in 10 C.F.R. § 2.326 and the NRC's criteria for admission of contentions are found in 10 C.F.R. § 2.309(f).

wished to litigate." NRC Br. 38. The NRC's argument is blatantly inconsistent with the plain language of the agency's own contention admissibility standards and the Commission's longstanding interpretation of those standards.

2. NRC's arguments that Petitioners' contention lacked specificity or support are inconsistent with NEPA and NRC admissibility regulations.

a. Petitioners' contention raised an admissible legal claim based on undisputed facts.

The NRC argues that Petitioners' contention was inadmissible because it asserted a "legal conclusion" rather than a factual dispute. NRC Br. 38. But the NRC's argument is inconsistent with the agency's own procedural regulations, which specifically allow the filing of contentions that raise issues of law rather than fact. *See* 10 C.F.R. § 2.309(f)(1)(i); *see also U.S. Department of Energy,* 69 N.R.C. 367, 422, *aff'd*, 69 NRC 580, 590 (2009).

Here, the parties had no dispute regarding the essential facts of Petitioners' claim, stated in the contention and motion to re-open the record: (a) that the Task Force recommended that the NRC revise its mandatory requirements for providing adequate protection of public health and safety from reactor accidents in light of the lessons learned from the Fukushima accident, (b) that both Vogtle 3 & 4 and the underlying AP1000 design were

subject to the Task Force recommendations, and (c) that the Commission endorsed virtually all of the recommendations and agreed to apply them. J.A __, __. The only actual dispute between the parties was a legal one: whether, given these facts, NEPA required the NRC to address the Task Force recommendations in a supplemental SEIS for Vogtle 3 & 4. It was this legal dispute, clearly stated in the contention and motion to re-open the record (J.A. ___, __), that Petitioners properly sought to litigate consistent with NRC regulations.

b. Petitioners were not required to detail every aspect of the Task Force Report that must be addressed.

Next, the NRC asserts that the "specifics" of the contention should have included every separate aspect of the Task Force Report that must be discussed in a supplemental SEIS for Vogtle 3 and 4.[4] NRC Br. 40. This assertion, however, is also diametrically opposed to NRC regulations, which just require petitioners to provide a "specific statement of the issue of law or fact to be raised or controverted" (10 C.F.R. § 2.309(f)(1)(i)) and a "concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner

[4] On this ground the NRC asserted that Petitioners failed to satisfy both the admissibility standard in 10 C.F.R. § 2.309(f)(1) and the standard for re-opening the record in 10 C.F.R. § 2.326. NRC Br. 25 and n. 58.

intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue." 10 C.F.R. § 2.309(f)(1)(v).

At the contention admission stage, NRC regulations do not require a petitioner to prove its case, support its claims in "formal evidentiary form," or provide support "as strong as that necessary to withstand a summary disposition motion." *Gulf States Utilities Co.,* 40 N.R.C. 43, 51 (1994). All that is required is "a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." *Id*. (internal citations omitted).[5] *See also* Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) ("The Commission expects that at 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."). The detailed information demanded by the NRC in this case is simply not required.

Moreover, the NRC may not interpret its admissibility standards in a manner than is inconsistent with NEPA. *Flint Ridge Development Corp.,*

[5] As discussed above in Section I.B.2, NRC regulations also permit petitioners to show a legal dispute based on undisputed facts.

426 U.S. at 787-88; *see also* 5 U.S.C. § 706(2)(A). NEPA puts the burden of conducting an environmental analysis on agencies, not the general public. *Calvert Cliffs Coordinating Comm. v. AEC,* 449 F.2d 1109, 1118-19 (D.C. Cir. 1971); *Dubois v. U.S. Dept. of Agric.,* 102 F.3d 1273, 1291 (1st Cir. 1996); *Friends of the Clearwater v. Dombeck,* 222 F.3d 552, 559 (D. C. Cir. 1983). As this Court explained in *Calvert Cliffs*:

> It is . . . unrealistic to assume that there will always be an intervenor with the information, energy and money required to challenge a staff recommendation which ignores environmental costs. NEPA establishes environmental protection as an integral part of the Atomic Energy Commission's [NRC's predecessor's] basic mandate. The primary responsibility for fulfilling that mandate lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendations.

449 F.2d at 1119.

Here, NRC regulations for the implementation of NEPA place the burden of proposing and establishing the scope of a supplemental EIS on the NRC. *See* 10 C.F.R. § 51.29(a) and (c) (setting forth requirements for the process of scoping an EIS and supplemental EIS). Under NEPA, the NRC was not entitled to interpret its admissibility criteria to allow the creation of a new pleading requirement that the Petitioners must -- in addition to demonstrating that the Task Force Report recommendations constitute new

and significant information applicable to Vogtle 3 & 4 -- assume the NRC's own responsibility to define the scope of the supplemental EIS and set forth every aspect of the Task Force Report that should be addressed.

Petitioners fully complied with the NRC's admissibility requirements for contentions by asserting that the undisputed facts established, as a matter of law, that the NRC was required to address the environmental implications of the Fukushima Task Force recommendations in a supplemental SEIS for Vogtle 3 & 4. The NRC cannot demand more.

c. Petitioners were not required to show their claims were unique to Vogtle 3 & 4.

Contrary to NRC's assertion (NRC Br. 39-40, 47), nothing in the NRC's contention admissibility regulations or NEPA requires a petitioner to demonstrate that an alleged deficiency in an EIS is "unique" to a particular reactor. The fact that an environmental issue is common to more than one reactor does not absolve the NRC from addressing the issue for that reactor. If the agency chooses to address the issue generically, it may bar petitioners from raising the issue in individual licensing cases. *See e.g. Kelley v. Selin*, 42 F.3d 1501, 1511-12 (6th Cir. 1995). Here, however, the NRC has explicitly stated that at this time it does not intend to address the issues raised by the Task Force generically. CLI-11-05, slip op. at 30-31 (J.A. __). Therefore, the NRC must admit Petiitoners' contention seeking

consideration of the environmental implications of the Task Force conclusions and recommendations with respect to the proposed operation of Vogtle 3 & 4.

d. NRC regulations do not require contentions of omission to dispute specific portions of an EIS or license application.

Finally, the NRC asserts that Petitioners' contention is inadmissible because it failed to dispute specific portions of the SEIS. NRC Br. 40. The court should disregard this argument because it was not part of the decision below. *California,* 311 F.3d at 1175-76. In any event, the NRC's argument is once again inconsistent with the plain language of the agency's own regulations for the admissibility of contentions, the regulations' history, and Commission decisions.

Under 10 C.F.R. § 2.309(f)(1)(vi), references to "specific portions of the application" are required *only* where a petitioner is disputing assertions made in the application. If, as in this case, "the petitioner believes that the application fails to contain information on a relevant matter as required by law," section 2.309(f)(1)(vi) requires only that the contention identify "each failure and the supporting reasons for the petitioner's belief." *Id. See also* 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) ("Where the intervenor believes the application and supporting material do not address a relevant matter, it will be sufficient for the intervenor to explain why the application is deficient.") As the NRC Commissioners concluded in another case:

> [I]n fairness, we cannot . . . require that to adequately specify a dispute over a material fact, a petitioner must refer to a particular portion of the licensee's application, when the licensee neither identified, nor was obligated to identify, the disputed issue in its application. Such a narrow reading of section 2.714(b)(2)(iii) [the NRC's previous numbering of the current section 2.309(f)(1)(vi)] would have the unintended effect of prohibiting petitioners from raising issues otherwise germane to a proceeding.

Georgia Power Co., 38 NRC 25, 40-41 (1993). Petitioners' contention fully complied with section 2.309(f)(1)(vi) by stating specifically that the NRC had violated NEPA by failing to address the environmental significance of the findings and recommendations of the Fukushima Task Force Report.

C. By Adopting the Fukushima Task Force Recommendations and Conceding Their Safety Significance, the NRC has Legally Bound Itself to Supplement the SEIS for Vogtle 3 & 4 to Address the Environmental Implications of the Fukushima Task Force's Conclusions and Recommendations.

As demonstrated above in sections I.A. and I.B., the NRC's legal rationales for rejecting Petitioners' contention are erroneous and unreasonable. Petitioners' contention should have been admitted. Because the contention raises a fundamentally legal question – whether the

undisputed facts establish that the Task Force recommendations constitute new and significant information that the NRC was required to evaluate in a supplemental SEIS for Vogtle 3 & 4 (*see* section I.A.2. above) – the Court may go further than merely requiring the NRC to hold a hearing and instead require the NRC to supplement the Vogtle SEIS. The NRC has effectively given up any discretion it may have had to declare that the Fukushima Task Force recommendations are insignificant and that supplementation of the SEIS for Vogtle 3 & 4 is unnecessary, by adopting virtually all of the recommendations and by affirmatively declaring their significance from a safety standpoint. *See* Pet. Br. 37 and 44 and section I.A.2. above.

The NRC accuses the Petitioners of "semantic gamesmanship" with respect to the meaning of the term "significant." NRC Br. 49. But this charge is more fairly leveled at the NRC. Nowhere does the NRC explain how or why the Task Force's recommendations to fundamentally overhaul the NRC's regulatory system for basic protection of public health and safety could be "significant" from a safety standpoint but insignificant from an environmental standpoint. Just as there is no basis for a legal distinction between safety risks and environmental risks, so there is no basis for a practical distinction.

The NRC also claims that it already considered the environmental implications of the Fukushima accident and therefore no supplementation of the Vogtle SEIS is required. According to the NRC, the "record in *Vogtle* is crystal clear that NRC's NEPA review for Vogtle 'already contemplated' the 'type and magnitude' . . . of the accident at Fukushima – namely, the possibility, consequences and mitigation of severe accidents that involve reactor core damage and release of fission products to the environment." NRC Br. 46 (quoting *Or. Natural Res. Council v. Lyng,* 882 F.2d 1417, 1423 (9th Cir. 1989)). But the environmental analysis in CLI-12-07 is inadequate to satisfy NEPA because it completely disregards the conclusions and recommendations of the Commission's own Fukushima Task Force, even though the Commission appointed the most qualified members of its technical staff to the Task Force for the very purpose of advising it regarding the lessons to be learned from the Fukushima accident. Pet. Br. 16; *Hughes River Watershed,* 81 F.3d at 445. While the NRC claims to have evaluated the impacts of Fukushima-like accidents, it failed to take into account that its own experts had already concluded that the NRC's current regulatory program for addressing severe accident risks is inadequate and should be overhauled.[6] The NRC can point to no evidence that the SEIS for Vogtle 3

[6] The only thing that CLI-12-02 has to say about the Task Force Report is

& 4 reflects consideration of the serious safety and environmental concerns raised by the Fukushima Task Force or the impacts of failing to implement the Task Force recommendations.

Finally, while the Commission offered Southern Co. and the NRC Staff an opportunity the opportunity to participate in the determination of whether the Fukushima accident warranted supplementation of the SEIS for Vogtle 3 & 4, Petitioners were excluded from that proceeding by design, and therefore had no opportunity to contribute to the analysis. Petitioners do not contend that the NRC was required to admit them to the mandatory hearing as a general matter, but NEPA precluded the NRC from depriving Petitioners of the opportunity to make a meaningful contribution to the agency's determination at the same time it offered other parties such an opportunity. *Marsh,* 490 U.S. at 371("the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time.").

Accordingly, as a matter of law, the NRC was required to prepare a supplemental SEIS to address the environmental implications of the conclusions and recommendations of the Fukushima Task Force.

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that all nuclear plants affected by the recommendations "will be required to comply with NRC direction resulting from lessons learned from the Fukushima accident, regardless of the timing of the issuance of the affected licenses." NRC Br. 21 (quoting CLI-12-02, slip op. at 82).

II. THE NRC'S LEGAL RATIONALES FOR REFUSING TO SUPPLEMENT THE AP1000 EA ARE ERRONEOUS AND INCONSISTENT WITH NEPA AND NRC REGULATIONS.

In defending its decision not to supplement the EA for the AP1000 to address the implications of the Task Force Report recommendations, the NRC (together with Intervenors) relies on similar arguments it used in defense of its decision not to supplement the SEIS for Vogtle 3 & 4. For the same reasons as discussed above, these arguments fail.

First, the NRC asserts that the AEA precludes safety considerations in NEPA analyses. NRC Br. 64-65 ("[P]etitioners conflate NRC's *safety* duties under the Atomic Energy Act with its *environmental* duties under NEPA"). *See also* Int. Br. 20 ("Petitioners argue that the Task Force recommendations – which addressed technical *safety* considerations – should somehow have affected the Environmental Assessment."). As discussed in section I.A.1. above, the NRC's position presumes a legal dichotomy between NEPA and the AEA that does not exist. NEPA requires consideration of "the degree to which the proposed action affects public health or safety." 40 C.F.R. §1508.27(b)(2); *see also* 42 U.S.C. § 4331(b)(3).

Second, the NRC argues that Petitioners lack a valid NEPA claim because its original severe accident design mitigation alternatives ("SAMDA") analysis in the EA for the amended AP1000 design "had

already considered environmental consequences of severe accidents similar to a Fukushima-like accident." NRC Br. 65. But the NRC admits that every single mitigation measure it considered at that time was rejected on the basis of cost. NRC Br. 8; *see also* Int. Br. 6. The Task Force Report now recommends that the NRC incorporate severe accidents into the design basis for nuclear reactors and implement mitigation measures as *mandatory* requirements, regardless of their cost. Task Force Report at 20-21 (J.A. __). Given that such implementation has not yet occurred, to comply with NEPA, the EA for the AP1000 design must evaluate the environmental impacts of postponing the imposition of these mandatory mitigation measures deemed essential or advisable by the Task Force for protection of public health and safety.

Further, the NRC argues that there is no need to supplement the EA for the AP1000 design because the design incorporates "*many* of the features and attributes necessary to address the Task Force recommendations." NRC Br. 69 (quoting Final Rule, AP1000 Design Certification Amendment, 76 Fed. Reg. 82,079, 82,081) (Dec. 30, 2011) (emphasis added) (J.A. __). Such a vague statement, however, falls far short of the rigor required for a "hard look" at the environmental implications of the Task Force Report. *Marsh,* 489 U.S. at 374. NEPA requires the NRC to account for the degree to which

it has implemented the Task Force recommendations, explaining how it has implemented some recommendations and justifying its decision to postpone others.

Finally, the NRC argues that Petitioners failed to exhaust their administrative remedies by not specifying, in their rulemaking comments or in the *Vogtle* licensing proceeding, "which recommendations NRC should have incorporated into its NEPA analysis or how it should have done so." NRC Br. 67. As discussed above in section I.B.2.b., the NRC may not shift its own burden of NEPA compliance onto Petitioners. In the process for taking public comment on environmental documents, "the purpose of public participation regulations is simply 'to provide notice' to the agency, not to 'present technical or precise scientific or legal challenges to specific provisions' of the document in question." *Dubois v. U.S. Dept. of Agric.,* 102 F.3d 1273, 1291 (1st Cir. 1996) (quoting *Adams v. U.S. EPA,* 38 F.3d 43, 52 (1st Cir. 1994)).

CONCLUSION

For the reasons stated above, the Court should vacate the Commission's decisions with respect to the licensing of the Vogtle 3 & 4 COLs and the certification of the AP1000 design and remand this case to the NRC for further proceedings consistent with NEPA.

Respectfully submitted,

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July 16, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C) and Circuit Rule 32(a)(2)(C), I certify that the attached Reply Brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 6,570 words. This figure includes footnotes and citations, but excludes the Cover Page, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, Addendum of Statutes, Rules and Regulations, and Standing Addendum. I have relied on Microsoft Word's calculation feature for this calculation.

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I certify that on July 16, 2012, I served the foregoing Petitioners' Reply Brief on the following individuals by electronic service and that paper copies will be served by first-class mail within two business days.

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Addendum of Statutes and Regulations

I. Statutes

42 USC § 4331……ADD 2

II. Regulations

10 CFR § 2.326……ADD 4

10 CFR § 51.29……ADD 6

40 CFR § 1508.27……ADD 9

42 USC § 4331

42 USCS § 4331

*** Current through PL 112-139, approved 6/27/12 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 55. NATIONAL ENVIRONMENTAL POLICY

POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act [*42 USCS §§ 4321* et seq.], it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

10 CFR § 2.326

10 CFR § 2.326

*** This section is current through the July 12, 2012 ***
*** issue of the Federal Register ***

TITLE 10 -- ENERGY

CHAPTER I -- NUCLEAR REGULATORY COMMISSION

PART 2 -- RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND ISSUANCE OF ORDERS

SUBPART C -- RULES OF GENERAL APPLICABILITY: HEARING REQUESTS, PETITIONS TO INTERVENE, AVAILABILITY OF DOCUMENTS, SELECTION OF SPECIFIC HEARING PROCEDURES, PRESIDING OFFICER POWERS, AND GENERAL HEARING MANAGEMENT FOR NRC ADJUDICATORY HEARINGS

§ 2.326 Motions to reopen.

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(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.

(b) The motion must be accompanied 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. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

(c) A motion predicated in whole or in part on the allegations of a confidential informant must identify to the presiding officer the source of the allegations and must request the issuance of an appropriate protective order.

(d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c).

10 CFR § 51.29

10 CFR § 51.29

*** This section is current through the July 12, 2012 ***
*** issue of the Federal Register ***

TITLE 10 -- ENERGY

CHAPTER I -- NUCLEAR REGULATORY COMMISSION

PART 51 -- ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

SUBPART A -- NATIONAL ENVIRONMENTAL POLICY ACT -- REGULATIONS IMPLEMENTING SECTION 102(2)

PRELIMINARY PROCEDURES

SCOPING

§ 51.29 Scoping-environmental impact statement and supplement to environmental impact statement.

(a) The scoping process for an environmental impact statement shall begin as soon as practicable after publication of the notice of intent as provided in § 51.116, and shall be used to:

(1) Define the proposed action which is to be the subject of the statement or supplement. For environmental impact statements other than a supplement to an early site permit final environmental impact statement prepared for a combined license application, the provisions of 40 CFR 1502.4 will be used for this purpose. For a supplement to an early site permit final environmental impact statement prepared for a combined license application, the proposed action shall be as set forth in the relevant provisions of § 51.92(e).

(2) Determine the scope of the statement and identify the significant issues to be analyzed in depth.

(3) Identify and eliminate from detailed study issues which are peripheral or are not significant or which have been covered by prior environmental review. Discussion of these issues in the statement will be limited to a brief presentation of why they are peripheral or will not have a significant effect on the quality of the human environment or a reference to their coverage elsewhere.

(4) Identify any environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the statement under consideration.

(5) Identify other environmental review and consultation requirements related to the proposed action so that other required analyses and studies may be prepared concurrently and integrated with the environmental impact statement.

(6) Indicate the relationship between the timing of the preparation of environmental analyses and the Commission's tentative planning and decision-making schedule.

(7) Identify any cooperating agencies, and as appropriate, allocate assignments for preparation and schedules for completion of the statement to the NRC and any cooperating agencies.

(8) Describe the means by which the environmental impact statement will be prepared, including any contractor assistance to be used.

(b) At the conclusion of the scoping process, the appropriate NRC staff director will prepare a concise summary of the determinations and conclusions reached, including the significant issues identified, and will send a copy of the summary to each participant in the scoping process.

(c) At any time prior to issuance of the draft environmental impact statement, the appropriate NRC staff director may revise the determinations made under paragraph (b) of this section, as appropriate, if substantial changes are made in the proposed action, or if significant new circumstances or information arise which bear on the proposed action or its impacts.

40 CFR § 1508.27

40 CFR § 1508.27

*** This section is current through the July 5, 2012 ***
*** issue of the Federal Register ***

TITLE 40 -- PROTECTION OF ENVIRONMENT

CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY

PART 1508 -- TERMINOLOGY AND INDEX

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it

down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.