

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

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Gary S. Arnold
Nicholas G. Trikouros

In the Matter of

NORTHERN STATES POWER CO.

(Prairie Island Nuclear Generating Plant
Independent Spent Fuel Storage Installation)

Docket No. 72-10-ISFSI-2

ASLBP No. 12-922-01-ISFSI-MLR-BD01

December 20, 2012

MEMORANDUM AND ORDER

(Ruling on Request for Hearing and Petition to Intervene)

The Prairie Island Indian Community (PIIC) has filed a Request for Hearing and Petition to Intervene challenging the application of Northern States Power Company (Northern States) for renewal of its 10 C.F.R. Part 72 license to operate an Independent Spent Fuel Storage Installation (ISFSI) at the Prairie Island Nuclear Generating Plant (PINGP) in Red Wing, Minnesota.¹ In this Memorandum and Order, we determine that PIIC has standing to intervene, and we admit (in whole or in part) three of PIIC's seven proffered contentions. Additionally, in accord with the Commission's directive in its August 2012 decision in CLI-12-16,² we hold in abeyance Contention 1 and parts of Contentions 2 and 4 insofar as they are based on the United States Court of Appeals for the District of Columbia Circuit's June 2012 vacatur of the Nuclear Regulatory Commission's (NRC's) Waste Confidence Decision and Temporary Storage

¹ [PIIC]'s Request for Hearing and Petition to Intervene in License Renewal Proceeding for the Prairie Island [ISFSI] (Aug. 24, 1012) [Petition].

² Calvert Cliffs Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), et al., CLI-12-16, 76 NRC __ (Aug. 7, 2012).

Rule.³

I. Background

This proceeding arises from Northern States' license renewal application submitted on October 20, 2011.⁴ Northern States seeks a forty-year extension of its license to operate the Prairie Island ISFSI. On August 24, 2012, in response to a notice in the Federal Register,⁵ PIIC petitioned to intervene in the licensing proceeding and proffered seven contentions on which it seeks an evidentiary hearing.⁶ The Secretary of the Commission referred this petition to the Atomic Safety and Licensing Board Panel,⁷ and this Licensing Board was established.⁸

We granted the parties' request for an extension of time to file their respective answers and reply.⁹ Northern States and the NRC Staff each submitted their answers on September 25,¹⁰ and PIIC filed its reply on October 9.¹¹ We heard oral argument on November 8 in Saint

³ See Calvert Cliffs Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), et al., CLI-12-16, 76 NRC __, __ (slip op. at 6) (Aug. 7, 2012); see also New York v. NRC, 681 F.3d 471 (D.C. Cir. 2012).

⁴ Prairie Island Independent Spent Fuel Storage Installation (ISFSI) License Renewal Application (Oct. 11, 2011) (ADAMS Accession No. ML11304A068). Northern States supplemented its application on February 29, 2012. See Responses to Requests for Supplemental Information—Prairie Island Independent Spent Fuel Storage Installation (ISFSI) License Renewal Application (TAC No. L24592) (Feb. 29, 2012) (ADAMS Accession No. ML12065A073).

⁵ See License Renewal Application for Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation, 77 Fed. Reg. 37,937 (June 25, 2012).

⁶ PIIC also petitions for a waiver of the application of the waste confidence rule, 10 C.F.R. § 51.23(a), in this ISFSI license renewal proceeding. Because of our resolution of the contentions, we defer ruling on the petition and hold it in abeyance with the waste confidence contentions.

⁷ Memorandum from Annette L. Vietti-Cook, Secretary of the Commission to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel (Sept. 13, 2012).

⁸ Northern States Power Company, Establishment of Atomic Safety and Licensing Board, 77 Fed. Reg. 58,591 (Sept. 21, 2012).

⁹ See Licensing Board Order (Granting Motions for Extension of Time and Setting Dates for Oral Argument) (Sept. 18, 2012) at 2 (unpublished).

¹⁰ NRC Staff Response to the Request for Hearing and Petition to Intervene by the Prairie Island Indian Community (Sept. 25, 2012) [NRC Staff Answer]; Northern States Power

Paul, Minnesota regarding the admissibility of the PIIC contentions.¹²

II. Standing

Although neither Northern States nor the Staff contest PIIC's standing, we have an independent obligation to determine whether PIIC meets this threshold criterion for intervention in this proceeding.¹³ NRC regulations require a petitioner to establish standing by demonstrating (1) the nature of its right under the Atomic Energy Act to be made a party to the proceeding, (2) the nature and extent of its interest in the proceeding, and (3) the possible effect of any decision in the proceeding on the petitioner's interest.¹⁴ Additionally, the Commission has instructed that, in assessing a petitioner's standing, we should look to contemporary judicial concepts of standing and determine whether (1) a petitioner is threatened with a concrete injury, (2) the injury is fairly traceable to the licensing action, and (3) the injury is capable of being redressed by a favorable decision.¹⁵ And where an organization such as PIIC seeks standing as a party, it must show either a discrete injury to its own institutional interests (organizational standing),¹⁶ or authorization to represent an individual who would have standing in his or her

Company's Answer to the Prairie Island Indian Community's Petition to Intervene (Sept. 25, 2012) [Northern States Answer].

¹¹ [PIIC]'s Reply on Request for Hearing and Petition to Intervene in License Renewal Proceeding for the Prairie Island [ISFSI] (Oct. 9, 2012) [Reply].

¹² Tr. at 1.

¹³ 10 C.F.R. § 2.309(d)(3); see also Nextera Energy Seabrook, LLC (Seabrook Station, Unit 1), LBP-11-02, 73 NRC 28, 41 n.54 (2011); S. Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-01, 71 NRC 165, 177 n.3 (2010).

¹⁴ 10 C.F.R. § 2.309(d)(1). Looser standing criteria exist for Federally-recognized Indian Tribes, see id. § 2.309(d)(2), but only where the facility at issue is within the Tribe's boundaries, which the Prairie Island ISFSI concededly is not.

¹⁵ See, e.g., Energysolutions, LLC (Radioactive Waste Import/Export Licenses), CLI-11-03, 73 NRC 613, 621 (2011).

¹⁶ See International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001).

own right (representational standing).¹⁷

In materials licensing actions such as this one, a petitioner is entitled to a presumption of standing if the petitioner resides in the “zone of reasonably foreseeable harm from the source of radioactivity,” and if “the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”¹⁸ In materials licensing matters, there is no predefined distance marking the area of potential offsite consequences on which to establish standing—instead this must be “judged on a case-by-case basis.”¹⁹

PIIC has met the requirements for organizational standing based on its proximity to the Prairie Island ISFSI. The potential for offsite consequences to PIIC from the ISFSI is clear. According to PIIC, tribal members reside a mere 600 yards from the spent fuel casks.²⁰ Accordingly, the threat of radiological exposure from an accidental release of radioactive material from an open cask is obvious and real. PIIC also alleges potential harm to cultural resources from the likely expansion of the ISFSI. These alleged injuries would threaten the interests of PIIC as a whole, and are sufficient to meet the test for organizational standing. Therefore, PIIC has the requisite standing to assert its contentions in this proceeding.

III. Standards Governing Contention Admissibility

Contentions must meet the admissibility criteria set forth in 10 C.F.R. § 2.309(f)(1). That rule requires each contention to: (1) provide a specific statement of the issue of law or fact to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the

¹⁷ See Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30-31 (1998).

¹⁸ U.S. Dep’t of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 364-65 (2004).

¹⁹ Id. at 365. In contrast, in reactor proceedings, the Commission applies a “proximity presumption,” whereby the very fact that an individual or organization is located within fifty miles of a reactor is sufficient to demonstrate the requisite threat of injury. See, e.g., Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915-16 (2009).

²⁰ See Petition at 8-9.

issue raised in the contention is within the scope of the proceeding; (4) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the licensing action; (5) provide a concise statement of the alleged facts or expert opinions in support of the petitioner's position on the issue and on which the petitioner intends to rely at hearing; and (6) provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact, with reference to specific disputed portions of the application.²¹ A failure to meet any of these criteria renders the contention inadmissible.

IV. Ruling on Contentions

A. Contention 1

PIIC's Contention 1 is as follows:

[Northern States'] Environmental Report Improperly Minimizes Waste Storage Impacts.

This contention, as well as portions of Contentions 2, 3 and 4, arise from the June 8, 2012 decision of the United States Court of Appeals for the District of Columbia Circuit in New York v. NRC, which vacated and remanded to the NRC its Waste Confidence Decision (WCD) and Temporary Storage Rule (TSR).²² The WCD and TSR expressed the agency's determination that spent nuclear fuel could be stored safely at licensed nuclear facilities until such time as a long-term geologic storage facility was constructed.²³ As a result, before the decision in New York v. NRC, the WCD and TSR permitted license applicants to omit any "discussion of any environmental impact of spent fuel storage in [ISFSIs] for the period following the term of the . . . initial ISFSI license . . . in any environmental report, environmental impact statement,

²¹ 10 C.F.R. § 2.309(f)(i)-(vi).

²² New York v. NRC, 681 F.3d 471 (D.C. Cir. 2012). The court held, among other things, that in light of the dim prospects for moving forward with a geologic repository in the contemporary political environment, the NRC must consider the environmental effects of storing waste in spent fuel pools or casks for extended periods. Id. at 478.

²³ See 10 C.F.R. § 51.23(a).

environmental assessment, or other analysis.” The effect of the WCD and TSR was to render contentions concerning long-term storage of spent fuel beyond the permissible scope of NRC licensing proceedings.²⁴

PIIC asserts that, now that the WCD and TSR have been vacated, Northern States’ Environmental Report (ER) must consider the impacts of long-term storage at the Prairie Island ISFSI.²⁵

The Staff urges that Contention 1 be held in abeyance in light of the Commission’s August 7, 2012 decision in CLI-12-16.²⁶ There, the Commission recognized that, as a result of New York v. NRC, substantially identical waste confidence contentions were pending in every open reactor licensing proceeding.²⁷ The Commission held that “[i]n view of the special circumstances of this case, as an exercise of our inherent supervisory authority over adjudications, we direct that these [waste confidence] contentions—and any related contentions that may be filed in the near term—be held in abeyance pending our further order.”²⁸

In its Reply, PIIC agrees with the Staff that Contention 1 should be held in abeyance.²⁹

In contrast, Northern States argues that Contention 1 is wholly inadmissible and so should not be held in abeyance. In support of its claim, Northern States maintains that, after the Commission issued CLI-12-16, the NRC took a series of definitive steps that will lead to the promulgation of successor rules to the WCD and TSR—and that these steps supersede the Commission’s directive in CLI-12-16. Chief among these is the Commission’s issuance of a Staff Requirements Memorandum (SRM) directing the Staff to prepare a generic environmental

²⁴ Id. § 51.23(b).

²⁵ See Petition at 23-24.

²⁶ See Staff Answer at 10.

²⁷ Calvert Cliffs Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), et al., CLI-12-16, 76 NRC __ (Aug. 7, 2012).

²⁸ Id. at __ (slip op. at 6).

²⁹ Reply at 3.

impact statement (EIS) to support an updated WCD and TSR.³⁰ As a result of this SRM, Northern States argues, waste confidence has “become the subject of rulemaking,” placing Contention 1 outside the permissible scope of adjudication because licensing boards “should not accept in individual license proceedings contentions which are (or are about to become) the subject of rulemaking by the Commission.”³¹ In effect, Northern States maintains that Contention 1 must not be admitted because the underlying issue will be addressed generically.

We are not persuaded. PIIC’s contention that the environmental impacts of long-term waste storage are insufficiently examined in the application presents a genuine, material issue. In light of the vacatur of the WCD and TSR in New York v. NRC, NRC’s rules require the ER to consider the reasonably foreseeable impacts of permanent storage, which Northern States’ ER clearly fails to do. We agree with the Staff, however, that Contention 1 must be held in abeyance pursuant to the Commission’s direction in CLI-12-16.

While Northern States is correct in its claim that the Commission’s issuance of the SRM will begin the lengthy process of replacing the WCD and TSR, it is not dispositive of the contention. CLI-12-16 provided specific instructions to licensing boards and a memorandum to the NRC Staff is not the type of “further order” to which the Commission referred. The SRM itself contains no mention of ongoing adjudications or of the many waste confidence contentions now held in abeyance; and its directives are clearly aimed at the Staff, rather than to this (or any other) licensing board. Nevertheless, in light of the Commission’s directive in CLI-12-16, we do not admit Contention 1 at this time, but instead hold it in abeyance pending the Commission’s further order.

³⁰ See Staff Requirements – COMSECY-12-0016 – Approach For Addressing Policy Issues Resulting From Court Decision To Vacate Waste Confidence Decision And Rule (Sept. 6, 2012) (ADAMS Accession No. ML12250A023).

³¹ Duke Energy Corp. (Oconee Nuclear Station), CLI-99-11, 49 NRC 328, 345 (1999) (quoting Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 89 (1974)).

B. Contention 2³²

PIIC's Contention 2 is as follows:

[Northern States'] Environmental Report Fails to Address Cumulative Impacts of Related Projects on the PIIC, Its Members and Its Lands

PIIC argues that Northern States has not provided an analysis of the cumulative impacts associated with relicensing the Prairie Island ISFSI. The phrase "cumulative impact" is defined as "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."³³ PIIC asserts that an analysis of cumulative impacts is required under the National Environmental Policy Act (NEPA) to avoid the segmentation into multiple environmental reviews of connected projects, the impacts of which should be considered together.³⁴

PIIC proffers several examples of cumulative impacts that it claims should be included in Northern States' ER. First, PIIC maintains that the scope of the ER should extend beyond "the basis of a 40-year license term and 48 dry casks."³⁵ It asserts the ER should include the consequences of long-term storage on site in the event a geologic repository is not available at the end of the term of relicensing, particularly in light of the "state of flux" surrounding the vacated WCD and TSR.³⁶ Next, PIIC claims that the ER fails to consider the impacts of the ISFSI in conjunction with the recent license renewal of the PINGP and the additional spent fuel that will be generated by the plant's continued operation.³⁷ Third, PIIC alleges that the likely expansion of the ISFSI to include additional casks on new concrete pads would produce

³² Judge Arnold dissents from the Board's ruling on Contention 2. See infra, Dissenting Statement of Judge Arnold.

³³ 40 C.F.R. § 1508.7 (adopted by reference in 10 C.F.R. § 51.14(b)).

³⁴ See Petition at 27-28.

³⁵ Id. at 30.

³⁶ Id. at 30-31.

³⁷ Id. at 32.

cumulative impacts that were not addressed in the ER.³⁸ PIIC points to Northern States' application to the Minnesota Public Utilities Commission (MPUC) for a Certificate of Need to expand the ISFSI to accommodate up to sixty-four casks, more than the forty-eight considered in the ER. PIIC asserts that the construction of additional pads would result in impacts including traffic from construction activities, health impacts from additional casks, and disturbance of archeological and cultural resources. Finally, PIIC argues that the ER does not address the long-term viability of cask storage beyond the forty-year relicensing term and the risks of future transportation.³⁹

The NRC Staff would have us admit Contention 2 in part. Although the Staff maintains that license applicants are not required to analyze cumulative impacts in the ER and that the Staff is not required to analyze cumulative impacts in an Environmental Assessment (EA),⁴⁰ it observes that applicable guidance in NUREG-1748 encourages a cumulative impacts analysis in both documents.⁴¹ Moreover, the Staff informs us that it intends to analyze cumulative impacts in its EA, and that it may request additional information from Northern States for that planned analysis of cumulative impacts. In effect, the Staff does not object to admission of the contention as a place-holder to preserve future claims by PIIC against the Staff's cumulative impacts analysis.⁴²

On the other hand, Northern States, disputes that Contention 2 is admissible. It acknowledges that it applied for and received a Certificate of Need from the MPUC to expand the ISFSI. However, it contends that the impacts of an expansion are outside the scope of this

³⁸ Id. at 32-34.

³⁹ Id. at 35.

⁴⁰ In its Answer and at oral argument, the Staff indicated its intention initially to prepare an EA, rather than a full EIS. See Staff Answer at 6, 11-12; Tr. at 23. In light of the impacts on historical and cultural resources alleged by PIIC, we anticipate that an EIS will be required.

⁴¹ NRC Staff Answer at 11.

⁴² Id. at 12.

proceeding because Northern States has not yet applied to the NRC for an amendment to its license.⁴³ In addition, Northern States argues that NRC regulations do not require it to include a cumulative impacts analysis in the ER.⁴⁴ As to the specific concern that the expansion of the ISFSI will adversely impact archaeological resources, Northern States claims that it has addressed PIIC's concerns through a 2009 settlement agreement and a subsequent archaeological field survey.⁴⁵ Northern States also urges us, for the same reasons as it opposes Contention 1, to reject those aspects of Contention 2 that concern impacts of waste storage beyond the renewal term.⁴⁶

At the outset, we reject Northern States' and the Staff's argument that an applicant is not required to address cumulative impacts in its ER. 10 C.F.R. § 51.45 directs an applicant to discuss in its ER "[t]he impact of the proposed action on the environment."⁴⁷ A regulation of the Council on Environmental Quality, 40 C.F.R. § 1508.25, which is incorporated into NRC regulations,⁴⁸ makes clear that the scope of the term "impact" includes cumulative impacts.⁴⁹ Even NUREG-1748, the NRC Staff's non-binding environmental review guidance document for materials license applicants, instructs applicants to "[d]iscuss any past, present, or reasonably foreseeable future actions which could result in cumulative impacts when combined with the proposed action."⁵⁰

⁴³ Northern States Answer at 15-17.

⁴⁴ Id. at 17-18.

⁴⁵ Id. at 19-21.

⁴⁶ Id. at 15.

⁴⁷ 10 C.F.R. § 51.45(b)(1).

⁴⁸ See id. § 51.14(b).

⁴⁹ 40 C.F.R. § 1508.25(c); see also Strata Energy, Inc. (Ross In Situ Uranium Recovery Project), LBP-12-03, 75 NRC __, __ & n.33 (Feb. 10, 2012) (slip op. at 40-41 & n.33), aff'd as to standing ruling, CLI-12-12, 75 NRC __ (May 11, 2012).

⁵⁰ Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, NUREG-1748, at 6-4 (Aug. 2003) (ADAMS Accession No. ML032450279) [NUREG-1748].

Two of PIIC's asserted bases for this contention concern the impacts of long-term storage of spent nuclear fuel. These impacts implicate waste confidence, and they are encompassed within the breadth of Contention 1 as held in abeyance. Accordingly we do not admit these claims as a separate contention, but hold them in abeyance in conjunction with Contention 1.

In addition to the waste confidence issues that Contention 2 raises, PIIC asserts a separate claim:

The need for additional casks and the related expansion of the ISFSI are reasonably foreseeable actions that should have been discussed in the ER because the Applicant has already secured State of Minnesota approval. We believe that the additional casks and expansion of the ISFSI will result in cumulative impacts, when combined with the proposed action (ISFSI license renewal)...[W]e are particularly concerned about the ER providing a cumulative impact analysis of how the ground-disturbing activities related to the ISFSI expansion have the potential to impact archaeological resources.⁵¹

PIIC has raised an admissible contention that the ER fails to discuss the cumulative impacts of the ISFSI renewal in conjunction with the likely expansion of the ISFSI. The fact that Northern States has applied for a state Certificate of Need to build more pads to house sixteen additional casks strongly suggests that such a future expansion is at least "reasonably foreseeable." Added to this is the fact, as was acknowledged by counsel for Northern States at oral argument, that if PINGP is to operate to the end of its current operating license, additional spent fuel storage would be required such that "[p]robably in the 2017 timeframe, we would submit an application for expansion of our ISFSI."⁵² Thus, being reasonably foreseeable, this expansion must be the subject of a cumulative impacts analysis.⁵³

Contrary to the view of the dissent, insofar as Contention 2 seeks to challenge the failure

⁵¹ Petition at 33-4.

⁵² Tr. at 88-89.

⁵³ See Strata Energy, LBP-12-3, 75 NRC at ___ (slip op. at 42-43) (cumulative impacts analysis required for future facility expansion described in ER).

of Northern States to address the cumulative impacts on archaeological and historical resources, it should be admitted. The sole ground on which the dissent seeks to exclude this portion of Contention 2 is that, because the contention was plead as a contention of omission, the following three sentences found in the ER are fatal to its admission:

The environmental impacts of the PI ISFSI were first presented in the ER for the PI ISFSI license, and more recently in the 2008 cask design license amendment request. The GEIS, the PINGP ER, and the NRC's SEIS address the PI ISFSI operations during a plant's period of extended operation. Because these documents have previously defined the impacts of the PI ISFSI, NSPM [Northern States] adopts appropriate material from these documents by reference.⁵⁴

We disagree with the dissent for several reasons.

First, these three sentences appear in the generic "Scoping and Methodology" section of the ER,⁵⁵ not in the more specific "Historical and Cultural Resources" section.⁵⁶ It is the latter section, however, that is the subject of PIIC's claim that it will sustain cumulative impacts. Absent a clear incorporation by reference to specific provisions of prior studies involving historical and archaeological resources, there was nothing in the ER that could be deemed to provide a reasonably prudent person with notice of such incorporation by reference.⁵⁷

Second, although the ER is only 196 pages long, the extrinsic documents that Northern

⁵⁴ Prairie Island Independent Spent Fuel Storage Installation Application for Renewed ISFSI Site-Specific License, Appendix E, Environmental Report Supplement, Section E1.4 at E-4 (emphasis added) (ADAMS Accession No. ML113040123) [ER].

⁵⁵ Id.

⁵⁶ ER, Section E3.9 at E-30 to -32. The Staff's guidance in NUREG-1748 indicates that consideration of cumulative impacts on historic and cultural resources in the ER should be included as part of the section detailing environmental impacts, including cumulative impacts on historic and cultural resources. NUREG-1748 at 6-18, 6-23.

⁵⁷ Cf. One Beacon Ins. Co. v. Crowley Marine Services, Inc., 648 F.3d 258, 268 (5th Cir. 2011) ("Notice of incorporated terms is reasonable where, under the particular facts of the case, a reasonably prudent person should have seen them."); Caldwell-Baker Co. v. Southern Illinois Railcar Co., 225 F.Supp.2d 1243, 1251-2 (D. Kan. 2002) ("where extraneous writing is incorporated for a specific purpose, the writing will be incorporated only to the extent of the reference and for the specific purpose intended; to constitute part of the contract the reference must be clear and unequivocal.").

States referenced encompass over 2500 pages.⁵⁸ Moreover, Northern States did not attempt to incorporate every jot and tittle in these extrinsic documents—only the “material portions.”⁵⁹ It would be patently unreasonable to expect PIIC to read Northern States’ mind and ascertain the particular sentences of these 2500 pages that Northern States deems material.⁶⁰ As the Commission has made clear relative to the information brought before it or a Board in support of a contention, it is not sufficient to incorporate by reference large portions of material where doing so would force one “to sift through it in search of asserted factual support” that is not otherwise specified.⁶¹

Third, the “Historical and Cultural Resources” section⁶² of the ER actually refers to specific provisions of these extrinsic documents. Yet, significantly, that section makes no reference at all to “cumulative impacts.” This absence negates any intention to incorporate any discussion of cumulative impacts from these prior documents into its ER, consistent with “the maxim of expressio unius est exclusio alterius . . . , meaning that the expression of one thing is

⁵⁸ The GEIS for the License Renewal of Nuclear Plants encompasses 1188 pages; the Applicant’s ER in support of its application for renewal of the PINGP operating license spanned 649 pages; and the Supplemental EIS for the renewal of the PINGP operating license consisted of 751 pages.

⁵⁹ ER, Section E1.4 at E-4.

⁶⁰ Cf. Guerini Stone Co. v. P. J. Carlin Constr. Co., 240 U.S. 264, 277 (1916) (“[I]n our opinion the true rule, based upon sound reason and supported by the greater weight of authority, is that . . . a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified.”); see also Northrop Grumman Info. Tech., Inc. v. U.S., 535 F.3d 1339, 1345 (Fed. Cir. 2008) (“The language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated.”); PaineWebber, Inc. v. Bybyk, 81 F.3d 1193, 1201 (2d Cir.1996) (“the paper to be incorporated into a written instrument by reference must be so referred to and described in the instrument that the paper may be identified beyond all reasonable doubt”); Carahsoft Tech. Corp. v. U.S., 86 Fed. Cl. 325, 350 (2009) (“For a contract to incorporate the terms of extrinsic material by reference, it must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract.”).

⁶¹ Nextera Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-05, 75 NRC __, __, (slip op. at 40) (Mar. 8, 2012).

⁶² ER, Section E3.9 at E-30 to -32.

to the exclusion of another.”⁶³

Nevertheless, even were one to assume arguendo that this language from the ER were sufficient to incorporate by reference a “cumulative impacts” analysis from these extrinsic documents, the argument of the dissent still must fail. There is only one sentence in the 2011 Supplemental EIS for the renewal of the PINGP operating license (PINGP SEIS) that could support the conclusion the dissent seeks to reach:

Based on this information and the analysis of human health and environmental impacts presented in this SEIS, the . . . ISFSI expansion at PINGP would not have any long-term cumulative disproportionately high and adverse human health and environmental operational effects on minority and low-income populations residing in the vicinity of PINGP 1 and 2.⁶⁴

Yet, nowhere in the PINGP SEIS is there any factual or expert information that could support this naked claim. In fact, the Staff conceded in the PINGP SEIS that it lacked specific information about a possible expansion of the ISFSI, even promising that such analysis would be undertaken once Northern States submitted an application for renewal of the ISFSI:

The impacts of the proposed action [i.e., renewing the license for the continued operation of the reactors], as described in Sections 4.1–4.9, are combined with other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Actions which Northern States has expressed an interest in pursuing are the license renewal of the independent spent fuel storage installation (ISFSI), expanding the number of spent fuel casks stored at the ISFSI, and a power uprate increase. Each of these actions requires that an application and environmental report be submitted to the NRC for review and approval of the proposed action. While there have been a number of pre-meetings to discuss these proposed actions, no applications have yet been submitted to the NRC for any of these projects. Without the specific technical information available for the proposed actions, staff is not able to perform a comprehensive environmental assessment for aquatic and water resources at this time. Qualitative evaluations in the areas of human health, socioeconomics and cultural resources are included in the section of the SESI [sic]. Once the applications, with its environmental report, are submitted to the NRC, staff will conduct a thorough

⁶³ Dubinsky v. Mermart, LLC, 595 F.3d 812, 818 (8th Cir. 2010); see also Tenn. Valley Auth. (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702, 707 (1978).

⁶⁴ Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 39, Regarding Prairie Island Nuclear Generating Plant, Units 1 and 2, NUREG-1437, at 4-63 (May 2011) (ADAMS Accession No. ML11133A029) [PINGP SEIS].

assessment of both safety and the impact to the environmental impact will be conducted and documented [sic].⁶⁵

And in this same vein, in noting that the Staff does not oppose the admission of this contention, the Staff's Answer states: "[t]he Staff intends to follow the guidance in NUREG-1748 and consider cumulative effects associated with the relicensing of the PI ISFSI."⁶⁶

Finally, the PINGP SEIS catalogues each license and permit to be issued by another federal and state agency that might impact that EIS.⁶⁷ Conspicuously absent from this list is the Certificate of Need from the MPUC that forms the basis for this portion of Contention 2.

The MPUC approved the CON [Certificate of Need] on December 18, 2009. According to the CON application, it is expected that two additional pads (for the additional casks), adjoining the ISFSI, will be constructed in 2020. The pads will be 216 feet long, 18 feet wide and 3 feet thick. The project will involve excavating the pad area and digging trenches for concrete ductbanks and associated electrical conduits and replacing the structural fill. Site preparation activities will involve earthmoving equipment such as bulldozers, scrapers, backhoes and graders to excavate and level the pad and ductbank areas. Following the leveling of the area, reinforced steel, conduit and forms will be put in place and concrete will be poured forming the storage pads and ductbanks. Concrete trucks will deliver concrete to the site and pumping trucks will place it in the pad area. The area around the pad and trench over the ductbank will be back-filled and returned to the 2% grade when complete. ...Although, as noted, there would be many types of cumulative impacts from the additional casks, we are particularly concerned about the ER providing a cumulative impact analysis of how the ground-disturbing activities related to the ISFSI expansion have the potential to impact archaeological resources.⁶⁸

Stated otherwise, the key document that forms the basis for this portion of Contention 2 was never even considered in the PINGP SEIS. Rather, it was omitted from the PINGP SEIS and therefore could not have been incorporated by reference.⁶⁹

⁶⁵ Id. at 4-55 (emphasis added).

⁶⁶ Staff Answer at 11.

⁶⁷ PINGP SEIS at 1-11 to 1-12, Table 1-1.

⁶⁸ Petition at 33-34.

⁶⁹ The Commission's regulations contain many references to when incorporation by reference is appropriate. They include the following:

10 C.F.R. § 30.32(a): Application for specific license for byproduct material may incorporate "Information contained in previous applications, statements or reports filed with the

For each of the foregoing reasons, PIIC, has raised an admissible claim that Northern States failed to address cumulative impacts in its ER. As a consequence, the Board majority

Commission,” “provided that the reference is clear and specific.”

Id. § 40.31(a): Application for specific license for source material may incorporate “Information contained in previous applications, statements or reports filed with the Commission,” “provided that the reference is clear and specific.”

Id. § 50.30(d): Application for operating license may incorporate any pertinent info submitted with application for construction permit.

Id. § 51.49(e): In an application for limited work authorization for a site where a construction permit was issued but construction of the plant was never completed, the ER may incorporate the earlier environmental impact statement.

Id. § 51.50(c)(2), (3): An ER for a COL application may incorporate NRC’s EA for a standard design certification or an underlying manufacturing license.

Id. § 51.53(a): “Any environmental report prepared under the provisions of this section may incorporate by reference any information contained in a prior environmental report or supplement thereto that relates to the production or utilization facility or site, or any information contained in a final environmental document previously prepared by the NRC staff that relates to the production or utilization facility or site.”

Id. § 51.53(d): “The ‘Supplement to Applicant’s Environmental Report—Post Operating License Stage’ may incorporate by reference any information contained in ‘Applicants Environmental Report—Construction Permit Stage.’”

Id. § 51.60(a): For materials licenses, “If the application is for an amendment to or a renewal of a license or other form of permission for which the applicant has previously submitted an environmental report, the supplement to applicant’s environmental report may be limited to incorporating by reference, updating or supplementing the information previously submitted to reflect any significant environmental change, including any significant environmental change resulting from operational experience or a change in operations or proposed decommissioning activities.”

Id. § 51.62(a): In application for land disposal of radioactive waste, ER “may incorporate by reference information contained in the application or in any previous application, statement or report filed with the Commission provided that such references are clear and specific”

Id. § 60.23: DOE may incorporate in its application for geologic repository info in previous reports filed with the Commission “Provided, That such references are clear and specific”

Id. § 70.21(c): For special nuclear material licenses: “Information contained in previous applications, statements, or reports filed with the Commission may be incorporated by reference if the references are clear and specific.”

Although there is a general lack of consistency in these provisions, a common thread is that many of them require statements of incorporation to be “clear and specific.” We note also that the provision cited by the dissent, 10 C.F.R. § 51.60, allows an applicant to incorporate material that the applicant itself has previously submitted, not, as the dissent argues, material prepared by the Staff.

agrees with the NRC Staff that this portion of Contention 2 is admissible.

C. Contention 3

PIIC's Contention 3 is as follows:

[Northern States'] Environmental Report Fails to Account for the Federal Trust Responsibility that Informs Its Review of Potential Impacts on the Community, Its People and Its Land.

Contention 3 invokes the long-recognized "trust responsibility" that the federal government owes to Indian tribes.⁷⁰ As PIIC explains, the trust responsibility imposes both substantive and procedural duties on the federal government, and the government "has a general mandate to ensure the preservation of a usable land base for future generations of tribal members."⁷¹ In essence, PIIC is arguing that, in furtherance of the government's performance of its trust obligation, Northern States' ER should address issues related to the federal government's trust responsibility—particularly the prospect that the ISFSI will continue to store waste near PIIC long after the deadline for permanent storage established by the Nuclear Waste Policy Act (NWPA).⁷²

Northern States and the Staff both oppose admission of Contention 3. Northern States argues that PIIC fails to raise a material issue with the application or to explain with any specificity how the application is deficient.⁷³ Northern States asserts that the NRC fulfills its trust responsibility through compliance with its general regulations and statutes.⁷⁴ For its part, the Staff argues that the trust responsibility does not apply to Northern States, and that there is no requirement for it to address the trust responsibility in the ER.⁷⁵ The Staff also asserts that

⁷⁰ See, e.g., Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

⁷¹ Petition at 37.

⁷² See Id. at 38-42.

⁷³ Northern States Answer at 21-22.

⁷⁴ Id. at 22-23.

⁷⁵ Staff Answer at 13.

PIIC's arguments about NRC compliance with the NWPA are beyond the scope of the current proceeding.

In its Reply, PIIC argues that the ER is "insufficient" because it fails to "address matters that are necessary for the NRC to meet its trust obligation."⁷⁶ PIIC claims that an applicant "must discuss the NRC's compliance with all applicable federal laws," including the common-law trust obligation, in order to present a sufficient basis for the NRC to review the application.⁷⁷ PIIC also reiterates its claim that the NRC has violated the trust responsibility by failing to move forward with a geologic repository.⁷⁸

Contention 3 is inadmissible for failure to present a genuine dispute with the application. Although the contention alleges that Northern States' ER fails to discuss the federal trust responsibility, in fact that responsibility rests solely with the federal government, and cannot be discharged by Northern States.⁷⁹ Furthermore, nothing in 10 C.F.R. § 51.45, which governs the contents of ERs, requires an applicant to discuss the federal government's trust responsibility. PIIC claims that a discussion of the trust responsibility is necessary to support the NRC's review of the application, but PIIC does not explain how the information included in the application is insufficient for the Staff to undertake its own consideration of the trust responsibility.

Although we deny Contention 3, PIIC is free to raise a contention challenging the Staff's compliance with its trust responsibility once the Staff issues its EA or draft EIS. We express no opinion as to whether such a contention would be admissible.

⁷⁶ Reply at 23.

⁷⁷ Id.

⁷⁸ Id. at 24.

⁷⁹ See Parravano v. Babbitt, 70 F.3d 539, 546 (9th Cir. 1995) ("the federal government is the trustee of the Indian tribes' rights This trust responsibility extends not just to the Interior Department, but attaches to *the federal government as a whole.*") (emphasis added).

D. Contention 4⁸⁰

PIIC's Contention 4 is as follows:

[Northern States'] Environmental Report Does Not Adequately Assess the Impacts of the PI ISFSI on the Adjacent Minority Population.

Contention 4 implicates environmental justice, a policy established by Executive Order 12898 that federal agencies shall identify and consider whether their actions will cause disproportionate environmental impacts on minority, low-income, or other sensitive populations.⁸¹ The policy of the NRC is to address the required environmental justice analysis in its general environmental review process under NEPA.⁸²

PIIC disputes the conclusion in Northern States' ER that the environmental justice impacts of the Prairie Island ISFSI license renewal will be "small."⁸³ It also attacks the ER for failing to consider environmental justice impacts beyond the forty-year period of the renewal term. Additionally, PIIC raises a number of discrete claims of disparate impact on its community from the ISFSI and from the Prairie Island Nuclear Generating Plant more generally. These include: destruction of tribal cultural resources at the plant site; unfulfilled promises of jobs and infrastructure improvements for the community; radiological and thermal pollution from plant operations; elevated risks from radiological release or leaks from the spent fuel pools; the potential exposure from the "skyshine" radiation associated with ongoing nuclear waste storage;⁸⁴ inadequate environmental monitoring by Northern States; increased emergency

⁸⁰ Judge Arnold dissents from the Board's ruling on Contention 4. See infra, Dissenting Statement of Judge Arnold.

⁸¹ Exec. Order No. 12,898, 3 § C.F.R. 859 (1995), reprinted as amended in 42 U.S.C. § 4321.

⁸² See Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (Aug. 24, 2004).

⁸³ ER at E-59.

⁸⁴ Skyshine refers to radiation that is reflected by the atmosphere and is redirected towards the ground. See Tr. at 166.

preparedness costs; and fear and anxiety among tribal members about their health and safety.⁸⁵ Finally, PIIC alleges that the National Academy of Sciences has called into question the long-term health impact studies on which Northern States and the NRC rely to establish lifetime cancer risk.⁸⁶

The Staff states that it plans to conduct an environmental justice review in its Environmental Assessment. According to the Staff, NRC regulations do not require applicants to discuss environmental justice concerns in their applications—although, even were they obligated to do so, the Staff views Northern States' ER as containing sufficient socioeconomic data for the Staff to begin its review.⁸⁷ Nevertheless, because petitioners are required to bring their environmental contentions at the petition stage against the ER, the Staff concedes that this contention is timely and admissible as a placeholder for PIIC to contest the adequacy of the Staff's yet-to-be-completed environmental justice review.⁸⁸

Even then, however, the Staff urges that Contention 4 be narrowed to exclude certain claims that are outside the scope of this proceeding because they implicate impacts and features of the PINGP reactor units (rather than the ISFSI itself), such as spent fuel pools.⁸⁹ The Staff also cites case law holding that agencies need not consider psychological impacts from fear and anxiety as part of a NEPA analysis.⁹⁰ Third, the Staff asserts that Northern States' ER already considers skyshine as part of its overall dose calculation for radiation exposure.⁹¹ Finally, the Staff states that the National Academy of Sciences report cited by PIIC

⁸⁵ See Petition at 45-48.

⁸⁶ Id. at 48 (citing National Academy of Sciences, Analysis of Cancer Risks in Populations Near Nuclear Facilities (Phase I) (2012)).

⁸⁷ NRC Staff Answer at 15.

⁸⁸ Id. at 15, 17.

⁸⁹ Id. at 16.

⁹⁰ Id.

⁹¹ Id.

has not been finalized or incorporated by the NRC, and therefore Northern States' ER is "not deficient for failing to consider the report's findings."⁹²

Northern States opposes admission of Contention 4 in its entirety. It echoes the Staff's concerns with the individual bases of the contention and argues further that the remaining portions of the contention lack support, fail to present a material dispute with the application, and are outside the scope of the proceeding.⁹³ In Northern States' view, the contention as a whole fails to allege the "significant, high and adverse" disparate impacts that are necessary to form a valid environmental justice contention.⁹⁴

We disagree. PIIC has stated an admissible contention with respect to two disparate impacts on PIIC as a minority population (1) potential disturbance of historic and archaeological resources and (2) skyshine radiation. These impacts are similar to those asserted in Contention 2 in that they stem from the likely future expansion of the ISFSI that is not examined in the ER.

As we observed in admitting Contention 2, to the extent a future expansion of the ISFSI will disturb the ground and risk adversely affecting historical and archaeological resources, these impacts will be felt particularly by PIIC. These alleged impacts are material to the Staff's review, and their absence from the environmental justice analysis in the ER creates a genuine dispute regarding the adequacy of Northern States' application.

Secondly, PIIC asserts that the ER does not consider the expansion of the ISFSI to encompass as many as ninety-eight casks⁹⁵ that could result in an increase in skyshine radiation, some of which may find its way within PIIC's borders. According to PIIC, it is

⁹² Id. at 17.

⁹³ Northern States Answer at 24.

⁹⁴ Northern States Answer at 28 (citing Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 154 (2002)).

⁹⁵ At oral argument, counsel for the PIIC alleged that upon decommissioning of the PINGP, the waste remaining in the reactor and the spent fuel pools will necessitate ninety-eight casks for long-term storage. Tr. at 80.

reasonably foreseeable that there will be a disproportionate impact on PIIC from additional skyshine.⁹⁶ The Staff's claim that the application already considers skyshine as part of the overall dose calculation is thus incorrect—for that analysis was based on an ISFSI of only forty-eight casks.⁹⁷ Northern States goes even further than the Staff to argue that because PIIC itself has characterized the impact of additional skyshine in its Petition as a "small incremental risk," we must conclude that the impact on PIIC is trivial.⁹⁸ In fact, however, the Petition makes clear that PIIC is concerned with the effects of long-term exposure to this low-level radiation.⁹⁹ Accordingly, there is a genuine dispute as to whether the skyshine impacts are "significant, high, and adverse."

The remaining portions of Contention 4 are not admissible. First, PIIC's concerns about impacts from the spent fuel pool and from radiological and thermal pollution are challenges to the reactor units, and are thus outside the scope of this proceeding. The ISFSI renewal does not afford PIIC a second bite of the apple to relitigate issues it had the opportunity to raise in the recent PINGP relicensing proceeding. PIIC also raises grievances about Northern States' past behavior (prior destruction of burial mounds, previous failure to provide jobs and infrastructure) that cannot be adjudicated in this forum. Additionally, PIIC's assertion that continued operation of the ISFSI causes fear and anxiety among PIIC members is not a valid claim under NEPA.¹⁰⁰ Finally, PIIC's citation to the National Academy of Sciences Phase 1 study to challenge other, unspecified studies on which the NRC and Northern States rely is in effect a challenge to NRC

⁹⁶ Petition at 47-48.

⁹⁷ See ER at E-50 to -51; Reply at 30-31.

⁹⁸ Northern States Answer at 32.

⁹⁹ Petition at 48.

¹⁰⁰ See Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 775-79 (1983); Entergy Nuclear Generation Company & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC __, __ (slip op. at 28) (June 7, 2012) ("NEPA is not intended to encompass every possible impact, and does not encompass potential losses due to individuals' 'perception' of a risk.").

regulations setting maximum dose limits for the protection of the public, and therefore is beyond the permissible scope of this proceeding.

E. Contention 5¹⁰¹

PIIC's Contention 5 is as follows:

The [Northern States] License Application Is Deficient Because It Does Not Include the ISFSI Pressure Monitoring System as a SSC Within the Aging Management Program

Contention 5 concerns the pressure monitoring system, which gauges the helium pressure between the inner and outer seals of each spent fuel cask.¹⁰² The pressure monitoring system functions to alert ISFSI operators of potential storage problems, specifically a leak of one of the seals. Such a capability is intended to meet the requirements of 10 C.F.R. § 72.122(h)(4) for monitoring of dry spent fuel storage. PIIC argues that, because the pressure monitoring system "is needed to provide the capability to determine when corrective action needs to be taken to maintain safe storage conditions,"¹⁰³ the system itself should be considered one of the "structures, systems, and components [SSCs] important to safety" that are evaluated within the scope of license renewal.¹⁰⁴

PIIC cites to the guidance in NUREG/CR-6407, which defines items having a "major impact on safety" as those SSCs "whose failure or malfunction could indirectly result in a condition adversely affecting public health and safety."¹⁰⁵ PIIC claims the pressure monitoring

¹⁰¹ Judge Gibson concurs separately as to the Board's ruling on Contention 5. See infra, Concurring Statement of Judge Gibson.

¹⁰² See Northern States Answer at 34 (citing Prairie Island Independent Spent Fuel Storage Installation, Safety Analysis Report, Rev. 14 at 1.3-1, A1.3-1 (Sept. 2011) (ADAMS Accession No. ML113040131) [SAR]).

¹⁰³ Petition at 49.

¹⁰⁴ See Standard Review Plan for Renewal of Spent Fuel Dry Cask Storage System Licenses and Certificates of Compliance, NUREG-1927, Section 2.4.2, "Structures, Systems, and Components Within the Scope of License Renewal" (ADAMS Accession No. ML111020115) (Mar. 2011) [NUREG-1927].

¹⁰⁵ Petition at 50 (citing Classification of Transportation Packaging and Dry Spent Fuel Storage

system falls squarely within this definition.

PIIC provides support for Contention 5 by highlighting two examples of seal leaks detected by a pressure monitoring system.¹⁰⁶ These incidents occurred at the Peach Bottom Atomic Power Station ISFSI in 2011 and at the Surry Power Station ISFSI in 2000.¹⁰⁷ PIIC alleges that “[n]either of these two leaks would have been discovered if the management of the aging of the pressure monitoring system was outside the scope of license renewal.”¹⁰⁸

The Staff supports admission of Contention 5. The Staff informs us that it “is currently reviewing the Applicant’s determination that the pressure monitoring system is not within the scope of the license renewal.”¹⁰⁹ Because Contention 5 is based on factors that the Staff is considering in its review, the Staff maintains that the contention is material and within the scope of this proceeding. In the Staff’s view, PIIC’s references to prior seal leaks provide sufficient support for its contention that the pressure monitoring system is incorrectly scoped in the application.¹¹⁰

Northern States characterizes Contention 5 as an inappropriate attack on the licensing basis of the ISFSI, which it argues cannot be challenged in a license renewal proceeding.¹¹¹ The current licensing basis, as described in Northern States’ Safety Analysis Report (SAR), classifies the pressure monitoring system as “not important to safety.”¹¹² Northern States draws

System Components According to Importance to Safety, NUREG/CR-6407, (Feb. 1996) at 4).

¹⁰⁶ Id. at 51.

¹⁰⁷ See NRC Inspection Report Nos. 05000277/2010010 and 05000278/2010010, Exelon Nuclear Peach Bottom Atomic Power Station (July 29, 2011) (ADAMS Accession No. ML112101576); NRC Inspection Report No. 72-002/2000-06, Surry Power Station Independent Spent Fuel Storage Installation (ISFSI) (Aug. 4, 2000) (ADAMS Accession No. ML003738176).

¹⁰⁸ Id. at 52.

¹⁰⁹ NRC Staff Answer at 18.

¹¹⁰ Id. at 19.

¹¹¹ Northern States Answer at 35-37.

¹¹² Id. at 35, 38 (citing SAR at 4.5-2, A4.5-24).

an analogy to the NRC's practice regarding license renewal for reactors, which requires aging management review only for passive components. Northern States argues that the pressure monitoring system is an active system, not a passive one, and therefore it is appropriately placed outside the scope of license renewal. Additionally, Northern States suggests that an aging management program would be superfluous because the system is already checked once a day and the alarm system is tested annually.

Contention 5 is inadmissible. NRC regulations require that applications for renewal of an ISFSI license contain "[a] description of the AMP [aging management plan] for management of issues associated with aging that could adversely affect structures, systems, and *components important to safety*."¹¹³

Northern States has cited to current license documents that define the pressure monitoring system not to be safety related.¹¹⁴ Petitioners charge that this classification is incorrect. But this classification is part of the current licensing basis, and the time to have challenged this classification was when it was originated, during initial licensing of the ISFSI.

The Commission has explained that it is not "necessary or appropriate to throw open the full gamut of provisions in a [facility's] current licensing basis to re-analysis during the license renewal review," because the current licensing basis "is effectively addressed and maintained by ongoing agency oversight, review, and enforcement."¹¹⁵ Although providing guidance rather than regulations, NUREG-1927 states concerning ISFSI license renewal:

The NRC bases a license . . . renewal on the continuation of the existing licensing basis throughout the period of extended operation and on the maintenance of the intended functions of the SSCs important to safety. The NRC does not intend a license . . . renewal to be a vehicle for imposing new

¹¹³ 10 CFR § 72.42(a)(2) (emphasis added).

¹¹⁴ Northern States Answer at 35 (citing SAR at 4.5-2, A4.5-2).

¹¹⁵ Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9 (2001).

regulatory requirements. If new safety-related deficiencies are discovered, they must be addressed through the license . . . amendment process.¹¹⁶

This is sufficient for us to conclude that the Commission intends the scope of ISFSI license renewal to be limited similar to renewal of operating licenses where challenges to the current licensing basis are inadmissible.¹¹⁷

Here, the current licensing basis for the Prairie Island ISFSI classifies the pressure monitoring system as “not important to safety.”¹¹⁸ For this reason alone, this challenge is outside the scope of license renewal and this contention is not admissible.

F. Contention 6

PIIC’s Contention 6 is as follows:

[Northern States’] License Renewal Application Is Deficient Because It Did Not Adequately Address the Potential Degradation of High Burnup Fuel Due to Aging During Storage, Subsequent Handling, and Transportation. 10 CFR § 72.122 Requires Confinement Barriers and Systems to Protect Degradation of Fuel and to Not Pose Operational Safety Problems.

PIIC alleges significant uncertainty concerning the behavior of high burn-up fuel during dry storage and its subsequent handling and transportation.¹¹⁹ It cites to reports of the NRC, the Department of Energy, and the Nuclear Waste Technical Review Board to support its allegations that expected physical and chemical aging processes¹²⁰ could lead to degradation of

¹¹⁶ NUREG-1927 at 9.

¹¹⁷ See Amergen Energy Co. (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 272 n.209 (2009) (“a challenge to the adequacy of the acceptance criteria (or any other component of the current licensing basis) is not within the scope of the license renewal proceeding”); Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), 68 NRC 590, 601 (2008).

¹¹⁸ Our acknowledgement that the pressure monitoring system is defined as not safety-related in the current license basis is not a judgment that this categorization is correct. It is only an acknowledgement that the system is defined that way in the current license.

¹¹⁹ Petition at 53.

¹²⁰ These physical and chemical aging processes include hydriding effects, creep, stress corrosion cracking, embrittlement, oxidation, and galvanic corrosion. Petition at 52-54.

the high burn-up fuel cladding and threaten the containment systems.¹²¹ PIIC argues that the license renewal application does not address these issues or uncertainties, and that Northern States' ER has failed to satisfy "the requirements of 10 C.F.R § 72.122 to protect spent fuel from significant degradation during the proposed extended storage period."¹²²

The Staff would have us admit this contention in part. The Staff states that the contention invokes Northern States' responsibility both under 10 C.F.R. § 72.122(h)(1)—either to protect fuel cladding from degradation during storage, or to confine the fuel in such a way that degradation does not cause operational problems when removed from storage—and under § 72.122(l) to provide for ready retrieval of the spent fuel from storage for further processing or disposal.¹²³ Additionally, the Staff cites to its standard review plan for spent fuel storage licenses, NUREG-1927, which instructs applicants to "provide any new supporting data demonstrating high-burn-up fuel performance during extended storage."¹²⁴ Accordingly, relative to these matters, the Staff deems Contention 6 to raise issues material to its review of the application.

Northern States opposes admission of Contention 6, arguing that the application not only discusses aging management of high-burn-up fuel but also follows NRC guidance in doing so.¹²⁵

¹²¹ Petition at 52-54 (citing U.S. NRC, Draft Report for Comment, Identification and Prioritization of the Technical Information Needs Affecting Potential Regulation of Extended Storage and Transportation of Spent Nuclear Fuel (May 2012) (ADAMS Accession No. ML120580143); U.S. Department of Energy, Gap Analysis to Support Extended Storage of Used Nuclear Fuel, Rev. 0 (Jan. 31, 2012), available at [http://www.nuclear.energy.gov/pdfFiles/Gap Analysis Rev 0 Final.pdf](http://www.nuclear.energy.gov/pdfFiles/Gap%20Analysis%20Rev%200%20Final.pdf); U.S. Nuclear Waste Technical Review Board, Evaluation of the Technical Basis for Extended Dry Storage and Transportation of Used Nuclear Fuel (Dec. 2010), available at <http://www.nwtrb.gov/reports/eds-final.pdf>).

¹²² Id. at 54. The Petition also charges that Northern States "has not provided adequate justification and support for use of full burnup credit in the criticality analysis," id., but during oral argument, PIIC abandoned this argument. Tr. at 235.

¹²³ Staff Answer at 20.

¹²⁴ Id. (citing NUREG-1927 at 20).

¹²⁵ Northern States Answer at 40-41.

Northern States specifically states that it has addressed the acceptance criteria of the NRC Interim Staff Guidance document concerning spent fuel cladding during storage,¹²⁶ and has demonstrated that these criteria will be met.¹²⁷ Further, Northern States asserts that the three reports cited by PIIC fail to provide support for the contention.¹²⁸ According to Northern States, each of these reports considered storage for periods longer than sixty years (i.e. the length of time the Prairie Island ISFSI will have been operational at the end of the relicensing period), and are therefore not relevant to the current license renewal.¹²⁹

At oral argument, PIIC noted that, although the Prairie Island ISFSI is licensed for storage of high burn-up fuel, the current licensing action extends that approval for an additional forty years.¹³⁰ PIIC explained that available data and experience with high burn-up fuels are inadequate to support the safe dry storage of high burn-up fuel for such an extended period.¹³¹ In essence, PIIC is alleging that there is no available information to support Northern States' claim that it can meet 10 C.F.R. § 72.122(h)(1) during the planned relicensing period of forty years .

PIIC has presented an admissible contention. To date the Prairie Island ISFSI has stored only low burn-up fuel,¹³² and so the effects and challenges of storing high burn-up fuel over the forty-year renewal term are new and material safety issues within the scope of this proceeding. PIIC has raised a genuine dispute that Northern States' application did not

¹²⁶ Cladding Considerations for Transportation and Storage of Spent Fuel, ISG-11, Rev. 3 (Nov. 2003) (ADAMS Accession No. ML033230335) [ISG-11].

¹²⁷ Northern States Answer at 41 (citing Application at 3-11; SAR at A3.3-12 to -13).

¹²⁸ Id. at 42-43.

¹²⁹ Id.

¹³⁰ Tr. at 239-40.

¹³¹ Id. at 243-44.

¹³² See Tr. at 246 (Statement by Ms. Harshaw: "We will be loading our first high burn-up fuel in 2013.").

sufficiently consider the uncertainties associated with long-term dry storage of high burn-up fuel. Contrary to Northern States' argument that the studies on which the Staff and PIIC rely relate only to "extended storage," (and so of necessity must be for a period longer than the forty remaining years were the ISFSI license renewed), PIIC's claim is that no such bright line can be drawn to mark the age at which degradation becomes a concern. Whether these studies are adequate to show that high burn-up fuel is safe from serious degradation within the forty-year timeframe is a question appropriate for adjudication on the merits. At this contention admissibility stage, there is a genuine dispute as to the studies' interpretation. Accordingly, Contention 6 is admissible.

G. Contention 7

PIIC's Contention 7 is as follows:

The [Northern States] License Renewal Application Does Not Address the Potential for Operational Radiological Effluent Releases in Excess of the Limits in NRC Regulations from the Fuel Cask Confinement System Due to Aging of the System.

PIIC posits that, over the forty-year renewal period, "it can reasonably be anticipated that one or more TN casks¹³³ will experience confinement failure" due to degradation of materials and seals, potentially leading to offsite doses of radiation to the public.¹³⁴ PIIC challenges the ER's exclusive focus on direct radiation doses and its conclusion that there will be no releases of radioactive material.¹³⁵ Additionally, PIIC alleges that the ER should apply the stricter regulatory dose limits for operational releases, rather than treat a release of radioactive material as an accident condition. PIIC bases the contention on "the history of defects that have caused leaks to occur in TN casks."¹³⁶

¹³³ TN Casks are spent fuel storage casks manufactured by Transnuclear, Inc. Petition at 51.

¹³⁴ Petition at 55.

¹³⁵ Id.

¹³⁶ Id.

The Staff argues that Contention 7 should be dismissed because it is outside the scope of the proceeding, lacks factual support, and fails to show a genuine dispute with the application.¹³⁷ First, the Staff observes that because Northern States' current licensing basis contains technical specifications limiting radioactive releases to levels below NRC's regulatory standards, it is beyond the permissible scope of adjudication here.¹³⁸ The basis for the Staff's claim in this regard is the Applicant's demonstration "that the casks will not leak radionuclides into the environment under normal conditions of operations."¹³⁹ Second, the Staff presumes that the "history of defects" cited by PIIC refers to the leaks at Surry and Peach Bottom discussed as support for Contention 5, and notes that neither leak resulted in a loss of containment. From this, the Staff argues that PIIC has shown neither that there has been a history of operational radioactive releases nor that any such release would be greater than the dose limits set by NRC regulations.¹⁴⁰

Northern States also argues that the contention is unsupported, and that the examples of seal leaks contained in the Petition do not establish that it can "reasonably be anticipated" that an operational release will occur.¹⁴¹ Further, Northern States argues that the current licensing basis established that "no credible mechanisms that could result in leakage of radioactive products have been identified," and that the application contains both an analysis of accidental releases and an aging management plan to guard against degradation of the seals and other components.¹⁴²

We agree with Northern States and the Staff that Contention 7 is inadmissible. NRC

¹³⁷ Staff Answer at 21.

¹³⁸ Id. at 21-22.

¹³⁹ Id. at 22.

¹⁴⁰ Id. at 22-23.

¹⁴¹ Northern States Answer at 44-45.

¹⁴² Id. at 48 (citing SAR at 8.2-4, A8.2-5).

regulations require ISFSI licensees to limit releases of radioactive materials to “as low as is reasonably achievable,” and to establish operational limits to prevent doses to the public that exceed the limits in 10 C.F.R. § 72.104(a).¹⁴³ The current licensing basis for the ISFSI specifies that under normal operating conditions, there will be no release of radioactive material from the casks.¹⁴⁴ Were such a release to occur, whether due to some catastrophic event or simply due to aging, the current licensing basis treats this as an accident.¹⁴⁵ As PIIC observes, Northern States’ SAR estimates that a loss of confinement would produce a dose of 0.15 rem at the nearest site boundary , which is less than the 5 rem limit set by 10 C.F.R. § 72.106(b).¹⁴⁶ In essence, PIIC’s contention challenges not only the current licensing basis, but as well the NRC’s regulatory dose limit. Challenges to the current licensing basis are outside the scope of license renewal proceedings, and contentions that pose a challenge to Commission regulations are inadmissible in licensing proceedings, absent a waiver, which has not been sought in this instance.¹⁴⁷ Further, PIIC’s unsupported statement that loss of confinement can “reasonably be expected” over the license renewal term fails to present a genuine dispute with the application. Contention 7 is therefore inadmissible.

V. Conclusion

For the reasons stated above, we grant PIIC’s Request for Hearing and Petition to Intervene and we admit PIIC as a party to this proceeding. We further admit Contentions 2, 4, and 6, as narrowed herein, and hold in abeyance Contention 1, as well as those portions of Contentions 2 and 4 that implicate the WCD and the TSR.

¹⁴³ 10 C.F.R. § 72.104(a)-(c).

¹⁴⁴ See SAR at A7A.8-6.

¹⁴⁵ Id.

¹⁴⁶ Petition at 55 (citing SAR at 8.2-13).

¹⁴⁷ 10 C.F.R. § 2.335(a) (“no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.”), (b).

We will issue a further order governing the schedule for this proceeding in due course. Because no party requested to conduct the proceeding under the procedures specified in 10 C.F.R. Part 2, Subpart G, we will conduct the proceeding in accordance with the procedures of 10 C.F.R. Part 2, Subpart L. An appeal of the selection of hearing procedures may be filed within ten (10) days, pursuant to 10 C.F.R. § 2.311(e).

An appeal of this Memorandum and Order may be filed within twenty-five (25) days of service of this Memorandum and Order by filing a notice of appeal and an accompanying supporting brief, in accordance with 10 C.F.R. § 2.311(b). Any party opposing an appeal may file a brief in opposition to the appeal. All briefs must conform to the requirements of 10 C.F.R. § 2.341(c)(2).

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael M. Gibson
CHAIRMAN

/RA/

Dr. Gary S. Arnold
Administrative Judge

/RA/

Nicholas G. Trikouros
Administrative Judge

Rockville, Maryland
December 20, 2012

Dissenting Statement of Judge Arnold

Although I agree with the other members of the Board on most of this order, I differ from the majority of the Board on admissibility of Contentions 2 and 4. I discuss each of my alternative opinions in turn.

Contention 2

Contention 2 states that “Northern States Power’s Environmental Report fails to address cumulative impacts of related projects on the PIIC, its members, and its lands.”¹ There is nothing in the contention, as written, that indicates that the contention was intended to be one alleging inadequacy of a cumulative impacts analysis that is present. The phrase “fails to address” clearly indicates that this contention is solely one of omission; that the ER failed to address something that the Petitioners believe should have been addressed.

As addressed in the discussion of Contention 2 in the majority decision and at oral argument, this contention has two main concepts.² The first is that the ER did not consider cumulative impacts of extending the ISFSI license along with activities related to long-term storage of waste and the Waste Confidence Rule.³ I agree with the majority of the Board that this must be held in abeyance. The second concept was that the ER did not consider the cumulative impacts of extending the ISFSI license along with recent and reasonably foreseeable actions. The two specific examples of this latter concept provided in the petition are the recent renewal of the operating license and the foreseeable future expansion of the ISFSI.⁴

The second part of the contention is the source of disagreement between myself and the majority of the Board. Prior to discussing the issue, it is informative to review the specific

¹ Petition at 26.

² See Tr. 106-08.

³ Tr. at 30-31.

⁴ Tr. at 32-33.

regulatory requirement that an ISFSI license renewal application contain an ER. This is found in 10 C.F.R. § 51.60. However, this section allows for the ER for a license renewal to be provided in an abbreviated form:

If the application is for an amendment to or a renewal of a license or other form of permission for which the applicant has previously submitted an environmental report, *the supplement to applicant's environmental report may be limited to incorporating by reference, updating or supplementing the information previously submitted* to reflect any significant environmental change, including any significant environmental change resulting from operational experience or a change in operations or proposed decommissioning activities.⁵

The second part of Contention 2 alleges that the ER is required to consider the cumulative effects of extending the ISFSI license along with the recent extension of the operating licenses of the two PI units and the future expansion of the ISFSI, and challenges that the ER fails to do so. I believe that the Applicant did provide such an analysis in its ER by incorporating by reference the Supplemental Environmental Impact Statement (SEIS) provided by NRC Staff for relicensing of the two PI operating licenses.⁶

The cumulative impacts analysis provided in this earlier SEIS is introduced with:

The NRC staff considered potential cumulative impacts in the environmental analysis of continued operation of PINGP 1 and 2. For the purposes of this analysis, past actions are those related to the resources at the time of the power plant licensing and construction, present actions are those related to the resources at the time of current operation of the power plant, and future actions are considered to be those that are reasonably foreseeable through the end of plant operation including the period of extended operation. . .

The impacts of the proposed action, as described in Sections 4.1–4.9, are combined with other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such

⁵ 10 C.F.R. § 51.60 (emphasis added).

⁶ Prairie Island Independent Spent Fuel Storage Installation Application for Renewed ISFSI Site-Specific License (Application) at E-4:

“The GEIS, the PINGP ER, and the NRC’s SEIS address the PI ISFSI operations during a plant’s period of extended operation. Because these documents have previously defined the impacts of the PI ISFSI, NSPM adopts appropriate material from these documents by reference.”

*other actions. Actions which NSP has expressed an interest in pursuing are the license renewal of the independent spent fuel storage installation (ISFSI), expanding the number of spent fuel casks stored at the ISFSI, and a power uprate increase.*⁷

As stated in the quote above, the cumulative impacts evaluation contained in Section 4.11 of the SEIS, consists of a 12-page discussion of the various cumulative impacts associated with the combination of operating license renewal, ISFSI license renewal, and future ISFSI expansion. This evaluation has been incorporated in the ISFSI license renewal application by reference.⁸ Contention 2 does not cite or in any way refer to this cumulative impacts analysis. Petitioners do not challenge that this evaluation is inadequate or out of date. In fact, the contention provides no indication that the Petitioners were even aware of this analysis.

To find this second part of Contention 2 admissible, the Board would have to consider that the SEIS for operating license renewal was not a legitimate part of the current ISFSI license renewal application. Such a decision could be based either on the concept that the SEIS was improperly incorporated into the ER or upon a decision that the cumulative impacts analysis in the SEIS was inadequate. The majority of the Board seems to believe both.

The Majority provides three reasons why Applicant's incorporation by reference of the cumulative impact evaluation of the EIS for operating license renewal is inadequate. These are: 1) incorporation of the cumulative impacts evaluation occurs in the wrong part of the ER, 2) incorporation was not sufficiently specific, and 3) the ER failed to evaluate cumulative impacts in the "Historical and Cultural Resources" section of the ER.⁹ None of these arguments hold water as discussed below.

⁷ NUREG-1437, Supplement 39, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Prairie Island Nuclear Generating Plant, Units 1 and 2 — Final Report," at 4-55 (SEIS) (emphasis added).

⁸ Application at E-4.

⁹ See Majority Opinion, supra at 12-13.

The majority of the Board takes issue with the fact that incorporation of the cumulative impacts was performed under the “Scoping and Methodology” section of the ER rather than under the section on “Historical and Cultural Resources”. However, examination of the FEIS for most operating plants demonstrates that cumulative impacts, even those of historical and cultural resources are not discussed in the “Historical and Cultural Resources” section of the EIS. For instance, the EIS for South Texas contains in Section 5 (“Operational Impacts at the Proposed Site”) discussions of impacts on historical and cultural resources.¹⁰ However, the discussion of cumulative impacts on historical and cultural resources is contained in Section 7.5 (Cumulative Impacts – Historical and Cultural Resources). Therefore, contrary to the assertion of the majority, the “Historical and Cultural Resources” section of the ER is not the appropriate location for a cumulative impacts evaluation. Instead, Applicant appropriately placed incorporation of the cumulative impacts analysis of the license renewal EIS in the “Scoping and Methodology” section of the ER.

Second, the majority stated that the incorporation was not sufficiently specific.¹¹ They cite the Commission’s statement in the recent Seabrook decision:

The Commission has made clear that it is not sufficient to incorporate by reference large portions of material where doing so would force one ‘to sift through it in search of asserted factual support’ that is not otherwise specified.¹²

The information incorporated by reference by the Applicant in its ER is the EIS for the PINGP operating license renewal. This is a Staff-authored document that is clearly indexed and easily accessed on the NRC public web site. While the majority indicates that accessing

¹⁰ NUREG-1937, Vol. 1, “Environmental Impact Statement for Combined Licenses for South Texas Project Electric Generating Station Units 3 and 4,” Table of Contents at xii, xv.

¹¹ Incorporation was accomplished with the words, “NSPM adopts appropriate material from these documents by reference.” ER at E-4. Admittedly this is not specific to page or section numbers. However, it is not a great extrapolation to conclude that “appropriate material” refers to those parts of the documents that pertain to the ISFSI.

¹² See Majority Opinion, *supra* at 13 (citing Nextera Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-05, 75 NRC ___, __ (slip op. at 40) (March 8, 2012)).

relevant portions of the SEIS amounts to a major exercise, in reality, locating this public document and finding the cumulative impacts analysis requires less than 10 minutes. Furthermore it should be noted that the Commission's admonitions on referencing large portions of materials are directed at Petitioners or Intervenors attempting to bolster weak contentions. To my knowledge the Commission has never admonished an Applicant for incorporating by reference too much information into an application.

The third reason that the majority of the Board finds the Applicant's incorporation of the cumulative impacts analysis to be inadequate is similar to the first reason and focuses on the fact that the ER's evaluation of "Historical and Cultural Resources" does not consider cumulative impacts. However, as I discussed previously, the ER did consider cumulative impacts elsewhere and was not required to consider them in the "Historical and Cultural Resources" section.

The Board's decision fails to provide any reasonable justification to exclude the discussion of cumulative impacts that was contained in the SEIS for the renewal of the operating license and which was incorporated in the ISFSI license renewal application by reference.

The majority of the Board then assumes "arguendo that this language from the ER [is] sufficient to incorporate by reference cumulative impacts analysis from these extrinsic documents."¹³ The Majority concludes that even so, the cumulative impacts analysis contained therein is inadequate. This decision is based on a claimed lack of support in the SEIS for its conclusion of "no significant cumulative impacts." This is effectively a challenge to the SEIS as well as to the ER. However, it is far too late to challenge the adequacy of an SEIS for a license renewal completed over a year ago. Furthermore, the PIIC, in pleadings and at oral argument made no challenge concerning the adequacy of this earlier cumulative impacts evaluation. I believe that the majority of the Board is improperly evaluating licensing documents for a

¹³ See Majority Opinion, supra at 13-14.

completed licensing action that have not been challenged and has improperly declared them inadequate.

The majority of the Board also notes that their decision on admission of Contention 2 is consistent with the opinion expressed by NRC Staff. While I believe that Staff's opinion is informative, I believe that in this case it is even more informative to look at the reasons given by Staff for its opinion. The Staff states:

While the regulation at 10 C.F.R. § 51.45 does not require an assessment of cumulative impacts from the applicant in its ER, the applicable guidance in NUREG-1748 requests that an applicant discuss "any past, present or reasonably foreseeable future actions which could result in cumulative impacts when combined with the proposed action."¹⁴

Thus, the Staff's willingness to support admission of this contention is not based upon a legal requirement, but rather because the intent of this contention is consistent with NRC guidance. As expressed by Staff, there is no legal requirement for the ER to contain the subject analysis. This is in itself sufficient for the contention to be inadmissible.

Contention 4

For many of the same reasons, I disagree with the majority of the Board on the admissibility of Contention 4. The majority admits the contention with respect to two disparate impacts: disturbance of historic and archeological resources and the effects of skyshine radiation. But the Board also notes that these effects stem from the likely future expansion of the ISFSI. Hence, this is not a challenge of environmental justice impacts relative to this license renewal alone, but is rather a challenge to cumulative impacts concerning environmental justice at PI as a whole. This is because the alleged impacts will only occur if other, reasonably foreseeable federal actions actually occur. Such an analysis must be included in the EIS (and by extension in the ER), but how the analysis is included and its location in the document is not defined by regulation.

¹⁴ Staff Answer at 11.

The ER does not discuss cumulative impacts, but rather it incorporates by reference the cumulative impacts evaluation of the SEIS for operating license renewal. Even a superficial reading of the appropriate sections of this document demonstrates that the disparate impacts mentioned above were addressed in the SEIS.¹⁵ Yet the PIIC challenge did not identify or in any other way discuss the existence of this information.

One of the criteria that a proffered contention must meet to be admissible is that it must:

[P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes. . .¹⁶

Having failed to identify or otherwise discuss the existing cumulative impacts analysis, it is not obvious that the Petitioners were even aware that the material they challenged was provided in a document for an earlier licensing proceeding. For failing to satisfy 10 C.F.R. § 2.309(f)(1)(vi), in that the Petitioners have failed to allege any deficiency in the material that is actually present, this contention is not admissible.

¹⁵ See SEIS, Section 4.11.5, "Cumulative Environmental Justice Impacts."

¹⁶ 10 C.F.R. § 2.309(f)(1)(vi) (emphasis added).

Concurring Statement of Judge Gibson

I write separately to note that while I agree that the Commission's regulations require us to deny admission of Contention 5, I find the result unfortunate.

As the majority states, the categorization of the pressure monitoring system as not important to safety is part of the current licensing basis (CLB) for the Prairie Island ISFSI. NRC Regulations state that the CLB includes "the plant-specific design-basis information defined in 10 CFR 50.2 as documented in the most recent [FSAR]."¹ "Design bases" are defined, in part, in 10 C.F.R. § 50.2 as "that information which identifies the specific functions to be performed by a structure, system, or component of a facility."² Northern States' conclusion, in its FSAR, that the pressure monitoring system is "not important to safety" appears to be "information which identifies the specific functions to be performed" by an SSC. In other words, that determination is "design-basis information," which is, in turn, part of the CLB.

The NRC's Standard Review Plan for renewal of ISFSI licenses makes clear that the CLB defines the scope of license renewal.³ It states that the scope of license renewal includes SSCs that "are classified as important to safety" or "are classified as not important to safety but, according to the licensing basis, their failure could prevent fulfillment of a function that is important to safety, or their failure as support SSCs could prevent fulfillment of a function that is important to safety."⁴ Therefore, the scope of license renewal, at least according to NUREG-1927, is defined by the classifications of SSCs made by an applicant/licensee in its FSAR. While this conclusion seems to me to be legally correct, it is also deeply troubling.

¹ 10 C.F.R. § 54.3(a).

² Id. § 50.2.

³ Standard Review Plan for Renewal of Spent Fuel Dry Cask Storage System Licenses and Certificates of Compliance, Final Report, NUREG-1927 (Mar. 2011).

⁴ Id. at 12.

Because the Commission has excluded issues relating to the CLB from the scope of license renewal,⁵ and because the scope of a facility's CLB is defined largely by the contents of an applicant/licensee's FSAR, it appears that an applicant/licensee, by defining (at least in part) the scope of the CLB, can also define the scope of license renewal. This conclusion, while apparently demanded by NRC regulations, seems patently unfair to potential petitioners. The petitioner here, PIIC, simply wants to raise the claim that a component—although classified by Northern States as “not important to safety”—should instead be characterized as one that is in fact important to safety, and therefore should be included in an aging management program. This strikes me as a not unreasonable claim, and one that would likely benefit from an evidentiary hearing. However, PIIC is precluded from raising it because the determination that Northern States made in its FSAR has, in effect, removed it from the scope of license renewal.

While a petitioner presumably could file a request under 10 C.F.R. § 2.206 to suspend, modify, or revoke a license or could seek a regulation waiver under 10 C.F.R. § 2.335(b), these avenues are likely to be just as unavailing as the result that has been reached here. As has been rather convincingly pointed out elsewhere, Section 2.206 petitions rarely, if ever, result in any meaningful action on the part of the NRC.⁶ And while Section 2.335 allows petitioners to seek waiver of a regulation by demonstrating both “special circumstances” and that the regulation “would not serve the purposes for which [it] was adopted,”⁷ the Commission

⁵ See Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 117-18 (2006) (stating that “review of a license renewal application does not reopen issues relating to a plant's current licensing basis”).

⁶ See All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments, CLI-12-14, 76 NRC __, __ (separate opinion of Judge Rosenthal, slip op. at 6) (July 10, 2012).

⁷ 10 C.F.R. § 2.335(b).

established a much higher (and in my estimation, nearly insurmountable) burden in Millstone.⁸ As a practical matter, then, these alternative remedies afford petitioners no meaningful relief.

While I agree with the result reached by the majority that current NRC regulations demand the result reached on Contention 5, I question whether it reflects good policy insofar as it effectively empowers applicants/licensees to define the scope of their own license renewal,⁹ and thus prevents petitioners from raising a large swath of issues in a license renewal proceeding (and anywhere else, really). For these reasons, I reluctantly concur with my colleagues in their decision to deny admission of Contention 5.

⁸ See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005) (holding that a waiver should be granted only if “(i) the rule’s strict application ‘would not serve the purposes for which [it] was adopted’; (ii) the movant has alleged ‘special circumstances’ that were ‘not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived’; (iii) those circumstances are ‘unique’ to the facility rather than ‘common to a large class of facilities’; and (iv) a waiver of the regulation is necessary to reach a ‘significant safety problem.’” (citations omitted)).

⁹ It may be worth noting that the Staff did not oppose admitting this contention on the grounds that it “is currently reviewing the Applicant’s determination that the pressure monitoring system is not within the scope of the license renewal.” NRC Staff Answer at 18. Perhaps this is a recognition that too much has been ceded to its licensees.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
Northern States Power Company) Docket No. 72-10-ISFSI-2
)
(Prairie Island Nuclear Generating Plant,)
Independent Spent Fuel Storage Installation))
)
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Ruling on Request for Hearing and Petition to Intervene)** have been served upon the following persons by Electronic Information Exchange or by electronic mail as indicated by an asterisk*.

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Prairie Island Nuclear Generating Plant, Independent Spent Fuel Storage Installation,
Docket No. 72-10-ISFSI
MEMORANDUM AND ORDER (Ruling on Request for Hearing and Petition to Intervene)

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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 20th day of December, 2012