

**NUCLEAR REGULATORY COMMISSION
ISSUANCES**

**OPINIONS AND DECISIONS OF THE
NUCLEAR REGULATORY COMMISSION
WITH SELECTED ORDERS**

January 1, 2010 – June 30, 2010

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PREFACE

This is the seventy-first volume of issuances (1–703) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from January 1, 2010, to June 30, 2010.

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

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

On June 29, 1990, however, the Commission voted to abolish the Atomic Safety and Licensing Appeal Panel, and the Panel ceased to exist as of June 30, 1991. Since then, the Commission itself reviews Licensing Board and other adjudicatory decisions, as a matter of discretion. *See* 56 FR 29403 (1991).

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

The hardbound edition of the Nuclear Regulatory Commission Issuances is a final compilation of the monthly issuances. It includes all of the legal precedents for the agency within a six-month period. Any opinions, decisions, denials, memoranda and orders of the Commission inadvertently omitted from the monthly softbounds and any corrections submitted by the NRC legal staff to the printed softbound issuances are contained in the hardbound edition. Cross references in the text and indexes are to the NRCI page numbers which are the same as the page numbers in this publication.

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

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

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

**Docket Nos. 52-027-COL
52-028-COL**

**SOUTH CAROLINA ELECTRIC &
GAS COMPANY and SOUTH
CAROLINA PUBLIC SERVICE
AUTHORITY (also referred to
as SANTEE COOPER)
(Virgil C. Summer Nuclear Station,
Units 2 and 3)**

January 7, 2010

RULES OF PRACTICE: APPEALS

The Commission's rules of practice provide for an automatic right to appeal a board decision wholly denying a petition to intervene.

INTERVENTION RULINGS: STANDARD OF REVIEW

The Commission will defer to the board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion.

***PRO SE* LITIGANTS**

The Commission generally extends some latitude to *pro se* litigants, but they still are expected to comply with the Commission's procedural rules, including contention pleading requirements.

RULES OF PRACTICE: APPEALS

The Commission will not consider information that is introduced for the first time on appeal in an attempt to cure deficient contentions.

RULES OF PRACTICE: REPLY BRIEFS

Replies should be narrowly focused on the legal or logical arguments presented in the answers on a request for hearing/petition to intervene.

RULES OF PRACTICE: CONTENTIONS, ADMISSIBILITY

The Commission’s contention admissibility standards do not call for a dispositive standard of proof for a contention or its bases, but rather, a clear statement as to the basis for the contention and the submission of supporting information and references to specific documents and sources that establish the validity of the contention.

APPLICANTS: COMBINED LICENSES

The Commission’s regulations allow an applicant — at its own risk — to submit a combined license application that does not reference a certified design.

LICENSING BOARD DECISIONS: COMBINED LICENSE PROCEEDING

Before a board may refer a design certification-related contention to the Staff and hold it in abeyance, the contention must first be admissible. If the contention is inadmissible in the first instance, no further action is required on the part of the board.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA): RULE OF REASON

In a case involving an application to produce baseload power for a defined service area, NEPA’s “rule of reason” would not exclude consideration of demand-side management as part of an alternatives analysis *per se*.

MEMORANDUM AND ORDER

This proceeding concerns the application of South Carolina Electric and Gas Company and South Carolina Public Service Authority (also referred to as Santee Cooper) (together, SCE&G or Applicant) for a combined license (COL) under 10 C.F.R. Part 52 to construct and operate two new nuclear reactor units at the Virgil C. Summer Nuclear Station (Summer) in Fairfield County, South Carolina.¹ Today we resolve two appeals. The Sierra Club and Friends of the Earth, filing jointly (together, Joint Petitioners),² and Mr. Joseph Wojcicki, filing separately,³ have appealed LBP-09-2, an Atomic Safety and Licensing Board decision denying their respective intervention petitions.⁴ The Applicant⁵ and the NRC Staff⁶ oppose both appeals.

For the reasons set forth below, we affirm the Board's decision in part, reverse it in part, and remand the case for further proceedings consistent with this Memorandum and Order.

I. BACKGROUND

Following publication of the notice of hearing for this proceeding, Mr. Wojcicki and the Joint Petitioners filed timely intervention petitions, on December 7 and 8, 2008, respectively.⁷ Joint Petitioners submitted three contentions. First, Joint Petitioners challenge the completeness of the COL application, given the NRC Staff's ongoing review of Revision 17 of the AP1000 Design Control Document

¹The proposed project is a joint effort between SCE&G and Santee Cooper (a state-owned public utility), with SCE&G acting on behalf of itself and as Santee Cooper's agent in this combined license proceeding. According to the application, "SCE&G and Santee Cooper will jointly own the facility and share in the costs (including the cost of decommissioning) and output of the facility as follows: SCE&G, 55%; Santee Cooper, 45%." COL Application Part 1, "General and Administrative Information," section 1.3.3, "Decommissioning Funding" (Rev. 0, Mar. 27, 2008) (ADAMS Accession No. ML081300504).

²See Brief on Appeal of Sierra Club and Friends of the Earth (Feb. 27, 2009) (Joint Petitioners' Appeal).

³See Notice of Appeal (Feb. 27, 2009) (Wojcicki Appeal).

⁴See LBP-09-2, 69 NRC 87 (2009).

⁵South Carolina Electric and Gas Company Brief in Opposition to Sierra Club and Friends of the Earth Appeal from LBP-09-2 (Mar. 9, 2009) (Applicant Opposition).

⁶NRC Staff Brief in Opposition to Appeal of LBP-09-2 by Sierra Club and Friends of the Earth (Mar. 9, 2009) (Staff Opposition).

⁷See Notice of Order, Hearing and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 60,362 (Oct. 10, 2008); Petition to Intervene (Dec. 7, 2008) (Wojcicki Petition); Petition to Intervene and Request for Hearing by Sierra Club and Friends of the Earth (Dec. 8, 2008) (Joint Petition).

(DCD), which the application incorporates by reference.⁸ Second, Joint Petitioners contend that the COL application does not address the effects of an aircraft impact at the proposed site.⁹ Finally, Joint Petitioners argue that the Applicant's Environmental Report (ER) inadequately addresses seven discrete issues, broadly characterized as analyses addressing the need for power, energy alternatives, and costs and schedule for the proposed action.¹⁰

Mr. Wojcicki, petitioning as an individual, did not specifically identify a contention, although he indicated his desire to participate in the proceeding so that he could "be sure that the motion to change the location of [proposed Units 2 and 3] to a new location near the Atlantic Ocean . . . is accepted by the NRC."¹¹ He asserted in a general fashion that such a change would provide "significantly better economic, environmental, and social solutions."¹²

The Board denied both intervention petitions. The Board found that the Sierra Club successfully demonstrated standing to participate in the proceeding, but that Friends of the Earth and Mr. Wojcicki did not, and that neither Joint Petitioners nor Mr. Wojcicki submitted an admissible contention. Mr. Wojcicki and Joint Petitioners filed timely appeals of the Board's decision.¹³

II. DISCUSSION

Our rules of practice provide for an automatic right to appeal a Board decision wholly denying a petition to intervene.¹⁴ We will defer to the Board's rulings on

⁸ See Joint Petition at 12-13.

⁹ See *id.* at 17-18.

¹⁰ See *id.* at 24-26.

¹¹ Wojcicki Petition at 1. The referenced "motion" appears to be a filing that Mr. Wojcicki made before the South Carolina Public Service Commission, in a parallel "public convenience and necessity" proceeding related to the proposed new units. See Motion to Change the Location of the Two New Reactors Planned by the Applicant (Nov. 10, 2008) (ADAMS Accession No. ML090080830), filed as an attachment to Mr. Wojcicki's reply. See The Additional Information Supporting Joseph Wojcicki's "Petition to Intervene" (Jan. 7, 2009).

¹² Wojcicki Petition at 1.

¹³ Prior to filing his appeal, Mr. Wojcicki filed a motion asking the Board to reconsider its decision to reject his petition to intervene. See Motion for the Reconsideration (Mar. 6, 2009). The Board noted that jurisdiction transferred to the Commission upon termination of the proceeding, but accepted jurisdiction "in the interests of rapid resolution of the matter." See *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), Order, ASLBP No. 09-875-03-COL-BD01, at 1-2 (Mar. 12, 2009) (unpublished). The Board denied the motion, citing Mr. Wojcicki's failure to demonstrate the existence of a compelling circumstance that would warrant reconsideration of the Board's decision. See *id.* at 2. The Board's order is not before us on appeal.

¹⁴ See 10 C.F.R. § 2.311(b).

standing and contention admissibility, however, unless the appeal points to an error of law or abuse of discretion.¹⁵

A. Wojcicki Appeal

Mr. Wojcicki intervened on his own behalf and raised a single issue. In his original petition, Mr. Wojcicki asserted that SCE&G should locate the two proposed new reactors at a different site, closer to the Atlantic Ocean.¹⁶ The Board determined that this issue failed to comply with any of our contention admissibility requirements.¹⁷ On appeal, Mr. Wojcicki reiterates in summary form the reasons underlying his argument. Specifically, he states that if SCE&G would agree to resite its two proposed plants to an unspecified “Atlantic Ocean location,” then it would realize significant cost savings “by avoiding: (a) evaporating over 40 million gallons of water per day[,] (b) building unnecessary hundreds of miles of 230 & 115 kV transmission lines and [(c)] other savings in construction costs (hundreds of millions [of] dollars) and operational costs (billions per reactors’ life).”¹⁸ He also claims that, if we disregard his siting proposal and “seawater cooling solution” and instead approve the current application, then we “will have to change (revoke) [our] finding about the drought affecting nuclear plants — 24 of them existing in Southeast region, on the map widely publicized in January 2008.”¹⁹ These latter claims were not stated before the Board, and are presented for the first time on appeal.²⁰

SCE&G and the NRC Staff oppose Mr. Wojcicki’s appeal. Both argue that Mr. Wojcicki has not identified any error of law or abuse of discretion on the part of the Board. Further, SCE&G and the Staff both argue that the Board properly

¹⁵ See *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986).

¹⁶ See Wojcicki Petition at 1.

¹⁷ See LBP-09-2, 69 NRC at 94-95 n.21.

¹⁸ Wojcicki Appeal at 3.

¹⁹ *Id.* (citation omitted). Outside of this adjudication Mr. Wojcicki transmitted a letter, which included a substantively identical statement of his proposed contention, to the President of the United States. This letter has been referred to us for response. See Letter from J. Wojcicki to the President of the United States (Mar. 14, 2009) (White House Referral ID number WH1912009110473). Because the arguments in Mr. Wojcicki’s letter duplicate those raised in his initial petition and his appeal, we do not address them separately.

²⁰ We will not consider information that is introduced for the first time on appeal in an attempt to “cure deficient contentions.” See *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006). In any event, however, the additional general statements provided by Mr. Wojcicki are not sufficient to repair his inadmissible contention.

ruled on both Mr. Wojcicki's standing and the admissibility of his proposed contention.²¹

For the reasons stated by the Board, Mr. Wojcicki's proposed contention fails to satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).²² We generally extend some latitude to *pro se* litigants, but they still are expected to comply with our procedural rules, including contention pleading requirements.²³ Mr. Wojcicki's filings on appeal largely restate his diffuse and generalized claims. He has given us no reason to set aside the Board's ruling, and we decline to do so.²⁴

B. Joint Petitioners' Appeal

1. Standing

The Board concluded that although the Sierra Club had demonstrated representational standing, Friends of the Earth had failed to do so. In reaching this conclusion, the Board found that none of the affidavits submitted with the original intervention petition "makes any mention of [Friends of the Earth] or states that [Friends of the Earth] is authorized to represent the affiant's interests."²⁵ The Board also rejected Joint Petitioners' efforts to cure this defect on reply.²⁶

Contrary to the Board's determination, two of Joint Petitioners' standing declarations, which were timely submitted in conjunction with the initial petition, refer to Friends of the Earth. The declarations of Thomas W. Clements and Leslie A. Minerd expressly reference that they are members of Friends of the Earth; Mr. Clements' declaration states that he is employed by that organization.²⁷

²¹ See South Carolina Electric & Gas Company Brief in Opposition to Joseph Wojcicki Appeal from LBP-09-2 (Mar. 9, 2009), at 7-13; NRC Staff Brief in Opposition to Wojcicki Appeal of LBP-09-2 (Mar. 9, 2009), at 9-13.

²² See LBP-09-2, 69 NRC at 94-95 & n.21.

²³ See, e.g., *American Centrifuge*, CLI-06-10, 63 NRC at 456-57; *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999).

²⁴ Because Mr. Wojcicki has not identified any error or abuse of discretion with regard to his proposed contention, we need not reach the question of his standing.

²⁵ See LBP-09-2, 69 NRC at 94 n.18.

²⁶ See *id.* (citing *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 261 (2008) (citation omitted)).

²⁷ See Declaration of Thomas W. Clements ¶1 (Dec. 8, 2008) (ADAMS Accession No. ML083440664) (stating that affiant is "employee and member in good standing of Friends of the Earth," resides within 50 miles of the proposed plant, and engages in recreational activities within 10 miles of the plant); Declaration of Leslie A. Minerd ¶1 (Dec. 8, 2008) (ADAMS Accession No. ML083440664) (stating that she is a member of Friends of the Earth, resides within 50 miles of the plant, and owns and operates a nature preserve on land within 10 miles of the plant). The declarations were filed with Joint Petitioners' original petition.

However, neither of these declarations, as originally submitted, specifically stated that Friends of the Earth was authorized to represent the declarant's interests.²⁸ In conjunction with Joint Petitioners' reply, the declarants provided revised declarations, which expressly authorized Friends of the Earth to represent their legal interests in the proceeding.²⁹ Joint Petitioners argue that the failure of these declarations to expressly authorize representation in the original petition was an "inadvertent omission."³⁰

The Board's finding seems to hinge on its inaccurate determination that none of the initial affidavits mentions Friends of the Earth, and that Friends of the Earth's subsequent efforts to cure the affidavits constituted entirely new information that was improper for a reply. Considering the record before us, however, we find that the Board's misinterpretation of the record led to an erroneous ruling with respect to the affidavits. As described above, the declarants had demonstrated standing in every other respect, and cited their affiliation with Friends of the Earth in their original declarations. The reply pleading and supplemental declarations appropriately clarified the original affidavits,³¹ and we find that the corrections provided in the reply did not exceed the appropriate scope of a reply.³²

For these reasons, we *reverse* the Board's ruling on standing with respect to Friends of the Earth, and find that Friends of the Earth has demonstrated representational standing on the basis of their original and supplemental declarations.

2. *Contention Admissibility*

Our contention admissibility "requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements."³³ Under our rules:

A request for hearing or petition for leave to intervene must set forth with particular-

²⁸ See LBP-09-2, 69 NRC at 94 n.18.

²⁹ See Supplemental Declaration of Thomas W. Clements ¶4 (Jan. 8, 2009) (ADAMS Accession No. ML090120908); Supplemental Declaration of Leslie A. Miner ¶4 (Jan. 8, 2009) (ADAMS Accession No. ML090120908). The revised declarations accompanied Joint Petitioners' reply. See Reply by Sierra Club and Friends of the Earth (Jan. 12, 2009).

³⁰ See Joint Petitioners' Appeal at 2-3.

³¹ See *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995) ("To derive standing from a member, the organization must demonstrate that the individual member has standing to participate, and has authorized the organization to represent his or her interests").

³² Replies should be "narrowly focused on the legal or logical arguments presented in the [answers] on a request for hearing/petition to intervene." Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

³³ *USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006).

ity the contentions sought to be raised. For each contention, the request or petition must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner 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; [and]
- (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.³⁴

Contrary to Joint Petitioners' assertion, our contention admissibility standards do not call for "a dispositive standard of proof for a contention or its bases,"³⁵ but rather, "a clear statement as to the basis for the contention[] and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention."³⁶

a. Contention 1 (AP1000 Deficiencies)

Joint Petitioners appeal the rejection of their proposed Contention 1, which states:

The [COL application] is incomplete at this time because many of the major safety components and procedures proposed for the Summer reactors are only conditionally designed at best. In its [COL application], SCE&G has adopted the AP1000 DCD Revision 16 which has not been certified by the NRC and with the filing of Revision 17 by Westinghouse, Revision 16 will no longer be reviewed by the NRC Staff. SCE&G is now required to resubmit its [COL application] as a plant-specific design or to adopt Revision 17 by reference and provide a timetable when its safety components will be certified.^[37] Either the plant-specific design or

³⁴ 10 C.F.R. § 2.309(f)(1).

³⁵ Joint Petitioners' Appeal at 9.

³⁶ *Oyster Creek*, CLI-06-24, 64 NRC at 118-19 (quoting *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991)).

³⁷ We note that SCE&G submitted Revision 1 of its ER in early 2009 and, at that time, incorporated into the ER the information from Revision 17 of the DCD. See Letter from R. B. Clary, SCE&G, to
(Continued)

adoption of AP1000 Revision 17 would require changes in SCE&G's application, the final design and operational procedures. Regardless of whether the components are certified or not, the COLA cannot be reviewed without the full disclosure of all designs and operational procedures.

This contention, Joint Petitioners assert, is a “‘classic’ contention of omission,” that is, an argument that an application omits one or more necessary safety-related steps or analyses.³⁸ According to Joint Petitioners, the Summer COL application falls short in two such respects. First, the Commission has not yet certified the design revision of the version of the AP1000 that the Applicant proposes to use.³⁹ Second, Joint Petitioners argue, the Applicant has not adopted the “final AP1000 design, as certified and as potentially modified through the design certification process.”⁴⁰ Joint Petitioners also rely on a Board decision in the *Shearon Harris* COL proceeding to admit for litigation a similar contention of omission.⁴¹ Joint Petitioners conclude that their contention is similarly admissible, and request that the contention be admitted and held in abeyance pending completion of the design certification rulemaking.⁴²

We find that Joint Petitioners have failed to identify any error of law or abuse of discretion by the Board in rejecting Contention 1. We recently have addressed contentions substantively similar to Joint Petitioners' Contention 1 in a number of combined license cases, and held that our regulations “allow an applicant — at its own risk — to submit a COL application that does not reference a certified design.”⁴³ Our analysis in those cases applies equally here. Further, we recently overturned the *Shearon Harris* contention admissibility decision, finding that the Board erred in referring the contention to the Staff (for consideration in conjunction with the design certification rulemaking) without first assessing

NRC Document Control Desk (Feb. 13, 2009) (ADAMS Accession No. ML090510267). SCE&G has since incorporated Revision 17 into the balance of the COL application. See Letter from R. B. Clary, SCE&G, to NRC Document Control Desk (July 30, 2009) (ADAMS Accession No. ML092170504).

³⁸ Joint Petitioners' Appeal at 10.

³⁹ See *id.*

⁴⁰ See *id.* at 10-11.

⁴¹ See *id.* at 11-12 (quoting *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 563 (2008)).

⁴² See *id.* at 13.

⁴³ *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 4 (2008). See *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 2 and 3), CLI-09-13, 69 NRC 575 (2009); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-09-4, 69 NRC 80 (2009). See also *Luminant Generating Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), Docket Nos. 52-034-COL and 52-035-COL (Apr. 27, 2009) (unpublished); Letter from Andrew Bates to Diane Curran, Esq., and James Blackburn, Jr. (Dec. 30, 2008) (ADAMS Accession No. ML083650299).

its admissibility.⁴⁴ Before a Board may refer such a contention to the Staff and hold it in abeyance, the contention must first be admissible.⁴⁵ If the contention is inadmissible in the first instance, as is the case here, no further action is required on the part of the Board.

We find, therefore, that the Board did not err in rejecting this contention.

b. Contention 2 (Aircraft Impacts)

Joint Petitioners appeal the Board's rejection of Contention 2, which argues that the COL application has not addressed the possibility of an accidental or deliberate aircraft crash into the proposed reactors:

SCE&G's ER, Chapter 7, "Postulated Accidents," fails to satisfy NEPA [the National Environmental Policy Act] and the NRC rules because it does not address the environmental impacts of a successful attack by either the accidental or deliberate and malicious crash of a fuel-laden and/or explosive laden aircraft and resulting severe accidents of the aircraft's impact and penetration on the facility. SCE&G is required to identify and incorporate into the design those design features and functional capabilities that avoid or mitigate, to the extent practicable and with reduced reliance on operator actions, the effects of the aircraft impact on the key safety functions, such as core cooling capability, containment integrity, spent fuel cooling capability and spent fuel pool integrity.

Contention 2 incorporates both safety and environmental arguments.

From the safety standpoint, Joint Petitioners cite the requirement, in 10 C.F.R. § 50.34(a)(4), that a construction permit application consider the consequences of design basis events, and argues that "the potential for accidents caused by deliberate malicious actions and the resulting equipment failures is not only reasonably foreseeable, but is likely enough to qualify as a design-basis threat ("DBT"), i.e., an accident that must be designed against under NRC safety regulations."⁴⁶ Joint Petitioners also direct our attention to our own recent rulemaking activity on the same issue, noting that, under a then-proposed rule, applicants for new reactors

⁴⁴ See *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317 (2009). Following the remand, the Board reassessed the contention and found it to be inadmissible, due in part to the presence in the COL application of the petitioner's asserted omissions. See *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-09-8, 69 NRC 736 (2009).

⁴⁵ See *Conduct of New Reactor Licensing Proceedings; Final Policy Statement*, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008); *Shearon Harris*, CLI-09-8, 69 NRC at 324.

⁴⁶ Joint Petitioners' Appeal at 14.

would be required to incorporate into their design “additional practical features that would avoid or mitigate the effects of an aircraft impact.”⁴⁷

In support of its argument that SCE&G’s environmental analysis is inadequate, Joint Petitioners cite a 2006 decision of the U.S. Court of Appeals for the Ninth Circuit, *San Luis Obispo Mothers for Peace v. NRC*, which held that the NRC could not, under NEPA, categorically refuse to consider the consequences of a terrorist attack against a spent fuel storage facility at the Diablo Canyon reactor site in California.⁴⁸ Joint Petitioners further argue that SCE&G’s ER “does not provide information that allows the NRC staff to consider reasonable alternatives for avoiding or reducing the environmental impacts of this class of threats and accidents.”⁴⁹ Finally, Joint Petitioners reiterate their argument that 10 C.F.R. § 51.53 requires SCE&G to consider alternatives to mitigate severe accidents (SAMAs).⁵⁰ Both SCE&G and the Staff oppose Joint Petitioners’ appeal.⁵¹

As an initial matter, as the Board observes, Joint Petitioners appear to confuse the concepts of the “design basis threat,” that is, the set of events that must be considered in the design of plant security features, and a “design basis event,” that is, an accident that must be considered in plant design.⁵² Considering the aircraft crash hazard in either context, however, leads us to the same conclusion: Joint Petitioners have not raised an admissible contention.

With respect to aircraft crash as an element of the design basis threat, the Ninth Circuit recently upheld our decision not to include the threat of air attacks in our revised final DBT rule.⁵³ The court held, among other things, that the agency reasonably concluded that adequate protection against the air threat was assured by the active defenses provided by other federal agencies, together with what reasonably could be expected of licensees.⁵⁴ The issue of whether aircraft crashes are appropriately considered part of the DBT, therefore, is settled in our regulations and thus is beyond the scope of this proceeding.⁵⁵ The Board did not err in excluding it.

⁴⁷ See *id.* at 14-17.

⁴⁸ See 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007) (cited in Joint Petitioners’ Appeal at 15).

⁴⁹ See Joint Petitioners’ Appeal at 18.

⁵⁰ See *id.* at 17-18. The Board correctly observed that 10 C.F.R. § 51.53, a provision pertaining to operating reactor license renewal, does not apply to COL applicants. See LBP-09-2, 69 NRC at 102.

⁵¹ See Applicant Opposition at 13-17; Staff Opposition at 14-20.

⁵² LBP-09-2, 69 NRC at 101 n.52. Compare 10 C.F.R. § 50.34(a)(4) (design basis event), with 10 C.F.R. § 73.1 (design basis threat).

⁵³ See *Public Citizen v. NRC*, 573 F.3d 916 (9th Cir. 2009). See generally Final Rule: “Design Basis Threat,” 72 Fed. Reg. 12,705 (Mar. 19, 2007).

⁵⁴ See *Pub. Citizen*, 573 F.3d at 925-26.

⁵⁵ See 10 C.F.R. § 2.335(a) (NRC regulations not “subject to attack” in adjudications).

With respect to aircraft crash as a safety matter, Joint Petitioners assert an omission from the COL application — a failure to incorporate into the design features to mitigate the effects of an aircraft impact. As the Board pointed out, the inquiry underlying this issue is whether the probability of aircraft impacts is greater than the threshold probability that calls for analysis — generally, for reactors, a probability greater than 1 in 10 million per year.⁵⁶ SCE&G’s COL application specifically assessed the risk due to aircraft hazards, concluding that the probable accidental rate of an aircraft affecting the site was less than the threshold “one-in-ten-million” probability stated in our guidance.⁵⁷ As noted by the Board, Joint Petitioners did not challenge this analysis “with any specificity.”⁵⁸ Absent any such challenge, the Board correctly ruled that Joint Petitioners failed to articulate a genuine dispute with the application, as required by 10 C.F.R. § 2.309(f)(1)(vi).

In any event, Joint Petitioners’ current safety arguments with respect to Contention 2 are effectively moot as adjudicatory matters, because of our recent final rule requiring applicants for new nuclear power reactors to perform a design-specific assessment of the effects of the impact of a large, commercial aircraft.⁵⁹ The final rule identified a number of avenues by which the rule may be implemented, including by amendment to a certified reactor design.⁶⁰ As reflected in the statements of consideration for the final rule, Westinghouse

⁵⁶ See 10 C.F.R. §§ 52.17, 52.79, 100.10, 100.20, 100.21; NUREG-0800, “Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants (SRP),” § 3.5.1.6, “Aircraft Hazards” (Rev. 3, Mar. 2007) (ADAMS Accession No. ML070510639), at 3.5.1.6-4 (providing that Part 52 and Part 100 regulations are satisfied “if the probability of aircraft accidents resulting in radiological consequences greater than the 10 [C.F.R.] Part 100 exposure guidelines is less than order of magnitude of 10^{-7} [1 in 10 million] per year[.]” provided that certain distance criteria identified in the SRP are met). See also SRP § 2.2.3, “Evaluation of Potential Accidents” (Rev. 3, Mar. 2007) (ADAMS Accession No. ML070460336) (SRP § 2.2.3).

⁵⁷ See FSAR § 2.2.2.7.6, “Aircraft and Airway Hazards” (Rev. 0, Mar. 27, 2008) (ADAMS Accession No. ML081300513). The AP1000 DCD states that a COL applicant referencing the design should provide an analysis of aircraft hazards. See AP1000 Design Control Document Revision 17, Tier 2, Chapter 2.2 (Sept. 22, 2008) (ADAMS Accession No. ML083230296). NRC guidance states that the threshold probability for considering potential accidents is 10^{-7} (1 in 10 million), so that events falling below this threshold need not be analyzed. See SRP § 2.2.3, at 2.2.3-3. In this case, SCE&G calculated the probable accidental rate of aircraft affecting the Summer site would be “on the order of 3.64×10^{-8} per year.” FSAR § 2.2.2.7.6, at 2.2-8.

⁵⁸ LBP-09-2, 69 NRC at 105.

⁵⁹ See Final Rule: “Consideration of Aircraft Impacts for New Nuclear Power Plants,” 74 Fed. Reg. 28,112 (June 12, 2009). The rule, which went into effect on July 13, 2009, reflects the agency’s determination that the impact of a large, commercial aircraft is a beyond-design-basis event. The objective of the rule “is to require nuclear power plant designers to perform a rigorous assessment of the design to identify features and functional capabilities that could provide additional inherent protection to withstand the effects of an aircraft impact” *Id.* (footnote omitted).

⁶⁰ See *id.* at 28,137-41.

Electric Company (Westinghouse), the AP1000 design certification applicant, has submitted a proposed amendment to the certified design that is intended to comply with the final rule.⁶¹ That proposed amendment is currently under consideration as part of the ongoing design certification rulemaking for the AP1000.⁶² Joint Petitioners may participate in the design certification rulemaking process, through which the NRC Staff will assess the Westinghouse proposal for the AP1000 design's compliance with the final aircraft impacts rule.⁶³

With respect to Joint Petitioners' environmental arguments related to a terrorist attack, the Board correctly rejected them. As the Board observed, we have consistently maintained that "NEPA is not an appropriate vehicle for exploring questions about the potential for a terrorist attack upon a proposed nuclear facility."⁶⁴ We summed up our position in *Grand Gulf*:

"The 'environmental' effect caused by third-party miscreants 'is . . . simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.' [Citation omitted.] The claimed impact is too attenuated to find the proposed federal action to be the 'proximate cause' of that impact."⁶⁵

This is true of an aircraft attack, which — as the Third Circuit recently held in *New Jersey Department of Environmental Protection v. NRC* — "lengthens the

⁶¹ See Letter from R. Sisk, Westinghouse, to NRC, "AP1000 Standard COL Technical Report Submittal of APPGW-GLR-126, Revision 0 (TR 126) (Apr. 3, 2008) (ADAMS Accession No. ML080980257); Westinghouse, Technical Report No. 126, APP-GW-GLR-126-NS, Nuclear Island Response to Aircraft Impact (Public Version) (Apr. 3, 2008) (ADAMS Accession No. ML080980258). See also AP1000 Design Control Document Revision 17, Appendix 19F (Sept. 22, 2008) (ADAMS Accession No. ML083230294).

⁶² See 74 Fed. Reg. at 28,140.

⁶³ If a referenced design (here, the AP1000) is not amended to comply with the aircraft impacts rule during the pendency of the COL application, then the COL applicant would be required to amend its application to comply with the requirements of the rule. See *id.* Such an amendment could form the basis for a late-filed contention, provided our procedural requirements for contention admissibility are met. See 10 C.F.R. § 2.309(f)(1), (f)(2).

⁶⁴ LBP-09-2, 69 NRC at 103 (citing *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144 (2007); *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139, 141-42 (2007); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-34 (2007), *aff'd*, *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3d Cir. 2009) (*NJDEP*)).

⁶⁵ *Grand Gulf*, CLI-07-10, 65 NRC at 146-47 (quoting *Oyster Creek*, CLI-07-8, 65 NRC at 129, in turn quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 349 (2002)).

causal chain beyond the ‘reasonably close causal relationship’” required to be considered under NEPA.⁶⁶

Joint Petitioners would have us apply the Ninth Circuit’s *Mothers for Peace* ruling here, rather than the Third Circuit’s *NJDEP* ruling. We decline to do so.⁶⁷ We continue to believe that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks, including aviation attacks, on NRC-licensed facilities.⁶⁸

We are not persuaded by the Chairman’s dissent, and are not prepared to abandon our carefully considered decisions without sufficient justification. Fundamentally, we cannot agree with the Chairman’s assertion that our approach is at odds with the agency’s commitment to transparency. At bottom, this ruling reflects our consistent position on the requirements of NEPA and their application.⁶⁹ Moreover, there is no dispute that the agency has devoted enormous resources and effort to ensure the adequate protection of public health and safety from the risks of terrorism after the events of September 11, 2001. Our differences with Chairman Jaczko on this issue should not obscure this fact.

For all of these reasons, proposed Contention 2 is rejected.

⁶⁶ 561 F.3d at 132 (holding, among other things, that the fact that an aircraft attack on a nuclear power plant requires at least two intervening events (the act of a third-party criminal, and the failure of government agencies specifically charged with preventing terrorist attacks), and results in a chain of causation too attenuated to require NEPA review).

⁶⁷ In *Oyster Creek*, we observed that “the NRC is not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question.” CLI-07-8, 65 NRC at 128-29 (citing *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 173 (1984)). The proposed new Summer plant lies outside the Ninth Circuit.

⁶⁸ The examination of SAMAs and severe accident mitigation design alternatives (SAMDA) relating to aircraft attacks, which arise in connection with the agency’s NEPA obligations, is similarly outside the scope of this proceeding for this reason. In addition, a challenge to the SAMDA analysis performed for the AP1000 certified design constitutes an impermissible challenge to our regulations. See LBP-09-2, 69 NRC at 104 & n.70 (quoting 10 C.F.R. Part 52, App. D, § VI.B); 10 C.F.R. § 51.107(c). To the extent that Joint Petitioners challenge a proposed amendment to the AP1000 design, they do not cite to any DCD revision, and therefore their challenge also fails for lack of specificity. In addition, Joint Petitioners fail to challenge the SAMA discussion in ER § 7.3, “Severe Accident Mitigation Alternatives.”

⁶⁹ We have complied with the Ninth Circuit’s ruling for facilities within the Ninth Circuit, as we are required to do. That experience, however, is very limited, and does not demonstrate that conducting environmental analyses of terrorist scenarios for the licensing of all major facilities would be practicable or lead to meaningful additional information.

c. *Contention 3 (Need for Power, Energy Alternatives, and Costs of Proposed Action)*

Finally, Joint Petitioners appeal the Board's rejection of their Contention 3, which comprises seven discrete subparts:

Contrary to the requirements of the National Environmental Policy Act and 10 C.F.R. § 51.45 the Applicant's Environmental Report (ER) fails to adequately discuss the impacts of the proposed action and alternatives in proportion to their significance; fails to discuss alternatives with sufficient completeness to aid the Commission in developing and exploring "appropriate alternatives to recommended courses of action" in this "proposal which involves unresolved conflicts concerning alternative uses of available resources;" fails to adequately present the environmental impacts of this proposal and the alternatives in comparative form; fails to adequately discuss the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity with respect to this proposal and alternatives; fails to adequately discuss irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented; fails to include an adequate analysis that considers and balances the environmental effects of the proposed action, the environmental impacts of alternatives to the proposed action, and alternatives available for reducing or avoiding adverse environmental effects; fails to include analyses which, to the fullest extent practicable, quantify the various factors considered or adequately discuss important qualitative considerations or factors that cannot be quantified; and fails to contain sufficient data to aid the Commission in its development of an independent analysis in the following particulars:

- A. With respect to Chapter 8 of the ER, "Need for Power," the Applicant completely dismisses the current economic crisis and recent reductions in its sales, and has conducted no sensitivities of its load forecast to try to capture the possible effects of a recession, including the possibility of a long and deep economic downturn.
- B. With respect to Chapter 9 of the ER, "Proposed Action Alternatives," the Applicant almost completely ignores demand-side management, undervaluing opportunities for cost-effective energy efficiency and demand response or load management.
- C. With respect to Chapter 9 of the ER, "Proposed Action Alternatives," the Applicant ignores the potential contribution of renewables to an overall sustainable and economic portfolio, and does not take into account significant improvement in unit costs and operations of renewables in recent years and as projected to continue.
- D. With respect to Chapter 9 of the ER, "Proposed Action Alternatives," the Applicant fails to properly evaluate the risk of choosing a single technology and two extremely large construction projects in lieu of a more modular

approach made up of a greater variety of resource options allowing a greater opportunity to change course during implementation of the plan, in the event that risks, known to be potential and those that are not now foreseeable, develop into real difficulties during implementation, and in the event that other superior opportunities become realistic.

- E. With respect to Chapter 10 of the ER, “Proposed Action Consequences,” the Applicant underestimates the impact of its proposed construction and operation on vulnerable customers via rate increases.
- F. With respect to Chapter 10 of the ER, “Proposed Action Consequences,” the Applicant’s cost estimate for construction and operation fails to take into account recent rapid increases in the cost of inputs for construction.
- G. With respect to Chapter 10 of the ER, “Proposed Action Consequences,” the Applicant’s cost estimate for construction and operation is based on an unrealistic schedule, and assumes a settled and approved design for its proposed AP1000, which has not yet been established and for which there is no firm date for Commission determination.

Joint Petitioners’ appeal does not address Contention 3 by “subpart,” and is diffuse and somewhat difficult to follow. Therefore, we address the appeal in three broad categories — the need for power, energy alternatives, and costs and schedule for the proposed action.

(i) THE NEED FOR POWER ANALYSIS — SUBPART 3A

The Board rejected Joint Petitioners’ “need for power” arguments, citing a lack of supporting data or analysis challenging the application’s assessment of economic conditions, including the load forecast.⁷⁰ Regarding the load forecast, Joint Petitioners complained that SCE&G conducted “no sensitivities of its load forecast to try to capture the possible effects of a recession, including the possibility of a long and deep economic downturn.”⁷¹ The Board rejected this proposition because, in its view, the challenge to the economic analysis “address[ed] a level of detail well beyond what is required of the Agency in its analyses,”⁷² and the contention raised no genuine dispute with the application that is material to the NRC’s decision on the application.⁷³

On appeal, Joint Petitioners principally argue that the Board’s decision would impermissibly narrow the discussion in the COL application of the need for power,

⁷⁰LBP-09-2, 69 NRC at 107-08.

⁷¹See Joint Petition at 29.

⁷²LBP-09-2, 69 NRC at 108 (citing, *inter alia*, Nuclear Energy Institute; Denial of Petition for Rulemaking, 68 Fed. Reg. 55,905, 55,910 (Sept. 29, 2003) (NEI Rulemaking Denial)).

⁷³See *id.*

contravening the Commission's 2003 denial of the Nuclear Energy Institute's (NEI) rulemaking petition.⁷⁴ Joint Petitioners also assert that the Applicant's ER contains an outdated load forecast, which fails to account for current economic conditions.⁷⁵

SCE&G counters that the Board correctly rejected the need-for-power claim on the ground that the contention was not adequately supported and failed to demonstrate a material dispute because the COL application includes an evaluation of the need for power, including a consideration of the effects of the current economic conditions.⁷⁶ Similarly, the Staff argues that the Board properly rejected Joint Petitioners' claim because it lacked the specificity required to show a genuine dispute with the COL application, and because it discussed a level of detail not required by the NRC.⁷⁷ Moreover, the Staff argues, Joint Petitioners have not articulated any error of law or abuse of discretion by the Board in rejecting this contention.⁷⁸

At the outset, we do not find that the Board's ruling runs counter to our denial of NEI's rulemaking petition. In particular, NEI requested that the agency initiate a rulemaking to remove the 10 C.F.R. Part 51 requirements that applicants, licensees, and the NRC Staff analyze "alternative energy sources and the need for power with respect to the siting, construction, and operation of nuclear power plants."⁷⁹ We denied the request, concluding that NEI had not demonstrated any change in NEPA law or practice that would lead us to believe that consideration of need for power or energy alternatives were no longer required as part of our NEPA obligations.⁸⁰ With respect to the "need for power" analysis, we emphasized, however, that such an assessment "should not involve burdensome attempts to precisely identify future conditions. Rather, it should be sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions."⁸¹

Joint Petitioners' appeal appears to misunderstand the Board's ruling as it relates to the NEI decision. In rejecting this aspect of Contention 3, the Board *did not* find that need for power should not be considered at all. Rather, the Board cited the NEI rulemaking decision as an illustration of the level of detail necessary in a "need for power" analysis. The Board rejected Joint Petitioners' challenges to the "need for power" analysis for other reasons. In particular, the Board cited

⁷⁴ See Joint Petitioners' Appeal at 20 (citing NEI Rulemaking Denial).

⁷⁵ See *id.* at 22, 23-24.

⁷⁶ See Applicant Opposition at 19-21.

⁷⁷ See Staff Opposition at 21.

⁷⁸ See *id.* at 21-22.

⁷⁹ NEI Rulemaking Denial, 68 Fed. Reg. at 55,906.

⁸⁰ See *id.* at 55,911.

⁸¹ *Id.* at 55,910.

Joint Petitioners' failure to provide supporting data or analysis to indicate that SCE&G "failed to consider a sufficient economic impact," or to challenge the analysis contained in SCE&G's load forecast.⁸²

On appeal, Joint Petitioners do not refute the Board's conclusions, which, in our view, were reasonable. The focus of the Board's ruling on the "need for power" claims is the fact that SCE&G did in fact consider several different economic conditions, including recessions. The Board reasoned that the contention could succeed only if it argued, with adequate support, that the Applicant's economic impact analysis was inadequate.⁸³ The Board found, and we agree, that the contention did not challenge the COL application with specificity, nor did it otherwise provide sufficient information to demonstrate the existence of a genuine dispute.⁸⁴

Further, in our view, the Board reasonably concluded that Joint Petitioners' load forecast claims would call for a more detailed "need for power" analysis than the NRC requires.⁸⁵ As we have stated:

[W]hile a discussion of need for power is required, the Commission is not looking for burdensome attempts by the applicant to precisely identify future market conditions and energy demand, or to develop detailed analyses of system generating assets, costs of production, capital replacement ratios, and the like in order to establish with certainty that the construction and operation of a nuclear power plant is the most economical alternative for generation of power.⁸⁶

The Board also rejected the challenge to the load forecast on an alternate ground — that Joint Petitioners failed to offer information to indicate that there is a

⁸² See LBP-09-2, 69 NRC at 107.

⁸³ See *id.*

⁸⁴ The Board concluded that Joint Petitioners' expert, who asserted that SCE&G failed to consider the impact of the current economic downturn, neither quantified the impact on the need for power nor provided any analysis to challenge that supplied by SCE&G. See *id.* at 107 n.80. We agree. The declaration submitted by Joint Petitioners' expert provides several statistical or anecdotal references intended to demonstrate the severity of the current economic downturn, see, e.g., Declaration of Nancy Brockway in Support of Petition for Intervention and Request for Hearing by the Sierra Club and Friends of the Earth ¶¶ 18-27 (Dec. 9, 2008) (ADAMS Accession No. ML083440663) (Brockway Declaration), but gives only unsupported assertions that SCE&G is "have" in its refusal to update its load forecasts, see *id.* ¶ 32, and provides no specific challenge to SCE&G's current analysis — which accounts for recessions.

⁸⁵ See LBP-09-2, 69 NRC at 107-08.

⁸⁶ NEI Rulemaking Denial, 68 Fed. Reg. at 55,910. Cf. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Facility), CLI-98-3, 47 NRC 77, 94 (1998) (affirming the Board's findings of fact regarding price effects, in the context of a "need for power" analysis, and observing: "[T]he Board's price projections reflect not ineluctable truth, but rather a plausible scenario that . . . should be added to the environmental record of decision").

genuine dispute on a material issue.⁸⁷ We agree that Joint Petitioners' expert provided merely conclusory statements, without supporting facts or detail, that fundamentally do not challenge SCE&G's load forecasts. Thus, the Board reasonably concluded that Joint Petitioners had failed to demonstrate the existence of a genuine dispute.

We find no error on the part of the Board in denying the "need for power" aspect of Contention 3.

(ii) ENERGY ALTERNATIVES — SUBPARTS 3B, 3C, AND 3D

Regarding energy alternatives, the Board held that Joint Petitioners presented, at bottom, a challenge to SCE&G's stated project purpose of providing baseload power generation.⁸⁸ The Board further found that Joint Petitioners failed to raise a specific challenge to SCE&G's energy alternatives analyses, and did not demonstrate that Joint Petitioners' preferred alternatives could reasonably meet SCE&G's stated purpose.⁸⁹

Joint Petitioners contend on appeal that the Board erred in "narrow[ing] the proposed action to be considered" and in "uncritically accepting" the Applicant's statement of purpose, thereby eliminating "fair consideration" of the need for, or alternatives to, the generation of approximately 2000 megawatts of baseload power.⁹⁰ Specifically, they argue that the Board "summarily dismisses" consideration of renewable energy sources and takes the position that "neither wind nor solar are baseload forms of power."⁹¹ Joint Petitioners also contend that the ER is inadequate because it does not adequately address demand-side management or a "modular" approach to adding sources of electrical power generation.⁹²

SCE&G argues principally that Joint Petitioners "ignore longstanding agency precedent" in asserting that the Board improperly narrowed the applicant's stated

⁸⁷ LBP-09-2, 69 NRC at 108. Joint Petitioners rely on the Brockway Declaration for their challenge to the load forecast. *See* Brockway Declaration ¶¶ 9-33. The Brockway Declaration states that SCE&G's April 2007 and May 2008 load forecasts are "out of date" and "unreliable," because they fail to take into account the likely impact of the recent economic crises in the United States. *Id.* ¶¶ 15-17. However, beyond these statements, the Brockway Declaration does not challenge the application; the balance of the Declaration's discussion of the load forecasts includes general statements about the U.S. economic downturn that are unrelated to the COL application.

⁸⁸ *See* LBP-09-2, 69 NRC at 109.

⁸⁹ *See id.* at 109-10.

⁹⁰ Joint Petitioners' Appeal at 19-20.

⁹¹ *Id.* at 25.

⁹² *See id.* at 23-24, 28. Additionally, Joint Petitioners argue that, as with the "need for power" analysis, the Board's decision would improperly dismiss *any* consideration of energy alternatives. *See id.* at 20 (citing NEI Rulemaking Denial). As discussed above, the Board's rejection of the contention did not, in our view, amount to a rejection of energy alternatives analysis as a general matter.

purpose.⁹³ SCE&G further argues that Joint Petitioners' appeal does not address the Board's conclusions that their contention neither controverts the energy alternatives analysis in the COL application nor provides support for their assertion that certain alternatives are reasonable methods for generating baseload power.⁹⁴

With respect to whether SCE&G "undervalued" the potential contributions of demand-side management (Subpart 3B of the contention), the Board grounded its contention admissibility ruling on the legal determination that demand-side management is not a substitute for the addition of baseload power, the project's accepted purpose. The Board therefore found that Joint Petitioners' challenge raises matters outside the scope of the proceeding, and raised matters not material to the determination the NRC must make.⁹⁵

As support for this ruling, the Board cited to our decision in the *Clinton* early site permit (ESP) case.⁹⁶ There, the Commission affirmed the licensing board's rejection of a similar demand-side management analysis contention, observing that the ESP applicant, Exelon (which intended the proposed plant to generate power for sale on the open market) had no transmission or distribution system of its own, and no link to the consumer. We found, on this basis, that the NEPA "rule of reason" did not require Exelon to consider "energy efficiency" in its NEPA analysis, because "energy efficiency" was not a reasonable alternative for a merchant power producer.⁹⁷ The Board found that that the challenge to SCE&G's demand-side management analysis is "directly analogous" to the situation in *Clinton*, and found that the *Clinton* decision mandated its conclusion to exclude the demand-side management contention here.⁹⁸

But in our view the Board paints the issue with too broad a brush. In *Clinton*, the applicant was a merchant power producer proposing to sell power on the open market, nationwide. Given that goal, Exelon had neither the mission nor the ability to implement "energy efficiency" alternatives. In such a circumstance, energy efficiency is not a reasonable alternative under NEPA. Here, by contrast, SCE&G and Santee Cooper propose to produce power for state-designated service territories in which customers have no choice of alternative electric service providers.⁹⁹ SCE&G and Santee Cooper are, therefore, in a position to implement and promote programs such as energy conservation, efficiency, and load management such that the need for additional generation capacity may be

⁹³ See Applicant Opposition at 22.

⁹⁴ See *id.* at 23-24.

⁹⁵ LBP-09-2, 69 NRC at 108-09.

⁹⁶ *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806-08 (2005), *aff'd*, *Environmental Law & Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006).

⁹⁷ *Clinton*, CLI-05-29, 62 NRC at 806-07.

⁹⁸ See LBP-09-2, 69 NRC at 109 n.86.

⁹⁹ See ER § 8.0.

reduced. As discussed below, SCE&G and Santee Cooper have such programs in place, and they themselves discussed in the ER the potential for demand-side management programs to offset future demand. Because, unlike *Clinton*, this case involves an application to produce baseload power for a defined service area, we find that NEPA’s “rule of reason” would not exclude consideration of demand-side management as part of an alternatives analysis *per se*. We therefore find that the Board erred in excluding Contention 3B on this basis.

The inquiry turns, then, on whether Joint Petitioners otherwise have submitted a challenge to the demand-side management analysis that satisfies the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). In this vein, the Board suggests in conclusory terms that it does not. The Board observed that the claims in Subpart B challenge SCE&G’s selected project purpose to add baseload power generation, and need not be considered because demand-side management is not a substitute for the addition of baseload power.¹⁰⁰ The Board also concludes that Joint Petitioners do not support their proposition that demand-side management is not a reasonable means by which to accomplish its project purpose — to generate baseload power.¹⁰¹ However, the Board did not articulate a basis for its conclusion that Subpart 3B is not adequately supported, and it is not self-evident that the Board is correct. Given our determination that Subpart 3B may not be excluded as a legal matter on the basis of the *Clinton* case, we remand Subpart 3B to the Board for a further evaluation of its admissibility.

Joint Petitioners also renew on appeal their challenge to the adequacy of SCE&G’s alternatives analysis as it relates to renewable sources of power. The Board excluded this aspect of the contention to the extent that it constituted an impermissible challenge to SCE&G’s selected project purpose to generate baseload power.¹⁰² The Board further found that Joint Petitioners pointed to no error in the Applicant’s analysis of renewables, or in its conclusion that the proposed alternatives cannot generate baseload power.

We find that the Board did not err in excluding this portion of the contention, because Joint Petitioners have not identified a genuine dispute with SCE&G on the application. Section 9.2.2 of the ER discusses possible alternatives for new generating capacity, including wind power, solar technologies, and power generation from combustion of biomass.¹⁰³ In challenging the adequacy of SCE&G’s analysis of renewable sources of power, Joint Petitioners again rely on the Brockway Declaration.¹⁰⁴ However, the Brockway Declaration does not

¹⁰⁰ LBP-09-2, 69 NRC at 109.

¹⁰¹ *Id.* at 110.

¹⁰² *Id.*

¹⁰³ See ER §§ 9.2.2.2 (“Wind”), 9.2.2.3 (“Solar Technologies”), 9.2.2.6 (“Biomass Related Fuels”).

¹⁰⁴ See Joint Petition at 39-42; Brockway Declaration ¶¶ 57-76. The Brockway Declaration focuses specifically on wind and solar technologies, with a brief mention (¶ 76) of off-system purchases.

specifically challenge the ER's alternatives analysis of renewable energy sources. For example, with respect to wind power, the Brockway Declaration states that offshore wind is a "proven source of generation," but also observes that "wind power is intermittent and therefore its capacity cannot substitute [megawatt for megawatt] with baseload thermal generation."¹⁰⁵ With respect to solar power, the Brockway Declaration makes a number of observations about the lower costs of solar technologies, and the evolution of solar alternatives, but none that expressly challenge the analysis contained in the ER.¹⁰⁶ As the Board observed, such general assertions, without some effort to show why the assertions undercut findings or analyses in the ER, fail to satisfy the requirements of section 2.309(f)(1)(vi).

Finally, Joint Petitioners argue that the application "fails to properly evaluate the risk of choosing a single technology and two extremely large construction projects in lieu of a more modular approach made up of a greater variety of resource options."¹⁰⁷ SCE&G's ER included a discussion in which it considered whether a mix of alternatives might be cost-effective to generate 2214 megawatts electric (MWe).¹⁰⁸ Joint Petitioners did not contradict this discussion in the ER. Nor did they offer alternate combinations of modular alternatives, with a discussion of why such alternate combinations would constitute reasonable alternatives.¹⁰⁹ As the Board correctly observed, Joint Petitioners do not dispute the discussion in the application on "modular" alternatives. We therefore find no error in the Board's determination that this aspect of the contention fails to articulate a genuine dispute with the application.

On this issue, Joint Petitioners also focus on SCE&G's business decisions.¹¹⁰ To the extent that Joint Petitioners' claims concerning modular energy projects challenge SCE&G's business decisions, the Board reasonably excluded them on the basis that the business decisions of licensees or applicants are beyond our purview.¹¹¹

¹⁰⁵ *Id.* ¶¶ 65, 67.

¹⁰⁶ *See id.* ¶¶ 69-73.

¹⁰⁷ Joint Petition at 42.

¹⁰⁸ *See* ER § 9.2.2.12, "Combination of Alternatives." SCE&G acknowledged that a large number of combinations could be possible, but considered two combinations in particular: a mix of wind energy and natural gas (one wind farm and three gas-fired combined cycle units), and a mix of coal and natural gas (two coal-fired units and one gas-fired combined cycle unit).

¹⁰⁹ LBP-09-2, 69 NRC at 111.

¹¹⁰ *See* Joint Petitioners' Appeal at 28 (observing that inclusion in the ER of a modular approach to adding electrical generation resources would provide "the Applicant [an opportunity] to avert making a commitment to two large central station plants of an uncertain design whose costs are at least equal to the utility's net worth").

¹¹¹ *See* LBP-09-2, 69 NRC at 111 (citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005)). *See also* *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 48-49 (2001).

In sum, we find that the Board erred in excluding Subpart 3B on the basis that NEPA's "rule of reason" does not require consideration of demand-side management as part of an alternatives analysis. Therefore, we reverse the Board's decision on Subpart 3B and remand it to the Board for further consideration, as delineated above. We find, however, that the Board did not err in excluding Subparts 3C and 3D of the contention regarding renewable energy alternatives and the use of a "modular" approach.

(iii) COSTS AND SCHEDULE FOR THE PROPOSED ACTION

Joint Petitioners conclude their appeal with a brief discussion concerning rate increases and costs associated with the proposed project, relative to Subparts 3E, 3F, and 3G of this contention as originally submitted. The Board excluded these challenges as outside the scope of the proceeding, and irrelevant to the findings the agency must make.¹¹²

Joint Petitioners' appeal restates its arguments made before the Board, arguing that SCE&G's cost estimates for construction and operation are inadequate.¹¹³ Joint Petitioners' "cost" challenge is twofold: it argues that SCE&G's cost estimates fail to take into account "recent rapid increases" in the costs of inputs for construction, and also that the cost estimate is based on an unrealistic schedule, and inappropriately assumes a completed, certified design for the AP1000.¹¹⁴

The Board held that Joint Petitioners' challenges to SCE&G's cost estimates failed to raise a matter within the scope of the proceeding, and failed to demonstrate a genuine dispute with the application. The Board observed that neither SCE&G nor Joint Petitioners identified an environmentally preferable alternative and that, in the absence of such an alternative, no cost-benefit analysis is required.¹¹⁵ The Board relied on the *Midland* case, in which the Atomic Safety and Licensing Appeal Board held that it is inappropriate for the agency to consider economic costs when no environmentally preferable alternative has been identified.¹¹⁶ The Appeal Board stated:

[N]either NEPA nor any other statute gives us the authority to reject an applicant's proposal solely because an alternative might prove less costly financially. Monetary considerations come into play in only the opposite fashion — *i.e.*, if an alternative

¹¹² See LBP-09-2, 69 NRC at 111-12.

¹¹³ See Joint Petitioners' Appeal at 30.

¹¹⁴ See Joint Petition at 26, 42-46.

¹¹⁵ See LBP-09-2, 69 NRC at 112.

¹¹⁶ *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-458, 7 NRC 155, 162 (1978). The Board also cited a recent decision in the *Shearon Harris* COL case, relying on *Midland* to reject a similar contention. See LBP-09-2, 69 NRC at 111 & n.102 (citing *Shearon Harris*, LBP-08-21, 68 NRC at 576-77).

to the applicant's proposal is environmentally preferable, then we must determine whether the environmental benefits conferred by that alternative are worthwhile enough to outweigh any additional cost needed to achieve them.¹¹⁷

In view of today's ruling with respect to Subpart 3B of this contention, it would be premature to find that the *Midland* ruling applies to the circumstances of this case. The admissibility of Subpart B of Joint Petitioners' contention relating to SCE&G's analysis of demand-side management practices is still subject to further consideration by the Board. If Subpart B is admitted, it would then be further explored in the hearing process. We cannot, therefore, say with certainty at this time that all parties have failed to identify an environmentally preferable alternative. We therefore *reverse* the Board's ruling on Contentions 3F and 3G.

Should the Board admit Subpart B of Contention 3, the rationale set forth in *Midland* will not be applicable to this case, and, contrary to the Board's conclusion, Subparts F and G will not necessarily be excluded pursuant to 10 C.F.R. § 2.309(f)(1)(iii) and (iv). In that circumstance, the Board should consider whether Joint Petitioners' claims raised in connection with Subparts 3F and 3G otherwise articulate an admissible contention.¹¹⁸

In summary, we find that the Board erred in excluding Subpart B of Contention 3, regarding Joint Petitioners' challenges to SCE&G's demand-side management analysis. Because the Board erred in excluding Subpart 3B, we find that it similarly erred in its legal rationale for excluding Joint Petitioners' claims regarding SCE&G's estimates of construction and operating costs, set forth in Subparts F and G, respectively. We *reverse* the Board's decision to reject those portions of Contention 3, and *remand* those issues to the Board for reconsideration, as delineated above. We have identified no error in the Board's decision to reject the balance of Contention 3, and we decline to disturb its ruling further.

III. CONCLUSION

For the reasons set forth above, we *affirm in part, and reverse in part*, the Board's denial of the petitions to intervene, and *remand* the case to the Board for further proceedings consistent with this Memorandum and Order.¹¹⁹

¹¹⁷ *Midland*, ALAB-458, 7 NRC at 163 n.25. *See also id.* at 162-63 & nn.21-24.

¹¹⁸ Should the Board exclude Subpart 3B as inadmissible, however, its stated rationale for Subparts 3F and 3G would form a valid basis for excluding these claims.

¹¹⁹ The Board denied as moot the request of the South Carolina Office of Regulatory Staff (SC ORS) to participate in the proceeding pursuant to 10 C.F.R. § 2.315(c). *See* LBP-09-2, 69 NRC at 92. In view of our decision today, if the Board determines that any of the remanded portions of Contention 3 are, in fact, admissible, it is directed to provide SC ORS the opportunity to participate in the proceeding on those issues.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of January 2010.

Chairman Jaczko, Dissenting

I disagree with the majority's continued adherence to a policy of ignoring terrorism when conducting environmental reviews for facilities located outside the Ninth Circuit. On this issue, I respectfully disagree with the majority decision. As I explained in detail in my dissent in *Oyster Creek*, CLI-06-24, 64 NRC at 135, I believe that the agency should have a consistent, nationwide approach to the consideration of terrorism under NEPA. As we conduct terrorism reviews under NEPA for some facilities, but not others, we create a disparity in the information provided to the public. I see no reason to provide this important information selectively, especially now that our experience demonstrates we can prepare timely environmental analysis of potential terrorist events and provide valuable information to the public while protecting sensitive security information. Fundamentally, we cannot reconcile a policy that denies this information to a significant portion of the public with our agency commitment to transparency.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

**Docket Nos. 52-029-COL
52-030-COL
(Combined License Application)**

**PROGRESS ENERGY FLORIDA, INC.
(Levy County Nuclear Power
Plant, Units 1 and 2)**

January 7, 2010

CONTENTIONS: REFORMULATION

A licensing board may reformulate contentions to “eliminate extraneous issues or to consolidate issues for a more efficient proceeding.” *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552 (citing *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 482 (2008) (emphasis omitted).

CONTENTIONS: NEPA

The Board did not err in reformulating a contention to state that the application failed to comply with 10 C.F.R. Part 51, rather than with the National Environmental Policy Act (NEPA). Strictly speaking, NEPA imposes requirements on the agency, while Part 51 imposes requirements on both a license applicant and the agency. Because NEPA, by its terms, places obligations upon the federal agency, not the applicant, it is correct to say that an application violates section 51.45, not “NEPA.” The Board’s clarifying restatement is no basis for rejecting the substantive claims in a contention charging that the application violates “NEPA.”

CONTENTIONS: ADMISSIBILITY

Although NRC recognizes a difference between contentions of “omission” and contentions of inadequacy, the Board did not err in reading the contention as one of inadequacy despite the contentions’ occasional use of terms such as “failed to address.”

CONTENTIONS: EXPERT SUPPORT

The Board did not make an impermissible “merits” ruling by observing that a contention was supported by the affidavit of an “expert.” This initial assessment is not dispositive of the expert status of the witness or the Board’s reliance on testimony provided by the witness. As the case progresses the Board will consider the proffered expert’s qualifications in further depth and accord her opinion appropriate weight.

CONTENTIONS: ADMISSIBILITY

The Board did not create a “new regulatory requirement” in finding that an application must show how the proposed facility will deal with long-term storage of low-level radioactive waste (LLRW). Safety regulations in 10 C.F.R. § 52.79(a)(3) require the COL application to describe the kinds and quantities of radioactive materials that will be produced in operating a proposed new power plant and to describe the “means for controlling and limiting the radioactive effluents and radiation exposures within the limits set forth” in 10 C.F.R. Part 20.

CONTENTIONS: ADMISSIBILITY

Given that proposed contentions were grounded in the partial closure of the Barnwell facility for the disposal of low-level radioactive waste (LLRW), contentions failed to show basis for including Greater-Than-Class C (GTCC) waste. GTCC waste is the responsibility of the federal government and has never been shipped to the Barnwell facility.

MEMORANDUM AND ORDER

The Applicant in this combined license proceeding, Progress Energy Florida, Inc. (Progress), has appealed the Atomic Safety and Licensing Board’s order

granting a hearing to three organizational petitioners.¹ For the reasons set forth below, we affirm the Board's decision to grant a hearing, and affirm in part, and reverse in part, its decision to admit three contentions.

I. BACKGROUND

Progress is pursuing licenses to build a new 2000-megawatt facility in Levy County, Florida, consisting of two units of the Westinghouse AP1000 design. Three organizations, the Green Party of Florida, the Nuclear Information and Resource Service, and the Ecology Party of Florida (jointly, Petitioners), filed a timely joint petition to intervene in the proceeding.² Petitioners proposed eleven contentions, including a Contention 4 (Hydroecology) that consisted of sixteen subparts. The Board's decision admitted for hearing only certain subparts of proposed Contention 4, and portions of Contentions 7 and 8 (concerning storage and disposal of low-level radioactive waste (LLRW)).

Progress does not contest Petitioners' standing, but argues on appeal that none of the contentions should have been admitted by the Board.³ Although the Staff opposed all contentions before the Board, it filed no response to the Progress Appeal.

II. DISCUSSION

The Commission defers to Board rulings on contention admissibility in the absence of clear error or abuse of discretion.⁴ The Board's decision here was thorough and clear, and, with the exception of one matter related to Contentions 7 and 8 — the Board's consideration of Greater-than-Class-C (GTCC) waste — we decline to disturb the challenged contention admissibility rulings.

A. Contention 4 (Hydroecology)

Contention 4 consisted of sixteen subparts, designated sections 4A through

¹ See LBP-09-10, 70 NRC 51 (2009); Notice of Correction (July 10, 2009) (unpublished).

² Petition to Intervene and Request for Hearing by the Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service (Feb. 6, 2009) (Petition).

³ Applicant's Notice of Appeal from LBP-09-10 (July 20, 2009) (Progress Appeal).

⁴ *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009) (citing, *inter alia*, *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008)); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317, 324 (2009); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

40,⁵ entitled “Omissions, misrepresentations, and failures of proposed Levy Nuclear Plant (LNP) environmental report (ER) to address adverse direct, indirect, and cumulative environmental impacts.” The contention claimed generally that Progress’ Environmental Report had underestimated effects of the project on the surrounding wetlands and its inhabitants. In support of Contention 4, Petitioners offered a 23-page affidavit by a hydroecologist, Dr. Sydney Bacchus, Ph.D.⁶

Progress argued before the Board, as it does on appeal, that the sixteen subparts of Contention 4 were actually sixteen separate contentions that must be considered independently to determine admissibility. Rejecting Progress’ argument, the Board found that Contentions 4A-O were intended to be read together and stated that it would not independently apply the six admissibility factors in discussing each subpart.⁷ Instead, the Board made general findings for several admissibility factors. It found that, overall, Contention 4: “provides a specific statement of the issue of law or fact to be raised or controverted;”⁸ provides “a brief explanation of the basis” of the claim (10 C.F.R. § 51.45);⁹ and that the general topic of Contention 4 is within the scope of, and material to, the proceeding.¹⁰ The Board found that Contention 4 makes a single claim that our regulations require that “the ER cover all significant environmental impacts associated with the proposed project, and (allegedly) the [Progress] ER fails to meet this legal requirement because it does not adequately address the indirect

⁵ See Petition at 67. The initial petition contained two subparts designated “4N.” The Board designated the second 4N as subpart “4P,” which it subsequently rejected. LBP-09-10, 70 NRC at 102.

⁶ See Expert Declaration by Dr. Sydney T. Bacchus in Support of Petitioners’ Standing to Intervene in This Proceeding (Feb. 6, 2009) (Bacchus Declaration) (appended to Petition). With respect to Dr. Bacchus’ expertise, the Board observed:

Dr. Sidney [*sic*] Bacchus, who (as noted above) has a PhD in hydroecology and has studied and written concerning the hydroecology of Northern Florida, where the LNP project is proposed to be located, has the knowledge, experience, and education to make her declaration of assistance to this Board in understanding these issues. And while she is not an expert on all subjects, and not a geologist, the Board believes that her considered opinions regarding the connection of the Northern Florida wetlands (such as the LNP site) to the underlying Floridan aquifer via relict sinkholes, are helpful to our understanding of the environmental impacts of the LNP project and are admissible.

LBP-09-10, 70 NRC at 102-03.

⁷ LBP-09-10, 70 NRC at 88-89.

⁸ *Id.* at 101-02 (citing 10 C.F.R. § 2.309(f)(1)(i)).

⁹ *Id.* at 102 (citing 10 C.F.R. § 2.309(f)(1)(ii)).

¹⁰ *Id.* (citing 10 C.F.R. § 2.309(f)(1)(iii), (iv)). The Board observed that some subparts of Contention 4 “may not satisfy the scope or materiality requirements of the regulation, certainly other subparts do.” *Id.* As discussed here, the Board went on to consider each subpart of the contention individually with respect to these factors.

and cumulative environmental impacts associated with certain specified aspects of the LNP project.”¹¹

The Board then turned its analysis to each subpart, finding that some were adequately supported, while others were not.¹² First, it observed that subpart 4A provided an overview of the entire contention.¹³ It found admissible sections claiming adverse effects from dewatering (a portion of subpart 4D, and subparts 4E, 4F, and 4G), increased nutrient concentrations due to an asserted increased prevalence of wildfires resulting from dewatering (subpart 4H), salt drift and salt deposition (claims associated with the impacts of seawater used for cooling on the freshwater wetlands and other waters in the area of the project site) (subpart 4I), and resulting failure to adequately identify the zone of environmental impacts (subparts 4L, 4M, and 4N) (which the Board termed the “consequential” subparts).¹⁴ The Board summarized the elements of Contention 4 that it had found admissible, as follows:

CONTENTION 4: Progress Energy Florida’s (PEF’s) Environmental Report fails to comply with 10 C.F.R. Part 51 because it fails to adequately address, and inappropriately characterizes as SMALL, certain direct, indirect, and cumulative impacts, onsite and offsite, of constructing and operating the proposed LNP facility:

- A. Impacts to wetlands, floodplains, special aquatic sites, and other waters, associated with dewatering, specifically:
 - 1. Impacts resulting from active and passive dewatering;
 - 2. Impacts resulting from the connection of the site to the underlying Floridan aquifer system;
 - 3. Impacts on Outstanding Florida Waters such as the Withlacoochee and Waccasassa Rivers;
 - 4. Impacts on water quality and the aquatic environment due to alterations and increases in nutrient concentrations caused by the removal of water; and
 - 5. Impacts on water quality and the aquatic environment due to increased nutrients resulting from destructive wildfires resulting from dewatering.
- B. Impacts to wetlands, floodplains, special aquatic sites, and other waters, associated with salt drift and salt deposition resulting from cooling towers

¹¹ *Id.* at 102.

¹² *Id.* at 103.

¹³ *Id.* at 83, 103.

¹⁴ *Id.* at 104-06.

(that use salt water) being situated in an inland, freshwater wetland area of the LNP site.

- C. As a result of the omissions and inadequacies described above, the Environmental Report also failed to adequately identify, and inappropriately characterizes as SMALL, the proposed project's zone of:
 1. Environmental impacts,
 2. Impact on Federally listed species,
 3. Irreversible and irretrievable environmental impacts, and
 4. Appropriate mitigation measures.¹⁵

On appeal, Progress cites six reasons why, in its view, the Board erred in admitting these portions of Contention 4.¹⁶ We address each argument in turn.

1. Basis for Admitting Contention 4

Progress argues that the Board failed to “identify the bases” for admitting Contention 4 in conflict with our recent holding in *Crow Butte Resources, Inc.* (North Trend Expansion Area).¹⁷ But Progress misunderstands our holding in *Crow Butte*.

As an initial matter, the circumstances surrounding the *Crow Butte* decision are not on point with this case. The *Crow Butte* Board had been presented with a muddled *pro se* petition, which included several diffuse claims generally relating to potential groundwater contamination. The *Crow Butte* Board reformulated the groundwater claims into two separate contentions, encompassing safety and environmental issues. The *Crow Butte* Board acknowledged that “not all issues would fall under the contentions” as it had reframed them, but it failed to specify which claims or bases were admitted or to which contention each claim applied.¹⁸ We found no fault with the *Crow Butte* Board’s decision to reformulate the contentions into separate NEPA and safety claims. Rather we found fault with the Board’s failure to identify clearly which of the diffuse and, in some cases, unsupported claims were admitted for hearing.¹⁹ At bottom, in *Crow Butte*, the

¹⁵ LBP-09-10, Attachment A, 70 NRC at 149.

¹⁶ See Progress Appeal at 6-17.

¹⁷ CLI-09-12, 69 NRC 535 (2009).

¹⁸ See *Crow Butte Resources, Inc.* (North Trend Expansion Project), LBP-08-6, 67 NRC 241, 321 (2008).

¹⁹ *Crow Butte*, CLI-09-12, 69 NRC at 552.

parties were left without a clear roadmap as to which elements of several broadly worded claims were, in fact, admissible.²⁰

That is simply not the case here. As we observed in *Crow Butte*, a licensing board may reformulate contentions to “eliminate extraneous issues or to consolidate issues for a more efficient proceeding.”²¹ That is just what the Board achieved with its consideration of Contention 4 in this proceeding. The Board has identified the specific issues admitted for hearing, and has provided well-organized and sound reasons for its determinations. First, it discussed each contention individually. Where a contention proposed multiple subparts, the Board considered each individual subpart. Second, the Board expressly restated all admitted contentions in Attachment A to its decision. Thus, the Board left no doubt as to which matters were and were not admitted for hearing. Our *Crow Butte* decision, therefore, is inapposite.

On appeal, Progress takes issue with the Board’s discussion of the *legal* basis for Contention 4 — the National Environmental Policy Act (NEPA) and our related regulations in 10 C.F.R. Part 51 — and with the Board’s reformulation of the contention consistent with that analysis.²² Petitioners’ original Contention 4 generally cited NEPA as its basis for the contention.²³ In considering Contention 4, the Board pointed out that, strictly speaking, NEPA imposes requirements on the agency, while Part 51 imposes requirements on both a license applicant and the agency. Specifically, 10 C.F.R. § 51.45 requires an applicant to file an ER that contains “a description of the proposed action, a statement of its purposes, a description of the environment affected” and a discussion of the project’s environmental impacts “in proportion to their significance” and alternatives to the proposal — all information that the Staff will use in preparing its environmental impact statement.²⁴ The Board observed that because NEPA, by its terms, places obligations upon the federal agency, not the applicant, it is correct to say that an application violates section 51.45, not “NEPA.”²⁵ Consistent with this reasoning,

²⁰ *Id.* at 553.

²¹ *Id.* at 552 (citing *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 482 (2008) (emphasis omitted). (See *AREVA*, LBP-08-11, 67 NRC at 481-83 for a discussion of Board’s legal authority to reformulate contentions). See also *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 237, 240-44 (2006); *Emergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 341 (2006); *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), LBP-04-17, 60 NRC 229, 245, 252 (2004), *review denied*, CLI-04-31, 60 NRC 461 (2004); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 271, 276 (2004)).

²² LBP-09-10, 70 NRC at 87.

²³ See Petition at 32.

²⁴ 10 C.F.R. § 51.45(b). See 10 C.F.R. § 51.50(c) (specifically addressing environmental reports prepared as part of COL applications).

²⁵ LBP-09-10, 70 NRC at 87.

in reformulating the admissible portions of Contention 4, the Board referred to “Part 51” rather than to NEPA. Progress argues that this reformulation is in error because the Petition cited “NEPA” rather than “Part 51,” as the basis for the contention,²⁶ and because Part 51 compliance is not an issue within the scope of the hearing.²⁷

We find no reversible error. The Board’s observations concerning Part 51 are correct, and clarify the basis that was presented by Petitioners. Part 51 implements NEPA § 102(2), consistent with NRC’s domestic licensing and related regulatory authority. The agency may comply with NEPA without requiring that the applicant submit an environmental report, but NEPA and Council on Environmental Quality (CEQ) regulations permit agencies to request information from an applicant for a license or permit that will require a NEPA analysis.²⁸ In order to facilitate our compliance with NEPA, we require a combined license applicant to submit a complete environmental report with its application,²⁹ which is essentially the applicant’s proposal for the draft environmental impact statement. Ordinarily (and in the case of Contention 4), contentions that seek compliance with NEPA must be based on that environmental report.³⁰

The Board, therefore, was correct when it observed that it is not NEPA, but our regulations in 10 C.F.R. Part 51, that require that an applicant submit an ER. However, we do not find that the Board erred as a matter of law by citing 10 C.F.R. Part 51 as a basis for Contention 4. Our rules require that, to the extent an environmental issue is raised in the applicant’s ER, a petitioner must file contentions on that document.³¹ Although the ultimate burden with respect to NEPA lies with the NRC Staff, our policy with respect to the identification of issues for hearing has long been that such issues must be raised as early as

²⁶ Petitioners cited to 10 C.F.R. § 51.45 in their reply brief. *See* Response of the Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service to Answers to Our Petition to Intervene from NRC Staff Attorneys and Progress Energy Florida Attorneys (Mar. 17, 2009), at 13, 16, 19, 23, and 30.

²⁷ Progress Appeal at 7 & n.8.

²⁸ *See* 40 C.F.R. § 1506.5(a). The NRC takes into account CEQ regulations (with certain exceptions not relevant here). *See* 10 C.F.R. § 51.10(a).

²⁹ *See* 10 C.F.R. §§ 51.50(c), 51.45.

³⁰ 10 C.F.R. § 2.309(f)(2); *see Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983) (“While all environmental contentions may, in a general sense, ultimately be challenges to the NRC’s compliance with NEPA, factual disputes of particular issues can be raised before the DES [Draft Environmental Impact Statement] is prepared. As a practical matter, much of the information in an Applicant’s ER is used in the DES. . . . [T]he Commission expects that the filing of an environmental concern based on the ER will not be deferred because the staff may provide a different analysis in its DES”).

³¹ *See* Final Rule: “Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989).

possible.³² In our view, the Board’s clarifying restatement is no basis for rejecting the substance of the claims in Contention 4, or for reversal.

2. *Reformulation*

Progress next complains that the Board erred in reformulating Contention 4, arguing that subparts 4A through 4O are, in fact, “separate” contentions that would not, if read individually, constitute admissible contentions. Progress claims that by reading the “separate” contentions together, the Board “implicitly finds that individually those Contentions were inadmissible.”³³ Progress seems to argue, in fact, that because the Petition failed to reiterate how each “subpart” of Contention 4 would meet the section 2.309(f)(1) contention admissibility factors, no part of the contention is admissible.

Progress has not shown that the Board committed any error, much less reversible error, in its treatment of Contention 4. The Petition presented eleven numbered contentions, several of which had subparts designated by letter.³⁴ At oral argument, Petitioners confirmed that the contention was intended to be read as a whole.³⁵ Further, it is apparent that the Board examined each issue raised in the contention to see if it met all contention admissibility requirements. In particular, for each subpart that was rejected, the Board stated which admissibility factor was *not* shown. For example, the Board found that the claims relating to environmental effects from offsite mining (subparts 4B, 4C, and 4D) were not adequately supported with an explanation why the claimed effects would be significant.³⁶ Similarly, the Board rejected subpart 4J (climate change impacts from clearing land to build the facility) because Petitioners did not support their claim that the number of trees that would be destroyed could have a potentially significant effect on global warming.³⁷ In a different vein, the Board rejected subpart 4P (inconsistencies with 40 C.F.R. Part 230),³⁸ as outside the scope of the proceeding.³⁹ Thus, it is clear that the Board considered the admissibility factors with respect to each subpart of Contention 4.

³² See *Catawba*, CLI-83-19, 17 NRC at 1050.

³³ Progress Appeal at 10.

³⁴ See Petition at 32-72.

³⁵ Tr. 45-46.

³⁶ LBP-09-10, 70 NRC at 103.

³⁷ *Id.* at 104.

³⁸ As noted *supra*, Subpart P was designated in the initial Petition as the second Contention 4N. Petition at 67.

³⁹ Subpart 4P claimed that the proposed project would violate federal regulations governing the issuance of a permit for disposal of dredged or fill material — regulations administered by the

(Continued)

In addition, where a single contention has many subparts, the arguments for each of the section 2.309(f) factors logically may apply to more than one subpart. The Board was not required to “read” each section of the contention in a vacuum, nor was it required to discuss each subpart as if its own preceding findings had not been set forth. While our contention pleading standards are strict, they are not so strict as to prohibit multipart contentions, or to require the Board to abandon a commonsense approach to consideration of the contention.

Progress’ brief on appeal relies heavily on *Crow Butte*⁴⁰ for the principle that a Board may not supply the missing pieces of a contention that fails to meet our admissibility standards.⁴¹ But we do not find that the Board, simply by reading the parts of the contention together, supplied information that was not provided by Petitioners. On the contrary, it culled from proposed Contention 4 claims that it found to be inadmissible. As we observe above, the Board may properly reformulate contentions in this manner.⁴² We therefore find that the Board’s action was consistent with relevant case law.

3. *Contention 4 as a “Contention of Omission”*

Progress argues generally that “Contentions 4.A through 4.O” were all pled as several contentions of “omission,” but that the Board disregarded the plain language of the Petition and improperly recast them as one “contention of inadequacy.”⁴³ Progress argues that Petitioners claimed that the application omitted necessary information — when, in fact, the application did contain the relevant discussions. But instead of finding the contentions inadmissible, Progress argues, the Board reframed the contentions as challenges to the sufficiency, or adequacy, of the ER’s discussion. Progress is raising form over substance.⁴⁴

Army Corps of Engineers, not the NRC. The Board determined that, while the ER must address environmental effects of the proposed project — including effects outside this agency’s jurisdiction to regulate — a contention whether the project will meet another agency’s regulations is not admissible in our licensing proceedings. LBP-09-10, 70 NRC at 105.

⁴⁰ CLI-09-12, 69 NRC at 552-53.

⁴¹ Progress Appeal at 10.

⁴² See note 21, *supra*.

⁴³ See Progress Appeal at 11-13.

⁴⁴ The distinction between “contentions of omission” and “contentions of inadequacy” does not appear in our contention pleading regulations. Rather it is a useful concept from agency caselaw. See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002). In *Catawba/McGuire*, we held that where a contention complained of an ER’s failure to address a particular study, the subsequent inclusion of the study in the DEIS would moot the contention. The contention must then be modified as a contention attacking the adequacy of the now-included analysis, or dismissed as moot.

The plain language of the proposed contention does not speak solely in terms of omissions from the application. Petitioners' introduction to Contention 4 stated that the contention would address "omissions, mischaracterizations, and failures of the environmental report to address direct, indirect, and cumulative effects."⁴⁵ "Contention 4A" asserted that the ER's discussion of hydroecological effects, overall, mischaracterized the effects as "small."

The Board addressed Progress' "contention of omission" argument in its decision:

We reject the suggestion that, because C4 [Contention 4] uses the phrase "failed to address," C4 can only be seen as a contention of omission, and any reference to the relevant topic in the ER automatically results in the denial of C4. It is obvious that Petitioners know that the ER addressed, in some sense, some of the C4 topics In context, it is clear that these pro se Petitioners are arguing that the ER is inadequate So long as C4 provides some explanation as to how or why Petitioners assert that the discussion in the ER is inadequate, there is the basis for a reasoned response by [Progress], and an issue that is specific and fairly litigable.⁴⁶

The Board viewed the Petition as a whole to determine that, despite using words such as "failed to address" or "omitted," various subparts of Contention 4 were actually attacks on the *adequacy* of the ER's discussion.⁴⁷ For example, with respect to subpart 4D, the Board observed that the Petition stated that the ER "failed to address" cumulative impacts of onsite mining, excavation, and dewatering. But the Board correctly reasoned that this is not truly a contention of omission because "Petitioners immediately cite several portions of the ER that address these subjects . . . and then explain, with Dr. Bacchus' support, why they

⁴⁵ Petition at 58.

⁴⁶ LBP-09-10, 70 NRC at 101-02 n.37.

⁴⁷ See, e.g., LBP-09-10, 70 NRC at 89 (concerning subpart 4B), at 90 (concerning subpart 4D). Specifically, subpart 4D (effects of dewatering) challenges ER Table 3.3-2 (description of operating reactor's consumptive water use); subpart 4F (effects on Outstanding Florida Waters) challenges Table 4.6-1 (Summary of Measures and Controls to Limit Adverse Impacts During Construction); subpart 4I (salt drift) challenges ER Figure 4.1-4 and section 10.2.1.2 (Hydrological and Water Use). The "consequential" subparts — so called by the Board — acknowledged that the ER discussed each of the claimed consequences but challenged the conclusions that the resulting impacts would be "small." Only a few claims argue that a narrow category of specific information was wholly omitted from the ER: subpart 4E (ER fails to disclose that region is characterized by sinkholes that connect wetlands to Floridan aquifer); subpart 4G (dewatering will cause alterations to nutrient concentrations in the surrounding wetlands); and subpart 4H (dewatering will cause wildfires). ER Chapter 2 characterizes the site. See ER § 2.6.1.4 (discussing geologic structures, including sinkholes). Impacts of dewatering during construction are discussed in ER §§ 4.2.1.4, 4.2.1.5, and 4.2.2.1; the contention challenges asserted inadequacies in these discussions.

believe these ER discussions are inadequate.”⁴⁸ Progress’ argument on this point is unavailing.

Although Contention 4 may have used terms such as “failed to address” in some sections, its overall argument is that the specific omissions led the ER to erroneously conclude that impacts would be “small.”⁴⁹ We find no error in the Board’s conclusion that Contention 4 presents claims of *inadequacy*, rather than omission.

4. Contention 4 as “Impermissibly Vague”

Progress argues that Contention 4 as reformulated by the Board is impermissibly vague “because it fails to identify what resource is implicated by the alleged ‘LARGE’ impacts to be litigated.”⁵⁰ Progress claims it is “unclear how the parties would litigate the characterization of impacts,” because “defining the resource is an *ad hoc* decision based on what makes sense in context.”⁵¹ Progress claims that because the contention, as admitted, did not identify the resource impacted, the Board should have rejected it rather than deferring until after further briefing the determination of what the limits of the affected “resource” are.⁵²

Progress’ claim stems from the Board’s remark that Part 51 does not define the term “resource” in describing how an impact should be characterized as small, moderate, or large.⁵³ The Board observed that whether an impact is seen as “large” or “small” depends on how the affected resource is defined.⁵⁴ Progress argues that the Board’s remark — which in fact goes to the merits of the contention — somehow shows that Petitioners failed to support the contention by identifying the affected resource. We reject Progress’ argument that Contention 4 is impermissibly vague for failing to identify the affected “resource.” Progress has taken the Board’s observation out of context.

The Petition claimed impacts to the “vicinity” (a 6-mile radius) and in the “region” (a 50-mile radius) of the proposed project.⁵⁵ The Petition, as well as the supporting declaration of Dr. Bacchus, also identifies the surface and

⁴⁸ *Id.* at 90 (citations to Petition omitted).

⁴⁹ *See* Petition at 58.

⁵⁰ Progress Appeal at 13.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See* Progress Appeal at 14 (citing LBP-09-10, 70 NRC at 101).

⁵⁴ LBP-09-10 at 101. That is to say, an impact on the onsite wetlands might be large, but the overall impact on the Atlantic Ocean small.

⁵⁵ *See* Petition at 33.

ground waters that Petitioners claim will be affected by the proposed project.⁵⁶ Therefore, Petitioners clearly identified the resources *they claim* will suffer “large” impacts. For its part, the Board addressed the affected resources in restating the contention as admitted. Contention 4, as restated by the Board in Attachment A, specifically identifies the aquifer system underlying the project area, the Withlacoochee and Waccasassa rivers, and the freshwater wetlands in the area of the project site as the affected aquatic resources.⁵⁷ It remains for further evidentiary proceedings to determine whether the claimed impacts are reasonably foreseeable and appropriately characterized. The Board’s observation, in our view, means no more than that, and Progress has articulated no Board error or abuse of discretion on this point.

5. Claims Regarding “Consequences”

In reformulating Contention 4, the Board characterized three parts of the contention — specifically, subparts 4L, 4M, and 4N — as “consequence” claims. It grouped these subparts into section C of the reformulated contention.⁵⁸ Section 4C, as admitted, argues that, “[a]s a result of the omissions and inadequacies described above, the Environmental Report also failed to adequately identify, and inappropriately characterizes as SMALL,” the proposed project’s environmental impact, including impacts on threatened and endangered species, irretrievable commitments of resources, and the appropriate mitigation impacts.⁵⁹ Progress argues that the Board did not “rigorously apply” the contention factors to subparts 4L, 4M, and 4N, and therefore that they should not have been admitted.

As discussed above, Progress would require a strained and overly formalistic reading of Contention 4. It is evident to us (as it was to the Board) that each of these three subparts is logically connected to, and, indeed, part and parcel of, the balance of admitted Contention 4. The contention argues that, because of certain identified asserted inadequacies to the environmental impacts assessment, the discussion of certain consequences of the project is inadequate. That this claim is raised in several subparts and not as a single assertion, is not material. The Board did not err in considering the contention as a whole.

⁵⁶ See, e.g., Petition at 45-46 (waters claimed to be affected by proposed project), 52-55 (lands claimed to be affected by “cooling tower salt drift”); Bacchus Declaration at 9-10 (waters), 14 (lands).

⁵⁷ See text of admitted Contention 4, *supra* note 15, and accompanying text.

⁵⁸ See LBP-09-10, 70 NRC at 106. See also Tr. 45-46.

⁵⁹ LBP-09-10, Attachment A, 70 NRC at 149).

6. *Treatment of Bacchus Declaration*

Progress argues that the Board erred in relying on the declaration of Dr. Bacchus because the declaration “contains nothing more than bald, unsubstantiated assertions.”⁶⁰ Progress contends that Dr. Bacchus does not explain her “conclusory statements” that the construction and operation of the plant will cause widespread dewatering and salt drift.⁶¹

Progress cites our holding in *USEC*⁶² for the proposition that a Board need not accept the unexplained conclusions of an expert. In *USEC*, the support offered for the contention consisted of brief quotes from the petitioners’ correspondence with a physicist, which the Board found to be “bare conclusory remarks with respect to which [the petitioner] offer[ed] no explanation or analysis.”⁶³ Notably, the petitioner offered no expert affidavit in support of its hearing request. We affirmed the Board’s decision to reject the contention, noting a number of problems associated with the purported expert support.⁶⁴ In *USEC*, we held that the Board need not accept an expert’s bare conclusions that an application is “‘deficient,’ ‘inadequate’ or ‘wrong’” as support for a contention.⁶⁵

Here, Petitioners offered more than the expert’s conclusion that the environmental impacts from dewatering and salt drift would be “large.” Dr. Bacchus’ declaration explained her reasons for concluding that the proposed project would have harmful effects on aquatic resources, and cited or attached supporting documents.⁶⁶ This is sufficient for the purpose of our contention admissibility standards; whether those reasons are proven correct is a matter for resolution on the merits.

Progress also claims that the Board erred in referring to Dr. Bacchus as an “expert,” arguing that this constitutes an improper “merits” ruling.⁶⁷ We disagree. At the contention admissibility stage, a Board may consider a proffered expert’s qualifications in evaluating whether a contention is adequately supported. Dr. Bacchus’ declaration summarizes her education, research focus, and publications. She holds a Ph.D. in hydroecology, which she describes as a multidisciplinary

⁶⁰ Progress Appeal at 17.

⁶¹ *Id.*

⁶² *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006).

⁶³ *USEC Inc. (American Centrifuge Plant)*, LBP-05-28, 62 NRC 585, 613 (2005).

⁶⁴ For example, it was unclear from the expert’s remarks whether he had been provided the entire relevant environmental report. *USEC*, CLI-06-10, 63 NRC at 472 n.127. We further observed that the putative expert’s remarks were “difficult to comprehend,” and that it was “not apparent that even [the petitioner] understands [the expert’s] statements.” *Id.* at 472.

⁶⁵ *Id.*

⁶⁶ See Petition, Exh. K, “List of Bacchus Exhibits and References” (ADAMS Accession No. ML090400137).

⁶⁷ Progress Appeal at 18.

field combining physical and life sciences, from the University of Georgia.⁶⁸ Her declaration cites various publications relating to the effects she claims could result from the proposed project.⁶⁹ It is apparent that she holds at least a minimal amount of knowledge to allow her to make a declaration for the purposes of determining contention admissibility. This initial assessment is not dispositive of the expert status of the witness or the Board's reliance on testimony provided by the witness. As the case progresses on the admitted portions of Contention 4, we expect that the Board will consider Dr. Bacchus' qualifications in further depth, and accord her opinion appropriate weight.

B. Contentions 7 and 8 (Long-Term Storage of Low-Level Radioactive Waste)

Contentions 7 and 8 concern the lack of a disposal facility for LLRW that would be generated by operations at the proposed Levy County facility. Due to the closing of the land disposal facility at Barnwell, South Carolina, to states outside the Atlantic Compact, there currently is no licensed disposal facility in the United States that will accept LLRW from a nuclear power plant located in Florida.⁷⁰ As a result, the proposed facility likely would have to store such waste onsite, or in an offsite storage location that is not a land disposal facility, for the foreseeable future.

Proposed Contentions 7 and 8 charge that the ER and Final Safety Analysis Report (FSAR) neglect to account for long-term storage of LLRW. Proposed Contention 7 encompasses the environmental aspects, and Contention 8 the safety aspects, of the asserted failure of the application to discuss long-term LLRW storage. As originally submitted, the contentions stated as follows:

Contention 7:

[Progress'] application to build and operate Levy County Nuclear Station Units 1 & 2 violates the National Environmental Policy Act by failing to address the environmental impacts of the waste that it will generate in the absence of licensed disposal facilities or capability to isolate the radioactive waste from the environment. [Progress'] environmental report does not address environmental, environmental

⁶⁸ Bacchus Declaration at 1.

⁶⁹ See, e.g., Bacchus Declaration at 5, citing to Bacchus, "Nonmechanical Dewatering of the Regional Floridan Aquifer System," Geological Society of America (2006); Declaration at 8, citing S. T. Bacchus, *Uncalculated Impacts of Unsustainable Aquifer Yield Including Evidence of Subsurface Interbasin Flow*, 36 J. Am. Water Resources Ass'n, 457-81 (2000).

⁷⁰ As of July 2008, the Barnwell facility only accepts such waste from facilities in South Carolina, New Jersey, and Connecticut.

justice, health, safety, security or economic consequences that will result from lack of permanent disposal for the radioactive wastes generated.⁷¹

Contention 8:

A substantial omission in [Progress'] COL application to build and operate Levy county Nuclear Station Units 1 & 2 is the failure to address the absence of access to a licensed disposal [facility] or capability to isolate the radioactive waste from the environment. [Progress'] FSAR does not address an alternative plan or the safety, radiological and health, security or economic consequences that will result from lack of permanent disposal for the radioactive wastes generated.⁷²

In support of these contentions, Petitioners cited portions of the application dealing with LLRW,⁷³ which state that LLRW will be packed in shipping containers to await transportation to a disposal facility. According to Petitioners, neither the "ER nor the FSAR indicated that the intent is to store Class B, C and Greater than C wastes for 60 years nor is there indication that the facilities could accommodate physically or otherwise such an accumulation."⁷⁴ Petitioners also disputed assertions in the application that the proposed "systems are capable of meeting the design objectives of 10 C.F.R. 20 and 10 C.F.R. 50, Appendix I,"⁷⁵ which set standards for protecting the public and workers against radiation and for meeting the "As Low As Reasonably Achievable (ALARA)" criterion. Petitioners acknowledged that Contention 7 raised "a challenge to the generic assumptions and conclusions in Table S-3," but stated that they were only raising that challenge to protect their interests in a parallel rulemaking petition.⁷⁶ Petitioners further argued that long-term onsite storage could turn into *de facto* disposal, and that therefore Progress should be required to obtain a license for a LLRW disposal facility under 10 C.F.R. Part 61.⁷⁷

Oral argument in this case was held shortly after we ruled in the *Bellefont* COL matter, reversing that Board's decision to admit two similar — although

⁷¹ See Petition at 87.

⁷² *Id.* at 93-94.

⁷³ Although the contentions use the term "radioactive wastes generated," it is clear from the discussion following that Petitioners intended Contentions 7 and 8 to refer only to Class B, C, and GTCC waste. See Petition at 87-97. Petitioners also offered a similar contention concerning spent nuclear fuel, but this was rejected by the Board as an improper challenge to the Waste Confidence Rule. See LBP-09-10, 70 NRC at 112-18.

⁷⁴ Petition at 88.

⁷⁵ *Id.* at 89, 92.

⁷⁶ *Id.* at 87 n.30.

⁷⁷ *Id.* at 91.

not identical — contentions.⁷⁸ At oral argument, Petitioners backed away from the claim that the proposed facility should be required to obtain a license under 10 C.F.R. Part 61.⁷⁹ Also at that time, Progress acknowledged that the dose calculations for the radwaste building (where the storage would take place) are based on the building’s maximum storage capacity — or approximately 2 years’ waste stream.⁸⁰

The Board found the contentions “generally inadmissible” consistent with the *Bellefonte* decision. It specifically ruled out any challenge to Table S-3,⁸¹ and claims relating to Part 61.⁸²

The Board admitted narrowed versions of the contentions, as follows:

CONTENTION 7: [Progress’] application is inadequate because the Environmental Report assumes that the class B, C, and greater than C low-level radioactive waste (LLW) generated by proposed Levy Units 1 and 2 will be promptly (e.g., within two years) shipped offsite and fails to address the environmental impacts in the event that [Progress] will need to manage such LLW on the Levy site for a more extended period of time.

CONTENTION 8: [Progress’] application is inadequate because the Safety Analysis Report assumes that the class B, C, and greater than C low-level radioactive waste (LLW) generated by proposed Levy Units 1 and 2 will be promptly (e.g., within two years) shipped offsite and fails to address compliance with Part 20 and Part 50 Appendix I (ALARA) in the event that [Progress] will need to manage such LLW on the Levy site for a more extended period of time.⁸³

The Board emphasized that these contentions encompass only the long-term storage, and not the permanent disposal, of LLRW.⁸⁴

⁷⁸ *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68 (2009). In *Bellefonte*, we reversed the admission of two contentions concerning LLRW. Among other things, we rejected the two bases proffered for those contentions, finding that a challenge to LLRW storage may not rely on 10 C.F.R. Part 61, which pertains to land disposal facilities. Further, a LLRW contention may not challenge Table S-3, codified at 10 C.F.R. § 51.51, consistent with our policy that regulations may not be the subject of collateral attack in an adjudication. See 10 C.F.R. § 2.335(a), (b).

⁷⁹ Tr. 310-11.

⁸⁰ Tr. 329-30.

⁸¹ See 10 C.F.R. § 51.51, “Table S-3 — Table of Uranium Fuel Cycle Environmental Data.”

⁸² LBP-09-10, 70 NRC at 121-22.

⁸³ *Id.* at 123.

⁸⁴ *Id.*

1. The Board Did Not Err in Its Application of Commission Precedent

Progress initially argues that the proposed Contentions 7 and 8 are necessarily inadmissible because they are virtually identical to those admitted by the Board in *Bellefonte* and subsequently rejected by the Commission after *sua sponte* review. But this overbroad argument is not persuasive.⁸⁵ The validity of a contention depends on the support provided in the petition and by the contents of the application that is subject to challenge. We recognized this in *Bellefonte* when we stated: “we do not rule out that, in a future COL proceeding, a petitioner could proffer an application-specific contention suitable for litigation on the subject of onsite storage of low-level radioactive waste.”⁸⁶ In short, *Bellefonte* does not necessarily demand rejection of proposed environmental or safety contentions raising the effects of potential long-term onsite storage of LLRW. In fact, the Board applied *Bellefonte* correctly when it eliminated the challenges to Table S-3 and the claim regarding Part 61 licensing.

Although we had not yet ruled on the admissibility of similar LLRW contentions in the *Vogtle* COL and *Calvert Cliffs* COL proceedings⁸⁷ at the time of the Board’s decision here, the Board’s ruling comports with those decisions. In *Vogtle*, we affirmed the Board’s decision to admit a safety-related contention on the potential impact of the lack of disposal options for LLRW at a proposed facility in Georgia. In *Calvert Cliffs*, we approved the Board’s similar decision to admit, as narrowed, a well-pled environmental contention concerning the effects of long-term onsite management of LLRW.⁸⁸ The applicable provision, 10 C.F.R. § 52.79(a)(3), requires an applicant to describe the “kinds and quantities of radioactive materials expected to be produced” in facility operations, and the “means for controlling and limiting radioactive effluents” to comply with Part 20 limits: “In short, the rule pertains to how the COL applicant intends, through its design, operational organization, and procedures, to comply with relevant substantive radiation protection requirements in 10 C.F.R. Part 20.”⁸⁹

2. The Board Did Not Provide New Bases for Contentions 7 and 8

Progress next argues that the Board formulated its own bases to support

⁸⁵ Indeed, we recently rejected a similar argument in *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 923-24 (2009).

⁸⁶ CLI-09-3, 69 NRC at 77 n.42.

⁸⁷ See *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33 (2009); *Calvert Cliffs*, CLI-09-20, 70 NRC 911.

⁸⁸ CLI-09-20, 70 NRC at 923-24.

⁸⁹ *Vogtle*, CLI-09-16, 70 NRC at 37.

Contentions 7 and 8.⁹⁰ With respect to Contention 7, Progress points to a citation in the Board’s ruling to 10 C.F.R. §§ 51.45(b)(1), (2), (5) — provisions discussing broadly the considerations to be discussed in an ER.⁹¹ Progress further claims that the Board improperly invoked 10 C.F.R. § 52.79(a)(3) as support for the admission of Contention 8.⁹² Progress claims that because these provisions were not cited in the Petition, it did not have a “fair opportunity to present argument.”⁹³

We find no reversible error. First, the Board briefly addressed these provisions as part of a lengthy discussion of the two contentions.⁹⁴ The Board rested its decision in significant part on the broader claims found in the Petition, Petitioners’ reply, and at oral argument, not on the few provisions cited toward the end of its ruling. Second, 10 C.F.R. Part 51 contains our regulations implementing NEPA, and section 51.45(b) sets out the broad requirements of an environmental report.⁹⁵ While the Petition did not cite these regulations, it did refer to NEPA. As discussed above with respect to Contention 4, the Board’s reference to Part 51 served simply to clarify the argument presented by Petitioners.

Further, Progress cannot reasonably argue that it did not have fair notice, for example, that Contention 7 includes a claim that the environmental impacts of LLRW storage were inadequately discussed.⁹⁶ In addition, Progress’ representative specifically discussed 10 C.F.R. § 52.79(a)(3) at oral argument, so Progress had a “fair opportunity to present argument” on the applicability of that regulation.⁹⁷ The Board’s recitation of these specific section numbers appears, in our view, to be merely a clarification rather than the addition of new grounds for the contentions.

⁹⁰ Progress Appeal at 18-30.

⁹¹ *Id.* at 24-25.

⁹² *Id.*

⁹³ Progress Appeal at 25.

⁹⁴ LBP-09-10, 70 NRC at 124), *see generally id.* at 116-25.

⁹⁵ Section 51.45(b)(1) requires that the ER discuss “the impact of the proposed action on the environment.”

⁹⁶ At oral argument, Petitioners’ representative explained that at the heart of their claim is the ER’s failure to acknowledge the lack of offsite disposal:

CHAIRMAN KARLIN: [D]oes their ER, they say it deals with the onsite storage. How is it defective or insufficient?

MS. OLSON: It deals with it in anticipation of shipping it offsite for disposal. . . . This one doesn’t talk about any timeline, except that it’s going to be packaged and sent off. And because it doesn’t give detail, we don’t find that that’s an adequate plan for being able to assert that they could handle 40 or 60 years’ worth of so-called low level waste that’s been generated.

See Tr. 314-15.

⁹⁷ *See* Tr. 330-32.

3. *Contentions 7 and 8 Are Admissible as Narrowed by the Board*

Progress argues that the Board effectively “created a new regulatory requirement” that Progress’ ER must “confront the plausible problem of longer term management of [LLRW] onsite”⁹⁸ We disagree; the regulatory basis for the contentions is already grounded in our regulations. As discussed above, we have held that from a safety standpoint, the LLRW storage information required by 10 C.F.R. § 52.79(a)(3) is tied to the COL applicant’s particular plans for compliance through design, operational organization, and procedures.⁹⁹ With respect to the Staff’s environmental review, the EIS must discuss the reasonably foreseeable environmental impacts of the proposed project.¹⁰⁰ Absent a licensed LLRW disposal facility that will accept waste from the Levy County facility, it is reasonably foreseeable that LLRW generated by normal operations will be stored at the site for a longer term than is currently envisioned in Progress’ COL application.¹⁰¹

Progress further argues that in reformulating Contention 8, the Board effectively created a new regulatory requirement that the applicant perform safety calculations for a source term greater than a 2-year period of accumulation.¹⁰² But as the Board explained in its decision, the safety regulations in 10 C.F.R. § 52.79(a)(3) require the COL application to describe the kinds and quantities of radioactive materials that will be produced in operating the plant and to describe the “means for controlling and limiting the radioactive effluents and radiation exposures” within the limits set forth in 10 C.F.R. Part 20.¹⁰³ In our view, the Board reasonably interpreted that existing provision to find that Progress must

⁹⁸ Progress Appeal at 25 (citing LBP-09-10, 70 NRC at 123).

⁹⁹ See *Vogtle*, CLI-09-16, 70 NRC at 37.

¹⁰⁰ NEPA §§ 102, 42 U.S.C. § 4332. See *Sierra Club v. Marsh*, 976 F.2d 763 (1st Cir. 1992).

¹⁰¹ Although Progress’ counsel acknowledged at oral argument that the application currently provides plans for a radwaste building to accommodate approximately 2 years’ accumulation, this is not apparent from the ER itself. See Tr. 330-31. The application states that the solid waste management system will have “sufficient temporary storage,” as provided by the design control document:

The solid waste management system . . . provides temporary onsite storage for wastes prior to processing and for the packed wastes. . . . The system has sufficient temporary waste accumulation capacity based on maximum waste generation rates so that maintenance, repair, or replacement of the solid waste management system equipment does not impact power generation.

Levy Nuclear Plant, Units 1 and 2, COL Application Part 3, Environmental Report, at 3-49. According to the AP1000 Design Control Document, “[t]he packaged waste storage room provides storage for more than two years at the expected rate of generation and more than a year at the maximum rate of generation.” Westinghouse, AP1000 Design Control Document (Rev. 16) Chapter 11, at 11.4-6 (2007).

¹⁰² See Progress Appeal at 27.

¹⁰³ See LBP-09-10, 70 NRC at 36-37.

address, in its COL application, how it intends to handle an accumulation of LLRW.

4. Inclusion of “Greater Than Class C” (GTCC) Waste in Contentions 7 and 8

The Board’s ruling on Contentions 7 and 8 expressly includes the issue of storage of GTCC waste.¹⁰⁴ On this point, we agree with Progress that the Board erred in failing to exclude GTCC waste from the contentions.

GTCC waste¹⁰⁵ is the responsibility of the federal government.¹⁰⁶ GTCC waste is not (and was not) shipped to the Barnwell facility; rather, it is stored onsite with a licensee’s spent nuclear fuel. Given that Contentions 7 and 8 are grounded in the partial closure of the Barnwell facility, we find that Petitioners have not adequately supported their challenge, insofar as it would include GTCC waste. The Petition repeatedly refers to “Class B, C and Greater-than-C” wastes in support of Contentions 7 and 8.¹⁰⁷ However, the proposed contentions do not explain why the partial closure of Barnwell or the capacity limits of the radwaste storage building would affect either the handling of GTCC waste or the amount present. This portion of Contentions 7 and 8 is, as Progress argues, unsupported.

The Board briefly mentioned, but did not respond to, Progress’ argument that GTCC waste is the responsibility of the government and not affected by the partial closure of Barnwell.¹⁰⁸ We observe that other licensing boards that

¹⁰⁴ See LBP-09-10, 70 NRC at 118 n.54 (citing Declaration of Diane D’Arrigo ¶ 5 (Feb. 5, 2009), attached to Petition (“In addition, there is no disposal site for Greater-than-C radioactive wastes which would be generated by the Levy Nuclear Power 1 and 2 reactors if they operate”).

¹⁰⁵ As recently stated by the U.S. Court of Appeals for the Federal Circuit by way of definition: GTCC waste is one of the radioactive byproducts of nuclear power generation. See 10 C.F.R. § 61.55(a)(2). Nuclear power generation creates GTCC when the metal components of a reactor, including the inside of the core shroud surrounding the nuclear core, control rods, and support plates that hold the reactor together, absorb neutrons during operation and become irradiated. Utilities must dispose of GTCC waste before they can decommission reactor sites. *Yankee Atomic Electric Co. v. United States*, 536 F.3d 1268, 1277 (Fed. Cir. 2008).

¹⁰⁶ Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021c(b)(1)(D). See *Yankee Atomic*, 536 F.3d at 1278-79. In *Yankee Atomic*, the Federal Circuit affirmed the finding (in the context of ongoing litigation over DOE’s liability under the Standard Contract) of the Court of Federal Claims that “the conclusions reached with respect to recoverability of [spent nuclear fuel] storage expenses are equally applicable to GTCC waste, which is stored on-site in the same manner as [spent nuclear fuel].” *Yankee Atomic Electric Co. v. United States*, 73 Fed. Cl. 249, 315 (2006).

¹⁰⁷ See Petition at 87-93, 95, 97.

¹⁰⁸ LBP-09-10, 70 NRC at 119.

have considered this issue, particularly the *North Anna*¹⁰⁹ and *Calvert Cliffs*¹¹⁰ Boards, have excluded the consideration of storage of GTCC waste from the scope of admitted LLRW contentions. Although licensing board rulings are not precedential,¹¹¹ we agree with the reasoning set forth by both of those Boards, and likewise find that the GTCC waste issue is outside the scope of this adjudicatory proceeding. We therefore *reverse* the Board's decision to include the impacts of GTCC waste in Contentions 7 and 8, as admitted.

III. CONCLUSION

For the foregoing reasons, we *affirm* the Board's ruling admitting Contention 4, as reformulated. Further, we *affirm in part, and reverse in part*, the Board's decision to admit Contentions 7 and 8.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of January 2010.

¹⁰⁹ *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 313 n.86 (2008) (observing that the partial closure of the Barnwell facility does not affect the disposal of GTCC waste, because GTCC waste disposal is the responsibility of the federal government).

¹¹⁰ *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plants, Unit 3), LBP-09-4, 69 NRC 170, 220-21 (2009) (again observing that the disposal of GTCC waste is the responsibility of the federal government, and that the petitioners did not provide a factual foundation to show that the United States will fail in its responsibility to provide for the disposal of GTCC waste).

¹¹¹ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-22, 62 NRC 542, 544 (2005); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 72-72-EA

DETROIT EDISON COMPANY
(Fermi Power Plant Independent
Spent Fuel Storage Installation)

January 7, 2010

RULES OF PRACTICE: APPEALS

We do not consider arguments or new facts raised for the first time on appeal unless their proponent can demonstrate that the information was previously unavailable. *See, e.g., AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 132-33 & n.38 (2007), *aff'd*, *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3d Cir. 2009).

RULES OF PRACTICE: STANDING

We generally defer to our licensing boards on issues of standing, absent an error of law or abuse of discretion. *See, e.g., Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009).

ENFORCEMENT PROCEEDINGS: SCOPE

In *Bellotti v. NRC*, the U.S. Court of Appeals for the District of Columbia Circuit upheld an NRC decision to limit the scope of an enforcement adjudication to the question of whether the order should be sustained. 725 F.2d 1380 (D.C. Cir. 1983). In subsequent enforcement cases, we have consistently followed the *Bellotti* approach. *See, e.g., State of Alaska Department of Transportation and*

Public Facilities, CLI-04-26, 60 NRC 399 (2004). Under *Bellotti*, petitioners must provide factual support for their claim that injury could be redressed by a favorable Board ruling; that is, that they would be better off if the order were vacated. *See id.* at 406.

ENFORCEMENT ACTIONS: NONADJUDICATORY REMEDIES

If a petitioner wishes to propose security measures in addition to those laid out in a Staff enforcement order, then the petitioner's remedies are either to petition the NRC under 10 C.F.R. § 2.206 for further enforcement action or to petition the NRC under 10 C.F.R. § 2.802 to institute a rulemaking to impose broader security measures.

ADMINISTRATIVE PROCEDURE ACT

It is well established that the Commission has discretion under the Administrative Procedure Act to impose binding, prospectively applicable legal requirements by either rulemaking or adjudication.

MEMORANDUM AND ORDER

On April 17, 2009, the NRC Staff issued an immediately effective Order modifying Detroit Edison Company's (Detroit Edison) general license for an independent spent fuel storage installation (ISFSI) at its Fermi Power Plant site.¹ That Order required Detroit Edison to take certain physical security measures, in addition to those already required by our regulations, to protect the spent fuel it plans to store in the new ISFSI. The following month, nine petitioners (Petitioners) jointly sought to intervene and requested a hearing in which to challenge the Staff Order.² The Atomic Safety and Licensing Board has issued its ruling on standing and contention admissibility, denying their request on the ground that Beyond

¹ In the Matter of Detroit Edison Company; Fermi Power Plant; Independent Spent Fuel Installation; Order Modifying License (Effective Immediately), 74 Fed. Reg. 17,890 (Apr. 17, 2009) (Staff Order).

² Petition of Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville and Marilyn R. Timmer for Leave to Intervene in, and/or Request a Hearing Upon, DTE Order Modifying License of ISFSI Security Provisions (May 7, 2009) (Petition to Intervene).

Nuclear and each individual petitioner failed to demonstrate standing.³ Petitioners have appealed.⁴ We affirm.

I. THE BOARD'S DECISION

The Board ruled solely on the basis of Petitioners' failure to demonstrate standing to intervene. In so doing, the Board considered claims of organizational, representational, and individual standing. The Board first found that Beyond Nuclear had failed to identify any "discrete institutional injury to itself, other than general environmental and policy interests of the sorts the [federal courts and NRC] repeatedly have found insufficient for organizational standing."⁵

Beyond Nuclear also claimed representational standing on behalf of the eight individual petitioners.⁶ All of these claims are based on the proximity of the individuals' residences to the Fermi site — seven live within 17 miles and one within 50 miles.⁷ Based on a finding that none of the Petitioners had demonstrated how the Staff Order "creates any potential for offsite consequences," the Board rejected all claims of presumptive proximity-based standing.⁸

³ LBP-09-20, 70 NRC 565 (2009).

⁴ Petition of Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville and Marilyn R. Timmer for Review of August 21, 2009 ASLB Order (Aug. 31, 2009), at 10 (Appeal). Petitioners' appellate pleading is styled a "petition for review," but is appropriately considered an appeal pursuant to 10 C.F.R. § 2.311(c).

⁵ LBP-09-20, 70 NRC at 576, quoting *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007) (in turn quoting *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001)). The Board also found that Beyond Nuclear had made "no attempt to demonstrate how the [Staff Order] could result in any injury to [its organizational] interests" (*id.* at 576) — a prerequisite to organizational standing (*id.* at 574-75). Petitioners have not appealed the Board's ruling as to Beyond Nuclear's organizational standing, and we consider the argument waived. See *White Mesa*, CLI-01-21, 54 NRC at 253.

⁶ Each person also sought to intervene individually, in the event that Beyond Nuclear was not granted leave to intervene as his or her representative. See, e.g., Declaration of Frank Mantei in Support of Beyond Nuclear Petition to Intervene in Docket 52-033 [sic] (ISFSI Security) (May 7, 2009) (appended to Petition to Intervene) ¶ 3. Each of the other seven individual declarations is identical in this respect.

⁷ LBP-09-20, 70 NRC at 576, 577-78 & n.65. On appeal, Petitioners assert for the first time, based on "recalculation," that several of their number live within just 6 to 8 miles of the site. Appeal at 10. We do not consider arguments or new facts raised for the first time on appeal unless their proponent can demonstrate that the information was previously unavailable, which does not appear to be the case here. See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 132-33 & n.38 (2007), *aff'd*, *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3d Cir. 2009).

⁸ LBP-09-20, 70 NRC at 578.

Finally, the Board considered the redress requirement for standing⁹ and found that none of the individual petitioners had shown how a hearing on the Staff Order could lead to a redress of any asserted injuries.¹⁰ The Board recognized that the scope of this hearing is limited to the question of “whether [the Staff] Order should be sustained” and that, consequently, the only relief available to the petitioners is rescission of the Staff Order.¹¹ The Board concluded that, because the Petitioners have failed to explain why they would “be better off in the absence of the [Staff Order],” they therefore had failed to make the required demonstration that “a hearing will redress their injury.”¹²

Petitioners filed a timely appeal, which challenges the Board’s rulings as to representational and individual standing, and raises additional administrative law issues. Both the Staff and Detroit Edison oppose Petitioners’ appeal.¹³

II. DISCUSSION

We generally defer to our licensing boards on issues of standing, absent an error of law or abuse of discretion.¹⁴ Here, we find the Board’s decision on Petitioners’ standing to be sound and well reasoned, and we affirm that decision for the reasons stated by the Board. Below, we address the standing question briefly, and also explain why other issues Petitioners raise on appeal lack merit.

Petitioners fundamentally challenge the Board’s determination that they failed to explain why they would be better off in the absence of the Staff Order.¹⁵ In particular, Petitioners disagree with the Board’s conclusion that the result of the Staff Order will be “inevitably positive.”¹⁶ In support of their claim of potential “negative effects,” Petitioners express their concern that the Staff Order’s “[i]mposition of new background vetting rules can create the negative of a false sense of security by emphasizing the formation of human security workforce over

⁹ *Id.*

¹⁰ Petitioners assert “various injuries related to a potential terrorist attack affecting onsite fuel storage at the Fermi site.” *Id.*

¹¹ *Id.* (citing 74 Fed. Reg. at 17,892).

¹² *Id.* at 579.

¹³ Response of Detroit Edison Company in Opposition to Petition for Review of Beyond Nuclear and Eight Named Individuals (Sept. 10, 2009) (Detroit Edison Response); NRC Staff’s Response to Petition for Review of LBP-09-20 by Beyond Nuclear, Mark Farris, Michael Keegan, Shirley Steinman, Keith Gunter, Frank Mantei, Marcee Meyers, Leonard Mandeville, and Marilyn R. Timmer (Sept. 10, 2009) (Staff Response).

¹⁴ See, e.g., *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009).

¹⁵ Appeal at 5.

¹⁶ *Id.* at 6.

the substance of putting into place physical barriers and important technologies to protect the plant itself and significant public interests.”¹⁷

In *Bellotti v. NRC*, the U.S. Court of Appeals for the District of Columbia Circuit upheld an NRC decision to limit the scope of an enforcement adjudication to the question of whether the order should be sustained.¹⁸ In subsequent enforcement cases, like the present one, we have consistently followed the *Bellotti* approach.¹⁹ Under *Bellotti*, Petitioners must provide factual support for their claim that injury could be redressed by a favorable Board ruling, that is, that they would be better off if the order were vacated.²⁰ Petitioners here have not made such a showing. Their argument is both cursory and unsupported. They do not explain why the “false sense of security” purportedly created by the Staff Order — whose security benefits Petitioners do not question — would be ameliorated by revoking the Order.²¹

Petitioners also fault the Board for limiting the scope of the proceeding to the Staff Order. In support, they refer merely to security “lapses” at another nuclear plant — the Palisades facility.²² But Petitioners do not explain how these “lapses” at another site are relevant to the Staff Order regarding the Fermi ISFSI or how they support the conclusion that Petitioners would be better off if that Order were vacated.

In sum, Petitioners’ assertions fail to demonstrate that implementation of the Staff Order would erode ISFSI or plant security at the Fermi site.

Petitioners also claim that the Staff Order constitutes an inappropriate “*ad hoc* rulemaking,” observing that “[r]ules adopted on a case-by-case basis without due consideration of the reality of practice can create unfortunate and unintended

¹⁷ *Id.* at 12-13. They complain that the Board “restricted its analysis of potential harm to the ends of the new rules being imposed by the April 7 order (i.e., putting new background vetting practices into effect), instead of the possibility that those rules . . . might have zero positive effect, or even *negative effects* through bungling or incompetence, on Fermi 2 ISFSI security.” *Id.* at 10 (emphasis added).

¹⁸ 725 F.2d 1380 (D.C. Cir. 1983). In other words, as the Board observed, under *Bellotti*, “a petitioner must show that he would be better off in the absence of any order at all.” LBP-09-20, 70 NRC at 575.

¹⁹ *See, e.g., State of Alaska Department of Transportation and Public Facilities*, CLI-04-26, 60 NRC 399 (2004) (*Alaska DOT*).

²⁰ *See id.* at 406 (requiring demonstration of an injury attributable to the confirmatory order at issue).

²¹ If Petitioners wish to propose security measures in addition to those laid out in the Staff Order, their remedy is to petition the NRC under 10 C.F.R. § 2.206 for further enforcement action. In the alternative, Petitioners may ask the NRC to institute a rulemaking to impose broader security measures. *See* 10 C.F.R. § 2.802.

²² *See* Appeal at 10; Petition to Intervene at 14-15 (citing an article in *Esquire* magazine and related correspondence between then-Chairman Klein and Representative Edward Markey).

consequences.”²³ But this argument fails as a matter of law. It is well established that the Commission has discretion under the Administrative Procedure Act (APA) to impose binding, prospectively applicable legal requirements either by rulemaking or adjudication. Indeed, in our 2005 decision in *All Power Reactor Licensees*, we considered in some detail essentially the same question that Petitioners raise here — namely, whether issuance of a post-9/11 security order, similar in form to the Staff Order, amounted to a regulation. We concluded that it did not.²⁴ An order modifying a license, such as the Staff Order, falls well within the APA’s definition of “adjudication.”²⁵ As such, the Staff Order did not trigger the notice-and-comment procedures applicable to rulemakings.²⁶

Petitioners are incorrect in claiming an unlawful deprivation of hearing “rights.”²⁷ As *Bellotti* held, the scope of a hearing in an adjudication on an enforcement order is limited to whether the order should be sustained.²⁸ As in the *All Power Reactor Licensees* case, this matter involves the enforcement of security via adjudication. Although the scope of the hearing is limited, the agency meets its “hearing” obligations under the Atomic Energy Act in this matter by offering a hearing on the order. Therefore, the NRC proceeded properly in issuing its Order, subject to a hearing opportunity. As noted above, the NRC provides a separate process, under 10 C.F.R. § 2.206, for any interested person to seek enforcement actions beyond those adopted in the Staff Order. Petitioners may raise their concerns with the Commission at any time by filing a petition under that section.²⁹

²³ Appeal at 7. Based on this argument, Petitioners appear to claim standing on the grounds that they have a procedural interest in notice of the imposition of security measures. *See id.* at 13.

²⁴ *See All Power Reactor Licensees and Research Reactor Licensees Who Transport Spent Nuclear Fuel*, CLI-05-6, 61 NRC 37 (2005) (concluding that certain NRC security orders did not amount to unlawfully promulgated regulations). CLI-05-6 involved an immediately effective order imposing enhanced security measures for spent nuclear fuel shipments. As in the 2005 security order case, the Staff Order at issue here neither repudiates nor rescinds any NRC safety and security requirements, but rather imposes new, more stringent security requirements that supplement those already found in NRC regulations. *See generally National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947).

²⁵ *All Power Reactor Licensees*, CLI-05-6, 61 NRC at 41.

²⁶ *See id.* at 39, 41.

²⁷ *See* Appeal at 13 (citing 42 U.S.C. § 2239(a)).

²⁸ *See Alaska DOT*, CLI-04-26, 60 NRC at 404-06; *Bellotti*, 725 F.2d at 1381-82. *See generally Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-43 (1980) (articulating policy reasons for limiting the scope of enforcement proceedings).

²⁹ *See Bellotti*, 725 F.2d at 1383. As stated above, members of the public may also submit views on the proper scope or content of the NRC’s security requirements via a petition for rulemaking under 10 C.F.R. § 2.802.

Finally, Petitioners maintain that this proceeding “is the first and only opportunity they have had to request a hearing to critique the December 10, 2007 nonpublic notice sent by [Detroit Edison] to the NRC wherein the utility asserted its choice of Holtec casks for its ISFSI.”³⁰ This is essentially a restatement of one of Petitioners’ three contentions, raised in its initial petition.³¹ Although the Board did not expressly rule on Petitioners’ proposed contentions, and we need not decide the issue here, it appears that none of Petitioners’ proposed contentions relates directly to the ISFSI, let alone argues that the Staff Order should not be sustained.³² Therefore, they are beyond the scope of this proceeding.

III. CONCLUSION

For the reasons set forth both here and by the Board, LBP-09-20 is *affirmed*.
IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of January 2010.

³⁰ Appeal at 11.

³¹ See Petition to Intervene at 15-20.

³² The proposed contentions are somewhat diffuse. Petitioners generally assert that both the Fermi site and the Holtec dry casks are vulnerable to attack and that adequate security measures must therefore be implemented. They provide a number of references for the general propositions that “security vulnerabilities have long been identified” and that they seek to intervene to “ensure that adequate security is instituted” at Fermi “over its on-site stored irradiated nuclear fuel.” Petition to Intervene at 7-15. Petitioners also request an independent quality assurance inspection of the Holtec HI-STORM 100 dry casks prior to their introduction into the Fermi site. *Id.* at 15-20. Finally, they request that the NRC prepare an environmental impact statement, including a sociological impacts analysis that considers potential infringements of civil liberties. *Id.* at 20-23.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 70-7016

**GE-HITACHI GLOBAL LASER
ENRICHMENT LLC
(GLE Commercial Facility)**

January 7, 2010

The Commission provides notice of its docketing and consideration of the 10 C.F.R. Part 70 license application submitted by GE Hitachi Global Laser Enrichment LLC (GEH), for authorization to possess and use source, byproduct, and special nuclear material to enrich natural uranium by a laser-based enrichment process at its planned GLE Commercial Facility to be built in the City of Wilmington in New Hanover County, North Carolina. In addition to providing notice of the application, the Commission also gives notice of hearing, Commission guidance on the conduct of the proceeding, and procedures for access to sensitive unclassified nonsafeguards information and safeguards information for contention preparation.

MANDATORY HEARING (URANIUM ENRICHMENT FACILITY)

Pursuant to 10 C.F.R. § 70.23a and section 193 of the AEA, as amended, a hearing will be conducted according to the rules of practice in 10 C.F.R. Part 2, Subparts A, C, G, and to the extent that classified information becomes involved, Subpart I. The hearing will be held under the authority of sections 53, 63, 189, 191, and 193 of the AEA.

**MANDATORY HEARING: MATTERS FOR CONSIDERATION
(URANIUM ENRICHMENT FACILITY)**

The matters of fact and law to be considered in a proceeding on an application for a license to construct and operate a uranium enrichment facility are whether the application satisfies the applicable standards in 10 C.F.R. Parts 30, 40, and 70, and whether the requirements of the National Environmental Policy Act of 1969 (NEPA) and the NRC's implementing regulations in 10 C.F.R. Part 51 have been met.

MANDATORY HEARING: SCOPE OF REVIEW (UNCONTESTED MATTERS)

When a proceeding involving an application for a uranium enrichment facility is uncontested, the Licensing Board will determine without conducting a *de novo* evaluation of the application: whether the applicant and record of the proceeding contain sufficient information to support license issuance; whether the NRC Staff's review of the application has been adequate to support findings to be made by the Director of the Office of Nuclear Materials Safety and Safeguards; and whether the review conducted by the NRC Staff pursuant to 10 C.F.R. Part 51 has been adequate.

MANDATORY HEARING: SCOPE OF REVIEW (ENVIRONMENT)

Regardless of whether a proceeding on an application for a uranium enrichment facility is contested or uncontested, the Licensing Board will, in its initial decision, in accordance with Subpart A of 10 C.F.R. Part 51: (1) determine whether the requirements of section 102(2)(A), (C), and (E) of NEPA and Subpart A of Part 51 have been complied with in the proceeding; (2) independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and (3) determine, after weighing the environmental, economic, technical, and other benefits against the environmental and other costs, and considering reasonable alternatives, whether a license should be issued, denied, or conditioned to protect environmental values.

**RULES OF PRACTICE: SCOPE AND TYPE OF PROCEEDING
(CONTESTED PROCEEDING; MANDATORY HEARING)**

If the proceeding on an application for a uranium enrichment facility becomes a contested proceeding, the Licensing Board shall make findings of fact and conclusions of law on admitted contentions. Moreover, with respect to matters relating to the applicable standards of 10 C.F.R. Parts 30, 40, and 70, and the

adequacy of the Staff's review pursuant to Part 51, but not covered by admitted contentions, the Board will determine, without conducting a *de novo* evaluation of the application: whether the applicant and record of the proceeding contain sufficient information to support license issuance; whether the NRC Staff's review of the application has been adequate to support findings to be made by the Director of the Office of Nuclear Materials Safety and Safeguards; and whether the review conducted by the NRC Staff pursuant to 10 C.F.R. Part 51 has been adequate.

RULES OF PRACTICE: INTERVENTION

To intervene in an NRC proceeding, a petitioner must file a written petition for leave to intervene in accordance with the requirements of 10 C.F.R. § 2.309. In addition to setting forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding, a petition for leave to intervene must also include a specification of the contentions that the petitioner seeks to have litigated in the hearing. Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully with respect to resolution of that person's admitted contentions.

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

For each contention, the petitioner must assert an issue of law or fact that is within the scope of the proceeding and is material to the outcome of the licensing proceeding. Each contention must be one that, if proven, would entitle the petitioner to relief.

ORDER

(Notice of Receipt of Application for License; Notice of Consideration of Issuance of License; Notice of Hearing and Commission Order; and Order Imposing Procedures for Access to Sensitive Unclassified Nonsafeguards Information and Safeguards Information for Contention Preparation)

I. RECEIPT OF APPLICATION AND AVAILABILITY OF DOCUMENTS

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC or the Commission) received on June 26, 2009, an application from GE-Hitachi Global Laser Enrichment LLC (GLE), for a license to possess and use source,

byproduct, and special nuclear material and to enrich natural uranium to a maximum of 8% U-235 by a laser-based enrichment process. The plant, to be known as the GLE Commercial Facility (GLE-CF), would be located approximately 6 miles north of the City of Wilmington in New Hanover County, North Carolina, and would have a nominal capacity of 6 million separative work units (SWU) per year.

GLE is a Delaware limited liability company and is a subsidiary of majority owner and Delaware limited liability company GE-Hitachi Nuclear Energy Americas LLC (GEH), which is a wholly owned subsidiary of GE-Hitachi Nuclear Energy Holdings LLC (GEH-Holdings). GEH-Holdings is a subsidiary of majority owner GENE Holding LLC (GENE) and minority owner Hitachi America, Ltd. GENE, also a Delaware limited liability company, is wholly owned by General Electric Company (GE), a United States corporation incorporated in New York. Hitachi America is a wholly owned subsidiary of Hitachi Ltd., a Japanese corporation. GLE also has two minority owners, GENE and Cameco Enrichment Holdings, LLC, a Delaware limited liability company wholly owned by Cameco US Holdings, Inc., a Nevada corporation, which is in turn wholly owned by Cameco Corporation, a Canadian corporation. GE, through its wholly owned and majority owned subsidiaries, has a 51% indirect interest in GLE. GLE's minority owners Hitachi and Cameco have indirect interests of 25% and 24%, respectively.

On January 13, 2009, GLE was granted an exemption to file its environmental report in advance of its license application. GLE submitted its environmental report on January 30, 2009; and on July 13, 2009, GLE submitted a supplement to its environment report, GLE Environmental Report Supplement 1 — Early Construction. On April 9, 2009, the NRC published notice of its intent to prepare an Environmental Impact Statement (EIS) on the proposed action and the opportunity for public comment on the appropriate scope of issues to be considered in the EIS. *See* 74 Fed. Reg. 16,237 (Apr. 9, 2009). By notice published in the *Federal Register* on July 24, 2009, the NRC extended the public comment period to allow members of the public to review the publicly available portions of the license application filed after June 26, 2009. *See* 74 Fed. Reg. 36,781 (July 24, 2009). On August 6, 2009, the NRC Staff notified GLE by letter that Staff had completed its acceptance review and had determined that the application was acceptable for formal review.

Copies of GLE's application, safety analysis report, environmental report, and supplement to its environmental report (except for portions subject to withholding from public inspection in accordance with 10 C.F.R. § 2.390, Availability of Public Records) are available for public inspection at the Commission's Public Document Room (PDR) at One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. These documents are also available for review and copying using any of the following methods: (1) enter the NRC's GE Laser Enrichment Facility Licensing website at <http://www.nrc.gov/materials/fuel-cycle-fac/laser.html#2a>; (2) enter

the NRC's Agencywide Documents Access and Management System (ADAMS) at <http://www.nrc.gov/reading-rm/adams.html>, where the accession number for GLE's Environmental Report is ML090910573; accession number for the license application is ML091871003, and the accession number for Supplement 1 to the Environmental Report is ML092100577; (3) contact the PDR by calling (800) 397-4209, faxing a request to (301) 415-3548, or sending a request by electronic mail to pdrc@nrc.gov. Hard copies of the documents are available from the PDR for a fee.

As indicated above, GLE's initial application has been accepted for docketing and formal review (ADAMS Accession No. ML091960561) and, accordingly, the Commission is providing this notice of hearing and notice of opportunity to intervene in GLE's application for a license to construct and operate a laser enrichment facility. Pursuant to the Atomic Energy Act of 1954, as amended (AEA), the NRC Staff will prepare a safety evaluation report (SER) after reviewing the application and make findings concerning the public health and safety and common defense and security. In addition, pursuant to the National Environmental Policy Act of 1969 (NEPA) and the Commission's regulations in 10 C.F.R. Part 51, the NRC Staff will complete an environmental evaluation and prepare an EIS before the hearing on the issuance of a license is completed. *See* Notice of Intent to Prepare an Environmental Impact Statement for the Proposed General Electric-Hitachi Global Laser Enrichment Uranium Enrichment Facility, 74 Fed. Reg. 16,237 (Apr. 9, 2009); and Extension of Public Scoping Period for the Environmental Impact Statement for the Proposed General Electric-Hitachi Global Laser Enrichment Facility, 74 Fed. Reg. 36,781 (July 24, 2009).

When available, the NRC Staff's SER and EIS (except for portions subject to withholding from public inspection in accordance with 10 C.F.R. § 2.390) will also be placed in the PDR and in ADAMS. Copies of correspondence between the NRC and GLE, and transcripts of prehearing conferences and hearings (except for portions subject to withholding from public inspection in accordance with 10 C.F.R. § 2.390) similarly will be made available to the public.

If, following the hearing, the Commission is satisfied that GLE has complied with the Commission's regulations and the requirements of this Notice and Commission Order and the Commission finds that the application satisfies the applicable standards set forth in 10 C.F.R. Parts 30, 40, and 70, a single license will be issued authorizing: (1) the construction and operation of the GLE-CF; and (2) the receipt, possession, use, delivery, and transfer of byproduct (e.g., calibration sources), source, and special nuclear material at the GLE-CF. If the GLE-CF is licensed, prior to commencement of operations the NRC will verify through an inspection conducted in accordance with section 193c of the AEA and 10 C.F.R. § 70.32(k) that the facility meets the construction and operation requirements of the license. The inspection findings will be published in the *Federal Register*.

II. NOTICE OF HEARING

A. Pursuant to 10 C.F.R. § 70.23a and section 193 of the AEA, as amended by the Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990, Pub. L. No. 101-575, § 5, 104 Stat. 2834, 2835-36 (codified as amended at 42 U.S.C. § 2243), a hearing will be conducted according to the rules of practice in 10 C.F.R. Part 2, Subparts A, C, G, and to the extent that classified information becomes involved, Subpart I. The hearing will be held under the authority of sections 53, 63, 189, 191, and 193 of the AEA. The Applicant and the NRC Staff shall be parties to the proceeding.

B. Pursuant to 10 C.F.R. Part 2, Subparts C and G, a contested hearing shall be conducted by an Atomic Safety and Licensing Board (Licensing Board) appointed by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel. Notice as to the membership of the Licensing Board will be published in the *Federal Register* at a later date.

C. The matters of fact and law to be considered are whether the application satisfies the standards set forth in this Notice and Commission Order and the applicable standards in 10 C.F.R. Parts 30, 40, and 70, and whether the requirements of NEPA and the NRC's implementing regulations in 10 C.F.R. Part 51 have been met.

D. If this proceeding is not a contested proceeding, as defined by 10 C.F.R. § 2.4, the Licensing Board will determine the following without conducting a *de novo* evaluation of the application: (1) whether the application and record of the proceeding contain sufficient information to support license issuance and whether the NRC Staff's review of the application has been adequate to support findings to be made by the Director of the Office of Nuclear Materials Safety and Safeguards with respect to the matters set forth in paragraph C of this section; and (2) whether the review conducted by the NRC Staff pursuant to 10 C.F.R. Part 51 has been adequate.

E. Regardless of whether the proceeding is contested or uncontested, the Licensing Board will, in the initial decision, in accordance with Subpart A of 10 C.F.R. Part 51: determine whether the requirements of section 102(2)(A), (C), and (E) of NEPA and Subpart A of 10 C.F.R. Part 51 have been complied with in the proceeding; independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and determine, after weighing the environmental, economic, technical, and other benefits against the environmental and other costs,

and considering reasonable alternatives, whether a license should be issued, denied, or appropriately conditioned to protect environmental values.

F. If the proceeding becomes a contested proceeding, the Licensing Board shall make findings of fact and conclusions of law on admitted contentions. With respect to matters set forth in paragraph C of this section, but not covered by admitted contentions, the Licensing Board will make the determinations set forth in paragraph D without conducting a *de novo* evaluation of the application.

III. INTERVENTION

A. By March 15, 2010, any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Petitions for leave to intervene shall be filed in accordance with the provisions of 10 C.F.R. § 2.309. Interested persons should consult 10 C.F.R. Part 2, section 2.309, which is available at the NRC's PDR, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, MD (or call the PDR at (800) 397-4209 or (301) 415-4737). NRC regulations are also accessible electronically from the NRC's Electronic Reading Room on the NRC website at <http://www.nrc.gov>.

As required by 10 C.F.R. § 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition must provide the name, address, and telephone number of the petitioner and specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) the nature of the petitioner's right under the AEA to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding on the petitioner's interest.

A petition for leave to intervene must also include a specification of the contentions that the petitioner seeks to have litigated in the hearing. For each contention, the petitioner must provide a specific statement of the issue of law or fact to be raised or controverted, as well as a brief explanation of the basis for the contention. Additionally, the petitioner must demonstrate that the issue raised by each contention is within the scope of the proceeding and is material to the findings the NRC must make to support the granting of a license in response to GLE's application. The petition must also include a concise statement of the alleged facts or expert opinions which support the position of the petitioner and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely. Finally, the petition must provide sufficient information to show that a genuine dispute

exists with the Applicant on a material issue of law or fact, including references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. Each contention must be one that, if proven, would entitle the petitioner to relief.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions, including the opportunity to present evidence and to submit a cross-examination plan for cross-examination of witnesses, consistent with NRC regulations, policies, and procedures. The Licensing Board will set the time and place for any prehearing conferences and evidentiary hearings, and the appropriate notices will be provided.

Nontimely petitions for leave to intervene and contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the Licensing Board, or a Presiding Officer that the petition should be granted and/or the contentions should be admitted based upon a balancing of the factors specified in 10 C.F.R. § 2.309(c)(1)(i)-(viii).

B. A state, county, municipality, federally recognized Indian tribe, or agencies thereof, may submit a petition to the Commission to participate as a party under 10 C.F.R. § 2.309(d)(2). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by March 15, 2010. The petition must be filed in accordance with the filing instructions in Section IV, and should meet the requirements for petitions for leave to intervene set forth in Section III.A, except that state and federally recognized Indian tribes do not need to address the standing requirements in 10 C.F.R. § 2.309(d)(1) if the facility is located within its boundaries. The entities listed above could also seek to participate in a hearing as a nonparty pursuant to 10 C.F.R. § 2.315(c).

C. Any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance pursuant to the provisions of 10 C.F.R. § 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to such limits and conditions as may be imposed by the Licensing Board. Persons desiring to make a limited appearance are requested to inform the Secretary of the Commission by March 15, 2010.

IV. ELECTRONIC SUBMISSIONS (E-FILING)

All documents filed in NRC adjudicatory proceedings, including a petition for leave to intervene and proffered contentions, any motion or other document filed in the proceeding prior to the submission of a petition to intervene, and documents filed by interested governmental entities participating under 10 C.F.R. § 2.315(c), must be filed in accordance with the NRC E-Filing rule. The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet or, in some cases, to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner must contact the Office of the Secretary by e-mail at Hearing.Docket@nrc.gov, or by calling (301) 415-1677, to request: (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at <http://www.nrc.gov/sitehelp/e-submittals/install-viewer.html>. Information about applying for a digital ID certificate is available on NRC's public website at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>.

Once a petitioner has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a petition for leave to intervene including proffered contentions. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public website at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance through the "Contact Us" link located on the NRC website at <http://www.nrc.gov/site-help/e-submittals.html> or by calling the NRC electronic filing Help Desk, which is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays. The toll-free help line number is (866) 672-7640. A person filing electronically may also seek assistance by sending an e-mail to the NRC electronic filing Help Desk at MSHD.Resource@nrc.gov.

Participants who believe that they have a good cause for not submitting documents electronically must, in accordance with 10 C.F.R. § 2.302(g), file an exemption request with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) first-class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville, Pike, Rockville, MD, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at http://ehd.nrc.gov/EHD_Proceeding/home.asp, unless excluded pursuant to an order of the Commission, the Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

V. COMMISSION GUIDANCE

A. Licensing Board Determination of Contentions

The Licensing Board shall issue a decision on the admissibility of contentions no later than June 14, 2010.

B. Novel Legal Issues

If rulings on petitions, contention admissibility, or admitted contentions raise novel legal or policy questions, the Commission will provide early guidance and direction on the treatment and resolution of such issues. Accordingly, the Commission directs the Licensing Board to promptly certify to the Commission in accordance with 10 C.F.R. §§ 2.319(l) and 2.323(f) all novel legal or policy issues that would benefit from early Commission consideration should such issues arise in this proceeding.

C. Discovery Management

1. All parties, except the NRC Staff, shall make the mandatory disclosures required by 10 C.F.R. § 2.704(a) and (b) within forty-five (45) days of the issuance of the Licensing Board order admitting contentions.

2. The Licensing Board, consistent with fairness to all parties, should narrow the issues requiring discovery and limit discovery to no more than one round for admitted contentions.

3. All discovery against the NRC Staff shall be governed by 10 C.F.R. §§ 2.336(b) and 2.709. The NRC Staff shall comply with 10 C.F.R. § 2.336(b) no later than 30 days after the Licensing Board order admitting contentions and shall update the information at the same time as the issuance of the SER or the Final Environmental Impact Statement (FEIS), and, subsequent to the publication of the SER and FEIS, as otherwise required by the Commission's regulations. Discovery under 10 C.F.R. § 2.709 shall not commence until the issuance of the particular document, i.e., SER or EIS, unless the Licensing Board, in its discretion, finds that commencing discovery against the NRC Staff on safety issues before the SER is issued, or on environmental issues before the FEIS is issued will expedite the hearing without adversely affecting the Staff's ability to complete its evaluation in a timely manner.

4. No later than 30 days before the commencement of the hearing at which an issue is to be presented, all parties other than the NRC Staff shall make the pretrial disclosures required by 10 C.F.R. § 2.704(c).

D. Hearing Schedule

In the interest of providing a fair hearing, avoiding unnecessary delays in NRC's review and hearing process, and producing an informed adjudicatory record that supports the licensing determination to be made in this proceeding, the Commission expects that both the Licensing Board and NRC Staff, as well as the Applicant and other parties to this proceeding, will follow the applicable requirements contained in 10 C.F.R. Part 2 and guidance in the Commission's

Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998) (63 Fed. Reg. 41,872 (Aug. 5, 1998)) to the extent that such guidance is not inconsistent with specific guidance in this Order. The guidance in the *Statement of Policy on Conduct of Adjudicatory Proceedings* is intended to improve the management and the timely completion of the proceeding and addresses hearing schedules, parties' obligations, contentions, and discovery management. In addition, the Commission is providing the following direction for this proceeding:

1. The Commission directs the Licensing Board to set a schedule for the hearing in this proceeding consistent with this Order that establishes, as a goal, the issuance of a final Commission decision on the pending application within 2½ years (30 months) from the date of this Order. Accordingly, the Licensing Board should issue its decision on either the contested or mandatory hearing, or both, held in this matter no later than 28½ months (855 days) from the date of this Order. Formal discovery against the Staff shall be suspended until after the Staff completes its final SER and EIS in accordance with the direction provided in paragraph V.C.3, above.

2. The evidentiary hearing with respect to issues should commence promptly after completion of the final Staff documents (SER or EIS) unless the Licensing Board, in its discretion, finds that starting the hearing with respect to one or more safety issues prior to issuance of the final SER¹ (or one or more environmental contentions directed to the Applicant's Environmental Report) will expedite the proceeding without adversely impacting the Staff's ability to complete its evaluations in a timely manner.

3. The Commission also believes that issuing a decision on the pending application within about 2½ years may be reasonably achieved under the rules of practice contained in 10 C.F.R. Part 2 and the enhancements directed by this Order. We do not expect the Licensing Board to sacrifice fairness and sound decision making to expedite any hearing granted on this application. We do expect the Licensing Board to use the applicable techniques specified in: this Order; 10 C.F.R. §§ 2.332, 2.333, and 2.334; and the Commission's *Policy Statement on the Conduct of Adjudicatory Proceedings* (CLI-98-12, *supra*) to ensure prompt and

¹The Commission believes that, in the appropriate circumstances, allowing discovery or an evidentiary hearing with respect to safety-related issues to proceed before the final SER is issued will serve to further the Commission's objective, as reflected in the *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, *supra*, to ensure a fair, prompt, and efficient resolution of contested issues. For example, it may be appropriate for the Board to permit discovery against the Staff and/or the commencement of an evidentiary hearing with respect to safety issues prior to the issuance of the final SER in cases where the Applicant has responded to the Staff's "open items" and there is an appreciable lag time until the issuance of the final SER, or in cases where the initial SER identifies only a few open items.

efficient resolution of contested issues. *See also Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981).

4. If this is a contested proceeding, the Licensing Board should adopt the following milestones, in developing a schedule, for conclusion of significant steps in the adjudicatory proceeding.²

Within <i>March 15, 2010</i>	Deadline for Requests for Hearing; Petitions to Intervene and Contentions; and Requests for Limited Participation.
Within <i>April 13, 2010</i>	Answers to Requests for Hearing; Petitions to Intervene and Request for Limited Participation.
Within <i>April 23, 2010</i>	Replies to Answers regarding Requests for Hearing; Petitions to Intervene and Request for Limited Participation.
Within <i>May 13, 2010</i>	Licensing Board holds Prehearing Conference to hear arguments on petitions to intervene and contention admissibility.
Within <i>30 days</i> of prehearing conference	Licensing Board issues order determining intervention. Discovery commences, except against the Staff.
Within <i>10 days</i> of the Licensing Board order determining intervention:	Persons admitted or entities participating under 10 C.F.R. § 2.309(d) may submit a motion for reconsideration (see below, in Section VI.B).*
Within <i>20 days</i> of the Licensing Board order determining intervention:	Persons admitted or entities participating under 10 C.F.R. § 2.309(d) may respond to any motion for reconsideration.

²This schedule assumes that the SER and FEIS are issued essentially at the same time. If these documents are not to be issued very close in time, the Board should adopt separate schedules but concurrently running for the safety and environmental reviews consistent with the time frames herein for each document.

Within <i>30 days</i> of the Licensing Board decision determining intervention:	Staff prepares hearing file.
Date of issuance of final SER/EIS	Staff updates hearing file. Discovery commences against the Staff.
Within <i>20 days</i> of the issuance of the final SER/EIS:	Motions to amend contentions; motions for late-filed contentions.
Within <i>40 days</i> of the issuance of final SER/EIS:	Completion of answers and replies to motions for amended and late-filed contentions. Completion of discovery on original contentions. Deadline for summary disposition motions on original contentions.**
Within <i>50 days</i> of the issuance of the final SER/EIS:	Licensing Board decision on admissibility of late-filed contentions.**
Within <i>55 days</i> of the issuance of the final SER/EIS:	Licensing Board determination as to whether resolution of any motion for summary disposition will serve to expedite the proceedings.
Within <i>65 days</i> of the issuance of the final SER/EIS:	Answers to motions for summary disposition identified by Licensing Board.
Within <i>75 days</i> of the issuance of the final SER/EIS:	Replies to answers to motions for summary disposition.
Within <i>80 days</i> of the issuance of final SER/EIS:	Completion of discovery on late-filed contentions.
Within <i>105 days</i> of the issuance of the final SER/EIS:	Licensing Board decision on summary disposition motions on original contentions.
Within <i>115 days</i> of the issuance of final SER/EIS:	Direct testimony filed on original contentions and any amended or admitted late-filed contentions.
Within <i>125 days</i> of the issuance of final SER/EIS:	Cross-examination plans filed on original contentions and any amended or admitted late-filed contentions.

Within <i>135 days</i> of the issuance of final SER/EIS:	Evidentiary hearing begins on original contentions and any amended or admitted late-filed contentions.
Within <i>160 days</i> of the issuance of final SER/EIS:	Completion of evidentiary hearing on remaining contentions and any amended or admitted late-filed contentions.
Within <i>205 days</i> of the issuance of final SER/EIS:	Completion of findings and replies.
Within <i>245 days</i> of the issuance of final SER/EIS:	Licensing Board's initial decision.***

*Motions for reconsideration do not stay this schedule.

**No summary disposition motions on late-filed contentions are contemplated.

***The Licensing Board's initial decision with respect to either a contested adjudicatory hearing or an uncontested, mandatory hearing should be issued no later than 28 1/2 months from the date of this Order.

To avoid unnecessary delays in the proceeding, the Licensing Board should not routinely grant requests for extensions of time and should manage the schedule such that the overall hearing process is completed within 28 1/2 months. Although summary disposition motions are included in the schedule above, the Licensing Board shall not entertain motions for summary disposition under 10 C.F.R. § 2.710, unless the Licensing Board finds that such motions, if granted, are likely to expedite the proceeding. Unless otherwise justified, the Licensing Board shall provide for the simultaneous filing of answers to proposed contentions, responsive pleadings, proposed findings of fact, and other similar submittals.

5. Parties are obligated to comply with applicable requirements in 10 C.F.R. Part 2, unless directed otherwise by this Order or the Licensing Board. They are also obligated in their filings before the Licensing Board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, a party being dismissed from the proceeding.

6. The Commission directs the Licensing Board to inform the Commission promptly, in writing, if the Licensing Board determines that any single milestone could be missed by more than 30 days. The Licensing Board must include an explanation of why the milestone cannot be met and the measures the Licensing Board will take to mitigate the failure to achieve the milestone and restore the proceeding to the overall schedule.

E. Commission Oversight

As in any proceeding, the Commission retains its inherent supervisory authority over the proceeding to provide additional guidance to the Licensing Board and participants and to resolve any matter in controversy itself.

VI. APPLICABLE REQUIREMENTS

A. Licensing

The Commission will license and regulate byproduct, source, and special nuclear material at the GLE-CF in accordance with the Atomic Energy Act of 1954, as amended. Section 274c(1) of the AEA was amended by Public Law 102-486 (October 24, 1992) to require the Commission to retain authority and responsibility for the regulation of uranium enrichment facilities. Therefore, in compliance with law, the Commission will be the sole licensing and regulatory authority with respect to byproduct, source, and special nuclear material for the GLE-CF and with respect to the control and use of any equipment or device in connection therewith.

Many rules and regulations in 10 C.F.R. Chapter I are applicable to the licensing of a person to receive, possess, use, transfer, deliver, or process byproduct, source, or special nuclear material in the quantities that would be possessed at the GLE-CF. These include 10 C.F.R. Parts 19, 20, 21, 25, 30, 40, 51, 70, 71, 73, 74, 95, 140, 170, and 171 for the licensing and regulation of byproduct, source, and special nuclear material, including requirements for notices to workers, reporting of defects, radiation protection, waste disposal, decommissioning funding, and insurance.

With respect to these regulations, the Commission notes that this is the fifth proceeding involving the licensing of an enrichment facility. The Commission issued a number of decisions in earlier proceedings regarding proposed sites in Homer, Louisiana (Claiborne Enrichment Center); Eunice, New Mexico (National Enrichment Facility); and Piketon, Ohio (American Centrifuge Plant). These final decisions — *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-92-7, 35 NRC 93 (1992); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-5, 61 NRC 22, 36 (2005); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-17, 62 NRC 5 (2005); *USEC Inc.* (American Centrifuge Plant), CLI-07-5, 65 NRC 109 (2007) — resolve a number of issues concerning uranium enrichment licensing and may be relied upon as precedent.

Consistent with the AEA, and the Commission's regulations, the Commission is providing the following direction for licensing uranium enrichment facilities.

1. Environmental Issues

a. General

Part 51 of 10 C.F.R. governs the preparation of an environmental report and an EIS for a materials license. GLE's environmental report and the NRC Staff's associated EIS are to include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative.

b. Treatment of Depleted Uranium Hexafluoride Tails

As to the treatment of the disposition of depleted uranium hexafluoride tails (depleted tails) in these environmental documents, unless GLE demonstrates a use for uranium in the depleted tails as a potential resource, the depleted tails will be considered waste. The Commission has previously concluded that depleted uranium from an enrichment facility is appropriately classified as low-level radioactive waste. *See Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-5, 61 NRC 22, 36 (2005). An approach for disposition of tails that is consistent with the USEC Privatization Act, such as transfer to DOE for disposal, constitutes a "plausible strategy" for disposition of the GLE depleted tails. *Id.* The NRC Staff may consider the Department of Energy's "Final Programmatic Environmental Impact Statement for Alternative Strategies for the Long-Term Management and Use of Depleted Uranium Hexafluoride" (DOE/EIS-0269), 64 Fed. Reg. 43,358 (Aug. 10, 1999), in preparing the Staff's EIS. Alternatives for the disposition of depleted uranium tails will need to be addressed in these documents. As part of the licensing process, GLE must also address the health, safety, and security issues associated with the onsite storage of depleted uranium tails pending removal of the tails from the site for disposal or DOE disposition.

2. Financial Qualifications

Review of financial qualifications for enrichment facility license applications is governed by 10 C.F.R. Part 70. In *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 309 (1997), the Commission held that the 10 C.F.R. Part 70 financial criteria, 10 C.F.R. §§ 70.22(a)(8) and 70.23(a)(5), could be met by conditioning the LES license to require funding commitments to be in place prior to construction and operation. The specific license condition imposed — providing one way to satisfy the requirements of

10 C.F.R. Part 70 — required LES to have in place prior to commencement of construction or operation: a minimum equity contribution of 30% of project costs from the parents and affiliates of LES partners prior to construction of the associated capacity; firm funding commitments for the remaining project costs; and long-term enrichment contracts with prices sufficient to cover both construction and operating costs, including a return on investment, for the entire term of the contracts.

3. *Antitrust Review*

Section 105 of the AEA conferred on the NRC certain antitrust responsibilities with respect to applications for section 103 or 104b licenses to construct or operate utilization or production facilities filed prior to August 8, 2005. The GLE enrichment facility, the application for which was filed after August 8, 2005, is subject to sections 53 and 63 of the AEA and is not a production or utilization facility within the meaning of section 105. Consequently, the NRC does not have antitrust responsibilities for GLE. The NRC will not entertain or consider antitrust issues in connection with the GLE application in this proceeding.

4. *Foreign Ownership*

The GLE application is governed by sections 53 and 63 of the AEA, and, consequently, issues of foreign involvement shall be determined pursuant to sections 57 and 69, not sections 103, 104, or 193f. Sections 57 and 69 of the AEA require, among other things, an affirmative finding by the Commission that issuance of a license for the GLE-CF will not be “inimical to the common defense and security.” The requirements of sections 57 and 69 are incorporated in 10 C.F.R. § 70.31 and 10 C.F.R. § 40.32, respectively.

5. *Creditor Requirements*

Pursuant to section 184 of the AEA, the creditor regulations in 10 C.F.R. § 50.81 shall apply to the creation of creditor interests in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235. In addition, the creditor regulations in 10 C.F.R. § 70.44 shall apply to the creation of creditor interests in special nuclear material. These creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements (such as sale and leaseback) not covered by 10 C.F.R. § 50.81, provided it can be found that such arrangements are not inimical to the common defense and security of the United States.

6. *Classified Information*

All matters of classification of information related to the design, construction, operation, and safeguarding of the GLE-CF shall be governed by classification guidance in “DOE Classification Guide for Isotope Separation by the Gas Centrifuge Process” (June 2002); Change 1 (Sept. 2005); Change 2 (May 2007) (CG-ICG-1); “Joint NRC/DOE Classification Guide for Louisiana Energy Services Gas Centrifuge Plant (U),” Confidential RD (January 2008) (CG-LCP-3A); and “Joint NRC/DOE Classification Guide for Louisiana Energy Services Gas Centrifuge Plant Safeguards & Security (U),” OUO (January 2008) (CG-LCP-3B), and any later versions thereof. Any person producing such information must adhere to the criteria in CG-ICG-1, CG-LCP-3A, and CG-LCP-3B. All decisions on questions of classification or declassification of information shall be made by appropriate classification officials in the NRC and are not subject to *de novo* review in this proceeding.

7. *Access to Classified Information*

Portions of GLE’s application for a license are classified Restricted Data or National Security Information. Persons needing access to those portions of the application will be required to have the appropriate security clearance for the level of classified information to which access is required. Access requirements apply equally to intervenors, their witnesses and counsel, employees of the Applicant, its witnesses and counsel, NRC personnel, and others. Any person who believes that he or she will have a need for access to classified information for the purpose of this licensing proceeding, including the hearing, should immediately contact the NRC, Division of Fuel Cycle Safety and Safeguards, Washington, DC 20555, for information on the clearance process. Telephone calls may be made to Timothy C. Johnson, Senior Project Manager, Uranium Enrichment Branch, Fuel Facility Licensing Directorate, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards at (301) 492-3121.

8. *Obtaining NRC Security Facility Approval for Safeguarding Classified Information Received or Developed Pursuant to 10 C.F.R. Part 95*

Any person who requires possession of classified information in connection with the licensing proceeding may process, store, reproduce, transmit, or handle classified information only in a location for which facility security approval has been obtained from the NRC’s Division of Security Operations (NSIR), Washington, DC 20555. Telephone calls may be made to A. Lynn Silvious, Chief, Information Security Branch at (301) 415-2214.

B. Reconsideration

The above guidance does not foreclose the Applicant, any person admitted as a party to the hearing, or an entity participating under 10 C.F.R. § 2.315(c) from litigating material factual issues necessary for resolution of contentions in this proceeding. Persons permitted to intervene and entities participating under 10 C.F.R. § 2.315(c) as of the date of the order on intervention may also move the Commission to reconsider any portion of Section VI of this Notice and Commission Order where there are no clear Commission precedents or unambiguously governing statutes or regulations. Any motion to reconsider must be filed within 10 days after the order on intervention. The motion must contain all technical or other arguments to support the motion. Other persons granted intervention and entities participating under 10 C.F.R. § 2.315(c), including the Applicant and the NRC Staff, may respond to motions for reconsideration within 20 days of the order on intervention. Motions will be ruled upon by the Commission. A motion for reconsideration does not stay the schedule set out above in Section V.D.4. However, if the Commission grants a motion for reconsideration, it will, as necessary, provide direction on adjusting the hearing schedule.

VII. NOTICE OF INTENT REGARDING CLASSIFIED INFORMATION

As noted above, a hearing on this application will be governed by 10 C.F.R. Part 2, Subparts A, C, G, and to the extent classified material becomes involved, Subpart I. Subpart I requires in accordance with 10 C.F.R. § 2.907 that the NRC Staff file a notice of intent if, at the time of publication of Notice of Hearing, it appears that it will be impracticable for the Staff to avoid the introduction of Restricted Data or National Security Information into a proceeding. The Applicant has submitted portions of its application that are classified. The Commission notes that, since the entire application may become part of the record of the proceeding, the NRC Staff has found it impracticable for it to avoid the introduction of Restricted Data or National Security Information into the proceeding.

**VIII. ORDER IMPOSING PROCEDURES FOR ACCESS
TO SENSITIVE UNCLASSIFIED NONSAFEGUARDS INFORMATION
AND SAFEGUARDS INFORMATION FOR CONTENTION
PREPARATION**

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing sensitive unclassified information (including Sensitive Unclassified Nonsafeguards Information (SUNSI) and Safeguards Information (SGI)). Requirements for access to SGI are primarily set forth in 10 C.F.R. Parts 2 and 73. Nothing in this Order is intended to conflict with the SGI regulations.

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI or SGI is necessary to respond to this notice may request access to SUNSI or SGI. A “potential party” is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 C.F.R. § 2.309. Requests for access to SUNSI or SGI submitted later than 10 days after publication will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requester shall submit a letter requesting permission to access SUNSI, SGI, or both to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555-0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, MD 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are Hearing.Docket@nrc.gov and OGCmailcenter@nrc.gov, respectively.³ The request must include the following information:

1. A description of the licensing action with a citation to this *Federal Register* notice;
2. The name and address of the potential party and a description of the potential party’s particularized interest that could be harmed by the action identified in C.1;

³ While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC’s “E-Filing Rule,” the initial request to access SUNSI and/or SGI under these procedures should be submitted as described in this paragraph.

3. If the request is for SUNSI, the identity of the individual or entity requesting access to SUNSI and the requester's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention;

4. If the request is for SGI, the identity of each individual who would have access to SGI if the request is granted, including the identity of any expert, consultant, or assistant who will aid the requester in evaluating the SGI. In addition, the request must contain the following information:

a. A statement that explains each individual's "need to know" the SGI, as required by 10 C.F.R. § 73.2 and 10 C.F.R. § 73.22(b)(1). Consistent with the definition of "need to know" as stated in 10 C.F.R. § 73.2, the statement must explain:

(i) Specifically why the requestor believes that the information is necessary to enable the requestor to proffer and/or adjudicate a specific contention in this proceeding;⁴ and

(ii) The technical competence (demonstrable knowledge, skill, training, or education) of the requester to effectively utilize the requested SGI to provide the basis and specificity for a proffered contention. The technical competence of a potential party or its counsel may be shown by reliance on a qualified expert, consultant, or assistant who satisfies these criteria.

b. A completed Form SF-85, "Questionnaire for Non-Sensitive Positions" for each individual who would have access to SGI. The completed Form SF-85 will be used by the Office of Administration to conduct the background check required for access to SGI, as required by 10 C.F.R. Part 2, Subpart G and 10 C.F.R. § 73.22(b)(2), to determine the requestor's trustworthiness and reliability. For security reasons, Form SF-85 can only be submitted electronically through the electronic questionnaire for investigations processing (e-QIP) website, a secure website that is owned and operated by the Office of Personnel Management. To obtain online access to

⁴Broad SGI requests under these procedures are unlikely to meet the standard for need to know; furthermore, Staff redaction of information from requested documents before their release may be appropriate to comport with this requirement. These procedures do not authorize unrestricted disclosure or less scrutiny of a requester's need to know than ordinarily would be applied in connection with an already-admitted contention or nonadjudicatory access to SGI.

the form, the requester should contact the NRC's Office of Administration at (301) 492-3524.⁵

c. A completed Form FD-258 (fingerprint card), signed in original ink, and submitted in accordance with 10 C.F.R. § 73.57(d). Copies of Form FD-258 may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, by calling (301) 415-7232 or (301) 492-7311, or by e-mail to Forms.Resource@nrc.gov. The fingerprint card will be used to satisfy the requirements of 10 C.F.R. Part 2, 10 C.F.R. § 73.22(b)(1), and section 149 of the Atomic Energy Act of 1954, as amended, which mandates that all persons with access to SGI must be fingerprinted for an FBI identification and criminal history records check;

d. A check or money order payable in the amount of \$200.00⁶ to the U.S. Nuclear Regulatory Commission for each individual for whom the request for access has been submitted, and

e. If the requester or any individual who will have access to SGI believes they belong to one or more of the categories of individuals that are exempt from the criminal history records check and background check requirements in 10 C.F.R. § 73.59, the requestor should also provide a statement identifying which exemption the requestor is invoking and explaining the requestor's basis for believing that the exemption applies. While processing the request, the Office of Administration, Personnel Security Branch, will make a final determination whether the claimed exemption applies. Alternatively, the requestor may contact the Office of Administration for an evaluation of their exemption status prior to submitting their request. Persons who are exempt from the background check are not required to complete the SF-85 or Form FD-258; however, all other requirements for access to SGI, including the need to know, are still applicable.

Note: Copies of documents and materials required by paragraphs C.4.b, .c, and .d of this Order must be sent to the following address:

⁵ The requester will be asked to provide his or her full name, social security number, date and place of birth, telephone number, and e-mail address. After providing this information, the requester usually should be able to obtain access to the online form within 1 business day.

⁶ This fee is subject to change pursuant to the Office of Personnel Management's adjustable billing rates.

Office of Administration
U.S. Nuclear Regulatory Commission
Personnel Security Branch
Mail Stop TWB-05-B32M
Washington, DC 20555-0001.

These documents and materials should not be included with the request letter to the Office of the Secretary, but the request letter should state that the forms and fees have been submitted as required above.

D. To avoid delays in processing requests for access to SGI, the requestor should review all submitted materials for completeness and accuracy (including legibility) before submitting them to the NRC. The NRC will return incomplete packages to the sender without processing.

E. Based on an evaluation of the information submitted under paragraphs C.3 or C.4, above, as applicable, the NRC Staff will determine within 10 days of receipt of the request whether:

1. There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and
2. The requestor has established a legitimate need for access to SUNSI or need to know the SGI requested.

F. For requests for access to SUNSI, if the NRC Staff determines that the requestor satisfies both E.1 and E.2, above, the NRC Staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Nondisclosure Agreement or Affidavit, or Protective Order⁷ setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

G. For requests for access to SGI, if the NRC Staff determines that the requestor has satisfied both E.1 and E.2, above, the Office of Administration will then determine, based upon completion of the background check, whether the proposed recipient is trustworthy and reliable, as required for access to SGI

⁷ Any motion for Protective Order or draft Nondisclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

by 10 C.F.R. § 73.22(b). If the Office of Administration determines that the individual or individuals are trustworthy and reliable, the NRC will promptly notify the requestor in writing. The notification will provide the names of approved individuals as well as the conditions under which the SGI will be provided. Those conditions may include, but not be limited to, the signing of a Nondisclosure Agreement or Affidavit, or Protective Order⁸ by each individual who will be granted access to SGI.

H. Release and Storage of SGI

Prior to providing SGI to the requestor, the NRC Staff will conduct (as necessary) an inspection to confirm that the recipient's information protection system is sufficient to satisfy the requirements of 10 C.F.R. § 73.22. Alternatively, recipients may opt to view SGI at an approved SGI storage location rather than establish their own SGI protection program to meet SGI protection requirements.

I. Filing of Contentions

Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI or SGI must be filed by the requestor no later than 25 days after the requestor is granted access to that information. However, if more than 25 days remain between the date the petitioner is granted access to the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI or SGI contentions by that later deadline.

J. Review of Denials of Access

1. If the request for access to SUNSI or SGI is denied by the NRC Staff either after a determination on standing and requisite need, or after a determination on trustworthiness and reliability, the NRC Staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

2. Before the Office of Administration makes an adverse determination regarding the proposed recipient's(s') trustworthiness and reliability for access to SGI, the Office of Administration, in accordance with 10 C.F.R. § 2.705(c)(3)(iii), must provide the proposed recipient(s) any records that were considered in the trustworthiness and reliability determination, including those required to be

⁸ Any motion for Protective Order or draft Nondisclosure Affidavit or Agreement for SGI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 180 days of the deadline for the receipt of the written access request.

provided under 10 C.F.R. § 73.57(e)(1), so that the proposed recipient(s) have an opportunity to correct or explain the record.

3. The requester may challenge the NRC Staff's adverse determination with respect to access to SUNSI by filing a challenge within 5 days of receipt of that determination with: (a) the presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to 10 C.F.R. § 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

4. The requester may challenge the NRC Staff's or Office of Administration's adverse determination with respect to access to SGI by filing a request for review in accordance with 10 C.F.R. § 2.705(c)(3)(iv). Further appeals of decisions under this paragraph must be made pursuant to 10 C.F.R. § 2.311.

K. Review of Grants of Access

A party other than the requester may challenge an NRC Staff determination granting access to SUNSI or SGI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed with the Chief Administrative Judge within 5 days of the notification by the NRC Staff of its grant of access.

If challenges to the NRC Staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC Staff determinations (whether granting or denying access) is governed by 10 C.F.R. § 2.311.⁹

L. The Commission expects that the NRC Staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI or SGI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 C.F.R. Part 2. Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

⁹Requesters should note that the filing requirements of the NRC's E-Filing Rule (72 Fed. Reg. 49,139 (Aug. 28, 2007)) apply to appeals of NRC Staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI/SGI request submitted to the NRC Staff under these procedures.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of January 2010.

Chairman Gregory B. Jaczko, Offering a Separate Statement

I support issuance of this notice and order in part. As I explained in my separate statement for the AREVA notice, I welcome the opportunity for interested members of the public to participate in our hearing process and to have their concerns about the proposed facility heard. I have, however, the same concerns with this hearing notice as I expressed with regard to the AREVA notice.

First, I am troubled by establishing a tight schedule that depends on superior applicant performance and therefore may turn out to be unrealistic. For example, the schedule reduces the time normally allowed for Applicant responses to Staff requests for additional information despite the fact that the agency has no control over the timeliness or quality of Applicant submittals. Establishing timelines which may not be met, even through no fault of the Staff, may result in unfounded claims that the agency's process is inefficient and decrease confidence in our licensing process.

I also believe that the numerous milestones set forth in the order are unnecessary and overly prescriptive. With the milestones and deadlines already provided in our regulations, the agency has the structure in place to ensure an efficient and effective hearing process. Importantly, those regulations allow the Boards flexibility in adapting the hearing schedule to accommodate the complexity of the issues and the circumstances unique to each adjudicatory proceeding. I believe this flexibility is important and should be retained for enrichment applications.

Recent developments highlight my concerns. Staff has informed the Commission that issuance of the Final Environmental Impact Statement (FEIS) will be delayed at least 7 months in light of information only recently submitted by AREVA concerning the need to construct additional transmission lines. Staff explained that its aggressive review schedule is predicated upon the submittal of complete information by AREVA. Therefore, any deficiency in AREVA's submittals, like this one, can delay the Staff's review and, consequently, the hearing schedule. Events which can impact schedule are inevitable and unpredictable given the complexity and length of these adjudications. The schedule adjustments necessitated by these events are best handled by the Boards responsible for the hearings without rigid Commission deadlines which may compromise the fairness or thoroughness of the hearing process.

In addition, as I stated in regard to the AREVA notice, I believe the order should state that the Commission, rather than the licensing board, should preside over the mandatory hearing. Gaining experience in this mandatory proceeding will aid the Commission in handling mandatory hearings on new reactor applications.

Unlike the AREVA notice, this notice is silent on the question of whether the NEPA review should address terrorism. I believe that the Commission should direct the Staff to consider terrorism in its environmental review, as we did in the AREVA notice. I believe that the Commission should have a consistent,

nationwide approach to NEPA and should discontinue the practice of addressing terrorism only for facilities within the jurisdiction of the Ninth Circuit. This practice creates a disparity in the public information we provide concerning the potential impacts of a terrorist attack on our nuclear facilities based on the arbitrary criteria of geographic location. This disparity is highlighted when, as here, the agency simultaneously conducts NEPA reviews for similar facilities within and outside the geographical boundaries of the Ninth Circuit. I believe the public is disserved when they are selectively and arbitrarily denied information on a matter of this importance to health and safety. As a policy matter, I believe that the Commission's commitment to transparency should no longer be compromised, particularly now that we know that the environmental impacts of terrorism can be analyzed and disclosed meaningfully to the public, while appropriately protecting classified information.

Lastly, I am troubled by a matter which is related to both the AREVA and GE-Hitachi applications — the prospect of allowing applicants to conduct construction activities prohibited by our regulations through issuance of exemptions. In my view, the appropriate process for allowing construction activities before licensing is the one we used for reactor licensees — our rulemaking process. This process, which allows stakeholder input and, therefore, offers transparency in our decision-making process, should not be circumvented by the use of exemptions which I believe should be reserved for circumstances unique to a specific facility.

Commissioners Dale E. Klein and Kristine L. Svinicki, Offering a Further Statement

We support issuance of this order, in its entirety, as we did the AREVA notice of hearing. *Areva Enrichment Services, LLC* (Eagle Rock Enrichment Facility), CLI-09-15, 70 NRC 1 (2009). The U.S. NRC Strategic Plan recognizes that initiatives such as the Government Performance and Results Act challenge federal agencies to become more effective and efficient and to justify their budget requests with demonstrated program results. The NRC must strive to become more effective and efficient in light of the increasing licensing workload and the drive to improve performance in government. With this in mind, the NRC has formally adopted strategic goals in the area of organizational excellence, including the following: “NRC actions are high quality, efficient, timely, and realistic, to enable the safe and beneficial use of radioactive materials.”

The NRC has recognized, in setting its strategic goals and through its performance and accountability reporting, that the efficiency of the agency’s regulatory processes is important to the regulated community and other stakeholders, including federal, state, local, and tribal authorities and the public. The NRC has committed itself to improving the timeliness of its application reviews without compromising safety and security, and acknowledges that this is possible provided industry submits complete, high-quality applications. Quoting again from the NRC Strategic Plan: “While the NRC will never compromise safety and security for increased efficiency, the agency works to improve the efficiency of its regulatory processes wherever possible.”

High quality — on both the agency’s and the applicant’s parts — should be, and is, the NRC’s goal. The proceeding at issue here is no exception. We believe that the schedule laid out in the order — while demanding the requisite quality in licensee submittals — has been demonstrated for similar applications, is achievable with no compromise to the agency’s safety and security missions, and is representative of the performance expectations the NRC should set for itself. Our judgment is not altered by the Chairman’s reliance on the recently announced events in an entirely separate proceeding — the AREVA Eagle Rock Enrichment Facility application. There, NRC Staff announced a delay in issuing the final EIS as a result of AREVA’s recent submission on the need to construct additional transmission lines. This is thin support at best for the Chairman’s unwarranted conclusion that the Commission’s deadlines “may compromise the fairness or thoroughness of the hearing process.” A later date for the scheduled issuance of the final EIS may delay completion of the hearing, but it does not necessitate any change in the milestones since the milestones that follow the issuance of the final EIS are measured from the date of its issuance.

Further, we are not persuaded by the Chairman’s argument regarding consideration of terrorism under NEPA. We have considered this issue in many

proceedings,¹ and are not prepared to abandon our carefully considered decisions without sufficient justification. Fundamentally, we cannot agree with the Chairman's assertion that our approach is at odds with the agency's commitment to transparency. At bottom, this ruling reflects our consistent position on the requirements of NEPA and their application.² Moreover, there is no dispute that the agency has devoted enormous resources and effort to ensure the adequate protection of public health and safety from the risks of terrorism after the events of September 11, 2001. Our differences with Chairman Jaczko on this issue should not obscure this fact.

¹ See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124 (2007), *aff'd New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3d Cir. 2009).

² We have complied with the Ninth Circuit's ruling for facilities within the Ninth Circuit, as we are required to do. That experience, however, is very limited, and does not demonstrate that conducting environmental analyses of terrorist scenarios for the licensing of all major facilities would be practicable or lead to meaningful additional information.

ATTACHMENT 1

**General Target Schedule for Processing and Resolving
Requests for Access to Sensitive Unclassified Nonsafeguards
Information and Safeguards Information in This Proceeding**

Day	Event/Activity
0	Publication of <i>Federal Register</i> notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Nonsafeguards Information (SUNSI) and/or Safeguards Information (SGI) with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding; demonstrating that access should be granted (e.g., showing technical competence for access to SGI); and, for SGI, including application fee for fingerprint/background check.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI and/or SGI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	Nuclear Regulatory Commission (NRC) Staff informs the requester of the Staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows (1) need for SUNSI or (2) need to know for SGI. (For SUNSI, NRC Staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC Staff makes the finding of need for SUNSI and likelihood of standing, NRC Staff begins document processing (preparation of redactions or review of redacted documents). If NRC Staff makes the finding of need to know for SGI and likelihood of standing, NRC Staff begins background check (including fingerprinting for a criminal history records check), information processing (preparation of redactions or review of redacted documents), and readiness inspections.

- 25 If NRC Staff finds no “need,” no “need to know,” or no likelihood of standing, the deadline for petitioner/requester to file a motion seeking a ruling to reverse the NRC Staff’s denial of access; NRC Staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC Staff finds “need” for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC Staff’s grant of access.
- 30 Deadline for NRC Staff reply to motions to reverse NRC Staff determination(s).
- 40 (Receipt +30) If NRC Staff finds standing and need for SUNSI, deadline for NRC Staff to complete information processing and file motion for Protective Order and draft Nondisclosure Affidavit. Deadline for applicant/licensee to file Nondisclosure Agreement for SUNSI.
- 190 (Receipt +180) If NRC Staff finds standing, need to know for SGI, and trustworthiness and reliability, deadline for NRC Staff to file motion for Protective Order and draft Nondisclosure Affidavit (or to make a determination that the proposed recipient of SGI is not trustworthy or reliable). Note: Before the Office of Administration makes an adverse determination regarding access to SGI, the proposed recipient must be provided an opportunity to correct or explain information.
- 205 Deadline for petitioner to seek reversal of a final adverse NRC Staff trustworthiness or reliability determination either before the presiding officer or another designated officer under 10 C.F.R. § 2.705(c)(3)(iv).
- A If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC Staff.
- A + 3 Deadline for filing executed Nondisclosure Affidavits. Access provided to SUNSI and/or SGI consistent with decision issuing the protective order.

- A + 28 Deadline for submission of contentions whose development depends upon access to SUNSI and/or SGI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI or SGI contentions by that later deadline.
- A + 53 (Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI and/or SGI.
- A + 60 (Answer receipt +7) Petitioner/Intervenor reply to answers.
- >A + 60 Decision on contention admission.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 52-011-ESP

**SOUTHERN NUCLEAR OPERATING
COMPANY
(Early Site Permit for Vogtle
ESP Site)**

January 7, 2010

RULES OF PROCEDURE: PETITIONS FOR REVIEW

The Commission grants review on a discretionary basis, giving due weight to a petitioner's showing that there is a substantial question with respect to the five considerations listed in 10 C.F.R. § 2.341(b)(4).

LICENSING BOARD, AUTHORITY

The licensing board's principal role in our adjudicatory process is carefully to review all of the evidence, including testimony and exhibits, and to resolve any factual disputes.

LICENSING BOARD: FINDINGS OF FACT, STANDARD OF REVIEW

The Commission does not exercise its authority to make *de novo* findings of fact where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact. The Commission has discretion to review all underlying factual issues *de novo*, but is disinclined to do so where a board has weighed arguments presented by experts and rendered reasonable, record-based factual

findings. The Commission defers to a board's factual findings and generally steps in only to correct clearly erroneous findings — that is, findings not even plausible in light of the record viewed in its entirety — where there is strong reason to believe that a board has overlooked or misunderstood important evidence. The Commission's standard of clear error for overturning a board's factual finding is quite high.

LICENSING BOARD: CONCLUSIONS OF LAW, STANDARD OF REVIEW

As for conclusions of law, our standard of review is more searching. We review legal questions *de novo*. We will reverse a licensing board's legal rulings if they are a departure from or contrary to established law.

LICENSING BOARD, AUTHORITY: EVIDENTIARY QUESTIONS, STANDARD OF REVIEW

Decisions on evidentiary questions fall within our boards' authority to regulate hearing procedures. A licensing board normally has considerable discretion in making evidentiary rulings. The Commission reviews decisions on evidentiary questions under an abuse of discretion standard.

ADJUDICATORY PROCEEDING: NATIONAL ENVIRONMENTAL POLICY ACT

The separate purposes of the Commission's adjudicatory and National Environmental Policy Act (NEPA) processes should not be confused — contested proceedings litigate particular contentions that may include arguable NEPA-analysis shortfalls, whereas the Staff's NEPA analysis encompasses the full range of NEPA issues whether or not a contested proceeding even takes place.

CONTENTIONS, SCOPE

The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with the Commission's rules. Otherwise, NRC adjudications quickly would lose order. Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing. The Commission's procedural rules on contentions are designed to ensure focused and fair proceedings.

NATIONAL ENVIRONMENTAL POLICY ACT: CUMULATIVE IMPACTS, SCOPE

There is a difference between what an agency like the NRC must look at in order to evaluate cumulative impacts under the National Environmental Policy Act — regardless of any contentions that may be filed by a party — and the scope of a particular cumulative impacts contention, which may, as here, be a subset of the total array of cumulative impacts required to be examined.

MEMORANDUM AND ORDER

Southern Nuclear Operating Company (Southern) filed an application for an early site permit (ESP) for two reactors using the Westinghouse Electric Company's AP1000 certified design to be added at the existing Vogtle Electric Generating Plant site near Waynesboro, Georgia. Center for a Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy, Atlanta Women's Action for New Directions, and Blue Ridge Environmental Defense League (collectively, Joint Intervenors), filed a petition for review¹ of the Atomic Safety and Licensing Board's First Partial Initial Decision in the contested portion of this proceeding.² Southern³ and the NRC Staff⁴ oppose the petition for review; Joint Intervenors replied to these pleadings.

For the reasons provided below, we deny the petition for review.

I. BACKGROUND

A detailed description of the procedural history of this proceeding, conducted under 10 C.F.R. Part 2, Subpart L, is provided in the Board's decision.⁵ In brief, Joint Intervenors proposed a total of eight environmental contentions (ECs), three of which — contentions EC 1.2, EC 1.3, and EC 6.0 — were admitted for hearing.⁶ The Board held an evidentiary hearing on these three contentions in

¹ Joint Intervenors' Petition for Review of the First Partial Initial Decision (Contested Proceeding) (July 15, 2009) (Petition for Review).

² LBP-09-7, 69 NRC 613 (2009).

³ Southern Nuclear Operating Company's Answer Opposing Petition for Review (July 27, 2009) (Southern Answer).

⁴ NRC Staff's Answer to "Joint Intervenors' Petition for Review of the First Partial Initial Decision (Contested Proceeding)" (July 27, 2009) (Staff Answer).

⁵ LBP-09-7, 69 NRC at 624-31.

⁶ *Id.*, 69 NRC at 623.

Augusta, Georgia, on March 16-19, 2009.⁷ The Board subsequently ruled against Joint Intervenors on the merits of all three contentions.⁸ Joint Intervenors have petitioned for review of the Board’s decision on contentions EC 1.2 and EC 6.0 only.

A. Contention EC 1.2

Contention EC 1.2, as initially proposed, stated:

Contention 1.2: The [Environmental Report (ER)] fails to identify and consider direct, indirect, and cumulative impacts of the proposed cooling system intake and discharge structures on aquatic resources.⁹

In explaining the basis for the “cumulative impacts” portion of this contention, Joint Intervenors stated in their Intervention Petition:

[T]he ER does not adequately address the cumulative impacts on aquatic resources of the *new cooling system facilities*, combined with the current impacts of *the existing intake* and discharge. In 1984, the NRC examined impingement and entrainment associated with the existing intake in the FE[IS] for operation of the existing units at Plant Vogtle and concluded there will be no significant impacts on the aquatic community of the Savannah River. According to the ER, “twenty years of operating experience suggest that Savannah River fish populations have not been adversely affected by operation of the existing” intake structure. ER at 5.3-3. In two decades of operation, however, [Southern] has not monitored impingement or entrainment associated with the existing structure. Thus, the ER fails to provide a meaningful basis to evaluate the cumulative impacts of the *new and existing intake structures* on aquatic species. There is no data on the rate of entrainment and impingement for any of the fish species that inhabit the Savannah River.¹⁰

The Board admitted a narrowed version of Contention EC 1.2 after oral argument on the admissibility of proffered contentions based upon the factual support provided by affidavit by Joint Intervenors’ expert. This factual support included specific references to asserted errors in the ER “[f]or each of the asserted deficiencies concerning the ER impact discussion regarding the intake/discharge

⁷ See Tr. at 506-1660.

⁸ LBP-09-7, 69 NRC at 623-24, 734-35.

⁹ Petition for Intervention (Dec. 12, 2006) (Intervention Petition) at 10.

¹⁰ *Id.* at 12-13 (emphasis added).

structure for the two new proposed facilities — impingement¹¹/entrainment,¹² chemical discharges, and thermal discharges, *including cumulative impacts from these items associated with the existing Vogtle facilities.*¹³ The Board provided additional direction on the scope of the contention, stating that litigation on the merits of the contention “may involve the question of the adequacy of the baseline information provided by [Southern] relative to the portion of the Savannah River that encompasses the project area associated with the intake/discharge structures for both the existing and proposed Vogtle facilities.”¹⁴

As part of its decision on a summary disposition motion filed by Southern, the Board narrowed Contention EC 1.2 by deleting the “chemical discharges” component of the contention.¹⁵ (Joint Intervenors conceded the “chemical discharge” issue was moot because the Staff’s Draft Environmental Impact Statement (DEIS) properly addressed the impact of chemical discharges on aquatic life.¹⁶) The balance of the contention — concerning the adequacy of baseline information on water flows and aquatic populations, entrainment/impingement of aquatic organisms due to water withdrawals, and thermal pollution — survived the motion for summary disposition.¹⁷

In their answer to Southern’s summary disposition motion, Joint Intervenors argued for the first time that the impacts of water withdrawals by non-Vogtle site users were part of the contention.¹⁸ The Board rejected this new argument, noting that in Joint Intervenors’ original petition and their expert’s supporting material:

[T]he discussion of cumulative withdrawals includes only the existing Vogtle units. . . . Consequently, in their existing issue statement EC 1.2 and its supporting bases (which they choose not to amend), Joint Intervenors have failed to provide the other parties with notice that the issue of the impacts of cumulative withdrawals was intended to include anything other than the existing and proposed Vogtle units. Given . . . that a purpose of the bases of a contention [is] “to put the other parties on notice as to what issues they will have to defend against or oppose,” . . . Joint Intervenors current argument that the DEIS must consider the cumulative impacts

¹¹ “Impingement” occurs “when aquatic organisms collide with cooling system components.” LBP-08-2, 67 NRC 54, 73 (2008).

¹² “Entrainment” occurs “when aquatic organisms are carried into the cooling system.” *Id.*

¹³ LBP-07-3, 65 NRC 237, 258 (2007) (emphasis added).

¹⁴ *Id.* at 259.

¹⁵ LBP-08-2, 67 NRC at 81-82.

¹⁶ *Id.* at 82.

¹⁷ *See id.* at 68-80, 82-83.

¹⁸ *See* Joint Intervenors[’] Answer Opposing Southern Nuclear Operating Co.’s Motion for Summary Disposition of Environmental Contention 1.2 (Nov. 13, 2007) (Joint Intervenors’ Opposition to Summary Disposition) at 18-19.

of water withdrawals by other facilities on the Savannah River . . . is outside the scope of EC 1.2.¹⁹

As admitted by the Board in final form, the contention stated:

EC 1.2 — ER FAILS TO IDENTIFY AND ADEQUATELY CONSIDER COOLING SYSTEM IMPACTS ON AQUATIC RESOURCES

CONTENTION: The ER fails to identify and adequately consider direct, indirect, and cumulative impingement/entrainment and thermal effluent discharge impacts of the proposed cooling system intake and discharge structures on aquatic resources.²⁰

Prior to the evidentiary hearing, the Board ruled on two sets of *in limine* motions, challenging, respectively, Joint Intervenors' prefiled direct and rebuttal testimony and exhibits. In response to the first set of *in limine* motions, Joint Intervenors claimed that portions of the challenged EC 1.2 testimony and exhibit language (discussing non-Vogtle site water withdrawals) were intended to "demonstrate the inherent weakness of the methodology" the Staff used in its cumulative impact analysis, and thus should not be excluded.²¹ Based on its review of the materials, however, the Board ruled that Joint Intervenors' concerns were already clear without the challenged language — which, contrary to Joint Intervenors' argument, went to matters outside the scope of the contention.²²

In response to the second set of *in limine* motions, Joint Intervenors argued (in connection with EC 1.2) that the Staff's discussion of river flow rates measured upstream at Thurmond Dam and entrainment studies across the river at DOE's Savannah River Site (SRS) "opened the door" to rebuttal testimony on non-Vogtle ESP site withdrawals of water.²³ The Board concluded that excluding the challenged language would not affect Joint Intervenors' ability to address "current

¹⁹ LBP-08-2, 67 NRC at 77-78. Joint Intervenors' discussion of the cumulative impacts of water withdrawals is followed by a discussion of the cumulative impacts of effluent discharges. With respect to *discharges* only, the description of basis adds the argument that cumulative impacts from "other sources of pollution in the area" must be considered. Intervention Petition at 13.

²⁰ LBP-08-2, 67 NRC at 83-84.

²¹ Joint Intervenors' Response to Motions *In Limine* to Exclude Portions of Testimony and Exhibits (Jan. 21, 2009) at 8. Joint Intervenors did not challenge the exclusions related to EC 1.3 and EC 6.0 raised in the motions. *Id.* at 2 n.2.

²² Memorandum and Order (Ruling on [*In Limine*] Motions) (Jan. 26, 2009) (unpublished) (slip op. at 3).

²³ Joint Intervenors' Response to Southern Nuclear Operating Company's and NRC Staff's Motions *In Limine* to Exclude Portions of Rebuttal Testimony and Exhibits filed by Joint Intervenors (Feb. 17, 2009) at 4-5.

aquatic baselines versus aquatic baselines at the time of the SRS studies,”²⁴ and that the Staff’s testimony on flow rates at Thurmond Dam did not “open the door” to rebuttal testimony because “the appropriateness of assuming a flow rate at the Vogtle site equal to the discharge rate from the Thurmond Dam appears to be a separate question from the cumulative impingement and entrainment impacts of water withdrawals between the two locations.”²⁵

B. Contention EC 6.0

After the Staff issued its Final Environmental Impact Statement (FEIS),²⁶ Joint Intervenors moved for admission of a new contention:

Proposed Contention EC 6.0: The discussion of potential impacts associated with dredging and use of the Savannah River Federal navigation channel is inadequate and fails to comply with [the National Environmental Policy Act (NEPA)] because it relies on the Army Corps of Engineers (the “Corps”) to analyze these impacts in the future. As a result, the [S]taff’s conclusion that impacts would be moderate runs counter to the evidence in the hearing record. Additionally, the FEIS wholly fails to address impacts of navigation on the Corps’ upstream reservoir operations, an important aspect of the problem.²⁷

The Board admitted this contention as supported by three of the eight proffered bases:

- The [S]taff’s conclusion, as set forth in the “Cumulative Impacts” chapter of the FEIS, that the large-scale dredging from Savannah Harbor to the [Vogtle] site could have moderate impacts is inadequately supported.
- Dredging the federal navigation channel has potentially significant impacts on the environment.
- Navigation requires release of significant amounts of water from upstream reservoirs, which is not addressed in the FEIS.²⁸

²⁴ Memorandum and Order (Ruling on [*In Limine*] Motions) (Feb. 23, 2009) (unpublished) (slip op. at 3).

²⁵ *Id.*

²⁶ NUREG-1872, “Final Environmental Impact Statement for an Early Site Permit (ESP) at the Vogtle Electric Generating Plant Site” (Aug. 2008) (FEIS) (ADAMS Accession Nos. ML082240145 & ML082240165) (also, Errata (Sept. 2008) (ADAMS Accession No. ML082550040)).

²⁷ Joint Intervenors’ Motion to Admit New Contention (Sept. 22, 2008) (Motion to Admit New Contention) at 2.

²⁸ Memorandum and Order (Ruling on Motion to Admit New Contention) (Oct. 24, 2008) (unpublished) (slip op. at 4, 16-17).

As admitted by the Board, the contention read:

EC 6.0 — FINAL ENVIRONMENTAL IMPACT STATEMENT (FEIS) FAILS TO PROVIDE ADEQUATE DISCUSSION OF IMPACTS ASSOCIATED WITH DREDGING THE SAVANNAH RIVER FEDERAL NAVIGATION CHANNEL

Because Army Corps of Engineers (Corps) dredging of the Savannah River Federal navigation channel has potentially significant impacts on the environment, the NRC [S]taff's conclusion, as set forth in the "Cumulative Impacts" chapter of the FEIS, that such impacts would be moderate is inadequately supported. Additionally, the FEIS fails to address adequately the impacts of the Corps' upstream reservoir operations as they support navigation, an important aspect of the problem.²⁹

C. Hearing and Board Decision

The Board heard testimony and received evidence from witnesses on behalf of all three parties³⁰ during its nearly 4-day hearing, subsequently ruling on the merits in favor of the Staff and Southern. With respect to contention EC 1.2, the Board found Joint Intervenors had failed to show by a preponderance of the evidence that the information the Staff relied on to evaluate the impingement, entrainment, and thermal discharge impacts on aquatic life of the proposed Vogtle units was inadequate. The Board also found that Joint Intervenors had failed to show that the river flow data used by the Staff was inadequate and that certain protected species should also be designated as "special status species," and had failed to support their challenges to the Staff's finding that impacts related to impingement, entrainment, and thermal discharges would be SMALL. Finally, the Board found that Joint Intervenors had failed to show that the Staff's analysis of the cumulative impacts of the new and existing Vogtle units was inadequate.³¹

With respect to contention EC 6.0, the Board found that the Staff's analysis of impacts of potential dredging of the Savannah River satisfied the Staff's NEPA obligations given available information. The Board found that "the preponderance of the evidence presented at the hearing support[ed] the Staff's finding that the cumulative impacts from dredging could be MODERATE."³² The Board found that, should a plan to dredge become reality, additional information likely would be included in environmental review documents produced in response to that

²⁹ *Id.* (slip op. at 20 (Appendix A)).

³⁰ The Staff's witnesses included a panel of witnesses from the Corps. *See* Tr. at 1383-1466. *See also* U.S. Army Corps of Engineers Testimony of William G. Bailey, Carol L. Bernstein, Lyle J. Maciejewski, and Stanley L. Simpson Concerning Environmental Contention EC 6.0 (Jan. 9, 2009) (after Tr. 1385).

³¹ LBP-09-7, 69 NRC at 685.

³² *Id.*, 69 NRC at 734.

plan by the Corps, by the Staff in connection with the Vogtle ESP application, or by the Staff in connection with Southern's pending Vogtle combined license application, depending on timing. Finally, the Board found that releases from upstream reservoirs apart from the Corps' normal flood control operations were not reasonably foreseeable, so the Staff was not required to analyze impacts of such releases.³³

II. DISCUSSION

A. Standards for Review

We grant review on a discretionary basis, giving due weight to a petitioner's showing that there is a substantial question with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.³⁴

The licensing board's principal role in our adjudicatory process "is carefully to review all of the evidence, including testimony and exhibits, and to resolve any factual disputes."³⁵ We do not exercise our authority to make *de novo* findings of fact "where a Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact."³⁶ As we have stated on other occasions, "[w]hile [we have] discretion to review all underlying factual issues *de novo*, we are disinclined to do so where a Board has weighed arguments presented by

³³ *Id.*

³⁴ 10 C.F.R. § 2.341(b)(4).

³⁵ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009), citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005).

³⁶ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003). See also *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 723 (2005).

experts and rendered reasonable, record-based factual findings.”³⁷ We defer to a board’s factual findings and “generally step in only to correct ‘clearly erroneous’ findings — that is, findings ‘not even plausible in light of the record viewed in its entirety’”³⁸ — where there “is strong reason to believe that . . . a board has overlooked or misunderstood important evidence.”³⁹ “Our standard of ‘clear error’ for overturning a Board’s factual finding is quite high.”⁴⁰

“As for conclusions of law, our standard of review is more searching. We review legal questions *de novo*. We will reverse a licensing board’s legal rulings if they are ‘a departure from or contrary to established law.’”⁴¹

Decisions on evidentiary questions fall within our boards’ authority to regulate hearing procedure.⁴² “[A] licensing board normally has considerable discretion in making evidentiary rulings.”⁴³ We review decisions on evidentiary questions under an abuse of discretion standard.⁴⁴

B. Analysis

Joint Intervenors challenge the Board’s ruling on the merits of EC 1.2 and EC 6.0, arguing that both should have been resolved in their favor. Joint Intervenors’ petition for review focuses on claims of legal and evidentiary errors by the Board. They base their petition for review on 10 C.F.R. § 2.341(b)(4)(ii), (iii), and (iv)⁴⁵ for EC 1.2, and on 10 C.F.R. § 2.341(b)(4)(ii) and (iii) for EC 6.0. For the reasons discussed below, we find that Joint Intervenors have not shown a “substantial question” warranting further Commission review of the Board’s decision.

³⁷ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-22, 64 NRC 37, 40 (2006) (some internal quotation marks omitted).

³⁸ *Id.* at 40 (some internal quotation marks omitted), citing *Hydro Resources, Inc.*, (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 2 (2006), *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985), and *Private Fuel Storage*, CLI-03-8, 58 NRC at 25-26.

³⁹ *Oyster Creek*, CLI-09-7, 69 NRC at 259, citing *Private Fuel Storage*, CLI-05-19, 62 NRC at 411.

⁴⁰ *Oyster Creek*, CLI-09-7, 69 NRC at 259, citing *Private Fuel Storage*, CLI-03-8, 58 NRC at 26.

⁴¹ *Oyster Creek*, CLI-09-7, 69 NRC at 259, citing *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Brown’s Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 190 (2004).

⁴² *See, e.g.*, 10 C.F.R. § 2.319(d).

⁴³ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004); *see also Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

⁴⁴ *Catawba*, CLI-04-21, 60 NRC at 27.

⁴⁵ “A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law.” 10 C.F.R. § 2.341(b)(4)(ii). “A substantial and important question of law, policy, or discretion has been raised.” 10 C.F.R. § 2.341(b)(4)(iii). “The conduct of the proceeding involved a prejudicial procedural error.” 10 C.F.R. § 2.341(v)(4)(iv).

1. Contention EC 1.2

Rather than challenging the fact findings made by the Board in connection with contention EC 1.2 — an aquatic impacts contention with a “cumulative impacts” component — Joint Intervenors’ petition for review focuses almost entirely on the Staff’s (and the Board’s) asserted failure to analyze the cumulative impacts of “other” water withdrawals from the Savannah River in addition to withdrawals associated with the existing and proposed Vogtle units. In other words, Joint Intervenors make legal arguments against the Board’s prehearing threshold ruling on the scope of the admitted contention, not record-based factual arguments against the Board’s ruling on the merits after the hearing.

In our view, Joint Intervenors’ concept of the contention’s scope — which matches neither the contention’s language and bases as initially worded, nor the Board’s formulation of the contention, as ultimately admitted for hearing — misinforms their view of the range of evidence properly admissible. Joint Intervenors also confuse the separate purposes of our adjudicatory and NEPA processes — contested proceedings litigate particular contentions that may include arguable NEPA-analysis shortfalls, whereas the Staff’s NEPA analysis encompasses the full range of NEPA issues whether or not a contested proceeding even takes place. In short, Joint Intervenors provide no basis for granting their petition for review with respect to contention EC 1.2.

The Staff opposes Joint Intervenors’ argument that the Board should have considered cumulative impacts related to withdrawals from non-Vogtle sites. The Staff argues that the Board properly limited the scope of the contention to include only cumulative impacts of the existing and proposed reactors — correctly matching the scope of the contention to the bases provided for it by Joint Intervenors in their petition to intervene.⁴⁶ The Staff argues that the Board’s decisions on the admissibility of evidence likewise matched the scope of the contention — so testimony and evidence addressing cumulative impacts other than those of the existing and proposed reactors were properly excluded.⁴⁷ We agree with the Staff’s position.

The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases,⁴⁸ unless the contention is satisfactorily amended in accordance with our rules.⁴⁹ Otherwise, NRC adjudications quickly would lose order. Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare

⁴⁶ Staff Answer at 7-8.

⁴⁷ *Id.* at 9.

⁴⁸ See 10 C.F.R. § 2.309(f). See also *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 378-81 (2002).

⁴⁹ See 10 C.F.R. § 2.309(f)(2).

for summary disposition or for hearing. Our procedural rules on contentions are designed to ensure focused and fair proceedings.

In this instance, Joint Intervenors' contention and its bases explicitly limited its critique of the ER's cumulative impacts analysis to the combined effects of water withdrawals by the intake structures of the proposed and existing Vogtle units — “the ER fails to provide a meaningful basis to evaluate the cumulative impacts of the *new and existing intake structures* on aquatic species.”⁵⁰ The exhibits attached to the Intervention Petition also limited the discussion to cumulative impacts resulting from the combination of proposed and existing Vogtle units.⁵¹ Under NRC rules and practice, this limitation defined the scope of the cumulative impacts portion of the contention, rendering testimony and evidence addressing cumulative impacts of water withdrawals by non-Vogtle facilities outside the scope of the contention.⁵²

Nonetheless, Joint Intervenors maintain on appeal that they “repeatedly” challenged the ER's evaluation of the cumulative impacts of other withdrawals together with withdrawals at the existing and proposed Vogtle units. To support this position, Joint Intervenors cite “arguments, testimony, and evidence proffered by Joint Intervenors in their summary disposition answer, their prefiled direct testimony and supporting affidavits, and prefiled rebuttal testimony.”⁵³ They assert that the Board erred as a matter of law when it excluded this testimony and evidence, and that we should therefore grant review pursuant to 10 C.F.R. § 2.341(b)(4)(ii).⁵⁴

⁵⁰ Intervention Petition at 13 (emphasis added).

⁵¹ For example: “Without proper scientific study and analysis, there is no basis to conclude the proposed new intake and discharge structures, alone or *in combination with the existing facility*, will not have significant impacts on the Savannah River fish assemblage.” Intervention Petition, Exh. 1.3 at 3 (emphasis added). “At minimum, a study of entrainment and impingement associated with *the existing intake structure* is necessary to determine the cumulative withdrawal effects.” *Id.* at 4 (emphasis added).

⁵² See *McGuire*, CLI-02-28, 56 NRC at 379, citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *petition for review denied sub nom. Massachusetts v. NRC*, 924 F.2d 311, 332-33 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991).

⁵³ Petition for Review at 8 & n.42, 9 n.43, citing Joint Intervenors['] Answer Opposing [Southern's] Motion for Summary Disposition of EC 1.2 (Nov. 13, 2007) at 18-19. Also citing statements stricken from the record in: Prefiled Direct Testimony of Barry W. Sulkin in Support of EC 1.2 (Jan. 9, 2009); Affidavit of Young in Support of Joint Intervenors['] Answer Opposing [Southern's] Motion for Summary Disposition of EC 1.2 (Nov. 13, 2007); Declaration of Shawn Paul Young (Sept. 22, 2008) (cited as Exh. JTI000005, with incorrect title and date, but quoting language from stricken ¶ 17 of that exhibit); Affidavit of Sulkin in Support of Joint Intervenors['] Answer Opposing [Southern's] Motion for Summary Disposition of EC 1.2 (Nov. 9, 2007) ¶¶ 4, 22-24; Prefiled Rebuttal Testimony of Barry W. Sulkin Concerning Contention EC 1.2 (Feb. 6, 2009).

⁵⁴ Petition for Review at 9.

The problem with Joint Intervenors' argument is that all of the submissions they mention were filed *after* their initial contention and the Board's ruling on it. As Southern points out,⁵⁵ the question of water withdrawals from sites other than the Vogtle site was not raised at all until Joint Intervenors raised it in their response to Southern's motion for summary disposition, which was filed 11 months after their Intervention Petition.⁵⁶ The Board rejected this new argument as outside the scope of the contention. We conclude that the Board's rejection of the new argument was proper — given that, by its own terms, EC 1.2 was limited to the cumulative impacts of withdrawals by proposed and existing units at the Vogtle site.⁵⁷

As Southern also argues, even though the Board more than once excluded testimony as outside the scope of the contention, Joint Intervenors "never moved to supplement or expand the scope of EC 1.2."⁵⁸ A motion to that effect, compliant with our requirements for late-filed and amended contentions, while not guaranteed success, would have been the correct procedural route for Joint Intervenors to take. As it is, Joint Intervenors' answer to the summary disposition motion did not address our amended and late-filed contention pleading requirements, so their answer cannot be viewed as standing in for such a motion. Similarly, Joint Intervenors' discussions of non-Vogtle site water withdrawals in their prefiled direct and rebuttal testimony (and supporting affidavits) were outside the scope of contention EC 1.2, and did not serve to amend that scope.

In another attempt to belatedly expand the scope of the contention, Joint Intervenors argue that the Board incorrectly limited the definition of the term "cumulative impact."⁵⁹ Joint Intervenors argue, based on the regulatory definition of "cumulative impact,"⁶⁰ that their use of the term in and of itself was sufficient to incorporate a challenge to the adequacy of the analysis of water withdrawals by all nearby facilities, not just the Vogtle-site intake structures.⁶¹ We disagree. As Southern argues,⁶² the flaw in Joint Intervenors' argument is their failure

⁵⁵ Southern Answer at 6.

⁵⁶ Joint Intervenors' Opposition to Summary Disposition at 18-19, attached Affidavit of Barry W. Sulkin (Nov. 9, 2007) ¶¶ 22-24, and attached Affidavit of Shawn Paul Young, Ph.D. (Nov. 13, 2007) ¶ 28.

⁵⁷ See LBP-08-2, 67 NRC at 77-78.

⁵⁸ Southern Answer at 7; see also LBP-08-2, 67 NRC at 77-78.

⁵⁹ Petition for Review at 11.

⁶⁰ "Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

⁶¹ Petition for Review at 12.

⁶² Southern Answer at 15.

to understand the distinction between the scope of admitted contentions in a contested NRC adjudication and the scope of NEPA in general, as followed by the NRC Staff in its review and by the Board in its review in the mandatory, uncontested portion of the proceeding.

There is a difference between what an agency like the NRC must look at in order to evaluate cumulative impacts under NEPA — regardless of any contentions that may be filed by a party — and the scope of a particular cumulative impacts contention, which may, as here, be a subset of the total array of cumulative impacts required to be examined.⁶³ Consequently, Joint Intervenors' argument that the Board's exclusion of evidence found outside the scope of the contention limited the scope of the full cumulative impacts analysis, contrary to established law, is incorrect. The Board's ruling did not address the proper scope of "cumulative impacts" analysis as a matter of general NEPA law. The Board ruled merely that the expanded "cumulative impacts" approach Joint Intervenors belatedly advocated had not been preserved for adjudication.

Joint Intervenors maintain that, in any event, they "expressly"⁶⁴ pled their contention to include water withdrawals by non-Vogtle site facilities. To support this, Joint Intervenors point to the unrelated discussion in their intervention petition of the cumulative impact of new effluent *discharge* (not water *withdrawals*) combined with "other sources of pollution in the area."⁶⁵ As the Board reasonably found, however, this was "certainly not enough to give [Southern] and the Staff notice that Joint Intervenors meant anything other than the existing Vogtle units when discussing cumulative impacts and water withdrawals."⁶⁶

Joint Intervenors next reiterate the claim they made below that discussions of "other withdrawals" by the Staff and Southern "opened the door for Joint Intervenors' response,"⁶⁷ and complain that the Board based its merits decision "on a record that purposefully excluded any input from Joint Intervenors" related

⁶³ In other words, the Staff was required to perform the analysis of cumulative impacts called for under NEPA even though the contention did not challenge the broader set of cumulative impacts. The Staff's water use and quality analysis in fact considered "cumulative impacts of the proposed [Vogtle] Units 3 and 4, the existing [Vogtle] Units 1 and 2, the DOE's Savannah River Site directly across the Savannah River from the [Vogtle] site, and other water users in the region." FEIS at 7-3. *See also id.* at 7-22, 7-23 to 7-25. Overall, the Staff concluded "that cumulative impacts to aquatic resources as a result of the proposed [Vogtle] Units 3 and 4 would be SMALL." *Id.* at 7-25. The Board also independently examined the Staff's water use cumulative impacts analysis in the separate, uncontested portion of this proceeding (*See* LBP-09-19, 70 NRC 433, 460-67, 469 (2009)) — which is not under consideration in today's decision.

⁶⁴ Petition for Review at 12.

⁶⁵ *Id.* at 12, citing Intervention Petition at 13.

⁶⁶ LBP-08-2, 67 NRC at 78 n.17.

⁶⁷ Petition for Review at 12.

to the impacts of non-Vogtle site facilities.⁶⁸ But Joint Intervenors' position misapprehends the purpose of the "other withdrawal" evidence of the Staff and Southern.

As the Board made clear when it admitted EC 1.2, the contention included the issue of the adequacy of the baseline information for the part of the Savannah River at the Vogtle site intake structures.⁶⁹ The Board also stated that "arguments regarding the Savannah River's minimum water levels and the maximum percentage withdrawn from the river" were within the scope of the contention.⁷⁰ The Board recapitulated that issues within the scope of the contention included:

(1) how the aquatic environment in the Vogtle environs should be characterized in terms of the fish and other creatures that inhabit the Savannah River; (2) what river flows should be used in assessing the impingement/entrainment/thermal discharge impacts at issue; and (3) the degree to which there is what Joint Intervenors have labeled a "lower baseline" for certain of the aquatic creatures in the [Vogtle-site] environs such that they should be accorded "special creature status."⁷¹

The testimony and the decisional language to which Joint Intervenors refer⁷² (in making their argument that they should have been allowed to present non-Vogtle site cumulative impact evidence) addressed these within-scope issues, not cumulative impacts taking into account non-Vogtle withdrawals. As such, the Staff's (and Southern's) "other withdrawals" evidence was directed toward selecting the river flow levels at the Vogtle site that should be evaluated in the impact analysis and defining the current "baseline" against which cumulative

⁶⁸ *Id.* at 13.

⁶⁹ LBP-07-3, 65 NRC at 259.

⁷⁰ LBP-08-2, 67 NRC at 77.

⁷¹ LBP-09-7, 69 NRC at 642.

⁷² As examples of language they believe makes their point, Joint Intervenors quote (Petition for Review at 13 & nn.65-66) a passage from note 33 and passages from paragraphs 4.115 and 4.116 of the challenged decision (LBP-09-7, 69 NRC at 684 n.33, 685). Contrary to Joint Intervenors' argument, it is clear that, when considered in connection with the text it relates to, note 33 discusses the Savannah River environs in connection with special species/low baseline designations for aquatic species. Paragraph 4.115 is the concluding paragraph of the discussion of the analysis of cumulative impacts relating to the existing and proposed Vogtle units, given the aquatic organism and water flow rate baseline information provided. Paragraph 4.116 summarizes the Board's findings on the cumulative impacts, as bounded by the scope of the contention, and given the baseline information, which includes the baseline status of the Savannah River environs. The same holds true for the portions of the record Joint Intervenors direct us to via note 62 (& note 40) of the petition for review — the purpose is to discuss baselines, not broader cumulative impacts. And the cited transcript pages discuss the differences between once-through and closed-cycle cooling systems, not cumulative impacts (Tr. 698-99).

impacts to aquatic resources from the proposed and existing Vogtle units should be measured.

These river flow level and baseline questions related to the adequacy of the Staff's methodology rather than to cumulative impacts from ongoing non-Vogtle site water withdrawals, and the door properly was open for such within-scope "methodology" evidence. We find that the Board's decision, in not expanding the range of cumulative impacts beyond the scope of the contention, did not rely on unanswered testimony on that point.

Joint Intervenors also argue that the Commission should take review of the Board's decision, pursuant to 10 C.F.R. § 2.341(b)(4)(iii), to clarify the required extent of a cumulative impacts analysis because this is an issue that will arise in future ESP and combined license proceedings.⁷³ The Staff counters that there is no "important question" justifying our review under section 2.341(b)(4)(iii) because the Board's decision merely interprets the scope of a proceeding-specific contention — rather than the meaning of the term "cumulative impacts" — and this scope question has no generic implications for other reactor licensing proceedings.⁷⁴

We agree with the Staff. The Board's decision is case-specific. It is limited to the contention before it and does not make generic pronouncements regarding the scope of NEPA cumulative impact analysis that must be undertaken in connection with reactor licensing proceedings. Thus, there is no need for us to clarify the required extent of future cumulative impact analyses. Joint Intervenors raise no "important question" justifying granting their petition for review.

As their final point, Joint Intervenors argue that "[a]s a matter of fairness, Joint Intervenors should have had the opportunity to raise issues concerning the [S]taff's cumulative impacts analysis as it relates to withdrawals other than those from the proposed and existing Vogtle units," so the Commission should grant review pursuant to 10 C.F.R. § 2.341(b)(4)(v).⁷⁵ We reject this argument. Orderly adjudication requires an orderly (and timely) raising of claims. Here, Joint Intervenors easily could have pled their contention to include the impacts of withdrawals by facilities other than the proposed and existing Vogtle units. They did not do so. Nor did they attempt to use NRC's existing mechanisms to amend contentions or to add new ones. It was not "unfair" for the Board to confine its hearing to the contention Joint Intervenors actually filed, rather than to expand it to include a different contention.

For these reasons, we deny Joint Intervenors' petition for review of the Board's decision on Contention EC 1.2.

⁷³ Petition for Review at 13-14.

⁷⁴ Staff Answer at 12.

⁷⁵ Petition for Review at 14.

2. *Contention EC 6.0*

Joint Intervenors make a series of arguments urging us to take review of the Board's decision on the merits of Contention EC 6.0 — concerning dredging of the Savannah River — pursuant to 10 C.F.R. § 2.341(b)(4)(ii) (error of law), and also urge us to take review pursuant to section 2.341(b)(4)(iii) based on the purported existence of a question that is likely to arise in other proceedings. For the reasons we discuss below, we see nothing in Joint Intervenors' arguments that compels a result different from the Board's conclusions, and we do not agree that Joint Intervenors have raised an important question that is likely to recur in future proceedings.

Joint Intervenors argue that the Board erred when it (according to Joint Intervenors) "determin[ed] that the direct impacts of dredging need not be considered in the FEIS,"⁷⁶ and also erred when it (again according to Joint Intervenors) "conclud[ed] that the Commission's NEPA obligations are fulfilled by deference to a non-existent analysis that may be performed by the Corps sometime in the future."⁷⁷ Joint Intervenors maintain further that they repeatedly raised the issue of the Staff's failure to assess all of the environmental impacts of dredging, including the direct impacts, during the course of the proceeding.⁷⁸

The Staff argues in response that Joint Petitioners' "claims mischaracterize the basis for the Board's factual and legal findings, in particular by ignoring the Board's finding that 'the Staff's conclusion that the cumulative impacts as a result of dredging the federal navigation channel could be MODERATE is a reasonable, adequately supported, conservative conclusion[.]'"⁷⁹ According to the Staff, "Joint Intervenors mistakenly assert that the Staff failed to reach its own impact conclusion and that the Board thus found 'deferral' of NEPA analysis to be sufficient. . . ."⁸⁰ Southern argues, similarly, that Joint Intervenors mischaracterize the Board's decision, and adds that, directly contrary to Joint Petitioners' arguments, the Board took evidence on the scope and extent of

⁷⁶ Petition for Review at 14.

⁷⁷ *Id.* at 15.

⁷⁸ *Id.* at 15-16, citing Motion to Admit New Contention at 4-5, their statements of position, prefiled direct and rebuttal testimony, and their proposed and rebuttal findings of fact and conclusions of law. *See also* Petition for Review at 15 nn.77-80, citing Joint Intervenors' Re-Revised Initial Written Statement of Position and Pre-filed Direct Testimony (Feb. 13, 2009) at 19-22; Joint Intervenors' Revised Response Statement and Pre-Filed Rebuttal Testimony (Mar. 2, 2009) at 31-34; Joint Intervenors' Proposed Findings of Fact and Conclusions of Law (Apr. 24, 2009) at 33-36; and Joint Intervenors' Reply to Staff Proposed Findings (May 8, 2009) at 13-17.

⁷⁹ Staff Answer at 13, citing LBP-09-7, 69 NRC at 720.

⁸⁰ *Id.* at 15.

potential dredging and examined the actual impacts of dredging and did not rely on future analysis of dredging that might be undertaken by the Corps.⁸¹

In our view, the Staff's analysis of dredging in its Environmental Impact Statement (EIS), and the Board's evaluation of that analysis, comported with the reality of current plans for delivering heavy components to the Vogtle site. There is currently no specific proposal for any dredging of the federal navigation channel.⁸² As the Board found, Southern "could forego barging altogether and decide to transport its components solely by rail or by truck,"⁸³ even though barging is the "optimal and desired method" for delivering the heavier components to the site.⁸⁴ And even if barging is chosen, it will not necessarily require dredging — current drought conditions, for example, may end.⁸⁵ There is no "proposal" for dredging the federal navigation channel — in other words, no proposal for "major Federal action" within the meaning of NEPA § 102(C)⁸⁶ — and therefore no requirement for a NEPA analysis of such dredging.⁸⁷

That said, even though there is no proposed action, the Staff evaluated the potential impacts of such dredging under a cumulative impacts rubric. Therefore, the Board, during the adjudication, considered the Staff's evaluation, within the parameters set by contention EC 6.0. As for how the Board went about its adjudication, we see no error justifying further review.

In its merits decision finding the Staff's approach to dredging adequate under NEPA, the Board relied on a number of points in the Staff's analysis. For example, the Board pointed to the Staff's conservative assumptions for purposes of its NEPA analysis — first, that if dredging were required, most of the length of the federal navigation channel would have to be dredged for barging to be possible at normal river flow rates, and second, that the river would be dredged to the depth of 9 feet and the width of 90 feet,⁸⁸ namely the dimensions to which the Corps is authorized to maintain the channel if dredging is funded.⁸⁹ The Board recognized

⁸¹ Southern Answer at 17.

⁸² See Southern Nuclear Operating Company's Testimony of Thomas Moorer Concerning EC 6.0 (Jan. 2009) at 6-7 (after Tr. 1291); Tr. at 1306, 1314-16, 1557-58; LBP-09-7, 69 NRC at 721.

⁸³ LBP-09-7, 69 NRC at 713, citing Tr. at 1315.

⁸⁴ *Id.*, 69 NRC at 707, citing Southern Nuclear Operating Company's Testimony of Jeffrey Neubert, Benjamin Smith, and David Scott Concerning EC 6.0 (Mar. 6, 2009) (after Tr. 1290) at 3.

⁸⁵ See *id.*, 69 NRC at 708-10.

⁸⁶ See also 40 C.F.R. § 1508.23.

⁸⁷ See *Kleppe v. Sierra Club*, 427 U.S. 390, 401-02 (1976) ("[T]he statutory language requires an impact statement only in the event of a proposed action. . . . In the absence of a proposal . . . there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement." *Id.* at 401. Impact statements are "required in conjunction with specific proposals for action." *Id.* at 402 n.12.).

⁸⁸ LBP-09-7, 69 NRC at 715.

⁸⁹ *Id.* at 710, 721.

that actual dredging requirements could be less.⁹⁰ The Board also pointed out that the Staff had limited information regarding Southern's transportation plans and the potential extent of the dredging, if any, that would be required should barging be chosen for transportation of the heavier reactor components. This, held the Board, is why the Staff could not conduct a quantitative assessment. Instead, the Board said, the Staff reasonably conducted a qualitative analysis, relying on the experience of its expert and on its knowledge of the Corps' environmental review process and the considerations the Corps would include in its assessment.⁹¹

The Board canvassed the areas the Staff considered. As part of its qualitative assessment, for example, the Staff concluded that dredging the federal navigation channel and disposing of dredged material "would likely have an effect on aquatic organisms for most trophic levels," that is, food-chain strata.⁹² The Staff also reviewed potential impacts of dredging and disposal on water quality, stating that these could include physical, chemical, and biological impacts.⁹³ The Staff analyzed the types of environmental impacts that dredging the channel and disposing of the dredged matter might cause as well as mitigation measures to minimize the impacts.⁹⁴ The Staff discussed potential mitigation measures "as examples only and not as specific recommendations . . . because there was (and is) no formal request or permit application to dredge the [f]ederal navigation channel before the Corps for its review."⁹⁵ The Staff indicated that mitigation measures, in the event of an actual plan to dredge, could include scheduling dredging for periods that do not include peak reproductive and migratory times, seasonal restrictions, minimizing dredging in certain areas, (or, as a last resort, relocating organisms, specifically, any endangered mussels that might be present), and implementing best management practices, with limitations on the type and size of dredges, types of buckets, sediment control measures, etc.⁹⁶

The Board heard extensive testimony and received substantial written testimony and exhibits into evidence (sponsored by multiple expert witnesses on behalf of each of the parties).⁹⁷ With this testimony and evidence before it, and based on its consideration of the Staff's qualitative review, the Board found that

⁹⁰ *Id.* at 721.

⁹¹ *Id.* at 714-15.

⁹² *Id.* at 715, quoting NRC Staff Testimony of Mark D. Notich, Anne R. Kuntzleman, Rebekah H. Krieg, Dr. Christopher B. Cook, and Lance W. Vail Concerning Environmental Contention EC 6.0 (Feb. 26, 2009) (after Tr. 1477) (Staff EC 6.0 Direct Testimony) at 13; also citing Staff EC 6.0 Direct Testimony at 14-15.

⁹³ *Id.*, 69 NRC at 716, citing Staff EC 6.0 Direct Testimony at 15.

⁹⁴ *Id.*, 69 NRC at 715, citing Staff EC 6.0 Direct Testimony at 14.

⁹⁵ *Id.*, 69 NRC at 717, citing Staff EC 6.0 Direct Testimony at 20 (ellipsis in original).

⁹⁶ *Id.*, 69 NRC at 716-17.

⁹⁷ *See* Tr. at 1287-1631, with associated (interspaced) testimony.

“the Staff’s conclusion that the cumulative impacts as a result of dredging the federal navigation channel could be MODERATE is a reasonable, adequately supported, conservative conclusion given the limited information available regarding the nature and extent of any dredging.”⁹⁸ We see nothing in the record ourselves, and Joint Intervenors have pointed to nothing, that calls the Board’s findings into question and thereby justifies taking review of this facet of the Board’s decision.

Joint Intervenors also argue that the Board erred in failing to determine whether dredging the federal navigation channel and issuing the ESP were “connected actions,”⁹⁹ (as Joint Intervenors argue they were), prior to determining the nature of the impacts that needed to be assessed. Joint Intervenors argue that NEPA requires an analysis of all impacts of connected actions, including direct, indirect, and cumulative impacts, and that the Board erred when it (according to Joint Intervenors) concluded that only a cumulative analysis, and not a direct analysis, of dredging the river was necessary.¹⁰⁰

We reject this argument as beside the point given the lack of a specific proposal to dredge.¹⁰¹ But in any case, as the Staff points out, “Joint Intervenors have not shown how or why the Staff’s analysis and conclusion regarding possible impacts from dredging could change if characterized as ‘direct’ as opposed to ‘cumulative’ impacts.”¹⁰² The Staff is also correct that “Joint Intervenors have not shown, either in the record or in the [petition for review], that there are potential impacts that could have been analyzed that were omitted from the FEIS.”¹⁰³ As Southern says, Joint Intervenors fail to challenge “any of the Board’s findings on the impacts of dredging to or from: fish, mussels, aquatic resources, snag removal, sediment disposal, etc.” but argue only, without explanation or identification, “that additional impacts should have been considered under the label of ‘direct impacts.’”¹⁰⁴ Given the constraints on the analysis due to lack of information and lack of certainty, we agree with Southern that no matter the label attached to the impacts the Board examined — whether characterized as “*cumulative* impacts of issuance of the ESP or *direct* impacts of dredging” — “the actual analysis, in this case, would be the same given that the Board has already addressed the undisputed evidence concerning *any* impacts.”¹⁰⁵

⁹⁸ LBP-09-7, 69 NRC at 720.

⁹⁹ See 40 C.F.R. § 1508.25(a)(1).

¹⁰⁰ Petition for Review at 17.

¹⁰¹ In performing NEPA evaluations, agencies must consider: three types of actions (connected, cumulative, and similar), three types of alternatives (no action, other reasonable actions, and mitigation measures), and three types of impacts (direct, indirect, and cumulative). See 40 C.F.R. § 1508.25.

¹⁰² Staff Answer at 16-17.

¹⁰³ *Id.* at 17-18.

¹⁰⁴ Southern Answer at 20.

¹⁰⁵ *Id.*

Joint Intervenors argue that the Staff's deference to a future Corps' NEPA analysis is "incorrect as a matter of law," citing the NRC's Environmental Standard Review Plan.¹⁰⁶ Joint Intervenors claim that the NRC cannot "either fail to perform an adequate evaluation or . . . evade a NEPA responsibility by deferring to another agency,"¹⁰⁷ and that the Board erred when it allowed the deferral of the dredging issue, including possible mitigation measures, to future Corps analysis.¹⁰⁸

But as we see the case, the Board did not "allow the deferral" of the NRC's NEPA obligations to another agency, so there was no evasion of responsibility. The Staff's EIS, after all, did consider the potential for dredging and analyzed its environmental impacts in qualitative terms. The Board found the Staff's approach reasonable. So do we. As we stated earlier, a full NEPA evaluation is not possible absent a specific proposal to dredge. There is no such proposal here. Consequently, there was nothing to defer to another agency. Instead, the Staff reasonably looked at potential impacts of dredging that might occur, based on current information. The Staff and the Board also concluded, reasonably, that should an actual proposal for dredging emerge later, the Corps appropriately would contribute its own analysis, based on its expertise with dredging projects, at that time.

For similar reasons, we also reject Joint Intervenors' argument¹⁰⁹ that the Staff's supposed "deference" is contrary to the terms of the NRC's Memorandum of Understanding (MOU) with the Corps.¹¹⁰ As we have stressed, in the absence

¹⁰⁶ Petition for Review at 19, citing NUREG-1555, "Environmental Standard Review Plan: Standard Review Plans for Environmental Reviews for Nuclear Power Plants" (March 2000) (ADAMS Accession Nos. ML003702134 & ML003701937).

¹⁰⁷ *Id.* at 21. In support, Joint Intervenors cite *Wyoming Outdoor Council v. U.S. Army Corps of Engineers*, 351 F. Supp. 2d 1232, 1242 (D. Wyo. 2005) and *Ohio Valley Environmental Coalition v. Hurst*, 604 F. Supp. 2d 860, 887 (S.D. W. Va. 2009). Petition for Review at 20-21. These cases are distinguishable. In *Wyoming*, the Corps failed to consider cumulative impacts at all in connection with issuing a general permit for discharge of dredge and fill materials, postponing that assessment to future individual permits. In *Ohio*, the Corps failed to provide analysis supporting its cumulative impact analysis in a nationwide permit, based on further consideration in individual permits. In both cases, unlike the NRC here, the Corps had actual proposals under consideration. Moreover, the Staff did analyze potential impacts of dredging the federal navigation channel to the extent possible given available information for the hypothetical scenario where dredging occurs, and performed its analysis using conservative assumptions regarding the amount of dredging.

¹⁰⁸ Petition for Review at 22-23.

¹⁰⁹ *Id.* at 22.

¹¹⁰ See Notice of Availability of Memorandum of Understanding Between U.S. Army Corps of Engineers and U.S. Nuclear Regulatory Commission on Environmental Reviews Related to the Issuance of Authorizations [t]o Construct and Operate Nuclear Power Plants, 73 Fed. Reg. 55,546 (Sept. 25, 2008) (the text of the MOU appears at 55,547-49). The MOU establishes a framework
(Continued)

of a specific proposal there is nothing to defer — but in any event, as evidenced by the Corps’ participation in the proceeding,¹¹¹ the NRC and the Corps are already cooperating to the extent possible given current information.¹¹²

Finally, Joint Intervenors seek Commission review by arguing that delegating NEPA duties to other agencies is important and likely to arise in numerous proceedings in the future. Hence, Joint Intervenors say, future litigants “need to have a clear understanding of whether and to what extent dredging impacts must be considered in an FEIS.”¹¹³ The Staff counters that the petition for review does not explain why the question of delegating the Staff’s NEPA responsibilities to the Corps, insofar as this case even involves the question, might have generic implications.¹¹⁴

Given our holding today that the question of delegating NEPA responsibilities does not even arise in this case, we do not see Joint Intervenors’ unidentified generic implications as a basis for taking review. Additionally, the scope of review of dredging impacts in future environmental analyses will be determined when and if specific dredging proposals are presented. Future litigants are not without guidance in the form of existing statutes, regulations, and case law. Joint Intervenors have not shown that the Board’s decision raises an important question of law requiring our review.

For these reasons, Joint Intervenors’ petition for review of the Board’s decision on contention EC 6.0 is denied.

III. CONCLUSION

For the foregoing reasons, we *deny* the petition for review.

for early cooperation, coordination, and streamlining of the two agencies’ respective regulatory responsibilities and processes. Under the terms of the MOU, the NRC serves as lead agency in the preparation of the EIS, and the Corps generally serves as a cooperating agency in most circumstances unless a different form of coordination is more efficacious. *Id.* at 55,547. Presentation of a specific dredging proposal will not alter this arrangement.

¹¹¹ See note 31, *supra*.

¹¹² We note that the Staff will supplement the EIS for the ESP in the EIS prepared for the combined license. If any significant new information regarding dredging impacts develops in the future, it would be addressed in the combined license EIS. See LBP-09-7, 69 NRC at 730-31. We expect the Staff to continue to coordinate with the Corps to ensure that the Staff promptly obtains any new information relevant to the Staff’s environmental review, including dredging.

¹¹³ Petition for Review at 23.

¹¹⁴ Staff Answer at 18.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of January 2010.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

**Docket Nos. 50-438-CP
50-439-CP**

**TENNESSEE VALLEY AUTHORITY
(Bellefonte Nuclear Plant, Units 1
and 2)**

January 7, 2010

REINSTATEMENT

Section 185 of the Atomic Energy Act, 42 U.S.C. § 2235, is the Act's only section that addresses construction permits. This section does not speak to reinstating construction permits which a licensee surrendered to the NRC prior to the construction permit's expiration date. Rather, section 185 states that a construction permit will not expire and no rights under the permit will be forfeited unless two circumstances are present: (1) the facility is not completed, and (2) the latest date for completion has passed. Therefore, reinstating a voluntarily surrendered construction permit does not conflict with the AEA's statutory language.

FORFEITURE

Section 185a of the AEA, 42 U.S.C. § 2235(a), addresses forfeiture: "Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date." A licensee's voluntary surrender of a construction permit prior to that permit's expiration date does not constitute "forfeiture" under section 185.

AEA'S BROAD STATUTORY SCHEME

The NRC possesses broad discretion to act under the AEA when the statute is otherwise silent. *See Siegel v. AEC*, 400 F.2d 778, 783 (1968); *Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 82 (1st Cir. 1978) (some internal citations omitted); *see also Massachusetts v. NRC*, 522 F.3d 115, 126-27 (1st Cir. 2008). In the context of expired construction permits, the D.C. Circuit also found that the NRC may use its broad discretion of authority under the AEA to reinstate expired construction permits which the licensee inadvertently failed to renew. *See Citizens Association for Sound Energy v. NRC*, 821 F.2d 725, 731 (D.C. Cir. 1987).

REVOCAATION

Section 186 of the AEA, 42 U.S.C. § 2236, addresses revocation of licenses where there is wrongdoing on the part of the licensee. The voluntary surrender of a valid construction permit does not amount to wrongful activity which would warrant revocation.

MANDATORY HEARINGS

Section 189 of the AEA, 42 U.S.C. § 2239, calls for a mandatory hearing for the granting of a construction permit, as well as a hearing upon request for the granting, revoking, or amending of any permit or license. The issuance of new construction permits requires a section 189 mandatory hearing. However, the AEA does not provide for a mandatory hearing for the reinstatement of previously issued construction permits, as a hearing already occurred when the permits were initially issued.

REINSTATEMENT IS CONSISTENT WITH GENERAL ADMINISTRATIVE LAW AND POLICY

As a general matter, administrative agencies have inherent authority to change and modify their own prior decisions. *See generally United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965); *Gun South, Inc. v. Brady*, 877 F.2d 858, 862-63 (11th Cir. 1989). The NRC's authority to reinstate previously surrendered construction permits is consistent with general administrative law practice.

NOTICE-AND-COMMENT REQUIREMENT

Notice-and-comment rulemaking is required only when the NRC is attempting

to change a regulation. See *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995); section 189 of the AEA, 42 U.S.C. § 2239.

MEMORANDUM AND ORDER

Before us today are two contentions claiming that the Nuclear Regulatory Commission (NRC) lacks authority to reinstate construction permits for nuclear power reactors that the holder of the permits voluntarily surrendered. The Tennessee Valley Authority (TVA) and the NRC Staff maintain that the NRC has authority under the Atomic Energy Act (AEA) to reinstate voluntarily surrendered construction permits. Petitioners, the Blue Ridge Environmental Defense League (BREDL), its chapter Bellefonte Efficiency and Sustainability Team (BEST), and the Southern Alliance for Clean Energy (SACE) (hereinafter “Petitioners”), argue that by law such permits have expired and cannot be revived. After careful consideration of this issue of first impression, we find that the NRC does have the authority to reinstate voluntarily surrendered construction permits.

I. FACTUAL BACKGROUND

In June 1973, TVA filed an application to construct two nuclear reactors at the Bellefonte site, located on the Tennessee River in northwestern Alabama, approximately 7 miles northeast of Scottsboro, Alabama. After docketing this application in June 1973, the Atomic Energy Commission (AEC) published a notice of hearing in the *Federal Register*, notifying interested persons of their right to intervene and request a hearing in the AEC’s proceeding that would determine whether the agency would grant or deny the Bellefonte construction permits.¹

Interested persons filed petitions to intervene. An Atomic Safety and Licensing Board held a prehearing conference on proposed contentions and ultimately granted one petition to intervene, admitting one contention. In addition, the Board permitted the Alabama Department of Public Health to participate in the proceeding as an interested government entity. The Board conducted an evidentiary hearing on the admitted contention in 1974. At the hearing, the Intervenor and TVA reached an agreement on the sole contention. The Board then considered and resolved uncontested construction permit issues in favor of the Applicant.²

¹ See 38 Fed. Reg. 20,932 (Aug. 3, 1973).

² See LBP-74-66, 8 AEC 472, 473-76 (1974).

Ultimately, in December 1974, the AEC issued two construction permits to TVA authorizing the construction of Bellefonte Units 1 and 2.³ The construction permits for Units 1 and 2 were originally set to expire in December 1979 and September 1980, respectively. Thereafter, TVA began construction on both units. In February 1978, TVA applied for operating licenses for Units 1 and 2. Five months later, the NRC published both a notice of receipt of the operating license applications and a notice of opportunity for hearing, inviting interested persons to intervene in the NRC's operating license proceeding.⁴ There were no hearing requests and, consequently, no hearing.

Due to lower-than-anticipated power needs, TVA determined it would not need to operate Units 1 and 2 until the mid-1990s. In 1986, TVA requested that the NRC⁵ extend the completion dates for its Bellefonte construction permits. The NRC granted TVA's request in June 1987. Unit 1's construction permit was now set to expire in July 1994 and Unit 2's in July 1996. Subsequently, in 1988, TVA submitted a letter to the NRC giving notice that it had decided to defer construction of both units until the late 1990s. TVA stated that this deferral was due to reduced power needs as well as for economic reasons. At the time of this request, Units 1 and 2 were 88% complete and 58% complete, respectively.

As part of the deferral TVA included a list of specific activities it would undertake during the deferral period pursuant to Commission guidance in the Commission's Policy Statement on Deferred Plants (Commission Policy Statement).⁶ TVA also stated that it would place Units 1 and 2 in deferred plant status. This meant that although TVA still possessed valid construction permits, construction ceased and it would perform only maintenance activities onsite. The NRC agreed to TVA's deferral request, finding TVA's proposed list of deferral-period activities consistent with the Commission Policy Statement.⁷ In addition, because TVA's construction permits were set to expire during the deferral period, the NRC noted that TVA would have to request a timely extension of its construction permits.

Several years later, in March 1993, TVA submitted a letter to the NRC stating that it intended to resume construction activities on Units 1 and 2. However, TVA said it could not begin construction until after July 1994, because it first had to conduct a resource planning process. As Unit 1's construction permit was set to expire in July 1994, TVA asked the NRC to extend the dates of its construction

³ CP Nos. CPPR-122 and CPPR-123. *See* 39 Fed. Reg. 45,313 (Dec. 31, 1974).

⁴ *See* 43 Fed. Reg. 30,628 (July 17, 1978).

⁵ The Atomic Energy Commission became the Nuclear Regulatory Commission (NRC) on January 19, 1975, pursuant to the Energy Reorganization Act of 1974.

⁶ *See* 52 Fed. Reg. 38,077 (Oct. 14, 1987).

⁷ *Id.*

permits for both Bellefonte units. The NRC granted this request, setting Unit 1's new expiration date for October 2001 and Unit 2's for October 2004.⁸

In July 2001, TVA once again applied to extend the expiration dates of the Bellefonte construction permits, stating this time that an extension would enable TVA to better identify competitive energy needs and power issues.⁹ The NRC again agreed to extend the permits, with October 2011 the new expiration date for Unit 1 and October 2014 for Unit 2.¹⁰ Units 1 and 2 remained in "deferred" plant status. The NRC determined that TVA was maintaining both units and that TVA was interested in constructing the units at a future date.¹¹

A few years later, however, in 2005, TVA notified the NRC that TVA was placing Bellefonte Units 1 and 2 in "terminated" status, as opposed to "deferred" status.¹² In accordance with the Commission Policy Statement, this meant that TVA had permanently ceased construction on the Bellefonte facilities, although TVA still retained valid construction permits for both units. A year later, TVA notified the NRC that TVA's Board of Directors had voted to cancel construction of Bellefonte Units 1 and 2 due to anticipated reductions in power needs.¹³ TVA thus requested that the NRC "withdraw" the construction permits for both Units 1 and 2. On September 14, 2006, NRC granted TVA's withdrawal request, stating "the staff considers Construction Permit Nos. CPPR-122 and CPPR-123 to be terminated."¹⁴ TVA ceased maintenance of the partially constructed units and the NRC Staff stopped conducting inspections.

In 2008, TVA changed its mind. In two letters, TVA asked the NRC to reinstate its previously withdrawn construction permits for Bellefonte Units 1 and 2. This request was prompted in part by increased economic opportunities in power generation. TVA stated this constituted good cause for reinstatement.¹⁵ As part of its request, TVA said it wished to transfer Units 1 and 2 from terminated

⁸ See 59 Fed. Reg. 34,874 (July 7, 1994).

⁹ See 68 Fed. Reg. 11,415 (Mar. 10, 2003).

¹⁰ See *id.*

¹¹ See *id.*

¹² See Letter from TVA to NRC, Bellefonte Nuclear Plant (BLN) Units 1 and 2 — Notification: Construction Permits CPPR-122 (Unit 1) and CPPR-123 (Unit 2) Placed in Terminated Status (Dec. 12, 2005) (ADAMS Accession No. ML060120054).

¹³ See Letter from TVA to NRC, Bellefonte Nuclear Plant (BLN) Units 1 and 2 — Withdrawal of Construction Permits CPPR-122 (Unit 1) and CPPR-123 (Unit 2) — Request for Approval (Apr. 6, 2006) (ADAMS Accession No. ML061000538).

¹⁴ Letter from Catherine Haney to Karl W. Singer, Bellefonte Nuclear Plant, Units 1 and 2 — Withdrawal of Construction Permit Nos. CPPR-122 for Unit 1 and CPPR-123 for Unit 2 (Sept. 14, 2006) (ADAMS Accession No. ML061810505).

¹⁵ See Letter from TVA to NRC, Tennessee Valley Authority (TVA) — Bellefonte Nuclear Plant Units 1 and 2 — Request to Reinstate Construction Permits CPPR-122 (Unit 1) and CPPR-123 (Unit 2) (Aug. 26, 2008) (ADAMS Accession No. ML082410087).

to deferred status. Thereafter, TVA said it could begin to assess whether it was financially and practically possible to complete construction and, ultimately, operate the units.¹⁶

In response to TVA's reinstatement request, the NRC Staff sent us a memorandum recommending that the Commission authorize the Staff to grant reinstatement of TVA's construction permits for Bellefonte Units 1 and 2.¹⁷ On February 18, 2009, we authorized the Staff to issue an order reinstating the construction permits and placed Bellefonte Units 1 and 2 in "terminated" status under our Policy Statement, rather than the "deferred" status TVA sought.¹⁸ We also directed that the NRC Staff offer a hearing opportunity on the question of whether TVA had established "good cause" for reinstatement.

The NRC Staff then prepared an environmental assessment which concluded that reinstatement of the construction permits would not result in a significant environmental impact.¹⁹ After making this determination, the Staff granted TVA's request to reinstate the construction permits and placed the units in "terminated" plant status.²⁰ The Staff's *Federal Register* notice also afforded interested persons the right to request intervention and a hearing, limited to whether "good cause exists for reinstatement of the CPs."²¹

Petitioner BREDL filed suit in the United States Court of Appeals for the District of Columbia Circuit, and along with other petitioners also sought an NRC hearing to contest the lawfulness of reinstating the Bellefonte permits.²² The D.C. Circuit has held BREDL's lawsuit in abeyance.²³ In the NRC proceeding, Petitioners filed nine contentions, including two (Contentions 1 and 2) maintaining that the NRC did not possess the statutory authority to reinstate the previously withdrawn construction permits. We viewed the authority question as a potentially dispositive matter warranting our attention and resolution before the remainder of the adjudication proceeds. Thus, we issued an Order in May directing Petitioners,

¹⁶ *See id.*

¹⁷ *See* COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2 (Dec. 12, 2008) (ADAMS Accession No. ML083230895).

¹⁸ *See* Memorandum from Andrew L. Bates to R.W. Borchardt, Staff Requirements-COMSECY-08-0041-Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plants Units 1 and 2, at 1 (Feb. 18, 2009) (ADAMS Accession No. ML090490838).

¹⁹ *See* 74 Fed. Reg. 9308 (Mar. 3, 2009).

²⁰ *See* 74 Fed. Reg. 10,969 (Mar. 13, 2009).

²¹ *Id.*

²² Petition for Intervention at 1.

²³ *See Blue Ridge Environmental Defense League v. NRC*, Order Granting Motion to Hold Case in Abeyance (D.C. Cir. June 11, 2009).

TVA, and the NRC Staff to submit briefs on Contentions 1 and 2.²⁴ We also ordered that the remaining Contentions 3 through 9 be held in abeyance pending our ruling on the threshold authority issue.²⁵

II. THE LITIGANTS' POSITIONS

All litigants filed initial briefs and replies. Petitioners argue that the AEA does not authorize NRC to reinstate expired construction permits and that under section 185²⁶ of the AEA, all rights under expired permits “are forfeited.” According to Petitioners, therefore, the NRC lacks statutory authority to reinstate a voluntarily surrendered permit. Petitioners also maintain that allowing reinstatement prior to an agency hearing violates section 189 of the AEA.²⁷ TVA, on the other hand, argues that given Congress’s extremely broad delegation of authority to the NRC, and given that the AEA does not prohibit reinstatement of construction permits, the agency has inherent discretion to allow reinstatement in appropriate circumstances. No prior hearing is necessary, TVA contends, because no fresh construction permit is necessary. The NRC Staff agrees with TVA’s position, arguing that a voluntary surrender of construction permits, before the permits expire and without any claim of wrongdoing, does not equate to forfeiting all rights to seek reinstatement.

III. DISCUSSION

We previously authorized NRC Staff to issue an order that would reinstate

²⁴ Order of the Secretary Responding to Petitioners’ Contention Regarding Authority of the NRC to Reinstate the Withdrawn Construction Permit (May 20, 2009) (ADAMS Accession No. ML 091400780).

²⁵ There have been subsequent developments not directly pertinent to the authority issue before us today. On July 15, 2009, Petitioners filed a “Supplemental Basis for Previously Submitted Contention 5 — Lack of Good Cause.” Contention 5, entitled “Lack of Good Cause for Reinstatement,” is currently being held in abeyance pending our decision on the threshold authority issue. Petitioners’ filing rests on a June 15, 2009 *Federal Register* notice and seeks to amend Contention 5. The June 15 *Federal Register* notice announced that TVA is studying its Integrated Resource Plan “to evaluate TVA’s portfolio of resource options for achieving a sustainable future and meeting the future electrical energy and resource stewardship needs of the Tennessee Valley.” The notice also indicates that TVA plans to prepare an Environmental Impact Statement (EIS) and is seeking public comments on the scope of the EIS and the issues that the EIS will address. TVA has moved to strike Petitioners’ proposed supplemental basis for Contention 5. More recently, on August 11, 2009, TVA submitted a letter to the Commission requesting that the NRC move Bellefonte Units 1 and 2 from “terminated” to “deferred” plant status.

²⁶ 42 U.S.C. § 2235.

²⁷ 42 U.S.C. § 2239.

the Bellefonte construction permits. However, our action came in response to an NRC Staff recommendation, in the exercise of our supervisory agency-oversight responsibility. Our decision to authorize reinstatement was in no sense a *final* agency action, for it expressly was made subject to a hearing opportunity, an opportunity Petitioners have now taken up. In today's decision, we act as adjudicators and in that light we consider the reinstatement issue afresh, without regard for our earlier views.²⁸

Accordingly, we have carefully reviewed the litigants' pleadings and briefs, and have reexamined the underlying law and policy in depth. For the reasons we give below, we conclude that the AEA grants NRC sufficient flexibility to allow the agency to reinstate surrendered construction permits in appropriate circumstances.

A. Statutory Language

In deciding whether the Commission has the authority to reinstate a voluntarily surrendered construction permit, we start by examining section 185 of the AEA, the only statutory provision that addresses construction permits. The term "reinstatement" is not directly or indirectly mentioned in this section.²⁹ Nor does any other provision in the AEA speak to reinstatement of voluntarily surrendered construction permits. It cannot be said, therefore, that the AEA itself prohibits reinstating surrendered construction permits.

Petitioners claim that TVA forfeited its construction permits under the AEA when TVA asked the NRC Staff to withdraw them in 2006.³⁰ Petitioners point out

²⁸ See, e.g., *Withrow v. Larkin*, 421 U.S. 35, 53 (1975); see also *Career Education, Inc. v. Department of Education*, 6 F.3d 817, 820 (D.C. Cir. 1993).

²⁹ (a) Completion date

All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit. The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date. Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this chapter and of the rules and regulations of the Commission, and in the absence of any good cause being shown to the Commission why the granting of a license would not be in accordance with the provisions of this chapter, the Commission shall thereupon issue a license to the applicant. For all other purposes of this chapter, a construction permit is deemed to be a "license."

42 U.S.C. § 2235(a).

³⁰ Petitioners' Brief at 6; see also Petitioners' Reply at 5.

that “TVA did not merely stop construction, but affirmatively forfeited all rights under the permits.”³¹ Thereafter, Petitioners maintain, TVA no longer possessed valid permits, was not an NRC licensee, and was not bound by NRC regulations. As a result, Petitioners argue that TVA must now file a new application for construction permits.

But the AEA, in its terms, does not support Petitioners’ dogmatic approach to surrendered construction permits. Section 185, the only arguably relevant AEA provision, provides for a “forfeiture” of rights under a construction permit only where a construction permit has “expired” and has not been extended. Specifically, section 185 says, “[u]nless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.”³²

Thus, under the plain language of section 185, the voluntary surrender of a construction permit that has not in fact “expired” — that is where the construction completion date had not yet arrived — does not constitute a situation to which the “forfeiture” provision under section 185 applies.³³ Forfeitures in section 185 only cover expired construction permits. TVA’s Bellefonte construction permits that are at issue here never “expired.” They were simply surrendered before their expiration dates had arrived (in 2011 and 2014). Hence, no “forfeiture” within the meaning of section 185 took place.

Neither does voluntary surrender of a not-yet-expired construction permit fit within the ordinary meaning of “forfeiture.” The dictionary defines “forfeit” to mean “1. Something surrendered as punishment for a crime, offense, error, or breach of contract.”³⁴ The dictionary definition indicates that forfeiture is generally understood as a consequence for a wrongful act. But the scenario we are addressing here is one where a licensee had not engaged in any form of wrongdoing but, rather, *voluntarily* chose to surrender its construction permit.

B. NRC’s Broad Statutory Discretion

Although the AEA is silent on the NRC’s authority in the event of a voluntarily surrendered construction permit, it has long been established that the NRC possesses broad discretion in deciding how to proceed in the face of congressional silence. “The Atomic Energy Act of 1954 is hallmarked by the amount of discretion granted the Commission in working to achieve the statute’s ends.

³¹ Petitioners’ Reply at 4.

³² 42 U.S.C. § 2235(a).

³³ The legislative history of section 185 does not speak to what constitutes “good cause” for the purpose of avoiding forfeiture.

³⁴ *Webster’s New College Dictionary* 448 (3d ed. 2005).

The Act's regulatory scheme 'is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective.' *Siegel v. AEC*, 400 F.2d 778, 783 (1968)."³⁵

Our broad discretion under the AEA has been confirmed in numerous court decisions, including one approving our decision in the *Comanche Peak* construction permit proceeding to extend an already-expired construction permit under section 185.³⁶ In that case, the licensee inadvertently allowed its construction permit to expire. After the licensee realized its error, it applied for an extension of its permit, which the NRC granted. Deferring to the NRC's view of its statutory authority, the court found no forfeiture under section 185, despite the expiration of the permit, because section 185 did not specify when a showing of good cause for a construction permit extension had to be made. Similarly, in this case section 185 does not specify whether a relinquished construction permit may be reinstated. This statutory silence leaves the NRC room to allow reinstatement if reasonable.

C. AEA's Overall Statutory Scheme

Contrary to Petitioners' position, construing the AEA to authorize the Commission to reinstate a voluntarily surrendered construction permit does not conflict with the AEA's statutory language or objectives. In addition to section 185, which we have already considered, two other sections of the AEA, sections 186 and 189, may arguably bear on our interpretation of our reinstatement authority. We find, however, that our exercise of reinstatement authority does not conflict with either of these provisions.

Section 186 authorizes the NRC to revoke licenses where there is wrongdoing or other misfeasance:

a material false statement in the application . . . or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application, or for failure to construct or operate a facility in accordance with the terms of the construction permit or license [. . .]³⁷

However, a voluntary surrender of construction permits amounts to no sort of wrongful activity that may justify revoking a license under section 186. That provision, accordingly, does not bear on the issue before us today.

³⁵ *Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 82 (1st Cir. 1978) (some internal citations omitted); see also *Massachusetts v. NRC*, 522 F.3d 115, 126-27 (1st Cir. 2008).

³⁶ See *Citizens Association for Sound Energy v. NRC*, 821 F.2d 725, 731 (D.C. Cir. 1987).

³⁷ 42 U.S.C. § 2236(a).

Neither does section 189, which calls for a mandatory hearing for the granting of a construction permit and a hearing upon request for the granting, revoking, or amending of any permit or license, undercut our authority to reinstate a surrendered construction permit.³⁸ As in the Bellefonte case before us today, in any situation involving a request to reinstate a previously issued construction permit, the required construction permit hearing process would necessarily have *already* taken place at the time of the initial grant of the permit. Petitioners' argument that section 189 requires a new "prior" hearing begs the very "authority" question at issue here. Petitioners would be correct, of course, if fresh construction permits were required. But because we hold they are not, section 189 does not prevent NRC's reinstating surrendered permits.

It is worth noting that NRC has provided an opportunity to request a hearing on the question whether TVA has shown "good cause" to reinstate the Bellefonte permits, an opportunity Petitioners have partaken. In addition, should TVA prevail in that hearing and then apply for an operating license, there will be a future hearing opportunity on that application. Petitioners cannot fairly maintain they are not being given a meaningful opportunity to be heard.

D. General Administrative Law and Policy

As a general matter, administrative agencies have inherent authority to change and modify their own prior decisions.³⁹ Indeed, in the particular area of licensing, statutes and regulations often provide for reinstating surrendered licenses in appropriate circumstances. For example, the Federal Communications Commission (FCC) has authority to reinstate expired broadcasting permits: Section 312(g) of the Communications Act of 1934 provides that the FCC may reinstate a broadcasting station license that has expired.⁴⁰ Another example is law and medical licensing. Many jurisdictions allow nonpracticing lawyers or doctors who have voluntarily terminated their licenses to reinstate their licenses if they meet certain conditions.⁴¹ The reinstatement problem has not occurred previously at the NRC, so neither Congress nor the Commission has had occasion to codify a particular

³⁸ 42 U.S.C. § 2239(a)(1)(A).

³⁹ See generally *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965); *Gun South, Inc. v. Brady*, 877 F.2d 858, 862-63 (11th Cir. 1989).

⁴⁰ "If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness." 47 U.S.C. § 312(g).

⁴¹ See, e.g., D.C. Bar Bylaws, Art. III, § 4(a) and (b); see also District of Columbia Municipal Regulations for Medicine §§ 4606.1, 4606.4, and 4615.1.

NRC approach to reinstatement. But it is clear that our decision today is in line with common licensing schemes and with general administrative law practice.

Today's decision is also sound from a policy perspective. Exercising reinstatement authority here promotes regulatory efficiency by allowing the agency to credit both the licensee and the NRC Staff for work already completed during the initial construction permit proceeding and subsequent construction. This avoids repeating unnecessary procedures or reviews that may be legally required were the agency to insist on a fresh construction permit application.

At bottom, reinstating surrendered permits in appropriate circumstances is consistent with the NRC's duty to protect public health and safety. Reinstatement does not allow a licensee to conduct any activities that were not sanctioned by its original construction permits and all regulatory requirements for an operating license would have to be met before constructed plants could begin operating.⁴² Nor does reinstatement — in any way — affect the right of interested members of the public to raise safety, security, and environmental issues in connection with any future operating license application.

Finally, our decision today is confined to the unusual facts of this case, involving a previously withdrawn but not-yet-expired construction permit. As such, our reinstatement authority could be invoked again, if ever, only in the rarest of circumstances.

We find Chairman Jaczko's dissent unpersuasive. A reader would not know, based on the Chairman's full-throated rhetoric, that the Commission in actuality has acted with great deliberation and transparency in its reviews and actions, and has sought public participation, to ensure that any reinstatement of the Bellefonte Units 1 and 2 construction permits is fully protective of public health and safety and the environment. We see no need to reiterate our full rationale here, but we find a few of the dissent's points worthy of further discussion.⁴³

We are especially perplexed by the dissent's claim that the majority has provided no rationale or justification for our decision. As set forth above, today's decision explains the legal and policy reasoning for our position at considerable length. Disagreement with our reasoning does not erase it.

We also disagree with the dissent's notion that we have changed our prior position on an established policy matter, without explanation and without public participation. The Chairman apparently believes that *Citizens Awareness Network*

⁴² COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2.

⁴³ One minor but notable point warrants mention. The Chairman's dissent mischaracterizes the majority's position that reinstating the permits avoids repeating unnecessary procedures or reviews. Contrary to the Chairman's description, the majority did not state that "'legally required' procedures and reviews are 'unnecessary.'" (Emphasis added.) The majority had no reason to make such a definitive proclamation; it did not find that new construction permit applications were necessary.

v. *NRC* calls for a notice-and-comment process before the Commission may allow reinstating the surrendered Bellefonte construction permits.⁴⁴ But *Citizens Awareness Network* dealt with a situation quite different from the one before us today. In *Citizens Awareness Network*, the First Circuit struck down an NRC effort to change a settled interpretation of its regulations.⁴⁵ Here, by contrast, we are changing no prior interpretation of our regulations. Rather, in today's decision we answer a question that we have not addressed prior to the *Bellefonte* controversy. And, unlike the NRC decision at issue in *Citizens Awareness Network*, today's decision offers a full and rational explanation of our views, in the context of a hearing opportunity with briefs from all litigants.⁴⁶ *Citizens Awareness Network*, in short, does not undercut the approach we take in today's decision.

The dissent charges that the majority is allowing utilities to avoid statutory and regulatory requirements, thereby compromising the agency's duty to protect public health and safety. That conclusion appears to flow in large part from the Chairman's narrow reading of the Commission's authority and his conclusion that TVA must begin afresh in seeking construction permits for Units 1 and 2. Contrary to the impression left by the dissent, the agency's consideration of matters of safety and the environment have been paramount in decisions about whether and how TVA may proceed.⁴⁷ Moreover, the dissent should not obscure the Commission's application of its fundamental and traditional regulatory processes in regard to these construction permits.⁴⁸

Lastly, we object to the dissent's insinuation that the majority merely rubber-stamped its prior policy decision without considering the litigants' arguments

⁴⁴ 59 F.3d 284 (1st Cir. 1995).

⁴⁵ *Id.* at 291.

⁴⁶ Additionally, the Staff's previous memorandum to the Commission in response to the TVA request was publicly available, and subsequently the Commission's voting records and direction to Staff were made public. *See* note 17, *supra*.

⁴⁷ *See, e.g.*, COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2; NRC Staff's Environmental Assessment and Finding of No Significant Impact, 74 Fed. Reg. 9308 (Mar. 3, 2009); Safety Evaluation by the Office of Nuclear Reactor Regulation Relating to the Request for Reinstatement of Construction Permit Nos. CPR-122 and CPR-123, Bellefonte Nuclear Plant, Units 1 and 2 (Mar. 9, 2009) (ADAMS Accession No. ML090620052).

⁴⁸ For example, in addition to the instant hearing on the issue of TVA's "good cause" for reinstatement, the necessary safety and environmental reviews and public hearing on the applications for the construction permits were conducted prior to their issuance in the 1970s; in 2003, the NRC evaluated the environmental impacts relating to TVA's request to extend the construction permits to 2011 and 2014 and concluded that there was no significant effect on the quality of the human environment associated with continued construction activities up to the extended dates (*see* 68 Fed. Reg. 3571, 3573 (Jan. 24, 2003)); and, before any application for authority to operate these units would be determined, the application must be renoticed, the necessary safety and environmental reviews must be conducted, and a hearing must be held.

fully. While the Commission's previous decision to authorize the Staff to reinstate the permits was premised on the belief that this was within its authority, that step did not preclude the Commission from considering its position further, as this agency and other adjudicatory bodies are often permitted to do.⁴⁹ Public involvement in this decision is not a pretense; it is real and it is meaningful. Indeed, we requested briefs on the question of our authority to reinstate the construction permits for the very purpose of ensuring a full legal and policy understanding of the reinstatement issue. The Chairman may disagree with our conclusions but statements which call into question the good faith of our deliberations have no place in the Commission's discourse.

E. Remainder of Proceeding

This decision addresses the "authority" question only, a question raised in Petitioners Contentions 1 and 2. We hold that NRC has authority to reinstate surrendered construction permits. We refer the remainder of the petition to intervene and request for hearing, including Petitioners' July 15, 2009, supplemental filing to the Atomic Safety and Licensing Board Panel for further proceedings. Once a Licensing Board is convened, it will have to decide in the first instance whether Petitioners have established standing and have raised admissible contentions and if so, given their claims, whether reinstatement on the particular facts presented here is lawful and proper — that is, whether there is "good cause" for reinstatement.

IV. CONCLUSION

Accordingly, for the reasons given, the Commission has the authority to reinstate the Bellefonte Construction Permits for Units 1 and 2. Contentions 1 and 2 are *denied*. The remainder of the petition to intervene is referred to the Atomic Safety and Licensing Board Panel under 10 C.F.R. Part 2.

⁴⁹For example, we can take certain enforcement action or issue license amendments in certain circumstances before completion of any associated hearing. As the courts have held repeatedly, following the Supreme Court's lead in *Withrow v. Larkin*, in practicality an agency head often must act on the same matter initially as supervisor and later as adjudicator. This dual role is not illegal and does not equate to unfair prejudgment of adjudicatory issues. As we think is evident from our opinion today, we gave full and fair consideration to the arguments raised in the litigants' briefs.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of January 2010.

Chairman Jaczko, Respectfully Dissenting

I disagree with the majority's finding that the Commission has the authority to reinstate the Bellefonte Construction Permits for Units 1 and 2. I believe that the argument regarding the legal authority to reinstate a construction permit (CP) which the NRC has terminated at the request of the holder is weak at best. In addition, I disagree with the decision on policy grounds because it allows a utility to simply opt out of NRC requirements concerning maintenance and preservation until it decides to reactivate the permit to resume construction. In my view, we establish a dangerous precedent by allowing a utility to avoid these important regulatory requirements and NRC oversight by withdrawing its permit, knowing that it can be simply reinstated later regardless of the condition of the site.

Section 185a of the Atomic Energy Act (AEA) addresses the expiration of construction permits, which states:

The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.

This language reflects Congress's expectation that permit holders that do not maintain a valid permit forfeit all rights under that permit. This means that a new permit must be obtained through our application process before activities authorized under the permit may commence.

When TVA deliberately and voluntarily surrendered its construction permit, the NRC terminated the permit and TVA forfeited all rights under the permit. Like a permit which has expired, a permit which has been purposely and explicitly abandoned by the holder and terminated by the NRC no longer exists. Therefore, TVA cannot resume any activities authorized by a CP without applying for, and being granted, a new permit.

The majority concedes that the AEA calls for the forfeiture of permit rights upon the expiration date of the permit and is silent on "reinstatement." Faced with a statute that requires expiration and, upon expiration, forfeiture of all rights associated with construction permits, the majority resorts to misinterpreting the language of the statute in order to allow TVA to resurrect a long-terminated construction permit. This interpretation is inconsistent with the statutory language and establishes a policy that allows permit holders to avoid important regulatory obligations. Importantly, other statutes — such as the Communications Act — explicitly provide for reinstatement. Thus, there is ample support for the argument that, had Congress envisioned such an approach under the AEA, they certainly knew how to include it in the statutory language. That Congress chose not to provide for reinstatement should be informative.

Moreover, the majority appears to be relying primarily upon the underlying assumption that expiration date of the CP prevails. In other words, “forfeiture” does not matter because the expiration matters and in this case, the CP had not expired. But that logic does not play out as neatly as the majority would like. Following that chain of logic, the Applicant could have come in requesting an extension of the CP time frame (thus, not allowing it to expire), even though there was no current CP to extend.

The AEA places an obligation upon the NRC to determine if we can grant a CP and to determine when a CP has been forfeited. A permit holder can request to seek an end to its permit obligations at any time, but the agency still has to undergo an analysis to determine if we are ready to relieve the permit holder of the duties required of them under the permit. It is not automatically forfeited even upon a permittee’s request. The *Comanche Peak* analogy misses this point. In that instance, everyone — including the permit holder and the NRC — was operating under the presumption that the authority and obligations under the construction permit continued even though, unbeknownst to them, the permit had expired. It was in the line of a clerical error, not a conscious business decision where the permit holder sought and obtained permission to end its obligation to remain in compliance with NRC requirements and NRC oversight. We also know that TVA understood this distinction very well because it made a different business decision for Watts Bar II where it maintained its CP and is now following the established regulatory process to come in and seek an operating license for that facility.

The fact is that TVA has not held a CP for Bellefonte Units 1 or 2 since September 2006. Without a permit, TVA — like any other utility — is required by the AEA and our regulations to apply for a permit by submitting an application that satisfies 10 C.F.R. Part 50 or Part 52 requirements. To say otherwise — that termination of a permit does not matter — is to say that not having a permit is the same as having had a permit. Certainly, a regulatory agency should, at a minimum, defend its regulations and the need for them. Bypassing our application requirements by “reinstating” a nonexistent CP does the opposite.

Nor is this decision consistent with the Commission’s regulations, guidance, and procedures, as explained in the Policy Statement on Deferred Plants. NRC regulations provide that if the proposed construction is not completed by the latest completion date, the CP shall expire and all rights be forfeited. 10 C.F.R. § 50.55(b). Thus, our regulations, like the AEA, require forfeiture of all rights under the CP upon termination. Before deciding to permanently cancel construction, TVA had maintained the option of resuming construction by obtaining a deferred construction status while maintaining its CP. The Commission’s expectations regarding regulatory compliance while construction is deferred are detailed in the Commission’s Policy on Deferred Plants. As the policy explains, CP holders are required to maintain a quality assurance program in order to ensure that

equipment and materials are preserved and maintained and that documentation of those activities is preserved.

The Commission's policy on construction deferral is grounded on the need to ensure that safety-related structures and components are not compromised during the time construction is deferred. The Commission developed this policy in order to provide substantive guidance on the applicability of regulatory requirements in precisely this situation — when construction of a new power reactor ceases and is later restarted. Proposed Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 8075 (Mar. 16, 1987). The policy made clear that licensees must assure that their CPs do not expire and that, during the time that construction has ceased, licensees must comply with NRC requirements for verification of construction status, retention and protection of records, and maintenance and preservation of equipment and materials. *Id.* at 8077; Final Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077 (Oct. 14, 1987). TVA, fully aware of those requirements, chose to obtain termination of the CP to allow it to sell, take apart, remove, abandon in place or demolish structures without oversight or accountability to the NRC. Having made that choice, TVA should be required to establish entitlement to a Part 50 Construction Permit or a Part 52 Combined License.

The majority provides no rationale for suddenly departing from our established policy of ensuring that the safety-related structures, systems, and components are continuously maintained and preserved if construction is allowed to resume after being deferred. Without continuous regulatory authority, and the associated requirements for maintenance activities and record keeping, the Staff loses any assurance of the integrity or reliability of existing structures. While this is precisely the purpose behind the Commission's policy, this decision permits TVA to resume construction after obtaining CP termination — and abandoning preventive maintenance — for the sake of “regulatory efficiency.” However, this action will have the opposite effect. For, by allowing CP termination, we have lost the pedigree and certification of an ongoing QA program and NRC inspections. The potential that undocumented work activities, introduction of unapproved chemicals, corrosion, and other unknown degradation have occurred since the QA program was halted calls into question the integrity of and reliability of safety-related structures, components, and systems. This substantially increases the difficulty of assessing safety, a burden which is shifted to the Staff. The true impact of the majority's decision is to increase the Staff's regulatory burden.

Moreover, the majority decision adopts this policy shift on generic and broad policy grounds. Finding that our regulations and policy on deferred construction may be simply ignored, without requiring an exemption or waiver, is to abandon them. The majority did not reach a site-specific decision as to whether circumstances warrant an exemption. Indeed, the decision does not grant an exemption or discuss any site-specific reasons for allowing this unprecedented action. Instead,

the decision relies only on the Commission's broad authority to change and modify policy and cites policy concerns regarding regulatory efficiency.

Further, this decision to abandon our longstanding regulatory and policy stance on CPs was reached without offering any public notice or opportunity for comment. The First Circuit Court of Appeals addressed a similar situation in *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir 1995), when the Commission unilaterally changed its policy on decommissioning. The Court found that a change to agency policy providing substantive guidance on our regulations required compliance with the notice-and-comment requirements of AEA. I believe that the majority here is also adopting a change in policy which provides substantive guidance on the application of our regulations. Further, the new policy is not consistent with the AEA or our regulations. Therefore, it was improper to do so without providing notice and an opportunity for public comment.

Even more troubling is the fact that the Commission changed this policy without any justification. The majority does not cite any new facts, information, or changed circumstances that call for a change in our policy concerning CPs. Instead, the majority attempts to minimize the need for CPs by claiming that the "legally required" procedures and reviews are "unnecessary." The majority then tries to minimize the potential consequences of this policy shift by claiming that "reinstatement" will only occur in rare circumstances. That conclusion is far from certain. Up until now, utilities have not terminated permits and thereafter sought reinstatement because it is not permitted under our regulations. Following this shift in policy, however, they will have every incentive to do so and avoid the expense and burden of compliance with our regulations. While this would certainly be more expedient for the impacted utilities, abandoning our regulatory confines makes our job of ensuring public health and safety that much more difficult.

This shortcoming is not cured by allowing the parties to this proceeding to file briefs on this subject. The majority's decision to reverse our longstanding policy was not informed by public input. Rather, it was decided in response to a letter received from TVA. Based on the Commission's response to only a letter, the Staff issued an order allowing reinstatement of the CP. Per the Commission's direction, the Staff offered a hearing on the issue of "good cause" for reinstatement — a limited and narrow hearing at best and one that will not address the broader policy change underlying the decision to allow reinstatement of TVA's CP. Our request for briefs from only the parties in this hearing on the underlying broad policy decision, which applies to all CP holders, is no more than a belated pretense of public involvement. The majority decision is simply a reiteration of the policy decision the Commission had already decided without public comment or adjudicatory protections.

Lastly, I am troubled that, under this new "reinstatement" policy the public

is denied any opportunity to raise safety or environmental issues regarding construction of the Bellefonte reactors. This is because the opportunity for hearing has been limited to the question of whether TVA has good cause for obtaining reinstatement of the CPs. By restricting the hearing notice to this limited issue, we foreclose any hearing on the fundamental safety and environmental issues concerning the decision of whether TVA should be granted a CP.

This limited hearing opportunity cannot be reconciled with the AEA which requires hearings — including a mandatory hearing — on the decision of whether to grant a CP. The fact that a hearing is required before a CP is issued recognizes that construction of a power reactor, which has significant environmental implications, should not be undertaken without a full vetting of the application. Our regulations provide sufficient flexibility to prevent unnecessary duplication by permitting TVA to incorporate information from the original CP application (10 C.F.R. § 50.32) and to obtain exemptions (10 C.F.R. § 50.12). And the Staff may rely on its analysis of TVA's original CP application as appropriate. However, to the extent that TVA's CP must be reviewed anew in light of changes to the original application, new circumstances and new requirements, the public should be offered the opportunity to participate in a hearing and a mandatory hearing must be conducted.

In addition, this limited hearing opportunity cannot be reconciled with our commitment to openness and transparency. Hearings serve an important function in our process by ensuring that our regulatory decisions are thoroughly vetted and transparent. Denying the public an opportunity to raise safety or environmental issues on such an important regulatory decision is not defensible as a legal or policy matter. A hearing opportunity after construction is completed, but before operation is authorized, denies the public a meaningful opportunity to participate in the important issue of siting before substantial ir retrievable resources are invested and the significant environmental disruption of construction occurs. Put simply, a hearing after construction cannot substitute for a hearing before construction is authorized.

I believe that the majority opinion establishes a troubling precedent in allowing utilities and the agency to avoid statutory and regulatory requirements on safety, the environment, and public participation. When we ignore these fundamental tenets of our regulatory process we compromise our duty to public health and safety and our commitment to transparency and openness. Therefore, I dissent from the majority opinion.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 52-039-COL

PPL BELL BEND, LLC
(Bell Bend Nuclear Power
Plant)

January 7, 2010

STANDING: STANDARD OF REVIEW

The Commission generally defers to Board decisions regarding standing and contention admissibility in the absence of clear error or an abuse of discretion. *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317, 324 (2009); *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009) (citing, *inter alia*, *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008)); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

STANDING

A petitioner cannot rely on another board's finding of standing in a prior proceeding, even where the same licensed facility is involved.

STANDING

A petitioner must make a fresh demonstration of standing for *each* proceeding in which he seeks intervention because a petitioner's circumstances may change

from one proceeding to the next. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993). *See also Crow Butte*, CLI-09-9, 69 NRC at 342-43 (organizational petitioner could not rely on affidavit authorizing representation that was executed with respect to one proceeding to authorize representation in separate proceeding involving the same license).

LICENSING BOARD: DECISIONS

Unreviewed board decisions have no binding effect on a later board. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-22, 62 NRC 542, 544 (2005); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999).

STANDING

The petitioner bears the burden to provide facts sufficient to establish standing. *U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001) (citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000)).

STANDING: FREQUENT CONTACTS

The sufficiency of a nonresident petitioner's "frequent contacts" is a determination that necessarily will require the Board to weigh the information provided. Therefore, a petitioner who seeks to base standing on contacts within a 50-mile radius of a proposed facility must provide enough detail to allow the Board to distinguish a casual interest from a substantial one.

STANDING: FREQUENT CONTACTS

A petitioner's lack of specificity concerning the nature, extent, and duration of his contacts with the area surrounding the proposed site is a sufficient basis to reject a claim of standing. *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 402 n.85 (2009) (citing *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354-55 (1999); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999)).

MEMORANDUM AND ORDER

Mr. Eric Joseph Epstein has appealed the Atomic Safety and Licensing Board's ruling denying his petition for leave to intervene and request for hearing in this combined license proceeding.¹ For the reasons given below, we affirm the Board's ruling.

I. BACKGROUND

PPL Bell Bend, LLC (PPL Bell Bend) has proposed to build a U.S. Evolutionary Power Reactor (EPR) at a site adjacent to the Susquehanna Steam Electric Station in Luzerne County, Pennsylvania.²

The central issue before us involves whether Mr. Epstein has demonstrated standing to intervene in this proceeding. Mr. Epstein has experience as a petitioner in prior NRC proceedings. In particular, two licensing boards have determined that Mr. Epstein demonstrated standing in previous proceedings involving the neighboring Susquehanna Station. In a 2007 license renewal proceeding, the board found that Mr. Epstein had shown sufficient business contacts within close proximity to the plant to demonstrate standing, but rejected his intervention petition for failure to propose an admissible contention.³ Later that same year, the board in another Susquehanna proceeding — involving a request for an extended power uprate (EPU) — similarly found that Mr. Epstein had demonstrated standing but, again, had not offered an admissible contention.⁴ Mr. Epstein appealed. We affirmed the board's ruling based on Mr. Epstein's failure to offer an admissible contention, but did not review the board's standing determination.⁵

In his initial intervention petition before the Board in this matter, Mr. Epstein stated that he resides in Pennsylvania, although outside the 50-mile radius of the proposed site. However, he stated that he has business dealings that take him

¹ LBP-09-18, 70 NRC 385 (2009).

² The proposed Bell Bend reactor would be located roughly 1 mile from the Susquehanna site. *See* Bell Bend Nuclear Power Plant Combined License Application, Part 3: Environmental Report, Figure 2.1-1 (ADAMS Accession No. ML090710505).

³ *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 293-96 (2007). Mr. Epstein did not appeal this ruling to the Commission.

⁴ *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 17 (2007).

⁵ *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101 (2007).

within that radius.⁶ Mr. Epstein based his standing claim on two theories. First, he argued that he automatically had established standing by virtue of his showing in the Susquehanna license renewal proceeding.⁷ In addition, he described his various contacts with the area within a 50-mile radius of the proposed Bell Bend plant. His Petition stated that he “routinely pierces the 50-mile proximate rule [sic] during his day-to-day activities simply by traveling to Lebanon, Schuylkill and northern and Dauphin counties [sic].”⁸ He claimed that he represents East Hanover Township as “a contracted advocate” and thus his “livelihood” is tied to the “well-being and safety of East Hanover’s residents, property and infrastructure.”⁹ Mr. Epstein further claimed he commutes to Grantville, PA, a minimum of once a week.¹⁰ In addition, Mr. Epstein stated that he serves on the board of directors for two organizations based in Allentown, and attends meetings in Allentown, Berwick, Fogelsville, Hazleton, and Kingston (all of which, Mr. Epstein states, are within a 50-mile radius of the proposed site).¹¹ Mr. Epstein claimed that these contacts are sufficient to show that he has “well-established business and professional interests ‘within a 50-mile radius of the facility.’”¹²

PPL Bell Bend and the NRC Staff both disputed Mr. Epstein’s standing claims.¹³ Both argued that Mr. Epstein had not provided sufficient detail concerning his contacts with the area near the proposed site, such as the duration, frequency, and actual proximity to the proposed facility, other than the general implication that the contacts occur within 50 miles of the proposed facility.¹⁴ The Staff argued that simply traveling within a 50-mile radius is not sufficient to show a “bond” between Mr. Epstein and the proposed reactor, “particularly in the

⁶ Eric Joseph Epstein’s, Pro Se, Petition for Leave to Intervene, Request for Hearing, and Contentions with Supporting Factual Data Re: PPL Bell Bend LLC: Combined License Application for the Bell Bend Nuclear Power Plant Docket No. 52-039; NRC-2009-0112 Adams Accession No. ML082140630 (May 18, 2009) (Petition) at 8-9.

⁷ Petition at 7.

⁸ *Id.* at 8.

⁹ *Id.*

¹⁰ *Id.* Although the Petition is silent as to whether Grantville, PA, is within a 50-mile radius of the proposed Bell Bend site, it appears that the town is slightly more than 50 miles away. See <http://www.geobytes.com/CityDistanceTool.htm> (distance from Berwick, PA, to Grantville, PA estimated to be 53 miles) (last visited Oct, 20, 2009).

¹¹ Petition at 9.

¹² *Id.*

¹³ Applicant’s Answer to Petitions to Intervene (June 12, 2009) (Applicant’s Answer) at 20-24; NRC Staff Answer to “Eric Joseph Epstein’s Petition for Leave to Intervene, Request for Hearing, and Presentation of Contentions with Supporting Factual Data” (June 12, 2009) (Staff Answer) at 8-11.

¹⁴ Applicant’s Answer at 8-9; Staff Answer at 22-23.

absence of information regarding the length of time that he is within the 50-mile radius.”¹⁵

In his Reply to the NRC Staff’s and PPL Bell Bend’s answers, Mr. Epstein did not supply additional details concerning the frequency and duration of his contacts with the site, nor did he provide any other information showing his interest in the proposed facility. Rather, he merely reiterated that he had already established standing in the 2007 Susquehanna license renewal proceeding, and cited a filing he provided in that case in response to a board request for additional information regarding standing.¹⁶

The Board here found that Mr. Epstein had not demonstrated standing. First, it rejected the argument that Mr. Epstein’s showing in the Susquehanna license renewal proceeding had any bearing on the standing issue in this proceeding.¹⁷ The Board observed that in the Susquehanna EPU proceeding — decided only months after the Susquehanna license renewal board’s ruling on standing — the board specifically had rejected Mr. Epstein’s attempted reliance on the prior board’s ruling.¹⁸ The Board went on to find that Mr. Epstein had not provided sufficient information concerning the extent, frequency, and duration of his contacts in the vicinity of the proposed Bell Bend power plant.¹⁹

The Board also rejected Mr. Epstein’s four proposed contentions as inadmissible.²⁰ Among these was proposed Contention 2, which claimed that the application did not address how PPL Bell Bend would store and dispose of Class B and Class C low-level radioactive waste (LLRW) in view of the partial closing of the Barnwell, South Carolina, disposal facility.²¹ The Board found that Contention 2 failed to demonstrate a genuine dispute with the application. In particular, the Board observed that the application acknowledged the possibility that no offsite disposal facility would be available for Class B and C waste, described methods for minimization of LLRW, and discussed plans for additional storage should that become necessary.²²

¹⁵ Staff Answer at 22.

¹⁶ Eric Joseph Epstein’s Reply to Applicant’s Answers and the Nuclear Regulatory Commission Staff’s Answer to Eric Joseph Epstein Petition for Leave to Intervene, Request for hearing, and Contentions with Supporting Factual Data (June 19, 2009) at 8 n.2.

¹⁷ LBP-09-18, 70 NRC at 400-01.

¹⁸ *Id.* at 401.

¹⁹ *Id.* at 402.

²⁰ *See generally id.* at 419-31.

²¹ Petition at 20-21. As of July 2008, the EnergySolutions Barnwell Operations facility in Barnwell, South Carolina, only accepts Class B and C LLRW from facilities in South Carolina, New Jersey, and Connecticut.

²² LBP-09-18, 70 NRC at 423-24. *See also id.* at 410-11.

Mr. Epstein's appeal challenges only the Board's rulings on standing and Contention 2.²³

II. DISCUSSION

We generally defer to Board decisions regarding standing and contention admissibility in the absence of clear error or an abuse of discretion.²⁴ Because, as discussed below, we find that the Board did not err in its ruling on standing, we need not revisit its ruling on the admissibility of Mr. Epstein's proposed Contention 2.

As an initial matter, the Board correctly concluded that Mr. Epstein could not rely on other boards' findings of standing in the two prior proceedings concerning the Susquehanna facility. Unreviewed board decisions — including both Susquehanna standing rulings here — have no binding effect on a later board.²⁵ Further, our case law is clear that a petitioner must make a fresh standing demonstration in *each* proceeding in which intervention is sought because a petitioner's circumstances may change from one proceeding to the next.²⁶ We recently reiterated this principle in the *Crow Butte* case.²⁷ Therefore, the Board correctly found that it may focus only on the support Mr. Epstein presented with respect to *this proceeding* in ruling on his standing to intervene.

In proceedings for construction permit and operating licenses for nuclear power plants, we recognize a "proximity presumption" in favor of standing for persons who have "frequent contacts" within a 50-mile radius of a nuclear power plant.²⁸ As noted above, Mr. Epstein claims standing by virtue of his business contacts

²³ Eric Joseph Epstein's Appeal of the Memorandum and Order Issued by the Atomic Safety and Licensing Board on August 10, 2009 (Aug. 20, 2009) (Appeal).

²⁴ *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 319, 324 (2009); *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009) (citing, *inter alia*, *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008)); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

²⁵ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-22, 62 NRC 542, 544 (2005); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999). This rule of practice was pointed out to Mr. Epstein by the Susquehanna EPU board. See LBP-07-10, 66 NRC at 19.

²⁶ *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993).

²⁷ See *Crow Butte*, CLI-09-9, 69 NRC at 343 (organizational petitioner could not rely on affidavit authorizing representation that was executed with respect to one proceeding to authorize representation in separate proceeding involving the same license).

²⁸ *USEC Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311 (2005) (citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 (1993)).

generally within the site vicinity.²⁹ The question the Board faced was whether Mr. Epstein articulated sufficient information to demonstrate frequent contacts within the 50-mile site radius.

The petitioner bears the burden to provide facts sufficient to establish standing.³⁰ While determining a petitioner's residence generally is relatively straightforward, the sufficiency of a nonresident petitioner's "frequent contacts" is a determination that necessarily will require the Board to weigh the information provided. Therefore, a petitioner who seeks to base standing in a combined license proceeding on contacts within a 50-mile radius of the proposed facility must provide enough detail to allow the Board to distinguish a casual interest from a substantial one. A board may well consider that a person who spends 1 day a week 5 miles from a proposed reactor has a more significant interest in the combined license application than a person who passes within 45 miles of the site in his daily commute. By the same token, a board might consider that a petitioner who owns rental property 3 miles from the site that he occasionally visits, has a greater interest than a person who often visits parkland 20 miles from the proposed facility.³¹

As the Board correctly observed, a petitioner's lack of specificity concerning the nature, extent, and duration of his contacts with the area surrounding the proposed site is a sufficient basis to reject a claim of standing.³² At bottom, the Board found fault with Mr. Epstein's vague and generalized claims supporting his standing case, particularly the omission of specific supporting information concerning the distance between the proposed facility and the towns and other locations referenced in the Petition, and concerning the frequency and duration of Mr. Epstein's visits. Mr. Epstein had the opportunity to cure on reply the defects

²⁹ See, e.g., Appeal at 3 (stating that Mr. Epstein lives "slightly more than" 50 miles from the proposed facility).

³⁰ *U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001) (citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000)).

³¹ Compare *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116-17 (1995) (petitioner whose office was located within one half mile from research reactor may be "presumed to be affected by operation of the facility;" similarly, licensing board reasonably found that a petitioner whose daily commute took her within less than one half mile of a research reactor had standing based on the obvious potential for offsite consequences) and *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 44-45 (1990) (in a decommissioning proceeding — where the "proximity presumption did not apply — a petitioner who commuted past the entrance of plant once or twice a week was found to have standing). Neither case involved a license to construct and/or operate a power reactor, so a 50-mile "proximity presumption" did not apply.

³² LBP-09-18, 70 NRC at 402 n.85) (citing *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354-55 (1999); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999)).

in his initial petition, but did not avail himself of that opportunity.³³ Given the lack of specificity, the Board found itself unable to gauge the “extent, frequency, and duration” of Mr. Epstein’s contacts with the site or locations within its vicinity.³⁴

We find that the Board did not abuse its discretion in determining that Mr. Epstein did not meet his burden to demonstrate standing. Mr. Epstein’s various assertions in support of his standing do not demonstrate with the requisite specificity that he has *substantial* and *regular* contacts within the vicinity of the site. We agree with the Board that Mr. Epstein’s general statement that that he “routinely pierces” a 50-mile radius around the site, is too vague a statement on which to base standing. To support this, Mr. Epstein makes several claims that, even taken together, fail to demonstrate a pattern of regular, significant contacts within the vicinity of the site that would be sufficient to satisfy our standing requirements. For example, Mr. Epstein reiterates his claim that he has represented East Hanover Township “as a contracted advocate” since 2008, and commutes to the township building and makes unspecified “site visits” at a minimum of once per week.³⁵ Without more, we do not find it unreasonable for the Board to consider that a once-a-week commute to the township (only some portions of which lie within a 50-mile radius of the site) was not sufficient to establish a connection.³⁶ Mr. Epstein’s additional claim that he is on the board of directors of two organizations with interests within 50 miles of the site is likewise insufficiently specific to articulate the requisite pattern of regular contacts with the area.³⁷ Finally, we agree with the Board that Mr. Epstein’s claim that his business visits to Allentown, Berwick, Fogelsville, Hazelton, and Kingston add up to “substantial periods of time” was not sufficiently concrete to establish the requisite “significant contacts” within the 50-mile radius. General assertions such as these are simply insufficient to establish standing under the proximity presumption.

We therefore decline to disturb the Board’s ruling on standing. The Board did not err in its rulings on applicable law, nor did it abuse its discretion in finding

³³ LBP-09-18, 70 NRC at 402. Indeed, Mr. Epstein was cautioned by the Susquehanna EPU Board that it was his burden to demonstrate that the frequency, duration, and location of his contacts were sufficient to establish a bond with the area. *See Susquehanna*, LBP-07-10, 66 NRC at 19 (“a petitioner who fails to provide specific information regarding the geographic proximity or the timing and duration of its visits only complicates matters for itself”) (citing *Private Fuel Storage*, CLI-99-10, 49 NRC at 325).

³⁴ LBP-09-18, 70 NRC at 402.

³⁵ Appeal at 3. Mr. Epstein states that “[p]ortions of the township are within the 50 mile radius” of the Bell Bend site. *Id.*

³⁶ *See supra* note 10.

³⁷ Appeal at 4. Mr. Epstein notes that he commutes to Allentown, PA, for meetings associated with the organizations. He states only that his “meeting schedule for this calendar year includes Berwick, Fogelsville, Hazelton, and Kingston.” *Id.*

that Mr. Epstein had not demonstrated a sufficient connection with the proposed license to warrant standing to intervene in the proceeding. Because we find that the Board ruled correctly on the issue of standing, it is not necessary for us to reach the admissibility of proposed Contention 2.

III. CONCLUSION

For the foregoing reasons, we *deny* Mr. Epstein's appeal, and *affirm* the Board's decision to deny his intervention petition in this proceeding.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of January 2010.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 40-7102-MLA
(License Amendment Request)

**SHIELDALLOY METALLURGICAL
CORPORATION**
**(Decommissioning of the Newfield,
New Jersey Site)**

January 7, 2010

RULES OF PRACTICE: STAY APPLICATION

Section 2.342 of Title 10 of the *Code of Federal Regulations* applies to a stay of a decision or action of a presiding officer or licensing board. The movant must be a “party to the proceeding,” which, in the context of section 2.342, refers to an adjudicatory proceeding presided over by a presiding officer or board.

AGREEMENT STATES

Section 274 of the Atomic Energy Act of 1954, as amended, governs co-operation between the Commission and a state. That section authorizes the Commission, if certain conditions are met, to discontinue its regulatory authority over certain categories of material, which authority then is assumed by the state.

POLICY STATEMENTS

As a general matter, a policy statement announces what the Commission seeks to establish as policy, and does not bind either the agency or the public.

RULES OF PRACTICE: STAY APPLICATION

In reviewing a stay application, the Commission considers four factors: (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the party will be irreparably injured unless a stay is granted; (3) whether the granting of a stay would harm other parties; and (4) where the public interest lies.

RULES OF PRACTICE: STAY APPLICATION

When evaluating a motion for a stay the Commission places the greatest weight on the second factor — irreparable injury to the moving party unless a stay is granted. The Commission requires a showing of a threat of immediate and irreparable harm that will result absent a stay.

RULES OF PRACTICE: STAY APPLICATION

Without a showing of irreparable harm, the moving party must show that success on the merits is a virtual certainty to warrant issuance of a stay.

RULEMAKING: AGREEMENT STATE PROGRAM

Agreement State Program compatibility designations are made as part of the rulemaking process. Submission of a petition for rulemaking under 10 C.F.R. § 2.802 is the appropriate mechanism for challenging the compatibility category of an NRC regulation after the final rule has issued.

MEMORANDUM AND ORDER

This Memorandum and Order responds to a motion by Shieldalloy Metallurgical Corp. (Shieldalloy) for a stay pending judicial review of the transfer of regulatory authority over the Newfield, New Jersey site to the State of New Jersey.¹ For the reasons set forth below, we deny Shieldalloy’s motion.

¹Shieldalloy’s Amended Motion for Stay Pending Judicial Review of Commission Action Transferring Regulatory Authority over Newfield, New Jersey Facility to the State of New Jersey (Oct. 14, 2009) (Shieldalloy Motion for Stay). Shieldalloy filed its original motion for a stay on October 13, 2009. Changes were made on two pages to reflect the finding of the New Jersey Department of Environmental Protection (NJDEP) that Shieldalloy’s decommissioning plan does not meet the NJDEP’s regulations. *See id.* at 1 n.1. All citations herein refer to Shieldalloy’s amended motion.

I. BACKGROUND

As part of its smelting and alloy production at the Newfield site, Shieldalloy processed pyrochlore, a concentrated ore containing columbium (niobium). Because pyrochlore contains more than 0.05 wt % uranium and thorium, it is subject to NRC regulation as a source material.² For this, Shieldalloy obtained a source material license under Part 40 of the Commission's regulations, which entitled it to ship, receive, possess, and store such material.

A. Adjudicatory Proceeding on Proposed Decommissioning Plan

In August 2001, Shieldalloy notified the NRC that it intended to decommission the Newfield site, and the license was amended in November 2002 to authorize only decommissioning activities. Shieldalloy then submitted a decommissioning plan requesting a long-term control (LTC) license, proposing to bury the radioactive material under an engineered barrier onsite.³ Upon the NRC Staff's determination that the decommissioning plan was acceptable for docketing and review, a notice of opportunity to request a hearing was published in the *Federal Register*,⁴ and in response, seven petitioners filed petitions to intervene and requests for a hearing. The Atomic Safety and Licensing Board established to rule on the intervention petitions denied all but one — that submitted by the New Jersey Department of Environmental Protection (NJDEP).⁵ The Board found that the NJDEP had demonstrated standing to intervene and had proffered at least one admissible contention, but deferred its ruling on the balance of the NJDEP's contentions pending the Staff's completion of its safety and environmental review.⁶ The adjudicatory proceeding on the proposed decommissioning plan remains in a state of suspension.⁷

² See 10 C.F.R. § 40.4.

³ See Letter from David R. Smith, Radiation Safety Officer, Shieldalloy Metallurgical Corp., to Kenneth L. Kalman, U.S. NRC, at 2 (June 30, 2006) (ADAMS Accession No. ML061980092); Decommissioning Plan for the Newfield Facility, Vol. 1, Rev. 1, at xxii to xxiii (Oct. 21, 2005) (ADAMS Accession No. ML053190220).

⁴ See Notice of Consideration of Amendment Request for Decommissioning for Shieldalloy Metallurgical Corporation, Newfield NJ and Opportunity to Request a Hearing, 71 Fed. Reg. 66,986, 66,986 (Nov. 17, 2006).

⁵ LBP-07-5, 65 NRC 341 (2007).

⁶ *Id.* at 358-63.

⁷ See Order (Oct. 21, 2009) (unpublished) (suspending the Staff's obligation to file status reports on the progress of its review).

B. Discontinuance of Commission Authority over Shieldalloy

In a matter unrelated to the adjudicatory proceeding on Shieldalloy's proposed decommissioning plan, on October 16, 2008, the State of New Jersey (New Jersey) formally applied to become an Agreement State pursuant to section 274 of the Atomic Energy Act of 1954, as amended (AEA).⁸ In accordance with that section, Governor Jon S. Corzine certified "that the State of New Jersey wishes to assume regulatory authority and oversight responsibility for [certain materials now under NRC jurisdiction], and that the State of New Jersey has an adequate program for the control of radiation hazards covered by this proposed agreement."⁹ The NRC Staff reviewed the application, and determined that the New Jersey radiation protection program is both compatible with the Commission's program for regulation with respect to the proposed materials and adequate for the protection of public health and safety.¹⁰

In accordance with AEA §274e, the NRC Staff published the proposed agreement in the *Federal Register* once a week for 4 consecutive weeks to provide an opportunity for public comment.¹¹ Shieldalloy submitted comments on the proposed agreement.¹² After reviewing and responding to the comments, the NRC Staff determined that "[t]he comments did not affect [its] assessment" of the New Jersey program.¹³

Based on the Staff's assessment, we found that the New Jersey program is adequate to protect public health and safety and is compatible with the NRC's program.¹⁴ Thereafter, Chairman Jaczko and Governor Corzine signed the agreement on behalf of the NRC and New Jersey, respectively, and the agreement became

⁸ Letter from Jon S. Corzine, Governor, to Dale E. Klein, Chairman, U.S. NRC (Oct. 16, 2008) (ADAMS Accession No. ML090510713).

⁹ *Id.* at 1.

¹⁰ State of New Jersey: Discontinuance of Certain Commission Regulatory Authority Within the State; Notice of Agreement Between the Nuclear Regulatory Commission and the State of New Jersey, 74 Fed. Reg. 51,882, 51,883 (Oct. 8, 2009).

¹¹ State of New Jersey: NRC Staff Assessment of a Proposed Agreement Between the Nuclear Regulatory Commission and the State of New Jersey, 74 Fed. Reg. 25,283 (May 27, 2009); 74 Fed. Reg. 26,739 (June 3, 2009); 74 Fed. Reg. 27,572 (June 10, 2009); 74 Fed. Reg. 28,728 (June 17, 2009).

¹² Letter from Hoy E. Frakes, Jr., President, Shieldalloy Metallurgical Corp., to Michael T. Lesar, Chief, Rulemaking, Directives and Editing Branch, U.S. NRC (June 11, 2009) (ADAMS Accession Nos. ML091700382 and ML091680491).

¹³ 74 Fed. Reg. at 51,883. The NRC Staff's response to comments is available as an attachment to the Memorandum from R. W. Borchardt, Executive Director for Operations, to the Commissioners, SECY-09-0114 (Aug. 18, 2009) (Enclosure 2 — Staff Analysis of Public Comments) (ADAMS Accession No. ML091950400) (SECY-09-0114, Enclosure 2).

¹⁴ 74 Fed. Reg. at 51,883.

effective on September 30, 2009.¹⁵ Thus, as of September 30, 2009, the NRC discontinued, and New Jersey assumed, regulatory authority over all categories of materials covered in the agreement — (1) byproduct materials as defined in section 11e(1) of the AEA; (2) byproduct materials as defined in section 11e(3) of the AEA; (3) byproduct materials as defined in section 11e(4) of the AEA; (4) source materials; (5) special nuclear materials in quantities not sufficient to form a critical mass; and (6) the regulation of the land disposal of byproduct, source, or special nuclear waste materials received from other persons.¹⁶ Because the transfer included authority over source material, New Jersey assumed regulatory authority over Shieldalloy's Newfield site. With the discontinuance of NRC authority, the NRC Staff terminated its review of Shieldalloy's proposed decommissioning plan, and forwarded the files associated with its environmental and safety review of Shieldalloy's proposed decommissioning plan to New Jersey.¹⁷

On October 8, 2009, the NJDEP, which implements the New Jersey program, informed Shieldalloy that it had rejected Shieldalloy's proposal for an LTC license.¹⁸ The NJDEP directed Shieldalloy to submit a decommissioning plan proposing offsite disposal — specifically, removal of the material and disposal in a licensed facility out of state.¹⁹ The NJDEP determined that Shieldalloy "will remain in compliance if a revised [plan] is submitted by January 31, 2010."²⁰

After the agreement between New Jersey and the NRC became effective, Shieldalloy filed, pursuant to 10 C.F.R. § 2.323(a), the motion at issue here. In its motion, Shieldalloy states that it intends to seek judicial review of the NRC's decision to enter into the agreement with New Jersey.²¹ Shieldalloy therefore requests that we issue a stay of the effectiveness of the transfer of regulatory authority over the Newfield site pending judicial review.²² Citing 10 C.F.R.

¹⁵ *Id.* at 51,884 (Art. IX).

¹⁶ *Id.* at 51,883 (Art. I).

¹⁷ *See* NRC Staff's Fifteenth Status Report (Oct. 1, 2009) at 2.

¹⁸ Letter from Patricia Gardner, Manager, Bureau of Environmental Radiation, NJDEP, to Hoy Frakes, President, Shieldalloy Metallurgical Corporation (Oct. 8, 2009) (attached as Exhibit B to Shieldalloy Motion for Stay) (October 8 NJDEP Letter).

¹⁹ *See id.* (citing N.J. Admin. Code §§ 7:28-12.1 et seq., 7:28-58.1).

²⁰ *Id.* By letter dated December 11, 2009, the NJDEP extended the deadline for submitting a revised decommissioning plan to July 31, 2010. Letter from Jill Lipoti, Director, NJDEP, Division of Environmental Safety and Health, to Dennis J. Krumholz, counsel for Shieldalloy (Dec. 11, 2009) at 2 (ADAMS Accession No. ML093490230) (December 11 NJDEP Letter).

²¹ Shieldalloy Motion for Stay at 2. Shieldalloy has since filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit, requesting that the court overturn the agreement and direct the NRC to revoke its transfer of regulatory authority over the Newfield site to New Jersey, and resume its regulatory authority over the site. *Shieldalloy Metallurgical Corp. v. NRC*, No. 09-1268 (D.C. Cir. filed Nov. 2, 2009).

²² Shieldalloy Motion for Stay at 1-2.

§ 2.342(e) and NRC case law, Shieldalloy asserts that it has satisfied all of the relevant criteria for issuance of a stay.²³

II. DISCUSSION

A. Shieldalloy's Motion

Given that Shieldalloy's filing is associated with a challenge to the New Jersey Agreement, and not with the adjudicatory proceeding on Shieldalloy's proposed decommissioning plan, it does not fit cleanly into our procedural rules. Shieldalloy has filed its stay application pursuant to 10 C.F.R. § 2.342. That section, by its terms, applies to a stay *of a decision or action of a presiding officer or licensing board*.²⁴ The movant must be a "party to the proceeding," which, in the context of section 2.342, refers to an adjudicatory proceeding presided over by a presiding officer or board. Here, Shieldalloy challenges our approval of New Jersey's application to become an Agreement State. As stated above, our approval of the New Jersey Agreement is a matter separate from, and unrelated to, the pending adjudicatory proceeding before the Board on Shieldalloy's proposed decommissioning plan. Because Shieldalloy's motion involves a challenge to Commission action outside of the adjudicatory proceeding to which Shieldalloy is a party, section 2.342 does not apply. However, we have entertained requests for stays of final agency action in anticipation of judicial review in other proceedings.²⁵ Here, we will exercise discretion and consider Shieldalloy's request as a stay application.

A question has been raised regarding our authority to grant the stay requested by Shieldalloy.²⁶ We need not reach this question, however, because, as discussed

²³ *Id.* at 2, 5.

²⁴ 10 C.F.R. § 2.342(a).

²⁵ See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 80-82 (1992) (analyzing whether movant had met showing of stay factors in request for administrative stay of a license transfer pending anticipated challenge in state court); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 178-80 (1985) (declining to issue stay of issuance of full-power authorization because stay factors had not been met); cf. *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 n.4 (2006) ("[w]hile technically not applicable to a request for a stay of NRC Staff action, the section 2.342(e) standards simply restate commonplace principles of equity universally followed when judicial (or quasi-judicial) bodies consider stays or other forms of temporary injunctive relief").

²⁶ In particular, the Staff argues that we lack authority to provide the relief that Shieldalloy requests.
(Continued)

below, Shieldalloy has not made the requisite showing to warrant issuance of a stay in any event.

B. Analysis

By way of background, we begin with a brief summary of the review and approval process for a section 274 agreement.

Section 274 of the AEA governs cooperation between the Commission and a state. That section authorizes the Commission, if certain conditions are met, to discontinue its regulatory authority over certain categories of material, which authority then is assumed by the state. First, the governor must “certif[y] that the State has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials within the State covered by the proposed agreement, and that the State desires to assume regulatory responsibility for such materials.”²⁷ Second, the Commission must “find[] that the State program is in accordance with the requirements of subsection o. and in all other respects *compatible* with the Commission’s program for regulation of such materials, and that the State program is *adequate* to protect the public health and safety with respect to the materials covered by the proposed agreement.”²⁸ If the Commission determines that the state’s regulatory program is compatible with the Commission’s corresponding program and adequate to protect the public health and safety, then “[t]he Commission shall enter into [the] agreement.”²⁹

Section 274 is implemented via policy statements and agency guidance documents. Two policy statements provide guidance on the NRC Staff’s review of a proposed or amended agreement.³⁰ The first policy statement, implemented in 1981, outlines thirty-six criteria that “are intended to indicate factors which the Commission intends to consider in approving new or amended agreements.”³¹

See NRC Staff’s Response to Shieldalloy’s Motion for a Stay (Oct. 23, 2009) (NRC Staff Response). In the Staff’s view, our authority ended with the discontinuance of NRC authority over the Newfield site. Based on the Staff’s interpretation of section 274, the only means to suspend or terminate an agreement is through an action triggered under the circumstances, and taken in accordance with the procedures, enumerated in AEA § 274j. *Id.* at 1. According to the Staff, Shieldalloy has not shown that any of the circumstances necessary for triggering action under that section are present here and therefore we cannot grant the stay application. *Id.* at 7-8.

²⁷ AEA § 274d(1), 42 U.S.C. § 2021(d)(1).

²⁸ *Id.* § 2021(d)(2) (emphasis added).

²⁹ *Id.* § 2021(d).

³⁰ As a general matter, a policy statement announces what the Commission seeks to establish as policy, and does not bind either the agency or the public. *See Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974).

³¹ Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and
(Continued)

However, as stated in the policy statement, these criteria are not intended to limit Commission discretion in reviewing individual agreements, or amendments thereto.³²

A second policy statement was implemented in 1997 to describe the respective roles and responsibilities of the NRC and the states in the administration of section 274 agreements. In particular, the policy statement establishes “principles, objectives, and goals” that the Commission expects to be reflected in the implementing guidance and programs of the NRC and Agreement States, in order for each to meet their respective responsibilities. Further, the Commission explained:

In order to relinquish its authority to a particular State, the Commission must find that the program is compatible with the Commission’s program for the regulation of radioactive materials and that the State program is adequate to protect public health and safety.³³

To that end, the policy statement provides guidance on what it means for an Agreement State program to be “compatible” with that of the NRC and “adequate” to protect public health and safety.³⁴ Among other things, the 1997 Policy Statement creates a scheme of five “compatibility categories” that are assigned to all NRC regulations. Each compatibility category requires a different degree of compatibility for the corresponding state standard or program element under review. For example, for NRC regulations that are designated as compatibility category “A,” the corresponding state standard should be “essentially identical to those of the Commission, unless Federal statutes provide the State authority to adopt different standards.”³⁵ Likewise, for NRC regulations that are designated as compatibility category “B,” the “State program elements should be essentially identical to those of the Commission.”³⁶ However, for NRC regulations that are designated as compatibility category “C,” the state has greater flexibility in the standards it sets. Compatibility category “C” regulations are “other Commission program elements” considered to be “important for an Agreement State to have in order to avoid conflicts, duplications, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on

Assumption Thereof by States Through Agreement, 46 Fed. Reg. 7540, 7540 (Jan. 23, 1981) (as amended by policy statements published at 46 Fed. Reg. 36,969 (July 16, 1981) (revising Criterion 29f) and 48 Fed. Reg. 33,376 (July 21, 1983) (revising Criterion 9)) (collectively, 1981 Policy Statement).

³² *Id.*

³³ Statement of Principles and Policy for the Agreement State Program; Policy Statement on Adequacy and Compatibility of Agreement State Programs, 62 Fed. Reg. 46,517, 46,519 (Sept. 3, 1997) (1997 Policy Statement).

³⁴ *Id.* at 46,517-25.

³⁵ *Id.* at 46,524.

³⁶ *Id.*

a nationwide basis.”³⁷ The Agreement State program elements for compatibility category C “should embody the essential objective of the corresponding Commission program elements.”³⁸ Unlike NRC regulations that are designated as compatibility category “A” or “B,” an Agreement State program element need not be “essentially identical” to an NRC category “C” regulation.

The NRC’s Office of Federal and State Materials and Environmental Management Programs (FSME) administers the Agreement State program. It follows detailed standardized procedures for reviewing Agreement State applications.³⁹ For example, NRC Management Directive 5.9 provides guidance on the assignment of compatibility categories to NRC regulations.⁴⁰ FSME also has implemented guidance for use by NRC and Agreement State staff on the compatibility category scheme.⁴¹ In addition, the FSME website offers a “section-by-section summary” of the compatibility categories assigned to certain Parts of Title 10 of the *Code of Federal Regulations*.⁴² These summaries are provided in chart form, and provide a standardized template for use by NRC Staff reviewers when evaluating Agreement State regulations or program elements.⁴³

We consider the Shieldalloy stay application with this background in mind. In our review of a stay application, we consider four factors:

- (1) [w]hether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) [w]hether the party will be irreparably injured unless a stay is granted;

³⁷ *Id.*

³⁸ *Id.* The two remaining categories are “NRC,” which represents program elements that cannot be relinquished to Agreement States, and “H&S,” which represents program elements that are not required for the purposes of compatibility. However, states should adopt program elements in the H&S category that embody the essential objectives of the NRC program elements in order to maintain an adequate program for the protection of public health and safety. *Id.* at 46,524-25; *see also* Office of Federal and State Materials and Environmental Management Programs Internal Procedure SA-200, “Compatibility Categories and Health and Safety Identification for NRC Regulations and Other Program Elements” (June 5, 2009) at 6-7 (replacing the designations for categories “D” and “E” as “H&S” and “NRC,” respectively) (ADAMS Accession No. ML091190055) (SA-200).

³⁹ *See generally* Office of Federal and State Materials and Environmental Management Programs, <http://www.nrc.gov/about-nrc/organization/fsmefuncdesc.html> (last visited Nov. 25, 2009).

⁴⁰ Adequacy and Compatibility of Agreement State Programs, Directive 5.9 (Feb. 27, 1998) (ADAMS Accession No. ML041770094) (MD 5.9).

⁴¹ *See generally* SA-200.

⁴² *Id.* at 3 (citing Regulation Toolbox: Review Summary Sheets for Regulation Adoption for New Agreement States/Programs (10 CFR __), http://nrc-stp.ornl.gov/regsumsheets_newregs.html (last visited Nov. 25, 2009)).

⁴³ *See id.* at 3-5.

- (3) [w]hether the granting of a stay would harm other parties; and
(4) [w]here the public interest lies.⁴⁴

1. Irreparable Injury Unless a Stay Is Granted

As Shieldalloy notes,⁴⁵ when evaluating a motion for a stay we place the greatest weight on the second factor — irreparable injury to the moving party unless a stay is granted.⁴⁶ We require a showing of a “threat of immediate and irreparable harm” that will result absent a stay.⁴⁷

With respect to irreparable injury, Shieldalloy states that under New Jersey’s regulatory oversight it will be required to ship offsite the contaminated materials present at the Newfield site in lieu of Shieldalloy’s desired method of consolidating them in a restricted-access area under an engineered barrier onsite (i.e., the LTC approach). Implementation of New Jersey’s approach of shipping and disposing of the material offsite, Shieldalloy claims, will force Shieldalloy “to seek protection under the bankruptcy laws, as it had done before, and potentially liquidate.”⁴⁸ According to Shieldalloy, it “cannot defray” what it estimates to be “a \$70 million cost of removal of the materials from the site,” as compared “to the less than \$15 million cost to implement the LTC [approach].”⁴⁹

In addition, Shieldalloy asserts other harms that will result from offsite disposal of the materials. Noting that exposures under either approach “would be expected to be within NRC regulatory limits,” Shieldalloy maintains that removal and transportation of the material will result in a larger dose to workers at the Newfield site and members of the public than what would result from burial onsite.⁵⁰ Therefore, Shieldalloy argues, even though radiation doses would not exceed NRC limits, removal offsite “contravenes the principle of keeping radiation doses to the public resulting from the decommissioning process as low as is reasonably achievable [(ALARA)].”⁵¹

Shieldalloy fails to show that it will suffer the requisite injury without a stay

⁴⁴ 10 C.F.R. § 2.342(e).

⁴⁵ Shieldalloy Motion for Stay at 5.

⁴⁶ *David Geisen*, CLI-09-23, 70 NRC 935, 936 (2009) (citing *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006)); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

⁴⁷ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008).

⁴⁸ Shieldalloy Motion for Stay at 7.

⁴⁹ *Id.* at 7 (citing Affidavit of Hoy E. Frakes, Jr. ¶ 10 (Oct. 9, 2009) (attached as Exhibit A to Shieldalloy Motion for Stay) (Frakes Affidavit)).

⁵⁰ *Id.* at 7-8 (citing Frakes Affidavit ¶ 11).

⁵¹ *Id.* at 7.

of the effectiveness of the transfer of authority over the Newfield site to New Jersey. Shieldalloy's claimed harm is neither imminent nor irreparable. As New Jersey explains in its response to Shieldalloy's motion, Shieldalloy's liability for any amount paid to remove and dispose of the materials is "contingent upon the [NJDEP's] final decision on a decommissioning plan. . . . Shieldalloy will not be required to conduct any decommissioning activities until the [NJDEP] approves a plan."⁵² Shieldalloy has until July 31, 2010, to submit a revised plan to remain in compliance with NJDEP regulations.⁵³ Thus, Shieldalloy has not submitted, nor has NJDEP reviewed (let alone approved), a decommissioning plan for the Newfield site. Even assuming that Shieldalloy were correct that it will cost \$70 million to remove and transport the waste, Shieldalloy's claim of irreparable injury is speculative because it is contingent upon future NJDEP action after review of a not-yet-submitted revised decommissioning plan.⁵⁴ Likewise, as New Jersey points out, "it is premature to argue that additional exposures will be caused by offsite disposal before Shieldalloy proposes offsite disposal in a decommissioning plan. . . . New Jersey would review the plan to ensure that it meets all regulatory standards [for protection of workers and the environment against radiation hazards]."⁵⁵

Moreover, Shieldalloy is not without remedy if it wishes to challenge the compatibility of New Jersey's radiation protection program during the NJDEP's

⁵² New Jersey Response at 3.

⁵³ See December 11 NJDEP Letter at 2.

⁵⁴ This case can be distinguished from *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), one of the cases on which Shieldalloy relies to support its assertion that it will suffer irreparable injury. In *Holiday Tours*, the action that had been stayed pending appeal was a permanent injunction prohibiting a then recently transformed bus tour company from operating bus tours. There, the D.C. Circuit found that "the absence of a stay would [mean the] destruction [of the business] in its current form as a provider of bus tours." *Id.* at 843. Accordingly, in conjunction with the application of the other stay factors, the D.C. Circuit found that the district court did not abuse its discretion in staying its permanent injunction pending appeal. *Id.* at 845. Here, the action to be stayed does not have the immediacy of that in *Holiday Tours*. Any claimed financial harm to Shieldalloy's business from offsite disposal would not occur until the NJDEP approves offsite disposal after review of a revised decommissioning plan. The second case that Shieldalloy cites, *Goldstein v. Miller*, 488 F. Supp. 156 (D. Md. 1980) also is distinguishable for this reason. In that case, plaintiffs sought a permanent injunction against the implementation of a federal regulation establishing limits on liquor bottle sizes. After the court entered judgment for the defendants, plaintiffs sought a stay pending appeal. The district court found that at least one of the plaintiffs had shown "serious and seemingly irreparable" injury because it would have been forced out of business if a stay were not granted. Unlike here, the absence of a stay in that case likely would have resulted in immediate harm because the plaintiff would have been required to change its liquor bottling operations without delay in order to comply with the federal regulation.

⁵⁵ New Jersey Response at 4.

review of its revised decommissioning plan.⁵⁶ For example, Shieldalloy may request that the NRC take action under AEA § 274j.⁵⁷ Alternatively, if it wishes to challenge the compatibility category that is assigned to a particular regulation (including the license termination rule), it may do so at any time through submission of a petition for rulemaking under 10 C.F.R. § 2.802.⁵⁸ In the absence of either immediate or irreparable harm, Shieldalloy fails to make the requisite showing with respect to this factor.⁵⁹

⁵⁶ See *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958) (“Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.”). Cf. *Oyster Creek*, CLI-08-13, 67 NRC at 400 (noting that “[i]n any case, [movant] would not be irreparably harmed even if the license were at the point of issuance” because “[a] license renewal may be set aside (or appropriately conditioned) even after it has been issued, upon subsequent administrative or judicial review”). In essence, the immediate “injury” that would result in the absence of a stay is the submission of a revised decommissioning plan. This does not amount to irreparable harm. See *Virginia Petroleum Jobbers Ass’n*, 259 F.2d at 925. If Shieldalloy were to perceive difficulty in meeting the July 31, 2010 deadline for submission of a revised decommissioning plan, it appears that Shieldalloy could request an extension of time from the NJDEP. See N.J.A.C. § 7:28-58.1 (incorporating by reference 10 C.F.R. § 40.42(g)(2)); December 11 NJDEP Letter at 2 (extending deadline for submitting a revised decommissioning plan by 6 months).

⁵⁷ We have, in the past, responded to challenges to an Agreement State’s program raised in a section 2.206 petition. See *Envirocare of Utah, Inc.* (Salt Lake City, Utah), DD-98-9, 48 NRC 173, 176 (1998) (explaining that the Director responded to Agreement State program-related claims raised in 2.206 petition by letter); *State of Utah* (Agreement Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended), DD-95-1, 41 NRC 43, 43-44 (1995) (analyzing 2.206 petition challenging Agreement State program).

⁵⁸ See *infra* note 67 & accompanying text. In addition, the NRC Staff is required by law to conduct periodic reviews of the adequacy and compatibility of an Agreement State’s regulatory program. See AEA § 274j, 42 U.S.C. § 2021(j) (“The Commission shall periodically review such agreements and actions taken by the States under the agreements to ensure compliance with the provisions of this section”). Implemented through FSME guidance documents, this periodic review is called the Integrated Materials Performance Evaluation Program (IMPEP). The first IMPEP review generally takes place approximately 18 months after an agreement is signed, and thereafter, every 4 or 5 years. IMPEP reviews are conducted onsite at the Agreement State program’s offices by a team of NRC Staff, as well as a representative from another Agreement State. Depending on the findings made during that review, the NRC Staff might recommend action to be taken, which is then referred to a Management Review Board for further review. See generally SA-100, “Implementation of the Integrated Materials Performance Evaluation Program (IMPEP)” (Feb. 1, 2007) (ADAMS Accession No. ML070360578). Of note, a “special review” might be scheduled “if NRC staff learns of special problems with a licensee or group of licensees or of an event requiring special attention” rather than waiting until the next scheduled periodic review. *Id.* at 4.

⁵⁹ We also note that Shieldalloy has initiated an action in the U.S. District Court for the District of New Jersey seeking declaratory and injunctive relief to preclude the application of the NJDEP regulations to the Newfield site. See Letter from Matias F. Travieso-Diaz, Counsel for Shieldalloy,

(Continued)

2. *Strong Showing of Likelihood of Success on the Merits*

Without a showing of irreparable harm, Shieldalloy must show that success on the merits is a “virtual certainty” to warrant issuance of a stay.⁶⁰

With respect to its likelihood of success, Shieldalloy argues that there is a strong likelihood that it will prevail in the court of appeals on the merits of its challenge to our approval of the New Jersey Agreement. According to Shieldalloy, various aspects of New Jersey’s regulatory program are incompatible with the NRC’s program, in contravention of one of the conditions precedent to approval of a state agreement.⁶¹ In support of this argument, Shieldalloy repeats a selection of the claims it made in comments on the proposed agreement when it was published in the *Federal Register*. It takes issue with the Staff’s resolution⁶² of its comments, and summarizes “some of the errors in the Staff’s [assessment] that will warrant overturning by a reviewing court.”⁶³ Shieldalloy’s arguments are diffuse and difficult to follow. In its motion, Shieldalloy alternates, sometimes within the same paragraph, between challenging the compatibility category assigned to the license termination rule — compatibility category “C” — and challenging the compatibility of the New Jersey program itself. We discuss each challenge separately.

a. *“The New Jersey Program Fails to Implement the ALARA Principle, as Required by NRC Regulations”*

First, Shieldalloy argues that New Jersey “violated” Criterion 9 of the 1981 Policy Statement because the New Jersey program failed to “include adherence to ALARA as one of the radiological criteria for license termination.”⁶⁴ Criterion 9 states that an Agreement State’s standards for disposal of radioactive materials “shall be in accordance with [10 C.F.R.] Part 20.”⁶⁵ ALARA is one of the principles incorporated in Part 20.

to Licensing Board, (Oct. 5, 2009) at 1-2 (Shieldalloy October 5 Letter); *Shieldalloy Metallurgical Corp. v. New Jersey*, Civil Action No. 09-04375 (D.N.J. filed Aug. 25, 2009). In addition, Shieldalloy has “filed suit against the State of New Jersey in the Appellate Division of the New Jersey Superior Court, challenging the validity of the [NJDEP regulations].” Shieldalloy October 5 Letter at 2; *In re N.J.A.C. 7:28, No. A-278-09* (N.J. Super. Ct. App. Div. filed Sept. 14, 2009).

⁶⁰ *Geisen*, CLI-09-23, 70 NRC at 937; *Oyster Creek*, CLI-08-13, 67 NRC at 400; *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994) (citing *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990)).

⁶¹ Shieldalloy Motion for Stay at 9-10.

⁶² See generally SECY-09-0114, Enclosure 2.

⁶³ Shieldalloy Motion for Stay at 10.

⁶⁴ *Id.* at 11.

⁶⁵ 48 Fed. Reg. at 33,377.

As an initial matter, Shieldalloy misunderstands the nature of the numbered criteria in our 1981 Policy Statement. As discussed above, they serve as guidelines for matters to be considered when reviewing an agreement, and they do not limit the agency's discretion. Thus, a state cannot "violate" any of the criteria. Moreover, Criterion 9 concerns the disposal of low-level waste, not license termination, and is inapplicable here.⁶⁶ Nonetheless, as discussed below, the NJDEP's license termination regulations are "in accordance with" Part 20 because, as evaluated against the compatibility category "C" license termination rule, they embody the essential objective of the rule.

Again, each NRC regulation is assigned a particular compatibility category. The compatibility category is determined as part of the rulemaking process, and is set forth in the statements of consideration for the proposed and final rules, and as such, may be commented on in the rulemaking proceeding.⁶⁷ Relevant here, when we issued the proposed license termination rule, we solicited public comment on the designation of the compatibility category. We received divided responses: some commenters stated that states should have the authority to implement stricter radiation protection standards; others stated that a state should be required to adopt the NRC's standards without revision.⁶⁸ When the final rule was promulgated, we assigned to it what is now the equivalent of compatibility category "C" after consideration of the comments that were submitted. In doing so, we explained:

Because the dose criterion in the rule is not a "standard" in the sense of the public dose limits of 10 CFR part 20 but is a constraint within the public dose limit that provides a sufficient and ample margin of safety below the limit, it is reasonable that the rule would be a [C] level of compatibility under the current policy. This means that the Agreement States would be required to adopt the regulation but would have *significant flexibility in language, and would be allowed to adopt more stringent requirements.*⁶⁹

Therefore, a state's license termination regulations may be more stringent than the NRC license termination rule, with "significant flexibility in language," provided they embody the "essential objective" of the NRC's license termination rule.

The essential objective of the license termination rule is set forth in the statements of consideration to the final rule. It is "to provide specific radiological criteria for the decommissioning of lands and structures. . . . to ensure that decommissioning will be carried out without undue impact on public health and

⁶⁶ SECY-09-0114, Enclosure 2, at 5.

⁶⁷ See, e.g., Radiological Criteria for License Termination, 62 Fed. Reg. 39,058, 39,079-80, 39,086 (July 21, 1997).

⁶⁸ *Id.* at 39,079.

⁶⁹ *Id.* at 39,080 (emphasis added).

safety and the environment.”⁷⁰ The NJDEP’s license termination regulations are permissibly more restrictive than the NRC’s. They require a licensee to show that members of the public will not be exposed to a total effective dose equivalent of more than 15 mrem per year as compared to the 25-mrem limit established in Part 20.⁷¹ Because New Jersey’s program lowers the maximum permissible radiation exposure to members of the public, this aspect of New Jersey’s program embodies the license termination rule’s essential objective of ensuring that decommissioning will be carried out without undue impact on public health and safety and the environment.

Shieldalloy argues that “if the NJDEP Regulations are applied to the Newfield Facility,” it will result in “higher doses to workers and the public and a lower level of protection of public health and safety than that provided by the NRC regulations.”⁷² This, Shieldalloy asserts, is caused by the “[f]ailure [of the regulations] to observe the ALARA principle.”⁷³

ALARA is defined as “every reasonable effort to maintain exposures to radiation as far below the dose limits in this part as is practical consistent with the purpose for which the licensed activity is undertaken.”⁷⁴ A cost-benefit analysis is employed to determine a practicable dose limit.⁷⁵ The ALARA principle, as applied in the license termination rule, defines the maximum permissible annual dose as 25 mrem TEDE, but directs further that exposures should be minimized, such that they will be “as low as is reasonably achievable” below the

⁷⁰ *Id.* at 39,058.

⁷¹ Compare N.J. Admin. Code § 7:28-12.8(a)(1) (“Sites shall be remediated so that the incremental radiation dose to any person from any residual radioactive contamination at the site above that due to natural background radionuclide concentration, under either an unrestricted use remedial action, limited restricted use remedial action, or a restricted use remedial action, shall be as specified below: 1. For the sum of annual external gamma radiation dose (in effective dose equivalent) and intake dose (in committed effective dose equivalent), including the groundwater pathway: 15 millirem (0.15 milliSievert) total annual effective dose equivalent (15 mrem/yr TEDE).”), with 10 C.F.R. § 20.1402 (“A site will be considered acceptable for unrestricted use if the residual radioactivity that is distinguishable from background radiation results in a TEDE to an average member of the critical group that does not exceed 25 mrem (0.25 mSv) per year, including that from groundwater sources of drinking water, and . . . the residual radioactivity has been reduced to levels that are as low as reasonably achievable (ALARA).”).

⁷² Shieldalloy Motion for Stay at 12 (citing Frakes Affidavit ¶ 11).

⁷³ *Id.* at 11-12.

⁷⁴ 10 C.F.R. § 20.1003.

⁷⁵ *Id.* (“taking into account the state of technology, the economics of improvements in relation to state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of nuclear energy and licensed materials in the public interest”).

25-mrem limit.⁷⁶ As we understand Shieldalloy's argument, Shieldalloy would have it that "as low as is reasonably achievable" in the context of the NJDEP's decommissioning regulations means that a permissible dose would be above 15 mrem, but below 25 mrem. This is a misunderstanding of the ALARA principle. ALARA is defined by the dose limit delineated in the regulations. The NJDEP's dose limit is 15 mrem. Consequently, if the NJDEP expressly had incorporated the ALARA principle into its license termination regulations, Shieldalloy's decommissioning plan would then have to show that the maximum annual dose to any person is "as low as is reasonably achievable" below 15 mrem.⁷⁷

The gravamen of Shieldalloy's complaint, as we understand it, is that it would prefer the dose limit in the NJDEP's decommissioning regulations to be 25 mrem rather than 15 mrem. This argument fails because New Jersey is permitted to establish more stringent decommissioning standards than the NRC's. This is consistent with the NRC Staff's response to Shieldalloy's comment concerning this issue — an assessment with which we agreed in our approval of the New Jersey Agreement.⁷⁸ Viewed another way, Shieldalloy appears to challenge the license termination rule's compatibility category designation.⁷⁹ As discussed above, the compatibility designation is made as part of the rulemaking process. Submission of a petition for rulemaking under 10 C.F.R. § 2.802 is the appropriate mechanism for challenging the compatibility category of the license termination rule. For all of these reasons, it is unlikely that Shieldalloy will succeed on the merits of this challenge to the New Jersey program.

b. "The New Jersey Program Is Also Incompatible with Other Aspects of the 10 C.F.R. Part 20 Regulations"

Aside from its complaint concerning the 15-mrem dose limit in the NJDEP regulations, in its motion Shieldalloy cites two examples of the "[n]umerous"

⁷⁶ See, e.g., 62 Fed. Reg. at 39,065 (listing various reports that "all suggest that, in addition to setting a constraint value for an individual source, achievement of exposures that are ALARA should continue to be considered as a means of optimization. For this reason and because the generic analysis . . . tends to indicate that achieving doses below 0.25 mSv/y (25 mrem/y) may be ALARA for some cases, the rule continues to require an ALARA evaluation below the unrestricted dose criterion").

⁷⁷ See N.J. Admin. Code § 7:28-6.1(d)(2).

⁷⁸ See SECY-09-0114, Enclosure 2, at 5 ("A state is permitted to establish more stringent dose limits as long as those limits "provide a sufficient and ample margin of safety to ensure compliance with the public dose limits of 10 CFR Part 20." (Emphasis added.)).

⁷⁹ See Shieldalloy Motion for Stay at 11 (referencing guideline that NRC uses when designating a particular regulation as compatibility category "A," Shieldalloy asserts that "NRC radiation protection regulations are 'basic radiation protection standards'"). See also *id.* at 11-12 n.9 (referencing category "B" program elements).

“other departures from the Part 20 regulatory requirements.”⁸⁰ Shieldalloy asserts that New Jersey’s program is incompatible because: (1) NJDEP regulations do not permit license termination under restricted release criteria, while restricted release is permitted under NRC regulations; and (2) NJDEP regulations require decommissioning-related dose calculations up to the point of peak dose or 1000 years, whichever is longer, while NRC regulations only require calculation up to 1000 years after decommissioning.⁸¹

The NRC’s restricted release criteria are provided in 10 C.F.R. § 20.1403. The NRC dose calculation period is provided in 10 C.F.R. § 20.1401(d). Both regulations are part of the license termination rule, and, as such, have been designated as compatibility category “C.” As discussed above, a state is permitted to establish standards that are more stringent than the NRC’s for category “C” regulations, as long as they embody the essential objective of the NRC’s program elements. Neither New Jersey’s restricted release criteria⁸² nor its requirement of a calculation of up to peak dose⁸³ is inconsistent with the essential objective of the rule, and the Staff appropriately found them to be compatible. In both of Shieldalloy’s examples, the NJDEP’s regulations embody the essential objective of the rule because they are aimed at limiting the dose during and after decommissioning activities to members of the public,⁸⁴ thus ensuring that decommissioning will be carried out without undue impact on public health and safety and the environment.

In addition to explaining that the NJDEP regulations embody the essential objective of the NRC’s program, the NRC Staff, in responding to Shieldalloy’s comments on the proposed agreement, explained that they also “provide a level of protection of public health and safety that is at least equivalent to that afforded by NRC’s requirements.”⁸⁵ We continue to concur with the NRC Staff’s assessment in this regard. Shieldalloy takes issue with the Staff’s response, insisting that this

⁸⁰ Shieldalloy Motion for Stay at 12.

⁸¹ *Id.*

⁸² See N.J. Admin. Code §§ 7:28-12.8(a) (including “limited restricted use” and “restricted use” as decommissioning options), 7:28-12.12 (delineating requirements pertaining to engineering or institutional controls). The NJDEP regulations appear to permit “limited restricted use” and “restricted use” decommissioning options. We construe Shieldalloy’s assertion to the contrary as a preference for the NJDEP restricted release criteria to be identical to 10 C.F.R. § 20.1403.

⁸³ See N.J. Admin. Code §§ 7:28-12.10(d), 7:28-12.11(f)(2)(iii).

⁸⁴ See, e.g., 40 N.J. Reg. 5196(b), at 7 (Sept. 15, 2008) (reasoning, in rejecting Shieldalloy’s suggestion that 1000 years should be the limit, that “long-lived radionuclides, such as uranium and thorium, have half-lives in the millions and billions of years and peak doses may well occur after 1,000 years. The [NJDEP] and Commission [on Radiation Protection] believe it is vital to consider the peak dose, whenever it occurs, to ensure that adequate measures are taken to protect public health and safety” (emphasis added)).

⁸⁵ SECY-09-0114, Enclosure 2, at 5.

“‘equivalency’ does not in fact exist.”⁸⁶ In support of this proposition, Shieldalloy asserts that without the option of restricted release, it will be required to remove the radioactive materials from the Newfield site, which will “result[] in higher doses to workers and the public and a lower level of protection of public health and safety than that provided by the NRC regulations.”⁸⁷ Shieldalloy does not offer any support for its assertion that there is no “equivalency” in the NJDEP’s peak dose calculation requirement.

Shieldalloy’s restricted release argument fails for reasons similar to those addressed above. The NJDEP will review Shieldalloy’s decommissioning plan when it is submitted to ensure the protection of workers and the public.⁸⁸ At this point in time, “it is premature to argue that additional exposures will be caused by offsite disposal before Shieldalloy proposes offsite disposal in a decommissioning plan.”⁸⁹ Shieldalloy otherwise fails to offer support for the proposition that New Jersey’s program results in a lower level of protection of public health and safety than that provided by the NRC regulatory scheme.⁹⁰ In our view, Shieldalloy is not likely to succeed on the merits of this challenge to the New Jersey program.

c. *“The NJDEP Regulations Do Not Allow Appropriate Exemptions to Their Provisions”*

With respect to this challenge, Shieldalloy argues that certain NJDEP regulations are inconsistent with 1981 Policy Statement Criterion 12.⁹¹ Criterion 12 states that “[c]onsistent with the overall criteria here enumerated and to accommodate special cases or circumstances, the State regulatory authority shall be authorized in individual cases to impose additional requirements to protect health and safety, or to grant necessary exemptions which will not jeopardize health and safety.”⁹² Here, Shieldalloy questions the NJDEP’s ability to grant exemptions, not its ability to impose additional requirements. Specifically, Shieldalloy states that the NJDEP’s decommissioning regulations, unlike NRC regulations: (1) do not permit alternative remediation standards that would exceed the dose criterion

⁸⁶ Shieldalloy Motion for Stay at 12.

⁸⁷ *Id.* at 13.

⁸⁸ New Jersey Response at 4 (“Shieldalloy would be required to propose measures to ensure protection of workers and the environment against radiation hazards during decommissioning. . . . New Jersey would review the plan to ensure that it meets all regulatory standards.”).

⁸⁹ *Id.*

⁹⁰ Indeed, Shieldalloy essentially concedes that New Jersey’s program is at least equivalent to the NRC’s in observing that additional exposures to workers and the public resulting from removal of the material would be expected to remain within NRC regulatory limits. Shieldalloy Motion for Stay at 7.

⁹¹ *Id.* at 13.

⁹² 46 Fed. Reg. at 7541.

of 15 mrem per year, “even if justified through an ALARA analysis”; (2) do not permit alternative remediation standards if they would result in doses exceeding 100 mrem per year for an “all controls fail” scenario; (3) require the use of tables of parameters based on specific exposure scenarios for dose calculation; and (4) do not allow licensees to take credit for engineering controls such as a fence or cover when modeling the “all controls fail” scenario to determine if the 100-mrem-per-year limit is exceeded.⁹³

When we approved the New Jersey Agreement, as now, we agreed with the Staff’s assessment that NJDEP regulation N.J. Admin. Code § 7:28-2.8 fulfills Criterion 12. This regulation expressly allows the NJDEP to provide exemptions to its rules:

[The NJDEP may,] upon application and a showing of hardship or compelling need, with the approval of the Commission [on Radiation Protection], . . . grant an exemption from *any requirement of the rules* should it determine that such exemption will not result in any exposure to radiation in excess of the limits permitted by N.J.A.C. 7:28-6, “Standards for protection against radiation.”⁹⁴

Section 7:28-2.8 thus provides a mechanism for seeking an appropriate exemption, and reflects the NJDEP’s determination that an exemption will not jeopardize health and safety if it will not result in exposure to radiation in excess of NJDEP’s dose limits.

Unsatisfied with this response, Shieldalloy asserts that it “ignore[s] New Jersey’s position that it is precluded by statute from providing . . . exceptions” that would allow consideration of the ALARA principle in meeting the decommissioning dose criteria.⁹⁵ Shieldalloy’s grievance, then, is not that the NJDEP

⁹³ Shieldalloy Motion for Stay at 13.

⁹⁴ SECY-09-0114, Enclosure 2, at 6 (emphasis added). *See also* N.J. Admin. Code § 7:28-12.11(a) (permitting the filing of a petition for alternative soil remediation standards as long as the resulting dose would not exceed 15 mrem per year).

⁹⁵ Shieldalloy Motion for Stay at 14. In its response to Shieldalloy’s comments in this regard on the proposed NJDEP rules, the NJDEP stated that “[t]he fact that these dose criteria do not have an explicit associated ALARA requirement is . . . not new. ALARA determinations allow the use of cost as a factor for determining what level of remediation is cost effective below the standards. The [NJDEP] and the Commission [on Radiation Protection] did not include a provision for ALARA in meeting these dose criteria because the Brownfield and Contaminated Site Remediation Act [(BCSRA)], N.J.S.A. 58:10B-1 et seq., does not allow such a provision.” 40 N.J. Reg. 5196(b), at 9. In its response, the NJDEP did not explain further what specifically in the BCSRA does not permit the use of ALARA.

Section 58:10B-1.2 articulates the New Jersey Legislature’s findings in enacting the BCSRA. The legislature recognized that “often there are legal, financial, technical, and institutional impediments to the efficient and cost-effective cleanup of brownfield sites as well as all other contaminated sites wherever they may be.” It determined that “strict standards coupled with a risk based and flexible

(Continued)

cannot provide exemptions as a general matter, but rather that it cannot or will not provide the specific exemptions that Shieldalloy would request with respect to the license termination regulations. At bottom, Shieldalloy rehashes its complaint that the NJDEP regulations do not incorporate its — incorrect — interpretation of ALARA. Shieldalloy appears to assume that incorporation of the ALARA principle would permit it to exceed the 15 mrem per year dose limit, but remain under 25 mrem. As discussed above, the ALARA principle, if it were incorporated expressly in the NJDEP’s regulations, would require an annual dose limit “as low as is reasonably achievable” under 15 mrem, not 25 mrem.

Moreover, Shieldalloy’s ALARA reference and the four examples that it provides are based on NJDEP regulations that correspond with the NRC’s license termination rule. As such, they are compatibility category “C” regulations, and are therefore permissibly more stringent than the NRC’s corresponding regulations. As stated above, by lowering the annual dose limit and requiring the use of conservative dose calculation methodologies, the NJDEP’s decommissioning regulations embody the essential objective of the license termination rule.⁹⁶ With nothing offered to controvert the finding that the NJDEP’s regulations are at least equivalent to the level of protection of public health and safety afforded by NRC requirements, Shieldalloy’s argument fails. Accordingly, Shieldalloy is not likely to succeed on the merits with respect to this challenge to the New Jersey program.⁹⁷

regulatory system will result in more cleanups and thus the elimination of the public’s exposure to these hazardous substances and the environmental degradation that contamination causes.” N.J. Stat. Ann. § 58:10B-1.2. The NJDEP regulations accordingly provide strict standards — the maximum permissible annual dose cannot exceed 15 mrem; however, “there is flexibility in complying with the remediation standards, including the availability of a petition for alternative remediation standards, N.J.A.C. 7:28-12.11.” 40 N.J. Reg. 5196(b), at 9.

⁹⁶ See, e.g., 40 N.J. Reg. 5196(b), at 8-9 (responding to Shieldalloy’s comment regarding the NRC’s allowing credit for certain engineering controls when modeling the all controls fail scenario, NJDEP states that “the rules require the [NJDEP] to consider the public health consequences in the event that the engineered barriers completely fail at some point in the future. This is a reasonable approach to ensure an adequate degree of protection to the public health and safety. The NRC approach of assuming that engineered structures degrade over time does not take into account intentional human intervention. In the [NJDEP’s] experience, human intervention greatly increases radiation exposure at radiologically contaminated sites”).

⁹⁷ Shieldalloy requested an exemption from the requirements of N.J. Admin. Code §§ 7:28-12 and 7:28-58, which the NJDEP denied on December 11, 2009. See December 11 NJDEP Letter at 1. The NJDEP reasoned that Shieldalloy “ha[d] not demonstrated hardship or a compelling need for the exemption,” as required under N.J. Admin. Code § 7:28-2.8. *Id.* According to the NJDEP, “if [Shieldalloy] considers itself to be aggrieved by the [NJDEP’s] denial of the exemption request,” it may request a hearing before the New Jersey Office of Administrative Law within 20 days of receipt of the denial letter. *Id.* at 2.

d. *“The New Jersey Program Disrupts Ongoing Licensed Activities”*

Finally, in its motion Shieldalloy asserts that the New Jersey program, “as applied to Newfield,” fails to satisfy 1981 Policy Statement Criterion 25,⁹⁸ which concerns the “arrangements [that] will be made by NRC and the State to ensure that there will be no interference with or interruption of licensed activities or the processing of license applications by reason of the transfer” of NRC authority.⁹⁹ Shieldalloy cites the NJDEP’s rejection of its decommissioning plan with the proposed LTC approach as “disrupting” its licensed activities. This argument is without merit. New Jersey law provides for recognition of NRC licenses, and NJDEP procedures provide that upon the effective date of the agreement, all active NRC licenses issued to facilities in New Jersey will be recognized as NJDEP licenses.¹⁰⁰ Consistent with Criterion 25, the NJDEP recognized Shieldalloy’s source material license at the Newfield site.¹⁰¹ Furthermore, in rejecting its proposed decommissioning plan, the NJDEP acknowledged that Shieldalloy met the timeliness requirements of 10 C.F.R. § 40.42 when it submitted the plan to the NRC. It used this as a basis for granting Shieldalloy an extension of time to file a revised decommissioning plan.¹⁰² These actions appear to be consistent with an orderly transfer of authority between the NRC and New Jersey.

Shieldalloy’s arguments to the contrary are, in essence, yet another challenge to the NRC’s designation of the license termination rule as compatibility category “C.”¹⁰³ The NJDEP’s rejection of Shieldalloy’s proposed decommissioning plan was taken pursuant to the regulatory scheme that we found to be adequate and compatible in accordance with AEA § 274. Taking Shieldalloy’s argument to its logical conclusion, the NJDEP would have had to apply NRC regulations rather than its own in order to meet Criterion 25 to Shieldalloy’s satisfaction. This would be characteristic of compatibility category “A” or “B” regulations, not, as here, compatibility category “C” regulations. For these reasons, Shieldalloy is not likely to succeed on the merits of this challenge to the New Jersey program.¹⁰⁴

⁹⁸ Shieldalloy Motion for Stay at 15.

⁹⁹ 46 Fed. Reg. at 7543.

¹⁰⁰ See SECY-09-0114, Enclosure 2, at 8 (citing N.J. Stat. Ann. § 26:2D-9(k); NJDEP BER Procedure 3.08, “License Transition from NRC to New Jersey”).

¹⁰¹ See October 8 NJDEP Letter at 1.

¹⁰² *Id.*

¹⁰³ See *supra* notes 58 and 67 and accompanying text.

¹⁰⁴ The Frakes Affidavit attached to Shieldalloy’s motion contains an additional challenge to the New Jersey program that is not addressed in the body of the motion. In Paragraph 9 of the affidavit, Mr. Frakes asserts that the New Jersey program is incompatible with the NRC’s program because it “is aimed specifically and uniquely at the [Shieldalloy] Newfield Facility.” Frakes Affidavit ¶9. According to Mr. Frakes, this “runs directly contrary to NRC [1981 Policy Statement] Criterion 23,

(Continued)

3. *Balancing of the Stay Factors*

Shieldalloy's failure to satisfy the first two stay factors renders it unnecessary to make determinations on the two remaining factors: harm to other parties and where the public interest lies.¹⁰⁵ Absent a demonstration of irreparable harm or likelihood of success on the merits — the two factors that are given the most weight — we find no basis upon which to grant a stay.

III. CONCLUSION

For the reasons set forth above, we *deny* Shieldalloy's stay request.
IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of January 2010.

which requires that the State implement 'practices for assuring the fair and impartial administration of regulatory law.'" *Id.* This argument is without merit. The NRC requires states to have a regulatory program in place that will cover all types of uses of the radioactive material or activities over which a state assumes regulatory authority, even if there is only one licensee in the state currently licensed for a specific radioactive material or activity. The NJDEP's license termination regulations would apply to any licensee that submits a request for license termination. *See, e.g.*, 40 N.J. Reg. 5196(b), at 8 ("The fact that there may be only one facility in the State now affected by the rule does not mean that other facilities will not be affected in the future. . . . Creating an open class is not the equivalent of special legislation, which is prohibited, nor is it arbitrary or discriminatory."). We have received no evidence that would indicate that New Jersey's program cannot be implemented fairly and impartially. *See* SECY-09-0114, Enclosure 2, at 7.

¹⁰⁵ *See Oyster Creek*, CLI-08-13, 67 NRC at 400. *See also Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1635 (1984).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

Docket Nos. 52-025-COL
52-026-COL
(ASLBP No. 09-873-01-COL-BD01)

SOUTHERN NUCLEAR OPERATING
COMPANY
(Vogtle Electric Generating Plant,
Units 3 and 4)

January 8, 2010

In this 10 C.F.R. Part 52 proceeding regarding the application of Southern Nuclear Operating Company (SNC) for a combined license (COL) to construct and operate two new nuclear reactors at its existing Vogtle Electric Generating Plant (VEGP) site, ruling on a petition filed jointly by five individuals seeking to intervene to contest the SNC COL application, the Licensing Board concludes that although one of the five petitioners has established the requisite standing, because they have failed to proffer one admissible contention, their hearing request must be denied.

RULES OF PRACTICE: STANDING TO INTERVENE

In determining whether an individual or organization is an “interested person” under section 189a of the Atomic Energy Act (AEA) of 1954, 42 U.S.C. § 2239(a)(1)(A), that has standing “as of right” such that it can be granted party status in a proceeding in accord with 10 C.F.R. § 2.309(d), the Commission applies

contemporaneous judicial standing concepts that require a participant to establish that (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the AEA, 42 U.S.C. § 2011 et seq., the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq.); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

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

In proceedings involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish standing. *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010); *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915-16 (2009).

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

The proximity presumption applies when petitioners live within 50 miles of the proposed facility or when they have “frequent contacts” with the area affected by the proposed facility. *Calvert Cliffs*, CLI-09-20, 70 NRC at 915-16; *see Bell Bend*, CLI-10-7, 71 NRC at 138.

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

To establish the requisite proximity, a petitioner must clearly indicate where he lives and/or what contact he has with the site. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42, 47 (1991) (no standing when petitioner alleged proximity but failed to state his physical address or elaborate on the extent of his activities in the area).

**RULES OF PRACTICE: STANDING TO INTERVENE (SHOWING
REGARDING STANDING BASED ON GEOGRAPHIC PROXIMITY)**

To establish standing based on “frequent contacts,” the petitioner must show that it “*frequently* engages in *substantial* business and related activities in the

vicinity of the facility,’ engages in ‘normal, *everyday* activities’ in the vicinity, has ‘*regular*’ and ‘*frequent* contacts’ in an area near a licensed facility, or otherwise has visits of a ‘length’ and ‘nature’ showing ‘an ongoing connection and presence,’” but standing is not presumed “where contact has been limited to ‘*mere occasional trips* to areas located close to reactors.’” *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-21, 65 NRC 519, 523-24 (2007) (footnotes omitted); *see also PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 402 (2009) (no proximity-based standing when petitioner failed to supply “more specific information regarding the frequency, nature, and length of his contacts” within the proximity zone), *aff’d*, CLI-10-7, 71 NRC at 139; *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 26 (2002) (no proximity-based standing when petitioner “demonstrate[d] only occasional contact with the zone of harm”).

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

Ultimately, it is the petitioner’s responsibility to “provide enough detail to allow the Board to distinguish a casual interest from a substantial one.” *Bell Bend*, CLI-10-7, 71 NRC at 139.

ATOMIC ENERGY ACT: STANDING TO INTERVENE (JURISDICTIONAL NATURE UNDER AEA; LICENSING BOARD’S INDEPENDENT OBLIGATION TO MAKE STANDING DETERMINATION)

RULES OF PRACTICE: STANDING TO INTERVENE (UNCONTESTED; LICENSING BOARD’S INDEPENDENT OBLIGATION TO MAKE STANDING DETERMINATION)

Regardless of whether there is a challenge to a petitioner’s standing, given the jurisdictional nature of standing under the AEA, a licensing board has an independent obligation to make a standing determination. *Cf. Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1152 (2009) (court must make independent assessment of Article III standing claims).

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

Petitioner’s claim to have fished “regularly,” does not necessarily convey the same meaning as the term “frequently” that is referenced in Commission standing

cases. One who performs an act “regularly” does so “in a regular, orderly, . . . or methodical way,” *Webster’s Third New International Dictionary* 1913 (Philip B. Gove ed. in chief, 1976) (unabridged) (definition of “regularly”), while one who does something “frequently” does so “at frequent or short intervals,” “frequent” being defined as “often or habitually,” *id.* at 909 (definitions of “frequently” and “frequent”). Thus, an individual who fishes once a year, every year, might be considered to do so “regularly,” but not necessarily “frequently.”

RULES OF PRACTICE: BURDEN OF PROOF (STANDING)

Petitioners bear the burden of providing sufficient relevant, specific information, whether by good-faith estimate or otherwise, to establish the basis for their standing claims. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999) (intervenors who fail to provide specific information regarding proximity or frequency of contacts only complicate matters for themselves); *see also Bell Bend*, CLI-10-7, 71 NRC at 139 (“a petitioner’s lack of specificity concerning the nature, extent, and duration of his contacts with the area surrounding the proposed site is a sufficient basis to reject a claim of standing”); *id.* at 140 (affirming licensing board finding that petitioner’s claim that he “routinely pierces” 50-mile radius around reactor site is too vague to support standing).

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

While the nature of the activities undertaken within the affected area undoubtedly impacts the amount of detail that must be provided to establish whether the activity is sufficiently “frequent,” *see Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 45 (1990) (“regular” commute that takes petitioner past plant entrance once or twice a week sufficient to establish standing), in describing a discretionary recreational activity such as fishing, providing more, rather than less, detail would generally be prudent.

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

The distinction between “frequently” and “regularly” might seem overly formalistic/legalistic, but it highlights the importance of making a more detailed factual showing (rather than relying on conclusory adjectives and adverbs) in situations in which a standing claim rests upon the nature of a petitioner’s activities purportedly near to, or bearing some connection with, the reactor facility at

issue. Without question, a large number of individuals who do not reside within a 50-mile radius of a reactor site may undertake a variety of activities (e.g., going to work or school, shopping, attending meetings or religious services, visiting friends and relatives) within that distance from the reactor site. The degree to which those activities are sufficient to afford standing in a reactor licensing proceeding, as a question that “will require the Board to weigh the information provided,” *Bell Bend*, CLI-10-7, 71 NRC at 139, undoubtedly is a matter that benefits from more, rather than less, factual information.

**RULES OF PRACTICE: STANDING TO INTERVENE
(CONSTRUCTION OF PETITION)**

A Licensing Board has responsibility to construe a hearing petition in a light most favorable to the petitioner. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

**RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN
FACT)**

Even if a party seeking standing has some intent to return to an area, when such intentions are not supported by “concrete plans” or a “specification of when” future visits would take place, they do not support a finding of injury in the standing context. *Summers*, 129 S. Ct. at 1151 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).

RULES OF PRACTICE: INTERVENTION (DISCRETIONARY)

NRC’s regulations provide for the possibility of discretionary intervention in circumstances when one petitioner has standing as of right and has proffered at least one admissible contention, but other petitioners have not demonstrated their standing. *See* 10 C.F.R. § 2.309(e). If a petitioner did not request discretionary intervention in the event the petitioner is found to lack standing as of right, a licensing board need not consider affording such intervention status.

**RULES OF PRACTICE: NONTIMELY INTERVENTION
PETITION(S)**

Under section 2.309(c), whether a “nontimely” petition and its associated contentions should be considered is based upon a balancing of eight factors:

- (i) Good cause, if any, for the failure to file on time;

- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

**RULES OF PRACTICE: NONTIMELY INTERVENTION
PETITION(S) (BALANCING OF 10 C.F.R. § 2.309(c)(1) FACTORS)**

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

RULES OF PRACTICE: CONTENTIONS (NEW OR AMENDED)

Also potentially relevant to the admissibility of a hearing petition filed after the initial filing deadline is 10 C.F.R. § 2.309(f)(2), which provides:

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

- (i) The information upon which the amended or new contention is based was not previously available;

- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

**RULES OF PRACTICE: NONTIMELY INTERVENTION
PETITION(S) (FACTOR (i): GOOD CAUSE)**

The initial, good cause factor under section 2.309(c)(1) favors a petitioner when, in accord with a previous licensing board directive, the petitioner has filed its petition within 30 days of what it has asserted is the trigger date for the new filing — that is, within 30 days of the availability of the document the petitioner contends contains new and significant information so as to form the basis for its contention.

**RULES OF PRACTICE: NONTIMELY INTERVENTION
PETITION(S) (FACTORS (ii) THROUGH (iv): STANDING-RELATED
CRITERIA)**

If a petitioner is found to have standing, standing-related factors two through four of section 2.309(c)(1) favor the petitioner.

**RULES OF PRACTICE: NONTIMELY INTERVENTION
PETITION(S) (FACTOR (v): OTHER MEANS TO PROTECT
INTERVENORS' INTEREST)**

Although a petitioner also could participate in another federal agency's comment process relating to a proposed environmental assessment that is the focus of a new contention and thus does have some alternative means for protecting its interests, for the purpose of factor five of section 2.309(c)(1) that process is not analogous to participation in an NRC adjudicatory proceeding and therefore does not weigh heavily against the petitioner's intervention in the NRC proceeding.

**RULES OF PRACTICE: NONTIMELY INTERVENTION
PETITION(S) (FACTOR (vi): OTHER PARTIES TO PROTECT
INTERVENORS' INTEREST)**

With respect to factor six of section 2.309(c)(1), the presence of another admitted party to the proceeding, particularly when that party previously raised the issue that is the subject of the new contention, weighs against a petitioner.

**RULES OF PRACTICE: NONTIMELY INTERVENTION
PETITION(S) (FACTOR (vii): BROADENING OF ISSUES OR DELAY)**

Regarding factor seven of section 2.309(c)(1), although admitting the new contention would broaden the issues in dispute, in the early stage of the proceeding, this does not weigh heavily against a petitioner.

**RULES OF PRACTICE: NONTIMELY INTERVENTION
PETITION(S) (FACTOR (viii): ASSISTANCE IN DEVELOPING A
SOUND RECORD)**

Relative to section 2.309(c)(1) factor eight, when a petitioner has filed an expert declaration with its petition, indicating that it can assist, through expert opinion, in the development of a sound record, this is a factor that weighs in favor of admission.

**RULES OF PRACTICE: CONTENTIONS (NEW OR AMENDED
SUBMITTED PRIOR TO NRC NEPA ISSUANCES)**

When the Staff's draft or final EIS regarding the COL application has not been issued so as to provide the petitioner with a basis for framing its contention, the licensing board must look to the three other factors specified in section 2.309(f)(2) in assessing the admissibility of a new NEPA-related issue statement.

**RULES OF PRACTICE: CONTENTIONS (NEW OR AMENDED
SUBMITTED PRIOR TO NRC NEPA ISSUANCES; FACTOR (i):
INFORMATION NOT PREVIOUSLY AVAILABLE)**

Under the first section 2.309(f)(2) element, when the particular draft EA prepared by another federal agency that is the focus of a new contention was not issued until recently, it was not available previously.

**RULES OF PRACTICE: CONTENTIONS (NEW OR AMENDED
SUBMITTED PRIOR TO NRC NEPA ISSUANCES; FACTOR (ii):
INFORMATION MATERIALLY DIFFERENT THAN PREVIOUSLY
AVAILABLE)**

Although the licensing board did not consider a draft EA prepared by another federal agency that is the focus of the new contention document to be "material" in the context of its assessment of the substantive admissibility of the issue statement, relative to the second factor under section 2.309(f)(2), the licensing board concludes that the potential difference in temporal coverage — as compared

to a previous EA by that federal agency regarding the same subject matter — makes that federal agency’s later draft EA “materially different” from other information previously available.

RULES OF PRACTICE: CONTENTIONS (MATERIALITY; NEW OR AMENDED SUBMITTED PRIOR TO NRC NEPA ISSUANCES; FACTOR (ii): INFORMATION MATERIALLY DIFFERENT THAN PREVIOUSLY AVAILABLE)

Materiality in the context of section 2.309(f)(2) differs from materiality in the context of section 2.309(f)(1). Whereas the former relates to the magnitude of the difference between previously available information and currently available information, the latter relates to the impact of the information on the proceeding at hand.

RULES OF PRACTICE: CONTENTIONS (NEW OR AMENDED SUBMITTED PRIOR TO NRC NEPA ISSUANCES; FACTOR (iii): TIMELY SUBMISSION)

Given an earlier licensing board directive that any new or amended contention should be submitted within 30 days of the occurrence or circumstance under which the contention arises, a petitioner’s hearing submission focusing on another agency’s draft EA that is filed within 30 days of issuance of the EA would be considered timely based on the public availability of the document.

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

A contention based on another agency’s draft EA that does not apply to the time period in which proposed reactor units would be operational is not material to the findings the licensing board must make in the proceeding. *See* 10 C.F.R. § 2.309(f)(1)(iv).

**MEMORANDUM AND ORDER
(Ruling on Petition to Intervene)**

Pending before the Licensing Board is an October 30, 2009 petition filed by Vince Drescher, Kenneth Ward, John C. Horn, Jr., William S. Bashlor, and James Eddie Partain (hereinafter Joint Petitioning Individuals or JPI), seeking to intervene in this 10 C.F.R. Part 52 combined license (COL) proceeding and to have admitted one new contention, NEPA-1. *See* Amended Petition of Vince

Drescher, Kenneth Ward, John C. Horn, Jr., William S. Bashlor and James Eddie Partain to Intervene and Admit New Contention (Nov. 2, 2009) [hereinafter JPI Amended Petition].¹ Both Applicant Southern Nuclear Operating Company (SNC) and the NRC Staff oppose the JPI petition to intervene. *See* [SNC] Answer Opposing Petition of Vince Drescher, Kenneth Ward, John C. Horn, Jr., William S. Bashlor and James Eddie Partain to Intervene and Admit New Contention (Nov. 20, 2009) [hereinafter SNC Answer]; NRC Staff's Answer to Petition to Intervene and Admit New Contention (Nov. 20, 2009) [hereinafter Staff Answer].

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

I. BACKGROUND

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

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

Clean Energy (Joint Intervenors) — jointly petitioned for leave to intervene in the Vogtle COL proceeding. On March 5, 2009, this Board granted Joint Intervenors petition and admitted one contention, SAFETY-1, regarding the onsite storage of low-level radioactive waste associated with proposed Units 3 and 4.² See LBP-09-3, 69 NRC 139 (2009), *referred rulings declined*, CLI-09-13, 69 NRC 575 (2009), and *appeals denied*, CLI-09-16, 70 NRC 33 (2009).

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

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

JPI Amended Petition at 3-4.

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

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

II. ANALYSIS

A. Joint Petitioning Individuals Standing

1. Standards Governing Standing

As we noted in our ruling admitting Joint Intervenors as parties to this proceeding, *see* LBP-09-3, 69 NRC at 149, in determining whether an individual or organization is an “interested person” under section 189a of the Atomic Energy Act (AEA) of 1954, 42 U.S.C. § 2239(a)(1)(A), that has standing “as of right” such that it can be granted party status in a proceeding in accord with 10 C.F.R. § 2.309(d), the Commission applies contemporaneous judicial standing concepts that require a participant to establish that (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the AEA, 42 U.S.C. § 2011 et seq., NEPA, 42 U.S.C. § 4321 et seq.); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Further, in proceedings involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish standing. *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010); *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915-16 (2009). The proximity presumption applies when petitioners live within 50 miles of the proposed facility or when they have “frequent contacts” with the area affected by the proposed facility. *Calvert Cliffs*, CLI-09-20, 70 NRC at 915-16 ; *see Bell Bend*, CLI-10-7, 71 NRC at 138. To establish the requisite proximity, however, a petitioner must clearly indicate where he lives and/or what contact he has with the site. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42, 47 (1991) (no standing when petitioner alleged proximity but failed to state his physical address or elaborate on the extent of his activities in the area). Additionally, to establish standing based on “frequent contacts,” the petitioner must show that it “‘frequently engages in substantial business and related activities in the vicinity of the facility,’ engages in ‘normal, everyday activities’ in the vicinity, has ‘regular’ and ‘frequent contacts’ in an area near a licensed facility, or otherwise has visits of a ‘length’ and ‘nature’ showing ‘an ongoing connection and presence,’” but standing is not presumed “where contact has been limited to ‘mere occasional trips to areas located close to reactors.’” *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-21, 65 NRC 519, 523-24 (2007) (footnotes omitted); *see also PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 402 (2009) (no proximity-based standing when petitioner failed to

supply “more specific information regarding the frequency, nature, and length of his contacts” within the proximity zone), *aff’d*, CLI-10-7, 71 NRC at 139; *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 26 (2002) (no proximity-based standing when petitioner “demonstrate[d] only occasional contact with the zone of harm”). Ultimately, it is the petitioner’s responsibility to “provide enough detail to allow the Board to distinguish a casual interest from a substantial one.” *Bell Bend*, CLI-10-7, 71 NRC at 139.

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

2. *Kenneth Ward*

Mr. Ward asserts that he lives “less than fifty miles” from of the VEGP site. JPI Amended Petition, Declaration of Kenneth Ward ¶2 (Oct. 26, 2009). Based on the home address provided in his declaration in support of the JPI petition, *see id.* ¶1, it appears Mr. Ward lives within 30 miles of the site (as verified using the Google Maps distance measurement tool in accord with 10 C.F.R. § 2.337(f)).³ Accordingly, Mr. Ward has established his standing to intervene in this proceeding.

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

Messrs. Drescher, Horn, Bashlor, and Partain do not claim to live within 50 miles of the VEGP site.⁴ Instead, they assert standing based on “actively us[ing] and enjoy[ing] the Savannah River for recreational purposes, including fishing,” within 50 miles of the VEGP site. JPI Amended Petition at 3; *see also* JPI Reply at 3-4. In their declarations in support of the petition, Messrs. Drescher, Horn, Bashlor, and Partain state that they fish “regularly” in locations downstream of the VEGP site, including Blue Springs, where Route 301 crosses the Savannah River (verified as approximately 21 miles from the VEGP site based on a check on Google Maps), and Clys (verified as approximately 54 miles from the VEGP

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

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

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

According to the Staff, the JPI do not indicate how frequently or for what duration Messrs. Drescher, Horn, Bashlor, and Partain travel to areas within 50 miles of the VEGP site to fish so as to establish standing based on the proximity of these activities to the Vogtle facility. *See* Staff Answer at 9-10. Additionally, SNC and the Staff both argue that the JPI have not sufficiently explained how Messrs. Drescher, Horn, Bashlor, and Partain meet the traditional standing requirements. *See* SNC Answer at 4; Staff Answer at 11-12. In particular, the Staff asserts that the JPI have not stated a specific injury-in-fact “fairly traceable” to proposed Vogtle Units 3 and 4 or “how impacts attributable to the Vogtle COL application would adversely affect their recreational fishing interests.” Staff Answer at 11.

The Board concludes that Messrs. Drescher, Horn, Bashlor, and Partain have not established the requisite injury-in-fact on which to base standing to intervene in this proceeding. Although the petitioners claim to have fished on the Savannah River “regularly,” this does not necessarily convey the same meaning as the term “frequently” that is referenced in Commission standing cases. One who performs an act “regularly” does so “in a regular, orderly, . . . or methodical way,” *Webster’s Third New International Dictionary* 1913 (Philip B. Gove ed. in chief, 1976) (unabridged) (definition of “regularly”), while one who does something “frequently” does so “at frequent or short intervals,” “frequent” being defined as “often or habitually,” *id.* at 909 (definitions of “frequently” and “frequent”). Thus, an individual who fishes once a year, every year, might be considered to do so “regularly,” but not necessarily “frequently.” This case thus is distinguishable from the Commission’s ruling in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323-24 (1999), that a petitioner who had “frequently” visited an area allegedly affected by the proposed action for recreational purposes had shown injury in the standing context. Petitioners bear the burden of providing sufficient relevant, specific information, whether by good-faith estimate or otherwise, to establish the basis for their standing claims. *See id.* at 325 (intervenors who fail to provide specific information regarding proximity or frequency of contacts only complicate matters

for themselves); *see also Bell Bend*, CLI-10-7, 71 NRC at 139 (“a petitioner’s lack of specificity concerning the nature, extent, and duration of his contacts with the area surrounding the proposed site is a sufficient basis to reject a claim of standing”); *id.* at 140 (affirming licensing board finding that petitioner’s claim that he “routinely pierces” 50-mile radius around reactor site is too vague to support standing). In this instance, we find the information provided by the JPI, both in their initial petition and in their reply pleading responding to the Staff’s challenge to their proximity standing showing, to be wanting.⁵

Moreover, and unlike the petitioner in *PFS* who specifically indicated that he planned to visit the relevant area “*in the future* with some frequency,” CLI-99-10, 49 NRC at 323 (emphasis added), the petitioners here have not specified any intent to continue fishing at particular locations along the Savannah River in the future with a rate of recurrence that, notwithstanding our responsibility to construe the JPI petition in a light most favorable to them, *see Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995), we could consider “frequent.” Even if a party seeking standing has some intent to return to an area, when such intentions are not supported by “concrete plans” or a “specification of *when*” future visits would take place, they do not support a finding of injury in the standing context. *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1151 (2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).

Finally, we agree with SNC and the Staff that these individuals, having failed in their attempt to invoke the proximity presumption, likewise have failed under traditional standing precepts to show how impacts attributable to the SNC COL application would adversely affect their recreational fishing interests as they might seek to pursue those interests, whether inside or outside the 50-mile

⁵ While the nature of the activities undertaken within the affected area undoubtedly impacts the amount of detail that must be provided to establish whether the activity is sufficiently “frequent,” *see Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 45 (1990) (“regular” commute that takes petitioner past plant entrance once or twice a week sufficient to establish standing), in describing a discretionary recreational activity such as fishing, providing more, rather than less, detail would generally be prudent.

We would add that to the degree our focus on the distinction between “frequently” and “regularly” might seem overly formalistic/legalistic, we believe it highlights the importance of making a more detailed factual showing (rather than relying on conclusory adjectives and adverbs) in situations such as this one in which a standing claim rests upon the nature of a petitioner’s activities purportedly near to, or bearing some connection with, the reactor facility at issue. Without question, a large number of individuals who do not reside within a 50-mile radius of the VEGP site undertake a variety of activities (e.g., going to work or school, shopping, attending meetings or religious services, visiting friends and relatives) within that distance from the reactor site. The degree to which those activities are sufficient to afford standing in a reactor licensing proceeding, as a question that “will require the Board to weigh the information provided,” *Bell Bend*, CLI-10-7, 71 NRC at 139, undoubtedly is a matter that benefits from more, rather than less, factual information.

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

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

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

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

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

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor’s/petitioner’s interest;
- (v) The availability of other means whereby the requestor’s/petitioner’s interest will be protected;
- (vi) The extent to which the requestor’s/petitioner’s interests will be represented by existing parties;

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

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

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

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

Also potentially relevant to the admissibility of the JPI hearing petition is 10 C.F.R. § 2.309(f)(2), which provides:

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

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

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

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

Regardless of whether the JPI petition and contention NEPA-1 are considered under section 2.309(c)(1) or (f)(2), our analysis of these factors favors the petitioners. Looking first to section 2.309(c)(1), the good cause factor in particular favors the petitioners because they filed their petition within 30 days of what they have asserted is the trigger date for their new filing — that is, within 30 days of the availability of the document they contend contains new and

significant information so as to form the basis for their contention.⁷ Additionally, because one of the petitioners has standing, standing-related factors two through four favor the petitioners. Although the petitioners also could participate in the USACE comment process relating to the proposed EA regarding river flow reduction and thus do have some alternative means for protecting their interests, for the purpose of factor five that process is not analogous to participation in an NRC adjudicatory proceeding and therefore does not weigh heavily against the petitioners' intervention in this proceeding. With respect to factor six, the presence of the Joint Intervenors in this proceeding, particularly when the Joint Intervenors have previously raised river flow rate issues, does weigh against the petitioners. Regarding factor seven, although admitting the JPI and their NEPA-related contention would broaden the issues in dispute, because we are at this early stage in the proceeding, this does not weigh heavily against the petitioners. Finally, relative to factor eight, the JPI have filed an expert declaration with their petition, *see* JPI Amended Petition, Declaration of Paula L. Feldman, P.E. (Oct. 29, 2009) [hereinafter Feldman Decl.], indicating that they can assist, through expert opinion, in the development of a sound record, making this a factor that weighs in favor of admission as well. Upon balancing these factors, we find that, particularly in light of the fact the petitioners have shown good cause for their nontimely filing, the scales tilt in favor of allowing the JPI late-filed petition.

As to the section 2.309(f)(2) factors, given that the Staff's draft or final EIS regarding the SNC COL application has not been issued so as to provide the petitioners with a basis for framing their contention, we must look to the three other factors specified in that provision in assessing the admissibility of their issue statement. In this regard, under the first element, it is apparent that the particular USACE draft EA that is the focus of the JPI contention was not available previously. Further, although, as we detail in section II.C, below, we do not consider that document to be "material" in the context of our assessment of the substantive admissibility of this issue statement, relative to the second factor under section 2.309(f)(2), we conclude that the potential difference in temporal coverage — as compared to the previous USACE EA regarding a temporary river flow level deviation⁸ — makes the October 2009 USACE draft EA "materially

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

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

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

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

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

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

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

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

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

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

Id. at 78.¹⁰ Certainly, the information now before us, including the information provided by the JPI, *see* JPI Reply, attach. A (CBS Atlanta, Officials: Georgia Drought Over (June 10, 2009), <http://www.cbsatlanta.com/news/19712975/detail.html>) (most recent drought conditions ended in June 2009), provides no basis to question this statement of the draft EA's scope and applicability.¹¹

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

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

¹¹Also in this regard, the Board notes the contrast between USACE's lack of action on its current draft EA and its actions following the issuance of a draft EA for a similar "temporary deviation" to its Drought Contingency Plan a year ago. As the petitioners indicated, USACE had a "temporary deviation plan" reducing Thurmond Dam releases to 3100 cfs between November 1, 2008, and February 28, 2009. *See* JPI Reply at 10; *see also* USACE 2008 Draft EA at 5. That draft EA was apparently issued in October 2008, and a news release on November 24, 2008, announced that USACE was in fact implementing the plan. *See* [USACE], Savannah District, News Release: Army Corps of Engineers to reduce outflows from Savannah River reservoirs (Nov. 24, 2008), available at <http://www.sas.usace.army.mil/NR%2008-41.pdf>. The present draft EA, which was published on October 2, 2009, proposes a 3100 cfs release rate starting in September 2009 but, to the best of the Board's knowledge, has not been followed by any USACE documentation indicating that the proposed EA has been adopted.

¹²This is not to say that a contention like that now before us that was submitted in such a situation would necessarily be admissible. The JPI contention also raises a number of other issues that seemingly are problematic given the current posture of this proceeding. Under the agency's Part 52 regulations, when a COL application references an ESP, neither the applicant nor the Staff needs to address environmental issues resolved in the ESP proceeding unless "new and significant" information arises on those issues. *See* 10 C.F.R. § 51.50(c), 51.92(e)(6)-(7). As a consequence, environmental contentions at the COL stage are generally only admissible where they either raise issues that were not resolved at the ESP stage or raise issues resolved at the ESP stage "for which new and significant information has been identified." 10 C.F.R. § 51.107(b)(2), (3); *see also id.* § 52.39(c)(v). In this context, to the extent petitioners intend their contention to encompass (1) the asserted need to preserve

(Continued)

III. CONCLUSION

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

For the foregoing reasons, it is this 8th day of January 2010, ORDERED, that:

1. Joint Petitioning Individuals October 30, 2009 hearing request is *denied*.
2. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon an intervention petition, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

James F. Jackson
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 8, 2010

river flow rates equal to or above 7Q10 flow rates, (2) the choice of gauge locations along the Savannah River at which it is appropriate to measure flow rates, and (3) the existence of impacts further downstream at flow rates already addressed in the ESP proceeding, *see* JPI Amended Petition at 8, 9; Feldman Decl. at 6-7, 8-10, they must account for (1) the fact that aquatic impacts were already addressed in both the Staff's final EIS and the contested and mandatory portions of the evidentiary hearing before the licensing board in the ESP proceeding, *see Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-09-7, 69 NRC 613, 652-56 (2009) (contested hearing), *petition for review denied*, CLI-10-5, 71 NRC 90, 100-05 (2010); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-09-19, 70 NRC 433, 460-69 (2009) (mandatory hearing); and (2) the need to cite information that was not available before or during the ESP proceeding as support for their assertions regarding anything besides the potential for lower future flow rates due to USACE action at Thurmond Dam.

Concurring Opinion of Bollwerk, J.

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

To understand the interplay between these two provisions requires an explanation of their history. Prior to the extensive February 2004 changes in the Nuclear Regulatory Commission's (NRC) rules of practice, the admissibility of a "nontimely" hearing *petition* submitted after the time specified in the original hearing opportunity notice was assessed by balancing what are now factors one and five through eight of section 2.309(c)(1). 10 C.F.R. § 2.714(a)(1)(i)-(v) (2004).¹ The same generally was true for what then was often referred to as a "late-filed" contention, i.e., a new or amended *contention* submitted after the deadline specified in the original hearing opportunity notice, that did not raise matters based on data or conclusions in the Staff's draft or final environmental impact statement (EIS), environmental assessment (EA), or any supplements relating to an EIS or EA.² See *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 (1998). Under those pre-2004 rules, the admissibility of the JPI petition would, at a minimum, have been subject to review under what are now section 2.309(c)(1) factors one and five through eight. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 321 (1999).

With the adoption of existing sections 2.309(c)(1) and (f)(2) in 2004, the admissibility standards for "nontimely" hearing *petitions* filed after the initial hearing opportunity notice date, as well as "late-filed" new and amended *contentions* associated with timely petitions filed before that notice filing deadline,

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

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

arguably became both more and less clear. Under section 2.309(f)(2), the admissibility of a new or amended contention that does not involve the Staff's draft or final EIS, an EA, or any EIS or EA supplements, such as JPI contention NEPA-1, seemingly is governed by, at a minimum, the three section 2.309(f)(2) factors set forth above in section II.B.1 of the Board's decision. *See* Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004) (new section 2.309(f)(2) incorporates substance of section 2.714(b)(2)(iii) regarding all new or amended environmental contentions, while all other new or amended contentions must satisfy section 2.309(f)(2)(i)-(iii) factors). At the same time, however, as is illustrated in a recent Commission-issued hearing notice for a potential enrichment facility, the provisions of section 2.309(c)(1) are deemed to apply to any "nontimely" petition or new or amended contention, *see GE-Hitachi Global Laser Enrichment LLC* (GLE Commercial Facility), CLI-10-4, 71 NRC 56, 63 (2010) ("nontimely" intervention petitions/contentions, amended petitions, and supplemental petitions will not be entertained absent determination that petition should be granted and/or contentions should be admitted based upon balancing of section 2.309(c)(1)(i)-(viii) factors), with language in the Commission's statement of considerations accompanying the 2004 rule providing some support for the proposition that an assessment of the section 2.309(c) factors is appropriate relative to the admission of such a new or amended submission, *see* 69 Fed. Reg. at 2202 (if safety evaluation report information bears upon existing contention or suggests new contention, section 2.309(c) should be used to evaluate the effect of new or amended contention admission upon a proceeding).

Subsequent to the 2004 rule change, licensing boards have taken different approaches in determining which of these provisions are applicable to a petition and/or new or amended contentions submitted after the hearing opportunity notice deadline. One approach is that first set forth in the *Vermont Yankee* power uprate proceeding, *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 (2005). This line of authority, which appears to be the path followed by the majority of boards that have considered the issue,³ holds that a new or amended contention that is found to be "timely" in accord with section 2.309(f)(2) need not be assessed under the section 2.309(c) factors, which are considered to apply only to otherwise "nontimely" submissions. Presumably, under the *Vermont Yankee* approach, when (as here) the new contention is provided in conjunction with a new hearing petition, the

³ *See, e.g., Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572-74 (2006); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 744-45 & n.12 (2006); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 265 n.5 (2007); *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 138-40 (2009), *aff'd in part and rev'd in part as to other matters*, CLI-10-2, 71 NRC 27 (2010).

timeliness of each new contention would likewise accrue to the petition such that, once those contentions are found to be timely under section 2.309(f)(2), there is no need to consider the section 2.309(c)(1) factors with respect to those contentions.⁴ In contrast, consistent with the long-standing use of the term “nontimely,” other boards have chosen to assess such new or amended issue submissions under both the section 2.309(c)(1) and (f)(2) standards. See *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), No. 52-011-ESP, Licensing Board Memorandum and Order (Ruling on Motion to Admit New Contention) (Oct. 24, 2008) at 6-14 (unpublished); *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), Nos. 52-014-COL & 52-015-COL, Licensing Board Memorandum and Order (Ruling on Request to Admit New Contention) (Oct. 14, 2008) at 4-7 (unpublished).

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

The interpretation adopted by the licensing board in the *Vermont Yankee* power uprate proceeding, which has much to commend itself as a matter of law and logic, appears on its way to becoming the accepted reading of these agency rules of practice. And notwithstanding (1) the lack of any explanation in the Commission’s extensive statement of considerations that accompanied the 2004 rulemaking suggesting the prior meaning of the term “nontimely” in

⁴This can be contrasted with the common approach under the pre-2004 rules under which, in analyzing what is now the first factor in section 2.309(c)(1) regarding “good cause,” the fact that a petition or new/amended contention was filed after the hearing opportunity notice deadline because the document or other item relied upon as the submission trigger was not available was considered “good cause” for the late filing. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 47-48, *aff’d*, CLI-99-10, 49 NRC 318 (1999).

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

section 2.309(c) was being changed, and (2) the fact that the *Vermont Yankee* interpretation appears to narrow appreciably the requirement to consider factors that, at least prior to the 2004 rule change, were generally identified by the Commission as important in assessing the admissibility of a petition or contention filed after the initial hearing opportunity notice filing deadline,⁵ it may well be the interpretation the Commission considers appropriate. But whatever interpretation the Commission ultimately finds to be correct, those involved in the agency's litigation process would benefit from near-term Commission consideration and clarification of the appropriate application of these two provisions to "nontimely" petitions and new/amended contentions.

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Gary S. Arnold
Dr. Randall J. Charbeneau

In the Matter of

**Docket Nos. 52-012-COL
52-013-COL
(ASLBP No. 09-885-08-COL-BD01)**

**SOUTH TEXAS PROJECT NUCLEAR
OPERATING COMPANY
(South Texas Project, Units 3 and 4)**

January 29, 2010

In this 10 C.F.R. Part 52 proceeding regarding the application of South Texas Project Nuclear Operating Company (“STP”) for a combined license (“COL”) to construct and operate two new nuclear units, using the Advanced Boiling Water Reactor certified design, at its site in Matagorda County, Texas, ruling on motions by Intervenor seeking (1) to admit seven new contentions into the contested portion of this proceeding that challenge the adequacy of STP’s May 26, 2009 Mitigative Strategies Report; and (2) to obtain access to a Draft Interim Staff Guidance document that the NRC Staff had designated as containing Sensitive Unclassified Non-Safeguards Information (“SUNSI”), the Licensing Board (1) directs the NRC Staff to provide Intervenor with a copy of all non-SUNSI portions of the guidance document; (2) directs the NRC Staff to reevaluate Intervenor’s request for access to the guidance document, using the standard for access to SUNSI in a licensing board proceeding articulated herein, and file a memorandum explaining its reevaluation; and (3) denies the motion to admit seven new contentions.

**SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
(SUNSI): INTERPRETATION**

**FREEDOM OF INFORMATION ACT: WITHHOLDING OF
DOCUMENTS**

A participant in administrative litigation — having an even greater interest in obtaining access to SUNSI than does the general public — is entitled to obtain documents under standards no more restrictive than would be accorded the general public under FOIA.

**FREEDOM OF INFORMATION ACT: WITHHOLDING OF
DOCUMENTS**

FOIA provides, with nine enumerated exceptions, that each agency make copies of all records available to the public. 5 U.S.C. § 552(a)-(b). NRC regulations implement and repeat this FOIA obligation. *See* 10 C.F.R. §§ 9.15, 2.390. In addition, NRC regulations provide, with certain very limited exceptions, that “all hearings will be public,” 10 C.F.R. § 2.328, and that the public is entitled to copies of the transcripts of all hearings, 10 C.F.R. § 2.327(c).

**FREEDOM OF INFORMATION ACT: WITHHOLDING OF
DOCUMENTS**

If it seeks to withhold a document from a party or the public, or to bar a party or member of the public from attending any adjudicatory proceeding before a Licensing Board, NRC Staff bears the burden of proving that the document or situation meets one of FOIA’s specifically enumerated exceptions. *See* 10 C.F.R. §§ 2.325 and 2.390 (proponent of protective order shoulders burden of proof).

**FREEDOM OF INFORMATION ACT: WITHHOLDING OF
DOCUMENTS**

Even if a document contains information that is exempt from disclosure, FOIA mandates that “[a]ny reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions which are exempt.” 5 U.S.C. § 552(b)(9).

**FREEDOM OF INFORMATION ACT: WITHHOLDING OF
DOCUMENTS**

For decades, the Commission has restricted public access to classified informa-

tion and SGI. *See* 10 C.F.R. §§ 95.34, 73.21; 38 Fed. Reg. 35,430 (Dec. 28, 1973). These restrictions on the dissemination and handling of such materials have a clear statutory and regulatory foundation. *See* 10 C.F.R. § 9.19. Safeguards Information (“SGI”) is an example of a FOIA exemption. Under FOIA, and the NRC regulations implementing FOIA, the duty to make all documents available does not apply to records “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3); 10 C.F.R. § 2.390(a)(3). SGI qualifies for this exemption because the Atomic Energy Act specifically exempts it from disclosure. 42 U.S.C. § 2167. The NRC has promulgated regulations implementing the FOIA exemption for SGI. *See* 10 C.F.R. § 73.21. Likewise, FOIA exempts classified information from disclosure, 5 U.S.C. § 552(b)(1), and NRC regulations implement this exemption. 10 C.F.R. § 2.390(a)(1); 10 C.F.R. Part 2, Subpart I; 10 C.F.R. Part 95.

SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION (SUNSI): INTERPRETATION

The term “sensitive unclassified non-safeguards information” or SUNSI is apparently used only twice in the NRC regulations. First, the regulations authorize the Secretary of the Commission to establish procedures for obtaining access to SUNSI prior to granting intervention in a licensing proceeding. 10 C.F.R. § 2.307(c). Second, the regulations authorize interlocutory appeal to the Commission of certain rulings relating to SUNSI. 10 C.F.R. §§ 2.311(a)(3), 2.311(d)(2). But these regulations never define the term.

SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION (SUNSI): INTERPRETATION

FREEDOM OF INFORMATION ACT: WITHHOLDING OF DOCUMENTS

Although 10 C.F.R. § 2.390(d) never uses the term SUNSI, this regulation seems to fit NRC Staff’s claim that SUNSI is “security-related,” and it is our best lodestar as to the meaning of this term. Under this regulation, in order for a document to qualify as exempt from FOIA disclosure as “SUNSI” the document must:

1. Qualify as commercial or financial information under 10 C.F.R. § 9.17(a)(4) (commonly referred to as “FOIA Exemption 4”);
2. Constitute “correspondence and reports to or from NRC”;
3. Contain information or records concerning a licensee’s or applicant’s
 - i. Physical protection of special nuclear material,

- ii. Classified matter protection, or
- iii. Material control and accounting program relating to special nuclear material;
- 4. Not constitute Safeguards Information; and
- 5. Not constitute classified information (National Security Information or Restricted Data).

**SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
(SUNSI): INTERPRETATION**

In conjunction with a licensing board's reevaluation of the NRC Staff's refusal to provide intervenors with access to a SUNSI document, a board may direct the Staff to segregate those paragraphs of the document that contain SUNSI from those that do not contain SUNSI. NRC regulations require that documents containing classified information or SGI be evaluated paragraph by paragraph, that those paragraphs containing classified information or SGI be redacted, and that the remaining paragraphs (not containing such sensitive material) be available for disclosure to the public. *See* 10 C.F.R. 95.37(f); NRC Safeguards Information Security Program Handbook 12.7 Part II (June 25, 2008) at 8-9.

**SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
(SUNSI): INTERPRETATION**

ADJUDICATORY PROCEEDINGS: PUBLIC ACCESS

The implications of excessively broad claims of SUNSI in a licensing proceeding impact not just an intervenors' access to documents, but, as importantly, the public's access to the adjudicatory process.

ADJUDICATORY PROCEEDINGS: PUBLIC ACCESS

The public is normally to be afforded full access to all NRC proceedings involving the issuance of a license, and the extraordinary step of closure (e.g., to ensure that SUNSI is not disclosed to the public) should not be instituted unless a party can establish that closure is the only reasonable alternative available. Before a licensing board will close future proceedings, the party (or parties) seeking closure must demonstrate that the need to close the hearing outweighs the strong presumption that all licensing board proceedings will be open to the public.

ADJUDICATORY PROCEEDINGS: PUBLIC ACCESS

Anglo-American jurisprudence has long ensured that judicial proceedings will be open to the public. *Pennekamp v. Florida*, 328 U.S. 331, 361 (1946) (Frankfurter, J., concurring) (“Of course trials must be public and the public have a deep interest in trials”); *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“A trial is a public event. What transpires in the court room is public property.”); *see also In re Oliver*, 333 U.S. 257, 278 (1948); *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966) (“The principle that justice cannot survive behind walls of silence has long been reflected in the ‘Anglo-American distrust for secret trials’” (citation omitted)). In a 1980 decision, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), the U.S. Supreme Court enunciated a constitutional basis for public access to courts, grounded in the First Amendment: “Free speech carries with it some freedom to listen.” *Id.* at 576. The First Amendment requires public access not only to criminal proceedings, *id.*, but as well both to civil trials, *see, e.g., Gitto Global Corp. v. Worcester Telegram & Gazette Corp.*, 422 F.3d 1 (1st Cir. 2005), and to trial-type administrative proceedings, *see, e.g., Detroit Free Press v. Ashcroft*, 303 F.3d 681, 702 (6th Cir. 2002), such as a combined licensing proceeding.

ADJUDICATORY PROCEEDINGS: PUBLIC ACCESS

Public access to judicial proceedings is not absolute. Instead, *Richmond Newspapers* only creates a “presumption of openness.” 448 U.S. at 573. To determine whether a tribunal should block public access to a judicial proceeding, *Richmond Newspapers* established a two-part “experience and logic” test. *See, e.g., North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 209-20 (3d Cir. 2002); *Detroit Free Press*, 303 F.3d at 703.

SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION (SUNSI): INTERPRETATION

ADJUDICATORY PROCEEDINGS: PUBLIC ACCESS

Withholding from public access an entire document — just because it may contain some SUNSI information — is not only a misuse of the SUNSI designator, but fails the logic test of *Richmond Newspapers* by excluding the public from access to information that is not security-related.

**SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
(SUNSI): INTERPRETATION**

ADJUDICATORY PROCEEDINGS: PUBLIC ACCESS

A wholesale closure of a licensing proceeding, effectively shutting out the public, cannot be justified under the *Richmond Newspapers* test as long as there is material, not properly designated as SUNSI, to which the public should have access. Under *Richmond Newspapers*, it is essential that such proceedings be accessible to the public and that they be closed only where specific information — legitimately designated as SUNSI — must be discussed.

ORDER

**(Rulings on the Admissibility of New Contentions and on Intervenors’
Challenge to Staff Denial of Documentary Access)**

[THIS ORDER REPLACES THE PUBLICLY AVAILABLE VERSION ISSUED ON JANUARY 29, 2010, AS LBP-10-2.*]

This proceeding involves the 10 C.F.R. Part 52 application of the South Texas Project Nuclear Operating Company (“STP” or the “Applicant”)¹ seeking combined operating licenses (“COL”) for two new nuclear units, using the Advanced Boiling Water Reactor certified design, at its site in Matagorda County, Texas. Two matters are before the Licensing Board for resolution. First, Intervenors² have asserted seven new contentions that challenge the adequacy of the Applicant’s May 26, 2009 Mitigative Strategies Report, which addresses the possible loss of large areas of the nuclear plant due to fires or explosions. Second, Intervenors have challenged NRC Staff’s refusal to provide them with access to DC/COL-ISG-016 (“ISG-016”),³ a Draft Interim Staff Guidance document

*This order is being reissued on February 16, 2010.

¹ STP filed the Application on behalf of the joint applicants for STP Units 3 and 4, including NRG South Texas 3 LLC, NRG South Texas 4 LLC, and the City of San Antonio, Texas, acting by and through the City Public Service Board (“CPS Energy”).

² Intervenors are the Sustainable Energy and Economic Development Coalition (“SEED”), the South Texas Association for Responsible Energy, and Public Citizen.

³ NRC Staff posted a notice about the existence of ISG-016 on its public website at <http://www.nrc.gov/reading-rm/doc-collections/isg/col-dc-isg-16.pdf> (dated Oct. 7, 2009). We note that a document on the NRC Intranet entitled “New Reactors Hot Topics” and dated January 15, 2010, stated that NRC Staff developed “DC/COL-ISG-016, Compliance with 10 C.F.R. 50.54(hh)(2) and 10 C.F.R. 52.80(d) Loss of Large Areas of the Plant Due to Explosions or Fires from a Beyond-Design Basis Event,” to endorse NEI 06-06 Revision 3. The ISG public comment period closed on November 17, 2009,

(Continued)

that the NRC Staff has designated as containing Sensitive Unclassified Non-Safeguards Information (“SUNSI”). As discussed below, we hold that all seven of these newly proffered contentions are inadmissible, and we sustain Intervenors’ challenge regarding documentary access to the extent NRC Staff is directed to reevaluate Intervenors’ request for ISG-016 in accordance with this Order.

I. BACKGROUND

As catalogued in detail in a prior order in this case,⁴ Intervenors challenge the Applicant’s efforts to obtain COLs to build and to operate two additional nuclear reactors in Matagorda County, Texas, on the site where the Applicant currently operates two reactors. Previously, this Board accorded standing to Intervenors and admitted five of their twenty-eight original contentions.⁵

The instant disputes arise as a result of the Applicant’s May 26, 2009 addendum to its combined license application (“COLA”).⁶ This addendum, in turn, is based on the Applicant’s Mitigative Strategies Report, also submitted on May 26, 2009, which was prepared to comply with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d).⁷ On August 14, 2009, Intervenors submitted seven additional contentions that relate to this May 26, 2009 addendum. Both the Applicant and NRC Staff filed answers opposing Intervenors’ submission.⁸ Intervenors filed a reply to both the Applicant’s and NRC Staff’s answers on September 15, 2009.⁹ On

and NRC Staff is reviewing the comments. The document stated that issuance of the final version is expected in January 2010. We expect, therefore, that ISG-016 will soon be finalized, issued, and possibly renamed. Throughout this Order, when we refer to ISG-016, we are referring to its most up-to-date version, regardless of its designation at that time.

⁴ LBP-09-21, 70 NRC 581 (2009).

⁵ LBP-09-25, 70 NRC 867 (2009).

⁶ See Intervenors’ Contentions Regarding Applicant’s Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) and Request for Subpart G Hearing (Aug. 14, 2009) at 1 [hereinafter Intervenors’ New Contentions].

⁷ See Letter from Scott Head, Manager, Regulatory Affairs, STP Units 3 and 4, to NRC Document Control Desk (May 26, 2009) (ADAMS Accession No. ML091470723). The Mitigative Strategies Report is not, however, publicly available because the Applicant maintains it contains SUNSI.

⁸ STP Nuclear Operating Company’s Answer Opposing Late-Filed Contentions Regarding the Mitigative Strategies Report (Sept. 4, 2009) [hereinafter STP Answer New Contentions]; NRC Staff’s Answer to Intervenors’ Contentions and Request for a Subpart G Hearing (Sept. 8, 2009) [hereinafter Staff Answer New Contentions].

⁹ Intervenors’ Consolidated Response to the Answers of Applicant and NRC Staff to the Intervenors’ Contentions Regarding Applicant’s Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) (Sept. 15, 2009) [hereinafter Intervenors’ Response]. On September 8, 2009, Intervenors’ moved to file a consolidated response to the answers of both Applicant and Staff. See Intervenors’ Motion

(Continued)

November 13, 2009, this Board heard oral argument in Rockville, Maryland, regarding admissibility of the proposed new contentions.¹⁰

The dispute surrounding ISG-016, which had not fully emerged prior to oral argument, and thus was not addressed there, arose as a result of the NRC Staff announcing on its public website, on October 13, 2009, that ISG-016 existed.¹¹ However, because NRC Staff designated ISG-016 as SUNSI — claiming it contains “security-related” information¹² — the public (including Intervenors) were not afforded access to this document. As a result, on November 5, 2009, Intervenors sought to obtain ISG-016 from NRC Staff. On November 16, 2009, NRC Staff declined to afford Intervenors access to ISG-016. As a result, on November 20, 2009, Intervenors prosecuted a challenge to the denial of access.¹³

II. SUNSI AND PUBLIC ACCESS CONCERNS

Before addressing Intervenors’ seven new contentions — the discussion of which is set forth in subsequent parts of this Order that are under seal and inaccessible to the public — we turn first to the issue of public access and SUNSI.

Access to SUNSI here is sought in adjudication rather than in a request for information under the Freedom of Information Act (“FOIA”), and the reasons for providing access to Intervenors are even more compelling than they are when a member of the public seeks information under FOIA. Here, a party is seeking the information not merely as an interested member of the public, but as a litigant focused on a specific document that may augment the pleading and proof of its claims. Moreover, NRC Staff, as a party opposing Intervenors’ claims, is refusing to provide the requested document. A participant in administrative litigation — having an even greater interest in obtaining access to SUNSI than does the general public — is entitled to obtain documents under standards no more restrictive than would be accorded the general public under FOIA.

FOIA provides, with nine enumerated exceptions, that each agency make copies of all records available to the public.¹⁴ NRC regulations implement and repeat this FOIA obligation.¹⁵ In addition, NRC regulations provide, with certain

to File a Consolidated Response to NRC Staff and Applicant Answers to Contentions Regarding 10 C.F.R. § 50.54(hh)(2) (Sept. 8, 2009). Because a consolidated response was not improper, the Board considered the reply in its evaluation of the admissibility of the proposed contentions.

¹⁰ Tr. at 551-759.

¹¹ See Letter from Michael Spencer to Robert Eye at 1 (Nov. 16, 2009).

¹² *Id.*

¹³ Letter from Robert Eye to Judges Young and Gibson (Nov. 20, 2009).

¹⁴ 5 U.S.C. § 552(a)-(b).

¹⁵ See 10 C.F.R. §§ 9.15, 2.390.

very limited exceptions, that “all hearings will be public,”¹⁶ and that the public is entitled to copies of the transcripts of all hearings.¹⁷

Thus, if it seeks to withhold a document from a party or the public, or to bar a party or member of the public from attending any adjudicatory proceeding before a Licensing Board, NRC Staff must carry the burden of proving that the document or situation fits one of FOIA’s specifically enumerated exceptions.¹⁸ Moreover, even if a document contains information that is exempt from disclosure, FOIA mandates that “[a]ny reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions which are exempt.”¹⁹ NRC’s FOIA regulations implement this mandate.²⁰

For decades, the Commission has restricted public access to classified information and SGI.²¹ These restrictions on the dissemination and handling of such materials have a clear statutory and regulatory foundation.²²

Approximately 4 years ago, NRC Staff began to assert an additional category of information that, it believes, also warrants protection from public access.²³ Specifically, the NRC’s Executive Director of Operations developed a new classification category, SUNSI, which the Executive Director asserted was exempt from disclosure.²⁴ The Executive Director then directed NRC Staff to implement

¹⁶ 10 C.F.R. § 2.328.

¹⁷ 10 C.F.R. § 2.327(c).

¹⁸ See 10 C.F.R. §§ 2.325 and 2.390 (proponent of protective order shoulders burden of proof).

¹⁹ 5 U.S.C. § 552(b)(9).

²⁰ See 10 C.F.R. § 9.19. Safeguards Information (“SGI”) is an example of a FOIA exemption. Under FOIA, and the NRC regulations implementing FOIA, the duty to make all documents available does not apply to records “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3); 10 C.F.R. § 2.390(a)(3). SGI qualifies for this exemption because the Atomic Energy Act specifically exempts it from disclosure. 42 U.S.C. § 2167. The NRC has promulgated regulations implementing the FOIA exemption for SGI. See 10 C.F.R. § 73.21. Likewise, FOIA exempts classified information from disclosure, 5 U.S.C. § 552(b)(1), and NRC regulations implement this exemption. 10 C.F.R. § 2.390(a)(1); 10 C.F.R. Part 2, Subpart I; 10 C.F.R. Part 95.

²¹ See 10 C.F.R. §§ 95.34, 73.21; 38 Fed. Reg. 35,430 (Dec. 28, 1973).

²² See *supra* note 20.

²³ See NRC Briefing on Sensitive Unclassified Non-Safeguards Information Policy (Feb. 2, 2006) at 8, available at <http://www.nrc.gov/reading-rm/doc-collections/commission/tr/2006/20060202b.pdf> (“Over time, the EDO’s [Executive Director of Operations] office and the staff had recognized, particularly in a number of reviews we did to look at root causes for the inadvertent release of information. What we found was . . . that a large share of our documents were being marked ‘official use only’ There was inconsistent treatment in document markings.”).

²⁴ See Management of Sensitive Unclassified Non-Safeguards Information, Task Force Report for the Executive Director of Operations (Nov. 10, 2004) at 1 (ADAMS Accession No. ML043010551).

it.²⁵ As far as this Board is aware, however, there is no statutory or regulatory definition of “SUNSI.” The term “sensitive unclassified non-safeguards information” or SUNSI is apparently used only twice in the NRC regulations. First, the regulations authorize the Secretary of the Commission to establish procedures for obtaining access to SUNSI prior to granting intervention in a licensing proceeding.²⁶ Second, the regulations authorize interlocutory appeal to the Commission of certain rulings relating to SUNSI.²⁷ But these regulations never define the term.

The only plausibly relevant regulation that helps circumscribe the concept of SUNSI is 10 C.F.R. § 2.390(d), which specifies in pertinent part:

The following information is considered commercial or financial information within the meaning of § 9.17(a)(4) of this chapter and is subject to disclosure in accordance with the provisions of § 9.19 of this chapter.

(1) Correspondence and reports to or from the NRC which contain information or records concerning a licensee’s or applicant’s physical protection, classified matter protection, or material control and accounting program for special nuclear material, not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data.

Although 10 C.F.R. § 2.390(d) never uses the term SUNSI, this regulation seems to fit NRC Staff’s claim that SUNSI is “security-related,” and it is our best lodestar as to the meaning of this term. Under this regulation, in order for a document to qualify as exempt from FOIA disclosure as “SUNSI” the document must:

1. Qualify as commercial or financial information under 10 C.F.R. § 9.17(a)(4) (commonly referred to as “FOIA Exemption 4”)²⁸;
2. Constitute “correspondence and reports to or from NRC;”
3. Contain information or records concerning a licensee’s or applicant’s
 - i. Physical protection of special nuclear material,
 - ii. Classified matter protection, or
 - iii. Material control and accounting program relating to special nuclear material;
4. Not constitute Safeguards Information; and

²⁵ See Memorandum from Luis A. Reyes, NRC Executive Director of Operations to Office Directors and Regional Administrators (Jan. 19, 2005) (ADAMS Accession No. ML043500718).

²⁶ 10 C.F.R. § 2.307(c).

²⁷ 10 C.F.R. §§ 2.311(a)(3), 2.311(d)(2).

²⁸ There are additional criteria for determining whether information may be withheld from the public as exempt commercial or financial information. See 10 C.F.R. § 2.390(b)(3)-(4).

5. Not constitute classified information (National Security Information or Restricted Data).

Against this legal background, we turn to the NRC Staff's current claim that ISG-016 is exempt from disclosure and must be withheld from intervenors and the public.²⁹ In a November 5, 2009 letter to NRC Staff, intervenors requested access to ISG-016, a document that the NRC Staff maintains is SUNSI "because it contains security-related information."³⁰ Intervenors represented that they sought ISG-016 to afford them "meaningful participation in the adjudicatory proceeding because it clarifies or addresses issues not discussed in the Standard Review Plan governing compliance with 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2)."³¹ Intervenors also asserted that they cannot meaningfully analyze the Applicant's claim that it has complied with the Staff's guidance related to 10 C.F.R. § 50.54(hh)(2) without having access to this guidance document.³²

NRC Staff claims that it evaluated intervenors' request for ISG-016 pursuant to the "Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation" ("SUNSI Access Order").³³ That order states that requests for access to SUNSI will be granted where the requestor both establishes standing to intervene in the proceeding (or a likelihood of obtaining it), and "demonstrate[s] a need for access to SUNSI."³⁴ Although conceding that intervenors have standing in this

²⁹ We note that the NRC public website states that SUNSI "encompasses a wide variety of categories (e.g., personnel privacy, attorney-client privilege, confidential source, etc.)." <http://www.nrc.gov/security/info-security.html#cfr> (last visited Jan. 28, 2010). This assertion is inconsistent with 10 C.F.R. § 2.390(d). There is no legal basis for sweeping aside the well-established (and long-recognized) privileges such as the Privacy Act, 5 U.S.C. § 552(a), and the Attorney-Client Privilege (*see Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, CLI-95-15, 42 NRC 181 (1995)) into the new and foreign rubric of SUNSI.

³⁰ Letter from Michael Spencer to Robert Eye at 1. By NRC's own admission, the SUNSI designation protects "information about a licensee's or applicant's physical protection or material control and accounting program for special nuclear material not otherwise designated as [SGI] or classified as National Security Information or Restricted Data." NRC: Information Security, <http://www.nrc.gov/security/info-security.html#cfr> (last visited Jan. 28, 2010). While we are not asked directly to resolve questions about the SUNSI designation process, we note that because ISG-016 was created by NRC Staff, the Staff's designation of its own material as SUNSI is inconsistent with SUNSI's purported objective of protecting licensee or applicant data. *See* 10 C.F.R. § 2.390(d).

³¹ Letter from Robert Eye to NRC Staff (Nov. 5, 2009).

³² *Id.* Additionally, intervenors claim that the Applicant erroneously used another guidance document, NEI 06-12, asserting it is currently approved by the Commission for use only with respect to existing, not new, reactors. *Id.*

³³ The SUNSI Access Order is appended to the notice of hearing, which here is found at 74 Fed. Reg. 7934, 7936 (Feb. 20, 2009). *See also* Letter from Michael Spencer to Robert Eye at 2.

³⁴ 74 Fed. Reg. at 7937. However, we note a disparity between the standard articulated in the SUNSI
(Continued)

proceeding, NRC Staff stated that Intervenors failed to establish their need for access to ISG-016. Specifically, NRC Staff determined that Intervenors “have not explained how a draft guidance document is necessary to form the basis and specificity for a proffered contention.”³⁵ Intervenors challenged the Staff’s denial of their request for ISG-016 to this Board on November 20, 2009. We direct NRC Staff to reevaluate Intervenors’ request for ISG-016.

At the outset, it is noteworthy that it is not at all clear whether the SUNSI Access Order procedures apply to proceedings once a petition to intervene has been granted.³⁶ However, even assuming *arguendo* that the procedures outlined in the

Access Order (which NRC Staff stated it used to evaluate Intervenors’ request) and that described in another document entitled “NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information.” The latter states that “no person . . . may have access to SUNSI unless that person has an established *need-to-know* the information for conducting official business.” NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information at 2-3 (ADAMS Accession No. ML051220287) (emphasis added). In 2008, the Commission established procedures for deciding whether parties may access SGI or SUNSI in a proceeding. The Commission determined that the Secretary “will assess initially whether the proposed recipient has shown a need for SUNSI (or need to know for SGI).” Delegated Authority to Order Use of Procedures for Access to Certain Sensitive Unclassified Information, 73 Fed. Reg. 10,978, 10,979 (Feb. 29, 2008); *see also* 10 C.F.R. § 2.307(c); Procedures to Allow Potential Intervenors to Gain Access to Relevant Records That Contain [SUNSI] or [SGI], Attachment 1, Procedures for Access to [SUNSI] and [SGI] for Contention Preparation at 5 (Feb. 29, 2008) (ADAMS Accession No. ML080380626). In both of these Orders, the Commission has effectively renounced the notion that a party must establish its “need to know” in order to obtain access to SUNSI. Accordingly, any suggestion — in the NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information, or otherwise — that a party seeking access to SUNSI must first demonstrate a “need to know” is erroneous.

³⁵ Letter from Michael Spencer to Robert Eye at 2. NRC Staff also denied access to Intervenors by claiming that “[c]ontentions must be based on the application and must provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact.” *Id.* While this statement, on its own, is not inaccurate, it is completely irrelevant to Intervenors’ request for ISG-016.

³⁶ This dispute comes before us, not pursuant to a motion to compel production of this document, but rather as a result of Intervenors requesting access to ISG-016 from NRC Staff pursuant to the SUNSI Access Order that was part of the original Notice of Hearing in this case. 74 Fed. Reg. at 7936. Likewise, it was pursuant to the SUNSI Access Order that NRC Staff denied such access and that Intervenors prosecuted this challenge to that denial of access. A SUNSI Access Order, which appears in most, if not all, such notices that NRC Staff issues appears to be a creature of 10 C.F.R. § 2.307(c). That regulation states: “In circumstances where, in order to meet the Commission requirements for intervention, potential parties may deem it necessary to obtain access to . . . sensitive unclassified non-safeguards information, the Secretary is delegated authority to issue orders establishing procedures and timelines for submitting and resolving requests for this information.” Thus, it appears that the Commission intended the SUNSI Access Order to apply only during the time period bracketed, on one end, by the issuance of the Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, and, on the other end, by the issuance of the Order granting intervention.

(Continued)

SUNSI Access Order continue to have vitality after a petition for intervention has been granted, it is clear that the NRC Staff misapplied them here. First, NRC Staff improperly characterized Intervenors' request for access to ISG-016. Intervenors stated that they sought access to ISG-016 because it is relevant to their assessment of the Applicant's compliance with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d).³⁷ When NRC Staff denied Intervenors' request for ISG-016 on November 16, 2009³⁸ (3 days after this Board heard oral argument on the Intervenors' contentions related to the Applicant's mitigative strategies), it asserted Intervenors had failed to explain why ISG-016 was necessary to provide the basis and specificity for those contentions.³⁹ In fact, the very existence of ISG-016 was not publicly announced until October 13, 2009,⁴⁰ nearly 2 full months after Intervenors had submitted their contentions and certainly long after the deadline had passed for filing pleadings with respect to the Applicant's mitigative strategies.

Second, in evaluating Intervenors' request for access to ISG-016, NRC Staff imposed additional burdens on Intervenors that are not warranted under the standards for access to SUNSI. The SUNSI Access Order obligates a party seeking

Consistent with this interpretation, the SUNSI Access Order sets a time schedule that starts 10 days after the Notice is issued, and generally ends before the presiding officer or Board has been created. Likewise, 10 C.F.R. § 2.307(c) suggests that this new and novel method is intended only to deal with issues arising before intervention occurs and a Board is created. Therefore, the procedures and schedules set forth in the SUNSI Access Order should not govern the resolution of disputes concerning access to SUNSI once the intervention petition has been granted and the Intervenors have become actual parties to adjudication — as opposed to the “potential parties” that are referenced in the SUNSI Access Order. Finally, it is significant that the SUNSI Access Order is issued by the Commission or NRC in its role as “supervisor” of NRC Staff and does not constitute an adjudicatory ruling by the Commission. *See Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 1 and 2), CLI-10-6, 113, 126 n.49 (2010) (“As the courts have held repeatedly, following the Supreme Court’s lead in *Withrow v. Larkin*, in practicality an agency head often must act on the same matter initially as supervisor and later as adjudicator.”). Finally, it is of note that for more than 50 years, Atomic Safety and Licensing Boards have been invested, pursuant to 10 C.F.R. Part 2, with responsibility for resolving disputes concerning discovery and the scope of claimed privileges and FOIA exemptions.

Nevertheless, because of the unusual procedural posture that brought this matter before us, because of NRC Staff's failure to provide a clear, adequate basis on which it would deny Intervenors access to ISG-016, and because NRC Staff has not made available to Intervenors (and the general public) the reasonably segregable non-SUNSI portions of ISG-016, we are directing NRC Staff to reevaluate its decision. Certainly, our decision directing NRC Staff to reevaluate its denial of access to ISG-016 should not be deemed to suggest that the Commission intended, by including a SUNSI Access Order in its Notices of Hearing, to create an additional set of procedures for the resolution of disputes concerning SUNSI that may be brought before Licensing Boards after intervention has been granted.

³⁷ Letter from Robert Eye to NRC Staff (Nov. 5, 2009); Letter from Robert Eye to Judges Young and Gibson (Nov. 20, 2009).

³⁸ Letter from Michael Spencer to Robert Eye at 2.

³⁹ *Id.*

⁴⁰ *See id.* at 1.

SUNSI only to explain its “need for the information in order to meaningfully participate in this adjudicatory proceeding.”⁴¹ It requires nothing more. NRC Staff have attempted to add another requirement for access to ISG-016 that does not appear in the SUNSI guidance, asserting that Intervenors have not “demonstrated a legitimate need for access to DC/COL ISG-016 . . . particularly why it is necessary to provide the basis and specificity for the current contentions, which have already been formulated and submitted.”⁴² Contrary to NRC Staff’s position, however, the requested document does not have to be directly applicable to an admissible contention — that requirement only applies when a public version of the requested SUNSI document is also available.⁴³ As long as Intervenors can show that access to ISG-016 may enable them to participate more meaningfully in this adjudicatory proceeding, they are to be provided that access.

Because the release of SUNSI poses less of a security threat than either classified information or SGI (where a party must establish a “need to know” to obtain access), there is no basis for piling such added burdens on Intervenors to demonstrate a “need for SUNSI.” This is particularly so in light of the fact that the risks attendant to affording access to SUNSI are minimal. The SUNSI Access Order in this case provides that SUNSI is to be released to Intervenors only after they have executed a protective order that governs its use and dissemination.⁴⁴ In the instant proceeding, Intervenors sought access to ISG-016, a nonpublic document, because of the possibility that it contains information⁴⁵ to support

⁴¹ 74 Fed. Reg. at 7936.

⁴² Letter from Michael Spencer to Robert Eye at 2.

⁴³ See 74 Fed. Reg. at 7936. Intervenors asserted that there is no publicly available version of ISG-016. Letter from Robert Eye to NRC Staff; Letter from Robert Eye to Judges Young and Gibson. If a public version does exist, NRC Staff certainly has not so informed the Board.

⁴⁴ See SUNSI Access Order, 74 Fed. Reg. at 7937. That Order states that access to SUNSI will be granted if (among other requirements) “[t]he proposed recipient of the information has executed a Non-Disclosure Agreement or Affidavit and agrees to be bound by the terms of a Protective Order setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI and/or SGI.” *Id.*

⁴⁵ We view this standard for obtaining access to SUNSI similar to that used in determining whether a discovery request is permissible under the Federal Rules of Civil Procedure: whether the information sought will assist the party in pleading or proving its claims. Federal Rule of Civil Procedure 26 states “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). Relevant information “need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* Similarly, a party may seek the SUNSI material to provide factual support for its pleadings or an admitted contention against a motion for summary disposition or at trial. The fact that a SUNSI document itself may not be admissible evidence is an insufficient basis for denying access. Rather, providing access to a party seeking the SUNSI may lead to the discovery of admissible evidence (e.g., a new data set that may be referenced in a SUNSI document). As long as there might be information

(Continued)

their challenge to the Applicant's compliance with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d). Even though ISG-016 is only in draft form, Intervenors' request seems reasonable insofar as ISG-016 contains the most up-to-date information available regarding NRC Staff's view of what is necessary to comply with these regulations. Intervenors stated that they need ISG-016 because it is relevant to their dispute, and it appears reasonably calculated to assist them in forming new contentions.

In conjunction with the reevaluation of its refusal to provide Intervenors with access to ISG-016, NRC Staff is further directed to segregate those paragraphs of the document that contain SUNSI from those that do not contain SUNSI. NRC regulations require that documents containing classified information or SGI be evaluated paragraph by paragraph,⁴⁶ that those paragraphs containing classified information or SGI be redacted, and that the remaining paragraphs (not containing such sensitive material) be available for disclosure to the public.⁴⁷ Here, NRC Staff designated ISG-016 as SUNSI in its entirety and did not conduct such a paragraph-by-paragraph analysis.⁴⁸ The reasons for this are unclear — for disclosure of SUNSI poses less of a security threat than would disclosure of either classified information or SGI.

The practical effect of NRC Staff's decision not to conduct a paragraph-by-paragraph analysis of documents containing SUNSI has significance beyond their disclosure to Intervenors. On January 21, 2009, the President announced

in a SUNSI document that could be reasonably calculated to lead to obtaining factual support for a new contention, factual support to augment a contention that has already been pleaded, or evidence relative to an admitted contention, there is a need for SUNSI. In fact, because the instant dispute concerns solely whether Intervenors are to be accorded access to a document that might enable them to augment a pleading, the threshold for obtaining the document is even lower than that applied in a discovery context.

⁴⁶ See 10 C.F.R. § 95.37(f); NRC Safeguards Information Security Program Handbook 12.7 Part II (June 25, 2008) at 8-9.

⁴⁷ See 10 C.F.R. § 95.37(f); NRC Safeguards Information Security Program Handbook 12.7 Part II (June 25, 2008) at 8-9.

⁴⁸ Apparently, this is not the first time NRC Staff has decided not to conduct a paragraph-by-paragraph review of documents containing SUNSI. See NRC Briefing on Sensitive Unclassified Non-Safeguards Information Policy at 2. Moreover, the documents that gave rise to the seven new contentions addressed elsewhere in this Order also were not analyzed on a paragraph-by-paragraph basis — instead, the entire contents of these document were designated SUNSI, even though neither the Applicant nor NRC Staff indicated the type or amount of SUNSI information contained within these documents. The practical effect, of course, is improperly to shift the burden onto Intervenors to prove their need for the information without the benefit of proper redaction. This procedure is contrary, not only to the NRC's obligations under FOIA and its implementing regulations (discussed *supra* notes 13-20 & accompanying text), but as well to the notion that a party claiming a privilege or other protection bears the burden of pleading and proof to maintain that privilege. See, e.g., *Smith v. Federal Trade Commission*, 403 F. Supp. 1000, 1016 (D. Del. 1975) (once the requesting party meets its burden of demonstrating a need for the document, "the burden is upon the claimant of executive privilege to demonstrate a proper entitlement to exemption from disclosure").

an Open Government Directive with three goals: (1) to ensure the federal government operates “with an unprecedented level of openness”;⁴⁹ (2) to prevent “over classification” of documents;⁵⁰ and (3) to ensure “that the handling and dissemination of information is not restricted unless there is a compelling need.”⁵¹ The NRC recently announced that it would comply fully with this Presidential directive.⁵² Blocking public access to materials that are not SUNSI is inconsistent with the NRC’s adoption of the Open Government Directive. Only by conducting a paragraph-by-paragraph review of ISG-016 and affording full public access to the non-SUNSI portions can NRC Staff comply with this directive. Certainly, if ISG-016 contains classified information or SGI, that information should be redesignated as such, with appropriate restrictions placed on its dissemination. In addition, NRC Staff should, at a minimum, conduct a paragraph-by-paragraph review of ISG-016 and provide Intervenor with those reasonably segregable portions that do not contain SUNSI.

The implications of excessively broad claims of SUNSI in this case impact not just the Intervenor’s access to ISG-016, but, as importantly, the public’s access to the adjudicatory process. This problem of denying public access was made abundantly clear at oral argument of Intervenor’s seven new contentions. It originated with the Board’s own action — issuing a Protective Order on July 1, 2009, that largely memorialized an agreement among the parties regarding the handling of documents related to the Applicant’s submittal of its Mitigative Strategies Report. That report addressed the Applicant’s efforts to comply with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d) — the regulations that concern the possibility of a loss of large areas of a nuclear power plant due to fires or explosions. The July 1, 2009 Protective Order enabled Intervenor (and their counsel and expert witnesses) to obtain these documents by executing nondisclosure affidavits restricting the handling and dissemination of the documents. Of particular relevance to our discussion here, the Mitigative Strategies Report, as well as a guidance document (NEI 06-12) on which the Applicant relied heavily in preparing its Mitigative Strategies Report, has been designated as SUNSI. The practical effect of issuing the Protective Order was to ensure that any proceedings related to these documents would be closed to the public — for were Intervenor to disclose the substance of any of such documents in a public forum, they would be in violation of the Protective Order and the nondisclosure affidavits.

⁴⁹ Memorandum: Classified Information and Controlled Unclassified Information, 74 Fed. Reg. 26,277, 26,277 (May 27, 2009).

⁵⁰ *Id.*

⁵¹ *Id.* at 26,279.

⁵² See NRC Seeks Input on Open Government Initiative, <http://www.nrc.gov/reading-rm/doc-collections/news/2010/10-007.html> (last visited Jan. 29, 2010); Implementation of Open Government Initiative, 75 Fed. Reg. 1418, 1419 (Jan. 11, 2010).

Accordingly, when Intervenors filed the new contentions that are the subject of this ruling today, the pleadings related to these new contentions were filed under seal in a separate docket that is not open to the public. Moreover, although the Board conducted oral argument on November 13, 2009, for the most part, that oral argument was closed and the public shut out.⁵³

As discussed immediately below, the public is normally to be afforded full access to all NRC proceedings involving the issuance of a license, and the extraordinary step of closure (here, to ensure that SUNSI is not disclosed to the public) should not be instituted unless a party can establish that closure is the only reasonable alternative available. Before this Board will close future proceedings in this case, the party (or parties) seeking closure must demonstrate, in accordance with the discussion below, that the need to close the hearing outweighs the strong presumption that all Licensing Board proceedings will be open to the public.

Anglo-American jurisprudence has long ensured that judicial proceedings will be open to the public.⁵⁴ In a 1980 decision, *Richmond Newspapers v. Virginia*,⁵⁵ the U.S. Supreme Court enunciated a constitutional basis for public access to courts, grounded in the First Amendment: “Free speech carries with it some freedom to listen.”⁵⁶ The First Amendment requires public access not only to criminal

⁵³ On November 2, 2009, Intervenors belatedly sought to open the oral argument to the public with a “Motion for Order That Arguments/Hearings Related to the Fires and Explosions Contentions That Address Factual and Legal Arguments Related Thereto and NEI 06-12 Be Conducted in Public Pursuant to 10 C.F.R. § 2.328,” filed November 2, 2009. In response, those portions of the November 13, 2009 oral argument that did not involve SUNSI were open to the public, but it was necessary to close the remainder of the oral argument to comport with the July 1, 2009 Protective Order. See Licensing Board Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) (unpublished) [hereinafter Protective Order]. The Protective Order, which all parties signed, specifies that nothing in the Protective Order “shall preclude any person from seeking public disclosure of Protected Information in accordance with NRC regulations.” *Id.* at 4. It also directs any party to file a motion for amendment to the Protective Order or nondisclosure affidavits should a dispute arise about the information they protect. *Id.* at 3. As of the issuance date of the instant Order, Intervenors have not moved to amend the Protective Order.

⁵⁴ *Pennekamp v. Florida*, 328 U.S. 331, 361 (1946) (Frankfurter, J., concurring) (“Of course trials must be public and the public have a deep interest in trials”); (*Craig v. Harney*, 331 U.S. 367, 374 (1947) (“A trial is a public event. What transpires in the court room is public property.”). See also *In re Oliver*, 333 U.S. 257, 278 (1948); and *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966) (“The principle that justice cannot survive behind walls of silence has long been reflected in the ‘Anglo-American distrust for secret trials’” (citation omitted)).

⁵⁵ 448 U.S. 555 (1980).

⁵⁶ *Id.* at 576.

proceedings,⁵⁷ but as well both to civil trials⁵⁸ and to trial-type administrative proceedings,⁵⁹ such as this adjudicatory proceeding.

At the same time, however, public access to judicial proceedings is not absolute. Instead, *Richmond Newspapers* only creates a “presumption of openness.”⁶⁰ To determine whether a tribunal should block public access to a judicial proceeding, *Richmond Newspapers* established a two-part “experience and logic” test.⁶¹ With respect to the “experience” prong, NRC licensing adjudication has always been open to the public. Long before *Richmond Newspapers*, the NRC’s predecessor, the Atomic Energy Commission, required that — absent compelling circumstances — adjudicatory hearings involving nuclear power plant licensing be open to the public.⁶² That rule affording public access continues to this day.⁶³ In 2005, the Commission made clear this rule is central to how business is conducted here:

⁵⁷ *Id.*

⁵⁸ All Courts of Appeal confronted with this issue have recognized that the First Amendment requires a presumption of openness in civil proceedings. See *Gitto Global Corp. v. Worcester Telegram & Gazette Corp.*, 422 F.3d 1 (1st Cir. 2005); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006); *Huminski v. Corsones*, 396 F.3d 53 (2d Cir. 2005); *In re Cendant*, 260 F.3d 183 (3d Cir. 2001); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983); *Jessup v. Luther*, 227 F.3d 993 (7th Cir. 2000); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994); *Rice v. Kempker*, 374 F.3d 675 (8th Cir. 2004); *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001).

⁵⁹ See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 702 (6th Cir. 2002), holding that First Amendment required public access to deportation hearing despite government’s strenuous objections that open hearings would enable terrorists to obtain information useful to their malevolent goals. That Court noted that as long as the subject administrative proceedings “‘walk, talk, and squawk’ very much like [an Article III] judicial proceeding” they should be open to the public. *Id.* See also *United States v. Miami University*, 294 F.3d 797, 824 (6th Cir. 2002); *Whiteland Woods, L.P. v. W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999); *Society of Professional Journalists v. Secretary of Labor*, 616 F. Supp. 569, 574 (D. Utah 1985), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987). Although the United States Court of Appeals for the Fifth Circuit has not directly addressed this question, the United States District Court for the Southern District of Texas (where the Applicant’s proposed reactor will be sited) has recognized a First Amendment basis for public access to administrative proceedings. See *Doe v. Santa Fe Independent School District*, 933 F. Supp. 647, 650 (S.D. Tex. 1996).

⁶⁰ *Richmond Newspapers*, 448 U.S. at 573.

⁶¹ While the term “experience and logic test” does not actually appear in *Richmond Newspapers*, this formulation — attributed to *Richmond Newspapers* — has been used in subsequent decisions involving public access to judicial proceedings. See, e.g., *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 209-20 (3d Cir. 2002); *Detroit Free Press*, 303 F.3d at 703.

⁶² 27 Fed. Reg. 377 (Jan. 13, 1962) (promulgating the original public access rule (originally found in 10 C.F.R. § 2.751)).

⁶³ 10 C.F.R. § 2.328.

The hearing process established under the Atomic Energy Act is a vehicle to permit members of the public to seek a resolution of their concerns about the health, safety, and environmental impacts of a proposed licensing action, and that process operates most fairly and effectively when those who seek to utilize it have the benefit of accurate information regarding the agency's licensing review system and its possible outcomes.⁶⁴

Moreover, the public is entitled to copies of the transcripts of all Licensing Board hearings.⁶⁵ Clearly, then, the NRC "experience" with adjudicatory hearings is one of openness to the public.

We turn now to the second part of the *Richmond Newspapers* analysis to determine the circumstances under which closure is appropriate: the "logic" portion of the test. Where an agency deems it appropriate to protect security information from being released to the public, it can certainly do so as long as it hews to its obligations under FOIA and *Richmond Newspapers*. As discussed previously,⁶⁶ the NRC has for many years placed restrictions on the disclosure of classified information and SGI, and recently, it has done so as well for SUNSI.⁶⁷ In doing so, the NRC has balanced the Commission's goal that proceedings related to adjudicatory hearings be open against the need for security and protection of the public health and safety. However, in the instant dispute, withholding from public access an entire document — just because it may contain some SUNSI information — fails the logic test by excluding the public from access to information that is not security-related. This is not only a misuse of the SUNSI designator, but fails the logic test of *Richmond Newspapers*. As the NRC's Office of the Inspector General noted in a recent semiannual report to Congress:

OIG learned that NRC's inconsistent handling of documents considered sensitive has also created concern among some public stakeholders. Specifically, while the NRC staff will not release documents deemed as sensitive to a private citizen, the staff has taken no action to restrict a citizen from obtaining the same documents from the former Local Public Document Rooms (a now-defunct NRC recordkeeping system). This inconsistency has created a perception that the NRC may be using the continued classification of a number of documents as SUNSI merely to exclude

⁶⁴ *CFC Logistics*, LBP-05-1, 61 NRC 45, 50 n.8 (2005).

⁶⁵ 10 C.F.R. § 2.327(c).

⁶⁶ See *supra* notes 20-21 & accompanying text.

⁶⁷ President Obama recently addressed the continuing importance of protecting classified information and SGI in a Memorandum for the Heads of Executive Departments and Agencies. 74 Fed. Reg. at 26,277 (May 27, 2009).

the public from participation in NRC proceedings where these documents could be referenced.⁶⁸

Of particular importance to this case, when documents containing SUNSI are at issue in an adjudicatory hearing, proceedings — that would otherwise be open to the public — involving these materials will be closed in order to ensure that the SUNSI is not disclosed. However, a wholesale closure of the proceeding, effectively shutting out the public, cannot be justified under the *Richmond Newspapers* test as long as there is material, not properly designated as SUNSI, to which the public should have access. Under *Richmond Newspapers*, it is essential that such proceedings be accessible to the public and that they be closed only where specific information — legitimately designated as SUNSI — must be discussed.

III. BOARD ANALYSIS AND RULINGS ON INTERVENORS' CONTENTIONS

1. *Timeliness Standards Governing New Contentions*

As a general rule, new contentions filed by an intervenor must comply with the timeliness standards of 10 C.F.R. § 2.309(f)(2). In this instance, however, Intervenors filed new contentions that implicate documents subject to the terms of the July 1, 2009 Protective Order. The Protective Order (signed by Intervenors, the Applicant, and NRC Staff), in turn, established time limits and deadlines for submitting new contentions based on the new information contained in the Mitigative Strategies Report. Section 14 of the Protective Order dictates that “[t]he [Intervenors] must file any proposed SUNSI contentions within 30 days after receipt of or access to that information.”⁶⁹ Intervenors asked for and were granted an extension of this deadline⁷⁰ and filed their new contentions on August 14, 2009.

In complying with the deadlines set forth in the Protective Order, Intervenors timely filed their new contentions. Contrary to the Applicant’s argument that Intervenors’ new contentions do not meet the timeliness requirements of 10 C.F.R. § 2.309(f)(2), because these new contentions are based on information subject to

⁶⁸ Office of the Inspector, General Semiannual Report to Congress, NUREG-1415, Vol. 19, No. 2, at 25 (Mar. 2007).

⁶⁹ Protective Order at 4.

⁷⁰ Licensing Board Order Extending Time for Filing New Contentions Based on SUNSI Information (July 14, 2009) (ADAMS Accession No. ML091950690).

the Protective Order, timeliness is dictated by the terms of the Protective Order, under which the new contentions are timely.⁷¹

2. *Standards for Contention Admissibility*

As we discussed in detail in our August 27, 2009 Order, to litigate a contention, a petitioner who has established standing must also ensure each contention meets the six admissibility criteria of 10 C.F.R. § 2.309(f)(1).⁷²

3. *Rulings on Contentions*

[THE DISCUSSION OF INTERVENORS' CONTENTIONS HAS BEEN REDACTED BECAUSE IT CONTAINS MATERIAL THAT HAS BEEN DESIGNATED AS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION (SUNSI). PURSUANT TO NUCLEAR REGULATORY COMMISSION POLICY, AS WELL AS A PROTECTIVE ORDER ENTERED IN THIS PROCEEDING, THIS MATERIAL IS NOT TO BE DISCLOSED TO THE PUBLIC.]

4. *Request for Subpart G Proceeding*

Intervenors' request for a formal adjudication of their contentions pursuant to 10 C.F.R. § 2.700 is denied as moot because the seven contentions are inadmissible.

IV. ORDER

For the foregoing reasons:

- A. Within 20 days of the issuance of this Order, NRC Staff shall provide Intervenors with a copy of all non-SUNSI portions of ISG-016.
- B. Within 30 days of the issuance of this Order, NRC Staff shall reevaluate Intervenors' request for access to ISG-016, using the standard for access to SUNSI in a Licensing Board proceeding articulated herein, and file a memorandum explaining its reevaluation.

⁷¹ See 10 C.F.R. § 2.307 (“[T]ime fixed . . . for an act that is required or allowed to be done within a specified time, may be extended or shortened either by the Commission or the presiding officer for good cause . . .”).

⁷² LBP-09-21, 70 NRC 581 (2009).

C. New Contentions 1 through 7 are inadmissible and, as such, will not be further considered in this proceeding.

The dismissal of Contentions 1 through 7 is without prejudice to Intervenors' right to file new or amended contentions based upon any information they might subsequently obtain as the result of a grant of access to material contained in ISG-016.

This Order is subject to appeal to the Commission in accordance with 10 C.F.R. § 2.311. Petitions for review meeting applicable requirements set forth in that section must be filed within ten (10) days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Dr. Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 29, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. Jeffrey D. E. Jeffries
Nicholas G. Trikouros

In the Matter of

Docket No. 70-1374-MLR
(ASLBP No. 10-897-01-MLR-BD01)
(Special Nuclear Materials
License No. SNM-1373)

IDAHO STATE UNIVERSITY

February 24, 2010

MEMORANDUM AND ORDER
(Granting Motion to Withdraw Hearing Request
and Intervention Petition and Terminating
Proceeding)

On January 12, 2010, Kevan C. Crawford, Ph.D. (Petitioner) filed a request for hearing and petition for leave to intervene with regard to the pending application of the Idaho State University (Applicant) for a renewal of its Special Nuclear Materials (SNM) License, SNM-1373.¹ The license covers nuclear material used for research, training, and education purposes at the Applicant's campus in Pocatello, Idaho.²

¹ Kevan Crawford Request for Hearing and Petition for Leave to Intervene (Jan. 11, 2010) at 1 [hereinafter Crawford Hearing Request]; ISU Application (Feb. 27, 2009) (ADAMS Accession No. ML092730441).

² Idaho State University's Answer Opposing Petition to Intervene and Request for Hearing by Dr. Kevan C. Crawford (Feb. 8, 2010) at 2 [hereinafter ISU Answer].

In his Hearing Request, Petitioner, a former employee of the Applicant, alleges various regulatory and criminal violations by the Applicant in the early 1990s.³ He seeks compensation from the Applicant for “acts taken by [it] to prevent reporting of . . . regulatory and criminal violations governing the licensed SNM materials for the protection of the public and the interests of the U.S. government.”⁴ Petitioner asserts that he has standing to intervene in this proceeding because he is: (1) an eyewitness, (2) an expert witness, (3) a whistleblower, and (4) a victim of whistleblower retribution.⁵

Both the Applicant and NRC Staff oppose the petition. They assert that Petitioner lacks standing to intervene and seeks a remedy that is not available in a proceeding on a license renewal application.⁶ Further, they point out that Petitioner’s application does not identify a link between the renewal of the SNM license and any actual harm suffered by Petitioner.⁷

On February 18, Petitioner filed a motion to withdraw his petition.⁸ According to the motion, after receipt of the Applicant and NRC Staff replies to the petition and consultation with congressional staff members of a U.S. House of Representatives energy subcommittee, Petitioner had concluded that an adjudicatory hearing on the license renewal application could not serve to resolve the issues he raised, and he had “discovered the more appropriate forum for the matter of [the alleged] criminal violations.”⁹ Petitioner goes on to state a belief that the proper forum for his grievances is “through a 10 C.F.R. § 70.81 Action to permanently revoke Idaho State University’s SNM-1373 license and the parallel 10 C.F.R. § 50.100 Action to permanently revoke Idaho State University’s R-110 license based on observed criminal violations associated with that license.”¹⁰

The motion to withdraw the petition is unopposed by the Applicant and NRC Staff and is hereby *granted*. We do not, of course, take a position on whether the

³ Crawford Hearing Request at 2-3.

⁴ *Id.* at 6. Most of the allegations contained in the Hearing Request were also contained in a June 25, 2009 petition filed with the NRC Executive Director for Operations, which was appended to the Hearing Request as Exhibit 1. Submitted under the provisions of 10 C.F.R. § 2.206, the petition sought the correction of “decades of regulatory, criminal, and ethical violations” on the part of the Applicant in the conduct of its licensed activities. Insofar as we are aware, the petition has not as yet been acted upon by the NRC Staff.

⁵ Crawford Hearing Request at 1.

⁶ See ISU Answer at 3-4; NRC Staff’s Response to Kevan C. Crawford’s Request for Hearing and Petition for Leave to Intervene (Feb. 12, 2010) at 1, 6 [hereinafter NRC Staff Answer].

⁷ ISU Answer at 5; NRC Staff Answer at 6. In fact, the Hearing Request does not appear specifically to seek the denial of, or some relevant condition attached to the grant of, a license renewal.

⁸ Petition to Withdraw (Feb. 18, 2010).

⁹ *Id.* at 1, 3.

¹⁰ *Id.* at 2. The cited regulations are concerned with the revocation, suspension, and modification of outstanding NRC licenses.

relief sought by the Petitioner might be available to him through the vehicles he now suggests.

There being no other intervention petitions on file, the proceeding is hereby *terminated*.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

Jeffrey D. E. Jeffries
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 24, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Anthony J. Baratta
Dr. Michael F. Kennedy

In the Matter of

Docket No. 40-9083
(ASLBP No. 10-895-01-ML-BD01)

**U.S. ARMY INSTALLATION
COMMAND
(Schofield Barracks, Oahu, Hawaii,
and Pohakuloa Training Area,
Island of Hawaii, Hawaii)**

February 24, 2010

**RULES OF PRACTICE: INTERVENTION PETITION(S) (*PRO SE*
PETITIONERS)**

Because Petitioners were not represented by counsel, this Board — consistent with longstanding precedent (*see, e.g., Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973)) — held them to less rigid pleading standards than we would ordinarily apply to litigants who are represented by counsel.

**RULES OF PRACTICE: INTERVENTION PETITION(S) (*PRO SE*
PETITIONERS)**

Although we acknowledge that complying with Commission regulations “may be especially difficult for *pro se* petitioners . . . it has long been a basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation.” *Florida*

Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 26 (2001) (internal quotation marks omitted).

RULES OF PRACTICE: STANDING TO INTERVENE

In determining whether a petitioner has demonstrated a sufficient interest to intervene under section 2.309(d)(1), the Commission long has applied contemporaneous judicial concepts of standing. *See, e.g., Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI 95-12, 42 NRC 111, 115 (1995). Those concepts require a petitioner to allege “(1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the [AEA] (or other applicable statute, such as the National Environmental Policy Act), and (4) is likely to be redressed by a favorable decision.” *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001).

RULES OF PRACTICE: STANDING TO INTERVENE (PROXIMITY PRESUMPTION)

In proceedings involving construction permits and operating licenses for nuclear power plants, the Commission recognizes a “‘proximity presumption’ in favor of standing for persons who [reside or] have ‘frequent contacts’ within a 50-mile radius of a nuclear power plant.” *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010).

RULES OF PRACTICE: STANDING TO INTERVENE (PROXIMITY PRESUMPTION)

No “proximity presumption” is automatically applied in proceedings that, like this, do not involve nuclear power plants. Instead, “[w]hether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.” *Georgia Tech*, CLI-95-12, 42 NRC at 116-17. Pursuant to this so-called “proximity-plus” approach, a “presumption based on geographical proximity (albeit at distances much closer than 50 miles) may be applied where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.” *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994).

RULES OF PRACTICE: STANDING TO INTERVENE (PROXIMITY PRESUMPTION)

In cases where the record fails to support the existence of a significant source of radioactivity producing an obvious potential for offsite consequences at a particular distance frequented by a petitioner, “it becomes the petitioner’s ‘burden to show a specific and plausible means’ of how the challenged action may harm him or her.” *USEC Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 312 (2005). In other words, when a petitioner cannot establish proximity plus standing, he or she must resort to establishing standing under traditional standing principles. See *Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 581 (2005).

RULES OF PRACTICE: STANDING TO INTERVENE

The “petitioner bears the burden to provide facts sufficient to establish standing.” *Bell Bend Nuclear Power Plant*, CLI-10-7, 71 NRC at 139; *accord Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000). In meeting this burden, it is generally sufficient if the petitioner provides plausible factual allegations that satisfy each element of standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

RULES OF PRACTICE: STANDING TO INTERVENE

In proceedings where a petitioner’s factual assertions in support of standing are challenged, untenable, conjectural, or conclusory, a Board need not uncritically accept such assertions. See *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 410 (2007); *Zion Nuclear Power Station*, CLI-00-5, 51 NRC at 98. In such circumstances, a Board may be required to “weigh the information” and exercise judgment to determine if a standing element has been satisfied. See *Bell Bend Nuclear Power Plant*, CLI-10-7, 71 NRC at 139. See also *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 82-83 (1993).

RULES OF PRACTICE: CONTENTION ADMISSIBILITY

To be admissible, a contention must (10 C.F.R. § 2.309(f)(1)(i)-(vi)): (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 issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions

that support the petitioner's position and on which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Failure to satisfy any of these requirements is sufficient grounds to render the contention inadmissible. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

**RULES OF PRACTICE: CONTENTION ADMISSIBILITY
(SUPPORTING INFORMATION OR EXPERT OPINION)**

It is emphatically the petitioner's burden to produce some "alleged facts or expert opinion which support [a contention]." 10 C.F.R. § 2.309(f)(1)(v).

RULES OF PRACTICE: PUBLIC PARTICIPATION

Any member of the public may provide the NRC Staff with comments relating to health and safety at any time during the license-review process, and the NRC Staff "will consider and resolve all safety questions regardless of whether any hearing takes place." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 339 (1999) (internal quotation marks omitted). If an interested person wishes to propose health and safety measures after a license has been issued, such proposals may be submitted to the NRC by filing a petition pursuant to the enforcement process set forth in 10 C.F.R. § 2.206.

**MEMORANDUM AND ORDER
(Denying Requests for Hearing)**

In this proceeding, four *pro se* petitioners — Cory Harden, Luwella K. Leonardi, Jim Albertini, and Isaac D. Harp (hereinafter referred to as Petitioners) — each filed a hearing request challenging the license application submitted to the U.S. Nuclear Regulatory Commission (NRC) by the U.S. Army Installation Command (Army) to possess depleted uranium (DU) on firing ranges at the Schofield Barracks on the island of Oahu, and at the Pohakuloa Training Area on the island of Hawaii. For the reasons discussed below, we are constrained to deny the requests.

I. BACKGROUND

A. The Army's Application for a License to Possess Depleted Uranium

The Army's pending request for a DU possession-only license pursuant to 10 C.F.R. Part 40 stems from its use of M101 "spotting rounds" in the 1960s on firing ranges at the Schofield Barracks (Schofield) on the island of Oahu and the Pohakuloa Training Area (Pohakuloa) on the island of Hawaii.¹ The M101 spotting rounds were used with the Davy Crockett Weapon System, which was a then-classified tactical nuclear weapon system produced from 1960 to 1968. The Army used the spotting rounds and nonnuclear practice projectiles for training purposes until 1968. The spotting rounds contained DU because its heavy weight enabled the rounds to imitate the trajectory of the nonnuclear practice projectiles. The spotting rounds held a small explosive charge that detonated on impact, allowing the weapon system operator to target the weapon accurately before firing practice projectiles. The practice projectiles purportedly had a range of approximately 1000 to 1500 yards.²

The Army states that, as the decades passed after 1968 during which the Davy Crockett Weapon System was no longer used, the DU fragments from the spotting rounds that were fired remained undetected at the Army installations. The Army further states, however, that in August 2005, personnel at Schofield discovered spotting round tail assemblies and other DU fragments while clearing former range areas of munitions.³ This discovery triggered an Army-wide historical records search to identify other sites where M101 spotting rounds may have been

¹ DU is uranium with a percentage of uranium-235 lower than the 0.7% (by mass) contained in natural uranium. The normal residual uranium-235 content in DU is 0.2 to 0.3%, with uranium-238 comprising the remaining 98.7 to 98.8%. DU results from the production of, e.g., nuclear fuel. Commercial uses of DU include counterweights, military armor, armor-piercing munitions, and spotting rounds. See Background Information on [DU], <http://www.nrc.gov/about-nrc/regulatory/rulemaking/potential-rulemaking/uw-streams/bg-info-du.html>. The NRC granted the Army authority to manufacture and distribute the M101 spotting rounds pursuant to NRC License SUB 459.

² See Memorandum from Peter Strauss to Cory Harden at 2 (Aug. 1, 2008) (Enclosure to Attachment 1 of NRC Staff's Response to Requests for Hearing and Petitions to Intervene filed by Cory Harden, Luwella Leonardi, Isaac Harp, Jim Albertini, and Others (Nov. 6, 2009)) [hereinafter Strauss Memorandum].

³ See U.S. Army Installation Management Command, Environmental Radiation Monitoring Plan for [DU] from the M101 Spotting Round for Schofield Barracks at 4 [hereinafter Schofield Radiation Monitoring Plan]; US Army Installation Command's Answer to Ms. Barbara Moore, Ms. Cory Harden, Malu Aina Center for Non-Violent Education & Action (Mr. Jim Albertini), Luwella K. Leonardi and Mr. Isaac D. Harp's ("Petitioners") Request for Hearing (Nov. 5, 2009) at 1 [hereinafter Army Response].

used.⁴ In 2008, the Army confirmed the presence of DU from M101 spotting rounds at Pohakuloa.⁵

The Army's application states that archival research revealed a total of 75,318 spotting rounds were manufactured at the Lake City Army Ammunition Plant (LCAAP) in Independence, Missouri.⁶ In the 1960s, 2,000 spotting rounds were fired for testing purposes at the LCAAP, and in the 1970s, 44,000 spotting rounds were "demilitarized" at the LCAAP by firing the munitions into sand-filled bullet catchers. The difference between the number of spotting rounds that were manufactured (75,318) and those that were definitively accounted for (2,000 that were tested and 44,000 that were demilitarized) is 29,318 rounds, which contained a total of 5,560 kilograms, or about 12,232 pounds, of DU. *See* Application for Materials License at 4 (Nov. 6, 2008) [hereinafter License Application].

The Army's archival research also indicates that 714 of the M101 spotting rounds were shipped to Oahu, Hawaii in 1962 for use at either Schofield or Pohakuloa. *See* Archive Search Report at 4. Extant records found by the Army do not reveal how these 714 spotting rounds were allocated between Schofield and Pohakuloa. Moreover, it is not possible to determine from the records thus far found by the Army whether additional spotting rounds were shipped to Oahu. *See* Oral Argument Transcript at 108-09 (Jan. 13, 2010) [hereinafter Tr.].

The Army thus is unable definitively to determine the precise number of spotting rounds fired at Schofield or Pohakuloa. According to the Army's Archive Search Report, however, due to the number of Davy Crockett Weapon Systems allocated to the Army in Hawaii — i.e., fifteen Davy Crockett Light Weapons M28, and seven Davy Crockett Heavy Weapons M29 — "it is highly probable that additional stocks besides the original shipment [of 714 spotting rounds to Hawaii] . . . were fired." Archive Search Report at 4.

It is against this background — in particular, the Army's discovery of DU fragments at Schofield and Pohakuloa in, respectively, 2005 and 2008 — that the Army in November 2008 submitted a License Application to the NRC requesting authority to possess and to manage DU at Schofield and Pohakuloa. The "specific functions" the Army seeks authority to perform under the license are "limited to radiological surveys as necessary to fully characterize the nature and extent of

⁴*See* U.S. Army Installation Management Command, Physical Security Plan for [DU] from the M101 Spotting Round at 1.

⁵*See* Schofield Radiation Monitoring Plan at 3-4; *accord* U.S. Army Installation Management Command, Environmental Radiation Monitoring Plan for [DU] from the M101 Spotting Round for Pohakuloa Training Area at 3-4 [hereinafter Pohakuloa Radiation Monitoring Plan].

⁶*See* U.S. Army Corp of Engineers, St. Louis District, Final Archive Search Report on the Use of Cartridge, 20MM Spotting M101 for Davy Crockett Light Weapon M28, Schofield Barracks and Associated Training Areas Islands of Oahu and Hawaii (May 2007) at 4 [hereinafter Archive Search Report].

contamination and, when appropriate, to obtain information necessary to support development of decommissioning plans. [DU] . . . may also be subjected to disposal by transfer to a properly permitted/licensed disposal facility.” License Application at 4. Notably, the Army states in its application that the “M101 spotting round fragments are located . . . well within the [military] installation boundary and are located in an impact area where access is strictly controlled.” *Id.* at 3. Because the impact areas where DU fragments are located also contain unexploded ordnance, special training is required prior to entry, which “limits the potential for inadvertent exposure and ensures members of the general public, [as well as] . . . Army civilians and soldiers, are not directly exposed to the material.” *Id.*

In light of the uncertainty regarding the number of spotting rounds fired at Schofield and Pohakuloa, the Army’s License Application conservatively assumes that 10% of the 29,318 rounds that cannot definitely be accounted for by the Army — i.e., 2932 rounds — were all fired on a single range either at Schofield or Pohakuloa, distributing an estimated total of 560 kilograms (or about 1232 pounds) of DU in the surface soils of each range. *See* License Application at 4, 9. According to the License Application, the resulting “concentration is significantly lower than the [decommissioning] screening values for uranium . . .” *Id.* at 9. Additionally, the License Application states that because the radiation exposure from “direct, inhalation, ingestion and crop pathways are determined by concentration only, not total inventory . . . one can reasonably conclude that potential doses [of radiation] due to the presence of [DU] from the M101 Spotting Round . . . are expected to be much less than general public exposure limits specified [by regulation].” *Id.* at 10 (internal quotation marks omitted).⁷

On August 3, 2009, the NRC informed the Army that its License Application and accompanying documents were adequate for the NRC to begin its review to determine whether it could make the safety, health, and security findings required by the Atomic Energy Act of 1954 and the NRC’s implementing regulations for

⁷The Army states that, in preparing the Environmental Radiation Monitoring Plans that accompany its license application, it likewise used conservative values for the number of spotting rounds used at Schofield and Pohakuloa in an effort to ensure its radiation modeling represents the worst-case estimate. Specifically, the Army assumed that the 714 spotting rounds shipped to Oahu were not divided between Schofield and Pohakuloa, but rather *all* of the 714 rounds were fired at *each* installation. The Army’s radiation modeling thus assumes that 298 pounds of DU were deposited on the firing range of each installation (i.e., 714 rounds × 6.7 ounces/round). *See* Schofield Barracks Radiation Monitoring Plan at 3; Pohakuloa Training Area Radiation Monitoring Plan at 3. The Army acknowledges that the assumption in its Environmental Radiation Monitoring Plans of 714 spotting rounds and 298 pounds of DU at each installation is less conservative than the assumption in its License Application of 2932 spotting rounds and 1232 pounds of DU at each installation, but it states that, in its judgment, the former assumption is more realistic and adequately conservative. *See* Tr. at 113-17.

approving the Army's license request. *See* 74 Fed. Reg. 40,855, 40,855 (Aug. 13, 2009).

On August 13, 2009, the NRC published a "Notice of License Application Request of U.S. Army Installation Command for Schofield Barracks, Oahu, HI, and Pohakuloa Training Area, Island of Hawaii, HI; and Notice of Opportunity for Hearing" in the *Federal Register*. *See* 74 Fed. Reg. at 40,855. This Notice announced that the Army had applied for a 10 C.F.R. Part 40 license to possess DU in Hawaii, and "[a]ny person whose interest may be affected by this [license application] proceeding and who desires to participate as a party must file a request for a hearing and a specification of the contentions which the person seeks to have litigated in the hearing." *Id.* The Notice explained the Commission's rules regarding the information that a person must include in a hearing request to establish standing and to proffer an admissible contention. *See id.* at 40,856. Additionally, the Notice explained that "contentions must be based on documents or other information available at the time the petition is to be filed, such as the application or other supporting document filed by an applicant . . . or otherwise available to the petitioner." *Id.* Hearing requests, stated the Notice, "must be filed by October 13, 2009," and "[n]on-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission . . . or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted based on a balancing of the factors specified in 10 C.F.R. 2.309(c)(1)(i)-(viii)." *Id.*

B. Petitioners' Responses to the August 13, 2009 *Federal Register* Notice

1. Petitioners' Requests for Extensions of Time to File Petitions

On September 22, 2009, one of the four Petitioners, Cory Harden — who resides on the island of Hawaii about 30 miles from Pohakuloa (Tr. at 15) — filed a request with the NRC on behalf of the Sierra Club, Moku Loa Group seeking an extension of the October 13, 2009 filing deadline until 60 days after the NRC made certain documents publically available. *See* E-mail from Cory Harden to the NRC Office of the Secretary, Extend Due Date for Docket #40-9083 at 2 (Sept. 22, 2009). On September 27, 2009, another Petitioner from the island of Hawaii, Jim Albertini — whose home is about 25 miles from Pohakuloa (Tr. at 63) — requested an identical extension. *See* E-mail from Jim Albertini to the NRC Office of the Secretary, Re: Request Extending Due Date (Sept. 27, 2009) [hereinafter Albertini Sept. 27 E-mail].

The Army did not respond to the two extension requests, but on October 1, 2009, the NRC Staff filed a response opposing the requests in part. *See* NRC Staff's Response to Sierra Club's Motion for Extension of Time to File Comments, a Request for Hearing and Petition for Intervention (Oct. 1, 2009) [hereinafter

NRC Response to Extension Requests]. The NRC Staff argued the extension requests amounted to impermissible requests for an indefinite deadline, because two of the requested documents were not in the NRC Staff's possession and one did not exist. *Id.* at 3. In any event, argued the Staff, the open-ended extension requests should not be granted because hearing requests must be "based on documents or other information available at the time the petition is to be filed." *Id.* (citing 10 C.F.R. § 2.309(f)(2)) (internal quotation marks omitted). The NRC Staff did not, however, oppose a 2-week extension of the filing deadline, until October 27, 2009. *Id.*

On October 8, 2009, the Secretary of the Commission issued an Order extending the filing deadline for the Sierra Club and Mr. Albertini until October 27, 2009. *See* Commission Order (Oct. 8, 2009) (unpublished).⁸

On October 14, 2009, a third petitioner from the island of Hawaii, Isaac D. Harp — whose home is about 19 miles from Pohakuloa (Tr. at 77) — requested the same 2-week extension of time granted to Ms. Harden and Mr. Albertini. *See* E-mail from Isaac D. Harp to John Hayes (Oct. 14, 2009). On October 16, 2009, the Secretary of the Commission granted the request, extending Mr. Harp's filing deadline until October 27, 2009. *See* Commission Order (Oct. 16, 2009) (unpublished).

Meanwhile, on October 9, 2009, Ms. Harden filed another submission that: (1) announced Ms. Harden would be participating in this proceeding "as an individual, not representing the Sierra Club"; (2) sought an extension of the October 13, 2009

⁸The Secretary's October 8 Order contained an administrative error insofar as it stated that the 2-week extension was granted to the Sierra Club and the Malu 'Aina Center for Non-violent Education & Action (Malu 'Aina). The extension should properly have been granted to the Sierra Club and Mr. Albertini. This inaccuracy may have arisen from the fact that Mr. Albertini's extension request indicated he is president of Malu 'Aina. But the NRC Staff construed Mr. Albertini's request as seeking an extension on his own behalf. *See* NRC Response to Extension Requests at 1 n.1. We agree with the NRC Staff that Mr. Albertini's extension request, fairly construed, was on his own behalf, because he spoke only in furtherance of his own interests as "a citizen" and "a farmer." Albertini Sept. 27 E-mail. We similarly view Mr. Albertini's subsequent pleading as being filed on his own behalf, because he again spoke only in furtherance of his personal interests. *See* E-mail from Jim Albertini to the Secretary of the Commission, NRC hearing request (Oct. 27, 2009) [hereinafter Albertini Oct. 27 Hearing Request].

During oral argument, Mr. Albertini asserted that, in addition to seeking a hearing as an individual, he also seeks a hearing on behalf of Malu 'Aina (Tr. at 63). As stated above, we construe Mr. Albertini's pleadings as being submitted solely on his own behalf as an individual. In any event, because Mr. Albertini fails to establish his own standing as an individual (*see infra* Part II.A.2.b), this Board is precluded from granting representational standing on behalf of Malu 'Aina. *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994). And because Mr. Albertini's pleadings fail to provide adequate information about (1) the organizational interests of Malu 'Aina, and (2) how those interests would be adversely affected by this licensing proceeding, this Board is precluded from granting organizational standing on behalf of Malu 'Aina. *See Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 411 (2007).

hearing request deadline until 60 days after the NRC made certain documents publicly available; (3) requested pursuant to 10 C.F.R. § 2.302(g)(3) that Ms. Harden be exempted from the electronic filing (E-filing) requirement; and (4) challenged the accuracy of the Army's estimate of the number of spotting rounds fired in Hawaii. *See* Cory Harden's Request for Extension of Time to File a Request for Hearing and Petition for Intervention (Oct. 9, 2009) at 2 [hereinafter Harden Oct. 9 Request].

Neither the Army nor the NRC Staff took a position on the requests in Ms. Harden's October 9 submission. Nor did the Secretary of the Commission act on any of the requests in Ms. Harden's October 9 submission. Ms. Harden did not submit any additional filings before the October 13 deadline lapsed.

2. *Petitioners' Requests for Hearing*

On October 12, 2009, Luwella K. Leonardi — who resides on the island of Oahu about 2 miles from Schofield (Tr. at 49) — e-mailed what the Board construes as a hearing request challenging the Army's License Application. *See* E-mail from Luwella Leonardi to John Hayes, Senior Project Manager for the NRC Staff's Review of the Army's Application, Depleted Uranium Public Hearing for the Waianae Coast (Oct. 12, 2009) [hereinafter Leonardi Hearing Request].⁹

On October 26, 2009, Mr. Harp submitted two e-mails to the NRC Staff that, for present purposes, we will treat as a single submission requesting a hearing. *See* E-mail from Isaac D. Harp, to NRC Staff Counsel, Re: Comment Deadline (Oct. 26, 2009); and E-mail from Isaac D. Harp, to the Office of the Secretary, Army Request for a Depleted Uranium Possession-Only Permit (Oct. 26, 2009) [hereinafter referred to jointly as Harp Hearing Request]. As relevant here, in Mr. Harp's hearing request, he proffered several contentions, and he requested to join Ms. Harden's October 9 hearing request as well as her request for an exemption from E-filing. *See* Harp Hearing Request at 2.

On October 27, 2009, Mr. Albertini submitted a hearing request in which he proffered contentions, requested to join Mr. Harp's hearing request, and requested to join Ms. Harden's October 9 hearing request as well as her request for an exemption from E-filing. *See* Albertini Oct. 27 Hearing Request at 1.

⁹Rather than filing her hearing request with the Office of the Secretary via the Commission's E-Filing system as required by the *Federal Register* Notice (74 Fed. Reg. at 40,855), Ms. Leonardi sent an e-mail message to Mr. John Hayes, who is the NRC Project Manager responsible for the review of the Army's License Application. Mr. Hayes forwarded Ms. Leonardi's e-mail to the Office of the Secretary, and Ms. Leonardi subsequently clarified she was, in fact, requesting an adjudicatory hearing. *See* E-mail from Luwella Leonardi to the Office of the Secretary, Re: U.S. Army Installation Command, Docket No. 40-9083 — Response to Your 10/12/09 E-mail (Oct. 14, 2009).

In a letter dated October 30, 2009 — over 2 weeks after the October 13 filing deadline had lapsed, and 3 days after the October 27 filing deadline, as extended, had lapsed — Ms. Harden advised the NRC that, consistent with an October 26 telephone discussion she had with an individual in the Office of the Secretary, she wished her October 9 submission to be treated as her hearing request. *See* Letter from Cory Harden to the Office of the Secretary of the Commission (Oct. 30, 2009) [hereinafter Harden Oct. 30 Letter]. Ms. Harden also attached an addendum to her October 30 letter containing newly proffered contentions and information, and she instructed the NRC to “[p]lease also consider the enclosed ADDENDUM, dated October 30, 2009, as part of the October 9 document.” Harden Oct. 30 Letter at 1.

On November 5 and 6, 2009, the Army and the NRC Staff, respectively, filed answers to the Petitioners’ hearing requests, arguing that Petitioners lacked standing and failed to proffer any admissible contentions.¹⁰ Although permitted to do so by the NRC’s rules of practice (10 C.F.R. § 2.309(h)(2)), none of the Petitioners filed a reply to either answer.

On November 19, 2009, the Secretary of the Commission referred this case to the Atomic Safety and Licensing Board Panel to establish a licensing board (Memorandum of the Secretary to E. Roy Hawkens, Chief Administrative Judge (Nov. 19, 2009)), and this Board was established on November 24, 2009, to preside over this proceeding. *See* Army Installation Command; Establishment of Atomic Safety and Licensing Board, 74 Fed. Reg. 62,830 (Dec. 1, 2009).

On December 8, 2009, this Board held a teleconference with the four Petitioners, the Army, and the NRC Staff to discuss convening an oral argument in January 2010 on standing and contention admissibility. This Board thereafter issued an order directing the participants to be prepared to address specific questions and topics during the oral argument. *See* Licensing Board Order (Identifying Issues for Oral Argument) (Dec. 17, 2009) (unpublished).¹¹

¹⁰ *See* Army Response; NRC Staff’s Response to Requests for Hearing and Petitions to Intervene filed by Cory Harden, Luwella Leonardi, Isaac Harp, Jim Albertini, and Others (Nov. 6, 2009) [hereinafter NRC Staff Response].

¹¹ During the 2-week period after the October 13, 2009 deadline for filing hearing requests had lapsed, the NRC Staff received approximately twenty e-mails from Hawaiian residents commenting on the Army’s License Application. Many of these submissions included requests that the NRC hold a formal hearing. *See* NRC Staff Response at 3-4 n.10; Army Response at 11. Assuming the latter submissions were intended to be petitions to intervene, we summarily deny them, because none endeavored to argue that it was timely pursuant to 10 C.F.R. § 2.309(f)(2), or that it should be considered notwithstanding its lateness pursuant to the balancing test in 10 C.F.R. § 2.309(c). *See, e.g., Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-06-21, 64 NRC 30, 34 (2006) (“failure to comply with [Commission] pleading requirements for late filings constitutes sufficient grounds for rejecting . . . intervention and hearing requests”).

On January 13, 2010, this Board heard oral argument at the Atomic Safety and Licensing Board Panel's Hearing Room in Rockville, Maryland. Representatives for the Army and the NRC Staff appeared before the Board in Rockville, and the Petitioners participated by videoconference from the Hilo Campus of the University of Hawaii on the island of Hawaii. The argument was also webstreamed for the benefit of stakeholders and other interested members of the public.¹²

II. ANALYSIS

The four Petitioners in this case prepared their hearing requests and represented themselves at oral argument without the assistance of attorneys. Because Petitioners were not represented by counsel, this Board — consistent with long-standing precedent (*see, e.g., Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Units 1 and 2)*, ALAB-136, 6 AEC 487, 489 (1973)) — held them to less rigid pleading standards than we would ordinarily apply to litigants who are represented by counsel. Petitioners capably conveyed their concerns to this Board through their written submissions and the clarifications they provided at oral argument. We were impressed with the sincerity and resolve they exhibited in expressing those concerns. We are unable, however, to grant their hearing requests.

We conclude that the three Petitioners from the island of Hawaii — Ms. Harden, Mr. Albertini, and Mr. Harp, who all live at least 19 miles from Pohakuloa — fail to establish standing, and we deny their hearing requests on that ground. We likewise conclude that Ms. Leonardi, who lives on the island of Oahu about 2 miles from Schofield, fails to establish standing. Because she lives so close to the firing range, however, we believe it prudent also to examine the admissibility of her proffered contentions. We conclude that none is admissible, which provides an alternative ground for denying her hearing request.¹³

¹² This Board acknowledges with gratitude the officials at the University of Hawaii, Hilo Campus, for making their videoconference facility available for this proceeding. Our ability to use the University's videoconference facility, combined with our ability to webstream the proceeding, promoted significant efficiencies and resulted in substantial cost savings without compromising either the transparency of the proceeding or the Petitioners' ability to participate.

¹³ This Board grants, for good cause shown, the requests of the Petitioners for exemptions from compliance with the Commission's E-filing requirement. *See* 10 C.F.R. § 2.302(g)(3).

A. Petitioners Fail to Establish Standing

1. The Legal Principles Governing Standing

This proceeding implicates two legal frameworks for analyzing standing: (1) traditional standing principles; and (2) proximity-plus standing principles.

a. Traditional Standing Principles

Pursuant to the Atomic Energy Act, the NRC shall provide a hearing “upon request of any person whose interest may be affected by the proceeding.” 42 U.S.C. § 2239(a)(1)(A). The Commission’s implementing regulations state that a licensing board “will grant the request [for a hearing] if it determines that the requestor has standing under the provisions of [10 C.F.R. § 2.309(d)(1)] and has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)].” 10 C.F.R. § 2.309(a).

Under the general standing requirements of 10 C.F.R. § 2.309(d)(1), a petitioner must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor’s/petitioner’s right under the [Atomic Energy Act or National Environmental Policy Act] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest.

In determining whether a petitioner has demonstrated a sufficient interest to intervene under section 2.309(d)(1), the Commission long has applied contemporaneous judicial concepts of standing. *See, e.g., Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). Those concepts require a petitioner to allege “(1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the [AEA] (or other applicable statute, such as the National Environmental Policy Act), and (4) is likely to be redressed by a favorable decision.” *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001). The requirement that an injury or threat of injury is concrete and particularized perforce means that the injury must not be “conjectural” or “hypothetical.” *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72. Further, a determination that an injury is fairly traceable to the challenged action does not depend “on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible.” *Id.* at 75. Finally, a petitioner may not establish standing by alleging injury

on behalf of another entity; rather, the petitioner must be the object of the actual or threatened injury. See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

b. Proximity-Plus Standing Principles

In proceedings involving construction permits and operating licenses for nuclear power plants, the Commission recognizes a “‘proximity presumption’ in favor of standing for persons who [reside or] have ‘frequent contacts’ within a 50-mile radius of a nuclear power plant.” *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010).

No such “proximity presumption” is automatically applied, however, in proceedings that, like this, do not involve nuclear power plants. Instead, “[w]hether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.” *Georgia Tech*, CLI-95-12, 42 NRC at 116-17. Pursuant to this so-called “proximity-plus” approach, a “presumption based on geographical proximity (albeit at distances much closer than 50 miles) may be applied where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.” *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22.

In cases where the record fails to support the existence of a significant source of radioactivity producing an obvious potential for offsite consequences at a particular distance frequented by a petitioner, “it becomes the petitioner’s ‘burden to show a specific and plausible means’ of how the challenged action may harm him or her.” *USEC Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 312 (2005). In other words, when a petitioner cannot establish proximity-plus standing, he or she must resort to establishing standing under traditional standing principles. See *Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 581 (2005).

Finally, when analyzing standing, a licensing board must be mindful of the following principles. First, the “petitioner bears the burden to provide facts sufficient to establish standing.” *Bell Bend Nuclear Power Plant*, CLI-10-7, 71 NRC at 139; accord *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000). In meeting this burden, it is generally sufficient if the petitioner provides plausible factual allegations that satisfy each element of standing. See *Lujan v. Defenders of Wildlife*, 504 U.S.

555, 561 (1992).¹⁴ Second, when evaluating whether a petitioner has established standing, a licensing board is to “construe the [intervention] petition in favor of the petitioner.” *Georgia Tech*, CLI-95-12, 42 NRC at 115. Third, *pro se* petitioners are not held to the same standard of pleading as petitioners who are represented by counsel. *See Salem Nuclear Generating Station*, ALAB-136, 6 AEC at 489.

We apply these principles in considering the standing of each Petitioner.

2. *The Petitioners from the Island of Hawaii — Ms. Harden, Mr. Albertini, and Mr. Harp — Fail to Establish Standing*

a. *Ms. Harden Fails to Establish Standing*

Applying relaxed pleading standards, and construing Ms. Harden’s hearing request in her favor, we find that Ms. Harden seeks to establish standing based on the following alleged facts: (1) she lives on the island of Hawaii about 30 miles from Pohakuloa; (2) the existence of DU from the firing of about 2000 spotting rounds at Pohakuloa poses a health risk; and (3) the Army’s failure to disclose two documents containing information about its use of spotting rounds at Pohakuloa has injured her because she needs the information to provide the NRC Staff with meaningful comments as to conditions that should be included in the Army’s license. *See Harden Oct. 9 Request at 2-3; Tr. at 15, 173.*¹⁵

The Army and the NRC Staff aver that the above facts are insufficient to establish standing under either proximity-plus standing principles or traditional standing principles. *See Army Response at 4; NRC Staff Response at 8.* We agree.¹⁶

¹⁴Of course, in proceedings where a petitioner’s factual assertions in support of standing are challenged, untenable, conjectural, or conclusory, a Board need not uncritically accept such assertions. *See Palisades Nuclear Plant*, CLI-07-18, 65 NRC at 410; *Zion Nuclear Power Stations*, CLI-00-5, 51 NRC at 98. In such circumstances, a Board may be required to “weigh the information” and exercise judgment to determine if a standing element has been satisfied. *See Bell Bend Nuclear Power Plant*, CLI-10-7, 71 NRC at 139. *See also Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 82-83 (1993).

¹⁵The two documents sought by Ms. Harden were (1) the Archives Search Report, and (2) an Army document giving the scientific basis for the decision not to do a Human Health Risk Assessment for Pohakuloa. *See Harden Oct. 9 Extension Request at 2.* Regarding the former document, Ms. Harden informed this Board (Tr. at 24) that she obtained a copy in late October 2009. Regarding the latter document, the Army represents that no such report has been, or will be, generated. *See NRC Response to Extension Requests, Attachment 3, Affidavit of John Hayes ¶ 4 (Oct. 1, 2009).*

¹⁶Preliminarily, we summarily reject Ms. Harden’s claim that, for purposes of establishing standing, she should be deemed injured because she lacked access to certain documents. Our regulations provide that “contentions must be based on documents or other information available at the time the petition is to be filed” (10 C.F.R. § 2.309(f)(2)), and they provide petitioners with the opportunity to amend

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To establish proximity-plus standing, Ms. Harden is required to show that (1) the licensing action involves a significant source of radioactivity, (2) the radioactivity produces an obvious potential for offsite consequences, and (3) she is sufficiently close to the site to be presumptively affected by an offsite consequence. *See supra* Part II.A.1.b. This she fails to do.

With regard to the first criterion, Ms. Harden claims that about 2000 spotting rounds may have been fired at Pohakuloa, depositing about 838 pounds of DU on the firing ranges. *See* Harden Oct. 9 Request at 3; Tr. at 12, 173; Strauss Memorandum at 4. But she fails to make a showing that, in the context of this case, 838 pounds of DU scattered on the firing ranges of Pohakuloa constitutes a “significant source of radioactivity.” In particular, she fails to dispute the analysis in the Army’s License Application showing that, even if *far more than* the 2000 rounds claimed by Ms. Harden had been fired and distributed in the surface soils within the impact area on a single range at Pohakuloa (i.e., even if 2932 spotting rounds had been fired and concentrated within a single range), this concentration of radioactivity “should represent an appropriate bounding condition . . . [and] is significantly lower than the [decommissioning] screening values for uranium (13, 8, and 14 pCi/g for U-234, U-235, and U-238, respectively) specified in Volume 2, Appendix H, NUREG-1757.” License Application at 9, 10. Because the regulatory exposure limits are determined by concentration, “one can reasonably conclude that the potential doses due to the presence of [DU] from the M101 spotting round . . . are expected to be much less than general public exposure limits specified in 10 C.F.R. 20.1301 and are likely to be some small fraction of the [dose limit] prescribed by 10 C.F.R. 20.1402 [which establishes radiological criteria for unrestricted use].” *Id.* at 10.¹⁷ Ms. Harden fails to satisfy the first criterion

existing contentions and file new contentions based on new information that had not previously been available. *Id.* § 2.309(f)(2)(i)-(iii). Hence, both as a practical matter and as a matter of law, Ms. Harden suffered no cognizable injury arising from the unavailability of a document. As to Ms. Harden’s commendable desire to provide the NRC Staff with meaningful suggestions about licensing conditions after obtaining particular documents, we observe that any member of the public may provide the NRC Staff with comments relating to health and safety at any time during the license-review process, and the NRC Staff “will consider and resolve all safety questions regardless of whether any hearing takes place.” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 339 (1999) (internal quotation marks omitted). If an interested person wishes to propose health and safety measures after a license has been issued, such proposals may be submitted to the NRC by filing a petition pursuant to the enforcement process set forth in 10 C.F.R. § 2.206.

¹⁷To further explain the Commission’s screening values, a picocurie (pCi) is a measurement of “activity” (i.e., a measurement of the number of radioactive decays per second), and a pCi/g refers to the amount of radioactivity per gram of material. One pCi is equal to 2.2 decays per minute, or 0.037 decays per second. Thus, 1 pCi/g would mean that there are 2.2 decays each minute in a gram of material. As relevant here, the regulations are written to define the allowable concentrations of a radioactive material by specifying the number of decays per gram. Pursuant to the Army’s

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for establishing proximity-plus standing, because she fails to demonstrate that the DU at Pohakuloa constitutes a significant amount of radioactivity, and she offers nothing to impugn the Army's conservative analysis in its License Application indicating that DU from 2932 spotting rounds located within a limited impact area on a single range (1) is significantly lower than the decommissioning screening standards for uranium, and accordingly (2) will result in *de minimis* exposure.

Ms. Harden likewise fails to satisfy the second criterion for establishing proximity-plus standing, because she fails to show that the onsite radioactivity produces an obvious potential for offsite consequences. On August 1, 2008, Mr. Peter Strauss — who is an energy and environmental consultant with PM Strauss & Associates — provided Ms. Harden with a memorandum containing the results of his independent review of the DU at Pohakuloa. *See* Strauss Memorandum. He pointed out that DU is “primarily dangerous to people when it gets inside the body . . . through ingestion or inhalation.” *Id.* at 5. But he went on to point out that there is not an obvious potential in the instant case for the offsite ingestion or inhalation of DU. Specifically, Mr. Strauss indicates that there is no obvious potential for offsite ingestion of DU through the drinking of DU-contaminated water, because the “geochemistry of the site makes it unlikely that DU is leaching from the surface to the groundwater.” *Id.* at 6. Nor does Mr. Strauss believe that there is an obvious potential for offsite inhalation of DU, because “[i]t is unlikely . . . that small particles of DU would be inhaled unless the person was in the immediate vicinity. Wind-carried particles would not likely carry very far because of the weight of DU.” *Id.* Mr. Strauss provided the following additional views regarding the potential for inhaling DU:

Because the spotting rounds were not vaporized, but broke into fragments, off-site inhalation would be unlikely. Homeowners nearby took air samples and had them analyzed, and there did not appear to be the presence of uranium above background. Although the samples were collected by the Homeowners Association and the chain of custody and quality control probably did not follow general procedures, I would have expected the same result.

Id.

The Army's Environmental Radiation Monitoring Plan for Pohakuloa provides further support for the conclusion that onsite radioactivity does not present an

unchallenged analysis, assuming 2932 spotting rounds (a conservatively high number) were fired into an impact area of a single range (a conservatively small area), the resulting concentration is “significantly” lower than decommissioning screening values for uranium in Commission guidance documents, and the resulting offsite dose is “much less” than public exposure limits prescribed in Commission regulations. *See* License Application at 9, 10.

obvious potential for offsite consequences.¹⁸ For example, the document states that “the combination of limited precipitation and great depth to the aquifer make it unlikely that DU will impact groundwater.” Pohakuloa Radiation Monitoring Plan at 4. “Although soil may be considered a source media at [Pohakuloa], the absence of release mechanisms results in incomplete pathways” for DU migration. *Id.* Indeed, the document concludes that the “surface water/sediment and groundwater pathways” were all “incomplete” and, hence, would not support DU migration from Pohakuloa. *Id.*; *see also id.* at 5 (“The limited rainfall and minimal amounts of soil limit potential pathways at [Pohakuloa].”). Finally, “DU has not been detected in air monitoring programs” conducted by the Army around the impact area at Pohakuloa. *Id.* at 5.¹⁹

During oral argument, Ms. Harden expressed concern that “live-fire and dummy bombs may be falling on undiscovered [DU], which may pulverize and ignite it, generating aerosols which can travel for miles into the air,” thus providing an inhalation pathway for offsite exposure. Tr. at 11. But Ms. Harden’s speculative concern is not sufficient to establish an obvious potential for offsite exposure, especially in light of the Army’s statement that it adheres to the Department of Defense Directive that “provides restrictions for firing high explosive emissions into [DU] areas.” Tr. at 118; *see* Dep’t of Defense (DoD) Directive 4715.11, “Environmental and Explosives Safety Management on Operational Ranges Within the United States,” at 5 (May 10, 2004). To that end, the Army represented that: (1) “range safety limits have been adjusted and buffers have been established in the impact area so that no high-explosive rounds are being or will be fired into the DU area[s]” at Pohakuloa or Schofield (Tr. at

¹⁸The Army’s License Application states there is no serious risk that members of the public will venture into areas containing DU, because the DU “fragments are located . . . well within the [military] installation boundary and are located in an impact area where access is strictly controlled.” License Application at 3. Nor, states the Army, is there a serious risk that military service members or civilian employees of the military will unknowingly venture into such areas, because those areas also contain unexploded ordnance and, accordingly, special training is required prior to entry, which “limits the potential for inadvertent exposure and ensures . . . Army civilians and soldiers are not directly exposed.” *Id.*

¹⁹Although the potential for offsite consequences is remote, there is considerable uncertainty regarding the amount of DU at Pohakuloa and Schofield. We note that, for purposes of drafting the License Application, the Army conservatively assumed 2932 spotting rounds were fired on a single range at each site (License Application at 9), while in drafting the Environmental Radiation Monitoring Plans, the Army assumed 714 spotting rounds were fired on a single range at each site. *See supra* note 7. Given this disparity in assumptions, we suggest the Army and the NRC Staff consider conducting studies to see how sensitive the Environmental Radiation Monitoring programs are to variations in the amount of the DU at each site. For example, because it appears that the lower bound on DU is 714 spotting rounds at each site, what differences, if any, would there be in the environmental radiation programs and monitoring plans if the ultraconservative assumption of 2932 spotting rounds were used?

120); and (2) aerial bombing will “not [be] permitted in the DU buffer area[s]” at Pohakuloa. Tr. at 121. The Army also represented that the only munitions permitted to be fired into potential DU areas are small arms ammunition — i.e., .50-caliber and smaller — and training rounds for certain types of grenades that contain just enough explosive to create a puff of smoke. See Tr. at 118-20. Ms. Harden’s bare conjecture that the Army might — in derogation of DoD Directive 4715.11 — use explosives in the DU areas that would generate DU aerosols that could be inhaled by offsite individuals is insufficient to establish standing.²⁰

In short, we conclude that for proximity-plus standing purposes, Ms. Harden’s pleading, even as amplified by her representations during oral argument, fails to establish either that the Army’s proposed licensing action involves a significant source of radioactivity or that the radioactivity produces an obvious potential for offsite consequences. Having failed to make either of these showings, Ms. Harden fails to establish that her home, which is 30 miles from Pohakuloa, is sufficiently close to the site to be presumptively affected by an offsite consequence. She therefore fails to establish proximity-plus standing.

Nor, in our view, does Ms. Harden satisfy the traditional standing criteria, which would require her to show: (1) a concrete and particularized injury, actual or threatened, that (2) is fairly traceable to the Army’s licensing action, (3) falls among the general interests protected by the AEA or other applicable statute, and (4) is likely to be redressed by a favorable decision. See *supra* Part II.A.1.a. Specifically, she fails to show she will suffer a concrete and particularized injury that is fairly traceable by a plausible chain of causation to the Army’s licensing action. Although Ms. Harden expresses concern that the DU might migrate offsite and thereby cause her injury by ingestion or inhalation, she offers no plausible chain of causation by which the DU could exit a firing range and migrate from Pohakuloa, much less be transported 30 miles from Pohakuloa to the area around her home.²¹ In light of Mr. Strauss’s statement that offsite migration of DU by

²⁰ Although we do not question the Army’s representation that high-explosive munitions are not, and will not be, used in the DU areas at Pohakuloa or Schofield, we nevertheless believe it would be well if this representation were embodied in a license condition. Moreover, we believe the Army would be well advised to include in its radiological monitoring program a provision to monitor for airborne dispersal of DU in the event a high-explosive round were accidentally detonated in a DU-contaminated area.

²¹ During oral argument, Ms. Harden summarized her alleged causation chain as follows: “We are saying that the DU oxide, you get a tiny amount in your lungs, the chain of causation is all you do is breathe when you go up there.” Tr. at 176. The infirmity in Ms. Harden’s causation chain — which is an infirmity common to all Petitioners’ causation chains — is that it fails to provide a plausible transport mechanism for the DU to exit the firing range or the military installation.

In this regard, the record indicates that dominant winds on the island of Hawaii blow from the northeast to the southwest. See Tr. at 63. That Ms. Harden lives 30 miles northeast (*upwind*) of
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groundwater or wind transport is “unlikely” (Strauss Memorandum at 6), and the absence of any record information indicating a reasonable possibility that DU could migrate from Pohakuloa and travel 30 miles to Ms. Harden’s home, we conclude that Ms. Harden fails to satisfy her burden of demonstrating standing, because her assertion of injury is (1) speculative and hypothetical and (2) not fairly traceable to the Army’s licensing action.²²

b. Mr. Albertini Fails to Establish Standing

Applying relaxed pleading standards, and construing Mr. Albertini’s hearing request in his favor, we find that he seeks to establish standing based on the following alleged facts: (1) he is a resident of the island of Hawaii who lives about 25 miles from Pohakuloa; (2) the firing of about 2000 spotting rounds at Pohakuloa resulted in the depositing of DU that poses an inhalation hazard to humans and might be the cause of animal tumors reported in the Pohakuloa area; and (3) in May 2007, he was present at Mauna Kea State Park, located between

Pohakuloa further weakens her causation chain and vitiates her claim of actual or threatened injury from the inhalation of DU at her home.

²² In Ms. Harden’s letter to the NRC dated October 30, 2009 — which was submitted 17 days after the original filing deadline had lapsed, and 3 days after the end of the filing extension granted to the Sierra Club and Mr. Albertini had lapsed — Ms. Harden included an Addendum containing new contentions and new information, and she invited the NRC to “[p]lease also consider the enclosed ADDENDUM, dated October 30, 2009, as part of [her] October 9 document.” Addendum to Harden Oct. 30 Letter at 1. We decline Ms. Harden’s invitation. Although this Board does not hold *pro se* petitioners to the same standard that it holds litigants who are represented by counsel, we are not empowered wholly to exempt a *pro se* petitioner from the procedural rules that govern our adjudications. See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 201 (1998) (“[*pro se* petitioners are] expected to comply with our basic procedural rules . . . [including] those establishing filing deadlines”). Accordingly, in the present circumstance, where Ms. Harden conceded that the information in her October 30 Addendum was previously available (Tr. at 18), admitted the lateness of her filing (Tr. at 17), and made no effort at the time of its submission to justify its lateness or explain why this Board should consider it under the relevant rule of practice (10 C.F.R. § 2.309(c)), we deny her request to supplement her October 9 submission with her October 30 Addendum.

Even if we had granted Ms. Harden’s request to supplement her October 9 submission, nothing in her October 30 Addendum alters our conclusion that she fails to establish standing. An excerpt from a September 25, 2009 e-mail from Dr. G. Michael Reimer, Ph.D., Geologist, to Ms. Harden is not to the contrary. The excerpt indicates Dr. Reimer stated that the “most probable exposure vector for the residents of the [island of Hawaii] is the inhalation of . . . [DU] aerosols. As long as the bombs drop and the winds blow in the spotting round test area, there will be aerosol production and transport of DU.” Addendum to Harden Oct. 30 Letter at 7. But as explained above in text, the Army states it does not, and will not, use land-launched or air-dropped high explosives in the DU areas, thus preventing the production of DU aerosols, thereby negating what Dr. Reimer characterizes as the “most probable exposure vector” for Hawaii residents. *Id.*

1 to 2 miles from Pohakuloa, when a portable radiation monitor carried by his colleague recorded a reading of 75 counts per minute (cpm) in response to dust blowing from Pohakuloa. *See* Albertini Oct. 27 Hearing Request at 1-2; Tr. at 63, 69-70.

The Army and the NRC Staff assert that the above facts are insufficient to establish standing under either proximity-plus standing principles or traditional standing principles. *See* Army Response at 4-5; NRC Staff Response at 10-11. We agree.

First, for purposes of establishing proximity-plus standing, we conclude that Mr. Albertini is similarly situated in material respects to Ms. Harden and, accordingly, fails to establish proximity-plus standing for the same reasons that Ms. Harden fails to establish such standing. *See supra* Part II.A.2.a. Although Mr. Albertini — unlike Ms. Harden — asserts he was present at Mauna Kea State Park in May 2007 when a radiation monitor recorded a reading of 75 cpm in response to dust blowing from Pohakuloa (Albertini Oct. 27 Hearing Request at 2), this assertion falls short of establishing proximity-plus standing, because even if Mr. Albertini had adequately shown what the purported reading represents (which he did not do), he failed to establish that the reading was plausibly linked to DU from Pohakuloa. His failure to link the monitor’s reading to DU from Pohakuloa is especially significant in light of Mr. Strauss’s conclusion that “[w]ind-carried particles [of DU] would not likely carry very far because of the weight of DU” (Strauss Memorandum at 6), and the Army’s representation that, consistent with the governing DoD Directive, land-launched and aerial bombings are not permitted in the DU areas or established DU buffer areas at Pohakuloa (Tr. at 120-21), which prevents the generation and migration of DU aerosols. *See supra* Part II.A.2.a.²³

Even if we assumed that the 75-cpm reading on the radiation monitor in Mauna Kea State Park was attributable to wind-carried DU from Pohakuloa, we would still conclude that Mr. Albertini failed to establish proximity-plus standing based on his residence, because he fails to demonstrate that wind-carried DU could be blown an additional 23 miles to his home. Nor did he show that his visits to Mauna Kea State Park were sufficiently frequent or lengthy to justify standing based on such visits. *Cf. Bell Bend Nuclear Power Plant*, CLI-10-7, 71 NRC at 140 (a petitioner must show “a pattern of regular, significant contacts within the vicinity of the site” to satisfy standing requirements).

²³ Contrary to Mr. Albertini’s understanding (Tr. at 67-68), it is not the Army’s burden — for purposes of standing analysis — to “rule out” that wind-blown DU is being transported from Pohakuloa. Rather, it is the petitioner’s “burden to provide facts sufficient to establish standing.” *Bell Bend Nuclear Power Plant*, CLI-10-7, 71 NRC at 139. It was thus incumbent on Mr. Albertini to make a plausible showing that DU from Pohakuloa was being, or plausibly could be, carried offsite by the wind or by some other transport mechanism. He failed to make that showing.

In short, Mr. Albertini fails to show either that the Army's licensing action involves a significant source of radioactivity, that the radioactivity produces an obvious potential for offsite consequences, or that his home — which is 25 miles from Pohakuloa — is sufficiently close to the site to be presumptively affected by an offsite consequence. He thus does not satisfy proximity-plus standing principles.

Mr. Albertini also fails to satisfy traditional standing principles. Like Ms. Harden (*supra* Part II.A.2.a), Mr. Albertini fails to make a plausible showing that the DU subjects him to a concrete and particularized injury, actual or potential. Although he claims that “[r]eports of animal tumors in the [Pohakuloa] area need to be investigated for possible links to DU” (Albertini Oct. 27 Hearing Request at 2), he fails to (1) provide a factual basis for the existence of this problem, (2) proffer a credible causal link between DU at Pohakuloa and the alleged reports of animal tumors, or (3) explain how the existence of such tumors portends harm to him. We therefore conclude that Mr. Albertini's claim of injury is too speculative to establish a basis for standing, and it is not fairly traceable to the Army's licensing action in any event.

c. Mr. Harp Fails to Establish Standing

Applying relaxed pleading standards, and construing Mr. Harp's hearing request in his favor, we find that he seeks to establish standing based on the following alleged facts: (1) he is a resident of the island of Hawaii who lives about 19 miles from Pohakuloa (Tr. at 77); (2) “[DU] has been pointed to as the probable cause of various cancers and other mysterious illnesses that many military veterans suffer from” (Harp Hearing Request at 2); (3) “[d]isturbing the [DU] with on-going [high-explosive munitions] is placing the residents of Hawaii in jeopardy” (*id.*); (4) the highest rates of cancer in the State of Hawaii occur on the island of Hawaii (*id.*); and (5) the DU at Pohakuloa constitutes a “never-ending threat to the health and well-being of Hawaii's lands and Hawaii's residents.” *Id.*

The Army and the NRC Staff claim that Mr. Harp fails to satisfy standing requirements. *See* Army Response at 5; NRC Staff Response at 9-10. We agree.

For purposes of proximity-plus standing, we conclude that Mr. Harp is similarly situated in all material respects to Ms. Harden and Mr. Albertini. Accordingly, for the same reasons that Ms. Harden and Mr. Albertini failed to satisfy proximity-plus standing requirements (*supra* Parts II.A.2.a and II.A.2.b), we conclude that Mr. Harp likewise fails to satisfy proximity-plus standing requirements.

Nor does Mr. Harp satisfy traditional standing requirements. First, although he asserts that DU is the “probable cause” of illnesses suffered by many military veterans (Harp Hearing Request at 2), he provides no factual support for his assertion, he makes no plausible showing that the DU could exit the firing ranges

and migrate from Pohakuloa to affect him, and he thus makes no concrete and particularized showing of injury or threatened injury to himself. Second, Mr. Harp's unsupported claim that the Army is "[d]isturbing the [DU] with on-going [high-explosive munitions]" (*id.*) is negated by the Army's representation that, consistent with DoD Directive 4715.11, high-explosive munitions are not, and will not be, used in the DU areas or buffer areas at Pohakuloa. Tr. at 120-21. Third, the statistics offered by Mr. Harp that indicate a high incidence of cancer on the island of Hawaii (Harp Hearing Request at 2) are inadequate to confer standing, because those statistics, standing alone, fail to provide a plausible chain of causation between such cancers and the DU at Pohakuloa. Similarly inadequate to confer standing is Mr. Harp's claim that DU constitutes a "never-ending threat to the health and well-being of Hawaii's lands and Hawaii's residents" (*id.*), because Mr. Harp fails either to specify a concrete and particularized harm or to articulate a plausible chain of causation as to how the DU at Pohakuloa would cause such harm. *See Zion Nuclear Power Station*, CLI-00-5, 51 NRC at 98 ("broad and conclusory statements [by petitioners] . . . that they have 'direct information concerning the threat to health and safety posed by [the license applicant]' . . . are insufficient to establish standing").

We therefore conclude that Mr. Harp pleads insufficient facts on which to base a claim of standing.

3. Ms. Leonardi, Who Lives on the Island of Oahu, Fails to Establish Standing and Fails to Proffer an Admissible Contention

a. Ms. Leonardi Fails to Establish Standing

Applying relaxed pleading standards, and construing Ms. Leonardi's hearing request in her favor, we find that she seeks to establish standing based on the following alleged facts: (1) she is a resident of the island of Oahu and lives about 2 miles from Schofield (Tr. at 49); (2) her community has, for many years, been inundated with "bombing plume dust" containing DU from Schofield (Leonardi Hearing Request at 1); (3) truckers load their trucks with DU-contaminated soil from Schofield and dump it in her community (*id.*); and (4) her community has a higher incidence of serious illnesses than other communities on Oahu. *Id.*

The Army and the NRC Staff aver that Ms. Leonardi fails to plead sufficient facts to satisfy standing requirements. *See* Army Response at 4; NRC Staff Response at 8-9. We agree.²⁴

²⁴ Like Mr. Albertini (*supra* note 23), Ms. Leonardi appears to have been under the misapprehension that the Army had the burden to demonstrate she lacked standing. *See, e.g.*, Tr. at 61. But binding case law (*Bell Bend Nuclear Power Plant*, CLI-10-7, 71 NRC at 139) establishes that Ms. Leonardi, as

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First, we conclude that Ms. Leonardi fails to establish proximity-plus standing. Despite the fact that Ms. Leonardi's home is only about 2 miles from Schofield, she — like the other three Petitioners (*see supra* Part II.A.2) — fails to show that the proposed licensing action involves a significant source of radioactivity and that the onsite radioactivity produces an obvious potential for offsite consequences. Regarding the latter factor, the Army's Radiation Monitoring Plan for Schofield concludes that "DU mobility is restricted and remains localized" (Schofield Radiation Monitoring Plan at 6), and neither ground water, surface water, nor wind are likely transport pathways for DU. *Id.*; *see also* Strauss Memorandum at 6 ("[w]ind-carried particles [of DU] would not likely carry very far because of the weight of DU"). Moreover, because controlled burns are routinely conducted at Schofield to control grass fires, the Army performed a study to evaluate the potential dispersal of DU during such events, and the Army found "no evidence of DU in the particulates generated during these prescribed burns." Schofield Radiation Monitoring Plan at 4.²⁵ Ms. Leonardi does not offer any facts that contradict this record information, nor — as we show below — does she otherwise suggest a plausible, much less an obvious, potential pathway for the DU to migrate from the firing range and be transported from Schofield to her home.

Ms. Leonardi's assertion (Leonardi Hearing Request at 1) that DU-contaminated bombing plumes from Schofield drift over her home is not tenable given the Army's policy of not using high-explosive munitions in the DU areas that would generate DU aerosol. Tr. at 120-21; *supra* text accompanying note 20.

Similarly untenable is Ms. Leonardi's claim that truckers dump DU-contaminated soil from Schofield in her community. Because DU fragments on Schofield firing ranges are located in the midst of unexploded ordnance, "access is strictly controlled" and special training is required prior to entry into DU areas. *See* License Application at 3. Ms. Harden's expert, Mr. Strauss, stated that, in his view, the unexploded ordnance on the ranges presents a greater hazard than the

the petitioner, has the burden to plead sufficient, *plausible* facts to demonstrate standing. This was a burden she failed to carry. During oral argument (Tr. at 29-30), Ms. Leonardi cited a federal district court decision, *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984), that she suggested affected our standing analysis, because it supported the principle that the Army has the burden to protect the public from DU. We do not take issue with that principle, but it is not relevant to our standing inquiry; rather, it is relevant to the Army's ability to demonstrate that the NRC Staff should grant the Army's possession-only license application. Moreover, we note that the decision in *Allen* is inapposite to our standing analysis because (1) the decision in *Allen* was reversed on appeal (*Allen v. United States*, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988)), and (2) the analysis in *Allen* involved different legal issues arising under a different statutory framework (i.e., the Federal Tort Claims Act).

²⁵ The absence of DU in the smoke generated during the controlled burns vitiates Ms. Leonardi's unsupported suggestion (Tr. at 50) that residents in her community are "affected" by DU-contaminated smoke from the "burning" activities at Schofield.

DU (*see* Strauss Memorandum at 7), and the record contains nothing to suggest the Army has sent, or would send, truckers into such patently hazardous areas to load their vehicles with contaminated soil. To the contrary, the Army unequivocally stated that, aside from taking small soil samples for testing, it is “not removing DU from any installation in Hawaii . . . and . . . to our knowledge, no soil has been removed from the Schofield Barracks impact area since [the Army] became aware of this issue in 2005.” Tr. at 131; *accord* Tr. at 192. Especially in light of these representations from the Army, Ms. Leonardi’s unsupported assertion that the Army is responsible for truckers dumping DU-contaminated soil into her neighborhood is inadequate to establish standing.²⁶

Finally, although we do not question Ms. Leonardi’s assertion that her community has a higher incidence of serious illnesses than other communities on Oahu (Leonardi Hearing Request at 1), Ms. Leonardi failed to provide any factual basis that would lead us to conclude there may be a causative link between the illnesses and the DU at Schofield. In other words, her claim of harm attributable to DU is conjectural and, accordingly, does not support a finding of standing.

Significantly, the Army performed a “dose and risk evaluation . . . to evaluate the potential health impacts [from DU] to an offsite subsistence farmer living 1500 meters from [Schofield].” Schofield Radiation Monitoring Plan at 5. The Army’s evaluation — which Ms. Leonardi does not challenge — shows that “both radiological and chemical risks are within the [U.S. Environmental Protection Agency’s] acceptable risk range” and, accordingly, “there are no likely adverse effects to offsite receptors resulting from the presence of DU at [Schofield].” *Id.*

In short, Ms. Leonardi fails to establish proximity-plus standing. Nor does she plead sufficient facts to establish traditional standing, because she fails to show concrete and particularized injury to herself, actual or threatened, that is plausibly linked to the Army’s proposed licensing action.

Additionally, as we now show, even if Ms. Leonardi had established standing (which she failed to do), we would have been compelled to deny her hearing request because she fails to proffer an admissible contention.

²⁶The Army provided what might be an explanation for Ms. Leonardi’s mistaken belief that DU-contaminated soil was being taken from Schofield — namely, the existence of ongoing projects at Schofield that entail the hauling of soil or rock from Schofield to other locations. For example, one current project involves the repair of roads and trails at another military facility. This project requires the delivery of 9000 tons, or about 3500 truckloads, of crushed rock from Schofield. No project, however, involves the removal of soil from areas reasonably believed to be contaminated with DU. *See* Tr. at 131.

Notably, the NRC Staff represented that if Ms. Leonardi ever were to provide a credible factual foundation for the conclusion that DU-contaminated soil from Schofield was being dumped in her community, or otherwise being disposed of in an improper manner, the NRC Staff would have an obligation to take prompt corrective action. *See* Tr. at 150.

b. Ms. Leonardi Fails to Proffer an Admissible Contention

To participate in an NRC adjudicatory hearing, a petitioner must — in addition to demonstrating standing — proffer an admissible contention. *See* 10 C.F.R. § 2.309(a). To be admissible, a contention must (*id.* § 2.309(f)(1)(i)-(vi)): (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 issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions that support the petitioner’s position and on which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Failure to satisfy any of these requirements is sufficient grounds to render the contention inadmissible. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

Applying relaxed pleading standards to Ms. Leonardi’s one-page hearing request, this Board educed the following two contentions. First, Ms. Leonardi asserts that her community on the Waianae Coast has for many years been inundated by DU-contaminated “bombing plume dust” from Schofield. Leonardi Hearing Request at 1. Second, she alleges that truckers remove DU-contaminated soil from Schofield and dump it in her community, creating toxic dusts that cause serious illnesses. *Id.*

The Army and the NRC Staff assert that Ms. Leonardi’s contentions fail to satisfy the admissibility requirements in 10 C.F.R. § 2.309(f)(1). *See* Army Response at 7-8; NRC Staff Response at 18. We agree.

(1) CONTENTION ONE IS NOT ADMISSIBLE

Ms. Leonardi’s first contention, which alleges that DU-contaminated bombing plume dust from Schofield causes health issues in her community, is inadmissible for two independent reasons. First, in derogation of 10 C.F.R. § 2.309(f)(1)(v), Ms. Leonardi’s hearing request is utterly bereft of a statement of the alleged facts or expert opinions that support this contention. The Board asked Ms. Leonardi to be prepared at oral argument to provide “the factual foundation for this [contention], including the basis for a conclusion that (1) the offending dust plumes emanate from [Schofield], (2) the dust plumes are radioactive, and (3) there is a causal connection between the dust plumes and health issues.” Licensing Board Order (Identifying Issues for Oral Argument) (Dec. 17, 2009) at 3 (unpublished). At oral argument, Ms. Leonardi asserted that dust plumes are blown from Schofield to her community because she lives in a valley into which the wind blows dust from all directions, including from Schofield. *See* Tr. at 50, 55. In support of her claim that the dust plumes blowing from Schofield contain radioactivity, Ms. Leonardi

relied on a document showing that cancer rates in Hawaii are rising. *See* Tr. at 51-52. Even as amplified by her presentation at oral argument, Ms. Leonardi's contention fails to articulate facts supporting her claims that (1) the offending dust plumes contain DU, or (2) the dust plumes are responsible for cancer or other health issues in her community. Her contention is therefore inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v).

Ms. Leonardi's contention is also inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi), because it fails to show that a genuine dispute exists on a material issue of fact regarding the Army's License Application. Even inferring generally that Ms. Leonardi's contention challenges the Army's overall conclusion that there is no viable pathway for offsite human exposure to DU, her unsupported claim that bombing dust plumes from Schofield contain DU fails to articulate a genuine dispute of material fact in light of the record information indicating that (1) the Army does not use high-explosive munitions in the DU areas, and (2) the heavy weight of DU makes aerial transport unlikely in any event. *See supra* Part II.A.2.a. Ms. Leonardi's first contention is thus inadmissible.

(2) CONTENTION TWO IS NOT ADMISSIBLE

Ms. Leonardi's second contention, which alleges that the Army employs truckers to remove DU-contaminated soil from Schofield and dump it in her community, is likewise inadmissible for two independent reasons. Ms. Leonardi's hearing request states that she has followed truckers to Schofield and at the end of the day watched the same truckers dump their load in her community (Leonardi Hearing Request at 1), and during oral argument, she claimed that in December 2009 approximately fifty trucks per day transported DU-contaminated soil from Schofield to her community. *See* Tr. at 60. This Board asked Ms. Leonardi whether she had any factual information to support her beliefs that (1) the trucks she saw in December 2009 originated from Schofield, and (2) those trucks were transporting DU-contaminated soil. *See* Tr. at 61. Ms. Leonardi conceded she did not have any information to support her beliefs. *Id.* She asserted, however, that it was not her burden to produce information that the trucks transported soil from Schofield or that the soil transported by the trucks contained DU. *See* Tr. at 61-62. Ms. Leonardi is incorrect.

It is emphatically the petitioner's burden to produce some "alleged facts or expert opinion which support [a contention]." 10 C.F.R. § 2.309(f)(1)(v). Ms. Leonardi fails to provide such facts. On this record, her assertion that trucks are dumping *DU-contaminated soil* from Schofield in her community is predicated on "bare assertions and speculation." *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (quoting *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)).

Although we acknowledge that complying with Commission regulations "may

be especially difficult for *pro se* petitioners . . . it has long been a basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation.” *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 26 (2001) (internal quotation marks omitted). Because Ms. Leonardi produced no factual information to support her claim that the truck-transported soil from Schofield is contaminated with DU, we conclude her second contention is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v). Moreover, in light of the Army’s representation that it is “not removing DU from [Schofield]” (Tr. at 131) and, hence, not “dumping DU soil in [Ms. Leonardi’s] community” (Tr. at 192), we conclude that Ms. Leonardi’s unsupported contention fails to articulate a genuine issue of material fact regarding the Army’s License Application and, accordingly, it is also inadmissible pursuant to section 2.309(1)(f)(vi).²⁷

III. CONCLUSION

For the foregoing reasons, we: (1) *deny* the hearing requests of Ms. Harden, Mr. Albertini, and Mr. Harp for lack of standing (*supra* Part II.A.2); (2) *deny* the hearing request of Ms. Leonardi for lack of standing and failure to proffer an admissible contention (*supra* Part II.A.3); and (3) *deny* as untimely the sundry other hearing requests referenced in the NRC Staff’s Response that were submitted after October 13, 2009 (*supra* note 11).

This Memorandum and Order is subject to appeal in accordance with the provisions in 10 C.F.R. § 2.311, which provides, *inter alia*, that such appeal must be initiated by the filing of a notice of appeal and accompanying supporting brief within 10 days after service of the challenged order.

²⁷ See *supra* note 26 & accompanying text.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD²⁸

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

Michael F. Kennedy
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 24, 2010

²⁸ In addition to being filed through the E-Filing system, copies of this Order were sent this day by Internet e-mail to: (1) Cory Harden; (2) Luwella Leonardi; (3) Jim Albertini; (4) Isaac Harp; (5) counsel for the U.S. Army; and (6) counsel for the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

**Docket Nos. 52-022-COL
52-023-COL**

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

March 11, 2010

RULES OF PRACTICE: REQUESTS FOR ORAL ARGUMENT

The Commission has discretion to allow oral argument upon the request of a party made in a petition for review, brief on review, or upon its own initiative. In order to grant a request for oral argument, the Commission requires a showing of how it will assist the Commission in reaching a decision.

RULES OF PRACTICE: MOTIONS FOR RECONSIDERATION

A motion for reconsideration may not be filed except upon leave of the adjudicatory body that rendered the decision. If leave is granted, the motion must show compelling circumstances, such as the existence of an unanticipated, clear, and material error, which could not have been anticipated, that renders the decision invalid.

RULES OF PRACTICE: MOTIONS FOR RECONSIDERATION

The Commission's rules do not allow for multiple requests for reconsideration of the same decision.

APPLICANTS: COMBINED LICENSES

The Commission's rules permit the filing of a combined license application during the pendency of a design certification rulemaking.

RULES OF PRACTICE: APPEALS

The Commission's rules of practice provide for an automatic right to appeal a board decision wholly denying a petition to intervene.

INTERVENTION RULINGS: STANDARD OF REVIEW

The Commission will defer to the board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion.

**RULES OF PRACTICE: CONTENTION ADMISSIBILITY
(MANAGEMENT CHARACTER AND COMPETENCE)**

The Commission has placed strict limits on management and character contentions. When character or integrity issues are raised, they are expected to be directly germane to the challenged licensing action, and of more than historical interest.

RULES OF PRACTICE: APPEALS

The Commission will deem waived arguments before the Board that are abandoned on appeal.

RULES OF PRACTICE: APPEALS

The Commission will not consider information that was not raised before the Board.

**RULES OF PRACTICE: CONTENTION ADMISSIBILITY
(CONTENTIONS OF OMISSION AND ADEQUACY)**

There is a difference between contentions that merely allege an omission of information and those that challenge substantively and specifically how particular information has been discussed in a license application.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY

Pursuant to longstanding Commission precedent, a contention that is the subject of what is, or is about to become, the subject of a rulemaking is inadmissible.

RULES OF PRACTICE: APPEALS

Attempting to circumvent page-limit rules could be grounds for sanctions. The better practice is for participants to abide by page-limit rules, and if they cannot, to file a motion to enlarge the number of pages permitted.

MEMORANDUM AND ORDER

This proceeding concerns the application of Progress Energy Carolinas, Inc. (Progress) for a combined license (COL) under 10 C.F.R. Part 52 to construct and operate two new nuclear reactor units at the Shearon Harris Nuclear Power Plant Site located in Wake County, North Carolina. The North Carolina Waste Awareness and Reduction Network, Inc. (NC WARN) filed a notice of appeal, and supporting brief, of two Commission decisions and three Licensing Board decisions in this proceeding.¹ NC WARN also requests the opportunity for oral argument on the issues raised in its appeal. Progress and the NRC Staff oppose the appeal and the request for oral argument.²

For the reasons set forth below, we deny the appeal of NC WARN as well as the embedded motion to suspend the proceeding. We also deny the request for oral argument because we find it to be unnecessary.

I. BACKGROUND

On February 19, 2008, Progress submitted an application for a COL to construct and operate two Westinghouse AP1000 reactors at the Shearon Harris site. The application was docketed and a Notice of Hearing and Opportunity to Petition

¹ Notice of Appeal, Request for Oral Argument and Brief Supporting Notice of Appeal by NC WARN (July 22, 2009) (NC WARN Appeal).

² Brief of Progress Energy Carolinas, Inc. in Opposition to NC WARN's Notice of Appeal, Request for Oral Argument, and Brief Supporting Notice of Appeal (Aug. 3, 2009); NRC Staff Brief in Opposition to NC WARN's Appeal and Request for Oral Argument (Aug. 3, 2009).

for Leave to Intervene was published in the *Federal Register*.³ In response, NC WARN filed a motion to immediately suspend the hearing notice on June 24, 2008.⁴ We denied the motion in CLI-08-15, on July 23, 2008.⁵

Thereafter, NC WARN timely filed a request for hearing and petition for leave to intervene, asserting that it had representational standing on behalf of its members and proffering eleven contentions.⁶ Progress and the NRC Staff timely filed answers. Progress did not contest NC WARN's standing, but opposed admission of all eleven contentions.⁷ The NRC Staff also did not challenge NC WARN's standing, and opposed all but a portion of one of the contentions.⁸ NC WARN filed a timely reply.⁹ In addition, the North Carolina Utilities Commission (NCUC) and the South Carolina Office of Regulatory Staff (SC ORS) each requested to participate as an interested governmental entity in any hearing pursuant to 10 C.F.R. § 2.315(c) and requested to be added to the service list.¹⁰ Neither Progress nor the Staff opposed those requests.¹¹

As part of its petition to intervene and request for hearing, NC WARN sought reconsideration of our ruling in CLI-08-15 that denied NC WARN's motion to immediately suspend the hearing notice.¹² Recognizing that it lacked

³ Acceptance for Docketing of an Application for Combined License for Shearon Harris Units 2 and 3, 73 Fed. Reg. 21,995 (Apr. 23, 2008); Notice of Hearing and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the Shearon Harris Units 2 and 3, 73 Fed. Reg. 31,899 (June 4, 2008).

⁴ Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration by the North Carolina Waste Awareness and Reduction Network (June 24, 2008).

⁵ CLI-08-15, 68 NRC 1 (2008).

⁶ Petition for Intervention and Request for Hearing by the North Carolina Waste Awareness and Reduction Network (Aug. 4, 2008) (NC WARN Petition).

⁷ Progress Energy's Answer Opposing Petition for Intervention and Request for Hearing by the North Carolina Waste Awareness and Reduction Network (Aug. 29, 2008) (Progress Answer).

⁸ NRC Staff Answer to "Petition for Intervention and Request for Hearing by the North Carolina Waste Awareness and Reduction Network" (Aug. 29, 2008) (NRC Staff Answer).

⁹ NC WARN's Reply to Staff and Progress Energy Answers to Petition for Intervention and Request for Hearing (Sept. 5, 2008) (NC WARN Sept. 5, 2008 Reply).

¹⁰ Request of the North Carolina Utilities Commission for an Opportunity to Participate in Any Hearing and to Be Added to the Official Service List (July 28, 2008); Request of the South Carolina Office of the Regulatory Staff for an Opportunity to Participate in Any Hearing and to Be Added to the Official Service List (Aug. 4, 2008).

¹¹ Progress Energy's Response to Requests of the North Carolina Utilities Commission and the South Carolina Office of the Regulatory Staff (Aug. 28, 2009); NRC Staff Answer to "Request of the North Carolina Utilities Commission for an Opportunity to Participate in Any Hearing and to Be Added to the Official Service List" (Aug. 20, 2008); NRC Staff Answer to "Request of the South Carolina Office of the Regulatory Staff for an Opportunity to Participate in Any Hearing and to Be Added to the Official Service List" (Aug. 28, 2008).

¹² NC WARN Petition at 7.

jurisdiction to reconsider a Commission decision, the Board promptly issued a memorandum and order explaining that its standing and contention admissibility ruling would not address the embedded motion.¹³ We denied the embedded motion for reconsideration in an unpublished decision on September 11, 2008.¹⁴

The Atomic Safety and Licensing Board issued LBP-08-21 on October 30, 2008, which granted NC WARN's request for hearing and admitted NCUC and SC ORS as interested governmental entities.¹⁵ The Board found that NC WARN had demonstrated representational standing and had proffered one admissible contention, namely, Contention TC-1 — NC WARN's assertion that the COL application is incomplete due to ongoing review of revisions to the AP1000 certified design.¹⁶

On November 10, 2008, Progress and the NRC Staff appealed the Board's ruling in LBP-08-21, arguing that the Board erred in admitting Contention TC-1 and referring it to the Staff to "sort out" its relevance to the ongoing AP1000 design certification amendment proceeding.¹⁷ NC WARN filed an answer in opposition to the Progress and NRC Staff appeals.¹⁸ Meanwhile, on November 13, 2008, NC WARN filed a motion to hold the proceeding in abeyance pending completion of the design certification rulemaking.¹⁹ NC WARN included within this motion a request that we reconsider our ruling in CLI-08-15 denying NC WARN's motion to immediately suspend the hearing notice.²⁰

In CLI-09-8, we agreed with Progress and the Staff, holding that the Board erred in referring Contention TC-1 to the NRC Staff without making an appropriate contention admissibility determination under 10 C.F.R. § 2.309(f)(1).²¹ Accordingly, we remanded the proceeding to the Board for reassessment of the admissibility of Contention TC-1. We also instructed that if the Board found the contention to be "otherwise admissible," it then must determine if referral to the

¹³ Licensing Board Memorandum and Order (Concerning Administrative Matters) (Aug. 20, 2008) (unpublished).

¹⁴ Order (Sept. 11, 2008) (unpublished).

¹⁵ LBP-08-21, 68 NRC 554 (2008).

¹⁶ *Id.* at 559-64.

¹⁷ Progress Energy's Appeal of the Atomic Safety and Licensing Board's Decision Admitting the North Carolina Waste Awareness and Reduction Network (Nov. 10, 2008); NRC Staff Notice of Appeal of LBP-08-21, Memorandum and Order (Ruling on Standing and Contention Admissibility) and Accompanying Brief (Nov. 10, 2008).

¹⁸ Response by NC WARN in Opposition to NRC Staff and Progress Energy Appeals from LBP-08-21 (Nov. 20, 2008).

¹⁹ Motion by NC WARN to Hold the Harris Combined License Application Adjudication in Abeyance Pending Completion of Rulemaking on the Standard Design Certification Application for the AP1000 Reactor Design (Nov. 13, 2008).

²⁰ *Id.* at 2.

²¹ CLI-09-8, 69 NRC 317 (2009).

NRC Staff for resolution in the AP1000 design certification rulemaking would be appropriate.²² In addition, we rejected NC WARN's November 13, 2008 motion to hold the proceeding in abeyance as well as the motion for reconsideration of CLI-08-15 embedded within it.²³

In the time between the appeal of LBP-08-21 and our decision in CLI-09-8, NC WARN filed before the Board a motion to allow a new contention.²⁴ Labeled as Contention TC-7, the purportedly new contention states that the COL application is incomplete due to the filing of Revision 17 to the AP1000 certified design and incorporates NC WARN's arguments made in support of then-admitted Contention TC-1. Upon Progress' motion that the Board issue a scheduling order governing the responses to this and future new or amended contention motions, the Board established a two-part briefing schedule for new or amended contentions. First, the parties were required to address the timing factors under subsections 2.309(c) and (f)(2). If the Board determined that NC WARN met the timing requirements under this section and granted the motion for leave to file a new or amended contention, then the parties would be required to address the contention admissibility factors in section 2.309(f)(1).²⁵ Consistent with the Board's order, Progress and the Staff filed their answers opposing admission of Contention TC-7 on the grounds that the new contention motion failed to meet the requirements of 10 C.F.R. § 2.309(f)(2) and (c).²⁶ The second part of the Board's established briefing schedule was not initiated because the Board determined that NC WARN failed to meet the requirements of 10 C.F.R. § 2.309(f)(2) and (c), and thus denied the motion.²⁷

Finally, on remand from CLI-09-8, the Board determined that Contention TC-1 did not meet the contention admissibility requirements under 10 C.F.R. § 2.309(f)(1).²⁸ Accordingly, the Board denied NC WARN's petition to intervene and request for hearing, denied the participation requests of NCUC and SC ORS as moot, and terminated the proceeding.²⁹ NC WARN's timely appeal followed.

²² *Id.* at 327.

²³ *Id.* at 328-29.

²⁴ Motion by NC WARN to Allow New Contention (Nov. 13, 2008) (NC WARN New Contention Motion).

²⁵ Licensing Board Order (Scheduling Order for Responses to Late-Filed Contentions) (Nov. 19, 2008) (unpublished).

²⁶ Progress Response Opposing the Motion by the North Carolina Waste Awareness and Reduction Network for Leave to File a New Contention (Nov. 24, 2008); NRC Staff Answer to "Motion by NC WARN to Allow New Contention" (Nov. 24, 2008).

²⁷ Licensing Board Memorandum and Order (Ruling on Request to Admit New Contention) (Dec. 23, 2008) (unpublished) (Licensing Board New Contention Decision).

²⁸ LBP-09-8, 69 NRC 736 (2009).

²⁹ *Id.* at 746.

II. DISCUSSION

NC WARN challenges the three Board orders discussed above: (1) LBP-08-21, finding ten of NC WARN's original contentions to be inadmissible, but admitting Contention TC-1; (2) the December 23, 2008 unpublished order denying the motion for leave to file Contention TC-7; and (3) LBP-09-8, finding Contention TC-1 to be inadmissible and terminating the proceeding. In addition, NC WARN "appeals" the two Commission orders discussed above: (1) CLI-08-15, denying NC WARN's motion to immediately suspend the hearing notice; and (2) CLI-09-8, remanding the Board's contention admissibility determination on Contention TC-1, denying the motion for reconsideration of CLI-08-15, and denying the motion to suspend the proceeding.

These appeals, and NC WARN's request for oral argument, are addressed below. We begin with NC WARN's request for oral argument.

A. Request for Oral Argument

Pursuant to 10 C.F.R. § 2.343, the Commission has discretion to "allow oral argument upon the request of a party made in a petition for review, brief on review, or upon its own initiative." In order to grant a request for oral argument, we require a showing of how it will assist us in reaching a decision.³⁰ The only statement made in NC WARN's appeal supporting its request for oral argument is that it should be granted "in light of the arguments given above [in the appeal] and the serious and significant issues raised."³¹ We decline to exercise our discretion here because the written record in this case is thorough, effectively sets forth the positions of the participants, and, overall, contains sufficient information on which to base our decision.³² We therefore deny the request for oral argument.

B. CLI-08-15 and CLI-09-8

As discussed above, in CLI-08-15 we denied NC WARN's motion to suspend the hearing notice; in CLI-09-8 we remanded the issue of the admissibility of Contention TC-1 to the Board and denied an embedded motion for reconsideration of CLI-08-15 and an embedded motion to hold the proceeding in abeyance. NC

³⁰ See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 59 n.4 (1993) (denying request for oral argument because showing was not made); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 68-69 (1992) (reiterating holding in earlier decision that request must be accompanied with an explanation of how oral argument will assist the Commission in reaching a decision).

³¹ NC WARN Appeal at 30.

³² See *Comanche Peak*, CLI-92-12, 36 NRC at 68-69.

WARN styled its challenges to CLI-08-15 and CLI-09-8 as appeals.³³ However, our rules do not permit such “appeals.” In substance, NC WARN’s appeals of CLI-08-15 and CLI-09-8 are motions for reconsideration,³⁴ which are appropriately considered under 10 C.F.R. § 2.323(e).

A motion for reconsideration may not be filed except upon leave of the adjudicatory body that rendered the decision. If leave is granted, the motion must show “compelling circumstances, such as the existence of an unanticipated, clear and material error, which could not have been anticipated, that renders the decision invalid.”³⁵

NC WARN’s challenges to these two Commission decisions are procedurally defective because NC WARN has not sought leave to file the “motions.” This alone is sufficient reason to deny them.³⁶ In any event, NC WARN also has failed to assert any compelling circumstances that would justify reconsideration of our denial in CLI-08-15 of NC WARN’s motion to immediately suspend the proceeding, or the denial in CLI-09-8 of NC WARN’s embedded motion for reconsideration of CLI-08-15³⁷ and additional motion to hold the proceeding in abeyance. Rather, NC WARN incorporates by reference the legal arguments made in the previous motions and pleadings that were the subject of CLI-08-15 and CLI-09-8 and otherwise provides no new justification as to why these decisions deserve reconsideration.³⁸ Thus, we find no “changed circumstances that could not previously have been brought to us,”³⁹ and we decline to disturb our rulings in CLI-08-15 and CLI-09-8.⁴⁰

³³ See NC WARN Appeal at 1.

³⁴ See *id.* at 30 (concluding that “the decisions by the ASLB and the Commission not to hold this proceeding in abeyance should be reconsidered and reversed”).

³⁵ 10 C.F.R. § 2.323(e). In addition, “[t]he motion must be filed within ten (10) days of the action for which reconsideration is requested.” *Id.*

³⁶ See Order (Sept. 11, 2008) (unpublished) (citing 10 C.F.R. §§ 2.323(e), 2.345(b)). Further, NC WARN’s request is untimely, as more than 10 days have passed since the issuance of either decision.

³⁷ That makes this the third motion for reconsideration of CLI-08-15. As we explained earlier in this proceeding, “[o]ur rules do not provide for multiple requests for reconsideration of the same decision.” CLI-09-8, 69 NRC at 328.

³⁸ NC WARN Appeal at 2. NC WARN also, as it did in support of its November 13, 2008 motion for reconsideration, “adopts . . . the compelling arguments in the Texans for a Sound Energy Policy’s Petition to Hold Docketing Decision and/or Hearing Notice for Victoria Combined License Application in Abeyance . . . filed on November 3, 2008.” *Id.* at 17 n.9. We find this support to be unpersuasive, as we did in CLI-09-8. See CLI-09-8, 69 NRC at 329.

³⁹ CLI-09-8, 69 NRC at 328-29 n.48 (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-7, 29 NRC 395, 398 n.8 (1989)).

⁴⁰ NC WARN requests that the Commission reconsider “[p]recluding NC WARN from raising the issue of the lack of finality of reactor design and procedures.” NC WARN Appeal at 17-18. We again reject this request. Our rules permit the filing of a combined license application during the pendency of a design certification rulemaking.

C. LBP-08-21

In its appeal of LBP-08-21, NC WARN asserts that the Board erred in denying ten of its originally proffered contentions.⁴¹

Our rules of practice provide for an automatic right to appeal a Board decision wholly denying a petition to intervene.⁴² We will defer to the Board's rulings on standing and contention admissibility, however, unless the appeal points to an error of law or abuse of discretion.⁴³

Our contention admissibility "requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements."⁴⁴ Under our rules:

A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner 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; [and]
- (vi) . . . Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.⁴⁵

Applying these factors, we find that the Board did not err in rejecting NC WARN's proposed contentions, as discussed below.

⁴¹ NC WARN's standing is not at issue here.

⁴² See 10 C.F.R. § 2.311(c). This occurred when the Board found the last remaining contention, Contention TC-1, inadmissible in LBP-09-8.

⁴³ See *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986).

⁴⁴ *USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006).

⁴⁵ 10 C.F.R. § 2.309(f)(1).

1. Contention TC-2 (Track Record of Fire Violations)

The event of a significant fire can lead to the loss of the operators' ability to achieve and maintain hot standby/shutdown conditions further resulting in significant accidental release of radiation and posing a severe threat to public health and safety. Given its track record of noncompliance of fire regulations at the existing Harris Unit 1, Progress Energy should not be granted a COL for the two proposed reactors. The existing Harris reactor has been out of compliance since at least 1992 with requirements to maintain the post-fire safe shutdown systems of the reactor that minimize the probability and effects of fires and explosions. Given Progress Energy's history of noncompliance at the existing Harris reactor, NC WARN anticipates similar noncompliance at the proposed Harris reactors.⁴⁶

In Contention TC-2, NC WARN references perceived violations of NRC fire protection regulations involving the existing reactor in operation at the site, Unit 1. As argued in the petition, these violations present "both a risk to [the existing] reactor and an additional risk to the proposed Harris reactors."⁴⁷ NC WARN does not elaborate on this claim except to suggest that a potential accident at the existing reactor could have an impact on the proposed reactors.⁴⁸ In addition, NC WARN speculates that Progress will not comply with the fire regulations for the proposed reactors given its "history of noncompliance at the existing Harris reactor."⁴⁹

NC WARN also challenges the "one fire assumption" in the design of the AP1000, which is used in performing the safe shutdown evaluation. In support of this challenge, NC WARN asserts that the "risk of 'multiple spurious actuation'" renders this a false assumption.⁵⁰ On appeal, NC WARN maintains that in finding the contention to be inadmissible, the Board ignored the past record of fire violations and treated them as irrelevant.⁵¹

We find no reversible error in the Board's decision. To the extent that Contention TC-2 challenges compliance with fire protection regulations at existing Unit 1, the Board appropriately ruled that the issue is outside the scope of this COL proceeding for proposed Units 2 and 3, and therefore fails to

⁴⁶ NC WARN Petition at 18.

⁴⁷ *Id.* at 23.

⁴⁸ *See id.* at 24 ("No assurance can be given by Progress Energy or the NRC that public health and safety will be protected or that potential accidents at the existing Harris reactor will have no impact on the proposed Harris reactors.").

⁴⁹ *Id.* at 18.

⁵⁰ *Id.* at 23-24.

⁵¹ *See* NC WARN Appeal at 19.

meet 10 C.F.R. § 2.309(f)(1)(iii).⁵² With regard to the COL application, the Board reasonably concluded that NC WARN has not met the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi) because it has not demonstrated any link between the purported violations at Unit 1 and any future noncompliance or resulting safety risk affecting proposed Units 2 and 3. Contrary to NC WARN's assertion, the Board did not find the claimed violations irrelevant in and of themselves; rather the Board pointed out that NC WARN had not shown, with more than bare assertions, how these violations were relevant to the COL proceeding.⁵³

On appeal, NC WARN emphasizes that the purported track record of non-compliance means that Progress cannot be trusted with a COL for Units 2 and 3.⁵⁴ This argument, which amounts to a challenge to the character or integrity of the applicant, fails as well. "We have . . . placed strict limits on 'management' and 'character' contentions."⁵⁵ "When 'character' or 'integrity' issues are raised, we expect them to be directly germane to the challenged licensing action,"⁵⁶ and "be of more than historical interest."⁵⁷ As the Board pointed out, NC WARN has failed to provide the requisite link between what are essentially historical claims regarding the existing unit and the COL application in this proceeding.

Finally, NC WARN's challenge to the "one fire assumption" in the AP1000 design constitutes an impermissible challenge to Commission regulations.⁵⁸ Elements of the AP1000 design concerning fire protection, including the "one fire assumption," were addressed in the initial AP1000 rulemaking, and are not currently at issue in the ongoing design certification amendment rulemaking.⁵⁹

⁵² See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 240 (2008) (finding claim of deficiency in construction of concrete containment to be insufficient because it was not linked to application at issue in the proceeding).

⁵³ LBP-08-21, 68 NRC at 565-66.

⁵⁴ NC WARN Appeal at 19-20.

⁵⁵ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 366 (2001).

⁵⁶ *Id.* at 366-67.

⁵⁷ *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 120 (1995).

⁵⁸ See 10 C.F.R. § 2.335(a). Further, NC WARN has not requested a waiver pursuant to 10 C.F.R. § 2.335(b).

⁵⁹ There has been no change in this section of Revision 16 from what was approved in Revision 15 (10 C.F.R. Part 52, Appendix D). See NRC Staff Answer at 20. Compare Westinghouse AP1000 Design Control Document, Rev. 15, Tier 2, Chapter 9, Appendix 9A, section 9A.2.7.1, at 9A-5 (ADAMS Accession No. ML053460410), with Westinghouse AP1000 Design Control Document, Rev. 16, Tier 2, Chapter 9, Appendix 9A, section 9A.2.7.1, at 9A-5 (ADAMS Accession No. ML071580937). On September 22, 2008, Westinghouse submitted Revision 17 to the AP1000 design. Letter from Robert Sisk, Manager, Licensing and Customer Interface, Regulatory Affairs and Standardization, Westinghouse, to U.S. Nuclear Regulatory Commission (Sept. 22, 2008) (ADAMS Accession No.

(Continued)

For these reasons, and for the reasons the Board gave, we find that the Board did not err in determining that Contention TC-2 is inadmissible.

2. *Contention TC-3 (Aircraft Attacks)*

Progress Energy's [environmental report (ER)] fails to satisfy [the National Environmental Policy Act (NEPA)] because it does not address the environmental impacts of a successful attack by the deliberate and malicious crash of a fuel-laden and/or explosive-laden aircraft and resulting severe accidents of the aircraft's impact and penetration on the facility. It is unreasonable for the NRC to dismiss the possibility of an aviation attack on the existing and proposed Harris reactors in light of the studies by the NRC that this is a real possibility that could have devastating results.⁶⁰

Even though Contention TC-3 mentions NEPA in the body of the contention, which suggests that the contention addresses environmental issues, NC WARN also addresses safety issues in connection with Contention TC-3. Of the environmental issues it raises, NC WARN insists that the "Commission's basis for refusing to consider the environmental impacts of deliberate and malicious acts in a COL is no longer viable, and therefore may be challenged in this proceeding."⁶¹ In support of this claim, NC WARN argues, among other things, that the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC*⁶² should control in this proceeding.⁶³ NC WARN also asserts that the ER does not provide alternatives for mitigating the consequences of an aircraft impact. According to NC WARN, this is required as part of the severe accident mitigation alternatives (SAMA) analysis.⁶⁴

Of the safety-related issues it raises, NC WARN quotes 10 C.F.R. § 50.34(a)(4) for the proposition that NRC regulations require "that a nuclear power plant must be designed against accidents that are 'anticipated during the life of the facility.'"⁶⁵

ML083230167). Prior to the Board's reassessed ruling on Contention TC-1 and termination of the proceeding, Progress notified the Board and the parties that it had revised its COL application to include, among others, changes reflected in Revision 17. Letter from John H. O'Neill, Jr., counsel for Progress Energy, to Board (June 22, 2009) (ADAMS Accession No. ML091730590). The "one fire assumption" remains unchanged in Revision 17. See Westinghouse AP1000 Design Control Document, Rev. 17, Tier 2, Chapter 9, Appendix 9A, section 9A.2.7.1, at 9A-5 (ADAMS Accession No. ML083230723).

⁶⁰ NC WARN Petition at 24. In its appeal NC WARN jointly addressed Contentions TC-3 and TC-4, but they are addressed separately here. See NC WARN Appeal at 20-21.

⁶¹ NC WARN Petition at 25.

⁶² 449 F.3d 1016 (9th Cir. 2006).

⁶³ NC WARN Petition at 29.

⁶⁴ *Id.* at 30.

⁶⁵ *Id.* at 24-25.

NC WARN then argues that an aircraft attack is reasonably foreseeable and should “qualify as a design-basis threat (DBT), i.e., an accident that must be designed against under NRC safety regulations.”⁶⁶ NC WARN also incorporates the fire safety discussion in Contention TC-2 that “the various structures, systems, and components of the plant cannot be relied upon if the plant is not in compliance with safety-related rules that leave all of the post-fire safe shutdown systems vulnerable.”⁶⁷ In addition, NC WARN provides examples of the possible effects after an aircraft impact, citing various studies.⁶⁸

On appeal, NC WARN discusses only its environmental arguments,⁶⁹ apparently abandoning the safety-related ones.⁷⁰ Nevertheless, we address both the environmental and safety aspects of Contention TC-3.

With regard to the contention’s environmental aspects, we continue to maintain that the environmental effects of aircraft impacts from terrorist attacks are outside the scope of the NRC’s NEPA review.⁷¹ We have made clear that outside of the Ninth Circuit, as is the case here, we will not apply the *Mothers for Peace* ruling.⁷² We have complied with the Ninth Circuit’s ruling for facilities within that Circuit, as we are required to do. That experience, however, is very limited and does not demonstrate that conducting environmental analyses of terrorist scenarios for the licensing of all major facilities would be practicable or lead to meaningful additional information. Therefore, we are not persuaded by the Chairman’s dissent, and are not prepared to abandon our carefully considered decisions without sufficient justification. This ruling reflects the Commission’s consistent position on the requirements of NEPA and their application, and fundamentally, we continue to disagree with the Chairman’s assertion that our approach is at odds with the agency’s commitment to transparency. Accordingly, to the extent that

⁶⁶ *Id.* at 25.

⁶⁷ *Id.* at 26.

⁶⁸ *Id.* at 25-28.

⁶⁹ See NC WARN Appeal at 20-21.

⁷⁰ We will deem waived arguments made before the Board that are abandoned on appeal. See *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 414 (1990).

⁷¹ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-29 (2007). The Third Circuit recently held that because the petitioner in *Oyster Creek* had not shown a “reasonably close causal relationship” between an aircraft attack and the relicensing proceeding at issue, “such an attack does not warrant NEPA evaluation.” *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132, 136 (3d Cir. 2009). In doing so, the Third Circuit discussed its departure from the Ninth Circuit’s reasoning in *Mothers for Peace*. *Id.* at 142-43.

⁷² See, e.g., *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 14 (2010).

the contention asserts that the NRC must address these environmental effects, it is inadmissible.⁷³

With regard to the contention's remaining aspects, as an initial matter we note — as we did recently in the *Summer* COL proceeding⁷⁴ — that NC WARN appears to confuse the concepts of “design basis threat,” that is, the set of events that must be considered in the design of plant security features, and a “design basis event,” that is, an accident that must be considered in plant design.⁷⁵ Under either interpretation, however, the contention is inadmissible.

First, with respect to the design basis threat, the NRC has concluded that protection against the threat of air attacks is adequately provided by other federal agencies and what measures reasonably can be expected of licensees. Accordingly, the agency decided not to include the threat of air attacks in the 2007 revision to the design basis threat rule. The Ninth Circuit recently upheld this decision, finding the NRC's conclusions to be reasonable.⁷⁶ Thus, NC WARN's challenge, to the extent that it asserts the application should consider air attacks as a design basis threat, is outside the scope of the proceeding.⁷⁷

Second, as a safety matter, a recent final rule requires applicants for new nuclear power reactors to perform a design-specific assessment of the effects of the impact of a large, commercial aircraft.⁷⁸ Because the AP1000 vendor has submitted a proposed amendment to the design that is intended to comply with the final rule, which is currently under consideration in the AP1000 design certification amendment rulemaking, this aspect of the contention effectively is moot.⁷⁹ We therefore find no error or abuse of discretion in the Board's decision regarding Contention TC-3 for the above reasons.

⁷³This includes NC WARN's assertion that the NRC must consider aircraft attacks as part of its SAMA and severe accident mitigation design alternatives (SAMDA) analysis, which arise in connection with the agency's NEPA obligations. Further, to the extent it challenges the SAMDA analysis, it is an impermissible challenge to the AP1000 certified design in 10 C.F.R. Part 52, Appendix D. See 10 C.F.R. § 51.107(c).

⁷⁴*Summer*, CLI-10-1, 71 NRC at 11.

⁷⁵Compare 10 C.F.R. § 50.34(a)(4) (design basis event), with 10 C.F.R. § 73.1 (design basis threat).

⁷⁶See *Public Citizen v. NRC*, 573 F.3d 916, 925-26 (9th Cir. 2009). See generally Final Rule: “Design Basis Threat,” 72 Fed. Reg. 12,705 (Mar. 19, 2007).

⁷⁷See 10 C.F.R. § 2.309(f)(1)(iii).

⁷⁸See Final Rule: “Consideration of Aircraft Impacts for New Nuclear Power Reactor Designs,” 74 Fed. Reg. 28,112, 28,112 (June 12, 2009). In promulgating the final rule, the Commission determined that the impact of a large, commercial aircraft is a beyond-design basis event. *Id.*

⁷⁹When the Licensing Board made its admissibility determination on this contention, the proposed rule was pending. See Proposed Rule: “Consideration of Aircraft Impacts for New Nuclear Power Reactor Designs,” 72 Fed. Reg. 56,287 (Oct. 3, 2007). The Board thus found the contention inadmissible to the extent that it challenged a matter that was the subject of an ongoing rulemaking. We find no error in the Board's analysis in this regard.

3. *Contention TC-4 (Aviation Attacks and Fires)*

The ER for the COL for the proposed Harris reactors fails to satisfy NEPA because it does not address a significant fire involving noncompliant fire protection features for both primary and redundant safe shutdown electrical circuits caused by a deliberate malicious action using a fuel-laden and/or explosive-laden aircraft on the facility.⁸⁰

In a nutshell, Contention TC-4, both before the Board and on appeal, combines and repeats the arguments made in support of Contentions TC-2 and TC-3.⁸¹ This contention is inadmissible for the reasons the Board gave,⁸² as well as the reasons discussed above. The Board did not err or abuse its discretion in finding this contention to be inadmissible.

4. *Contention TC-5 (High-Density Spent Fuel Pools)*

The ER for the proposed Harris reactors fails to satisfy NEPA because it does not consider the potential impacts of a radiation release caused by high-density storage of highly-radioactive “spent” fuel in its spent fuel pools. The [COL application] indicates that spent fuel rods would be stored in two newly constructed cooling pools in buildings designed to withstand only weather-related impacts. The proposed high-density storage heightens the risk of catastrophic radiation releases due to accident or terrorism.⁸³

NC WARN asserts in Contention TC-5 that the design of the spent fuel pools at the current reactor and proposed reactors increases the risk of fire in the event of a loss-of-pool-coolant accident or terrorist attack.⁸⁴ According to NC WARN, the NRC should evaluate the releases from these events in its NEPA analysis. Contention TC-5 also incorporates the arguments made in support of Contentions TC-3 and TC-4 regarding aircraft attacks.⁸⁵ The Board found Contention TC-5 to be inadmissible on the grounds that NC WARN failed to provide supporting references for its arguments; it improperly challenged the AP1000 certified design; it impermissibly challenged Revision 16 of the AP1000 design control document (DCD);⁸⁶ and, to the extent it raised issues regarding the environmental

⁸⁰NC WARN Petition at 31.

⁸¹See *id.* at 31-33; NC WARN Appeal at 20-21.

⁸²See LBP-08-21, 68 NRC at 568-69.

⁸³NC WARN Petition at 33-34.

⁸⁴*Id.* at 34-36.

⁸⁵*Id.* at 36.

⁸⁶The Board erred in rejecting this argument out of hand. See LBP-08-21, 68 NRC 571. As we explained in our Policy Statement on the Conduct of New Reactor Licensing Proceedings, contentions
(Continued)

consequences of terrorist attacks, it improperly raised matters outside the scope of the proceeding.⁸⁷

In its appeal, NC WARN argues that the Board erred in finding Contention TC-5 inadmissible as a challenge to the certified design because Westinghouse's submission of Revision 17 means there is "a significant deficiency in the [COL application]" from the absence of a final design.⁸⁸ NC WARN elaborates that "[t]he regulatory required SAMDAs simply cannot be investigated or developed until the final designs and procedures are finalized."⁸⁹

The Board's determination that Contention TC-5 is inadmissible was reasonable. To the extent that the contention asserts that NEPA requires the Commission to analyze the environmental impacts of terrorist attacks — either by its incorporation of Contentions TC-3 and 4 or the argument that a SAMDA analysis should be performed — it is inadmissible. As discussed above with respect to Contention TC-3, we decline to apply the ruling in *Mothers for Peace* outside of the Ninth Circuit. To the extent that NC WARN challenges the AP1000 design certified in Part 52, Appendix D, it is an impermissible challenge to NRC regulations, as is the challenge regarding the absence of a "final" design. As we have reiterated in other COL proceedings, NRC regulations permit an applicant to reference a docketed, but not yet certified, design.⁹⁰

5. *Contention TC-6 (Reliability of Uranium Fuel)*

The assumption that uranium fuel is a reliable source of fuel for the projected operating life of the proposed Harris reactors is not supported in the [COL application] submitted by Progress Energy.⁹¹

that challenge a docketed, but not yet certified design that are "otherwise admissible" should be referred to the NRC Staff for consideration in the design review proceeding and held in abeyance. Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008) (providing instructions for treatment of certain design-related contentions in a proceeding on a COL application referencing a design for which certification has been requested, but not yet approved) (New Reactor Policy Statement). Nevertheless, the Board's oversight does not rise to the level of reversible error because the contention, in any event, is not otherwise admissible for the reasons discussed below.

⁸⁷ LBP-08-21, 68 NRC at 571.

⁸⁸ NC WARN Appeal at 22.

⁸⁹ *Id.*

⁹⁰ See 10 C.F.R. § 52.55(c); *Summer*, CLI-10-1, 71 NRC at 9; *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-09-4, 69 NRC 80, 85 (2009); see also *Luminant Generating Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), Nos. 52-034-COL and 52-035-COL (Apr. 27, 2009) (unpublished); *infra* Sections II.D, II.E.

⁹¹ NC WARN Petition at 36-37.

NC WARN states that worldwide uranium consumption has exceeded uranium production, and consequently asserts that Progress has failed to “fully and credibly discuss the reliability of uranium fuel supply” in its COL application. NC WARN cites information from the World Nuclear Association website to support this argument.⁹²

Due to ambiguity in the petition, the Board treated the contention as both a contention asserting an omission in the application or as one asserting flaws in an existing analysis, and found the contention inadmissible under either interpretation.⁹³ The Board explained that Contention TC-6 failed as a contention of omission because the ER contains a discussion of “Uranium Fuel and Energy Consumption.”⁹⁴ The Board then reasoned that the contention did not sufficiently challenge the analysis contained in the application. As an alternative basis for its ruling, the Board, “in an abundance of caution, examined” the information from the World Nuclear Association website cited in support of the contention and noted that it directly contradicted NC WARN’s claim that uranium is in short supply.⁹⁵

On appeal, NC WARN argues that the Board “apparently made evidentiary findings without allowing the parties the opportunity to put on evidence at hearing or even allow motions for summary disposition.”⁹⁶ NC WARN provides no support for this assertion, merely stating that “[i]t is not clear what factual evidence the ASLB based its decisions on or if the members of the ASLB relied on their own biases and beliefs outside any hearing record.”⁹⁷ The decision consists of the Board’s determination that the contention was insufficiently supported and failed to show that a genuine dispute exists on a material issue of law or fact with the application in contravention of 10 C.F.R. § 2.309(f)(1)(v) and (vi). The Board — appropriately — reviewed the materials cited in support of the contention, while making no pronouncements on whether the information contained in the application or the claims made in the petition were valid.⁹⁸ “We expect our licensing boards to examine cited materials to verify that they do, in fact, support

⁹² *Id.* at 37-38.

⁹³ LBP-08-21, 68 NRC at 573.

⁹⁴ *Id.* at 573 (citing Shearon Harris Nuclear Power Plant Units 2 and 3 COL Application, Part 3, Environmental Report (Rev. 0), section 10.2.2.3 (Feb. 2008) (ADAMS Accession No. ML080601078) (ER)).

⁹⁵ *Id.* at 573-74.

⁹⁶ NC WARN Appeal at 22.

⁹⁷ *Id.* NC WARN repeats its general claim of Board bias and/or Board reliance on extra-record material for a number of its contentions. We reject all of these unsupported assertions.

⁹⁸ *See, e.g., USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457, 462 (2006); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

a contention.”⁹⁹ We therefore decline to disturb the Board’s ruling on Contention TC-6.

6. Contention EC-1 (Underestimation of Costs)

In its [COL application], Progress Energy grossly underestimates the costs and risks of the proposed Harris reactors and grossly overestimates the costs of their alternatives. The lack of a reasonable cost basis means that there can be no reasonable analysis of comparative sources of energy generation, energy efficiency or other energy management strategies.¹⁰⁰

According to NC WARN, Contention EC-1 challenges “[o]ne of the fundamental deficiencies in the present ER[:] . . . the lack of a realistic and up-to-date cost estimate for the proposed Harris reactors.”¹⁰¹ NC WARN points out what it asserts to be a discrepancy in the higher estimated cost of reactors proposed by Progress Energy Florida, Inc., for a greenfield site in Levy County, Florida. In addition, NC WARN asserts that the estimates do not account for the cost of “transmission lines (excluding AFUDC [allowance for funds used during construction]), . . . [f]ederal subsidies, such as the cost of high-level waste disposal at the proposed Yucca Mountain repository . . . , tax breaks and direct subsidies, and liability coverage under the Price-Anderson Act.”¹⁰² NC WARN then argues that Progress Energy Carolinas, Inc. — the applicant here — “has not addressed any of the substantive issues about the costs and risks” (of which NC WARN lists examples),¹⁰³ “nor shown any of its analysis to support its decision to construct the proposed Harris reactors despite the costs and risks.”¹⁰⁴ Further, NC WARN asserts, the ER does not accurately present the costs of alternative energy sources, and “in large part ignores the positive benefits of energy efficiency, cogeneration, purchased power and alternative energy sources to reduce or meet the reduced energy demand.”¹⁰⁵

After this contention was briefed, but before the Board ruled on the petition, Progress sent a letter to the Board explaining, among other things, that it had substituted the higher cost estimate in the ER for the proposed Levy County reactors for the cost estimate in the ER for the proposed Harris reactors.¹⁰⁶ NC

⁹⁹ *American Centrifuge Plant*, CLI-06-10, 63 NRC at 457.

¹⁰⁰ NC WARN Petition at 38.

¹⁰¹ *Id.* at 39.

¹⁰² *Id.* at 40.

¹⁰³ *Id.* at 41.

¹⁰⁴ *Id.* at 42.

¹⁰⁵ *Id.*

¹⁰⁶ Letter from John H. O’Neill, Jr., Counsel for Progress Energy, to Board (Oct. 6, 2008) at 2-3.

WARN responded by letter that this rendered moot the part of the contention “that alleges that the estimate in the ER is understated,” but not “[t]he remainder of the contention regarding the cost-benefit analysis requirements.”¹⁰⁷ In ruling on the contention, the Board acknowledged both letters, but stated that they had no bearing on the Board’s decision.¹⁰⁸ Instead, the Board primarily relied on the *Midland* case, in which the Atomic Safety and Licensing Appeal Board held that it is inappropriate for the agency to consider economic costs when no environmentally preferable alternative has been identified.¹⁰⁹ Based on *Midland*, the Board determined that a COL applicant is required to provide a cost estimate in its ER “only where the [a]pplicant’s alternatives analysis indicates that there is an environmentally preferable alternative.”¹¹⁰ Because Progress had not identified an environmentally preferable alternative in its ER, the Board rejected Contention EC-1 “because it relies upon the faulty premise that NEPA, or our [a]gency’s implementation of NEPA, requires [Progress] to provide cost estimates in its ER.”¹¹¹

On appeal, NC WARN acknowledges that its claims relating to Progress’ cost estimates are now moot.¹¹² However, NC WARN argues that the Board’s “rationale for determining that costs are not required to be considered in the ER [only when there is an environmentally preferable alternative] is arbitrary and unreasonable.”¹¹³ According to NC WARN, this is because the Board “fails to comprehend that in the context of [a] reactor licensing case, the ‘no reactor’

¹⁰⁷ Letter from John D. Runkle, Counsel for NC WARN, to Board (Oct. 13, 2008) at 2. NC WARN also requested that the Board “take notice” of costs it asserted were omitted from Progress’ amended cost estimate. *Id.*

¹⁰⁸ LBP-08-21, 68 NRC at 575 n.23.

¹⁰⁹ *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 163 n.25 (1978).

¹¹⁰ LBP-08-21, 68 NRC at 576 (emphasis in original).

¹¹¹ *Id.* at 577.

¹¹² NC WARN Appeal at 24 (stating, “[t]he above discussion aside, this contention was rendered in large part moot”) (emphasis added). The subject of the “above discussion” to which NC WARN refers is NC WARN’s disagreement with the Board’s rationale for determining that a cost-benefit analysis is not required, and NC WARN’s assertion that there are environmentally preferable alternatives to the proposed reactors — specifically, the “no-reactor” option. *See id.* at 23 (stating that “the ‘no reactor’ option always has far fewer environmental impacts than the proposed ‘two reactor’ option and is therefore environmentally preferable”).

NC WARN also states on appeal that “it should be noted that the [Levy County] cost estimates did not include financing costs that could add an additional 50 percent to the total cost of the reactors.” *Id.* at 24. NC WARN fails to explain the relevance of this information or the relief it desires. Even if we were to consider it, NC WARN offers no facts or expert opinion — in contravention of 10 C.F.R. § 2.309(f)(1)(v) — to support its assertion that the total cost of the reactors will increase an additional 50% with financing costs.

¹¹³ *Id.* at 23.

option always has far fewer environmental impacts than the proposed ‘two reactor’ option and is therefore environmentally preferable.”¹¹⁴

As an initial matter, we agree with NC WARN that its claims relating to Progress’ cost estimates are now moot. In its initial petition, NC WARN used data from the proposed Levy County reactors as an example of a more current cost estimate. When Progress amended its ER to use the Levy County cost estimate, this portion of the contention was rendered moot.¹¹⁵ Therefore, we address the balance of the contention — NC WARN’s assertion that a cost-benefit analysis is required, and its assertion that this cost-benefit analysis should include a comparison to alternative energy sources.

In our recent ruling in the *Summer* COL proceeding — which was issued after the Board’s decision in LBP-08-21 — we explained that if a petitioner has proffered an admissible contention asserting an environmentally preferable alternative to the proposed reactor(s), this also would trigger the requirement in *Midland* that the ER contain cost estimates.¹¹⁶ The question before us in this matter, then, is whether NC WARN has stated an admissible contention that asserts an environmentally preferable alternative to the proposed reactors.

Although the Board did not reach the issue, it suggested in a footnote that NC WARN had not “properly challenged” Progress’ alternatives analysis.¹¹⁷ Based on our reading of the petition, we find that the Board’s decision to reject the contention did not constitute reversible error.

Contrary to the requirements in 10 C.F.R. § 2.309(f)(1)(v), NC WARN merely asserts, without any facts or expert opinion offered in support, that

[i]n contrast to the underestimation of reactor costs, the costs, impacts, and requirements for the renewable energy alternatives are particularly inaccurate in the ER, with inflated land requirements for wind and solar, and unreasonable conclusions that the waste impacts of wind and solar are greater than that of a nuclear power plant. Progress Energy has substituted its calculation of land requirements for flat plate or tracking photovoltaics, for solar thermal plants which is a completely different technology.¹¹⁸

¹¹⁴ *Id.*

¹¹⁵ NC WARN did not state its view as to whether any of its other “underestimation of costs” arguments were not rendered moot by Progress’ amended cost estimate. Nonetheless, to the extent it takes the position that any of them remain viable (e.g., its arguments regarding costs for transmission lines, federal subsidies “such as the cost of high-level waste disposal,” tax breaks and direct subsidies, liability coverage under the Price-Anderson Act, or the risks of nuclear energy), *see* NC WARN Petition at 40, we deem them abandoned. NC WARN does not mention these arguments on appeal. *See White Mesa*, CLI-01-21, 54 NRC at 253.

¹¹⁶ *See Summer*, CLI-10-1, 71 NRC at 23-24.

¹¹⁷ *See LBP-08-21*, 68 NRC at 576 n.25.

¹¹⁸ NC WARN Petition at 42.

There is no support or explanation offered to elucidate what land requirements ought to have been considered (i.e., how they differed from what is assumed in the application), or why the conclusions regarding the waste impacts of power generation using wind and solar technologies are unreasonable. Likewise, there is no support offered for NC WARN's assertion in its petition that Progress has underestimated the environmental impact of the proposed reactors.¹¹⁹ Moreover, with no specific mention in its appeal, NC WARN apparently has abandoned this discussion concerning the benefits of alternative energy sources.¹²⁰

The only alternative that NC WARN mentions on appeal is the "no reactor" option. The "no reactor" option, or no-action alternative, was not raised before the Board and is therefore improperly raised on appeal.¹²¹ Even were we to consider it, NC WARN has provided no facts or expert opinion in support of its assertion that this option "always has far fewer environmental impacts than the proposed 'two reactor' option."¹²²

Therefore, as the Board suggested, NC WARN has not "properly challenged"¹²³ Progress' alternatives analysis or conclusion that there is no environmentally preferable alternative to the two reactors. Consequently, the balance of Contention EC-1 is inadmissible. For the above reasons, we find no reversible error or abuse of discretion in the Board's finding Contention EC-1 inadmissible.

7. Contention EC-2 (Carbon Footprint)

Progress Energy fails to present evidence or analysis of the "carbon footprint," i.e., the atmospheric carbon generated by mining and fuel processing, the construction

¹¹⁹ *Id.* (stating, without more, that "Progress Energy includes only the 192-acre footprint for the land use impact of the proposed reactors, omitting the thousands of acres to be flooded by increasing the size of the Harris Lake, the land taken for new transmission lines, relocated roads and bridges, and other infrastructure needs"). As Progress points out in its answer, these asserted omissions are not, in fact, omitted from the ER. See Progress Answer at 71-73 (citing ER §§ 10.1.1, 10.2.1.1, 10.3.1.1, 10.3.1.2, 10.3.1.3, 10.3.1.8, 10.3.2.2, 10.3.2.7, 10.3.3, and tables 10.1-1 and 10.4-1). The same is true for NC WARN's statement that the ER "*in large part* ignores the positive benefits of energy efficiency, cogeneration, purchased power and alternative energy sources to reduce or meet the reduced energy demand." NC WARN Petition at 42 (emphasis added). A discussion of these options is included in the ER, as Progress points out, and it is not otherwise clear what portion of the analysis in the application is challenged by NC WARN. See Progress Answer at 73-76 (citing ER §§ 8.2.2.2, 8.3.3, 9.2.1.1, 9.2.1.3, 9.2.2, 9.2.3, and table 9.2-1).

¹²⁰ See *White Mesa*, CLI-01-21, 54 NRC at 253.

¹²¹ See *Millstone*, CLI-08-17, 68 NRC at 239 n.38 (citing *American Centrifuge*, CLI-06-10, 63 NRC at 460).

¹²² NC WARN Appeal at 23.

¹²³ LBP-08-21, 68 NRC at 576 n.25.

and operation, the long-term waste storage, associated with the proposed Harris reactors in its ER.¹²⁴

In support of Contention EC-2, NC WARN asserts that “[t]he proposed Harris reactors would contribute to th[e] problem” of climate destabilization from greenhouse gases.¹²⁵ Therefore, according to NC WARN, the application “needs to include an analysis of the emission of greenhouse gases in the entire cycle, i.e.,” mining, transporting, and processing uranium ores; producing and transporting raw materials and components; constructing, operating, and closing the proposed reactors; and transporting and disposing radioactive waste.¹²⁶

The NRC Staff pointed out in its answer that the application did contain information on the carbon imprint of the reactor life cycle and uranium fuel cycle.¹²⁷ Accordingly, the Board reasoned that NC WARN erred when it asserted “that the [COL application] must consider these matters and implie[d] that it did not.”¹²⁸ NC WARN therefore failed to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact as required under 10 C.F.R. § 2.309(f)(1)(vi). Furthermore, the Board noted that NC WARN did not reference any portion of the COL application with which it takes issue, which also is required under section 2.309(f)(1)(vi).¹²⁹

In addition to finding the contention inadmissible, the Board provided additional views that it characterized as “not relevant to [its] finding.”¹³⁰ On appeal,

¹²⁴ NC WARN Petition at 43.

¹²⁵ *Id.* at 43-44.

¹²⁶ *Id.* at 44.

¹²⁷ NRC Staff Answer at 40-41 (citing ER §§ 9.2.3.1.1 and 9.2.3.2.1; Parliamentary Office of Science and Technology, “Carbon Footprint of Electricity Generation,” No. 268 (Oct. 2006), *available at* www.parliament.uk/documents/upload/postpn268.pdf (last visited Oct. 29, 2009)).

¹²⁸ LBP-08-21, 68 NRC at 579.

¹²⁹ *Id.*

¹³⁰ *Id.* The Board opined that even if NC WARN had asserted with particularity an error in the applicant’s analysis, it then would be faced with the “significant hurdle” of showing the requisite materiality of such an issue. This “impediment” would arise from (in the Board’s assessment) the low carbon imprint of nuclear power generation compared to that of “the only viable power generation alternatives (which are fossil-fueled)” rendering the carbon imprint issue immaterial to the decision the NRC must make. *Id.* The Board also suggested that the Commission consider amending Table S-3 in 10 C.F.R. § 51.51. *Id.* at 579-80. Because the Board did not refer to us its decision on this contention (as two other boards have done, *see Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431 (2008); *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361 (2008)), we need not address the Board’s additional views on the matter. However, the guidance that we provided in our recent decision declining review of the referred rulings in the *Bellefonte* and *Lee* COL proceedings applies equally here. *See Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), CLI-09-21, 70 NRC 927, 931 (2009).

NC WARN asserts that the Board's inclusion of these additional views indicates that it "apparently made evidentiary findings but did not allow the parties the opportunity to put on evidence at hearing or even allow motions for summary disposition."¹³¹ NC WARN claims that the Board "based its decision on a report in the [COL application] and the members . . . appeared to rely on their own biases and beliefs outside any hearing record."¹³² In addition, NC WARN asserts that "[a] clear reading of the contention shows that the [p]etition provides reports and citations to documents . . . that directly challenge the report relied upon in the [COL application]."¹³³

As we stated above,¹³⁴ NC WARN offers no support for this assertion, nor do we find any. Contrary to NC WARN's argument, the Board provided a clear rationale for its admissibility ruling, noting the areas where the application appeared to contain information that NC WARN erroneously claimed was omitted.¹³⁵ The Board also made clear that its additional views had no bearing on its admissibility decision.¹³⁶ Further, NC WARN's assertions that it provided sufficient support for the contention do not directly challenge the Board's finding that the contention erroneously asserted an omission in the application. Because the application contained the information NC WARN asserted was missing, the Board did not err or abuse its discretion in concluding that NC WARN failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

For these reasons, we reject NC WARN's unsupported claims that the Board improperly made evidentiary findings, and find that the Board reasonably concluded that Contention EC-2 is inadmissible.

8. Contention EC-3 (Water Requirements)

The [COL application] does not identify the plans for meeting the water requirements for the proposed Harris reactors with sufficient detail to determine if there will be adequate water during adverse weather conditions, such as droughts, and the environmental impacts for water withdrawals during both normal and adverse conditions.¹³⁷

¹³¹ NC WARN Appeal at 25.

¹³² *Id.* The Board cited an October 2006 report from the United Kingdom's Parliamentary Office of Science and Technology entitled "Carbon Footprint of Electricity Generation, No. 268," which is referenced in Chapter 9 of the ER. See LBP-08-21, 68 NRC at 578-79; *supra* note 127.

¹³³ *Id.*

¹³⁴ See *supra* note 97.

¹³⁵ LBP-08-21, 68 NRC at 579.

¹³⁶ *Id.*

¹³⁷ NC WARN Petition at 45.

Contention EC-3 addresses both environmental and safety issues, although they are not clearly delineated. First, NC WARN argues that “without a clear plan on how [cooling water for safe shutdown] will be provided, the COLA is incomplete.”¹³⁸ Second, NC WARN asserts that the NRC Staff “declared the application to be incomplete” with respect to “the environmental impacts caused by changing water levels at the Harris Lake and the intake on the Cape Fear River.”¹³⁹ Third, NC WARN lists a series of perceived deficiencies in the application:

- a. Analysis of the additive and synergistic impacts on the local and downstream ecosystem from the reactor thermal discharge on water in Harris Lake, which is already elevated in temperature.
- b. Analysis of the impact of warmed water on condenser cooling.
- c. The evaluation of increasingly warmer water on reactor cooling.
- d. Evaluation of the impact of warmer ambient water temperatures on total withdrawal, consumption, and evaporation.
- e. Analysis of the impacts of the proposed water withdrawal from the Cape Fear River for the proposed Harris reactors on the other facilities and municipalities downstream that use the river for either or both water supply and wastewater discharge.
- f. Analysis of the impact of pollution in water at warmer temperatures on the ecology of Harris Lake and downstream.
- g. A full analysis of the impact of reactor heat increasing the temperature in water on the other pollutants in the water, including implications for the food chain.
- h. Analysis of the impact of reactors going off-line on overall power and reliability, including the impact on Progress Energy’s customers.
- i. Analysis of the impact of reactors going off-line on regional grid stability.
- j. An evaluation of the potential for extended drought locally, and in the region, that would exacerbate all of the issues identified above.¹⁴⁰

Fourth, NC WARN mentions that Progress’ commitment not to withdraw water from the Cape Fear River during low flow periods is often “coincident with its

¹³⁸ *Id.* at 46.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 46-47.

summer peak demand.”¹⁴¹ Finally, NC WARN argues that there is a “significant safety concern” caused by reactors “go[ing] to low-power or off-line due to elevated cooling water temperatures and the loss of efficiency in power production due to loss of effective condensation of steam used to generate power.”¹⁴²

We first address NC WARN’s insistence that in the letter announcing the docketing of the application, the NRC Staff declared the application to be incomplete for two items related to water use impacts. We made clear in CLI-08-15 that the Staff’s letter did not state that the application was incomplete. To the contrary, the NRC Staff found that the application was sufficient to commence review. As we stated then, “[t]he mere fact that the Staff is asking for more information does not make an application incomplete.”¹⁴³ Therefore, we again reject this argument.

Next, we address the various components of Contention TC-3. As Progress explained in its answer, the ER describes the source of water for the two proposed reactors as the Harris Reservoir, with the Cape Fear River providing makeup water.¹⁴⁴ Other sections of the ER also discuss water supply.¹⁴⁵ Moreover, the final safety analysis report (FSAR) states that for safety-related water supply, the proposed plants — which utilize a passive containment cooling system — will not rely on an external water source.¹⁴⁶ NC WARN does not challenge these provisions of the COL application, or otherwise elaborate on its assertions that Progress does not have a “clear plan” on how sufficient cooling water will be provided for plant operations. Thus, for this argument, NC WARN has failed to show a genuine dispute on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi).

Further, the list of arguments that NC WARN labels “a” through “j” also do not show a genuine dispute on a material issue of law or fact. For example, the ER contains information relating to NC WARN’s assertion in “a” on the impacts of thermal discharge.¹⁴⁷ NC WARN does not challenge the analyses or conclusions in these sections, let alone cite them. In its appeal, NC WARN emphasizes — without elaboration — that the Board erred in pointing out NC WARN’s failure to cite specific sections of the application that it challenged because “it is clear in

¹⁴¹ *Id.* at 47.

¹⁴² *Id.*

¹⁴³ CLI-08-15, 68 NRC at 3.

¹⁴⁴ Progress Answer at 98; ER § 5.2.1.

¹⁴⁵ Progress Answer at 98; ER §§ 3.3, 3.4, 4.2.

¹⁴⁶ See Progress Answer at 112-13; Shearon Harris Nuclear Power Plant Units 2 and 3 COL Application, Part 2, Final Safety Analysis Report (Rev. 0), § 2.4.11, at 2.4-36 (Feb. 2008) (ADAMS Accession No. ML080600902).

¹⁴⁷ See Progress Answer at 101-02; ER § 5.3.2.

the contention that this analysis was not included in any section.”¹⁴⁸ NC WARN asserts that it is not required to cite any specific sections when “[t]he primary allegation is that the information is missing, not that it is required to be in a specific section.”¹⁴⁹

NC WARN’s general proposition misunderstands the concept of a “contention of omission.”¹⁵⁰ “There is, in short, a difference between contentions that merely allege an ‘omission’ of information and those that challenge substantively and specifically how particular information has been discussed in a license application.”¹⁵¹ Here, NC WARN has made generalized assertions that mirror the general subject matter of what is included in various portions of the application. Because the challenged issues are in fact addressed in the COL application, NC WARN’s contentions go to the adequacy of the ER discussion. For example, argument “a” does not assert an omission. Thermal impacts of the proposed units are discussed in ER § 5.3.2.¹⁵² As a challenge to the adequacy or validity of the thermal impacts analyses within the application, it also fails because it does not indicate what is wrong with them aside from stating that they are “deficient.” The remaining arguments through “j” suffer from similar inadequacies.

Additionally, NC WARN does not elaborate on the relevance of, or provide support for, its statement that Progress’ plan not to withdraw water from the Cape Fear River during low flow conditions coincides with summer peak demand. Nor does it cite any facts or expert opinion in support of its statement that there are safety and energy-efficiency concerns stemming from a reactor going offline when cooling water temperatures are elevated.¹⁵³ Moreover, NC WARN does not explain what these concerns would be, and we decline to speculate as to what aspect of the application NC WARN is challenging.¹⁵⁴

For these reasons, and for the reasons the Board gave,¹⁵⁵ this contention is inadmissible.

¹⁴⁸ NC WARN Appeal at 26-27. NC WARN also asserts that the Board improperly based its admissibility determination “on its assessment of the credibility of the factual allegations in the Petition.” We reject this argument for the same reasons discussed in notes 97 and 134, *supra*.

¹⁴⁹ NC WARN Appeal at 27.

¹⁵⁰ See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002).

¹⁵¹ *Id.*

¹⁵² ER § 5.3.2.

¹⁵³ See 10 C.F.R. § 2.309(f)(1)(v).

¹⁵⁴ See *id.* § 2.309(f)(1)(vi).

¹⁵⁵ See LBP-08-21, 68 NRC at 582-83.

9. *Contention EC-4 (Deficiencies in Emergency Planning)*

The area around the Harris site has changed considerably since the first reactor was constructed from dramatically increased populations and changing land uses. The ER does not provide an adequate analysis of the current populations and land use, and does not address the forecasted growth in the area. As a result, emergency planning that adequately protects the health and safety of the residents, students and workers around the proposed Harris reactors cannot be adequately accomplished.¹⁵⁶

In Contention EC-4, NC WARN argues that the application does not address adequately the impacts on emergency planning from population increases and changes in land use within the 10-mile emergency planning zone and the 50-mile ingestion pathway since Harris Unit 1 was licensed. NC WARN also implies that Progress does not have a “solid grasp” on the medical needs of members of susceptible populations living around the plant.¹⁵⁷ For this, NC WARN states that additional studies are needed, and references the affidavit of Dr. Steven Wing, which was not prepared for this case, but rather was submitted in support of NC WARN’s petition to intervene and request for hearing in the *Shearon Harris* license renewal proceeding.¹⁵⁸ In that affidavit, Dr. Wing noted an increase in population and stated that “the evacuation plan for the Shearon Harris nuclear plant must provide care for all persons around the plant, and make special provisions for susceptible populations.”¹⁵⁹

In addition, NC WARN maintains that “[t]he ER needs to examine the forecasted increase in vehicle use on the highways in the area” and that “evacuation routes may be impassible at most times of day without extensive new spending on highway expansions and improvements.”¹⁶⁰ It also claims that “potential changes in infrastructure,” such as removal of roads or bridges if Harris Lake is expanded, “could limit the ability for safe evacuation.”¹⁶¹ NC WARN repeats these arguments on appeal and argues that the Board did not consider Dr. Wing’s affidavit, and that, in finding it inadmissible, the Board misrepresented what is in the contention, and its members “relied on their own biases and beliefs.”¹⁶²

At the outset we conclude that the Board fairly presented the contents of Contention EC-4. The Board noted, without opining on the validity of the information in the application or the petition, that increased population, projected land use, the need for changes in infrastructure (including the coordination of

¹⁵⁶ NC WARN Petition at 48.

¹⁵⁷ *Id.* at 49-50.

¹⁵⁸ *Id.* at 50-51.

¹⁵⁹ *Id.* at 51.

¹⁶⁰ *Id.* at 49.

¹⁶¹ *Id.*

¹⁶² NC WARN Appeal at 27-28.

a transportation study with the State), and additional considerations relating to the evacuation of certain susceptible populations are addressed in the ER and/or the emergency plan (Part 5 of the COL application).¹⁶³ Because NC WARN neither explained how these sections are inadequate, nor cited any section of the application that it challenged, the Board reasonably found that NC WARN had failed to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi).¹⁶⁴ Furthermore, we reject NC WARN's claim that the Board erred in its treatment of Dr. Wing's affidavit. The Board determined that NC WARN failed to explain its relevance to the emergency planning for the proposed reactors.¹⁶⁵ Because it was filed in a separate proceeding regarding the existing Shearon Harris Unit 1 reactor, its relevance to this proceeding is not immediately apparent; nor is it apparent whether Dr. Wing even reviewed the COL application at issue here.¹⁶⁶

For these reasons, the Board did not err or abuse its discretion in finding Contention EC-4 to be inadmissible.

10. Contention EC-5 (Waste Disposal)

The [COL application] fails to evaluate whether and in what time frame the irradiated "spent" fuel generated by the proposed Harris nuclear reactors can be safely disposed. The ER does not contain any discussion of the environmental implications of the lack of options for permanent disposal of the irradiated fuel to be generated by the Harris site.¹⁶⁷

Contention EC-5 is, as NC WARN concedes, a direct challenge to NRC regulations — the Waste Confidence Rule, 10 C.F.R. § 51.23. Indeed, NC WARN agrees with the Board's assessment in this regard.¹⁶⁸ However, NC WARN nevertheless asserts that the Board erred in "agreeing with the faulty premises behind the rule" and that the Commission should allow challenges to Commission rules on a case-by-case basis."¹⁶⁹ This contention is an impermissible challenge to NRC regulations.¹⁷⁰ NC WARN has not requested, nor has it demonstrated any supporting reasons for, a waiver of the Waste Confidence Rule under 10 C.F.R. § 2.335(b). Therefore the contention is inadmissible. That the Waste Confidence Rule is currently subject to an ongoing rulemaking also supports this

¹⁶³ LBP-08-21, 68 NRC at 585-86; *see also supra* notes 97 & 134.

¹⁶⁴ LBP-08-21, 68 NRC at 585-86.

¹⁶⁵ *Id.* at 586.

¹⁶⁶ *Cf. Crow Butte*, CLI-09-9, 69 NRC at 343.

¹⁶⁷ NC WARN Petition at 51-52.

¹⁶⁸ NC WARN Appeal at 28.

¹⁶⁹ *Id.* at 28-29.

¹⁷⁰ *See* LBP-08-21, 68 NRC at 587.

determination.¹⁷¹ Pursuant to longstanding Commission precedent, a contention that is the subject of what is, or is about to become, the subject of a rulemaking is inadmissible.¹⁷²

In sum, NC WARN has shown no error or abuse of discretion in the Board's decision in LBP-08-21 to merit reversal of the Board's rulings, and we find none.

D. LBP-09-8

NC WARN appeals the Board's ruling in LBP-09-8 that found Contention TC-1 to be inadmissible. As stated above, we will defer to a board's determination on issues of standing and contention admissibility absent error or abuse of discretion.

1. Contention TC-1 (AP1000 Certification)

The [COL application] is incomplete because many of the major safety components and procedures at proposed Harris reactors are only conditional at this time. The [COL application] adopts by reference a design and operational procedures that have not been certified by the NRC or accepted by the applicant. Modifications to the design or operational procedures for the AP1000 Revision 16 would require changes in Progress Energy's application, the final design and operational procedures. Regardless whether the components are certified or not, the [COL application] cannot be reviewed without the full disclosure of all designs and operational procedures.¹⁷³

According to NC WARN, the COL application is incomplete because the design certification rulemaking is ongoing with the submission of Revision 16 to the AP1000 design for the NRC Staff's review. Regarding the COL application, NC WARN states generally that the design and operational practices are lacking. NC WARN then lists nine asserted omissions from the application:

- a. The final design of the reactor containment.
- b. The control room set up and operator decision-making procedures.
- c. Seismic qualifications for various components of the AP1000 reactors.

¹⁷¹ See Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008); Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008).

¹⁷² See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999); *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974). *But see* New Reactor Policy Statement, 73 Fed. Reg. at 20,972; *infra* Sections II.D, II.E. Contention EC-5 does not pertain to design issues.

¹⁷³ NC WARN Petition at 13.

- d. The establishment of fire protection areas.
- e. Technology requirements for heat removal.
- f. Human factors engineering design throughout the plant.
- g. Plant personnel requirements.
- h. Alarm systems throughout the plant.
- i. Plant-wide requirements for pipes and conduits.¹⁷⁴

In addition, NC WARN states what it believes to be deficiencies in the AP1000 design. NC WARN maintains that “there are a number of serious safety inadequacies in the AP1000 revision 16 design that have not been satisfactorily addressed,” such as “an incomplete recirculation screen design, i.e., the ‘sump problem.’”¹⁷⁵ Furthermore, NC WARN argues, because Tier 2 components have not been certified, the certified Tier 1 components have not been “fully approved as they depend on the interaction with non-certified components.”¹⁷⁶ NC WARN asserts that changes in the design certification process would require Progress to modify its application; therefore, the application is incomplete.¹⁷⁷ NC WARN concludes that “[i]t is impossible to conduct a meaningful technical and safety review of the COLA without knowing the final design of the reactors as they would be constructed by Progress Energy.”¹⁷⁸

The Board originally determined that this contention was admissible as limited to the list of nine purported omissions in the COL application, and referred it to the NRC Staff for its “review and consideration . . . in the design certification rulemaking.”¹⁷⁹ In CLI-09-8, we reversed this ruling and remanded the contention to the Board because, among other things, it did not appear that the Board had applied fully the contention admissibility factors in 10 C.F.R. § 2.309(f)(1) before referring the contention to the Staff.¹⁸⁰ On remand, the Board reassessed the admissibility of Contention TC-1 consistent with our direction, and found that NC WARN: (1) erroneously asserted omissions from the application that were incorporated by reference as part of the AP1000 certified design in 10 C.F.R. Part 52, Appendix D; (2) did not discuss any specific flaws in the application where the analyses are set forth; and (3) impermissibly challenged the process established in NRC regulations that permits an applicant to reference a docketed,

¹⁷⁴ *Id.* at 16.

¹⁷⁵ *Id.* at 14.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 15.

¹⁷⁸ *Id.* at 13.

¹⁷⁹ LBP-08-21, 68 NRC at 563-64.

¹⁸⁰ CLI-09-8, 69 NRC at 325-26.

but not approved, design.¹⁸¹ Therefore the Board determined that the contention was inadmissible for failing to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi) and for challenging Commission regulations.¹⁸² Because the contention was not admitted, the Board did not address¹⁸³ the issue of whether to refer the contention to the NRC Staff for resolution in the AP1000 design certification amendment rulemaking.¹⁸⁴

On appeal, NC WARN repeats many of the above arguments.¹⁸⁵ It insists that “[a]ny unresolved issue or uncertified component in the DCD are *de facto* omissions in the [COL application],”¹⁸⁶ and emphasizes that its “assertions were that the omissions are of the *final* designs and operating procedures, not that the [COL application] did not mention them.”¹⁸⁷ It further contends that “[f]rom a policy point of view, the Commission should reconsider the issue [of the lack of finality of reactor design and procedures] because its ‘anticipated’ process, i.e., having the designs certified prior to licensing, has provided a failure.”¹⁸⁸

NC WARN agrees — in its petition and on appeal — that the application incorporates 10 C.F.R. Part 52, Appendix D and Revision 16 by reference, thus acknowledging that its purported contention of omission addresses items that are part of the application.¹⁸⁹ Because NC WARN does not specifically challenge the analyses in the application or provide support for its general assertions, it has failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi). What remains of the contention is what NC WARN emphasizes — that the *final design* is the omission. Contention TC-1 therefore amounts to an impermissible challenge to Part 52 of the Commission’s regulations, which allows an applicant to submit an application referencing a docketed, but not yet approved, design.¹⁹⁰ As a consequence, Contention TC-1 is inadmissible. We find no error in the Board’s reassessed ruling on Contention TC-1.

¹⁸¹ LBP-09-8, 69 NRC at 743-45.

¹⁸² *Id.*

¹⁸³ See CLI-09-8, 69 NRC at 327; New Reactor Policy Statement, 73 Fed. Reg. at 20,972.

¹⁸⁴ LBP-09-8, 69 NRC at 745.

¹⁸⁵ NC WARN combines its arguments for Contentions TC-1 and TC-7 in its appeal, but they are discussed separately here.

¹⁸⁶ NC WARN Appeal at 14.

¹⁸⁷ *Id.* at 16.

¹⁸⁸ *Id.* at 18.

¹⁸⁹ See *id.* at 14; NC WARN Petition at 13.

¹⁹⁰ As we explained in denying NC WARN’s motion to immediately suspend the notice of hearing, “although the Commission anticipated that applicants would first seek to have designs certified before submitting COLs which reference those designs, the NRC’s regulations, nonetheless, allow an applicant — at its own risk — to submit a COL application that does not reference a certified design.” CLI-08-15, 68 NRC at 4.

E. December 23, 2008 Unpublished Board Decision (Contention TC-7)

While the NRC Staff and Progress appeals challenging the admission of Contention TC-1 were pending, NC WARN filed with the Board a motion for leave to file a new contention. That contention, Contention TC-7, states:

The [COL application] is incomplete because many of the major safety components and procedures at proposed Harris reactors are only conditional at this time and will be for the indefinite future. In its [COL application], Progress Energy has adopted the AP1000 Revision 16 which has not been certified by the NRC and with the filing of Revision 17 by Westinghouse, Revision 16 will no longer be reviewed by the NRC Staff. Progress Energy is now required to resubmit its [COL application] as a plant-specific design or to adopt Revision 17 by reference and provide a timetable when its safety components will be certified. The [COL application] cannot be reviewed at this time without the full disclosure of all designs and operational procedures. Either plant-specific design or adoption of AP1000 Revision 17 would require changes in Progress Energy's application, the final design and operational procedures.¹⁹¹

Mostly repeating arguments made in support of Contention TC-1, but applying them to the subsequent Revision 17 of the AP1000 DCD, NC WARN lists “the uncertified components specifically addressed in Revision 17,” which “include turbine design changes, physical security, human factors engineering, responses to seismic activities and adverse weather conditions, radiation protection measures, technical specifications for valves and piping, accident analyses, and aircraft impact.”¹⁹² NC WARN adds that “[t]hese non-certified components interact with Tier 1 components and each other to a significant degree.”¹⁹³ Because Revision 17 is under consideration in the ongoing design certification amendment rulemaking, the design has not been finalized, and NC WARN insists that the application is incomplete.¹⁹⁴

NC WARN asserts on appeal that the Board “arbitrarily dismissed Contention TC-7” after admitting Contention TC-1 “even though the contentions addressed a similar issue, following the same legal and factual logic.”¹⁹⁵ NC WARN also asserts that its motion was timely; it explained that when it filed its new contention motion, Revision 17 was not publicly available. Because it did not have access to the document, NC WARN based its motion on the cover letter for Revision 17

¹⁹¹ NC WARN New Contention Motion at 4-5.

¹⁹² *Id.* at 6.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 4-8.

¹⁹⁵ NC WARN Appeal at 15.

and presentations made by Westinghouse Electric Company (the AP1000 vendor) to the NRC Staff, “[r]ather than wait for Revision 17 to be available.”¹⁹⁶

In accordance with the procedure established by the Board, the parties briefed only the issue of the motion’s timeliness, not the admissibility of the proposed new contention. In its unpublished decision issued on December 23, 2008, the Board denied the motion for leave to file Contention TC-7. One of the bases on which the Board denied the motion was that NC WARN did not demonstrate that the information on which the contention is based is materially different from what was previously available in the COL application.¹⁹⁷ The Board therefore determined that NC WARN had not made the requisite showing under 10 C.F.R. § 2.309(f)(2)(ii), and found the contention to be nontimely. The Board went on to rule that NC WARN had not adequately addressed the factors for nontimely contentions under 10 C.F.R. § 2.309(c)(1). Therefore, the Board denied the motion.¹⁹⁸

We need not decide whether the Board’s timeliness ruling was in error, because we find Contention TC-7 to be inadmissible. As an alternative basis for its holding, the Board concluded that “even had NC WARN satisfied the criteria relating to untimeliness, the substantive focus of Contention TC-7 on the revisions in the design certification process would present an inadmissible contention.”¹⁹⁹ Proposed Contention TC-7 is substantively similar to Contention TC-1. The only difference is that Contention TC-7 challenges the completeness of the application based on Progress’ adoption of Revision 17 to the AP1000 design, rather than Revision 16.²⁰⁰ Like Contention TC-1, NC WARN explains that Contention TC-7 is written as a contention of omission.²⁰¹ However, NC WARN admits that the components it identifies in Contention TC-7 as examples of the application being “incomplete” are “specifically addressed in Revision 17.”²⁰² Indeed, as NC WARN emphasizes in its appeal regarding both contentions, its assertions “were that the omissions are of the *final* designs and operating procedures, not that the [COL application] did not mention them.”²⁰³ Thus, Contention TC-7 is fundamentally a challenge that the application will be affected by a design that is not yet certified. Because, as stated above, our regulations expressly allow a COL applicant to reference an uncertified design, Contention TC-7 is an impermissible challenge to our regulations, and was appropriately excluded by the Board.

¹⁹⁶ *Id.*

¹⁹⁷ Licensing Board New Contention Decision at 5.

¹⁹⁸ *Id.* at 4-6.

¹⁹⁹ *Id.* at 11.

²⁰⁰ *See generally* NC WARN New Contention Motion at 4-8.

²⁰¹ *See* NC WARN Appeal at 15-16.

²⁰² NC WARN New Contention Motion at 6.

²⁰³ NC WARN Appeal at 15-16.

F. Motion to Suspend Proceeding

Finally, we consider what we construe to be a third motion to suspend the proceeding embedded within NC WARN's appeal. NC WARN requests, as it has "attempted twice so far, [that] the proceeding . . . be halted until the applicant is prepared to file a complete application."²⁰⁴ In support, NC WARN "adopts herein the compelling arguments in the Texans for a Sound Energy Policy's Petition" to hold the docketing decision and/or hearing notice in abeyance for the Victoria County Station COL application.²⁰⁵ That petition requested that the *Victoria County Station* COL proceeding be held in abeyance pending the resolution of the design certification rulemaking for a different design.²⁰⁶ As we explained in CLI-09-8, "our rules permit the filing of combined license applications in advance of design certifications."²⁰⁷ Accordingly, we deny NC WARN's embedded motion to suspend the proceeding.

III. CONCLUSION

For the reasons set forth by the Board and discussed above, we *deny* NC WARN's requests for oral argument and to suspend the proceeding, and *affirm* the Board's decisions in LBP-08-21; LBP-09-8; and the unpublished decision dated December 23, 2008.

²⁰⁴ *Id.* at 17.

²⁰⁵ *Id.* at 17 n.9. NC WARN also states that it adopts several of the legal arguments made in its prior pleadings and incorporates them by reference because of the page limit imposed by 10 C.F.R. § 2.341(c)(2). *Id.* at 2. It does so without citation to specific arguments or page numbers. Such an approach leaves us and the other participants guessing as to which legal arguments are intended to be relevant. Moreover, this is effectively an attempt to circumvent our page-limit rules, which could be grounds for sanctions. See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001). Although we do not sanction NC WARN here, we do not consider these referenced arguments. The better practice is for participants "to abide by our current page-limit rules, and if they cannot, to file a motion to enlarge the number of pages permitted." *Id.* at 394.

²⁰⁶ See generally *Texans for a Sound Energy Policy's Petition to Hold Docketing Decision and/or Hearing Notice for Victoria Combined License Application in Abeyance Pending Completion of Rulemaking on Design Certification Application for Economically Simplified Boiling Water Reactor* (Nov. 3, 2008). No hearing notice has issued for the Victoria County project for reasons unrelated to the Texans for a Sound Energy Policy's Petition. See CLI-09-8, 69 NRC at 328 n.47.

²⁰⁷ *Id.* at 329.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 11th day of March 2010.

Chairman Jaczko, Dissenting

I respectfully disagree with the majority decision to follow a policy of excluding the potential impacts of terrorism when conducting environmental reviews for facilities located outside the Ninth Circuit. As I explained in detail in my dissent in *Oyster Creek*, CLI-07-8, 65 NRC 124, 135 (2007), and have reiterated in more recent decisions, I believe that the agency should have a consistent, nationwide approach to the consideration of terrorism under NEPA. Further, I believe that, consistent with our commitment to transparency, the better policy course is to provide this important information to the public for all nuclear facilities.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 63-001-HLW

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

March 11, 2010

PROCEDURE: SUBPART J

The procedural rules governing this proceeding in 10 C.F.R. Part 2, Subpart J, do not provide for the appeal of a Presiding Officer's ruling on a late-filed intervention petition. No appeals may be taken from any Presiding Officer order or decision, except as specifically permitted by rule. 10 C.F.R. § 2.1015(a).

MEMORANDUM AND ORDER

William D. Peterson has appealed the decision of Construction Authorization Board 04 (CAB-04, or the Board) denying his untimely petition to intervene in this proceeding.¹ This filing includes a motion for rule waiver pursuant to 10 C.F.R. § 2.335. Mr. Peterson has since filed additional requests for relief.² As discussed below, we decline to consider Mr. Peterson's appeal, and deny his other requests.

¹ See Motion for Waiver per 10 C.F.R. § 2.335 (Nov. 12, 2009) (also including a "Motion to Appeal") (Appeal/Waiver Request); Memorandum in Support of Notice of Appeal (Nov. 13, 2009) (Memorandum).

² Motion for a Plan and Schedule (Dec. 2, 2009) (Motion for Plan). See also Motion for Judgment (Feb. 22, 2010); Motion to Enlarge List of Contentions (Feb. 25, 2010).

I. BACKGROUND

In September 2009, Mr. Peterson submitted a “motion” in this proceeding stating his opposition to the proposed high-level waste repository, and describing his proposal for an alternative plan to reprocess the fuel.³ After the NRC Staff pointed out that Mr. Peterson is not a party to this proceeding,⁴ Mr. Peterson filed a late petition to intervene on October 5, 2009,⁵ more than nine months after the published deadline to file intervention petitions.⁶ Mr. Peterson’s petition stated his reasons for filing out of time,⁷ and articulated an interest in this proceeding stemming from his attempts to promote his alternative plan for reprocessing spent fuel rather than disposing of it at the proposed Yucca Mountain repository.⁸ His contentions consisted of various arguments why his proposed alternative would be better for the U.S. economy, the environment, and national security, than geologic disposal.⁹

CAB-04 denied Mr. Peterson’s petition on the grounds that it was not timely, failed to establish standing for Mr. Peterson, and offered no contention admissible in this proceeding.¹⁰ After the Board ruled, Mr. Peterson submitted an additional pleading, styled a “supplement” to the petition, which expanded on his theory that the U.S. Environmental Protection Agency (EPA) has the authority to adopt Mr. Peterson’s alternative disposal plan if it chooses.¹¹ CAB-04 treated this pleading as a motion for reconsideration, but denied it because it pointed to no “compelling circumstances” warranting reconsideration.¹²

³ Motion (Sept. 22, 2009). Mr. Peterson also stated in this filing that he “moves to compel” the Staff to make available on the Licensing Support Network (LSN) all documents claimed as privileged. However, he offered no substantive challenge to the Staff’s claims of privilege.

⁴ NRC Staff Answer to “Motion” of William Peterson (Sept. 29, 2009).

⁵ Petition for Admission (Oct. 5, 2009) (Peterson Petition).

⁶ U.S. Department of Energy (High Level Waste Repository); Notice of Hearing and Opportunity to Petition for Leave to Intervene on an Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (Oct. 22, 2008).

⁷ Mr. Peterson stated that he is busy, does not read the *Federal Register*, and was not personally informed of the proceeding. Peterson Petition at 5-6.

⁸ *Id.* at 1-4.

⁹ *Id.* at 6-15.

¹⁰ U.S. Department of Energy (High-Level Waste Repository), Order (Denying Intervention Petition) (Oct. 28, 2009) (unpublished) (October 28 Order). Because Mr. Peterson’s petition failed for these reasons, the Board did not address his failure to show compliance with the LSN requirements in 10 C.F.R. § 2.1012(b)(1), or his failure to submit contentions in the form prescribed by the Pre-License Application Presiding Officer’s June 20, 2008 order. *See id.* at 8 n.32.

¹¹ Supplement to Petition to Enter (Nov. 5, 2009).

¹² Order (Denying Motion for Reconsideration) (Nov. 10, 2009) (unpublished) (citing 10 C.F.R. § 2.323(e)).

In a filing dated November 12, 2009, Mr. Peterson filed the instant appeal together with his “waiver request.” Shortly thereafter, he filed with us a pleading styled a “Motion for a Plan and Schedule.”¹³

II. DISCUSSION

The procedural rules governing this proceeding in 10 C.F.R. Part 2, Subpart J, do not provide for the appeal of a Presiding Officer’s ruling on a late-filed intervention petition. In particular, 10 C.F.R § 2.1015(a) provides that *no appeals* may be taken from any Presiding Officer order or decision, except as otherwise permitted by the rule. Section 2.1015(b) provides for appeals from certain specified decisions of the Pre-License Application Presiding Officer and the Presiding Officer. Section 2.1015(c) provides for appeals of an initial decision or partial initial decision of the Presiding Officer. Finally, section 2.1015(d) permits the Board to refer certain rulings to the Commission, and permits certain participants in the proceeding to request that the Presiding Officer certify to the Commission rulings not otherwise immediately appealable pursuant to section 2.1015(b). None of these provisions contemplates an appeal of the type of decision at issue here.

CAB-04 made note of this, and suggested to Mr. Peterson that he also request Commission review as a matter of our discretion.¹⁴ Mr. Peterson made no such request, and, in any event, Mr. Peterson articulates no reason why we should take up his appeal on our own motion. Given that the applicable rules of practice do not permit Mr. Peterson’s appeal, and absent a compelling reason to take up his appeal *sua sponte*, we need not consider it further. In any event, even if the appeal were properly before us, CAB-04’s handling of Mr. Peterson’s petition was entirely reasonable, and his brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of CAB-04’s decision.

¹³ Thereafter, Mr. Peterson filed yet another motion before CAB-04. Motion for a Three (3) Year Economy Recovery Plan, Plan for SNF Disposal and Fuel Independence, and Plan for CO₂ Reduction for Slowing Global Climate Change (Dec. 23, 2009). CAB-04 denied the motion. *See* Order (Denying William D. Peterson Motion) (Dec. 30, 2009) (unpublished). In addition, on December 29, 2009, Mr. Peterson filed with CAB-04 a “Notice of Intent to Appeal” indicating an intent to file a lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). On January 4, 2010, Mr. Peterson filed a “Notice of Appeal” via the NRC’s Electronic Information Exchange, which appears to be directed to the DC Circuit. On January 21, 2010, Mr. Peterson filed a Motion for Hydrogen Fuel Independence with the D.C. Circuit under Docket No. 10-1007. Mr. Peterson continues to file various pleadings with the D.C. Circuit with copies to the NRC. *See* Motion to Consolidate the Right Issues with the Right Parties (Feb. 22, 2010), filed with the D.C. Circuit (copy to NRC); Motion to Find Activity of the NRC, DOE & EPA is Unlawful (Feb. 22, 2010), filed with the D.C. Circuit (copy to NRC).

¹⁴ *See* October 28 Order at 8.

A. Request for Rule Waiver

A petition for rule waiver under 10 C.F.R. § 2.335(b) must show that “special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.”¹⁵ It must be accompanied by an affidavit that describes “with particularity the special circumstances” that justify the waiver. The petition and affidavit must set forth a *prima facie* case for rule waiver, whereupon the presiding officer will certify the matter directly to us for our consideration.¹⁶

Mr. Peterson’s waiver request is deficient on its face. His request does not describe with particularity the circumstances justifying a waiver, as he does not inform us which rule or rules he seeks to waive. Mr. Peterson’s motion is not accompanied by an affidavit. We cannot discern from his pleading whether he seeks a waiver of the rules regarding timeliness, standing, and contention admissibility (which resulted in the rejection of his intervention petition) or whether he seeks a waiver of one or more provisions of the 10 C.F.R. Part 63 rules concerning disposal of waste in a geologic repository. Aside from these procedural defects, even if we were to infer that Mr. Peterson seeks a waiver of both our Part 2 procedural rules and the Part 63 rules, he has not shown that any of them “would not serve the purpose for which the rule or regulation was adopted,” which is the *sole* ground that can support such a waiver.¹⁷

Instead, Mr. Peterson’s motion broadly argues that the country’s need for his proposed “300-year storage solution” is a “special circumstance” that justifies the Commission’s consideration of this alternative.¹⁸ His lack of particularity as to which regulation he seeks to waive stems from the fact — as CAB-04 found — that the gravamen of his complaint is with the Nuclear Waste Policy Act (NWPA) itself, and that statute’s mandate of geologic disposal. Mr. Peterson’s waiver request focuses on his proposal for an alternative method of high-level waste storage, which, as the Board observed, is a matter beyond the scope of this proceeding. Our rules implement the NWPA, and Mr. Peterson has not shown that those rules fail to serve their intended purpose. Mr. Peterson’s waiver request is denied.

B. Motion for Plan

On December 2, 2009, after briefing on his appeal was completed, Mr. Peterson

¹⁵ 10 C.F.R. § 2.335(b).

¹⁶ 10 C.F.R. § 2.335(c).

¹⁷ 10 C.F.R. § 2.335(b).

¹⁸ See Appeal/Waiver Request at 2.

submitted to us his Motion for Plan. This “motion” reiterates the arguments made in his other pleadings, focusing on his proposal to reprocess and store spent nuclear fuel. But, as the Staff points out in its response, this pleading fails whether we consider it under our motions rule, or as a supplement to Mr. Peterson’s appeal.¹⁹ At bottom, Mr. Peterson’s request provides his views on U.S. energy policy, and proposes his plan for a reprocessing facility and spent fuel storage facility as an alternative to the proposed Yucca Mountain project.²⁰ This proposal is beyond the scope of this proceeding, which concerns only the adequacy of the Department of Energy’s request for construction authorization at Yucca Mountain. As we advised Mr. Peterson in the *Private Fuel Storage* proceeding, in which he made a similar proposal:

Our regulations provide procedures for qualified applicants to obtain licenses for safely operated nuclear facilities. If Peterson believes he is qualified to operate a nuclear storage or reprocessing facility, he must comply with those prescribed licensing procedures.²¹

Further, as was the case in *Private Fuel Storage*, this proceeding “is not an open forum for discussing the country’s need for energy and spent fuel storage.”²² Mr. Peterson’s Motion for Plan is therefore denied.

III. CONCLUSION

For the reasons stated above, we *decline to consider* Mr. Peterson’s appeal, and *deny* both his waiver request and his Motion for Plan.

¹⁹ NRC Staff Response to Peterson’s Motion for a Plan and Schedule (Dec. 14, 2009).

²⁰ In addition, Mr. Peterson’s Motion for a Plan, his Motion for Judgment, and his Motion to Enlarge List of Contentions all suffer from fatal procedural defects. A person who has not been admitted as a party to a proceeding — such as Mr. Peterson here — is not entitled to make a motion in an ongoing proceeding. Nor does the motion comply with our rules regarding good-faith efforts to resolve with the other parties the subject matter of the motion. *See* 10 C.F.R. § 2.323(b).

²¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-7, 59 NRC 111, 112 (2004).

²² *Id.*

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland
this 11th day of March 2010.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

Docket No. 50-293-LR

**ENTERGY NUCLEAR GENERATION
COMPANY and ENTERGY NUCLEAR
OPERATIONS, INC.
(Pilgrim Nuclear Power Station)**

March 26, 2010

The Commission grants review of an Atomic Safety and Licensing Board decision that dismissed a contention on summary disposition. The Commission reverses in part the decision, remanding the contention to the Board for hearing, as limited by the Commission's ruling.

SEVERE ACCIDENT MITIGATION ALTERNATIVES ANALYSIS

Mitigation alternatives or "SAMAs" refer to safety enhancements such as a new hardware item or procedure intended to reduce the risk of severe accidents.

SUMMARY DISPOSITION

Applicable NRC standards governing summary disposition are set forth in 10 C.F.R. § 2.710. Summary disposition is appropriate where relevant documents and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

SUMMARY DISPOSITION

When a motion for summary disposition is made and supported as described in

our regulations, a party opposing the motion may not rest upon mere allegations or denials, but must state specific facts showing that there is a genuine issue of material fact. Only disputes over facts that might affect the outcome of a proceeding would preclude summary disposition.

SUMMARY DISPOSITION

At the summary disposition stage, the licensing board's or presiding officer's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for hearing. The evidence of the movant is to be believed, and all justifiable inferences are to be drawn in his favor. If reasonable minds could differ as to the import of the evidence, summary disposition is not appropriate. But if the evidence in favor of the nonmoving party is merely colorable, or not significantly probative, summary disposition may be granted.

CONTENTIONS

NRC threshold contention standards require petitioners to review application materials and set forth their contentions with particularity. Where any issue arises over the proper scope of a contention, the Commission has long referred back to the bases set forth in support of the contention. Our contention rules require reasonably specific factual and legal allegations at the outset to assure that matters admitted for hearing have at least some minimal foundation, are material to the proceeding, and provide notice to opposing parties of the issues they will need to defend against.

CONTENTIONS: AMENDMENT

Intervenors may not freely change the focus of an admitted contention at will to add a host of new issues and objections that could have been raised at the outset. Where warranted, we allow for amendment of admitted contentions, but do not allow distinctly new complaints to be added at will as litigation progresses, stretching the scope of admitted contentions beyond their reasonably inferred bounds.

NATIONAL ENVIRONMENTAL POLICY ACT

There is no NEPA requirement to use the best scientific methodology, and NEPA should be construed in the light of reason if it is not to demand virtually infinite study and resources. Nor is an environmental impact statement intended

to be a research document, reflecting the frontiers of scientific methodology, studies, and data.

NATIONAL ENVIRONMENTAL POLICY ACT

The SAMA analysis is a site-specific mitigation analysis. For a mitigation analysis, NEPA demands no fully developed plan or detailed examination of specific measures which will be employed to mitigate adverse environmental effects.

SEVERE ACCIDENT MITIGATION ALTERNATIVES ANALYSIS

Unless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated, no purpose would be served to further refine the SAMA analysis, whose goal is only to determine what safety enhancements are cost-effective to implement.

MEMORANDUM AND ORDER

I. INTRODUCTION

This proceeding stems from the application of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (together, Entergy) to renew the operating license for the Pilgrim Nuclear Power Station for an additional 20 years beyond the current operating license expiration date of June 8, 2012. In a request for hearing and petition to intervene, Pilgrim Watch, a nonprofit citizens' organization, submitted five contentions challenging the renewal application.¹ The Atomic Safety and Licensing Board granted Pilgrim Watch's intervention petition, admitting two contentions, Contention 1 (challenging Entergy's aging management program for buried pipes) and Contention 3 (challenging Entergy's analysis of Severe Accident Mitigation Alternatives (SAMAs)). A majority of the Board dismissed Contention 3 prior to hearing, granting an Entergy motion for summary disposition.² Following an evidentiary hearing on Contention 1,

¹ Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) (Petition).

² Memorandum and Order (Ruling on Motion to Dismiss Petitioners' Contention 3 Regarding Severe Accident Mitigation Alternatives), LBP-07-13, 66 NRC 131 (2007).

the Board issued Initial Decision LBP-08-22, resolving all outstanding issues pertaining to Contention 1 in favor of Entergy.³

Pursuant to 10 C.F.R. § 2.341(b), Intervenor Pilgrim Watch has filed a petition for review of the Board's Initial Decision in LBP-08-22, and numerous earlier Board decisions in this proceeding, including LBP-07-13 (which dismissed Contention 3, the SAMA contention); LBP-06-23 (which ruled on standing and contention admissibility);⁴ as well as "the many interlocutory decisions in this proceeding."⁵ Both Entergy and the NRC Staff oppose the petition.⁶

On the issue of the dismissed SAMA contention (Contention 3), we requested the parties to provide additional briefing.⁷ For the reasons outlined below, we grant review of the Board decision dismissing Contention 3 (LBP-07-13), and reverse in part the decision, remanding Contention 3, as limited by today's ruling, to the Board for hearing.⁸

II. PROCEDURAL BACKGROUND

Contention 3 addresses the Entergy Environmental Report's SAMA analysis for the Pilgrim facility. Mitigation alternatives or "SAMAs" refer to safety enhancements such as a new hardware item or procedure intended to reduce the

³ 68 NRC 590 (2008). Judge Ann Marshall Young issued a Concurring Opinion on October 31, 2008.

⁴ 64 NRC 257 (2006).

⁵ See Pilgrim Watch's Petition for Review of LBP-06-848 [sic], LBP-07-13, LBP-06-23 and the Many Interlocutory Decisions in the Pilgrim Nuclear Power Station Proceeding (Nov. 12, 2008) (Petition for Review) at 1. Additional Board decisions challenged in Pilgrim Watch's petition include LBP-07-12, 66 NRC 113 (2007), Memorandum and Order (Ruling on Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 1, Regarding Adequacy of Aging Management Program for Buried Pipes and Tanks and Potential Need for Monitoring Wells to Supplement Program); Order (Revising Schedule for Evidentiary Hearing and Responding to Pilgrim Watch's December 14 and 15 Motions) (Dec. 19, 2007) (unpublished); Order (Denying Pilgrim Watch's Motion for Reconsideration (Jan. 11, 2008) (unpublished); and Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1) (June 4, 2008) (unpublished).

⁶ See NRC Staff's Answer in Opposition to Pilgrim Watch's Petition for Review of LBP-08-22, LBP-07-13, LBP-06-23 and Interlocutory Decisions (Nov. 24, 2008) (Staff Answer to Petition for Review); Entergy's Answer Opposing Pilgrim Watch's Petition for Review (Nov. 24, 2008) (Entergy Answer to Petition for Review).

⁷ CLI-09-11, 69 NRC 529 (2009).

⁸ Today's decision addresses only issues surrounding Contention 3; the balance of the Pilgrim Watch petition for review will be decided in a separate decision. A petition for review may be granted in the Commission's discretion as outlined in 10 C.F.R. § 2.341(b)(4). Based on the reasons discussed in this decision, Pilgrim Watch's petition for review raised sufficient questions of law to warrant review of LBP-07-13.

risk of severe accidents. “The purpose of the SAMA review is to ensure that any plant changes . . . that have a potential for significantly improving severe accident safety performance are identified and assessed.”⁹ NRC SAMA analysis evaluates a number of potential accident progression sequences (scenarios) and the possible safety enhancements that may reduce the risk of those accident scenarios. The analysis assesses whether and to what extent the probability-weighted consequences of the analyzed severe accident sequences would decrease if a specific SAMA were implemented at a particular facility. SAMA analysis is used for determining whether particular SAMAs would sufficiently reduce risk — e.g., by reducing frequency of core damage or frequency of containment failure — for the SAMA to be cost-effective to implement. The SAMA analysis therefore is a probabilistic risk assessment analysis. If the cost of implementing a particular SAMA is greater than its estimated benefit, the SAMA is not considered cost-beneficial to implement. Certain license renewal applicants, including Entergy, are required to consider SAMAs in the environmental report prepared in connection with the application.¹⁰

NRC guidance documents conclude that the MACCS2 code (a version of the MELCOR Accident Consequence Code System code) is acceptable for performing SAMA analyses,¹¹ and NRC licensees commonly use the MACCS2 code for performing SAMA analyses. Entergy’s SAMA analysis utilized the MACCS2 code to evaluate the offsite consequences (population dose and economic costs) of a radioactive material release to the environment from severe accidents.

In Contention 3, Pilgrim Watch challenged the Entergy SAMA analysis, claiming that it “ignore[d] the true off-site radiological and economic consequences of a severe accident at Pilgrim.”¹² As originally proffered, much of Contention 3 was a broad-brush challenge to the use of probabilistic risk assessment modeling, in which to determine the overall accident risk the estimated potential consequences of a severe accident are multiplied by the possibility of the accident occurring.¹³ Contention 3 stressed that “[b]y multiplying high consequence values with low probability numbers, the consequence figures appear far less startling,” and therefore “the likely impacts of a severe accident have been drastically minimized.”¹⁴

⁹ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 5 (2002).

¹⁰ *See* 10 C.F.R. § 51.53(c)(3)(ii)(L).

¹¹ *See, e.g.,* NEI-05-01[Rev A], Severe Accident Mitigation Analysis (SAMA) Analysis, Guidance Document (Nov. 2005) (NEI-05-01[Rev A]) (endorsed by Final License Renewal Interim Staff Guidance LR-ISG-2006-03: Staff Guidance for Preparing Severe Accident Mitigation Alternatives Analyses, 72 Fed. Reg. 45,466 (Aug. 14, 2007).

¹² Petition at 26.

¹³ *See id.* at 28-31.

¹⁴ *Id.* at 29-30.

The contention indeed claimed that the “overarching defect” of the analysis is that it considered severe accident “risks” by considering the probability of particular severe accidents.¹⁵

In addition to generally challenging probabilistic risk assessment, Contention 3 further claimed that Entergy “used incorrect input data” in analyzing severe accident consequences. The contention argued that incorrect, incomplete, or outdated “inputs to the [MACCS2] code” were used, including inputs related to “meteorologic data, demographics, emergency response, and regional economic data,” and that these incorrect inputs “minimized the likely risks of a severe accident.”¹⁶

Among these arguments on “input data,” Pilgrim Watch claimed that the MACCS2 code has “limitations inherent in the software” which can result “in an incorrect evaluation of actual plume dispersion and which by design omit the majority of the economic costs.”¹⁷ In challenging the SAMA analysis’s “meteorological data,” for example, Pilgrim Watch criticized the MACCS2 code’s use of the straight-line Gaussian plume model to estimate the atmospheric dispersion of a release of radionuclides. Pilgrim Watch stated that the straight-line Gaussian plume model does not take into effect “terrain effects, which can have highly complex impact on wind field patterns and plume dispersion,” and that the “topography of a coastal environment,” such as that along the coast of Massachusetts, “plays an important role in the sea breeze circulation,” where the “uneven heating of land and water is responsible for . . . coastal winds known as sea and land breezes.”¹⁸

The Board admitted Contention 3 in part. While the Board did not find admissible all of the challenges, it concluded that “input data” challenges related to three specific subjects — “evacuation times, economic impacts, and meteorologic plume behavior” — had been “sufficiently raised and supported.”¹⁹ The Board found that Contention 3 raised a “reasonable” claim that “use of more accurate input data in these three areas could materially impact the computed outcome” of the SAMA analysis.²⁰

To the degree, however, that the contention could be characterized as claiming that “risk is to be ignored” in SAMA analysis, the Board ruled the contention inadmissible, stating as follows:

[T]o the extent that any part of the contention or basis may be construed as

¹⁵ *Id.* at 29 (emphasis in original).

¹⁶ *Id.* at 34.

¹⁷ *Id.*

¹⁸ *See id.* at 34-36.

¹⁹ LBP-06-23, 64 NRC 257, 339 (2006).

²⁰ *Id.* at 339.

challenging on a generic basis the use of probabilistic techniques that evaluate risk, we find any such portion(s) to be inadmissible. The use of probabilistic risk assessment and modeling is obviously accepted and standard practice in SAMA analyses.

LBP-06-23, 64 NRC at 340.

As admitted by the Board, Contention 3 read as follows:

Applicant's SAMA analysis for the Pilgrim plant is deficient in that the input data concerning (1) evacuation times, (2) economic consequences, and (3) meteorological patterns are incorrect, resulting in incorrect conclusions about the costs versus benefits of possible mitigation alternatives, such that further analysis is called for.²¹

Entergy subsequently moved for summary disposition of Contention 3. In support, Entergy claimed that it had "performed a series of sensitivity studies to evaluate the effects of changes in the input parameters challenged by Pilgrim Watch on the results of the SAMA analysis."²² From the sensitivity studies, Entergy concluded that the claims made in Contention 3 would prove immaterial to the SAMA analysis conclusions. Specifically, Entergy claimed that the sensitivity studies showed that "the maximum increase in benefit," in terms of reduced population dose risk and offsite economic cost risk, from implementing additional SAMAs would be less than 4%, while "for any additional SAMAs to become potentially cost effective, the benefits would have to increase by more than 100%, far greater than the maximum increase in benefit calculated by any of the sensitivity analyses."²³ The Staff supported Entergy's motion, agreeing that "the information Pilgrim Watch sought to have considered . . . has now been considered" and the "additional factors considered do not change the conclusions of the SAMA analysis," and therefore no genuine material dispute remained.²⁴

After considering Entergy's additional analyses, a majority of the Board agreed that no material fact remained in dispute regarding evacuation, economic impacts, or meteorological patterns, and therefore dismissed Contention 3.²⁵ The majority reasoned that the additional SAMA²⁶ that came closest to being cost-effective

²¹ *Id.* at 341.

²² Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 3 (May 17, 2007) (Summary Disposition Motion) at 10.

²³ *Id.*

²⁴ See NRC Staff Response to Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 3 (June 29, 2007) (Staff Response to Summary Disposition Motion) at 6.

²⁵ LBP-07-13, 66 NRC at 144-54.

²⁶ From its SAMA analysis, Entergy identified seven potentially cost-effective SAMAs. See NUREG-1437, Supplement 29, "Generic Environmental Impact Statement for License Renewal of
(Continued)

would produce an estimated benefit of \$2.5 million, but would cost approximately \$5 million to implement. Therefore, the majority concluded that Pilgrim Watch would need to indicate “errors aggregating nearly 100% in the estimated benefit of implementation” for such asserted errors to be material to the SAMA cost-benefit conclusions.²⁷ The majority stated that Entergy’s “bounding analyses” demonstrated that the maximum change Pilgrim Watch’s claimed oversights or errors could produce on the SAMA analysis “is on the order of [only] 2%,” and that Pilgrim Watch had not offered any evidence contradicting this conclusion.²⁸

In reaching its decision, the Board majority rejected Pilgrim Watch’s “criticisms of the Gaussian plume model” used in the MACCS2 code for a SAMA analysis, stating that “a challenge to the use of probabilistic methodologies and/or the modeling used was rejected by this Board [when it admitted the contention],” and that at issue were only “challenges to the *input* to the code in these three specific arenas [evacuation, economic impacts, and meteorological patterns], not the modeling itself.”²⁹

The majority nonetheless went on to conclude that, in any event, Entergy’s analyses were applied conservatively to the SAMA analysis to “maximize the effects of the radiation carried by the meteorological pattern in each of the hundreds of particular scenarios computed,” and that the analyses “encompass any particular scenario which might incorporate the time-dependent effects of ‘sea-breeze’ or localized time-dependent wind patterns.”³⁰ The majority therefore stated that the results of Entergy’s modeling “subsume[d] all reasonably possible meteorologic patterns,” and that Pilgrim Watch’s experts had not challenged Entergy’s assertions that the new SAMA analyses’ computations were “conservative” and “predict worse consequences, and therefore, higher costs of any particular event.”³¹

Judge Young issued a dissenting opinion, and would have denied the summary disposition motion, “at least on the meteorological matters at issue, and whatever impact these might have on the evacuation and [economic] cost matters.”³² The dissent concluded that the majority inappropriately had engaged in “the sort of weighing of evidence that is not appropriate [at the] summary disposition” stage,

Nuclear Plants, Regarding Pilgrim Nuclear Power Station, Final Report-Main Report” (July 2007) (Pilgrim EIS) at 5-5 to 5-10. Because none of the seven potentially cost-effective SAMAs bear on adequately managing the effects of aging, none need be implemented as part of the license renewal safety review, pursuant to 10 C.F.R. Part 54.

²⁷ LBP-07-13, 66 NRC at 147.

²⁸ *Id.*

²⁹ *Id.* at 151 & n.21 (emphasis in original); *see also id.* at 146, 149-50.

³⁰ *Id.* at 151-52.

³¹ *Id.* at 151.

³² *Id.* at 167 (dissenting opinion).

and that it was “clear that Intervenor *dispute* Entergy’s conclusions” and did so with adequate support.³³

Notably, the dissent disagreed with the majority’s conclusion that meteorological arguments involving the straight-line Gaussian plume model did not fall within the scope of Contention 3 as admitted. The dissent emphasized that in admitting Contention 3 the Board merely had excluded any aspects of the contention that challenged “*on a generic basis* the use of probabilistic techniques that evaluate risk,” but “did *not* exclude *specific* [modeling methodology] challenges that might bring into question specific aspects of the SAMA analysis regarding the three types of input we admitted.”³⁴ The dissent stressed that Contention 3’s claims regarding meteorological issues “centrally involved challenges to the ‘straight-line Gaussian plume model,’ and [that the Board] did not exclude this” from the contention.³⁵

While acknowledging that the straight-line Gaussian plume model is not an “input per se in the technical sense,” the dissent stated that the Gaussian plume model “is implicitly part of what is ‘put in’ to the MACCS2 code to produce results about meteorological patterns,” that Pilgrim Watch challenges “several aspects of what is ‘put in’ to the SAMA analysis on meteorological issues,” and that by excluding challenges to the plume model used in the MACCS2 code, the majority had rendered Contention 3 “meaningless with regard to meteorological issues.”³⁶

In its petition for review, Pilgrim Watch contests the majority’s decision in LBP-07-13 to dismiss Contention 3. Pilgrim Watch claims that it disputed all of the material facts Entergy presented in its motion for summary disposition, and set forth facts supported by experts disputing Entergy’s conclusions.³⁷ Citing repeatedly to the dissenting opinion, Pilgrim Watch claims that the majority inappropriately weighed the evidence presented, failed to view the record in the light most favorable to Pilgrim Watch, and improperly excluded “areas of inquiry” that the Board in LBP-06-23 had admitted, such as the specific challenges regarding the straight-line Gaussian plume model.³⁸

Pilgrim Watch’s arguments on meteorological patterns largely focus on its claim that because Entergy’s sensitivity analyses used a standard straight-line Gaussian plume model to estimate the atmospheric dispersion of a release of radionuclides, the additional Entergy sensitivity analyses repeated “the same

³³ *Id.* at 156, 160, 163 (dissenting opinion) (emphasis in original).

³⁴ *Id.* at 161 (emphasis in original).

³⁵ *Id.*

³⁶ *Id.* at 161-62.

³⁷ *See* Petition for Review at 13.

³⁸ *Id.* at 11-12, 14-15.

mistakes”³⁹ of Entergy’s earlier analysis, and therefore the additional sensitivity studies did not “add useful information” because the “primary model is flawed.”⁴⁰ Pilgrim Watch argues that it “demonstrated that Entergy’s use of the straight-line steady state Gaussian plume model leads to a non-conservative geographical distribution of dose within the 50-mile radius of Pilgrim,” and that “this could materially affect the costs of mitigation alternatives.”⁴¹ Pilgrim Watch states that it showed that “a variable trajectory plume model — not a straight-line Gaussian plume model — is appropriate for Pilgrim’s coastal location and would bring more SAMAs into play.”⁴² On the issue of economic costs, Pilgrim Watch argues that it showed how the MACCS2 code is “not the proper diagnostic tool to assess economic consequences,” and that the majority “ignored Petitioner’s demonstration showing how Entergy both underestimated the costs they considered and totally ignored other costs that belong in a proper SAMA analysis.”⁴³ For evacuation times inputs, Pilgrim Watch claims that the majority “accepted the Applicant’s unrealistically low” estimates for how long an evacuation would take, and that “projected health related costs in the evacuee population would be greater if an appropriate variable trajectory plume model” were used.⁴⁴

In CLI-09-11,⁴⁵ we requested additional briefing on Contention 3, directing the parties to address the following two questions, with appropriate specific references to the existing adjudicatory record:

1. In granting summary disposition, was it appropriate for the Board majority to exclude challenges to the use of particular methodologies, such as the use of the straight-line Gaussian plume model to predict the atmospheric dispersion of radionuclides, or the use of the MACCS2 code for determining economic costs?
2. Did Pilgrim Watch present a supported, genuine dispute that could materially affect the ultimate conclusions of the SAMA cost-benefit analysis? For example, discuss evidence or testimony presented on (1) whether use of a variable trajectory model could materially affect whether any additional SAMA may be cost-beneficial; (2) the conservatism of the Gaussian plume model and the MACCS2 code (including the economic model) as applied in the cost-benefit analysis; and (3) whether the cost-benefit analysis “subsumes all reasonably possible meteorologic patterns.”

³⁹ *Id.* at 14.

⁴⁰ *Id.* at 16 (quoting Pilgrim Watch expert’s affidavit); *see also id.* at 14-17.

⁴¹ *Id.* at 15.

⁴² *Id.*

⁴³ *Id.* at 18.

⁴⁴ *Id.* at 17.

⁴⁵ CLI-09-11, 69 NRC at 533.

A. Summary Disposition Standards

Applicable NRC standards governing summary disposition are set forth in 10 C.F.R. § 2.710. The standards are based upon those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.⁴⁶ Summary disposition is appropriate where relevant documents and affidavits “show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.”⁴⁷ When a motion for summary disposition is made and supported as described in our regulations, “a party opposing the motion may not rest upon . . . mere allegations or denials,” but must state “specific facts showing that there is a genuine issue of fact” for hearing.⁴⁸ It is not sufficient, however, for there merely to be the existence of “some alleged factual dispute between the parties, for “the requirement is that there be no *genuine* issue of *material* fact.”⁴⁹ “Only disputes over facts that might affect the outcome” of a proceeding would preclude summary disposition.⁵⁰ “Factual disputes that are . . . unnecessary will not be counted.”⁵¹

The correct inquiry is whether there are material factual issues that “properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.”⁵² At issue is not whether evidence “unmistakably favors one side or the other,” but whether “there is sufficient evidence favoring the non-moving party” for a reasonable trier of fact to find in favor of that party.⁵³ If the evidence in favor of the nonmoving party is “merely colorable” or “not significantly probative,” summary disposition may be granted.⁵⁴

In ruling on a motion for summary disposition a licensing board (or presiding officer) should not, however, conduct a “trial on affidavits.”⁵⁵ At this stage, “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for [hearing].”⁵⁶ “The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”⁵⁷ If “reasonable minds could differ as to the import of the

⁴⁶ See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

⁴⁷ 10 C.F.R. § 2.710(d)(2).

⁴⁸ 10 C.F.R. § 2.710(b).

⁴⁹ *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

⁵⁰ *Id.* at 248.

⁵¹ *Id.*

⁵² *Id.* at 250.

⁵³ *Id.* at 249-52.

⁵⁴ *Id.* at 249-50.

⁵⁵ See *id.* at 242, 255.

⁵⁶ *Id.* at 249.

⁵⁷ *Id.* at 255.

evidence,” summary disposition is not appropriate.⁵⁸ Caution should be exercised in granting summary disposition, which may be denied if “there is reason to believe that the better course would be to proceed to a full [hearing].”⁵⁹

Below we address in turn arguments on (1) the scope of Contention 3 as admitted, and (2) the conservatism of the straight-line Gaussian plume model and Entergy SAMA analyses. We additionally highlight other key SAMA-related arguments made in the record that the majority did not specifically address, but that may be relevant to resolution of Contention 3.

III. ANALYSIS

A. Scope of Contention 3

The parties — and even the Board judges among themselves — do not agree on the scope of Contention 3 as admitted. Like the Board majority, Entergy and the NRC Staff claim that Contention 3 included only challenges to specific input data applied in the SAMA analysis and not challenges to any model embedded in the MACCS2 code, such as the straight-line Gaussian plume atmospheric dispersion model and the code’s economic model.⁶⁰ Entergy and the Staff therefore conclude that the Board majority properly rejected Pilgrim Watch’s arguments concerning the adequacy of the Gaussian plume model because the model is not an “input” to the MACCS2 code. Pilgrim Watch argues that the majority misinterpreted the decision admitting Contention 3 (LBP-06-23) and therefore improperly “excluded areas of inquiry” that had been admitted as part of the contention, including the adequacy of the straight-line Gaussian plume model.

We agree with Pilgrim Watch and the dissent that the majority improperly excluded the issue of the adequacy of the straight-line Gaussian plume model. While the Board decision admitting the contention declared the contention’s scope limited to particular types of “input data” that are entered into the MACCS2 code, the Board did not make a distinction between specific *input* data entered into the MACCS2 code and specific *models* embedded in the code (such as the atmospheric dispersion model), resulting in confusion over the contention’s scope. Pilgrim Watch’s arguments on the adequacy of the straight-line Gaussian plume model and the sea breeze phenomenon appeared under the headings of “incorrect input data” and “Meteorological Data”⁶¹ and, as the dissent notes, “centrally involved”

⁵⁸ *Id.* at 250-51.

⁵⁹ *Id.* at 255.

⁶⁰ See NRC Staff’s Initial Brief in Response to CLI-09-11 (Memorandum and Order (Request for Additional Briefing)) (June 25, 2009) (NRC Initial Brief) at 9-10; Entergy’s Brief in Response to CLI-09-11 (June 25, 2009) (Entergy Initial Brief) at 14-17.

⁶¹ See Petition at 34-38.

arguments asserting the “limitations” of the straight-line Gaussian plume model.⁶² Moreover, different models require different amounts and kinds of data, with more detailed variable trajectory models requiring significantly more data than that used in the straight-line Gaussian dispersion model. Therefore, there easily may be an overlap between arguments challenging the sufficiency of “input data” used and challenging the model used, if the model does not require, allow for, or otherwise take into account particular types of data.

In admitting the contention, the Board indicated that Contention 3 included issues relating to plume behavior, including whether Entergy had “adequately taken into account relevant and realistic data with respect to . . . meteorological patterns that would carry the plume,” and the “use of more accurate data relating to . . . meteorologic plume behavior.”⁶³ Unless expressly narrowed otherwise, these issues logically may encompass arguments that a model is deficient because it does not take into account and reflect sufficient types of meteorological information or “data.”

While in admitting Contention 3, the Board explicitly rejected challenges “on a *generic* basis” to the use of probabilistic techniques, it is not clear from the decision what the Board meant by the term “generic.”⁶⁴ Pilgrim Watch’s meteorological arguments involving plume dispersion were specific to the Pilgrim location, and were separate from its more generalized argument against any consideration of probability-weighted risk assessment.⁶⁵ In short, given that concerns relating to the input used and the model used may overlap, the Board did not adequately specify that Pilgrim Watch’s claims involving the atmospheric dispersion model were beyond the scope of the contention.

Moreover, Entergy’s motion for summary disposition did not confine its discussion to data inputs, but also focused on affirming the adequacy of the straight-line

⁶² See, e.g., *id.* at 34-35; LBP-07-13, 66 NRC at 161 (dissenting opinion).

⁶³ LBP-06-23, 64 NRC at 339-40.

⁶⁴ *Id.* at 340 (emphasis added).

⁶⁵ In rejecting challenges on a generic basis to probabilistic risk assessments, LBP-06-23 appeared to be addressing Pilgrim Watch’s numerous broad arguments against considering the probability-weighted “risk” of accidents by multiplying the consequences of an accident by its probability. See 64 NRC at 340. Before the Board, Pilgrim Watch had stated that its opposition to risk analysis was not “central” to its contention. See Pilgrim Watch Reply to Entergy Answer to Request for Hearing and Petition to Intervene By Pilgrim Watch (July 3, 2006) at 14. But while Pilgrim Watch stressed that the “bulk” of its contention highlighted incorrect, incomplete, or inadequate input data, we do not read its arguments before the Board as abandoning the specific plume modeling-related claims that are interwoven with “input data” claims. See *id.* at 16, 20-22, 24; Transcript (July 7, 2006) at 371-72, 418-19 (“Meteorological data is very, very important. That’s why we spent a lot of time indicating why the straight-line Gaussian plume model is inappropriate for our coastal community”) (Pilgrim Watch representative Ms. Mary Lampert).

Gaussian plume model for SAMA analysis in general and for this analysis.⁶⁶ To address Contention 3, Entergy sought the assistance of Washington Safety Management Solutions LLC (WSMS), whose report Entergy relied upon for its summary disposition motion. WSMS's report describes the issues "admitted" to the proceeding as including "[t]he validity of the MACCS2 meteorological *model* and data used in the economic SAMA analysis, including the *ability of the model* to treat terrain effects and sea breeze phenomena. . . ."⁶⁷ The report specifically identifies as a part of Contention 3 the claim that "the Gaussian model underpinning MACCS2 is inappropriate to the Pilgrim plant physical environment, and that the meteorological model cannot adequately treat dispersion and the subsequent consequences of postulated severe accidents."⁶⁸ In short, Entergy's motion for summary disposition and attached documents addressed several Pilgrim Watch arguments challenging the adequacy of the Gaussian plume model, nowhere suggesting that challenges related to the model should be considered beyond the scope of the admitted contention. Similarly, the Staff's Supplemental Environmental Impact Statement (issued prior to the Board's decision on summary disposition) also describes the admitted contention as "present[ing] a number of issues concerning the MACCS2 Gaussian plume model and the *appropriateness of using this model* to assess dispersion of radionuclide releases and related consequences."⁶⁹

And *even if* the decision admitting Contention 3 in fact had specified that the contention did not encompass the adequacy of any dispersion model claims, the majority provided insufficient legal grounds for categorically rejecting the plume modeling methodology claims. The Staff suggests that the Board in admitting Contention 3 rejected the plume model issue for lack of sufficient basis. But the majority's decision simply states that in admitting the contention (in LBP-06-23) the Board rejected all challenges to "probabilistic methodologies and/or the modeling used."⁷⁰ The majority also stated that Pilgrim Watch's plume model arguments impermissibly challenge an "approach mandated by [NRC]

⁶⁶ See Summary Disposition Motion at 12-17, and attached Declaration of Kevin R. O'Kula (O'Kula Declaration) at 6-12 (addressing "Gaussian Plume Modeling Issues").

⁶⁷ WSMS-TR-07-0005, Revision 1, "Radiological Dispersion and Consequence Analysis Supporting Pilgrim Nuclear Station Severe Accident Mitigation Alternative Analysis" (May 2007) (WSMS Report) at ix, 1 (emphasis added), Exhibit 2 to Summary Disposition Motion; *see also* WSMS Report at 2-3, 13-20.

⁶⁸ *Id.* at 13.

⁶⁹ See Pilgrim EIS, Final Report — Volume 2, Appendices at G-19 to G-21 (emphasis added).

⁷⁰ LBP-07-13, 66 NRC at 151; *see also id.* at 142-43, 150. Entergy argues that as originally pled, Contention 3 never challenged use of the Gaussian plume model, but the contention clearly claimed that the "modeling tool . . . fail[ed] to properly characterize weather conditions." *See* Petition at 34-36.

regulations,” but did not specify any regulation requiring use of a particular atmospheric dispersion model or code for use in SAMA analysis.⁷¹

The majority is correct that the Staff used a “customarily” used code, “widely used and accepted as an appropriate tool” for conducting SAMA analyses,⁷² and that the Gaussian plume model is a “fundamental part” of the MACCS2 code.⁷³ But those reasons are not a sufficient ground to exclude the code’s integral dispersion model from all challenge, if adequate support is presented for a contention. Here, neither the decision admitting Contention 3, nor the majority decision dismissing the contention, anywhere specifies that Pilgrim Watch presented inadequate support for its straight-line Gaussian plume model claims. And while we have not conducted a *de novo* review of the admissibility of Contention 3, it is not obvious to us that the Pilgrim Watch Gaussian plume arguments, raised in support of the meteorological patterns issue, were insufficient to meet threshold contention admissibility requirements.

For the reasons outlined above, we conclude that the majority provided insufficient legal grounds for categorically rejecting meteorological arguments involving adequacy of the straight-line Gaussian plume model. This does not by itself suggest that Pilgrim Watch raised sufficient evidence to withstand summary disposition. But the majority’s outright rejection of plume modeling-related claims raises the concern that it may have overlooked or at least inadequately addressed arguments (by Pilgrim Watch as well as by Entergy and the Staff) on the adequacy of the straight-line plume dispersion model for the purpose of the Pilgrim SAMA analysis.

B. Conservatism of Straight-Line Gaussian Plume Model and Its Application

Our inquiry does not end here, however, because in dismissing Contention 3 the majority provided an additional ground for rejecting Pilgrim Watch’s plume model arguments. The majority concluded that Pilgrim Watch, in any event, had neither controverted Entergy’s claims that the straight-line Gaussian plume model generally results in more *conservative* analyses (indicating *greater* accident consequences), nor controverted claims that the SAMA analysis with the new sensitivity studies included conservative computations that would account for *any* potential meteorological patterns. The majority therefore concluded that any asserted errors in modeling would not render any additional SAMA cost-effective because the effects of “variations in wind speed and direction, meteorological

⁷¹ 66 NRC at 150.

⁷² *Id.* at 142.

⁷³ *Id.* at 151.

patterns, and plume shape are fully encompassed by the stochastic/statistical methods used in the SAMA analysis.”⁷⁴ Before the Commission, Entergy similarly stresses that the “absence of any challenge by [Pilgrim Watch’s] declarants to the *conservatism* of the Gaussian plume model renders meaningless [Pilgrim Watch’s] repeated claims that Entergy’s sensitivity analyses were irrelevant because Entergy had used the wrong model.”⁷⁵

We cannot agree with the majority that Pilgrim Watch failed altogether to address whether the MACCS2 code “is technically sound or produces, as Entergy and Staff aver, conservative results,”⁷⁶ and failed to dispute evidence “indicating that the Applicant’s analyses maximize the effects of the radiation carried by the meteorological pattern in each of the hundreds of particular scenarios computed.”⁷⁷

We focus on a declaration by Pilgrim Watch expert Mr. Bruce A. Egan. Mr. Egan’s declaration states that he is familiar with Contention 3. Mr. Egan directly responds to several itemized assertions made in the declaration of Entergy expert Mr. Kevin R. O’Kula, who supported Entergy’s motion for summary disposition. Mr. Egan contested Mr. O’Kula’s conclusion that the SAMA analysis accounts for time-dependent weather conditions by analyzing multiple plumes under different weather conditions, calling it an “erroneous concept” that “randomly chosen meteorological conditions would give the same results as inputting meteorological conditions as a function of time.”⁷⁸ He declared “incorrect” and a “misconception” the claim that the sea breeze is “generally a highly beneficial phenomena that disperses and dilutes the plume concentration and thereby lowers the projected doses downwind from the release point,” and instead claimed that at a coastal site “the sea breeze would draw contaminants across the land and inland subjecting the population to potentially *larger* doses.”⁷⁹

The majority is correct that a key focus of Mr. Egan’s declaration is the issue of emergency planning — the need to provide accurate, “real time” projections of the location and duration of potential public exposures to determine whether, when, and where particular population groups may need to be evacuated. These are issues beyond the scope of SAMA analysis. But we are not convinced that *all* of Mr. Egan’s statements should be dismissed as irrelevant or inapplicable to the SAMA cost-benefit issue. Mr. Egan describes his declaration on Contention 3 as bearing on the issues of “developing credible evacuation plans, estimating

⁷⁴ *Id.* at 146; *see also id.* at 150-52.

⁷⁵ Entergy Initial Brief at 23.

⁷⁶ LBP-07-13, 66 NRC at 151 & n.21.

⁷⁷ *Id.* at 151.

⁷⁸ Pilgrim Watch’s Answer Opposing Entergy’s Motion for Summary Disposition of Pilgrim Watch Contention 3 (June 29, 2007) (Opposition to Summary Disposition), attached Declaration of Bruce E. Egan (Egan Declaration) at 5, Number 13 (addressing Item 16 of O’Kula declaration).

⁷⁹ *Id.* (emphasis added).

realistic evacuation times, *and* in assessing the cost versus benefits of possible mitigating efforts,”⁸⁰ and he reviewed, addressed and, as noted, disagreed with some of Mr. O’Kula’s assertions on whether the SAMA analysis fully accounts for the sea breeze effect and whether the sea breeze effect could lead to greater projected population doses.⁸¹

Admittedly, some of Mr. Egan’s statements are ambiguous. For example, in addressing three of Mr. O’Kula’s assertions on the conservatism of the straight-line Gaussian plume model and the Entergy SAMA analyses Mr. Egan states that:

The fact that a model may seem to be conservative in particular applications or in limited data comparisons does not mean that the model is better or should be recommended for an application. Models can be conservative but have incorrect simulations of the underlying physics. Similarly, sensitivity studies do not add useful information if the primary model is flawed.⁸²

This could mean that Mr. Egan does not contest that the straight-line Gaussian plume model yields more conservative results compared to more detailed varied trajectory models (as the majority concluded), or that he merely does not contest that in the two comparative studies Mr. O’Kula referenced the straight-line Gaussian plume model produced generally more conservative or comparable results. Pilgrim Watch argues that the latter interpretation is correct.⁸³

While the majority’s interpretation of Mr. Egan’s declaration is reasonable, at the summary disposition stage “all ambiguities and . . . all permissible inferences” must be resolved “in favor of the party against whom summary [disposition] is sought.”⁸⁴ Taken as a whole, we find that Mr. Egan’s declaration can also be read to challenge the claim that the Entergy analyses subsumed all potential meteorological patterns, and to argue that there could be “potentially larger doses” due to the sea breeze effect that may not be taken into account by the current analysis. We therefore disagree with the majority’s conclusion that there was uncontroverted evidence on the conservatism of the straight-line Gaussian plume model and uncontroverted evidence showing that the SAMA analysis “maximize[d] the effects of the radiation carried by the meteorological pattern in each of the hundreds of particular scenarios computed.”⁸⁵

⁸⁰ *Id.* at 3, Number 6.

⁸¹ *See generally id.* at 3-6.

⁸² *Id.* at 5, Number 13 (addressing Items 17, 18, 19 of O’Kula Declaration).

⁸³ *See* Pilgrim Watch Brief in Response to Entergy’s Response to CLI-09-11 (Requesting Additional Briefing) (July 6, 2009) (Pilgrim Watch Reply to Entergy Initial Brief) at 8-9.

⁸⁴ *See Patterson v. Oneida, New York*, 375 F.3d 206, 219 (2d Cir. 2004).

⁸⁵ *See* LBP-07-13, 66 NRC at 151.

Significantly, however, even if the SAMA analysis may not fully account for all potential plume patterns or all dose impacts relating to the sea breeze effect, that would not necessarily mean that the cost-benefit conclusions are in error, given the nature of SAMA analysis. Entergy and the Staff presented evidence on other, potentially significant considerations for evaluating Entergy's SAMA cost-benefit conclusions, but the Board did not address those factors.

For example, Entergy expert Mr. O'Kula concluded that sea breeze effects generally are most often localized within 10 miles of the coast and therefore would not be "a factor towards the heavily populated areas in the Pilgrim 50-mile region," *and* that "it is the impact in the populated zones that dominates population dose and off-site economic cost consequences."⁸⁶ Consequently, even assuming that the SAMA analysis does not entirely account for the sea breeze effect and that the effect could result in "potentially larger doses" as Mr. Egan claims, if the sea breeze effect essentially is limited to lower population areas within 10 miles of the plant and occurs only on a limited number of days per year,⁸⁷ its overall impact on the SAMA cost-benefit conclusions may be insignificant.⁸⁸

⁸⁶ See O'Kula Declaration at 9-10 (referencing Exhibit 2, WSMS Report at 19-21), attached to Summary Disposition Motion. See also WSMS Report at 20 (concluding that the "close-in effects within five to ten miles of the point of release will have little bearing on the SAMA PDR [population dose risk] and OECR [offsite economic cost risk] results"); *id.* at 8 (describing spatial dependence of the population dose).

⁸⁷ Mr. O'Kula was the principal author of and repeatedly references the WSMS Report submitted as Exhibit 2 in support of Entergy's motion for summary disposition. The report notes that for the SAMA cost-benefit analysis sea breeze effect conditions "should be weighted by frequency of occurrence based on site conditions, time of day, effective release elevation, and other factors." See WSMS Report at 20. The affidavit of Staff experts Joseph A. Jones and Dr. Nathan Bixler similarly stresses that sea breeze occurrences "occur a small percentage of the total weather time assessed," and the "effects are averaged out in the MACCS2 analysis for the annual period assessed." See Affidavit of Joseph A. Jones and Dr. Nathan Bixler Concerning Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 3 (June 25, 2007) (Jones and Bixler Affidavit) at 5, attached to Staff Response to Summary Disposition Motion.

Pilgrim Watch itself repeatedly has stated that "a sea breeze front can penetrate inland from 1 km (.5 miles) to 15 km (9 miles)," and that while a sea breeze can occur throughout the year, on average the Pilgrim site "experiences about 45 sea breeze days" a year. See, e.g., Opposition to Summary Disposition at 18, 52 (citing to study by J.D. Spengler & G.J. Keeler, Feasibility of Exposure Assessment for the Pilgrim Nuclear Power Plant (May 12, 1988)).

⁸⁸ Population dose is predicted in terms of "person-rem." A "rem" is a unit of radiation dose and "person" refers to the number of people exposed to the particular amount of rem. These two factors are multiplied to obtain the population dose in person-rem. Therefore, for example, a population dose of 10 person-rem may arise from 10 people exposed to 1 rem each, one person exposed to 10 rem, or 100 people exposed to 0.1. Under NRC practice, for a particular weather sequence, SAMA analysis calculates the *total* population dose, the sum of the estimated dose commitments to populations located in all the sectors on a spatial grid-map out to a defined distance (usually 50 miles) from the plant).

(Continued)

The majority's decision does not, however, address these specific considerations (and related evidence) bearing on the significance of the sea breeze effect for the Pilgrim SAMA analysis. In our view, these are complex, fact-intensive issues best left for the Board's consideration in the first instance, therefore warranting further development of the record.

Moreover, Pilgrim Watch also argued that while exposures within the 20- to 50-mile zone "would not be adversely impacted by localized sea breeze conditions" near the Pilgrim facility, in the months when sea breeze conditions are uncommon, another meteorological phenomenon "would likely" carry concentrated plumes "into the 20+ mile region."⁸⁹ Specifically, Pilgrim Watch argued that "releases from Pilgrim initially headed out to sea will remain tightly concentrated due to reduced [vertical] turbulence" rates over the ocean water, and that if wind direction "then shifts toward populated areas," contaminants which will have "remain[ed] relatively undiluted," may cause "hot spots of radioactivity in unexpected locations."⁹⁰ In support, Pilgrim Watch cited to a passage in a report by Mr. Jan Beyea, and to two articles (which were cited in Mr. Beyea's report). The cited articles, concerning the transport of pollutants in New England, Pilgrim Watch had identified in its disclosure statement as items of evidence it intended to rely upon at hearing.⁹¹

The majority did not address the reduced turbulence/"hot spots" claim. It rejected Mr. Beyea's report in its entirety, concluding that the report "proffer[ed] no information regarding the facts at issue."⁹² Mr. Beyea prepared his report in support of a contention on spent fuel pool fires that the Massachusetts Attorney General submitted in this proceeding — a contention ultimately rejected by the Board and later by us as an impermissible challenge to NRC regulations and the license renewal GEIS.⁹³ Mr. Beyea did not provide a supporting affidavit

The mean value of the predicted total population dose is obtained by statistical averaging over many hundreds of randomly selected hourly weather sequences (based on hourly meteorological data points obtained from the site).

⁸⁹ Opposition to Summary Disposition at 19.

⁹⁰ *See id.* at 19-20, 55-56. *See also* Pilgrim Watch's Brief in Response to CLI-09-11 (Requesting Additional Briefing) (June 25, 2009) (Pilgrim Watch Initial Brief) at 5-6, 17-18.

⁹¹ *See* Document Disclosure List (Nov. 15, 2006) at 4 (listing articles by Angevine et al.).

⁹² LBP-07-13, 66 NRC at 148.

⁹³ *See* LBP-06-23, 64 NRC at 280-300; *see also id.* at 283 n.103; *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13 (2007), *reconsideration denied*, CLI-07-13, 65 NRC 211 (2007). The NRC subsequently denied a related petition for rulemaking filed by the Attorney General. *See* Petition for Rulemaking; Denial, 73 Fed. Reg. 46,204 (Aug. 8, 2008), *aff'd*, *New York v. NRC*, 589 F.3d 551 (2d Cir. 2009). Pilgrim Watch also submitted a contention on spent fuel pool accidents (Contention 4), similarly found inadmissible by the Board. *See* LBP-06-23, 64 NRC at 280-300. Pilgrim Watch has appealed dismissal of Contention 4, an issue we will address in a forthcoming decision.

for Pilgrim Watch on Contention 3, and there is no indication that he has any familiarity with the specific arguments concerning Contention 3. The majority therefore found that Mr. Beyea's report on potential releases from spent fuel pool fires had no bearing on the SAMA contention (SAMAs do not encompass spent fuel pool accidents).⁹⁴ The majority further stressed that the Beyea report largely rested on cancer risk claims that went well beyond the scope of the issues in Contention 3, including distinctly new claims that the "dollar equivalent of cancers" should be estimated differently in SAMA analysis.⁹⁵

For the reasons the Board majority gave, we agree that nearly all of Mr. Beyea's report is not relevant to the SAMA issues in Contention 3. But to the extent that Pilgrim Watch, in arguing a meteorological claim, relies upon a specific portion of the report that addresses meteorological patterns or phenomena in the New England coastal area, we see no basis to ignore Mr. Beyea's statements. The dissent states that it would have considered Mr. Beyea's report "with regard to meteorological issues,"⁹⁶ an approach we find reasonable. We do not mean to suggest that Pilgrim Watch's evidence on the "hot spots" claim would have sufficed to raise a genuine material dispute over the SAMA cost-benefit conclusions,⁹⁷ but

⁹⁴ See *infra* Section III.E.

⁹⁵ See LBP-07-13, 66 NRC at 148.

⁹⁶ *Id.* at 160 n.25.

⁹⁷ We note, for example, that Mr. Beyea's discussion appears more in the manner of a "suggest[ion]" for further study to see *if* reduction of turbulence could lead to radiological impacts as far away as Boston or could impact any "cost-benefit computations." See Report to the Massachusetts Attorney General on the Potential Consequences of a Spent Fuel Pool Fire at the Pilgrim or Vermont Yankee Plant (May 25, 2006) (Beyea Report) at 7, 11-12, attached to Opposition to Summary Disposition. Whether and to what extent the cited articles on pollutant transport bear on the Pilgrim SAMA analysis is an issue we do not reach; neither Mr. Beyea nor Pilgrim Watch provided any discussion of the articles.

Entergy argues that Pilgrim Watch relies upon several documents that were not "offered as [an] exhibit" in this case and should not be considered by the Commission. Entergy's Reply to Pilgrim Watch's Brief in Response to CLI-09-11 (July 6, 2009) (Entergy Reply to Pilgrim Watch Initial Brief) at 8. We examined the following documents, which were both referenced by Pilgrim Watch before the Board and which we were able to obtain readily on the internet: J.D. Spengler & G.J. Keeler, Feasibility of Exposure Assessment for the Pilgrim Nuclear Power Plant (May 12, 1988) (discussed also by Mr. Egan in his declaration); M. Zagar, M. Tjernstrom, W. Angevine, New England Coastal Boundary Layer Modeling (Aug. 2004) (referenced by Mr. Beyea); and SAND96-0957, "Site Restoration: Estimation of Attributable Costs from Plutonium-Dispersion Accidents" (May 1996). Our decision today to remand the meteorological patterns issue does not depend upon any of these documents. For future proceedings, we make clear that any documents or other evidence referenced in parties' briefs must be available in the case record. Licensing Boards and the Commission should not be expected to consider items never provided on the record.

the claim was raised with sufficient particularity to have warranted consideration by the majority.⁹⁸

Ultimately, the majority's decision is not sufficiently comprehensive to support the summary disposition of Contention 3. In our view, genuine factual questions remain. As we noted, it is not clear to us that Pilgrim Watch's expert on air dispersion modeling failed to dispute the conservatism of the straight-line Gaussian plume model and Entergy analysis. And while Entergy and the Staff presented additional key arguments in support of summary disposition (i.e., the potential limited significance of the "sea breeze" effect to the Pilgrim SAMA analysis), these considerations were left unaddressed by the majority. Nor are all of Pilgrim Watch's claims on the meteorological patterns issue addressed in the majority's decision (i.e., the "hot spots" argument). In short, we cannot conclude that no material dispute remains on the meteorological patterns issue. The best course at this stage is to remand the contention for hearing.

In a case such as this one, with a voluminous case record and numerous factual issues and competing expert declarations, proceeding to an evidentiary hearing where factual claims appropriately can be weighed, clarified, and resolved with merits findings may be more efficient for all parties, as the dissent in this case suggested.⁹⁹ Where the Licensing Board is itself the trier of fact, the time required for careful consideration of the evidence, including expert declarations and referenced exhibits, often may be more effectively used to resolve factual claims on the merits following consideration of testimony and a brief hearing.

For the reasons outlined above, we reverse the majority's summary dismissal of the meteorological patterns issue in Contention 3, and remand the issue for hearing. In addition to the meteorological patterns issue, Contention 3 included challenges to offsite economic costs considered in the analysis, and to the inputs on evacuation times. In disagreeing with the majority's grant of summary disposition, the dissent stated that it would have permitted a hearing "at least with regard to meteorological patterns, and how the meteorological analysis might affect analysis of the evacuation and cost data."¹⁰⁰

Because the Board has yet to reach a merits conclusion on the adequacy of the meteorological patterns/air dispersion modeling issue, we agree that it would be

⁹⁸ Pilgrim Watch also referenced Mr. Beyea's report to support a claim that because the MACCS2 code is not used to measure dispersion within 100 meters of the source, it ignores resuspension of material deposited there but blown further offsite, ultimately impacting cost. We do not decide whether Mr. Beyea's report provides any probative support for these claims. Since the Board on remand will consider Pilgrim Watch's arguments in regard to meteorological patterns, it can assess the timeliness and merit of Pilgrim Watch's air dispersion modeling arguments regarding wind-driven resuspension.

⁹⁹ LBP-07-13, 66 NRC at 167-68.

¹⁰⁰ *Id.* at 162-63.

premature to dismiss entirely from this proceeding other portions of Contention 3 that may be linked to the adequacy of the meteorological modeling underpinning the SAMA analysis. For example, the plume/air dispersion modeling depicts projected patterns and amounts of radioactive doses, as well as the projected amount and extent of land contamination. These in turn impact the calculations of averted offsite economic costs and evacuation time assumptions. Consequently, if the Board on remand were to conclude that there is a material deficiency in the meteorological patterns modeling, the economic cost calculations also could warrant reexamination. We therefore remand the economic cost and evacuation time portions of Contention 3 to the Board, but only to the extent that the Board's merits conclusion on meteorological patterns may materially call into question the relevant economic cost and evacuation timing conclusions in the Pilgrim SAMA analysis.

While we disagree with some of the majority's conclusions on the meteorological patterns issue and find that the issue warrants further analysis in the record, we otherwise agree with the majority that the bulk of Pilgrim Watch's arguments before the Board were unsupported by significantly probative evidence, go well beyond the scope of Contention 3 as originally proffered and admitted, or raise issues beyond the intent and scope of a SAMA analysis. Insofar as Pilgrim Watch raises distinct "economic costs" or "evacuation times" challenges that extend beyond its meteorological modeling concerns, we agree with the majority that Pilgrim Watch fails to raise a genuine material dispute for hearing. Accordingly, if the Board on remand concludes that there is no significant meteorological modeling deficiency calling into question the overall Pilgrim SAMA cost-benefit analysis conclusions, no genuine dispute concerning economic costs or evacuation timing inputs will remain. To expedite consideration of Contention 3 on remand, below we outline the majority's conclusions with which we agree and therefore affirm, and additional, related observations of our own. We do not list all of Pilgrim Watch's numerous unsupported assertions.

C. New Arguments Not Part of the Original Contention

NRC threshold contention standards require petitioners to review application materials and set forth their contentions "with particularity."¹⁰¹ Where any issue arises over the proper scope of a contention, "NRC opinions have long referred

¹⁰¹ 10 C.F.R. § 2.309(f)(1); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 426-28 (2003) (contention standards require pleading "specific grievances, not simply to provide general 'notice pleadings'").

back to the bases set forth in support of the contention.”¹⁰² The “reach of a contention necessarily hinges upon its terms *coupled with* its stated bases.”¹⁰³ Our contention rules require “‘reasonably specific factual and legal’ allegations at the outset” to assure that matters admitted for hearing have at least some minimal foundation, are material to the proceeding, and provide notice to opposing parties of the issues they will need to defend against.¹⁰⁴ Intervenors therefore may not “freely change the focus of an admitted contention at will” to add a host of new issues and objections that could have been raised at the outset.¹⁰⁵ Where warranted we allow for amendment of admitted contentions,¹⁰⁶ but do not allow distinctly new complaints to be added at will as litigation progresses, stretching the scope of admitted contentions beyond their reasonably inferred bounds.

Pilgrim Watch raises a number of distinctly new arguments not fairly encompassed by Contention 3 as originally proffered and admitted. For example, on the issue of offsite “economic costs,”¹⁰⁷ Contention 3 as pled challenged the SAMA analysis for failure to account for “the loss of economic activity in Plymouth County.”¹⁰⁸ Specifically, the contention claimed that the economic costs analysis “only included the assessed value” of property but did not assess “business value” — the “fact that the building is an ongoing business with inventory equipment and income generation capability.”¹⁰⁹ The contention particularly highlighted a potential loss of tourism, noting that the SAMA analysis did not “account[] for the destruction of this region’s economy as a major tourist, and historical and recreational area.”¹¹⁰ More generally, Pilgrim Watch asserted that the economic costs analysis “should include loss of economic infrastructure and tourism.”¹¹¹ These were the specific bases for Pilgrim Watch’s challenge to the Entergy SAMA analysis of offsite economic costs.

¹⁰² *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) (*Catawba/McGuire*); *see also Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 727 (2005).

¹⁰³ *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991); *see also Catawba/McGuire*, CLI-02-28, 56 NRC at 379, 383.

¹⁰⁴ *Catawba/McGuire*, CLI-02-28, 56 NRC at 381, 383; *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-35 (1999).

¹⁰⁵ *Catawba/McGuire*, CLI-02-28, 56 NRC at 386 & n.61 (internal quotation and citation omitted).

¹⁰⁶ *See* 10 C.F.R. § 2.309(f).

¹⁰⁷ SAMA analysis conducts initial separate analyses for offsite population dose and offsite economic costs.

¹⁰⁸ *See* Petition at 44.

¹⁰⁹ *See id.*

¹¹⁰ *Id.* at 45.

¹¹¹ *See id.*

In moving for summary disposition, Entergy provided a supplemental sensitivity analysis intended to account for loss of tourism and other county and metropolitan area gross domestic product.¹¹² Pilgrim Watch then responded with numerous distinctly new asserted deficiencies. It claimed that Entergy had not accounted for “health costs” such as “medical costs, loss of productivity and costs associated with disability, psychological effects,¹¹³ loss of well-being or changes in quality of life such as grief, pain, and changed social functioning.”¹¹⁴ Pilgrim Watch also argued that the analysis underestimated cancer mortality risk, failed to include health costs other than cancer mortality, failed to base health costs on new cancer coefficients, and assigned an insufficient dollar value per person-rem.¹¹⁵ It further claimed that the analysis failed to account for the “difficulty of conducting ecological restoration” at a coastal and wetlands location and that porous surfaces are more difficult to decontaminate, stressing that the Pilgrim coastal area has buildings made of wood, brick, and concrete.¹¹⁶ Pilgrim Watch repeats these claims in its brief before us, adding that the MACCS2 decontamination “assumptions are based on a radiological weapon event” where “particulates are relatively large and swept up with a broom,” but that with a reactor accident a release “cannot be swept up with a broom.”¹¹⁷

The majority properly rejected the various new “health” or cancer risk arguments as late because they are not fairly encompassed by the description of Contention 3 that Pilgrim Watch set forth in its petition for hearing.¹¹⁸ Pilgrim Watch’s new claims of dramatically underestimated decontamination or cleanup costs also are not reasonably inferable from the economic cost challenges proffered in Contention 3, as both Entergy and the Staff argue.¹¹⁹ These claims simply

¹¹² See Summary Disposition Motion at 26-27; O’Kula Declaration at 20-21.

¹¹³ We note that NEPA does not require an agency to assess potential psychological impacts due to fear of radiological harm. See generally *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

¹¹⁴ Opposition to Summary Disposition at 81.

¹¹⁵ See *id.* at 46, 81-84.

¹¹⁶ *Id.* at 90.

¹¹⁷ See Pilgrim Watch Initial Brief at 10, 12-13, 17, 19-20.

¹¹⁸ See LBP-07-13, 66 NRC at 145-46. The majority further correctly noted that SAMA analyses typically address *separately* those costs “relating to population dose” from “those relating to offsite economics,” and that the Entergy SAMA analyses obviously had followed this approach. Contention 3 as pled addressed only offsite economic costs (not population dose issues) in its arguments challenging the economic costs analysis. See *id.* at 145, 148; see also *id.* at 148 (“the scope of the admitted contention does not include errors in estimating the dollar-equivalent of cancers caused by a severe accident”).

¹¹⁹ See, e.g., Entergy Reply to Pilgrim Watch Initial Brief at 3; NRC Staff’s Reply to Pilgrim Watch’s Brief in Response to CLI-09-11 (July 6, 2009) at 9-10. The only references in the contention

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were not encompassed by the specific business-related bases — e.g., “economic infrastructure and tourism” — proffered by Pilgrim Watch in Contention 3. Pilgrim Watch never sought to amend Contention 3 to add these issues, and the record was never developed on them. We have long stressed that “NRC adjudicatory proceedings would prove endless if parties were free . . . to introduce entirely new claims which they either originally opted not to make or which simply did not occur to them at the outset.”¹²⁰ Nor does Pilgrim Watch, in any event, demonstrate a *supported* genuine material issue — bearing on the overall SAMA cost-benefit results — for these new economic cost analysis claims.¹²¹

to “decontamination,” for example, were (1) acknowledgments that the MACCS2 model analysis of economic costs *includes* the cost of decontamination, the cost of condemnation of property that cannot be decontaminated to a specified level, and decontamination or interdiction for the longer term; and (2) in reference to tourism, the claim that tourism-related revenues in the historical sites within 10 miles of Pilgrim would never fully recover after a severe accident, even if the sites were cleaned and decontaminated. *See* Petition at 43-44.

¹²⁰ *National Enrichment Facility*, CLI-05-28, 62 NRC at 727-28 (internal quotations and citation omitted).

¹²¹ Repeatedly, as we examined Pilgrim Watch’s evidence (when it had any) on economic costs, we could not discern any direct connection to the Pilgrim SAMA cost-benefit results. For example, as support for a claim that cleanup costs are underestimated, Pilgrim Watch cites to a page in a Sandia National Laboratories report. *See, e.g.*, Petition for Review at 18; Pilgrim Watch Initial Brief at 12 (citing to SAND96-0957, “Site Restoration: Estimation of Attributable Costs from Plutonium-Dispersal Accidents” (May 1996)); *see also* Pilgrim Watch Initial Brief at 21. But the cited page merely states that after the Chernobyl accident it became recognized that decontamination of urban areas and particularly porous surfaces can be very difficult, although the acknowledged difficulties of the Chernobyl cleanup may largely have been due to poor training, lack of equipment, and a nearly complete breakdown in leadership. Pilgrim Watch provided no specific argument of error in the SAMA cost-benefit analysis calculations or conclusions. Merely citing to pages in diverse reports without any additional explanation or other obvious link to the SAMA analysis is insufficient to raise a genuine material dispute for hearing.

We agree, additionally, with Entergy that Contention 3 as pled did not challenge *all* use of the MACCS2 code for determining economic costs. *See, e.g.*, Entergy Initial Brief at 14. As we outlined, in challenging the economic costs analysis, Pilgrim Watch argued that the analysis was deficient because the economic model in the MACCS2 code did not account for the loss of all economic activity — specifically, that it “models only the economic cost of mitigative actions” and did not account for lost business value, economic infrastructure and tourism. In short, Pilgrim Watch claimed that particular costs *were missing* from the analysis, not that the economic analysis done to date could not be considered *at all* or revised because the MACCS2 code’s economic model is completely invalid. Indeed, Pilgrim Watch specifically stated that what it sought was to have the asserted missing economic costs “add[ed] in,” “supplementing” the existing “analysis data.” *See* Pilgrim Watch Reply to Entergy Answer to Request for Hearing and Petition to Intervene By Pilgrim Watch (July 3, 2006) (Pilgrim Watch Reply to Entergy Answer to Request for Hearing) at 21. Entergy’s revised economic analyses sought to address the costs Pilgrim Watch asserted had been missing.

In opposing summary disposition, however, Pilgrim Watch presented excerpts from the “MACCS2
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D. Issues Outside the Scope of SAMA Analysis

Many of Pilgrim Watch's arguments on the need for improving meteorological monitoring by, for example, installing continuous recording meteorological instruments along the coast and at additional sites, go to improving the ability to predict — in “real time” fashion during an actual accident — where a *specific* identifiable plume is heading, to know precisely whether and where to direct people to evacuate.¹²² These concerns are not directly relevant to probabilistic risk assessment in NRC SAMA analysis, which examines a spectrum of hypothetical accident scenarios and under NRC practice utilizes the mean value of population dose risk and offsite economic costs. To the extent, however, that Pilgrim Watch claims that additional meteorological information would significantly *change the Pilgrim SAMA cost-benefit conclusions* — e.g., Pilgrim Watch's plume modeling claims — the issue falls within the scope of Contention 3.

Pilgrim Watch raises numerous new claims relating to spent fuel pool fires, and argues that the SAMA analysis is deficient for failing to address potential spent fuel pool accidents.¹²³ These claims fall beyond the scope of NRC SAMA analysis and impermissibly challenge our regulations.¹²⁴ The NRC's GEIS for license renewal provides a generic evaluation of potential spent fuel pool accidents, encompassing the potentially *most serious* accident — a seismic-generated accident causing catastrophic failure of the pool — and concludes that there is no further need for a site-specific spent fuel pool accident or mitigation analysis for license renewal.¹²⁵ In its intervention petition, Pilgrim Watch submitted a separate

Support Forum” blog, in which Mr. David Chanin (a primary developer of the MACCS2 computer code) states that the MACCS2 cost model is “seriously flawed” and “not worth anyone’s time.” *See* Attachments to Declaration of David I. Chanin in Support of Pilgrim Watch's Response Opposing Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 3. To the extent that Pilgrim Watch now claims that *no aspect* of a MACCS2 code SAMA offsite economic costs analysis can be considered valid, we find Pilgrim Watch's argument well beyond the scope of its proffered contention. In any event, Mr. Chanin's comments do not address Entergy's supplemental economic analyses, demonstrate no specific knowledge of the analysis, and, as the majority stressed, do not “indicat[e], even broadly” that the Pilgrim SAMA economic cost-benefit conclusions are not sufficiently conservative. *See* LBP-07-13, 66 NRC at 149.

¹²² *See, e.g.*, Pilgrim Watch Initial Brief at 19 (on “emergency response implications”).

¹²³ Contention 3 as submitted and admitted did not include specific challenges to the Pilgrim SAMA analysis's consideration of source term magnitude, timing, duration and energy of release.

¹²⁴ *See supra* note 92.

¹²⁵ *See* NUREG-1437, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Vol. 1, Final Report (May 1996) (GEIS) at 6-70 to 6-83, 6-85 to 6-86, 6-91 to 6-92; *see also Massachusetts v. NRC*, 522 F.3d 115 (1st Cir. 2008); Petition for Rulemaking; Denial, 73 Fed. Reg. 46,204, 46,212 (Aug. 8, 2008). The GEIS concludes — without exception or qualification for any type of spent fuel pool accident — that “regulatory requirements already in place provide adequate mitigation incentives for on-site storage of spent fuel,” and therefore mitigation alternatives for the

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Contention 4 centered on the claim that the Entergy Environmental Report should have addressed mitigation alternatives to reduce the potential for spent fuel pool water loss and fires.¹²⁶ The Board in LBP-06-23 rejected this contention as a challenge to NRC regulations and outside the scope of license renewal.¹²⁷ As previously stated, we will address in a separate decision all remaining issues raised in Pilgrim Watch’s petition for review, including Pilgrim Watch’s arguments on Contention 4.

E. Challenges to Evacuation Inputs

Pilgrim Watch argues that Entergy used “unrealistically low time estimates” for evacuation, ignored the potential of “shadow evacuation”¹²⁸ from outside of the 10-mile emergency planning zone (EPZ), ignored “peak traffic times” and otherwise failed to account for “[i]ncreased exposure from delayed evacuation.”¹²⁹ Pilgrim Watch’s petition for review, however, fails to address the majority’s grounds for rejecting the evacuation times input claims.¹³⁰ The majority’s grounds include that Entergy’s sensitivity analyses assumed *no evacuation or sheltering at all* (Sensitivity Case 6), thereby assuming “that everyone within the EPZ carried on with their normal activities” and bounding the effects of possible uncertainties in evacuation speed and other potential evacuation delays.¹³¹ The sensitivity analysis showed only a difference of 6% in population dose risk (PDR), and a 2% increase in Overall Economic Cost Risk (OECR).¹³² Further, as the majority noted, Mr. O’Kula presented evidence that most of the population dose (about 83%) in this SAMA analysis is received during the long-term phase after the accident, indicating that evacuation and sheltering actions during the initial

spent fuel pool need not be considered for the license renewal review. *See* GEIS at 6-86, 6-91 to 6-92. The NRC is in the process of revisiting and updating the GEIS, including the spent fuel pool accident analysis. The proposed GEIS (which is still under consideration) describes that the potential for any cost-effective SAMAs related to the spent fuel pool is “substantially less than for reactor accidents” and therefore no change is warranted to the existing GEIS conclusion that mitigation alternatives for spent fuel pool accidents need not be considered on a site-specific basis. *See* Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Appendices, Draft Report for Comment (July 2009) (Proposed GEIS) at E-42.

¹²⁶ Petition at 50-78.

¹²⁷ *See* LBP-06-23, 64 NRC at 288-300.

¹²⁸ “Shadow evacuation” refers to voluntary evacuation by individuals who have not been directed to evacuate.

¹²⁹ *See* Petition for Review at 17.

¹³⁰ *See* LBP-07-13, 66 NRC at 144-45.

¹³¹ *See* O’Kula Declaration at 14, 16; WSMS Report at 26.

¹³² *See* LBP-07-13, 66 NRC at 145.

7-day emergency phase would have relatively small impacts on overall population dose.¹³³

Pilgrim Watch presented no supported argument raising a genuine material dispute over the bounding nature of Sensitivity Case 6. The Staff notes, for example, that because Sensitivity Case 6 “assessed the population as though they were continuing regular activities,” it “assesse[d] any effect of a shadow evacuation where a portion of the public may be in their vehicles.”¹³⁴ In addition, Pilgrim Watch did not contest Entergy’s evidence that in the two accident scenarios that dominated nearly 95% of the risk in this Pilgrim SAMA analysis (because of their high frequency and large release), there would be at least 12 hours after initiation of the accident until a release would begin.¹³⁵ We therefore agree with the majority that none of Pilgrim Watch’s arguments regarding evacuation speed and timing, traffic and other delays, shadow evacuation, etc., raise a genuine material dispute for hearing over the current evacuation times assumptions in the Pilgrim SAMA analysis.¹³⁶

F. Economic Inputs

As we earlier outlined, many — indeed most — of Pilgrim Watch’s economic cost arguments sought to improperly expand the scope of Contention 3 (e.g., distinctly new claims on cancer coefficients used in the analysis) or effectively challenged NRC regulations (e.g., spent fuel pool claims). We have carefully considered, *de novo*, all of Pilgrim Watch’s arguments to us going to lost business, economic infrastructure, or tourism, including claims that farm wealth was underestimated, that the SAMA analysis does not include the “business value of property,” and that “a myriad of smaller economic costs were underestimated or totally ignored . . . that when added together would in all likelihood add up collectively to a significant amount.”¹³⁷ We agree with the majority’s conclusion that Pilgrim Watch failed to present significantly probative evidence countering the Entergy expert evidence and supplemental analyses on economic costs.¹³⁸ Pilgrim Watch provides no supported evidence raising a genuine material dispute with the SEIS’s conclusion that “further adjustments to more precisely account

¹³³ See O’Kula Declaration at 13; LBP-07-13, 66 NRC at 144-45.

¹³⁴ See Pilgrim EIS, Final Report-Appendices at G-15.

¹³⁵ See, e.g., WSMS Report at 8-10.

¹³⁶ To the extent, however, that the Board’s merits conclusions on meteorological modeling may have a material impact on or otherwise may materially call into question the evacuation timing inputs used in the analysis, the Board on remand should revisit the evacuation matters raised in Contention 3. See *supra* pp. 308-09.

¹³⁷ Petition for Review at 18; see also Pilgrim Watch Initial Brief at 22.

¹³⁸ See LBP-07-13, 66 NRC at 146, 148-49, 153-54.

for business and tourism would not change the overall conclusions of the SAMA analysis.”¹³⁹ At the summary disposition stage, the “quality of the evidentiary support” provided is “expected to be of a higher level than that at the contention filing stage.”¹⁴⁰ Even viewing Pilgrim Watch’s claims on economic costs in the most favorable light, we do not find significantly probative evidence of a genuine material dispute for hearing on any of Pilgrim Watch’s particular economic cost input claims. Pilgrim Watch’s arguments, largely based on its own unsupported reasoning and computations, are insufficient to demonstrate a genuine material dispute with Pilgrim SAMA analysis’s current overall cost-benefit conclusions.

Again, however, we will not foreclose entirely the possibility that the offsite economic cost challenges could be revisited in this proceeding, given that SAMA economic cost calculations ultimately depend upon the results of the meteorological modeling. Therefore, as earlier outlined, we include as part of our remand the economic costs issue, but only to the extent that the Board’s merits findings on the adequacy of the meteorological modeling may have a material impact on the economic cost matters raised and admitted as part of Contention 3.

* * * *

We conclude by emphasizing that the issue here is whether the Pilgrim SAMA analysis resulted in erroneous conclusions on the SAMAs found cost-beneficial to implement. The question is not whether there are “plainly better” atmospheric dispersion models or whether the SAMA analysis can be refined further. There is no NEPA requirement to use the best scientific methodology,¹⁴¹ and NEPA “should be construed in the light of reason if it is not to demand” virtually infinite study and resources.¹⁴² Nor is an environmental impact statement intended to be a “research document,” reflecting the frontiers of scientific methodology, studies, and data.¹⁴³ NEPA does not require agencies to use technologies and methodologies that are still “emerging” and under development, or to study phenomena “for which there are not yet standard methods of measurement or analysis.”¹⁴⁴ And while there “will always be more data that could be gathered,” agencies “must have some discretion to draw the line and move forward with decisionmaking.”¹⁴⁵

¹³⁹ Pilgrim EIS, Final Report-Appendices at G-18.

¹⁴⁰ See, e.g., Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, Final Rule, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

¹⁴¹ See, e.g., *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1185 (9th Cir. 2000).

¹⁴² See *Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988).

¹⁴³ See *Town of Winthrop v. Federal Aviation Administration*, 535 F.3d 1, 11-13 (1st Cir. 2008).

¹⁴⁴ *Id.* at 12-13.

¹⁴⁵ *Id.* at 11.

In short, NEPA allows agencies “to select their own methodology as long as that methodology is reasonable.”¹⁴⁶

Significantly, NRC SAMA analyses are not a substitute for, and do not represent, the NRC NEPA analysis of potential impacts of severe accidents. The NRC’s GEIS for license renewal provides a generic evaluation of severe accident impacts and the technical basis for the NRC’s conclusion that “the probability-weighted consequences of atmospheric releases, fallout onto open bodies of water, releases to groundwater, and societal and economic impacts from severe accidents are small for all plants.”¹⁴⁷ The severe accident analysis provides a “prediction of environmental impacts of severe accidents for all plants,”¹⁴⁸ estimating and using 95% upper confidence bounding values. It further includes a discussion of the uncertainties associated with the likelihood of accident sequences and the estimates of environmental consequences, including the uncertainty in atmospheric dispersion modeling of radioactive plume transport, and acknowledges that plume dispersion may be influenced by the terrain surrounding the plant.¹⁴⁹ Because the GEIS provides a severe accident impacts analysis that envelopes the potential impacts at *all* existing plants, the environmental impacts of severe accidents during the license renewal term already have been addressed generically in bounding fashion.

The SAMA analysis is a site-specific *mitigation* analysis. For a mitigation analysis, NEPA “demands ‘no fully developed plan’ or ‘detailed examination of specific measures which *will* be employed’ to mitigate adverse environmental effects.”¹⁵⁰ As a mitigation analysis, NRC SAMA analysis is neither a worst-case nor a best-case impacts analysis. It is NRC practice to utilize the *mean* values of the consequence distributions for each postulated release scenario or category — the mean estimated value for predicted total population dose and predicted offsite economic costs.¹⁵¹ These mean consequence values are multiplied by the estimated frequency of occurrence of specific accident scenarios to determine population dose risk and offsite economic cost risk for each type of accident sequence studied. There is in SAMA analysis, therefore, an averaging of potential consequences. As a policy matter, license renewal applicants are not required to base their SAMA

¹⁴⁶ *Id.* at 13; *see also The Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir. 2008) (an EIS need not be based on the “best scientific methodology available”).

¹⁴⁷ *See* 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 (regarding “severe accidents”); GEIS, Final Report, Vol. 1 at 5-12 to 5-106.

¹⁴⁸ GEIS at 5-113, 5-115.

¹⁴⁹ *See id.* at 5-100 to 5-106, *see also id.* at 5-26.

¹⁵⁰ *See Catawba/McGuire*, CLI-03-17, 58 NRC at 431 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)).

¹⁵¹ *See, e.g., NEI-05-01*[Rev. A] at 15; *see also id.* at 28 (describing how detailed cost estimates often are not necessary to gauge the economic viability of a particular SAMA candidate).

analysis upon consequence values at the 95th percentile consequence level (the level used for the GEIS severe accident environmental impacts analysis). Unless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated, no purpose would be served to further refine the SAMA analysis, whose goal is only to determine what safety enhancements are cost-effective to implement.

IV. CONCLUSION

For the reasons outlined above, the majority's decision in LBP-07-13 is *reversed* in part and *affirmed* in part, and Contention 3 is remanded for hearing, consistent with this decision.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
This 26th day of March 2010.

Additional Views of Commissioner Kristine L. Svinicki

I agree with my colleagues on the reasoning and outcome of today's decision. I write separately, however, to underscore the difficulty of reaching that decision. In my opinion, the conclusion the Commission reaches in this order is generous to Pilgrim Watch, but not inappropriately so. As evidenced by the Board's decision in LBP-07-13, applying the summary disposition standard to a complex, technical case is no simple feat. Although judges must construe the evidence in the light most favorable to the party opposing summary disposition, they cannot be expected to extract and parse arguments that have not been clearly articulated. Were the Commission itself to delve into the evidence, it would risk engaging in the sort of weighing that is inappropriate at the summary disposition stage. Even though Pilgrim Watch's demonstration of a genuine issue of material fact is a close call, at bottom, I believe that the best course forward is to remand parts of Contention 3 for hearing. I recognize that this issue reasonably could have resulted in a different outcome, and I appreciate the challenge faced by the Board.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman

Dale E. Klein

Kristine L. Svinicki

In the Matter of

Docket No. 50-391-OL

TENNESSEE VALLEY AUTHORITY

(Watts Bar Nuclear Plant,

Unit 2)

March 26, 2010

RULES OF PRACTICE: APPEALS

The Commission's rules of practice provide for an automatic right to appeal a board decision wholly denying a petition to intervene.

INTERVENTION RULINGS: STANDARD OF REVIEW

The Commission will defer to the board's rulings on threshold issues absent an error of law or abuse of discretion.

HEARING REQUESTS, LATE-FILED

In ruling on a nontimely petition, boards are to consider eight factors that will excuse the tardiness of the petition if, on balance, they weigh in favor of the petitioner: (i) good cause, if any, for the failure to file on time; (ii) the nature of the requestor's/petitioner's right under the Atomic Energy Act of 1954, as amended (AEA) to be made a party to the proceeding; (iii) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; (iv) the possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest; (v) the availability of other means whereby the requestor's/petitioner's interest will be protected; (vi) the extent to which the

requestor's/petitioner's interests will be represented by existing parties; (vii) the extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and (viii) the extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

HEARING REQUESTS, LATE-FILED (GOOD CAUSE)

The first factor — good cause — is accorded the greatest weight.

HEARING REQUESTS, LATE-FILED (ABSENCE OF GOOD CAUSE)

Absent a showing of good cause, a nontimely petition will not be excused unless the petitioner makes a compelling showing on the remaining factors. A petitioner's showing must be highly persuasive; it would be a rare case where the Commission would excuse a nontimely petition absent good cause.

HEARING REQUESTS, LATE-FILED (ABILITY TO ASSIST IN DEVELOPING RECORD)

Under longstanding Commission precedent, a petitioner must provide more than vague assertions that it will be able to assist in developing the record. When a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.

PROCEDURE COMPLIANCE: FAIRNESS

Fundamentally, fairness requires that all participants in NRC adjudicatory proceedings abide by the Commission's procedural rules, especially those who are cognizant of those rules and represented by counsel.

MEMORANDUM AND ORDER

This proceeding concerns the application of the Tennessee Valley Authority (TVA) for a license under 10 C.F.R. Part 50 to operate a second nuclear reactor (Watts Bar Unit 2) at the Watts Bar Nuclear Plant site in Rhea County, Tennessee. The Sierra Club, Blue Ridge Environmental Defense League, Tennessee Environmental Council, and We the People, Inc. (collectively, Petitioners) filed a notice of appeal, and supporting brief, of the Atomic Safety and Licensing

Board's ruling denying their late-filed intervention request.¹ TVA and the NRC Staff oppose the appeal.²

For the reasons set forth below, we affirm the Board's ruling.

I. BACKGROUND

On March 4, 2009, TVA submitted an update to its original operating license application for Watts Bar Unit 2. Shortly thereafter, the NRC Staff published a notice of opportunity for hearing in the *Federal Register*.³ As set forth in the notice, requests for hearing and petitions to intervene were due on or before June 30, 2009.⁴ The Southern Alliance for Clean Energy (SACE) requested, and received, a 2-week extension of time to file a request for hearing and petition to intervene.⁵ The SACE extension request did not mention any other prospective petitioners.⁶

SACE and Petitioners jointly filed a petition to intervene and request for hearing on July 13, 2009.⁷ In their answers, the Staff and TVA argued that the request for hearing was timely filed only with respect to SACE.⁸ Concurrent with the reply jointly filed by Petitioners and SACE, Petitioners filed a motion to permit late intervention.⁹ In their motion, they conceded that the request for hearing was timely only with respect to SACE, but argued that they had satisfied

¹Notice of Appeal of LBP-09-26 by Sierra Club, Blue [Ridge] Environmental Defense League, Tennessee Environmental Council, and We the People, Inc.; Brief on Appeal of LBP-[09-26] by Sierra Club, Blue [Ridge] Environmental Defense League, Tennessee Environmental Council, and We the People, Inc. (Dec. 3, 2009) (Petitioners' Appeal).

²Tennessee Valley Authority's Brief in Opposition to Sierra Club, et al. Appeal from LBP-09-26 (Dec. 14, 2009) (TVA Opposition); NRC Staff's Brief in Opposition to Sierra Club, Blue Ridge Environmental Defense League, Tennessee Environmental Council, and We the People, Inc.'s Appeal of LBP-09-26 (Dec. 14, 2009) (NRC Staff Opposition).

³Tennessee Valley Authority; Notice of Receipt of Update to Application for Facility Operating License and Notice of Opportunity for Hearing for the Watts Bar Nuclear Plant, Unit 2 and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 74 Fed. Reg. 20,350 (May 1, 2009).

⁴*Id.*

⁵Order (June 24, 2009) (unpublished).

⁶*See generally* Southern Alliance for Clean Energy's Request for Extension of Time to Submit Hearing Request/Petition to Intervene (June 16, 2009).

⁷Petition to Intervene and Request for Hearing (July 13, 2009).

⁸NRC Staff's Answer to Petition to Intervene and Request for Hearing (Aug. 7, 2009) at 12-13; Tennessee Valley Authority's Answer Opposing the Southern Alliance for Clean Energy, et al. Petition to Intervene and Request for Hearing (Aug. 7, 2009) at 16-17.

⁹Motion to Permit Late Addition of Co-Petitioners to Southern Alliance for Clean Energy's Petition to Intervene and Admit Them as Intervenors (Aug. 14, 2009) (Motion for Late Intervention).

the criteria in 10 C.F.R. § 2.309(c)(1) for nontimely filings.¹⁰ The Board denied Petitioners' motion for late intervention, as well as the larger request for hearing as to Petitioners, finding the failure to make a timely decision to join SACE in the petition to intervene to be inadequate justification for late filing.¹¹ The Board granted the request for hearing with respect to SACE, finding that it alone had demonstrated standing and submitted two admissible contentions.¹² Petitioners' timely appeal followed.

II. DISCUSSION

Our rules of practice provide for an automatic right to appeal a Board decision wholly denying a petition to intervene.¹³ We will defer to the Board's rulings on threshold issues absent an error of law or abuse of discretion.¹⁴ In ruling on a nontimely petition, boards are to consider eight factors that will excuse the tardiness of the petition if, on balance, they weigh in favor of the petitioner:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the [Atomic Energy Act of 1954, as amended (AEA)] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.¹⁵

¹⁰ *Id.* at 2.

¹¹ LBP-09-26, 70 NRC 939, 950-51 (2009).

¹² *Id.* at 946.

¹³ See 10 C.F.R. § 2.311(c).

¹⁴ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261 (2000). See also *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

¹⁵ 10 C.F.R. § 2.309(c)(1).

The first factor — good cause — is accorded the greatest weight.¹⁶ Absent a showing of good cause, a nontimely petition will not be excused unless the petitioner makes a compelling showing on the remaining factors.¹⁷ A petitioner’s showing must be highly persuasive; it would be a rare case where we would excuse a nontimely petition absent good cause.¹⁸

With respect to good cause, Petitioners assert, both in their motion to permit late intervention and on appeal,¹⁹ that they have made a sufficient showing because the reasons that merited SACE an extension of time — “the hearing notice’s failure to identify or provide the location of relevant licensing documents, and the unavailability of experts to analyze those licensing documents during the month of June” — apply equally to them.²⁰ They explain that at the time SACE requested an extension of the deadline to file intervention petitions they had not yet decided whether they would seek to intervene. According to Petitioners, when they did decide to join in SACE’s petition, their counsel inadvertently overlooked the need to request an extension of time on their behalf. Presented with this explanation, the Board determined that Petitioners’ untimely filing was caused by their uncertainty over whether to seek intervention, and reasoned that “such indecision does not constitute good cause for failure to file a timely petition.”²¹

Petitioners argue that the Board’s reasoning with respect to good cause was illogical and unfair because it focused on Petitioners’ reason for not joining in SACE’s extension request — the fact that they had not decided whether to intervene — instead of the reasons cited in SACE’s extension request. In Petitioners’ view, the Board should have considered whether their indecision was justified by the same reasons SACE cited for seeking an extension of time.²² Petitioners insist that the only difference between their circumstances and those of SACE is that their counsel mistakenly failed to request an extension of the deadline.²³ According to Petitioners, it would be “arbitrary and unfair” to exclude them from the proceeding.²⁴

We find no error or abuse of discretion in the Board’s ruling that Petitioners failed to establish good cause. The Board properly focused on whether Petitioners

¹⁶ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564 (2005).

¹⁷ *Id.* at 565.

¹⁸ *See id.* at 564-65 (distinguishing *Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975)).

¹⁹ Petitioners’ Appeal at 6-7; Motion for Late Intervention at 2-3.

²⁰ Petitioners’ Appeal at 6-7.

²¹ LBP-09-26, 70 NRC at 950.

²² Petitioners’ Appeal at 6.

²³ *Id.* at 6 n.1.

²⁴ *Id.* at 7.

had good cause for not complying with the established deadline or seeking an extension of the deadline. By acknowledging that they had not yet decided whether or not to intervene, Petitioners also acknowledged that they were aware of the deadline and of SACE's extension request. On appeal, Petitioners point out that, in focusing on the fact that Petitioners were unable to decide whether to seek intervention, the Board made no mention of their attorney's error.²⁵ Even though the Board apparently did not take it into account, Petitioners argue that their attorney's error, in any event, is "not directly relevant to the question of whether [they] had good cause to seek to intervene two weeks late."²⁶ In our view, any error by counsel does not change the result here. Petitioners do not clarify when they decided to seek intervention. They do not claim that they decided to join in SACE's petition prior to the filing deadline in the notice of opportunity for hearing — in such a case, a failure to file a timely extension request might be attributable to counsel.²⁷ Assuming Petitioners decided to join in SACE's petition some time after the filing deadline, they would have had to address their tardiness in any event, regardless of whether any additional delay was introduced by their counsel's asserted oversight. At bottom, Petitioners failed to demonstrate good cause for their late filing. Consequently, we find that the Board did not err in making that determination.²⁸

Given its reasonable determination regarding good cause, we find that the Board did not err or abuse its discretion in requiring Petitioners to make the requisite "compelling" showing on the remaining late-filing factors. We also find, as discussed below, that the Board did not err in determining that Petitioners failed to make this showing.

In its analysis of the remaining factors, the Board found that four of them weighed in Petitioners' favor. In an apparent reference to the three factors relating to a petitioner's standing, the Board determined that "[Petitioners] have the same rights under the [AEA] to be made a party to this proceeding, and the same interests in this proceeding" as SACE.²⁹ The Board's determination that SACE

²⁵ *Id.* at 6 n.1.

²⁶ *Id.*

²⁷ Petitioners state only that they decided to intervene "in time to meet the deadline that had been extended for SACE." *Id.* at 7.

²⁸ See *Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Units 1 and 2; R.E. Ginna Nuclear Power Plant; Turkey Point Nuclear Generating Plant, Units 3 and 4; St. Lucie Nuclear Power Plant, Units 1 and 2; Seabrook Station; Duane Arnold Energy Center), CLI-06-21, 64 NRC 30, 33 (2006) (finding that petitioner's tardiness due to its belated realization that it could present its arguments before the NRC did not constitute good cause); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 223 (1999) (finding that petitioner's failure "to read carefully the governing procedural regulations" did not constitute good cause).

²⁹ LBP-09-26, 70 NRC at 951. See 10 C.F.R. § 2.309(c)(1)(ii), (iii), (iv).

had demonstrated standing apparently was the basis for the Board's conclusion that these factors weighed in Petitioners' favor.³⁰ The Board also found that one additional factor weighed in Petitioners' favor because "admitting [them] as parties will not broaden or delay the proceeding."³¹ The Board nevertheless concluded that "these factors are insufficient absent a demonstration of good cause for . . . late filing, to justify . . . admitting them as parties to this proceeding."³²

In particular, the Board found that Petitioners had not shown that the sixth factor — whether Petitioners' interests will be represented by existing parties — and the eighth factor — whether Petitioners reasonably may be expected to assist in developing a sound record, weighed in their favor.³³ Concerning the sixth factor, the Board reasoned that Petitioners' interests will be represented by their co-petitioner, SACE, which was admitted as a party to the proceeding. In their motion, Petitioners claimed that there is a risk that SACE might withdraw from the proceeding, and consequently their interests will not be adequately represented. The Board rejected this argument as "far too speculative to carry much weight in the Board's decision."³⁴

Regarding the eighth factor, Petitioners asserted in their motion that they had shown how they would assist in developing a sound record by "co-sponsoring four contentions that are supported by expert declarations; and by submitting other contentions that are supported by both factual and legal bases."³⁵ Petitioners also stated that they plan to coordinate with SACE and contribute their knowledge of local environmental and economic conditions for two of the contentions proffered in the joint petition.³⁶ The Board concluded that these statements were insufficient to show how Petitioners would assist in the development of a sound record. As the basis for its conclusion, the Board pointed to Petitioners' failure to "explain how their knowledge . . . is superior to, or even different from, that of SACE or why, if they are not admitted as parties, they could not, nevertheless, provide [assistance] to SACE."³⁷ Thus, the Board concluded overall that Petitioners' showing on the remaining factors was not so compelling as to overcome their lack of good cause.³⁸

On appeal, Petitioners challenge the Board's rulings on the sixth and eighth factors.³⁹ First, with respect to the sixth factor, Petitioners assert that the Board's

³⁰ See LBP-09-26, 70 NRC at 947-48.

³¹ *Id.* at 951. See 10 C.F.R. § 2.309(c)(1)(vii).

³² LBP-09-26, 70 NRC at 951.

³³ *Id.* See 10 C.F.R. § 2.309(c)(1)(vi), (viii).

³⁴ LBP-09-26, 70 NRC at 951.

³⁵ Motion for Late Intervention at 4.

³⁶ *Id.*

³⁷ LBP-09-26, 70 NRC at 951.

³⁸ See *id.*

³⁹ The Board's determination on the other factors is not at issue. See generally Petitioners' Appeal.

rejection of their argument that SACE might withdraw from the proceeding “lacks a reasonable basis.”⁴⁰ This is because, Petitioners posit, “it is not unreasonable to anticipate circumstances in which an intervenor would be forced to drop out of a case for lack of resources” “[g]iven the significant demands of any NRC licensing proceeding [and] the length of a typical operating license case.”⁴¹ But Petitioners would have the Board hypothesize with regard to SACE’s “general fortunes” and “ability to continue to participate” based on mere generalizations about NRC licensing proceedings.⁴² Without any facts or particularized information offered in support of their assertion, we cannot find that the Board erred in declining to guess whether SACE will, at some unknown future time, withdraw from the proceeding. Therefore, we do not disturb the Board’s ruling on this factor.

Second, Petitioners reiterate that they have demonstrated the ability to assist in the development of a sound record because they assisted in the preparation of the petition and because they plan to coordinate with SACE during the proceeding.⁴³ They argue that in finding that they had not provided sufficient support, the Board “disregarded [their] statement that [they have] special knowledge of economic and environmental issues stem[ming] from the fact that [they] are located ‘in the vicinity of the Watts Bar Unit 2 nuclear plant.’”⁴⁴ Furthermore, the Board contradicted itself, Petitioners assert, by concluding that Petitioners failed to show how they would contribute to a sound record when the Board noted that the petition was “professional, and well-supported.”⁴⁵

Under longstanding Commission precedent, a petitioner must provide more than vague assertions that it will be able to assist in developing the record.⁴⁶ For example, in *Comanche Peak*, we found a petitioner’s vague statements that it would rely on its experts and documents from various sources to be insufficient.⁴⁷ Citing an earlier decision, we explained that “[w]hen a petitioner addresses this . . . criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.”⁴⁸ Here, Petitioners merely offer their proximity to

⁴⁰ Petitioners’ Appeal at 8.

⁴¹ *Id.*

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Id.* at 8 (quoting Motion for Late Intervention at 4).

⁴⁵ *Id.* at 9.

⁴⁶ *See, e.g., Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 166 (1993). *See also Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 611 (1988); *Grand Gulf*, ALAB-704, 16 NRC at 1730.

⁴⁷ *See Comanche Peak*, CLI-93-4, 37 NRC at 166.

⁴⁸ *Id.* (quoting *Comanche Peak*, CLI-88-12, 28 NRC at 611) (alteration and omission in original).

the location of the proposed reactor and their assistance in the preparation of the intervention petition to support their claim that they will be able to assist in developing a sound record. Given this limited information, we decline to second-guess the Board's conclusion that it could not discern "how [Petitioners'] knowledge . . . is superior to, or even different from, that of SACE, and why, if they are not admitted as parties, they could not, nevertheless, provide [assistance] to SACE."⁴⁹ Although the Board acknowledged that the petition was "professional, and well-supported," Petitioners' assertion that they co-sponsored and submitted contentions apparently did not enable the Board to distinguish between SACE's contribution to the petition and that of Petitioners. Petitioners have not demonstrated that the Board clearly erred in making this ruling.

Having found that Petitioners had not established good cause and had not made a compelling showing on two of the remaining seven factors, we find that the Board did not err or abuse its discretion when it determined that the four factors it weighed in Petitioners' favor did not tip the balance toward excusing their late filing.⁵⁰ Further, we find that the Board's decision is not, as Petitioners claim, inconsistent with fundamental notions of fairness in the hearing process.⁵¹ Fundamentally, fairness requires that all participants in NRC adjudicatory proceedings abide by our procedural rules, especially those who, as here, are cognizant of those rules and represented by counsel.⁵² As we said in our *Statement of Policy on Conduct of Licensing Proceedings*, "[f]airness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations."⁵³

In conclusion, we find that Petitioners point to no error of law or abuse

⁴⁹ LBP-09-26, 70 NRC at 951. Even if they are not participating as parties, we see nothing to prevent Petitioners from providing assistance to SACE, as they state they plan to do.

⁵⁰ Although the Board did not specifically address it, we observe that the factor pertaining to other means by which Petitioners may protect their interests also weighs against Petitioners. See 10 C.F.R. § 2.309(c)(1)(v). Petitioners have the option of filing a request for Commission action under 10 C.F.R. § 2.206. See *Millstone*, CLI-05-24, 62 NRC at 565-66. In addition, Petitioners have the opportunity to participate, as appropriate, as *amici curiae*. See generally 10 C.F.R. § 2.315(d). Cf. *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 722, 724 (2006) (identifying the ability to participate as *amici curiae* as one of the means to participate in an adjudicatory proceeding).

⁵¹ See Petitioners' Appeal at 5, 7.

⁵² See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 201 (1998); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 NRC 63, 66 (1992). See also *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984).

⁵³ CLI-81-8, 13 NRC 452, 454 (1981), 46 Fed. Reg. 28,533, 28,534 (May 27, 1981).

of discretion in the Board's determination that Petitioners had not justified sufficiently their late filing.⁵⁴

III. CONCLUSION

For the reasons articulated by the Board and set forth above, we *affirm* the Board's decision denying Petitioners' motion to permit late intervention, as well as their request for hearing.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of March 2010.

⁵⁴ Because we affirm the Board's ruling on Petitioners' motion, we need not reach the issue of whether Petitioners' motion was timely filed in accordance with 10 C.F.R. § 2.323(a), nor need we address the assertion that Petitioners failed to file a notice of appearance. *See, e.g.*, TVA Opposition at 3 (regarding the timeliness issue); NRC Staff Opposition at 11 n.11 (regarding the notice of appearance requirement).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

**Ann Marshall Young, Chair
Dr. Gary S. Arnold
Dr. Alice C. Mignerey**

In the Matter of

**Docket Nos. 52-034-COL
52-035-COL
(ASLBP No. 09-886-09-COL-BD01)**

**LUMINANT GENERATION
COMPANY, LLC
(Comanche Peak Nuclear Power
Plant, Units 3 and 4)**

March 11, 2010

RULES OF PRACTICE: HEARINGS; CLOSING OF HEARINGS

Section 2.390(d)(1) of 10 C.F.R. provides legal authority for nondisclosure and protection of security-related information concerning the physical protection of nuclear power plants, and for the closing of portions of hearings and other sessions in which such information will necessarily be discussed. During closed portions of oral argument, only the Board, NRC Staff, Applicant, and individuals who signed nondisclosure affidavits pursuant to protective order would be permitted to remain in the hearing room. After the session, parties could propose creation of a public copy of the transcript, with appropriate redactions for protected information.

**RULES OF PRACTICE: CONTENTIONS OF OMISSION;
MOOTNESS**

Under Commission precedent on contentions of omission, once information asserted to have been omitted is supplied, the original contention is moot and

Intervenors must timely file new or amended contention(s) in order to raise specific challenges regarding the new information.

**RULES OF PRACTICE: CONTENTIONS OF OMISSION;
MOOTNESS**

Intervenors' original Contention 7, asserting omission of information addressing requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), is ruled to be moot based on information newly supplied by Applicant, but the ruling does not address the adequacy of newly supplied information. Questions of adequacy will be addressed in rulings on Intervenors' new contentions.

RULES OF PRACTICE: ACCESS TO SUNSI

A party requesting access to a document withheld as sensitive unclassified nonsafeguards information (SUNSI) protected under 10 C.F.R. § 2.390(d)(1) must, in the event no protective order addresses the matter and/or in the event of a dispute concerning such access, show that it needs the document in order to participate meaningfully in the proceeding, a standard that is not onerous.

RULES OF PRACTICE: ACCESS TO SUNSI

The Licensing Board finds that Intervenors met the standard of showing need for the document in order to participate meaningfully in the proceeding, based on the following factors: (1) Intervenors noted expected issuance of the document and informed the Board and other parties about it at a reasonable time; (2) they followed its progress thereafter and requested access to it within a reasonable time after it was issued; (3) they have shown its relevance to matters at issue in the proceeding relating to the requirements of sections 52.80(d) and 50.54(hh)(2), which have been a concern of Intervenors from the outset of this proceeding; and (4) they have an expert who can provide support for any new contentions relating to these requirements and to any provisions of the document. Board also considered: lack of a publicly available version of the document; the fact that the document, even though merely guidance and not binding legal authority, has the purpose of assisting applicants and licensees with meeting requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), which provide somewhat minimal information themselves; the fact that Intervenors had signed nondisclosure affidavits pursuant to a joint protective order regarding related information; the fact that Intervenors could not use the document in preparation of current contentions because it was not then available to them; the inefficiency of waiting until the Commission finalizes the document; and considerations of basic fairness.

RULES OF PRACTICE: CONTENTIONS (TIMELINESS)

After obtaining access to a draft Staff guidance document, Intervenors would need to show that any future contentions based on the document are timely and that the information on which they are based was not available from any other reasonably available source prior to obtaining the document, and to provide more than merely what is in the guidance document, in the form of expert and/or other documentary support.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION; GUIDANCE DOCUMENTS)

While a guidance document alone does not provide sufficient support for a contention, where there is expert support a guidance document may be part of the support for a contention.

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MEMORANDUM AND ORDER
(Ruling on New SUNSI Contentions, Mootness of Original
Contention 7, and Intervenor’s Access to ISG-016)¹

I. INTRODUCTION

This Licensing Board rules herein on issues relating to the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), which concern “guidance and strategies” for addressing certain circumstances that might arise from potential beyond-design-basis explosions and fires,² relative to the two proposed new nuclear reactors at the Comanche Peak site that are the subject of the Combined Operating License (COL) Application at issue.³ Intervenor Sustainable Energy and Economic Development (SEED) Coalition, Public Citizen, True Cost of Nukes, and Texas State Representative Lon Burnam argue in contentions now pending before us that Applicant Luminant Generation Company has not satisfied these requirements. Specifically before us at this time are (1) the matter of the mootness of Intervenor’s original Contention 7 (alleging that Applicant had failed altogether to address the relevant requirements), in light of Applicant’s subsequent submission of a “Mitigative Strategies Report” (Report) claimed to comply with the require-

¹ Because this Memorandum and Order contains information relating to the physical protection of the proposed nuclear power plants for which licenses are sought in the Application at issue, those parts of the document that contain and discuss such security-related information are protected from public disclosure under 10 C.F.R. § 2.390(d)(1), and are not part of the public version of this document. *See infra* note 277 for the language of § 2.390(d)(1).

² *See* 10 C.F.R. §§ 52.80(d), 50.54(hh)(2). Section 52.80(d) requires a combined license application to contain:

(d) A description and plans for implementation of the guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with the loss of large areas of the plant due to explosions or fire as required by § 50.54(hh)(2) of this chapter.

Section 50.54(hh)(2) provides that:

(2) Each licensee shall develop and implement guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with loss of large areas of the plant due to explosions or fire, to include strategies in the following areas:

- (i) Fire fighting;
- (ii) Operations to mitigate fuel damage; and
- (iii) Actions to minimize radiological release.

³ *See* Letter Transmitting Combined License Application for Comanche Peak Nuclear Power Plant, Units 3 and 4 (Sept. 19, 2008) (ADAMS Accession No. ML082680250); <http://www.nrc.gov/reactors/new-reactors/col/comanche-peak/documents.html> [hereinafter Application or COLA]; *see also* Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 66,276 (Nov. 7, 2008).

ments; (2) five new contentions alleging various failures to address adequately the requirements in question in the new Report; and (3) Intervenors' appeal of the NRC Staff's denial of access to a document designated by the NRC Staff as containing "sensitive unclassified non-safeguards information" ("SUNSI").⁴ For the reasons discussed herein, we conclude that Contention 7 is moot under relevant Commission case law; that Intervenors have not demonstrated that their new contentions are admissible; and that Intervenors should be provided with access to the document withheld by the NRC Staff.

II. BACKGROUND

In LBP-09-17,⁵ this Licensing Board granted the hearing request of Intervenors in this proceeding, finding that they had shown standing and submitted two admissible contentions, and ruling that the hearing on those contentions would be conducted according to the provisions of 10 C.F.R. Part 2, Subpart L.⁶ We did not therein rule on Intervenors' original Contention 7, Applicant having on May 26, 2009, provided notification that it had filed its Mitigative Strategies Report, which, Applicant asserted, rendered Contention 7 moot.⁷ Because this Report was designated by the Applicant as containing security-related information that was to be withheld from public disclosure under 10 C.F.R. § 2.390, Intervenors were not initially provided with a copy of the document.⁸ They did, however, request,⁹ and

⁴ See *infra* note 276, regarding the definition of SUNSI and related matters. Intervenors request access to a draft NRC Staff guidance document regarding means that COL applicants may use to satisfy the requirements of sections 52.80(d) and 50.54(hh)(2). As indicated in the Background section of this Memorandum, the issue of the extent to which various information should be protected or be open to Intervenors, and in some cases the public, is one that runs throughout the matters before us herein. See also note 277.

⁵ 70 NRC 311 (2009).

⁶ See *id.* at 382-83.

⁷ Letter from Steven P. Frantz, Counsel for Luminant, to Ann Marshall Young *et al.* (May 26, 2009), with attached Letter from Rafael Flores to NRC Document Control Desk (May 22, 2009) [hereinafter Flores May 22, 2009, Letter]; see also Letter from Steven P. Frantz, Counsel for Luminant, to Office of the Secretary (April 30, 2009), with attached Letter from Rafael Flores to NRC Document Control Desk (April 24, 2009); Letter from Steven P. Frantz, Counsel for Luminant, to Office of the Secretary (Apr. 29, 2009), with attached Letter from Rafael Flores to NRC Document Control Desk (Apr. 28, 2009).

⁸ In the original Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene in this proceeding, 74 Fed. Reg. 6177 (Feb. 5, 2009), the means potential parties could utilize to obtain access to such SUNSI were described. *Id.* at 6179. Petitioners had to demonstrate, among other things, a "need for the information in order to meaningfully participate in this adjudicatory proceeding." *Id.*

⁹ Letter from Robert Eye, Counsel for Petitioners, to NRC Office of the Secretary (June 5, 2009).

the NRC Staff subsequently granted them, access to the document.¹⁰ All parties then filed a joint proposed Protective Order,¹¹ which the Board approved and issued on July 1, 2009.¹² Thereafter, certain of the Intervenors, their counsel, and their expert signed nondisclosure agreements regarding the Report and related information also designated as SUNSI.¹³ The Board permitted Intervenors to respond to Applicant's claim that its Report rendered Contention 7 moot,¹⁴ and after receiving the Report,¹⁵ Intervenors challenged the asserted mootness;¹⁶ all parties thereafter briefed the mootness issue.¹⁷

On August 10, 2009, pursuant to deadlines arising out of the Protective Order,¹⁸ Intervenors also submitted five new "SUNSI Contentions" regarding Applicant's Report, requesting a 10 C.F.R. Part 2, Subpart G hearing on the contentions.¹⁹ On September 4, 2009, Applicant and NRC Staff submitted Answers opposing

¹⁰ Letter from James Biggins, Counsel for NRC Staff, to Robert Eye, Counsel for Petitioners (June 15, 2009).

¹¹ Joint Motion for Entry of a Protective Order (June 30, 2009).

¹² Licensing Board Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) (unpublished) [hereinafter Protective Order].

¹³ See Nondisclosure Affidavits of Eliza Brown, Karen Hadden, and Robert V. Eye (July 2, 2009); Nondisclosure Affidavit of Dr. Edwin S. Lyman (July 21, 2009).

¹⁴ Licensing Board Order (July 1, 2009) (unpublished).

¹⁵ Letter from Jonathan M. Rund, Counsel for Luminant, to Robert V. Eye, Counsel for Petitioners (July 7, 2009).

¹⁶ Letter from Robert V. Eye, Counsel for Petitioners, to Ann Marshall Young (July 14, 2009).

¹⁷ Petitioners' Brief Regarding Contention Seven's Mootness (July 20, 2009) (document filed as a nonpublic submission pursuant to the July 1, 2009, Protective Order) [hereinafter Petitioners' Brief on Contention 7 Mootness]; Luminant's Response to Petitioners' Brief Regarding Mootness of Contention 7 (July 27, 2009) (document filed as a nonpublic submission pursuant to the July 1, 2009, Protective Order); NRC Staff's Answer to Petitioners' Brief Regarding Contention Seven's Mootness (July 27, 2009); Petitioners' Consolidated Response to NRC Staff's Answer and Applicant's Answer to Petitioners' Brief Regarding Contention Seven's Mootness (Aug. 3, 2009) [hereinafter Petitioners' Mootness Response] (document filed as a nonpublic submission pursuant to the July 1, 2009, Protective Order).

¹⁸ Protective Order at 4 (stating that "Petitioners must file any proposed SUNSI contentions within twenty-five (25) days after receipt of or access to that information"). The Board later amended the Protective Order, on Petitioners' motion, extending the deadline for SUNSI contentions by 7 days. Licensing Board Order (Amending Protective Order and Extending Time for Filing New Contentions Based on SUNSI Information) (July 16, 2009) (unpublished).

¹⁹ See Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) and Request for Subpart G Hearing (Aug. 10, 2009) [hereinafter SUNSI Contentions].

admission of the new contentions,²⁰ and on September 11, 2009, Intervenors filed a Consolidated Response to these Answers.²¹

The Board meanwhile, recognizing the possibility of needing to refer to the above-referenced information designated as SUNSI in oral argument and in orders relating to Applicant's Report, had, by Order dated August 7, 2009, required the parties to file briefs regarding legal authority on the treatment of such material in adjudication-related contexts.²² In response the parties on August 27 filed a joint brief in which they cited 10 C.F.R. § 2.390(b) along with the *Federal Register* notice in this proceeding, and restated certain NRC policy on identifying and withholding SUNSI.²³ In this brief, which was prepared by NRC Staff counsel,²⁴ no actual legal authority for the Board to close otherwise-public sessions or to issue anything other than public orders with regard to information labeled as "SUNSI" was cited. Thereafter, in a telephone scheduling conference held September 16, 2009,²⁵ questions regarding the legal authority for protection of SUNSI were further addressed. The Board raised with the parties the requirement of 10 C.F.R. § 2.328 that all NRC hearings are to be public except as requested under section 181 of the Atomic Energy Act (AEA) or otherwise ordered by the Commission,²⁶ and Staff counsel pointed out the Board's authority to hold *in camera* hearings under 10 C.F.R. § 2.390(b)(6).²⁷

²⁰Luminant's Answer Opposing Late-Filed Contentions Regarding the Mitigative Strategies Report (Sept. 4, 2009) [hereinafter Luminant Answer]; NRC Staff's Answer to Intervenors' Contentions and Request for Subpart G Hearing (Sept. 4, 2009) [hereinafter NRC Staff Answer].

²¹Intervenors' Consolidated Response to the Answers of Applicant and NRC Staff to the Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) (Sept. 11, 2009) [hereinafter Intervenors' Consolidated Reply].

²²Licensing Board Order (Regarding Briefing on Handling SUNSI in Board Orders and Oral Argument) (Aug. 7, 2009) (unpublished) at 1.

²³Parties' Joint Brief on Handling SUNSI in Board Orders and Oral Argument (Aug. 27, 2009).

²⁴*See id.* at 1.

²⁵*See* Transcript of Proceeding (Tr.) at 414-57.

²⁶*See* Tr. at 442; *see also id.* at 440-43. 10 C.F.R. § 2.328 provides:

Except as may be requested under section 181 of the Act, all hearings will be public unless otherwise ordered by the Commission.

²⁷Tr. at 443. Section 2.390(b)(6) provides as follows:

Withholding from public inspection does not affect the right, if any, of persons properly and directly concerned to inspect the document. Either before a decision of the Commission on the matter of whether the information should be made publicly available or after a decision has been made that the information should be withheld from public disclosure, the Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection under a protective agreement by contractor personnel or government officials other than NRC officials, by the presiding officer in a proceeding, and under protective order by the parties to a proceeding. In camera sessions of

(Continued)

The Board subsequently determined that 10 C.F.R. § 2.390(d)(1) does provide legitimate legal authority for nondisclosure and protection of security-related information concerning the physical protection of nuclear power plants, and in September indicated, in setting oral argument on the five “SUNSI Contentions,” that significant portions of the argument might be closed based on this authority.²⁸ Only the Board, NRC Staff, Applicant, and necessary associated persons, along with individuals who had signed a nondisclosure affidavit pursuant to the July 1, 2009, Protective Order, would be permitted to remain in the hearing room during the closed portions of the oral argument, which was scheduled for November 12, 2009.²⁹

Notwithstanding the preceding developments, on November 2, 2009, Intervenor filed a Motion for Public Argument/Hearing, requesting that the November 12 oral argument and all future hearings regarding Applicant’s COLA (COL Application) be held in public pursuant to 10 C.F.R. § 2.328.³⁰ On November 6, 2009, Applicant submitted its Answer opposing Intervenor’s November 2 Motion.³¹ Also on November 6, 2009, the Board issued an order regarding the scheduled November 12 oral argument, directing all parties to be prepared to address certain issues related to Intervenor’s Motion and directing the Staff to bring an expert in security classification matters to answer related questions.³² Finally, on November 10, the Board advised the parties that Intervenor’s Motion would be addressed at the beginning of the November 12 session, and provided questions for the parties to focus on, related to the five SUNSI contentions.³³

During the November 12 oral argument,³⁴ after hearing the parties’ arguments on Intervenor’s Motion for Public Argument, the Board denied the Motion to the extent that argument on the contentions relating to Applicant’s SUNSI Report was

hearings may be held when the information sought to be withheld is produced or offered in evidence. If the Commission subsequently determines that the information should be disclosed, the information and the transcript of such in camera session will be made publicly available.

²⁸ See Licensing Board Order (Regarding Oral Argument and Future Course of Proceeding) (Sept. 24, 2009) (unpublished).

²⁹ Licensing Board Notice (Regarding Oral Argument) (Oct. 9, 2009) at 2 (unpublished).

³⁰ Motion for Order that Arguments/Hearings Related to the Fires and Explosions Contentions That Address Factual and Legal Arguments Related Thereto and NEI 06-12 Be Conducted in Public Pursuant to 10 C.F.R. § 2.328 (Nov. 2, 2009) [hereinafter Motion for Public Hearing].

³¹ Luminant’s Answer Opposing Motion to Make Public the Oral Arguments and Documents Related to the Large Fires and Explosions Contentions (Nov. 6, 2009) [hereinafter Luminant Answer to Motion for Public Hearing].

³² Licensing Board Order (Regarding November 12, 2009, Oral Argument) (Nov. 6, 2009) at 1 (unpublished).

³³ See Licensing Board Order (Regarding November 12, 2009, Oral Argument) (Nov. 10, 2009) (unpublished).

³⁴ See Tr. at 462-720.

held in closed session.³⁵ The parties were, however, advised that, consistent with the provisions of 10 C.F.R. § 2.390(b)(6), they might propose creation of a public copy of the transcript, with appropriate redactions for protected information, and further advised to attempt to cooperate in this effort.³⁶ At the conclusion of the oral argument intervenors were given the opportunity to file any citations to relevant authority on statutory construction that might support their contentions.³⁷ They thereafter filed a letter providing certain additional arguments,³⁸ to which Applicant and Staff filed responses.³⁹

Finally, on November 20 intervenors appealed to this Licensing Board⁴⁰ the NRC Staff's denial⁴¹ of their November 5, 2009, request⁴² that the Staff grant them access to a newly issued draft Staff Guidance Document relating to the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), which the Staff has designated as containing SUNSI.⁴³ NRC Staff replied to intervenors' appeal on November 25.⁴⁴ We rule on this matter in Section IV *infra*.

III. DISCUSSION AND RULINGS ON NEW CONTENTIONS AND MOOTNESS OF ORIGINAL CONTENTION 7

A. General Observations

Because intervenors' new contentions as well as their arguments on the mootness of their original Contention 7 largely concern one central theme that is repeated throughout, we preliminarily direct our attention to this theme and

³⁵ See Tr. at 523-24.

³⁶ See *supra* note 27.

³⁷ See Tr. at 621, 717.

³⁸ Letter to Licensing Board from Robert V. Eye (Nov. 20, 2009) [hereinafter Eye Nov. 20, 2009, Letter].

³⁹ Letter to Licensing Board from Jonathan M. Rund (Nov. 27, 2009) [hereinafter Rund Nov. 27, 2009, Letter]; Letter to Licensing Board from Susan H. Vrahoretis (Nov. 30, 2009) [hereinafter Vrahoretis Nov. 30, 2009, Letter].

⁴⁰ Letter from Robert V. Eye to Administrative Judge Ann Marshall Young (Nov. 20, 2009) [hereinafter Intervenors' SUNSI Appeal].

⁴¹ Letter from Susan H. Vrahoretis to Robert Eye (Nov. 16, 2009) [hereinafter Staff's Denial].

⁴² Email from Robert V. Eye to Susan Vrahoretis et al., Re: SUNSI request/ ISG 06-12 [sic] (Nov. 5, 2009) [hereinafter Intervenors' SUNSI Request to Staff]. Intervenors' counsel subsequently amended the request to correct the reference, indicating that the "request is for ISG 0-16 not ISG 06-12." Email from Robert V. Eye to Susan Vrahoretis et al., Re: Amended request for ISG 06-12 [sic] (Nov. 9, 2009).

⁴³ See Staff Denial at 1.

⁴⁴ NRC Staff's Reply to Intervenors' Challenge of the NRC Staff's Denial of Access to SUNSI (Nov. 25, 2009) [hereinafter NRC Staff's Reply to SUNSI Appeal].

related legal issues arising from it. We then address the individual matters before us.

. . . .
REDACTED PURSUANT TO 10 C.F.R. § 2.390(d)(1)

B. Mootness of Original Contention 7

Petitioners in their original Contention 7 alleged:

The Applicant's COLA is incomplete because it fails to include the requirements of 10 CFR 52.80(d) that require the applicant to submit a description and plans for implementation of the guidance strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities with the loss of large areas of the plant due to explosions and/or fires as required by 10 CFR 50.54(hh)(2).⁵²

On May 26, 2009, Applicant through counsel notified the Board that it had filed its "Mitigative Strategies Report" with the NRC, stating that the filing of the report rendered Contention 7 moot.⁵³ Intervenors contest the mootness of Contention 7, challenging the adequacy of Applicant's Report and indicating among other things that they "modify" the original contention in various particulars.⁵⁴ At the November 12 oral argument, their counsel agreed, however, that the arguments they make in challenging the adequacy of the Report are all essentially contained in their new contentions.⁵⁵ We therefore address those issues in conjunction with the new contentions.

Regarding the mootness of original Contention 7, it is clear that, after the filing of that contention, Applicant filed its Mitigative Strategies Report for the express purpose of addressing the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2).⁵⁶ Under Commission precedent on "contentions of omission," once information asserted to have been omitted is supplied, "the [original] contention is moot," and "Intervenors must timely file a new or amended contention . . . in order to raise specific challenges regarding the new information."⁵⁷ Thus, Intervenors' original Contention 7, asserting omission of information addressing sections

⁵² Petition at 22.

⁵³ See *supra* note 7. We refrained from ruling on the mootness of the original Contention 7 until all submissions related to it, along with the new contentions now before us, were filed and oral argument was held on all these related matters. See LBP-09-17, 70 NRC at 350.

⁵⁴ See Petitioners' Brief on Mootness; Petitioners' Mootness Response at 2, 4, 6, 7, 9, 10.

⁵⁵ See Tr. at 507-11; see also Tr. at 501-07.

⁵⁶ See Flores May 22, 2009, Letter at 1; Report at 1.

⁵⁷ See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

52.80(d) and 50.54(hh)(2), is now moot. This ruling should not, however, be taken to suggest any ruling on whether Applicant's Report *adequately* addresses the requirements of the sections at issue. Intervenors were provided with opportunity to contest such adequacy in the filing of new contentions, and we rule herein on the admissibility of Intervenors' five new contentions that were timely filed to this end.

* * *

*RULINGS ON CONTENTIONS REDACTED PURSUANT TO
10 C.F.R. § 2.390(d)(1)*

* * * *

**IV. RULING ON INTERVENORS' REQUEST FOR ACCESS
TO SUNSI GUIDANCE DOCUMENT**

Intervenors have appealed to this Licensing Board²⁷¹ the NRC Staff's denial²⁷² of their November 5, 2009, request that the Staff grant them access to a newly issued draft Staff Guidance Document relating to the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2).²⁷³ The document in question — Interim Staff Guidance DC/COL-ISG-016 — Compliance with 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d), or "ISG-016"²⁷⁴ — was withheld as security-related SUNSI, and

²⁷¹ See Intervenors' SUNSI Appeal.

²⁷² See Staff's Denial.

²⁷³ See Intervenors' SUNSI Request to Staff.

²⁷⁴ Interim Staff Guidance — Compliance with 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d) — Loss of Large Areas of the Plant Due to Explosions or Fires from a Beyond-Design Basis Event — DC/COL-ISG-016 (Oct. 2009) (ADAMS Accession No. NL092100361) [hereinafter ISG-016]. See <http://www.nrc.gov/reading-rm/doc-collections/isg/col-dc-isg-16.pdf> (last visited Feb. 23, 2010). On the website is found the following description:

The Interim Staff Guidance (ISG) outlines technical positions defining specific acceptance criteria or an acceptable approach and includes information to be included in a combined license (COL) application to fully address compliance with 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d), loss of large areas (LOLAs) of the plant due to explosions or fires from a beyond-design basis event (BDBE). This ISG is provided to assist new applicants for, and new holders of, a COL issued under 10 CFR Part 52 to comply with requirements to address LOLAs of the plant due to explosions or fires from a BDBE. This ISG provides one acceptable approach for satisfying the requirements in Section 50.54(hh)(2) of 10 CFR Part 50 and Section 52.80(d) of 10 CFR Part 52. New applicants for, and new holders of, an operating license may use other methods for satisfying these requirements. The NRC staff will review such methods and determine their acceptability on a case by case basis.

(Continued)

the Staff in denying access to it cited the provisions of the Commission's Order Imposing Procedures for Access to [SUNSI] and Safeguards Information for Contention Preparation, found in the original Federal Register Notice in this proceeding.²⁷⁵ We note that the document, in addition to assertedly fitting within NRC policy defining SUNSI,²⁷⁶ appears to fall within the ambit of "information . . . concerning a licensee's or applicant's physical protection" under 10 C.F.R. § 2.390(d)(1).²⁷⁷ It is also the same document to which Intervenors refer in their Consolidated Reply on Contention 1.²⁷⁸ On November 16, NRC Staff denied

Since this guidance was issued as need to know, Official Use only (OUO) and security related, the details are characterized as SUNSI-A(3) in accordance with MD 3.4 Category A.3 and not available for public [sic].

Id.

²⁷⁵ See Staff's Denial at 2 (citing 74 Fed. Reg. at 6179).

²⁷⁶ See NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (Oct. 26, 2006) (ADAMS Accession No. ML052990146), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/comm-secy/2005/2005-0054comscy-attachment2.pdf> (last visited Feb. 24, 2010), wherein "SUNSI" is defined as "any information of which the loss, misuse, modification, or unauthorized access can reasonably be foreseen to harm the public interest, the commercial or financial interests of the entity or individual to whom the information pertains, the conduct of NRC and Federal programs, or the personal privacy of individuals." *Id.* at 1. The policy lists seven category groupings of SUNSI: (1) Allegation information; (2) Investigation information; (3) Security-related information; (4) Proprietary information; (5) Privacy Act information; (6) Federal-, State-, foreign government-, and international agency-controlled Information; and (7) Sensitive internal information. *Id.*

²⁷⁷ Section 2.390(d)(1) provides as follows:

(d) The following information is considered commercial or financial information within the meaning of § 9.17(a)(4) of this chapter and is subject to disclosure only in accordance with the provisions of § 9.19 of this chapter.

(1) Correspondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's physical protection, classified matter protection, or material control and accounting program for special nuclear material not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data.

Section 9.17(a)(4) defines certain exemptions from public disclosure; section 9.19 concerns the segregation of exempt information. See *supra* note 27 for the language of 10 C.F.R. § 2.390(b)(6), which concerns the right of "persons properly and directly concerned" to inspect material, and means for managing the protection and inspection of information addressed in section 2.390(d)(1) such as *in camera* hearings and subsequent consideration of whether transcripts should be made public.

We note that the provisions now found in section 2.390(d)(1), previously found in section 2.790(d)(1), have been in effect since 1981, see Protection of Unclassified Safeguards Information, 46 Fed. Reg. 51,718, 51,723 (Oct. 22, 1981), the same year the definition for "Safeguards," see *supra* note 89 (providing definition for "Safeguards Information" from 10 C.F.R. § 73.2), was added to 10 C.F.R. § 73.2, see 46 Fed. Reg. at 51,724.

²⁷⁸ See *supra* note 127 (referring to an NRC listing of Interim Staff Guidance documents as of August 2009, including ISG-016 (ADAMS Accession No. ML092450022)) and accompanying text;

(Continued)

the Intervenors access to the document, finding that they had not “demonstrated a legitimate need for access to DC/COL-ISG-016 in order to meaningfully participate in this adjudicatory proceeding at this time.”²⁷⁹ We will not repeat here the arguments of Intervenors in support of their initial request to the Staff, or the statements of the Staff explaining its denial of access in greater detail, as these are largely repeated in Intervenors’ SUNSI Appeal and in the NRC Staff’s Reply to the Intervenors’ Appeal.

In their Appeal Intervenors argue that they “require [ISG-016] for meaningful participation” in this proceeding, asserting that the document “may clarify or address issues not discussed in the Standard Review Plan by providing guidance on compliance with 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) for new reactor applications.”²⁸⁰ Stating that NEI 06-12 has been approved by the Commission only for current operating reactors, not new reactors,²⁸¹ Intervenors contend that they “cannot meaningfully analyze Applicants’ claims that they comply with 10 C.F.R. § 50.54(hh)(2) for new reactor submittals without having access to the subject guidance itself.”²⁸² They argue that the standard for access to ISG-016 “should be identical to the standard by which Intervenors were granted access to other SUNSI documents,” and that the document “is relevant and material to the pending fires and explosions contentions because it has a direct bearing on whether the Applicants’ [sic] submittals are consistent with the Staff’s interpretation of the requirements under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2).”²⁸³ Indeed, they urge, ISG-016 is “every bit as relevant and material as NEI 06-12 and arguably, even more so given the express limitation that NEI 06-12 is primarily intended to apply to currently operating nuclear plants.”²⁸⁴ Finally, they note that they refer to the document in their Consolidated Reply on the current contentions, and state that it is their understanding that there is no publicly available version of the document.²⁸⁵

NRC Staff confirms that there is no publicly available version of the document,²⁸⁶ also noting that ISG-016 is a draft document and has not been approved by the Commission as “an approved means to comply with a regulatory require-

see also supra text accompanying note 139 (regarding reference to ISG-016 in Transcript of closed hearing).

²⁷⁹ Staff’s Denial at 3.

²⁸⁰ Intervenors’ SUNSI Appeal at 1.

²⁸¹ *Id.* (citing 74 Fed. Reg. at 13,958).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ NRC Staff’s Reply to SUNSI Appeal at 2.

ment.”²⁸⁷ Staff does acknowledge that the “purpose in developing” the document, according to the website notice for it, is “to assist COL applicants and licensees with meeting the requirements of §§ 50.54(hh)(2) and 52.80(d).”²⁸⁸ However, Staff argues that Intervenor have not shown a need for the document under the requirements the Commission set out in its “SUNSI/SGI Order.”²⁸⁹ Staff asserts that under these requirements a “requester,” in addition to showing standing, must “explain why it needs the information ‘in order to meaningfully participate in this adjudicatory proceeding.’”²⁹⁰

Staff puts forth a number of arguments to “flesh out” this basic need standard. First, Staff avers, the fact that Intervenor with the assistance of an expert were, based on the information available to them, able to prepare the contentions addressed herein shows that they do not need ISG-016 with regard to these contentions.²⁹¹ With regard to any additional, new contentions, Staff cites a licensing board decision in the *South Texas* COL proceeding for the proposition that, in order to demonstrate a need for SUNSI, the Intervenor must “(1) discuss the basis for a proffered contention and (2) describe why the information available to the Intervenor is not sufficient to provide the basis and specificity for a proffered contention.”²⁹² Next, Staff cites a licensing board decision in the *Vermont Yankee* proceeding for the proposition that, “in the absence of documentary or expert support, reliance on a guidance document to form the basis of a proposed contention does not, by itself, demonstrate a dispute with the Applicant.”²⁹³ Staff cites additional licensing board decisions in the *Indian Point* and *Crow Butte* proceedings for the proposition that “[t]he admissibility of contentions does not hinge on access to a draft guidance document, which is not a legal requirement.”²⁹⁴ Staff urges that, although Intervenor have established standing, “they have not demonstrated that they need the draft [ISG-016] to provide the basis and specificity for a proffered contention.”²⁹⁵

Finally, Staff points out, regarding NEI 06-12 and the Commission’s approval of it for COL applicants, that although the Commission did endorse Rev. 2 of the

²⁸⁷ *Id.* at 6.

²⁸⁸ *Id.* at 2; *see also supra* note 274.

²⁸⁹ NRC Staff’s Reply to SUNSI Appeal at 3; *see* 74 Fed. Reg. at 6179.

²⁹⁰ NRC Staff’s Reply to SUNSI Appeal at 3.

²⁹¹ *Id.* at 4.

²⁹² *Id.* at 4 (citing *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), LBP-09-5, 69 NRC 303, 308, 312-13 (2009)).

²⁹³ *Id.* at 5 (citing *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 200-01 (2006), *rev’d on other grounds*, CLI-07-16, 65 NRC 371 (2007)).

²⁹⁴ *Id.* at 5-6 (citing *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 89 (2008); *Crow Butte Resources, Inc.* (North Trend Expansion Project), LBP-08-6, 67 NRC 241, 323 (2008), *rev’d in part on other grounds*, CLI-09-12, 69 NRC 535 (2009)).

²⁹⁵ *Id.* at 6.

document as providing an “acceptable method for *current reactors* to comply with the mitigative strategies requirement,” it also made other statements indicating its appropriateness for COL applicants. The statements noted by the Staff are that “[n]ew reactor licensees are required to employ the same strategies as current reactor licensees to address core cooling, spent fuel pool cooling, and containment integrity”; but that, “[u]nlike current operating reactors, new reactors ‘also need to account for, as appropriate, the specific features of the plant design.’”²⁹⁶

We approach the question of whether Intervenors should be granted access to ISG-016 by considering, as the Staff did, whether Intervenors have shown that they need the document in order to participate meaningfully in the proceeding, but we ultimately reach a different result. We begin by noting that this standard for obtaining access to information designated as SUNSI, cited by Staff and as set forth in the Commission’s *Federal Register* Notice and Order in this proceeding, is actually directed to “potential parties,” defined by the Commission as including “any person who intends or may intend to participate as a party by demonstrating standing and the filing of an admissible contention under 10 CFR 2.309.”²⁹⁷ We note also that Intervenors have signed nondisclosure affidavits pursuant to the July 2009 Protective Order, which by its own terms applies to “access to and use of protected information in the correspondence from Applicant to the NRC Staff dated May 22, 2009 [i.e., Applicant’s Mitigative Strategies Report], regarding the requirements under 10 C.F.R. § 52.80(d) and 10 C.F.R. § 50.54(hh)(2) *and any related documents* (Protected Information).”²⁹⁸ This suggests that access to ISG-016, which addresses the requirements of the very same regulations cited at page 1 of the Protective Order, might reasonably fall under the Protective Order.

At this point, however, we are faced with a dispute between Intervenors and Staff on access to ISG-016, and with the situation that Intervenors have not been provided with access to the document, as they were with NEI 06-12. Under these circumstances, notwithstanding that Intervenors are already parties in the proceeding and are no longer “potential parties,” we find it appropriate to apply the standard of showing a need for a document in order to participate meaningfully in a proceeding. The standard is a fairly generic one, and it is not an inappropriate one to apply when parties have a dispute over information that is security-related,

²⁹⁶ *Id.* at 6 n.7 (quoting 74 Fed. Reg. at 13,957-58).

²⁹⁷ 74 Fed. Reg. at 6179. We further note that “potential party” is defined in 10 C.F.R. § 2.4 (also cited by the Commission, *id.*) as “any person who has requested, or who may intend to request, a hearing or petition to intervene in a hearing under 10 CFR part 2, other than hearings conducted under Subparts J and M of 10 CFR part 2.” *See also* Proposed Rule: “Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information; Reopening of Public Comment Period and Notice of Availability of Proposed Procedures for Comment,” 72 Fed. Reg. 43,569, 43,570 (Aug. 6, 2007).

²⁹⁸ Protective Order at 1 (emphasis added).

as ISG-016 is. It is not an onerous standard on its face and, particularly with actual parties, should not be applied to lead to an onerous result.

Applying this standard, we find that Intervenors have shown a need for the document in order to participate meaningfully in this proceeding. First, we note, they refer to the document in their Consolidated Reply on new Contentions 1 through 5, and have obviously followed its progress prior to and following its issuance.²⁹⁹ Second, they have shown an interest in Applicant's satisfaction of the requirements of sections 52.80(d) and 50.54(hh)(2) from the outset of this proceeding. And although the document is currently only a draft, according to Staff the undisputed "purpose" of its development is "to assist COL applicants and licensees with meeting the requirements of §§ 50.54(hh)(2) and 52.80(d)." To be sure, the draft status of the document lessens its relevance to these requirements, but it does not negate it, given that the NRC Staff prepared it, and it thus may be accorded a level of consideration, or even persuasiveness, appropriate to its contents.³⁰⁰ In this light, to require the Intervenors to wait until the Commission determines whether to approve it would not seem to be an efficient approach.

In addition, the Intervenors have an expert who can guide them in submitting any additional contentions relating to sections 52.80(d) and 50.54(hh)(2) after they have read the Staff's draft guidance document. While it is true that a guidance document alone does not provide sufficient support for a contention, where there is in fact expert support, a guidance document may well be part of the support for a contention.

Regarding Staff's arguments that Intervenors must "discuss the basis for a proffered contention" in order to show need for the document, citing the *South Texas* April 2009 Order on SUNSI access,³⁰¹ what that Board actually said, in considering a like argument by Staff, was that such argument "is not to be equated with the discussion that would be necessary to support an admissible contention." Rather, the Board said, "the discussion need only show why the publicly available information in the application is not sufficient to support the basis and specificity of a proffered contention."³⁰² The Board pointed out that the Petitioners — *potential parties at that point* — had "simply asserted that they needed information . . . because ratepayers had a 'right to know the expected costs of the project.'"³⁰³

In the instant case, the Intervenors — who are actual parties at this point — have made no such argument, and have instead asserted that the document they seek, which they argue is "every bit as relevant as NEI 06-12," may clarify

²⁹⁹ See *supra* notes 127, 139, and accompanying text.

³⁰⁰ See *supra* text accompanying note 288.

³⁰¹ See *supra* text accompanying note 292.

³⁰² *South Texas*, LBP-09-5, 69 NRC at 313.

³⁰³ *Id.*

issues relating to the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), which will allow them more meaningful participation in this proceeding. In light of the somewhat minimal information that is included in the rules themselves, Intervenors' argument on needing such clarification carries some weight. In addition, they have, as we point out above, followed the progress of the document, sought out information on it, but could not use it in the preparation of the contentions now at issue because it was not then available to them. They point out that no publicly available version of the document exists.³⁰⁴ Basic fairness dictates that they should have access to the document, for which they have shown a need in order to meaningfully participate in the proceeding.

Nor does Staff's argument that the "admissibility of contentions does not hinge on access to a draft guidance document"³⁰⁵ change this conclusion. Staff's wording misstates the actual principle of the *Indian Point* and *Crow Butte* Orders, which is simply that guidance documents are merely guidance and not binding legal authority.³⁰⁶ Nor do we find persuasive Staff's argument that, because Intervenors crafted the contentions we rule on herein without access to ISG-016, they do not need access to the document.

In conclusion, we find, based on all of the arguments and information before us, that the appropriate standard to apply in this proceeding is as follows: A party requesting access to a document withheld as SUNSI (or as protected under 10 C.F.R. § 2.390(d)(1)³⁰⁷) must, in the event no protective order addresses the matter and/or in the event of a dispute concerning such access, show that it needs the document in order to participate meaningfully in the proceeding. We further find that Intervenors have met this standard and shown that they need the document in order to participate meaningfully in this proceeding, based in this case on the following factors: (1) Intervenors noted the expected issuance of the document

³⁰⁴ Although we note the *South Texas* Board's reference to "publicly available information in the application," see *supra* text accompanying note 302, the request in that case by the potential parties was for information not included in the Environmental Report of the publicly available version of the Application, whereas the Intervenors who have been admitted as parties in this proceeding seek not information that has been omitted from the Application, but another document altogether. It would not make sense to require the Intervenors to show that they could not formulate a contention with the publicly available information in the Application. They obviously can, and have. As parties, they are in a different position than "potential parties," however. They have shown that they deserve status as parties, and they have signed nondisclosure affidavits pursuant to a Protective Order. They have shown that no publicly available version of the document they seek exists. To this extent, the requisite showing of need in these circumstances does not require the same showing with regard to the "publicly available version of the application."

³⁰⁵ See *supra* text accompanying note 294.

³⁰⁶ See *Indian Point*, LBP-08-13, 68 NRC at 89; *Crow Butte*, LBP-08-6, 67 NRC at 323.

³⁰⁷ See *supra* note 277. We note that it is 10 C.F.R. § 2.390(d)(1) that provides the actual legal authority for withholding information relating to the physical protection of nuclear power plants.

and informed the Board and other parties about it in their September 2009 Reply on the current contentions; (2) they followed its progress thereafter, and requested access to it within a reasonable time after it was issued; (3) they have shown its relevance to matters at issue in the proceeding relating to the requirements of section 52.80(d) and 50.54(hh)(2), which have been a concern of Intervenors from the outset of this proceeding; and (4) they have an expert who can provide support for any new contentions relating to these requirements and to any provisions of ISG-016.³⁰⁸

V. CONCLUSION AND ORDER

Having found Intervenors' original Contention 7 to be moot, that Intervenors have not demonstrated that their five new contentions are admissible, and that Intervenors have shown a need for access to ISG-016, we hereby ORDER the following:

A. Intervenors' original Contention 7 and their five new contentions relating to the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2) are DISMISSED.

B. Intervenors' request for access to ISG-016 is GRANTED, and Staff shall provide ISG-016 to Intervenors in the same manner that Applicant's Report and NEI 06-12 have been provided to them, with the same conditions to be applied.

C. Having denied admission of all of Intervenors' new contentions, it is not necessary that we rule on their request for a 10 C.F.R. Part 2, Subpart G hearing on the contentions.

D. If the parties wish to jointly propose line-by-line redactions in place of any of the redactions made in the Public Version of this Memorandum and Order, they may do so, and should file a notice of intent regarding this within 45 days of issuance of this Memorandum and Order.

E. Section IV of this Order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.311(a)(3). In addition, interlocutory review of the Order may also be requested as provided at 10 C.F.R. § 2.341(f)(2).

³⁰⁸ We do not mean to imply by this ruling that we will necessarily consider any such contentions to be timely based simply on when Intervenors ultimately obtain access to ISG-016. For example, they would need to show that the information on which they base any contention was not available from any other reasonably available source prior to obtaining the document, and, as we indicate in the text, to provide more than merely what is in the guidance document — specifically, expert and/or other documentary support. *See supra* text accompanying note 293. In short, they would need to meet all relevant requirements of 10 C.F.R. § 2.309.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ann Marshall Young, Chair³⁰⁹
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Dr. Alice C. Mignerey
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 11, 2010³¹⁰

³⁰⁹ Judge Young signs subject to the Additional Statement that follows this Memorandum and Order.

³¹⁰ Copies of this Order were filed this date with the agency's E-filing system for service to all parties.

Additional Statement of Administrative Judge Ann Marshall Young

My colleagues and I are joined on all rulings made in the preceding Memorandum and Order, save one. I would admit the Intervenors' new Contention 3, in part.

....

REDACTED PURSUANT TO 10 C.F.R. § 2.390(d)(1)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Dr. Paul B. Abramson, Chairman
Dr. Michael F. Kennedy
Dr. Jeffrey D. E. Jeffries

In the Matter of

Docket Nos. 52-027-COL
52-028-COL
(ASLBP No. 09-875-03-COL-BD01)

**SOUTH CAROLINA ELECTRIC &
GAS COMPANY and SOUTH
CAROLINA PUBLIC SERVICE
AUTHORITY (also referred to
as SANTEE COOPER)**
(Virgil C. Summer Nuclear Station,
Units 2 and 3)

March 17, 2010

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

The conditions for admission of a contention are “strict by design,” *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002)); *see also Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 253 (2010); for a contention to be admissible it must satisfy, without exception, each of the criteria set out in 10 C.F.R. § 2.309(f)(1)(i) through (vi). *See Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.*

(Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). Mere notice pleading is insufficient. *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003); *Oyster Creek*, CLI-06-24, 64 NRC at 119.

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

In order to be admissible, a contention must assert an issue of law or fact that is “material to the findings the NRC must make to support the action that is involved in the proceeding.” 10 C.F.R. § 2.309(f)(1)(iv). Thus, the petitioner must show that “the subject matter of the contention would impact the grant or denial of a pending license application.” *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 62 (2008).

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

“Materiality” requires a showing that the alleged error or omission is of possible significance to the result of the proceeding, i.e., that some significant link exists between the claimed deficiency and either the health and safety of the public, or the environment. *Indian Point*, LBP-08-13, 68 NRC at 62 (citing *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied sub nom. Portland Cement Corp. v. Administrator, Environmental Protection Agency*, 417 U.S. 921 (1974)). A dispute is material “if its resolution would ‘make a difference in the outcome of the licensing proceeding.’” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999) (citing 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)).

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

NEPA: SUFFICIENCY OF CONTENTIONS

Where a contention challenges the Applicant’s compliance with the Commission’s rules implementing NEPA, materiality relates not only to the Commission’s determination regarding denial, issuance, or conditioning of the requested COL, but also to the Commission’s fulfillment of its obligations under NEPA.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

Contentions must be accompanied by “a concise statement of the alleged facts

or expert opinions which support the requestor's/petitioner's position on the issue . . . together with references to the specific sources and documents on which [it] intends to rely to support its position." 10 C.F.R. § 2.309(f)(1)(v).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

It is the petitioner's obligation to present the factual and expert support for its contention. *Palo Verde*, CLI-91-12, 34 NRC at 155-56; *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253 (2007); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *and aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Failure to do so requires that the contention be rejected. *Palo Verde*, CLI-91-12, 34 NRC at 155-56; *Vogtle*, LBP-07-3, 65 NRC at 253.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

A contention "will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.'" *Fansteel*, CLI-03-13, 58 NRC at 203 (quoting *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)); *see also Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 414 (2007). "[E]xpert opinion that merely states a conclusion (e.g., the application is 'deficient,' 'inadequate,' or 'wrong') without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion." *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181, *aff'd*, CLI-98-3, 48 NRC 26 (1998)).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

Providing any material or document as the foundation for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of a contention. *Fansteel*, CLI-03-13, 58 NRC at 204; *Indian Point*, LBP-08-13, 68 NRC at 63.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

If a petitioner neglects to provide the requisite support for its contentions, the Board should not make assumptions of fact that favor the petitioner or supply information that is lacking. *Georgia Tech*, LBP-95-6, 41 NRC at 305 (citing *Palo Verde*, CLI-91-12, 34 NRC at 155-56); *see also Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552-53 (2009); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

A petitioner does not have to prove its contention at the admissibility stage. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004); *North Anna*, LBP-08-15, 68 NRC at 335. That said, although a “Board may appropriately view [p]etitioners’ support for its contention in a light that is favorable to the [p]etitioner,” *Palo Verde*, CLI-91-12, 34 NRC at 155; *see also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 275 (2009), a petitioner must provide that support for his or her contention.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

The information, alleged facts, and expert opinions provided by the petitioner will be examined by the Board to confirm that the petitioner does indeed supply adequate support for the contention. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990); *see also American Centrifuge*, CLI-06-10, 63 NRC at 457; *Shearon Harris*, CLI-10-9, 71 NRC at 261-62.

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)

A contention must “show that a genuine dispute exists . . . on a material issue of law or fact” with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute. 10 C.F.R. § 2.309(f)(1)(vi). Any contention that “fails to controvert the application,” *Crow Butte*, CLI-09-12,

69 NRC at 557, or that mistakenly asserts that the application does not address a relevant issue, may be dismissed. *See American Centrifuge*, CLI-06-10, 63 NRC at 462-63 (rejecting contention asserting failure to analyze an alternative actually analyzed in the application).

RULES OF PRACTICE: CONTENTIONS (SPECIFICITY AND BASIS; CHALLENGE TO LICENSE APPLICATION)

It is the petitioner's responsibility "to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of th[e] proceeding." *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998). If a petitioner fails to offer alleged facts or expert opinion and a "reasoned statement" explaining any alleged inadequacy in the application, the petitioner has not demonstrated a genuine dispute. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 & n.12 (1990).

RULES OF PRACTICE (SPECIFICITY AND BASIS; SUPPORTING INFORMATION OR EXPERT OPINION)

The contention admissibility standards do not require dispositive proof of the contention or its bases, but they do require "a clear statement as to the bases for the contention[] and . . . supporting information and references to documents and sources that establish the validity of the contention." *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 8 (2010) (citations omitted).

NEPA: ENVIRONMENTAL REPORT (ALTERNATIVES ANALYSIS); RULE OF REASON

Under 10 C.F.R. Part 51, the NRC's regulations implementing NEPA, an ER must, in relevant part, contain a "discussion of alternatives . . . sufficiently complete to aid the Commission in developing and exploring, pursuant to section 102(2)(E) of NEPA, 'appropriate alternatives to recommended courses of action . . .'" 10 C.F.R. § 51.45(b)(3). However, the agency's NEPA responsibilities (and, by extension, the applicant's responsibilities under 10 C.F.R. Part 51) are subject to a "rule of reason." *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-8, 63 NRC 241, 258-59 (2006); *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 836 (1973).

NEPA: CONSIDERATION OF ALTERNATIVES

In the context of alternatives analyses, “[a]gencies need only discuss those alternatives that are reasonable and ‘will bring about the ends’ of the proposed action.” *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991)).

NEPA: CONSIDERATION OF ALTERNATIVES

Where the agency’s action is to approve or deny a proposal by a private party, the agency should ordinarily “accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.” Nuclear Energy Institute; Denial of Petition for Rulemaking, 68 Fed. Reg. 55,905, 55,909 (Sept. 29, 2003) (internal quotations omitted); *accord Citizens Against Burlington*, 938 F.2d at 199 (“An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving its goals, shaped by the application at issue and by the function that the agency plays in the decisional process.”).

RULES OF PRACTICE: CONTENTIONS (SPECIFICITY AND BASIS; CHALLENGE TO LICENSE APPLICATION)

General assertions of insufficient consideration are inadequate to raise an admissible contention. *See* 10 C.F.R. § 2.309(f)(1)(v), (vi) (requiring “references to specific sources and documents” and “references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute.”). To have presented an admissible contention, Petitioners needed to allege specific inadequacies in the Applicant’s analysis and provide some support or reasoning for any such alleged deficiencies.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION; CHALLENGE TO LICENSE APPLICATION)

Where Petitioners fail to connect the information and assertions contained in their supporting statements to alleged deficiencies or omissions in the Application, these statements do not provide the requisite support, in the form of alleged facts or reasoned (as opposed to merely conclusory) expert opinion, to show that Petitioners have raised a genuine dispute with the Application on a material issue of law or fact.

NEPA: CONSIDERATION OF ALTERNATIVES

It is well established that there is no obligation under NEPA to consider every possible alternative. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 71 (1991) (“An agency’s environmental review ‘must consider not every possible alternative, but every reasonable alternative.’” (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)); see also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978) (“the ‘detailed statement of alternatives’ cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man”).

NEPA: CONSIDERATION OF ALTERNATIVES

RULES OF PRACTICE: CONTENTIONS (SPECIFICITY AND BASIS)

The burden rests upon a petitioner to propose a particular alternative, and bare generalizations will not support an admissible contention. *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 158 (2005); see also *Shearon Harris*, CLI-10-9, 71 NRC at 264 (“The question before us . . . is whether [petitioner] has stated [a contention asserting] an environmentally preferable alternative to the proposed reactors.”); *id.* at 264-65 (affirming Board ruling that petitioner had not “properly challenged” applicant’s conclusion that no environmentally preferable alternative existed where “[t]he only alternative that [petitioner] mentions on appeal is the ‘no reactor’ option,” and petitioner neither raised that option before the Board nor supported its argument that it would always be environmentally preferable); *cf. Olmsted Citizens for a Better Community v. United States*, 793 F.2d 201, 209 (8th Cir. 1986); *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 576-77 (9th Cir. 1998). A board may not supply information that is missing or make assumptions of fact not provided by the petitioner. *Georgia Tech*, LBP-95-6, 41 NRC at 305; see also *Crow Butte*, CLI-09-12, 69 NRC at 552-53; *MOX*, LBP-01-35, 54 NRC at 422.

NEPA: NEED FOR POWER

Where demand side management (DSM) reduces by a small portion Applicant’s demand for power, it should be analyzed as a surrogate for need for power. See *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 159, *aff’d*, CLI-05-29, 62 NRC 801, 805-08 (2005); see also *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 245 (2004).

NEPA: NEED FOR POWER

Since it is widely recognized that energy sales projections are inherently uncertain, and the Commission is clear that it does not impose “burdensome attempts” to predict future conditions, and that it “should be sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions,” *Summer*, CLI-10-1, 71 NRC at 17 (quoting 68 Fed. Reg. at 55,910), a contribution from DSM that would simply result in shifting the need curve back by 2 years cannot be material to the decision the NRC must make.

NEPA: CONSIDERATION OF ALTERNATIVES

The ultimate objective of the NEPA requirement to examine alternatives is to ensure the NRC has made an informed decision by examining reasonable alternatives to the proposed action.

NEPA: CONSIDERATION OF ALTERNATIVES

The only alternatives which are, in the end, relevant to the NRC’s decision are those alternatives that are environmentally preferable.

MEMORANDUM AND ORDER ON REMAND (Denying on Remand the Sierra Club and Friends of the Earth’s Petition to Intervene)

I. INTRODUCTION

In LBP-09-2, we issued our ruling on two petitions to intervene regarding South Carolina Electric & Gas Company’s (SCE&G) application to the Nuclear Regulatory Commission (NRC) on behalf of itself and the South Carolina Public Service Authority (also referred to as Santee Cooper) for a combined license (COL) under 10 C.F.R. Part 52 that would authorize SCE&G to construct and operate two new Westinghouse Electric Corporation AP1000 advanced pressurized water nuclear power reactor units on its existing Virgil C. Summer site, which is located in Fairfield County, South Carolina.¹ We found that Friends of the Earth (FOE), which jointly filed a petition with the Sierra Club, and individual petitioner

¹ LBP-09-2, 69 NRC 87 (2009).

Joseph Wojcicki lacked standing to participate in this proceeding.² Additionally, we found that neither petition set out any admissible contention.³

In CLI-10-1, the Commission, responding to appeals from Mr. Wojcicki, and from the Sierra Club and FOE, filing jointly, affirmed LBP-09-2 in part, reversed it in part, and remanded the case in part to this Board.⁴ More particularly, the Commission reversed the Board's ruling regarding FOE's standing and remanded for reconsideration the Board's determination regarding admissibility of Part B of environmental Contention 3 (Contention 3B) submitted by the Sierra Club and FOE.⁵ The Commission additionally determined that, should the Board hold on reconsideration that Contention 3B presented an admissible contention, it should reconsider its rulings regarding the admissibility of Parts F and G of Contention 3.⁶

Contention 3B provides as follows:

With respect to Chapter 9 of the [Environmental Report (ER)], 'Proposed Action Alternatives,' the Applicant almost completely ignores demand-side management, undervaluing opportunities for cost-effective energy efficiency and demand response or load management.⁷

For the reasons set forth below, we hold that Contention 3B fails to present an admissible contention. Further, having reconsidered Contention 3 Parts F and G in accordance with the Commission's direction, we also conclude that those portions of Contention 3 are inadmissible.

II. ANALYSIS

A. Legal Standards

The conditions for admission of a contention are "strict by design";⁸ for

² *Id.* at 93-94.

³ *Id.* at 113.

⁴ CLI-10-1, 71 NRC 1 (2010).

⁵ *Id.* at 6-7, 23.

⁶ *Id.* at 23-24.

⁷ Petition to Intervene and Request for Hearing by Sierra Club and [FOE] (Dec. 8, 2008) at 34 [hereinafter Petition].

⁸ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002)); see also *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 253 (2010). This principle is expressly reaffirmed in the Remand Order itself. See CLI-10-1, 71 NRC at 7.

a contention to be admissible it must satisfy, without exception, each of the criteria set out in 10 C.F.R. § 2.309(f)(1)(i) through (vi).⁹ Mere notice pleading is insufficient.¹⁰

For a contention to be admissible, under 10 C.F.R. § 2.309(f)(1), it must

- (i) Provide a specific statement of the issue of law or fact sought to be raised . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requester's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requester/petitioner intends to rely to support its position on the issue; [and]
- (vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. . . . includ[ing] references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.¹¹

These requirements have been further explained through the Commission's case law. Of particular relevance to our determination of the admissibility of Contention 3B are the following.

1. Materiality

In order to be admissible, a contention must assert an issue of law or fact that is "material to the findings the NRC must make to support the action that is involved in the proceeding."¹² Thus, the petitioner must show that "the subject matter of the contention would impact the grant or denial of a pending license application."¹³

⁹ See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

¹⁰ *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003); *Oyster Creek*, CLI-06-24, 64 NRC at 119.

¹¹ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

¹² 10 C.F.R. § 2.309(f)(1)(iv).

¹³ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 62 (2008).

“Materiality” requires a showing that the alleged error or omission is of possible significance to the result of the proceeding,¹⁴ i.e., that some significant link exists between the claimed deficiency and either the health and safety of the public, or the environment.¹⁵ A dispute is material “if its resolution would ‘make a difference in the outcome of the licensing proceeding.’”¹⁶ In this particular instance, because the contention challenges the Applicant’s compliance with the Commission’s rules implementing NEPA, materiality relates not only to the Commission’s determination regarding denial, issuance, or conditioning of the requested COL, but also to the Commission’s fulfillment of its obligations under NEPA.

2. Supporting Information Comprised of Alleged Facts or Expert Opinion

Contentions must be accompanied by “a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue . . . together with references to the specific sources and documents on which [it] intends to rely to support its position.”¹⁷ It is the petitioner’s obligation to present the factual and expert support for its contention.¹⁸ Failure to do so requires that the contention be rejected.¹⁹ A contention “will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’”²⁰ “[E]xpert opinion that merely states a conclusion (e.g., the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary,

¹⁴ *Id.* (citing *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied sub nom. Portland Cement Corp. v. Administrator, Environmental Protection Agency*, 417 U.S. 921 (1974)).

¹⁵ *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 315 (2008).

¹⁶ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999) (citing 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)).

¹⁷ 10 C.F.R. § 2.309(f)(1)(v).

¹⁸ *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253 (2007); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *and aff’d in part*, CLI-95-12, 42 NRC 111 (1995); *Palo Verde*, CLI-91-12, 34 NRC at 155-56.

¹⁹ *Vogtle*, LBP-07-3, 65 NRC at 253; *Palo Verde*, CLI-91-12, 34 NRC at 155-56.

²⁰ *Fansteel*, CLI-03-13, 58 NRC at 203 (quoting *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)); *see also Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 414 (2007).

reflective assessment of the opinion.”²¹ Likewise, providing any material or document as the foundation for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of a contention.²² Further, if a petitioner neglects to provide the requisite support for its contentions, the Board should not make assumptions of fact that favor the petitioner or supply information that is lacking.²³

The foregoing discussion notwithstanding, a petitioner does not have to prove its contention at the admissibility stage.²⁴ That said, although a “Board may appropriately view [p]etitioners’ support for its contention in a light that is favorable to the [p]etitioner,”²⁵ a petitioner must provide that support for his or her contention. The information, alleged facts, and expert opinions provided by the petitioner will be examined by the Board to confirm that the petitioner does indeed supply adequate support for the contention.²⁶

3. Genuine Dispute Regarding Specific Portions of the Application

A contention must “show that a genuine dispute exists . . . on a material issue of law or fact” with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute.²⁷ Any contention that “fails to controvert the application,”²⁸ or that mistakenly asserts that the application does

²¹ *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006) (quoting *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 181, *aff’d*, CLI-98-13, 48 NRC 26 (1998)). See also CLI-10-1, 71 NRC at 19 (affirming this Board’s rejection of a contention where “Joint Petitioners’ expert provided merely conclusory statements, without supporting facts or detail”).

²² *Indian Point*, LBP-08-13, 68 NRC at 63; *Fansteel*, CLI-03-13, 58 NRC at 204.

²³ *Georgia Tech*, LBP-95-6, 41 NRC at 305 (citing *Palo Verde*, CLI-91-12, 34 NRC at 155-56). See also *Crow Butte Resources, Inc. (North Trend Expansion Project)*, CLI-09-12, 69 NRC 535, 552-53 (2009); *Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility)*, LBP-01-35, 54 NRC 403, 422 (2001).

²⁴ *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-04-22, 60 NRC 125, 139 (2004); *North Anna*, LBP-08-15, 68 NRC at 335.

²⁵ *Palo Verde*, CLI-91-12, 34 NRC at 155; see also *AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station)*, CLI-09-7, 69 NRC 235, 275 (2009).

²⁶ *Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station)*, ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990); see also *American Centrifuge*, CLI-06-10, 63 NRC at 457; *Shearon Harris*, CLI-10-9, 71 NRC at 261-62.

²⁷ 10 C.F.R. § 2.309(f)(1)(vi).

²⁸ *Crow Butte*, CLI-09-12, 69 NRC at 557.

not address a relevant issue, may be dismissed.²⁹ It is the petitioner's responsibility "to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of th[e] proceeding."³⁰ If a petitioner fails to offer alleged facts or expert opinion and a "reasoned statement" explaining any alleged inadequacy in the application, the petitioner has not demonstrated a genuine dispute.³¹

4. General Considerations

These standards do not, as the Commission pointed out in the Remand Order, require dispositive proof of the contention or its bases, but they do require "a clear statement as to the bases for the contention[] and . . . supporting information and references to documents and sources that establish the validity of the contention."³² The degree of this requirement is discussed above in Part A.2.

Contention 3B arises under NEPA and challenges the Applicant's alternatives analysis, namely the amount of energy need reduction provided by the Applicant's demand-side management (DSM) programs and the use of that figure in the alternatives analysis, as it relates to the NRC Staff's future preparation of an environmental impact statement (EIS) for the proposed Summer Units 2 and 3. Therefore, the contention only raises a material issue if it alleges some omission from, or inadequacy in, the ER's alternatives analysis that could result in the NRC's failure to satisfy its responsibilities under NEPA.

Under 10 C.F.R. Part 51, the NRC's regulations implementing NEPA,³³ an ER must, in relevant part, contain a "discussion of alternatives . . . sufficiently complete to aid the Commission in developing and exploring, pursuant to section 102(2)(E) of NEPA, 'appropriate alternatives to recommended courses of action . . .'"³⁴ However, the agency's NEPA responsibilities (and, by extension, the applicant's responsibilities under 10 C.F.R. Part 51) are subject to a "rule of reason."³⁵

²⁹ See *American Centrifuge*, CLI-06-10, 63 NRC at 462-63 (rejecting contention asserting failure to analyze an alternative actually analyzed in the application).

³⁰ *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998).

³¹ See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 & n.12 (1990).

³² CLI-10-1, 71 NRC at 8 (citations omitted).

³³ The NRC may, and has, required applicants to supply information helpful to its (the NRC's) ability to satisfy its obligations under NEPA. See 10 C.F.R. § 51.41.

³⁴ *Id.* § 51.45(b)(3).

³⁵ *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-8, 63 NRC 241, 258-59 (2006); *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 836 (1973).

In the context of alternatives analyses, “[a]gencies need only discuss those alternatives that are reasonable and ‘will bring about the ends’ of the proposed action.”³⁶ Where the agency’s action is to approve or deny a proposal by a private party, the agency should ordinarily “accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.”³⁷ In this regard, we believe the law is clear that the NRC (and therefore this Board) defers to this Applicant’s selected purpose of supplying baseload power. Nonetheless, as we reexamine Petitioners’ Contention 3B, we bear in mind that the Commission, in remanding this matter to us for reconsideration, has clarified its view that: (a) DSM is not a reasonable alternative for a merchant generator principally because such an applicant does not have the ability to implement such a program; but (b) DSM may not be excluded *per se* as part of the alternatives analysis to new generation for a fully integrated electric utility such as SCE&G in this proceeding.³⁸

These principles guide our determination of the admissibility of Contention 3B.

B. Admissibility of Contention 3B (Alternatives Analysis — Demand-Side Management)

1. General Discussion of Contention 3B and the Bases Proffered

As we noted above, Contention 3B provides as follows:

With respect to Chapter 9 of the [Environmental Report (ER)], ‘Proposed Action Alternatives,’ the Applicant almost completely ignores demand-side management, undervaluing opportunities for cost-effective energy efficiency and demand response or load management.³⁹

To the extent they intended to allege that the Applicant completely ignored

³⁶ *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991)).

³⁷ Nuclear Energy Institute; Denial of Petition for Rulemaking, 68 Fed. Reg. 55,905, 55,909 (Sept. 29, 2003) (internal quotations omitted); *accord Citizens Against Burlington*, 938 F.2d at 199 (“An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process.”).

³⁸ CLI-10-1, 71 NRC at 20-21.

³⁹ Petition at 34.

DSM in its ER, Petitioners err: section 9.2.1.3 of the ER clearly discusses DSM,⁴⁰ and the ER specifically states that the Applicant considered a 250-megawatt (MW) contribution of DSM toward future peak energy demand.⁴¹

Petitioners imprecisely qualify their assertion by stating that the Applicant “almost completely ignores” DSM. This could be taken to be an assertion that either:

- (a) the Applicant should have attributed a higher value to DSM than the 250 MW it did consider (which is somewhat more than 20% of SCE&G’s share of the proposed project); or
- (b) the Applicant should have considered DSM (or additional DSM) in connection with its consideration of alternatives for the proposed project — particularly those involving combinations of generation methodologies.

From either perspective, general assertions of insufficient consideration of DSM are inadequate to raise an admissible contention.⁴² To have presented an admissible contention, Petitioners needed to allege specific inadequacies in the Applicant’s analysis of DSM or in its analysis of alternatives and provide some support or reasoning for any such alleged deficiencies. The statements comprising the Contention 3B supporting information in the Petition relate, with the single exception of the last assertion which we label below as D23, to the perspective presented by clause (a), above, and consist entirely of references to energy efficiency gains obtained by other entities in other situations, statements of goals of a variety of agencies, and brief summaries of the Petitioners’ views of positions taken by SCE&G. None of those statements makes any effort to translate or connect that information to any program currently or potentially available to Applicant. Nor do any of those statements provide any reasoning to support Petitioners’ hypothesis that SCE&G could achieve greater DSM amounts than the 250 MW it has incorporated into the load forecasts in the Application. Petitioners simply fail to connect the dots between the information supplied as support/clarification for Contention 3B and either the Application or SCE&G’s potential for achieving additional DSM which Petitioners assert, broadly, to be lacking from the Application. For these reasons, as we discuss in depth below, Petitioners have not, with regard to clause (a), above, identified a genuine dispute

⁴⁰ [SCE&G], V.C. Summer Nuclear Station, Units 2 & 3, COL Application, Part 3, Environmental Report (Rev. 1 Feb. 2009) at 9.2-3 to -6 (ADAMS Accession No. ML090510259) [hereinafter ER]. The ER also discusses SCE&G’s DSM programs as part of the “Need-for-Power” section. *See id.* at 8.1-4 to -5 (ADAMS Accession No. ML090510258).

⁴¹ *Id.* at 8.1-5.

⁴² *See* 10 C.F.R. § 2.309(f)(1)(v), (vi) (requiring “references to specific sources and documents” and “references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute.”).

on a material issue of law or fact,⁴³ demonstrated that the issue they wish to raise is material to the findings the NRC must make regarding this Application,⁴⁴ or provided support for their premise,⁴⁵ and, with regard to clause (b), above, they have failed to raise a genuine dispute with the Applicant on a material issue.⁴⁶ For these reasons, Contention 3B is not admissible.

2. *Specific Analysis of Supporting and Clarifying Statements*

As support for this contention, Petitioners incorporate into their pleadings twenty-three specific assertions,⁴⁷ following nearly identically those matters set out in paragraphs 34 through 56 of the supporting Declaration of Petitioners' expert, Nancy Brockway.⁴⁸ Notwithstanding the fact that, as we discussed in the previous section, Petitioners' assertions collectively fail to raise a genuine dispute with the Application or provide adequate support for Petitioners' position, we examine each specific assertion, both separately and as it might be combined with the other assertions, to determine whether it provides a basis or support for the contention. For the purposes of our analysis, we identify these twenty-three assertions as items D1 through D23 below. These twenty-three assertions or statements specifically address one of two matters: (a) the amount of reduction in projected energy need due to DSM; and (b) the "Proposed Action Alternatives" analysis provided in the ER. More particularly, statements D1 through D22 all regard the amount of DSM projected by the Applicant in the ER, whereas D23 is a challenge to the Applicant's alternatives analysis. We discuss these two topics separately below. Furthermore, we regroup, for the purpose of our analysis, these statements into the following particular substantive matters:

- (i) statements D6 and D9 through D22 assert alleged facts intended to support the contention as it challenges the amount of energy savings attributable to DSM;
- (ii) statements D1 through D5, D7, and D8, when construed in a light most favorable to the Petitioners, attempt to focus or clarify the contention as it regards the assertion that SCE&G should have considered a larger contribution from DSM; and
- (iii) statement D23, in and of itself, is an assertion that the Application should have

⁴³ See *id.* § 2.309(f)(1)(vi).

⁴⁴ See *id.* § 2.309(f)(1)(iv).

⁴⁵ See *id.* § 2.309(f)(1)(v).

⁴⁶ See *id.* § 2.309(f)(1)(iv), (vi).

⁴⁷ See Petition at 34-38.

⁴⁸ See Petition, Declaration of Nancy Brockway in Support of Petition for Intervention and Request for Hearing by the Sierra Club and [FOE] ¶¶ 34-56 (Dec. 8, 2008) [hereinafter Brockway Decl.].

considered alternatives to the proposed project available through other means of generation coupled with additional DSM.

In accord with accepted practice among licensing boards, endorsed by the Commission,⁴⁹ we examine the assertions to determine if individually or in the aggregate they provide the requisite support, or focus and clarify Contention 3B such that it presents an admissible contention.

a. Statements D1-D22 Addressing Applicant's DSM Estimate

Of the twenty-two statements related to the DSM estimate, as we mentioned above, fifteen provide statements apparently intended to support the proposition made by Contention 3B (as illuminated by the focusing statements D1-D5, D7, and D8) addressing the overall DSM level considered by SCE&G in the Application. Those regard the following specific categories of information: nationwide DSM potential, DSM potential in South Carolina, DSM achievements by other utilities, residential demand response activities, and potential DSM achievements by SCE&G. We first address the fifteen supporting statements, organized by these categories, and then apply those statements to the stated contention and to the focusing statements provided by Declarations D1-D5, D7, and D8 below.

(i) STATEMENTS PROVIDING SUPPORTING INFORMATION (D6 AND D9-D22)

Although none of the following statements attempts to clarify or focus Contention 3B, we consider them, individually and for collective effect, from the perspective of the information they proffer which might provide support for Contention 3B, whether considered as it is written or as it could be focused and clarified by the statements discussed below in subsection II.B.2.a(ii).

(a) Statements Addressing Nationwide DSM Potential (D9 and D22)

D9. A number of technical potential studies of the United States economy have found that the United States could reduce energy usage by 25% on average through cost-effective efficiency.⁵⁰

⁴⁹ See, e.g., *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004) (“[T]he reach of a contention necessarily hinges upon its terms coupled with its stated bases” (quoting *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988)); *Crow Butte*, CLI-09-12, 69 NRC at 553 (“As we have held, the scope of an admitted contention is defined by its bases.” (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002))).

⁵⁰ Petition at 36. Brockway Decl. ¶ 42 is identical.

Petitioners' assertion D9 fails to indicate any link between these generalized studies and the Application that is the subject of this proceeding. Petitioners fail to indicate with any specificity how the unidentified "technical potential studies" referred to in D9 indicate energy usage could be reduced, or how, if at all, such methods might be applied by SCE&G. This generalized reference to a "number of technical potential studies" thus fails to provide any of the support needed for an admissible contention.

D22. The National Action Plan for Energy Efficiency (NAPEE), a joint effort of the United States Environmental Protection Agency and the United States Department of Energy, along with state regulators and the electricity and gas industry, recites that well-designed energy efficiency programs "are delivering annual energy savings on the order of 1% of electricity and natural gas sales." The NAPEE can be downloaded from <http://www.epa.gov/cleanrgy/documents/>.⁵¹

Statement D22 fails to indicate how the referenced report provides any support for the proposition that some DSM potential beyond that analyzed in the Applicant's ER should have been addressed. Petitioners fail to provide any reasoning or explanation regarding how this national plan suggesting that it is possible to achieve a 1% annual reduction in energy from consumption of electricity and natural gas relates to a potential additional capacity reduction for SCE&G achievable from DSM. This assertion again suffers from a fundamental flaw — it fails to indicate how the referenced data correlate to any potential capacity savings — or to place it in the context of the 250-MW capacity reduction resulting from the DSM programs considered in the Application.⁵² Statement D22 thus also fails to provide any of the support necessary for an admissible contention.

⁵¹ Petition at 38. Brockway Decl. ¶ 55 is identical.

⁵² Petitioners nowhere suggest that the capacity reductions which could be achieved through energy conservation programs are significant when compared to the capacity of the proposed project. For example, Petitioners suggest in D17 (which is their only statement proposing actual numerical values for an asserted reduction in generation needs by SCE&G) a 5% reduction in energy sales (not capacity), and elsewhere seem to propose that energy conservation (which we take to mean DSM, although a number of the references to which Petitioners refer regard natural gas consumption reductions as well as electricity consumption reductions) can achieve a 5% energy reduction (see D13 and D15), while SCE&G has incorporated 250 MW of peak capacity reduction via DSM into its projections. See Petition at 36-37; ER at 8.1-5. But it is not apparent, nor do Petitioners suggest any method for calculating, how an overall energy consumption reduction translates into any particular reduction in electricity use, or how such a reduced electricity use would translate into a reduced need for capacity. The concepts of energy use, electricity use, and capacity needs, while related, differ. Similarly, without detailed information on load, comparisons to overall electricity sales do not translate timing and sources into capacity needs.

(b) *Statements Addressing Potential DSM Achievements in South Carolina (D10, D6, D13-D16, and D18)*

D10. Having enjoyed relatively low energy prices, South Carolina has so far lagged behind the nation in its energy efficiency activities (South Carolina ranks 30th in the nation to date in commitment to energy efficiency), and thus, contrary to SCE&G's analysis, the Applicant is likely to have greater than average opportunities to reduce energy usage while maintaining end-use benefits such as cooling, light, and motor power.⁵³

The bare statement that the "Applicant is likely to have greater than average opportunities to reduce energy usage," even when made by Ms. Brockway as Petitioners' expert, is insufficient to support admission of a contention.⁵⁴ The statement itself is speculative ("likely to have"), fails to indicate any particular "opportunities" that might be available to SCE&G, and fails to set forth, or even indicate, any relationship between South Carolina's national ranking in efficiency activities and SCE&G's particular DSM programs. This statement fails to support admission of this contention.

D6. SCE&G in testimony filed with the South Carolina PSC in Docket 2008-196-E similarly rejected the idea that it could achieve considerable DSM energy benefits or peak load reductions using demand side management.⁵⁵

This statement fails to raise any issue or point to any alleged facts that support the proposition that any DSM benefits could be achieved by SCE&G beyond

⁵³ Petition at 36. Brockway Decl. ¶ 43 is identical.

⁵⁴ See *American Centrifuge*, CLI-06-10, 63 NRC at 472 ("an expert opinion that merely states a conclusion (e.g., the application is 'deficient,' 'inadequate,' or 'wrong') without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion." (quoting *PFS*, LBP-98-7, 47 NRC at 181)). This principle was further clarified in a decision issued the same day as CLI-10-1, see *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27 (2010) (noting that petitioners, in contrast to the petitioner in *American Centrifuge*, offered sufficient expert support in the form of a declaration from their expert that explained the reasons for the expert's conclusions and cited or attached supporting documents), and has been stated in other licensing board decisions, see, e.g., *Vogtle*, LBP-07-3, 65 NRC at 253 ("neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention"); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 358 (2006) ("an expert opinion that 'merely states a conclusion (e.g., the application is "deficient," "inadequate," or "wrong") without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of its ability to make the necessary, reflective assessment of the opinion'" (quoting *American Centrifuge*, CLI-06-10, 63 NRC at 472)).

⁵⁵ Petition at 35-36. Brockway Decl. ¶ 39 is identical.

those analyzed in the Application. It simply provides no supporting information relevant to admissibility of Contention 3B.

D13. The South Carolina Climate, Energy and Commerce Committee (CECAC), established by the Governor of South Carolina, and comprising representatives of all key energy-using and energy-producing sectors in the state, agreed in a report issued in July 2008 that 5% of the state's energy needs could be met with energy efficiency resources by 2020, at a savings of almost \$600 million, net present value.⁵⁶

This statement asserts findings from a report concerning statewide energy efficiency potential, but fails to relate those findings to the Application, and fails to indicate how the findings it attributes to this report indicate that, as the contention appears to assert, the Applicant could achieve more DSM than it has incorporated in its analysis. Once again, Petitioners fail to draw any connection between the generalized results they attribute to the report and either some failure of the analysis in the Application or any error or omission from SCE&G's programs, and fail to provide any reasoning to support the relevance of this report to SCE&G's programs or the analysis set out in the Application. Statement D13 therefore fails to support an admissible contention disputing the contents of the Application.

D14. The CECAC agreed that a 1% annual target of improvement in energy use efficiency was reasonable and achievable in the near term.⁵⁷

D15. CECAC adopted a policy goal of 5% energy efficiency savings by 2020, for recommendation to the legislature.⁵⁸

Statements D14 and D15 both simply assert that CECAC has established certain energy efficiency targets, but neither identifies any particular measure (whether discussed in the CECAC report or not) that has been proposed for, or could be implemented by, SCE&G, nor do Petitioners provide any reasoning why they believe these targets can be met by SCE&G. Neither of these statements provides any information to support the proposition set out in Contention 3B that SCE&G "almost completely ignores demand-side management, undervaluing opportunities for cost-effective energy efficiency and demand response or load management. . . ." They thus fail to provide support for an admissible contention.

D16. The CECAC produced a supply curve of low- and no-carbon resources in South Carolina, which shows that energy efficiency could eliminate up to 8 percent of net

⁵⁶ Petition at 36-37. Brockway Decl. ¶ 46 is identical.

⁵⁷ Petition at 37. Brockway Decl. ¶ 47 is identical.

⁵⁸ Petition at 37. Brockway Decl. ¶ 48 is identical.

[greenhouse gas (GHG)] in 2020, at a net cost savings relative to the generation alternative.⁵⁹

Petitioners here fail to provide any reasoning which might translate the projected reduction in greenhouse gases achievable through energy efficiency into a potential improvement in DSM by SCE&G. While we might infer a connection between the two principles, in the absolute absence of any suggested correlation, this Board is unable to deduce any particularized suggested potential improvement from DSM, nor are we permitted to supply that missing link.⁶⁰ Petitioners simply fail to identify any particular energy efficiency methods identified or discussed in the studies underlying this CECAC curve that could be applied generally or specifically to the Applicant's programs, and fail to indicate how such possibilities relate to the capabilities of SCE&G. As a result, statement D16 fails to provide support for admission of Contention 3B.

D18. SCE&G participated fully in the CECAC deliberations, and did not publicly disagree with its recommendations (although it sent a letter to the CECAC chair disavowing its support of the July 2008 Final Report).⁶¹

These alleged facts fail to provide any support for Petitioners' contention as it regards the amount of DSM considered by SCE&G in the Application. Statement D18 fails to support admission of Contention 3B.

(c) *Statements Addressing DSM Achievements by Other Utilities (D19-D21)*

D19. Duke Energy has forecast that it could produce energy resources using efficiency amounting to 1% per year of its load in the Carolinas.⁶²

D20. Xcel Energy in Colorado has recently agreed to achieve savings of 1.4% by 2013.⁶³

D21. According to data from 2006 filed with the Energy Information Administration, a number of large utilities have achieved efficiency savings of 1% or more annually. Massachusetts Electric achieved a reduction of just under 2% in 2006. Since 2006, utilities and others have developed innovative designs for energy efficiency programs that can capture efficiency opportunities not previously available to utilities.⁶⁴

⁵⁹ Petition at 37. Brockway Decl. ¶ 49 is identical.

⁶⁰ See *supra* note 23 and accompanying text.

⁶¹ Petition at 37. Brockway Decl. ¶ 51 is identical.

⁶² Petition at 37. Brockway Decl. ¶ 52 is identical.

⁶³ Petition at 38. Brockway Decl. ¶ 53 is identical.

⁶⁴ Petition at 38. Brockway Decl. ¶ 54 is identical.

Statements D19 through D21 point to achievements by other electricity suppliers but fail to indicate any link whatsoever to potential or proposed programs of SCE&G; they fail to indicate which specific programs might have led to such success for these utilities or whether any such programs have been or could be implemented by SCE&G. These statements fail to provide any supporting information which correlates the energy efficiencies achieved at these utilities to any achievable by SCE&G or to any incremental capacity reductions which SCE&G might achieve from such incremental energy efficiencies, or to provide any reasoning to support a belief that the DSM estimate provided in the Application is too small. Statements D19 through D21, therefore, severally and collectively, fail to support an admissible contention challenging the Applicant's DSM analysis.

(d) Statements Addressing Residential Demand Management (D11 and D12)

D11. Other utilities in the Southeastern region of the United States have had great success involving residential customers in direct load control programs, whereby participating customers' air conditioning load is cycled off during peak days, contributing significantly to peak load reductions while not inconveniencing such customers unduly (participants receive benefits for participating).⁶⁵

This statement, when construed in a light most favorable to Petitioners, implies that the ER does not address direct load control programs for residential customers. However, to begin with, this statement provides no information regarding which particular other utilities it is referencing or how much demand reduction those other utilities achieve specifically through residential direct load control programs. Here again Petitioners have not suggested any correlation between the programs it references and any particular amount of demand reduction which might be possible for SCE&G to achieve — in this instance through residential direct load control programs. Additionally, even the combination of this statement with statements D19 through D21, which discuss total DSM energy savings at other utilities, does not support the proposition that residential direct load programs could result in additional energy savings to SCE&G because those statements also fail to indicate the amount of energy savings attributable to residential direct load control programs. Thus, statement D11 does not provide an adequate basis or support for an admissible contention.

D12. The potential for greater demand response among residential customers has recently been recognized by the South Carolina Public Service Commission.⁶⁶

⁶⁵ Petition at 36. Brockway Decl. ¶ 44 is identical.

⁶⁶ Petition at 36. Brockway Decl. ¶ 45 is identical.

This statement similarly fails to relate the asserted South Carolina Public Service Commission view to any existing SCE&G program, any alleged flaw in SCE&G's ER analysis of its existing programs, or any specific new program SCE&G might use to achieve additional energy savings or reduced capacity needs. Statement D12 fails to support admissibility of Contention 3B.

(e) *Statement Addressing DSM Benefits to SCE&G (D17)*

D17. By 2020, under the Company's load forecast filed in this docket, the Company's sales are projected to be 30,599 gigawatthours. A 5% reduction in sales made possible by efficiency would lower that forecast by 1530 gWh, or a significant portion of the roughly 9600 gWh* that SCE&G claims it will receive from its share of the proposed two units at the Summer Station.⁶⁷

Petitioners here simply provide a sample computation of the effects of a 5% reduction in energy sales by 2020, applying, perhaps (though without indicating that this is the case), the 5% energy conservation goal they attribute to CECAC in D15. This statement fails to discuss or even indicate any programs or measures being implemented (or not being implemented) by the Applicant that might be possible or feasible for the Applicant to achieve a reduced need for capacity. Nor does it explain, or provide any reasoning suggesting, a correlation between the suggested 5% reduction in energy sales and any reduced need for capacity from the proposed baseload project or how or why the referenced 5% reduction in energy sales differs from, or might correlate to, the 250-MW peak demand reduction which the Applicant has assumed it will get from DSM. Further, even assuming, in an abundance of caution, that it was implied by this statement, or by the collective effect of all supporting statements, Petitioners provide no information to indicate how an *additional* 5% reduction in energy sales beyond the amount accounted for in the Application through the DSM programs would be achievable. Statement D17 therefore fails to support admission of Contention 3B.

(ii) STATEMENTS CLARIFYING OR FOCUSING CONTENTION 3B
(D1-D5, D7, AND D8)

We consider each of the following statements to, rather than providing information which might support admission of Contention 3B, assert particular challenges to the Application, and therefore could provide some clarification and focus to Contention 3B.

*The SCE&G share of the output of Summer Units 2 and 3 is calculated by multiplying 1.218 gW (SCE&G's share of the plants) by 90% (SCE&G's forecast capacity factor) by 8760 hours in a year.

⁶⁷ Petition at 37. Brockway Decl. ¶ 50 is identical, including the footnoted material.

D1. SCE&G in its ER dismisses the possibility of alternatives to building two new nuclear generating plants, and undervalues the alternatives. In particular, SCE&G does not take demand side management or renewable sources of generation seriously, and overstates the risks associated with such resources, even as it understates the uncertainties associated with its chosen resource plan. As a result, SCE&G's resource plan is flawed and does not support its conclusion that Summer Units 2 and 3 are the least cost most reliable plan to provide resources for its customers.⁶⁸

The assertion that SCE&G “dismisses” or “undervalues” the alternatives and “overstates the risks” and understates the uncertainties” and the conclusory statement that “SCE&G’s resource plan is flawed” are bare and unsupported — even when considered in light of the supporting statements discussed above — failing to point to any particular instance in, or reason for Petitioners’ belief of such a shortcoming in, the content of the Application. As the Commission affirmed in CLI-10-1, “such general assertions, without some effort to show why the assertions undercut findings or analyses in the ER, fail to satisfy the requirements of section 2.309(f)(1)(vi).”⁶⁹ Thus, this statement fails to clarify Contention 3B to a level that any genuine dispute exists with the Application or that any issue exists that is material to the findings the NRC must make vis-à-vis the granting, denial, or conditioning of the COLA or the NRC’s NEPA alternatives analysis. Therefore, statement D1, as it is supported by the other statements, does not focus or clarify Contention 3B to make it an admissible contention.

D2. With respect to demand side management, SCE&G utterly dismisses the potential for DSM to produce resource benefits for customers and reduce the need or push off the timing of desirable generation additions.⁷⁰

This statement is contradicted by the fact that the Applicant’s ER not only discusses DSM but specifically notes that “SCE&G’s load management program reliably reduces the system’s peak demand by approximately 250 MW of capacity. SCE&G uses this figure to forecast its firm peak demand for planning purposes.”⁷¹ The Petitioners do not explain how, in light of this statement, they reason that SCE&G has “utterly dismis[s]e[d]” the potential benefits of DSM. Additionally, as with item D1, above, the assertion that “SCE&G utterly dismisses . . . ,” even when considered in light of the supporting statements, is bare and conclusory and is not adequately supported by alleged facts. Further, to the extent that this

⁶⁸ Petition at 34-35. Brockway Decl. ¶ 34 is substantively identical except that the phrase “are the least cost most reliable” is replaced with the phrase “represent the least cost and most reliable.”

⁶⁹ CLI-10-1, 71 NRC at 22.

⁷⁰ Petition at 35. Brockway Decl. ¶ 35 is identical.

⁷¹ ER at 8.1-5.

challenge asserts that DSM “pushes off” the need for the proposed project, it, in substance, amounts to a challenge to the need for power analysis which we discuss and reject below.⁷² Thus statement D2, as illuminated by the supporting statements, fails to clarify or focus Contention 3B such that it raises a genuine dispute with the Application.

D3. In its Environmental Report, SCE&G’s discussion of demand side management is limited to a few paragraphs, in which the Applicant names what it calls conservation programs and load management programs, whereas the conservation programs are not well-designed and will not achieve significant efficiency as currently designed (regardless of budget).⁷³

No material issue is raised by the statement that the discussion of DSM is limited to a few paragraphs. The bare assertion that “the conservation programs are not well designed and will not achieve significant efficiency” is unsupported by any alleged facts (and the fact that it is made by Petitioners’ expert also fails to elevate it to the requisite level of support because it is equally bare in that expert’s affidavit), fails to make any particularized challenge to the Application, and fails to provide any reasoning for the belief it asserts. Statement D3 fails to clarify or focus Contention 3B to make it admissible.

D4. and the load management programs are limited to voluntary reductions by large customers, and ignore the potential for load reduction and shifting from residential and small commercial air conditioning loads.⁷⁴

Petitioners’ statement here is, to a degree, expanded by its statements in D9, D11, D20, and D21. However, as we discussed above, none of those references to the programs of other electricity providers indicates how much or how those providers benefit from the potential load reductions subject of this portion of the contention, nor do any of these statements indicate how such programs might be implemented by SCE&G or how much effect they might have on SCE&G’s energy demand or capacity needs.⁷⁵ Thus, they do not connect this data from

⁷² See *infra* notes 96-97 and accompanying text.

⁷³ Petition at 35. Brockway Decl. ¶ 36 is identical.

⁷⁴ Petition at 35. Brockway Decl. ¶ 37 provides:

The Company forecasts no additional load reductions from efficiency or load response programs after 2012. Its load management programs are limited to voluntary reductions by large customers, and ignore the potential for load reduction and shifting from residential and small commercial air conditioning loads. Its load management forecasts significantly understate the technical and economic potential for load management in its service area.

⁷⁵ Also, as we noted above, generalized references fail to provide the requisite support for an admissible contention. See *supra* note 22 and accompanying text.

other utilities to any energy demand or capacity need reduction that they assert SCE&G should have analyzed above the 250 MW discussed in the Application, nor do they indicate how any additional such reduction could materially affect the NEPA alternatives analysis for proposed Summer Units 2 and 3. Petitioners raise no correlation between their argument that SCE&G's load management programs are limited to large customers and any particular purported reduction in need for capacity that might be achieved by including the residential and small commercial air-conditioning loads in an efficiency program, nor do they refer to or suggest any specific flaw or omission in SCE&G's DSM programs described in sections 8.1.1.2 and 9.1.2.3.1 of the ER regarding residential and other conservation efforts, and Petitioners' references in D9, D11, and D19-D21 do not provide any such information. Statement D4, even when extended to the maximum level of specificity and support potentially offered by the supporting statements, therefore fails to clarify Contention 3B such that it raises a genuine dispute on a material issue of law or fact or an issue which is material to the findings the NRC must make or to the NRC's NEPA alternatives analysis. Statement D4 fails to clarify Contention 3B so that it would be admissible.

D5. In the ER, the Company justifies its lack of projected energy efficiency and load management gains by citing the argument that "The relatively low cost of electricity in South Carolina works counter to the incentives provided in the available demand side management programs for reducing demand. Thus, given the customer growth and the low cost of electricity, the available energy savings from demand side management will not be sufficient to offset a significant portion of future demand." E.R. Para. 9.2.1.3.3. This analysis is insufficient.⁷⁶

The bare assertion that "this analysis is insufficient" (or, as Ms. Brockway put it, "incorrect and insufficient"), fails to supply any reasoning for that postulate, and therefore fails to provide sufficient support for an admissible contention. What is more, the statements attributing the lack of potential for DSM in SCE&G's service territory to the low cost of electricity in that territory (which are attributable not to the Applicant but to the South Carolina Energy Office (SCEO)),⁷⁷ in our view

⁷⁶ Petition at 35. Brockway Decl. ¶ 38 is substantively identical, asserting "This analysis is *incorrect and insufficient*." (emphasis added).

⁷⁷ The ER excerpts appear to have been quoted from the following text:

Data submittals were received from 37 of the 46 electric utilities operating in South Carolina, and 11 of the 18 natural gas suppliers operating in the state. The general findings of the survey indicate that the future of electric demand-side programs in South Carolina appears bleak, due in part to the low cost of electricity as compared with the other states. Although interest in

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directly contradict the principle for which Petitioners cite them and therefore offer no support for a proposition of an error in, or omission from, the Application. Neither Petitioners nor Ms. Brockway offer any explanation for why they believe, or reasoning to support the proposition that, the SCEO is incorrect, nor do they provide any rationale for the proposition that SCE&G's reliance on the SCEO report makes its ER discussion insufficient. Even when read in conjunction with the supporting statements, this statement does not support any claim of a specific error in the SCEO analysis or explain how any such error would affect the Applicant-specific DSM potential analyzed in the Application. Statement D5 thus fails to clarify, or support, Contention 3B to enable it to properly challenge the Application.

D7. SCE&G's demand response initiatives appear to be largely directed towards large customers, such as industrial loads.⁷⁸

First, we note that in sections 8.1.1.2 and 9.2.1.3.1 of the ER, SCE&G explicitly addresses the spectrum of DSM initiatives it is taking, including initiatives directed toward residential customers. Additionally, Petitioners' vague statement to the effect that SCE&G's programs are "largely directed towards large customers" fails to indicate the relative sizes of those programmatic contributions, fails to indicate, even when taken in consideration with D1-D5 and D8, any particular shortcomings in SCE&G's other DSM programs, how the relative benefits of each might be altered, and any reasoning for their belief. Thus, as with D4 and D6, and when taken collectively with other statements, statement D7 fails to clarify or support Contention 3B such that it has the necessary substance to present an admissible challenge to the Applicant's DSM analysis.

deregulation in the state has mostly faded, there has been no corresponding renewal of interest in demand-side management programs.

South Carolina Energy Office, *The Status of Utility Demand-Side Management in South Carolina, 2004* (July 2005) at vi, available at <http://www.energy.sc.gov/publications/2004%20DSM%20Report.pdf>.

South Carolina ranks third in electricity consumption per capita in the U.S., and has the fifth highest residential monthly electric bill with an average of \$94.95. Although the average residential rate per kWh in South Carolina is better than the average rates for 25 other states, South Carolina residential customers rank fourth in the nation in the per household amount of money spent on electricity. This greater cost of electricity is the result of high consumption levels, not high rates. Moreover, not only does South Carolina have a lower average rate per kilowatt-hour in the residential sector than the national average, but also in the commercial and industrial sectors as indicated in Figure 8.

Id. at 7.

⁷⁸Petition at 36. Brockway Decl. ¶40 is identical.

D8. There is much greater potential for economic energy efficiency and peak load reduction in South Carolina than reflected in SCE&G's Environmental Report.⁷⁹

This assertion, even when viewed together with the supporting declarations, is entirely speculative and does not support any specific challenge to the Applicant's DSM analysis, and therefore fails to clarify or support Contention 3B such that it would be an admissible contention.

(iii) BOARD CONCLUSION REGARDING ADMISSIBILITY OF CONTENTION 3B
AS IT REGARDS POTENTIAL FOR GREATER DSM ACHIEVEMENT

The supporting statements (D6 and D9-D22) fail, when considered individually and collectively, to provide the support required for an admissible contention. These statements fail to provide any reasoning for the belief that greater DSM is achievable; fail to suggest any specific alternative estimate of DSM contribution that might have been evaluated in the Summer COL Application arising out of information suggested by any of the referenced reports, the referenced goals, or the general statements proffered; and fail to link the findings or suggestions of these reports, goals, or statements to any specific potential reduction in SCE&G's energy needs.⁸⁰ Petitioners fail to connect the information and assertions contained in these supporting statements to SCE&G's programs discussed in the ER (or to challenge those programs other than by bare, generalized assertions of insufficiency) or to any other possible program which Petitioners believe SCE&G might implement. These statements do not provide, individually or collectively, the requisite support, in the form of alleged facts or reasoned (as

⁷⁹ Petition at 36. Brockway Decl. ¶41 is identical.

⁸⁰ Further, this series of statements by Petitioners plainly indicates that the concept of need for power and the use of DSM as an alternative to building additional generation capacity are inextricably linked. This principle and view are not new, as they were suggested in the Clinton ESP proceeding, *see Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 245 (2004), as well as CLI-10-1, 71 NRC at 20-21 (observing that "SCE&G and Santee Cooper are . . . in a position to implement and promote programs such as energy conservation, efficiency, and load management such that the need for additional generation capacity may be reduced . . . and they themselves discussed in the ER the potential for demand-side management programs to offset future demand"), wherein the Commission also observed that "[w]ith respect to the 'need for power' analysis . . . such an assessment 'should not involve burdensome attempts to precisely identify future conditions,'" and applied that principle to both market conditions and energy demand, *id.* at 17-19. Indeed the idea behind DSM is that one alternative to building additional generation capacity is to reduce demand so that the need is reduced. The Commission, in CLI-10-1, upheld our finding that Petitioners had not proffered an admissible contention regarding SCE&G's need for power analysis. *See id.* at 19. As discussed below, *see infra* note 96 and accompanying text, based on the information provided by the Petitioners, DSM could at most only delay the need for Summer Units 2 and 3 and therefore would not materially affect the need for power analysis.

opposed to merely conclusory) expert opinion,⁸¹ to show that Petitioners have raised a genuine dispute with the Application on a material issue of law or fact in Contention 3B either in its bare form or as it might be clarified or focused by statements D1-D5, D7, and D8.

Furthermore, when considering the clarifications and focusing offered by statements D1-D5, D7, and D8, individually and collectively, and any support offered by Statements D6 and D9-D22, Contention 3B still fails to raise an issue material to the decision the NRC must make respecting either its licensing decision or its NEPA obligations.

And, finally, all of the matters suggested, raised, or referred to in Statements D1-D22 relate to the premise that SCE&G should have considered a larger contribution of DSM in its planning, but the maximum suggested by the Petitioners is small when compared to the overall capacity of the proposed project.⁸² The size of reduction in capacity needs which can rationally be associated with this small increase in DSM cannot alter the decision the NRC must make regarding issuance, conditioning, or rejection of the license; it would only serve to affect the projected timeline for SCE&G's need for the 1218 MW it will receive from the proposed project. As we discuss below,⁸³ when energy demand reduction through DSM is examined in the context of the need for power analysis, such challenges do not create an admissible contention. Thus, even if Contention 3B, as focused and clarified by Statements D1-D22, were not inadmissible for the foregoing reasons, it is inadmissible because it raises essentially the same challenge to the Applicant's need for power which we have previously found inadmissible, a ruling affirmed by the Commission.⁸⁴

⁸¹ See CLI-10-1, 71 NRC at 22 (“[S]uch general assertions, without some effort to show why the assertions undercut findings or analyses in the ER, fail to satisfy the requirements of section 2.309(f)(1)(vi).”).

⁸² See discussion of statement D17, *infra* Section II.B.2.a(i)(e). Statement D17 is the only statement in the Petition suggesting any demand reduction figure from DSM that can be compared with the 250-MW peak demand already discussed in the Application. None of the other percentages cited in the Petition suggests any actual reduction in demand achievable by SCE&G because the Petitioners offer no explanation of how one might translate, for example, CECAC's energy efficiency goals and targets described in statements D14 and D15 into a potential reduction in SCE&G's peak capacity needs. See also *supra* note 52.

⁸³ See *infra* notes 96-97 and accompanying text.

⁸⁴ See LBP-09-2, 69 NRC at 107-08 (where Petitioners challenged Applicant's need for power analysis on the basis of the current economic downturn, finding Petitioners' need for power contention to be inadmissible because it would impose “a level of detail well beyond what is required of the Agency in its analyses”); CLI-10-1, 71 NRC at 16 (affirming Board's conclusion that Petitioners' need for power contention called for more detailed analysis than NRC requires because, “[a]s we have stated: ‘[W]hile a discussion of need for power is required, the Commission is not looking for burdensome attempts by the applicant to precisely identify future market conditions and energy

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For the foregoing reasons, Contention 3B, even when viewed in light of these clarifying, focusing, and supporting statements, fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi).

b. Board Analysis of Statement D23 Addressing Applicant's Alternatives Analysis

Finally, turning to statement D23, we observe that it is capable of being interpreted to focus and clarify Contention 3B on alternatives which SCE&G was required to consider, or might have considered, but assertedly did not. Although, as discussed above, statements D1-D22 were considered as providing supporting or clarifying information regarding the amount of DSM projected by SCE&G, they did not provide any basis to support the admissibility of Contention 3B from the perspective of the asserted need to consider greater DSM contributions. Nonetheless, these statements purport to offer information regarding what others have been able to achieve for DSM-related load reductions, and for that reason, we consider them also in the context of the amount of DSM to be considered when examining Petitioners' statement D23 related to the Applicant's alternatives analysis.

D23. The Applicant appears to argue that incremental demand side management above amounts reflected in its forecasts need not be considered as an alternative to the proposed plants unless by itself it can replace the resources represented by proposed plants. This approach would not constitute sound resource planning. Rather, all possible alternatives must be identified, and alternate scenarios, consisting of various mixes of resources and timing of resources, must be modeled to examine their net present value, given a variety of input assumptions. There is no evidence that the Company has used this basic method of resource planning. If it has, it has not presented the results to this Commission in its Environmental Report, nor explained its methodology in detail and identified the specific inputs to its modeling of various scenarios.⁸⁵

Statement D23 appears to focus upon Petitioners' view of how the Applicant should have analyzed DSM as an alternative in its ER. We view this statement as proffering a challenge to the Applicant's "Proposed Action Alternatives."⁸⁶ This portion of the support/bases for Contention 3B has two fundamental components:

demand, or to develop detailed analyses of system generating assets, costs of production, capital replacement ratios, and the like in order to establish with certainty that the construction and operation of a nuclear power plant is the most economical alternative for generation of power.'" (quoting 68 Fed. Reg. at 55,910)).

⁸⁵ Petition at 38. Brockway Decl. ¶ 56 is identical.

⁸⁶ ER ch. 9.

- a. The assertion that there is a requirement to identify and consider all possible alternatives, and
- b. The assertion that Applicant has failed to consider certain alternatives that incorporate DSM along with other possible generation sources.

(i) CONSIDERATION OF “ALL POSSIBLE ALTERNATIVES”

Petitioners’ assertion in D23 that “all possible alternatives must be identified . . . and modeled” and, impliedly, considered, has no foundation in law. As regards the general requirements for consideration of alternatives, it is well established that there is no obligation under NEPA to consider every possible alternative.⁸⁷ Thus, viewing D23 to assert that there is a requirement to examine *all* possible alternatives, this assertion fails to raise an issue material to the NRC’s NEPA analysis and, accordingly fails to cause Contention 3B to raise an admissible contention.

(ii) CONSIDERATION OF ALTERNATIVES INVOLVING DSM

Regarding the consideration of specific combination alternatives, we note that the burden rests upon a petitioner to propose a particular alternative, and bare generalizations will not support an admissible contention.⁸⁸ A board may not supply information that is missing or make assumptions of fact not provided by the petitioner,⁸⁹ and therefore we may not assume that Petitioners intended to propose (or contend) that any particular combination should be examined if none can be discerned from the Petition.

⁸⁷ *Long Island Lighting Co.* (Shoreham Nuclear Power Station Unit 1), CLI-91-2, 33 NRC 61, 71 (1991) (“An agency’s environmental review ‘must consider not every possible alternative, but every reasonable alternative.’” (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir.1985)); see also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978) (“the ‘detailed statement of alternatives’ cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man”).

⁸⁸ *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 158 (2005); see also *Shearon Harris*, CLI-10-9, 71 NRC at 264 (“The question before us . . . is whether [petitioner] has stated [a contention asserting] an environmentally preferable alternative to the proposed reactors.”); *id.* at 264-65 (affirming Board ruling that petitioner had not “properly challenged” applicant’s conclusion that no environmentally preferable alternative existed where “[t]he only alternative that [petitioner] mentions on appeal is the ‘no reactor’ option,” and petitioner neither raised that option before the Board nor supported its argument that it would always be environmentally preferable); cf. *Olmsted Citizens for a Better Community v. United States*, 793 F.2d 201, 209 (8th Cir. 1986); *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 576-77 (9th Cir. 1998).

⁸⁹ *Georgia Tech*, LBP-95-6, 41 NRC at 305. See also *Crow Butte*, CLI-09-12, 69 NRC at 552-53; *MOX*, LBP-01-35, 54 NRC at 422.

(a) *Specific Alternatives Not Addressed in the Application*

In the instant circumstance, Petitioners have proposed no particular alternative that includes DSM as a component, and therefore have failed to carry their burden; as a result, Contention 3B, as clarified by D23, fails to raise a genuine dispute on a material issue of fact or law regarding a purported failure by SCE&G to consider, as an alternative to the proposed project, particular combinations of generation methodologies that include DSM as one component.

(b) *Materiality of Matters Raised by Contention 3B as It Regards Alternatives Analyses*

Had we found that subpart 3B of Petitioners' contention proposed a specific alternative, we would have examined whether or not, because of the small contribution to total energy supply provided by even the maximum amount of DSM suggested by the pleadings, such a consideration would have been material to the decision that the NRC must make.

As an initial matter, we note that it is fundamental to the materiality of combination alternatives including DSM to examine the magnitude of the actual reduction in SCE&G's generation needs that DSM could make beyond the amount already analyzed in the Application. Applicant has stated in the Application that DSM can reduce the necessary peak power demand by approximately 250 MW⁹⁰ (which amounts, at 100% availability, to 2190 GWh per year), while Petitioners' asserted maximum contribution from DSM is 1530 GWh of the roughly 9600 GWh that SCE&G claims it will receive each year from its share of the proposed two units at the Summer Station in 2020.⁹¹ Thus the Applicant has apparently considered DSM in a larger increment than is suggested by Petitioners. Although Petitioners imply through their assertions in D23 that some incremental additional DSM might be achieved, no information has been supplied to us to imply or indicate the amount of any such incremental improvement — or how it might affect the Applicant's conclusions regarding alternatives. This failure alone causes the assertion to fail to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi), failing to identify any genuine dispute with the Application on a material issue.

Additionally, it would have been, in our view, reasonable to hold that the small amount of energy savings Petitioners attribute to DSM renders DSM not material to the decision the NRC must make in this case for the following reasons:

First, as Petitioners do not dispute, and as is evident from their statement D17, DSM alone cannot replace the 2214 MWe of new generation (or SCE&G's 1218 MW share of that generation capacity) that would be provided by the proposed

⁹⁰ ER at 8.1-5.

⁹¹ Petition at 37.

nuclear units,⁹² and therefore DSM alone cannot be an alternative to the project objectives of the Applicant to generate baseload power — in this instance through its proposal to construct new nuclear units.⁹³

Second, because it reduces by a small portion SCE&G’s demand for power, DSM should be analyzed in this instance as a surrogate for need for power,⁹⁴ and when considered in this light, no material challenge is mounted to the Applicant’s need for power analysis. SCE&G’s projected energy sales, as discussed in the ER for proposed Summer Units 2 and 3, increase from 29,927 GWh in 2019 to 31,187 GWh in 2021,⁹⁵ so that an additional contribution from DSM of approximately 1500 GWh (approximately the amount suggested by Petitioners), if realized, would simply result in shifting the need curve back by 2 years.⁹⁶ Since it is widely recognized that such projections are inherently uncertain, and the Commission is clear that it does not impose “burdensome attempts” to predict future conditions, and that it “should be sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions,”⁹⁷ the contribution of 1500 GWh of DSM to a reduction of need cannot be material to the decision the NRC must make, and therefore Contention 3B fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv).

⁹² See ER at 9.2-7 (“For analysis purposes, SCE&G assumed a target value of 2,214 MWe for the net electrical output from a new facility at VCSNS.”); *id.* at 8.0-1 (“SCE&G would receive 1,218 megawatts of the net electricity generated” from proposed Summer Units 2 and 3.).

⁹³ The Commission has stated that “[a]gencies need only discuss those alternatives that are reasonable and ‘will bring about the ends’ of the proposed action,” *Hydro*, CLI-01-4, 53 NRC at 55 (2001) (citing *Citizens Against Burlington*, 938 F.2d at 195), and that an agency approving or denying a proposal by a private party should ordinarily “accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project,” Nuclear Energy Institute; Denial of Petition for Rulemaking, 68 Fed. Reg. 55,905, 55,909 (Sept. 29, 2003) (internal citations omitted). Nothing in CLI-10-1 suggests the contrary, particularly since the Commission affirmed the Board’s ruling regarding Petitioners’ renewable energy alternatives contention, noting specifically that the Petitioners admitted that wind power is intermittent and therefore cannot substitute for baseload power. See CLI-10-1, 71 NRC at 21-22. Thus, we consider the purpose of the proposed action to be supplying (whether through generation or efficiency measures) 2214 MW of baseload power. With that purpose in mind, we find nothing in Petitioners’ pleadings to suggest that DSM alone could be a reasonable substitute for that amount of baseload power and therefore we find that the Petitioners have not supported a contention proposing DSM alone as an alternative.

⁹⁴ See *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 159, *aff’d*, CLI-05-29, 62 NRC 801, 805-08 (2005); see also *Clinton*, LBP-04-17, 60 NRC at 245.

⁹⁵ ER at 8.1-11 (Table 8.1-1).

⁹⁶ In a different procedural context, the Commission has stated, “A possible one-year slip in construction schedule is clearly within the margin of uncertainty” and therefore, at least in the context of relitigating an issue, is unlikely to affect the need for power. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609-10 (1979).

⁹⁷ CLI-10-1, 71 NRC at 17 (quoting 68 Fed. Reg. at 55,910).

(c) *Environmentally Preferable NEPA Alternatives*

Finally, there are generic principles at play regarding this contention:

- a. the ultimate objective of the NEPA requirement to examine alternatives is to ensure the NRC has made an informed decision by examining reasonable alternatives to the proposed action; and
- b. the only alternatives which are, in the end, relevant to the NRC's decision are those alternatives that are environmentally preferable; and
- c. the NRC must defer to the Applicant's project purpose, which in this proceeding is to provide baseload power.⁹⁸

These generic principles, along with the substance of Contention 3B as illuminated by the twenty-three statements, lead, inescapably, to the following conclusions. The net effect of generic principles a and b, above, is that a contention can only raise an issue material to the decision the NRC must make (i.e., satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv)) if it suggests a reasonable alternative with environmentally preferable environmental impacts. The net effect of generic principle c is that no alternative made up solely of renewable generation sources will be a reasonable alternative because renewables cannot generate baseload power, which is the goal of the proposed project.⁹⁹

In analyzing Contention 3B, as it might be clarified or focused by D23, we begin by noting that Petitioners present absolutely no information regarding the environmental impacts of a combination alternative incorporating DSM. They have not even suggested that any particular combination of DSM and other generation technologies might have smaller environmental impacts than the proposed nuclear units, and have not alleged any facts, or offered any expert opinion, to support the proposition that some such environmentally preferable alternative exists. Thus, Petitioners have plainly failed to provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of fact or law, and failed to demonstrate that they raise an issue material to the findings the NRC must make as it proceeds to satisfy its NEPA obligations

⁹⁸ See *supra* note 93.

⁹⁹ See, e.g., *Clinton*, CLI-05-29, 62 NRC at 810 (noting that "a solely wind- or solar-powered facility could not satisfy the project's purpose" to generate baseload power); see also CLI-10-1, 71 NRC at 21 ("Joint Petitioners also renew on appeal their challenge to the adequacy of SCE&G's alternatives analysis as it relates to renewable sources of power. The Board excluded this aspect of the contention to the extent that it constituted an impermissible challenge to SCE&G's selected project purpose to generate baseload power. The Board further found that Joint Petitioners pointed to no error in the applicant's analysis of renewables, or its conclusion that the proposed alternatives cannot generate baseload power. We find that the Board did not err in excluding this portion of the contention, because Joint Petitioners have not identified a genuine dispute with SCE&G on the application.").

regarding examination of alternatives to the proposed nuclear project. Therefore, Contention 3B as it might be focused and clarified by D23, fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi).¹⁰⁰

Finally, the project goal of the Applicant, in this case, to supply baseload power, must be deferred to by this Agency. The Applicant has identified a number of potential alternatives¹⁰¹ but apparently concluded that the only viable alternative involving a renewable energy source (in this case, wind) would also require a backup fossil fuel component in order to provide baseload-type power.¹⁰² As the Applicant discussed in its ER, fossil fuel generation would result in air emission impacts considerably larger than any expected from the proposed nuclear plants, and any other impacts would be small for both nuclear and fossil generation.¹⁰³ Any additional DSM at the level suggested by the Petitioners would serve only to reduce the requirement for the fossil fuel generation source, not to eliminate it. Thus, because all of the combination alternatives examined in the Application incorporate a fossil component (and petitioners have not suggested any other specific combination alternative), it is simply not possible for any of the combination alternatives at issue to have a smaller environmental impact than the proposed nuclear project. Thus, there could not be a finding that an environmentally preferable alternative exists which should be considered, so as to be material to the decision the NRC must make.¹⁰⁴ Thus, to the extent that Contention 3B presents a contention that the Applicant's ER is inadequate because it did not consider an alternative incorporating a larger DSM contribution, it fails to raise a matter material to the decision the NRC must make, thereby failing to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv), and therefore failing to present an admissible contention.

4. Board Conclusions on Admissibility of Contention 3B

Having reexamined and reconsidered Contention 3B, including Petitioners'

¹⁰⁰ Furthermore, where a petitioner suggests there should have been consideration of alternatives, the burden falls upon a petitioner to propose particular alternative(s) to be considered, *see supra* note 88, which Petitioners have not done in this instance.

¹⁰¹ *See* ER at 9.2-8 to -21.

¹⁰² The Applicant discussed alternatives involving a combination of wind and either natural gas or coal. ER at 9.2-20 to -21. The Board could not discern from the Petition any additional potential alternatives involving a combination of DSM, renewables, and any load-filling generation source.

¹⁰³ *See, e.g.*, ER at 9.2-35 to -38.

¹⁰⁴ The Commission has stated, "There may, of course, be mistakes in the [EIS], but in an NRC adjudication, it is Intervenor's burden to show their significance and materiality." *Clinton*, CLI-05-29, 62 NRC at 811. Here, Petitioners have not carried their burden because they have not shown how any of the errors they assert in the Applicant's discussion of DSM could affect the environmental impact balancing in the ER or in the Staff's EIS based on that ER.

statements appearing to clarify and focus the contention and those purporting to lend factual or expert support to the contention, we find that Contention 3B fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi) and is therefore inadmissible.

C. Admissibility of Contention 3, Parts F and G (Alternatives Analysis — Costs)

Finally, because we hold that Petitioners have failed to propose an admissible contention asserting that there is an environmentally preferable alternative that the Applicant has failed to consider, we conclude that Parts F and G of Contention 3 (Contentions 3F and 3G) are also inadmissible. We held in LBP-09-2 that “[t]he accuracy of project cost estimates only becomes relevant if an environmentally preferable alternative has been identified” and that because neither the Applicant nor the Petitioners had identified an environmentally preferable alternative, Contentions 3F and 3G, which addressed the cost of the proposed nuclear units, did not raise an issue material to the decision the NRC must make.¹⁰⁵ The Commission instructed us to reconsider the admissibility of these two subparts in the event that, on remand, we found Contention 3B to be admissible because the issue of whether an alternative involving DSM is environmentally preferable to the proposed nuclear units would then be in dispute.¹⁰⁶ However, because we hold Contention 3B to be inadmissible, there is no potentially environmentally preferable alternative at issue in this proceeding. Therefore we conclude that Parts F and G of Contention 3 are inadmissible.

III. CONCLUSION

Although the Sierra Club and FOE have standing to intervene in this proceeding, they have not submitted an admissible contention under the requirements of 10 C.F.R. § 2.309(f)(1). Thus, the hearing petition of the Sierra Club and FOE is denied.¹⁰⁷

¹⁰⁵ LBP-09-2, 69 NRC at 112.

¹⁰⁶ See CLI-10-1, 71 NRC at 24.

¹⁰⁷ Because the Commission upheld the Board’s finding that Joseph Wojcicki lacked standing to participate in this proceeding, see CLI-10-1, 71 NRC at 6, our denial of his petition to intervene still stands. Additionally, because we deny the petition of the Sierra Club and FOE, the request of the South Carolina Office of Regulatory Staff (SC ORS) to participate in the proceeding as an interested governmental entity pursuant to 10 C.F.R. § 2.315(c) is denied as moot.

IV. ORDER

For the foregoing reasons, it is this 17th day of March 2010, ORDERED that:

1. The Sierra Club and FOE's Contention 3, parts B, F, and G are inadmissible.
2. The Petition to Intervene of the Sierra Club and FOE is denied, and the proceeding is terminated.
3. The request of SC ORS to participate in this proceeding as an interested governmental entity under 10 C.F.R. § 2.315(c) is denied as moot.
4. In accordance with the provisions of 10 C.F.R. § 2.311, any appeal to the Commission of the outcome of this Memorandum and Order shall be taken within ten (10) days of the date it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD¹⁰⁸

Dr. Paul B. Abramson, Chairman
ADMINISTRATIVE JUDGE

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Dr. Jeffrey D. E. Jeffries
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 17, 2010

¹⁰⁸ A copy of this Memorandum and Order was sent this date by the Agency's E-Filing System to: (1) Counsel for the Staff; (2) Counsel for SCE&G; (3) Sierra Club and Friends of the Earth; (4) SC ORS; and (5) Joseph Wojcicki.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
William D. Magwood, IV
William C. Ostendorff

In the Matter of

Docket No. 63-001-HLW

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

April 23, 2010

MEMORANDUM AND ORDER

The Department of Energy (DOE) has filed a motion to withdraw¹ its request for authorization to construct a permanent geologic spent fuel and high-level nuclear waste repository at Yucca Mountain, Nevada. Five new petitioners have sought to intervene in the proceeding, submitting proposed contentions that challenge the legality of DOE's proposed withdrawal.² After first scheduling briefing, the Construction Authorization Board issued a decision suspending briefing, suspending its consideration of the five new intervention petitions and DOE's motion to withdraw, and extending the stay of the proceeding it had

¹U.S. Department of Energy's Motion to Withdraw (Mar. 3, 2010) (Motion to Withdraw).

²See Petition of the State of South Carolina to Intervene (Feb. 26, 2010), Supplement/Amendment to Petition of the State of South Carolina to Intervene (Mar. 26, 2010); State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 3, 2010); Petition of Aiken County, South Carolina, to Intervene (Mar. 4, 2010); National Association of Regulatory Utility Commissioners, Petition to Intervene (Mar. 15, 2010); Petition to Intervene of the Prairie Island Indian Community (Mar. 15, 2010).

entered previously.³ The Board based its suspension decision on its view that it was prudent and efficient to await guidance on the “motion to withdraw” issue from the U.S. Court of Appeals for the District of Columbia Circuit, which has before it several lawsuits challenging DOE’s effort to halt the Yucca Mountain project.⁴ DOE has petitioned for interlocutory review of the Board’s decision.⁵

Given the unique circumstances of this case, we review and vacate the Board’s decision as an exercise of our inherent supervisory authority over adjudications.⁶ DOE’s motion to withdraw invokes section 2.107 of our rules⁷ and statutes central

³Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (Apr. 6, 2010), at 12-13 (unpublished) (Suspension Order). *See also* Order (Granting Stay of Proceeding) (Feb. 16, 2010) (unpublished).

⁴Suspension Order at 2-3 & n.6. Four cases are pending in the U.S. Court of Appeals for the District of Columbia Circuit: *In re Aiken County*, No. 10-1050 (D.C. Cir. filed Feb. 19, 2010); *Ferguson v. U.S. Department of Energy*, No. 10-1052 (D.C. Cir. filed Feb. 25, 2010); *South Carolina v. U.S. Department of Energy*, No. 10-1069 (D.C. Cir. transferred Mar. 25, 2010). These cases were consolidated on April 8. The State of Washington also has filed a lawsuit, *Washington v. Department of Energy*, No. 10-1082 (D.C. Cir. filed Apr. 13, 2010), and asked that it be consolidated with the other three cases. All these lawsuits, except for *Ferguson*, include NRC and NRC officials among the respondents. Three of the petitioners in the court cases, South Carolina, Washington, and Aiken County (SC), also have sought intervention in the NRC proceeding.

⁵U.S. Department of Energy’s Petition for Interlocutory Review (Apr. 12, 2010). The State of Nevada filed an answer in support of DOE’s petition. State of Nevada Answer in Support of the Department of Energy’s Petition for Interlocutory Review (Apr. 14, 2010). Nye County, Nevada, an admitted party in the proceeding, joined DOE’s petition. Nye County Nevada’s Petition for Interlocutory Review of CAB04 April 6, 2010 Order (Apr. 15, 2010). Aiken County, the NRC Staff, the State of Washington, the State of South Carolina, and Clark County, Nevada (also an admitted party in the proceeding), responded to DOE’s and Nye County’s petitions. *See* Aiken County’s Response to Two Petitions for Interlocutory Review (Apr. 16, 2010); NRC Staff Answer to U.S. Department of Energy Petition for Interlocutory Review (Apr. 20, 2010); NRC Staff Answer to Nye County Nevada’s Petition for Interlocutory Review of CAB04 April 6, 2010 Order (Apr. 20, 2010); State of Washington’s Response to Petitions for Interlocutory Review (Apr. 21, 2010); Answer of the State of South Carolina to Petitions for Interlocutory Review (Apr. 22, 2010); Answer of Clark County, Nevada in Support of the Department of Energy’s Petition for Interlocutory Review (Apr. 22, 2010).

⁶The special NRC rules governing this high-level waste proceeding do not provide for the kind of interlocutory review that DOE seeks. *See* 10 C.F.R. § 2.1015. DOE asks that we invoke our inherent supervisory authority over adjudications, but we generally do not entertain such requests. *See, e.g., Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 138 (2009). Even so, were this an ordinary case, DOE’s petition surely would qualify for interlocutory review because it challenges a Board decision that “[a]ffects the basic structure of the proceeding in a pervasive [and] unusual manner.” *See* 10 C.F.R. § 2.341(f)(2); *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 62-63 (2009). Therefore, in these unique circumstances, we believe it appropriate to exercise our *sua sponte* review authority.

⁷*See* Motion to Withdraw at 1-3. Among other things, section 2.107(a) provides that “[w]ithdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.”

to our mission — the Nuclear Waste Policy Act (NWPA) (particularly NWPA § 114(b), (d)) and the Atomic Energy Act of 1954, as amended (AEA).⁸ Courts generally accord considerable weight to an agency’s construction of the statutes it administers,⁹ and defer to an agency’s interpretation of its own regulations.¹⁰ Fundamental questions have been raised, both before us and before the D.C. Circuit, regarding the terms of DOE’s requested withdrawal, as well as DOE’s authority to withdraw the application in the first instance. Interpretation of the statutes at issue and the regulations governing their implementation falls within our province. If judicial review is pursued after our final decision, the application of our expertise in the interpretation of the AEA, the NWPA, and our own regulations will, at a minimum, inform the court in its consideration of the issues raised by DOE’s motion to withdraw.

The Board understandably has sought to manage this case with an eye toward the efficient use of NRC resources and in anticipation of an authoritative legal ruling from the D.C. Circuit on DOE’s effort to withdraw its Yucca Mountain application. But we respectfully do not agree with the Board that freezing our consideration of DOE’s motion to withdraw promotes respect for the courts or efficiency. As noted above, judicial review may well benefit from NRC’s consideration of the issues surrounding DOE’s motion. And, in any event, it is not clear when or if the D.C. Circuit will provide the guidance the Board expects on those issues. In the D.C. Circuit litigation, the government has raised substantial justiciability arguments that, if accepted, would block a judicial merits determination until after the NRC acts.¹¹

Thus, rather than await a judicial decision, the timing and result of which is uncertain, and absent a contrary instruction from the court, we think the prudent course of action is to resolve the matters pending before our agency as expeditiously and responsibly as possible.

⁸ NWPA, 42 U.S.C. §§ 10101 et seq. (*see* Motion to Withdraw at 2, 4-8); NWPA § 114(b), (d), 42 U.S.C. § 10134(b), (d) (*see* Motion to Withdraw at 2, 5-6); AEA, 42 U.S.C. §§ 2011 et seq. (*see* Motion to Withdraw at 4 n.5).

⁹ *See, e.g., United States v. Eurodif S.A.*, 129 S. Ct. 878, 886-87 (2009); *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *See also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“courts generally will defer to an agency’s construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.”).

¹⁰ *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (an agency’s interpretation of its own regulation is controlling provided it is not “plainly erroneous or inconsistent with the regulation.” (citing *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414 (1945)). *Accord Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007); *see also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978).

¹¹ *See* Respondents’ Response in Opposition to the Petition, *In re: Aiken County*, No. 10-1050 (D.C. Cir. filed Mar. 24, 2010).

For these reasons, we vacate the Board's Suspension Order and remand the matter to the Board for prompt resolution of DOE's motion to withdraw. We direct the Board to establish a briefing schedule on DOE's motion to withdraw and issue a decision on that motion no later than June 1, 2010. The Board should continue case management and resolve all remaining issues promptly.

IT IS SO ORDERED.¹²

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 23d day of April 2010.

¹² Commissioner Apostolakis did not participate in this Order because he had not yet taken the oath of office.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Anthony J. Baratta
Dr. William W. Sager

In the Matter of

Docket Nos. 50-438-CP
50-439-CP
(ASLBP No. 10-896-01-CP-BD01)

TENNESSEE VALLEY AUTHORITY
(Bellefonte Nuclear Plant,
Units 1 and 2)

April 2, 2010

In this proceeding regarding the reinstatement of the Tennessee Valley Authority's (TVA) previously withdrawn construction permits (CPs) for two partially completed reactors located on TVA's existing Bellefonte Nuclear Power Plant site, the Licensing Board concludes that although two of the three named petitioners have established the requisite standing, because they failed to proffer an admissible contention in accord with the "good cause" standard that governs the proceeding, their intervention petition and hearing request must be denied.

COMBINED LICENSE PROCEEDING(S): SCOPE

The 10 C.F.R. Part 52 combined license (COL) process has been described as follows:

an entity may apply for a single COL that authorizes both new reactor construction and operation. Specifically, Subpart C of Part 52 establishes procedures for the issuance of a combined construction permit and conditional operating license for a nuclear power plant and the conduct of the hearing that is afforded for a COL.

The COL is “essentially a construction permit which also requires consideration and resolution of many of the issues currently considered at the operating license stage.” See Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 53 Fed. Reg. 32,060, 32,062 (Aug. 23, 1988).

Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 374 (2008), *rev'd in part*, CLI-09-3, 69 NRC 68 (2009), and *referred ruling declined*, CLI-09-21, 70 NRC 927 (2009).

CONSTRUCTION PERMIT/OPERATING LICENSE PROCEEDINGS: SCOPE

In contrast, the 10 C.F.R. Part 50 CP/operating license (OL) process has been described as follows:

[t]he 10 C.F.R. Part 50 licensing process that was applied to the 104 commercial nuclear power plants currently operating in the United States requires that an applicant first obtain a construction permit for the facility, followed by an operating license. Both licenses are issued separately and, under section 189a of the Atomic Energy Act (AEA) of 1954, as amended, 42 U.S.C. § [2239(a)], hearing rights accrue separately as to each requested permission.

Id.

CONSTRUCTION PERMIT/OPERATING LICENSE PROCEEDINGS: SCOPE

In the statement of considerations accompanying the initial Part 52 proposed rule, the Commission offered this explanation of the reasons for, as well as the scope of, the two elements of the Part 50 CP/OL process:

In the early years of the nuclear power industry, there were many first-time nuclear plant applicants, designers, and consultants, and many novel design concepts. Accordingly, the process was structured to allow licensing decisions to be made while design work was still in progress and to focus on case-specific reviews of individual plant and site considerations. Construction permits were commonly issued with the understanding that open safety issues would be addressed and resolved during construction, and that issuance of a construction permit did not constitute Commission approval of any design feature. Consequently, the operating license review was very broad in scope.

53 Fed. Reg. at 32,065.

CONSTRUCTION PERMIT/OPERATING LICENSE PROCEEDINGS: RISK TO APPLICANT

In addition to the broad scope of the OL proceeding, however, it was also a well-established precept regarding the risk that accrues to an applicant under the Part 50 process that

[w]hen an applicant receives a construction permit . . . , it proceeds at its own risk. Prior to operation, the applicant must satisfy all safety requirements; and if additional research performed or data acquired during construction indicates that any safety requirement cannot be satisfied, the operating license must be denied or appropriately conditioned. . . . [T]his is so regardless of the amount of money which an applicant may have expended during construction.

Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 355 (1973); *see also Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), CLI-79-11, 10 NRC 733, 742-43 (1979) (possession of CP no guarantee that OL will be received; if any aspect of facility fails to pass muster at OL stage, applicant bears risk the plant will not be allowed to operate).

CONSTRUCTION PERMIT PROCEEDING(S): PROCESS FOR ISSUANCE

Following (1) a safety and environmental review of a CP application by the Staff, (2) a safety review of the application by the Advisory Committee on Reactor Safeguards, (3) an adjudicatory hearing on any safety or environmental challenges to the application raised by any intervening party, and (4) a “mandatory hearing” in which safety and environmental matters not at issue in the contested adjudication are considered by a presiding officer (which could be either the Commission or a three-member Atomic Safety and Licensing Board), assuming all issues are appropriately resolved, a CP is issued to an applicant.

CONSTRUCTION PERMIT EXTENSION PROCEEDING(S): PROCESS FOR ISSUANCE

Consistent with AEA § 185a, 42 U.S.C. § 2235(a), a CP specifies a date by which construction of the unit is to be completed. If the CP holder is unable to finish construction by the date specified in the permit, under 10 C.F.R. § 50.55(b) the CP holder can apply for and obtain an extension of the CP. In doing so, it must provide “good cause” for the extension, a standard that is specified in AEA § 185a. As was the case with an initial CP application, an extension request could be the subject of an adjudicatory hearing challenge by a petitioner.

CONSTRUCTION PERMIT(S): DEFERRED STATUS

If for some reason a CP holder wishes to discontinue construction activities at a facility but continue to have its 10 C.F.R. Part 50 construction authorization remain effective, it can do so under the terms of the 1987 Commission Policy Statement on Deferred Plants. In that policy statement, the Commission outlines the maintenance, preservation, and documentation requirements that would apply to a facility in such a “deferred” status. *See* Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077, 38,078-79 (Oct. 14, 1987).

CONSTRUCTION PERMIT(S): DEFERRED STATUS

The 1987 Commission Policy Statement on Deferred Plants also describes the process under which, at the CP holder’s request, the facility can be reactivated from deferred status so that construction can begin again, which includes providing 120 days’ notice to the Staff before restarting construction activities. *See id.* at 38,079.

CONSTRUCTION PERMIT(S): DEFERRED STATUS; TERMINATED STATUS

The 1987 Commission Policy Statement on Deferred Plants sets forth the process under which a plant could be placed in a terminated status pending the withdrawal of the CP, as well as the procedures and requirements associated with reactivating the facility from terminated status (assuming the CP has not been withdrawn). *See id.* at 38,079-80.

RULES OF PRACTICE: STANDING TO INTERVENE

In determining whether an individual or organization is an “interested person” under section 189a of the Atomic Energy Act (AEA) of 1954, 42 U.S.C. § 2239(a)(1)(A), that has standing “as of right” such that it can be granted party status in a proceeding in accord with 10 C.F.R. § 2.309(d), the Commission applies contemporaneous judicial standing concepts that require a participant to establish that (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the AEA, 42 U.S.C. § 2011 et seq., NEPA, 42 U.S.C. § 4321 et seq.); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

RULES OF PRACTICE: STANDING TO INTERVENE

In pertinent part, section 2.309(d)(1) requires that a hearing request/intervention petition must state (1) the name, address, and telephone number of the requestor/petitioner; (2) the nature of the requestor's/intervenor's right under the AEA to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order issued in the proceeding on the petitioner's/requestor's interest. Additionally, section 2.309(d)(3) mandates that the presiding officer determine whether, considering these factors, the requestor/petitioner is a person whose interest may be affected by the proceeding in accord with AEA § 189a.

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

In proceedings involving the possible construction or operation of a nuclear power reactor, including proceedings regarding the extension of a construction permit, proximity to the proposed facility has been considered sufficient to establish standing. *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010); *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 564-65 (1980).

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

The proximity presumption applies when an individual or organization, or an individual authorizing an organization to represent his or her interests as the organization seeks to establish its representational standing, resides within 50 miles of the proposed facility or has "frequent contacts" with the area affected by the proposed facility. *Calvert Cliffs*, CLI-09-20, 70 NRC at 915; *see Bell Bend*, CLI-10-7, 71 NRC at 138.

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

To establish the requisite proximity, a petitioner must clearly indicate where he or she resides and/or what contact he or she has with the site. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2,

33 NRC 42, 47 (1991) (no standing when petitioner alleged proximity but failed to state his physical address or elaborate on the extent of his activities in the area).

RULES OF PRACTICE: STANDING TO INTERVENE

Ultimately, it is the petitioner's responsibility to "provide enough detail to allow the Board to distinguish a casual interest from a substantial one." *Bell Bend*, CLI-10-7, 71 NRC at 139.

RULES OF PRACTICE: NOTICE OF APPEARANCE; STANDING TO INTERVENE

The notice of appearance information identifying the individual or individuals authorized to act on behalf of each participant should provide the means whereby any participant needing to reach another participant's authorized representatives to serve a filing or have a discussion about any litigation-related matters will be able to do so. The failure of an organizational participant to have a representative provide an appearance notice in accord with section 2.314(b) might, as could be the case for any other unresolved procedural deficiency that persists without adequate justification, provide cause for an appropriate sanction for failure properly to prosecute the litigation. Such a failure, however, does not fall into the same category as, for example, the failure under 10 C.F.R. § 2.309(d) to support an intervention petition with affidavits providing necessary information regarding the basis for representational standing, a deficiency directly associated with a petitioner's standing that could interpose a jurisdictional flaw potentially warranting the participant's dismissal from the proceeding.

RULES OF PRACTICE: NOTICE OF APPEARANCE; NOTICE OF WITHDRAWAL

Exactly when a notice of appearance must be filed (or a notice of withdrawal submitted when an attorney or representative is no longer acting as a participant representative) is not specified in the agency's rules of practice.

RULES OF PRACTICE: STANDING TO INTERVENE

It is well established in NRC jurisprudence that each intervening participant that wishes to be a party to a proceeding must establish his or her own standing, *see Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981), a showing that depends on the particular circumstances associated with that participant rather than the standing of other entities or

individuals with whom it may claim to be aligned relative to the substance of the matters at issue in the proceeding.

**CONSTRUCTION PERMIT REINSTATEMENT PROCEEDING(S):
SCOPE; GOOD CAUSE STANDARD**

The Commission stated with respect to the scope of review governing a licensing board's consideration of a hearing request in a proceeding regarding reinstatement of a previously withdrawn CP that the board should

decide in the first instance whether Petitioners have established standing and have raised admissible contentions and if so, given their claims, whether reinstatement on the particular facts presented here is lawful and proper — that is, *whether there is "good cause" for the reinstatement.*

CLI-10-6, 71 NRC 113, 126 (emphasis added). The Commission thus expressly directed the board to restrict its inquiry in the proceeding, including its consideration of contention admissibility matters, in line with the "good cause" standard of AEA § 185a, 42 U.S.C. § 2235(a), and the Commission's regulation implementing the good cause standard, 10 C.F.R. § 50.55(b).

**CONSTRUCTION PERMIT REINSTATEMENT PROCEEDING(S):
SCOPE; GOOD CAUSE STANDARD**

As AEA § 185 and 10 C.F.R. § 50.55(b) adumbrate, up to this point the good cause standard's bailiwick has been the CP extension proceeding. Nonetheless, given the Commission's direction in CLI-10-6 that "good cause" should be the standard that governs consideration of a CP reinstatement request, a principal task for a licensing board is to determine how that standard should apply in the CP reinstatement proceeding before it.

**CONSTRUCTION PERMIT EXTENSION PROCEEDING(S): GOOD
CAUSE STANDARD**

Guidance regarding the meaning and scope of the "good cause" standard as the Commission intended it to be applied in a CP reinstatement proceeding is provided by an earlier Commission decision regarding the application of "good cause" in the context of a CP extension proceeding. In *Washington Public Power Supply System* (WPPSS Nuclear Project Nos. 1 & 2), CLI-82-29, 16 NRC 1221 (1982), a case involving a request for construction permit extension, the Commission noted that AEA § 185a indicated "no intent on the part of Congress to require the periodic relitigation of health, safety, or environmental questions in

agency adjudications between the time a construction permit is granted and the time the facility is authorized to operate.” *Id.* at 1228. The Commission further declared that section 50.55(b)’s “thrust is clearly that the Commission’s inquiry will be into reasons that have contributed to the delay in construction and whether those reasons constitute ‘good cause’ for the extension,” and that “[t]his same limitation should apply if any interested person seeks to challenge the request for an extension.” *Id.*

CONSTRUCTION PERMIT EXTENSION PROCEEDING(S): SHOW CAUSE PROCEEDING

Limitations on the scope of a CP extension proceeding “does not mean that those who wish to raise health, safety, or environmental concerns before the agency have no remedy prior to the operating license proceeding. This opportunity is afforded all persons under 10 CFR § 2.206, which allows any person to seek the institution of a show-cause proceeding under 10 CFR § 2.202.” *Id.*

CONSTRUCTION PERMIT EXTENSION PROCEEDING(S): SCOPE

“[T]he most ‘common sense’ approach to the interpretation of section 185 and 10 CFR § 50.55 is that the scope of a construction permit extension proceeding is limited to direct challenges to the permit holder’s asserted reasons that show ‘good cause’ justification for the delay.” *Id.* at 1229.

CONSTRUCTION PERMIT EXTENSION PROCEEDING(S): GOOD CAUSE STANDARD

A CP holder who requests an extension of the CP completion date “must put forth reasons, founded in fact, that explain why the delay occurred and those reasons must, as a matter of law, be sufficient to sustain a finding of good cause.” An intervenor thus is “always free to challenge a request for a permit extension by seeking to prove that, on balance, delay was caused by circumstances that do not constitute ‘good cause.’” *Id.* at 1229-30.

CONSTRUCTION PERMIT EXTENSION PROCEEDING(S): GOOD CAUSE STANDARD

Two Commission-endorsed principles are apparent relative to the “good cause” standard. One is that an AEA § 185-related Part 50 CP proceeding is not to become a substitute for an ongoing or future Part 50 OL proceeding, albeit with section 2.206 providing an avenue for raising safety and environmental concerns

regarding a proposed facility pending the OL proceeding. The other is that the “good cause” rationale that must be put forth by the CP holder to justify the relief sought is to be the focus of any intervenor challenge to the CP holder’s request.

CONSTRUCTION PERMIT EXTENSION PROCEEDING(S): SCOPE (CONTENTIONS)

CONSTRUCTION PERMIT/OPERATING LICENSE PROCEEDING(S): SCOPE

A number of subsequent agency cases, such as the Commission’s *Seabrook* case, *Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984), and the later Commission decision in *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), CLI-86-15, 24 NRC 397 (1986), have devoted substantial attention to exploring the parameters of the latter precept regarding the scope of “good cause” in the context of making CP extension request contention admissibility determinations. None of these rulings, however, suggests any diminution of the tenet that for Part 50 applications, safety and environmental issues are generally to be adjudicated in the OL proceeding rather than an AEA § 185 “good cause” proceeding regarding the continued viability of a previously issued CP. Certainly, nothing in the Commission’s more-recent adoption of the Part 52 COL process suggests that the Commission has identified any basis under the Part 50 rules to back away from the traditional application of that two-step licensing process, notwithstanding its acknowledged tendency to “backload” issues and thereby create substantial scheduling and resource uncertainties.

CONSTRUCTION PERMIT REINSTATEMENT PROCEEDING(S): EFFECT OF DEFERRAL OF ISSUES TO OL PROCEEDING

A general concern regarding the potential for a significant squandering of time and resources if, at the OL stage, one or more of the matters sought to be raised in a CP reinstatement proceeding are found to mandate the denial of, or substantial revisions to an OL license is not untoward. Nonetheless, it is not a sufficient basis for a board to deviate from the well-established, Commission-endorsed approach to the application of the “good cause” standard in AEA § 185-related Part 50 CP proceedings as outlined in the Commission’s *WPPSS* decision and subsequent determinations.

RULES OF PRACTICE: CONTENTIONS (SPECIFICITY AND BASIS; SUPPORTING INFORMATION OR EXPERT OPINION; CHALLENGE TO LICENSE APPLICATION; SCOPE OF THE PROCEEDING; MATERIALITY)

Section 2.309(f) of the Commission's rules of practice specifies the requirements that must be met if a contention is to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of the basis of the contention; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. *See* 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." 10 C.F.R. § 2.309(f)(1)(iii)-(iv). Failure to comply with any of these requirements is grounds for dismissing a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *see also Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE; CHALLENGE OF STATUTORY REQUIREMENT; CHALLENGE OF BASIC STRUCTURE OF AGENCY REGULATORY POLICY; CHALLENGE BASED ON REGULATORY POLICY VIEWS)

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. *See Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. *See* 10 C.F.R. § 2.335; *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. *See Florida Power & Light Co.* (Turkey Point

Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states petitioner's views about what regulatory policy should be does not present a litigable issue. *See Peach Bottom*, ALAB-216, 8 AEC at 20-21 & n.33.

RULES OF PRACTICE: CONTENTIONS (SCOPE OF THE PROCEEDING)

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board. *See* 10 C.F.R. § 2.309(f)(1)(iii); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

It is the petitioner's obligation to present factual information and/or expert opinion necessary to support its contention. *See* 10 C.F.R. § 2.309(f)(1)(v); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *and aff'd in part*, CLI-95-12, 42 NRC 111 (1995). While a Board may appropriately view a petitioner's supporting information in a light favorable to the petitioner, failure to provide such information regarding a proffered contention requires that the contention be rejected. *See Palo Verde*, CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not

within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. *See Palo Verde*, CLI-91-12, 34 NRC at 155; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); *Georgia Tech Research Reactor*, LBP-95-6, 41 NRC at 305.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

Simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention. *See Fansteel*, CLI-03-13, 58 NRC at 204-05. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that on its face it does supply adequate support for the contention. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

RULES OF PRACTICE: CONTENTION (MATERIALITY)

To be admissible, NRC regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application. *See* 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *See Yankee Nuclear*, LBP-96-2, 43 NRC at 75-76; *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003).

RULES OF PRACTICE: CONTENTION (CHALLENGE TO LICENSE APPLICATION)

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the

application (including the Safety Analysis Report and the Environmental Report) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue will be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

RULES OF PRACTICE: SEPARATE STATEMENT OF CONTENTION AND BASIS

The failure to specify the language of the issue framed by a contention and distinguish it from the discussion that provides the supporting foundation for that issue statement might be grounds for dismissing a contention. This approach to contention formulation is not one that should be emulated in future proceedings.

MEMORANDUM AND ORDER (Ruling on Intervention Petition)

On May 8, 2009, the Blue Ridge Environmental Defense League (BREDL), with its Bellefonte Efficiency and Sustainability (BEST) chapter, and the Southern Alliance for Clean Energy (SACE), hereinafter referred to as Joint Petitioners, submitted an intervention petition challenging the August 28, 2008 licensing request of the Tennessee Valley Authority (TVA). In its request, TVA asked that the agency reinstate the 10 C.F.R. Part 50 construction permits (CPs) for Bellefonte Nuclear Plant, Units 1 and 2, two partially completed Babcock and Wilcox pressurized water reactors located on TVA's Bellefonte site approximately 7 miles northeast of Scottsboro, Alabama. In conjunction with the Commission's consideration and denial of two potentially dispositive contentions proffered by Joint Petitioners contesting the agency's authority to permit such a CP reinstatement, on January 7, 2010, their petition was referred for consideration by an Atomic Safety and Licensing Board. According to the Commission's referral, that board should determine in the first instance whether Joint Petitioners have standing and have proffered one or more admissible contentions among their remaining seven issue statements so as to provide the basis for further consideration of their concerns in an adjudicatory hearing. Acting pursuant to that referral, TVA and the Nuclear Regulatory Commission (NRC) Staff, in addition to positing challenges

to the standing of petitioners SACE and BEST, have contested the admissibility of the balance of Joint Petitioners' contentions before this Licensing Board.

For the reasons set forth below, we find that, although petitioners BREDL and SACE have established their standing in this proceeding, they have failed to proffer an admissible contention and, accordingly, we dismiss their hearing petition.

I. BACKGROUND

A. Part 50 Licensing Process Associated with Bellefonte Units 1 and 2

Before outlining the pertinent procedural history associated with the Joint Petitioners hearing request, because of the somewhat unusual nature of this proceeding we consider it useful to provide a brief explanation outlining the nature of the Part 50 licensing process that is applicable to Bellefonte Units 1 and 2. In that regard, two aspects of that process are pertinent to this case: (1) the two-step licensing process under which an applicant such as TVA must obtain two separate agency authorizations, a CP and an operating license (OL), before it can begin operating a power reactor unit; and (2) the CP extension process, under which the construction completion date specified in a Part 50 CP can be prolonged to permit the CP holder to finish construction of a facility. Below, we provide pertinent background information on each of these aspects of the Part 50 licensing regime.

1. CP/OL Licensing Process

As it turns out, the Bellefonte facility provides a unique backdrop for an overview of the agency's reactor licensing schemes, both past and present, given that TVA has pending construction and/or operation authorization proposals for reactor units that are subject to either the longstanding Part 50 CP/OL licensing regimen or the newer 10 C.F.R. Part 52 combined license (COL) process for authorizing the construction and operation of nuclear reactors.

As the licensing board described the COL process in its initial prehearing decision in the currently ongoing Part 52 proceeding regarding Bellefonte Units 3 and 4,¹ which TVA proposes to construct and operate at its existing Bellefonte site utilizing the Westinghouse Electric Corporation AP1000 advanced passive pressurized water reactor certified design,

¹ Although it has the same administrative judges as members, this Board is a separate entity from the licensing board conducting the COL proceeding for proposed Bellefonte Units 3 and 4.

an entity may apply for a single COL that authorizes both new reactor construction and operation. Specifically, Subpart C of Part 52 establishes procedures for the issuance of a combined construction permit and conditional operating license for a nuclear power plant and the conduct of the hearing that is afforded for a COL. The COL is “essentially a construction permit which also requires consideration and resolution of many of the issues currently considered at the operating license stage.” See Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 53 Fed. Reg. 32,060, 32,062 (Aug. 23, 1988).

Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 374 (2008), *rev'd in part*, CLI-09-3, 69 NRC 68 (2009), and *referred ruling declined*, CLI-09-21, 70 NRC 927 (2009). In contrast, as that board noted in describing the CP/OL process,

[t]he 10 C.F.R. Part 50 licensing process that was applied to the 104 commercial nuclear power plants currently operating in the United States requires that an applicant first obtain a construction permit for the facility, followed by an operating license. Both licenses are issued separately and, under section 189a of the Atomic Energy Act (AEA) of 1954, as amended, 42 U.S.C. § [2239(a)], hearing rights accrue separately as to each requested permission.

Id. Further, in the statement of considerations accompanying the initial Part 52 proposed rule, the Commission offered this explanation of the reasons for, as well as the scope of, the two elements of the Part 50 CP/OL process:

In the early years of the nuclear power industry, there were many first-time nuclear plant applicants, designers, and consultants, and many novel design concepts. Accordingly, the process was structured to allow licensing decisions to be made while design work was still in progress and to focus on case-specific reviews of individual plant and site considerations. Construction permits were commonly issued with the understanding that open safety issues would be addressed and resolved during construction, and that issuance of a construction permit did not constitute Commission approval of any design feature. Consequently, the operating license review was very broad in scope.

53 Fed. Reg. at 32,065. In addition to the broad scope of the OL proceeding, however, it was also a well-established precept regarding the risk that accrues to an applicant under the Part 50 process that

[w]hen an applicant receives a construction permit . . . , it proceeds at its own risk. Prior to operation, the applicant must satisfy all safety requirements; and if additional research performed or data acquired during construction indicates that any safety requirement cannot be satisfied, the operating license must be denied or

appropriately conditioned. . . . [T]his is so regardless of the amount of money which an applicant may have expended during construction.

Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 355 (1973); *see also Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), CLI-79-11, 10 NRC 733, 742-43 (1979) (possession of CP no guarantee that OL will be received; if any aspect of facility fails to pass muster at OL stage, applicant bears risk the plant will not be allowed to operate).

Yet, notwithstanding the use of this Part 50 process to authorize construction and operation of the existing United States power reactor fleet, its two-step procedure was found to be less than ideal, as the Commission explained in the statement of considerations accompanying the initial proposed Part 52 rulemaking to establish the alternative COL licensing process:

As presently constituted, the American population of nuclear power reactors consists largely of one-of-a-kind designs. Experience has shown that the highly individualistic character of this population has consumed enormous resources in the processes of design, construction, and safety review. Because, typically, design of a plant was not complete when construction of it began, many safety questions were not resolved until late in the licensing proceeding for that plant. This late resolution of questions introduced great uncertainty into proceedings, because the process of resolution often entailed lengthy safety reviews, construction delays, and backfits.

53 Fed. Reg. at 32,068. Although the Part 50 regime remains a licensing option, apparently these aspects of the process make it unattractive as an authorization mechanism given that all seventeen applications for new power reactor units currently pending with the agency have invoked the Part 52 COL process.

2. Construction Permit Extension Process

In addition to this outline of the Part 50 CP/OL licensing procedure, a brief exposition concerning the process associated with extending a CP also provides useful background in this instance. Following (1) a safety and environmental review of a CP application by the Staff, (2) a safety review of the application by the Advisory Committee on Reactor Safeguards, (3) an adjudicatory hearing on any safety or environmental challenges to the application raised by any intervening party, and (4) a “mandatory hearing” in which safety and environmental matters not at issue in the contested adjudication are considered by a presiding officer (which could be either the Commission or a three-member Atomic Safety and Licensing Board), assuming all issues are appropriately resolved, the CP would be issued to the applicant. Consistent with AEA § 185a, 42 U.S.C. § 2235(a), the CP specifies a date by which construction of the unit is to be completed. If the CP

holder is unable to finish construction by the date specified in the permit, under 10 C.F.R. § 50.55(b) the CP holder can apply for and obtain an extension of the CP. In doing so, it must provide “good cause” for the extension, a standard that is specified in AEA § 185a and whose application in this proceeding is discussed in more detail in section II.B, below. As was the case with the initial CP application, the extension request could be the subject of an adjudicatory hearing challenge by a petitioner.

Additionally, if for some reason a CP holder wishes to discontinue construction activities at a facility but continue to have its Part 50 construction authorization remain effective, it can do so under the terms of a 1987 Commission policy statement. In that issuance, the Commission outlines the maintenance, preservation, and documentation requirements that would apply to a facility in such a “deferred” status. *See* Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077, 38,078-79 (Oct. 14, 1987). The policy statement also describes the process under which, at the CP holder’s request, the facility can be reactivated from deferred status so that construction can begin again, which includes providing 120 days’ notice to the Staff before restarting construction activities. *See id.* at 38,079. Finally, the policy statement sets forth the process under which a plant could be placed in a terminated status pending the withdrawal of the CP, as well as the procedures and requirements associated with reactivating the facility from terminated status (assuming the CP has not been withdrawn). *See id.* at 38,079-80.

With this background, we turn to a brief description of the procedural posture of this proceeding as it recently has come before this Board.

B. Bellefonte Units 1 and 2 CP Reinstatement Proceeding

Because the Bellefonte Units 1 and 2 CPs that are the subject of this proceeding were first granted by the Atomic Energy Commission, the NRC’s regulatory predecessor, back in December 1974, *see* [TVA], (Bellefonte Nuclear Plant, Units 1 and 2) Notice of Issuance of Construction Permits, 39 Fed. Reg. 45,313 (Dec. 31, 1974), those construction authorizations, along with the August 2008 TVA reinstatement request that is the focus of Joint Petitioners’ pending May 2009 hearing request, have substantial background associated with them as well. The pertinent historical backdrop was, however, detailed by the Commission in its January 2010 ruling on the first two of Joint Petitioners’ nine contentions and need not be restated here. *See* CLI-10-6, 70 NRC 113, 115-19 (2010). For the purpose of this decision regarding the admissibility of the Joint Petitioners hearing request, we need only note that, notwithstanding the 2006 agency approval of a TVA request to withdraw the CPs for Units 1 and 2, in August 2008 TVA filed a request to have the permits for both units reinstated, which it subsequently supplemented with an environmental assessment (EA). *See* Letter from Ashok S. Bhatnager, TVA Senior Vice President, to NRC Document Control Desk at

1, 5 (Aug. 26, 2008) (ADAMS Accession No. ML082410087) [hereinafter TVA Reinstatement Request]; Letter from Jack A. Bailey, TVA Vice President, to NRC Document Control Desk encl. (Sept. 25, 2008) (TVA EA) (ADAMS Accession No. ML082730756); Letter from Jack A. Bailey, TVA Vice President, to NRC Document Control Desk encl. (Nov. 24, 2008) (TVA response to Staff request for additional information regarding EA) (ADAMS Accession No. ML083360045). After generating its own National Environmental Policy Act (NEPA)-related EA and a safety evaluation (SE) regarding the TVA CP reinstatement request, *see* [TVA]; Bellefonte Nuclear Power Plant, Units 1 and 2, [EA] and Finding of No Significant Impact, 74 Fed. Reg. 9308 (Mar. 3, 2009) [hereinafter Staff EA]; Safety Evaluation by the Office of Nuclear Reactor Regulation Relating to the Request for Reinstatement of Construction Permit Nos. CPPR-122 and CPPR-123, Bellefonte Nuclear Plant, Units 1 and 2, Docket Nos. 50-438 and 50-439 (Mar. 9, 2009) (ADAMS Accession No. ML090620052) [hereinafter Staff SE], the Staff approved the TVA request in a March 2009 order that also afforded interested persons a hearing opportunity to challenge its determination, albeit with the caveat that “any proceeding hereunder is limited to direct challenges to the permit holder’s asserted reasons that show good cause justification for the reinstatement of the CPs,” In the Matter of [TVA] (Bellefonte Nuclear Plant Units 1 and 2); Order, 74 Fed. Reg. 10,969, 10,970 (Mar. 13, 2009). Thereafter, when Joint Petitioners lodged their hearing request on May 8, 2009, *see* Petition for Intervention and Request for Hearing by [Joint Petitioners] (May 8, 2009) [hereinafter Intervention Petition], the Commission decided to consider, in the first instance, the question of the agency’s authority to grant the requested relief, as framed in Contentions 1 and 2 in Joint Petitioners’ hearing request. These contentions were the subject of the January 2010 Commission determination referenced above. We thus pick up the narrative of events beginning with the Commission’s January 7 ruling, which referred Joint Petitioners’ intervention request to the Atomic Safety and Licensing Board Panel for further consideration. *See* CLI-10-6, 71 NRC at 126.

Acting in response to the Commission’s referral, on January 15, 2010, the Licensing Board Panel’s Chief Administrative Judge established this Licensing Board to rule on that hearing petition and to preside over any subsequent adjudicatory proceeding. *See* [TVA]; Establishment of Atomic Safety and Licensing Board, 75 Fed. Reg. 3946 (Jan. 25, 2010). That same date, we issued an initial prehearing order that established a schedule for (1) TVA and Staff answers to the Joint Petitioners hearing request, which permitted those participants to provide their views on the previously unaddressed questions of Joint Petitioners’ standing and the admissibility of their remaining seven issue statements, including additional basis information subsequently provided by Joint Petitioners relative

to their Contentions 5 and 6;² and (2) Joint Petitioners' reply to those TVA and Staff answers. *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (Jan. 15, 2010) at 3 (unpublished). Thereafter, at the Board's prompting, the participants provided, and the Board adopted, a joint report designating March 1, 2010, as the date upon which they would be available to conduct a day-long initial prehearing conference during which the Board would hear oral argument on designated contested matters associated with the Joint Petitioners intervention petition. *See* Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference) (Jan. 21, 2010) at 1-3 (unpublished); Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference) (Feb. 2, 2010) at 1-2 (unpublished).

In accord with the Board-established schedule, on January 29, 2009, both TVA and the Staff submitted their answers to the Joint Petitioners hearing request. *See* Answer of [TVA] Opposing the Petition for Intervention and Request for Hearing by [Joint Petitioners] (Jan. 29, 2010) [hereinafter TVA Answer]; NRC Staff's Answer to Petition for Intervention and Request for Hearing, and Response to Joint Intervenors' Supplemental Basis to Contention 5 — Lack of Good Cause, and Joint Petitioners' Supplemental Basis for Previously Submitted Contention 6 — TVA Has Not and Cannot Meet the NRC's [QA/QC] Requirements (Jan. 29, 2010) [hereinafter Staff Answer]. Subsequently, following an 11-day delay in submitting their reply filing engendered by their search for counsel to represent them and a nearly week-long February 5-11, 2010 mid-Atlantic region snow event, on February 16, 2010, Joint Petitioners filed their response to the TVA and Staff answers. *See* Petitioners' Reply to NRC Staff's and TVA's Answers in Opposition to Petition for Intervention and Request for Hearing (Feb. 16, 2010) [hereinafter Joint Petitioners Reply]; *see also* Licensing Board Memorandum and Order (Ruling on Motion for Additional Time; Prehearing Conference Argument Time Allocations; Webstreaming; Written Limited Appearance Statements) (Feb. 18,

²In connection with their Contentions 5 and 6, Joint Petitioners sought to supplement their May 2009 hearing petition in July 2009 and January 2010, respectively. *See* Joint Intervenors' Supplemental Basis for Previously Submitted Contention 5 — Lack of Good Cause (July 15, 2009) [hereinafter Contention 5 Supplement]; Joint Petitioners' Supplemental Basis for Previously Submitted Contention 6 — TVA Has Not and Cannot Meet the NRC's Quality Assurance and Quality Control [(QA/QC)] Requirements (Jan. 11, 2010) [hereinafter Contention 6 Supplement]. Moreover, as to each contention supplement, TVA submitted a motion to strike, to which Joint Petitioners submitted a response. *See* [TVA] Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 5 (July 17, 2009) [hereinafter Motion to Strike Contention 5 Supplement]; Petitioners' Opposition to [TVA] Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 5 (July 27, 2009) [hereinafter Motion to Strike Contention 5 Supplement Response]; [TVA] Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 6 (Jan. 14, 2010) [hereinafter Motion to Strike Contention 6 Supplemental Basis]; Joint Petitioners' Answer to [TVA] Motion to Strike Supplemental Basis for Contention 6 (Jan. 25, 2010) [hereinafter Motion to Strike Contention 6 Supplemental Basis Response].

2010) at 1-5 (unpublished). Then, on March 1, 2010, the Licensing Board conducted the previously scheduled initial prehearing conference during which it entertained argument from counsel for the participants regarding the application of the AEA § 185a “good cause” standard and the admissibility of Joint Petitioners’ seven remaining contentions. *See* Tr. at 1-197.

II. ANALYSIS

A. Joint Petitioners’ Standing

1. Standards Governing Standing

In determining whether an individual or organization is an “interested person” under section 189a of the Atomic Energy Act (AEA) of 1954, 42 U.S.C. § 2239(a)(1)(A), that has standing “as of right” such that it can be granted party status in a proceeding in accord with 10 C.F.R. § 2.309(d),³ the Commission applies contemporaneous judicial standing concepts that require a participant to establish that (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the AEA, 42 U.S.C. § 2011 et seq., NEPA, 42 U.S.C. § 4321 et seq.); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Further, in proceedings involving the possible construction or operation of a nuclear power reactor, including proceedings regarding the extension of a construction permit, proximity to the proposed facility has been considered sufficient to establish standing. *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010); *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 564-65 (1980). The proximity presumption applies when an individual or organization, or an individual authorizing an organization to represent his or her interests as the organization seeks to establish its representational standing, resides within 50 miles of the proposed facility or has “frequent contacts” with

³In pertinent part, section 2.309(d)(1) requires that a hearing request/intervention petition must state (1) the name, address, and telephone number of the requestor/petitioner; (2) the nature of the requestor’s/intervenor’s right under the AEA to be made a party to the proceeding; (3) the nature and extent of the requestor’s/petitioner’s property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order issued in the proceeding on the petitioner’s/requestor’s interest. Additionally, section 2.309(d)(3) mandates that the presiding officer determine whether, considering these factors, the requestor/petitioner is a person whose interest may be affected by the proceeding in accord with AEA § 189a.

the area affected by the proposed facility. *Calvert Cliffs*, CLI-09-20, 70 NRC at 915; see *Bell Bend*, CLI-10-7, 71 NRC at 138. To establish the requisite proximity, however, a petitioner must clearly indicate where it resides and/or what contact it has with the site. See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42, 47 (1991) (no standing when petitioner alleged proximity but failed to state his physical address or elaborate on the extent of his activities in the area). Ultimately, it is the petitioner's responsibility to "provide enough detail to allow the Board to distinguish a casual interest from a substantial one." *Bell Bend*, CLI-10-7, 71 NRC at 139.

We apply these rules and guidelines in evaluating each of Joint Petitioners' standing presentations.

2. *Southern Alliance for Clean Energy (SACE)*

DISCUSSION: Intervention Petition at 3-7; TVA Answer at 16-18; Staff Answer at 11; Joint Petitioners Reply at 1-2.

RULING: SACE is a not-for-profit organization the members of which oppose reinstatement of the CPs for Bellefonte Units 1 and 2. Attached to Joint Petitioners' hearing request are the affidavits of three SACE members, each of whom states that SACE is authorized to represent his or her interests in this proceeding. The information provided in these affidavits also indicates that two of these members reside within 50 miles of the Bellefonte site, and at least one lives within approximately 40 miles of the facility.⁴

Although the Staff does not question SACE's standing to participate in this CP reinstatement proceeding, TVA asserts that SACE lacks standing because, notwithstanding the affidavits of the various individuals authorizing SACE to represent his or her interests as an organization, no one entered a timely appearance on behalf of SACE to act as its representative in accordance with 10 C.F.R. § 2.314(b). According to TVA, this result follows from the fact that it was not until February 16, some 3 weeks after the date established for the entry of notices of appearance in the Board's January 15, 2010 initial prehearing order, that an appearance notice was first submitted by Joint Petitioners' new legal counsel indicating he would be representing SACE in this proceeding.

⁴Consistent with the jurisdictional nature of standing under the AEA and the Board's independent obligation to make a standing determination regardless of whether there is a challenge to a petitioner's standing, cf. *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1152 (2009) (court must make independent assessment of Article III standing claims), and in accord with 10 C.F.R. § 2.337(f), the Google Maps distance measurement tool was used to verify these distances relative to the Bellefonte site using the home addresses given in the affidavits provided in support of the Joint Petitioners hearing request.

We find the asserted health, safety, and environmental interests of the two individuals residing within 50 miles of the Bellefonte facility and their agreement to permit SACE to represent their interests to be sufficient to establish SACE's representational standing to intervene in this CP reinstatement proceeding. Moreover, we do not consider the fact that SACE did not have a designated representative until February 16 negates this finding regarding the organization's standing.

The date for the filing of appearance notices set by the Board in its initial prehearing conference order was established to try to ensure, particularly given the longstanding nature of this proceeding, that each participant had provided current authorized representative contact information to the Board and the other participants. This information identifying the individual or individuals authorized to act on behalf of each participant should provide the means whereby any participant needing to reach another participant's authorized representatives to serve a filing or have a discussion about any litigation-related matters will be able to do so. The failure of an organizational participant to have a representative provide an appearance notice in accord with section 2.314(b) might, as could be the case for any other unresolved procedural deficiency that persists without adequate justification, provide cause for an appropriate sanction for failure properly to prosecute the litigation. Contrary to TVA's suggestion, however, such a failure does not fall into the same category as, for example, the failure under 10 C.F.R. § 2.309(d) to support an intervention petition with affidavits providing necessary information regarding the basis for representational standing, a deficiency directly associated with a petitioner's standing that could interpose a jurisdictional flaw potentially warranting the participant's dismissal from the proceeding.⁵

Given that the individual who signed the SACE hearing petition in this proceeding, although not a lawyer, apparently was aware of the process for submitting an appearance notice based on her participation in the *Bellefonte COL* proceeding, *see* Notice of Appearance for Sara Barczak (Apr. 2, 2008) (Docket Nos. 52-014-COL & 52-015-COL), it is not clear why she (or some other individual) did not undertake that relatively straightforward action on behalf of SACE in this CP reinstatement case. Nonetheless, SACE (along with the other Joint Petitioners) now has counsel who, in conformity with section 2.314(b), has entered an appearance on its behalf so as to be identified as available to file and receive pleadings and make representations for the organization. In any event, the timing of SACE's designation of a representative provides us with no basis

⁵ Certainly, nothing in the agency's rules of practice suggests that a section 2.314(b) appearance notice, or the lack thereof, has the significance attributed to it by TVA. Indeed, exactly when a notice of appearance must be filed (or a notice of withdrawal submitted when an attorney or representative is no longer acting as a participant representative) is not specified in the agency's rules of practice.

for concluding that the organization lacks standing in accord with 10 C.F.R. § 2.309(d).

3. *Blue Ridge Environmental Defense League (BREDL)*

DISCUSSION: Intervention Petition at 3-7; TVA Answer at 17; Staff Answer at 11; Joint Petitioners Reply at 1-2.

RULING: BREDL likewise is a not-for-profit organization whose members oppose reinstatement of the CPs for Bellefonte Units 1 and 2. Attached to the Joint Petitioners hearing request are the affidavits of eighty-six BREDL members, each of whom states that BREDL is authorized to represent his or her interests in this proceeding. Per the information provided in these affidavits, at least seventy-seven of these members reside within 50 miles of the Bellefonte site, and at least one lives within 5 miles of the facility. BREDL's standing is not contested by TVA or the Staff. *See supra* note 4.

We find the asserted health, safety, and environmental interests of each of these seventy-seven individuals residing within 50 miles of the Bellefonte facility and their agreement to permit BREDL to represent their interests sufficient to establish BREDL's representational standing to intervene in this CP reinstatement proceeding.

4. *Bellefonte Efficiency and Sustainability Team (BEST)*

DISCUSSION: Intervention Petition at 3-7; TVA Answer at 16-17 & n.84; Staff Answer at 11-12; Joint Petitioners Reply at 1-2.

RULING: As TVA noted, while Joint Petitioners in their hearing request mentioned BEST in several places, they explicitly claimed standing only for BREDL and SACE. Previously, BEST had been described as a chapter of BREDL, founded in February 2008, and sharing the same attributes and goals as BREDL, which was categorized as "a league of community groups called "chapters." BREDL and its chapters are unitary, with a common incorporation, financial structure, board of directors and executive officer." *Bellefonte COL*, LBP-08-16, 68 NRC at 379 (quoting Petition for Intervention and Request for Hearing by [BEST, BREDL, and SACE] (June 6, 2008) at 3 (Docket Nos. 52-014-COL and 52-015-COL)). While TVA contends that BEST's treatment in the petition established that it is not a separate entity from BREDL, the Staff asserts that BEST should not be admitted as a party because it has failed to establish either its organizational or representational standing.

BEST has not made any showing of harm to its organizational interests. Moreover, to whatever extent a chapter and its parent organization can have simultaneous representational standing, not one of the affidavits from individuals

living in the vicinity of the Bellefonte site that were provided by Joint Petitioners, all of which are in substantially the same form, makes any mention of BEST or states that BEST is authorized to represent the affiant's interests. Nor do we find applicable the line of United States Supreme Court cases cited in the Joint Petitioners' reply brief for the proposition that "if one party's standing has been established, the standing of allied parties is not to be questioned." Joint Petitioners Reply at 2 (citing *Clinton v. City of New York*, 524 U.S. 417, 431 n.19 (1998); *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 719 (1990); *Board of Natural Resources v. Brown*, 992 F.2d 937, 942 (9th Cir. 1993)). It is well established in NRC jurisprudence that each intervening participant that wishes to be a party to a proceeding must establish its own standing, see *Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981), a showing that depends on the particular circumstances associated with that participant rather than the standing of other entities or individuals with whom it may claim to be aligned relative to the substance of the matters at issue in the proceeding.

As was the case previously, because none of the affidavits submitted in support of Joint Petitioners' hearing request in this proceeding indicates BEST represents the interests of the submitter, BEST has failed to establish it has standing. See *Bellefonte COL*, LBP-08-16, 68 NRC at 379-80 (BREDL chapter BEST lacks standing because none of affidavits supporting standing mentions affiliation with BEST); see also *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 304 (2008) (BREDL chapter People's Alliance for Clean Energy (PACE) lacks standing because none of affidavits supporting standing mention affiliation with PACE). Accordingly, to the degree BEST is seeking party status in this proceeding, that request must be *denied*.

B. Standard Governing CP Reinstatement Proceeding

DISCUSSION: TVA Answer at 21-22; Staff Answer at 10-11; Joint Petitioners Reply at 2-4; Tr. at 15-32.

RULING: For most agency licensing authorizations, the standards that govern what an applicant must show to obtain a favorable determination are well established in NRC jurisprudence. The TVA request to reinstate the Part 50 CPs for Bellefonte Units 1 and 2 seemingly is not one of those permitting actions, as evidenced by the Commission's early involvement in this proceeding to resolve the question of the agency's authority to entertain and act upon the TVA request. See CLI-10-6, 71 NRC at 119-26. Moreover, despite the Commission majority declaring in CLI-10-6 that the "good cause" standard associated with AEA § 185a is to be the governing precept for this proceeding, according to Joint Petitioners, the exact parameters of that standard in this sui generis CP reinstatement case are not clear. The application of that standard in this case, Joint Petitioners contend,

is not necessarily governed by how that standard has been applied in the previous CP extension proceedings, notwithstanding their resemblance to the proceeding now before us. Below, we explore Joint Petitioners' assertion in more detail in the context of addressing their argument regarding the meaning of "good cause" relative to TVA's CP reinstatement request.

As we noted previously, in its March 2009 order granting the TVA CP reinstatement request, the Staff provided a hearing opportunity for anyone adversely affected by the request, declaring that any "request for a hearing is limited to whether good cause exists for the reinstatement of the CPs" and that the scope of the reinstatement order "and any proceeding hereunder is limited to direct challenges to the permit holder's asserted reasons that show good cause justification for the reinstatement of the CPs." 74 Fed. Reg. at 10,969, 10,970. Thereafter, in referring Joint Petitioners' remaining contentions challenging the Bellefonte CP reinstatement to a licensing board, the Commission stated with respect to the scope of review governing the board's consideration of the hearing request that the board should

decide in the first instance whether petitioners have established standing and have raised admissible contentions and if so, given their claims, whether reinstatement on the particular facts presented here is lawful and proper — that is, *whether there is "good cause" for the reinstatement.*

CLI-10-6, 71 NRC at 126 (emphasis added). The Commission thus expressly directed the Board to restrict its inquiry in the instant proceeding, including its consideration of contention admissibility matters, in line with the "good cause" standard.

As the Commission also made clear, the "good cause" standard to which it was referring is that which arises under AEA § 185a, "the only statutory provision that addresses construction permits." *Id.* at 120. Specifically, AEA § 185a states that

[a] construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, *unless upon good cause shown, the Commission extends the completion date.*

42 U.S.C. § 2235(a) (emphasis added). Further, the Commission regulation that implements this good cause standard, 10 C.F.R. § 50.55(b), declares that

upon good cause shown, the Commission will extend the completion date for a reasonable period of time. The Commission will recognize, among other things, developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike, sabotage, domestic violence, enemy action, an act of

the elements, and other acts beyond the control of the permit holder, as a basis for extending the completion date.

As AEA § 185 and this regulation adumbrate, up to this point the good cause standard's bailiwick has been the CP extension proceeding. Nonetheless, given the Commission's direction in CLI-10-6 that "good cause" should be the standard that governs our consideration of the TVA CP reinstatement request for Bellefonte Units 1 and 2, a principal task for us here is to determine how that standard should apply in this proceeding.

According to Joint Petitioners, "the Commission cast the Board and the parties into uncharted waters without a rudder" because neither the Commission in its January 2010 ruling nor the AEA or implementing agency regulations provide relevant guidance about applying the good cause standard in a CP reinstatement proceeding such as this one. Joint Petitioners Reply at 2. Declaring that the good cause standard as it has been employed in the past in CP extension cases "is retrospective in nature, as it addresses the applicant's past negligence or culpability," Joint Petitioners assert that the Board in this CP reinstatement proceeding should take a different tack and apply a "prospective" stance to address whether "the applicant can complete construction of the plant without jeopardizing public safety or the environment." *Id.* at 4; *see also* Tr. at 16-21. For their part, both TVA and the Staff, citing the Commission's *Seabrook* CP extension decision, *Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984), declare that an admissible contention under the good cause standard must allege that a permit holder's reasons for past delay failed to constitute good cause for a CP extension and be supported by a showing that construction delay is traceable to permit holder action that was intentional and without a valid business purpose. *See* TVA Answer at 21; Staff Answer at 10-11; *see also* Tr. at 22-29.

Guidance regarding the meaning and scope of the "good cause" standard as the Commission intended it to be applied here seems to us to be provided by an earlier Commission decision regarding the application of "good cause" in the context of a CP extension proceeding. In *Washington Public Power Supply System* (WPPSS Nuclear Project Nos. 1 & 2), CLI-82-29, 16 NRC 1221 (1982), with two hearing petitions regarding a Part 50 CP extension request pending before it prior to referral to a licensing board, the Commission took the opportunity to outline its understanding of the basic parameters under which the AEA § 185a "good cause" standard was to be applied. And in that regard, the Commission noted:

Although the congressional intent behind section 185 may be somewhat ambiguous, we discern no intent on the part of Congress to require the periodic relitigation of health, safety, or environmental questions in agency adjudications between the time a construction permit is granted and the time the facility is authorized to operate.

Rather, interested persons have been legislatively afforded a particular opportunity to raise such issues in the context of a proceeding in which the agency determines whether an operating license will be granted. 42 U.S.C. § 2239(a). Consistency with the congressionally mandated two-step licensing process suggests a construction of section 185 that limits the scope of litigable issues with regard to the extension of a construction permit.

In line with this interpretation of section 185 is the language of the Commission's regulation implementing section 185. 10 CFR § 50.55(b) speaks in terms of Commission consideration of "developmental problems attributable to the experimental nature of the facility" and "acts beyond the control of the permit holder." Its thrust is clearly that the Commission's inquiry will be into reasons that have contributed to the delay in construction and whether those reasons constitute "good cause" for the extension. This same limitation should apply if an interested person seeks to challenge the request for an extension.

This, of course, does not mean that those who wish to raise health, safety, or environmental concerns before the agency have no remedy prior to the operating license proceeding. This opportunity is afforded all persons under 10 CFR § 2.206, which allows any person to seek the institution of a show cause proceeding under 10 CFR § 2.202. The invocation of this procedure under section 2.206, which does not depend on the fortuity of a delay in the completion of a plant that triggers a permit extension request, requires that the NRC staff give serious consideration to requests for regulatory action concerning a licensed facility so long as the request specifies the action sought and sets forth the facts that constitute the basis of the request. The staff must analyze the technical, legal, and factual basis for the relief requested and respond either by undertaking some regulatory activity or, if it believes no show-cause proceeding or other action is necessary, by advising the requestor in writing with a statement of reasons explaining that determination. . . .

We believe that the most "common sense" approach to the interpretation of section 185 and 10 CFR § 50.55 is that the scope of a construction permit extension proceeding is limited to direct challenges to the permit holder's asserted reasons that show "good cause" justification for the delay. The avenue afforded for the expression of health, safety, and environmental concerns in any pending operating license proceeding, or in the absence of such a proceeding, in a petition under 10 CFR § 2.206 would be exclusive despite the pendency of a construction permit extension request. This does not mean, however, that no challenge can be made to an application for an extension of a construction permit completion date. In seeking an extension, a permit holder must put forth reasons, founded in fact, that explain why the delay occurred and those reasons must, as a matter of law, be sufficient to sustain a finding of good cause. Certainly, the factual basis for the reasons for delay asserted are always open to question in that the permit holder cannot invent reasons that did not exist. Moreover, the permit holder cannot misrepresent those reasons upon which it seeks to rely An intervenor is thus always free to challenge a request for a permit extension by seeking to prove that, on balance, delay was caused by circumstances that do not constitute "good cause."

Id. at 1228-30 (footnote omitted). Utilizing this guidance, the Commission found one of the ten contentions in the hearing petitions before it admissible and sent that issue statement to a licensing board for further consideration. *See id.* at 1230-31.

From this passage, two Commission-endorsed principles are apparent relative to the “good cause” standard. One is that an AEA § 185-related Part 50 CP proceeding is not to become a substitute for an ongoing or future Part 50 OL proceeding, albeit with section 2.206 providing an avenue for raising safety and environmental concerns regarding a proposed facility pending the OL proceeding. The other is that the “good cause” rationale that must be put forth by the CP holder to justify the relief sought is to be the focus of any intervenor challenge to the CP holder’s request. A number of subsequent agency cases, such as the Commission’s *Seabrook* case cited by TVA and the Staff and the later Commission decision in *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), CLI-86-15, 24 NRC 397 (1986), have devoted substantial attention to exploring the parameters of the latter precept in the context of making CP extension request contention admissibility determinations.⁶ None of these rulings, however, suggests any diminution of the tenet that for Part 50 applications, safety and environmental issues are generally to be adjudicated in the OL proceeding rather than an AEA § 185 “good cause” proceeding regarding the continued viability of a previously issued CP. Certainly, as is outlined in the discussion in Section I.A, above, nothing in the Commission’s more-recent adoption of the Part 52 COL process suggests that the Commission has identified any basis under the Part 50 rules to back away from the traditional application of that two-step licensing process, notwithstanding its acknowledged tendency to “backload” issues and thereby create substantial scheduling and resource uncertainties.

The general concern Joint Petitioners espouse regarding the potential for a significant squandering of time and resources if, at the OL stage, one or more of the matters they seek to raise in this CP reinstatement proceeding are found to mandate the denial of, or substantial revisions to, the OL license for Unit 1 and/or Unit 2, is not untoward. Nonetheless, in our judgment, it is not a sufficient basis for the Board to deviate from the well-established, Commission-endorsed approach to the application of the “good cause” standard in AEA § 185-related Part 50 CP proceedings as outlined in the Commission’s *WPPSS* decision and subsequent determinations. We thus make our contention admission rulings regarding the scope of this proceeding consistent with this conclusion.

⁶ Although the Commission in its *WPPSS* decision pretermitted the question of “the permissible scope for contentions that challenge a staff finding concerning the agency’s [NEPA] responsibilities with regard to an extension of a construction completion date,” CLI-82-29, 16 NRC at 1230 n.3, in this instance that issue is presented by several of Joint Petitioners’ contentions raising questions about the sufficiency of the Staff’s February 2009 EA regarding the TVA CP reinstatement request.

C. Admissibility of Joint Petitioners' Contentions

1. Contention Admissibility Standards

Section 2.309(f) of the Commission's rules of practice specifies the requirements that must be met if a contention is to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of the basis of the contention; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. *See* 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." *Id.* § 2.309(f)(1)(iii)-(iv). Failure to comply with any of these requirements is grounds for dismissing a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *see also Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). NRC case law has further developed these requirements, as is summarized below:

a. Challenges to Statutory Requirements/Regulatory Process/Regulations

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. *See Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. *See* 10 C.F.R. § 2.335; *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7,

43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. *See Peach Bottom*, ALAB-216, 8 AEC at 20-21 & n.33.

b. Challenges Outside Scope of Proceeding

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. *See* 10 C.F.R. § 2.309(f)(1)(iii); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

c. Need for Adequate Factual Information or Expert Opinion

It is the petitioner's obligation to present factual information and/or expert opinion necessary to support its contention. *See* 10 C.F.R. § 2.309(f)(1)(v); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *and aff'd in part*, CLI-95-12, 42 NRC 111 (1995). While a Board may appropriately view a petitioner's supporting information in a light favorable to the petitioner, failure to provide such information regarding a proffered contention requires that the contention be rejected. *See Palo Verde*, CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. *See Palo Verde*, CLI-91-12, 34 NRC at 155; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); *Georgia Tech Research Reactor*, LBP-95-6, 41 NRC at 305. Likewise, simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the

admission of the contention. *See Fansteel*, CLI-03-13, 58 NRC at 204-05. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that on its face it does supply adequate support for the contention. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

d. Materiality

To be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application. *See* 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *See Yankee Nuclear*, LBP-96-2, 43 NRC at 75-76; *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003).

e. Insufficient Challenges to the Application

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the Safety Analysis Report and the Environmental Report) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue will be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

2. *Joint Petitioners' Contentions*

a. *Contention 3: The Environmental Assessment Violated NEPA*

CONTENTION: Contention issue statement/basis language are not separately designated.⁷

DISCUSSION: Intervention Petition at 14-18; TVA Answer at 23-36; Staff Answer at 12-19; Joint Petitioners Reply at 6-7; Tr. at 32-70.

RULING: *Inadmissible*, in that this contention and its foundational support raise matters that impermissibly challenge the basic structure of the Commission's regulatory program and are either inaccurate or inadequate to establish that the issue raised is material to the proceeding or are insufficient to show that a genuine dispute on a material factual or legal issue exists so as to warrant admission of the contention. *See* 10 C.F.R. § 2.309(f)(1)(iii), (v), (vi); section II.C.1.a, c, d, e, *supra*.

As set forth in the Joint Petitioners hearing request, this contention raises two concerns. Initially, Joint Petitioners challenge the Staff's February 24, 2009 EA regarding the NEPA-related impacts associated with the CP reinstatement for Bellefonte Units 1 and 2 as being prepared improperly because the EA came after a Commission decision had already been made regarding the reinstatement request. Additionally, they insist that a full environmental impact statement (EIS), as opposed to an EA,⁸ was required in connection with the Staff's reinstatement decision given (1) asserted "substantial changes in circumstances" since the Units 1 and 2 CPs were issued in the mid-1970s; and (2) the need to assess cumulative impacts and avoid illegal segmentation relative to reinstating the Units 1 and 2

⁷In setting forth their contentions, Joint Petitioners did not indicate which part of their discussion was the "specific statement of law or fact to be raised or converted," 10 C.F.R. § 2.309(f)(1)(i), and which was the explanation of the "basis" supporting the contention, *id.* § 2.309(f)(1)(ii) and/or the "concise statement of the alleged facts or expert opinions" that supports their position on the specified issue, *id.* § 2.309(f)(1)(v). While this failure to specify the language of the issue framed by their contention and distinguish it from the discussion that provides the supporting foundation for their issue statement might be grounds for dismissing the contentions, we do not rely upon this drafting flaw as a reason for rejecting their issue statements. Nevertheless, this approach to contention formulation is not one they (or other petitioners) should emulate in future proceedings.

⁸The Staff's EA included (1) a description of the plant site and its environs, the proposed action (i.e., CP reinstatement), and the need for that action; (2) an analysis of the (a) nonradiological impacts (i.e., land use and aesthetic impacts; historic and archaeological resource impacts; impacts from socioeconomic concerns and environmental justice; water, air quality, and aquatic resources impacts; impacts on threatened and endangered aquatic and terrestrial biota and endangered terrestrial species); (b) radiological impacts (i.e., radioactive effluent and solid waste impacts, occupational, public, and accident radiation doses; uranium fuel cycle and transportation impacts); and (c) cumulative impacts associated with CP reinstatement; and (3) discussions of the alternatives to the proposed action and alternative use of resources. *See* Staff EA, 74 Fed. Reg. at 9308-14.

CPs, which are on the same site that is to be utilized for constructing and operating proposed Units 3 and 4.

With respect to the first segment of this contention alleging that the Staff's assessment was done after the Commission had made a reinstatement determination, as is evident from the discussion in the Commission's January 2010 decision regarding the admissibility of Joint Petitioners' Contentions 1 and 2, *see* CLI-10-6, 71 NRC at 119-20, this claim is based on incorrect information regarding the substance and timing of the Staff's March 2009 determination concerning the substantive validity of the TVA CP reinstatement request, which followed a February 2009 Commission supervisory/oversight decision indicating only that the agency had the authority to entertain such a CP reinstatement request.

With regard to Joint Petitioners' assertion concerning the need to prepare an EIS, although agency regulations (in the absence of a categorical exclusion under 10 C.F.R. § 51.22) provide at least a general legal footing for their claim, *see* 10 C.F.R. § 51.20(b)(14) (EIS required for any agency action that is a major action significantly affecting the environment), we find the necessary support for such an assertion otherwise lacking relative to this CP reinstatement proceeding. As we discuss below, *see* section II.C.2.b-g, *infra*, to the degree they would be cognizable in the licensing process, the specific impacts and alternatives they claim provide significant new information or circumstances that engender the need for a new EIS are, consistent with the agency's longstanding Part 50 CP/OL licensing process, matters to be considered if and when applicant TVA seeks an OL for the units in question. Moreover, we find Joint Petitioners' concern that the EA for reinstating the Units 1 and 2 CPs on the same site as COLs are being sought for Units 3 and 4 omits a necessary assessment of cumulative impacts and constitutes illegal segmentation is, in fact, appropriately addressed in the Staff's recognition that, with a decision by TVA to resume construction of Units 1 and 2, the cumulative impacts associated with a four-unit site will have to be assessed. *See* Staff EA, 74 Fed. Reg. at 9314 (if construction activities resume for Units 1 and 2, TVA would need to assess Units 1 and 2 construction impacts relative to Units 3 and 4).⁹

b. Contention 4: Plant Site Geologic Issues Are Not Adequately Addressed

CONTENTION: Contention issue statement/basis language are not separately designated.

⁹We note also that this approach is consistent with that outlined by the licensing board in the Units 3 and 4 COL proceeding. *See* Licensing Board Memorandum and Order (Ruling on Request to Admit New Contention) (Oct. 14, 2008) at 12 n.7 (Docket Nos. 52-014-COL and 52-015-COL) (unpublished).

DISCUSSION: Intervention Petition at 18-20; TVA Answer at 36-39; Staff Answer at 19-21; Joint Petitioners Reply at 4-6; Tr. at 71-91.

RULING: *Inadmissible*, in that this contention and its foundational support impermissibly challenge the basic structure of the Commission's regulatory program, raise a matter that is not within the scope of this proceeding, and fail to establish a genuine dispute on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(iii), (vi); section II.C.1.a, b, e, *supra*.

In this contention, relying in part on arguments found wanting as adequate support for an admissible contention in the Bellefonte Units 3 and 4 COL proceeding, *see Bellefonte COL*, LBP-08-16, 68 NRC at 390-94, Joint Petitioners seek to challenge the seismic design basis for Units 1 and 2.¹⁰ Notwithstanding Joint Petitioners' overarching concern that no further resources should be expended on the construction of these units until issues such as this one challenging the safety of the units' design have been resolved, we conclude this is a matter that is outside the limited scope of this proceeding as it has nothing to do with either the good cause elements outlined by TVA in its reinstatement request or the Staff's EA. Instead, consistent with longstanding agency practice, this is a matter that must abide any Part 50 OL proceeding relating to these units or, if Joint Petitioners wish to utilize that process, could be the subject of a petition for agency action under 10 C.F.R. § 2.206.¹¹

c. Contention 5: Lack of Good Cause for Reinstatement

CONTENTION: Contention issue statement/basis language are not separately designated.

DISCUSSION: Intervention Petition at 20-25; Contention 5 Supplement at 1-2; Motion to Strike Contention 5 Supplement at 3-5; Motion to Strike Contention 5 Supplement Response at 1-4; TVA Answer at 39-45; Staff Answer at 21-24; Tr. at 91-123.

¹⁰With this contention, Joint Petitioners claim, among other things, that prior to reinstating the CPs for Units 1 and 2, TVA must (1) submit additional information to satisfy NRC regulatory requirements regarding seismic criteria under 10 C.F.R. § 100.23; (2) because a magnitude 5.0 earthquake occurring at the site could cause serious damage to the Bellefonte facilities, provide more seismic geologic data to enable the Board to make a sound decision concerning the units' seismic design before reinstatement, including data regarding the 2003 occurrence of a 4.6 magnitude earthquake in Fort Payne, Alabama, which is within 60 miles of the Bellefonte site, and numerous smaller earthquakes purported to have taken place recently in the immediate vicinity of the 2003 quake; and (3) explain why a formerly operating German reactor of the design proposed for Units 1 and 2 was shut down due to plant siting issues. *See* Intervention Petition at 18-20.

¹¹In this regard, we note that petitions submitted under section 2.206 are assessed by the Staff in accord with NRC Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions" and associated Handbook 8.11 (rev. Oct. 25, 2000) (ADAMS Accession No. ML041770328).

RULING: *Inadmissible*, in that the foundational support for the contention is either inaccurate or inadequate to establish that a genuine dispute on a material factual or legal issue exists so as to warrant admission of the contention. *See* 10 C.F.R. § 2.309(f)(1)(v), (vi); section II.C.1.d., e, *supra*.

As “good cause” for reinstatement of the CPs for Units 1 and 2, in its August 2008 request TVA relied upon the need to determine whether the partially completed units were “a viable option” as a potential electricity generation source, which TVA asserted might well be more likely than in 2005 when TVA had the NRC withdraw the CPs. This could be the case, according to TVA, because of the increased cost per kilowatt hour among generation alternatives, the worldwide decrease in suppliers for new nuclear facilities, and the nearly completed status of many of the major Unit 1 and 2 structures, systems, and components (SSCs). TVA Reinstatement Request at 1, 5. Noting that TVA’s “[g]ood cause for re-instatement relies upon financial predictions and estimates of capital and operation costs,” Intervention Petition at 20, with this contention Joint Petitioners seek to raise questions about the financial underpinnings of the TVA CP reinstatement request. In doing so, however, they rely on information that either is (1) not relevant, to the degree they seek to utilize information relating to the costs associated with constructing and operating new Units 3 and 4 rather than cost information applicable to partially constructed Units 1 and 2; or (2) in the case of their supplemental material regarding an ongoing TVA integrated resource plan study,¹² wholly speculative as to its impact on the financial elements TVA asserts provide “good cause” for its CP reinstatement request. As a consequence, although the general subject matter of this contention had the potential to be within the scope of this proceeding as outlined by the hearing notice, the information provided by Joint Petitioners fails to lend any relevant support to a challenge to the financially footed “good cause” reasons TVA provided as justification for its request.

¹² Although we fail to find anything in the Commission’s May 20, 2009 order placing the consideration of Joint Petitioners’ contentions three through nine “in abeyance” pending its resolution of their first two contentions, *see* Commission Order (May 20, 2009) at 2 (unpublished), that would preclude Joint Petitioners from seeking timely to submit additional information regarding their already proffered contentions, because we conclude that the material submitted with Joint Petitioners’ July 2009 supplemental basis filing does not support the admissibility of this contention, we need not rule on the question whether Joint Petitioners failed to follow the proper procedural avenue in providing the information such that their supplemental material should, as TVA asserts, be stricken.

d. *Contention 6: The Reinstatement Was Improper Because TVA Has Not and Cannot Meet the NRC's Quality Assurance and Quality Control Requirements*

CONTENTION: Contention issue statement/basis language are not separately designated.

DISCUSSION: Intervention Petition at 25-28; Contention 6 Supplement at 2-5; Motion to Strike Contention 6 Supplement at 4-6; Motion to Strike Contention 6 Supplement Response at 1-2; TVA Answer at 45-51; Staff Answer at 25-31; Tr. at 125-54.

RULING: *Inadmissible*, in that the support offered for the contention is either inaccurate or inadequate to establish that the issue raised is material to the proceeding or is insufficient to show a genuine dispute on a material factual or legal issue exists so as to warrant admission of the contention. *See* 10 C.F.R. § 2.309(f)(1)(iv), (v), (vi); section II.C.1.c, d, e, *supra*.

Putting aside the issue whether this challenge to TVA's ability to resume preservation and maintenance activities at Units 1 and 2 is within the "good cause" scope of this proceeding,¹³ we find this issue statement to be inadmissible because it lacks adequate support. Initially, we note that this contention is essentially one of omission, i.e., that TVA has not provided sufficient information to demonstrate that it can meet the agency's quality assurance/quality control standards as embodied in the Commission's 1987 deferred plant policy statement and Appendix A to 10 C.F.R. Part 50, so as to provide a basis for bringing the facility back to the deferred status that it was in when the CPs were withdrawn. In the time between the filing of this contention and its referral to this Board,

¹³While both TVA and the Staff assert that the "good cause" for the TVA reinstatement request is limited to TVA's financially based justifications regarding the apparent viability of the option of completing Units 1 and 2, this is not necessarily apparent given the language of the August 2008 TVA reinstatement request. In its second paragraph, the request indicated that "[a]s explained below, good cause exists to support TVA's request," and declared the reinstatement would (1) allow the units to return to deferred status and resume preservation and maintenance activities consistent with the Commission's deferred plant policy; and (2) allow TVA to determine whether completion of construction and operation of the units is a "viable option." TVA Reinstatement Request at 1. Certainly, if the facilities cannot be returned to deferred status, as Joint Petitioners maintain they cannot given the circumstances here, then the units seemingly are not a viable option. *See id.* at 5 (whether units are viable depends on assessment that will be made if and when unit CPs are reinstated and units are returned to deferred status). Nonetheless, we need not resolve this scope issue given we find, as we explain above, that the contention lacks adequate foundational support for its cardinal thesis that TVA has not provided any basis for showing it can bring the units back to a status in which they will comply with the Commission's deferred plant policy.

We do note, however, that Joint Petitioners' assertion in the final paragraph of this contention statement that an entirely new construction permit is required is outside the scope of this proceeding and otherwise not litigable for the reasons set forth by the Commission in its decision in CLI-10-6, 71 NRC at 126.

however, as TVA indicated in its answer to Joint Petitioners' hearing request, in seeking to have the units returned to deferred status TVA implemented quality assurance and corrective action programs for Units 1 and 2 that are intended to address the issues associated with the facilities not being maintained in deferred status for several years and having some components removed. *See* TVA Answer at 6 n.25 (citing Letter from Ashok S. Bhatnager, TVA Senior Vice President, to NRC Document Control Desk at 1, 5 (Aug. 10, 2009) (ADAMS Accession No. ML092230594)) [hereinafter TVA Deferral Request]; *see also* Letter from R. M. Krich, TVA Vice President, to NRC Document Control Desk encl. 2 (Sept. 28, 2009) (TVA Nuclear Quality Assurance Plan (rev. 21)) (ADAMS Accession No. ML0927503500). Although Joint Petitioners did seek to supplement the information they provided initially relative to this contention,¹⁴ TVA documents that supply previously unavailable information central to the focus of this contention have not been referenced or made the subject of any additional analysis by Joint Petitioners in seeking to have this contention admitted. As a consequence, we find this contention essentially has been rendered moot by subsequent events, i.e., the submission of information that, at least facially, addresses Joint Petitioners' concern about TVA QA/QC compliance,¹⁵ and thus is inadmissible.

Of course, the degree to which applicable QA/QC requirements have been properly implemented is generally a matter that can be raised in a Part 50 OL proceeding relating to the facility at issue, or, if Joint Petitioners wish to utilize that process, could be the subject of a petition for agency action under 10 C.F.R. § 2.206.

e. Contention 7: The BLN Units 1 and 2 Cannot Satisfy NRC Safety, Environmental and Other Requirements That Have Been Imposed or Upgraded Since 1974

CONTENTION: Contention issue statement/basis language are not separately designated.

¹⁴This January 2010 supplement, which concerned a TVA notice regarding a containment vertical tendon coupling failure and was the subject of a TVA motion to strike as well, provides nothing of substance in support of the contention's thesis that TVA cannot bring the units back into deferred status so as to make the units a viable option. As a consequence, we need not rule on the merits of this TVA motion to strike either. *See supra* note 12.

¹⁵We note also that, on the basis of that information and an October 2009 inspection to assess whether TVA had addressed the elements of the Commission's deferred plant policy statement, on January 14, 2010, the Staff returned Bellefonte Units 1 and 2 to deferred plant status. *See* Letter from Eric J. Leeds, NRC Office of Nuclear Reactor Regulation Director, to Ashok S. Bhatnager, TVA Senior Vice President at 5-6 (Jan. 14, 2010) (ADAMS Accession No. ML093420915).

DISCUSSION: Intervention Petition at 29-31; TVA Answer at 51-55; Staff Answer at 31-33; Tr. at 154-73.

RULING: *Inadmissible*, in that this contention and its foundational support impermissibly challenge the basic structure of the Commission's regulatory program, raise a matter that is not within the scope of this proceeding, and fail to establish a genuine dispute on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(iii), (vi); section II.C.1.a, b, e, *supra*.

The thrust of this issue statement is that, because Units 1 and 2 were designed and, to varying degrees, constructed over 30 years ago, the CPs should not be reinstated because they cannot meet current agency criteria associated with the Staff's safety, environmental, and other regulatory reviews. As this concern bears no relationship to the good cause elements outlined by TVA in its reinstatement request or to the Staff's EA, it is outside the scope of this proceeding. And once again, despite Joint Petitioners' claim the agency should consider this matter now, consistent with the Commission's deferred plant policy outlining the manner in which new regulatory requirements will be considered as applying to a plant under construction, the degree to which such requirements are applicable and have been properly implemented is a matter that generally must abide any Part 50 OL proceeding relating to the unit in question, or, if Joint Petitioners wish to utilize that process, could be the subject of a petition for agency action under 10 C.F.R. § 2.206.

f. Contention 8: Bellefonte Units 1 and 2 Do Not Meet Operating Life Requirements

CONTENTION: Contention issue statement/basis language are not separately designated.

DISCUSSION: Intervention Petition at 31-32; TVA Answer at 55-59; Staff Answer at 33-34; Tr. at 173-82.

RULING: *Inadmissible*, in that this contention and its foundational support impermissibly challenge the basic structure of the Commission's regulatory program, raise a matter that is not within the scope of this proceeding, and fail to establish a genuine dispute on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(iii), (vi); section II.C.1.a, b, e, *supra*.

This contention asserts that if operating authority ultimately were provided for these units, because some SSCs for Bellefonte Units 1 and 2 will be 80 or 90 years old by the end of the units' 40-year operating life, any CP reinstatement must include an analysis of the advanced age of these items. As this concern likewise bears no relationship to the good cause elements outlined by TVA in its reinstatement request or to the Staff's EA, it is outside the scope of this proceeding. Moreover, Joint Petitioners' claim that the agency should consider this matter now once again fails to account for the longstanding agency regulatory

practice that in the Part 50 licensing context, this is a matter that must abide any OL or life extension proceeding relating to these units or, if Joint Petitioners wish to utilize that process, could be the subject of a petition for agency action under 10 C.F.R. § 2.206.

g. Contention 9: Impacts on Aquatic Resources Including Fish and Mussels of the Tennessee River

CONTENTION: Contention issue statement/basis language are not separately designated.

DISCUSSION: Intervention Petition at 32-38; TVA Answer at 59-65; Staff Answer at 34-41; Tr. at 182-89.

RULING: *Inadmissible*, in that this contention and its foundational support impermissibly challenge the basic structure of the Commission's regulatory program, raise a matter that is not within the scope of this proceeding, and fail to establish a genuine dispute on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(iii), (vi); section II.C.1.a, b, e, *supra*.

With this contention, which has five subparts, Joint Petitioners seek to have admitted for litigation various issues associated with the impacts of the operation of Units 1 and 2 and, in some instances, of Units 3 and 4, upon the aquatic environment and resources of the Tennessee River basin.¹⁶ As these various issue statements bear no relationship to the good cause elements outlined by TVA in its reinstatement request or to the Staff EA assessing the impacts of reinstating the CPs for Units 1 and 2, the contention is outside the scope of this proceeding. Moreover, Joint Petitioners' claim that the agency should consider these matters now once more fails to account for the longstanding agency practice that in the Part 50 licensing context, these are matters that generally must abide any OL proceeding relating to Units 1 and 2 (assuming they have not been assessed previously as cumulative impacts relative to the Units 3 and 4 COL proceeding) or, if Joint Petitioners wish to utilize that process, could be the subject of a petition for agency action under 10 C.F.R. § 2.206.

¹⁶ Among the items Joint Petitioners seek to raise in this issue statement are the purported lack of recent studies to evaluate the impacts of Units 1 and 2 operation on aquatic resources; failure to address operating impacts of Units 1 through 4 on Tennessee River basin fish and mussels; inadequate analysis of impacts of increased water intake and thermal/chemical discharges from facility operation on fish and mussels in the vicinity of the Bellefonte facility; and TVA use of purportedly biased aquatic resource health and status ratings relative to the impacts of operation of the Bellefonte units. *See* Intervention Petition at 32-38.

III. CONCLUSION

For the reasons set forth above, the Board concludes that although petitioners SACE and BREDL (but not petitioner BEST) have established their standing as of right to intervene in this 10 C.F.R. Part 50 CP reinstatement proceeding, they have failed to proffer an admissible contention, so that we must dismiss their hearing petition.

We do so, however, with some trepidation. In this instance, the combination of the AEA § 185a “good cause” standard as applied to this proceeding (and, presumably, the CP extension proceedings for Units 1 and 2 in 2011 and 2014, respectively); the apparent absence of any AEA adjudicatory process applicable to the already-approved TVA request to place the units in deferred status as well as any forthcoming TVA request to resume plant construction, *see* Tr. at 49-51; and the application of the largely superseded Part 50 CP/OL reactor licensing process have the overall effect of “backloading” a number of issues of potential significance to the safe and environmentally responsible operation of Units 1 and 2. Joint Petitioners’ contentions certainly suggest several possible areas of concern, one of the most prominent undoubtedly being whether the facilities, which were not subject to the NRC’s deferred plant maintenance and preservation requirements for several years and from which various safety-related items such as steam generator tubing and reactor coolant piping have been removed, ultimately can be restored and completed in a manner that is fully consistent with the agency’s QA/QC and safety requirements.

Notwithstanding the experience TVA and the agency have gained in dealing with the long-delayed restart of Browns Ferry Unit 2 and the ongoing Part 50 licensing of the long-deferred Watts Bar Unit 2, the circumstances surrounding Bellefonte Units 1 and 2 strongly suggest the Bellefonte units cannot be treated as “business as usual” facilities. Consequently, it seems apparent that there must be (1) complete transparency on the part of TVA regarding the details of both its planning for, and implementation of, the restoration and completion of Bellefonte Units 1 and 2; and (2) significantly enhanced vigilance on the part of the Staff in reviewing and inspecting TVA’s QA/QC and restoration/construction efforts associated with those units. Moreover, if one or both of these Bellefonte units move forward to the OL stage, TVA’s “off again/on again” approach to their construction, in combination with what is likely to be the span of some four decades between the Units 1 and 2 CP and OL proceedings, has generated a unique set of circumstances such that, to ensure all safety and environmental matters of substance regarding these two units are thoroughly vetted in a public forum, the Commission should consider holding, as a matter of discretion, a “mandatory hearing”-type proceeding regarding these reactors (utilizing whatever procedures it may decide to employ for the upcoming COL proceedings) before allowing the units to begin full-power operation.

For the foregoing reasons, it is this second day of April 2010, ORDERED that

1. Joint Petitioners' May 8, 2009 hearing petition is *denied*.
2. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon an intervention petition, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

William W. Sager
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 2, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

Docket Nos. 52-025-COL
52-026-COL
(ASLBP No. 09-873-01-COL-BD01)

SOUTHERN NUCLEAR OPERATING
COMPANY
(Vogtle Electric Generating Plant,
Units 3 and 4)

May 19, 2010

In this proceeding regarding the application of Southern Nuclear Operating Company (SNC) for a 10 C.F.R. Part 52 combined license (COL) to construct and operate two new nuclear reactors at its existing Vogtle Electric Generating Plant (VEGP) site, in ruling on an SNC motion for summary disposition regarding contention SAFETY-1, which is the sole admitted contention and challenges the adequacy of SNC's final safety analysis report (FSAR) discussion of SNC's plans for storage of the low-level radioactive waste (LLRW) associated with proposed Units 3 and 4, finding that no material factual dispute has been interposed in connection with contention SAFETY-1 and concluding as a matter of law that the LLRW plan outlined in SNC's FSAR is in accord with the applicable regulatory provision, 10 C.F.R. § 52.79(a)(3), the Licensing Board grants SNC's dispositive motion and enters a judgment in SNC's favor regarding the contention, thereby resolving all the contested issues in the proceeding.

**RULES OF PRACTICE: SUMMARY DISPOSITION
(APPLICATION OF STANDARDS FOR FORMAL
HEARINGS TO INFORMAL PROCEEDINGS)**

For proceedings such as this one conducted pursuant to the 10 C.F.R. Part 2, Subpart L “informal” hearing procedures, *see* LBP-09-3, 69 NRC 139, 165, *aff’d*, CLI-09-16, 70 NRC 33 (2009), summary disposition motions are to be resolved in accord with the same standards for dispositive motions that are utilized for “formal” hearings as set forth in 10 C.F.R. Part 2, Subpart G. *See* 10 C.F.R. § 2.1205(c). Under Subpart G, 10 C.F.R. § 2.710 provides that summary disposition may be entered with respect to “all or any part of the matters involved in the proceeding” if the motion, along with any appropriate supporting materials (including affidavits, discovery responses, and documents), shows that there is “no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” *Id.* § 2.710(a), (d)(2).

**RULES OF PRACTICE: SUMMARY DISPOSITION
(BURDEN OF PROOF)**

The party proffering the motion bears the burden of making the requisite showing by providing “a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard.” *Id.* § 2.710(a). A party opposing the motion must counter any adequately supported material facts provided by the movant with its own “separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard,” with the recognition that, to the degree the responsive statement fails to contravene any adequately supported material facts proffered by the movant, the movant’s facts “will be considered to be admitted.” *Id.*

REGULATIONS: INTERPRETATION (10 C.F.R. § 52.79(a))

On the matter of whether paragraph (3) or paragraph (4) is the controlling provision of section 52.79(a) in this instance, although paragraph (a)(4) might require the more detailed design, location, and worker health impacts information sought by the intervenor, paragraph (a)(4) governs only those structures that are “a component of the facility to be constructed under the COL.” [SNC] Motion for Summary Disposition of Contention SAFETY-1 (Jan. 29, 2010) at 9; *see* NRC Staff Answer in Support of [SNC] Motion for Summary Disposition of Contention SAFETY-1 (Feb. 12, 2010) at 6. A contention declaring that a long-term onsite LLRW storage facility would only be needed “in the event an off-site waste disposal facility remains unavailable” when a new reactor unit begins operation and supporting information that at best suggests the COL applicant might not

have an offsite option when needed following the beginning of facility operation is not the same as showing that an applicant must build an additional long-term onsite storage facility under the auspices of its COL to manage LLRW generated by a proposed facility because it is certain offsite storage or disposal will be unavailable when needed after facility operations begin. In such circumstances, a long-term LLRW storage facility for the proposed reactor would not be considered one that must be constructed under the COL. Certainly, such an interpretation is consistent with the longstanding agency recognition of the availability of the mechanisms under 10 C.F.R. §§ 50.59 or 50.90 for obtaining authorization to construct additional onsite LLRW storage facilities. *See* Office of Nuclear Reactor Regulation, NRC, NRC [RIS] 2008-32, Interim [LLRW] Storage at Reactor Sites at 2-4 (Dec. 30, 2008). The COL applicant's contingent long-term onsite LLRW storage facility and the contents of the applicant's FSAR with regard to that facility thus are not governed by section 52.79(a)(4) as a part of the reactor facilities to be constructed under the requested COL.

REGULATIONS: INTERPRETATION (10 C.F.R. § 52.79(a))

Because section 52.79(a)(4) does not govern, the requisite content of the applicant's FSAR discussion of long-term LLRW storage depends on the application of 10 C.F.R. § 52.79(a)(3) and what is meant by its requirement to provide information on the "means for controlling and limiting radioactive effluents and radiation exposures." Nothing in the rule or cited Commission statements regarding LLRW indicates section 52.79(a)(3) requires the detailed design, location, and health impacts information outlined in the contention at issue. Unlike section 52.79(a)(4), section 52.79(a)(3) does not list "principal design criteria," "design bases," or "[i]nformation relative to materials of construction, arrangement, and dimensions" as items that must be discussed in the FSAR. *Compare* 10 C.F.R. § 52.79(a)(3) *with id.* § 52.79(a)(4)(i)-(iii). Nor does the Commission's language in CLI-09-16 indicate that "means" includes actual design, location, or health impacts information. Rather, the Commission seems merely to have been stating that the information required under section 52.79(a)(3) is tied to the applicant's "particular plans for compliance through," but not necessarily the details of, "design, operational organization, and procedures" associated with any contingent long-term LLRW facility. CLI-09-16, 70 NRC at 37.

MEMORANDUM AND ORDER
(Ruling on Dispositive Motion Regarding Contention SAFETY-1)

Before the Licensing Board in this 10 C.F.R. Part 52 proceeding regarding

the application of Southern Nuclear Operating Company (SNC) for a combined license (COL) for two new AP1000 units on its existing Vogtle Electric Generating Plant (VEGP) site is an SNC motion requesting summary disposition in its favor on the Joint Intervenor¹ sole remaining admitted issue statement, amended contention SAFETY-1. This contention concerns SNC's discussion of its plans for storage of the low-level radioactive waste (LLRW) associated with proposed Units 3 and 4. The Nuclear Regulatory Commission (NRC) Staff supports SNC's dispositive motion, while Joint Intervenor¹ oppose the request. Additionally, SNC has filed a motion to exclude portions of Joint Intervenor¹ response or, alternatively, to file a reply, which Joint Intervenor¹ oppose.

For the reasons set forth below, finding that no material factual dispute has been interposed by any party in connection with contention SAFETY-1, we conclude as a matter of law that the LLRW plan outlined in SNC's final safety evaluation report (FSAR) is in accord with the applicable regulatory provision, 10 C.F.R. § 52.79(a)(3). We thus grant the SNC summary disposition motion and enter judgment in its favor regarding contention SAFETY-1, thereby resolving all the contested issues in this proceeding.

I. BACKGROUND

In response to a September 16, 2008 notice of hearing and opportunity to petition for leave to intervene regarding the Vogtle Units 3 and 4 COL application, *see* [SNC] et al.; Notice of Hearing and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the [VEGP] Units 3 and 4, 73 Fed. Reg. 53,446 (Sept. 16, 2008), Joint Intervenor¹ filed a petition to intervene in which they posited three contentions, including SAFETY-1.

Framed in response to the recent closure of the Barnwell, South Carolina LLRW disposal facility to materials coming from, among others, the two existing and the two proposed VEGP reactor units, SAFETY-1 alleged, in pertinent part, that SNC's FSAR submitted as part of its COL application (COLA) was incomplete because it did not discuss SNC's plans for LLRW storage "in the event an off-site waste disposal facility remains unavailable when VEGP Units 3 and 4 begin operations." Petition for Intervention (Nov. 17, 2008) at 7. The Board admitted the contention as follows:

¹ Joint Intervenor¹ include the Center for a Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy, Atlanta Women's Action for New Directions, and Blue Ridge Environmental Defense League (BREDL).

CONTENTION: SNC's COLA is incomplete because the FSAR fails to provide any detail as to how SNC will comply with NRC regulations governing storage of LLRW in the event an off-site waste disposal facility remains unavailable when VEGP Units 3 and 4 begin operations.

LBP-09-3, 69 NRC 139, 169 (2009), *aff'd*, CLI-09-16, 70 NRC 33 (2009).

On the basis of a September 23, 2009 letter from SNC responding to an August 24, 2009 Staff request for additional information (RAI) concerning LLRW storage, *see* Letter from Charles R. Pierce, AP1000 Licensing Manager, SNC, to U.S. NRC Document Control Desk, encl. (Sept. 23, 2009) (ADAMS Accession No. ML092680023) [hereinafter SNC RAI Response Enclosure]; Letter from Donald Habib, Project Manager, NRC, to Joseph A. (Buzz) Miller, Executive Vice President, SNC, encl. (Aug. 24, 2009) (ADAMS Accession No. ML092600698),² Joint Intervenors filed a motion to amend their contention, *see* Joint Intervenors' Motion to Amend Contention SAFETY-1 (Oct. 23, 2009) at 2-3. The Board granted Joint Intervenors' motion and, based on the information provided by Joint Intervenors in support of their motion, revised contention SAFETY-1 as follows:

CONTENTION: SNC's COLA is incomplete because the FSAR fails to provide adequate detail as to how SNC will comply with NRC regulations governing storage of LLRW in the event an off-site waste disposal facility remains unavailable when VEGP Units 3 and 4 begin operations in that it does not contain the following information:

- A. A design plan for the LLRW storage facility for the two new proposed units based on more than assurances that the facility design will comply with NRC requirements, which must include information regarding building materials and high-integrity containers so as to permit a determination regarding exposure rates and dosages;
- B. A specific designation of where on the VEGP site the storage facility will be located; and
- C. A discussion of the health impacts on SNC employees from the additional LLRW storage associated with the two new proposed units.

Licensing Board Memorandum and Order (Ruling on Motion to Amend Contention) (Jan. 8, 2010) app. A (unpublished). In that order, the Board also indicated

²In its RAI response, SNC indicated that it would revise its FSAR § 11.4 to incorporate new language concerning its long-term LLRW storage and disposal plans. *See* SNC RAI Response Enclosure at 3, 5-7. SNC subsequently amended its FSAR to include that language. *See* [SNC], [COLA], Part 2, [FSAR] at 11.4-1, 11.4-3 to -6 (rev. 2 Dec. 2009) (ADAMS Accession No. ML093570429) [hereinafter FSAR].

that it now viewed contention SAFETY-1 as amended to be a legal contention and that it considered the appropriate procedure for resolving the contention to be the filing of summary disposition motions. *See id.* at 8-9.

In accordance with the dispositive motion schedule established for contention SAFETY-1 in the Board's January 8 order, *see id.* at 10, on January 29, 2010, SNC filed a motion, accompanied by a statement of material facts purportedly not at issue, requesting that summary disposition be entered in its favor in connection with contention SAFETY-1. *See* [SNC] Motion for Summary Disposition of Contention SAFETY-1 (Jan. 29, 2010) [hereinafter SNC Dispositive Motion]; [SNC] Statement of Undisputed Facts in Support of Motion for Summary Disposition of Contention SAFETY-1 (Jan. 29, 2010) [hereinafter SNC Statement of Undisputed Facts]. On February 12, 2010, after a weather-related delay, the Staff filed a response in support of the SNC dispositive motion. *See* NRC Staff Answer in Support of [SNC] Motion for Summary Disposition of Contention SAFETY-1 (Feb. 12, 2010) [hereinafter Staff Answer].³ Thereafter, on February 16, the Board issued an order acknowledging the timeliness of the Staff response under 10 C.F.R. § 2.306 and setting a new deadline of March 4 for Joint Intervenor's response to the dispositive motion. *See* Licensing Board Memorandum and Order (Schedule for Joint Intervenor's Response to Dispositive Motion) (Feb. 16, 2010) (unpublished). Accordingly, on March 4, 2010, Joint Intervenor's filed their response opposing SNC's dispositive motion along with a supporting statement of material facts purportedly in dispute. *See* Joint Intervenor's Response to Motion for Summary Disposition of Contention SAFETY-1 (Mar. 4, 2010) [hereinafter Joint Intervenor's Answer]; Joint Intervenor's Statement of Disputed Facts in Response to SNC's Motion for Summary Disposition of Contention SAFETY-1 (Mar. 4, 2010) [hereinafter Joint Intervenor's Statement of Disputed Facts].

Subsequently, on March 15, SNC submitted a motion requesting that the Board exclude portions of Joint Intervenor's answer to SNC's dispositive motion. *See* [SNC] Motion to Exclude Portions of Joint Intervenor's Response to Motion for Summary Disposition of Contention SAFETY-1 or, in the Alternative, for Leave to Reply (Mar. 15, 2010) [hereinafter SNC Motion to Exclude]. In support of its motion to exclude, SNC contends that Joint Intervenor's sought improperly to amend the scope of their admitted contention in two respects: first, by introducing arguments that SNC's onsite storage plan "materially deviates from applicable regulations and guidance" and that onsite storage in general is not an adequate mechanism for handling LLRW; and second, by attacking the validity of SNC's offsite storage options as support for a new assertion that "the Board should

³ Pursuant to the schedule set out in the Board's January 8 order, responses in support of dispositive motions were due February 8, 2010. Because federal offices in the Washington, D.C. area were closed on February 8-11 due to inclement weather, the Staff filed its response on February 12. *See* Staff Answer at 1 n.2.

assume that LLRW will have to be stored onsite.” SNC Motion to Exclude at 8-10 (quoting Joint Intervenors Answer at 10). Accordingly, SNC asserts that the Board should exclude from its consideration those portions of Joint Intervenors’ answer and statement of disputed facts, as well as the associated citations to the expert declaration provided in support of their summary disposition response, that address these topics in connection with SNC’s dispositive motion. *See id.* attach. A. Alternatively, SNC requests that it be given an opportunity, pursuant to 10 C.F.R. § 2.323(c), to file a reply to Joint Intervenors’ answer. *See id.* at 2, 10. In accord with a March 16 Board order, *see* Licensing Board Order (Schedule for Responses to Motion to Exclude or for Leave to Reply; Request for Notice Regarding Issuance of Advanced Safety Evaluation Report Chapter) (Mar. 16, 2010) (unpublished), on March 25, 2010, Joint Intervenors and the Staff filed responses opposing SNC’s motion to exclude. *See* Joint Intervenors’ Response to [SNC] Motion to Exclude Portions of Joint Intervenors’ Response to Motion for Summary Disposition of Contention SAFETY-1 or, in the Alternative, for Leave to Reply (Mar. 25, 2010); NRC Staff Answer to [SNC] Motion to Exclude or in the Alternative for Leave to Reply (Mar. 25, 2010).

II. ANALYSIS

A. Summary Disposition Standards

For proceedings such as this one conducted pursuant to the 10 C.F.R. Part 2, Subpart L “informal” hearing procedures, *see* LBP-09-3, 69 NRC at 165, summary disposition motions are to be resolved in accord with the same standards for dispositive motions that are utilized for “formal” hearings as set forth in 10 C.F.R. Part 2, Subpart G. *See* 10 C.F.R. § 2.1205(c). Under Subpart G, 10 C.F.R. § 2.710 provides that summary disposition may be entered with respect to “all or any part of the matters involved in the proceeding” if the motion, along with any appropriate supporting materials (including affidavits, discovery responses, and documents), shows that there is “no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” *Id.* § 2.710(a), (d)(2).

The party proffering the motion bears the burden of making the requisite showing by providing “a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard.”⁴ *Id.* § 2.710(a). A party opposing the motion must counter any adequately

⁴ Citing the differences between the language in section 2.710(a) and section 2.1205(a), there has been a past instance in which a summary disposition movant in a Subpart L proceeding declined to provide a statement of material facts not in dispute in support of its motion. *See AmerGen Energy Co., LLC*

(Continued)

supported material facts provided by the movant with its own “separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard,” with the recognition that, to the degree the responsive statement fails to contravene any adequately supported material facts proffered by the movant, the movant’s facts “will be considered to be admitted.” *Id.*

B. Analysis of Summary Disposition Motion

1. SNC Position

SNC asserts that, as a matter of law, it is not required to include in its FSAR the design, location, and employee health impact information at issue in contention SAFETY-1. According to SNC, only 10 C.F.R. § 52.79, not 10 C.F.R. Part 20, governs the content of this aspect of its FSAR, *see* SNC Dispositive Motion at 4-5, with section 52.79(a)(3) being the particular focus for the FSAR discussion of LLRW storage, *see id.* at 7. SNC further asserts that section 52.79(a)(3) requires only a discussion of “the ‘means’ for controlling and limiting radioactive effluents and radiation exposures” within Part 20 limits rather than detailed design information. This, according to SNC, is in contrast to section 52.79(a)(4) that requires “information such as ‘principal design criteria,’ ‘design bases,’ and ‘information relative to materials of construction, arrangement, and dimensions, sufficient to provide reasonable assurance that the design will conform to the design bases with adequate margin for safety.’” *Id.* at 8-9 (quoting 10 C.F.R. § 52.79(a)(3), (4)).

In that regard, SNC argues that the more stringent requirements of section 52.79(a)(4) “are triggered *only* when temporary LLRW storage *is a component of the facility to be constructed* under the COL” and are not implicated if, as is the case for proposed Vogtle Units 3 and 4, the additional onsite LLRW storage facility is a contingency plan. *Id.* at 9. Additionally, SNC cites as relevant to its assertions the regulatory guidance from NUREG-0800, the Staff’s standard review plan for reviewing a reactor applicant’s SAR, and Regulation Information Summary (RIS) 2008-32, which provides Staff guidance to operating reactors on LLRW disposal in the wake of the Barnwell closure. According to SNC, as these documents instruct nuclear plant licensees that “on-site storage should only be utilized if off-site options are unavailable” and that they may use

(License Renewal for Oyster Creek Nuclear Generating Station), Licensing Board Memorandum and Order (Denying AmerGen’s Motion for Summary Disposition), Docket No. 50-0219-LR (June 19, 2007) at 10 n.12 (unpublished). Notwithstanding the Commission’s statement that section 2.1205 is intended to provide a “simplified procedure for summary disposition in informal proceedings,” Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2228 (Jan. 14, 2004), we fail to see how not providing such a statement (and the corresponding statement of disputed material facts from the responding party) makes the summary disposition process simpler.

the procedures in 10 C.F.R. §§ 50.59 or 50.90 to expand onsite LLRW storage facilities, they are further evidence that COL applicants are not required to describe “at a construction-level of detail” onsite LLRW storage facilities that are merely contingent. *Id.* at 10-13 (citing NUREG-0800, “Standard Review Plan for the Review of [SARs] for Nuclear Power Plants,” app. 11.4-A (rev. 3 Mar. 2007) (ADAMS Accession No. ML0707103970) [hereinafter NUREG-0800]; Office of Nuclear Reactor Regulation, NRC, NRC [RIS] 2008-32, Interim [LLRW] Storage at Reactor Sites at 3-4 (Dec. 30, 2008) (ADAMS Accession No. ML082190768) [hereinafter RIS 2008-32]).

Finally, in further support of its dispositive motion, SNC submits sixteen purported undisputed material factual statements regarding the contents of its FSAR generally discussing LLRW storage and disposal, potential offsite storage and disposal options, and the contents of its FSAR specifically describing its contingent onsite storage plan. *See* SNC Statement of Undisputed Facts. In this regard, SNC asserts that it has three offsite disposal options for LLRW from Units 3 and 4: (1) the EnergySolutions, Inc. facility near Clive, Utah, which is licensed by the State of Utah to accept Class A LLRW for disposal; (2) the Waste Control Specialists, Inc. facility near Andrews, Texas, which currently has pending with the Texas LLRW Disposal Compact Commission (TDCC) a request for authorization to accept Class A, B, and C LLRW for disposal from entities in states outside the Texas-Vermont compact that it expects to be acted upon in 2010; and (3) the Studsvik, Inc. facility near Erwin, Tennessee, which (a) is licensed by the State of Tennessee to accept Class A, B, and C waste, (b) under its Tennessee license can take title to transferred LLRW, and (c) offers a service to the nuclear industry whereby Studsvik accepts (and takes title to) Class B and C LLRW, processes such waste, and then transports the waste to the WCS Andrews, Texas facility for storage until a permanent disposal option becomes available. *See id.* at 4-5; *id.* exh. A, at 1-2 (Affidavit of Steven Jameson (Jan. 29, 2010)). Further, relative to onsite storage, referencing the provisions of its FSAR § 11.4.6.3, SNC declares that although the radwaste building associated with Units 3 and 4 will hold only 6-months’ volume of packaged LLRW, onsite LLRW storage capacity can be expanded via an outside storage pad constructed in accord with NUREG-0800, app. 11.4-A. According to SNC, such additional onsite storage can be provided utilizing suitable containers that will not decay over time, sited such that the onsite facility can be sized to accommodate storage of Class B and C waste (which will be subject to minimization/volume reduction measures), and designed to accommodate future expansion as needed, with capacity added in phases based on the availability of offsite treatment, storage, and disposal facilities. *See id.* at 5-7.

2. Staff Position

Although not taking a position on whether SNC has actually satisfied the requirements of 10 C.F.R. § 52.79 with regard to its FSAR discussion of LLRW, the Staff nonetheless concurs with SNC's legal arguments regarding the requirements of section 52.79(a)(3) and (a)(4). *See* Staff Answer at 5. Accordingly, the Staff argues that the information listed in contention SAFETY-1 is not required in a COL application and that SNC's summary disposition motion should therefore be granted. *See id.* at 6-9.

3. Joint Intervenors' Position

For their part, Joint Intervenors emphasize language in 10 C.F.R. § 52.79(a) requiring an FSAR to describe “*the facility as a whole . . . at a level of information sufficient to enable the Commission to reach a final conclusion*” on safety matters relevant to the issuance of a COL. Joint Intervenors Answer at 4-5 (quoting 10 C.F.R. § 52.79(a) (emphasis in original)). Joint Intervenors argue that this language is intended to “apply to all parts of the plant that have a bearing on its safe operation” and therefore includes any onsite LLRW storage. *Id.* at 5. Joint Intervenors also assert that compliance with 10 C.F.R. § 52.79(a)(3) requires “a description of means [that] must show how the intended goal will be accomplished, and not be a mere commitment to accomplish it.” *Id.* Additionally, Joint Intervenors recite the Commission's statement in its July 2009 ruling reviewing the admissibility of contention SAFETY-1 that 10 C.F.R. § 52.79(a)(3) requires information “*“tied to the COL applicant's particular plans for compliance through design, operational organization, and procedures,”*” as well as reference RIS 2008-32 and section 11.4 of NUREG-0800 as evidence that the Commission intended the design, location, and health and safety impacts of an LLRW storage facility to be included in a COL applicant's FSAR. *Id.* at 6-9 (quoting CLI-09-16, 70 NRC at 37 (emphasis in original)).

Finally, Joint Intervenors dispute SNC's statement of facts with regard to the availability of the WCS and Studsvik offsite storage and disposal options for Class B and C LLRW and, accordingly, argue that the Board should assume that SNC's onsite LLRW storage facility will be necessary rather than contingent. *See id.* at 9-10. According to Joint Intervenors, although the WCS facility has a valid license to store and process LLRW, it may be unable to accept Plant Vogtle waste because of duration restrictions and radioactivity limitations that would lead to a lack of storage space at WCS for the waste from facilities in the various states, such as Georgia, that now lack affiliation with a compact having access to an operational disposal site. Moreover, while the WCS facility has a license to dispose of LLRW, there are (1) conditions imposed by the Texas Commission on Environmental Quality (TCEQ) that must be fulfilled before it can begin commercial LLRW

disposal; and (2) a limitation on accepting waste from outside the Texas-Vermont compact, although Joint Intervenors note that permitting waste importation from outside the compact is under consideration in a current rulemaking (35 Tex. Reg. 1028 (Feb. 12, 2010)). Joint Intervenors note further that the WCS license and the facility's funding source are being challenged in the Texas state courts. And with regard to the Studsvik facility, Joint Intervenors declare that a 1-year limitation in the Studsvik storage contract on Studsvik's retention of any accepted waste makes this an implausible long-term waste storage option. *See* Joint Intervenors Statement of Disputed Facts at 7-9; Joint Declaration of Arjun Makhijani and Diane D'Arrigo in Support of Intervenors' Opposition to Motion for Summary Disposition of Contention SAFETY-1, at unnumbered pp. 2-4 (Mar. 4, 2010) [hereinafter Makhijani/D'Arrigo Declaration]. Joint Intervenors also dispute SNC statements regarding the composition and volume of the LLRW that will be generated by Units 3 and 4 as well as the efficacy of outdoor pads as a safe storage method. *See* Joint Intervenors Statement of Disputed Fact at 4, 6; Makhijani/D'Arrigo Declaration at unnumbered pp. 5-6.

4. Board Ruling

After reviewing the information provided by the parties in their summary disposition-related filings, we conclude that the legal question of whether the items listed in contention SAFETY-1 are required in SNC's FSAR for Vogtle Units 3 and 4 depends on (1) which provision of 10 C.F.R. § 52.79(a), i.e., paragraph 3 or paragraph 4, governs the contingent LLRW storage facility; and (2) what level of detail is required by the relevant provision.⁵

On the matter of the controlling provision of section 52.79(a), we agree with SNC's and the Staff's position that paragraph (a)(4), which might well require the type of design features that Joint Intervenors seek by way of contention SAFETY-1, governs only those structures that are "*a component of the facility to be constructed* under the COL." SNC Dispositive Motion at 9; *see* Staff Answer at 6. As contention SAFETY-1 by its own terms appears to concede, however, a Vogtle Units 3 and 4 long-term onsite LLRW storage facility only would be needed "in the event an off-site waste disposal facility remains unavailable when VEGP Units 3 and 4 begin operations." On that score, the information Joint Intervenors provide regarding offsite disposal options at best suggests that SNC might not have an offsite option when needed following the beginning of

⁵ As SNC points out, although 10 C.F.R. Part 20 "establish[es] standards for protection against ionizing radiation," it does not define the required contents of an FSAR and therefore does not guide the resolution of contention SAFETY-1. SNC Dispositive Motion at 5 (quoting 10 C.F.R. § 20.1001(a)).

facility operation.⁶ This is not, however, the same as showing that SNC must build an additional long-term onsite storage facility under the auspices of its COL to manage LLRW generated by proposed Vogtle Units 3 and 4 because it is certain offsite storage or disposal will be unavailable when needed after facility operations begin. That facility thus is not one that must be constructed under the COL. Certainly, such an interpretation is consistent with the longstanding agency recognition of the availability of the mechanisms under 10 C.F.R. §§ 50.59 or 50.90 for obtaining authorization to construct additional onsite LLRW storage facilities. *See* RIS 2008-32, at 2-4. We thus conclude that SNC's contingent long-term onsite LLRW storage facility, and the contents of SNC's FSAR with regard to that facility, are not governed by section 52.79(a)(4) as a part of the reactor facilities to be constructed under the requested COLs for Units 3 and 4.

As a consequence, the requisite content of SNC's FSAR discussion of long-term LLRW storage depends on the application of 10 C.F.R. § 52.79(a)(3) and what is meant by its requirement to provide information on the "means for controlling and limiting radioactive effluents and radiation exposures." We find nothing in the rule or the cited Commission statements regarding LLRW that indicate section 52.79(a)(3) requires the detailed design, location, and health impacts information outlined in amended contention SAFETY-1. Unlike section 52.79(a)(4), section 52.79(a)(3) does not list "principal design criteria," "design bases," or "[i]nformation relative to materials of construction, arrangement, and dimensions" as items that must be discussed in the FSAR. *Compare* 10 C.F.R. § 52.79(a)(3) *with id.* § 52.79(a)(4)(i)-(iii). Nor does the Commission's language in CLI-09-16 indicate that "means" includes actual design, location, or health impacts information. Rather, the Commission seems merely to have been stating that the information required under section 52.79(a)(3) is tied to the applicant's "particular plans for compliance through," but not necessarily the details of, "design, operational organization, and procedures" associated with any contingent long-term LLRW facility. CLI-09-16, 70 NRC at 37.

We also do not agree with Joint Intervenors' argument that NUREG-0800, Appendix A "implies that the location of the onsite LLRW storage facility is an integral part of the facility design" and so establishes that the "means" required by section 52.79(a)(3) include such a design-related element. Joint Intervenors Answer at 8-9. We see this as a variation on Joint Intervenors' assertion that, regardless of the contingent nature of any long-term onsite LLRW storage facility,

⁶For example, the Joint Intervenors disputed facts statement asserts that WCS, one of the offsite options SNC discussed in support of its motion, "may be unable to accept waste from Plant Vogtle in the future," Joint Intervenors Statement of Disputed Facts at 6 (emphasis added), and the accompanying supporting expert declaration states that WCS currently has a LLRW storage license renewal application under TCEQ review and that the license is still in effect during the review period, *see* Makhijani/D'Arrigo Declaration at unnumbered p. 3.

such a storage site nonetheless should be treated as part of the COL facility and thus be described in accordance with the detailed requirements of section 52.79(a)(4). As we discussed above, because any Units 3 and 4 long-term LLRW facility is merely contingent at this stage, we conclude that section 52.79(a)(4) does not govern its description in SNC's FSAR.

We therefore find no requirement in section 52.79(a)(3) for SNC's FSAR to include, as contention SAFETY-1 maintains, details regarding "building materials and high-integrity containers," exact location, or health impacts on employees for the Vogtle Units 3 and 4 contingent onsite long-term LLRW storage facility.⁷ Thus, we conclude that, as a matter of law, SNC's FSAR need not include the details listed in contention SAFETY-1.

We would add as well that, in reaching these determinations regarding the requirements associated with section 52.79(a), we find that there is no dispute as to any material fact with respect to contention SAFETY-1. In their response, Joint Intervenors largely dispute SNC's statements regarding offsite disposal and storage options for Class B and C LLRW, specifically the WCS facility in Texas and the Studsvik, Inc., waste processing facility in Tennessee. *See* Joint Intervenors Statement of Disputed Facts at 6, 7-9. This challenge centers on how likely those offsite facilities will be to accept LLRW from Vogtle Units 3 and 4. Even assuming there is some probability, even a high probability, that SNC could not send LLRW from Vogtle Units 3 and 4 to either of those sites, as Joint Intervenors' own submissions indicate, *see supra* note 6, the possibility, albeit contingent, of offsite storage and disposal nonetheless remains so as not to bring any FSAR discussion of a long-term LLRW facility for Units 3 and 4 under section 52.79(a)(4) rather than section 52.79(a)(3).⁸ Additionally, although Joint Intervenors challenge SNC's stated volumes of wet and dry Class B and C waste,

⁷ Because contention SAFETY-1 focuses on the safety rather than environmental-related aspects of the SNC application, it is not apparent the issue we resolve in this ruling has any particular implications for the contention challenging the environmental impacts of long-term onsite LLRW storage admitted and pending in the *Levy County* COL proceeding. *See Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 123 (2009) (admitting LLRW storage-related safety and environmental contentions); *Levy County*, Licensing Board Order (Approving Settlement and Dismissal of Contention 8) (Apr. 21, 2010) (dismissing safety-related LLRW storage contention of omission as settled) (unpublished).

⁸ In support of their disputed facts statement, Joint Intervenors' expert declaration also indicates that it is speculative whether disposal of out-of-state waste would be permitted at the WCS facility given the estimated disposal requirements of compact members Texas and Vermont. *See Makhijani/D'Arrigo* Declaration at unnumbered p. 4. This assertion, however, fails to account for the TDCC's ongoing rulemaking under which out-of-compact entities could be permitted to import LLRW for disposal at the WCS site. *See id.* at unnumbered p. 2. By the same token, given SNC's reliance on the WCS facility as an LLRW disposal planning option, a subsequent action by the TDCC that did not permit out-of-compact entities to import LLRW for disposal at the WCS site could provide the basis for a new contention in this proceeding. *See* 10 C.F.R. § 2.309(c).

see Joint Intervenors Statement of Disputed Facts at 4, and question whether the LLRW facility described in the AP1000 design certification document (DCD) can accommodate an extended period of delay in the availability of offsite disposal or storage options, *see id.* at 5-6, neither of these points affects whether SNC should have included further detail concerning its contingent onsite long-term LLRW storage facility in its FSAR.⁹ Finally, Joint Intervenors challenge SNC's characterization of the adequacy or level of detail in its revised FSAR, *see id.* at 3-4, 10-12, but these disputes do not concern material matters of fact in this context.¹⁰ Thus, we find that no material factual dispute exists relative to contention SAFETY-1 that would preclude the entry of summary disposition in favor of SNC.¹¹

III. CONCLUSION

Joint Intervenors' amended contention SAFETY-1 posits several different alleged deficiencies in applicant SNC's FSAR plan for addressing the storage of LLRW from proposed Vogtle Units 3 and 4 in light of the closure of the LLRW repository at Barnwell, South Carolina. For the reasons set forth above, however, we find these purported failures to provide detailed information regarding design, location, and worker health impacts do not identify a deficiency under 10 C.F.R. § 52.79(a)(3), the agency's regulatory provision governing the FSAR LLRW information that is required to be provided in the SNC COL application.¹² Given

⁹This dispute concerning waste volumes also relates to the accuracy of information that SNC did include in its FSAR, which Joint Intervenors did not challenge in either their original or amended contention SAFETY-1, a circumstance that differentiates this case from the recent Licensing Board decision in the *North Anna* COL proceeding, in which an amended contention challenging an applicant's FSAR LLRW storage plan was admitted based on intervenor BREDL's adequately supported challenge to the plan's provisions regarding waste volume reduction. *See Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-09-27, 70 NRC 992, 1016 (2009), *reconsideration denied*, Licensing Board Order (Denying Motion for Reconsideration of LBP-09-27) (Mar. 22, 2010) (unpublished).

¹⁰Both Joint Intervenors and the Staff also note that SNC misstated the issuance date of the Vogtle Units 3 and 4 early site permit (ESP). *See* Joint Intervenors Statement of Disputed Facts at 2; Staff Answer at 9. However, that error does not raise a dispute on a material fact related to the required content of SNC's FSAR with regard to its LLRW storage plans.

¹¹Because we find nothing in Joint Intervenors' disputed facts statement that creates a material factual dispute, we need not give further consideration to the SNC motion to exclude portions of Joint Intervenors' response or, alternatively, to file a reply.

¹²Given the current situation with the closure of the Barnwell facility to LLRW from states outside the Atlantic Compact, our ruling in this instance should not be interpreted as in any way relieving COL applicants that lack access to Barnwell or the LLRW disposal facility in Hanford, Washington,
(Continued)

this determination regarding the application of section 52.79(a)(3), along with our determination that there are no material factual disputes associated with the SNC motion that would prevent the entry of summary disposition, we conclude that summary disposition regarding contention SAFETY-1 should be entered in favor of SNC. Further, because there are no additional contentions pending before the Board in this COL proceeding, with this ruling the contested portion of this proceeding is concluded.

For the foregoing reasons, it is, this 19th day of May 2010, ORDERED that

1. The January 29, 2010 motion for summary disposition of applicant SNC with respect to Joint Intervenors' contention SAFETY-1 is *granted* and judgment is entered in SNC's favor with respect to contention SAFETY-1.

2. As this Memorandum and Order concludes the contested portion of this COL proceeding in that no admitted contentions remain for litigation,¹³ in accord with 10 C.F.R. § 2.341(b)(1), any petition for review shall be filed within fifteen (15) days after this issuance is served.

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

James F. Jackson
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 19, 2010

of the need in their safety analysis report and/or environmental report to outline adequately their plans for long-term LLRW onsite and offsite storage and disposal.

¹³ A mandatory/uncontested hearing must, of course, still be conducted in this proceeding. *See* 73 Fed. Reg. at 53,446-47. Additionally, a hearing opportunity notice currently is outstanding in this proceeding relative to a pending SNC supplement to its COLA by which SNC requests a limited work authorization to engage in selected construction activities as defined by 10 C.F.R. § 50.10. *See* [SNC], et al.: Supplementary Notice of Hearing and Opportunity to Petition for Leave to Intervene on a [COLA] for the [VEGP] Units 3 and 4, 75 Fed. Reg. 23,306 (May 3, 2010).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of

Docket No. 50-293-LR

**ENTERGY NUCLEAR GENERATION
COMPANY and ENTERGY
NUCLEAR OPERATIONS, INC.
(Pilgrim Nuclear Power Station)**

June 17, 2010

The Commission addresses a petition for review of several Atomic Safety and Licensing Board decisions, including LBP-08-22, 68 NRC 590 (2008), LBP-06-23, 64 NRC 257 (2006), and interlocutory decisions, and denies review of these Board decisions. An earlier Commission decision, CLI-10-11, 71 NRC 287 (2010), *reconsideration denied*, CLI-10-15, 71 NRC 479 (2010) addressed the petition's request for review of LBP-07-13, 66 NRC 131 (2007), and granted review of and partially reversed LBP-07-13.

LICENSE RENEWALS

The NRC's license renewal safety regulations are set forth in 10 C.F.R. Part 54. Underlying the renewal regulations is the principle that each nuclear power plant has a plant-specific licensing basis that must be maintained during the renewal term in the same manner and to the same extent as during the original licensing term. The current licensing basis is the set of NRC requirements applicable to a specific plant. The current licensing basis does not remain static. The NRC continually reassesses the current licensing basis through the regulatory

oversight process, including plant-specific and generic reviews, plant inspections, and enforcement actions.

LICENSE RENEWALS

The aging management review for license renewal focuses on structures and components that perform passive functions — with no moving parts or changes in configuration or properties. Further, the license renewal safety review focuses on those systems, structures, and components that are of principal importance to safety. The general scope of the license renewal safety review is outlined in 10 C.F.R. § 54.4.

LICENSE RENEWALS

Section 54.4(a)(1)(3) outlines the three general categories of systems, structures, and components (SSCs) falling within the initial focus of the license renewal safety review. The first category (§ 54.4(a)(1)) consists of all safety-related SSCs. These are SSCs relied upon to remain functional during and following design-basis events to ensure the integrity of the reactor coolant pressure boundary, the capability to shut down the reactor and maintain it in a safe shutdown condition, or the capability to prevent or mitigate the consequences of accidents which could result in potential offsite exposures comparable to those referred to in sections 50.34(a)(1), 50.67(b)(2), or 100.11. The second category (§ 54.4(a)(2)) consists of all non-safety-related SSCs whose failure could prevent satisfactory accomplishment of any of the safety functions identified in section 54.4(a)(1). The third category (§ 54.4(a)(3)) consists of all SSCs relied on in safety analyses or plant evaluations to perform a function that demonstrates compliance with the NRC's regulations for fire protection, pressurized thermal shock, anticipated transients without scram, and station blackout.

LICENSE RENEWALS

From among the three general categories of SSCs that fall within the initial focus of the license renewal safety review, applicants must identify and list, in an integrated plant assessment (IPA), those structures and components subject to an aging management review. Section 54.21 provides the standards for determining which structures and components require an aging management review.

LICENSE RENEWALS

SSCs requiring an aging management review perform an “intended function”

as described in section 54.4. These are the functions outlined in the three general categories of SSCs within the initial scope of license renewal. Additionally, SSCs subject to an aging management review perform an intended function in a *passive* fashion, and they are not already subject to replacement based on a qualified life or specified time period.

LICENSE RENEWALS

For each structure or component requiring an aging management review, a license renewal applicant must demonstrate that the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the CLB for the period of extended operation.

REASONABLE ASSURANCE

The reasonable assurance determination for license renewal need not be reduced to a mechanical verbal formula or set of objective standards but may be given content through case-by-case applications of the Commission's technical judgment in light of all relevant information. The reasonable assurance determination is not quantified as equivalent to a percent confidence level, but is based on sound technical judgment of the particulars of a case and on compliance with our regulations.

LICENSE RENEWALS: ENVIRONMENTAL REVIEW

A license renewal applicant need not address mitigation for issues designated "Category 1." The license renewal rulemaking history makes clear that an issue cannot be identified as "Category 1" if the NRC has not made a generic determination that additional mitigation measures are unlikely to be warranted, given mitigation practices already in place.

LICENSE RENEWALS: ENVIRONMENTAL REVIEW

Onsite storage of spent fuel during the license renewal term is a "Category 1" issue, and as such explicitly has been found not to warrant any additional site-specific analysis of mitigation measures.

MEMORANDUM AND ORDER

I. INTRODUCTION

This proceeding stems from the application of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (together, Entergy or Applicant) to renew the operating license for the Pilgrim Nuclear Power Station for an additional 20 years beyond the current operating license expiration date of June 8, 2012. The intervenor in this proceeding is Pilgrim Watch, a nonprofit citizens' organization. In a request for hearing and petition to intervene, Pilgrim Watch submitted five contentions challenging the renewal application.¹ The Atomic Safety and Licensing Board granted the intervention petition, admitting the following two contentions: (1) Contention 1, a safety contention challenging Entergy's aging management program for buried pipes; and (2) Contention 3, an environmental contention challenging Entergy's severe accident mitigation alternatives (SAMA) analysis.²

In response to an Entergy motion for summary disposition, a majority of the Board dismissed Contention 3 prior to hearing.³ The Board went on to hold an evidentiary hearing on Contention 1, regarding buried piping. Following the hearing, the Board issued LBP-08-22, an Initial Decision resolving all Contention 1 issues in favor of Entergy.⁴

Pilgrim Watch has filed a petition for review, pursuant to 10 C.F.R. § 2.341(b). Pilgrim Watch petitions for review of LBP-08-22 (ruling on the merits of Contention 1), LBP-07-13 (dismissing Contention 3), LBP-06-23 (ruling on contention admissibility), and "the many interlocutory decisions in this proceeding."⁵

¹ Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) (Petition for Hearing).

² LBP-06-23, 64 NRC 257 (2006).

³ LBP-07-13, 66 NRC 131 (2007).

⁴ 68 NRC 590 (2008). Judge Ann Marshall Young issued a Concurring Opinion.

⁵ Pilgrim Watch's Petition for Review of LBP-06-848 [sic], LBP-07-13, LBP-06-23 and the Many Interlocutory Decisions in the Pilgrim Nuclear Power Station Proceeding (Nov. 12, 2008) (Petition for Review). In addition to LBP-08-22, LBP-07-13, and LBP-06-23, Pilgrim Watch also challenges LBP-07-12, 66 NRC 113 (2007), Memorandum and Order (Ruling on Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 1, Regarding Adequacy of Aging Management Program for Buried Pipes and Tanks and Potential Need for Monitoring Wells to Supplement Program); Order (Revising Schedule for Evidentiary Hearing and Responding to Pilgrim Watch's December 14 and 15 Motions) (Dec. 19, 2007) (unpublished); Order (Denying Pilgrim Watch's Motion for Reconsideration) (Jan. 11, 2008) (unpublished); and Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Evidence Relating to Pilgrim Watch Contention 1) (June 4, 2008) (unpublished).

Both Entergy and the NRC Staff oppose review of any of these Board decisions.⁶ We requested additional briefs from the parties on LBP-07-13 and Contention 3, the SAMA contention.⁷

In CLI-10-11, we granted review of and partially reversed LBP-07-13, and remanded Contention 3 to the Board for hearing and further action as appropriate.⁸ For the reasons outlined below, we deny review of all other Board decisions Pilgrim Watch challenges.

II. ANALYSIS

We will grant a petition for review at our discretion, giving due weight to the existence of a substantial question with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which [we] may deem to be in the public interest.⁹

As discussed below, Pilgrim Watch has not raised a substantial question warranting review.

A. Scope of License Renewal Safety Review

Because a portion of Pilgrim Watch's claims bear on the scope of license renewal, we begin with a brief description of the NRC's license renewal safety regulations, set forth in 10 C.F.R. Part 54. Underlying the renewal regulations is the principle that each nuclear power plant has a plant-specific licensing basis that must be maintained during the renewal term "in the same manner and to the same extent as during the original licensing term."¹⁰ The current licensing basis

⁶ See NRC Staff's Answer in Opposition to Pilgrim Watch's Petition for Review of LBP-08-22, LBP-07-13, LBP-06-23 and Interlocutory Decisions (Nov. 24, 2008) (Staff Answer); Entergy's Answer Opposing Pilgrim Watch's Petition for Review (Nov. 24, 2008) (Entergy Answer).

⁷ See CLI-09-11, 69 NRC 529 (2009).

⁸ See CLI-10-11, 71 NRC 287 (2010), *reconsideration denied*, CLI-10-15, 71 NRC 479 (2010).

⁹ See 10 C.F.R. § 2.341(b)(4)(i)-(v).

¹⁰ Final Rule: "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461, 22,464 (May 8, 1995) (License Renewal Rule).

(CLB) is the set of NRC requirements (including regulations, orders, technical specifications, and license conditions) applicable to a specific plant, and includes the licensee’s written, docketed commitments for ensuring compliance with applicable NRC requirements and the plant-specific design basis.¹¹

The CLB is not static. It is an “evolving set of requirements and commitments for a specific plant that [is] modified as necessary over the life of a plant to ensure continuation of an adequate level of safety.”¹² Both during the original license term and continuing through the renewal term, the NRC “continually assesses the adequacy of and compliance with” the licensing basis, and does so through the NRC regulatory oversight process, which includes generic and plant-specific reviews, plant inspections, and enforcement actions.¹³

The objective of the license renewal regulations is “to supplement the regulatory process, if warranted, to provide sufficient assurance that adequate safety will be assured during the extended period of operation.”¹⁴ In developing the renewal regulations, the Commission concluded that the “only issue” where the regulatory process may not adequately maintain a plant’s current licensing basis involves the potential “detrimental effects of aging on the functionality of certain systems, structures, and components in the period of extended operations.”¹⁵

The aging management review for license renewal does not focus on all aging-related issues, however. The review focuses on structures and components that perform “passive” intended functions — with no moving parts or changes in configuration or properties — such as maintaining pressure boundary or structural integrity. Detrimental effects of aging on passive functions of structures and components are less apparent than aging effects on active functions of structures and components.¹⁶ Existing regulatory programs, including required maintenance programs, can be expected to “directly detect the effects of aging” on active functions.¹⁷

Further, the license renewal safety review focuses upon “those systems, structures, and components [SSCs] that are of principal importance to safety.”¹⁸ The general scope of the license renewal safety review is outlined in 10 C.F.R. § 54.4 (“Scope”). The scope is intended to (1) “reflect an appropriate consideration of

¹¹ See 10 C.F.R. § 54.3.

¹² License Renewal Rule, 60 Fed. Reg. at 22,473.

¹³ *Id.*; see also *id.* at 22,485.

¹⁴ *Id.* at 22,464.

¹⁵ *Id.*

¹⁶ *Id.* at 22,476; see also *id.* at 22,471-72, 22,477.

¹⁷ *Id.* at 22,472. Examples of structures or components that perform “active” functions are pumps and valves (which have moving parts), an electrical relay (which can change its configuration), and a battery (which changes its electrolyte properties when discharging).

¹⁸ *Id.* at 22,466; see also *id.* at 22,467.

the existing regulatory process”; (2) “properly focus the initial license renewal review on those systems, structures, and components that are most important to safety”; and (3) “not result in an unwarranted re-examination of the entire plant.”¹⁹

Section 54.4(a)(1)-(3) outlines the three general categories of SSCs falling within the “initial focus” of the safety review.²⁰ The first category (§ 54.4(a)(1)) consists of all “safety-related” SSCs. These are SSCs “relied upon to remain functional during and following design-basis events” to ensure the integrity of the reactor coolant pressure boundary; the capability to shut down the reactor and maintain it in a safe shutdown condition; or the capability to prevent or mitigate the consequences of accidents which could result in potential offsite exposures comparable to those referred to in sections 50.34(a)(1), 50.67(b)(2), or 100.11.²¹

The second category (§ 54.4(a)(2)) consists of all non-safety-related SSCs whose failure could prevent satisfactory accomplishment of any of the safety functions identified above.²² This category would include, for example, “auxiliary systems, necessary for the function of safety-related systems.”²³

The third category (§ 54.4(a)(3)) consists of all SSCs relied on in safety analyses or plant evaluations to perform a function that demonstrates compliance with the NRC’s regulations for fire protection (10 C.F.R. § 50.48), environmental qualification (10 C.F.R. § 50.49), pressurized thermal shock (50 C.F.R. § 50.61), anticipated transients without scram (ATWS) (10 C.F.R. § 50.62), and station blackout (10 C.F.R. § 50.63).²⁴ From industry operating experience and continuing regulatory analysis, the Commission determined that SSCs necessary for compliance with these regulations “provide substantial additional protection to the public health and safety or are an important element in providing adequate protection to the public health and safety.”²⁵ These SSCs, therefore, are included within the initial scope of the renewal safety review, even if they otherwise might be “considered outside the traditional definition of safety-related,” and “outside of the first two categories” in section 54.4(a).²⁶

Section 54.4(a) merely outlines the three general categories of SSCs that fall within the “initial focus” of the license renewal review.²⁷ From among these SSCs, license renewal applicants must identify and list — in an integrated plant assess-

¹⁹ *Id.* at 22,468.

²⁰ *Id.* at 22,465.

²¹ See 10 C.F.R. § 54.4(a)(1)(i)-(iii). “Safety-related structures, systems, and components” is an NRC term of art. See 10 C.F.R. § 50.2 (defining the term).

²² 10 C.F.R. § 54.4(a)(2); see also License Renewal Rule, 60 Fed. Reg. at 22,465.

²³ See License Renewal Rule, 60 Fed. Reg. at 22,465.

²⁴ 10 C.F.R. § 54.4(a)(3).

²⁵ See License Renewal Rule, 60 Fed. Reg. at 22,465.

²⁶ See *id.*

²⁷ See *id.*

ment (IPA) — those structures and components subject to an aging management review. Section 54.21 provides the standards for determining which structures and components require an aging management review. SSCs requiring an aging management review perform “an intended function, as described in § 54.4.”²⁸ These are the functions outlined in the three general categories of SSCs within the initial scope of license renewal — the safety functions outlined in section 54.4(a)(i)-(iii) (e.g., ensuring integrity of the reactor pressure coolant boundary); nonsafety functions that are necessary to ensure satisfactory accomplishment of safety functions; and functions that demonstrate compliance with the Commission’s regulations for fire protection, environmental qualification, pressurized thermal shock, ATWS, and station blackout.²⁹

Additionally, SSCs subject to an aging management review perform an intended function in a *passive* fashion (“without moving parts or without a change in configuration or properties”); and are not already subject to replacement based on a qualified life or specified time period.³⁰ For each structure or component requiring an aging management review, a license renewal applicant must demonstrate that the “effects of aging will be adequately managed so that the *intended function(s)* will be maintained consistent with the CLB for the period of extended operation.”³¹

B. Contention 1

In Contention 1, Pilgrim Watch challenged the adequacy of Entergy’s aging management program for buried pipes and tanks. Specifically, the contention challenged the “Buried Pipes and Tanks Inspection Program” in Entergy’s Safety Analysis Report (SAR).³² As described in the SAR, the aging management program for buried piping and tanks includes preventive measures to mitigate corro-

²⁸ 10 C.F.R. § 54.21(a)(1)(i).

²⁹ See 10 C.F.R. § 54.4(b) (“intended functions” that SSCs “must be shown to fulfill in § 54.21 are those functions that are the bases for including them within the scope of license renewal as specified in paragraphs (a)(1)-(3) of” section 54.4).

³⁰ See 10 C.F.R. § 54.21(a)(1)-(2). For those structures and components already subject to periodic replacement, the license renewal application must provide time-limited aging analyses, demonstrating that existing replacement programs will provide reasonable assurance that the effects of aging on intended functions will be adequately managed for the period of extended operation. See 10 C.F.R. § 54.21(c).

³¹ 10 C.F.R. § 54.21(a)(3) (emphasis added).

³² See Petition for Hearing at 4-16 (referencing Entergy License Renewal Application, Pilgrim Nuclear Power Station, Appendix A, § A.2.1.2 at A-14; Appendix B, § B.1.2 at B-17 (Jan. 27, 2006) (Entergy Application)).

sion, and inspections to manage the effects of corrosion on the pressure-retaining capability of buried carbon steel, stainless steel, and titanium components.³³

Contention 1 challenged the program's frequency and method of inspection, claiming that there should be "frequent inspections of all components that contain radioactive water in this aging plant."³⁴ The contention also called for monitoring wells to detect "small but steady leaks [that] could go undetected for months" and could "percolate into local groundwater or Cape Cod Bay."³⁵

Preventing potential offsite groundwater contamination due to undetected leaks of radioactive liquids from buried pipes and tanks was the clear focus of Contention 1:

Nuclear Power Plants have underground pipes containing large quantities of radioactively contaminated water. . . . Large leaks in these pipes may be detected by a drop of water level in a tank or via increased makeup to a tank. However, smaller leaks, if undetected, can eventually result in much larger releases of radioactive liquid into the ground, and are more difficult to detect The topography of the Pilgrim site is such that, were a leak to develop in an underground pipe or tank, the contaminated water would most likely migrate seaward and drain into the ocean The only effective way to monitor for such an occurrence would be to have on-site monitoring wells located between Pilgrim and the ocean.³⁶

Among its proffered bases, the contention referred to incidents involving leaks of radioactively contaminated water from buried pipes or tanks that have occurred at other facilities.³⁷ Pilgrim Watch claimed that in "most of the recent cases of leaked radioactive water, the leaks were detected by monitoring wells, but often not until long after the leaks occurred."³⁸

The Board admitted Contention 1, noting that it challenged a specific aging management program described in Entergy's application.³⁹ The Board stated that Contention 1 "challenges the absence of monitoring wells to serve as leak detection devices, strategically placed between the plant and the coast toward which all water that may be released through any leaks from such pipes and tanks would flow."⁴⁰ The Board emphasized, however, that the contention would be limited to those underground pipes and tanks that fall within the scope of the

³³ Entergy Application, Appendix at A-14; Appendix B at B-17.

³⁴ Petition for Hearing at 12.

³⁵ *See id.* at 9, 13-16.

³⁶ *Id.* at 13; *see also id.* at 6-9, 13-15.

³⁷ *Id.* at 6-7.

³⁸ *Id.* at 13.

³⁹ *See* LBP-06-23, 64 NRC at 310-15.

⁴⁰ *Id.* at 315.

license renewal safety review in 10 C.F.R. Part 54, an issue which could require further clarification as the proceeding progressed.⁴¹

As originally admitted by the Board, Contention 1 read as follows:

The Aging Management program proposed in the Pilgrim Application for license renewal is inadequate with regard to aging management of buried pipes and tanks that contain radioactively contaminated water, because it does not provide for monitoring wells that would detect leakage.⁴²

Subsequently, Entergy moved for summary disposition of Contention 1, claiming that Pilgrim Watch misunderstood the purpose and scope of the Entergy aging management program for buried piping and tanks. Entergy argued that the program is not focused upon preventing leakage of radioactive liquids that may contaminate groundwater, but on maintaining the pressure boundary of buried pipes and tanks to ensure that systems containing these components can continue to perform their intended safety functions pursuant to NRC's license renewal regulations.⁴³

Specifically, Entergy stressed that Contention 1's radioactive leakage concerns "fall within the realm of existing [NRC] regulatory processes for protecting the public from such radiation exposures," but not within the safety functions that are the focus of the renewal safety review under Part 54 (e.g., preventing or mitigating design-basis accidents which could result in offsite exposures comparable to those discussed in sections 50.34(a)(1), 50.67(b)(2), or 100.11).⁴⁴ Entergy therefore argued that Pilgrim Watch's particular claims of "inadequate monitoring" did not present a genuine material dispute within the scope of a renewal proceeding.⁴⁵ Entergy's motion went on to argue that Contention 1 provided no basis challenging the sufficiency of the aging management program.⁴⁶ The NRC Staff supported Entergy's motion.⁴⁷

In LBP-07-12, the Board denied Entergy's motion, but significantly altered the focus of Contention 1. The Board stressed that "prevention of leaks *per se* is not a stated objective of any relevant aging management program."⁴⁸ It

⁴¹ *Id.* at 315 & n.261.

⁴² *Id.* at 315.

⁴³ *See, e.g.*, Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 1 (June 8, 2007) at 15-18.

⁴⁴ *Id.* at 18.

⁴⁵ *Id.* at 15.

⁴⁶ *See id.* at 19-25.

⁴⁷ *See* NRC Staff Response to Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 1 (June 28, 2007).

⁴⁸ LBP-07-12, 66 NRC 113, 129 (2007).

further specified that “issues concerned with monitoring of radiological releases, or determination of how leakage could harm health or the environment, are not legitimately in dispute here, because they do not relate to aging and/or because they are addressed as part of ongoing regulatory processes.”⁴⁹ In short, the Board concluded that it saw no “relevant, litigable dispute . . . regarding any health effects of leaking radioactive liquid.”⁵⁰

But the Board determined that a different issue involving buried piping fell within the scope of license renewal: the “prevention of an aging-induced leak large enough to compromise the ability of buried piping or tanks to fulfill their intended safety function.”⁵¹ The Board ruled that Contention 1 raised a genuine material dispute over whether Entergy’s aging management program for buried pipes and tanks at the Pilgrim facility “are adequate on their own, without need of any leak detection devices (Intervenors propose monitoring wells) to assure that the pipes and tanks in question will perform their intended functions and thereby protect public health and safety.”⁵² The Board explained that this issue, in its view, was raised in Contention 1 because the contention “implicitly addresses the adequacy of the AMPs [aging management programs] to assure that the pipes and tanks perform as intended to perform.”⁵³ The Board reasoned that “[a] system of monitoring wells . . . might well, by detecting leaks, allow for earlier and/or more effective detection and correction of any problems that might compromise the intended functions of relevant components.”⁵⁴

The Board therefore narrowed the issue for hearing as follows:

[T]he only issue remaining before this Licensing Board regarding Contention 1 is whether or not monitoring wells are necessary to assure that the buried pipes and tanks at issue will continue to perform their safety function during the license renewal period — or, put another way, whether Pilgrim’s existing AMPs have elements that provide appropriate assurance as required under relevant NRC regulations that the

⁴⁹ *Id.* at 130 n.81.

⁵⁰ *Id.* at 130. The Board additionally noted that Pilgrim Watch’s response to the summary disposition motion had included statements on potential environmental consequences of leaks, but that the Board had admitted Contention 1 as a safety contention. *Id.* at 124.

⁵¹ *Id.* at 129. Pilgrim Watch did not raise this precise issue in its initial intervention petition, which focused on potential small, undetected leaks that could pose a threat of offsite groundwater contamination and “excessive radiation doses.” *See, e.g.*, Petition for Hearing at 13-14 (acknowledging that “[l]arge leaks in these pipes may be detected by a drop in water level in a tank or via increased water makeup to a tank”).

⁵² LBP-07-12, 66 NRC at 128.

⁵³ *See id.*

⁵⁴ *Id.* at 129 n.79.

buried pipes and tanks will not develop leaks so great as to cause those pipes and tanks to be unable to perform their intended safety functions.⁵⁵

Following an evidentiary hearing on Contention 1, a majority of the Board issued Initial Decision LBP-08-22, finding that the aging management program for buried pipes provides reasonable assurance that components in question will perform their intended safety functions through the license renewal term, and that monitoring wells are unnecessary.⁵⁶ Judge Young issued a detailed concurring opinion.⁵⁷

Pilgrim Watch seeks review of several Board rulings bearing on Contention 1. We address each claim in turn below.

1. Board's Interpretation of the Hearing's Scope

Pilgrim Watch argues that the Board improperly limited the scope of the hearing when it narrowed the focus of Contention 1 to whether Entergy's aging management program for buried pipes and tanks would adequately prevent "leaks of radioactive water . . . so great as to permit a design base [sic] failure."⁵⁸ In effect, Pilgrim Watch claims that once a structure or component is found to fall

⁵⁵ *Id.* at 129. In a subsequent order, the Board stated that "information related to monitoring wells is irrelevant to the issues at hand before this Board." *See* Order (Revising Schedule for Evidentiary Hearing and Responding to Pilgrim Watch's December 14 and 15 Motions) (Dec. 19, 2007) (unpublished) at 2. This prompted both a separate statement by Judge Young, and a motion for reconsideration by Pilgrim Watch, both of which claimed that the issue of monitoring wells was relevant to the admitted contention. *See* Separate Statement of Judge Ann Marshall Young (Regarding December 19 Order) (Dec. 21, 2007) (unpublished); Pilgrim Watch Motion for Reconsideration (Dec. 28, 2007).

The full Board denied Pilgrim Watch's motion for reconsideration, stating that Contention 1, as "reformulated" by the Board to focus on the issue of buried pipes "leaking at such great rates that they would fail their respective safety functions," did "NOT [involve] whether or not the [aging management programs] . . . address monitoring wells." *See* Order (Denying Pilgrim Watch's Motion for Reconsideration) (Jan. 11, 2008) (unpublished) at 4-5 (emphasis in original). The Board stressed that "unless and until the Applicant advises that it intends to rely upon such wells" to assure that buried pipes and tanks containing radioactive fluids will not leak at such great rates that they may compromise intended safety functions, "information regarding the performance of, or need for, monitoring wells is not relevant." *Id.* at 5. But in a later order, the Board stated that it would allow information on the "relative effectiveness of monitoring wells" in detecting leaks that could become large enough to compromise safety functions. *See* Order (Ruling on Pending Matters and Addressing Preparation of Exhibits for Hearing) (Mar. 24, 2008) (unpublished) at 2-3. The Board explained that Entergy had "opened the door to litigation" of the issue by arguing that wells are not necessary and would not be as effective as the proposed aging management programs. *Id.*

⁵⁶ *See* LBP-08-22, 68 NRC at 593-610.

⁵⁷ *See id.* at 611-53 (Young, J., concurring).

⁵⁸ Petition for Review at 2-3.

within the initial scope of the renewal safety review, pursuant to section 54.4(a), an aging management review must assure that all these “in-scope components [will] comply with . . . *all* NRC regulations over the license extension period.”⁵⁹ Pilgrim Watch argues that the Board unduly restricted the focus of Contention 1 to the safety “functions outlined in 10 C.F.R. § 54.4(a)(1)-(3),” and “ignored” or “erroneously dispensed with” other issues that relate to assuring compliance with the CLB during the renewal term.⁶⁰

Pilgrim Watch, for example, notes that there are existing NRC safety regulations intended to prevent exposure of the public to excessive radiation doses, and states that “[e]ffective monitoring systems” are necessary to assure compliance with these safety regulations.⁶¹ As Pilgrim Watch’s argument goes, because “NRC regulations require the Applicant to have in place an effective program for monitoring radiation on-site and offsite” and “leaks of radioactively contaminated water into the ground” potentially could result in “excessive radiation doses,” the Board improperly narrowed the scope of Contention 1 “to exclude unmonitored leakage of radioactive water, unless the leaks happened to be large enough to permit a design basis failure.”⁶²

At bottom, however, Pilgrim Watch’s concern goes to the adequacy of the NRC’s regulatory oversight process for assuring compliance with our existing radiological dose limits and other current licensing basis requirements. Through the regulatory process, which includes plant inspections, notices and guidance to licensees, and enforcement actions, the NRC takes a host of measures to improve the ability to timely detect and correct inadvertent leaks to assure compliance with public dose limits. This is an ongoing operational issue involving existing facilities regardless of whether those facilities are seeking or will seek license renewal.

The question before us here is not the adequacy to date of NRC regulatory actions to address leakage incidents, but whether the key safety functions that are the focus of the license renewal safety review under Part 54 include, as a general matter, preventing inadvertent leaks from buried piping. We agree with the Board that they do not.

Pilgrim Watch’s claims do not point to any error in the Board’s interpretation of the license renewal rules. Pilgrim Watch is correct that 10 C.F.R. § 54.21 “explains what has to be looked at in an aging management review of components once they are determined to be within scope” of license renewal.⁶³ But Pilgrim Watch otherwise misreads the rule. Section 54.21 does not require each structure and

⁵⁹ *See id.* at 4 (emphasis added).

⁶⁰ *Id.* at 4.

⁶¹ *Id.* at 5-6.

⁶² *See id.* at 4-5.

⁶³ *Id.* at 4.

component within the scope of license renewal to be the subject of a far-reaching evaluation encompassing all aspects of the CLB. For those structures or components requiring an aging management review (pursuant to section 54.21(a)(1)), there must be a demonstration that the effects of aging will be adequately managed “so that the *intended function(s)* will be maintained consistent with the CLB.”⁶⁴ As we earlier noted, section 54.21 plainly states that what is meant by the phrase “intended functions” are those functions “described in section 54.4.”⁶⁵ Similarly, section 54.4(b) makes clear that the “intended functions” that SSCs “must be shown to fulfill” in the aging management review required by section 54.21 “*are those functions . . . specified in paragraphs (a)(1)-(3)*” of section 54.4.⁶⁶ The NRC definition of “safety-related structures, systems, and components” is rooted in these functions.⁶⁷

In the rulemaking process, the Commission acknowledged that “[m]ost systems, structures, and components have *more than one function* and each could be regarded” as in some form a “required” function.⁶⁸ But the Commission concluded that it was “unreasonable” to require a licensee “to ensure *all* functions of a system, structure, or component as part of the aging management review.”⁶⁹ “Consideration of ancillary functions would expand the scope of the license renewal review beyond the Commission’s intent,” which was to focus the renewal safety review “only on those systems, structures, and components of primary importance to safety.”⁷⁰ In short, the license renewal application must provide reasonable assurance that structures and components “will perform such that the *intended functions*, as delineated in § 54.4, are maintained consistent with the CLB.”⁷¹

⁶⁴ 10 C.F.R. § 54.21(a)(3) (emphasis added).

⁶⁵ See 10 C.F.R. § 54.21(a)(1)(i).

⁶⁶ 10 C.F.R. § 54.4(b) (emphasis added).

⁶⁷ See 10 C.F.R. § 50.2.

⁶⁸ See License Renewal Rule, 60 Fed. Reg. at 22,467 (emphasis added).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *id.* at 22,479 (emphasis added). Pilgrim Watch suggests that 10 C.F.R. § 54.29, which lists the standards for issuance of a renewed license, expands the scope of the license renewal aging management review well beyond the “intended functions” outlined in section 54.4, which are the subject of the IPA’s aging management review. Section 54.29(a)(1) states that for license renewal, there must be reasonable assurance that activities authorized by the renewed license will continue to be conducted in accordance with the CLB, *with respect to specified matters*, including “managing the effects of aging during the period of extended operation *on the functionality* of structures and components” that have been identified — pursuant to section 54.21 — to require an aging management review. See 10 C.F.R. § 54.29(a)(1) (emphasis added).

Section 54.29 does not expand the scope of review to any matter involving the CLB. Read in context
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In issuing the license renewal regulations, the Commission recognized that not “all reactors are in full compliance with their respective CLBs on a continuous basis” and that “[t]he NRC conducts its inspection and enforcement activities under the presumption that non-compliances will occur.”⁷² But “all aspects of a plant’s CLB . . . and the NRC’s regulatory process,” including inspection and oversight activities, “carry forward into the renewal period” to maintain the CLB.⁷³ “[L]imits on the scope of [the] renewal review and hearing” were based “on careful review of the sufficiency of the NRC regulatory process to resolve issues not considered in renewal.”⁷⁴ The regulatory process continuously reassesses whether there is a need for additional oversight or regulations to protect public health and safety.⁷⁵

Though not necessary for this decision, it is important to note that the agency has engaged in just such a reassessment on this issue. Indeed, the NRC has taken an extensive array of actions to review and address leakage from buried piping, tanks, and spent fuel pools. In particular, the NRC has taken several actions in response to the recommendations of an NRC task force on inadvertent releases of radioactive liquids.⁷⁶

with section 54.21, it is clear that the reference in section 54.29 to “functionality” means the “intended functions” that must be assured in the IPA aging management review. *See, e.g.*, License Renewal Rule, 60 Fed. Reg. at 22,481 (findings required under section 54.29 were written to be consistent with section 64.21(a)(3)); *id.* at 22,461 n.1 (“[t]he finding required by § 54.29 considers . . . the results of the integrated plant assessment [IPA]”); *id.* at 22,479 (purpose of IPA process is to demonstrate whether there is “reasonable assurance” that SSCs “will perform such that the intended functions, as delineated in § 54.4, are maintained, consistent with the CLB”); *id.* at 22,476 (“an aging management review of the passive functions of structures and components is warranted to provide the reasonable assurance that their intended functions are adequately maintained during the period of extended operation”).

⁷² *See* License Renewal Rule, 60 Fed. Reg. at 22,473.

⁷³ *Id.* at 22,475.

⁷⁴ *Id.* at 22,482.

⁷⁵ *Id.* at 22,485.

⁷⁶ The NRC’s efforts in this regard have included: (1) revised inspection procedures to evaluate effluent pathways, review onsite contamination events, and expand documentation of releases; (2) issuance of new inspection guidance on the Nuclear Energy Institute’s (NEI) initiative on groundwater contamination events (NEI-07-07, “Industry Ground Water Protection Initiative — Final Guidance Document” (Aug. 2007)); (3) proposed a new rule amending 10 C.F.R. Part 20 to clarify that licensees are required to conduct operations to minimize introduction of residual radioactivity into the subsurface soil and groundwater of the site, and to specify that licensee survey requirements include consideration of residual radioactivity, including to the subsurface; (4) updated guidance on detecting, evaluating, reporting, and documenting unmonitored releases, and providing onsite monitoring capability for various release points, including groundwater; (5) updated guidance on licensee radiological environmental monitoring programs to limit licensee flexibility to reduce sampling frequency without documented justification; and (6) proposed revisions to the license renewal rules that would require environmental reports for license renewal applications to address “the potential

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While the NRC task force on liquid radioactive releases concluded that inadvertent releases had a “negligible impact on public radiation doses,”⁷⁷ it nonetheless recommended specific actions to help assure that leaks will be detected before radionuclides may migrate offsite by an unmonitored pathway.⁷⁸ The result is that numerous new measures are now in place, with additional measures proposed and under consideration, as described above. Moreover, the NRC continues to assess generically whether any further actions are called for to assure the timely detection and correction of leaks from buried piping at nuclear reactor facilities.⁷⁹

In summary, Pilgrim Watch presents no substantial question warranting review of the Board decisions narrowing the scope of Contention 1⁸⁰ to piping and tank leaks that could affect the intended safety functions outlined in 10 C.F.R. § 54.4.⁸¹

impact of discharges of radionuclides, such as tritium, from plant systems into groundwater.” *See, e.g.*, Liquid Release Task Force Recommendations Implementation Status as of July 10, 2009 (ADAMS Accession No. ML091900252) (listing status of specific regulatory guides, inspection procedures, and other responses to task force recommendations); Proposed Rule: “Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses,” 74 Fed. Reg. 38,117, 38,122-23, 38,129 (July 31, 2009); SECY-09-0042, “Final Rule: Decommissioning Planning (10 CFR Parts 20, 30, 40, 50, 70 and 72)” (Mar. 13, 2009) at 3-4.

⁷⁷ Liquid Radioactive Release Lessons Learned Task Force, Final Report (Sept. 1, 2006) (ADAMS Accession No. ML062650312) at 13; *see also id.* at 15.

⁷⁸ *See, e.g., id.* at 15, 21-22, 27, 30, 38-39, 51, 53.

⁷⁹ *See* Memorandum from Chairman Jaczko to R.W. Borchardt, Executive Director for Operations (EDO) (Sept. 3, 2009) (ADAMS Accession No. ML092460648). Most recently, the EDO directed the Staff to convene a team of NRC experts to, among other things, reevaluate the recommendations made in the 2006 Task Force Report and to review the actions taken in response to recent releases of tritium into groundwater by nuclear facilities, in order to determine whether these recommendations and actions should be augmented. *See* Memorandum from R.W. Borchardt, EDO, to Bruce S. Mallett and Charles A. Casto, “Groundwater Contamination Task Force” (Mar. 5, 2010) (ADAMS Accession No. ML100640188).

⁸⁰ We note that the Board reformulated Contention 1. In recent decisions, we have urged the licensing boards to exercise caution when reformulating contentions. *See Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535 (2009). While a licensing board “may reformulate contentions to ‘eliminate extraneous issues or to consolidate issues for a more efficient proceeding’ . . . a board should not add material not raised by a petitioner in order to render a contention admissible.” *Id.* at 552-53 (citing, *inter alia*, *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 720-21 (2006)). We take this opportunity to encourage the licensing boards to adhere to this standard when reformulating contentions.

⁸¹ Recently, Pilgrim Watch filed with us a “notice,” claiming that an NRC Staff SECY paper presents “new and significant” information relevant to Pilgrim Watch’s petition for review in this proceeding. *See* Pilgrim Watch Notice to Commission Regarding New and Significant Information Pertaining to Pilgrim Watch’s Petition for Review of [sic] LBP-06-848 (Jan. 21, 2010) (referencing SECY-09-0174, “Staff Progress in Evaluation of Buried Piping at Nuclear Reactor Facilities” (Dec. 2, 2009)). Contrary to Pilgrim Watch’s claims, SECY-09-0174 is consistent with the Board’s interpretation of the scope of

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2. Reasonable Assurance Standard

To issue a renewed license, the NRC must find “reasonable assurance” that the licensee will manage the effects of aging on the functionality of SSCs identified to require an aging management review.⁸² In LBP-08-22, the Board found that Entergy’s aging management program for underground piping and tanks provides reasonable assurance that the relevant “components in question will perform their intended functions throughout the renewal period.”⁸³

Pilgrim Watch claims that the Board never precisely defined “what ‘reasonable assurance’ means and requires,” and suggests that “reasonable assurance requires 95% confidence.”⁸⁴ Although Pilgrim Watch concedes that “what constitutes ‘reasonable assurance’ . . . will require a case-by-case determination,” it nonetheless seeks a defined “*particular level* of assurance [that] the pipes or tanks will not fail over the license extension period.”⁸⁵ Pilgrim Watch further claims that whether or not the “reasonable assurance” standard is “susceptible to mathematical calculation, nothing short of an extremely high level of assurance” would be “reasonable.”⁸⁶ Pilgrim Watch argues that we should determine “what level of ‘assurance’ is ‘reasonable assurance,’” and remand the case to the Board to determine “whether Entergy can prove, by a clear preponderance of the evidence, that the required level of assurance will exist throughout the license extension period.”⁸⁷

Pilgrim Watch points to no applicable statutory, regulatory, or other ground requiring us to establish a particular “level of assurance” to define the standard of “reasonable assurance.” In another license renewal case, we recently stated that “‘reasonable assurance’ is not quantified as equivalent to a 95% (or any other percent) confidence level, but is based on sound technical judgment of the particulars of a case and on compliance with our regulations.”⁸⁸ Like the Atomic Energy Act’s standard of “adequate protection,” the “reasonable assurance” determination need not be reduced to “a mechanical verbal formula or set of

the license renewal safety review. The Staff’s paper discusses both the license renewal safety review regulations and current NRC safety regulations governing piping design, radioactive effluents, and public dose limits.

⁸² See 10 C.F.R. § 54.29(a)(1) (broadly outlining findings necessary for a renewed license).

⁸³ LBP-08-22, 68 NRC at 593; see also *id.* at 648-52 (Young, J., concurring).

⁸⁴ Petition for Review at 7.

⁸⁵ *Id.* (emphasis added).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 263 (2009).

objective standards,” but may be “given content through case-by-case applications of [the Commission’s] technical judgment,” in light of all relevant information.⁸⁹

Here, based on the evidentiary record and parties’ arguments, the full Board — including two technical experts — without reservation found “reasonable assurance” that Entergy’s aging management program for buried piping and tanks would ensure the intended safety functions without need of “leak detection devices,” such as the monitoring wells Pilgrim Watch proposed.⁹⁰ The Board explained the basis for its conclusion. Regarding the aging management of pipes in the condensate storage system, the Board observed that the water level indicator on the two condensate storage tanks is monitored every 4 hours, and that flow rate tests on relevant pumps are conducted every quarter to detect any leakage “well before it reaches a level that could challenge the required flow rates.”⁹¹ The Board further stressed that the water level of the condensate storage tanks is maintained above 30 feet and that “there would have to be about a 20-foot drop in tank level” before relevant intended functions would be impaired.⁹² In short, the Board found that there would be ample opportunity to detect and correct leaks in condensate storage system piping before any intended safety functions could be impaired.

Similarly, in regard to piping in the salt service water system (SSW), the majority concluded that the “only way the intended functionality of the SSW . . . piping could be impaired” were if “it became so blocked that water could not pass,” and that Pilgrim Watch proposed no “credible scenario by which this might happen.”⁹³ The majority additionally stressed that the “substance” of Contention 1 was *leaks* from piping, and that no evidence in the hearing suggested a “credible scenario . . . by which a leak in the SSW system . . . piping could reasonably be expected to lead to” restricted outlet flow.⁹⁴ The majority emphasized that “the lack of such a credible scenario is made even clearer” because the relevant portion of SSW piping “actually consists of two parallel piping systems each capable of carrying the entire required outlet flow.”⁹⁵

⁸⁹ See *Union of Concerned Scientists v. NRC*, 880 F.2d 552, 558 (D.C. Cir. 1989). See also *id.* (“the determination of what constitutes ‘adequate protection’ under the Act, absent specific guidance from Congress, is just such a situation where the Commission should be permitted to have discretion to make case-by-case judgments based on its technical expertise and on all the relevant information”); accord *Public Citizen v. NRC*, 573 F.3d 916, 918 (9th Cir. 2009). See also *Carstens v. NRC*, 742 F.2d 1546, 1558-59 (D.C. Cir. 1984) (NRC reasonable in not providing a quantifiable definition for the “key regulatory phrase ‘conservative manner,’” given that relevant judgment calls did not “lend themselves to rigid statistical definitions”).

⁹⁰ See LBP-08-22, 68 NRC at 604-10; see also *id.* at 612-52 (Young, J., concurring).

⁹¹ See *id.* at 608 (majority opinion); see also *id.* at 627-28, 643-44, 648-49 (Young, J., concurring).

⁹² *Id.* at 608 (majority opinion).

⁹³ *Id.* at 609; see also *id.* at 637-38, 649-50 (Young, J., concurring).

⁹⁴ *Id.* at 609; see also *id.* at 639-42 (Young, J., concurring).

⁹⁵ *Id.* at 610; see also *id.* at 637 (Young, J., concurring).

Judge Young’s concurring opinion agreed with the majority’s conclusions, but provided additional detail and reasoning, indeed stressing the “*large number* of facts and circumstances” in the record that “clearly” supported the finding of “reasonable assurance,” notwithstanding lack of evidence with a specific “numeric level of certainty.”⁹⁶ Pilgrim Watch identifies no error in the Board’s underlying rationale for finding “reasonable assurance.” Nor does any statute, regulation, or case law require the Commission to assign and apply a precise “level or degree” of confidence to the “reasonable assurance” standard. In short, Pilgrim Watch does not provide a compelling legal or factual basis for revisiting the Board’s finding of “reasonable assurance.”

3. *Exclusion of Evidence*

The Board held an oral evidentiary hearing on Contention 1 on April 10, 2008. Over a month later, Pilgrim Watch filed a motion seeking to strike from the case record portions of expert testimony presented by Entergy and the Staff.⁹⁷ The motion claimed that “critical testimony” on cured-in-place linings, coatings, and cathodic protection was “inaccurate, incomplete or gave a misleading impression.”⁹⁸ The motion requested the Board to “strike the offending testimony from the record” or, alternatively, to “reopen the hearing.”⁹⁹ Shortly thereafter, Pilgrim Watch filed a related motion, requesting the Board to include in the case record the exhibits that had been attached to its earlier motion to strike testimony.¹⁰⁰ This second motion claimed that the exhibits sought to be included in the record “could materially affect the decision” of the Board.¹⁰¹

The Board denied both motions. The Board explained that it “effectively” had closed the case record on May 12, 2008.¹⁰² It therefore treated the Pilgrim Watch motions as a request to reopen the record, and went on to find that the motions did not satisfy the standards for reopening a closed record, pursuant to 10 C.F.R. § 2.326. In particular, the Board stressed that Pilgrim Watch failed to show that

⁹⁶ See *id.* at 613, 648 (Young, J., concurring) (emphasis added).

⁹⁷ See Pilgrim Watch Motion to Strike Incorrect and Misleading Testimony from the Record (May 15, 2008) (Motion to Strike).

⁹⁸ *Id.* at 1.

⁹⁹ *Id.*

¹⁰⁰ See Pilgrim Watch Motion to Include as Part of the Record Exhibits Attached to Pilgrim Watch Motion to Strike Incorrect and Misleading Testimony from the Record of May 15, 2008 (May 27, 2008).

¹⁰¹ *Id.* at 2.

¹⁰² See Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1) (June 4, 2008) (Board Order Denying Pilgrim Watch Motions).

the newly proffered information was either timely submitted or was likely to lead to a materially different result in the proceeding.¹⁰³

Pilgrim Watch argues that the Board improperly rejected “and thus did not consider” the evidence submitted in its motions.¹⁰⁴ Pilgrim Watch’s argument rests on the claim that the Board did not formally close the case record until June 4, 2008, *after* Pilgrim Watch filed its motions. Pilgrim Watch does not claim that the Board misapplied the standard for reopening a case record, but that it inappropriately evaluated the Pilgrim Watch motions under the reopening standard. Entergy and the Staff support the Board’s view that, insofar as Contention 1 was concerned, the evidentiary record was “effectively closed” by May 12, 2008.¹⁰⁵

We need not reach whether the Board properly deemed the evidentiary record on Contention 1 “effectively closed” on May 12, 2008. First, the Board’s order provided an *alternate* ground for rejecting the Pilgrim Watch motions. The Board stated that “in any event,” even if the case record were not closed, it would be improper to grant the Pilgrim Watch motions to strike testimony and allow further evidence to be added as exhibits.¹⁰⁶ The Board found the motions an improper effort to address — post-hearing — testimony it considered “incorrect, incomplete, or misleading,” but could have challenged at the hearing.¹⁰⁷ The

¹⁰³ *Id.* at 6-10 (referencing 10 C.F.R. §§ 2.326(a)(1) and (a)(3)).

¹⁰⁴ Petition for Review at 9.

¹⁰⁵ *See, e.g.*, Entergy Answer at 10 & n.32. The Board did not formally close the record at the end of the hearing on April 10, 2008. Two days earlier, the United States Court of Appeals for the First Circuit had issued a decision denying petitions for review filed by the Commonwealth of Massachusetts, which had sought unsuccessfully to intervene as a party in the *Pilgrim* and *Vermont Yankee* license renewal proceedings. The court ordered a stay of the “close of hearings in both license renewal proceedings . . . to afford the Commonwealth an opportunity to request participant status” as an interested State (pursuant to 10 C.F.R. § 2.315(c)) in both proceedings. *See Massachusetts v. NRC*, 522 F.3d 115, 130 (1st Cir. 2008).

Because the Board was unsure of the effect of the First Circuit’s stay order, it did not close the case record at the end of the hearing. *See* Transcript (Apr. 10, 2008) at 867-72. Judge Abramson specified, however, that “while the record isn’t formally closed there should be no further testimony from any party on this particular contention.” *See id.* at 871. On May 12, 2008, the Board issued an order setting “provisional” deadlines for proposed findings of fact and conclusions of law on Contention 1. The Board explained that the deadlines were provisional and the case record should not be construed as closed because, “among other things, if the need for further findings later arises based on the current [court-imposed] stay or related activities, these will be permitted as appropriate and necessary.” *See* Order (Setting Deadlines for Provisional Proposed Findings and Conclusions on Contention 1, and for Pleadings Related to Pilgrim Watch’s Recent Motion Regarding CUFs) (May 12, 2008) (Board Order Denying Motions) at 3. In denying the Pilgrim Watch motions, the Board viewed this May 12, 2008 order as effectively having closed the evidentiary record on Contention 1. *See* Board Order Denying Pilgrim Watch Motions at 3.

¹⁰⁶ *See* Board Order Denying Pilgrim Watch Motions at 4 n.12.

¹⁰⁷ *Id.*

Board stressed that it had provided Pilgrim Watch repeated occasions throughout the hearing to challenge evidence presented, and that “Pilgrim Watch did not take advantage of this opportunity . . . to raise matters asserted in its current motions, or even to raise the possible need to do so after the hearing, instead presenting its current arguments more than a month” after the hearing.¹⁰⁸ The Board identified repeated instances where Pilgrim Watch, a *pro se* litigant, had been provided assistance in understanding basic legal or procedural principles.¹⁰⁹ The Board concluded that, ultimately, “a party that proceeds without counsel” must bear responsibility for failures to properly and timely submit evidence.¹¹⁰ We agree.

Pilgrim Watch did not seek to introduce information that was authentically new. It therefore should have been prepared to object to testimony and evidence presented at the hearing. Objections not raised at hearing are deemed waived.¹¹¹ Among the items Pilgrim Watch sought to have admitted as exhibits were e-mail transmissions by individuals providing their opinion on statements in the hearing transcript. Pilgrim Watch explained that it had “sent the Transcript to experts in the field of cathodic protection” for their comment.¹¹² At bottom, this was an improper effort bring in new witnesses after hearing. Pilgrim Watch’s motions effectively sought to relitigate issues after the fact.¹¹³ The Board appropriately rejected this effort under its alternate ground for denying the motions.

Moreover, as the Staff states, Pilgrim Watch “fail[s] to show that the Board committed prejudicial error.”¹¹⁴ Pilgrim Watch does not indicate — nor is it obvious to us — how the information it sought to strike or introduce would have been material, given the Board’s reasoning for its finding of “reasonable assurance.” For example, Pilgrim Watch sought to introduce new opinions on cathodic protection. But as the Board stated, cathodic protection is “but one of two acceptable alternatives for the license renewal aging management of buried

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 411 & n.46 (1976) (asserted procedural defects should be called to agency’s attention “when, if in fact they were defects, they would have been correctable”).

¹¹² Motion to Strike at 8.

¹¹³ For example, as to a 2004 contractor article on piping liner installation that Pilgrim Watch sought to introduce, the Board noted Entergy’s claim that it disclosed to Pilgrim Watch other documents (some attached to Entergy’s response) that were “consistent with” and which “fully described in greater detail” the “design, installation, repairs, and testing of the liners.” *See* Board Order Denying Pilgrim Watch Motions at 7. The Board highlighted Pilgrim Watch’s concession that it “failed before the hearing to find among the documents Entergy provided those that describe the design, installation, repairs and testing of the liners.” *Id.*

¹¹⁴ *See* Staff Answer at 15.

pipes.”¹¹⁵ The Board found acceptable Entergy’s proposed aging management program, which *does not rely* on cathodic protection. In other words, the Board found Entergy’s current program fully adequate without need of cathodic protection. Therefore, we can discern no reason — and Pilgrim Watch provides none — why additional descriptions or clarifications on the relative safety or difficulty of utilizing cathodic protection would undermine the ultimate conclusions of the Board.

Nor can we discern how a 2004 contractor’s article, which Pilgrim Watch sought to introduce, would have materially affected the Board’s conclusions. The article, apparently prepared for a trade organization presentation, described the contractor’s experience installing cured-in-place pipe (CIPP) liner in one of two loops (Loop A) of the salt service water discharge piping at Pilgrim. The article noted challenges involved with the installation of the CIPP liner in Loop A, and earlier errors requiring correction that had been made in the installation of the CIPP liner in the other loop (Loop B) of the discharge piping. Pilgrim Watch does not describe how the majority’s decision, which does not mention the CIPP liner, would be materially affected by the information contained in the 2004 article.

And while Judge Young’s concurring opinion mentions the CIPP liner — among numerous other factors — it is evident that Judge Young expressly considered the 2004 article on the CIPP liner installation, but found it immaterial. Judge Young notes that the contractor’s article describes how challenges confronted were addressed with “favorable results,” and piping was “tested to ‘confirm compliance with physical property specifications.’”¹¹⁶ We cannot discern any reason why the 2004 article would materially affect the Board’s conclusions in this case.¹¹⁷

In short, Pilgrim Watch gives us no reason to conclude that the information sought to be stricken or added to the record would have materially changed the

¹¹⁵ See Board Order Ruling on Pilgrim Watch Motions at 8; *see also id.* at 9-10 (noting that issue before Board was whether Entergy’s aging management programs are adequate “as they currently exist”).

¹¹⁶ See LBP-08-22, 68 NRC at 650 n.285 (Young, J., concurring). Similarly, the Board’s decision denying the Pilgrim Watch motions also had concluded, “in light of information *in the document itself*,” that the 2004 report was unlikely to “lead to a materially different result.” See Board Order Denying Pilgrim Watch Motions at 7 (emphasis added).

¹¹⁷ Like the majority, the concurring opinion concludes that “[i]t is clear that the only way that [salt service water system] pipe corrosion might trigger the loss of [salt service water system] safety function would be a total collapse of both discharge pipes so that the flow path was completely blocked,” a scenario found simply not to be credible, for a number of reasons. See LBP-08-22, 68 NRC at 637-42, 649-50 (Young, J., concurring). The concurring opinion further highlights upcoming required inspections of the CIPP liner (“[t]he CIPP liner for Loop B would be subject to a complete examination in 2011, before the period of extended operation . . . commences”; the “CIPP liner for Loop A would be subject to a complete examination in 2013, shortly after the period of extended operation commences”). *Id.* at 637; *see also id.* at 650.

Board’s ultimate finding of “reasonable assurance.” Therefore, even if the Board erroneously rejected Pilgrim Watch’s motions, which we do not find, the record before us does not suggest that Pilgrim Watch suffered any prejudicial error warranting Commission review.¹¹⁸

In summary, Pilgrim Watch raises no substantial question warranting review of the Board’s merits determination on Contention 1.

C. Contention 4

The Board declined to admit for hearing Pilgrim Watch’s Contention 4, which claimed that Entergy’s Environmental Report was deficient because its SAMA analysis addressed only reactor accidents and not, additionally, possible mitigation alternatives for spent fuel pool accidents.¹¹⁹ Citing our decision in the *Turkey Point* license renewal proceeding, the Board found that environmental impacts from the spent fuel pool (including potential beyond-design-basis accidents and the need for mitigation measures) are addressed generically in the NRC’s Generic Environmental Impact Statement for License Renewal (GEIS), and do not require a site-specific analysis as part of an individual license renewal environmental review.¹²⁰

License renewal applicants need not provide site-specific analyses of environmental impacts of subjects identified as “Category 1” issues in Appendix B to 10 C.F.R. Part 51, Subpart A.¹²¹ Such issues are generically addressed in the GEIS, and the GEIS’s generic analysis and conclusion “may be adopted in each plant-specific review.”¹²² For all Category 1 issues, the need for “mitigation of adverse impacts associated with the issue” was considered, and “it has been determined that additional plant-specific mitigation measures are likely not to be sufficiently beneficial to warrant implementation.”¹²³ A license renewal applicant therefore “need not address mitigation for issues” designated Category 1.¹²⁴ The license renewal rulemaking history makes clear that an issue cannot be identified as Category 1 if the NRC has not made a generic determination that additional

¹¹⁸ See, e.g., *National Whistleblower Center v. NRC*, 208 F.3d 256, 264-65 (D.C. Cir. 2000).

¹¹⁹ See LBP-06-23, 64 NRC at 280-300; Petition for Hearing at 50.

¹²⁰ See LBP-06-23, 64 NRC at 289-93 (referencing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 21-23 (2001)).

¹²¹ See 10 C.F.R. § 51.53(c)(3)(i).

¹²² See, e.g., Final Rule: “Environmental Review for Renewal of Nuclear Power Plant Operating Licenses,” 61 Fed. Reg. 28,467, 28,474 (1996) (Environmental Rules); NUREG-1437, Vol. 1, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Main Report, Final Report” (May 1996) (GEIS) at 1-5.

¹²³ See GEIS at 1-5.

¹²⁴ See Environmental Rules, 61 Fed. Reg. at 28,484.

mitigation measures are unlikely to be warranted, given “mitigation practices” already in place.¹²⁵

Part 51 designates the environmental impacts pertaining to onsite spent fuel a Category 1 issue.¹²⁶ The GEIS generically addresses “onsite storage of spent fuel during a renewal period of up to 20 years.”¹²⁷ Chapter six of the GEIS addresses the “environmental impacts associated with the uranium fuel cycle as they apply to license renewal,” and the “environmental impacts specifically associated with the management of radiological and nonradiological wastes resulting from license renewal.”¹²⁸ Chapter six finds “ample basis to conclude that continued storage of existing spent fuel and storage of spent fuel generated during the license renewal period can be accomplished safely and without significant environmental impacts.”¹²⁹

Chapter six further specifies — without qualification or other exception — that “the need for mitigation alternatives within the context of [license] renewal . . . has been considered, and the Commission concludes that its regulatory requirements already in place provide adequate mitigation incentives for onsite storage of spent fuel.”¹³⁰ Therefore, “[o]nsite storage of spent fuel during the term of a renewed operating license is a Category 1 issue.”¹³¹

Section 51.53(c)(3)(ii)(L) requires a SAMA analysis “[i]f the Staff has not previously considered severe accident mitigation alternatives for the applicant’s plant in an environmental impact statement or related supplement or in an environmental assessment.”¹³² In *Turkey Point*, we clarified that because onsite storage of spent fuel during the license renewal term is a Category 1 issue, and as such explicitly has been found not to warrant any additional site-specific analysis of mitigation measures, the required SAMA analysis for license renewal is intended to focus on reactor accidents.¹³³ We reiterated this in CLI-07-3, addressing a similar spent fuel pool contention raised by the Attorney General of Massachusetts in this and the *Vermont Yankee* license renewal proceedings.¹³⁴

On appeal, Pilgrim Watch argues that we misread the NEPA regulations and supporting GEIS analyses. Specifically, Pilgrim Watch claims that chapter six

¹²⁵ See *id.* at 28,474.

¹²⁶ 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1.

¹²⁷ Environmental Rules, 61 Fed. Reg. at 28,480.

¹²⁸ GEIS at 6-1.

¹²⁹ *Id.* at 6-91.

¹³⁰ *Id.* at 6-92.

¹³¹ *Id.*

¹³² 10 C.F.R. § 51.53(c)(3)(ii)(L).

¹³³ See *Turkey Point*, CLI-01-17, 54 NRC at 21-23.

¹³⁴ See *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 19-21 (2007).

of the GEIS, which we referenced in *Turkey Point*, only “deals with *normal operations*” associated with the spent fuel pool.¹³⁵ As Pilgrim Watch’s argument goes, because only the environmental impacts of “normal [spent fuel pool] operations” have been found in the GEIS to be a Category 1 issue, license renewal applicants must provide a SAMA analysis encompassing beyond-design-basis spent fuel pool accidents.

In support, Pilgrim Watch cites to two sentences from the introductory section in chapter six of the GEIS:

Accidental releases or noncompliance with [regulatory] standards could conceivably result in releases that would cause moderate or large radiological impacts. Such conditions are beyond the scope of regulations controlling normal operations and providing an adequate level of protection.¹³⁶

But Pilgrim Watch reads these statements out of context. These sentences do not mean that chapter six only addresses “normal” conditions. The purpose of the passage in which these statements are found is to explain that, in response to comments on the draft GEIS, the NRC changed “the standard defining *small radiological impact* . . . from a comparison with background radiation to compliance with the dose and regulatory release limits applicable to various stages of the fuel cycle.”¹³⁷ As the passage explains, NRC regulations and related inspections and other oversight and enforcement activities “provide an adequate level of protection of the public health and safety and the environment.”¹³⁸ Therefore, “[f]or the purposes of assessing radiological impacts, the Commission . . . concluded that impacts are of small significance if doses and releases [would] not exceed permissible levels in the Commission’s regulations.”¹³⁹

The sentences Pilgrim Watch cites merely make the corollary point: “accidental releases” or “noncompliance” with NRC standards “could conceivably result in releases that would cause moderate or large radiological impacts.”¹⁴⁰ Such releases would represent conditions beyond the “adequate level of protection” provided by NRC regulations. The GEIS concludes that “the Commission has no reason to expect that such noncompliance will occur at any significant frequency,” and instead expects that future radiological impact from the fuel cycle will represent releases and impacts within applicable regulatory limits.”¹⁴¹ Chapter six outlines

¹³⁵ Petition for Review at 22 (emphasis in original).

¹³⁶ GEIS at 6-1.

¹³⁷ *Id.* (emphasis in original).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 6-7.

the reasons for this conclusion, addressing numerous potential environmental impacts associated with the fuel cycle.

Chapter six clearly is not limited to discussing only “normal operations,” but also discusses potential accidents and other nonroutine events.¹⁴² For onsite spent fuel pool storage, the GEIS analysis addresses concerns related to expanded spent fuel pool capacity and the risk that “plant life extension could possibly increase the likelihood of criticality through dense-racking or spent fuel handling accidents.”¹⁴³ It specifically addresses spent fuel pool accidents and abnormal incidents, both actual events that occurred and the “worst probable cause of a loss of spent-fuel pool coolant (a severe seismic-generated accident causing a catastrophic failure of the pool),” concluding that “the likelihood of a fuel-cladding fire is highly remote,” and that “[i]nadvertent criticality and acute occupational exposure are remote risks of dense-racking.”¹⁴⁴

The Category 1 finding for onsite spent fuel storage (and chapter six of the GEIS upon which the finding is based) is not limited to routine or “normal operations.”¹⁴⁵ As specified in the Environmental SRP, there are “no Category 2

¹⁴² See, e.g., *id.* at 6-19, 6-28 (referencing scenarios including “catastrophic release of [high-level waste] repository inventory by a direct meteor strike”); *id.* at 6-21 (describing fatal accident and offsite contamination caused by rupture of overfilled cylinder of UF₆); *id.* at 6-31 (addressing “accidents in transport” of radioactive waste); *id.* at 6-34 (addressing concern of “theft or sabotage leading to a release that could pose a major risk of occupational and population exposure” and environmental harm).

¹⁴³ See *id.* at 6-80 to 6-81; see also *id.* at 6-70 to 6-86.

¹⁴⁴ *Id.* at 6-74 to 6-75.

¹⁴⁵ Admittedly, section 51.53(c)(3)(ii)(L), the rule requiring a SAMA analysis for certain applicants, does not specify this limitation. But the GEIS discussion of the requirement provides the necessary context. It specifies that our policy statement for severe accidents called for licensees to examine severe accident vulnerabilities and potential cost-effective mitigation on a plant-specific basis, focused on “core melt or unusually poor containment.” See GEIS at 5-106; see also *id.* at 5-107 to 5-114. At the time of the GEIS’s issuance, IPEs (individual plant examinations) and IPEEEs (individual plant examination external events) had not been completed for all plants, and therefore the GEIS explains that “it would be premature to generically conclude that a consideration of severe accident mitigation is not required for license renewal.” *Id.* at 5-113. The Statement of Considerations for the rule further “notes that upon completion of its IPE/IPEEE program, [the Commission] may review the issue of severe accident mitigation for license renewal and consider, by separate rulemaking, reclassifying severe accidents as a Category 1 issue.” See Environmental Rules, 61 Fed. Reg. at 28,481.

The IPE and IPEEE programs, as well as the policy statement calling for them, are focused on reactor accidents, not spent fuel pool accidents. See Policy Statement on Severe Reactor Accidents Regarding Future Designs and Existing Plants, 50 Fed. Reg. 32,138 (Aug. 8, 1995) (“severe nuclear accidents are those in which substantial damage is done to the reactor core whether or not there are serious offsite consequences”); *id.* at 32,139 (“fundamental objective” of “Commission’s severe accident policy is . . . to take all reasonable steps to reduce the chances of occurrence of a severe accident involving substantial damage to the reactor core and to mitigate the consequences of such an accident should

(Continued)

issues related to the uranium fuel cycle and solid waste management.”¹⁴⁶ The NRC recently reiterated that a “SAMA that addresses [spent fuel pool] accidents would not be expected to have a significant impact on total risk for the site” because the spent fuel pool accident “risk level is less than that for a reactor accident.”¹⁴⁷

Alternatively, Pilgrim Watch argues that Contention 4 presented new and significant information demonstrating that “the risk and consequences of spent fuel pool fires is much greater than previously thought,” and that the Board improperly rejected these claims.¹⁴⁸ Rejecting the claims, the Board explained that petitioners with new and significant information challenging a Category 1 finding could (1) seek a waiver of the generic rule, pursuant to 10 C.F.R. § 2.335 (if there are particular plant- or site-specific circumstances that render the generic analysis inapplicable); or (2) petition for rulemaking.¹⁴⁹ Pilgrim Watch did neither.

Addressing similar claims of “new and significant” spent fuel pool information raised by the Attorney General of Massachusetts in this and the *Vermont Yankee* proceedings, we held that “[a]djudicating Category 1 issues site by site based merely on a claim of ‘new and significant information,’ would defeat the purpose of resolving generic issues in a GEIS.”¹⁵⁰ The United States Court of Appeals for the First Circuit affirmed our decision, finding that NRC regulations provide procedural channels through which new and significant information may be brought to the Staff’s attention for review to determine if a generic Category

one occur”). See also Generic Letter 88-20, “Individual Plant Examination for Severe Accident Vulnerabilities” (Nov. 23, 1988) at 7 (purpose of IPE reviews is to obtain “reasonable assurance that the licensee has adequately analyzed the plant and operations to discover instances of particular vulnerability to core melt or unusually poor containment performance given a core melt accident”); *id.*, Appendix 2 (outlining criteria for IPE sequences, focusing on core damage and containment performance). See also NUREG-1555, Supplement 1, “Environmental Standard Review Plan” (Mar. 2000) (Environmental SRP) at 5.1.1-4 (purpose of section 51.53(c)(3)(ii)(L) SAMA analysis is to review and evaluate design and procedural changes that “could significantly reduce the radiological risk from a severe accident by preventing substantial core damage (i.e. preventing a severe accident) or by limiting releases from containment in the event that substantial core damage occurs (i.e. mitigating the impacts of a severe accident).”

¹⁴⁶ Environmental SRP at 6.1-1. The NRC currently is in the process of revising the GEIS. The proposed GEIS revision does not change the Category 1 finding for onsite spent fuel storage. See Proposed Rule, “Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses,” 74 Fed. Reg. 38,117 (July 31, 2009).

¹⁴⁷ See Attorney General of Massachusetts, Attorney General of California; Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204, 46,207-08, 46,211-12 (Aug. 8, 2008) (“[r]isk is defined as the probability of the occurrence of a given event multiplied by the consequences of that event”). The NRC has found the “risk of beyond design-basis accidents (DBAs) in [spent fuel pools] . . . to be several orders of magnitude below those involving the reactor core.” See *id.* at 46,207.

¹⁴⁸ Petition for Review at 23.

¹⁴⁹ See LBP-06-23, 64 NRC at 294-300; see also GEIS at 1-10 to 1-11.

¹⁵⁰ See CLI-07-3, 65 NRC at 21.

1 finding warrants modification.¹⁵¹ Additionally, many of the spent fuel pool arguments that Pilgrim Watch suggested were new and significant we have since addressed and found insufficient to warrant revision of the Category 1 finding regarding the environmental impacts of onsite spent fuel.¹⁵²

Pilgrim Watch further argues that the Board improperly rejected its argument that the Pilgrim SAMA analysis failed to consider “the contribution to severe accident costs made by intentional attacks on Pilgrim’s reactor or spent fuel pool.”¹⁵³ We have stated that NEPA “imposes no legal duty on the NRC to consider intentional malevolent acts . . . in conjunction with commercial power reactor license renewal applications.”¹⁵⁴ We further have stressed that, in any event, in developing the GEIS, the NRC “performed a discretionary analysis of terrorist acts in connection with license renewal, and concluded that the core damage and radiological release from such acts would be no worse than the damage and release to be expected from internally initiated events.”¹⁵⁵ The United States Court of Appeals for the Third Circuit recently affirmed both of these positions.¹⁵⁶

We are not persuaded by the Chairman’s dissent. We recognize the differing opinions of the Ninth and Third Circuits on this issue, but our ruling today reflects our consistent position on the requirements of NEPA and their application, namely, that the agency will conduct environmental analyses of terrorist scenarios only for facilities within the Ninth Circuit.¹⁵⁷ We have complied with the Ninth Circuit’s ruling for facilities within that Circuit, as we are required to do. Our experience within the Ninth Circuit, however, is very limited and does not demonstrate that conducting environmental analyses of terrorist scenarios for the licensing of all major facilities would be practicable or further the agency’s commitment to transparency. Moreover, there is no dispute that the agency has devoted enormous

¹⁵¹ See *Massachusetts v. NRC*, 522 F.3d at 120-21, 125-27.

¹⁵² See Denial of Petitions for Rulemaking, 73 Fed. Reg. at 46,208-12.

¹⁵³ Petition for Review at 19.

¹⁵⁴ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007) (quoting *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 365 (2002)).

¹⁵⁵ *Id.* at 131 (citation omitted).

¹⁵⁶ See *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132, 137-44 (3d Cir. 2009) (holding that an aircraft attack on a nuclear power plant does not warrant NEPA evaluation. The Third Circuit discussed its departure from the Ninth Circuit’s reasoning in *San Luis Obispo Mothers for Peace v. NRC*. *Id.* at 142-43. In *Mothers for Peace*, the Ninth Circuit held that it was unreasonable for the NRC to refuse to consider the environmental effects of a terrorist attack on a “categorical” basis. 449 F.3d 1016 (9th Cir. 2006).

¹⁵⁷ See, e.g., *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 13-14 (2010); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 257-58 (2010).

resources and effort to ensure the adequate protection of public health and safety from the risks of terrorism after the events of September 11, 2001.

III. CONCLUSION

We have given careful consideration to Pilgrim Watch's petition for review. As earlier noted, in a separate decision (CLI-10-11), we addressed Pilgrim Watch's challenge to LBP-07-13. For the reasons outlined above, we find that Pilgrim Watch's petition for review does not raise a substantial question warranting review of the other challenged Board rulings.¹⁵⁸ We therefore *deny* the balance of the Pilgrim Watch petition for review.

It is so ORDERED.¹⁵⁹

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of June 2010.

¹⁵⁸ See note 5, *supra* (listing challenged rulings).

¹⁵⁹ Commissioner Apostolakis did not participate in this matter.

Chairman Gregory Jaczko Dissents in Part

I respectfully disagree with the majority's approval of a policy of ignoring terrorism when conducting environmental reviews for certain facilities located outside the Ninth Circuit. As I explained in detail in my dissent in *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 127 (2006), I believe that the agency should have a consistent, nationwide approach to the consideration of terrorism under NEPA. As we conduct terrorism reviews under NEPA for some facilities, but not others, we create a disparity in the information provided to the public. I see no reason to provide this important information selectively, especially now that our experience demonstrates we can provide valuable information to the public while protecting sensitive security information. Fundamentally, we cannot reconcile a policy that denies this information to a significant portion of the public with our agency commitment to transparency.

Cite as 71 NRC 479 (2010)

CLI-10-15

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of

Docket No. 50-293-LR

**ENTERGY NUCLEAR GENERATION
COMPANY and ENTERGY NUCLEAR
OPERATIONS, INC.
(Pilgrim Nuclear Power Station)**

June 17, 2010

The Commission denies a motion for reconsideration of its decision in CLI-10-11, 71 NRC 287 (2010).

MOTIONS FOR RECONSIDERATION

The Commission will grant a motion for reconsideration only upon a showing of compelling circumstances, such as a clear and material error that could not have been reasonably anticipated and that renders a decision invalid.

SUMMARY DISPOSITION

At the summary disposition stage, the quality of evidentiary support is expected to be of a higher level than that at the contention filing stage.

MEMORANDUM AND ORDER

Pilgrim Watch, the intervenor in this license renewal proceeding, has filed a motion for reconsideration of our decision in CLI-10-11, 71 NRC 287 (2010).¹ Both the NRC Staff and the applicants, Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (together, Entergy) oppose the motion. We will grant a petition for reconsideration only upon a showing of “compelling circumstances,” such as a “clear and material error,” which “could not have been reasonably anticipated” and “that renders the decision invalid.”² Pilgrim Watch’s motion sets forth its disagreement with portions of our ruling in CLI-10-11, but does not demonstrate any material error or fundamental misunderstanding on our part. We therefore deny the motion.

The issue before us in CLI-10-11 was whether the Atomic Safety and Licensing Board erred in granting summary disposition of Pilgrim Watch’s Contention 3, a contention challenging the Severe Accident Mitigation Alternatives (SAMA) analysis in Entergy’s Environmental Report. In LBP-07-13, a Board majority agreed with Entergy that, based upon new sensitivity studies, no genuine material dispute remained over any of the admitted issues regarding three aspects of the SAMA analysis: “evacuation times,” “economic impact,” and “meteorological patterns.”³ The majority therefore dismissed Contention 3 in its entirety, with one judge dissenting.⁴

In CLI-10-11, we agreed with Pilgrim Watch that the majority erred in declaring that no genuine material dispute remained on Contention 3’s meteorological patterns claims.⁵ We therefore reversed the Board’s summary disposition ruling in part, and remanded the meteorological patterns issue to the Board for hearing. But we agreed with the majority that Pilgrim Watch failed to raise any genuine material dispute for hearing on the evacuation timing and economic cost analysis issues.⁶

In its motion for reconsideration, Pilgrim Watch does not contest our conclusions on the remanded meteorological patterns issue or the evacuation timing issue, but argues that we improperly “rewrote Contention 3 to limit” the scope of issues that were part of the “economic consequences” portion of Contention 3.⁷ Specifically, Pilgrim Watch argues that we “rewrote Contention 3 . . . to exclude

¹ Pilgrim Watch Motion for Reconsideration of CLI-10-11 (Apr. 5, 2010) (Motion).

² See 10 C.F.R. § 2.341(d) (referencing the standard found in section 2.323(e)).

³ See LBP-07-13, 66 NRC 131, 141-46 (2007).

⁴ *Id.* at 156-68.

⁵ See CLI-10-11, 71 NRC at 298-308.

⁶ See *id.* 308-15.

⁷ See Motion at 2.

any input data concerning the effects of a spent fuel accident; and . . . to exclude inputs concerning decontamination/interdiction clean-up costs and health costs.”⁸ Pilgrim Watch claims that these issues were all part of Contention 3 as originally submitted, and that Pilgrim Watch did not “add anything to expand the scope of the contention beyond what was accepted by the Board, recognized by Entergy and the Staff, and already of record throughout the filings.”⁹

Pilgrim Watch’s argument that we “rewrote” Contention 3 to exclude “input data” claims involving “the effects of a spent fuel accident” lacks any basis in fact. The full Board in its contention admissibility decision rejected Pilgrim Watch’s spent fuel pool SAMA claims (raised in a separate contention, Contention 4) as an impermissible challenge to our license renewal regulations, and as beyond the scope of NRC SAMA analysis, which focuses upon reactor accidents.¹⁰ The majority’s decision on summary disposition accordingly rejected the Pilgrim Watch arguments on spent fuel pool fires as outside the scope of Contention 3 and of NRC SAMA analysis,¹¹ a conclusion we confirmed in CLI-10-11.¹² The admitted Contention 3 never included spent fuel pool accident risk claims.

We likewise did not “rewrite” Contention 3 to exclude “health” cost claims. The majority repeatedly stressed that Pilgrim Watch’s opposition to summary disposition inappropriately raised various new “health” cost arguments, which were “simply not reasonably inferable” as part of Contention 3’s admitted economic cost analysis challenges.¹³ We agreed that the new “health” cost arguments were *never* a part of Contention 3’s admitted economic cost analysis challenges, and further noted that some of the new “health” claims are not even cognizable under the National Environmental Policy Act (NEPA).¹⁴

⁸ *See id.*

⁹ *See id.* at 5.

¹⁰ *See* LBP-06-23, 64 NRC at 280-300. In Contention 4, Pilgrim Watch argued that Entergy’s Environmental Report was deficient because it did not analyze the environmental impacts of onsite spent fuel pool storage, and did not provide a SAMA analysis of spent fuel pool accidents. *See id.* at 281-82.

¹¹ *See* LBP-07-13, 66 NRC at 147-48 (referring to rejected spent fuel pool contentions submitted in this proceeding by Pilgrim Watch and the Massachusetts Attorney General).

¹² *See* CLI-10-11, 71 NRC at 312-13. We noted, additionally, that we would further address Pilgrim Watch’s spent fuel pool arguments in a separate decision addressing Pilgrim Watch’s petition for review of LBP-06-23, the Board decision that rejected Contention 4 as inadmissible. *See id.* at 34. In a separate Memorandum and Order issued today, we affirmed the Board’s decision. *See* CLI-10-14, 71 NRC 449 (2010).

¹³ *See* LBP-07-13, 66 NRC at 148; *see also id.* at 143-44, 145-46.

¹⁴ *See* CLI-10-11, 71 NRC at 310-11.

Under our rules, petitioners must set forth their contentions “with particularity”:¹⁵

The scope of a contention is limited to issues of law and fact *pled with particularity* in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with our rules. . . . Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing. Our procedural rules on contentions are designed to ensure focused and fair proceedings.¹⁶

It “should not be necessary to speculate about what a pleading is supposed to mean,” and petitioners bear the responsibility for setting forth their grievances clearly.¹⁷ Our “contention standards . . . require petitioners to plead specific grievances, not simply to provide general “notice pleadings.”¹⁸ Accordingly, under longstanding NRC practice, if a question arises over the scope of an admitted contention, the Board or Commission will refer back to the bases set forth in support of the contention.¹⁹

Here, Contention 3 specifically described a failure to “account for the loss of economic activity in Plymouth County,” such as lost “business value,” “[t]he fact that the business is an on-going business with inventory, equipment, and income generation capability,” and losses associated with impacts to the “tourism sector.”²⁰ Contention 3 did not include, for example, a challenge to the underlying conversion factor (dollar value per rem of exposure) used to compute health exposure costs, even though Entergy’s Environmental Report clearly and *repeat-*

¹⁵ 10 C.F.R. § 2.309(f)(1). “It is simply insufficient, for example, for a petitioner to point to an Internet Web site or article and expect the Board on its own to discern what *particular* issue a petitioner is raising . . . and why.” *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006) (emphasis added).

¹⁶ *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 70 NRC 90, 100-01 (2010) (emphasis added). *See also, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 359 (2001).

¹⁷ *See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999) (citation omitted).

¹⁸ *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428 (2003).

¹⁹ *See, e.g., Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379, 386 (2002) (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991)); *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 543, 553 (2009); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

²⁰ Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) (Petition for Hearing) at 44-45.

edly had specified the conversion factor that was used — a standard factor from NRC guidance documents.²¹ In short, we did not *remove* any “health” cost claims from the scope of Contention 3, but agreed with the majority that Pilgrim Watch improperly sought to oppose summary disposition with various distinctly new economic cost analysis challenges never proffered, supported, or admitted as part of Contention 3’s economic cost claims.

We also noted that Pilgrim Watch’s opposition to summary disposition raised particular new challenges that decontamination or “cleanup” costs had been dramatically underestimated in the SAMA analysis.²² Again, these were claims nowhere intimated by Contention 3 as proffered or admitted, as both Entergy and the Staff argued.²³ More significantly, quite apart from any timeliness or

²¹ See, e.g., License Renewal Application (Pilgrim Nuclear Power Station), Appendix E, Environmental Report at 4-32, 4-36, 4-45. See also NUREG/BR-0184, “Regulatory Analysis Technical Handbook, Final Report” (June 1997) at 5.26.

Moreover, as the majority stressed, the challenged “off-site economic costs” portion of the SAMA analysis *did not encompass* the valuation of health consequences from dose exposure. See CLI-10-11, 71 NRC at 310 n.118 (citing LBP-07-13, 66 NRC at 145-46). The Pilgrim SAMA analysis *separately* assessed the monetary value of health consequences to offsite population in an “off-site exposure costs” analysis. See also, e.g., Environmental Report at 4-32, 4-36, 4-43. The only obvious arguments bearing on health and dose exposure in Contention 3 went to the accuracy of atmospheric dispersion modeling (which depicts the projected plume trajectory and related radionuclide deposition), the meteorological patterns issue we remanded for hearing.

²² CLI-10-11, 71 NRC at 310-11.

²³ See *id.* at 310-11 & n.119. The specific “decontamination” arguments found beyond the scope of Contention 3 were that the economic cost analysis fundamentally mischaracterized decontamination costs because its underlying decontamination “‘assumptions are based on a radiological weapon event’ where ‘particulates are relatively large and swept up with a broom’” (an argument never specifically raised in the opposition to summary disposition and therefore waived), and a claim that the analysis failed to account for the “difficulty of conducting ecological restoration.” See *id.* at 310.

Pilgrim Watch appears to believe that, because its contention broadly referred to “economic infrastructure” and “economic activity,” it was free to add at will all manner of distinctly new claims simply by labeling these as issues falling within the infinitely broad umbrella of “economic activity,” regardless of whether Contention 3 gave adequate notice of the challenges, or provided the necessary support for their admission. See Motion at 5-6. But as we have stressed, NRC contention standards do not allow for general “notice pleading[s], with details to be filled in later.” *Millstone*, CLI-01-24, 54 NRC at 363 (citation omitted). Pilgrim Watch’s motion now sets forth an expansive definition of what it states it meant by “economic infrastructure,” asserting a litany of matters neither outlined in its contention, nor even identified or argued before the Board in Pilgrim Watch’s opposition to summary disposition. See Motion at 5-6.

Pilgrim Watch is correct that NRC SAMA analyses routinely account for decontamination costs, as Entergy documents properly described. See Motion at 4-5. Contention 3 acknowledged that SAMA economic cost calculations include decontamination costs, an undisputed point. See Petition for Hearing at 43-44; CLI-10-11, 71 NRC at 310-11 n.119. That all parties were aware that decontamination costs are part of SAMA analysis has no bearing on the timeliness of the particular

(Continued)

contention scope issues bearing on the decontamination/cleanup arguments, we considered *all* of Pilgrim Watch's economic cost arguments on summary disposition, but agreed with the Board majority that Pilgrim Watch failed to present any significantly probative evidence of a genuine material dispute on any of its economic cost input claims.²⁴ Whether within the scope of Contention 3 or not, none of Pilgrim Watch's economic cost arguments raised a genuine material dispute for hearing. Pilgrim Watch provides us with no reason to revisit that conclusion.

Building off of its initial claim, Pilgrim Watch additionally argues that we applied the incorrect standard of review in considering the Board's grant of summary disposition, and thereby improperly "limit[ed]" the evidence that Pilgrim Watch may present at the remand hearing. Pilgrim Watch suggests that, absent the Board's error in granting summary disposition and our subsequent error in reviewing that decision, Pilgrim Watch later would have "assembled and submitted" more evidence to support Contention 3 on "inputs relating to economic consequences," including evidence on "spent fuel pool accident consequences," "decontamination," and "health costs."²⁵

This argument is without merit. The premise of Pilgrim Watch's argument depends on the viability of its position that we improperly limited the scope of Contention 3. However, as we explained above, the scope of Contention 3 was dictated by Pilgrim Watch in its original pleading, not by our decision in CLI-10-11. With regard to summary disposition, while Pilgrim Watch certainly was not required to present all of its supporting evidence at the summary disposition stage, it was incumbent upon it to provide some significantly probative evidence of a genuine material dispute to counter Entergy's motion for summary disposition, which addressed the three parts of Contention 3: meteorological patterns, evacuation timing inputs, and economic cost analysis.

At the summary disposition stage, the quality of evidentiary support is "expected to be of a higher level than that at the contention filing stage."²⁶ Because Pilgrim Watch failed to provide significantly probative evidence of a genuine material dispute for hearing on the evacuation inputs and economic cost issues,

"decontamination" claims Pilgrim Watch later sought to introduce to oppose summary disposition. Simply put, Contention 3 neither challenged underlying assumptions regarding how decontamination costs are computed, nor asserted "ecological restoration" claims. Moreover, even if timely, Pilgrim Watch's opposition to summary disposition raised no supported, genuine material dispute on these claims.

²⁴ CLI-10-11, 71 NRC at 311-12 & n.121.

²⁵ Motion at 7-8.

²⁶ CLI-10-11, 71 NRC at 315 (quoting 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)).

we affirmed the Board majority's conclusion that no material dispute remained on those portions of the contention. Pilgrim Watch therefore cannot now insist that it is free to "present evidence" on remand challenging the inputs in the Pilgrim SAMA offsite economic costs analysis, to the extent that such evidence is not within the scope of the remanded meteorological patterns issue, as explained in CLI-10-11.²⁷

In CLI-10-11, we gave careful and generous consideration to all of Pilgrim Watch's arguments challenging the Board majority's dismissal of Contention 3. Pilgrim Watch's motion for reconsideration points to no compelling circumstances such as clear and material error or oversight that would render the Commission's decision invalid and therefore is *denied*. Finally, we encourage the Board's continued progress in establishing the schedule for the remainder of the proceeding and achieving its timely conclusion.²⁸

IT IS SO ORDERED.²⁹

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of June 2010.

²⁷ We also note that Pilgrim Watch's motion closes with the suggestion that we have "prejudged" the SAMA analysis issue because in CLI-10-11 we noted that the GEIS concludes, based on an extensive and bounding analysis, the probability-weighted consequences of a severe accident are "small" for all plants. Motion at 9; *see also* CLI-10-11, 71 NRC at 315, 316-17. We have not prejudged the issue. Pilgrim Watch itself acknowledged the distinction between the GEIS's generic severe accident consequences finding and the requirement for a site-specific SAMA analysis: "*even though* the probability of a severe accident is so low that the impacts can be considered small, all plants must still individually consider alternatives to mitigate the consequences of those accidents." Petition for Hearing at 29 (emphasis in original).

²⁸ Late last week, Judge Abramson issued a decision denying a motion by Pilgrim Watch requesting that he recuse himself from this proceeding. *See* Decision (Denying Motion on Behalf of Pilgrim Watch for My Self-Disqualification from the Remand Proceedings and Referring Motion to the Commission) (June 10, 2010). Judge Abramson has referred the matter to us pursuant to 10 C.F.R. § 2.313(b)(2). We will address the referral in the near term.

²⁹ Commissioner Apostolakis did not participate in this matter.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of

**Docket Nos. 52-012-COL
52-013-COL**

**SOUTH TEXAS PROJECT
NUCLEAR OPERATING COMPANY
(South Texas Project, Units 3
and 4)**

June 17, 2010

RULES OF PRACTICE: APPEALS

Section 2.311 of our rules of practice permits an appeal as of right from a board's ruling on an intervention petition in two limited circumstances: (1) upon the denial of a petition to intervene and/or request for hearing, on the question as to whether it should have been granted; or (2) upon the granting of a petition to intervene and/or request for hearing, on the question as to whether it should have been wholly denied.

RULES OF PRACTICE: APPEALS, INTERLOCUTORY

Other requests for review generally are governed by section 2.341, which provides for interlocutory review, at our discretion, only upon a showing that the issue for which interlocutory review is sought: (i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or (ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.

RULES OF PRACTICE: APPEALS, INTERLOCUTORY

That interlocutory review only will be granted under extraordinary circumstances reflects our disfavor of piecemeal appeals during ongoing licensing board proceedings.

RULES OF PRACTICE: APPEALS, INTERLOCUTORY

Under longstanding Commission precedent, once a petition to intervene and request for hearing has been granted and contentions are admitted for hearing, appeals of Board rulings on new or amended contentions are treated under section 2.341(f)(2), regardless of the subject matter of those contentions.

RULES OF PRACTICE: APPEALS, INTERLOCUTORY

The rejection or admission of a contention, where the Petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact, nor affects the basic structure of the proceeding in a pervasive and unusual manner.

MEMORANDUM AND ORDER

Today we address Intervenors' appeal of a Board ruling¹ that rejected seven late-filed contentions, and treat it as a petition for interlocutory review.² For the reasons set forth below, because Intervenors' petition has demonstrated no grounds for interlocutory review, their appeal must await the final merits decision in this matter.³

¹LBP-10-2 (Jan. 29, 2010) (slip op.) (nonpublic version). A public version of the decision is available at 71 NRC 190 (2010) and at ADAMS Accession No. ML100470855.

²Notice of Appeal (Feb. 9, 2010); Brief in Support of Intervenors' Appeal of Atomic Safety and Licensing Board's Order of January 29, 2010 (Feb. 9, 2010) (Intervenors' Appeal) (nonpublic). Intervenors are the Sustainable Energy and Economic Development (SEED) Coalition, the South Texas Association for Responsible Energy, and Public Citizen.

³The NRC Staff's appeal of the Board's ruling in LBP-10-2, concerning an access determination involving a document containing sensitive unclassified nonsafeguards information (SUNSI), will be addressed in a separate memorandum and order.

I. BACKGROUND

This matter involves the combined license (COL) application of South Texas Project Nuclear Operating Company (STPNOC) to construct and operate two new units on its South Texas site, located in Matagorda County, Texas. Following publication of a notice of hearing and opportunity to petition for leave to intervene on STPNOC's COL application,⁴ Intervenors filed a timely petition to intervene and request for hearing on STPNOC's COL application, submitting twenty-eight proposed contentions.⁵ The Board found that Intervenors had demonstrated standing and had submitted five admissible contentions. Accordingly, they were admitted as parties to the proceeding.⁶

Shortly after briefing was completed, but before the Board ruled on the intervention petition, STPNOC notified the Board that it had submitted to the Staff, as a supplement to the COL application, a "Mitigative Strategies Report" containing a description and plan for implementation of mitigative strategies in accordance with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d).⁷ At STPNOC's request, the Staff has withheld the Mitigative Strategies Report from the public because it contains security-related SUNSI.⁸

In accordance with the terms of a protective order issued by the Board, Intervenors submitted seven new contentions challenging the completeness of the information contained in the Mitigative Strategies Report.⁹ After a prehearing

⁴South Texas Project Nuclear Operating Company Application for the South Texas Project Units 3 and 4; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 7934 (Feb. 20, 2009).

⁵Petition for Intervention and Request for Hearing (Apr. 21, 2009).

⁶The five admitted contentions are Contentions 8, 9, 14, 16, and 21. *See* LBP-09-21, 70 NRC 581 (2009) (admitting Intervenors as parties to the proceeding and ruling on nineteen of twenty-eight proposed contentions); LBP-09-25, 70 NRC 867 (2009) (ruling on the remaining nine contentions).

⁷Letter from Steven P. Frantz, counsel for STPNOC, to Licensing Board (May 27, 2009) at 1 (ADAMS Accession No. ML091470724). *See also* Letter from Scott Head, Manager, Regulatory Affairs, STPNOC, to U.S. NRC (May 26, 2009) at 1 (ADAMS Accession No. ML091470723) (stating that the Mitigative Strategies Report will be incorporated into the COL application as Part 11) (Mitigative Strategies Report Cover Letter). One contention in the initial petition asserted that the application was deficient and incomplete for failing to include the information required by sections 50.54(hh)(2) and 52.80(d), which concern strategies for mitigating loss of large areas of the plant in the event of explosions or fire. The Board found that this contention was inadmissible on the grounds that it became moot with STPNOC's submission of the Mitigative Strategies Report. *See* LBP-09-21, 70 NRC at 596.

⁸Mitigative Strategies Report Cover Letter at 1. STPNOC prepared the report using NEI-06-12, B.5.b Phase 2 & 3 Submittal Guideline, Rev. 2 (Dec. 2006) (NEI-06-12), which also has been withheld from public disclosure as containing security-related SUNSI.

⁹Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) and Request for Subpart G Hearing (Aug. 14, 2009) (nonpublic).

conference on the new contentions, portions of which were closed to the public under the protective order, the Board ruled that all seven new contentions were inadmissible.¹⁰

Intervenors thereafter filed the instant appeal challenging the Board's rulings on three of those contentions — Contentions MS-1, MS-3, and MS-6.¹¹ STPNOC and the NRC Staff oppose the appeal.¹² As discussed below, Intervenors' appeal is premature.

II. DISCUSSION

Section 2.311 of our rules of practice permits an appeal as of right from a board's ruling on an intervention petition in two limited circumstances: (1) upon the denial of a petition to intervene and/or request for hearing, on the question as to whether it should have been granted; or (2) upon the granting of a petition to intervene and/or request for hearing, on the question as to whether it should have been wholly denied.¹³ Other requests for review generally are governed by section 2.341, which provides for interlocutory review, at our discretion, only upon a showing that the issue for which interlocutory review is sought:

- (i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
- (ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.¹⁴

That interlocutory review only will be granted under extraordinary circumstances

¹⁰ LBP-10-2, 71 NRC at 211 (public version).

¹¹ Intervenors' Appeal at 5 n.11.

¹² STP Nuclear Operating Company's Brief Opposing Intervenors' Appeal of LBP-10-02 (Feb. 19, 2010) (nonpublic); NRC Staff's Brief in Opposition to Intervenors' Appeal of LBP-10-02 (Feb. 19, 2010) (nonpublic). Intervenors also have filed a reply to STPNOC's and the Staff's opposition briefs. Intervenors Consolidated Reply to Applicant's and Staff's Responses to the Appeal of the ASLB's Order of January 29, 2010 (Feb. 24, 2010) (nonpublic) (Intervenors' Reply).

¹³ See 10 C.F.R. § 2.311(c), (d)(1). An appeal of an order selecting a hearing procedure also is governed by section 2.311, "on the question as to whether the selection of the particular hearing procedures was in clear contravention of the criteria set forth in § 2.310." 10 C.F.R. § 2.311(e). The Board's selection of a hearing procedure is not at issue here.

¹⁴ 10 C.F.R. § 2.341(a)(1), (f)(2). See also CLI-09-18, 70 NRC 859, 862 (2009) (explaining in this proceeding that "challenges to Board rulings on late-filed contentions normally fall under our rules for interlocutory review").

reflects our disfavor of piecemeal appeals during ongoing licensing board proceedings.¹⁵

Arguing that they are entitled to an appeal as of right, Intervenors characterize their new contentions as “not inherently linked to the[ir] Petition for Intervention.”¹⁶ In Intervenors’ view, the Board treated these contentions as “a separate stand-alone petition for intervention and request for hearing,” and thus “specified that the decision was subject to appeal under 10 C.F.R. § 2.311.”¹⁷ Intervenors assert that an appeal under section 2.311 is appropriate because “there are no fires and explosions contentions now pending before the Board.”¹⁸

Intervenors’ appeal does not fall within the circumstances permitted for appeals as of right. The Board has granted their petition to intervene with five contentions admitted for hearing; the question on appeal is whether the Board erred in rejecting three of Intervenors’ newly proffered contentions. Under longstanding Commission precedent, once a petition to intervene and request for hearing has been granted and contentions are admitted for hearing, appeals of Board rulings on new or amended contentions are treated under section 2.341(f)(2), regardless of the subject matter of those contentions.¹⁹ Contrary to Intervenors’ assertions, it would be illogical to construe Intervenors’ new contentions as a stand-alone intervention petition when they already have intervened and a contested hearing has been granted. Intervenors’ appeal is properly treated as a petition for interlocutory review under section 2.341(f)(2).

To be sure, the Board correctly stated that its ruling was subject to appeal under 10 C.F.R. § 2.311, consistent with our ruling in CLI-09-18.²⁰ In CLI-09-18, we held that, in the unusual circumstances presented by this case, no appeal lay under section 2.311 until the Board acted on all contentions then pending — which included those raised in Intervenors’ intervention petition and the seven new contentions that were filed in advance of the Board’s ruling on the intervention petition.²¹ The Board’s decision in LBP-10-2 ruled on the last of these pending contentions. As such, the *decision* is subject to appeal under section 2.311. But because Intervenors’ intervention petition was granted, their

¹⁵ See, e.g., *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 365 & n.178 (2009); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 137 (2009).

¹⁶ Intervenors’ Reply at 2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *Crow Butte*, CLI-09-9, 69 NRC at 365; *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 11-12 (2007); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 125-26 (2006); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 4-7 (2001).

²⁰ LBP-10-2, 71 NRC at 211.

²¹ See CLI-09-18, 70 NRC at 862.

contention admissibility appeal does not fall into either of the circumstances envisioned by section 2.311.

We decline to exercise our discretion to grant interlocutory review of the Board's rulings on the admissibility of Contentions MS-1, MS-3, and MS-6. Intervenors have not addressed either of the section 2.341(f)(2) factors to show that interlocutory review is warranted. In any event, it does not appear that a convincing case could be made for interlocutory review. The focus of Intervenors' appeal is its assertion that the Board erred in finding these contentions to be inadmissible. But as we recently reiterated in the *Crow Butte* license renewal proceeding, "the rejection or admission of a contention, where the Petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact, nor affects the basic structure of the proceeding in a pervasive and unusual manner."²² Intervenors will have the opportunity to file a petition for review of the Board's contention admissibility rulings following the issuance of the Board's final dispositive decision in this matter.²³ At this time, their appeal is not ripe.

III. CONCLUSION

For the reasons set forth above, we *deny* Intervenors' request for interlocutory review without prejudice to their ability to file a petition for review of the Board's contention admissibility rulings following the issuance of the Board's final dispositive decision in this matter.

IT IS SO ORDERED.²⁴

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of June 2010.

²² *Crow Butte*, CLI-09-9, 69 NRC at 365 (quoting *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 192 (2008)) (internal quotation marks omitted).

²³ See 10 C.F.R. § 2.341(a), (b); *Crow Butte*, CLI-09-9, 69 NRC at 365 & n.180.

²⁴ Commissioner Magwood did not participate in this matter.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Michael F. Kennedy
Dr. Randall J. Charbeneau

In the Matter of

Docket No. 52-033-COL
(ASLBP No. 09-880-05-BD01)

DETROIT EDISON COMPANY
(Fermi Nuclear Power Plant,
Unit 3)

June 15, 2010

RULES OF PRACTICE: NEW OR AMENDED CONTENTIONS

Several Licensing Boards have recently recognized a dichotomy between “new” contentions filed under 10 C.F.R. § 2.309(f)(2) and “nontimely” contentions filed under 10 C.F.R. § 2.309(c), based on both the regulatory text and the apparent absurdity of requiring intervenors with contentions rooted in new material information (“new” contentions) to make the same showing as intervenors who have simply delayed filing their contentions until after expiration of the regulatory deadline (“nontimely” contentions).

**RULES OF PRACTICE: NEW OR AMENDED CONTENTIONS;
GOOD CAUSE**

Intervenors acted reasonably in waiting for NRC Staff to announce the results of its inspection and its determination, based on the Inspection Report, that DTE had in fact violated Appendix B requirements in three specific ways. To force intervenors to file contentions before the results of an ongoing NRC investigation are announced to the public would effectively force intervenors to speculate about

the results of such investigations and the conclusions the Staff might reach. We doubt the Commission would want to encourage the filing of such speculative contentions.

RULES OF PRACTICE: STANDING; 50-MILE PROXIMITY PRESUMPTION

Intervenors have standing based upon their proximity to the proposed Fermi Unit 3. The nature of their interest in the proceeding is based upon the fact that members of the Intervenor organizations reside, work, or recreate within 50 miles of the proposed nuclear power plant. Any order that may be entered in this proceeding concerning QA issues may affect those interests.

RULES OF PRACTICE: NEW OR AMENDED CONTENTIONS; BROADENING SCOPE OF PROCEEDING

Contention 15 will broaden the issues in this proceeding because none of the other admitted contentions concern QA violations. This might delay the proceeding to some extent, although we doubt any delay would be significant. To the extent there will be any delay, it is the price for affording the public the opportunity to litigate questions arising from an applicant's failure to comply with QA requirements. Licensing boards have recognized compliance with QA requirements as an important factor in the licensing decision, and we are reluctant to deny Intervenors the chance to address this important issue based solely on the possibility of a minor delay.

RULES OF PRACTICE: NEW OR AMENDED CONTENTIONS; REFORMULATED CONTENTIONS

Boards have the discretion to reformulate contentions so as to clarify the issues for litigation. We therefore need not reject a contention based solely on technical pleading defects. Instead, the Board will restate the contention to clarify the specific issues arising from the NOV that Intervenors want to litigate and that relate to the licensing decision for Fermi Unit 3.

RULES OF PRACTICE: NEW OR AMENDED CONTENTIONS; SCOPE OF PROCEEDING

The scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board; any contention that falls outside the specified scope of the proceeding is inadmissible.

**RULES OF PRACTICE: NEW OR AMENDED CONTENTIONS;
MATERIALITY**

DTE's QA violations create substantial uncertainty over whether the agency can rely on the tainted information in the FSAR to make the safety-related findings required to issue the license. The quality of the safety-related information in the FSAR is material to the licensing decision, and Contention 15A, by calling into question the quality of that information, raises a material issue.

The question asserted in Contention 15B of whether the COL applicant will in fact implement the QA program required by Appendix B is also material to the licensing decision. If the NRC is not confident that DTE will implement the QA program described in the FSAR, this would certainly raise a substantial question whether the agency could find "reasonable assurance that the facility will be constructed and will operate in conformity with the license, the provisions of the Act, and the Commission's regulations," and that "issuance of the license will not be inimical to the health and safety of the public."

**RULES OF PRACTICE: NEW OR AMENDED CONTENTION;
SUPPORTING EVIDENCE**

An intervenor need not provide all supporting facts for a contention in the original submission or prove its case to have the contention admitted.

**RULES OF PRACTICE: NEW OR AMENDED CONTENTION;
MERITS**

Intervenors have provided a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support their position and upon which they intend to rely at the hearing. This is all that section 2.309(f)(1)(v) demands. To be sure, Applicant contends it did not violate any QA requirement, and NRC Staff maintains that DTE's QA violations are less extensive than Intervenors allege. These disputes go to the merits, however, and we need not resolve them now in order to admit Contentions 15A and 15B.

**RULES OF PRACTICE: NEW OR AMENDED CONTENTION
PRESENTED IN A REPLY**

As a general matter, a party may not present a new contention, or a new basis for a proposed contention, in its reply.

**RULES OF PRACTICE: NEW OR AMENDED CONTENTION;
MERITS**

Arguments concerning the interpretation of debatable evidence are inappropriate in the context of a contention admissibility ruling, where we do not decide the merits or draw factual inferences in favor of the party opposing the admission of a contention.

RULES OF PRACTICE: BURDEN OF PROOF; QA VIOLATIONS

While perfection in the applicant's QA program is not required, once a pattern of QA violations has been shown, the license applicant has the burden of showing that the license may be granted notwithstanding the violations.

RULES OF PRACTICE: SUSPENSION OF ADJUDICATION

Intervenors have provided no legal or factual basis for the Board to order partial suspension of the COLA adjudication. We see no realistic prospect of injury to Intervenors if the adjudication continues because Intervenors will have the opportunity to fully litigate Contentions 15A and 15B before the Commission makes a final decision whether to issue the license. The Commission's general policy is to avoid unnecessary delays in adjudicatory proceedings, and Intervenors have not provided a sufficient justification to show that a delay in this proceeding is necessary.

**RULES OF PRACTICE: NEW OR AMENDED CONTENTIONS;
DESIGN CERTIFICATION**

Because Intervenors cannot reasonably be expected to discover the QA issues that gave rise to the November NOV without the NOV itself as notice, we find that Intervenors have plausibly argued that the November NOV is new and materially different information. Because Contention 16 was filed within 30 days of the release of the NOV, as our Scheduling Order requires, we consider Contention 16 timely filed.

RULES OF PRACTICE: SUSPENSION OF ADJUDICATION

Under 10 C.F.R. § 52.55(c), an applicant may reference a design certification that the Commission has docketed but not granted. Citing this regulation, the Commission has previously rejected a request to hold a license application in abeyance until the design certification rulemaking is completed. *Progress Energy*

Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 4 (2008).

RULES OF PRACTICE: SUSPENSION OF ADJUDICATION

Intervenors request that “the ASLB and Commission . . . suspend design activities related to use of the ESBWR design by DTE until the quality problems at GEH are resolved.” This request must be denied because, although it sounds like a request for something analogous to injunctive relief, it actually represents another attempt by Intervenors to circumvent the regulation permitting license applicants to reference design certification applications that have not been granted. The fact that NRC Staff issued a NOV to GEH based on alleged QA violations in connection with the DCD for the standard design does not affect application of the regulation. DTE may accept the risk that the standard design certification will not be granted, because of GEH’s alleged QA violations or for any other reason.

RULES OF PRACTICE: IMPERMISSIBLE CHALLENGE TO NRC REGULATIONS

A licensing board may not ordinarily consider the validity of or a challenge to a Commission regulation. Although an intervenor may petition the Commission for permission to challenge a rule, the party must make a showing of “special circumstances.” The special circumstances required to obtain waiver have been described as a prima facie showing that application of a rule in a particular way would not serve the purposes for which the rule was adopted.

RULES OF PRACTICE: NEW OR AMENDED CONTENTION; GENUINE DISPUTE

To comply with 10 C.F.R. § 2.309(f)(1)(vi), Intervenors must present sufficient information to demonstrate a genuine dispute with the application on a material issue of law or fact. Merely quoting or citing documents as the basis for a contention, as Intervenors have done for Contention 16, is not enough to fulfill this requirement.

DESIGN CERTIFICATION RULEMAKING: ABEYANCE

Commission policy dictates that, when a COLA references a docketed design certification application, a contention challenging an aspect of the standard reactor design should be resolved in the rulemaking proceeding for the standard design, not in the COL proceeding. Such a contention may be held in abeyance by a

licensing board pending completion of the rulemaking, but for a board to take that action the contention must be “otherwise admissible.” Licensing Boards have interpreted “otherwise admissible” to mean a contention that meets the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) but for the fact that it challenges a yet-to-be-certified reactor design.

ORDER

(Ruling on Proposed New Contentions 15 and 16)

This combined license (COL) proceeding involves the application of Detroit Edison Company (DTE or Applicant) under 10 C.F.R. Part 52, Subpart C, to construct and to operate a GE-Hitachi Economic Simplified Boiling Water Reactor (ESBWR)¹ designated Unit 3, on its existing Fermi nuclear facility site near Newport City in Monroe County, Michigan.²

Intervenors³ have submitted two new contentions, 15 and 16, for the Board’s consideration.⁴ In Contention 15, Intervenors allege that DTE failed to implement a quality assurance (QA) program under 10 C.F.R. Part 50 Appendices A and

¹ The ESBWR design is the subject of an ongoing rulemaking proceeding under Docket No. 52-010. *See* General Electric Company; Notice of Acceptance of Application for Final Design Approval and Standard Design Certification of the ESBWR Standard Plant Design, 70 Fed. Reg. 73,311 (Dec. 9, 2005).

² On September 18, 2008, DTE submitted its COL Application for Fermi Unit 3 to the NRC. *See* Notice of Hearing, and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for Fermi 3, 74 Fed. Reg. 836 (Jan. 8, 2009) [hereinafter Notice of Hearing]. The NRC accepted and docketed the Application on November 25 and December 2, 2008, respectively. On January 8, 2009, the Commission published in the *Federal Register* a notice of hearing and opportunity to petition for leave to intervene on the COL Application for Fermi Unit 3. *Id.* The Commission instituted this adjudicatory proceeding after Petitioners submitted a petition to intervene on March 9, 2009. *See* Petition of Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don’t Waste Michigan, Sierra Club, et al. for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing (Mar. 9, 2009). In July 2009, the Board found that Petitioners had standing to participate in this proceeding, admitted four of the contentions that Petitioners submitted for litigation, and granted Petitioners’ hearing request. LBP-09-16, 70 NRC 227 (2009), *aff’d*, CLI-09-22, 70 NRC 932, 933 (2009).

³ Intervenors are Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don’t Waste Michigan, the Sierra Club (Michigan Chapter), and numerous individuals.

⁴ Supplemental Petition of Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don’t Waste Michigan, Sierra Club, et al. for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA

(Continued)

B during preparation of its COLA Application (COLA) for Fermi Unit 3.⁵ In Contention 16, Intervenor alleges QA deficiencies in the ESBWR reactor design certification application.⁶ Both Applicant and Nuclear Regulatory Commission (NRC) Staff oppose admission of Contentions 15 and 16.⁷

For the reasons explained in Section II below, the Board concludes that Contention 15, as clarified by the Board, is admissible. We deny, however, Intervenor's request to suspend partially the adjudication of the Fermi Unit 3 COLA.⁸

The Board concludes that Contention 16 is inadmissible, as described in Section III, below. We also deny Intervenor's requests to suspend partially the Fermi Unit 3 COLA adjudication and to suspend the ESBWR design activities.

I. BACKGROUND

Contentions 15 and 16 arose following the October and November 2009 NRC Staff issuance of Notices of Violation (NOV) to DTE or to GE-Hitachi Nuclear Americas LLC (GEH) for various QA violations related to the Fermi Unit 3 COLA.

Adjudication (Nov. 6, 2009) [hereinafter Contention 15]; Second Supplemental Petition of Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, et al. for Admission of a New Contention on ESBWR Quality Assurance, and for Partial Suspension of COLA Adjudication (Dec. 14, 2009) [hereinafter Contention 16].

⁵ See Contention 15 at 2-6.

⁶ See Contention 16 at 2-3.

⁷ See Applicant's Response to Proposed Supplemental Contention (Dec. 1, 2009) [hereinafter Applicant Answer to 15]; NRC Staff Answer to Supplemental Petition for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication (Dec. 1, 2009) [hereinafter NRC Staff Answer to 15].

⁸ We note that Intervenor requests at least three different types of "suspension" in Contentions 15 and 16. The titles of both Contentions 15 and 16 include the phrase "request . . . for partial suspension of COLA adjudication." In Contention 15, Intervenor moves for suspension of "part of the adjudication of the Fermi 3 COLA, except for their proffered Contention 15, indefinitely until there is satisfactory proof positive of a fully-implemented quality assurance program for Fermi 3 which integrates all previous and contemplated QA revisions." Contention 15 at 2. In Contention 16, however, it appears that Intervenor requests both suspension of the COLA adjudication (as the title of the document suggests) and suspension of ESBWR design activities "by DTE until the quality problems at GEH are resolved . . ." Contention 16 at 3. Later in Contention 16, Intervenor states that "adjudication on the COLA must be delayed until the rulemaking on the ESBWR is complete." Contention 16 at 17. Suspending design activities until the quality problems at GEH are resolved would involve stopping work by either the Applicant or its reactor vendor (GEH). That request is different from a request for suspension of this adjudication proceeding, which would involve a halt to this Board's activities.

In Contention 15, Intervenors state that, in or about March 2007, DTE entered into a contract with Black and Veatch (B&V) under which B&V performed activities in support of the COLA for Fermi Unit 3, including site-related testing and investigation.⁹ We are told that, pursuant to Appendix B of 10 C.F.R. Part 50 (Appendix B), DTE was required to establish a QA program and to apply that program to the safety-related activities of B&V.¹⁰ Nevertheless, an NRC Staff inspection concluded that DTE failed to comply with the QA requirements of Appendix B.¹¹ On October 5, 2009, NRC Staff issued an Inspection Report and NOV in which it described the results of its August 18-21, 2009 inspection of DTE's activity relating to the Fermi Unit 3 COLA.¹² In the NOV, NRC Staff cited DTE for three violations of NRC requirements under "Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants," set forth in Appendix B. These violations included: (A) failing to establish and implement a Fermi Unit 3 QA program between March 2007 (when DTE initially contracted with B&V for the conduct of COLA activities for Fermi Unit 3) and February 2008 and failing to retain overall control of contracted COLA activities as required under Criterion II, "Quality Assurance Program" of Appendix B, resulting in inadequate control of procurement documents and ineffective control of contract services performed by B&V for COLA activities; (B) failing to perform internal audits of QA programmatic areas implemented for Fermi Unit 3 COLA activities; and (C) failing to document trending of DTE's corrective action reports (CARs).¹³

DTE responded to the NOV letter on November 9, 2009, denying that any violation occurred because DTE was not actually a COL applicant before September 18, 2008, and thus was not subject to Appendix B.¹⁴ DTE's reply also describes the corrective actions it had taken since the NOV was issued.¹⁵ On April 27, 2010, NRC Staff responded to DTE, explaining that, despite its lack of applicant status before September 18, 2008, DTE must demonstrate compliance with QA regu-

⁹ See Contention 15 at 4-5.

¹⁰ *Id.*

¹¹ See *id.* at 3-4; see also Letter from Richard Rasmussen, Chief Quality and Vendor Branch B, Division of Construction Inspection & Operational Programs, Office of New Reactors, to Jack Davis, Chief Nuclear Officer, Detroit Edison Company [hereinafter NOV Letter] and attached Notice of Violation (Oct. 5, 2009) [hereinafter NOV]; Vendor Inspection Report, U.S. NRC, Office of New Reactors, Division of Construction Inspection & Operational Programs (Inspection Report Number 2009-201) (Aug. 18-21, 2009) (ADAMS Accession No. ML0927400640).

¹² See NOV Letter.

¹³ *Id.* at 1-2. To promote clarity, the violations have been labeled as A, B, and C in this Order.

¹⁴ Letter from Peter Smith, Director, Nuclear Development Licensing & Engineering, Detroit Edison Company, to NRC Staff (Nov. 9, 2009) (ADAMS Accession No. ML093160318) [hereinafter DTE NOV Reply].

¹⁵ *Id.* at 9.

lations.¹⁶ The NRC Staff response contained a new NOV that reformulated the original violations A, B, and C into two new violations.¹⁷

In response to Applicant and NRC Staff answers opposing admission of Contention 15, Intervenor filed a reply and the Declaration of Arnold Gundersen.¹⁸ Due to the breadth of Intervenor's reply to their answer to Contention 15, NRC Staff submitted its Motion for Leave to Reply to Intervenor's Combined Reply.¹⁹ In that motion, NRC Staff requested leave to reply to Intervenor's submission of the Gundersen Declaration and the June e-mails, which NRC Staff asserts Intervenor had not previously cited or mentioned.²⁰ While reserving judgment on admissibility of Contention 15, this Board issued an order on December 23, 2009, granting NRC Staff's Motion for Leave to Reply.²¹ In that same order, we allowed the Applicant to file a reply to the same arguments and supporting material that formed the subject of NRC Staff's reply, but stated that no additional filings concerning Contention 15 would be permitted.²²

¹⁶ Letter from Richard Rasmussen, Chief Quality and Vendor Branch B, Division of Construction Inspection & Operational Programs, Office of New Reactors, to Jack Davis, Chief Nuclear Officer, Detroit Edison Company and Revised Notice of Violation to Detroit Edison Company (Apr. 27, 2010) (ADAMS Accession No. ML100330687) [hereinafter NRC Response to DTE NOV Reply].

¹⁷ NRC Staff formulated two new violations citing DTE's noncompliance with 10 C.F.R. Part 50, Appendix B. NRC Staff withdrew Violation A of the original NOV and formulated new Violation A using the requirements of Criterion VII in Appendix B. Original Violations B and C were reformulated into a new Violation B. NRC Staff accepted Applicant's corrective actions regarding the reformulated Violation B (which superseded the original NOV's violations 05200033/2009-201-02 and -03). Applicant must respond to the new violation 05200033/2009-201-04 within 30 days of the April 27, 2010 letter. *See* NRC Response to DTE NOV Reply at 2.

¹⁸ RESUBMITTED Intervenor's Combined Reply in Support of Supplemental Petition for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication (Dec. 8, 2009) [hereinafter Intervenor's Reply]. Intervenor filed part of this reply document on December 8, 2009, and shortly thereafter, a few minutes into December 9, 2009, filed the remaining portion of the same document. The timing of these filings indicates the possibility of error or complications involving the electronic filing system. While the deadline was December 8, not December 9, neither Applicant nor NRC Staff submitted a motion within the 10-day time period required under 10 C.F.R. § 2.323 to challenge this filing as late. Because of the apparent electronic complications and because no party filed a challenge to Intervenor's Reply document as "late," the Board will treat the December 9, 2009 filing as a valid reply. *See* Declaration of Arnold Gundersen Supporting Supplemental Petition of Intervenor Contention 15: DTE COLA Lacks Statutorily Required Cohesive QA Program (Dec. 8, 2009) [hereinafter Gundersen Declaration].

¹⁹ NRC Staff Motion for Leave to Reply in Support of Supplemental Petition (Dec. 18, 2009) [hereinafter NRC Staff Reply to Intervenor's Reply].

²⁰ *Id.* at 1.

²¹ Licensing Board Order (Granting Motion for Leave to Reply) (Dec. 23, 2009) (unpublished).

²² *Id.* On the same day the order was issued, Applicant submitted its response to the NRC Staff's Motion. Applicant's Response to NRC Staff Motion for Leave to Reply (Dec. 23, 2009). In this

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Meanwhile, Intervenor filed a second new contention in this proceeding on December 14, 2009. Contention 16 is based on a letter and NOV from NRC Staff to GEH.²³ GEH has filed an application with the NRC seeking design certification for the ESBWR, and DTE has stated in the Fermi Unit 3 COLA that it intends to use the ESBWR design. In Contention 16, Intervenor alleges QA problems in the ESBWR reactor design process.²⁴ They further allege that the November NOV identifies errors that appear to violate the ESBWR Design Control Document (DCD) that is incorporated by reference in the Fermi Unit 3 COLA.²⁵ Intervenor relates the history of GEH's QA problems with the ESBWR design, which they claim started when the Fermi Unit 3 project began in March 2007.²⁶ Reasoning that it is DTE's responsibility to construct and to operate Fermi Unit 3's ESBWR using the QA protocols that GEH sets, Intervenor states that they are alarmed at the violations²⁷ and GEH's failure to remedy them.²⁸ Applicant and NRC Staff each filed answers on January 8, 2010, in which they oppose admission of Contention 16.²⁹ Intervenor filed their reply to these answers on January 15, 2010.³⁰

response, Applicant agrees with NRC Staff's arguments that the scope of Intervenor's reply was improper and that Intervenor cannot bypass the requirements of 10 C.F.R. § 2.309(c) for late-filed contentions by stating these arguments for the first time in a reply. *Id.*

²³ In this NOV, NRC Staff outlined three Severity Level IV violations of NRC requirements at the GEH facility in Wilmington, North Carolina. After its review of the GEH QA program implementation and documentation, NRC Staff cited the first violation because GEH failed to provide procedural guidance for managing the computer databases that contain training records of its personnel. The second violation concerns GEH's failure to provide adequate guidance for receipt inspections of design and engineering work from its suppliers and its failure to perform an adequate annual evaluation of Empresarios Agrupados Internacional, S.A. (a contractor) in 2008. The third violation is due to GEH's failure to adequately classify a corrective action report and to perform an accompanying root cause evaluation for the corrective action, which involves radiation shielding. Letter from Richard Rasmussen, NRC, to Russell Bastyr, GEH, NRC Inspection Report 05200010/2009-201 and Notice of Violation (Nov. 12, 2009) (ADAMS Accession No. ML093090440) [hereinafter November NOV].

²⁴ Contention 16 at 1.

²⁵ *Id.* at 2, 4.

²⁶ *Id.* at 4-5.

²⁷ In Contention 16, Intervenor cites two separate NOVs related to GEH QA issues: one dated March 25, 2009, and the other dated November 12, 2009. The November 12, 2009 NOV is the basis for Contention 16.

²⁸ Contention 16 at 9.

²⁹ See Applicant's Response to Second Proposed Supplemental Contention (Jan. 8, 2010) [hereinafter Applicant Answer to 16]; NRC Staff Answer to Second Supplemental Petition for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication (Jan. 8, 2010) [hereinafter NRC Staff Answer to 16].

³⁰ Petitioners' Combined Reply in Support of Second Supplemental Petition for Admission of a New Contention on ESBWR Quality Assurance (Jan. 15, 2010) [hereinafter Intervenor's Reply to 16].

II. RULING ON CONTENTION 15

Contention 15 states:

Detroit Edison has failed to comply with Appendix B to 10 C.F.R. Part 50 to establish and maintain a quality assurance (QA) program since March 2007 when it entered into a contract with Black and Veatch (B&V) for the conduct of safety-related combined license (COL) application activities and to retain overall control of safety-related activities performed by B&V. DTE further has failed to complete any internal audits of QA programmatic areas implemented for Fermi 3 COLA activities performed to date. And DTE also has failed to document trending of corrective actions to identify recurring conditions adverse to quality since the beginning of the Fermi 3 project in March 2007.³¹

A. Timeliness

We first consider whether this new contention may be filed after the expiration of the deadline for filing contentions established in the notice of opportunity for a hearing.

A new contention may be filed after the deadline found in the notice of hearing with leave of the presiding officer upon a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.³²

Given that NOV first became available on October 7, 2009, NRC Staff acknowledges that Contention 15 was timely filed³³ under the Board's scheduling order for this case.³⁴ DTE, however, contends that Contention 15 was untimely.³⁵ Recognizing that Contention 15 is based upon the NOV, DTE argues that information upon which the NOV was based — although not the NOV itself — was available before October 7, 2009.³⁶ DTE points to documents related to the QA

³¹ Contention 15 at 2-3.

³² 10 C.F.R. § 2.309(f)(2).

³³ NRC Staff Answer to 15 at 9.

³⁴ Licensing Board Order (Establishing Schedule and Procedures to Govern Further Proceedings) (Sept. 11, 2009) at 2 (unpublished) [hereinafter Scheduling Order].

³⁵ Applicant Answer to 15 at 8.

³⁶ *Id.* at 8-12.

issue that predate the NOV, including its own submittals to the agency stating its intent to rely on the B&V QA program; an NRC Staff internal memorandum that, according to DTE, “highlighted the precise issues that are the basis for the Notice of Violation”; and Requests for Additional Information (RAIs) related to the QA issue.³⁷ DTE maintains that the NOV contains no information that is materially different from that previously available to the Intervenors.³⁸

We disagree. The NOV is not simply a reiteration of information and NRC Staff conclusions contained in the various documents cited by DTE. On the contrary, the NOV Letter explains that the NOV is based on the results of an inspection conducted on August 18-21, 2009, during which an “NRC inspection team reviewed certain portions of [DTE’s] quality assurance (QA) program implementation to ensure that they were effectively implemented with respect to the Fermi Unit 3 combined license . . . application.”³⁹ The NOV Letter and its attachments announced the results of the August 18-21 inspection and NRC Staff’s finding of three specific violations of Appendix B requirements based on those results.⁴⁰ Both the Inspection Report and the three specific violations listed in the NOV constitute new information that was materially different from that previously available to Intervenors.⁴¹

We are not persuaded by DTE’s argument for an additional reason. As the Board in the *Prairie Island* relicensing proceeding stated, “we are ‘not impressed with arguments suggesting that, in order to raise a timely contention, a party must piece together disparate shreds of information that, standing alone, have little apparent significance.’”⁴² The *Prairie Island* Board rejected such an argument, explaining:

³⁷ *Id.* at 9-10.

³⁸ *Id.* at 10.

³⁹ NOV Letter at 1.

⁴⁰ By contrast, although the June 23, 2009 Staff memo cited by DTE indicates that NRC Staff had concerns about DTE’s QA program, it also states that “[t]hese concerns will be assessed during an inspection” See Memorandum from John Nakoski, NRC, to Jeffrey Cruz, NRC, “Fermi 3 Application Quality Assurance (QA) Program” (June 23, 2009) (ADAMS Accession No. ML091671550). Thus, the June 23, 2009 Staff memo contemplates further investigation by the NRC Staff before it decides whether any violations occurred. We will not deem Contention 15 untimely merely because Intervenors waited for the NRC’s investigatory process to be concluded and the Staff to announce its determination.

⁴¹ The Board reviewed the documents posted in ADAMS on the Fermi Unit 3 docket between August 18, 2009 (the start date of NRC Staff’s QA inspection) and October 5, 2009 (the NOV issuance date). This review confirmed that the Inspection Report was not available on ADAMS until after October 5, 2009. See *supra* notes 11, 16-17 and accompanying text.

⁴² *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), Order (Narrowing and Admitting PIIC’s Safety Culture Contention) (Jan. 28, 2010) at 6 (unpublished) (quoting *U.S. Department of Energy* (High-Level Waste Repository), LBP-09-29, 70 NRC 1028, 1036 (2009)).

Applicant and NRC Staff . . . claim that [the Petitioner] could have filed this contention in the wake of numerous events that transpired since late 2008. Those events include meetings and reports on the cavity leakage issue, the issuance of yellow and white findings in early 2009, NSPM's responses to the NRC Staff's requests for additional information (RAIs), and issuance of the preliminary SER in June 2009, which identified the cavity leakage issue as an open item. All of those events revealed fragments of the story that PIIC would ultimately fashion into a contention. But none of those events, by itself, fully captured the scope of PIIC's concerns related to safety culture. We would not expect PIIC to "piece together" those "shreds of information" and formulate its contention prior to issuance of the final SER. Accordingly, we find that PIIC's contention meets all of the criteria at 10 C.F.R. § 2.309(f)(2).⁴³

Similarly, we do not expect Intervenors to have pieced together various shreds of information to conclude that DTE violated QA requirements in the three specific ways stated in the NOV even before NRC Staff itself announced its determination.

The only remaining issue is whether Intervenors filed Contention 15 in compliance with the requirements of our scheduling order once the NOV was issued. We agree with NRC Staff that they did. The scheduling order states that "a proposed new or amended contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available."⁴⁴ The NOV is dated October 5, 2009; it was posted on ADAMS on October 7, 2009; and Contention 15 was filed on November 6, 2009.

We therefore conclude that Contention 15 satisfies the criteria of 10 C.F.R. § 2.309(f)(2). DTE maintains that we must also determine whether Contention 15 may be admitted under the balancing test in 10 C.F.R. § 2.309(c), which applies to nontimely contentions.⁴⁵ We doubt that this is correct.⁴⁶ Nevertheless, we will

⁴³ *Id.* at 6-7.

⁴⁴ Scheduling Order at 2.

⁴⁵ Applicant Answer to 15 at 2.

⁴⁶ "[S]everal Licensing Boards have [recently] recognized a dichotomy between 'new' contentions filed under [10 C.F.R. §] 2.309(f)(2) and 'nontimely' contentions filed under 10 C.F.R. § 2.309(c), based on both the regulatory text and the apparent absurdity of requiring intervenors with contentions rooted in new material information ('new' contentions) to make the same showing as intervenors who have simply delayed filing their contentions until after expiration of the regulatory deadline ('nontimely' contentions)." *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-09-27, 70 NRC 992, 998 (2009); *see also Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 210 n.95 (2007); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 NRC 391, 396 n.3 (2006); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573-74 (2006); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-05-32,

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apply the section 2.309(c) criteria to remove any lingering question concerning the timeliness issue.

Section 2.309(c) sets forth eight factors that apply to nontimely intervention petitions, hearing requests, and contentions.⁴⁷ Even if we assume *arguendo* that Contention 15 was nontimely, we conclude that Intervenors have on balance satisfied the section 2.309(c) factors. The Commission has long affirmed that “[g]ood cause’ is the most significant of the late-filing factors set out [in] 10 C.F.R. § 2.309(c).”⁴⁸ Recently, the Commission upheld the *Crow Butte* Licensing Board’s finding that a petitioner demonstrated “good cause” for its late filing.⁴⁹ In this case, Intervenors have shown good cause. For the reasons we have previously explained, they acted reasonably in waiting for NRC Staff to announce the results of its August 18-21 inspection and its determination, based on the Inspection Report, that DTE had in fact violated Appendix B requirements in three specific ways. To force intervenors to file contentions before the results of an ongoing NRC investigation are announced to the public would effectively force intervenors to speculate about the results of such investigations and the conclusions the Staff might reach. We doubt the Commission would want to encourage the filing of such speculative contentions.

Most of the other factors also weigh in favor of Intervenors.⁵⁰ We have

62 NRC 813, 821 n.21 (2005). Simply put, “[i]f a contention satisfies the timeliness requirement of 10 C.F.R. § 2.309(f)(2)(iii), then, by definition, it is *not* subject to 10 C.F.R. § 2.309(c) which specifically applies to ‘nontimely filings.’” *Vermont Yankee*, LBP-06-14, 63 NRC at 573 n.14 (emphasis in original).

⁴⁷ The criteria are:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the [petitioner’s] right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the [petitioner’s] property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the [petitioner’s] interest;
- (v) The availability of other means whereby the [petitioner’s] interest will be protected;
- (vi) The extent to which the [petitioner’s] interests will be represented by existing parties;
- (vii) The extent to which the [petitioner’s] participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the [petitioner’s] participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1).

⁴⁸ *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549 n.61 (2009); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 558 (2005); *Private Fuel Storage, L.L.C.* (Independent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000).

⁴⁹ *North Trend*, CLI-09-12, 69 NRC at 549.

⁵⁰ 10 C.F.R. § 2.309(c)(1)(ii)(vi), (viii).

already ruled that Intervenors have standing based upon their proximity to the proposed Fermi Unit 3, admitted four of their contentions, and granted their request for a hearing.⁵¹ They have therefore established their right to be parties to the proceeding.⁵² The nature of their interest in the proceeding is based upon the fact that members of the Intervenor organizations reside, work, or recreate within 50 miles of the proposed nuclear power plant.⁵³ Any order that may be entered in this proceeding concerning QA issues may affect those interests.⁵⁴ As Intervenors state, “[i]f the NRC de-emphasizes quality concerns in plant design and construction, the margin of public safety, including the safety of [Intervenors] or their members, will be directly affected.”⁵⁵ And, although the NRC has issued an NOV to DTE on the subject of QA, the scope of the issues in this licensing proceeding is potentially broader. Intervenors claim, for example, that “the FSAR’s accuracy in explicating accident scenarios and probabilities” is brought into question by DTE’s QA violations.⁵⁶ By contrast, the NOV does not address the impact of the alleged QA violations on the FSAR. We therefore cannot say that means other than this proceeding are available to protect Intervenors’ interests.⁵⁷ Although NRC Staff is a party to this proceeding, Intervenors appear to have much broader concerns with the impact of DTE’s QA violations than NRC Staff has articulated in its filings before the Board. We therefore doubt that Intervenors’ interests will be represented by the existing parties to this proceeding.⁵⁸ Finally, Intervenors have directed the Board to various internal NRC documents that appear relevant to the QA issue, and they have provided the declaration of an expert witness concerning the extent of DTE’s QA violations.⁵⁹ This suggests they may be able to assist the Board in developing a sound record.⁶⁰

The one factor that may not favor Intervenors is “[t]he extent to which the [Intervenors’] participation will broaden the issues or delay the proceeding.”⁶¹ Contention 15 will broaden the issues in this proceeding because none of the other admitted contentions concern QA violations. This might delay the proceeding to some extent, although we doubt any delay would be significant. To the extent there will be any delay, it is the price for affording the public the opportunity to

⁵¹ LBP-09-16, 70 NRC at 227, *aff’d*, CLI-09-22, 70 NRC 932 (2009).

⁵² 10 C.F.R. § 2.309(c)(1)(ii).

⁵³ LBP-09-16, 70 NRC at 242.

⁵⁴ 10 C.F.R. § 2.309(c)(1)(iii).

⁵⁵ Contention 15 at 11.

⁵⁶ Contention 15 at 12.

⁵⁷ 10 C.F.R. § 2.309(c)(1)(v).

⁵⁸ 10 C.F.R. § 2.309(c)(1)(vi).

⁵⁹ *See* Gunderson Decl., discussed *supra* note 18 and accompanying text.

⁶⁰ 10 C.F.R. § 2.309(c)(1)(viii).

⁶¹ 10 C.F.R. § 2.309(c)(1)(vii).

litigate questions arising from an applicant's failure to comply with QA requirements. Licensing boards have recognized compliance with QA requirements as an important factor in the licensing decision,⁶² and we are reluctant to deny Intervenor's the chance to address this important issue based solely on the possibility of a minor delay.

Because the most important factor, the "good cause" issue, favors Intervenor's, and because most of the other factors also weigh in their favor, we may admit Contention 15 even if it was nontimely.

B. Admissibility

Having concluded that Contention 15 was timely filed, we next consider whether it satisfies the admissibility requirements of 10 C.F.R. § 2.309(f)(1).

In order to be admissible, a proposed contention must include specific statements of law or fact to be raised or controverted, as required by section 2.309(f)(1)(i), and provide a brief explanation of the basis for the contention, as required by section 2.309(f)(1)(ii). In opposing the new contention, NRC Staff complains that Contention 15 merely restates the violations alleged in the NOV, without identifying the specific issues to be raised or controverted.⁶³ NRC Staff acknowledges, however, that "[i]n their discussion of proposed Contention 15, the Intervenor's do attempt to explain the significance of the violations cited in the NOV and to link them to issues they wish to litigate in this proceeding."⁶⁴ We can identify from Intervenor's discussion of Contention 15 two specific issues related to the licensing decision that Intervenor's intend to litigate.

The first issue concerns the reliability of safety-related information in the FSAR. Intervenor's complain that DTE's failure to comply with Appendix B requirements infects the safety-related information in the FSAR that is based on B&V's tests, investigations, or other safety-related activities, thereby precluding the NRC from relying on such information in its licensing decision. Intervenor's note that, "[b]efore issuing a COL, the NRC staff must complete safety and environmental reviews of the application" and that the COLA "must comply with . . . NRC regulations and all applicable laws."⁶⁵ They state that

⁶² *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 632-33 (1985). See also *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 89 (1983) (noting "the importance of the subject of QA/QC").

⁶³ NRC Staff Answer to 15 at 10-14.

⁶⁴ *Id.* at 14. NRC Staff maintains, however, that those issues are "outside the subject matter covered by the NOV, and in some cases . . . outside the scope of this licensing proceeding." *Id.* We disagree, for the reasons explained *infra*.

⁶⁵ Contention 15 at 16.

[s]ince there has apparently not been a genuine QA program administered by DTE in the Fermi 3 preconstruction phase, the lack of QA infects all of the steps taken to date, and a halt to COLA processing is needed because of the potentially large revisions which might become necessary to it.⁶⁶

Intervenors further argue that “the FSAR’s accuracy in explicating accident scenarios and probabilities is brought into question by the claimed utter lack of ongoing quality assurance activity.”⁶⁷ Thus, Intervenors’ first argument is that safety-related information in the FSAR is unreliable and should not be used to support the licensing decision because it is based in whole or in part on tests, investigations, or other safety-related activities performed by B&V during the period when DTE had neither established nor implemented its own Appendix B QA program to govern those activities.

We understand Intervenors’ second argument to be that, given DTE’s history of QA violations and perceived lack of commitment to compliance with Appendix B requirements, the NRC cannot make the safety findings necessary to support issuance of the COL. Intervenors state at the beginning of Contention 15 that “DTE . . . appears to be serially in violation of NRC regulations requiring the implementation of a Quality Assurance program during the planning and development stages of the Economic Simplified Boiling Water Reactor design which it proposes for the proposed Fermi 3 nuclear reactor.”⁶⁸ Intervenors also state that DTE’s failure to comply with General Design Criteria #1⁶⁹ “suggests that DTE’s corporate management has little concern for nuclear quality assurance, as they allowed the situation to become serious for more than two (2) years, without intervening,” and that “[b]y willingly and deliberately choosing not to comply with 10 CFR part 50 since the inception of the COLA proceeding, DTE cannot provide adequate assurance that Fermi 3 can ever comply.”⁷⁰

In rebuttal to NRC Staff’s argument that DTE’s QA violations were much less extensive than Intervenors claim,⁷¹ Intervenors maintain in their Reply that “the lack of a meaningful, DTE-run quality assurance program continues right down to the present.”⁷² Intervenors attached to their Reply the Declaration of Arnold Gundersen, a nuclear engineer, who had examined various internal NRC Staff e-mails stating that, in fact, DTE was out of compliance with some Appendix

⁶⁶ *Id.*

⁶⁷ *Id.* at 12.

⁶⁸ *Id.* at 1-2.

⁶⁹ General Design Criterion #1 is contained in 10 C.F.R. Part 50, Appendix A, and it requires a COLA submitted under 10 C.F.R. § 52.79 to establish and to implement a QA program.

⁷⁰ *Id.* at 3, 7.

⁷¹ See NRC Staff Answer to 15 at 14-16.

⁷² Intervenors’ Reply at 2.

B requirements as late as June 2009, well after the date by which, according to NRC Staff's Answer, the issue of DTE's noncompliance had been resolved.⁷³ Intervenor contend that they "have articulated evidence that there has been a breakdown of DTE's QA program for Fermi 3 'sufficient to raise legitimate doubt as to whether the plant can be operated safely.'" ⁷⁴ Intervenor demand that DTE "provide satisfactory proof positive of a fully-implemented quality assurance program which integrates all previous and contemplated QA revisions."⁷⁵

Given our understanding of Intervenor's arguments, we can restate Contention 15 to satisfy the requirement that it identify the specific issues to be litigated. As we noted in our previous ruling on contention admissibility, boards have the discretion to reformulate contentions so as to clarify the issues for litigation.⁷⁶ We therefore need not reject a contention based solely on technical pleading defects. Instead, the Board will restate the contention as follows to clarify the specific issues arising from the NOV that Intervenor want to litigate and that relate to the licensing decision for Fermi Unit 3.

Contention 15 (including subparts A & B):

Detroit Edison (DTE) failed to comply with Appendix B to 10 C.F.R Part 50 to establish and implement its own quality assurance (QA) program when it entered into a contract with Black and Veatch (B&V) for the conduct of safety-related combined license (COL) application activities and to retain overall control of safety-related activities performed by B&V. This violation began in March 2007 and continued through at least February 2008. Further, DTE failed to complete internal audits of QA programmatic areas implemented for the Fermi 3 COL Application, and DTE also has failed to document trending of corrective actions to identify recurring conditions adverse to quality since the beginning of the Fermi Unit 3 project in March 2007.

Contention 15A: These deficiencies adversely impact the quality of the safety-related design information in the FSAR that is based on B&V's tests, investigations, or other safety-related activities. Because the NRC may base its licensing decision on safety-related design information in the FSAR only if it has reasonable assurance of the quality of that information, it may not lawfully issue the COL until the deficiencies have been adequately corrected by the Applicant, or until the Applicant

⁷³ *Id.* at 3-5.

⁷⁴ *Id.* at 7 (quoting *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344-45 (1983)) (other citations omitted).

⁷⁵ *Id.* at 14.

⁷⁶ LBP-09-16, 69 NRC at 256 (quoting *North Trend*, CLI-09-12, 69 NRC at 552 (quoting *Shaw Areva MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 482 (2008) (emphasis omitted))); see also *Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-96 (1979).

demonstrates that the deficiencies do not affect the quality of safety-related design information in the FSAR.

Contention 15B: Although DTE claims that in February 2008 it adopted a QA program that conforms to Appendix B, DTE has failed to implement that program in the manner required to properly oversee the safety-related design activities of B&V. This demonstrates an ongoing lack of commitment on the part of DTE's management to compliance with NRC QA regulations. The NRC cannot support a finding of reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety until DTE provides satisfactory proof of a fully-implemented QA program that will govern the design, construction, and operation of Fermi Unit 3 in conformity with all relevant NRC regulations.

As clarified by the Board, Contention 15 includes two specific statements of law or fact to be raised or controverted and briefly explains the bases of these statements.⁷⁷ Contention 15A questions the reliability of safety-related design information in the FSAR that is based in whole or in part on B&V tests, investigations, or other activities conducted during any period when DTE lacked the required QA program to oversee those activities, or failed to implement the QA program. Contention 15A maintains that such safety-related design information is not reliable given the deficiencies in Applicant's QA program, and that, accordingly, the NRC may not rely upon such analyses and data in deciding whether a license should be granted. Contention 15B contends that the NRC lacks reasonable assurance that DTE will implement the QA program required by Appendix B during future phases of the Fermi Unit 3 project, including any future safety-related design work,⁷⁸ construction of the plant, and operation. This is based on the ongoing pattern of QA violations described above and the perceived lack of corporate commitment to compliance with Appendix B requirements.

Contentions 15A and 15B are within the scope of this proceeding, as required by section 2.309(f)(1)(iii).⁷⁹ The scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board; any contention that falls outside the specified scope of the proceeding is inadmissible. The Notice of Hearing for this proceeding explained that the Licensing Board would consider DTE's Application under Part 52 for a COL for Fermi Unit 3. Because Contentions 15A and 15B concern alleged violations of NRC regulations in connection with the preparation of the FSAR for Fermi Unit 3, they fall within the scope of this proceeding, as section 2.309(f)(1)(iii) requires.

⁷⁷ 10 C.F.R. § 2.309(f)(1)(i) and (ii).

⁷⁸ This might include, for example, responses to Requests for Additional Information (RAIs) issued by NRC Staff or future departures from the Standard ESBWR design.

⁷⁹ 10 C.F.R. § 2.309(f)(1)(iii).

Section 2.309(f)(1)(iv) requires that the issues raised by a contention be material to the licensing decision. The issues raised by both subparts of the revised Contention 15 satisfy this requirement. “[T]he Board regards potential QA/QC problems as serious and significant considerations bearing heavily on the issuance of a license to operate a nuclear facility.”⁸⁰ Contrary to DTE’s argument⁸¹ that Contention 15 raises matters of compliance rather than the adequacy of the COLA, the quality of the information presented in the FSAR is at the heart of the issues considered in this licensing proceeding. Before it may issue a combined license for a nuclear power plant, the Commission is required by its regulations to find (among other things) that “[t]here is reasonable assurance that the facility will be constructed and will operate in conformity with the license, the provisions of the Act, and the Commission’s regulations”; “[t]he applicant is technically . . . qualified to engage in the activities authorized”; and “[i]ssuance of the license will not be inimical to . . . the health and safety of the public.”⁸² In order to make these findings, the agency must rely on extensive safety-related information that the applicant provides in the FSAR. As the Board explained in the *Diablo Canyon* licensing proceeding,

Normally, an effectively functioning design quality assurance program ensures that the design of a nuclear power plant is in conformance with the design criteria and commitments set forth in an applicant’s PSAR [Preliminary Safety Analysis Report] and FSAR [Final Safety Analysis Report]. In the case of Diablo Canyon, however, this confidence has been seriously eroded by the existence of significant evidence that the design quality assurance program was faulty (i.e. it failed to comply with 10 C.F.R. Part 50, Appendix B). Hence, there is now substantial uncertainty whether any particular structure, system or component was designed in accordance with stated criteria and commitments.⁸³

DTE’s QA violations have the same confidence-eroding effect on the safety-related design information in the FSAR for Fermi Unit 3 that the defects in the design QA program for the Diablo Canyon plant had on the agency’s confidence in the design of that facility. DTE’s QA violations thereby create substantial uncertainty over whether the agency can rely on the tainted information in the FSAR to make the safety-related findings required to issue the license. In short, the quality of the safety-related information in the FSAR is material to the

⁸⁰ *Braidwood*, LBP-85-11, 21 NRC at 632-33.

⁸¹ Applicant Answer to 15 at 13.

⁸² 10 C.F.R. § 52.97(a)(1)(iii), (a)(1)(iv), and (a)(1)(v).

⁸³ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, 576 (1984) (quoting that Board’s Scheduling Order).

licensing decision, and Contention 15A, by calling into question the quality of that information, raises a material issue.⁸⁴

The question asserted in Contention 15B of whether the COL applicant will in fact implement the QA program required by Appendix B is also material to the licensing decision. If the NRC is not confident that DTE will implement the QA program described in the FSAR, this would certainly raise a substantial question whether the agency could find “reasonable assurance that the facility will be constructed and will operate in conformity with the license, the provisions of the Act, and the Commission’s regulations,” and that “[i]ssuance of the license will not be inimical to . . . the health and safety of the public.”⁸⁵

Section 2.309(f)(1)(v) requires that a contention be supported by a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support Intervenors’ position and upon which they intend to rely at the hearing.⁸⁶ As the Commission has explained, however, an intervenor need not provide all supporting facts for a contention in the original submission or prove its case to have the contention admitted.⁸⁷ Intervenors in this proceeding, by citing and quoting the NOV, have provided documentation to show that DTE may not have complied with QA requirements with respect to the safety-related COLA activities of its contractor. Contention 15 also cited factual support for Intervenors’ allegations that DTE’s violations of some QA requirements continued well after February 2008. Intervenors quoted the statement in the NOV (Violation B)⁸⁸ that, contrary to Criterion XVIII (“Audits”) of Appendix B, “as of August 21, 2009, DECo QA personnel had not completed any internal audits of QA programmatic areas implemented for Fermi 3 COL application activities performed to date.”⁸⁹ The failure to perform required audits raises an implementation issue, and thus the statement in the NOV supports Intervenors’ contention that DTE was not fully implementing a QA program in compliance with Appendix B even after the COLA was filed with the NRC. In

⁸⁴ In its Response to the NOV, DTE disagreed that violations occurred, arguing that the QA program was not necessary because it had delegated QA responsibilities to B&V. However, DTE did acknowledge that alleged deficiencies in QA could create an issue for the license review: “It follows that deficiencies in quality would affect the licensing review, but there is no suggestion that there are requirements enforceable by the issuance of a Notice of Violation (NOV).” DTE NOV Reply, Attachment 1 at 5. DTE’s statement is consistent with our conclusion that the alleged QA violations are material to the licensing decision.

⁸⁵ 10 C.F.R. § 52.97(a)(iii), (v).

⁸⁶ 10 C.F.R. § 2.309(f)(1)(v).

⁸⁷ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004).

⁸⁸ See *supra* notes 13-17 and accompanying text.

⁸⁹ Contention 15 at 4 (quoting the NOV at 2).

addition, Intervenors' allegations of ongoing QA violations are supported by the Gundersen Declaration and the NRC Staff e-mails cited in it.

Thus, Intervenors have provided a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support their position and upon which they intend to rely at the hearing. This is all that section 2.309(f)(1)(v) demands. To be sure, Applicant contends it did not violate any QA requirement,⁹⁰ and NRC Staff maintains that DTE's QA violations are less extensive than Intervenors allege.⁹¹ These disputes go to the merits, however, and we need not resolve them now in order to admit Contentions 15A and 15B.

NRC Staff argues that we should not consider the Gundersen Declaration, or any of the NRC Staff's e-mails quoted in the Declaration, because the Declaration was submitted with Intervenors' Reply Brief.⁹² We agree that, as a general matter, a party may not present a new contention, or a new basis for a proposed contention, in its reply.⁹³ But that is not what Intervenors have done by submitting the Gundersen Declaration. Contention 15 alleged an ongoing failure by DTE to implement the QA program required by Appendix B, and, as we have just explained, NOV Violation B provides some support for that claim.⁹⁴ Nevertheless, in its response, NRC Staff argued that Intervenors had significantly overstated the extent of DTE's QA violations.⁹⁵ To challenge this NRC Staff argument, Intervenors submitted the Gundersen Declaration with their reply.⁹⁶ The Declaration quoted and relied on a series of NRC Staff e-mails showing that NRC Staff itself did not believe DTE had a fully implemented Appendix B QA program in place as late as June of 2009. For example, one e-mail from NRC Staff member Aida Rivera-Varona, dated June 11, 2009, explains that

Fermi is not meeting the requirements of [10 C.F.R. §] 52.79(a)(25), which requires the applicant to provide a QA program consistent with AppB to 10 CFR Part 50 for design, fabrication and construction activities. Although we understand that the FSAR is not a quality document and is a licensing document subject to 52.6, all design activities performed in support of the FSAR (e.g., sitting [sic], geotechnical, departures from the DCD) are quality activities subject to AppB requirements. At

⁹⁰ Applicant Answer to 15 at 8, 12.

⁹¹ NRC Staff Answer to 15 at 7-8, 14-16.

⁹² NRC Staff Reply to Intervenors' Reply at 6.

⁹³ See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004).

⁹⁴ See *supra* notes 88-89 and accompanying text.

⁹⁵ NRC Staff Answer to 15 at 14-16. For example, the Staff stated that "DTE put its Fermi 3 QA program into place in February 2008 and issued implementing procedures at that time." *Id.* at 15 (citations omitted).

⁹⁶ See Gundersen Decl.

this time, the application is not providing an applicant's QA program for these activities as required by 52.79(a)(25). Fermi [did submit] with the application a QA program for construction and operations.

Second, we understand that the regulations allow[] for delegation of QA programs to other organizations. However the Reg Guide 1.206 is very clear that the FSAR should also clearly delineate those QA functions that are implemented within the applicant's QA organization and those that are delegated to other organizations. In addition, the Reg guide states that the FSAR should describe how the applicant will retain responsibility for, and maintain control over, those portions of the QA program delegated to other organizations. Based on the application and the phone calls we have done with DTE, there is no description of how they are maintaining this responsibility and under which program. The Reg Guide clearly states that the FSAR should identify the responsible organization and the process for verifying that delegated QA functions are effectively implemented. Also, based on the calls we have had, DTE has rel[ied] on others for verification of implementation.⁹⁷

By citing this and other NRC Staff e-mails, Intervenors have not attempted to amend or provide a different basis for Contention 15. Instead, they have responded to NRC Staff's argument that they significantly overstated the extent of DTE's QA violations, and they have provided additional factual support for Contention 15's assertion that DTE "appears to be serially in violation of NRC regulations requiring the implementation of a Quality Assurance program"⁹⁸ Although Intervenors did not cite the June 2009 e-mails in Contention 15, our contention admissibility rules do not require an intervenor to provide all supporting facts for a contention or prove its case on the merits in its original submission.⁹⁹ When the NRC Staff's Answer accused Intervenors of overstating the extent of the violations identified in the NOV, it was appropriate for Intervenors to respond by citing statements of NRC Staff that appear consistent with Intervenors' position.¹⁰⁰

Nevertheless, given that Intervenors did not cite the June 2009 e-mails in Contention 15, we permitted NRC Staff and Applicant to file replies to Inter-

⁹⁷ June 11, 2009 e-mail from Aida Rivera-Varona (quoted in Gundersen Decl. at 13).

⁹⁸ Contention 15 at 1-2.

⁹⁹ *LES*, CLI-04-35, 60 NRC at 623.

¹⁰⁰ Thus, Intervenors responded to a specific argument made by NRC Staff in its answer to Contention 15. Intervenors thereby complied with the requirement that replies should be "narrowly focused on the legal or logical arguments presented in the [answers] on a request for hearing/petition to intervene." *South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3)*, CLI 10-1, 70 NRC 1, 7 n.32 (2010) (quoting "Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004)). See also *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI 10-7, 70 NRC 133 (2010).

venors' Combined Reply to address the issues raised by the e-mails.¹⁰¹ In addition to the procedural objections discussed above, NRC Staff argues that the June 2009 e-mails were "predecisional," that the NOV was the product of additional investigation and represents the Staff's final position concerning the extent of DTE's QA violations, and that the NOV contradicts Intervenor's position that those violations continued through June 2009.¹⁰² NRC Staff maintains that when "a contention is based on a factual underpinning in a document that has been essentially repudiated by the source of that document, the contention may be dismissed unless the intervenor offers another independent source."¹⁰³

NRC Staff emphasizes the statement in NOV Violation A that DTE "failed to establish and implement a Fermi Unit 3 quality assurance (QA) program between March 2007 . . . [and] February 2008"¹⁰⁴ Apparently NRC Staff interprets NOV Violation A to mean that after February 2008 DTE did establish and implement a Fermi Unit 3 QA program. Even if this is correct, we do not understand the June 2009 e-mails to focus on the general question whether DTE had any QA program whatsoever for Fermi Unit 3 after February 2008, but on the more specific question whether DTE's QA program provided the required level of supervision of the safety-related activities of B&V. In particular, the e-mails raise the question whether B&V's safety-related COLA activities were being performed pursuant to DTE's QA program or still being delegated to B&V to perform pursuant to its own QA program. For example, one message states that as of June 2009, DTE lacked its own QA program for plant-specific design activities, relying instead on the B&V QA program.¹⁰⁵ Another asserts that all design activities performed in support of the FSAR, such as siting, geotechnical investigations, and departures from the DCD, are quality activities subject to Appendix B requirements, but that "[a]t this time, the application is not providing an applicant's QA program for these activities as required by [10 C.F.R. § 52.79(a)(25)]."¹⁰⁶ A third e-mail complains that the FSAR fails to describe how Applicant will retain responsibility for, and maintain control over, those portions of the QA program delegated to other organizations (such as B&V).¹⁰⁷ We do

¹⁰¹ Absent permission from the Board, neither NRC Staff nor DTE could have filed a reply to Intervenor's Combined Reply in support of Contention 15. Scheduling Order at 2; 10 C.F.R. § 2.309(h)(3).

¹⁰² NRC Staff Reply to Intervenor's Reply at 8-12.

¹⁰³ *Id.* at 10 (quoting *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 136 (1987)).

¹⁰⁴ NRC Staff Answer to 15 at 7-8 (quoting NOV Violation A at 1).

¹⁰⁵ June 10, 2009 e-mail from Mark Tonacci (quoted in Gundersen Decl. at 10).

¹⁰⁶ June 4, 2009 e-mail from Aida Rivera-Varona (quoted in Gundersen Decl. at 7).

¹⁰⁷ June 11, 2009 e-mail from Aida Rivera-Varona (quoted in Gundersen Decl. at 13).

not read the NOV as repudiating these or similar statements. On the contrary, NOV Violation B, concerning DTE's failure to audit B&V's activities, alleges violations that continued through August 2009. Thus, NRC Staff concluded that at least some of DTE's QA violations continued well into 2009.

At bottom, NRC Staff's argument concerns the interpretation of debatable evidence and is therefore inappropriate in the context of a contention admissibility ruling, where we do not decide the merits or draw factual inferences in favor of the party opposing the admission of a contention. We therefore are not persuaded by NRC Staff's argument that we should ignore its June 2009 e-mails. Such arguments belong at the evidentiary stage of this proceeding. We therefore conclude that Contentions 15A and 15B satisfy 10 C.F.R. § 2.309(f)(1)(v).

The final requirement is that Intervenors provide sufficient information to show that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that Intervenors dispute, or, in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.¹⁰⁸ Both DTE and NRC Staff allege that the proposed contention is not admissible because it fails to directly challenge the COLA. NRC Staff focuses upon Intervenors' statement that Contention 15 is a "contention of omission."¹⁰⁹ NRC Staff points out that Chapter 17 of the FSAR and Appendix 17AA describe DTE's QA program.¹¹⁰ Thus, in their view, the FSAR satisfies 10 C.F.R. § 52.79(a)(25). In addition, NRC Staff and DTE argue that, although Intervenors quote and rely on the NOV, they fail to explain how the violations in the NOV give rise to a dispute of material fact with the Application.¹¹¹

We agree with NRC Staff and DTE that, to the extent Contention 15 alleges that the COLA fails to include a description of DTE's QA program, the contention is not admissible because the FSAR does include such a description. But, unlike NRC Staff and DTE, we do not understand the primary concern of Contention 15 to be that DTE failed to describe a QA program. Although Intervenors do characterize Contention 15 as a contention of omission,¹¹² they refer on the next page of Contention 15 to "DTE's lack of a *meaningful* QA program."¹¹³ We understand this statement to refer to the entire pattern of DTE's QA violations, including both the complete lack of a DTE QA program between March 2007 and February 2008 and the claim that, even after February 2008, DTE failed to consistently implement a QA program that complies fully with Appendix B.

¹⁰⁸ 10 C.F.R. § 2.309(f)(1)(vi).

¹⁰⁹ NRC Staff Answer to 15 at 7 (citing Contention 15 at 12).

¹¹⁰ *Id.* at 8.

¹¹¹ *See id.* at 12-16; Applicant Answer to 15 at 13-14.

¹¹² Contention 15 at 12.

¹¹³ *Id.* at 13 (emphasis added).

Intervenors also assert that DTE cannot be relied upon to implement a compliant QA program in the future. Accordingly, the fact that FSAR Chapter 17 describes a QA program does not render Contention 15 inadmissible.

NRC Staff argues that Intervenors must do more than restate the QA violations in the NOV. In order to show that Contention 15 concerns a dispute of material fact with the Application, NRC Staff maintains that they must tie the QA violations in the NOV to some defect in the COLA.¹¹⁴ “We agree in general with the Applicant and Staff that the mere recitation of unrelated adverse findings in reports of inspections and audits performed by the Staff and Applicant does not supply information on what specifically would be litigated.”¹¹⁵ But “[t]his is to be contrasted with proceedings where particular allegations of specific patterns of QA/QC problems, often based on inspection reports, have been litigated.”¹¹⁶ Here, the NOV describes a “specific pattern[] of QA/QC problems.”¹¹⁷ These include DTE’s failure between March 2007 and February 2008 to establish and implement a QA program to govern safety-related COLA activities, retain overall control of safety-related activities performed by B&V, complete internal audits of QA programmatic areas implemented for Fermi Unit 3 COLA activities, and document trending of corrective actions to identify recurring conditions adverse to quality.¹¹⁸ Intervenors also allege that DTE’s failure to implement the QA program required by Appendix B continues to the present day. The alleged violations are thus not isolated instances of noncompliance, but rather reflect a pattern of violations that Intervenors claim continued throughout the period during which the COLA was under preparation, and arose from DTE’s failure to establish and implement its own QA program under Appendix B for safety-related COLA activities.

Intervenors have also cited language in the NOV which shows that, during the period when DTE lacked its own QA program, B&V was performing safety-related work connected with the preparation of the COLA. The NOV states that between March 2007 and February 2008, DTE failed to “retain overall control of safety-related activities performed by B&V,” “classify safety-related B&V COL application and OE contracts as safety-related,” and “adequately document the qualification of B&V to perform safety-related COL application activities.”¹¹⁹ If we take these statements in the NOV at face value, they confirm that B&V was performing safety-related work at the time of the QA violations in the NOV.

¹¹⁴ NRC Staff Answer to 15 at 12-16.

¹¹⁵ *Limerick*, LBP-83-39, 18 NRC at 89.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ NOV at 1-2.

¹¹⁹ Contention 15 at 4 (quoting NOV at 1).

In addition, as we have previously explained, Intervenors allege that the FSAR is infected by DTE's QA violations.¹²⁰ In particular, Intervenors state that "the FSAR's accuracy in explicating accident scenarios and probabilities is brought into question by the claimed utter lack of ongoing quality assurance activity."¹²¹ They maintain that such tainted parts of the FSAR should not be used by the NRC as a basis for issuing the COL. It is true that Intervenors allege only that the FSAR's accuracy is "brought into question," not that it actually provides false information. But to argue that they must show specific information in the FSAR to be false to have Contention 15 admitted misapprehends the effect of QA violations. The effect of a pattern of QA violations is not necessarily to show that particular safety-related information is false, but, as the Appeal Board stated in the *Diablo Canyon* licensing proceeding, to erode the confidence the NRC can reasonably have in, and create substantial uncertainty about the quality of, the work that is tainted by the alleged QA violations.¹²² To be sure, this does not lead inexorably to the conclusion that the work must be rejected or the application denied.

[P]erfection in plant construction and the facility construction quality assurance program is not a precondition for a license under either the Atomic Energy Act or the Commission's regulations. What is required instead is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety.¹²³

Similarly, in the *Callaway* licensing proceeding, the Appeal Board stated:

In any project even remotely approaching in magnitude and complexity the erection

¹²⁰ See *supra* Section II.B.

¹²¹ Contention 15 at 12. Accident scenarios and probabilities are evaluated in Chapter 15 of the FSAR. Although Intervenors specifically identify only the "the FSAR's accuracy in explicating accident scenarios and probabilities" as brought into question by the alleged pattern of QA violations, we do not interpret Contention 15A as limited to only those specific safety issues. As we have explained, we understand Contention 15A to challenge the quality of the safety-related information in the FSAR that is based on B&V's tests, investigations, or other safety-related activities performed when DTE failed to establish and implement its own QA program that conformed to the requirements of Appendix B. Thus, Contention 15A potentially implicates other parts of the FSAR, including Chapters 5, 6, and 15.

¹²² *Diablo Canyon*, ALAB-763, 19 NRC at 576 (quoting that Board's Scheduling Order).

¹²³ *Diablo Canyon*, ALAB-756, 18 NRC at 1345 (citing 42 U.S.C. §§ 2133(d), 2232(a); 10 C.F.R. § 50.57(a)(3)(i)); *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, AFL-CIO No. 315, 367 U.S. 396, 407 (1961); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1004 (1973), *aff'd sub nom. Citizens for Safe Power v. NRC*, 524 F.2d 1291 (D.C. Cir. 1975)). See also *Union Electric Co.* (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983).

of a nuclear power plant, there inevitably will be some construction defects tied to quality assurance lapses. It would therefore be totally unreasonable to hinge the grant of an NRC operating license upon a demonstration of error-free construction. Nor is such a result mandated by either the Atomic Energy Act of 1954, as amended, or the Commission's implementing regulations. What they require is simply a finding of reasonable assurance that, as built, the facility can and will be operated without endangering the public health and safety. 42 U.S.C. §§ 2133(d), 2232(a); 10 C.F.R. § 50.57(a)(3)(i). Thus, in examining claims of quality assurance deficiencies, one must look to the implication of those deficiencies in terms of safe plant operation.¹²⁴

Nevertheless, while perfection in the applicant's QA program is not required, once a pattern of QA violations has been shown, the license applicant has the burden of showing that the license may be granted notwithstanding the violations. For example, in the *Diablo Canyon* proceeding, petitioners successfully obtained reopening of the record with regard to design QA. The Appeal Board conducted an adjudicatory hearing to determine whether the applicant's design verification program established the adequacy of the unit's design notwithstanding the QA violations.¹²⁵ The Appeal Board made clear that the applicant, not the petitioners, had the burden of proof on that issue.

The [Appeal Board's scheduling order] . . . indicated we would take our lead from the Commission and permit the applicant's various verification efforts "to substitute for, and supplement, the applicant's design quality assurance program in order to demonstrate that the Diablo Canyon plant is correctly designed." It concluded by stating that the "real issue . . . has, in effect, moved beyond the question of what deficiencies existed in the applicant's Diablo Canyon design quality assurance program to the question whether *the applicant can demonstrate* that [its verification efforts] verify the correctness of the Diablo Canyon design."

. . . .

In order to prevail on each of the remaining factual issues, *the applicant's position must be supported by a preponderance of the evidence*. . . . [W]e must independently determine whether the verification programs and their results placed before us in the reopened operating license proceeding are sufficient to verify the adequacy of the Diablo Canyon design. To do this, *the applicant's efforts* must be measured against the same standard as that set forth in the Commission's quality assurance criteria, 10 C.F.R. Part 50, Appendix B: whether the verification program provides "adequate confidence that a [safety-related] structure, system, or component will perform satisfactorily in service." If the *applicant's verification efforts* meet this standard, then there will be reasonable assurance with respect to the design of the

¹²⁴ *Callaway*, ALAB-740, 18 NRC at 346 (footnote omitted).

¹²⁵ See *Deukmejian v. NRC*, 751 F.2d 1287, 1321 (D.C. Cir. 1984).

Diablo Canyon facility that it can be operated without endangering the health and safety of the public.¹²⁶

Thus, once the petitioners in the *Diablo Canyon* proceeding established that the plant's design was infected by a pattern of QA violations, the burden shifted to the applicant to reestablish confidence in the adequacy of the design. The implication of that ruling for the present case is that Intervenors need show only that safety-related design information in the FSAR is infected by a pattern of QA violations. The burden would then shift to DTE to reestablish confidence in the safety-related aspects of the design. As we have explained, Intervenors point to a pattern of QA violations that coincides with the period when DTE's contractor was performing safety-related tests, investigations, and other activities in support of the FSAR. Intervenors allege that the FSAR is therefore infected by this pattern of QA violations. Because this places upon DTE the burden of removing the taint of the QA violations, Intervenors have established in Contention 15A a dispute of material fact with a specific portion of the application (the FSAR), as required by 10 C.F.R. § 2.309(f)(1)(vi).¹²⁷

Intervenors also claim that DTE's alleged failure to consistently implement a QA program precludes the NRC from finding that the program will be implemented during future stages of the Fermi Unit 3 project. This claim also presents a dispute of material fact with a specific portion of the Application. Chapter 17 of the FSAR, as we have noted, describes DTE's QA program. "The description of the quality assurance program for a nuclear power plant must include a discussion of how the applicable requirements of appendix B to 10 CFR part 50 have been and will be satisfied, including a discussion of how the quality assurance program will be implemented."¹²⁸ FSAR § 17.5 purports to satisfy this requirement.¹²⁹ In Contention 15B, however, Intervenors dispute whether DTE's QA program will in fact be implemented, thus taking issue with a material aspect of FSAR Chapter 17. In the *Callaway* licensing proceeding, the Appeal Board recognized

¹²⁶ *Diablo Canyon*, ALAB-763, 19 NRC at 576-78 (quoting that Board's Scheduling Order) (emphasis added). The quotation concerns the allocation of the burden of proof at an evidentiary hearing. There would be even less justification to impose a more demanding burden upon Intervenors at the contention admissibility stage, where they are not required to prove their case on the merits.

¹²⁷ NRC Staff notes a July 2007 NRC Staff audit of B&V's subsurface investigations that were carried out to support site characterization. The audit found that "drilling and field testing activities were controlled by adequate procedures and standards with an appropriate level of supervisory and quality assurance oversight." NRC Staff Answer to 15 at 16 n.4. However, NRC Staff has not called to our attention any other record of a QA audit of other safety-related work that may have been performed by B&V.

¹²⁸ 10 C.F.R. § 52.79(a)(25).

¹²⁹ Fermi 3 COL Application, Part 2, Final Safety Analysis Report, Rev. 1 (March 2009) at 17-4.

the viability of a claim that, even when an applicant shows that all ascertained construction errors have been cured,

there may remain a question whether there has been a breakdown in quality assurance procedures of sufficient dimensions to raise legitimate doubt as to the overall integrity of the facility and its safety-related structures and components. A demonstration of a pervasive failure to carry out the quality assurance program might well stand in the way of the requisite safety finding.¹³⁰

Intervenors here allege such a pervasive failure.

We therefore conclude that both subparts of Contention 15 (A and B) meet the requirements of 10 C.F.R. § 2.309(f)(1). We agree with DTE and NRC Staff, however, that Intervenors have provided no legal or factual basis for the Board to order partial suspension of the COLA adjudication.¹³¹ We see no realistic prospect of injury to Intervenors if the adjudication continues because Intervenors will have the opportunity to fully litigate Contentions 15A and 15B before the Commission makes a final decision whether to issue the license. The Commission's general policy is to avoid unnecessary delays in adjudicatory proceedings,¹³² and Intervenors have not provided a sufficient justification to show that a delay in this proceeding is necessary.

We accordingly admit Contentions 15A and 15 B but deny Intervenors' request for partial suspension of the COLA adjudication.¹³³

III. RULING ON CONTENTION 16

Contention 16 states:

¹³⁰ Callaway, ALAB-740, 18 NRC at 346.

¹³¹ Applicant Answer to 15 at 18; NRC Staff Answer to 15 at 18-19.

¹³² See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998).

¹³³ NRC Staff's April 2010 decision to grant DTE's appeal of NOV Violation A does not affect our decision. See *supra* note 16 and accompanying text. No party has called that decision to our attention, much less suggested that it should affect our ruling on the admissibility of Contention 15. We also note that the decision to partially grant DTE's appeal seems to rest on NRC Staff's view that it lacks legal authority to issue a NOV for Appendix B violations that occurred prior to the date the COLA was filed with the NRC. *Id.* The issue before us, however, is not the extent of NRC Staff's legal authority to issue a NOV, but the effect of DTE's alleged QA violations on the quality of safety-related design information in the FSAR and the confidence the NRC can reasonably have in DTE's commitment to implementing QA requirements. NRC Staff's April 2010 decision does not appear to affect those issues. Moreover, even if it did so, we are not bound by NRC Staff's position or by changes in that position. See *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-08-25, 68 NRC 763, 824-25 (2008).

General Electric-Hitachi Nuclear Energy (“GEH”), the partnership which is designing the Economic Simplified Boiling Water Reactor (“ESBWR”) (the planned reactor design for Fermi 3) is alleged to have violated NRC quality assurance requirements. If proven, these violations would have implications for the Design Control Document (“DCD”) for the ESBWR[,] which is incorporated by reference into the Combined Operating License Application (“COLA”) for Fermi 3.

The GEH quality assurance violations and any remedy which might be ordered will have to be addressed and encompassed not only by GEH, but ultimately by the Quality Assurance Program which is mandated for Fermi 3’s owner, Detroit Edison (“DTE”), the Applicant, to establish. [. . .]

Quality assurance problems, some of them major, are cropping up in this array of manufacturer, utility and regulator around the ESBWR reactor design. Consequently, Petitioners request and move the ASLB and Commission to suspend design activities related to use of the ESBWR design by DTE until the quality problems at GEH are resolved, the quality assurance program design problems at DTE have been corrected, and the NRC Office of New Reactors staff charged with review and approval of new COLAs have [sic] been certified by an objective overseer to having improved quality assurance review of COLAs to the expectations of the OIG and NRC regulations, namely 10 C.F.R. Part 50, Appendix B.¹³⁴

A. Timeliness

Contention 16, like Contention 15, was filed after the expiration of the filing deadline in the notice of hearing. We accordingly first ask whether Contention 16 satisfies the criteria of 10 C.F.R. § 2.309(f)(2). We must consider whether the material forming the basis for the contention was previously unavailable and materially different from other information already available to Intervenors.¹³⁵

Intervenors state that Contention 16 is timely filed because its basis is the November NOV, which contains information about GEH’s QA program that was not previously available.¹³⁶ The NOV was posted on ADAMS on November 12, 2009, and Contention 16 was filed within 30 days of that posting.¹³⁷ Applicant argues that Contention 16 is untimely because the November NOV does not contain any information that was not previously available to Intervenors.¹³⁸ Applicant claims that Intervenors are actually challenging the ESBWR design

¹³⁴ Contention 16 at 2-3.

¹³⁵ 10 C.F.R. § 2.309(f)(2)(i) and (ii).

¹³⁶ Contention 16 at 11.

¹³⁷ *Id.* A proposed new or amended contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within 30 days of the date when the new and material information on which it is based first becomes available. Scheduling Order at 2.

¹³⁸ Applicant Answer to 16 at 11.

certification application, which has been publicly available for several years.¹³⁹ Under Applicant's logic, Intervenors would be expected to carefully research the ESBWR design certification application and raise any related QA contentions before the initial opportunity to file a petition to intervene in the Fermi Unit 3 COL proceeding expired. We do not believe the Commission intended for intervenors to anticipate this type of problem and exercise such exacting scrutiny over the design process accompanying a COLA. Because Intervenors cannot reasonably be expected to discover the QA issues that gave rise to the November NOV without the NOV itself as notice, we find that Intervenors have plausibly argued that the November NOV is new and materially different information. Because Contention 16 was filed within 30 days of the release of the NOV, as our Scheduling Order requires, we consider Contention 16 timely filed. Therefore, Contention 16 satisfies the requirements of 10 C.F.R. § 2.309(f)(2), and there is no need to consider the criteria in 10 C.F.R. § 2.309(c).

B. Admissibility

In contrast to Contention 15, in which Intervenors allege that DTE failed to establish and to implement a QA program for Fermi Unit 3 that conforms to Appendix B, Contention 16 principally alleges that GEH is not adequately implementing its QA program in connection with the standard design of the ESBWR.¹⁴⁰ Although Contention 16 suggests several issues arising from the November NOV that Intervenors want to raise in this proceeding, none provides a basis to admit Contention 16.

Intervenors repeat their earlier request that the Board suspend the Fermi Unit 3 COLA adjudication until rulemaking on the ESBWR design is complete. Intervenors reason that "to permit the COLA adjudication to proceed in light of this lack of [design certification] completion mocks the NRC's regulatory requirements."¹⁴¹ NRC Staff correctly analogizes this argument to that Intervenors presented in Contention 4, which this Board previously rejected.¹⁴² In Contention 4, Intervenors also argued in favor of suspending this proceeding until final rulemaking to certify the ESBWR design is complete.¹⁴³ We reject the request again, both because our prior ruling is *res judicata*, and because NRC regulations

¹³⁹ *Id.*

¹⁴⁰ Contention 16 at 1-2.

¹⁴¹ *Id.* at 17.

¹⁴² NRC Staff Answer to 16 at 8; LBP-09-16, 70 NRC at 268-69.

¹⁴³ *Id.*

clearly permit combined license applications that reference incomplete design certifications.¹⁴⁴

In a related argument, Intervenors request that “the ASLB and Commission . . . suspend design activities related to use of the ESBWR design by DTE until the quality problems at GEH are resolved.”¹⁴⁵ This request must be denied because, although it sounds like a request for something analogous to injunctive relief, it actually represents another attempt by Intervenors to circumvent the regulation permitting license applicants to reference design certification applications that have not been granted. The fact that NRC Staff issued a NOV to GEH based on alleged QA violations in connection with the DCD for the standard design does not affect application of the regulation. DTE may accept the risk that the standard design certification will not be granted, because of GEH’s alleged QA violations or for any other reason.

To the extent Intervenors object to the regulation allowing an applicant to reference a standard design that is the subject of a rulemaking, this Board cannot address their concerns. A licensing board may not ordinarily consider the validity of or a challenge to a Commission regulation.¹⁴⁶ Although an intervenor may petition the Commission for permission to challenge a rule, the party must make a showing of “special circumstances.”¹⁴⁷ The special circumstances required to obtain waiver have been described as a prima facie showing that application of a rule in a particular way would not serve the purposes for which the rule was adopted.¹⁴⁸ No such showing has been attempted here.

Intervenors’ principal complaint appears to be that the GEH QA program implementation is deficient. To make their point, Intervenors reiterate portions

¹⁴⁴ Under 10 C.F.R. § 52.55(c), an applicant may reference a design certification that the Commission has docketed but not granted. Citing this regulation, the Commission has previously rejected a request to hold a license application in abeyance until the design certification rulemaking is completed. *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 4 (2008).

¹⁴⁵ Contention 16 at 3.

¹⁴⁶ 10 C.F.R. § 2.335(a) (“no regulation . . . of the Commission . . . concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding”); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Stations, Units 2 and 3), LBP-01-10, 53 NRC 273, 286 (2001) (intervenor may not attack regulatory limits for effluent releases).

¹⁴⁷ 10 C.F.R. § 2.335. To obtain waiver of a rule, it is not enough to merely allege special circumstances. The special circumstances must be set forth with particularity and supported by an affidavit or other proof. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

¹⁴⁸ See, e.g., *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 584-85 (1978).

of the November NOV.¹⁴⁹ Intervenors attempt to tie their concerns with the GEH QA program to the ESBWR DCD by stating that the NOV identifies errors that appear to violate the DCD.¹⁵⁰ However, Intervenors do not identify which specific parts of the Fermi Unit 3 COLA (or the DCD embedded in the COLA) were violated. Therefore, it is unclear what issue Intervenors want to litigate. Because Contention 16 contains little more than a recitation of the November NOV, it does not specify the law or fact to be challenged, as the first contention admissibility criterion requires.¹⁵¹

To support their general argument, Intervenors cite the Gundersen Declaration, which was filed in support of Contention 15.¹⁵² The Gundersen Declaration concerns weaknesses in DTE's QA program, while Contention 16, as we understand it, concerns the adequacy of GEH's QA program implementation. Thus, the Gundersen Declaration does not support Contention 16. Intervenors also reference portions of a 2009 NRC Inspector General's (IG) report on Quality Assurance Planning for New Reactors that outlines the IG's concerns about communication issues with foreign-based companies.¹⁵³ Intervenors do not explain how the IG report supports the admissibility of Contention 16. To comply with 10 C.F.R. § 2.309(f)(1)(vi), Intervenors must present sufficient information to demonstrate a genuine dispute with the Application on a material issue of law or fact. Merely quoting or citing documents as the basis for a contention, as Intervenors have done for Contention 16, is not enough to fulfill this requirement.¹⁵⁴

As an alternative to admitting Contention 16 for adjudication now, Intervenors request that Contention 16 be admitted and held in abeyance pending NRC Staff review of the design certification application.¹⁵⁵ Intervenors concede that Contention 16 raises an issue related to the design certification rulemaking.¹⁵⁶ Commission policy dictates that, when a COLA references a docketed design certification application, a contention challenging an aspect of the standard reactor design should be resolved in the rulemaking proceeding for the standard design, not in the COL proceeding.¹⁵⁷ Such a contention may be held in abeyance by a

¹⁴⁹ Intervenors also supplement their discussion of the GEH QA program with various statements about oversight of new reactors that appear to be unrelated to the Fermi Unit 3 COLA or the ESBWR DCD. *See, e.g.*, Contention 16 at 10, 16.

¹⁵⁰ Contention 16 at 4.

¹⁵¹ 10 C.F.R. § 2.309(f)(1)(i).

¹⁵² Contention 16 at 6.

¹⁵³ *Id.* at 9-10.

¹⁵⁴ *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 205 (2003).

¹⁵⁵ Contention 16 at 13.

¹⁵⁶ *Id.* at 14.

¹⁵⁷ *Id.*; Final Policy Statement on the Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008).

licensing board pending completion of the rulemaking, but for a board to take that action the contention must be “otherwise admissible.”¹⁵⁸ Licensing Boards have interpreted “otherwise admissible” to mean a contention that meets the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) but for the fact that it challenges a yet-to-be-certified reactor design.¹⁵⁹

Contention 16 is not “otherwise admissible” under this interpretation. The issue only leads back to the problem we previously identified: Contention 16 does not adequately assert a point of law or fact to be challenged, much less explain the reasoning for that challenge. Contention 16 could be interpreted as a vague challenge to either the ESBWR design certification application or the Fermi Unit 3 COLA, but under either interpretation it fails to identify a genuine dispute of material fact with the application. Therefore, because Contention 16 fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1), it is not otherwise admissible and may not be held in abeyance.

We therefore do not admit Contention 16.

IV. CONCLUSION AND ORDER

For the foregoing reasons:

- A. Contentions 15A and 15B are admitted.
- B. Contention 16 is not admitted.
- C. The Board denies Intervenors’ requests to suspend partially the Fermi Unit 3 COLA adjudication and to suspend the ESBWR design activities.

¹⁵⁸ 73 Fed. Reg. at 20,972; *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317, 324 (2009).

¹⁵⁹ See, e.g., *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-09-17, 70 NRC 311, 333-34 (2009); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 561-64 (2008).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

Michael F. Kennedy
ADMINISTRATIVE JUDGE

Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 15, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Dr. Gary S. Arnold
Dr. Alice C. Mignerey

In the Matter of

**Docket Nos. 52-034-COL
52-035-COL
(ASLBP No. 09-886-09-COL-BD01)**

**LUMINANT GENERATION
COMPANY, LLC
(Comanche Peak Nuclear Power
Plant, Units 3 and 4)**

June 25, 2010

The Licensing Board majority finds one existing contention moot and another moot in part, denies admission of a number of new environmental contentions, and consolidates admissible portions of other new contentions with the remaining part of an existing contention on a proposed renewable fuels NEPA alternative.

RULES OF PRACTICE: MOOTNESS OF CONTENTION

Where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant, the contention is moot and Intervenors must timely file a new or amended contention in order to raise specific challenges regarding the new information.

RULES OF PRACTICE: MOOTNESS OF CONTENTION

Mootness occurs when a justiciable controversy no longer exists, or when an

issue is no longer “live,” such that a party no longer has a legal interest in the issue.

RULES OF PRACTICE: MOOTNESS OF CONTENTION

Admission of a contention establishes a legal interest on the part of intervenors in that contention being resolved in a legally appropriate manner. If all matters at issue in a “contention of omission” are addressed by an applicant through the actual (not purported or claimed) provision of information on all such matters, then no legal interest in that contention remains, and the contention is moot. The information need not be such that an intervenor agrees with it, but it must actually address in some way all of the issues encompassed within the admitted contention it purports to moot. If, on the other hand, not all matters at issue in such a contention are addressed in information submitted by applicant, then intervenors retain a legal interest in having any unaddressed matter(s) appropriately resolved.

RULES OF PRACTICE: MOOTNESS OF CONTENTION

On issues of whether a contention has been rendered moot by provision of information by an applicant, the applicant bears the burden of persuasion.

RULES OF PRACTICE: MOOTNESS OF CONTENTION

A contention that impacts from a severe radiological accident at any one unit on operation of other units at the site had not been, and should be, considered in the application’s environmental report is found to be moot. Although the original contention might arguably be viewed as conceptually including impacts from spent fuel pool accidents, intervenors’ arguments are found unpersuasive in light of the bounding analysis provided by applicant, which is not overcome by intervenors, in light of the lack of any support in the original contention or subsequent arguments that the impact of such accidents would add meaningfully to the applicant’s bounding analysis of severe accidents at all four units simultaneously.

RULES OF PRACTICE: MOOTNESS OF CONTENTION

A contention that the application’s environmental report was inadequate, because it did not include consideration of alternatives to the proposed new units consisting of renewable energy sources such as wind and solar with technological advances in storage methods and supplemental use of natural gas to create baseload power, is found to be moot in part. The contention is found not to be moot insofar as it alleges applicant did not consider the combination of wind

(relatively more productive at night) and solar (more productive during the day) to produce a uniform generating profile, notwithstanding applicant's argument that even if this combination were considered its overall impacts would not be significantly different from the impacts of either solar or wind in combination with storage methods and natural gas. Both the original contention and its support, and the contention as admitted, included references to wind and solar, and this combination would obviously be the most likely to have any chance of achieving the goal of producing baseload power. Passing references in the environmental report to wind and solar did not constitute significant consideration of the combination alternative at issue.

RULES OF PRACTICE: NEPA CONTENTIONS

Although the requirements of NEPA are directed to federal agencies and the primary duties of NEPA accordingly fall on the NRC Staff in NRC proceedings, the initial requirement to analyze the environmental impacts of an action is directed to applicants under 10 C.F.R. § 51.45. Thus, at the outset of a proceeding, NEPA-related contentions are to be filed based on an applicant's environmental report, under 10 C.F.R. § 2.309(f)(2). Thereafter, the NRC Staff's issuance of its draft and final environmental impact statements may lead to the filing of additional contentions if the data or conclusions contained in them are significantly different from the data or conclusions found in the applicant's documents.

RULES OF PRACTICE: NEPA CONTENTIONS

A contention that applicant's "failure to address externally initiated accident scenarios is a material omission from the Environmental Report" is found inadmissible, because applicant did address externally initiated events. Even if applicant addressed such events in less detail that intervenors would like, intervenors provided no evidence to dispute applicant's conclusion that the release frequency for such external events is "negligible compared to internal events." Also, applicant addressed related safety and emergency planning concerns raised in the contention in other parts of the application, and there is no requirement that such concerns must be raised in the environmental report.

RULES OF PRACTICE: NEPA CONTENTIONS

A contention that applicant failed to consider and evaluate the impacts of severe accident scenarios, regardless of probability, with release times shorter than the duration needed to achieve cold shutdown, is found inadmissible, because intervenors ignored case law that "low probability is the key to applying NEPA's rule

of reason test to contentions” on the environmental impacts of specific accident scenarios, and did not context the probability calculations in the application.

RULES OF PRACTICE: NEPA CONTENTIONS

A contention alleging a failure to evaluate the impact of a severe accident at one unit on other units when the initiating event is an external event such as an earthquake is found inadmissible, because intervenors overlooked applicant’s actual consideration of such events as well as applicant’s bounding analysis of simultaneous accidents at all four units, which bounds any impacts of external events on a colocated unit.

RULES OF PRACTICE: NEPA CONTENTIONS

A contention that applicant failed to address the radiological impacts of a severe accident at one unit during shutdown, when the primary containment head is removed, on other units is found inadmissible, because intervenors did not substantively contest applicant’s determination that such events are remote and speculative or applicant’s bounding analysis of simultaneous accidents at all four units.

RULES OF PRACTICE: NEPA CONTENTIONS

A contention that applicant failed to address the impact of a chain reaction that leads to more than one unit experiencing a severe accident is found inadmissible, because intervenors provide no facts or expert opinion to challenge applicant’s actual consideration of the potential for a chain reaction resulting from simultaneous accidents at all four units, nor demonstrate that applicant’s conclusion that such a chain reaction would not occur is incorrect, nor show that the analysis they request would result in any appropriate new SAMDA or cost-beneficial SAMA.

RULES OF PRACTICE: NEPA CONTENTIONS

Parts of a contention concerning the impacts of wind power generation and storage are found inadmissible, because intervenors show no cause why they could not have raised the issues earlier. Other parts, relating to the combination of wind and storage, overlapping uses of land, and feasibility, amounted to more than “flyspecking” of the environmental report and are admitted, as consolidated with nonmoot and admissible parts of other contentions.

RULES OF PRACTICE: NEPA CONTENTIONS

Parts of a contention concerning impacts of solar and storage are found inadmissible, because intervenors showed no cause why they could not have raised the issues earlier, and they are unrelated to baseload power, which the board already determined defines the scope of relevant issues relating to renewable fuels, or were actually addressed by applicant. Other parts, relating to the feasibility of thermal energy storage and combination with wind and an “integrated gas turbine,” and to some cost issues, are admitted, as consolidated with nonmoot and admissible parts of other contentions.

RULES OF PRACTICE: NEPA CONTENTIONS

A contention challenging applicant’s determination that nuclear is environmentally preferable to renewable energy with storage and supplemental natural gas, was denied in part and admitted in part, insofar as it fits in the four-part solar/wind/storage/natural gas supplementation alternative consolidated contention. Intervenors’ experts are found to have provided enough support to warrant further inquiry.

RULES OF PRACTICE: NEPA CONTENTIONS

The central issue found admissible from Alternatives Contentions 1 through 3 is the feasibility of intervenors’ proposed four-part wind/solar/storage/natural gas supplementation combination, and all other admissible issues relate to this “feasibility” issue in one way or another.

RULES OF PRACTICE: NEPA CONTENTIONS

The NEPA alternatives analysis is the “heart of the environmental impact statement,” and all “reasonable alternatives” must be identified and discussed in such analysis, under a “rule of reason.” The duty to consider alternatives originates with two provisions of NEPA: (1) 42 U.S.C. § 4322(2)(C)(iii), which requires that an agency’s environmental impact statement (EIS) include “a detailed statement [of the] alternatives to the proposed action,” and (2) 42 U.S.C. § 4322(2)(E), which requires that an agency “study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” The goals — the central one in this case being the production of baseload power — of an applicant are accorded substantial weight in determining what is “reasonable,” but such goals may not be defined so narrowly as to unreasonably circumscribe the range of alternatives considered.

RULES OF PRACTICE: NEPA CONTENTIONS

In order to “make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility.” *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978). Alternatives that are “remote and speculative” do not require detailed discussion, and a “‘detailed statement of alternatives’ cannot be found wanting simply because [not] every alternative device and thought conceivable by the mind of Man” has not been included. *Id.* at 552-53. Moreover, while “the concept of ‘alternatives’ is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood,” it is “incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful [and] alerts the agency to the intervenors’ position and contentions.” *Id.* Comments “must be significant enough to step over a threshold requirement of materiality . . . [,] cannot merely state that a particular mistake was made[, but] must show why the mistake was of possible significance.” *Id.* “[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that ‘ought to be’ considered.” *Id.* at 553-54. The court viewed favorably the Commission’s statement that an intervenor should not be held to a prima facie burden at the contention admissibility stage of a proceeding, but that “the showing should be sufficient to require reasonable minds to inquire further.” *Id.* at 555.

RULES OF PRACTICE: NEPA CONTENTIONS

The “notion of feasibility” includes the concept of “reasonable availability.” *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972). On the question whether “reasonably available” is essentially the same concept as “developed, proven, and available,” as used in NUREG-1555, a guidance document does not have the binding force of law but is entitled to some level of deference. To the extent that NUREG-1555’s standard of “developed, proven, and available in the relevant region” directs the inquiry to the question of reasonableness, this standard is relevant to the determination of “reasonable availability” and feasibility, and ultimately, to that of the overall reasonableness of the four-part combination. But to the extent this standard from NUREG-1555 would require a narrower inquiry, it cannot, of course, overcome the legal principles of reasonableness, feasibility, and “reasonable availability” that are found in binding case law.

RULES OF PRACTICE: NEPA CONTENTIONS

On appropriately defining terms and reconciling concepts such as “reasonable,” “feasible,” and “reasonably available,” in an alternatives analysis, the board majority observes that the D.C. Circuit has noted that a “problem for agencies” is that even the term “alternatives” is “not self-defining.” *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). The “rule of reason governs ‘both which alternatives [must be discussed] and the extent to which [they must be discussed].’” *Id.* If an alternative is “viable,” it may not be rejected as not “reasonable” without appropriate examination or evaluation, according to several Courts of Appeals. Thus, to the extent that Staff, in making statements to the effect that if the Applicant rejects an alternative it is not required to do a detailed discussion of its impacts, appears to imply that Applicant’s elimination of alternatives from consideration is essentially beyond challenge, this is in error.

RULES OF PRACTICE: NEPA CONTENTIONS

Just because one or more parts of a proposed alternative taken separately would not be feasible as baseload power, if it is feasible to combine aspects of existing separate parts, which together might reasonably be able to produce baseload power, then the combination is an alternative that must be considered.

RULES OF PRACTICE: NEPA CONTENTIONS

The Board majority finds that Intervenors in the first three of their new contentions provide sufficient information to meet the requirements of 10 C.F.R. § 2.309(f)(1) and to warrant “further inquiry” on the feasibility and reasonable availability of the four-part alternative of wind and solar energy combined with storage (including CAES and molten salt) and natural gas supplementation, and certain related subissues, as consolidated and reformulated by the board majority. Intervenors’ arguments regarding such combinations and their components are perhaps not as well organized as they might be, but they are also neither cryptic nor obscure, and rather provide a sufficient showing to require reasonable minds to inquire further. The Board majority finds that both common sense and the interest in efficiency support reformulation of the admissible parts of the contentions in question.

RULES OF PRACTICE: NEPA CONTENTIONS

A contention on the viability of a baseload wind system is found inadmissible because it is insufficiently supported to show a genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi).

RULES OF PRACTICE: NEPA CONTENTIONS

A contention alleging applicant did not take into account new ERCOT demand data, and the positive impacts of modular additions of renewable/storage combinations in meeting a declining and uncertain demand, is found inadmissible, because it could have been raised at a much earlier time and is thus untimely under 10 C.F.R. § 2.309(c).

RULES OF PRACTICE: NEPA CONTENTIONS

A contention alleging that applicant has not shown that its proposed project is developed, proven, and available in the relevant ERCOT region is found inadmissible because it is untimely, not within the scope of the proceeding, and does not show a genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi).

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MEMORANDUM AND ORDER
**(Ruling on Mootness of Contentions 13 and 18, and New
Environmental Contentions)**

I. INTRODUCTION AND BACKGROUND

The Licensing Board rules herein on various matters relating to two of the intervenors' original contentions in this proceeding, which involves the Combined Operating License (COL) Application of Luminant Generation Company (Luminant or Applicant) for two new nuclear reactors at its Comanche Peak site.¹ Intervenors Sustainable Energy and Economic Development (SEED) Coalition, Public Citizen, True Cost of Nukes, and Texas State Representative Lon Burnam have challenged this Application and shown standing to participate collectively as a party in the proceeding.² The only two contentions admitted in the proceeding prior to our rulings herein concern the Applicant's alleged failure, or omission, to include consideration of certain information in its Environmental Report (ER), having to do with the impacts of a severe radiological accident at one unit on operation of the other units also located at the Comanche Peak site (original Contention 13), and with alternatives to the proposed new units consisting of combinations of renewable energy sources such as wind and solar power with certain storage methods and supplemental use of natural gas to create

¹ See Letter Transmitting Combined License Application for Comanche Peak Nuclear Power Plant, Units 3 & 4 (Sept. 19, 2008) (ADAMS Accession No. ML082680250); <http://www.nrc.gov/reactors/new-reactors/col/comanche-peak/documents.html> [hereinafter Application or COLA]; see also Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 66,276 (Nov. 7, 2008).

² See LBP-09-17, 70 NRC 311, 382 (2009).

baseload power (original Contention 18).³ Applicant subsequently amended its ER to include discussion related to these issues, and moved to dismiss the two original admitted contentions on the basis of mootness.⁴ Intervenors contest the mootness of the original contentions and present new contentions challenging the Applicant's amendments to its ER,⁵ in regard to which Responses and Replies have been filed.⁶

³ See *id.* at 369, 380, 382.

⁴ See Letter from Jonathan M. Rund, Counsel for Luminant, to Ann Marshall Young *et al.* (Dec. 8, 2009), with attached Letter from Rafael Flores to NRC Document Control Desk (Dec. 8, 2009), with attached COL Application Part 3, Environmental Report Revision 1, Update Tracking Report Revision 0 (Dec. 7, 2009) (ADAMS Accession No. ML093440179) [hereinafter Alternatives ER Revision or ER Revision]; Luminant's Motion to Dismiss Contention 18 as Moot (Dec. 14, 2009) [hereinafter Motion to Dismiss Contention 18]; Letter from Jonathan M. Rund, Counsel for Luminant, to Ann Marshall Young *et al.* (Jan. 15, 2010), with attached Letter from Rafael Flores to NRC Document Control Desk (Jan. 15, 2010), with attached COL Application Part 3, Environmental Report Revision 1, Update Tracking Report, Contention 13 (Jan. 15, 2010) (ADAMS Accession No. ML100191529); Letter from Jonathan M. Rund, Counsel for Luminant, to Ann Marshall Young *et al.* (Jan. 19, 2010), with attached Letter from Rafael Flores to NRC Document Control Desk (Jan. 19, 2010), with attached COL Application Part 3, Environmental Report Revision 1, Update Tracking Report Revision 2 (Jan. 19, 2010) (ADAMS Accession No. ML100192101) [hereinafter Colocation ER Revision or ER Revision]; Luminant's Motion to Dismiss Contention 13 as Moot (Jan. 25, 2009) [hereinafter Motion to Dismiss Contention 13].

⁵ See Intervenors' Response Opposing Applicant's Motion to Dismiss Contention 18 as Moot (Jan. 4, 2010) [hereinafter Intervenors' Mootness Response Contention 18]; Letter from Robert V. Eye, Counsel for Intervenors, to Ann Marshall Young *et al.* (Jan. 7, 2010); Intervenors' Response to Applicant's Motion to Dismiss Contention 13 as Moot (Feb. 4, 2010) [hereinafter Intervenors' Mootness Response Contention 13]; Intervenors' Contentions Regarding Applicant's Revisions to Environmental Report Concerning Alternatives to Nuclear Power (Jan. 15, 2010) [hereinafter Alternatives Contentions] (attaching Raymond H. Dean, Ph.D., Comments Regarding Luminant's Revision to the Comanche Peak Nuclear Power Plant, Units 3 & 4 COL Application Part 3 — Environmental Report [hereinafter Dean Report]); Declaration of Arjun Makhijani regarding the revision of Luminant's Environmental Report concerning Comanche Peak Units 3 and 4 (Attachment to the Dec. 8, 2009 letter from Jonathan Rund to the NRC) [sic] [hereinafter Makhijani Declaration]; Analysis of Alternative Energy Section Rebuttal by Luminant Generation Company in Defense of Comanche Peak Licensing Application (written by Paul Robbins) (Jan. 15, 2010) (ADAMS Accession No. ML100151735) [hereinafter Robbins Report]; Resume of Paul Robbins, Research Associate (Jan. 15, 2010); National Renewable Energy Laboratory, U.S. Dept. of Energy, Office of Energy Efficiency and Renewable Energy, Creating Baseload Wind Power Systems Using Advanced Compressed Air Energy Storage Concepts (Oct. 1, 2006) (NREL/PO-640-40674) (http://rasei.colorado.edu/pdf/denholm_poster.pdf (last visited June 24, 2010)) [hereinafter NREL Baseload Factsheet]; Intervenors' Motion for Leave to File New Contentions (Feb. 16, 2010); Intervenors' Proposed Contentions Regarding Applicant's Environmental Report Revisions and Request for Hearing [sic] (Feb. 16, 2010) [hereinafter Colocation Contentions].

⁶ NRC Staff Consolidated Response to Intervenors' Amended Contention 18 and Proposed Contentions Concerning Alternatives to Nuclear Power (Feb. 4, 2010) [hereinafter Staff's Alternatives] (*Continued*)

The Board concludes that Contention 13 is moot, that Contention 18 is moot in part, that all of the new Colocation Contentions relating to severe accidents are inadmissible, that new Alternatives Contentions 4, 5, and 6 are inadmissible, and that portions of new Alternatives Contentions 1 through 3 are inadmissible. These conclusions are based on the analysis that follows. This analysis also includes the Board majority's conclusions that a part of Contention 18 is not moot, and that parts of new Alternatives Contentions 1 through 3 — specifically, as they relate to a four-part combination of wind energy, solar energy, energy storage, and supplemental natural gas — are admissible, as limited and reformulated by the Board majority. On these latter conclusions, Judge Arnold files a dissenting opinion, which is found at the end of this Memorandum and Order.

II. MOOTNESS OF CONTENTIONS 13 AND 18

Since our admission of Contentions 13 and 18, Applicant has revised its ER by adding two new sections, and on the basis of the information in these new sections moves that the contentions in question be dismissed because the new information renders them moot. These contentions concern the Applicant's asserted failure, or omission, to consider certain information in its ER and, as admitted, state as follows:

Contention 13 — Impacts from a severe radiological accident at any one unit on operation of other units at the Comanche Peak site have not been, and should be, considered in the Environmental Report.⁷

Contention 18 — The Comanche Peak Environmental Report is inadequate because it fails to include consideration of alternatives to the proposed Comanche Peak Units 3 and 4, consisting of combinations of renewable energy sources such as wind and solar power, with technological advances in storage methods and supplemental use of natural gas, to create baseload power.⁸

Response]; Luminant's Answer Opposing New and Modified Contentions Regarding Alternative Energy Sources (Feb. 4, 2010) [hereinafter Applicant's Alternatives Answer]; Intervenors' Consolidated Response to NRC Staff's and Applicant's Answers to Alternatives Contentions (Feb. 12, 2010) [hereinafter Intervenors' Alternatives Reply]; Luminant's Answer Opposing New Severe Accident Contentions (Mar. 8, 2010) [hereinafter Applicant's Colocation Answer]; NRC Staff's Answer to Intervenors' Proposed Contentions Regarding Applicant's Environmental Report Revisions and Request for Hearing (Mar. 8, 2010) [hereinafter Staff's Colocation Answer]; Intervenors' Consolidated Response to NRC Staff's and Applicant's Answers to Intervenors' Proposed Co-location Contentions (Mar. 15, 2010) [hereinafter Intervenors' Colocation Reply].

⁷ LBP-09-17, 70 NRC at 369, 382.

⁸ *Id.* at 380, 382.

Applicant filed new ER § 7.5 (and associated subparts and table) for the express purpose of addressing the issues raised in Contention 13,⁹ and new ER § 9.2.2.11 (and associated subparts and references) for the express purpose of addressing the issues raised in Contention 18.¹⁰ In its Motion to Dismiss Contention 13 as Moot, Applicant states that it “evaluates the impacts that a severe accident at one of the new or existing units at the Comanche Peak site would have on the other units at the site.”¹¹ In its Motion to Dismiss Contention 18 as Moot, Applicant states that it “evaluates alternative generation sources consisting of combinations of renewable energy sources, energy storage, and natural gas power generation.”¹²

In ruling on Applicant’s motions, we are guided by Commission precedent in a 2002 *Duke Energy* decision to the effect that, “[w]here a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant . . . the contention is moot,” and “Intervenors must timely file a new or amended contention . . . in order to raise specific challenges regarding the new information.”¹³ Although, as indicated above, Intervenors have filed new contentions challenging the new sections of Applicant’s ER in various particulars, they also contest the mootness of the original contentions Applicant’s new sections are purported to address, arguing that the Applicant does not in its ER revisions actually address certain information that was part of the original contentions.

As correctly argued by Intervenors, mootness occurs “when a justiciable controversy no longer exists.”¹⁴ Put differently, when an issue is no longer “live,” such that a party no longer has a legal interest in the issue, then it is moot.¹⁵ Applying this principle to this proceeding, the admission of Contentions 13 and 18 may be said to have established a legal interest on the part of Intervenors in those contentions being resolved in a legally appropriate manner. If all matters at issue in a contention of omission are addressed by an applicant through the actual (not “purport[ed]” or “claim[ed]”¹⁶) provision of information on all such matters, then no legal interest in that contention remains, and the contention is moot. The information need not be such that an intervenor agrees with it, but it must actually

⁹ See Flores Jan. 19, 2010, Letter at 1.

¹⁰ See Flores Dec. 8, 2009, Letter at 1.

¹¹ Motion to Dismiss Contention 13 at 3.

¹² Motion to Dismiss Contention 18 at 3.

¹³ See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

¹⁴ Intervenors’ Mootness Response Contention 18 at 1 (citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-19, 42 NRC 191, 194 (1995)).

¹⁵ *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993); see Intervenors’ Mootness Response Contention 18 at 1.

¹⁶ See *infra* J. Arnold Dissent at 605.

address in some way *all* of the issues encompassed within the admitted contention it purports to moot. If, on the other hand, not all matters at issue in such a contention are addressed in information submitted by Applicant, then Intervenors retain a legal interest in having any unaddressed matter(s) appropriately resolved.

We must therefore look to whether all of “the information” alleged in Contentions 13 and 18 to have been omitted from the Application was in fact “later supplied by the Applicant,”¹⁷ such that all matters at issue have been addressed, leaving no remaining legal interest on the part of Intervenors. On this issue, as Applicant and Staff agree,¹⁸ Applicant as the movant bears the burden of persuasion. This is an important consideration that the Dissent does not appear to appreciate. The Dissent in effect suggests that Intervenors have the same legal interest at stake in (1) submitting new contentions, as they do in (2) maintaining in a “live” state any part of a contention not actually addressed in Applicant’s new submission. But the Dissent’s approach is incorrect, legally. To the contrary, it completely ignores the actual legal standards for ruling on mootness motions, as summarized above, as well as the significant legal interest Intervenors have in the burden of persuasion being on the Applicant in the mootness context, as opposed to it being on themselves in a contention admissibility context — where it is well recognized that the standards are quite strict.

With the preceding principles in mind, we address the two mootness motions filed by Applicant, involving original Contentions 13 and 18.

A. Contention 13 — Environmental Impacts of Severe Accident on Colocated Units

Intervenors argue that Contention 13 is not moot because Applicant actually “avoids addressing the impacts of a severe accident at one unit on colocated units [by assuming that] operators would have sufficient warning to complete safe shutdown of unaffected units,”¹⁹ and “does not discuss the impacts on safe shutdown in the absence of sufficient warning or environmental impacts if there is inadequate time to complete safe shutdown.”²⁰ Intervenors urge that “consideration of the relative probabilities/frequencies of large releases is qualitatively different from consideration of their impacts,” and contend that Applicant “overlooks the requirement that even remote and speculative events require analysis in some circumstances.”²¹ An example posited by Intervenors is the need to consider

¹⁷ See *supra* text accompanying note 13.

¹⁸ Tr. at 739-41.

¹⁹ Intervenors’ Mootness Response Contention 13 at 1.

²⁰ *Id.* at 2.

²¹ *Id.* at 3.

“accident scenarios anticipated under 10 C.F.R. § 50.150 and § 50.54(hh),” the omission of which is “contrary to the requirements of 42 U.S.C. § 2133(d).”²² In addition, in a footnote, Intervenors aver that, “[i]n addition to the accident scenarios the Applicant has disregarded as remote and speculative, the ER Revision does not address accident scenarios involving the spent fuel pool.”²³

At oral argument Applicant maintained that, although it did not specifically address in the Colocation ER Revision any impacts on operators and equipment, it did provide a bounding analysis by addressing severe accidents at all four units simultaneously.²⁴ Moreover, Applicant argued, this analysis essentially assumes “that you have an accident that is one that immediately causes an accident at . . . the other three units, because you wouldn’t have time to shut down.”²⁵ Intervenors through counsel agreed to an extent that Applicant’s bounding analysis addressed the issues in Contention 13, but challenged the presentation of impacts in terms of risk and core damage frequency, which they contend “is a different and more narrow impact analysis than the impact analysis that was anticipated in the contention as it was admitted.”²⁶ In addition, Intervenors assert that Applicant’s analysis does not “factor[] in spent fuel pool releases,” which they contend is a “rather large potential source of doses.”²⁷ Intervenors were unable to “quantify the difference [this] would make,” but argued that omitting spent fuel pool releases from the analysis “understates the . . . total dose that might be anticipated.”²⁸ Although neither spent fuel pool accidents nor spent fuel pool releases were discussed in, or in support of, Contention 13, Intervenors argued that the subject was encompassed within the contention.²⁹ Applicant responded that Intervenors had provided no basis to “indicate that any accidents involving spent fuel pools would be significant relative to the accidents in reactor[s].”³⁰

We conclude that Contention 13 is moot. Although Intervenors express some reservations about the presentation of impacts in terms of core damage frequency, and suggest that Applicant’s bounding analysis of severe accidents at all four units simultaneously does not take into account any spent fuel pool releases, we

²² *Id.* at 4 (citing *Druid Hills Civil Association v. Federal Highway Administration*, 772 F.2d 700, 709 (11th Cir. 1985); *Ohio River Valley Environmental Coalition v. Kempthorne*, 473 F.2d 94, 102 (4th Cir. 2006)). Intervenors also state that they “incorporate by reference their arguments and authorities related to the Mitigative Strategies (MS) Contentions related to compliance with 10 C.F.R. § 50.54(hh)(2), August 10, 2009.” *Id.* at 4 n.15.

²³ *Id.* at 4 n.14.

²⁴ Tr. at 794.

²⁵ Tr. at 796.

²⁶ Tr. at 803.

²⁷ Tr. at 805.

²⁸ *Id.*

²⁹ Tr. at 812-13.

³⁰ Tr. at 816.

do not find that either argument overcomes the practical effect of Applicant's bounding analysis. Even assuming that the original contention, in its reference to "impacts from a severe radiological accident," conceptually includes impacts from spent fuel pool accidents, Intervenor's arguments are not persuasive in light of the bounding analysis provided by Applicant. No support is provided in original Contention 13, in the brief reference to spent fuel pool accidents in the aforementioned footnote in Intervenor's Mootness Response,³¹ or in oral argument, for the suggestion that consideration of the impacts of such accidents would add meaningfully to the Applicant's bounding analysis of severe accidents at all four units simultaneously. And we consider Intervenor's questions about the presentation of impacts in terms of risk and core damage frequency to be more in the nature of questioning the manner in which, or the adequacy with which, Applicant addresses the matters at issue.

We therefore grant Applicant's Motion to Dismiss Contention 13.

B. Contention 18 — Renewable Fuels NEPA Alternatives

In response to Applicant's Motion to Dismiss Contention 18, Intervenor's argue that the contention is not moot because, although the Applicant in section 9.2.2.11 purports to consider "combinations of renewable energy sources such as wind and solar power, with technological advances in storage methods and supplemental use of natural gas, to create baseload power," as stated in the contention, it did not do so. Instead, according to Intervenor's, Applicant considered each technology separately; "preemptively" dismissed them; did not "consider whether baseload capacity could be supplied with combinations of wind and solar power coupled with advanced storage methods supplemented with natural gas"; and "did not consider the combination of wind (relatively more productive at night) and solar (productive during the day) to produce a uniform generating profile," or "discuss the structure and function of integrated systems."³² Intervenor's make additional arguments that go more to the adequacy of *how* Applicant addresses alternatives consisting of combinations of renewable energy sources, storage methods, and natural gas to create baseload power, which we do not find effectively overcome the conclusion that Applicant has indeed considered most such combinations. We do, however, find persuasive Intervenor's argument that Applicant did not consider a combination that includes both wind *and* solar.

Applicant does not argue that it *did* consider this "information" — i.e., any "combination[] of renewable energy sources . . . storage methods and

³¹ See *supra* note 23.

³² Intervenor's Mootness Response Contention 18 at 2, 3, 8; see *id.* at 2-8.

supplemental use of natural gas, to create baseload power,”³³ that would include both solar and wind energy sources. Rather, it argues, such a combination was not raised in Contention 18.³⁴ Moreover, Applicant argues, even if such a combination were to be considered, the overall impacts of this combination would not be significantly different from the impacts of either solar or wind in combination with storage methods and natural gas.³⁵ NRC Staff supports Applicant’s arguments.³⁶

In admitting Contention 18, we limited it to alternatives “consisting of combinations of renewable energy sources such as wind *and* solar power, with technological advances in storage methods and supplemental use of natural gas, to create baseload power.”³⁷ So stated, the contention is arguably somewhat ambiguous as to whether a combination including both wind and solar is included among those combinations encompassed within it. To resolve this ambiguity, we look to other language in our ruling, and to the original contention and the support Intervenor provided for it.

In this regard, the Board clearly stated in LBP-09-17, in referring to a report by Dr. Arjun Makhijani and others that was submitted in support of Contention 18, that “[i]t is suggested [in this report] that *a combination of* natural gas, wind, solar *and* storage sites in Texas could also produce baseload power.”³⁸ We further note that, in the Makhijani Report (in addition to extensive discussion of renewable energy sources as energy alternatives), it is also stated that “[i]t is also important to coordinate solar and wind investments; this reduces the requirements for added reserve capacity.”³⁹ Based on these statements the following may be concluded: First, Intervenor may reasonably be said to have raised in the contention the specific alternative of combining wind *and* solar with storage methods and natural gas to create baseload power.

Second, particularly given the actual language of the Board’s own statement quoted above from LBP-09-17 (referring to the Makhijani Report and the four-part combination of solar, wind, storage, and natural gas), it would be unreasonable and logically inconsistent to read Contention 18 as *not* encompassing combinations *including* a combination of wind, solar, energy storage, and natural gas supplementation. Indeed, to read it as encompassing virtually all combinations

³³ See *supra* text accompanying note 8.

³⁴ See, e.g., Tr. at 746, 757.

³⁵ Tr. at 749-50.

³⁶ See Tr. at 760-64; Staff’s Alternatives Response at 7-12.

³⁷ LBP-09-17, 70 NRC at 380 (emphasis added).

³⁸ *Id.* at 376 (citing Arjun Makhijani and SEED Coalition, Nuclear Costs and Alternatives at 42 (2009) [hereinafter Makhijani Report] (attached to original Petition for Intervention and Request for Hearing (Apr. 6, 2009)) (emphasis added).

³⁹ Makhijani Report at 35.

except one including all four parts included in the formulation of the contention, would be to exclude the one combination that would obviously be *most likely to have any chance of achieving the goal of producing baseload power*.⁴⁰ This would, moreover, require overlooking the Board’s unequivocal statement in LBP-09-17 that is quoted above, referring to the four-part combination. In any event, that statement by the Board fits clearly within the statement of the contention itself, as admitted, which we repeat here for the convenience of the reader:

Contention 18 — The Comanche Peak Environmental Report is inadequate because it fails to include consideration of alternatives to the proposed Comanche Peak Units 3 and 4, consisting of combinations of renewable energy sources such as wind and solar power, with technological advances in storage methods and supplemental use of natural gas, to create baseload power.⁴¹

The next step in our analysis takes us to what alternatives the Applicant, in its Alternatives ER Revision on which its Motion to Dismiss Contention 18 is based, actually considers. We note that Applicant’s Alternatives ER Revision does briefly, in passing, refer to “natural gas, wind, and solar, either individually or in combination with each other and energy storage,” at 9.2-31, and to “natural gas, wind, solar; [sic] and energy storage either individually or in combination,” at 9.2-50, not being “viable alternatives.” The four-part combination is not, however, specifically considered or evaluated, and there is no heading for it as there are for other combinations involving wind *or* solar. Nor, contrary to Judge Arnold’s statement that “the solar/wind/storage/natural gas option appears to have been, at least superficially, evaluated in the ER in section 9.2.2.11.14.1,”⁴² does the Applicant in this section in any way evaluate the four-part combination including wind and solar.

The only use of the words “wind and solar” in section 9.2.2.11.4.1 comes in the following paragraph:

The concept behind this alternative is that the primary baseload power could be produced by *solar or wind units* with some of the excess energy placed into storage and from the charged energy storage facility. The natural gas plant could be activated when the *wind and solar power* is interrupted and the stored energy supply exhausted. The natural gas plant could also be used as supplemental load when the

⁴⁰To the effect implicitly suggested by Intervenors, *see supra* text accompanying note 32, there would seem to be some obvious level of merit, and at the very least some plausible common sense, in considering a combination of “wind (relatively more productive at night) and solar (productive during the day)” to overcome the comparative intermittency problems of each. *See also infra* note 302 and accompanying text.

⁴¹*Id.* at 380, 382.

⁴²J. Arnold Dissent at 605 n.8.

energy available from either *the renewable energy source* or energy storage facility is at some level below the targeted 3200 MW.⁴³

In contrast, in the section at issue, the terms “wind” (or “wind power with storage [or CAES]”) and “solar” (or “solar power with storage [or molten salt storage]”) are used in conjunction with each other with the word “or” or the word “nor” between them eleven times.⁴⁴ All analyses are stated in terms of using *either* one *or* the other of “wind”/“wind with storage”/“wind with CAES” *or* “solar”/“solar with storage”/“solar with molten salt storage.”⁴⁵ And perhaps most importantly, Applicant itself does not claim to have included any consideration or evaluation of a combination including both wind and solar power with storage methods and natural gas supplementation.⁴⁶

Under these circumstances, we do not consider the few passing references to “wind and solar” in the Alternatives ER Revision to constitute any significant consideration of the four-part alternative of wind, solar, energy storage, and natural gas supplementation. And we find that, not having “included consideration” of this four-part combination in its ER Revision, Applicant did not supply all of “the information” alleged to have been omitted from its original ER. Based on this finding, we conclude that, while Contention 18 is moot with regard to all of the other combinations actually addressed in the Alternatives ER Revision, Applicant has not shown it to be moot with regard to the alternative of combining wind, solar, energy storage, and natural gas supplementation to create baseload power.⁴⁷ We address the extent to which this part of the original contention remains in the proceeding for litigation in Section III.I, below, in which we summarize and formalize our conclusions on the admissible parts of the first three NEPA alternatives contentions, focusing most directly on questions of feasibility.

III. NEW CONTENTIONS

All of Intervenor’s new contentions, like their original Contentions 13 and 18, concern environmental issues under the National Environmental Policy Act (NEPA). We note in this regard that, although the requirements of NEPA are directed to federal agencies and the primary duties of NEPA accordingly fall on

⁴³ Alternatives ER Revision at 9.2-45 (emphasis added).

⁴⁴ See generally Alternatives ER Revision § 9.2.2.11.4.1, at 9.2-45 to -47.

⁴⁵ See *id.*

⁴⁶ See generally Luminant’s Motion to Dismiss Contention 18 as Moot; Tr. at 746-59.

⁴⁷ In reaching this conclusion we make no findings or statements regarding the adequacy of *how* Applicant addressed any of the alternatives in question, and address questions of adequacy in considering Intervenor’s new Alternatives Contentions *infra*.

the NRC Staff in NRC proceedings, the initial requirement to analyze the environmental impacts of an action is directed to applicants under 10 C.F.R. § 51.45. Thus, at the outset of a proceeding, NEPA-related contentions are to be filed based on an applicant's environmental report (ER), under 10 C.F.R. § 2.309(f)(2). Thereafter, the NRC Staff's issuance of its draft and final environmental impact statements (EISs) may lead to the filing of additional contentions if the data or conclusions contained in them are significantly different from the data or conclusions found in the applicant's documents.⁴⁸

Five of Intervenor's new contentions, like their original Contention 13, concern severe accident impacts, and six, like their original Contention 18, concern the analysis of alternatives to the proposed new units under NEPA.⁴⁹ We consider the severe accident contentions first, then address the alternatives contentions.

A. Colocation Contention 1 — Externally Initiated Accident Scenarios

In the first of their severe accident contentions Intervenor asserts:

The Applicant's failure to address externally initiated accident scenarios is a material omission from the Environmental Report.⁵⁰

In support of this contention Intervenor argues, citing the ER Update revisions at 7.5-2 and 10 C.F.R. § 52.79(a)(29)(ii), that the Colocation ER Revision considers only internally initiated events in the severe accident scenarios, and that the "failure to address externally initiated events is a material omission in the context of dealing with emergencies." Stating that this contention is one of omission, Intervenor challenges the adequacy of the ER Revision based on the preceding alleged omission.⁵¹

Intervenor suggests that the "contention is within the scope of the proceeding because the Board's order admitting Contention 13 recognized that accident impacts at one unit may materially affect other units," and urge that the contention

⁴⁸ See 10 C.F.R. §§ 51.45, 2.309(f)(2).

⁴⁹ We note that Intervenor in their Response to Applicant's Motion to Dismiss Contention 18 suggest that, as an alternative to ruling against Applicant's Motion altogether, Contention 18 "should advance in a modified version that requires the Applicant to: 1) at a minimum, actually consider combinations of wind *and* solar with CAES supplemented with natural gas; 2) consider molten-salt storage by itself and in combination with CAES; and 3) address the geological advantages presented in the ERCOT area that favor deployment of CAES in tandem with wind and solar power sources." Intervenor's Mootness Response Contention 18 at 8-9. Because our rulings on Intervenor's new Alternatives Contentions essentially address all these issues, we issue no separate rulings herein on these three suggested modifications to original Contention 18.

⁵⁰ Intervenor's Colocation Contentions at 2.

⁵¹ *Id.*

“bears on the requirements of 10 C.F.R. § 52.79(a)(29)(ii) [which deals with plans for coping with emergencies] and the Atomic Energy Act [at] 42 USC 2133(d).”⁵² According to Intervenors, “categorically excluding external events such as aircraft impacts from accident scenarios” is contrary to the requirement of section 2133(d) that the “health and safety of the public be protected in the context of nuclear plant licensing,” and in addition, “failure to consider the large release scenario on safe shutdown ignores an obvious factor that bears on impacts on collocated units.”⁵³ Intervenors argue the contention is “material to findings the NRC must make in this proceeding related to the adequacy of Applicant’s capacity to safely shut down reactors and its ability to deal with accidents.”⁵⁴

Intervenors point to indications in the Colocation ER Revision that it would take 10 to 12 hours to reach cold shutdown at the proposed plants, and assert that the ER Revision does not “evaluate externally initiated, rapid onset, catastrophic events that would cause large releases of radiation before the 10/12 hours required to bring co-located units into cold shutdown status.”⁵⁵ They assert that Applicant did not consider such external events because it “assumed that release frequencies for external events are ‘negligible.’”⁵⁶ Intervenors challenge this assumption and argue that the failure to consider external events “excludes an entire set of accident scenarios that form the basis for the NRC’s adoption of 10 C.F.R. § 50.150 regarding aircraft impact design requirements,” as well as “the mitigation requirements of 10 C.F.R. § 50.54(hh) to deal with loss of large areas of nuclear plant(s) due to events such as aircraft impact(s).”⁵⁷ Intervenors argue that Applicant’s approach ignores these requirements, which they assert “recogni[ze]” that risk profiles for severe accidents have changed since the events of September 11, 2001.⁵⁸ They also challenge Applicant’s references to its conclusion in its FSAR⁵⁹ that “unintentional aircraft accidents” are “not credible events.”⁶⁰

Finally, Intervenors cite the 1989 case of *Limerick Ecology Action v. NRC*,⁶¹ in which the court “confronted a similar problem in the context of whether the location of a nuclear plant in a densely populated area allowed adoption of

⁵² *Id.* at 3.

⁵³ *Id.* at 4 n.14 (citing *Druid Hills*, 772 F.2d at 709; *Ohio River Valley*, 473 F.3d at 102, for the principle that “Administrative Procedure Act directs review of agency action to determine if decision is product of consideration of relevant factors and whether a clear error of judgment has occurred”).

⁵⁴ *Id.* at 3 (citing 10 C.F.R. § 52.79(a)(29)(ii); 42 U.S.C. § 2133(d); 10 C.F.R. § 2.309(f)(1)(iii), (iv)).

⁵⁵ *Id.* (citing Colocation ER Revision § 7.5.2, at 7.5-2).

⁵⁶ *Id.* (citing Colocation ER Revision § 7.5.2, at 7.5-2).

⁵⁷ *Id.* at 3-4.

⁵⁸ *Id.* at 4.

⁵⁹ FSAR is an acronym for Final Safety Analysis Report.

⁶⁰ Intervenors’ Colocation Contentions at 4 (citing Colocation ER Revision § 7.5.1).

⁶¹ *Id.* at 5 (citing *Limerick Ecology Action v. NRC*, 869 F. 2d 719, 739-40 (3d Cir. 1989)).

generic risk factors and a SAMDA (severe accident mitigation design alternatives) decision supported by a policy statement rather than a rulemaking.” Intervenor argue the following:

The court rejected the NRC’s argument that its policy statement addressing SAM-DAs satisfied NEPA. The court noted that “(1) after Three Mile Island, it would be irrational for the NRC to maintain that severe accident risks are too remote to require consideration; (2) the NRC itself has devoted \$50 million to studying such risks, not to mention the expenditures for evacuation plans; and (3) the NRC’s own interpretation of its NEPA requirements requires consideration of such risks.” Similarly in this case, categorical exclusion of aircraft impact initiating event scenarios that could cause a large radiation release before an unaffected unit could reach safe shutdown is a reasonable basis to consider whether a license should issue. (10 C.F.R. § 2.309(f)(1)(v)). The *Limerick* court’s observation that disregarding serious accident scenarios after TMI would be “irrational” is also pertinent here. After the aircraft attacks of September 11, 2001, it would be irrational to conclude similar attacks on nuclear plants are too remote for inclusion in the ER. And the use of NRC resources to study aircraft attacks/impacts on nuclear plants is similar to the regulatory response to TMI referenced in *Limerick*. Finally, the NRC’s recognition that aircraft impacts are to be analyzed for some regulatory purposes (impact design and mitigation strategies) is an interpretation of the NRC’s requirements that the risks are not remote. (10 C.F.R. § 2.309(f)(1)(v)).⁶²

Intervenor insist that a genuine dispute exists on whether the Applicant should have included in its ER revisions “accident scenarios that are characterized by rapid onset of externally initiated events that result in large uncontrolled/unmitigated releases of radiation caused by, for example, explosions and fires from impact(s) of a large commercial airliner(s).”⁶³

Applicant argues that Colocation Contention 1 is inadmissible, first, because “the ER explicitly addresses external events,” and therefore the contention fails to raise a genuine dispute with the Application.⁶⁴ Second, Applicant points to the NRC’s “longstanding view that NEPA demands no terrorism inquiry,” which the Board relied on in rejecting Intervenor’s original Contention 19, and concludes that Applicant need not address intentional aircraft impacts in its ER.⁶⁵ Applicant criticizes Intervenor’s reading of *Limerick*, noting that “[i]n fact, that decision upheld NRC’s decision not to analyze risks of sabotage under NEPA

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Applicant’s Colocation Answer at 9-10 (citing *id.* at 17-21, which cites Colocation ER Revision at 7.5-4, 7.5-9).

⁶⁵ *Id.* at 10-11 (quoting LBP-09-17, 70 NRC at 382 (quoting *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 126 (2007))).

where a petitioner did not propose a meaningful way to analyze that risk.”⁶⁶ Third, to the extent Intervenor’s attack Luminant’s compliance with 10 C.F.R. § 52.79(a)(29)(ii), Applicant argues that any attempt to raise safety and emergency planning concerns in the context of this environmental contention is an untimely attempt to broaden Contention 13 to include safety and emergency planning issues.⁶⁷ In any case, Applicant asserts, its FSAR specifically “assessed the risk due to aircraft hazards, concluding that the probable accidental rate of an aircraft affecting the site was less than the threshold ‘one-in-ten-million’ probability stated in our guidance.”⁶⁸ Also, as required by section 52.79(a)(29)(ii), the FSAR “includes [p]lans for coping with emergencies, other than the plans required by § 52.79(a)(21).”⁶⁹ Finally, Applicant contends that Intervenor’s offer no factual support for their assertion that “an external event could cause a large release before 10 to 12 hours.”⁷⁰

The NRC Staff also objects to the admission of Colocation Contention 1, arguing that it falls outside the scope of the proceeding and that Intervenor’s provide no supporting legal basis.⁷¹ The Staff points out that “Applicant has addressed externally initiated accident scenarios in the ER” and concluded that such events are “remote and speculative.”⁷² According to Staff, Intervenor’s provide no legal basis for the notion that Applicant must consider such remote and speculative scenarios in the ER. On the contrary, the Staff notes, the Third Circuit in *Limerick* affirmed that “[i]t is undisputed that NEPA does not require consideration of remote and speculative risks.”⁷³ Like Applicant, Staff also notes that this Board already rejected Intervenor’s argument in Contention 19 that Applicant must consider intentional aircraft impacts in the ER.⁷⁴ Finally, the Staff urges that Contention 1 is untimely to the extent it challenges Applicant’s assumption that “release frequencies for external events are ‘negligible’ compared to internal events.” According to the Staff, this assumption appears in the unrevised portion

⁶⁶ *Id.* at 10 n.48.

⁶⁷ *Id.* at 11.

⁶⁸ *Id.* (citing Comanche Peak Nuclear Power Plant, Units 3 & 4, COL Application, Part 2, Final Safety Analysis Report (FSAR), Rev. 1, FSAR Chapter 3, Design of Structures, Systems, Components, and Equipment (Nov. 20, 2009) at 3.5-2 (ADAMS Accession No. ML100082052) [hereinafter FSAR].

⁶⁹ *Id.* at 12 (citing FSAR § 13.5.2.1).

⁷⁰ *Id.* at 12.

⁷¹ NRC Staff’s Colocation Answer at 8-9.

⁷² *Id.* at 7 (citing Colocation ER Revision at 7.5-4).

⁷³ *Id.* (quoting *Limerick*, 869 F.2d at 739).

⁷⁴ *Id.* at 8-9 (citing LBP-09-17, 70 NRC at 381-82).

of Applicant's ER and could have been challenged in Intervenor's original Petition to Intervene.⁷⁵

In their Reply, Intervenor reiterates their argument that exclusion of external events from the ER "is not credible in light of the inclusion of other externally generated events such as aircraft impacts and seismic events in other contexts of the COLA."⁷⁶ Citing a discussion of the NRC's emergency planning regulations in *Limerick*, Intervenor further argues that "[i]t is not only the statistical improbability of a severe accident that bears on the determination whether, in a given circumstance, a severe accident should be anticipated and thereby considered in the context of the COLA."⁷⁷ Intervenor also repeats their argument that a colocation accident analysis in the ER would be consistent with the Commission's recent adoption of 10 C.F.R. §§ 50.150 and 50.54(hh)(2), "both of which are premised on external events." Intervenor claims as well that the requirements of 10 C.F.R. § 2.309(f)(1)(v) do not apply to a contention of omission, thus obviating Applicant's argument that Contention 1 — a contention of omission — lacks factual support.⁷⁸

We note in addressing Colocation Contention 1 that a central argument of Intervenor in its support is that the Commission in adopting 10 C.F.R. §§ 50.150 and 50.54(hh) essentially changed the "risk profiles" for certain types of severe accidents, thereby rendering accidents that may in the past have been considered "remote and speculative" less so, such that they require analysis in the Applicant's ER. The accidents at issue in this contention are those that are externally initiated, which are asserted to require analysis under this rationale. As stated, the contention concerns Applicant's asserted "failure to address externally initiated accident scenarios," which is argued to constitute a "material omission" from the ER. Intervenor actually, however, in their somewhat rambling and poorly organized arguments, appear to recognize that Applicant did in fact consider external events to the extent of stating that the "release frequency for [such] external events . . . are [sic] negligible compared to internal events . . . [and] too low to warrant further consideration ([because] these events are remote and speculative)."⁷⁹

⁷⁵ *Id.* at 10 (citing Comanche Peak Nuclear Power Plant, Units 3 & 4, COL Application, Part 3, Environmental Report, Rev. 1 (Non-Proprietary Version) (Nov. 20, 2009) § 7.2.2, at 7.2-4 (ADAMS Accession No. ML100080530) [hereinafter ER]).

⁷⁶ Intervenor's Colocation Reply at 2.

⁷⁷ *Id.* at 3 (citing *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 713 (1985)); *see also* Tr. at 819-26.

⁷⁸ Intervenor's Colocation Reply at 6-7.

⁷⁹ Colocation ER Revision at 7.5-4. Intervenor in their Colocation Contentions at 3 refer to the Applicant's "negligible" reference, but appear to miscite it, citing the Colocation ER Revision at 7.5-2, rather than at 7.5-4, cited by both Applicant and NRC Staff in their Answers.

As Applicant maintains, however, Intervenors have not provided any evidence to dispute Applicant's conclusion that the release frequency for such external events is "negligible compared to internal events."⁸⁰ Intervenors argue that the contention is one of omission and as such requires no factual support,⁸¹ but this argument is unpersuasive to the extent that they themselves implicitly recognize that Applicant *does* address externally initiated accidents, even if in less detail than they would like. To the extent, however, that the contention is considered as an omission contention based on the omission of more extensive consideration of external events, Intervenors must, under 10 C.F.R. § 2.309(f)(1)(vi), show that what is allegedly omitted is "required by law." And in this regard, they argue that 10 C.F.R. §§ 50.150 and 50.54(hh) require such consideration, citing as well the *Limerick* decision.

It is true that the Third Circuit in *Limerick* found persuasive the argument that, after Three Mile Island, it was "irrational for the NRC to maintain that severe accident risks are too remote to require consideration."⁸² As NRC Staff points out, however, in the Third Circuit's later 2009 decision in *New Jersey v. NRC*, the Court upheld the denial of a contention challenging the failure to include in the EIS for the Oyster Creek license renewal any consideration of the effects of an aircraft attack.⁸³ In reaching its decision, indeed, the Court cited the *Limerick* decision in pointing out that New Jersey had "not provided any evidence to challenge" the NRC's conclusion that "the environmental effects of a hypothetical terrorist attack on a nuclear plant" would be "no worse than those caused by a severe accident."⁸⁴ We note that the Court in *New Jersey* did not take into account the Commission's promulgation, 4 days prior to the decision's issuance, of 10 C.F.R. §§ 50.54(hh) and 50.150.⁸⁵ Intervenors have, however, provided no argument to support the proposition that the Commission in adopting those rules intended that they should appropriately be read as "changing the risk profiles" of the accidents addressed in the rules, or that they would change the NRC's conclusion that was upheld in *New Jersey*.⁸⁶ Intervenors merely assert, with no supporting authority,

⁸⁰ Nor have Intervenors provided any support for their argument that "an external event could cause a large release before 10 to 12 hours." Intervenors' Colocation Contentions at 3.

⁸¹ Intervenors Colocation Reply at 6-7.

⁸² *Limerick*, 869 F.2d at 741.

⁸³ *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (2009).

⁸⁴ *Id.* at 136-37 (citing *Limerick*, 869 F.2d at 744 & n.31).

⁸⁵ See 74 Fed. Reg. 13,926 (Mar. 27, 2009). The *New Jersey* decision was issued March 31, 2009. See *supra* note 83.

⁸⁶ We note also in this regard the NRC Staff's citation of the Commission's statement in *Private Fuel Storage* that, in deciding against including terrorist attacks within NEPA reviews, this "does not mean that we plan to rule out the possibility of a terrorism attack against NRC-regulated facilities," but that

(Continued)

that the requirements of the new rules are “recognitions that the risk profile has changed.”⁸⁷

It is also true, as argued by Intervenors, that in ruling original Contention 13 admissible, we observed that NUREG-1555 includes the statement that “[t]he events arising from causes external to the plant that are considered possible contributors to the risk associated with the plant should be discussed.”⁸⁸ However, as Intervenors themselves appear to recognize to an extent, Applicant has at least “discussed” external events, both in the original ER and in the recent ER Revision,⁸⁹ and Intervenors have provided no facts to dispute Applicant’s statements in this discussion.

With respect to the safety and emergency planning concerns raised in this contention, all parties appear to agree that these matters are addressed by Applicant — just not in the ER. Intervenors have not, however, provided any persuasive argument to support the idea that, simply because matters are addressed in those contexts and in the FSAR, the same matters must necessarily also be addressed in the ER. And regarding Applicant’s argument that Intervenors are in any event untimely in their attempt to raise safety and emergency planning concerns in the context of this environmental contention and thereby broaden the scope of original Contention 13, Intervenors’ response is likewise unpersuasive. They urge that the Board use its “discretion to accept nontimely contentions under section 2.309(c)(1) upon a showing of ‘good cause’ for failure to file such in a timely manner and a weighing of a number of other factors,” but pose no such good cause, other than to argue that the ER Revisions constitute “new information” justifying such arguments.⁹⁰ We find this bare argument to be insufficient to demonstrate the requisite “good cause.”

Finally, regarding Intervenors’ arguments that Colocation Contention 1 “bears on the requirements of 10 C.F.R. § 52.79(a)(29)(ii) and 42 U.S.C. § 2133(d),”⁹¹ and that the *Druid Hills* and *Ohio River Valley* decisions support their position,⁹² we find these to be unpersuasive as well. None of these support their contention

it saw no “practical benefit in conducting that review, case-by-case, under the rubric of NEPA,” nor did it consider that it had any legal duty to do this. NRC Staff’s Colocation Answer at 9 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 347-48 (2002)). Intervenors have provided nothing to suggest the Commission has changed its approach in this regard.

⁸⁷ Intervenors Colocation Reply at 4.

⁸⁸ LBP-09-17, 70 NRC at 368. Office of Nuclear Reactor Regulation, Standard Review Plans for Environmental Reviews for Nuclear Power Plants, NUREG-1555 at 7.2-3 (Oct. 1999) [hereinafter NUREG-1555].

⁸⁹ See *supra* note 79; see also Tr. at 839.

⁹⁰ Intervenors’ Colocation Reply at 7.

⁹¹ See *supra* note 52.

⁹² See *supra* note 53.

that Applicant should have addressed externally initiated severe accidents any more than it did in its ER.

Based on the preceding, we conclude that Colocation Contention 1 does not provide sufficient support or information to show a genuine dispute on a material issue of law or fact, as required at 10 C.F.R. § 2.309(f)(1)(vi), or demonstrate that consideration of externally initiated accidents to the degree argued by Intervenors is required by law. The contention is inadmissible.

B. Colocation Contention 2 — Scenarios with Release Times Shorter Than Cold Shutdown Time

In this contention Intervenors argue:

The Applicant fails to consider and evaluate the impacts of severe accident scenarios, regardless of probability, with release times shorter than the duration needed to achieve cold shutdown.⁹³

Here, Intervenors focus on Applicant's approach in the ER Revision to consider only "severe accident scenarios with a probability of more than 1.0 E-6 and eliminate events with a probability less than 1.0 E-6 from further consideration as 'remote and speculative.'" Again, they argue that the "failure to consider radiological impacts of events with a release time shorter than the time needed to achieve cold shutdown is a material omission in the context of dealing with emergencies," and make some of the same arguments made in support of Colocation Contention 1, relating to 10 C.F.R. § 52.79(a)(29)(ii) and 42 U.S.C. § 2133(d).⁹⁴

Intervenors argue that "it is not only the statistical probability of a serious accident that bears on the determination whether, in a given circumstance, such should be anticipated and thereby considered in the context of the ER." They cite the Appeal Board's 1985 decision in the *Limerick* case on the improbability issue, quoting the decision as follows:

the improbability of PMMC's evacuation and consequent unavailability to receive contaminated injured workers is beside the point. The Commission's emergency planning regulations are premised on the assumption that a serious accident might occur and that evacuation of the EPZ might well be necessary. The adequacy of a given emergency plan therefore must be adjudged with this underlying assumption in mind. As a corollary, a possible deficiency in an emergency plan cannot properly be disregarded because of the low probability that action pursuant to the plan will

⁹³ Colocation Contentions at 6.

⁹⁴ *Id.*

ever be necessary. Thus, the Licensing Board majority gave undue weight to the fact that evacuation of PMMC is remote.⁹⁵

Intervenors note that Applicant in its SAMA (severe accident mitigation alternatives) analysis considered the types of events it advocates here, but argue that the reasoning of the Commission in *Limerick* should also apply in the colocation context herein at issue:

Notwithstanding the low probability of a severe accident, Applicant has on-site emergency response capabilities, separation distances between units and independent safety systems. The Applicant has made design decisions and preparations for severe accidents that it claims are so remote and speculative that there is actually no need to anticipate such in the context of severe colocation accident effects. However, evidently, the accidents are not so remote and speculative to obviate the need to account for such in design (10 C.F.R. § 50.150) and accident mitigation responses (10 C.F.R. § 50.54(hh)).⁹⁶

Thus, according to Intervenors, a genuine dispute exists on whether Applicant must address in the ER revisions “severe accident event scenarios that may prevent safe shutdown and/or require additional time to bring collocated units to safe shutdown status.”⁹⁷

Applicant argues that Colocation Contention 2 is inadmissible, noting first that the ER does exclude as “remote and speculative” certain low-probability severe accident scenarios with a likelihood of “about eight in ten million (7.8×10^{-7}) to one in a billion (1.03×10^{-9}) per reactor-year.”⁹⁸ Applicant argues that Intervenors did not contest these probability calculations, which are contained in section 7.5 of Applicant’s Colocation ER Revision, and that Intervenors thus fail to raise a genuine dispute with the Applicant on an issue of material fact.⁹⁹ Applicant further argues that the central premise of Intervenors’ arguments in Colocation Contention 2 is directly contrary to Commission case law holding that “low probability is the key to applying NEPA’s rule-of-reason test to contentions that allege that specified accident scenario presents a significant environmental impact that must be evaluated.”¹⁰⁰ Applicant urges, citing a licensing board decision in the *Calvert Cliffs* COL proceeding, that one in a million (10^{-6}) per year is the threshold above which accident scenarios should be evaluated for NEPA consideration, and

⁹⁵ *Id.* at 7 (citing *Limerick*, ALAB-819, 22 NRC at 713).

⁹⁶ *Id.* at 8.

⁹⁷ *Id.*

⁹⁸ Applicant’s Colocation Answer at 14.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 14-15 (quoting *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-7, 32 NRC 129, 131 (1990) (internal quotations omitted)).

that the Board should therefore reject Colocation Contention 2 as lacking a legal basis under NEPA to require an evaluation of events with frequencies of less than 10^{-6} per year.¹⁰¹

Applicant also claims that this contention is beyond the scope of this proceeding and not material to NRC's NEPA review requirements.¹⁰² Applicant suggests the Appeal Board's *Limerick* decision is not relevant to Colocation Contention 2 and fails to provide a legal basis for its admission, because it involves AEA emergency planning requirements, not NRC's obligations under NEPA.¹⁰³ Finally, Applicant argues that Intervenors fail to provide sufficient factual information or expert opinion to controvert Applicant's conclusion in section 7.5.5 of its ER that risk-based environmental impacts from simultaneous severe accidents at all four Comanche Peak units would be small given the low probability of such an event, and that the evaluation in section 7.5.5 indeed provides the "very evaluation requested by Intervenors."¹⁰⁴

NRC Staff argues that Intervenors fail to state a legal basis for their assertion that Applicant must consider in its ER severe accident initiating sequences with a probability less than one in a million per reactor-year.¹⁰⁵ Staff claims that Intervenors have not raised a genuine dispute with the Applicant on a material issue of fact, because they do not dispute the probabilities Applicant assigns to events in the ER that are excluded as remote and speculative and thus do not warrant further consideration.¹⁰⁶ Staff urges that Intervenors' citation to 10 C.F.R. § 52.79(a)(29)(ii), as it relates to requirements for an FSAR, is inapposite, fails to establish a legal basis for the contention, and also fails to raise a genuine dispute with Applicant regarding a material issue of law.¹⁰⁷ In addition, Staff suggests, Intervenors' arguments relating to Applicant's Emergency Plan and FSAR Safety Requirements are untimely, as these were part of the original application and are not based on new or materially different information.¹⁰⁸

Intervenors reply that 42 U.S.C. § 2133(d) is an "overarching requirement" to protect public health and safety that requires Applicants to anticipate catastrophic events that would result in large releases before the 10 to 12 hours required to achieve safe shutdown. They submit that NEPA requires Applicants to include discussion of release scenarios that are shorter than the time required to achieve

¹⁰¹ *Id.* at 15 (quoting *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 209 (2009)).

¹⁰² *Id.* at 15-16.

¹⁰³ *Id.* at 16.

¹⁰⁴ *Id.* at 16-17.

¹⁰⁵ NRC Staff's Colocation Answer at 11-12.

¹⁰⁶ *Id.* at 11-12.

¹⁰⁷ *Id.* at 12.

¹⁰⁸ *Id.* at 11, 15.

safe shutdown “to fully inform decision makers about the effects of releases that occur prior to safe shutdown of unaffected units,” repeating their argument that statistical improbability does not mean that the event is speculative, and referring to the events of September 11, 2001, to lend support to this proposition.¹⁰⁹

We note that in Colocation Contention 2 Intervenors essentially restate their arguments in their first colocation contention, to the effect that Applicant should consider and evaluate in its ER impacts of severe accident scenarios, specifically those with release time shorter than that needed to achieve cold shutdown. For the same reasons discussed in our ruling on Colocation Contention 1, Intervenors’ arguments in this regard are without merit. Intervenors ignore the authority that “low probability is the key to applying NEPA’s rule of reason test to contentions” regarding environmental impacts of specific accident scenarios.¹¹⁰ In addition, they neglect the fact that the ER revisions on which they have predicated their colocation contentions, including this one, involve environmental — not safety or emergency planning — issues, which we have likewise addressed above in our ruling on Colocation Contention 1. In the end, in this contention as well, Intervenors fail to raise a genuine dispute on a material issue of law or fact, as required under 10 C.F.R. § 2.309(f)(1)(vi). We therefore conclude that Colocation Contention 2 is inadmissible.

C. Colocation Contention 3 — Impact of Earthquake Resulting in Common-Cause Failures at Multiple Units

In this contention Intervenors assert:

The Applicant fails to evaluate the impact of a severe accident at one CP unit on the other units when the initiating event of the accident is an external event, such as an earthquake, that could result in common-cause failures of systems at one or more of the other units, potentially extending the time necessary for operators to put the units into stable long-term decay heat removal configurations.¹¹¹

In addition to making arguments similar to those made in support of Colocation Contentions 1 and 2, Intervenors postulate that an external event such as an earthquake could lead to “common-cause failures of safety systems at one or more collocated units,” in which “additional time may be required to restore operability of safety systems and achieve stable long-term configurations, increasing the risk that stable shutdown will not be achieved and core-melt may occur at one of the

¹⁰⁹ Intervenors’ Colocation Reply at 8.

¹¹⁰ See *Natural Res. Def. Council v. Morton*, 458 F.2d at 834; *Vermont Yankee*, CLI-90-4, 32 NRC at 131.

¹¹¹ Colocation Contentions at 8.

other units.”¹¹² Intervenor again cite 10 C.F.R. § 52.79(a)(29)(ii) and 42 U.S.C. § 2133(d), and argue that “failure to consider the large release scenario on safe shutdown ignores an obvious factor that bears on impacts on co-located units.”¹¹³

Applicant argues that Intervenor fail to raise a genuine dispute on a material issue of fact in this contention, because external events, including seismic events, are addressed in section 7.5 of the ER.¹¹⁴ Applicant therein determines that, because the Comanche Peak site is located in a low seismicity region, “the release frequency for external events, including seismic, [is] negligible,” or “remote and speculative” as “compared to internal events,” and is thus “too low to warrant further consideration.”¹¹⁵ In support of its argument that its decision to exclude certain improbable events from further impact evaluation is appropriate, Applicant again cites the Commission’s *Vermont Yankee* decision holding that “low probability is the key to applying NEPA’s rule of reason test to contentions that allege that a specified accident scenario presents a significant environmental impact that must be evaluated.”¹¹⁶ Thus, Applicant urges, as Intervenor “do not contest the frequencies of external events” provided in the ER Revision, Colocation Contention 3 is beyond the scope of this proceeding and not material to the NEPA findings the NRC must make in this proceeding.¹¹⁷

Applicant emphasizes that Intervenor offer no facts, documents, or expert opinion to support their “bare assertions” and “speculative claims.”¹¹⁸ Thus, Applicant argues, they fail to show a genuine dispute with the Applicant on a material issue of fact.¹¹⁹ Applicant states that it in fact considered in section 7.5.5 of the ER a hypothetical evaluation assuming simultaneous accidents at all four reactors on the Comanche Peak site, which encompasses Intervenor’s arguments on impacts of external events on collocated units. For this reason also, Applicant argues, Intervenor fail to satisfy the requirement at 10 C.F.R. § 2.309(f)(1)(vi) that they show a genuine issue on a material issue of law or fact with the Application.¹²⁰

Staff also points to Applicant’s consideration of external events such as seismic events, floods, hurricanes, and tornadoes in its ER, arguing that Intervenor thus fail to show a genuine dispute on a material issue of law or fact.¹²¹ Staff as

¹¹² *Id.* at 9.

¹¹³ *Id.* at 9 & n.32 (citing *Druid Hills*, 772 F.2d at 709; *Ohio River Valley*, 473 F.3d at 102).

¹¹⁴ Applicant’s Colocation Answer at 18-19.

¹¹⁵ *Id.* at 18-19 (citing its ER at 7.5-5).

¹¹⁶ *Id.* at 19 (quoting *Vermont Yankee*, CLI-90-7 at 131).

¹¹⁷ *Id.* at 19.

¹¹⁸ *Id.* at 20.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ NRC Staff’s Colocation Answer at 16.

well notes Applicant's discussion of simultaneous accidents at all four units, the impacts of which are the same regardless of the cause of the accident, whether external or internal, and which bounds the impacts argued by Intervenors.¹²² Moreover, Staff notes, contrary to Intervenors' assertion, Applicant's ER Revision at 7.5 does address common cause failures by explaining that there are no shared systems between the adjacent units on the Comanche Peak site, and that there is thus no direct mechanism for a severe accident at one unit to propagate and cause an accident at an adjacent unit.¹²³ Because Intervenors do not explain why this information is inadequate or deficient, and provide only vague and unsupported assertions about what might potentially happen, Staff contends that Intervenors fail to provide sufficient information to demonstrate any genuine dispute about any significant error or omission in the new Colocation ER Revision.¹²⁴

In reply, Intervenors among other things claim that seismic events and aircraft impacts are "reasonably foreseeable," supporting this argument by generally referencing "the Commission's requirements to design for and mitigate in response to external events." Intervenors also claim that Applicant's and Staff's arguments are inconsistent, in that they acknowledge requisite consideration of certain events for the FSAR and DCD (design control document), but not for NEPA analyses, and that this inconsistency "does not make sense."¹²⁵

As Applicant and Staff argue, Intervenors in Colocation Contention 3 overlook sections of Applicant's ER in which external initiating events, specifically including seismic events, are considered. Furthermore, Intervenors overlook Applicant's analysis of simultaneous accidents at all four units, which bounds any impacts of external events on a collocated unit. Intervenors thus fail to raise a genuine dispute on a material issue of law or fact as required under 10 C.F.R. § 2.309(f)(1)(vi), and Colocation Contention 3 is inadmissible.

D. Colocation Contention 4 — Impact on Colocated Units of Accident at Shutdown Unit with Containment Head Removed

Intervenors in this contention assert:

The Applicant fails to address the radiological impacts of a severe accident at a CP unit during shutdown, when the primary containment head is removed, on the other CP units.¹²⁶

¹²² *Id.* at 19.

¹²³ *Id.* at 20.

¹²⁴ *Id.* at 20-21.

¹²⁵ Intervenors' Colocation Reply at 9.

¹²⁶ Colocation Contentions at 10.

In this contention Intervenor argue that “[f]uel damage events occurring during refueling outages have a much higher risk of early large radiological releases to the environment than when the reactor is at power,” and therefore “shutdown events should be of particular concern with regard to any analysis of colocation environmental impacts including impacts on safe shutdown of collocated units.”¹²⁷ Intervenor challenge Applicant’s conclusion that such events are too remote and speculative to justify analysis in the ER. Noting Applicant’s reliance on quantitative risk, Intervenor again argue that “[i]t is not only the statistical improbability of a serious accident that bears on the determination whether, in a given circumstance, a severe accident should be anticipated and thereby considered in the context of the COLA.”¹²⁸ They argue that Applicant has considered such accidents in the contexts of emergency response capabilities, separation distances between units, independent safety systems, and the requirements of 10 C.F.R. §§ 50.150 and 50.54(hh), and should likewise consider them in the context of colocation accident effects. Again, Intervenor contend that “categorically excluding events during shutdown is contrary to 42 U.S.C. § 2133(d).”¹²⁹

Applicant argues that Intervenor fail to demonstrate a genuine dispute with Applicant regarding a material issue of fact, because their assertions in Colocation Contention 4 are simply incorrect; it did in fact address shutdown events in section 7.5 of the ER.¹³⁰ Further, Applicant notes its explanation in that section of how the release frequency for shutdown events at Comanche Peak Units 1 and 2 is less than 4 in 100 million (3.8×10^{-8}) per reactor-year, and 2 in 10 million (2×10^{-7}) per reactor-year for units 3 and 4, which are probabilities lower than that which would warrant further consideration.¹³¹ Applicant argues that, to the extent Intervenor demand further consideration of remote and speculative shutdown events, Colocation Contention 4 conflicts with the Commission’s *Vermont Yankee* ruling that low probability is key to the admissibility of contentions on impacts of specified accident scenarios.¹³² As the probabilities involved in Applicant’s analysis of shutdown events that Intervenor proposes in Colocation Contention 4 are lower than the threshold probability established in the *Calvert Cliffs* case, Applicant argues, Intervenor raise issues in this contention that go beyond the scope of this proceeding and are not material to the NEPA findings the NRC must make in this proceeding.¹³³

¹²⁷ *Id.* at 10-11 (citing ER at 7.5-4, -7).

¹²⁸ *Id.* at 11 (citing *Limerick*, ALAB-819, 22 NRC at 713).

¹²⁹ *Id.* (citing *Druid Hills*, 772 F. 2d at 709; *Ohio River Valley*, 473 F.3d at 102).

¹³⁰ Applicant’s Colocation Answer at 21.

¹³¹ *Id.*

¹³² *Id.* at 22 (citing *Vermont Yankee*, CLI-90-7, 32 NRC at 131).

¹³³ *Id.*

Pointing out that Intervenors' reference to the Appeal Board's decision in the *Limerick* case addresses emergency planning requirements, not relevant to NEPA requirements, Applicant contends that this reference fails to provide a legal basis for admission of Colocation Contention 4.¹³⁴ Urging that Intervenors' arguments in this contention fail to show adequate support for their claims that events during shutdown have a much higher risk of early large radiological releases to the environment than when the reactor is at power, Applicant states that its evaluation of simultaneous accidents at all four units, in section 7.5.5 of its Colocation ER Revision, encompasses Intervenors' arguments regarding shutdown events and their impact on a collocated unit, and provides the "very type of evaluation" the Intervenors request.¹³⁵

Staff agrees that the *Limerick* case does not support Intervenors' assertions and again cites NEPA's "rule of reason."¹³⁶ Citing in addition Commission precedent stating the "undisputed" proposition "that NEPA does not require consideration of remote and speculative risks," Staff maintains that Intervenors fail to raise a genuine dispute with the Applicant on a material issue of fact or law.¹³⁷ Staff also claims that Applicant evaluated shutdown scenarios in ER § 7.2.4, which is part of the original application.¹³⁸ Thus, Staff urges, Intervenors' arguments in this regard are untimely.¹³⁹

Intervenors respond to Staff's untimeliness arguments by noting that Applicant did not consider accident impacts on collocated plants prior to admission of Contention 13, and that while Applicant considered shutdown scenarios in its ER § 7.2.4, this did not address impacts related to colocation accidents.¹⁴⁰

We first observe that, contrary to Intervenors' assertions in Colocation Contention 4, Applicant has considered shutdown events in section 7.5 of the Colocation ER Revision, in which it determines that the release frequency for such events is extremely improbable and is thus remote and speculative,¹⁴¹ which Intervenors do not substantively contest. Furthermore, Intervenors again fail to demonstrate why case law addressing accident scenario analysis in safety and emergency planning contexts should apply in an environmental context. Finally, the impact analysis Intervenors request is also bounded by Applicant's discussion in ER Revision § 7.5.5 of releases from hypothetical simultaneous accidents at all four units. We conclude that Intervenors fail to state a genuine dispute with the Ap-

¹³⁴ *Id.*

¹³⁵ *Id.* at 22-23.

¹³⁶ NRC Staff's Colocation Answer at 25-26.

¹³⁷ *Id.* at 26.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Intervenors' Colocation Reply at 10.

¹⁴¹ Colocation ER Revision at 7.5-4.

plication on a material issue of fact as required under 10 C.F.R. § 2.309(f)(1)(vi), and that Colocation Contention 4 is therefore inadmissible.

E. Colocation Contention 5 — Combined Radiological Consequences of Simultaneous Accidents at All Four Units

In this contention Intervenor's allege:

The Applicant fails to fully evaluate the impact of a chain-reaction that leads to more than one unit experiencing a severe accident.¹⁴²

Intervenor's contend that Applicant has failed to address radiological impacts of accidents at all four Comanche Peak units, and again argue that this is a "material omission in the context of dealing with emergencies" under 10 C.F.R. § 52.79(a)(29)(ii). They argue that, because "the Board's order admitting Contention 13 recognized that accident impacts at one unit may materially affect other units," it "follows that accidents that occur at all four units in close temporal proximity may materially affect capacity of plant operators to achieve safe shutdown of the units." Again citing 10 C.F.R. § 52.79(a)(29)(ii) and 42 U.S.C. § 2133(d), Intervenor's argue that, "if a severe accident affecting one would likely lead to comparable accidents in one or more of the collocated units, then the combined radiological consequences could have a significant impact on the US-APWR SAMDA analysis." Intervenor's assert that a "genuine dispute exists with the Applicant based on its decision to exclude a full evaluation of the impact of a chain-reaction that leads to more than one unit experiencing a severe accident."¹⁴³

Applicant claims that, in Colocation Contention 5, Intervenor's fail to raise a genuine dispute with Applicant on a material issue of fact, because Applicant did in fact evaluate the potential for an accident with a frequency greater than 10^{-6} per year to impact collocated units and it concluded that a chain reaction among the Comanche Peak units would not occur.¹⁴⁴ Thus, according to Applicant, there was no reason for it to perform a SAMDA analysis assuming simultaneous accidents at all four units. Applicant argues that Intervenor's provide no facts or expert opinion explaining why this conclusion in their ER is incorrect, nor have Intervenor's identified any SAMDAs that should be adopted if some unspecified new analysis

¹⁴² Colocation Contentions at 12.

¹⁴³ *Id.* at 12-13.

¹⁴⁴ Applicant's Colocation Answer at 24 (citing Colocation ER Revision § 7.5.5).

were performed,¹⁴⁵ nor any cost-beneficial SAMAs.¹⁴⁶ Nor, Applicant claims, have Intervenors provided any reason to believe that the results of the SAMA analysis in ER § 7.5.4 would be affected if the approach they suggest were adopted. Applicant argues that Colocation Contention 5 thus lacks adequate support and fails to establish a genuine dispute with Applicant's SAMA analysis on a material issue of law or fact.¹⁴⁷

Staff also opposes admission of Colocation Contention 5, arguing that Intervenors fail to show a genuine dispute with the Applicant on a material issue of law or fact, because Applicant in fact has evaluated an event where severe accidents occur simultaneously in all four reactor units at the Comanche Peak site.¹⁴⁸ Thus, Staff claims, Intervenors are mistaken in their assertions in Colocation Contention 5 and also have not directly controverted the application.¹⁴⁹ Further, Staff argues, the SAMDA analysis is part of the design certification application and thus this part of the contention constitutes an impermissible challenge to a future rulemaking.¹⁵⁰

Intervenors in their Reply state that Applicant relies on a "flawed underlying analysis" in ER Revision § 7.5.5, and again argue that statistically improbable events must be anticipated in reactor design and LOLA¹⁵¹ mitigation plans, so they should also be required under NEPA in ERs to avoid "inconsistency."¹⁵²

We find that Intervenors in Colocation Contention 5 fail to provide facts or expert opinion to challenge Applicant's actual consideration of the potential occurrence of chain reaction events resulting from a simultaneous accident at all four units on the Comanche Peak site. Nor do they demonstrate that Applicant's conclusion that such a chain reaction would not occur is incorrect, or show that the analysis they request would result in any appropriate new SAMDA or cost-beneficial SAMA. Intervenors thus fail to provide adequate support to establish any genuine dispute with the Applicant on a material issue of law or fact as required under 10 C.F.R. § 2.309(f)(1)(vi). We therefore conclude that Colocation Contention 5 is inadmissible.

¹⁴⁵ *Id.* at 25.

¹⁴⁶ *Id.* (quoting *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 7-8 (2002)).

¹⁴⁷ *Id.* at 25-26.

¹⁴⁸ *Id.* at 28.

¹⁴⁹ NRC Staff's Colocation Answer at 28.

¹⁵⁰ *Id.* at 29 (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999)).

¹⁵¹ LOLA is an acronym for "loss of large area."

¹⁵² Colocation Reply at 11.

F. Alternatives Contention 1 — Impacts of Wind and CAES

Intervenors in their first contention on Applicant's new NEPA alternatives section of its ER state:

The Applicant overstates and mischaracterizes, without substantiation, the impacts of wind power generation and CAES.¹⁵³

There are, in addition, two subheadings, which state as follows:

- A. Applicant substantially overstates wind power and CAES land use impacts.¹⁵⁴
- B. Applicant does not consider the benefits of using CAES in Texas.¹⁵⁵

Supported by their expert, Ray Dean, Ph.D.,¹⁵⁶ Intervenors accuse Applicant of using “misleading statements about environmentally impacted areas,” thereby overstating the negative environmental land use impacts from wind generation and compressed air energy storage (CAES).¹⁵⁷ Also, according to Intervenors, Applicant fails to acknowledge negative environmental impacts of nuclear power, and various regulatory requirements relating to “security of nuclear plants . . . water use, radioactive waste management, radioactive contamination of air, water and soil, and radiation monitoring,” which “do not apply to wind/CAES.”¹⁵⁸ According to Intervenors, “Applicant’s attenuated comparison of the environmental impacts of nuclear and wind/CAES is inadequate to adequately inform decision makers about the competing choices.”¹⁵⁹

Intervenors challenge Applicant’s estimate in its ER amendments that, in order to generate 3200 megawatts of energy a wind farm would take up 452,000 to 816,000 acres of land, claiming that these numbers “overstate the environmental impact by two orders of magnitude.”¹⁶⁰ They suggest, with the support of Dr.

¹⁵³ Alternatives Contentions at 3.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 4.

¹⁵⁶ According to his Resume, Dr. Dean is Professor Emeritus in Electrical Engineering and Computer Science at the University of Kansas, has an M.S. in nuclear reactor design, and pre-retirement was a Registered Professional Engineer. See Resume of Raymond H. Dean (Jan. 4, 2010).

¹⁵⁷ Alternatives Contentions at 3 (citing Dean Report at 5).

¹⁵⁸ *Id.* (citing 10 C.F.R. §§ 50.54(hh), 50.150).

¹⁵⁹ *Id.* (citing *Department of Transportation v. Public Citizen*, 541 U.S. 752, 768-69 (2004)).

¹⁶⁰ *Id.* at 4 (quoting Dean Report at 6 (citing Alternatives ER Revision at 9.2-40)).

Dean as well as that of Arjun Makhijani, Ph.D.,¹⁶¹ and Mr. Paul Robbins,¹⁶² that the wind turbines, associated roads and buildings in a wind farm occupy a “very small fraction” of the land area, leaving the remaining 96.5% of the area usable for farming and ranching, with roads also usable for other purposes.¹⁶³ Intervenor also contest Applicant’s description of the CAES facility covering “between 63,289 and 114,420 acres,”¹⁶⁴ stating that Applicant includes in these figures an underground reservoir “as part of the above-ground footprint,” and provide the following from Dr. Dean’s Report:

The CASE [sic] facility would not cover that amount of land. The indicated area is the area of a 10-meter thick aquifer, which is two or three thousand feet underground. The only above-ground impacts of CAES are the building that houses the compressors, expanders, heat exchangers, and combustors, plus scattered well heads and (probably) buried pipes connecting those well heads to the building. Since the net power coming out of a CAES expander is two or three times greater than the net power coming out of a combustion turbine having the same diameter, the CAES equipment building will be substantially smaller than a building housing conventional combustion turbines capable of the same electrical output.¹⁶⁵

....

The site for Comanche Peak’s reactors and related facilities occupies 7950 acres. The area actually occupied by the foundations of the 4000 wind turbines could range from 1000 to 2000 acres, plus the area of the CAES facility and scattered CAES well heads. The Applicant’s use of the term “LARGE” to describe the relative environmental impact of an alternative wind-and-storage system is not justified.¹⁶⁶

In the second part of the contention, Intervenor suggest that “Applicant does not consider the benefits of using CAES in Texas,” citing the Dean Report for the observation that underestimation of such benefits may arise from experience of slow development in a porous aquifer in Iowa, whereas the existence of old gas wells and a “vast amount” of geological data from their development would

¹⁶¹ According to his Curriculum Vita, Dr. Makhijani has a Ph.D. in electrical engineering, specializing in plasma physics as applied to controlled nuclear fusion, and has authored numerous articles on energy and environment-related issues. See Curriculum Vita of Arjun Makhijani (Feb. 17, 2009).

¹⁶² According to his Resume, Mr. Robbins does research and writing on environmental issues, energy policy and technology. See Resume of Paul Robbins (Jan. 15, 2010).

¹⁶³ *Id.* (quoting Dean Report at 6); see also *id.* (citing Robbins Report at 3; Makhijani Declaration at 2).

¹⁶⁴ *Id.* (quoting Alternatives ER Revision at 9.2-40).

¹⁶⁵ *Id.* (quoting Dean Report at 6-7; citing Robbins Report at 3).

¹⁶⁶ *Id.* (quoting Dean Report at 7).

support much easier development of CAES in Texas. They cite the Robbins Report for similar “inherent advantages of developing CAES in Texas.”¹⁶⁷

Applicant suggests that intervenors’ arguments on land use of wind power are untimely under 10 C.F.R. § 2.309(c) or (f)(2), because its ER has “always” contained the statements about wind power’s impact on land use being “large” and involving “approximately 452,800-816,000 acres of land.”¹⁶⁸ Moreover, Applicant points out, the ER already acknowledges that some of the land used for a wind farm could also be used for other purposes such as agriculture.¹⁶⁹ Given these acknowledgments, intervenors’ land use arguments do not, according to Applicant, raise a genuine issue of material fact as required by 10 C.F.R. § 2.309(f)(1)(vi).¹⁷⁰ On the land use of CAES, Applicant characterizes intervenors’ arguments on what area the CAES would “cover” as “flyspecking,” given that intervenors do not dispute the need for the area Applicant specifies, and that the ER Update clearly states that the CAES would involve “large scale underground storage capacity.”¹⁷¹

In addition, Applicant argues, whatever the advantages of developing CAES facilities in Texas, the reason Applicant rejected a wind-CAES combination is that “the economics and feasibilities of such a system in Texas are speculative,” and intervenors fail to show that wind power combined with CAES is feasible, or “developed, proven, and available to supply baseload power.”¹⁷² Thus, Applicant argues, intervenors’ argument on “the relative ease of developing CAES in Texas is simply not material,” and fails to demonstrate a genuine issue of material fact.¹⁷³

NRC Staff challenges intervenors’ land use arguments on the basis that they fail to refer to sections of the ER dealing with land use, and fail to “identify or describe the current types of land use at the site.”¹⁷⁴ Moreover, Staff argues, “[e]ven assuming that the Applicant overestimated the amount of land that would be necessary for wind generation, such a facility would likely extend beyond the boundaries of the proposed facility and affect land uses that would not otherwise be impacted,” citing as an example the ER’s indication that there are 144,425 acres of farmland in the vicinity of the site but that construction of the proposed new units would not affect them, in contrast to greater impacts of a wind farm.¹⁷⁵ In addition, among other things Staff argues that, “[w]hile NEPA requires that the EIS identify and address ‘all reasonable alternatives,’ this does

¹⁶⁷ *Id.* at 4-5 (quoting Dean Report at 3-4; citing Robbins Report at 3-4).

¹⁶⁸ Applicant’s Alternatives Answer at 8-9 (citing ER § 9.2.2.1).

¹⁶⁹ *Id.* at 11 (citing ER at 9.2-8).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 11 (citing Alternatives ER Revision at 9.2-34, -40).

¹⁷² *Id.* at 12 (citing Alternatives ER Revision at 9.2-34, -40); *see also* NUREG-1555 at 9.2.2-4.

¹⁷³ Applicant’s Alternatives Answer at 12.

¹⁷⁴ Staff’s Alternatives Response at 13.

¹⁷⁵ *Id.* (citing ER § 4.1.1.2, at 4.1-3).

not mean that every conceivable alternative must be included in the EIS.”¹⁷⁶ Staff agrees that an EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.”¹⁷⁷ But Staff further contends, citing the NEPA “rule of reason,” that, “if the Applicant eliminates an alternative from consideration, NEPA does not require a detailed discussion of the rejected alternative’s environmental impacts.”¹⁷⁸ Staff insists that Intervenor’s in Alternatives Contention 1 have failed to show a genuine dispute with the Applicant on a material issue of law or fact, and have thus failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi). Finally, Staff also challenges Intervenor’s incorporation by reference of arguments in their Response to Applicant’s Motion to Dismiss Contention 18,¹⁷⁹ as well as their citation and excerpting of the Dean Report concerning the “geological advantages that weigh in favor of CAES in Texas,” arguing that the latter argument “fails to support the Intervenor’s contention that the Applicant *mischaracterizes* the impacts of wind power generation and CAES,” and fails to controvert any information in the ER Revision at issue.¹⁸⁰

Intervenor’s respond to Applicant and Staff by arguing among other things that their land use challenges are not untimely, as the Applicant’s land use information did not apply to the combination of wind power and CAES until the filing of the ER Revisions, and that in any event the Board has the discretion to consider them for good cause under 10 C.F.R. § 2.309(c)(1)(ii)-(viii).¹⁸¹ In addition, Intervenor’s contend Applicant has not taken the NEPA-required “hard look” at alternatives, and that its contention does not “flyspeck” but rather points out distortions that “frustrates a fair comparison of alternatives.”¹⁸² They argue that, contrary to Applicant’s and Staff’s arguments, they show through their expert, Dr. Dean, that

¹⁷⁶ *Id.* at 14 (citing *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 127 (2009) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978))).

¹⁷⁷ *Id.* (citing 40 C.F.R. § 1502.14).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 15 (citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999), *petition for review denied sub nom. Dienenthal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000) (“We do not expect our adjudicatory Boards, unaided by the parties, to sift through the parties’ pleadings to uncover and resolve arguments not advanced by litigants themselves.”); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 89 (2004) (arguing that a “petitioner cannot include a reference as support without showing why the reference provides a basis to support its contention”).

¹⁸⁰ *Id.* at 15-16.

¹⁸¹ Intervenor’s Alternatives Reply at 2-3.

¹⁸² *Id.* at 3-4.

the wind-CAES combination is feasible and not speculative.¹⁸³ Finally, we note Intervenor’s argument, in response to Staff,¹⁸⁴ that they have no obligation to “identify or describe the current types of land use at the site,” because Alternatives Contention 1 is an “omission contention,” alleging that “Applicant has omitted a discussion of impacts based on an accurate land use projection.”¹⁸⁵

Addressing this final argument first, we note that it appears to be based on Intervenor’s view that filing “omission contentions” relieves them of as much as possible in the way of logical and factual support for such contentions. In this instance, such a view is facially supported by the second subheading of Alternatives Contention 1, which states that “Applicant *does not consider* the benefits of using CAES in Texas.” But the overall thrust and substance of the contention concerns not omissions, but rather the manner in which, and the adequacy with which, Applicant addresses the impacts of wind generation and CAES — as evidenced by the introductory language of the contention to the effect that Applicant “overstates and mischaracterizes” the impacts of wind power generation and CAES. Although an omission of “substantiation” is asserted, this is secondary to the central assertion made in the contention. As to how Applicant does characterize the impacts of wind power generation and CAES, we note at the outset that it *does consider* the wind-CAES combination. Intervenor’s challenge the *adequacy* of how Applicant analyzes this combination and its impacts, as to land use impacts and other particulars. But to argue that the land use projections Applicant uses are inadequate or incorrect is one thing; to characterize such projections as “omitt[ing] a discussion of impacts based on an accurate land use projection” is another, bordering on the frivolous.

Turning to the issue of land use impacts, we must agree with Applicant that Intervenor’s land use arguments as to wind power itself are untimely, insofar as they concern estimates of acreages that would be required for a wind farm. Notwithstanding Intervenor’s arguments that their new land use challenges relate only to the combination of wind and CAES, they have shown no good cause why they could not have earlier addressed these acreage estimates provided by Applicant in its ER. Indeed, in their original Petition, in their support of original Contention 18, Intervenor’s rely on parts of Chapter 9 of Applicant’s ER, and make a reference to “Environmental Report, p. 9.2-1 *et seq.*” — but do not address the land use statements regarding acreage made at page 9.2-9 thereof.¹⁸⁶ In addition, Dr. Makhijani in his April 2009 46-page report, “Nuclear Costs and Alternatives,” refers to section 9.2.1.3 of the ER,¹⁸⁷ which indicates that he had access to the

¹⁸³ *Id.* at 4-5.

¹⁸⁴ See *supra* text accompanying note 174.

¹⁸⁵ *Id.* at 3.

¹⁸⁶ Petition at 42 (citing ER at 9.2-1).

¹⁸⁷ Makhijani Report at 3.

ER, but nowhere addresses the land use statements in the ER that relate to wind power alone, which could presumably have been done in the preparation of the extensive report. In these circumstances, we do not find good cause under 10 C.F.R. § 2.309(c) for Intervenors not earlier raising their challenges to the acreage figures for land use alone. We therefore find that part of Alternatives Contention 1 that concerns land use of wind power, insofar as it concerns acreage figures, to be inadmissible.

Intervenors are correct, however, that the CAES land use figures were not in the original ER, and we find Intervenors' challenges amount to more than "flyspecking," and meet the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi). We also find persuasive Intervenors' arguments with respect to that part of the contention on land being usable for multiple purposes. Applicant makes a passing, one-sentence reference to this in the ER, in a section related to analysis of wind power alone,¹⁸⁸ not in combination with CAES. We find this wind-CAES aspect to raise the multiple use argument to a new level, showing a genuine dispute with the Applicant on this material issue of fact and warranting admission of this part of the contention under section 2.309(f)(1).

In addition, insofar as this contention concerns questions of the feasibility of developing wind power and CAES in Texas, we also find, based on the support offered from the Dean and Robbins Reports on the relative advantages and ease of development of a wind-CAES combination in Texas, this issue to be admissible, to the limited extent that it may, when considered with the admissible parts of Alternatives Contentions 2 and 3, be relevant in the context of a combination alternative made up of wind and solar energy, energy storage methods, and natural gas supplementation. In conclusion, to the preceding limited extent, insofar as Alternatives Contention 1 concerns (1) the feasibility of developing wind and CAES together in Texas, (2) land use relating to CAES, and (3) multiple, overlapping uses of land, we find it admissible under 10 C.F.R. § 2.309(f)(1)(i)-(vi), as further defined in Section III.I below, in our Summary of Rulings on Admissible Parts of Alternatives Contentions 1 Through 3.

G. Alternatives Contention 2 — Impacts of Solar with Storage

In their second alternatives contention Intervenors state:

The Applicant inadequately characterizes, without substantiation, the impacts of solar with storage.¹⁸⁹

¹⁸⁸ In the ER at 9.2-8 the only sentence referring to multiple uses of land is, "Some of this land could be used for other purposes, such as agriculture." *See supra* note 169 and accompanying text.

¹⁸⁹ Alternatives Contentions at 5.

Alternatives Contention 2 has two subheadings, which state as follows:

- A. Applicant inappropriately characterizes and overstates adverse socioeconomic impacts and ignores the potential positive socioeconomic impacts of solar with storage.¹⁹⁰
- B. Applicant overstates solar with storage land use impacts and fails to consider solar technologies with no land use impacts.¹⁹¹

Citing their Robbins and Dean Reports, Intervenors challenge Applicant's assertion of adverse socioeconomic impact based on "economic losses the company would incur due to energy stored during peak hours being sold for a lower cost at non-peak hour prices," suggesting that socioeconomic impacts should be considered to include social as well as economic factors, and that the latter include "the cost savings and reliability gained with storage," which Applicant does not consider.¹⁹² According to Intervenors, thermal storage actually allows for reduction of "O&M" costs and options on when to sell, with resulting additional potential revenue.¹⁹³ Moreover, they argue, Comanche Peak generates less profit as a baseload plant than it would if it produced power at peak.¹⁹⁴

Intervenors also argue that solar energy "could have positive local economic impacts in terms of jobs," citing a study estimating that "a 100-MW solar plant [could create] . . . a minimum of 1,588 jobs . . . in the 2-year period of construction, which would generate \$57.4 million in wages," and that eighty-five jobs would be created during operation, "which would generate \$3.1 million in wages."¹⁹⁵

Contending that solar "is a viable baseload source alternative," Intervenors argue, citing the website of a German company, that "SCCS Integrated Solar Combined Cycle Systems are the newest integrated solution for applying solar solutions to baseload needs," and are "attractive where a suitable fossil fuel (natural gas is preferred though fuel oil can be used) is available due to excellent performance, cost and emission characteristics."¹⁹⁶ Intervenors cite another website for the argument that solar-powered "steam augmentation technology" can "deliver solar steam to conventional power stations that would enable the production of additional electricity without additional fuel," suggesting that this could be "integrated into the Applicant's existing steam electric plants," with

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 8.

¹⁹² *Id.* at 5 (citing Alternatives ER Revisions at 9.2-43).

¹⁹³ *Id.* at 5-6 (citing Robbins Report at 5-6).

¹⁹⁴ *Id.* at 6 (citing Robbins Report at 6).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (citing http://www.flagsol-gmbh.com/flagsol/cms/front_content.php?idcat=19 (last visited June 24, 2010)).

“minimal impact on land use” and increased efficiency, “another option that the Applicant has neglected.”¹⁹⁷

Supported by the Robbins Report, Intervenors question Applicant’s estimate of 55,510 to 76,000 acres for a solar facility, which Robbins equates to 86.73 to 118.75 square miles, and which “is far from the reality of the Mojave Solar Park, set to be completed in 2011.” According to Robbins, this “553 MW solar thermal facility will take up 9 square miles of land, so even if storage facilities were added, it would be no where [sic] close to the 86.73 to 118.75 square miles claimed by the applicant.”¹⁹⁸ Intervenors argue that Applicant “also ignores the possible contributions to capacity from rooftop solar applications, which would involve no additional land use.”¹⁹⁹

Finally, we note that part of Alternatives Contention 2, supported by the Dean Report, asserting that thermal energy storage “overcomes the variability of sunlight as a constraint on baseload,” and, when combined with wind generation and an “integrated gas turbine,” can “provide a seamless transition to the load need by providing energy when the production of both technologies is overlapped.”²⁰⁰

Applicant argues that solar with storage to produce baseload power has not been shown to be feasible, which Intervenors do not, in Applicant’s view, dispute with any “supporting information that contradicts any conclusion in the ER or that otherwise indicates that solar power generation in combination with storage is an economically or technologically proven way to provide baseload power.”²⁰¹ This, Applicant argues, renders the part of the contention dealing with “O&M,” or operations and maintenance costs, inadmissible, and any economic impacts are therefore immaterial.²⁰² Applicant also cites a recent Commission decision in the *Summer* proceeding for the proposition that “issues related to costs only become relevant if an intervenor identifies an environmentally preferable, reasonable alternative.”²⁰³

As to positive job impacts of solar, Applicant argues that these are likewise immaterial, and also points out that the ER Update does in any event acknowledge such positive impacts.²⁰⁴ Further, Applicant argues, Intervenors’ peaking arguments are immaterial, as Comanche Peak is a baseload power plant, and the

¹⁹⁷ *Id.* at 7 (citing <http://www.ausra.com/products/augmentation.html> (last visited June 24, 2010)).

¹⁹⁸ *Id.* at 8 (citing Robbins Report at 5).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 7-8 (citing Dean Report at 1-2; http://www.flagsol-gmbh.com/flagsol/cms/front_content.php?idcat=45 (last visited June 24, 2010)).

²⁰¹ Applicant’s Alternatives Answer at 15.

²⁰² *Id.* at 14-15.

²⁰³ *Id.* at 15 (citing *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 23-24 (2010)).

²⁰⁴ *Id.* at 15-16 (citing Alternatives ER Revision at 9.2-43 to -44).

ER Update already explicitly evaluates solar and natural gas combinations.²⁰⁵ On intervenors' land use arguments, Applicant points out that these, like those related to wind, are untimely, because the ER has "always estimated the amount of land required for a solar power project by scaling up the amount of land needed to the 553-MW Mojave Solar Park," and in any event any discrepancies intervenors assert are relatively small, such that their arguments amount to "flyspecking."²⁰⁶ As to rooftop solar, Applicant argues that intervenors fail to show that this could either produce baseload power or be practicable for a merchant generator.²⁰⁷ And finally, concerning intervenors' arguments on solar and gas, as in the German system referenced by intervenors, this should not be admitted, because Applicant evaluates a solar-gas combination, which intervenors do not cite or address.

NRC Staff argues that Alternatives Contention 2 "does not sufficiently allege why the Applicant's analysis of alternatives is deficient under NEPA" and therefore fails to show a genuine dispute on a material issue of law or fact.²⁰⁸ Because Applicant dismissed solar with storage as not a viable alternative, Staff argues, this alternative does not meet NEPA's "rule of reason."²⁰⁹ Moreover, Staff suggests, intervenors "fail to recognize that the Applicant's discussion of alternatives is bounded by feasibility."²¹⁰ Staff asserts that intervenors "appear to confuse land use impacts with the amount of land required for the operation of a power generation facility," that they "merely challenge" Applicant's acreage estimate for a solar facility, that they fail to show how "the incomplete Mojave Solar Park" would "provide a viable alternative," that they do not "directly challenge any of the information contained in the ER related to the types of land use at the site," and that they fail to "show how the effects of solar power generation with storage would not negatively affect current land uses."²¹¹ Therefore, Staff urges, Alternatives Contention 2 fails to show a genuine dispute on a material issue of law or fact as required at 10 C.F.R. § 2.309(f)(1)(vi) and should be rejected.²¹²

Intervenors respond that Applicant's analysis of solar power with storage is flawed, and "inappropriately weighted the economic parameter at the expense of the more complete socioeconomic analysis," which should be done because this combination is feasible and non-speculative.²¹³

²⁰⁵ *Id.* at 16-17 (citing Alternatives ER Revision at 9.2-40 to -50).

²⁰⁶ *Id.* at 18-19 (citing ER at 9.2-11).

²⁰⁷ *Id.* at 19.

²⁰⁸ Staff's Alternatives Response at 18.

²⁰⁹ *Id.* at 17 (citing *Pub. Citizen*, 541 U.S. at 754).

²¹⁰ *Id.* at 18, 19 (citing *Vermont Yankee*, 435 U.S. at 551).

²¹¹ *Id.* at 17-18 (emphasis in original).

²¹² *Id.* at 18.

²¹³ Intervenors' Alternatives Reply at 5.

As with the land use impacts of wind, Intervenor's arguments on land use impacts of solar power are untimely under 10 C.F.R. § 2.309(c). In addition, we find arguments related to peaking power, steam augmentation, and rooftop solar power to be outside the scope of the proceeding and not to present a genuine dispute on a material issue, as required at 10 C.F.R. § 2.309(f)(1)(iii) and (vi), as they have not been shown to be related to baseload power, which we have already determined defines the scope of relevant issues relating to renewable fuels.²¹⁴ In addition, because Intervenor does not address that part of the ER Revision in which Applicant does acknowledge positive job impacts of solar, we find this part of Alternatives Contention 2 to be inadmissible under section 2.309(f)(1)(vi). Finally, regarding Intervenor's arguments on the new German solar-gas Combined Cycle Systems, as Applicant argues, Intervenor fails to refer to the part of the ER Revision addressing solar-gas combinations, and we therefore find this part of the contention inadmissible under section 2.309(f)(1)(vi).

Intervenor does provide, however, a fact-based argument, supported by their expert, Dr. Dean, to support the contention insofar as it concerns the feasibility of thermal energy storage "overcome[ing] the variability of sunlight as a constraint on baseload," and combining solar and thermal energy storage with wind generation and an "integrated gas turbine" to "provide a seamless transition to the load need by providing energy when the production of both technologies is overlapped."²¹⁵ We find this to be sufficient to meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1), including presenting a genuine dispute with the Applicant, who has not addressed such a combination alternative, on a material issue of fact, as required by section 2.309(f)(1)(vi).

In addition, we do not agree with Applicant that issues relating to operation and maintenance costs of solar in comparison to the proposed new nuclear units are necessarily immaterial, based on the argument that cost issues are relevant only if an alternative is "environmentally preferable." We note the Commission's *Summer* decision, cited by Applicant, in which the Commission quoted the following from the 1978 Appeal Board decision in *Midland*:

[N]either NEPA nor any other statute gives us the authority to reject an applicant's proposal solely because an alternative might prove less costly financially. Monetary considerations come into play in only the opposite fashion — *i.e.*, if an alternative to the applicant's proposal is environmentally preferable, then we must determine whether the environmental benefits conferred by that alternative are worthwhile enough to outweigh any additional cost needed to achieve them.²¹⁶

²¹⁴ See LBP-09-17, 70 NRC at 380.

²¹⁵ See *supra* text accompanying note 200.

²¹⁶ *Summer*, CLI-10-1, 71 NRC at 23-24 (citing *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 163 n.25 (1978)).

In reaching its decision to remand the *Summer* case, however, the Commission stated, significantly, that it would be “premature” to find that *Midland* applied to *Summer*, because it was remanding one of the *Summer* Licensing Board’s contention admissibility rulings, and until the Board made its determination on whether to admit the contention in question — and, if admitted, until a hearing on the matter was held — it was impossible to “say with certainty at this time that all parties have failed to identify an environmentally preferable alternative.”²¹⁷

In this proceeding, once Intervenors’ arguments on peaking power and rooftop solar are taken out of the mix, we cannot say that Intervenors state in so many words that solar with storage is actually environmentally preferable to the proposed new units, notwithstanding their clear arguments to this effect throughout. They explicitly, however, make an argument that combining solar with thermal energy storage, wind generation, and an “integrated gas turbine,” has positive benefits.²¹⁸ Moreover, Intervenors clearly challenge the position that nuclear is preferable to a wind-solar-storage-natural gas supplementation combination. As further discussed in our Summary of Rulings on Admissible Parts of Alternatives Contentions 1 Through 3, we find that Intervenors’ arguments fairly bring into question Applicant’s argument based on *Summer* and *Midland*. Indeed, the situation herein is more akin to that facing the Commission when it found it premature to find the *Midland* rationale applicable in the *Summer* case.

H. Alternatives Contention 3 — Impacts Comparison: Nuclear and Renewable with Storage

In this contention Intervenors assert:

The Applicant’s determination that nuclear is environmentally preferable to renewable energy with storage, supplemented by natural gas is based on fundamentally flawed assumptions about the nature and extent of environmental impacts related thereto.²¹⁹

Alternatives Contention 3 has three subheadings, in which Intervenors state as follows:

- A. By assuming that each technology needs to be capable of generating 3200 MW “individually,” the Applicant overstates the environmental impacts of the combinations of wind and CAES.²²⁰

²¹⁷ *Id.* at 24.

²¹⁸ *See supra* text accompanying note 200.

²¹⁹ Alternatives Contentions at 8.

²²⁰ *Id.*

- B. The Applicant uses inadequate characterizations of the impacts of renewable energy with storage to conclude that renewable energy with storage, supplemented by natural gas is not environmentally preferable to nuclear power.²²¹
- C. The Applicant did not consider wind *and* solar energy combined.²²²

Intervenors challenge Applicant's assertion, in ER § 9.2.2.11.4.1, that renewable energy with storage supplemented by natural gas would result in "cumulative impacts since each technology would have to have the capacity to produce 3200 MW of power individually," as overstating the environmental impacts of "combinations of wind and CAES, supplemented by natural gas or solar and storage supplemented by natural gas."²²³ They state that "Applicant's claim that a natural gas plant of 3200 MW would be needed is directly contradicted by Drs. Dean and Makhijani, who opine that wind and CAES alone can suffice as baseload."²²⁴ In addition, they argue that Applicant's "premise is questionable in light of NUREG-1555, which states, 'a competitive alternative could be composed of combinations of individual alternatives.'"²²⁵ Thus, Intervenors argue, Applicant's conclusion, that renewable energy with storage supplemented by natural gas is not environmentally preferable to nuclear, is flawed.²²⁶ They contend that, by overstating land requirements, Applicant also overstates the environmental impacts of "wind/solar/CAES," and again assert "the well-known fact that wind generation allows multiple uses of the same land including farming and ranching that has the effect of minimizing consequential socioeconomic dislocations."²²⁷

"Adopting the Applicant's methodology," Intervenors urge, "would cause the analysis of the viability of renewable fuels in combination with storage technologies and/or natural gas to be considered in an overly restrictive and artificial way. . . . [and] ignore substantial evidence that contradicts the Applicant's assertion."²²⁸ In fact, Intervenors argue, Applicant is incorrect in not recognizing the environmental preferability of renewable energy with storage supplemented by natural gas; they assert that "solar with storage could have a positive socioeconomic impact and wind with CAES could have a positive impact on land use."²²⁹

²²¹ *Id.* at 10.

²²² *Id.*

²²³ *Id.* at 8-9 & n.26 (citing Alternatives ER Revisions at 9.2-46).

²²⁴ *Id.* at 9 n.26.

²²⁵ *Id.* at 9 (citing NUREG-1555 at 9.2.3-1).

²²⁶ *Id.*

²²⁷ *Id.* (referring to their Response to Motion to Dismiss Contention 18 at 5-6).

²²⁸ *Id.* (citing *Druid Hills*, 772 F.2d at 709; *Ohio River Valley*, 473 F.3d at 102).

²²⁹ *Id.* at 10 (citing ER Revision at 9.2-47).

In addition, Intervenor contend, Applicant in its analyses in the ER Revision considered combinations including wind *or* solar, but did not consider combinations including both wind *and* solar energy.²³⁰ According to Intervenor, “[t]he introduction of coastal wind, which has production curves that closely match the fall off in solar production, allows the production curve to match the load curve.”²³¹ They state, citing the Dean Report:

North and West Texas wind provide energy in the night load hours, solar with storage provides for peak demand production and coastal wind can provide overlap in the production curve in the late afternoon and early evening hours to provide a smooth generation curve that closely follows the load need.²³²

Finally, Intervenor conclude, “[t]he Applicant’s questionable analysis and determination that nuclear is environmentally preferable to the alternatives [Intervenor propose] allows the Applicant to avoid an economic cost comparison.”²³³ In explanation of this conclusion, they provide the following additional quotation from the Dean Report:

The Applicant tries to justify its position with four tricks: (1) They restrict the alternatives considered. (2) They frame evaluation criteria narrowly around the form of the CP COL ER’s desired solution (a large nuclear power plant) rather than its function (providing the requisite electricity), even though this form has significant problems that other forms do not have. (3) They argue in contradictory ways at different times. (4) They use quantitative facts out of proper context and stretch truths beyond reasonable limits.²³⁴

Applicant argues that new Alternatives Contention 3 is unsupported, immaterial, and fails to raise a genuine issue, and that the contention that wind and solar should have been considered together is untimely, as original Contention 18 did not include any solar and wind combination arguments.²³⁵ In addition, according

²³⁰ *Id.* We take Intervenor’s reference to Applicant’s analyses to include its analyses of renewable energy sources combined with storage and natural gas, whether as supplemental or the main energy source.

²³¹ *Id.*

²³² *Id.* Intervenor also cite parts of the Dean Report addressing issues including wind and solar as complementary components, the feasibility of using aquifers for CAES storage, and related costs issues.

²³³ *Id.* at 10-11 (citing NUREG-1555’s description at 9.2.3-2 of a two-step process consisting of “(1) comparing the environmental and health impacts of the competitive alternatives to the proposed action, and (2) comparing the economic costs of any competitive alternatives found to be environmentally preferable to the proposed action”).

²³⁴ *Id.* at 10-11 n.32.

²³⁵ Applicant’s Alternatives Answer at 21-23.

to Applicant, the contention is speculative, and Intervenors do not provide support for the idea of using solar-wind combinations for baseload power.²³⁶ In any event, argues Applicant, given its analysis of the options separately and conclusions that each would have a large impact on land use and aesthetics and a moderate impact on ecological and other resources, Intervenors have shown no reason to believe that combined wind and solar energy would have any different impacts, and have not put forward an alternative that is significantly distinguishable from those already considered.²³⁷

NRC Staff argues that Alternatives Contention 3 is inadmissible because it fails to demonstrate a material issue, is inadequately supported, fails to reference a specific portion of the application that the Intervenors dispute, and fails to show a genuine dispute with the Applicant on a material issue of law or fact.²³⁸ Regarding Intervenors' argument on each technology needing 3200-MW capacity, Staff argues that "Applicant did not limit its analysis by requiring each energy source to produce 3200 MW," but instead referred to "natural gas replaced by amounts *up to* 3200 MW of renewable power (either wind or solar) and *up to* 3200 MW of storage (either CAES or molten salt)," and thus no genuine dispute is presented by Intervenors.²³⁹ Nor, argues Staff, do Intervenors address Applicant's actual analysis in section 9.2.2.11.4.2 of the ER Revision, concerning "Natural Gas Power Generation Supplemented by Renewable Energy Sources Combined with Storage."²⁴⁰ Staff also challenges Intervenors' contention that wind and CAES could supply baseload power, based on Intervenors' failure to address ER § 9.2.2.11.3.1.²⁴¹

On land use impacts, Staff avers that, "even assuming the information from the Intervenors is correct," Intervenors do not provide facts or expert opinion on the actual impacts to current land usage.²⁴² Staff points out that the ER actually discusses, in addition to the total area that would be affected by the proposed units, "impacts to land uses such as: 'undisturbed woodland,' 'floodplain,' 'wetland habitats,' 'National Wild and Scenic Rivers,' 'historic properties,' 'tribal lands,' and 'prime farmland,'"²⁴³ as well as construction impacts to land use in the vicinity of the proposed plant.²⁴⁴

²³⁶ *Id.* at 23.

²³⁷ *Id.* at 23-24.

²³⁸ Staff's Alternatives Response at 19-20.

²³⁹ *Id.* at 20 (emphasis in original) (citing Alternatives ER Revision § 9.2.2.11.4.2 at 9.2-37, 9.2-47).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 21; *see id.* at 22.

²⁴³ *Id.* at 21 (citing ER at Table 2.2-1, ER at 2.2-10, 4.1-1 to 4.1-10, 4.1-1 to 4.1-3).

²⁴⁴ *See id.* (citing ER at 4.1-3 to 4.1-10).

Staff argues that Intervenors' support for Alternatives Contention 3 "does not demonstrate that a wind facility could be environmentally preferable to the construction and operation of the proposed units at the site," and therefore does not demonstrate a genuine dispute with the Applicant on a material issue of law or fact.²⁴⁵ In addition, according to Staff:

If the Intervenors are proposing in this contention that the wind facility could be constructed at a different location than the proposed site, they still have not provided any facts or expert opinion to show what the impacts on land uses would be at that different location, other than to establish generally that the wind facility land could have a dual use for wind power and ranching or farming.²⁴⁶

Nor, Staff argues, do Intervenors raise a material dispute with Applicant on the viability of a solar with storage alternative, or "provide facts or expert opinion describing what the actual land use impacts of wind with CAES would be and thereby do not comply with 10 C.F.R. § 2.309(f)(1)(v) and (vi)."²⁴⁷

Regarding Intervenors' proposed combination of North/West Texas wind, coastal wind, solar and storage, Staff urges that Intervenors fail to meet the requirements of section 2.309(f)(1)(iv), (v), and (vi),²⁴⁸ and challenges Intervenors' arguments based on the *Druid Hills* and *Ohio River Valley* cases, arguing that they do not override the NEPA "rule of reason."²⁴⁹ "Not every conceivable alternative is required to be examined," Staff argues, and under CEQ regulations,²⁵⁰ all reasonable alternatives are to be "[r]igorously explore[d] and objectively evaluate[d]," but for alternatives eliminated from detailed study, only a brief discussion of the reasons for their having been eliminated is required.²⁵¹ Staff contends that Intervenors fail to demonstrate that this proposed alternative is a reasonable one that requires NEPA analysis.²⁵²

Staff states that ER § 9.2.2.11.4 "shows that the Applicant already determined that a three part combination alternative would not be environmentally preferable to the proposed project due to the cumulative and additive impacts from each part," and argues that Intervenors provide no "facts or expert opinions challenging the Applicant's assertion that in a multi-part combination alternative (e.g. wind,

²⁴⁵ *Id.* at 22.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 23-24.

²⁴⁸ Staff's Alternatives Response at 24.

²⁴⁹ *Id.* at 23.

²⁵⁰ The Council on Environmental Quality (CEQ) promulgates NEPA-related regulations, found in 40 C.F.R. Chapter V. *See, e.g.*, 40 C.F.R. § 1500.1 *et seq.*

²⁵¹ *Id.* at 24 (citing *Vermont Yankee*, 435 U.S. at 551; *NRDC*, 458 F.2d at 837; 40 C.F.R. § 1502.14).

²⁵² *Id.*

storage, natural gas), the impacts from each part of the alternative would result in additive and cumulative impacts.”²⁵³ Without such information, Staff argues, Intervenor has failed to demonstrate “that analysis of their proposed alternative is required under NEPA or that the Applicant’s failure to consider it was unreasonable.”²⁵⁴ For this reason, Staff insists, Intervenor fails to meet the requirements of section 2.309(f)(1)(iv) and (vi).²⁵⁵

In addition, Staff urges, Intervenor provides no facts or expert opinions “beyond assertions about what the expected impacts would be” from the North/West Texas wind, coastal wind, solar and storage combination, and as a result fail to meet the support requirement of section 2.309(f)(1)(v).²⁵⁶ Specifically, Staff faults the expert statements provided by Intervenor as merely stating conclusions “(e.g., the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’)” that provide no “reasoned basis or explanation” for such conclusions, and which therefore do not meet the requirement of section 2.309(f)(1)(v).²⁵⁷

As discussed *supra*, we find that part of Intervenor’s original Contention 18 is not moot, because the contention as raised and admitted included the four-part combination of wind, solar, storage methods, and natural gas supplementation. Applicant’s untimeliness arguments are therefore without merit. And while Applicant and Staff may ultimately prove to be correct with regard to many of their arguments on feasibility and related issues, we find that Intervenor has provided sufficient facts and expert opinion to merit going forward with parts of this contention, at least on the question of the feasibility of the combination of solar and wind power with storage methods, insofar as it fits within the four-part combination of solar/wind/energy storage/natural gas supplementation, as addressed in Alternatives Contention 2 and in our Summary section below. As we observe there, the idea of combining wind and solar energy, as stated in subpart C of Alternatives Contention 3, is not an unreasonable concept.

We do find parts of the contention to be inadmissible, including those relating to land use, for the same reasons discussed with regard to New Alternatives Contentions 1 and 2 above, as well as Intervenor’s arguments on each technology needing 3200-MW capacity, for the reasons put forward by the Staff. With regard, however, to NRC Staff’s argument that Intervenor fails to address sections 9.2.2.11.3.1 and 9.2.2.11.4.2, Dr. Dean in his Report, relied upon by Intervenor, does reference parts of these sections,²⁵⁸ and in any event Intervenor

²⁵³ *Id.* at 24-25 (citing ER at 9.2-47, 9.2-49).

²⁵⁴ *Id.* at 25.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 25-26 (citing *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006)).

²⁵⁸ *See, e.g.,* Dean Report at 1-2 nn.2 & 7, 3 n.14, 5 n.7.

address the substance of their contents, even if they do not specifically mention the section number in the text of their contention.

We note one further argument raised by the NRC Staff — the claim that Intervenor’s experts merely state conclusions, without any reasoned basis for such conclusions. We disagree. Although the information provided by the experts in question is not extensive, we find that it is not devoid of reasoned bases for any conclusions drawn or suggested. For example, Dr. Dean addresses, among other things, the complementarity of wind and solar energy, their feasibility for baseload power, the use of aquifers for storage, and related cost issues. Although the amount and quality of information provided by Intervenor and their experts to this point would obviously not be sufficient as evidence for a hearing, all they need to provide at this point is a reasoned presentation sufficient to warrant further inquiry,²⁵⁹ and we find they have done that, on the solar-wind combination proposed in this contention, and met the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi).

I. Summary of Rulings on Admissible Parts of Alternatives Contentions 1 Through 3

As indicated in our separate discussions of Alternatives Contentions 1 through 3, we have concluded that significant parts of these contentions do not meet all of the requirements of 10 C.F.R. § 2.309(f)(1) and are therefore inadmissible. We have, however, found other aspects of these contentions to meet the contention admissibility requirements sufficiently to warrant further inquiry. We provide this Summary section as a means for stating, in one place and in greater detail and depth than might practically and efficiently be done in separate rulings on Contentions 1 through 3, our rationale for concluding that those matters falling into the second category should be admitted, in a reformulated form. We note at the outset here, as we recognized in our discussion of Colocation Contention 1, that Intervenor, despite being represented by counsel, present their contentions and support therefor in a somewhat rambling and poorly organized form. We nonetheless find that some of their arguments have merit.

We address first the legal context for the matters at issue in these contentions, all of which concern NEPA “alternatives.” Applicant acknowledges that NEPA requires that an EIS must discuss “alternatives to the proposed action,”²⁶⁰ and that this discussion must incorporate a “hard look” at alternatives to a proposed

²⁵⁹ See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996) (citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 118 (1995); *Vermont Yankee*, 435 U.S. at 554); *Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980).

²⁶⁰ Applicant’s Alternatives Answer at 6 (quoting 42 U.S.C. § 4332(2)(C)(iii)).

action.²⁶¹ Applicant points out, however, that this “hard look” is subject to a “rule of reason,” such that it is not necessary to “look at every conceivable alternative to the proposed licensing action, but only *reasonable* alternatives — namely, those that are *feasible*,” and “reasonably related to the scope and goals of the proposed action.”²⁶² Applicant argues that this means that “the NRC need only consider a range of alternatives”²⁶³ that are “*technologically feasible* and *economically practicable* — in this case *commercially viable* alternatives for producing baseload power.”²⁶⁴ Furthermore, Applicant argues, “NEPA does not require a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences.”²⁶⁵ Quoting the Commission for the principle that “significant inaccuracies and omissions from the ER” are proper subjects of contentions but that adding “details or nuances” are not (nor are boards to “flyspeck” environmental documents), Applicant argues that Intervenor’s Alternatives Contentions request consideration of alternatives that are neither “reasonable” nor significantly different from those it has already considered.²⁶⁶

The NRC Staff has also argued, as indicated above, that, although NEPA does require identification, “rigorous[] explor[ation],” and “objective[] evaluat[ion]” of “all reasonable alternatives,” this does not mean that every conceivable alternative must be included in the EIS.²⁶⁷ Staff argues that, for alternatives that are eliminated from detailed study, the reasons for their having been eliminated

²⁶¹ *Id.* (citing *Environmental Law & Policy Center v. NRC*, 470 F.3d 676, 685 (7th Cir. 2006); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998)).

²⁶² *Id.* (citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-8, 63 NRC 241, 258 (2006); *Vermont Yankee*, 435 U.S. at 551; *Morton*, 458 F.2d at 837; *City of Carmel-by-the-Sea v. Department of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997)).

²⁶³ *Id.* (citing *City of Grapevine v. Department of Transportation*, 17 F.3d 1502, 1506 (D.C. Cir. 1994); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991); *Louisiana Wildlife Federation, Inc. v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806-08 (2005), *aff’d sub nom. Environmental Law & Policy Center*, 470 F.3d at 685).

²⁶⁴ *Id.* (citing *Kelley v. Selin*, 42 F.3d 1501, 1521 (6th Cir. 1995); *Communities, Inc. v. Busey*, 956 F.2d 619, 627 (6th Cir. 1992); *Morton*, 458 F.2d at 837; Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981)).

²⁶⁵ *Id.* at 7 (citing *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1181 (9th Cir. 1990)).

²⁶⁶ *Id.* (citing *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003) (“NRC adjudicatory hearings are not EIS editing sessions. Our busy boards do not sit to parse and fine-tune EISs.”)).

²⁶⁷ Staff’s Alternatives Response at 14 (citing *Levy*, LBP-09-10, 70 NRC at 127 (quoting *Vermont Yankee*, 435 U.S. at 551); citing 40 C.F.R. § 1502.14).

must be only “briefly discuss[ed],”²⁶⁸ and cites the NEPA “rule of reason” for the proposition that “NEPA does not require a detailed discussion of the rejected alternative’s environmental impacts.”²⁶⁹ Like Applicant, Staff points out that a discussion of alternatives is “bounded by feasibility,” citing the 1978 Supreme Court *Vermont Yankee* decision.²⁷⁰

We note further that Applicant has prepared its ER in reliance on NUREG-1555, and relies on a provision therein providing that one of the criteria for evaluating “competitive alternatives” is that an alternative be “developed, proven, and available in the relevant region.”²⁷¹ Applicant has concluded that combinations of wind or solar with storage and natural gas are not reasonable, or “developed, proven, and available” for production of baseload power;²⁷² and that “combining a natural gas power plant with a renewable power plant with a renewable power technology (such as wind or solar power) in combination with a storage technology (such as CAES or molten salt batteries) is not a reasonable energy alternative” because it is not “developed, proven, and available in the relevant region” and because

such a combination . . . as a single project, with the capacity to generate baseload power equivalent to [the proposed new Comanche Peak units 3 and 4] is not considered to be available during the same time frame as the proposed project unless the vast majority of the power is generated from natural gas.²⁷³

The central issue we find admissible from Alternatives Contentions 1 through 3 is the feasibility of the four-part wind-solar-storage-natural gas supplementation combination alternative proposed by Intervenors. All other admissible issues relate to this “feasibility” issue in one way or another. Of course, as demonstrated by the parties’ references to this term throughout their filings on the Alternatives Contentions to this term, both what is “feasible” and what is “reasonable” in any given context are subject to varying interpretations. We do not find that these interpretations are necessarily inconsistent with each other. We do consider that further edification on the subject is in order.

We begin our inquiry into this matter by recalling the fundamental principles that the NEPA alternatives analysis is the “heart of the environmental impact

²⁶⁸ *Id.* (citing 40 C.F.R. § 1502.14).

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 18 (citing *Vermont Yankee*, 435 U.S. at 551); *see also id.* at 28.

²⁷¹ Applicant’s Alternatives Answer at 6-7 (citing NUREG-1555 at 9.2.2-4 and characterizing this as “noting that to be considered a competitive (*i.e.*, reasonable) alternative, an ‘energy conversion technology should be developed, proven, and available in the relevant region’”) (emphasis added).

²⁷² *See, e.g.*, Alternatives ER Revision at 9.2-40, 9.2-43; *see also id.* at 9.2-50.

²⁷³ *Id.* at 9.2-49 to -50.

statement,” and that all “reasonable alternatives” must be identified and discussed in such analysis, under a “rule of reason.”²⁷⁴ The goals — the central one in this case being the production of baseload power — of an applicant are accorded substantial weight in determining what is “reasonable,” but such goals may not be “define[d] so narrowly as to unreasonably circumscribe the range of alternatives” considered.²⁷⁵

For further guidance on what constitutes a “reasonable” alternative that must be considered, we look to the Supreme Court’s 1978 decision in *Vermont Yankee*. As touched on by Applicant and Staff, the Court therein observed that, in order to “make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility.”²⁷⁶ Alternatives that are “remote and speculative” do not require detailed discussion, and a “‘detailed statement of alternatives’ cannot be found wanting simply because [not] every alternative device and thought conceivable by the mind of Man” has not been included.²⁷⁷ Moreover, while “the concept of ‘alternatives’ is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood,” it is “incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful [and] alerts the agency to the intervenors’ position and contentions.”²⁷⁸ Comments “must be significant enough to step over a threshold requirement of materiality . . . [,] cannot merely state that a particular mistake was made[, but] must show why the mistake was of possible significance.”²⁷⁹ And “[i]ndeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that ‘ought to be’ considered.”²⁸⁰ The Court viewed favorably the Commission’s statement

²⁷⁴ See LBP-09-17, 70 NRC at 378-80 (quoting *Levy*, LBP-09-10, 70 NRC at 126-28). As we therein noted,

The duty to consider alternatives originates with two provisions of NEPA — (1) 42 U.S.C. § 4322(2)(C)(iii), which requires that an agency’s environmental impact statement (EIS) include “a detailed statement [of the] alternatives to the proposed action,” and (2) 42 U.S.C. § 4322(2)(E), which requires that an agency “study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.”

Id. at 378.

²⁷⁵ *Id.* at 379.

²⁷⁶ *Vermont Yankee*, 435 U.S. at 551.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 552-53.

²⁷⁹ *Id.* at 553 (quoting *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied sub nom. Portland Cement Corp. v. Environmental Protection Agency*, 417 U.S. 921 (1974)).

²⁸⁰ *Id.* at 553-54.

that an intervenor should not be held to a *prima facie* burden at the contention admissibility stage of a proceeding, but that “the showing should be sufficient to require reasonable minds to inquire further.”²⁸¹ Based on these principles, the Court reversed the Court of Appeals’ holding that intervenors’ proposed alternative of energy conservation, which did not meet certain Commission requirements including that it was “reasonably available,” was wrongfully rejected by the Commission.²⁸²

The D.C. Circuit Court of Appeals, prior to the *Vermont Yankee* decision, had also referred to a standard of an alternative being “reasonably available,” in the *NRDC v. Morton* case (cited by Applicant and Staff).²⁸³ Based on this authority, we find it reasonable to conclude that the “notion of feasibility” includes the concept of “reasonable availability.” The question arises, whether “reasonably available” is essentially the same concept as “developed, proven and available,” as used in NUREG-1555 — which, as a guidance document, does not have the binding force of law but is entitled to some level of deference.²⁸⁴

We observe, in the context of appropriately defining terms and reconciling concepts such as “reasonable,” “feasible,” “reasonably available,” etc., that the D.C. Circuit has also noted that a “problem for agencies” is that even the term “alternatives” is “not self-defining.”²⁸⁵ With regard to the term “reasonable,” the Court stated the following: “Recognizing the harm that an unbounded understanding of alternatives might cause, CEQ regulations oblige agencies to discuss only alternatives that are feasible, or (much the same thing) reasonable. But the adjective ‘reasonable’ is no more self-defining than the noun that it modifies.”²⁸⁶ Moreover, the “rule of reason governs ‘both *which* alternatives [must be discussed] and the *extent* to which [they must be discussed].”²⁸⁷ As to the former, several Circuit Courts of Appeals have observed that if an alternative is “viable,” it may not be rejected as not “reasonable” without appropriate examination

²⁸¹ *Id.* at 554 (quoting Commission Appellate Brief).

²⁸² *Id.* at 555; *see also id.* at 533-35, 549.

²⁸³ *Morton*, 458 F.2d at 834; *see, e.g., supra* notes 251, 262. The Court in *Morton* also stated that it did not agree that alternatives had to be limited to measures that the agency itself could adopt, or that alternatives that did not offer a “complete solution to the problem” could be disregarded. *Id.* at 834, 836. *See also* 10 C.F.R. Part 51, Subpart A, Appendix A § 5, which provides that “[a]n otherwise reasonable alternative will not be excluded from discussion solely on the ground that it is not within the jurisdiction of the NRC.”

²⁸⁴ *See Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 98 (1995).

²⁸⁵ *Citizens Against Burlington*, 938 F.2d at 195.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

or evaluation.²⁸⁸ Thus, to the extent that Staff, in making statements to the effect that if the Applicant rejects an alternative it is not required to do a detailed discussion of its impacts,²⁸⁹ appears to imply that Applicant's elimination of alternatives from consideration is essentially beyond challenge, this is in error.

With the preceding in mind, we look back to the alternatives addressed by both Applicant and Intervenors with regard to Alternatives Contentions 1 through 3. In this endeavor, we consider questions of "feasibility" as well as "reasonable availability." As to NUREG-1555's "developed, proven, and available" standard, we find that we should consider this in a context of reasonableness. And in this regard we note the specific context for the standard in question, which appears in a section titled "Review Procedures" and contains among other things the following:

The reviewer should review the alternative energy sources and combinations of sources available to the applicant, and categorize them as either competitive or noncompetitive with the proposed project. A competitive alternative is one that is *feasible* and compares favorably with the proposed project in terms of environmental and health impacts. If the proposed project is intended to supply baseload power, a competitive alternative would also need to be capable of supplying baseload power. A competitive alternative could be composed of combinations of individual alternatives.

For competitive alternatives, the reviewer should ensure that the energy source or system meets the following criteria:

- The energy conversion technology should be *developed, proven, and available* in the relevant region.^(a)
- The alternative energy source should provide generating capacity substantially equivalent to the capacity need established by the reviewer of ESRP 8.4.
- The capacity should be available within the timeframe determined for the proposed project.
- Use of the energy source is in accord with national policy goals for energy use.

²⁸⁸ See *Dallas v. Hall*, 562 F.2d 712, 718 (5th Cir. 2009) ("rejection of even viable and reasonable alternatives, after an appropriate evaluation, is not arbitrary and capricious"); *Friends of the Boundary Waters Wilderness v. Dombek*, 164 F.3d 1115, 1128 (8th Cir. 1999) ("[e]xistence of a viable but unexamined alternative renders an environmental impact statement inadequate"); *Westlands Water District v. U.S. Department of the Interior*, 376 F.3d 853, 868 (9th Cir. 2004) ("existence of a viable but unexamined alternative renders an environmental impact statement inadequate"); *Coalition on Sensible Transportation v. Dole*, 642 F. Supp. 573 (D.D.C. 1986) ("NEPA is not violated so long as the agency takes a 'hard look' at alternatives and explains its reasons for rejecting them"), *aff'd*, 826 F.2d 60 (D.C. Cir. 1987).

²⁸⁹ See, e.g., *supra* text accompanying notes 178, 209, 251.

- Federal, State, or local regulations do not prohibit or restrict the use of the energy source.
- There are no unusual environmental impacts or exceptional costs associated with the energy source that would make it impractical.
- The reviewer should ensure that the following energy sources have been considered by the applicant:
 - *wind*
 - geothermal
 - natural gas
 - hydropower
 - municipal solid wastes
 - biomass
 - coal
 - photovoltaic cells
 - *solar thermal power*
 - wood waste
 - energy crops
 - other advanced systems (e.g. fuel cells, synthetic fuels, etc.).
- The reviewer should ensure that all alternative energy sources available have been evaluated using the criteria listed above to determine if the alternatives can be considered competitive with the proposed project.

^(a) Current reports on specific technologies may be identified from the DOE’s program offices’ websites (<http://www.doe.gov>).²⁹⁰

Applicant in its ER Revision has separate sections evaluating the feasibility of wind energy combined with CAES storage,²⁹¹ solar energy with molten salt storage,²⁹² and each of the preceding combined with natural gas.²⁹³ Applicant concludes that a wind-CAES combination is not reasonable because it is neither “developed, proven, and available in the relevant region” nor feasible as baseload power, based on a fairly substantial analysis of factors including its own project with Shell-Wind Energy to evaluate the possibility of wind farms in Texas.²⁹⁴ The solar-storage alternative is also found not to be developed, proven, or available in the relevant region,²⁹⁵ and both are determined to have various negative environmental impacts relating to land use, socioeconomic, and other factors.²⁹⁶

²⁹⁰ NUREG-1555 at 9.2.2-3 to -4 (emphasis added).

²⁹¹ Alternatives ER Revision at 9.2-34, 9.2-37 to -40.

²⁹² *Id.* at 9.2-36, 9.2-41 to -44.

²⁹³ *Id.* at 9.2-44 to -50.

²⁹⁴ *Id.* at 9.2-40, 9.2-39.

²⁹⁵ *Id.* at 9.2-43 to -44.

²⁹⁶ *Id.* at 9.2-39 to -40; 9.2-43.

We note also Applicant’s determination that combinations consisting of wind *or* solar with storage are not capable of providing baseload power on their own, based primarily on there being “periods of time at which the renewable source may be unavailable and the storage units are depleted,” thus requiring a 3200-MW natural gas plant “to generate power when the renewable resource not available [sic] and the storage units are depleted and the baseload power cannot be generated.”²⁹⁷

Intervenors challenge these conclusions, offering in support of such challenges fact-based arguments and statements of their experts on (1) the relative ease of developing wind and CAES in Texas; (2) the feasibility and benefits of using wind and solar energy to complement each other, with solar available more in the daytime, and wind available more at night in Texas; and (3) the feasibility of using thermal energy storage to overcome the variability of sunlight and combining solar and thermal storage with wind generation and natural gas and using overlapping technologies to create baseload power; and related issues.

Applicant and NRC Staff insist that such approaches are not feasible or reasonable, but many of their arguments in this regard go to the merits of the question. At this stage of this proceeding, we look to whether the Intervenors have satisfied the contention admissibility rule, which does not mandate that they “establish” their assertions of fact, but rather that they satisfy the requirements of 10 C.F.R. § 2.309(f)(1).²⁹⁸

We find that Intervenors in their new contentions provide sufficient information to meet these requirements and to warrant “further inquiry”²⁹⁹ on the feasibility and reasonable availability of the four-part alternative of wind and solar energy combined with storage (including CAES and molten salt) and natural gas supplementation. Indeed, the lack of significant consideration of this four-part combination³⁰⁰ is a rather obvious one — the combination is hardly the sort of far-fetched alternative posited by the Court in *Vermont Yankee*,³⁰¹ particularly given the self-evident reality, acknowledged by Applicant, of the greater availability of solar power during the daytime and the “diurnal nature of the wind resource in Texas,” with “wind being the strongest during the nighttime and early morning hours and weakest during the daytime hours.”³⁰²

We note Applicant’s and Staff’s arguments that combining solar and wind together with storage and gas supplementation would have additive and cumulative

²⁹⁷ *Id.* at 9.2-45.

²⁹⁸ See LBP-09-17, 70 NRC at 324-29 (discussion of contention admissibility standards).

²⁹⁹ See *supra* note 259.

³⁰⁰ As indicated in our ruling on Luminant’s Motion to Dismiss Contention 18 as Moot, we note that Applicant does make passing reference to the four-part combination in question at Alternatives ER Revision §§ 9.2-31 and 9.2-50, but does not purport to seriously consider or evaluate it.

³⁰¹ See *Vermont Yankee*, 435 U.S. at 551.

³⁰² Alternatives ER Revision at 9.2-37.

land use impacts as compared to either alone. However, as we have also noted, and as is to an extent also self-evident, it is also likely that there may be overlapping uses of land, as argued by Intervenors. More importantly, what we are admitting is the issue of the feasibility of this four-part alternative. As touched on above, relevant to this issue is the extent to which this combination, or separate parts of it that may reasonably be combined,³⁰³ are “reasonably available.” And to the extent that NUREG-1555’s standard of “developed, proven, and available in the relevant region” directs the inquiry to the question of reasonableness, this standard is relevant to the determination of “reasonable availability” and feasibility, and ultimately, to that of the overall reasonableness of the four-part combination. But to the extent this standard from NUREG-1555 would require a more narrow inquiry, it cannot, of course, overcome the legal principles of reasonableness, feasibility, and “reasonable availability” that are found in binding case law.

We are cognizant that there are no existing four-part wind/solar/energy storage/natural gas supplementation combinations currently producing baseload power. As noted above, however, just because one or more parts taken separately would not be feasible as baseload power, if it is feasible to combine aspects of existing separate parts, which together might reasonably be able to produce baseload power, then the combination is an alternative that must be considered.³⁰⁴ We conclude that Intervenors have provided sufficient support for going forward on the feasibility and reasonable availability of this four-part combination, through expert reports and fact-based arguments.

Although not necessary to our ruling, we would observe, regarding the circumstance that some of the parts of the combination alternative at issue are relatively new and have not yet been tested or implemented in combination,³⁰⁵ that the renewable energy parts of the combination are currently the subject of significant and focused attention as a matter of national policy,³⁰⁶ as the nation attempts to address energy policy in an age of overreliance on foreign oil, concerns about global warming and associated negative effects of carbon sources of energy, and the recent disaster of the worst oil spill in our history in the Gulf of Mexico. Nuclear power appears to be approaching a “renaissance,” but in the preceding

³⁰³ See NUREG-1555 at 9.2.2-3; *Morton*, 458 F.2d at 836 (“Nor is it appropriate . . . to disregard alternatives merely because they do not offer a complete solution to the problem.”).

³⁰⁴ See *id.*

³⁰⁵ Although not necessary for our decision herein, we note Intervenors’ arguments in new Alternatives Contention 6 to the effect that, indeed, the design for the applied-for units does not yet exist in final form.

³⁰⁶ For example, the Department of Energy has an Office of Energy Efficiency and Renewable Energy, which, according to the Department’s website at <http://www.energy.gov/energysources/renewables.htm> (last visited June 24, 2010), “invests in clean energy technologies that strengthen the economy, protect the environment, and reduce dependence on foreign oil.” See also *supra* text accompanying note 290.

circumstances it is also understood that renewable fuels should also be relied on to the extent possible. In this context, and given the support that Intervenor have provided — even if not optimal at this point — it is most appropriate to permit further inquiry into the feasibility and reasonable availability under NEPA of the alternative of a combination of wind and solar energy with storage and natural gas supplementation to produce baseload power.

Intervenor may be said to have a “hard row to hoe,” and it is of course possible that they may not prevail in the end in showing the admitted combination to be feasible, but we do not find that any of those parts of their first three Alternatives Contentions that we herein admit are so “remote and speculative” as to foreclose further inquiry. Unlike energy conservation, at issue in *Vermont Yankee*, it may be said that each part of the combination at issue appears to have been shown to be feasible as well as “reasonably available” for less than baseload power. Based on this, and on the support the Intervenor have shown for those parts of Contentions 1 through 3 that we find to be admissible, we find these parts to pose at least a plausibly “reasonable” combination alternative for baseload power, the relevant goal of the Applicant. Intervenor’s arguments regarding such combinations and their components are not, perhaps, as well organized as they might be, but they are also neither cryptic nor obscure, and rather provide a sufficient showing to “require reasonable minds to inquire further.”³⁰⁷

As part of the litigation of this issue, as noted above we do not permit Intervenor to contest the land use acreage estimates for wind and solar provided by Applicant,³⁰⁸ nor are issues concerning job impacts of solar energy, new solar technologies relating to combined cycle systems and steam augmentation technology, peaking power and rooftop solar, and each technology requiring up to 3200-MW capacity, admissible. But we do find reasonable, and admissible, the issue of the feasibility and reasonable availability of the four-part wind/solar/storage/natural gas supplementation combination to produce baseload power, as set forth in Alternatives Contention 2 and to an extent in Alternatives Contention 3; the related issues of the feasibility of wind power and CAES in Texas, CAES land usage, and concurrent overlapping usage of land for more than one purpose, as set forth in Alternatives Contention 1; and the operation and maintenance cost issues related to solar energy, as set forth in Alternatives Contention 2 and addressed and limited in our discussion thereof.

³⁰⁷ See *supra* note 281 and accompanying text.

³⁰⁸ Notwithstanding our finding land use acreage figures to be inadmissible, we note indications in the Staff’s Alternatives Answer that it may also have questions about the accuracy of Applicant’s acreage figures, see, e.g., *supra* text accompanying notes 175, 242, and if the Staff in its EIS ultimately concludes that smaller figures are appropriate, these would be the figures that could be used in a hearing.

With respect to each of the preceding, we find that Intervenors have provided a reasonably specific statement of the issue they seek to raise and a brief explanation of the basis for the contention, as required at 10 C.F.R. § 2.309(f)(1)(i) and (ii). A mere cursory glance at NUREG-1555's discussion of the review process for alternatives demonstrates that it is unquestionable that these wind- and solar-power-related issues are within the scope of the hearing, as required by section 2.309(f)(1)(iii), and that the issues are material to the findings the NRC must make to support the Application at issue, as required by section 2.309(f)(1)(iv). As addressed in our discussion of the three individual Alternatives Contentions 1 through 3, Intervenors have provided concise statements of the alleged facts and expert opinions supporting their positions, together with references to specific sources and documents on which they intend to rely, with regard to each, as required by section 2.309(f)(1)(v). And, finally, they have provided sufficient information to show that a genuine dispute exists with the Applicant on the following material issues of fact, as required by section 2.309(f)(1)(vi):

- (1) the feasibility and reasonable availability of a four-part combination of wind and solar power with CAES, thermal energy storage, and natural gas supplementation to produce baseload power;
- (2) the feasibility of wind and CAES in Texas in the context of the four-part combination described in (1), as parts of a baseload power system;
- (3) land use related to CAES, and overlapping land uses in the context of (1); and
- (4) operation and maintenance costs of solar in the context of (1), as limited herein and in our discussion of Alternatives Contention 2.

We thus conclude that those parts of Intervenors' new Alternatives Contentions that concern the preceding four issues are admissible.³⁰⁹

In order to simplify and expedite this proceeding to the extent reasonably possible, we find it appropriate to consolidate all of the preceding related admissible issues from the Intervenors' first three Alternatives Contentions, as

³⁰⁹ Regarding Judge Arnold's argument in his Dissent, *see* text accompanying Dissent notes 10-11, to the effect that Intervenors do not challenge the Applicant's determinations that the alternatives it addresses in its ER Revision are unreasonable, we would simply observe that, to the extent any such challenges are not explicit, implicit in all of Intervenors' Alternatives Contentions (not just those we admit parts of) is the clear assertion that virtually all of the Applicant's determinations on the reasonableness of alternatives involving renewable energy sources are incorrect. We do not find all such assertions to warrant the admission of contentions or parts thereof, but we do not find the Dissent's rationale to constitute an appropriate basis for denying any parts of contentions that we admit herein. Nor, we note, except to the extent that we recount and summarize any such arguments, do Applicant and Staff appear to make the argument utilized by the Dissent as justification for denying contentions.

discussed herein, and reformulate them into one admitted contention. Although Intervenor's are represented by counsel, in contrast to other cases in which contentions submitted in *pro se* petitions have been reformulated by boards, such representation does not preclude reformulation of contentions where appropriate. While an intervenor's representational status is one factor in determining whether reformulation is appropriate, and *pro se* status may provide additional cause for reformulation,³¹⁰ the two primary grounds for reformulation in NRC proceedings have been "to *eliminate extraneous issues* or to *consolidate related issues for a more efficient proceeding*."³¹¹ Our reformulation herein is based primarily on the second of these grounds.

It is also based on common sense, a factor the Commission has recently found to be a relevant consideration in determining whether to reformulate contentions.³¹² We find that both common sense and the interest in efficiency in this proceeding support reformulation. To proceed otherwise, and admit as separate contentions (but individually reformulated to eliminate extraneous nonadmitted portions thereof) those parts of new Alternatives Contentions 1 through 3 that we find admissible, would result in a piecemeal approach to adjudicating issues that are closely related, which would lead in turn to much less efficient and effective consideration of the issues, whether in a prehearing, hearing, or posthearing context.

³¹⁰ See, e.g., *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 482 (2008).

³¹¹ *Id.* (emphasis in original).

³¹² *Progress Energy Florida* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 36 (2010). The Commission therein observed that the NRC's contention pleading standards, while strict, are not so strict as "to require [a] Board to abandon a commonsense approach to consideration of . . . contention[s]." *Id.* See also *id.* at 33 & n.21, 35-36. In *Levy*, the Commission upheld reformulation of the admissible portions of sixteen parts of a contention submitted by *pro se* petitioners, see *id.* at 37 (which the applicant therein argued were actually separate contentions, see *id.* at 35). See generally *id.* at 29-38. The Commission in *Levy* also referred to its earlier decision in the *Crow Butte* proceeding, in which it had found "no fault" with that Board's decision to reorganize and reformulate two submitted contentions, one of which concerned alleged contamination of groundwater resources and the other of which concerned alleged environmental and health impacts, into two separate admitted contentions, one concerned with NEPA-related issues, and the other concerned with safety-related issues. *Id.* at 32 (citing *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009); *Crow Butte Resources, Inc.* (North Trend Expansion Project), LBP-08-6, 67 NRC 241 (2008)); see *Crow Butte*, LBP-08-6, 67 NRC at 294-323. (In *Crow Butte* the initial petition was prepared and submitted by unrepresented petitioners, who had by the time of oral argument on the petition obtained counsel. See *id.* at 252-53.) The Commission in *Levy* stated that the *Crow Butte* Board had not, however, "identif[ied] clearly which of the diffuse and, in some cases, unsupported claims were admitted for hearing." *Levy*, CLI-10-2, 71 NRC at 32. Here, in order to comply with the Commission's analysis in *Levy* and *Crow Butte*, we specify which parts, of the three original separate contentions that we reorganize into one reformulated contention, are admissible and which are not, including only those parts we find to be admissible in the one reformulated contention.

We therefore admit the preceding admissible issues from new Alternatives Contentions 1 through 3, reformulated into the following one contention, which we designate as

Alternatives Contention A:

The Applicant has not considered the feasibility under NEPA of an alternative consisting of a combination of solar and wind energy, energy storage methods including CAES and molten salt storage, and natural gas supplementation, to produce baseload power, with specific regard to:

- (a) the reasonable availability of the four parts of such combination for consolidation into an integrated system to produce baseload power;³¹³
- (b) the feasibility of the use of such combination in the area of Texas served by the Comanche Peak plant;³¹⁴
- (c) the extent to which there may be efficiencies arising from overlapping uses of land for each of the four parts of the combination as well as for other reasonable purposes;³¹⁵ and
- (d) if it is shown that such an alternative is environmentally preferable, the extent to which operation and maintenance costs of solar in such combination may be a comparative benefit.³¹⁶

We conclude this portion of our Memorandum by noting, as stated above,³¹⁷ that the portion of original Contention 18 that we find not to be moot is essentially the same contention as admitted Alternatives Contention A above, except that the contention admitted here is more limited than the original open-ended Contention 18 as it defined the four-part combination of wind and solar energy with energy storage methods and supplemental natural gas. Based on the same arguments relating to this admitted contention, however, we conclude that the part of original Contention 18 that we find is not moot should likewise be limited to the issues encompassed within Alternatives Contention A. Moreover, as the two contentions are as a result identical, there is no need to discuss further the contentions as

³¹³ See *supra* text accompanying note 303.

³¹⁴ Although, strictly speaking, the only admissible part of the contention that concerned feasibility in Texas was that relating to wind and CAES, we find it appropriate and efficient to limit the entire admitted contention to the issue of feasibility of the four-part combination in Texas, given that the project is in Texas, and what is therefore relevant is the question of feasibility in that location.

³¹⁵ This portion of the admitted contention does not encompass challenges to Applicant's land use acreage figures for wind or solar power, as discussed in our rulings on new Alternatives Contentions 1 and 2.

³¹⁶ See *supra* text accompanying notes 216-218.

³¹⁷ See *supra* Section II.B of this Memorandum and Order.

separate and apart from each other, except that Alternatives Contention A may be viewed as being supported by both our mootness ruling on original Contention 18, as well as our rulings on new Alternatives Contentions 1 through 3.

Finally, we note that it is likely that Applicant may well, in response to our admission of this contention, provide an additional revision to their ER and move to dismiss Alternatives Contention A for mootness, which is of course Applicant's prerogative. And Intervenors, faced with another revision to the ER and related motion to dismiss for mootness, will no doubt, with the assistance of their experts, file new contentions challenging any such ER revision, which is their prerogative. We wish to emphasize, however, that questions of feasibility, as are involved in the contention we admit herein, are at bottom factual issues that go to the merits of the alternative at issue, which may well be most efficiently addressed by moving this proceeding forward in the most expeditious manner possible to resolution of such matters in the setting of a hearing on such factual merits questions. Such a course would seem to further the interests of efficiency in adjudication, a policy consideration that the Commission has on more than one occasion highlighted as one to be desired and adhered to as much as possible.³¹⁸

J. Alternatives Contention 4 — Viability of Baseload Wind System

In this contention Intervenors state:

The Applicant's assertion that renewable energy sources and energy storage options are not viable baseload generating options ignores the United States Department of Energy National Renewable Energy Laboratory (NREL) findings that "Wind energy systems that combine wind turbine generation with energy storage and long-distance transmission may overcome these obstacles and provide a source of power that is functionally equivalent to a conventional baseload electric power plant. A "baseload wind" system can produce a stable, reliable output that can replace a conventional fossil or nuclear baseload plant, instead of merely supplementing its output. This type of system could provide a large fraction of a region's electricity demand, far beyond the 10-20% often suggested as an economic upper limit for conventional wind generation deployed without storage."³¹⁹

Intervenors challenge Applicant's assertions that "options which rely on renewable energy sources and energy storage are best suited for power peaking or stabilizing purposes [and that] [r]enewable energy sources and energy storage

³¹⁸ See, e.g., Final Rule: "Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,179 (Aug. 11, 1989); Changes to Adjudicatory Process, Nuclear Regulatory Commission, 69 Fed. Reg. 2,182 (Jan. 14, 2004).

³¹⁹ Alternatives Contentions at 11 (citing and quoting NREL Baseload Factsheet).

options are not currently, or projected to be, used for baseload power applications.”³²⁰ In response Intervenor point out what they claim is a “diametrically opposed conclusion” of the U.S. Department of Energy National Renewable Energy Laboratory (NREL) — namely, a one-page document in which the following language, reproduced in this contention, is stated: “A ‘baseload wind’ system can produce a stable, reliable output that can replace a conventional fossil or nuclear baseload plant, instead of merely supplementing its output.”³²¹

Observing that the Applicant’s view may have been “plausible . . . in the past,” Intervenor aver, citing NREL and Drs. Dean and Makhijani, that “renewables and storage technologies such as CAES and molten salt are capable of meeting baseload generation requirements.”³²² Intervenor argue that “Applicant’s premise that wind/solar/storage are not capable of providing baseload generation skews its analysis of the viability of renewable fuels in combination with storage technologies and/or natural gas,” and constitutes an “overly restrictive methodology with artificial constraints,” which “ignores substantial evidence that contradicts the Applicant’s assertion.”³²³ Applicant’s premise is “pervasive throughout its discussion about alternatives to nuclear power” and “colors [its] entire analysis,” Intervenor contend. In short, in Intervenor’s view, Applicant “makes no attempt to show how combined/integrated renewable fuel systems augmented by storage and . . . natural gas can meet baseload requirements,” and the contention should be admitted in order to consider whether such combinations are “viable alternative[s].”³²⁴

Applicant, citing case law for the proposition that any supporting material offered by Intervenor is “subject to Board scrutiny ‘both for what it does and does not show,’” suggests that the NREL Fact Sheet makes clear that a combination of wind and storage to provide baseload power is still “only a ‘concept’” — in agreement with Applicant’s point that the option is “not currently a proven technology for generating baseload power.”³²⁵

NRC Staff submits that Alternatives Contention 4 does not comply with 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi) and is inadmissible. According to Staff, Intervenor “simply contradict” Applicant’s assertions in ER § 9.2.2.11.3 that “(1) there are no large scale baseload combination renewable and storage facilities in existence; (2) this combination as a baseload power source has not been proven

³²⁰ *Id.* (citing Alternatives ER Revisions § 9.2.2.11.5, at 9.2-50).

³²¹ *Id.* at 11 n.36 (quoting NREL Baseload Factsheet).

³²² *Id.* at 12.

³²³ *Id.* (citing *Druid Hills*, 772 F.2d at 709; *Ohio River Valley*, 473 F.3d at 102).

³²⁴ *Id.*

³²⁵ Applicant’s Alternatives Answer at 25 (citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev’d in part on other grounds*, CLI-96-7, 43 NRC 235 (1996)).

or demonstrated; and (3) the projects being proposed operate as either peaking or intermediate, intermittent power source.”³²⁶ They also, Staff argues, “overstate [the conclusions of the NREL Baseload Factsheet] regarding the viability of wind combined with CAES to provide baseload power,” a review of which “indicates that it is more equivocal in its discussion of the feasibility of using advanced compressed air energy storage concepts.”³²⁷ Staff contends that “[n]either Drs. Dean nor Makhijani provide any facts in their reports to contravene [Applicant’s] assertions and show that a renewable combination is available for baseload supply rather than a peaking supply,” and therefore Intervenors do not meet the requirement for facts or expert opinion at 10 C.F.R. § 2.309(f)(1)(v).³²⁸ Nor, insist Staff, do Intervenors demonstrate that the issues raised in the contention are material as required by section 2.309(f)(1)(iv).³²⁹

Finally, Staff cites the NEPA “rule of reason,” and quotes from the *Vermont Yankee* case the principle that NEPA does not require:

detailed discussion of the environmental effects of “alternatives” put forward . . . when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies — making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed.³³⁰

Staff argues that Intervenors “do not establish that the proposed alternative is viable, and thereby do not show how examination of this proposed alternative is required under NEPA,” and that as a result they do not comply with the materiality requirement of section 2.309(f)(1)(iv), or the genuine dispute on a material issue of law or fact requirement of section 2.309(f)(1)(vi).³³¹

Intervenors respond by, among other things, arguing that, “[w]hile the NREL study acknowledges that this alternative requires additional development there is no indication that it is a speculative and infeasible alternative,” and “[a]ccordingly, its analysis . . . is required.”³³²

We conclude that Intervenors in Alternatives Contention 4 fail to provide sufficient factual support for their contention that a baseload wind system is

³²⁶ Staff Alternatives Response at 27 (citing ER at 9.2-37).

³²⁷ *Id.* (citing NREL Baseload Factsheet (“Background/Overview,” “Technical and Environmental Performance,” and “Advanced Wind/CAES Concepts”).

³²⁸ *Id.*

³²⁹ *Id.* at 28.

³³⁰ *Id.* (quoting *Vermont Yankee*, 435 U.S. at 551; citing *Morton*, 458 F.2d at 837-38).

³³¹ *Id.*

³³² Intervenors’ Alternatives Reply at 8.

a feasible alternative. Although, as discussed in our rulings above on the admissible parts of Alternatives Contentions 1 through 3, some of Dr. Dean's and Dr. Makhijani's analyses support admission of a contention on a combination including both wind and solar energy, we do not find it sufficient to show a genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi), on a baseload wind system. We find significant in this regard that the primary support for this contention, the 4-year-old, one-page NREL Baseload Factsheet, states, in addition to the quotation used by Intervenor in Alternatives Contention 4, that "[d]evelopment of the 'baseload' wind concept will require a greater understanding of the local geologic compatibility of air storage, and additional work will be required to examine the feasibility of advanced wind/CAES concepts described here." In light of this, we find that the Factsheet, even taken in combination with the minimal additional support provided by Intervenor, fails to supply the requisite support to warrant further inquiry. We therefore deny admission of Alternatives Contention 4.

K. Alternatives Contention 5 — New ERCOT Demand Data and Renewable with Storage

Intervenor in this contention allege:

In evaluating alternatives, the Applicant has not taken into account new ERCOT demand data and the positive impacts of modular additions of renewable/storage combinations in meeting a declining and uncertain demand.³³³

In this contention Intervenor address criteria for evaluating alternatives, asserting a discrepancy between one of the Applicant's own criteria (Applicant's Criterion 2, "Capacity equivalent to the planned generation") and the criterion in NUREG-1555 that "the alternative energy source should provide generating capacity substantially equivalent to the capacity need established."³³⁴ Intervenor cite the reports of their experts Dean and Makhijani as addressing the "economic risks of pursuing a large nuclear power plant project rather than a phased approach of renewable combinations which can be adjusted with changing demand." They argue that Applicant in its recent ER revisions "failed to consider the benefits of a modular approach over nuclear in meeting the need for power in an uncertain demand environment."³³⁵

Intervenor quote from Dr. Dean's report the following:

³³³ Alternatives Contentions at 13.

³³⁴ *Id.* (citing Alternatives ER Revision at 9.2-38, -42, -46, -48; NUREG-1555 at 9.2.2-4).

³³⁵ *Id.* (citing Rebecca Smith, *Turmoil in Power Sector, Falling Electricity Demand Trips Up Utilities' Plans for Infrastructure Projects*, Wall St. J., Jan. 14, 2010).

The misleading “Large Project” concept:

The application abuses *Criterion 2 — Capacity equivalent to the planned generation*. The application also abuses *Criterion 3 — Available during the same time frame*. Although micro-nuclear systems have been informally proposed, commercial nuclear power needs to be very large to be economically viable. However, large size is also an economic liability. It creates a very large financial gamble on projected future electrical-energy demand, and it minimizes real options. Compared to a typical wind farm, a large nuclear plant takes a relatively long time to build. So the large initial investment must be made a long time before the benefits of that investment can start to be realized. Moreover, when a large nuclear power plant does finally come on line, it changes the generating capacity of the system by a very large amount in one big step. In contrast, market demand does not change in giant steps widely separated in time. So a nuclear plant’s large size is inherently poorly matched to changes in actual market demand. On the other hand, combinations of gas, renewable energy sources, and storage can be committed to and installed gradually over time — with ongoing flexibility in the size of the ultimate commitment and ongoing flexibility in the detailed mix of components. In spite of the inherent riskiness (and suppression of real options) in a single large fixed investment in a nuclear plant, the Applicant essentially infers that the ability to implement wind-storage-gas systems gradually over time as market demand develops disqualifies those wind-storage-gas systems alternatives. In effect, they claim that the most conservative approach to a large long-duration hard-to-estimate future need should be “not allowed” because it is different from a more reckless approach that happens to be the only approach available to nuclear power. The applicant’s demand that proposed alternatives to nuclear power must similarly put “all their eggs in one big basket” is very unreasonable.³³⁶

In addition, they quote Dr. Makhijani, as follows:

Finally, the fact that CPNPP is an order of magnitude larger than existing CAES facilities is also technically irrelevant; in fact, it could be economically very advantageous. Facilities that are in the ~100 MW to 300 MW range can be scaled up or, preferably, be built on a modular basis. Given the great uncertainties in demand projections eight to ten years hence, a modular approach is much less risky since growth in supply can be more closely tailored to growth in demand. The one requirement that this strategy would require is the acquisition of a suitable number of sites for wind and CAES development.

Solar thermal with heat storage facilities are currently being built on a scale that modules could be built that would add up to the equivalent of CPNPP. There is no technical reason for a ~3,000 MW facility to consist of just one or two units.³³⁷

Intervenors claim that “Applicant’s restrictive assumption that a one-time

³³⁶ *Id.* at 13-14 (quoting Dean Report at 5).

³³⁷ *Id.* at 14 (quoting Makhijani Declaration at 2-3).

addition of 3200 MW is the most prudent way to meet demand fails to recognize that growth in demand is declining,” and suggest that “a phased approach that can be achieved with smaller increments of renewable fuels generating capacity that can more closely match actual demand increases.”³³⁸ Thus, they argue, there is a “material dispute about whether meeting the projected demand *via* renewable fuels/storage makes the renewable option environmentally preferable.”³³⁹

Applicant argues that the new Alternatives Contention is untimely under 10 C.F.R. § 2.309(c) and (f)(2), as it could have been raised earlier by Intervenors, when they filed their original contention.³⁴⁰ Nor do Intervenors dispute or controvert Applicant’s “need-for-power discussion in ER Chapter 8, which discussed the bases for the [ERCOT] conclusion that a significant amount of new generation is needed to meet the demand in the region.”³⁴¹ In any event, such business strategies and any challenges to them are outside the scope of this proceeding.³⁴²

NRC Staff also, among other things, challenges Intervenors’ failure to raise these issues related to the need for power earlier, and their failure to address specifically Chapter 8 of Applicant’s ER, which has been available since 2008 when the Application was filed, and which contains analysis of ERCOT demand data and projections — none of which Intervenors have challenged.³⁴³ Staff argues that Intervenors’ contention regarding a modular approach is outside the scope of this proceeding and immaterial, because the Application at issue does not deal with modular reactors.³⁴⁴ Intervenors also, in Staff’s view, do not show that any such consideration of a modular approach is required by law, or that it would meet the purpose and need of the Applicant’s goals, including its economic goals.³⁴⁵

Intervenors respond to the timeliness arguments of Applicant and Staff by stating that the issues they raise in Alternatives Contention 5 are new because they are based on Applicant’s ER Revisions. We do not, however, find this response to be persuasive. Chapter 8 of the ER, dealing with and headed “Need for Power,” has been available since 2008, and Alternatives Contention 5 clearly deals with the need for power in the area. Intervenors have neither seriously argued, nor

³³⁸ *Id.* (citing Dean Report and Makhijani Declaration).

³³⁹ *Id.*

³⁴⁰ Applicant’s Alternatives Answer at 26-27.

³⁴¹ *Id.* at 27.

³⁴² *Id.* (citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005)).

³⁴³ Staff’s Alternatives Response at 29-32.

³⁴⁴ *Id.* at 32.

³⁴⁵ *Id.* at 32-33 (citing, *inter alia*, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 146 (2004) (“[i]n considering alternatives under NEPA, an agency must ‘take into account the needs and goals of the parties involved in the application’”) (quoting *Citizens Against Burlington*, 938 F.2d at 199)).

shown, good cause to permit the issue to be brought at this time, when it could obviously have been raised at a much earlier time. We therefore find Alternatives Contention 5 to be inadmissible because it is untimely under 10 C.F.R. § 2.309(c).

L. Alternatives Contention 6 — US-APWR Development Status

Intervenors in this contention assert:

Applicant does not meet Criterion 1: Developed, proven, and available in the relevant region ERCOT.³⁴⁶

Intervenors criticize Applicant for measuring “renewables/storage against the criteria that the alternative be developed, proven, and available in the relevant region ERCOT,” when, according to Intervenors, “CPNPP Units 3 & 4 clearly do not meet this criterion.”³⁴⁷ Quoting Dr. Dean, Intervenors state that “the US-APWR reactor design ‘has never been built before, it has never been designed before, and the design that is being worked on now is not likely to be certified until after 2011.’”³⁴⁸ They cite all three of their experts for pointing out that Applicant “fails to account for the fact that the US-APWR reactor design is not yet certified by the NRC,” and thus “[t]he proposed reactors themselves fail to meet Criterion 1 although this is the standard the Applicant applies to all other technologies.”³⁴⁹ Intervenors characterize Applicant’s “silen[ce] on the point that the US-APWR is not developed, proven or available” as “a material omission,” which should result in the contention being admitted for adjudication.³⁵⁰

Applicant argues that new Alternatives Contention 6 is untimely and beyond the scope of original Contention 18, as it is “unrelated to the ER Update” and could have been raised in their original Petition.³⁵¹ In any event, the US-APWR is

³⁴⁶ Alternatives Contentions at 14. ERCOT stands for “Electric Reliability Council of Texas.” According to its website:

[ERCOT] manages the flow of electric power to 22 million Texas customers — representing 85 percent of the state’s electric load and 75 percent of the Texas land area. As the independent system operator for the region, ERCOT schedules power on an electric grid that connects 40,000 miles of transmission lines and more than 550 generation units. ERCOT also manages financial settlement for the competitive wholesale bulk-power market and administers customer switching for 6.5 million Texans in competitive choice areas.

<http://www.ercot.com/about/> (last visited June 24, 2010).

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 15 (citing Dean Report).

³⁴⁹ *Id.* (citing Dean Report at 8-10, Makhijani Declaration at 2, Robbins Report at 1).

³⁵⁰ *Id.* (citing *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 317-18 (2008) (quoting *Pa’ina Hawaii, LLC*, LBP-06-12, 63 NRC 403, 414 (2006))).

³⁵¹ Applicant’s Alternatives Answer at 28.

“similar to current operating U.S. four-loop plants,” and “Intervenors provide no technical analysis that suggests that any of the parameters or systems [involved in it] present any safety or environmental problems that might somehow limit the deployment of this technology.”³⁵² In addition, the certification of the design is required prior to licensure, so this argument raises no material dispute.³⁵³

NRC Staff also objects to Contention 6, for reasons including timeliness, given that the information on which it is based has been available since 2008, and because it challenges an NRC regulation.³⁵⁴ In support of the latter argument, Staff points out that the Commission has ruled that issues concerning a design certification application are to be resolved in the design certification rulemaking, not in an adjudication on the COL.³⁵⁵ In addition, Staff argues, Applicant’s business decisions are outside the scope of the proceeding, and Intervenors do not provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact, and thus the contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi).³⁵⁶

Notwithstanding a certain level of superficial cleverness in Intervenors’ arguments in some respects in support of Alternatives Contention 6, we find that they could have been raised earlier, and that Intervenors have shown no good cause for not doing so. Alternatives Contention 6 is therefore untimely. Moreover, based on some of the same reasons we found similar issues raised by Intervenors at the outset of this proceeding to be inadmissible, we must agree that Intervenors have not shown that Alternatives Contention 6 is within the scope of the proceeding or shown a genuine dispute on a material issue of fact or law.³⁵⁷ We therefore find Alternatives Contention 6 to be inadmissible in this proceeding.

IV. CONCLUSION AND ORDER

Having found Intervenors’ original Contention 13 to be moot, and their original Contention 18 to be moot in part and not moot in part, and that Intervenors have demonstrated that parts of their new Alternatives Contentions 1 through 3 are admissible, but that they have not demonstrated that the remaining new contentions are admissible, we hereby ORDER the following:

- A. Intervenors’ original Contention 13 is dismissed.

³⁵² *Id.* at 28-29.

³⁵³ *Id.* at 29.

³⁵⁴ Staff’s Alternatives Response at 36.

³⁵⁵ *Id.* at 37 (citing *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 4 (2008)).

³⁵⁶ *Id.* at 38.

³⁵⁷ See LBP-09-17, 70 NRC at 330-35.

- B. Intervenor's original Contention 18 is dismissed, except to the extent that the contention concerns a NEPA alternative consisting of a combination of solar and wind energy with storage methods and supplemental natural gas, limited to the issues stated in Paragraph D below.
- C. Intervenor's new Colocation Contentions, and new Alternatives Contentions 4 through 6, are dismissed.
- D. A hearing is granted with respect to the following limited and reformulated parts of new Alternatives Contentions 1 through 3:

Alternatives Contention A

The Applicant has not considered the feasibility under NEPA of an alternative consisting of a combination of solar and wind energy, energy storage methods including CAES and molten salt storage, and natural gas supplementation, to produce baseload power, with specific regard to

- (a) the reasonable availability of the four parts of such combination for consolidation into an integrated system to produce baseload power;
 - (b) the feasibility of the use of such combination in the area of Texas served by the Comanche Peak plant;
 - (c) the extent to which there may be efficiencies arising from overlapping uses of land for each of the four parts of the combination as well as for other reasonable purposes; and
 - (d) if it is shown that such an alternative is environmentally preferable, the extent to which operation and maintenance costs of solar in such combination may be a comparative benefit.
- E. The above statement of Alternatives Contention A is coextensive with that part of original Contention 18 that is not rendered moot by Applicant's Alternatives ER Revision and that we find warrants adjudication in this proceeding, as explained in Section III.I above and limited as stated in Paragraphs B and D above, and the matters encompassed within the remaining part of Contention 18 and within Alternatives Contention A shall be adjudicated as one contention.
 - F. Interlocutory review of the Order may be requested as provided at 10 C.F.R. § 2.341(f)(2).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Dr. Alice C. Mignerey
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 25, 2010³⁵⁸

³⁵⁸Copies of this Order were filed this date with the agency's E-filing system for service to all parties.

Dissenting Opinion of Judge Gary S. Arnold

I agree with this Board's decision on colocation issues. However, I am unable to concur with my colleagues on original Contention 18 and new Alternatives Contentions 1 through 3. In the following, I discuss the reasoning for my opinion that Contention 18 is moot and that contentions Alt-1 through Alt-3 are inadmissible. In addition, I discuss what I perceive as irregularities in the process by which the Board reformulated contentions.

I. MOOTNESS OF CONTENTION 18

I find it necessary, before considering new alternatives contentions, to address the concept of reasonable versus feasible. The majority of this Board appears to treat the two terms as sufficiently closely related that they may be used interchangeably in evaluating alternatives. As cited in this Board Order, the Supreme Court in the *Vermont Yankee* decision stated that "the concept of alternatives must be bounded by some notion of feasibility."¹ As noted in this Board Order, there is a plethora of case law attempting to make a usable interpretation of this statement.²

I note that in 10 C.F.R. Part 51, in the eight places where "alternatives" is linked to a relevant adjective, the word appears as "reasonable alternatives." There are no instances of alternatives being described in a broader sense as feasible, viable, possible, or practical. Also, in Commission adjudication, the Commission appears to scrupulously avoid describing "alternatives" with any word other than

¹ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978); see also *supra* Section III.I.

² See *Vermont Yankee*, 435 U.S. at 551 (The alternatives discussion in NEPA analysis is bounded by the notion of feasibility. NEPA was not meant to require a detailed discussion of environmental effects of alternatives when these effects cannot be readily ascertained and are deemed to result from only remote and speculative possibilities. "Common sense teaches us that the detailed statement of alternatives cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. . . . Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972) (Implicit in NEPA is a rule of reason, under which the agency may limit the alternatives discussion where there is no environmental effect or where an effect is simply not significant. Congress did not intend for NEPA analyses to discuss the environmental impact of alternatives that are so remote from reality as to depend on something extreme (i.e., total repeal of antitrust laws); see also *Aeschliman v. NRC*, 547 F.2d 622, 626 (D.C. Cir. 1977) (The impact of proposed energy conservation alternatives (regarding demand for energy) must be susceptible to a reasonable degree of proof. Largely speculative and remote possibilities need not be weighed against a convincing projection of demand).

“reasonable.”³ After consulting several dictionaries on words such as reasonable, viable, speculative, feasible, possible, etc., a practical definition of the word reasonable for use when selecting alternative concepts would be an alternative is reasonable if it is both feasible (possible, viable) *and* nonspeculative.⁴ The nonspeculative component of this means that to some extent the resources, capabilities, skills, and time required to effectuate the alternative are known so that development and construction of the concept can, at least, be estimated.

In our original decision admitting Contention 18, we reworded the contention to state that the Environmental Report (ER) “fails to include consideration of alternatives to the proposed Comanche Peak Units 3 and 4, consisting of combinations of renewable energy sources such as wind and solar power, with technological advances in storage methods and supplemental use of natural gas, to create baseload power.”⁵ We admitted the contention as one alleging purely omission from the ER — that evaluation of the identified alternatives was missing in its entirety. With Applicant’s supplement to the ER, this information is no longer missing in its entirety.

The Commission has stated, regarding contentions of omission:

Where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot. Intervenors must timely file a new or amended contention that addresses the factors in section 2.714(b) in order to raise specific challenges regarding the new information.⁶

The question remains, to what extent does “the information is later supplied” require a board to determine whether the later-supplied information completely

³ See *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 223 (2007) (An ER must identify all reasonable alternatives); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88 (1998) (an EIS must describe the potential environmental impact of a proposed action and discuss any reasonable alternatives); *Long Island Lighting Co.* (Shoreham Nuclear Power Station) CLI-91-2, 33 NRC 61, 71 (1991) (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)) (“An agency’s environmental review ‘must consider not every possible alternative, but every *reasonable* alternative’”).

⁴ Webster’s II New College Dictionary (2001); Webster’s Third New International Dictionary of the English Language (Unabridged) (1986). I found no definition of “reasonable” that clearly fits this situation, but the definition I provide above has some support in case law and appears to encompass the essential difference between reasonable and feasible provided by the dictionaries. *Piedmont Heights Civil Club, Inc. v. Moreland*, 637 F.2d 430, 436 (5th Cir. 1981) (NEPA “requires consideration only of feasible, non-speculative alternatives.”).

⁵ LBP-09-17, 70 NRC 311, 380 (2009).

⁶ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 371, 382-83 (2002).

fills the alleged omission. The Commission decision in *Duke Energy* enables boards to avoid this question. For contentions alleging a total omission, once a party supplies information purporting to fill the alleged omission, the original contention should be considered moot. Then petitioners may sift through the supplemental information to identify items still missing.⁷ This permits the parties to identify continued omissions.

Because Applicant in this proceeding supplied information that they claim fills the omission alleged in Contention 18, Contention 18 is now moot. Intervenor had the opportunity to propose new contentions based on Applicant's supplement to Contention 18 (revisions to the Environmental Report), and in response they timely proposed six new contentions (Alternatives Contentions 1 through 6) based on this supplement.⁸

II. NEW ALTERNATIVES CONTENTIONS

Examination of new Alternatives Contentions 1 through 6 reveals a sparsity of details, and a plethora of inferences. None of Alternatives Contentions 1 through 6 fully satisfies all of the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). Below, I consider the first three⁹ of these contentions and briefly describe which of the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) these new contentions fail to satisfy.

A. Alternatives Contention 1: The Applicant Overstates and Mischaracterizes, Without Substantiation, the Impacts of Wind Power Generation and CAES

This contention was in response to the four-page evaluation of a wind/CAES storage alternative provided by Applicant in section 9.2.2.11.3.1 of its revised ER. It provides a concise statement of the issue, challenging how Applicant characterized impacts of the wind/CAES alternative. However, reading the ER reveals that Applicant evaluated this alternative using the evaluation methodology

⁷ *Id.*

⁸ Furthermore, the solar/wind/storage/natural gas option appears to have been, at least superficially, evaluated in the ER in section 9.2.2.11.14.1 "Renewable Energy Sources Combined with Storage and Supplemented by Natural Gas Power Generation." So as a contention of omission, this one fails.

⁹ I do not address Alternatives Contentions 4, 5, and 6, because I am in substantial agreement with the Board that these contentions are entirely inadmissible.

of NUREG-1555 and determined that this alternative was unreasonable.¹⁰ A prerequisite to challenging the adequacy of Applicant's characterization of impacts is a challenge of Applicant's determination that this alternative is unreasonable. Intervenors provide information to suggest that they do not agree with Applicant's ultimate determination but they never directly challenge the validity of this determination. Therefore, none of the bases Intervenors provide in Alternatives Contention 1 offers any reason why Applicant must provide a better characterization of the wind/CAES alternative. Hence, although this issue is within the scope of adjudication, Intervenors have not demonstrated how this contention is material to the findings the NRC must make in order to issue the license in this proceeding.¹¹ The facts provided in this contention indicate that characterizations of the wind/CAES alternative other than that provided in the ER are possible, but they do not controvert what Applicant has said. The only reference to portions of the ER being challenged, as required by 10 C.F.R. § 2.309(f)(1)(vi), is ER page 9.2-40,¹² and its discussion of the amount of land required. Even the Board has decided that this land use issue is not admissible. Therefore, Intervenors fail to show that a genuine dispute exists, and this contention is inadmissible.

B. Alternatives Contention 2: The Applicant Inadequately Characterizes, Without Substantiation, the Impacts of Solar with Storage

Intervenors provide a concise statement of the contention clearly indicating they challenge Applicant's characterization of impacts of the solar/storage alternative. Similar to the previous contention, Intervenors fail to challenge Applicant's reasoned decision that solar/storage is not a reasonable alternative. None of the possible bases provided addresses why, given the unchallenged unreasonableness of the alternative, any further characterization of solar/storage option is required. This issue is within the scope of adjudication, but given the unchallenged unreasonableness of this alternative, Intervenors do not demonstrate that this contention is material. Thus this contention does not satisfy 10 C.F.R. § 2.309(f)(1)(iv).

Intervenors allege that there are ways to characterize impacts of solar/storage other than that provided in the ER, but do not dispute Applicant's characterization. Intervenors also introduce a new power alternative — that of a combined cycle

¹⁰ See Alternatives ER Revision § 9.2.2.11.3.1, at 9.2-40; see also Office of Nuclear Reactor Regulation, Standard Review Plans for Environmental Reviews for Nuclear Power Plants, NUREG-1555 at 9.2.2-4 (Oct. 1999) (to be considered "competitive" with the proposed project, "[t]he energy conversion technology should be developed, proven, and available in the relevant region").

¹¹ See 10 C.F.R. § 2.309(f)(1)(iv).

¹² Intervenors' Contentions Regarding Applicant's Revisions to Environmental Report Concerning Alternatives to Nuclear Power (Jan. 15, 2010) at 4.

solar power system. In sum, although alleged facts are provided by Intervenors, in total they do not provide adequate support to demonstrate a genuine dispute with the ER, and thus fail to satisfy 10 C.F.R. § 2.309(f)(1)(vi). Furthermore, the only part of the ER that Intervenors reference is ER page 9.2-43,¹³ which discusses socioeconomic impacts. Considering the unchallenged unreasonableness of this alternative, this final challenge appears to “flyspeck” the ER.¹⁴ This contention is not admissible.

C. Alternatives Contention 3: The Applicant’s Determination That Nuclear Is Environmentally Preferable to Renewable Energy with Storage, Supplemented by Natural Gas Is Based on Fundamentally Flawed Assumptions About the Nature and Extent of Environmental Impacts Related Thereto

Intervenors provide a concise statement of the contention. However, this statement flies directly in the face of information provided in the Application that Intervenors do not challenge. ER § 9.2.2.11.4.1 provides the allegedly missing evaluation of this alternative. The last paragraph of this section of the ER states unequivocally that this alternative was ruled out as being not reasonable. Because Intervenors do not challenge this determination, there appears to be no requirement for any further assessment of environmental impacts. The three bases provided are (1) Applicant’s assumption that each technology in a multitechnology alternative must be capable of producing 3200 MW unreasonably distorts the impacts, (2) Applicant inadequately characterizes impacts of renewable with storage alternatives, and (3) Applicant did not consider a wind *and* solar alternative. None of these bases addresses the fundamental fault of this contention — that Intervenors do not demonstrate why Applicant must discuss further environmental impacts. The third basis is flatly incorrect, as ER § 9.2.2.11.4.1 includes this alternative. This contention is within scope, but as with Alternatives Contentions 1 and 2, it fails to demonstrate that the issue is material given Applicant’s undisputed determination that the alternative is not reasonable. Although some supporting facts are provided, none of them supports that an evaluation of impacts is required. Thus, Alternatives Contention 3 does not establish a genuine dispute with the ER as required under 10 C.F.R. § 2.309(f)(1)(vi) and is not admissible.

¹³ *Id.* at 5.

¹⁴ *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 259 (1996) (boards do not sit to “flyspeck” environmental documents or to add details or nuances).

III. THE BOARD HAS IMPROPERLY REFORMULATED CONTENTIONS

Boards are within their discretion to limit contentions by weeding out inadmissible portions, and even to reformulate contentions when they have been poorly organized or drafted. In this case, I think the Board has aided Intervenors to an impermissible extent. Intervenors, in this case, include a statewide organization and a nationwide organization with experience in NRC adjudications. They are represented by an attorney. Their contentions should be fairly well organized and not in need of reformulation by the Board.¹⁵ Instead, disparate, undeveloped and unrelated concepts have been reassembled by the Board and reorganized in the appearance of an admissible contention. This has required an extended extrapolation of what Intervenors actually said to what the Board believes Intervenors intended. The final contention statement that the Board admits in the majority decision bears only a loose, if any, relationship to the contention statements that Intervenors provided. Instead, the Board's reformulated contentions reflect what the Board thinks Intervenors intended. I believe that the Board relies too heavily on the interpretation that a reasonable alternative is one that is feasible, i.e., merely possible — an idea that I believe to be incorrect.

I believe that each individual step the Board took in reformulating the contentions is well intended and has the appearance of being reasonable and justified. I could not argue against many of the specific steps. However, so many such steps have been taken that the gestalt is an unreasonable and unrecognizable distortion of the contentions Intervenors actually submitted. The Board has thus exceeded any reasonable limit in its reformulation of Intervenors Alternatives Contentions.

¹⁵ See *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999) (Parties “represented by counsel are generally held to a higher standard than *pro se* litigants.”).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of

Docket No. 63-001-HLW
(ASLBP No. 09-892-HLW-CAB04)

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

June 29, 2010

In this 10 C.F.R Part 63 proceeding regarding the application of the Department of Energy (DOE) to construct a national high-level nuclear waste repository at Yucca Mountain, Nevada, ruling on a motion of DOE to withdraw the application and five new intervention petitions, the Board denies the withdrawal motion and grants the five new intervention petitions.

HLW REPOSITORY: NUCLEAR WASTE POLICY ACT
(STATUTORY CONSTRUCTION)

The Nuclear Waste Policy Act of 1982, as amended (NWPA), does not permit the Secretary to withdraw the Application that the NWPA mandates the Secretary file. Specifically, the NWPA does not give the Secretary the discretion to substitute his policy for the one established by Congress in the NWPA.

HLW REPOSITORY: NUCLEAR WASTE POLICY ACT
(STATUTORY CONSTRUCTION)

Congress directed both that DOE file the Application and that the NRC

consider the Application and issue a final, merits-based decision approving or disapproving the construction authorization application. Unless Congress directs otherwise, DOE may not single-handedly derail the legislated decisionmaking process by withdrawing the Application.

**HLW REPOSITORY: NUCLEAR WASTE POLICY ACT
(STATUTORY CONSTRUCTION)**

The NWPA set out a detailed, specific procedure for site selection and review by the Secretary of Energy, the President, and the Congress, followed by submission of the Application for a construction permit, review, and final decision thereon by the NRC. *See* 42 U.S.C. §§ 10132-10135.

**HLW REPOSITORY: NUCLEAR WASTE POLICY ACT
(STATUTORY CONSTRUCTION)**

Allowing DOE to withdraw the Application at this stage in the process would be contrary to congressional intent, as reflected in the legislative history of the NWPA.

**HLW REPOSITORY: NUCLEAR WASTE POLICY ACT
(STATUTORY CONSTRUCTION)**

In 42 U.S.C. § 10135, Congress clearly stated that Congress itself was to decide the policy question as to whether the Yucca Mountain project was to move forward by reserving final review authority of site selection. By overruling Nevada's disapproval of the Yucca Mountain site, Congress was commanding, as a matter of policy, that Yucca Mountain was to move forward and its acceptability as a possible repository site was to be decided based on its technical merits.

**HLW REPOSITORY: NUCLEAR WASTE POLICY ACT
(STATUTORY CONSTRUCTION)**

Surely Congress did not contemplate that, by withdrawing the Application, DOE might unilaterally terminate the Yucca Mountain review process in favor of DOE's independent policy determination that alternatives will better serve the public interest. At this point in the process created by Congress, it is not for DOE to do so.

**HLW REPOSITORY: NUCLEAR WASTE POLICY ACT
(STATUTORY CONSTRUCTION)**

Although the NWPA does not expressly repeal the Atomic Energy Act (AEA) — indeed, it specifically refers to it — it would be erroneous to interpret the AEA in a manner that would contravene the statutory scheme that Congress specifically adopted in the NWPA. The language, structure, and legislative history of the NWPA all contravene the notion that Congress intended to allow DOE to terminate the NRC’s consideration of the Application. *See* 42 U.S.C. §§ 10101-10270.

**RULES OF PRACTICE: HLW REPOSITORY (MOTIONS,
WITHDRAWAL OF APPLICATION)**

Section 2.107 of 10 C.F.R. does not “authorize” withdrawal here, but rather clarifies that licensing boards have authority to impose reasonable conditions upon voluntary withdrawals in appropriate circumstances. In effect, section 2.107 authorizes licensing boards to deny unconditional withdrawals.

**RULES OF PRACTICE: HLW REPOSITORY (STATUTORY
CONSTRUCTION)**

Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.” *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001). It would require a strained and tortured reading of the NWPA to conclude that Congress intended that its explicit mandate to the NRC — to consider and decide the merits of the Application — might be nullified by a nonspecific reference to an obscure NRC procedural regulation as being among the “laws” to be applied.

**HLW REPOSITORY: NUCLEAR WASTE POLICY ACT
(STATUTORY CONSTRUCTION)**

But where the statute is clear on its face, or is clear in light of its statutory scheme and legislative history, deference is inappropriate. *See Chevron U.S.A., Inc v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). This is especially so where, as here, DOE’s interpretation is reflected in nothing more formal than a motion before this Board — and not, for example, in a formal agency adjudication or notice-and-comment rulemaking. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

**HLW REPOSITORY: NUCLEAR WASTE POLICY ACT
(STATUTORY CONSTRUCTION)**

Under the framework of the NWPA, however, DOE’s application is not like any other application, and DOE is not just “any litigant,” because its policy discretion is clearly limited by the NWPA. The obvious difference is that Congress has never imposed a duty on private NRC applicants to pursue license applications, nor has Congress required that the Commission reach a decision on a private licensing application that the applicant chooses to withdraw. In contrast, Congress here required DOE to file the Application.

**HLW REPOSITORY: NUCLEAR WASTE POLICY ACT
(STATUTORY CONSTRUCTION)**

Statutes should not be interpreted so as to create internal inconsistencies, an absurd result, or an interpretation inconsistent with congressional intent. *See United States v. Turkette*, 452 U.S. 576, 580 (1981); *United States v. Raynor*, 302 U.S. 540, 547 (1938).

HLW REPOSITORY: STATUTORY CONSTRUCTION

The possibility that the Application might not be granted — or, if granted, that the repository might ultimately not be constructed and become operational for any number of reasons — does not entitle DOE to terminate a statutorily prescribed review process.

HLW REPOSITORY: STATUTORY CONSTRUCTION

In including funding for the Blue Ribbon Commission in the 2010 Appropriations Bill, Congress did not repeal the NWPA or declare that the Yucca Mountain site is inappropriate.

HLW REPOSITORY: STATUTORY CONSTRUCTION

DOE says that it would be “absurd and unreasonable” to require DOE to proceed with an application that it no longer favors on policy grounds. Where the law is declared to require it, however, DOE and other agencies within the Executive Branch are often required to implement legislative directives in a manner with which they do not necessarily agree.

RULES OF PRACTICE: HLW REPOSITORY (DISMISSAL OF PROCEEDINGS)

In NRC practice, “it is highly unusual to dispose of a proceeding on the merits, *i.e.*, with *prejudice*, when in fact the health, safety and environmental merits of the application have not been reached.” *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133 (1981) (emphasis in original).

RULES OF PRACTICE: HLW REPOSITORY (STANDING)

In determining whether an individual or organization should be granted party status “as of right,” the NRC applies judicial standing concepts that require a petitioner to establish: (1) a distinct and palpable harm that constitutes injury-in-fact; (2) the harm is fairly traceable to the challenged action; and (3) the harm is likely to be redressed by a favorable decision. *See U.S. Department of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 381-82 (2009).

RULES OF PRACTICE: HLW REPOSITORY (CONTENTIONS, INCORPORATION BY REFERENCE)

Where Aiken County relies on precisely the same legal arguments as South Carolina — arguments that do not require any factual support — we see no reason to prohibit its adoption of South Carolina’s contentions.

RULES OF PRACTICE: HLW REPOSITORY (TIMELINESS, INCORPORATION BY REFERENCE)

Where Aiken County’s contentions are based on the same triggering event as those of South Carolina — namely, DOE’s decision to seek withdrawal — we accept Aiken County’s incorporation of South Carolina’s timeliness arguments.

RULES OF PRACTICE: HLW REPOSITORY (STANDING)

There is no requirement that a petitioner identify the time at which the asserted harm will occur when the subject is the storage of high-level waste any more than a petitioner must identify the moment an asserted accident might happen in a reactor proceeding.

**RULES OF PRACTICE: HLW REPOSITORY
(REPRESENTATIONAL STANDING)**

To establish representational standing, an organization must: (1) demonstrate that the licensing action will affect at least one of its members; (2) identify that member by name and address; and (3) show it is authorized by that member to request a hearing on his or her behalf. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000).

**RULES OF PRACTICE: HLW REPOSITORY (STANDING, INJURY
IN FACT)**

NARUC states that ratepayers, via the pass-throughs of regulated utilities, have contributed over 17 billion dollars to the Nuclear Waste Policy Fund (NWF) established under the NWPA, and will continue to pay into the NWF, even if DOE is permitted to abandon Yucca Mountain. We agree with NARUC that, because state utility commissioners are responsible for protecting ratepayers' interests and overseeing the operations of regulated electric utilities, these economic harms constitute its members' injury-in-fact.

**RULES OF PRACTICE: HLW REPOSITORY (NONTIMELY
INTERVENTION)**

The availability of new information is central to determining whether a petitioner has good cause for late filing. A petitioner must show that the information on which its new contention is based was not reasonably available to the public previously and that it filed its intervention petition promptly after learning of such new information. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 (2005).

**RULES OF PRACTICE: HLW REPOSITORY (NONTIMELY
INTERVENTION)**

A petitioner cannot base an intervention petition on an unforeseeable "possibility" that an applicant might later withdraw an application, or on the possibility that the Commission might ultimately deny an application.

**RULES OF PRACTICE: HLW REPOSITORY (NONTIMELY
INTERVENTION)**

Amicus curiae participation does not provide the same rights of participation as

party status and cannot be considered a substitute means to protect a petitioner's interest or preserve a petitioner's appellate rights. *See* 10 C.F.R. § 2.309(c)(1)(v).

RULES OF PRACTICE: HLW REPOSITORY (NONTIMELY INTERVENTION)

Factor six instructs the Board to consider the extent a petitioner's interests are represented by existing parties, not potential parties. *See* 10 C.F.R. § 2.309(c)(1)(vi).

RULES OF PRACTICE: HLW REPOSITORY (NONTIMELY INTERVENTION)

The Staff's argument that somehow an admissible contention is relevant to analyzing whether a nontimely factor weighs in favor of a petitioner, an analysis that is a prerequisite to determining contention admissibility, is without merit.

RULES OF PRACTICE: HLW REPOSITORY (CONTENTIONS, SCOPE)

The Board does not read the Commission's initial hearing notice without regard for the Commission's subsequent pronouncements.

RULES OF PRACTICE: HLW REPOSITORY (LEGAL ISSUE CONTENTIONS)

Because the contention is purely legal in nature, petitioners need not satisfy all of the contention admissibility requirements applicable to a factual contention.

**MEMORANDUM AND ORDER
(Granting Intervention to Petitioners and Denying Withdrawal Motion)**

I. INTRODUCTION

The Commission has variously described the adjudicatory portion of the proceeding on the application of the Department of Energy (DOE) for authorization to construct a national high-level nuclear waste repository at Yucca Mountain,

Nevada, as “unusual,” “extensive,” and “unique.”¹ Ensuring that these labels remain current and valid, we now have before us DOE’s motion to withdraw with prejudice its 17-volume, 8600-page construction authorization application (Application), an application submitted just a little over 24 months ago, but over two decades in the making and undergirded by millions of pages of studies, reports, and related materials at a reported cost of over 10 billion dollars.²

Conceding that the Application is not flawed nor the site unsafe, the Secretary of Energy seeks to withdraw the Application with prejudice as a “matter of policy”³ because the Nevada site “is not a workable option.”⁴ In response to the Secretary’s action, we also have before us five new petitions to intervene in the ongoing proceeding filed by the State of Washington (Washington), the State of South Carolina (South Carolina), Aiken County, South Carolina (Aiken County), the Prairie Island Indian Community (PIIC), and the National Association of Regulatory Utility Commissioners (NARUC), as well as the *amicus curiae* filing of the Florida Public Service Commission.⁵ In addition to DOE and the NRC Staff, which are regulatorily designated parties, there are currently ten admitted parties and two interested governmental participants in the ongoing high-level waste (HLW) proceeding.⁶

¹ *U.S. Dep’t of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 582, 609 (2009). The adjudicatory portion of the proceeding is only part of the agency’s extensive review process. The technical staff of the NRC reviews the entirety of the application and produces a safety evaluation report on the safety and technical merits of the application, while the adjudicatory process involves only the admitted contentions (i.e., issues) put forth by those petitioners accepted as parties.

² Department of Energy, Office of Civilian Radioactive Waste Management, Office of Business Management, Summary of Program Financial & Budget Information 9 (Jan. 31, 2010), available at <http://www.energy.gov/media/ocrwm-budget-summary.pdf>.

³ U.S. Department of Energy’s Reply to the Responses to the Motion to Withdraw (May 27, 2010) at 1 [hereinafter DOE Reply].

⁴ U.S. Department of Energy’s Motion to Withdraw (Mar. 3, 2010) at 1 [hereinafter DOE Motion].

⁵ See State of Washington’s Petition for Leave to Intervene and Request for Hearing (Mar. 3, 2010) [hereinafter Washington Petition]; Petition of the State of South Carolina to Intervene (Feb. 26, 2010) [hereinafter South Carolina Petition]; Petition of Aiken County, South Carolina, to Intervene (Mar. 4, 2010) [hereinafter Aiken County Petition]; Petition to Intervene of the Prairie Island Indian Community (Mar. 15, 2010) [hereinafter PIIC Petition]; National Association of Regulatory Utility Commissioners Petition to Intervene (Mar. 15, 2010) [hereinafter NARUC Petition]. The Florida Public Service Commission timely filed an unopposed motion for leave to file a memorandum opposing DOE’s withdrawal motion with its memorandum attached. See Motion of the Florida Public Service Commission for Leave to Participate as Amicus Curiae and File Memorandum (May 14, 2010). The Florida Commission’s motion is granted.

⁶ The history of the proceeding dating back to 2004 can be found in numerous memoranda and orders of the Pre-License Application Presiding Officer (PAPO) Board, the Advisory Pre-License Application Presiding Officer (APAPO) Board, the Construction Authorization Boards (CABs), and the Commission, and that background need not be repeated here. See, e.g., *U.S. Department of Energy* (Continued)

As detailed in Part II, we deny DOE's motion to withdraw the Application. We do so because the Nuclear Waste Policy Act of 1982, as amended (NWPA),⁷ does not permit the Secretary to withdraw the Application that the NWPA mandates the Secretary file. Specifically, the NWPA does not give the Secretary the discretion to substitute his policy for the one established by Congress in the NWPA that, at this point, mandates progress toward a merits decision by the Nuclear Regulatory Commission on the construction permit.

As set forth in Part III, we grant the intervention petitions of all five petitioners because we conclude that each has established standing, addressed the timeliness of its petition, demonstrated compliance with the Licensing Support Network (LSN) requirements, and set forth at least one admissible contention.

II. DOE MOTION TO WITHDRAW

DOE's motion to withdraw the construction authorization application raises two issues. First, does DOE have authority to withdraw the Application before the NRC reviews it? Second, if DOE has such authority, what if any requirements should the Board impose as conditions of withdrawal?

The Commission has directed the Board to consider both issues. In accordance with the Commission's April 23, 2010 order, the Board will address "DOE's authority to withdraw the application in the first instance" as well as "the terms of DOE's requested withdrawal."⁸

The five new petitioners, i.e., Washington, South Carolina, Aiken County, PIIC, and NARUC, along with four existing parties including the Nuclear Energy Institute (NEI) and the six Nevada counties of Nye, White Pine, Churchill, Esmeralda, Lander, and Mineral,⁹ all oppose DOE's motion to withdraw with prejudice, as does the Florida Public Service Commission as *amicus curiae*. The State of Nevada (Nevada) — joined by Clark County, Nevada (Clark County), the

(High-Level Waste Repository), LBP-09-6, 69 NRC 367, *aff'd in part, rev'd in part*, CLI-09-14, 69 NRC 580 (2009); *U.S. Department of Energy* (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), LBP-08-10, 67 NRC 450 (2008); *U.S. Department of Energy* (High-Level Waste Repository: Pre-Application Matters), LBP-08-5, 67 NRC 205 (2008); PAPO Board Revised Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (July 6, 2007) (unpublished) [hereinafter RSCMO]; *U.S. Department of Energy* (High-Level Waste Repository: Pre-Application Matters), LBP-04-20, 60 NRC 300 (2004); *U.S. Department of Energy* (High-Level Waste Repository: Pre-Application Matters), CLI-04-32, 60 NRC 469 (2004).

⁷ Pub. L. No. 97-425, 96 Stat. 2201 (1982) (codified as amended at 42 U.S.C. §§ 10101-10270 (2009)).

⁸ *U.S. Department of Energy* (High-Level Waste Repository), CLI-10-13, 71 NRC 387, 389 (2010).

⁹ The counties of Churchill, Esmeralda, Lander, and Mineral sought intervention and were admitted as a single party (Nevada 4 Counties). See LBP-09-6, 69 NRC at 377-78, 483.

Joint Timbisha Shoshone Tribal Group (JTS), and the Native Community Action Council (NCAC) — supports DOE’s motion to withdraw with prejudice. The NRC Staff advocates for withdrawal without prejudice, and the State of California (California) supports the motion to withdraw but takes no position on the issue of prejudice. The remaining party and the interested governmental participants take no position on DOE’s motion.

A. DOE’s Authority to Withdraw

In moving to withdraw the Application with prejudice, DOE makes clear that “the Secretary’s judgment here is not that Yucca Mountain is unsafe or that there are flaws in the [Application], but rather that it is not a workable option and that alternatives will better serve the public interest.”¹⁰ DOE also acknowledges, however, that it cannot withdraw the Application if that would be contrary to the statutes passed by Congress.¹¹

Section 114(d) of the NWPA provides that the NRC “shall consider” the Application and “issue a final decision approving or disapproving the issuance of a construction authorization.”¹² The key question is therefore whether DOE retains discretion to decide, by withdrawing the Application, that the NRC should not consider it and issue a final decision. Having filed the Application with the NRC pursuant to a process mandated by Congress, can DOE unilaterally decide, on policy grounds, that the Yucca Mountain repository is not a “workable option” and that the NRC should proceed no further? Or, under the legislative scheme enacted by Congress, has responsibility for determining the technical merits of the Application at this stage necessarily passed to the NRC?

For the reasons explained below, we conclude that Congress directed both that DOE file the Application (as DOE concedes) and that the NRC consider the Application and issue a final, merits-based decision approving or disapproving the construction authorization application. Unless Congress directs otherwise, DOE may not single-handedly derail the legislated decisionmaking process by withdrawing the Application. DOE’s motion must therefore be denied.¹³

We look first to the statute. Congress enacted the NWPA in 1982 for the purpose of establishing a “definite Federal policy” for the disposal of high-level radioactive waste and spent nuclear fuel.¹⁴ In section 111, entitled “Findings and

¹⁰ DOE Reply at 31 n.102.

¹¹ *Id.* at 23.

¹² 42 U.S.C. § 10134(d).

¹³ Because we conclude that DOE’s motion clearly must be denied under the NWPA, the Board does not address objections that have been raised on other grounds, such as DOE’s alleged failure to comply with the National Environmental Policy Act of 1969 (NEPA).

¹⁴ 42 U.S.C. § 10131(b)(2).

Purposes,” Congress found that “[f]ederal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate.”¹⁵ Congress’s solution was to establish, through the NWPA, “a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance” of safe disposal of these materials.¹⁶ To that end, the NWPA set out a detailed, specific procedure for site selection and review by the Secretary of Energy, the President, and the Congress, followed by submission of the Application for a construction permit, review, and final decision thereon by the NRC.¹⁷

In 1987, Congress adopted an amendment to the NWPA that directed DOE to limit its site selection efforts to Yucca Mountain and to “provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site.”¹⁸ In February 2002, following a comprehensive site evaluation, the Secretary of Energy concluded that Yucca Mountain was “likely to meet applicable radiation protection standards”¹⁹ and recommended to the President that Yucca Mountain be developed as a nuclear waste repository.²⁰ The President then recommended the Yucca Mountain site to Congress.²¹ Pursuant to section 116, Nevada filed a notice of disapproval.²² Congress responded — pursuant to section 115 (a special expedited procedure that prevented delay and limited debate) — with a joint resolution in July 2002 approving the development of a repository at Yucca Mountain.²³

As DOE agrees,²⁴ this official site designation then required DOE to submit an

¹⁵ *Id.* § 10131(a)(3).

¹⁶ *Id.* § 10131(b)(1).

¹⁷ *See id.* §§ 10132-10135.

¹⁸ *Id.* § 10172(a); *see also id.* § 10134(f)(6).

¹⁹ Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1982 at 26 (Feb. 2002), *available at* http://www.energy.gov/media/Secretary_s_Recommendation_Report.pdf [hereinafter Secretary’s Recommendation].

²⁰ *Id.* at 6.

²¹ Letter from President George W. Bush to Congress (Feb. 15, 2002), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2002/02/20020215-10.html>.

²² *See* Guinn, Kenny C., Statement of Reasons Supporting the Governor of Nevada’s Notice of Disapproval of the Proposed Yucca Mountain Project (Apr. 8, 2002), *available at* <http://www.yucca-mountain.org/pdf/govveto0402.pdf> [hereinafter Nevada Notice of Disapproval].

²³ *See* Pub. L. No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135). Although not required by the NWPA, the joint resolution was presented to the President and signed into law. *See Nuclear Energy Institute v. Environmental Protection Agency*, 373 F.3d 1251, 1302 (D.C. Cir. 2004) (holding that “Congress has settled the matter” of Yucca Mountain’s approval for development because “Congress’s enactment of the Resolution . . . was a final legislative action once it was signed into law by the President”).

²⁴ DOE Motion at 5.

application to construct a high-level waste geologic repository at Yucca Mountain pursuant to section 114(b) (“the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site”).²⁵ Likewise, submission of the Application triggered a duty on the NRC’s part to consider and to render a decision on the Application pursuant to section 114(d) of the NWPA (“[t]he Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application, except that the Commission may extend such deadlines by not more than 12 months”).²⁶

Given the stated purposes of the NWPA and the detailed structure of that legislation, it would be illogical to allow DOE to withdraw the Application without any examination of the merits. For instance, under the NWPA, ultimate authority to make a siting decision is not committed to the discretion of either the Secretary of Energy or the President, but instead rests with Congress. Why would Congress have specified in detail the steps that the Secretary, the President, the State of Nevada, and even Congress itself had to take to permit the Yucca Mountain Application to be filed, and included provisions mandating that the Application be filed with and considered by the NRC, if DOE could simply withdraw it at a later time or in the same breath if the Secretary so desired?²⁷

Allowing withdrawal would also ignore the distinction that Congress drew between the site characterization phase and the Application phase. Congress expressly contemplated that, during site characterization, DOE might determine the Yucca Mountain site to be “unsuitable” for development as a repository.²⁸ In section 113 of the NWPA, Congress specified numerous steps that DOE must undertake in that event, such as reporting to Congress “the Secretary’s recommendations for further action,” including “the need for new legislative authority.”²⁹ Clearly, when Congress wished to permit DOE to terminate activities,

²⁵ 42 U.S.C. § 10134(b).

²⁶ *Id.* § 10134(d).

²⁷ Indeed, it would appear that, until DOE filed the instant motion, DOE claimed no such authority. In May 2009, Secretary Chu testified before Congress that DOE would “continue participation in the Nuclear Regulatory Commission (NRC) license application process, consistent with the provisions of the Nuclear Waste Policy Act.” FY 2010 Appropriations Hearing Before the Subcomm. on Energy and Water Development, and Related Agencies of the S. Comm. on Appropriations, 111th Cong. (2009) [hereinafter FY 2010 Appropriations Hearing].

²⁸ 42 U.S.C. § 10133(c)(3). DOE promulgated detailed site suitability guidelines. *See* 10 C.F.R. Part 963; Secretary’s Recommendation at 12-18.

²⁹ 42 U.S.C. § 10133(c)(3)(F).

it knew how to do so (while keeping control of what might happen next).³⁰ In contrast, the absence of any similar provision in section 114 of the NWPA, which spells out what is to transpire after DOE has submitted its Application to the NRC, strongly implies that Congress never contemplated that DOE could withdraw the Application before the NRC considered its merits in accordance with section 114(d). “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”³¹

Finally, allowing DOE to withdraw the Application at this stage in the process would be contrary to congressional intent, as reflected in the legislative history of the NWPA. Well aware of the failed efforts to address nuclear waste disposal prior to the NWPA, Congress believed it “necessary, therefore, to provide close Congressional control and public and state participation in the program to assure that the political and programmatic errors of our past experience will not be repeated.”³² In enacting the NWPA, Congress stated that “there is a solid consensus on major elements of the Federal program, and on the need for legislation to solidify a program and keep it on track.”³³

Did Congress, which so carefully preserved ultimate control over the multistage process that it crafted, intend — without ever saying so — that DOE could unilaterally withdraw the Application and prevent the NRC from considering it? We think not. When Congress selected the Yucca Mountain site over Nevada’s objection in 2002, it reinforced the expectation in the 1982 Act that the project would be removed from the political process and that the NRC would complete an evaluation of the technical merits:

If this resolution is approved, a license application will be submitted by the Department of Energy for Yucca Mountain and over the next several years, the Nuclear Regulatory Commission will go through all of the scientific and environmental data and look at the design of the repository to make sure that it can meet environmental and safety standards. This will be done by scientists and technical experts.³⁴

DOE’s arguments to the contrary are not persuasive.

³⁰ See, e.g., *id.* § 10172a(a) (prohibiting DOE from characterizing a second repository site “unless Congress has specifically authorized and appropriated funds for such activities”).

³¹ *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) (internal quotations omitted).

³² H.R. Rep. No. 97-491(I), at 29-30 (1982), as reprinted in 1982 U.S.C.C.A.N. 3792, 3796.

³³ *Id.* at 29.

³⁴ 148 Cong. Rec. S6476 (2002) (statement of Sen. Levin). For an extensive discussion of the structure and legislative background of the NWPA, see generally *Nuclear Energy Inst.*, 373 F.3d at 1258-62.

First, DOE contends that its conclusion that Yucca Mountain is not a “workable option” and that “alternatives will better serve the public interest” constitutes a policy judgment with which the NRC should not interfere.³⁵ Insofar as relevant, however, the pertinent policy — that DOE’s Yucca Mountain Application should be decided on the merits by the NRC — is footed on controlling provisions of the Nuclear Waste *Policy Act* that DOE lacks authority to override. Regardless of whether DOE thinks the congressional scheme is wise, it is beyond dispute that DOE and the NRC are each bound to follow it. In section 115, Congress clearly stated that Congress itself was to decide the policy question as to whether the Yucca Mountain project was to move forward by reserving final review authority of site selection. By overruling Nevada’s disapproval of the Yucca Mountain site, Congress was commanding, as a matter of policy, that Yucca Mountain was to move forward and its acceptability as a possible repository site was to be decided based on its technical merits.

Moreover, this congressional withdrawal of DOE authority is not unique within the NWPA, in which Congress undisputedly took numerous other policy determinations out of DOE’s hands. For example, section 113(a) of the NWPA directed DOE to carry out site characterization activities only at Yucca Mountain, section 114(b) required DOE to submit an application for a construction authorization, and section 114(f)(6) directed that DOE’s environmental impact statement not consider the “need for the repository, the time of initial availability of a repository, alternative sites to the Yucca Mountain site, or nongeologic alternatives to such site.” Surely Congress did not contemplate that, by withdrawing the Application, DOE might unilaterally terminate the Yucca Mountain review process in favor of DOE’s independent policy determination that “alternatives will better serve the public interest.”³⁶ As the United States Court of Appeals for the District of Columbia Circuit has stated, “[i]t is not for this or any other court to examine the strength of the evidence upon which Congress based its judgment” to approve the Yucca Mountain site.³⁷ Nor, at this point in the process created by Congress, is it for DOE to do so.

³⁵ DOE Motion at 4.

³⁶ We rule as a matter of law that DOE lacks discretion to withdraw the Application, and do not evaluate the grounds on which it purports to rely. *See* DOE Reply at 28-33. We must express surprise, however, that DOE invokes the assertion that “many Nevadans oppose the Yucca Mountain project” (DOE Reply at 32 n.104) — surely something of which Congress was aware when it rejected Nevada’s disapproval of the site in 2002. Indeed, most of the developments cited by DOE in support of its motion to withdraw predate Congress’s selection of the Yucca Mountain site, over Nevada’s objection, in 2002. Almost all of these developments were cited by Nevada before Congress and were rejected by Congress when it selected the Yucca Mountain site. *See* Nevada Notice of Disapproval, *supra* note 22.

³⁷ *Nuclear Energy Inst.*, 373 F.3d at 1304.

Second, DOE contends that, by enacting the NWPA, Congress did not expressly take away the broad powers that DOE otherwise enjoys under the Atomic Energy Act of 1954 (AEA).³⁸ The NWPA, however, is a subsequently enacted, much more specific statute that directly addresses the matters at hand.³⁹ As the Supreme Court has stated, “‘a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.’”⁴⁰

Although the NWPA does not expressly repeal the AEA — indeed, it specifically refers to it⁴¹ — it would be erroneous to interpret the AEA in a manner that would contravene the statutory scheme that Congress specifically adopted in the NWPA. “An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.”⁴² As explained above, the language, structure, and legislative history of the NWPA all contravene the notion that Congress intended to allow DOE to terminate the NRC’s consideration of the Application.⁴³ The meaning — or absence — of statutory language cannot be considered in isolation. It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”⁴⁴ As the Court of Appeals explained concerning the relationship between the NRC’s own authority before and after enactment of the NWPA: “That Congress may have authorized NRC to regulate DOE’s disposal of radioactive waste before it enacted the NWPA . . . hardly negates the fact that *in the NWPA* Congress specifically

³⁸ See DOE Reply at 5. DOE contended at argument (Tr. at 11 (June 3, 2010)) that the Secretary’s authority to withdraw the Application is footed on section 161(p) of the AEA which authorizes DOE to “make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act.” 42 U.S.C. § 2201(p). In seeking to withdraw the Application, however, DOE has not taken any of the actions (i.e., made, promulgated, issued, rescinded or amended rules and regulations) authorized in section 161(p) to carry out the purposes of the AEA. See also AEA § 161(b), *id.* § 2201(b), to like effect.

³⁹ See *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

⁴⁰ *Id.* at 143 (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)).

⁴¹ See, e.g., 42 U.S.C. §§ 10134, 10141.

⁴² *Burns v. United States*, 501 U.S. 129, 136 (1991).

⁴³ DOE relies on *Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968), for the proposition that the AEA’s statutory scheme is “virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.” *Id.* at 783. But *Siegel* was decided before Congress enacted the NWPA, which specifically narrows DOE’s discretionary authority in the area of high-level waste disposal, thereby overriding the AEA’s broad grant of authority.

⁴⁴ *Brown & Williamson*, 529 U.S. at 133 (internal citation omitted).

directed NRC to issue ‘requirements and criteria’ for evaluating repository-related applications and, not insignificantly, how to do so.”⁴⁵

Third, DOE argues that, because the NWPA requires the NRC to consider the Application “in accordance with the laws applicable to such applications,” Congress necessarily intended to incorporate 10 C.F.R. § 2.107, an NRC regulation that DOE claims “authorizes” withdrawals.⁴⁶ This argument fails on several grounds. In the first place, section 2.107 does not “authorize” withdrawals. It states, in relevant part, that “[w]ithdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.”⁴⁷ In the absence of section 2.107, most license applicants, whose applications are filed voluntarily, presumably might seek to abandon their applications at any time. Fairly characterized, section 2.107 does not “authorize” withdrawal here, but rather clarifies that licensing boards have authority to impose reasonable conditions upon voluntary withdrawals in appropriate circumstances.⁴⁸ In effect, section 2.107 authorizes licensing boards to *deny* unconditioned withdrawals. Nothing in section 2.107 gives any applicant the presumptive permission to unilaterally withdraw its application. Furthermore, the Commission’s case law is not helpful in this circumstance because no previous case involved an applicant that was mandated by statute to submit its application, as is the case here with DOE’s Application under the NWPA.

DOE’s reliance on section 2.107 is also misplaced for an entirely separate and independent reason. Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.”⁴⁹ It would require a strained and tortured reading of the NWPA to conclude that Congress intended that its explicit mandate to the NRC — to consider and decide the merits of the Application — might be nullified by a nonspecific reference to an obscure NRC procedural regulation as being among the “laws” to be applied.⁵⁰ As the Supreme Court has admonished,

⁴⁵ *Nuclear Energy Inst.*, 373 F.3d at 1288 (emphasis in original).

⁴⁶ DOE Motion at 5.

⁴⁷ 10 C.F.R. § 2.107(a).

⁴⁸ Indeed, in the statement of considerations accompanying the final rule, the Commission did not characterize section 2.107 as providing the authority for withdrawal. On the contrary, the Commission explained, “This section *describes how the Commission will process a withdrawal* of an application by an applicant.” Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2216 (Jan. 14, 2004) (emphasis added).

⁴⁹ *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001).

⁵⁰ DOE finds an inconsistency between its opponents’ reading of section 114(b) — that section 114(b) precludes withdrawal after submittal of the Application — and its own reading of section 114(d) — that 10 C.F.R. § 2.107 is among the “laws applicable” to the Application and plainly authorizes DOE to withdraw. Noting that “[a] reading that causes an internal inconsistency in a statute

(Continued)

“we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”⁵¹ Here, “we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”⁵²

The better reading of the language of the NWPA consistent with the content and detailed legislative scheme is to the contrary. The NRC is directed by section 114(d) to consider the Application in accordance with existing laws “*except* that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization” within the prescribed time period.⁵³ Insofar as application of section 2.107 might possibly be construed to interfere with that prime directive, by the terms of the statute it cannot apply.

Additional support for this conclusion is found in the legislative history. During the floor debate on S. 1662 — which contained a provision that was substantially identical to section 114(d) of the NWPA in its current form⁵⁴ — the bill’s sponsor, Senator McClure, explained:

should be rejected,” DOE therefore rejects its opponents’ reading of section 114(b). DOE Reply at 10. But any perceived inconsistency between sections 114(b) and (d) flows entirely from DOE’s misreading of the NWPA.

⁵¹ *Brown & Williamson*, 529 U.S. at 133.

⁵² *Id.* at 160. The three cases and one dissent DOE cites do not advance its position that we should presume Congress was aware of 10 C.F.R. § 2.107 when enacting the NWPA. In *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 575 (1993), the dissent presumed that Congress understood the IRS interpretation of “goodwill” in a tax code regulation only because the regulation was 65 years old, Congress reenacted the tax code not less than six times without substantial change, and the legislative history indicated Congress was specifically aware of the IRS definition of goodwill. In *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988), the Court attributed to Congress only a general awareness that state workers’ compensation laws provided a variety of compensation schemes. In *Bowen v. Massachusetts*, 487 U.S. 879, 896-98 (1988), the Court presumed that Congress was aware of the definition of “monetary damages” when it selected the language for a statute, in part, because “monetary damages” was explicitly addressed in the legislative history. Similarly, in *Bullcreek v. NRC*, 359 F.3d 536, 542 (D.C. Cir. 2004), the court presumed (to the extent it applied such presumption at all) that Congress was aware of the NRC’s regulations for licensing private away-from-reactor storage facilities because the substantive regulations were specifically discussed in the legislative history. In none of these cases did the court presume that Congress was aware of one specific agency rule when that rule was not expressly discussed in the legislative history. DOE points to no such legislative history addressing section 2.107.

⁵³ 42 U.S.C. § 10134(d) (emphasis added).

⁵⁴ Section 405(e) of S. 1662, as amended, read as follows:

(e) The Commission shall consider an application for authorization to construct a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the first such application not later than December 31, 1989, and the second such application not later than December 31, 1992.

The Nuclear Regulatory Commission has been established as an independent body to check upon whether or not the administrative bodies are functioning according to the statutes and policies that have been already enacted. The Nuclear Regulatory Commission will have that same function with respect to determining whether this program is being administered correctly or not.⁵⁵

As this explanation plainly suggests, “the laws applicable to such applications” was primarily intended as a blanket reference to the substantive standards that the NRC applies in judging applications. There is no suggestion in the legislative history that Congress had in mind the relatively obscure procedural regulation that DOE seeks to invoke here to nullify the otherwise unambiguous command of Congress, in section 114(d) of the NWPA, that the NRC “shall consider” the Application and “shall issue a final decision approving or disapproving the issuance of a construction authorization.”⁵⁶

Fourth, DOE claims that its decision to seek to withdraw the Application is entitled to deference.⁵⁷ But where the statute is clear on its face, or is clear in light of its statutory scheme and legislative history, deference is inappropriate: “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁵⁸ This is especially so where, as here, DOE’s interpretation is reflected in nothing more formal than a motion before this Board — and not, for example in a formal agency adjudication or notice-and-comment rulemaking.⁵⁹ Moreover, as DOE’s counsel appeared to concede at argument,⁶⁰ the NRC does not owe deference to DOE’s understanding of the NRC’s own responsibilities under section 114(d). Once DOE has applied for a construction authorization, the NRC — not DOE —

⁵⁵ 128 Cong. Rec. S4128 (1982).

⁵⁶ DOE advances a further argument in this regard. As DOE points out, the NRC has interpreted the 3-year deadline in section 114(d) to commence with the docketing, rather than the submission, of the Application. *See* Licensing Proceedings for the Receipt of High-Level Radioactive Waste at a Geologic Repository: Licensing Support Network, Design Standards for Participating in Websites, 66 Fed. Reg. 29,453, 29,453 n.1 (2001). DOE suggests, therefore, that the NRC’s requirement to reach a merits decision on the Application “pertains only while an application is docketed before the NRC.” DOE Reply at 11. If the NRC grants DOE’s motion to withdraw, thereby removing the Application from the docket, DOE contends that the NRC is relieved of its obligation to render a decision within 3 years. But the Commission’s decision to define the term “submission” as “docketing” is relevant only to the statutory deadline, not to the NRC’s mandate to reach a merits decision on the Application. Surely, Congress did not intend that the NRC could unilaterally nullify its statutory duty to consider the Application by simply removing that Application from the docket.

⁵⁷ DOE Motion at 7.

⁵⁸ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Thus, contrary to DOE’s arguments (DOE Motion at 8), there is no legislative “gap” in the NWPA.

⁵⁹ *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

⁶⁰ Tr. at 77 (June 3, 2010).

is charged with granting or denying the construction permit application under the sequential process prescribed by the NWPA.⁶¹

Fifth, DOE claims that Congress intended that DOE be treated just like any private applicant, including the right to seek freely to withdraw its application.⁶² Under the framework of the NWPA, however, DOE's application is not like any other application, and DOE is not just "any litigant," because its policy discretion is clearly limited by the NWPA. The obvious difference is that Congress has never imposed a duty on private NRC applicants to pursue license applications, nor has Congress required that the Commission reach a decision on a private licensing application that the applicant chooses to withdraw. In contrast, Congress here required DOE to file the Application. Statutes should not be interpreted so as to create internal inconsistencies, an absurd result, or an interpretation inconsistent with congressional intent.⁶³ DOE claims that the "law on withdrawal does not require a determination of whether [the applicant's] decision [to withdraw] is sound,"⁶⁴ but neglects to note that the rationale for the decision from which it quotes was that the applicant's filing was "wholly voluntary" in the first place.⁶⁵

Sixth, DOE claims significance in the fact that the NWPA does not mandate construction and operation of the repository, even if the NRC should approve a construction authorization.⁶⁶ We find that fact insignificant. Congress crafted a multistage process for consideration of the Yucca Mountain repository, including the requirements that DOE file the Application and that the NRC consider it and issue a "final decision" approving or disapproving construction. That further steps must take place before a repository might actually be constructed and become operational does not entitle DOE to ignore the process that Congress created. The Board is mindful that the NWPA does not compel the NRC to grant a construction authorization for a repository at Yucca Mountain. But the possibility that the Application might not be granted — or, if granted, that the repository might ultimately not be constructed and become operational for any number of reasons — does not entitle DOE to terminate a statutorily prescribed review process.

Seventh, DOE claims that Congress's funding of a Blue Ribbon Commission on America's Nuclear Future (Blue Ribbon Commission) to review federal policy on spent nuclear fuel management and disposal and to examine alternatives to

⁶¹ See *Nuclear Energy Inst.*, 373 F.3d at 1289 ("We defer to NRC's interpretation of the NWPA under *Chevron*" in promulgating regulations to be applied in administering the licensing stage).

⁶² Tr. at 297 (June 3, 2010).

⁶³ See *United States v. Turkette*, 452 U.S. 576, 580 (1981); *United States v. Raynor*, 302 U.S. 540, 547 (1938).

⁶⁴ DOE Reply at 28.

⁶⁵ *Pacific Gas and Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51 (1983).

⁶⁶ DOE Motion at 5.

Yucca Mountain is inconsistent with continuing to process the Yucca Mountain Application.⁶⁷ We disagree. In including funding for the Blue Ribbon Commission in the 2010 Appropriations Bill,⁶⁸ Congress did not repeal the NWPA or declare that the Yucca Mountain site is inappropriate, as DOE concedes in its reply.⁶⁹ Unless and until Congress does so, both DOE and the NRC are bound to follow the existing law.

Finally, DOE says that it would be “absurd and unreasonable” to require DOE to proceed with an application that it no longer favors on policy grounds.⁷⁰ Where the law is declared to require it, however, DOE and other agencies within the Executive Branch are often required to implement legislative directives in a manner with which they do not necessarily agree.⁷¹ The Board is confident that

⁶⁷ *Id.* at 7.

⁶⁸ See Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (2009) [hereinafter Appropriations Act].

⁶⁹ See DOE Reply at 20. In appropriating funds for the Blue Ribbon Commission, Congress instructed the Commission to “consider *all* alternatives for nuclear waste disposal,” necessarily including a geologic repository at Yucca Mountain. Appropriations Act at 2865 (emphasis added). In the House Committee Report accompanying the appropriations bill, the Committee conditioned its funding of the Blue Ribbon Commission, “provided that Yucca Mountain is considered in the review.” See H.R. Rep. No. 111-203 at 85 (2009). The Conference Report contains a reconciliation provision directing that “[r]eport language included by the House which is not contradicted by the report of the Senate or the conference, and Senate report language which is not contradicted by the report of the House or the conference is approved by the committee of conference.” See H.R. Rep. No. 111-278 at 39 (2009). There appears to be no express contradiction of the House Report language, which requires the Blue Ribbon Commission to consider Yucca Mountain, in either the Conference Report or the Senate Report and thus the language in the House Report appears to be the law. See S. Rep. No. 111-45 (2009); H.R. Rep. No. 111-278. See also Blue Ribbon Commission on America’s Nuclear Future Advisory Committee Charter (Mar. 1, 2010), available at http://www.energy.gov/news/documents/BRC_Charter.pdf (requiring the Commission to evaluate all alternatives for permanent disposal of HLW, including deep geologic disposal). Thus, Congress’s decision to fund the Blue Ribbon Commission — and to keep Yucca Mountain as an alternative to be considered — does not indicate any congressional intent to disrupt the process mandated by the NWPA. Indeed, in the same Appropriations Act, Congress also appropriated \$93,400,000 for “nuclear waste disposal activities to carry out the purposes of the [NWPA],” i.e., for Yucca Mountain licensing activities. Appropriations Act at 2864. *But see* Steven Chu, Sec’y, Dep’t of Energy, Remarks at the Meeting of the Blue Ribbon Commission on America’s Nuclear Future 27 (Mar. 25, 2010) (transcript available at <http://brc.gov/pdfFiles/0325scur.pdf>), where the Secretary stated, “I don’t want the committee . . . spending time and saying by looking at past history was Yucca Mountain a good decision or a bad decision and whether it can be used as a future repository.”

⁷⁰ DOE Reply at 18.

⁷¹ See, e.g., *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007) (requiring EPA to include greenhouse gases within its regulatory purview under the Clean Air Act); *Northern States Power Co. v. U.S. Department of Energy*, 128 F.3d 754 (D.C. Cir. 1997) (granting a partial mandamus against DOE to enforce its prior holding in *Indiana Michigan Power Co. v. U.S. Department of*

(Continued)

DOE can and will prosecute the Application before the NRC in good faith,⁷² as we believe the NWPA requires. Moreover, DOE has acknowledged that its decision to seek to withdraw the Application is not based on a judgment that Yucca Mountain is unsafe or on flaws in the Application. It should be able to proceed with an evaluation of the technical merits, as directed by the NWPA, without undue discomfort.

If Congress does not wish to see the Yucca Mountain project go forward, it can of course change the law or decide not to fund the proposed repository. Likewise, this Board's decision does not in any way bear upon whether, after considering the merits, the NRC will ultimately authorize construction. As directed by the Commission, we merely decide whether DOE's motion to withdraw the Application from the NRC's consideration should be granted. We conclude that, under the statutory process Congress created in the NWPA, which remains in effect, DOE lacks authority to seek to withdraw the Application. DOE's motion must therefore be denied.

B. Conditions of Withdrawal

Because the Board concludes that DOE lacks discretion to withdraw the Application at this time, the question of appropriate conditions is moot. The Commission apparently contemplated, however, that the Board would address "the terms of DOE's requested withdrawal, as well as DOE's authority to withdraw the application in the first instance."⁷³ Accordingly, we briefly address the conditions that the Board concludes should apply if DOE were permitted to withdraw.

1. Dismissal Without Prejudice

DOE seeks dismissal of the Application with prejudice "because it does not intend ever to refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain."⁷⁴ According to DOE, dismissal with prejudice "will provide finality in ending the Yucca Mountain project for a permanent geologic repository and will enable the Blue Ribbon Commission, as established by the Department and funded by

Energy, 88 F.3d 1272 (D.C. Cir. 1996), that the NWPA creates an obligation for DOE to dispose of spent nuclear fuel by January 31, 1998); *see also* U.S. Const. art. II, § 3, cl. 4 (the President shall "take Care that the Laws be faithfully executed").

⁷² As counsel for DOE stated at argument, "[w]e will do what we're ordered to do." Tr. at 78 (June 3, 2010).

⁷³ *Dep't of Energy*, CLI-10-13, 71 NRC at 389.

⁷⁴ DOE Motion at 3 n.3.

Congress, to focus on alternative methods of meeting the federal government's obligation to take high-level waste and spent nuclear fuel."⁷⁵

Contrary to DOE's request, if dismissal were allowed at all it should be without prejudice. The Board is not aware, in previous NRC practice, of any applicant voluntarily seeking dismissal with prejudice of its own application. Moreover, no aspect of the Application has been adjudicated on the merits. In NRC practice, "it is highly unusual to dispose of a proceeding on the merits, i.e., *with prejudice*, when in fact the health, safety and environmental merits of the application have not been reached."⁷⁶

While the current Secretary may have no intention of refile, his judgment should not tie the hands of future Administrations for all time.⁷⁷ Rather, "the public interest would best be served by leaving the . . . option open to the applicant should changed conditions warrant its pursuit."⁷⁸ The Board appreciates that Nevada and other opponents of the Yucca Mountain repository have expended substantial resources, but, as the Commission has stated, "it is well settled that the prospect of a second lawsuit [with its expenses and uncertainties] . . . or . . . another application . . . does not provide the requisite quantum of legal harm to warrant dismissal with prejudice."⁷⁹

2. *Preservation of LSN Document Collection*

For similar reasons, if DOE were permitted to withdraw the Application, it should be required to preserve, in usable form, the millions of documents that DOE has placed in its LSN document collection (LSNdc).

On December 17, 2009, the LSN Administrator (LSNA) submitted a memorandum concerning potential impacts on the LSN should DOE be allowed to withdraw the Application.⁸⁰ In response, this Board issued various orders and held case management conferences with the parties, the interested governmental

⁷⁵ *Id.* at 3.

⁷⁶ *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133 (1981) (emphasis in original).

⁷⁷ To date, since 1982, the repository process has moved forward through five Administrations and the leadership of nine different DOE Secretaries. See *Opposition of the Nuclear Energy Institute to the Department of Energy's Motion for Withdrawal* (May 17, 2010) at 4 n.8.

⁷⁸ *North Coast*, ALAB-662, 14 NRC at 1132.

⁷⁹ *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 n.3 (1999) (quoting *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 979 (1981)).

⁸⁰ Memorandum from Daniel J. Graser, LSNA, to Administrative Judges (Dec. 17, 2009).

participants, and the petitioners⁸¹ concerning how DOE's potential withdrawal would affect the LSN and to propose withdrawal conditions necessary to assure DOE meets its commitment to: (1) maintain its LSN website until final appellate review of any order terminating this proceeding,⁸² and (2) "preserve and archive its project records thereafter in compliance with federal requirements and consistent with DOE's objective of preserving the core scientific knowledge from the Yucca Mountain project."⁸³

As part of this process, the Board submitted written questions to DOE to provide a better understanding of the structure of DOE's document collection and its archiving plans, so that the Board might fashion appropriate conditions if DOE's motion to withdraw the Application were to be granted.⁸⁴ DOE submitted its answers to these questions on May 24, 2010. On June 1, 2010, Nevada and Nye County exercised the option provided to all parties, interested participants, and petitioners to respond to DOE's answers. These responses and comments from other parties, interested governmental participants, and petitioners were discussed at the case management conference held on June 4, 2010.⁸⁵

Based on the foregoing, it was apparent that all were in close agreement regarding the conditions necessary to preserve LSN documentary material. Subsequently, the Board directed the parties, the interested governmental participants, and the petitioners to confer with DOE and to submit agreed-upon proposed conditions.⁸⁶

A set of proposed conditions regarding DOE's LSNdc, based in substantial part on the submitted agreement,⁸⁷ is set forth in the Appendix. In the Board's view, these conditions would assure that DOE's LSNdc is appropriately preserved and archived. Therefore, the Board concludes that, in the event DOE's motion to withdraw the Application for the Yucca Mountain geologic repository were granted, the conditions set forth in the Appendix should be imposed.

⁸¹ See CAB Order (Concerning LSNA Memorandum) (Dec. 22, 2009) (unpublished); Tr. at 345-405 (Jan. 27, 2010); CAB Order (Questions for Several Parties and LSNA) (Apr. 21, 2010) (unpublished); Tr. at 316-447 (June 4, 2010).

⁸² The Department of Energy's Status Report on Its Archiving Plan (Feb. 19, 2010) at 2.

⁸³ The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference (Feb. 4, 2010) at 2.

⁸⁴ See CAB Order (Questions for Several Parties and LSNA) (Apr. 21, 2010) (unpublished).

⁸⁵ See Tr. at 316-447 (June 4, 2010).

⁸⁶ CAB Order (June 7, 2010) at 1 (unpublished).

⁸⁷ Joint Report Concerning Conditions Regarding DOE LSN Document Collection (June 18, 2010) [hereinafter Joint Report].

III. INTERVENTION PETITIONS

To attain party status in this one-of-a-kind proceeding, each of the five new petitioners (Washington, South Carolina, Aiken County, PIIC, and NARUC) must establish standing, address the timeliness of its petition, demonstrate compliance with the LSN requirements, and set forth at least one admissible contention. DOE, the movant and applicant, does not oppose the intervention of the five petitioners. Nye County, Nevada, the host county of the proposed repository, filed a brief answer supporting the five intervention petitions, as did the party comprised of the four Nevada counties of Churchill, Esmeralda, Lander, and Mineral. The NRC Staff and Nevada each filed answers opposing the petitions on various grounds, with NCAC, JTS, and Clark County joining Nevada's answers.⁸⁸

In the sections that follow, we conclude that all five petitioners have met the applicable requirements. Accordingly, we grant each of the intervention petitions. We also conclude that Washington, South Carolina, Aiken County, and PIIC meet the lesser requirements for participation as interested governmental participants under 10 C.F.R. § 2.315(c).

A. Standing

In determining whether an individual or organization should be granted party status "as of right," the NRC applies judicial standing concepts that require a petitioner to establish: (1) a distinct and palpable harm that constitutes injury-in-fact; (2) the harm is fairly traceable to the challenged action; and (3) the harm is likely to be redressed by a favorable decision.⁸⁹

1. *Washington, South Carolina, Aiken County, and PIIC*

Petitioners Washington, South Carolina, Aiken County, and PIIC assert similar injuries as a basis for standing. All four petitioners either have within their boundaries temporary HLW storage facilities or represent communities located adjacent to such facilities. Washington is home to the Hanford Nuclear Reservation (Hanford), where, Washington asserts, millions of gallons of highly toxic radioactive weapons program waste and foreign reactor waste are stored in aging

⁸⁸ Clark County's answer also included a brief argument regarding the timeliness of the five petitions. See *infra* text accompanying note 127. Additionally, the County of Inyo, California, and Eureka County, Nevada, an interested governmental participant, each filed brief responses stating they took no position regarding the five petitions. The other parties to the proceeding, California, White Pine County, Nevada, and NEI, filed no answers to the petitions.

⁸⁹ See *Dep't of Energy*, LBP-09-6, 69 NRC at 381-82. The NRC requirements for standing, which generally track judicial concepts, are set forth in 10 C.F.R. § 2.309(d).

underground tanks.⁹⁰ South Carolina declares that it is home to seven commercial reactors that store HLW onsite, as well as the Savannah River Site (SRS), where, similar to Hanford, weapons program waste is currently housed.⁹¹ Aiken County points out that it is the county in which the SRS is found,⁹² and PIIC states that its reservation is located close to a nuclear reactor and immediately adjacent to an independent spent fuel storage installation (ISFSI), where spent nuclear fuel is currently stored.⁹³ According to petitioners, DOE's decision to abandon Yucca Mountain leaves this nation without the permanent disposal solution mandated by the NWPA, and thus without a federally promised process and timetable for removal of HLW from temporary storage facilities. As a result, petitioners assert they will be forced to bear the associated health and safety risks indefinitely,⁹⁴ or at least until Congress legislates an alternative method of disposal — a prospect that, if achievable at all, would mean decades of delay. The petitioners are correct. This prolonged risk of harm, and the cessation of the legislatively established process looking to alleviate it, constitute injury-in-fact.

The second and third requirements for standing — causation and redressability — necessarily follow from petitioners' injury. With respect to causation, DOE's decision to abandon the Yucca Mountain project, in the absence of any ongoing alternative solution, will delay indefinitely any possible removal of HLW from the

⁹⁰ Washington Petition at 2.

⁹¹ South Carolina Petition at 4.

⁹² Aiken County Petition at 2. Aiken County's petition incorporates South Carolina's petition by reference, necessarily including South Carolina's contentions, as well as its timeliness and standing arguments. No party objects to this incorporation, except for the NRC Staff, which argues that "[t]he Commission's strict pleading requirements disfavor incorporation by reference in an intervention petition." NRC Staff Answer to Petition of Aiken County, South Carolina, to Intervene (Mar. 29, 2010) at 5. In support of this position, the Staff quotes dicta in a Commission decision suggesting that the NRC would not accept "incorporation by reference of another petitioner's issues" in an instance where the petitioner has not submitted "at least one admissible issue of its own." *Id.* at 6 (quoting *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 133 (2001)). In the instant case, where Aiken County is a subsidiary governmental unit, whose standing is based upon the same injury as that of South Carolina, in which it is located, we find incorporation appropriate. Moreover, where Aiken County relies on precisely the same legal arguments as South Carolina — arguments that do not require any factual support — we see no reason to prohibit its adoption of South Carolina's contentions. Similarly, where, as here, Aiken County's contentions are based on the same triggering event as those of South Carolina — namely, DOE's decision to seek withdrawal — we accept Aiken County's incorporation of South Carolina's timeliness arguments.

⁹³ PIIC Petition at 2.

⁹⁴ For example, Washington describes the ongoing leakage of radioactive waste from underground tanks at Hanford as threatening to inflict "irreversible environmental harm within Washington, and beyond." Washington Petition at 3. Additionally, Washington contends that abandoning Yucca Mountain will require the redesign and reconstruction of a costly and 52-percent-finished Waste Treatment Plant, which serves as "the linchpin for completing Hanford's tank waste mission." *Id.* at 4-5.

temporary storage sites affecting petitioners, thereby prolonging the associated risks. With regard to redressability, a decision to reject DOE's withdrawal motion will require that DOE continue to follow the licensing process established by the NWPA, along the path toward the prospect of a permanent HLW repository.

As previously indicated, DOE does not challenge the standing of any petitioner. Only Nevada particularizes arguments that petitioners lack standing, while Clark County, NCAC, and JTS join those arguments.⁹⁵ Nevada tailors its objections to the circumstances of each petitioner, but its arguments are essentially the same. First, Nevada characterizes the alleged injury as too "general" to support standing and faults petitioners for failing "to explain how abandoning Yucca Mountain would give rise to impacts beyond those already present."⁹⁶ Citing the Licensing Board's ruling in *White Mesa*, Nevada argues that petitioners fail to explain "how the alleged impacts would arise from the proposed . . . activities as opposed to past activities not in issue."⁹⁷ But *White Mesa* was a license amendment case, where the Board found no "larger risk of injury" flowing from the processing and storage activities sought to be authorized by the amendment. In the instant case, petitioners have clearly established a larger risk of injury, flowing from DOE's attempt to abandon its responsibilities under the NWPA, thereby virtually insuring that the risks associated with temporary storage of HLW will continue to impact

⁹⁵ NRC Staff opposes only Aiken County's standing on the grounds that that it "does not explain how its injury can be redressed by a favorable decision in this proceeding." NRC Staff Answer to Aiken County at 5. Because we accept Aiken County's incorporation of South Carolina's petition, *see supra* note 92, and the Staff does not object to South Carolina's standing, its argument necessarily fails.

⁹⁶ *See, e.g.*, Answer of the State of Nevada to the State of South Carolina's Petition to Intervene (Mar. 29, 2010) at 2 [hereinafter Nevada Answer to South Carolina].

⁹⁷ *Id.* (citing *International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-01-15, 53 NRC 344, *aff'd*, CLI-01-21, 54 NRC 247 (2001)). In its answer to PIIC's petition, Nevada cites two additional license amendment cases for the same proposition. State of Nevada's Answer to Prairie Island Indian Community's Petition to Intervene (May 4, 2010) at 4 [hereinafter Nevada Answer to PIIC]. In *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185 (1999), the Commission upheld the Licensing Board's denial of standing, where the petitioner failed to "indicate *how* [the alleged] harms might result from the license amendments, particularly given not only the shutdown status of the facility, but also the continued applicability of the NRC's safety-oriented regulations governing defueled nuclear plants." *Id.* at 192. In *Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414 (1997), the Board held that petitioner failed to specify any radiological contacts "with enough concreteness to establish some impact on him that is sufficient to provide him with standing." *Id.* at 426. Neither case bears any similarity to the case at hand, where petitioners establish quite clearly how a denial of DOE's motion would prolong their exposure to health and safety risks.

petitioners indefinitely (i.e., beyond “temporary” storage). Thus, petitioners’ injury is sufficiently “distinct and palpable” to give rise to standing.⁹⁸

Second, Nevada challenges what it characterizes as petitioners’ attempts to assert purely procedural rights (i.e., the right to have DOE’s application be considered on its merits) without concrete interests in the outcome of the proceeding.⁹⁹ Nevada relies upon the Supreme Court’s ruling in *Lujan*, which allows petitioners to enforce procedural rights only if “the procedures in question are designed to protect some threatened concrete interest of [theirs] that is the ultimate basis of [their] standing.”¹⁰⁰ But here, petitioners do assert a concrete interest — namely, the interest in removal of HLW from temporary storage facilities,

⁹⁸ With respect to PIIC, Nevada advances two related arguments. First, it argues that PIIC’s asserted injury is “indistinguishable” from a “generalized concern” about the destruction of scenery and wildlife in a national forest, which the Supreme Court found insufficient to confer standing upon a national environmental group, the Sierra Club. Nevada Answer to PIIC at 2 (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)). Second, Nevada argues that PIIC “bears a special obligation . . . to identify the approximate times when contamination and exposures may occur,” in light of the NRC’s generic “waste confidence” rulemaking determination that spent fuel can be stored safely onsite for at least 30 years. Neither argument defeats petitioners’ standing. As to the first, PIIC — unlike the Sierra Club — is an Indian Tribe whose reservation is adjacent to facilities where spent nuclear fuel is currently stored. PIIC asserts harm to the health and safety of its members, the nearest of which resides just 600 yards from an ISFSI. PIIC Petition at 3. Thus, the alleged impacts amount to more than a “mere interest in a problem,” as Nevada would have it. Nevada Answer to PIIC at 2 (citing *Morton*, 405 U.S. at 739). As to Nevada’s second argument, Nevada cites no support for such a claimed “special obligation,” and there is none. As should be obvious, there is no requirement that a petitioner identify the time at which the asserted harm will occur when the subject is the storage of HLW any more than a petitioner must identify the moment an asserted accident might happen in a reactor proceeding.

⁹⁹ See, e.g., Nevada Answer to PIIC at 5-6.

¹⁰⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992). Nevada cites two additional circuit court cases for this proposition. In *Electric Power Supply Association v. Federal Energy Regulatory Commission*, 391 F.3d 1255 (D.C. Cir. 2004), in which the petitioner challenged a FERC rule permitting certain *ex parte* communications in agency hearings, Nevada suggests that the court granted standing only “because [petitioner’s] members had concrete financial interests at stake and were participating as parties in the hearings where the rule applied.” See, e.g., Nevada Answer to PIIC at 5. Nevada overlooks, however, the court’s unequivocal statement that “[petitioner’s] standing is not defeated by the fact that it cannot show, with any certainty, that its or its members’ financial interests will be damaged by the operation of [FERC’s rule].” *Elec. Power Supply*, 391 F.3d at 1262. Thus, the *Elec. Power Supply* holding actually supports petitioners’ bids for standing here, where the petitioners have established a concrete risk of harm, albeit without absolute certainty that it will come to pass. Nevada cites *Guerrero v. Clinton*, 157 F.3d 1190 (9th Cir. 1998), also to no avail. In that case, the court explicitly declined to decide whether petitioners’ “concrete interests” were affected, because it found “there is nothing that can be done by way of judicial review to redress the adverse consequences . . . that they say they are suffering.” *Id.* at 1194. The instant circumstances hardly fit that mold. Thus, *Guerrero* does nothing to bar the petitioners’ “concrete interests” from establishing standing.

in accordance with the process mandated by the NWPA.¹⁰¹ Moreover, Nevada’s suggestion that petitioners will “disappear from the scene” once their procedural right is vindicated (i.e., DOE’s motion is denied), thus leaving their interests “at the mercy of other parties,”¹⁰² is wholly unfounded. None of the petitioners affirmatively asserts that denial of DOE’s motion will terminate its participation. Indeed, as PIIC states,¹⁰³ given DOE’s recent reversal of position, the petitioners have every reason to remain active participants as proponents of the Application in this proceeding.

Having rejected Nevada’s objections, we conclude that petitioners Washington, South Carolina, Aiken County, and PIIC have all established standing pursuant to 10 C.F.R. § 2.309(d). Accordingly, we need not address their respective bids for discretionary intervention under 10 C.F.R. § 2.309(e). We do find, however, that, if not admitted as parties, these petitioners would qualify for participation under 10 C.F.R. § 2.315(c) as interested governmental participants.¹⁰⁴

2. NARUC

To establish representational standing, an organization must: (1) demonstrate

¹⁰¹ Under the Supreme Court’s ruling in *Lujan*, one who asserts a procedural right to protect a concrete interest “can assert that right without meeting all the normal standards for redressability and immediacy.” 504 U.S. at 572 n.7. Nevada states, however, that in the event we decline to treat this as a procedural rights case, petitioners fail to meet the “normal standards for redressability.” Specifically, Nevada submits that petitioners’ injury can only be redressed if Yucca Mountain is ultimately licensed — an outcome that is far from certain. *See, e.g.*, Nevada Answer to PIIC at 5 n.2. But Nevada misapprehends the petitioners’ statement of redressability. Redress will occur not if and when Yucca Mountain is ultimately licensed, but rather upon resumption of the licensing process, which is designed to move the nation further along the path to a geologic repository. This form of redress, as articulated by petitioners, is absolutely certain to result from the denial of DOE’s motion. But even if we were to accept Nevada’s formulation of redress, petitioners need not demonstrate a “substantial likelihood” of redressability. *See, e.g., id.* (citing *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 78 (1978)). Rather, petitioners need only show that redress is “likely,” as opposed to “speculative.” *See Lujan*, 504 U.S. at 561. Although it did not make the licensing of Yucca Mountain a certitude, DOE’s filing of an 8600-page application, after the expenditure of many billions of dollars and more than two decades of study, certainly moved the likelihood of licensure out of the realm of what reasonably can be labeled “speculative.”

¹⁰² *See, e.g.*, Nevada Answer to South Carolina at 3.

¹⁰³ Reply of the Prairie Island Indian Community to Answers to Petition to Intervene (May 11, 2010) at 7 [hereinafter PIIC Reply].

¹⁰⁴ We reject Nevada’s argument that “PIIC has not designated a single representative” as is required under 10 C.F.R. § 2.315(c). Nevada Answer to PIIC at 7. Nevada apparently overlooks page 4 of PIIC’s petition, where PIIC explicitly identifies its General Counsel, Philip R. Mahowald. PIIC Petition at 4. Indeed, PIIC’s designation of its General Counsel is no different than Nevada’s designation of its Attorney General in its intervention petition. *See* State of Nevada’s Petition to Intervene as a Full Party (Dec. 19, 2008) at 1.

that the licensing action will affect at least one of its members; (2) identify that member by name and address; and (3) show it is authorized by that member to request a hearing on his or her behalf.¹⁰⁵

NARUC is a national organization comprised of state public utility commissioners charged with the duty to protect the health, safety, and economic interests of ratepayers. In its petition to intervene, as amended,¹⁰⁶ NARUC seeks to demonstrate representational standing by submitting the affidavits of two member state Commissioners — a Commissioner with the Minnesota Public Utilities Commission and a Commissioner with the South Carolina Public Service Commission.¹⁰⁷

NARUC characterizes the injury to its members as follows: DOE's withdrawal of the Application will delay indefinitely the federal government taking title to and disposing of HLW pursuant to the NWPAs, which will increase the costs to regulated utilities of interim storage and security measures.¹⁰⁸ NARUC states that ratepayers, via the pass-throughs of regulated utilities, have contributed over 17 billion dollars to the Nuclear Waste Fund (NWF) established under the NWPAs, and will continue to pay into the NWF, even if DOE is permitted to abandon Yucca Mountain.¹⁰⁹ We agree with NARUC that, because state utility commissioners are responsible for protecting ratepayers' interests and overseeing the operations of regulated electric utilities, these economic harms constitute its members' injury-in-fact.

The causation and redressability requirements for standing follow from NARUC's alleged injury. With respect to causation, DOE's abandonment of

¹⁰⁵ *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000).

¹⁰⁶ NARUC filed an amendment to its intervention petition on May 11, 2010, in which it named one of the Commissioners of Minnesota as an additional member to demonstrate representational standing. Supplement/Amendment to Petition of the National Association of Regulatory Utility Commissioners to Intervene (May 11, 2010) at *1 [hereinafter NARUC Petition Amendment]. Both the Staff and Nevada characterize the amendment as an unauthorized filing, which the Board should reject. *See* State of Nevada's Answer in Opposition to Supplement/Amendment to Petition of [NARUC] to Intervene (May 19, 2010) at 2; NRC Staff Answer to Supplemental/Amendment to Petition of [NARUC] to Intervene (May 21, 2010) at 4. In the unique circumstances of this proceeding, we find it appropriate to accept NARUC's amendment to its petition. In similar fashion, because of the significance of the issues at hand, we permitted DOE to reply to the answers to its motion to withdraw, a right to which it is not entitled under the regulations. *See* 10 C.F.R. § 2.323(c). Further, in accepting DOE's forty-page reply, we have allowed DOE great latitude to make and to respond to arguments that could have been reasonably anticipated in its initial nine-page motion to withdraw. Having allowed DOE such leeway, basic fairness requires us to allow NARUC to amend its petition and permit a like treatment of all participants' filings.

¹⁰⁷ *See* NARUC Petition at 9-10; NARUC Petition Amendment at *1.

¹⁰⁸ NARUC Petition at 11.

¹⁰⁹ *Id.*

the Application will delay the removal of wastes from interim storage sites nationwide, increasing costs to regulated utilities and fees paid by ratepayers. In regard to redressability, a decision to reject DOE's motion to withdraw will substantially diminish the economic harms alleged by NARUC by maintaining the NWPA licensing process and continuing along the legislatively established course toward a possible permanent repository for HLW.

Both Nevada and the Staff challenge NARUC's standing. The Staff concedes that NARUC's claimed injury is similar to the economic harm asserted by NEI, which a previous Construction Authorization Board held was sufficient to establish standing.¹¹⁰ The Staff, however, distinguishes NARUC's economic harm from NEI's, stating that the intended beneficiaries of the NWPA are the nuclear utilities, not ratepayers.¹¹¹ We find this distinction neither meaningful nor persuasive. The fact that nuclear utilities are the "intended beneficiaries" of the NWPA is irrelevant to NARUC's standing.¹¹² On the contrary, the economic harms alleged by NEI and NARUC are indistinguishable because the fees required to be paid into the NWF, pursuant to the NWPA, by nuclear utilities regulated by NARUC members are directly passed through to ratepayers.¹¹³

Nevada objects to NARUC's standing on the grounds that the Commissioner of the South Carolina Public Service Commission cannot establish standing as of right because the State of South Carolina is also petitioning to intervene in this proceeding.¹¹⁴ Under 10 C.F.R. § 2.309(d)(2)(ii), Nevada argues, only a "single designated representative" of a state may be admitted as a party. Nevada's argument is without merit. The Commissioner of the South Carolina Public Service Commission is not seeking to be admitted as a party to represent the State of South Carolina. Rather, NARUC names the Commission member for

¹¹⁰ *Dep't of Energy*, LBP-09-6, 69 NRC at 433.

¹¹¹ NRC Staff Answer to National Association of Regulatory Utility Commissioners' Petition to Intervene (May 4, 2010) at 7 [hereinafter NRC Staff Answer to NARUC].

¹¹² The Staff relies solely upon *Roedler v. U.S. Department of Energy*, 255 F.3d 1347 (Fed. Cir. 2001), asserting that only nuclear utilities are the intended beneficiaries of the NWPA. But *Roedler* involved a class action suit brought by ratepayers seeking damages based on the established breach of the Standard Contract. *Id.* at 1350. The court held that ratepayers were not third-party beneficiaries of the Standard Contract and therefore could not sue for breach of contract when the DOE failed to dispose of nuclear waste by the statutory deadline. *Id.* at 1353. No question of standing was involved in *Roedler*. Nor is "third-party beneficiary" status, a contract law concept, relevant to any element of the standing analysis in this instance. Thus, *Roedler* is not pertinent to NARUC's claim of economic injury as the basis for its standing.

¹¹³ We need not linger on the Staff's argument that an economic harm is insufficient to establish standing under the AEA. See NRC Staff Answer to NARUC at 7. As we explained above, economic harm itself has been held sufficient to establish standing under the NWPA in the circumstances of this proceeding. *Dep't of Energy*, LBP-09-6, 69 NRC at 433.

¹¹⁴ State of Nevada's Answer to the National Association of Regulatory Utility Commissioners' Petition to Intervene (May 4, 2010) at 1-2 [hereinafter Nevada Answer to NARUC].

the purpose of establishing representational standing, so that NARUC may be admitted as a party. In any event, while NARUC's initial intervention petition named only a South Carolina Commissioner, NARUC amended its petition with an affidavit prepared by a Commissioner of the Minnesota Public Utilities Commission, another one of NARUC's members.¹¹⁵ Accordingly, we conclude that NARUC has sufficiently demonstrated representational standing.¹¹⁶

B. Timeliness

Before the Board can grant an intervention petition filed outside the time set forth in the hearing notice,¹¹⁷ the eight factors of 10 C.F.R. § 2.309(c)(1) must be addressed by the petitioners and balanced by the Board.¹¹⁸ Factor (i), good cause, is the most significant of the late-filing factors.¹¹⁹ Absent a showing of good cause, the Board will not entertain a petition filed after the deadline established in the hearing notice unless the petitioner makes a compelling showing on the remaining factors.¹²⁰ Further, the availability of new information is central to determining whether a petitioner has good cause for late filing. A petitioner must show that the information on which its new contention is based was not reasonably available to the public previously and that it filed its intervention petition promptly after learning of such new information.¹²¹

1. Good Cause: 10 C.F.R. § 2.309(c)(1)(i)

With respect to the five petitions before the Board, as all but Nevada (joined by JTS, NCAC, and Clark County) do not contest, there is good cause for the

¹¹⁵ See *supra* note 106, accepting NARUC's amendment to its petition.

¹¹⁶ Nevada also argues that NARUC's alleged injury is "purely procedural" and insufficient to demonstrate standing — the same argument Nevada asserts with respect to the other four petitioners. See Nevada Answer to NARUC at 2-3. For the same reasons stated above, this argument lacks merit. See *supra* text accompanying notes 99-103.

¹¹⁷ U.S. Department of Energy (High Level Waste Repository); Notice of Hearing and Opportunity to Petition for Leave to Intervene on an Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (Oct. 22, 2008).

¹¹⁸ The Board need not detour to discuss the applicability of 10 C.F.R. § 2.309(c) rather than section 2.309(f)(2) in evaluating the timeliness of the petitions to intervene, as all petitioners agree that section 2.309(c) is applicable here.

¹¹⁹ *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 323 (2010); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009).

¹²⁰ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 (2005).

¹²¹ *Id.* at 564-65.

nontimely filings. The petitioners filed their intervention petitions in response to DOE's decision to withdraw the Application with prejudice.¹²² We agree that DOE's motion to withdraw could not have been reasonably anticipated prior to its filing. For nearly two years, DOE has supported and actively prosecuted the Application, therein fully participating in the NWPA process, as mandated by Congress. Never, during that time, did DOE articulate that it would seek to withdraw the Application or claim that it had discretion to do so. Moreover, DOE never wavered in its defense of the technical, safety, and environmental merits of the Application.¹²³ Thus, DOE's decision to withdraw is an unforeseeable change in DOE's posture in this proceeding constituting new information that was not reasonably available to the public, and each petitioner filed promptly after receiving notice of DOE's decision.¹²⁴ In the circumstances presented, petitioners clearly have established good cause for not filing their intervention petitions by December 22, 2008, the deadline set in the notice of hearing.¹²⁵

In arguing that none of the petitioners has shown good cause, Nevada asserts that they should have sought to intervene in support of the Application at the outset of the proceeding, rather than be "lulled into inaction" by the petitions of the other participants.¹²⁶ In a similar vein, Clark County chastises petitioners for presuming that this proceeding will inevitably result in approval of the Application and claims it would have been prudent for petitioners to seek intervention in December 2008.¹²⁷ These arguments misapprehend the requirements for intervention. Under

¹²² See Washington Petition at 1; South Carolina Petition at 2; Aiken County Petition at 3; PIIC Petition at 2; NARUC Petition at 3.

¹²³ DOE opposed every prior intervention petition, including all 318 proffered contentions challenging the Application. See LBP-09-6, 69 NRC at 375. DOE also opposed all but one new contention subsequently proffered by the parties. See *U.S. Department of Energy*, LBP-09-29, 70 NRC 1028, 1030-37 (2009).

¹²⁴ See *Millstone*, CLI-05-24, 62 NRC at 564-65; *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009) ("To show good cause, a petitioner must show that the information on which the new contention is based was not *reasonably available to the public* . . ." (emphasis in original)); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-70 (1992) (explaining that new information may constitute good cause for late intervention if petitioners file promptly thereafter).

¹²⁵ See 73 Fed. Reg. at 63,030.

¹²⁶ See *e.g.*, Nevada Answer to South Carolina at 7. The cases Nevada relies upon for the proposition that a petitioner may not justify intervening after the established deadline by claiming it was "lulled into inaction" by the participation of other parties are completely inapposite to the unique circumstances at hand. Unlike the petitioners in those cases, the five instant petitioners seek neither to re-enter an ongoing proceeding nor to litigate a withdrawing intervenor's admitted contentions. Here, each petitioner seeks to intervene for the first time to litigate a newly raised legal issue, which was prompted by DOE's unforeseen motion to withdraw.

¹²⁷ See, *e.g.*, Answer of Clark County, Nevada to Petitions to Intervene of the State of South Carolina, Aiken County, South Carolina and the State of Washington (Mar. 29, 2010) at 2-3.

the Commission's rules of practice, a petitioner cannot base an intervention petition on an unforeseeable "possibility" that an applicant might later withdraw an application, or on the possibility that the Commission might ultimately deny an application. At the outset of this proceeding the five petitioners were justifiably satisfied that the Application would be fully and fairly adjudicated on the merits without their intervention. With no challenge to the Application, they could not, for example, have set forth contentions that demonstrate a "genuine dispute with the applicant/licensee on a material issue of law or fact," as required by 10 C.F.R. § 2.309(f)(1)(vi). Indeed, as long as DOE continued to prosecute the Application, the five instant petitioners could not have satisfied the Commission's strict requirements for intervention in a licensing proceeding, and any attempt to intervene would have been denied.

Nevada also insists that, based upon the President's campaign promises to abandon Yucca Mountain, which were made prior to the original filing deadline, the petitioners were on notice that DOE would withdraw the Application. According to Nevada, they should have anticipated DOE's motion to withdraw and sought to intervene, if not before the original deadline lapsed, then shortly thereafter.¹²⁸ We disagree. Campaign promises of a political candidate on the stump in no way equate to notice that DOE would seek to withdraw the Application with prejudice and cannot form the basis for filing a petition in advance of the motion to withdraw. In fact, subsequent to such campaign statements and to any press speculation that DOE would seek withdrawal, DOE's own lawyers in this proceeding stated unequivocally that DOE's policy toward Yucca Mountain had not been changed by the election.¹²⁹ Moreover, the Secretary of Energy requested and received funding for DOE "to continue participation in the [NRC] license application process, consistent with the provisions of the Nuclear Waste Policy Act" during the 2010 fiscal year.¹³⁰ Thus, DOE gave no indication it would reverse course and discontinue prosecuting the Application until the eve of its filing a motion to withdraw the Application, with prejudice, and petitioners could not have had cause to file any sooner.

2. Remaining Nontimely Factors: 10 C.F.R. § 2.309(c)(1)(ii)-(viii)

Factors (ii) through (iv) of section 2.309(c)(1) largely mirror the requirements

¹²⁸ See, e.g., Nevada Answer to South Carolina at 5-7.

¹²⁹ Tr. at 76-77 (Mar. 31, 2009).

¹³⁰ FY 2010 Appropriations Hearing, *supra* note 27, at 10-11.

for standing,¹³¹ and as such, the petitioners' arguments, with one exception,¹³² simply reference or mirror their standing arguments.¹³³ Similarly, the positions of the Staff and Nevada as to whether the petitioners satisfy these three nontimely factors are identical to their positions with respect to petitioners' standing.¹³⁴ Accordingly, because the Board has concluded that all petitioners have standing,¹³⁵ so too do these three nontimely factors weigh in favor of the petitioners.¹³⁶

With respect to factor (v) — the availability of other means to protect the petitioners' interests¹³⁷ — as the Staff concedes, intervention in this proceeding is the most direct and adequate remedy for the petitioners to challenge DOE's motion.¹³⁸ Furthermore, the Staff does not dispute that factor (vi) — the extent

¹³¹ 10 C.F.R. § 2.309(c)(1)(ii)-(iv) (concerning the petitioners' right to be made parties, their interest in this proceeding, and the possible effect on them of any Board order).

¹³² Regarding factor (iv) — the effect of any NRC order on the petitioners' interests — South Carolina asserts that if it is not made a party to this proceeding, it might be held not to have a right to petition for review in the Court of Appeals any NRC decision on DOE's motion to withdraw. *See* South Carolina Petition at 11. In response, the NRC Staff claims that a grant of an intervention petition is not a prerequisite for judicial review. *See* NRC Staff Answer to South Carolina Petition to Intervene and Supplement (Mar. 29, 2010) at 8 [hereinafter NRC Staff Answer to South Carolina]. However, given the uncertain state of the law on the judicial review provision, section 119 of the NWPAct, the Staff can in no way be the guarantor of South Carolina's appellate rights. *See Nuclear Energy Inst.*, 373 F.3d at 1287. For its part, Nevada asserts that South Carolina's argument warrants an "A+ for chutzpah" because "[w]hy, on earth, would the NRC 'shoot itself in the foot' by exercising its discretion to grant party status to a petitioner just to enable the petitioner to sue the agency." Nevada Answer to South Carolina at 10. We reject outright Nevada's specious claim that the possibility of an appeal is a reason to deny South Carolina's petition.

¹³³ *See* Washington Petition at 11; NARUC Petition at 16; PIIC Petition at 11; South Carolina Petition at 7-12. As stated *supra* note 92, we accept Aiken County's incorporation of South Carolina's timeliness arguments.

¹³⁴ *See, e.g.*, Nevada Answer to South Carolina at 8-10; NRC Staff Answer to State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 29, 2010) at 7 [hereinafter NRC Staff Answer to Washington].

¹³⁵ *See supra* Section III.A.

¹³⁶ *See Watts Bar*, CLI-10-12, 71 NRC at 325 (declining to overturn the Licensing Board's decision to use the petitioners' demonstration of standing as "the basis for [its] conclusion that these [three] factors weighed in Petitioners' favor").

¹³⁷ 10 C.F.R. § 2.309(c)(1)(v).

¹³⁸ Nevada asserts that factor (v) weighs against the petitioners because each seeks to raise legal issues and may participate effectively before the NRC by filing an amicus brief. *See, e.g.*, Nevada Answer to NARUC at 9-10. We disagree. A petitioner always has the option to seek to file an amicus brief, and following Nevada's reasoning, this factor therefore could never weigh in favor of any petitioner's interest, a result at odds with the regulation's call for a "balancing" of the 10 C.F.R. § 2.309(c)(1) factors. Moreover, amicus curiae participation does not provide the same rights of participation as party status and cannot be considered a substitute means to protect a petitioner's interest or to preserve a petitioner's appellate rights.

to which other parties represent the petitioners' interests¹³⁹ — weighs in favor of each petitioner, except with respect to NARUC, whose interests, the Staff claims, are adequately represented by NEI.¹⁴⁰ Nevada also concedes that Washington has unique interests in this proceeding;¹⁴¹ however, it insists that the other petitioners' interests are represented by NEI.¹⁴² We disagree. Notwithstanding Nevada's and the Staff's arguments to the contrary, the interests of each petitioner are sufficiently special and will not be represented by NEI, a policy organization (i.e., a trade association) with a diverse membership representing the nuclear industry.¹⁴³ Thus, both factors (v) and (vi) weigh in favor of the petitioners.

Further, as to factor (vii), admitting the petitioners as parties will not broaden or delay the proceeding, as Nevada argues.¹⁴⁴ On the contrary, it was DOE, not the petitioners, that broadened the proceeding by submitting its motion to withdraw, thereby putting into issue DOE's authority to request withdrawal. Moreover, entertaining petitioners' legal issue contentions will not cause further delay because existing parties have raised the same issues in briefing DOE's motion to withdraw, and, in any event, the Board has already stayed discovery and the prosecution of all other admitted contentions in this proceeding.

Finally, as to factor (viii), the petitioners' participation will assist in developing a sound record.¹⁴⁵ In arguing otherwise,¹⁴⁶ Nevada interprets the relevant record as the evidentiary record and asserts that, because the petitioners proffer legal

¹³⁹ 10 C.F.R. § 2.309(c)(1)(vi).

¹⁴⁰ See NRC Staff Answer to NARUC at 14.

¹⁴¹ See Answer of the State of Nevada to the State of Washington's Petition to Intervene (Mar. 29, 2010) at 7 [hereinafter Nevada Answer to Washington].

¹⁴² Nevada also claims that if South Carolina's intervention petition is granted, NARUC's interests will be represented by South Carolina. This argument fails, however, because factor (vi) instructs the Board to consider the extent a petitioner's interests are represented by *existing* parties, not potential parties. See 10 C.F.R. § 2.309(c)(1)(vi).

¹⁴³ See *Dep't of Energy*, LBP-09-6, 69 NRC at 429; *The Nuclear Energy Institute's Petition to Intervene* (Dec. 19, 2008) at 1-2.

¹⁴⁴ 10 C.F.R. § 2.309(c)(1)(vii). The NRC Staff points out that South Carolina, and Aiken County by reference, did not address whether their participation might broaden the issues in this proceeding. NRC Staff Answer to South Carolina at 7. Still, the Staff concludes that this factor does not weigh for or against these petitioners, and we agree.

¹⁴⁵ 10 C.F.R. § 2.309(c)(1)(viii).

¹⁴⁶ Warranting only brief mention, the Staff asserts that no petitioner can contribute to the record because none has proffered an admissible contention. See, e.g., NRC Staff Answer to NARUC at 13. This Board will evaluate the admissibility of the petitioners' proffered contentions only *after* it decides whether to entertain the nontimely petitions at all, which it determines by balancing the section 2.309(c)(1) factors. Thus, the Staff's argument that somehow an admissible contention is relevant to analyzing whether a nontimely factor weighs in favor of a petitioner, an analysis that is a prerequisite to determining contention admissibility, is without merit.

issue contentions, their legal arguments will contribute no evidence.¹⁴⁷ Nevada’s narrow reading of the word “record” in the regulation not only overlooks that the regulation contains no such limitation, but also fails to account for the uniqueness of this proceeding.¹⁴⁸ The Commission has recognized that the record of this proceeding includes legal arguments, explaining in its remand decision that DOE’s motion raises fundamental legal questions, both before this Board and before the United States Court of Appeals for the District of Columbia Circuit.¹⁴⁹ The Commission specifically noted the importance of the Board’s decision, and hence necessarily the record, in informing the Court of Appeals’ consideration of DOE’s motion to withdraw.¹⁵⁰ Thus, the participation of the five petitioners will ensure full briefing and argument on the DOE motion before us and the Commission, thereby assisting the development of the judicially reviewable record.

In sum, because each of the petitioners has demonstrated good cause, and because the remaining factors weigh in favor of petitioners, or are neutral at worst, on balance we conclude that we must entertain all five petitioners’ intervention petitions.

3. *LSN Compliance*

Before a petitioner can be granted party status in the HLW proceeding, it must be able to demonstrate substantial and timely compliance with the LSN requirements.¹⁵¹ As part of compliance, each petitioner must identify all its doc-

¹⁴⁷ See, e.g., Nevada Answer to Washington at 8.

¹⁴⁸ Nevada cites *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1979) to support its narrow interpretation of the record; that case does not, however, actually support Nevada’s position. In fact, in *Pebble Springs*, the Commission explained that the relevant record includes legal issues and necessarily legal arguments. *Id.* at 617 (“Permission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented . . .” (emphasis added)). Likewise, the other two cases Nevada relies upon do not support Nevada’s interpretation of the regulatory term “record.” In *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508 (1982), the petitioner sought to intervene well after the commencement of the evidentiary hearing and raised an evidentiary matter. Similarly, in *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878 (1984), the petitioner sought intervention during the evidentiary hearing and proffered a factual contention. Neither case involved legal issue contentions, and thus both cases are actually consistent with *Pebble Springs*, in that the relevant record encompasses issues of both law and fact.

¹⁴⁹ *Dep’t of Energy*, CLI-10-13, 71 NRC at 389.

¹⁵⁰ *Id.*

¹⁵¹ 10 C.F.R. § 2.1012(b)(1). If a petitioner fails to make such a demonstration, it may later request party status upon a showing of “subsequent compliance.” *Id.* § 2.1012(b)(2).

umentary material¹⁵² required by 10 C.F.R. § 2.1003 and designate a responsible LSN official, who can certify that “to the best of his or her knowledge” all such material has been made electronically available.¹⁵³ The certification requirement embodies a good faith standard, meaning that a petitioner need only make a reasonable effort to produce all of its documentary material.¹⁵⁴ Further, as the PAPO Board determined, what constitutes a “reasonable effort” depends on the following factors: the time petitioner has to assemble its collection, the extent of petitioner’s control over the certification deadline, the importance of petitioner’s obligation, and petitioner’s status and financial ability.¹⁵⁵

All five petitioners have filed initial certifications of LSN compliance¹⁵⁶ and subsequent monthly certifications. DOE does not challenge any of those certifications. Only the NRC Staff and Nevada (with Clark County and NCAC joining Nevada’s answer) raise objections, insisting that some petitioners have failed to satisfy the requirements of 10 C.F.R. § 2.1009 and to compile fully their document collections.¹⁵⁷ It is apparent that petitioners have struggled to meet the requirements of Subpart J, but as previously stated, a petitioner or party is not held to a standard of perfection.¹⁵⁸ Unlike Nevada and the Staff, who compiled their respective document collections over the course of many years, these five petitioners have been forced to achieve compliance in just a few months — a time frame thrust upon them by DOE’s sudden reversal of position in this proceeding.

¹⁵²“Documentary material” is defined as (1) “[a]ny information upon which a party, potential party, or interested governmental participant intends to rely and/or to cite in support of its position in the proceeding . . .”; (2) “[a]ny information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party’s position”; and (3) “[a]ll reports and studies, prepared by or on behalf of the potential party, interested governmental participant, or party, including all related ‘circulated drafts,’ relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon and/or cited by a party.” *Id.* § 2.1001.

¹⁵³ *Id.* § 2.1009.

¹⁵⁴ *Dep’t of Energy*, LBP-09-6, 69 NRC at 387.

¹⁵⁵ *Dep’t of Energy*, LBP-04-20, 60 NRC at 314-15.

¹⁵⁶ Aiken County Certification of Electronically Available Documentary Material (Mar. 15, 2010); State of South Carolina’s Initial Certification and Certification of Licensing Support Network Supplementation (Apr. 1, 2010); National Association of Regulatory Utility Commissioners Designation of Responsible Person, Initial Certification, and Certification of Licensing Support Network Supplementation (Apr. 1, 2010); State of Washington Licensing Support Network Initial Certification (Apr. 2, 2010); Prairie Island Indian Community’s Initial and Supplemental Certification of Licensing Support Network, and Designation of Responsible Person (Apr. 30, 2010).

¹⁵⁷ Nevada raises objections to South Carolina, Washington, PIIC, and Aiken County, while the NRC Staff objects to the compliance of South Carolina, Washington, and PIIC. No party objects to NARUC’s compliance with the LSN requirements.

¹⁵⁸ *See, e.g., Dep’t of Energy*, LBP-09-6, 69 NRC at 387-88; *Dep’t of Energy*, LBP-04-20, 60 NRC at 313.

In these circumstances, we find that petitioners “have made every reasonable effort to produce all of their documentary material.”¹⁵⁹ While we expect that petitioners will update their collections “as promptly as possible in each monthly supplementation,”¹⁶⁰ we credit the good-faith efforts they have expended thus far and find sufficient their respective demonstrations of compliance with the standards of 10 C.F.R. § 2.1003.

Moreover, none of the newly proffered contentions raises a factual dispute. Rather, all five petitioners advance legal issue contentions — contentions which, as the Commission has affirmed, do not require any supporting facts.¹⁶¹ Nevada insists that petitioners rely upon a “vast array of factual information” that should be made publicly available, including a transcript of a DOE press conference, a waste management report, and expert affidavits, together with their underlying source documents.¹⁶² Apparently, Nevada interprets “documentary material” to mean any document attached to an intervention petition.¹⁶³ But many of these documents set forth undisputed facts (i.e., DOE’s decision to abandon Yucca Mountain), and some do not even relate to petitioners’ contentions (e.g., affidavits setting forth a basis for standing). Such information hardly constitutes “documentary material” as the regulations define it.¹⁶⁴

Given the unique circumstances described above, we find that all five petitioners have demonstrated substantial and timely compliance with the LSN requirements.¹⁶⁵ Accordingly, nothing about their LSN collections bars them being granted party status in this proceeding.¹⁶⁶

¹⁵⁹ *Dep’t of Energy*, LBP-09-6, 69 NRC at 387 (citing *Dep’t of Energy*, LBP-04-20, 60 NRC at 314-15).

¹⁶⁰ RSCMO, *supra* note 6, at 21.

¹⁶¹ See *Dep’t of Energy*, CLI-09-14, 69 NRC at 590, *aff’g* LBP-09-6, 69 NRC at 422.

¹⁶² See, e.g., Nevada Answer to Washington at 11; Nevada Answer to South Carolina at 14.

¹⁶³ Petitioners do not in the first instance rely upon these attachments as factual support for their contentions. They note them only out of an abundance of caution. For example, PIIC cites to the Affidavit of Ronald C. Callen only “[t]o the degree factual matters are involved” in its contentions. PIIC Petition at 21. In fact, the Callen Affidavit speaks more to PIIC’s standing than to its contentions. No factual support is required for PIIC’s purely legal contentions.

¹⁶⁴ It would appear that none of the remaining documents that Nevada alleges to be missing are subject to production under 10 C.F.R. § 2.1005. Section 2.1005 specifically excludes such material as “[p]ress clippings and press releases” and “[r]eadily available references.”

¹⁶⁵ PIIC’s reply, filed on May 11, 2010, indicates that testing of its LSN arrangements “revealed a glitch in URL’s or other connectivity that unexpectedly delayed the interconnection.” PIIC Reply at 29. This “glitch” was promptly resolved, and PIIC’s LSN document collection came into operation on May 13, 2010. See Corrected Memorandum from Daniel J. Graser, LSNA, to the Administrative Judges (June 22, 2010).

¹⁶⁶ As stated in the initial order admitting the original parties to this proceeding, the failure of any petitioner to participate in the pre-license application phase — which the Board is instructed to

(Continued)

C. Contention Admissibility

All five petitioners proffer virtually identical contentions, which advance claims under the NWPA, NEPA, the Administrative Procedure Act (APA), and certain constitutional provisions. Because only one admissible contention is required for each petitioner to intervene,¹⁶⁷ and given the exceptional circumstances of this proceeding, the Board finds it unnecessary to determine whether all of their contentions meet the admissibility criteria.¹⁶⁸ Instead, we conclude that each petitioner's first proffered contention is admissible, and we reserve judgment on the admissibility of the remaining contentions until a later date, as appropriate.¹⁶⁹ The contention we admit, although worded slightly differently by each of the petitioners, generally provides as follows:

DOE lacks the authority under the NWPA to withdraw the Application.

As noted previously, DOE does not object to the admissibility of this contention, or any of petitioners' other contentions.

Only the NRC Staff raises objections to this contention's admissibility.¹⁷⁰ Specifically, the Staff argues that it falls outside the scope of the proceeding, is immaterial to the findings the NRC must make to support the licensing action, and does not raise a genuine dispute with the applicant on a material issue of law or fact.¹⁷¹ The Staff defines the scope of the proceeding according to the Commission's initial hearing notice: whether DOE's application "satisfies applicable safety, security and technical standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met."¹⁷² By this

consider under 10 C.F.R. § 2.309(a) — did not, in the circumstances presented, preclude the grant of any petition. *Dep't of Energy*, LBP-09-6, 69 NRC at 389. The same circumstances obviously also attend here.

¹⁶⁷ 10 C.F.R. § 2.309(a).

¹⁶⁸ See *Dep't of Energy*, LBP-09-6, 69 NRC at 389-91 for an explanation of the six contention admissibility requirements, which can be found in 10 C.F.R. § 2.309(f)(1).

¹⁶⁹ As the Commission held in affirming the Licensing Board's action in admitting only one of many proffered contentions in *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 501 (2007), it is appropriate for a licensing board to defer the consideration of all but one contention in some limited and exceptional circumstances. If ever there were such circumstances, they are plainly present here.

¹⁷⁰ With respect to PIIC, Nevada (joined by Clark County, NCAC, and JTS) does object to this contention insofar as it questions DOE's compliance with the Standard Contract. Nevada Answer to PIIC at 19. However, Nevada does not challenge PIIC's claims under the NWPA, as expressed in our formulation of the contention. We need not consider the breadth of PIIC's contention at this stage, given that we find it to be admissible at least in part.

¹⁷¹ 10 C.F.R. § 2.309(f)(1)(iii), (iv), (vi).

¹⁷² See, e.g., NRC Staff Answer to Washington at 12 (citing 73 Fed. Reg. 63,029).

logic, the Staff claims, a contention challenging DOE's authority to withdraw the Application falls outside the scope of the proceeding because it does not raise a safety, security, technical, or environmental issue. Moreover, the Staff argues that the contention is not material to the merits of the Application, because it does not directly controvert or allege any omission from the Application.¹⁷³ Thus, according to the Staff, it must be rejected.

We disagree. Unlike the Staff, the Board does not read the Commission's initial hearing notice without regard for the Commission's subsequent pronouncements. The Commission emphatically broadened the scope of the proceeding on April 23, 2010, when it directed the Board to rule on DOE's motion to withdraw. In its order, the Commission recognized that

[f]undamental questions have been raised, both before us and before the D.C. Circuit, regarding the terms of DOE's requested withdrawal, as well as DOE's authority to withdraw the application in the first instance. Interpretation of the statutes at issue and the regulations governing their implementation falls within our province.¹⁷⁴

We can imagine no clearer expansion of this proceeding's scope. Namely, the Commission has ordered us to consider the merits of DOE's withdrawal motion — a purely legal question, unrelated to the technical merits of the Application. Just as DOE offers no merits-based justification for its motion to withdraw, petitioners need not identify any safety, security, technical, or environmental concerns in support of their legal issue contention.

Because we conclude that the petitioners' contention is now clearly within the scope of the proceeding, the legal issue contention is certainly material to this Board's decision on DOE's motion to withdraw. Moreover, the contention raises a genuine dispute with the DOE on a material issue of law — specifically, its authority to withdraw the Yucca Mountain Application. Accordingly, we find that petitioners have all proffered at least one admissible contention.¹⁷⁵

¹⁷³ See, e.g., NRC Staff Answer to Washington at 14-15.

¹⁷⁴ *Dep't of Energy*, CLI-10-13, 71 NRC at 389.

¹⁷⁵ Because the contention is purely legal in nature, we also note that petitioners need not satisfy all of the contention admissibility requirements applicable to a factual contention. The Commission has confirmed, for example, that a proponent of a legal issue contention need not provide supporting facts or expert opinion, as required by 10 C.F.R. § 2.309. *Dep't of Energy*, CLI-09-14, 69 NRC at 590. In the instant case, because petitioners' contention responds to a motion that is purely legal in nature, anything more than merely stating the legal issue and providing the foundational explanation for the issue is not required. Moreover, motion practice is part and parcel to any proceeding, and any procedural motion by an applicant necessarily falls within the scope. A contention based on such a motion is material because procedural issues must be addressed before reaching the merits issues of the proceeding.

IV. CONCLUSION

For the foregoing reasons:

1. The petitions to intervene of Washington, South Carolina, Aiken County, PIIC, and NARUC are *granted*.
 2. As to each such petitioner, the following contention is *admitted*: DOE lacks the authority under the NWPA to withdraw the Application.
 3. Judgment on the admissibility of all other contentions proffered by the foregoing five petitioners is *reserved*.
 4. The motion of the Florida Public Service Commission for leave to participate as amicus curiae and to file a memorandum opposing DOE's withdrawal motion is *granted*.
 5. DOE's motion to withdraw the Application is *denied*.
- It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Paul S. Ryerson
ADMINISTRATIVE JUDGE

Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 29, 2010

APPENDIX

Proposed License Conditions Should DOE's Motion to Withdraw Be Granted

Proposed conditions are set forth herein to help preserve the Department of Energy's (DOE) documentary material should DOE's motion to withdraw the construction authorization application for the Yucca Mountain geologic repository (Application) be granted.¹ These conditions are based in substantial part on previous DOE representations² and the joint report from the parties, the interested governmental participants (IGPs), and the petitioners.³

These conditions include: (1) those applicable prior to the conclusion of final appellate review (including resolution of any petitions for certiorari to the United States Supreme Court) of an order granting or denying DOE's motion to withdraw the Application (Final Termination); and (2) conditions for the period after Final Termination, including conditions applicable should DOE ever attempt to renew the Application or file a new application seeking authority to establish a facility at Yucca Mountain for the disposal or storage of spent nuclear fuel or other high-level nuclear waste (HLW).

In the Board's view, these conditions would help to assure that DOE's LSN document collection (LSNdc) will be appropriately archived.⁴ Therefore, the Board concludes that these conditions should be imposed in any order granting DOE's motion to withdraw the application for the Yucca Mountain geologic repository.

A. Conditions Applicable Until Final Termination

1. DOE shall not take its LSNdc offline until there is Final Termination.

¹ Nothing in these conditions should be considered as superseding the NRC's policy decisions on the continued operation of the Licensing Support Network (LSN) in accordance with 10 C.F.R. Part 2, Subpart J.

² These include DOE's representations and answers to the Board's questions during the January 27 and June 4, 2010 case management conferences and DOE's written filings of February 4, February 19, and May 24, 2010. *See* Tr. at 345-405 (Jan. 27, 2010); Tr. at 316-447 (June 4, 2010); The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference (Feb. 4, 2010); The Department of Energy's Status Report on Its Archiving Plan (Feb. 19, 2010); U.S. Department of Energy Answers to ASLB Questions from Order (Questions for Several Parties and LSNA) (May 24, 2010).

³ Joint Report Concerning Conditions Regarding DOE LSN Document Collection (June 18, 2010) [hereinafter Joint Report].

⁴ The use of the phrase DOE's "LSNdc" means the entire collection of documentary material (whether in full text or header only) currently available on its LSN participant website.

2. DOE shall maintain its LSNdc such that the public shall continuously have access to it through the NRC's LSN web portal with its current functionality until Final Termination.

3. As stated in A.1, above, DOE shall maintain⁵ the existing functionalities of its LSNdc via the NRC portal until Final Termination, independent of which office within DOE is assigned maintenance responsibility.

4. Unless this designation is modified by DOE, DOE's Team Leader,⁶ Archives and Information Management Team at DOE's Office of Legacy Management (LM) shall: (a) serve as LM's relevant point of contact for specific questions about problems with DOE documents or images that may be reported by other parties and IGPs to the proceeding; and (b) serve as LM's point of contact for persons who wish to acquire specific documents or categories of documents from the DOE LSNdc (according to current protocol) or copies of the entire DOE LSNdc (in accordance with B.13 and B.14, below).⁷

5. Should DOE wish to designate a different organization or person to serve as the point of contact for these tasks, DOE shall notify CAB-04, or such other presiding officer as the Commission may designate, all parties, and IGPs of the replacement and schedule for the change.

6. The transfer of DOE's institutional knowledge of the program activities, its records, and HLW issues shall be facilitated by the continuing involvement of the DOE Office of General Counsel in LM's response to requests for DOE LSNdc documents.

7. Until Final Termination, to ensure the electronic availability of DOE's documentary material,⁸ and to resolve any disputes with respect thereto during the period prior to Final Termination, CAB-04, or such other presiding officer as the Commission may designate, shall maintain continuing jurisdiction to enforce the terms of these obligations.

8. DOE shall apply previously appropriated funds, seek in good faith additional necessary appropriations, and, if funded, expend those appropriations to

⁵Maintenance of existing functionalities includes: (1) adding documents to the LSNdc as any relevant documents are generated or discovered; (2) modifying documents currently on the DOE LSNdc by changing their status from full text to header only or vice versa if a privilege is claimed or waived; (3) adding redacted documents, as appropriate; (4) producing privilege logs, as appropriate; and (5) producing documents when requested in accordance with Subpart J and applicable case management orders.

⁶As confirmed by DOE, currently John V. Montgomery is serving as DOE's Team Leader, Archives and Information Management Team at LM. *See* Joint Report at 4.

⁷The expertise and the mission of DOE's LM is the maintenance and preservation of archived records, which shall include the maintenance of DOE's LSNdc, its preservation, and its public availability as stated herein.

⁸*See* 10 C.F.R. §§ 2.1001 and 2.1003 (defining the scope of documentary material).

maintain the existing functionality of the DOE LSNdc in a manner consistent with the various conditions in this section until Final Termination.

B. Conditions Applicable After Final Termination

1. After Final Termination, the text, image, and bibliographic header files that comprise the DOE LSNdc shall be archived by LM. The archiving of the DOE LSNdc in the LM facility shall not commence until Final Termination.

2. The files that comprise the DOE LSNdc shall be on magnetic tapes that shall be maintained by DOE's LM. LM shall archive the following files that comprise each document in the DOE LSNdc: (a) text files (HTML format); (b) image files (TIFF or JPEG formats); and (c) bibliographic header files (XML format).

3. On or before the time LM loads the DOE LSNdc onto its storage area network, it shall create a compiled PDF file of each imageable document in the LSNdc and thereafter shall preserve those PDF files.⁹

4. As currently planned by DOE, the tapes shall be stored at a facility in Morgantown, West Virginia, and the data, including a PDF file of each document, shall be loaded onto a storage area network which can be electronically searched and retrieved. Consistent with the period before Final Termination, DOE shall notify CAB-04, or such other presiding officer as the Commission may designate, all parties, and IGPs to this proceeding of any change should DOE designate a different LM team leader or organization to archive the DOE LSNdc.

5. While text and image files of: (a) nonimageable documentary material;¹⁰ (b) documents upon which DOE has asserted a legal privilege as represented on DOE's privilege log; (c) copyright documents; and (d) documents from DOE's employee concerns program will not be loaded onto the magnetic tapes and LM's storage area network, bibliographic headers for these categories of the DOE LSNdc shall be loaded onto the LM tapes. LM shall provide copies of nonimageable documentary materials in accordance with B.13 and B.14.

6. The documentary material represented only by bibliographic headers in the LSNdc shall be archived and retained in accordance with the same records schedule as the rest of the DOE LSNdc.

7. DOE shall preserve the physical samples, specimens, and other items that are only represented on the DOE LSNdc by bibliographic headers for the same duration as the LSN collection. Upon request, DOE shall work with a requester

⁹ DOE asserts that the compiled PDF file will not be in a searchable PDF format. Joint Report at 7.

¹⁰ "Nonimageable" material may include, but is not limited to, items such as data currently stored on DVDs or CDs that could not be scanned and made available on the LSN in text or image format, digital computer printouts, oversized drawings, physical items (e.g., core samples, metallurgic specimens), and strip charts.

to provide access to such items. If physical items were produced by another party to this proceeding, but were represented on the DOE LSNdc as a bibliographic header only, DOE shall consult with that party about the physical items' storage. If DOE has physical samples and specimens in its or its agents' possession that currently have no LSN headers, DOE shall work with parties and IGPs to verify whether such samples or specimens should have been represented by a header. If so, DOE shall produce a header and insert it into the LSN in the next monthly LSN update cycle. Controversies regarding whether an item is or is not documentary material shall be forwarded to CAB-04, or such other presiding officer as the Commission may designate, for resolution.

8. After Final Termination, DOE shall preserve its LSNdc for 100 years. This commitment shall be met regardless of whether the DOE LSNdc shall be deemed temporary or permanent. Upon request, the public shall be entitled to receive copies of the DOE LSNdc through DOE's LM during the 100-year period. Such requests must comply with B.13 and B.14. DOE shall likewise comply with the Federal Records Act and any requirements of the National Archives and Records Administration (NARA).

9. The archived DOE LSNdc shall be compiled into documents at the directory level with each directory containing the bibliographic header file, the text file, and all of the image files comprising a document. The directory name shall correspond to the participant accession number of the document.¹¹

10. Because the compiled PDF files that shall be created and stored by LM (*see* B.3) will not be in a searchable PDF format, DOE shall maintain with the PDF files its existing text files that have the optical character recognition (OCR) searchability.¹²

11. After Final Termination, LM shall use a replacement search index that will allow LM to search for documents in the archived DOE LSNdc in order to conduct word searches or search for a particular document using its DOE OCR text files, identify the document, and then electronically produce the corresponding document.

12. DOE shall ensure that the integrity and content of the LSNdc remains intact following any change in format or storage location of the LSNdc. If a problem or issue is identified with respect to the integrity or content of the LSNdc, the issue shall be brought to the attention of LM, which shall work with the requester in a good-faith effort to resolve the issue.

13. DOE shall make and provide a copy on electronic media to the LSN

¹¹This is intended to ensure that, even without a document management software system, the directory structure will define where one document ends and another begins.

¹²DOE asserts that it plans to maintain its text files created for the LSNdc because they have superior quality and searchability characteristics as compared to those generated through a standard PDF creation of a document. Joint Report at 7.

Administrator and/or CAB-04, or such other presiding officer as the Commission may designate, of the entire DOE LSNdc, or those documents that are responsive to specific search requests, which documents were previously publicly available on the DOE LSNdc. If requested by others, DOE shall make and provide to the requester a copy on electronic media of the same DOE LSNdc. The requester shall submit all requests in writing and reimburse DOE for all of the costs of copying, including all labor costs associated with such response. DOE shall provide an itemized statement for reimbursement to the requester. Only those documents which were previously publicly available on the LSNdc shall be provided. DOE shall provide such copies after the transition of the LSNdc to LM, and after LM has created its replacement search index, activated its new search engine, and compiled PDF files.

14. After a requester receives a copy of the DOE LSNdc, or specific documents in the DOE LSNdc, and LM notifies the requester that the requested material contains privacy-protected information and identifies those documents that contain such information, DOE shall work with the requester to redact the identified privacy-protected information, or otherwise delete the copy of the document that contains such information, and provide the requester with a replacement copy of the document with the privacy information redacted. As discussed in B.5 to B.7, LM shall also provide copies of nonimageable material to the extent such information can be readily copied, the requester identifies the information with specificity, and the requester complies with the terms of paragraph B.13 and of this paragraph. Unless DOE and the requester agree otherwise, the requester shall receive the entire DOE LSNdc, or particular documents from the DOE LSNdc that are responsive to the requester's specific document request, in bibliographic header (XML file), text (HTML file), and image (PDF file) form.

15. To the extent possible, DOE shall redact unclassified but sensitive security information (e.g., unclassified Naval Nuclear Propulsion Information and Safeguards Information), proprietary information, and privacy information from documents containing such information. If such information cannot be redacted from documents in the DOE LSNdc, then a bibliographic header file for such documents, but not a text or image file, shall be contained in the LM tapes of the DOE LSNdc. The documentary material represented only by bibliographic headers in the LSN shall be transferred to LM for archiving with the DOE LSNdc, and these unredacted copies shall also be retained in accordance with the same records schedule as the rest of the DOE LSNdc.

16. Following Final Termination, DOE's LSN vendor, CACI, shall submit its then-current copy of the DOE LSNdc to LM. Such information provided by CACI shall be preserved for 100 years following Final Termination.

17. While there is currently no search engine for the DOE LSN collection outside the LSN, such a search engine shall be developed by LM (loading the data onto servers and creating a search engine for that collection). The search engine

shall function in a manner consistent with the way the LSN is currently managed relative to being able to search for and retrieve documents.

18. Since the header and text files in DOE's LSNdc are currently in a searchable format, LM shall use a replacement index utility to search for documents using those same files, and no files need to be converted for that purpose.¹³

19. Because DOE cannot represent how NARA will make the DOE LSNdc available, LM shall create a search function for DOE's LSNdc and maintain it for the 100-year period following Final Termination, regardless of whether the documents are deemed to be temporary or permanent.

20. The copy of DOE's complete LSNdc to be provided to a requester by DOE shall include any existing LM index of materials.

21. In the event the LSN needs to be reestablished for whatever purpose, DOE shall work with the NRC to make all the documents presently in its LSNdc electronically available on the LSN, or whatever successor system is established.

22. While DOE does not know the specific cost of the tasks to be performed to archive and preserve its LSNdc,¹⁴ DOE shall apply existing resources, seek in good faith additional necessary appropriations, and, if funded, expend those appropriations to meet the commitments stated herein relating to the maintenance of its LSNdc after Final Termination through the 100-year period.

¹³The existing header files and the existing text files of the DOE LSN collection are presently in a searchable format, and LM shall create an index or spidering-type function to replace what the NRC's LSN portal now does. DOE confirms that, in using the copy which a requester would receive from DOE of its complete LSNdc, no unique proprietary DOE software will be involved and that presumably off-the-shelf software will work. Joint Report at 10.

¹⁴DOE does not know the specific costs because these costs are still being developed and funding of such costs is subject to congressional appropriations.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Paul B. Abramson
Dr. Gary Arnold

In the Matter of

Docket No. 50-391-OL
(ASLBP No. 09-893-01-OL-BD01)

TENNESSEE VALLEY AUTHORITY
(Watts Bar Nuclear Plant, Unit 2)

June 29, 2010

**RULES OF PRACTICE: CHALLENGE TO COMMISSION
REGULATIONS; WAIVER OF RULES OR REGULATIONS**

While Commission regulations may not be directly attacked in adjudicatory proceedings, a party may petition for a waiver of the application of a regulation on the sole ground that special circumstances exist such that the application of the regulation would not serve the purpose for which it was adopted. 10 C.F.R. § 2.335(b).

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

As was outlined in the Commission's 2005 ruling in *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005), to justify the waiver of a Commission rule or regulation, a party generally must show that: (1) the regulation's application would not serve its original purpose; (2) special circumstances exist in the instant proceeding that were not considered in the rulemaking; (3) the special circumstances are unique to the instant proceeding; and (4) the waiver would be necessary in order to address a significant safety or environmental issue.

**RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS
(ROLE OF LICENSING BOARD)**

Although a Licensing Board is not empowered to grant a waiver, if it concludes that a *prima facie* showing has been made, the Board must certify the matter to the Commission for a determination of whether the application of the regulation should be waived or an exception granted under the specific circumstances presented. 10 C.F.R. § 2.335(d).

**RULES OF PRACTICE: BURDEN OF PERSUASION (PRIMA
FACIE CASE)**

Although the term *prima facie* is not defined in the Commission's regulations, we interpret it to mean a substantial showing. That is, the affidavits supporting the petition must present each element of the case for waiver in a persuasive manner with adequate supporting facts. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 22 (1988); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981).

**RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS
(ROLE OF LICENSING BOARD)**

To certify a waiver petition the Board must find that the petitioner has met "extremely high standards" showing the existence of "compelling circumstances in which the rationale of [the regulation] is undercut." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 245 (1989).

**OPERATING LICENSE HEARING: ISSUES FOR CONSIDERATION
(NEED FOR POWER/ALTERNATIVE ENERGY SOURCES)**

Given the NRC's two-step licensing process (CP/OL), the need for power and alternative energy sources generally are not considered at the OL stage. Proposed Rule: "Need for Power and Alternative Energy Issues in Operating Licensing Proceedings," 46 Fed. Reg. 39,440 (Aug. 3, 1981). The need for power analysis was at the CP stage because, prior to construction, little environmental disturbance would have occurred and real alternatives, including the no-action alternative, existed. *Id.*

**OPERATING LICENSE HEARING: ISSUES FOR CONSIDERATION
(NEED FOR POWER/ALTERNATIVE ENERGY SOURCES)**

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

In promulgating the final rule in 1982, the Commission recognized that “in very unusual cases [at the OL stage], such as where it appears that an alternative exists that is clearly and substantially environmentally superior, the NRC Staff would be obligated under NEPA to address [the need for power and alternatives] in its environmental impact statement.” Final Rule: “Need for Power and Alternative Energy Issues in Operating License Proceedings,” 47 Fed. Reg. 12,940, 12,941 (Mar. 26, 1982). However, it is clear from these provisions that the petitioner has the burden of demonstrating that there is warrant for the waiver of the rule prohibiting consideration of the need for power and energy alternatives at the OL stage. *See Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1614-16 (1984).

**OPERATING LICENSE HEARING: ISSUES FOR CONSIDERATION
(NEED FOR POWER/ALTERNATIVE ENERGY SOURCES)**

When it published this rule, the Commission expressly stated that the *prima facie* showing needed to support a waiver request was a “much stricter standard than the current requirements for raising need for power and alternative energy sources in OL proceedings.” 47 Fed. Reg. at 12,941.

**OPERATING LICENSE HEARING: ISSUES FOR CONSIDERATION
(NEED FOR POWER/ALTERNATIVE ENERGY SOURCES)**

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

Under the case law governing waiving the application of the “OL stage need for power rule,” to meet its burden to justify certification of its waiver request, a petitioner must make a *prima facie* showing that the proposed facility “would not be needed: (1) to meet increased energy needs; (2) to replace older, less economical operating capacity; and (3) that there are viable alternatives . . . likely to exist which could tip the NEPA cost-benefit balance against issuance of the operating license.” *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 401 (1984); *see also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 893-94 (1984).

RULES OF PRACTICE: WAIVER PETITIONS (TIMELINESS)

There is no NRC regulation that expressly governs the timing of waiver

petitions. Accordingly, the appropriate standard for determining whether a waiver petition is timely is reasonableness.

**OPERATING LICENSE HEARING: ISSUES FOR CONSIDERATION
(NEED FOR POWER/ALTERNATIVE ENERGY SOURCES)**

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

The Commission has limited such waivers to “very unusual cases, such as where it appears that an alternative exists that is clearly and substantially environmentally superior,” in which “the Commission would be obligated under NEPA to address [the need for power and alternatives] in its environmental impact statement.” 47 Fed. Reg. at 12,941.

**OPERATING LICENSE HEARING: ISSUES FOR CONSIDERATION
(NEED FOR POWER/ALTERNATIVE ENERGY SOURCES)**

The Commission promulgated the OL-stage need-for-power rule based, in part, on its experience that at the time the OL application was submitted the vast majority of the environmental disruption would have already occurred and that an electric utility would use the new nuclear plant to meet increased energy demand or, in the alternative, if there was no increase in demand, to replace older, less economical generation capacity. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 547 (1986).

**OPERATING LICENSE HEARING: ISSUES FOR CONSIDERATION
(NEED FOR POWER/ALTERNATIVE ENERGY SOURCES)**

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

In *Shearon Harris*, which is binding precedent for the ASLBP, the Appeal Board held that, in order for intervenors to demonstrate that the purpose of the regulation excluding consideration of alternatives and the need for power from the OL phase would not be served, they must make a *prima facie* showing that the proposed facility “is not needed to meet increased energy demand and that it need not be used to displace an equivalent amount of older, less economical capacity.” *Shearon Harris*, ALAB-837, 23 NRC at 547. The Appeal Board went on to state that “the petition [for waiver] must establish that all of the applicant’s fossil fuel baseload generation that is less efficient than [the facility under consideration] has been accounted for” to make its *prima facie* showing. *Id.* at 548.

MEMORANDUM AND ORDER
(Denial of Petition to Waive 10 C.F.R. §§ 51.53(b), 51.95(b), 51.106(c)
in the Watts Bar Operating License Proceeding)

Pending with the Licensing Board in this proceeding is a request under 10 C.F.R. § 2.335(b) by Intervenor Southern Alliance for Clean Energy (SACE) for a waiver of the application of the provisions of 10 C.F.R. §§ 51.53(b), 51.95(b), and 51.106(c) precluding consideration of the issues of “need for power” and “alternative energy sources” from a Part 50 operating license (OL) proceeding. Both applicant Tennessee Valley Authority (TVA) and the NRC Staff oppose the rule waiver request. For the reasons set forth below, we find that although SACE’s waiver request is timely, it fails to provide the *prima facie* showing required in such petitions when they concern need for power/alternative energy sources. Accordingly, this Petition will not be referred by this Board to the Commission for its consideration.

**I. BACKGROUND REGARDING WATTS BAR UNIT 2
OL PROCEEDING**

This proceeding arises from an updated TVA application pursuant to Part 50 for an OL for a second nuclear reactor at the Watts Bar Nuclear Plant (WBN) in Rhea County, Tennessee. On November 19, 2009, this Board granted a Request for Hearing submitted on behalf of SACE in which it demonstrated its standing and submitted two admissible contentions (SACE Contentions 1 and 7).¹

As noted by SACE in its Petition to Intervene, this proceeding has run an unusual course.² TVA was issued a Part 50 construction permit (CP) for WBN Unit 2 in January 1973 and initially submitted its OL application on June 30, 1976. However, before the OL was issued, but after WBN Unit 2 had been approximately 80% completed, TVA suspended construction, albeit while keeping its CP in effect.³ Thereafter, on March 4, 2009, after a more than 30-year hiatus, TVA submitted an update to its OL application that precipitated this

¹ LBP-09-26, 70 NRC 939 (2009). Thereafter, the Board dismissed SACE Contention 1 as moot. Licensing Board Order (Granting TVA’s Unopposed Motion to Dismiss SACE Contention 1) (June 2, 2010) (unpublished).

² Petition to Intervene and Request for Hearing (July 13, 2009) at 1-2 [hereinafter SACE Petition to Intervene].

³ *Id.*

licensing proceeding.⁴ In that update, TVA stated that, pursuant to its existing CP authority, it expects to complete construction on WBN Unit 2 prior to April 1, 2012.⁵

II. RULE WAIVER BACKGROUND

A. Legal Standards Governing NRC Rule Waiver Requests

Before exploring the particulars of the SACE rule waiver Petition now before the Board, to aid in a fuller understanding of the parties' arguments, we provide some background regarding the existing agency case law and other precedent governing section 2.335 waiver requests in general and the Part 51 need for power/alternative energy sources rules that are of particular concern in this instance.

While Commission regulations may not be directly attacked in adjudicatory proceedings, a party may petition for a waiver of the application of a regulation on the sole ground that special circumstances exist such that the application of the regulation would not serve the purpose for which it was adopted.⁶ As was outlined in the Commission's 2005 ruling in *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3),⁷ to justify the waiver of a Commission rule or regulation, a party generally must show that: (1) the regulation's application would not serve its original purpose; (2) special circumstances exist in the instant proceeding that were not considered in the rulemaking; (3) the special circumstances are unique to the instant proceeding; and (4) the waiver would be necessary in order to address a significant safety [or environmental] issue.⁸

⁴Tennessee Valley Authority; Notice of Receipt of Update to Application for Facility Operating License and Notice of Opportunity for Hearing for the Watts Bar Nuclear Plant, Unit 2 and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 74 Fed. Reg. 20,350, 20,350 (May 1, 2009). TVA also recently submitted a Final Supplemental Environmental Impact Statement (FSEIS) for WBN Unit 2, Letter from Masoud Bajestani, Watts Bar Unit 2 Vice President, to NRC (Feb. 15, 2008), Encl., [TVA], [FSEIS], Completion and Operation of Watts Bar Nuclear Plant Unit 2 (June 2007) (ADAMS Accession No. ML0805104690), and a Final Supplemental Environmental Impact Statement — Severe Accident Management Alternatives, Letter from Masoud Bajestani, Watts Bar Unit 2 Vice President, to NRC (Jan. 27, 2009), Encl. 1, WBN Unit 2 Severe Accident Management Alternatives Analysis (Jan. 21, 2009) (ADAMS Accession No. ML090360589), for WBN Unit 2.

⁵ 74 Fed. Reg. at 20,350.

⁶ 10 C.F.R. § 2.335(b).

⁷ CLI-05-24, 62 NRC 551, 559-60 (2005).

⁸ *Id.* Millstone dealt specifically with an alleged safety problem, but we believe that the reasoning underlying its holding is also applicable to the raising of an environmental issue.

Although a Licensing Board is not empowered to grant a waiver, if it concludes that a *prima facie* showing⁹ has been made, the Board must certify the matter to the Commission for a determination of whether the application of the regulation should be waived or an exception granted under the specific circumstances presented.¹⁰ However, to certify a waiver petition the Board must find that the petitioner has met “extremely high standards” showing the existence of “compelling circumstances in which the rationale of [the regulation] is undercut.”¹¹

B. OL Stage Need for Power/Alternative Energy Sources Rule

The regulations at issue were developed from a proposed rule published by the Commission in 1981. That proposal, which was adopted, specified that, given the NRC’s two-step licensing process (CP/OL), the need for power and alternative energy sources would not be considered at the OL stage.¹² This proposed rule placed the need-for-power analysis at the CP stage because, prior to construction, little environmental disturbance would have occurred and real alternatives, including the no-action alternative, existed.¹³

Nonetheless, in promulgating the final rule in 1982, the Commission recognized that “in very unusual cases [at the OL stage], such as where it appears that an alternative exists that is clearly and substantially environmentally superior, the NRC Staff would be obligated under NEPA to address [the need for power and alternatives] in its environmental impact statement.”¹⁴ However, it is clear from these provisions that the petitioner has the burden of demonstrating that there is warrant for the waiver of the rule prohibiting consideration of the need for power and energy alternatives at the OL stage.¹⁵ Moreover, when it published this rule, the Commission expressly stated that the *prima facie* showing needed to support

⁹ Although the term *prima facie* is not defined in the Commission’s regulations, we interpret it to mean a substantial showing. That is, the affidavits supporting the petition must present each element of the case for waiver in a persuasive manner with adequate supporting facts. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 22 (1988); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981).

¹⁰ 10 C.F.R. § 2.335(d).

¹¹ *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 245 (1989).

¹² Proposed Rule: “Need for Power and Alternative Energy Issues in Operating Licensing Proceedings,” 46 Fed. Reg. 39,440 (Aug. 3, 1981).

¹³ *Id.*

¹⁴ Final Rule: “Need for Power and Alternative Energy Issues in Operating License Proceedings,” 47 Fed. Reg. 12,940, 12,941 (Mar. 26, 1982).

¹⁵ See *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1614-16 (1984).

a waiver request was a “much stricter standard than the current requirements for raising need for power and alternative energy sources in OL proceedings.”¹⁶

Additionally, under the case law governing waiving the application of the “OL stage need for power rule,” to meet its burden to justify certification of its waiver request, SACE must make a *prima facie* showing that the proposed facility “would not be needed: (1) to meet increased energy needs; (2) to replace older, less economical operating capacity; and (3) that there are viable alternatives . . . likely to exist which could tip the NEPA cost-benefit balance against issuance of the operating license.”¹⁷

III. PARTIES’ RULE WAIVER FILINGS

A. SACE’s Request for Waiver

As noted above, now pending before the Board is a request filed by SACE pursuant to the provisions of 10 C.F.R. § 2.335(b) seeking the waiver of 10 C.F.R. §§ 51.53(b), 51.95(b), and 51.106(c)¹⁸ “to the extent that those regulations bar consideration of the need for power and alternative energy sources (including energy efficiency/no action).”¹⁹ SACE bases its arguments for a waiver on the criteria articulated by the Commission in its 2005 *Millstone* decision.²⁰ SACE asserts that it should be granted a waiver because it has shown that (1) the rules’ application in this case would not serve their original purpose; (2) special circumstances exist in this case that were not considered in the rulemaking; and

¹⁶ 47 Fed. Reg. at 12,941.

¹⁷ *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 401 (1984); see also *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 893-94 (1984).

¹⁸ In its initial pleading, SACE referenced section 51.53(b), which provides that, at the OL stage, the applicant’s ER need not include a discussion of the need for power or the economic costs and benefits of the proposed action, and section 51.95(b), which provides that the NRC Staff’s FEIS need not include a discussion of the need for power or alternative energy sources. SACE subsequently expanded its request for waiver to encompass 10 C.F.R. § 51.106(c), which provides that, at the OL stage, Licensing Boards will not admit contentions concerning the need for power or alternative energy sources. [SACE]’s Motion for Leave to Amend Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) (Mar. 10, 2010) [hereinafter SACE Waiver Amendment].

¹⁹ Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) with Respect to Admission of Contentions Regarding Need for Power and Consideration of Alternative Energy Sources (Feb. 4, 2010) at 1 [hereinafter SACE Petition for Waiver]. The waiver petition was accompanied by a Declaration by Dr. Arjun Makhijani. *Id.*, Exh. 1, Declaration of Dr. Arjun Makhijani in Support of [SACE]’s Petition for Waiver of or Exception to 10 C.F.R. §§ 51.53(b) and 51.95(b) with Respect to Need for Power and Consideration of Alternative Energy Sources (Feb. 4, 2010) [hereinafter Makhijani Declaration].

²⁰ SACE Petition for Waiver at 2-3 (citing *Millstone*, CLI-05-24, 62 NRC at 560).

(3) the special circumstances are unique to WBN Unit 2.²¹ In addition, relative to the final *Millstone* factor regarding whether a regulation waiver is necessary to reach a “significant safety problem,” SACE argues that because the issues of need for power and energy alternatives arise under NEPA, the appropriate test is not that a waiver address a “significant safety problem,” but instead that “new and significant information or changed circumstances [exist] that would affect the outcome of the previous environmental analysis.”²²

SACE asserts that the WBN Unit 2 OL proceeding presents special circumstances not considered in the Commission rulemaking and unique to WBN Unit 2 because (1) over 30 years have elapsed since the issuance of the CP, which is a longer period of time than in any prior OL proceeding; (2) construction of WBN Unit 2 is only 60% complete and completion would cost an additional \$2.5 billion dollars; and (3) after the issuance of the CP for WBN Unit 2, TVA itself “found it more economical to rely on other sources of energy . . . to the extent of purposely excluding WBN 2 from the energy portfolio that it developed in the mid-1990’s.”²³ Additionally, SACE asserts that this case presents special circumstances unique to WBN Unit 2 because of “fundamental changes in the regional economy, energy technology, and the administrative and political landscape” that have “significantly undermined the validity of TVA’s 1972 prediction of need for WBN Unit 2.”²⁴ According to SACE, these changes include “TVA’s own post-1972 pattern of chronic delays and escalating costs in nuclear plant construction,” TVA’s exclusion of WBN Unit 2 as a preferred energy source in its 1995 resource planning, and a decreased cost of purchased power.²⁵ Finally, SACE argues that, because the NRC Staff issued a Request for Additional Information (RAI) to TVA with questions regarding its need for power, it would be contradictory with other agency actions if the Board did not consider that issue.²⁶

SACE further asserts that the purpose of 10 C.F.R. §§ 51.53(b) and 51.95(b) is to avoid “unnecessary duplication” of need-for-power and energy alternatives analyses where construction of a plant had already been completed so that it would be “extremely unlikely” that any “new information or new developments” would demonstrate an energy alternative that was both environmentally and economically preferable existed.²⁷ SACE argues that the rules’ purpose would not be served for WBN Unit 2 because the unit is only 60% complete and completion would require an additional \$2.5 billion that might not be justified because TVA

²¹ *Id.*

²² *Id.* at 3.

²³ *Id.* at 4.

²⁴ *Id.* at 4-5.

²⁵ *Id.* at 5.

²⁶ *Id.*

²⁷ *Id.* at 6-7.

has thus far relied on other energy sources.²⁸ SACE also argues that the economic and energy situation in TVA's service area has changed significantly so that "it is not a foregone conclusion that operation of WBN Unit 2 would be preferable to other energy alternatives."²⁹

Finally, SACE asserts that the changes in TVA's circumstances since 1972 constitute significant new information that would change the outcome of the environmental analysis for WBN Unit 2 so that the NRC must reexamine TVA's need for power and energy alternatives to WBN Unit 2 in order to fulfill its NEPA obligations.³⁰

B. TVA's Response

In response, TVA asserts that the Waiver Petition should be denied because (1) it is impermissibly late; (2) it does not meet the threshold necessary for the certification of a waiver request; and (3) the waiver would be "purely academic" because SACE did not submit an otherwise admissible contention on the issues of need for power and energy alternatives.³¹

As to timing, TVA asserts that the Petition should have been filed with SACE's proposed contention regarding need for power and energy alternatives and is now impermissibly late because, when it filed its original Petition to Intervene, SACE had all of the information needed to file the Waiver Petition and should have been aware of the need to file one.³² TVA also argues that granting the Waiver Petition now would expand the scope of and delay the proceeding.³³

As for certification, TVA argues that SACE has not met the threshold for certifying a waiver petition to the commission because SACE has not made a *prima facie* showing that WBN Unit 2 is not needed to meet increased energy demand, displace older and less efficient units, or "reduce air emissions and provide fuel diversity and operational flexibility" or that an environmentally and economically preferable alternative energy source exists, contrary to NRC case law governing waiver of the OL need-for-power and energy alternatives regulations.³⁴ Specifically, TVA claims that SACE has improperly focused on current economic conditions instead of long-term forecasts in its arguments about

²⁸ *Id.* at 8.

²⁹ *Id.* at 8-9.

³⁰ *Id.* at 9-10.

³¹ [TVA]'s Response in Opposition to Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) (Mar. 1, 2010) at 1-2 [hereinafter TVA Response].

³² *Id.* at 15-16.

³³ *Id.* at 16-17.

³⁴ *Id.* at 2 (citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 546-48 (1986)).

future demand and has not provided factual or expert support to show that WBN Unit 2 “is less economical to operate than *all* of TVA’s fossil fuel baseload generation.”³⁵ Additionally, TVA argues that to demonstrate special circumstances such as those articulated in *Millstone* that were not considered in the rulemaking, SACE must “demonstrate that an environmentally *and* economically superior alternative exists” but that SACE has shown neither.³⁶ TVA also argues that the construction status of WBN Unit 2 is not unique among OL applicants, that “the Commission never assumed that construction would be complete while the OL proceeding is still ongoing, years before the scheduled operation start date,”³⁷ and that construction costs are outside the permissible scope of an OL proceeding.³⁸ In addition, TVA asserts that the NRC Staff’s issuance of an RAI is irrelevant to the purpose of 10 C.F.R. §§ 51.53(b) and 51.95(b) and does not establish special circumstances in this case.³⁹

Finally, TVA argues that the Waiver Petition should be rejected because 10 C.F.R. § 51.106(c) bars admission of contentions concerning need for power or energy alternatives, and SACE did not initially seek a waiver from this prohibition.⁴⁰ Therefore, TVA concludes, absent a waiver of that section, SACE is barred from litigating those issues even if the waiver of sections 51.53(b) and 51.95(b) is granted.⁴¹

C. NRC Staff’s Response

In its response, the NRC Staff asserts that the Waiver Petition should be denied because SACE did not make a *prima facie* showing that this case involves special circumstances that were not considered in the rulemaking.⁴² Like TVA, the NRC Staff maintains that relative to any waiver of the need-for-power and energy alternatives rules, SACE has not met the test established in earlier OL cases, namely that SACE has not made a *prima facie* showing that (1) TVA will not need WBN Unit 2 to meet increased energy demand; (2) WBN Unit 2 will not

³⁵ *Id.* at 18. *See also id.* at 20-22 (need to meet increasing energy demand), 22-23 (replacing existing generation), 23-24 (reducing air emissions and providing fuel diversity and operational flexibility).

³⁶ *Id.* at 18-19; *see also id.* at 24-27.

³⁷ *Id.* at 19.

³⁸ *Id.* at 27.

³⁹ *Id.* at 20; *see also id.* at 28-29.

⁴⁰ TVA does not discuss, or even note, that section 51.106(b) is directed only to the Board and not to either the Applicant or any Intervenor.

⁴¹ TVA Response at 30.

⁴² NRC Staff’s Response to Request by [SACE] for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) with Respect to Admission of Contentions Regarding Need for Power and Consideration of Alternative Energy Sources (Feb. 26, 2010) at 2 [hereinafter NRC Staff Response].

be needed to displace older, less-economical generating capacity; and (3) viable energy alternatives exist that “could tip the NEPA cost-benefit balance against issuance of the operating license.”⁴³ Also, like TVA, the NRC Staff asserts that the mere issuance of an RAI on need for power and energy alternatives does not support SACE’s waiver of the need for power and energy alternatives rules because “the Staff’s RAI simply does not have such power.”⁴⁴ Additionally, the NRC Staff argues that the Waiver Petition should be denied because it does not discuss the purpose or the regulatory history and rulemaking behind 10 C.F.R. § 51.95(b).⁴⁵

D. SACE’s Reply

In its reply, SACE responds to TVA’s timeliness argument, TVA’s and the NRC Staff’s arguments regarding the criteria for a waiver, and TVA’s assertion that SACE should have also requested a waiver of 10 C.F.R. § 51.106(c). On the issue of timeliness, SACE points out that NRC has no regulation governing the timing of waiver petitions and asserts that the standard for timeliness should therefore be reasonableness.⁴⁶ Applying that standard, SACE argues that it was reasonable for it not to have filed a waiver petition earlier because (1) it was unclear that a waiver petition was necessary when SACE filed its initial intervention petition because TVA had already discussed need for power and energy alternatives in its FSEIS; (2) until TVA submitted its response to the NRC Staff’s RAI, SACE could not ascertain if there were significant safety or environmental issues to justify seeking a waiver; and (3) granting a waiver at this point in the proceeding will not delay the NRC Staff’s issuance of a Draft Supplemental Environmental Impact Statement because that document is already being delayed by TVA’s failure to respond fully to the RAI.⁴⁷

Regarding the criteria for obtaining a waiver, SACE maintains that its expert, Dr. Makhijani, has shown that there are environmentally and economically preferable alternatives to WBN Unit 2.⁴⁸ In addition, SACE claims that Dr. Makhijani’s Declaration demonstrates that WBN Unit 2 will not be needed for future energy demand, that TVA’s data and projections in this regard are inadequate “to support a need for power in the future,” and that the NRC Staff’s

⁴³ *Id.* at 8-19.

⁴⁴ *Id.* at 19-22.

⁴⁵ *Id.* at 23.

⁴⁶ [SACE]’s Reply to [TVA] and NRC Staff Regarding Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) with Respect to Admission of Contentions Regarding Need for Power and Consideration of Alternative Energy Sources (Mar. 8, 2010) at 1-2 [hereinafter SACE Reply].

⁴⁷ *Id.* at 1-3.

⁴⁸ *Id.* at 3.

criticism that SACE does not project excess capacity “well into the future” ignores the fact that SACE is using TVA’s and the NRC Staff’s timeline.⁴⁹ SACE further argues that the Staff’s argument that it must show that the proposed plant will not be needed to replace older, less economical generating capacity is based on an assumption — that the plant is essentially complete — that SACE claims is inapplicable in this case because WBN Unit 2 is not complete and will require approximately an additional \$2100 per kilowatt to complete.⁵⁰ Additionally, SACE argues that, so long as the NRC Staff continues to request and analyze information on need for power for WBN Unit 2, the Commission is in violation of the Atomic Energy Act if it excludes SACE and members of the public from being able to participate in that part of the licensing process.⁵¹

Finally, regarding 10 C.F.R. § 51.106(c), SACE asserts that this provision has no rationale independent of sections 51.53(b) and 51.95(b) and that SACE’s failure to request a waiver of section 51.106(c) is therefore not a substantive ground for denying the Petition.⁵² Nonetheless, SACE also submitted a motion to amend the Waiver Petition to include 10 C.F.R. § 51.106(c).⁵³

IV. BOARD DECISION

As explained in Section II, above, in a Part 50 proceeding the need for power and the availability of alternative energy sources are considered by the Commission as part of its NEPA cost/benefit analysis at the CP stage and are generally not considered at the OL stage. However, due to the lengthy delay between the granting of the CP for WBN Unit 2 in 1973 and this proceeding on the OL in 2010, SACE has asked the Board to certify its request for a waiver to the Commission. Two procedural and one substantive objections have been interposed by TVA and the NRC Staff to SACE’s Petition. We find that the two procedural objections lack merit and dispose of them briefly.

In its February 2010 Petition, SACE sought the waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) “to the extent that those regulations bar consideration of the need for power and alternative energy sources (including energy efficiency/no action).”⁵⁴ Thereafter, in its reply to the response filed by TVA in opposition to its waiver request,⁵⁵ SACE expanded its request for waiver to expressly encompass 10

⁴⁹ *Id.*

⁵⁰ *Id.* at 4-5.

⁵¹ *Id.* at 5.

⁵² *Id.* at 6.

⁵³ SACE Waiver Amendment.

⁵⁴ SACE Petition for Waiver at 1.

⁵⁵ *See* TVA Response at 30.

C.F.R. § 51.106(c).⁵⁶ We find SACE's failure to initially reference all three regulations implementing the need-for-power rule at the OL stage to be without consequence. Not only was it clear from SACE's initial Petition exactly what was being requested, but it is unclear why the regulatory provision excluding the consideration of the need for power at the OL stage is repeated in the Commission's regulations three separate times.⁵⁷ Certainly, the parties opposing the waiver were in no way confused or misled about what it was seeking, and allowing SACE to expand its request to include expressly section 51.106(c) will not expand or delay these proceedings.⁵⁸

Second, we disagree with TVA and the NRC Staff that SACE's Petition for Waiver was not timely. In its initial Petition to Intervene, SACE claimed that TVA had introduced the need for power and the availability of alternatives into this proceeding by incorporating a lengthy, albeit in SACE's view inadequate, alternatives discussion in its Supplemental Environmental Impact Statement.⁵⁹ SACE also maintained that the NRC Staff's RAI to TVA seeking information regarding the need for power suggested that both TVA and the NRC Staff considered the need for power to be material to the agency's decision on this long-delayed OL application.⁶⁰ Thus, it was not unreasonable for SACE to conclude that this issue was within the scope of this proceeding, and it was not until this Board rejected SACE's need-for-power contention (SACE Contention 4)⁶¹ that it had reason to file a waiver petition.⁶²

There being no NRC regulation that governs the timing of waiver petitions, we agree with SACE that the appropriate standard for determining whether a waiver petition is timely is reasonableness.⁶³ On that score, we find that SACE has acted with reasonable dispatch under the circumstances presented here to bring its waiver petition before this Board. Accordingly, we find that SACE's Waiver Petition was timely.

While the procedural challenges to SACE's Waiver Petition lack merit, the same cannot be said for the substantive challenge because the Commission has limited such waivers to "very unusual cases, such as where it appears that an

⁵⁶ SACE Reply at 6.

⁵⁷ If the Applicant need not include the need for power or alternative energy sources in its ER (§ 51.53(b)) and the NRC Staff need not include any discussion of the need for power or alternative energy sources in its FEIS (§ 51.95(b)), it seems redundant to expressly prohibit a Board from admitting a contention concerning the need for power or alternative energy sources (§ 51.106(c)).

⁵⁸ We also note that section 51.106(c) is directed only to the presiding officer, not to the parties.

⁵⁹ SACE Petition to Intervene at 2.

⁶⁰ SACE Reply at 2.

⁶¹ LBP-09-26, 70 NRC at 977.

⁶² SACE Reply at 2.

⁶³ *Id.* at 1-2.

alternative exists that is clearly and substantially environmentally superior,” in which “the Commission would be obligated under NEPA to address [the need for power and alternatives] in its environmental impact statement.”⁶⁴ As we have previously noted, the burden of proof to obtain a waiver is on the Intervenor.⁶⁵ The Commission promulgated the OL-stage need-for-power rule based, in part, on its experience that at the time the OL application was submitted the vast majority of the environmental disruption would have already occurred and that an electric utility would use the new nuclear plant to meet increased energy demand or, in the alternative, if there was no increase in demand, to replace older, less economical generation capacity.⁶⁶

Accordingly, to meet its burden of proof, SACE is required to make a *prima facie* showing that WBN Unit 2 would not be needed (1) to meet increased energy needs or (2) to replace older, less economical generating capacity; *and* that there are viable alternatives to the completed nuclear plant likely to exist which could tip the NEPA cost-benefit balance against issuance of the operating license.⁶⁷ In *Shearon Harris*, which is binding precedent for this Board, the Appeal Board held that, in order for intervenors to demonstrate that the purpose of the regulation excluding consideration of alternatives and the need for power from the OL phase would not be served, they must make a *prima facie* showing that the proposed facility “is not needed to meet increased energy demand and that it need not be used to displace an equivalent amount of older, less economical capacity.”⁶⁸ The Appeal Board went on to state that “the petition [for waiver] must establish that all of the applicant’s fossil fuel baseload generation that is less efficient than [the facility under consideration] has been accounted for” to make its *prima facie* showing.⁶⁹ SACE has not met this burden in this instance.

In support of its Petition for Waiver, SACE offers the Declaration of Dr. Arjun Makhijani, an electrical engineer who has almost 40 years’ experience in the nuclear industry. That Declaration, however, falls far short of making the *prima facie* showing that is required. We are presented with little, if any, useful information regarding the environmental impact of the proposed action, and we are presented with no information regarding the environmental costs associated with the continued operation of TVA’s existing baseload generation facilities.

Dr. Makhijani notes that, according to TVA’s website, the projected cost of bringing WBN Unit 2 online would be \$2.5 billion, which, according to Dr.

⁶⁴ 47 Fed. Reg. at 12,941.

⁶⁵ See *Byron*, ALAB-793, 20 NRC at 1614-16.

⁶⁶ *Shearon Harris*, ALAB-837, 23 NRC at 547.

⁶⁷ *Beaver Valley*, LBP-84-6, 19 NRC at 401.

⁶⁸ *Shearon Harris*, ALAB-837, 23 NRC at 547.

⁶⁹ *Id.* at 548.

Makhijani, “shows that a great deal of work remains to be done.”⁷⁰ But we are offered no indication what that remaining work might entail, or what the environmental impact of that unspecified work would be. Dr. Makhijani also states that “it is not a foregone conclusion that it would be cost-effective for TVA to finish and operate the plant.”⁷¹ In support of this conclusion, Dr. Makhijani states that “TVA continues to have more than enough idle capacity to generate electricity in the absence of Watts Bar [Unit] 2” and that “at all times during 2009 it was cheaper for TVA to purchase power than to operate some of its less efficient generation plants.”⁷² But we are offered no information regarding the comparative financial and environmental cost of operating WBN Unit 2 as opposed to the continued operation of the fifty-nine coal-fired generating units or twenty-nine hydroelectric dams now relied upon for baseload power by TVA.⁷³

SACE represents that Dr. Makhijani shows that alternative energy sources are environmentally and economically preferable to WBN Unit 2.⁷⁴ He does not. In support of this claim, SACE points primarily to paragraph 14 of Dr. Makhijani’s Declaration in which he represents that “[d]uring the thirty two years that elapsed between TVA’s initial operating license application for Unit 2 and its renewed application in 2008, TVA obviously found it more economical to rely on other sources of energy” and concludes that this fact fatally undermines any conclusion that the operation of WBN Unit 2 is a necessary and environmentally preferable course of action.⁷⁵ It does not. That it was not necessary to operate a facility in the past simply does not establish that it will be unreasonable to operate it in the future. Likewise, the other paragraphs of Dr. Makhijani’s Declaration and the report attached to the Declaration⁷⁶ offer no more than unsupported conclusions, which do not make out a *prima facie* case for a waiver.

Given the passage of almost four decades since the CP application for WBN Unit 2 was submitted, the Commission may well wish to consider whether the need for power and the availability of alternative energy sources should be

⁷⁰ Makhijani Declaration ¶ 13.

⁷¹ *Id.* ¶ 12.

⁷² *Id.* ¶ 15.

⁷³ See NRC Staff Response at 15, 17.

⁷⁴ SACE Reply at 3 (citing Makhijani Declaration ¶¶ 14,16 & Attach. 2, Arjun Makhijani, Ph.D., Watts Bar Unit 2: Analysis of Need and Alternatives at 4-7 (July 10, 2007) [hereinafter Makhijani Report]).

⁷⁵ Makhijani Declaration ¶ 14.

⁷⁶ The Makhijani Report is dated July 10, 2007, but this is apparently a typographical error given that, from the content, it appears to have been prepared in 2009.

factored into the decision to grant or deny the OL.⁷⁷ But, given the language of the applicable regulations and the interpretation of the regulations regarding waiver that are binding on this Board, we have no authority to certify SACE's Petition to the Commission. SACE simply has not made the requisite *prima facie* showing that would justify certification pursuant to section 2.335(d).⁷⁸

Accordingly, the February 2009 SACE Petition, as amended, requesting a waiver of the application of the provisions of 10 C.F.R. §§ 51.53(b), 51.95(b), and 51.106(c) is *denied* in that the Board will not refer the Waiver Petition to the Commission or give any further consideration to the matters raised in the Petition.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD⁷⁹

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

Dr. Gary Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 29, 2010

⁷⁷ Cf. *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 1 and 2), LBP-10-7, 71 NRC 391, 430 (2010) ("off again/on again" approach to construction of long-delayed Bellefonte Units 1 and 2 has generated a unique set of circumstances such that Commission should consider holding a new mandatory hearing prior to allowing full-power operation of units), *petition for Commission review pending*.

⁷⁸ The NRC Staff's request for additional information referenced by SACE, Waiver Request at 10, had no impact on our decision in this matter. Although SACE suggests that the Staff's request effectively waived the applicability of 10 C.F.R. §§ 51.53(b) and 51.95(b) to this proceeding, there is no authority for that proposition and, in our view, it is illogical. Just as applicants and intervenors are bound by the regulations, so is the NRC Staff. Only the Commission, and then only under specific circumstances, has the authority to waive the application of NRC regulations.

⁷⁹ A copy of this Order was sent this date by Internet e-mail to: (1) Counsel for the NRC Staff; (2) Counsel for TVA; and (3) Diane Curran as Counsel for SACE.

Cite as 71 NRC 673 (2010)

LBP-10-13

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

**Docket Nos. 50-0247-LR
50-286-LR
(ASLBP No. 07-858-03-LR-BD01)**

**ENERGY NUCLEAR
OPERATIONS, INC.
(Indian Point, Units 2 and 3)**

June 30, 2010

In this license renewal proceeding, Intervenor filed two amended and two new contentions challenging the Applicant's SAMA Reanalysis. The Licensing Board ruled that one of the amended contentions was admissible in whole and one was admissible in part, while both new contentions were admissible in part.

LICENSE RENEWAL: CURRENT LICENSING BASIS

NRC: NRC RESPONSIBILITIES UNDER NEPA

The NRC has the authority and responsibility to supplement or to amend conditions to the current licensing basis (CLB) of an existing operating license at the time of license renewal if such supplements or amendments are deemed necessary to protect the environment.

LICENSE RENEWAL: ENVIRONMENTAL ISSUES (SCOPE)

**NEPA: CONSIDERATION OF SEVERE ACCIDENTS;
ENVIRONMENTAL IMPACT STATEMENT (SEVERE
ACCIDENTS); GENERIC ISSUES**

NRC: NRC RESPONSIBILITIES UNDER NEPA

Relative to the agency's acknowledged NEPA responsibilities in the license renewal context, the NRC's regulatory framework divides NEPA issues between Category 1 issues, which are those generically addressed by the NRC's Generic Environmental Impact Statement for License Renewal and thus inadmissible in a license renewal proceeding, and Category 2 issues, which are those issues that must be analyzed on a site-by-site basis and thus are within the scope of license renewal proceedings.

**LICENSE RENEWAL: CURRENT LICENSING BASIS;
ENVIRONMENTAL ISSUES (SAMA)**

**NEPA: COST-BENEFIT ANALYSIS; CONSIDERATION OF
SEVERE ACCIDENTS**

The NRC Staff's obligation regarding SAMAs under NEPA and Part 51 is met by taking a hard look at those SAMAs identified as potentially cost-beneficial. While the only cost-beneficial SAMAs that an applicant must implement as part of a license renewal safety review are those dealing with aging management, an order by the NRC Staff to implement SAMAs not dealing with aging management can be issued concurrently as part of a Part 50 CLB review. Consistent with the mandate of the Administrative Procedure Act (APA) and NEPA, if properly carried out, the NRC Staff's hard-look analysis of all potentially cost-beneficial SAMAs under NEPA and Part 51 (not just those that are aging-related) ensures that it has given proper consideration to all relevant factors in granting a license renewal.

**ADMINISTRATIVE PROCEDURE ACT: ARBITRARY AND
CAPRICIOUS STANDARD**

LICENSE RENEWAL: ENVIRONMENTAL ISSUES (SAMA)

**NEPA: COST-BENEFIT ANALYSIS; CONSIDERATION OF
SEVERE ACCIDENTS**

If the benefit-to-cost ratio is glaringly large for a potentially cost-beneficial SAMA, the NRC Staff must, as a prerequisite to extending the license, impose

implementation of that SAMA as a license condition or, in the alternative, explain why it is not requiring implementation of that SAMA. The failure to do either of these alternatives would be to act arbitrarily and capriciously.

EMERGENCY PLANNING: CONTENTIONS (OPPORTUNITY TO LITIGATE)

LICENSE RENEWAL: SCOPE

The adequacy of emergency planning is outside the scope of license renewal proceedings.

LICENSE RENEWAL: CURRENT LICENSING BASIS; ENVIRONMENTAL ISSUES (SAMA; SCOPE); SCOPE

NEPA: CONSIDERATION OF SEVERE ACCIDENTS; COST-BENEFIT ANALYSIS

While it may be that implementation of non-aging-related SAMAs cannot be directly required as license conditions within a Part 54 license renewal review, the NRC Staff nonetheless is authorized to impose such conditions that are necessary to protect the environment to an applicant's CLB under a Part 50 backfit procedure. Thus, when faced with cost-beneficial SAMAs, an alleged failure by the NRC Staff to explain why it has not instituted a backfit to a CLB as a condition precedent to license renewal could constitute a failure to meet the hard-look obligations the NRC Staff has under the APA and NEPA. Moreover, simply saying that implementation of SAMAs is outside of the scope of license renewal review is not sufficient to meet that obligation because the NRC Staff must review SAMAs under Part 51 and has the option, if necessary, to institute a backfit prior to license renewal under Part 50 as a result of its SAMA review.

LICENSE RENEWAL: CURRENT LICENSING BASIS; ENVIRONMENTAL ISSUES (SAMA; SCOPE); SCOPE

NEPA: CONSIDERATION OF SEVERE ACCIDENTS; NRC RESPONSIBILITIES

As a part of a license renewal proceeding, an applicant is required pursuant to 10 C.F.R. § 51.53(c)(3)(ii)(L) to incorporate, as part of its ER, a consideration of alternatives to mitigate severe accidents. This review is not limited to consideration of accidents that would be the result of aging. Pursuant to NRC regulations, as required by the *Limerick* decision, the NRC Staff must evaluate an applicant's submission and take appropriate action in deciding whether to grant the requested

license renewal. In order to meet its obligations under NEPA, once a SAMA has been identified as plainly cost-effective, the NRC Staff must either require implementation or, in the alternative, explain why it has decided not to require implementation prior to license renewal. Likewise, the applicant must supply information that is sufficiently complete for the Commission to be able to explain its decision.

MEMORANDUM AND ORDER
(Ruling on the Admissibility of New York's New and Amended
Contentions 12B, 16B, 35, and 36)

On December 11, 2009, Entergy Nuclear Operations, Inc. (hereinafter Entergy or the Applicant) filed a Severe Accident Mitigation Alternative (SAMA) Re-analysis Using Alternate Meteorological Tower Data (Entergy's December 2009 SAMA Reanalysis).¹ Before this Licensing Board is a Motion by the State of New York (New York) for leave to file new and amended contentions arising from that SAMA Reanalysis.² The State of Connecticut (Connecticut) filed an Answer supporting the admission of New York's new and amended contentions.³ Entergy and the NRC Staff each filed Answers supporting in part and opposing in part the admission of the contentions.⁴ New York filed a Reply on April 12, 2010.⁵ For the reasons explained below, the Board hereby *admits* Contention NYS-12B *in whole* and Contentions NYS-16B, NYS-35, and NYS-36 *in part*.

¹ See Letter from Fred Dacimo, Entergy Nuclear Northeast, to U.S. Nuclear Regulatory Commission, NL-09-165 (Dec. 11, 2009) (ADAMS Accession No. ML093580089) [hereinafter NL-09-165].

² State of New York's Motion for Leave to File New and Amended Contentions Concerning the December 2009 Reanalysis of Severe Accident Mitigation Alternatives (Mar. 11, 2010) [hereinafter New York's Motion]. In response to a request by New York, the Board originally set a February 25, 2010 deadline for filing contentions arising from Entergy's Revised SAMA Analysis, which was subsequently extended to March 11, 2010. See Licensing Board Order (Extending Time Within Which to File New Contentions) (Feb. 24, 2010) (unpublished).

³ Answer of the Attorney General of the State of Connecticut to State of New York's Motion for Leave to File New and Amended Contentions Concerning the December 2009 Reanalysis of Severe Accident Mitigation Alternatives (Apr. 1, 2010) [hereinafter Connecticut's Answer].

⁴ Applicant's Answer to New York State's New and Amended Contentions Concerning Entergy's December 2009 Revised SAMA Analysis (Apr. 5, 2010) [hereinafter Entergy's Answer]; NRC Staff's Answer to State of New York's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis (Apr. 5, 2010) [hereinafter NRC Staff's Answer].

⁵ State of New York's Combined Reply to Entergy and NRC Staff Answers to the State's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis (Apr. 12, 2010) [hereinafter New York's Reply].

I. LEGAL STANDARDS GOVERNING THE TIMELINESS OF NEW AND AMENDED CONTENTIONS

In addition to the general contention admissibility requirements,⁶ NRC regulations require that amended or new contentions filed after an intervenor's initial filing be admitted only upon "leave of the presiding officer" and include a demonstration that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.⁷

Responding to a request by New York, the Board declared that "new contentions filed by the State of New York on or before February 25, 2010, which arise out of Entergy's revised SAMA submissions from December 21, 2009, through January 20, 2010, will be deemed timely under 10 C.F.R. § 2.309(f)(2)."⁸ Complying with the requirement of section 2.309(f)(2)(iii) regarding timely submission, New York submitted its new and amended SAMA contentions within the deadline we set. We analyze New York's compliance with the "not previously available" and "materially different" factors of section 2.309(f)(2)(i), (ii) in Sections IV and V, below.

⁶ As we have explained in detail earlier in this proceeding, in order for a contention to be admissible under 10 C.F.R. § 2.309(f)(1)(i)-(vii), it must (1) "provide a specific statement of the" legal or factual issue sought to be raised; (2) "provide a brief explanation of the basis for the contention"; (3) "demonstrate that the issue raised . . . is within the scope of the proceeding"; (4) "demonstrate that the issue raised . . . is material to the findings the NRC must make to support the action that is involved in the proceeding"; (5) "provide a concise statement of the alleged facts or expert opinions," including "references to specific sources and documents," that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (6) "provide sufficient information to show that a genuine dispute exists with . . . [regard to] a material issue of law or fact," including "references to specific portions of the application that the petitioner disputes," or where the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.

⁷ 10 C.F.R. § 2.309(f)(2)(i)-(iii).

⁸ Licensing Board Order (Granting New York's Motion to Establish February 25, 2010 as the Date by Which New York May File Contentions Related to Entergy's Revised Submission Concerning Severe Accident Mitigation Alternatives) (Jan. 22, 2010) at 2 (unpublished). We extended the deadline to file new contentions arising from Entergy's SAMA analyses from February 25, 2010, to March 11, 2010. Licensing Board Order (Extending Time Within Which to File New Contentions) (Feb. 24, 2010) at 1 (unpublished).

II. LEGAL STANDARDS GOVERNING SAMA ANALYSES AND ENVIRONMENTAL CONTENTIONS

The scope of license renewal review for a nuclear power reactor is generally restricted by Part 54 “to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant’s systems, structures, and components that are subject to an evaluation of time-limited aging analysis.”⁹ However, Part 54 also mandates environmental review of certain site-specific environmental impacts pursuant to the NRC’s implementation of the National Environmental Policy Act (NEPA) in Part 51.¹⁰ In fact, the NRC’s “aging-based safety review” in its license renewal review “does not in any sense ‘restrict NEPA’ or ‘drastically narrow[] the scope of NEPA.’”¹¹ Moreover, the NRC has the authority and responsibility to supplement or to amend conditions to the current licensing basis (CLB)¹² of an existing operating license at the time of license renewal if such supplements or amendments are deemed necessary to protect the environment.¹³

Relative to the agency’s acknowledged NEPA responsibilities in the license renewal context, the NRC’s regulatory framework divides NEPA issues between Category 1 issues, which are those generically addressed by the NRC’s Generic Environmental Impact Statement for License Renewal and thus inadmissible in a license renewal proceeding, and Category 2 issues, which are those issues that must be analyzed on a site-by-site basis and thus are within the scope of license renewal proceedings.¹⁴ NRC regulations define severe accident mitigation

⁹LBP-08-13, 68 NRC 43, 66 (2008) (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000)).

¹⁰*Id.*; 10 C.F.R. § 54.29(b) (“A renewed license may be issued by the Commission up to the full term authorized by § 54.31 if the Commission finds that: . . . [a]ny applicable requirements of Subpart A of 10 CFR Part 51 have been satisfied.”). *Cf.* Nuclear Energy Institute; Denial of Petition for Rulemaking, 66 Fed. Reg. 10,834, 10,834-36 (Feb. 20, 2001) (acknowledging that “[t]here is no requirement in 10 CFR part 54 for analysis of SAMAs” but concluding that “[i]n the case of license renewal, it is the Commission’s responsibility under NEPA to consider all environmental impacts stemming from its decision to allow the continued operation of the entire plant for an additional 20 years.”).

¹¹*Turkey Point*, CLI-01-17, 54 NRC at 13.

¹²*See* 10 C.F.R. § 54.3(a). *See also Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 453-54 (2010) (“The current licensing basis (CLB) is the set of NRC requirements (including regulations, orders, technical specifications, and license conditions) applicable to a specific plant, and includes the licensee’s written, docketed commitments for ensuring compliance with applicable NRC requirements and the plant specific design basis.”).

¹³10 C.F.R. § 54.33(c). *But see infra* note 18.

¹⁴LBP-08-13, 68 NRC at 67 (citing *Turkey Point*, CLI-01-17, 54 NRC at 11-12).

alternatives (SAMAs) as a Category 2 issue that demands a site-specific analysis.¹⁵ In reviewing a license renewal application, Part 51 mandates that “[i]f the [NRC] staff has not previously considered severe accident mitigation alternatives for the applicant’s plant in an environmental impact statement or related supplement or in an environmental assessment, a consideration of alternatives to mitigate severe accidents must be provided.”¹⁶

The Commission has held that a litigable NEPA issue is one that concerns whether the NRC Staff has taken the requisite “hard look” at “mitigation (and the SAMA issue is one of mitigation) . . . in ‘sufficient detail to ensure that environmental consequences [of the proposed project] have been fairly evaluated.’”¹⁷ The NRC Staff’s obligation regarding SAMAs under NEPA and Part 51 is met by taking a hard look at those SAMAs identified as potentially cost-beneficial. While the only SAMAs that an applicant must implement as part of a license renewal safety review are those dealing with aging management,¹⁸ an order by the NRC Staff to implement SAMAs not dealing with aging management can be issued concurrently as part of a Part 50 CLB review.¹⁹ Consistent with the mandate of the Administrative Procedure Act (APA) and NEPA, if properly carried out, the NRC Staff’s hard-look analysis of all potentially cost-beneficial SAMAs under NEPA and Part 51 (not just those that are aging related) ensures that it has given proper consideration to all relevant factors in granting a license renewal.²⁰

¹⁵ See 10 C.F.R. Part 51, Subpart A, App. B, Table B-1 (under “Postulated Accidents,” classifying severe accidents as Category 2 issues and explaining that “[t]he probability weighted consequences of atmospheric releases, fallout onto open bodies of water, releases to ground water, and societal and economic impacts from severe accidents are small for all plants. However, alternatives to mitigate severe accidents must be considered for all plants that have not considered such alternatives.”).

¹⁶ 10 C.F.R. § 51.53(c)(3)(ii)(L).

¹⁷ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)).

¹⁸ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 293-94 n.26 (2010).

¹⁹ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 388 n.77 (2002). See also 10 C.F.R. § 50.109(a)(3) (“[t]he Commission shall require the backfitting of a facility only when it determines, based on the analysis described in paragraph (c) of this section, that there is a substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from the backfit and that the direct and indirect costs of implementation for that facility are justified in view of this increased protection.”).

²⁰ Cf. *Hanley v. Kleindienst*, 471 F.2d 823, 828-29 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

III. FACTUAL BACKGROUND OF ENTERGY'S DECEMBER 2009 SAMA REANALYSIS

Entergy's original Environmental Report (ER) for its Indian Point license renewal application (LRA) in 2007 contained a chapter on SAMAs.²¹ The SAMAs were analyzed using a five-step procedure: (1) "Establish the Baseline Impacts of a Severe Accident"; (2) "Identify SAMA Candidates"; (3) "Phase I: Preliminary Screening"; (4) "Phase 2: Final Screening and Cost Benefit Evaluation"; and (5) "Sensitivity Analyses."²² Entergy conducted its analysis utilizing

the most recent IP2 [Indian Point Unit 2] and IP3 [Indian Point Unit 3] PSA [probabilistic safety assessment] available at that time, a plant-specific offsite consequence analysis performed using the MELCOR Accident Consequence Code System 2 (MACCS2) computer program, and insights from the IP2 and IP3 individual plant examination . . . and individual plant examination of external events.²³

Out of 231 identified SAMA candidates at Indian Point Unit 2 (IP2), Entergy found that it would be possible to implement 68. Out of 237 identified SAMA candidates at Indian Point Unit 3 (IP3), Entergy found that it would be possible to implement 62.²⁴ Entergy then subjected the sixty-eight SAMAs at IP2 and the sixty-two SAMAs at IP3 to the "Phase 2: Final Screening and Cost Benefit Evaluation," determining that a total of twelve SAMAs were potentially cost-beneficial — five for IP2 and five for IP3 as a result of the baseline and sensitivity analyses, and two for IP2 as a result of an uncertainties analysis.²⁵

In 2008, in the course of the NRC Staff's environmental review of Indian Point's SAMAs for its Draft Supplemental Environmental Impact Statement (Draft SEIS), the NRC Staff asked Entergy to revise its SAMA analyses to consider "the impact of lost tourism and business . . . in the baseline analysis (rather than as a separate sensitivity case)."²⁶ As a result of this reanalysis, the NRC Staff identified a total of fourteen potentially cost-beneficial SAMAs —

²¹ Indian Point Energy Center, License Renewal Application, Appendix E, Environmental Report "Severe Accident Mitigation Alternatives" at 4-47 to 4-78 [hereinafter Entergy's ER].

²² *See id.* at 4-47 to 4-50.

²³ Office of Nuclear Reactor Regulation, Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment, Main Report, NUREG-1437, at 5-5 (Supp. 38, Vol. 1 Dec. 2008) (ADAMS Accession No. ML083540594) [hereinafter Draft SEIS].

²⁴ Entergy's ER at E.2-2, E.4-2.

²⁵ *See* Draft SEIS at 5-4 to 5-5, 5-8.

²⁶ *Id.* at 5-9.

nine for IP2 (IP2-009,²⁷ -028, -044, -053, -054, -056, -060, -061, and -065) and five for IP3 (IP3-052, — 053, -055, -061, and -062).²⁸ The NRC Staff's review also showed that one SAMA (IP3-030) was erroneously designated as potentially cost-beneficial by Entergy.²⁹ The NRC Staff concurred with Entergy that further cost-benefit analyses of these SAMAs would be appropriate, but also concluded that since none of these SAMAs related to aging management, "they need not be implemented as part of the license renewal pursuant to Part 54."³⁰

In December 2009, Entergy submitted the SAMA Reanalysis that is the focus of the new and amended contentions now before us in response to a series of teleconferences with the NRC Staff in November 2009.³¹ Entergy addressed the NRC Staff's comments by endeavoring to present information regarding:

- The meteorological data and justification supporting its use in the SAMA analysis (e.g., if a single year is used or an average of several years),
- Revised estimates of the offsite population dose and offsite economic costs,
- Identification of the meteorological tower elevation from which meteorological data were obtained and the rationale for selecting the data from that tower elevation,
- Revised SAMA analysis results, specifically for the analysis case discussed in response to [Request for Additional Information (] RAI 4e [)], dated February 5, 2008, and
- The complete MACCS2 input file used for the reanalysis (in electronic format).³²

In the original SAMA Analysis of its ER, Entergy used an average of 5 years (2000-2004) of meteorological data, consisting of "wind speed, wind direction, temperature, and accumulated precipitation," derived from Indian Point's onsite meteorological monitoring system.³³ Conceding that the wind direction was incorrectly averaged during that 5-year period, Entergy, purportedly in accordance

²⁷ Instead of using the full labels by Entergy of each SAMA, we refer to each SAMA by its numerical identification.

²⁸ *Id.* at 5-9 to 5-10.

²⁹ *Id.* at 5-10.

³⁰ *Id.*

³¹ *See* NL-09-165 at 1.

³² *Id.*

³³ *See* Letter from Fred Dacimo, Entergy Nuclear Northeast, to U.S. Nuclear Regulatory Commission, Attachment 1, "License Renewal Application — SAMA Reanalysis Using Alternate Meteorological Tower Data" (Dec. 11, 2009) at 3 (ADAMS Accession No. ML093580089) [hereinafter Entergy's December 2009 SAMA Analysis].

with the dictates of NEI-05-01, reanalyzed its SAMAs using measurements from only the year 2000 because the year 2000's data "resulted in the most conservative (i.e. largest) calculated population doses."³⁴ As it did in response to the NRC Staff's reviews for the Draft SEIS, Entergy also reconducted a sensitivity study, using values originating in NUREG-1750, for those SAMAs that were previously found to pass the Phase 1 Preliminary Screening but had not yet been determined to be potentially cost-beneficial.³⁵ Entergy's cost-benefit reanalysis revealed that a total of nineteen SAMAs continued to be potentially cost-beneficial, twelve for IP2 (IP2-009, -021, -022, -028, -044, -053, -054, -056, -060, -061, -062, and -065) and seven for IP3 (IP3-007, -019, -052, -053, -055, -061, and -062).³⁶

In addition to the fourteen SAMAs previously designated for further cost-benefit analyses in the NRC Staff's Draft SEIS, Entergy stated that its reanalysis identified six additional SAMAs (IP2-021, -022, and -062 and IP3-007, -018, and -019) that "have been submitted for engineering project cost benefit analysis."³⁷ Echoing statements made before, Entergy also reiterated its position that its aging management programs

are sufficient to manage the effects of aging during the license renewal period without implementation of the above SAMA candidates for IP2 and IP3, these potentially cost beneficial SAMAs need not be implemented as part of license renewal pursuant to 10 CFR Part 54.³⁸

IV. NEW YORK'S AMENDED CONTENTIONS

With this background, we turn first to an analysis of the admissibility of each of New York's amended contentions.

A. NYS-12B

The December 14, 2009 SAMA Re-analysis for IP2 and IP3 underestimates decontamination and clean up costs associated with a severe accident in the New York metropolitan area and, therefore, underestimates the cost of a severe accident and fails to consider mitigation measures which are related to license renewal in violation of NEPA.

³⁴ *Id.* at 3.

³⁵ *Id.* at 4, 29-31.

³⁶ *Id.* at 10-19, 20-28.

³⁷ *Id.* at 31-32.

³⁸ *Id.* at 32.

1. New York's Argument

Like NYS-12³⁹ and NYS-12A,⁴⁰ NYS-12B contends that Entergy's December 2009 SAMA Reanalysis improperly uses the MACCS2 code to estimate how radiation would be dispersed in the event of a severe accident, which in turn underestimates likely decontamination and cleanup costs in the event of a severe accident.⁴¹ New York continues to assert that the MACCS2 code is inadequate because it assumes the release of large-sized radionuclides, which are easier to clean up and to remove compared to small-sized radionuclides, while New York contends that small-sized radionuclides would be spread during a severe accident at the Indian Point Nuclear Plant.⁴² New York insists in this regard that Entergy should have used the 1996 Sandia National Laboratories Site Restoration Study results for more precise input to its December 2009 SAMA Reanalysis, thus resulting in what New York predicts would be much higher cleanup costs, making mitigation more cost-beneficial.⁴³

2. Entergy's, the NRC Staff's, and Connecticut's Answers

Neither Entergy,⁴⁴ the NRC Staff,⁴⁵ nor Connecticut⁴⁶ opposes admission of NYS-12B as a modification to NYS-12/12A.

3. Board's Decision

There is no material opposition by Entergy or the NRC Staff to admission of NYS-12B to the degree New York is relying on the same analytic framework that the Board accepted in admitting NYS-12/12A. Accordingly, finding this contention meets the "not previously available" and "materially different" standards of section 2.309(f)(2)(i) and (ii), and the contention admissibility standards of

³⁹ See LBP-08-13, 68 NRC at 100-02.

⁴⁰ See Licensing Board Order (Ruling on New York State's New and Amended Contentions) (June 16, 2009) at 3-4 (unpublished) [hereinafter June 16, 2009 Order].

⁴¹ State of New York's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternatives Reanalysis (Mar. 11, 2010) at 1 [hereinafter New York's New and Amended Contentions].

⁴² *Id.* at 2.

⁴³ *Id.* at 3-6 (citations omitted).

⁴⁴ Entergy's Answer at 19. Entergy continues to assert its disagreement with NYS-12/12A on the merits, but does not resist admission of NYS-12B to the extent that the amended contention reasserts what the Board already admitted as NYS-12/12A and that NYS-12B relies on the same evidence as the previously admitted contention. *Id.*

⁴⁵ NRC Staff's Answer at 11-12.

⁴⁶ Connecticut's Answer at 3-4.

section 2.309(f)(1), we *admit* NYS-12B as an adjunct to NYS-12/12A and hereby *consolidate* it with NYS-12/12A as NYS-12/12A/12B.

B. NYS-16B

The December 2009 SAMA Reanalysis for IP2 and IP3 uses an air dispersion model which will not accurately predict the geographic dispersion of radionuclides released in a severe accident and will not present an accurate estimate of the costs of human exposure.

1. New York's Argument

Like NYS-16⁴⁷ and NYS-16A,⁴⁸ NYS-16B challenges Entergy's use of the ATMOS model (which is an element of the MACCS2 code used in Entergy's December 2009 SAMA Reanalysis) to predict the spread of radionuclides in the event of a severe accident. Because of Entergy's reliance on the straight-line Gaussian plume model used in ATMOS, New York asserts that Entergy's December 2009 SAMA Reanalysis does not accurately measure the effects that changing wind direction and speed will have on such dispersion due to the varied terrain near Indian Point.⁴⁹ According to New York this does not predict a "conservative" (i.e., large) population dose as Entergy claims, but rather results in a smaller population dose that has the effect of underestimating the benefit of implementing identified SAMAs.⁵⁰ Further, New York charges in a footnote that Entergy's calculations also underestimate the population dose and possible benefit of each SAMA because they do not consider the daily tourist and commuter population of New York City affected by a radioactive dispersion.⁵¹ In another footnote, New York also emphasizes that such underestimations mislead the public and emergency response officials responsible for dealing with such accidents and therefore preclude Entergy from satisfying "its obligations under 10 C.F.R. § 50.47(b)(9) . . . and NRC Staff [from] meet[ing] its concurrent obligations under NEPA."⁵²

2. Entergy's Answer

Paralleling its position taken in response to NYS-12B, Entergy does not resist

⁴⁷ See LBP-08-13, 68 NRC at 110-13.

⁴⁸ See June 16, 2009 Order at 4-7.

⁴⁹ New York's New and Amended Contentions at 9-11 (citations omitted).

⁵⁰ *Id.* at 8-11 (citations omitted).

⁵¹ *Id.* at 8 n.3 (citations omitted).

⁵² *Id.* at 10 & n.4 (citations omitted).

admission of NYS-16B to the extent that it “relies on the same supporting evidence as NYS-16/16A.”⁵³ Entergy nonetheless challenges two aspects of New York’s amended contention. First, Entergy insists that NYS-16B’s assertion “that Entergy cannot meet its emergency planning obligations under 10 C.F.R. § 50.47(b)(9), and . . . the [NRC] Staff cannot meet its ‘concurrent obligations under NEPA,’” are beyond what the Board admitted in NYS-16/16A, since emergency planning issues are outside the scope of license renewal proceedings.⁵⁴ Second, Entergy stresses that the issue of whether its December 2009 SAMA Reanalysis fails to take into account the influx of tourists and commuters into New York City’s daily population is “impermissibly late” and therefore should not be admitted as a part of NYS-16B. Asserting that New York has failed to justify why it has waited until now to raise this issue, Entergy also maintains that New York had the opportunity to address this claim in response to Entergy’s original SAMA analysis or when Entergy, in responding to an NRC RAI in 2008, dealt with assumptions of lost tourism and business and their role in Entergy’s SAMA analysis.⁵⁵

3. *NRC Staff’s Answer*

Like Entergy, the NRC Staff does not challenge the admission of NYS-16B “as limited by the Board’s previous rulings on Contentions 16 and 16-A.”⁵⁶ Yet, the NRC Staff also takes issue with New York’s assertions relating to “daytime transients and tourism,” given that New York “has not shown that it could not have raised this issue regarding the Applicant’s previous SAMA analyses independently from the [NRC] Staff, or that this additional issue arose from” Entergy’s December 2009 SAMA Reanalysis.⁵⁷ Accordingly, the NRC Staff concludes that this part of NYS-16B should not be admitted because it is not timely filed and lacks the requisite showing under 10 C.F.R. § 2.309(c)(1).⁵⁸

4. *Connecticut’s Answer*

Connecticut supports admission of NYS-16B as timely under 10 C.F.R. § 2.309(f)(2) due to the December 2009 recalculation of these SAMAs.⁵⁹ Specific

⁵³ Entergy’s Answer at 19.

⁵⁴ *Id.* at 19-20 (citations omitted).

⁵⁵ *Id.* at 20 (citations omitted).

⁵⁶ NRC Staff’s Answer at 12.

⁵⁷ *Id.* at 12-13 (citations omitted).

⁵⁸ *Id.* at 13.

⁵⁹ Connecticut’s Answer at 1-2. The portion of Connecticut’s Answer cited here begins on the “cover page” to its Answer, which has no page number. The pagination begins on the “second” full

(Continued)

to this contention, Connecticut claims that the December 2009 SAMA Reanalysis mistakenly relies on the ATMOS air dispersion model, thus incorrectly stating the wind direction and underestimating the population dose used to determine the benefit of implementing SAMAs.⁶⁰

5. *New York's Reply*

New York responds that NYS-16B's statements regarding tourists and commuters are timely because this aspect of its contention relates strictly to population levels used as inputs into Entergy's SAMA Reanalysis, whereas Entergy's Answer focuses on the impacts that severe accidents have on tourism and temporary visitors to New York.⁶¹ Moreover, New York argues that the Board already admitted the question of underestimation of population projections as part of NYS-16/16A, and the issue of offsite population doses was part of the impetus for Entergy's December 2009 SAMA Reanalysis.⁶² Therefore, New York reasons that this portion of NYS-16B is timely in the sense that Entergy has raised this issue for the first time in its December 2009 SAMA Reanalysis by attempting to address the NRC Staff's questions of offsite population doses.⁶³

Additionally, New York criticizes Entergy's statement that NYS-16B improperly seeks to raise emergency planning issues that the Board has already excluded from this proceeding. New York repeats its arguments cited in our Order that admitted NYS-16A: "the State does not challenge Entergy's compliance 'but simply describes one of the possible consequences of Entergy's continued reliance on what is known to be a deficient and outdated air dispersion model.'"⁶⁴

6. *Board's Decision*

We agree with New York that the focus of NYS-16B is not the effect of the loss of tourism itself on the cost-benefit analysis in Entergy's revised SAMA analyses. New York's criticism, which makes NYS-16B relevant to the concerns it raised in NYS-16/16A, is over the population figure used to estimate the population dose. It is not clear that Entergy's December 2009 SAMA Reanalysis adds the infusion of tourists and commuters in New York City to the population

page of Connecticut's Answer. We note that our citation to Connecticut's Answer here includes that cover page as well as numbered pages 1-2. Subsequent citations to Connecticut's Answer will refer to the number mentioned at the bottom of each page.

⁶⁰ *Id.* at 3-4.

⁶¹ New York's Reply at 32.

⁶² *Id.* at 32-33.

⁶³ *Id.* at 33.

⁶⁴ *Id.* (citing June 16, 2009 Order at 5-6).

used for its SAMA analysis — an absence that might underestimate the exposed population in a severe accident and, in turn, underestimate the benefit achieved in implementing a SAMA. As we said in discussing both NYS-16 and NYS-16A, the question “whether the population projections used by Entergy are underestimated” is admissible.⁶⁵ Moreover, while New York did not expressly articulate this issue in either NYS-16 or NYS-16A, Entergy’s December 2009 SAMA Reanalysis shows cost-benefit determinations and conclusions regarding implementation that diverge from those reached previously by Entergy. Accordingly, we find that this contention arises out of Entergy’s SAMA Reanalysis and that New York was confronted with materially new information sufficient to establish that the contention complies with 10 C.F.R. § 2.309(f)(2)(i) and (ii).

Further, while this addition does not materially change the contention as admitted, it does contain sufficient information to support its admissibility as an amendment under section 2.309(f)(1). New York was not required to present all of its supporting information in its petition to intervene; it must only supply an adequate basis for admission of the contention.⁶⁶ Therefore, recognizing that it repeats the allegations in NYS-16/16A, we *admit* NYS-16B inasmuch as it deals with the additional aspect of tourist and commuter populations.

Finally, we reaffirm that the adequacy of emergency planning is outside the scope of license renewal proceedings.⁶⁷ Moreover, in line with our June 16, 2009 Order, we reiterate our statement that “New York will not be allowed to address arguments from the original NYS-16 that went beyond the limiting language of the admitted contention.”⁶⁸ Because the emergency planning question was not previously admitted in either NYS-16 or NYS-16A, and in contrast to population estimates, emergency planning is not within the scope of NYS-16, we do not adjust our prior rulings to widen the scope of NYS-16/16A to include consideration of fulfillment of Entergy’s emergency planning obligations or the NRC Staff’s NEPA obligations related to emergency planning. Therefore, we *reject* this aspect of NYS-16B and *only admit NYS-16B in part* as described above and consolidate it with NYS-16/16A as NYS-16/16A/16B.

⁶⁵ June 16, 2009 Order at 6 (quoting LBP-08-13, 68 NRC 43, 112 (2008)).

⁶⁶ Cf. *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 100 (2009) (“Challenges to the admissibility of a contention pursuant to [10 C.F.R. §§] 2.309(f)(1)(ii) on the ground that it does not include an ‘adequate basis’ because it does not include sufficient facts, evidence, or supporting factual information are thus misguided. If the petitioner provides a brief explanation of the rationale underlying the contention, it is sufficient to satisfy 10 C.F.R. § 2.309(f)(1)(ii).”).

⁶⁷ See LBP-08-13, 68 NRC at 149-50 (citations omitted).

⁶⁸ June 16, 2009 Order at 6.

V. NEW YORK'S NEW CONTENTIONS

We move next to an analysis of the admissibility of New York's new contentions.

A. NYS-35

The December 2009 Severe Accident Mitigation Alternatives ("SAMA") Reanalysis does not comply with the requirements of the National Environmental Policy Act (42 U.S.C. Sections 4332(2)(C)(iii) and (2)(E)), the President's Council on Environmental Quality's Regulations (40 C.F.R. Section 1502.14), the Nuclear Regulatory Commission's Regulations (10 C.F.R. Section 51.53(c)(3)(ii)(L)) or controlling federal court precedent (*Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989)) because it identifies nine mitigation measures which have not yet been finally determined to be cost-effective and which, if they are sufficiently cost-effective, must be added as license conditions before a new and extended operating license can be issued.

1. *New York's Argument*

With its two parts, NYS-35 (1) calls for a complete cost-benefit analysis of nine SAMAs deemed potentially cost-beneficial; and (2) states that any SAMA deemed "sufficiently" cost-beneficial must be added as a license condition to a renewed operating license for IP2 and IP3.⁶⁹ According to New York, the NRC Staff is obligated to consider SAMAs if it has not already done so as part of its NEPA obligations in a license renewal review.⁷⁰ As a consequence, the absence of a complete cost-benefit analysis of SAMAs in the NRC Staff's Environmental Impact Statement (EIS) necessarily precludes the required hard look under NEPA.⁷¹ New York represents that such a requirement is not foreclosed in this license renewal proceeding by Part 54's prohibition on consideration of "an applicant's non-compliance with its current licensing basis ('CLB')" because SAMAs are part of a NEPA alternatives analysis that demands examination of which alternatives are preferable.⁷²

The nine SAMAs for which New York demands a complete analysis are divided into two groups. The first group consists of those SAMAs in the December 2009 SAMA Reanalysis that Entergy promises to subject to further cost-benefit screening because it deems them sufficiently cost-beneficial for the

⁶⁹ New York's New and Amended Contentions at 13-14.

⁷⁰ *Id.* (citing 10 C.F.R. § 51.53(c)(3)(ii)(L)).

⁷¹ *Id.* at 31-33 (citations omitted).

⁷² *Id.* at 31 n.13 (referencing 10 C.F.R. § 54.30).

first time. For IP2, these are IP2-021, -022, and -062; and for IP3, they are IP3-007, -018, and -019.⁷³ The second group consists of SAMAs that were not identified in Entergy's ER but were found to be cost-beneficial by the NRC Staff in its Draft SEIS and that Entergy in its December 2009 SAMA Reanalysis committed to subject to further cost-benefit screening.⁷⁴ These are IP2-009, IP2-053, and IP3-053.⁷⁵ New York argues that because Entergy has committed to a complete cost-benefit analysis for both groups of SAMAs but has not yet done so, the NRC Staff (and, by extension, the Board) is unable to take the hard look necessary to make an informed decision, with a rational basis, as to which SAMAs would be cost-beneficial to implement.⁷⁶

Second, regarding license conditions, New York argues that, if the NRC Staff finds any SAMA conferring a substantial benefit compared to its cost of implementation, it must make such SAMA a license condition for the renewed operating license. To do otherwise, according to New York, would allow the NRC Staff to make its licensing decision without the requisite rational basis required by the APA.⁷⁷ Similarly, New York reasons that, because the NRC Staff, pursuant to its own guidance, must include a statement in its Final Environmental Impact Statement (FEIS) explaining when the implementation of SAMAs are not "warranted," conversely the NRC Staff must require implementation of any SAMAs that are "warranted." Failure to do so, reasons New York, would be acting irrationally, in contravention of the APA.⁷⁸ If the NRC Staff has not required implementation of cost-beneficial SAMAs, then, New York argues, the NRC Staff is acting without a rational basis.⁷⁹ New York suggests that even without additional cost-benefit analyses, the NRC Staff must require the implementation of SAMAs IP2-009 and IP3-007 because

- (1) each of these SAMAs is cost-effective using both the baseline and the conservative benefit calculation; (2) some additional engineering cost estimates have already

⁷³ *Id.* at 33-34.

⁷⁴ See Entergy's December 2009 SAMA Reanalysis at 11, 17, 27, 32; see also Draft SEIS at 5-9 to 5-10.

⁷⁵ New York's New Contentions at 34.

⁷⁶ *Id.* at 15.

⁷⁷ *Id.* at 14-15 (citing *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 57 (1983); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); Office of Nuclear Reactor Regulation, Standard Review Plans for Environmental Reviews for Nuclear Power Plants, Supplement 1: Operating License Renewal, NUREG 1555, at 5.1.1-8 to 5.1.1-9 (Oct. 1999) (ADAMS Accession No. ML003702019) [hereinafter NUREG-1555, Supp. 1]).

⁷⁸ *Id.* at 14, 26 (citing NUREG-1555, Supp. 1, at 5.1.1-7 to 5.1.1-8).

⁷⁹ *Id.* at 15.

been done making it less likely further analysis will change the outcome; (3) the safety benefit of each mitigation measure is substantial — reducing the population dose risk by 47.03% and 24.16% respectively; and (4) the difference between the cost and the benefit is significant — amounting to \$1-2 million for each one.⁸⁰

2. *Entergy's Answer*

Entergy's Answer opposing admission of NYS-35 rests upon two arguments: (1) NYS-35 does not satisfy the section 2.309(f)(2)(i) timeliness requirement because it is based on previously available information; and (2) under section 2.309(f)(1), NYS-35 "lack[s] adequate support in law or fact and fail[s] to raise a genuine dispute on a material legal or factual issue."⁸¹ The first is a procedural challenge to contention admissibility and the second is a substantive challenge.

Regarding Entergy's procedural challenge, Entergy represents that its original ER and the Draft SEIS contained statements similar to those found in its December 2009 SAMA Reanalysis pledging to conduct a complete analysis of potentially cost-beneficial SAMAs.⁸² Therefore, Entergy reasons that NYS-35 should have been filed shortly after the ER was issued or, at the very latest, after the Draft SEIS was issued, since that document "explicitly sets forth Entergy's and the [NRC] Staff's positions on these issues."⁸³ Entergy disputes New York's characterization of the December 2009 SAMA Reanalysis as completely new, noting that the December 2009 SAMA Reanalysis used the same nonmeteorological input data with changed meteorological input data.⁸⁴

Entergy stresses that it "did not alter the probabilistic or cost-benefit techniques used to obtain the results . . . in its" earlier documents containing SAMA analyses.⁸⁵ Further, Entergy says that New York has not explained why it did not raise challenges to the three SAMAs found potentially cost-beneficial in Entergy's earlier analysis from 2008 (SAMAs IP2-009 and -053 for IP2 and SAMA IP3-053 for IP3).⁸⁶ Nor, Entergy says, was the December 2009 SAMA Reanalysis the first instance that Entergy included factors such as lost tourism and business in its SAMA analyses.⁸⁷ In the same vein, according to Entergy, because some of its earlier cost-benefit determinations resulted in ratios favoring implementation, New York could (and thus should) have raised challenges to Entergy's promise to

⁸⁰ *Id.* at 34 n.15.

⁸¹ Entergy's Answer at 21, 24.

⁸² *Id.* at 21-22 (citations omitted).

⁸³ *Id.* at 22 (citations omitted).

⁸⁴ *Id.* at 22-23 (citations omitted).

⁸⁵ *Id.* at 23.

⁸⁶ *Id.* at 23 n.127.

⁸⁷ Entergy's Answer at 22 n.125.

conduct further analyses and its failure to implement these SAMAs only as late as when the Draft SEIS was issued.⁸⁸ Therefore, Entergy sees NYS-35 as untimely and urges dismissal of the contention.

Entergy's substantive argument against admission of NYS-35 contains three subarguments: (1) "NEPA is a Procedural Statute That Does Not Mandate Implementation of Potentially Cost-Beneficial SAMAs as a Condition of License Renewal"; (2) "Entergy Has Provided a Sufficiently 'Thorough' and 'Complete' Cost-Benefit Analysis"; and (3) New York "Does Not Allege That Entergy Should Have Identified Additional SAMAs As 'Potentially Cost-Beneficial' Beyond Those Already Identified in Its Revised SAMA Analysis."⁸⁹ Entergy criticizes New York for relying on inapposite precedent, which it argues has nothing to do with NEPA, in order to attempt to raise the "arbitrary and capricious" standard. Instead, it suggests that the Supreme Court's *Methow Valley* decision is controlling⁹⁰ in that it interprets NEPA to mandate neither mitigative action against harmful effects of major federal actions nor in-depth statements of planned actions to be taken to dull such impacts.⁹¹

According to Entergy, Part 54 compliance is not dependent on complete fulfillment of Part 51 requirements given that the Commission has explicitly excluded SAMA analysis from Part 54 and distinguished the safety requirements of Part 54 from the environmental evaluation commanded by Part 51.⁹² Moreover, Entergy alleges that New York misinterprets the Third Circuit's *Limerick* decision because, according to Entergy, *Limerick* only "held that the NRC could not generically dispense with the consideration of SAMAs, under NEPA, through a policy statement issued pursuant to its AEA [Atomic Energy Act] authority."⁹³ Rather, Entergy describes *Limerick* as prescribing "reasonable evaluation and disclosure — but not implementation — of possible mitigation measures, including SAMAs."⁹⁴ Therefore, Entergy reasons, NYS-35 is outside the scope of this proceeding because, as long as Entergy has conducted this evaluation and disclosure, it has satisfied its obligations under the NRC's NEPA regulation, and the only way the NRC Staff could oblige Entergy to implement these mitigation measures would be through a Part 50 CLB review.⁹⁵

⁸⁸ *Id.* at 23.

⁸⁹ *Id.* at 24-31.

⁹⁰ *Id.* at 25 n.137.

⁹¹ *Id.* at 24-25 (citing *Methow Valley*, 490 U.S. at 353).

⁹² *Id.* at 25-26 (citing *Florida Power & Light Co. (Turkey Point Nuclear Power Plant, Units 3 & 4)*, CLI-01-17, 54 NRC 3, 13 (2001); 66 Fed. Reg. 10,834, 10,834 (Feb. 20, 2001)).

⁹³ *Id.* at 26 (citing *Limerick Ecology Action v. NRC*, 869 F.2d 719, 736-39 (3d Cir. 1989)).

⁹⁴ *Id.*

⁹⁵ *Id.* at 27 (citations omitted).

Entergy goes on to insist that it has conducted a sufficiently complete SAMA cost-benefit analysis. Rather than delaying indefinitely this analysis or running contrary to NRC license renewal procedures, Entergy stresses that, like the SAMA analyses in its ER, its December 2009 SAMA Reanalysis has adhered to both engineering judgment and “existing estimates for similar modifications contained in prior NRC-approved SAMA analyses.”⁹⁶ Entergy justifies the multistep procedure of subjecting only a few SAMA candidates to the full battery of cost-benefit tests, which it depicts as sanctioned by NEI-05-01, because some SAMAs were clearly not cost-beneficial after initial tests, while others merited further scrutiny to ascertain whether they would truly be cost-beneficial.⁹⁷ Additionally, Entergy regards New York as not taking issue with any specific SAMA cost estimate and conflating the analysis for potentially cost-beneficial SAMAs under Part 51 with the analysis undertaken merely to assess the viability of implementation under Entergy’s current operating license. Therefore, Entergy claims that NYS-35 raises no genuine dispute over Entergy’s SAMA analyses themselves.⁹⁸

Likewise, Entergy portrays NYS-35 as beyond the bounds of an admissible SAMA contention because it “does not allege that Entergy should have identified any additional SAMAs as potentially cost-beneficial,” thus running counter to the Commission’s instructions in *Pilgrim* to admit SAMA contentions only if “it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated.”⁹⁹ Finally, Entergy argues that the NRC Staff need not issue a new Draft SEIS including and evaluating the results of the December 2009 SAMA Reanalysis since the Commission has on previous occasions allowed discussions of mitigation measures, not originally featured in a Draft SEIS, to be included in a Final EIS as long as they are within the same range of alternatives mentioned in the Draft SEIS, while the December 2009 SAMA Reanalysis does not reflect any dramatic differences in the environmental evaluation of Indian Point.¹⁰⁰

3. NRC Staff’s Answer

The NRC Staff agrees with Entergy’s objection to the admission of NYS-35. At the outset, the NRC Staff notes that since NEPA does not require a specific outcome regarding “mitigation of potential environmental impacts,”

⁹⁶ *Id.* at 28 (citations omitted).

⁹⁷ *Id.* at 28-29 (citations omitted).

⁹⁸ *Id.* at 29-30 (citations omitted).

⁹⁹ *Id.* at 30 (citing *Pilgrim*, CLI-10-11, 71 NRC at 293, 317; *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 10 (2002)).

¹⁰⁰ *Id.* at 30-31 (citations omitted).

it also does not mandate the implementation as license conditions of those SAMAs identified as potentially cost-beneficial.¹⁰¹ Citing, *inter alia*, the Board's contention admissibility decision in this proceeding,¹⁰² the NRC Staff says that it is not bound by NEPA to "require the Applicant to reach a 'final' determination as to the cost-beneficial status of SAMAs which the Applicant has already identified as *potentially* cost-beneficial, or to implement such 'finally-determined' cost-beneficial SAMAs as license conditions."¹⁰³ Furthermore, contrary to the position put forward by New York, the NRC Staff asserts that it has included a rational basis for its own SAMA analysis in its Draft SEIS, and thus characterizes New York as having "not identified any deficiency in the [NRC] Staff's analysis."¹⁰⁴ Instead, it argues that New York "simply disagrees with the [NRC] Staff's determination not to impose the identified SAMAs as a condition for license renewal."¹⁰⁵

According to the NRC Staff, NYS-35 misinterprets 10 C.F.R. § 51.52(c) (3)(ii)(L), given that the regulation only dictates consideration of SAMAs in the NRC Staff's environmental review, whereas NYS-35 calls for a final determination and imposition as license conditions of cost-beneficial SAMAs.¹⁰⁶ The NRC Staff also challenges New York's reading of NRC Staff guidance documents. The NRC Staff urges that New York incorrectly construes these documents as authority for the NRC Staff to identify and require the implementation of mitigative alternatives as part of license renewal.¹⁰⁷ The NRC Staff contends that these documents do not provide authority for the NRC Staff to require implementation of any SAMAs.¹⁰⁸

As a factual matter, the NRC Staff describes NYS-35 as failing to present a material issue in this proceeding, given that New York has not challenged Entergy's methods for conducting SAMA reviews and not predicted that a complete review would necessarily result in identification of any additional SAMAs that have not already been identified as potentially cost-beneficial. Additionally, the NRC Staff affirms that those SAMAs that are planned for more review could not be required for implementation as license renewal conditions.¹⁰⁹ The NRC Staff also analogizes the instant contention to contentions that were disposed of in the *McGuire/Catawba* decision, reasoning that there has already been a determination that certain SAMAs were potentially cost-beneficial in the

¹⁰¹ NRC Staff's Answer at 17-18 (citations omitted).

¹⁰² See LBP-08-13, 68 NRC at 201 n.1038.

¹⁰³ NRC Staff's Answer at 18-19 (citations omitted) (emphasis added).

¹⁰⁴ *Id.* at 19.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 20-21.

¹⁰⁷ *Id.* at 21-22 (citations omitted).

¹⁰⁸ *Id.* at 22.

¹⁰⁹ *Id.* at 23-24 (citations omitted).

Draft SEIS and there is no remedy of implementation, or even further review, available to New York. This is because, in the NRC Staff's view, the SAMAs named in NYS-35 do not relate to aging management and New York does not specify what is missing from the December 2009 SAMA Reanalysis that further review would elicit.¹¹⁰ The NRC Staff cites the *Pilgrim* decision for the proposition that New York's contention is deficient because it "does not allege that additional SAMAs should have been identified as potentially cost-beneficial, nor does it allege that any significant errors were made in the Applicant's SAMA Reanalysis."¹¹¹ Therefore, the NRC Staff urges rejection of NYS-35 as failing to raise a material issue in this proceeding.

Finally, citing the Commission's *Oyster Creek* decision, the NRC Staff describes NYS-35 as based on old information that is not rendered new due simply to the publication of a new document. Therefore, the NRC Staff labels NYS-35 as untimely since the information that is at the heart of the contention, Entergy's decision not to implement any of its analyzed SAMAs and the NRC Staff's conclusion not to require implementation, has been available to New York from at least the time of the submission of Entergy's ER.¹¹²

4. Connecticut's Answer

Connecticut endorses admission of NYS-35. Citing *Limerick*, Connecticut urges a full review of SAMAs, explaining that because the NRC Staff may not engage in an ad hoc policy of evaluating severe accidents under NEPA, it is required to "carefully evaluate the environmental impacts that could result from severe accidents and the means to mitigate such impacts in order to comply with NEPA."¹¹³

5. New York's Reply

In its Reply, New York asserts that the NRC Staff and Entergy fail to offer a rational basis for not implementing potentially cost-beneficial SAMAs.¹¹⁴ New York dismisses Entergy's rationalizations for why it has not yet agreed to implement potentially cost-beneficial SAMAs because, according to New York, such justification should have been included in Entergy's ER. Therefore, New York characterizes these as merely post hoc bases having no legal effect on the

¹¹⁰ *Id.* at 24-26 (citations omitted).

¹¹¹ *Id.* at 26-27 (citing *Pilgrim*, CLI-10-11, 71 NRC at 315, 316-17).

¹¹² *Id.* at 32-33 (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 272-74 (2009)).

¹¹³ Connecticut's Answer at 5-6 (citing *Limerick*, 869 F.2d 719).

¹¹⁴ New York's Reply at 7.

ER.¹¹⁵ Entergy's allusion to Part 54 is not a sufficient rationalization, New York argues, because Part 54 explicitly conditions receipt of a renewed license upon satisfactory compliance with Part 51's environmental regulations.¹¹⁶ Because the NRC Staff and Entergy have both alluded to the fact that the impending reviews of the SAMAs in NYS-35 will eventually be conducted anyway, New York urges that they must be conducted within the NRC Staff's environmental review in order for the public to be able to adequately understand the NRC Staff's decisionmaking process under NEPA and confirm that the NRC Staff has made its decision with a rational basis.¹¹⁷ Moreover, New York contests Entergy's claimed adherence to NEI-05-01 and NRC Staff Guidance because Entergy has not yet fully determined the economic viability of the SAMAs subject to further cost-benefit analysis, which in turn leaves the NRC Staff unable to decide whether implementation of any SAMAs is warranted.¹¹⁸

As a procedural matter, citing the Board's January 22, 2010 Order, New York argues that NYS-35 is indeed timely because NYS-35 arises out of Entergy's December 2009 SAMA Reanalysis, which identifies nine SAMAs as cost-effective or potentially cost-beneficial that were not previously labeled as such in the baseline analysis found in Entergy's ER.¹¹⁹ Specifically, New York identifies nine SAMAs from the December 2009 Reanalysis as resulting in a material change in the degree to which the benefit outweighs the cost of implementing the SAMA at this stage in the analysis.¹²⁰ According to New York, it was only when the new SAMA analysis substantively increased the benefits of these nine mitigation measures that it became relevant to insist that the cost analysis be completed in order to determine if the SAMAs would be cost-effective. Therefore, New York emphasizes that it was not able to raise NYS-35 in response to Entergy's ER or the NRC Staff's Draft SEIS since neither document included the inputs used in the December 2009 SAMA Reanalysis.¹²¹

6. Board's Decision

We find that NYS-35 presents a genuine issue of material fact and *admit it in part*. As New York noted, Entergy's December 2009 SAMA Reanalysis entailed

¹¹⁵ *Id.* at 7 n.2 (referencing *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, 128 S. Ct. 2733, 2758 (2008); *Federal Power Commission v. Texaco*, 417 U.S. 380, 397 (1974)).

¹¹⁶ *Id.* at 9.

¹¹⁷ *Id.* at 9-12 (citations omitted).

¹¹⁸ *Id.* at 12 (citations omitted).

¹¹⁹ *Id.* at 7 n.3, 22-23 (citations omitted).

¹²⁰ *Id.* at 23-24.

¹²¹ *Id.* at 26-28 (citations omitted).

a new analysis, with different inputs used to arrive at revised determinations of the costs and benefits associated with implementation. The six SAMAs not previously identified as potentially cost-beneficial that are now planned by Entergy for further analyses (SAMAs IP2-021, -022 and -062 and SAMAs IP3-007, -018, and -019) were not deemed worthy of additional analysis by Entergy in its ER or the NRC Staff's Draft SEIS.¹²² Thus, the challenge to the decision to subject them to further review is a result and arises out of the December 2009 SAMA Reanalysis. Moreover, although the other three SAMAs on which NYS-35 focuses (SAMAs IP2-009, IP2-053, and IP3-053) were categorized in the NRC Staff's Draft SEIS as potentially cost-beneficial,¹²³ the actual numbers reached in Entergy's decision whether to subject any of them to further analysis have changed significantly since the NRC Staff's Draft SEIS.¹²⁴

We are not persuaded by the NRC Staff's comparison of the timeliness of NYS-35 to that disposed of in *Oyster Creek*.¹²⁵ The underlying information that sparked this contention appeared for the first time in Entergy's December 2009 SAMA Reanalysis, in which Entergy utilized different inputs in its analysis, thus creating a new cost-benefit picture. Even though, at each stage, neither Entergy nor the NRC Staff concluded that implementation was necessary, it is the new analysis that led to the conclusion that New York argues is insufficient. Therefore, we find New York's submission of NYS-35 timely because it is based on materially different information that was previously unavailable under 10 C.F.R. § 2.309(f)(2)(i) and (ii).¹²⁶

This contention alleges that the NRC Staff has not been presented with a sufficiently complete SAMA analysis and, accordingly, it does not have sufficient information to enable it to take a "hard look" at the mitigation alternative nor

¹²² See Entergy's December 2009 SAMA Reanalysis at 32 ("[C]onsistent with those SAMAs identified previously as cost beneficial, the above potentially cost beneficial SAMAs have been submitted for engineering project cost benefit analysis.").

¹²³ See Draft SEIS at 5-9 to 5-10.

¹²⁴ For example, in Entergy's December 2009 SAMA Reanalysis for IP2, SAMA 009 featured an estimated cost of \$4,100,000 with a baseline benefit of \$6,347,528 and a benefit with uncertainty of \$13,363,217. Entergy's December 2009 SAMA Reanalysis at 11. However, the analysis of that same SAMA, as cited in the NRC Staff's December 2008 Draft SEIS, showed an estimated cost of \$3,714,000 and an estimated benefit with uncertainty of \$3,797,152. Letter from Fred Dacimo to U.S. Nuclear Regulatory Commission, Reply to Request for Additional Information Regarding License Renewal Application — Severe Accident Mitigation Alternatives Analysis (Feb. 5, 2008) at 26 (ADAMS Accession No. ML080420264). Furthermore, in Entergy's original ER, that same SAMA showed an estimated cost of \$3,714,000 with a baseline benefit of \$1,697,309 and a baseline benefit with uncertainty of \$3,573,283. Entergy's ER at E.2-38.

¹²⁵ Cf. *Oyster Creek*, CLI-09-7, 69 NRC at 272-74.

¹²⁶ We have already noted our finding that this is timely under section 2.309(f)(2)(iii) because it was submitted in response to and arises out of Entergy's December 2009 SAMA Reanalysis. See *supra* Section I.

sufficient information to explain, with a rational basis, why it would allow the license to be renewed without the implementation of cost-beneficial SAMAs under a backfit to the CLB.

“[T]he adequacy and accuracy of environmental analyses and proper disclosure of information are always at the heart of NEPA claims. If ‘further analysis’ is called for, that in itself is a valid and meaningful remedy under NEPA.”¹²⁷ Moreover, if the benefit-to-cost ratio is glaringly large for a potentially cost-beneficial SAMA, the NRC Staff must, as a prerequisite to extending the license, impose implementation of that SAMA as a license condition or, in the alternative, explain why it is not requiring implementation of that SAMA. The failure to do either of these alternatives would be to act arbitrarily and capriciously.

While it may be that implementation of non-aging-related SAMAs is not directly required as license conditions within a Part 54 license renewal review, the NRC Staff nonetheless is authorized to impose such conditions that are necessary to protect the environment to an applicant’s CLB under a Part 50 backfit procedure.¹²⁸ Thus, when faced with cost-beneficial SAMAs, an alleged failure by the NRC Staff to explain why it has not instituted a backfit to a CLB as a condition precedent to license renewal could constitute a failure to meet the hard look obligations the NRC Staff has under the APA and NEPA. Moreover, simply saying that implementation of SAMAs is outside of the scope of license renewal review is not sufficient to meet that obligation because the NRC Staff must review SAMAs under Part 51 and has the option, if necessary, to institute a backfit prior to license renewal under Part 50 as a result of its SAMA review.

That being said, as we noted before, the NRC Staff does not have to require implementation, and an intervenor such as New York cannot demand implementation from the NRC Staff as part of a license renewal proceeding. Consequently, pursuant to section 2.309(f)(1)(iii), we *reject* that portion of NYS-35 demanding implementation of the six SAMAs newly deemed potentially cost-beneficial (SAMAs IP2-021, -022, and -062; and IP3-007, -018, and -019) as outside the scope of this proceeding.

On the other hand, challenges to Entergy’s environmental review are permissible in a license renewal proceeding, and in the proceeding the NRC Staff must demonstrate that it would be acting with a rational basis if it were to allow the licenses to be renewed. Based on these principles and finding the contention and its supporting information to be in accord with the standards set forth in section 2.309(f)(1), we *admit* NYS-35 insofar as it alleges that the Applicant has not provided the NRC Staff with the necessary information regarding specific SAMAs that New York maintains are potentially cost-beneficial.

¹²⁷ *McGuire/Catawba*, CLI-02-17, 56 NRC at 10.

¹²⁸ *See* 10 C.F.R. § 54.33(b).

It may be that at the end of Entergy's analysis of these SAMAs they are not sufficiently cost-beneficial to warrant implementation. However, until that determination regarding their status is made, the NRC Staff has not been presented with the sufficient facts to satisfy its obligations under NEPA to take a hard look at the environmental consequences that would result from license renewal. Accordingly, we *admit* the portion of NYS-35 calling for completion of the cost-benefit analysis to determine which SAMAs are cost-beneficial to implement as a contention of omission.

In addition, with regard to the three SAMAs that were identified in the December 2009 SAMA Reanalysis as cost-effective, i.e., IP2-009, IP2-053, and IP3-053, and any SAMAs classified as cost-effective in any final analysis, the contention is *admitted* as a contention of omission, meeting the requirements of section 2.309(f)(1), insofar as it alleges that the Draft SEIS does not provide a rational basis for granting the license extension without mandating a CLB backfit as a prerequisite for the extension.

B. NYS-36

The December 2009 Severe Accident Mitigation Alternatives ("SAMA") Reanalysis does not comply with the requirements of the National Environmental Policy Act ("NEPA") (42 U.S.C. Sections 4332(2)(C)(iii) and (2)(E)), the President's Council on Environmental Quality's regulations (40 C.F.R. Section 1502.14), the Nuclear Regulatory Commission's regulations (10 C.F.R. Section 51.53(c)(3)(ii)(L)), the Administrative Procedure Act (5 U.S.C. Sections 553(c), 554(d), 557(c), and 706, or controlling Federal court precedent (*Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989)) because this SAMA Reanalysis identifies a number of mitigation alternatives which are now shown, for the first time, to have substantially greater benefits in excess of their costs than previously shown yet are not being included as conditions of the proposed new operating license.

1. New York's Argument

NYS-36's underlying legal bases are similar to NYS-35,¹²⁹ but deviate from NYS-35 to the extent that it asserts there is a

failure to commit to implement those SAMAs which now, for the first time, have been shown to provide both a substantial increase in safety *and* where the margin of benefit over cost is so high that there is little chance that even a more complete cost estimate will be able to eliminate the substantial benefit.¹³⁰

¹²⁹ See New York's New and Amended Contentions at 36-42 (citations omitted). See also Section V.A.1, *supra*, for a summary of the legal bases that this contention and NYS-35 have in common.

¹³⁰ *Id.* at 46 (footnotes omitted).

Like NYS-35, NYS-36 also takes issue with nine SAMAs (albeit not the same SAMAs in NYS-35) that are divided into two groups. The first group consists of SAMAs that “have now become cost-effective for the baseline benefit comparison and not just for the benefit with uncertainty comparison,” namely, for IP2, SAMAs IP2-028 and -044, and for IP3, SAMA IP3-055.¹³¹ By way of example, for IP2-044, the original baseline benefit was \$984,503, original baseline benefit with uncertainty was \$2,072,638, and original cost was \$1,656,000. As a result of Entergy’s December 2009 SAMA Reanalysis, New York represents that the new baseline benefit is \$2,350,530, the new baseline benefit with uncertainty is \$4,948,485, and the new cost remains \$1,656,000.¹³²

The second group consists of SAMAs in which New York asserts, “the differences between the original calculation and the new calculation are dramatic, particularly the sheer dollar value of the difference.”¹³³ These are, for IP2, SAMAs IP2-054, -060, -061, and for IP3, SAMAs IP3-061 and -062.¹³⁴ Because of the general differences in both sets of SAMAs between the original analysis in Entergy’s ER and the December 2009 SAMA Reanalysis, New York claims that admission of NYS-36 is timely under section 2.309(f)(2)(i) because it arises from new information in that reanalysis.¹³⁵ For example, New York highlights the following changes in SAMA IP3-062: its original baseline benefit was \$1,365,046, its original baseline benefit with uncertainty was \$1,978,328, and its original cost was \$196,800. As a result of Entergy’s December 2009 SAMA Reanalysis, New York represents that the new baseline benefit is \$4,359,371, the new baseline benefit with uncertainty is \$6,317,929, and the new cost remains \$196,800.¹³⁶

Accordingly, New York seeks implementation of the above-named SAMAs, a plan for which it asserts is missing from Entergy’s Application and the NRC Staff’s Draft SEIS.¹³⁷

2. *Entergy’s Answer*

Entergy’s opposes admission of NYS-36. Its analysis for this position follows its analysis in response to NYS-35, which we have summarized *supra* in Section V.A.2.

¹³¹ *Id.* at 50 (citations omitted).

¹³² *Id.* at 48.

¹³³ *Id.* at 50.

¹³⁴ *Id.* New York also appears to include SAMA IP2-065 in this SAMA group in which it alleges there is a dramatic change in values, rather than in the first group that purportedly showed a difference between the baseline and uncertainties analyses.

¹³⁵ *Cf.* New York’s Motion at 8-9.

¹³⁶ New York’s New and Amended Contentions at 49.

¹³⁷ *Id.* at 50.

3. *NRC Staff's Answer*

The NRC Staff's Answer to NYS-36 largely repeats its response to NYS-35. Like its response to NYS-35, the NRC Staff argues that no NRC regulation requires the NRC Staff to impose implementation of cost-beneficial SAMAs, and that compelling a license renewal applicant to implement potentially cost-beneficial SAMAs not related to aging can only be instituted pursuant to a Part 50 backfit proceeding, thus rendering NYS-36 outside the scope of this proceeding.¹³⁸ Further, the NRC Staff asserts that New York's submission of NYS-36 is untimely under section 2.309(f)(2)(i)-(ii) and thus should be dismissed.¹³⁹

In this regard, the NRC Staff says that "[t]he Commission has rejected the idea that publication of a new document can transform previously available material into new information sufficient to support a new contention," comparing NYS-36 to information rejected by the Commission as "new" since the underlying information, even though used in recent presentations and studies, had been available since at least 1991.¹⁴⁰ Accordingly, the NRC Staff regards NYS-36 as untimely since both Entergy in its ER and subsequent SAMA analyses and the NRC Staff in its Draft SEIS have repeated that they neither find implementation of any of Entergy's analyzed SAMAs necessary nor will they commit to implement them (in the case of Entergy) or require implementation of them (in the case of the NRC Staff).¹⁴¹

4. *Connecticut's Answer*

Connecticut supports admission of NYS-36. Its analysis for this position parallels its analysis in response to NYS-35, which we previously have summarized. Accordingly, see *supra* Section V.A.4.

5. *New York's Reply*

New York attempts in its Reply to clarify NYS-36 by first distinguishing the situation here from that faced by the Supreme Court in *Methow Valley*. New York interprets *Methow Valley* as not condoning Entergy's and the NRC Staff's "refus[al] to implement those specifically identified mitigation alternatives that are significantly cost-effective and will provide a substantial increase in safety and a substantial reduction in potential adverse environmental impacts."¹⁴² New

¹³⁸ NRC Staff's Answer at 27-29 (citations omitted).

¹³⁹ *Id.* at 30-35 (citations omitted).

¹⁴⁰ *Id.* at 32-33 (citing *Oyster Creek*, CLI-09-7, 69 NRC at 272-74).

¹⁴¹ *Id.* at 30-32.

¹⁴² New York's Reply at 15.

York concedes that Part 50 is the vehicle in license renewal for imposing new conditions like non-aging-management-related SAMAs on a renewed license. However, New York also points out that the SAMA alternatives analysis is the source for identifying mitigation measures that, if preferable to relicensing under the current CLB, must be implemented.¹⁴³ Moreover, New York attempts to undermine Entergy's and the NRC Staff's argument that Part 51 is unrelated to Part 54 by asserting that an environmental review is not restricted to the aging management confines of Part 54.¹⁴⁴

Regarding implementation itself, New York construes the GEIS as necessitating the "implementation of cost-effective mitigation SAMAs."¹⁴⁵ In response to Entergy's and the NRC Staff's citation of the *Pilgrim* decision, New York acknowledges that SAMAs may not be directly implemented as part of a safety review. But New York interprets *Pilgrim* as "confirming that the implementation of SAMAs must occur through the NEPA process and Part 51, just as the GEIS Statement of Considerations and Interim Policy Statement on severe accidents under NEPA contemplated."¹⁴⁶

Finally, New York distinguishes NYS-36 from the SAMA in question in *McGuire/Catawba* since there, unlike here,

the Commission . . . offered a rational basis for why implementation as part of the license renewal process is not required — not because there can never be such a requirement, but because another process was already in place [i.e., the generic issues process,] that was focused on the particular SAMA at issue and the outcome of which would determine whether implementation was "warranted."¹⁴⁷

The issue of implementation of that "SAMA was already the subject of a generic issues process and, . . . for that reason, it did not require implementation of the SAMA."¹⁴⁸ Finally, New York proffers the same timeliness argument for NYS-36 as it used for NYS-35, which is summarized *supra* in Section V.A.5.¹⁴⁹

6. Board's Decision

The Board *admits* NYS-36 *in part* for the same procedural and substantive reasons we admit NYS-35 *in part*. What separates these two groups of SAMAs

¹⁴³ *Id.* at 17.

¹⁴⁴ *Id.* at 17-18 (citations omitted).

¹⁴⁵ *Id.* at 19-20 (citations omitted).

¹⁴⁶ *Id.* at 20 (citing *Pilgrim*, CLI-10-11, 71 NRC at 293-94 n.26).

¹⁴⁷ *Id.* at 21 (citing *McGuire/Catawba*, CLI-02-28, 56 NRC at 388 n.7).

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* at 22-31 (citations omitted).

is that one group, those referenced in NYS-35, has only been deemed potentially cost-beneficial in Entergy's December 2009 SAMA Reanalysis (SAMAs IP2-021, -022, and -062 for IP2 and SAMAs IP3-007, -018, and -019 for IP3) or in the NRC Staff's Draft SEIS (SAMAs IP2-009 and -053 for IP2 and SAMA IP3-053 for IP3). In contrast, all the SAMAs in NYS-36 were deemed at least somewhat cost-beneficial in Entergy's original ER, but after the latest analysis appear to be dramatically more cost-beneficial in both the baseline and sensitivity analyses. Yet, because all these cost-benefit determinations arise out of the same change in inputs and all arrived at different cost-benefit calculations than before, they all constitute the requisite new, materially different information so as to permit the admission of NYS-36 as timely under section 2.309(f)(2)(i) and (ii), in the same way as NYS-35.

In accord with the substantive admissibility provisions of section 2.309(f)(1), the triable issue of fact established in NYS-36 is whether the NRC Staff has fulfilled its duty to take a hard look at SAMAs deemed potentially cost-beneficial in Entergy's December 2009 SAMA Reanalysis by explaining in its record of decision why it would allow the license to be renewed without requiring the implementation of those SAMAs that are plainly cost-beneficial as a condition precedent to the granting of license renewal.

As a part of this license renewal proceeding, Entergy was required pursuant to 10 C.F.R. § 51.53(c)(3)(ii)(L) to incorporate, as part of its ER, a consideration of alternatives to mitigate severe accidents. This review was not limited to consideration of accidents that would be the result of aging. Pursuant to NRC regulations, as required by the *Limerick* decision, the NRC Staff must evaluate an applicant's submission and take appropriate action in deciding whether to grant the requested license renewal. We hold that in order to meet its obligations under NEPA, once a SAMA has been identified as plainly cost-effective, the NRC Staff must either require implementation or, in the alternative, explain why it has decided not to require implementation prior to license renewal. Likewise, the applicant must supply information that is sufficiently complete for the Commission to be able to explain its decision. Accordingly, we *admit* NYS-36 *in part* and consolidate it with NYS-35 as NYS-35/36.

VI. CONCLUSION

For the foregoing reasons, the Board hereby *admits* NYS-12B *in whole* and *admits* NYS-16B, NYS-35, and NYS-36 *in part*.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD¹⁵⁰

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

T. S. Moore for
Dr. Kaye D. Lathrop
ADMINISTRATIVE JUDGE

T. S. Moore for
Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 30, 2010

¹⁵⁰Copies of this Order were sent this date by Internet e-mail to: (1) Counsel for the NRC Staff; (2) Counsel for Entergy; (3) Counsel for the State of New York; (4) Counsel for Riverkeeper, Inc.; (5) Manna Jo Green, the Representative for Clearwater; (6) Counsel for the State of Connecticut; (7) Counsel for Westchester County; (8) Counsel for the Town of Cortlandt; (9) Mayor Sean Murray, the Representative for the Village of Buchanan; and (10) Counsel for the New York City Economic Development Corporation.

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- All Power Reactor Licensees and Research Reactor Licensees Who Transport Spent Nuclear Fuel*, CLI-05-6, 61 NRC 37, 41 (2005)
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- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 132-33 & n.38 (2007), *aff'd*, *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3d Cir. 2009) arguments or new facts raised for the first time on appeal are not considered unless their proponent can demonstrate that the information was previously unavailable; CLI-10-3, 71 NRC 51 n.7 (2010)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008) a license renewal may be set aside or appropriately conditioned even after it has been issued, upon subsequent administrative or judicial review; CLI-10-8, 71 NRC 153 n.56 (2010) a showing of a threat of immediate and irreparable harm that will result absent a stay is required for grant of the stay; CLI-10-8, 71 NRC 151 (2010) failure to satisfy the first two stay factors renders it unnecessary to make determinations on the two remaining factors, harm to other parties and where the public interest lies; CLI-10-8, 71 NRC 163 (2010) stay petitioner must show that success on the merits is a virtual certainty to warrant issuance of the stay; CLI-10-8, 71 NRC 154 (2010) the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm; CLI-10-8, 71 NRC 153 n.56 (2010)
- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009) as for conclusions of law, the Commission will reverse a licensing board's legal rulings if they are a departure from or contrary to established law; CLI-10-5, 71 NRC 99 (2010) the Commission defers to a board's factual findings and generally steps in only to correct clearly erroneous findings or where there is strong reason to believe that a board has overlooked or misunderstood important evidence; CLI-10-5, 71 NRC 99 (2010) the licensing board's principal role in the adjudicatory process is to carefully review all of the evidence, including testimony and exhibits, and to resolve any factual disputes; CLI-10-5, 71 NRC 98 (2010) the standard of clear error for overturning a board's factual finding is quite high; CLI-10-5, 71 NRC 99 (2010)
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- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 272-74 (2009)
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- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 275 (2009)
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- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 NRC 391, 396 n.3 (2006)
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- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 744-45 & n.12 (2006)
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- AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 237, 240-44 (2006)
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- Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985)
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- Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986)
it is not sufficient for there to be merely the existence of some alleged factual dispute between the parties, but rather that there be no genuine issue of material fact; CLI-10-11, 71 NRC 297 (2010)
- Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)
only disputes over facts that might affect the outcome of a proceeding would preclude summary disposition, factual disputes that are unnecessary not being counted; CLI-10-11, 71 NRC 297 (2010)
- Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986)
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- Anderson v. Liberty Lobby*, 477 U.S. 242, 249-50 (1986)
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- Anderson v. Liberty Lobby*, 477 U.S. 242, 249-52 (1986)
at issue in summary disposition is not whether evidence unmistakably favors one side or the other, but whether there is sufficient evidence favoring the nonmoving party for a reasonable trier of fact to find in favor of that party; CLI-10-11, 71 NRC 297 (2010)
- Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986)
the correct inquiry in deciding summary disposition motions is whether there are material factual issues that can be properly resolved only by a finder of fact because they may reasonably be resolved in favor of either party; CLI-10-11, 71 NRC 297 (2010)
- Anderson v. Liberty Lobby*, 477 U.S. 242, 250-51 (1986)
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- Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986)
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- Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 722, 724 (2006)
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- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991)
a board appropriately reviews the materials cited in support of a contention, while making no pronouncements on whether the information contained in the application or the claims made in the petition are valid; CLI-10-9, 71 NRC 261 (2010)
a board may appropriately view petitioner's supporting information in a light favorable to the petitioner, but failure to provide such information regarding a proffered contention requires that the contention be rejected; LBP-10-6, 71 NRC 361 (2010); LBP-10-7, 71 NRC 420 (2010)
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- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991)
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- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991)
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- Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426 (1997)
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- Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998)
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- Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 (1998)
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- Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983)
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- Bellotti v. NRC*, 725 F.2d 1380, 1381-82 (D.C. Cir. 1983)
the scope of an enforcement adjudication is limited to the question of whether the order should be sustained; CLI-10-3, 71 NRC 54 (2010)
- Bellotti v. NRC*, 725 F.2d 1380, 1383 (D.C. Cir. 1983)
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- Board of Natural Resources v. Brown*, 992 F.2d 937, 942 (9th Cir. 1993)
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- Bowen v. Massachusetts*, 487 U.S. 879, 896-98 (1988)
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- Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414 (1945)
an agency's interpretation of its own regulation is controlling provided it is not plainly erroneous or inconsistent with the regulation; CLI-10-13, 71 NRC 389 n.10 (2010)
- Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974)
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- Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983)
the First Amendment requires a presumption of openness in civil proceedings; LBP-10-2, 71 NRC 208 n.58 (2010)
- Bullcreek v. NRC*, 359 F.3d 536, 542 (D.C. Cir. 2004)
Congress can be presumed to be aware of one specific agency rule only when that rule has been expressly discussed in the legislative history; LBP-10-11, 71 NRC 625 n.52 (2010)
- Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)
if NRC Staff finds any severe accident mitigation alternative conferring a substantial benefit compared to its cost of implementation, it must make such SAMA a license condition for the renewed operating license; LBP-10-13, 71 NRC 689 n.77 (2010)
- Burns v. United States*, 501 U.S. 129, 136 (1991)
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- California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002)
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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915-16 (2009)
in proceedings involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish standing; LBP-10-1, 71 NRC 176 (2010)
the proximity presumption applies when petitioners live within 50 miles of the proposed facility or when they have frequent contacts with the area affected by the proposed facility; LBP-10-1, 71 NRC 176 (2010)
- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 923-24 (2009)
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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 209 (2009)
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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plants, Unit 3), LBP-09-4, 69 NRC 170, 220-21 (2009)
greater-than-Class-C waste is the responsibility of the federal government and is not affected by the partial closure of the Barnwell facility; CLI-10-2, 71 NRC 48 n.110 (2010)
- Career Education, Inc. v. Department of Education*, 6 F.3d 817, 820 (D.C. Cir. 1993)
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- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 547 (1986)
for intervenors to demonstrate that the purpose of the regulation excluding consideration of alternatives and the need for power from the OL phase would not be served, they must make a *prima facie* showing that the proposed facility is not needed to meet increased energy demand and that it need not be used to displace an equivalent amount of older, less economical capacity; LBP-10-12, 71 NRC 670 (2010)
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- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 548 (1986)
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- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001)
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- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982)
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- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609-10 (1979)
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- Carstens v. NRC*, 742 F.2d 1546, 1558-59 (D.C. Cir. 1984)
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- CFC Logistics*, LBP-05-1, 61 NRC 45, 50 n.8 (2005)
the hearing process is a vehicle to permit the public to seek resolution of their concerns about the health, safety, and environmental impacts of a proposed licensing action, and that process operates most fairly and effectively when those who seek to use it have the benefit of accurate information regarding the agency’s licensing review system and its possible outcomes; LBP-10-2, 71 NRC 208 (2010)
- Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)
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- Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)
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- Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001)
the First Amendment requires a presumption of openness in civil proceedings; LBP-10-2, 71 NRC 208 n.58 (2010)
- Christensen v. Harris County*, 529 U.S. 576, 587 (2000)
NRC does not owe deference to DOE where DOE’s interpretation of NRC’s own responsibilities is reflected in nothing more formal than a motion before the board and not, for example, in a formal agency adjudication or notice-and-comment rulemaking; LBP-10-11, 71 NRC 626 (2010)
- Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991)
in the context of alternatives analyses, agencies need only discuss those alternatives that are reasonable and will bring about the ends of the proposed action; LBP-10-6, 71 NRC 363 (2010)
in the context of appropriately defining terms and reconciling concepts such as “reasonable,” “feasible,” and “reasonably available,” a problem for agencies is that even the term “alternatives” is not self-defining; LBP-10-10, 71 NRC 584 (2010)
NRC need only consider a range of alternatives in its environmental impact statement that are technologically feasible and economically practicable alternatives for producing baseload power; LBP-10-10, 71 NRC 581 (2010)
- Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991)
an agency cannot redefine the goals of a proposal but instead must evaluate alternative ways of achieving its goals, shaped by the application at issue and by the function that the agency plays in the decisional process; LBP-10-6, 71 NRC 363 n.37 (2010)
in considering alternatives under NEPA, an agency must take into account the needs and goals of the parties involved in the application; LBP-10-10, 71 NRC 598 n.345 (2010)
- Citizens Association for Sound Energy v. NRC*, 821 F.2d 725, 731 (D.C. Cir. 1987)
NRCs broad discretion under the Atomic Energy Act was confirmed where the Commissions decided to extend an already-expired construction permit; CLI-10-6, 71 NRC 122 (2010)
- Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir 1995)
a change to agency policy providing substantive guidance on its regulations requires compliance with the notice-and-comment requirements of the Atomic Energy Act; CLI-10-6, 71 NRC 133 (2010)

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- Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir.1985)
an agency's environmental review must consider not every possible alternative, but every reasonable alternative; LBP-10-6, 71 NRC 380 n.87 (2010); LBP-10-10, 71 NRC 604 n.3 (2010)
- City of Carmel-by-the-Sea v. Department of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997)
the hard look required by NEPA is subject to a rule of reason, such that it is not necessary to look at every conceivable alternative to the proposed licensing action, but only those that are feasible and reasonably related to the scope and goals of the proposed action; LBP-10-10, 71 NRC 581 (2010)
- City of Grapevine v. Department of Transportation*, 17 F.3d 1502, 1506 (D.C. Cir. 1994)
NRC need only consider a range of alternatives in its environmental impact statement that are technologically feasible and economically practicable alternatives for producing baseload power; LBP-10-10, 71 NRC 581 (2010)
- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 (1993)
in proceedings for construction permits and operating licenses for nuclear power plants, a proximity presumption is recognized in favor of standing for persons who have frequent contacts within a 50-mile radius of the plant; CLI-10-7, 71 NRC 138 (2010)
- Clinton v. City of New York*, 524 U.S. 417, 431 n.19 (1998)
if one party's standing has been established, the standing of allied parties is not to be questioned; LBP-10-7, 71 NRC 414 (2010)
- Coalition on Sensible Transportation v. Dole*, 642 F. Supp. 573 (D.D.C. 1986), *aff'd*, 826 F.2d 60 (D.C. Cir. 1987)
NEPA is not violated as long as the agency takes a hard look at alternatives and explains its reasons for rejecting them; LBP-10-10, 71 NRC 584-85 n.288 (2010)
- Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986)
of the section 2.309(c) factors, the first factor regarding good cause for the failure to file on time is the most important element in that, absent a demonstration of good cause under this factor, a compelling showing must be made on the other factors if a nontimely petition is to be granted or a nontimely contention is to be admitted; LBP-10-1, 71 NRC 181 (2010)
- Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244-45 (1986)
factors (v) and (vi) of 10 C.F.R. 2.309(c) generally are given less weight than factors (vii) and (viii); LBP-10-1, 71 NRC 181 (2010)
- Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 632-33 (1985)
compliance with quality assurance requirements is an important factor in the licensing decision; LBP-10-9, 71 NRC 508, 512 (2010)
- Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1614-16 (1984)
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- Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981)
each intervening participant that wishes to be a party to a proceeding must establish its own standing; LBP-10-7, 71 NRC 414 (2010)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999)
standing was denied where petitioner failed to indicate how the alleged harms might result from the license amendments, particularly given not only the shutdown status of the facility, but also the continued applicability of the NRC's safety-oriented regulations governing defueled nuclear plants; LBP-10-11, 71 NRC 634 n.97 (2010)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999), *petition for review denied sub nom. Dienenthal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000)
adjudicatory boards should not be expected, unaided by the parties, to sift through the parties' pleadings to uncover and resolve arguments not advanced by litigants themselves; LBP-10-10, 71 NRC 567 n.179 (2010)

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- it should not be necessary to speculate about what a pleading is supposed to mean, and petitioners bear the responsibility for setting forth their grievances clearly; CLI-10-15, 71 NRC 482 (2011)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000) broad and conclusory statements by petitioners that they have direct information concerning the threat to health and safety posed by the license applicant are insufficient to establish standing; LBP-10-4, 71 NRC 238 (2010)
- in proceedings where petitioner's factual assertions in support of standing are challenged, untenable, conjectural, or conclusory, a board need not uncritically accept such assertions; LBP-10-4, 71 NRC 230 n.14 (2010)
- petitioner bears the burden to provide facts sufficient to establish standing; CLI-10-7, 71 NRC 139 (2010); LBP-10-4, 71 NRC 229 (2010)
- Communities, Inc. v. Busey*, 956 F.2d 619, 627 (6th Cir. 1992)
- NRC need only consider a range of alternatives in its environmental impact statement that are technologically feasible and economically practicable for producing baseload power; LBP-10-10, 71 NRC 581 (2010)
- Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980)
- all that intervenors and their experts need to provide at the contention admission stage is a reasoned presentation sufficient to warrant further inquiry; LBP-10-10, 71 NRC 580 (2010)
- Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 133 (2001)
- NRC would not accept incorporation by reference of another petitioner's issues in an instance where the petitioner has not submitted at least one admissible issue of its own; LBP-10-11, 71 NRC 633 n.92 (2010)
- Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-21, 65 NRC 519, 523-24 (2007)
- standing is not presumed where contact has been limited to mere occasional trips to areas located close to reactors; LBP-10-1, 71 NRC 176 (2010)
- to establish standing based on frequent contacts, petitioner must show that it frequently engages in substantial business and related activities in the vicinity of the facility, engages in normal, everyday activities in the vicinity, has regular and frequent contacts in an area near a licensed facility, or otherwise has visits of a length and nature showing an ongoing connection and presence; LBP-10-1, 71 NRC 176 (2010)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007)
- organizational petitioner fails to identify any discrete institutional injury to itself, other than general environmental and policy interests of the sorts the federal courts and NRC repeatedly have found insufficient for organizational standing; CLI-10-3, 71 NRC 51 n.5 (2010)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 410 (2007)
- in proceedings where petitioner's factual assertions in support of standing are challenged, untenable, conjectural, or conclusory, a board need not uncritically accept such assertions; LBP-10-4, 71 NRC 230 n.14 (2010)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 411 (2007)
- because petitioner's pleadings fail to provide adequate information about the interests of the organization to which he belongs and how those interests would be adversely affected by the licensing proceeding, the board is precluded from granting organizational standing; LBP-10-4, 71 NRC 224 n.8 (2010)
- Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 414 (2007)
- a contention will be ruled inadmissible if petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation; LBP-10-6, 71 NRC 360 (2010)
- Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 355 (1973)
- when an applicant receives a construction permit, it proceeds at its own risk, regardless of the amount of money that it may have expended during construction; LBP-10-7, 71 NRC 405-06 (2010)
- Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162 (1978)
- it is inappropriate for the agency to consider economic costs when no environmentally preferable alternative has been identified; CLI-10-1, 71 NRC 23 (2010)

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- Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162-63 & nn.21-25 (1978)
if an alternative to the applicant's proposal is environmentally preferable, then NRC must determine whether the environmental benefits conferred by that alternative are worthwhile enough to outweigh any additional cost needed to achieve them; CLI-10-1, 71 NRC 24 (2010)
- Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 163 n.25 (1978)
it is inappropriate for the agency to consider economic costs when no environmentally preferable alternative has been identified; CLI-10-9, 71 NRC 263 (2010)
monetary considerations come into play only if an alternative to applicant's proposal is environmentally preferable, and then boards must determine whether the environmental benefits conferred by that alternative are worthwhile enough to outweigh any additional cost needed to achieve them; LBP-10-10, 71 NRC 573 (2010)
- Craig v. Harney*, 331 U.S. 367, 374 (1947)
a trial is a public event, and what transpires in the courtroom is public property; LBP-10-2, 71 NRC 206 n.54 (2010)
- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009)
the Commission defers to a board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion; CLI-10-1, 71 NRC 5 (2010); CLI-10-2, 71 NRC 29 (2010); CLI-10-3, 71 NRC 52 (2010); CLI-10-7, 71 NRC 138 (2010); CLI-10-9, 71 NRC 253 (2010)
- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 343 (2009)
an organizational petitioner cannot rely on an affidavit authorizing representation that was executed with respect to one proceeding to authorize representation in a separate proceeding involving the same license; CLI-10-7, 71 NRC 138 (2010)
petitioner has not met the pleading requirements because it has not demonstrated any link between the purported violations at an existing unit and any future noncompliance or resulting safety risk affecting proposed units; CLI-10-9, 71 NRC 272 (2010)
- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 365 (2009)
once a petition to intervene and request for hearing have been granted and contentions are admitted for hearing, appeals of board rulings on new or amended contentions are treated under section 2.341(f)(2), regardless of the subject matter of those contentions; CLI-10-16, 71 NRC 490 (2010)
rejection or admission of a contention, where petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact nor affects the basic structure of the proceeding in a pervasive and unusual manner; CLI-10-16, 71 NRC 491 (2010)
- Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 365 & n.178 (2009)
that interlocutory review will only be granted under extraordinary circumstances reflects the Commission's disfavor of piecemeal appeals during ongoing licensing board proceedings; CLI-10-16, 71 NRC 490 (2010)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535 (2009)
licensing boards must exercise caution when reformulating contentions; CLI-10-14, 71 NRC 464 n.80 (2010)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 543, 553 (2009)
if a question arises over the scope of an admitted contention, the board or Commission will refer back to the bases set forth in support of the contention; CLI-10-15, 71 NRC 482 (2011)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549 n.61 (2009)
good cause is the most significant of the late-filing factors of 10 C.F.R. 2.309(c)(1); LBP-10-9, 71 NRC 506 (2010)
- Crow Butte Resources, Inc.* (North Trend Expansion Area), CLI-09-12, 69 NRC 535, 552 (2009)
boards have discretion to reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; CLI-10-2, 71 NRC 33 (2010); LBP-10-9, 71 NRC 510 (2010)
the Commission found fault with the board's failure to identify clearly which of the diffuse and, in some cases, unsupported claims were admitted for hearing; CLI-10-2, 71 NRC 32 (2010)

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- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552-53 (2009)
if petitioner neglects to provide the requisite support for its contentions, the board should not make assumptions of fact that favor the petitioner or supply information that is lacking; LBP-10-6, 71 NRC 361 (2010)
licensing boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding, but should not add material not raised by a petitioner in order to render a contention admissible; CLI-10-14, 71 NRC 464 n.80 (2010)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009)
a board may not supply information that is missing or make assumptions of fact not provided by the petitioner; LBP-10-6, 71 NRC 380 (2010)
boards have reformulated contentions prepared and submitted by unrepresented petitioners; LBP-10-10, 71 NRC 591 n.312 (2010)
parties were left without a clear roadmap as to which elements of several broadly worded claims were, in fact, admissible; CLI-10-2, 71 NRC 33 (2010)
the scope of an admitted contention is defined by its bases; LBP-10-6, 71 NRC 366 n.49 (2010)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 557 (2009)
any contention that fails to controvert the application may be dismissed; LBP-10-6, 71 NRC 361 (2010)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), LBP-08-6, 67 NRC 241, 294-323 (2008)
boards have reformulated contentions prepared and submitted by unrepresented petitioners; LBP-10-10, 71 NRC 591 n.312 (2010)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), LBP-08-6, 67 NRC 241, 321 (2008)
on appeal, the Commission found fault with the board's failure to identify clearly which of the diffuse and, in some cases, unsupported claims were admitted for hearing; CLI-10-2, 71 NRC 32 (2010)
- Crow Butte Resources, Inc.* (North Trend Expansion Project), LBP-08-6, 67 NRC 241, 323 (2008), *rev'd in part on other grounds*, CLI-09-12, 69 NRC 535 (2009)
admissibility of contentions does not hinge on access to a draft guidance document, which is not a legal requirement; LBP-10-5, 71 NRC 343 (2010)
guidance documents are not binding legal authority; LBP-10-5, 71 NRC 346 (2010)
- Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 98 (1995)
NRC guidance documents do not have the binding force of law but are entitled to some level of deference; LBP-10-10, 71 NRC 584 (2010)
- Dallas v. Hall*, 562 F.2d 712, 718 (5th Cir. 2009)
rejection of even viable and reasonable alternatives, after an appropriate evaluation, is not arbitrary and capricious; LBP-10-10, 71 NRC 584-85 n.288 (2010)
- David Geisen*, CLI-09-23, 70 NRC 935, 936 (2009)
when evaluating a motion for a stay the Commission places the greatest weight on irreparable injury to the moving party unless a stay is granted; CLI-10-8, 71 NRC 151 (2010)
- David Geisen*, CLI-09-23, 70 NRC 935, 937 (2009)
stay petitioner must show that success on the merits is a virtual certainty to warrant issuance of a stay; CLI-10-8, 71 NRC 154 (2010)
- Department of Transportation v. Public Citizen*, 541 U.S. 752, 754 (2004)
because applicant dismissed solar with storage as not a viable alternative, this alternative does not meet NEPA's rule of reason; LBP-10-10, 71 NRC 572 (2010)
- Department of Transportation v. Public Citizen*, 541 U.S. 752, 768-69 (2004)
applicant's comparison of the environmental impacts of nuclear and wind/CAES is inadequate to inform decision makers about the competing choices; LBP-10-10, 71 NRC 564 (2010)
- Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 584-85 (1978)
the special circumstances required to obtain waiver of a rule have been described as a prima facie showing that application of a rule in a particular way would not serve the purposes for which the rule was adopted; LBP-10-9, 71 NRC 525 (2010)
- Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-09-4, 69 NRC 80 (2009)
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- Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-09-4, 69 NRC 80, 85 (2009)
NRC regulations permit an applicant to reference a docketed, but not yet certified, design; CLI-10-9, 71 NRC 260 (2010)
- Detroit Free Press v. Ashcroft*, 303 F.3d 681, 702 (6th Cir. 2002)
as long as the administrative proceedings walk, talk, and squawk very much like an Article III judicial proceeding, they should be open to the public; LBP-10-2, 71 NRC 208 n.59 (2010)
the First Amendment requires public access to deportation hearings despite government's strenuous objections that open hearings would enable terrorists to obtain information useful to their malevolent goals; LBP-10-2, 71 NRC 208 n.59 (2010)
- Detroit Free Press v. Ashcroft*, 303 F.3d 681, 703 (6th Cir. 2002)
to determine whether a tribunal should block public access to a judicial proceeding, a two-part experience and logic test is applied; LBP-10-2, 71 NRC 207 n.61 (2010)
- Deukmejian v. NRC*, 751 F.2d 1287, 1321 (D.C. Cir. 1984)
petitioners successfully obtained reopening of the record to determine whether applicant's design verification program established the adequacy of the unit's design notwithstanding the QA violations; LBP-10-9, 71 NRC 520 (2010)
- Doe v. Santa Fe Independent School District*, 933 F. Supp. 647, 650 (S.D. Tex. 1996)
a First Amendment basis for public access to administrative proceedings is recognized; LBP-10-2, 71 NRC 208 n.59 (2010)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008)
the Commission defers to board rulings on contention admissibility in the absence of clear error or abuse of discretion; CLI-10-2, 71 NRC 29 (2010); CLI-10-7, 71 NRC 138 (2010)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 239 n.38 (2008)
a no-reactor or no-action alternative that was not raised before the board is therefore improperly raised on appeal; CLI-10-9, 71 NRC 265 (2010)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 240 (2008)
a claim of deficiency in construction of the concrete containment is insufficient because it was not linked to the application at issue in the proceeding; CLI-10-9, 71 NRC 254-55 n.52 (2010)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009)
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- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002)
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- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 359 (2001)
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procedural rules on contentions are designed to ensure focused and fair proceedings; CLI-10-15, 71 NRC 482 (2011)
the scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with NRC rules; CLI-10-15, 71 NRC 482 (2011)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 366 (2001)
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- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 366-67 (2001)
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- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 558 (2005)
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- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005)
a party may petition for a waiver of application of a regulation on the sole ground that special circumstances exist such that the application of the regulation would not serve the purpose for which it was adopted; LBP-10-12, 71 NRC 661 (2010)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564 (2005)
good cause is accorded the greatest weight in ruling on a nontimely petition; CLI-10-12, 71 NRC 323 (2010)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564-65 (2005)
absent a showing of good cause, petitioner's showing on the remaining factors must be highly persuasive; CLI-10-12, 71 NRC 323 (2010)
petitioner must show that the information on which its new contention is based was not reasonably available to the public previously and that it filed its intervention petition promptly after learning of such new information; LBP-10-11, 71 NRC 639 (2010)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 (2005)
absent a showing of good cause, a nontimely petition will not be excused unless the petitioner makes a compelling showing on the remaining factors; CLI-10-12, 71 NRC 323 (2010); LBP-10-11, 71 NRC 639 (2010)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565-66 (2005)
petitioners may protect their interests by filing a request for Commission action under 10 C.F.R. 2.206; CLI-10-12, 71 NRC 327 n.50 (2010)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 89 (2004)
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- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 223 (2007)
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- Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 271, 276 (2004)
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- Druid Hills Civil Association v. Federal Highway Administration*, 772 F.2d 700, 709 (11th Cir. 1985)
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- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)
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- Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), CLI-09-21, 70 NRC 927, 931 (2009)
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- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004)
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- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 5 (2002)
the purpose of the severe accident mitigation alternatives review is to ensure that any plant changes that have a potential for significantly improving severe accident safety performance are identified and assessed; CLI-10-11, 71 NRC 291 (2010)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 7-8 (2002)
if intervenors provide no facts or expert opinion explaining why a conclusion in applicant's environmental report is incorrect, or fail to identify any SAMDAs that should be adopted if some unspecified new analysis were performed or any cost-beneficial SAMAs, their contention should be dismissed; LBP-10-10, 71 NRC 563 (2010)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 10 (2002)
if further analysis is called for, that in itself is a valid and meaningful remedy under the National Environmental Policy Act; LBP-10-13, 71 NRC 697 (2010)
SAMA contentions will be admitted in license renewal proceedings only if it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated; LBP-10-13, 71 NRC 692 (2010)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 365 (2002)
NEPA imposes no legal duty on the NRC to consider intentional malevolent acts in conjunction with commercial power reactor license renewal applications; CLI-10-14, 71 NRC 476 (2010)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 378-81 (2002)
the scope of a contention is limited to issues of law and fact pleaded with particularity in the intervention petition, including its stated bases; CLI-10-5, 71 NRC 100 (2010)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002)
the scope of an admitted contention is defined by its bases; LBP-10-6, 71 NRC 366 n.49 (2010)
where any issue arises over the proper scope of a contention, NRC opinions have long referred back to the bases set forth in support of the contention; CLI-10-11, 71 NRC 309 (2010)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379, 383 (2002)
the reach of a contention necessarily hinges upon its terms coupled with its stated bases; CLI-10-11, 71 NRC 309 (2010)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379, 386 (2002)
if a question arises over the scope of an admitted contention, the board or Commission will refer back to the bases set forth in support of the contention; CLI-10-15, 71 NRC 482 (2011)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 371, 382-83 (2002)
intervenors must timely file a new or amended contention that addresses the factors in section 2.714(b) in order to raise specific challenges regarding new information; LBP-10-10, 71 NRC 604 (2010)

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- the distinction between contentions of omission and contentions of inadequacy does not appear in NRC contention pleading regulations, but rather is a useful concept from agency case law; CLI-10-2, 71 NRC 36 n.44 (2010)
- there is a difference between contentions that merely allege an omission of information and those that challenge substantively and specifically how particular information has been discussed in a license application; CLI-10-9, 71 NRC 270 (2010)
- where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot; LBP-10-10, 71 NRC 604 (2010)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002)
- NRC contention rules require reasonably specific factual and legal allegations at the outset to ensure that matters admitted for hearing have at least some minimal foundation, are material to the proceeding, and provide notice to opposing parties of the issues they will need to defend against; CLI-10-11, 71 NRC 309 (2010)
- under Commission precedent on contentions of omission, once information asserted to have been omitted is supplied, the original contention is moot, and intervenors must timely file a new or amended contention in order to raise specific challenges regarding the new information; LBP-10-5, 71 NRC 339 (2010); LBP-10-10, 71 NRC 540 (2010)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 & n.61 (2002)
- intervenors may not freely change the focus of an admitted contention at will to add a host of new issues and objections that could have been raised at the outset; CLI-10-11, 71 NRC 309 (2010)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 388 n.77 (2002)
- an order by NRC Staff to implement severe accident mitigation alternatives not dealing with aging management can be issued concurrently as part of a Part 50 current licensing basis review; LBP-10-13, 71 NRC 679 (2010)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 426-28 (2003)
- contention standards require pleading specific grievances, not simply providing general notice pleadings; CLI-10-11, 71 NRC 308 n.101 (2010)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428 (2003)
- contention standards require petitioners to plead specific grievances, not simply to provide general notice pleadings; CLI-10-15, 71 NRC 482 (2011)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003)
- a litigable NEPA issue is one that concerns whether the NRC Staff has taken the requisite hard look at mitigation in sufficient detail to ensure that environmental consequences of the proposed project have been fairly evaluated; LBP-10-13, 71 NRC 679 (2010)
- for a mitigation analysis, the National Environmental Policy Act demands no fully developed plan or detailed examination of specific measures that will be employed to mitigate adverse environmental effects; CLI-10-11, 71 NRC 316 (2010)
- NRC adjudicatory hearings are not EIS editing sessions; LBP-10-10, 71 NRC 581 n.266 (2010)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999)
- a dispute is material if its resolution would make a difference in the outcome of the licensing proceeding; LBP-10-6, 71 NRC 360 (2010)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-35 (1999)
- NRC contention rules require reasonably specific factual and legal allegations at the outset to ensure that matters admitted for hearing have at least some minimal foundation, are material to the proceeding, and provide notice to opposing parties of the issues they will need to defend against; CLI-10-11, 71 NRC 309 (2010)

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- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 339 (1999)
any member of the public may provide the NRC Staff with comments relating to health and safety at any time during the license review process, and the NRC Staff will consider and resolve all safety questions regardless of whether any hearing takes place; LBP-10-4, 71 NRC 231 n.16 (2010)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999)
a contention that is, or is about to become, the subject of a rulemaking is inadmissible; CLI-10-9, 71 NRC 273 (2010)
the SAMDA analysis is part of the design certification application and thus intervenor's contention constitutes an impermissible challenge to a future rulemaking; LBP-10-10, 71 NRC 563 (2010)
- Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 78 (1978)
petitioners need not demonstrate a substantial likelihood of redressability, but rather need only show that redress is likely as opposed to speculative; LBP-10-11, 71 NRC 636 n.101 (2010)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 411 & n.46 (1976)
asserted procedural defects should be called to an agency's attention when, if in fact they were defects, they would have been correctable; CLI-10-14, 71 NRC 471 (2010)
objections not raised at hearing are deemed waived; CLI-10-14, 71 NRC 469 (2010)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1635 (1984)
failure to satisfy the first two stay factors renders it unnecessary to make determinations on the two remaining factors, harm to other parties and where the public interest lies; CLI-10-8, 71 NRC 163 (2010)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985)
all proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-10-7, 71 NRC 420 (2010)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983)
although all environmental contentions may, in a general sense, ultimately be challenges to the NRC's compliance with NEPA, factual disputes of particular issues can be raised before the draft environmental impact statement is prepared; CLI-10-2, 71 NRC 34 n.30 (2010)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983)
although the ultimate burden with respect to NEPA lies with the NRC Staff, NRC policy with respect to the identification of issues for hearing has long been that such issues must be raised as early as possible; CLI-10-2, 71 NRC 34-35 (2010)
- Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982)
licensing boards normally have considerable discretion in making evidentiary rulings; CLI-10-5, 71 NRC 99 (2010)
- Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 401 (1984)
to meet its burden to justify certification of its request to waive 10 C.F.R. 51.53(b), 51.95(b), and 51.106(c), petitioner must make a *prima facie* showing that the proposed facility would not be needed to meet increased energy needs or to replace older, less economical operating capacity, and that there are viable alternatives likely to exist that could tip the NEPA cost-benefit balance against issuance of the operating license; LBP-10-12, 71 NRC 663, 670 (2010)
- Electric Power Supply Association v. Federal Energy Regulatory Commission*, 391 F.3d 1255 (D.C. Cir. 2004)
petitioners may enforce procedural rights only if the procedures in question are designed to protect some threatened concrete interest of theirs that is the ultimate basis of their standing; LBP-10-11, 71 NRC 635 n.100 (2010)
- Electric Power Supply Association v. Federal Energy Regulatory Commission*, 391 F.3d 1255, 1262 (D.C. Cir. 2004)
petitioner's standing is not defeated by the fact that it cannot show, with any certainty, that its or its members' financial interests will be damaged by the operation of a rule; LBP-10-11, 71 NRC 635 n.100 (2010)

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- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 11-12 (2007)
once a petition to intervene and request for hearing have been granted and contentions are admitted for hearing, appeals of board rulings on new or amended contentions are treated under section 2.341(f)(2), regardless of the subject matter of those contentions; CLI-10-16, 71 NRC 490 (2010)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 293, 317 (2010)
SAMA contentions will be admitted in license renewal proceedings only if it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated; LBP-10-13, 71 NRC 692 (2010)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 293-94 n.26 (2010)
the only severe accident mitigation alternatives that applicant must implement as part of a license renewal safety review are those dealing with aging management; LBP-10-13, 71 NRC 679 (2010)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315, 316-17 (2010)
contention is deficient because it does not allege that additional SAMAs should have been identified as potentially cost-beneficial or that any significant errors were made in applicant's SAMA reanalysis; LBP-10-13, 71 NRC 694 (2010)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 453-54 (2010)
the current licensing basis is the set of NRC requirements (including regulations, orders, technical specifications, and license conditions) applicable to a specific plant and includes licensee's written, docketed commitments for ensuring compliance with applicable NRC requirements and the plant-specific design basis; LBP-10-13, 71 NRC 678 n.12 (2010)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 341 (2006)
licensing boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; CLI-10-2, 71 NRC 33 (2010)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 358 (2006)
an expert opinion that merely states a conclusion that the application is deficient, inadequate, or wrong without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the board of its ability to make the necessary, reflective assessment of the opinion; LBP-10-6, 71 NRC 368 n.54 (2010)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 192 (2008)
rejection or admission of a contention, where petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact nor affects the basic structure of the proceeding in a pervasive and unusual manner; CLI-10-16, 71 NRC 491 (2010)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 137 (2009)
that interlocutory review will only be granted under extraordinary circumstances reflects the Commission's disfavor of piecemeal appeals during ongoing licensing board proceedings; CLI-10-16, 71 NRC 490 (2010)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 138 (2009)
the Commission generally does not entertain requests to invoke its inherent supervisory authority over adjudications; CLI-10-13, 71 NRC 388 n.6 (2010)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 62 (2008)
petitioner must show that the subject matter of a contention would impact the grant or denial of a pending license application; LBP-10-6, 71 NRC 359 (2010)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 63 (2008)
providing any material or document as the foundation for a contention without setting forth an explanation of its significance is inadequate to support the admission of a contention; LBP-10-6, 71 NRC 361 (2010)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 89 (2008)
admissibility of contentions does not hinge on access to a draft guidance document, which is not a legal requirement; LBP-10-5, 71 NRC 343 (2010)
guidance documents are not binding legal authority; LBP-10-5, 71 NRC 346 (2010)
- Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 261 (2008)
petitioner may not use its reply brief to cure pleading defects in its intervention petition; CLI-10-1, 71 NRC 6 (2010)

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- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006)
when evaluating a motion for a stay, the Commission places the greatest weight on irreparable injury to the moving party unless a stay is granted; CLI-10-8, 71 NRC 151 (2010)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 n.4 (2006)
although technically not applicable to a request for a stay of NRC Staff action, the section 2.342(e) standards simply restate commonplace principles of equity universally followed when judicial (or quasi-judicial) bodies consider stays or other forms of temporary injunctive relief; CLI-10-8, 71 NRC 147 n.25 (2010)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13 (2007), *reconsideration denied*, CLI-07-13, 65 NRC 211 (2007)
a contention on spent fuel pool fires is rejected as an impermissible challenge to NRC regulations and the license renewal generic environmental impact statement; CLI-10-11, 71 NRC 305 n.93 (2010)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 19-21 (2007)
because onsite storage of spent fuel during the license renewal term is a Category 1 issue, and as such explicitly has been found not to warrant any additional site-specific analysis of mitigation measures, the required SAMA analysis for license renewal is intended to focus on reactor accidents; CLI-10-14, 71 NRC 472 (2010)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 (2005)
a new or amended contention that is found to be timely in accord with section 2.309(f)(2) need not be assessed under the section 2.309(c) factors, which are considered to apply only to otherwise nontimely submissions; LBP-10-1, 71 NRC 187 (2010)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 n.21 (2005)
intervenors with contentions rooted in new material information need not make the same showing as intervenors who have simply delayed filing their contentions until after expiration of the regulatory deadline; LBP-10-9, 71 NRC 506 n.46 (2010)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572-74 (2006)
a new or amended contention that is found to be timely in accord with section 2.309(f)(2) need not be assessed under the section 2.309(c) factors, which are considered to apply only to otherwise nontimely submissions; LBP-10-1, 71 NRC 187 (2010)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573 n.14 (2006)
if a contention satisfies the timeliness requirement of 10 C.F.R. 2.309(f)(2)(iii), then, by definition, it is not subject to section 2.309(c) which specifically applies to nontimely filings; LBP-10-9, 71 NRC 506 n.46 (2010)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573-74 (2006)
intervenors with contentions rooted in new material information need not make the same showing as intervenors who have simply delayed filing their contentions until after expiration of the regulatory deadline; LBP-10-9, 71 NRC 505-06 n.46 (2010)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 200-01 (2006), *rev'd on other grounds*, CLI-07-16, 65 NRC 371 (2007)
in the absence of documentary or expert support, reliance on a guidance document to form the basis of a proposed contention does not, by itself, demonstrate a dispute with applicant; LBP-10-5, 71 NRC 343 (2010)
- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 265 n.5 (2007)
a new or amended contention that is found to be timely in accord with section 2.309(f)(2) need not be assessed under the section 2.309(c) factors, which are considered to apply only to otherwise nontimely submissions; LBP-10-1, 71 NRC 187 (2010)

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- Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-08-25, 68 NRC 763, 824-25 (2008)
licensing boards are not bound by NRC Staff's position or by changes in that position; LBP-10-9, 71 NRC 522 n.133 (2010)
- Envirocare of Utah, Inc.* (Salt Lake City, Utah), DD-98-9, 48 NRC 173, 176 (1998)
challenges to an Agreement State's program may be raised in a section 2.206 petition; CLI-10-8, 71 NRC 153 n.57 (2010)
- Environmental Law & Policy Center v. NRC*, 470 F.3d 676, 685 (7th Cir. 2006)
an environmental impact statement must discuss alternatives to the proposed action, and this discussion must incorporate a hard look at alternatives to a proposed action; LBP-10-10, 71 NRC 581 (2010)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806-07 (2005), *aff'd*, *Environmental Law & Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006)
the NEPA rule of reason does not require applicant to consider energy efficiency in its NEPA analysis, because energy efficiency is not a reasonable alternative for a merchant power producer; CLI-10-1, 71 NRC 20 (2010)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806-08 (2005), *aff'd sub nom. Environmental Law & Policy Center v. NRC*, 470 F.3d 676, 685 (7th Cir. 2006)
NRC need only consider a range of alternatives in its environmental impact statement that are technologically feasible and economically practicable alternatives for producing baseload power; LBP-10-10, 71 NRC 581 (2010)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 810 (2005)
a solely wind- or solar-powered facility could not satisfy the project's purpose to generate baseload power; LBP-10-6, 71 NRC 383 n.99 (2010)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005)
significant inaccuracies and omissions from the environmental report are proper subjects of contentions but details or nuances are not, nor are boards to flyspeck environmental documents; LBP-10-10, 71 NRC 581 (2010)
there may be mistakes in an environmental impact statement, but in an NRC adjudication, it is intervenors burden to show their significance and materiality; LBP-10-6, 71 NRC 384 n.104 (2010)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 245 (2004)
the concept of need for power and the use of demand-side management as an alternative to building additional generation capacity are inextricably linked; LBP-10-6, 71 NRC 377 n.80 (2010)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 245, 252 (2004), *review denied*, CLI-04-31, 60 NRC 461 (2004)
licensing boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; CLI-10-2, 71 NRC 33 (2010)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 158 (2005)
regarding consideration of specific combination alternatives, the burden rests upon a petitioner to propose a particular alternative, and bare generalizations will not support an admissible contention; LBP-10-6, 71 NRC 380 n.88 (2010)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 159, *aff'd*, CLI-05-29, 62 NRC 801, 805-08 (2005)
because demand-side management reduces by a small portion applicant's demand for power, it should be analyzed in this instance as a surrogate for need for power; LBP-10-6, 71 NRC 382 (2010)
- Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 581 (2005)
when a petitioner cannot establish proximity-plus standing, he or she must resort to establishing standing under traditional standing principles; LBP-10-4, 71 NRC 229 (2010)
- Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)
a contention will be ruled inadmissible if petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation; LBP-10-6, 71 NRC 360 (2010); LBP-10-7, 71 NRC 420 (2010)
mere notice pleading is insufficient for contention admission; LBP-10-6, 71 NRC 359 (2010)

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- petitioner's assertion that trucks are dumping depleted uranium-contaminated soil from the Army site in the community is predicated on bare assertions and speculation and thus is inadmissible; LBP-10-4, 71 NRC 242 (2010)
- Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204 (2003)
providing any material or document as the foundation for a contention without setting forth an explanation of its significance is inadequate to support the admission of a contention; LBP-10-6, 71 NRC 361 (2010)
- Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003)
simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention; LBP-10-7, 71 NRC 420-21 (2010)
- Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 205 (2003)
merely quoting or citing documents as the basis for a contention is not enough to demonstrate a genuine dispute with the application on a material issue of law or fact; LBP-10-9, 71 NRC 526 (2010)
- Federal Power Commission v. Texaco*, 417 U.S. 380, 397 (1974)
post hoc bases have no legal effect on the environmental report; LBP-10-13, 71 NRC 695 (2010)
- Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-06-21, 64 NRC 30, 34 (2006)
failure to comply with Commission pleading requirements for late filings constitutes sufficient grounds for rejecting intervention and hearing requests; LBP-10-4, 71 NRC 226 n.11 (2010)
- Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Units 1 and 2; R.E. Ginna Nuclear Power Plant; Turkey Point Nuclear Generating Plant, Units 3 and 4; St. Lucie Nuclear Power Plant, Units 1 and 2; Seabrook Station; Duane Arnold Energy Center), CLI-06-21, 64 NRC 30, 33 (2006)
petitioner's tardiness due to its belated realization that it could present its arguments before the NRC did not constitute good cause for its late filing; CLI-10-12, 71 NRC 324 n.28 (2010)
- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989)
petitioner may not establish standing by alleging injury on behalf of another entity, but rather, petitioner must be the object of the actual or threatened injury; LBP-10-4, 71 NRC 228-29 (2010)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000)
all proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-10-7, 71 NRC 420 (2010)
the scope of license renewal review for a nuclear power reactor is generally restricted to plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analysis; LBP-10-13, 71 NRC 678 (2010)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11-12 (2001)
NEPA issues are divided between inadmissible Category 1 issues and Category 2 issues which must be analyzed on a site-by-site basis and thus are within the scope of license renewal proceedings; LBP-10-13, 71 NRC 678 (2010)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 13 (2001)
NRC's aging-based safety review in its license renewal review does not in any sense restrict or drastically narrow the scope of NEPA; LBP-10-13, 71 NRC 678 (2010)
Part 54 compliance is not dependent on complete fulfillment of Part 51 requirements given that the Commission has explicitly excluded SAMA analysis from Part 54 and distinguished the safety requirements of Part 54 from the environmental evaluation commanded by Part 51; LBP-10-13, 71 NRC 691 (2010)

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- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 21-23 (2001)
because onsite storage of spent fuel during the license renewal term is a Category 1 issue, and as such explicitly has been found not to warrant any additional site-specific analysis of mitigation measures, the required SAMA analysis for license renewal is intended to focus on reactor accidents; CLI-10-14, 71 NRC 472 (2010)
environmental impacts from the spent fuel pool, including potential beyond-design-basis accidents and the need for mitigation measures, are addressed in NRC's generic environmental impact statement for license renewal and do not require a site-specific analysis as part of an individual license renewal environmental review; CLI-10-14, 71 NRC 471 (2010)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 26 (2001)
although complying with Commission regulations may be especially difficult for pro se petitioners, it has long been a basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation; LBP-10-4, 71 NRC 243 (2010)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 & n.12 (1990)
if petitioner fails to offer alleged facts or expert opinion and a reasoned statement explaining any alleged inadequacy in the application, petitioner has not demonstrated a genuine dispute; LBP-10-6, 71 NRC 362 (2010)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42, 47 (1991)
to establish the requisite proximity for standing, petitioner must clearly indicate where he lives and/or what contact he has with the site; LBP-10-1, 71 NRC 176 (2010); LBP-10-7, 71 NRC 411 (2010)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001)
contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-10-7, 71 NRC 419 (2010)
- Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)
common sense to a degree must guide as to the manner in which Congress is likely to delegate a policy decision of economic and political magnitude to an administrative agency; LBP-10-11, 71 NRC 625 (2010)
the words of a statute must be read in their context and with a view to their place in the overall statutory scheme; LBP-10-11, 71 NRC 623 (2010)
- Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000)
a specific policy embodied in a later federal statute should control the construction of the earlier statute, even though it has not been expressly amended; LBP-10-11, 71 NRC 623 (2010)
- Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999)
existence of a viable but unexamined alternative renders an environmental impact statement inadequate; LBP-10-10, 71 NRC 584-85 n.288 (2010)
- GE-Hitachi Global Laser Enrichment LLC* (GLE Commercial Facility), CLI-10-4, 71 NRC 56, 63 (2010)
nontimely intervention petitions/contentions, amended petitions, and supplemental petitions will not be entertained absent a determination based on a balancing of section 2.309(c)(1)(i)-(viii) factors; LBP-10-1, 71 NRC 187 (2010)
- General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987)
the Commission does not exercise its authority to make *de novo* findings of fact where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact; CLI-10-5, 71 NRC 98 (2010)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)
boards are to construe intervention petitions in a light most favorable to petitioners; LBP-10-1, 71 NRC 179 (2010); LBP-10-4, 71 NRC 230 (2010)

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- in determining whether petitioner has demonstrated sufficient interest to intervene under 10 C.F.R. 2.309(d)(1), the Commission has long applied contemporaneous judicial concepts of standing; LBP-10-4, 71 NRC 228 (2010)
- to derive standing from a member, an organization must demonstrate that the individual member has standing to participate, and has authorized the organization to represent his or her interests; CLI-10-1, 71 NRC 7 n.31 (2010)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116-17 (1995)
- in proceedings that do not involve nuclear power plants, whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source; LBP-10-4, 71 NRC 229 (2010)
- petitioner whose daily commute took her within less than one-half mile of a research reactor had standing based on the obvious potential for offsite consequences; CLI-10-7, 71 NRC 139 n.31 (2010)
- petitioner whose office was located within one-half mile from a research reactor may be presumed to be affected by operation of the facility; CLI-10-7, 71 NRC 139 n.31 (2010)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 118 (1995)
- all intervenors and their experts need to provide at the contention admission stage is a reasoned presentation sufficient to warrant further inquiry; LBP-10-10, 71 NRC 580 (2010)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 120 (1995)
- when character or integrity issues are raised, they are expected to be of more than historical interest; CLI-10-9, 71 NRC 255 (2010)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, and *aff'd in part*, CLI-95-12, 42 NRC 111 (1995)
- if petitioner neglects to provide the requisite support for its contentions, the board should not make assumptions of fact that favor the petitioner or supply information that is lacking; LBP-10-6, 71 NRC 361, 380 (2010); LBP-10-7, 71 NRC 420 (2010)
- petitioner is obliged to present the factual and expert support for its contention; LBP-10-6, 71 NRC 360 (2010); LBP-10-7, 71 NRC 420 (2010)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-19, 42 NRC 191, 194 (1995)
- mootness occurs when a justiciable controversy no longer exists; LBP-10-10, 71 NRC 540 (2010)
- Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 136 (1987)
- when a contention is based on a factual underpinning in a document that has been essentially repudiated by the source of that document, the contention may be dismissed unless the intervenor offers another independent source; LBP-10-9, 71 NRC 516 (2010)
- Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 NRC 63, 66 (1992)
- fairness requires that all participants in NRC adjudicatory proceedings abide by its procedural rules, especially those who are cognizant of those rules and represented by counsel; CLI-10-12, 71 NRC 327 (2010)
- Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181 (1995)
- although the NRC public website states that SUNSI encompasses a wide variety of categories (e.g., personnel privacy, attorney-client privilege, confidential source), there is no legal basis for sweeping aside well-established and long-recognized privileges such as the Privacy Act, 5 U.S.C. § 552(a), and the attorney-client privilege; LBP-10-2, 71 NRC 200 n.29 (2010)
- Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 893-94 (1984)
- to meet its burden to justify certification of its request to waive 10 C.F.R. 51.53(b), 51.95(b), and 51.106(c), petitioner must make a prima facie showing that the proposed facility would not be needed to meet increased energy needs or to replace older, less economical operating capacity, and that there are viable alternatives likely to exist that could tip the NEPA cost-benefit balance against issuance of the operating license; LBP-10-12, 71 NRC 663 (2010)

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- Gitto Global Corp. v. Worcester Telegram & Gazette Corp.*, 422 F.3d 1 (1st Cir. 2005)
the First Amendment requires a presumption of openness in civil proceedings; LBP-10-2, 71 NRC 208 n.58 (2010)
- Goldstein v. Miller*, 488 F. Supp. 156 (D. Md. 1980)
a stay pending appeal is granted where the absence of a stay would force plaintiff out of business; CLI-10-8, 71 NRC 152 n.54 (2010)
- Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988)
Congress can be presumed to be aware of one specific agency rule only when that rule has been expressly discussed in the legislative history; LBP-10-11, 71 NRC 625 n.52 (2010)
- GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)
a contention will be ruled inadmissible if petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation; LBP-10-6, 71 NRC 360 (2010)
petitioner's assertion that trucks are dumping depleted uranium-contaminated soil from the Army site in the community is predicated on bare assertions and speculation and thus is inadmissible; LBP-10-4, 71 NRC 242 (2010)
- Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994)
the First Amendment requires a presumption of openness in civil proceedings; LBP-10-2, 71 NRC 208 n.58 (2010)
- Guerrero v. Clinton*, 157 F.3d 1190, 1194 (9th Cir. 1998)
the court declined to decide whether petitioners' concrete interests were affected because it found that nothing can be done by way of judicial review to redress the adverse consequences that they say they are suffering; LBP-10-11, 71 NRC 635 n.100 (2010)
- Gun South, Inc. v. Brady*, 877 F.2d 858, 862-63 (11th Cir. 1989)
administrative agencies have inherent authority to change and modify their own prior decisions; CLI-10-6, 71 NRC 123 (2010)
- Hanley v. Kleindienst*, 471 F.2d 823, 828-29 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973)
NRC Staff's hard look at all potentially cost-beneficial severe accident mitigation alternatives under NEPA and Part 51 ensures that it has given proper consideration to all relevant factors in granting a license renewal; LBP-10-13, 71 NRC 679 (2010)
- Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1181 (9th Cir. 1990)
NEPA does not require a separate analysis of alternatives that are not significantly distinguishable from alternatives actually considered or that have substantially similar consequences; LBP-10-10, 71 NRC 581 (2010)
- Heckler v. Chaney*, 470 U.S. 821, 832 (1985)
courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute; CLI-10-13, 71 NRC 389 n.9 (2010)
- Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1185 (9th Cir. 2000)
there is no National Environmental Policy Act requirement to use the best scientific methodology; CLI-10-11, 71 NRC 315 (2010)
- Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508 (1982)
petitioner sought to intervene well after the commencement of the evidentiary hearing and raised an evidentiary matter; LBP-10-11, 71 NRC 644 n.148 (2010)
- Huminski v. Corsones*, 396 F.3d 53 (2d Cir. 2005)
the First Amendment requires a presumption of openness in civil proceedings; LBP-10-2, 71 NRC 208 n.58 (2010)
- Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 48-49 (2001)
business decisions of licensees or applicants are beyond NRC purview; CLI-10-1, 71 NRC 22 (2010)
- Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001)
in the context of alternatives analyses, agencies need only discuss those alternatives that are reasonable and will bring about the ends of the proposed action; LBP-10-6, 71 NRC 363 (2010)

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- Hydro Resources, Inc.*, (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 2 (2006)
the Commission defers to a board's factual findings and generally steps in only to correct clearly erroneous findings, that is, findings not even plausible in light of the record viewed in its entirety; CLI-10-5, 71 NRC 99 (2010)
- In re Cendant*, 260 F.3d 183 (3d Cir. 2001)
the First Amendment requires a presumption of openness in civil proceedings; LBP-10-2, 71 NRC 208 n.58 (2010)
- In re Oliver*, 333 U.S. 257, 278 (1948)
Anglo-American jurisprudence has long ensured that judicial proceedings will be open to the public; LBP-10-2, 71 NRC 206 n.54 (2010)
- Indiana Michigan Power Co. v. U.S. Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996)
the Nuclear Waste Policy Act created an obligation for DOE to dispose of spent nuclear fuel by January 31, 1998; LBP-10-11, 71 NRC 628-29 n.71 (2010)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001)
petitioner organization fails to identify any discrete institutional injury to itself other than general environmental and policy interests of the sorts the federal courts and NRC repeatedly have found insufficient for organizational standing; CLI-10-3, 71 NRC 51 n.5 (2010)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001)
arguments made before the board that are abandoned on appeal are deemed to be waived; CLI-10-9, 71 NRC 257 n.70, 264 n.115, 265 (2010)
petitioners have not appealed the board's ruling as to organizational standing, and thus the argument is considered waived; CLI-10-3, 71 NRC 51 n.5 (2010)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-01-15, 53 NRC 344, *aff'd*, CLI-01-21, 54 NRC 247 (2001)
petitioners fail to explain how alleged impacts would arise from the proposed activities as opposed to past activities not in issue; LBP-10-11, 71 NRC 634 n.97 (2010)
- Jessup v. Luther*, 227 F.3d 993 (7th Cir. 2000)
the First Amendment requires a presumption of openness in civil proceedings; LBP-10-2, 71 NRC 208 n.58 (2010)
- Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878 (1984)
petitioner sought intervention during the evidentiary hearing and proffered a factual contention; LBP-10-11, 71 NRC 644 n.148 (2010)
- Kelley v. Selin*, 42 F.3d 1501, 1521 (6th Cir. 1995)
NRC need only consider a range of alternatives in its environmental impact statement that are technologically feasible and economically practicable alternatives for producing baseload power; LBP-10-10, 71 NRC 581 (2010)
- Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990)
stay petitioner must show that success on the merits is a virtual certainty to warrant issuance of a stay; CLI-10-8, 71 NRC 154 (2010)
- Kleppe v. Sierra Club*, 427 U.S. 390, 401-02 (1976)
the statutory language of the National Environmental Policy Act requires an impact statement only in the event of a proposed action, and thus in the absence of a proposal there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement; CLI-10-5, 71 NRC 107 n.87 (2010)
- Kleppe v. Sierra Club*, 427 U.S. 390, 402 n.12 (1976)
environmental impact statements are required in conjunction with specific proposals for action; CLI-10-5, 71 NRC 107 n.87 (2010)
- KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004)
where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion; LBP-10-11, 71 NRC 621 (2010)
- Limerick Ecology Action v. NRC*, 869 F.2d 719, 736-39 (3d Cir. 1989)
NRC cannot generically dispense with the consideration of SAMAs, under NEPA, through a policy statement issued pursuant to its Atomic Energy Act authority; LBP-10-13, 71 NRC 691 (2010)

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- Limerick Ecology Action v. NRC*, 869 F. 2d 719, 739 (3d Cir. 1989)
NEPA does not require consideration of remote and speculative risks; LBP-10-10, 71 NRC 550 (2010)
- Limerick Ecology Action v. NRC*, 869 F. 2d 719, 739-40 (3d Cir. 1989)
the court confronted the problem of whether location of a nuclear plant in a densely populated area allowed adoption of generic risk factors and a severe accident mitigation design alternatives decision supported by a policy statement rather than a rulemaking; LBP-10-10, 71 NRC 548-49 (2010)
- Limerick Ecology Action v. NRC*, 869 F. 2d 719, 741 (3d Cir. 1989)
after the Three Mile Island accident, it is irrational for NRC to maintain that severe accident risks are too remote to require consideration; LBP-10-10, 71 NRC 552 (2010)
- Limerick Ecology Action v. NRC*, 869 F. 2d 719, 744 & n.31 (3d Cir. 1989)
petitioner failed to provide any evidence to challenge NRC's conclusion that the environmental effects of a hypothetical terrorist attack on a nuclear plant would be no worse than those caused by a severe accident; LBP-10-10, 71 NRC 552 (2010)
- Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007)
an agency's interpretation of its own regulation is controlling, provided it is not plainly erroneous or inconsistent with the regulation; CLI-10-13, 71 NRC 389 n.10 (2010)
- Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 836 (1973)
NRC's NEPA responsibilities and, by extension, the applicant's responsibilities under 10 C.F.R. Part 51, are subject to a rule of reason; LBP-10-6, 71 NRC 362 (2010)
- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986)
the Commission defers to a board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion; CLI-10-1, 71 NRC 5 (2010); CLI-10-9, 71 NRC 253 (2010)
- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 71 (1991)
an agency's environmental review must consider not every possible alternative, but every reasonable alternative; LBP-10-6, 71 NRC 380 n.87 (2010); LBP-10-10, 71 NRC 604 n.3 (2010)
- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 80-82 (1992)
NRC has entertained requests for stays of final agency action in anticipation of judicial review; CLI-10-8, 71 NRC 147 n.25 (2010)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-92-7, 35 NRC 93 (1992)
this decision resolves a number of issues concerning uranium enrichment licensing and may be relied upon as precedent; CLI-10-4, 71 NRC 71 (2010)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997)
this decision resolves a number of issues concerning uranium enrichment licensing and may be relied upon as precedent; CLI-10-4, 71 NRC 71 (2010)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 309 (1997)
financial criteria of 10 C.F.R. 70.22(a)(8) and 70.23(a)(5) can be met by conditioning the license to require funding commitments to be in place prior to construction and operation; CLI-10-4, 71 NRC 72 (2010)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998)
this decision resolves a number of issues concerning uranium enrichment licensing and may be relied upon as precedent; CLI-10-4, 71 NRC 71 (2010)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998)
an environmental impact statement must discuss alternatives to the proposed action, and this discussion must incorporate a hard look at alternatives to a proposed action; LBP-10-10, 71 NRC 581 (2010)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88 (1998)
an environmental impact statement must describe the potential environmental impact of a proposed action and discuss any reasonable alternatives; LBP-10-10, 71 NRC 604 n.3 (2010)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Facility), CLI-98-3, 47 NRC 77, 94 (1998)
the board's price projections reflect not ineluctable truth, but rather a plausible scenario that should be added to the environmental record of decision; CLI-10-1, 71 NRC 18 n.86 (2010)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225, reconsideration denied, CLI-04-35, 60 NRC 619 (2004)
as a general matter, a party may not present a new contention, or a new basis for a proposed contention, in its reply; LBP-10-9, 71 NRC 514 (2010)

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- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004)
intervenor need not provide all supporting facts for a contention in the original submission or prove its case to have the contention admitted; LBP-10-9, 71 NRC 513 (2010)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-5, 61 NRC 22, 36 (2005)
an approach for disposition of depleted tails that is consistent with the USEC Privatization Act, such as transfer to DOE for disposal, constitutes a plausible strategy; CLI-10-4, 71 NRC 72 (2010)
depleted uranium from an enrichment facility is appropriately classified as low-level radioactive waste; CLI-10-4, 71 NRC 72 (2010)
this decision resolves a number of issues concerning uranium enrichment licensing and may be relied upon as precedent; CLI-10-4, 71 NRC 71 (2010)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-17, 62 NRC 5 (2005)
this decision resolves a number of issues concerning uranium enrichment licensing and may be relied upon as precedent; CLI-10-4, 71 NRC 71 (2010)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 723 (2005)
the Commission does not exercise its authority to make *de novo* findings of fact where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact; CLI-10-5, 71 NRC 98 (2010)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005)
business strategies in the context of need for power and any challenges to them are outside the scope of a licensing proceeding; CLI-10-1, 71 NRC 22 (2010); LBP-10-10, 71 NRC 598 (2010)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 727 (2005)
where any issue arises over the proper scope of a contention, NRC opinions have long referred back to the bases set forth in support of the contention; CLI-10-11, 71 NRC 309 (2010)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 727-28 (2005)
NRC adjudicatory proceedings would prove endless if parties were free to introduce entirely new claims that they either originally opted not to make or that simply did not occur to them at the outset; CLI-10-11, 71 NRC 311 (2010)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-22, 64 NRC 37, 40 (2006)
although the Commission has discretion to review all underlying factual issues *de novo*, it is disinclined to do so where a board has weighed arguments presented by experts and rendered reasonable, record-based factual findings; CLI-10-5, 71 NRC 99 (2010)
the Commission defers to a board's factual findings and generally steps in only to correct clearly erroneous findings, that is, findings not even plausible in light of the record viewed in its entirety; CLI-10-5, 71 NRC 99 (2010)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004)
the reach of a contention necessarily hinges upon its terms coupled with its stated bases; LBP-10-6, 71 NRC 366 n.49 (2010)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-8, 63 NRC 241, 258 (2006)
the hard look required by NEPA is subject to a rule of reason, such that it is not necessary to look at every conceivable alternative to the proposed licensing action, but only those that are feasible and reasonably related to the scope and goals of the proposed action; LBP-10-10, 71 NRC 581 (2010)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-8, 63 NRC 241, 258-59 (2006)
NRC's NEPA responsibilities and, by extension, the applicant's responsibilities under 10 C.F.R. Part 51, are subject to a rule of reason; LBP-10-6, 71 NRC 362 (2010)
- Louisiana Wildlife Federation, Inc. v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985)
NRC need only consider a range of alternatives in its environmental impact statement that are technologically feasible and economically practicable alternatives for producing baseload power; LBP-10-10, 71 NRC 581 (2010)
- Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006)
the First Amendment requires a presumption of openness in civil proceedings; LBP-10-2, 71 NRC 208 n.58 (2010)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)
petitioners need not demonstrate a substantial likelihood of redressability, but rather need only show that redress is likely as opposed to speculative; LBP-10-11, 71 NRC 636 n.101 (2010)

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- to meet its burden, it is generally sufficient if petitioner provides plausible factual allegations that satisfy each element of standing; LBP-10-4, 71 NRC 229-30 (2010)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)
even if a party seeking standing has some intent to return to an area, when such intentions are not supported by concrete plans or a specification of when future visits would take place, they do not support a finding of injury in the standing context; LBP-10-1, 71 NRC 179 (2010)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)
one who asserts a procedural right to protect a concrete interest can assert that right without meeting all the normal standards for redressability and immediacy; LBP-10-11, 71 NRC 636 n.101 (2010)
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992)
petitioners may enforce procedural rights only if the procedures in question are designed to protect some threatened concrete interest of theirs that is the ultimate basis of their standing; LBP-10-11, 71 NRC 635 n.100 (2010)
- Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-09-17, 70 NRC 311, 333-34 (2009)
“otherwise admissible” has been interpreted to mean a contention that meets the admissibility requirements of 10 C.F.R. 2.309(f)(1) but for the fact that it challenges a yet-to-be-certified reactor design; LBP-10-9, 71 NRC 527 (2010)
- Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1004 (1973), *aff'd sub nom. Citizens for Safe Power v. NRC*, 524 F.2d 1291 (D.C. Cir. 1975)
perfection in plant construction and the construction quality assurance program is not a precondition for a license, but rather what is required is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety; LBP-10-9, 71 NRC 519 (2010)
- Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007)
where the law is declared to require it, DOE and other agencies within the Executive Branch are often required to implement legislative directives with which they do not necessarily agree; LBP-10-11, 71 NRC 628 n.71 (2010)
- Massachusetts v. NRC*, 522 F.3d 115, 120-21, 125-27 (1st Cir. 2008)
NRC regulations provide procedural channels through which new and significant information may be brought to the Staff’s attention for review to determine if a generic Category 1 finding warrants modification; CLI-10-14, 71 NRC 476 (2010)
- Massachusetts v. NRC*, 522 F.3d 115, 126-27 (1st Cir. 2008)
the Atomic Energy Act’s regulatory scheme is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective; CLI-10-6, 71 NRC 122 (2010)
- Massachusetts v. NRC*, 522 F.3d 115, 130 (1st Cir. 2008)
stay of the close of hearings in license renewal proceedings was ordered to afford the Commonwealth an opportunity to request participant status as an interested state; CLI-10-14, 71 NRC 468 n.105 (2010)
- Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983)
the National Environmental Policy Act does not require an agency to assess potential psychological impacts due to fear of radiological harm; CLI-10-11, 71 NRC 309 n.113 (2010)
- Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984)
fairness requires that all participants in NRC adjudicatory proceedings abide by its procedural rules, especially those who are cognizant of those rules and represented by counsel; CLI-10-12, 71 NRC 327 (2010)
- Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982)
petitioner must provide more than vague assertions that it will be able to assist in developing the record to satisfy a requirement for late filing; CLI-10-12, 71 NRC 326 (2010)
the Commission will defer to a board’s rulings on threshold issues absent an error of law or abuse of discretion; CLI-10-12, 71 NRC 322 (2010)

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- Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, 128 S. Ct. 2733, 2758 (2008)
post hoc bases have no legal effect on the environmental report; LBP-10-13, 71 NRC 695 (2010)
- Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 576-77 (9th Cir. 1998)
petitioner did not properly challenge applicant's conclusion that no environmentally preferable alternative existed where the only alternative that petitioner mentions on appeal is the no-reactor option, and petitioner neither raised that option before the board nor supported its argument that it would always be environmentally preferable; LBP-10-6, 71 NRC 380 n.88 (2010)
- Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 57 (1983)
if NRC Staff finds any severe accident mitigation alternative conferring a substantial benefit compared to its cost of implementation, it must make such SAMA a license condition for the renewed operating license; LBP-10-13, 71 NRC 689 n.77 (2010)
- National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267 (1974)
a Staff order that neither repudiates nor rescinds any NRC safety and security requirements, but rather imposes new, more stringent security requirements that supplement those already found in NRC regulations does not amount to unlawfully promulgated regulations; CLI-10-3, 71 NRC 54 n.24 (2010)
- National Whistleblower Center v. NRC*, 208 F.3d 256, 264-65 (D.C. Cir. 2000)
if a board erroneously rejected petitioner's motions, but the record does not suggest that petitioner suffered any prejudicial error, Commission review is not warranted; CLI-10-14, 71 NRC 471 (2010)
- Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988)
NEPA should be construed in the light of reason if it is not to demand virtually infinite study and resources; CLI-10-11, 71 NRC 315 (2010)
- Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972)
low probability is the key to applying NEPA's rule of reason test to contentions regarding environmental impacts of specific accident scenarios; LBP-10-10, 71 NRC 557 (2010)
- Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834, 836 (D.C. Cir. 1972)
an otherwise reasonable alternative will not be excluded from discussion in an environmental impact statement solely on the ground that it is not within the jurisdiction of the NRC; LBP-10-10, 71 NRC 584 n.286 (2010)
- Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834, 837-38 (D.C. Cir. 1972)
NEPA does not require detailed discussion of the environmental effects of alternatives put forward when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities; LBP-10-10, 71 NRC 595 (2010)
- Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972)
all reasonable alternatives are to be rigorously explored and objectively evaluated, but for alternatives eliminated from detailed study, only a brief discussion of the reasons for their having been eliminated is required; LBP-10-10, 71 NRC 578 (2010)
NRC need only consider a range of alternatives in its environmental impact statement that are technologically feasible and economically practicable for producing baseload power; LBP-10-10, 71 NRC 581 (2010)
the hard look required by NEPA is subject to a rule of reason, such that it is not necessary to look at every conceivable alternative to the proposed licensing action, but only those that are feasible and reasonably related to the scope and goals of the proposed action; LBP-10-10, 71 NRC 581 (2010)
- Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972)
implicit in NEPA is a rule of reason, under which the agency may limit the alternatives discussion where there is no environmental effect or where an effect is simply not significant; LBP-10-10, 71 NRC 603 n.2 (2010)
- New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (2009)
denial of a contention challenging the failure to include in the environmental impact statement for the license renewal any consideration of the effects of an aircraft attack was upheld; LBP-10-10, 71 NRC 552 (2010)
the fact that an aircraft attack on a nuclear power plant requires at least two intervening events (the act of a third-party criminal and failure of government agencies specifically charged with preventing

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- terrorist attacks) results in a chain of causation too attenuated to require NEPA review; CLI-10-1, 71 NRC 13-14 (2010)
- New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132, 136 (3d Cir. 2009)
where petitioner has not shown a reasonably close causal relationship between an aircraft attack and the relicensing proceeding, NEPA evaluation is not warranted; CLI-10-9, 71 NRC 257 n.71 (2010)
- New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132, 136-37 (2009)
petitioner failed to provide any evidence to challenge NRC's conclusion that the environmental effects of a hypothetical terrorist attack on a nuclear plant would be no worse than those caused by a severe accident; LBP-10-10, 71 NRC 552 (2010)
- New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132, 137-44 (3d Cir. 2009)
an aircraft attack on a nuclear power plant does not warrant NEPA evaluation; CLI-10-14, 71 NRC 476 n.156 (2010)
- Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 575 (1993)
Congress can be presumed to be aware of one specific agency rule only when that rule has been expressly discussed in the legislative history; LBP-10-11, 71 NRC 625 n.52 (2010)
- North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 223 (1999)
petitioner's failure to carefully read the governing procedural regulations does not constitute good cause for its late filing; CLI-10-12, 71 NRC 324 n.28 (2010)
- North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 209-20 (3d Cir. 2002)
to determine whether a tribunal should block public access to a judicial proceeding, a two-part experience and logic test is applied; LBP-10-2, 71 NRC 207 n.61 (2010)
- Northeast Nuclear Energy Co.* (Millstone Nuclear Power Stations, Units 2 and 3), LBP-01-10, 53 NRC 273, 286 (2001)
intervenor may not attack regulatory limits for effluent releases; LBP-10-9, 71 NRC 525 n.146 (2010)
- Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 564-65 (1980)
in proceedings involving the possible construction or operation of a nuclear power reactor, including construction permit extension proceedings, proximity to the proposed facility has been considered sufficient to establish standing; LBP-10-7, 71 NRC 410 (2010)
- Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), CLI-79-11, 10 NRC 733, 742-43 (1979)
if any aspect of a facility fails to pass muster at the operating license stage, applicant bears the risk that the plant will not be allowed to operate; LBP-10-7, 71 NRC 406 (2010)
possession of a construction permit is no guarantee that an operating license will be issued; LBP-10-7, 71 NRC 406 (2010)
- Northern States Power Co. v. U.S. Department of Energy*, 128 F.3d 754 (D.C. Cir. 1997)
where the law is declared to require it, DOE and other agencies within the Executive Branch are often required to implement legislative directives with which they do not necessarily agree; LBP-10-11, 71 NRC 628 n.71 (2010)
- Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 44-45 (1990)
in a decommissioning proceeding, where the proximity presumption did not apply, a petitioner who commuted past the entrance of plant once or twice a week was found to have standing; CLI-10-7, 71 NRC 139 n.31 (2010)
- Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 45 (1990)
a regular commute that takes petitioner past a plant entrance once or twice a week is sufficient to establish standing; LBP-10-1, 71 NRC 179 n.5 (2010)
- Nuclear Energy Institute v. Environmental Protection Agency*, 373 F.3d 1251, 1258-62 (D.C. Cir. 2004)
an extensive discussion of the structure and legislative background of the Nuclear Waste Policy Act is provided; LBP-10-11, 71 NRC 621 n.34 (2010)
- Nuclear Energy Institute v. Environmental Protection Agency*, 373 F.3d 1251, 1288 (D.C. Cir. 2004)
that Congress may have authorized NRC to regulate DOE's disposal of radioactive waste before it enacted the Nuclear Waste Policy Act hardly negates the fact that in the NWPAct, Congress specifically directed NRC to issue requirements and criteria for evaluating repository-related applications and how to do so; LBP-10-11, 71 NRC 623-24 (2010)

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- Nuclear Energy Institute v. Environmental Protection Agency*, 373 F.3d 1251, 1289 (D.C. Cir. 2004)
the court deferred to NRC's interpretation of the Nuclear Waste Policy Act in promulgating regulations to be applied in administering the licensing stage for the high-level waste repository; LBP-10-11, 71 NRC 627 n.61 (2010)
- Nuclear Energy Institute v. Environmental Protection Agency*, 373 F.3d 1251, 1302 (D.C. Cir. 2004)
Congress has settled the matter of Yucca Mountain's approval for development because Congress's enactment of the resolution was a final legislative action once it was signed into law by the President; LBP-10-11, 71 NRC 619 n.23 (2010)
- Nuclear Energy Institute v. Environmental Protection Agency*, 373 F.3d 1251, 1304 (D.C. Cir. 2004)
it is not for any court to examine the strength of the evidence upon which Congress based its judgment to approve the Yucca Mountain site; LBP-10-11, 71 NRC 622 (2010)
- Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975)
absent a showing of good cause, petitioner's showing on the remaining factors must be highly persuasive; CLI-10-12, 71 NRC 323 (2010)
- Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139, 141-42 (2007)
NEPA is not an appropriate vehicle for exploring questions about the potential for a terrorist attack upon a proposed nuclear facility; CLI-10-1, 71 NRC 13 (2010)
- Ohio River Valley Environmental Coalition v. Kempthorne*, 473 F.2d 94, 102 (4th Cir. 2006)
omitting consideration of accident scenarios anticipated under 10 C.F.R. 50.150 and 50.54(hh) is contrary to the requirements of 42 U.S.C. § 2133(d); LBP-10-10, 71 NRC 542 (2010)
the Administrative Procedure Act directs review of agency action to determine if its decision is a product of consideration of relevant factors and whether a clear error of judgment has occurred; LBP-10-10, 71 NRC 548 n.53 (2010)
- Ohio Valley Environmental Coalition v. Hurst*, 604 F. Supp. 2d 860, 887 (S.D. W. Va. 2009)
NRC cannot either fail to perform an adequate evaluation or evade a NEPA responsibility by deferring to another agency; CLI-10-5, 71 NRC 110 n.107 (2010)
- Olmsted Citizens for a Better Community v. United States*, 793 F.2d 201, 209 (8th Cir. 1986)
petitioner did not properly challenge applicant's conclusion that no environmentally preferable alternative existed where the only alternative that petitioner mentions on appeal is the no-reactor option, and petitioner neither raised that option before the board nor supported its argument that it would always be environmentally preferable; LBP-10-6, 71 NRC 380 n.88 (2010)
- Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974)
policy statements announce what the Commission seeks to establish as policy and does not bind either the agency or the public; CLI-10-8, 71 NRC 148 n.30 (2010)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981)
"prima facie showing" means that the affidavits supporting a petition for rule waiver must present each element of the case for waiver in a persuasive manner with adequate supporting facts; LBP-10-12, 71 NRC 662 n.9 (2010)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344-45 (1983)
a contention alleging a breakdown of applicant's quality assurance program must provide evidence that there is legitimate doubt as to whether the plant can be operated safely; LBP-10-9, 71 NRC 510 (2010)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1345 (1983)
perfection in plant construction and the construction quality assurance program is not a precondition for a license, but rather what is required is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety; LBP-10-9, 71 NRC 519 (2010)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, 576 (1984)
significant evidence that the design quality assurance program is faulty makes it uncertain whether any particular structure, system, or component has been designed in accordance with stated criteria and commitments; LBP-10-9, 71 NRC 512, 519 (2010)

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- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, 576-78 (1984)
applicant, not petitioners, has the burden of proof to show reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety; LBP-10-9, 71 NRC 521 n.126 (2010)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 178-80 (1985)
NRC has entertained requests for stays of final agency action in anticipation of judicial review; CLI-10-8, 71 NRC 147 n.25 (2010)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993)
contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-10-7, 71 NRC 419 (2010)
- Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003)
the materiality requirement for contention admission often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment; LBP-10-7, 71 NRC 421 (2010)
- Pacific Gas and Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51 (1983)
the law on withdrawal of an application does not require a determination of whether applicant's decision to withdraw is sound where the applicant's filing was wholly voluntary in the first place; LBP-10-11, 71 NRC 627 (2010)
- Pa'ina Hawaii, LLC*, LBP-06-12, 63 NRC 403, 414 (2006)
intervenors characterize applicant's silence on the point that its reactor is not developed, proven, or available as a material omission, which should result in the contention being admitted for adjudication; LBP-10-10, 71 NRC 599 n.350 (2010)
- Pennekamp v. Florida*, 328 U.S. 331, 361 (1946) (Frankfurter, J., concurring)
Anglo-American jurisprudence has long ensured that judicial proceedings will be open to the public; LBP-10-2, 71 NRC 206 n.54 (2010)
- Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-96 (1979)
boards have discretion to reformulate contentions so as to clarify the issues for litigation; LBP-10-9, 71 NRC 510 (2010)
- Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 979 (1981)
the prospect of a second lawsuit with its expenses and uncertainties or another application does not provide the requisite quantum of legal harm to warrant dismissal of an application with prejudice; LBP-10-11, 71 NRC 630 (2010)
- Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 713 (1985)
it is not only the statistical improbability of a severe accident that bears on the determination whether, in a given circumstance, a severe accident should be anticipated and thereby considered in the context of a combined license application; LBP-10-10, 71 NRC 551 n.77 (2010)
- Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 89 (1983)
compliance with quality assurance requirements is an important factor in the licensing decision; LBP-10-9, 71 NRC 508 (2010)
mere recitation of unrelated adverse findings in reports of inspections and audits performed by the Staff and applicant does not supply information on what specifically would be litigated; LBP-10-9, 71 NRC 518 (2010)
- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974)
an adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process; LBP-10-7, 71 NRC 419 (2010)

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- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 & n.33, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974)
a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue; LBP-10-7, 71 NRC 420 (2010)
- Piedmont Heights Civil Club, Inc. v. Moreland*, 637 F.2d 430, 436 (5th Cir. 1981)
NEPA requires consideration only of feasible, nonspeculative alternatives; LBP-10-10, 71 NRC 604 n.4 (2010)
- Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied sub nom.*
Portland Cement Corp. v. Administrator, Environmental Protection Agency, 417 U.S. 921 (1974)
intervenor's comments must be significant enough to step over a threshold requirement of materiality, not merely state that a particular mistake was made, but show why the mistake was of possible significance; LBP-10-10, 71 NRC 583 (2010)
materiality requires a showing that the alleged error or omission is of possible significance to the result of the proceeding; LBP-10-6, 71 NRC 360 (2010)
- Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1979)
permission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact that will not otherwise be properly raised or presented; LBP-10-11, 71 NRC 644 n.148 (2010)
the relevant record includes legal issues and necessarily legal arguments; LBP-10-11, 71 NRC 644 n.148 (2010)
- Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979)
any contention that falls outside the specified scope of the proceeding must be rejected; LBP-10-7, 71 NRC 420 (2010)
- Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)
a contention that is, or is about to become, the subject of a rulemaking is inadmissible; CLI-10-9, 71 NRC 273 (2010)
- Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974)
a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible; LBP-10-7, 71 NRC 419 (2010)
- Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO No. 315*, 367 U.S. 396, 407 (1961)
perfection in plant construction and the facility construction quality assurance program is not a precondition for a license, but rather what is required is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety; LBP-10-9, 71 NRC 519 (2010)
- PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI 10-7, 70 NRC 133 (2010)
replies should be narrowly focused on the legal or logical arguments presented in the answers on a request for hearing/petition to intervene; LBP-10-9, 71 NRC 515 n.100 (2010)
- PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010)
a proximity presumption applies when an individual or organization, or an individual authorizing an organization to represent his or her interests resides within 50 miles of the proposed facility or has frequent contacts with the area affected by the proposed facility; LBP-10-7, 71 NRC 410-11 (2010)
in proceedings involving construction permits and operating licenses for nuclear power plants, the Commission recognizes a proximity presumption in favor of standing for petitioners who reside or have frequent contacts within a 50-mile radius of a nuclear power plant; LBP-10-1, 71 NRC 176 (2010); LBP-10-4, 71 NRC 229 (2010); LBP-10-7, 71 NRC 410 (2010)
- PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010)
in proceedings where petitioner's factual assertions in support of standing are challenged, untenable, conjectural, or conclusory, a board may be required to weigh the information and exercise judgment to determine if a standing element has been satisfied; LBP-10-4, 71 NRC 230 n.14 (2010)
petitioner bears the burden to provide facts sufficient to establish standing; LBP-10-4, 71 NRC 229, 238-39 n.24 (2010)

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- petitioner's lack of specificity concerning the nature, extent, and duration of his contacts with the area surrounding the proposed site is sufficient basis to reject a claim of standing; LBP-10-1, 71 NRC 179 (2010)
- the degree to which petitioner's activities are sufficient to afford standing in a reactor licensing proceeding, as a question that will require the board to weigh the information provided, is a matter that benefits from more, rather than less, factual information; LBP-10-1, 71 NRC 179 n.5 (2010)
- to establish proximity-based standing, it is petitioner's responsibility to provide enough detail to allow the board to distinguish a casual interest from a substantial one; LBP-10-1, 71 NRC 177 (2010); LBP-10-7, 71 NRC 411 (2010)
- PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 140 (2010)
- petitioner must show a pattern of regular, significant contacts within the vicinity of the site to satisfy standing requirements; LBP-10-4, 71 NRC 236 (2010)
- petitioner's claim that he routinely pierces the 50-mile radius around a reactor site is too vague to support standing; LBP-10-1, 71 NRC 179 (2010)
- PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 402 (2009), *aff'd*, CLI-10-7, 71 NRC 133, 139 (2010)
- proximity-based standing is denied when petitioner fails to supply more specific information regarding the frequency, nature, and length of his contacts within the proximity zone; LBP-10-1, 71 NRC 176 (2010)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101 (2007)
- although petitioner had shown sufficient business contacts within close proximity to the plant to demonstrate standing, his intervention petition was rejected for failure to propose an admissible contention; CLI-10-7, 71 NRC 135 (2010)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 293-96 (2007)
- although petitioner had shown sufficient business contacts within close proximity to the plant to demonstrate standing, his intervention petition was rejected for failure to propose an admissible contention; CLI-10-7, 71 NRC 135 (2010)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 17 (2007)
- although petitioner had shown sufficient business contacts within close proximity to the plant to demonstrate standing, his intervention petition was rejected for failure to propose an admissible contention; CLI-10-7, 71 NRC 135 (2010)
- PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 19 (2007)
- intervention petitioner who fails to provide specific information regarding the geographic proximity or the timing and duration of its visits only complicates matters for itself in establishing standing; CLI-10-7, 71 NRC 140 n.33 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 321 (1999)
- under pre-2004 rules, admissibility of contentions based on environmental impact statement or environmental assessment information that differed significantly from data or conclusions in applicant's environmental report would, at a minimum, have been subject to review under what are now section 2.309(c)(1) factors (i) and (v) through (Viii); LBP-10-1, 71 NRC 186 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323-24 (1999)
- petitioner who had frequently visited an area allegedly affected by the proposed action for recreational purposes had shown injury in the standing context; LBP-10-1, 71 NRC 178 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999)
- petitioner's lack of specificity concerning the nature, extent, and duration of his contacts with the area surrounding the proposed site is a sufficient basis to reject a claim of standing; CLI-10-7, 71 NRC 139 (2010)

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- the Commission defers to a board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion; CLI-10-1, 71 NRC 5 (2010); CLI-10-9, 71 NRC 253 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)
- failure to satisfy any of the pleading requirements of 10 C.F.R. 2.309(f)(1)(i)-(vi) is sufficient grounds to render the contention inadmissible; LBP-10-4, 71 NRC 241 (2010); LBP-10-6, 71 NRC 358-59 (2010); LBP-10-7, 71 NRC 419 (2010)
- intervention petitioner who fails to provide specific information regarding the geographic proximity or the timing and duration of its visits only complicates matters for itself in establishing standing; CLI-10-7, 71 NRC 140 n.33 (2010)
- petitioners bear the burden of providing sufficient relevant, specific information, whether by good-faith estimate or otherwise, to establish the basis for their standing claims; LBP-10-1, 71 NRC 178-79 (2010)
- Private Fuel Storage, L.L.C.* (Independent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000)
- good cause is the most significant of the late-filing factors of 10 C.F.R. 2.309(c)(1); LBP-10-9, 71 NRC 506 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261 (2000)
- the Commission will defer to a board's rulings on threshold issues absent an error of law or abuse of discretion; CLI-10-12, 71 NRC 322 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 4-7 (2001)
- once a petition to intervene and request for hearing have been granted and contentions are admitted for hearing, appeals of board rulings on new or amended contentions are treated under section 2.341(f)(2), regardless of their subject matter; CLI-10-16, 71 NRC 490 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 347-48 (2002)
- deciding against including terrorist attacks within NEPA reviews does not mean that NRC plans to rule out the possibility of a terrorist attack against NRC-regulated facilities, but that it saw no practical benefit in conducting that review, case-by-case, under the rubric of NEPA, nor did it consider that it had any legal duty to do this; LBP-10-10, 71 NRC 553 n.86 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 349 (2002)
- the environmental effect caused by third-party miscreants is simply too far removed from the natural or expected consequences of agency action to require a study under NEPA; CLI-10-1, 71 NRC 13 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003)
- the Commission defers to a board's factual findings and generally steps in only to correct clearly erroneous findings, that is, findings not even plausible in light of the record viewed in its entirety; CLI-10-5, 71 NRC 99 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003)
- the Commission does not exercise its authority to make *de novo* findings of fact where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact; CLI-10-5, 71 NRC 98 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-7, 59 NRC 111, 112 (2004)
- if petitioner believes he is qualified to operate a nuclear storage or reprocessing facility, he must comply with prescribed licensing procedures; CLi-10-10, 71 NRC 285 (2010)
- NRC proceedings are not an open forums for discussing the country's need for energy and spent fuel storage; CLi-10-10, 71 NRC 285 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004)
- petitioner does not have to prove its contention at the admissibility stage; LBP-10-6, 71 NRC 361 (2010)

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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 146 (2004)
in considering alternatives under NEPA, an agency must take into account the needs and goals of the parties involved in the application; LBP-10-10, 71 NRC 598 n.345 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005)
the Commission defers to a board's factual findings and generally steps in only to correct clearly erroneous findings or where there is strong reason to believe that a board has overlooked or misunderstood important evidence; CLI-10-5, 71 NRC 99 (2010)
the licensing board's principal role in the adjudicatory process is to carefully review all of the evidence, including testimony and exhibits, and to resolve any factual disputes; CLI-10-5, 71 NRC 98 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-22, 62 NRC 542, 544 (2005)
licensing board rulings are not precedential; CLI-10-2, 71 NRC 48 (2010)
unreviewed board decisions have no binding effect on a later board; CLI-10-7, 71 NRC 138 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181, *aff'd*, CLI-98-13, 48 NRC 26 (1998)
expert opinion that merely states a conclusion that the application is deficient, inadequate, or wrong without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the board of the ability to make the necessary reflective assessment of the opinion; LBP-10-6, 71 NRC 360-61, 368 n.54 (2010)
the standard of clear error for overturning a board's factual finding is quite high; CLI-10-5, 71 NRC 99 (2010)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 47-48, *aff'd*, CLI-99-10, 49 NRC 318 (1999)
under pre-2004 rules, the fact that a petition or new/amended contention was filed after the hearing opportunity notice deadline because the document or other item relied upon as the submission trigger was not available is considered good cause for the late filing; LBP-10-1, 71 NRC 188 n.4 (2010)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 4 (2008)
applicant may, at its own risk, submit a combined license application that does not reference a certified design; CLI-10-1, 71 NRC 9 (2010)
applicant may reference a design certification that the Commission has docketed but not granted; LBP-10-9, 71 NRC 525 n.144 (2010)
issues concerning a design certification application are to be resolved in the design certification rulemaking, not in an adjudication on the combined license; LBP-10-10, 71 NRC 600 (2010)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317 (2009)
a board erred in referring a contention to the Staff for consideration in conjunction with the design certification rulemaking without first assessing its admissibility; CLI-10-1, 71 NRC 10 (2010)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317, 324 (2009)
a contention may be held in abeyance by a licensing board pending completion of a rulemaking, but the contention must be otherwise admissible; CLI-10-1, 71 NRC 10 (2010); LBP-10-9, 71 NRC 527 (2010)
the Commission generally defers to board decisions regarding standing and contention admissibility in the absence of clear error or an abuse of discretion; CLI-10-2, 71 NRC 29 (2010); CLI-10-7, 71 NRC 138 (2010)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 253 (2010)
conditions for admission of a contention are strict by design; LBP-10-6, 71 NRC 358 (2010)

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- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 257-58 (2010)
NRC will conduct environmental analyses of terrorist scenarios only for facilities within the Ninth Circuit; CLI-10-14, 71 NRC 476 (2010)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 261-62 (2010)
information, alleged facts, and expert opinions provided by a petitioner will be examined by the board to confirm that the petitioner does indeed supply adequate support for its contention; LBP-10-6, 71 NRC 361 (2010)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 264 (2010)
regarding consideration of specific combination alternatives, the burden rests upon a petitioner to propose a particular alternative, and bare generalizations will not support an admissible contention; LBP-10-6, 71 NRC 380 n.88 (2010)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 264-65 (2010)
petitioner did not properly challenge applicant's conclusion that no environmentally preferable alternative existed where the only alternative that petitioner mentions on appeal is the no-reactor option, and petitioner neither raised that option before the board nor supported its argument that it would always be environmentally preferable; LBP-10-6, 71 NRC 380 n.88 (2010)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 561-64 (2008)
"otherwise admissible" has been interpreted to mean a contention that meets the contention admissibility requirements of 10 C.F.R. 2.309(f)(1) but for the fact that it challenges a yet-to-be-certified reactor design; LBP-10-9, 71 NRC 527 (2010)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 576-77 (2008)
it is inappropriate for the agency to consider economic costs when no environmentally preferable alternative has been identified; CLI-10-1, 71 NRC 23 n.118 (2010)
- Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-09-8, 69 NRC 736 (2009)
a contention was found to be inadmissible because the combined license application contained petitioner's asserted omissions; CLI-10-1, 71 NRC 10 n.44 (2010)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27 (2010)
petitioners offered sufficient expert support in the form of a declaration from their expert that explained the reasons for the expert's conclusions and cited or attached supporting documents; LBP-10-6, 71 NRC 368 n.54 (2010)
- Progress Energy Florida* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 33 & n.21, 35-36 (2010)
NRC's contention pleading standards, while strict, are not so strict as to require a board to abandon a commonsense approach to consideration of contentions; LBP-10-10, 71 NRC 591 n.312 (2010)
- Progress Energy Florida* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 36 (2010)
common sense is a relevant consideration in determining whether to reformulate contentions; LBP-10-10, 71 NRC 591 (2010)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 123 (2009)
because a contention focuses on the safety- rather than environmental-related aspects of a COL application, it is not apparent that the issue resolved in the board's admissibility ruling has any particular implications for a contention challenging the environmental impacts of long-term onsite low-level radioactive waste storage admitted and pending in another proceeding; LBP-10-8, 71 NRC 445 n.7 (2010)

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- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 126-28 (2009)
the NEPA alternatives analysis is the heart of the environmental impact statement and all reasonable alternatives must be identified and discussed in such analysis, under a rule of reason; LBP-10-10, 71 NRC 583 n.274 (2010)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 127 (2009)
although NEPA requires that the environmental impact statement identify and address all reasonable alternatives, this does not mean that every conceivable alternative must be included; LBP-10-10, 71 NRC 567, 581 (2010)
- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 138-40 (2009), *aff'd in part and rev'd in part as to other matters*, CLI-10-2, 71 NRC 27 (2010)
a new or amended contention that is found to be timely in accord with section 2.309(f)(2) need not be assessed under the section 2.309(c) factors, which are considered to apply only to otherwise nontimely submissions; LBP-10-1, 71 NRC 187 (2010)
- Public Citizen v. NRC*, 573 F.3d 916, 918 (9th Cir. 2009)
determination of what constitutes adequate protection under the Atomic Energy Act, absent specific guidance from Congress, is just such a situation where the Commission should be permitted to have discretion to make case-by-case judgments based on its technical expertise and on all the relevant information; CLI-10-14, 71 NRC 466 n.89 (2010)
- Public Citizen v. NRC*, 573 F.3d 916, 925-26 (9th Cir. 2009)
the agency decided not to include the threat of air attacks in the 2007 revision to the design basis threat rule, a decision upheld by the Ninth Circuit; CLI-10-9, 71 NRC 258 (2010)
with respect to aircraft crash as an element of the design basis threat, the court held that the agency reasonably concluded that adequate protection against the air threat was assured by the active defenses provided by other federal agencies, together with what reasonably could be expected of licensees; CLI-10-1, 71 NRC 11 (2010)
- Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-43 (1980)
policy reasons for limiting the scope of enforcement proceedings are described; CLI-10-3, 71 NRC 54 n.28 (2010)
- Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 82 (1st Cir. 1978)
the Atomic Energy Act's regulatory scheme is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective; CLI-10-6, 71 NRC 122 (2010)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 22 (1988)
"prima facie showing" means that the affidavits supporting a petition for rule waiver must present each element of the case for waiver in a persuasive manner with adequate supporting facts; LBP-10-12, 71 NRC 662 n.9 (2010)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991)
the reach of a contention necessarily hinges upon its terms coupled with its stated bases; CLI-10-11, 71 NRC 309 (2010); LBP-10-6, 71 NRC 366 n.49 (2010)
the scope of a contention is limited to issues of law and fact pleaded with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with NRC rules; CLI-10-5, 71 NRC 101 (2010)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 414 (1990)
arguments made before the board that are abandoned on appeal are deemed to be waived; CLI-10-9, 71 NRC 257 n.70 (2010)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-83-23, 18 NRC 311, 312 (1983)
the applicability of the section 2.309(c)(1) standards to post-hearing opportunity notice petitions and new/amended contentions could have procedural significance in a particular instance and has been the subject of controversy in Commission rulings; LBP-10-1, 71 NRC 189 n.5 (2010)

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- Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984)
an admissible contention under the good cause standard must allege that a permit holder's reasons for past delay failed to constitute good cause for a CP extension and be supported by a showing that construction delay is traceable to permit holder action that was intentional and without a valid business purpose; LBP-10-7, 71 NRC 416 (2010)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989)
when a contention is based on a factual underpinning in a document that has been essentially repudiated by the source of that document, the contention may be dismissed unless petitioner offers another independent source; LBP-10-9, 71 NRC 516 (2010)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-7, 29 NRC 395, 398 n.8 (1989)
the Commission finds no changed circumstances that could not previously have been brought to it, and therefore denies a motion for reconsideration; CLI-10-9, 71 NRC 252 n.39 (2010)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 245 (1989)
to certify a waiver petition to the Commission, the board must find that petitioner has met extremely high standards showing the existence of compelling circumstances in which the rationale of the regulation is undercut; LBP-10-12, 71 NRC 662 (2010)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982)
contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-10-7, 71 NRC 419 (2010)
- Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973)
petitioners who are not represented by counsel are held to less rigid pleading standards than would ordinarily be applied to litigants represented by counsel; LBP-10-4, 71 NRC 227, 230 (2010)
- Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984)
the First Amendment requires a presumption of openness in civil proceedings; LBP-10-2, 71 NRC 208 n.58 (2010)
- Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132 (1981)
the public interest would best be served by leaving the option open to the applicant should changed conditions warrant pursuit of a withdrawn application; LBP-10-11, 71 NRC 630 (2010)
- Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133 (1981)
it is highly unusual to dispose of a proceeding on the merits, i.e., with prejudice, when in fact the health, safety, and environmental merits of an application have not been reached; LBP-10-11, 71 NRC 630 (2010)
- Rice v. Kempker*, 374 F.3d 675 (8th Cir. 2004)
the First Amendment requires a presumption of openness in civil proceedings; LBP-10-2, 71 NRC 208 n.58 (2010)
- Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980)
there is a presumption of openness in administrative proceedings; LBP-10-2, 71 NRC (2010)
- Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980)
public access to courts is grounded in the First Amendment and free speech carries with it some freedom to listen; LBP-10-2, 71 NRC 206 (2010)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)
a litigable NEPA issue is one that concerns whether the NRC Staff has taken the requisite hard look at mitigation in sufficient detail to ensure that environmental consequences of the proposed project have been fairly evaluated; LBP-10-13, 71 NRC 679 (2010)

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- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)
for a mitigation analysis, the National Environmental Policy Act demands no fully developed plan or detailed examination of specific measures that will be employed to mitigate adverse environmental effects; CLI-10-11, 71 NRC 316 (2010); LBP-10-13, 71 NRC 691 (2010)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)
an agency's interpretation of its own regulation is controlling provided it is not plainly erroneous or inconsistent with the regulation; CLI-10-13, 71 NRC 389 n.10 (2010)
- Roedler v. U.S. Department of Energy*, 255 F.3d 1347, 1353 (Fed. Cir. 2001)
ratepayers are not third-party beneficiaries of the Standard Contract and therefore cannot sue for breach of contract when DOE fails to dispose of nuclear waste by the statutory deadline; LBP-10-11, 71 NRC 638 n.112 (2010)
- Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994)
any contention that fails to directly controvert the application or that mistakenly asserts the application does not address a relevant issue will be dismissed; LBP-10-7, 71 NRC 421 (2010)
- San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007)
NRC cannot, under NEPA, categorically refuse to consider the consequences of a terrorist attack against a spent fuel storage facility; CLI-10-1, 71 NRC 11 (2010); CLI-10-14, 71 NRC 476 n.156 (2010)
- Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947)
a Staff order that neither repudiates nor rescinds any NRC safety and security requirements, but rather imposes new, more stringent security requirements that supplement those already found in NRC regulations does not amount to unlawfully promulgated regulations; CLI-10-3, 71 NRC 54 n.24 (2010)
- Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001)
judicial concepts of standing require a petitioner to allege an actual or threatened, concrete and particularized injury that is fairly traceable to the challenged action, falls among the general interests protected by the Atomic Energy Act or other applicable statute, and is likely to be redressed by a favorable decision; LBP-10-4, 71 NRC 228 (2010)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994)
stay petitioner must show that success on the merits is a virtual certainty to warrant issuance of the stay; CLI-10-8, 71 NRC 154 (2010)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994)
because petitioner fails to establish his own standing as an individual, the board is precluded from granting representational standing on behalf of an organization; LBP-10-4, 71 NRC 224 n.8 (2010)
the requirement that an injury or threat of injury be concrete and particularized perforce means that the injury must not be conjectural or hypothetical; LBP-10-4, 71 NRC 228 (2010)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994)
a determination that an injury is fairly traceable to the challenged action does not depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible; LBP-10-4, 71 NRC 228 (2010)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)
pursuant to the proximity-plus approach, a presumption based on geographical proximity (albeit at distances much closer than 50 miles) may be applied where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-10-4, 71 NRC 229 (2010)
- Shaw AREVA MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 62-63 (2009)
a petition would qualify for interlocutory review where it challenges a board decision that affects the basic structure of the proceeding in a pervasive and unusual manner; CLI-10-13, 71 NRC 388 n.6 (2010)

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- Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 210 n.95 (2007)
intervenors with contentions rooted in new material information need not make the same showing as intervenors who have simply delayed filing their contentions until after expiration of the regulatory deadline; LBP-10-9, 71 NRC 505 n.46 (2010)
- Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 481-83 (2008)
a board's legal authority to reformulate contentions is discussed; CLI-10-2, 71 NRC 33 (2010)
- Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 482 (2008)
boards have discretion to reformulate contentions so as to clarify the issues for litigation; CLI-10-2, 71 NRC 33 (2010); LBP-10-9, 71 NRC 510 (2010)
intervenor's representational status is one factor in determining whether reformulation is appropriate, and *pro se* status may provide additional cause for reformulation; LBP-10-10, 71 NRC 591 (2010)
- Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966)
the principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials; LBP-10-2, 71 NRC 206 n.54 (2010)
- Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999)
parties represented by counsel are generally held to a higher standard than *pro se* litigants; LBP-10-10, 71 NRC 608 n.15 (2010)
the Commission generally extends some latitude to *pro se* litigants, but they still are expected to comply with NRC procedural rules, including contention pleading requirements; CLI-10-1, 71 NRC 6 (2010)
- Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354-55 (1999)
petitioner's lack of specificity concerning the nature, extent, and duration of his contacts with the area surrounding the proposed site is a sufficient basis to reject a claim of standing; CLI-10-7, 71 NRC 139 (2010)
- Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 501 (2007)
it is appropriate for a licensing board to defer the consideration of all but one contention in some limited and exceptional circumstances; LBP-10-11, 71 NRC 647 n.169 (2010)
- Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968)
the Atomic Energy Act's statutory scheme is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective; CLI-10-6, 71 NRC 122 (2010); LBP-10-11, 71 NRC 623 n.43 (2010)
- Sierra Club v. Marsh*, 976 F.2d 763 (1st Cir. 1992)
Staff's environmental impact statement for a combined license must discuss the reasonably foreseeable environmental impacts of the proposed project; CLI-10-2, 71 NRC 46 (2010)
- Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)
a generalized concern about the destruction of scenery and wildlife in a national forest was insufficient to confer standing upon a national environmental group; LBP-10-11, 71 NRC 635 n.98 (2010)
an Indian Tribe whose reservation is adjacent to facilities where spent nuclear fuel is currently stored, the nearest of which resides just 600 yards from an ISFSI, has more than a mere interest in a problem; LBP-10-11, 71 NRC 635 n.98 (2010)
- Smith v. Federal Trade Commission*, 403 F. Supp. 1000, 1016 (D. Del. 1975)
once the requesting party meets its burden of demonstrating a need for a document, the burden is upon the claimant of executive privilege to demonstrate a proper entitlement to exemption from disclosure; LBP-10-2, 71 NRC 204 n.48 (2010)
- Society of Professional Journalists v. Secretary of Labor*, 616 F. Supp. 569, 574 (D. Utah 1985), *vacated as moot*, 832 F. 2d 1180 (10th Cir. 1987)
as long as the administrative proceedings walk, talk, and squawk very much like an Article III judicial proceeding, they should be open to the public; LBP-10-2, 71 NRC 208 n.59 (2010)

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- South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 70 NRC 1, 7 n.32 (2010)
replies should be narrowly focused on the legal or logical arguments presented in the answers on a request for hearing/petition to intervene; LBP-10-9, 71 NRC 515 n.100 (2010)
- South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 13-14 (2010)
NRC will conduct environmental analyses of terrorist scenarios only for facilities within the Ninth Circuit; CLI-10-14, 71 NRC 476 (2010)
- South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 14 (2010)
although the Commission has complied with the Ninth Circuit's ruling for facilities within the Ninth Circuit, that experience is very limited and does not demonstrate that conducting environmental analyses of terrorist scenarios for the licensing of all major facilities would be practicable or lead to meaningful additional information; CLI-10-9, 71 NRC 257 (2010)
NRC regulations permit an applicant to reference a docketed, but not yet certified, design; CLI-10-9, 71 NRC 260 (2010)
- South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 23-24 (2010)
if petitioner has proffered an admissible contention asserting an environmentally preferable alternative to the proposed reactors, this also would trigger the requirement that the environmental report contain cost estimates; CLI-10-9, 71 NRC 264 (2010)
issues related to costs only become relevant if an intervenor identifies an environmentally preferable, reasonable alternative; LBP-10-10, 71 NRC 571 (2010)
monetary considerations come into play only if an alternative to applicant's proposal is environmentally preferable, and then boards must determine whether the environmental benefits conferred by that alternative are worthwhile enough to outweigh any additional cost needed to achieve them; LBP-10-10, 71 NRC 573 (2010)
- South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), LBP-09-5, 69 NRC 303, 308, 312-13 (2009)
to demonstrate a need for SUNSI, intervenors must discuss the basis for a proffered contention and describe why the information available to the intervenors is not sufficient to provide the basis and specificity for a proffered contention; LBP-10-5, 71 NRC 343 (2010)
- Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 70 NRC 90, 100-01 (2010)
parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing; CLI-10-15, 71 NRC 482 (2011)
procedural rules on contentions are designed to ensure focused and fair proceedings; CLI-10-15, 71 NRC 482 (2011)
the scope of a contention is limited to issues of law and fact pleaded with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with NRC rules; CLI-10-15, 71 NRC 482 (2011)
- Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253 (2007)
failure to provide adequate support for a contention requires that the contention be rejected; LBP-10-6, 71 NRC 360 (2010)
neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention; LBP-10-6, 71 NRC 368 n.54 (2010)
petitioner is obliged to present the factual and expert support for its contention; LBP-10-6, 71 NRC 360 (2010)
- Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 2 and 3), CLI-09-13, 69 NRC 575 (2009)
applicant may, at its own risk, submit a combined license application that does not reference a certified design; CLI-10-1, 71 NRC 9 (2010)

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- Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33 (2009)
a safety-related contention on the potential impact of the lack of disposal options for low-level radioactive waste at a proposed facility is admissible; CLI-10-2, 71 NRC 44 (2010)
- Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33, 37 (2009)
from a safety standpoint, the required low-level radioactive waste storage information is tied to the COL applicant's particular plans for compliance through design, operational organization, and procedures; CLI-10-2, 71 NRC 44, 46 (2010)
- State of Alaska Department of Transportation and Public Facilities*, CLI-04-26, 60 NRC 399 (2004)
the scope of an enforcement adjudication is limited to the question of whether the order should be sustained; CLI-10-3, 71 NRC 53 (2010)
- State of Alaska Department of Transportation and Public Facilities*, CLI-04-26, 60 NRC 399, 404-06 (2004)
the scope of a hearing in an adjudication on an enforcement order is limited to whether the order should be sustained; CLI-10-3, 71 NRC 54 (2010)
- State of Alaska Department of Transportation and Public Facilities*, CLI-04-26, 60 NRC 399, 406 (2004)
petitioners must provide factual support for their claim that an enforcement-related injury could be redressed by a favorable board ruling; CLI-10-3, 71 NRC 53 n.20 (2010)
- State of Utah* (Agreement Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended), DD-95-1, 41 NRC 43, 43-44 (1995)
challenges to an Agreement State's program may be raised in a section 2.206 petition; CLI-10-8, 71 NRC 153 n.57 (2010)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998)
in the appropriate circumstances, allowing discovery or an evidentiary hearing with respect to safety-related issues to proceed before the final safety evaluation report is issued will serve to further the Commission's objective to ensure a fair, prompt, and efficient resolution of contested issues; CLI-10-4, 71 NRC 67 n.1 (2010)
licensing boards are expected to use the applicable techniques to ensure prompt and efficient resolution of contested issues; CLI-10-4, 71 NRC 67-68 (2010)
this guidance is intended to improve the management and timely completion of the proceeding and addresses hearing schedules, parties' obligations, contentions, and discovery management; CLI-10-4, 71 NRC 66-67 (2010)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998)
the Commission's general policy is to avoid unnecessary delays in adjudicatory proceedings; LBP-10-9, 71 NRC 522 (2010)
- Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981)
licensing boards are expected to use the applicable techniques to ensure prompt and efficient resolution of contested issues; CLI-10-4, 71 NRC 67-68 (2010)
- Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981)
fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations; CLI-10-12, 71 NRC 327 (2010)
- Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1151 (2009)
even if a party seeking standing has some intent to return to an area, when such intentions are not supported by concrete plans or a specification of when future visits would take place, they do not support a finding of injury in the standing context; LBP-10-1, 71 NRC 179 (2010)
- Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1152 (2009)
boards have an independent obligation to make a standing determination regardless of whether there is a challenge to a petitioner's standing; LBP-10-1, 71 NRC 177 n.3 (2010); LBP-10-7, 71 NRC 411 n.4 (2010)
- System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005)
significant inaccuracies and omissions from the environmental report are proper subjects of contentions but details or nuances are not, nor are boards to flyspeck environmental documents; LBP-10-10, 71 NRC 581, 607 n.14 (2010)

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- System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144 (2007)
NEPA is not an appropriate vehicle for exploring questions about the potential for a terrorist attack upon a proposed nuclear facility; CLI-10-1, 71 NRC 13 (2010)
- System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 146-47 (2007)
the environmental effect caused by third-party miscreants is simply too far removed from the natural or expected consequences of agency action to require a study under NEPA; CLI-10-1, 71 NRC 13 (2010)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68 (2009)
contentions challenging low-level radioactive waste storage may not rely on 10 C.F.R. Part 61, which pertains to land disposal facilities; CLI-10-2, 71 NRC 43 n.78 (2010)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 1 and 2), CLI-10-6, 113, 126 n.49 (2010)
the SUNSI Access Order is issued by the Commission or NRC in its role as supervisor of NRC Staff and does not constitute an adjudicatory ruling by the Commission; LBP-10-2, 71 NRC 202 n.36 (2010)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 1 and 2), LBP-10-7, 71 NRC 391, 430 (2010)
off-again/on-again approach to construction of long-delayed units has generated a unique set of circumstances such that Commission should consider holding a new mandatory hearing prior to allowing full-power operation of units; LBP-10-12, 71 NRC 672 n.77 (2010)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361 (2008)
the Commission addresses a boards additional views when the board refers its decision to the Commission; CLI-10-9, 71 NRC 266 n.130 (2010)
- Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 374 (2008), *rev'd in part*, CLI-09-3, 69 NRC 68, *referred ruling declined*, CLI-09-21, 70 NRC 927 (2009)
a combined license is essentially a construction permit that also requires consideration and resolution of many of the issues currently considered at the operating license stage; LBP-10-7, 71 NRC 405 (2010)
the 10 C.F.R. Part 50 licensing process that was formerly applied to commercial nuclear power plants required that an applicant first obtain a construction permit for the facility, followed by an operating license; LBP-10-7, 71 NRC 405 (2010)
- Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 26 (2002)
proximity-based standing was denied when petitioner demonstrated only occasional contact with the zone of possible harm; LBP-10-1, 71 NRC 177 (2010)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Brown's Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 190 (2004)
the Commission will reverse a licensing board's legal rulings if they are a departure from or contrary to established law; CLI-10-5, 71 NRC 99 (2010)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 323 (2010)
good cause is the most significant of the late-filing factors; LBP-10-11, 71 NRC 639 (2010)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), CLI-86-15, 24 NRC 397 (1986)
the "good cause" rationale that must be put forth by a construction permit holder to justify an extension is to be the focus of any intervenor challenge to the CP holder's request; LBP-10-7, 71 NRC 418 (2010)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 59 n.4 (1993)
grant of a request for oral argument requires a showing of how it will assist the Commission in reaching a decision; CLI-10-9, 71 NRC 251 n.30 (2010)

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- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993)
petitioner must make a fresh standing demonstration in each proceeding in which intervention is sought because a petitioner's circumstances may change from one proceeding to the next; CLI-10-7, 71 NRC 138 (2010)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 166 (1993)
petitioner must provide more than vague assertions that it will be able to assist in developing the record to satisfy a requirement for late filing; CLI-10-12, 71 NRC 326 (2010)
petitioner's vague statements that it would rely on its experts and documents from various sources are insufficient to satisfy a requirement for late filing; CLI-10-12, 71 NRC 326 (2010)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993)
when an issue is no longer live, such that a party no longer has a legal interest in the issue, then it is moot; LBP-10-10, 71 NRC 540 (2010)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992)
any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue will be dismissed; LBP-10-7, 71 NRC 421 (2010)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 611 (1988)
petitioner must provide more than vague assertions that it will be able to assist in developing the record to satisfy a requirement for late filing; CLI-10-12, 71 NRC 326 (2010)
when petitioner addresses 10 C.F.R. 2.309(c)(1)(viii), it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony; CLI-10-12, 71 NRC 326 (2010)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 68-69 (1992)
grant of a request for oral argument requires a showing of how intervenor will assist the Commission in reaching a decision; CLI-10-9, 71 NRC 251 n.30 (2010)
the Commission declines to exercise its discretion to allow oral argument because the written record in the case is thorough, effectively sets forth the positions of the participants, and, overall, contains sufficient information on which to base its decision; CLI-10-9, 71 NRC 251 (2010)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-70 (1992)
new information may constitute good cause for late intervention if petitioners file promptly thereafter; LBP-10-11, 71 NRC 640 n.124 (2010)
- The Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir. 2008)
an environmental impact statement need not be based on the best scientific methodology available; CLI-10-11, 71 NRC 316 n.146 (2010)
- Town of Winthrop v. Federal Aviation Administration*, 535 F.3d 1, 11 (1st Cir. 2008)
although there will always be more data that could be gathered, agencies must have some discretion to draw the line and move forward with decisionmaking; CLI-10-11, 71 NRC 315 (2010)
- Town of Winthrop v. Federal Aviation Administration*, 535 F.3d 1, 11-13 (1st Cir. 2008)
an environmental impact statement is not intended to be a research document, reflecting the frontiers of scientific methodology, studies, and data; CLI-10-11, 71 NRC 315 (2010)
- Town of Winthrop v. Federal Aviation Administration*, 535 F.3d 1, 12-13 (1st Cir. 2008)
the National Environmental Policy Act does not require agencies to use technologies and methodologies that are still emerging and under development, or to study phenomena for which there are not yet standard methods of measurement or analysis; CLI-10-11, 71 NRC 315 (2010)
- Town of Winthrop v. Federal Aviation Administration*, 535 F.3d 1, 13 (1st Cir. 2008)
the National Environmental Policy Act allows agencies to select their own methodology as long as that methodology is reasonable; CLI-10-11, 71 NRC 315 (2010)

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- U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 590, *aff'g* LBP-09-6, 69 NRC 367, 422 (2009)
legal issue contentions do not require any supporting facts; LBP-10-11, 71 NRC 646 (2010)
- U.S. Department of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 381-82 (2009)
NRC applies judicial standing concepts that require a petitioner to establish a distinct and palpable harm that constitutes injury-in-fact, the harm is fairly traceable to the challenged action, and the harm is likely to be redressed by a favorable decision; LBP-10-11, 71 NRC 632 (2010)
- U.S. Department of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 433 (2009)
economic harm itself has been held sufficient to establish standing under the Nuclear Waste Policy Act; LBP-10-11, 71 NRC 638 n.113 (2010)
- U.S. Department of Energy* (High-Level Waste Repository), LBP-09-29, 70 NRC 1028, 1036 (2009)
to raise a timely contention, a party is not expected to piece together disparate shreds of information that, standing alone, have little apparent significance; LBP-10-9, 71 NRC 504 n.42 (2010)
- U.S. Department of Labor v. Triplett*, 494 U.S. 715, 719 (1990)
if one party's standing has been established, the standing of allied parties is not to be questioned; LBP-10-7, 71 NRC 414 (2010)
- U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001)
petitioner bears the burden to provide facts sufficient to establish standing; CLI-10-7, 71 NRC 139 (2010)
- Union Electric Co.* (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983)
demonstration of a pervasive failure to carry out the quality assurance program might well stand in the way of the requisite safety finding; LBP-10-9, 71 NRC 522 (2010)
perfection in plant construction and the facility construction quality assurance program is not a precondition for a license, but rather what is required is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety; LBP-10-9, 71 NRC 519 (2010)
- Union of Concerned Scientists v. NRC*, 880 F.2d 552, 558 (D.C. Cir. 1989)
like the Atomic Energy Act's standard of adequate protection, the reasonable assurance determination need not be reduced to a mechanical verbal formula or set of objective standards, but may be given content through case-by-case applications of the Commission's technical judgment, in light of all relevant information; CLI-10-14, 71 NRC 466 (2010)
- United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965)
administrative agencies have inherent authority to change and modify their own prior decisions; CLI-10-6, 71 NRC 123 (2010)
- United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)
a specific policy embodied in a later federal statute should control the construction of the earlier statute, even though it has not been expressly amended; LBP-10-11, 71 NRC 623 (2010)
- United States v. Eurodif S.A.*, 129 S. Ct. 878, 886-87 (2009)
courts generally accord considerable weight to an agency's construction of the statutes it administers; CLI-10-13, 71 NRC 389 n.9 (2010)
- United States v. Miami University*, 294 F.3d 797, 824 (6th Cir. 2002)
as long as the administrative proceedings walk, talk, and squawk very much like an Article III judicial proceeding, they should be open to the public; LBP-10-2, 71 NRC 208 n.59 (2010)
- United States v. Stauffer Chemical Co.*, 464 U.S. 165, 173 (1984)
NRC is not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question; CLI-10-1, 71 NRC 14 n.67 (2010)
- United States v. Turkette*, 452 U.S. 576, 580 (1981)
statutes should not be interpreted so as to create internal inconsistencies, an absurd result, or an interpretation inconsistent with congressional intent; LBP-10-11, 71 NRC 627 (2010)
- USEC Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311 (2005)
in proceedings for construction permits and operating licenses for nuclear power plants, a proximity presumption is recognized in favor of standing for persons who have frequent contacts within a 50-mile radius of the plant; CLI-10-7, 71 NRC 138 (2010)

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- USEC Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 312 (2005)
in cases where the record fails to support the existence of a significant source of radioactivity producing an obvious potential for offsite consequences at a particular distance frequented by a petitioner, it becomes petitioner's burden to show a specific and plausible means of how the challenged action may harm him or her; LBP-10-4, 71 NRC 229 (2010)
- USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006)
contention admissibility requirements are deliberately strict, and any contention that does not satisfy the requirements will be rejected; CLI-10-1, 71 NRC 7 (2010); CLI-10-9, 71 NRC 253 (2010)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 456-57 (2006)
the Commission generally extends some latitude to *pro se* litigants, but they still are expected to comply with NRC procedural rules, including contention pleading requirements; CLI-10-1, 71 NRC 6 (2010)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006)
information, alleged facts, and expert opinions provided by a petitioner will be examined by the board to confirm that petitioner does indeed supply adequate support for its contention; CLI-10-9, 71 NRC 262 (2010); LBP-10-6, 71 NRC 361 (2010)
it is insufficient for petitioner to point to an Internet Web site or article and expect the Board on its own to discern what particular issue a petitioner is raising and why; CLI-10-15, 71 NRC 482 n.15 (2011)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457, 460 (2006)
a no-reactor or no-action alternative that was not raised before the board is therefore improperly raised on appeal; CLI-10-9, 71 NRC 265 (2010)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457, 462 (2006)
a board appropriately reviews the materials cited in support of a contention, while making no pronouncements on whether the information contained in the application or the claims made in the petition are valid; CLI-10-9, 71 NRC 261 (2010)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006)
the Commission will not consider information that is introduced for the first time on appeal in an attempt to cure deficient contentions; CLI-10-1, 71 NRC 5 n.20 (2010)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 462-63 (2006)
any contention that fails to controvert the application or that mistakenly asserts that the application does not address a relevant issue, may be dismissed; LBP-10-6, 71 NRC 362 n.29 (2010)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006)
an expert opinion that merely states a conclusion that the application is deficient, inadequate, or wrong without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the board of the ability to make the necessary, reflective assessment of the opinion; CLI-10-2, 71 NRC 40 (2010); LBP-10-6, 71 NRC 360-61, 368 n.54 (2010); LBP-10-10, 71 NRC 579 (2010)
- USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 n.127 (2006)
a board need not accept an expert's bare conclusions that an application is deficient, inadequate, or wrong as support for a contention; CLI-10-2, 71 NRC 40 n.64 (2010)
- USEC Inc.* (American Centrifuge Plant), CLI-07-5, 65 NRC 109 (2007)
this decision resolves a number of issues concerning uranium enrichment licensing and may be relied upon as precedent; CLI-10-4, 71 NRC 71 (2010)
- USEC Inc.* (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 613 (2005)
support for a contention that consisted of brief quotes from the petitioners' correspondence with a physicist were found to be bare conclusory remarks with respect to which the petitioner offered no explanation or analysis; CLI-10-2, 71 NRC 40 (2010)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978)
an agency's interpretation of its own regulation is controlling provided it is not plainly erroneous or inconsistent with the regulation; CLI-10-13, 71 NRC 389 n.10 (2010)

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- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978)
- all reasonable alternatives are to be rigorously explored and objectively evaluated, but for alternatives eliminated from detailed study, only a brief discussion of the reasons for their having been eliminated is required; LBP-10-10, 71 NRC 578 (2010)
 - alternatives that are remote and speculative do not require detailed discussion in an environmental impact statement and a detailed statement of alternatives cannot be found wanting simply because not every alternative device and thought conceivable by the mind of man has not been included; LBP-10-6, 71 NRC 380 n.87 (2010); LBP-10-10, 71 NRC 583 (2010)
 - although NEPA does require identification, rigorous exploration, and objective evaluation of all reasonable alternatives, this does not mean that every conceivable alternative must be included in the EIS; LBP-10-10, 71 NRC 567, 581 (2010)
 - applicant's discussion of alternatives in its environmental report is bounded by feasibility; LBP-10-10, 71 NRC 572, 603 (2010)
 - the hard look required by NEPA is subject to a rule of reason, such that it is not necessary to look at every conceivable alternative to the proposed licensing action, but only those that are feasible, and reasonably related to the scope and goals of the proposed action; LBP-10-10, 71 NRC 581 (2010)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 552-53 (1978)
- intervenors' comments must be significant enough to step over a threshold requirement of materiality, not merely state that a particular mistake was made, but show why the mistake was of possible significance; LBP-10-10, 71 NRC 583 (2010)
 - it is incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful and alerts the agency to the intervenors' position and contentions; LBP-10-10, 71 NRC 583 (2010)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978)
- administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that "ought to be" considered; LBP-10-10, 71 NRC 583 (2010)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554 (1978)
- all intervenors and their experts need to provide at the contention admission stage is a reasoned presentation sufficient to warrant further inquiry; LBP-10-10, 71 NRC 580 (2010)
 - intervenors should not be held to a *prima facie* burden at the contention admissibility stage of a proceeding, but its showing should be sufficient to require reasonable minds to inquire further; LBP-10-10, 71 NRC 583-84 (2010)
- Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990)
- material provided in support of a contention will be carefully examined by the board to confirm that on its face it does supply adequate support for the contention; LBP-10-6, 71 NRC 361 (2010); LBP-10-7, 71 NRC 421 (2010)
- Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-7, 32 NRC 129, 131 (1990)
- low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that a specified accident scenario presents a significant environmental impact that must be evaluated; LBP-10-10, 71 NRC 555, 557 (2010)
- Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000)
- to establish representational standing, an organization must demonstrate that the licensing action will affect at least one of its members, identify that member by name and address, and show it is authorized by that member to request a hearing on his or her behalf; LBP-10-11, 71 NRC 637 (2010)

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- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 304 (2008)
an organization lacks standing if none of the affidavits supporting standing mentions affiliation with the organization; LBP-10-7, 71 NRC 414 (2010)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 313 n.86 (2008)
greater-than-Class-C waste is the responsibility of the federal government and is not affected by the partial closure of the Barnwell facility; CLI-10-2, 71 NRC 48 n.109 (2010)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 315 (2008)
to be admissible, a contention must show that some significant link exists between the claimed deficiency and either the health and safety of the public or the environment; LBP-10-6, 71 NRC 360 (2010)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 317-18 (2008)
intervenors characterize applicant's silence on the point that its reactor is not developed, proven, or available as a material omission, which should result in the contention being admitted for adjudication; LBP-10-10, 71 NRC 599 n.350 (2010)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 335 (2008)
petitioner does not have to prove its contention at the admissibility stage; LBP-10-6, 71 NRC 361 (2010)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-09-27, 70 NRC 992, 998 (2009)
intervenors with contentions rooted in new material information need not make the same showing as intervenors who have simply delayed filing their contentions until after expiration of the regulatory deadline; LBP-10-9, 71 NRC 505 n.46 (2010)
- Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-09-27, 70 NRC 992, 1016 (2009), *reconsideration denied*, Licensing Board Order (Denying Motion for Reconsideration of LBP-09-27) (Mar. 22, 2010)
an amended contention challenging applicant's FSAR LLRW storage plan was admitted based on intervenor's adequately supported challenge to the plan's provisions regarding waste volume reduction; LBP-10-8, 71 NRC 446 n.9 (2010)
- Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958)
mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough; CLI-10-8, 71 NRC 153 n.56 (2010)
- Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843, 845 (D.C. Cir. 1977)
a stay pending appeal is granted where the absence of a stay would mean the destruction of the business in its current form; CLI-10-8, 71 NRC 152 n.54 (2010)
- Washington Public Power Supply System* (WPPSS Nuclear Project Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1228-30 (1982)
in the context of a construction permit extension proceeding, the Commission outlines its understanding of the basic parameters under which the Atomic Energy Act § 185a "good cause" standard is to be applied; LBP-10-7, 71 NRC 416 (2010)
- Westlands Water District v. U.S. Department of the Interior*, 376 F.3d 853, 868 (9th Cir. 2004)
existence of a viable but unexamined alternative renders an environmental impact statement inadequate; LBP-10-10, 71 NRC 584-85 n.288 (2010)
- Whiteland Woods, L.P. v. W. Whiteland*, 193 F. 3d 177, 181 (3d Cir. 1999)
as long as the administrative proceedings walk, talk, and squawk very much like an Article III judicial proceeding, they should be open to the public; LBP-10-2, 71 NRC 208 n.59 (2010)
- Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001)
Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions, hiding elephants in mouseholes; LBP-10-11, 71 NRC 624 (2010)
- Withrow v. Larkin*, 421 U.S. 35, 53 (1975)
the Commission acts as adjudicator and in that light considers the reinstatement of a construction permit afresh, without regard for its earlier views; CLI-10-6, 71 NRC 120 (2010)

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- Wyoming Outdoor Council v. U.S. Army Corps of Engineers*, 351 F. Supp. 2d 1232, 1242 (D. Wyo. 2005)
NRC cannot either fail to perform an adequate evaluation or evade a NEPA responsibility by deferring to another agency; CLI-10-5, 71 NRC 110 n.107 (2010)
- Yankee Atomic Electric Co. v. United States*, 73 Fed. Cl. 249, 315 (2006)
recoverability of spent nuclear fuel storage expenses is equally applicable to greater-than-Class-C waste, which is stored onsite in the same manner as spent nuclear fuel; CLI-10-2, 71 NRC 47 n.106 (2010)
- Yankee Atomic Electric Co. v. United States*, 536 F.3d 1268, 1277 (Fed. Cir. 2008)
utilities must dispose of greater-than-Class-C waste before they can decommission reactor sites; CLI-10-2, 71 NRC 47 n.105 (2010)
- Yankee Atomic Electric Co. v. United States*, 536 F.3d 1268, 1277, 1278-79 (Fed. Cir. 2008)
greater-than-Class-C waste is the responsibility of the federal government; CLI-10-2, 71 NRC 47 (2010)
- Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-1, 43 NRC 1, 6 (1996)
to establish standing, petitioner must show that it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes, the injury is fairly traceable to the challenged action, and the injury is likely to be redressed by a favorable decision; LBP-10-1, 71 NRC 176 (2010)
- Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, LBP-96-2, 43 NRC 61, 75-76 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996)
the materiality requirement for contention admission often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment; LBP-10-7, 71 NRC 421 (2010)
- Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996)
any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to board scrutiny; LBP-10-7, 71 NRC 421 (2010); LBP-10-10, 71 NRC 594 (2010)
- Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-7, 43 NRC 235, 249 (1996)
all intervenors and their experts need to provide at the contention admission stage is a reasoned presentation sufficient to warrant further inquiry; LBP-10-10, 71 NRC 580 (2010)
- Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-7, 43 NRC 235, 251 (1996)
contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-10-7, 71 NRC 419-20 (2010)
- Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-7, 43 NRC 235, 259 (1996)
boards do not sit to flyspeck environmental documents or to add details or nuances; LBP-10-10, 71 NRC 607 n.14 (2010)
- Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-1, 43 NRC 1, 6 (1996)
contemporaneous judicial standing concepts require that participant establish that it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes, the injury is fairly traceable to the challenged action, and the injury is likely to be redressed by a favorable decision; LBP-10-7, 71 NRC 410 (2010)
- Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-98-21, 48 NRC 185, 201 (1998)
although boards do not hold *pro se* petitioners to the same standard that it holds litigants who are represented by counsel, *pro se* petitioners are expected to comply with basic procedural rules including those establishing filing deadlines; LBP-10-4, 71 NRC 235 n.22 (2010)
fairness requires that all participants in NRC adjudicatory proceedings abide by its procedural rules, especially those who are cognizant of those rules and represented by counsel; CLI-10-12, 71 NRC 327 (2010)
- Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-99-24, 50 NRC 219, 222 (1999)
licensing board rulings are not precedential; CLI-10-2, 71 NRC 48 (2010)
unreviewed board decisions have no binding effect on a later board; CLI-10-7, 71 NRC 138 (2010)

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Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 n.3 (1999)
the prospect of a second lawsuit with its expenses and uncertainties or another application does not
provide the requisite quantum of legal harm to warrant dismissal of an application with prejudice;
LBP-10-11, 71 NRC 630 (2010)

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REGULATIONS**

- 10 C.F.R. 2.4
“potential party” is defined as any person who has requested, or who may intend to request, a hearing or petition to intervene in a hearing under 10 C.F.R. Part 2, other than hearings conducted under Subparts J and M of 10 C.F.R. Part 2; LBP-10-5, 71 NRC 344 n.297 (2010)
- 10 C.F.R. 2.107(a)
this section does not authorize withdrawal of an application but rather clarifies that licensing boards have authority to impose reasonable conditions upon voluntary withdrawals in appropriate circumstances; LBP-10-11, 71 NRC 624 (2010)
withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe; CLI-10-13, 71 NRC 388-89 (2010)
- 10 C.F.R. 2.206
an interested person may propose health and safety measures after a license has been issued by filing a petition for enforcement action; LBP-10-4, 71 NRC 231 n.16 (2010)
if petitioners wish to propose security measures in addition to those laid out in a Staff enforcement order, their remedy is to petition the NRC for further enforcement action; CLI-10-3, 71 NRC 53 n.21, 54 (2010)
invocation of this procedure requires that the NRC staff give serious consideration to requests for regulatory action concerning a licensed facility as long as the request specifies the action sought and sets forth the facts that constitute the basis of the request; LBP-10-7, 71 NRC 417 (2010)
petitioners may protect their interests by filing a request for Commission action; CLI-10-12, 71 NRC 327 n.50 (2010)
petitions submitted under this section are assessed by the Staff in accord with NRC Management Directive 8.11 and associated Handbook 8.11; LBP-10-7, 71 NRC 424 n.11 (2010)
- 10 C.F.R. 2.302(g)
participants who believe that they have a good cause for not submitting documents electronically must file an exemption request with their initial paper filing requesting authorization to continue to submit documents in paper format; CLI-10-4, 71 NRC 65 (2010)
- 10 C.F.R. 2.302(g)(3)
for good cause shown, the board grants the requests of petitioners for exemptions from compliance with the Commission’s E-filing requirement; LBP-10-4, 71 NRC 227 n.13 (2010)
- 10 C.F.R. 2.307
timeliness of new contentions is dictated by the terms of the protective order; LBP-10-2, 71 NRC 210 (2010)
- 10 C.F.R. 2.307(c)
procedures and schedules set forth in the SUNSI Access Order are intended only to deal with issues arising before intervention occurs and a board is created; LBP-10-2, 71 NRC 202 n.36 (2010)
the Secretary of the Commission is delegated authority to issue orders establishing procedures and timelines for submitting and resolving requests for sensitive unclassified nonsafeguards information; LBP-10-2, 71 NRC 199, 201 n.36 (2010)
the Secretary of the Commission will assess initially whether a proposed recipient has shown a need for sensitive unclassified nonsafeguards information or or safeguards information; LBP-10-2, 71 NRC 201 n.34 (2010)

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- 10 C.F.R. 2.309
intervention petitions must address the nature of petitioner's right under the Atomic Energy Act to be made a party to the proceeding, the nature and extent of petitioner's property, financial, or other interest in the proceeding, and the possible effect of any order that may be entered in the proceeding on the petitioner's interest; CLI-10-4, 71 NRC 62 (2010)
- intervention petitions must provide the name, address, and telephone number of the petitioner and specifically explain the reasons why intervention should be permitted; CLI-10-4, 71 NRC 62 (2010)
- intervention petitions shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding; CLI-10-4, 71 NRC 62 (2010)
- materiality in the context of paragraph (f)(2) differs from materiality in the context of paragraph (f)(1); LBP-10-1, 71 NRC 183 n.9 (2010)
- 10 C.F.R. 2.309(a)
a licensing board will grant a request for a hearing if it determines that the requestor has standing under the provisions of this section and has proposed at least one admissible contention that meets the requirements of 10 C.F.R. 2.309(f); LBP-10-4, 71 NRC 228 (2010)
- only one admissible contention is required for each petitioner to intervene; LBP-10-11, 71 NRC 646-47 n.166 (2010)
- to participate in an NRC adjudicatory hearing, petitioner must demonstrate standing and proffer an admissible contention; LBP-10-4, 71 NRC 241 (2010)
- 10 C.F.R. 2.309(c)
absent a demonstration of good cause, a compelling showing must be made on the other factors if a nontimely petition is to be granted or a nontimely contention is to be admitted; LBP-10-1, 71 NRC 181 (2010)
- applicant's reliance on a facility for LLRW disposal that will no longer permit out-of-compact entities to import LLRW for disposal at its site could provide the basis for a new contention; LBP-10-8, 71 NRC 445 n.8 (2010)
- factors (v) and (vi) generally are given less weight than factors (vii) and (viii); LBP-10-1, 71 NRC 181 (2010)
- failure to comply with Commission pleading requirements for late filings constitutes sufficient grounds for rejecting intervention and hearing requests; LBP-10-4, 71 NRC 226 n.11 (2010)
- good cause is the most significant of the late-filing factors; LBP-10-1, 71 NRC 181 (2010); LBP-10-9, 71 NRC 506 (2010)
- if a contention satisfies the timeliness requirement of 10 C.F.R. 2.309(f)(2)(iii), then, by definition, it is not subject to this section which specifically applies to nontimely filings; LBP-10-9, 71 NRC 506 n.46 (2010)
- where petitioner conceded that information in its addendum was previously available, admitted the lateness of her filing, and made no effort at the time of its submission to justify its lateness or explain why this board should consider it, her request to supplement her submission is denied; LBP-10-4, 71 NRC 235 n.22 (2010)
- whether a nontimely petition and its associated contentions should be considered is based upon a balancing of eight factors; LBP-10-1, 71 NRC 180-81 (2010)
- 10 C.F.R. 2.309(c)(1)
in ruling on a nontimely petition, boards are to consider eight factors that will excuse the tardiness of the petition if, on balance, they weigh in favor of the petitioner; CLI-10-12, 71 NRC 322 (2010); LBP-10-9, 71 NRC 506 n.47 (2010)
- the good cause factor favors petitioners who have filed their petition within 30 days of the availability of the document they contend contains new and significant information so as to form the basis for their contention; LBP-10-1, 71 NRC 181-82 (2010)
- the provisions of this section are deemed to apply to any nontimely petition or new or amended contention; LBP-10-1, 71 NRC 187 (2010)
- 10 C.F.R. 2.309(c)(1)(i)-(viii)
nontimely intervention petitions, contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the licensing board, or a presiding officer that a balancing of the factors specified in this section favors admission; CLI-10-4, 71 NRC 63 (2010); LBP-10-4, 71 NRC 223 (2010)

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- 10 C.F.R. 2.309(c)(1)(vi)
boards must consider the extent a petitioner's interests are represented by existing parties, not potential parties; LBP-10-11, 71 NRC 642-43 (2010)
- 10 C.F.R. 2.309(d)
failure of an organizational participant to have a representative provide an appearance notice might be cause for an appropriate sanction for failure to properly prosecute its litigation, but such a failure does not fall into the same category as failure to support an intervention petition with affidavits providing necessary information regarding the basis for representational standing; LBP-10-7, 71 NRC 412 (2010)
in determining whether an individual or organization is an interested person that has standing as of right such that it can be granted party status in a proceeding, the Commission applies contemporaneous judicial standing concepts; LBP-10-1, 71 NRC 176 (2010); LBP-10-7, 71 NRC 410 (2010)
NRC applies judicial standing concepts that require a petitioner to establish a distinct and palpable harm that constitutes injury-in-fact, is fairly traceable to the challenged action, and is likely to be redressed by a favorable decision; LBP-10-11, 71 NRC 632 n.89 (2010)
timing of petitioner's designation of a representative provides the board with no basis for concluding that the organization lacks standing; LBP-10-7, 71 NRC 412-13 (2010)
- 10 C.F.R. 2.309(d)(1)
a licensing board will grant a request for a hearing if it determines that the requestor has standing under the provisions of this section and has proposed at least one admissible contention; LBP-10-4, 71 NRC 228 (2010)
pleading requirements to demonstrate standing are discussed; LBP-10-4, 71 NRC 228 (2010)
state and federally recognized Indian tribes do not need to address standing requirements if the facility is located within their boundaries; CLI-10-4, 71 NRC 63 (2010)
- 10 C.F.R. 2.309(d)(2)
a state, county, municipality, federally recognized Indian tribe, or agencies thereof may submit a petition to the Commission to participate as a party; CLI-10-4, 71 NRC 63 (2010)
- 10 C.F.R. 2.309(d)(3)
a hearing request/intervention petition must state the name, address, and telephone number of the requestor/petitioner, the nature of the requestor's/intervenor's right under the AEA to be made a party to the proceeding, the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding, and the possible effect of any decision or order issued in the proceeding on the petitioner's/requestor's interest; LBP-10-7, 71 NRC 410 n.3 (2010)
the presiding officer must determine whether requestor/petitioner is a person whose interest may be affected by the proceeding; LBP-10-7, 71 NRC 410 n.3 (2010)
- 10 C.F.R. 2.309(e)
discretionary intervention may be granted in circumstances when one petitioner has standing as of right and has proffered at least one admissible contention, but other petitioners have not demonstrated their standing; LBP-10-1, 71 NRC (2010)
- 10 C.F.R. 2.309(f)
the scope of a contention is limited to issues of law and fact pleaded with particularity in the intervention petition, including its stated bases; CLI-10-5, 71 NRC 100 (2010)
where warranted, NRC allows for amendment of admitted contentions, but does not allow distinctly new complaints to be added at will as litigation progresses, stretching the scope of admitted contentions beyond their reasonably inferred bounds; CLI-10-11, 71 NRC 309 (2010)
- 10 C.F.R. 2.309(f)(1)
a licensing board erred in referring a contention to the NRC Staff without making an appropriate contention admissibility determination; CLI-10-9, 71 NRC 249 (2010)
amendment of a combined license application to comply with an amended aircraft impacts rule during the pendency of the combined license application could form the basis for a late-filed contention; CLI-10-1, 71 NRC 13 n.63 (2010)
for a contention to be admissible, it must satisfy eight pleading requirements; LBP-10-7, 71 NRC 419 (2010); LBP-10-13, 71 NRC 677 n.6 (2010)
for an intervention petition to be granted, it also must proffer a contention that meets the general admissibility requirements; LBP-10-1, 71 NRC 183 n.9 (2010)

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- hearing requests and intervention petitions must set forth with particularity the contentions sought to be raised; CLI-10-1, 71 NRC 7-8 (2010); CLI-10-9, 71 NRC 253 (2010)
- petitioners must set forth their contentions with particularity; CLI-10-15, 71 NRC 482 (2011)
- threshold contention standards require petitioners to review application materials and set forth their contentions with particularity; CLI-10-11, 71 NRC 308 (2010)
- to litigate a contention, petitioner who has established standing must also ensure each contention meets six admissibility criteria; LBP-10-2, 71 NRC 210 (2010)
- under the 2004 Part 2 revisions, contentions are now required to be included with, rather than being submitted sometime subsequent to the filing of, the intervention petition; LBP-10-1, 71 NRC 188 n.4 (2010)
- 10 C.F.R. 2.309(f)(1)(i)
- a contention that contains little more than a recitation of a notice of violation does not specify the law or fact to be challenged as required for contention admissibility; LBP-10-9, 71 NRC 526 (2010)
- failure to specify the language of the issue framed by a contention and distinguish it from the discussion that provides the supporting foundation for the issue statement might be grounds for dismissing contentions; LBP-10-7, 71 NRC 422 (2010)
- to be admissible, a proposed contention must include specific statements of law or fact to be raised or controverted; CLI-10-2, 71 NRC 30 (2010); LBP-10-9, 71 NRC 508 (2010)
- 10 C.F.R. 2.309(f)(1)(i)-(vi)
- for a contention to be admissible it must satisfy, without exception, each of the criteria set out in this section; LBP-10-4, 71 NRC 241 (2010); LBP-10-6, 71 NRC 358-59 (2010)
- insofar as a contention concerns the feasibility of developing wind and CAES together, land use relating to CAES, and multiple, overlapping uses of land, it is admissible; LBP-10-10, 71 NRC 569 (2010)
- 10 C.F.R. 2.309(f)(1)(ii)
- a contention must provide a brief explanation of the basis of the claim; CLI-10-2, 71 NRC 30 (2010); LBP-10-9, 71 NRC 508 (2010); LBP-10-13, 71 NRC 687 n.66 (2010)
- failure to specify the language of the issue framed by a contention and distinguish it from the discussion that provides the supporting foundation for the issue statement might be grounds for dismissing contentions; LBP-10-7, 71 NRC 422 (2010)
- 10 C.F.R. 2.309(f)(1)(iii)
- a contention that challenges compliance with fire protection regulations at an existing unit is outside the scope of a combined license proceeding; CLI-10-9, 71 NRC 254-55 (2010)
- all proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; CLI-10-2, 71 NRC 30 (2010); LBP-10-7, 71 NRC 420 (2010)
- contentions and their foundational support that raise matters that impermissibly challenge the basic structure of Commission's regulatory program and are either inaccurate or inadequate to establish that the issue raised is material to the proceeding or are insufficient to show that a genuine dispute on a material factual or legal issue exists are inadmissible; LBP-10-7, 71 NRC 422, 424 (2010)
- the agency decided not to include the threat of air attacks in the 2007 revision to the design basis threat rule, a decision upheld by the Ninth Circuit; CLI-10-9, 71 NRC 258 (2010)
- 10 C.F.R. 2.309(f)(1)(iv)
- to be admissible, contentions must assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application; CLI-10-2, 71 NRC 30 (2010); LBP-10-6, 71 NRC 359 (2010); LBP-10-7, 71 NRC 421 (2010); LBP-10-9, 71 NRC 512 (2010)
- 10 C.F.R. 2.309(f)(1)(v)
- a contention must be supported by a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support intervenors' position and upon which they intend to rely at the hearing; LBP-10-6, 71 NRC 360 (2010); LBP-10-9, 71 NRC 513 (2010)
- contention alleging that depleted uranium-contaminated bombing plume dust causes health issues in the community is inadmissible because it lacks a supporting statement of the alleged facts or expert opinions; LBP-10-4, 71 NRC 241-42 (2010)
- contention alleging that the Army employs truckers to remove depleted uranium-contaminated soil from its site and dump it in the community is inadmissible; LBP-10-4, 71 NRC 242 (2010)

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- contentions and their foundational support that raise matters that impermissibly challenge the basic structure of Commission's regulatory program and are either inaccurate or inadequate to establish that the issue raised is material to the proceeding are inadmissible; LBP-10-7, 71 NRC 424 (2010)
- failure to specify the language of the issue framed by a contention and distinguish it from the discussion that provides the supporting foundation for the issue statement might be grounds for dismissing contentions; LBP-10-7, 71 NRC 422 (2010)
- general assertions are inadequate to raise an admissible contention; LBP-10-6, 71 NRC 364 (2010)
- it is emphatically petitioner's burden to produce some alleged facts or expert opinion that support a contention; LBP-10-4, 71 NRC 242 (2010)
- petitioner has not met the pleading requirements because it has not demonstrated any link between the purported violations at an existing unit and any future noncompliance or resulting safety risk affecting proposed units; CLI-10-9, 71 NRC 255 (2010)
- petitioner is obliged to present factual information and/or expert opinion necessary to support its contention; LBP-10-7, 71 NRC 420 (2010)
- 10 C.F.R. 2.309(f)(1)(vi)
- a contention concerning the feasibility of combining solar and thermal energy storage with wind generation and an integrated gas turbine to provide a seamless transition to the load needed by providing energy when the production of both technologies is overlapped is admissible; LBP-10-10, 71 NRC 573 (2010)
- a contention must show that a genuine dispute exists on a material issue of law or fact with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute; LBP-10-6, 71 NRC 361 (2010); LBP-10-7, 71 NRC 421 (2010); LBP-10-9, 71 NRC 517 (2010)
- contention alleging that depleted uranium-contaminated bombing plume dust causes health issues in the community is inadmissible because it fails to show that a genuine dispute exists on a material issue of fact; LBP-10-4, 71 NRC 242 (2010)
- contentions and their foundational support that raise matters that impermissibly challenge the basic structure of Commission's regulatory program and are either inaccurate or inadequate to establish that the issue raised is material to the proceeding are inadmissible; LBP-10-7, 71 NRC 424 (2010)
- failure of petitioner to reference any portion of the combined license application with which it takes issue is grounds for dismissal of a contention; CLI-10-9, 71 NRC 266 (2010); LBP-10-9, 71 NRC 526 (2010)
- failure to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact is grounds for dismissal of a contention; CLI-10-9, 71 NRC 266 (2010)
- general assertions, without some effort to show why the assertions undercut findings or analyses in the environmental report, fail to satisfy the requirements of this section; LBP-10-6, 71 NRC 364, 378 n.81 (2010)
- in a contention of omission, intervenors must show that what is allegedly omitted is required by law; LBP-10-10, 71 NRC 552 (2010)
- petitioner has not met the pleading requirements because it has not demonstrated any link between the purported violations at an existing unit and any future noncompliance or resulting safety risk affecting proposed units; CLI-10-9, 71 NRC 255 (2010)
- 10 C.F.R. 2.309(f)(2)
- a new contention may be filed after the deadline in the notice of hearing with leave of the presiding officer upon a showing that information on which it is based was not previously available, is materially different than information previously available, and has been submitted in a timely fashion based on the availability of the subsequent information; LBP-10-9, 71 NRC 503 (2010)
- amendment of a combined license application to comply with an amended aircraft impacts rule during the pendency of the COL application could form the basis for a late-filed contention; CLI-10-1, 71 NRC 13 n.63 (2010)
- contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer; LBP-10-1, 71 NRC 181 (2010)
- contentions must be based on documents or other information available at the time the petition is to be filed; LBP-10-4, 71 NRC 230-31 n.16 (2010)
- contentions that seek compliance with NEPA must be based on the environmental report; CLI-10-2, 71 NRC 34 (2010); LBP-10-10, 71 NRC 547 (2010)

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- failure to comply with Commission pleading requirements for late filings constitutes sufficient grounds for rejecting intervention and hearing requests; LBP-10-4, 71 NRC 226 n.11 (2010)
- new contentions filed by an intervenor must comply with timeliness standards; LBP-10-2, 71 NRC 209 (2010)
- open-ended extension requests should not be granted because hearing requests must be based on documents or other information available at the time the petition is to be filed; LBP-10-4, 71 NRC 224 (2010)
- petitioner may amend contentions or file new contentions on issues arising under NEPA if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents; LBP-10-1, 71 NRC 181 (2010); LBP-10-10, 71 NRC 547 (2010)
- the NEPA-related provision from 2004 in section 2.714(b)(2)(iii) was retained in the 2004 rule change; LBP-10-1, 71 NRC 186 n.2 (2010)
- the scope of a contention is limited to issues of law and fact pleaded with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with NRC rules; CLI-10-5, 71 NRC 100 (2010)
- 10 C.F.R. 2.309(f)(2)(i) and (ii)
- to determine admissibility of new contentions, boards must consider whether the material forming the basis for the contention was previously unavailable and materially different from other information already available to Intervenors; LBP-10-9, 71 NRC 523 (2010)
- 10 C.F.R. 2.309(f)(2)(i)-(iii)
- in addition to general contention admissibility requirements, amended or new contentions filed after an intervenor's initial filing will be admitted only upon leave of the presiding officer and a demonstration that information upon which the contention is based was not previously available and is materially different than information previously available and has been submitted in a timely fashion based on the availability of the subsequent information; LBP-10-13, 71 NRC 677 (2010)
- petitioners are given the opportunity to amend existing contentions and file new contentions based on new information that had not previously been available; LBP-10-4, 71 NRC 230-31 n.16 (2010)
- 10 C.F.R. 2.309(f)(2)(iii)
- a proposed new or amended contention shall be deemed timely if it is filed within 30 days of the date when the new and material information on which it is based first becomes available; LBP-10-9, 71 NRC 505 (2010)
- if a contention satisfies the timeliness requirement of this section, then, by definition, it is not subject to section 2.309(c) which specifically applies to nontimely filings; LBP-10-9, 71 NRC 506 n.46 (2010)
- 10 C.F.R. 2.311
- a requester may challenge NRC Staff's or Office of Administration's adverse determination with respect to access to safeguards information by filing a request for interlocutory review; CLI-10-4, 71 NRC 81 (2010)
- 10 C.F.R. 2.311(a)(3)
- interlocutory appeal to the Commission of certain rulings relating to sensitive unclassified nonsafeguards information is authorized; LBP-10-2, 71 NRC 199 (2010)
- 10 C.F.R. 2.311(b)
- intervention petitioners have an automatic right to appeal a board decision wholly denying a petition to intervene; CLI-10-1, 71 NRC 4 (2010)
- 10 C.F.R. 2.311(c)
- an appeal as of right from a board's ruling on an intervention petition is permitted upon denial of a petition to intervene and/or request for hearing on the question as to whether it should have been granted or upon the granting of a petition to intervene and/or request for hearing, on the question as to whether it should have been wholly denied; CLI-10-16, 71 NRC 489 (2010)
- petitioners have an automatic right to appeal a board decision wholly denying a petition to intervene; CLI-10-9, 71 NRC 253 (2010); CLI-10-12, 71 NRC 322 (2010)
- 10 C.F.R. 2.311(d)(1)
- an appeal as of right from a board's ruling on an intervention petition is permitted upon denial of a petition to intervene and/or request for hearing on the question as to whether it should have been

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- granted or upon the granting of a petition to intervene and/or request for hearing, on the question as to whether it should have been wholly denied; CLI-10-16, 71 NRC 489 (2010)
- 10 C.F.R. 2.311(d)(2)
interlocutory appeal to the Commission of certain rulings relating to sensitive unclassified nonsafeguards information is authorized; LBP-10-2, 71 NRC 199 (2010)
- 10 C.F.R. 2.311(e)
an appeal of an order selecting a hearing procedure is permitted on the question as to whether the selection of the particular hearing procedures was in clear contravention of the criteria set forth in section 2.310; CLI-10-16, 71 NRC 489 n.13 (2010)
- 10 C.F.R. 2.314(b)
failure of an organizational participant to have a representative provide an appearance notice might provide cause for an appropriate sanction for failure to properly prosecute its litigation, but such a failure does not fall into the same category as failure to support an intervention petition with affidavits providing necessary information regarding the basis for representational standing; LBP-10-7, 71 NRC 412 (2010)
- 10 C.F.R. 2.315(a)
any person who does not wish, or is not qualified, to become a party to a proceeding may request permission to make a limited appearance; CLI-10-4, 71 NRC 63 (2010)
- 10 C.F.R. 2.315(c)
a state, county, municipality, federally recognized Indian tribe, or agencies thereof may seek to participate in a hearing as a nonparty; CLI-10-4, 71 NRC 63 (2010)
because a petition to intervene was wholly denied, the request of a governmental office to participate in the proceeding as an interested governmental entity is denied as moot; LBP-10-6, 71 NRC 385 n.107 (2010)
court ordered a stay of the close of hearings in license renewal proceedings to afford the Commonwealth an opportunity to request participant status as an interested state; CLI-10-14, 71 NRC 468 n.105 (2010)
- 10 C.F.R. 2.315(d)
petitioners may protect their interests by participating as appropriate, as amici curiae; CLI-10-12, 71 NRC 327 n.50 (2010)
- 10 C.F.R. 2.319(f)
licensing boards must promptly certify to the Commission all novel legal or policy issues that would benefit from early Commission consideration should such issues arise in the proceeding; CLI-10-4, 71 NRC 66 (2010)
- 10 C.F.R. 2.319(d)
decisions on evidentiary questions fall within licensing boards' authority to regulate hearing procedure; CLI-10-5, 71 NRC 99 (2010)
- 10 C.F.R. 2.323
because of apparent electronic complications and the lack of a challenge to intervenors' reply document as late, the board treats a late filing as a valid reply; LBP-10-9, 71 NRC 501 n.18 (2010)
- 10 C.F.R. 2.323(b)
a person who has not been admitted as a party to a proceeding is not entitled to make a motion in an ongoing proceeding; CLI-10-10, 71 NRC 285 n.20 (2010)
parties must make good-faith efforts to resolve with the other parties the subject matter of their motion; CLI-10-10, 71 NRC 285 n.20 (2010)
- 10 C.F.R. 2.323(c)
because of the significance of the issues at hand, DOE was permitted to reply to the answers to its motion to withdraw, a right to which it is not entitled under the regulations; LBP-10-11, 71 NRC 637 n.106 (2010)
- 10 C.F.R. 2.323(e)
if leave to file a motion for reconsideration is granted, the motion must show compelling circumstances, such as the existence of an unanticipated, clear, and material error, which could not have been anticipated, that renders the decision invalid; CLI-10-9, 71 NRC 252 (2010)
motions for reconsideration are appropriately considered under this section; CLI-10-9, 71 NRC 252 (2010)
motions for reconsideration may not be filed except upon leave of the adjudicatory body that rendered the decision; CLI-10-9, 71 NRC 252 (2010)

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- motions for reconsideration must be filed within 10 days of the action for which reconsideration is requested; CLI-10-9, 71 NRC 252 n.35 (2010)
- motions for reconsideration will be denied if they point to no compelling circumstances warranting reconsideration; CLi-10-10, 71 NRC 282 (2010)
- 10 C.F.R. 2.323(f)
- licensing boards must promptly certify to the Commission all novel legal or policy issues that would benefit from early Commission consideration should such issues arise in the proceeding; CLI-10-4, 71 NRC 66 (2010)
- 10 C.F.R. 2.325
- if it seeks to withhold a document from a party or the public, or to bar a party or member of the public from attending any adjudicatory proceeding before a licensing board, NRC Staff must carry the burden of proving that the document or situation fits one of FOIA's specifically enumerated exceptions; LBP-10-2, 71 NRC 198 (2010)
- proponent of a protective order shoulders burden of proof; LBP-10-2, 71 NRC 198 (2010)
- 10 C.F.R. 2.327(c)
- the public is entitled to copies of the transcripts of all hearings; LBP-10-2, 71 NRC 198, 208 (2010)
- 10 C.F.R. 2.328
- all NRC hearings are to be public except as requested under section 181 of the Atomic Energy Act or otherwise ordered by the Commission; LBP-10-2, 71 NRC 197-98 (2010); LBP-10-5, 71 NRC 336 (2010)
- 10 C.F.R. 2.335
- a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible; LBP-10-7, 71 NRC 419 (2010)
- intervenor may petition the Commission for permission to challenge a rule, but must make a showing of special circumstances; LBP-10-9, 71 NRC 525 n.147 (2010)
- petitioners with new and significant information challenging a Category 1 finding could seek a waiver of the generic rule or petition for rulemaking if there are particular plant- or site-specific circumstances that render the generic analysis inapplicable; CLI-10-14, 71 NRC 475 (2010)
- 10 C.F.R. 2.335(a)
- low-level radioactive waste disposal contentions may not challenge Table S-3, consistent with NRC policy that regulations may not be the subject of collateral attack in an adjudication; CLI-10-2, 71 NRC 43 n.78 (2010)
- no regulation of the Commission concerning the licensing of production and utilization facilities is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding; CLI-10-1, 71 NRC 11 (2010); LBP-10-9, 71 NRC 525 n.146 (2010)
- petitioners challenge to the one-fire assumption in the AP1000 design constitutes an impermissible challenge to Commission regulations; CLI-10-9, 71 NRC 255 (2010)
- 10 C.F.R. 2.335(b)
- a petition for rule waiver must be accompanied by an affidavit that describes with particularity the special circumstances that justify the waiver; CLi-10-10, 71 NRC 284 (2010)
- a petition for rule waiver must show that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted; CLi-10-10, 71 NRC 284 (2010); LBP-10-12, 71 NRC 661 (2010)
- low-level radioactive waste disposal contentions may not challenge Table S-3, consistent with NRC policy that regulations may not be the subject of collateral attack in an adjudication; CLI-10-2, 71 NRC 43 n.78 (2010)
- request for waiver of application of 10 C.F.R. 51.53(b), 51.95(b), and 51.106(c) precluding consideration of need for power and alternative energy sources from a Part 50 operating license proceeding fails to provide the prima facie showing required; LBP-10-12, 71 NRC 660 (2010)
- to support a contention challenging the Waste Confidence Rule, petitioner must request, and demonstrate any supporting reasons for, a waiver of the rule; CLI-10-9, 71 NRC 272 (2010)

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- 10 C.F.R. 2.335(c)
a petition for rule waiver and affidavit must set forth a prima facie case for rule waiver, whereupon the presiding officer will certify the matter directly to the Commission for its consideration; CLI-10-10, 71 NRC 284 (2010)
- 10 C.F.R. 2.335(d)
boards must certify the matter of rule waiver to the Commission for a determination of whether the application of the regulation should be waived or an exception granted under the specific circumstances presented; LBP-10-12, 71 NRC 662 (2010)
- 10 C.F.R. 2.337(f)
for proximity-based standing, distance from a facility can be verified using the Google Maps distance measurement tool; LBP-10-1, 71 NRC 177 (2010); LBP-10-7, 71 NRC 411 n.4 (2010)
- 10 C.F.R. 2.341(a)(1)
interlocutory review is permitted at the Commission's discretion only upon a showing that the issue for which interlocutory review is sought threatens the party adversely affected by it with immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-10-16, 71 NRC 489 (2010)
- 10 C.F.R. 2.341(b)(4)
a petition for review may be granted in the Commission's discretion; CLI-10-11, 71 NRC 290 n.8 (2010) the showing that petitioner must make for grant of a review on a discretionary basis is discussed; CLI-10-5, 71 NRC 98, 99, 101, 105, 106 (2010)
- 10 C.F.R. 2.341(b)(4)(i)-(v)
petitions for review will be granted at the Commission's discretion, giving due weight to the existence of a substantial question with respect to the five considerations of this section; CLI-10-14, 71 NRC 453 (2010)
- 10 C.F.R. 2.341(d)
a motion for reconsideration will be granted only upon a showing of compelling circumstances, such as a clear and material error, which could not have been reasonably anticipated and that renders the decision invalid; CLI-10-15, 71 NRC 480 (2011)
- 10 C.F.R. 2.341(f)(2)
interlocutory review is permitted at the Commission's discretion only upon a showing that the issue for which interlocutory review is sought threatens the party adversely affected by it with immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-10-13, 71 NRC 388 n.6 (2010); CLI-10-16, 71 NRC 489 (2010)
once a petition to intervene and request for hearing have been granted and contentions are admitted for hearing, appeals of board rulings on new or amended contentions are treated under this section, regardless of the subject matter of those contentions; CLI-10-16, 71 NRC 490 (2010)
- 10 C.F.R. 2.342(a)
this section, by its terms, applies to a stay of a decision or action of a presiding officer or licensing board and therefore does not apply to NRC's approval of a states application to become an Agreement State; CLI-10-8, 71 NRC 147 (2010)
- 10 C.F.R. 2.343
the Commission has discretion to allow oral argument upon the request of a party made in a petition for review, brief on review, or upon its own initiative; CLI-10-9, 71 NRC 251 (2010)
- 10 C.F.R. 2.390
if it seeks to withhold a document from a party or the public, or to bar a party or member of the public from attending any adjudicatory proceeding before a licensing board, NRC Staff must carry the burden of proving that the document or situation fits one of FOIA's specifically enumerated exceptions; LBP-10-2, 71 NRC 198 (2010)
NRC implements and repeats the FOIA obligation that, with nine enumerated exceptions, each agency make copies of all records available to the public; LBP-10-2, 71 NRC 197 (2010)
proponent of a protective order shoulders the burden of proof; LBP-10-2, 71 NRC 198 (2010)
- 10 C.F.R. 2.390(a)(1)
classified information is exempt from disclosure; LBP-10-2, 71 NRC 198 n.20 (2010)

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- 10 C.F.R. 2.390(a)(3)
the duty to make all documents available does not apply to records specifically exempted from disclosure by statute; LBP-10-2, 71 NRC 198 n.20 (2010)
- 10 C.F.R. 2.390(b)(6)
licensing boards have authority to hold in camera hearings; LBP-10-5, 71 NRC 336 n.27 (2010)
parties may propose creation of a public copy of the transcript of a closed hearing, with appropriate redactions for protected information; LBP-10-5, 71 NRC 338 (2010)
- 10 C.F.R. 2.390(d)
although the NRC public website states that SUNSI encompasses a wide variety of categories (e.g., personnel privacy, attorney-client privilege, confidential source), there is no legal basis for sweeping aside the well-established and long-recognized privileges such as the Privacy Act, 5 U.S.C. § 552(a), and the attorney-client privilege; LBP-10-2, 71 NRC 200 n.29 (2010)
documents that qualify as exempt from FOIA disclosure as sensitive unclassified nonsafeguards information are described; LBP-10-2, 71 NRC 199 (2010)
Staff's designation of its own material as sensitive unclassified nonsafeguards information is inconsistent with SUNSI's purported objective of protecting licensee or applicant data; LBP-10-2, 71 NRC 200 N.30 (2010)
- 10 C.F.R. 2.390(d)(1)
legal authority exists for nondisclosure and protection of security-related information concerning the physical protection of nuclear power plants; LBP-10-5, 71 NRC 337 (2010)
- 10 C.F.R. 2.704(a), (b)
all parties, except NRC Staff, shall make mandatory disclosures within 45 days of the issuance of the licensing board order admitting contentions; CLI-10-4, 71 NRC 66 (2010)
- 10 C.F.R. 2.704(c)
no later than 30 days before the commencement of the hearing at which an issue is to be presented, all parties other than the NRC Staff shall make the required pretrial disclosures; CLI-10-4, 71 NRC 66 (2010)
- 10 C.F.R. 2.705(c)(3)(iii)
before the Office of Administration makes an adverse determination regarding a proposed recipient's trustworthiness and reliability for access to safeguards information, it must provide the proposed recipient any records that were considered in the determination, so that the proposed recipient will have an opportunity to correct or explain the record; CLI-10-4, 71 NRC , 80 (2010)
- 10 C.F.R. 2.705(c)(3)(iv)
a requester may challenge NRC Staff's or Office of Administration's adverse determination with respect to access to safeguards information by filing a request for review; CLI-10-4, 71 NRC 81 (2010)
- 10 C.F.R. 2.709
discovery under this section shall not commence until the issuance of the safety evaluation report or environmental impact statement unless the licensing board, in its discretion, finds that commencing discovery against NRC Staff on safety issues before the SER is issued, or on environmental issues before the FEIS is issued will expedite the hearing without adversely affecting the Staff's ability to complete its evaluation in a timely manner; CLI-10-4, 71 NRC 66 (2010)
- 10 C.F.R. 2.710
NRC standards governing summary disposition are based on those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; CLI-10-11, 71 NRC 297 (2010)
the licensing board shall not entertain motions for summary disposition unless it finds that such motions, if granted, are likely to expedite the proceeding; CLI-10-4, 71 NRC 70 (2010)
- 10 C.F.R. 2.710(a)
a party opposing summary disposition must counter any adequately supported material facts provided by the movant with its own separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard; LBP-10-8, 71 NRC 439-40 (2010)
summary disposition may be entered with respect to all or any part of the matters involved in the proceeding if the motion, along with any appropriate supporting materials (including affidavits, discovery responses, and documents), shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law; LBP-10-8, 71 NRC 439 (2010)

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- the party proffering a summary disposition motion bears the burden of making the requisite showing by providing a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard; LBP-10-8, 71 NRC 439 (2010)
- to the degree the response to a summary disposition motion fails to contravene any adequately supported material facts proffered by the movant, the movant's facts will be considered to be admitted; LBP-10-8, 71 NRC 440 (2010)
- 10 C.F.R. 2.710(b)
a party opposing a motion for summary disposition may not rest upon mere allegations or denials, but must state specific facts showing that there is a genuine issue of fact for hearing; CLI-10-11, 71 NRC 297 (2010)
- 10 C.F.R. 2.710(d)(2)
summary disposition is appropriate where relevant documents and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law; CLI-10-11, 71 NRC 297 (2010)
summary disposition may be entered with respect to all or any part of the matters involved in the proceeding if the motion, along with any appropriate supporting materials (including affidavits, discovery responses, and documents), shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law; LBP-10-8, 71 NRC 439 (2010)
- 10 C.F.R. 2.714(b)(1) (2004)
under the 2004 Part 2 revisions to this section, contentions are now required to be included with, rather than being submitted sometime subsequent to the filing of, the intervention petition; LBP-10-1, 71 NRC 188 n.4 (2010)
- 10 C.F.R. 2.714(b)(2)(iii) (2004)
this NEPA-related provision was retained in the 2004 rule change; LBP-10-1, 71 NRC 186 (2010)
- 10 C.F.R. 2.802
if a licensee wishes to challenge the compatibility category that is assigned to a particular regulation (including the license termination rule), it may do so at any time through submission of a petition for rulemaking; CLI-10-8, 71 NRC 153, 157 (2010)
if petitioners wish to propose security measures in addition to those laid out in a Staff enforcement order, their remedy is to ask NRC to institute a rulemaking to impose broader security measures; CLI-10-3, 71 NRC 53 n.21, 54 n.29 (2010)
- 10 C.F.R. 2.907
NRC Staff must file a notice of intent if, at the time of publication of Notice of Hearing, it appears that it will be impracticable for the Staff to avoid the introduction of restricted data or national security information into a proceeding; CLI-10-4, 71 NRC 75 (2010)
- 10 C.F.R. Part 2, Subpart I
classified information is exempt from disclosure; LBP-10-2, 71 NRC 198 n.20 (2010)
- 10 C.F.R. 2.1001
"documentary material" is defined; LBP-10-11, 71 NRC 645 n.152 (2010)
- 10 C.F.R. 2.1009
as part of compliance with the LSN requirements, each petitioner must identify all its documentary material required by section 2.1003 and designate a responsible LSN official who can certify that to the best of his or her knowledge all such material has been made electronically available; LBP-10-11, 71 NRC 645 (2010)
- 10 C.F.R. 2.1012(b)(1)
before petitioner can be granted party status in the high-level waste proceeding, it must be able to demonstrate substantial and timely compliance with the Licensing Support Network requirements; LBP-10-11, 71 NRC 644 (2010)
- 10 C.F.R. 2.1012(b)(2)
if petitioner fails to make such a demonstration of substantial and timely compliance with the LSN requirements, it may later request party status upon a showing of subsequent compliance; LBP-10-11, 71 NRC 644 n.151 (2010)
- 10 C.F.R. 2.1015
NRC rules governing the high-level waste proceeding do not provide for interlocutory review; CLI-10-13, 71 NRC 388 n.6 (2010)

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- 10 C.F.R. 2.1015(a)
no appeals may be taken from any presiding officer order or decision, except as otherwise permitted by the rule; CLI-10-10, 71 NRC 283 (2010)
- 10 C.F.R. 2.1015(b)
appeals may be taken from certain specified decisions of the pre-license application presiding officer and the presiding officer; CLI-10-10, 71 NRC 283 (2010)
- 10 C.F.R. 2.1015(c)
appeals of an initial decision or partial initial decision of the presiding officer are permitted; CLI-10-10, 71 NRC 283 (2010)
- 10 C.F.R. 2.1015(d)
the board may refer certain rulings to the Commission, and certain participants in the proceeding may request that the presiding officer certify to the Commission rulings not otherwise immediately appealable pursuant to section 2.1015(b); CLI-10-10, 71 NRC 283 (2010)
- 10 C.F.R. 2.1205(c)
under Subpart L informal hearing procedures, summary disposition motions are to be resolved in accord with the same standards for dispositive motions that are utilized for formal hearings under Subpart G; LBP-10-8, 71 NRC 439 (2010)
- 10 C.F.R. 9.15
NRC implements and repeats the FOIA obligation that, with nine enumerated exceptions, each agency make copies of all records available to the public; LBP-10-2, 71 NRC 197 (2010)
- 10 C.F.R. 9.19
even if a document contains information that is exempt from disclosure, FOIA mandates that any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions that are exempt; LBP-10-2, 71 NRC 198 (2010)
- 10 C.F.R. 20.1003
a cost-benefit analysis is employed to determine a practicable dose limit; CLI-10-8, 71 NRC 156 n.75 (2010)
ALARA is defined as every reasonable effort to maintain exposures to radiation as far below the dose limits in Part 20 as is practical consistent with the purpose for which the licensed activity is undertaken; CLI-10-8, 71 NRC 156 (2010)
- 10 C.F.R. 20.1301
because regulatory exposure limits are determined by concentration, one can reasonably conclude that potential doses due to the presence of depleted uranium from M101 spotting rounds are expected to be much less than general public exposure limits; LBP-10-4, 71 NRC 231 (2010)
- 10 C.F.R. 20.1401(d)
dose calculation period is provided; CLI-10-8, 71 NRC 158 (2010)
- 10 C.F.R. 20.1402
dose limits for a site to be considered acceptable for unrestricted use are specified; CLI-10-8, 71 NRC 156 n.71 (2010); LBP-10-4, 71 NRC 231 (2010)
- 10 C.F.R. 20.1403
restricted release criteria are provided; CLI-10-8, 71 NRC 158 (2010)
- 10 C.F.R. 40.4
because pyrochlore contains more than 0.05 wt % uranium and thorium, it is subject to NRC regulation as a source material; CLI-10-8, 71 NRC 144 (2010)
- 10 C.F.R. 40.42(g)(2)
if licensee perceives a difficulty in meeting the deadline for submission of a revised decommissioning plan, it may request an extension of time from the Agreement State; CLI-10-8, 71 NRC 153 n.56 (2010)
- 10 C.F.R. 50.2
"safety-related structures, systems, and components" is an NRC term of art defined in this section; CLI-10-14, 71 NRC 455 n.21 (2010)
the definition of safety-related structures, systems, and components is rooted in functions specified in section 54.4(a)(1)-(3); CLI-10-14, 71 NRC 462 (2010)

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- 10 C.F.R. 50.12
applicant would be permitted to obtain exemptions based on information submitted in its application and NRC Staff may rely on its analysis of applicant's original, surrendered construction permit application; CLI-10-6, 71 NRC 132 (2010)
- 10 C.F.R. 50.32
applicant would be permitted to incorporate information from its original construction permit application in a new application; CLI-10-6, 71 NRC 132 (2010)
- 10 C.F.R. 50.34(a)(4)
a construction permit application must consider the consequences of design basis events; CLI-10-1, 71 NRC 10 (2010)
a nuclear power plant must be designed against accidents that are anticipated during the life of the facility; CLI-10-9, 71 NRC 256 (2010)
design basis event is distinguished from design basis threat; CLI-10-1, 71 NRC 11 n.52 (2010); CLI-10-9, 71 NRC 258 (2010)
- 10 C.F.R. 50.54(hh)
intervenor has provided no argument to support the proposition that the Commission intended that this rule should be read as changing the risk profiles of the accidents addressed in the rules; LBP-10-10, 71 NRC 552 (2010)
- 10 C.F.R. 50.54(hh)(2)
licensee must develop and implement guidance and strategies to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities if large areas of the plant are lost due to explosions or fire; LBP-10-5, 71 NRC 333 n.2 (2010)
- 10 C.F.R. 50.55(b)
if a construction permit holder is unable to finish construction by the date specified in the permit, the CP holder can apply for and obtain an extension of the CP; LBP-10-7, 71 NRC 407 (2010)
if the proposed construction is not completed by the latest completion date, the permit shall expire and all rights be forfeited; CLI-10-6, 71 NRC 129 (2010)
the scope of a construction permit extension proceeding is limited to direct challenges to the permit holder's asserted reasons that show "good cause" justification for the delay; LBP-10-7, 71 NRC 417 (2010)
upon good cause shown, the Commission will extend the construction completion date for a reasonable period of time; LBP-10-7, 71 NRC 415 (2010)
- 10 C.F.R. 50.57(a)(3)(i)
perfection in plant construction and the construction quality assurance program is not a precondition for a license, but rather what is required is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety; LBP-10-9, 71 NRC 519 (2010)
- 10 C.F.R. 50.81
creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements, such as sale and leaseback, not covered by this section, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-10-4, 71 NRC 73 (2010)
- 10 C.F.R. 50.109(a)(3)
backfitting of a facility is required only when the Commission determines that there is a substantial increase in the overall protection of the public health and safety or the common defense and security to be derived and that the direct and indirect costs of implementation are justified; LBP-10-13, 71 NRC 679 (2010)
- 10 C.F.R. 50.150
intervenor has provided no argument to support the proposition that the Commission in adopting this rule intended that it should appropriately be read as changing the risk profiles of the accidents addressed in the rules; LBP-10-10, 71 NRC 552 (2010)
- 10 C.F.R. Part 50, Appendix B
applicant for a combined license is required to establish a quality assurance program and to apply that program to its safety-related activities; LBP-10-9, 71 NRC 500 (2010)

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- 10 C.F.R. 51.10(a)
NRC takes into account Council on Environmental Quality regulations, with certain exceptions; CLI-10-2, 71 NRC 34 (2010)
- 10 C.F.R. 51.20(b)(14)
an environmental impact statement is required for any agency action that is a major action significantly affecting the environment; LBP-10-7, 71 NRC 423 (2010)
- 10 C.F.R. 51.23
a challenge to the Waste Confidence Rule, which is the subject of a rulemaking, is inadmissible; CLI-10-9, 71 NRC 272 (2010)
- 10 C.F.R. Part 51, Subpart A, Appendix A, § 5
an otherwise reasonable alternative will not be excluded from discussion in an environmental impact statement solely on the ground that it is not within the jurisdiction of the NRC; LBP-10-10, 71 NRC 584 n.286 (2010)
- 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1
environmental impacts pertaining to onsite spent fuel are a Category 1 issue; CLI-10-14, 71 NRC 471 (2010)
severe accident mitigation alternatives are a Category 2 issue that demands a site-specific analysis for license renewal; LBP-10-13, 71 NRC 679 (2010)
- 10 C.F.R. 51.41
NRC may, and has, required applicants to supply information helpful to the NRC's ability to satisfy its obligations under NEPA; LBP-10-6, 71 NRC 362 (2010)
- 10 C.F.R. 51.45
although the requirements of NEPA are directed to federal agencies and the primary duties of NEPA accordingly fall on the NRC Staff in NRC proceedings, the initial requirement to analyze the environmental impacts of an action is directed to applicants; LBP-10-10, 71 NRC 546-47 (2010)
applicant for a combined license must file an environmental report that describes the proposed action, states its purposes, describes the environment affected, and discusses the project's environmental impacts in proportion to their significance and alternatives to the proposal; CLI-10-2, 71 NRC 33, 34 (2010)
NRC Staff's issuance of its draft and final environmental impact statements may lead to the filing of additional contentions if the data or conclusions contained in them are significantly different from the data or conclusions found in the applicant's documents; LBP-10-10, 71 NRC 547 (2010)
- 10 C.F.R. 51.45(b)
Staff will use information from applicant's environmental report in preparing its environmental impact statement; CLI-10-2, 71 NRC 33 (2010)
- 10 C.F.R. 51.45(b)(1)
applicant's environmental report must discuss the impact of the proposed action on the environment; CLI-10-2, 71 NRC 45 n.95 (2010)
- 10 C.F.R. 51.45(b)(3)
applicant's environmental report must, in relevant part, contain a discussion of alternatives sufficiently complete to aid the Commission in developing and exploring, pursuant to section 102(2)(E) of NEPA, appropriate alternatives to recommended courses of action; LBP-10-6, 71 NRC 362 (2010)
- 10 C.F.R. 51.50(c)
to facilitate compliance with NEPA, NRC requires a combined license applicant to submit a complete environmental report with its application; CLI-10-2, 71 NRC 34 (2010)
when a combined license application references an early site permit, neither applicant nor Staff needs to address environmental issues resolved in the ESP proceeding unless new and significant information arises on those issues; LBP-10-1, 71 NRC 184 n.12 (2010)
- 10 C.F.R. 51.51
low-level radioactive waste disposal contentions may not challenge Table S-3, consistent with NRC policy that regulations may not be the subject of collateral attack in an adjudication; CLI-10-2, 71 NRC 43 n.78 (2010)
- 10 C.F.R. 51.53
this provision pertains to operating reactor license renewal, and does not apply to combined license applicants; CLI-10-1, 71 NRC 11 (2010)

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- 10 C.F.R. 51.53(b)
at the operating license stage, applicant's environmental report need not include a discussion of the need for power or the economic costs and benefits of the proposed action; LBP-10-12, 71 NRC 663 n.18 (2010)
- 10 C.F.R. 51.53(c)(3)(i)
license renewal applicants need not provide site-specific analyses of environmental impacts of subjects identified as Category 1 issues in Appendix B to 10 C.F.R. Part 51, Subpart A; CLI-10-14, 71 NRC 471 (2010)
- 10 C.F.R. 51.53(c)(3)(ii)(L)
a SAMA analysis is required for license renewal if the Staff has not previously considered severe accident mitigation alternatives for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment; CLI-10-14, 71 NRC 472 (2010)
if NRC Staff has not previously considered severe accident mitigation alternatives for the applicant's plant in an environmental impact statement or related supplement or assessment, they must be considered for license renewal; LBP-10-13, 71 NRC 679, 688 (2010)
license renewal applicants are required to consider severe accident mitigation alternatives in the environmental report prepared in connection with the application; CLI-10-11, 71 NRC 291 (2010)
- 10 C.F.R. 51.92(e)(6)-(7)
when a combined license application references an early site permit, neither the applicant nor the Staff needs to address environmental issues resolved in the ESP proceeding unless new and significant information arises on those issues; LBP-10-1, 71 NRC 184 n.12 (2010)
- 10 C.F.R. 51.95(b)
NRC Staff's final environmental impact statement need not include a discussion of the need for power or alternative energy sources; LBP-10-12, 71 NRC 663 n.18 (2010)
- 10 C.F.R. 51.106(c)
at the operating license stage, licensing boards will not admit contentions concerning need for power or alternative energy sources; LBP-10-12, 71 NRC 663 n.18 (2010)
- 10 C.F.R. 51.107(b)(2), (3)
environmental contentions at the COL stage are generally only admissible where they either raise issues that were not resolved at the ESP stage or raise issues resolved at the ESP stage for which new and significant information has been identified; LBP-10-1, 71 NRC 184 n.12 (2010)
- 10 C.F.R. 51.107(c)
to the extent petitioner challenges the SAMDA analysis, it is an impermissible challenge to the AP1000 certified design in 10 C.F.R. Part 52, Appendix D; CLI-10-1, 71 NRC 14 n.68 (2010); CLI-10-9, 71 NRC 258 (2010)
- 10 C.F.R. 52.17
the threshold probability that calls for analysis for reactors is generally greater than 1 in 10 million per year; CLI-10-1, 71 NRC 12 n.56 (2010)
- 10 C.F.R. 52.39(c)(v)
environmental contentions at the combined license stage are generally only admissible where they either raise issues that were not resolved at the early site permit stage or raise issues resolved at the ESP stage for which new and significant information has been identified; LBP-10-1, 71 NRC 184 n.12 (2010)
- 10 C.F.R. 52.55(c)
applicant may reference a design certification that the Commission has docketed but not granted; CLI-10-9, 71 NRC 260 (2010); LBP-10-9, 71 NRC 525 n.144 (2010)
- 10 C.F.R. 52.73(a)
the current COL application references the early site permit; LBP-10-1, 71 NRC 174 (2010)
- 10 C.F.R. 52.79
the threshold probability that calls for analysis for reactors is generally greater than 1 in 10 million per year; CLI-10-1, 71 NRC 12 n.56 (2010)
- 10 C.F.R. 52.79(a)(3)
combined license applicants must describe the kinds and quantities of radioactive materials expected to be produced in facility operations, and the means for controlling and limiting radioactive effluents to comply with Part 20 limits; CLI-10-2, 71 NRC 45, 46 (2010)

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- from a safety standpoint, the required low-level radioactive waste storage information is tied to the combined license applicant's particular plans for compliance through design, operational organization, and procedures; CLI-10-2, 71 NRC 45 (2010)
- purported failures to provide detailed information regarding design, location, and worker health impacts do not identify a deficiency in FSAR LLRW information that is required to be provided in the COL application; LBP-10-8, 71 NRC 444 (2010)
- 10 C.F.R. 52.79(a)(4)
- because any discussion of a long-term low-level radioactive waste storage facility is merely contingent at the combined license application stage, this section does not govern its description in applicant's final safety analysis report; LBP-10-8, 71 NRC 444, 445 (2010)
- this section governs only those structures that are a component of the facility to be constructed under the combined license; LBP-10-8, 71 NRC 440 (2010)
- 10 C.F.R. 52.80(d)
- the licensing board rules on issues that concern guidance and strategies in the combined license application for maintaining or restoring core cooling, containment, and spent fuel pool cooling capabilities if large areas of the plant are lost due to explosions or fire; LBP-10-5, 71 NRC 333 & n.2 (2010)
- 10 C.F.R. 52.97(a)(1)(iii)-(v)
- before it may issue a combined license, the Commission is required to find reasonable assurance that the facility will be constructed and operated in conformity with the license, provisions of the applicable statutes, and regulations, the applicant is technically qualified to engage in the activities authorized, and issuance of the license will not be inimical to the health and safety of the public; LBP-10-9, 71 NRC 512 (2010)
- 10 C.F.R. Part 52, Appendix D, § VI.B
- a challenge to the severe accident mitigation design alternatives analysis performed for the AP1000 certified design constitutes an impermissible challenge to NRC regulations; CLI-10-1, 71 NRC 14 n.68 (2010)
- 10 C.F.R. 54.3
- the current licensing basis is the set of NRC requirements that includes regulations, orders, technical specifications, and license conditions applicable to a specific plant as well as licensee's written, docketed commitments for ensuring compliance with applicable NRC requirements and the plant-specific design basis; CLI-10-14, 71 NRC 453-54 (2010)
- 10 C.F.R. 54.3(a)
- the current licensing basis is the set of NRC requirements that includes regulations, orders, technical specifications, and license conditions applicable to a specific plant as well as licensee's written, docketed commitments for ensuring compliance with applicable NRC requirements and the plant-specific design basis; LBP-10-13, 71 NRC 678 (2010)
- 10 C.F.R. 54.4(a)(1)-(3)
- safety-related structures, systems, and components are those that are relied upon to remain functional during and following design-basis events to ensure the integrity of the reactor coolant pressure boundary, the capability to shut down the reactor and maintain it in a safe shutdown condition, or the capability to prevent or mitigate the consequences of accidents that could result in potential offsite exposures; CLI-10-14, 71 NRC 455 (2010)
- three general categories of structures, systems, and components that fall within the initial focus of license renewal review are outlined; CLI-10-14, 71 NRC 455 (2010)
- 10 C.F.R. 54.4(a)(2)
- safety-related structures, systems, and components in this category consist of all non-safety-related SSCs whose failure could prevent satisfactory accomplishment of any of the safety functions identified in section 54.4(a)(1), including auxiliary systems necessary for the function of safety-related systems; CLI-10-14, 71 NRC 455 (2010)
- 10 C.F.R. 54.4(a)(3)
- all structures, systems, and components in this section are included within the initial scope of license renewal safety review, even if they otherwise might be considered outside the traditional definition of safety-related, and outside of section 54.4(a)(1) and (2); CLI-10-14, 71 NRC 455 (2010)

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- all structures, systems, and components relied on in safety analyses or plant evaluations to perform a function that demonstrates compliance with the NRC's regulations for fire protection, environmental qualification, pressurized thermal shock, anticipated transients without scram, and station blackout are included in this category; CLI-10-14, 71 NRC 455 (2010)
- 10 C.F.R. 54.4(b)
"intended functions" that structures, systems, and components must be shown to fulfill in the aging management review are those specified in section 54.4(a)(1)-(3); CLI-10-14, 71 NRC 456, 462 (2010)
- 10 C.F.R. 54.21
standards for determining which structures and components require an aging management review are provided; CLI-10-14, 71 NRC 456 (2010)
this section does not require each structure and component within the scope of license renewal to be the subject of a far-reaching evaluation encompassing all aspects of the current licensing basis; CLI-10-14, 71 NRC 461-62 (2010)
this section explains what has to be looked at in an aging management review of components once they are determined to be within scope of license renewal; CLI-10-14, 71 NRC 461 (2010)
- 10 C.F.R. 54.21(a)(1)-(2)
structures, systems, and components subject to an aging management review for license renewal perform an intended function in a passive fashion and are not already subject to replacement based on a qualified life or specified time period; CLI-10-14, 71 NRC 456 (2010)
- 10 C.F.R. 54.21(a)(1)(i)
"intended functions" are those functions described in section 54.4; CLI-10-14, 71 NRC 462 (2010)
structures, systems, and components requiring an aging management review perform an intended function, as described in section 54.4; CLI-10-14, 71 NRC 456 (2010)
- 10 C.F.R. 54.21(a)(3)
for each structure or component requiring an aging management review, a license renewal applicant must demonstrate that the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the current licensing basis for the period of extended operation; CLI-10-14, 71 NRC 456 (2010)
- 10 C.F.R. 54.21(c)
for structures and components already subject to periodic replacement, the license renewal application must provide time-limited aging analyses, demonstrating that existing replacement programs will provide reasonable assurance that the effects of aging on intended functions will be adequately managed for the period of extended operation; CLI-10-14, 71 NRC 456 n.30 (2010)
- 10 C.F.R. 54.29
findings required under this section were written to be consistent with section 64.21(a)(3); CLI-10-14, 71 NRC 463 n.71 (2010)
the findings required by this section consider the results of the integrated plant assessment; CLI-10-14, 71 NRC 463 n.71 (2010)
the reference to functionality means the intended functions that must be assured in the integrated plant assessment aging management review; CLI-10-14, 71 NRC 463 n.71 (2010)
this section does not expand the scope of review to any matter involving the current licensing basis; CLI-10-14, 71 NRC 462-63 n.71 (2010)
- 10 C.F.R. 54.29(b)
environmental review of certain site-specific environmental impacts is required for license renewal; LBP-10-13, 71 NRC 678 (2010)
- 10 C.F.R. 54.33(b)
NRC Staff is authorized to impose such conditions on applicant's current licensing basis under a backfit procedure if they are necessary to protect the environment; LBP-10-13, 71 NRC 697 (2010)
- 10 C.F.R. 54.33(c)
NRC has the authority and responsibility to supplement or to amend conditions to the current licensing basis of an existing operating license at the time of license renewal if such supplements or amendments are deemed necessary to protect the environment; LBP-10-13, 71 NRC 678 (2010)
- 10 C.F.R. 61.55(a)(2)
greater-than-Class-C waste is one of the radioactive byproducts of nuclear power generation; CLI-10-2, 71 NRC 47 n.105 (2010)

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- 10 C.F.R. 70.23a
a hearing on a uranium enrichment facility application will be conducted according to the rules of practice in 10 C.F.R. Part 2, Subparts A, C, G, and to the extent that classified information becomes involved, Subpart I; CLI-10-4, 71 NRC 61 (2010)
- 10 C.F.R. 70.32(k)
if a uranium enrichment facility is licensed, prior to commencement of operations NRC will verify through an inspection that the facility meets the construction and operation requirements of the license; CLI-10-4, 71 NRC 60 (2010)
- 10 C.F.R. 73.1
design basis event is distinguished from design basis threat; CLI-10-1, 71 NRC 11 n.52 (2010); CLI-10-9, 71 NRC 258 (2010)
- 10 C.F.R. 73.2
an individual requesting access to safeguards information must provide a statement that explains the individual's need to know; CLI-10-4, 71 NRC 77 (2010)
- 10 C.F.R. 73.21
for decades, the Commission has restricted public access to classified information and safeguards information; LBP-10-2, 71 NRC 198 (2010)
safeguards information qualifies for the FOIA exemption from disclosure; LBP-10-2, 71 NRC 198 n.20 (2010)
- 10 C.F.R. 73.22
prior to providing safeguards information to a requestor, NRC Staff will conduct (as necessary) an inspection to confirm that the recipient's information protection system is sufficient to satisfy the requirements of this section; CLI-10-4, 71 NRC 80 (2010)
- 10 C.F.R. 73.22(b)
the Office of Administration must determine, based upon completion of the background check, whether a proposed recipient is trustworthy and reliable, as required for access to safeguards information; CLI-10-4, 71 NRC 79-80 (2010)
- 10 C.F.R. 73.22(b)(1)
an individual requesting access to safeguards information must provide a statement that explains the individual's need to know; CLI-10-4, 71 NRC 77 (2010)
- 10 C.F.R. 73.22(b)(2)
a completed Form SF-85, Questionnaire for Non-Sensitive Positions, will be used by the Office of Administration to conduct the background check required for access to safeguards information; CLI-10-4, 71 NRC 77 (2010)
- 10 C.F.R. 73.57(e)(1)
before the Office of Administration makes an adverse determination regarding a proposed recipient's trustworthiness and reliability for access to safeguards information, it must provide the proposed recipient any records that were considered in the trustworthiness and reliability determination, so that the proposed recipient will have an opportunity to correct or explain the record; CLI-10-4, 71 NRC 80-81 (2010)
- 10 C.F.R. 73.59
any requester or individual who will have access to safeguards information and believes they belong to one or more of the categories of individuals that are exempt from the criminal history records check and background check requirements should provide a statement identifying which exemption the requestor is invoking and explain the requestor's basis for believing that the exemption applies; CLI-10-4, 71 NRC 78 (2010)
- 10 C.F.R. Part 95
classified information is exempt from disclosure; LBP-10-2, 71 NRC 198 n.20 (2010)
- 10 C.F.R. 95.34
for decades, the Commission has restricted public access to classified information and safeguards information; LBP-10-2, 71 NRC 198 (2010)
- 10 C.F.R. 95.37(f)
documents containing classified information or SGI must be evaluated paragraph by paragraph and those paragraphs containing classified information or SGI are to be redacted and the remaining paragraphs

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- (not containing such sensitive material) are to be made available for disclosure to the public; LBP-10-2, 71 NRC 204 (2010)
- 10 C.F.R. 100.10, 100.20, 100.21
the threshold probability that calls for analysis for reactors is generally greater than 1 in 10 million per year; CLI-10-1, 71 NRC 12 n.56 (2010)
- 40 C.F.R. 1502.14
all reasonable alternatives are to be rigorously explored and objectively evaluated, but for alternatives eliminated from detailed study, only a brief discussion of the reasons for their having been eliminated is required; LBP-10-10, 71 NRC 567, 578 (2010)
- although NEPA does require identification, rigorous exploration, and objective evaluation of all reasonable alternatives, this does not mean that every conceivable alternative must be included in the EIS; LBP-10-10, 71 NRC 581 (2010)
- NEPA does not require a detailed discussion of the rejected alternative's environmental impacts in an environmental impact statement; LBP-10-10, 71 NRC 581-82 (2010)
- 40 C.F.R. 1506.5(a)
NRC may comply with NEPA without requiring that applicant submit an environmental report, but NEPA and Council on Environmental Quality regulations permit agencies to request information from an applicant for a license or permit that will require a NEPA analysis; CLI-10-2, 71 NRC 34 (2010)
- 40 C.F.R. 1508.7
cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time; CLI-10-5, 71 NRC 102 n.60 (2010)
- 40 C.F.R. 1508.23
where there is no proposal for major federal action within the meaning of NEPA § 102(C), there is no requirement for a NEPA analysis of dredging; CLI-10-5, 71 NRC 107 (2010)
- 40 C.F.R. 1508.25
in performing NEPA evaluations, agencies must consider three types of actions, three types of alternatives, and three types of impacts; CLI-10-5, 71 NRC 109 n.101 (2010)
- 40 C.F.R. 1508.25(a)(1)
NEPA requires an analysis of all impacts of connected actions, including direct, indirect, and cumulative impacts; CLI-10-5, 71 NRC 109 (2010)
- 40 N.J. Reg. 5196(b)
a provision for ALARA determinations allows the use of cost as a factor for determining what level of remediation is cost-effective below the standards, but is not allowed by the New Jersey Agreement State Program; CLI-10-8, 71 NRC 160 n.95 (2010)
- 40 N.J. Reg. 5196(b), at 8
creating an open class is not the equivalent of special legislation, which is prohibited, nor is it arbitrary or discriminatory; CLI-10-8, 71 NRC 163 n.105 (2010)
- 40 N.J. Reg. 5196(b), at 8-9
by lowering the annual dose limit and requiring the use of conservative dose calculation methodologies, the NJDEP's decommissioning regulations embody the essential objective of the license termination rule; CLI-10-8, 71 NRC 161 (2010)
- 40 N.J. Reg. 5196(b), at 9
there is flexibility in complying with the remediation standards, including the availability of a petition for alternative remediation standards; CLI-10-8, 71 NRC 161 n.96 (2010)

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- Atomic Energy Act, 147, 42 U.S.C. § 2167
safeguards information qualifies for the exemption from disclosure; LBP-10-2, 71 NRC 198 n.20 (2010)
- Atomic Energy Act, 161(p), 42 U.S.C. § 2201(p)
DOE is authorized to make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act; LBP-10-11, 71 NRC 623 n.38 (2010)
- Atomic Energy Act, 184
creditor regulations in 10 C.F.R. 50.81 apply to the creation of creditor interests in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235; CLI-10-4, 71 NRC 73 (2010)
creditor regulations in 10 C.F.R. 70.44 apply to the creation of creditor interests in special nuclear material; CLI-10-4, 71 NRC 73 (2010)
- Atomic Energy Act, 185, 42 U.S.C. § 2235(a)
rights under a construction permit are forfeited only when a construction permit has expired and has not been extended; CLI-10-6, 71 NRC 121 (2010)
the scope of a construction permit extension proceeding is limited to direct challenges to the permit holder's asserted reasons that show "good cause" justification for the delay; LBP-10-7, 71 NRC 418 (2010)
the term "reinstatement" is not directly or indirectly mentioned in this section; CLI-10-6, 71 NRC 120 (2010)
the voluntary surrender of a construction permit that has not expired, that is, where the construction completion date had not yet arrived, does not constitute a situation to which the "forfeiture" provision applies; CLI-10-6, 71 NRC 121 (2010)
- Atomic Energy Act, 185a, 42 U.S.C. § 2235(a)
a construction permit holder seeking an extension of the permit must provide good cause for the extension; LBP-10-7, 71 NRC 407 (2010)
construction permits shall state the earliest and latest dates for completion of construction or modification, and unless the facility or modification is completed by the completion date, the permit shall expire and all rights thereunder be forfeited, unless upon good cause shown the Commission extends the completion date; LBP-10-7, 71 NRC 415 (2010)
the construction permit specifies a date by which construction of the unit is to be completed; LBP-10-7, 71 NRC 406-07 (2010)
- Atomic Energy Act, 186, 42 U.S.C. § 2236(a)
NRC is authorized to revoke licenses where there is wrongdoing or other misfeasance; CLI-10-6, 71 NRC 122 (2010)
- Atomic Energy Act, 189a, 42 U.S.C. § 2239(a)(1)(A)
a construction permit and operating license were formerly issued separately, with hearing rights accruing separately as to each requested permission; LBP-10-7, 71 NRC 405 (2010)
in determining whether an individual or organization is an interested person that has standing as of right such that it can be granted party status in a proceeding, the Commission applies contemporaneous judicial standing concepts; LBP-10-1, 71 NRC 176 (2010); LBP-10-7, 71 NRC 410 (2010)
NRC shall provide a hearing upon request of any person whose interest may be affected by the proceeding; LBP-10-4, 71 NRC 228 (2010)
the mandatory hearing requirement for the granting of a construction permit and the requirement for a hearing upon request for the granting, revoking, or amending of any permit or license does not

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- undercut NRC authority to reinstate a surrendered construction permit; CLI-10-6, 71 NRC 122-23 (2010)
- Atomic Energy Act, 193, as amended by the Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990, Pub. L. No. 101-575, § 5, 104 Stat. 2834, 2835-36 (codified as amended at 42 U.S.C. § 2243)
- a hearing on a uranium enrichment facility application will be conducted according to the rules of practice in 10 C.F.R. Part 2, Subparts A, C, G, and to the extent that classified information becomes involved, Subpart I; CLI-10-4, 71 NRC 61 (2010)
- Atomic Energy Act, 193c
- if a uranium enrichment facility is licensed, prior to commencement of operations, NRC will verify through an inspection that the facility meets the construction and operation requirements of the license; CLI-10-4, 71 NRC 60 (2010)
- Atomic Energy Act, 274d(1), 42 U.S.C. § 2021(d)(1)
- if the Commission determines that a state's regulatory program is compatible with the Commission's corresponding program and adequate to protect the public health and safety, then the Commission shall enter into the agreement; CLI-10-8, 71 NRC 148 (2010)
- the Commission must find that an Agreement State program is in accordance with the requirements of subsection 274o and in all other respects is compatible with the Commission's program for regulation of radioactive materials, and that the state program is adequate to protect the public health and safety with respect to the materials covered by the proposed agreement; CLI-10-8, 71 NRC 148 (2010)
- to become an Agreement State, the governor must certify that the state has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials within the state covered by the proposed agreement, and that the state desires to assume regulatory responsibility for such materials; CLI-10-8, 71 NRC 148 (2010)
- Atomic Energy Act, 274j, 42 U.S.C. § 2021(j)
- NRC Staff is required by law to conduct periodic reviews of the adequacy and compatibility of an Agreement State's regulatory program; CLI-10-8, 71 NRC 153 n.58 (2010)
- Brownfield and Contaminated Site Remediation Act, N.J. Stat. Ann. 7:28-12.11
- there is flexibility in complying with the remediation standards, including the availability of a petition for alternative remediation standards; CLI-10-8, 71 NRC 161 n.95 (2010)
- Brownfield and Contaminated Site Remediation Act, N.J. Stat. Ann. 58:10B-1.2
- strict standards coupled with a risk-based and flexible regulatory system will result in more cleanups and thus the elimination of the public's exposure to these hazardous substances and the environmental degradation that contamination causes; CLI-10-8, 71 NRC 160 n.95 (2010)
- Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et seq.
- a provision for ALARA determinations allows the use of cost as a factor for determining what level of remediation is cost-effective below the standards; CLI-10-8, 71 NRC 160 n.95 (2010)
- Communications Act of 1934, 312(g), 47 U.S.C. § 312(g)
- the Federal Communications Commission may reinstate a broadcasting station license that has expired; CLI-10-6, 71 NRC 123 (2010)
- Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (2009)
- Congress did not repeal the Nuclear Waste Policy Act or declare that the Yucca Mountain site is inappropriate; LBP-10-11, 71 NRC 628 (2010)
- Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2865 (2009)
- in appropriating funds for the Blue Ribbon Commission, Congress instructed the Commission to consider all alternatives for nuclear waste disposal, necessarily including a geologic repository at Yucca Mountain; LBP-10-11, 71 NRC 628 n.69 (2010)
- Freedom of Information Act, 5 U.S.C. § 552(b)(1)
- classified information is exempt from disclosure; LBP-10-2, 71 NRC 198 n.20 198 n.20 (2010)
- Freedom of Information Act, 5 U.S.C. § 552(b)(3)
- the duty to make all documents available does not apply to records specifically exempted from disclosure by statute; LBP-10-2, 71 NRC 198 n.20 (2010)

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- Freedom of Information Act, 5 U.S.C. § 552(b)(9)
even if a document contains information that is exempt from disclosure, FOIA mandates that any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions that are exempt; LBP-10-2, 71 NRC 198 (2010)
- Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021c(b)(1)(D)
greater-than-Class-C waste is the responsibility of the federal government; CLI-10-2, 71 NRC 47 (2010)
- N.J. Stat. Ann. § 26:2D-9(k)
upon the effective date of the agreement between NRC and the state, all active NRC licenses issued to facilities in the state will be recognized as state licenses; CLI-10-8, 71 NRC 162 (2010)
- National Environmental Policy Act, 102, 42 U.S.C. § 4332
Staff's environmental impact statement for a combined license must discuss the reasonably foreseeable environmental impacts of the proposed project; CLI-10-2, 71 NRC 46 (2010)
- National Environmental Policy Act, 102(2)(C), 42 U.S.C. § 4332(2)(C)(iii)
an environmental impact statement must discuss alternatives to the proposed action, and this discussion must incorporate a hard look at alternatives to a proposed action; LBP-10-10, 71 NRC 580 (2010)
- Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101-10270 (2009)
the Secretary of the Department of Energy does not have the discretion to substitute his policy for the one established by Congress that mandates progress toward a merits decision by NRC on the construction permit; LBP-10-11, 71 NRC 617 (2010)
- Nuclear Waste Policy Act of 1982, 111, 42 U.S.C. § 10131(a)(3)
federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate; LBP-10-11, 71 NRC 618-19 (2010)
- Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10131(b)(1)
Congress was to establish a schedule for the siting, construction, and operation of repositories that will provide reasonable assurance of safe disposal of high-level radioactive waste; LBP-10-11, 71 NRC 619 (2010)
- Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10131(b)(2)
Congress enacted this law for the purpose of establishing a definite federal policy for the disposal of high-level radioactive waste and spent nuclear fuel; LBP-10-11, 71 NRC 618 (2010)
- Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10132-10135
a detailed, specific procedure for site selection and review by the Secretary of Energy, the President, and the Congress, followed by submission of the application for a construction permit, review, and final decision thereon by the NRC is set out; LBP-10-11, 71 NRC 619 (2010)
- Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10133(c)(3)
during site characterization, DOE may determine that the Yucca Mountain site is unsuitable for development as a repository; LBP-10-11, 71 NRC 620 (2010)
- Nuclear Waste Policy Act of 1982, 113, 42 U.S.C. § 10133(c)(3)(F)
steps that DOE must undertake in the event that it determines the Yucca Mountain site to be unsuitable for development as a repository are provided; LBP-10-11, 71 NRC 620 (2010)
- Nuclear Waste Policy Act of 1982, 114(b), 42 U.S.C. § 10134(b)
DOE is required to submit an application to construct a high-level waste geologic repository at Yucca Mountain; LBP-10-11, 71 NRC 620 (2010)
withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe; CLI-10-13, 71 NRC 388-89 (2010)
- Nuclear Waste Policy Act of 1982, 114(d), 42 U.S.C. § 10134(d)
submission of the application to construct a high-level waste geologic repository at Yucca Mountain triggered a duty on NRC's part to consider and to render a decision on the application; LBP-10-11, 71 NRC 618, 620, 625 (2010)
withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe; CLI-10-13, 71 NRC 388-89 (2010)
- Nuclear Waste Policy Act of 1982, 114(f)(6), 42 U.S.C. § 10134(f)(6)
DOE's environmental impact statement is not to consider the need for the repository, the time of initial availability of a repository, alternative sites to the Yucca Mountain site, or nongeologic alternatives to such site; LBP-10-11, 71 NRC 622 (2010)

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DOE was directed to limit its site selection efforts to Yucca Mountain and to provide for an orderly phase-out of site-specific activities at all candidate sites other than the Yucca Mountain site; LBP-10-11, 71 NRC 619 (2010)

Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10172(a)

DOE was directed to limit its site selection efforts to Yucca Mountain and to provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site; LBP-10-11, 71 NRC 619 (2010)

Nuclear Waste Policy Act of 1982, § 10172a(a)

DOE is prohibited from characterizing a second repository site unless Congress has specifically authorized and appropriated funds for such activities; LBP-10-11, 71 NRC 620-21 n.30 (2010)

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- 128 Cong. Rec. S4128 (1982)
NRC has been established as an independent body to check upon whether or not the administrative bodies are functioning according to the statutes and policies that have been already enacted; LBP-10-11, 71 NRC 626 (2010)
- D.C. Bar Bylaws, Art. III, § 4(a) and (b)
nonpracticing lawyers or doctors who have voluntarily terminated their licenses may reinstate their licenses if they meet certain conditions; CLI-10-6, 71 NRC 123 (2010)
- District of Columbia Municipal Regulations for Medicine §§ 4606.1, 4606.4, and 4615.1
nonpracticing lawyers or doctors who have voluntarily terminated their licenses may reinstate their licenses if they meet certain conditions; CLI-10-6, 71 NRC 123 (2010)
- Fed. R. Civ. P. 26(b)(1)
parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense; LBP-10-2, 71 NRC 203 n.45 (2010)
relevant information need not be admissible at a trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence; LBP-10-2, 71 NRC 203 n.45 (2010)
- Fed. R. Civ. P. 56
NRC standards governing summary disposition are based on those the federal courts apply to motions for summary judgment; CLI-10-11, 71 NRC 297 (2010)
- H.R. Rep. No. 97-491(I), at 29-30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3792, 3796
allowing DOE to withdraw its application for a high-level waste repository is contrary to congressional intent; LBP-10-11, 71 NRC 621 (2010)
- N.J. Admin. Code § 7:28-2.8
the state may provide exemptions from its rules upon application and a showing of hardship or compelling need, with the approval of the Commission on Radiation Protection; CLI-10-8, 71 NRC 160 (2010)
- N.J. Admin. Code § 7:28-6.1(d)(2)
licensee's decommissioning plan would have to show that the maximum annual dose to any person is as low as is reasonably achievable below 15 mrem; CLI-10-8, 71 NRC 157 (2010)
- N.J. Admin. Code § 7:28-12.8(a)
New Jersey's restricted release criteria are compatible with NRC rules; CLI-10-8, 71 NRC 158 n.82 (2010)
- N.J. Admin. Code § 7:28-12.8(a)(1)
dose limits for sites to be remediated are specified; CLI-10-8, 71 NRC 156 n.71 (2010)
- N.J. Admin. Code §§ 7:28-12.10(d), 7:28-12.11(f)(2)(iii)
requirement of a calculation of up to peak dose is consistent with the essential objective of NRC's rule; CLI-10-8, 71 NRC 158 (2010)
- N.J. Admin. Code 7:28-12.11(a)
filing of a petition for alternative soil remediation standards is permitted as long as the resulting dose would not exceed 15 mrem per year; CLI-10-8, 71 NRC 160 n.94 (2010)
- N.J. Admin. Code § 7:28-12.12
requirements pertaining to engineering or institutional controls are compatible with NRC rules; CLI-10-8, 71 NRC 158 n.82 (2010)

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N.J. Admin. Code §7:28-58.1

if licensee perceives a difficulty in meeting the deadline for submission of a revised decommissioning plan, it may request an extension of time from the Agreement State; CLI-10-8, 71 NRC 153 n.56 (2010)

U.S. Const. art. II, § 3, cl. 4

the President shall take care that the laws be faithfully executed; LBP-10-11, 71 NRC 629 n.71 (2010)

Webster's II New College Dictionary (2001)

a practical definition of the word reasonable for use when selecting alternative concepts would be an alternative is reasonable if it is both feasible (possible, viable) and nonspeculative; LBP-10-10, 71 NRC 604 n.4 (2010)

Webster's New College Dictionary 448 (3d ed. 2005)

"forfeit" is defined as something surrendered as punishment for a crime, offense, error, or breach of contract; CLI-10-6, 71 NRC 121 (2010)

Webster's Third New International Dictionary Unabridged 909 (Philip B. Gove ed. in chief, 1976)

one who does something "frequently" does so at frequent or short intervals, "frequent" being defined as often or habitually; LBP-10-1, 71 NRC 178 (2010)

Webster's Third New International Dictionary Unabridged 1913 (Philip B. Gove ed. in chief, 1976)

one who performs an act "regularly" does so in a regular, orderly, or methodical way; LBP-10-1, 71 NRC 178 (2010)

Webster's Third New International Dictionary Unabridged (1986)

a practical definition of the word reasonable for use when selecting alternative concepts would be an alternative is reasonable if it is both feasible (possible, viable) and nonspeculative; LBP-10-10, 71 NRC 604 n.4 (2010)

SUBJECT INDEX

ABEYANCE OF CONTENTION

- a contention may be held in abeyance by a licensing board pending completion of a rulemaking, but the contention must be otherwise admissible; LBP-10-9, 71 NRC 493 (2010)
- before a board may refer a design certification-related contention to the Staff and hold it in abeyance, the contention must first be admissible; CLI-10-1, 71 NRC 1 (2010)

ABUSE OF DISCRETION

- the Commission defers to a board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion; CLI-10-1, 71 NRC 1 (2010); CLI-10-2, 71 NRC 27 (2010); CLI-10-9, 71 NRC 245 (2010); CLI-10-12, 71 NRC 319 (2010)
- the Commission will review decisions on evidentiary questions under an abuse of discretion standard; CLI-10-5, 71 NRC 90 (2010)

ACCIDENTS, SEVERE

- a contention that impacts from a severe radiological accident at any one unit on operation of other units at the site had not been, and should be, considered in the application's environmental report is found to be moot; LBP-10-10, 71 NRC 529 (2010)
- after the Three Mile Island accident, it is irrational for NRC to maintain that severe accident risks are too remote to require consideration; LBP-10-10, 71 NRC 529 (2010)
- combined license applications must describe plans for implementing guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities if large areas of the plant are lost due to explosions or fire; LBP-10-5, 71 NRC 329 (2010)
- contention alleging a failure to evaluate the impact of a severe accident at one unit on other units when the initiating event is an external event such as an earthquake is found inadmissible; LBP-10-10, 71 NRC 529 (2010)
- contention that applicant failed to address the impact of a chain reaction that leads to more than one unit experiencing a severe accident is found inadmissible; LBP-10-10, 71 NRC 529 (2010)
- contention that applicant's failure to address externally initiated accident scenarios is a material omission from the environmental report is inadmissible; LBP-10-10, 71 NRC 529 (2010)
- it is not only the statistical improbability of a severe accident that bears on the determination whether, in a given circumstance, a severe accident should be anticipated and thereby considered in the context of a combined license application; LBP-10-10, 71 NRC 529 (2010)
- low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that a specified accident scenario presents a significant environmental impact that must be evaluated; LBP-10-10, 71 NRC 529 (2010)
- NEPA mandates neither mitigative action against harmful effects of major federal actions nor in-depth statements of planned actions to be taken to dull such impacts; LBP-10-13, 71 NRC 673 (2010)
- omitting consideration of accident scenarios anticipated under 10 C.F.R. 50.150 and 50.54(hh) is contrary to the requirements of 42 U.S.C. § 2133(d); LBP-10-10, 71 NRC 529 (2010)
- one in a million per year is the threshold above which accident scenarios should be evaluated for NEPA consideration; LBP-10-10, 71 NRC 529 (2010)
- petitioner failed to provide any evidence to challenge NRC's conclusion that the environmental effects of a hypothetical terrorist attack on a nuclear plant would be no worse than those caused by a severe accident; LBP-10-10, 71 NRC 529 (2010)

SUBJECT INDEX

SAMA contentions will be admitted in license renewal proceedings only if it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated; LBP-10-13, 71 NRC 673 (2010)

the licensing board rules on issues that concern guidance and strategies for addressing certain circumstances that might arise from potential beyond-design-basis explosions and fires; LBP-10-5, 71 NRC 329 (2010)

ADJUDICATORY PROCEEDINGS

as long as the administrative proceedings walk, talk, and squawk very much like an Article III judicial proceeding, they should be open to the public; LBP-10-2, 71 NRC 190 (2010)

it is not for any court to examine the strength of the evidence upon which Congress based its judgment to approve the Yucca Mountain site; LBP-10-11, 71 NRC 609 (2010)

NRC proceedings are not open forums for discussing the country's need for energy and spent fuel storage; CLI-10-10, 71 NRC 281 (2010)

the Commission acts as adjudicator and in that light considers the reinstatement of a construction permit afresh, without regard for its earlier views; CLI-10-6, 71 NRC 113 (2010)

with certain very limited exceptions, all NRC hearings will be public; LBP-10-2, 71 NRC 190 (2010)

See also Closed Hearings; Combined License Proceedings; Decommissioning Proceedings; Enforcement Proceedings; Evidentiary Hearings; Materials License Renewal Proceedings; NRC Proceedings; Public Hearings; Uranium Enrichment Facility Proceedings

ADMINISTRATIVE PROCEDURE ACT

an order modifying a license, such as a Staff order, falls well within the APA's definition of adjudication, and as such, the Staff order does not trigger the notice-and-comment procedures applicable to rulemakings; CLI-10-3, 71 NRC 49 (2010)

review of agency action is directed to determine if its decision is a product of consideration of relevant factors and whether a clear error of judgment has occurred; LBP-10-10, 71 NRC 529 (2010)

the Commission has discretion to impose binding, prospectively applicable legal requirements by either rulemaking or adjudication; CLI-10-3, 71 NRC 49 (2010)

ADMISSIBILITY OF EVIDENCE

relevant information need not be admissible at a trial if the discovery appears reasonably calculated to lead to admissible evidence; LBP-10-2, 71 NRC 190 (2010)

AFFIDAVITS

a petition for rule waiver must be accompanied by an affidavit that describes with particularity the special circumstances that justify the waiver; CLI-10-10, 71 NRC 281 (2010)

in ruling on a motion for summary disposition, a licensing board or presiding officer should not conduct a trial on affidavits; CLI-10-11, 71 NRC 287 (2010)

AGING MANAGEMENT

all non-safety-related structures, systems, and components whose failure could prevent satisfactory accomplishment of any of the safety functions identified in 10 C.F.R. 54.4(a)(1), including auxiliary systems necessary for the function of safety-related systems, are subject to safety review for license renewal; CLI-10-14, 71 NRC 449 (2010)

all structures, systems, and components relied on in safety analyses or plant evaluations to perform a function that demonstrates compliance with the NRC's regulations for fire protection, environmental qualification, pressurized thermal shock, anticipated transients without scram, and station blackout are subject to safety review for license renewal; CLI-10-14, 71 NRC 449 (2010)

general categories of structures, systems, and components falling within the initial focus of the safety review for license renewal are outlined; CLI-10-14, 71 NRC 449 (2010)

license renewal safety review focuses on structures and components that perform passive functions, with no moving parts or changes in configuration or properties; CLI-10-14, 71 NRC 449 (2010)

safety review for license renewal focuses on those systems, structures, and components that are of principal importance to safety; CLI-10-14, 71 NRC 449 (2010)

structures, systems, and components that are relied upon to remain functional during and following design-basis events to ensure the integrity of the reactor coolant pressure boundary, the capability to shut down the reactor and maintain it in a safe shutdown condition, or the capability to prevent or mitigate the consequences of accidents that could result in potential offsite exposures are subject to safety review for license renewal; CLI-10-14, 71 NRC 449 (2010)

SUBJECT INDEX

the general scope of the license renewal safety review is outlined in 10 C.F.R. 54.4; CLI-10-14, 71 NRC 449 (2010)

the scope of license renewal review for a nuclear power reactor is generally restricted to plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analysis; LBP-10-13, 71 NRC 673 (2010)

AGREEMENT STATE PROGRAMS

by its terms, 10 C.F.R. 2.342(a) applies to a stay of a decision or action of a presiding officer or licensing board and therefore does not apply to NRC's approval of a state's application to become an Agreement State; CLI-10-8, 71 NRC 142 (2010)

challenges to an Agreement State's program may be raised in a section 2.206 petition; CLI-10-8, 71 NRC 142 (2010)

filing of a petition for alternative soil remediation standards is permitted as long as the resulting dose would not exceed 15 mrem per year; CLI-10-8, 71 NRC 142 (2010)

if certain conditions are met, the Commission will discontinue its regulatory authority over certain categories of material, which authority then is assumed by the state; CLI-10-8, 71 NRC 142 (2010)

if licensee perceives a difficulty in meeting the deadline for submission of a revised decommissioning plan, it may request an extension of time from the Agreement State; CLI-10-8, 71 NRC 142 (2010)

if licensee wishes to challenge the compatibility category that is assigned to a particular regulation, including the license termination rule, it may do so at any time through submission of a petition for rulemaking; CLI-10-8, 71 NRC 142 (2010)

New Jersey's requirement of a calculation of up to peak dose is consistent with the essential objective of NRC's rule; CLI-10-8, 71 NRC 142 (2010)

New Jersey's requirements pertaining to engineering or institutional controls are compatible with NRC rules; CLI-10-8, 71 NRC 142 (2010)

New Jersey's restricted release criteria are compatible with NRC rules; CLI-10-8, 71 NRC 142 (2010)

NRC Staff is required by law to conduct periodic reviews of the adequacy and compatibility of an Agreement State's regulatory program; CLI-10-8, 71 NRC 142 (2010)

states may provide exemptions from their rules upon application and a showing of hardship or compelling need, with the approval of the Commission on Radiation Protection; CLI-10-8, 71 NRC 142 (2010)

the Commission must find that a program is in accordance with the requirements of Atomic Energy Act § 274o and in all other respects is compatible with the Commission's program for regulation of radioactive materials, and that the state program is adequate to protect the public health and safety with respect to the materials covered by the proposed agreement; CLI-10-8, 71 NRC 142 (2010)

AGREEMENT STATES

to become an Agreement State, the governor must certify that the state has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials within the state covered by the proposed agreement, and that the state desires to assume regulatory responsibility for such materials; CLI-10-8, 71 NRC 142 (2010)

AIRCRAFT CRASHES

amendment of a combined license application to comply with an amended aircraft impacts rule during the pendency of the combined license application could form the basis for a late-filed contention; CLI-10-1, 71 NRC 1 (2010)

the agency decided not to include the threat of air attacks in the 2007 revision to the design-basis threat rule, a decision upheld by the Ninth Circuit; CLI-10-9, 71 NRC 245 (2010)

where petitioner has not shown a reasonably close causal relationship between an aircraft attack and the relicensing proceeding at issue, such an attack does not warrant NEPA evaluation; CLI-10-9, 71 NRC 245 (2010)

with respect to aircraft crash as an element of the design-basis threat, adequate protection against an air threat is assured by the active defenses provided by other federal agencies, together with what reasonably could be expected of licensees; CLI-10-1, 71 NRC 1 (2010)

ALARA

a provision for ALARA determinations allows the use of cost as a factor for determining what level of remediation is cost-effective below the standards, but is not allowed by the New Jersey Agreement State program; CLI-10-8, 71 NRC 142 (2010)

SUBJECT INDEX

ALARA PRINCIPLE

ALARA is defined as every reasonable effort to maintain exposures to radiation as far below the dose limits in Part 20 as is practical consistent with the purpose for which the licensed activity is undertaken; CLI-10-8, 71 NRC 142 (2010)

AMENDMENT

changes in a combined license application to comply with an amended aircraft impacts rule during the pendency of the COL application could form the basis for a late-filed contention; CLI-10-1, 71 NRC 1 (2010)

AMENDMENT OF CONTENTIONS

in addition to general contention admissibility requirements, amended or new contentions filed after an intervenor's initial filing will be admitted only upon leave of the presiding officer and a demonstration that information on which the contention is based was not previously available and is materially different than information previously available and has been submitted in a timely fashion based on the availability of the subsequent information; LBP-10-13, 71 NRC 673 (2010)

intervenors may not freely change the focus of an admitted contention at will to add a host of new issues and objections that could have been raised at the outset; CLI-10-11, 71 NRC 287 (2010)

intervenors must timely file a new or amended contention that addresses the factors in section 2.714(b) in order to raise specific challenges regarding new information; LBP-10-10, 71 NRC 529 (2010)

non-NEPA-related contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer; LBP-10-1, 71 NRC 165 (2010)

NRC adjudicatory proceedings would prove endless if parties were free to introduce entirely new claims that they either originally opted not to make or that simply did not occur to them at the outset; CLI-10-11, 71 NRC 287 (2010)

once a petition to intervene and request for hearing have been granted and contentions are admitted for hearing, appeals of board rulings on new or amended contentions are treated under section 2.341(f)(2), regardless of their subject matter; CLI-10-16, 71 NRC 486 (2010)

petitioner may amend contentions or file new contentions on issues arising under NEPA if there are data or conclusions in the NRC environmental documents that differ significantly from the data or conclusions in the applicant's documents; LBP-10-1, 71 NRC 165 (2010)

where warranted, NRC allows for amendment of admitted contentions, but does not allow distinctly new complaints to be added at will as litigation progresses, stretching the scope of admitted contentions beyond their reasonably inferred bounds; CLI-10-11, 71 NRC 287 (2010)

AMENDMENT OF HEARING REQUESTS

petitions will not be entertained absent a determination by the Commission, the licensing board, or a presiding officer that a balancing of the factors specified in 10 C.F.R. 2.309(c)(1)(i)-(viii) favors admission; CLI-10-4, 71 NRC 56 (2010)

AMENDMENT OF REGULATIONS

notice-and-comment rulemaking is required only when NRC is attempting to change a regulation; CLI-10-6, 71 NRC 113 (2010)

AMICUS CURIAE

petitioners may protect their interests by participating as appropriate, as amici curiae; CLI-10-12, 71 NRC 319 (2010)

ANTICIPATED TRANSIENTS WITHOUT SCRAM

all structures, systems, and components relied on in safety analyses or plant evaluations to perform a function that demonstrates compliance with the NRC's regulations are subject to aging management review for license renewal; CLI-10-14, 71 NRC 449 (2010)

APPEALS

a no-reactor or no-action alternative that was not raised before the board is therefore improperly raised on appeal; CLI-10-9, 71 NRC 245 (2010)

an appeal as of right from a board's ruling on an intervention petition is permitted upon denial of a petition to intervene and/or request for hearing on the question as to whether it should have been granted or upon the granting of a petition to intervene and/or request for hearing, on the question as to whether it should have been wholly denied; CLI-10-16, 71 NRC 486 (2010)

arguments made before the board that are abandoned on appeal are deemed to be waived; CLI-10-9, 71 NRC 245 (2010)

SUBJECT INDEX

arguments or new facts raised for the first time on appeal are not considered unless their proponent can demonstrate that the information was previously unavailable; CLI-10-3, 71 NRC 49 (2010)
certain specified decisions of the pre-license application presiding officer and the presiding officer are appealable; CLI-10-10, 71 NRC 281 (2010)
initial decisions or partial initial decisions of the presiding officer in the high-level waste repository proceeding may be appealed; CLI-10-10, 71 NRC 281 (2010)
no appeals may be taken from any presiding officer order or decision, except as otherwise permitted by 10 C.F.R. 2.1015(a); CLI-10-10, 71 NRC 281 (2010)
petitioners have an automatic right to appeal a board decision wholly denying a petition to intervene; CLI-10-1, 71 NRC 1 (2010); CLI-10-9, 71 NRC 245 (2010); CLI-10-12, 71 NRC 319 (2010)
the Commission generally defers to licensing boards on issues of standing, absent an error of law or abuse of discretion; CLI-10-3, 71 NRC 49 (2010)
the Commission will not consider information that was not raised before the board; CLI-10-9, 71 NRC 245 (2010)

APPEALS, INTERLOCUTORY

certain rulings relating to sensitive unclassified nonsafeguards information are subject to interlocutory appeal; LBP-10-2, 71 NRC 190 (2010)
once a petition to intervene and request for hearing have been granted and contentions are admitted for hearing, appeals of board rulings on new or amended contentions are treated under section 2.341(f)(2), regardless of their subject matter; CLI-10-16, 71 NRC 486 (2010)
rejection or admission of a contention where petitioner has been admitted as a party and has other contentions pending neither constitutes serious and irreparable impact nor affects the basic structure of the proceeding in a pervasive and unusual manner; CLI-10-16, 71 NRC 486 (2010)

APPELLATE BRIEFS

arguments that are not mentioned on appeal are considered waived; CLI-10-3, 71 NRC 49 (2010)
the Commission has discretion to allow oral argument upon the request of a party made in a petition for review, brief on review, or upon its own initiative; CLI-10-9, 71 NRC 245 (2010)

APPELLATE REVIEW

a petition for review may be granted in the Commission's discretion; CLI-10-11, 71 NRC 287 (2010)
if a board erroneously rejected petitioner's motions, but the record does not suggest that petitioner suffered any prejudicial error, Commission review is not warranted; CLI-10-14, 71 NRC 449 (2010)
if there is nothing that can be done by way of judicial review to redress the adverse consequences that petitioners say they are suffering, review will be denied; LBP-10-11, 71 NRC 609 (2010)
petitions for review will be granted at the Commission's discretion, giving due weight to the existence of a substantial question with respect to the five considerations of 10 C.F.R. 2.341(b)(4)(i)-(v); CLI-10-14, 71 NRC 449 (2010)
the Commission defers to a board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion; CLI-10-2, 71 NRC 27 (2010); CLI-10-7, 71 NRC 133 (2010); CLI-10-9, 71 NRC 245 (2010); CLI-10-12, 71 NRC 319 (2010)
the Commission found fault with the board's failure to identify clearly which of the diffuse and, in some cases, unsupported claims were admitted for hearing; CLI-10-2, 71 NRC 27 (2010)
the Commission grants review of a licensing board decision that dismissed a contention on summary disposition, reversing the decision in part, and remanding the contention to the board for hearing, as limited by the Commission's ruling; CLI-10-11, 71 NRC 287 (2010)
the Commission has discretion to allow oral argument upon the request of a party made in a petition for review, brief on review, or upon its own initiative; CLI-10-9, 71 NRC 245 (2010)
the Commission will not consider information that is introduced for the first time on appeal in an attempt to cure deficient contentions; CLI-10-1, 71 NRC 1 (2010)

APPLICANTS

although the requirements of NEPA are directed to federal agencies and the primary duties of NEPA accordingly fall on the NRC Staff in NRC proceedings, the initial requirement to analyze the environmental impacts of an action is directed to applicants; LBP-10-10, 71 NRC 529 (2010)
NRC rules permit the filing of a combined license application during the pendency of a design certification rulemaking; CLI-10-9, 71 NRC 245 (2010)

SUBJECT INDEX

when an applicant receives a construction permit, it proceeds at its own risk, regardless of the amount of money that it may have expended during construction; LBP-10-7, 71 NRC 391 (2010)

ATOMIC ENERGY ACT

a construction permit will not expire and no rights under the permit will be forfeited unless the facility is not completed and the latest date for completion has passed; CLI-10-6, 71 NRC 113 (2010)

a hearing on a uranium enrichment facility application will be held under the authority of sections 53, 63, 189, 191, and 193; CLI-10-4, 71 NRC 56 (2010)

all NRC hearings are to be public except as requested under section 181 of the Act or otherwise ordered by the Commission; LBP-10-5, 71 NRC 329 (2010)

boards should restrict their inquiry in a construction permit reinstatement proceeding, including their consideration of contention admissibility matters, in line with the good cause standard; LBP-10-7, 71 NRC 391 (2010)

broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective; CLI-10-6, 71 NRC 113 (2010); LBP-10-11, 71 NRC 609 (2010)

determination of what constitutes adequate protection under the Act is a situation in which the Commission should be permitted to have discretion to make case-by-case judgments based on its technical expertise and on all the relevant information; CLI-10-14, 71 NRC 449 (2010)

DOE is authorized to make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act; LBP-10-11, 71 NRC 609 (2010)

judicial standing concepts are applied in NRC proceedings; LBP-10-1, 71 NRC 165 (2010)

NRC cannot generically dispense with the consideration of SAMAs, under NEPA, through a policy statement issued pursuant to its AEA authority; LBP-10-13, 71 NRC 673 (2010)

NRC may use its broad discretion of authority under the Act to reinstate expired construction permits that the licensee inadvertently failed to renew; CLI-10-6, 71 NRC 113 (2010)

NRC possesses broad discretion to act when the statute is otherwise silent; CLI-10-6, 71 NRC 113 (2010)

NRC shall provide a hearing upon request of any person whose interest may be affected by the proceeding; LBP-10-4, 71 NRC 216 (2010)

regardless of whether there is a challenge to a petitioner's standing, the board has an independent obligation to make a standing determination; LBP-10-1, 71 NRC 165 (2010)

rights under a construction permit are forfeited only when a construction permit has expired and has not been extended; CLI-10-6, 71 NRC 113 (2010)

the 10 C.F.R. Part 50 licensing process that was formerly applied to commercial nuclear power plants required that an applicant first obtain a construction permit for the facility, followed by an operating license; LBP-10-7, 71 NRC 391 (2010)

the Commission, if certain conditions are met, may discontinue its regulatory authority over certain categories of material, which authority then is assumed by the state; CLI-10-8, 71 NRC 142 (2010)

the construction permit specifies a date by which construction of the unit is to be completed; LBP-10-7, 71 NRC 391 (2010)

the term "reinstatement" is not directly or indirectly mentioned in section 185; CLI-10-6, 71 NRC 113 (2010)

the voluntary surrender of a construction permit that has not expired, i.e., where the construction completion date has not yet arrived, does not constitute a situation to which the "forfeiture" provision applies; CLI-10-6, 71 NRC 113 (2010)

to establish standing petitioner must show that it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes, the injury is fairly traceable to the challenged action, and the injury is likely to be redressed by a favorable decision; LBP-10-1, 71 NRC 165 (2010)

BACKFITTING

if the Commission determines that there is a substantial increase in overall protection of public health and safety or common defense and security and that direct and indirect costs of implementation for that facility are justified, it may impose a license condition to implement severe accident mitigation alternatives; LBP-10-13, 71 NRC 673 (2010)

SUBJECT INDEX

BREACH OF CONTRACT

ratepayers are not third-party beneficiaries of the Standard Contract and therefore cannot sue for breach of contract when DOE fails to dispose of nuclear waste by the statutory deadline; LBP-10-11, 71 NRC 609 (2010)

BURDEN OF PERSUASION

on issues of whether a contention has been rendered moot by provision of information by an applicant, the applicant bears the burden of persuasion; LBP-10-10, 71 NRC 529 (2010)

petitioner bears the burden to provide facts sufficient to establish standing; CLI-10-7, 71 NRC 133 (2010)

BURDEN OF PROOF

if it seeks to withhold a document from a party or the public, or to bar a party or member of the public from attending any adjudicatory proceeding before a licensing board, NRC Staff must carry the burden of proving that the document or situation fits one of FOIA's specifically enumerated exceptions; LBP-10-2, 71 NRC 190 (2010)

impact of proposed energy conservation alternatives regarding demand for energy must be susceptible to a reasonable degree of proof; LBP-10-10, 71 NRC 529 (2010)

in cases where the record fails to support the existence of a significant source of radioactivity producing an obvious potential for offsite consequences at a particular distance frequented by a petitioner, it becomes petitioner's burden to show a specific and plausible means of how the challenged action may harm him or her; LBP-10-4, 71 NRC 216 (2010)

in proceedings where petitioner's factual assertions in support of standing are challenged, untenable, conjectural, or conclusory, a board need not uncritically accept such assertions; LBP-10-4, 71 NRC 216 (2010)

in ruling on summary disposition motions, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor; CLI-10-11, 71 NRC 287 (2010)

intervenor should not be held to a prima facie burden at the contention admissibility stage of a proceeding, but its showing should be sufficient to require reasonable minds to inquire further; LBP-10-10, 71 NRC 529 (2010)

once the requesting party meets its burden of demonstrating a need for a document, the burden is upon the claimant of executive privilege to demonstrate a proper entitlement to exemption from disclosure; LBP-10-2, 71 NRC 190 (2010)

opponent of summary disposition must counter any adequately supported material facts provided by the movant with its own separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard; LBP-10-8, 71 NRC 433 (2010)

perfection in applicant's QA program is not required, but once a pattern of QA violations has been shown, applicant has the burden of showing that the license may be granted notwithstanding the violations; LBP-10-9, 71 NRC 493 (2010)

petitioner has the burden of demonstrating that there is warrant for waiver of a rule prohibiting consideration of the need for power and energy alternatives at the operating license stage; LBP-10-12, 71 NRC 656 (2010)

petitioner has the burden to plead sufficient, plausible facts to demonstrate standing; LBP-10-4, 71 NRC 216 (2010)

proponent of a protective order bears the burden of proof; LBP-10-2, 71 NRC 190 (2010)

proponent of a summary disposition motion bears the burden of making the requisite showing by providing a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard; LBP-10-8, 71 NRC 433 (2010)

to meet its burden, it is generally sufficient if petitioner provides plausible factual allegations that satisfy each element of standing; LBP-10-4, 71 NRC 216 (2010)

to the degree the response to a summary disposition motion fails to contravene any adequately supported material facts proffered by the movant, the movant's facts will be considered to be admitted; LBP-10-8, 71 NRC 433 (2010)

CASE MANAGEMENT

decisions on evidentiary questions fall within boards' authority to regulate hearing procedures; CLI-10-5, 71 NRC 90 (2010)

licensing boards are expected to use the applicable techniques to ensure prompt and efficient resolution of contested issues; CLI-10-4, 71 NRC 56 (2010)

SUBJECT INDEX

licensing boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; CLI-10-2, 71 NRC 27 (2010)

licensing boards normally have considerable discretion in making evidentiary rulings; CLI-10-5, 71 NRC 90 (2010)

CERTIFICATION

boards must certify the matter of rule waiver to the Commission for a determination of whether the application of the regulation should be waived or an exception granted under the specific circumstances presented; LBP-10-12, 71 NRC 656 (2010)

the board may refer certain rulings to the Commission, and certain participants in the proceeding may request that the presiding officer certify to the Commission rulings not otherwise immediately appealable pursuant to 10 C.F.R. 2.1015(b); CLI-10-10, 71 NRC 281 (2010)

to certify a waiver petition to the Commission, the board must find that petitioner has met extremely high standards showing the existence of compelling circumstances in which the rationale of the regulation is undercut; LBP-10-12, 71 NRC 656 (2010)

See also Design Certification; Directed Certification

CLASSIFIED INFORMATION

documents containing classified information or safeguards information must be evaluated paragraph by paragraph and those paragraphs containing classified information or SGI are to be redacted and the remaining paragraphs not containing such sensitive material are to be made available for disclosure to the public; LBP-10-2, 71 NRC 190 (2010)

FOIA exemption from disclosure applies; LBP-10-2, 71 NRC 190 (2010)

CLOSED HEARINGS

all NRC hearings are to be public except as requested under section 181 of the Atomic Energy Act or otherwise ordered by the Commission; LBP-10-5, 71 NRC 329 (2010)

before a licensing board will close future proceedings, the party seeking closure must demonstrate that the need to close the hearing outweighs the strong presumption that all licensing board proceedings will be open to the public; LBP-10-2, 71 NRC 190 (2010)

during closed portions of oral argument, only the board, NRC Staff, applicant, and individuals who signed nondisclosure affidavits pursuant to protective order would be permitted to remain in the hearing room; LBP-10-5, 71 NRC 329 (2010)

legal authority exists for nondisclosure and protection of security-related information concerning the physical protection of nuclear power plants under 10 C.F.R. 2.390(d)(1); LBP-10-5, 71 NRC 329 (2010)

licensing boards have authority to hold in camera hearings under 10 C.F.R. 2.390(b)(6); LBP-10-5, 71 NRC 329 (2010)

parties can propose creation of a public copy of the transcript, with appropriate redactions for protected information; LBP-10-5, 71 NRC 329 (2010)

section 2.390(d)(1) of 10 C.F.R. provides legal authority for nondisclosure and protection of security-related information concerning the physical protection of nuclear power plants, and for the closing of portions of hearings and other sessions in which such information will necessarily be discussed; LBP-10-5, 71 NRC 329 (2010)

to determine whether a tribunal should block public access to a judicial proceeding, a two-part experience and logic test is applied; LBP-10-2, 71 NRC 190 (2010)

COLOCATED UNITS

a contention that impacts from a severe radiological accident at any one unit on operation of other units at the site had not been, and should be, considered in the application's environmental report is found to be moot; LBP-10-10, 71 NRC 529 (2010)

contention that applicant failed to address the impact of a chain reaction that leads to more than one unit experiencing a severe accident is found inadmissible; LBP-10-10, 71 NRC 529 (2010)

COMBINED LICENSE APPLICATION

a contention was found to be inadmissible because the COL application contained petitioner's asserted omissions; CLI-10-1, 71 NRC 1 (2010)

amendment of a combined license application to comply with an amended aircraft impacts rule during the pendency of the COL application could form the basis for a late-filed contention; CLI-10-1, 71 NRC 1 (2010)

SUBJECT INDEX

- applicant may, at its own risk, submit a combined license application that does not reference a certified design; CLI-10-1, 71 NRC 1 (2010)
- applicant may reference a design certification that the Commission has docketed but not granted; LBP-10-9, 71 NRC 493 (2010)
- applicant must describe plans for implementing guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities if large areas of the plant are lost due to explosions or fire; LBP-10-5, 71 NRC 329 (2010)
- applicant must file an environmental report that describes the proposed action, states its purposes, describes the environment affected, and discusses the project's environmental impacts in proportion to their significance and alternatives to the proposal; CLI-10-2, 71 NRC 27 (2010)
- applicant's contingent long-term onsite low-level radioactive waste storage facility and the contents of its final safety analysis report with regard to that facility are not governed by 10 C.F.R. 52.79(a)(4) as a part of the reactor facilities to be constructed under the requested combined licenses; LBP-10-8, 71 NRC 433 (2010)
- because a contention focuses on the safety-related aspects of a COL application, it is not apparent that the issue resolved in the board's admissibility ruling has any particular implications for a contention challenging the environmental impacts of long-term onsite low-level radioactive waste storage admitted and pending in another proceeding; LBP-10-8, 71 NRC 433 (2010)
- from a safety standpoint, the required low-level radioactive waste storage information is tied to the COL applicant's particular plans for compliance through design, operational organization, and procedures; CLI-10-2, 71 NRC 27 (2010)
- it is not only the statistical improbability of a severe accident that bears on the determination whether a severe accident should be anticipated and thereby considered in the context of a combined license application; LBP-10-10, 71 NRC 529 (2010)
- NRC regulations permit an applicant to reference a docketed, but not yet certified, design; CLI-10-9, 71 NRC 245 (2010)
- paragraph (4) of 10 C.F.R. 52.79(a) governs only those structures that are a component of the facility to be constructed under the combined license; LBP-10-8, 71 NRC 433 (2010)
- perfection in applicant's QA program is not required, but once a pattern of QA violations has been shown, applicant has the burden of showing that the license may be granted notwithstanding the violations; LBP-10-9, 71 NRC 493 (2010)
- purported failures to provide detailed information regarding design, location, and worker health impacts do not identify a deficiency in final safety analysis report low-level radioactive waste information that is required to be provided in the COL application; LBP-10-8, 71 NRC 433 (2010)
- safety regulations in 10 C.F.R. 52.79(a)(3) require applicant to describe the kinds and quantities of radioactive materials that will be produced in operating a proposed new power plant and to describe the means for controlling and limiting the radioactive effluents and radiation exposures; CLI-10-2, 71 NRC 27 (2010)
- the board did not create a new regulatory requirement in finding that an application must show how the proposed facility will deal with long-term storage of low-level radioactive waste; CLI-10-2, 71 NRC 27 (2010)
- when a COLA references an early site permit, neither applicant nor Staff needs to address environmental issues resolved in the ESP proceeding unless new and significant information arises on those issues; LBP-10-1, 71 NRC 165 (2010)
- COMBINED LICENSE PROCEEDINGS**
- a claim of deficiency in construction of the concrete containment is insufficient because it was not linked to the application at issue in the proceeding; CLI-10-9, 71 NRC 245 (2010)
- a contention alleging a breakdown of applicant's quality assurance program must provide evidence that there legitimate doubt as to whether the plant can be operated safely; LBP-10-9, 71 NRC 493 (2010)
- a contention that challenges compliance with fire protection regulations at an existing unit is outside the scope of a combined license proceeding; CLI-10-9, 71 NRC 245 (2010)
- a well-pleaded environmental contention concerning the effects of long-term onsite management of low-level radioactive waste is admissible; CLI-10-2, 71 NRC 27 (2010)
- business strategies in the context of need for power and any challenges to them are outside the scope of a licensing proceeding; LBP-10-10, 71 NRC 529 (2010)

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- character or integrity issues are expected to be directly germane to the challenged licensing action; CLI-10-9, 71 NRC 245 (2010)
- members of intervenor organizations who reside, work, or recreate within 50 miles of the proposed nuclear power plant have proximity-based standing; LBP-10-9, 71 NRC 493 (2010)
- NRC adjudicatory hearings are not EIS editing sessions; LBP-10-10, 71 NRC 529 (2010)
- petitioner has not met the pleading requirements because it has not demonstrated any link between the purported violations at an existing unit and any future noncompliance or resulting safety risk affecting proposed units; CLI-10-9, 71 NRC 245 (2010)
- petitioner's challenge to the one-fire assumption in the AP1000 design constitutes an impermissible challenge to Commission regulations; CLI-10-9, 71 NRC 245 (2010)
- rationale for and scope of process are explained; LBP-10-7, 71 NRC 391 (2010)
- the licensing board rules on issues that concern guidance and strategies for addressing certain circumstances that might arise from potential beyond-design-basis explosions and fires; LBP-10-5, 71 NRC 329 (2010)
- the scope of the proceeding and thus of admissible contentions is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board; LBP-10-9, 71 NRC 493 (2010)
- COMBINED LICENSES
 - applicant is required to establish a quality assurance program and to apply that program to its safety-related activities; LBP-10-9, 71 NRC 493 (2010)
 - perfection in plant construction and the construction quality assurance program is not a precondition for a license, but rather what is required is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety; LBP-10-9, 71 NRC 493 (2010)
 - procedures for issuance of a combined construction permit and conditional operating license for a nuclear power plant and the conduct of the hearing are described; LBP-10-7, 71 NRC 391 (2010)
 - Staff's environmental impact statement for a COL must discuss the reasonably foreseeable environmental impacts of the proposed project; CLI-10-2, 71 NRC 27 (2010)
- COMMON DEFENSE AND SECURITY
 - creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements, such as sale and leaseback, not covered by this section, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-10-4, 71 NRC 56 (2010)
- CONCLUSIONS OF LAW
 - the Commission will review legal questions de novo and reverse a licensing board's legal rulings if they are a departure from or contrary to established law; CLI-10-5, 71 NRC 90 (2010)
- CONCRETE
 - a claim of deficiency in construction of the concrete containment is insufficient because it was not linked to the application at issue in the proceeding; CLI-10-9, 71 NRC 245 (2010)
- CONSIDERATION OF ALTERNATIVES
 - a no-reactor or no-action alternative that was not raised before the board is therefore improperly raised on appeal; CLI-10-9, 71 NRC 245 (2010)
 - a practical definition of "reasonable" for use when selecting alternative concepts would be that an alternative is reasonable if it is both feasible (possible, viable) and nonspeculative; LBP-10-10, 71 NRC 529 (2010)
 - a solely wind- or solar-powered facility could not satisfy the project's purpose to generate baseload power; LBP-10-6, 71 NRC 350 (2010)
 - agencies need only discuss those alternatives that are reasonable and will bring about the ends of the proposed action; LBP-10-6, 71 NRC 350 (2010)
 - alternatives that are remote and speculative do not require detailed discussion in an environmental impact statement; LBP-10-10, 71 NRC 529 (2010)
 - an agency must take into account the needs and goals of the parties involved in the application; LBP-10-10, 71 NRC 529 (2010)
 - an agency's environmental review must consider not every possible alternative, but every reasonable alternative; LBP-10-6, 71 NRC 350 (2010); LBP-10-10, 71 NRC 529 (2010)

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an environmental impact statement must describe the potential environmental impact of a proposed action and discuss any reasonable alternatives; LBP-10-10, 71 NRC 529 (2010)

an environmental impact statement must incorporate a hard look at alternatives to a proposed action; LBP-10-10, 71 NRC 529 (2010)

an environmental impact statement must rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives that were eliminated from detailed study, briefly discuss the reasons for their having been eliminated; LBP-10-10, 71 NRC 529 (2010)

an environmental report must identify all reasonable alternatives; LBP-10-10, 71 NRC 529 (2010)

an otherwise reasonable alternative will not be excluded from discussion in an environmental impact statement solely on the ground that it is not within the jurisdiction of the NRC; LBP-10-10, 71 NRC 529 (2010)

applicant's comparison of the environmental impacts of nuclear and wind/compressed air energy storage is inadequate to adequately inform decision makers about the competing choices; LBP-10-10, 71 NRC 529 (2010)

applicant's environmental report must contain a discussion of alternatives sufficiently complete to aid the Commission in developing and exploring, pursuant to section 102(2)(E) of NEPA, appropriate alternatives to recommended courses of action; LBP-10-6, 71 NRC 350 (2010)

at the operating license stage, licensing boards will not admit contentions concerning the need for power or alternative energy sources; LBP-10-12, 71 NRC 656 (2010)

because demand-side management reduces by a small portion applicant's demand for power, it should be analyzed in this instance as a surrogate for need for power; LBP-10-6, 71 NRC 350 (2010)

business decisions of licensees or applicants are beyond NRC purview; CLI-10-1, 71 NRC 1 (2010)

cost issues only become relevant if an intervenor identifies an environmentally preferable, reasonable alternative; LBP-10-10, 71 NRC 529 (2010)

DOE's environmental impact statement is not to consider the need for the repository, the time of initial availability of a repository, alternative sites to the Yucca Mountain site, or nongeologic alternatives to such site; LBP-10-11, 71 NRC 609 (2010)

energy sales projections are inherently uncertain, and the Commission does not impose burdensome attempts to predict future conditions, and it should be sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions; LBP-10-6, 71 NRC 350 (2010)

if an alternative to the applicant's proposal is environmentally preferable, then NRC must determine whether the environmental benefits conferred by that alternative are worthwhile enough to outweigh any additional cost needed to achieve them; CLI-10-1, 71 NRC 1 (2010)

if petitioner has proffered an admissible contention asserting an environmentally preferable alternative to the proposed reactors, this also would trigger the requirement that the environmental report contain cost estimates; CLI-10-9, 71 NRC 245 (2010)

impact of proposed energy conservation alternatives regarding demand for energy must be susceptible to a reasonable degree of proof; LBP-10-10, 71 NRC 529 (2010)

implicit in NEPA is a rule of reason, under which the agency may limit the alternatives discussion where there is no environmental effect or where an effect is simply not significant; LBP-10-10, 71 NRC 529 (2010)

in the context of appropriately defining terms and reconciling concepts such as "reasonable," "feasible," and "reasonably available," a problem for agencies is that even the term "alternatives" is not self-defining; LBP-10-10, 71 NRC 529 (2010)

it is inappropriate for the agency to consider economic costs when no environmentally preferable alternative has been identified; CLI-10-1, 71 NRC 1 (2010)

NEPA requires consideration only of feasible, nonspeculative alternatives; LBP-10-10, 71 NRC 529 (2010)

NRC Staff's final environmental impact statement need not include a discussion of the need for power or alternative energy sources; LBP-10-12, 71 NRC 656 (2010)

NRC's NEPA responsibilities and, by extension, the applicant's responsibilities under 10 C.F.R. Part 51, are subject to a rule of reason; LBP-10-6, 71 NRC 350 (2010)

petition for waiver of regulation excluding consideration of alternatives and need for power from the operating license phase must establish that all of applicant's fossil fuel baseload generation that is less efficient than the facility under consideration has been accounted for; LBP-10-12, 71 NRC 656 (2010)

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- petitioner did not properly challenge applicant's conclusion that no environmentally preferable alternative existed where the only alternative that petitioner mentions on appeal is the no-reactor option, and petitioner neither raised that option before the board nor supported its argument that it would always be environmentally preferable; LBP-10-6, 71 NRC 350 (2010)
- regarding consideration of specific combination alternatives, the burden rests upon a petitioner to propose a particular alternative, and bare generalizations will not support an admissible contention; LBP-10-6, 71 NRC 350 (2010)
- rejection of even viable and reasonable alternatives, after an appropriate evaluation, is not arbitrary and capricious; LBP-10-10, 71 NRC 529 (2010)
- request for waiver of application of 10 C.F.R. 51.53(b), 51.95(b), and 51.106(c) precluding consideration of need for power and alternative energy sources from a Part 50 operating license proceeding fails to provide the prima facie showing required; LBP-10-12, 71 NRC 656 (2010)
- the concept of alternatives must be bounded by some notion of feasibility; LBP-10-10, 71 NRC 529 (2010)
- the hard look required by NEPA is subject to a rule of reason, such that it is not necessary to look at every conceivable alternative to the proposed licensing action, but only those that are feasible, and reasonably related to the scope and goals of the proposed action; LBP-10-10, 71 NRC 529 (2010)
- the NEPA rule of reason does not require applicant to consider energy efficiency in its NEPA analysis, because energy efficiency is not a reasonable alternative for a merchant power producer; CLI-10-1, 71 NRC 1 (2010)
- the only alternatives that are relevant to NRC's decision are those that are environmentally preferable; LBP-10-6, 71 NRC 350 (2010)
- to meet its burden to justify certification of its request to waive 10 C.F.R. 51.53(b), 51.95(b), and 51.106(c), petitioner must make a prima facie showing that the proposed facility would not be needed to meet increased energy needs or to replace older, less economical operating capacity, and that there are viable alternatives likely to exist that could tip the NEPA cost-benefit balance against issuance of the operating license; LBP-10-12, 71 NRC 656 (2010)
- waivers are limited to very unusual cases, such as where it appears that an alternative exists that is clearly and substantially environmentally superior; LBP-10-12, 71 NRC 656 (2010)
- where the agency's action is to approve or deny a proposal by a private party, the agency should ordinarily accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project; LBP-10-6, 71 NRC 350 (2010)
- CONSTRUCTION**
- a claim of deficiency in construction of the concrete containment is insufficient because it was not linked to the application at issue in the proceeding; CLI-10-9, 71 NRC 245 (2010)
- CONSTRUCTION AUTHORIZATION APPLICATION**
- applicant would be permitted to incorporate information from its original construction permit application in a new application; CLI-10-6, 71 NRC 113 (2010)
- the Secretary of the Department of Energy does not have the discretion to substitute his policy for the one established by Congress that mandates progress toward a merits decision by NRC on a construction permit for the high-level waste repository; LBP-10-11, 71 NRC 609 (2010)
- CONSTRUCTION OF MEANING**
- boards are to construe intervention petitions in a light most favorable to petitioners; LBP-10-1, 71 NRC 165 (2010)
- one who does something "frequently" does so at frequent or short intervals, "frequent" being defined as often or habitually; LBP-10-1, 71 NRC 165 (2010)
- one who performs an act "regularly" does so in a regular, orderly, or methodical way; LBP-10-1, 71 NRC 165 (2010)
- "otherwise admissible" has been interpreted to mean a contention that meets the admissibility requirements of 10 C.F.R. 2.309(f)(1) but for the fact that it challenges a yet-to-be-certified reactor design; LBP-10-9, 71 NRC 493 (2010)
- the distinction between "frequently" and "regularly" highlights the importance of making a more detailed factual showing, rather than relying on conclusory adjectives and adverbs, when a standing claim rests on the nature of petitioner's activities purportedly near to, or bearing some connection with, the reactor facility at issue; LBP-10-1, 71 NRC 165 (2010)

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CONSTRUCTION PERMIT EXTENSION

a construction permit holder must provide good cause for the extension; LBP-10-7, 71 NRC 391 (2010)
earliest and latest dates for completion of construction or modification shall be stated, and unless the construction or modification of the facility is completed by the completion date, the permit shall expire and all rights thereunder be forfeited, unless upon good cause shown the Commission extends the completion date; LBP-10-7, 71 NRC 391 (2010)

if a construction permit holder is unable to finish construction by the date specified in the permit, the CP holder can apply for and obtain an extension; LBP-10-7, 71 NRC 391 (2010)

CONSTRUCTION PERMIT EXTENSION PROCEEDINGS

as was the case with an initial CP application, an extension request could be the subject of an adjudicatory hearing challenge by a petitioner; LBP-10-7, 71 NRC 391 (2010)

CONSTRUCTION PERMIT PROCEEDING

an admissible contention under the good cause standard must allege that a permit holder's reasons for past delay failed to constitute good cause for a CP extension and be supported by a showing that construction delay is traceable to permit holder action that was intentional and without a valid business purpose; LBP-10-7, 71 NRC 391 (2010)

boards should restrict their inquiry in a reinstatement proceeding, including their consideration of contention admissibility matters, in line with the good cause standard of the Atomic Energy Act; LBP-10-7, 71 NRC 391 (2010)

CONSTRUCTION PERMITS

a combined license is essentially a construction permit that also requires consideration and resolution of many of the issues currently considered at the operating license stage; LBP-10-7, 71 NRC 391 (2010)

a construction permit will not expire and no rights under the permit will be forfeited unless the facility is not completed and the latest date for completion has passed; CLI-10-6, 71 NRC 113 (2010)

a facility can be reactivated from deferred status so that construction can begin again, which includes providing 120 days' notice to the Staff before restarting construction activities; LBP-10-7, 71 NRC 391 (2010)

a mandatory hearing for the reinstatement of previously issued construction permits is not required because a hearing already occurred when the permits were initially issued; CLI-10-6, 71 NRC 113 (2010)

applications must consider the consequences of design basis events; CLI-10-1, 71 NRC 1 (2010)

earliest and latest dates for completion of construction or modification shall be stated in the permit, and unless the construction or modification of the facility is completed by the completion date, the permit shall expire and all rights thereunder be forfeited, unless upon good cause shown the Commission extends the completion date; LBP-10-7, 71 NRC 391 (2010)

if a construction permit holder wishes to discontinue construction activities at a facility but continue to have its 10 C.F.R. Part 50 construction authorization remain effective, it can do so under the terms of the 1987 Commission Policy Statement on Deferred Plants; LBP-10-7, 71 NRC 391 (2010)

NRC may use its broad discretion of authority under the Atomic Energy Act to reinstate expired construction permits that licensee inadvertently failed to renew; CLI-10-6, 71 NRC 113 (2010)

rights under a permit are forfeited only when a construction permit has expired and has not been extended; CLI-10-6, 71 NRC 113 (2010)

the 10 C.F.R. Part 50 licensing process that was formerly applied to commercial nuclear power plants required that an applicant first obtain a construction permit for the facility, followed by an operating license; LBP-10-7, 71 NRC 391 (2010)

the 1987 Commission Policy Statement on Deferred Plants sets forth the process under which a plant could be placed in a terminated status pending withdrawal of the CP, as well as procedures and requirements for reactivating the facility from terminated status; LBP-10-7, 71 NRC 391 (2010)

the Commission acts as adjudicator and in that light considers the reinstatement of a construction permit afresh, without regard for its earlier views; CLI-10-6, 71 NRC 113 (2010)

the date by which construction of the unit is to be completed is specified; LBP-10-7, 71 NRC 391 (2010)

the term "reinstatement" is not directly or indirectly mentioned in section 185 of the Atomic Energy Act; CLI-10-6, 71 NRC 113 (2010)

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- the voluntary surrender of a construction permit that has not expired, i.e., where the construction completion date had not yet arrived, does not constitute a situation to which the “forfeiture” provision of the Atomic Energy Act applies; CLI-10-6, 71 NRC 113 (2010)
 - voluntary surrender of a valid permit does not amount to wrongful activity that would warrant revocation; CLI-10-6, 71 NRC 113 (2010)
 - when an applicant receives a construction permit, it proceeds at its own risk, regardless of the amount of money that it may have expended during construction; LBP-10-7, 71 NRC 391 (2010)
 - CONSULTATION DUTY
 - parties must make good-faith efforts to resolve with the other parties the subject matter of their motion; CLI-10-10, 71 NRC 281 (2010)
 - CONTAINMENT
 - a claim of deficiency in construction of the concrete containment is insufficient because it was not linked to the application at issue in the proceeding; CLI-10-9, 71 NRC 245 (2010)
 - CONTENTIONS
 - a contention that impacts from a severe radiological accident at any one unit on operation of other units at the site had not been, and should be, considered in the application’s environmental report is found to be moot; LBP-10-10, 71 NRC 529 (2010)
 - a licensing board erred in referring a contention to the NRC Staff without making an appropriate contention admissibility determination; CLI-10-9, 71 NRC 245 (2010)
 - although all environmental contentions may, in a general sense, ultimately be challenges to the NRC’s compliance with NEPA, factual disputes of particular issues can be raised before the draft environmental impact statement is prepared; CLI-10-2, 71 NRC 27 (2010)
 - although NRC recognizes a difference between contentions of omission and contentions of inadequacy, the board did not err in reading the contention as one of inadequacy despite the contentions’ occasional use of terms such as “failed to address”; CLI-10-2, 71 NRC 27 (2010)
 - although the ultimate burden with respect to NEPA lies with the NRC Staff, NRC policy with respect to the identification of issues for hearing has long been that such issues must be raised as early as possible; CLI-10-2, 71 NRC 27 (2010)
 - applicant’s reliance on a facility for low-level radioactive waste disposal that will no longer permit out-of-compact entities to import LLRW for disposal at its site could provide the basis for a new contention; LBP-10-8, 71 NRC 433 (2010)
 - common sense is a relevant consideration in determining whether to reformulate contentions; LBP-10-10, 71 NRC 529 (2010)
 - intervenor’s representational status is one factor in determining whether reformulation is appropriate, and pro se status may provide additional cause for reformulation; LBP-10-10, 71 NRC 529 (2010)
 - NEPA-related contentions are to be filed based on an applicant’s environmental report; LBP-10-10, 71 NRC 529 (2010)
 - NRC Staff’s issuance of its draft and final environmental impact statements may lead to the filing of additional contentions if the data or conclusions contained in them are significantly different from the data or conclusions found in the applicant’s documents; LBP-10-10, 71 NRC 529 (2010)
 - on issues of whether a contention has been rendered moot by provision of information by an applicant, the applicant bears the burden of persuasion; LBP-10-10, 71 NRC 529 (2010)
 - only one admissible contention is required for each petitioner to intervene; LBP-10-11, 71 NRC 609 (2010)
 - the distinction between contentions of omission and contentions of inadequacy does not appear in NRC contention pleading regulations, but rather is a useful concept from agency case law; CLI-10-2, 71 NRC 27 (2010)
 - there is a difference between contentions that merely allege an omission of information and those that challenge substantively and specifically how particular information has been discussed in a license application; CLI-10-9, 71 NRC 245 (2010)
 - under the 2004 Part 2 revisions, contentions are now required to be included with, rather than being submitted sometime subsequent to the filing of, the intervention petition; LBP-10-1, 71 NRC 165 (2010)
- See also Abeyance of Contention; Amendment of Contentions

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CONTENTIONS, ADMISSIBILITY

- a board appropriately reviews the materials cited in support of a contention, while making no pronouncements on whether the information contained in the application or the claims made in the petition are valid; CLI-10-9, 71 NRC 245 (2010)
- a board did not err in reformulating a contention to state that the application failed to comply with 10 C.F.R. Part 51, rather than with the National Environmental Policy Act; CLI-10-2, 71 NRC 27 (2010)
- a board erred in referring a contention to the Staff for consideration in conjunction with the design certification rulemaking without first assessing its admissibility; CLI-10-1, 71 NRC 1 (2010)
- a challenge to the Waste Confidence Rule, which is the subject of a rulemaking, is inadmissible; CLI-10-9, 71 NRC 245 (2010)
- a claim of deficiency in construction of the concrete containment is insufficient because it was not linked to the application at issue in the proceeding; CLI-10-9, 71 NRC 245 (2010)
- a contention alleging a breakdown of applicant's quality assurance program must provide evidence that there is legitimate doubt as to whether the plant can be operated safely; LBP-10-9, 71 NRC 493 (2010)
- a contention based on another agency's draft environmental assessment that does not apply to the time period in which proposed reactor units would be operational is not material to the findings the licensing board must make in the proceeding; LBP-10-1, 71 NRC 165 (2010)
- a contention challenging the failure to include in the environmental impact statement for license renewal any consideration of the effects of an aircraft attack is inadmissible; LBP-10-10, 71 NRC 529 (2010)
- a contention may be held in abeyance by a licensing board pending completion of a rulemaking, but the contention must be otherwise admissible; LBP-10-9, 71 NRC 493 (2010)
- a contention on spent fuel pool fires is rejected as an impermissible challenge to NRC regulations and the license renewal generic environmental impact statement; CLI-10-11, 71 NRC 287 (2010)
- a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible; CLI-10-9, 71 NRC 245 (2010); LBP-10-7, 71 NRC 391 (2010)
- a contention that challenges compliance with fire protection regulations at an existing unit is outside the scope of a combined license proceeding; CLI-10-9, 71 NRC 245 (2010)
- a contention was found to be inadmissible because the combined license application contained petitioner's asserted omissions; CLI-10-1, 71 NRC 1 (2010)
- a contention will be ruled inadmissible if the petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only are assertions and speculation; LBP-10-6, 71 NRC 350 (2010)
- a dispute is material if its resolution would make a difference in the outcome of the licensing proceeding; LBP-10-6, 71 NRC 350 (2010)
- a licensing board will grant a request for a hearing if it determines that the requestor has standing has proposed at least one admissible contention; LBP-10-4, 71 NRC 216 (2010)
- a litigable NEPA issue is one that concerns whether the NRC Staff has taken the requisite hard look at mitigation in sufficient detail to ensure that environmental consequences of the proposed project have been fairly evaluated; LBP-10-13, 71 NRC 673 (2010)
- a new or amended contention that is found to be timely in accord with 10 C.F.R. 2.309(f)(2) need not be assessed under the section 2.309(c) factors, which are considered to apply only to otherwise nontimely submissions; LBP-10-1, 71 NRC 165 (2010)
- a party may not present a new contention, or a new basis for a proposed contention, in its reply; LBP-10-9, 71 NRC 493 (2010)
- a possible 1-year slip in the construction schedule is clearly within the margin of uncertainty and therefore, in the context of relitigating an issue, is unlikely to affect the need for power; LBP-10-6, 71 NRC 350 (2010)
- a proposed new or amended contention shall be deemed timely if it is filed within 30 days of the date when the new and material information on which it is based first becomes available; LBP-10-9, 71 NRC 493 (2010)
- a specific statement of the issue of law or fact to be raised or controverted must be provided; CLI-10-2, 71 NRC 27 (2010)
- a well-pleaded environmental contention concerning the effects of long-term onsite management of low-level radioactive waste is admissible; CLI-10-2, 71 NRC 27 (2010)

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adequacy of emergency planning is outside the scope of license renewal proceedings; LBP-10-13, 71 NRC 673 (2010)

adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process; LBP-10-7, 71 NRC 391 (2010)

adjudicatory boards should not be expected, unaided by the parties, to sift through the parties' pleadings to uncover and resolve arguments not advanced by litigants themselves; LBP-10-10, 71 NRC 529 (2010)

administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that "ought to be" considered; LBP-10-10, 71 NRC 529 (2010)

although a board may appropriately view petitioner's support for its contention in a light that is favorable to the petitioner, petitioner must provide that support for his or her contention; LBP-10-6, 71 NRC 350 (2010)

although admitting the new contention would broaden the issues in dispute, in the early stage of the proceeding this does not weigh heavily against a petitioner; LBP-10-1, 71 NRC 165 (2010)

although petitioner could participate in another federal agency's comment process relating to a proposed environmental assessment that is the focus of a new contention and thus does have some alternative means for protecting its interests, for the purpose of 10 C.F.R. 2.309(c)(1)(v), that process is not analogous to participation in an NRC adjudicatory proceeding and therefore does not weigh heavily against the petitioner's intervention in the NRC proceeding; LBP-10-1, 71 NRC 165 (2010)

although petitioner has established the requisite standing, the hearing request must be denied because of a failure to proffer one admissible contention; CLI-10-7, 71 NRC 133 (2010); LBP-10-1, 71 NRC 165 (2010)

an admissible contention under the good cause standard must allege that a construction permit holder's reasons for past delay failed to constitute good cause for a CP extension and be supported by a showing that construction delay is traceable to permit holder action that was intentional and without a valid business purpose; LBP-10-7, 71 NRC 391 (2010)

an amended contention challenging applicant's final safety analysis report on its low-level radioactive waste storage plan was admitted based on intervenor's adequately supported challenge to the plan's provisions regarding waste volume reduction; LBP-10-8, 71 NRC 433 (2010)

any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue will be dismissed; LBP-10-6, 71 NRC 350 (2010); LBP-10-7, 71 NRC 391 (2010)

any supporting material offered by intervenors is subject to board scrutiny both for what it does and does not show; LBP-10-7, 71 NRC 391 (2010); LBP-10-10, 71 NRC 529 (2010)

at the operating license stage, licensing boards will not admit contentions concerning the need for power or alternative energy sources; LBP-10-12, 71 NRC 656 (2010)

because a contention focuses on safety-related aspects of a COL application, it is not apparent that the issue resolved in the board's admissibility ruling has any particular implications for a contention challenging the environmental impacts of long-term onsite low-level radioactive waste storage admitted and pending in another proceeding; LBP-10-8, 71 NRC 433 (2010)

because intervenors cannot reasonably be expected to discover the QA issues that gave rise to a notice of violation without the NOV itself as notice, they have plausibly argued that their new contention is based on new and materially different information; LBP-10-9, 71 NRC 493 (2010)

before a board may refer a design certification-related contention to the Staff and hold it in abeyance, the contention must first be found to be admissible; CLI-10-1, 71 NRC 1 (2010)

boards have discretion to reformulate contentions so as to clarify the issues for litigation; CLI-10-14, 71 NRC 449 (2010); LBP-10-9, 71 NRC 493 (2010)

boards may appropriately view petitioner's supporting information in a light favorable to the petitioner, but failure to provide such information regarding a proffered contention requires that the contention be rejected; LBP-10-7, 71 NRC 391 (2010)

boards may not supply information that is missing or make assumptions of fact not provided by the petitioner; CLI-10-14, 71 NRC 449 (2010); LBP-10-6, 71 NRC 350 (2010)

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Category 1 issues, which are those generically addressed by the NRC's Generic Environmental Impact Statement for License Renewal, are inadmissible in a license renewal proceeding; LBP-10-13, 71 NRC 673 (2010)

challenge to the severe accident mitigation design alternatives analysis performed for the AP1000 certified design constitutes an impermissible challenge to NRC regulations; CLI-10-1, 71 NRC 1 (2010)

Commission regulations may not be directly attacked in adjudicatory proceedings, but a party may petition for a waiver of the application of a regulation; LBP-10-12, 71 NRC 656 (2010)

contention admissibility requirements are deliberately strict, and any contention that does not satisfy the requirements will be rejected; CLI-10-9, 71 NRC 245 (2010); LBP-10-6, 71 NRC 350 (2010)

contention alleging a failure to evaluate the impact of a severe accident at one unit on other units when the initiating event is an external event such as an earthquake is inadmissible; LBP-10-10, 71 NRC 529 (2010)

contention alleging that depleted uranium-contaminated bombing plume dust causes health issues in the community is inadmissible because it lacks a supporting statement of the alleged facts or expert opinions; LBP-10-4, 71 NRC 216 (2010)

contention alleging that the Army employs truckers to remove depleted uranium-contaminated soil from its site and dump it in the community is inadmissible; LBP-10-4, 71 NRC 216 (2010)

contention standards require pleading specific grievances, not simply providing general notice pleadings; CLI-10-11, 71 NRC 287 (2010)

contention that applicant failed to address the impact of a chain reaction that leads to more than one unit experiencing a severe accident is inadmissible; LBP-10-10, 71 NRC 529 (2010)

contention that applicant failed to consider and evaluate the impacts of severe accident scenarios, regardless of probability, with release times shorter than the duration needed to achieve cold shutdown, is inadmissible; LBP-10-10, 71 NRC 529 (2010)

contention that applicant's failure to address externally initiated accident scenarios is a material omission from the environmental report is inadmissible; LBP-10-10, 71 NRC 529 (2010)

contentions challenging low-level radioactive waste storage may not rely on 10 C.F.R. Part 61, which pertains to land disposal facilities; CLI-10-2, 71 NRC 27 (2010)

contentions must be accompanied by a concise statement of the alleged facts or expert opinions that support the requestor's/petitioner's position on the issue together with references to the specific sources and documents on which it intends to rely to support its position; LBP-10-6, 71 NRC 350 (2010)

contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-10-7, 71 NRC 391 (2010)

contentions must satisfy the six pleading requirements of 10 C.F.R. 2.309(f)(1)(i)-(vi); LBP-10-4, 71 NRC 216 (2010)

contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-10-7, 71 NRC 391 (2010)

contentions that seek compliance with the National Environmental Policy Act must be based on applicant's environmental report; CLI-10-2, 71 NRC 27 (2010)

contentions that simply state petitioner's views about what regulatory policy should be do not present a litigable issue; LBP-10-7, 71 NRC 391 (2010)

contested issues must be within the scope of the proceeding; CLI-10-2, 71 NRC 27 (2010)

expert opinion that merely states a conclusion that the application is deficient, inadequate, or wrong without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the board of the ability to make the necessary, reflective assessment of the opinion; CLI-10-2, 71 NRC 27 (2010); LBP-10-6, 71 NRC 350 (2010); LBP-10-10, 71 NRC 529 (2010)

factors (v) and (vi) of 10 C.F.R. 2.309(c) generally are given less weight than factors (vii) and (viii); LBP-10-1, 71 NRC 165 (2010)

failure of petitioner to reference any portion of the combined license application with which it takes issue is grounds for dismissal of its contention; CLI-10-9, 71 NRC 245 (2010)

failure to comply with any of the contention pleading requirements of 10 C.F.R. 2.309(f)(1) is grounds for dismissing a contention; LBP-10-4, 71 NRC 216 (2010); LBP-10-7, 71 NRC 391 (2010)

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- failure to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact is grounds for dismissal of a contention; CLI-10-9, 71 NRC 245 (2010); LBP-10-6, 71 NRC 350 (2010)
- failure to specify the language of the issue framed by a contention and distinguish it from the discussion that provides the supporting foundation for the issue statement might be grounds for dismissing contentions; LBP-10-7, 71 NRC 391 (2010)
- for a contention to be admissible, it must satisfy eight pleading requirements; LBP-10-13, 71 NRC 673 (2010)
- for an intervention petition to be granted, it also must proffer a contention that meets the general admissibility requirements; LBP-10-1, 71 NRC 165 (2010)
- general assertions, without some effort to show why the assertions undercut findings or analyses in the environmental report, fail to satisfy the requirements of 10 C.F.R. 2.309(f)(1)(vi); LBP-10-6, 71 NRC 350 (2010)
- if a contention satisfies the timeliness requirement of 10 C.F.R. 2.309(f)(2)(iii), then, by definition, it is not subject to section 2.309(c) which specifically applies to nontimely filings; LBP-10-9, 71 NRC 493 (2010)
- if a question arises over the scope of an admitted contention, the board or Commission will refer back to the bases set forth in support of the contention; CLI-10-15, 71 NRC 479 (2010)
- if intervenors provide no facts or expert opinion explaining why a conclusion in applicant's environmental report is incorrect, or fail to identify any SAMDAs that should be adopted if some unspecified new analysis were performed or any cost-beneficial SAMAs, their contention should be dismissed; LBP-10-10, 71 NRC 529 (2010)
- if petitioner fails to offer alleged facts or expert opinion and a reasoned statement explaining any alleged inadequacy in the application, then petitioner has not demonstrated a genuine dispute; LBP-10-6, 71 NRC 350 (2010)
- if petitioner has proffered an admissible contention asserting an environmentally preferable alternative to the proposed reactors, this also would trigger the requirement that the environmental report contain cost estimates; CLI-10-9, 71 NRC 245 (2010)
- if petitioner neglects to provide the requisite support for its contentions, the board should not make assumptions of fact that favor the petitioner or supply information that is lacking; LBP-10-6, 71 NRC 350 (2010); LBP-10-7, 71 NRC 391 (2010)
- in a contention of omission, intervenors must show that what is allegedly omitted is required by law; LBP-10-10, 71 NRC 529 (2010)
- in addition to general contention admissibility requirements, amended or new contentions filed after an intervenor's initial filing will be admitted only upon leave of the presiding officer and a demonstration that information upon which the contention is based was not previously available and is materially different than information previously available and has been submitted in a timely fashion based on the availability of the subsequent information; LBP-10-13, 71 NRC 673 (2010)
- in the absence of documentary or expert support, reliance on a guidance document to form the basis of a proposed contention does not, by itself, demonstrate a dispute with applicant; LBP-10-5, 71 NRC 329 (2010)
- information, alleged facts, and expert opinions provided by a petitioner will be examined by the board to confirm that the petitioner does indeed supply adequate support for its contention; LBP-10-6, 71 NRC 350 (2010)
- insofar as a contention concerns the feasibility of developing wind and compressed air energy storage together, land use relating to compressed air energy storage, and multiple, overlapping uses of land, it is admissible; LBP-10-10, 71 NRC 529 (2010)
- intervenor may not attack regulatory limits for effluent releases; LBP-10-9, 71 NRC 493 (2010)
- intervenor may petition the Commission for permission to challenge a rule, but must make a showing of special circumstances; LBP-10-9, 71 NRC 493 (2010)
- intervenor need not provide all supporting facts for a contention in the original submission or prove its case to have the contention admitted; LBP-10-9, 71 NRC 493 (2010)
- intervenor should not be held to a prima facie burden at the contention admissibility stage of a proceeding, but its showing should be sufficient to require reasonable minds to inquire further; LBP-10-10, 71 NRC 529 (2010)

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intervenor and their experts need to provide at the contention admission stage only a reasoned presentation sufficient to warrant further inquiry; LBP-10-10, 71 NRC 529 (2010)

intervenor's comments must be significant enough to step over a threshold requirement of materiality, not merely state that a particular mistake was made, but show why the mistake was of possible significance; LBP-10-10, 71 NRC 529 (2010)

intervenor must provide sufficient information to show that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that intervenor dispute, or, in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief; LBP-10-9, 71 NRC 493 (2010)

intervenor must timely file a new or amended contention that addresses the factors in section 2.714(b) in order to raise specific challenges regarding new information; LBP-10-10, 71 NRC 529 (2010)

intervenor with contentions rooted in new material information need not make the same showing as intervenor who have simply delayed filing their contentions until after expiration of the regulatory deadline; LBP-10-9, 71 NRC 493 (2010)

issues raised by a contention must be material to the licensing decision; LBP-10-9, 71 NRC 493 (2010)

issues related to costs only become relevant if an intervenor identifies an environmentally preferable, reasonable alternative; LBP-10-10, 71 NRC 529 (2010)

it is insufficient for petitioner to point to an Internet Web site or article and expect the board on its own to discern what particular issue a petitioner is raising and why; CLI-10-15, 71 NRC 479 (2010)

it is petitioner's responsibility to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of the proceeding; LBP-10-6, 71 NRC 350 (2010)

legal issue contentions do not require any supporting facts; LBP-10-11, 71 NRC 609 (2010)

licensing boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; CLI-10-2, 71 NRC 27 (2010)

low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that specified accident scenario presents a significant environmental impact that must be evaluated; LBP-10-10, 71 NRC 529 (2010)

low-level radioactive waste disposal contentions may not challenge Table S-3, consistent with NRC policy that regulations may not be the subject of collateral attack in an adjudication; CLI-10-2, 71 NRC 27 (2010)

materiality requires a showing that the alleged error or omission is of possible significance to the result of the proceeding; LBP-10-6, 71 NRC 350 (2010); LBP-10-7, 71 NRC 391 (2010)

materiality to the proceeding is required; CLI-10-2, 71 NRC 27 (2010)

mere notice pleading is insufficient for contention admission; LBP-10-6, 71 NRC 350 (2010)

mere recitation of unrelated adverse findings in reports of inspections and audits performed by the Staff and applicant does not supply information on what specifically would be litigated; LBP-10-9, 71 NRC 493 (2010)

merely quoting or citing documents as the basis for a contention is not enough to demonstrate a genuine dispute with the application on a material issue of law or fact; LBP-10-9, 71 NRC 493 (2010)

mootness occurs when a justiciable controversy no longer exists; LBP-10-10, 71 NRC 529 (2010)

need-for-power contentions are barred in operating license proceedings partly because at the time the OL application is submitted, most of the environmental disruption would have already occurred and an electric utility would use the new nuclear plant to meet increased energy demand or replace older, less economical generation capacity; LBP-10-12, 71 NRC 656 (2010)

neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention; LBP-10-7, 71 NRC 391 (2010)

new contentions filed by an intervenor must comply with timeliness standards; LBP-10-2, 71 NRC 190 (2010)

NRC regulations are not subject to attack in adjudications; CLI-10-1, 71 NRC 1 (2010); LBP-10-9, 71 NRC 493 (2010)

NRC rules do not call for a dispositive standard of proof for a contention or its bases; CLI-10-1, 71 NRC 1 (2010)

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NRC standards require petitioners to plead specific grievances, not simply to provide general notice pleadings; CLI-10-15, 71 NRC 479 (2010)

NRC would not accept incorporation by reference of another petitioner's issues in an instance where the petitioner has not submitted at least one admissible issue of its own; LBP-10-11, 71 NRC 609 (2010)

NRC's contention pleading standards, while strict, are not so strict as to require a board to abandon a commonsense approach to consideration of contentions; LBP-10-10, 71 NRC 529 (2010)

on appeal, the Commission found fault with the board's failure to identify clearly which of the diffuse and, in some cases, unsupported claims were admitted for hearing; CLI-10-2, 71 NRC 27 (2010)

"otherwise admissible" has been interpreted to mean a contention that meets the contention admissibility requirements of 10 C.F.R. 2.309(f)(1) but for the fact that it challenges a yet-to-be-certified reactor design; LBP-10-9, 71 NRC 493 (2010)

parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing; CLI-10-15, 71 NRC 479 (2010)

petitioner cannot include a reference as support without showing why the reference provides a basis to support its contention; LBP-10-10, 71 NRC 529 (2010)

petitioner did not properly challenge applicant's conclusion that no environmentally preferable alternative existed where the only alternative that petitioner mentions on appeal is the no-reactor option, and petitioner neither raised that option before the board nor supported its argument that it would always be environmentally preferable; LBP-10-6, 71 NRC 350 (2010)

petitioner does not have to prove its contention at the admissibility stage; LBP-10-6, 71 NRC 350 (2010)

petitioner failed to provide any evidence to challenge NRC's conclusion that the environmental effects of a hypothetical terrorist attack on a nuclear plant would be no worse than those caused by a severe accident; LBP-10-10, 71 NRC 529 (2010)

petitioner has not met the pleading requirements because it has not demonstrated any link between the purported violations at an existing unit and any future noncompliance or resulting safety risk affecting proposed units; CLI-10-9, 71 NRC 245 (2010)

petitioner is obliged to present the factual and expert support for its contention; LBP-10-6, 71 NRC 350 (2010); LBP-10-7, 71 NRC 391 (2010)

petitioner may amend contentions or file new contentions on issues arising under NEPA if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents; LBP-10-1, 71 NRC 165 (2010)

petitioner must present a clear statement of the basis for the contention and submit supporting information and references to specific documents and sources that establish the validity of the contention; CLI-10-1, 71 NRC 1 (2010)

petitioner must provide only a brief explanation of the rationale underlying its contention; LBP-10-13, 71 NRC 673 (2010)

petitioner must show that a genuine dispute exists on a material issue of law or fact with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute; LBP-10-6, 71 NRC 350 (2010)

petitioner must show that the information on which its new contention is based was not reasonably available to the public previously and that it filed its intervention petition promptly after learning of such new information; LBP-10-11, 71 NRC 609 (2010)

petitioner must show that the subject matter of a contention would impact the grant or denial of a pending license application; LBP-10-6, 71 NRC 350 (2010)

petitioner's challenge to the one-fire assumption in the API1000 design constitutes an impermissible challenge to Commission regulations; CLI-10-9, 71 NRC 245 (2010)

petitioners fail to explain how alleged impacts would arise from the proposed activities as opposed to past activities not in issue; LBP-10-11, 71 NRC 609 (2010)

petitioners must provide factual support for their claim that an enforcement-related injury could be redressed by a favorable board ruling; CLI-10-3, 71 NRC 49 (2010)

petitioners must set forth their contentions with particularity; CLI-10-15, 71 NRC 479 (2010)

pleading requirements are deliberately strict, and any contention that does not satisfy the requirements will be rejected; CLI-10-1, 71 NRC 1 (2010)

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prior to 2004, in addition to meeting the substantive admissibility criteria found in 10 C.F.R. 2.714(b)(2), the issue statement was based on environmental impact statement or environmental assessment information that differed significantly from the data or conclusions in the applicant's environmental report; LBP-10-1, 71 NRC 165 (2010)

properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application, including the safety analysis report and the environmental report, so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact; LBP-10-7, 71 NRC 391 (2010)

providing any material or document as the foundation for a contention, without setting forth an explanation of its significance, is inadequate to support admission of the contention; LBP-10-6, 71 NRC 350 (2010)

reasonably specific factual and legal allegations are required at the outset to ensure that matters admitted for hearing have at least some minimal foundation, are material to the proceeding, and provide notice to opposing parties of the issues they will need to defend against; CLI-10-11, 71 NRC 287 (2010)

regarding consideration of specific combination alternatives, the burden rests on petitioner to propose a particular alternative, and bare generalizations will not support an admissible contention; LBP-10-6, 71 NRC 350 (2010)

rejection or admission of a contention, where petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact, nor affects the basic structure of the proceeding in a pervasive and unusual manner; CLI-10-16, 71 NRC 486 (2010)

requests for hearing or petitions for leave to intervene must set forth with particularity the contentions sought to be raised, addressing six pleading requirements; CLI-10-1, 71 NRC 1 (2010)

SAMA contentions will be admitted in license renewal proceedings only if it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated; LBP-10-13, 71 NRC 673 (2010)

severe accident mitigation alternatives are a Category 2 issue that demands a site-specific analysis for license renewal; LBP-10-13, 71 NRC 673 (2010)

significant inaccuracies and omissions from the environmental report are proper subjects of contentions but details or nuances are not, nor are boards to flyspeck environmental documents; LBP-10-10, 71 NRC 529 (2010)

simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is insufficient to support admission of the contention; LBP-10-7, 71 NRC 391 (2010)

standards do not require dispositive proof of the contention or its bases, but they do require a clear statement as to the bases for the contention and supporting information and references to documents and sources that establish the validity of the contention; LBP-10-6, 71 NRC 350 (2010)

support for a contention that consisted of brief quotes from the petitioners' correspondence with a physicist were found to be bare conclusory remarks with respect to which the petitioner offered no explanation or analysis; CLI-10-2, 71 NRC 27 (2010)

the Commission defers to a board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion; CLI-10-1, 71 NRC 1 (2010); CLI-10-2, 71 NRC 27 (2010); CLI-10-7, 71 NRC 133 (2010)

the Commission will not consider information that is introduced for the first time on appeal in an attempt to cure deficient contentions; CLI-10-1, 71 NRC 1 (2010)

the good cause factor favors petitioners who have filed their petition within 30 days of the availability of the document they contend contains new and significant information so as to form the basis for their contention; LBP-10-1, 71 NRC 165 (2010)

the materiality requirement for contention admission often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment; LBP-10-7, 71 NRC 391 (2010)

the reach of a contention necessarily hinges upon its terms coupled with its stated bases; CLI-10-11, 71 NRC 287 (2010)

the SAMDA analysis is part of the design certification application and thus intervenor's contention constitutes an impermissible challenge to a future rulemaking; LBP-10-10, 71 NRC 529 (2010)

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the scope of a contention is limited to issues of law or fact pleaded with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with NRC rules; CLI-10-5, 71 NRC 90 (2010); CLI-10-15, 71 NRC 479 (2010)

the scope of an enforcement adjudication is limited to the question of whether the order should be sustained; CLI-10-3, 71 NRC 49 (2010)

the scope of the proceeding and thus of admissible contentions is defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-10-9, 71 NRC 493 (2010)

there is a difference between what NRC must look at in order to evaluate cumulative impacts under the National Environmental Policy Act and the scope of a particular cumulative impacts contention, which may be a subset of the total array of cumulative impacts required to be examined; CLI-10-5, 71 NRC 90 (2010)

threshold pleading standards require petitioners to review application materials and set forth their contentions with particularity; CLI-10-11, 71 NRC 287 (2010)

to be admissible, a contention must assert an issue of law or fact that is material to the findings NRC must make to support the action that is involved in the proceeding; LBP-10-6, 71 NRC 350 (2010); LBP-10-9, 71 NRC 493 (2010)

to be admissible, a contention must satisfy, without exception, each of the criteria set out in 10 C.F.R. 2.309(f)(1)(i)-(vi); LBP-10-2, 71 NRC 190 (2010); LBP-10-6, 71 NRC 350 (2010)

to be admissible, a contention must show that some significant link exists between the claimed deficiency and either the health and safety of the public or the environment; LBP-10-6, 71 NRC 350 (2010)

to force intervenors to file contentions before the results of an ongoing NRC investigation are announced to the public would effectively force intervenors to speculate about the results of such investigations and the conclusions the Staff might reach; LBP-10-9, 71 NRC 493 (2010)

to raise a timely contention, a party is not expected to piece together disparate shreds of information that, standing alone, have little apparent significance; LBP-10-9, 71 NRC 493 (2010)

to support a contention challenging a Commission rule, petitioner must request, and demonstrate any supporting reasons for, a waiver of the rule; CLI-10-9, 71 NRC 245 (2010)

to the extent a new contention will cause delay, it is the price for affording the public the opportunity to litigate questions arising from an applicant's failure to comply with quality assurance requirements; LBP-10-9, 71 NRC 493 (2010)

to the extent petitioner challenges the SAMDA analysis, it is an impermissible challenge to the AP1000 certified design in 10 C.F.R. Part 52, Appendix D; CLI-10-9, 71 NRC 245 (2010)

under Commission precedent on contentions of omission, once information asserted to have been omitted is supplied, the original contention is moot, and intervenors must timely file a new or amended contention in order to raise specific challenges regarding the new information; LBP-10-5, 71 NRC 329 (2010)

under pre-2004 rules, the fact that a petition or new/amended contention was filed after the hearing opportunity notice deadline because the document or other item relied upon as the submission trigger was not available was considered good cause for the late filing; LBP-10-1, 71 NRC 165 (2010)

when a contention is based on a factual underpinning in a document that has been essentially repudiated by the source of that document, the contention may be dismissed unless the intervenor offers another independent source; LBP-10-9, 71 NRC 493 (2010)

when an issue is no longer live, such that a party no longer has a legal interest in the issue, then it is moot; LBP-10-10, 71 NRC 529 (2010)

when character or integrity issues are raised, they are expected to be directly germane to the challenged licensing action; CLI-10-9, 71 NRC 245 (2010)

when petitioner has filed an expert declaration with its petition, indicating that it can assist, through expert opinion, in the development of a sound record, this weighs in favor of admission; LBP-10-1, 71 NRC 165 (2010)

when the draft or final environmental impact statement for a combined license application has not been issued so as to provide petitioner with a basis for framing its contention, the licensing board must look to the three other factors specified in 10 C.F.R. 2.309(f)(2) in assessing the admissibility of a new NEPA-related issue statement; LBP-10-1, 71 NRC 165 (2010)

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- where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot; LBP-10-10, 71 NRC 529 (2010)
- where a contention challenges applicant's compliance with the Commission's rules implementing the National Environmental Policy Act, materiality relates not only to the Commission's determination regarding denial, issuance, or conditioning of the requested combined license, but also to the Commission's fulfillment of its obligations under NEPA; LBP-10-6, 71 NRC 350 (2010)
- where any issue arises over the proper scope of a contention, NRC opinions have long referred back to the bases set forth in support of the contention; CLI-10-11, 71 NRC 287 (2010)
- where petitioner has not shown a reasonably close causal relationship between an aircraft attack and the relicensing proceeding at issue, such an attack does not warrant NEPA evaluation; CLI-10-9, 71 NRC 245 (2010)
- with respect to 10 C.F.R. 2.309(c)(1)(vi), the presence of another party admitted to the proceeding, particularly when that party previously raised the issue that is the subject of the new contention, weighs against a petitioner; LBP-10-1, 71 NRC 165 (2010)
- CONTENTIONS, LATE-FILED**
- a new contention may be filed after the deadline found in the notice of hearing with leave of the presiding officer upon a showing that information upon which it is based was not previously available, is materially different than information previously available, and has been submitted in a timely fashion based on the availability of the subsequent information; LBP-10-9, 71 NRC 493 (2010)
- absent good cause, a compelling showing must be made on the other section 2.309(c) factors if a nontimely petition is to be granted or a nontimely contention is to be admitted; LBP-10-1, 71 NRC 165 (2010)
- although admitting the new contention would broaden the issues in dispute, in the early stage of the proceeding this does not weigh heavily against a petitioner; LBP-10-1, 71 NRC 165 (2010)
- although petitioner could participate in another federal agency's comment process relating to a proposed environmental assessment that is the focus of a new contention and thus does have some alternative means for protecting its interests, for the purpose of 10 C.F.R. 2.309(c)(1)(v), that process is not analogous to participation in an NRC adjudicatory proceeding and therefore does not weigh heavily against petitioner's intervention in the NRC proceeding; LBP-10-1, 71 NRC 165 (2010)
- amendment of a combined license application to comply with an amended aircraft impacts rule during the pendency of the COL application could form the basis for a late-filed contention; CLI-10-1, 71 NRC 1 (2010)
- contentions will not be entertained absent a determination by the Commission, the licensing board, or a presiding officer that a balancing of the factors specified in 10 C.F.R. 2.309(c)(1)(i)-(viii) favors admission; CLI-10-4, 71 NRC 56 (2010); LBP-10-9, 71 NRC 493 (2010)
- factors (v) and (vi) of 10 C.F.R. 2.309(c) generally are given less weight than factors (vii) and (viii); LBP-10-1, 71 NRC 165 (2010)
- good cause is the most significant of the section 2.309(c) late-filing factors; LBP-10-1, 71 NRC 165 (2010); LBP-10-9, 71 NRC 493 (2010)
- if a contention satisfies the timeliness requirement of 10 C.F.R. 2.309(f)(2)(iii), then, by definition, it is not subject to section 2.309(c) which specifically applies to nontimely filings; LBP-10-9, 71 NRC 493 (2010)
- intervenor with contentions rooted in new material information need not make the same showing as intervenors who have simply delayed filing their contentions until after expiration of the regulatory deadline; LBP-10-9, 71 NRC 493 (2010)
- new contention is untimely if information on which it is based has been available since submission of applicant's environmental report; LBP-10-13, 71 NRC 673 (2010)
- non-NEPA-related contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer; LBP-10-1, 71 NRC 165 (2010)
- nontimely hearing requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the licensing board that the petition and/or request should be granted and/or the contentions should be admitted based on a balancing of the factors specified in 10 C.F.R. 2.309(c)(1)(i)-(viii); LBP-10-4, 71 NRC 216 (2010)

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- once a petition to intervene and request for hearing have been granted and contentions are admitted for hearing, appeals of board rulings on new or amended contentions are treated under section 2.341(f)(2), regardless of the subject matter of those contentions; CLI-10-16, 71 NRC 486 (2010)
- petitioner may amend contentions or file new contentions on issues arising under NEPA if there are data or conclusions in the NRC environmental documents that differ significantly from the data or conclusions in the applicant's documents; LBP-10-1, 71 NRC 165 (2010)
- the good cause factor favors petitioners who have filed their petition within 30 days of the availability of the document they contend contains new and significant information so as to form the basis for their contention; LBP-10-1, 71 NRC 165 (2010)
- to force intervenors to file contentions before the results of an ongoing NRC investigation are announced to the public would effectively force intervenors to speculate about the results of such investigations and the conclusions the Staff might reach; LBP-10-9, 71 NRC 493 (2010)
- when petitioner has filed an expert declaration with its petition, indicating that it can assist, through expert opinion, in the development of a sound record, this weighs in favor of admission; LBP-10-1, 71 NRC 165 (2010)
- when the draft or final environmental impact statement for a combined license application has not been issued so as to provide petitioner with a basis for framing its contention, the licensing board must look to the three other factors specified in 10 C.F.R. 2.309(f)(2) in assessing the admissibility of a new NEPA-related issue statement; LBP-10-1, 71 NRC 165 (2010)
- with respect to 10 C.F.R. 2.309(c)(1)(vi), the presence of another party admitted to the proceeding, particularly when that party previously raised the issue that is the subject of the new contention, weighs against a petitioner; LBP-10-1, 71 NRC 165 (2010)
- CONTESTED LICENSE APPLICATIONS**
- for a uranium enrichment facility, the licensing board shall make findings of fact and conclusions of law on admitted contentions; CLI-10-4, 71 NRC 56 (2010)
- COST-BENEFIT ANALYSES**
- energy sales projections are inherently uncertain, and the Commission is clear that it does not impose burdensome attempts to predict future conditions, and that it should be sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions; LBP-10-6, 71 NRC 350 (2010)
- if an alternative to the applicant's proposal is environmentally preferable, then NRC must determine whether the environmental benefits conferred by that alternative are worthwhile enough to outweigh any additional cost needed to achieve them; CLI-10-1, 71 NRC 1 (2010)
- issues related to costs only become relevant if an intervenor identifies an environmentally preferable, reasonable alternative; LBP-10-10, 71 NRC 529 (2010)
- the analysis is employed to determine a practicable dose limit; CLI-10-8, 71 NRC 142 (2010)
- unless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated, no purpose would be served to further refine the SAMA analysis, whose goal is only to determine what safety enhancements are cost-effective to implement; CLI-10-11, 71 NRC 287 (2010)
- COSTS**
- if petitioner has proffered an admissible contention asserting an environmentally preferable alternative to the proposed reactors, this also would trigger the requirement that the environmental report contain cost estimates; CLI-10-9, 71 NRC 245 (2010)
- it is inappropriate for the agency to consider economic costs when no environmentally preferable alternative has been identified; CLI-10-1, 71 NRC 1 (2010); CLI-10-9, 71 NRC 245 (2010)
- recoverability of spent nuclear fuel storage expenses is equally applicable to greater-than-Class-C waste, which is stored onsite in the same manner as spent nuclear fuel; CLI-10-2, 71 NRC 27 (2010)
- See also Decommissioning Costs
- COUNCIL ON ENVIRONMENTAL QUALITY**
- NRC takes into account CEQ regulations, with certain exceptions; CLI-10-2, 71 NRC 27 (2010)
- CUMULATIVE IMPACTS ANALYSIS**
- cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time; CLI-10-5, 71 NRC 90 (2010)

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there is a difference between what NRC must look at in order to evaluate cumulative impacts under the National Environmental Policy Act and the scope of a particular cumulative impacts contention, which may be a subset of the total array of cumulative impacts required to be examined; CLI-10-5, 71 NRC 90 (2010)

CURRENT LICENSING BASIS

each nuclear power plant has a plant-specific licensing basis that must be maintained during the renewal term in the same manner and to the same extent as during the original licensing term; CLI-10-14, 71 NRC 449 (2010)

NRC has the authority and responsibility to supplement or to amend conditions to the current licensing basis of an existing operating license at the time of license renewal if deemed necessary to protect the environment; LBP-10-13, 71 NRC 673 (2010)

this set of NRC requirements includes regulations, orders, technical specifications, and license conditions applicable to a specific plant as well as licensee's written, docketed commitments for ensuring compliance with applicable NRC requirements and the plant-specific design basis; CLI-10-14, 71 NRC 449 (2010); LBP-10-13, 71 NRC 673 (2010)

DEADLINES

all parties, except NRC Staff, shall make mandatory disclosures within 45 days of the issuance of the licensing board order admitting contentions; CLI-10-4, 71 NRC 56 (2010)

because of apparent electronic complications and the lack of a challenge to intervenors' reply document as late, the board treats a late filing as a valid reply; LBP-10-9, 71 NRC 493 (2010)

motions for reconsideration must be filed within 10 days of the action for which reconsideration is requested; CLI-10-9, 71 NRC 245 (2010)

no later than 30 days before the commencement of the hearing at which an issue is to be presented, all parties other than the NRC Staff shall make the required pretrial disclosures; CLI-10-4, 71 NRC 56 (2010)

DECISION ON THE MERITS

the board did not make an impermissible merits ruling by observing that a contention was supported by the affidavit of an expert; CLI-10-2, 71 NRC 27 (2010)

DECISIONS

appeals of an initial decision or partial initial decision of the presiding officer are permitted in the high-level waste repository proceeding; CLI-10-10, 71 NRC 281 (2010)

DECOMMISSIONING

utilities must dispose of greater-than-Class-C waste before they can decommission reactor sites; CLI-10-2, 71 NRC 27 (2010)

DECOMMISSIONING COSTS

a provision for ALARA determinations allows the use of cost as a factor for determining what level of remediation is cost-effective below the standards, but is not allowed by the New Jersey Agreement State program; CLI-10-8, 71 NRC 142 (2010)

DECOMMISSIONING PLANS

filing of a petition for alternative soil remediation standards is permitted as long as the resulting dose would not exceed 15 mrem per year; CLI-10-8, 71 NRC 142 (2010)

if licensee perceives a difficulty in meeting the deadline for submission of a revised decommissioning plan, it may request an extension of time from the Agreement State; CLI-10-8, 71 NRC 142 (2010)

licensee's plan would have to show that the maximum annual dose to any person is as low as is reasonably achievable below 15 mrem; CLI-10-8, 71 NRC 142 (2010)

DECOMMISSIONING PROCEEDINGS

where the proximity presumption did not apply, petitioner who commuted past the entrance of a plant once or twice a week was found to have standing; CLI-10-7, 71 NRC 133 (2010)

DEFERRED STATUS

a facility can be reactivated from deferred status so that construction can begin again, which includes providing 120 days' notice to the Staff before restarting construction activities; LBP-10-7, 71 NRC 391 (2010)

if a construction permit holder wishes to discontinue construction activities at a facility but continue to have its 10 C.F.R. Part 50 construction authorization remain effective, it can do so under the terms of the 1987 Commission Policy Statement on Deferred Plants; LBP-10-7, 71 NRC 391 (2010)

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the 1987 Commission Policy Statement on Deferred Plants sets forth the process under which a plant could be placed in a terminated status pending withdrawal of the CP, as well as procedures and requirements for reactivating the facility from terminated status; LBP-10-7, 71 NRC 391 (2010)

DEFINITIONS

“ALARA” is defined as every reasonable effort to maintain exposures to radiation as far below the dose limits in Part 20 as is practical consistent with the purpose for which the licensed activity is undertaken; CLI-10-8, 71 NRC 142 (2010)

an alternative is “reasonable” if it is both feasible (possible, viable) and non-speculative; LBP-10-10, 71 NRC 529 (2010)

“current licensing basis” is the set of NRC requirements that includes regulations, orders, technical specifications, and license conditions applicable to a specific plant as well as licensee’s written, docketed commitments for ensuring compliance with applicable NRC requirements and the plant-specific design basis; CLI-10-14, 71 NRC 449 (2010)

“forfeit” means something surrendered as punishment for a crime, offense, error, or breach of contract; CLI-10-6, 71 NRC 113 (2010)

in the context of appropriately defining terms and reconciling concepts such as “reasonable,” “feasible,” and “reasonably available,” a problem for agencies is that even the term “alternatives” is not self-defining; LBP-10-10, 71 NRC 529 (2010)

NRC was reasonable in not providing a quantifiable definition for the key regulatory phrase “conservative manner,” given that relevant judgment calls did not lend themselves to rigid statistical definitions; CLI-10-14, 71 NRC 449 (2010)

“potential party” is defined as any person who has requested, or who may intend to request, a hearing or petition to intervene in a hearing under 10 C.F.R. Part 2, other than hearings conducted under Subparts J and M of 10 C.F.R. Part 2; LBP-10-5, 71 NRC 329 (2010)

“prima facie showing” means that the affidavits supporting a petition for rule waiver must present each element of the case for waiver in a persuasive manner with adequate supporting facts; LBP-10-12, 71 NRC 656 (2010)

DELAY OF PROCEEDING

to the extent a new contention will cause delay, it is the price for affording the public the opportunity to litigate questions arising from an applicant’s failure to comply with quality assurance requirements; LBP-10-9, 71 NRC 493 (2010)

DEMAND-SIDE MANAGEMENT

because DSM reduces by a small portion applicant’s demand for power, it should be analyzed in this instance as a surrogate for need for power; LBP-10-6, 71 NRC 350 (2010)

impact of proposed energy conservation alternatives regarding demand for energy must be susceptible to a reasonable degree of proof; LBP-10-10, 71 NRC 529 (2010)

DEPARTMENT OF ENERGY

DOE is authorized to make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of the Atomic Energy Act; LBP-10-11, 71 NRC 609 (2010)

DOE is prohibited from characterizing a second repository site unless Congress has specifically authorized and appropriated funds for such activities; LBP-10-11, 71 NRC 609 (2010)

DOE’s environmental impact statement is not to consider the need for the high-level waste repository, the time of initial availability of a repository, alternative sites to the Yucca Mountain site, or nongeologic alternatives to such site; LBP-10-11, 71 NRC 609 (2010)

during site characterization, DOE may determine that the Yucca Mountain site is unsuitable for development as a repository; LBP-10-11, 71 NRC 609 (2010)

NRC does not owe deference to DOE where DOE’s interpretation of NRC’s own responsibilities is reflected in nothing more formal than a motion before the board and not, for example, in a formal agency adjudication or notice-and-comment rulemaking; LBP-10-11, 71 NRC 609 (2010)

that Congress may have authorized NRC to regulate DOE’s disposal of radioactive waste before it enacted the Nuclear Waste Policy Act hardly negates the fact that in the NWPA, Congress specifically directed NRC to issue requirements and criteria for evaluating repository-related applications and, not insignificantly, how to do so; LBP-10-11, 71 NRC 609 (2010)

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the Secretary of DOE does not have the discretion to substitute his policy for the one established by Congress that mandates progress toward a merits decision by NRC on a construction permit for the high-level waste repository; LBP-10-11, 71 NRC 609 (2010)

DEPLETED URANIUM

although the Army has the burden to protect the public from depleted uranium, that issue is not relevant to a standing inquiry; LBP-10-4, 71 NRC 216 (2010)

an approach for disposition of depleted tails that is consistent with the USEC Privatization Act, such as transfer to DOE for disposal, constitutes a plausible strategy; CLI-10-4, 71 NRC 56 (2010)

contention alleging that depleted uranium-contaminated bombing plume dust causes health issues in the community is inadmissible because it lacks a supporting statement of the alleged facts or expert opinions; LBP-10-4, 71 NRC 216 (2010)

contention alleging that the Army employs truckers to remove depleted uranium-contaminated soil from its site and dump it in the community is inadmissible; LBP-10-4, 71 NRC 216 (2010)

DU from an enrichment facility is appropriately classified as low-level radioactive waste; CLI-10-4, 71 NRC 56 (2010)

DESIGN

a nuclear power plant must be designed against accidents that are anticipated during the life of the facility; CLI-10-9, 71 NRC 245 (2010)

See also Reactor Design

DESIGN BASIS EVENTS

construction permit applications must consider the consequences of design basis events; CLI-10-1, 71 NRC 1 (2010)

design basis event is distinguished from design basis threat; CLI-10-1, 71 NRC 1 (2010); CLI-10-9, 71 NRC 245 (2010)

DESIGN BASIS THREAT

design basis event is distinguished from design basis threat; CLI-10-1, 71 NRC 1 (2010); CLI-10-9, 71 NRC 245 (2010)

the agency decided not to include the threat of air attacks in the 2007 revision to the design basis threat rule, a decision upheld by the Ninth Circuit; CLI-10-9, 71 NRC 245 (2010)

with respect to aircraft crash as an element of the design basis threat, adequate protection against an air threat is assured by the active defenses provided by other federal agencies, together with what reasonably could be expected of licensees; CLI-10-1, 71 NRC 1 (2010)

DESIGN CERTIFICATION

a board erred in referring a contention to the Staff for consideration in conjunction with the design certification rulemaking without first assessing its admissibility; CLI-10-1, 71 NRC 1 (2010)

applicant may reference a design certification that the Commission has docketed but not granted; LBP-10-9, 71 NRC 493 (2010)

applicant may, at its own risk, submit a combined license application that does not reference a certified design; CLI-10-1, 71 NRC 1 (2010)

challenge to the SAMDA analysis performed for the AP1000 certified design constitutes an impermissible challenge to NRC regulations; CLI-10-1, 71 NRC 1 (2010)

NRC rules permit the filing of a combined license application during the pendency of a design certification rulemaking; CLI-10-9, 71 NRC 245 (2010)

“otherwise admissible” has been interpreted to mean a contention that meets the admissibility requirements of 10 C.F.R. 2.309(f)(1) but for the fact that it challenges a yet-to-be-certified reactor design; LBP-10-9, 71 NRC 493 (2010)

petitioner’s challenge to the one-fire assumption in the AP1000 design constitutes an impermissible challenge to Commission regulations; CLI-10-9, 71 NRC 245 (2010)

the SAMDA analysis is part of the design certification application and thus intervenor’s contention constitutes an impermissible challenge to a future rulemaking; CLI-10-9, 71 NRC 245 (2010);

LBP-10-10, 71 NRC 529 (2010)

DIRECTED CERTIFICATION

licensing boards must promptly certify to the Commission all novel legal or policy issues that would benefit from early Commission consideration should such issues arise in this proceeding; CLI-10-4, 71 NRC 56 (2010)

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DISCLOSURE

all parties, except NRC Staff, shall make mandatory disclosures within 45 days of the issuance of the licensing board order admitting contentions; CLI-10-4, 71 NRC 56 (2010)

although the NRC public website states that SUNSI encompasses a wide variety of categories (e.g., personnel privacy, attorney-client privilege, confidential source), there is no legal basis for sweeping aside the well-established and long-recognized privileges such as the Privacy Act, 5 U.S.C. § 552(a), and the attorney-client privilege; LBP-10-2, 71 NRC 190 (2010)

Anglo-American jurisprudence has long ensured that judicial proceedings will be open to the public; LBP-10-2, 71 NRC 190 (2010)

classified information is exempt; LBP-10-2, 71 NRC 190 (2010)

documents containing classified information or safeguards information must be evaluated paragraph by paragraph and those paragraphs containing classified information or SGI are to be redacted and the remaining paragraphs (not containing such sensitive material) are to be made available for disclosure to the public; LBP-10-2, 71 NRC 190 (2010)

documents that qualify as exempt from FOIA disclosure as sensitive unclassified nonsafeguards information are described; LBP-10-2, 71 NRC 190 (2010)

even if a document contains information that is exempt from disclosure, FOIA mandates that any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions that are exempt; LBP-10-2, 71 NRC 190 (2010)

interlocutory appeal to the Commission of certain rulings relating to sensitive unclassified nonsafeguards information is authorized; LBP-10-2, 71 NRC 190 (2010)

no later than 30 days before the commencement of the hearing at which an issue is to be presented, all parties other than the NRC Staff shall make the required pretrial disclosures; CLI-10-4, 71 NRC 56 (2010)

once the requesting party meets its burden of demonstrating a need for a document, the burden is upon the claimant of executive privilege to demonstrate a proper entitlement to exemption from disclosure; LBP-10-2, 71 NRC 190 (2010)

safeguards information qualifies for the exemption from disclosure; LBP-10-2, 71 NRC 190 (2010)

Staff's designation of its own material as SUNSI is inconsistent with SUNSI's purported objective of protecting licensee or applicant data; LBP-10-2, 71 NRC 190 (2010)

the duty to make all documents available does not apply to records specifically exempted from disclosure by statute; LBP-10-2, 71 NRC 190 (2010)

the Secretary is authorized to establish procedures for obtaining access to sensitive unclassified nonsafeguards information prior to granting intervention in a licensing proceeding; LBP-10-2, 71 NRC 190 (2010)

the Secretary of the Commission will assess initially whether the proposed recipient has shown a need for sensitive unclassified nonsafeguards information or safeguards information; LBP-10-2, 71 NRC 190 (2010)

to demonstrate a need for SUNSI, intervenors must discuss the basis for a proffered contention and describe why the information available to the intervenors is not sufficient to provide the basis and specificity for a proffered contention; LBP-10-5, 71 NRC 329 (2010)

withholding from public access an entire document just because it may contain some SUNSI information is not only a misuse of the SUNSI designator, but fails the logic test by excluding the public from access to information that is not security-related; LBP-10-2, 71 NRC 190 (2010)

DISCOVERY

parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense; LBP-10-2, 71 NRC 190 (2010)

relevant information need not be admissible at a trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence; LBP-10-2, 71 NRC 190 (2010)

to demonstrate a need for SUNSI, intervenors must discuss the basis for a proffered contention and describe why the information available to the intervenors is not sufficient to provide the basis and specificity for a proffered contention; LBP-10-5, 71 NRC 329 (2010)

DISCOVERY AGAINST NRC STAFF

parties shall not commence discovery under 10 C.F.R. 2.709 until issuance of the safety evaluation report or environmental impact statement unless the licensing board, in its discretion, finds that commencing

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- discovery before these documents are issued will expedite the hearing without adversely affecting the Staff's ability to complete its evaluation in a timely manner; CLI-10-4, 71 NRC 56 (2010)
- Staff's designation of its own material as SUNSI is inconsistent with SUNSI's purported objective of protecting licensee or applicant data; LBP-10-2, 71 NRC 190 (2010)
- DISMISSAL OF PROCEEDING**
- it is highly unusual to dispose of a proceeding on the merits, i.e., with prejudice, when in fact the health, safety, and environmental merits of an application have not been reached; LBP-10-11, 71 NRC 609 (2010)
- the prospect of a second lawsuit with its expenses and uncertainties or another application does not provide the requisite quantum of legal harm to warrant dismissal of an application with prejudice; LBP-10-11, 71 NRC 609 (2010)
- DOSE LIMITS**
- a cost-benefit analysis is employed to determine a practicable dose limit; CLI-10-8, 71 NRC 142 (2010)
- ALARA is defined as every reasonable effort to maintain exposures to radiation as far below the dose limits in Part 20 as is practical consistent with the purpose for which the licensed activity is undertaken; CLI-10-8, 71 NRC 142 (2010)
- filing of a petition for alternative soil remediation standards is permitted as long as the resulting dose would not exceed 15 mrem per year; CLI-10-8, 71 NRC 142 (2010)
- licensee's decommissioning plan would have to show that the maximum annual dose to any person is as low as is reasonably achievable below 15 mrem; CLI-10-8, 71 NRC 142 (2010)
- New Jersey's restricted release criteria are compatible with NRC rules; CLI-10-8, 71 NRC 142 (2010)
- DREDGING**
- where there is no proposal for major federal action within the meaning of National Environmental Policy Act § 102(C), there is no requirement for a NEPA analysis of dredging; CLI-10-5, 71 NRC 90 (2010)
- EARLY SITE PERMITS**
- when a combined license application references an ESP, neither applicant nor Staff needs to address environmental issues resolved in the ESP proceeding unless new and significant information arises on those issues; LBP-10-1, 71 NRC 165 (2010)
- EARTHQUAKES**
- contention alleging a failure to evaluate the impact of a severe accident at one unit on other units when the initiating event is an external event such as an earthquake is found inadmissible; LBP-10-10, 71 NRC 529 (2010)
- ECONOMIC EFFECTS**
- if petitioner has proffered an admissible contention asserting an environmentally preferable alternative to the proposed reactors, this also would trigger the requirement that the environmental report contain cost estimates; CLI-10-9, 71 NRC 245 (2010)
- it is inappropriate for the agency to consider economic costs when no environmentally preferable alternative has been identified; CLI-10-9, 71 NRC 245 (2010)
- ECONOMIC INJURY**
- economic harm has been held sufficient to establish standing under the Nuclear Waste Policy Act; LBP-10-11, 71 NRC 609 (2010)
- ECONOMIC ISSUES**
- it is inappropriate for the agency to consider economic costs when no environmentally preferable alternative has been identified; CLI-10-1, 71 NRC 1 (2010)
- EFFECTIVENESS**
- if a construction permit holder wishes to discontinue construction activities at a facility but continue to have its 10 C.F.R. Part 50 construction authorization remain effective, it can do so under the terms of the 1987 Commission Policy Statement on Deferred Plants; LBP-10-7, 71 NRC 391 (2010)
- ELECTRONIC FILING**
- for good cause shown, the board grants the requests of petitioners for exemptions from compliance with the Commission's E-filing requirement; LBP-10-4, 71 NRC 216 (2010)
- participants who believe that they have a good cause for not submitting documents electronically must file an exemption request with their initial paper filing, requesting authorization to continue to submit documents in paper format; CLI-10-4, 71 NRC 56 (2010)

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EMERGENCY PLANNING

adequacy of emergency planning is outside the scope of license renewal proceedings; LBP-10-13, 71 NRC 673 (2010)

there is no requirement that such concerns must be raised in the environmental report; LBP-10-10, 71 NRC 529 (2010)

ENERGY

NRC proceedings are not an open forums for discussing the country's need for energy and spent fuel storage; CLI-10-10, 71 NRC 281 (2010)

ENERGY EFFICIENCY

impact of proposed energy conservation alternatives regarding demand for energy must be susceptible to a reasonable degree of proof; LBP-10-10, 71 NRC 529 (2010)

the NEPA rule of reason does not require applicant to consider energy efficiency in its NEPA analysis, because energy efficiency is not a reasonable alternative for a merchant power producer; CLI-10-1, 71 NRC 1 (2010)

See also Demand-Side Management

ENFORCEMENT ACTIONS

if petitioners wish to propose security measures in addition to those laid out in a Staff enforcement order, their remedy is to petition NRC under 10 C.F.R. 2.206 for further enforcement action or to ask NRC to institute a rulemaking to impose broader security measures; CLI-10-3, 71 NRC 49 (2010)

ENFORCEMENT ORDERS

a Staff order that neither repudiates nor rescinds any NRC safety and security requirements, but rather imposes new, more stringent security requirements that supplement those already found in NRC regulations does not amount to unlawfully promulgated regulations; CLI-10-3, 71 NRC 49 (2010)

ENFORCEMENT PROCEEDINGS

petitioners must provide factual support for their claim that an enforcement-related injury could be redressed by a favorable board ruling; CLI-10-3, 71 NRC 49 (2010)

the scope of an enforcement adjudication is limited to the question of whether the order should be sustained; CLI-10-3, 71 NRC 49 (2010)

ENVIRONMENTAL ANALYSIS

a contention based on another agency's draft EA that does not apply to the time period in which proposed reactor units would be operational is not material to the findings the licensing board must make in the proceeding; LBP-10-1, 71 NRC 165 (2010)

although the Commission has complied with the Ninth Circuit's ruling for facilities within the Ninth Circuit, that experience is very limited and does not demonstrate that conducting environmental analyses of terrorist scenarios for the licensing of all major facilities would be practicable or lead to meaningful additional information; CLI-10-9, 71 NRC 245 (2010)

where there is no proposal for major federal action within the meaning of National Environmental Policy Act § 102(C), there is no requirement for a NEPA analysis of dredging; CLI-10-5, 71 NRC 90 (2010)

ENVIRONMENTAL IMPACT STATEMENT

a contention challenging the failure to include in the EIS for license renewal any consideration of the effects of an aircraft attack is inadmissible; LBP-10-10, 71 NRC 529 (2010)

agencies need only discuss those alternatives that are reasonable and will bring about the ends of the proposed action; LBP-10-6, 71 NRC 350 (2010)

alternatives that are remote and speculative do not require detailed discussion; LBP-10-10, 71 NRC 529 (2010)

although all environmental contentions may, in a general sense, ultimately be challenges to the NRC's compliance with NEPA, factual disputes of particular issues can be raised before the draft environmental impact statement is prepared; CLI-10-2, 71 NRC 27 (2010)

although NEPA requires that the environmental impact statement identify and address all reasonable alternatives, this does not mean that every conceivable alternative must be included; LBP-10-10, 71 NRC 529 (2010)

although there will always be more data that could be gathered, agencies must have some discretion to draw the line and move forward with decisionmaking; CLI-10-11, 71 NRC 287 (2010)

an EIS is not intended to be a research document, reflecting the frontiers of scientific methodology, studies, and data; CLI-10-11, 71 NRC 287 (2010)

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an EIS must rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives that were eliminated from detailed study, briefly discuss the reasons for their having been eliminated; LBP-10-10, 71 NRC 529 (2010)

an otherwise reasonable alternative will not be excluded from discussion in an EIS solely on the ground that it is not within the jurisdiction of the NRC; LBP-10-10, 71 NRC 529 (2010)

boards do not sit to flyspeck environmental documents or to add details or nuances; LBP-10-10, 71 NRC 529 (2010)

DOE's EIS is not to consider the need for the high-level waste repository, the time of initial availability of a repository, alternative sites to the Yucca Mountain site, or nongeologic alternatives to such site; LBP-10-11, 71 NRC 609 (2010)

for a combined license, Staff must discuss the reasonably foreseeable environmental impacts of the proposed project; CLI-10-2, 71 NRC 27 (2010)

in performing NEPA evaluations, agencies must consider three types of actions, three types of alternatives, and three types of impacts; CLI-10-5, 71 NRC 90 (2010)

low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that specified accident scenarios present a significant environmental impact that must be evaluated; LBP-10-10, 71 NRC 529 (2010)

NEPA requires an analysis of all impacts of connected actions, including direct, indirect, and cumulative impacts; CLI-10-5, 71 NRC 90 (2010)

NRC cannot either fail to perform an adequate evaluation or evade a NEPA responsibility by deferring to another agency; CLI-10-5, 71 NRC 90 (2010)

NRC Staff must discuss alternatives to the proposed action, and this discussion must incorporate a hard look at alternatives; LBP-10-10, 71 NRC 529 (2010)

NRC Staff's issuance of its draft and final EISs may lead to the filing of additional contentions if the data or conclusions contained in them are significantly different from the data or conclusions found in the applicant's documents; LBP-10-10, 71 NRC 529 (2010)

potential environmental impacts of a proposed action and any reasonable alternatives must be discussed; LBP-10-10, 71 NRC 529 (2010)

rejection of even viable and reasonable alternatives, after an appropriate evaluation, is not arbitrary and capricious; LBP-10-10, 71 NRC 529 (2010)

Staff will use information from applicant's environmental report in preparing its EIS; CLI-10-2, 71 NRC 27 (2010)

the hard look required by NEPA is subject to a rule of reason, such that it is not necessary to look at every conceivable alternative to the proposed licensing action, but only those that are feasible and reasonably related to the scope and goals of the proposed action; LBP-10-10, 71 NRC 529 (2010)

the National Environmental Policy Act allows agencies to select their own methodology as long as that methodology is reasonable; CLI-10-11, 71 NRC 287 (2010)

the National Environmental Policy Act does not require agencies to use technologies and methodologies that are still emerging and under development, or to study phenomena for which there are not yet standard methods of measurement or analysis; CLI-10-11, 71 NRC 287 (2010)

the National Environmental Policy Act requires an EIS for any agency action that is a major action significantly affecting the environment; LBP-10-7, 71 NRC 391 (2010)

the statutory language of the National Environmental Policy Act requires an EIS only in the event of a proposed action, and thus in the absence of a proposal there is nothing that could be the subject of the analysis envisioned by the statute for an EIS; CLI-10-5, 71 NRC 90 (2010)

there is no requirement to use the best scientific methodology, and NEPA should be construed in the light of reason if it is not to demand virtually infinite study and resources; CLI-10-11, 71 NRC 287 (2010)

where the agency's action is to approve or deny a proposal by a private party, the agency should ordinarily accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project; LBP-10-6, 71 NRC 350 (2010)

See also Generic Environmental Impact Statement

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ENVIRONMENTAL ISSUES

- although all environmental contentions may, in a general sense, ultimately be challenges to the NRC's compliance with NEPA, factual disputes of particular issues can be raised before the draft environmental impact statement is prepared; CLI-10-2, 71 NRC 27 (2010)
- because a contention focuses on the safety-related aspects of a COL application, it is not apparent that the issue resolved in the board's admissibility ruling has any particular implications for a contention challenging the environmental impacts of long-term onsite low-level radioactive waste storage admitted and pending in another proceeding; LBP-10-8, 71 NRC 433 (2010)
- contested proceedings litigate particular contentions that may include arguable NEPA-analysis shortfalls, whereas the Staff's NEPA analysis encompasses the full range of NEPA issues whether or not a contested proceeding even takes place; CLI-10-5, 71 NRC 90 (2010)
- prior to 2004, in addition to meeting the substantive admissibility criteria found in 10 C.F.R. 2.714(b)(2), the issue statement was based on environmental impact statement or environmental assessment information that differed significantly from the data or conclusions in the applicant's environmental report; LBP-10-1, 71 NRC 165 (2010)
- when a combined license application references an early site permit, neither applicant nor Staff needs to address environmental issues resolved in the ESP proceeding unless new and significant information arises on those issues; LBP-10-1, 71 NRC 165 (2010)

ENVIRONMENTAL QUALIFICATION OF ELECTRICAL EQUIPMENT

- all structures, systems, and components relied on in safety analyses or plant evaluations to perform a function that demonstrates compliance with the NRC's regulations are subject to aging management review for license renewal; CLI-10-14, 71 NRC 449 (2010)

ENVIRONMENTAL REPORT

- a contention that impacts from a severe radiological accident at any one unit on operation of other units at the site had not been, and should be, considered in the application's environmental report is found to be moot; LBP-10-10, 71 NRC 529 (2010)
- all reasonable alternatives must be identified; LBP-10-10, 71 NRC 529 (2010)
- although the requirements of NEPA are directed to federal agencies and the primary duties of NEPA accordingly fall on the NRC Staff in NRC proceedings, the initial requirement to analyze the environmental impacts of an action is directed to applicants; LBP-10-10, 71 NRC 529 (2010)
- applicant's comparison of the environmental impacts of nuclear and wind/compressed air energy storage is insufficient to adequately inform decisionmakers about the competing choices; LBP-10-10, 71 NRC 529 (2010)
- applicant's ER must describe the proposed action, state its purposes, describe the environment affected, and discuss the project's environmental impacts in proportion to their significance and alternatives to the proposal; CLI-10-2, 71 NRC 27 (2010)
- applicant's ER must, in relevant part, contain a discussion of alternatives sufficiently complete to aid the Commission in developing and exploring, pursuant to section 102(2)(E) of NEPA, appropriate alternatives to recommended courses of action; LBP-10-6, 71 NRC 350 (2010)
- boards do not sit to flyspeck environmental documents or to add details or nuances; LBP-10-10, 71 NRC 529 (2010)
- contention that applicant's failure to address externally initiated accident scenarios is a material omission from the environmental report is inadmissible; LBP-10-10, 71 NRC 529 (2010)
- contentions that seek compliance with NEPA must be based on applicant's ER; CLI-10-2, 71 NRC 27 (2010)
- general assertions, without some effort to show why the assertions undercut findings or analyses in applicant's ER, fail to satisfy the contention admissibility requirements of 10 C.F.R. 2.309(f)(1)(vi); LBP-10-6, 71 NRC 350 (2010)
- if intervenors provide no facts or expert opinion explaining why a conclusion in applicant's ER is incorrect, or fail to identify any SAMDAs that should be adopted if some unspecified new analysis were performed or any cost-beneficial SAMAs, their contention should be dismissed; LBP-10-10, 71 NRC 529 (2010)
- if petitioner has proffered an admissible contention asserting an environmentally preferable alternative to the proposed reactors, this also would trigger the requirement that the ER contain cost estimates; CLI-10-9, 71 NRC 245 (2010)

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license renewal applicants are required to consider severe accident mitigation alternatives in the ER prepared in connection with the application; CLI-10-11, 71 NRC 287 (2010)

NEPA-related contentions are to be filed based on an applicant's ER; LBP-10-10, 71 NRC 529 (2010)

NRC may comply with NEPA without requiring that applicant submit an ER, but NEPA and Council on Environmental Quality regulations permit agencies to request information from an applicant for a license or permit that will require a NEPA analysis; CLI-10-2, 71 NRC 27 (2010)

NRC's NEPA responsibilities and, by extension, the applicant's responsibilities under 10 C.F.R. Part 51, are subject to a rule of reason; LBP-10-6, 71 NRC 350 (2010)

omitting consideration of accident scenarios anticipated under 10 C.F.R. 50.150 and 50.54(hh) is contrary to the requirements of 42 U.S.C. § 2133(d); LBP-10-10, 71 NRC 529 (2010)

significant inaccuracies and omissions from the ER are proper subjects of contentions but details or nuances are not, nor are boards to flyspeck environmental documents; LBP-10-10, 71 NRC 529 (2010)

Staff will use information from applicant's ER in preparing its environmental impact statement; CLI-10-2, 71 NRC 27 (2010)

there is no requirement that safety and emergency planning concerns must be raised; LBP-10-10, 71 NRC 529 (2010)

ENVIRONMENTAL REVIEW

an agency must consider not every possible alternative, but every reasonable alternative; LBP-10-10, 71 NRC 529 (2010)

an issue cannot be identified as Category 1 if NRC has not made a generic determination that additional mitigation measures are unlikely to be warranted, given mitigation practices already in place; CLI-10-14, 71 NRC 449 (2010)

applicants need not provide site-specific analyses of environmental impacts of subjects identified as Category 1 issues in Appendix B to 10 C.F.R. Part 51, Subpart A; CLI-10-14, 71 NRC 449 (2010)

environmental impacts from the spent fuel pool, including potential beyond-design-basis accidents and the need for mitigation measures, are addressed in NRC's generic environmental impact statement for license renewal and do not require a site-specific analysis as part of an individual license renewal environmental review; CLI-10-14, 71 NRC 449 (2010)

Part 54 compliance is not dependent on complete fulfillment of Part 51 requirements, given that the Commission has explicitly excluded SAMA analysis from Part 54 and distinguished the safety requirements of Part 54 from the environmental evaluation commanded by Part 51; LBP-10-13, 71 NRC 673 (2010)

ERROR

a board did not err in reformulating a contention to state that the application failed to comply with 10 C.F.R. Part 51, rather than with the National Environmental Policy Act; CLI-10-2, 71 NRC 27 (2010)

a board erred in referring a contention to the Staff for consideration in conjunction with the design certification rulemaking without first assessing the contention's admissibility; CLI-10-1, 71 NRC 1 (2010); CLI-10-9, 71 NRC 245 (2010)

if a board erroneously rejected petitioner's motions, but the record does not suggest that petitioner suffered any prejudicial error, Commission review is not warranted; CLI-10-14, 71 NRC 449 (2010)

if leave to file a motion for reconsideration is granted, the motion must show compelling circumstances, such as the existence of an unanticipated, clear, and material error, which could not have been anticipated, that renders the decision invalid; CLI-10-9, 71 NRC 245 (2010)

the Commission defers to a board's factual findings and generally steps in only to correct clearly erroneous findings, that is, findings not even plausible in light of the record viewed in its entirety; CLI-10-5, 71 NRC 90 (2010)

the Commission defers to a board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion; CLI-10-1, 71 NRC 1 (2010); CLI-10-2, 71 NRC 27 (2010); CLI-10-9, 71 NRC 245 (2010); CLI-10-12, 71 NRC 319 (2010)

the standard of clear error for overturning a board's factual finding is quite high; CLI-10-5, 71 NRC 90 (2010)

EVIDENCE

in ruling on summary disposition motions, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor; CLI-10-11, 71 NRC 287 (2010)

SUBJECT INDEX

it is not for any court to examine the strength of the evidence upon which Congress based its judgment to approve the Yucca Mountain site; LBP-10-11, 71 NRC 609 (2010)

EVIDENTIARY HEARINGS

decisions on evidentiary questions fall within boards' authority to regulate hearing procedure; CLI-10-5, 71 NRC 90 (2010)

licensing boards normally have considerable discretion in making evidentiary rulings; CLI-10-5, 71 NRC 90 (2010)

the Commission will review decisions on evidentiary questions under an abuse of discretion standard; CLI-10-5, 71 NRC 90 (2010)

EXECUTIVE PRIVILEGE

once the requesting party meets its burden of demonstrating a need for a document, the burden is upon the claimant of executive privilege to demonstrate a proper entitlement to exemption from disclosure; LBP-10-2, 71 NRC 190 (2010)

EXEMPTIONS

for good cause shown, the board grants the requests of petitioners for exemptions from compliance with the Commission's E-filing requirement; LBP-10-4, 71 NRC 216 (2010)

if it seeks to withhold a document from a party or the public, or to bar a party or member of the public from attending any adjudicatory proceeding before a licensing board, NRC Staff must carry the burden of proving that the document or situation fits one of FOIA's specifically enumerated exceptions; LBP-10-2, 71 NRC 190 (2010)

individuals who will have access to safeguards information and believe they belong to one or more of the categories of individuals that are exempt from the criminal history records check and background check requirements should provide a statement identifying which exemption the requestor is invoking and explain the requestor's basis for believing that the exemption applies; CLI-10-4, 71 NRC 56 (2010)

once the requesting party meets its burden of demonstrating a need for a document, the burden is upon the claimant of executive privilege to demonstrate a proper entitlement to exemption from disclosure; LBP-10-2, 71 NRC 190 (2010)

participants who believe that they have a good cause for not submitting documents electronically must file an exemption request with their initial paper filing requesting authorization to continue to submit documents in paper format; CLI-10-4, 71 NRC 56 (2010)

states may provide exemptions from their rules upon application and a showing of hardship or compelling need, with the approval of the Commission on Radiation Protection; CLI-10-8, 71 NRC 142 (2010)

the duty to make all documents available does not apply to records specifically exempted from disclosure by statute; LBP-10-2, 71 NRC 190 (2010)

EXTENSION OF TIME

if licensee perceives a difficulty in meeting the deadline for submission of a revised decommissioning plan, it may request an extension of time from the Agreement State; CLI-10-8, 71 NRC 142 (2010)

open-ended extension requests should not be granted because hearing requests must be based on documents or other information available at the time the petition is to be filed; LBP-10-4, 71 NRC 216 (2010)

FEDERAL RULES OF CIVIL PROCEDURE

NRC standards governing summary disposition are based on those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; CLI-10-11, 71 NRC 287 (2010)

FINAL ENVIRONMENTAL IMPACT STATEMENT

NRC Staff's final environmental impact statement need not include a discussion of the need for power or alternative energy sources; LBP-10-12, 71 NRC 656 (2010)

FINAL SAFETY ANALYSIS REPORT

an amended contention challenging applicant's final safety analysis report on its low-level radioactive waste storage plan was admitted based on intervenor's adequately supported challenge to the plan's provisions regarding waste volume reduction; LBP-10-8, 71 NRC 433 (2010)

applicant's contingent long-term onsite low-level radioactive waste storage facility and the contents of its FSAR with regard to that facility are not governed by 10 C.F.R. 52.79(a)(4) as a part of the reactor facilities to be constructed under the requested combined licenses; LBP-10-8, 71 NRC 433 (2010)

SUBJECT INDEX

purported failures to provide detailed information regarding design, location, and worker health impacts do not identify a deficiency in low-level radioactive waste information that is required to be provided in the COL application; LBP-10-8, 71 NRC 433 (2010)

FINANCIAL ASSURANCE

creditor regulations in 10 C.F.R. 50.81 apply to the creation of creditor interests in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235; CLI-10-4, 71 NRC 56 (2010)

creditor regulations in 10 C.F.R. 70.44 apply to the creation of creditor interests in special nuclear material; CLI-10-4, 71 NRC 56 (2010)

financial criteria of 10 C.F.R. 70.22(a)(8) and 70.23(a)(5) can be met by conditioning the license to require funding commitments to be in place prior to construction and operation; CLI-10-4, 71 NRC 56 (2010)

FINDINGS OF FACT

the Commission defers to a board's factual findings and generally steps in only to correct clearly erroneous findings, i.e., findings not even plausible in light of the record viewed in its entirety; CLI-10-5, 71 NRC 90 (2010)

the Commission does not exercise its authority to make de novo findings of fact where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact; CLI-10-5, 71 NRC 90 (2010)

the licensing board's principal role in the adjudicatory process is to carefully review all of the evidence, including testimony and exhibits, and to resolve any factual disputes; CLI-10-5, 71 NRC 90 (2010)

FIRE PROTECTION

a contention that challenges compliance with fire protection regulations at an existing unit is outside the scope of a combined license proceeding; CLI-10-9, 71 NRC 245 (2010)

petitioner's challenge to the one-fire assumption in the AP1000 design constitutes an impermissible challenge to Commission regulations; CLI-10-9, 71 NRC 245 (2010)

FIRE PROTECTION SYSTEMS

all structures, systems, and components relied on in safety analyses or plant evaluations to perform a function that demonstrates compliance with the NRC's regulations are subject to aging management review for license renewal; CLI-10-14, 71 NRC 449 (2010)

FIRES

a contention on spent fuel pool fires is rejected as an impermissible challenge to NRC regulations and the license renewal generic environmental impact statement; CLI-10-11, 71 NRC 287 (2010)

combined license applications must describe plans for implementing guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities if large areas of the plant are lost due to explosions or fire; LBP-10-5, 71 NRC 329 (2010)

the licensing board rules on issues that concern guidance and strategies for addressing certain circumstances that might arise from potential beyond-design-basis explosions and fires; LBP-10-5, 71 NRC 329 (2010)

FIRST AMENDMENT

public access to courts is grounded in the First Amendment and free speech carries with it some freedom to listen; LBP-10-2, 71 NRC 190 (2010)

FOREIGN OWNERSHIP

creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements, such as sale and leaseback, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-10-4, 71 NRC 56 (2010)

FREEDOM OF INFORMATION ACT

a participant in administrative litigation, having an even greater interest in obtaining access to SUNSI than does the general public, is entitled to obtain documents under standards no more restrictive than would be accorded the general public under FOIA; LBP-10-2, 71 NRC 190 (2010)

classified information is exempt from disclosure; LBP-10-2, 71 NRC 190 (2010)

documents that qualify as exempt from FOIA disclosure as sensitive unclassified nonsafeguards information are described; LBP-10-2, 71 NRC 190 (2010)

SUBJECT INDEX

- even if a document contains information that is exempt from disclosure, FOIA mandates that any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions that are exempt; LBP-10-2, 71 NRC 190 (2010)
- if it seeks to withhold a document from a party or the public, or to bar a party or member of the public from attending any adjudicatory proceeding before a licensing board, NRC Staff must carry the burden of proving that the document or situation fits one of FOIA's specifically enumerated exceptions; LBP-10-2, 71 NRC 190 (2010)
- NRC implements and repeats the FOIA obligation that, with nine enumerated exceptions, each agency make copies of all records available to the public; LBP-10-2, 71 NRC 190 (2010)
- safeguards information qualifies for the exemption from disclosure; LBP-10-2, 71 NRC 190 (2010)
- the duty to make all documents available does not apply to records specifically exempted from disclosure by statute; LBP-10-2, 71 NRC 190 (2010)
- the public is entitled to copies of the transcripts of all hearings; LBP-10-2, 71 NRC 190 (2010)
- GENERIC ENVIRONMENTAL IMPACT STATEMENT**
- a contention on spent fuel pool fires is rejected as an impermissible challenge to NRC regulations and the license renewal GEIS; CLI-10-11, 71 NRC 287 (2010)
- GENERIC ISSUES**
- environmental impacts from the spent fuel pool, including potential beyond-design-basis accidents and the need for mitigation measures, are addressed generically in the NRC's generic environmental impact statement for license renewal, and do not require a site-specific analysis as part of an individual license renewal environmental review; CLI-10-14, 71 NRC 449 (2010)
- issue of whether location of a nuclear plant in a densely populated area allowed adoption of generic risk factors and a severe accident mitigation design alternatives decision supported by a policy statement rather than a rulemaking was confronted; LBP-10-10, 71 NRC 529 (2010)
- NRC cannot generically dispense with the consideration of SAMAs, under NEPA, through a policy statement issued pursuant to its Atomic Energy Act authority; LBP-10-13, 71 NRC 673 (2010)
- HEALTH EFFECTS**
- contention alleging that depleted uranium-contaminated bombing plume dust causes health issues in the community is inadmissible because it lacks a supporting statement of the alleged facts or expert opinions; LBP-10-4, 71 NRC 216 (2010)
- HEARING REQUESTS**
- a licensing board will grant a request for a hearing if it determines that the requestor has standing under the provisions of this section and has proposed at least one admissible contention; LBP-10-4, 71 NRC 216 (2010)
- intervention petitions must set forth with particularity the contentions sought to be raised; CLI-10-9, 71 NRC 245 (2010)
- open-ended extension requests should not be granted because hearing requests must be based on documents or other information available at the time the petition is to be filed; LBP-10-4, 71 NRC 216 (2010)
- See also Amendment of Hearing Requests
- HEARING REQUESTS, LATE-FILED**
- eight factors of 10 C.F.R. 2.309(c)(1) apply to nontimely intervention petitions, hearing requests, and contentions; LBP-10-9, 71 NRC 493 (2010)
- nontimely hearing requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the licensing board that the petition and/or request should be granted and/or the contentions should be admitted based on a balancing of the factors specified in 10 C.F.R. 2.309(c)(1)(i)-(viii); LBP-10-4, 71 NRC 216 (2010)
- HEARING RIGHTS**
- NRC shall provide a hearing upon request of any person whose interest may be affected by the proceeding; LBP-10-4, 71 NRC 216 (2010)
- HIGH-LEVEL WASTE REPOSITORY**
- a detailed, specific procedure for site selection and review by the Secretary of Energy, the President, and the Congress, followed by submission of the application for a construction permit, review, and final decision thereon by NRC was set out; LBP-10-11, 71 NRC 609 (2010)

SUBJECT INDEX

- Congress did not intend that its explicit mandate to NRC to consider and decide the merits of the high-level waste repository application might be nullified by a nonspecific reference to an obscure NRC procedural regulation as being among the laws to be applied; LBP-10-11, 71 NRC 609 (2010)
- DOE is prohibited from characterizing a second repository site unless Congress has specifically authorized and appropriated funds for such activities; LBP-10-11, 71 NRC 609 (2010)
- DOE was directed to limit its site selection efforts to Yucca Mountain and to provide for an orderly phase-out of site-specific activities at all other candidate sites; LBP-10-11, 71 NRC 609 (2010)
- DOE's environmental impact statement is not to consider the need for the repository, the time of initial availability of a repository, alternative sites to the Yucca Mountain site, or nongeologic alternatives; LBP-10-11, 71 NRC 609 (2010)
- during site characterization, DOE may determine that the Yucca Mountain site is unsuitable for development as a repository; LBP-10-11, 71 NRC 609 (2010)
- it is not for any court to examine the strength of the evidence upon which Congress based its judgment to approve the Yucca Mountain site; LBP-10-11, 71 NRC 609 (2010)
- submission of the application to construct a high-level waste geologic repository at Yucca Mountain triggered a duty on NRC's part to consider and to render a decision on the application; LBP-10-11, 71 NRC 609 (2010)
- that Congress may have authorized NRC to regulate DOE's disposal of radioactive waste before it enacted the Nuclear Waste Policy Act hardly negates the fact that in the NWPA, Congress specifically directed NRC to issue requirements and criteria for evaluating repository-related applications and, not insignificantly, how to do so; LBP-10-11, 71 NRC 609 (2010)
- the court deferred to NRC's interpretation of the Nuclear Waste Policy Act in promulgating regulations to be applied in administering the licensing stage for the high-level waste repository; LBP-10-11, 71 NRC 609 (2010)
- the law on withdrawal of an application does not require a determination of whether applicant's decision to withdraw is sound where the applicant's filing was wholly voluntary in the first place; LBP-10-11, 71 NRC 609 (2010)
- the public interest would best be served by leaving the option open to the applicant should changed conditions warrant pursuit of a withdrawn application; LBP-10-11, 71 NRC 609 (2010)
- the Secretary of the Department of Energy does not have the discretion to substitute his policy for the one established by Congress that mandates progress toward a merits decision by NRC on a construction permit for the high-level waste repository; LBP-10-11, 71 NRC 609 (2010)
- HIGH-LEVEL WASTE REPOSITORY APPLICATION**
- the prospect of a second lawsuit with its expenses and uncertainties or another application does not provide the requisite quantum of legal harm to warrant dismissal of an application with prejudice; LBP-10-11, 71 NRC 609 (2010)
- withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe; CLI-10-13, 71 NRC 387 (2010)
- HIGH-LEVEL WASTE REPOSITORY PROCEEDING**
- appeals may be taken from certain specified decisions of the pre-license application presiding officer and the presiding officer; CLI-10-10, 71 NRC 281 (2010)
- appeals of an initial decision or partial initial decision of the presiding officer are permitted; CLI-10-10, 71 NRC 281 (2010)
- as part of compliance with the LSN requirements, each petitioner must identify all its documentary material required by 10 C.F.R. 2.1003 and designate a responsible LSN official, who can certify that to the best of his or her knowledge all such material has been made electronically available; LBP-10-11, 71 NRC 609 (2010)
- before petitioner can be granted party status in the high-level waste proceeding, it must be able to demonstrate substantial and timely compliance with the Licensing Support Network requirements; LBP-10-11, 71 NRC 609 (2010)
- conditions are proposed that would ensure that DOE's documentary material is appropriately preserved and archived should its request to withdraw its application be granted; LBP-10-11, 71 NRC 609 (2010)
- if petitioner fails to demonstrate substantial and timely compliance with the Licensing Support Network requirements, it may later request party status upon a showing of subsequent compliance; LBP-10-11, 71 NRC 609 (2010)

SUBJECT INDEX

no appeals may be taken from any presiding officer order or decision, except as otherwise permitted by 10 C.F.R. 2.1015(a); CLI-10-10, 71 NRC 281 (2010)

NRC rules governing the high-level waste proceeding do not provide for interlocutory review; CLI-10-13, 71 NRC 387 (2010)

INCORPORATION BY REFERENCE

an attempt to circumvent page-limit rules by incorporating documents by reference could be grounds for sanctions; CLI-10-9, 71 NRC 245 (2010)

applicant would be permitted to incorporate information from its original construction permit application in a new application; CLI-10-6, 71 NRC 113 (2010)

NRC would not accept incorporation by reference of another petitioner's issues in an instance where the petitioner has not submitted at least one admissible issue of its own; LBP-10-11, 71 NRC 609 (2010)

INFORMAL PROCEEDINGS

summary disposition may be entered with respect to all or any part of the matters involved in the proceeding if the motion, along with any appropriate supporting materials, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law; LBP-10-8, 71 NRC 433 (2010)

summary disposition motions are to be resolved in accord with the same standards for dispositive motions that are utilized for formal hearings under Subpart G; LBP-10-8, 71 NRC 433 (2010)

INJUNCTIVE RELIEF

although technically not applicable to a request for a stay of NRC Staff action, the 10 C.F.R. 2.342(e) standards simply restate commonplace principles of equity universally followed when judicial (or quasi-judicial) bodies consider stays or other forms of temporary injunctive relief; CLI-10-8, 71 NRC 142 (2010)

INJURY IN FACT

a determination that an injury is fairly traceable to the challenged action does not depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible; LBP-10-4, 71 NRC 216 (2010)

even if a party seeking standing has some intent to return to an area, when such intentions are not supported by concrete plans or a specification of when future visits would take place, they do not support a finding of injury in the standing context; LBP-10-1, 71 NRC 165 (2010)

petitioner may not establish standing by alleging injury on behalf of another entity, but rather, petitioner must be the object of the actual or threatened injury; LBP-10-4, 71 NRC 216 (2010)

the requirement that an injury or threat of injury be concrete and particularized perforce means that the injury must not be conjectural or hypothetical; LBP-10-4, 71 NRC 216 (2010)

INSPECTION

See NRC Inspection

INTEGRATED PLANT ASSESSMENT

from among the three general categories of structures, systems, and components that fall within the initial focus of the license renewal safety review, applicants must identify and list those structures and components subject to an aging management review; CLI-10-14, 71 NRC 449 (2010)

INTERESTED GOVERNMENTAL ENTITY

a state, county, municipality, federally recognized Indian tribe, or agencies thereof may also seek to participate in a hearing as a nonparty; CLI-10-4, 71 NRC 56 (2010)

INTERVENTION

a licensing board will grant a request for a hearing if it determines that the requestor has standing and has proposed at least one admissible contention; LBP-10-4, 71 NRC 216 (2010); LBP-10-11, 71 NRC 609 (2010)

although complying with Commission regulations may be especially difficult for pro se petitioners, it has long been a basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation; LBP-10-4, 71 NRC 216 (2010)

although petitioner has established the requisite standing, the hearing request must be denied because of a failure to proffer one admissible contention; LBP-10-1, 71 NRC 165 (2010)

SUBJECT INDEX

before petitioner can be granted party status in the high-level waste proceeding, it must be able to demonstrate substantial and timely compliance with the Licensing Support Network requirements; LBP-10-11, 71 NRC 609 (2010)

if petitioner fails to demonstrate substantial and timely compliance with the Licensing Support Network requirements, it may later request party status upon a showing of subsequent compliance; LBP-10-11, 71 NRC 609 (2010)

INTERVENTION PETITIONERS

the Secretary of the Commission is authorized to establish procedures for obtaining access to sensitive unclassified nonsafeguards information prior to granting intervention in a licensing proceeding; LBP-10-2, 71 NRC 190 (2010)

INTERVENTION PETITIONS

a state, county, municipality, federally recognized Indian tribe, or agencies thereof may submit a petition to the Commission to participate as a party; CLI-10-4, 71 NRC 56 (2010)

an unopposed motion to withdraw the petition is granted; LBP-10-3, 71 NRC 213 (2010)

boards are to construe the intervention petitions in a light most favorable to petitioners; LBP-10-1, 71 NRC 165 (2010)

for an intervention petition to be granted, it also must proffer a contention that meets the general admissibility requirements; LBP-10-1, 71 NRC 165 (2010)

hearing requests must set forth with particularity the contentions sought to be raised; CLI-10-9, 71 NRC 245 (2010)

petitioner may not use its reply brief to cure pleading defects in its intervention petition; CLI-10-1, 71 NRC 1 (2010)

petitioners must address the nature of their right under the Atomic Energy Act to be made a party to the proceeding, the nature and extent of their property, financial, or other interest in the proceeding, and the possible effect of any order that may be entered in the proceeding on their interest; CLI-10-4, 71 NRC 56 (2010); LBP-10-7, 71 NRC 391 (2010)

petitioners must provide their name, address, and telephone number and specifically explain the reasons why intervention should be permitted; CLI-10-4, 71 NRC 56 (2010); LBP-10-7, 71 NRC 391 (2010)

petitioners shall set forth with particularity their interest in the proceeding and how that interest may be affected by the results of the proceeding; CLI-10-4, 71 NRC 56 (2010)

petitioners who are not represented by counsel are held to less rigid pleading standards than would ordinarily be applied to litigants who are represented by counsel; LBP-10-4, 71 NRC 216 (2010)

requests for hearing or petitions for leave to intervene must set forth with particularity the contentions sought to be raised, addressing six pleading requirements; CLI-10-1, 71 NRC 1 (2010)

state and federally recognized Indian tribes do not need to address standing requirements if the facility is located within their boundaries; CLI-10-4, 71 NRC 56 (2010)

the scope of a contention is limited to issues of law and fact pleaded with particularity in the intervention petition, including its stated bases; CLI-10-5, 71 NRC 90 (2010)

under the 2004 Part 2 revisions, contentions are now required to be included with, rather than being submitted sometime subsequent to the filing of, the intervention petition; LBP-10-1, 71 NRC 165 (2010)

INTERVENTION PETITIONS, LATE-FILED

absent a showing of good cause, a nontimely petition will not be excused unless the petitioner makes a compelling showing on the remaining factors; CLI-10-12, 71 NRC 319 (2010); LBP-10-1, 71 NRC 165 (2010); LBP-10-11, 71 NRC 609 (2010)

factors (v) and (vi) of 10 C.F.R. 2.309(c) generally are given less weight than factors (vii) and (viii); LBP-10-1, 71 NRC 165 (2010)

failure to comply with Commission pleading requirements for late filings constitutes sufficient grounds for rejecting intervention and hearing requests; LBP-10-4, 71 NRC 216 (2010)

good cause is accorded the greatest weight in ruling on a nontimely petition; CLI-10-12, 71 NRC 319 (2010); LBP-10-1, 71 NRC 165 (2010) LBP-10-11, 71 NRC 609 (2010)

in ruling on a nontimely petition, boards are to consider eight factors of 10 C.F.R. 2.309(c)(1) that will excuse the tardiness of the petition if, on balance, they weigh in favor of the petitioner; CLI-10-4, 71 NRC 56 (2010); CLI-10-12, 71 NRC 319 (2010); LBP-10-1, 71 NRC 165 (2010); LBP-10-4, 71 NRC 216 (2010); LBP-10-9, 71 NRC 493 (2010)

SUBJECT INDEX

new information may constitute good cause for late intervention if petitioners file promptly thereafter; LBP-10-11, 71 NRC 609 (2010)

petitioner must provide more than vague assertions that it will be able to assist in developing the record to satisfy a requirement for late filing; CLI-10-12, 71 NRC 319 (2010)

petitioner's failure to carefully read the governing procedural regulations does not constitute good cause for its late filing; CLI-10-12, 71 NRC 319 (2010)

petitioners may protect their interests by filing a request for Commission action under 10 C.F.R. 2.206 rather than a late-filed intervention petition; CLI-10-12, 71 NRC 319 (2010)

petitioners may protect their interests by participating as appropriate, as amici curiae; CLI-10-12, 71 NRC 319 (2010)

petitioner's tardiness due to its belated realization that it could present its arguments before the NRC did not constitute good cause for its late filing; CLI-10-12, 71 NRC 319 (2010)

petitioner's vague statements that it would rely on its experts and documents from various sources are insufficient to satisfy a requirement for late filing; CLI-10-12, 71 NRC 319 (2010)

when petitioner addresses 10 C.F.R. 2.309(c)(1)(viii), it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony; CLI-10-12, 71 NRC 319 (2010)

where petitioner conceded that information in its addendum was previously available, admitted the lateness of her filing, and made no effort at the time of its submission to justify its lateness or explain why the board should consider it, her request to supplement her submission is denied; LBP-10-4, 71 NRC 216 (2010)

INTERVENTION RULINGS

a board appropriately reviews the materials cited in support of a contention, while making no pronouncements on whether the information contained in the application or the claims made in the petition are valid; CLI-10-9, 71 NRC 245 (2010)

a board erred in referring a contention to the Staff for consideration in conjunction with the design certification rulemaking without first assessing the contention's admissibility; CLI-10-1, 71 NRC 1 (2010)

absent a showing of good cause, a nontimely petition will not be excused unless the petitioner makes a compelling showing on the remaining factors; CLI-10-12, 71 NRC 319 (2010)

although NRC recognizes a difference between contentions of omission and contentions of inadequacy, the board did not err in reading the contention as one of inadequacy despite the contentions' occasional use of terms such as "failed to address"; CLI-10-2, 71 NRC 27 (2010)

although petitioner had shown sufficient business contacts within close proximity to the plant to demonstrate standing, his intervention petition was rejected for failure to propose an admissible contention; CLI-10-7, 71 NRC 133 (2010)

an appeal as of right from a board's ruling on an intervention petition is permitted upon denial of a petition to intervene and/or request for hearing on the question as to whether it should have been granted or upon the granting of a petition to intervene and/or request for hearing on the question as to whether it should have been wholly denied; CLI-10-16, 71 NRC 486 (2010)

boards are to construe the intervention petitions in a light most favorable to petitioners; LBP-10-1, 71 NRC 165 (2010)

good cause is accorded the greatest weight in ruling on a nontimely petition; CLI-10-12, 71 NRC 319 (2010)

in ruling on a nontimely petition, boards are to consider eight factors that will excuse the tardiness of the petition if, on balance, they weigh in favor of the petitioner; CLI-10-12, 71 NRC 319 (2010)

it is appropriate for a licensing board to defer consideration of all but one contention in some limited and exceptional circumstances; LBP-10-11, 71 NRC 609 (2010)

on appeal, the Commission found fault with the board's failure to identify clearly which of the diffuse and, in some cases, unsupported claims were admitted for hearing; CLI-10-2, 71 NRC 27 (2010)

petitioners have an automatic right to appeal a board decision wholly denying a petition to intervene; CLI-10-1, 71 NRC 1 (2010); CLI-10-9, 71 NRC 245 (2010); CLI-10-12, 71 NRC 319 (2010)

the board did not make an impermissible merits ruling by observing that a contention was supported by the affidavit of an expert; CLI-10-2, 71 NRC 27 (2010)

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the Commission defers to a board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion; CLI-10-1, 71 NRC 1 (2010); CLI-10-2, 71 NRC 27 (2010); CLI-10-3, 71 NRC 49 (2010); CLI-10-7, 71 NRC 133 (2010); CLI-10-9, 71 NRC 245 (2010); CLI-10-12, 71 NRC 319 (2010)

INTERVENTION, DISCRETIONARY

if petitioner did not request discretionary intervention in the event that the petitioner is found to lack standing as of right, a licensing board need not consider affording such intervention status; LBP-10-1, 71 NRC 165 (2010)

intervention may be granted in circumstances when one petitioner has standing as of right and has proffered at least one admissible contention, but other petitioners have not demonstrated their standing; LBP-10-1, 71 NRC 165 (2010)

IRREPARABLE INJURY

a showing of a threat of immediate and irreparable harm that will result absent a stay is required for grant of the stay; CLI-10-8, 71 NRC 142 (2010)

a stay pending appeal is granted where the absence of a stay would mean the destruction of the business in its current form; CLI-10-8, 71 NRC 142 (2010)

mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay are not enough to establish irreparable injury; CLI-10-8, 71 NRC 142 (2010)

rejection or admission of a contention, where petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact nor affects the basic structure of the proceeding in a pervasive and unusual manner; CLI-10-16, 71 NRC 486 (2010)

the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm; CLI-10-8, 71 NRC 142 (2010)

when evaluating a motion for a stay the Commission places the greatest weight on irreparable injury to the moving party unless a stay is granted; CLI-10-8, 71 NRC 142 (2010)

without a showing of irreparable harm, the moving party must show that success on the merits is a virtual certainty to warrant issuance of a stay; CLI-10-8, 71 NRC 142 (2010)

LICENSE APPLICATIONS

withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe; CLI-10-13, 71 NRC 387 (2010)

LICENSE CONDITIONS

a license renewal may be set aside or appropriately conditioned even after it has been issued, upon subsequent administrative or judicial review; CLI-10-8, 71 NRC 142 (2010)

conditions are proposed that would ensure that DOE's documentary material is appropriately preserved and archived should its request to withdraw its application be granted; LBP-10-11, 71 NRC 609 (2010)

financial criteria of 10 C.F.R. 70.22(a)(8) and 70.23(a)(5) can be met by conditioning the license to require funding commitments to be in place prior to construction and operation; CLI-10-4, 71 NRC 56 (2010)

if NRC Staff finds any severe accident mitigation alternative conferring a substantial benefit compared to its cost of implementation, it must make such SAMA a license condition for the renewed operating license; LBP-10-13, 71 NRC 673 (2010)

if the Commission determines that there is a substantial increase in overall protection of public health and safety or common defense and security and that direct and indirect costs of implementation for that facility are justified, it may require backfitting to implement severe accident mitigation alternatives; LBP-10-13, 71 NRC 673 (2010)

LICENSE RENEWAL APPLICATIONS

from among the three general categories of structures, systems, and components that fall within the initial focus of the license renewal safety review, applicants must identify and list, in an integrated plant assessment, those structures and components subject to an aging management review; CLI-10-14, 71 NRC 449 (2010)

LICENSE RENEWALS

a license renewal may be set aside or appropriately conditioned even after it has been issued, upon subsequent administrative or judicial review; CLI-10-8, 71 NRC 142 (2010)

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LICENSE TERMINATION PLANS

if licensee wishes to challenge the compatibility category that is assigned to a particular regulation, including the license termination rule, it may do so at any time through submission of a petition for rulemaking; CLI-10-8, 71 NRC 142 (2010)

LICENSING BOARD DECISIONS

by its terms, 10 C.F.R. 2.342(a) applies to a stay of a decision or action of a presiding officer or licensing board and therefore does not apply to NRC's approval of a state's application to become an Agreement State; CLI-10-8, 71 NRC 142 (2010)

decisions on evidentiary questions fall within boards' authority to regulate hearing procedures; CLI-10-5, 71 NRC 90 (2010)

licensing board rulings are not precedential; CLI-10-2, 71 NRC 27 (2010)

the Commission defers to a board's factual findings and generally steps in only to correct clearly erroneous findings, i.e., findings not even plausible in light of the record viewed in its entirety; CLI-10-5, 71 NRC 90 (2010)

the Commission does not exercise its authority to make de novo findings of fact where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact; CLI-10-5, 71 NRC 90 (2010)

the Commission generally defers to board decisions regarding standing and contention admissibility in the absence of clear error or an abuse of discretion; CLI-10-7, 71 NRC 133 (2010)

the Commission will review decisions on evidentiary questions under an abuse of discretion standard; CLI-10-5, 71 NRC 90 (2010)

the standard of clear error for overturning a board's factual finding is quite high; CLI-10-5, 71 NRC 90 (2010)

unreviewed board decisions have no binding effect on a later board; CLI-10-7, 71 NRC 133 (2010)

LICENSING BOARD ORDERS

a licensing board erred in referring a contention to the NRC Staff without making an appropriate contention admissibility determination; CLI-10-9, 71 NRC 245 (2010)

LICENSING BOARDS, AUTHORITY

a board did not err in reformulating a contention to state that the application failed to comply with 10 C.F.R. Part 51, rather than with the National Environmental Policy Act; CLI-10-2, 71 NRC 27 (2010)
boards are not bound by NRC Staff's position or by changes in that position; LBP-10-9, 71 NRC 493 (2010)

boards are to construe intervention petitions in a light most favorable to petitioners; LBP-10-1, 71 NRC 165 (2010)

boards do not sit to flyspeck environmental documents or to add details or nuances; LBP-10-10, 71 NRC 529 (2010)

boards may not supply information that is missing or make assumptions of fact not provided by the petitioner; CLI-10-14, 71 NRC 449 (2010); LBP-10-6, 71 NRC 350 (2010)

boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; CLI-10-2, 71 NRC 27 (2010); CLI-10-14, 71 NRC 449 (2010); LBP-10-9, 71 NRC 493 (2010)

common sense is a relevant consideration in determining whether to reformulate contentions; LBP-10-10, 71 NRC 529 (2010)

decisions on evidentiary questions fall within boards' authority to regulate hearing procedure; CLI-10-5, 71 NRC 90 (2010)

if petitioner did not request discretionary intervention in the event that the petitioner was found to lack standing as of right, a licensing board need not consider affording such intervention status; LBP-10-1, 71 NRC 165 (2010)

if petitioner neglects to provide the requisite support for its contentions, the board should not make assumptions of fact that favor the petitioner or supply information that is lacking; LBP-10-6, 71 NRC 350 (2010); LBP-10-7, 71 NRC 391 (2010)

in camera hearings are authorized under 10 C.F.R. 2.390(b)(6); LBP-10-5, 71 NRC 329 (2010)

intervenor's representational status is one factor in determining whether reformulation is appropriate, and pro se status may provide additional cause for reformulation; LBP-10-10, 71 NRC 529 (2010)

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it is appropriate for a licensing board to defer consideration of all but one contention in some limited and exceptional circumstances; LBP-10-11, 71 NRC 609 (2010)

licensing boards are expected to use applicable techniques to ensure prompt and efficient resolution of contested issues; CLI-10-4, 71 NRC 56 (2010)

licensing boards normally have considerable discretion in making evidentiary rulings; CLI-10-5, 71 NRC 90 (2010)

NRC's contention pleading standards, while strict, are not so strict as to require a board to abandon a commonsense approach to consideration of contentions; LBP-10-10, 71 NRC 529 (2010)

section 2.107(a) does not authorize withdrawal of an application but rather clarifies that boards have authority to impose reasonable conditions upon voluntary withdrawals in appropriate circumstances; LBP-10-11, 71 NRC 609 (2010)

the board's principal role in the adjudicatory process is to carefully review all of the evidence, including testimony and exhibits, and to resolve any factual disputes; CLI-10-5, 71 NRC 90 (2010)

the judge's function in ruling on summary disposition motions is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for hearing; CLI-10-11, 71 NRC 287 (2010)

LICENSING BOARDS, JURISDICTION

regardless of whether there is a challenge to a petitioner's standing, given the jurisdictional nature of standing under the Atomic Energy Act, the board has an independent obligation to make a standing determination; LBP-10-1, 71 NRC 165 (2010)

LICENSING SUPPORT NETWORK

before petitioner can be granted party status in the high-level waste proceeding, it must be able to demonstrate substantial and timely compliance with LSN requirements; LBP-10-11, 71 NRC 609 (2010)

conditions are proposed that would ensure that DOE's documentary material is appropriately preserved and archived should its request to withdraw its application be granted; LBP-10-11, 71 NRC 609 (2010)

each petitioner must identify all its documentary material required by 10 C.F.R. 2.1003 and designate a responsible LSN official, who can certify that to the best of his or her knowledge all such material has been made electronically available; LBP-10-11, 71 NRC 609 (2010)

if petitioner fails to demonstrate substantial and timely compliance with LSN requirements, it may later request party status upon a showing of subsequent compliance; LBP-10-11, 71 NRC 609 (2010)

LIMITED APPEARANCE STATEMENTS

any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance; CLI-10-4, 71 NRC 56 (2010)

MANAGEMENT CHARACTER AND COMPETENCE

when character or integrity issues are raised, they are expected to be directly germane to the challenged licensing action; CLI-10-9, 71 NRC 245 (2010)

MANDATORY HEARINGS

a hearing for the reinstatement of previously issued construction permits is not required because the hearing already occurred when the permits were initially issued; CLI-10-6, 71 NRC 113 (2010)

off-again/on-again approach to construction of long-delayed units has generated a unique set of circumstances such that Commission should consider holding a new mandatory hearing prior to allowing full-power operation of units; LBP-10-12, 71 NRC 656 (2010)

MATERIALITY

a contention based on another agency's draft environmental assessment that does not apply to the time period in which proposed reactor units would be operational is not material to the findings the licensing board must make; LBP-10-1, 71 NRC 165 (2010)

a dispute is material if its resolution would make a difference in the outcome of the licensing proceeding; LBP-10-6, 71 NRC 350 (2010)

contentions alleging deficiencies or errors in an application must also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment; LBP-10-7, 71 NRC 391 (2010)

failure to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact is grounds for dismissal of a contention; CLI-10-9, 71 NRC 245 (2010)

for contention admissibility, a showing that the alleged error or omission is of possible significance to the result of the proceeding is required; LBP-10-6, 71 NRC 350 (2010)

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intervenor's comments must be significant enough to step over a threshold requirement of materiality, not merely state that a particular mistake was made, but show why the mistake was of possible significance; LBP-10-10, 71 NRC 529 (2010)

petitioner must show that the subject matter of a contention would impact the grant or denial of a pending license application; LBP-10-6, 71 NRC 350 (2010)

properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application, including the safety analysis report and the environmental report, so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact; LBP-10-7, 71 NRC 391 (2010)

the meaning of materiality in the context of paragraph (f)(2) differs from materiality in the context of paragraph (f)(1) of 10 C.F.R. 2.309; LBP-10-1, 71 NRC 165 (2010)

to be admissible, a contention must assert an issue of law or fact that is material to the findings NRC must make to support the action that is involved in the proceeding; LBP-10-6, 71 NRC 350 (2010)

to be admissible, a contention must show that some significant link exists between the claimed deficiency and either the health and safety of the public or the environment; LBP-10-6, 71 NRC 350 (2010)

to be admissible, contentions must assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application; LBP-10-7, 71 NRC 391 (2010)

where a contention challenges applicant's compliance with the Commission's rules implementing the National Environmental Policy Act, materiality relates not only to the Commission's determination regarding denial, issuance, or conditioning of the requested combined license, but also to the Commission's fulfillment of its obligations under NEPA; LBP-10-6, 71 NRC 350 (2010)

MATERIALS LICENSE PROCEEDINGS

pursuant to the proximity-plus approach, a presumption based on geographical proximity (albeit at distances much closer than 50 miles) may be applied where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-10-4, 71 NRC 216 (2010)

whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source; LBP-10-4, 71 NRC 216 (2010)

MATERIALS LICENSE RENEWAL PROCEEDINGS

an unopposed motion to withdraw the sole intervention petition is granted and the proceeding is terminated; LBP-10-3, 71 NRC 213 (2010)

MODIFICATION ORDER

an order modifying a license, such as a Staff order, falls well within the Administrative Procedure Act's definition of adjudication, and as such, the Staff order did not trigger the notice-and-comment procedures applicable to rulemakings; CLI-10-3, 71 NRC 49 (2010)

MOOTNESS

a contention that impacts from a severe radiological accident at any one unit on operation of other units at the site had not been, and should be, considered in the application's environmental report is found to be moot; LBP-10-10, 71 NRC 529 (2010)

mootness occurs when a justiciable controversy no longer exists; LBP-10-10, 71 NRC 529 (2010)

on issues of whether a contention has been rendered moot by provision of information by an applicant, the applicant bears the burden of persuasion; LBP-10-10, 71 NRC 529 (2010)

under Commission precedent on contentions of omission, once information asserted to have been omitted is supplied, the original contention is moot, and intervenors must timely file a new or amended contention in order to raise specific challenges regarding the new information; LBP-10-5, 71 NRC 329 (2010); LBP-10-10, 71 NRC 529 (2010)

when a contention is based on a factual underpinning in a document that has been essentially repudiated by the source of that document, the contention may be dismissed unless the intervenor offers another independent source; LBP-10-9, 71 NRC 493 (2010)

when an issue is no longer live, such that a party no longer has a legal interest in the issue, then it is moot; LBP-10-10, 71 NRC 529 (2010)

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where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by NRC Staff in a draft environmental statement, the contention is moot; LBP-10-10, 71 NRC 529 (2010)

MOTIONS

a person who has not been admitted as a party to a proceeding is not entitled to make a motion in an ongoing proceeding; CLI-10-10, 71 NRC 281 (2010)

if a board erroneously rejected petitioner's motions, but the record does not suggest that petitioner suffered any prejudicial error, Commission review is not warranted; CLI-10-14, 71 NRC 449 (2010)

parties must make good-faith efforts to resolve with the other parties the subject matter of their motion; CLI-10-10, 71 NRC 281 (2010)

MOTIONS FOR RECONSIDERATION

if leave to file a motion is granted, the motion must show compelling circumstances, such as the existence of an unanticipated, clear, and material error, which could not have been anticipated, that renders the decision invalid; CLI-10-9, 71 NRC 245 (2010); CLI-10-15, 71 NRC 479 (2010)

motions are appropriately considered under 10 C.F.R. 2.323(e); CLI-10-9, 71 NRC 245 (2010)

motions may not be filed except upon leave of the adjudicatory body that rendered the decision; CLI-10-9, 71 NRC 245 (2010)

motions must be filed within 10 days of the action for which reconsideration is requested; CLI-10-9, 71 NRC 245 (2010)

motions will be denied if they point to no compelling circumstances warranting reconsideration; CLI-10-10, 71 NRC 281 (2010)

NRC rules do not allow for multiple requests for reconsideration of the same decision; CLI-10-9, 71 NRC 245 (2010)

the Commission finds no changed circumstances that could not previously have been brought to it; CLI-10-9, 71 NRC 245 (2010)

NATIONAL ENVIRONMENTAL POLICY ACT

a board did not err in reformulating a contention to state that the application failed to comply with 10 C.F.R. Part 51, rather than with NEPA; CLI-10-2, 71 NRC 27 (2010)

a possible 1-year slip in construction schedule is clearly within the margin of uncertainty and therefore, in the context of relitigating an issue, is unlikely to affect the need for power; LBP-10-6, 71 NRC 350 (2010)

a practical definition of "reasonable" for use when selecting alternative concepts would be an alternative is reasonable if it is both feasible (possible, viable) and nonspeculative; LBP-10-10, 71 NRC 529 (2010)

a solely wind- or solar-powered facility could not satisfy the project's purpose to generate baseload power; LBP-10-6, 71 NRC 350 (2010)

agencies are allowed to select their own methodology as long as that methodology is reasonable; CLI-10-11, 71 NRC 287 (2010)

agencies are not required to use technologies and methodologies that are still emerging and under development, or to study phenomena for which there are not yet standard methods of measurement or analysis; CLI-10-11, 71 NRC 287 (2010)

agencies need only discuss those alternatives that are reasonable and will bring about the ends of the proposed action; LBP-10-6, 71 NRC 350 (2010)

although all environmental contentions may, in a general sense, ultimately be challenges to the NRC's compliance with NEPA, factual disputes of particular issues can be raised before the draft environmental impact statement is prepared; CLI-10-2, 71 NRC 27 (2010)

although NEPA requires that the environmental impact statement identify and address all reasonable alternatives, this does not mean that every conceivable alternative must be included; LBP-10-10, 71 NRC 529 (2010)

although the Commission has complied with the court's ruling for facilities within the Ninth Circuit, that experience is very limited and does not demonstrate that conducting environmental analyses of terrorist scenarios for the licensing of all major facilities would be practicable or lead to meaningful additional information; CLI-10-9, 71 NRC 245 (2010)

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although the requirements of NEPA are directed to federal agencies and the primary duties of NEPA accordingly fall on the NRC Staff in NRC proceedings, the initial requirement to analyze the environmental impacts of an action is directed to applicants; LBP-10-10, 71 NRC 529 (2010)

although the ultimate burden with respect to NEPA lies with the NRC Staff, NRC policy with respect to the identification of issues for hearing has long been that such issues must be raised as early as possible; CLI-10-2, 71 NRC 27 (2010)

although there will always be more data that could be gathered, agencies must have some discretion to draw the line and move forward with decisionmaking; CLI-10-11, 71 NRC 287 (2010)

an agency is not required to assess potential psychological impacts due to fear of radiological harm; CLI-10-11, 71 NRC 287 (2010)

an agency's environmental review must consider not every possible alternative, but every reasonable alternative; LBP-10-6, 71 NRC 350 (2010)

an environmental impact statement is not intended to be a research document, reflecting the frontiers of scientific methodology, studies, and data; CLI-10-11, 71 NRC 287 (2010)

an environmental impact statement is required for any agency action that is a major action significantly affecting the environment; LBP-10-7, 71 NRC 391 (2010)

an environmental impact statement must rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives that were eliminated from detailed study, briefly discuss the reasons for their having been eliminated; LBP-10-10, 71 NRC 529 (2010)

an otherwise reasonable alternative will not be excluded from discussion in an environmental impact statement solely on the ground that it is not within the jurisdiction of NRC; LBP-10-10, 71 NRC 529 (2010)

analysis of all impacts of connected actions, including direct, indirect, and cumulative impacts, is required for major federal actions; CLI-10-5, 71 NRC 90 (2010)

applicant's comparison of the environmental impacts of nuclear and wind/compressed air energy storage is insufficient to adequately inform decision makers about the competing choices; LBP-10-10, 71 NRC 529 (2010)

applicant's environmental report must, in relevant part, contain a discussion of alternatives sufficiently complete to aid the Commission in developing and exploring, pursuant to section 102(2)(E) of NEPA, appropriate alternatives to recommended courses of action; LBP-10-6, 71 NRC 350 (2010)

because demand-side management reduces by a small portion applicant's demand for power, it should be analyzed in this instance as a surrogate for need for power; LBP-10-6, 71 NRC 350 (2010)

business strategies in the context of need for power and any challenges to them are outside the scope of a licensing proceeding; LBP-10-10, 71 NRC 529 (2010)

contentions that seek compliance with NEPA must be based on applicant's environmental report; CLI-10-2, 71 NRC 27 (2010)

contested proceedings litigate particular contentions that may include arguable NEPA-analysis shortfalls, whereas the Staff's NEPA analysis encompasses the full range of NEPA issues whether a contested proceeding even takes place; CLI-10-5, 71 NRC 90 (2010)

cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time; CLI-10-5, 71 NRC 90 (2010)

energy sales projections are inherently uncertain, and the Commission is clear that it does not impose burdensome attempts to predict future conditions, and that it should be sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions; LBP-10-6, 71 NRC 350 (2010)

environmental contentions are to be filed based on an applicant's environmental report; LBP-10-10, 71 NRC 529 (2010)

for a SAMA analysis, NEPA demands no fully developed plan or detailed examination of specific measures that will be used to mitigate adverse environmental effects; CLI-10-11, 71 NRC 287 (2010)

if an alternative to the applicant's proposal is environmentally preferable, then NRC must determine whether the environmental benefits conferred by that alternative are worthwhile enough to outweigh any additional cost needed to achieve them; CLI-10-1, 71 NRC 1 (2010)

implicit in NEPA is a rule of reason, under which the agency may limit the alternatives discussion where there is no environmental effect or where an effect is simply not significant; LBP-10-10, 71 NRC 529 (2010)

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in considering alternatives under NEPA, an agency must take into account the needs and goals of the parties involved in the application; LBP-10-10, 71 NRC 529 (2010)

in performing NEPA evaluations, agencies must consider three types of actions, three types of alternatives, and three types of impacts; CLI-10-5, 71 NRC 90 (2010)

issues related to costs only become relevant if an intervenor identifies an environmentally preferable, reasonable alternative; LBP-10-10, 71 NRC 529 (2010)

it is inappropriate for the agency to consider economic costs when no environmentally preferable alternative has been identified; CLI-10-1, 71 NRC 1 (2010); CLI-10-9, 71 NRC 245 (2010)

low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that specified accident scenarios present a significant environmental impact that must be evaluated; LBP-10-10, 71 NRC 529 (2010)

neither mitigative action against harmful effects of major federal actions nor in-depth statements of planned actions to be taken to dull such impacts is required; LBP-10-13, 71 NRC 673 (2010)

no terrorism inquiry is required; CLI-10-1, 71 NRC 1 (2010); LBP-10-10, 71 NRC 529 (2010)

NRC cannot categorically refuse to consider the consequences of a terrorist attack against a spent fuel storage facility; CLI-10-1, 71 NRC 1 (2010)

NRC cannot either fail to perform an adequate evaluation or evade a NEPA responsibility by deferring to another agency; CLI-10-5, 71 NRC 90 (2010)

NRC cannot generically dispense with the consideration of SAMAs, under NEPA, through a policy statement issued pursuant to its Atomic Energy Act authority; LBP-10-13, 71 NRC 673 (2010)

NRC may comply with NEPA without requiring that applicant submit an environmental report, but NEPA and Council on Environmental Quality regulations permit agencies to request information from an applicant for a license or permit that will require a NEPA analysis; CLI-10-2, 71 NRC 27 (2010)

NRC's NEPA responsibilities and, by extension, the applicant's responsibilities under 10 C.F.R. Part 51 are subject to a rule of reason; LBP-10-6, 71 NRC 350 (2010)

omitting consideration of accident scenarios anticipated under 10 C.F.R. 50.150 and 50.54(hh) is contrary to the requirements of 42 U.S.C. § 2133(d); LBP-10-10, 71 NRC 529 (2010)

one in a million per year is the threshold above which accident scenarios should be evaluated for NEPA consideration; LBP-10-10, 71 NRC 529 (2010)

only feasible, nonspeculative alternatives must be considered; LBP-10-10, 71 NRC 529 (2010)

petitioner did not properly challenge applicant's conclusion that no environmentally preferable alternative existed where the only alternative that petitioner mentions on appeal is the no-reactor option, and petitioner neither raised that option before the board nor supported its argument that it would always be environmentally preferable; LBP-10-6, 71 NRC 350 (2010)

petitioner may amend contentions or file new contentions on issues arising under NEPA if there are data or conclusions in NRC environmental documents that differ significantly from the data or conclusions in the applicant's documents; LBP-10-1, 71 NRC 165 (2010)

regarding consideration of specific combination alternatives, the burden rests on petitioner to propose a particular alternative, and bare generalizations will not support an admissible contention; LBP-10-6, 71 NRC 350 (2010)

rejection of even viable and reasonable alternatives, after an appropriate evaluation, is not arbitrary and capricious; LBP-10-10, 71 NRC 529 (2010)

the concept of alternatives must be bounded by some notion of feasibility; LBP-10-10, 71 NRC 529 (2010)

the environmental effect caused by third-party miscreants is simply too far removed from the natural or expected consequences of agency action to require a study under NEPA; CLI-10-1, 71 NRC 1 (2010)

the good cause factor favors petitioners who have filed their petition within 30 days of the availability of the document they contend contains new and significant information so as to form the basis for their contention; LBP-10-1, 71 NRC 165 (2010)

the hard look required by NEPA is subject to a rule of reason, such that it is not necessary to look at every conceivable alternative to the proposed licensing action, but only those that are feasible and reasonably related to the scope and goals of the proposed action; LBP-10-10, 71 NRC 529 (2010)

the NEPA rule of reason does not require applicant to consider energy efficiency in its NEPA analysis, because energy efficiency is not a reasonable alternative for a merchant power producer; CLI-10-1, 71 NRC 1 (2010)

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- the only alternatives that are relevant to NRC's decision are those alternatives that are environmentally preferable; LBP-10-6, 71 NRC 350 (2010)
- the statutory language requires an impact statement only in the event of a proposed action, and thus in the absence of a proposal there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement; CLI-10-5, 71 NRC 90 (2010)
- the ultimate objective of the NEPA requirement to examine alternatives is to ensure that NRC has made an informed decision by examining reasonable alternatives to the proposed action; LBP-10-6, 71 NRC 350 (2010)
- there is a difference between what NRC must look at to evaluate cumulative impacts under NEPA and the scope of a particular cumulative impacts contention, which may be a subset of the total array of cumulative impacts required to be examined; CLI-10-5, 71 NRC 90 (2010)
- there is no requirement to use the best scientific methodology, and NEPA should be construed in the light of reason if it is not to demand virtually infinite study and resources; CLI-10-11, 71 NRC 287 (2010)
- when the draft or final environmental impact statement for a combined license application has not been issued so as to provide petitioner with a basis for framing its contention, the licensing board must look to the three other factors specified in 10 C.F.R. 2.309(f)(2) in assessing the admissibility of a new NEPA-related issue statement; LBP-10-1, 71 NRC 165 (2010)
- where a contention challenges applicant's compliance with the Commission's rules implementing NEPA, materiality relates not only to the Commission's determination regarding denial, issuance, or conditioning of the requested combined license, but also to the Commission's fulfillment of its obligations under NEPA; LBP-10-6, 71 NRC 350 (2010)
- where petitioner has not shown a reasonably close causal relationship between an aircraft attack and the relicensing proceeding at issue, such an attack does not warrant NEPA evaluation; CLI-10-9, 71 NRC 245 (2010)
- where the agency's action is to approve or deny a proposal by a private party, the agency should ordinarily accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project; LBP-10-6, 71 NRC 350 (2010)
- where there is no proposal for major federal action within the meaning of section 102(C), there is no requirement for a NEPA analysis of dredging; CLI-10-5, 71 NRC 90 (2010)
- NATIONAL SECURITY INFORMATION**
- NRC Staff must file a notice of intent if, at the time of publication of Notice of Hearing, it appears that it will be impracticable for the Staff to avoid the introduction of restricted data or national security information into a proceeding; CLI-10-4, 71 NRC 56 (2010)
- NATIVE AMERICANS**
- an Indian Tribe whose reservation is adjacent to facilities where spent nuclear fuel is currently stored, the nearest of which resides just 600 yards from an ISFSI, has more than a mere interest in a problem; LBP-10-11, 71 NRC 609 (2010)
- NEED FOR POWER**
- a possible 1-year slip in construction schedule is clearly within the margin of uncertainty and therefore, in the context of relitigating an issue, is unlikely to affect the need for power; LBP-10-6, 71 NRC 350 (2010)
- at the operating license stage, licensing boards will not admit contentions concerning the need for power or alternative energy sources; LBP-10-12, 71 NRC 656 (2010)
- because demand-side management reduces by a small portion applicant's demand for power, it should be analyzed in this instance as a surrogate for need for power; LBP-10-6, 71 NRC 350 (2010)
- business strategies in the context of need for power and any challenges to them are outside the scope of a licensing proceeding; LBP-10-10, 71 NRC 529 (2010)
- energy sales projections are inherently uncertain, and the Commission does not impose burdensome attempts to predict future conditions, and thus it should be sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions; LBP-10-6, 71 NRC 350 (2010)
- NRC Staff's final environmental impact statement need not include a discussion of the need for power or alternative energy sources; LBP-10-12, 71 NRC 656 (2010)

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petition for waiver of regulation excluding consideration of alternatives and the need for power from the operating license phase must establish that all of applicant's fossil fuel baseload generation that is less efficient than the facility under consideration has been accounted for; LBP-10-12, 71 NRC 656 (2010)

request for waiver of application of 10 C.F.R. 51.53(b), 51.95(b), and 51.106(c) precluding consideration of need for power and alternative energy sources from a Part 50 operating license proceeding fails to provide the prima facie showing required; LBP-10-12, 71 NRC 656 (2010)

to meet its burden to justify certification of its request to waive 10 C.F.R. 51.53(b), 51.95(b), and 51.106(c), petitioner must make a prima facie showing that the proposed facility would not be needed to meet increased energy needs or to replace older, less economical operating capacity, and that there are viable alternatives likely to exist that could tip the NEPA cost-benefit balance against issuance of the operating license; LBP-10-12, 71 NRC 656 (2010)

NONSAFETY-RELATED

all non-safety-related structures, systems, and components whose failure could prevent satisfactory accomplishment of any of the safety functions identified in 10 C.F.R. 54.4(a)(1), including auxiliary systems necessary for the function of safety-related systems, are subject to aging management review for license renewal; CLI-10-14, 71 NRC 449 (2010)

NOTICE AND COMMENT PROCEDURES

an order modifying a license, such as a Staff order, falls well within the Administrative Procedure Act's definition of adjudication, and as such, the Staff order did not trigger the notice-and-comment procedures applicable to rulemakings; CLI-10-3, 71 NRC 49 (2010)

NOTICE OF APPEARANCE

exactly when a notice of appearance must be filed, or a notice of withdrawal submitted when an attorney or representative is no longer acting as a participant representative, is not specified in the agency's rules of practice; LBP-10-7, 71 NRC 391 (2010)

failure of an organizational participant to have a representative provide an appearance notice in accord with section 2.314(b) might provide cause for an appropriate sanction for failure properly to prosecute the litigation; LBP-10-7, 71 NRC 391 (2010)

identifying the individual or individuals authorized to act on behalf of each participant should provide the means whereby any participant needing to reach another participant's authorized representatives to serve a filing or have a discussion about any litigation-related matters will be able to do so; LBP-10-7, 71 NRC 391 (2010)

NOTICE OF HEARING

withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe; CLI-10-13, 71 NRC 387 (2010)

NOTICE OF INTENT

NRC Staff must file a notice of intent if, at the time of publication of the Notice of Hearing, it appears that it will be impracticable for the Staff to avoid the introduction of restricted data or national security information into a proceeding; CLI-10-4, 71 NRC 56 (2010)

NRC GUIDANCE DOCUMENTS

in the absence of documentary or expert support, reliance on a guidance document to form the basis of a proposed contention does not, by itself, demonstrate a dispute with applicant; LBP-10-5, 71 NRC 329 (2010)

such documents are merely guidance and not binding legal authority; LBP-10-5, 71 NRC 329 (2010)

such documents do not have the binding force of law but are entitled to some level of deference; LBP-10-10, 71 NRC 529 (2010)

NRC INSPECTION

if a uranium enrichment facility is licensed, prior to commencement of operations NRC will verify through an inspection that the facility meets the construction and operation requirements of the license; CLI-10-4, 71 NRC 56 (2010)

NRC INSPECTORS

prior to providing safeguards information to a requestor, NRC Staff will conduct an inspection to confirm that recipient's information protection system is sufficient to satisfy the requirements of 10 C.F.R. 73.22; CLI-10-4, 71 NRC 56 (2010)

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NRC POLICY

although the ultimate burden with respect to NEPA lies with the NRC Staff, NRC policy with respect to the identification of issues for hearing has long been that such issues must be raised as early as possible; CLI-10-2, 71 NRC 27 (2010)

contentions that simply state petitioner's views about what regulatory policy should be do not present a litigable issue; LBP-10-7, 71 NRC 391 (2010)

NRC PROCEEDINGS

before a licensing board will close future proceedings, the party seeking closure must demonstrate that the need to close the hearing outweighs the strong presumption that all licensing board proceedings will be open to the public; LBP-10-2, 71 NRC 190 (2010)

with certain very limited exceptions, all NRC hearings will be public; LBP-10-2, 71 NRC 190 (2010)

NRC STAFF

although the ultimate burden with respect to NEPA lies with the NRC Staff, NRC policy with respect to the identification of issues for hearing has long been that such issues must be raised as early as possible; CLI-10-2, 71 NRC 27 (2010)

if it seeks to withhold a document from a party or the public, or to bar a party or member of the public from attending any adjudicatory proceeding before a licensing board, NRC Staff must carry the burden of proving that the document or situation fits one of FOIA's specifically enumerated exceptions; LBP-10-2, 71 NRC 190 (2010)

licensing boards are not bound by NRC Staff's position or by changes in that position; LBP-10-9, 71 NRC 493 (2010)

See also Discovery Against NRC Staff

NRC STAFF REVIEW

in a license renewal review, Staff is obligated to consider severe accident mitigation alternatives if it has not already done so as part of its NEPA obligations; LBP-10-13, 71 NRC 673 (2010)

NRC Staff is required by law to conduct periodic reviews of the adequacy and compatibility of an Agreement State's regulatory program; CLI-10-8, 71 NRC 142 (2010)

NRC's NEPA responsibilities and, by extension, the applicant's responsibilities under 10 C.F.R. Part 51 are subject to a rule of reason; LBP-10-6, 71 NRC 350 (2010)

NUCLEAR POWER PLANTS

plants must be designed against accidents that are anticipated during the life of the facility; CLI-10-9, 71 NRC 245 (2010)

NUCLEAR REGULATORY COMMISSION, AUTHORITY

a petition for review may be granted in the Commission's discretion; CLI-10-11, 71 NRC 287 (2010)

a sensitive unclassified nonsafeguards information access order is issued by the Commission or NRC in its role as supervisor of NRC Staff and does not constitute an adjudicatory ruling by the Commission; LBP-10-2, 71 NRC 190 (2010)

administrative agencies have inherent authority to change and modify their own prior decisions; CLI-10-6, 71 NRC 113 (2010)

although the Commission has discretion to review all underlying factual issues de novo, it is disinclined to do so where a board has weighed arguments presented by experts and rendered reasonable, record-based factual findings; CLI-10-5, 71 NRC 90 (2010)

an agency's interpretation of its own regulation is controlling provided it is not plainly erroneous or inconsistent with the regulation; CLI-10-13, 71 NRC 387 (2010)

business decisions of licensees or applicants are beyond NRC purview; CLI-10-1, 71 NRC 1 (2010)

courts generally accord considerable weight to an agency's construction of the statutes it administers; CLI-10-13, 71 NRC 387 (2010)

determination of what constitutes adequate protection under the Atomic Energy Act is a situation in which the Commission should be permitted to have discretion to make case-by-case judgments based on its technical expertise and on all the relevant information; CLI-10-14, 71 NRC 449 (2010)

NRC cannot generically dispense with the consideration of SAMAs, under NEPA, through a policy statement issued pursuant to its Atomic Energy Act authority; LBP-10-13, 71 NRC 673 (2010)

NRC does not owe deference to DOE where DOE's interpretation of NRC's own responsibilities is reflected in nothing more formal than a motion before the board and not, for example, in a formal agency adjudication or notice-and-comment rulemaking; LBP-10-11, 71 NRC 609 (2010)

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- NRC has the authority and responsibility to supplement or to amend conditions to the current licensing basis of an existing operating license at the time of license renewal if such supplements or amendments are deemed necessary to protect the environment; LBP-10-13, 71 NRC 673 (2010)
- NRC is not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question; CLI-10-1, 71 NRC 1 (2010)
- NRC may comply with NEPA without requiring that applicant submit an environmental report, but NEPA and Council on Environmental Quality regulations permit agencies to request information from an applicant for a license or permit that will require a NEPA analysis; CLI-10-2, 71 NRC 27 (2010)
- NRC may use its broad discretion of authority under the Atomic Energy Act to reinstate expired construction permits that the licensee inadvertently failed to renew; CLI-10-6, 71 NRC 113 (2010)
- NRC possesses broad discretion to act under the Atomic Energy Act when the statute is otherwise silent; CLI-10-6, 71 NRC 113 (2010)
- NRC was reasonable in not providing a quantifiable definition for the key regulatory phrase "conservative manner," given that relevant judgment calls did not lend themselves to rigid statistical definitions; CLI-10-14, 71 NRC 449 (2010)
- that Congress may have authorized NRC to regulate DOE's disposal of radioactive waste before it enacted the Nuclear Waste Policy Act hardly negates the fact that in the NWPA, Congress specifically directed NRC to issue requirements and criteria for evaluating repository-related applications and, not insignificantly, how to do so; LBP-10-11, 71 NRC 609 (2010)
- the Commission acts as adjudicator and in that light considers the reinstatement of a construction permit afresh, without regard for its earlier views; CLI-10-6, 71 NRC 113 (2010)
- the Commission declines to exercise its discretion to allow oral argument because the written record in the case is thorough, effectively sets forth the positions of the participants, and, overall, contains sufficient information on which to base its decision; CLI-10-9, 71 NRC 245 (2010)
- the Commission generally does not entertain requests to invoke its inherent supervisory authority over adjudications; CLI-10-13, 71 NRC 387 (2010)
- the Commission has discretion to allow oral argument upon the request of a party made in a petition for review, brief on review, or upon its own initiative; CLI-10-9, 71 NRC 245 (2010)
- the Commission has discretion under the Administrative Procedure Act to impose binding, prospectively applicable legal requirements by either rulemaking or adjudication; CLI-10-3, 71 NRC 49 (2010)
- the Commission, if certain conditions are met, may discontinue its regulatory authority over certain categories of material, which authority then is assumed by the state; CLI-10-8, 71 NRC 142 (2010)
- the Secretary of the Department of Energy does not have the discretion to substitute his policy for the one established by Congress that mandates progress toward a merits decision by NRC on a construction permit for the high-level waste repository; LBP-10-11, 71 NRC 609 (2010)
- under the Atomic Energy Act, broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective; CLI-10-6, 71 NRC 113 (2010)
- NUCLEAR REGULATORY COMMISSION, JURISDICTION**
- an otherwise reasonable alternative will not be excluded from discussion in an environmental impact statement solely on the ground that it is not within the jurisdiction of the NRC; LBP-10-10, 71 NRC 529 (2010)
- NRC has entertained requests for stays of final agency action in anticipation of judicial review; CLI-10-8, 71 NRC 142 (2010)
- submission of the application to construct a high-level waste geologic repository at Yucca Mountain triggered a duty on NRC's part to consider and to render a decision on the application; LBP-10-11, 71 NRC 609 (2010)
- NUCLEAR WASTE POLICY ACT**
- a detailed, specific procedure for site selection and review by the Secretary of Energy, the President, and the Congress, followed by submission of the application for a construction permit, review, and final decision thereon by the NRC was set out; LBP-10-11, 71 NRC 609 (2010)
- Congress did not intend that its explicit mandate to the NRC to consider and decide the merits of the high-level waste repository application might be nullified by a nonspecific reference to an obscure NRC procedural regulation as being among the laws to be applied; LBP-10-11, 71 NRC 609 (2010)

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Congress enacted this law for the purpose of establishing a definite federal policy for the disposal of high-level radioactive waste and spent nuclear fuel; LBP-10-11, 71 NRC 609 (2010)

DOE was directed to limit its site selection efforts to Yucca Mountain and to provide for an orderly phase-out of site-specific activities at all other candidate sites; LBP-10-11, 71 NRC 609 (2010)

economic harm itself has been held sufficient to establish standing; LBP-10-11, 71 NRC 609 (2010)

ratepayers are not third-party beneficiaries of the Standard Contract and therefore cannot sue for breach of contract when DOE fails to dispose of nuclear waste by the statutory deadline; LBP-10-11, 71 NRC 609 (2010)

submission of the application to construct a high-level waste geologic repository at Yucca Mountain triggered a duty on NRC's part to consider and to render a decision on the application; LBP-10-11, 71 NRC 609 (2010)

the court deferred to NRC's interpretation of the NWPA in promulgating regulations to be applied in administering the licensing stage for the high-level waste repository; LBP-10-11, 71 NRC 609 (2010)

the Secretary of the Department of Energy does not have the discretion to substitute his policy for the one established by Congress that mandates progress toward a merits decision by NRC on a construction permit for the high-level waste repository; LBP-10-11, 71 NRC 609 (2010)

OBJECTIONS

issues not challenged at hearing are deemed waived; CLI-10-14, 71 NRC 449 (2010)

OPERATING LICENSE PROCEEDINGS

licensing boards will not admit contentions concerning the need for power or alternative energy sources; LBP-10-12, 71 NRC 656 (2010)

need-for-power contentions are barred in operating license proceedings partly because at the time the OL application is submitted, most of the environmental disruption would have already occurred and an electric utility would use the new nuclear plant to meet increased energy demand or replace older, less economical generation capacity; LBP-10-12, 71 NRC 656 (2010)

off-again/on-again approach to construction of long-delayed units has generated a unique set of circumstances such that Commission should consider holding a new mandatory hearing prior to allowing full-power operation of units; LBP-10-12, 71 NRC 656 (2010)

petition for waiver of regulation excluding consideration of alternatives and the need for power from the operating license phase must establish that all of applicant's fossil fuel baseload generation that is less efficient than the facility under consideration has been accounted for; LBP-10-12, 71 NRC 656 (2010)

request for waiver of application of 10 C.F.R. 51.53(b), 51.95(b), and 51.106(c) precluding consideration of need for power and alternative energy sources from a Part 50 operating license proceeding fails to provide the prima facie showing required; LBP-10-12, 71 NRC 656 (2010)

rule waivers are limited to very unusual cases, such as where it appears that an alternative exists that is clearly and substantially environmentally superior; LBP-10-12, 71 NRC 656 (2010)

OPERATING LICENSE RENEWAL

aging management review focuses on structures and components that perform passive functions, with no moving parts or changes in configuration or properties; CLI-10-14, 71 NRC 449 (2010)

all non-safety-related structures, systems, and components whose failure could prevent satisfactory accomplishment of any of the safety functions identified in 10 C.F.R. 54.4(a)(1), including auxiliary systems necessary for the function of safety-related systems, are subject to aging management review; CLI-10-14, 71 NRC 449 (2010)

all structures, systems, and components relied on in safety analyses or plant evaluations to perform a function that demonstrates compliance with the NRC's regulations for fire protection, environmental qualification, pressurized thermal shock, anticipated transients without scram, and station blackout are subject to aging management review for license renewal; CLI-10-14, 71 NRC 449 (2010)

an issue cannot be identified as Category 1 if NRC has not made a generic determination that additional mitigation measures are unlikely to be warranted, given mitigation practices already in place; CLI-10-14, 71 NRC 449 (2010)

applicants are required to consider severe accident mitigation alternatives in the environmental report prepared in connection with the application; CLI-10-11, 71 NRC 287 (2010)

applicants need not provide site-specific analyses of environmental impacts of subjects identified as Category 1 issues in Appendix B to 10 C.F.R. Part 51, Subpart A; CLI-10-14, 71 NRC 449 (2010)

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- each nuclear power plant has a plant-specific licensing basis that must be maintained during the renewal term in the same manner and to the same extent as during the original licensing term; CLI-10-14, 71 NRC 449 (2010)
- environmental impacts from the spent fuel pool, including potential beyond-design-basis accidents and the need for mitigation measures, are addressed in NRC's generic environmental impact statement for license renewal and do not require a site-specific analysis as part of an individual license renewal environmental review; CLI-10-14, 71 NRC 449 (2010)
- from among the three general categories of structures, systems, and components that fall within the initial focus of the license renewal safety review, applicants must identify and list, in an integrated plant assessment, those structures and components subject to an aging management review; CLI-10-14, 71 NRC 449 (2010)
- general categories of structures, systems, and components falling within the initial focus of safety review are outlined; CLI-10-14, 71 NRC 449 (2010)
- if NRC Staff finds any severe accident mitigation alternative conferring a substantial benefit compared to its cost of implementation, it must make such SAMA a license condition for the renewed operating license; LBP-10-13, 71 NRC 673 (2010)
- if the benefit-to-cost ratio is glaringly large for a potentially cost-beneficial SAMA, NRC Staff must, as a prerequisite to extending a license, impose implementation of that SAMA as a license condition or, in the alternative, explain why it is not requiring implementation of that SAMA; LBP-10-13, 71 NRC 673 (2010)
- NRC has authority and responsibility to supplement or to amend conditions to the current licensing basis of an existing operating license at the time of license renewal if such supplements or amendments are deemed necessary to protect the environment; LBP-10-13, 71 NRC 673 (2010)
- NRC Staff is obligated to consider severe accident mitigation alternatives if it has not already done so as part of its NEPA obligations in a license renewal review; LBP-10-13, 71 NRC 673 (2010)
- NRC Staff's hard look at all potentially cost-beneficial severe accident mitigation alternatives under NEPA and Part 51 ensures that it has given proper consideration to all relevant factors in granting a license renewal; LBP-10-13, 71 NRC 673 (2010)
- onsite storage of spent fuel during the license renewal term is a Category 1 issue, and as such does not warrant any additional site-specific analysis of mitigation measures; CLI-10-14, 71 NRC 449 (2010)
- safety review focuses on those systems, structures, and components that are of principal importance to safety; CLI-10-14, 71 NRC 449 (2010)
- safety-related structures, systems, and components are those that are relied upon to remain functional during and following design-basis events to ensure the integrity of the reactor coolant pressure boundary, the capability to shut down the reactor and maintain it in a safe shutdown condition, or the capability to prevent or mitigate the consequences of accidents that could result in potential offsite exposures; CLI-10-14, 71 NRC 449 (2010)
- the general scope of the license renewal safety review is outlined in 10 C.F.R. 54.4; CLI-10-14, 71 NRC 449 (2010)
- the only severe accident mitigation alternatives that applicant must implement as part of a license renewal safety review are those dealing with aging management; LBP-10-13, 71 NRC 673 (2010)
- the reasonable assurance determination need not be reduced to a mechanical verbal formula or set of objective standards, but may be given content through case-by-case applications of the Commission's technical judgment, in light of all relevant information; CLI-10-14, 71 NRC 449 (2010)
- the scope of license renewal review for a nuclear power reactor is generally restricted to plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analysis; LBP-10-13, 71 NRC 673 (2010)
- OPERATING LICENSE RENEWAL PROCEEDINGS**
- adequacy of emergency planning is outside the scope of license renewal proceedings; LBP-10-13, 71 NRC 673 (2010)
- Category 1 issues, which are those addressed by NRC's Generic Environmental Impact Statement for License Renewal, are inadmissible in a license renewal proceeding; LBP-10-13, 71 NRC 673 (2010)
- if NRC Staff has not previously considered severe accident mitigation alternatives for applicant's plant in an environmental impact statement or related supplement or assessment, they must be considered for

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license renewal; LBP-10-13, 71 NRC 673 (2010)

OPERATING LICENSES

if any aspect of a facility fails to pass muster at the operating license stage, applicant bears the risk the plant will not be allowed to operate, regardless of the amount of money expended during construction; LBP-10-7, 71 NRC 391 (2010)

NRC Staff's final environmental impact statement need not include a discussion of the need for power or alternative energy sources; LBP-10-12, 71 NRC 656 (2010)

the 10 C.F.R. Part 50 licensing process that was formerly applied to commercial nuclear power plants required that an applicant first obtain a construction permit for the facility, followed by an operating license; LBP-10-7, 71 NRC 391 (2010)

ORAL ARGUMENT

grant of a request for oral argument requires a showing of how it will assist the Commission in reaching a decision; CLI-10-9, 71 NRC 245 (2010)

the Commission declines to exercise its discretion to allow oral argument because the written record in the case is thorough, effectively sets forth the positions of the participants, and, overall, contains sufficient information on which to base its decision; CLI-10-9, 71 NRC 245 (2010)

the Commission has discretion to allow oral argument upon the request of a party made in a petition for review, brief on review, or upon its own initiative; CLI-10-9, 71 NRC 245 (2010)

PARTIES

a person who has not been admitted as a party to a proceeding is not entitled to make a motion in an ongoing proceeding; CLI-10-10, 71 NRC 281 (2010)

participant in administrative litigation, having an even greater interest in obtaining access to sensitive unclassified nonsecrets information than does the general public, is entitled to obtain documents under standards no more restrictive than would be accorded the general public under the Freedom of Information Act; LBP-10-2, 71 NRC 190 (2010)

"potential party" is defined in as any person who has requested, or who may intend to request, a hearing or petition to intervene in a hearing under 10 C.F.R. Part 2, other than hearings conducted under Subparts J and M of 10 C.F.R. Part 2; LBP-10-5, 71 NRC 329 (2010)

PHYSICAL SECURITY PLAN

during closed portions of oral argument, only the board, NRC Staff, applicant, and individuals who signed nondisclosure affidavits pursuant to protective order would be permitted to remain in the hearing room; LBP-10-5, 71 NRC 329 (2010)

legal authority exists for nondisclosure and protection of security-related information concerning the physical protection of nuclear power plants under 10 C.F.R. 2.390(d)(1); LBP-10-5, 71 NRC 329 (2010)

section 2.390(d)(1) of 10 C.F.R. provides legal authority for nondisclosure and protection of security-related information concerning the physical protection of nuclear power plants, and for the closing of portions of hearings and other sessions in which such information will necessarily be discussed; LBP-10-5, 71 NRC 329 (2010)

PLEADINGS

an attempt to circumvent page-limit rules by incorporating documents by reference could be grounds for sanctions; CLI-10-9, 71 NRC 245 (2010)

parties represented by counsel are generally held to a higher standard than pro se litigants; LBP-10-10, 71 NRC 529 (2010)

the Commission generally extends some latitude to pro se litigants, but they still are expected to comply with NRC procedural rules, including contention pleading requirements; CLI-10-1, 71 NRC 1 (2010)

POLICY STATEMENTS

as a general matter, a policy statement announces what the Commission seeks to establish as policy and does not bind either the agency or the public; CLI-10-8, 71 NRC 142 (2010)

if a construction permit holder wishes to discontinue construction activities at a facility but continue to have its 10 C.F.R. Part 50 construction authorization remain effective, it can do so under the terms of the 1987 Commission Policy Statement on Deferred Plants; LBP-10-7, 71 NRC 391 (2010)

issue of whether location of a nuclear plant in a densely populated area allowed adoption of generic risk factors and a severe accident mitigation design alternatives decision supported by a policy statement rather than a rulemaking was confronted; LBP-10-10, 71 NRC 529 (2010)

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- NRC cannot generically dispense with the consideration of SAMAs, under NEPA, through a policy statement issued pursuant to its Atomic Energy Act authority; LBP-10-13, 71 NRC 673 (2010)
- POPULATION DENSITY**
issue of whether location of a nuclear plant in a densely populated area allowed adoption of generic risk factors and a severe accident mitigation design alternatives decision supported by a policy statement rather than a rulemaking was confronted; LBP-10-10, 71 NRC 529 (2010)
- PRECEDENTIAL EFFECT**
licensing board rulings are not precedential; CLI-10-2, 71 NRC 27 (2010)
unreviewed board decisions have no binding effect on a later board; CLI-10-7, 71 NRC 133 (2010)
- PREJUDICE**
if a board erroneously rejected petitioner's motions, but the record does not suggest that petitioner suffered any prejudicial error, Commission review is not warranted; CLI-10-14, 71 NRC 449 (2010)
the prospect of a second lawsuit with its expenses and uncertainties or another application does not provide the requisite quantum of legal harm to warrant dismissal of an application with prejudice; LBP-10-11, 71 NRC 609 (2010)
- PRESIDING OFFICER, AUTHORITY**
the judge's function in ruling on summary disposition motions is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for hearing; CLI-10-11, 71 NRC 287 (2010)
- PRESSURIZED THERMAL SHOCK**
all structures, systems, and components relied on in safety analyses or plant evaluations to perform a function that demonstrates compliance with the NRC's regulations are subject to aging management review for license renewal; CLI-10-14, 71 NRC 449 (2010)
- PRIVILEGED INFORMATION**
although the NRC public website states that SUNSI encompasses a wide variety of categories (e.g., personnel privacy, attorney-client privilege, confidential source), there is no legal basis for sweeping aside the well-established and long-recognized privileges such as the Privacy Act, 5 U.S.C. § 552(a), and the attorney-client privilege; LBP-10-2, 71 NRC 190 (2010)
excessively broad claims of SUNSI in a licensing proceeding impact not just an intervenors' access to documents, but also the public's access to the adjudicatory process; LBP-10-2, 71 NRC 190 (2010)
- PRO SE LITIGANTS**
although complying with Commission regulations may be especially difficult for pro se petitioners, it has long been a basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation; LBP-10-4, 71 NRC 216 (2010)
intervenor's representational status is one factor in determining whether reformulation is appropriate, and pro se status may provide additional cause for reformulation; LBP-10-10, 71 NRC 529 (2010)
parties represented by counsel are generally held to a higher standard than pro se litigants; LBP-10-10, 71 NRC 529 (2010)
petitioners who are not represented by counsel are held to less rigid pleading standards than would ordinarily be applied to litigants who are represented by counsel; LBP-10-4, 71 NRC 216 (2010)
the Commission generally extends some latitude to pro se litigants, but they still are expected to comply with NRC procedural rules, including contention pleading requirements; CLI-10-1, 71 NRC 1 (2010)
- PROBABILISTIC RISK ASSESSMENT**
low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that specified accident scenario presents a significant environmental impact that must be evaluated; LBP-10-10, 71 NRC 529 (2010)
the threshold probability that calls for analysis for reactors is generally greater than 1 in 10 million per year; CLI-10-1, 71 NRC 1 (2010)
- PROOF**
See Burden of Proof
- PROTECTIVE ORDERS**
a sensitive unclassified nonsafeguards information access order is issued by the Commission or NRC in its role as supervisor of NRC Staff and does not constitute an adjudicatory ruling by the Commission; LBP-10-2, 71 NRC 190 (2010)

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even if a document contains information that is exempt from disclosure, FOIA mandates that any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions that are exempt; LBP-10-2, 71 NRC 190 (2010)

if it seeks to withhold a document from a party or the public, or to bar a party or member of the public from attending any adjudicatory proceeding before a licensing board, NRC Staff must carry the burden of proving that the document or situation fits one of FOIA's specifically enumerated exceptions; LBP-10-2, 71 NRC 190 (2010)

procedures and schedules set forth in the SUNSI access order are intended only to deal with issues arising before intervention occurs and a board is created; LBP-10-2, 71 NRC 190 (2010)

proponent bears the burden of proof; LBP-10-2, 71 NRC 190 (2010)

the Secretary of the Commission is authorized to establish procedures for obtaining access to sensitive unclassified nonsafeguards information prior to granting intervention in a licensing proceeding; LBP-10-2, 71 NRC 190 (2010)

PROXIMITY PRESUMPTION

a presumption of standing applies when an individual, an organization, or an individual authorizing an organization to represent his or her interests resides within 50 miles of the proposed facility or has frequent contacts with the area affected by the proposed facility; LBP-10-7, 71 NRC 391 (2010)

a regular commute that takes petitioner past a plant entrance once or twice a week is sufficient to establish standing; LBP-10-1, 71 NRC 165 (2010)

even if a party seeking standing has some intent to return to an area, when such intentions are not supported by concrete plans or a specification of when future visits would take place, they do not support a finding of injury in the standing context; LBP-10-1, 71 NRC 165 (2010)

for standing, distance from a facility can be verified using the Google Maps distance measurement tool; LBP-10-1, 71 NRC 165 (2010)

in a decommissioning proceeding, where the proximity presumption did not apply, a petitioner who commuted past the entrance of plant once or twice a week was found to have standing; CLI-10-7, 71 NRC 133 (2010)

in proceedings for construction permit and operating licenses for nuclear power plants, a proximity presumption is recognized in favor of standing for persons who have frequent contacts within a 50-mile radius of the plant; CLI-10-7, 71 NRC 133 (2010); LBP-10-1, 71 NRC 165 (2010); LBP-10-4, 71 NRC 216 (2010); LBP-10-7, 71 NRC 391 (2010)

it is petitioner's responsibility to provide enough detail to allow the board to distinguish a casual interest from a substantial one; LBP-10-1, 71 NRC 165 (2010)

members of intervenor organizations who reside, work, or recreate within 50 miles of the proposed nuclear power plant have proximity-based standing; LBP-10-9, 71 NRC 493 (2010)

one who does something "frequently" does so at frequent or short intervals, "frequent" being defined as often or habitually; LBP-10-1, 71 NRC 165 (2010)

one who performs an act "regularly" does so in a regular, orderly, or methodical way; LBP-10-1, 71 NRC 165 (2010)

petitioner who frequently visited an area allegedly affected by the proposed action for recreational purposes showed injury in the standing context; LBP-10-1, 71 NRC 165 (2010)

petitioner who seeks to base standing on contacts within a 50-mile radius of a proposed facility must provide enough detail to allow the board to distinguish a casual interest from a substantial one; CLI-10-7, 71 NRC 133 (2010)

petitioner whose daily commute took her within less than one-half mile of a research reactor had standing based on the obvious potential for offsite consequences; CLI-10-7, 71 NRC 133 (2010)

petitioner whose office was located within one-half mile from a research reactor may be presumed to be affected by operation of the facility; CLI-10-7, 71 NRC 133 (2010)

petitioners bear the burden of providing sufficient relevant, specific information, whether by good-faith estimate or otherwise, to establish the basis for their standing claims; LBP-10-1, 71 NRC 165 (2010)

petitioner's claim that he routinely pierces the 50-mile radius around a reactor site is too vague to support standing; LBP-10-1, 71 NRC 165 (2010)

petitioners who fail to provide specific information regarding proximity or frequency of contacts that may establish standing only complicate matters for themselves; LBP-10-1, 71 NRC 165 (2010)

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pursuant to the proximity-plus approach, a presumption based on geographical proximity (albeit at distances much closer than 50 miles) may be applied where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-10-4, 71 NRC 216 (2010)

standing has been denied when petitioner has demonstrated only occasional contact with the zone of possible harm; LBP-10-1, 71 NRC 165 (2010)

standing will be denied when petitioner fails to supply more specific information regarding the frequency, nature, and length of his contacts within the proximity zone; LBP-10-1, 71 NRC 165 (2010)

the distinction between “frequently” and “regularly” highlights the importance of making a more detailed factual showing, rather than relying on conclusory adjectives and adverbs, when a standing claim rests on the nature of petitioner’s activities purportedly near to, or bearing some connection with, the reactor facility at issue; LBP-10-1, 71 NRC 165 (2010)

to establish proximity-based standing, it is petitioner’s responsibility to provide enough detail to allow the board to distinguish a casual interest from a substantial one; LBP-10-7, 71 NRC 391 (2010)

to establish standing based on frequent contacts, petitioner must show that it frequently engages in substantial business and related activities in the vicinity of the facility, engages in normal, everyday activities in the vicinity, has regular and frequent contacts in an area near a licensed facility, or otherwise has visits of a length and nature showing an ongoing connection and presence; LBP-10-1, 71 NRC 165 (2010)

to establish the requisite proximity for standing, petitioner must clearly indicate where he lives and/or what contact he has with the site; LBP-10-1, 71 NRC 165 (2010); LBP-10-7, 71 NRC 391 (2010)

when petitioner cannot establish proximity-plus standing, he or she must resort to establishing standing under traditional principles; LBP-10-4, 71 NRC 216 (2010)

whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source; LBP-10-4, 71 NRC 216 (2010)

PSYCHOLOGICAL EFFECTS

the National Environmental Policy Act does not require an agency to assess potential psychological impacts due to fear of radiological harm; CLI-10-11, 71 NRC 287 (2010)

PUBLIC HEARINGS

a First Amendment basis for public access to administrative proceedings is recognized; LBP-10-2, 71 NRC 190 (2010)

a trial is a public event, and what transpires in the courtroom is public property; LBP-10-2, 71 NRC 190 (2010)

all NRC hearings are to be public except as requested under section 181 of the Atomic Energy Act or otherwise ordered by the Commission; LBP-10-5, 71 NRC 329 (2010)

Anglo-American jurisprudence has long ensured that judicial proceedings will be open to the public; LBP-10-2, 71 NRC 190 (2010)

as long as the administrative proceedings walk, talk, and squawk very much like an Article III judicial proceeding, they should be open to the public; LBP-10-2, 71 NRC 190 (2010)

public access to courts is grounded in the First Amendment and free speech carries with it some freedom to listen; LBP-10-2, 71 NRC 190 (2010)

the First Amendment requires a presumption of openness in civil proceedings; LBP-10-2, 71 NRC 190 (2010)

the First Amendment requires public access to deportation hearings despite government’s strenuous objections that open hearings would enable terrorists to obtain information useful to their malevolent goals; LBP-10-2, 71 NRC 190 (2010)

the principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials; LBP-10-2, 71 NRC 190 (2010)

PUBLIC INTEREST

the public interest would best be served by leaving the option open to the applicant should changed conditions warrant pursuit of a withdrawn application; LBP-10-11, 71 NRC 609 (2010)

PYROCHLORE

because pyrochlore contains more than 0.05 wt % uranium and thorium, it is subject to NRC regulation as a source material; CLI-10-8, 71 NRC 142 (2010)

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QUALITY ASSURANCE PROGRAMS

a contention alleging a breakdown of applicant's QA program must provide evidence that there legitimate doubt as to whether the plant can be operated safely; LBP-10-9, 71 NRC 493 (2010)

applicant for a combined license is required to establish a QA program and to apply that program to its safety-related activities; LBP-10-9, 71 NRC 493 (2010)

because intervenors cannot reasonably be expected to discover the QA issues that gave rise to a notice of violation without the NOV itself as notice, they have plausibly argued that their new contention is based on new and materially different information; LBP-10-9, 71 NRC 493 (2010)

perfection in applicant's QA program is not required, but once a pattern of QA violations has been shown, applicant has the burden of showing that the license may be granted notwithstanding the violations; LBP-10-9, 71 NRC 493 (2010)

perfection in plant construction and the construction quality assurance program is not a precondition for a license, but rather what is required is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety; LBP-10-9, 71 NRC 493 (2010)

to the extent a new contention will cause delay, it is the price for affording the public the opportunity to litigate questions arising from an applicant's failure to comply with QA requirements; LBP-10-9, 71 NRC 493 (2010)

RADIOACTIVE EFFLUENTS

safety regulations in 10 C.F.R. 52.79(a)(3) require applicant to describe the kinds and quantities of radioactive materials that will be produced in operating a proposed new power plant and to describe the means for controlling and limiting the radioactive effluents and radiation exposures; CLI-10-2, 71 NRC 27 (2010)

RADIOACTIVE WASTE DISPOSAL

a well-pleaded environmental contention concerning the effects of long-term onsite management of low-level radioactive waste is admissible; CLI-10-2, 71 NRC 27 (2010)

an approach for disposition of depleted tails that is consistent with the USEC Privatization Act, such as transfer to DOE for disposal, constitutes a plausible strategy; CLI-10-4, 71 NRC 56 (2010)

contentions challenging low-level radioactive waste storage may not rely on 10 C.F.R. Part 61, which pertains to land disposal facilities; CLI-10-2, 71 NRC 27 (2010)

from a safety standpoint, the required low-level radioactive waste storage information is tied to the combined license applicant's particular plans for compliance through design, operational organization, and procedures; CLI-10-2, 71 NRC 27 (2010)

greater-than-Class-C waste is the responsibility of the federal government; CLI-10-2, 71 NRC 27 (2010)

low-level radioactive waste disposal contentions may not challenge Table S-3, consistent with NRC policy that regulations may not be the subject of collateral attack in an adjudication; CLI-10-2, 71 NRC 27 (2010)

ratepayers are not third-party beneficiaries of the Standard Contract and therefore cannot sue for breach of contract when DOE fails to dispose of nuclear waste by the statutory deadline; LBP-10-11, 71 NRC 609 (2010)

utilities must dispose of greater-than-Class-C waste before they can decommission reactor sites; CLI-10-2, 71 NRC 27 (2010)

RADIOACTIVE WASTE STORAGE

an amended contention challenging applicant's final safety analysis report on its low-level radioactive waste storage plan was admitted based on intervenor's adequately supported challenge to the plan's provisions regarding waste volume reduction; LBP-10-8, 71 NRC 433 (2010)

applicant's contingent long-term onsite low-level radioactive waste storage facility and the contents of its final safety analysis report with regard to that facility are not governed by 10 C.F.R. 52.79(a)(4) as a part of the reactor facilities to be constructed under the requested combined licenses; LBP-10-8, 71 NRC 433 (2010)

applicant's reliance on a facility for low-level radioactive waste disposal that will no longer permit out-of-compact entities to import LLRW for disposal at its site could provide the basis for a new contention; LBP-10-8, 71 NRC 433 (2010)

purported failures to provide detailed information regarding design, location, and worker health impacts do not identify a deficiency in final safety analysis report low-level radioactive waste information that is required to be provided in the COL application; LBP-10-8, 71 NRC 433 (2010)

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the board did not create a new regulatory requirement in finding that an application must show how the proposed facility will deal with long-term storage of low-level radioactive waste; CLI-10-2, 71 NRC 27 (2010)

RADIOACTIVE WASTE, HIGH-LEVEL

greater-than-Class-C waste is the responsibility of the federal government; CLI-10-2, 71 NRC 27 (2010)
recoverability of spent nuclear fuel storage expenses is equally applicable to greater-than-Class-C waste, which is stored onsite in the same manner as spent nuclear fuel; CLI-10-2, 71 NRC 27 (2010)
utilities must dispose of greater-than-Class-C waste before they can decommission reactor sites; CLI-10-2, 71 NRC 27 (2010)

RADIOACTIVE WASTE, LOW-LEVEL

a well-pleaded environmental contention concerning the effects of long-term onsite management of low-level radioactive waste is admissible; CLI-10-2, 71 NRC 27 (2010)
an amended contention challenging applicant's final safety analysis report on its LLRW storage plan was admitted based on intervenor's adequately supported challenge to the plan's provisions regarding waste volume reduction; LBP-10-8, 71 NRC 433 (2010)
an approach for disposition of depleted tails that is consistent with the USEC Privatization Act, such as transfer to DOE for disposal, constitutes a plausible strategy; CLI-10-4, 71 NRC 56 (2010)
applicant's contingent long-term onsite LLRW storage facility and the contents of its final safety analysis report with regard to that facility are not governed by 10 C.F.R. 52.79(a)(4) as a part of the reactor facilities to be constructed under the requested combined licenses; LBP-10-8, 71 NRC 433 (2010)
applicant's reliance on a facility for LLRW disposal that will no longer permit out-of-compact entities to import LLRW for disposal at its site could provide the basis for a new contention; LBP-10-8, 71 NRC 433 (2010)
contentions challenging low-level radioactive waste storage may not rely on 10 C.F.R. Part 61, which pertains to land disposal facilities; CLI-10-2, 71 NRC 27 (2010)
contentions may not challenge Table S-3, consistent with NRC policy that regulations may not be the subject of collateral attack in an adjudication; CLI-10-2, 71 NRC 27 (2010)
depleted uranium from an enrichment facility is appropriately classified as LLRW; CLI-10-4, 71 NRC 56 (2010)
from a safety standpoint, the required LLRW storage information is tied to the combined license applicant's particular plans for compliance through design, operational organization, and procedures; CLI-10-2, 71 NRC 27 (2010)
purported failure to provide detailed information regarding design, location, and worker health impacts does not identify a deficiency in final safety analysis report LLRW information that is required to be provided in the COL application; LBP-10-8, 71 NRC 433 (2010)
the board did not create a new regulatory requirement in finding that an application must show how the proposed facility will deal with long-term storage of low-level radioactive waste; CLI-10-2, 71 NRC 27 (2010)

RADIOLOGICAL EXPOSURE

safety regulations in 10 C.F.R. 52.79(a)(3) require applicant to describe the kinds and quantities of radioactive materials that will be produced in operating a proposed new power plant and to describe the means for controlling and limiting the radioactive effluents and radiation exposures; CLI-10-2, 71 NRC 27 (2010)

REACTOR DESIGN

a board erred in referring a contention to the Staff for consideration in conjunction with the design certification rulemaking without first assessing its admissibility; CLI-10-1, 71 NRC 1 (2010)
applicant may reference a design certification that the Commission has docketed but not granted; LBP-10-9, 71 NRC 493 (2010)
applicant may, at its own risk, submit a combined license application that does not reference a certified design; CLI-10-1, 71 NRC 1 (2010)
"otherwise admissible" has been interpreted to mean a contention that meets the contention admissibility requirements of 10 C.F.R. 2.309(f)(1) but for the fact that it challenges a yet-to-be-certified reactor design; LBP-10-9, 71 NRC 493 (2010)
the SAMDA analysis is part of the design certification application and thus intervenor's contention constitutes an impermissible challenge to a future rulemaking; LBP-10-10, 71 NRC 529 (2010)

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REASONABLE ASSURANCE

perfection in plant construction and the construction quality assurance program is not a precondition for a license, but rather what is required is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety; LBP-10-9, 71 NRC 493 (2010)
the determination need not be reduced to a mechanical verbal formula or set of objective standards, but may be given content through case-by-case applications of the Commission's technical judgment, in light of all relevant information; CLI-10-14, 71 NRC 449 (2010)

RECONSIDERATION

See Motions for Reconsideration

RECORD

the relevant record includes legal issues and necessarily legal arguments; LBP-10-11, 71 NRC 609 (2010)

RECORD OF DECISION

the Commission declines to exercise its discretion to allow oral argument because the written record in the case is thorough, effectively sets forth the positions of the participants, and, overall, contains sufficient information on which to base its decision; CLI-10-9, 71 NRC 245 (2010)

REDRESSABILITY

if there is nothing that can be done by way of judicial review to redress the adverse consequences that petitioners say they are suffering, review will be denied; LBP-10-11, 71 NRC 609 (2010)
one who asserts a procedural right to protect a concrete interest can assert that right without meeting all the normal standards for redressability and immediacy; LBP-10-11, 71 NRC 609 (2010)
petitioners need not demonstrate a substantial likelihood of redressability, but rather need only show that redress is likely as opposed to speculative; LBP-10-11, 71 NRC 609 (2010)

REFERRAL OF RULING

the board may refer certain rulings to the Commission, and certain participants in the proceeding may request that the presiding officer certify to the Commission rulings not otherwise immediately appealable pursuant to section 2.1015(b); CLI-10-10, 71 NRC 281 (2010)

REFERRED RULINGS

guidance is provided on declining review of referred rulings; CLI-10-9, 71 NRC 245 (2010)
the Commission addresses a board's additional views when the board refers its decision to the Commission; CLI-10-9, 71 NRC 245 (2010)

REGULATIONS

a contention on spent fuel pool fires is rejected as an impermissible challenge to NRC regulations and the license renewal generic environmental impact statement; CLI-10-11, 71 NRC 287 (2010)
adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process; LBP-10-7, 71 NRC 391 (2010)
creditor regulations in 10 C.F.R. 50.81 apply to the creation of creditor interests in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235; CLI-10-4, 71 NRC 56 (2010)
creditor regulations in 10 C.F.R. 70.44 apply to the creation of creditor interests in special nuclear material; CLI-10-4, 71 NRC 56 (2010)
creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements, such as sale and leaseback, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-10-4, 71 NRC 56 (2010)
intervenor may petition the Commission for permission to challenge a rule, but must make a showing of special circumstances; LBP-10-9, 71 NRC 493 (2010)
low-level radioactive waste disposal contentions may not challenge Table S-3, consistent with NRC policy that regulations may not be the subject of collateral attack in an adjudication; CLI-10-2, 71 NRC 27 (2010)
NRC regulations not subject to attack in adjudications; CLI-10-1, 71 NRC 1 (2010); LBP-10-9, 71 NRC 493 (2010)
NRC takes into account Council on Environmental Quality regulations, with certain exceptions; CLI-10-2, 71 NRC 27 (2010)
petitioner's challenge to the one-fire assumption in the AP1000 design constitutes an impermissible challenge to Commission regulations; CLI-10-9, 71 NRC 245 (2010)

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the board did not create a new regulatory requirement in finding that an application must show how the proposed facility will deal with long-term storage of low-level radioactive waste; CLI-10-2, 71 NRC 27 (2010)

the court deferred to NRC's interpretation of the Nuclear Waste Policy Act in promulgating regulations to be applied in administering the licensing stage for the high-level waste repository; LBP-10-11, 71 NRC 609 (2010)

the distinction between contentions of omission and contentions of inadequacy does not appear in NRC contention pleading regulations, but rather is a useful concept from agency case law; CLI-10-2, 71 NRC 27 (2010)

See also Amendment of Regulations

REGULATIONS, INTERPRETATION

although 10 C.F.R. 2.390(d) never uses the term "sensitive unclassified nonsafeguards information", this regulation seems to fit NRC Staff's claim that SUNSI is security-related; LBP-10-2, 71 NRC 190 (2010)

although technically not applicable to a request for a stay of NRC Staff action, the 10 C.F.R. 2.342(e) standards simply restate commonplace principles of equity universally followed when judicial (or quasi-judicial) bodies consider stays or other forms of temporary injunctive relief; CLI-10-8, 71 NRC 142 (2010)

an agency's interpretation of its own regulation is controlling provided it is not plainly erroneous or inconsistent with the regulation; CLI-10-13, 71 NRC 387 (2010)

contentions challenging low-level radioactive waste storage may not rely on 10 C.F.R. Part 61, which pertains to land disposal facilities; CLI-10-2, 71 NRC 27 (2010)

courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute; CLI-10-13, 71 NRC 387 (2010)

design basis event is distinguished from design basis threat; CLI-10-9, 71 NRC 245 (2010)

"intended functions" that structures, systems, and components must be shown to fulfill in the aging management review are those functions specified in 10 C.F.R. 54.4(a)(1)-(3); CLI-10-14, 71 NRC 449 (2010)

materiality in the context of paragraph (f)(2) differs from materiality in the context of paragraph (f)(1) of 10 C.F.R. 2.309; LBP-10-1, 71 NRC 165 (2010)

paragraph (4) of 10 C.F.R. 52.79(a) governs only those structures that are a component of the facility to be constructed under the combined license; LBP-10-8, 71 NRC 433 (2010)

section 2.107(a) does not authorize withdrawal of an application but rather clarifies that licensing boards have authority to impose reasonable conditions upon voluntary withdrawals in appropriate circumstances; LBP-10-11, 71 NRC 609 (2010)

the term "sensitive unclassified nonsafeguards information" or SUNSI is used only twice in the NRC regulations, relating to authority to establish procedures for disclosure and for appeals of disclosure rulings; LBP-10-2, 71 NRC 190 (2010)

REINSTATEMENT OF PROCEEDING

an admissible contention under the good cause standard must allege that a construction permit holder's reasons for past delay failed to constitute good cause for a CP extension and be supported by a showing that construction delay is traceable to permit holder action that was intentional and without a valid business purpose; LBP-10-7, 71 NRC 391 (2010)

boards should restrict their inquiry in a construction permit reinstatement proceeding, including their consideration of contention admissibility matters, in line with the good cause standard of the Atomic Energy Act; LBP-10-7, 71 NRC 391 (2010)

REMAND

the Commission grants review of an Atomic Safety and Licensing Board decision that dismissed a contention on summary disposition, reversing the decision in part, and remanding the contention to the board for hearing, as limited by the Commission's ruling; CLI-10-11, 71 NRC 287 (2010)

REPLY BRIEFS

a party may not present a new contention, or a new basis for a proposed contention, in its reply; LBP-10-9, 71 NRC 493 (2010)

because of apparent electronic complications and the lack of a challenge to intervenors' reply document as late, the board treats a late filing as a valid reply; LBP-10-9, 71 NRC 493 (2010)

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- petitioner may not use its reply brief to cure pleading defects in its intervention petition; CLI-10-1, 71 NRC 1 (2010)
- petitioners should narrowly focus on the legal or logical arguments presented in the answers on a request for hearing or petition to intervene; CLI-10-1, 71 NRC 1 (2010); LBP-10-9, 71 NRC 493 (2010)
- REPLY TO ANSWER TO MOTION**
- because of the significance of the issues at hand, applicant was permitted to reply to the answers to its motion to withdraw; LBP-10-11, 71 NRC 609 (2010)
- REQUEST FOR ACTION**
- challenges to an Agreement State's program may be raised in a 10 C.F.R. 2.206 petition; CLI-10-8, 71 NRC 142 (2010)
- if petitioners wish to propose security measures in addition to those laid out in a Staff enforcement order, their remedy is to petition the NRC under 10 C.F.R. 2.206 for further enforcement action; CLI-10-3, 71 NRC 49 (2010)
- petitioners may protect their interests by filing a request for Commission action under 10 C.F.R. 2.206 rather than a late-filed intervention petition; CLI-10-12, 71 NRC 319 (2010)
- petitions submitted under 10 C.F.R. 2.206 are assessed by the Staff in accord with NRC Management Directive 8.11 and associated Handbook 8.11; LBP-10-7, 71 NRC 391 (2010)
- RESEARCH REACTORS**
- petitioner whose daily commute took her within less than one-half mile of a research reactor had standing based on the obvious potential for offsite consequences; CLI-10-7, 71 NRC 133 (2010)
- petitioner whose office was located within one-half mile from a research reactor may be presumed to be affected by operation of the facility; CLI-10-7, 71 NRC 133 (2010)
- RESTRICTED RELEASE**
- New Jersey's restricted release criteria are compatible with NRC rules; CLI-10-8, 71 NRC 142 (2010)
- REVERSAL OF RULING**
- the Commission grants review of an Atomic Safety and Licensing Board decision that dismissed a contention on summary disposition, reversing the decision in part, and remanding the contention to the board for hearing, as limited by the Commission's ruling; CLI-10-11, 71 NRC 287 (2010)
- REVIEW**
- a requester may challenge NRC Staff's or Office of Administration's adverse determination with respect to access to safeguards information by filing a request for review; CLI-10-4, 71 NRC 56 (2010)
- See also Appellate Review; NRC Staff Review
- REVIEW, DISCRETIONARY**
- although the Commission has discretion to review all underlying factual issues de novo, it is disinclined to do so where a board has weighed arguments presented by experts and rendered reasonable, record-based factual findings; CLI-10-5, 71 NRC 90 (2010)
- as for conclusions of law, the Commission will review legal questions de novo and reverse a licensing board's legal rulings if they are a departure from or contrary to established law; CLI-10-5, 71 NRC 90 (2010)
- interlocutory review is permitted at the Commission's discretion only upon a showing that the issue for which it is sought threatens the party adversely affected by it with immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-10-16, 71 NRC 486 (2010)
- the Commission generally does not entertain requests to invoke its inherent supervisory authority over adjudications; CLI-10-13, 71 NRC 387 (2010)
- the Commission grants review based on petitioner's showing that there is a substantial question with respect to the five considerations listed in 10 C.F.R. 2.341(b)(4); CLI-10-5, 71 NRC 90 (2010)
- the standard of clear error for overturning a board's factual finding is quite high; CLI-10-5, 71 NRC 90 (2010)
- REVIEW, INTERLOCUTORY**
- NRC rules governing the high-level waste proceeding do not provide for interlocutory review; CLI-10-13, 71 NRC 387 (2010)
- review is permitted at the Commission's discretion only upon a showing that the issue for which review is sought threatens the party adversely affected by it with immediate and serious irreparable impact or

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affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-10-13, 71 NRC 387 (2010); CLI-10-16, 71 NRC 486 (2010)
that interlocutory review will only be granted under extraordinary circumstances reflects the Commission's disfavor of piecemeal appeals during ongoing licensing board proceedings; CLI-10-16, 71 NRC 486 (2010)

REVOCACTION OF LICENSES

a license renewal may be set aside or appropriately conditioned even after it has been issued, upon subsequent administrative or judicial review; CLI-10-8, 71 NRC 142 (2010)
voluntary surrender of a valid construction permit does not amount to wrongful activity that would warrant revocation; CLI-10-6, 71 NRC 113 (2010)

RISK ASSESSMENT

issue of whether location of a nuclear plant in a densely populated area allowed adoption of generic risk factors and a severe accident mitigation design alternatives decision supported by a policy statement rather than a rulemaking was confronted; LBP-10-10, 71 NRC 529 (2010)

RISKS

when an applicant receives a construction permit, it proceeds at its own risk, regardless of the amount of money that it may have expended during construction; LBP-10-7, 71 NRC 391 (2010)

RULE OF REASON

implicit in NEPA is a rule of reason, under which the agency may limit the alternatives discussion where there is no environmental effect or where an effect is simply not significant; LBP-10-10, 71 NRC 529 (2010)

low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that specified accident scenarios present a significant environmental impact that must be evaluated; LBP-10-10, 71 NRC 529 (2010)

NEPA does not require applicant to consider energy efficiency in its NEPA analysis, because energy efficiency is not a reasonable alternative for a merchant power producer; CLI-10-1, 71 NRC 1 (2010)
the hard look required by NEPA is subject to a rule of reason, such that it is not necessary to look at every conceivable alternative to the proposed licensing action, but only those that are feasible, and reasonably related to the scope and goals of the proposed action; LBP-10-10, 71 NRC 529 (2010)

RULEMAKING

a board erred in referring a contention to the Staff for consideration in conjunction with the design certification rulemaking without first assessing its admissibility; CLI-10-1, 71 NRC 1 (2010)

a challenge to the Waste Confidence Rule, which is the subject of a rulemaking, is inadmissible; CLI-10-9, 71 NRC 245 (2010)

a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible; CLI-10-9, 71 NRC 245 (2010); LBP-10-7, 71 NRC 391 (2010)

a Staff order that neither repudiates nor rescinds any NRC safety and security requirements, but rather imposes new, more stringent security requirements that supplement those already found in NRC regulations does not amount to unlawfully promulgated regulations; CLI-10-3, 71 NRC 49 (2010)

amendment of a combined license application to comply with an amended aircraft impacts rule during the pendency of the COL application could form the basis for a late-filed contention; CLI-10-1, 71 NRC 1 (2010)

an order modifying a license, such as a Staff order, falls well within the Administrative Procedure Act's definition of adjudication, and as such, the Staff order does not trigger the notice-and-comment procedures applicable to rulemakings; CLI-10-3, 71 NRC 49 (2010)

contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-10-7, 71 NRC 391 (2010)

if licensee wishes to challenge the compatibility category that is assigned to a particular regulation, including the license termination rule, it may do so at any time through submission of a petition for rulemaking; CLI-10-8, 71 NRC 142 (2010)

if petitioners wish to propose security measures in addition to those laid out in a Staff enforcement order, their remedy is to ask NRC to institute a rulemaking to impose broader security measures; CLI-10-3, 71 NRC 49 (2010)

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issuance of a post-9/11 security order does not amount to unlawfully promulgated regulations; CLI-10-3, 71 NRC 49 (2010)

issue of whether location of a nuclear plant in a densely populated area allowed adoption of generic risk factors and a severe accident mitigation design alternatives decision supported by a policy statement rather than a rulemaking was confronted; LBP-10-10, 71 NRC 529 (2010)

notice-and-comment rulemaking is required only when the NRC is attempting to change a regulation; CLI-10-6, 71 NRC 113 (2010)

NRC rules permit the filing of a combined license application during the pendency of a design certification rulemaking; CLI-10-9, 71 NRC 245 (2010)

the agency decided not to include the threat of air attacks in the 2007 revision to the design basis threat rule, a decision upheld by the Ninth Circuit; CLI-10-9, 71 NRC 245 (2010)

the Commission has discretion under the Administrative Procedure Act to impose binding, prospectively applicable legal requirements by either rulemaking or adjudication; CLI-10-3, 71 NRC 49 (2010)

the SAMDA analysis is part of the design certification application and thus intervenor's contention constitutes an impermissible challenge to a future rulemaking; LBP-10-10, 71 NRC 529 (2010)

RULES

a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible; LBP-10-7, 71 NRC 391 (2010)

contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-10-7, 71 NRC 391 (2010)

RULES OF PRACTICE

a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible; CLI-10-9, 71 NRC 245 (2010); LBP-10-7, 71 NRC 391 (2010)

a contention will be ruled inadmissible if petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation; LBP-10-6, 71 NRC 350 (2010)

a determination that an injury is fairly traceable to the challenged action does not depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible; LBP-10-4, 71 NRC 216 (2010)

a dispute is material if its resolution would make a difference in the outcome of the licensing proceeding; LBP-10-6, 71 NRC 350 (2010)

a motion for reconsideration will be granted only upon a showing of compelling circumstances, such as a clear and material error, which could not have been reasonably anticipated and that renders the decision invalid; CLI-10-15, 71 NRC 479 (2010)

a new contention may be filed after the deadline in the notice of hearing with leave of the presiding officer upon a showing that information upon which it is based was not previously available, is materially different than information previously available, and has been submitted in a timely fashion based on the availability of the subsequent information; LBP-10-9, 71 NRC 493 (2010)

a petition for rule waiver must be accompanied by an affidavit that describes with particularity the special circumstances that justify the waiver; CLI-10-10, 71 NRC 281 (2010)

a petition for rule waiver must show that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted; CLI-10-10, 71 NRC 281 (2010); LBP-10-12, 71 NRC 656 (2010)

a petition would qualify for interlocutory review where it challenges a board decision that affects the basic structure of the proceeding in a pervasive and unusual manner; CLI-10-13, 71 NRC 387 (2010)

a presumption of standing applies when an individual, an organization, or an individual authorizing an organization to represent his or her interests resides within 50 miles of the proposed facility or has frequent contacts with the area affected by the proposed facility; LBP-10-7, 71 NRC 391 (2010)

a proposed new or amended contention shall be deemed timely if it is filed within 30 days of the date when the new and material information on which it is based first becomes available; LBP-10-9, 71 NRC 493 (2010)

a regular commute that takes petitioner past a plant entrance once or twice a week is sufficient to establish standing; LBP-10-1, 71 NRC 165 (2010)

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absent good cause, a compelling showing must be made on the other section 2.309(c) factors if a nontimely petition is to be granted or a nontimely contention is to be admitted; CLI-10-12, 71 NRC 319 (2010); LBP-10-1, 71 NRC 165 (2010); LBP-10-11, 71 NRC 609 (2010)

adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process; LBP-10-7, 71 NRC 391 (2010)

although a board may appropriately view petitioner's support for its contention in a light that is favorable to the petitioner, petitioner must provide that support for his or her contention; LBP-10-6, 71 NRC 350 (2010)

although petitioner could participate in another federal agency's comment process relating to a proposed environmental assessment that is the focus of a new contention and thus does have some alternative means for protecting its interests, for the purpose of 10 C.F.R. 2.309(c)(1)(v), that process is not analogous to participation in an NRC adjudicatory proceeding and therefore does not weigh heavily against the petitioner's intervention in the NRC proceeding; LBP-10-1, 71 NRC 165 (2010)

although petitioner has established the requisite standing, the hearing request must be denied because of a failure to proffer one admissible contention; LBP-10-1, 71 NRC 165 (2010)

although the Army has the burden to protect the public from depleted uranium, that issue is not relevant to a standing inquiry; LBP-10-4, 71 NRC 216 (2010)

an admissible contention under the good cause standard must allege that a construction permit holder's reasons for past delay failed to constitute good cause for a CP extension and be supported by a showing that construction delay is traceable to permit holder action that was intentional and without a valid business purpose; LBP-10-7, 71 NRC 391 (2010)

an appeal as of right from a board's ruling on an intervention petition is permitted upon denial of a petition to intervene and/or request for hearing on the question as to whether it should have been granted or upon the granting of a petition to intervene and/or request for hearing on the question as to whether it should have been wholly denied; CLI-10-16, 71 NRC 486 (2010)

an Indian Tribe whose reservation is adjacent to facilities where spent nuclear fuel is currently stored, the nearest of which resides just 600 yards from an ISFSL, has more than a mere interest in a problem; LBP-10-11, 71 NRC 609 (2010)

any contention that fails to controvert the application or that mistakenly asserts that the application does not address a relevant issue, may be dismissed; LBP-10-6, 71 NRC 350 (2010); LBP-10-7, 71 NRC 391 (2010)

any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to board scrutiny; LBP-10-7, 71 NRC 391 (2010)

appeals of an initial decision or partial initial decision of the presiding officer are permitted in the high-level waste repository proceeding; CLI-10-10, 71 NRC 281 (2010)

applicable NRC standards governing summary disposition are set forth in 10 C.F.R. 2.710; CLI-10-11, 71 NRC 287 (2010)

arguments made before the board that are abandoned on appeal are deemed to be waived; CLI-10-3, 71 NRC 49 (2010); CLI-10-9, 71 NRC 245 (2010)

arguments or new facts raised for the first time on appeal are not considered unless their proponent can demonstrate that the information was previously unavailable; CLI-10-3, 71 NRC 49 (2010)

at the summary disposition stage, the quality of evidentiary support is expected to be of a higher level than that at the contention filing stage; CLI-10-15, 71 NRC 479 (2010)

because of the significance of the issues at hand, applicant was permitted to reply to the answers to its motion to withdraw; LBP-10-11, 71 NRC 609 (2010)

because petitioner fails to establish his own standing as an individual, the board is precluded from granting representational standing on behalf of an organization; LBP-10-4, 71 NRC 216 (2010)

because petitioner's pleadings fail to provide adequate information about the interests of the organization to which he belongs and how those interests would be adversely affected by the licensing proceeding, the board is precluded from granting organizational standing; LBP-10-4, 71 NRC 216 (2010)

boards may appropriately view petitioner's supporting information in a light favorable to the petitioner, but failure to provide such information regarding a proffered contention requires that the contention be rejected; LBP-10-1, 71 NRC 165 (2010); LBP-10-7, 71 NRC 391 (2010)

boards may not supply information that is missing or make assumptions of fact not provided by the petitioner; LBP-10-6, 71 NRC 350 (2010)

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boards must consider the extent a petitioner's interests are represented by existing parties, not potential parties; LBP-10-11, 71 NRC 609 (2010)

broad and conclusory statements by petitioners that they have direct information concerning the threat to health and safety posed by the license applicant are insufficient to establish standing; LBP-10-4, 71 NRC 216 (2010)

Commission regulations may not be directly attacked in adjudicatory proceedings, but a party may petition for a waiver of the application of a regulation; LBP-10-12, 71 NRC 656 (2010)

contemporaneous judicial standing concepts are applied in NRC proceedings; LBP-10-7, 71 NRC 391 (2010)

contemporaneous judicial standing concepts require that participant establish that it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing, the injury is fairly traceable to the challenged action, and the injury is likely to be redressed by a favorable decision; LBP-10-7, 71 NRC 391 (2010)

contention admissibility requirements are deliberately strict, and any contention that does not satisfy the requirements will be rejected; CLI-10-1, 71 NRC 1 (2010); CLI-10-9, 71 NRC 245 (2010); LBP-10-6, 71 NRC 350 (2010)

contention admissibility standards call for a clear statement as to the basis for the contention and the submission of supporting information and references to specific documents and sources that establish the validity of the contention; CLI-10-1, 71 NRC 1 (2010)

contention admissibility standards do not require dispositive proof of the contention or its bases, but they do require a clear statement as to the bases for the contention and supporting information and references to documents and sources that establish the validity of the contention; CLI-10-1, 71 NRC 1 (2010); LBP-10-6, 71 NRC 350 (2010)

contention alleging that depleted uranium-contaminated bombing plume dust causes health issues in the community is inadmissible because it lacks a supporting statement of the alleged facts or expert opinions; LBP-10-4, 71 NRC 216 (2010)

contention standards require pleading specific grievances, not simply providing general notice pleadings; CLI-10-11, 71 NRC 287 (2010); CLI-10-15, 71 NRC 479 (2010)

contentions must be accompanied by a concise statement of the alleged facts or expert opinions that support the requestor's/petitioner's position on the issue together with references to the specific sources and documents on which it intends to rely to support its position; LBP-10-6, 71 NRC 350 (2010)

contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; CLI-10-2, 71 NRC 27 (2010); LBP-10-7, 71 NRC 391 (2010)

contentions must provide a specific statement of the issue of law or fact to be raised or controverted; CLI-10-2, 71 NRC 27 (2010)

contentions must show that a genuine dispute exists on a material issue of law or fact with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute; LBP-10-6, 71 NRC 350 (2010)

contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-10-7, 71 NRC 391 (2010)

contentions that simply state petitioner's views about what regulatory policy should be do not present a litigable issue; LBP-10-7, 71 NRC 391 (2010)

discretionary intervention may be granted in circumstances when one petitioner has standing as of right and has proffered at least one admissible contention, but other petitioners have not demonstrated their standing; LBP-10-1, 71 NRC 165 (2010)

each intervening participant that wishes to be a party to a proceeding must establish its own standing; LBP-10-7, 71 NRC 391 (2010)

eight factors of 10 C.F.R. 2.309(c)(1) apply to nontimely intervention petitions, hearing requests, and contentions; LBP-10-9, 71 NRC 493 (2010)

exactly when a notice of appearance must be filed (or a notice of withdrawal submitted when an attorney or representative is no longer acting as a participant representative) is not specified in the agency's rules; LBP-10-7, 71 NRC 391 (2010)

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expert statements by intervenors that merely state conclusions and provide no reasoned basis or explanation for such conclusions do not meet the contention admission requirement of 10 C.F.R. 2.309(f)(1)(v); LBP-10-6, 71 NRC 350 (2010); LBP-10-10, 71 NRC 529 (2010)

factors (v) and (vi) of 10 C.F.R. 2.309(c) generally are given less weight than factors (vii) and (viii); LBP-10-1, 71 NRC 165 (2010)

failure of an organizational participant to have a representative provide an appearance notice in accord with section 2.314(b) might provide cause for an appropriate sanction for failure properly to prosecute the litigation; LBP-10-7, 71 NRC 391 (2010)

failure of petitioner to reference any portion of the combined license application with which it takes issue is grounds for dismissal of a contention; CLI-10-9, 71 NRC 245 (2010)

failure to comply with any of the contention pleading requirements of 10 C.F.R. 2.309(f)(1) is grounds for dismissing a contention; LBP-10-7, 71 NRC 391 (2010)

failure to comply with Commission pleading requirements for late filings constitutes sufficient grounds for rejecting intervention and hearing requests; LBP-10-4, 71 NRC 216 (2010)

failure to indicate how alleged harms might result from license amendments, particularly given not only the shutdown status of the facility, but also the continued applicability of the NRC's safety-oriented regulations governing defueled nuclear plants, is grounds for denial of standing; LBP-10-11, 71 NRC 609 (2010)

failure to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact is grounds for dismissal of a contention; CLI-10-9, 71 NRC 245 (2010); LBP-10-6, 71 NRC 350 (2010)

failure to satisfy any of the pleading requirements of 10 C.F.R. 2.309(f)(1)(i)-(vi) is sufficient grounds to render the contention inadmissible; LBP-10-4, 71 NRC 216 (2010); LBP-10-6, 71 NRC 350 (2010)

failure to specify any radiological contacts with enough concreteness to establish some impact on petitioner will result in denial of standing; LBP-10-11, 71 NRC 609 (2010)

failure to specify the language of the issue framed by a contention and distinguish it from the discussion that provides the supporting foundation for the issue statement might be grounds for dismissing contentions; LBP-10-7, 71 NRC 391 (2010)

failure under 10 C.F.R. 2.309(d) to support an intervention petition with affidavits providing necessary information regarding the basis for representational standing could interpose a jurisdictional flaw potentially warranting the participant's dismissal from the proceeding; LBP-10-7, 71 NRC 391 (2010)

fairness requires that all participants in NRC adjudicatory proceedings abide by its procedural rules, especially those who are cognizant of those rules and represented by counsel; CLI-10-12, 71 NRC 319 (2010)

for a contention to be admissible, it must satisfy eight pleading requirements; LBP-10-13, 71 NRC 673 (2010)

for organizational standing, petitioner must identify any discrete institutional injury to itself other than general environmental and policy interests of the sorts the federal courts and NRC repeatedly have found insufficient; CLI-10-3, 71 NRC 49 (2010)

general assertions, without some effort to show why the assertions undercut findings or analyses in the environmental report, fail to satisfy the requirements of 10 C.F.R. 2.309(f)(1)(vi); LBP-10-6, 71 NRC 350 (2010)

good cause is the most significant of the late-filing factors; CLI-10-12, 71 NRC 319 (2010); LBP-10-1, 71 NRC 165 (2010); LBP-10-9, 71 NRC 493 (2010); LBP-10-11, 71 NRC 609 (2010)

hearing requests and intervention petitions must set forth with particularity the contentions sought to be raised; CLI-10-9, 71 NRC 245 (2010)

identifying the individual or individuals authorized to act on behalf of each participant should provide the means whereby any participant needing to reach another participant's authorized representatives to serve a filing or have a discussion about any litigation-related matters will be able to do so; LBP-10-7, 71 NRC 391 (2010)

if a contention satisfies the timeliness requirement, then, by definition, it is not subject to section 2.309(c) which specifically applies to nontimely filings; LBP-10-9, 71 NRC 506 n.46 (2010); LBP-10-9, 71 NRC 493 (2010)

if a question arises over the scope of an admitted contention, the board or Commission will refer back to the bases set forth in support of the contention; CLI-10-15, 71 NRC 479 (2010)

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- if leave to file a motion for reconsideration is granted, the motion must show compelling circumstances, such as the existence of an unanticipated, clear, and material error, which could not have been anticipated, that renders the decision invalid; CLI-10-9, 71 NRC 245 (2010)
- if petitioner fails to offer alleged facts or expert opinion and a reasoned statement explaining any alleged inadequacy in the application, petitioner has not demonstrated a genuine dispute; LBP-10-6, 71 NRC 350 (2010)
- if petitioner neglects to provide the requisite support for its contentions, the board should not make assumptions of fact that favor petitioner or supply information that is lacking; LBP-10-6, 71 NRC 350 (2010); LBP-10-7, 71 NRC 391 (2010)
- in a contention of omission, intervenors must show that what is allegedly omitted is required by law; LBP-10-10, 71 NRC 529 (2010)
- in addition to general contention admissibility requirements, amended or new contentions filed after an intervenor's initial filing will be admitted only upon leave of the presiding officer and a demonstration that information upon which the contention is based was not previously available, is materially different than information previously available, and has been submitted in a timely fashion based on the availability of the subsequent information; LBP-10-13, 71 NRC 673 (2010)
- in cases where the record fails to support the existence of a significant source of radioactivity producing an obvious potential for offsite consequences at a particular distance frequented by a petitioner, it becomes petitioner's burden to show a specific and plausible means of how the challenged action may harm him or her; LBP-10-4, 71 NRC 216 (2010)
- in construction permit proceedings, proximity to the proposed facility has been considered sufficient to establish standing; LBP-10-7, 71 NRC 391 (2010)
- in determining whether petitioner has demonstrated sufficient interest to intervene under 10 C.F.R. 2.309(d)(1), the Commission has long applied contemporaneous judicial concepts of standing; LBP-10-4, 71 NRC 216 (2010)
- in establishing proximity-based standing, it is petitioner's responsibility to provide enough detail to allow the board to distinguish a casual interest from a substantial one; LBP-10-1, 71 NRC 165 (2010)
- in proceedings involving construction permits and operating licenses for nuclear power plants, the Commission recognizes a proximity presumption in favor of standing for persons who reside or have frequent contacts within a 50-mile radius of a nuclear power plant; LBP-10-1, 71 NRC 165 (2010); LBP-10-4, 71 NRC 216 (2010)
- in proceedings where petitioner's factual assertions in support of standing are challenged, untenable, conjectural, or conclusory, a board need not uncritically accept such assertions; LBP-10-4, 71 NRC 216 (2010)
- in ruling on a nontimely petition, boards are to consider eight factors that will excuse the tardiness of the petition if, on balance, they weigh in favor of the petitioner; CLI-10-12, 71 NRC 319 (2010)
- information, alleged facts, and expert opinions provided by a petitioner will be examined by the board to confirm that the petitioner does indeed supply adequate support for its contention; LBP-10-6, 71 NRC 350 (2010)
- interlocutory review is permitted at the Commission's discretion only upon a showing that the issue for which interlocutory review is sought threatens the party adversely affected by it with immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-10-16, 71 NRC 486 (2010)
- intervenor need not provide all supporting facts for a contention in the original submission or prove its case to have the contention admitted; LBP-10-9, 71 NRC 493 (2010)
- intervenor should not be held to a prima facie burden at the contention admissibility stage of a proceeding, but its showing should be sufficient to require reasonable minds to inquire further; LBP-10-10, 71 NRC 529 (2010)
- intervenors and their experts need to provide at the contention admission stage only a reasoned presentation sufficient to warrant further inquiry; LBP-10-10, 71 NRC 529 (2010)
- intervenors may not freely change the focus of an admitted contention at will to add a host of new issues and objections that could have been raised at the outset; CLI-10-11, 71 NRC 287 (2010)
- intervenors must provide sufficient information to show that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that intervenors

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dispute, or, in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief; LBP-10-9, 71 NRC 493 (2010)

intervenor must timely file a new or amended contention that addresses the factors in section 2.714(b) in order to raise specific challenges regarding new information; LBP-10-10, 71 NRC 529 (2010)

intervenor with contentions rooted in new material information need not make the same showing as intervenors who have simply delayed filing their contentions until after expiration of the regulatory deadline; LBP-10-9, 71 NRC 493 (2010)

intervention petitioners have an automatic right to appeal a board decision wholly denying a petition to intervene; CLI-10-1, 71 NRC 1 (2010)

intervention petitions shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding; CLI-10-4, 71 NRC 56 (2010)

issues raised by a contention must be material to the licensing decision; LBP-10-9, 71 NRC 493 (2010)

it is insufficient for petitioner to point to an Internet Web site or article and expect the board on its own to discern what particular issue a petitioner is raising and why; CLI-10-15, 71 NRC 479 (2010)

it is petitioner's responsibility to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of the proceeding; LBP-10-6, 71 NRC 350 (2010)

judicial concepts of standing require a petitioner to allege an actual or threatened, concrete and particularized injury that is fairly traceable to the challenged action, falls among the general interests protected by the Atomic Energy Act or other applicable statute, and is likely to be redressed by a favorable decision; LBP-10-4, 71 NRC 216 (2010)

judicial standing concepts are applied in NRC proceedings; LBP-10-1, 71 NRC 165 (2010)

legal issue contentions do not require any supporting facts; LBP-10-11, 71 NRC 609 (2010)

materiality in the context of paragraph (f)(2) differs from materiality in the context of paragraph (f)(1) of 10 C.F.R. 2.309; LBP-10-1, 71 NRC 165 (2010)

materiality requires a showing that the alleged error or omission is of possible significance to the result of the proceeding; LBP-10-6, 71 NRC 350 (2010)

members of intervenor organizations who reside, work, or recreate within 50 miles of the proposed nuclear power plant have proximity-based standing; LBP-10-9, 71 NRC 493 (2010)

mere notice pleading is insufficient for contention admission; LBP-10-6, 71 NRC 350 (2010)

mootness occurs when a justiciable controversy no longer exists; LBP-10-10, 71 NRC 529 (2010)

motions for reconsideration are appropriately considered under 10 C.F.R. 2.323(e); CLI-10-9, 71 NRC 245 (2010)

motions for reconsideration may not be filed except upon leave of the adjudicatory body that rendered the decision; CLI-10-9, 71 NRC 245 (2010)

motions for reconsideration must be filed within 10 days of the action for which reconsideration is requested; CLI-10-9, 71 NRC 245 (2010)

motions for reconsideration will be denied if they point to no compelling circumstances warranting reconsideration; CLI-10-10, 71 NRC 281 (2010)

multiple requests for reconsideration of the same decision are not allowed; CLI-10-9, 71 NRC 245 (2010)

neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention; LBP-10-7, 71 NRC 391 (2010)

new contentions filed by an intervenor must comply with timeliness standards; LBP-10-2, 71 NRC 190 (2010)

new information may constitute good cause for late intervention if petitioners file promptly thereafter; LBP-10-11, 71 NRC 609 (2010)

no appeals may be taken from any presiding officer order or decision, except as otherwise permitted by 10 C.F.R. 2.1015(a); CLI-10-10, 71 NRC 281 (2010)

nontimely hearing requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the licensing board that the petition and/or request should be granted and/or the contentions should be admitted based on a balancing of the factors specified in 10 C.F.R. 2.309(c)(1)(i)-(viii); CLI-10-4, 71 NRC 56 (2010); LBP-10-4, 71 NRC 216 (2010)

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NRC applies judicial standing concepts that require a petitioner to establish a distinct and palpable harm that constitutes injury-in-fact, the harm is fairly traceable to the challenged action, and the harm is likely to be redressed by a favorable decision; LBP-10-11, 71 NRC 609 (2010)

NRC rules governing the high-level waste proceeding do not provide for interlocutory review; CLI-10-13, 71 NRC 387 (2010)

NRC would not accept incorporation by reference of another petitioner's issues in an instance where petitioner has not submitted at least one admissible issue of its own; LBP-10-11, 71 NRC 609 (2010)

objections not raised at hearing are deemed waived; CLI-10-14, 71 NRC 449 (2010)

on issues of whether a contention has been rendered moot by provision of information by an applicant, the applicant bears the burden of persuasion; LBP-10-10, 71 NRC 529 (2010)

once a petition to intervene and request for hearing have been granted and contentions are admitted for hearing, appeals of board rulings on new or amended contentions are treated under section 2.341(f)(2), regardless of the subject matter of those contentions; CLI-10-16, 71 NRC 486 (2010)

only one admissible contention is required for each petitioner to intervene; LBP-10-11, 71 NRC 609 (2010)

opponent of summary disposition may not rest upon mere allegations or denials, but must state specific facts showing that there is a genuine issue of fact for hearing; CLI-10-11, 71 NRC 287 (2010)

opponent of summary disposition must counter any adequately supported material facts provided by the movant with its own separate, short, and concise statement of the material facts as to which it contends there exists a genuine issue to be heard; LBP-10-8, 71 NRC 433 (2010)

parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing; CLI-10-15, 71 NRC 479 (2010)

permission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact that will not otherwise be properly raised or presented; LBP-10-11, 71 NRC 609 (2010)

petitioner cannot rely on another board's finding of standing in a prior proceeding, even where the same licensed facility is involved; CLI-10-7, 71 NRC 133 (2010)

petitioner does not have to prove its contention at the admissibility stage; LBP-10-6, 71 NRC 350 (2010)

petitioner is obliged to present factual information and/or expert opinion necessary to support its contention; LBP-10-4, 71 NRC 216 (2010); LBP-10-6, 71 NRC 350 (2010); LBP-10-7, 71 NRC 391 (2010)

petitioner may amend contentions or file new contentions on issues arising under NEPA if there are data or conclusions in NRC environmental documents that differ significantly from the data or conclusions in applicant's documents; LBP-10-1, 71 NRC 165 (2010)

petitioner may not establish standing by alleging injury on behalf of another entity, but rather, petitioner must be the object of the actual or threatened injury; LBP-10-4, 71 NRC 216 (2010)

petitioner may not use its reply brief to cure pleading defects in its intervention petition; CLI-10-1, 71 NRC 1 (2010)

petitioner must make a fresh demonstration of standing for each proceeding in which he seeks intervention because petitioner's circumstances may change from one proceeding to the next; CLI-10-7, 71 NRC 133 (2010)

petitioner must provide more than vague assertions that it will be able to assist in developing the record to satisfy a requirement for late filing; CLI-10-12, 71 NRC 319 (2010)

petitioner must provide only a brief explanation of the rationale underlying its contention; LBP-10-13, 71 NRC 673 (2010)

petitioner must show a pattern of regular, significant contacts within the vicinity of the site to satisfy standing requirements; LBP-10-4, 71 NRC 216 (2010)

petitioner must show that the information on which its new contention is based was not reasonably available to the public previously and that it filed its intervention petition promptly after learning of such new information; LBP-10-11, 71 NRC 609 (2010)

petitioner must show that the subject matter of a contention would impact the grant or denial of a pending license application; LBP-10-6, 71 NRC 350 (2010)

petitioner must state its name, address, and telephone number, nature of its right under the Atomic Energy Act to be made a party to the proceeding, nature and extent of its property, financial, or other

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interest in the proceeding, and possible effect of any decision or order issued in the proceeding on its interest; LBP-10-7, 71 NRC 391 (2010)

petitioner who had frequently visited an area allegedly affected by the proposed action for recreational purposes showed injury in the standing context; LBP-10-1, 71 NRC 165 (2010)

petitioners bear the burden of providing sufficient relevant, specific information, whether by good-faith estimate or otherwise, to establish the basis for their standing claims; LBP-10-1, 71 NRC 165 (2010)

petitioner's claim that he routinely pierces the 50-mile radius around a reactor site is too vague to support standing; LBP-10-1, 71 NRC 165 (2010)

petitioner's failure to carefully read the governing procedural regulations does not constitute good cause for its late filing; CLI-10-12, 71 NRC 319 (2010)

petitioners have an automatic right to appeal a board decision wholly denying a petition to intervene; CLI-10-9, 71 NRC 245 (2010); CLI-10-12, 71 NRC 319 (2010)

petitioners may enforce procedural rights only if the procedures in question are designed to protect some threatened concrete interest of theirs that is the ultimate basis of their standing; LBP-10-11, 71 NRC 609 (2010)

petitioners may protect their interests by filing a request for Commission action under 10 C.F.R. 2.206 rather than a late-filed intervention petition; CLI-10-12, 71 NRC 319 (2010)

petitioners may protect their interests by participating as appropriate, as amici curiae; CLI-10-12, 71 NRC 319 (2010)

petitioners must set forth their contentions with particularity; CLI-10-15, 71 NRC 479 (2010)

petitioner's tardiness due to its belated realization that it could present its arguments before the NRC did not constitute good cause for its late filing; CLI-10-12, 71 NRC 319 (2010)

petitioner's vague statements that it would rely on its experts and documents from various sources are insufficient to satisfy a requirement for late filing; CLI-10-12, 71 NRC 319 (2010)

petitioners who are not represented by counsel are held to less rigid pleading standards than would ordinarily be applied to litigants who are represented by counsel; LBP-10-4, 71 NRC 216 (2010)

petitioners who fail to provide specific information regarding proximity or frequency of contacts that may establish standing only complicate matters for themselves; LBP-10-1, 71 NRC 165 (2010)

petitions for review will be granted at the Commission's discretion, giving due weight to the existence of a substantial question with respect to the five considerations of 10 C.F.R. 2.341(b)(4)(i)-(v); CLI-10-14, 71 NRC 449 (2010)

prior to 2004, in addition to meeting the substantive admissibility criteria found in 10 C.F.R. 2.714(b)(2), the issue statement was based on environmental impact statement or environmental assessment information that differed significantly from the data or conclusions in the applicant's environmental report; LBP-10-1, 71 NRC 165 (2010)

properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application, including the safety analysis report and the environmental report, so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact; LBP-10-7, 71 NRC 391 (2010)

proponent of a summary disposition motion bears the burden of making the requisite showing by providing a separate, short, and concise statement of the material facts as to which movant contends that there is no genuine issue to be heard; LBP-10-8, 71 NRC 433 (2010)

providing any material or document as the foundation for a contention without setting forth an explanation of its significance is inadequate to support the admission of a contention; LBP-10-6, 71 NRC 350 (2010)

proximity-based standing has been denied when petitioner has demonstrated only occasional contact with the zone of possible harm; LBP-10-1, 71 NRC 165 (2010)

proximity-based standing will be denied when petitioner fails to supply more specific information regarding the frequency, nature, and length of his contacts within the proximity zone; LBP-10-1, 71 NRC 165 (2010)

pursuant to the proximity-plus approach, a presumption based on geographical proximity (albeit at distances much closer than 50 miles) may be applied where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-10-4, 71 NRC 216 (2010)

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reasonably specific factual and legal allegations are required at the outset to ensure that matters admitted for hearing have at least some minimal foundation, are material to the proceeding, and provide notice to opposing parties of the issues they will need to defend against; CLI-10-11, 71 NRC 287 (2010)

rejection or admission of a contention where petitioner has been admitted as a party and has other contentions pending neither constitutes serious and irreparable impact nor affects the basic structure of the proceeding in a pervasive and unusual manner; CLI-10-16, 71 NRC 486 (2010)

replies should be narrowly focused on the legal or logical arguments presented in the answers on a request for hearing/petition to intervene; CLI-10-1, 71 NRC 1 (2010)

request for waiver of application of 10 C.F.R. 51.53(b), 51.95(b), and 51.106(c) precluding consideration of need for power and alternative energy sources from a Part 50 operating license proceeding fails to provide the prima facie showing required; LBP-10-12, 71 NRC 656 (2010)

requests for hearing or petitions for leave to intervene must set forth with particularity the contentions sought to be raised, addressing six pleading requirements; CLI-10-1, 71 NRC 1 (2010)

section 2.107(a) does not authorize withdrawal of an application but rather clarifies that licensing boards have authority to impose reasonable conditions upon voluntary withdrawals in appropriate circumstances; LBP-10-11, 71 NRC 609 (2010)

simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention; LBP-10-7, 71 NRC 391 (2010)

standing will be denied where contact has been limited to mere occasional trips to areas located close to reactors; LBP-10-1, 71 NRC 165 (2010)

summary disposition may be entered with respect to all or any part of the matters involved in the proceeding if the motion, along with any appropriate supporting materials, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law; CLI-10-11, 71 NRC 287 (2010); LBP-10-8, 71 NRC 433 (2010)

that interlocutory review will only be granted under extraordinary circumstances reflects the Commission's disfavor of piecemeal appeals during ongoing licensing board proceedings; CLI-10-16, 71 NRC 486 (2010)

the board may refer certain rulings to the Commission, and certain participants in the proceeding may request that the presiding officer certify to the Commission rulings not otherwise immediately appealable pursuant to section 2.1015(b); CLI-10-10, 71 NRC 281 (2010)

the Commission has discretion to allow oral argument upon the request of a party made in a petition for review, brief on review, or upon its own initiative; CLI-10-9, 71 NRC 245 (2010)

the Commission will defer to a board's rulings on threshold issues absent an error of law or abuse of discretion; CLI-10-3, 71 NRC 49 (2010); CLI-10-12, 71 NRC 319 (2010)

the Commission will not consider information that was not raised before the board; CLI-10-9, 71 NRC 245 (2010)

the good cause factor favors petitioners who have filed their petition within 30 days of the availability of the document they contend contains new and significant information so as to form the basis for their contention; LBP-10-1, 71 NRC 165 (2010)

the materiality requirement for contention admission often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment; LBP-10-7, 71 NRC 391 (2010)

the presiding officer must determine whether petitioner is a person whose interest may be affected by the proceeding; LBP-10-7, 71 NRC 391 (2010)

the proximity presumption applies when petitioners live within 50 miles of the proposed facility or when they have frequent contacts with the area affected by the proposed facility; LBP-10-1, 71 NRC 165 (2010)

the reach of a contention necessarily hinges upon its terms coupled with its stated bases; CLI-10-11, 71 NRC 287 (2010)

the requirement that an injury or threat of injury be concrete and particularized perforce means that the injury must not be conjectural or hypothetical; LBP-10-4, 71 NRC 216 (2010)

the scope of a contention is limited to issues of law and fact pleaded with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with the Commission's rules; CLI-10-5, 71 NRC 90 (2010); CLI-10-15, 71 NRC 479 (2010)

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threshold contention standards require petitioners to review application materials and set forth their contentions with particularity; CLI-10-11, 71 NRC 287 (2010)

to be admissible, a contention must assert an issue of law or fact that is material to the findings NRC must make to support the action that is involved in the proceeding; LBP-10-6, 71 NRC 350 (2010)

to be admissible, a contention must satisfy the six pleading requirements of 10 C.F.R. 2.309(f)(1)(i)-(vi); LBP-10-4, 71 NRC 216 (2010)

to be admissible, a contention must show that some significant link exists between the claimed deficiency and either the health and safety of the public or the environment; LBP-10-6, 71 NRC 350 (2010)

to be admissible, a proposed contention must include specific statements of law or fact to be raised or controverted; LBP-10-9, 71 NRC 493 (2010)

to be admissible, contentions must assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application; LBP-10-7, 71 NRC 391 (2010)

to derive standing from a member, an organization must demonstrate that the individual member has standing to participate and has authorized the organization to represent his or her interests; CLI-10-1, 71 NRC 1 (2010)

to establish proximity-based standing, it is petitioner's responsibility to provide enough detail to allow the board to distinguish a casual interest from a substantial one; LBP-10-7, 71 NRC 391 (2010)

to establish representational standing, an organization must demonstrate that the licensing action will affect at least one of its members, identify that member by name and address, and show that it is authorized by that member to request a hearing on his or her behalf; LBP-10-11, 71 NRC 609 (2010)

to establish standing based on frequent contacts, petitioner must show that it frequently engages in substantial business and related activities in the vicinity of the facility, engages in normal, everyday activities in the vicinity, has regular and frequent contacts in an area near a licensed facility, or otherwise has visits of a length and nature showing an ongoing connection and presence; LBP-10-1, 71 NRC 165 (2010)

to establish standing petitioner must show that it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes, the injury is fairly traceable to the challenged action, and the injury is likely to be redressed by a favorable decision; LBP-10-1, 71 NRC 165 (2010)

to establish the requisite proximity for standing, petitioner must clearly indicate where he lives and/or what contact he has with the site; LBP-10-1, 71 NRC 165 (2010); LBP-10-7, 71 NRC 391 (2010)

to force intervenors to file contentions before the results of an ongoing NRC investigation are announced to the public would effectively force intervenors to speculate about the results of such investigations and the conclusions the Staff might reach; LBP-10-9, 71 NRC 493 (2010)

to litigate a contention, petitioner who has established standing must also ensure that each contention meets six admissibility criteria; LBP-10-2, 71 NRC 190 (2010)

to meet its burden, it is generally sufficient if petitioner provides plausible factual allegations that satisfy each element of standing; LBP-10-4, 71 NRC 216 (2010)

to raise a timely contention, a party is not expected to piece together disparate shreds of information that, standing alone, have little apparent significance; LBP-10-9, 71 NRC 493 (2010)

to support a contention challenging a Commission rule, petitioner must request, and demonstrate any supporting reasons for, a waiver of the rule; CLI-10-9, 71 NRC 245 (2010)

to the degree the response to a summary disposition motion fails to contravene any adequately supported material facts proffered by the movant, the movant's facts will be considered to be admitted; LBP-10-8, 71 NRC 433 (2010)

under pre-2004 rules, the fact that a petition or new/amended contention was filed after the hearing opportunity notice deadline because the document or other item relied upon as the submission trigger was not available was considered good cause for the late filing; LBP-10-1, 71 NRC 165 (2010)

under Subpart L informal hearing procedures, summary disposition motions are to be resolved in accord with the same standards for dispositive motions that are utilized for formal hearings under Subpart G; LBP-10-8, 71 NRC 433 (2010)

under the 2004 Part 2 revisions, contentions are now required to be included with, rather than being submitted sometime subsequent to the filing of, the intervention petition; LBP-10-1, 71 NRC 165 (2010)

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when a petitioner cannot establish proximity-plus standing, he or she must resort to establishing standing under traditional standing principles; LBP-10-4, 71 NRC 216 (2010)

when an issue is no longer live, such that a party no longer has a legal interest in the issue, then it is moot; LBP-10-10, 71 NRC 529 (2010)

when character or integrity issues are raised, they are expected to be directly germane to the challenged licensing action; CLI-10-9, 71 NRC 245 (2010)

when petitioner addresses 10 C.F.R. 2.309(c)(1)(viii), it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony; CLI-10-12, 71 NRC 319 (2010)

where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by applicant, the contention is moot and intervenors must timely file a new or amended contention in order to raise specific challenges regarding the new information; LBP-10-10, 71 NRC 529 (2010)

where a contention challenges applicant's compliance with the Commission's rules implementing the National Environmental Policy Act, materiality relates not only to the Commission's determination regarding denial, issuance, or conditioning of the requested combined license, but also to the Commission's fulfillment of its obligations under NEPA; LBP-10-6, 71 NRC 350 (2010)

where any issue arises over the proper scope of a contention, NRC opinions have long referred back to the bases set forth in support of the contention; CLI-10-11, 71 NRC 287 (2010)

where petitioner conceded that information in its addendum was previously available, admitted the lateness of her filing, and made no effort at the time of its submission to justify its lateness or explain why the board should consider it, her request to supplement her submission was denied; LBP-10-4, 71 NRC 216 (2010)

whether a nontimely petition and its associated contentions should be considered is based upon a balancing of eight factors; LBP-10-1, 71 NRC 165 (2010)

whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source; LBP-10-4, 71 NRC 216 (2010)

with respect to 10 C.F.R. 2.309(c)(1)(vi), the presence of another admitted party to the proceeding, particularly when that party previously raised the issue that is the subject of the new contention, weighs against a petitioner; LBP-10-1, 71 NRC 165 (2010)

withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe; CLI-10-13, 71 NRC 387 (2010)

RULES OF PROCEDURE

as for conclusions of law, the Commission will review legal questions de novo and reverse a licensing board's legal rulings if they are a departure from or contrary to established law; CLI-10-5, 71 NRC 90 (2010)

asserted procedural defects should be called to an agency's attention when, if in fact they were defects, they would have been correctable; CLI-10-14, 71 NRC 449 (2010)

discretionary review is granted based on petitioner's showing that there is a substantial question with respect to the five considerations listed in 10 C.F.R. 2.341(b)(4); CLI-10-5, 71 NRC 90 (2010)

SAFEGUARDS INFORMATION

a completed Form SF-85, Questionnaire for Non-Sensitive Positions, will be used by the Office of Administration to conduct the background check required for access to SGI; CLI-10-4, 71 NRC 56 (2010)

after a closed hearing, parties can propose creation of a public copy of the transcript, with appropriate redactions for protected information; LBP-10-5, 71 NRC 329 (2010)

an individual requesting access must provide a statement that explains the individual's need to know; CLI-10-4, 71 NRC 56 (2010)

before the Office of Administration makes an adverse determination regarding a proposed recipient's trustworthiness and reliability for access to safeguards information, it must provide the proposed recipient any records that were considered in the trustworthiness and reliability determination, so that the proposed recipient will have an opportunity to correct or explain the record; CLI-10-4, 71 NRC 56 (2010)

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- documents containing classified information or SGI must be evaluated paragraph by paragraph and those paragraphs containing classified information or SGI are to be redacted and the remaining paragraphs (not containing such sensitive material) are to be made available for disclosure to the public; LBP-10-2, 71 NRC 190 (2010)
- during closed portions of oral argument, only the board, NRC Staff, applicant, and individuals who signed nondisclosure affidavits pursuant to protective order would be permitted to remain in the hearing room; LBP-10-5, 71 NRC 329 (2010)
- individuals who will have access to safeguards information and believe they belong to one or more of the categories of individuals that are exempt from the criminal history records check and background check requirements should provide a statement identifying which exemption the requestor is invoking and explain the requestor's basis for believing that the exemption applies; CLI-10-4, 71 NRC 56 (2010)
- legal authority exists for nondisclosure and protection of security-related information concerning the physical protection of nuclear power plants under 10 C.F.R. 2.390(d)(1); LBP-10-5, 71 NRC 329 (2010)
- NRC Staff must file a notice of intent if, at the time of publication of Notice of Hearing, it appears that it will be impracticable for the Staff to avoid the introduction of restricted data or national security information into a proceeding; CLI-10-4, 71 NRC 56 (2010)
- prior to providing safeguards information to a requestor, NRC Staff will conduct (as necessary) an inspection to confirm that the recipient's information protection system is sufficient to satisfy the requirements of 10 C.F.R. 73.22; CLI-10-4, 71 NRC 56 (2010)
- requester may challenge NRC Staff's or Office of Administration's adverse determination with respect to access to safeguards information by filing a request for review; CLI-10-4, 71 NRC 56 (2010)
- section 2.390(d)(1) of 10 C.F.R. provides legal authority for nondisclosure and protection of security-related information concerning the physical protection of nuclear power plants, and for the closing of portions of hearings and other sessions in which such information will necessarily be discussed; LBP-10-5, 71 NRC 329 (2010)
- SGI qualifies for the exemption from disclosure; LBP-10-2, 71 NRC 190 (2010)
- the Office of Administration must determine, based upon completion of the background check, whether a proposed recipient is trustworthy and reliable, as required for access to safeguards information; CLI-10-4, 71 NRC 56 (2010)
- the Secretary will assess initially whether the proposed recipient has shown a need for sensitive unclassified nonsafeguards information or SGI; LBP-10-2, 71 NRC 190 (2010)
- SAFETY ANALYSIS**
- the purpose of the severe accident mitigation alternatives review is to ensure that any plant changes that have a potential for significantly improving severe accident safety performance are identified and assessed; CLI-10-11, 71 NRC 287 (2010)
- SAFETY EVALUATION**
- Part 54 compliance is not dependent on complete fulfillment of Part 51 requirements given that the Commission has explicitly excluded SAMA analysis from Part 54 and distinguished the safety requirements of Part 54 from the environmental evaluation commanded by Part 51; LBP-10-13, 71 NRC 673 (2010)
- SAFETY ISSUES**
- because a contention focuses on the safety-related aspects of a COL application, it is not apparent that the issue resolved in the board's admissibility ruling has any particular implications for a contention challenging the environmental impacts of long-term onsite low-level radioactive waste storage admitted and pending in another proceeding; LBP-10-8, 71 NRC 433 (2010)
- the required low-level radioactive waste storage information is tied to a combined license applicant's particular plans for compliance through design, operational organization, and procedures; CLI-10-2, 71 NRC 27 (2010)
- there is no requirement that such concerns must be raised in the environmental report; LBP-10-10, 71 NRC 529 (2010)
- SAFETY REVIEW**
- aging management review for license renewal focuses on structures and components that perform passive functions, with no moving parts or changes in configuration or properties; CLI-10-14, 71 NRC 449 (2010)

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aging management review for license renewal focuses on those systems, structures, and components that are of principal importance to safety; CLI-10-14, 71 NRC 449 (2010)

all non-safety-related structures, systems, and components whose failure could prevent satisfactory accomplishment of any of the safety functions identified in 10 C.F.R. 54.4(a)(1), including auxiliary systems necessary for the function of safety-related systems, are subject to aging management review for license renewal; CLI-10-14, 71 NRC 449 (2010)

all structures, systems, and components relied on in safety analyses or plant evaluations to perform a function that demonstrates compliance with the NRC's regulations for fire protection, environmental qualification, pressurized thermal shock, anticipated transients without scram, and station blackout are subject to aging management review for license renewal; CLI-10-14, 71 NRC 449 (2010)

general categories of structures, systems, and components falling within the initial focus of the safety review for license renewal are outlined; CLI-10-14, 71 NRC 449 (2010)

the general scope of the license renewal safety review is outlined in 10 C.F.R. 54.4; CLI-10-14, 71 NRC 449 (2010)

the only severe accident mitigation alternatives that applicant must implement as part of a license renewal safety review are those dealing with aging management; LBP-10-13, 71 NRC 673 (2010)

SAFETY-RELATED

all non-safety-related structures, systems, and components whose failure could prevent satisfactory accomplishment of any of the safety functions identified in 10 C.F.R. 54.4(a)(1), including auxiliary systems necessary for the function of safety-related systems, are subject to aging management review for license renewal; CLI-10-14, 71 NRC 449 (2010)

structures, systems, and components that are relied upon to remain functional during and following design-basis events to ensure the integrity of the reactor coolant pressure boundary, the capability to shut down the reactor and maintain it in a safe shutdown condition, or the capability to prevent or mitigate the consequences of accidents that could result in potential offsite exposures are subject to aging management review for license renewal; CLI-10-14, 71 NRC 449 (2010)

SANCTIONS

an attempt to circumvent page-limit rules by incorporating documents by reference could be grounds for sanctions; CLI-10-9, 71 NRC 245 (2010)

failure of an organizational participant to have a representative provide an appearance notice in accord with section 2.314(b) might provide cause for an appropriate sanction for failure properly to prosecute the litigation; LBP-10-7, 71 NRC 391 (2010)

failure under 10 C.F.R. 2.309(d) to support an intervention petition with affidavits providing necessary information regarding the basis for representational standing could interpose a jurisdictional flaw potentially warranting the participant's dismissal from the proceeding; LBP-10-7, 71 NRC 391 (2010)

SECRETARY OF THE COMMISSION

the Secretary is authorized to establish procedures for obtaining access to sensitive unclassified nonsafeguards information prior to granting intervention in a licensing proceeding; LBP-10-2, 71 NRC 190 (2010)

the Secretary will assess initially whether the proposed recipient has shown a need for sensitive unclassified nonsafeguards information or safeguards information; LBP-10-2, 71 NRC 190 (2010)

SECURITY

if petitioners wish to propose security measures in addition to those laid out in a Staff enforcement order, their remedy is to petition NRC under 10 C.F.R. 2.206 for further enforcement action or to ask NRC to institute a rulemaking to impose broader security measures; CLI-10-3, 71 NRC 49 (2010)

issuance of a post-9/11 security order does not amount to unlawfully promulgated regulations; CLI-10-3, 71 NRC 49 (2010)

See also Common Defense and Security; National Security Information

SENSITIVE UNCLASSIFIED NONSAFEGUARDS INFORMATION

a participant in administrative litigation, having an even greater interest in obtaining access to SUNSI than does the general public, is entitled to obtain documents under standards no more restrictive than would be accorded the general public under the Freedom of Information Act; LBP-10-2, 71 NRC 190 (2010)

a SUNSI access order is issued by the Commission or NRC in its role as supervisor of NRC Staff and does not constitute an adjudicatory ruling by the Commission; LBP-10-2, 71 NRC 190 (2010)

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- although 10 C.F.R. 2.390(d) never uses the term "sensitive unclassified nonsafeguards information, this regulation seems to fit NRC Staff's claim that SUNSI is security-related; LBP-10-2, 71 NRC 190 (2010)
- although the NRC public website states that SUNSI encompasses a wide variety of categories (e.g., personnel privacy, attorney-client privilege, confidential source), there is no legal basis for sweeping aside the well-established and long-recognized privileges such as the Privacy Act, 5 U.S.C. § 552(a), and the attorney-client privilege; LBP-10-2, 71 NRC 190 (2010)
- documents that qualify as exempt from FOIA disclosure are described; LBP-10-2, 71 NRC 190 (2010)
- excessively broad claims of SUNSI in a licensing proceeding impact not just an intervenors' access to documents, but also the public's access to the adjudicatory process; LBP-10-2, 71 NRC 190 (2010)
- interlocutory appeal to the Commission of certain rulings relating to SUNSI is authorized; LBP-10-2, 71 NRC 190 (2010)
- procedures and schedules set forth in the SUNSI access order are intended only to deal with issues arising before intervention occurs and a board is created; LBP-10-2, 71 NRC 190 (2010)
- Staff's designation of its own material as SUNSI is inconsistent with SUNSI's purported objective of protecting licensee or applicant data; LBP-10-2, 71 NRC 190 (2010)
- the Secretary of the Commission is authorized to establish procedures for obtaining access to SUNSI prior to granting intervention in a licensing proceeding; LBP-10-2, 71 NRC 190 (2010)
- the Secretary will assess initially whether the proposed recipient has shown a need for SUNSI or safeguards information; LBP-10-2, 71 NRC 190 (2010)
- to demonstrate a need for SUNSI, intervenors must discuss the basis for a proffered contention and describe why the information available to the intervenors is not sufficient to provide the basis and specificity for a proffered contention; LBP-10-5, 71 NRC 329 (2010)
- withholding from public access an entire document just because it may contain some SUNSI information is not only a misuse of the SUNSI designator, but fails the logic test by excluding the public from access to information that is not security-related; LBP-10-2, 71 NRC 190 (2010)
- SEVERE ACCIDENT MITIGATION ALTERNATIVES ANALYSIS**
- if NRC Staff finds any SAMA conferring a substantial benefit compared to its cost of implementation, it must make such SAMA a license condition for the renewed operating license; LBP-10-13, 71 NRC 673 (2010)
- if the benefit-to-cost ratio is glaringly large for a potentially cost-beneficial SAMA, NRC Staff must, as a prerequisite to extending a license, impose implementation of that SAMA as a license condition or, in the alternative, explain why it is not requiring implementation of that SAMA; LBP-10-13, 71 NRC 673 (2010)
- license renewal applicants are required to consider SAMAs in the environmental report prepared in connection with the application; CLI-10-11, 71 NRC 287 (2010)
- NRC cannot generically dispense with the consideration of SAMAs, under NEPA, through a policy statement issued pursuant to its Atomic Energy Act authority; LBP-10-13, 71 NRC 673 (2010)
- NRC Staff is obligated to consider severe accident mitigation alternatives if it has not already done so as part of its NEPA obligations in a license renewal review; LBP-10-13, 71 NRC 673 (2010)
- NRC Staff's hard look at all potentially cost-beneficial severe accident mitigation alternatives under NEPA and Part 51 ensures that it has given proper consideration to all relevant factors in granting a license renewal; LBP-10-13, 71 NRC 673 (2010)
- onsite storage of spent fuel during the license renewal term is a Category I issue and as such does not warrant any additional site-specific analysis of mitigation measures; CLI-10-14, 71 NRC 449 (2010)
- Part 54 compliance is not dependent on complete fulfillment of Part 51 requirements given that the Commission has explicitly excluded SAMA analysis from Part 54 and distinguished the safety requirements of Part 54 from the environmental evaluation commanded by Part 51; LBP-10-13, 71 NRC 673 (2010)
- the National Environmental Policy Act demands no fully developed plan or detailed examination of specific measures that will be employed to mitigate adverse environmental effects; CLI-10-11, 71 NRC 287 (2010)
- the only SAMAs that applicant must implement as part of a license renewal safety review are those dealing with aging management; LBP-10-13, 71 NRC 673 (2010)

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- the purpose of the SAMA review is to ensure that any plant changes that have a potential for significantly improving severe accident safety performance are identified and assessed; CLI-10-11, 71 NRC 287 (2010)
- unless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated, no purpose would be served to further refine the SAMA analysis, whose goal is only to determine what safety enhancements are cost-effective to implement; CLI-10-11, 71 NRC 287 (2010)
- SEVERE ACCIDENT MITIGATION DESIGN ALTERNATIVES ANALYSIS**
- challenge to the SAMDA analysis performed for the AP1000 certified design constitutes an impermissible challenge to NRC regulations; CLI-10-1, 71 NRC 1 (2010); CLI-10-9, 71 NRC 245 (2010); LBP-10-10, 71 NRC 529 (2010)
- if intervenors provide no facts or expert opinion explaining why a conclusion in applicant's environmental report is incorrect, or fail to identify any SAMDAs that should be adopted if some unspecified new analysis were performed or any cost-beneficial SAMAs, their contention should be dismissed; LBP-10-10, 71 NRC 529 (2010)
- issue of whether location of a nuclear plant in a densely populated area allowed adoption of generic risk factors and a SAMDA decision supported by a policy statement rather than a rulemaking was confronted; LBP-10-10, 71 NRC 529 (2010)
- SHOW-CAUSE PROCEEDINGS**
- invocation of a 10 C.F.R. 2.206 procedure requires that NRC Staff give serious consideration to requests concerning a licensed facility as long as the request specifies the action sought and sets forth the facts that constitute the basis of the request; LBP-10-7, 71 NRC 391 (2010)
- SITE CHARACTERIZATION**
- DOE is prohibited from characterizing a second repository site unless Congress has specifically authorized and appropriated funds for such activities; LBP-10-11, 71 NRC 609 (2010)
- DOE may determine that the Yucca Mountain site is unsuitable for development as a repository during site characterization; LBP-10-11, 71 NRC 609 (2010)
- SITE REMEDIATION**
- a provision for ALARA determinations allows the use of cost as a factor for determining what level of remediation is cost-effective below the standards, but is not allowed by the New Jersey Agreement State Program; CLI-10-8, 71 NRC 142 (2010)
- filing of a petition for alternative soil remediation standards is permitted as long as the resulting dose would not exceed 15 mrem per year; CLI-10-8, 71 NRC 142 (2010)
- SITE SELECTION**
- DOE was directed to limit its site selection efforts to Yucca Mountain and to provide for an orderly phase-out of site-specific activities at all other candidate sites; LBP-10-11, 71 NRC 609 (2010)
- SITE SUITABILITY**
- DOE's environmental impact statement is not to consider the need for the repository, the time of initial availability of a repository, alternative sites to the Yucca Mountain site, or nongeologic alternatives to such site; LBP-10-11, 71 NRC 609 (2010)
- SOIL**
- contention alleging that the Army employs truckers to remove depleted uranium-contaminated soil its site and dump it in the community is inadmissible; LBP-10-4, 71 NRC 216 (2010)
- filing of a petition for alternative soil remediation standards is permitted as long as the resulting dose would not exceed 15 mrem per year; CLI-10-8, 71 NRC 142 (2010)
- SOURCE MATERIAL**
- because pyrochlore contains more than 0.05 wt % uranium and thorium, it is subject to NRC regulation as a source material; CLI-10-8, 71 NRC 142 (2010)
- SPECIAL NUCLEAR MATERIALS**
- creditor regulations in 10 C.F.R. 70.44 apply to the creation of creditor interests in special nuclear material; CLI-10-4, 71 NRC 56 (2010)
- SPENT FUEL POOLS**
- a contention on spent fuel pool fires is rejected as an impermissible challenge to NRC regulations and the license renewal generic environmental impact statement; CLI-10-11, 71 NRC 287 (2010)

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environmental impacts from the spent fuel pool, including potential beyond-design-basis accidents and the need for mitigation measures, are addressed generically in the NRC's generic environmental impact statement for license renewal, and do not require a site-specific analysis as part of an individual license renewal environmental review; CLI-10-14, 71 NRC 449 (2010)

SPENT FUEL STORAGE

environmental impacts pertaining to onsite spent fuel storage are a Category 1 issue; CLI-10-14, 71 NRC 449 (2010)

NRC cannot, under NEPA, categorically refuse to consider the consequences of a terrorist attack against a spent fuel storage facility; CLI-10-1, 71 NRC 1 (2010)

recoverability of spent nuclear fuel storage expenses is equally applicable to greater-than-Class-C waste, which is stored onsite in the same manner as spent nuclear fuel; CLI-10-2, 71 NRC 27 (2010)

STANDARD OF PROOF

contention admissibility standards do not call for a dispositive standard of proof for a contention or its bases, but rather petitioner must present a clear statement of the basis for the contention and submit supporting information and references to specific documents and sources that establish the validity of the contention; CLI-10-1, 71 NRC 1 (2010)

STANDARD OF REVIEW

a board appropriately reviews the materials cited in support of a contention, while making no pronouncements on whether the information contained in the application or the claims made in the petition are valid; CLI-10-9, 71 NRC 245 (2010)

discretionary review is granted based on petitioner's showing that there is a substantial question with respect to the five considerations listed in 10 C.F.R. 2.341(b)(4); CLI-10-5, 71 NRC 90 (2010)

for conclusions of law, the Commission will review legal questions de novo and reverse a licensing board's legal rulings if they are a departure from or contrary to established law; CLI-10-5, 71 NRC 90 (2010)

if a board erroneously rejected petitioner's motions, but the record does not suggest that petitioner suffered any prejudicial error, Commission review is not warranted; CLI-10-14, 71 NRC 449 (2010)

interlocutory review is permitted at the Commission's discretion only upon a showing that the issue for which interlocutory review is sought threatens the party adversely affected by it with immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-10-16, 71 NRC 486 (2010)

petitions for review will be granted at the Commission's discretion, giving due weight to the existence of a substantial question with respect to the five considerations of 10 C.F.R. 2.341(b)(4)(i)-(v); CLI-10-14, 71 NRC 449 (2010)

the Commission addresses a board's additional views when the board refers its decision to the Commission; CLI-10-9, 71 NRC 245 (2010)

the Commission defers to a board's factual findings and generally steps in only to correct clearly erroneous findings, that is, findings not even plausible in light of the record viewed in its entirety; CLI-10-5, 71 NRC 90 (2010)

the Commission defers to a board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion; CLI-10-1, 71 NRC 1 (2010); CLI-10-5, 71 NRC 90 (2010); CLI-10-7, 71 NRC 133 (2010); CLI-10-9, 71 NRC 245 (2010); CLI-10-12, 71 NRC 319 (2010)

the Commission will not consider information that was not raised before the board; CLI-10-9, 71 NRC 245 (2010)

the standard of clear error for overturning a board's factual finding is quite high; CLI-10-5, 71 NRC 90 (2010)

STANDING TO INTERVENE

a determination that an injury is fairly traceable to the challenged action does not depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible; LBP-10-4, 71 NRC 216 (2010)

a licensing board will grant a request for a hearing if it determines that the requestor has standing and has proposed at least one admissible contention; LBP-10-4, 71 NRC 216 (2010)

a presumption of standing applies when an individual, an organization, or an individual authorizing an organization to represent his or her interests resides within 50 miles of the proposed facility or has frequent contacts with the area affected by the proposed facility; LBP-10-7, 71 NRC 391 (2010)

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a regular commute that takes petitioner past a plant entrance once or twice a week is sufficient to establish standing; LBP-10-1, 71 NRC 165 (2010)

although petitioner has established the requisite standing, the hearing request must be denied because of a failure to proffer one admissible contention; CLI-10-7, 71 NRC 133 (2010); LBP-10-1, 71 NRC 165 (2010)

although the Army has the burden to protect the public from depleted uranium, that issue is not relevant to a standing inquiry; LBP-10-4, 71 NRC 216 (2010)

an Indian Tribe whose reservation is adjacent to facilities where spent nuclear fuel is currently stored, the nearest of which resides just 600 yards from an ISFSI, has more than a mere interest in a problem; LBP-10-11, 71 NRC 609 (2010)

boards must consider the extent a petitioner's interests are represented by existing parties, not potential parties; LBP-10-11, 71 NRC 609 (2010)

broad and conclusory statements by petitioners that they have direct information concerning the threat to health and safety posed by the license applicant are insufficient to establish standing; LBP-10-4, 71 NRC 216 (2010)

contemporaneous judicial standing concepts are applied in NRC proceedings; LBP-10-7, 71 NRC 391 (2010)

contemporaneous judicial standing concepts require that participant establish that it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing, the injury is fairly traceable to the challenged action, and the injury is likely to be redressed by a favorable decision; LBP-10-7, 71 NRC 391 (2010)

each intervening participant that wishes to be a party to a proceeding must establish its own standing; LBP-10-7, 71 NRC 391 (2010)

economic harm itself has been held sufficient to establish standing under the Nuclear Waste Policy Act; LBP-10-11, 71 NRC 609 (2010)

even if a party seeking standing has some intent to return to an area, when such intentions are not supported by concrete plans or a specification of when future visits would take place, they do not support a finding of injury in the standing context; LBP-10-1, 71 NRC 165 (2010)

failure to indicate how alleged harms might result from license amendments, particularly given not only the shutdown status of the facility, but also the continued applicability of the NRC's safety-oriented regulations governing defueled nuclear plants, is grounds for denial; LBP-10-11, 71 NRC 609 (2010)

failure to specify any radiological contacts with enough concreteness to establish some impact on petitioner will result in denial of standing; LBP-10-11, 71 NRC 609 (2010)

for proximity-based standing, distance from a facility can be verified using the Google Maps distance measurement tool; LBP-10-1, 71 NRC 165 (2010)

in a decommissioning proceeding, where the proximity presumption does not apply, a petitioner who commuted past the entrance of the plant once or twice a week was found to have standing; CLI-10-7, 71 NRC 133 (2010)

in cases where the record fails to support the existence of a significant source of radioactivity producing an obvious potential for offsite consequences at a particular distance frequented by a petitioner, it becomes petitioner's burden to show a specific and plausible means of how the challenged action may harm him or her; LBP-10-4, 71 NRC 216 (2010)

in determining whether petitioner has demonstrated sufficient interest to intervene under 10 C.F.R. 2.309(d)(1), the Commission has long applied contemporaneous judicial concepts of standing; LBP-10-4, 71 NRC 216 (2010)

in establishing proximity-based standing, it is petitioner's responsibility to provide enough detail to allow the board to distinguish a casual interest from a substantial one; LBP-10-1, 71 NRC 165 (2010)

in proceedings for construction permit and operating licenses for nuclear power plants, a proximity presumption is recognized in favor of standing for persons who have frequent contacts within a 50-mile radius of the plant; CLI-10-7, 71 NRC 133 (2010); LBP-10-1, 71 NRC 165 (2010); LBP-10-4, 71 NRC 216 (2010); LBP-10-7, 71 NRC 391 (2010)

in proceedings where petitioner's factual assertions in support of standing are challenged, untenable, conjectural, or conclusory, a board need not uncritically accept such assertions; LBP-10-4, 71 NRC 216 (2010)

judicial standing concepts are applied in NRC proceedings; LBP-10-1, 71 NRC 165 (2010)

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members of intervenor organizations who reside, work, or recreate within 50 miles of the proposed nuclear power plant have proximity-based standing; LBP-10-9, 71 NRC 493 (2010)

NRC applies judicial standing concepts that require a petitioner to establish a distinct and palpable harm that constitutes injury-in-fact, the harm is fairly traceable to the challenged action, and the harm is likely to be redressed by a favorable decision; LBP-10-1, 71 NRC 165 (2010); LBP-10-4, 71 NRC 216 (2010); LBP-10-11, 71 NRC 609 (2010)

one who asserts a procedural right to protect a concrete interest can assert that right without meeting all the normal standards for redressability and immediacy; LBP-10-11, 71 NRC 609 (2010)

one who does something “frequently” does so at frequent or short intervals, “frequent” being defined as often or habitually; LBP-10-1, 71 NRC 165 (2010)

one who performs an act “regularly” does so in a regular, orderly, or methodical way; LBP-10-1, 71 NRC 165 (2010)

permission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact that will not otherwise be properly raised or presented; LBP-10-11, 71 NRC 609 (2010)

petitioner cannot rely on another board’s finding of standing in a prior proceeding, even where the same licensed facility is involved; CLI-10-7, 71 NRC 133 (2010)

petitioner has the burden to plead sufficient, plausible facts to demonstrate standing; CLI-10-7, 71 NRC 133 (2010); LBP-10-4, 71 NRC 216 (2010)

petitioner may not establish standing by alleging injury on behalf of another entity, but rather, petitioner must be the object of the actual or threatened injury; LBP-10-4, 71 NRC 216 (2010)

petitioner must make a fresh demonstration of standing for each proceeding in which he seeks intervention because petitioner’s circumstances may change from one proceeding to the next; CLI-10-7, 71 NRC 133 (2010)

petitioner must show a pattern of regular, significant contacts within the vicinity of the site to satisfy standing requirements; LBP-10-4, 71 NRC 216 (2010)

petitioner must state its name, address, and telephone number, nature of its right under the Atomic Energy Act to be made a party to the proceeding, nature and extent of its property, financial, or other interest in the proceeding, and possible effect of any decision or order issued in the proceeding on its interest; LBP-10-7, 71 NRC 391 (2010)

petitioner who had frequently visited an area allegedly affected by the proposed action for recreational purposes had shown injury in the standing context; LBP-10-1, 71 NRC 165 (2010)

petitioner who seeks to base standing on contacts within a 50-mile radius of a proposed facility must provide enough detail to allow the board to distinguish a casual interest from a substantial one; CLI-10-7, 71 NRC 133 (2010)

petitioner whose daily commute took her within less than one-half mile of a research reactor had standing based on the obvious potential for offsite consequences; CLI-10-7, 71 NRC 133 (2010)

petitioner whose office was located within one-half mile from a research reactor may be presumed to be affected by operation of the facility; CLI-10-7, 71 NRC 133 (2010)

petitioners bear the burden of providing sufficient relevant, specific information, whether by good-faith estimate or otherwise, to establish the basis for their standing claims; LBP-10-1, 71 NRC 165 (2010)

petitioner’s claim that he routinely pierces the 50-mile radius around a reactor site is too vague to support standing; LBP-10-1, 71 NRC 165 (2010)

petitioners may enforce procedural rights only if the procedures in question are designed to protect some threatened concrete interest of theirs that is the ultimate basis of their standing; LBP-10-11, 71 NRC 609 (2010)

petitioners need not demonstrate a substantial likelihood of redressability, but rather need only show that redress is likely as opposed to speculative; LBP-10-11, 71 NRC 609 (2010)

petitioners who fail to provide specific information regarding proximity or frequency of contacts that may establish standing only complicate matters for themselves; LBP-10-1, 71 NRC 165 (2010)

proximity-based standing has been denied when petitioner has demonstrated only occasional contact with the zone of possible harm; LBP-10-1, 71 NRC 165 (2010)

proximity-based standing will be denied when petitioner fails to supply more specific information regarding the frequency, nature, and length of his contacts within the proximity zone; LBP-10-1, 71 NRC 165 (2010)

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pursuant to the proximity-plus approach, a presumption based on geographical proximity (albeit at distances much closer than 50 miles) may be applied where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-10-4, 71 NRC 216 (2010)

regardless of whether there is a challenge to a petitioner's standing, given the jurisdictional nature of standing under the Atomic Energy Act, the board has an independent obligation to make a standing determination; LBP-10-1, 71 NRC 165 (2010)

standing will be denied where contact has been limited to mere occasional trips to areas located close to reactors; LBP-10-1, 71 NRC 165 (2010)

state and federally recognized Indian tribes do not need to address standing requirements if the facility is located within their boundaries; CLI-10-4, 71 NRC 56 (2010)

the Commission defers to a board's rulings on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion; CLI-10-1, 71 NRC 1 (2010; CLI-10-3, 71 NRC 49 (2010)); CLI-10-7, 71 NRC 133 (2010)

the distinction between "frequently" and "regularly" highlights the importance of making a more detailed factual showing, rather than relying on conclusory adjectives and adverbs, when a standing claim rests on the nature of petitioner's activities purportedly near to, or bearing some connection with, the reactor facility at issue; LBP-10-1, 71 NRC 165 (2010)

the presiding officer must determine whether petitioner is a person whose interest may be affected by the proceeding; LBP-10-7, 71 NRC 391 (2010)

the requirement that an injury or threat of injury be concrete and particularized perforce means that the injury must not be conjectural or hypothetical; LBP-10-4, 71 NRC 216 (2010)

to establish proximity-based standing, it is petitioner's responsibility to provide enough detail to allow the board to distinguish a casual interest from a substantial one; LBP-10-7, 71 NRC 391 (2010)

to establish standing based on frequent contacts, petitioner must show that he frequently engages in substantial business and related activities in the vicinity of the facility, engages in normal, everyday activities in the vicinity, has regular and frequent contacts in an area near a licensed facility, or otherwise has visits of a length and nature showing an ongoing connection and presence; LBP-10-1, 71 NRC 165 (2010)

to establish the requisite proximity for standing, petitioner must clearly indicate where he lives and/or what contact he has with the site; LBP-10-1, 71 NRC 165 (2010); LBP-10-7, 71 NRC 391 (2010)

to meet its burden, it is generally sufficient if petitioner provides plausible factual allegations that satisfy each element of standing; LBP-10-4, 71 NRC 216 (2010)

when a petitioner cannot establish proximity-plus standing, he or she must resort to establishing standing under traditional standing principles; LBP-10-4, 71 NRC 216 (2010)

whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source; LBP-10-4, 71 NRC 216 (2010)

STANDING TO INTERVENE, ORGANIZATIONAL

because petitioner's pleadings fail to provide adequate information about the interests of the organization to which he belongs and how those interests would be adversely affected by the licensing proceeding, the board is precluded from granting organizational standing; LBP-10-4, 71 NRC 216 (2010)

failure of an organizational participant to have a representative provide an appearance notice in accord with section 2.314(b) might provide cause for an appropriate sanction for failure properly to prosecute the litigation; LBP-10-7, 71 NRC 391 (2010)

petitioner cannot rely on an affidavit authorizing representation that was executed with respect to one proceeding to authorize representation in a separate proceeding involving the same license; CLI-10-7, 71 NRC 133 (2010)

petitioner must identify any discrete institutional injury to itself other than general environmental and policy interests of the sorts the federal courts and NRC repeatedly have found insufficient for organizational standing; CLI-10-3, 71 NRC 49 (2010)

STANDING TO INTERVENE, REPRESENTATIONAL

because petitioner fails to establish his own standing as an individual, the board is precluded from granting representational standing on behalf of an organization; LBP-10-4, 71 NRC 216 (2010)

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failure under 10 C.F.R. 2.309(d) to support an intervention petition with affidavits providing necessary information regarding the basis for representational standing could interpose a jurisdictional flaw potentially warranting the participant's dismissal from the proceeding; LBP-10-7, 71 NRC 391 (2010) to derive standing from a member, an organization must demonstrate that the individual member has standing to participate and has authorized the organization to represent his or her interests; CLI-10-1, 71 NRC 1 (2010); LBP-10-11, 71 NRC 609 (2010)

STATION BLACKOUT

all structures, systems, and components relied on in safety analyses or plant evaluations to perform a function that demonstrates compliance with the NRC's regulations are subject to aging management review for license renewal; CLI-10-14, 71 NRC 449 (2010)

STATUTORY CONSTRUCTION

a specific policy embodied in a later federal statute should control the construction of the earlier statute, even though it has not been expressly amended; LBP-10-11, 71 NRC 609 (2010)

an inference drawn from congressional silence cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent; LBP-10-11, 71 NRC 609 (2010)

Congress can be presumed to be aware of one specific agency rule only when that rule has been expressly discussed in the legislative history; LBP-10-11, 71 NRC 609 (2010)

Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions, i.e., hiding elephants in mouseholes; LBP-10-11, 71 NRC 609 (2010)

courts generally accord considerable weight to an agency's construction of the statutes it administers; CLI-10-13, 71 NRC 387 (2010)

if the intent of Congress is clear, the court as well as the agency must give effect to the unambiguously expressed intent of Congress; LBP-10-11, 71 NRC 609 (2010)

rights under a construction permit are forfeited only when a construction permit has expired and has not been extended; CLI-10-6, 71 NRC 113 (2010)

statutes should not be interpreted so as to create internal inconsistencies, an absurd result, or an interpretation inconsistent with congressional intent; LBP-10-11, 71 NRC 609 (2010)

the term "reinstatement" is not directly or indirectly mentioned in section 185 of the Atomic Energy Act; CLI-10-6, 71 NRC 113 (2010)

the voluntary surrender of a construction permit that has not expired, that is, where the construction completion date had not yet arrived, does not constitute a situation to which the "forfeiture" provision of the Atomic Energy Act applies; CLI-10-6, 71 NRC 113 (2010)

the words of a statute must be read in their context and with a view to their place in the overall statutory scheme; LBP-10-11, 71 NRC 609 (2010)

where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion; LBP-10-11, 71 NRC 609 (2010)

STAY

a showing of a threat of immediate and irreparable harm that will result absent a stay is required for grant of the stay; CLI-10-8, 71 NRC 142 (2010)

a stay pending appeal is granted where the absence of a stay would mean the destruction of the business in its current form; CLI-10-8, 71 NRC 142 (2010)

although technically not applicable to a request for a stay of NRC Staff action, the 10 C.F.R. 2.342(e) standards simply restate commonplace principles of equity universally followed when judicial or quasi-judicial bodies consider stays or other forms of temporary injunctive relief; CLI-10-8, 71 NRC 142 (2010)

by its terms, 10 C.F.R. 2.342(a) applies to a stay of a decision or action of a presiding officer or licensing board and therefore does not apply to NRC's approval of a state's application to become an Agreement State; CLI-10-8, 71 NRC 142 (2010)

failure to satisfy the first two stay factors renders it unnecessary to make determinations on the two remaining factors, harm to other parties and where the public interest lies; CLI-10-8, 71 NRC 142 (2010)

in reviewing a stay application, the Commission considers whether the moving party has made a strong showing that it is likely to prevail on the merits, whether the party will be irreparably injured unless a

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stay is granted, whether the granting of a stay would harm other parties, where the public interest lies; CLI-10-8, 71 NRC 142 (2010)

mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay are not enough to establish irreparable injury; CLI-10-8, 71 NRC 142 (2010)

NRC has entertained requests for stays of final agency action in anticipation of judicial review; CLI-10-8, 71 NRC 142 (2010)

the possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm; CLI-10-8, 71 NRC 142 (2010)

when evaluating a motion for a stay the Commission places the greatest weight on irreparable injury to the moving party unless a stay is granted; CLI-10-8, 71 NRC 142 (2010)

without a showing of irreparable harm, the moving party must show that success on the merits is a virtual certainty to warrant issuance of a stay; CLI-10-8, 71 NRC 142 (2010)

SUBPART G PROCEEDINGS

under Subpart L informal hearing procedures, summary disposition motions are to be resolved in accord with the same standards for dispositive motions that are utilized for formal hearings under Subpart G; LBP-10-8, 71 NRC 433 (2010)

SUBPART L PROCEEDINGS

summary disposition motions are to be resolved in accord with the same standards for dispositive motions that are utilized for formal hearings under Subpart G; LBP-10-8, 71 NRC 433 (2010)

SUMMARY DISPOSITION

all or any part of the matters involved in a proceeding may be summarily dismissed if the motion, along with any appropriate supporting materials, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law; LBP-10-8, 71 NRC 433 (2010)

applicable NRC standards governing summary disposition are set forth in 10 C.F.R. 2.710; CLI-10-11, 71 NRC 287 (2010)

at issue in summary disposition is not whether evidence unmistakably favors one side or the other, but whether there is sufficient evidence favoring the nonmoving party for a reasonable trier of fact to find in favor of that party; CLI-10-11, 71 NRC 287 (2010)

caution should be exercised in granting summary disposition, which may be denied if there is reason to believe that the better course would be to proceed to a full hearing; CLI-10-11, 71 NRC 287 (2010)

if reasonable minds could differ as to the import of the evidence, summary disposition is not appropriate; CLI-10-11, 71 NRC 287 (2010)

if the evidence in favor of the nonmoving party is merely colorable or not significantly probative, summary disposition may be granted; CLI-10-11, 71 NRC 287 (2010)

in ruling on a motion for summary disposition, a licensing board or presiding officer should not conduct a trial on affidavits; CLI-10-11, 71 NRC 287 (2010)

in ruling on summary disposition motions, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor; CLI-10-11, 71 NRC 287 (2010)

it is not sufficient for there to be merely the existence of some alleged factual dispute between the parties, but rather that there be no genuine issue of material fact; CLI-10-11, 71 NRC 287 (2010)

NRC standards governing summary disposition are based on those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; CLI-10-11, 71 NRC 287 (2010)

only disputes over facts that might affect the outcome of a proceeding would preclude summary disposition, factual disputes that are unnecessary not being counted; CLI-10-11, 71 NRC 287 (2010)

opponent of a summary disposition motion may not rest upon mere allegations or denials, but must state specific facts showing that there is a genuine issue of fact for hearing; CLI-10-11, 71 NRC 287 (2010)

opponent of summary disposition must counter any adequately supported material facts provided by the movant with its own separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard; LBP-10-8, 71 NRC 433 (2010)

proponent of a summary disposition motion bears the burden of making the requisite showing by providing a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard; LBP-10-8, 71 NRC 433 (2010)

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- the Commission grants review of a licensing board decision that dismissed a contention on summary disposition, reversing the decision in part, and remanding the contention to the board for hearing, as limited by the Commission's ruling; CLI-10-11, 71 NRC 287 (2010)
- the correct inquiry in deciding summary motions is whether there are material factual issues that can be properly resolved only by a finder of fact because they may reasonably be resolved in favor of either party; CLI-10-11, 71 NRC 287 (2010)
- the judge's function in ruling on summary disposition motions is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for hearing; CLI-10-11, 71 NRC 287 (2010)
- the licensing board shall not entertain motions for summary disposition unless it finds that such motions, if granted, are likely to expedite the proceeding; CLI-10-4, 71 NRC 56 (2010)
- the quality of evidentiary support is expected to be of a higher level than that at the contention filing stage; CLI-10-15, 71 NRC 479 (2010)
- to the degree the response to a summary disposition motion fails to contravene any adequately supported material facts proffered by the movant, the movant's facts will be considered to be admitted; LBP-10-8, 71 NRC 433 (2010)
- under Subpart L informal hearing procedures, summary disposition motions are to be resolved in accord with the same standards for dispositive motions that are utilized for formal hearings under Subpart G; LBP-10-8, 71 NRC 433 (2010)
- where relevant documents and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law, summary disposition is appropriate; CLI-10-11, 71 NRC 287 (2010)
- SUMMARY JUDGMENT**
- NRC standards governing summary disposition are based on those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; CLI-10-11, 71 NRC 287 (2010)
- SUSPENSION OF PROCEEDING**
- NRC's general policy is to avoid unnecessary delays in adjudicatory proceedings, and intervenors have not provided a sufficient justification to show that delay is necessary; LBP-10-9, 71 NRC 493 (2010)
- TERMINATION OF LICENSE**
- the 1987 Commission Policy Statement on Deferred Plants sets forth the process under which a plant could be placed in a terminated status pending withdrawal of the CP, as well as procedures and requirements for reactivating the facility from terminated status; LBP-10-7, 71 NRC 391 (2010)
- TERMINATION OF PROCEEDING**
- with grant of an unopposed motion to withdraw the sole intervention petition, the proceeding is terminated; LBP-10-3, 71 NRC 213 (2010)
- TERRORISM**
- a contention challenging the failure to include in the environmental impact statement for license renewal any consideration of the effects of an aircraft attack is inadmissible; LBP-10-10, 71 NRC 529 (2010)
- although the Commission has complied with the court's ruling for facilities within the Ninth Circuit, that experience is very limited and does not demonstrate that conducting environmental analyses of terrorist scenarios for the licensing of all major facilities would be practicable or lead to meaningful additional information; CLI-10-9, 71 NRC 245 (2010)
- NEPA is not an appropriate vehicle for exploring questions about the potential for a terrorist attack upon a proposed nuclear facility; CLI-10-1, 71 NRC 1 (2010)
- NRC cannot, under NEPA, categorically refuse to consider the consequences of a terrorist attack against a spent fuel storage facility; CLI-10-1, 71 NRC 1 (2010)
- petitioner failed to provide any evidence to challenge NRC's conclusion that the environmental effects of a hypothetical terrorist attack on a nuclear plant would be no worse than those caused by a severe accident; LBP-10-10, 71 NRC 529 (2010)
- the agency decided not to include the threat of air attacks in the 2007 revision to the design basis threat rule, a decision upheld by the Ninth Circuit; CLI-10-9, 71 NRC 245 (2010)
- the environmental effect caused by third-party miscreants is simply too far removed from the natural or expected consequences of agency action to require a study under NEPA; CLI-10-1, 71 NRC 1 (2010)
- the National Environmental Policy Act demands no terrorism inquiry; LBP-10-10, 71 NRC 529 (2010)

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where petitioner has not shown a reasonably close causal relationship between an aircraft attack and the relicensing proceeding at issue, such an attack does not warrant NEPA evaluation; CLI-10-9, 71 NRC 245 (2010)

with respect to aircraft crash as an element of the design basis threat, adequate protection against an air threat is ensured by the active defenses provided by other federal agencies, together with what reasonably could be expected of licensees; CLI-10-1, 71 NRC 1 (2010)

TRANSCRIPTS

after a closed hearing, parties can propose creation of a public copy of the transcript, with appropriate redactions for protected information; LBP-10-5, 71 NRC 329 (2010)

the public is entitled to copies of the transcripts of all hearings; LBP-10-2, 71 NRC 190 (2010)

U.S. CONSTITUTION

a First Amendment basis for public access to administrative proceedings is recognized; LBP-10-2, 71 NRC 190 (2010)

the First Amendment requires a presumption of openness in civil proceedings; LBP-10-2, 71 NRC 190 (2010)

the First Amendment requires public access to deportation hearings despite government's strenuous objections that open hearings would enable terrorists to obtain information useful to their malevolent goals; LBP-10-2, 71 NRC 190 (2010)

UNCONTESTED LICENSE APPLICATIONS

in a uranium enrichment facility proceeding, the licensing board will not conduct a de novo evaluation of the application, but will determine whether there is sufficient information to support license issuance and whether the NRC Staff's review of the application is adequate; CLI-10-4, 71 NRC 56 (2010)

URANIUM ENRICHMENT FACILITIES

an approach for disposition of depleted tails that is consistent with the USEC Privatization Act, such as transfer to DOE for disposal, constitutes a plausible strategy; CLI-10-4, 71 NRC 56 (2010)

creditor regulations in 10 C.F.R. 50.81 apply to the creation of creditor interests in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235; CLI-10-4, 71 NRC 56 (2010)

creditor regulations in 10 C.F.R. 70.44 apply to the creation of creditor interests in special nuclear material; CLI-10-4, 71 NRC 56 (2010)

creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements, such as sale and leaseback, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-10-4, 71 NRC 56 (2010)

depleted uranium from an enrichment facility is appropriately classified as low-level radioactive waste; CLI-10-4, 71 NRC 56 (2010)

financial criteria of 10 C.F.R. 70.22(a)(8) and 70.23(a)(5) can be met by conditioning the license to require funding commitments to be in place prior to construction and operation; CLI-10-4, 71 NRC 56 (2010)

if a facility is licensed, prior to commencement of operations NRC will verify through an inspection that the facility meets the construction and operation requirements of the license; CLI-10-4, 71 NRC 56 (2010)

URANIUM ENRICHMENT FACILITY PROCEEDINGS

a hearing on a uranium enrichment facility application will be held under the authority of sections 53, 63, 189, 191, and 193 of the Atomic Energy Act; CLI-10-4, 71 NRC 56 (2010)

a hearing will be conducted according to the rules of practice in 10 C.F.R. Part 2, Subparts A, C, G, and to the extent that classified information becomes involved, Subpart I; CLI-10-4, 71 NRC 56 (2010)

a state, county, municipality, federally recognized Indian tribe, or agencies thereof may submit a petition to the Commission to participate as a party or nonparty; CLI-10-4, 71 NRC 56 (2010)

all parties, except NRC Staff, shall make mandatory disclosures within 45 days of the issuance of the licensing board order admitting contentions; CLI-10-4, 71 NRC 56 (2010)

any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance; CLI-10-4, 71 NRC 56 (2010)

discovery under 10 C.F.R. 2.709 shall not commence until the issuance of the safety evaluation report or environmental impact statement unless the licensing board, in its discretion, finds that commencing discovery against NRC Staff on safety issues before the SER is issued, or on environmental issues

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- before the FEIS is issued will expedite the hearing without adversely affecting the Staff's ability to complete its evaluation in a timely manner; CLI-10-4, 71 NRC 56 (2010)
- in an uncontested proceeding, the licensing board will not conduct a de novo evaluation of the application, but will determine whether there is sufficient information to support license issuance and whether the NRC Staff's review of the application is adequate; CLI-10-4, 71 NRC 56 (2010)
- intervention petitions must address the nature of petitioner's right under the Atomic Energy Act to be made a party to the proceeding, the nature and extent of petitioner's property, financial, or other interest in the proceeding, and the possible effect of any order that may be entered in the proceeding on petitioner's interest; CLI-10-4, 71 NRC 56 (2010)
- intervention petitions must provide the name, address, and telephone number of the petitioner and specifically explain the reasons why intervention should be permitted; CLI-10-4, 71 NRC 56 (2010)
- intervention petitions shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding; CLI-10-4, 71 NRC 56 (2010)
- licensing boards must promptly certify to the Commission all novel legal or policy issues that would benefit from early Commission consideration should such issues arise in this proceeding; CLI-10-4, 71 NRC 56 (2010)
- matters of fact and law to be considered in a proceeding on an application for a license to construct and operate a uranium enrichment facility are whether the application satisfies the applicable standards in 10 C.F.R. Parts 30, 40, and 70, and whether the requirements of the National Environmental Policy Act and the NRC's implementing regulations in 10 C.F.R. Part 51 have been met; CLI-10-4, 71 NRC 56 (2010)
- no later than 30 days before the commencement of the hearing at which an issue is to be presented, all parties other than the NRC Staff shall make the required pretrial disclosures; CLI-10-4, 71 NRC 56 (2010)
- participants who believe that they have a good cause for not submitting documents electronically must file an exemption request with their initial paper filing requesting authorization to continue to submit documents in paper format; CLI-10-4, 71 NRC 56 (2010)
- state and federally recognized Indian tribes do not need to address standing requirements if the facility is located within their boundaries; CLI-10-4, 71 NRC 56 (2010)
- the Commission gives notice of hearing, guidance on conduct of the proceeding, and procedures for access to sensitive unclassified nonsafeguards information and safeguards information for contention preparation; CLI-10-4, 71 NRC 56 (2010)
- the licensing board shall not entertain motions for summary disposition unless it finds that such motions, if granted, are likely to expedite the proceeding; CLI-10-4, 71 NRC 56 (2010)
- USEC PRIVATIZATION ACT**
- an approach for disposition of depleted tails that is consistent with the Act, such as transfer to DOE for disposal, constitutes a plausible strategy; CLI-10-4, 71 NRC 56 (2010)
- VIOLATIONS**
- perfection in applicant's QA program is not required, but once a pattern of QA violations has been shown, applicant has the burden of showing that the license may be granted notwithstanding the violations; LBP-10-9, 71 NRC 493 (2010)
- WAIVER OF OBJECTION**
- arguments that are not mentioned on appeal are considered waived; CLI-10-3, 71 NRC 49 (2010)
- WAIVER OF RULE**
- a petition for rule waiver must be accompanied by an affidavit that describes with particularity the special circumstances that justify the waiver; CLI-10-10, 71 NRC 281 (2010)
- a petition for rule waiver must show that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted; CLI-10-10, 71 NRC 281 (2010); LBP-10-12, 71 NRC 656 (2010)
- boards must certify the matter of rule waiver to the Commission for a determination of whether the application of the regulation should be waived or an exception granted under the specific circumstances presented; LBP-10-12, 71 NRC 656 (2010)
- Commission regulations may not be directly attacked in adjudicatory proceedings, but a party may petition for a waiver of the application of a regulation; LBP-10-12, 71 NRC 656 (2010)

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- petition for waiver of regulation excluding consideration of alternatives and the need for power from the operating license phase must establish that all of applicant's fossil fuel baseload generation that is less efficient than the facility under consideration has been accounted for; LBP-10-12, 71 NRC 656 (2010)
- petitioner has the burden of demonstrating that there is warrant for waiver of a rule prohibiting consideration of the need for power and energy alternatives at the operating license stage; LBP-10-12, 71 NRC 656 (2010)
- "prima facie showing" means that the affidavits supporting a petition for rule waiver must present each element of the case for waiver in a persuasive manner with adequate supporting facts; LBP-10-12, 71 NRC 656 (2010)
- request for waiver of application of 10 C.F.R. 51.53(b), 51.95(b), and 51.106(c) precluding consideration of need for power and alternative energy sources from a Part 50 operating license proceeding fails to provide the prima facie showing required; LBP-10-12, 71 NRC 656 (2010)
- the appropriate standard for determining whether a waiver petition is timely is reasonableness; LBP-10-12, 71 NRC 656 (2010)
- the special circumstances necessary to obtain waiver of a rule must be set forth with particularity and supported by an affidavit or other proof; LBP-10-9, 71 NRC 493 (2010)
- to certify a waiver petition to the Commission, the board must find that petitioner has met extremely high standards showing the existence of compelling circumstances in which the rationale of the regulation is undercut; LBP-10-12, 71 NRC 656 (2010)
- to meet its burden to justify certification of its request to waive 10 C.F.R. 51.53(b), 51.95(b), and 51.106(c), petitioner must make a prima facie showing that the proposed facility would not be needed to meet increased energy needs or to replace older, less economical operating capacity, and that there are viable alternatives likely to exist that could tip the NEPA cost-benefit balance against issuance of the operating license; LBP-10-12, 71 NRC 656 (2010)
- to support a contention challenging a Commission rule, petitioner must request, and demonstrate any supporting reasons for, a waiver of the rule; CLI-10-9, 71 NRC 245 (2010)
- waivers are limited to very unusual cases, such as where it appears that an alternative exists that is clearly and substantially environmentally superior; LBP-10-12, 71 NRC 656 (2010)
- WASTE CONFIDENCE RULE**
- a challenge to the Waste Confidence Rule, which is the subject of a rulemaking, is inadmissible; CLI-10-9, 71 NRC 245 (2010)
- to support a contention challenging a Commission rule, petitioner must request, and demonstrate any supporting reasons for, a waiver of the rule; CLI-10-9, 71 NRC 245 (2010)
- WASTE DISPOSAL SITES**
- contention alleging that the Army employs truckers to remove depleted uranium-contaminated soil from its site and dump it in the community is inadmissible; LBP-10-4, 71 NRC 216 (2010)
- See also Radioactive Waste Disposal
- WITHDRAWAL**
- after the issuance of a notice of hearing, withdrawal of an application shall be on such terms as the presiding officer may prescribe; CLI-10-13, 71 NRC 387 (2010)
- an unopposed motion to withdraw the sole intervention petition is granted and the proceeding is terminated; LBP-10-3, 71 NRC 213 (2010)
- section 2.107(a) does not authorize withdrawal of an application but rather clarifies that licensing boards have authority to impose reasonable conditions upon voluntary withdrawals in appropriate circumstances; LBP-10-11, 71 NRC 609 (2010)
- the law on withdrawal of an application does not require a determination of whether applicant's decision to withdraw is sound where the applicant's filing was wholly voluntary in the first place; LBP-10-11, 71 NRC 609 (2010)
- the public interest would best be served by leaving the option open to the applicant should changed conditions warrant pursuit of a withdrawn application; LBP-10-11, 71 NRC 609 (2010)
- the Secretary of the Department of Energy does not have the discretion to substitute his policy for the one established by Congress that mandates progress toward a merits decision by NRC on a construction permit for the high-level waste repository; LBP-10-11, 71 NRC 609 (2010)

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- boards need not accept an expert's bare conclusions that an application is deficient, inadequate, or wrong as support for a contention; CLI-10-2, 71 NRC 27 (2010)
- expert opinion that merely states a conclusion (e.g., the application is deficient, inadequate, or wrong) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the board of the ability to make the necessary, reflective assessment of the opinion; LBP-10-6, 71 NRC 350 (2010); LBP-10-10, 71 NRC 529 (2010)
- support for a contention that consisted of brief quotes from the petitioners' correspondence with a physicist were found to be bare conclusory remarks with respect to which the petitioner offered no explanation or analysis; CLI-10-2, 71 NRC 27 (2010)

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