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September 1, 2010 – December 31, 2010

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PREFACE

This is Book II of the seventy-second volume of issuances (451–776) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from September 1, 2010, to December 31, 2010. Book I covers the period from July 1, 2010 to August 31, 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.

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

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

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CONTENTS

Issuances of the Nuclear Regulatory Commission

ENTERGY NUCLEAR GENERATION COMPANY
(Pilgrim Nuclear Power Station)
Docket 50-293-LR
Memorandum and Order, CLI-10-28, November 5, 2010 553
ENTERGY NUCLEAR OPERATIONS, INC.
(Indian Point, Units 2 and 3)
Dockets 50-247-LR, 50-286-LR
Memorandum and Order, CLI-10-30, November 30, 2010 564
(Pilgrim Nuclear Power Station)
Docket 50-293-LR
Memorandum and Order, CLI-10-28, November 5, 2010 553
LUMINANT GENERATION COMPANY, LLC
(Comanche Peak Nuclear Power Plant, Units 3 and 4)
Dockets 52-034-COL, 52-035-COL
Memorandum and Order, CLI-10-25, September 29, 2010 469
NORTHERN STATES POWER COMPANY
(Prairie Island Nuclear Generating Plant, Units 1 and 2)
Dockets 50-282-LR, 50-306-LR
Memorandum and Order, CLI-10-27, September 30, 2010 481
SOUTH TEXAS PROJECT NUCLEAR OPERATING COMPANY
(South Texas Project, Units 3 and 4)
Dockets 52-012-COL, 52-013-COL
Memorandum and Order, CLI-10-24, September 29, 2010 451
TENNESSEE VALLEY AUTHORITY
(Bellefonte Nuclear Plant, Units 1 and 2)
Dockets 50-438-CP, 50-439-CP
Memorandum and Order, CLI-10-26, September 29, 2010 474
(Watts Bar Nuclear Plant, Unit 2)
Docket 50-391-OL
Memorandum and Order, CLI-10-29, November 30, 2010 556

Issuances of the Atomic Safety and Licensing Boards

BABCOCK & WILCOX NUCLEAR OPERATIONS GROUP, INC.
(Lynchburg, VA Facility)
Docket 70-27-EA
Memorandum and Order, LBP-10-18, October 12, 2010 519

CALVERT CLIFFS 3 NUCLEAR PROJECT, LLC
(Calvert Cliffs Nuclear Power Plant, Unit 3)
Docket 52-016-COL
Order, LBP-10-24, December 28, 2010 720
DOMINION VIRGINIA POWER
(North Anna Power Station, Unit 3)
Docket 52-017-COL
Memorandum and Order, LBP-10-17, September 2, 2010 501
ENTERGY NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power Station)
Docket 50-271-LR
Memorandum and Order, LBP-10-19, October 28, 2010 529
ENTERGY NUCLEAR VERMONT YANKEE, LLC
(Vermont Yankee Nuclear Power Station)
Docket 50-271-LR
Memorandum and Order, LBP-10-19, October 28, 2010 529
OLD DOMINION ELECTRIC COOPERATIVE
(North Anna Power Station, Unit 3)
Docket 52-017-COL
Memorandum and Order, LBP-10-17, September 2, 2010 501
PROGRESS ENERGY FLORIDA, INC.
(Levy County Nuclear Power Plant, Units 1 and 2)
Dockets 52-029-COL, 52-030-COL
Memorandum and Order, LBP-10-20, November 18, 2010 571
Memorandum and Order, LBP-10-23, December 22, 2010 692
SOUTHERN NUCLEAR OPERATING COMPANY
(Vogtle Electric Generating Plant, Units 3 and 4)
Docket 52-025-COL, 52-026-COL
Memorandum and Order, LBP-10-21, November 30, 2010 616
UNISTAR NUCLEAR OPERATING SERVICES, LLC
(Calvert Cliffs Nuclear Power Plant, Unit 3)
Docket 52-016-COL
Order, LBP-10-24, December 28, 2010 720
U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)
Docket 63-001-HLW
Memorandum and Order, LBP-10-22, December 14, 2010 661
VIRGINIA ELECTRIC AND POWER COMPANY
(North Anna Power Station, Unit 3)
Docket 52-017-COL
Memorandum and Order, LBP-10-17, September 2, 2010 501

Indexes

Case Name Index I-1
Legal Citations Index I-5
Cases I-5
Regulations I-59
Statutes I-85
Others I-87
Subject Index I-89
Facility Index I-189

UNITED STATES OF AMERICA
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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) **September 29, 2010**

RULES OF PRACTICE: APPEALS

Our rules permit an appeal as of right by the NRC Staff on the question whether a request for access to SUNSI should have been denied in whole or in part. We review the Board's determination *de novo.*

RULES OF PRACTICE: DISCLOSURE

Once a petition to intervene has been granted, issues involving access to documents for use in the proceeding are governed by our discovery rules. In a Subpart L proceeding, we look to the mandatory disclosure provisions of 10 C.F.R. § 2.336.

ADJUDICATORY PROCEEDINGS: ACCESS TO NONPUBLIC INFORMATION

The purpose of the Access Order is to provide an avenue for access to

documents through which potential parties already would have been accorded access but for their containing SUNSI or Safeguards Information.

ADJUDICATORY PROCEEDINGS: DISCOVERY

We have long held that discovery is not permitted before a petition to intervene has been granted.

ADJUDICATORY PROCEEDINGS: ACCESS TO NONPUBLIC INFORMATION

We have long held that petitioners or intervenors may request and, where appropriate, obtain — under protective order or other measures — information withheld from the general public for proprietary or security reasons.

MEMORANDUM AND ORDER

Today we address several matters associated with our procedures governing access by potential parties to sensitive unclassified nonsafeguards information (SUNSI) in adjudicatory proceedings. Earlier this year, the Atomic Safety and Licensing Board issued an order that, among other things, addressed Intervenors'[1] request for access to a SUNSI document that the Staff previously had denied. On this issue, the Board directed the Staff to redact the nonpublic portions of the document and provide the redacted version to Intervenors, and to reassess its denial of access to the document as a whole.[2] The Staff has appealed these rulings.[3] In addition, the Staff has requested a stay of the effectiveness of the Board's order pending resolution of its appeal. For the reasons set forth below, we reverse the Board's rulings with respect to release of the document, and remand the issue to the Board for further proceedings consistent with this Memorandum and Order. In addition, we deny the Staff's stay application, which had been

[1] Intervenors are the Sustainable Energy and Economic Development (SEED) Coalition, the South Texas Association for Responsible Energy, and Public Citizen.

[2] LBP-10-2, 71 NRC 190, 210 (2010).

[3] NRC Staff Notice of Appeal and Request for Stay of LBP-10-02, Order (Rulings on the Admissibility of New Contentions and on Intervenors' Challenge to Staff Denial of Documentary Access) (Feb. 9, 2010); NRC Staff Brief in Support of Appeal of LBP-10-02 (Feb. 9, 2010) (Staff Appeal).

held in abeyance by the Secretary's issuance of a housekeeping stay,[4] as moot.[5] Finally, we provide general guidance on how to address the "need" for SUNSI in future adjudications.

I. BACKGROUND

Given that this is the first appeal to arise under our SUNSI Policy, we begin with a brief discussion of the agency's general practices regarding the handling of sensitive information that, while not designated classified or Safeguards Information, nonetheless merits a level of additional protection. A short statement of the case follows.

A. NRC SUNSI Policy

After the events of September 11, 2001, the NRC undertook an evaluation of the types of information that it releases to the public out of concern that certain information might be used by terrorists in planning and executing an attack.[6] At our direction, the Staff developed guidance regarding the withholding of certain categories of sensitive information. At bottom, it was our goal for the guidance to reflect the balance between fostering meaningful participation by providing the public with access to information on the one hand, and, on the other, preventing potential adversaries from using the information to do harm.[7] Out of this process, the concept of "SUNSI" was formed. The term describes information that already was withheld from the public prior to September 11, 2001 — i.e., information withheld for reasons of security, personal privacy, and commercial or trade secrets — as well as additional information for which it was determined there was a risk of use by potential adversaries to plan or execute an attack.[8]

As defined in the current interim "NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information," "'SUNSI' means any information of which the loss, misuse, modification, or unauthorized access

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[4] *See* Order (Feb. 17, 2010) (unpublished) (Housekeeping Stay).

[5] Intervenors' appeal of the Board's ruling regarding the admissibility of three contentions challenging STPNOC's Mitigative Strategies Report is addressed in a separate memorandum and order. *See* CLI-10-16, 71 NRC 486.

[6] *See* SECY-04-0191, Withholding Sensitive Unclassified Information Concerning Nuclear Power Reactors from Public Disclosure (Oct. 19, 2004) at 2 (ADAMS Accession No. ML042310663) (SECY-04-0191). *See also* SECY-05-0091, Task Force Report on Public Disclosure of Security-Related Information (May 18, 2005) at 1 (ADAMS Accession No. ML051400108) (Task Force Report on Public Disclosure).

[7] *See* SECY-04-0191, at 2.

[8] *See, e.g., id.* at 2-4. "SUNSI" does not encompass classified or Safeguards Information.

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."[9] Seven categories of information comprise "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.[10] The SUNSI Policy does not change any of the statutory, regulatory, or other obligations of the agency with respect to the handling of information. To the contrary, the policy expressly incorporates existing requirements to the extent they apply to any of the seven SUNSI categories.[11]

A separate matter from the categorization of SUNSI is access to SUNSI. As relevant here, issues involving access to SUNSI might arise in connection with our adjudicatory proceedings, when potential parties[12] or parties seek to obtain this information to assist them in litigating their claims. With respect to access sought by potential parties, in mid-2007 the Staff developed and solicited public comment on a proposed rule, and a related document incorporating a set of procedures designed to facilitate access to information categorized as SUNSI (and Safeguards Information) that potential parties might need in order to meet

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[9] COMSECY-05-0054, Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (SUNSI), Attachment 2 (Oct. 26, 2005) at 1 (ADAMS Accession No. ML052520181) (SUNSI Policy). We disapproved the Staff's revised SUNSI policy set forth in COMSECY-05-0054. In so doing, we instructed the Staff to "develop a simplified policy, including a two-tiered handling regime, that incorporates the seven existing SUNSI categories and incorporate performance based, common sense approaches when possible, subject to the specific directions contained in this SRM." Staff Requirements — COMSECY-05-0054 — Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (SUNSI) (June 29, 2006) at 1 (ADAMS Accession No. ML061800218). Among other things, we observed that any SUNSI policy that we ultimately approved could change upon the Executive Branch standardizing a government-wide policy on the handling of sensitive information. *Id.* at 1. However, we stated that the Staff should "continue to use the SUNSI policy it has in place" until it develops the simplified policy or until a standardized federal government policy is instituted. *Id.* Therefore, the policy outlined in COMSECY-05-0054 reflects the agency's current interim SUNSI policy.

[10] SUNSI Policy at 1.

[11] *Id.* For example, the Privacy Act of 1974, as amended, governs the handling of Privacy Act information. *Id.* As another example, 10 C.F.R. § 2.390 governs the handling of confidential commercial or financial (proprietary) information that has been submitted to the agency. *Id. See generally* 10 C.F.R. § 2.390.

[12] A "potential party" is defined in our rules 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." 10 C.F.R. § 2.4.

the requirements to intervene in an adjudicatory proceeding.[13] In accordance with these procedures, a potential party seeking access to SUNSI may submit a request to the Staff within 10 days after publication of a notice of hearing or notice of opportunity to request a hearing in a licensing proceeding.[14] Within 10 days of receipt of the request, the Staff then will determine if the request demonstrates a likelihood of establishing standing and a need for SUNSI.[15] If the request for SUNSI is granted, the terms and conditions for access will be set forth in a proposed protective order and nondisclosure agreement.[16] The procedures also provide an avenue for appeals of Staff access determinations to a presiding officer — either the Board established to preside over the proceeding; or if one has not been established, the Chief Administrative Judge; or a Board established to rule on information access issues.[17] These procedures were finalized in early 2008.[18] At that time we also amended sections 2.307 and 2.311 of our regulations, respectively, to: (1) delegate authority to the Secretary of the Commission to issue orders imposing the access procedures in connection with a notice of hearing or notice of opportunity to request a hearing in a licensing proceeding; and (2) establish a mechanism for appeals of presiding officer or licensing board access determinations.[19]

B. The *South Texas* Proceeding

The issue before us pertains to access to SUNSI, and arises in connection with the combined license (COL) application of South Texas Project Nuclear

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[13] *See* Proposed Rule: "Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information," 72 Fed. Reg. 32,018, 32,018 (June 11, 2007) (comment period reopened and proposed procedures issued for comment in 72 Fed. Reg. 43,569 (Aug. 6, 2007)); Availability for Comment of Proposed Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information (July 31, 2007) (ADAMS Accession No. ML071910149) (Proposed Access Procedures).

[14] *See* Procedures to Allow Potential Intervenors to Gain Access to Relevant Records That Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information, Attachment 1 (Feb. 29, 2009) at 1 (ADAMS Accession No. ML080380626) (Access Procedures).

[15] *Id.* at 5.

[16] *Id.* at 7.

[17] *Id.* at 8. Either the requester may appeal an adverse access determination, or a party other than the requester may challenge a Staff determination granting access to SUNSI that would harm that party's interest independent of the proceeding. *Id.*

[18] *Id.* at 1.

[19] *See* Final Rule: "Delegated Authority to Order Use of Procedures for Access to Certain Sensitive Unclassified Information," 73 Fed. Reg. 10,978 (Feb. 29, 2008); Final Rule: "Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information," 73 Fed. Reg. 12,627 (Mar. 10, 2008).

Operating Company (STPNOC) to construct and operate two new units on its South Texas site, located in Matagorda County, Texas. Early last year, a notice of hearing and opportunity to petition for leave to intervene on STPNOC's COL application was published in the *Federal Register*.[20] Appended to the notice was an order imposing procedures for potential parties to seek access to certain nonpublic information, including SUNSI, to support their initial petitions and requests for hearing.[21] The Access Order requires a potential party requesting access to SUNSI to demonstrate: (1) that the potential party is likely to establish standing or otherwise participate as a party in the proceeding; and (2) that the proposed recipient has a need for SUNSI.[22]

The SEED Coalition, the South Texas Association for Responsible Energy, and Public Citizen filed a timely joint petition to intervene and request for hearing on STPNOC's COL application, proffering twenty-eight contentions.[23] Shortly after briefing on the intervention petition was complete, but before the Board ruled on the 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 dealing with explosions and fire in accordance with newly promulgated sections 50.54(hh)(2) and 52.80(d) of the newly promulgated Power Reactor Security Rule.[24] STPNOC explained that it had prepared the report using NEI-06-12,[25] a nonpublic guidance document.[26]

When STPNOC submitted the Mitigative Strategies Report to the Staff, it requested that the report be withheld from public disclosure because it contained security-related information;[27] the Staff has not publicly released the report.

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[20] South 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).

[21] 74 Fed. Reg. at 7936. We refer to that order here as the "Access Order."

[22] *Id.* at 7936-37.

[23] Petition for Intervention and Request for Hearing (Apr. 21, 2009).

[24] Letter 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) of the newly promulgated rule. 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 581, 596 (2009).

[25] NEI-06-12, B.5.b Phase 2 & 3 Submittal Guideline, Rev. 2 (Dec. 2006) (ADAMS Accession No. ML070090060) (nonpublic ADAMS).

[26] Mitigative Strategies Report Cover Letter at 1.

[27] *Id. See also* 10 C.F.R. § 2.390(b), (d).

Responding to a joint motion filed by STPNOC, the Staff, and the SEED Coalition,[28] the Board issued a protective order governing "access to and use of protected information in the correspondence from [STPNOC] to the NRC Staff dated May 26, 2009, regarding the requirements under 10 C.F.R. § 52.80(d) and 10 C.F.R. § 50.54(hh)(2) and any related documents."[29] The Board also directed that persons receiving access to the protected information sign nondisclosure agreements.[30] Shortly thereafter, in accordance with the terms of the Protective Order, Intervenors submitted seven new contentions challenging the completeness of the information contained in the Mitigative Strategies Report.[31]

The Board issued the first of two rulings on the initial petition in August, finding that all three of the potential parties had demonstrated standing and had proffered at least one admissible contention.[32] Accordingly, all three were admitted as parties to the proceeding.[33]

In October, subsequent to the submission of the new contentions challenging the Mitigative Strategies Report, the NRC Staff posted a notice on the agency website informing the public that the Staff had issued a draft interim Staff guidance document, DC/COL-ISG-016 (ISG-016),[34] to assist COL applicants and licensees in complying with sections 50.54(hh)(2) and 52.80(d).[35] In particular, the notice explained that ISG-016 "outlines technical positions defining specific acceptance criteria or an acceptable approach and includes information to be included in a [COL] application to fully address compliance with [sections 50.54(hh)(2) and

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[28] Joint Motion for Entry of a Protective Order (June 26, 2009) (Joint Motion for Protective Order).

[29] Licensing Board Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) at 1 (unpublished) (Protective Order); Licensing Board Order (Amending Protective Order) (July 14, 2009) (unpublished).

[30] Protective Order at 1-2.

[31] 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) (ADAMS Accession No. ML092260793) (nonpublic ADAMS).

[32] *See* LBP-09-21, 70 NRC at 638 (admitting Intervenors as parties to the proceeding and ruling on nineteen of twenty-eight proposed contentions). *See also* LBP-09-25, 70 NRC 867 (2009) (ruling on the remaining nine contentions).

[33] *See* LBP-09-21, 70 NRC at 638. This proceeding is being held under our rules set forth in 10 C.F.R. Part 2, Subparts C and L. *See id.*

[34] DC/COL-ISG-016, [Draft] 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 (Oct. 7, 2009) (ADAMS Accession No. ML092100361) (nonpublic ADAMS).

[35] Issuance of Interim Staff Guidance DC/COL-ISG-016 — Compliance with 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d), http://www.nrc.gov/reading-rm/doc-collections/isg/col-dc-isg-16.pdf (last visited May 14, 2010). ISG-016 specifically is geared toward mitigative strategies for new reactor designs.

52.80(d)]."[36] Because the Staff determined that ISG-016 contains security-related SUNSI, the document has not been released to the public.[37]

Intervenors requested access to ISG-016 shortly after notice of its issuance was published on the NRC website. At the time of their request, Intervenors had been admitted as parties to the proceeding. In their request, Intervenors asserted that they "need th[e] document for meaningful participation in the adjudicatory proceeding," apparently operating under the terms of the Access Order.[38] According to Intervenors, without access to ISG-016 they will be unable to "meaningfully analyze applicants' claims" of compliance with the Power Reactor Security Rule.[39] Intervenors explained that they are unable to obtain this information from other guidance documents to which they have access — the Standard Review Plan, which is available publicly, and NEI-06-12, which certain members of the Intervenors, their counsel, and their consultant obtained pursuant to the Protective Order in this proceeding, but which is not keyed specifically to new reactor license applications.[40]

The NRC Staff denied Intervenors' request for access to ISG-016, asserting that Intervenors had not provided a sufficient basis "for the Staff to determine at this time that [Intervenors] have demonstrated a legitimate need for access" to the document.[41] At the outset, the Staff determined that the Access Order "establishes the proper procedure for a party to request access to SUNSI."[42] The Staff acknowledged that Intervenors had demonstrated standing, thus meeting the first requirement of the Access Order.[43] With regard to the second requirement — the "need for SUNSI" — the Staff found that Intervenors had not demonstrated with specificity: (1) why the publicly available versions of the application and the nonpublic information already obtained by Intervenors would be insufficient to form the basis for a proffered contention; and (2) the foundation for a proffered

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[36] *Id.* As stated in the notice, a COL applicant or licensee would not be limited to the criteria outlined in ISG-016; applicants and licensees could propose other methods of satisfying the requirements in sections 50.54(hh)(2) and 52.80(d), which would be evaluated by the Staff on a case-by-case basis.

[37] *Id.* Intervenors have not challenged the Staff's determination that ISG-016 properly has been characterized as "security-related" SUNSI in accordance with the agency's current SUNSI Policy; that issue is not before us on appeal.

[38] E-mail from Robert V. Eye, counsel for Intervenors, to Office of the Secretary (Nov. 5, 2009 6:41 p.m.) (as amended by e-mails dated Nov. 5, 2009 6:49 p.m. and Nov. 9, 2009 7:03 p.m.) (SUNSI Request). In the same request, Intervenors sought access to ISG-016 in connection with the *Comanche Peak* COL proceeding. That request is not addressed here. *See infra* note 82.

[39] *Id.* at 1.

[40] *See id.*

[41] Letter from Michael A. Spencer, counsel for NRC Staff, to Robert Eye, counsel for Intervenors (Nov. 16, 2009) at 2 (Staff Denial Letter).

[42] *Id.*

[43] *Id.*

contention.[44] The Staff therefore denied Intervenors' request for failure to show a need for ISG-016 either for their already-proffered contentions or for any possible, but unspecified, new or amended contentions.[45]

Intervenors appealed the Staff's denial of access to the Board.[46] Intervenors repeated their reasons for seeking access to ISG-016, and asserted that 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."[47] In response to the appeal, the Staff maintained that "Intervenors have not met the standards for access set forth in the [Access Order]," that is, they had not shown how access to ISG-016 would assist them in formulating a contention.[48]

The Board sustained Intervenors' challenge to the denial of access. As a starting point in its analysis, the Board compared Intervenors' SUNSI request to a request for documents pursuant to the Freedom of Information Act (FOIA).[49] The Board observed that because Intervenors are seeking access to information in an adjudicatory proceeding, "the reasons for providing access to Intervenors are even more compelling than they are when a member of the public seeks information under FOIA."[50] Thus, the Board reasoned that Intervenors are "entitled to obtain documents under standards no more restrictive than would be accorded the general public under FOIA," and concluded that the "NRC Staff must carry the burden of proving that [a] document . . . fits . . . one of FOIA's specifically enumerated [exemptions]" in order to withhold the document from a party or a member of the public.[51] Further, the Board stated, even if portions of the document appropriately could be withheld from disclosure under a FOIA exemption, the Staff, in any event, would be required to produce the reasonably segregable portions that are subject to release after redacting the nonpublic material.[52] Using this framework, the Board directed the Staff to "conduct a paragraph-by-paragraph review of

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[44] *Id.* at 2-3.

[45] *See id.*

[46] Letter from Robert V. Eye, counsel for Intervenors, to Administrative Judges Young and Gibson (Nov. 20, 2009) at 1 (Intervenors' Challenge to Denial of Access) (appealing the Staff's denial of access to both the *South Texas* and *Comanche Peak* Boards). Intervenors cited the *Comanche Peak* Access Order as authority for their appeal to the Board; the *Comanche Peak* and *South Texas* Access Orders are substantively identical as to appeal rights. *Id.*

[47] *Id.*

[48] NRC Staff Reply to Intervenors' Challenge to the NRC Staff's Denial of Access to SUNSI (Nov. 25, 2009) at 1, 3-6.

[49] LBP-10-2, 71 NRC at 197.

[50] *Id.*

[51] *Id.* at 198.

[52] *Id.*

ISG-016 and provide Intervenors with those reasonably segregable portions that do not contain SUNSI" after redacting the document.[53]

The Board then turned to the applicability of the Access Order. Although noting that the Access Order, on its face, applied only to "potential parties," and not those who, like Intervenors, have been accorded party status, the Board assumed *arguendo* the continuing vitality of the Access Order.[54] The Board determined that under the Access Order a party requesting access to SUNSI need "only to explain its 'need for the information in order to meaningfully participate in this adjudicatory proceeding.' It requires nothing more."[55] Based on this interpretation, the Board determined that the Staff had misapplied the "need for SUNSI" standard by requiring Intervenors to show that the request for ISG-016 is, in the Board's terms, "directly applicable to an admissible contention."[56] Rather, the Board interpreted the Access Order to require the requested document to "be directly applicable to an admissible contention" "only . . . when a public version of the requested SUNSI document is also available."[57] Noting that a public version of ISG-016 was not available, the Board found that the Staff's denial of access on these grounds constituted the imposition of an unwarranted additional burden on Intervenors.[58]

Additionally, the Board analogized Intervenors' SUNSI request to a litigant's discovery request in a federal court proceeding. In this vein, the Board reasoned that similar to Federal Rule of Civil Procedure 26(b)(1), the "need for SUNSI" inquiry is essentially a relevance inquiry. That is, just as a federal court litigant must show that the information sought in discovery is relevant to its claims or defenses,[59] Intervenors must show that the document containing SUNSI is "reasonably calculated to lead to obtaining factual support for a new contention, factual support to augment a contention that has already been [pled], or evidence

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[53] *Id.* at 205, 210. Subsequent to the Board's decision in LBP-10-2, Intervenors filed a FOIA request for ISG-016, among other documents. *See* Letter from SEED Coalition to FOIA/Privacy Officer, U.S. NRC (Feb. 26, 2010) at 1 (ADAMS Accession No. ML100910567). The Staff responded to Intervenors' FOIA request, and provided a redacted version of ISG-016. *See* Notice to Commission of Information Relevant to the NRC Staff Appeal of LBP-10-2 (July 13, 2010); FOIA/PA-2010-0145 — Resp 2 Partial, DC/COL-ISG-016, 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 (June 24, 2010) (ADAMS Accession No. ML101760169) (ADAMS package). Because the Staff responded to Intervenors' FOIA request and provided a redacted version of ISG-016, we need not reach the question of the Board's authority to direct the Staff to redact the document.

[54] LBP-10-2, 71 NRC at 201-02 & n.36.

[55] *Id.* at 202-03 (quoting 74 Fed. Reg. at 7936).

[56] *Id.* at 203.

[57] *Id.* (citing 74 Fed. Reg. at 7936).

[58] *Id.*

[59] *See* Fed. R. Civ. P. 26(b)(1).

relative to an admitted contention."[60] Accordingly, the Board directed the Staff to reevaluate Intervenors' request using the Board's articulation of the "need for SUNSI" standard.[61] And, although it left the Staff to reevaluate Intervenors' need for ISG-016, the Board observed that Intervenors had demonstrated the requisite need, stating:

> 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 the[ ] 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.[62]

The Staff timely filed the instant appeal challenging the Board's rulings. Intervenors oppose the appeal.[63]

II. DISCUSSION

Our rules permit an appeal as of right by the NRC Staff on the question of whether a request for access to SUNSI should have been denied in whole or in part.[64] We review the Board's determination *de novo.*[65]

On appeal, the Staff argues that the Board misapplied the standards for access to SUNSI, and that the Board acted without authority in directing it to provide Intervenors with a redacted version of ISG-016.[66]

A. Applicability of the Access Order

As an initial matter, we address the question of the applicability of the Access

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[60] LBP-10-2, 71 NRC at 203-04 n.45.

[61] *Id.* at 203, 210. It further directed the Staff to provide the Board with a memorandum describing its reevaluation efforts. *Id.* at 210.

[62] *Id.* at 204.

[63] Intervenors' Response Brief in Opposition to Staff's Appeal of LBP-10-02 (Feb. 19, 2010) (Intervenors' Opposition).

[64] 10 C.F.R. § 2.311(d)(2). *See also* 73 Fed. Reg. at 12,629-30.

[65] *See, e.g., Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27, 31 (2004); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 67, 73 (2004). *Cf.* 5 U.S.C. § 552(a)(4)(B); *King v. U.S. Department of Justice,* 830 F.2d 210, 217 (D.C. Cir. 1987). Intervenors cite Catawba for the proposition that the standard of review on appeal is abuse of discretion. *See* Intervenors' Opposition at 3 (citing *Catawba,* CLI-04-21, 60 NRC at 27). The principal issue on appeal in *Catawba* involved a Board evidentiary ruling regarding expert qualification, to which the abuse of discretion standard properly applied. *See Catawba,* CLI-04-21, 60 NRC at 27. For the related issue involving access to Safeguards Information, however, we stated that we would continue our practice in reviewing such issues "closely." *Id.* at 31.

[66] Staff Appeal at 6.

Order. By its terms, the Access Order permits "potential parties" to request access to nonpublic information to support an initial request for hearing and petition to intervene; it does not address requests by parties to the proceeding. As discussed above, the Board expressed skepticism that the Access Order provides the appropriate standard for access to SUNSI at this stage of the proceeding, but nevertheless assumed *arguendo* its continuing vitality. On appeal, the Staff acknowledges that there is a question as to whether the Access Order applies, but argues that it is logical to apply it here because a requester's status as a "potential party" or "party" does not change the fact that the information is to be used to assist in the formulation of contentions.[67]

The Access Order does not apply to the circumstances presented here. Contrary to the Staff's argument, a requester's status as a "potential party" or "party" changes the analysis for determining whether the requester is entitled to obtain access to a document. Once a petition to intervene has been granted, issues involving access to documents for use in the proceeding are governed by our discovery rules. In a Subpart L proceeding such as this, we look to the mandatory disclosure provisions of 10 C.F.R. § 2.336.[68] The procedures embodied in the Access Order, on the other hand, were intended to fill a gap in our rules.[69] The purpose of the Access Order is to provide an avenue for access to documents through which potential parties already would have been accorded access but for their containing SUNSI or Safeguards Information. Accordingly, where, as here, a petition to intervene has been granted, we see no reason to depart from our discovery rules. Simply stated, the issue presented here is a discovery dispute. As discussed below, it involves the Staff's disclosure obligations.[70]

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[67] *See id.* at 12-13. The Staff asserts that: (1) "the Access Order is the only Commission approved approach for adjudicating SUNSI or [Safeguards] access determinations"; (2) "it is logical to use the same approach for SUNSI requested to formulate . . . contentions both at the beginning of a proceeding and . . . throughout the proceeding"; and (3) even though the Staff is a party in litigation in the circumstances presented here, the Access Order "maintains the Staff's traditional role of making access determinations in the first instance, subject to review by a licensing Board." *Id.*

[68] 10 C.F.R. §§ 2.336(g), 2.1203(d). *See generally* Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2225 (Jan. 14, 2004) ("The discovery required by § 2.336 constitutes the totality of the discovery that may be obtained in informal proceedings.").

[69] *See* 72 Fed. Reg. at 32,018.

[70] Our discovery rules impose disclosure obligations on the Staff that are somewhat different from those imposed on other parties. Under section 2.336(a), parties other than the Staff are required to disclose certain information *relevant to the admitted contentions. See* 10 C.F.R. § 2.336(a). The Staff's disclosure obligations, on the other hand, are not tied to the admitted contentions. Rather, the Staff must make available documents that relate to the application and its review as a whole. *See* 10 C.F.R. §§ 2.336(b), 2.1203. This obligation ordinarily ensures that intervenors have enough

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As relevant here, section 2.336(b) provides, among other things, that after issuance of the order granting leave to intervene, the Staff shall:

> disclose and/or provide, to the extent available (but excluding those documents for which there is a claim of privilege or protected status):
>
> . . . .
>
> (3) All documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding.[71]

For documents that are otherwise discoverable, but for which there is a claim of privilege or protected status, the Staff must list them and provide "sufficient information for assessing the[ir] . . . privilege or protected status."[72] A party seeking to challenge the Staff's claim of privilege or protected status may file a motion to compel production of the document.[73] If the Board determines that the party is entitled to obtain access to a document that has been claimed as privileged or protected, the Board may issue a protective order as necessary to prevent public disclosure of the document.[74] Alternatively, the parties may reach an agreement as to access and jointly propose a protective order.[75]

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information to support existing contentions and to frame fresh ones (if new information emerges). To the extent that the Board would allow discovery to enable a petitioner to support or otherwise augment the formulation of an intervention petition, the Board would be in error. We have long held that discovery is not permitted before a petition to intervene has been granted. *See, e.g., AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 676 & n.73 (2008); *Wisconsin Electric Power Co.* (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 929 (1974).

[71] 10 C.F.R. § 2.336(b)(3).

[72] 10 C.F.R. § 2.336(b)(5).

[73] 10 C.F.R. § 2.323(h).

[74] 10 C.F.R. § 2.390(b)(6), (f). We have long held that "petitioners or intervenors may request and, where appropriate, obtain — under protective order or other measures — information withheld from the general public for proprietary or security reasons." *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 460 (2006) (and cases cited therein). *See also Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214 (1985) ("Disputes frequently arise in which one party to a proceeding seeks purportedly proprietary information from another. Protective orders and in camera proceedings are the customary and favored means of handling such disputes."); *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 469 (1974) ("In Commission licensing proceedings, protective orders provide an effective means for safeguarding proprietary information, where . . . the party seeking . . . discovery is not a competitor. Further, the rules differentiate between the release of information to the public and to interested parties, and provide that 'withholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect the document.' They explicitly authorize the use in appropriate circumstances of a protective order and of *in camera* sessions of the hearing.") (internal citations omitted).

[75] Here, a protective order is already in place to protect security-related SUNSI. *See supra* note 29.

Intervenors have requested a draft interim Staff guidance document that, in final form, is intended for use in the Staff's evaluation of compliance with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d). To the extent the Staff intends to use ISG-016 in its evaluation of STPNOC's Mitigative Strategies Report, which is part of the COL application, ISG-016 would be included under 10 C.F.R. § 2.336(b)(3) as part of the Staff's disclosures.[76] Due to its security-related SUNSI categorization, the rules provide that the Staff would not have to produce ISG-016 in the first instance. Rather the Staff would be required to identify the document as part of its continuing duty of disclosure.[77] Assuming (as we do) that the Staff would seek to withhold the document, it would be required to provide sufficient information to support the Staff's claim of protected status.[78] Intervenors then would have an opportunity to seek access to the document, under the terms of the Protective Order already in place for this proceeding.

However, the circumstances in this proceeding appear to present an obstacle for Intervenors that ordinarily might not be present under our rules. Here, in addition to the requirements of section 2.336, the Board's initial scheduling order further defines the scope of the parties' mandatory disclosures according to an agreement reached by the parties, and approved by the Board, not to produce or identify draft versions of documents.[79] As indicated above, Intervenors have requested a *draft* version of ISG-016. It would seem to us that, but for the status of the document as a draft, Intervenors would be able to seek access to it through normal discovery channels.[80] Because the parties have not briefed this issue, we remand the discovery dispute concerning access to draft ISG-016 to the Board for further proceedings consistent with the framework set forth above.[81]

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[76] *See* 10 C.F.R. § 2.336(b)(3) (requiring that the Staff disclose, among other things, "[a]ll documents . . . supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding"). A Staff guidance document, used as one of perhaps many tools to assess an application's compliance with our rules, would, in our view, "support the Staff's review," and be subject to identification pursuant to this provision.

[77] *See* 10 C.F.R. § 2.336(d). In this proceeding, the parties, including the Staff, are required to update their disclosures on the first day of each month, "cover[ing] all documents or other material or information required to be disclosed that is in the possession, custody, or control of each party (or their agents) as of the fifteenth day of the preceding month." Initial Scheduling Order (Oct. 20, 2009) at 4 (unpublished).

[78] *See* 10 C.F.R. § 2.336(b)(5).

[79] Initial Scheduling Order at 5. *See also* Letter from Alvin H. Gutterman, counsel for STPNOC, to Licensing Board (Sept. 10, 2009) ¶ 1.

[80] *See generally* Initial Scheduling Order at 7 (setting forth the terms for disclosure disputes and motions to compel).

[81] The final version of ISG-016 has now been issued. *See* DC/COL-ISG-016, [Final] Interim Staff Guidance, Compliance with 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d) Loss of Large Areas of

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B. Further Guidance on "Need" for SUNSI

Given our ruling on the applicability of the Access Order, we need not reach the question whether the Staff appropriately assessed Intervenors' "need" for SUNSI. However, the issue of what is required to demonstrate a "need" for SUNSI has not been addressed by the Commission, and is likely to recur in a number of ongoing and future proceedings.[82] We therefore take this opportunity, in our supervisory capacity, to provide guidance on the "need" analysis, for use in those instances when an access order applies.[83]

In rejecting Intervenors' request for access to ISG-016, as well as on appeal, the Staff has taken a position concerning the showing required for "need" for SUNSI with which we disagree. As provided in the Access Order, in addition to showing a likelihood of establishing standing, a potential party must explain how the requested SUNSI is necessary for meaningful participation in the proceeding. In essence, this means that the request for SUNSI should include: (1) an explanation of the importance of the requested information to the proceeding, i.e., how the information relates to the license application or to NRC requirements or guidance, and how it will assist the requester in seeking intervention;[84] and (2) an explanation of why existing publicly available versions of the application would not be sufficient.[85] In the end, whether a request for SUNSI sufficiently

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the Plant Due to Explosions or Fires from a Beyond-Design Basis Event (June 9, 2010) (ADAMS Accession No. ML100431200) (nonpublic ADAMS). Assuming that the Staff plans to use ISG-016 in evaluating STPNOC's COL application, we expect the Staff to identify the final version in its next mandatory disclosure update in accordance with 10 C.F.R. § 2.336(b)(3) and (d), and the Board's Initial Scheduling Order. (The Staff did not identify the document in its July 1, 2010, August 2, 2010, or September 1, 2010 updates.) Should the Staff seek to withhold the document under a claim of privilege or protected status, we expect the document to be identified as required under section 2.336(b)(5). Intervenors then may seek to obtain the document in accordance with the procedures set forth in the Board's Initial Scheduling Order. *See* Initial Scheduling Order at 7. On remand, the Board may want to explore with the parties whether Intervenors wish to continue their pursuit of the draft version considering that the guidance has now issued in final form.

[82] For example, we also decide today the Staff's appeal of a Board ruling applying the Access Order's "need" for SUNSI analysis in the *Comanche Peak* COL proceeding. NRC Staff Notice of Appeal and Request for Stay of Sections IV and V.B of LBP-10-05, Order (Ruling on Intervenors' Access to ISG-016) (Mar. 22, 2010). *See Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-10-5, 71 NRC 329 (2010), *rev'd,* CLI-10-25, 72 NRC 469 (2010).

[83] *Cf. Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 23 (1998) (recognizing the benefit of early Commission review as to matters involving "novel legal or policy questions").

[84] 74 Fed. Reg. at 7936-37.

[85] The showing could include, but does not require (nor is it limited to), an explanation that the information will be used as support for a contention. *See generally* 10 C.F.R. § 2.309(f)(1)(v). *See also infra* note 98 and accompanying text.

demonstrates a "need" for the information will depend on the particular facts and circumstances presented.

A useful example is the *Indian Point* license transfer proceeding.[86] There, the petitioners sought access to an unredacted version of the license transfer application in order to obtain confidential "financial information relevant to the expected costs of the plant's operation and maintenance" that had been redacted.[87] As part of the application, this information otherwise would have been available to the petitioners but for its being submitted to the NRC as confidential commercial and financial information.[88] The petitioners asserted that they needed access to this information because without it they would be unable to submit sufficiently specific and supported contentions regarding the applicant's financial qualifications.[89] Upon this showing of need, we granted the petitioners' request to obtain access to the unredacted application.[90]

For another illustration of this point, in this case, as discussed above, Intervenors (then petitioners) sought access to STPNOC's Mitigative Strategies Report — a document to which Intervenors would have had access if it did not contain sensitive information, given that it is part of the COL application. Because they were potential parties at the time of this request, the Access Order properly applied.[91] Pending at the time of their request was Intervenors' originally proffered contention asserting that STPNOC's COL application failed to include the information that later would be provided in the Mitigative Strategies Report. In our view, a statement that Intervenors needed the report to assess whether their original contention had been rendered moot, or a statement that the report was an essential source of information to determine whether to amend their original contention, would suffice to establish the requisite "need" for the document. The same is true for NEI-06-12, an industry guidance document, which likely would

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[86] When we made available for comment the access procedures that eventually were incorporated into the Access Order, we stated that the procedures were based on "principles that have previously been applied for access to sensitive financial information in license transfer proceedings." Proposed Access Procedures at 2.

[87] *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 227 (2001).

[88] *See generally* 10 C.F.R. § 2.790(a)(4), (b) (2000). Confidential commercial or financial information presumably would not be available from another public source.

[89] *Indian Point,* CLI-01-8, 53 NRC at 230. *See also* Letter from Timothy L. Judson, Citizens Awareness Network, Inc., to U.S. NRC (Feb. 20, 2001) at 15-17 (ADAMS Accession No. ML010570266) (enclosing Citizens Awareness Network's Request for Hearing and Petition to Intervene in the License Transfers for Indian Point Nuclear Generating Unit Nos. 1 and 2).

[90] *Indian Point,* CLI-01-8, 53 NRC at 230-31.

[91] Although the record for this proceeding does not contain Intervenors' (then petitioners') request for these documents, it is apparent that Intervenors and the Staff applied the Access Order. *See* Tr. at 32-34; Joint Motion for Protective Order.

have been available to stakeholders if it did not contain security-related SUNSI. An explanation that Intervenors sought the document because STPNOC had used it in the preparation of its Mitigative Strategies Report, which was the subject of one of Intervenors' pending contentions, would suffice to establish "need."[92]

The Staff argues on appeal that Intervenors have not shown a need for ISG-016 because they have "not shown how access to a draft staff guidance document could help them prepare new contentions, when contentions must challenge the application."[93] The Staff continues 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. [ISG-016] is not part of the COL application, and therefore does not, by itself, demonstrate a dispute with the Applicant.'"[94] In its answer to Intervenors' challenge to the denial of access, the Staff again referenced the materiality requirement for an admissible contention in arguing that "[t]he admissibility of contentions does not hinge on access to a draft guidance document, which is not a legal requirement."[95]

But the Staff goes too far. The "need" for SUNSI analysis should not be conflated with the contention admissibility standards. A request for SUNSI must demonstrate how the information would assist in meeting the Commission requirements for intervention petitions, including formulation of a proposed contention. It does not require a showing that the contention will be *admissible* if it is formulated using that information. The Staff is correct that a contention must challenge the application,[96] and it is true that a guidance document does not create binding legal requirements.[97] However, in proffering contentions that challenge an application, a petitioner or an intervenor must provide support, including references to sources and documents on which it intends to rely.[98] A guidance document like ISG-016 could be one of those sources, particularly where, as here, the guidance purports to bear on the Staff's assessment of the application's conformance to our regulatory requirements. The Staff — as well as any other participant — is free to argue compliance with the contention admissibility standards at the appropriate time, which is in any answer to proposed contentions.

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[92] As stated above, the purpose of the Access Order is to provide direction for obtaining documents to which potential parties otherwise would have had access but for the documents' containing SUNSI or Safeguards Information. Under longstanding agency precedent, discovery is not permitted to uncover additional information supporting the admissibility of contentions. *See supra* note 70. The Access Order is consistent with this well-settled principle.

[93] Staff Appeal at 3.

[94] *Id.* at 8 (quoting Staff Denial Letter at 2) (second alteration in original).

[95] Staff Reply at 5-6.

[96] *See* 10 C.F.R. § 2.309(f)(1)(vi), (f)(2).

[97] *See, e.g., International Uranium (USA) Corp.* (Request for Materials License Amendment), CLI-00-1, 51 NRC 9, 19 (2000).

[98] *See* 10 C.F.R. § 2.309(f)(1)(v).

The question of a contention's admissibility, however, is a separate inquiry from the threshold question whether a petitioner or putative petitioner has shown that it is entitled to obtain access to a nonpublic document.[99]

III. CONCLUSION

For the reasons set forth above, we *reverse* the Board's ruling regarding access to the requested draft ISG-016, and *remand* the question of access to draft ISG-016 to the Board for further proceedings in accordance with this Memorandum and Order.[100] We *deny* the Staff's stay application as moot.[101]

IT IS SO ORDERED.[102]

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of September 2010.

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[99] The Board raised several questions concerning the Staff's apparent practice of withholding in their entirety documents containing SUNSI, as well as the potential impact of this practice on our adjudicatory proceedings. *See* LBP-10-2, 71 NRC at 204-09. The Board's concerns are not without force; we intend to look further into these questions outside of the adjudicatory process.

[100] This includes the Board's ruling that the Staff reassess Intervenors' showing of need for ISG-016.

[101] With the issuance of this Memorandum and Order, the housekeeping stay expires automatically. *See* Housekeeping Stay at 2.

[102] Commissioner Magwood did not participate in this matter.

Cite as 72 NRC 469 (2010) **CLI-10-25**

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. 52-034-COL**
52-035-COL

LUMINANT GENERATION COMPANY, LLC
(Comanche Peak Nuclear Power Plant, Units 3 and 4) **September 29, 2010**

RULES OF PRACTICE: DISCLOSURE

Once a petition to intervene has been granted, issues involving access to documents are governed by our discovery rules. In a Subpart L proceeding, we look to the mandatory disclosure provisions of 10 C.F.R. § 2.336.

MEMORANDUM AND ORDER

Today we resolve an appeal and request for stay[1] of an Atomic Safety and Licensing Board decision regarding access to a nonpublic document that presents issues identical to those raised in the *South Texas* proceeding, which we resolved

[1] NRC Staff Notice of Appeal and Request for Stay of Sections IV and V.B of LBP-10-05, Order (Ruling on Intervenors' Access to ISG-016) (Mar. 22, 2010); NRC Staff Brief in Support of Appeal from LBP-10-05 and Request for Stay (Mar. 22, 2010) (Staff Appeal).

in CLI-10-24.[2] We reverse the Board's rulings with respect to access to the document and remand the issue to the Board for further proceedings consistent with CLI-10-24. We deny the Staff's stay application as moot.[3]

This proceeding concerns the combined license (COL) application filed by Luminant Generation Company LLC (Luminant), to construct and operate two new nuclear reactors at the Comanche Peak site in Somervell County, Texas. In accordance with the notice of hearing issued for this proceeding,[4] the Sustainable Energy and Economic Development (SEED) Coalition, Public Citizen, True Cost of Nukes, and Texas State Representative Lon Burnam (collectively, Intervenors) jointly petitioned to intervene.[5] The Board granted Intervenors' petition, admitting them as parties to the proceeding.[6]

Appended to the notice of hearing was an order imposing procedures for potential parties[7] to seek access to certain nonpublic information, including sensitive unclassified nonsafeguards information (SUNSI), to support their initial petitions and requests for hearing.[8] As in the *South Texas* case, after being admitted as parties to the proceeding, Intervenors requested, under the Access Order, DC/COL-ISG-016 (ISG-016),[9] a draft interim Staff guidance document that has been categorized as containing security-related SUNSI, and thus has been withheld from the public.

The Staff denied Intervenors' request for access to ISG-016,[10] and Intervenors

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[2] CLI-10-24, 72 NRC 451 (2010).

[3] *See* Order (Mar. 30, 2010) (unpublished) (issuance by the Secretary of a housekeeping stay, pending our resolution of the Staff's stay application) (Housekeeping Stay).

[4] Luminant Generation Company LLC; Application for the Comanche Peak Nuclear Power Plant Units 3 and 4; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 6177 (Feb. 5, 2009).

[5] Petition for Intervention and Request for Hearing (Apr. 6, 2009).

[6] LBP-09-17, 70 NRC 311, 382 (2009). This proceeding is being held under our rules set forth in 10 C.F.R. Part 2, Subparts C and L. *Id.* at 383.

[7] A "potential party" is defined in our rules 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." 10 C.F.R. § 2.4.

[8] 74 Fed. Reg. at 6179 (Access Order).

[9] DC/COL-ISG-016, [Draft] 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 (Oct. 7, 2009) (ADAMS Accession No. ML092100361) (nonpublic ADAMS). The guidance pertains to compliance with the Power Reactor Security Rule. *See* 10 C.F.R. §§ 50.54(hh)(2), 52.80(d). Intervenors' request followed the submission by Luminant of a supplement to the COL application required by that rule.

[10] Letter from Susan H. Vrahoretis, counsel for NRC Staff, to Robert Eye, counsel for Intervenors (Nov. 16, 2009) at 1 (Staff Denial Letter).

appealed the Staff's denial of access to the Board.[11] The Board sustained Intervenors' challenge to the denial of access, reaching a different result from the Staff regarding whether Intervenors had shown a "need" for ISG-016.[12] The Staff filed the instant appeal, which is opposed by Intervenors.[13] On appeal, the Staff argues that the Board's ruling should be reversed because the Board "misconstrued the [Access Order] . . . and created an incorrect standard for 'need' determinations."[14]

We addressed the precise issue of access by a party to draft ISG-016 in the *South Texas* COL proceeding. The procedural posture of the two cases is identical — there, as here, the intervenors in *South Texas* had been admitted as parties at the time of their request for SUNSI, raising the question of the Access Order's applicability.

As we explained in *South Texas,*[15] the Access Order does not apply in the circumstances presented here. Once a petition to intervene has been granted, issues involving access to documents for use in the proceeding are governed by our discovery rules. In a Subpart L proceeding such as this, we look to the mandatory disclosure provisions of 10 C.F.R. § 2.336.[16] In this case, we are presented with a discovery dispute that involves the Staff's disclosure obligations. Intervenors have requested a draft Staff guidance document that, in final form, is intended for use in the Staff's evaluation of the COL application's compliance with our rules. To the extent the Staff intends to use ISG-016 in its evaluation of

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[11] Letter from Robert V. Eye, counsel for Intervenors, to Administrative Judges Young and Gibson (Nov. 20, 2009) at 1 (appealing the Staff's denial of access to both the *South Texas* and *Comanche Peak* Boards). Intervenors cite the Access Order as authority for their appeal. *Id.* (citing 74 Fed. Reg. at 6180).

[12] LBP-10-5, 71 NRC 329, 344 (2010). Before the Board's decision in LBP-10-5, Intervenors filed a Freedom of Information Act (FOIA) request for ISG-016, among other documents. *See* Letter from SEED Coalition to FOIA/Privacy Officer, U.S. NRC (Feb. 26, 2010) at 1 (ADAMS Accession No. ML100910567). The Staff responded to Intervenors' FOIA request, and provided a redacted version of ISG-016. *See* FOIA/PA-2010-0145 — Resp 2 Partial, DC/COL-ISG-016, 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 (June 24, 2010) (ADAMS Accession No. ML101760169) (ADAMS package).

[13] Intervenors' Response Brief in Opposition to Staff's Appeal of LBP-10-05, Sections IV and V.B. (Apr. 1, 2010).

[14] Staff Appeal at 1-2.

[15] CLI-10-24, 72 NRC at 462.

[16] *See* 10 C.F.R. §§ 2.336(g), 2.1203(d). *See generally* Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2225 (Jan. 14, 2004) ("The discovery required by § 2.336 constitutes the totality of the discovery that may be obtained in informal proceedings.").

Luminant's COL application, ISG-016 would be appropriately identified as part of the Staff's mandatory disclosures.[17]

However, as was also the case in *South Texas,* the circumstances in this proceeding appear to present an obstacle for Intervenors that ordinarily might not be present under our rules. Here, in addition to the requirements of section 2.336, the Board's initial scheduling order further defines the scope of the parties' mandatory disclosures according to an agreement reached by the parties, and approved by the Board, not to produce or identify draft versions of documents.[18] As indicated above, Intervenors have requested a *draft* version of ISG-016. It appears that, but for the status of the document as a draft, Intervenors would be able to seek access to it through normal discovery channels.[19] Because the parties have not briefed this issue, we remand the discovery dispute concerning access to draft ISG-016 to the Board for further proceedings consistent with the framework set forth in CLI-10-24.[20]

For the reasons set forth above, we *reverse* the Board's ruling regarding access to draft ISG-016, and *remand* the question of access to the document to the Board

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[17] *See* 10 C.F.R. § 2.336(b)(3) (requiring that the Staff disclose, among other things, "[a]ll documents . . . supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding").

[18] Initial Scheduling Order (Oct. 28, 2009) at 4 (unpublished) ("Except as otherwise stated herein or in subsequent orders, the Board accepts and adopts the Agreement of the Parties Regarding Mandatory Discovery Disclosures, submitted on August 13, 2009."). *See also* Letter from Steven P. Frantz, counsel for Luminant, to Licensing Board (Aug. 13, 2009) ¶ 1.

[19] *See generally* Initial Scheduling Order at 4-5 (setting forth the terms for disclosure disputes and motions to compel).

[20] The final version of ISG-016 has now been issued. *See* DC/COL-ISG-016, [Final] 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 (June 9, 2010) (ADAMS Accession No. ML100431200) (nonpublic ADAMS). Assuming that the Staff plans to use ISG-016 in evaluating Luminant's COL application, we expect the Staff to identify the final version in its next mandatory disclosure update in accordance with 10 C.F.R. § 2.336(b)(3) and (d), and the Board's Initial Scheduling Order. (The Staff did not identify the document in its June 15, 2010, July 15, 2010, August 16, 2010, or September 15, 2010 updates.) Should the Staff seek to withhold the document under a claim of privilege or protected status, we expect the document to be identified as required under section 2.336(b)(5). Intervenors then may seek to obtain the document in accordance with the procedures set forth in the Board's Initial Scheduling Order. *See* Initial Scheduling Order at 4-5. On remand, the Board may want to explore with the parties whether Intervenors wish to continue their pursuit of the draft version considering that the guidance has now issued in final form.

for further proceedings in accordance with CLI-10-24.[21] We *deny* the Staff's stay application as moot.[22]

IT IS SO ORDERED.[23]

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of September 2010.

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[21] In view of our decision, we need not address the Staff's argument that the Board has misconstrued the Access Order's "need for SUNSI" standard. We direct the parties' attention to the guidance that we provided on this issue in CLI-10-24. *See* 72 NRC at 465-68.

[22] With the issuance of this Memorandum and Order, the housekeeping stay expires automatically. *See* Housekeeping Stay at 2.

[23] Commissioner Magwood 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. 50-438-CP**
50-439-CP

TENNESSEE VALLEY AUTHORITY
(Bellefonte Nuclear Plant, Units 1
and 2) **September 29, 2010**

RULES OF PRACTICE: APPEALS; TIMELINESS

In the interest of efficient case management and prompt resolution of adjudications, we generally have enforced the 10-day deadline for appeals strictly, excusing it only in unavoidable and extreme circumstances. Unfamiliarity with NRC's Rules of Practice is not a sufficient excuse for late filings, particularly where the challenged order expressly advised the petitioner of the time within which appellate rights had to be exercised.

RULES OF PRACTICE: TIMELINESS

The fact that a party may have other obligations does not relieve that party of its NRC hearing obligations — specifically its obligation to file pleadings in a timely manner.

RULES OF PRACTICE: TIMELINESS

We disfavor motions for extensions of time that are themselves filed out-of-

time, such as the one at issue here. Indeed, we generally expect parties to file motions for extensions of time so that they are received by the NRC well before the time specified expires.

REINSTATEMENT OF CONSTRUCTION PERMIT

CONSTRUCTION PERMIT: REINSTATEMENT

Reinstatement of the construction permits did not authorize construction of the reactors. Rather, the effect of the reinstatement was to place the facility in a terminated plant status.

MEMORANDUM AND ORDER

On April 2, 2010, the Board issued a Memorandum and Order denying the joint petition to intervene and request for hearing of the Southern Alliance for Clean Energy (SACE), the Blue Ridge Environmental Defense League (BREDL), and BREDL's Bellefonte Efficiency and Sustainability Team chapter (BEST) (collectively, Petitioners).[1] Our procedural regulations provide that, to be accorded intervenor status and a hearing, a petitioner must demonstrate standing and proffer at least one admissible contention.[2] The Board concluded that while SACE and BREDL had demonstrated standing, they had not submitted an admissible contention.[3] The Board also concluded that BEST had not satisfied the requirements for standing.[4] Our rules accorded petitioners 10 days (until April 12, 2010) to appeal LBP-10-7[5] — a deadline to which the Board specifically directed their attention.[6]

Petitioners missed the deadline, belatedly filing their appeal on April 20, 2010.[7] On appeal, Petitioners argue that the Board erred in refusing to consider

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[1] LBP-10-7, 71 NRC 391 (2010).

[2] 10 C.F.R. § 2.309(a), (d), (f).

[3] LBP-10-7, 71 NRC at 404.

[4] *Id.* at 413-14.

[5] 10 C.F.R. § 2.311(b), (c) (providing the petitioner an opportunity for an appeal as of right with respect to an order denying a petition to intervene and/or request for hearing, as to the question whether the request and/or petition should have been granted, and requiring that such appeals may be made within 10 days after the service of the order).

[6] LBP-10-7, 70 NRC at 431.

[7] Brief on Appeal of LBP-10-07 by Blue Ridge Environmental Defense League, Its Chapter Bellefonte Efficiency and Sustainability Team and the Southern Alliance for Clean Energy (Apr. 20, 2010) (Appeal Brief).

their Contention 6, in which Petitioners had argued that the Applicant, Tennessee Valley Authority (TVA) both did not and cannot satisfy the NRC's quality assurance (QA) standards.[8] In an equally belated "Motion . . . for Additional Time in Which to File Appeal of LBP-10-07," they seek to excuse the tardiness of their appeal on grounds of (i) their counsel's new arrival to the case, (ii) the lengthy time it took him to become conversant with the case file and relevant authorities, and (iii) his need to attend to other legal matters at the time.[9]

In the interest of efficient case management and prompt resolution of adjudications,[10] we generally have enforced the 10-day deadline for appeals strictly, excusing it only in "unavoidable and extreme circumstances."[11] We see no such circumstances here. As we held in *Turkey Point,* "unfamiliar[ity] with NRC's Rules of Practice is not sufficient excuse for late . . . filings, particularly where the order that is being challenged expressly advised the [p]etitioner of his appellate rights [and] of the time within which those rights had to be exercised . . . ."[12]

Moreover, Petitioners' argument that their counsel was busy working on other legal matters disregards our longstanding policy that "the fact that a party may have . . . other obligations . . . does not relieve that party of its hearing obligations."[13] Petitioners' counsel was aware both of the Board's likely issuance of a decision in early April[14] and of his two other cited obligations[15] well in advance of the appeal deadline in the case now before us,[16] so he could have filed with us a timely motion for extension of time based upon them. He did not. Nor,

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[8] *See id.* at 2, 4-7.

[9] Motion by Blue Ridge Environmental Defense League, Its Chapter Bellefonte Efficiency and Sustainability Team and the Southern Alliance for Clean Energy for Additional Time in Which to File Appeal of LBP-10-07 (Apr. 20, 2010), at 1. Petitioners' counsel joined the case on February 16, 2010. In addition, Petitioners direct our attention to their counsel's obligations to submit an appellate brief in *Hardin v. Jackson,* No. 09-5365 (D.C. Cir), due April 19, 2010, and to participate in an appellate oral argument in *Virginia v. BREDL,* Nos. 2221-09-02, 2222-09-02 (Va. Ct. App.) on April 22, 2010.

[10] *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 18-20 (1998).

[11] *Id.* at 21. *See also Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 342 (1998); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202 (1998) ("extraordinary and unanticipated circumstances" (citation omitted)).

[12] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 240 (1991).

[13] *Statement of Policy on Conduct of Licensing Proceedings,* CLI-81-8, 13 NRC 452, 454 (1981).

[14] Transcript of Pre-Hearing Conference at 196 (Mar. 1, 2010).

[15] *See* note 9, *supra.*

[16] The appellate brief and oral argument to which petitioners direct our attention were scheduled on March 3 and March 19, 2010, respectively — 40 and 24 days in advance of the April 12, 2010 deadline for an appeal of LBP-10-7. *See Hardin v. Jackson,* No. 09-5365 (D.C. Cir. Mar. 3, 2010); Scheduling Notice of Oral Arguments (Va. Ct. App. Mar. 19, 2010).

contrary to our practice, did he offer an explanation for the tardiness of the motion for extension of time.[17]

Regarding this last point, we disfavor motions for extensions of time that are themselves filed out-of-time, such as the one at issue here. Indeed, we generally expect parties to file motions for extensions of time so that they are "received by the [NRC] well before the time specified expires."[18]

Even had Petitioners filed a timely appeal, the outcome would still be the same. We do not believe the Board committed an abuse of discretion in its ruling on Contention 6. TVA's submittal of additional QA information rendered the contention moot and therefore inadmissible as originally submitted. And although Petitioners could have revised the contention by addressing the new QA information, they chose not to do so.

Moreover, Contention 6 appears to be grounded in two misconceptions on the part of Petitioners. First, they appear to believe that the NRC's reinstatement of the construction permits allows TVA to restart construction on the two units immediately.[19] This is incorrect. Reinstatement of the construction permits did not authorize construction of the reactors; rather, the effect of the reinstatement was to place the facility in a terminated plant status.[20] Second, Petitioners appear to believe that TVA is claiming that it already has satisfied NRC's QA require-

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[17] *See Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 125 (1977):

> In the event of some eleventh hour unforeseen development, a party may tender a document belatedly. The tender must, however, be accompanied . . . by a motion for leave to file out-of-time which satisfactorily explains not only the reason for the lateness, but also why a motion for an extension of time could not have been seasonably submitted. This is so irrespective of the extent of the lateness.

[18] *Statement of Policy,* CLI-81-8, 13 NRC at 455. This is a routine — and reasonable — expectation frequently articulated by our licensing boards. *See, e.g., Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), Initial Scheduling Order (Nov. 17, 2006) (unpublished), at 9 (directing that a motion for extension of time should be filed "as soon as the movant knows or should have known" of the basis for the motion, and in any event no later than the day preceding the applicable deadline, and providing that motions filed after the applicable deadline will be "summarily denied" in the absence of "extraordinary circumstances."); *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), Memorandum and Order (Prehearing Conference Call Summary and Initial Scheduling Order) (Feb. 18, 2009) (unpublished), at 6 (same); *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), Memorandum and Order (Initial Prehearing Order) (Dec. 2, 2008) (unpublished) at 6 (requiring motions for extensions of time to be submitted at least 3 business days before the due date of the submission for which an extension is sought).

[19] *See, e.g.,* Petition to Intervene at 3, 7.

[20] *See* Tennessee Valley Authority (Bellefonte Nuclear Plant Units 1 and 2); Order, 74 Fed. Reg. 10,969, 10,969 (Mar. 13, 2009). *See generally* Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077 (Oct. 14, 1987).

ments.[21] However, the record is clear that TVA has not fully implemented a QA plan.[22]

For these reasons, we *deny* Petitioners' motion for extension of time and *dismiss* their appeal.[23]

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of September 2010.

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[21] *See* Appeal Brief at 6-7.

[22] *See* Tr. at 143, 147-48. It is worth noting that Petitioners' concerns may be raised in other contexts. For example, proper implementation of QA requirements is a matter that may be raised in a subsequent Part 50 operating license proceeding or in a petition for agency action under 10 C.F.R. § 2.206.

[23] The scope of the hearing offered in this proceeding is not at issue in the instant appeal, and, therefore, we need not revisit the previously stated rationale for reinstating these construction permits. *See Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-6, 71 NRC 113, 128 (2010) (Jaczko, G., dissenting). However, we take the opportunity to emphasize the agency's commitment to openness and transparency. 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)). Finally, before we render any decision on an application for authority to operate these units, an opportunity for hearing on that application will be issued and the necessary safety and environmental reviews will be conducted. Therefore, we expect the decision process related to the operation of Bellefonte Units 1 and 2 to also be performed in an open and transparent manner.

Chairman Gregory B. Jaczko, Respectfully Concurring in Part and Dissenting in Part

I concur with the majority that the Board did not commit clear error or abuse its discretion in finding that the contention challenging TVA's ability to satisfy NRC's Quality Assurance and Quality Control (QA) requirements was not adequately supported. Because of this determination, the Board did not reach the question of whether the contention raised an issue within the limited scope of the proceeding. I disagree with the scope of the hearing offered in this proceeding and therefore provide these additional comments.

The crux of my disagreement stems from the Commission's decision to reinstate TVA's Construction Permit (CP) after it had been terminated at TVA's request. As I said when TVA's request first came to the Commission, and in my earlier dissent, I believe that reinstatement contradicts the clear meaning of the Atomic Energy Act, which requires forfeiture of all CP rights upon termination. As implemented by our regulations, guidance, and procedures, and under longstanding Commission policy, if a utility changes its mind, a new CP application must be filed and a new permit granted. Once terminated, a CP cannot simply be resurrected.

In addition to these legal objections, there are important policy reasons not to permit reinstatement of abandoned CPs. Utilities can avoid the expense and burden of complying with our regulations while construction is deferred by abandoning CPs, knowing that they can be reinstated at will. But, by doing so, the NRC loses assurance that the site is properly maintained. For example, the Bellefonte site was no longer required to maintain a QA program beginning in 2006, when the CP was terminated, until 2008, when TVA obtained reinstatement of its CP. Without the pedigree and certification of an ongoing QA program subject to NRC inspections during that time, there is the potential for significant but unknown degradation of existing structures, components, or systems.

Therefore, I believe we should adhere to our longstanding policy of requiring utilities to remain under NRC oversight during the time construction activities are deferred if they are to be resumed under the same CP. If utilities choose to abandon a CP, they should be treated like any new applicant, and be subject to our application requirements, including opportunity for the public to raise any safety or environmental issues in a contested hearing. Instead, with reinstatement of the terminated CP, the opportunity for hearing was limited to "direct challenges to the permit holder's asserted reasons that show good cause justification for the reinstatement." This limited hearing opportunity does not allow the public to raise critical safety and environmental concerns with the construction of the proposed nuclear reactors in our adjudicatory process. I continue to believe that this limited hearing opportunity cannot be reconciled with our commitment to openness and transparency.

Hearings serve an important function in our licensing process by ensuring that our regulatory decisions are thoroughly vetted and transparent. The public interest is best served by a new hearing opportunity now that more than 40 years have elapsed since the Bellefonte CPs were originally issued. The hearing opportunity for the original CPs, issued over four decades ago, is hardly an adequate substitute for the opportunity to participate in our hearing process on the decision of whether a CP may be reissued. Similarly, the fact that a hearing opportunity will be offered after construction is completed, but before operation is authorized, is not a substitute for a hearing at the CP stage. By that time, when substantial resources have been invested and the environmental disruption of construction has occurred, it is too late to raise important issues relating to the location of the facility.

Cite as 72 NRC 481 (2010) **CLI-10-27**

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. 50-282-LR**
50-306-LR

NORTHERN STATES POWER COMPANY
(Prairie Island Nuclear Generating Plant, Units 1 and 2) **September 30, 2010**

INSPECTION FINDINGS

A "Green" inspection finding indicates that the deficiency in licensee performance has a very low risk significance and has little or no impact on safety. By contrast, "White," "Yellow," and "Red" inspection findings indicate increasingly serious safety problems. "White" findings denote a "low to moderate" safety significance.

INTERLOCUTORY REVIEW: DISCRETIONARY

The issues here are "significant," have "potentially broad impact," and "may well recur in the likely license renewal proceedings for other plants." Therefore, although we deny the interlocutory appeals, we nonetheless exercise our inherent supervisory authority over adjudications to take *sua sponte* review of the Board Order.

LICENSE RENEWAL: SCOPE

License renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to our ongoing compliance oversight activity. We specifically indicated that other broad-based issues akin to safety culture — such as operational history, quality assurance, quality control, management competence, and human factors — were beyond the bounds of a license renewal proceeding. This is because these *conceptual* issues fall outside the bounds of the passive, safety-related *physical* systems, structures, and components that form the scope of our license renewal review.

TECHNICAL TERMS: SAFETY CULTURE

We define safety culture broadly.

TECHNICAL TERMS: SAFETY CULTURE

If the Commission were to permit fundamentally routine inspection findings and regulatory determinations to form the basis for safety culture contentions, this result could lead to a potentially neverending stream of minitrials on operational issues, in which the applicant would be required to demonstrate how each issue was satisfactorily resolved.

TECHNICAL TERMS: SAFETY CULTURE

Our regulatory process continually reassesses whether there is a need for additional oversight or regulations to protect public health and safety. We have taken, and continue to take, measures to include the monitoring of safety culture in its oversight programs and internal management processes.

LICENSE RENEWAL: SCOPE

Our license renewal proceedings focus on the potential impacts of an additional 20 years of nuclear power plant operation, not on everyday operational issues — even those that might be age-related. Those issues are effectively addressed and maintained by ongoing agency oversight, review, and enforcement.

ENFORCEMENT PETITIONS

If a stakeholder believes that immediate action is needed to remedy an ailing safety culture at a licensed facility, then that matter should be brought immediately to the attention of the agency via 10 C.F.R. § 2.206.

RULES OF PRACTICE: UNTIMELY CONTENTIONS

The Board concluded that the new contention was not based on specific new facts ("any single event or any single piece of information") but rather on "the history of [Northern States'] 'deficient performance and dereliction of its obligations to promptly and effectively correct deficient conditions'" — a "history . . . outlined for the first time in the . . . SER [Safety Evaluation Report]." The Board stated that it would not expect the petitioner to "piece together" mere "fragments" or "shreds of information" and that, therefore, the petitioner's delay in filing its contention until the issuance of the SER was justified. We disagree. Based on our review of the record, we see no indication that the SER added a "last piece" of information or in any way addressed the "safety culture" at Prairie Island. Rather, the SER merely compiled and organized certain preexisting information regarding one issue raised by PIIC — the refueling cavity leakage issue — into a single document.

The Board's ruling would effectively allow a petitioner or intervenor to delay filing a contention until a document becomes available that collects, summarizes, and places into context the facts supporting that contention. This interpretation, however, turns on its head the regulatory requirement that new contentions be based on "information . . . not previously available." Further, such an interpretation is inconsistent with our longstanding policy that a petitioner has an "iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention."

RULES OF PRACTICE: UNTIMELY CONTENTIONS

Where the pieces of information underpinning a late-filed contention were publicly available between 2 1/2 and 10 months prior to the contention's filing, the filing was untimely.

MEMORANDUM AND ORDER

This proceeding stems from Northern States Power Company's (Northern States) application for a 20-year renewal of its licenses to operate Units 1 and 2 of the Prairie Island Nuclear Generating Plant (Prairie Island). The Prairie Island Indian Community (PIIC) opposes the application. Following the Staff's issuance of its Safety Evaluation Report (SER),[1] PIIC submitted a new

[1] Safety Evaluation Report Related to the License Renewal of Prairie Island Nuclear Generating Plant Units 1 and 2 (Oct. 16, 2009) (ADAMS Accession No. ML092890209).

contention questioning whether Prairie Island's safety culture was sufficiently strong to ensure effective aging management during the 20-year period of extended operation.[2] The Licensing Board admitted a narrowed version of the contention.[3] Both the Staff and Northern States filed interlocutory appeals challenging the Board's order.[4] We deny the interlocutory appeals but nevertheless take review of the Board's decision on our own motion, reverse that decision, and terminate this adjudication.

I. BACKGROUND

A. "Safety Culture" Contention

PIIC has submitted a new contention asserting that the safety culture at Prairie Island was insufficiently strong to merit the Staff's finding, required under 10 C.F.R. § 54.29(a), of a "reasonable assurance" that the applicant will manage the effects of aging during the period of extended operation.[5] Specifically, the new contention argued that:

> Contrary to the conclusion in the . . . SER . . . , [PIIC] does not believe that the requirements of 10 CFR 54.29(a) have been met. Due to recent significant non-compliances with NRC regulations, as well as the applicant's failure to address a known potentially serious safety problem identified in the SER, [PIIC] does not believe that there is any justification for a reasonable assurance determination by the NRC that the applicant will . . . manag[e] the effects of aging during the period of extended operation on the functionality of structure and components as required by 10 CFR 54.29(a)(1).[6]

PIIC also offered the following description of the primary concern underlying its new contention: the "applicant's deficient performance and dereliction of

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[2] Prairie Island Indian Community's Submission of a New Contention on the NRC Safety Evaluation Report (Nov. 23, 2009) (New Contention). PIIC's new contention is supported by an expert affidavit. *See* Declaration of Christopher I. Grimes (Nov. 23, 2009) (Grimes Declaration), attached to the New Contention. PIIC's "Safety Culture" contention is the sole remaining contention at issue in this adjudication.

[3] Order (Narrowing and Admitting PIIC's Safety Culture Contention) (Jan. 28, 2010) (Board Order) (unpublished).

[4] Northern States Power Company's Petition for Interlocutory Review of an Order Admitting a Safety Culture Contention (Feb. 12, 2010) (Northern States Petition); NRC Staff's Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision Admitting Late-Filed and Out of Scope Safety Culture Contention (Feb. 12, 2010) (Staff Petition).

[5] New Contention at 4 (referring to SER at p. 6-1).

[6] *Id.* at 4 (internal quotation marks omitted).

its obligations to promptly and effectively correct deficient conditions call into question the applicant's ability to effectively implement the aging management program during the period of extended operation."[7]

In support, PIIC directed the Board's attention to examples cited in the SER of asserted "poor safety culture" from at least as early as 1998 to 2008, to "significant non-compliances" with our regulations in both 2008 and 2009,[8] and to an NRC finding that Northern States' implementation of its Corrective Action Program for Prairie Island was "lacking in rigor, resulting in inconsistent and undesirable results."[9]

As to timeliness, when it filed the new contention, PIIC stated simply that its contention was timely because the information on which it is based was not available when it submitted its initial petition, and that the new information was materially different from information previously available.[10] In its reply, PIIC argued that the SER provided for the first time the final pieces of information that, together with earlier deficiencies, displayed a pattern of a poor safety culture.[11]

As support for this contention, PIIC argued that a poor safety culture relates directly to the following four elements of an effective aging management program, as set forth in the NRC's Standard Review Plan for License Renewal:

> 7. Corrective actions, including root cause determination and prevention of recurrence, should be timely.
>
> 8. Confirmation process should ensure that preventive actions are adequate and that appropriate corrective actions have been completed and are effective.
>
> 9. Administrative controls should provide a formal review and approval process.
>
> 10. Operating experience should provide objective evidence to support the conclusion that the effects of aging will be managed adequately so that the structure and component intended function(s) will be maintained during the period of extended operation.[12]

PIIC directed the Board's attention to several disparate issues related to the plant. One issue concerned "the leakage of borated water from the . . . refueling cavities"

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[7] *Id.* at 5.

[8] *Id.* at 4-6.

[9] *Id.* at 11 (citing Inspection Report 05000282/2009009;05000306/2009009, U.S. Nuclear Regulatory Commission (Sept. 25, 2009), at 1 (ADAMS Accession No. ML102160771)).

[10] *Id.* at 4-5.

[11] *See* Prairie Island Indian Community's Reply to NRC Staff's Answer and Northern States Power Company's Answer in Opposition to the Community's New Contention on the NRC Safety Evaluation Report (Dec. 10, 2009) (PIIC Reply), at 3.

[12] New Contention at 12 (citing NUREG-1800, Rev. 1, Standard Review Plan for License Renewal (Sept. 2005), at p. A.-8 (ADAMS Accession No. ML052110007)); Grimes Declaration at 11.

— an issue addressed in the SER, where the Staff concluded that the refueling cavities had been leaking since at least as early as 1998[13] and perhaps for the entire life of the plant.[14]

PIIC also cited several instances associated with findings made as part of the Regulatory Oversight Process. Principally, PIIC referenced NRC Information Notice 2009-11, and a related inspection "White" finding.[15] Information Notice 2009-11 discussed an event at Prairie Island Unit 1, where an auxiliary feedwater pump was rendered inoperable by a mispositioned valve. The Information Notice identified several factors that either caused mispositioning events, or led to their remaining undetected. PIIC also directed the Board's attention to two other "White" findings, regarding public radiation safety and mitigating systems.[16] PIIC denied, however, that it was focusing on the operational aspects of these problems. In particular, it claimed specifically that Northern States' poor management of the refueling cavity issue was "a culminating symptom of a weak safety culture."[17]

Taking these events together, PIIC concluded that "the NRC cannot legitimately find that there is reasonable assurance" under section 54.29(a)(1).[18] PIIC later clarified that its contention "goes to the viability of the Applicant's License Renewal Application" as well as to "the conclusions in the NRC Staff's Safety Analysis [sic] Report."[19]

PIIC did not request that the NRC reject the application due to asserted safety culture problems. Rather, it asked that the Commission "direct the applicant to conduct a third party assessment of safety culture" and thereafter that the Commission "address what corrective actions by the applicant are necessary before the renewal should be granted."[20]

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[13] New Contention at 4 (citing SER at p. 3-142). *See also* Grimes Declaration at 4-5.

[14] New Contention at 5-7.

[15] *Id.* at 12-13 (referring to NRC Information Notice 2009-11: Configuration Control Errors (July 7, 2009) (ADAMS Accession No. ML091240039), and Notice of Violation, EA-08-272 (Jan. 27, 2009) (turbine-driven auxiliary feedwater pump) (ADAMS Accession No. ML102160763).

A "Green" inspection finding indicates that the deficiency in licensee performance has a very low risk significance and has little or no impact on safety. By contrast, "White," "Yellow," and "Red" inspection findings indicate increasingly serious safety problems. "White" findings denote a "low to moderate" safety significance. NUREG-1649, "Reactor Oversight Process," Rev. 4 (Dec. 2006), at 6 (ADAMS Accession No. ML070890365).

[16] *See* Notice of Violation, EA-08-349 (May 6, 2009) (public radiation safety, shipment of radioactive materials) (ADAMS Accession No. ML091270080); Notice of Violation, EA-09-0167 (Sept. 3, 2009) (mitigating systems, component cooling water system) (ADAMS Accession No. ML092450624).

[17] PIIC Reply at 6.

[18] New Contention at 14.

[19] PIIC Reply at 5-6. *See also id.* at 7.

[20] New Contention at 14; Grimes Declaration at 12-13.

Both the Staff and Northern States opposed admission of the new contention.[21] Both made substantively similar arguments. First, the information upon which PIIC relies was available months prior to the SER's issuance, and the SER contained no information that was either new or different from that previously available.[22] Second, the contention impermissibly challenged the adequacy of the Staff's SER rather than Northern States' application.[23] Third, the contention raised issues that fall outside the scope of a license renewal proceeding.[24] And fourth, the information upon which the contention is based did not present a genuine dispute of material fact.[25]

B. Board Order

The Board concluded that the contention was timely because it was filed by the deadline that the Board had set for new contentions that were based on the SER.[26] It likewise concluded that the information contained in the SER was not previously available and was materially different from previously available information. Here, the Board reasoned that, while the safety issues to which PIIC refers date back to 2008, the contention is premised on what PIIC perceives to be a pattern of deficiencies at Prairie Island — a "history . . . outlined for the first time in the . . . SER."[27] The Board rejected the Staff's and Northern States' argument that all the individual pieces of information were available to PIIC and that it therefore could have filed its contention earlier.[28] Instead, the Board concluded that, prior to the SER's issuance, PIIC lacked "the full spectrum of information

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[21] NRC Staff's Answer in Opposition to Prairie Island Indian Community's Submission of a New Contention on the NRC Safety Evaluation Report (Dec. 3, 2009) (Staff Answer); Northern States Power Company's Answer Opposing the PIIC's Late-Filed Contention (Dec. 3, 2009) (Northern States Answer).

[22] *See* Northern States Petition at 5, 8 n.18; Staff Petition at 15-22; Northern States Answer at 10-13; Staff Answer at 5-10.

[23] *See* Northern States Petition at 5; Northern States Answer at 14-15; Staff Answer at 11-13.

[24] *See* Northern States Petition at 1-2, 5-6, 8, 9-18; Staff Petition at 6-15; Northern States Answer at 16-18; Staff Answer at 13-17.

[25] *See* Northern States Petition at 6, 8, 18-22; Northern States Answer at 18-23; Staff Answer at 17-19.

[26] Board Order at 5. Because of this timeliness finding, the Board concluded that it did not need to consider whether the contention also would satisfy the requirements for nontimely filings found in 10 C.F.R. § 2.309(c). *Id.* at 7-8.

[27] Board Order at 6. *See also* PIIC Reply at 3, 4.

[28] Board Order at 6. The Board quotes with approval another Board's statement that it was "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." *Id.* (quoting *U.S. Department of Energy* (High-Level Waste Repository), LBP-09-29, 70 NRC 1028, 1036 (2009)).

necessary to formulate its contention."[29] According to the Board, "none of those events, by itself, fully captured the scope of PIIC's concerns related to safety culture."[30] For these reasons, the Board concluded that PIIC's contention was timely filed.

The Board then turned to the issue of the contention's admissibility. It admitted the contention, but narrowed it to read: "[Prairie Island's] safety culture is not adequate to provide the reasonable assurance required by 10 C.F.R. § 54.29(a)(1) that [Prairie Island] can manage the effects of aging during the requested period of extended operation."[31] In admitting this narrowed version, the Board addressed three objections from the Staff and Northern States.

The first objection was that the contention fails to raise a genuine material dispute. The Staff and Northern States argued that the contention challenges the SER rather than the application, and that we have expressly barred such challenges in adjudicatory proceedings.[32] The Board acknowledged that the contention explicitly challenged the "reasonable assurance" finding in the Staff's SER, but nonetheless concluded that PIIC intended to challenge the adequacy of Northern States' aging management plan as described in the license renewal application. To the extent PIIC was challenging the SER, the Board refused to consider the challenge. But to the extent PIIC was challenging the application, the Board concluded that PIIC raised a genuine material dispute.[33]

Next, the Board rejected the argument that PIIC's contention raised operational issues that were outside the scope of this proceeding. The Board acknowledged that the contention appears to raise current operating issues, but it concluded that a close reading of the contention reveals that it was treating those operating issues as indications of a safety culture too weak to ensure the effectiveness of Northern States' aging management plan.[34] The Board accepted PIIC's argument that "safety culture is an essential component of an effective [aging management plan],"[35] and specifically is necessary to achieve an effective aging management plan.[36]

Finally, the Board disagreed with the Staff's and Northern States' argument that the contention was factually unsupported. The Board concluded that the

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[29] Board Order at 6.

[30] *Id.* at 6-7.

[31] *Id.* at 8.

[32] *See id.* at 9 (citing Northern States Answer at 14-15, Staff Answer at 11-13, and Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004)).

[33] *Id.* at 10.

[34] *Id.* at 11.

[35] *Id.*

[36] *Id.* at 11-12. *See supra* note 12.

reports, transcripts, expert declaration, and other documents provided factual support for the "Safety Culture" contention sufficient to justify its admission.[37]

Both Northern States and the Staff sought timely interlocutory review of the Board's Order.

II. DISCUSSION

A. The Interlocutory Appeals

Northern States and the Staff seek interlocutory review under 10 C.F.R. § 2.341(f)(2).[38] Although we find that the grounds asserted by the appellants do not fit within the confines of our rules for interlocutory review, we believe that the issues raised by the Staff go to the very heart of our longstanding position that license renewal proceedings should be limited in scope.[39] Like the issues for which we granted interlocutory review in *Vermont Yankee,* the issues here are "significant," have "potentially broad impact," and "may well recur in the likely license renewal proceedings for other plants."[40] We therefore deny the interlocutory appeals, but exercise our inherent supervisory authority over adjudications to take *sua sponte* review of the Board Order.

B. Admissibility of "Safety Culture" Contention

1. Requirements for Admissibility of New or Amended Contentions

The appellants argue that the Board should not have admitted the "Safety Culture" contention. These arguments rely upon two sets of regulatory requirements — for the admissibility of contentions generally and for the admission of contentions filed once the time for filing initial intervention petitions has passed. Our general regulation governing contention admissibility provides that the proponent of a contention 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;

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[37] Board Order at 14.

[38] *See* Staff Petition at 1, 5-15; Northern States Petition at 22-24.

[39] The Staff argues that the "Safety Culture" Contention fundamentally addresses operational rather than aging-related issues and therefore falls outside the scope of license renewal review, and that its admission, if upheld, could open the floodgates to an endless stream of new operating-issue contentions under the guise of "safety culture." *See* Staff Petition at 13.

[40] *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 5 (2007).

(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 the 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 on a material issue of law or fact. This information must include reference to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute.[41]

In addition, our regulation governing the admissibility of nontimely contentions requires the proponent of such a contention to show 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.[42]

2. Contention Improperly Expands Scope of License Renewal Proceeding

Both Northern States and the Staff argue that the Board erred in admitting PIIC's contention, given that it brings into this license renewal proceeding operational issues that are already addressed by existing NRC regulatory processes.[43] We agree. We stated unambiguously in our License Renewal Rule that "license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to [our] ongoing compliance oversight activity."[44]

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[41] 10 C.F.R. § 2.309(f)(1)(i)-(vi) (regarding contention admissibility). Subsection (vii) of section 2.309(f)(1) applies only to proceedings arising under 10 C.F.R. § 52.103(b), and therefore is inapplicable here.

[42] 10 C.F.R. § 2.309(f)(2)(i)-(iii).

[43] *See* Northern States Petition at 1-2, 5-6, 9-18; Staff Petition at 6-15.

[44] Final Rule: "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,952 (Dec. 13, 1991) (License Renewal Rule), *revised,* 60 Fed. Reg. 22,461 (May 8, 1995) (Revised License Renewal Rule).

We specifically indicated that other broad-based issues akin to safety culture[45] — such as operational history, quality assurance, quality control, management competence, and human factors — were beyond the bounds of a license renewal proceeding.[46] This is because these *conceptual* issues fall outside the bounds of the passive, safety-related *physical* systems, structures, and components that form the scope of our license renewal review.[47]

Likewise, in our Revised License Renewal Rule, we explicitly rejected a comment that we should analyze "whether there was any condition, act or practice that occurred during the period of initial licensing that would affect the period of extended operation."[48] Yet PIIC's contention would necessitate just such an analysis — the contention is based on compliance history that is retrospective by its very nature.

In large part, the references upon which PIIC relies involve ongoing operational matters that are appropriately addressed under the Staff's ongoing regulatory oversight process. The citations provided by PIIC here reflect no more than a collection of fundamentally routine inspection findings and regulatory determinations — to permit these to form the basis for a "safety culture" contention could result in a potentially neverending stream of minitrials on operational issues, in which the applicant would be required to demonstrate how each issue was satisfactorily resolved.[49]

This is not to say that the issue of safety culture is not of paramount importance.

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[45] We define safety culture broadly. *See, e.g.,* Draft Safety Culture Policy Statement: Request for Public Comments, 74 Fed. Reg. 57,525, 57,525 (Nov. 6, 2009) (Draft Safety Culture Policy Statement) (defining the term as "that *assembly of characteristics, attitudes, and behaviors* in organizations and individuals which establishes that as an overriding priority, nuclear safety and security issues receive the attention warranted by their significance" (emphasis added; footnote omitted)); Policy Statement on the Conduct of Nuclear Power Plant Operations, 54 Fed. Reg. 3424, 3425 (Jan. 24, 1989) ("the phrase safety culture refers to a *very general matter,* the personal dedication and accountability of all individuals engaged in any activity which has a bearing on the safety of nuclear power plants" (emphasis added)).

[46] *See, e.g.,* License Renewal Rule, 56 Fed. Reg. at 64,959 (operational history, quality assurance, quality control, human factors), 64,967 (training of operators), 64,968 (financial qualifications).

[47] *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 454 (2010) ("In developing the renewal regulations, the Commission concluded that the 'only [safety] 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 [SSCs] in the period of extended operations'" (quoting Revised License Renewal Rule, 60 Fed. Reg. at 22,464)). *Id.* (passive SSCs only). We explained the reasons underlying these limits in *Pilgrim, id.,* 71 NRC at 453-56.

[48] 60 Fed. Reg. at 22,485.

[49] And as the Staff correctly observes, to permit a safety culture contention on the grounds articulated by PIIC would open the door to a potentially unending series of revised contentions, which could be proffered upon each new inspection report, notice of violation, etc. *See* Staff Petition at 13, 15.

We recognize the importance of establishing and maintaining a strong safety culture, and the consideration of safety culture is part of our mission to protect the public health and safety. As we recently stated in the *Pilgrim* license renewal proceeding, "[t]he regulatory process continuously reassesses whether there is a need for additional oversight or regulations to protect public health and safety."[50] Although (as in *Pilgrim*) not necessary for this decision, we note that the NRC has taken, and continues to take, measures to include the monitoring of safety culture in its oversight programs and internal management processes.[51]

As we stated in *Millstone,* our license renewal proceedings focus "on the potential impacts of an additional 20 years of nuclear power plant operation, not on everyday operational issues"[52] — even those that might be age-related.[53] "Those issues are effectively addressed and maintained by ongoing agency oversight, review, and enforcement."[54] To the extent PIIC believes that the Staff has overlooked facts indicating an inadequate safety culture at Prairie Island as a general matter — separate and apart from license renewal — then PIIC's remedy is to direct the Staff's attention to the supporting facts via a petition for enforcement action under 10 C.F.R. § 2.206.[55] Indeed, if a stakeholder is of the view that immediate action is needed to remedy an ailing safety culture at Prairie Island or at any facility, then that matter should be brought immediately to the attention of the agency via section 2.206. Here, for example, PIIC's request for a third-party assessment of the plant's safety culture *now* seems fundamentally a concern that relates to current operations at the plant, as opposed to how it might operate during the period of extended operation.

We do not mean to underestimate the importance of the findings upon which PIIC relies, or to suggest that Prairie Island has a flawless safety record. We

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[50] *See Pilgrim,* CLI-10-14, 71 NRC at 463.

[51] *See, e.g.,* Draft Safety Culture Policy Statement, 74 Fed. Reg. at 57,526; NRC Regulatory Issue Summary 2006-13, "Information on the Changes Made to the Reactor Oversight Process to More Fully Address Safety Culture" (July 31, 2006) (ADAMS Accession No. ML061880341); NRC Regulatory Issue Summary 2005-18, "Guidance for Establishing and Maintaining a Safety Conscious Work Environment" (Aug. 25, 2005) (ADAMS Accession No. ML052220239); Statement of Policy, Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation, 61 Fed. Reg. 24,336 (May 14, 1996).

[52] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 637-38 (2004) (footnote and internal quotation marks omitted).

[53] *Pilgrim,* CLI-10-14, 71 NRC at 454 ("The aging management review for license renewal does not focus on all aging-related issues").

[54] *Millstone,* CLI-04-36, 60 NRC at 638 (footnote and internal quotation marks omitted).

[55] *Id.; Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 23, 24 n.18 (2001).

merely conclude that, taken as a whole, and in view of the SER, PIIC has not demonstrated a sufficient foundation for a "safety culture" contention.[56]

3. PIIC's Contention Is Untimely

Though we conclude that the Board should have dismissed the contention as beyond the scope of the proceeding, there is another basis for denial of the contention. Appellants argue that the information on which PIIC relies has been available for months (and, in one instance, 11 years) prior to both the Staff's October 16, 2009, SER and PIIC's November 23, 2009, "Safety Culture" Contention, that the SER contained no information that was either new or materially different from that previously available, and that these two facts render the contention fatally untimely.[57]

We agree. The Board fundamentally erred in concluding that the SER provided the final "piece of the puzzle" that allowed PIIC to formulate an admissible contention. The Board concluded that PIIC's contention was not based on specific new facts ("any single event or any single piece of information") but rather on "the history of [Northern States'] 'deficient performance and dereliction of its obligations to promptly and effectively correct deficient conditions'" — a "history . . . outlined for the first time in the . . . SER."[58] The Board stated that it would not expect PIIC to "piece together" mere "fragments" or "shreds of information" and that, therefore, PIIC's delay in filing its contention until the issuance of the SER was justified.[59]

We do not find that there are grounds present in today's case that support admission of a new contention. Based on our review of the record, we see no indication that the SER added a "last piece" of information or in any way addressed the "safety culture" at Prairie Island. Rather, the SER merely compiled and organized certain preexisting information regarding one issue raised by PIIC — the refueling cavity leakage issue — into a single document.

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[56] The Staff also argues that the original contention impermissibly challenges the adequacy of the Staff's SER rather than Northern States' application. *See* Staff Petition at 3. On this point, the Staff is correct. The contention, as originally worded by PIIC, inappropriately focused on the Staff's review of the application rather than upon the errors and omissions of the application itself. Such challenges are not permitted in our adjudications. *See, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 123 n.39 (2009); Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004). But this matter is not before us; the contention, as reformulated and admitted by the Board, properly excludes PIIC's challenge to the Staff review.

[57] *See, e.g.,* Northern States Petition at 5, 8 n.18; Staff Petition at 18-19.

[58] Board Order at 5-6 (quoting New Contention at 5).

[59] *Id.* at 6-7.

The relevant discussion is located in SER § 3.0.3.2.17. The section discusses the Structures Monitoring Program (an aging management program), ultimately concluding that the program is consistent with the associated generic aging management program. As part of its consideration of the program, the SER describes in detail the chronology of events associated with the reactor refueling cavity leakage issue, which was the subject of requests for additional information and, ultimately, licensee commitments.[60] The SER discussion simply reflects the discovery, chronology, and resolution of a technical issue over the course of the license renewal review, as well as measures that will be taken to address the issue during the period of extended operation. The SER nowhere addresses the other facts on which PIIC relies in its "Safety Culture" Contention, and, indeed, does not discuss safety culture as a general matter. In our view, neither SER § 3.0.3.2.17 nor the SER as a whole articulates a "reasonably apparent" foundation for a safety culture contention.

Given that the SER does not provide support for PIIC's contention, we are left to consider whether the contention is otherwise timely. We find that it is not. As explained below, the remaining information on which PIIC relies was already available to it at least 2 months prior to PIIC's submission of its new contention.

It is undisputed that the individual documents upon which PIIC relies to support its new contention have been in the public domain for some time. Regarding the refueling cavity leakage issue, PIIC states that it relies upon "material found in the SER in regard to the leakage of borated water from the . . . refueling cavities" since at least as early as 1998[61] and perhaps for the entire life of the plant.[62] PIIC acknowledges, however, that this information was publicly available in late 2008.[63] Moreover, insofar as PIIC is relying upon the SER's discussion of the history of the refueling cavity leakage issue, nearly all of this information had been included previously in the Staff's SER with Open Items issued 5 1/2 months earlier.[64]

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[60] *See* SER at pp. 3-141 to 3-149, 1-8 to 1-9.

[61] *See* New Contention at 4 (citing SER at p. 3-142); Grimes Declaration at 4-5.

[62] New Contention at 5-7.

[63] *Id.* at 4.

[64] Staff Petition at 22 & n.69. *Compare* SER § 3.0.3.2.17, pp. 3-141 to 3-149 (*Operating Experience*) *with* Division of License Renewal, Office of Nuclear Reactor Regulation, Safety Evaluation Report with Open Items Related to the License Renewal of Prairie Island Nuclear Generating Plant, Units 1 and 2 (June 4, 2009), § 3.0.3.2.17, pp. 3-142-to 3-143 (*Operating Experience*) (ADAMS Accession No. ML091550014) (SER with Open Items).

The final SER did contain some information that had not been available when the SER with Open Items was issued on June 4, 2009. Specifically, the Final SER summarized additional information submitted by the applicant on June 24 and August 7, 2009, in response to a June 10, 2009 request

(Continued)

PIIC also relies upon three "White" findings of regulatory noncompliance. The Staff, however, had issued the Notices of Violation that were premised upon these findings on January 27, May 6, and September 3, 2009 — 10, 6 1/2, and 2 1/2 months prior to the filing date of PIIC's new contention.[65] In addition, PIIC cites a September 25, 2009, inspection report discussing the Corrective Action Program (CAP) in place at Prairie Island,[66] as well as the Staff's identification of cross-cutting issues regarding Human Performance.[67] The document upon which PIIC relies for its cross-cutting issues argument was a September 1, 2009 letter, written 2 1/2 months prior.[68]

It is clear that a contention based on these documents — all of which were available well before the SER issued — would be untimely, absent a discussion in the SER that would make "reasonably apparent" a foundation for such a contention.[69] As discussed above, we find no such discussion there.

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for additional information. *See* SER at pp. 1-8 to 1-9 and 3-342 to 3-349. But these documents were available 5, 3 1/2, and 5 1/2 months, respectively, prior to the filing of PIIC's new contention.

Also, the information in the SER with Open Items was the focus of extensive discussions at the July 7, 2009 meeting of the Subcommittee on License Renewal of the Advisory Committee on Reactor Safeguards (ACRS), held 4 1/2 months prior to the filing of the new contention. Transcript, ACRS, Subcommittee on the Plant License Renewal for the Prairie Island Nuclear Generating Station (July 7, 2009), at 47-81 (ADAMS Accession No. ML092180127).

[65] *See* New Contention at 4, 10. PIIC specifically relies upon Notice of Violation, EA-08-272 (Jan. 27, 2009) (turbine-driven auxiliary feedwater pump) (ADAMS Accession No. ML102160763); Notice of Violation, EA-08-349 (May 6, 2009) (Shipment of radioactive materials) (ADAMS Accession No. ML091270080); and Notice of Violation, EA-09-0167 (Sept. 3, 2009) (component cooling water system) (ADAMS Accession No. ML092450624).

[66] New Contention at 11; Grimes Declaration at 10 (citing Inspection Report 05000282/2009009; 05000306/2009009 (Sept. 25, 2009), at 1 ("Inspectors continued to have concerns with the performance of the corrective action program") (ADAMS Accession No. ML102160771)). Following a 24-day inspection, NRC inspectors concluded, among other things, that "the corrective action . . . program at Prairie Island was functional, but implementation was lacking in rigor[,] resulting in inconsistent and undesirable results." Inspection Report, *supra,* at 1. The inspectors commented that the 2007 biennial problem identification and resolution inspection had criticized program implementation, that plant management had initiated an improvement effort, but that performance had nevertheless declined further. Although yet another improvement plan was "in progress," it had not been fully implemented and effective at the time the inspectors prepared their Inspection Report. *Id.*

[67] New Contention at 9-11.

[68] New Contention at 10-22 (citing Letter from K. Stephen West, Director of Reactor Projects, U.S. Nuclear Regulatory Commission, to Mark A. Schimmel, Site Vice President (Acting), Prairie Island Nuclear Generating Plant (Sept. 1, 2009)) (ADAMS Accession No. ML092440367).

[69] *See* Order (Conference Call Summary and Scheduling Order) (Nov. 4, 2009), at 3 (unpublished) (providing a 30-day time frame for the filing of new or amended contentions after issuance of the latter of the draft Supplemental Environmental Impact Statement or SER with Open Items)); Memorandum and Order (Prehearing Conference Call Summary and Initial Scheduling Order) (Feb. 18, 2009), at

(Continued)

The Board's ruling would effectively allow a petitioner or intervenor to delay filing a contention until a document becomes available that collects, summarizes and places into context the facts supporting that contention.[70] To conclude otherwise would turn on its head the regulatory requirement that new contentions be based on "information . . . *not previously available*."[71] Further, such an interpretation is inconsistent with our longstanding policy that a petitioner has an "iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention."[72] As we recently held in *Oyster Creek*:

> [O]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset. There simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.[73]

By permitting PIIC to wait for the Staff to compile all relevant information in a single document, the Board improperly ignored PIIC's obligation to conduct its own due diligence. We find that the contention is impermissibly out of time.

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4 (unpublished) (same). *See generally Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1043 (1983) ("the unavailability of . . . documents does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner"); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 21 (1986) (an intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was publicly available "for some time" prior to the filing of the contention).

[70] *Cf. Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009) (to show good cause for the late filing of a contention, "a petitioner must show that the information on which the new contention is based was *not reasonably available to the public,* not merely that the *petitioner* recently found out about it" (emphasis in original)).

[71] 10 C.F.R. § 2.309(f)(2)(i) (emphasis added). Here, the SER contained no facts that were previously unavailable to PIIC. Nor, in our view, does the SER address the existing cumulative facts in such a way as to create new information previously inaccessible to PIIC.

[72] *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993) (internal quotation marks and footnote omitted). *Accord Shaw AREVA MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002); *Turkey Point,* CLI-01-17, 54 NRC at 24-25.

[73] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-72 (2009) (footnotes and internal quotation marks omitted).

III. CONCLUSION

Based upon the reasons set forth above, we *deny* the interlocutory appeals, *reverse* the Board Order, and *terminate* this adjudicatory proceeding.

IT IS SO ORDERED.[74]

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of September 2010.

[74] Commissioner Apostolakis did not participate in this matter.

Chairman Gregory Jaczko, Dissenting

I disagree with the majority's decision to overturn the Board's contention admissibility finding. Our procedures provide the parties with mechanisms to correct errors by seeking reconsideration and to avoid unnecessary evidentiary hearings by seeking summary disposition. Our procedures do not allow parties to seek interlocutory Commission review except in extraordinary circumstances, such as when a Board decision fundamentally alters the scope or conduct of a proceeding. Those circumstances are not present here. The possibility that a hearing will be conducted on a contention we may later find inadmissible is simply not a legitimate grounds for seeking Commission review under our present regulatory scheme. As we consider changes to our adjudicatory procedures, I believe the Commission should obtain public comment on a proposal to allow appeals of contention admissibility decisions. But until such appeals are permitted, I believe we should allow hearings to proceed as provided in our rules and, therefore, would not take review of the contention admissibility ruling at this time.

Commissioner Kristine L. Svinicki, Concurring

My dissenting colleague argues that the Commission should not have taken review of the Board's contention admissibility decision because our interlocutory review standards have not been satisfied. In many respects, this argument parallels a dissenting opinion in a previous matter before the Commission (involving the *Vermont Yankee* license renewal), to which Commissioners McGaffigan and Merrifield responded in a concurring opinion.[75] I have studied the parallelisms of the dissent in that case, and find that I agree with the concurring opinion's views. I will not repeat those views here, but like Commissioners McGaffigan and Merrifield, I respectfully disagree with my dissenting colleague's position that the Commission should not have taken review of this matter.

As explained in today's decision, I agree that the grounds for review advanced by Northern States and the Staff do not satisfy our interlocutory review standards. However, taking review of this matter as an exercise of the Commission's inherent supervisory authority over adjudications is appropriate to ensure consistency with our license renewal rules. In this instance, the Board's admission of this contention is fundamentally at odds with the well-established limited scope of license renewal proceedings. Moreover, consistent with our Policy Statement on the Conduct of Adjudicatory Proceedings, the Commission is obliged to ensure that our licensing proceedings are conducted efficiently and fairly. In my opinion, allowing the continued litigation of this contention would lead to the unnecessary expenditure of time and resources on an issue not germane to the proposed action.

[75] *Vermont Yankee,* CLI-07-1, 65 NRC at 8-9.

Cite as 72 NRC 501 (2010) **LBP-10-17**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Richard F. Cole
Dr. Alice C. Mignerey

In the Matter of **Docket No. 52-017-COL**
(ASLBP No. 08-863-01-COL)

VIRGINIA ELECTRIC AND POWER COMPANY d/b/a DOMINION VIRGINIA POWER and OLD DOMINION ELECTRIC COOPERATIVE
(North Anna Power Station, Unit 3) **September 2, 2010**

In this combined license proceeding, Intervenor filed a new contention challenging Applicant's ability to revise its Combined License Application and the NRC Staff's authority to review those revisions without requiring the Applicant to file a new Application. Applicant filed a Motion to Dismiss the only admitted contention because the revisions in Applicant's Combined License Application rendered that contention moot. The Licensing Board granted Applicant's Motion to Dismiss the previously admitted contention on mootness grounds and denied admission of Intervenor's new contention for failure to demonstrate materiality and a genuine dispute of a material issue of law or fact. However, the Licensing Board did not terminate the proceeding because of the time it previously permitted Intervenor to file new contentions arising out of Applicant's revisions to its Combined License Application.

RULES OF PRACTICE: CONTENTIONS (MOOTNESS)

"[W]here a contention is 'superseded by the subsequent issuance of licensing-related documents' . . . the contention must be disposed of or modified." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382 (2002)) (quoting *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983)).

RULES OF PRACTICE: ADMISSIBILITY, NEW CONTENTIONS (MATERIALITY; NEW NFORMATION)

An applicant's change of reactor design constitutes new and materially different information for the purposes of filing a new contention.

LICENSING BOARDS: RESPONSIBILITIES

RULES OF PRACTICE: ADMISSIBILITY, CONTENTIONS (TIMELINESS)

A Licensing Board is under an obligation to evaluate the timeliness of a proposed contention even if no party raises the issue. *See, e.g., Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 250-51 (1986); *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 (1985).

RULES OF PRACTICE: ADMISSIBILITY, CONTENTIONS (TIMELINESS)

A submission of a new contention within 30 days of the event giving rise to that contention is timely. *See, e.g., Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640, 647 (2009); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (2006).

RULES OF PRACTICE: ADMISSIBILITY, CONTENTIONS (LEGAL)

The agency's procedural "rules permit contentions that raise issues of law as well as contentions that raise issues of fact." *U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 590 (2009).

LICENSING BOARDS: DELEGATED AUTHORITY

RULES OF PRACTICE: ADMISSIBILITY, CONTENTIONS (LEGAL; WITHIN SCOPE OF PROCEEDING), JURISDICTION (LICENSING BOARDS), SCOPE AND TYPE OF PROCEEDING

Contentions raising legal issues, like fact-based contentions, must fall within the allowable scope of the proceeding to be admissible. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 154 (2001). The scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). Any contention that falls outside the specified scope of the proceeding is inadmissible. *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

RULEMAKING: REFERRAL OF DESIGN CERTIFICATION ISSUES

Section 52.55(c) of 10 C.F.R. permits an applicant, at its own risk, to reference a pending design certification application, and that the Staff need not complete a design certification rulemaking before proceeding to evaluate an applicant's revised Combined License Application. The Commission has held that "[t]he design certification rulemaking and individual COL adjudicatory proceedings may proceed simultaneously, and issues raised in an adjudicatory proceeding that are appropriately addressed in the generic design certification rulemaking are to be referred to the rulemaking for resolution." *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), CLI-09-8, 69 NRC 317, 329 (2009).

LICENSING BOARDS: REVIEW OF NRC STAFF'S ACTIONS

RULES OF PRACTICE: CONTENTIONS (LICENSE REVIEW-RELATED ACTIVITIES)

Licensing "[b]oards do not direct the staff in the performance of [its] administrative functions." *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980). *See also U.S. Department of Energy* (High-Level Waste Repository), CLI-08-20, 68 NRC 272, 274-75 (2008); *New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 278-79 (1978). Therefore, a board may not order the Staff to cease review of an applicant's revised application or direct the Staff to require an applicant to submit a new application.

LICENSING BOARDS: REVIEW OF NRC STAFF'S ACTIONS

RULES OF PRACTICE: ADMISSIBILITY, CONTENTIONS (WITHIN SCOPE OF PROCEEDING)

The sufficiency of an application is not a matter committed solely to the NRC Staff's discretion and thus is within the scope of an adjudicatory proceeding. *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), Licensing Board Order (Ruling on Joint Intervenors' Motion to File and Admit New Contention 8A) (Aug. 9, 2010) at 14-15 (unpublished).

LICENSE APPLICATIONS: AMENDMENTS

Far from prohibiting amendments to a license application, the agency's regulations expressly contemplate such amendments. *See* 10 C.F.R. § 52.3(b)(2). The application may be modified or improved during the NRC review process. *See Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395 (1995). Amendments are not limited to minor details, but may include significant changes to the application. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 879 (1974).

ATOMIC ENERGY ACT: HEARINGS

DUE PROCESS: OPPORTUNITY FOR HEARING

LICENSE APPLICATIONS: AMENDMENTS

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY), NEW CONTENTIONS (MATERIALITY, NEW INFORMATION, TIMELY SUBMISSION), SCHEDULING

NRC regulations preserve the right to a hearing when an application is amended by allowing new or amended contentions to be filed in response to material new information. 10 C.F.R. § 2.309(f)(2). *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-33, 60 NRC 749, 754 (2004) (citing 10 C.F.R. § 2.309(c) and (f)(2)). Thus, an intervenor may request a hearing on issues arising from a revision that adds material new information to the original application.

LICENSE APPLICATIONS

RULES OF PRACTICE: SCHEDULING

No regulation requires a license application to be completely resubmitted

because someone might find it difficult to understand. Such concerns can be addressed, as they were here, through a request for modification of a board's scheduling order.

LICENSE APPLICATIONS: AMENDMENTS

NEPA: ENVIRONMENTAL IMPACT STATEMENT (SUPPLEMENT), NRC RESPONSIBILITIES, PROCEDURES

The agency's NEPA-implementing regulations anticipate the possibility of "substantial changes in the proposed action that are relevant to environmental concerns," and provide that when this happens "the NRC staff will prepare a supplement to a final environmental impact statement." 10 C.F.R. § 51.92(a)(1). The filing of a revised application thus does not prevent the NRC from complying with its obligations under NEPA. It simply means that, in some instances, the NRC Staff may have to prepare a supplement to the environmental impact statement.

MEMORANDUM AND ORDER
(Rulings on Motion to Dismiss Contention 10 and Proposed New Contention 11)

This proceeding concerns the Combined License (COL) Application filed by Virginia Electric and Power Company d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative (Dominion or Applicant) for a nuclear reactor, North Anna Unit 3, to be located at the North Anna Power Station in Louisa County, Virginia. Before the Board are (1) Dominion's Motion to Dismiss Contention 10 as moot; and (2) the Motion of the Blue Ridge Environmental Defense League (BREDL) to admit proposed new Contention 11, which alleges that Dominion's revisions to its Application, and the NRC Staff's decision to evaluate the revised Application rather than to require Dominion to file a completely new application, violate federal law. We grant the Motion to Dismiss Contention 10 and decline to admit Contention 11.

I. BACKGROUND

On November 26, 2007, pursuant to Subpart C of 10 C.F.R. Part 52, Dominion filed a COL Application (COLA) to construct and operate an Economic Simplified

Boiling Water Reactor (ESBWR) at its existing North Anna Power Station site.[1] On March 10, 2008, the NRC published a Notice of Hearing and Opportunity to Petition for Leave to Intervene on the COLA, requiring that any contentions be filed within 60 days.[2] On May 9, 2008, BREDL submitted a Petition to Intervene and Request for Hearing, which included eight contentions.[3] The Board issued a Memorandum and Order on August 15, 2008, in which it found that BREDL has standing, admitted BREDL's first contention in part, determined that BREDL's remaining contentions were inadmissible, admitted BREDL as a party, and granted BREDL's request for a hearing.[4]

BREDL's first contention alleged that Dominion should have explained its plan for the management of low-level radioactive waste (LLRW) given the lack of an offsite disposal facility.[5] Dominion subsequently submitted such a plan, after which it moved to dismiss Contention 1 as moot.[6] In response, BREDL submitted a new contention (Contention 10) on June 26, 2009,[7] alleging that Dominion's new plan was inadequate. Because the COLA had been amended to include a plan for the management of Class B and C wastes in the absence of an offsite disposal facility, we granted Dominion's Motion to Dismiss Contention 1 as moot.[8] In a later Memorandum and Order, the Board admitted one aspect of Contention 10 and dismissed the remainder.[9] The Board admitted Contention 10 only to the extent it challenged Dominion's claim that the new reactor will provide increased fuel efficiency, and therefore will generate less LLRW when compared to existing reactors.[10]

On June 1, 2010, the NRC Staff informed the parties that Dominion would

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[1] *See* Virginia Electric and Power Company, d/b/a Dominion Virginia Power, and Old Dominion Electric Cooperative; Correction to Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for North Anna Unit 3, 73 Fed. Reg. 31,516, 31,516 (June 2, 2008); Notice of Receipt and Availability of Application for a Combined License Dominion Virginia Power — North Anna Unit 3, 72 Fed. Reg. 70,619, 70,619 (Dec. 12, 2007).

[2] Dominion Virginia Power; Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for North Anna Unit 3, 73 Fed. Reg. 12,760, 12,761 (Mar. 10, 2008).

[3] Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (May 9, 2008) [hereinafter Petition].

[4] LBP-08-15, 68 NRC 294, 337-38 (2008).

[5] *Id.* at 312-13.

[6] Dominion's Motion to Dismiss BREDL Contention 1 as Moot (June 1, 2009) at 1.

[7] Intervenor's Amended Contention Ten (June 26, 2009) at 1. BREDL had previously filed a Motion to Submit New Contention on June 8, 2009. *See* Intervenor's Motion to Submit New Contention (June 8, 2009).

[8] Licensing Board Order (Denying Contention 1 as Moot) (Aug. 19, 2009) at 3-4 (unpublished).

[9] LBP-09-27, 70 NRC 992, 1016 (2009).

[10] *See* Licensing Board Order (Denying Motion for Reconsideration of LBP-09-27) (Mar. 22, 2010) at 5-6 (unpublished).

revise its COLA to incorporate the U.S. Advanced Pressurized Water Reactor (US-APWR) design instead of the ESBWR.[11] On June 29, 2010, Dominion confirmed the NRC Staff's letter by filing a notice of its revision to its COLA.[12]

The COLA revision led to both of the matters presently pending before the Board. First, because the COLA revision does not include the claim of improved fuel efficiency that was the subject of Contention 10, Dominion moved to dismiss the Contention as moot.[13] BREDL has not filed an opposition to Dominion's Motion to Dismiss.

BREDL did, however, submit a new contention (Contention 11) challenging the legality of Dominion's June 29, 2010 COLA revision.[14] The NRC Staff[15] and Dominion[16] each filed responses opposing admission of Contention 11. BREDL did not file a reply in support of Contention 11.

II. ANALYSIS

A. Contention 10

The Motion to Dismiss Contention 10 is unopposed and, in any event, it must be granted because the issue raised by the contention is clearly moot. The Application, as revised, no longer includes any statement indicating that improved fuel performance is part of Dominion's plan for management of Class B and Class C LLRW.[17] "[W]here a contention is 'superseded by the subsequent issuance of licensing-related documents' . . . the contention must be disposed of or modified."[18] Because the challenged reference to good fuel performance

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[11] Letter from Robert M. Weisman, Counsel for the NRC Staff, to Atomic Safety and Licensing Board (June 1, 2010) at 1 (ADAMS Accession No. ML101520734).

[12] Letter from David R. Lewis, Counsel for Dominion, to Atomic Safety and Licensing Board (July 1, 2010) at 1 (ADAMS Accession No. ML101820626).

[13] Dominion's Motion to Dismiss BREDL's Contention 10 as Moot (July 12, 2010) at 3-4.

[14] Intervenor's New Contention Eleven (June 17, 2010) at 1 [hereinafter New Contention 11].

[15] NRC Staff Answer to the Blue Ridge Environmental Defense League's New Contention Eleven (July 2, 2010) at 1 [hereinafter NRC Staff Answer].

[16] Dominion's Opposition to BREDL's New Contention 11 (July 12, 2010) at 1 [hereinafter Dominion Answer].

[17] *Compare* North Anna Unit 3 Combined License Application, Rev. 2, Part 2: Final Safety Analysis Report § 11.4.1 at 11-7 through 11-8 (May 2009) (ADAMS Accession No. ML091540602) *with* North Anna Unit 3, Combined License Application, Rev. 3, Part 2: Final Safety Analysis Report § 11.4 at 11-65 through 11-68 (June 2010) (ADAMS Accession No. ML102040543).

[18] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382 (2002)) (quoting *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983)).

is no longer included in Dominion's waste management plan, Contention 10 is *dismissed* as moot.

B. Contention 11

Contention 11, as summarized by BREDL, maintains that

> [t]he Applicant's mid-stream change of nuclear reactor technology for North Anna Unit 3 subverts the letter and intent of federal regulations for the licensing of a new nuclear power plant under 10 CFR Part 52 and deprives the interested public of its rightful opportunity to review and comment on the proceedings conducted by the Nuclear Regulatory Commission. The Commission should require the Applicant to re-start its application process from the beginning by submitting a new application referencing a new design certification rule.[19]

We first evaluate the timeliness of Contention 11 under section 2.309(f)(2), and then turn to its admissibility under section 2.309(f)(1).

1. Timeliness

BREDL insists that Contention 11 is timely under 10 C.F.R. § 2.309(f)(2), and neither Dominion nor the NRC Staff challenges admission of Contention 11 on timeliness grounds.[20] Nevertheless, the Board is under an obligation to evaluate the timeliness of a proposed contention even if no party raises the issue.[21]

We summarized the factors for admission of new or amended contentions under NRC regulations in our previous contention admissibility Memorandum and Order.[22] However, we reiterate 10 C.F.R. § 2.309(f)(2)'s provision that a new contention such as Contention 11 may be filed after the initial docketing "with leave of the presiding officer upon a showing that —

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[19] New Contention 11 at 2.

[20] *See, e.g.,* Dominion Answer at 3 n.2.

[21] *See, e.g., Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 250-51 (1986); *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 (1985) ("Even if all of the parties are inclined to waive the tardiness, the board nevertheless is duty-bound to deny the petition on its own initiative unless it is persuaded that, on balance, the lateness factors point in the opposite direction."). Even though these two cases dealt with "late-filed" petitions under what would now be section 2.309(c)(1), the Commission, in adopting the rule for new contentions that eventually became section 2.309(f)(2), explicitly stated that the amended rule was "not intended to alter the standards in § 2.714(a) of its rules of practice as interpreted by NRC caselaw . . . respecting late-filed contentions." *See* Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989). Accordingly, we evaluate the timeliness of BREDL's newly filed contentions *infra.*

[22] *See* LBP-09-27, 70 NRC at 998-99.

(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.[23]

BREDL asserts that Contention 11 is timely under section 2.309(f)(2) because it arises out of a May 18, 2010 letter from Dominion to the NRC, the contents of which consisted of information that was previously unavailable and materially different from information that existed before, and the contention was timely filed after the NRC Staff's June 1, 2010 letter.[24]

Under section 2.309(f)(2)(i), we find that Contention 11 is based on information that was previously unavailable because, until the NRC Staff's June 1, 2010 letter to the Board, there was no formal notice to the Board and other parties regarding Dominion's decision to change its COLA to reference the US-APWR. Given that this reactor design has the effect of displacing much of the discussion of the ESBWR in Dominion's COLA, we also find that this information is materially different from the information that existed before to satisfy section 2.309(f)(2)(ii). Finally, because BREDL filed Contention 11 on June 17, 2010, and the NRC Staff's letter to the Board was filed on June 1, 2010, we find that it was filed within 30 days of the information upon which it is based and has thus been timely filed under section 2.309(f)(2)(iii).[25]

2. Admissibility of Contention 11 Under 10 C.F.R. § 2.309(f)(1)

We next review the admissibility of Contention 11 under 10 C.F.R.

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[23] 10 C.F.R. § 2.309(f)(2)(i)-(iii).

[24] New Contention 11 at 7-8.

[25] Our Scheduling Order incorporated by reference the deadlines imposed by the Model Milestones of 10 C.F.R. Part 2, under which new contentions based on the Final Safety Evaluation Report (FSER) and any necessary National Environmental Policy Act (NEPA) document are considered timely if filed within 30 days of the issuance of those documents. *See* Licensing Board Order (Establishing Schedule to Govern Further Proceedings) (Sept. 10, 2008) at 2 (unpublished); 10 C.F.R. Part 2, App. B. Since Contention 11 is not based on either of those documents, the Model Milestones do not provide clear guidance on what length of time renders a submission "timely." Nevertheless, in this instance we follow the example of other licensing boards, which have held that a submission of a new contention within 30 days of the event giving rise to that contention is timely. *See, e.g., Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640, 647 (2009); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (2006). Even if Contention 11 was entirely rooted in Dominion's May 18, 2010 letter to the NRC Staff, Contention 11's June 17, 2010 filing would have fallen within 30 days of the submission of that letter.

§ 2.309(f)(1). We conclude that BREDL has failed to identify any statute or NRC regulation to support its theory that Dominion may not revise its Application to include a different reactor design. We therefore will not admit Contention 11.

Proposed Contention 11 is essentially a legal contention. It turns on the claim that Dominion's revised COLA, because it incorporates a new reactor design, violates statutory provisions and NRC regulations that allegedly require Dominion to file an entirely new application when it intends to make such a substantial change. The fact that the revised COLA references a different reactor design than the original COLA is undisputed. The primary issue raised by Contention 11 is the legal consequence (if any) of that action.[26] The agency's procedural "rules permit contentions that raise issues of law as well as contentions that raise issues of fact."[27] In general, the same requirements apply to legal contentions as factual contentions, but the Commission has explained that "requiring a petitioner to allege 'facts' under section 2.309(f)(1)(v) or to provide an affidavit that sets out the 'factual and/or technical bases' under section 51.109(a)(2) in support of a *legal* contention — as opposed to a *factual* contention — is not necessary."[28] Therefore, our discussion will be limited to the other requirements of section 2.309(f)(1).

The first applicable requirement is that Contention 11 include a sufficiently clear statement of the issue BREDL intends to litigate.[29] That issue is the legality of Dominion's changed reactor design referenced in its COLA and the NRC Staff's consent to Dominion's refiling its Application to include the changed design. According to BREDL, the change violates federal statutes (NEPA and the Atomic Energy Act (AEA)) and NRC regulations.[30] BREDL requests the Board to order Dominion to refile its Application completely, the NRC Staff to renotice the Application "under federal administrative procedures," and the NRC to conduct its review of the North Anna Unit 3 Application only after the

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[26] Contention 11 raises some issues that are not entirely legal in nature. BREDL predicts that the revised COLA will be difficult for the public and the NRC Staff to understand. New Contention 11 at 5. As explained *infra* at p. 516, this speculation is not a reason to admit the contention. BREDL also quotes testimony that David A. Lochbaum submitted to a congressional committee in March 2008, stating his concerns about the NRC's oversight of the nuclear industry. *Id.* at 5-6. BREDL has an obligation to explain why this testimony provides a basis for the contention. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-3, 69 NRC 139, 153-54 (2009) (citing *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003)). BREDL has failed to do that. We therefore do not view either of these matters as a basis for admitting proposed Contention 11.

[27] *U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 590 (2009).

[28] *Id.*

[29] 10 C.F.R. § 2.309(f)(1)(i).

[30] New Contention 11 at 6-7.

referenced US-APWR design certification is complete.[31] This is a sufficiently clear statement of the issue BREDL wants to litigate.

We also find that BREDL has satisfied section 2.309(f)(1)(ii) by providing a sufficient explanation of the basis of the contention. BREDL asserts that the basis "of Contention 11 is Dominion's statement which indicates the applicant is seeking a fundamental change in its license application, one neither anticipated by nor provided for in Commission statutes and implementing regulations."[32] BREDL reasons that Dominion's COLA revisions muddle the regulatory record such that the NRC Staff will not be able to render its decision effectively in conformity with the AEA, 10 C.F.R. Part 52, and NEPA, and that the revisions shut the public out of the involvement they are entitled to under these laws.[33] Moreover, BREDL challenges Dominion's change in reactor design under NRC regulations, alleging that the design criteria of a COLA may be filed no later than 6 months after the submission the Environmental Report (ER), financial qualifications, and FSAR (Final Safety Analysis Report). Therefore, BREDL reasons, given that Dominion's Application was filed in December 2008, and the revision was filed in May 2010, Dominion has missed the mandatory deadline outlined in 10 C.F.R. § 2.101(a-1)(2).[34] Thus, BREDL has adequately alerted the Board and the other parties of the basis of its claim that Dominion's revised Application is unlawful.

The next issue is whether BREDL's challenge to the lawfulness of the revised Application is within the scope of this proceeding.[35] Contentions raising legal issues, like fact-based contentions, must fall within the allowable scope of the proceeding to be admissible.[36] The scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board.[37] Any contention that falls outside the specified scope of the proceeding is inadmissible.[38] The Notice of Hearing and Opportunity to Petition for Leave to Intervene for this proceeding explained that the Licensing Board would consider Dominion's Application under Part 52 for a COL for North Anna

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[31] New Contention 11 at 7.

[32] *Id.* at 4.

[33] *Id.* at 4-5.

[34] *Id.* at 5 (citing 10 C.F.R. § 2.101(a-1)(2)).

[35] 10 C.F.R. § 2.309(f)(1)(iii).

[36] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 154 (2001).

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

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

Unit 3.[39] Thus, Contention 11 is within the scope of the proceeding to the extent it challenges the sufficiency of the Application, including the June 29, 2010 revision.

Dominion argues that Contention 11 is outside the scope of this proceeding because it is really a challenge to NRC regulations that permit a COLA to reference pending design certification applications, and cites NRC caselaw denying requests to hold a contention in abeyance until completion of a design certification.[40] In addition, Dominion states that "[t]he manner in which the Staff conducts its review is outside the scope of this proceeding."[41] The NRC Staff agrees with this argument, stating that "the decision to docket, and the subsequent handling of an application, is within the discretion of the Staff."[42] BREDL claims that, because Contention 11 concerns deficiencies in Dominion's Application under NRC regulations and the AEA, it is material to the NRC's responsibility to provide reasonable assurance of the plant's construction in conformity with the law, and therefore it is within the scope of this proceeding.[43]

We agree with Dominion and the NRC Staff that some parts of Contention 11 are outside the scope of this proceeding. BREDL argues that the Commission should complete the US-APWR rulemaking before proceeding with the review of the COLA for North Anna Unit 3.[44] Dominion correctly responds that 10 C.F.R. § 52.55(c) permits an applicant, at its own risk, to reference a pending design certification application, and that the Staff need not complete the US-APWR design certification rulemaking before proceeding to evaluate Dominion's revised COLA.[45] The Commission has held that "[t]he design certification rulemaking and individual COL adjudicatory proceedings may proceed simultaneously, and issues raised in an adjudicatory proceeding that are appropriately addressed in the generic design certification rulemaking are to be referred to the rulemaking for resolution."[46] We also recognize that "[b]oards do not direct the staff in [the]

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[39] 73 Fed. Reg. at 12,760-61.

[40] Dominion Answer at 7 (citing *inter alia* 10 C.F.R. §§ 2.335(a), 52.55(c)).

[41] *Id.* at 6 (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station, CLI-08-23, 68 NRC 461, 476-77, 481-82, 486 (2008); *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 NRC 47, 66 (2003)).

[42] NRC Staff Answer at 9 (citing *U.S. Department of Energy* (High-Level Waste Repository), CLI-08-20, 68 NRC 272, 274-75 (2008)).

[43] New Contention 11 at 6-7.

[44] *Id.* at 7.

[45] Dominion Answer at 7.

[46] *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), CLI-09-8, 69 NRC 317, 329 (2009).

performance of [its] administrative functions."[47] We therefore may not order the Staff to cease review of Dominion's revised COLA or direct it to require Dominion to submit a new application.

Nevertheless, Contention 11 is not limited to matters outside the scope of this proceeding. BREDL expressly challenges the "the application by Dominion-Virginia Power to build and operate a new nuclear power plant on the North Anna site,"[48] which is the subject of this proceeding. BREDL alleges that the revised Application violates federal law by substituting one reactor design for another, citing the AEA, NEPA, and NRC regulations in support of its theory that such a significant modification of the Application is unlawful.[49] According to BREDL, the substitution of a new reactor design requires an entirely new license application. This argument falls within the scope of this proceeding because it alleges, in substance, that the revised Application is unlawful and therefore may not serve as the basis for granting a license. And, even though the NRC Staff evidently interpreted the law differently than BREDL when it decided to accept the revised Application for review, this does not place BREDL's challenge to the revised Application outside the scope of this proceeding. The Staff's view of the law, while certainly entitled to consideration, is not binding upon the Board. Another licensing board recently rejected the argument that the sufficiency of an application is a matter committed solely to the NRC Staff's discretion and is entirely outside the scope of an adjudicatory proceeding.[50] As the board in that case explained,

> Certainly, the NRC Staff may make an initial assessment as to whether or not the Applicant has provided sufficient information to satisfy 10 C.F.R. § 52.79(a). If the Staff thinks that the COLA is insufficient, then the Staff might decline to docket the application, request additional information, and even deny the application. But, while the Staff's role in initially assessing the sufficiency of the application is important, it does not foreclose the possibility of adjudication. To the contrary, Intervenors may always challenge the sufficiency of the COLA and the fact that the Staff (which is simply another party to the litigation) is of the opinion that the COLA is sufficient, is merely a *fact* to be considered by the Board. If contentions

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[47] *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980). *See also U.S. Dep't of Energy,* CLI-08-20, 68 NRC at 274-75; *New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 278-79 (1978).

[48] New Contention 11 at 1.

[49] *Id.* at 4-5.

[50] *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), Licensing Board Order (Ruling on Joint Intervenors' Motion to File and Admit New Contention 8A) (Aug. 9, 2010) at 14-15 (unpublished).

> are to be denied automatically every time the Staff agrees with the Applicant, then virtually *no contentions would ever be admitted.*[51]

We agree.

The last two applicable requirements present a more significant problem for BREDL. Under section 2.309(f)(1)(iv), BREDL must show that Contention 11 asserts an issue of law that is "material to the findings the NRC must make to support the action that is involved in the proceeding," that is, the subject matter of the contention must impact the grant or denial of the pending license application.[52] Thus, BREDL must show that the action it challenges — Dominion's submission of a revised application that incorporates a new reactor design rather than an entirely new application — is relevant to the agency's decision to grant or to deny the license. To satisfy Section 2.309(f)(1)(vi), BREDL must show that a genuine dispute exists concerning a material issue of law, including references to specific portions of Dominion's COLA that BREDL disputes.

Contention 11 is material to the licensing decision if, but only if, at least one of the statutes or regulations BREDL relies upon can plausibly be read to require that Dominion submit a new license application when it decided to reference a different reactor design in the COLA. Similarly, in order to find a genuine dispute of law, we must find some statutory or regulatory foundation for BREDL's argument that Dominion was obligated to submit a new COLA. BREDL need not convince us at the contention admissibility stage that its legal arguments will ultimately prevail, but it must at least persuade us that Contention 11 has a sufficient foundation in law that it should be admitted in this proceeding.

Examining BREDL's legal arguments for this limited purpose, we conclude that BREDL has failed to establish a statutory or regulatory foundation for the legal arguments that underlie Contention 11. Far from prohibiting amendments to a license application, the agency's regulations expressly contemplate such amendments.[53] The application may be modified or improved during the NRC review process.[54] Amendments are not limited to minor details, but may include significant changes to the application.

> In the Board's view, an amendment of an application, even a substantial amendment, is not only permissible but in fact is often a necessary consequence of the review process conducted by the Staff. It would not be appropriate for the Applicant to be

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

[52] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80 (1998), *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998).

[53] *See* 10 C.F.R. § 52.3(b)(2).

[54] *See Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395 (1995).

> subject to dismissal of the application in each instance where the review process undercovers a substantial area requiring design modification. Such a result would have the effect of virtually eliminating the review by making it a menial, detail seeking scrutiny with no substantive impact.[55]

As Dominion correctly argues, "BREDL does not identify a single statutory provision, regulation, or precedent that prohibits an applicant from amending a COL application to reflect changes in the selected reactor design."[56] Section 189a of the AEA, cited by BREDL, does not prohibit license amendments or limit their scope. Instead, it provides for a hearing in a licensing proceeding "upon the request of any person whose interest may be affected by the proceeding."[57] BREDL's only attempt to explain the connection between section 189a and proposed Contention 11 is its statement that, in this proceeding, "[m]ost of the Commission's reviews and most of the opportunities for the Intervenor and the affected public to participate have passed. A diminishing number of occasions for review and comment on the prospective North Anna APWR remain."[58] Thus, we understand the argument to be that the revised COLA indirectly deprives BREDL of its rights under section 189a because the opportunity for public participation had passed by the time the revision was filed.

NRC regulations, however, preserve the right to a hearing when an application is amended by allowing new or amended contentions to be filed in response to material new information.[59] Thus, an intervenor may request a hearing on issues arising from a revision that adds material new information to the original application. To be sure, an intervenor must comply with procedural requirements for the filing of new or amended contentions, including the requirement that new or amended contentions be "submitted in a timely fashion based on the availability of the subsequent information."[60] And a new or amended contention, like any other, must comply with the admissibility requirements of 10 C.F.R. § 2.309(f)(1). There is no necessary conflict, however, between these requirements and the right to a hearing provided in AEA § 189a. In general, licensing boards have the authority to control the schedule for a proceeding to ensure that intervenors have adequate

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[55] *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 879 (1974).

[56] Dominion Answer at 4.

[57] Atomic Energy Act of 1954, § 189a, 42 U.S.C. § 2239(a)(1)(A) (2010).

[58] New Contention 11 at 3.

[59] 10 C.F.R. § 2.309(f)(2). *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-33, 60 NRC 749, 754 (2004) (citing 10 C.F.R. § 2.309(c) and (f)(2)) (Board rejected claim that petitioner's rights would be prejudiced by supplements to the application because "a participant in a proceeding has the ability to file new, amended, or late-filed contentions when additional documentation becomes available.").

[60] 10 C.F.R. § 2.309(f)(2)(iii).

time to prepare new or amended contentions in response to new information.[61] The Board has done that in this proceeding. BREDL requested, and the Board allowed, 60 days for the filing of new contentions based on new information in Dominion's revised Application.[62] Given that licensing boards have the authority to establish reasonable schedules for the filing of new or amended contentions based on changes to a license application, we see no inherent conflict between section 189a's right to a hearing and the filing of a revised license application that incorporates a different reactor design.

BREDL's prediction that Dominion's revised COLA will be difficult for the public and the NRC Staff to follow[63] adds nothing to its argument. As Dominion points out, the revised COLA delineates where it deviates from earlier submissions, and in any event no regulation requires a COLA to be completely resubmitted because someone might find it difficult to understand.[64] Such concerns can be addressed, as they were here, through a request for modification of the Board's scheduling order.

BREDL also mentions the NRC's obligation under NEPA to evaluate the environmental impact of North Anna Unit 3,[65] but it does not develop any specific argument based on NEPA. We will not invent arguments for BREDL that it has failed to make for itself. Moreover, we see nothing about a revised license application that would necessarily create a conflict with the agency's obligations under NEPA. BREDL may have in mind the possibility that, after an environmental impact statement has been prepared for a proposed action, a revised application could be submitted that alters the action's predicted environmental consequences. The agency's NEPA-implementing regulations anticipate the possibility of "substantial changes in the proposed action that are relevant to environmental concerns," and provide that when this happens "the NRC staff will prepare a supplement to a final environmental impact statement."[66] The filing of a revised application thus does not prevent the NRC from complying with its obligations under NEPA. It simply means that, in some instances, the NRC Staff may have to prepare a supplement to the environmental impact statement.

BREDL's reliance on 10 C.F.R. § 2.101(a-1)(2) is also misplaced.[67] That provision pertains to early consideration of site suitability issues, allows a COL

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[61] *See* 10 C.F.R. § 2.319(k).

[62] Licensing Board Order (Setting Deadline for Filing New Contentions Based on New Information in the Applicant's June 29, 2010 Revision to the License Application) (Aug. 11, 2010) at 2-3 (unpublished) [hereinafter Aug. 11, 2010 Licensing Board Order].

[63] New Contention 11 at 5.

[64] Dominion Answer at 6.

[65] New Contention 11 at 7.

[66] 10 C.F.R. § 51.92(a)(1).

[67] BREDL incorrectly cites "10 CFR § 2.101 (2)." *See* New Contention 11 at 5.

applicant requesting such consideration to submit its application in parts, and provides a schedule for submitting those parts of the application to the agency.[68] Dominion, however, did not request such early consideration of site suitability issues.[69] Thus, this provision does not apply to Dominion's COLA.[70]

We therefore conclude that BREDL lacks a credible legal foundation for its argument that Dominion was obligated to file a new license application when it decided to adopt the US-APWR in place of the ESBWR. Accordingly, Contention 11 is not material to the NRC's licensing decision under 10 C.F.R. § 2.309(f)(1)(iv), and fails to identify a genuine dispute of law with the revised Application under 10 C.F.R. § 2.309(f)(1)(vi).[71]

III. CONCLUSION

For the foregoing reasons, we dismiss Contention 10 as moot and do not admit Contention 11. These rulings, however, do not terminate this case. Dominion's revised Application, although not in violation of any statute or regulation cited by BREDL, may include changes that could form the basis for new contentions. Under the Board's supplemental scheduling order of August 11, 2010, BREDL has until October 4, 2010, to file new contentions based on the June 29, 2010 COLA revision.[72] We retain jurisdiction to decide whether to admit any new contentions BREDL might file pursuant to that order.[73]

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[68] 10 C.F.R. § 2.101(a-1)(2).

[69] NRC Staff Answer at 11.

[70] BREDL also makes a general claim that Dominion's revised Application violates 10 C.F.R. Part 52. New Contention 11 at 3. BREDL fails, however, to cite any specific provision of Part 52, much less one that prohibits Dominion's revised Application. In fact, as we have explained, Part 52 contemplates amendments to applications. 10 C.F.R. § 52.3(b)(2). Thus, we find no merit in BREDL's claim.

[71] 10 C.F.R. § 2.309(f)(1)(iv), (vi).

[72] Aug. 11, 2010 Licensing Board Order at 7.

[73] *See* 10 C.F.R. § 2.318(a).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

(G. Paul Bollwerk for ERH)
Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

(G. Paul Bollwerk for ERH)
Dr. Alice C. Mignerey
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 2, 2010

Cite as 72 NRC 519 (2010) **LBP-10-18**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Chairman
E. Roy Hawkens
Dr. Nicholas Tsoulfanidis

In the Matter of **Docket No. 70-27-EA**
(ASLBP No. 10-902-01-EA-BD01)

BABCOCK & WILCOX NUCLEAR OPERATIONS GROUP, INC.
(Lynchburg, VA Facility) **October 12, 2010**

MEMORANDUM AND ORDER
(Approving Proposed Settlement Agreement and Dismissing Proceeding)

1. On February 23, 2010, the Nuclear Regulatory Commission Staff (NRC Staff) issued a Notice of Violation and Proposed Imposition of Civil Penalty in the amount of $32,500 (NOV) to Babcock & Wilcox Nuclear Operations Group, Inc. (Licensee). The NOV related to an April 28, 2008 incident at the Licensee's facility that involved the failure to have neutralized properly a spillage of hydrofluoric acid (HF). That failure, which occasioned an acute chemical exposure to Licensee operators, was attributed by the Staff to "the failure to develop and implement a formalized procedure to neutralize a spill involving hydrofluoric acid."[1]

[1] Letter from Luis A. Reyes, Regional Administrator, Region II, U.S. Nuclear Regulatory Commission, to Mr. R. P. Cochrane, General Manager, Babcock & Wilcox Nuclear Operations Group, Inc.
(Continued)

2. On June 15, 2010, the NRC Staff issued an Order imposing upon the Licensee a civil monetary penalty in the amount of $32,500 on the basis of a determined Severity Level III violation that the Staff identified during a March 23 through June 21, 2008 inspection that encompassed the HF spill.[2] As appeared in the Appendix to the Order, the Staff determined both that Licensee operators had not received adequate instructions regarding the proper method to neutralize an HF spill and that the mislabeling of the drums containing the chemicals had been a factor in the operators' exposure to the HF. The Order further provided the Licensee an opportunity to request a hearing within 20 days of its publication in the *Federal Register*.[3]

3. On July 2, 2010, the Licensee requested a 90-day extension of the time in which to request a hearing, so as to enable the Licensee and the NRC Staff to endeavor to resolve this matter without resort to an adjudicatory hearing.[4]

4. In response to that request, on July 8, 2010, the NRC Staff extended the deadline for requesting a hearing by 16 days to July 29, 2010.[5]

5. On July 27, 2010, the Licensee requested a hearing in accordance with the June 15 Order and 10 C.F.R. § 2.205.[6]

6. This Atomic Safety and Licensing Board (Board) was established on July 29, 2010.[7]

7. On August 11, 2010, the Board granted the Licensee's Request for Hearing.[8]

8. On August 13, 2010, the Licensee and the NRC Staff jointly submitted a

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with attached Notice of Violation and Proposed Imposition of Civil Penalty (Feb. 23, 2010) (ADAMS Accession No. ML100540701) [hereinafter NOV].

[2] *See* Order Imposing Civil Monetary Penalty — $32,500 (June 15, 2010) (ADAMS Accession No. ML101580256); *see also* NOV; NRC Inspection Report No. 70-27/2008-002 and Notice of Violation (July 31, 2008) (ADAMS Accession No. ML082140005).

[3] *See id.*; 75 Fed. Reg. 35,846 (June 23, 2010).

[4] Letter from Roger Cochrane, Vice-President & General Manager, B&W Nuclear Operations Group Inc., Lynchburg, to Roy P. Zimmerman, Director, Office of Enforcement, [NRC] (July 2, 2010) (ADAMS Accession No. ML101880237).

[5] Letter from Roy Zimmerman, Director, Office of Enforcement to R. P. Cochrane, General Manager, Babcock & Wilcox Nuclear Operations Group, Inc. (July 8, 2010) (ADAMS Accession No. ML101880730).

[6] Request for Hearing (July 27, 2010).

[7] *See* Establishment of Atomic Safety and Licensing Board (July 29, 2010).

[8] Licensing Board Memorandum and Order (Granting Licensee's Hearing Request, and Scheduling Telephone Prehearing Conference) (Aug. 11, 2010) at 2 (unpublished) [hereinafter Order Granting Hearing Request].

motion asking the Board *inter alia*[9] to hold this administrative enforcement proceeding in abeyance pending the outcome of proposed settlement negotiations.[10]

9. On August 17, 2010, the Board granted this motion, and instructed the parties to submit jointly on September 20, 2010, a report setting forth in detail the then status of negotiations and providing an estimate of their completion date.[11]

10. On September 20, 2010, the parties submitted a joint motion to approve the proposed settlement agreement and to terminate the proceeding,[12] to which they attached their proposed settlement agreement and proposed Board order. In this joint motion, the parties asserted that their settlement agreement explained the steps the Licensee had taken and will take to assure future compliance with all regulatory requirements and to comply with the purpose of the NRC enforcement program, which "is to deter noncompliance with regulatory requirements and to encourage prompt, comprehensive corrective actions."[13] The parties further maintained in the joint motion that their settlement agreement will achieve this purpose of the NRC enforcement program "without the likely litigation risks and resource costs to both parties" in litigating the NRC Staff's enforcement Order, and that it is in the public interest for the Board to approve the proposed settlement agreement and to dismiss this proceeding. In the proposed settlement agreement, which is appended to this Memorandum and Order, the parties recited the following details of the agreement:

a. Licensee will not challenge the existence of a violation of NRC requirements relating to the HF spill, and will seek dismissal of its Request for Hearing;

b. NRC Staff will recategorize the violation from a Severity Level III violation to a violation with no assigned severity level;

c. NRC Staff will, within 21 days of the issuance of the Board Order approving settlement agreement, withdraw the Order imposing civil penalty;

d. Licensee will pay $32,500, in lieu of the withdrawn civil penalty, as a

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[9] In this motion, the parties also requested that the Board defer the telephone prehearing conference that the Board scheduled in its August 11, 2010 order. *See* Joint Motion to Defer Telephone Prehearing Conference and Hold Proceeding in Abeyance (Aug. 13, 2010) at 1 [hereinafter Joint Motion to Defer]; Order Granting Hearing Request at 2.

[10] Joint Motion to Defer at 1.

[11] Licensing Board Order (Cancelling Telephone Prehearing Conference and Holding the Proceeding in Abeyance) (Aug. 17, 2010) at 2 (unpublished).

[12] Joint Motion to Approve Settlement Agreement and Terminate Proceeding (Sept. 20, 2010) [hereinafter Joint Motion] with attached Settlement Agreement (Sept. 20, 2010) [hereinafter Settlement Agreement].

[13] *Id.* at 1.

settlement payment, on or before a specified date and in accordance with NUREG/BR-0254;

e. Licensee will perform one quarterly emergency drill within a 12-month time period following the Board's approval of the settlement agreement; and

f. Licensee will give a presentation addressing lessons learned from the HF spill event at the 2011 Fuel Cycle Information Exchange.[14]

11. Given the potential severity of the HF exposure event at the heart of this enforcement proceeding, and in light of the Board's explicit authority under 10 C.F.R. §§ 2.203 and 2.338(i) to pursue adjudication of issues implicating the public interest, on September 22, 2010, the Board requested clarification from the parties regarding the extent, if any, that the proposed settlement agreement called upon the Licensee to take specific measures designed to avoid a repetition of the storage tank (drum) mislabeling and insufficient operator training that led to the HF spill event that is the focus of this enforcement action.[15]

12. On October 1, 2010, the parties submitted a joint memorandum providing the clarification the Board requested.[16] In that memorandum, the parties discussed the primary corrective and improvement actions the Licensee had implemented, prior to negotiating the proposed settlement agreement, to avoid recurrence of the HF spill incident, and the measures NRC Staff had taken to assure that timely, comprehensive corrective actions were taken by the Licensee.[17] The parties cited the July 31, 2008 Inspection Report's description of the HF spill event and resulting exposure of two operators.[18] The parties further cited this report for its description of the steps the Licensee took immediately after the HF spill event, which include:

a. Sealing and tagging out of service the NaOH and soda ash drums;

b. Making improvements to the labeling on the drums;

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[14] *See* Settlement Agreement at p. 527.

[15] Licensing Board Memorandum and Order (Requesting Clarification of Scope of Proposed Settlement Agreement) (Sept. 22, 2010) at 2.

[16] Joint Memorandum in Response to Licensing Board Memorandum and Order Requesting Clarification of Proposed Settlement Agreement (Oct. 1, 2010) [hereinafter Joint Memorandum].

[17] *Id.*

[18] *Id.* at 2-4 (citing Letter from Joseph W. Shea, Director, Division of Fuel Facility Inspection, [NRC] Region II, to R. P. Cochrane, General Manager, BWX Technologies, Inc. (July 31, 2008) encl. 2 at 2-3 (NRC Inspection Report No. 70-27/2008-002, Report Details) (ADAMS Accession No. ML082140005)).

c. Performance by area engineers of a "walk down" to ensure the licensee's HF system safety;

d. Reviewing the incident with all [uranium recovery] personnel; and

e. Initiating an investigation to identify causal factors and recommend corrective action, and licensee's completion of a root cause investigation report in which licensee identified three causal factors and proposed three corrective actions.[19]

Further, the parties listed the long-term corrective actions that the Licensee had implemented following its immediate actions in response to the HF spill event.[20] In additional explanation of those long-term corrective actions, the parties noted the following specific actions taken:

a. Revision of the licensee's Operating Procedure to include specific instructions on how to neutralize acid spills and on the use of personal protective equipment (PPE);

b. Revision of the licensee's Operating Procedure for General Safety and Safeguards Guidelines to emphasize the use of PPE;

c. Revision of the licensee's applicable operating procedure in the Uranium Recovery area to ensure a spill of HF due to valve misalignment does not recur, by implementing a positive means to identify valves, which, if left in the wrong position, would result in the loss of containment of either uranium-bearing or non-uranium-bearing hazardous substances;

d. Revision of several of the licensee's procedures to provide appropriate guidance for valve manipulations associated with the HF Day Tank; and

e. Agreement, as part of settlement with the NRC Staff, consistent with the NRC's overall enforcement program to enhance prompt medical support for any future

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[19] *Id.* at 3. The three causal factors that the Licensee identified in its root cause investigation report are: (1) selection and application of the wrong chemical to neutralize spill; (2) failure to don a face shield during the attempted spill neutralization; and (3) failure to close maintenance valves on HF pumps after testing them. *Id.* The three corrective actions Licensee proposed as a result of its root cause investigation report are: (1) development/training of a sitewide procedure for responding to chemical spills; (2) establishment of spill response kits; and (3) a review of test plans to ensure they include steps to return systems to normal operations. *Id.*

[20] *Id.* at 4. The long-term measures that the Licensee has undertaken subsequent to the HF spill event include: (1) conduct of a Root Cause Analysis; (2) development of a sitewide procedure for responding to chemical spills, including area-specific information; (3) appropriate procedural training; (4) conduct of an inventory of chemicals in work areas; (5) disposal of obsolete chemicals and measures to ensure proper sealing and labeling of drums with chemical agents; (6) the establishment of detailed guidance regarding the use of face shields, preparation of spill-response kits, and related personnel training; and (7) new-employee and annual training to address the hazards of acids, the use of spill kits, and the proper use of PPE. *Id.* (citing NOV).

> chemical exposure event, to contribute to an industry-wide understanding of the incident, and to deter the occurrence of similar events at other NRC-licensed facilities by: 1) participating in a joint exercise with the Lynchburg General Hospital responding to a hydrofluoric acid-exposed worker, and 2) providing a presentation at the 2011 Fuel Cycle Information Exchange addressing lessons learned from the April 28, 2008 HF chemical exposure event.[21]

13. The parties' submissions in their joint memorandum satisfy the Board's concerns regarding chemical storage labeling and operator training.

14. Accordingly, upon review of the settlement agreement and the clarification that the parties provided in their joint memorandum, the terms of the proposed settlement agreement reflect a fair and reasonable resolution of this matter, are in keeping with the objectives of the NRC's Enforcement Policy, and satisfy the requirements of 10 C.F.R. § 2.338(g) and (h). Accordingly, the proposed settlement agreement is *approved* pursuant to 10 C.F.R. § 2.338(i). The Enforcement Order issued to the Licensee on June 15, 2010 is hereby *withdrawn* consistent with the terms of the settlement agreement.

15. The settlement agreement, attached hereto, is *incorporated* into this Memorandum and Order.[22]

16. Further, in accordance with 10 C.F.R. § 2.203, the public interest does not require additional adjudication of this matter, and, given that all matters required to be adjudicated as part of this proceeding have been resolved, this proceeding is *dismissed.*[23]

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[21] *See* Joint Memorandum at 5-6.

[22] *See* Settlement Agreement.

[23] As noted above, the settlement agreement provides that the NRC Staff will "recategorize" the violation from a Severity Level III to a violation with no assigned severity level. Although that step is clearly within the scope of the NRC Staff's authority, it is not apparent to us how this recategorization might affect the NRC Staff's view of the severity of this violation should there be a need to consider it in connection with the assessment of the sanction to be imposed in the event of a subsequent determined license violation by this Licensee.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[24]

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

E. Roy Hawkens
ADMINISTRATIVE JUDGE

By A. Rosenthal for
Dr. Nicholas Tsoulfanidis
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 12, 2010

[24] Copies of this Memorandum and Order were sent this date by the agency's e-filing system to counsel for: (1) Licensee Babcock & Wilcox Nuclear Operations Group, Inc.; and (2) the NRC Staff.

ATTACHMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	**Docket No. EA-70-27** **(ASLBP No. 10-902-EA-BD01)**
BABCOCK & WILCOX NUCLEAR OPERATIONS GROUP, INC. **(Lynchburg, VA Facility)**	**September 20, 2010**

SETTLEMENT AGREEMENT

Babcock & Wilcox Nuclear Operations Group, Inc. (B&W NOG) located in Lynchburg, Virginia, is the holder of U.S. Nuclear Regulatory Commission (NRC) Materials License No. SNM-42, which expires on March 29, 2027. The license authorizes B&W NOG to manufacture nuclear components for the government and commercial entities in accordance with the conditions specified therein.

On February 23, 2010, the NRC Staff issued a Notice of Violation and Proposed Imposition of Civil Penalty of $32,500 (NOV) to B&W NOG. The NOV was issued following NRC Staff inspections conducted at B&W NOG's Lynchburg, Virginia facility from March 23 through June 21, 2008, as a result of an event on April 28, 2008, in which a process operator took inappropriate actions to neutralize a spill of hydrofluoric acid (HF) by adding sodium hydroxide (NaOH), a strong base, which reacted violently with the acid on the floor. The operator sustained an ocular exposure from the flash of HF that required medical attention but did not result in long lasting health effects, due to the prompt mitigation actions taken by the operator and the onsite emergency response personnel. Notwithstanding B&W NOG's timely and effective response, the NRC Staff considered the injury to the operator to be significant. The NOV stated that B&W NOG had failed to develop and implement a formalized procedure with adequate instructions to neutralize a spill involving HF.

On March 31, 2010, B&W NOG filed a response to the NOV denying the severity level of the violation and protesting the civil penalty in its entirety. On June 15, 2010, the NRC Staff issued an Order Imposing Civil Monetary Penalty

of $32,500, maintaining that B&W NOG had failed to develop and implement a formalized procedure to neutralize a spill involving HF. *See* 75 Fed. Reg. 35,846 (June 23, 2010). In the letter transmitting the Order, the NRC Staff acknowledged B&W NOG's "prompt and effective corrective actions." ADAMS Accession No. ML101580256.

On July 2, 2010, B&W NOG submitted a request for a 90-day extension to the Director of the NRC Office of Enforcement (OE). On July 8, 2010, the Director of OE granted a 16-day extension. On July 27, 2010, B&W NOG requested a hearing in accordance with the June 15, 2010 Order, 10 C.F.R. § 2.205, and the Director's extension of time. On August 11, 2010, the Atomic Safety and Licensing Board (Board) granted the hearing request.

The NRC Staff and B&W NOG have engaged in negotiations and have determined that it is in the public interest to terminate this proceeding without further litigation.

THE PARTIES AGREE TO THE FOLLOWING IN SETTLEMENT:

1. B&W NOG agrees not to challenge the existence of a violation of NRC requirements resulting from the chemical exposure event, which occurred at the B&W Lynchburg facility on April 28, 2008, and to seek dismissal of its Request for Hearing filed on July 27, 2010.

2. The Staff agrees to recategorize the February 23, 2010 NOV from a Severity Level III violation to a violation with no assigned severity level.

3. The Staff agrees to withdraw the Order Imposing Civil Penalty dated June 15, 2010, published in the *Federal Register* on June 23, 2010, 75 Fed. Reg. 35,846, within 21 days of the Board Order approving the settlement agreement on the terms set forth in the agreement.

4. B&W NOG agrees to pay $32,500, in lieu of the withdrawn civil penalty, as a settlement payment, within 30 days after the Board Order approving the settlement agreement on the terms set forth in the agreement, in accordance with NUREG/BR-0254.

5. B&W NOG agrees to perform one quarterly emergency drill with the Lynchburg General Hospital responding to a hydrofluoric acid-exposed worker, within 12 months of the date of the Board Order approving the settlement agreement on the terms set forth in the agreement.

6. B&W NOG agrees to give a presentation at the 2011 Fuel Cycle Information Exchange addressing lessons learned from the chemical exposure event, which occurred on April 28, 2008.

IN WITNESS THEREOF, B&W NOG and the NRC Staff have caused this

Settlement Agreement to be executed by their duly authorized representatives on this 20th day of September, 2010.

Respectfully Submitted,

Molly L. Barkman
Counsel for the NRC Staff

Executed in accord with 10 C.F.R. § 2.304(d)

Lawrence J. Chandler
Donald J. Silverman
Morgan, Lewis & Bockius LLP
Counsel for Babcock & Wilcox Nuclear
Operations Group, Inc.

Dated at Rockville, MD and Washington, DC
this 20th day of September, 2010

Cite as 72 NRC 529 (2010) **LBP-10-19**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Richard E. Wardwell
Dr. William H. Reed

In the Matter of **Docket No. 50-271-LR**
(ASLBP No. 06-849-03-LR)

ENTERGY NUCLEAR VERMONT YANKEE, LLC, and ENTERGY NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power Station) **October 28, 2010**

RULES OF PRACTICE: MOTIONS TO REOPEN A CLOSED RECORD

This Board denies Intervenors' motion to reopen this proceeding to introduce a new contention asserting issues related to aging management of the effects of moist or wet environments on buried, below-grade, underground, or hard-to-access safety-related electrical cables, because the motion satisfies neither the timeliness nor the materially different result requirements of 10 C.F.R. § 2.326(a)(1) and (3).

RULES OF PRACTICE: MOTIONS TO REOPEN A CLOSED RECORD

Motions to reopen a proceeding to introduce an entirely new contention (i.e., a contention not previously in controversy among the parties) must successfully

navigate at least nineteen different regulatory factors under 10 C.F.R. §§ 2.326, 2.309(c), and 2.309(f)(1).

RULES OF PRACTICE: CLOSED PROCEEDINGS

At some point, a proceeding before an Atomic Safety and Licensing Board must end. Once the Board has admitted original contentions, conducted the evidentiary hearing, and issued its ruling on the merits, and after the parties have appealed that decision, and the Commission has rendered its decision on the merits of the matter, the adjudicatory proceeding should be over, absent some extenuating circumstances.

RULES OF PRACTICE: MOTIONS TO REOPEN A CLOSED RECORD (TIMELINESS)

Under 10 C.F.R. § 2.326(a)(1), the timeliness of a motion to reopen in which the proponent of the motion proffers a new contention depends primarily on an assessment as to when the proponent of the motion first knew, or should have known, enough information to raise the issues presented in the new contention. If the motion and the proposed new contention are based on material information that was not previously available, then it qualifies as timely.

RULES OF PRACTICE: MOTIONS TO REOPEN A CLOSED RECORD (TIMELINESS)

For purposes of the timeliness analysis under 10 C.F.R. § 2.326(a)(1), the question is: when should these issues have been identified and asserted? Are these complaints based on new information, or on information that has been available for a significant time period?

RULES OF PRACTICE: MOTIONS TO REOPEN A CLOSED RECORD (TIMELINESS)

Where an issue has been apparent from information that has been available from the outset of a proceeding, a petitioner or intervenor may not wait to raise that issue in a new contention by proffering it in a motion to reopen after the record has been closed in that proceeding. Such a submission is not timely under 10 C.F.R. § 2.326(a)(1).

RULES OF PRACTICE: MOTIONS TO REOPEN A CLOSED RECORD (SIGNIFICANT SAFETY ISSUE)

The proponent of a motion to reopen must do more than simply raise a safety issue. The proponent of the motion to reopen must show that the safety issue it raises is significant.

RULES OF PRACTICE: MOTIONS TO REOPEN (MATERIALLY DIFFERENT RESULT LIKELY)

Under 10 C.F.R. § 2.326(a)(3), the proponent of a motion to reopen must demonstrate more than the mere possibility that the newly proffered evidence might warrant a materially different result. The movant must show that it is *likely* that the result would have been materially different, i.e., that it is more probable than not that the movant would have prevailed on the merits of the proposed new contention. A motion to reopen requires a demonstration that the movant is likely to succeed.

MEMORANDUM AND ORDER
(Ruling on Motion to Reopen Proffering New Contention)

This proceeding involves the application of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (collectively, Entergy) for a 20-year renewal of its license to operate the Vermont Yankee Nuclear Power Station (VYNPS) in Windham County, Vermont. Before this Board is an August 20, 2010 motion by the New England Coalition (NEC) to reopen this proceeding to admit a new contention, which, for simplicity, we will refer to as Contention 7 or C-7.[1] Proposed Contention 7 challenges the adequacy of Entergy's aging management program (AMP) and time-limited aging analysis (TLAA) with regard to the effects of moist or wet environments on buried, below-grade, underground, or hard-to-access safety-related electrical cables. Motion at 8.

As we discuss herein, a motion to reopen a proceeding to introduce a new contention must successfully navigate at least nineteen regulatory factors. *See* Attachment A. For the reasons stated below, the Board concludes that NEC's motion founders on several of the initial criteria, *i.e.,* 10 C.F.R. § 2.326(a)(1) and

[1] [NEC's] Motion to Reopen the Hearing and for the Admission of New Contentions (Aug. 20, 2010) (Motion).

(3), and we therefore find it unnecessary to prolong this ruling by analyzing all of the others.

I. BACKGROUND

This adjudicatory proceeding has a long history that we do not need to repeat here. Instead, we review the highlights that are relevant to the current motion to reopen. The case started with Entergy's January 25, 2006 application to renew its license to operate the VYNPS nuclear reactor (license renewal application or LRA).[2] Several entities challenged the LRA and petitioned to intervene. On September 22, 2006, the Board granted the intervention petitions of NEC and Department of Public Service of the State of Vermont (Vermont) and admitted five contentions for hearing.[3] A long hiatus followed during which the Board and the parties waited (as we must) for the NRC Staff to review and analyze the LRA, and to generate the necessary safety and environmental documents. During this hiatus the five original contentions evolved and changed, as Entergy filed various motions to dismiss a number of the original contentions and NEC filed various new or modified contentions.

On July 21-24, 2008, after the NRC Staff completed its safety and environmental reports, the Board conducted the evidentiary hearing on the surviving contentions — NEC Contentions 2A, 2B, 3, and 4. On November 24, 2008, we issued a Partial Initial Decision, ruling that Entergy had met the regulatory requirements applicable to the four contentions, with one exception. LBP-08-25, 68 NRC 763, 896-97 (2008). The exception involved Entergy's metal fatigue analyses for two important nozzles, the core spray and reactor recirculation outlet nozzles. With regard to those nozzles, we ruled that Entergy's analyses had failed to comply with all relevant requirements and therefore that Entergy had not demonstrated that there was a reasonable assurance of safety as required by 10 C.F.R. § 54.29(a). *Id.* at 780, 895. Thus, the Board declined to authorize the license renewal. Rather than terminating the proceeding however, the Board held Contention 2 in abeyance, invited Entergy to recalculate and resubmit its metal fatigue analyses for the core spray and reactor recirculation outlet nozzles, and specified that NEC would be entitled to challenge any such revised analyses if it viewed those analyses to be defective. *Id.* at 895. The NRC Staff appealed this ruling. NRC Staff Petition for Review of LBP-08-25 (Dec. 9, 2008).

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[2] Entergy License Renewal Application, Vermont Yankee Nuclear Power Station (Jan. 25, 2006) (LRA). Entergy has since supplemented and amended its application several times.

[3] LBP-06-20, 64 NRC 131, 209 (2006). In LBP-06-20, the Board also granted interested state status under 10 C.F.R. § 2.315 to the State of New Hampshire and the Commonwealth of Massachusetts.

On March 10, 2009, Entergy submitted its revised metal fatigue analyses for the core spray and reactor outlet nozzles.[4] On April 24, 2009, NEC filed a motion challenging the adequacy of Entergy's revised metal fatigue calculations and proposing a new contention which we denominated Contention 2C.

On July 8, 2009, the Board issued its Full Initial Decision, LBP-09-9, rejecting Contention 2C as not timely. LBP-09-9, 70 NRC 41, 48-49 (2009). On July 23, 2009, NEC appealed LBP-09-9. [NEC's] Petition for Review of the Licensing Board's Full Initial Decision (July 23, 2009).

On July 8, 2010, the Commission issued its ruling on the two appeals.[5] The Commission affirmed the Board's ruling in LBP-09-9 (wherein we rejected Contention 2C). CLI-10-17, 72 NRC at 54. However, the Commission reversed the Board's ruling in LBP-08-25 on Contentions 2A and 2B (wherein we had ruled that Entergy's original metal fatigue calculations for the core spray and reactor recirculation outlet nozzles were inadequate), and held that the Board should have decided these matters in Entergy's favor. *Id.* at 4. In light of these rulings, and the fact that the Board had placed the original Contention 2 in abeyance, the Commission remanded the case to us in order to give NEC the opportunity to submit a revised Contention 2 (challenging the adequacy of Entergy's aging management program for metal fatigue). *Id.* The Commission added, in a footnote, that during the pendency of the remand:

> NEC and Vermont are free to submit a motion to reopen the record pursuant to 10 C.F.R. § 2.326, should they seek to address any *genuinely new* issues related to the license renewal application that previously could not have been raised.

Id. at 10 n.37 (emphasis in original).

The Board immediately issued an order setting August 20, 2010, as the deadline for NEC or Vermont to file a revised Contention 2 or a motion to reopen the record with any new contentions. Licensing Board Order (Setting Schedule for Remand Filings) (July 12, 2010) at 2 (unpublished).

On August 20, NEC moved to reopen the record, requesting that the Board admit a new contention, Contention 7. Motion at 1.[6] Proposed Contention 7 reads as follows:

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[4] Letter from Matias Travieso-Diaz to the Atomic Safety and Licensing Board and attached documents (Mar. 10, 2009) at 1.

[5] CLI-10-17, 72 NRC 1 (2010).

[6] NEC declined to file a revised Contention 2, stating that it could "find no opening for redress of [the] outstanding dispute with the licensee regarding metal fatigue AMP or TLAA through a revised Contention 2 because the decisions of the Board and the Commission render an AMP unnecessary and a TLAA unassailable." Motion at 4.

> Applicant has not demonstrated adequate aging management review and/or time-limited aging analysis nor does the applicant have in place an adequate aging management program to address the effects of moist or wet environments on buried, below grade, underground, or hard-to-access safety-related electrical cables, thus the applicant does not comply with NRC regulation (10 C.F.R. § 54.21(a) and guidance and/or provide adequate assurance of protection of public health and safety (54.29(a) [sic].

Id. at 8.

Entergy and the NRC Staff filed their answers to the motion on September 14, 2010, asserting that the motion should be denied.[7] On September 21, NEC submitted its reply.[8]

II. LEGAL FRAMEWORK GOVERNING MOTIONS TO REOPEN

Motions to reopen that seek to introduce an entirely new contention (i.e., a contention not previously in controversy among the parties) are disfavored and must address at least nineteen different regulatory factors. *See* Attachment A. The rationale for this approach is that, at some point, the administrative proceeding must end. Once the Board has admitted the original contentions, conducted the evidentiary hearing, and issued its ruling on the merits, and after the parties have appealed that decision, and the Commission has rendered its decision on the merits of the matter, the adjudicatory proceeding should be over, absent some extenuating circumstances.[9]

The nineteen factors are contained in the three main regulations that govern a motion to reopen a closed case for the consideration of a new contention. The first regulation is 10 C.F.R. § 2.326, entitled "Motions to Reopen." The second main regulation is 10 C.F.R. § 2.309(c), which establishes eight separate factors

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[7] Entergy's Answer Opposing New England Coalition's Motion to Reopen (Sept. 14, 2010) (Entergy Answer) with attached Declaration of Norman L. Rademacher and Roger B. Rucker in Support of Entergy's Answer Opposing New England Coalition's Motion to Reopen (Sept. 14, 2010) (Entergy Declaration); NRC Staff's Opposition to the New England Coalition's Motion to Reopen the Hearing and Answer to Proposed New Contention (Sept. 14, 2010) (Staff Answer) with attached Affidavit of Roy K. Mathew (Sept. 14, 2010) (Mathew Affidavit).

[8] New England Coalition's Reply to NRC Staff and Entergy Nuclear Vermont Yankee Opposition to New England Coalition's Motion to Reopen the Hearing and Reply to NRC Staff's Answer to Proposed New Contention (Sept. 21, 2010) (Reply) with attached Declaration of Paul Blanch (Sept. 21, 2010).

[9] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 555 (1978)); 51 Fed. Reg. 19,535, 19,538 (May 30, 1986).

that must be considered and balanced for any nontimely filing. The third is 10 C.F.R. § 2.309(f)(1), which establishes the six criteria that all contentions must meet. We will review, briefly, each of these regulations.

The first major regulation, 10 C.F.R. § 2.326, states that a motion to reopen a closed record to consider additional evidence must *inter alia* (1) be timely, (2) address a significant safety or environmental issue, and (3) demonstrate that a materially different result would have been likely. 10 C.F.R. § 2.326(a)(1)-(3). In addition, the motion "must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) . . . have been satisfied." 10 C.F.R. § 2.326(b). These affidavits must "separately address" each of the foregoing criteria set forth in 10 C.F.R. § 2.326(a)(1)-(3). *Id.* Even more stringent requirements apply if the intervenor seeks to reopen in order to introduce a new contention that was not previously in controversy among the parties. In such a case, the motion to reopen "must also satisfy the requirements for nontimely contentions in § 2.309(c)," 10 C.F.R. § 2.326(d), by addressing the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of 10 C.F.R. § 2.309(c).

The second major regulation applicable here — 10 C.F.R. § 2.309(c) — governs untimely new contentions. This regulation specifies that no new contention will be admitted unless the petitioner has satisfied the requirements of 10 C.F.R. § 2.309(c) by providing the information requested therein.

The third major hurdle is 10 C.F.R. § 2.309(f)(1)(i)-(vi). This regulation articulates the familiar six factors that must be satisfied before any contention can be admitted. We have reviewed and discussed this regulation, and these six factors, several times during the course of this proceeding, and will not repeat that discussion here. *See* LBP-06-20, 64 NRC at 146-51.

III. POSITIONS OF THE PARTIES

A. Arguments Relating to Motion to Reopen and Proposed Contention 7

NEC's motion to reopen the record to admit proposed Contention 7 focuses primarily on the reopening standards of 10 C.F.R. § 2.326(a) and the contention admissibility standards of 10 C.F.R. § 2.309(f)(1). First, NEC asserts that the motion satisfies the three criteria of 10 C.F.R. § 2.326(a)(1)-(3), i.e., that the motion is timely, that it raises a "significant" safety issue, and that it demonstrates that a materially different result would have been likely if the motion were granted. Motion at 4-6.

NEC asserts the motion and new contention are timely because it filed them "as soon as sufficient evidence had accrued to adduce the basis and substance of the contention." *Id.* at 5. Specifically, NEC points to an NRC Inspection Report published on May 10, 2010 (NRC Inspection Report), in which the

NRC inspectors found that Entergy had violated certain requirements relating to submergence of safety-related electrical cables.[10] NEC notes that as of May 10, it was still awaiting a Commission decision on its petition for review of LBP-09-9. *Id.* NEC states that, since that date, it has "diligently pursued additional evidence . . . concerning Entergy's approach to the problem of aging acceleration due to wetting and submergence of safety-related electrical cables." *Id.* NEC also notes that the NRC and the nuclear industry have both issued reports that indicate "deep concern on an industry-wide basis" regarding the susceptibility of safety-related electrical cables, such as those present at VYNPS, to wetting or submergence and accelerated aging. *Id.* at 5-6. Specifically, NEC quotes from NUREG/CR-7000[11] and from a June 2010 report by the Electric Power Research Institute (EPRI Report), to the effect that electric cables are important safety-related components of a nuclear power plant and that these cables must be protected against degradation and aging (via moisture and submergence) to maintain their reliability and integrity. *Id.* at 6. NEC concludes its discussion regarding 10 C.F.R. § 2.326(a)(1) by stating that it filed this contention "as soon as practicably possible following the apprehension of sufficient information" and that, in any event, the issue is "grave." *Id.*

NEC next addresses the requirement that a motion to reopen must raise a "significant safety . . . issue" under 10 C.F.R. § 2.326(a)(2). NEC devotes only two sentences to this point, referencing its preceding discussion of timeliness under 10 C.F.R. § 2.326(a)(1). *Id.* Presumably, NEC is referring to its quotes of NUREG/CR-7000 and the EPRI Report.

NEC then turns to the third criterion for a motion to reopen, and maintains that its motion "demonstrate[s] that a materially different result would be or would have been likely had the newly proffered evidence been considered initially," citing 10 C.F.R. § 2.326(a)(3). *Id.* at 7. In support of this assertion, NEC says that, had the issue of safety-related electrical cable susceptibility to wetting or submergence been in issue earlier in the proceeding, "it is highly unlikely that [the] Board could have" concluded that Entergy's LRA satisfied 10 C.F.R. §§ 54.29(a) and 54.21(a). *Id.* at 7. NEC cites to the EPRI Report, the NRC Inspection Report, and the declaration of its expert, Paul M. Blanch. *Id.* at 7.

The declaration of Paul M. Blanch states certain factual and technical bases to support the proposition that NEC's motion satisfies the requirements under 10 C.F.R. § 2.326(a)(1)-(3). Declaration and Affidavit of Paul M. Blanch

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[10] Motion at 5, 10-13 (citing Letter from Donald E. Jackson, Chief, Projects Branch 5, Division of Reactor Projects to Michael Colomb, Site Vice President, Entergy Nuclear Operations, Inc. with Enclosure: Inspection Report No. 05000271/2010002 (May 10, 2010).

[11] *See* NUREG/CR-7000, "Essential Elements of an Electric Cable Monitoring Program" (January 2010).

(Aug. 20, 2010) (Blanch Declaration). With regard to timeliness under 10 C.F.R. § 2.326(a)(1), Mr. Blanch quotes the May 10, 2010, NRC Inspection Report as saying that:

> Entergy did not select and review safety-related cables suitable for application in the environment in which they were found. Specifically, Entergy allowed the continuous submergence of safety-related cables that were not qualified for continuous submergence and failed to demonstrate that the cables would remain operable. . . . Two manholes, MH-32(SH) and MH-33(SH) contained safety-related cables that were submerged.

Blanch Declaration at 5 (quoting NRC Inspection Report at 4, 20). Mr. Blanch maintains that this is new information. *Id.* at 5-6.

With regard to the second factor of 10 C.F.R. § 2.326(a)(2) (i.e., that the motion to reopen raises a significant safety issue), Mr. Blanch never directly addresses this issue, but does make several assertions that are relevant to it. Mr. Blanch quotes 10 C.F.R. §§ 54.4 and 54.21(a)(1)(i) to show that electrical cables, including low-voltage cables, are safety-related equipment within the scope of license renewal. *Id.* at 6-7. He states that "a diligent review of the LRA and the Staff's SER finds no such [TLAA or AMP], thus I am led to conclude that the LRA is inaccurate and incomplete with respect to TLAA or AMP of below grade, buried, underground, or otherwise inaccessible safety-related electrical cable." *Id.* at 8. Strangely, on the next page, Mr. Blanch acknowledges that the LRA does include an AMP for medium-voltage cables and that the NRC Final Safety Evaluation Report discusses the AMP. *Id.* at 9. Mr. Blanch states that the failure of safety-related electrical cables may result in beyond design basis accidents and could result in the loss of emergency power to safety-related equipment. *Id.* Mr. Blanch goes on to focus on low-voltage cables, asserting that they represent the majority of the VYNPS cables and that most of them are within the scope of license renewal, but are not identified, inspected, or maintained by any AMP, even though some of them are periodically submerged and are not qualified for such an environment. *Id.* at 10.

More generally, Mr. Blanch states that although the integrity and function of instrumentation and control electrical cables may be monitored indirectly through the performance of in-service testing of the instruments and controls, this is inadequate because it does not provide specific information about the status of the cable aging and degradation processes or the integrity of the insulation and jacket materials on the cable. *Id.* at 11. "A cable circuit with undetected damaged or degraded insulation could pass an in-service functional test, but still fail unexpectedly." *Id.* He says that several reports, including NRC Generic Letter 2007-01, Inaccessible or Underground Power Cable Failures That Disable Accident Mitigation Systems or Cause Plant Transients, "suggest that licensee

approaches to cable testing, such as in-service testing . . . do not fully characterize the condition of cable insulation nor provide information on the extent of aging and degradation mechanisms that can lead to cable failure." *Id.* at 12.

NEC next presents its arguments that Contention 7 satisfies the six basic admissibility standards of 10 C.F.R. § 2.309(f)(1)(i)-(vi). Given that, as we explain below, the Board has concluded that the motion fails to satisfy at least two of the three criteria of 10 C.F.R. § 2.326(a)(1)-(3), we will review NEC's arguments relating to 10 C.F.R. § 2.309(f)(1) only insofar as they relate to NEC's case with regard to the three hurdles of 10 C.F.R. § 2.326(a)(1)-(3).[12]

With regard to 10 C.F.R. § 2.309(f)(1), NEC alleges, "upon information and belief" that Entergy's "buried, underground, and inaccessible low and medium-voltage cables . . . have not been adequately monitored" and that its AMP fails to address "deficiencies now apparent in their current wholly inadequate monitoring program." Motion at 9. NEC cites various regulations and quotes at length from the NRC Inspection Report. *Id.* at 10-13. This material describes how "Entergy allowed the continuous submergence of safety-related cables that were not qualified for continuous submergence and failed to demonstrate that the cables would remain operable." *Id.* (quoting NRC Inspection Report at 4). The quoted sections of the Inspection Report describe how NRC inspectors "concluded that Entergy failed to ensure that the cables were maintained in a design condition for the anticipated environmental conditions by not thoroughly evaluating the effect of continuous cable submergence." *Id.* (quoting NRC Inspection Report at 20).

NEC argues that Entergy's corrective action in response to the discovery of the cable submergence (i.e., a plan to dewater the manholes containing submerged cables and to develop a preventive maintenance frequency for subsequent pump-downs) does not constitute an adequate AMP. *Id.* at 13 (quoting NRC Inspection Report at 20). NEC asserts that Entergy has failed to amend the aging management program in its LRA, or to propose a license condition, to encompass the newly discovered vulnerability of safety-related cables to wetting, submergence, and a resulting increased rate of aging. *Id.* at 13. NEC found no evidence that Entergy's AMP has been amended to include a review of cable environmental qualification, an inventory of cables susceptible to wet or submerged conditions, or a schedule of preventative inspection, testing, maintenance, or systematic replacement in order to assure operability of vulnerable safety-related cables under accident conditions. *Id.* NEC contends Entergy had "ample notice of the issue" citing to NRC information notices and generic letters (concerning the submergence of inaccessible electrical cables) issued in 1989, 2002, and 2007. *Id.* at 14.

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[12] We apply a similar approach in reviewing the answers. We focus on their analysis of 10 C.F.R. § 2.326(a)(1)-(3), and review their arguments relating to 10 C.F.R. § 2.309(c) and (f)(1) only to the extent that the latter may support the former.

Turning finally to NEC's discussion of 10 C.F.R. § 2.309(c), NEC asserts that the motion to reopen is timely because the underlying information supporting the motion "was not manifest until recently" and thus could not be raised earlier in this proceeding. *Id.* at 23. NEC argues that admission of Contention 7 will not broaden or delay the proceeding because the contention is not highly technical in nature and NEC is willing to discuss settlement or to participate in an expedited proceeding. *Id.* at 24.

Entergy opposes NEC's motion to reopen on all nineteen grounds. Entergy says that the Commission remanded this proceeding for the limited purpose of allowing NEC to submit a revised Contention 2 and, instead, NEC is seeking to restart the process on a completely different issue. Entergy Answer at 2. Entergy asserts that NEC could have raised Contention 7 at the outset of this proceeding, when Entergy first submitted its AMP for electrical cables. *Id.* at 3. Entergy cites the Commission as stating that "applicants for a license are . . . entitled to a prompt resolution of disputes concerning their applications" and says that the NRC rules, as well as fundamental fairness, dictate that this proceeding be brought to a close. *Id.* Entergy argues that NEC's motion fails to satisfy the criteria of 10 C.F.R. § 2.326(a), the evidentiary requirements of 10 C.F.R. § 2.326(b), the balancing criteria of 10 C.F.R. § 2.309(c), or the contention admissibility criteria of 10 C.F.R. § 2.309(f)(1).[13]

Entergy's answer, supported by the Declaration of Norman L. Rademacher (the Director of Engineering at VYNPS) and Roger B. Rucker (an electrical engineering consultant to Entergy), (Entergy Declaration) recounts the following facts:

1. Entergy's LRA includes an AMP for Non-Environmentally qualified inaccessible medium-voltage cable that is based upon and consistent with the GALL Report.[14]
2. The Non-EQ AMP for medium-voltage cable is designed to manage the potential effects of wetting, including submergence, on inaccessible electrical cable.
3. The Non-EQ AMP for medium-voltage cable requires periodic actions to prevent cables from being exposed to significant moisture, such as inspecting manholes at least biennially and draining water as needed.
4. The Non-EQ AMP for medium-voltage cable requires the testing of cable insulation at least every ten years.

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[13] Again, we review Entergy's arguments related to 10 C.F.R. § 2.309(c) and (f)(1) only to the extent that they might inform our analysis of 10 C.F.R. § 2.326(a)(1)-(3).

[14] *See* NUREG-1801, "Generic Aging Lessons Learned (GALL) Report," Vol. 1, Rev. 1 (Sept. 2005) (GALL Report).

5. The Non-EQ AMP for medium-voltage cable was amended on September 3, 2010, so that it now includes low-voltage cable.

Entergy Answer at 27-29; Entergy Declaration at 1-3. Thus, according to Entergy, NEC ignores the already-existing AMPs in Entergy's LRA that specifically address the electrical cabling issues and that are the focus of NEC's motion and new contention. Entergy Answer at 2-3.

In addition, Entergy maintains that the issue is not new, because in 2007 the NRC Staff issued a Generic Letter informing licensees of failures that had occurred in inaccessible cable subject to wetted environments and requesting information from the licensees. *Id.* at 9. Entergy notes that, in late 2008, the NRC Staff issued another report on this subject. *Id.* Then, in January 2010, the NRC Staff issued NUREG/CR-7000 "Essential Elements of a Cable Monitoring Program." *Id.* at 10. Entergy further recounts that the submergence of the electrical cables in two manhole covers was discovered by Entergy itself on November 28, 2009, when it performed an inspection of underground cable access points, and it was this inspection that was the subject of NRC's review in the Spring of 2010. *Id.*

Finally, Entergy recounts that the September 3, 2010, revision to its AMP (to include low-voltage cables) was the result of an April 2010 draft revision to the GALL Report wherein the NRC Staff proposed extending the AMPs applicable to medium-voltage non-EQ inaccessible electrical cables to also cover low-voltage cables. *Id.* at 11.

Based on the foregoing alleged facts, Entergy asserts that NEC's motion to reopen fails to satisfy the criteria of 10 C.F.R. § 2.326(a)(1)-(3). As to the first factor — timeliness — Entergy notes that, even at the outset of this proceeding in 2006, its LRA included an AMP (as prescribed by the GALL Report) to cover the exposure of inaccessible electrical cabling to wet conditions, including submergence. *Id.* at 20-22. Entergy asserts that NEC failed to bring this issue into contention at that time and that it is now too late to do so, regardless of the May 10, 2010 NRC Inspection Report. *Id.* Entergy refers to the part of its LRA that explicitly addresses a "Non-EQ Inaccessible Medium-Voltage Cable Program," and claims that it "has committed to implement this program by March 21, 2012."[15] Specifically, Entergy notes its commitment to inspect for cable submergence, and to use the results of those inspections to adjust frequency of inspection and draining where necessary. *Id.* at 23-24.

Entergy also claims that NEC's motion fails to demonstrate that Contention 7 raises a significant safety issue as required by 10 C.F.R. § 2.326(a)(2). Entergy

[15] Entergy Answer at 22 (citing Office of Nuclear Reactor Regulation, Safety Evaluation Report Related to the License Renewal of Vermont Yankee Nuclear Power Station, NUREG-1907, at 3-22 (May 2008)).

argues that NEC ignores the AMPs in Entergy's LRA that manage aging effects on electrical cables, fails to explain why they are defective, and thus fails to show that the safety issue is "significant." *Id.* at 23-24. Entergy also cites the NRC Inspection Report, which characterizes the NRC findings to be "of very low significance," and states that "continuously submerged cables [at VYNPS] were still fully capable of performing their design." *Id.* at 24.

With regard to 10 C.F.R. § 2.326(a)(3), Entergy claims that the motion and Blanch Declaration both fail to show, beyond mere speculation, how consideration of the electrical cable submergence issue would *likely* lead to a materially different result in the instant proceeding. *Id.* at 25-26.

The NRC Staff also opposes the grant and admission of NEC's motion and new contention on all nineteen grounds, arguing that NEC fails to show that the motion satisfies the requirements of 10 C.F.R. § 2.326(a)(1)-(3), fails to show how its newly proffered contention meets the eight-factor balancing test for nontimely filings of 10 C.F.R. § 2.309(c), and fails to address sufficiently the admissibility requirements of 10 C.F.R. § 2.309(f)(1). As stated above, we will focus primarily on the Staff's arguments relating to 10 C.F.R. § 2.326.

First, the NRC Staff argues that the motion fails to show that proposed Contention 7 raises a "significant" safety issue as required by 10 C.F.R. § 2.326(a)(2). Staff Answer at 5-6. The NRC Staff notes that the NRC Inspection Report relied upon by NEC states that the cabling issue was of "very low safety significance" in terms of operability or functionality of VYNPS. *Id.* at 7 (citing NRC Inspection Report at 4). The NRC Staff also attached the Affidavit of Roy K. Mathew, which explains that submergence of safety-related electric cables at VYNPS is the subject of ongoing oversight of licensee operations, and that Entergy recently expanded the scope of its AMPs to address low-voltage cabling. *Id.* at 7 (citing Mathew Affidavit ¶ 4-5). On the basis of this explanation, the NRC Staff maintains that Entergy's AMP for electrical cabling is not a significant safety issue under 10 C.F.R. § 2.326(a)(2). *Id.*

The NRC Staff then asserts two main reasons why the motion to reopen fails the timeliness requirement of 10 C.F.R. § 2.326(a)(1). First, the NRC Staff says that even if the NRC Inspection Report of May 10, 2010, was the triggering event, the motion should have been filed within 30 days thereof, because this is the time frame established by the Board's initial scheduling order. *Id.* at 8-9; *see also* Initial Scheduling Order (Nov. 17, 2006) at 7 (unpublished). The NRC Staff asserts that the pendency of the petitions for Commission review does not absolve litigants of their responsibility to file motions to reopen promptly. *Id.* at 9. Second, the NRC Staff argues that "NEC has long had sufficient information to file this Motion and contention" because "NEC references as bases for its contention documents [2007 NRC Generic Letters] that . . . have been available for one and a half to three years." *Id.* at 11. The NRC Staff says that, if, as NEC asserted, these documents "gave Entergy ample notice" of the issues of

submergence of electrical cables, "then they also gave NEC ample notice of this issue for a least a year and a half, making NEC's new contention untimely." *Id.*

The NRC Staff next maintains that NEC has not demonstrated that the admission of the proposed contention would likely lead to a materially different result. *Id.* at 12. "To satisfy 2.326(a)(3), the evidence supporting Contention 7 must show a likelihood that the contention would be resolved in NEC's favor." *Id.* The NRC Staff argues that neither the motion nor the Blanch declaration demonstrates how NEC's evidence shows that it is likely to prevail. *Id.* The Staff reiterates that its Inspection Report characterized the cable issue to be of "very low safety significance." *Id.* at 13. The Staff notes that the NRC inspection "was not conducted to review the adequacy of Vermont Yankee's aging management programs" because they were not in effect yet. *Id.* It adds that neither the motion nor the Blanch declaration acknowledges Entergy's already-existing AMP for cabling submergence or its recent amendment to that AMP to address specifically low-voltage cable submergence. *See id.* at 14. The Staff also points out that NUREG/CR-7000 does not specify that it is necessary to preclude submergence of safety-related cables, but instead requires that they be managed to assure that they can perform their intended functions even if submerged. *Id.* at 14 (citing Mathew Affidavit ¶ 8). For all of these reasons, the Staff avers that NEC would not prevail on this contention. The NRC Staff thus claims that, even if admitted, a hearing on Contention 7 is not *likely* to lead to a materially different result — the showing that is required by 10 C.F.R. § 2.326(a)(3) to reopen this proceeding. *Id.* at 13-14.

In its reply, NEC asserts that its motion to reopen this proceeding meets the three criteria of 10 C.F.R. § 2.326(a)(1)-(3). First, NEC argues that Contention 7 raises a significant safety issue. NEC notes that "NRC Regulations, Guidance, and industry literature are rife with references to the serious safety implications of vulnerable electrical cables." Reply at 5. NEC says that "the central issue . . . whether or not the Entergy VY LRA proposes or has in place . . . an adequate program . . . to address the deleterious effects of moisture or wetness on safety-related cables is of grave safety significance." *Id.* at 6. NEC avers that the fact that NRC's May 10, 2010, Inspection Report characterized the wet cabling issue to be of "low safety significance" is irrelevant because the inspection was done in the context of the NRC reactor oversight process which uses both consequences and probability to assess the significance of a problem, whereas "in most NRC regulation . . . safety significance is considered . . . in an absolute or prescriptive sense." *Id.* NEC quotes NUREG/CR7000 as follows: "Electric cables are one of the most important components of a nuclear power plant because they provide the power needed to operate safety-related equipment and to transmit signals . . . used to perform safety operations." *Id.* at 7. NEC quotes Mr. Roy Matthews of the NRC Staff to the same effect. *Id.*

As to the timeliness of the motion to reopen, NEC takes the position that the May 10, 2010 Inspection Report was the critical event.

> Entergy wastes a good deal of type explaining the many opportunities NEC had to take issue with the AMPS from early 2006 to the present. What was wrong with the AMPs was not readily apparent until events at Vermont Yankee revealed the details of Entergy's intentions which are masked in the omissions, vagaries, and generalities of the AMPs. Who could have guessed that Vermont Yankee had a history of flooded non-waterproof cables to which the AMPs would be applied, or that Entergy had no intention of preventing periodic and sustained immersion of these many cables? No, NEC's first notice of a fly in the ointment was the Inspection Report of May 10, 2010.

Id. at 3. NEC argues that "[w]hat NEC saw in the May 10th NRC inspection report was a revelation of detail regarding Entergy's approach to the AMP that NEC could not have been expected to ascertain from the LRA, or the SER and FSER." *Id.* at 9.

NEC says that even the Inspection Report was not enough to form the basis of Contention 7, and that NEC used the time subsequent to the issuance of the report, until its filing of the motion on August 20, 2010, to attempt to gather further information on Entergy's handling of flooding and electrical cabling and regarding the industry and regulatory context of this issue. *Id.* at 3, 8-11. In this regard, NEC notes that on September 3, 2010, Entergy filed a "supplement" to its LRA that extends the AMP for medium-voltage cables to also cover low-voltage cables. *Id.* at 11. NEC questions the status of this supplement. *Id.* at 11-12.

NEC then insists that its motion satisfies the "materially different result" requirement of 10 C.F.R. § 2.326(a)(3), because the Board's admission of Contention 7 "is certain to result in an amendment to and/or conditioning of the initial order(s) and a positive effect on assurance of adequate protection of public safety." *Id.* at 3. NEC maintains that it has put forth "ample testimony" to show "defects and omissions in Entergy VY's buried, underground, and difficult-to-access safety-related electrical cable AMP." *Id.* at 12. According to NEC, the Board will reasonably conclude that Entergy's cabling AMP is "wholly inadequate to assure protection of public health and safety," and that upon admitting the new contention, the Board will order Entergy to correct these deficiencies. *Id.*

Finally, NEC states that Contention 7 is within the scope of this license renewal proceeding as that contention relates not to ongoing compliance issues, but instead to "events to come" during the period of extended operation at VYNPS. *Id.* at 14. NEC replies that the Blanch declaration provides sufficient factual basis for Contention 7 in satisfaction of 10 C.F.R. § 2.309(f)(1)(v). Along with its reply, NEC submitted another declaration of Mr. Paul Blanch in which Mr. Blanch further "addresses uncertainties and fallacies" that NEC claims are

contained within NRC and Entergy filings and in the LRA, SER, NUREG-1800, NUREG/CR-7000, and other EPRI documents as they relate to Entergy's AMP for cabling at VYNPS. *Id.* at 15-16.

B. Arguments Related to Motion to Strike the Second Blanch Declaration

On September 23, 2010, Entergy moved to strike the declaration of Paul Blanch that NEC attached to its reply (the Second Blanch Declaration). Entergy's Motion to Strike the Declaration of Paul Blanch (Sept. 23, 2010) (Motion to Strike). Entergy argues that 10 C.F.R. § 2.326(b) requires that the *motion* to reopen (not the *reply*) be accompanied by affidavits that set forth the factual and/or technical basis for the movant's claim that the criteria of 10 C.F.R. § 2.326(a)(1)-(3) have been met. *Id.* at 1. Entergy cites to Commission precedent prohibiting litigants from using a reply to cure an otherwise deficient contention. *Id.* at 1-2. Such a practice, says Entergy, "would effectively bypass and eviscerate [the Commission's] rules governing timely filing, contention amendment, and submission of late-filed contentions" and "deprives other parties of an opportunity to challenge the new evidence." *Id.* (internal citations omitted). Entergy states that the NRC Staff supports the motion to strike. *Id.* at 2.

NEC opposes the motion to strike.[16] It asserts that the Second Blanch Declaration was "offered as a direct response to the affidavits of NRC Staff and Entergy witnesses; in part to affirm that a live dispute on the adequacy of the LRA with respect to aging management of certain safety-related electrical cables remains." NEC Answer at 3. NEC argues that a reply may include arguments and alleged facts that are focused on the legal or logical arguments presented in the answers and may focus on the "legal or factual arguments . . . raised in [the] answers."[17] *Id.* at 3 (citations omitted). NEC argues that no regulation prohibits appending an affidavit to a reply and that past practice supports it. *Id.* at 4. NEC asserts that the Second Blanch Declaration was not an attempt to cure an otherwise deficient contention, and that if Entergy thought that it was deprived of an opportunity to challenge any new evidence in the reply then it should have filed a request for leave to reply to NEC's reply. *Id.* at 5-6.

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[16] New England Coalitions' Answer and Opposition to Entergy's Motion to Strike the Declaration of Paul Blanch (Sept. 30, 2010) (NEC Answer).

[17] *Id.* (citing *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI 06-17, 63 NRC 727, 732 (2006)).

IV. ANALYSIS AND RULING ON MOTION TO REOPEN

Our analysis of NEC's motion to reopen starts with the words of the regulation — 10 C.F.R. § 2.326(a). It establishes three key criteria that must be met:

> (a) A motion to reopen a closed record to consider additional evidence *will not be granted* unless the following criteria are satisfied:
>
> (1) The motion must be *timely.* However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
>
> (2) The motion must address a *significant* safety or environmental issue; and
>
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.326(a)(1)-(3) (emphasis added). For the reasons stated below, the Board concludes that the motion to reopen does not satisfy this regulation.

A. Timeliness

The timeliness of NEC's motion to reopen depends primarily on an assessment as to when NEC first knew, or should have known, enough to raise the issues presented in Contention 7. If the motion and the proposed new contention are based on material information that was not previously available, then it qualifies as timely. *See, e.g.,* 10 C.F.R. § 2.309(f)(2). Thus, we need to examine Contention 7 and the information upon which it is based.

The essence of Contention 7, quoted in full *supra,* is that Entergy's AMP relating to the aging and degradation of buried, below-grade, underground, or hard-to-access safety-related electrical cables due to submergence and wet environments is inadequate under 10 C.F.R. §§ 54.21(a) and 54.29(a).[18] As we understand it, NEC asserts that the AMP is inadequate because it: (1) fails to provide for frequent enough *monitoring and inspections* of the cables (Motion at 13, 22, Blanch Declaration at 12), (2) fails to provide for appropriate and/or frequent enough *testing* of the cables (Motion at 13, 21; Blanch Declaration at 11), (3) fails to *preclude the submergence* of electrical cables (Motion at 13, 17,

[18] At one point, NEC seems to be arguing that the LRA contains *no* AMP that addresses the subject of age-related degradation of safety-related electrical cables. Blanch Declaration at 8 ("A diligent review of the LRA . . . finds no such [TLAA or AMP]"). This is patently incorrect because the LRA contains an AMP for such cables. Entergy Answer at 27, Entergy Declaration at 1-3. Thus, we do not examine this issue. Likewise, given that the LRA contains an AMP, there is no need for a TLAA on the same subject. *See* 10 C.F.R. § 54.21(c)(1)(i)-(iii). Thus, we do not need to analyze the TLAA prong of Contention 7.

19-20; Blanch Declaration at 9), and (4) fails to cover *low-voltage* cables (Motion at 9, 13, 20; Blanch Declaration at 10).

For purposes of the timeliness analysis under 10 C.F.R. § 2.326(a)(1), the question is: when should these issues have been identified and asserted? Are these complaints based on new information, or on information that has been available for a significant time period?

NEC asserts that NRC's May 10, 2010 Inspection Report was the critical event and that its motion and new Contention 7 are timely. In its motion, NEC quotes the NRC Inspection Report, which states that on November 29, 2009, an inspection of VYNPS by Entergy revealed that, of the 57 manholes or handholes that were inspected, 12 contained cables that were submerged, two of which (manholes MH-32(SH) and MH-33(SH)) contained safety-related cables. Motion at 11 (quoting NRC Inspection Report at 19-20). These two safety-related cables were control cables for the emergency diesel generators and control and power cables for the generator's fuel oil transfer pumps. *Id.* (quoting NRC Inspection Report at 20). The Inspection Report indicated that Entergy responded by dewatering the affected manholes and initiating a preventive maintenance plan to insure proper conditions. *Id.* Thereafter, the NRC inspectors determined that this situation was a violation "because Entergy staff did not select and review safety-related cables in the environment in which they were found." *Id.* at 10 (quoting NRC Inspection Report at 4). The inspectors stated that "the finding is more than minor because if left uncorrected, the performance deficiency had the potential to lead to a more significant safety concern. Specifically, the inspectors noted that the insulation of continuously submerged cables would degrade more than dry or periodically wetted cables which would lead to failure." *Id.* at 12 (quoting NRC Inspection Report at 4). The inspectors characterized the finding to be of "very low safety significance (Green) because it was a design or qualification deficiency which was confirmed to have not resulted in a loss of operability or functionality. Specifically, the continuously submerged cables were not designed or qualified for that environment but were still capable of performing their design functions." *Id.* (quoting NRC Inspection Report at 4).

We reject the proposition that the May 10, 2010 Inspection Report entitles NEC to file a new contention at this late date. The Inspection Report revealed that, at two locations, safety-related electrical cables were, in fact, submerged. But the potential for such submergence, and the need to manage and address it, has been apparent from the outset of this proceeding. Indeed, the potential for wetting or submergence is a central point of Entergy's AMP. As Entergy pointed out, its LRA includes an AMP for medium-voltage cable. Entergy Declaration at 1. The AMP provides for *biennial inspections* of manholes, the draining of water as needed, and the *testing of cable* insulation at least every 10 years. Entergy Answer at 7; Entergy Declaration at 1-3. NEC does not challenge these assertions.

If Entergy's AMP suffers from the inadequacies enumerated by NEC, then it has been inadequate since the beginning of this proceeding.[19]

The issues raised in Contention 7 are not new. NRC's GALL Report, issued in September 2005, addresses the issue of aging management for safety-related electrical cables and clearly recounts that "there could be potential for long-term submergence." *See* GALL Report at XI.E-8. Likewise, issues associated with the aging and degradation of safety-related electrical cable due to submergence and wet environments have been the subject of an EPRI report and of numerous formal issuances by NRC, including documents issued by NRC in 1989, 2002, and 2007. Motion at 14. NEC stated that the issues raised in Contention 7 were "within Entergy's ability to foresee" and that Entergy failed to consider these issues "*despite ample notice of the issue by both EPRI and NRC.*" *Id.* (emphasis added). If NEC is correct, then the same principle applies to the timeliness of the motion to reopen. Given this background, including the fact that the potential for submergence was anticipated and part of the AMP, the May 10, 2010 disclosure that two safety-related cables were *actually* submerged is not an unexpected revelation that entitles NEC to raise these issues now. As we see it, Contention 7 is based on information that has been available since the beginning of this proceeding (e.g., the AMP and NRC and Industry concerns associated with the wetting or submergence of safety-related electrical cables) and the motion to reopen is not timely under 10 C.F.R. § 2.326(a)(1).[20]

B. Significance

The regulation specifies that a motion to reopen "must address a significant . . . safety issue." 10 C.F.R. § 2.326(a)(2). Raising a safety issue is not sufficient. The safety issue must be significant. Thus, we must examine Contention 7 to assess whether the safety issues it raises are significant.

NEC and its expert, Mr. Blanch, cite several authorities for the proposition that the integrity of safety-related electric cables is an important part of the safety of a nuclear power plant. "Electric cables are one of the most important components in a nuclear plant because they provide the power needed to operate safety-related

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[19] In its motion, NEC notes its then-pending petition for Commission review of LBP-09-9 in its argument for timeliness of its motion to reopen. *See* Motion at 5. However, pendency of NEC's petition for Commission review of LBP-09-9 does not absolve NEC of its duty to file a motion to reopen in a timely fashion.

[20] Although 10 C.F.R. § 2.326(a)(1) normally requires that the motion to reopen be timely, it also specifies that "an exceptionally grave issue" may be considered even if the motion is not timely. For the reasons stated in Section IV.A, we conclude that the motion is not timely. While the Board declines to determine whether NEC has established that the issues raised in Contention 7 are "significant," see Section IV.B, exceptional gravity is a much higher threshold. We have no doubt in concluding that NEC has failed to show that the issues raised in Contention 7 are "exceptionally grave."

equipment and to transmit signals to and from the various controllers used to perform safety operations in the plant." Motion at 6 (citing NUREG/CR-7000). NEC notes that cables play a vital role in the operation of a nuclear power plant, citing 10 C.F.R. §§ 54.4 and 54.21. *Id.* at 17; Blanch Declaration at 4. Mr. Blanch alleges that NRC Information Notices and Generic Letters recount that

> Recent incidents involving early failures of electric cables and cable failures leading to multiple equipment failures . . . suggest that licensee approaches to cable testing, such as in-service testing, surveillance testing, preventative maintenance, maintenance rule [sic], etc., do not fully characterize the condition of cable insulation nor provide information on the extent of aging and degradation mechanisms that can lead to cable failure.

Blanch Declaration at 12.

Our analysis of 10 C.F.R. § 2.326(a)(2) is as follows. We agree that Contention 7 raises a safety issue. The wetting and submergence of safety-related electrical cable is a safety issue. We also agree that the *general topic* — the integrity of safety-related electrical cables in the context of wetting and submergence of such cables — is significant. But it is less clear whether the *specific issues* raised in Contention 7 are significant safety issues.

As discussed above, Contention 7 alleges four basic defects in the AMP for safety-related electrical cable: (1) biennial inspections are not frequent enough, (2) decennial testing is not frequent enough, (3) the AMP does not preclude submergence, and (4) it does not cover low-voltage cables. But, even acknowledging the general significance of managing the aging of safety-related electrical cables, it is unclear, based on NEC's pleadings, how or why these specific complaints are significant. What, specifically, is wrong with Entergy's inspection and testing schedules, and why do these schedules raise a significant safety issue? Should the AMP prescribe annual inspections? Quarterly? Is the difference between biennial and quarterly a "significant" safety matter? Other than arguing that the general topic is important (which we posit), NEC has given us little or nothing that might support the conclusion that these alleged problems are safety significant. Likewise, while the total preclusion of wetting or submergence below-grade cables might be ideal, it does not appear that the mere existence of such wetting or submergence is automatically significant. Indeed, the potential for such wetting or submergence seems to be assumed, otherwise there would be no need for an AMP to manage it. As to NEC's complaint that the AMP should cover low-voltage cables, even if this issue were significant, it has been rendered moot by Entergy's September 3, 2010 supplement to its AMP which expanded the AMP to cover low-voltage safety-related cables. NEC never even addresses this point. *See* Reply at 11-12.

In the end, we remain uncertain as to whether NEC has shown that the issues in

proposed new Contention 7 raise a "significant safety . . . issue" as required by 10 C.F.R. § 2.326(a)(2).[21] Given that we hold that the motion to reopen fails to satisfy 10 C.F.R. § 2.326(a)(1) and (3), it is unnecessary to decide the "significance" prong of this regulation.

C. Materially Different Result Likely

The third criterion that must be met by a motion to reopen is that the motion "must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." 10 C.F.R. § 2.326(a)(3). The possibility of a materially different result is insufficient. The movant must show that it is *likely* that the result would have been materially different, i.e., that it is more probable than not that NEC would have prevailed on the merits of the proposed new contention. NEC has not satisfied this criterion. NEC devotes two sentences to this issue:

> Had the newly proffered evidence been considered initially, *it is reasonable to assume,* based on the weight of the evidence and the safety significance of the issue, that, in keeping with 10 CFR §§ 54 [sic] *the Board would have rejected Entergy's LRA* pending a submittal and demonstration of an adequate AMP or TLAA for electrical cables susceptible to wetting or submergence, because in considering the evidence *it is highly unlikely that the Board could have positively contributed* to a Commission finding that aging management review, aging management planning, or aging analysis had been properly performed in keeping with 10 CFR § 54.29(a) and 54.21(a). (Please see EPRI Report above, NRC Inspection Report following, and the Declaration of Paul M. Blanch (attached). [sic].

Motion at 7 (emphasis added).

These are conclusory assumptions and predictions as to what NEC thinks that the Board would have done. Certainly, *if* the Board had admitted Contention 7 and *if* the Board had ruled in NEC's favor on the merits of Contention 7, *then* the result would have been materially different (e.g., some additional conditions would have been imposed on Entergy relating to the frequency of testing safety-related cable). But NEC has not demonstrated that it is *likely* that it would have prevailed on the merits of Contention 7. For example, we see nothing in NEC's pleadings, or in either declaration of Mr. Blanch, that makes it appear likely that NEC is correct that biennial inspections or decennial testing is inadequate. A motion to reopen

[21] In the May 10, 2010 Inspection Report, the NRC Staff characterized the finding with regard to the safety-related electric cables as being of "very low safety significance" in part, because no loss of operability or functionality was found to have occurred. Inspection Report at 4. This characterization, while worthy of some consideration, was of a different legal requirement (the AMP is not even in effect now) and for a different purpose, and is not central to our analysis of 10 C.F.R. § 2.326(a)(2).

requires more than a possibility. It requires a demonstration that the petitioner is likely to succeed. That is lacking here.

In conclusion, the Board holds that the motion to reopen this proceeding fails to satisfy 10 C.F.R. § 2.326(a)(1) and (3). Given that this is fatal to the motion, we find it unnecessary to analyze the other sixteen hurdles that are also applicable to this motion. Accordingly, NEC's motion to reopen is denied.

V. RULING ON MOTION TO STRIKE

Given our ruling on 10 C.F.R. § 2.326(a), Entergy's motion to strike the Second Blanch Declaration is moot. Even assuming the admissibility of all of Mr. Blanch's statements in the second declaration, NEC has not satisfied the requirements to reopen this proceeding at this late date.

VI. ORDER

The Board denies NEC's motion to reopen this proceeding to admit new Contention 7 for failure to satisfy 10 C.F.R. § 2.326(a)(1) and (3). This decision shall constitute the final decision of the Commission forty (40) days from the date of its issuance unless, within fifteen (15) days of its service, a petition for review is filed with the Commission in accordance with 10 C.F.R. §§ 2.1212 and 2.341(b). Unless otherwise authorized by law, a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of this action. 10 C.F.R. § 2.341(b)(1).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD[22]

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

By E. Roy Hawkens for:
Dr. William H. Reed
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 28, 2010

[22] Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Licensee Entergy; (2) Intervenors Vermont Department of Public Service and New England Coalition of Brattleboro, Vermont; (3) the NRC Staff; (4) the State of New Hampshire; and (5) the Commonwealth of Massachusetts.

ATTACHMENT A

Regulatory Factors Applicable to NEC Motion to Reopen to Introduce a New Contention

Criterion	Regulation
1. Motion is timely (or raises exceptionally grave issue)	10 C.F.R. § 2.326(a)(1)
2. Significant safety or environmental issue	10 C.F.R. § 2.326(a)(2)
3. Demonstrate that a materially different result would have been likely	10 C.F.R. § 2.326(a)(3)
4. Accompanied by affidavits that (a) set forth factual or technical bases for claim that 10 C.F.R. § 2.326(a)(1)-(3) criteria have been satisfied; (b) by competent individuals; (c) with evidence that is admissible; and (d) with each of the foregoing criteria separately addressed	10 C.F.R. § 2.326(b)
5. Satisfy 10 C.F.R. § 2.309(c)	10 C.F.R. § 2.326(d)
6. Good cause, if any, for failure to file on time	10 C.F.R. § 2.309(c)(1)(i)
7. Nature of right to be a party	10 C.F.R. § 2.309(c)(1)(ii)
8. Nature of interest	10 C.F.R. § 2.309(c)(1)(iii)
9. Possible effect on requestor's interests	10 C.F.R. § 2.309(c)(1)(iv)
10. Availability of other means to protect interests	10 C.F.R. § 2.309(c)(1)(v)
11. Extent represented by other parties	10 C.F.R. § 2.309(c)(1)(vi)
12. Extent to which participation will broaden the issues or delay the proceeding	10 C.F.R. § 2.309(c)(1)(vii)
13. Extent to which participation will assist in developing a sound record	10 C.F.R. § 2.309(c)(1)(viii)
14. Specific statement of issue of law or fact	10 C.F.R. § 2.309(f)(1)(i)
15. Brief explanation of the basis for the contention	10 C.F.R. § 2.309(f)(1)(ii)
16. Demonstrate that the issue is within scope	10 C.F.R. § 2.309(f)(1)(iii)
17. Demonstrate that the issue is material	10 C.F.R. § 2.309(f)(1)(iv)
18. Provide concise statement of the alleged facts or expert opinion which support the contention	10 C.F.R. § 2.309(f)(1)(v)
19. Provide sufficient information to show that a genuine dispute exists on a material issue of law or fact.	10 C.F.R. § 2.309(f)(1)(vi)

Cite as 72 NRC 553 (2010) **CLI-10-28**

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) **November 5, 2010**

CASE MANAGEMENT

The Board has the authority to regulate the course of the proceeding, and the Commission generally defers to the Board on case management decisions.

MEMORANDUM AND ORDER

Intervenor Pilgrim Watch has filed a motion requesting that we either (1) order the Atomic Safety and Licensing Board to respond to a "motion for clarification" that Pilgrim Watch filed before the Board on September 9, 2010, or (2) ourselves respond to questions Pilgrim Watch raised in its motion before the Board.[1] Both the NRC Staff and the Applicant, Entergy Nuclear Generation Company and

[1] Pilgrim Watch Motion Regarding ASLB Refusal to Respond to Pilgrim Watch's Motion for Clarification ASLB Order (Sept. 2, 2010) (Sept. 22, 2010) (referencing Pilgrim Watch's Motion for Clarification of the ASLB Order (Scheduling Conference Call) (Sept. 9, 2010)).

Entergy Nuclear Operations, Inc., oppose Pilgrim Watch's motion.[2] Our review of the record shows that Pilgrim Watch's questions either have been answered by the Board, or prematurely raise evidentiary matters that will be resolved by the Board at the appropriate point in the proceeding. The Board therefore found it unnecessary to respond formally to the questions Pilgrim Watch raised in its motion.[3] The Board has the authority to regulate the course of the proceeding, and we generally defer to the Board on case management decisions.[4] Pilgrim Watch's motion presents no justification for us to depart from our usual practice. We *deny* Pilgrim Watch's new motion before us.

We remanded contention 3 to the Board in March 2010. We expect the Board to make full use of its broad authority under our rules to establish and maintain a fair and disciplined hearing process, avoiding extensions of time absent good cause, unnecessary multiple rounds of briefs, or other unnecessary delay. We urge the Board and parties to work together to bring the proceeding to timely closure.[5]

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[2] *See* Entergy's Opposition to Pilgrim Watch's Interlocutory Motion Seeking Further Clarification (Oct. 4, 2010); NRC Staff's Answer to Pilgrim Watch's Motion Regarding ASLB Refusal to Respond to Pilgrim Watch's Motion for Clarification (Oct. 4, 2010). A "motion" filed under 10 C.F.R. § 2.323 is not a legitimate means to bring challenges to Board decisions to the Commission. Such challenges must be made in appeals or petitions for review. To the extent that Pilgrim Watch's motion could be considered a petition for interlocutory review, it neither addresses nor meets the interlocutory review standards. *See* 10 C.F.R. § 2.341(f)(2).

[3] *See, e.g.,* Transcript (Sept. 15, 2010) at 708, 718. In particular, pursuant to our direction in CLI-10-11, the Board has explained that it will first determine whether the asserted deficiencies in meteorological modeling credibly could have had a material impact on the Pilgrim Severe Accident Mitigation Alternatives (SAMA) analysis conclusions (*see, e.g.,* 71 NRC 287, 304-05 (2010) (regarding the significance of the "sea breeze" effect)). *See* Tr. at 707-08. If the Board finds in favor of Pilgrim Watch, it would then assess — to the extent reasonable — the degree to which any modeling deficiency may have materially affected the current economic cost and evacuation timing conclusions. We see no ground for upsetting the Board's decision to postpone making detailed evidentiary rulings going to the potential, second stage of the proceeding.

[4] *See, e.g., Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1 (2010); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 192 (2008). *See generally* 10 C.F.R. § 2.319.

[5] We additionally caution Pilgrim Watch against using future filings as a means to reargue matters previously resolved.

IT IS SO ORDERED.[6]

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of November 2010.

[6] Commissioner Apostolakis did not participate in this matter.

Cite as 72 NRC 556 (2010) **CLI-10-29**

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. 50-391-OL**

TENNESSEE VALLEY AUTHORITY
(Watts Bar Nuclear Plant, Unit 2) **November 30, 2010**

APPEALS, INTERLOCUTORY

We previously have held that licensing board decisions denying a petition for waiver are interlocutory and not immediately reviewable. Such decisions generally are not appealable until the board has issued a final decision resolving the case, unless a party seeking review shows that one of the grounds for interlocutory review has been met.

APPEALS, INTERLOCUTORY

Imminent mootness of an issue has been cause for taking interlocutory review in other proceedings. In those proceedings, however, the very issue sought to be reviewed would have become moot by the time the board issued a final decision. In such cases, the issue must be reviewed now or not at all.

OPERATING LICENSE PROCEEDINGS

We assume administrative regularity in the regulatory process, and review of the operating license application takes place independently of that associated with plant construction. There is no reason to assume that completion of construction

would in any way force the Commission's hand in making adjudicatory decisions on operating license issues, including NEPA issues, at the appropriate time. To find otherwise would eviscerate our two-step construction permit/operating license review process.

MEMORANDUM AND ORDER

The Southern Alliance for Clean Energy (SACE) requests interlocutory review of the Atomic Safety and Licensing Board's ruling denying its petition to waive 10 C.F.R. §§ 51.53(b), 51.95(b), and 51.106(c).[1] SACE seeks a waiver of these regulations in order to allow it to litigate a proposed contention challenging the Tennessee Valley Authority's (TVA) assessment of the need for power and alternative energy sources in its operating license application.[2] We decline to take review because SACE's appeal does not satisfy our interlocutory review standards.

I. BACKGROUND

This proceeding concerns TVA's application for an operating license for Watts Bar Nuclear Plant, Unit 2. The Commission issued construction permits (CPs) to TVA for Units 1 and 2 in 1973.[3] In 1976, TVA applied for operating licenses for both units. In the mid-1980s, TVA suspended construction of Unit 2, and the Staff suspended its review of the operating license application for that unit. Unit 2

[1] Southern Alliance for Clean Energy's Petition for Interlocutory Review of LBP-10-12 (Denying SACE's Waiver Petition) (July 14, 2010) (Petition for Interlocutory Review); LBP-10-12, 71 NRC 656 (2010).

[2] TVA and the NRC Staff oppose interlocutory review. Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Petition for Interlocutory Review of LBP-10-12 (July 26, 2010); NRC Staff's Answer Opposing Southern Alliance for Clean Energy's Petition for Review of Board Order LBP-10-12 (Denying Petition to Waive Need for Power Rule and Alternative Energy Rules) (July 26, 2010).

[3] *See* Tennessee 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); In the Matter of Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2); Order, 73 Fed. Reg. 39,995, 39,995 (July 11, 2008).

has since been in deferred plant status.[4] In the meantime, TVA has requested and received extensions of the CP completion date for Unit 2, which is now March 31, 2013.[5]

Early last year, TVA submitted an update to the operating license application for Unit 2.[6] With its updated application, TVA submitted a "Final Supplemental Environmental Impact Statement for the Completion and Operation of [Watts Bar] Unit 2" (FSEIS). The Staff also provided a notice of opportunity to request a hearing on TVA's operating license application.[7] SACE, along with four other petitioners, submitted a request for hearing.[8] The Board granted SACE's hearing request, admitting two contentions.[9]

In its hearing request, SACE submitted proposed Contention 4, asserting that TVA's FSEIS has not provided an adequate discussion of need for power and alternative energy sources.[10] Although acknowledging that 10 C.F.R. §§ 51.53(b) and 51.95(b) preclude further review of need for power and alternative energy sources once a CP has been issued, SACE claimed that these regulations do not apply because "TVA has stated that the purpose of the FSEIS . . . is not just to support TVA's operating license, but to update TVA's 1972 EIS for construction of the plant."[11] According to SACE, "it is appropriate to revisit the question of need and alternatives" because "Watts Bar Unit 2 is sixty percent complete, with significant expenditures and modifications still to be made."[12] SACE noted,

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[4] *See* Letter from Mark J. Burzynski, Manager, Nuclear Licensing, Tennessee Valley Authority, to Samuel J. Collins, Director, Nuclear Reactor Regulation, U.S. NRC (July 14, 2000) (ADAMS Accession No. ML003754798). *See generally* Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077 (Oct. 14, 1987).

[5] *See* 73 Fed. Reg. at 39,995. TVA has represented that it expects to complete construction of Unit 2 prior to April 1, 2012. *See* Letter from William R. McCollum, Jr., Chief Operating Officer, Tennessee Valley Authority, to U.S. NRC (Aug. 3, 2007) at 2 (ADAMS Accession No. ML072190047). *See also* 74 Fed. Reg. at 20,350.

[6] 74 Fed. Reg. at 20,350. The Staff states that it intends to use this information to supplement the Final Environmental Statement (FES) that was issued in 1978 in support of its review of the original operating license application for both units. Tennessee Valley Authority, Watts Bar Nuclear Station, Unit 2; Notice of Intent to Prepare a Supplement to the Operating License Final Environmental Statement and Conduct Scoping Process, 74 Fed. Reg. 46,799, 46,799 (Sept. 11, 2009). *See also* 74 Fed. Reg. at 20,350.

[7] 74 Fed. Reg. at 20,350.

[8] Petition to Intervene and Request for Hearing (July 13, 2009) (Hearing Request).

[9] LBP-09-26, 70 NRC 939, 946, 990 (2009). The Board denied the hearing request as to the other petitioners. Thereafter, the Board dismissed one of the two admitted contentions as moot; one contention remains at issue in this proceeding. *See* Order (Granting TVA's Unopposed Motion to Dismiss SACE Contention 1) (June 2, 2010) (unpublished).

[10] Hearing Request at 16-21.

[11] *Id.* at 16 n.4.

[12] *Id.* at 17.

however, that if the Board determined that sections 51.53(b) or 51.95(b) barred admission of the contention, SACE would submit a waiver petition.[13]

The Board found Contention 4 to be inadmissible as outside the scope of the proceeding. The Board reasoned that it was bound to follow section 51.53(b), and "[s]ince [under that section] TVA was . . . not obligated to include any discussion of the need for power or of alternative energy sources in its application for an operating license, a challenge to the adequacy of TVA's discussion of these issues is not within the scope of this proceeding at this point."[14]

Thereafter, SACE petitioned for a waiver of sections 51.53(b) and 51.95(b), attaching the Declaration of Dr. Arjun Makhijani in support.[15] SACE asserted that a waiver is justified under 10 C.F.R. § 2.335(b) because there are special circumstances in this proceeding such that the application of sections 51.53(b) and 51.95(b) would not serve the purpose for which they were adopted.[16] SACE later filed a motion to amend its waiver petition to add 10 C.F.R. § 51.106(c), which prohibits a presiding officer in an operating license proceeding from admitting contentions concerning need for power or alternative energy sources.[17] TVA and the NRC Staff opposed both the waiver petition and the subsequent motion to amend.[18]

The Board denied SACE's waiver petition, finding that SACE had not shown

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[13] *Id.* at 16 n.4.

[14] LBP-09-26, 70 NRC at 977.

[15] 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) (Waiver Petition); Declaration of Dr. Arjun Makhijani in Support of Southern Alliance for Clean Energy'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) (Makhijani Declaration).

[16] Waiver Petition at 2.

[17] Southern Alliance for Clean Energy's Motion for Leave to Amend Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) (Mar. 10, 2010) at 2.

[18] NRC Staff's Response to Request by Southern Alliance for Clean Energy ("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); Tennessee Valley Authority's Response in Opposition to Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) (Mar. 1, 2010). SACE sought leave to reply to TVA and the Staff's answers to the waiver petition, which also was opposed by TVA and the Staff. Southern Alliance for Clean Energy's Motion for Leave to Reply to Tennessee Valley Authority and NRC Staff Regarding Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) (Mar. 8, 2010); Southern Alliance for Clean Energy's Reply to Tennessee Valley Authority 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); Tennessee Valley Authority's Answer in Opposition to Motion for Leave to Reply and Motion for Leave to Amend Waiver Petition (Mar. 15, 2010); NRC Staff's Answer to SACE Reply Motion and Motion to Amend (Mar. 17, 2010).

that a waiver was justified under section 2.335(b).[19] The Board found that SACE had supplied "little, if any, useful information," and that the Makhijani Declaration consisted of "no more than unsupported conclusions."[20] Because it concluded that SACE had not made a prima facie case for waiver, the Board declined to certify the matter to the Commission, and found that section 2.335(c) prohibited it from considering the matter further.[21] SACE's timely petition for interlocutory review followed.

II. DISCUSSION

We previously have held that licensing board decisions denying a petition for waiver are interlocutory and not immediately reviewable.[22] Such decisions generally are "not appealable until the board has issued a final decision resolving the case," unless a party seeking review shows that one of the grounds for interlocutory review has been met.[23] Section 2.341(f)(2) of our rules of practice governs petitions for interlocutory review. This section requires a showing that the issue for which the party seeks review:

> (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.[24]

It is within our discretion to grant interlocutory review.[25] Because we disfavor piecemeal appeals, however, we will grant interlocutory review only in extraordinary circumstances.[26] SACE has not presented a case of extraordinary circumstances.

SACE spends the bulk of its petition addressing the general grounds for review

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[19] LBP-10-12, 71 NRC at 671.

[20] *Id.* at 670.

[21] *Id.* at 672. *See generally* 10 C.F.R. § 2.335(c).

[22] *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995).

[23] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-27, 68 NRC 655, 656 (2008).

[24] 10 C.F.R. § 2.341(f)(2).

[25] *Id.*

[26] *See, e.g., Claiborne,* CLI-95-7, 41 NRC at 384; *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 132, 137 (2009).

under 10 C.F.R. § 2.341(b)(4).[27] SACE, however, has failed first to establish that it has met one of the grounds required for *interlocutory* review under 10 C.F.R. § 2.341(f)(2).[28] SACE devotes a single paragraph to its argument that it meets the interlocutory review standard.[29] According to SACE, interlocutory review is warranted because waiting until the Board's issuance of a final decision could render the issues of need for power and alternative energy sources moot.[30] SACE relies on the incomplete construction status of Unit 2 to support its waiver petition, and speculates that construction of Unit 2 might be substantially complete, or the money needed to complete Unit 2 already spent, by the time the Board issues its final decision resolving the case.[31]

SACE's argument falls short of showing that it will be adversely affected by an immediate and serious irreparable impact that could not be alleviated through a petition for review after the Board's issuance of a final decision. SACE articulates a concern that its arguments regarding need for power and alternative energy sources "may" be moot by the end of this operating license proceeding. But SACE provides no factual or legal support for this argument.

Imminent mootness of an issue has been cause for taking interlocutory review in other proceedings. In those proceedings, however, the very issue sought to be reviewed would have become moot by the time the board issued a final decision.[32] In such cases, the issue must be reviewed now, or not at all. Here, in contrast, SACE's "mootness" concern stems from the factual circumstances relied on its

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[27] *See generally* Petition for Interlocutory Review at 2-19.

[28] *Cf. Oncology Services Corp.,* CLI-93-13, 37 NRC 419, 421 (1993) (stating that "[t]he Commission may consider the criteria listed in section 2.786(b)(4) when reviewing interlocutory matters on the merits, but when determining whether to undertake such review the standards in section 2.786(g) control [the] determination," citing prior versions of subsections 2.341(b)(4) and 2.341(f)(2), respectively).

[29] *See* Petition for Interlocutory Review at 5, 20.

[30] *Id.*

[31] *Id. See also id.* at 3, 8, 11, 15-16 (citing Waiver Petition and Makhijani Declaration).

[32] *See David Geisen,* CLI-06-19, 64 NRC 9, 11 (2006) ("The question whether to hold an NRC enforcement proceeding in abeyance pending a related criminal prosecution is generally suitable for interlocutory Commission review because, unlike most interlocutory questions, the abeyance issue cannot await the end of the proceeding (it becomes moot)."); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 71 (2004) ("Review at the end of the case would be meaningless because the Commission cannot later, on appeal from a final Board decision, rectify an erroneous disclosure order. A bell cannot be unrung. 'Because the adverse impact of that release would occur *now,* the alleged harm is immediate.'" (quoting *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994))). *See also Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-327, 3 NRC 408, 411, 413 (1976) (certifying a matter involving a board decision directing unrestricted disclosure of a document the applicant claimed to be proprietary because "[u]nlike most interlocutory discovery orders, the one here involved must be reviewed now or not at all").

waiver petition. The issue at the heart of the waiver petition (which is, ultimately, the issue for which SACE seeks interlocutory review) — whether the supplement to the FES should include a discussion of need for power and alternative sources of energy — is capable of review later, after the Board has completed its proceeding. Whether construction of Unit 2 has advanced — or is even completed — at the end of this adjudicatory proceeding has no bearing on the legal issues associated with SACE's waiver petition. We assume administrative regularity in the regulatory process, and review of the operating license application takes place independently of that associated with plant construction.[33] There is no reason to assume that completion of construction would in any way force the Commission's hand in making adjudicatory decisions on operating license issues, including NEPA issues, at the appropriate time. To find otherwise would eviscerate our two-step construction permit/operating license review process.

In any event, our experience with this very issue in another operating license proceeding where review was deferred until the end of the case demonstrates that SACE will not be irreparably injured.[34] At the close of the *Shearon Harris* operating license proceeding, the Appeal Board reviewed the licensing board's earlier, interlocutory denial of a petition to waive the very same NEPA regulations at issue here, without suggesting that the waiver issue was moot.[35]

SACE's argument also falls short of showing that the denial of the waiver petition "affects the basic structure of the proceeding in a pervasive or unusual manner." Although SACE did not address expressly this provision of our rules, we find that the basic structure of the proceeding remains unchanged.

We therefore deny SACE's request for interlocutory review, without prejudice to SACE's ability to file a petition for review raising the waiver question after issuance of the Board's final decision in this matter. Our decision to decline

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[33] *See Power Reactor Development Co. v. International Union of Electrical Workers,* 367 U.S. 396, 415-16 (1961); *Citizens Association for Sound Energy v. NRC,* 821 F.2d 725, 730 (D.C. Cir. 1987); *Porter County Chapter of the Izaak Walton League of America, Inc. v. NRC,* 606 F.2d 1363, 1370 (D.C. Cir. 1979). *See also Rockford League of Women Voters v. NRC,* 679 F.2d 1218, 1222-23 (7th Cir. 1982).

[34] *See, e.g., Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 546-48 (1986); *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1614-16 (1984).

[35] *See generally Shearon Harris,* ALAB-837, 23 NRC at 546-48 & n.70 (reviewing LBP-84-29B, 20 NRC 389 (1984) (denying waiver petition without explanation), and LBP-85-5, 21 NRC 410 (1985) (setting forth the licensing board's reasoning for the denial)). Construction of Harris Unit 1 continued during the operating license proceeding. *See* NUREG-0972, "Final Environmental Statement Related to the Operation of Shearon Harris Nuclear Power Plant, Units 1 and 2" (Oct. 1983) at v-vi, 1-1, A-4 (ADAMS Accession No. ML071340292).

review at this time should not be interpreted as a determination on the merits of either SACE's waiver petition or the Board's decision in LBP-10-12.[36]

One other matter bears mention. The Board has twice suggested, given the passage of time between the construction permit proceeding and this reinvigorated operating license proceeding, that we may wish to consider further the question whether the Staff's NEPA analysis in this case should address the need for power and alternative energy sources.[37] The Board's suggestion is not without force. The purpose of the regulatory provisions at issue here was to avoid unnecessary consideration of these issues, recognizing that they are not likely to alter the cost-benefit balance.[38] Nevertheless, we recognize our obligation under NEPA to supplement our environmental review documents if there is new and significant information relevant to these matters.[39] Therefore, we expect the Staff to take the requisite "hard look" at new information on the need for power and alternative sources of energy. If the Staff concludes the legal threshold for new and significant information has been met, we authorize the Staff to supplement the FES in this instance.[40]

III. CONCLUSION

For the reasons set forth above, we *deny* SACE's petition for interlocutory review of the Board's ruling in LBP-10-12, without prejudice.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of November 2010.

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[36] *Cf. Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998) (explaining that unreviewed board rulings have no precedential effect).

[37] *See* LBP-10-12, 71 NRC at 671-72; LBP-09-26, 70 NRC at 977.

[38] *See* Final Rule: "Need for Power and Alternative Energy Issues in Operating License Proceedings," 47 Fed. Reg. 12,940, 12,941 (Mar. 26, 1982).

[39] *See Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 373-74 (1989).

[40] *See* 10 C.F.R. § 51.95(b).

Cite as 72 NRC 564 (2010) **CLI-10-30**

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. 50-247-LR**
50-286-LR

ENTERGY NUCLEAR
OPERATIONS, INC.
(Indian Point, Units 2 and 3) **November 30, 2010**

The Commission denies petitions for interlocutory review of an Atomic Safety and Licensing Board decision that admitted new and amended contentions.

INTERLOCUTORY APPEALS

Pursuant to 10 C.F.R. § 2.341(f)(2), the Commission may, at its discretion, grant a party's request for interlocutory review of a Board decision. A petition for interlocutory review will be granted only if the party seeking review demonstrates that the issue for which it seeks review (i) threatens the party 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.

PRECEDENTIAL EFFECT

Unreviewed Board decisions lack precedential effect.

INTERLOCUTORY APPEALS

Parties should not seek interlocutory review by invoking the grounds under which the Commission might exercise its supervisory authority.

MEMORANDUM AND ORDER

I. INTRODUCTION

In separate petitions before us, Applicant Entergy Nuclear Operations, Inc. (Entergy) and the NRC Staff seek interlocutory review of the Atomic Safety and Licensing Board decision LBP-10-13.[1] The Board's decision admitted two new and two amended contentions filed by the State of New York. Entergy and the Staff seek review of LBP-10-13 only to the extent that the Board admitted the new contentions, now consolidated as Contention NYS-35/36. New York and the State of Connecticut oppose the petitions.[2] As outlined further below, we deny the petitions because they do not meet the interlocutory review standard.

II. BACKGROUND

Pursuant to NRC regulations, Entergy's Environmental Report for the Indian Point license renewal application included a Severe Accident Mitigation Alternatives (SAMA) analysis, outlining the costs and benefits of potential mitigation measures to reduce severe accident risk or consequences.[3] In response to Staff requests for additional information, Entergy provided clarifications and revisions of the analysis.[4] In November 2009, Entergy acknowledged in a letter to the Staff that there was a discrepancy in the wind direction inputs to the code used for

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[1] Applicant's Petition for Interlocutory Review of LBP-10-13 (July 15, 2010) (Entergy Petition); NRC Staff's Petition for Interlocutory Review of the Atomic Safety and Licensing Board's Decision Admitting New York State Contentions 35 and 36 on Severe Accident Mitigation Alternatives (LBP-10-13) (July 15, 2010) (Staff Petition). *See also* LBP-10-13, 71 NRC 673 (2010).

[2] The State of New York's and the State of Connecticut's Combined Reply to Entergy and NRC Staff Petitions for Interlocutory Review of the Atomic Safety and Licensing Board's Decision Admitting the State of New York's Contentions 35 and 36 (LBP-10-13) (July 26, 2010).

[3] *See* 10 C.F.R. § 51.53(c)(3)(ii)(L); Applicant's Environmental Report § 4.21 & Attachment E.

[4] *See* Reply to Request for Additional Information Regarding License Renewal Application — Severe Accident Mitigation Alternatives Analysis (Feb. 5, 2008) (ADAMS Accession No. ML080420264); Letter from Fred Dacimo, Vice President, License Renewal, Entergy Nuclear Northeast, to U.S. NRC, Supplemental Reply to Request for Additional Information Regarding License Renewal Application — Severe Accident Mitigation Alternatives Analysis (May 22, 2008) (ADAMS Accession No. ML081490336).

the SAMA analysis.[5] Entergy therefore committed to correct the wind direction inputs and accordingly "re-analyze the SAMAs for both units," including revising the estimates of offsite population dose and offsite economic costs.[6] Shortly thereafter, Entergy submitted its reanalysis with the corrected wind direction inputs.[7]

Subsequently, New York submitted two new contentions, NYS-35 and NYS-36, challenging Entergy's December 2009 Reanalysis.[8] Both contentions claimed that the revised SAMA analysis violates the National Environmental Policy Act (NEPA), the President's Council on Environmental Quality's regulations, the NRC SAMA regulation, or federal case law.[9]

NYS-35 claimed that Entergy has not sufficiently completed the cost-benefit analysis for nine specific mitigation measures — or "SAMAs" — identified in the December 2009 Reanalysis as "potentially cost-beneficial."[10] NYS-35 centered on Entergy's stated intention to conduct an additional analysis — an "engineering project" cost-benefit analysis — to consider further the costs and benefits of SAMAs currently identified as "potentially" cost-beneficial.[11] New York argued that without completing the "engineering project" cost-benefit analysis to determine ultimately which, if any, of these nine SAMAs are "finally determined to be cost-effective," the December 2009 Reanalysis does not satisfy NEPA and related environmental regulations.[12] As proffered, NYS-35 additionally claimed that any of these SAMAs ultimately found "sufficiently cost-effective[ ] must be added as license conditions before a new and extended operating license can be issued."[13]

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[5] *See* Letter from Fred Dacimo, Vice President, License Renewal, Entergy Nuclear Northeast, to U.S. NRC, Entergy Nuclear Operations Inc., Telephone Conference Call Regarding Met Tower Data for SAMA Analysis (Nov. 16, 2009) (ADAMS Accession No. ML093340049).

[6] *Id.* at 1.

[7] Letter from Fred Dacimo, Vice President, License Renewal, Entergy Nuclear Northeast, to U.S. NRC, License Renewal Application — SAMA Reanalysis Using Alternate Meteorological Tower Data (Dec. 11, 2009) (ADAMS Accession No. ML093580089) (December 2009 Reanalysis).

[8] *See* State of New York's New and Amended Contentions Concerning the December 2009 Re-analysis of Severe Accident Mitigation Alternatives Reanalysis (Mar. 11, 2010) (New Contentions) at 13-50. *See also* 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). In addition to the new contentions, NYS-35 and NYS-36, New York also submitted two amended contentions, NYS-12B and NYS-16B, which are not at issue in this decision.

[9] *See, e.g.,* New Contentions at 13, 36 (citing 10 C.F.R. § 51.53(c)(3)(ii)(L), and *Limerick Ecology Action, Inc. v. NRC,* 869 F.2d 719 (3d Cir. 1989)).

[10] *See id.* at 13, 15-17, 22-35.

[11] *See, e.g., id.* at 15, 23-25.

[12] *See id.* at 13. *See also id.* at 15-17, 22-35.

[13] *See id.* at 13.

NYS-36 focused on nine other SAMAs, asserting that the December 2009 Reanalysis shows these "for the first time, to have *substantially* greater benefits in excess of their costs."[14] More specifically, New York claimed that these SAMAs now have a "margin of benefit over cost [that] is so high that there is little chance that even a more complete cost estimate will be able to eliminate the substantial benefit."[15] NYS-36 went on to claim that the December 2009 Reanalysis violates NEPA and related regulations because although the reanalysis shows these SAMAs "to have substantially greater benefits in excess of their costs . . . [they] are not being included as conditions" of the proposed renewed license.[16] New York argued that the Administrative Procedure Act requires agencies to provide a "rational basis for actions taken by it," but that the reanalysis fails to provide a "rational basis" for not committing to implement "clearly cost-effective SAMAs."[17]

In LBP-10-13, the Board admitted the two new contentions as consolidated contention NYS-35/36.[18] The Board admitted the contentions only in part, however, stressing that the "NRC Staff does not have to require implementation [of SAMAs], and an intervenor such as New York cannot demand implementation . . . as part of a license renewal proceeding."[19] The Board therefore rejected as outside the scope of this Part 54 license renewal proceeding any portion of the contentions "demanding implementation" of cost-beneficial SAMAs.[20]

Nonetheless, the Board went on to reason that the Staff has the "option" to impose, "prior to license renewal," additional conditions to an applicant's current licensing basis (CLB) as a backfit under 10 C.F.R. Part 50, and that "as a result of its SAMA review," the Staff could choose "to impose such conditions that are necessary to protect the environment . . . under a Part 50 backfit procedure."[21] Under this reasoning, the Board found NYS-35 admissible "insofar as it alleges that the Draft SEIS [Supplemental Environmental Impact Statement] does not provide a rational basis for granting the license extension without mandating a CLB backfit" of any SAMAs that in "any final analysis" are "classified as cost-effective."[22] In addition, given that Entergy intends to perform further engineering cost analysis, the Board admitted "the portion of NYS-35 calling for completion of the cost-benefit analysis to determine which SAMAs are cost-beneficial to

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[14] *See id.* at 36 (emphasis added).

[15] *Id.* at 46. *See also id.* at 37.

[16] *Id.* at 36.

[17] *Id.* at 40-41.

[18] LBP-10-13, 71 NRC at 695-98, 701-02.

[19] *Id.* at 697.

[20] *See id.* at 697, 701.

[21] *See id.* at 697. *See also* 10 C.F.R. § 50.109 (regulation governing the backfitting of a facility).

[22] LBP-10-13, 71 NRC at 698.

implement."[23] The Board also admitted NYS-36 in part, finding a "triable issue of fact . . . whether the NRC Staff has fulfilled its duty to take a hard look [under NEPA] at SAMAs deemed potentially cost-beneficial in Entergy's December 2009 [ ] 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."[24]

III. ANALYSIS

Pursuant to 10 C.F.R. § 2.341(f)(2), we may, at our discretion, grant a party's request for interlocutory review of a Board decision. We grant interlocutory review only in "extraordinary circumstances."[25] A petition for interlocutory review will be granted only if the party seeking review demonstrates that the issue for which it seeks review:

> (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.[26]

Entergy and the Staff both argue that the Board's decision improperly imports Part 50 operating reactor oversight issues — going to the Indian Point reactors' current licensing basis — into a NEPA analysis and a Part 54 license renewal proceeding.[27] These arguments are not without force. Portions of the Board's decision appear problematic, and may warrant our review later in the proceeding. But the "mere potential for legal error" in a contention admissibility decision is not a ground for interlocutory review.[28]

We find uncompelling the Staff's and Entergy's claims that the Board's decision will result in a pervasive, unusual impact on the proceeding. We do not read LBP-10-13, a decision on contention admissibility, to *require* the Staff

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[23] *Id.*

[24] *Id.* at 702.

[25] *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 133 (2009) (citation omitted).

[26] *See* 10 C.F.R. § 2.341(f)(2).

[27] *See, e.g.,* Entergy Petition at 3-6, 13-20; Staff Petition at 12-16, 19-21.

[28] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 35 (2008); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001).

either to impose license conditions or to undertake formal Part 50 backfit analyses for the "potentially cost-beneficial" SAMAs identified in contention NYS-35/36. The Board has admitted a consolidated contention challenging the adequacy of the NEPA SAMA analysis. To the extent that the contention may call for further "explanation" of the SAMA analysis conclusions, we see no unusual or pervasive impact on the proceeding. Similarly, to the extent that the Board has admitted the issue of whether the current SAMA cost-benefit estimates are sufficient for the NEPA analysis, we can discern no "extraordinary" impact on the proceeding. We have long held and recently reiterated — in this very proceeding — that "increased litigation delay and expense do not justify review of an admissibility decision."[29]

Nor has Entergy or the Staff demonstrated an immediate, serious, and irreparable harm that cannot be reversed on appeal, if warranted, following the Board's final decision. The Staff states that it already provided the Board with a "detailed and rational explanation of why SAMA-based backfits to the CLB are not required for license renewal."[30] The Staff's concern is that while it "could provide the same type of explanation it provided previously," the Board "appears to have implicitly rejected this explanation."[31] If the Board in fact ultimately rejects the Staff's arguments, the Staff will have the opportunity to appeal the final decision.[32]

IV. CONCLUSION

For the reasons provided above, we *deny* the Entergy and Staff petitions for interlocutory review of the Board's ruling in LBP-10-13, without prejudice to Entergy's and the Staff's ability to file petitions for review following a final order by the Board.[33]

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[29] *See* CLI-09-6, 69 NRC at 133.

[30] *See* Staff Petition at 15.

[31] *See id.* at 22-23 n.59.

[32] Entergy additionally suggests that while the Board's decision may not provide "grounds for interlocutory review," it raises novel questions of law that may adversely impact other proceedings involving SAMA issues, and therefore may warrant Commission *sua sponte* review under our exercise of inherent supervisory authority over adjudicatory proceedings. *See* Entergy Petition at 24-25. We decline to take *sua sponte* review, and note further that unreviewed Board decisions lack precedential effect. *See Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998). *See also Indian Point,* CLI-09-6, 69 NRC at 138 (parties should not seek interlocutory review by invoking the grounds under which the Commission might exercise its supervisory authority).

[33] Because we deny the petitions for interlocutory review, we need not rule on New York's request for an oral argument before the Commission. *See* The State of New York's Request for Oral Argument on the Merits of Entergy and Staff's Appeal Should the Commission Accept Interlocutory Review (Aug. 12, 2010).

IT IS SO ORDERED.[34]

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of November 2010.

[34] Commissioner Apostolakis did not participate in this matter.

Cite as 72 NRC 571 (2010) **LBP-10-20**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Dr. William M. Murphy

In the Matter of **Docket Nos. 52-029-COL**
52-030-COL
(ASLBP No. 09-879-04-COL-BD01)

PROGRESS ENERGY FLORIDA, INC.
(Levy County Nuclear Power Plant,
Units 1 and 2) **November 18, 2010**

RULES OF PRACTICE: MOTIONS FOR SUMMARY DISPOSITION

Contention 8A (C-8A) alleges that the combined license application (COLA) by Progress Energy Florida, Inc. (PEF), which addresses the means by which PEF will manage low-level radioactive waste (LLRW) onsite for the period of time beyond the initial storage period (2 years) specified in the AP1000 Design Control Document (DCD), is inadequate. PEF's motion for summary disposition of C-8A is denied because PEF's LLWR plan (after the initial 2 years) fails to specify the "means for controlling and limiting radioactive effluent and radiation exposures within the limits set forth in Part 20," 10 C.F.R. § 52.79(a)(3), at "a *level of information sufficient* to enable the Commission to *reach a final conclusion on all safety matters* that must be resolved by the Commission *before* the issuance of a combined license" as required by 10 C.F.R. § 52.79(a). 10 C.F.R. § 52.79(a) (emphasis added).

RULES OF PRACTICE: MOTIONS FOR SUMMARY DISPOSITION

Absent the existence of an offsite LLRW disposal facility that is currently licensed and available to accept LLRW from the Applicant's facility, it is reasonably foreseeable that LLRW generated by the normal operations of the facility will need to be stored onsite for longer than the 2-year term that is currently envisioned by the AP1000 DCD that is referenced in the COLA.

RULES OF PRACTICE: MOTIONS FOR SUMMARY DISPOSITION

Disputes as to whether an offsite LLRW disposal facility will (or will not) be licensed and available within the initial 2-year term of the license are not material to this motion for summary disposition, because the motion assumes that more than 2 years of onsite management is needed, and asserts that PEF's extended LLRW plan is legally adequate to cover that extended time period.

COMBINED LICENSE APPLICATIONS (COLA): CONTENTS OF APPLICATIONS — ENFORCEABLE COMMITMENTS

An LLWR plan that states that "implementation of additional waste minimization strategies could extend the duration of temporary radwaste storage capability" and that the Applicant "will consider strategies to reduce generation of [LLRW] including reducing the in-service run length of resin beds, as well as resin selection, short loading, and point of generation aggregation techniques" provides no enforceable commitments as to whether the Applicant will implement a waste minimization plan, or, if so, what the plan will contain.

COMBINED LICENSE APPLICATIONS (COLA): CONTENTS OF APPLICATIONS — ENFORCEABLE COMMITMENTS

An LLRW plan that provides that "if additional storage capacity for [LLRW] is required, further temporary storage would be developed in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-4" does not provide enforceable commitments or a level of information sufficient to satisfy 10 C.F.R. § 52.79(a)(3). The NRC guidance document provides broad and general principles for designing an appropriate waste storage facility but does not provide sufficient information for the Commission to make a final safety determination, now, as to whether PEF has demonstrated the "means for controlling and limiting . . . radiation exposures" to be within the Part 20 limits. 10 C.F.R. § 52.79(a)(3).

COMBINED LICENSE APPLICATIONS (COLA): CONTENTS OF APPLICATIONS

Section 52.79(a) of 10 C.F.R. does not require the submission of design details or detailed construction plans. The term "details" is an unnecessary pejorative term that implies minutiae. But the regulation does require that the Final Safety Analysis Report specify the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in Part 20 at a "level of information sufficient" to enable the Commission to reach a "final conclusion" on all safety matters that must be resolved by the Commission "before" issuance of a combined license." 10 C.F.R. § 52.79(a) and (a)(3).

COMBINED LICENSE APPLICATIONS (COLA): CONTENTS OF APPLICATIONS

The words of 10 C.F.R. § 52.79(a)(3), specify that an FSAR in a COL application must contain a "level of information" that is "sufficient" to enable the Commission to make the necessary safety determination. Thus, the relevant question is: Does the Extended LLRW Plan contain that level of information?

COMBINED LICENSE APPLICATIONS (COLA): CONTENTS OF APPLICATIONS

Committing to follow a process or a method by which compliance can be achieved does not, by itself, provide a level of information sufficient to allow the Commission to make the Part 20 determination now, before the COL is issued. While procedures can be a part of an LLRW plan, a plan which is entirely procedural is not sufficient to meet 10 C.F.R. § 52.79(a)(3). A commitment to comply with the law and NRC guidance, even with the normal presumption of compliance, does not, itself, provide sufficient information to satisfy 10 C.F.R. § 52.79(a)(3).

COMBINED LICENSE APPLICATIONS (COLA): CONTENTS OF APPLICATIONS

The Commission's holding that 10 C.F.R. § 52.79(a)(3) can be satisfied by an FSAR that states "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" is stated in the conjunctive ("and"), not the disjunctive ("or"). The Commission did not state that an FSAR that is only procedural can satisfy the regulation.

COMBINED LICENSE APPLICATIONS (COLA): CONTENTS OF APPLICATIONS

The fact that the current FSAR does not specify concrete information about the additional onsite LLRW storage capacity during the extended time period (after 2 years), but instead specifies that the Applicant will perform a risk and safety review pursuant to 10 C.F.R. § 50.59 later, before it constructs and operates such additional storage indicates, almost per se, that the current FSAR does not provide "a level of information sufficient to . . . reach a final conclusion on all safety matters . . . before issuance of the combined license" as required by 10 C.F.R. § 52.79(a).

COMBINED LICENSE APPLICATIONS (COLA): CONTENTS OF APPLICATIONS

NRC Regulatory Issue Summary 2008-32, which repeatedly acknowledges that onsite storage of LLRW at reactor sites may be for a long and indefinite term and is not otherwise subject to independent licensing under Part 30, emphasizes the importance of carefully and fully reviewing the adequacy of extended onsite storage of LLRW now, as required by 10 C.F.R. § 52.79(a).

COMBINED LICENSE APPLICATIONS (COLA): CONTENTS OF APPLICATIONS

The fact that the PEF's extended LLRW plan is contingent does not mean that it does not need to comply with 10 C.F.R. § 52.79 or that it is subject to a relaxed standard. The "level of information sufficient" to satisfy 10 C.F.R. § 52.79(a) is the same, whether the plan is for the first 2 years and noncontingent, or it is for the second 2 years, and is contingent. In either case, the level of information must be sufficient for the Commission to be able to make the necessary Part 20 determination before the COL is issued.

COMBINED LICENSE APPLICATIONS (COLA): CONTENTS OF APPLICATIONS

The fact that an LLRW plan postpones some decisions does not necessarily mean that it does not provide sufficient information. For example, an LLRW plan could specify that if, after 2 years, additional storage is needed, then the licensee will build an additional storage building with a capacity of 3900 cubic feet, or 7800 cubic feet, or 11,700 cubic feet. If each of these three options is described with a level of information sufficient for NRC to make the necessary safety determinations now, then postponing the decision between them would not

violate 10 C.F.R. § 52.79(a). The problem with PEF's Extended LLRW Plan is not postponement, but is its utter lack of content. The Extended LLRW Plan keeps *all* options open to PEF and does not provide sufficient information to make the necessary Part 20 determinations now.

COMBINED LICENSE APPLICATIONS (COLA): CONTENTS OF APPLICATIONS

Requiring PEF to provide a level of information sufficient to meet 10 C.F.R. § 52.79(a) does not rob it of the flexibility necessary to deal with changes in circumstances (e.g., if Levy generates more LLRW per year than expected, or less LLRW, or different types of LLRW). Requiring PEF to provide sufficient information, now, to allow the NRC to make the necessary safety determinations, now, does not prevent PEF from *changing* these plans, as circumstances warrant, via the 10 C.F.R. § 50.59 and/or license amendment processes. Under our reading, PEF has all the flexibility it needs to deal with future contingencies.

MEMORANDUM AND ORDER
(Denying Motion for Summary Disposition of Contention 8A)

Before the Board is a motion by Progress Energy Florida, Inc. (PEF) for summary disposition of Contention 8A (C-8A), which challenges the adequacy of PEF's plan for onsite management of low-level radioactive waste (LLRW).[1] For the reasons stated below, we conclude, as a matter of law, that PEF's LLRW plan does not satisfy 10 C.F.R.§ 52.79(a) because it does not provide a level of information sufficient to enable the Commission to reach a final conclusion, before the issuance of the proposed combined license, to resolve whether PEF's means for controlling and limiting radioactive effluents and radiation exposures (beyond the initial storage period specified in the AP1000 Design Control Documents) will be within the limits set forth in 10 C.F.R. Part 20. Accordingly, the motion for summary disposition is denied.

I. BACKGROUND — PROCEDURAL POSTURE

On July 28, 2008, PEF filed a combined license application (COLA), pursuant to 10 C.F.R. Part 52, to construct and to operate two nuclear power reactors in

[1] Motion for Summary Disposition of Contention 8A (Aug. 27, 2010) (PEF Motion).

Levy County, Florida.[2] On July 8, 2009, we granted the petition to intervene of the Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (collectively, Joint Intervenors), finding that they had demonstrated standing and had proffered three admissible contentions. *See* LBP-09-10, 70 NRC 51, 147 (2009).

One of the contentions that we admitted was Contention 8. *Id.* This was a contention of omission alleging that the COLA was inadequate under 10 C.F.R. § 52.79(a) because it failed to address the management of LLRW for a longer term than envisioned in the COLA. Specifically, Contention 8, as admitted, alleged that the COLA

> [I]s inadequate because the Safety Analysis Report assumes that the class B, C, and greater than C low-level radioactive waste [LLRW] 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 PEF will need to manage such [LLRW] on the Levy site for a more extended period of time.

Id. at 150. The rationale for Contention 8 was that the COLA assumed that PEF would manage its LLRW by promptly shipping it offsite and thus only provided for a limited amount of onsite storage capacity (approximately 2 years' worth), but that the viability of this plan is questionable given that, since July 1, 2008, there has been no facility in the United States to which such wastes could legally be shipped and disposed. *See id.* at 117 & n.54, 124. This was based on the factual allegation that, as of July 1, 2008, the LLRW disposal facility in Barnwell, South Carolina, was closed to wastes other than wastes generated in South Carolina, New Jersey, and Connecticut. *Id.* at 117 n.54.

The Board reasoned that "[g]iven the closure of Barnwell, the current absence of any alternative disposal facility for [Levy Nuclear Plant LLRW], and the large length of time often required for the licensing of new [LLRW] facilities, we conclude that Petitioners have raised a legitimate and material safety issue." *Id.* at 124. We stated that the "Petitioners have fairly alleged that . . . the COLA does not confront the plausible looming scenario whereby the [LLRW] 2-year storage capacity [specified in the COLA] will be reached and exceeded." *Id.*

PEF appealed the admission of Contention 8, arguing that the Board had "effectively 'created a new regulatory requirement' that PEF's [COLA] must 'confront the plausible problem of longer term management of [LLRW] onsite.'" CLI-10-2, 71 NRC 27, 29-34, 46 (2010).

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[2] Progress Energy Florida, Inc.; Application for the Levy County Nuclear Power Plant Units 1 and 2; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 74,532, 74,532 (Dec. 8, 2008).

The Commission affirmed the admission of Contention 8. *Id.* at 46-47. First, the Commission acknowledged that "[d]ue 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." *Id.* at 41. In addition, the Commission agreed with the Board that "[a]bsent 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 [PEF's] COL application."[3] *Id.* at 46. The Commission noted that 10 C.F.R. § 52.79(a)(3) requires the COLA "to describe the 'means for controlling and limiting the radioactive effluents and radiation exposures'" from the proposed nuclear reactors. *Id.* at 46 (citing 10 C.F.R. § 52.79(a)(3)). In these circumstances, the Commission affirmed the admission of Contention 8, concluding that "the Board reasonably interpreted [10 C.F.R. § 52.79(a)(3)] to find that Progress must address, in its COL application, how it intends to handle an accumulation of LLRW" for a longer term than currently envisioned in the COLA.[4]

Meanwhile, the NRC Staff and PEF took steps that would result in the dismissal of Contention 8 as a contention of omission. Specifically, the NRC Staff issued two requests for additional information (RAIs) asking PEF, *inter alia,* to "submit the details of any proposed onsite storage facility" for "low-level waste [that] has been identified beyond that provided in [the] AP1000 Standard Design because of unavailability of offsite storage."[5] PEF responded to the two RAIs submitting,

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[3] The Commission noted that the problem arises from the lack of any currently (2010) licensed disposal facility in the U.S. and that PEF acknowledged that its COLA only provides for approximately 2 years' accumulation of LLRW. CLI-10-2, 71 NRC at 46 n.101. As a practical matter, however, it is well understood that the 2-year waste accumulation clock does not start to run until the PEF nuclear power reactors actually commence operation, which will be at least several years hence. For example, if it takes 2 years for NRC to issue the license to construct and operate the reactors, and an additional 3 years for PEF to commence and complete construction of the reactors, then PEF might not exceed its initial onsite LLRW storage capacity for at least 7 years (2 + 3 + 2 years), e.g., not until 2017. Issues related to this point (e.g., the likelihood that an additional offsite LLRW disposal facility would be available within this longer time frame) were litigated when the Board admitted Contention 8 and the Commission affirmed. For purposes of Contention 8A, however, no party has raised this issue. To the contrary, PEF specifically denies that there is any factual dispute concerning this issue: "[A]ny potential difference of opinion between Progress and Joint Intervenors regarding the current or future availability of offsite storage for LLRW generated by Levy is irrelevant to C-8A, because Progress's LLRW plans address that contingency. Therefore, there are no material facts in dispute, and the Board can grant summary disposition as a matter of law." PEF Motion at 15.

[4] CLI-10-2, 71 NRC at 46-47. The Commission narrowed Contention 8 to exclude any issues regarding the storage of greater than Class C waste. *Id.* at 48.

[5] PEF Motion, Attachment B, RAI Responses to NRC Dated 12/4/2009 at 4 (Dec. 4, 2009) (Attachment B).

inter alia, its plan for managing LLRW for a term longer than currently anticipated in the COLA. PEF Motion at 5-6.

On April 14, 2010, PEF and Joint Intervenors jointly moved for settlement and dismissal of Contention 8, apparently because they agreed that Contention 8, a contention of omission, had been cured by PEF's responses to the NRC Staff's RAIs.[6] The proposed settlement specified that the Contention 8 would be dismissed and that the Joint Intervenors would have 30 days within which to submit a new contention challenging the adequacy of the LLRW plan that had been submitted by PEF in response to the RAIs. Joint Motion at 2. The Board approved the settlement agreement and dismissed Contention 8.[7]

On May 14, 2010, pursuant to the settlement agreement, the Joint Intervenors moved for the admission of C-8A, alleging that PEF's plan for managing LLRW for the period beyond the term specified in the AP1000 Standard Design, failed to provide sufficient information to satisfy the relevant legal requirements.[8]

On August 9, 2010, the Board admitted C-8A.[9] This contention alleges that the plan submitted by PEF in response to the RAIs is inadequate under NRC regulations. It reads as follows:

> Progress Energy Florida's (PEF's) COL application is inadequate to satisfy 10 C.F.R. 52.79 because it assumes that class B and C radioactive waste generated by proposed Levy Units 1 and 2 will be promptly (e.g., within two years) shipped offsite, while currently there is an absence of access to a licensed disposal facility or capability to isolate the radioactive waste from the environment. The proposed amendment to the Levy County COL also fails to offer sufficient information to demonstrate the adequacy of PEF's plans for storing Class B and C radioactive waste on the Levy site if offsite disposal capacity is not available within two years. PEF's plan to postpone most of its decisions regarding how and where to store the waste (including "minimizing" the volume of the waste) until sometime after issuance of the license for Levy violates Section 52.79 and also the Atomic Energy Act's requirement that safety findings must be made before the license is issued.

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[6] Joint Motion for Approval of Settlement and Dismissal of Contention 8 (Apr. 14, 2010) at 1-2. *See infra* Section IV.B.3.a for an explanation of these RAI responses.

[7] Licensing Board Order (Approving Settlement and Dismissal of Contention 8) (Apr. 21, 2010) at 1 (unpublished).

[8] Motion by Joint Intervenors to Amend Contention 8 on So-Called "Low-Level" Radioactive Waste and Safety Issues Associated with Extended On-Site Storage (May 14, 2010) at 1-3 (Joint Intervenors' Motion to Amend Contention 8); *see also id.,* Declaration of Diane D'Arrigo in Support of Interveners' [sic] Amended Contention 8 on So-Called "Low-Level" Radioactive Waste Safety Issues ¶ 19 (May 14, 2010) (D'Arrigo Decl.).

[9] Licensing Board Memorandum and Order (Ruling on Joint Intervenors' Motion to File and Admit New Contention 8A) (Aug. 9, 2010) at 17 (unpublished) (Order Admitting C-8A).

Order Admitting C-8,A at 5 (quoting Joint Intervenors' Motion to Amend Contention 8 at 3).

On August 27, 2010, pursuant to 10 C.F.R. § 2.1205, PEF filed the instant motion for summary disposition of C-8A. PEF Motion at 1.

II. APPLICABLE LEGAL STANDARDS

In a Subpart L proceeding, such as this one, the Board must apply the summary disposition standard set forth in Subpart G. 10 C.F.R. § 2.1205(c). In general, the Commission applies the same standard that the federal courts apply when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).[10] Under the Subpart G standard, summary disposition is proper:

> if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, 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.

10 C.F.R. § 2.710(d)(2). Thus, there are two criteria. First, the movant must show that there is no genuine issue as to any material fact. Second, the movant must establish that its legal position is correct.

As to the first criterion, the moving party bears the burden of demonstrating that there is no genuine issue as to any material fact. 10 C.F.R. § 2.325; *Advanced Med. Sys.,* CLI-93-22, 38 NRC at 102. Summary disposition may be granted only if the truth is clear. *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 467 (1962). Any doubt as to the existence of a genuine issue of material fact is resolved against the moving party. *Advanced Med. Sys.,* CLI-93-22, 38 NRC at 102. Because the burden is on the moving party, the Board must examine the record in the light most favorable to the nonmoving party and give the nonmoving party the benefit of all favorable inferences that can be drawn from the evidence. *Id.* Summary disposition "is not a tool for trying to convince a Licensing Board to decide, on written submissions, genuine issues of material fact that warrant resolution at a hearing."[11]

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[10] *Advanced Medical Systems* construes the prior version of the summary disposition regulation, 10 C.F.R. § 2.749 (2004). The current regulations, 10 C.F.R. §§ 2.1205 and 2.710, are substantially similar. *See also Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010).

[11] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509 (2001) (emphasis omitted).

III. POSITIONS OF THE PARTIES

PEF's motion asserts that it meets the two basic criteria for summary disposition. PEF asserts both "that no genuine issue of material fact exists with respect to" C-8A, and that the motion presents a purely legal issue, i.e., whether the COLA includes "information regarding the means by which it will manage [LLRW] at Levy that is sufficient to satisfy the requirements set forth in 10 C.F.R. § 52.79(a)(3)." PEF Motion at 1. According to PEF, the "resolution of Contention 8A requires a legal, rather than a factual, determination." *Id.* at 4 (capitalizations omitted).

With regard to the first criterion for the granting of summary disposition — no genuine issue as to any material fact — PEF attaches its December 4, 2009, responses to NRC RAIs 11.04-1 and 11.04-2 and asserts that there is no dispute that these RAI responses constitute PEF's plan for managing LLRW "including its plans in the event that more than a two-year accumulation of such waste would have to be stored at Levy." *Id.* at 2. PEF's statement of material facts on which no genuine dispute exists includes the statement that PEF's "RAI responses provide [PEF's] plan, if needed, for controlling exposures from storage of more than a two-year accumulation of LLRW."[12]

PEF says that the alleged facts that *were* in dispute when the Board originally admitted C-8A, i.e., whether PEF will ever actually need to manage LLRW for a term longer than contemplated in the original COLA (approximately 2 years), are *no longer material.* PEF Motion at 14.

> These alleged facts [that no offsite facility will be available and PEF needs more than two years of onsite waste management capacity], even if assumed to be true, are not material to the matter in dispute. If Levy's initial LLRW storage capacity is inadequate, Progress's LLRW plan as described above and in its RAI Responses sets forth the means through which Progress would increase that capacity.

Id. at 14-15. PEF states that, under its LLRW plan, "at least two years of storage is available within the facilities described in the DCD [Design Control Document]." *Id.* If an offsite facility is not available within that time period, then PEF "will implement a waste minimization plan," and if additional onsite storage capacity is needed for LLRW, then PEF "would develop further temporary storage in accordance with NUREG-0800." *Id.* at 15. Thus, PEF says that "any potential difference of opinion between Progress and Joint Intervenors regarding the current or future availability of offsite storage for LLRW generated by Levy is irrelevant to C-8A, because Progress's LLRW plan addresses that contingency." *Id.*

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[12] PEF Motion, Attachment C, Statement of Material Facts Not in Dispute ¶ 9 (Attachment C).

PEF further asserts that, because it has now submitted a plan for managing LLRW in the event that offsite facilities are not available and onsite management will be needed for more than the term originally contemplated in the COLA (approximately 2 years), the only issue is whether the plan for managing LLRW for the period beyond the initial 2 years satisfies 10 C.F.R. § 52.79(a)(3). *Id.* at 4-7 & n.8.

PEF notes that this regulation requires two things. First it specifies that the Final Safety Analysis Report (FSAR), which is part of the COLA, "must describe the kinds and quantities of radioactive materials that Levy is expected to produce." *Id.* at 5. Second, the FSAR "must describe the 'means' by which radioactive effluents and radiation exposures will be controlled and limited to meet the Part 20 requirements." *Id.*

PEF argues that its plan complies with these regulatory requirements, and therefore that PEF is entitled to summary disposition in its favor as a matter of law. *Id.* at 6-14. PEF says that the FSAR satisfies the first requirement because the COLA incorporates the information contained in the AP1000 Design Control Document (DCD) (both the codified Revision 15 and the pending revisions submitted by Westinghouse[13]), and that "[t]he AP1000 DCD describes the kinds and quantities of radioactive materials expected to be generated" by an AP1000 nuclear power plant. PEF Motion at 5-6. PEF notes that the Board has found that PEF has satisfied this portion of 10 C.F.R. § 52.79(a)(3). *Id.* at 6 (citing Order Admitting C-8A at 17-18 n.22).

PEF argues that the only legal issue presented in its motion for summary disposition concerns the second part of 10 C.F.R. § 52.79(a)(3), i.e., "whether [PEF] has satisfied the requirement in 10 C.F.R. § 52.79(a)(3) that the FSAR identify the 'means' for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in 10 C.F.R. Part 20." *Id.* PEF notes that "the Commission has stated in this proceeding that '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.'" *Id.* at 8 (citing CLI-10-2, 71 NRC at 46) (emphasis in original). PEF interprets the regulation to require that the FSAR specify "the method or plan by which [PEF]

[13] *See* 73 Fed. Reg. at 74,532. PEF's COLA originally referenced Revisions 15 and 16 of the Westinghouse Electric Company, LLC AP1000 certified design. *Id.* Revision 15 has been certified by the NRC and Revision 16 is the subject of an ongoing rulemaking. *Id.*; *see* Design Certification Rule for the AP1000 Design, 10 C.F.R. Part 52, App. D, § III(A). In 2009, PEF updated its application to reference Revision 17 of the AP1000 design, which is also the subject of a pending rulemaking. *See* Letter from Garry D. Miller, General Manager, Nuclear Plant Development, Progress Energy Florida, Inc., to U.S. Nuclear Regulatory Commission (Oct. 2, 2009) (ADAMS Accession No. ML092860397). We note that an applicant that "reference[s] in its application a design for which a design certification application has been docketed but not granted" does so "at its own risk." 10 C.F.R. § 52.55(c).

will meet its commitment to satisfy Part 20, not the specific construction details, design, or location of the precise facilities that would be utilized." *Id.*

PEF argues that its RAI responses describe its plans for addressing LLRW storage at a sufficient level of detail to satisfy 10 C.F.R. § 52.79(a)(3). First, PEF says that, for the initial time frame, the onsite storage facilities described in the AP1000 DCD are adequate, because they "provide for storage capability onsite 'for greater than two years.'" *Id.* (citing Attachment B at 5) (hereinafter referred to as the Initial LLRW Plan). PEF cites to the DCD statement that the AP1000 "waste storage room is approximately 3900 cubic feet, which accommodates more than one full tractor-trailer truckload of storage/shipping containers." *Id.* at 8 n.9.

As the next part of its LLRW plan (dealing with the more extended time frame, and hereinafter referred to as the Extended LLRW Plan), PEF says that "in the event that an offsite facility is not available . . . [PEF] will evaluate reducing the amount of LLRW the Levy plant generates by implementing a waste minimization plan." *Id.* at 8-9 (citing Attachment B at 3, 5). PEF explains that the waste minimization plan "will consider the strategy of 'reducing the in-service run length of resin beds, as well as resin selection, short-loading, and point-of-generation segregation' techniques." *Id.* at 9 (citing Attachment B at 3, 5).

As a further part of its Extended LLRW Plan, PEF says that "if additional onsite storage capacity . . . is required despite implementation of these strategies, Progress will expand the capacity of Levy's licensed storage facilities, consistent with NRC guidance and regulations." *Id.* PEF contemplates that "such additional onsite storage would be designed and built 'utilizing the design guidance provided in NUREG-0800.'" *Id.* If it needs to build such additional onsite storage, PEF says that the plan specifies that it will "conduct written safety analyses under 10 C.F.R. § 50.59," which would allow it to "'make changes in the facility as already described in the final safety analysis report,' such as expanding the capacity of the LLRW storage facility already described in the FSAR, without a license amendment if certain conditions are satisfied.'" *Id.* (citing 10 C.F.R. § 50.59(c)(1)). If such conditions are not satisfied, then PEF says it "could add on-site storage capacity through the NRC's license amendment process." *Id.* (citing Attachment B at 4).

PEF asserts that the foregoing LLRW "plan provides the Commission with adequate assurance that radiation exposures from LLRW stored onsite at Levy will at all times be within the limits set forth in 10 C.F.R. Part 20, including ALARA (10 C.F.R. § 20.1101(b))," as is required by 10 C.F.R. § 52.79(a)(3). *Id.*

PEF argues that the Joint Intervenors are asking for too much detail in the LLRW plan, citing the recent decision by the *Vogtle* Board which concluded that "[w]e 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."[14]

Finally, PEF asserts that the "Joint Intervenors' assertion that 10 C.F.R. § 52.79(a) requires *detailed* plans for expanded LLRW storage capacity to be included in the COLA, if true, would make that regulation inconsistent with NRC guidance . . . ." *Id.* at 14 (emphasis added). PEF states that the NRC's Regulatory Issue Summary 2008-32, "Interim Low Level Radioactive Waste Storage at Reactor Sites" (RIS 2008-32) and NUREG-0800 expressly prefer offsite storage. *Id.* at 13-14. PEF argues that "RIS 2008-32 endorses the 10 C.F.R. § 50.59 process described in Progress's RAI Responses." *Id.* at 13. Further, says PEF, "RIS 2008-32 . . . explain[s] that if the criteria of 10 C.F.R. § 50.59 are not met, the licensee would be required to seek a license amendment . . . [which] would include all of the required *details* regarding the expanded storage capacity." *Id.* (emphasis added). PEF concludes that including such details in a COL would be inconsistent 'with . . . the availability of the mechanisms under 10 C.F.R. . . . § 50.59 . . . for obtaining authorization to construct additional onsite LLRW storage facilities." *Id.* at 14 (quoting *Vogtle,* LBP-10-8, 71 NRC at 444).

In conclusion, PEF claims there are no issues of material fact in dispute and that it is entitled to judgment of C-8A as a matter of law because it has fulfilled the requirements of 10 C.F.R. § 52.79(a)(3). *Id.* at 14-15.

Joint Intervenors oppose the motion for summary disposition on two grounds. First, Joint Intervenors assert that there are genuine issues of material fact in dispute.[15] In addition, they argue that PEF's interpretation of the law is incorrect. Joint Intervenors' Answer at 10-14.

Joint Intervenors assert that a number of material issues of fact are in dispute. First, they assert that there is a dispute concerning the "operational status of LLRW disposal sites" and when and whether PEF will be able to ship wastes to them. *Id.* at 5-6 (capitalizations omitted). Next, Joint Intervenors argue that there is an issue presented by the fact (as they assert it) that it is "more likely than not" that, during startup, the Levy site will generate LLRW at a rate *greater* than projected in the AP1000 DCD due to the so-called "bathtub curve" effect,[16] and

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[14] PEF Motion at 11 (citing *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-8, 71 NRC 433, 444 (2010) (*Vogtle*)).

[15] Intervener's [sic] Response to Applicant's Motion for Summary Disposition of Contention 8A (Sept. 15, 2010) at 1, 4 (Joint Intervenors' Answer).

[16] The "bathtub curve," as described in Attachment D to the Joint Intervenors' Answer, asserts that during the life cycle of any given facility, there are three stages: the break-in phase, the middle life phase, and the wear-out phase — and that the risks (and waste generation rates) will generally be higher during the break-in phase and the wear-out phase. Shown graphically, with time on the X-axis and failure rate on the Y-axis, this would show high levels at the beginning and end of the graph, and low levels in the long middle. Hence a "bathtub" shaped curve. *Id.,* Attachment D, Union of Concerned Scientists, U.S. Nuclear Plants in the 21st Century: The Risk of a Lifetime (May 2004).

thus the onsite storage capacity (2 years) will be insufficient. *Id.* at 6-7. Joint Intervenors assert that there is a dispute concerning the workability of the "trigger" and "timelines" for PEF's LLRW plan. *Id.* at 7. Joint Intervenors argue that PEF's LLRW plan — which contemplates that PEF will, if necessary, implement a waste minimization plan, and, if that does not work, will then perform an analysis under 10 C.F.R. § 50.59, and then, if necessary, will apply for and obtain an amendment to its COL, and then build the additional onsite waste storage facilities — cannot be implemented within 2 years and will thus require that the operating reactors "pause" their production of LLRW until the additional capacity is built. *Id.* at 7. Joint Intervenors say that the plan "does not provide [sufficient time] for the safety review required by NRC regulations" and/or is founded on the "illusion" that PEF will somehow be able to pause its production of LLRW once the reactors commence operation. *Id.* Joint Intervenors argue that now "is the appropriate moment for the 50.59 process to occur . . . instead of supporting PEF kicking the can down the road." *Id.* at 8.

Turning to the issue of legal disputes, Joint Intervenors acknowledge that they are relying primarily on 10 C.F.R. § 52.79(a) as a whole and 52.79(a)(3) in particular, but disagree with PEF's interpretation of these regulations. *Id.* at 10. Joint Intervenors argue that, under these regulations, "the issue is demonstration of compliance with radiation protection standards" and that "PEF's proposed plan does not deliver any certainty whatsoever about demonstration of compliance with Part 20." *Id.* at 11. Joint Intervenors quote the regulations as requiring that the FSAR describe "the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20" (10 C.F.R. § 52.79(a)(3)) and that this must be "at a level of information sufficient to enable the Commission to reach a final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license." *Id.* (quoting 10 C.F.R. § 52.79(a)(3)). Joint Intervenors say that "it is incumbent upon NRC to make a finding as to whether 10CFR20 [sic] and ALARA have been met, for workers and the public prior to granting the COL" and assert that, under PEF's LLRW plan as submitted, it is not clear how this determination can be made. *Id.* at 12.

Next, the Joint Intervenors argue that it is "premature" to rule on this motion for summary disposition, because the NRC Staff has not yet issued its Advanced Final Safety Evaluation Report (AFSER) and the Advisory Committee for Reactor Safeguards (ACRS) has not yet studied it. *Id.* at 13-14. Therefore, they urge that we decline to rule on the motion until these events have occurred. *Id.*

The NRC Staff takes the position that PEF's motion for summary disposition should be granted "[b]ecause there are no material facts in dispute, and because

the Applicant demonstrated that it is entitled to a decision as a matter of law."[17] The NRC Staff agrees with PEF that the issues raised by C-8A are legal and not factual. Staff Answer at 6-7. In addition, the NRC Staff agrees with PEF's interpretation of 10 C.F.R. § 52.79 and asserts that PEF's LLRW plan satisfies the regulation. *Id.* at 7-10.

The NRC Staff asserts that C-8A presents "two legal questions, (1) whether the Applicant must provide the level of detail sought by the Joint Intervenors to meet section 52.79, and (2) whether the Applicant can meet 52.79 by 'postponing most of its decisions' regarding how [LLRW] will be managed in the future." *Id.* at 6 (quoting Order Admitting C-8A at 5). As to the first point, the NRC Staff asserts that "section 52.79(a)(3) does not require more specific detailed information." *Id.* at 8. The NRC Staff notes that "'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." *Id.* (quoting CLI-10-2, 71 NRC at 46). The NRC Staff states that

> [t]here is nothing in the Commission's rulings, or in the regulation itself, that implies that the "means" for controlling LLRW in the FSAR must include construction level information or that it cannot include a plan that sets forth what actions will be taken should the existing LLRW storage prove insufficient.

Id. The NRC Staff says that "the COLA is not deferring compliance with section 52.79(a)(3) . . . [because it] *commits to a known regulatory process* should any future construction become necessary." *Id.* (emphasis added).

The Staff notes that the *Vogtle* Board "concluded that the *detailed design information* sought by the Intervenors in that case was not required to meet section 52.79(a)(3), and that there was no prohibition on an applicant using a plan for compliance that included contingent plans should future LLRW storage become necessary." *Id.* at 9 (citing *Vogtle,* LBP-10-8, 71 NRC at 444) (emphasis added). The Staff concludes that "it is acceptable to meet the regulation with a *plan that includes a process* for adding LLRW capacity" and that therefore PEF "is entitled to a decision as a matter of law." *Id.* at 10 (emphasis added).[18]

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[17] NRC Staff Answer in Support of Progress Energy Florida's Motion for Summary Disposition of Contention 8A (Sept. 16, 2010) at 1 (Staff Answer).

[18] The NRC Staff places a strange caveat on its position. First, it states that it agrees that PEF's LLRW plan satisfies the requirements of 10 C.F.R. § 52.79. *Id.* at 8-9. But then the Staff states that it "does not take a position at this time on whether the Applicant in fact satisfies these requirements." *Id.* at 5.

IV. ANALYSIS AND RULING

Two principal regulations govern our analysis of PEF's motion for summary disposition of C-8A. The first, 10 C.F.R. § 2.1205(c), through its reference to 10 C.F.R. § 2.710(d)(2), sets the two criteria that must be met in order for such a motion to be granted. Under this regulation, the movant must show that (1) the matter entails "no genuine issue as to any material fact" and (2) that it "is entitled to a decision as a matter of law." *See* 10 C.F.R. §§ 2.1205(c), 2.710(d)(2). The second key regulation is 10 C.F.R. § 52.79. C-8A asserts that PEF's LLRW plan is "inadequate to satisfy 10 C.F.R. § 52.79." PEF's motion asserts that it is adequate. Thus, in order to rule on PEF's motion, we must determine whether PEF's LLRW plan satisfies 10 C.F.R. § 52.79.

For the reasons set forth below, we rule that there is no genuine issue of material fact in dispute and that, as a matter of law, PEF's LLRW plan does *not* satisfy 10 C.F.R. § 52.79.

A. No Genuine Issue as to Any Material Fact

If the resolution of C-8A requires the resolution of disputed issues of material fact, then summary disposition cannot be granted. 10 C.F.R. §§ 2.1205(c), 2.710(d)(2). The first step in determining whether or not C-8A requires the resolution of disputed issues of material fact is to identify the issues that are raised in the contention.

Contention 8A, as quoted in full in Section I, above, makes three assertions that are essentially factual in nature. The Joint Intervenors assert that:

1. PEF's plan assumes that LLRW "will be promptly (e.g., within two years) shipped offsite;"
2. "Currently there is an absence of access to [an LLRW] licensed disposal facility;" and
3. "PEF's plan postpone[s] most of its decisions regarding how and where to store the" LLRW.

After studying the contention, and the briefs of the parties, we conclude that that there is no genuine dispute between the parties concerning any factual issue that is *material* to the resolution of Contention 8A. In this respect, we agree with PEF and the NRC Staff.

First and foremost, there is no dispute as to what constitutes PEF's plan for managing LLRW. For purposes of the motion for summary disposition, PEF's LLRW plan can be divided into two parts — the Initial LLRW Plan and the Extended LLRW Plan. The Initial LLRW Plan covers LLRW management for the initial term (approximately 2 years) and is found in Attachment D to the

motion. PEF Motion, Attachment D, AP1000 DCD Excerpts (Attachment D). The Extended LLRW Plan covers LLRW management for the period of time *after* the initial time frame and is found in Attachment B to the motion. Attachment B.

The Initial LLRW Plan, as laid out in Attachment D to the Motion, is section 11.4 of Revision 17 to the AP1000 Design Control Document and is entitled "Solid Waste Management." It covers over fourteen pages of material and includes a description of the functional and safety design bases of the onsite LLRW management system; the system description including a general description and descriptions of all significant components (such as spent resin tanks, pumps, filters, and sampling devices); system operational information (such as spent resin handling, spent filter processing, dry waste processing, and mixed waste processing); a description of the waste processing facilities, auxiliary building, and radwaste building; and a description of PEF's programs for testing, inspection, and quality assurance relating to LLRW management. Attachment D § 11.4, at 11.4-1 to 11.4-13. The Initial LLRW Plan also specifies, by multiple categories, the expected and maximum amounts of LLRW that the Levy plant will generate per year (*id.,* Table 11.4-1) and the expected and maximum annual curie content (for approximately sixty different isotopes) of the primary influents and shipped primary wastes and secondary wastes (*id.,* Table 11.4-2 to Table 11.4-10). There is no material factual dispute that the Initial LLRW Plan, as found in Attachment D, is PEF's plan for the initial operating period of the Levy plant.[19]

Likewise, there is no material factual dispute about what constitutes PEF's Extended LLRW Plan (i.e., plan for managing LLRW for a longer term than is currently envisioned in Attachment D). The Extended LLRW Plan is found in Attachment B, which is PEF's response to two RAIs. In RAI 11.04-2, the NRC Staff notes that "because of [the potential] unavailability of offsite storage" PEF may be required to store LLRW onsite for a time period "beyond that provided in

[19] PEF asserts that the initial onsite storage capacity is "for *greater than two years* at the expected rate of radwaste generation and greater than one year at the maximum rate of radwaste generation." PEF Motion at 8 (citing Attachment B at 5) (emphasis added). We are not sure how PEF reaches this conclusion. PEF notes that the AP1000 DCD states that the onsite storage facility will have a capacity of "approximately 3900 cubic feet, which accommodates more than one full tractor-trailer truckload." *Id.* at 8 n.9 (citing Attachment D at 11.4-6). However, the AP1000 DCD also estimates that the expected generation of "wet and dry wastes" combined, and treated as a "shipped solid," will be 1964 cubic feet per year. Attachment D at 11.4-15. Thus, in 2 years, the expected amount would be 3928 cubic feet ($1{,}964 \times 2$), an amount that exceeds 3900 cubic feet.

In any event, for purposes of the instant motion for summary disposition, it is *not material* whether the initial onsite storage capacity will last precisely 2 years, $2\,{}^{1}/_{2}$ years, or even slightly more. Even PEF agrees that there is no material factual dispute here. PEF Motion at 14-15. The point of C-8A (as was the point of Contention 8) is that "[a]bsent 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 [PEF's] COL application." CLI-10-2, 71 NRC at 46.

the AP1000 Standard Design." Attachment B at 4. Thus, the NRC Staff instructed PEF to "submit the *details* of any proposed onsite storage facility" for such extended time period. *Id.* (emphasis added). Attachment B is PEF's response to that RAI (and to RAI 11.04-1). There is no material factual dispute that PEF's RAI Responses constitute its plan for managing LLRW onsite for the term beyond that provided in the AP1000 DCD, i.e., its Extended LLRW Plan.

Although Joint Intervenors identify several factual issues that they contend are in dispute, we conclude that none of these potential factual disputes are material to the resolution of C-8A. As PEF has stated, any disputes as to whether an *offsite* LLRW disposal facility will be licensed and available within the initial time period (2 to 3 years) "are not material" because even "[i]f Levy's initial LLRW storage capacity is inadequate, Progress's [Extended] LLRW plans as described . . . in its RAI Responses sets forth the means through which Progress would increase that capacity." PEF Motion at 14-15. Likewise, any dispute about the rates at which Levy will generate LLRW (e.g., the "bathtub curve" effect raised by the Joint Intervenors Answer at 6) is not material, because PEF's Extended LLRW Plan addresses this contingency by specifying what PEF intends to do if its initial onsite storage capacity is insufficient. Similarly, even a factual dispute concerning the precise *amount* of onsite storage capacity included in the Initial LLRW Plan (e.g., whether the AP1000 DCD covers 2 years of storage capacity, or somewhat more capacity, *see* PEF Motion at 8) is not material. The RAI, the RAI Responses, and the Extended LLRW Plan all assume (as the Joint Intervenors assert) that the initial AP1000 onsite storage capacity (whatever it is) is insufficient. Thus, there is no material factual dispute on this point.

We note that the Joint Intevernors have raised an interesting factual question as to the workability of the triggers and timelines specified in PEF's Extended LLRW Plan. As we will discuss below, PEF's plan spells out the expected and maximum amount of LLRW that the AP1000 will generate per year and assumes that all such waste will be promptly shipped offsite. PEF provides only a limited amount of onsite storage (enough to store approximately 2 to 2 1/2 years' worth of LLRW). PEF says that, if this initial onsite storage capacity is not enough, then PEF will build more. However, as we discuss in Section IV.B.3.a, below, PEF's Extended LLRW Plan provides for a series of actions that precede the construction and operation of any additional onsite storage. The Joint Intervenors assert, as a factual dispute, that these steps cannot be accomplished in 2 to 2 1/2 years. Under PEF's Extended LLRW Plan, the following events will occur: (a) the Levy plant starts operating; (b) PEF implements a waste minimization plan to try to extend the life of its initial storage capacity; (c) as the Levy plant generates LLRW, PEF evaluates the effectiveness of the waste minimization plan; (d) PEF decides that it needs to construct additional storage capacity; (e) PEF conducts the analysis required under 10 C.F.R. § 50.59 to determine whether the management of a greater amount of LLRW onsite requires a license amendment; (f) PEF applies

for the necessary license amendment; (g) NRC evaluates the license amendment application, makes a determination, and grants the amendment; and (h) PEF constructs the additional storage capacity.[20] The Joint Intervenors assert that these steps and this timeline cannot be completed before the initial storage capacity runs out. Meanwhile, the Joint Intervenors assert that there is no way that PEF can "'pause' the production of this waste once [the Levy reactors] commence" operation. Joint Intervenors Answer at 7.

We agree with the Joint Intervenors that PEF's Extended LLRW Plan raises a timing problem that presents a potential factual dispute. But, under our reading of the law, any such factual dispute is not "material" because, regardless of how that dispute is resolved, it would not change our determination that PEF's LLRW plan does not satisfy 10 C.F.R. § 52.79(a).[21] As we explain below, PEF's Extended LLRW Plan fails to provide a level of information sufficient to make the 10 C.F.R. Part 20 determinations required by 10 C.F.R. § 52.79.[22] This is true, regardless of whether or not, as a factual matter, PEF could actually implement all of the steps specified in its plan, and construct additional LLRW storage capacity, within the approximately 2-year period (even if extended by waste minimization) contemplated in the Extended LLRW Plan.[23] In short, the resolution of any such factual dispute does not change our determination that the Extended LLRW Plan does not satisfy 10 C.F.R. § 52.79(a).[24]

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[20] See Section IV.B.3.a, below. Depending on the results of the 10 C.F.R. § 50.59 analysis, steps (f) and (g) may not be necessary.

[21] The Dissent incorrectly asserts that the "majority's analysis also assumes, without justification, that PEF will not take action to expand its LLRW storage capacity . . . sufficiently in advance to avoid NRC enforcement action that would result from a shortage of onsite LLRW storage capacity at the culmination of the 2- to 3-year period stated in PEF's initial LLRW plan." Dissent at p. 613. We make no such assertion. To the contrary, we only state that the Joint Intervenors have alleged that this may be a problem, and we state, flatly, that we do not make any determination, as to the validity of any such factual assertion at this juncture.

[22] The Dissent argues that it is "conceivable that PEF could commence [waste minimization] measures before, as opposed to after, commencing operation of the Levy Plant." Dissent at p. 613. It is always conceivable that a licensee will do more than is required by its license or the regulations. Our focus, however, is what PEF has committed to do.

[23] The Board need not, and does not, take a position regarding this factual dispute, i.e., whether the timing and triggers in the Extended LLRW Plan can be achieved before the initial storage capacity at the LNPs is exceeded.

[24] We note that *if* PEF's interpretation of the law (10 C.F.R. § 52.79(a)) is correct (e.g., that the level of information provided by PEF is sufficient), *then* the factual dispute raised by the Joint Intervenors would indeed be a material factual dispute. In such a situation, the motion for summary disposition would need to be denied because the movant would not have shown that there is "no genuine issue as to any material fact." Specifically, an evidentiary hearing would be required to allow the parties to

(Continued)

In sum, we conclude that there is no genuine issue as to any material fact raised by PEF's motion for summary disposition of C-8A.

B. Adequacy of PEF's LLRW Plan as a Matter of Law

We now turn to the second criterion for a successful motion for summary disposition — a showing that the movant is "entitled to a decision as a matter of law." 10 C.F.R. §§ 2.1205(c), 2.710(d)(2). In this context, the "matter of law" is whether PEF's LLRW plan satisfies 10 C.F.R. § 52.79. Specifically, C-8A asserts that PEF's LLRW plan "fails to offer sufficient information to demonstrate the adequacy of PEF's plans" and that its "plan to postpone most of its decisions . . . until sometime after issuance of the license for Levy violates Section 52.79 and the Atomic Entergy Act." Order Admitting C-8A at 5. PEF denies that its plan suffers from any such deficiencies and contends that it meets the requirements of this regulation.

We start with the words of 10 C.F.R. § 52.79. As relevant here, the regulation specifies the specific topics that must be covered in the FSAR and the level of information that is sufficient for each topic. In the case of LLRW, the regulation mandates, *inter alia,* that the FSAR include two related *topics* — (1) "the kinds and quantities of radioactive materials expected to be produced in the operation" and (2) "the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter." 10 C.F.R. § 52.79(a)(3). Turning to the *level of information,* the regulation mandates that the FSAR "shall include the . . . information, at a level of information sufficient to enable the Commission to reach a final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license." 10 C.F.R. § 52.79(a).

We now apply these regulatory requirements to the three main components of PEF's LLRW plan — the description of the LLRW, the Initial LLRW Plan, and the Extended LLRW Plan.

1. Adequacy of Description of Kinds and Quantities of Radioactive Materials

Applying the foregoing regulatory requirements to PEF's LLRW plan, we find that it clearly provides sufficient information concerning "the kinds and quantities of radioactive materials expected to be produced in the operation." 10 C.F.R.

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present evidence, and the Board to assess whether, as a factual matter, there is reasonable assurance that the various steps prescribed in the Extended LLRW Plan could be achieved, and the additional capacity constructed, within the time frame contemplated by PEF.

§ 52.79(a)(3). As discussed above, Revision 17 to the AP1000 DCD provides ample and specific information concerning the "kinds and quantities" of LLRW "expected to be produced" by each of Levy's proposed nuclear power plants. PEF's LLRW plan specifies the types and categories of LLRW, the amounts that will be generated per year (expected and maximum), and the annual curie content (for approximately sixty different isotopes) of the primary influents and shipped primary wastes and secondary wastes. *See* Attachment D. This portion of Revision 17 of the AP1000 DCD covers nineteen pages. *Id.* at 11.4-15 to 11.4-33. Accordingly, this portion of the FSAR provides a level of information that is sufficient under 10 C.F.R. § 52.79(a).

2. Adequacy of Initial LLRW Plan

Next, we turn to PEF's Initial LLRW Plan, which is the portion of PEF's LLRW plan for the initial period of time that is covered by Revision 17 to the AP1000 DCD. *See* Attachment B at 2. The Initial LLRW Plan covers over fourteen pages. It specifies the structures, systems, and components of PEF's onsite LLRW management program, including system descriptions, component descriptions, and waste processing and storage buildings and facilities. *See* Attachment D § 11.4, at 11.4-1 to 11.4-13. C-8A does not dispute that the level of information in the Initial LLRW Plan satisfies 10 C.F.R. § 52.79(a).

3. Adequacy of Extended LLRW Plan

The key legal dispute raised in C-8A is whether the PEF's Extended LLRW Plan (i.e., PEF's RAI Responses, which constitute the portion of PEF's LLRW plan for the period of time longer than envisioned in Revision 17 to the AP1000 DCD), satisfies 10 C.F.R. § 52.79(a). We agree with the NRC Staff that this presents two related legal questions: (1) is the level of information contained in the RAI Responses sufficient to satisfy the regulatory requirement, and (2) "whether [PEF] can meet 52.79 by 'postponing most of its decisions' regarding how LLRW will be managed in the future." Staff Answer at 6.

a. Contents of Extended LLRW Plan

In order to answer the foregoing questions, we must review the Extended LLRW Plan (i.e., the RAI Responses) to determine precisely what "information" PEF has provided and whether it is at a "level" that is "sufficient" to make the determinations required by 10 C.F.R. § 52.79(a).

The RAI Responses in Attachment B to PEF's Motion consist of PEF's responses to two related RAIs — RAI 11.04-1 and RAI 11.04-2. *See* Attachment

B. Each response is two pages long and has a tripartite structure. First, the response repeats the text of the RAI (*RAI Text*). Second, each response provides a short discussion and explanation of PEF's position and plans. This is referred to as the "*PGN Response.*" The third section of each RAI Response is titled "Associated LNP COL Application Revisions" and sets forth the *specific words by which PEF is amending the FSAR* section of the COLA (hereinafter *FSAR Revision*). The *FSAR Revision* becomes part of the FSAR and is a formal commitment by PEF. Given that 10 C.F.R. § 52.79(a) prescribes the mandatory "content of the FSAR," the *FSAR Revision* portion of PEF's RAI Response is the portion most critical to determining whether the FSAR (as amended) satisfies the regulation.

RAI 11.04-1 and PEF's response provide part of the Extended LLRW Plan. The *RAI Text* notes that PEF has stated that "no additional onsite radwaste storage is required beyond that described in the DCD" and instructs PEF to either "explain why this statement is included [in the FSAR] or remove it." Attachment B at 2. In the *PGN Response* section, PEF discusses and explains its position and plans. For example, it states that

> In the event that an offsite facility is not available [for LLRW] *a waste minimization plan will also be implemented.* This plan *will consider* strategies to reduce generation of [LLRW], including reducing the in-service run length of resin beds, as well as resin selection, short-loading, and point-of-generation segregation techniques. . . . If additional storage capacity . . . is required, *further temporary storage would be developed* in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A.

Id. (emphasis added).

Turning to the *FSAR Revision* portion of RAI 11.04-1, PEF amends the FSAR by adding the following to it:

> All packaged and stored radwaste will be shipped to offsite disposal/storage facilities and temporary storage of radwaste is only provided until routine offsite shipping can be performed. Accordingly, there is no expected need for permanent on-site storage facilities at LNP 1 & 2.
>
> If additional storage capacity for Class B and C waste is required, further *temporary storage would be developed in accordance with* NUREG-0800, Standard Review Plan 11.4, *Appendix 11.4-A.* To the extent that additional storage could be needed sometime in the future, the existing regulatory framework would allow Progress Energy to conduct *written safety analyses under 10 C.F.R. § 50.59.* If the additional storage does not satisfy 10 C.F.R. § 50.59, a *license amendment* would be required.

Id. at 3 (emphasis added). This constitutes the formal FSAR revision and commitment.[25]

The second part of the Extended LLRW Plan is found in PEF's response to RAI 11.04-2. The *RAI Text* notes that NUREG-1793 "states that if a need for onsite storage of [LLRW] has been identified beyond that provided in AP1000 Standard Design because of unavailability of offsite storage, the applicant should submit the details of any proposed onsite storage facility." *Id.* at 4. Based on that statement, the NRC requests PEF to "provide any arrangements for offsite storage for [LLRW] or submit plans for onsite storage." *Id.* In essence, this is NRC's request that PEF submit an LLRW plan for the period "beyond that provided in the AP1000 Standard Design."[26]

The *FSAR Revision* section of PEF's response to RAI 11.04-2 adds the following provision to its FSAR:

> 11.4.2.4.3 Temporary Storage of Low-Level Radioactive Waste
>
> In the event that off-site shipping is disrupted or facilities are not available to accept radwaste when LNP Units 1 & 2 become operational, as described in DCD Section 11.4.2.1 paragraph ten, temporary storage capability on-site is available for *greater than two years* at the expected rate of radwaste generation and greater than one year at the maximum rate of radwaste generation. *During this period,* the implementation of additional *waste minimization strategies could* extend the duration of temporary radwaste storage capability. Since there are no facilities currently licensed by the NRC for disposal of Greater Than Class C (GTCC) LLRW, storage of GTCC would be similar to the methodology used for storage of spent fuel.
>
> If additional temporary radwaste storage is eventually required, then on-site facilities *could* be constructed utilizing the design guidance provided in NUREG-0800, Standard Review Plan Chapter 11 Radioactive Waste Management Appendix 11.4-A, Design Guidance for Temporary Storage of Low-Level Radioactive Waste.

Id. at 5 (emphasis added).

Based on the RAI Responses, PEF's Extended LLRW Plan can be summarized into the following five statements:

i. If offsite shipping is disrupted or not available, then "temporary storage capability on-site is available for greater than two years." *Id.* at 4.

ii. "During this period, the implementation of additional waste minimiza-

[25] We note that while the *PGN Response* states that PEF will implement a waste minimization plan, the actual *FSAR Revision* does not.

[26] The *PGN Response* section of RAI 11.04-2 is substantially similar to the discussion found in the *PGN Response* to RAI 11.04-1 and/or the *FSAR Revision* section of RAI 11.04-2.

tion strategies could extend the duration of temporary radwaste storage capability." *Id.*

iii. "If additional storage capacity for [LLRW] is required, further temporary storage would be developed in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A." *Id.* at 3.

iv. If such additional storage capacity is needed, "the existing regulatory framework would allow Progress Energy to conduct written safety analyses under 10 C.F.R. § 50.59." *Id.*

v. "If the additional storage does not satisfy 10 C.F.R. § 50.59, a license amendment would be required." *Id.*

It is incumbent upon this Board to examine PEF's statements carefully. Of course, we assume that PEF will abide by its promises and commitments to the agency.[27] But what are they? It is crucial that we read PEF's statements and promises with a critical eye to determine what enforceable commitments, if any, they contain. What, concretely and specifically, has PEF committed to do?[28]

Statement (i) listed above provides nothing useful. It specifies that there is onsite storage, and that it might last for greater than 2 years. This is not material, because C-8A challenges the adequacy of PEF's LLRW plan for the period of time *beyond* that covered by the AP1000 DCD storage capacity. Quibbles about whether the AP1000 capacity will cover 2 years, or 2 1/2 years, or 3, are not material. As the Commission has stated, we are dealing with the "reasonably foreseeable" scenario "that LLRW generated by normal operations [at Levy] will be stored at the site for a longer term than is currently envisioned in [PEF's] COL application." CLI-10-2, 71 NRC at 46.

Statement (ii) is simply a factual statement and is not an enforceable commitment. It states that "[i]mplementation of additional waste minimization strategies *could* extend the duration of temporary radwaste storage capability." Attachment B at 5 (emphasis added). Yes, perhaps it could. But statement (ii) makes no promise or commitment to do so. Nothing in this *FSAR Revision* says that, if the

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[27] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001) ("[I]n the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises.").

[28] The Dissent incorrectly asserts that "this Board . . . presume[s] that PEF will violate the terms of its licenses and NRC regulations." *See* Dissent at p. 608 n.1. Quite the contrary, we assume that PEF will comply with the terms of its FSAR commitments (and license provisions and regulatory requirements). *See supra* note 27 and accompanying text. But what are they? The purpose of our critical analysis of the RAI Responses is to assess what, if anything, the FSAR commitments, mean, i.e., if they contain anything that is concrete and enforceable. To the extent that PEF makes enforceable commitments, we assume that PEF will comply with them.

AP1000 initial storage capacity is insufficient, then PEF *will, in fact, implement* a waste minimization strategy.

We note that PEF's *PGN Response* to RAI 11.04-1 does state that "a waste minimization plan *will* also be implemented." *Id.* at 2 (emphasis added). This is a commitment, but it is not part of the *FSAR Revision.* Assuming *arguendo* that this PGN Response is an enforceable part of the FSAR, we note that it still does not describe, or make any commitment as to the *content* of any such minimization plan. At most, PEF states that the waste minimization plan "*will consider* strategies to reduce generation of [LLRW], including reducing the in-service run length of resin beds, as well as resin selection, short loading, and point-of-generation aggregation techniques." *Id.* at 2 (emphasis added). Consideration is not commitment. Although PEF will *consider* several approaches, it commits to none of them. Thus, NRC would have no legal basis to complain, even if PEF implemented a waste minimization plan that contained *none* of the listed strategies. In sum, statement (ii) in PEF's Extended LLRW Plan, at most, commits PEF to implement a waste minimization plan, with no enforceable statements as to its content.

Statement (iii) includes a commitment. It states that "if additional storage capacity . . . is required, [then] further temporary storage *would* be developed." *Id.* at 3. This is an affirmative statement as to what PEF will do. So far so good. But again, there is no information about the storage facility and/or its operation. How much? Where? The phrase "would be developed" makes clear that PEF has not, at this point, actually determined what it *will* do. Thus, again, PEF has not committed to any specifics on any of these issues, and is keeping all of its options open.

Statement (iii) goes on to specify that PEF will develop the additional LLRW storage "in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A." *Id.* at 3. Appendix 11.4-A is included as part of Attachment E to PEF's Motion.[29] Appendix 11.4-A, which is titled "Design Guidance for Temporary Storage of Low-Level Radioactive Waste," provides guidance from the NRC Staff to licensees concerning the design of temporary onsite LLRW storage. Examples of the Appendix 11.4-A Guidance include:

1. "The duration of the intended storage, the type and form of the waste, and the amount of radioactive material present will dictate the . . . level of complexity required to assure public health and safety." *Id.* at 11.4-25.

2. "The specific design and operation of any storage facility will be significantly influenced by the various waste forms." *Id.*

[29] PEF Motion, Attachment E, Standard Review Plan, NUREG-0800, Chapter 11.4 at 11.4-25 to 11.4-32 (Attachment E).

3. "Before implementing any additional onsite storage capacity, licensees should conduct substantial safety review and environmental assessments to assure adequate public health and safety protections." *Id.*

4. "Design and operational acceptability will be based on minimal requirements, which are defined in existing SRPs, regulatory guides, and industry standards for proper management of radioactive waste." *Id.*

5. "The quantity of radioactive material allowed and the shielding configurations will be dictated by the dose rate criteria for both the site boundary and unrestricted areas of the site. . . . 10 CFR 20.1302 limits the exposure rates in unrestricted areas. Offsite doses from onsite storage must be sufficiently low . . . not likely to cause the 40 CFR Part 190 limits, as implemented under 10 CFR 20.1301(e) to be exceeded. Onsite dose limits associated with temporary storage will be controlled per 10 CFR part 20, including the ALARA principle of 10 CFR 20.1101." *Id.* at 11.4-26.

6. "If possible, the preferred location of the additional storage facility is inside the plant's protected area." *Id.* at 11.4-27.

7. "The facility should include design features, in accordance with 10 CFR 20.1406, that would minimize, to the extent practicable, contamination of the waste facility and environment; facilitate eventual decommissioning; and minimize, to the extent practicable, the generation of extraneous radioactive waste. This requirement applies to storage facilities . . . ." *Id.*

Appendix 11.4-A goes on to provide design criteria and/or objectives for various LLRW dry waste, wet waste, and stabilized LLRW. *Id.* at 11.4-2-27 to -31.

We have no reason to doubt that most, if not all, of this guidance is sound. Statement (iii) indicates that whatever additional storage PEF develops, it will be "in accordance with" this guidance.

Turning to statement (iv) in PEF's Extended LLRW Plan, we conclude that it is a statement of law but not a commitment. PEF says that if additional LLRW storage capacity is needed, then "the existing regulatory framework would allow Progress Energy to conduct written safety analyses under 10 C.F.R. § 50.59." Attachment B at 3. No doubt the regulations would allow this. But PEF has made no promise to do anything.

Even assuming, *arguendo,* that statement (iv) implies a promise by PEF to follow the "existing regulatory framework" under 10 C.F.R. § 50.59, the value of such a commitment is nil. All licensees are required to follow the law all of the time. Indeed, we generally assume that they will do so. Thus, a promise to comply with the law is a given. It adds nothing. And it is certainly not a plan.

The final part of PEF's Extended LLRW Plan, statement (v), is similarly empty. Statement (v) says that "If the additional storage does not satisfy 10 C.F.R.

§ 50.59, a license amendment would be required." *Id.* Again, this is a statement of law. It is not a commitment.

In sum, PEF's COLA states that the Levy nuclear power plants will generate a certain amount of LLRW per year (expected and maximum). The FSAR contains an Initial LLRW Plan, which specifies that PEF will build and operate onsite storage facilities to handle approximately 2 years' worth of LLRW (the initial period). The FSAR then contains the Extended LLRW Plan, which can be summarized as follows: During the initial 2-year period, PEF will consider, and if it deems it appropriate, implement, a waste minimization plan that might extend the lifespan of the initial storage capacity.[30] The waste minimization plan has not been provided and PEF makes no commitment as to what it will include. If PEF concludes that the initial onsite storage capacity plus the waste minimization plan is insufficient, then PEF will use the change procedure specified in 10 C.F.R. § 50.59 to *develop* further temporary storage. No information or commitment is provided regarding the nature or content of this "further temporary storage" except the commitment that it will be in accordance with the NRC guidance in Appendix 11.4-A of NUREG-0800. Once PEF has developed its plan for such additional storage, then PEF will conduct an analysis under 10 C.F.R. § 50.59 to determine whether the construction and implementation of such "further temporary storage" can be done without a license amendment. If a license amendment is required, then PEF will apply for such a license amendment.

b. Adequacy of Extended LLRW Plan Under 10 C.F.R. § 52.79(a)

The issue in this case is a purely legal one: whether PEF's Extended LLRW Plan, as summarized in the preceding paragraph, satisfies the requirements of 10 C.F.R. § 52.79(a). The key part of this regulation states that the FSAR must provide information concerning "the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in [10 C.F.R.] part 20," 10 C.F.R. § 52.79(a)(3), and that this information must be provided "at a level of information sufficient to enable the Commission to reach a final conclusion on all safety matters that must be resolved by the Commission before the issuance of a combined license." 10 C.F.R. § 52.79(a).

The Board concludes that PEF's FSAR (as amended by the RAI Responses) for the onsite management of LLRW for the period of time beyond the initial period specified the AP1000 DCD (i.e., its Extended LLRW Plan) does not satisfy 10 C.F.R. § 52.79(a) because it does not provide "a level of information sufficient to

[30] As we see it, PEF is making two contradictory statements. On the one hand, the AP1000 DCD states how much LLRW the PEF nuclear power plants are expected to generate per year. Meanwhile, PEF's RAI Responses say that PEF will implement a waste minimization plan and that it *will NOT* generate that amount of LLRW per year.

enable the Commission to reach a final conclusion . . . before the issuance of" the COL, to resolve whether PEF's "means for controlling and limiting radioactive effluents and radiation exposures" during the extended period will be "within the limits" set forth in 10 C.F.R. Part 20. The regulation requires that the NRC make a Part 20 safety determination now.

The Part 20 determination is: whether or not PEF has the "means for controlling and limiting radioactive effluents and radiation exposures" arising from the onsite storage of LLRW at Levy (beyond the initial AP1000 DCD period) "within the limits set forth in Part 20." The law requires that the Commission make this decision "before issuance of the combined license." Part 20 requires, *inter alia,* that PEF (1) have a program "to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA)," 10 C.F.R. § 20.1101(b); (2) "shall conduct operations so that . . . [t]he total effective dose equivalent to individual members of the public does not exceed [100 millirems per] year," 10 C.F.R. § 20.1301(a)(1); and (3) "provide reasonable assurance that . . . [t]he annual dose equivalent" to members of the public from planned discharges not exceed 25 millirems to the whole body, 10 C.F.R. § 20.1301(e) and 40 C.F.R. § 190.10.

It is clear to us that the Extended LLRW Plan lacks "sufficient information" for the NRC to "reach a final conclusion," now, on the Part 20 determination. The "level of information" provided in the Extended LLRW Plan is far too general and vague to make a final safety determination, now, as to whether PEF has "the means for controlling and limiting . . . radiation exposures within" the Part 20 limits.

Even the most specific element in the Extended LLRW Plan — PEF's commitment to develop its extended storage capacity "in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A," Attachment B at 3 — does not provide a level of information sufficient to make the Part 20 determination now. The design guidance contained in Appendix 11.4-A, sound as it might be, provides broad and general principles for designing an appropriate waste storage facility. For example, as quoted above, Appendix 11.4-A states that the design of the LLRW storage facility will be influenced by the storage duration, the type of waste, the waste form, and the amount of radioactive material present. Attachment E at 11.4-25. The "shielding configurations will be dictated" by the criteria of Part 20 and that "if possible, the preferred location for the additional storage is inside the plant's protected area." *Id.* at 11.4-26 to -27. All well and good. But committing to follow these general principles does not provide sufficient information for the Commission to make a final safety determination, now, as to whether PEF has the "means for controlling and limiting . . . radiation exposures within the" Part 20 limits.

The Board believes that the level of information found in PEF's Initial LLRW Plan provides a useful benchmark for assessing the adequacy of the level of

information in the Extended LLRW Plan. The contrast is stark. As we discussed above, PEF's Initial LLWR Plan (the AP1000 DCD Solid Waste Management Plan), covers fourteen pages. *See* Attachment D. Meanwhile, the FSAR Revisions that constitute PEF's Extended LLRW Plan together consume less than one page. Both the quality and quantity of concrete information in the Extended LLRW Plan are much lower than for the Initial LLRW Plan. The contrast between the level of information that PEF has provided for the Initial LLRW Plan and the Extended LLRW Plan confirms that the latter fails to provide sufficient information to satisfy 10 C.F.R. § 52.79(a).

PEF and the NRC Staff argue that, if we conclude that the Extended LLRW Plan is inadequate, then we are holding that 10 C.F.R. § 52.79 requires the submission of "details," PEF Motion at 13, "detailed plans," *id.* at 14, "construction level information," Staff Answer at 8, or "detailed design information," *id.* at 9. We reject this dichotomy. PEF's motion for summary disposition focuses us on PEF's Extended LLRW Plan and asserts that, as a matter of law, it satisfies 10 C.F.R. § 52.79(a). Our ruling is limited to that issue. We only find that the Extended LLRW Plan does *not* provide sufficient information to make the necessary Part 20 determination before the COL is issued. That is what C-8A asserts, and that is what we are deciding. We reject the proposition that 10 C.F.R. § 52.79 requires detailed plans or detailed construction or design information. As we have stated, we find that the level of information provided in the Initial LLRW Plan is a good benchmark for assessing what constitutes a sufficient level of information for the Extended LLRW Plan. The information in the Initial LLRW Plan is concrete and meaningful, but it is not "detailed design information." Neither the Initial LLRW Plan nor the Extended LLRW Plan requires "details" or "detailed design information."[31]

The use of the term "details" is a distraction. The word "details" has a pejorative connotation, i.e., that the Joint Intervenors or the Board are asking for "minutiae" or matters that "relate[ ] to minute points . . . small and subordinate part[s] . . . [or] minor part[s]."[32] We do not need to use the term "details" nor does it help advance our analysis. Instead, we focus on the words of the regulation, which specifies that the FSAR must contain a "level of information" that is "sufficient" to make the necessary safety determination. Does the Extended LLRW Plan contain that level of information? This is the relevant question.

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[31] Again, the Dissent mischaracterizes our position by stating that the "majority essentially asks PEF to state *now* how many years' worth of material it will likely need to store *in the future,* at the end of approximately 2 years' worth of operation at the Levy plant, and for how long this material must likely be stored." Dissent at p. 612. We do no such thing. We merely hold that PEF has not provided a level of information that is sufficient to make the required safety determination before the COL is issued.

[32] *Webster's Third New International Dictionary (Unabridged)* 616 (1976).

We also reject the proposition that our ruling creates an impossible or impractical standard. The regulation requires that the Extended LLRW Plan provide a "level of information sufficient" that will allow the Commission "to reach a final conclusion on all safety matters" now. This is entirely reasonable. PEF has already met this standard for the initial time period, and there is no reason why it cannot do so for the more extended time period. For example, one option, which is followed by COL applicants that use some of the other certified designs, is simply to provide onsite storage capacity for a longer initial period.[33] A second example of a simple, but concrete option would be for PEF to commit to construct, as needed, additional onsite storage buildings, identical to the one for the initial 2-year period, immediately adjacent to that initial building. A commitment to build and to operate such additional modules is concrete and specific. Either of the foregoing options could provide a level of information sufficient for the Commission to assess, now, whether PEF has the means to limit exposures to be within the Part 20 limits. Neither of the foregoing approaches is necessarily onerous or requires inordinate "details."[34]

The Extended LLRW Plan is primarily a procedural plan with little or no information by which NRC can make the required Part 20 determination. PEF says that it will follow the relevant legal procedures. Under the plan, if the initial storage capacity is insufficient, then PEF will implement an unspecified waste minimization plan, and if that is not enough, then PEF will develop unspecified additional onsite storage by conducting a safety analysis under 10

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[33] *See Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-09-27, 70 NRC 992, 996 (2009) (FSAR configured to accommodate at least *10 years of onsite storage*); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), Licensing Board Order (Granting Motion for Summary Disposition of Contention 3) (July 9, 2010) at 3 (unpublished) (Applicant provided at least *10 years of onsite LLRW storage*).

[34] The Dissent's reliance on the ruling in *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385 (2009) is misplaced. First, the *Bell Bend* decision dealt with the issue of contention admissibility. *See id.* at 411, 424. In the instant proceeding, we are far past that issue. Here, we have already admitted Contentions 8 and 8A. In addition, in this case the Commission confirmed the admission of Contention 8, flatly rejecting arguments that the *Bell Bend* Board found persuasive. CLI-10-2, 71 NRC 27. Specifically, the Board in *Bell Bend,* in rejecting the contention, noted that the "regulations do not dictate the duration" of onsite LLRW storage capacity, *Bell Bend,* LBP-09-18, 70 NRC at 424, whereas the Commission, in this case, rejected PEF's argument that there is "no regulatory basis" for requiring the applicant to confront the plausible problem of longer term management of LLRW onsite and affirmed the admission of such a contention. CLI-10-2, 71 NRC at 46. Second, *Bell Bend* held that the LLRW contentions were not admissible due, *inter alia,* to technical defects in the pleadings such as failure to satisfy 10 C.F.R. § 2.309(f)(1)(vi), (i), or (ii). *Bell Bend,* LBP-09-18, 70 NRC at 410-11. That regulation, 10 C.F.R. § 2.309(f)(1), is not in issue here. Third, and most importantly, *Bell Bend* dealt with *NEPA* contentions and *never even mentioned 10 C.F.R. § 52.79(a),* which is the regulation that is absolutely central to the instant decision. Given these significant differences, the *Bell Bend* decision is unhelpful to the Dissent's analysis, and as such is irrelevant to the disposition as a matter of law of C-8A.

C.F.R. § 50.59, applying for a license amendment if necessary, and constructing additional storage capacity in accordance with NUREG-0800 Appendix 11.4-A. The NRC Staff asserts this is sufficient under 10 C.F.R. § 52.79(a) because PEF "commits to a known regulatory process should any future construction be necessary." Staff Answer at 8. PEF agrees, noting that 10 C.F.R. § 52.79 only requires the FSAR to describe "the 'means' by which Levy will control and limit radioactive effluents and radiation exposures within the limits established by 10 C.F.R. Part 20" and that, in this context, it is sufficient if PEF simply describes "[a] method [or] course of action . . . by which [compliance with Part 20] can be . . . achieved." PEF Motion at 8 (citations omitted).

In our opinion, committing to follow a *process or a method* by which compliance can be achieved does not, *by itself,* satisfy 10 C.F.R. § 52.79(a) because the regulation requires a level of information sufficient to make the Part 20 determination now, before the COL is issued. While the Commission has ruled *procedures can be a part* of an LLRW plan required by 10 C.F.R. § 52.79(a)(3), we do not think that PEF's Extended LLRW Plan, which is entirely procedural, is sufficient. Speaking of 10 C.F.R. § 52.79(a)(3), the Commission has held: "[t]he 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."[35] The Commission noted that Part 20 imposes a number of radiation protection requirements and specifies that the COL licensee "must comply with these requirements regardless of the amount of LLRW stored on site — be it 1 cubic foot or 1000." *Id.* Thus, the Commission repeated that the level of 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." *Id.* (emphasis added); *see also* CLI-10-2, 71 NRC at 46.

PEF would have us substitute the word "or" for the term "and" in the Commission's rulings quoted in the preceding paragraph. Twice, the Commission has said that compliance with 10 C.F.R. § 52.79(a)(3) entails compliance through "design, operational organization, *and* procedures." But PEF quotes this statement by the Commission and claims that a purely procedural plan suffices, i.e., that compliance may be achieved through a plan consisting solely of design, operational organization, *or* procedures. This is not what the Commission has stated.

If a plan that consists merely of a promise to develop additional onsite storage for LLRW pursuant to the relevant legal procedures (10 C.F.R. § 50.59) in accordance with the relevant NUREG, is all that it takes to provide a "level of information sufficient" to satisfy 10 C.F.R. § 52.79(a) and (a)(3) and make the

[35] *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33, 37 (2009) (emphasis added).

Part 20 determination before the COL is issued, then the regulatory requirement is meaningless.[36]

On a different point, the fact that the Extended LLRW Plan relies on 10 C.F.R. § 50.59 establishes, almost per se, that the level of information in PEF's current FSAR is *not* sufficient to enable the Commission to reach a final conclusion on all safety matters *now.* This is because the function of 10 C.F.R. § 50.59 is to deal with *changes* to a nuclear power plant, and the regulation *requires, as a prerequisite to any such change, that the licensee perform additional safety analyses,* i.e., analyses *in addition* to those contained in the FSAR.[37] The Extended LLRW Plan acknowledges that if additional storage is needed in the future, then "the existing regulatory framework would allow Progress Energy to conduct written *safety analyses* under 10 C.F.R. § 50.59." Attachment B at 4 (emphasis added).[38]

Thus, the Extended LLRW Plan, by relying on the 10 C.F.R. § 50.59 process for any additional onsite storage, acknowledges that PEF must perform safety analyses, in *addition* to those contained in the FSAR, *before* it can be determined whether or not such additional storage satisfies the regulations. This is problematic, if not fatal, because under 10 C.F.R. § 52.79(a) and CLI-10-2, 70 NRC at 46-47, PEF must submit, now, its plans for managing LLRW for a period

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[36] This case is analogous to the situation in *Natural Resources Defense Council, Inc. v. Environmental Protection Agency,* 22 F.3d 1125 (D.C. Cir. 1994), where the Court of Appeals for the District of Columbia assessed whether a compliance plan submitted by a state satisfied the relevant Clean Air Act (CAA) requirements. The court noted that the state was required to submit "'the information necessary to enable [EPA] to determine whether the plan submission complies with the provisions of [the CAA].'" *Id.* at 1134 (citations omitted). The court rejected EPA's approval of the State submission, stating that the required "determination cannot reasonably be made unless the . . . submittal contains something more than a mere promise to take appropriate but unidentified measures in the future." *Id. See also Sierra Club v. Environmental Protection Agency,* 356 F.3d 296, 298 (D.C. Cir. 2004) ("We agree with Sierra Club's principal contention that EPA was not authorized to grant conditional approval to plans that did nothing more than promise to do tomorrow what the Act requires today.").

[37] As a general rule, 10 C.F.R. § 50.59 establishes that a licensee must apply for a license amendment and obtain NRC's approval before it can implement any proposed change. 10 C.F.R. §§ 50.59(c)(2), 50.90. However, if the licensee conducts an analysis of the proposed change and determines that it would *not* result in a more than minimal increase in (a) the frequency of accidents previously evaluated in the FSAR, (b) the likelihood of a malfunction important to safety previously evaluated in the FSAR, (c) consequences of an accident or malfunction previously evaluated in the FSAR, or (d) create a possibility for a type of accident or malfunction with a result different than previously evaluated in the FSAR, *then* the licensee may implement the change without obtaining a license amendment. 10 C.F.R. § 50.59(c)(1) and (2)(i)-(viii). Even if a license amendment is not required, the licensee must still conduct such a safety analysis (in addition to the original FSAR analysis), to assess the effect of the proposed amendment. 10 C.F.R. § 50.59 (d)(1) and (c)(2).

[38] Although the analysis required by 10 C.F.R. § 50.59 is not the same as the "final safety analysis," it is, nevertheless, a formal, written, analysis involving safety issues (accident probabilities and/or consequences). PEF itself characterizes the 10 C.F.R. § 50.59 analysis as a "safety analysis." We agree.

of *longer* than the original AP1000 capacity, and PEF's FSAR must contain "information sufficient to . . . reach a final conclusion on all safety matters . . . *before* the issuance of the combined license." 10 C.F.R. § 52.79(a) (emphasis added). While 10 C.F.R. § 50.59 is certainly a legitimate mechanism for making changes to a licensed facility, in this context, reliance on the 10 C.F.R. § 50.59 process *confirms* that PEF's *current* FSAR (including the RAI Responses) does *not* analyze the risk and safety consequences of any such additional LLRW storage facility.[39]

Turning to a different point, the recent decision of the Board in *Vogtle* dealt with a significantly different contention and is certainly not dispositive here. In this case, C-8A asserts that PEF's FSAR fails to offer "sufficient information to demonstrate the adequacy of PEF's plans" for storing LLRW for more than 2 years, and is defective because it "postpone[s] most of its decisions regarding how and where to store" the LLRW. Order Admitting C-8A at 5. In contrast, the contention at issue in *Vogtle,* SAFETY-1, listed specific "details" that it asserted must be in the FSAR. SAFETY-1 stated that the FSAR failed to provide "adequate detail as to how SNC will comply with NRC regulations" and that the FSAR must contain "a design plan for the LLRW storage facility . . . which must include information regarding building materials and high-integrity containers . . . [a] specific description of where . . . the storage facility will be located; and . . . [a] discussion of the health impacts on SNC employees." *Vogtle,* LBP-10-8, 71 NRC at 437. The *Vogtle* Board concluded that the motion for summary disposition posed the "legal question of whether the *items listed* in contention SAFETY-1 are required in [an applicant's] FSAR." *Id.* at 443. *Vogtle* held that there is

> no requirement in section 52.79(a)(3) for [an applicant'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 . . . contingent onsite long-term LLRW storage facility. Thus, *we conclude* that, as a matter of law, SNC's *FSAR need not include the details listed in contention SAFETY-1.*

Id. at 445 (emphasis added).

Our decision is consistent with *Vogtle.* For example, C-8A does not demand, as SAFETY-1 did, that the FSAR contain "details regarding 'building materials and high-integrity containers.'" *Id.* at 445. Instead, C-8A asserts that the level of information in the FSAR is insufficient to make the determination required in

[39] While the 10 C.F.R. § 50.59 analysis might confirm that the risk presented by the proposed change to the nuclear power plant is bounded by the original FSAR, it does not change the fact that the current FSAR does *not* analyze the risks associated with the construction of the currently unspecified additional storage capacity.

10 C.F.R. § 52.79(a) and postpones the concrete decisions needed to make that determination. PEF moves for summary disposition, asserting that C-8A is wrong as a matter of law. We disagree. But our ruling deals with a contention different than the one addressed in *Vogtle.*

As in *Vogtle,* we recognize that PEF's FSAR must comply with both 10 C.F.R. § 52.79(a)(3) (specify "the means for controlling and limiting . . . radiation exposures within the limits set forth in part 20") and 10 C.F.R. § 52.79(a)(4) (specify "the design of the facility" and provide "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"). The Board in *Vogtle* seems to concede that subsection (a)(4) applies to the *initial* (2-year) storage facility specified in the AP1000 DCD, but rules that it does not apply to the *additional/extended* storage facilities because such additional facilities are *contingent. See Vogtle,* 71 NRC at 443-44. Given the introductory clause of 10 C.F.R. § 52.79(a) (that the FSAR must provide a "level of information sufficient . . . to reach a final conclusion on all safety matters . . . before issuance of a combined license"), we do not necessarily agree with this parsing of the regulation. Nevertheless, the issue is not presented to us, because the Joint Intervenors in this case do not base their argument on 10 C.F.R. § 52.79(a)(4). We need not address the meaning of 10 C.F.R. § 52.79(a)(4) or how it compares to (a)(3). Instead, this case focuses on the meaning of the introductory clause of 10 C.F.R. § 52.79(a) (sufficient information) as it applies to 10 C.F.R. § 52.79(a)(3). As to that regulation, the Board in *Vogtle* stated that nothing in 10 C.F.R. § 52.79(a)(3) "requires the detailed design, location, and health impacts information outlined in amended safety contention SAFETY-1." *Vogtle,* 71 NRC at 444. We do not disagree. We focus here, on a different contention and hold that PEF's Extended LLRW Plan does not provide the level of information required by 10 C.F.R. § 52.79(a).

Likewise, our decision is consistent with NRC's Regulatory Information Summary 2008-32 (RIS 2008-32).[40] This RIS articulates the NRC Staff position regarding the "*long-term,* interim storage" of LLRW at licensed nuclear power plants. *Id.* at 1 (emphasis added). The NRC notes that as of the closure of Barnwell, "LLRW generators in 36 States are no longer able to ship . . . LLRW to a disposal facility" and that therefore those facilities will need to store their wastes for an "indeterminate" amount of time. *Id.* The RIS goes on to note that the NRC no longer requires reactor licensees to obtain a Part 30 materials license for the extended onsite storage of LLRW produced under their operating licenses. *Id.* at 3. It specifies that NRC has "also eliminated the five-year limit for on-site storage of LLRW." *Id.*

[40] PEF Motion, Attachment F, Regulatory Issue Summary 2008-32.

The foregoing elements of RIS 2008-32, which repeatedly acknowledge that the onsite storage of LLRW at reactors such as PEF may be for a long and indefinite term, serve to emphasize that onsite storage of LLRW must be carefully and fully reviewed *now,* before the COL is issued. No Part 30 license will be required. No 5-year review will be conducted. Thus, it is all the more important that the FSAR provide a level of information sufficient to make the necessary Part 20 determination now, as is required by 10 C.F.R. § 52.79(a).

Before closing, we address four points: Contingency, Postponement, Flexibility, and Timing.

First, the fact that the Extended LLRW Plan is *contingent* does not mean that it does not need to comply with 10 C.F.R. § 52.79 or that it is subject to a relaxed standard. The "level of information sufficient" to satisfy 10 C.F.R. § 52.79(a) is the same, whether the plan is for the first 2 years and noncontingent, or it is for the second 2 years, and is contingent. In either case, the level of information must be sufficient for the Commission to be able to make the necessary Part 20 determination before the COL is issued.

Second, the fact that an LLRW plan *postpones* some decisions does not necessarily mean that it does not provide sufficient information. For example, an LLRW plan could specify that if, after 2 years, additional storage is needed, then the licensee will build an additional storage building with a capacity of 3900 cubic feet, or 7800 cubic feet, or 11,700 cubic feet. If each of these three options is described with a level of information sufficient for NRC to make the necessary safety determinations now, then postponing the decision between them would not violate 10 C.F.R. § 52.79(a). The problem with PEF's Extended LLRW Plan is not postponement, but is its utter lack of content. The Extended LLRW Plan keeps *all* options open to PEF and does not provide sufficient information to make the necessary Part 20 determinations now.

Third, requiring PEF to provide a level of information sufficient to meet 10 C.F.R. § 52.79(a) does not rob it of the *flexibility* necessary to deal with changes in circumstances (e.g., if Levy generates more LLRW per year than expected, or less LLRW, or different types of LLRW). Requiring PEF to provide sufficient information, now, to allow the NRC to make the necessary safety determinations, now, does not prevent PEF from *changing* these plans, as circumstances warrant, via the 10 C.F.R. § 50.59 and/or license amendment processes. Under our reading, PEF has all the flexibility it needs to deal with future contingencies.[41]

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[41] The Dissent says that "the majority essentially denies PEF the flexibility to perform instead a 10 C.F.R. § 50.59 analysis." Dissent at p. 613. To the contrary, we would allow PEF all the future flexibility is wants (i.e., to change its licensed facility later), provided that it first comply with 10 C.F.R. § 52.79(a) now, i.e., provide sufficient information now to allow NRC to make the Part 20 safety determination before the COL is issued.

Finally, as discussed above, the Joint Intervenors have raised a factual dispute as to whether PEF's Extended LLRW Plan can be successfully implemented, given the limited amount of onsite storage capacity specified in PEF's Initial LLRW Plan. Under our reading of the law, PEF's plan is facially deficient, and therefore this factual dispute is immaterial (i.e., it does not change the result). However, if PEF's reading of 10 C.F.R. § 52.79(a) is correct (i.e., that the level of information contained in the Extended LLRW Plan is sufficient), then the workability of the plan becomes a material fact that is in dispute. In this situation, the motion for summary disposition would need to be denied for failure to show that there is "no genuine issue as to any material fact," 10 C.F.R. § 2.710(d), and an evidentiary hearing would be required concerning whether the additional storage facility could be constructed and operational within the initial time frame specified in the FSAR.

V. CONCLUSION AND ORDER

In conclusion, the Board denies PEF's motion for summary disposition of C-8A. We agree that the motion satisfies the first criterion for a summary disposition — that the resolution of the contention raises no genuine issue as to any material fact. However, we disagree that PEF meets the second criterion — that it is entitled to a decision as a matter of law. PEF contends that its plan for the onsite management of low-level radioactive waste for the time period beyond the initial period specified in the AP1000 Design Control Document (i.e., its Extended LLRW Plan) satisfies the requirements of 10 C.F.R. § 52.79(a). This we reject.

We conclude, as a matter of law, that PEF's Extended LLRW Plan (in its FSAR as amended by the RAI Responses) does *not* satisfy 10 C.F.R.§ 52.79(a) because it does not provide a "level of information sufficient to enable the Commission to reach a final conclusion," *before* the issuance of the COL, to resolve whether PEF's means for controlling and limiting radioactive effluents and radiation exposures during the extended period will be "within the limits" set forth in 10 C.F.R. Part 20. In light of this ruling, PEF may wish to revise and resubmit this part of its application. In the meantime, PEF's motion for summary disposition of C-8A is denied.

Petitions for review of this Order may be filed with the Commission pursuant to 10 C.F.R. § 2.341. Such petitions must be filed within fifteen (15) days of the service of this Order.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Dr. William M. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 18, 2010

Dissenting Opinion of Judge Anthony J. Baratta

While I agree with the majority of this Board that no genuine issue of material fact remains regarding Contention 8A (C-8A),[1] I dissent from the Board's analysis regarding the adequacy of PEF's (Progress Energy Florida, Inc.) revised low-level radioactive waste (LLRW) management plan. I would find that PEF has provided a sufficient level of information in its LLRW management plan to satisfy 10 C.F.R. § 52.79(a) and (a)(3), and is thus entitled to a ruling in its favor as a matter of law on its Motion for Summary Disposition of C-8A.[2] Unlike the majority, I would also find that PEF has more than adequate time to seek a license amendment should one be needed to construct additional storage facility should one be needed.[3] As this decision involves a significant and novel issue regarding LLRW management, the resolution of which would materially advance

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[1] However, I do not agree with the majority that *if* PEF had provided a sufficient level of information in PEF's LLRW management plan, an issue of material fact must necessarily remain regarding whether there is reasonable assurance that PEF's LLRW plan could be implemented in a 2-year time frame. *See supra* pp. 589 n.21, 602. It is possible that PEF may initiate those aspects of its "extended" LLRW plan that address expansion of onsite LLRW storage capacity *before* it has commenced operation of the plant, thereby providing greater than 2 years to undergo such an expansion. However, under my reading of 10 C.F.R. § 52.79(a) and (a)(3), PEF need not affirmatively state at this time precisely when it will undergo onsite LLRW storage expansion, because that expansion is merely a contingency at this time. Under Commission precedent, it is my view that this Board should not presume that PEF will violate the terms of its license and NRC regulations by generating more LLRW than PEF can store onsite at the Levy plant or ship to an offsite location. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001) (citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000)).

[2] Motion for Summary Disposition of Contention 8A (Aug. 27, 2010) (PEF Motion).

[3] At present, the Staff schedule for completing their review of PEF Levy's COLA calls for issuance of the final EIS in July 2011. *See* Status Report (Oct. 7, 2010) at 1. Once the final EIS is issued, it will likely be another 10 to 12 months before the hearings are concluded and the license granted. Assuming construction begins immediately, the Levy plant is likely not to be completed until sometime late in 2016 at the earliest. Thus the applicant would have until 2018 at a minimum to seek a license amendment and construct additional LLRW storage if needed. Since LLRW disposal is in a state of flux at this time, it simply is not prudent or required for PEF to do more at this time than develop a contingency plan for something so far off in the future. *See also* 31 TAC §§ 675.21-24 — 13 November 2010 Meeting Draft, Texas Low Level Radioactive Waste Disposal Compact Commission, Public Meetings & Information, Proposed New Rule 675.21-24 to be captioned "Exportation and Importation of Waste" (Nov. 13, 2010), http://www.tllrwdcc.org/information.html (last visited Nov. 18, 2010). On November 13, 2010, the Texas Low Level Radioactive Waste Disposal Compact Commission of the Texas Legislature received public comment and held discussion regarding a draft rule addressing "Importation of Waste from a Non-Compact Generator for Management." *Id.* While the Texas Legislature has not given public notice of any final action on this draft rule, I note that the uncertain status of this draft rule in turn impacts the according uncertainty of the future LLRW status at the Levy plant — specifically regarding PEF's ability to ship an excess of LLRW offsite after 2 years' worth of plant operation.

the orderly disposition of this proceeding, I would also refer this ruling to the Commission pursuant to 10 C.F.R. §§ 2.323(f) and 2.341(f)(1).

My analysis of this issue begins with a discussion of the relevant portions of the regulations at issue regarding C-8A: (1) the introductory language of 10 C.F.R. § 52.79(a); and (2) the "means" language of 10 C.F.R. § 52.79(a)(3). In my view and in the circumstances presented, PEF has provided a sufficient level of information in its LLRW management plan to satisfy these two portions of 10 C.F.R. § 52.79. Accordingly, I would find that PEF is entitled to a decision in its favor as a matter of law regarding C-8A, and would thus grant PEF's motion for summary disposition of C-8A.

I. LEVEL OF DETAIL REQUIRED TO SATISFY THE "MEANS" REQUIREMENT OF 10 C.F.R. § 52.79(a)(3)

The introductory language in 10 C.F.R. § 52.79(a) requires a COL applicant to include required information in its FSAR "at a level of information sufficient to reach a final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license." 10 C.F.R. § 52.79(a). Under 10 C.F.R. § 52.79(a)(3), applicants must describe in an FSAR the "*kinds and quantities* of radioactive materials expected to be produced in the operation and the *means* for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter." 10 C.F.R. § 52.79(a)(3) (emphasis added). As this Board stated in its August 9, 2010 decision admitting C-8A, PEF's COLA incorporates the description of the "kinds and quantities" of radioactive waste from the AP1000 Design Control Document (DCD), and, therefore, to the extent C-8A raised a challenge to the Levy COLA based on the "kinds and quantities" portion of 10 C.F.R. § 52.79(a)(3), it was inadmissible.[4] Thus, the specific provision of 10 C.F.R. § 52.79(a)(3) at issue for C-8A is the "means" language.

Dictionary definitions of the term "means" state that a "means" either consists of or includes a "method" or "strategy" for achieving an end.[5] Thus, a plain

[4] *See* Licensing Board Memorandum and Order (Ruling on Joint Intervenors' Motion to File and Admit New Contention 8A) at 17-18 n.22 (Aug. 9, 2010) (unpublished).

[5] *See, e.g., American Heritage Dictionary of the English Language* (4th ed. 2010) ("A method, a course of action, or an instrument by which an act can be accomplished or an end achieved.); *MacMillan English Dictionary* (American English ed.) (2010) ("a method for doing or achieving something"); *Collins English Dictionary — Complete and Unabridged* (2003) ("the medium, method, or instrument used to obtain a result or achieve an end"); *Cambridge Dictionary of American English* (2d ed. 2010) ("a method or way of doing something"); Oxford Dictionaries Online, http://oxforddictionaries.com/view/entry/m_en_us1266773#m_en_us1266773 ("an action or system by which a result is achieved; a method") (last visited Nov. 18, 2010).

language reading of this term indicates that the "means" required under 10 C.F.R. § 52.79(a)(3) can be a plan or procedure such as that posited by the applicants in this instance.[6] In contrast, 10 C.F.R. § 52.79(a)(4) requires that an applicant provide a higher level of detail by describing "[t]he design of the facility" to be constructed under the COL, including "principal design criteria," "design bases," and "[i]nformation relative to materials of construction, arrangement, and dimensions."[7]

Applicable to this issue of regulatory construction 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."[8] Accordingly, I interpret 10 C.F.R. § 52.79(a)(3) in the context of 10 C.F.R. § 52.79 as a whole, and in connection with the larger scheme of the applicable regulations.

Looking to 10 C.F.R. § 52.79 as a whole, the information required under 10 C.F.R. § 52.79(a)(4), unlike 10 C.F.R. § 52.79(a)(3), exacts more detailed showing, requiring the applicant to describe a high level of specific information about the facility to be built under the COL. *See supra* note 3 and accompanying text. By comparison, 10 C.F.R. § 52.79(a)(3) is a simpler statement requiring only the level of information necessary to provide "the *means* for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter." 10 C.F.R. § 52.79(a)(3) (emphasis added).

I would thus find that a COL applicant need not provide the high level of information that is required under 10 C.F.R. § 52.79(a)(4) for a merely contingent, or only potentially necessary, additional LLRW storage facility, like that at issue in the instant proceeding. In such a case, where an applicant does not plan to build, and need not necessarily build, the additional LLRW storage facility as part of a COL facility under the terms of its COLA and the associated DCD, only the 10 C.F.R. § 52.79(a)(3) level of information is necessary. Joint Intervenors themselves admit that 10 C.F.R. § 52.79(a)(4) "is clearly about the reactor structure

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[6] Joint Intervenors appear to argue that the FSAR for Levy Units 1 and 2 must contain more specific design-related information. *See, e.g.,* Intervenors' Answer to Summary Disposition, Attach. B, Decl. of Marvin Resnikoff, Ph.D., in Support of Intervenors' Contention 8 ¶ 11 (Sept. 15, 2010) ("There is no discussion for the processing of these materials for indefinite storage in terms of containers, buildings, locations.").

[7] 10 C.F.R. § 52.79(a)(4); *see also Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-8, 71 NRC 433, 443-44 (2010) (contrasting the language of 10 C.F.R. § 52.79(a)(4), "which might well require the type of design features" sought by the intervenors in that proceeding but "governs only those structures that are '*a component of the facility to be constructed* under the COL'" with the "means" language of 10 C.F.R. § 52.79(a)(3)).

[8] *See Food and Drug Administration v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (internal citation omitted).

itself" and thus not applicable here.[9] Therefore, I would not equate the level of detail required under 10 C.F.R. § 52.79(a)(3) with that which is needed to satisfy 10 C.F.R. § 52.79(a)(4). I would find that PEF has provided sufficient information in its LLRW management plan to satisfy the "means" language of 10 C.F.R. § 52.79(a)(3) and to enable the Commission to make a final safety determination as required under the introductory language of 10 C.F.R. § 52.79(a).

There is further support for my reading of 10 C.F.R. § 50.79(a) and (a)(3) in Part 20, Standards for Protection Against Radiation, in which 10 C.F.R. § 20.1101(b) states, "[t]he licensee shall use, to the extent practical, *procedures* and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA)." 10 C.F.R. § 20.1101 (emphasis added). Thus, the controlling regulation regarding radiation exposure recognizes that plans or procedures are also a valid "means" by which radiation exposure may be controlled, and does not specify that facility design is somehow implicated.

II. ADEQUACY AS A MATTER OF LAW OF PEF'S LLRW PLAN UNDER 10 C.F.R. § 52.79(a)(3)

In its motion, PEF contends that section 11.4.2.1 of the AP1000 DCD associated with its COLA satisfies the "means" requirement of 10 C.F.R. § 52.79(a)(3) by providing a three-pronged plan or procedure that incorporates PEF's initial LLRW management plan and its subsequent revisions that address the extended time period following the initial time frame (2 to 3 years) into one LLRW management plan.[10] This revised LLRW plan consists of: (1) onsite storage for *at least* 2 years;[11] (2) implementation of a waste minimization plan that is in accord with SRP 11.4 App. 11.4-A (NUREG-0800); and (3) in the event that additional offsite storage is needed, expansion of onsite storage capacity either (a) by conducting safety analyses under 10 C.F.R. § 50.59, as described in RIS 2008-32, to make changes already described in the FSAR without a license amendment, or (b) by

[9] Intervenors' Answer to Summary Disposition Motion at 10 (Joint Intervenors' Answer). In addition, the guidance discussed in Regulatory Issue Summary 2008-32 on the 10 C.F.R. § 50.59 process and the potential need for a license amendment to expand onsite LLRW storage further supports this conclusion. PEF Summary Disposition Motion, Attach. F, Regulatory Issue Summary 2008-32 at 2-3 (Dec. 30, 2008) (RIS 2008-32).

[10] The majority's analysis artificially divides PEF's LLRW management plan into two parts: an "initial" and an "extended" LLRW plan. *See supra* Section IV.A at pp. 586-87. PEF's current LLRW plan is instead a revision of its initial plan that incorporates all processing and storage requirements from the original plan and extends them to cover the time period after the initial 2 to 3 years.

[11] *See* PEF Motion at 6-7 n.8.

license amendment in accordance with the guidance of NUREG-0800/SRP 11. PEF Motion at 8-9.

I would find that this showing satisfies the 10 C.F.R. § 52.79(a)(3) "means" requirement at issue in C-8A. Given that the 10 C.F.R. § 52.79(a)(3) requirement does not demand the same level of specificity as 10 C.F.R. § 52.79(a)(4), PEF's LLRW management plan states a sufficient level of information. Therefore, PEF is entitled to a decision in its favor regarding its motion for summary disposition of C-8A as a matter of law.

According to the majority, PEF must under 10 C.F.R. § 52.79(a) and (a)(3) provide more specific information in their LLRW management plan, than they have so far submitted. In so doing, the majority essentially asks PEF to state *now* how many years' worth of material it will likely need to store *in the future,* at the end of approximately 2 years' worth of operation at the Levy plant, and for how long this material must likely be stored. This requirement translates simply into a question of the size of the facility that will be used to store the LLRW. Since the storage time period is at present unknown, the size of the facility is indeterminate and contingent on whether and when an offsite LLRW disposal site will become available.[12] Because of this uncertainty, it is unreasonable, as part of a contingency plan, to expect specificity regarding such a building.

Despite this uncertainty, PEF does describe its LLRW management plan in further detail in its response to Staff RAI. In its response, PEF states that if an offsite facility is not available to accept Class B and C waste, PEF will evaluate reducing the amount of LLRW the Levy plant generates by implementing a waste minimization plan. *See* PEF Motion at 9, Attachment B at 3, 5. Specifically, that waste minimization plan will consider the strategy of "reducing the in-service run length of resin beds, as well as resin selection, short-loading, and point-of-generation segregation" techniques. *Id.* The RAI responses go on to specify that if, despite the implementation of these strategies, additional onsite storage capacity for Class B and Class C waste is required, PEF will expand the capacity of the licensed storage facilities at the Levy plant consistent with NRC guidance and regulations. Such additional onsite storage would be designed and built "utilizing the design guidance provided in NUREG-0800, Standard Review Plan Chapter 11 Radioactive Waste Management Appendix 11.4-A, Design Guidance for Temporary Storage of Low-Level Radioactive Waste." *Id.,* Attachment B at 5.

PEF explains that, in lieu of invoking NRC's license amendment process, RIS 2008-32 provides for written safety analyses under 10 C.F.R. § 50.59 for such additional storage facilities without license amendment, provided certain

[12] *See supra* note 3 and accompanying text.

conditions are met. *Id.,* Attachment B at 4. If, however, the conditions set forth in the 10 C.F.R. § 50.59 are not satisfied, as PEF explains in its RAI Responses and associated COLA revisions, PEF can still seek to expand onsite storage capacity through the license amendment process. *Id.* Given this information, I would find that PEF has provided a plan consistent with the regulations and thus sufficient to enable the Commission to reach a final conclusion on safety matters as required under 10 C.F.R. § 52.79(a) and (a)(3).

Under the majority's interpretation, 10 C.F.R. § 52.79(a) and (a)(3) require PEF to provide more detail in their safety analysis regarding potential additional LLRW storage capacity that may not need to be constructed. In so doing, the majority essentially denies PEF the flexibility to perform instead a 10 C.F.R. § 50.59 analysis to expand LLRW storage capacity (assuming it is necessary), which is a fully acceptable process to support construction of such a facility under the regulations for COL licensees.

The majority's analysis also assumes, without justification, that PEF will not take action to expand its LLRW storage capacity, either by 10 C.F.R. § 50.59 analysis or by license amendment in accordance with NUREG-0800 *before* the Levy plant commences operation — enabling PEF a time frame of greater than 2 years in which it may complete the contingent LLRW storage capacity expansion measures it states in its revised LLRW management plan.[13] Thus, PEF may undertake these expansion measures sufficiently in advance to avoid NRC enforcement action that would result from a shortage of onsite LLRW storage capacity at the culmination of the 2- to 3-year time period stated in PEF's initial LLRW plan. Even Joint Intervenors state in their answer that there is neither a "'trigger' point" nor "any timeline for obtaining a license amendment in order to expand waste storage" stated in PEF's revised LLRW management plan. Joint Intervenors' Answer at 7. It is therefore just as conceivable that PEF could commence these measures before, as opposed to after, commencing operation of the Levy plant.

However, the factual issues of precisely when PEF may actually begin an onsite LLRW storage expansion effort, whether that effort will involve a license amendment application, and whether PEF could obtain such license amendment in a 2-year time period are immaterial to the resolution of the remaining legal issue regarding C-8A. Under my reading of 10 C.F.R. § 52.79(a) and (a)(3), PEF need not affirmatively state at this time precisely when it will begin an effort for onsite LLRW storage expansion or whether it can complete that expansion effort in 2 years, because that expansion is now merely a contingent possibility.

[13] The majority reads PEF's "extended" LLRW plan as a series of events, and states the first of these events as: "the Levy plant starts operating." *See supra* p. 588.

Thus, PEF need not provide any more information than it has already provided on LLRW expansion measures that may not be necessary.

In sum, the majority's ruling assumes that PEF would generate greater than 2 years' worth of LLRW prior to determining whether it may either ship it offsite or obtain the necessary regulatory authorization to store that amount of LLRW onsite at the Levy plant. In my view, this ruling contradicts the Commission's statement that "in the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises."[14] If an applicant receives a license, it "will be expected to meet all NRC rules and all safety commitments, subject to Commission oversight and enforcement." *Private Fuel Storage,* CLI-01-9, 53 NRC at 235. Thus, absent evidence to the contrary, which the Joint Intervenors certainly have not presented, the Board should not presume that PEF will violate its commitment to follow NUREG-0800 and the agency's regulations regarding onsite LLRW storage capacity expansion at the Levy plant, or that the Staff either cannot or will not enforce that commitment.

Additionally, I note that PEF has provided sufficient detail to determine how the waste will be stored onsite should a disposal site not be available after 2 years of operation at the Levy site. PEF states "[t]he design of the storage/shipping containers is specified in Attachment D, § 11.4.1.3 at 11.4-3." PEF Motion at 7. Section 11.4.1.3 references 49 C.F.R. Part 173, Shippers — General Requirements for Shipments and Packagings, which contains the governing regulations for shipment and packaging of radioactive material. These requirements are included by reference in the DCD and thus the application provides a sufficient level of specificity regarding the storage of the LLRW.

Lastly, at least one licensing board has rejected a contention challenging a LLRW plan similar to the one provided by PEF for failure to raise a genuine dispute with the application. *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 408-11 (2009). Specifically, the *Bell Bend* board noted that applicant's COLA discussion of LLRW management contained no omission where the applicant addressed the closure of the Barnwell LLRW disposal facility, discussed "in detail . . . additional waste minimization measures," and committed to "build an additional storage facility in accordance with NRC guidelines" if further additional storage became necessary. *Id.* at 411. In its reasoning the board stated that petitioners failed to show that the material in its COLA regarding LLRW storage was insufficient to enable the necessary findings in that proceeding, and that the board "fail[ed] to see any omission . . . on the LLRW issue" with regard to the COLA in that proceeding. *Id.* (internal quotations omitted).

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[14] *Private Fuel Storage,* CLI-01-9, 53 NRC at 235 (citing *Oyster Creek,* CLI-00-6, 51 NRC at 207).

In contrast to the instant proceeding, the *Bell Bend* board dealt with admissibility of a contention alleging an ER omission in a COLA regarding LLRW management, whereas this Board is now addressing the legal merits determination on C-8A, which claims an inadequacy with the LLRW management plan in PEF's FSAR. Nonetheless, I find the decision in *Bell Bend* to be persuasive on the instant issue of whether PEF must provide more information in its LLRW plan. Joint Intervenors here allege that PEF's LLRW management plan is inadequate because it lacks, or omits, a sufficient level of information to satisfy 10 C.F.R. § 52.79(a)(3). Although the board in *Bell Bend* did not address this regulation specifically, its holding addressed the issue of whether a COLA required additional detail in its LLRW management plan, which is the focus of the instant Contention 8A. *See id.* at 410-11.

III. CONCLUSION

I agree with the ruling of the majority of this Board that the motion satisfies the summary disposition requirement that C-8A no longer raises a genuine issue of material fact. Under the majority's ruling, PEF's COLA cannot be granted at this time, as a matter of law, because PEF's COLA does not comply with the regulations. However, contrary to the majority, I would find that PEF's plan, stated in its FSAR as amended by its RAI Response, for the onsite management of LLRW for the time period beyond the initial time period specified in the AP1000 DCD provides sufficient detail to satisfy the legal requirements of 10 C.F.R. § 52.79(a) and (a)(3). I therefore conclude that PEF is entitled to a decision in its favor on its motion, as a matter of law. Accordingly, I would *grant* PEF's motion for summary disposition of C-8A.

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Cite as 72 NRC 616 (2010) **LBP-10-21**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before the Licensing Board:

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. 10-903-01-COL-BD02)

SOUTHERN NUCLEAR OPERATING COMPANY
(Vogtle Electric Generating Plant, Units 3 and 4) **November 30, 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 jointly filed motions by three public interest organizations seeking to (1) admit a new contention into the previously terminated contested portion of this proceeding; and (2) file out of time their reply pleading supporting their contention admission motion, the Licensing Board (1) grants the motion for leave to file the reply pleading out of time; and (2) denies the motion to admit new contention SAFETY-2 regarding the adequacy of SNC's containment/coating inspection program for the two new proposed units, concluding that (a) despite having established their standing to intervene as of right, the organizations failed to meet their burden with respect to the reopening, nontimely petition, and new contention standards of 10 C.F.R. §§ 2.309(c)(1), (f)(2), 2.326, principally because they did not timely submit their new contention for consideration in the adjudicatory process, preferring to provide the report upon which they now place principal reliance as support for their contention initially to the Advisory

Committee on Reactor Safeguards (ACRS) for review and action; and (b) the organizations failed with respect to the section 2.309(f)(1) contention admissibility standards because they sought to challenge aspects of the Advanced Passive (AP)1000 certified design and NRC regulations adopting American Society of Mechanical Engineers (ASME) inspection standards.

LICENSING BOARD: AUTHORITY TO REGULATE PROCEEDINGS

RULES OF PRACTICE: AUTHORITY OF LICENSING BOARD(S) TO REGULATE PROCEEDINGS

The Commission's rules of practice provide the licensing board with substantial authority to regulate hearing procedures. *See Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 19 (1998) [hereinafter 1998 Policy Statement]; *Statement of Policy on Conduct of Licensing Proceedings,* CLI-81-8, 13 NRC 452, 453-54 (1981) [hereinafter 1981 Policy Statement]. This authority encompasses, among other things, the power to set a proceeding's schedule and to ensure compliance with that schedule. *See* 10 C.F.R. § 2.319 (power of the presiding officer); *id.* § 2.332 (general case scheduling management); *id.* § 2.334 (implementing hearing schedule for proceeding).

LICENSING BOARD: DISCRETION IN MANAGING PROCEEDINGS (EXTENSIONS OF TIME)

While the participants generally must comply with the proceeding schedule established by the presiding officer, it has been recognized that participants might, in what one might hope are rare circumstances, be unable to meet established deadlines. *See* 1998 Policy Statement, CLI-98-12, 48 NRC at 21. Therefore, participants are permitted to request a filing deadline extension. In an instance when the licensing board established that a participant may file a written motion for extension of time at least 3 business days before the due date for the pleading or other submission for which an extension is sought, *see* Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 2, 2008) at 6 (unpublished) [hereinafter Initial Prehearing Order]; *see also* 1981 Policy Statement, CLI-81-8, 13 NRC at 454-55 ("Requests for an extension of time should generally be in writing and should be received by the Board well before the time specified expires."), a time extension motion must (1) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (2) demonstrate appropriate cause that supports allowing the extension, *see* Initial Prehearing Order at 6.

LICENSING BOARD: AUTHORITY TO REGULATE PROCEEDINGS

In establishing and enforcing schedule deadlines, a licensing board must remain cognizant that it must take care not to compromise the Commission's fundamental commitment to a fair and thorough hearing process. *See* 1981 Policy Statement, CLI-81-8, 13 NRC at 453; *see also* 1998 Policy Statement, CLI-98-12, 48 NRC at 18-19. The Commission has long endorsed a balanced approach to hearings — one that both expedites the hearing process and ensures fairness — in an effort to produce a record that leads to high-quality decisions that adequately protect the public health and safety, the common defense and security, and the environment. *See* 1998 Policy Statement, CLI-98-12, 48 NRC at 19; 1981 Policy Statement, CLI-81-8, 13 NRC at 453. To achieve these ends, the Commission regards "good sense, judgment, and managerial skills" as the proper guideposts for conducting an efficient hearing. 1981 Policy Statement, CLI-81-8, 13 NRC at 453.

RULES OF PRACTICE: SANCTIONS

While sanctions may be necessary for a participant that breaches its obligations under a proceeding's schedule, with an eye toward mitigating prejudice to the nonbreaching participants, the licensing board also must tailor those sanctions to bring about improved future compliance. *See* 1981 Policy Statement, CLI-81-8, 13 NRC at 454.

RULES OF PRACTICE: SANCTIONS

The Commission in its 1981 Policy Statement, CLI-81-8, 13 NRC at 454, mentioned a list of factors to aid in selecting the appropriate sanction, including

> the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances.

RULES OF PRACTICE: FILING OUT OF TIME (STANDARD)

In its recent decision in the *Bellefonte* construction permit proceeding in which the Commission elaborated on the standards for accepting an appeal filed out of time, *see Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-26, 72 NRC 474, 476-78 (2010), the Commission reiterated its longstanding rule that deadlines are to be strictly enforced. According to the Commission, strict enforcement furthers the dual interests of efficient case

management and prompt resolution of adjudications. *See id.* at 476. Only in truly "'unavoidable and extreme circumstances,'" the Commission noted, would late filings be accepted. *See id.* (quoting 1998 Policy Statement, CLI-98-12, 48 NRC at 21); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202 (1998) ("'extraordinary and unanticipated circumstances'" (quoting *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 n.3 (1982))).

RULES OF PRACTICE: FILING OUT OF TIME (STANDARD)

In making a determination about a request to file out of time, the Commission relied upon several factors. First, the Commission observed that a party at risk of filing out of time arguably never needs to file out of time because the party can first request an extension, doing so "'well before the time specified expires.'" *Bellefonte,* CLI-10-26, 72 NRC at 477 (quoting 1981 Policy Statement, CLI-81-8, 13 NRC at 455). In *Bellefonte,* the petitioners had the opportunity to request an extension of the appeal filing deadline in a timely fashion, but failed to do so. The Commission also noted that the petitioners knew when the board would likely issue its decision with an appeal deadline 10 days later, but the petitioners took no advanced action to request an extension for filing their appeal. *See id.* at 476.

RULES OF PRACTICE: FILING OUT OF TIME (STANDARD)

A second element of concern to the Commission in *Bellefonte* was the need for a participant filing out of time to offer a satisfactory explanation for its lateness, including, if necessary, an account as to why a request for extension could not have been filed beforehand. *See id.* at 477 n.17. In that regard, however, the Commission did not find counsel's alleged unfamiliarity with the agency's rules of practice, *see id.* at 476 (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 240 (1991)), or counsel's asserted busy schedule, *see id.* (citing 1981 Policy Statement, CLI-81-8, 13 NRC at 454), to be satisfactory explanations.

RULES OF PRACTICE: FILING OUT OF TIME (STANDARD)

In contrast, if a party can demonstrate that its filing out of time was truly the product of unavoidable and extreme circumstances, then the agency's case law indicates that the filing may be accepted on a motion for leave to file out of time. For instance, in *Kansas Gas and Electric,* an appeal board accepted a filing that was 3 days late, which the board characterized as not "excessively late," based on findings that the intervenor offered a reasonable explanation for the delay and the

3-day delay did not prejudice any of the other parties to the proceeding. *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 124 (1977).

RULES OF PRACTICE: FILING OUT OF TIME (STANDARD)

The unexpected action of intervenors' former attorney withdrawing from the proceeding, which left them without a responsive pleading on the day that pleading was due or any opportunity to file a timely motion requesting an extension of the filing deadline, presents the type of unavoidable and extreme circumstances that support the grant of a motion for leave to file out of time. To be sure, the agency's rules of practice permit a participant to appear on its own behalf, but the timing of the unexpected withdrawal of intervenors' counsel presented a setback not easily overcome in an afternoon and provides a satisfactory explanation for their request to file out of time.

RULES OF PRACTICE: WITHDRAWAL OF COUNSEL

No Commission rule appears to apply directly to a situation in which counsel unilaterally withdraws from a proceeding, although 10 C.F.R. § 2.314(a) broadly provides that parties *and their representatives* are expected to conduct themselves "as they should before a court of law." Absent written consent of the party and the prior appearance of another attorney, many courts require a motion to withdraw. *See, e.g.,* D.D.C. R. 83.6(c). Further, ethical rules in most jurisdictions generally do not permit an attorney to withdraw from representing a client unless withdrawal can be accomplished without material adverse effect to the client's interests. *See, e.g.,* D.C. Rules of Prof'l Conduct R. 1.16.

RULES OF PRACTICE: STANDING TO INTERVENE

In determining whether an individual or organization should be granted party status in a proceeding based on standing "as of right" consistent with 10 C.F.R. § 2.309(d), the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., Atomic Energy Act of 1954 (AEA), 42 U.S.C. §§ 2011-2297; National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370); (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 (PRESUMPTION BASED ON GEOGRAPHIC PROXIMITY)

In cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been an essential element in establishing the requisite standing elements. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

RULES OF PRACTICE: STANDING (REPRESENTATIONAL)

When an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has formally authorized the organization to represent his or her interests. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163-64 (2000).

RULES OF PRACTICE: STANDING (DEMONSTRATION IN SUPPORT OF INTERVENTION IN PREVIOUSLY TERMINATED PROCEEDING)

In the context of a COL proceeding in which intervenors seek to resurrect a previously terminated contested portion of the proceeding by gaining the admission of a new contention, potentially pertinent is the Commission's case law that a petitioner must make a fresh standing demonstration in each individual proceeding in which intervention is sought. *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010) (citing *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 343 (2009); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993)).

RULES OF PRACTICE: STANDING (CURING DEMONSTRATION IN REPLY FILING)

Also of possible relevance, given intervenors' reply filing is their only pleading in which they address their standing, are recent cases that have recognized that a petitioner's standing showing can be corrected or supplemented to cure deficiencies by means of its reply pleading. *See Bell Bend,* CLI-10-7, 71 NRC at 139-40; *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 (2010).

RULES OF PRACTICE: STANDING (DEMONSTRATION IN SUPPORT OF INTERVENTION IN PREVIOUSLY TERMINATED PROCEEDING)

To interpose a new contention in the previously terminated contested portion of a COL proceeding requires the submission of a "fresh intervention petition" that fulfills the applicable standards that govern such filings, presumably including an appropriate standing demonstration. *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 195 & n.56 (2010).

RULES OF PRACTICE: STANDING (DEMONSTRATION IN SUPPORT OF INTERVENTION IN PREVIOUSLY TERMINATED PROCEEDING)

As a general rule, it is not sufficient to seek to establish standing in a proceeding by merely cross-referencing the showing made in another proceeding, rather than making a new presentation or, at the very least, providing a submission that updates the factual information that was provided previously. *See Bell Bend,* CLI-10-7, 71 NRC at 138. "[B]ecause a petitioner's circumstances may change from one proceeding to the next," it is important that the presiding officer have up-to-date information regarding any standing claims. *Id.*

RULES OF PRACTICE: STANDING (DEMONSTRATION IN SUPPORT OF INTERVENTION IN PREVIOUSLY TERMINATED PROCEEDING)

Assuming a potential intervenor wishes to rely upon standing-related information already in the record of a proceeding, the central issue is whether that information is materially the same as when it was originally submitted. Thus, if the factual showing that the residence of an individual was within 50 miles of a facility was previously relied upon to establish standing, the certification necessary by a potential intervenor would be that there has not been a material change in that factual situation in the interim.

RULES OF PRACTICE: REOPENING OF RECORD

Once the record of a proceeding is closed, new information may not be considered in the proceeding unless the reopening standards under 10 C.F.R. § 2.326(a) are met. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120-21, 124-25 (2005) (affirming licensing board ruling that petitioners seeking to introduce new contentions after

the board had denied their initial petition to intervene needed to address the reopening standards). Section 2.326 states that for a motion to reopen to be granted:

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

10 C.F.R. § 2.326(a)(1)-(3); *see also Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Plant), LBP-10-19, 72 NRC 529, 545-50 (2010) (discussing and analyzing reopening standards).

RULES OF PRACTICE: REOPENING OF RECORD

Relative to the reopening standards, a licensing board should consider both the timing and the significance of the issue raised in a motion to reopen such that a timely motion may be denied if it raises issues that "are not of 'major significance to plant safety,'" while a nontimely motion may be granted if it raises an issue of sufficient gravity. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973) (quoting *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station, ALAB-124, 6 AEC 358, 365 (1973)). In that regard, an untimely motion to reopen must demonstrate that the issue raised "is not merely 'significant' but 'exceptionally grave.'" *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 78 (1988), *cited with approval in Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 5 (2000).

RULES OF PRACTICE: REOPENING OF RECORD (SATISFACTION OF REQUIREMENTS; BURDEN ON MOVANT)

A motion to reopen must be accompanied by affidavits that "set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied," including addressing each of the reopening criteria "separately" with "a specific explanation of why it has been met." 10 C.F.R. § 2.326(b). Additionally, if the motion to reopen "relates to a contention not previously in controversy among the parties," the movant must meet the nontimely filing requirements of 10 C.F.R. § 2.309(c). *Id.* § 2.326(d). The Commission has stated that when a petitioner seeks to introduce a new contention after the record has been closed, it should "address the reopening standards contemporaneously

with a late-filed intervention petition, which must satisfy the standards for both contention admissibility and late filing." *Millstone,* CLI-09-5, 69 NRC at 124.

RULES OF PRACTICE: CONTENTIONS (STANDARD FOR ADMISSION AFTER RECORD CLOSED)

REOPENING OF RECORD (STANDARD FOR ADMISSION OF NEW CONTENTION)

The Commission has also held that "the standard for admitting a contention after the record is closed is higher than for an ordinary late-filed contention," i.e., to justify reopening the record to admit a new contention "the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition," and the new information "must be significant and plausible enough to require reasonable minds to inquire further." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005) (internal quotations omitted).

RULES OF PRACTICE: REOPENING OF RECORD (APPLICABILITY OF STANDARD TO POST-HEARING TERMINATION INTERVENTION REQUEST)

In an instance in which the contested portion of a proceeding was terminated following an unchallenged merits determination in favor of the applicant regarding the proceeding's sole admitted contention, the licensing board's focus must be on the requirements applicable to reopening a closed record set out in 10 C.F.R. § 2.326.

REGULATION: REOPENING OF RECORD (TIMELINESS)

The first factor under section 2.326(a) is whether the reopening motion is timely. The question of the "timeliness" of an intervention submission is a matter that has import relative to a number of the different admission standards that are implicated by that filing, including paragraphs (c)(1) and (f)(2) of section 2.309. This "timeliness" question, in turn, depends on two different considerations, i.e., what/when was the "trigger" that provided the footing for the new contention and was the motion seeking record reopening/contention admission filed timely after that "trigger" event.

RULES OF PRACTICE: REOPENING OF PROCEEDINGS (BOARD JURISDICTION)

Although the first licensing board issued the summary disposition ruling that resolved all contested matters before that board after the new contention "trigger" event, any motion to admit a new contention could have been filed before the Commission or lodged with the board with the reasonable expectation that it would be appropriately referred.

RULES OF PRACTICE: REOPENING OF RECORD (SATISFACTION OF REQUIREMENTS; BURDEN ON MOVANT)

There is a strict procedural requirement that a reopening pleading must be accompanied by an affidavit that "separately" addresses each of the paragraph (a) provisions of section 2.326 and provides "a specific explanation of why it has been met." 10 C.F.R. § 2.326(b). As is the case with unexplained material submitted in support of a contention, *see Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003); *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC 361, 398 (2010), the licensing board declines an offer to hunt in the intervention petition for information regarding section 2.326(a) criteria that the agency's procedural rules require be explicitly identified and fully explained.

RULES OF PRACTICE: NONTIMELY INTERVENTION

As the Commission recently has noted, in an instance in which a contested proceeding has been terminated following the resolution of all submitted contentions, an individual, group, or governmental entity that wishes to interpose an additional issue in the case for litigation must submit a new intervention petition in which it addresses, among other things, the standards in section 2.309(c)(1) that govern nontimely intervention petitions. *See Schofield Barracks,* CLI-10-20, 72 NRC at 195; *see also* 10 C.F.R. § 2.326(d).

RULES OF PRACTICE: NONTIMELY INTERVENTION

Although the standard governing nontimely intervention petitions lists eight items that are to be addressed, given the licensing board standing ruling that essentially addresses factors (ii)-(iv) such that they would weigh in favor of intervention, the board need consider only factors (i), (v)-(viii), which are as follows:

(i) Good cause, if any, for the failure to file on time;

* * * *

(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 other 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.

10 C.F.R. § 2.309(c)(1)(i), (v)-(viii).

RULES OF PRACTICE: NONTIMELY INTERVENTION (BALANCING OF 10 C.F.R. § 2.309(c)(1) CRITERIA)

Relative to the requisite weighing and balancing of these factors, agency case law establishes that factor (i) is of paramount importance, such that failure to meet this factor enhances considerably the burden of showing that the other factors justify admission of the nontimely petition. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983). Moreover, among the remaining four elements, factors (vii) and (viii) generally have been considered to have the most significance in the balancing process in instances in which there are no other parties or ongoing related proceedings. *See id.* at 399, 402.

RULES OF PRACTICE: NONTIMELY INTERVENTION (REQUIREMENT TO ADDRESS NONTIMELY INTERVENTION STANDARDS)

Regarding the section 2.309(c)(1) factors, intervenors' failure to provide any specific discussion of most of these items or the weight they should be given in the balance that is required under this provision is a potentially fatal omission. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-93-11, 37 NRC 251, 255 (1993).

RULES OF PRACTICE: NEW CONTENTIONS

Once the deadline for filing an initial intervention petition has passed, a party wishing to submit new (or amended) contentions on matters not associated with issuance of the Staff's draft or final environmental impact statement (EIS) must satisfy the requirements of 10 C.F.R. § 2.309(f)(2) by 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: NEW CONTENTION(S) (TIMELINESS)

In light of section 2.309(f)(2) requirements that any new contention be based on material information that was not previously available, the timeliness determination required under this provision and the section 2.326(a) reopening standard can be closely equated. *See Vermont Yankee,* LBP-10-19, 72 NRC at 545.

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)(1) of the Commission's rules of practice specifies the requirements for admitting contentions. 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; (4) a demonstration that the issue raised in the contention is within the scope of the proceeding; (5) a showing that the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; and (6) 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)-(vi). 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) (citing *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 TO BASIC STRUCTURE OF AGENCY REGULATORY POLICY; CHALLENGE BASED ON REGULATORY POLICY VIEWS)

In addition, of particular relevance is the precept that 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(a); *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. The same is true relative to a contention that challenges applicable statutory requirements or the basic structure of the agency's regulatory process. *See, e.g., Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds,* CLI-74-32, 8 AEC 217 (1974). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. *See id.* at 20-21 & n.33.

RULES OF PRACTICE: ADDITIONAL/SUPPLEMENTAL AUTHORITIES SUBMISSION

Generally, an additional authorities filing would be a submission that is the functional equivalent of a letter supplementing authorities, such as is permitted under Federal Rule of Appellate Procedure 28(j). A filing falls short that does not cite to any legal "authorities." *See Black's Law Dictionary* 153 (9th ed. 2009) ("authority" defined as "[a] legal writing taken as definitive or decisive; esp., a judicial or administrative decision cited as a precedent," or "[a] source, such as a statute, case, or treatise, cited in support of a legal argument"). Authorities may be binding, adverse, or merely persuasive, but all authorities must possess some legal and precedential/persuasive value.

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE)

It is well established that a licensing proceeding is not the proper forum for challenging a standard reactor plant design. Rather, issues concerning a standard design, reviewed as part of a design certification application, are resolved in the design certification rulemaking and not in a site-specific COLA proceeding. *See* 10 C.F.R. § 52.63(a)(5) ("[I]n making the findings required for issuance of

a [COL] . . . the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification rule."); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 4 (2008); *see also* 10 C.F.R. § 2.335(a); *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 397 (2008).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE)

A petitioner wishing to raise an issue suited for a design certification rule-making may pursue either seeking to amend the final design certification rule pursuant to section 52.63(a)(1) or commenting on a proposed design certification rule during the public comment period pursuant to section 52.51(a).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE)

Intervenors are precluded from challenging ASME inspection requirements in this proceeding because NRC regulations directly incorporate ASME inspection requirements by reference. *See* 10 C.F.R. § 2.335(a); *Peach Bottom,* ALAB-216, 8 AEC at 20; Tr. at 64. NRC regulations dictate that a COL application include, inter alia, a description of the programs, and their implementation, necessary to ensure that the systems and components meet the requirements of the ASME Boiler and Pressure Vessel Code in accordance with 10 C.F.R. § 50.55a. *See* 10 C.F.R. § 52.79(a)(11).

MEMORANDUM AND ORDER
(Ruling on Request to Admit New Contention)

Styling themselves as Joint Intervenors, three public interest groups — Blue Ridge Environmental Defense League (BREDL), the Center for a Sustainable Coast (CSC), and Georgia Women's Action for New Directions (Georgia WAND) — have filed an August 12, 2010 request (as amended on August 13) to admit a new contention into the previously terminated contested portion of this 10 C.F.R. Part 52 combined license (COL) proceeding. That contention, denoted as SAFETY-2, challenges aspects of the containment/coating inspection program associated with the COL application (COLA) of Southern Nuclear Operating Company (SNC) for authorization to construct and operate two Westinghouse Electric Company Advanced Passive (AP)1000 units at SNC's existing Vogtle

Electric Generating Plant (VEGP) facility located near Waynesboro, Georgia. Both SNC and the NRC Staff oppose admitting the new contention, one or the other arguing that Joint Intervenors have failed to establish (1) their standing to participate in this proceeding; (2) their compliance with the record reopening, nontimely filing, and/or new contention filing requirements of 10 C.F.R. §§ 2.309(c), (f)(2), 2.326; and (3) the admissibility of the contention in accord with the standards in 10 C.F.R. § 2.309(f)(1). Additionally, SNC asserts that the Licensing Board should not grant Joint Intervenors' September 22, 2010 motion for leave to file out of time their reply to the respective August 23 and September 2, 2010 SNC and Staff answers to their contention admission request, which would preclude the Board from considering the contents of that reply filing in ruling on Joint Intervenors' contention admission request.

For the reasons set forth herein, the Board concludes that (1) Joint Intervenors' motion for leave to file reply out of time is *granted*; (2) Joint Intervenors have established their standing to participate in this proceeding; (3) Joint Intervenors' request to admit a new contention fails to meet the applicable record reopening, nontimely intervention request submission, and new contention filing standards; and (4) Joint Intervenors' proposed contention SAFETY-2 fails to meet the applicable contention admission standards. As a consequence, we *deny* their motion to admit a new contention, which once again terminates the contested portion of this COL proceeding before the Board.

I. BACKGROUND

A. Licensing Board 1

In March 2008, SNC applied under Part 52 of the agency's regulations for a COL to construct and operate the proposed new Units 3 and 4 at the existing two-unit VEGP site. *See* [SNC]; Notice of Receipt and Availability of Application for a [COL], 73 Fed. Reg. 24,616, 24,616 (May 5, 2008). On November 17, 2008, five public interest groups, which were referred to as Joint Petitioners,[1] filed a petition to intervene in this proceeding challenging SNC's COLA. *See* LBP-09-3, 69 NRC 139 (2009). A licensing board granted the hearing request, agreeing that Joint Petitioners established the requisite standing to intervene and submitted one admissible contention, denoted as SAFETY-1, that questioned the completeness of the COLA's consideration of low-level radioactive waste (LLRW) storage and

[1] Joint Petitioners included Atlanta Women's Action for New Directions, BREDL, CSC, Savannah Riverkeeper, and Southern Alliance for Clean Energy. *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 2, 2008) at 1 n.1 (unpublished) [hereinafter Initial Prehearing Order].

disposal. *See id.* at 146. On appeal, the Commission declined to disturb the board's admission of SAFETY-1. *See* CLI-09-16, 70 NRC 33, 34 (2009).

Thereafter, the five groups, which were referred to as Joint Intervenors following their admission as parties to the proceeding, filed a motion to amend SAFETY-1 that the board then granted. *See* Licensing Board Memorandum and Order (Ruling on Motion to Amend Contention) (Jan. 8, 2010) at 10-11 (unpublished). In the same January 2010 order amending contention SAFETY-1, the board provided a procedural path forward for the litigation, declaring that the next step would be to see if the merits of the contention, which the board described as raising a legal issue, could be resolved on motions for summary disposition. *See id.* at 9-10 (citing 10 C.F.R. § 2.1205(c)).

SNC subsequently filed a motion seeking summary disposition on contention SAFETY-1, and in May 2010 the board granted SNC's request. *See* LBP-10-8, 71 NRC 433, 447 (2010). The board concluded that the deficiencies alleged by Joint Intervenors in contention SAFETY-1, i.e., not providing detailed information regarding the design, location, and worker health impacts of a contingent onsite LLRW storage facility, did not, as a matter of law, constitute a deficiency in SNC's COLA. *See id.* at 444-45. The board's conclusion followed from a determination that 10 C.F.R. § 52.79, which sets forth requirements for SNC's final safety analysis report (FSAR), while possibly requiring such detailed information for "a component of the facility to be constructed under the COL," did not require such information for a contingent facility like that which might later need to be constructed for Units 3 and 4. *Id.* at 443.

With the resolution of contention SAFETY-1, no contentions remained before the board. *See id.* at 447. Moreover, because no party sought Commission review of the SAFETY-1 ruling pursuant to 10 C.F.R. § 2.341(b)(1) and the Commission did not take sua sponte review of the board's decision in accord with section 2.341(a)(2), the contested portion of the SNC COL proceeding was effectively terminated. *See* Licensing Board Memorandum (Referring Request to Admit New Contention to the Commission) (Aug. 17, 2010) at 2 (unpublished) [hereinafter New Contention Referral].

B. Licensing Board 2

Although the first Vogtle COL licensing board thus ceased to exist, on August 12, 2010, the three public interest groups that now refer to themselves as Joint Intervenors submitted a request to that board seeking the admission of a new contention, SAFETY-2, challenging the adequacy of SNC's containment/coating inspection program for proposed reactor Units 3 and 4. *See* Proposed New Contention by Joint Intervenors Regarding the Inadequacy of Applicant's Containment/Coating Inspection Program (Aug. 12, 2008) at 1, 4 [hereinafter Motion for New Contention]. Finding that prior termination of the contested portion of

the SNC COL proceeding meant that jurisdiction for Joint Intervenors' request resided with the Commission rather than the previously formed board, the chairman of that board referred Joint Intervenors' request to the Commission. *See* New Contention Referral at 2-3. The Commission, in turn, sent the request to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for consideration under 10 C.F.R. § 2.309(a), (c). *See* Commission Order (Aug. 25, 2010) at 1 (unpublished). On August 27, 2010, the Chief Administrative Judge appointed this Licensing Board to preside over the admission of, and any subsequent litigation regarding, the proposed contention raised by Joint Intervenors in their August 2010 new contention motion.[2] *See* [SNC,] Establishment of Atomic Safety and Licensing Board, 75 Fed. Reg. 53,985 (Sept. 2, 2010).

On August 30, 2010, this Board issued a memorandum and order establishing several administrative and scheduling directives for the new proceeding. Initially, the Board indicated that the procedures set forth in the initial prehearing order issued by the first board applied with equal force to the proceeding now before it. *See* Licensing Board Memorandum and Order (Setting Balance of Initial Briefing Schedule and Oral Argument) (Aug. 30, 2010) at 2 (unpublished) [hereinafter Order Setting Initial Briefing Schedule]. Further, with the SNC answer to Joint Petitioners' new contention motion already having been filed, *see* [SNC] Answer to Proposed New Contention by Certain Former Joint Intervenors (Aug. 23, 2010) [hereinafter SNC Answer], the Board set a due date for the Staff's answer to Joint Intervenors' new contention motion, along with a September 10, 2010 date for Joint Intervenors' reply to the SNC and Staff answers. *See* Order Setting Initial Briefing Schedule at 2. Finally, the Board proposed several dates for an initial prehearing conference/oral argument regarding the new contention motion. *See id.* After receiving input from the participants, the Board set the oral argument for September 17, 2010. *See* Licensing Board Memorandum and Order (Initial Prehearing Conference Schedule; Opportunity for Written Limited Appearance Statements) (Sept. 3, 2010) at 1 (unpublished).

Nonetheless, on September 10, 2010, the date upon which Joint Intervenors were due to submit their reply to the SNC and Staff answers, the attorney who previously had entered an appearance on behalf of Joint Intervenors withdrew from this proceeding. *See* Notice of Withdrawal for James B. Dougherty, Esq. (Sept. 10, 2010) [hereinafter Dougherty Withdrawal]. On that same date, however, Louis Zeller entered an appearance in the proceeding as a nonattorney representative for BREDL, *see* Notice of Appearance for Louis A. Zeller (Sept. 10, 2010) [hereinafter Zeller Appearance], although neither BREDL, nor CSC, nor Georgia WAND filed a reply to the SNC and Staff answers on that due date. *See*

[2] This Board, while comprised of the same members as the first board that was convened for the SNC COL proceeding, is a separate and distinct entity.

Licensing Board Memorandum and Order (Canceling Scheduled Oral Argument; Setting Schedule for Further Submission by Joint Intervenors) (Sept. 13, 2010) at 2 (unpublished) [hereinafter Order Canceling Argument].

On September 13, 2010, Licensing Board Law Clerk Wen Bu contacted Mr. Zeller regarding Joint Intervenors' continued participation in this proceeding. At that time, Mr. Zeller indicated the withdrawal of Joint Intervenors' counsel had been unexpected, but BREDL and the other organizations were attempting to find other representation and did intend to make an additional filing in the proceeding, although Mr. Zeller could not say when that filing might be submitted. *See id.* Given the circumstances, the Board canceled the September 17 argument and set a deadline of September 22, 2010, for Joint Intervenors to (1) submit a notice of appearance for new counsel; and (2) either submit (a) a notice withdrawing their new contention motion, or (b) a motion seeking leave to file their reply late, with an accompanying reply pleading. *See id.* at 3.

On September 22, Joint Intervenors filed a motion for leave to file out of time, a notice of appearance from a new counsel, and a reply to the SNC and Staff answers. *See* Motion for Leave to File Out of Time (Sept. 22, 2010) [hereinafter Motion for Leave to File]; Notice of Appearance for John D. Runkle, Esq. (Sept. 22, 2010); Joint Intervenors' Reply to SNC and NRC Staff Answers (Sept. 22, 2010) [hereinafter Joint Intervenors' Reply]. Subsequently, in a September 23 issuance, the Board set a September 29 due date for responses by SNC and the Staff to Joint Intervenors' motion for leave to file out of time. *See* Licensing Board Memorandum and Order (Scheduling Regarding Joint Intervenors' Reply-Related Filings) (Sept. 23, 2010) at 1 (unpublished) [hereinafter Reply Schedule Order]. In the subsequent SNC and Staff responses, only SNC objected to Joint Intervenors' motion for leave to file their reply out of time. *See* [SNC] Response to Joint Intervenors' Motion for Leave to File Out of Time (Sept. 29, 2010) at 1 [hereinafter SNC Motion Response]; NRC Staff's Answer to Petitioners' Motion for Leave to File Out of Time (Sept. 28, 2010) at 1, 3 [hereinafter Staff Motion Response].

In its September 23, 2010 order, the Board also proposed dates and times during the week of October 4, 2010, for the prehearing conference/oral argument originally scheduled for September 17 regarding the admission of contention SAFETY-2. *See* Reply Schedule Order at 1-2. Joint Intervenors' counsel, however, was unavailable that week due to preexisting foreign travel plans. *See* Response to Atomic Safety and Licensing Board Order Regarding Oral Argument Dates (Sept. 27, 2010) at 1; *see also* Joint Intervenors' Response to Memorandum and Order (Sept. 27, 2010) at 1. As a consequence, after further consultation with the participants, the Board set October 19, 2010, for the prehearing conference/oral argument. *See* Licensing Board Memorandum and Order (Schedule Regarding Initial Prehearing Conference/Oral Argument) (Sept. 29, 2010) at 2 (unpublished). Thereafter, on October 19, 2010, the Board held a half-day prehearing conference

in the Panel's Rockville, Maryland hearing room during which it heard oral argument concerning the admissibility of contention SAFETY-2. *See* Tr. at 1-121.

II. ANALYSIS

Against this background, we turn to the various procedural issues that are presented by Joint Intervenors' new contention motion and the associated filings. According to SNC and/or the Staff, these include whether (1) to accept the submission of Joint Intervenors' late-filed reply pleading; (2) Joint Intervernors have established their standing; (3) Joint Intervenors' new contention motion complies with the reopening and new/nontimely filing standards of 10 C.F.R. §§ 2.309(c), (f)(2), 2.326; and (4) contention SAFETY-2 is admissible under the section 2.309(f)(1) standards. *See* SNC Answer at 2-4; NRC Staff's Answer to Petition (Sept. 2, 2010) at 1 [hereinafter Staff Answer]; SNC Motion Response at 1. We begin our analysis of these various items with Joint Intervenors' motion for leave to file their reply out of time, given that the information in that reply may be pertinent to the other procedural issues that SNC and the Staff claim are applicable in considering the adequacy of Joint Intervenors' motion/petition.

A. Motion for Leave to File Reply Out of Time

DISCUSSION: Motion for Leave to File at 1; SNC Motion Response at 1-3; Staff Motion Response at 1-2; Tr. at 46-47, 65-66, 96.

RULING: Joint Intervenors' reply pleading was not filed on the September 10, 2010 due date established by the Board, nor did they, in accord with this Board's initial order, *see* Order Setting Initial Briefing Schedule at 2 (citing Initial Prehearing Order), file a timely motion before the due date seeking to extend the time for submitting their reply pleading. They did, however, provide a motion for leave to file out of time, in support of which they have provided Mr. Zeller's declaration in which he states that on September 10 he was informed for the first time by Joint Intervenors' former counsel James B. Dougherty that Mr. Dougherty would be unable timely to file his clients' reply. *See* Motion for Leave to File, unnumbered attach. at 1 (Affidavit of Louis A. Zeller Regarding ASLB Initial Prehearing Order (Sept. 22, 2010)) [hereinafter Zeller Affidavit]. According to Mr. Zeller, before that time, he was unaware of any problems with counsel meeting this filing deadline. *See id.*

Although the Staff does not oppose Joint Petitioners' motion for leave to file out of time, in its response SNC argues that Joint Intervenors failed to explain adequately the reasons for their delay in submitting their reply. In this regard, SNC notes that the "affidavits submitted with Joint Intervenors' Reply, purporting to

support Joint Intervenors' claim of standing, are each dated more than a week after the Reply was originally due, suggesting that Joint Intervenors had not provided any information to their former counsel to support this critical issue by the time the Reply was due." SNC Motion Response at 2. SNC further asserts that a motion to file late should generally be denied, except under extraordinary conditions. *See id.* & n.6 (citing *Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-26, 72 NRC 474, 476-77 & n.18 (2010)). SNC claims that Joint Intervenors might have justified filing out of time by demonstrating that they "supported their former counsel's need for information upon which to base his Reply," but having failed to make this showing, their motion should be denied. *Id.* at 2-3.

The Commission's rules of practice provide the Board with substantial authority to regulate hearing procedures. *See Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 19 (1998) [hereinafter 1998 Policy Statement]; *Statement of Policy on Conduct of Licensing Proceedings,* CLI-81-8, 13 NRC 452, 453-54 (1981) [hereinafter 1981 Policy Statement]. This authority encompasses, among other things, the power to set a proceeding's schedule and to ensure compliance with that schedule. *See* 10 C.F.R. § 2.319 (power of the presiding officer); *id.* § 2.332 (general case scheduling management); *id.* § 2.334 (implementing hearing schedule for proceeding). In this proceeding, the Board established various deadlines in its August 30, 2010 initial briefing schedule order, including deadlines for the participants' responsive pleadings. *See* Order Setting Initial Briefing Schedule at 2.

While the participants generally must comply with the proceeding's schedule established by the presiding officer, it has been recognized that participants might, in what one might hope are rare circumstances, be unable to meet established deadlines. *See* 1998 Policy Statement, CLI-98-12, 48 NRC at 21. Therefore, participants are permitted to request a filing deadline extension. In this proceeding, the Board established that a participant may file a written motion for extension of time at least 3 business days before the due date for the pleading or other submission for which an extension is sought. *See* Initial Prehearing Order at 6; *see also* 1981 Policy Statement, CLI-81-8, 13 NRC at 454-55 ("Requests for an extension of time should generally be in writing and should be received by the Board well before the time specified expires."). Such a time extension motion must (1) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (2) demonstrate appropriate cause that supports allowing the extension. *See* Initial Prehearing Order at 6.

In establishing and enforcing schedule deadlines, the Board remains cognizant that it must take care not to compromise the Commission's fundamental commitment to a fair and thorough hearing process. *See* 1981 Policy Statement, CLI-81-8, 13 NRC at 453; *see also* 1998 Policy Statement, CLI-98-12, 48 NRC at 18-19. The Commission has long endorsed a balanced approach to hearings —

one that both expedites the hearing process and ensures fairness — in an effort to produce a record that leads to high-quality decisions that adequately protect the public health and safety, the common defense and security, and the environment. *See* 1998 Policy Statement, CLI-98-12, 48 NRC at 19; 1981 Policy Statement, CLI-81-8, 13 NRC at 453. To achieve these ends, the Commission regards "good sense, judgment, and managerial skills" as the proper guideposts for conducting an efficient hearing. 1981 Policy Statement, CLI-81-8, 13 NRC at 453. While sanctions may be necessary for a participant that breaches its obligations,[3] with an eye toward mitigating prejudice to the nonbreaching participants, the Board also must tailor those sanctions to bring about improved future compliance. *See* 1981 Policy Statement, CLI-81-8, 13 NRC at 454.[4]

In seeking to strike the appropriate balance in this particular instance, we find instructive the Commission's recent decision in the *Bellefonte* construction permit proceeding in which the Commission elaborated on the standards for accepting an appeal filed out of time.[5] *See Bellefonte,* CLI-10-26, 72 NRC at 475-78. In *Bellefonte,* the petitioners sought to appeal a licensing board's denial of their intervention petition. The Commission's rules accorded the petitioners 10 days to appeal the board's ruling. The petitioners, however, missed the deadline, filing their appeal 8 days out of time. *See id.* at 475. In a September 29, 2010 ruling, the Commission denied the petitioners' motion for additional time in which to file an appeal and dismissed the appeal. *See id.* at 478.

In doing so, the Commission reiterated its longstanding rule that deadlines are to be strictly enforced. According to the Commission, strict enforcement furthers the dual interests of efficient case management and prompt resolution of adjudications. *See id.* at 476. Only in truly "'unavoidable and extreme circumstances,'" the Commission noted, would late filings be accepted. *See id.* (quoting 1998 Policy Statement, CLI-98-12, 48 NRC at 21); *see also Yankee Atomic Electric*

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[3] In its 1981 Policy Statement, the Commission noted that a spectrum of sanctions from minor to severe may be employed by a Board to assist in the management of a proceeding. *See* 1981 Policy Statement, CLI-81-8, 13 NRC at 454 ("For example, [a board] could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or more of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding.")

[4] The Commission in its 1981 Policy Statement, CLI-81-8, 13 NRC at 454, mentioned a list of factors to aid in selecting the appropriate sanction, including

> the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances.

[5] The Board notes that the same attorney, James B. Dougherty, represented both the late-filing petitioners in *Bellefonte* and, until his withdrawal, the late-filing Joint Intervenors in this proceeding.

Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202-03 (1998) ("'extraordinary and unanticipated circumstances'" (quoting *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 n.3 (1982))). The Commission concluded, however, that the circumstances surrounding the *Bellefonte* petitioners' late filing were not unavoidable and extreme so as to support their motion for additional time.

In making this determination, the Commission relied upon several factors. First, the Commission observed that a party at risk of filing out of time arguably never needs to file out of time because the party can first request an extension, doing so "'well before the time specified expires.'" *Bellefonte,* CLI-10-26, 72 NRC at 477 (quoting 1981 Policy Statement, CLI-81-8, 13 NRC at 455). In *Bellefonte,* the petitioners had the opportunity to request an extension of the appeal filing deadline in a timely fashion, but failed to do so. The Commission also noted that the petitioners knew when the board would likely issue its decision with an appeal deadline 10 days later, but the petitioners took no advanced action to request an extension for filing their appeal. *See id.* at 476.

A second element of concern to the Commission in *Bellefonte* was the need for a participant filing out of time to offer a satisfactory explanation for its lateness, including, if necessary, an account as to why a request for extension could not have been filed beforehand. *See id.* at 477 n.17. In that regard, however, the Commission did not find counsel's alleged unfamiliarity with the agency's rules of practice, *see id.* at (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 240 (1991)), or counsel's asserted busy schedule, *see id.* (citing 1981 Policy Statement, CLI-81-8, 13 NRC at 454), to be satisfactory explanations.

In contrast, if a party can demonstrate that its filing out of time was truly the product of unavoidable and extreme circumstances, then the agency's case law indicates that the filing may be accepted on a motion for leave to file out of time. For instance, in *Kansas Gas and Electric,* an appeal board accepted a filing that was 3 days late, which the board characterized as not "excessively late," based on findings that the intervenor offered a reasonable explanation for the delay and the 3-day delay did not prejudice any of the other parties to the proceeding. *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 124 (1977).

With this precedent in mind, the Board concludes that in this proceeding Joint Intervenors have adequately demonstrated their reply was filed out of time because of unavoidable and extreme circumstances. On September 10, 2010, Joint Intervenors' attorney informed the BREDL representative for the first time that he would not be able to file the reply due that day, after which he withdrew as counsel. *See* Zeller Affidavit at 1; Dougherty Withdrawal at 1. According to Joint Intervenors, given that the reply was due that day, they were unable to file a timely reply or even a timely motion requesting an extension to file a reply later, which

under the Board's earlier directive would have been due 3 business days earlier. *See* Motion for Leave to File at 1; Order Setting Initial Briefing Schedule at 2; Initial Prehearing Order at 6. We agree with Joint Intervenors that the unexpected action of their former attorney,[6] which left them without a responsive pleading on the day that pleading was due or any opportunity to file a timely motion requesting an extension of the filing deadline, presents the type of unavoidable and extreme circumstances that support the grant of a motion for leave to file out of time. To be sure, the agency's rules of practice permit a participant to appear on its own behalf, but the timing of the unexpected withdrawal of Joint Intervenors' counsel presented a setback not easily overcome in an afternoon,[7] and in this instance provides a satisfactory explanation for their request to file out of time.[8]

Accordingly, we *grant* Joint Intervenors' motion to file their reply out of time.

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[6] In light of Mr. Zeller's simultaneous appearance as a nonattorney representative for BREDL, the Board did not address whether an attorney who has filed a notice of appearance in an NRC adjudicatory proceeding may unilaterally withdraw in the circumstances presented here. No Commission rule appears to apply directly to such a situation, although 10 C.F.R. § 2.314(a) broadly provides that parties *and their representatives* are expected to conduct themselves "as they should before a court of law." Absent written consent of the party and the prior appearance of another attorney, many courts require a motion to withdraw. *See, e.g.,* D.D.C. R. 83.6(c). Further, ethical rules in most jurisdictions generally do not permit an attorney to withdraw from representing a client unless withdrawal can be accomplished without material adverse effect to the client's interests. *See, e.g.,* D.C. Rules of Prof'l Conduct R. 1.16. Suffice it to say, the Board finds Mr. Doughtery's apparent abandonment of his client, on the day its reply was due, extremely troubling.

[7] While not constituting a proper motion requesting an extension, Mr. Zeller's September 10, 2010 notice of appearance, *see* Zeller Appearance at 1, does indicate that there was a desire on the part of Joint Intervenors to remain active participants in this proceeding despite the setback of having lost their attorney.

[8] In this regard, we do not find compelling SNC's assertion that Joint Intervenors must provide more information regarding their prior diligence, namely whether Joint Intervenors "supported their former counsel's need for information upon which to base his Reply." SNC Motion Response at 2; *see* Tr. at 65-66. Joint Intervenors' efforts to find new representation, submit a timely motion for leave to file out of time, and submit a timely reply in accordance with the Board's September 13, 2010 order within 12 days of their former counsel's unexpected withdrawal effectively counters any notion that they needed to make a further showing regarding their diligence in this proceeding. Moreover, SNC has not articulated any specific prejudice that it may experience if Joint Intervenors' motion for leave to file their reply out of time is granted. *See Wolf Creek,* ALAB-424, 6 NRC at 126 (1977) (permitting intervenor's appeal 3 days out of time, when applicants' motion to strike failed to "even hint at prejudice"). Although SNC raises the specter of unacceptable delay to the entire *Vogtle* COL proceeding, *see* SNC Answer at 1, the effect of accepting Joint Intervenors' reply out of time is, even at this late juncture in the proceeding, marginal.

B. Procedural Items Applicable to the Admission of Contention SAFETY-2

With Joint Intervenors' reply now before us, we consider its contents, as well as the information and arguments provided in Joint Intervenors' original contention admission request and the SNC and Staff answers to that request in determining whether the three organizations that constitute Joint Intervenors have made the appropriate procedural showings to support the admission of contention SAFETY-2. We begin with Joint Intervenors' standing, then move on to the various timeliness factors associated with Joint Intervenors' proposed contention, and finally consider the contention admissibility factors. In each instance, we provide a background discussion regarding the legal standards that govern that item. We then analyze the applicability of that item to Joint Intervenors' request and, as appropriate, whether Joint Intervenors have met those standards so as to permit contention SAFETY-2 to be admitted for litigation in this proceeding.

1. Joint Intervenors' Standing

a. Standards Governing Standing

In determining whether an individual or organization should be granted party status in a proceeding based on standing "as of right" consistent with 10 C.F.R. § 2.309(d), the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., Atomic Energy Act of 1954 (AEA), 42 U.S.C. §§ 2011-2297; National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). In this regard, in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been an essential element in establishing the requisite standing elements. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). Further, when an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has formally authorized the organization to represent his or her interests. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163-64 (2000). In assessing a petition to determine whether these elements are met, which a licensing board must do even though there are no objections to a petitioner's standing, the Commission has indicated that we are to "construe the petition in favor of the

petitioner." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

Additionally, in the context of this proceeding, the contested portion of which Joint Intervenors now seek to resurrect by gaining the admission of a new contention, several other principles govern the timing of and support for a standing claim. Potentially pertinent is the Commission's case law that a petitioner must make a fresh standing demonstration in each individual proceeding in which intervention is sought. *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010) (citing *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 343 (2009); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993)). Also of possible relevance, given Joint Intervenors' reply filing is their only pleading in which they address their standing, are recent cases that have recognized that a petitioner's standing showing can be corrected or supplemented to cure deficiencies by means of its reply pleading. *See id.* at 139-40; *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 (2010).

We apply these precepts below in evaluating whether Joint Intervenors must establish their standing and, assuming that is required, whether they have made the requisite showings.

b. Analysis of Joint Intervenors' Standing

DISCUSSION: SNC Answer at 5-6; Staff Answer at 3-7; Joint Intervenors' Reply at 6-7; Tr. at 63, 66-67, 97-99, 113-14.

RULING: With the first licensing board's May 2010 unchallenged summary disposition ruling in favor of SNC regarding the sole admitted contention in this proceeding (i.e., contention SAFETY-1), the contested portion of this case was terminated. As a consequence, to interpose a new contention now requires the submission of a "fresh intervention petition" that fulfills the applicable standards that govern such filings, presumably including an appropriate standing demonstration. *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 195 & n.56 (2010). Given that Joint Intervenors did not address standing in their request to admit a new contention, the outstanding question thus becomes whether the showing that was made in Joint Intervenors' reply pleading constitutes a sufficient presentation to establish their standing.

What the three petitioning organizations have provided are affidavits from each organization's executive director that state the following: (1) the organization previously filed in this COL proceeding declarations from one or more individuals who live within 50 miles of the VEGP site and who have authorized the organization to represent their interests regarding issuance of the Vogtle

COL; and (2) the organization, which is continuing to represent those residents' interests, has not had a substantial change in its status or its standing regarding its participation in this proceeding. *See* Joint Intervenors' Reply, unnumbered attachs. 2-4 (Declarations of Janet Marsh, David Kyler, and Barbara Paul). Both SNC and the Staff maintain that these showings are inadequate to establish Joint Intervenors' standing.

As a general rule, it is not sufficient to seek to establish standing in a proceeding by merely cross-referencing the showing made in another proceeding, rather than making a new presentation or, at the very least, providing a submission that updates the factual information that was provided previously. *See Bell Bend,* CLI-10-7, 71 NRC at 138. "[B]ecause a petitioner's circumstances may change from one proceeding to the next," it is important that the presiding officer have up-to-date information regarding any standing claims. *Id.*

The question here is whether the showing made in the Joint Intervenors' affidavits is sufficient to fulfill these requirements. They did not make a new presentation, choosing instead to reference the factual showing made previously in their November 2008 initial intervention petition. In this instance, the referenced material is in the record of this COL proceeding, albeit a record that was developed under the aegis of another licensing board. Looking at the information that exists in the record, several individuals provided affidavits indicating that they live within 50 miles of the VEGP site and that they authorize BREDL or CSC to represent their interests. Additionally, each affidavit filed in support of Joint Intervenors' reply includes a statement that, although perhaps not the most precisely worded, nonetheless indicates there is "no substantial change" in the circumstances that were the basis upon which these organizations relied in seeking to establish their standing previously.[9] Accordingly, under the circumstances here, we conclude that BREDL and CSC have provided information that is on the docket of this proceeding and a certification of its continuing validity sufficient to establish their standing in this proceeding.[10]

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[9] Assuming a potential intervenor wishes to rely upon standing-related information already in the record of a proceeding, the central issue is whether that information is materially the same as when it was originally submitted. Thus, if the factual showing that the residence of an individual was within 50 miles of a facility was previously relied upon to establish standing, the certification necessary by a potential intervenor would be that there has not been a material change in that factual situation in the interim. Put another way, if during the pendency of a COL proceeding the individual in question has moved from a residence that was 25 miles from the facility to one that is 35 miles from the facility, a potential intervenor to the COL proceeding properly could certify that there has not been a material change in the circumstances that are necessary to establish its standing. It is, of course, the burden of the potential intervenor to ascertain whether such a representation is, in fact, correct and to provide an appropriate sworn statement making the necessary certification.

[10] In this regard, we find the circumstances before us to be more in line with the situation that the

(Continued)

With respect to Georgia WAND, a somewhat different set of circumstances is in play given that Georgia WAND was not previously admitted as a party to this COL proceeding. Instead, another organization, the Atlanta Women's Action for New Directions (Atlanta WAND), was admitted as a party in the proceeding. Although the Georgia WAND affidavit attached to Joint Intervenors' reply makes no mention of Atlanta WAND, in a November 27, 2010 e-mail addressed to the Board Chairman, the Executive Director of Georgia WAND stated that "[w]hen we began our legal interventions on the Vogtle reactor project we were Atlanta WAND but we have since changed our name to better reflect our membership and reach across the state of Georgia." Licensing Board Memorandum and Order (Forwarding E-Mail for Placement in the Record) (Sept. 27, 2010) attach. (unpublished). In this instance, we find this information sufficient to clarify the status of Georgia WAND relative to Atlanta WAND and provide support adequate to underpin a determination that Georgia WAND likewise has established its standing to participate in this aspect of the Vogtle COL proceeding.

With the standing of the three petitioners established, we turn to a consideration of whether Joint Intervenors' request to admit a new contention meets the various threshold requirements potentially applicable to their filing, including the standards governing record reopening and the admission of untimely intervention petitions and new contentions.

2. Reopening the Record

a. Standards Governing Reopening

Once the record of a proceeding is closed, new information may not be considered in the proceeding unless the reopening standards under 10 C.F.R. § 2.326(a) are met.[11] *See Millstone,* CLI-09-5, 69 NRC at 120-21, 124-25 (affirming licensing board ruling that petitioners seeking to introduce new contentions after the

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Commission in the *Comanche Peak* proceeding suggested might be sufficient to allow a petitioner to rely on a prior standing demonstration, that is, "if those prior demonstrations are (1) specifically identified and (2) shown to correctly reflect the current status of the petitioner's standing." *Comanche Peak,* CLI-93-4, 37 NRC at 163. Certainly, the November 2008 showings referenced by Joint Intervenors are considerably more contemporaneous with this proceeding than those (over 4 years old) that were sought to be relied upon by the *Comanche Peak* petitioner.

[11] Ordinarily, once a licensing board has concluded board action on a licensing case, jurisdiction to decide a motion to reopen regarding that proceeding passes to the Commission, which retains jurisdiction until the license in question has been issued. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 35-36 (2006). In this proceeding, however, the Secretary of the Commission's referral of Joint Intervenors' motion to the ASLBP (and the subsequent establishment of this Board) gave this Board jurisdiction over the motion. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120-21 (2009).

board had denied their initial petition to intervene needed to address the reopening standards). Section 2.326 states that for a motion to reopen to be granted:

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

10 C.F.R. § 2.326(a)(1)-(3); *see also Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Plant), LBP-10-19, 72 NRC 529, 545-50 (2010) (discussing and analyzing reopening standards).

Relative to these reopening standards, a licensing board should consider both the timing and the significance of the issue raised in a motion to reopen such that a timely motion may be denied if it raises issues that "are not of 'major significance to plant safety,'" while a nontimely motion may be granted if it raises an issue of sufficient gravity. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973) (quoting *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station, ALAB-124, 6 AEC 358, 365 (1973)). In that regard, an untimely motion to reopen must demonstrate that the issue raised "is not merely 'significant' but 'exceptionally grave.'" *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 78 (1988), *cited with approval in Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 5 (2000).

A motion to reopen also must be accompanied by affidavits that "set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied," including addressing each of the reopening criteria "separately" with "a specific explanation of why it has been met." 10 C.F.R. § 2.326(b). Additionally, if the motion to reopen "relates to a contention not previously in controversy among the parties," the movant must meet the nontimely filing requirements of 10 C.F.R. § 2.309(c). *Id.* § 2.326(d). The Commission has stated that when a petitioner seeks to introduce a new contention after the record has been closed, it should "address the reopening standards contemporaneously with a late-filed intervention petition, which must satisfy the standards for both contention admissibility and late filing." *Millstone,* CLI-09-5, 69 NRC at 124. The Commission has also held that "the standard for admitting a contention after the record is closed is higher than for an ordinary late-filed contention," i.e., to justify reopening the record to admit a new contention "the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition," and the new information "must be significant and plausible enough to require reasonable minds to inquire further." *Private Fuel Storage, L.L.C.* (Independent

Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005) (internal quotations omitted).

b. Analysis of Record Reopening as Applicable to Joint Intervenors' New Contention Admission Request

DISCUSSION: SNC Answer at 5; Staff Answer at 1 n.1; Joint Intervenors' Reply at 7-13; Tr. at 35-46, 48-52, 61-62, 67-75, 99-100, 108-12.

RULING: Although not mentioned in Joint Intervenors' initial request to admit new contention SAFETY-2, as was conceded by Joint Intervenors' successor-counsel during the October 19 oral argument, *see* Tr. at 35, under established Commission authority, *see Millstone,* CLI-09-5, 69 NRC at 124-25, in an instance such as this in which the contested portion of a proceeding was terminated following an unchallenged merits determination in favor of the applicant regarding the proceeding's sole admitted contention, our focus must be on the requirements applicable to reopening a closed record now set out in 10 C.F.R. § 2.326.[12] As a consequence, we look to the various provisions in section 2.326 to determine whether Joint Intervenors can meet their burden regarding those standards.

The first factor under section 2.326(a) is whether the reopening motion is timely. As several of the participants have pointed out, however, the question of the "timeliness" of Joint Intervenors' August 12 submission is a matter that has import relative to a number of the different admission standards that are implicated by that filing, including paragraphs (c)(1) and (f)(2) of section 2.309. This "timeliness" question, in turn, depends on two different considerations, i.e., what/when was the "trigger" that provided the footing for the new contention and was the motion seeking record reopening/contention admission filed timely after that "trigger" event.

Relative to the issue of the "trigger," for their part, Joint Intervenors assert the initiating circumstance for proposed contention SAFETY-2 was a statement (or more precisely, the July 13, 2010 release of the transcript containing a statement) by the Chair of the agency's Advisory Committee on Reactor Safeguards (ACRS) during a June 25, 2010 meeting concerning AP1000 design certification issues.

[12] Although, for the purpose of applying the very high-threshold reopening standard, it might be possible to distinguish between attempts to reopen the closed "record" of an evidentiary hearing regarding an admitted contention and requests to reopen the overall "record" of an adjudicatory proceeding to permit the admission of a new contention, this is not the approach the Commission has taken relative to section 2.326 and its pre-2004 predecessor, section 2.734. *See* Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538-39 (May 30, 1986) (in response to comment that reopening standard should only apply to "motion to offer additional evidence on an issue already considered," Commission declares reopening standard applies "whenever a proponent seeks to add new information to a closed record, whether the information concerns a new contention or one which has already been heard").

See Motion for New Contention at 2-4. This statement, they assert, amounts to a determination that questions regarding containment inspections and coatings fall outside the ACRS's purview as it looks at generic design certification issues. That observation, Joint Intervenors contend, gave them cause to submit a new contention in this site-specific adjudicatory proceeding, which they did on August 12 along with the supporting affidavit of their expert, Arnold Gundersen, and the April 2010 Fairewinds Associates, Inc. (FAI) report that Mr. Gundersen helped author and upon which Joint Intervenors rely as a primary technical support for their new contention. *See id.* at 6-7. On the other hand, SNC and the Staff maintain that the issues Joint Intervenors now wish to raise could have been proffered in November 2008 when the intervention petition was originally submitted in this case or, according to SNC, based on the information cited by the April 2010 FAI report, at the latest shortly after September 2009. *See* SNC Answer at 11-16; Staff Answer at 10-11.

We do not need to explore the question whether Joint Intervenors had the information, or the technical/financial wherewithal to obtain such an analysis, at the time an intervention petition was originally scheduled to be filed in this proceeding. Even assuming the relevant informational "trigger" did not exist at that juncture, it clearly did exist in April 2010 when the FAI report was issued, at which time Joint Intervenors could have submitted an appropriate pleading seeking admission of a contention based on that report.[13] Joint Intervenors' attempt to assign significance to the ACRS Chair's purported characterization of the report and the issues it raises is a delineation that, even if correct, is irrelevant. Joint Intervenors have an ongoing, independent responsibility to identify and interpose issues into this proceeding on a timely basis. For reasons best known to Joint Intervenors,[14] they chose in April 2010 to present their FAI report-based concerns to the ACRS without, as they could have, also seeking to introduce them into this proceeding for consideration as to whether they constituted an appropriate subject for further litigation. With the FAI report's issuance in late-April 2010 being the "trigger" for any Joint Intervenor contention based in substantial part on the FAI report, given the presumptive need to submit a new contention within 30 days

[13] In addition to being two of the groups that make up the Joint Intervenors, BREDL and Georgia WAND are members of the AP1000 Oversight Group that first submitted the FAI report to the ACRS on April 21, 2010. *See* Letter from John D. Runkle, AP1000 Oversight Group Counsel, to Dr. Said Abdel-Khalik, ACRS Chairman, at 1 (Apr. 21, 2010) (ADAMS Accession No. ML101230513).

[14] Joint Intervenors also reference a June 2010 Staff issuance, NRC Information Notice No. 2010-12, asserting that it is an important indicator of the Staff's realization of the gravity of the containment problem. *See* Tr. at 110. The relevant inquiry here, however, is not the Staff's recognition of when there was a problem, but rather when Joint Intervenors reasonably should have realized that a litigable issue existed. In this case, that clearly was, at the latest, in April 2010 with issuance of the FAI report regarding the AP1000 containment.

of that "trigger" date (i.e., by late May 2010),[15] their attempt to bring contention SAFETY-2 into this proceeding in mid-August 2010, nearly 4 months after the "trigger" date, cannot be considered timely.

Joint Intervenors thus having failed to meet the section 2.326(a)(1) timeliness requirement, we must consider the "safety valve" provision included with that standard, i.e., whether the issue is "exceptionally grave" such that it should be considered even if untimely. We are unable to conclude that the proposed contention SAFETY-2 meets that very high threshold. Certainly, containment leakage is a concern, whatever the cause. But, as was noted during the oral argument, *see* Tr. at 115-16, the degree to which the information regarding current containment coating and inspection issues utilized in support of the FAI report has any applicability to the AP1000 containment is far from clear, and certainly not compelling enough for us to consider this a matter that is "exceptionally grave" within the meaning of section 2.326(a)(1).

As to the remaining applicable section 2.326(a)(3) standard,[16] which requires that the motion demonstrate that a materially different result would be likely had the new "evidentiary" information been considered initially, it is clear from the case law regarding reopening motions that the evidentiary basis of the information must be sufficient to avoid a summary disposition motion. *See supra* section II.B.2.a. In this instance, however, there is nothing in the Gundersen affidavit or the documentary material provided as "evidentiary" support for the motion that provides any information that would suggest Joint Intervenors' alleged concern regarding the AP1000 design has any particular significance for the proposed Vogtle units that would merit resolution in this adjudicatory proceeding. Certainly, the essentially unsupported and unexplained allusions in Joint Intervenors' reply pleading, *see* Joint Intervenors Reply at 12, and by Joint Intervenors' counsel as part of the reply during the oral argument, *see* Tr. at 22-23, to such factors as the hot, humid nature of the Georgia climate, salinity, and human factors, are wholly insufficient in that regard. Thus, this additional prong of the reopening standard is unfulfilled as well.

Finally, as is also noted in section II.B.2.a, there is a strict procedural requirement that a reopening pleading must be accompanied by an affidavit that

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[15] In conformity with what other licensing boards generally have done, the time frame for submitting a new contention following the "trigger" date is 30 days. *See* Initial Prehearing Order at 6 n.6. Although the first *Vogtle COL* licensing board issued the summary disposition ruling that resolved all contested matters before that board 28 days after the issuance of the FAI report, *see supra* p. 631, any motion to admit a new contention could have been filed before the Commission or lodged with the Board with the reasonable expectation that it would be appropriately referred. *See* New Contention Referral at 2-3.

[16] In instances when a reopening motion is untimely, the section 3.326(a)(1) "exceptionally grave" circumstances test supplants the "significant" issue standard under section 2.326(a)(2). *See Seabrook,* ALAB-886, 27 NRC at 78.

"separately" addresses each of the paragraph (a) provisions of section 2.326 and provides "a specific explanation of why it has been met." 10 C.F.R. § 2.326(b). Recognizing that their initial petition failed to even mention record reopening or the section 2.326(a) criteria, Joint Intervenors nonetheless urge that if we search through the affidavit attached to their August 12 motion as well as their expert report, we will be able to find something that addresses each of these standards. *See* Tr. at 35-36. As is the case with unexplained material submitted in support of a contention, *see Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003); *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC 361, 398 (2010), we decline this offer to hunt for information that the agency's procedural rules require be explicitly identified and fully explained.

In sum, Joint Intervenors' request to admit new contention SAFETY-2 fails to comply with the section 2.326 reopening standards so as to merit further consideration in this proceeding.

3. Nontimely Intervention Petition

Notwithstanding the failure of Joint Intervenors' motion to fulfill the reopening standards, which is sufficient grounds to reject their new contention admission motion, in the interest of completeness and a more efficient appellate review process, we also discuss their motion's compliance with the other procedural precepts potentially applicable here, including section 2.309(c)(1)'s standards governing nontimely intervention petitions, section 2.309(f)(2)'s requirements governing new contentions, and section 2.309(f)(1)'s contention admissibility standards.

a. Standards Governing Nontimely Intervention Petitions

As the Commission recently has noted, in an instance such as this one in which a contested proceeding has been terminated following the resolution of all submitted contentions, an individual, group, or governmental entity that wishes to interpose an additional issue in the case for litigation must submit a new intervention petition in which it addresses, among other things, the standards in section 2.309(c)(1) that govern nontimely intervention petitions. *See Schofield Barracks,* CLI-10-20, 72 NRC at 195; *see also* 10 C.F.R. § 2.326(d). Although that standard lists eight items that are to be addressed, given our standing ruling above that essentially addresses factors (ii)-(iv) such that they would weigh in favor of Joint Intervenors, *see* section II.B.1.b, we need consider only factors (i), (v)-(viii), which are as follows:

(i) Good cause, if any, for the failure to file on time;

* * * *

(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 other 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.

10 C.F.R. § 2.309(c)(1)(i), (v)-(viii). Relative to the requisite weighing and balancing of these factors, agency case law establishes that factor (i) is of paramount importance, such that failure to meet this factor enhances considerably the burden of showing that the other factors justify admission of the nontimely petition. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983). Moreover, among the remaining four elements, factors (vii) and (viii) generally have been considered to have the most significance in the balancing process in instances, such as this one, in which there are no other parties or ongoing related proceedings. *See id.* at 399, 402.

b. Analysis of Nontimely Intervention Petition Standards as Applicable to Joint Intervenors' New Contention Admission Request

DISCUSSION: SNC Answer at 16-18; Staff Answer at 7-12; Joint Intervenors' Reply at 7-13; Tr. at 70-72, 89.

RULING: As we noted in section II.B.2.b, above, the timeliness analysis under the record reopening standard has implications for the various other procedural precepts that govern a newly filed contention. Relative to factor (i) under the section 2.309(c)(1) standard for admitting nontimely intervention petitions, we consider our reopening determination regarding the untimeliness of Joint Intervenors' August 2010 motion to be dispositive of the good cause showing here, particularly given that the delay in filing, albeit only 3 months, comes in the latter portion of this proceeding.[17] *See Washington Public Power Supply System*

[17] In a preargument order, the Board posed a query to the participants regarding the relationship between the "exceptionally grave" circumstances safety valve under the section 2.326(a)(1) reopening standard and the section 2.309(c)(1) "good cause" standard, in that the former seemingly could supplant/fulfill the timeliness requirements associated with section 2.309(c)(1)(i) and, potentially, section 2.309(f)(2) as well. *See* Licensing Board Memorandum and Order (Additional Matters Regarding Initial Prehearing Conference/Oral Argument) (Oct. 6, 2010) at 3 (unpublished). Although we need not reach that issue in this instance, as applicant SNC noted, to the degree section 2.309(c)(1)(i) is a "good cause" standard, rather than simply a timeliness standard, it is possible to envision that

(Continued)

(WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983). As a consequence, with the lack of "good cause" for their nontimely petition, the other section 2.309(c)(1) factors must weigh heavily in favor of allowing Joint Intervenors' petition/motion into the proceeding.

In that regard,[18] factor (v) provides some support for their motion in that there is no other means to protect Joint Intervenors' interest, assuming that they have actually provided an issue warranting litigation in an individual adjudication. So too, factor (vi) provides some support to the extent that Mr. Gundersen, Joint Intervernors' chief supporting witness, appears to be in a position to assist in developing a sound record regarding their proposed contention, assuming it were to be found admissible for further litigation. Factor (vii) also supports the admission of Joint Intervenors' motion in that there are no other parties to represent their interest. Finally, notwithstanding the recent public disclosure that the Staff's final safety evaluation report for this proceeding is now delayed until June 2011, *see* Letter from David Matthews, Director, Division of New Reactor Licensing, NRC Office of New Reactors, to Joseph A. Miller, SNC Executive Vice President, at 1 (Oct. 29, 2010) (ADAMS Accession No. ML102310362), relative to factor (viii) the admission of Joint Intervenors' motion and the accompanying proposed contention weighs against acceptance as clearly broadening the issues in the contested portion of this proceeding, which heretofore was closed, as well as potentially delaying the proceeding while that matter is fully litigated.

Balancing these various section 2.309(c)(1) elements, we conclude that the lack of good cause under factor (i), in combination with the likelihood under factor (viii) that admission of Joint Intervenors' August 2010 motion and accompanying contention SAFETY-2 will broaden and delay the contested portion of this COL proceeding, weighs against granting Joint Intervenors' nontimely petition to such a degree that they are not negated by factors (v)-(vii) as they weigh in support of admission of the petition. The factors outlined in section 2.309(c)(1) therefore do not support the admission of Joint Intervenors' request to admit a new contention.

4. Admissibility of New Contention

In their initial August 2010 filing, Joint Intervenors addressed exclusively the question whether proposed contention SAFETY-2 meets the new contention admission standards of 10 C.F.R. § 2.309(f)(2). Because the contested portion of

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the significance of the issue being raised by a new contention would be a relevant "good cause" consideration. *See* Tr. at 70-71.

[18] In addressing these additional section 2.309(c)(1) factors, we note that Joint Intervenors did not provide any specific discussion of most of these items or the weight they should be given in the balance that is required under this provision, a potentially fatal omission. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-93-11, 37 NRC 251, 255 (1993).

this proceeding previously was terminated, it is not apparent that this provision applies since their request is, in actuality, a new petition to which the reopening and nontimely filing standards of sections 2.326 and 2.309(c)(1) apply. Nonetheless, for the sake of completeness, we analyze the section 2.309(f)(2) standard as well.

a. Standards Governing New Contention Admission Requests

Once the deadline for filing an initial intervention petition has passed, a party wishing to submit new (or amended) contentions on matters not associated with issuance of the Staff's draft or final environmental impact statement (EIS) must satisfy the requirements of 10 C.F.R. § 2.309(f)(2) by 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 light of its requirements that any new contention be based on material information that was not previously available, the timeliness determination required under this provision and the section 2.326(a) reopening standard can be closely equated. *See Vermont Yankee,* LBP-10-19, 72 NRC at 545.

b. Analysis of New Contention Admission Standards as Applicable to Joint Intervenors' New Contention Admission Request

DISCUSSION: Motion for New Contention at 6-7; SNC Answer at 18; Staff Answer at 9 n.8, 12-13; Joint Intervenors' Reply at 7-13.

RULING: Given the discussion in section II.B.2.b, above, regarding Joint Intervenors' failure to fulfill the record reopening timeliness standard, the failure of Joint Intervenors' motion to admit a new contention to fulfill the test of timeliness that section 2.309(f)(2) demands is equally apparent. As was the case there, Joint Intervenors' failure to proffer a new contention in this adjudicatory proceeding in a timely manner after the April 2010 FIA report was completed and given to the ACRS establishes that Joint Intervenors' motion cannot be considered timely in accord with paragraph (iii) of section 2.309(f)(2). As a consequence, the new contention admission provisions of section 2.309(f)(2) interpose a bar to the admission of new contention SAFETY-2 as well.

5. Admissibility of Contention SAFETY-2

a. Standards Governing Contention Admissibility

Section 2.309(f)(1) of the Commission's rules of practice specifies the requirements for admitting contentions. 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; (4) a demonstration that the issue raised in the contention is within the scope of the proceeding; (5) a showing that the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; and (6) 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)-(vi). 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) (citing *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991)).

In addition, of particular relevance here is the precept that 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(a); *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.[19] The same is true relative to a contention that challenges applicable statutory requirements or the basic structure of the agency's regulatory process. *See, e.g., Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds,* CLI-74-32, 8 AEC 217 (1974). By the same token, a contention that simply states the

[19] *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).

petitioner's views about what regulatory policy should be does not present a litigable issue. *See id.* at 20-21 & n.33.

b. Analysis of Contention Admissibility Standards as Applicable to Contention SAFETY-2

SAFETY-2 (Adequacy of Containment/Coating Inspection Program)

CONTENTION: SNC's COLA fails to demonstrate that VEGP Units 3 and 4 can be operated safely because the containment and containment-coating inspection regime proposed in the FSAR, see COLA at pp. 6.1-1 – 6.1-4, fails to provide assurance against corrosion-caused penetrations of the containment that would lead, in the event of an accident, to leakage to the environment of radioactive materials in excess of regulatory requirements.

DISCUSSION: Motion for New Contention at 4-6; SNC Answer at 6-10; Staff Answer at 15-22; Tr. at 23-27, 38-43, 75-84, 86-97, 104-08, 114-16.

RULING: Proposed contention SAFETY-2 amounts to no more than an improper challenge to the AP1000 standard design and NRC inspection-related regulations as well as a redundant affirmation of established maintenance methodology. Accordingly, the Board *denies* the admission of proposed contention SAFETY-2.

As supported principally by an affidavit from Mr. Gundersen and the April 2010 FAI report,[20] proposed contention SAFETY-2 sets forth two allegations.

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[20] Following the October 19, 2010 oral argument, in support of their contention Joint Intervenors also sought to offer a pleading entitled "Additional Authorities." *See* Additional Authorities (In Support of Oral Argument) (Nov. 1, 2010) [hereinafter Additional Authorities]. The Staff and SNC filed responses to this pleading, the latter in the form of a motion to strike, *see* NRC Staff's Answer to Petitioners' "Additional Authorities" (Nov. 5, 2010); [SNC] Motion to Strike the Filing Entitled "Additional Authorities," or, in the Alternative, [SNC] Response to Movants' Filing Entitled "Additional Authorities" (Nov. 8, 2010), to which the Staff and Joint Intervenors filed responses, *see* NRC Staff's Answer to Applicant's Motion to Strike and Notice of Additional Authority (Nov. 15, 2010); Response to SNC and Staff Motions to Strike Additional Authorities (Nov. 15, 2010).

Generally, an additional authorities filing would be a submission that is the functional equivalent of a letter supplementing authorities, such as is permitted under Federal Rule of Appellate Procedure 28(j). In contrast to SNC's November 8, 2010 additional authorities submission, *see* Letter from M. Stanford Blanton, SNC Counsel, to Licensing Board (Nov. 8, 2010), Joint Intervenors' filing falls short because it does not cite to any legal "authorities," *see Black's Law Dictionary* 153 (9th ed. 2009) ("authority" defined as "[a] legal writing taken as definitive or decisive; esp., a judicial or administrative decision cited as a precedent," or "[a] source, such as a statute, case, or treatise, cited in support of a legal argument"). Authorities thus may be binding, adverse, or merely persuasive, but all authorities must possess some legal and precedential/persuasive value.

(Continued)

First, Joint Intervenors allege that the AP1000 annular containment design creates an undue risk of through-wall containment defects that increases the likelihood of leaking radioactive material in the event of an accident. In addition, Joint Intervenors assert that the NRC inspection program applicable to the Units 3 and 4 containments and the associated containment coating regime are inadequate to protect against AP1000 containment defects.

(i) CONTENTION SAFETY-2 AS A CHALLENGE TO THE AP1000 STANDARD DESIGN

It is well established that a licensing proceeding is not the proper forum for challenging a standard reactor plant design. Rather, issues concerning a standard design, reviewed as part of a design certification application, are resolved in the design certification rulemaking and not in a site-specific COLA proceeding.[21] *See* 10 C.F.R. § 52.63(a)(5) ("[I]n making the findings required for issuance of a [COL] . . . the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification rule."); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 4 (2008); *see also* 10 C.F.R. § 2.335(a); *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 397 (2008).

In proposed contention SAFETY-2, Joint Intervenors object to several features of the AP1000 standard design containment system (CNS) and passive containment cooling system (PCS). Joint Intervenors maintain, however, that proposed contention SAFETY-2 does not run afoul of the general precept that a standard design cannot be challenged in an individual adjudication because "the design of the AP1000 presents special risks of containment corrosion and coating failure." Motion for New Contention at 4; *see also* Tr. 27-28, 38-39. Specifically, Joint Intervenors claim that the unique design of the AP1000 passive cooling system creates an annulus between the containment vessel and surrounding shield building that is "specifically designed" to waft air or gases outward based on natural

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In their November 1 filing, Joint Intervenors do not cite to any additional "authorities," at least as that term is generally defined in legal parlance. Instead, they seek to provide additional material, specifically, cites to three documents or events, in support of their position that contention SAFETY-2 is admissible. *See* Additional Authorities at 1-2 (discovery of containment defects at Turkey Point 3; comments to ACRS regarding inspectability of containment liners in operating plants; statements regarding the alleged containment leak rate compared to the design basis containment leak rate). Because none of Joint Intervenors' cited authorities possess legal and precedential/persuasive value, their pleading does not constitute a supplemental authorities submission and so is essentially irrelevant to this proceeding. As such, SNC's motion to strike is moot.

[21] The Commission has similarly bound itself, generally refusing to modify, rescind, or impose new requirements on certification information, unless through rulemaking. *See* 10 C.F.R. § 52.63(a)(1).

circulation, i.e., the so-called "chimney effect." Motion for New Contention, exh. 1, at 3-4, 6 (Declaration of Arnold Gundersen Supporting [BREDL's] New Contention Regarding AP1000 Containment Integrity on the Vogtle Nuclear Power Plant Units 3 and 4 (Aug. 13, 2010)) [hereinafter Gundersen Declaration]. Joint Intervenors claim, however, that the presence of the annulus also exposes a portion of the containment vessel outer surface to environmentally assisted degradation. While acknowledging the NRC has observed similar degradation in operating plants, Joint Intervenors maintain that degradation of the AP1000 design may be more difficult to inspect given the annular geometry.[22] *See* Gundersen Declaration at 4-5, 6; Motion for New Contention, exh. 3, at 1-2 (Post Accident AP1000 Containment Leakage, An Unreviewed Safety Issue (Apr. 21, 2010)) [hereinafter FAI Report]; Tr. at 25-27.

In part, Joint Intervenors are correct. SNC's COLA incorporates an annulus around the containment vessel as well as naturally circulating air flow within the annulus. But the AP1000 DCD[23] discusses these features extensively and identifies them as having been developed for their safety-related benefits. *See* Westinghouse Electric Company LLC, AP1000 Design Control Document, Tier 2 Material, at 1.2-15 (rev. 17 Sept. 22, 2008) ("The containment vessel and the passive containment cooling system are designed to remove sufficient energy from the containment to prevent the containment from exceeding its design pressure following postulated design basis accidents.") (ADAMS Accession No. ML083230208) [hereinafter AP1000 Rev. 17 DCD]; *id.,* Tier 1 Material, at 2.2.2-2 ("The PCS performs the following safety-related function[ ]: . . . [t]he PCS provides air flow over the outside of the containment vessel by a natural circulation air flow path from the air inlets to the air discharge structure.") (ADAMS Accession No. ML083230175). As a consequence, challenging these features of the AP1000 standard design is a matter for a design certification rulemaking, *see* 10 C.F.R. § 52.63(a)(1), not a COLA proceeding, *see id.* § 52.63(a)(5); *see also Shearon Harris,* CLI-08-15, 68 NRC at 4.[24] A petitioner wishing to raise an issue

[22] As a result of these AP1000 standard design features, Joint Intervenors claim that SNC's COLA does not satisfy General Design Criterion 53, which sets forth requirements on the design of a reactor containment. *See* Motion for New Contention at 5.

[23] The design features that Joint Intervenors challenge have been part of the AP1000 standard design since at least revision 15, which the Commission adopted as a certified design. *See* Tr. at 87.

[24] To the degree the general precept that a rule, including a design certification, cannot be challenged in an adjudication might be seen as placing such matters outside the scope of this proceeding, *cf. Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000) (concluding, per 10 C.F.R. §§ 54.21(a), (c), 54.4, that the scope of license renewal proceeding is limited to review of plant structures and components requiring an aging management review for the period of extended operation and to the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses), Joint Intervenors' challenge here also would be inadmissible under section 2.309(f)(1)(iii).

suited for a design certification rulemaking may pursue either seeking to amend the final design certification rule pursuant to section 52.63(a)(1) or commenting on a proposed design certification rule during the public comment period pursuant to section 52.51(a).[25]

(ii) CONTENTION SAFETY-2 AS A CHALLENGE TO NRC INSPECTION REGULATIONS

In proposed contention SAFETY-2, Joint Intervenors also challenge the inspection and maintenance regime relating to the AP1000 containment vessel. Joint Intervenors claim that "the design of the AP1000 presents special risks of containment corrosion and coating failure, thus requiring that each plant receive special, intensive inspections that address the special circumstances faced by every plant."[26] Motion for New Contention at 4-5; *see* Tr. at 31-32, 42. In particular, Joint Intervenors challenge the sufficiency of American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code section XI for inservice inspections of containment surfaces as they apply relative to the AP1000 containment corrosion matter about which they are concerned. According to Joint Intervenors, reliance on the ASME Boiler and Pressure Vessel Code section XI for inservice inspections of containment surfaces would, in the event of an accident, lead to an unacceptably high risk of leaking radioactive materials in excess of the dose requirement in 10 C.F.R. § 52.79(a)(1)(B). *See* Motion for New Contention at 5; Gundersen Declaration at 8-9.

In this regard, Joint Intervenors argue that inservice inspections of an AP1000 containment vessel per ASME Boiler & Pressure Vessel Code section XI are inadequate. Joint Intervenors emphasize the history of containment liner degradations in operating plants, *see* Gundersen Declaration at 4-5, and conclude that this

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[25] We would add that the burden on Joint Intervenors to gain admission of a contention in this proceeding is no different because the standard AP1000 design to which they object is being updated. Currently, the latest revision (revision 3) of SNC's COLA for Vogtle Units 3 and 4 references revision 17 of the AP1000 DCD. *See* [SNC], Vogtle Elec. Generating Plant, Units 3 & 4, COL[A], pt. 2, Final Safety Analysis Report at 1.1-1 (rev. 3 Aug. 6, 2010) (ADAMS Accession No. ML102220376) [hereinafter COLA]. But revision 17 of the AP1000 DCD is under review by the Staff and therefore has not been incorporated into the adopted AP1000 DCD. Thus, in accord with the Commission's *Shearon Harris* decision, were the Board to find proposed contention SAFETY-2 "'otherwise admissible,'" the Board could "'refer [SAFETY-2] to the Staff for consideration in the design certification rulemaking, and hold that contention in abeyance.'" *See Shearon Harris,* CLI-08-15, 68 NRC at 4 (quoting Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008)). For the reasons explained in this section, however, the Board, does not find proposed contention SAFETY-2 otherwise admissible.

[26] In addition to the inspections referenced in the DCD and the COLA, Joint Intervenors claim that perhaps "robotic inspections of the interior of the containment[ ]" should be required as well. Motion for New Contention at 5.

history is directly relevant to the proposed Vogtle AP1000 units, *see id.* at 5-6; FAI Report at 4-8, 17; Tr. at 116. According to Joint Intervenors, the "common element" in every case of containment degradation has been reliance on ASME inspection requirements. Gundersen Declaration at 5 ("use of ASME inspections to monitor containment integrity is a wholly inadequate methodology"); *id.* at 8 ("ASME XI inspection programs for containments and containment liners on operating reactors have a long history of failing to detect incipient cracks or rust until the metal has been completely breached").

Joint Intervenors, however, are precluded from challenging ASME inspection requirements in this proceeding because NRC regulations directly incorporate ASME inspection requirements by reference. *See* 10 C.F.R. § 2.335(a); *Peach Bottom,* ALAB-216, 8 AEC at 20; Tr. at 64. NRC regulations dictate that a COLA include, inter alia, a description of the programs, and their implementation, necessary to ensure that the systems and components meet the requirements of the ASME Boiler and Pressure Vessel Code in accordance with 10 C.F.R. § 50.55a. *See* 10 C.F.R. § 52.79(a)(11). In turn, section 50.55a requires that ASME Code Class MC pressure-retaining components, of which the containment vessel is one,[27] meet the requirements of section XI of the ASME Boiler and Pressure Vessel Code, incorporated by reference in section 50.55a(b). *See id.* § 50.55a(g)(4). Additionally, the AP1000 DCD expressly requires that the containment vessel be subject to inservice inspections in accordance with ASME Code, section XI, subsection IWE. *See* AP1000 Rev. 17 DCD, Tier 2 Material, at 3.2-12 (ADAMS Accession No. ML083230299). Therefore, to the extent that

[27] The containment vessel is identified as an ASME Code Class MC component in both the inservice inspection subsection of section 50.55a as well as the inspection requirements subsection of the AP1000 DCD. *See* 10 C.F.R. § 50.55a(g)(4)(v)(A); AP1000 Rev. 17 DCD, Tier 2 Material, at 3.2-21.

proposed contention SAFETY-2 challenges the adequacy of ASME inspection requirements,[28] the contention is inadmissible as a challenge to NRC regulations.[29]

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[28] At the October 19 oral argument, the Board identified a quandary pertaining to the admissibility of COL inspection-related contentions. *See* Tr. 78-81, 88-96, 105, 114-15. Specifically, the Board questioned how a petitioner could submit an admissible contention regarding a COLA inspection plan if, as SNC seemed to assert, an inspection plan could be shielded from challenge simply by including a bare-bones description pursuant to section 52.79(a)'s COLA requirements along with a statement that the inspection plan will comply with all pertinent NRC regulations. *See* Tr. at 80-81, 90. In response to Board queries about whether a petitioner could ever frame an admissible contention that challenged a COLA description of an inspection plan without necessarily challenging the referenced standard plant design or NRC regulations, the Staff conceded such a contention could be articulated (even though Joint Intervenors had not done so in this proceeding). *See* Tr. at 105. SNC argued, however, that in compliance with Commission guidance, inspection plans are subject only to operational oversight through the NRC's inspection and enforcement programs and are not subject to adjudicatory scrutiny in a licensing proceeding, *see* Tr. at 78-81.

Although the Board decides the admissibility of proposed contention SAFETY-2 on other grounds, it is not apparent to us how SNC's argument accounts for section 52.79(a) of the Commission rules, which identifies numerous requirements for a COLA, including the need for the application to include a description of inservice inspections pursuant to section 52.79(a)(11) (citing section 50.55a) and a description of the program, and its implementation, for monitoring the effectiveness of maintenance pursuant to section 52.79(a)(15) (citing section 50.65), *see* 10 C.F.R. § 52.79(a)(11), (15), as well as the general proposition that under AEA § 189a, 42 U.S.C. § 2239(a), issues material to the agency's licensing decision must be subject to adjudicatory challenge, *see Union of Concerned Scientists v. NRC,* 735 F.2d 1437, 1447 (D.C. Cir. 1984), *cert. denied,* 469 U.S. 1132 (1985).

[29] As a secondary matter, Joint Intervenors also argue that applying and monitoring protective coatings per American Society for Testing and Materials (ASTM) standards is inadequate to address their containment corrosion concern because "[t]hese policies have already failed in the past." Gundersen Declaration at 9. As with their challenge to the ASME inservice inspection requirements discussed above, Joint Intervenors cite several instances of degraded containment coatings at operating plants, *see id.* at 4-5, and argue that this history is directly relevant to the proposed Vogtle AP1000 units, *see id.* at 5-6; FAI Report at 4-8, 17; Tr. at 116. Joint Intervenors then conclude, albeit without providing any explanation or theory as to why, that the presence of coating defects on some containments subject to ASTM standards indicates that ASTM coating standards are inadequate generally. *See* Gundersen Declaration at 6, 9.

Joint Intervenors' ASTM coating standards concern appears to hinge on what Joint Intervenors state is a purported inability of the ASTM standards "to prevent incipient rust," Gundersen Declaration at 9, or to mitigate even "potential pitting," FAI Report at 15. In other words, Joint Intervenors argue that the ASTM coating standards fail because there is a lack of assurance that no coating defect will develop. This, however, does not account for the fact that SNC's COLA, in conjunction with the AP1000 certified design that it adopts, recognizes the potential for coating and containment degradation and sets forth numerous precautionary measures in keeping with established containment coating maintenance methodology. *See* AP1000 Rev. 17 DCD, Tier 2 Material, at 6.1-4, -5 ("The AP1000 design considers the function of the coatings, their potential failure modes, and their requirements for maintenance.") (ADAMS Accession No. ML083230331). Applying and maintaining a protective coating system in

(Continued)

III. CONCLUSION

The contested portion of this COL proceeding having been terminated, in submitting contention SAFETY-2, Joint Intervenors faced several not insubstantial hurdles in seeking to have the proceeding revived and a new contention regarding the adequacy of the AP1000 containment design and coating regime accepted for litigation. In addition to the provisions of the agency's rules under 10 C.F.R. §§ 2.326, 2.309(c)(1), (f)(2), governing, respectively, reopening a closed record and the admission of nontimely hearing petitions and new contentions, Joint Intervenors had to provide a showing that the contention fulfilled the admissibility requirements of section 2.309(f)(1). Joint Intervenors were able to establish their standing to intervene as of right. They failed, however, with respect to the reopening, nontimely petition, and new contention standards principally because they did not timely submit their new contention for consideration in the adjudicatory process, preferring to provide the report upon which they now place principal reliance as support for their contention to the ACRS for review and action. Additionally, their proffered contention is not admissible in this proceeding because it improperly seeks to raise a challenge to aspects of the AP1000 standard design and NRC regulations regarding ASME inspections.

For the foregoing reasons, it is, this 30th day of November 2010, ORDERED that

1. Joint Intervenors' September 22, 2010 motion for leave to file their reply pleading out of time is *granted.*

2. Joint Intervenors' August 12, 2010 motion to admit new contention SAFETY-2 is *denied.*

3. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon an

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accordance with ASTM standards is but one precautionary measure, *see* COLA at 6.1-1, -2, with other measures including establishing an inservice inspection plan for the containment vessel, *see* AP1000 Rev. 17 DCD, Tier 2 Material, at 3.2-12; setting an inspection schedule, *see id.* at 6.1-9; establishing an inspection technique for the coating, *see id.*; designing hatch access to the containment outer surface, *see id.* at 3.8-2 (ADAMS Accession No. ML083230305); designing an environmental seal between the middle and upper annulus, *see id.* at 3.8-38, -39; designing an environmental seal at the concrete and containment vessel junction, *see id.* at 3.8-15; increasing vessel wall thickness for corrosion-related thinning, *see id.* at 3.8-15; and generally monitoring the effectiveness of maintenance of the containment vessel outer wall, *see* 10 C.F.R. § 50.65. As a consequence, because this ASTM standards-based concern fails to mount a specific challenge to the containment coating application and maintenance requirements that would be applicable to the proposed Vogtle units, it fails to present a genuine dispute with SNC's COLA so as to warrant contention SAFETY-2's admission into this proceeding. *See* 10 C.F.R. § 2.309(f)(1)(vi).

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
November 30, 2010

Cite as 72 NRC 661 (2010) **LBP-10-22**

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) **December 14, 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, the Board rules on ten Phase I legal issues and denies two rule waiver petitions filed by the State of Nevada (Nevada).

RULES OF PRACTICE: HLW REPOSITORY (AS LOW AS IS REASONABLY ACHIEVABLE)

Section 20.1101(b), requires licensees (including Part 63 licensees) to use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA). 10 C.F.R. § 20.1101(b).

RULES OF PRACTICE: HLW REPOSITORY (AS LOW AS IS REASONABLY ACHIEVABLE)

In the language and context of the 10 C.F.R. § 20.1101 upon which NEI relies,

we find support for the view that DOE need not weigh ALARA considerations outside the geologic repository operations area for which it is responsible.

RULES OF PRACTICE: HLW REPOSITORY (AS LOW AS IS REASONABLY ACHIEVABLE)

The Commission said that NRC "regulations set a minimum standard for safety, not a maximum." *Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 599 (2009). The Commission's decision dictates our ruling here. DOE need not demonstrate that it meets applicable standards without "unnecessary expenditures."

RULES OF PRACTICE: HLW REPOSITORY (POSTCLOSURE PUBLIC HEALTH AND ENVIRONMENTAL STANDARDS)

An analysis based upon the historical geologic record is not required by the regulations, nor is it necessarily sufficient. The plain language of 10 C.F.R. § 63.305 does not say anything about analyzing future climate based upon the historical record. It says "DOE must vary factors related to the geology, hydrology, and climate based upon cautious, but reasonable assumptions of the changes in these factors that could affect the Yucca Mountain disposal system during the period of geologic stability." 10 C.F.R. § 63.305(c).

RULES OF PRACTICE: HLW REPOSITORY (POSTCLOSURE PUBLIC HEALTH AND ENVIRONMENTAL STANDARDS)

The Commission proposed adoption of a version of 10 C.F.R. Part 63 that included a provision (in proposed section 63.115(a)(3)) stating "[c]limate evolution shall be consistent with the geologic record of natural climate change in the region surrounding the Yucca Mountain site." Proposed Rule: "Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada," 64 Fed. Reg. 8640, 8677 (Feb. 22, 1999). The proposal was deleted from the final Part 63, with the explanation that "[r]equirements related to characteristics of the reference biosphere and critical group [in section 63.115] have been deleted from this section in light of the definitions and concepts necessary to estimate dose to the reasonably maximally exposed individual, now specified in subpart L [which included 10 C.F.R. § 63.305]." 66 Fed. Reg. at 55,778. Thus, the Commission considered whether it should require that projections of climate change be based upon the geologic record and ultimately decided not to do so, preferring instead the more general requirement in 10 C.F.R. § 63.305 that climate projections be based on "cautious, but reasonable assumption."

RULES OF PRACTICE: HLW REPOSITORY (POSTCLOSURE PUBLIC HEALTH AND ENVIRONMENTAL STANDARDS)

Pursuant to section 63.342(c)(2), DOE must assess the effects of climate change during the 990,000-year period regardless of whether it necessarily must assess climate change during the initial 10,000-year period under the criteria set forth in sections 63.342(a) and (b).

RULES OF PRACTICE: HLW REPOSITORY (POSTCLOSURE PUBLIC HEALTH AND ENVIRONMENTAL STANDARDS)

DOE may elect to use the prescribed method specified in section 63.342(c)(2) to analyze the effects of climate change during the post-10,000-year period, regardless of whether it is required to analyze the effects of climate change during the initial 10,000-year period.

RULES OF PRACTICE: HLW REPOSITORY (POSTCLOSURE PERFORMANCE ASSESSMENT)

Pursuant to 10 C.F.R. § 63.114, only FEPs that produce significant changes in releases or doses within the first 10,000 years after disposal must be included in performance assessments. 10 C.F.R. § 63.114(a)(5). Section 63.342(a), in turn, requires analysis of only those FEPs that cannot be excluded on the basis of low probability of occurrence and whose exclusion would result in a significant change in the results of the performance assessment in the first 10,000-year period.

RULES OF PRACTICE: HLW REPOSITORY (POSTCLOSURE PERFORMANCE ASSESSMENT)

Section 63.342(c) does not require the post-10,000-year performance assessment to include the effects of erosion if it is assumed there is no showing that erosion causes increases in radiological exposures or releases within the first 10,000 years.

RULES OF PRACTICE: HLW REPOSITORY (CONTENTS OF LICENSE APPLICATION)

By its terms, the applicable NRC regulation requires merely that the License Application be "as complete as possible in light of the information that is reasonably available at the time of docketing." 10 C.F.R. § 63.21(a). The only reference in the regulations to "final design" implies that a final design is not required. *Id.* § 63.21(c)(18). Rather, the regulations state that, in the

License Application, "[s]pecial attention must be given to those items that may significantly influence the final design." *Id.* It seems doubtful that the Commission would direct DOE to specify items that "may significantly influence the final design" of the repository if the License Application were to provide a final design.

RULES OF PRACTICE: HLW REPOSITORY (REQUIREMENTS FOR PERFORMANCE ASSESSMENT)

Although coverage of a potential event by DOE's quality assurance does not operate as a matter of law to exclude consideration of a feature, event, or process (FEP), the effects of the quality assurance program can be taken into account in determining the probability and consequences of the FEP.

HLW REPOSITORY: (STATUTORY CONSTRUCTION)

No requirement for a quantitative evaluation of an individual barrier's capabilities appears in the relevant statutory language. Section 121(b)(1)(B) of the Nuclear Waste Policy Act states merely that the NRC's licensing regulations must "provide for the use of a system of multiple barriers in the design of a repository." 42 U.S.C. § 10141(b)(1)(B).

RULES OF PRACTICE: HLW REPOSITORY (REQUIREMENTS FOR PERFORMANCE ASSESSMENT)

Because there is no requirement to demonstrate quantitatively the independent contribution of the drip shields, DOE need not perform a barrier neutralization analysis to ascertain each individual barrier's contribution to the repository's multiple barrier system.

RULES OF PRACTICE: HLW REPOSITORY (CONTENTS OF LICENSE APPLICATION)

Section 63.21(c)(7) requires that the License Application include a "description of plans for retrieval and alternate storage of the radioactive wastes, should retrieval be necessary." The most natural reading of this requirement is that the License Application must set forth a general "description" of plans that will be developed in greater detail "should retrieval be necessary."

RULES OF PRACTICE: HLW REPOSITORY (CONSTRUCTION AUTHORIZATION)

Before authorizing construction of the proposed repository, the Commission must determine, pursuant to 10 C.F.R. § 63.31(a)(2), "[t]hat there is reasonable expectation that the materials can be disposed of without unreasonable risk to the health and safety of the public." Thereafter, pursuant to 10 C.F.R. § 63.41(a)(2), before issuing a license to receive and possess such materials at the repository, the Commission must find that construction of "[a]ny underground storage space required for initial operation" has been "substantially complete[d]."

RULES OF PRACTICE: HLW REPOSITORY (PERFORMANCE MARGINS ANALYSIS)

Under 10 C.F.R. §§ 63.113, 63.114, and Part 63 Subpart G, the performance margins analysis cannot be used to validate or provide confidence in the total systems performance assessment if its data and models are not qualified under DOE's quality assurance program.

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

The Commission has set forth a four-part test, under which a petitioner must demonstrate that: (1) the rule's strict application "would not serve the purpose for which [it] was adopted"; (2) the petitioner has alleged "special circumstances" that were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived"; (3) those circumstances are "unique" to the facility, rather than "common to a large class of facilities"; and (4) a waiver of the regulation is necessary to reach a "significant safety problem." *Dominion Nuclear Connecticut Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005).

MEMORANDUM AND ORDER

(Deciding Phase I Legal Issues and Denying Rule Waiver Petitions)

This proceeding concerns the United States Department of Energy's (DOE's) application (License Application) for authorization to construct a high-level nuclear waste repository in Nye County, Nevada. Before the Board are ten legal issues and, in addition, two petitions for rule waivers pursuant to 10 C.F.R. § 2.335. The Board decides the legal issues, and denies both waiver petitions.

The Board respectfully calls to the Commission's attention, however, that one of the waiver petitions (NEV-SAFETY-203) raises a potentially significant safety concern: that is, whether long-term erosion over hundreds of thousands of years might entirely eliminate the proposed repository's upper geologic barrier and expose emplacement drifts to the surface. Under current regulations, the Board may not consider this allegation unless erosion is also shown to be a safety concern in the relatively near term (that is, over the next 10,000 years).[1] Accordingly, although the petition fails to satisfy the strict requirements for a rule waiver, the Commission might wish to revisit on its own initiative the rule in question (10 C.F.R. § 63.342) if it concludes that this safety concern was not adequately addressed in the original rulemaking proceeding.

I. BACKGROUND

Pursuant to CAB Case Management Order #2,[2] this proceeding is taking place in phases. That order directed the affected parties to try to reach agreement on a proposed legal question for each legal issue contention that will be addressed in Phase I.[3] The parties were able to agree on the wording of most of the eleven issues.[4]

Accordingly, on October 23, 2009, the Board issued an order that identified Phase I legal issues for briefing.[5] The Board accepted the parties' joint statement of eight issues (1, 2, 5, 6, 7, 8, 9, and 11), and directed briefing of one disputed legal issue (10) in the form stated by Nevada.[6]

As the parties recognized, Legal Issues 3 and 4 (as proposed) were closely related to the Board's decision on the admissibility of a proffered new contention (NEV-SAFETY-202). In its order identifying Phase I legal issues for briefing, the Board stated that it intended shortly to admit NEV-SAFETY-202 (as set forth in the first sentence of the contention) solely as a legal issue contention and to defer consideration of its alternative request for a rule waiver pursuant to 10 C.F.R. § 2.335. Accordingly, the Board directed that the legal issue presented by

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[1] *See* 10 C.F.R. § 63.342(c).

[2] CAB Case Management Order #2 (Sept. 30, 2009) (unpublished).

[3] *Id.* at 4.

[4] *See* U.S. Department of Energy, State of Nevada and Nuclear Energy Institute Joint Proposal Identifying Phase 1 Legal Issues for Briefing (Oct. 6, 2009) [hereinafter Joint Proposal Identifying Legal Issues]; U.S. Department of Energy Views on NEV-SAFETY-162 (Oct. 6, 2009); State of Nevada's Legal Issue for NEV-SAFETY-162 (Oct. 6, 2009); NRC Staff Comment on Joint Proposal Identifying Phase I Legal Issues for Briefing (Oct. 13, 2009).

[5] CAB Order (Identifying Phase I Legal Issues for Briefing) (Oct. 23, 2009) (unpublished) [hereinafter Order Identifying Phase I Legal Issues].

[6] *Id.* at 1-2.

NEV-SAFETY-202 be briefed in the same manner as all other Phase I legal issues (in effect merging that legal issue with Legal Issues 3 and 4, as proposed by the parties).[7] Therefore, pursuant to CAB Case Management Order #2, the affected parties filed initial briefs and reply briefs on ten legal issues.[8] The Board held oral argument on these ten legal issues on January 26 and 27, 2010.

Separately, by order dated December 9, 2009, the Board addressed the admissibility of six additional contentions that were filed subsequent to the original intervention petitions.[9] Two of these six contentions (NEV-SAFETY-202 and -203) were filed in response to the NRC's final rule implementing the Environmental Protection Agency's revised dose standard after 10,000 years.[10] Both contentions allege that DOE improperly excluded certain features, events, and processes (FEPs) from its post-10,000-year analysis — namely, climate change and land-surface erosion.[11]

Although styled as a contention, NEV-SAFETY-203 is actually a petition for a rule waiver pursuant to 10 C.F.R. § 2.335.[12] In lieu of holding argument on the petition, in our December 9, 2009 order, we directed the NRC Staff to file

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[7] *Id.* at 1.

[8] State of Nevada's Opening Brief on Phase I Contention Legal Issues (Dec. 7, 2009) [hereinafter Nevada Legal Issue Brief]; NRC Staff Brief on Phase I Legal Issues (Dec. 7, 2009) [hereinafter NRC Staff Legal Issue Brief]; The Nuclear Energy Institute's Brief on Phase I Legal Issue No. 1 (Dec. 7, 2009) [hereinafter NEI Legal Issue Brief]; U.S. Department of Energy Brief on NEI-SAFETY Contention 05 (Dec. 7, 2009) [hereinafter DOE Legal Issue 1 Brief]; U.S. Department of Energy Brief on Nevada Safety Contentions 009, 010, 011, 012, 013 and 019 (Dec. 7, 2009) [DOE Legal Issue 2 Brief]; U.S. Department of Energy Brief on NEVADA-SAFETY Contention 202 and Post 10,000 Year Aspects of NEVADA-SAFETY Contentions 011 and 019 (Dec. 7, 2009) [hereinafter DOE Legal Issues 3 & 4 Brief]; U.S. Department of Energy Brief on Contention NEV-SAFETY-041 (Dec. 7, 2009) [DOE Legal Issue 5 Brief]; U.S. Department of Energy Brief on Consolidated Contentions NEV-SAFETY-146/NEV-SAFETY-201 (Dec. 7, 2009) [hereinafter DOE Legal Issue 6 Brief]; U.S. Department of Energy Brief on NEVADA-SAFETY Contention 149 (Dec. 7, 2009) [hereinafter DOE Legal Issue 7 Brief]; U.S. Department of Energy Brief on Contention NEV-SAFETY-161 (Dec. 7, 2009) [hereinafter DOE Legal Issue 8 Brief]; U.S. Department of Energy Brief on Contention NEV-SAFETY-169 [hereinafter DOE Legal Issue 9 Brief]; U.S. Department of Energy Brief on Contention NEV-SAFETY-162 (Dec. 7, 2009) [DOE Legal Issue 10 Brief]; U.S. Department of Energy Brief on Contention NEV-SAFETY-171 (Dec. 7, 2009) [hereinafter DOE Legal Issue 11 Brief]; State of Nevada Reply Brief on Phase I Legal Issues (Jan. 6, 2010) [hereinafter Nevada Reply]; NRC Staff Reply to Initial Briefs on Phase I Legal Issues (Jan. 6, 2010) [hereinafter NRC Staff Reply]; Reply of the Nuclear Energy Institute to the Department of Energy and NRC Staff Briefs on Phase I Legal Issues (Jan. 6, 2010) [hereinafter NEI Reply]; U.S. Department of Energy Consolidated Reply Brief on Phase 1 Legal Issue Safety Contentions (Jan. 6, 2010) [hereinafter DOE Reply].

[9] *See* LBP-09-29, 70 NRC 1028 (2009).

[10] Implementation of a Dose Standard After 10,000 Years, 74 Fed. Reg. 10,811 (Mar. 13, 2009).

[11] *See* State of Nevada's New Contentions Based on Final NRC Rule (May 12, 2009) at 2, 9 [hereinafter Nevada's Final NRC Rule Contentions].

[12] *See* Nevada's Final NRC Rule Contentions at 9.

written answers to certain questions, and afforded other parties an opportunity to respond.[13]

As presaged in our October 23, 2009 order, the Board's December 9, 2009 order admitted NEV-SAFETY-202 solely as a legal issue contention.[14] Because of our resolution of that legal issue, Nevada's alternative request for a rule waiver in connection with this contention now becomes relevant. The Board concludes that this waiver request can be resolved at this time on the basis of the parties' original filings in connection with the contentions, as well as their answers and responses to the Board's questions concerning the similar issues raised by NEV-SAFETY-203.

Accordingly, ten legal issues and two waiver petitions are now ripe for decision.[15] As a result of the Board's resolution of the legal issues presented, some admitted contentions should likely be dismissed, while others may survive in part insofar as they allege factual disputes that cannot be resolved as a matter of law.

The Board therefore directs the affected parties to attempt (and without waiver of any party's eventual appeal rights with respect to the Board's rulings) to stipulate to the effects of these rulings on specific admitted contentions, which stipulation shall be filed on or before January 21, 2011. Insofar as the parties cannot fully agree, each party shall state its separate differing position on any contention by a filing due on that same date.

II. RULINGS ON LEGAL ISSUES

A. Legal Issue 1

> (1) Whether the above regulations [10 C.F.R. §§ 20.1002, 20.1003, 20.1101, 50.40, and 63.111] require ALARA considerations at individual nuclear plant sites remote from the [Geologic Repository Operations Area] to be addressed in DOE's [License

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[13] LBP-09-29, 70 NRC at 1037-38; *see* NRC Staff Response to Board Questions (Dec. 22, 2009) [hereinafter Staff Response to Board Questions]; State of Nevada's Response to NRC Staff Answers to Board Questions (Dec. 30, 2009).

[14] LBP-09-29, 70 NRC at 1031.

[15] The passage of time between briefing and decision on these matters results from unusual intervening developments. On February 1, 2010 — 5 days after argument on the legal issues — DOE filed unopposed motions for an interim suspension of discovery and for a stay of most aspects of this proceeding, which the Board granted on February 2 and February 16, 2010, respectively. *See* CAB Order (Granting Interim Suspension of Discovery) (Feb. 2, 2010) (unpublished); CAB Order (Granting Stay of Proceeding) (Feb. 16, 2010) (unpublished). On March 3, 2010, DOE moved to withdraw its License Application. *See* U.S. Department of Energy's Motion to Withdraw (Mar. 3, 2010). On June 29, 2010, the Board denied DOE's motion, and the stay expired. *See* LBP-10-11, 71 NRC 609 (2010). The next day the Commission directed the parties to brief whether the Commission should review the Board's ruling and, if so, whether it should reverse or affirm the Board. *See* Order of the Secretary Regarding Board Decision LBP-10-11 (June 30, 2010) at 1 (unpublished).

> Application]; and (2) whether DOE must demonstrate that the repository not only meets applicable safety and environmental regulatory standards, but must show that it does so without any alleged unnecessary expenditures of resources.[16]

This issue sets forth two questions.

The first concerns the Commission's requirement that licensees must generally try to keep radiation exposures "as low as is reasonably achievable" (ALARA). Pursuant to the cited regulations, must DOE weigh ALARA considerations insofar as design features of the repository might lead to unnecessary radiation exposures at individual nuclear reactor plant sites that are not part of the geologic repository operations area (GROA) itself?

DOE and the NRC Staff contend that DOE's ALARA responsibilities do not extend beyond the GROA that it controls.[17] NEI contends that no such limitation exists.[18]

The issue is one the Commission expressly directed the Board to consider[19] and indicated that it "merits close consideration."[20] On balance, the Board agrees with DOE and the NRC Staff.

NEI invokes 10 C.F.R. Part 20 of the Commission's regulations, and asserts that section 20.1002 applies Part 20 regulations to Part 63 licensees without limitation. In turn, section 20.1101(b) requires licensees (including Part 63 licensees) to "use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA)."[21]

Pointing out that the operators of nuclear power plants have their own ALARA responsibilities under 10 C.F.R. Part 50, DOE and the NRC Staff argue that 10 C.F.R. Part 20 was not intended to require DOE to consider the possible effects of its repository design on preclosure radiation exposures beyond the borders of

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[16] Joint Proposal Identifying Legal Issues, Attachment 1 at 1.

[17] *See* DOE Reply at 7; NRC Staff Legal Issue Brief at 8.

[18] NEI Legal Issue Brief at 11.

[19] *See* CLI-09-14, 69 NRC 580, 595 (2009) ("[T]he Boards should consider whether ALARA considerations at individual plant sites are appropriately part of this proceeding.").

[20] *See id.* at 595, 600.

[21] 10 C.F.R. § 20.1101(b). Further, section 20.1003 defines the ALARA obligation as:

> making 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, 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.

Id.

the repository operations area itself.[22] We agree, but not merely because — as DOE argues — the limitation "is understood implicitly because it is so obvious."[23] Rather, in the language and context of the regulation upon which NEI relies, we find support for the view that DOE need not weigh ALARA considerations outside the GROA for which it is responsible.

First, section 20.1101(b) directs licensees to "use" procedures and engineering controls to achieve ALARA. Even assuming that DOE's repository design might compel individual power plants to "use" certain procedures or controls, DOE itself cannot "use" such procedures or controls at individual plants, as that term is ordinarily understood, because DOE does not operate individual plants. The section upon which NEI relies does not, by its terms, literally apply. In that same vein, the contention underlying Legal Issue 1 challenges an element of the repository design, and such design does not fall within the ambit of the required "procedures and engineering controls" of section 20.1101(b).[24]

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[22] *See* NRC Staff Legal Issue Brief at 4; DOE Legal Issue 1 Brief at 2. The legal issue presented concerns the allegation that the repository's design will directly cause *preclosure* impacts on doses received by workers at nuclear power plants throughout the country. The regulatory history shows that while the Commission wanted to avoid layering *postclosure* ALARA considerations on top of a specific postclosure performance objective that it found to be already sufficiently conservative, the Commission did not wish to prevent appropriate ALARA consideration of preclosure doses. *See* Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, NV, 66 Fed. Reg. 55,732, 55,751 (Nov. 2, 2001).

[23] DOE Reply at 5.

[24] *See, e.g.,* The Nuclear Energy Institute's Petition to Intervene (Dec. 19, 2008) at 31 (arguing as a basis for NEI-SAFETY-05 that "[t]his overly conservative design will result in installation of disposal control rod assemblies at nuclear power plants"); NEI Legal Issue Brief at 7 ("NEI's contention focuses on certain repository design or operational parameters . . . ."); NEI Reply at 7 ("NEI's issue is a *design* issue . . . .") (emphasis in original). Similarly, the purpose of the inapplicable "procedures and engineer controls" in section 20.1101(b) are to ensure ALARA "occupational doses" and "doses to members of the public," terms defined in the definition section of 10 C.F.R. § 20.1003 so as to be mutually exclusive thereby making section 20.1101(b) inapplicable here as well. In pertinent part, an "[o]ccupational dose" is a "dose received by an individual in the course of employment in which the individual's assigned duties involve exposure to radiation" and a "[m]ember of the public" is "any individual except when that individual is receiving an occupational dose." 10 C.F.R. § 20.1003. Therefore, in the context of a section 20.1101 radiation protection program, the most reasonable reading of the meaning of "occupational dose" is a dose received by an employer's (here DOE's) own employees to whom DOE assigns duties, not the employees of individual nuclear power plant employers (here NEI members) at remote sites to whom DOE does not assign duties. When the Commission promulgated 10 C.F.R. Part 63, it amended the "Scope" section of Part 20, 10 C.F.R. § 20.1002, to include Part 63, thereby extending the long-established regulatory history and precedent of Part 20 to Part 63. The Board is aware of no situation, and NEI points to none, in which the NRC has interpreted and applied the term "occupation dose" so that employer A's section 20.1101 radiation protection program is required to achieve ALARA for employer B's employees who are at B's remote site and under employer B's exclusive control.

Second, section 20.1101(b) does not exist in isolation, and must be read in context. It follows section 20.1101(a) — which requires each licensee to develop a "radiation protection program" that is "commensurate with the scope and extent of licensed activities." Moreover, both section 20.1101(a) and (c) — the provisions immediately preceding and following the section upon which NEI relies — impose record keeping, reporting, and annual review requirements that appear wholly inconsistent with a "radiation protection program" that somehow extends to numerous distant locations over which the licensee lacks control or access.

Finally, 10 C.F.R. § 63.111(a)(1) expressly says that the "geologic repository operations area must meet the requirements of Part 20." If, as NEI argues, sections 20.1002 and 20.1101(b) independently impose far broader ALARA requirements on DOE's design, construction, and operation of the repository, why was section 63.111(a)(1) even necessary?[25]

Thus, the Board concludes that the first question presented by Legal Issue 1 must be answered in the negative.

As to the second part of Legal Issue 1, NEI claims that DOE must demonstrate that the repository meets applicable safety and environmental standards without any unnecessary expenditure of resources.[26] DOE and the NRC Staff say there is no such requirement.[27]

We agree with DOE and the NRC Staff. In reversing another board's admission of a contention previously proffered by NEI, the Commission said that NRC "regulations set a minimum standard for safety, not a maximum."[28] On this basis, the Commission reversed the admission of an NEI contention alleging "'excessive' conservatism" in repository design, explicitly ruling that NEI's concerns about "costs and delay" were not material.[29]

The Commission's decision dictates our ruling here. DOE need not demonstrate that it meets applicable standards without "unnecessary expenditures."

B. Legal Issue 2

Whether 10 C.F.R. § 63.305 requires DOE to project future levels of anthropogenic

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[25] "[A] basic tenet of statutory construction, equally applicable to regulatory construction, [is] that [a text] should be construed so that effect is given to all of its provisions, so no part will be inoperative or superfluous, void or insignificant . . . ." *Silverman v. Eastrich Multiple Investor Fund, L.P.,* 51 F.3d 28, 31 (3d Cir. 1995) (internal quotations omitted).

[26] *See* NEI Legal Issue Brief at 11-12.

[27] *See* DOE Legal Issue 1 Brief at 8-9; NRC Staff Legal Issue Brief at 9-10.

[28] *Dep't of Energy,* CLI-09-14, 69 NRC at 599.

[29] *Id.*

> greenhouse gas emissions such as CO_2 and evaluate the impact of these gases on future climate at Yucca Mountain in the 10,000-year performance assessment, or whether it is sufficient under that regulation for DOE to analyze the effects of anthropogenic greenhouse gas emissions on future climate based upon the historical geologic record.[30]

The legal issue as framed by the parties might be misleading. Nevada does not contend that, as a matter of law, 10 C.F.R. § 63.305 requires DOE to project future levels of anthropogenic greenhouse gas emissions such as CO_2 and to evaluate the impact of such gases on future climate at Yucca Mountain in the 10,000-year performance assessment. Rather, Nevada contends that meeting the requirements of section 63.305 raises a question of fact and expert opinion.[31]

DOE contends that, as a matter of law, it is sufficient under section 63.305 for DOE to analyze the effects of anthropogenic greenhouse gas emissions on future climate based solely upon the historical geologic record.[32] The NRC Staff's position, as clarified during argument, is essentially the same as Nevada's.[33]

We agree with Nevada and the NRC Staff. An analysis based upon the historical geologic record is not required by the regulations, nor is it necessarily sufficient. Whether such an analysis is adequate to comply with section 63.305 is a question of fact.

The plain language of 10 C.F.R. § 63.305 does not say anything about analyzing future climate based upon the historical geologic record. It says "DOE must vary factors related to the geology, hydrology, and climate based upon cautious, but reasonable assumptions of the changes in these factors that could affect the Yucca Mountain disposal system during the period of geologic stability."[34]

DOE acknowledges that the rule it proposes is not found in the language of section 63.305,[35] but claims that a safe harbor for its analysis of the historical geologic record should be read into the regulation by reason of the regulatory history.[36] In any circumstance, however, a safe harbor would have to be grounded upon language in the regulation itself.[37] Section 63.305 contains no such language.

Moreover, an important aspect of the regulatory history cuts directly against

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[30] Joint Proposal Identifying Legal Issues, Attachment 1 at 1.

[31] Nevada Legal Issue Brief at 4.

[32] DOE Legal Issue 2 Brief at 5; Tr. at 64 (Jan. 26, 2010).

[33] Tr. at 82.

[34] 10 C.F.R. § 63.305(c).

[35] DOE contends merely that "[n]othing in the plain language of the regulation is inconsistent with DOE's position." DOE Legal Issue 2 Brief at 3.

[36] *See id.* at 3-5.

[37] *See Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-14, 63 NRC 510, 516 (2006) (finding the plain language of a regulation controlling).

DOE's position. In 1999, the Commission proposed adoption of a version of 10 C.F.R. Part 63 that included a provision (in proposed section 63.115(a)(3)) stating "[c]limate evolution shall be consistent with the geologic record of natural climate change in the region surrounding the Yucca Mountain site."[38] This proposal was deleted from the final Part 63, with the explanation that "[r]equirements related to characteristics of the reference biosphere and critical group [in section 63.115] have been deleted from this section in light of the definitions and concepts necessary to estimate dose to the reasonably maximally exposed individual, now specified in subpart L [which included 10 C.F.R. § 63.305]."[39] Thus, the Commission considered whether it should require that projections of climate change be based upon the geologic record and ultimately decided not to do so, preferring instead the more general requirement in 10 C.F.R. § 63.305 that climate projections be based on "cautious, but reasonable assumptions."

We decline to graft upon section 63.305 language that does not appear in the regulation, and which the Commission specifically rejected. Whether it is sufficient under section 63.305 for DOE to analyze the effects of anthropogenic greenhouse gas emissions on future climate based upon the historical geologic record raises a question of fact.

C. Legal Issues 3 and 4

> Whether 10 C.F.R. § 63.342(c) requires climate change processes included as FEPs in the first 10,000 years to be carried forward for the next 990,000 years.[40]

As argued by the parties, the legal issue presented by this question is whether 10 C.F.R. § 63.342(c) requires climate change processes included as FEPs in the first 10,000 years to be carried forward for the next 990,000 years *using the same methodology employed for the first 10,000 years.*[41] Nevada contends that the answer is yes.[42] DOE and the NRC Staff say the answer is no.[43]

We agree with DOE and the NRC Staff. Pursuant to section 63.342(c)(2), DOE must assess the effects of climate change during the 990,000-year period regardless of whether it necessarily must assess climate change during the initial

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[38] Proposed Rule: "Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada," 64 Fed. Reg. 8640, 8677 (Feb. 22, 1999).

[39] 66 Fed. Reg. at 55,778.

[40] Order Indentifying Phase I Legal Issues at 1; Nevada's Final NRC Rule Contentions at 2.

[41] *See* Tr. at 110-11; Nevada Legal Issue Brief at 6; DOE Legal Issues 3 & 4 Brief at 2; NRC Staff Legal Issue Brief at 16.

[42] Nevada Legal Issue Brief at 6.

[43] *See* DOE Legal Issues 3 & 4 Brief at 3-7; NRC Staff Legal Issue Brief at 16.

10,000-year period under the criteria set forth in sections 63.342(a) and (b). Section 63.342(c)(2), however, allows DOE to simplify its assessment of climate change during the 990,000-year period. Section 63.342(c)(2) states that DOE's climate change analysis for this period may be limited to the effects of increased water flow through the repository as a result of climate change. Further, section 63.342(c)(2) allows DOE to perform its analysis using a specified percolation rate.[44]

Nevada contends that, if climate change in fact must be "screened in" under section 63.342(a), and analyzed during the first 10,000-year period for that reason, then section 63.342(c)(2) becomes irrelevant and the option of a simplified analysis during the subsequent 990,000-year period does not apply.[45] Instead, Nevada contends, in those circumstances DOE must project the continued effects of climate change during the 990,000-year period pursuant to the first paragraph of section 63.342(c), which contains no option for a simplified analysis using a specified percolation rate.[46]

Arguably, the language of the regulation is ambiguous. By its terms, section 63.342(c)(2) is linked with the first paragraph of section 63.342(c) with the phrase "and also." The regulation might have been clearer if the subsections were linked with a phrase such as "provided, however, that." Nonetheless, the regulatory history shows that the Commission intended for DOE to have the option to analyze climate change during the 990,000-year period using the simplified percolation rate method, regardless of whether DOE might be required to analyze climate change by some other method during the initial 10,000-year period.

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[44] Section 63.342(c)(2) states:

> DOE must assess the effects of climate change. The climate change analysis may be limited to the effects of increased water flow through the repository as a result of climate change, and the resulting transport and release of radionuclides to the accessible environment. The nature and degree of climate change may be represented by constant-in-time climate conditions. The analysis may commence at 10,000 years after disposal and shall extend through the period of geologic stability. The constant-in-time values to be used to represent climate change are to be the spatial average of the deep percolation rate within the area bounded by the repository footprint.

Id.

[45] Nevada Legal Issue Brief at 6-8.

[46] Section 63.342(c) states:

> For performance assessments conducted to show compliance with §§ 63.311(a)(2) and 63.321(b)(2), DOE's performance assessments shall project the continued effects of the features, events, and processes included in paragraph (a) of this section beyond the 10,000-year post-disposal period through the period of geologic stability. DOE must evaluate all of the features, events, or processes included in paragraph (a) of this section, and also: . . . .
>
> (2) DOE must assess the effects of climate change.

Id.

When it promulgated the final version of 10 C.F.R. § 63.342(c), the Commission expressed concern about the potential for "unbounded speculation" in projecting analyses out to 1 million years.[47] The Commission explained that the specified deep percolation rates for climate change "appropriately reflect the uncertainty in the area-averaged water flux through the footprint of the potential repository during the period after 10,000 years and are a reasonable basis for estimating and evaluating the long-term safety of the repository."[48] There is no suggestion in either the proposed or final rulemaking notices that an analysis utilizing the prescribed methodology for evaluation of climate change in the post-10,000-year period would not be sufficient under the regulation.

Accordingly, DOE may elect to use the prescribed method specified in section 63.342(c)(2) to analyze the effects of climate change during the post-10,000-year period, regardless of whether it is required to analyze the effects of climate change during the initial 10,000-year period.

D. Legal Issue 5

> Whether 10 C.F.R. § 63.342(c) requires the post-10,000-year performance assessment to include the continued effects of erosion if, assuming for purposes of legal argument, in the 10,000-year assessment erosion is shown to increase infiltration and seepage rates and thereby be potentially adverse to performance, with that potential increasing over time both before and after 10,000 years, but there is no showing that erosion causes increases in radiological exposures or releases within the first 10,000-years.[49]

Simply stated, the legal issue is whether 10 C.F.R. § 63.342(c) requires the post-10,000-year performance assessment to include the effects of erosion if there is no showing that erosion causes increases in radiological exposures or releases within the first 10,000 years.

Nevada contends the answer is yes.[50] DOE and the NRC Staff say the answer is no.[51] We agree with DOE and the NRC Staff.

Section 63.342(c) requires an analysis for the post-10,000-year period of certain specified FEPs (which do not include erosion), as well as all FEPs that are "screened in" during the first 10,000 years pursuant to section 63.342(a).[52] The

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[47] 74 Fed. Reg. at 10,815.

[48] *Id.* at 10,820.

[49] Joint Proposal Identifying Legal Issues, Attachment 1 at 3.

[50] *See* Nevada Legal Issue Brief 9-11.

[51] *See* DOE Legal Issue 5 Brief at 2-4; NRC Staff Legal Issue Brief at 20.

[52] 10 C.F.R. § 63.342(c).

key question, therefore, is whether in any circumstance erosion can be screened in under section 63.342(a) if there is no showing that erosion causes increases in radiological exposures or releases within the first 10,000 years.

That question must be answered no. Pursuant to 10 C.F.R. § 63.114, only FEPs that produce significant changes in releases or doses within the first 10,000 years after disposal must be included in performance assessments.[53] Section 63.342(a), in turn, requires analysis of only those FEPs that cannot be excluded on the basis of low probability of occurrence and whose exclusion would result in a significant change in the results of the performance assessment in the first 10,000-year period.

If one assumes that there is no showing that erosion causes *any* increases in radiological exposures or releases within the first 10,000 years, then obviously there can be no "significant" changes in releases or doses — and hence no "significant" change in performance assessment results — caused by erosion during the first 10,000 years. This is so regardless of whether there may be "increase[s] in infiltration and seepage rates."[54] Under the Commission's regulations, the relevant test is whether there are significant increases in radiological exposures or releases, not whether there might be increases in infiltration and seepage rates.

Nevada purports to find language in 10 C.F.R. § 63.102(j) to the effect that a FEP such as erosion must be considered if it is expected to be "potentially adverse to performance."[55] This could be the case, Nevada argues, if the FEP changed intermediate-performance measures (such as infiltration and seepage rates) that might eventually be linked to radiological exposures or releases even if there is no demonstrated effect during the first 10,000 years.[56]

The Board is not persuaded. Whether a FEP must be included in the performance assessment for the period after 10,000 years is governed by section 63.342, not by section 63.102(j). Section 63.102 is titled "Concepts." By its own terms, section 63.102 merely "provides a functional overview of . . . Subpart E."[57] As stated in the preamble to the 2001 final rule, "*except for . . . [section] 63.102, 'Concepts,'*" Subpart E "contains performance objectives for the geologic repository . . . after permanent closure (postclosure) . . . , and requirements for the analyses used to demonstrate compliance with the performance objectives."[58] Thus, the Commission has expressly recognized that, unlike the other provisions in Subpart E, section 63.102 does not set forth binding requirements.

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[53] *Id.* § 63.114(a)(5).

[54] *See* Nevada Reply at 17.

[55] Section 63.102(j) states in relevant part: "[t]hose [FEPs] expected to materially affect compliance with § 63.113(b) *or be potentially adverse to performance* are included, while events . . . that are very unlikely . . . can be excluded from the analysis." 10 C.F.R. § 63.102(j) (emphasis added).

[56] *See* Nevada Reply at 13-16.

[57] 10 C.F.R. § 63.102.

[58] 66 Fed. Reg. at 55,782 (emphasis added).

Accordingly, 10 C.F.R. § 63.342(c) does not require the post-10,000-year performance assessment to include the effects of erosion if it is assumed there is no showing that erosion causes increases in radiological exposures or releases within the first 10,000 years.

E. Legal Issue 6

> Whether, under 10 C.F.R. Part 63, DOE is required to provide and rely upon final design information in the [License Application].[59]

Nevada contends that, as a matter of law, DOE is required to provide final design information in the License Application.[60] DOE and the NRC Staff contend that the specific level of detail that is sufficient at this construction authorization stage raises fact questions, not a legal question.[61] Thus, they insist that the answer to the question presented must therefore be no.

The Board agrees with DOE and the NRC Staff.

By its terms, the applicable NRC regulation requires merely that the License Application be "as complete as possible in light of the information that is reasonably available at the time of docketing."[62] The only reference in the regulations to "final design" implies that a final design is not required.[63] Rather, the regulations state that, in the License Application, "[s]pecial attention must be given to those items that *may significantly influence the final design*."[64] It seems doubtful that the Commission would direct DOE to specify items that "may significantly influence the final design" of the repository if the License Application were to provide a final design.

This view is supported by the regulatory history. As the Commission explained, "part 63 provides for a multi-staged licensing process that affords the Commission the flexibility to make decisions in a logical time sequence that accounts for DOE collecting and analyzing additional information over the construction and operational phases of the repository."[65] As to the information required at this first construction authorization stage, the Commission stated:

> Clearly, the knowledge available at the time of construction authorization will be

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[59] Joint Proposal Identifying Legal Issues, Attachment 1 at 3.
[60] Nevada Legal Issue Brief at 14.
[61] DOE Legal Issue 6 Brief at 4 n.11; NRC Staff Reply at 14.
[62] 10 C.F.R. § 63.21(a).
[63] *Id.* § 63.21(c)(18).
[64] *Id.* (emphasis added).
[65] 66 Fed. Reg. at 55,738.

> less than at the subsequent stages. However, at each stage, DOE must provide sufficient information to support that stage. DOE has stated its intent to submit, and NRC expects to receive, a reasonably complete application at the time of construction authorization to allow the Commission to make a construction authorization decision.[66]

In short, the Commission intended for its regulations to "provide the necessary flexibility for making licensing decisions consistent with the amount and level of detail of information appropriate to each licensing stage."[67] Thus, before any waste may be received, DOE must "update" its application with additional information — including, specifically, additional "design" data obtained during construction.[68] Moreover, because 10 C.F.R. Part 63 is a performance-based regulation and is not prescriptive, even within particular stages the necessary level of design detail may vary, depending on the importance to public health and safety of the structure, component, or activity being described.[69] We see no indication that the Commission intended a blanket requirement for complete "final design" information at the initial construction authorization stage.

Nevada infers a contrary conclusion from the regulatory history, based upon a comparison between 10 C.F.R. Part 63 and the two-step nuclear plant licensing process of 10 C.F.R. Part 50.[70] We are not persuaded. Although the Commission no longer mandates separate construction and operating license applications for nuclear power plants, it is clear that it nonetheless contemplated a multistaged licensing scheme under 10 C.F.R. Part 63 — expressly allowing (indeed requiring) DOE to submit additional design information and to update its application at later stages.[71]

As Nevada correctly points out,[72] and both DOE and the NRC Staff appear to concede,[73] while the Board's decision on this issue will likely require dismissal of certain legal issue contentions, other factual contentions remain viable insofar as they allege that the application contains insufficient design information to permit an adequate safety review of specific structures, systems, and components.

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[66] *Id.* at 55,738-39.

[67] *Id.* at 55,739.

[68] 10 C.F.R. § 63.24(b)(1).

[69] *See* 66 Fed. Reg. at 55,736, 55,738-39.

[70] *See* Nevada Legal Issue Brief at 14-20.

[71] We also reject Nevada's claim that because the regulations do not explicitly refer to a "preliminary design" followed by a "final design," we should presume that the design level in the original application must be final in nature. *See* Nevada Legal Issue Brief at 14.

[72] *See id.* at 21.

[73] *See* DOE Legal Issue 6 Brief at 4 n.11; NRC Staff Reply at 14.

F. Legal Issue 7

> Whether, under 10 C.F.R. § 63.114, DOE may rely upon its quality assurance program and procedures as a basis for excluding from consideration in the TSPA [Total System Performance Assessment] potential deviations from repository design or errors in waste emplacement.[74]

As posited, the legal issue appears to have arisen from a misunderstanding based upon an erroneous statement in a supporting technical document, which was corrected before the License Application was filed.[75] Nevada initially believed it was DOE's position that deviations from the repository design or errors in waste emplacement caused by human errors could be screened out and excluded from further consideration merely because DOE will have a compliant and functioning quality assurance program.[76] Based upon this understanding, Nevada argued that such deviations from the repository design or errors in waste emplacement must be screened in (or out) using the same frequency or consequence screening criteria that apply to other FEPs.[77] Neither DOE nor the NRC Staff disagrees.[78]

We concur. Although coverage of a potential event by DOE's quality assurance does not operate as a matter of law to exclude consideration of a FEP, the effects of the quality assurance program can be taken into account in determining the probability and consequences of the FEP.

G. Legal Issue 8

> Whether, under NWPA § 121(b)(1)(B)[79] or 10 C.F.R. §§ 63.113(a) through (d) and 63.115(a) through (c), DOE is required to evaluate the absence or failure of all drip shields.[80]

As understood by the parties, the legal question presented is not whether

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[74] Joint Proposal Identifying Legal Issues, Attachment 1 at 4.

[75] *See* DOE Legal Issue 7 Brief at 3 n.6. The erroneous statement in the initial technical document was corrected before the License Application was filed. A corrected document was placed on the Licensing Support Network over 5 months before the deadline for filing intervention petitions. *Id.*

[76] *See* Nevada Legal Issue Brief at 22.

[77] *See id.* at 24.

[78] *See* DOE Reply at 28; NRC Staff Reply at 15-17.

[79] Nuclear Waste Policy Act (NWPA) § 121(b)(1)(B), 42 U.S.C. § 10141(b)(1)(B) (2009).

[80] Joint Proposal Identifying Legal Issues, Attachment 1 at 4.

DOE must postulate a failure to install drip shields.[81] Rather, it is whether DOE is required by the cited authorities to perform a drip shield neutralization analysis: that is, a performance analysis in which a barrier (the drip shields) is neutralized (assumed not to inhibit the movement of water or radionuclides), and a determination is made of the difference in result. Such an analysis, Nevada contends, is required to ascertain the drip shields' contribution to total system performance and thereby determine whether DOE has satisfied the multiple barrier requirements of section 121(b)(1)(B) of the NWPA[82] and 10 C.F.R. Part 63.[83]

DOE and the NRC Staff contend there is no regulatory requirement for DOE to assume and then to analyze the complete failure of any barrier in the absence of a finding that such a failure is within the bounds of probability or consequence that must be analyzed in the performance assessment.[84] They assert there is no legal requirement to analyze in the abstract the effects of a complete failure of drip shields.[85]

We agree with DOE and the NRC Staff. The answer to the question presented is no.

First, no requirement for a quantitative evaluation of an individual barrier's capabilities appears in the relevant statutory language. Section 121(b)(1)(B) of the NWPA states merely that the NRC's licensing regulations must "provide for the use of a system of multiple barriers in the design of the repository."[86]

Second, the Commission has twice declined the opportunity to require DOE to evaluate, as a general matter, the absence or failure of all drip shields. When it initially promulgated Part 63, the Commission expressly stated that it would not "prescribe arbitrary, minimum performance standards for subsystems to build confidence in the system's overall performance."[87] The Commission explained that the "[q]uantitative evidence of the capability of individual barriers to contribute to waste isolation is an integral part of the performance assessment. Therefore, an additional quantitative limit [for each barrier's capability] is not necessary to show that overall performance reflects a system of multiple barriers."[88] Again, in

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[81] *See* Nevada Legal Issue Brief at 25; DOE Reply at 31; Tr. at 243 (explaining that the NRC Staff understood the legal question to be whether the NRC regulations require DOE to consider the failure of all drip shields outside the performance assessment).

[82] 42 U.S.C. § 10141(b)(1)(B).

[83] *See* Nevada Legal Issue Brief at 25.

[84] *See* DOE Legal Issue 8 Brief at 2; NRC Staff Reply at 18.

[85] DOE concedes that it was required to analyze, and asserts that it did in fact analyze, complete failure of the drip shields in the context of certain circumstances (i.e., under the provisions of 10 C.F.R. § 63.342), where appropriate (i.e., for seismic and igneous), and that it included the results of those analyses in the performance assessment. *See* DOE Legal Issue 8 Brief at 5.

[86] 42 U.S.C. § 10141(b)(1)(B).

[87] 66 Fed. Reg. at 55,758.

[88] *Id.* at 55,759.

the statement of considerations accompanying the 2009 revision to 10 C.F.R. Part 63, the Commission confirmed that "'[t]he emphasis should not be on the isolated performance of individual barriers but rather on ensuring the repository system . . . is not wholly dependent on a single barrier'" and that DOE's proposed barrier system will be evaluated as an integrated whole "'without unnecessary constraints imposed by separate, additional subsystem performance requirements.'"[89]

Third, in *NEI v. EPA,*[90] the United States Court of Appeals for the District of Columbia Circuit considered the Commission's approach and approved it. Contrary to Nevada's arguments, the court ruled that section 121 of the NWPA does not require that each barrier provide either wholly independent protection or a specifically quantified amount of protection:

> Section 121 [of the NWPA] does not, as Nevada contends, require that each barrier type provide a quantified amount of protection or, indeed, independent protection. Its silence instead gives NRC flexibility in determining how best to "provid[e] for the use of a system of multiple barriers in the design of the repository."[91]

Based in large measure on the importance to safety of a philosophy of defense-in-depth, Nevada argues to the contrary — contending that a quantitative evaluation of the system's robustness requires a neutralization analysis.[92] The Board is not persuaded. Because there is no requirement to demonstrate quantitatively the independent contribution of drip shields, DOE need not perform a barrier neutralization analysis to ascertain each individual barrier's contribution to the repository's multiple barrier system. Given the regulatory history, the Board will not infer a requirement that does not appear in the language of the statute or applicable regulations and, in effect, rule for Nevada on an argument that it has lost twice before the Commission and once before the Court of Appeals.

Accordingly, the answer to the legal question presented is no. Resolution of this legal question, however, does not resolve the related factual question of whether DOE has adequately demonstrated that the multibarrier protection system is not "'wholly dependent on a single barrier.'"[93]

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[89] 74 Fed. Reg. at 10,826 (quoting 66 Fed. Reg. at 55,758).

[90] *Nuclear Energy Institute, Inc. v. Environmental Protection Agency,* 373 F.3d 1251 (D.C. Cir. 2004).

[91] *Id.* at 1295 (quoting 42 U.S.C. § 10141(b)(1)(B)) (internal citations omitted).

[92] *See* Nevada Legal Issue Brief at 25-32; Nevada Reply at 27-31.

[93] 74 Fed. Reg. at 10,826 (quoting 66 Fed. Reg. 55,758).

H. Legal Issue 9

> Whether 10 C.F.R. §§ 63.21(c)(7) and 63.31 allow DOE to submit in the [License Application] a description of its retrieval plans without having a full retrieval plan available for review.[94]

DOE and the NRC Staff contend that the answer to the question presented is yes.[95] Nevada contends the answer is no.[96]

The Board agrees with DOE and the NRC Staff.

Section 63.21(c)(7) requires that the License Application include a "description of plans for retrieval and alternate storage of the radioactive wastes, should retrieval be necessary." The most natural reading of this requirement is that the License Application must set forth a general "description" of plans that will be developed in greater detail "should retrieval be necessary." We do not believe, as Nevada would have it, that the requirement for a "description" of plans in the License Application implies that, when the License Application was submitted, fully developed plans must already exist.[97] Had the Commission intended to require more than a "description" of retrieval plans, it could have said so explicitly, as it did in other parts of section 63.21 with respect to other plans.[98]

The Board's reading also is supported by regulatory history. When promulgating 10 C.F.R. Part 63, the Commission expressly addressed the distinction between a plan and a description of a plan, as those terms are used in section 63.21. As originally proposed, section 63.21(b)(3) called for a "detailed plan" for providing physical protection for high-level waste.[99] In response to DOE's concern that sufficient information might not be available at the construction authorization stage, the Commission changed the language of the rule to require only a "description" of such security measures.[100] The Commission observed that this change would be consistent with other provisions requiring only that a "description" of plans be submitted with the License Application.[101]

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[94] Joint Proposal Identifying Legal Issues, Attachment 1 at 4.

[95] *See* DOE Legal Issue Brief 9 at 2; NRC Staff Legal Issue Brief at 36.

[96] *See* Nevada Legal Issue Brief at 33.

[97] *See id.* Nevada claims that "[t]he most natural reading of these regulations is that the plans must already exist, because plans that do not exist are indescribable." *Id.* at 32.

[98] *Compare, e.g.,* 10 C.F.R. § 63.21(c)(7) (description of retrieval plans), *with id.* § 63.21(c)(22)(iv) (plans for startup activities and testing), *and id.* § 63.21(c)(22)(v) (plans for conducting activities such as maintenance, surveillance, and periodic testing).

[99] 66 Fed. Reg. at 55,738.

[100] *Id.* at 55,738-39.

[101] *Id.*

Previously, when it promulgated section 60.21 (from which section 63.21 was adapted), the Commission likewise displayed an understanding that a "description" of a plan means, in effect, an overview or preliminary or conceptual plan, and not a description of an essentially final plan:

> A number of commenters expressed the opinion that the wording of section 60.21 did not explicitly reflect the preliminary nature of some of the information that would be available at the construction authorization stage. Some commenters believed that certain categories of information, such as emergency plans and plans for retrieval, did not seem necessary, at least in full detail, at the construction authorization stage. In view of the fact that § 60.21 must be read in conjunction with § 60.24(a), which specifies that the application shall be as complete as possible in light of information that is reasonably available at the time of docketing, no change to the proposed rule is required.[102]

In other words, the Commission did not change the requirement that the License Application include a "description of plans for retrieval" because it contemplated that the "full detail" of such plans could await a later stage of the proceeding.

Finally, the Board's interpretation of what is required by a "description" of a plan is consistent with the multistaged licensing process that is explained in connection with Legal Issue 6.[103] As the Commission has stated, "part 63 provides for a multi-staged licensing process that affords the Commission the flexibility to make decisions in a logical time sequence that account for DOE collecting and analyzing additional information over the construction and operational phases of the repository."[104]

To be sure, as Nevada points out,[105] the regulatory history also shows that the Commission expected DOE's retrieval plans to be closely scrutinized at the construction authorization stage. When promulgating Part 63, the Commission stated that "the retrieval operation would be an unusual event, and may be an involved and expensive operation" and that "[a]s such, DOE can expect that its plans and procedures in this area will receive extensive, detailed review by the NRC staff as part of any construction authorization review."[106]

In light of the plain language of the regulation and other parts of the regulatory history, however, this statement does not mean that, as a matter of law, we must read the requirement for a "description" of retrieval plans as requiring the

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[102] Disposal of High-Level Radioactive Wastes in Geologic Repositories: Licensing Procedures, 46 Fed. Reg. 13,971, 13,974 (Feb. 25, 1981) (internal quotations omitted).

[103] *See supra* Part II.E.

[104] 66 Fed. Reg. at 55,738.

[105] Nevada Legal Issue Brief at 33.

[106] 66 Fed. Reg. at 55,743.

existence of full, final plans at the time the License Application is submitted. As the NRC Staff points out, the exact level of information that will be sufficient for the Staff to reach the findings required at each stage of the License Application is not a question of law, but of fact.[107] Moreover, the level of detail necessary in a description of retrieval plans may, and probably will, vary depending on the stage of the Staff's review. The Commission expects DOE to update its License Application to provide "sufficient information to support [the relevant review] stage."[108]

Accordingly, the legal question presented must be answered in the affirmative.

I. Legal Issue 10

> Whether, in making the pre-construction authorization finding required by 10 C.F.R. § 63.31(a)(2), it must be considered whether, given DOE's plan to install drip shields only after all of the wastes have been emplaced, it will be impossible to make the pre-operational finding in 10 C.F.R. § 63.41(a) that construction of the underground facility has been substantially completed in accordance with the license application, as amended, the Atomic Energy Act, and applicable NRC regulations.[109]

Although perhaps awkwardly phrased,[110] in effect the parties have briefed and argued the issue as follows: Is it impossible, as a matter of law, for the Commission to make the finding required by 10 C.F.R. § 63.31(a)(2) in light of DOE's drip shield installation plan?

Nevada says yes,[111] and DOE and the NRC Staff say no.[112] The Board agrees with DOE and the NRC Staff.

The issue presented really poses two separate questions. First, at the time it decides whether to authorize construction, must the Commission consider whether or not it will later be able to determine that construction of the underground facility has been "substantially completed" in accordance with 10 C.F.R. § 63.41(a)? Second, if so, does DOE's plan to install drip shields only after wastes have been emplaced mean that, as a matter of law, the Commission will not be able to make

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[107] NRC Staff Reply at 21.

[108] 66 Fed. Reg. at 55,739.

[109] State of Nevada's Legal Issue for NEV-SAFETY-162 (Oct. 6, 2009) at 1.

[110] The parties were able to agree on the phrasing of most legal issues presented, but not on Legal Issue 10. The Board determined to decide Legal Issue 10 in the form proposed by Nevada. *See* Order Identifying Phase I Legal Issues at 2.

[111] *See* Nevada Legal Issue Brief at 40-41.

[112] *See* DOE Legal Issue 10 Brief at 3-4; NRC Staff Legal Issue Brief at 25.

a "substantial completion" finding before issuing DOE a license to receive and possess the wastes?

Before authorizing construction of the proposed repository, the Commission must determine, pursuant to 10 C.F.R. § 63.31(a)(2), "[t]hat there is reasonable expectation that the materials can be disposed of without unreasonable risk to the health and safety of the public." Thereafter, pursuant to 10 C.F.R. § 63.41(a)(2), before issuing a license to receive and possess such materials at the repository, the Commission must find that construction of "[a]ny underground storage space required for initial operation" has been "substantially complete[d]."

Nevada contends that the Commission cannot possibly make the first determination because it cannot make the second.[113] As a matter of law, Nevada argues, construction of "[a]ny underground storage space required for initial operation" cannot be "substantially complete" before the drip shields are installed.[114] The Board is not persuaded.

Nevada appears to jump the gun by invoking standards that do not apply at the construction authorization stage of this multistaged licensing process.[115] It concedes that ordinarily it would "make no sense to be concerned about the status of construction completion at the pre-construction stage, because no construction is to be completed at this point."[116] Nevada claims, however, that "we know now, at the pre-construction stage, that a factual finding related to construction completion and required to be made before operation can commence cannot possibly be made."[117]

We reject Nevada's suggestion that we must therefore read section 63.31 so broadly as to import the substantial completion test of section 63.41 (which is an analysis required during the subsequent license to receive and possess stage) into the construction authorization test of section 63.31. We do not conclude that, as a matter of law, the required finding concerning construction completion cannot be made.

The question presented addresses solely the requirement in section 63.41(a)(2) for substantial completion of underground storage space "required for initial operation."[118] The drip shields, however, are not scheduled to be installed during

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[113] Nevada Legal Issue Brief at 36.

[114] *Id.*

[115] Section 63.41 is entitled "Standards for issuance of license" and provides that the Commission may issue a license to receive and possess upon finding that the construction of the facility has been substantially completed. 10 C.F.R. § 63.41(a).

[116] Nevada Legal Issue Brief at 37.

[117] *Id.*

[118] Section 63.102(c) recognizes three phases of "operations": (1) the period of emplacement; (2) any subsequent period before permanent closure during which the emplaced wastes are retrievable; and (3) permanent closure. *Id.*

the period of "initial" operation (that is, during waste emplacement), but rather during the last phase of operation (permanent closure). Because the drip shields are not required for initial operation, they are not part of the substantial completion determination. Thus, Nevada's argument that the section 63.41(a) findings will be "impossible to make" is flawed because the finding purported to be "impossible" is not required by the regulations.

Moreover, before issuance of a license to receive and possess waste material, DOE must update its application.[119] The Commission has not yet received such an updated application, nor has the NRC Staff reviewed one. Nevada's reading of the regulations would require a finding pursuant to section 63.41 for an updated application that the Commission has not yet received.

As DOE acknowledges, Nevada will be able to raise factual issues concerning DOE's ability to install the drip shields under several admitted contentions.[120] The legal question presented, however, must be answered in the negative.

J. Legal Issue 11

> Whether, under 10 C.F.R. §§ 63.113, 63.114, and Part 63 Subpart G, the PMA [Performance Margins Analysis] can be used to validate or provide confidence in the TSPA, if its data and models are not qualified under DOE's quality assurance program.[121]

Nevada and the NRC Staff contend that the answer to the question posed is no.[122] Although DOE's briefs might be read to the contrary, during oral argument counsel for DOE clarified that it does not disagree with Nevada and the NRC Staff on the legal issue presented.[123] Rather, DOE contends that whether the PMA satisfies applicable quality assurance requirements is a question of fact.[124]

On the legal issue presented, the Board agrees with what now appears to be the position of all parties. Under 10 C.F.R. §§ 63.113, 63.114, and Part 63 Subpart G, the PMA cannot be used to validate or provide confidence in the TSPA if its data and models are not qualified under DOE's quality assurance program.

Commission regulations require a quality assurance program "to provide adequate confidence that the geologic repository and it structures, systems, or

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[119] *See* 10 C.F.R. § 63.24.

[120] *See* DOE Legal Issue 10 Brief at 6 n.14.

[121] Joint Proposal Identifying Legal Issues, Attachment 1 at 4.

[122] *See* Nevada Legal Issue Brief at 45; NRC Staff Legal Issue Brief at 47.

[123] *See* Tr. at 322-23.

[124] *See* Tr. at 323.

components will perform satisfactorily in service."[125] Pursuant to 10 C.F.R. § 63.142(a), the quality assurance program must be applied to all structures, systems, and components that are important to waste isolation and to "related activities" — defined as including "analyses of samples and data." The PMA, which is a model of repository performance, clearly constitutes an analysis of data.

Analyses that "provide adequate confidence" in performance of the repository are within the domain of the quality assurance program.[126] "Adequate confidence" in the performance assessment is derived from sufficient analyses, data, and the technical basis offered to demonstrate compliance with postclosure performance objectives.[127] Thus, if the PMA is needed to establish "adequate confidence" in the TSPA, then it is subject to the quality assurance requirements of 10 C.F.R. § 63.142.

Therefore, as all parties agree, the legal question presented, must be answered in the negative.

III. RULINGS ON RULE WAIVER PETITIONS

A. NEV-SAFETY-202

NEV-SAFETY-202 asserts that "climate-change processes included as FEPs in the TSPA for the first 10,000 years are neither carried forward for the next 990,000 years, as the rule requires, nor represented by NRC's specified deep percolation rate for that subsequent period."[128] According to Nevada, 10 C.F.R. § 63.342(c) should be construed so that climate change processes included as FEPs for the first 10,000-year period are carried forward for the post-10,000-year performance assessment using the same methodology, and not represented by the deep percolation flux that applies to climate change FEPs that are excluded for the pre-10,000-year period.[129]

As set forth above, however, the Board has ruled to the contrary. As to Legal

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[125] 10 C.F.R. § 63.141.

[126] *See id.*

[127] *See id.* § 63.113.

[128] Nevada's Final NRC Rule Contentions at 2.

[129] Additionally, Nevada faults DOE for neglecting to include the deep percolation rates established in the NRC's final rule, which are different from the rates set forth in the proposed rule. *Id.* at 2-3. Neither DOE nor the NRC Staff objects to the admissibility of NEV-SAFETY-202 to this limited extent. *See* U.S. Department of Energy's Answer to State of Nevada's New Contentions Based on Final NRC Rule (July 2, 2009) at 12; NRC Staff Answer to State of Nevada's New Contentions Based on Final NRC Rule (June 11, 2009) at 10-12 [hereinafter NRC Staff Answer to New Contentions]. This aspect of the contention is therefore admitted.

Issues 3 and 4, the Board has determined that section 63.342(c)(2) *does* allow DOE to elect to use the deep percolation flux to analyze the effects of climate change during the post-10,000-year period, regardless of whether it is required to analyze the effects of climate change during the initial 10,000-year period. Thus, we must address the alternative request in NEV-SAFETY-202, pursuant to 10 C.F.R. § 2.335, for a waiver of section 63.342(c).[130]

Under 10 C.F.R. § 2.335, if the petitioner makes a *prima facie* showing of the requirements for a rule waiver, the Board must certify the matter to the Commission.[131] Conversely, if there is no *prima facie* showing, the Board "may not further consider the matter."[132]

A petition to waive a Commission regulation "can be granted only in unusual and compelling circumstances."[133] Expanding on the literal requirements in section 2.335, the Commission has set forth a four-part test, under which a petitioner must demonstrate that: (1) the rule's strict application "would not serve the purpose for which [it] was adopted"; (2) the petitioner has alleged "special circumstances" that were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived"; (3) those circumstances are "unique" to the facility, rather than "common to a large class of facilities"; and (4) a waiver of the regulation is necessary to reach a "significant safety problem."[134] For a waiver request to be granted, all four factors must be met.[135]

Here, the dispositive issue is whether Nevada has made a *prima facie* showing that the issues it wishes to raise concerning climate change were not previously considered by the Commission — either explicitly or by necessary implication — in the rulemaking proceeding that led to 10 C.F.R. § 63.342. Nevada does not make such a *prima facie* showing.

Nevada contends that, in the period beyond 10,000 years, climatic conditions at Yucca Mountain will be determined by complex, shifting interactions between: (1) isolation changes driven by changes in the orbital characteristics of the Earth, which have characteristic timescales of between 21,000 and 400,000 years; (2) natural variations in greenhouse gas concentrations in the atmosphere; (3) the slow reduction in greenhouse gas concentrations resulting from human activities;

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[130] Nevada's Final NRC Rule Contentions at 2.

[131] 10 C.F.R. § 2.335(d).

[132] *Id.* § 2.335(c).

[133] *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 16 (1988) (internal quotations omitted), *aff'd,* CLI-88-10, 28 NRC 573 (1988), *reconsideration denied,* CLI-89-3, 29 NRC 234 (1989).

[134] *Dominion Nuclear Connecticut Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005) (internal citations omitted).

[135] *See id.* at 560.

and (4) internal variability within the climate system at suborbital timescales.[136] According to Nevada, the effects of these complex interactions have been studied for Europe, but neither DOE nor NRC has conducted corresponding studies for Yucca Mountain.[137] Thus, Nevada contends that the specification of a range of deep percolation rates, as set forth in 10 C.F.R. § 63.342(c), fails to account for recent advances in scientific knowledge.[138]

As the NRC Staff points out, however, when it promulgated section 63.342 the Commission recognized that scientific progress could be expected to continue.[139] Nonetheless, the Commission stated that "the intention of the rule is to specify a reasonable basis for evaluating safety using current knowledge. Given the current approach for estimating deep percolation, it would take a *major shift in scientific understanding* for the deep percolation rates to change significantly."[140]

Moreover, in promulgating the rule, the Commission did in fact consider many of the same factors as the authors of the studies performed in Europe.[141] Indeed, the Commission received and considered comments on the proposed rule that were similar to the concerns raised in NEV-SAFETY-202, and responded to them.[142]

In these circumstances, Nevada has failed to make a *prima facie* showing that the matters it seeks to raise were not previously considered by the Commission, "either explicitly or by necessary implication," when the Commission promulgated the pertinent regulation scarcely more than 2 years ago. Nevada's rule waiver petition, accordingly, must be denied. As the Commission stated in its statement of considerations amending the final rule, if Nevada "believes that the specification for climate change no longer provides a reasonable basis for demonstrating compliance based on new scientific evidence, they can petition NRC to amend the rules."[143]

B. NEV-SAFETY-203

NEV-SAFETY-203 asserts that, even if exclusion of land-surface erosion were correct for the first 10,000 years, land surface erosion should not be excluded from the TSPA in the subsequent period, notwithstanding 10 C.F.R. § 63.342(c), because "topography modifications will continue to the point that topography is

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[136] *See* Nevada's Final NRC Rule Contentions at 6-7.
[137] *Id.*
[138] *Id.* at 7.
[139] *See* 74 Fed. Reg. at 10,823; NRC Staff Answer to New Contentions at 10.
[140] 74 Fed. Reg. at 10,823 (emphasis added).
[141] *See* NRC Staff Answer to New Contentions, Affidavit of Eugene Peters ¶ 9 (June 11, 2009).
[142] *See* 74 Fed. Reg. at 10,818-24.
[143] *Id.* at 10,824; *see also* 10 C.F.R. § 2.802.

grossly altered."[144] Within this latter period, Nevada alleges that "portions of the Paintbrush Tuff may become completely eroded, with significant affects [sic] on infiltration and seepage, and the emplacement drifts may be exposed to the earth's surface, eliminating the upper geologic barrier entirely."[145]

Thus, NEV-SAFETY-203 likewise seeks a rule waiver, pursuant to section 2.335, and presents a similar key issue: Does Nevada make a *prima facie* showing that the facts upon which it relies were not previously considered by the Commission during the relevant rulemaking proceeding — either explicitly or by necessary implication? Again, Nevada does not make such a *prima facie* showing.

Nevada submits scientific evidence of a safety problem that might result from the long-term effects of erosion.[146] But the relevant test is not whether Nevada makes a *prima facie* showing of a potential safety concern, but rather whether it makes a *prima facie* showing that the Commission did not previously consider that concern.

Nevada relies primarily on a recent study (Stuewe) that was not itself before the Commission during the relevant rulemaking.[147] As the NRC Staff persuasively argues, however, the Commission considered a broad range of information relating to erosion in order to specify the deep percolation rates in section 63.342, including the types of information identified in the Stuewe paper and underlying the Stuewe model.[148] In these circumstances, Nevada's rule waiver petition again must be denied because of its failure to make a *prima facie* showing that its concerns about long-term erosion were not previously considered by the Commission "either explicitly or by necessary implication."

Nevada's allegation that the long-term effects of erosion might entirely eliminate the proposed repository's upper geologic barrier nonetheless raises a potentially significant safety concern. Unless erosion is "screened in" as a FEP because of its effects during the first 10,000 years, section 63.342 prevents Nevada from litigating the effects of erosion during the next 990,000 years. Thus, if the Commission is not satisfied that Nevada's arguments were adequately considered during the applicable rulemaking proceeding, it might wish to reconsider this aspect of section 63.342 on its own initiative. Of course, Nevada itself is also free to petition the Commission directly for a change in the rule.[149]

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[144] *See* Nevada's Final NRC Rule Contentions at 9.
[145] *Id.*
[146] *See id.* at 10-11.
[147] *See id.* at 11-12.
[148] *See* NRC Staff Answer to New Contentions at 14-17; Staff Response to Board Questions at 1-4.
[149] *See* 10 C.F.R. § 2.802.

IV. CONCLUSION

The Phase I legal issues identified for briefing in accordance with the Board's order of October 23, 2009 are decided as set forth herein. Without waiver of any party's eventual appeal rights with respect to such rulings, the affected parties shall attempt to stipulate to the effects of the Board's rulings on specific admitted contentions, which stipulation shall be submitted on or before January 21, 2011. If the parties cannot fully agree, each party shall state its separate differing position on any contention by a filing due the same date.

As previously noted, NEV-SAFETY-202 is admitted to the limited extent that DOE has failed to include the revised percolation rates established in NRC's final rule.[150] The rule waiver petitions set forth in NEV-SAFETY-202 and NEV-SAFETY-203 are 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
December 14, 2010

[150] *See supra* note 129.

Cite as 72 NRC 692 (2010) **LBP-10-23**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Dr. William M. Murphy

In the Matter of **Docket Nos. 52-029-COL**
52-030-COL
(ASLBP No. 09-879-04-COL-BD01)

PROGRESS ENERGY FLORIDA, INC.
(Levy County Nuclear Power
Plant, Units 1 and 2) **December 22, 2010**

RULES OF PRACTICE: MOTIONS TO COMPEL DISCLOSURE

In this decision, the Board grants the Intervenors' motion to compel disclosure of certain groundwater modeling information associated with PEF's application to construct and operate two nuclear power reactors in Levy County, Florida.

RULES OF PRACTICE: GENERAL DISCOVERY (MANDATORY DISCLOSURES)

Under 10 C.F.R. § 2.336, each party to a proceeding must automatically disclose and provide all documents and data compilations in their possession, custody, or control that are relevant to the admitted contentions, without waiting for a party to file a discovery request.

RULES OF PRACTICE: GENERAL DISCOVERY (MANDATORY DISCLOSURES)

Under 10 C.F.R. § 2.336(a), each party to a proceeding may either provide the other parties with an actual copy of the relevant document or data compilation, or describe it and provide it if the other party requests it.

RULES OF PRACTICE: GENERAL DISCOVERY (MANDATORY DISCLOSURES)

The scope of the mandatory disclosure obligations under 10 C.F.R. § 2.336 is wide-reaching.

RULES OF PRACTICE: DISCOVERY OF COMPUTER MODELING INFORMATION

Analysis of a motion to compel the mandatory disclosure of information under 10 C.F.R. § 2.336(a) is contingent on six issues: (1) is the information, such as a computer model, a "document" or "data compilation" within the meaning of the regulation; (2) is it "relevant" to the contention; (3) is it in the "possession, custody, or control" of the party receiving the disclosure request; (4) is it "publicly available" such that no further mandatory disclosure is needed; (5) would the mandatory disclosure of the information be "unduly burdensome and costly," and (6) if so, should the holder of the information be excused from the duty to produce them?

RULES OF PRACTICE: MANDATORY DISCLOSURE REGULATIONS

The term "document" as used in 10 C.F.R. § 2.336, is not limited to paper documents and it refers to information stored on any medium or form, including electronically stored information or ESI.

RULES OF PRACTICE: MANDATORY DISCLOSURE OF COMPUTER MODELING INFORMATION

The term "document" as used in 10 C.F.R. § 2.336 includes computer models and associated electronic inputs, outputs, data, and software.

RULES OF PRACTICE: MANDATORY DISCLOSURES (RELEVANCE)

When determining relevance of documents for discovery purposes in NRC proceedings, boards may look to the Federal Rules of Evidence (FRE) for useful guidance. Fed. R. Evid. 401 states that "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

RULES OF PRACTICE: MANDATORY DISCLOSURES (RELEVANCE)

The relevance standard of 10 C.F.R. § 2.336 is more flexible than the relevance standard of Fed. R. Evid. 401. When the Commission endorsed the use of the FRE as guidance for the boards, it did so with the express proviso that boards must apply the Part 2 rules with *greater flexibility* than the FRE. In addition, 10 C.F.R. § 2.336 is a *discovery* regulation, and the rules are clear that the scope of discovery is broader than the scope of admissible *evidence.* Finally, the Commission has affirmed that the mandatory disclosures in Subpart L proceedings encompass a "wide range of information."

RULES OF PRACTICE: MANDATORY DISCLOSURES (POSSESSION, CUSTODY, OR CONTROL)

Although the phrase "possession, custody, or control" appears in the NRC regulations in three instances (10 C.F.R. §§ 2.336(a)(2)(i), 2.704(a)(2), and 2.707(a)(1)), as far as we are aware, no NRC decision has ever provided guidance as to what constitutes "control."

RULES OF PRACTICE: MANDATORY DISCLOSURES (POSSESSION, CUSTODY, OR CONTROL)

We look to the Federal Rules of Civil Procedure for guidance on construing the term "control" as it applies to our ruling on the instant motion under 10 C.F.R. § 2.336(a)(2)(i). This is because the NRC's regulation is based on Fed. R. Civ. P. 26(a)(1)(A)(ii). In addition, Fed. R. Civ. P. 34(a)(1), which also uses the term "control," is essentially the same as NRC's "production of documents" regulation, 10 C.F.R. § 2.707(a)(1). The case law construing these federal rules is useful guidance in interpreting the NRC regulations.

RULES OF PRACTICE: MANDATORY DISCLOSURES (POSSESSION, CUSTODY, OR CONTROL)

The phrase "possession, custody, or control" as found in the FRCP and 10 C.F.R. § 2.336(a) is in the disjunctive. Only one of the enumerated requirements needs to be met. Neither possession nor custody of a document is required.

RULES OF PRACTICE: MANDATORY DISCLOSURES (POSSESSION, CUSTODY, OR CONTROL)

Neither legal ownership nor title is required in order for a party to have "possession, custody, or control" of a document under the FRCP or 10 C.F.R. § 2.336(a).

RULES OF PRACTICE: MANDATORY DISCLOSURES (POSSESSION, CUSTODY, OR CONTROL)

Term "control" is broadly construed. Documents are deemed to be within the control of a party if the party has the right to obtain the documents on demand. In addition, a document is deemed to be within a party's control if it is held by the party's attorney, expert, insurance company, accountant, or agent.

RULES OF PRACTICE: MANDATORY DISCLOSURES (POSSESSION, CUSTODY, OR CONTROL — PRACTICAL ABILITY TO OBTAIN)

The concept of control extends to situations in which the party has the practical ability to obtain materials in the possession of another, even if the party does not have the legal right to compel the other person or entity to produce the requested materials. Practical control by a party over the person in possession of the document is sufficient to require that the party produce the document.

RULES OF PRACTICE: MANDATORY DISCLOSURES (POSSESSION, CUSTODY, OR CONTROL)

The documents (computer models) prepared by CH2M Hill as a part of its expert consulting work for PEF on the Levy Nuclear Project are within PEF's "control" for purposes of 10 C.F.R. § 2.336(a)(2)(i) and must be disclosed, even though the documents were not contract deliverables, PEF may have no formal legal "right" to force CH2M Hill to provide them, and PEF must compensate CH2M Hill for providing these documents. This is because the documents were prepared by PEF's expert and PEF has the practical ability to obtain them.

RULES OF PRACTICE: MANDATORY DISCLOSURES (POSSESSION, CUSTODY, OR CONTROL — PRACTICAL ABILITY TO OBTAIN)

PEF's "control" of these computer models, i.e., its practical ability to access and obtain them, is illustrated by the fact that PEF acknowledged that, if the NRC Staff requested these documents, PEF could obtain and provide them.

RULES OF PRACTICE: MANDATORY DISCLOSURES (POSSESSION, CUSTODY, OR CONTROL — PRACTICAL ABILITY TO OBTAIN)

PEF's "control" of these computer models, i.e., its practical ability to access and obtain them, is illustrated by the fact that they were prepared under quality control measures associated with this nuclear project and the fact that PEF has the contractual right to audit and review this information.

RULES OF PRACTICE: MANDATORY DISCLOSURES (POSSESSION, CUSTODY, OR CONTROL — PRACTICAL ABILITY TO OBTAIN)

To rule that disclosure under 10 C.F.R. § 2.336(a)(2)(i) is limited to formal contractual deliverables would ignore practical reality. Such a reading of 10 C.F.R. § 2.336(a)(2)(i) would encourage applicants to draft consulting contracts to "insulate" themselves from the obligation to disclose critical computer modeling information. This is information that applicants routinely provide to the NRC Staff, if requested during the license application process.

RULES OF PRACTICE: MANDATORY DISCLOSURES (POSSESSION, CUSTODY, OR CONTROL — PRACTICAL ABILITY TO OBTAIN)

Rather than focusing on the contractual formalities, we adopt the FRCP approach and focus on the practical realities. An applicant has "control" of a document under 10 C.F.R. § 2.336 if the applicant has the practical ability to obtain it, albeit for a cost or fee, from the expert consulting firm that generated the document while performing work for the applicant.

RULES OF PRACTICE: MANDATORY DISCLOSURES (PUBLIC AVAILABILITY)

Under the mandatory disclosure regulation, 10 C.F.R. § 2.336(a)(2)(iii), a party

is excused from producing a document if the document is publicly available and if the party specifies where the document may be found.

RULES OF PRACTICE: MANDATORY DISCLOSURES (UNDUE BURDEN AND COST)

In the context of PEF's application to construct and operate two large nuclear power reactors at a total cost in excess of $14 billion dollars, and an NRC licensing process costing millions of dollars (disregarding any adjudicatory costs), PEF's request to be excused from disclosing, as is required by 10 C.F.R. § 2.336(a), the key groundwater models involved in this application on the ground that such disclosure would entail the excessive and undue cost of $30,000 is rejected. This is not an undue cost. This cost pales in comparison to the other costs involved in this project, including the cost PEF would incur in preparing and bringing the CH2M Hill environmental expert to the evidentiary hearing.

RULES OF PRACTICE: MANDATORY DISCLOSURES (UNDUE BURDEN AND COST)

PEF's claim that the computer models should be excused from the mandatory disclosure requirements of 10 C.F.R. § 2.336(a) because they entail proprietary information is rejected. Under the protective order that the Board has issued in this proceeding, the use of any proprietary information (e.g., trade secrets or confidential commercial or financial information) that is produced under 10 C.F.R. § 2.336 is strictly limited to this proceeding, and such information must be promptly returned at the close of this proceeding. We reject PEF's suggestion that it cannot produce the requested information because it is "proprietary," either to PEF, CH2M Hill, or to the company that provides software to CH2M Hill.

MEMORANDUM AND ORDER
(Granting Motion to Compel Disclosure of Groundwater Modeling Information)

On September 27, 2010, the Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (collectively, Intervenors) moved to compel Progress Energy Florida, Inc. (PEF) to produce certain groundwater modeling information associated with PEF's application to

construct and operate two nuclear power reactors in Levy County, Florida.[1] Intervenors assert that the groundwater modeling information is relevant to one of their admitted contentions and must be disclosed pursuant to 10 C.F.R. § 2.336(a)(2)(i). *See* Motion at 1, 4, 5. PEF has declined to provide the information and opposes the motion.[2] The NRC Staff takes no position on this matter.[3]

For the reasons set forth below, we grant the motion.

I. BACKGROUND

On July 28, 2008, PEF submitted its combined license application (COLA), pursuant to 10 C.F.R. Part 52, to construct and operate the proposed Levy Nuclear Plant (LNP) Units 1 and 2 at a site in Levy County, Florida.[4] This Board was established on February 23, 2009. 74 Fed. Reg. 9113 (Mar. 2, 2009). On July 8, 2009, we granted the Intervenors' petition to intervene in this proceeding, finding that they had demonstrated standing and had proffered three admissible contentions. *See* LBP-09-10, 70 NRC 51, 147 (2009).

One of the contentions we admitted was Contention 4. *Id.* This contention alleged, *inter alia,* that the Environmental Report submitted by PEF in connection with its COLA failed to adequately address, and inappropriately characterized as "small," the environmental impacts of the construction and operation of the proposed LNP facilities resulting from (a) active and passive dewatering, (b) the connection of the site to the underlying Floridan aquifer system, and (c) the impacts on water quality and the aquatic environment due to alterations in nutrient concentrations caused by the removal of water. *Id.* at 149.

The NRC regulations mandate that, within 30 days of the admission of a contention, each party must disclose to the other parties "all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions." 10 C.F.R. § 2.336(a)(2)(i). Pursuant to that regulation, on September 1, 2009, all parties submitted their initial mandatory disclosures.[5] These mandatory disclosures are updated every month. ISO § II.A; *see* 10 C.F.R. § 2.336(d).

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[1] Motion for Order Compelling Discovery of PEF Groundwater Model Digital Files (Sept. 27, 2010) (Motion).

[2] Progress Answer Opposing Joint Intervenors' Motion to Compel (Oct. 7, 2010) at 1 (PEF Answer).

[3] NRC Staff Answer to Joint Intervenors' Motion to Compel (Oct. 7, 2010) at 1 (Staff Answer).

[4] [PEF]; Application for the Levy County Nuclear Power Plant Units 1 and 2; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 74,532, 74,532 (Dec. 8, 2008).

[5] On August 27, 2009, the Board issued an Initial Scheduling Order, specifying that initial mandatory disclosures were due on September 1, 2009. *See* Initial Scheduling Order § II.A, LBP-09-22, 70 NRC 640, 642 (2009) (ISO).

In its initial mandatory disclosures on September 1, 2009, PEF submitted a groundwater report relevant to Contention 4 entitled "Revised Conceptual Wellfield Layout and Evaluation of Simulated Drawdown Impacts for Levy Nuclear Plant Technical Memorandum No. 338884-TMEM-074 (Nov. 14, 2008) (Report 74)." PEF Answer at 2 n.2.[6] Report 74 was issued by CH2M Hill, an expert consulting firm hired by PEF. Tr. at 519. Report 74 describes itself as follows:

> This technical memorandum (TM) documents the simulated hydrologic impacts associated with the proposed normal daily withdrawal of 1.58 million gallons per day (mgd) of groundwater from the upper Floridan acquifer (UFA) to provide fresh water for [PEF's] proposed Levy Nuclear Plant (LNP). The impacts were evaluated using a MODFLOW (Harbaugh, Banta, Hill, and McDonald, 2000) groundwater flow model developed by CH2M Hill. A new model was prepared by CH2M Hill in response to questions raised by the Southwest Florida Water Management District (SWFWMD) staff in their review of the SCA Volume 5, Section D 10.09, Water Use Permit, Attachment B, Groundwater Modeling (Progress Energy, 2008).
>
> The revised groundwater model was exported from the SWFWMD's District-Wide Regulation Model, Version 2 (DWRM2) (Environmental Simulations, Inc. 2004) using the telescopic mesh refinement (TMR) process, which creates a site-specific model from the regional DWRM model.

Report 74 at 2.

Subsequently, in its fifth supplement to its mandatory disclosures, PEF submitted a revised groundwater report issued by its consultant, CH2M Hill. *See* PEF Answer at 2 n.2.[7] This technical memorandum, referred to as Report 123, "documents an additional evaluation of the simulated hydrologic impacts associated with the proposed normal daily withdrawal of 1.58 million gallons per day (mgd) of groundwater from the Upper Floridan Aquifer." Report 123 at 2. Report 123 states that it was generated in response to an NRC request for additional information (RAI). "CH2M Hill completed a second evaluation by revising the model documented in [Report 74]. These revisions and associated simulation results are documented in [Report 123]." *Id.*

On August 5, 2010, the NRC Staff issued its draft environmental impact

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[6] A copy of Report 74 was also provided as Attachment C to PEF's Motion to Dismiss as Moot the Aspects of Contention 4 Related to Active Dewatering During Levy Nuclear Plant Operations (Sept. 30, 2010).

[7] Revised Groundwater Model Evaluation of Simulated Drawdown Water Impacts, Levy Nuclear Plant, Technical Memorandum No. 338884-TMEME-123 (Dec. 7, 2009) (Report 123). A copy of Report 123 was provided as Attachment D to PEF's Motion to Dismiss as Moot the Aspects of Contention 4 Related to Active Dewatering During Levy Nuclear Plant Operations (Sept. 30, 2010).

statement (DEIS) concerning PEF's COLA for LNP Units 1 and 2.[8] The DEIS discusses the LNP's expected impacts on water and groundwater and makes numerous references to the groundwater modeling work done by PEF and CH2M Hill.[9] The DEIS states that "PEF constructed a local-scale groundwater model as a requirement of the facility's Site Certification Application to the State of Florida. This model, which was a submodel of [SWFWMD's DWRM2] regional groundwater flow model, was used to simulate both LNP and cumulative groundwater-use impacts." DEIS at 2-25. The DEIS then explains that, because a "poor fit between simulated and observed heads in the vicinity of the LNP was obtained," the local scale model was "recalibrated by PEF using both site-specific and regional head data. A detailed description of this model and the recalibration process is provided by PEF (2009d)." DEIS at 2-28 to 2-29.

The CH2M Hill Report 74 is a technical memorandum that reports on the simulated environmental impacts predicted by what the DEIS refers to as the initial "local scale groundwater model" (hereinafter "Initial Local Scale GW Model"). Tr. at 518-20, 527. Meanwhile, Report 123 is a CH2M Hill technical memorandum that PEF/CH2M Hill generated after NRC requested that the Initial Local Scale GW Model be recalibrated. The DEIS refers to this as the recalibrated local scale groundwater model (hereinafter "Recalibrated Local Scale GW Model"). Tr. at 519, 530-31.

On September 27, 2010, the Intervenors filed the instant motion. They request that we require PEF "to produce the revised groundwater model . . . and any other water-related models referred to in the DEIS and/or relied upon by the NRC in drawing their conclusions regarding groundwater use." Motion at 1. The Intervenors seek "all water-related computer models, input files and reports, parameters, input data, boundary conditions, assumptions, and all iterations and results, in a model-ready digital format." *Id.* The Intervenors assert that they wish to determine for themselves whether the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model are appropriately calibrated and accurate. *Id.* at 5. They assert that "in no way is any result verifiable without access to the digital model files of the various iterations of model runs." *Id.* The Intervenors also explain, at some length, why the motion to compel was not filed earlier and outline what they describe as the "labyrinthine process [they] have navigated" to attempt to obtain the relevant information, either from PEF, the State of Florida, and/or the NRC Staff, all to no avail. *Id.* at 2-4 & Attachments

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[8] *See* Status Report (Aug. 5, 2010) at 2; Nuclear Regulatory Commission; Notice of Availability of the Draft Environmental Impact Statement for the Combined Licenses for Levy Nuclear Plant Units 1 and 2, 75 Fed. Reg. 49,539, 49,540 (Aug. 13, 2010).

[9] *See* Nuclear Regulatory Commission, Office of New Reactors, Draft Environmental Impact Statement for Combined Licenses (COLs) for Levy Nuclear Plant Units 1 and 2, Draft Report for Comment, NUREG-1941, at 2-24 to 2-29, 5-7 to 5-9 (Aug. 2010) (DEIS).

1-8. The Intervenors have retained two experts to assist them in evaluating the requested groundwater-related information.[10]

On October 7, 2010, PEF filed its answer opposing the motion to compel, asserting that it is untimely. PEF argues that some of the requested information (e.g., the SWFWMD DWRM2 model) is publicly available. PEF Answer at 3. As to the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model, PEF asserts that they are not in PEF's possession, custody, or control, but are instead in the hands of CH2M Hill. *Id.* at 2; Tr. at 515, 518-20. PEF asserts that it would be unduly burdensome and costly for PEF to obtain these models from CH2M Hill and thus that PEF is not obliged to produce the requested information. *See* PEF Answer at 3; Tr. at 523-25.

On November 17, 2010, the Board heard oral argument on the motion. Tr. at 497-627.

II. ANALYSIS AND RULING

Our analysis begins with the words of the regulation. The mandatory disclosure regulation is entitled "General discovery" and specifies, in pertinent part, that "all parties . . . shall . . . disclose and provide . . . all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions." 10 C.F.R. § 2.336(a)(2)(i). The disclosing party can either provide the other parties with an actual copy of the document or data compilation, or can simply describe it and provide it if the other party requests it. *Id.* If the document or data compilation is "publicly available," then a citation to the document and a description of where it may be publicly obtained is sufficient. 10 C.F.R. § 2.336(a)(2)(iii). The regulation makes clear that each party must make the mandatory disclosures automatically without the need for a party to file a discovery request. As to the scope of this obligation, the Commission has recently affirmed that "mandatory disclosures . . . which apply to Subpart L proceedings, are wide-reaching." *Crow Butte Resources, Inc.* (North Trend Expansion Project) CLI-09-12, 69 NRC 535, 572 (2009).

Based on the regulations and the pleadings herein, our analysis focuses on the following issues:

1. Are the models and associated modeling information, which are the

[10] *See* Note from Cara Campbell to Mary Olsen, FWD: Info Asked for in Oral Arguments Scheduling Order (Nov. 9, 2010) (ADAMS Accession No. ML103130685) (Identifying Kevin Vought, Water Resources Engineer and Groundwater/Surface Water Model); 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), Exh. K, Expert Declaration by Dr. Sydney T. Bacchus in Support of Petitioners' Standing to Intervene in This Proceeding (Feb. 6, 2009).

subject of the motion to compel, "documents" or "data compilations" within the meaning of 10 C.F.R. § 2.336(a)(2)(i)?

2. Are they "relevant" to Contention 4?

3. Are they in the "possession, custody, or control" of PEF?

4. Are they "publicly available" such that no further mandatory disclosure is needed?

5. If 10 C.F.R. § 2.336(a)(2)(i) mandates the disclosure of these groundwater models and associated information, would the production of this material be "unduly burdensome and costly," and, if so, should PEF be excused from the duty to produce them?

6. Should the motion to compel be denied as untimely?

Our analysis and interpretation of the mandatory disclosure regulation (10 C.F.R. § 2.336) are aided by the regulation's origins and context. The regulation was promulgated in 2004 as part of the Commission's new "informal" form of adjudicatory proceedings to be conducted pursuant to 10 C.F.R. Part 2 Subpart L.[11] In a Subpart L proceeding, mandatory disclosure pursuant to 10 C.F.R. § 2.336 is the *only* form of discovery allowed, and all other forms are expressly prohibited. *See* 10 C.F.R. §§ 2.336(g), 2.1203(d).[12]

NRC based the new mandatory disclosure regulation on the parallel requirements in the *Federal Rules of Civil Procedure* (FRCP).

> The Commission believes that the tiered approach to discovery set forth in the proposed rule represents a significant enhancement to the Commission's existing adjudicatory procedures, and has the potential to significantly reduce the delays and resources expended by all parties in discovery. At the foundation of the Commission's approach are the provisions in Subparts C and G which provide for *mandatory disclosure of a wide range of information,* documents, and tangible things relevant to the contested matter in the proceeding, and the NRC's provisions for broad public access to documents in § 2.390. *The mandatory disclosure provisions, which were generally modeled on Rule 26 of the Federal Rules of Civil Procedure,* have been tailored to reflect the nature and requirements of NRC proceedings. Mandatory disclosure of information relevant to the contested matter (together with the hearing file and/or electronic docket, discussed later) *should reduce or avoid* the need to draft often complex discovery requests such as interrogatories, prepare for time-consuming and costly depositions, and engage in *extended litigation of the responsiveness of a party to a discovery request.* Reducing the burden of discovery

[11] Nuclear Regulatory Commission; Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2247 (Jan 14, 2004).

[12] *See also Citizens Awareness Network, Inc. v. NRC,* 391 F.3d 338, 344-45, 350 (1st Cir. 2004).

> may enhance the participation of ordinary citizens in the discovery process, since they often do not have the resources to engage in protracted litigation over discovery.

69 Fed. Reg. at 2194 (emphasis added).

A. Document

As a threshold matter, the Board finds that the term "document," as used in 10 C.F.R. § 2.336, is not limited to paper documents. Nothing in the plain language of the regulation restricts the term "document" to hard-copy documents. Meanwhile, a variety of indicators point to the conclusion that the term "document," as used in the regulation, refers to information stored on any medium, including electronically stored information (ESI). First, this conclusion is consistent with the similar provisions of the FRCP.[13] In addition, it is consistent with the Commission's statement that the mandatory disclosure provision covers a "wide range of information." 69 Fed. Reg. at 2194. Furthermore, our initial scheduling order herein confirms and mandates that ESI is covered by 10 C.F.R. § 2.336. ISO § II.A.4.

Next, the Board holds that the term "document," as used in 10 C.F.R. § 2.336 includes computer models. Computer modeling is used extensively in the nuclear industry by applicants, both for safety analyses under the Atomic Energy Act and environmental analyses under the National Environmental Policy Act. The NRC itself relies heavily on computer modeling. There is no doubt that computer models and associated documentation are within the scope of discovery under NRC's regulations. For example, in *Illinois Power Co.* (Clinton Power Station, Units 1 and 2), ALAB-340, 4 NRC 27, 33-34 (1976), the Appeal Board (and underlying Licensing Board) dealt with a request by an intervenor that the applicant bring to the evidentiary hearing the "underlying data on computer models" which the applicant's expert had used in forecasting lifetime fuel cycle costs for the Clinton station. *Id.* at 31. The Appeal Board noted that the request covered the "source decks, data decks, computer programs and documentation upon which the models . . . were based." *Id.* at 34. While the request for the computer model was denied for other reasons (because it had been made on the very eve of the evidentiary

[13] The FRCP were amended in 2006 to expressly include ESI. *See* Federal Rules Decisions; Administrative Office of the U.S. Courts; Federal Rules of Civil Procedure; Adoption and Amendments to Civil Rules, 234 F.R.D. 219 (Apr. 12, 2006). However, even before this amendment, the FRCP case law had established that ESI was included within the scope of discovery and mandatory disclosures. *See infra* notes 15, 16.

hearing), no one suggested that computer models are not subject to discovery in NRC proceedings.[14]

The case law under the parallel provisions of the FRCP clearly establishes that computer modeling, and all of the inputs, outputs, and software associated with it, are within the scope of discovery.[15]

Given the NRC's heavy reliance on computer modeling, it is essential that litigants be able to access, evaluate, and challenge the computer modeling work that serves as the basis for a party's position and/or the grant or denial of a license. Such information will often be essential to the fair adjudication of admitted contentions, and to sound decisionmaking by the boards.[16] Accordingly, we hold that the scope of mandatory disclosure under 10 C.F.R. § 2.336(a)(2)(i) includes computer models (whether they be ESI or not), including the underlying data used in a computer analysis or simulation, the programs and programming methods, the software that embodies the computer program, and the inputs and outputs that comprise the model.

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[14] *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, 666 n.62 (2005) (where applicant and Staff used computer models to analyze potential consequences due to aircraft impact on an independent spent fuel storage installation facility); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 46 (2004) (addressing dismissal for late filing of a contention challenging the use of a computer model used to analyze transportation impacts).

[15] *See Bartley v. Isuzu Motors, Ltd.,* 151 F.R.D. 659, 660-61 (D. Colo. 1993) ("When one party seeks to present a computer study, in order to defend against the conclusions that are said to flow from those efforts, the discovering party not only must be given access to the data that represents the computer's work product, but also must see the data put into the computer, the programs used to manipulate the data and produce the conclusions, and the theory or logic employed by those who planned and executed the experiment."); *City of Cleveland v. Cleveland Electric Illuminating Co.,* 538 F. Supp. 1257, 1267 (N.D. Ohio 1980) (Where "expert reports are predicated upon complex data, calculations and computer simulations which are neither discernable nor deducible from the written reports themselves, disclosure thereof is essential to the effective and efficient examination of the experts at trial.").

[16] *See Novartis Corp. v. Ben Venue Laboratories, Inc.,* 271 F.3d 1043, 1054 (Fed. Cir. 2001) (explaining, with regard to "computer model" evidence, that while "there is nothing inherently unreliable or suspect about computer simulations as evidence . . . every simulation of a physical process embodies at least some simplifying assumptions, and requires both a solid theoretical foundation and realistic input parameters to yield meaningful results. Without knowing these foundations, a court cannot evaluate whether the simulation is probative, and it would be unfair to render an expert's opinion immune to challenge because its methodology is hidden in an uncommented computer model."); *Perma Research & Development Co. v. Singer Co.,* 542 F.2d 111, 125 (2d Cir. 1976) (Van Graafeiland, J., dissenting) (stating that a "computer model is valid only insofar as it enables us to make valid inferences about the real-world system being simulated," and that "although the computer has tremendous potential for improving our system of justice by generating more meaningful evidence . . . it presents a real danger of being the vehicle of introducing erroneous, misleading, or unreliable evidence.").

B. Relevant

Section 2.336(a)(2)(i) of 10 C.F.R. mandates the disclosure of documents that are relevant to the admitted contentions. Despite PEF's assertion to the contrary, Tr. at 545-47, it is clear that the computer modeling information specified in the motion to compel is relevant to Contention 4. The contention asserts, *inter alia,* that PEF's ER failed to adequately address and analyze the environmental impacts that the proposed LNP project will have on the water and groundwater in the vicinity of the site. *See* LBP-09-10, 70 NRC at 149. The adequacy of the modeling that PEF and its expert, CH2M Hill, performed to analyze and estimate the environmental impacts that the LNP project will have on the water and groundwater in the vicinity of the proposed site is of central relevance to Contention 4. For example, the Intervenors wish to determine for themselves whether the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model are appropriately calibrated and whether they provide a fair and accurate simulation and/or prediction regarding dewatering and its impacts on the water and groundwater. Motion at 1, 5, 6. The DEIS discusses these local scale models extensively, and the NRC Staff agrees that it is, in part, relying on these models for its conclusions. *See* DEIS at 2-25, 2-28 to 2-29, 5-7; Tr. at 581-82.

The *Federal Rules of Evidence* (FRE) provide some useful guidance. The FRE state that "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Clearly, the groundwater modeling information that is the subject of the instant motion to compel would be relevant under Fed. R. Evid. 401. For example, the inputs, logic, and software programs that PEF/CH2M Hill used to develop the Initial Local Scale GW Model and Recalibrated Local Scale GW Model are documents that will have a tendency to make the adequacy of the ER's environmental assessment of the LNP projects (i.e., the issue that is in dispute in this portion of Contention 4) "more probable or less probable." The groundwater modeling information therefore has probative value for the resolution of Contention 4 and is relevant.

Our conclusion in this regard is fortified by the fact that the relevance standard of 10 C.F.R. § 2.336 is even more flexible than the relevance standard of Fed. R. Evid. 401. First, although the FRE are not mandated for NRC adjudicatory proceedings, the Commission has endorsed the use of the FRE as guidance for the Boards,[17] with the express proviso that Boards must apply the Part 2 rules with

[17] *See Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001); *Consolidated Edison Co. of New York* (Indian Point, Unit 2), CLI-85-6, 21 NRC 1043,

(Continued)

greater flexibility than the FRE. *See* 69 Fed. Reg. at 2187; 10 C.F.R. § 2.319(d). Second, 10 C.F.R. § 2.336 is a *discovery* regulation, and the rules are clear that the scope of discovery is broader than the scope of admissible *evidence*. *See* 10 C.F.R. § 2.705(b)(1) ("It is not a ground for objection [to discovery] that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."). *See also* Fed. R. Civ. P. 26(b)(1). Third, the Commission has stated that the mandatory disclosures in Subpart L proceedings encompass a "wide range of information." 69 Fed. Reg. at 2194.

The Board concludes that the documents that are the subject of the Intervenors' motion to compel are relevant to the resolution of Contention 4.

C. Possession, Custody, or Control

The third test of the NRC mandatory disclosure regulation is that the document must be in the party's "possession, custody, or control." 10 C.F.R. § 2.336(a)(2)(i). PEF asserts that the computer models and associated information covered in the instant motion to compel are not in its possession, custody, or control, and therefore, it is not obliged to produce them. PEF Answer at 2.

At the outset, we note that NRC case law has never construed the phrase "possession, custody, or control" in the context of 10 C.F.R. § 2.336. Nor has it done so for the two other NRC regulations in which the phrase appears. First, there is a parallel provision governing formal adjudications under 10 C.F.R. Part 2, Subpart G proceedings that requires parties to disclose all relevant documents in their "possession, custody, or control." 10 C.F.R. § 2.704(a)(2). Second, the Subpart G rules allow a party to file a "request for production of documents," and the regulation states that a party receiving such a request must produce any relevant document in its "possession, custody, or control." 10 C.F.R. § 2.707(a)(1). However, as far as we are aware, no NRC decision has ever construed the meaning of the phrase "possession, custody, or control" under any of the Part 2 regulations.[18]

In this context, we turn to the FRCP for guidance. As previously noted, NRC's mandatory disclosure regulations are based on Fed. R. Civ. P. 26. *See* 69 Fed.

1084 (1985); *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

[18] While some NRC cases use or cite the phrase "possession, custody, or control," none of them provide relevant interpretation or construction of the phrase, or of the term "control." *See Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 72 & n.18 (2004); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 244 (1998); *Illinois Power Co.* (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1738 (1981); *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-72-29, 5 AEC 142, 143 (1972).

Reg. at 2194. Fed. R. Civ. P. 26 is, in pertinent part, essentially identical to the relevant provisions of 10 C.F.R. § 2.336(a)(2)(i) and 10 C.F.R. § 2.704(a)(2). Fed. R. Civ. P. 26(a)(1)(A)(ii) requires parties to make an "initial disclosure" including "a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control." Likewise, Fed. R. Civ. P. 34(a)(1), is essentially the same as NRC's "production of documents" regulation, 10 C.F.R. § 2.707(a)(1). The federal rule specifies that a party can request and obtain a copy of any document "in the possession, custody, or control" of the party upon whom the request is served. Fed. R. Civ. P. 34(a)(1).

The case law and commentary on these provisions of the FRCP, including the phrase "possession, custody, or control," serve as a valuable and practical guide for our interpretation of this phrase here. While we do not attempt to summarize all of the law interpreting the FRCP, we believe that the following principles apply here.

First, we note, as the FRCP cases do, that "[t]he phrase 'possession, custody, or control' is in the disjunctive, and only one of the enumerated requirements need be met."[19] Legal ownership of the documents is not required, nor is actual possession necessary if the party has control.[20]

In the instant case, PEF states that it does not have actual possession or custody of the relevant computer models and modeling information (e.g., the Initial Local Scale GW Model, the Recalibrated Local Scale GW Model, and the associated interim documents), because they are in the hands of PEF's contractor. The question becomes — are these documents nonetheless within PEF's "control"?

In the context of the FRCP, the term "control" is broadly construed.[21] Documents are deemed to be within the control of a party if the party has the right to

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[19] *Cumis Insurance Society, Inc. v. South-Coast Bank,* 610 F. Supp. 193, 196 (N.D. Ind. 1985); *see also* James Wm. Moore et al., Moore's Federal Practice ¶ 34.12[2][a] (3d ed. 2010) at 34-71 (Moore's Federal Practice).

[20] Moore's Federal Practice at 37-73 (citing *Green v. Fulton,* 157 F.R.D. 136, 142 (D. Me. 1994) (When party has "right, authority, or ability to obtain those documents on demand," they will be deemed to be under party's control.); *Prokosch v. Catalina Lighting, Inc.,* 193 F.R.D. 633, 636 (D. Minn. 2000) ("'[C]ontrol' does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.") (citation omitted)).

[21] *Id.* at 34-75 (citing *Scott v. Arex, Inc.,* 124 F.R.D. 39, 41 (D. Conn. 1989) (Party controls document if it has right, authority, or ability to obtain document on demand); *Japan Halon Co. v. Great Lakes Chemical Corp.,* 155 F.R.D. 626, 627 (N.D. Ind. 1993) (In context of analyzing "control" issue, court stated that Fed. R. Civ. P. 34 is to be liberally construed)).

obtain the documents on demand.[22] In addition, the cases affirm that a document is deemed to be within a party's control if it is held by the party's attorney, expert, insurance company, accountant, or agent. Moore's Federal Practice at 37-74.

The concept of control extends to situations in which the party has the *practical ability to obtain materials in the possession of another,* even if the party does not have the legal right to compel the other person or entity to produce the requested materials.[23] Practical control by a party over the person in possession of the document is deemed sufficient to require that the party produce the document.[24]

The foregoing principles provide a sound basis for determining whether a document must be disclosed pursuant to 10 C.F.R. § 2.336(a)(2)(i).

In determining the question of "control," e.g., whether a party has the practical ability to obtain a document that is in the possession of another, we look to the pleadings and representations of counsel at the oral argument.

We focus particularly on whether the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model are within PEF's control. First, we note that the DEIS states that these models were "prepared by PEF."[25] PEF stated, however, that these models were actually prepared by CH2M Hill, the expert environmental consulting firm hired by PEF. Tr. at 524-25. PEF stated that CH2M Hill performed the Initial Local Scale GW Model work in conjunction with PEF's site certification application (SCA) to the State of Florida for the LNP project. Tr. at 527. In its initial mandatory disclosure, PEF produced Report 74, which is CH2M Hill's report documenting the results of CH2M Hill's modeling work. *Id.* The Environmental Report that PEF submitted to NRC as part of its COLA is the same as the ER that it submitted to Florida for the SCA. Tr. at 528. As to the Recalibrated Local Scale GW Model, this was prepared and developed by CH2M

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[22] *Id.* (citing *In re Bankers Trust Co.,* 61 F.3d 465, 469 (6th Cir. 1995) ("In practice, the courts have sometimes interpreted Rule 34 to require production if the party has practical ability to obtain the documents from another, irrespective of his legal entitlement to the documents."); *cf. United States v. Skeddle,* 176 F.R.D. 258, 261 (N.D. Ohio 1997).

[23] *Id.* at 34-79 ("[T]he better view is that the concept of control extends to situations in which the party has the practical ability to obtain materials in the possession of another, even if the party cannot compel the other person or entity to produce the requested materials.") (citing *Addamax Corp. v. Open Software Foundation, Inc.,* 148 F.R.D. 462, 467-68 (D. Mass. 1993) (Some cases have expanded definition of control); *Comeau v. Rupp,* 810 F. Supp. 1127, 1166 (D. Kan. 1992) (Control "comprehends . . . the right, authority, or ability to obtain the documents"); *In re Domestic Air Transportation Antitrust Litigation,* 142 F.R.D. 354, 356-57 (D. Ga. 1992) (Defendants required to request that their employees order copy of transcripts of their deposition testimony given to government agency)).

[24] *Id.* at 34-80 (citing *Gray v. Faulkner,* 148 F.R.D. 220, 223 (N.D. Ind. 1992) (Party must seek information reasonably available from employees, agents, or others subject to party's control)).

[25] DEIS at 2-25 ("PEF constructed a local-scale groundwater model"), 2-29 ("PEF's model recalibration effort resulted in significant improvements in the model fit.").

Hill, at PEF's request (in response to NRC's RAI). Tr. at 530. Report 123 is the CH2M Hill report documenting the results of CH2M Hill's work. *Id.*

PEF emphasizes that, under its contract with CH2M Hill, the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model (and the interim documents related to these models) were not contract deliverables. PEF states that it hired CH2M Hill to produce and deliver the final reports (e.g., Report 74 or 123), but the contract did not require CH2M Hill to provide PEF with a copy of the computer modeling work that underlay Reports 74 and 123 and that CH2M Hill performed, as a necessary step in generating them. "To go back and get [the models] would be a change to the contract and would require additional money. . . . We're not saying [the models are] not available. . . . It's [just] not under Progress's control." Tr. at 534-35. "CH2M Hill in achieving Progress' objectives, developed intellectual property that has value. Under the terms of the contract, CH2M Hill retained that property and retains the ability to sell it for its own purposes. It is not a product that is supplied to Progress." Tr. at 535-36.

PEF readily acknowledges that it could obtain the models from CH2M Hill if it chose to do so. Tr. at 542. For example, PEF could readily obtain the models, *if NRC asked for them. Id.* This makes sense, given the fact the documents are in CH2M Hill's possession and CH2M Hill is (and presumably wishes to continue to be) PEF's environmental consultant on the LNP application. PEF's practical access to these documents is especially apparent here, because CH2M Hill generated the local scale models as a part of its work for PEF. Of course, PEF would discuss the matter with CH2M Hill and may need to compensate CH2M Hill for the cost and value of delivering the models. PEF says that this could cost it "in excess of $30,000." Tr. at 543. "This is the cost for CH2M Hill to go through, pick out the correct computer file, put them together in an integrated package so that they run together and provide them on essentially a DVD." *Id.*

The issue of "control" is illuminated by the fact that the groundwater modeling work done by CH2M Hill (PEF's contractor) was performed under quality control measures, Tr. at 557, and that PEF has the contractual right to audit and review this information. Tr. at 559.

> You're asking, Your Honor, whether or not Progress can see these files in the hands of CH2M Hill without — and the answer is yes. If Progress wanted to see the files, Progress could see the files. That's different from being able to walk away with a DVD of the file. That would require a contract mod.

Tr. at 567. Likewise, PEF acknowledged that it has the ability to negotiate with CH2M Hill so that CH2M Hill would allow the Intervenors' expert to access the computer models and underlying work. Tr. at 568-69.

Given the foregoing circumstances, the Board concludes that (a) PEF has the practical ability to obtain the groundwater models and supporting modeling

information generated by PEF's contractor, CH2M Hill, during CH2M Hill's performance of work in support of PEF's COLA (and related State environmental permit) for the LNP project, and therefore that (b) these documents are within PEF's "control" for purposes of 10 C.F.R. § 2.336(a)(2)(i). As a practical matter, PEF can readily obtain such information from its expert consultant — CH2M Hill. Thus, we conclude that PEF has control of (i.e., the practical ability to obtain) these particular documents now possessed by its expert consultant, CH2M Hill.

PEF's "practical ability to obtain" such documents is further demonstrated by the fact that, as a quality assurance measure, it retains the right to access the documentation and work done by its contractor, even if it is not a contract deliverable.[26]

Even though the computer models and associated information were not contract deliverables under the original contract between PEF and its expert consulting firm, and even though some cost may be involved, it is clear that, as a practical matter, PEF can readily obtain and produce the referenced computer models and supporting documentation and that PEF has "control" of the referenced computer models and information.[27]

To rule otherwise, i.e., that disclosure under 10 C.F.R. § 2.336(a)(2)(i) is limited to formal contractual deliverables, would ignore practical reality. Such a reading of 10 C.F.R. § 2.336(a)(2)(i) would encourage applicants to draft consulting contracts to "insulate" themselves, *see* Tr. at 595, from the obligation to disclose critical computer modeling information. This is information that applicants routinely provide to the NRC Staff, if requested, during the application

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[26] The NRC's standard review plan for environmental reviews for nuclear power plants states:

> In evaluating the applicant's environmental information, reviewers should identify and evaluate the quality assurance measures taken by the applicant in *collecting and analyzing data.* Quality assurance measures, including verification and validation, are also evaluated where computer models have been used to predict environmental consequences of the proposed actions.

Office of Nuclear Reactor Regulation, Standard Review Plans for Environmental Reviews for Nuclear Power Plants, NUREG-1555, at 13 (Initial ESRP Oct. 1999) (emphasis added) *available at* http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1555/sr1555.pdf.

[27] In an analogous situation, we note that when the U.S. Department of Energy (DOE) was required, under 10 C.F.R. § 2.1003(a), to make an initial mandatory disclosure of documentary material relevant to its application for a geologic repository for the disposal of high level radioactive wastes, DOE contacted its consultants and contractors working on the application and required them to submit all of the relevant documentary material in their possession. *See U.S. Department of Energy* (High-Level Waste Repository), LBP-04-20, 60 NRC 300, 337 (2004). Likewise, when the State of Nevada was required to produce its documentary material, it gathered such information from all of its consultants and contractors. *See U.S. Department of Energy* (High-Level Waste Repository), LBP-08-5, 67 NRC 205, 212 n.32, 221 (2008) (Karlin, J., dissenting). No one suggested that such documents were exempt from disclosure because they were not formal contract deliverables.

process.[28] Rather than focusing on the contractual formalities, we adopt the FRCP approach and focus on the practical realities. We rule that an applicant has "control" of a document under 10 C.F.R. § 2.336 if the applicant has the practical ability to obtain it, albeit for a cost or fee, from the expert consulting firm that generated the document while performing work for the applicant.

Having concluded that the computer models and modeling information, including the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model, are relevant documents that are within PEF's possession, custody, or control, we turn to PEF's arguments that it is relieved from the mandatory disclosure duty of 10 C.F.R. § 2.336(a)(2)(i) because either (a) the documents are publicly available, or (b) it would be unduly burdensome and costly for PEF to produce them.

D. Public Availability

The mandatory disclosure regulation excuses a party from producing a document if it is publicly available and if the party specifies where the document may be found. 10 C.F.R. § 2.336(a)(2)(iii).

The pleadings in this case reflect the confusion between the Intervenors and PEF as to which computer models and modeling information are being sought, and whether such documents are publicly available. The motion to compel provides a "lengthy narration" with numerous attached e-mails, attempting to explain that, when PEF claimed that the relevant computer models and information were publicly available, the Intervenors diligently pursued such documents, to no avail. Motion at 2-4. Specifically, the Intervenors state that when PEF represented that the models were publicly available from the SWFWMD, the Intervenors diligently contacted SWFWMD, NRC personnel, and others in an attempt to obtain this information. *Id.* The Intervenors apparently pursued several blind alleys involving SWFWMD's DWRM2 model before realizing that this was not what they were seeking (i.e., not the local scale groundwater submodels that PEF/CH2M Hill had generated and which were referred to in the DEIS). *Id.* Meanwhile PEF, apparently also focusing on the DWRM2, stated:

> the computer model at issue here was developed by agencies of the State of Florida, not Progress. Analysis was performed by Progress's contractor on an extracted section of that computer model. In the spirit of cooperation, counsel for Progress

[28] PEF seeks support from this Board's prior ruling, denying PEF's motion to compel. PEF states "[a]s this Board has previously held, a party is not obligated to disclose that which it does not have." PEF Answer at 2 (citing LBP-09-30, 70 NRC 1039, 1046 (2009)). PEF misses the mark entirely. PEF's earlier motion to compel was denied because the document in question *did not exist,* not because the Intervenors did not have possession, custody, or control of it. *Id.*

> advised Joint Intervenors that the computer model can be obtained from public sources.

PEF Answer at 3.

During the oral argument, it became clear that the Intervenors were not seeking the DWRM2 model developed by the SWFWMD. Tr. at 598. Apparently the DWRM2 is indeed publicly available in some form. *Id.* Instead, the Intervenors stated that they are seeking the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model. Tr. at 597. In addition, the Intervenors stated that they are interested in the "Multi-Layer Unsteady state (MLU) model of transient well flow in layered aquifer systems," referred to in the DEIS. DEIS at 2-26; Tr. at 603. Counsel for PEF indicated that CH2M Hill worked with the MLU model as part of its work scope for PEF, Tr. at 606, but was unsure whether the MLU model was still available from CH2M Hill. Tr. at 608.

The Board concludes that, with regard to the Initial Local Scale GW Model, the Recalibrated Local Scale GW Model, and the MLU model, PEF has not shown that they are publicly available. Therefore, PEF has not shown that it should be excused, under 10 C.F.R. § 2.336(a)(2)(iii), from being required to produce these documents pursuant to 10 C.F.R. § 2.336(a)(2)(i).

E. Undue Burden and Cost

PEF argues that it should be excused from the mandatory disclosure requirement of 10 C.F.R. § 2.336(a)(2)(i) because it would be "both burdensome and costly." PEF Answer at 3. We disagree.

PEF first cites to our ISO for the proposition that a party need not disclose "information that is not reasonably accessible because of undue burden or cost." PEF Answer at 3 (citing ISO § II.A.4(i)). But, the ISO provision in question is entitled "Electronically Stored Information — Reasonable Search." That provision focuses on the burden of *searching* for ESI (a potentially enormous task when dealing with ESI), not the cost of *producing* it. In contrast, in the instant situation the search costs are virtually nil, because PEF knows where the requested information is located (i.e., with CH2M Hill). The ISO does not support PEF's position.

Second, PEF says that obtaining the computer model would be burdensome and costly "because the input files are in a format that can only be used in conjunction with a proprietary computer program maintained by a contractor to the State of Florida." PEF Answer at 3. In fact, however, the Intervenors are *not* seeking a computer model or program from the State of Florida (e.g., the DWRM2 model from the SWFWMD). Rather, they are seeking a computer model and program held by PEF and/or its environmental consultant, e.g., the local scale models constructed and developed by CH2M Hill.

Third, on a related point, we reject PEF's suggestion that they cannot produce the requested information because it is "proprietary," either to PEF, CH2M Hill, or to the company that provides software to CH2M Hill. *See* PEF Answer at 3; Tr. at 516, 535-36, 584, 592, 602. There is, however, no risk that any such proprietary information (e.g., trade secrets or confidential commercial or financial information) will be released into commerce and thus inflict commercial harm or damage. This is because any such proprietary information will be protected under the terms of the protective order (and nondisclosure agreement) that we have already issued in this case.[29] Under the protective order, the use of any proprietary information that is produced under 10 C.F.R. § 2.336 is strictly limited to this proceeding, and such information must be promptly returned at the close of this proceeding. *See id.*

Fourth, PEF says that the cases cited by the Intervenors regarding the production of computer inputs and models "are not on point because they pertain to discovery in Federal Court, not disclosure in NRC proceedings" and because they "relate to the admissibility of evidence." PEF Answer at 3. As discussed above, we find the cases interpreting provisions of the FRCP that are virtually identical to the NRC regulations, including the mandatory disclosure regulations, to be useful guidance for our analysis of the language of 10 C.F.R. § 2.336.

At bottom, PEF's "undue burden and cost" argument seems to be that PEF might need to pay CH2M Hill "in excess of $30,000," which PEF says "is the cost for CH2M Hill to go through, pick out the correct computer file, put them together in an integrated package so that they run together and provide them on essentially a DVD." Tr. at 543. In the context of PEF's COLA and Contention 4, however, $30,000 does not represent an "undue burden or cost" that should relieve PEF from the duty to make the mandatory disclosures otherwise required by 10 C.F.R. § 2.336. PEF's application concerns the construction of two large nuclear reactors, at a total cost in excess of $14 billion.[30] The COLA application and the NRC application process itself (disregarding any adjudicatory costs) is a multi-million-dollar effort by PEF. Turning to the adjudication itself, $30,000 is likely to pale in comparison to PEF's cost of bringing its environmental experts (including CH2M Hill experts) to the evidentiary hearing on Contention 4 and

[29] Licensing Board Order (Protective Order Governing Non-Disclosure of Certain Documents Claimed to Be Proprietary) (Oct. 14, 2009) at 3 (unpublished).

[30] *See* News Release, Progress Energy gets approval to take next step to secure Florida's energy future (July 15, 2008), http://www.progress-energy.com/aboutus/news/article.asp?id=19062 ("The company estimates the total cost of the project to be approximately $14 billion for the two units and an additional $3 billion for the necessary transmission equipment.").

preparing them for that hearing.[31] In the context of this case, the ability of the Intervenors (and this Board) to test the validity of the local scale groundwater models that PEF is using to support its environmental conclusions appears to be essential to the resolution of Contention 4.[32]

Lastly, we note that these models are maintained under a quality assurance program and hence should be relatively available for inspection and review by the NRC Staff, a fact repeatedly acknowledged by PEF at the oral argument. Tr. at 538-41, 544-45; *see also* Tr. at 587-91. In these circumstances, we reject the proposition that it would be unduly burdensome or costly to require PEF to comply with this aspect of its mandatory disclosure duties under 10 C.F.R. § 2.336(a)(2)(i).[33]

F. Timeliness

PEF asserts that the Intervenors' motion to compel is untimely. PEF Answer at 4. PEF points out that it disclosed the existence of Report 74 in its initial disclosures on September 1, 2009, and that challenges to the adequacy of the initial disclosure were due on November 30, 2009.[34] *Id.* Likewise, PEF disclosed the existence of Report 123 in an updated disclosure on March 18, 2010, and therefore maintains that a challenge to that disclosure would have been due on March 29, 2010. *Id.* PEF notes that the Intervenors did not ask for these models

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[31] The fact that a document, such as computer modeling information, is within the scope of the mandatory disclosure requirements of 10 C.F.R. § 2.336(a)(2)(i) does not mean that the party must automatically go to the cost and expense of gathering and producing it (e.g., pay its subcontractor $30,000). To the contrary, the regulation allows a party to comply by merely providing a "description by category and location" of all documents subject to mandatory disclosure. *Id.* Once such descriptions are provided, a party need not provide an actual copy of the document unless and until the other party requests it.

[32] Under a proper quality assurance program (e.g., complying with safety requirements in 10 C.F.R. Part 50, App. B), information relating to the development and use of a recalibrated site model in the preparation of a COLA would be readily available as part of a configuration management program. We therefore question why producing this information is as burdensome as PEF claims.

[33] We also note that while there is an "undue burden or cost" exclusion to discovery under Subpart G, *see* 10 C.F.R. § 2.705(b)(2)(iii) (disclosure not required if "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the proceeding, the parties' resources, the importance of the issue in the proceeding, and the importance of the proposed discovery in resolving the issues"), there is no such "undue burden or cost" exclusion to the mandatory disclosures under 10 C.F.R. § 2.336.

[34] Normally, motions to compel must be filed within 10 days of the event or circumstance from which they arise. 10 C.F.R. § 2.323(a). The Board extended this deadline for initial mandatory disclosures and extended the deadline for challenges thereto. *See* ISO, 70 NRC at 642 and 646; Order (Granting Motion for Extension of Time) Oct. 27, 2009 (unpublished).

until July 8, 2010, "more than three months after the second deadline." *Id.* The motion to compel was not filed until September 27, 2010.

We agree with PEF that the timeliness of the Intervenors' request is problematic. Under NRC regulations, motions are to be filed within 10 days of the event or circumstance from which they arise. 10 C.F.R. § 2.323(a). Likewise, we have set deadlines for the filing of various motions both in the ISO and elsewhere. This Board is committed to active and efficient case management of this proceeding, so that matters are raised (and resolved) as promptly as possible. It does appear that the Intervenors could have challenged the completeness of PEF's mandatory disclosures and sought the models underlying Report 74 and Report 123 at an earlier time.

On the other hand, there are circumstances that counsel that the instant motion to compel should not be rejected on timeliness grounds. First, it is still quite early in this proceeding. The NRC Staff does not expect to issue the Final Environmental Impact Statement (FEIS) and the Final Safety Evaluation Report (FSER) for at least a year. *See* Status Report (Dec. 2, 2010) at 1-2. Indeed, the FSER was recently delayed by more than 6 months. *Id.* Meanwhile, the evidentiary hearing is at least 18 months away. ISO § II.J.6. Second, there is no suggestion that the timing of this motion causes prejudice or harm to any party. Requiring PEF to produce the requested information now will not disrupt its preparation for the evidentiary hearing. Third, the requested local scale groundwater models and associated information were relied upon, and discussed extensively by the NRC Staff in its August 5, 2010 DEIS. This served to remind the parties and the Board of the importance of these models to the issues raised in Contention 4. Indeed, if and when the NRC Staff relies on a document, then the NRC Staff itself is also obliged to disclose the document, to the extent it is available.[35] *See* 10 C.F.R. § 2.336(b)(3). The Intevernors asked for these models on July 8, 2010, even before the DEIS was issued. As a fourth matter, we agree that, once the Intervenors contacted PEF about these models, the Intervenors diligently pursued the modeling information, ultimately reaching an impasse with PEF and finding that the relevant models were not publicly available.

It is the Board's assessment that the groundwater issues are of central importance to the dewatering, groundwater, and other water-related allegations of Contention 4, and that mandatory disclosure of the models requested here will be very important in resolving the merits of Contention 4.[36] Given the importance

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[35] "Availability" not "possession, custody, or control" is the criterion for the NRC Staff's mandatory disclosure responsibilities. *Compare* 10 C.F.R. § 2.336(b) *with* 10 C.F.R. § 2.336(a)(2)(i).

[36] PEF has filed two motions for the dismissal or disposition of certain parts of Contention 4. Motion to Dismiss as Moot the Aspects of Contention 4 Related to Active Dewatering During Levy Nuclear Plant Operations (Sept. 30, 2010); Progress Energy's Motion for Summary Disposition of

(Continued)

of this information, the lack of prejudice to PEF or to the efficiency of this proceeding, and the fact that it in no way affects the critical path of this licensing process or evidentiary hearing, we decline to reject this motion to compel on the grounds of untimeliness.

III. CONCLUSION AND ORDER

For the foregoing reasons, the motion to compel Progress Energy Florida, Inc. to comply with the mandatory disclosure requirements of 10 C.F.R. § 2.336(a)(2)(i) is *granted.* We rule that Progress Energy Florida, Inc. must provide to the Intervenors the documents specified on Attachment A.

Within twenty (20) days of this Memorandum and Order, the Intervenors (including their experts) shall make a good faith effort to confer with Progress Energy Florida, Inc. (and its experts from CH2M Hill) for the purpose of discussing and attempting to arrange for a full, adequate, and efficient disclosure of the documents specified in Attachment A. For example, the parties may agree that such disclosure can be best achieved by having the Intervenors' expert(s) visit the facilities of CH2M Hill and review and run the relevant models at that location. Within thirty (30) days of this Memorandum and Order, the Intervenors shall advise the Board, in writing, whether such an agreement has been reached. If no such agreement is reached, then on the fortieth (40) day after this Memorandum and Order, Progress Energy Florida, Inc. shall deliver to the Intervenors, in an electronic format readable and usable by the Intervenors, all documents specified in Attachment A. If any of these documents contain information that is claimed to be proprietary, then it shall be disclosed, but Progress Energy Florida, Inc. may designate and identify any such information as proprietary, and it will be protected by the protective order previously issued in this proceeding.

Contention 4 (Environmental Impacts of Dewatering and Salt Drift) with Regard to Salt Drift and Passive Dewatering (Oct. 4, 2010). Meanwhile, the Intervenors have filed a motion for leave to file an amended Contention 4A. Ecology Party of Florida, Green Party of Florida, Nuclear Information and Resource Service Motion for Leave to Amend Contention 4 (Nov. 15, 2010); An Amended Contention 4 (Nov. 15, 2010). Although the Board has yet to issue its rulings on those motions, we affirm that Contention 4 remains a viable contention.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Dr. William M. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 22, 2010

ATTACHMENT A
DOCUMENTS CONTAINING GROUNDWATER MODELS OR MODELING INFORMATION TO BE PRODUCED PURSUANT TO 10 C.F.R. § 2.336

A. Scope of Mandatory Disclosure: Pursuant to 10 C.F.R. § 2.336(a)(2)(i), and the December 22, 2010 Memorandum and Order of the Atomic Safety and Licensing Board in the matter of *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-23, 72 NRC 692 (2010), Progress Energy Florida, Inc. (PEF) shall provide to the Intervenors, a copy of each document described below that is in the possession, custody, or control of PEF.

1. The Initial Local Scale Groundwater Model as that term is used in LBP-10-23.
2. The Recalibrated Local Scale Groundwater Model as that term is used in LBP-10-23.
3. The "Multi-Layer Unsteady state (MLU) model of transient well flow in layered aquifer systems" discussed, *inter alia,* in the DEIS at page 2-26.
4. Input data (in machine-readable format) used to perform the analyses associated with the models listed in items 1-3 above.
5. Results (in machine-readable format) produced from running the models listed in items 1-3 above.
6. Documents relating to, or providing results obtained from, the models listed in items 1-3 above, including documents discussing how the results produced from the modeling and calculations were interpreted and the basis for the interpretations.
7. Documents describing how the models listed in items 1-3 above were developed, including such information as the assumptions made and how the physical measurements of the site were used to create the model input and associated grid.
8. Documents describing the method used to recalibrate the model based on the measurements made.

B. Definitions and Conditions: For purposes of this Order:

1. The term "document" includes information of any kind, including, reports, analysis, raw data, algorithms, logic, graphics, inputs, output, and any computer analysis, simulation, software, program, model or submodel, that is contained, stored, or embodied in any form or medium, including paper, electronic, or otherwise.

2. As discussed in LBP-10-23, a document is within the PEF's "possession, custody, or control" if (a) PEF has actual possession or custody of the document, (b) PEF has legal title to the document or the legal right to access the document, or (c) the document was developed or generated by PEF's environmental consulting firm, CH2M Hill, in the course of CH2M Hill's performance of work for PEF related to the proposed LNP project (regardless of whether the document was a contract deliverable under the contractual arrangement between PEF and CH2M Hill and even though CH2M Hill may charge PEF a cost or fee for producing the document).

3. PEF is not obliged to generate, or require CH2M Hill to generate, any entirely new information, but it is obliged to review its extant information and documents (e.g., computer files) and gather, copy, and/or download the relevant and responsive portions thereof into an "integrated package" or packages and to provide them pursuant to LBP-10-23. *See* Tr. at 543.

4. If PEF or CH2M Hill (or any of their vendors) claims that any document contains trade secrets or proprietary commercial or financial information, then such document shall be disclosed in accordance with the terms of the October 14, 2009, protective order and nondisclosure agreement issued herein. Only the Intervenors and their experts who have signed a nondisclosure agreement may access any such Proprietary Documents, and they shall use them only as necessary for the conduct of this proceeding.

5. Documents shall be disclosed in the same form (electronic or paper) as the original document in PEF's or CH2M Hill's possession. If it was ESI, then it shall be disclosed and produced in a searchable and readable electronic format accessible to the Intervenors.

6. The provisions of the August 27, 2009, initial scheduling order (ISO) herein (e.g., waiver of mandatory disclosures for documents claimed to be attorney work product, continuing duty to update disclosures) shall apply to the information covered by LBP-10-23. In case of conflict, the provisions of LBP-10-23 will control.

Cite as 72 NRC 720 (2010) **LBP-10-24**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Gary S. Arnold
Dr. William W. Sager

In the Matter of **Docket No. 52-016-COL**
(ASLBP No. 09-874-02-COL-BD01)
(Combined License Application)

CALVERT CLIFFS 3 NUCLEAR PROJECT, LLC, and UNISTAR NUCLEAR OPERATING SERVICES, LLC
(Calvert Cliffs Nuclear Power Plant, Unit 3) **December 28, 2010**

RULES OF PRACTICE: CONTENTION ADMISSIBILITY

The use of the disjunctive phrase "data or conclusions" means it is sufficient that either data or conclusions in the Draft Environmental Impact Statement ("DEIS") differ significantly from those in the Environmental Report ("ER"); both need not do so. A contention may therefore challenge a DEIS even though its ultimate conclusion on a particular issue (e.g., the need for power) is the same as that in the ER, as long as the DEIS relies on significantly different data than the ER to support the determination. The reverse is also true: a significantly different conclusion in the DEIS may be challenged even though it is based on the same information that was cited in the ER.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY; TIMELINESS

The regulations do not define or specify an exact number of days within which a new or amended contention must be filed in order to be considered "timely." Accordingly, unless a deadline has been specified in the scheduling order for the proceeding, the determination of timeliness is subject to a reasonableness standard that depends on the facts and circumstances of each situation.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY; GOOD CAUSE

The Commission affirmed that "good cause" is the most significant of the late-filing factors set out in 10 C.F.R. § 2.309(c). If good cause is not shown, the board may still permit the late filing, but the petitioner must make a strong showing on the other factors.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY

The regulations do not define the phrase "differ significantly." In the absence of a statutory definition, courts normally define a term by its ordinary meaning. The ordinary meaning of "significant" is "having meaning," "full of import," "indicative," "having or likely to have influence or effect," "deserving to be considered."

RULES OF PRACTICE: CONTENTION ADMISSIBILITY; TIMELINESS

When a new contention is filed challenging "new data or conclusions" in the NRC's environmental documents, the timeliness of the new contention is determined based on whether it was filed promptly after the NRC's National Environmental Policy Act ("NEPA") document became publicly available, not whether it was filed promptly after the information on which the intervenor bases its challenge became publicly available. The intervenor must show that (1) the new data or conclusions in the NRC Staff NEPA document differ significantly from those in the ER, and (2) the new contention was submitted promptly after the NRC Staff NEPA document was issued to the public. If these requirements are met, the new contention is timely even if it is based on information that predates the NRC Staff NEPA document. This contrasts with the alternative basis for filing a new contention in section 2.309(f)(2)(i)-(iii), which requires that a new or amended contention based on material new information be filed "in a timely fashion based on the availability of the subsequent information." Under

this alternative, timeliness is determined based on the timing of the availability of the information on which the contention is based, not the timing of the NRC Staff NEPA document. The two tests are distinct, and therefore if the requirements of the first test are met we may not impose additional requirements derived from the second test.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY; NONTIMELY CONTENTIONS

The Intervenors' failure to expressly address the late-filing criteria does not necessarily preclude the Board from doing so. Licensing boards and the Commission have considered the late-filing criteria even in cases where the factors were not fully addressed by the petitioners and/or the NRC Staff or were not addressed at all.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY; GOOD CAUSE

Intervenors have good cause for filing Contention 10 in response to the DEIS because the NRC Staff NEPA document contains data or conclusions that differ significantly from those in the ER. By defining significantly different information in the DEIS as a permissible basis for filing a new contention, the Commission has in effect concluded that such new information is good cause for filing a new contention.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY; NEED FOR POWER

The assessment of need for power has historically been equated with the benefits of the proposed action for the cost-benefit balance consideration. If the need for power is less than the DEIS projects, then the benefits of the project might also be less, which might in turn alter the balance between the project's benefits and its environmental costs. Thus, the accuracy and reliability of the agency's need for power determination, as reflected in the DEIS, is material to the licensing decision.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY; NEED FOR POWER

Even if the NRC Staff finds that a State's evaluation satisfies the criteria of the Environmental Standard Review Plan ("ESRP") § 8.1, this does not relieve

the NRC of its obligation under NEPA to consider more recent data showing that conditions have changed materially, as Intervenors claim is true here. The NRC Staff's obligation to consider significant new information in preparing NEPA documents follows from the agency's NEPA regulations. Thus, if significant new information becomes available, the NRC Staff must explain how it took the new information into account in determining whether the State requires additional generating capacity. Chapter 8 of the DEIS fails to acknowledge the recent downturn in the demand for electrical power alleged by Intervenors, much less explain whether or how it affected the NRC's assessment of the need for power.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY; NEED FOR POWER

A short-term reduction in demand is not sufficient to necessitate an accounting in the DEIS for that changed demand. The longstanding position of the Commission is that inherent in any forecast of future electric power demands is a substantial margin of uncertainty. Thus, fluctuations in demand that may occur over a period of several years, such as changes brought about by an economic recession, are not a legally sufficient ground for challenging the need for power analysis under the Commission's interpretation of NEPA requirements.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY; NEPA ALTERNATIVES ANALYSIS

The Council on Environmental Quality ("CEQ"), numerous courts, and parties to this proceeding, including the NRC Staff, acknowledge that the alternatives analysis is the "heart of the environmental impact statement." "The existence of reasonable but unexamined alternatives renders an EIS inadequate." The adequacy of the DEIS's evaluation of alternatives is therefore a material issue in the licensing proceeding.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY; NEPA ALTERNATIVES ANALYSIS

The primary reason the DEIS did not consider either wind or solar power as a stand-alone alternative to Unit 3 is that neither of those sources was deemed capable of serving the purpose and need of the project, generating 1600 MW(e) of baseload power. Because Intervenors do not contest that basic conclusion, Contention 10B does not present a genuine dispute with the DEIS. Even if Intervenors are correct that the DEIS's analysis of wind and solar power is flawed, they have provided no basis to overturn the NRC Staff's conclusion that neither

source of power could, standing alone, provide a reasonable alternative to Calvert Cliffs Unit 3.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY; NEED FOR POWER

The NRC may consistently with NEPA define baseload power generation as the purpose of and need for a project.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY

Intervenors have satisfied our contention admissibility requirements by identifying information to support their contention that the DEIS contains an inaccurate or incomplete comparison of the proposed action and the combined alternative. If Intervenors' contention is upheld on the merits, they will have shown that the DEIS violates NEPA even if they have not shown precisely how the DEIS should be revised or what ultimate conclusion it should reach. Federal courts have held that inaccurate, incomplete, or misleading information in an EIS concerning the comparison of alternatives is itself sufficient to render the EIS unlawful and to compel its revision.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY; NEPA ALTERNATIVES ANALYSIS

We agree with the NRC Staff that, as a general proposition, "'[a]n agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative.'" In this instance, however, Intervenors cannot be accused of demanding that the NRC Staff analyze "every conceivable alternative." On the contrary, the combined alternative is the only alternative to the proposed action that the NRC Staff determined was a viable source of baseload power and that included renewable energy sources. A thorough and accurate analysis of the combined alternative is therefore particularly important to the agency's compliance with NEPA, because it represents the only opportunity the decisionmakers and the public will have to compare the proposed action to an alternative that includes renewable sources such as wind and solar power and is acknowledged to be capable of fulfilling the purpose and need of the project.

RULES OF PRACTICE: CONTENTION ADMISSIBILITY

Under section 2.309(f)(2), an intervenor may file a new or amended contention

"if there are data or conclusions in the NRC draft or final environmental impact statement . . . or any supplement relating thereto, that differ significantly from the data or conclusions in the applicant's documents." In this proceeding, the overnight capital cost estimate of $4500 to $6000/kW that appears in the DEIS also appears in Applicants' Response to Request for Additional Information ("RAI") No. 124, which clearly qualifies as part of "the applicant's documents" under section 2.309(f)(2). Thus, because the same overnight capital cost estimate — $4500 to $6000/kW — appears in both the DEIS and Applicants' documents, it cannot be said that the overnight capital cost estimates differ significantly between the DEIS and Applicants' documents.

ORDER
(Ruling on Intervenors' Proposed New Contention 10)

Before this Board is a proposed new contention, Contention 10, filed by Intervenors Nuclear Information and Resource Service, Beyond Nuclear, Public Citizen Energy Program and Southern Maryland Citizens' Alliance for Renewable Energy Solutions.[1] The Contention consists of four challenges to the Draft Environmental Impact Statement ("DEIS") issued by the NRC Staff in April 2010 pursuant to the National Environmental Policy Act ("NEPA").[2] For the reasons set forth below, the Board admits one aspect of this contention but declines to admit the remainder.

I. BACKGROUND

This case arises from an application by Unistar Nuclear Operating Services, LLC, and Calvert Cliffs 3 Nuclear Project, LLC ("Applicants") for a combined license ("COL"), pursuant to 10 C.F.R. Part 52, Subpart C, to construct and operate a U.S. Evolutionary Power Reactor ("U.S. EPR"), designated Unit 3, to be located at the Calvert Cliffs site in Lusby, Calvert County, Maryland. Applicants submitted this combined license application ("COLA") for Calvert Cliffs Nuclear Power Plant, Unit 3 ("Calvert Cliffs Unit 3") to the NRC in two

[1] *See* Submission of Contention 10 by Joint Intervenors (June 25, 2010) at 1, 18 [hereinafter Contention 10].

[2] 42 U.S.C. § 4321 *et seq.*

parts on July 13, 2007, and March 14, 2008.[3] The application was accepted and docketed by the NRC on January 25, 2008, and June 3, 2008,[4] but was subsequently revised and supplemented by the Applicants.

A notice of hearing and opportunity to petition for leave to intervene on the COLA for Calvert Cliffs Unit 3 was published in the *Federal Register* on September 26, 2008.[5] On November 19, 2008, Intervenors filed a timely request for a hearing and Petition to Intervene,[6] and on December 2, 2008, this Board was established to preside over the proceeding.[7] On March 24, 2009, the Board issued a Memorandum and Order, in which it found that the Intervenors had standing, admitted them as parties, admitted their first contention as pleaded, admitted their second and seventh contentions as modified by the Board, and granted their request for a hearing.[8] The Board also determined that Intervenors' remaining proposed contentions were inadmissible.[9]

On July 30, 2009, the Board granted Applicants' and the NRC Staff's Motion for Summary Disposition of Joint Intervenors' Contention 2, thus dismissing Contention 2 from the proceeding.[10] In addition, in its April 5, 2010 order the Board also granted Applicants' and the NRC Staff's Motion for Summary Disposition of Joint Intervenors' Contention 7.[11]

In April 2010, the NRC Staff issued the DEIS for the proposed Calvert Cliffs Unit 3.[12] Intervenors filed proposed Contention 10 on June 25, 2010,

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[3] *See* Letter from George Vanderheyden, UniStar President and CEO, to Document Control Desk, U.S. NRC (Mar. 14, 2008) at 2 (ADAMS Acession No. ML080990114) [hereinafter Vanderheyden Letter]; Letter from R.M. Krich, UniStar Senior Vice President, Regulatory Affairs, to Document Control Desk, U.S. NRC (July 13, 2007) at 1 (ADAMS Accession No. ML071980292). The original applicants were Constellation Generation Group, LLC, and UniStar Nuclear Operating Services, LLC. However, by letter on August 1, 2008, Constellation Generation Group, LLC, withdrew as an applicant and was replaced by Calvert Cliffs 3 Nuclear Project, LLC. *See* Letter from George Vanderheyden, UniStar President and CEO, to Document Control Desk, U.S. NRC (Aug. 1, 2008) at 1 (ADAMS Accession No. ML082770641) (referring to Revision 3 of the COLA).

[4] *See* Letter from John Rycyna, Project Manager, Office of New Reactors, U.S. NRC, to George Vanderheyden, UniStar President and CEO (June 3, 2008) at 1 (ADAMS Accession No. ML081510149); Vanderheyden Letter at 2.

[5] *See* 73 Fed. Reg. 55,876 (Sept. 26, 2008).

[6] *See* Petition to Intervene in Docket No. 52-016, Calvert Cliffs-3 Nuclear Power Plant Combined Construction and License Application (Nov. 19, 2008) at 52.

[7] *See* 73 Fed. Reg. 74,531 (Dec. 8, 2008).

[8] LBP-09-4, 69 NRC 170, 231-32 (2009).

[9] *See id.* at 231.

[10] *See* LBP-09-15, 70 NRC 198, 205 (2009).

[11] April 5, 2010 Order (unpublished) at 1.

[12] *See* 75 Fed. Reg. 20,867 (Apr. 21, 2010); Division of Site and Environmental Review, Office of New Reactors, Environmental Impact Statement for the Combined License (COL) for Calvert

(Continued)

challenging the adequacy of the NRC Staff's analyses of the need for power, energy alternatives, and costs. *See* Contention 10 at 1. Applicants and the NRC Staff timely filed their respective responses to Intervenors' Submission of Contention 10 on July 20, 2010,[13] and Intervenors timely submitted their reply on July 27, 2010.[14]

II. DISCUSSION

Contention 10 states:

> The Draft Environmental Impact Statement (DEIS) is inadequate to meet the requirements of 10 CFR 51.71(d) or provide reasonable support for the NRC's decision on issuance of a construction/operating license for the proposed Calvert Cliffs-3 nuclear reactor because its analyses of Need for Power, Energy Alternatives and Cost/Benefit analysis (Chapters 8, 9 and 10) are flawed and based on inaccurate, irrelevant and/or outdated information.

Id.

Intervenors present four arguments in support of Contention 10:

> A. The DEIS's Analysis of Need for Power is Inadequate and Based on Faulty and Outdated Information.
>
> B. The DEIS's Discussion of Energy Alternatives is Inadequate, Faulty and Misleading.
>
> C. The DEIS's Discussion of a Combination of Alternatives is Inadequate and Faulty.
>
> D. The DEIS's Discussion of Costs Both Understates Likely Costs and Disputes Cost Estimates in the Applicants' ER, Calling into Question the ER's discussion of Calvert Cliffs-3 vs. Alternatives.

See id. at 2, 6, 9, 11.

Each of Intervenors' arguments concerns a sufficiently distinct issue that we

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Cliffs Nuclear Power Plant Unit 3, Draft Report for Comment, NUREG-1936 (Apr. 2010) (ADAMS Accession Nos. ML101000012 and ML101000013) [hereinafter DEIS].

[13] *See* Applicants' Response to Proposed Contention 10 (July 20, 2010) at 1 [hereinafter Applicants' Response]; NRC Staff Answer to Joint Intervenors' New Contention 10 (July 20, 2010) at 27 [hereinafter NRC Staff Answer].

[14] *See* Joint Intervenor's [sic] Reply to NRC Staff's and Applicant's [sic] Responses to Submission of Contention 10 (July 27, 2010) at 16 [hereinafter Intervenors' Reply].

will divide Contention 10 into four separate contentions, referred to below as Contentions 10A-D.

A. Contention 10A: The Need for Power Analysis in the DEIS Is "Inadequate and Based on Faulty and Outdated Information"

Chapter 8 of the DEIS, entitled "Need for Power," contains the NRC Staff's analysis of the need for the proposed Calvert Cliffs Unit 3 reactor. The DEIS concludes that there is a need for at least as much baseload power as would be generated by the proposed new unit. *See* DEIS at 8-1. Intervenors attack this conclusion for three reasons. First, they allege that, because of the economic recession as well as demand-side management and legislative changes, electric power demand in Maryland has dropped significantly. They argue that the DEIS fails to acknowledge, much less take into account, these significant changes that have reduced the need for power, and thus may have reduced or eliminated the need for Unit 3. Contention 10 at 2-6.

Intervenors also claim that the DEIS underestimates the potential for demand-side management to reduce the demand for power. Intervenors state that

> [t]he most glaring flaw in the DEIS analysis of demand-side programs is that its discussion is limited to the actions of the utility BGE. In fact, it is asserted, there are 13 electric utilities in the state of Maryland, and demand-side actions taken by the other 12 (as required by Maryland law) will also act to reduce electrical demand in the state with a goal of an overall 15% per capita reduction in electricity consumption by 2015.

Id. at 5-6 (footnote omitted).

Intervenors further argue that the need for power analysis should have focused on a larger geographic area. *Id.* at 2. According to Intervenors, the DEIS attempts to justify the need for an additional reactor at Calvert Cliffs by maintaining that Maryland is an electricity importer and that the state's electrical supply is considerably below its current demand. *Id.* at 4. Intervenors acknowledge that this might be true, but they claim it is irrelevant to the question whether a new reactor is needed because (1) Maryland is part of a regional power grid that includes 13 states, and as long as sufficient power is generated within the region to meet the needs of the participant states, Maryland has no need to produce more power within its borders; and (2) Unit 3 will be a merchant power plant that can sell power to whomever it chooses, without regard to state boundaries, so it is uncertain whether it will play any role in lessening the power generation deficit in Maryland. *Id.* at 4-5.

The NRC Staff and the Applicants argue that Contention 10A is nontimely

and inadmissible.[15] We conclude that the first argument in support of Contention 10A is timely, but the second and third arguments are not. We further find that the one timely argument in support of Contention 10A is not admissible, because the sources and documents upon which Intervenors rely fail to support a legally sufficient challenge to the need for power analysis in the DEIS. We accordingly will not admit Contention 10A.

1. Timeliness of Contention 10A

a. General Considerations

Contentions 10A-D are new NEPA contentions filed in response to a new NRC Staff NEPA document, the DEIS.[16] The requirements for determining the timeliness of such a new NEPA contention are set forth in 10 C.F.R. § 2.309(f)(2), but 10 C.F.R. § 2.309(c) is also potentially relevant given that it provides criteria for boards to apply in deciding whether to admit "nontimely filings." We will first summarize the relevant provisions in general terms. We will then apply them to Contentions 10A-D.

Section 2.309(f)(2) states that "[o]n issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report." It then provides, however, that a petitioner "may amend those contentions or file new contentions 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." 10 C.F.R. § 2.309(f)(2). Thus, for example, if the DEIS contains data or conclusions concerning the costs or benefits of the proposed action that differ significantly from those contained in the Environmental Report ("ER") (an applicant's document), the petitioner (or intervenor)

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[15] *See* Applicants' Response at 4-12; NRC Staff Answer at 6-14.

[16] "The centerpiece of environmental regulation in the United States, NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives." *New Mexico ex rel. Richardson v. Bureau of Land Management,* 565 F.3d 683, 703 (10th Cir. 2009) (citing 42 U.S.C. § 4331(b) (congressional declaration of national environmental policy); *U.S. Department of Transportation v. Public Citizen,* 541 U.S. 752, 756-57 (2004); *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 371 (1989); *Forest Guardians v. U.S. Forest Service,* 495 F.3d 1162, 1172 (10th Cir. 2007)). When an agency proposes a "major Federal action[ ] significantly affecting the quality of the human environment," NEPA requires the preparation of an EIS concerning the proposed action. 42 U.S.C. § 4332. The requirement to prepare an EIS is a procedural mechanism designed to assure that agencies give proper consideration to the environmental consequences of their actions. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 558 (1978). However, NEPA does not require agencies to "elevate environmental concerns over other appropriate considerations." *Strycker's Bay Neighborhood Council, Inc. v. Karlen,* 444 U.S. 223, 227 (1980).

may file an amended contention, or an entirely new contention, to challenge the new data or conclusions. This provision tempers the restrictive effect of the agency's requirement that NEPA contentions be filed based on the ER by allowing petitioners or intervenors to challenge significantly different data or conclusions that appear for the first time in an NRC Staff NEPA document.

The use of the disjunctive phrase "data *or* conclusions" means it is sufficient that either data or conclusions in the DEIS differ significantly from those in the ER; both need not do so. *Id.* (emphasis added). A contention may therefore challenge a DEIS even though its ultimate conclusion on a particular issue (e.g., the need for power) is the same as that in the ER, as long as the DEIS relies on significantly different data than the ER to support the determination. The reverse is also true: a significantly different conclusion in the DEIS may be challenged even though it is based on the same information that was cited in the ER.

Also, the provision refers to "conclusions," not "the conclusion" or "all conclusions." Thus, even though the DEIS's ultimate conclusion on a particular issue might be the same as that in the ER (e.g., that there is a need for additional power generating capacity), other conclusions in the DEIS related to the ultimate conclusion might be challenged if they differ significantly from those in the ER. These could also be a permissible basis for a new or amended contention, even though the ultimate conclusion remains unchanged.

Thus, if the DEIS for Unit 3 contains either data or conclusions that differ significantly from those in the ER, Intervenors may file their new contention challenging the DEIS even though both the ER and the DEIS reach the same result.

If Intervenors fail to show that the DEIS contains new data or conclusions that differ from those in the ER, section 2.309(f)(2) provides another alternative. It allows a new contention to be filed after the initial docketing 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.

Id.

The regulations do not define or specify an exact number of days within which a new or amended contention must be filed in order to be considered "timely." Accordingly, unless a deadline has been specified in the scheduling order for the

proceeding, the determination of timeliness is subject to a reasonableness standard that depends on the facts and circumstances of each situation.[17]

If the filing of a proposed new contention is not authorized by either alternative in section 2.309(f)(2), then it may be evaluated under section 2.309(c). The Commission has held that, even if a petitioner is unable to show that the NRC Staff's NEPA document differs significantly from the ER, it "may still be able to meet the late-filed contention requirements."[18] Similarly, if a contention based on new information fails to satisfy the three-part test of section 2.309(f)(2)(i)-(iii), it may be evaluated under section 2.309(c).

Section 2.309(c)(1) includes eight factors that boards must balance in evaluating nontimely intervention petitions, hearing requests, and contentions.[19] In the *Crow Butte* proceeding, the Commission upheld the Licensing Board's finding that the petitioner demonstrated "good cause" for its late filing.[20] The Commission affirmed that "'[g]ood cause' is the most significant of the late-filing factors set out at 10 C.F.R. § 2.309(c)."[21] If good cause is not shown, the board may still permit the late filing, but the petitioner must make a strong showing on the other factors.[22]

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[17] *See, e.g., Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 266 n.11 (2007).

[18] *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993). Although this case was decided under pre-2004 regulations, including 10 C.F.R. § 2.714(a)(1)(i)-(v), there is no reason to think the result would be different under the current regulations. *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223-24 (2000).

[19] The factors 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).

[20] *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549 (2009).

[21] *Id.* at 549 n.61.

[22] *See Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 5-8 (2008).

b. Timeliness of Contention 10A Under 10 C.F.R. § 2.309(f)(2)

Intervenors justify filing Contention 10 under the "new data or conclusions" provision of section 2.309(f)(2). *See* Contention 10 at 14. They point to extensive new data in the DEIS that was not cited in the ER:

> In Chapter 8, the DEIS presents the NRC Staff's analysis of the need for the proposed Calvert Cliffs Unit 3 reactor. While Chapter 8 reaches the same conclusion as the Environmental Report that Unit 3 is needed, it is based on a completely different set of data that are more recent than the data presented in the Environmental Report. For example, it cites a 2009 Maryland Public Service Commission decision authorizing a Certificate of Public Convenience and Necessity for Calvert Cliffs-3, a January 2010 PJM load forecast report, a 2010 Maryland Department of Natural Resources report, and other documents much more recent than those cited by Applicants in their Environmental Report. The DEIS cites these various reports and studies to show that Maryland currently suffers from an imbalance in its electrical demand and supply, with demand considerably outstripping available generation.

Id. at 2 (footnote omitted). The new information cited for the first time in the DEIS could not have been challenged in Intervenors' hearing petition. *Id.* at 14. Intervenors also maintain that the new information in the DEIS is significantly different from that cited in the ER. *Id.* at 14-16. They explain:

> [I]n the Need for Power discussion in the Environmental Report, no documents from 2009 or 2010 are cited. A single document from 2008 is cited, and all of the other documents are from 2007 or earlier. Obviously these documents do not reflect the significant and long-lasting downturn in the U.S. economy that started during 2007, which has greatly affected electricity demand, nor the effects of Maryland's 2008 energy efficiency law and continuing improvement in demand-side management programs.

Id. at 15. Intervenors maintain that the data presented in the DEIS, while more up to date than that cited in the ER, is still inadequate because it ignores the reduction in the demand for power brought about by the economic recession and demand-side management. *Id.* at 2-3.

As another Board has warned, an intervenor that has sufficient information to file a NEPA contention but delays that filing until publication of the DEIS or FEIS does so at its peril.[23] In that case, however, the Intervenor did not contend that the NRC Staff NEPA document contained new or different data or conclusions.[24] In

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[23] *Private Fuel Storage,* LBP-00-27, 52 NRC at 223 (quoting *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205, 212 (1994)).

[24] *Id.*

this case, we do have such a claim. We therefore must decide whether Intervenors could file Contention 10A after the DEIS was issued, based upon the provision in section 2.309(f)(2) that permits a new contention challenging significant new data or conclusions in a NRC Staff NEPA document. We conclude that they could.

As Intervenors point out, the documents cited in the ER are primarily from 2007 or earlier. These include the Maryland Public Service Commission's ("MPSC's") Electric Supply Adequacy Report of 2007 ("MPSC 2007 Supply Adequacy Report"), and two reports prepared by the Maryland Department of Natural Resources' Power Plant Research Program ("PPRP") in 2006.[25] Chapter 8 shows that, although the DEIS reached the same ultimate conclusion as the ER concerning the need for power in Maryland, the DEIS cites additional information and more recent sources. Those include a 2009 MPSC decision authorizing a Certificate of Public Convenience and Necessity for Calvert Cliffs-3, a January 2010 PJM Interconnection (PJM) load forecast report, a 2010 PPRP Report, the *2009 Long-Term Reliability Assessment 2009-2018* prepared by the North American Electric Reliability Corporation ("NERC"), and the 2009 *Long Term Resource Assessment 2009-2018* prepared by the Reliability First Corporation ("RFC"). *See* DEIS at 8-9 to 8-11. The DEIS cites these reports and studies to show that Maryland suffers from an imbalance in its electrical demand and supply, with demand considerably outstripping available generation. *Id.* at 8-3 to 8-8. Intervenors are thus correct that the DEIS relies on different and more recent documents than those cited in the ER.

Even Applicants, who maintain that Contention 10A is nontimely, acknowledge that "the DEIS relies on some information that post-dates the ER." Applicants' Response at 5.

These post-ER differences are readily apparent when comparing equivalent sections of the ER and DEIS. For example, section 8.2 of the ER and the same section of the DEIS concern "Power Demand." ER § 8.2 discusses Maryland's dependence on power from out of state, noting that "'Maryland imports over 25% of its electric energy needs.'"[26] Quoting the MPSC 2007 Supply Adequacy Report, the ER states that "'Maryland's electric utilities and PJM forecast that electricity demand will continue to rise, albeit at a modest pace of between 1% and 2% per year, further increasing Maryland's need for additional electricity

[25] Calvert Cliffs Nuclear Power Plant Unit 3, Combined License Application Part 3: Environmental Report §§ 8-9, 8-15 (Rev. 6 Sept. 2009) (ADAMS Accession Nos. ML092880898-ML092880920) [hereinafter ER].

[26] *Id.* at 8-11 (quoting Maryland Public Service Commission, *Electronic Supply Adequacy Report of 2007* 2 (2007), http://www.psc.state.md.us/Intranet/Reports/2007SupplyAdequacyReport_0117207.pdf) [hereinafter MPSC 2007 Supply Adequacy Report].

supplies.'"[27] The ER also cites PPRP and PJM reports as supporting "a predicted annual growth rate in demand of about 1.5% through the year 2015." ER at 8-13.

Section 8.2 of the DEIS includes quantitative data on matters for which data were not provided in the ER. In addition, virtually all of the quantitative data in DEIS § 8.2 are new. DEIS at 8-3. The comparison is essentially the same for section 8.3 of the ER and the corresponding section of the DEIS, both of which concern power supply.[28] Again, the discussion in the ER is general and qualitative. The DEIS, however, provides more detailed quantitative information on power supply resources. The only projection of future supply in the ER extends to the "'middle of the next decade,'" which presumably means 2015.[29] DEIS § 8.3 includes projections that extend to 2018. *Id.* at 8-4. Also, the sources relied on in the DEIS are again more recent than those cited in the ER. *See id.* at 8-3 to 8-5.

Section 8.4 of the DEIS is entitled "Assessment of Need for Power." *Id.* at 8-5. Like the sections of the DEIS just discussed, it includes a substantial amount of information not included in the ER. In section 8.4.2, the DEIS reviews the conclusions of the MPSC 2007 Report, which is also cited in ER § 8.4.1 ("Assessment of the Need for New Capacity"). *See id.* at 8-6 to 8-7. But the MPSC 2007 Supply Adequacy Report, as summarized in the DEIS, concerns the State's need for additional power, not the need for any specific facility such as Unit 3. *See id.* The latter question was the subject of an adjudicatory proceeding conducted by the MPSC during 2008 and 2009, the purpose of which was to determine whether the MPSC should issue a Certificate of Public Convenience and Necessity ("CPCN") for the proposed Calvert Cliffs Unit 3.[30] Under Maryland law, the MPSC may issue such a Certificate "only after taking due consideration of the effect of a proposed generating station on the stability and reliability of the electrical system." *Id.* at 8-5. In addition, in the CPCN proceeding applicants "must address a full range of environmental, engineering, socioeconomic, planning, and cost issues." *Id.* The MPSC 2007 Supply Adequacy Report, as described in the DEIS, was broader in scope, primarily focusing on the general need for additional power in Maryland, while the CPCN proceeding focused specifically on whether the Applicant had adequately demonstrated that Unit 3 would be of benefit to the State and its citizens. *See id.* at 8-5 to 8-7. The ER noted that the MPSC would be considering the need for Calvert Cliffs

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[27] *Id.* (quoting MPSC 2007 Supply Adequacy Report at 2).

[28] *See* ER at 8-17; DEIS at 8-3 to 8-5.

[29] ER at 8-17 (quoting MPSC 2007 Supply Adequacy Report at 55).

[30] *See* Maryland Public Service Commission, *Proposed Order of Hearing Examiner* (2009), http://webapp.psc.state.md.us/Intranet/Casenum/submit_new.cfm?DirPath=C:\Casenum\9100-9199\9127\Item_114\&CaseN=9127\Item_114 [hereinafter Proposed Order of MPSC Hearing Examiner]. The MPSC's procedures for conducting adjudicatory proceedings are summarized in the ER. ER at 8-5.

Unit 3 in its CPCN proceeding, but, because that proceeding was not concluded until 2009, the MPSC's determinations concerning the need for Unit 3 were not included in the ER. *See* ER at 8-3 to 8-4.

The MPSC conducted an evidentiary hearing on the CPCN application in August of 2008, the hearing examiner issued his proposed order on April 28, 2009, and the MPSC issued its order granting the CPCN on June 26, 2009.[31] The DEIS summarizes the MPSC's conclusions concerning the benefits that proposed Calvert Cliffs Unit 3 would provide to the State, as follows:

- Unit 3 would constitute a new large source of power that would be of benefit to the citizens and State of Maryland.
- The beneficial effect of Unit 3 on the stability and reliability of the electric system is supported by the evidence on the MPSC's record.
- The additional power provided by Unit 3 would lessen Maryland's dependence on fossil fuels and would reduce the State's dependence on imported electricity.
- Unit 3 would be a welcome source of baseload power designed to run continuously, which would help peak period congestion on transmission lines within Maryland to the benefit of the public.
- Unit 3 would have a positive effect on the reliability and stability of the electric system and would be a beneficial power source for Maryland and the electric grid in general.

DEIS at 8-5 to 8-6.[32] No equivalent MPSC findings appear in the ER.

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[31] Proposed Order of MPSC Hearing Examiner at 1, 5; DEIS at 8-10.

[32] Section 8.4.1 of the DEIS also summarizes the hearing testimony of Mr. Craig Taborsky, an engineer in the MPSC's Engineering Division:

> [P]roposed Unit 3 would have a positive effect on the reliability and stability of the electric system in Maryland if it complies with all PJM requirements as the additional power supplied by the plant would be a beneficial source for Maryland and the grid in general. Mr. Taborsky noted that the plant would provide power with an alternate source, nuclear power, which would lessen Maryland's dependence on fossil fuels such as coal, oil, and natural gas. He also stated that the plant would be beneficial in reducing the State's dependence on imported electricity, as Maryland imported approximately 30 percent of its electric power in 2006. Mr. Taborsky further noted that Maryland may face a shortage of electricity in coming years, perhaps by the year 2011 or 2012, and wholesale prices continue to increase due to congestion, especially in central Maryland. Therefore, he testified that the new nuclear unit at Calvert Cliffs would be a welcome source of baseload power designed to run continuously, which is expected to reduce peak period congestion on transmission lines within Maryland and reduce the need for imported power (MPSC 2009b).

DEIS at 8-5.

The DEIS also says that the MPSC rejected arguments of opponents of Unit 3 that the CPCN should not be granted and that alternative forms of generation and additional conservation measures should be used in its place to meet Maryland's need for power. *Id.* at 8-6.

Thus, although the DEIS reaches the same ultimate conclusion as the ER concerning the need for Unit 3, data and conclusions cited in the DEIS to support that ultimate conclusion differ from the information cited in the ER.

The remaining question is whether the differences are significant. The regulations do not define the phrase "differ significantly." In the absence of a statutory definition, courts normally define a term by its ordinary meaning.[33] The ordinary meaning of "significant" is "having meaning," "full of import," "indicative," "having or likely to have influence or effect," "deserving to be considered."[34]

Applying this definition, much of the new data cited in the DEIS differs significantly from that cited in the ER. The NRC Staff updated the DEIS to include new and more recent data, demand projections that cover a later time period, additional and more recent sources, and the MPSC's determinations in the CPCN proceeding concerning the benefits of and need for Calvert Cliffs Unit 3. Not only does the DEIS contain new quantitative data, the projections of peak load growth now extend to 2018 and 2020. By contrast, the ER's projections of growth in demand, to the extent they identify a time period, extend only to 2015. Notably, the ER states that the projected startup date for the commercial operation of Calvert Cliffs Unit 3 is December 2015. *See* ER at 1-7. Thus, had the DEIS cited only the time-specific demand projections in the ER, its demand analysis would not have covered the period of the proposed operation of Calvert Cliffs Unit 3 and might therefore have been vulnerable to attack as outdated and unreliable.

In addition, unlike the ER, the DEIS cites the MPSC's determinations in the CPCN proceeding that there is a need for Calvert Cliffs Unit 3 and that it complies with the State's statutory and regulatory criteria for new power generating facilities. Those determinations were not available when the ER was prepared. The NRC Staff states that it gave "particular credence to the . . . MPSC's decision to grant Unistar a CPCN for Unit 3," as well as to the 2007 Supply Adequacy Report and the reliability assessment prepared by the RFC in 2009. DEIS at 8-9. Given the significance that the NRC Staff attached to the State's determinations in the CPCN proceeding concerning the need for Calvert Cliffs Unit 3, the fact that those determinations were discussed for the first time in the DEIS is a significant difference between the information provided in that NEPA document and that provided in the ER.

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[33] *See Smith v. United States,* 508 U.S. 223, 228 (1993).

[34] *Webster's Third New International Dictionary* 2116 (4th ed. 1976).

Also, Intervenors argue that, because the sources relied on in the DEIS are more recent than those cited in the ER, they should have taken into account the effects of the recession and other recent developments on the demand for power. Contention 10 at 2-3. Contention 10A is based in part on these alleged deficiencies.

In arguing that Contention 10A is nontimely, the Applicants state that "[a]lthough the DEIS relies on some information that post-dates the ER, that information supports the conclusions in the ER." Applicants' Response at 5. Even assuming this is true, it does not make Contention 10 nontimely under section 2.309(f)(2). Contention 10 challenges the reliability of new information the NRC Staff cited in the DEIS — including new projections of the demand for electricity and the conclusions from the State CPCN proceeding — to support the NRC Staff's determination that Calvert Cliffs Unit 3 is necessary to meet a need for additional power. As explained in the general discussion above, section 2.309(f)(2) permits the filing of a new or amended contention when an NRC Staff NEPA document relies upon new data, new conclusions, or both to support its ultimate determination on a particular issue. The plain language of this provision covers this situation where, although the ultimate conclusion remains the same, the DEIS and ER rely upon significantly different information to support that determination. Thus, the fact that the new information the NRC Staff cited in the DEIS is also consistent with the ER's conclusion concerning the need for power does not make Contention 10 nontimely. There need only be a significant change in the data or conclusions underlying the NRC Staff's ultimate conclusion, not a change in the ultimate conclusion itself.

The Applicants maintain that Contention 10A "is not based on any new data or new conclusions in the DEIS. The challenge could have been made to the ER at the time of the intervention petition." *Id.* In other words, Applicants would have it that Intervenors' attack upon the need for power analysis in the DEIS is based on previously available information that could have also been used to challenge the need for power analysis in the ER.

If Intervenors could have filed Contention 10A with their intervention petition, section 2.309(f)(2) required that they do so. We agree with Intevenors, however, that Contention 10A could not realistically have been filed at that time. This is because Contention 10A is based primarily upon information and events that postdate the intervention petition. Some of the information Intervenors rely upon to challenge the need for power analysis in the DEIS became available after the hearing petition was filed but before the DEIS was publicly available, while other data they cite are from June of 2010, approximately 2 months after the DEIS was available. *See* Contention 10 at 2-4. To explain why they did not file Contention 10 as a challenge to the ER, Intervenors point out that when they filed their hearing petition the impact of the recession and Maryland's legislative changes upon electricity demand was not yet clear:

> Contrary to Applicants' argument, it would have made no sense for Joint Intervenors to have challenged the demand conclusions in the ER, since at the time there was little reason to believe electricity demand would plummet so radically and thus place a major question mark over future demand projections. Moreover, the EmPower Maryland Act, passed in April 2008, which is intended to reduce electrical demand in the state, had not yet taken effect when the ER was prepared, nor had it had time to have any impact before Joint Intervenors filed our contentions; thus it would not have been feasible for Joint Intervenors to have filed a contention based on its impact at that time. The Maryland CPCN process referred to by Applicants in their response brief also took place during 2008 (NIRS was a participant in this process), and did not address the issue of falling electricity demand as at the time this issue was only beginning to be realized.

Intervenors' Reply at 5. This is a reasonable explanation of why Intervenors did not file Contention 10 as a challenge to the ER.

This leaves only the argument that Contention 10A should have been filed as a new contention challenging the ER promptly after the Intervenors became aware of the information upon which Contention 10A is based. At least some of that information, however, was not available until after the DEIS was issued, by which time a contention challenging the ER would have been moot. *See, e.g.,* Contention 10 at 2-4. Furthermore, this argument confuses the requirements for filing a new contention based on new and significantly different data or conclusions in the NRC Staff's NEPA documents with the alternative requirements for filing a new contention based on new information under section 2.309(f)(2)(i)-(iii). The Commission's preamble statement accompanying the 2004 final rule that included the present version of section 2.309(f)(2) confirms that, under the two alternative tests, the time for filing a new or amended contention is triggered by different events:

> Paragraph (f)(2) addresses the standards for amending existing contentions, or submitting new contentions based upon documents or other information not available at the time that the original request for hearing/petition to intervene was required to be filed. Paragraph (f)(2) incorporates the substance of existing § 2.714 (b)(2)(iii) with regard to new or amended environmental contentions — new or amended environmental contentions may be admitted if the petitioner shows that the new or amended contention is based on *data or conclusions in the NRC's environmental documents* that differ significantly from the data or conclusions in the applicant's documents. Of course, new or amended environmental [contentions] must be submitted promptly *after the NRC's environmental documents are issued. For all other new or amended contentions* the rule makes clear that the criteria in § 2.309(f)(2)(i) through (iii) must be satisfied for admission. Include [sic] in these standards is the requirement that it be shown that the new or amended contention has been submitted in a timely fashion based on the timing of availability of the subsequent information. See § 2.309(f)(2)(iii). This requires that the new or amended

> contention be filed promptly after the new information purportedly forming the basis for the new or amended contention become available.[35]

Thus, when a new contention is filed challenging "new data or conclusions" in the NRC's environmental documents, the timeliness of the new contention is determined based on whether it was filed promptly after the NRC's NEPA document became publicly available, not whether it was filed promptly after the information on which the intervenor bases its challenge became publicly available. The intervenor must show that (1) the new data or conclusions in the NRC Staff NEPA document differ significantly from those in the ER, and (2) the new contention was submitted promptly after the NRC Staff NEPA document was issued to the public. If these requirements are met, the new contention is timely even if it is based on information that predates the NRC Staff NEPA document.

This contrasts with the alternative basis for filing a new contention in section 2.309(f)(2)(i)-(iii), which requires that a new or amended contention based on material new information be filed "in a timely fashion based on the availability of the subsequent information." Under this alternative, timeliness is determined based on the timing of the availability of the information on which the contention is based, not the timing of the NRC Staff NEPA document. Here, Intervenors base their argument for the timeliness of Contention 10A on the first test. The two tests are distinct, and therefore if the requirements of the first test are met we may not impose additional requirements derived from the second test. That is what we would be doing if we accepted the Applicants' argument that Contention 10 should have been filed as a challenge to the ER.

We therefore conclude that the new information in the DEIS justifies filing the first argument in support of Contention 10A after the DEIS was issued.

We reach a different conclusion, however, with respect to the second and third arguments in support of Contention 10A. The second argument is that the DEIS underestimates the potential for demand-side management to contribute to reducing the demand for power. Intervenors argue that the DEIS focused solely on the demand-side management program of Baltimore Gas & Electric ("BG&E") and neglected to examine the programs of other Maryland utilities. Contention 10 at 5-6. Intervenors do not address, however, whether this alleged error was also in the ER, or whether it is a new issue in the DEIS. *See id.* In fact, the ER discussed demand-side management and that discussion was also based on BG&E's program. ER at 8-14 to 8-15. This aspect of Contention 10 is therefore not based on a new conclusion or new data in the DEIS. Rather, this aspect of Contention 10 argues a point that could have been raised in a contention

[35] 69 Fed. Reg. 2182, 2221 (2004) (emphasis added).

challenging the ER's analysis of the same issue. This argument is therefore nontimely.

The third argument in support of Contention 10A challenges the DEIS's focus on Maryland's power generation deficit, arguing that the DEIS should have examined the larger geographic area from which Maryland obtains electric power and that Calvert Cliffs Unit 3 will not be obligated to sell the electricity it generates within Maryland. *See* Contention 10 at 4-5. As with the second argument, however, Intervenors have not identified any significant difference between the treatment of this issue in the ER and in the DEIS. *See id.* The ER also emphasized Maryland's power generation deficit. ER at 8-17. Intervenors should have challenged the ER based on this alleged error, rather than waiting for the DEIS to be issued.

The first argument in support of Contention 10A is based on data or conclusions in the DEIS that differ significantly from those in the ER. Intervenors have not demonstrated any such significant difference for the second and third arguments in support of Contention 10A, however, and we accordingly find that those arguments are not timely. The remaining discussion of Contention 10A is therefore limited to the first argument in support of Contention 10A. The second and third arguments will not be considered further in this Order, unless specifically so stated.

c. Timing of Contention 10 in Relation to the Public Availability of the DEIS

The next question is whether Intervenors filed Contention 10A sufficiently promptly after the DEIS was available to the public. Because this issue also pertains to Contentions 10B, C, and D, we will analyze the issue as whether Contention 10 was filed sufficiently promptly after the public availability of the DEIS. We conclude that it was.

Intervenors filed the new contention on June 25, 2010, which was 60 days after the date (April 26) on which they understood the DEIS was first available for public review. *See* Contention 10 at 16-18. They state that they had an agreement with the Applicants that a 60-day period would be allowed for filing new contentions based on the DEIS. *Id.* at 16. Applicants do not dispute the existence of such an agreement or otherwise argue that Contention 10 should have been filed more promptly following public availability of the DEIS. Unlike Applicants, the NRC Staff insists that the Intervenors should have filed Contention 10 within 30 days of the public availability of the DEIS. NRC Staff Answer at 6-7. The NRC Staff also asserts that Contention 10 was late even under a 60-day deadline. *Id.* at 6.

All the parties agree that Intervenors were required to file Contention 10

reasonably promptly after the DEIS was issued.[36] We will have to decide, however, what this means because our Scheduling Order only included a specific deadline (30 days) for filing new or amended contentions based on the Final Environmental Impact Statement ("FEIS") or the Safety Evaluation Report ("SER"), not the DEIS.[37] It would not have been obvious to the parties that the deadline for new contentions based on the FEIS should apply to new contentions based on the DEIS. The latter document was the first NRC Staff NEPA document the Intervenors had the opportunity to review. By contrast, although it updates the DEIS to the extent necessary to respond to significant public comments, the FEIS typically is not an entirely new NRC Staff document but rather duplicates the DEIS in large part. Thus, review of the DEIS might require a significantly greater time and resource commitment than review of the FEIS. We therefore cannot find Contention 10 nontimely based solely on the Scheduling Order. We also cannot fault Intervenors for not seeking an extension of time to file Contention 10A, given that there was no applicable deadline to extend.

In the absence of a deadline in the Scheduling Order, the determination of timeliness is subject to a reasonableness standard.[38] Given the agreement between the Applicants and the Intervenors and the lack of a Board order requiring an earlier deadline, in the present circumstances 60 days was reasonable. Although the NRC Staff argues for a 30-day deadline, it fails to show that the 60-day period agreed to by the Applicant and the Intervenors was unreasonable. *See id.* at 7. Moreover, the NRC Staff was willing to allow a longer period — 75 days — for public comment on the DEIS.[39] We find that the 60-day period agreed to by the Intervenors and Applicant was reasonable.

The NRC Staff also argues that, even if we apply a 60-day deadline, Contention 10 was not filed within 60 days of public availability of the DEIS. *Id.* at 67.

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[36] *See* Contention 10 at 16-17; Intervenors' Reply at 2-4; NRC Staff Answer at 6-7.

[37] *See* Licensing Board Order (Establishing Schedule to Govern Further Proceedings) (Apr. 22, 2009) at 4-7 (unpublished) [hereinafter Scheduling Order].

[38] *Cf. Vermont Yankee,* LBP-07-15, 66 NRC at 266 n.11.

[39] 75 Fed. Reg. 20,867, 20,868 (April 21, 2010). The comment period began to run on the date that the U.S. Environmental Protection Agency published a Notice of Filing in the *Federal Register,* which the NRC Staff expected would be April 23, 2010. *Id.* The NRC Staff could have required that such comments be filed within 45 days, since that is the minimum comment period required under the agency's NEPA regulations. *See* 10 C.F.R. § 51.73 (the minimum time required for a DEIS comment period is 45 days). Evidently the NRC Staff concluded that the DEIS was of sufficient length and complexity that substantial additional time beyond the minimum 45 days would be necessary for the public to review the DEIS and prepare comments. In light of this action by the NRC Staff, it seems reasonable that Intervenors should have at least 60 days to prepare new contentions based on the DEIS. Writing a new contention is a more difficult task than submitting comments. We fail to see any sound justification for the NRC Staff's insistence on a far tighter deadline for new contentions than for public comments. The 30-day deadline that the NRC Staff argues for would actually be 15 days shorter than the *minimum* period required by the agency's regulations for public comment on a DEIS.

Intervenors state they understood that the DEIS was first available for public review on April 26, 2010, and that they filed Contention 10 within 60 days of that date, on June 25. Contention 10 at 1, 18. The NRC Staff responds that it alerted the Board and the parties to the availability of the DEIS on April 20, 2010, by service through the Electronic Information Exchange.[40] The Intervenors reply that they received multiple messages from the NRC Staff concerning the public availability of the DEIS. The last two NRC Staff messages they received were two e-mails dated April 20 and, as interpreted by the Intervenors, indicated that the DEIS would be available to the public on April 26. Intervenors relied upon that date in filing Contention 10 on June 25. *Id.* at 16-17.

We have reviewed the NRC Staff's April 20 e-mail messages, and it is understandable that Intervenors interpreted them to mean that the DEIS would not be publicly available until April 26. One of the messages includes a table identifying various correspondences. Immediately below the table appears the following:

> SUBJECT: NOTIFICATION OF THE ISSUANCE OF AND REQUEST FOR COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE CALVERT CLIFFS NUCLEAR POWER PLANT, UNIT 3 COMBINED LICENSE APPLICATION REVIEW
>
> Note: These documents will not be publicly available until April 26, 2010.[41]

The NRC Staff maintains that the phrase "[t]hese documents" actually refers to the correspondence identified in the table, not the DEIS. NRC Staff Answer at 6-7. Intervenors, however, reasonably interpreted "[t]hese documents" to include the DEIS. Contention 10 at 16-17. Therefore, assuming the NRC Staff is correct that the DEIS was actually publicly available on April 20, Intervenors had good cause for filing Contention 10 sixty-six days later, on June 25, 2010. The NRC Staff should not be able to use confusion it created to exclude an otherwise timely and admissible contention.

d. Analysis of Contention 10 Under 10 C.F.R. § 2.309(c)

Assuming arguendo that we were to agree with the NRC Staff that Contention 10 was nontimely based on the public availability of the DEIS, then we would face the question whether the late filing should be permitted under the balancing

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[40] Letter from James P. Biggins, Counsel for the NRC Staff, U.S. NRC, to the Board (Apr. 20, 2010) (ADAMS Accession No. ML101100546).

[41] E-mail message from Kimberly Dent to Kimberly Dent (Apr. 20, 2010, 17:30 EDT) (ADAMS Accession No. ML1018205360) (capitalization in original).

test of section 2.309(c). We will also analyze this issue with respect to Contention 10 generally.

Intervenors do not directly address the section 2.309(c) factors. We therefore might refuse to consider the issue. However, the Intervenors' failure to expressly address the late-filing criteria does not necessarily preclude the Board from doing so. Licensing boards and the Commission have considered the late-filing criteria even in cases where the factors were not fully addressed by the petitioners and/or the NRC Staff or were not addressed at all.[42] And, although Intervenors do not directly discuss the section 2.309(c) factors, they do argue, in both their initial filing and their reply, that any delay in filing Contention 10 should be excused by the Board.[43] We have enough information, based on the timeliness arguments that the parties did present and our knowledge of the case, to address the section 2.309(c) factors. In addition, we have already addressed the substance of three of the factors in our ruling on Intervenors' standing (see below).

The Commission has ruled that good cause is the most important of the eight factors under section 2.309(c).[44] Intervenors have good cause for filing Contention 10 in response to the DEIS because the NRC Staff NEPA document contains data or conclusions that differ significantly from those in the ER. By defining significantly different information in the DEIS as a permissible basis for filing a new contention, the Commission has in effect concluded that such new information is good cause for filing a new contention.[45] And, even if we conclude that Intervenors did not file Contention 10 sufficiently promptly after the DEIS was issued, they have good cause for any such delay based on (1) their agreement with the Applicant that new contentions could be filed within 60 days of the public availability of the DEIS; and (2) the NRC Staff's April 20 e-mails, which could reasonably be interpreted as stating that the DEIS would not be publicly available until April 26.

Most of the other section 2.309(c) criteria also favor Intervenors. Factors (ii), (iii), and (iv) weigh in favor of Intervenors, given that we have already ruled that Intervenors have standing to represent their members who live within 50 miles of the proposed new reactor.[46] Concerning the Intervenors' right to be made a party and the nature of their interest, we stated:

> All the Joint Petitioners have members that live within 50 miles of the proposed new reactor — in some instances much closer. The affiants are concerned about the

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[42] *See North Trend,* CLI-09-12, 69 NRC at 549 n.61; *Nuclear Management Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

[43] *See* Contention 10 at 14-17; Intervenors' Reply at 2-4.

[44] *North Trend,* CLI-09-12, 69 NRC at 549 n.61.

[45] *See Private Fuel Storage,* LBP-00-27, 52 NRC at 223.

[46] LBP-09-4, 69 NRC at 177-81.

> proposed new reactor's effects upon their health and safety and the environment in which they live. An alleged injury to health and safety, shared equally by many, can form the basis for standing. Even minor radiological exposures resulting from a proposed license activity can be enough to create the requisite injury-in-fact.[47]

Of course, a favorable ruling on Contention 10 will not necessarily prevent the construction or operation of Calvert Cliffs Unit 3, but such a ruling would ensure that the NRC will first accurately estimate the benefits, costs, and environmental consequences of the proposed action and its alternatives, which Intervenors contend is required under NEPA. We noted that "[f]avorable rulings on the NEPA contentions will ensure that procedures are observed that require adequate analysis of Joint Petitioners' environmental concerns. In short, Joint Petitioners' contentions, if proved, will afford relief from the injuries they have relied upon for standing."[48] Our rulings on standing (as well as contention admissibility) were affirmed by the Commission on appeal.[49] Thus, the Intervenors' rights to be made parties, the nature of their interest in the proceeding, and the effect of any order that may be entered on Intervenors' interests have already been established.

Factors (v) and (vi) also weigh in favor of Petitioners. There is no other apparent means by which Intervenors can protect their interest in having the NRC conduct the NEPA analysis they maintain is required. Nor is there any other party that could be expected to protect that interest if we reject Contention 10. The NRC Staff, although it is responsible for the agency's compliance with NEPA, has made clear its opposition to the Intervenors' NEPA contentions. And we can hardly expect the Applicants to challenge the NRC Staff's NEPA analysis when it supports the Applicants' interest in obtaining a license.

Factor (vii) seems to cut both ways. Contention 10 will broaden the issues in the proceeding because, at present, we have no other admitted NEPA contention. On the other hand, it is not clear that admitting Contention 10 will delay the proceeding. It could be resolved by summary disposition or by the NRC Staff addressing the issues raised by Contention 10 in the FEIS, which could render the contention moot.

Factor (viii) requires that we consider whether the Intervenors' participation can reasonably be expected to assist in developing a sound record. Intervenors have called our attention to data and reports concerning the NEPA issues they intend to litigate. They have not, however, made any proffer concerning the testimony or other evidence they might introduce at an evidentiary hearing, if one occurred. We can say, however, that there will be no record of any sort concerning the NEPA issues raised in Contention 10 if it is not admitted.

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[47] *Id.* at 180-81 (citations omitted).

[48] *Id.* at 187.

[49] CLI-09-20, 70 NRC 911, 913 (2009).

On balance, the fact that the "good cause" issue favors Intervenors, combined with the other factors that weigh in their favor, is sufficient to allow us to consider 10 (and therefore Contentions 10A-D) even if it were deemed not to be filed sufficiently promptly after the DEIS was issued.

2. Admissibility of Contention 10A

a. General Considerations

In addition to meeting timeliness requirements, Contention 10A must satisfy the requirements of 10 C.F.R. § 2.309(f)(1). *See* 10 C.F.R. § 2.309(a), (f)(1). An admissible contention must: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (vi) provide sufficient information to show that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or, in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. 10 C.F.R. § 2.309(f)(1).

b. Analysis

Contention 10A asserts that the need for power analysis is outdated and inaccurate and therefore violates NEPA. This aspect of Contention 10A includes a specific statement of the issue of law or fact Intervenors intend to litigate and an explanation of the basis of the contention. *See* 10 C.F.R. § 2.309(f)(1)(i)-(ii). It falls within the scope of the proceeding because it challenges the adequacy of the NEPA analysis that the NRC must complete in order to issue the combined operating license that is the subject of this proceeding. *See* 10 C.F.R. § 2.309(f)(1)(iii).

The next question is whether the issue raised by Contention 10A is material to the licensing decision. *See* 10 C.F.R. § 2.309(f)(1)(iv). Contention 10A alleges that the DEIS's analysis of the need for power is outdated and inadequate and therefore violates NEPA. "It is . . . settled that the NRC has the burden of complying with NEPA. Thus, the adequacy of the NRC's environmental review as reflected in the adequacy of a [DEIS or FEIS] is an appropriate issue for

litigation in a licensing proceeding."[50] The analysis of the need for Unit 3 is a part of the NEPA analysis that the agency must conduct. Under NEPA, the NRC must balance the benefits of the project against its environmental costs.[51] "The assessment of need for power has historically been equated 'with the benefits of the proposed action' for the cost-benefit balance consideration."[52] If the need for power is less than the DEIS projects, then the benefits of the project might also be less, which might in turn alter the balance between the project's benefits and its environmental costs. Thus, the accuracy and reliability of the agency's need for power determination, as reflected in the DEIS, is material to the licensing decision. *Id.*

The Applicants argue, however, that "Intervenors fail to establish a genuine or material dispute with the conclusions in the DEIS" concerning the need for power. Applicants' Response at 8-9. The Applicants maintain that when, as here, they relied in the ER on a State regulator's determination of the need for additional power (the Maryland CPCN process), the NRC Staff's role is limited to evaluating the State's analysis to determine whether it satisfies the criteria in section 8.1 of the Environmental Standard Review Plan ("ESRP").[53] ESRP § 8.1-2 provides:

> Affected States and/or regions are expected to prepare a need-for-power evaluation. NRC will review the evaluation and determine if it is (1) systematic, (2) comprehensive, (3) subject to confirmation, and (4) responsive to forecasting uncertainty. If the need for power evaluation is found acceptable, no additional independent review by NRC is needed, and the analysis can be the basis for ESRPs 8.2 through 8.4.

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[50] *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983).

[51] *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-366, 5 NRC 39, 61-62 (1977). As the Appeal Board explained, a licensing board may disapprove a site for a new reactor "only upon one of two findings: (1) that, on a cost/benefit balance, some alternate site was preferable; or (2) that the environmental impacts of construction and operation at Seabrook with towers outweighed the benefits that would be derived from the facility (*i.e.,* the electric power that would be generated by it)." *Id.* The Appeal Board further stated that "'[t]he purpose of the cost-benefit analysis called for by NEPA is to identify each significant environmental cost and to determine whether, all other factors considered, on balance the incurring of that cost is warranted. This determination necessarily involves the scrutiny of many factors; among them, offsetting benefits, available alternatives, and the possible means (and attendant costs) of reducing the environmental harm.'" *Id.* at 62 (quoting *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1007 (1973), *remanded on other grounds,* CLI-74-2, 7 AEC 2 (1974), *further statement of Appeal Board views,* ALAB-175, 7 AEC 62 (1974), *aff'd sub nom. Citizens for Safe Power v. NRC,* 524 F.2d 1291 (D.C. Cir. 1975)).

[52] NRC Staff Answer at 8 (quoting 68 Fed. Reg. 55,905, 55,909 (Sept. 29, 2003)).

[53] Applicants' Response at 8 (citing Office of Nuclear Reactor Regulation, Environmental Standard Review Plan, NUREG-1555, at 8.1-2 (Oct. 1999) (ADAMS Accession No. ML093340205) [hereinafter ESRP]).

The NRC Staff found that Maryland's need for power evaluation satisfied the four criteria. DEIS at 8-8. The Intervenors did not challenge Applicants' reliance on the CPCN process in the ER, nor did they challenge the NRC Staff's application of four criteria of ESRP § 8.1. The Applicants therefore argue that, in view of the NRC Staff's allegedly limited role in evaluation of the need for power, Contention 10A fails to demonstrate a genuine dispute with the DEIS on a material issue of law or fact. Applicants' Response at 8-9.

We are not persuaded by this argument. The question here is not whether Maryland's evaluation of its need for power was acceptable at the time the evaluation was performed. Rather, the question is whether the States' evaluation can continue to serve as a basis of the NRC's evaluation of the need for power, given the information provided by Intervenors suggesting that economic conditions affecting the demand for power have changed significantly since the CPCN was issued. ESRP § 8.1 does not directly address that question. Moreover, the ESRP is simply NRC Staff guidance, not a regulation.

In 2003 — approximately 4 years after the ESRP was issued — the Commission addressed squarely the question of whether NEPA requires the NRC to perform its own reasonable assessment of the need for power. The Nuclear Energy Institute ("NEI"), a trade association representing the nuclear power industry, had requested that the NRC amend its regulations to remove the requirements in 10 C.F.R. Parts 2, 50, and 51 that applicants analyze, and the NRC review, alternative sites, alternative energy sources, and the need for power in proceedings involving siting, construction, and operation of nuclear power plants. NEI claimed that the regulations requiring a "need for power" analysis were imposed solely based on the structure of the 1970's electric power industry and are not specifically required by NEPA. In addition, NEI argued that the NRC licensing process did not change the balance of power between the federal government and the states with regard to the construction and operation of electric power facilities, and that the NRC's assessment of environmental impacts "neither supplants nor interferes with the traditional responsibilities of States in evaluating the need for power."

In denying NEI's petition, the Commission ruled that NEI had not shown that law and/or practices had changed so much as to justify the NRC no longer taking into account the "need for power" in order to fulfill its NEPA obligations. The Commission stated:

> Consistent with the petitioner's claim, in considering the need for power as part of the NEPA process, the NRC does not supplant the States, which have traditionally been responsible for assessing the need for power generating facilities, their economic feasibility and for regulating rates and services. As the petitioner noted, the NRC has acknowledged the primacy of State regulatory decisions regarding future energy options. However, this acknowledgement *does not relieve the NRC from the need to perform a reasonable assessment of the need for power.* Moreover, in the

> non-regulated environment foreseen by the petitioner, NRC consideration of the need for power may become "more, not less, crucial" (in the words of a commenter) because a State decisionmaker may no longer conduct need for power assessments.[54]

Therefore, even if the NRC Staff finds that a State's evaluation satisfies the criteria of ESRP § 8.1, this does not relieve the NRC of its obligation under NEPA to consider more recent data showing that conditions have changed materially, as Intervenors claim is true here. The NRC Staff's obligation to consider significant new information in preparing NEPA documents follows from the agency's NEPA regulations. *See* 10 C.F.R. § 51.92(a)(2). Thus, if significant new information becomes available, the NRC Staff must explain how it took the new information into account in determining whether the State requires additional generating capacity. Chapter 8 of the DEIS fails to acknowledge the recent downturn in the demand for electrical power alleged by Intervenors, much less explain whether or how it affected the NRC's assessment of the need for power. If Intervenors have identified significant new information, then they have a plausible argument that the NRC Staff's need for power analysis violates NEPA.

The NRC Staff argues, however, that Intervenors have failed to identify significant new information relevant to the DEIS's need for power analysis. The NRC Staff maintains that "[a] short-term reduction in demand is not sufficient to necessitate an accounting in the DEIS for that changed demand. The longstanding position of the Commission is that 'inherent in any forecast of future electric power demands is a substantial margin of uncertainty.'"[55] Thus, fluctuations in demand that may occur over a period of several years, such as changes brought about by an economic recession, are not a legally sufficient ground for challenging the need for power analysis under the Commission's interpretation of NEPA requirements. We agree.

Chapter 8 of the DEIS analyzes the need for additional baseload power in Maryland and concludes that, by December 2015 and continuing thereafter, the State will need at least the additional baseload generating capacity that Calvert Cliffs Unit 3 will provide. DEIS at 8-1. Intervenors provide no quantitative projection of the long-term demand for baseload power in Maryland. Instead, Intervenors question the need for Unit 3 because of the reduced demand for power during the last several years, primarily as the result of the economic recession. According to Intervenors,

> the DEIS fails to reflect the reality that since 2006, electricity demand has actually plummeted in Maryland and throughout the PJM grid, primarily due to the recession,

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[54] 68 Fed. Reg. 55,905, 55,909-10 (emphasis added).

[55] NRC Staff Answer at 13 (quoting *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609 (1979)).

> but also due to demand-side management programs in the region which exist to reduce electrical usage. Electrical demand has not yet reached pre-recession levels, calling into question even the January 2010 PJM demand forecast cited by the DEIS that projects very modest growth (1.4-1.8%/year through 2020) in the PJM region.[56]

In *Shearon Harris,*[57] relying on a prediction of a downward turn in the growth rate for electricity in the state reported by the North Carolina Utilities Commission, the intervenor argued for a remand and reopened hearings on the question of the need for the new facility. The Commission responded:

> The general rule applicable to cases involving differences or changes in demand forecasts was stated in *Niagara Mohawk Power Corporation* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 352-69 (1975). In that case the Appeal Board found the question was "not *whether* Niagara Mohawk will need additional generating capacity but *when.*" *Id.* at 357. The intervenors in that case urged that the power would not be needed until 1981, the applicant urged 1979 as the date. The Board responded (*id.* at 365):
>
> > [W]e do not consider the difference in predicted year of need — 1979 vs. 1981 — a statistically meaningful distinction. If there was one thing agreed upon in the proceeding below, it is that inherent in any forecast of future electric power demands is a substantial margin of uncertainty. As with most methods of predicting the future, load forecasting involves at least as much art as science. The margin of error implicit in such predictions is at least of sufficient magnitude to encompass the two year difference between the applicant's and the intervenors' forecasts.[58]

Applying this general rule, the Commission concluded that "the possible one-year slip in need-for-power forecasts found by the NCUC Report is legally insufficient to order relitigation of this issue."[59]

It is true that in *Shearon Harris* the issue was whether the proceeding should be reopened, while here the issue is the admissibility of a new contention. But the Commission has subsequently followed the same general rule when reviewing the question whether a need for power contention should have been admitted. In *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3),[60] the petition alleged that the applicant's need for power analysis in

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[56] Contention 10 at 2-3 (footnote omitted). PJM manages the high-voltage electric grid and the wholesale electricity market in all or part of 13 states, including Maryland, and the District of Columbia. *See* PJM, Who We Are, http://www.pjm.com/about-pjm/who-we-are.aspx.

[57] *Shearon Harris,* CLI-79-5, 9 NRC 607.

[58] *Id.* at 609.

[59] *Id.*

[60] CLI-10-1, 71 NRC 1, 3 (2010).

its environmental report "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."[61] The Commission affirmed the Board's decision not to admit the contention for several reasons, including that

> the Board reasonably concluded that Joint Petitioners' load forecast claims would call for a more detailed "need for power" analysis than the NRC requires. 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.[62]

Thus, Contention 10A may be admitted only if it actually challenges the asserted need for the additional baseload power that Calvert Cliffs Unit 3 will provide, rather than merely demanding an updated forecast based on recent fluctuations in demand. Intervenors do allege that "there appears to be no need at all for a new reactor in the PJM service area." Contention 10 at 4. If nothing more than an allegation were sufficient, Intervenors might have satisfied the Commission's requirement. But our contention admissibility rule requires more. Intervenors must also satisfy the requirement of section 2.309(f)(1)(v) to provide a concise statement of the alleged facts, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing. Although a licensing board does not decide the merits or resolve conflicting evidence at the contention admissibility stage, materials cited as the basis for a contention are subject to scrutiny by the board to determine whether they actually support the facts alleged.[63] We may examine both the statements in the document that support the petitioner's assertions and those that do not.[64] The sources and documents cited by Intervenors must support the claim that the baseload power to be generated by Calvert Cliffs Unit 3 is not needed, rather than merely disputing the date on which that need will arise.

After reviewing the sources and documents cited by Intervenors, we conclude that they fail to support the allegation that Unit 3 is not needed. The relevant

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[61] *Id.* at 15.

[62] *Id.* at 18 (quoting 68 Fed. Reg. 55,905, 55,910 (Sept. 29, 2003)).

[63] *See Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 265 (2004).

[64] *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 n.30, *rev'd in part on other grounds,* CLI-96-7, 43 NRC 235 (1996).

time period begins in December 2015, when, according to the current application, Calvert Cliffs Unit 3 is expected to begin operation. Intervenors' sources and documents do not undermine the DEIS's conclusion that Maryland will need the additional baseload power from Calvert Cliffs Unit 3 during that period. At most, they concern when, not whether, the additional power to be generated by Calvert Cliffs Unit 3 will be needed.

For example, Intervenors cite the January 2010 PJM Load Forecast Report[65] to support their argument that "[e]lectrical demand has not yet reached pre-recession levels, calling into question even the January 2010 PJM demand forecast cited by the DEIS that projects very modest growth (1.4-1.8%/year through 2020) in the PJM region." *Id.* at 3 (footnote omitted). The January 2010 PJM Load Forecast Report, however, does not provide projections of baseload power demand. Instead, it contains forecasts of summer peak demand and winter peak demand for various geographic zones within the PJM RTO.[66] Intervenors fail to explain how these data are relevant to determining Maryland's baseload power needs in December 2015 and thereafter. Furthermore, the January 2010 PJM Load Forecast Report does not predict future reductions in summer or winter peak load demand. On the contrary, the forecasts of summer peak load demand,[67] while they do show a leveling-off or downturn in demand through 2010 in various geographic zones, also project resumed increases in peak load demand after 2010. In the BG&E geographic zone,[68] for instance, the "weather normalized peak" summer demand was essentially flat between 2005 and 2010. January 2010 PJM Load Forecast Report at 6. But, according to the 2010 forecast, summer peak load demand in that geographic zone will increase without interruption between 2010 and 2025. *Id.* Winter peak load demand is also projected to increase during those years. *Id.* The forecasts predict a similar pattern for the other geographic zones within the PJM RTO. The most that we could infer based on the January 2010 PJM Load Forecast Report is that the economic recession contributed to a temporary leveling-off or downturn in winter and summer peak demand through 2010, with demand levels projected to resume their upward trend after 2010. This fails to

[65] PJM Resource Adequacy Planning Department, *PJM Load Forecast Report January 2010* (2010), http://www.pjm.com/documents/~/media/reports/2010-load-forecast-report.ashx [hereinafter January 2010 PJM Load Forecast Report].

[66] *See id.* at 3-4. "RTO" stands for regional transmission organization. An RTO consists of each entity that either has a possessory interest in facilities that are used for the transmission of electrical energy in interstate commerce, or provides transmission that is a party to the PJM Transmission Owners Agreement and PJM Operating Agreement. PJM, PJM Glossary, http://www.pjm.com/Home/Glossary.aspx.

[67] The forecasts are presented as graphs in the January 2010 PJM Load Forecast Report. *See, e.g.,* January 2010 PJM Load Forecast Report at 3-4.

[68] This zone is within the State of Maryland.

provide any support for Intervenors' argument that Maryland does not need the baseload power to be provided by Calvert Cliffs Unit 3.

Intervenors also cite data on the PJM website concerning the demand for power at particular times on specific days during the summer of 2010. Contention 10 at 4 nn.6, 8. They argue, on the basis of these data, that "PJM's January 2010 forecast document may significantly overstate electrical demand and that the decline in electrical demand from 2006 through 2009 is continuing." *Id.* at 4. As the NRC Staff point out, "Intervenors never explain how peak demand taken at specific dates . . . is relevant to the analysis of the demand for baseload power generation." NRC Staff Answer at 13 (footnote omitted). Moreover, consistent with our responsibility to examine both the information in Intervenors' sources that supports their assertions and that which does not, we have considered all the relevant information on the PJM website. The website includes a news release dated November 9, 2010, entitled "Economy Boosts Electricity Demand," which contradicts Intervenors' assertion of a continuing decline in peak load demand:

> A recovering economy increased the peak demand for electricity this summer in the 13-state PJM Interconnection region. When adjusted for unusually warm weather, consumers' highest demand for electricity increased about 1 percent compared to summer 2009.
>
> "It may seem like a small increase, but it's consistent with expected effects of economic recovery," said Michael J. Kormos, PJM senior vice president – Operations. "It's also a significant change from the reduction in peak demand experienced in 2009 and is the largest increase in weather-adjusted peak demand since 2006 when we recorded our all-time peak."
>
> Peak demand is the greatest amount of electricity used in one hour. The power grid has to be built to handle that amount of power use. Enough resources — generation and demand response — have to be available to supply the peak demand. Power demand tends to peak in the summer in the PJM region because of the use of air conditioning.[69]

Thus, the website, instead of supporting Intervenors' theory of an ongoing decline in peak load demand, contradicts that claim.

We conclude, therefore, that Intervenors have failed to cite sources or documents to support their claim that the additional baseload power to be provided by Calvert Cliffs Unit 3 will not be needed. 10 C.F.R. § 2.309(f)(1)(v). By demanding that the NRC Staff nevertheless recalculate the need for power analysis to take account of the recent short-term reduction in demand brought about by the recession, Intervenors, like the petitioners in *Summer,* demand a more precise

[69] *Economy Boosts Electricity Demand,* PJM, Nov. 9, 2010, http://www.pjm.com/~/media/about-pjm/newsroom/2010-releases/20101109-economy-boosts-demand.ashx.

forecast of the need for power than the Commission has determined is required by NEPA.

We therefore will not admit Contention 10A.

B. Contention 10B: "The DEIS Discussion of Energy Alternatives Is Inadequate, Faulty and Misleading"

Intervenors allege that the analysis of wind power in section 9.2.3.2 of the DEIS is "egregiously inaccurate and illogical." Contention 10 at 6. Intervenors make several specific criticisms in support of this claim.

First, they contend that the DEIS improperly relied on a 2008 MPSC Report to conclude that "onshore wind 'yields net economic benefits, albeit on a small scale,'" but that "offshore wind, as modeled in the report, 'does not yield economic benefits.'"[70] Intervenors allege the report was "based on outdated or faulty information," because its conclusion that offshore wind power would not yield economic benefits "would probably come as news to Bluewater Wind (owned by the utility NRG), which has proposed a 600 MW wind power project offshore of Maryland, as well as a similarly-sized offshore wind project offshore of Delaware and a 350 MW offshore wind project in New Jersey." *Id.* at 7 (citation omitted). Intervenors maintain that the NRC Staff ignored these projects and generally failed to research adequately the offshore wind potential of Maryland, and of other areas of the mid-Atlantic Coast that also feed into the PJM Grid. *Id.* at 7-8.

Intervenors further argue that the NRC Staff "exacerbates its failure to consider relevant and up-to-date information by citing a 2007 study by Southern Company and the Georgia Institute of Technology of wind potential off the coast of Georgia as evidence that Maryland's offshore wind potential is trivial." *Id.* at 7. Relying upon a U.S. Department of Energy ("DOE") assessment of offshore wind potential, Intervenors respond that the offshore wind potential of Maryland is rated as outstanding to superb, as is the entire coastal region of the PJM service area, while Georgia's rating is only fair to good. *Id.* at 7-8. Intervenors therefore criticize the NRC Staff's reliance on conclusions regarding the economic viability of offshore wind power in Georgia to assess the viability of offshore wind power in Maryland and other mid-Atlantic states. *Id.*

Intervenors also challenge the DEIS's analysis of solar power. *Id.* at 8. The DEIS acknowledges, based on a DOE report, that, for flat-plate photovoltaic collectors (PV solar), "'Maryland has a good, useful solar resource throughout most of the state.'"[71] Although the NRC Staff expresses concern with the acreage

[70] Contention 10 at 6 (quoting DEIS at 9-20).

[71] *Id.* at 8 (quoting DEIS at 9-22).

required for solar collectors, Intervenors state that PV solar collectors would be "primarily above-ground (on rooftops, parking lots, etc.) and would take up essentially zero acreage." *Id.* Intervenors fault the DEIS for failing to quantify the possible contribution PV solar could make to supplying Maryland's need for additional power generation. *Id.* at 8-9.

We conclude that Contention 10B is timely, but that it fails to present a genuine dispute of material fact with the DEIS.

1. Timeliness

The DEIS introduces new data and new conclusions concerning the viability of wind and solar power as alternatives to Unit 3. For the reasons explained below, the new data and conclusions are significantly different from the information provided in the ER.

As to wind power, the Intervenors note that "the DEIS cites the 2007 study on offshore wind power potential in Georgia not cited in the Environmental Report." *Id.* at 15. In fact, the ER not only makes no mention of the 2007 study, it makes no mention whatsoever of offshore wind power potential in Georgia. This issue is introduced for the first time in the DEIS. The DEIS also claims that the cited conclusions in the 2007 study on offshore wind power potential in Georgia "would generally apply to a wind farm located offshore of Maryland based on similarities in the physical and regulatory environments." DEIS at 9-22. No such statement appears in the ER. It is precisely this new conclusion that Intervenors challenge. In the next sentence, the NRC Staff states that "[f]or the preceding reasons, the review team concludes that a wind energy facility would not currently be a reasonable alternative to construction of a 1600-MW(e) nuclear power generation facility that would be operated as a baseload plant within Unistar's ROI." *Id.* Thus, the 2007 Georgia offshore wind study, and the NRC Staff's conclusion that it is relevant to assessing the potential of offshore wind in Maryland, influenced the NRC Staff's conclusion that wind power is not a viable alternative to Unit 3. As a result, the NRC Staff's reliance on the 2007 study is a significant difference between the ER and the DEIS. Intervenors could not have challenged the NRC Staff's reliance on this study until the DEIS was issued. Section 2.309(f)(2) permits them to do so now.

The DEIS also relies on a 2008 MPSC Report, not cited in the ER's discussion of the wind alternative, to justify its conclusion that offshore wind in Maryland is not an economically viable alternative to nuclear power. DEIS at 9-20. By contrast, the ER states only that "[o]ff-shore wind farms are not competitive or viable with a new nuclear reactor at the CCNPP site, and were therefore not considered in more detail." ER at 9-12. The ER does not cite the 2008 MPSC Report, or any other study or report, to justify its failure to consider the economic viability of wind power in more detail. The DEIS, however, draws a specific

conclusion concerning the economic viability of wind power and justifies that conclusion by citing the 2008 MPSC Report. The fact that the DEIS cites a specific report to justify its conclusion, rather than merely stating that the issue was not considered in detail, is another significant difference between the ER and the DEIS.

Intervenors have also identified a new and significantly different conclusion in the DEIS concerning the viability of solar power. Unlike the ER, the DEIS states that according to the DOE "Maryland has a good, useful [PV] solar resource throughout most of the state." DEIS at 9-22. This is a significant concession because it supports Intervenors' claim that solar power, together with wind and a backup natural gas plant, could provide a viable alternative to Unit 3.

Contention 10B is therefore based on new data and conclusions in the DEIS that differ significantly from those in the ER. It was also filed sufficiently promptly after the DEIS was issued, for reasons stated previously explained.[72] Contention 10B is therefore timely under the 10 C.F.R. § 2.309(f)(2).

2. Admissibility

Contention 10B includes a specific statement of the issue of law or fact Intervenors intend to litigate and an explanation of the basis of the contention. It also falls within the scope of the proceeding.

Contention 10B is material to the licensing proceeding. An EIS must include a detailed statement of reasonable alternatives to a proposed action.[73] When considering alternatives, agencies must:

> (a) Rigorously 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.
>
> (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

40 C.F.R. § 1502.14.

The Council on Environmental Quality ("CEQ"),[74] numerous courts, and par-

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[72] See pp. 740-42, *supra.*

[73] 42 U.S.C. § 4332(2)(C)(iii); *see Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 104 (1998).

[74] CEQ was created by NEPA in the Executive Office of the President. CEQ has promulgated regulations governing federal agency compliance with NEPA. *See* 40 C.F.R. §§ 1500.1-1508.28. The regulations receive substantial deference from the federal courts. *See Pub. Citizen,* 541 U.S. at 757; *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 355-56 (1989). The Commission has

(Continued)

ties to this proceeding, including the NRC Staff, acknowledge that the alternatives analysis is the "heart of the environmental impact statement."[75] "The existence of reasonable but unexamined alternatives renders an EIS inadequate."[76] The adequacy of the DEIS's evaluation of alternatives is therefore a material issue in the licensing proceeding, and Contention 10B challenges that evaluation.

Intervenors have alleged facts or expert opinion to support their claim that the DEIS undervalues the potential contribution of wind and solar power to meeting Maryland's need for additional power. In response to the NRC Staff's reliance on the 2007 study of wind potential off the coast of Georgia, they have cited the DOE assessment to show that Maryland has greater potential than Georgia, and that the NRC Staff therefore should not have relied on the Georgia study to analyze Maryland's offshore wind potential. Contention 10 at 7-8. To counter the NRC Staff's claim that Maryland offshore wind power does not yield economic benefits, they have cited Bluewater Wind's plans to construct a 600-MW private wind power project off the Maryland Coast. *Id.* at 7. To support their claim that the DEIS undervalues the potential contribution of solar power to meeting Maryland's energy needs, Intervenors cite the statement in the DEIS that "Maryland has a good, useful [PV] solar resource throughout most of the state."[77]

To be sure, Intervenors have not established their claims on the merits. They are not required to do so at this point, however, but only to allege some facts or expert opinion that support their position. Explaining the level of support necessary for an admissible contention, the Commission observed:

> Although [the contention admissibility rule] imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner. . . . Nor does [the rule] require a petitioner to prove its case at the contention stage. For factual disputes, a petitioner need not proffer facts in "formal affidavit or evidentiary form," [sic] sufficient "to withstand a summary disposition motion." . . . On the other hand, a petitioner "must present

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stated that "the NRC as an independent regulatory agency can be bound by CEQ's NEPA regulations only insofar as those regulations are procedural or ministerial in nature. NRC is not bound by those portions of CEQ's NEPA regulations which have a substantive impact on the way in which the Commission performs its regulatory functions." 49 Fed. Reg. 9352, 9352 (Mar. 12, 1984). But the Commission also has an "announced policy to take account of the [CEQ regulations] voluntarily, subject to certain conditions." 10 C.F.R. § 51.10(a).

[75] 40 C.F.R. § 1502.14; *see Alaska v. Andrus,* 580 F.2d 465, 474 (D.C. Cir. 1978), *vacated in part as moot sub nom. Western Oil & Gas Ass'n v. Alaska,* 439 U.S. 922 (1978); NRC Staff Answer at 18-19.

[76] *Friends of Southeast's Future v. Morrison,* 153 F.3d 1059, 1065 (9th Cir.1998).

[77] Contention 10 at 8 (quoting DEIS at 9-22).

sufficient information to show a genuine dispute" and reasonably "indicating that a further inquiry is appropriate."[78]

By quoting and citing the information described above, the Intervenors have provided the required "concise statement" and supporting references. *See* 10 C.F.R. § 2.309(f)(1)(v).

There remains, however, the question whether Contention 10B reflects a genuine dispute with the DEIS on a material issue of law or fact. Although it challenges the DEIS's analysis of the viability of wind and solar power, Contention 10B does not allege that either of those energy sources could, by itself, serve as an alternative to the construction of Unit 3. *See* Contention 10 at 6-9. The primary reason the DEIS did not consider either wind or solar power as a stand-alone alternative to Unit 3 is that neither of those sources was deemed capable of serving the purpose and need of the project, generating 1600 MW(e) of baseload power. DEIS at 9-20 to 9-23. Because Intervenors do not contest that basic conclusion, Contention 10B does not present a genuine dispute with the DEIS.[79] Even if Intervenors are correct that the DEIS's analysis of wind and solar power is flawed, they have provided no basis to overturn the NRC Staff's conclusion that neither source of power could, standing alone, provide a reasonable alternative to Calvert Cliffs Unit 3.

Contention 10B, however, is closely related to Contention 10C, which challenges the DEIS's analysis of a combination of power sources, including both wind and solar power, that the DEIS recognizes could furnish a viable alternative to Unit 3.

C. Contention 10C: "The DEIS Discussion of a Combination of Alternatives Is Inadequate and Faulty"

In Section 9.2.4 of the DEIS, the NRC Staff acknowledged that, although individual alternatives to Calvert Cliffs Unit 3 might not be sufficient to generate Applicants' target value of 1600 MW(e) of new baseload power, a combination of alternative power sources might be a cost-effective way of meeting that objective.

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[78] *Yankee Nuclear,* CLI-96-7, 43 NRC at 249 (citations omitted) (quoting *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 118 (1995) (quotation errors in *Yankee Atomic Elec. Co.*); *see also Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994).

[79] The NRC may consistently with NEPA define baseload power generation as the purpose of and need for a project. *See Environmental Law and Policy Center v. NRC,* 470 F.3d 676, 684 (7th Cir. 2006) ("Because Exelon was a private company engaged in generating energy for the wholesale market, the Board's adoption of baseload energy generation as the purpose behind the [Early Site Permit] was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.").

DEIS at 9-26. The DEIS states that, given Applicants' objective, "a fossil energy source, most likely coal or natural gas, would need to be a significant contributor to any reasonable alternative energy combination." *Id.* The NRC Staff also noted that there are many possible combinations of fossil energy sources and alternative power sources that might be cost-effective ways of satisfying the project's purpose. It decided to focus on one combination, which included specified contributions from wind power, solar power, hydropower, biomass sources, conservation and demand-side management programs, and natural gas combined-cycle generating units (the "combined alternative"). *Id.* In the DEIS, the NRC Staff compared the environmental consequences of the combined alternative and two other "viable energy alternatives" to the proposed action. *Id.* at 9-28.[80] The NRC Staff estimated that the combined alternative would result in 4.2 million tons of carbon dioxide emissions per year, as well as the emission of other air pollutants, from the operation of the natural gas plant. *Id.* at 9-27. The NRC Staff concluded "from an environmental perspective, none of the viable energy alternatives are clearly preferable to construction of a new baseload power generating plant located within Unistar's ROI." *Id.* at 9-28.

Intervenors maintain that, because the NRC Staff underestimated Maryland's wind power potential and failed to quantify its acknowledged PV solar power potential, the NRC Staff underestimated the contribution wind and solar power could make to the combined alternative. Contention 10 at 9.[81] Intervenors argue that greater contributions from wind and solar power would reduce the air emissions from the combined alternative. The NRC Staff's errors therefore allegedly undermine its analysis of the estimated air emissions from the combined alternative. Intervenors contend that the NRC Staff's alternatives analysis is accordingly inaccurate and incomplete and cannot support the granting of a license for Calvert Cliffs Unit 3 until it is revised to provide a realistic comparison of viable alternatives. *Id.* at 9-10.

In order to focus Contention 10C on the facts alleged by Intervenors in support of the contention, the Board has reformulated it as follows:

> The DEIS discussion of a combination of alternatives is inadequate and faulty.

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[80] The other two viable energy alternatives that the Staff compared to the proposed action were the construction and operation of coal-fired or natural-gas fired combined-cycle generating units at the Calvert Cliffs site. DEIS at 9-28.

[81] Intervenors also argue that, in the combined alternative, the Staff underestimated the potential contribution of demand-side management. Contention 10 at 9. For the reasons previously explained, however, Intervenors' allegations regarding demand-side management are not properly before us. *See supra* pp. 739-40. We have therefore not considered the demand-side management issue in determining the admissibility of Contention 10C. The following discussion of the timeliness and admissibility of Contention 10C should be understood as limited to the allegations that the combined alternative undervalues the potential contributions of wind and solar power.

> By selecting a single alternative that underrepresents potential contributions of wind and solar power, the combination alternative depends excessively on the natural gas supplement, thus unnecessarily burdening this alternative with excessive environmental impacts.

The following discussion of Contention 10C refers to the contention as so restated.

Contention 10C is timely. In addition, we find that Contention 10C presents a genuine dispute of material fact with the combination of alternatives analysis in the DEIS and otherwise satisfies the admissibility criteria of 10 C.F.R. § 2.309(f)(1).

1. Timeliness

Contention 10C is derived from the Intervenors' challenge in Contention 10B to the NRC Staff's analysis of the potential contributions of wind and solar power. Contention 10C is therefore timely under 10 C.F.R. § 2.309(f)(2) for the reasons explained in connection with the analysis of Contention 10B.

Contention 10C is timely for another reason. The combined alternative evaluated in the ER did not include the specific information concerning the contributions from wind and solar power that is contained in the DEIS and that Intervenors challenge in Contention 10C. The ER indicated that its combined alternative would include a gas-fired power generation facility in combination with renewable power sources. The ER did not, however, define a specific combination of renewable power sources to be included in its combined alternative, much less state the specific amount of power to be contributed by each of those sources. Instead, it stated "the renewable portion of the combination alternative would be any combination of renewable technologies that could produce power equal to or less than CCNPP Unit 3 at a point when the resource was available." ER at 9-26.

By contrast, the DEIS for the first time presented a combined alternative that included specific renewable power sources and specific power contributions from those sources. The combined alternative evaluated in the DEIS included "an assumed combination of 1200 MW(e) of natural gas combined-cycle generating units at the Calvert Cliffs site and the following contributions from within UniStar's ROI: 25 MW(e) of hydropower; 75 MW(e) from solar power; 100 MW(e) from biomass sources, including municipal solid waste; 100 MW(e) from conservation and demand-side management programs; and 100 MW(e) from wind power." DEIS at 9-26. The NRC Staff maintains that the designated contributions from the renewable power sources were "reasonable and representative." *Id.* The Intervenors contest this claim for both wind and solar power. No such contention could have been filed based on the ER because the specific contributions from wind and solar power were not identified in the ER.

For these reasons, we conclude that the DEIS included new data and conclu-

sions concerning the combined alternative that differ significantly from the data or conclusions in the ER, as required by section 2.309(f)(2). Contention 10C arises from the new data and conclusions in the DEIS.

Finally, Contention 10C was filed sufficiently promptly after the DEIS was issued, for reasons stated previously.[82] Contention 10C is therefore timely under section 2.309(f)(2).

2. Admissibility

Contention 10C is admissible under 10 C.F.R. § 2.309(f)(1). It satisfies the first five admissibility criteria for the reasons explained concerning Contention 10B. Moreover, Contention 10C, unlike Contention 10B, challenges the analysis of an alternative that the DEIS acknowledges to be a viable source of baseload power. Because Contention 10C alleges and provides some support to show that the analysis of that viable alternative is inaccurate and incomplete, Contention 10C presents a genuine dispute of material fact with the DEIS under section 2.309(f)(1)(vi).

Intervenors assert that, while the NRC Staff assumes a contribution from all wind power sources of only 100 MW, the proposed Bluewater Wind project alone would provide 600 MW of power. Contention 10 at 9. In addition, Intervenors maintain that more power will be produced off the nearby coasts of Delaware and New Jersey, also feeding into the same PJM grid. *Id.* Intervenors have also cited the DOE assessment of offshore wind potential in Maryland to support their argument that the NRC Staff, by relying on the study of wind potential off the coast of Georgia, underestimated Maryland's offshore wind power potential. Thus, according to Intervenors, the DEIS significantly underestimated the potential contribution of wind power to the combined alternative. Intervenors additionally argue that, "[b]y failing to even attempt to quantify potential power from solar photovoltaics, the DEIS has no basis whatsoever for assuming a 75 MW contribution from solar power." *Id.* at 10. Intervenors contend that "a feasible combination of alternatives might well include a considerably smaller natural gas plant than contemplated in the DEIS, along with a much larger contribution from renewable sources of power and demand-side programs. With proper load management, such a combination could produce reliable electricity (the goal of 'baseload' power) with lower environmental consequence and quite likely at reduced economic cost." *Id.*

Intervenors have provided sufficient information to show that there is a genuine dispute concerning the appropriate composition of the combined alternative described in the DEIS and its environmental consequences. This dispute is

[82] See pp. 740-42, *supra.*

material to the licensing decision. In order to issue the license, the NRC Staff must prepare an EIS that complies with NEPA. As we have explained, the alternatives analysis is the most critical part of an EIS. Intervenors maintain that the comparison in the DEIS between a new nuclear power plant and the combined alternative violates NEPA because it is inaccurate and incomplete. They have identified information indicating that the NRC Staff might have significantly underestimated the potential contribution of wind power and solar power to the combined alternative. If Intervenors are correct, then the DEIS's comparison of alternatives might well be incomplete or inaccurate because, by underestimating the contribution of power sources that produce little or no air emissions, it overestimates the air emissions the combined alternative would produce. The estimated level of air emissions influenced the DEIS's comparison of the combined alternative to the construction of a new nuclear power plant.

According to the NRC Staff, Contention 10C is defective because Intervenors (1) have not quantified the precise contributions from wind, solar, and other renewable power sources that they contend should be included in the combined alternative; and (2) even assuming that Intervenors' combined alternative would have reduced environmental consequences, they have not provided sufficient information to show that their suggested combination alternative would be environmentally preferable to the proposed action. NRC Staff Answer at 19-20. In effect, the NRC Staff argues that is not enough for Intervenors to show that the DEIS presents an inaccurate and incomplete comparison of alternatives. The NRC Staff claims that Intervenors must also show precisely how the combined alternative should be revised and that doing so will change the DEIS's ultimate conclusion.

Intervenors reply that, once they have identified flaws in the DEIS's analysis of alternatives,

> it is perfectly reasonable to expect the NRC Staff to re-examine the document's section of Alternatives and produce a new analysis that takes the realities we have presented into account. What exactly the precise amounts of offshore and onshore wind power, solar power, energy efficiency programs, natural gas, etc. should be in this analysis are not ours to determine; they are the NRC's. But the NRC must have a factual basis for deciding what alternatives to analyze, and the DEIS does not provide such a factual basis. Instead the NRC has essentially set up a straw man: they have chosen an apparently random alternative scenario, without factual basis, and discounted it as an alternative.

Intervenors' Reply at 13.

Intervenors have the better of this argument. They have satisfied our contention admissibility requirements by identifying information to support their contention that the DEIS contains an inaccurate or incomplete comparison of the proposed

action and the combined alternative. If Intervenors' contention is upheld on the merits, they will have shown that the DEIS violates NEPA even if they have not shown precisely how the DEIS should be revised or what ultimate conclusion it should reach. Federal courts have held that inaccurate, incomplete, or misleading information in an EIS concerning the comparison of alternatives is itself sufficient to render the EIS unlawful and to compel its revision. As the court of appeals explained in *Animal Defense Council v. Hodel,*

> The Council alleges that the EIS was so filled with misinformation and incorrect cost figures that the Bureau must revise its EIS to adequately provide the public with an informed comparison of alternatives. Where the information in the initial EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide "a reasonable, good faith, and objective presentation of the subjects required by NEPA." *Johnston v. Davis,* 698 F.2d 1088, 1095 (10th Cir. 1983) (revision of EIS necessary where use of artificially low discount rate resulted in unreasonable comparison of alternatives to proposed project); *see also National Wildlife Federation v. Andrus,* 440 F. Supp. 1245, 1254 (D.D.C. 1977) (EIS deficient where several alternatives were not treated in the EIS and the EIS did not set forth reasons why these alternatives were rejected).[83]

Thus, if the DEIS's analysis of the combined alternative significantly underestimates the potential contribution of wind and solar power, as Intervenors maintain, then the EIS fails in one of its essential functions — to provide the public and the decisionmaker with accurate information comparing the proposed action and its alternatives — and, as such, it cannot support an agency decision to issue the license.

The Commission has said substantially the same thing about NEPA contentions generally, stating that, although boards should not "'flyspeck'" environmental documents, "petitioners may raise contentions seeking correction of significant inaccuracies and omissions in the ER."[84] Here Intervenors provide sufficient facts to support their claim that there are inaccuracies in the DEIS's analysis of the combined alternative and its environmental consequences. Intervenors have, for example, identified facts to show that Maryland has significant offshore wind potential that the combined alternative ignores. They have also pointed to information indicating that Maryland has substantial solar power potential, contrasting this with the DEIS's failure to explain why it assumed a contribution of only 75 MW(e) from solar power. In reviewing such claims of substantial

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[83] 840 F.2d 1432, 1439 (9th Cir. 1988); *see also Natural Resources Defense Council, Inc. v. U.S. Forest Service,* 421 F.3d 797, 810-12 (9th Cir. 2005).

[84] *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005) (citations omitted).

inaccuracies and incompleteness, we would not be "flyspecking" the DEIS. Instead, we would be reviewing the DEIS to determine whether the information it provides is sufficient to enable the decisionmakers and the public to make an informed comparison of viable alternatives.[85]

The NRC Staff's argument is also inconsistent with NEPA's goals of informed decisionmaking and public participation. As the Supreme Court has explained, the statutory requirement that an agency prepare an EIS

> ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.
>
> . . . .
>
> Publication of an EIS, both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency "has indeed considered environmental concerns in its decisionmaking process," . . . and, perhaps more significantly, provides a springboard for public comment . . . .[86]

As the Court further explained, "[a]lthough these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."[87]

Thus, Intervenors need not prove, in order to establish a NEPA violation, that revising the DEIS to comply with NEPA will change the NRC Staff's recommendation or the agency's decision whether to issue the license. It is sufficient that the information which Intervenors maintain should have been included in the DEIS would be relevant to the ability of the agency decisionmakers and the public to assess the environmental consequences of the project, including the environmental consequences of reasonable alternatives. If Intervenors establish that much,

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[85] *Cf. Animal Def. Council,* 840 F.2d at 1439.

[86] *Robertson,* 490 U.S. at 349 (quoting *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 97(1983)) (other citations omitted). The Commission has described the EIS requirement in similar terms, stating that its principal goals are "to force agencies to take a 'hard look' at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency's decision-making process." *Claiborne,* CLI-98-3, 47 NRC at 87 (citing *Robertson,* 490 U.S. at 349-50; *Hughes River Watershed Conservancy v. Glickman,* 81 F.3d 437, 443 (4th Cir. 1996)).

[87] *Robertson,* 490 U.S. at 350; *see also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 573 n.7 (1992) ("[U]nder our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.").

they will have shown that the agency failed to comply with NEPA's procedural requirements. It is the NRC Staff, not the Intervenors, that has the burden of complying with NEPA,[88] and the NRC Staff would therefore be responsible for revising the EIS if Intervenors prevail on Contention 10C. The NRC Staff would have to revise the alternatives analysis to include more accurate estimates of the potential contribution of wind and solar power to the combined alternative, and to provide a new estimate of the air emissions the combined alternative would produce. Thus, by alleging facts suggesting that the comparison of alternatives in the DEIS may be inaccurate or incomplete, and by citing sources and documents that provide some support to their allegations, Intervenors have met their burden under 10 C.F.R. § 2.309(f)(1)(v) and (vi).

We agree with the NRC Staff that, as a general proposition, "'[a]n agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative.'"[89] In this instance, however, Intervenors cannot be accused of demanding that the NRC Staff analyze "every conceivable alternative." On the contrary, the combined alternative is the only alternative to the proposed action that the NRC Staff determined was a viable source of baseload power and that included renewable energy sources. DEIS at 9-26, 9-28. A thorough and accurate analysis of the combined alternative is therefore particularly important to the agency's compliance with NEPA, because it represents the only opportunity the decisionmakers and the public will have to compare the proposed action to an alternative that includes renewable sources such as wind and solar power and is acknowledged to be capable of fulfilling the purpose and need of the project. As another board stated in admitting a similar contention concerning a combined alternative that also included renewable power sources,

> the renewable energy parts of the combination are currently the subject of significant and focused attention as a matter of national policy, 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 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 Intervenors 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

[88] *See Vt. Yankee Nuclear Power Corp.,* 435 U.S. at 553.

[89] NRC Staff Answer at 19 (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-30, 58 NRC 454, 479 (2003)).

> combination of wind and solar energy with storage and natural gas supplementation to produce baseload power.[90]

Finally, the NRC Staff argues that Intervenors have failed to provide alleged facts or expert opinion to show that a combined alternative with increased contributions from wind and solar power would fulfill the purpose and need of the project, providing baseload power. NRC Staff Answer at 20. The DEIS itself provides sufficient information on this issue, however, making further support from Intervenors unnecessary. The DEIS acknowledges that the combined alternative is a "viable energy alternative." DEIS at 9-28. The Intervenors propose that the DEIS should consider a combined alternative that includes increased contributions from wind and solar power. They recognize, however, that the combined alternative would still include natural gas combined-cycle generating units as a backup power source when the alternative sources are not able to generate the required amount of baseload power. *See* Contention 10 at 10. The DEIS does not suggest that the specific power allocations included in its combined alternative were the only ones consistent with the goal of providing baseload power. On the contrary, the DEIS acknowledges that many combinations of alternative power sources with a backup fossil fuel energy source would be capable of providing the required amount of new baseload power. DEIS at 9-26. Intervenors are simply suggesting that the Staff explore a combination that would include greater contributions from wind and solar power. The DEIS itself supports Intervenors' position that other combinations would be inconsistent with the combined alternative's acknowledged capability of providing baseload power, which is sufficient to carry the Intervenors' burden at the contention admissibility stage.

We therefore conclude that Contention 10C, as restated by the Board, is timely and admissible:

> The DEIS discussion of a combination of alternatives is inadequate and faulty. By selecting a single alternative that underrepresents potential contributions of wind and solar power, the combination alternative depends excessively on the natural gas supplement, thus unnecessarily burdening this alternative with excessive environmental impacts.

We will admit Contention 10C.

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[90] *Luminant Generation Co.* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LPB-10-10, 71 NRC 529, 588-89 (2010) (footnote omitted).

D. Contention 10D: "The DEIS Discussion of Costs Both Understates Likely Costs and Disputes Cost Estimates in the Applicants' ER, Calling into Question the ER's Discussion of Calvert Cliffs-3 vs. Alternatives"

Intervenors take issue with the DEIS's discussion concerning the projected costs associated with the construction of Calvert Cliffs Unit 3. Contention 10 at 11. Intervenors originally provided three arguments in support of their challenge to the DEIS discussion of costs, but now rely on only the second and third arguments. *See id.* at 11-14.

Intervenors originally asserted that the DEIS understates the cost of building Calvert Cliffs Unit 3 by relying on "overnight cost" estimates provided by Applicants and failing to account for the cost of capital.[91] However, in their Reply, Intervenors withdraw this argument to the extent that it relates to "the DEIS treatment of overnight construction costs and the need for a construction cost escalation factor in conducting a proper cost-benefit analysis of the proposed Calvert Cliffs-3." Intervenors' Reply at 1. Intervenors explain that "[w]hile we continue to believe our analysis is correct and the DEIS and ER should have included such an escalation factor (since there is nothing in the historical record to indicate that a nuclear reactor in the U.S. ever has, or ever will be, built at its estimated cost, there is no reason to assume one will be), we agree with the Applicants and Staff that we could have raised this issue at the initial intervention stage." *Id.*

Nonetheless, Intervenors reiterate in their Reply that they continue to believe that Contention 10D should be admitted. *Id.* at 1-2. Intervenors' assert that the DEIS's discussion of costs conflicts with the ER's discussion of costs. They point out that the DEIS's discussion of costs, which Intervenors claim is too low, estimates the overnight capital costs at $4500-$6000/kW, while the ER estimates its operation costs based on two outdated studies from the DOE's website, one of which projects the overnight capital costs to be only $1200 to $1800/kW.[92] Finally, Intervenors contend that substantially higher overnight capital costs will inevitably result in substantially higher electricity rates, thereby rendering the cost benefit analyses in the DEIS inaccurate and invalid. Contention 10 at 14.

The Board finds that Contention 10D is inadmissible. Contention 10D fails to meet the requirements of 10 C.F.R. § 2.309(f)(2) for new or amended contentions

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[91] Contention 10 at 11-13. The phrase "overnight costs," or "overnight capital costs," is commonly used to describe the financial cost of constructing a nuclear plant if one were to pay for the entire plant "overnight." Thus, interest and potential cost escalations during the preconstruction and construction phases of the plant are generally not included in overnight cost estimates. *See* DEIS at 10-24 to 10-25.

[92] Contention 10 at 13-14. "Operation costs," or the price per kWh to produce electricity, are calculated based on various factors, including operating costs, annualized capital costs, and overnight capital costs.

because the data from the DEIS on which the two remaining arguments in support of Contention 10D are based do not differ significantly from that contained in Applicants' documents and because the two remaining arguments were not submitted in a timely fashion once the subsequent relevant information became available. In addition, Contention 10D cannot be admitted as a nontimely contention because Intervenors' two remaining arguments in support of Contention 10D fail to satisfy the good cause requirement in 10 C.F.R. § 2.309(c) for the filing of nontimely contentions. Finally, Contention 10D does not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) because each of the remaining arguments in support of Contention 10D fail to provide the factual support necessary to demonstrate a genuine dispute with the DEIS on a material issue of law or fact.

1. Timeliness

Intervenors' second argument in support of Contention 10D involves the apparent inconsistency between the estimated overnight capital costs in the ER and the DEIS. Intervenors claim that this discrepancy indicates that both the ER and DEIS overnight capital cost estimates are too low and that "Chapters Nine and Ten of the Applicants' Environmental Report are wrong and misleading, and may not serve as the basis for licensing action." *Id.* With regard to overnight capital costs, the ER lists the factors to be considered in calculating such costs, but provides no explicit estimate, stating that "[t]he overnight capital cost for CCNPP Unit 3, excluding contingency costs, is estimated to be [ ]." ER at 10-27, 10-28. However, in Section 9 of the ER, which compares the costs of nuclear energy to the costs of energy alternatives, Applicants repeatedly rely on two DOE studies that project nuclear power to be produced in the range of $0.031 to $0.046 per kWh, one of which is based on overnight capital costs in the $1200 to $1800 range.[93] In the DEIS, the NRC Staff relies on an overnight capital cost estimate of $4500/kW to $6000/kW.[94] The overnight capital cost estimate contained in the DEIS was provided to the NRC Staff by Applicants in their

[93] *See, e.g.,* ER at 9-29; *see also* U.S. Department of Energy, *Business Case for New Nuclear Power Plants* (2002), http://www.ne.doe.gov/home/bc/businesscase.html [hereinafter DOE 2002 Study]; U.S. Department of Energy, *The Economic Future of Nuclear Power* (2004), http://nuclear.energy.gov/np2010/reports/NuclIndustryStudy-Summary.pdf [hereinafter DOE 2004 Study].

[94] DEIS at 10-25. It is important to note that while the DEIS contains Applicants' estimated overnight capital cost range of $4500 to $6000, these numbers are not relied on in the studies that are used to calculate the estimated operation costs in the DEIS. Rather, the estimated overnight capital cost range used by the studies to calculate the operation costs in the DEIS was $1200 to $4000. *See id.* at 10-25, 10-26. Although the updated overnight capital cost estimate in the DEIS relies on two new studies, Intervenors do not base Contention 10D on those studies and thus the Board will not consider those studies when determining the timeliness of Contention 10D.

follow-up response to the NRC Staff Request for Additional Information ("RAI") No. 124 on November 16, 2009.[95]

Applicants argue that "UniStar has, in fact, updated the cost estimates in the ER to capture more recent studies and that it is this estimate on which the NRC based its DEIS." *See* Applicants' Response at 25. Applicants explain that "[i]n its response to NRC Request for Additional Information No. 124, UniStar estimated the cost of Unit 3 in the range of $4500/kW to $6000/kW (same as DEIS)." *Id.* (footnote omitted). Intervenors respond by acknowledging that the Applicants have updated the cost estimates in their response to RAI No. 124 to reflect the new overnight capital cost estimate of $4500 to $6000/kW, but claim that such revisions are absent from the ER. Intervenors' Reply at 15-16.

The most recent revision of the ER still fails to include the updated overnight capital cost estimate of $4500 to $6000/kW. Instead, the ER continues to rely on the two DOE studies from 2002 and 2004 with overnight capital cost estimates in the $1200 to $1800/kW range, while failing to provide an explicit overnight capital cost estimate.[96] Nonetheless, as even Intervenors admit, Applicants' Response to RAI No. 124 does include the updated overnight capital cost estimate: "UNE proposes that the NRC may utilize a range of $4500/KW to $6000/KW for the cost of the unit. This range is reasonable for use in the EIS discussion and it corresponds well with internal financial studies." Response to RAI at 4.

Under section 2.309(f)(2), an intervenor may file a new or amended contention "if there are data or conclusions in the NRC draft or final environmental impact statement . . . or any supplement relating thereto, that differ significantly from the data or conclusions in the applicant's documents." In this proceeding, the overnight capital cost estimate of $4500 to $6000/kW that appears in the DEIS also appears in Applicants' Response to RAI No. 124, which clearly qualifies as part of "the applicant's documents" under section 2.309(f)(2). Thus, because the same overnight capital cost estimate — $4500 to $6000/kW — appears in both the DEIS and Applicants' documents, it cannot be said that the overnight capital cost estimates differ significantly between the DEIS and Applicants' documents. Consequently, the second argument in support of Contention 10D is nontimely under the first part of section 2.309(f)(2).

In addition, the second argument in support of Contention 10D is nontimely under the alternative three-part timeliness test contained in sections 2.309(f)(2)(i)-(iii). Under the third part of the alternative test set forth in section 2.309(f)(2)(iii), an intervenor must show that "[t]he amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information." Here,

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[95] *Id.* at 10-25; *see also* Letter from Greg Gibson, UniStar Vice President of Regulatory Affairs, to U.S. NRC Document Control Desk (Nov. 16, 2009) at 2 (ADAMS Acession No. ML093220193) [hereinafter Response to RAI].

[96] ER at 10-27, 10-28; *see also* DOE 2002 Study; DOE 2004 Study.

Applicants' Response to RAI No. 124, which contains the updated overnight capital cost estimates, was submitted roughly 1 year ago on November 16, 2009. Response to RAI at 1. In its April 22, 2009 Scheduling Order, the Board elaborated on the timeliness requirement in section 2.309(f)(2)(iii), stating that new or amended contentions filed under this provision should be filed "promptly" after the relevant information becomes available. Scheduling Order at 6. Given that over a year has elapsed since the updated overnight capital cost estimates became available, the second argument clearly fails to meet the third prong of the alternative basis for filing a new contention under sections 2.309(f)(2)(i)-(iii). Thus, even if the second argument in support of Contention 10D were to meet the first and second criteria of the alternative timeliness test in section 2.309(f)(2), it would still be nontimely under the alternative timeliness test therein because it fails to meet the third requirement that a new contention be filed in a timely fashion after the information upon which it was based becomes available.

If a contention fails to meet the timeliness requirements contained in section 2.309(f)(2), it still may be admitted by a Board if it passes the eight-part balancing test contained in section 2.309(c). *See* 10 C.F.R. § 2.309(c). As stated previously, the Commission has reiterated that "'[g]ood cause' is the most significant of the late-filing factors in § 2.309(c)."[97] Here, Intervenors have not identified any good cause for failing to timely file the second argument, and this is not the unusual case where the other factors listed in section 2.309(c) so favor Intervenors that we may entertain the contention despite the lack of good cause. The second argument in support of Contention 10D is accordingly deemed nontimely by the Board under both section 2.309(f)(2) and section 2.309(c).

Intervenors' third argument in support of Contention 10D relies on the first and second arguments to claim that "[s]ubstantially higher construction costs means [sic] substantially higher electricity rates." Contention 10 at 14. According to this argument, the need for a cost escalation factor (addressed in the first argument in support of Contention 10D), combined with the alleged increased overnight capital cost estimate provided in the DEIS (discussed in the second argument in support of Contention 10D) will necessarily increase operation costs, and hence undercut Applicants' cost-benefit analysis. *See id.* Intervenors themselves admitted that the first argument in support of Contention 10D discussing the need for a cost escalation factor was nontimely when they voluntarily withdrew it. Joint Intervenor's Reply at 1. Similarly, the Board found above that the second argument in support of Contention 10D addressing the increased overnight capital cost estimate in the DEIS was nontimely. Since both of the underlying arguments upon which the third argument relies were deemed nontimely, the third argument in support of Contention 10 is also nontimely.

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[97] *North Trend,* CLI-09-12, 69 NRC at 549 n.61; *see also Diablo Canyon,* CLI-08-1, 67 NRC at 5-8.

Thus, the second and third arguments in support of Contention 10D are both nontimely under the provisions outlined in section 2.309(f)(2) and section 2.309(c).

2. Admissibility

Even if the second and third arguments in support of Contention 10D were timely under section 2.309(f)(2), or met the requirements for nontimely contentions under section 2.309(c), Contention 10D would still be inadmissible because it fails to meet the contention admissibility standards contained in section 2.309(f)(1).

In the second argument, Intervenors fail to provide support sufficient to demonstrate a genuine dispute of material fact with the DEIS under sections 2.309(f)(1)(v)-(vi). The second argument is premised on the fact that the estimated overnight capital costs contained in the ER range from $1200 to $1800/kW, while the estimated overnight capital costs contained in the DEIS range from $4500 to $6000/kW. *See* Contention 10 at 14. From this observation, Intervenors conclude that the projected overnight capital costs in the DEIS are "almost certainly too low and nonconservative," and that the "outdated" overnight capital cost estimates relied on in the ER make it such that "Chapters Nine and Ten of the Applicants' Environmental Report are wrong and misleading, and may not serve as a basis for licensing action." *Id.* However, Intervenors merely assert that the overnight capital cost estimates in the ER and the substantially higher overnight capital costs in the DEIS are both too low, but fail to provide any expert or factual support for this claim, as required by section 2.309(f)(1)(v).

Intervenors' main evidence that the overnight capital cost estimates contained in the DEIS are too low comes from the fact that they are higher than the overnight capital cost estimates contained in the ER. In fact, the fact that the DEIS includes higher cost estimates shows nothing more than that Staff updated the cost estimates to reflect more recent information. Furthermore, even if the overnight capital cost estimates in the ER are low, this potential problem has been remedied in the DEIS since the capital cost estimates in the DEIS rely not only on the overnight capital cost studies from the ER, but also on more recent studies, including the 2007 Keystone Report and the 2009 MIT Update.[98] As it points out in its Answer, the NRC Staff's approach to calculating the estimated overnight capital costs in the DEIS is clearly within the discretion granted by the Commission when it stated that "[d]etermination of economic benefits and

[98] DEIS at 10-25; The Keystone Center, *Nuclear Power Joint Fact-Finding* (2007), http://keystone.org/files/file/about/publications/FinalReport_NuclearFactFinding6_2007.pdf [hereinafter Keystone Report]; Massachusetts Institute of Technology, *Update of the MIT 2003 Future of Nuclear Power* 6 (2009), http://web.mit.edu/nuclearpower/pdf/nuclearpower-update2009.pdf [hereinafter MIT Update].

costs that are tangential to environmental consequences are within a wide area of agency discretion."[99] In relying on the studies contained in the ER and more recent studies, the DEIS analysis is now based on an increased overnight capital cost estimate that ranges from $1200 to $6000/kW. *See* DEIS at 10-25 to 10-26. As a result, the second argument lacks the factual support necessary to demonstrate a genuine dispute of material fact with regard to the adequacy of the overnight cost estimates in the DEIS. Thus, the second argument fails to support the admission of Contention 10D.

Intervenors also argue that if Calvert Cliffs Unit 3 has higher overnight capital costs, then such construction cost increases will necessarily result in higher electricity rates, thus altering the cost-benefit analysis contained in the DEIS. However, this argument rests on the unsupported claim that overnight costs will exceed the values stated in the DEIS. Due to the entirely speculative nature of this claim, the third argument does not establish a material dispute with the DEIS and thus fails to support the admission of Contention 10D.

For the foregoing reasons, Contention 10D is not admitted.

III. CONCLUSION

For the foregoing reasons, the Board admits Contention 10C, but declines to admit Contentions 10A, 10B, and 10D.

[99] NRC Staff Answer at 25-26; *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005) (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 145 (2004)).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD[100]

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Dr. William W. Sager
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 28, 2010

[100] Copies of this Order were sent on this date by the agency's E-Filing system to the counsel/representatives for: (1) Intervenors Nuclear Information and Resource Services, Beyond Nuclear, Public Citizen Energy Program, and Southern Maryland Citizens Alliance for Renewable Energy Solutions; (2) UniStar Nuclear Operating Services, LLC and Calvert Cliffs-3 Nuclear Project, LLC; (3) NRC Staff; and (4) State of Maryland.

Concurring Opinion of Judge Gary S. Arnold

With respect to Contention 10A, although I agree with the conclusion of this Order, I am not entirely in agreement with the logic used by the Majority in arriving at that conclusion. My colleagues believe that the first argument in support of Contention 10A is timely; I do not. Both the Majority and I consider this contention to be inadmissible, but in addition to the reasons provided by the Majority, I would add that it was not timely filed.

In order for a Board to even consider the admissibility of a new timely contention on the DEIS, that contention must fulfill one of the two criteria of 10 C.F.R. § 2.309 (f)(2):

> On issues arising under the National Environmental Policy Act . . . . [a] petitioner may amend those contentions or file new contentions 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,

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.

To qualify under the first criterion, Intervenors must identify new data or conclusions in the DEIS that are significantly different from data or conclusions contained in earlier application documents. Unless these differences are obviously significant, Intervenors must also explain how the noted differences are significant. Regarding the current contention, the conclusions concerning need for power in the ER and DEIS are identical.[101] But Intervenors state that the DEIS "*is based* on a completely different set of data that are more recent than the

[101] *See* Calvert Cliffs Nuclear Power Plant Unit 3, Combined License Application Part 3: Environmental Report, at 8-18 to 8-22 (Rev. 6 Sept. 2009) (ADAMS Accession Nos. ML092880898-ML092880920) [hereinafter ER]; Division of Site Environmental Review, Office of New Reactors, Environmental Impact Statement for the Combined License (COL) for Calvert Cliffs Nuclear Power Plant Unit 3, Draft Report for Comment, NUREG-1936, at 8-8 to 8-9 (Apr. 2010) (ADAMS Accession Nos. ML101000012 and ML101000013) [hereinafter DEIS].

data presented in the Environmental Report."[102] I believe that the claim that the conclusion "is based on" new information is essential to a finding of timeliness under Section 2.309(f)(2). Intervenors cite a number of documents that were *considered* in the DEIS but not in the ER, but they fail to cite any specific differences in the data or to explain how any differences are significant. Contention 10 at 2. Furthermore, they do not differentiate between new information *considered* in the DEIS and new information upon which DEIS conclusions were *based.* But most importantly, although Intervenors claim that the DEIS "*is based* on a completely different set of data that are more recent than the data presented in the Environmental Report," they do not identify any new or different data upon which the conclusion of the DEIS need for power analysis *is based. See id.* (emphasis added).

The ER states that its need for power evaluation *is based* on the Maryland Public Service Commission's ("MPSC's") "Electric Supply Adequacy Report of 2007."[103] The DEIS states that its need for power discussion *is based* upon this same document plus the MPSC's Order granting a Certificate of Public Convenience and Necessity for proposed Unit 3 ("MPSC Order").[104] Thus the significantly different data, if it exists, must be contained in the MPSC Order. However, Intervenors fail to cite to any data in this Order. They apparently assume that if a document is newer, it must necessarily contain information that is significantly different. I do not agree. The Commission has stated:

> We expect our licensing boards to examine cited materials to verify that they do, in fact, support a contention. But it is not up to the boards to search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves; boards may not simply ''infer'' unarticulated bases of contentions. It is a ''contention's proponent, not the licensing board,'' that ''is

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[102] Submission of Contention 10 by Joint Intervenors (June 25, 2010) at 2 (emphasis added) [hereinafter Contention 10].

[103] *See* ER at 8-1. The ER states: "The assessment of power needs is based on input provided by the Maryland Public Service Commission (PSC) on the need to sustain a safe and reliable electric system in the state and reduce the state's reliance on imported electric power." *Id.* The ER later identifies the specific MPSC document as the "Electric Supply Adequacy Report of 2007." *See, e.g., id.* at 8-22.

[104] DEIS at 8-1. The DEIS states that:

> The Maryland Public Service Commission (MPSC) analyzed the need for power from a new baseload generating unit in a 2007 report (MPSC 2007) and in its 2009 Order granting a Certificate of Public Convenience and Necessity (CPCN) to UniStar for proposed Unit 3 (MPSC 2009a). The NRC staff relied on the MPSC's determinations to reach its conclusion that there is a need for power from proposed Unit 3 at the Calvert Cliffs site by December 2015.

Id. While the NRC Staff apparently looked at other, more recent information, this information was not used to reach the NRC Staff's conclusion on the need for power.

> responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions.''[105]

My colleagues have examined the MPSC Order and have chosen to consider the information contained therein to be significantly different. I, however, choose to determine admissibility of the contention based primarily upon information provided by the parties. Since Intervenors have not cited to any significantly different data used to determine the need for power,[106] I do not believe that this requirement has been fulfilled.

The second way that a new timely contention may be proposed for the DEIS is to base that contention on new information not previously available. Intervenors advance some information as "new," possibly to utilize this means to propose a contention. They cite the MPSC Ten-Year Plan for 2008-2017[107] in support of the idea that the DEIS does not adequately consider the effects of the current economic downturn. Contention 10 at 3. However, the current recession is not new, and its documentation in a new 10-year plan does not make it new. They also cite to peak energy use on June 24, 2010. *Id.* at 3-4. But this new information is for the large PJM[108] service area, and Intervenors fail to explain how an instantaneous demand in this large service area is relevant to long-term demand within the state of Maryland.

"NEPA does not specifically call for a discussion of 'need for power.' Instead, the NRC's NEPA regulations require that the benefits of the project be addressed."[109] The Commission has provided guidance concerning the purpose of the need for power discussion, and has characterized such discussions as inevitably containing large uncertainties:

> [L]ong-range forecasts [for future electric power demands] are especially uncertain in that they are affected by trends in usage, increasing rates, demographic changes, industrial growth or decline, the general state of the economy, etc. These factors exist even beyond the uncertainty that inheres to demand forecasts: assumptions on

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[105] *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006) (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 22 (1998)) (citations omitted).

[106] Intervenors merely cite the MPSC Order as a document cited by the DEIS. They do not claim that it contains new information that is significantly different than information considered in the ER. *See* Contention 10 at 2.

[107] This was mistakenly referred to by Intervenors as "Maryland Public Service Commission's Ten-Year Plan for 2008-2018." *See id.* at 3.

[108] PJM manages the high-voltage electric grid and the wholesale electricity market in all or part of 13 states, including Maryland, and the District of Columbia.

[109] Applicants' Response to Proposed Contention 10 (July 20, 2010) at 9 n.8.

> continued use from historical data, range of years considered, the area considered, extrapolations from usage in residential, commercial, and industrial sectors, etc."[110]

The Commission reiterated this characterization most recently when it stated:

> 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."[111]

Under 10 C.F.R. § 2.309(f)(1)(iv), a contention must "[d]emonstrate 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." The information contained in the MPSC Order appears to be consistent with the conclusions of both the DEIS and the ER. Given the Commission's statements, it is difficult to understand how a contention challenging the NRC Staff's treatment of this information could possibly pose a material challenge to the DEIS. This is especially true when Intervenors fail to identify the specific information upon which they base their claim.

I would also disagree with the Majority's evaluation of the additional non-timely admissibility criteria contained in 10 C.F.R. § 2.309(c). The Majority finds that the confusing e-mail received by Intervenors provides good cause for Intervenors' failure to file on time. I disagree. Intervenors received notification of the availability of the DEIS when they were officially served with a letter of notification concerning this adjudication on April 20, 2010, by the NRC Staff.[112] They then chose to disregard this official notification and instead rely upon an imprecise note contained in an ambiguous e-mail sent by someone not directly involved in this adjudication. I do not consider this to be good cause for nontimely filing.

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[110] *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609-10 (1979).

[111] *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 17 (2010) (quoting 68 Fed. Reg. 55,905, 55,910 (Sept. 29, 2003)).

[112] Letter from James P. Biggins, Counsel for the NRC Staff, U.S. NRC, to the Licensing Board (Apr. 20, 2010) (ADAMS Accession No. ML101100546).

CASE NAME INDEX

BABCOCK & WILCOX NUCLEAR OPERATIONS GROUP, INC.
ENFORCEMENT ACTION; MEMORANDUM AND ORDER (Approving Proposed Settlement Agreement and Dismissing Proceeding); Docket No. 70-27-EA (ASLBP No. 10-902-01-EA-BD01); LBP-10-18, 72 NRC 519 (2010)
CALVERT CLIFFS 3 NUCLEAR PROJECT, LLC
COMBINED LICENSE; ORDER (Ruling on Intervenors' Proposed New Contention 10); Docket No. 52-016-COL (ASLBP No. 09-874-02-COL-BD01); LBP-10-24, 72 NRC 720 (2010)
DAVID GEISEN
ENFORCEMENT; MEMORANDUM AND ORDER; Docket No. IA-05-052; CLI-10-23, 72 NRC 210 (2010)
DOMINION VIRGINIA POWER
COMBINED LICENSE; MEMORANDUM AND ORDER (Rulings on Motion to Dismiss Contention 10 and Proposed New Contention 11); Docket No. 52-017-COL (ASLBP No. 08-863-01-COL); LBP-10-17, 72 NRC 501 (2010)
ENTERGY NUCLEAR GENERATION COMPANY
LICENSE RENEWAL; MEMORANDUM AND ORDER; Docket No. 50-293-LR; CLI-10-22, 72 NRC 202 (2010); CLI-10-28, 72 NRC 553 (2010)
ENTERGY NUCLEAR OPERATIONS, INC.
LICENSE RENEWAL; MEMORANDUM AND ORDER; Docket No. 50-271-LR; CLI-10-17, 72 NRC 1 (2010)
LICENSE RENEWAL; MEMORANDUM AND ORDER; Docket No. 50-293-LR; CLI-10-22, 72 NRC 202 (2010); CLI-10-28, 72 NRC 553 (2010)
LICENSE RENEWAL; MEMORANDUM AND ORDER; Docket Nos. 50-247-LR, 50-286-LR; CLI-10-19, 72 NRC 98 (2010); CLI-10-30, 72 NRC 564 (2010)
LICENSE RENEWAL; MEMORANDUM AND ORDER (Ruling on Motion to Reopen Proffering New Contention); Docket No. 50-271-LR (ASLBP No. 06-849-03-LR); LBP-10-19, 72 NRC 529 (2010)
ENTERGY NUCLEAR VERMONT YANKEE, LLC
LICENSE RENEWAL; MEMORANDUM AND ORDER; Docket No. 50-271-LR; CLI-10-17, 72 NRC 1 (2010)
LICENSE RENEWAL; MEMORANDUM AND ORDER (Ruling on Motion to Reopen Proffering New Contention); Docket No. 50-271-LR (ASLBP No. 06-849-03-LR); LBP-10-19, 72 NRC 529 (2010)
FLORIDA POWER & LIGHT COMPANY
REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket Nos. 50-250, 50-251 (License Nos. DPR-31, DPR-41); DD-10-1, 72 NRC 149 (2010)
IDAHO STATE UNIVERSITY
REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket No. 50-284 (License No. R-110); DD-10-3, 72 NRC 171 (2010)
LUMINANT GENERATION COMPANY, LLC
COMBINED LICENSE; MEMORANDUM AND ORDER; Docket Nos. 52-034-COL, 52-035-COL; CLI-10-25, 72 NRC 469 (2010)
NORTHERN STATES POWER COMPANY
LICENSE RENEWAL; MEMORANDUM AND ORDER; Docket Nos. 50-282-LR, 50-306-LR; CLI-10-27, 72 NRC 481 (2010)

CASE NAME INDEX

REQUEST FOR ACTION; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; Docket Nos. 50-282, 50-306 (License Nos. DPR-42, DPR-60); DD-10-2, 72 NRC 163 (2010)

OLD DOMINION ELECTRIC COOPERATIVE

COMBINED LICENSE; MEMORANDUM AND ORDER (Rulings on Motion to Dismiss Contention 10 and Proposed New Contention 11); Docket No. 52-017-COL (ASLBP No. 08-863-01-COL); LBP-10-17, 72 NRC 501 (2010)

PACIFIC GAS AND ELECTRIC COMPANY

LICENSE RENEWAL; MEMORANDUM AND ORDER (Rulings on Standing, Contention Admissibility, Waiver Petition, and Selection of Hearing Procedures); Docket Nos. 50-275-LR, 50-323-LR (ASLBP No. 10-890-01-LR-BD01); LBP-10-15, 72 NRC 257 (2010)

PA'INA HAWAII, LLC

MATERIALS LICENSE; MEMORANDUM AND ORDER; Docket No. 30-36974-ML (Materials License Application); CLI-10-18, 72 NRC 56 (2010)

POWERTECH (USA), INC.

MATERIALS LICENSE AMENDMENT; MEMORANDUM AND ORDER (Ruling on Petitions to Intervene and Requests for Hearing); Docket No. 40-9075-MLA (ASLBP No. 10-898-02-MLA-BD01); LBP-10-16, 72 NRC 361 (2010)

PROGRESS ENERGY FLORIDA, INC.

COMBINED LICENSE; MEMORANDUM AND ORDER (Denying Motion for Summary Disposition of Contention 8A); Docket Nos. 52-029-COL, 52-030-COL (ASLBP No. 09-879-04-COL-BD01); LBP-10-20, 72 NRC 571 (2010)

COMBINED LICENSE; MEMORANDUM AND ORDER (Granting Motion to Compel Disclosure of Groundwater Modeling Information); Docket Nos. 52-029-COL, 52-030-COL (ASLBP No. 09-879-04-COL-BD01); LBP-10-23, 72 NRC 692 (2010)

SOUTH CAROLINA ELECTRIC & GAS COMPANY

COMBINED LICENSE; MEMORANDUM AND ORDER; Docket Nos. 52-027-COL, 52-028-COL; CLI-10-21, 72 NRC 197 (2010)

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY

COMBINED LICENSE; MEMORANDUM AND ORDER; Docket Nos. 52-027-COL, 52-028-COL; CLI-10-21, 72 NRC 197 (2010)

SOUTH TEXAS PROJECT NUCLEAR OPERATING COMPANY

COMBINED LICENSE; MEMORANDUM AND ORDER; Docket Nos. 52-012-COL, 52-013-COL; CLI-10-24, 72 NRC 451 (2010)

COMBINED LICENSE; MEMORANDUM AND ORDER (Rulings on Motions to Dismiss Contentions 8, 9, 14, 16, 21; Amended Contentions 8 and 21; New Colocation Contentions; and New Main Cooling Reservoir Contentions); Docket Nos. 52-12-COL, 52-13-COL (ASLBP No. 09-885-08-COL-BD01); LBP-10-14, 72 NRC 101 (2010)

SOUTHERN NUCLEAR OPERATING COMPANY

COMBINED LICENSE; MEMORANDUM AND ORDER (Ruling on Request to Admit New Contention); Docket Nos. 52-025-COL, 52-026-COL (ASLBP No. 10-903-01-COL-BD02); LBP-10-21, 72 NRC 616 (2010)

TENNESSEE VALLEY AUTHORITY

CONSTRUCTION PERMIT; MEMORANDUM AND ORDER; Docket Nos. 50-438-CP, 50-439-CP; CLI-10-26, 72 NRC 474 (2010)

OPERATING LICENSE; MEMORANDUM AND ORDER; Docket No. 50-391-OL; CLI-10-29, 72 NRC 556 (2010)

UNISTAR NUCLEAR OPERATING SERVICES, LLC

COMBINED LICENSE; ORDER (Ruling on Intervenors' Proposed New Contention 10); Docket No. 52-016-COL (ASLBP No. 09-874-02-COL-BD01); LBP-10-24, 72 NRC 720 (2010)

U.S. ARMY INSTALLATION COMMAND

MATERIALS LICENSE; MEMORANDUM AND ORDER; Docket No. 40-9083; CLI-10-20, 72 NRC 185 (2010)

CASE NAME INDEX

U.S. DEPARTMENT OF ENERGY
CONSTRUCTION AUTHORIZATION; MEMORANDUM AND ORDER (Deciding Phase I Legal Issues and Denying Rule Waiver Petitions); Docket No. 63-001-HLW (ASLBP No. 09-892-HLW-CAB04); LBP-10-22, 72 NRC 661 (2010)
VIRGINIA ELECTRIC AND POWER COMPANY
COMBINED LICENSE; MEMORANDUM AND ORDER (Rulings on Motion to Dismiss Contention 10 and Proposed New Contention 11); Docket No. 52-017-COL (ASLBP No. 08-863-01-COL); LBP-10-17, 72 NRC 501 (2010)

LEGAL CITATIONS INDEX
CASES

Abbs v. Sullivan, 963 F.2d 918, 924 (7th Cir. 1992)
a winner cannot appeal a judgment; CLI-10-17, 72 NRC 44 n.240 (2010)
Addamax Corp. v. Open Software Foundation, Inc., 148 F.R.D. 462, 467-68 (D. Mass. 1993)
the concept of control extends to situations in which the party has the practical ability to obtain materials in the possession of another, even if the party cannot compel the other person or entity to produce the requested materials; LBP-12-23, 72 NRC 708 n.23 (2010)
Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993)
any doubt as to the existence of a genuine issue of material fact is resolved against the proponent of summary disposition; LBP-10-20, 72 NRC 579 (2010)
because the burden is on the summary disposition movant, the board must examine the record in the light most favorable to the nonmoving party and give the nonmoving party the benefit of all favorable inferences that can be drawn from the evidence; LBP-10-20, 72 NRC 579 (2010)
summary disposition movant bears the burden of demonstrating that there is no genuine issue as to any material fact; LBP-10-20, 72 NRC 579 (2010)
the Commission generally applies the same standard for summary disposition that federal courts apply when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; LBP-10-20, 72 NRC 579 (2010)
Aharon Ben-Haim, CLI-99-14, 49 NRC 361, 364 (1999)
licensing board decisions carry no precedential weight; CLI-10-23, 72 NRC 222 (2010)
on appeal, the Commission is loath to address complaints concerning a board's skepticism of expert witness's testimony, given that the Commission lacks the board's ability to observe the demeanor of the parties' expert witnesses in general and petitioner's witness in particular; CLI-10-17, 72 NRC 46-47 (2010)
Aharon Ben-Haim, CLI-99-14, 49 NRC 361, 364 & n.2 (1999)
licensing board findings of fact that turn on witness credibility receive the Commission's highest deference on appeal; CLI-10-23, 72 NRC 225 n.64 (2010)
Akiak Native Community v. U.S. Postal Service, 213 F.3d 1140, 1148 (9th Cir. 2000)
it is not enough to consider only the proposed action and the no-action alternative in an environmental assessment; CLI-10-18, 72 NRC 84 (2010)
Alabama v. Shalala, 124 F. Supp. 2d 1250, 1263-64 (M.D. Ala. 2000)
when an adjudicating agency retroactively applies a new legal standard that significantly alters the rules of the game, the agency is obliged to give litigants proper notice and a meaningful opportunity to adjust; CLI-10-23, 72 NRC 224 (2010)
Alaska v. Andrus, 580 F.2d 465, 474 (D.C. Cir. 1978), *vacated in part as moot sub nom. Western Oil & Gas Association v. Alaska,* 439 U.S. 922 (1978)
the alternatives analysis is the heart of the environmental impact statement; LBP-10-24, 72 NRC 756 (2010)
Allentown Mack Sales & Service, Inc. v. National Labor Relations Board, 522 U.S. 359, 374 (1998)
if a board does not explain how it has arrived at its findings of fact, it would fail to comply with its responsibilities under the Administrative Procedure Act to issue a reasoned decision; CLI-10-23, 72 NRC 224 n.58 (2010)

LEGAL CITATIONS INDEX

CASES

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-32 (2007)
- even if NEPA required an assessment of the environmental effects of a hypothetical terrorist attack on a nuclear facility, NRC has already made this assessment in the generic environmental Impact statement and a site-specific supplemental environmental impact statement; LBP-10-15, 72 NRC 319 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 468 (2008)
- a license renewal applicant's use of an aging management program identified in the Generic Aging Lessons Learned Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period; CLI-10-17, 72 NRC 19 n.85, 36, 37 (2010); LBP-10-15, 72 NRC 328 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station, CLI-08-23, 68 NRC 461, 476-77, 481-82, 486 (2008)
- the manner in which the Staff conducts its review is outside the scope of a proceeding; LBP-10-17, 72 NRC 512 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 663 (2008)
- cumulative use factor is a means of quantifying the fatigue that a particular metal component experiences during plant operation; CLI-10-17, 72 NRC 5 n.9 (2010)
- for any material, there is a characteristic number of stress cycles that it can withstand at a particular applied stress level before fatigue failure occurs; CLI-10-17, 72 NRC 14 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 664 n.24 (2008)
- some license renewal applicants have sought to satisfy more than one of the three subsections of 10 C.F.R. 54.21(c)(1)(i)-(iii); CLI-10-17, 72 NRC 18 n.79 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 665 (2008)
- the standard review plan presents one acceptable methodology for calculating the environmentally adjusted cumulative usage factor; CLI-10-17, 72 NRC 20 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 675 (2008)
- the Commission is generally disinclined to upset fact-driven licensing board determinations; CLI-10-17, 72 NRC 30 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 676 & n.73 (2008)
- discovery is not permitted before a petition to intervene has been granted; CLI-10-24, 72 NRC 463 n.70 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009)
- as an exercise of its inherent supervisory authority over adjudicatory proceedings, the Commission directs the board to provide the Commission with a status report outlining the board's timetable for resolving all pending matters; CLI-10-18, 72 NRC 96 (2010)
- in the NRC adjudicatory process, the licensing board's principal role is to carefully review all of the evidence, including testimony and exhibits, and to resolve any factual disputes; CLI-10-18, 72 NRC 72 (2010)
- legal questions are reviewed de novo and will be reversed if a licensing board's legal rulings are a departure from or contrary to established law; CLI-10-18, 72 NRC 73 (2010)
- on appeal, the Commission defers to a board's factual findings, correcting only clearly erroneous findings where the Commission has strong reason to believe that a board has overlooked or misunderstood important evidence; CLI-10-18, 72 NRC 73 (2010)
- the standard of clear error for overturning a board's factual findings is quite high; CLI-10-18, 72 NRC 73 (2010)
- weighing of evidence and testimony is inherent in, and at the very heart of, adjudicatory fact-finding and is an area where the Commission has traditionally deferred to licensing boards; CLI-10-23, 72 NRC 241 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009)
- although a board may view petitioner's supporting information in a light favorable to the petitioner, petitioner (not the board) is required to supply all of the required elements for a valid intervention

petition; CLI-10-20, 72 NRC 192 n.39 (2010); LBP-10-15, 72 NRC 278 (2010); LBP-10-16, 72 NRC 394 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-72 (2009)

contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset; CLI-10-27, 72 NRC 496 (2010)

NRC's expanding adjudicatory docket makes it critically important that parties comply with NRC pleading requirements and that the board enforce those requirements; CLI-10-27, 72 NRC 496 (2010)

there simply would be no end to NRC licensing proceedings if petitioners could disregard timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding; CLI-10-27, 72 NRC 496 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188, 199-201 (2006), *aff'd,* CLI-07-8, 65 NRC 124 (2007)

terrorist attacks are outside the scope of NEPA; LBP-10-15, 72 NRC 319 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 744-45 & n.12 (2006)

if a contention meets the 10 C.F.R. 2.309(f)(2) criteria, it is timely and the intervenor proffering the contention need not also make a showing under 10 C.F.R. 2.309(c); LBP-10-14, 72 NRC 108 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 237, 240-44 (2006)

boards have legal authority to reformulate contentions; LBP-10-16, 72 NRC 403 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 253 (2006)

challenges to applicant's corrective action and quality assurance programs are outside the scope of license renewal; LBP-10-15, 72 NRC 327 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC 5, 21 (2008)

as with all contentions of omission, if applicant supplies the missing information or performs the omitted analysis, the contention is moot; LBP-10-14, 72 NRC 109 n.31 (2010)

Anderson v. Bessemer City, 470 U.S. 564, 573-76 (1985)

on appeal, the Commission defers to a board's factual findings, correcting only clearly erroneous findings, i.e., findings not even plausible in light of the record viewed in its entirety; CLI-10-18, 72 NRC 73 (2010)

to show clear error, appellant must demonstrate that the board's findings are not even plausible in light of the record viewed in its entirety; CLI-10-23, 72 NRC 225 (2010)

Andrew Siemaszko, CLI-06-16, 63 NRC 708, 718-19 (2006)

on appeal, the Commission is loath to address complaints concerning a board's skepticism of expert witness testimony, given that the Commission lacks the Board's ability to observe the demeanor of the parties' expert witnesses in general and petitioner's witness in particular; CLI-10-17, 72 NRC 46-47 (2010)

Andrus v. Sierra Club, 442 U.S. 347, 356-58 (1979)

Council on Environmental Quality regulations receive substantial deference from federal courts in interpreting the requirements of NEPA; LBP-10-16, 72 NRC 418 n.275 (2010)

Animal Defense Council v. Hodel, 840 F.2d 1432, 1439 (9th Cir. 1988)

where the information in the initial environmental impact statement is so incomplete or misleading that the decisionmaker and the public cannot make an informed comparison of the alternatives, revision of an EIS may be necessary to provide a reasonable, good-faith, and objective presentation of the subjects required by NEPA; LBP-10-24, 72 NRC 762, 763 (2010)

Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991)

failure to comply with any of the requirements of 10 C.F.R. 2.309(f)(1)(i)-(vi) is grounds for dismissing a contention; LBP-10-21, 72 NRC 651 (2010)

LEGAL CITATIONS INDEX

CASES

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)
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-10-21, 72 NRC 651 (2010)

Arthur Andersen LLP v. United States, 544 U.S. 696, 705 (2005)
concerning criminal guilt, the words "knowledge" and "knowingly" are normally associated with awareness, understanding, or consciousness; CLI-10-23, 72 NRC 223 (2010)

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983)
publication of an environmental impact statement gives the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process and provides a springboard for public comment; LBP-10-24, 72 NRC 763 (2010)

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 99 n.12 (1983)
the Supreme Court has expressly left open the issue of whether Council on Environmental Quality regulations are binding on the NRC; LBP-10-16, 72 NRC 418 n.275 (2010)

Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 342 (1998)
in the interest of efficient case management and prompt resolution of adjudications, the Commission has generally enforced the 10-day deadline for appeals strictly, excusing it only in unavoidable and extreme circumstances; CLI-10-26, 72 NRC 476 (2010)

Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998)
unreviewed board rulings have no precedential effect; CLI-10-29, 72 NRC 563 n.36 (2010); CLI-10-30, 72 NRC 569 (2010)

Bartley v. Isuzu Motors, Ltd., 151 F.R.D. 659, 660-61 (D. Colo. 1993)
computer modeling and all of the inputs, outputs, and software associated with it are within the scope of discovery; LBP-12-23, 72 NRC 704 n.15 (2010)

Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers, 524 F.3d 938, 953 (9th Cir. 2008)
an agency, when preparing an environmental assessment, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decisionmaking process; CLI-10-18, 72 NRC 71, 93 (2010)

Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1213 (9th Cir. 1998)
under the National Environmental Policy Act, general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided; CLI-10-18, 72 NRC 74 (2010)

Board of County Supervisors v. Scottish & York Insurance Services, 763 F.2d 176, 179 (4th Cir. 1985)
issues not decided by special verdict are difficult to decipher for collateral estoppel purposes because of the uncertainty whether the precise issue was actually determined in the prior criminal case; CLI-10-23, 72 NRC 253 n.218 (2010)

Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988)
even when a proposed action does not require preparation of an environmental impact statement, the consideration of alternatives remains critical to the goals of NEPA; CLI-10-18, 72 NRC 75 (2010)

Bonds v. Snapper Power Equipment Co., 935 F.2d 985, 988 (8th Cir. 1991)
the civil law concept of "assumption of risk" requires not merely general knowledge of a risk but also that the risk assumed be specifically known, understood, and appreciated; CLI-10-23, 72 NRC 223 (2010)

Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 (1985)
even if all parties are inclined to waive the tardiness, the board nevertheless is duty-bound to deny a petition on its own initiative unless it is persuaded that, on balance, the lateness factors point in the opposite direction; LBP-10-17, 72 NRC 508 n.21 (2010)

Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 468 n.28 (1985)
because appellant submitted no offer of proof, its case could be so weak that the denial of a right to reply by the licensing board would have been harmless error; CLI-10-23, 72 NRC 246 (2010)

parties taking appeals on purely procedural points are expected to explain precisely what injury to them was occasioned by the asserted error; CLI-10-23, 72 NRC 245 n.175 (2010)

Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915-17 (2009)

in proceedings involving nuclear power reactors, petitioner is presumed to have standing to intervene without the need to specifically plead injury, causation, and redressability if petitioner lives within 50 miles of the proposed facility; LBP-10-15, 72 NRC 276 (2010)

Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 194-95 (2009)

the requirement under 10 C.F.R. 2.309(f)(1)(v) that contentions be supported by alleged facts or expert opinion generally is fulfilled when the sponsor of an otherwise acceptable contention provides a brief recitation of the factors underlying the contention or references to documents and text that provide such reasons; LBP-10-14, 72 NRC 129 (2010)

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 546-48 (1986)

deferral of review of board denial of rule waiver petition did not cause irreparable injury; CLI-10-29, 72 NRC 562 (2010)

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 386 & n.6 (2001), *petition for review denied, Orange County v. NRC,* 47 Fed. App'x 1, 2002 WL 31098379 (D.C. Cir. 2002)

licensing board findings of fact that turn on witness credibility receive the Commission's highest deference on appeal; CLI-10-23, 72 NRC 225 n.64 (2010)

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 31 (1999)

petitioners are not required to demonstrate their asserted injury with certainty at the contention admission stage, or to provide extensive technical studies in support of their standing argument; LBP-10-16, 72 NRC 388 (2010)

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001)

although the Federal Rules of Evidence are not mandated for NRC adjudicatory proceedings, the Commission has endorsed the use of the FRE as guidance for the boards with the express proviso that boards must apply the Part 2 rules with greater flexibility than the FRE; LBP-12-23, 72 NRC 705 (2010)

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609 (1979)

inherent in any forecast of future electric power demands is a substantial margin of uncertainty; LBP-10-24, 72 NRC 748, 749 (2010)

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609-10 (1979)

long-range forecasts for future electric power demands are especially uncertain in that they are affected by trends in usage, increasing rates, demographic changes, industrial growth or decline, and the general state of the economy, among others; LBP-10-24, 72 NRC 776 (2010)

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980)

boards do not direct the Staff in the performance of its administrative functions; LBP-10-17, 72 NRC 513 (2010)

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516-17 (1980)

as an exercise of the Commission's inherent supervisory authority over adjudicatory proceedings, the Commission directs the board to provide the Commission with a status report outlining the board's timetable for resolving all pending matters; CLI-10-18, 72 NRC 96 (2010)

Center for Biological Diversity v. National Highway Traffic Safety Administration, 538 F.3d 1172, 1217-18 (9th Cir. 2008)

the agency must give full and meaningful consideration to all reasonable alternatives under NEPA; CLI-10-18, 72 NRC 75 (2010)

LEGAL CITATIONS INDEX

CASES

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 197 (D.C. Cir. 1991)
if issuing a license involves oversight of a private project rather than a federally sponsored project, the agency is entitled to give the applicant's preferences substantial weight when considering project design alternatives; LBP-10-14, 72 NRC 110 (2010)

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 199 (D.C. Cir. 1990), *cert. denied,* 502 U.S. 994 (1991)
project goals are to be determined by the applicant, not the agency; CLI-10-18, 72 NRC 78-79 (2010)

Citizens Association for Sound Energy v. NRC, 821 F.2d 725, 730 (D.C. Cir. 1987)
administrative regularity in the regulatory process is assumed, and review of the operating license application takes place independently of that associated with plant construction; CLI-10-29, 72 NRC 562 (2010)

Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 344-45, 350 (1st Cir. 2004)
in a Subpart L proceeding, mandatory disclosure is the only form of discovery allowed, and all other forms are expressly prohibited; LBP-12-23, 72 NRC 702 (2010)

Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 351 (1st Cir. 2004)
a party is entitled to conduct such cross-examination as may be required for a full and true disclosure of the facts; LBP-10-15, 72 NRC 343-44 (2010)

Citizens Committee to Save Our Canyons v. U.S. Forest Service, 297 F.3d 1012, 1030 (10th Cir. 2002)
agencies are not allowed to define objectives of a project so narrowly as to preclude a reasonable consideration of alternatives; CLI-10-18, 72 NRC 79 (2010)

City of Cleveland v. Cleveland Electric Illuminating Co., 538 F. Supp. 1257, 1267 (N.D. Ohio 1980)
where expert reports are predicated upon complex data, calculations, and computer simulations that are neither discernible nor deducible from the written reports themselves, disclosure thereof is essential to the effective and efficient examination of the experts at trial; LBP-12-23, 72 NRC 704 n.15 (2010)

Clarkco Landfill Co. v. Clark City Solid Waste Management District, 20 F. Supp. 2d 1185, 1191 (S.D. Ohio 1998)
mere experience or background in a relevant technical field does not imply knowledge of the specific disputed facts in a case; CLI-10-22, 72 NRC 206 (2010)

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)
standing requires that petitioner allege a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; LBP-10-16, 72 NRC 380 (2010)
where a facility will not be located within an Indian tribes boundaries, the tribe must meet the standing requirements imposed by 10 C.F.R. 2.309(d)(1); LBP-10-16, 72 NRC 390-91 (2010)

Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162, 1172 (10th Cir. 1999)
the test of compliance with NEPA and 40 C.F.R. 1502.22 is whether the analysis constitutes a reasonable, good-faith presentation of the best information available under the circumstances; LBP-10-15, 72 NRC 286 (2010)

Comeau v. Rupp, 810 F. Supp. 1127, 1166 (D. Kan. 1992)
control comprehends the right, authority, or ability to obtain the documents; LBP-12-23, 72 NRC 708 n.23 (2010)

Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 250-51 (1986)
the board is obliged to evaluate the timeliness of a proposed contention even if no party raises the issue; LBP-10-17, 72 NRC 508 (2010)

Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1614-16 (1984)
deferral of review of board denial of rule waiver petition did not cause irreparable injury; CLI-10-29, 72 NRC 562 (2010)

Commonwealth Edison Co. (LaSalle County Nuclear Power Station, Units 1 and 2), CLI-73-8, 6 AEC 169, 170 (1973)
diligent, even aggressive, probing for weaknesses in a witness's or counsel's position may be necessary if presiding officers are to fulfill their duty to develop an adequate record that will contribute to informed decisionmaking; CLI-10-17, 72 NRC 47 (2010)

LEGAL CITATIONS INDEX

CASES

Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 469 (1974)
in licensing proceedings, protective orders provide an effective means for safeguarding proprietary information, where the party seeking discovery is not a competitor; CLI-10-24, 72 NRC 463 n.74 (2010)
withholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect a proprietary document; CLI-10-24, 72 NRC 463 n.74 (2010)

Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-222, 8 AEC 229, 235, *aff'd in part on other grounds,* CLI-74-35, 8 AEC 374 (1974)
Congress considers the Atomic Safety and Licensing Board to be a panel of experts; CLI-10-17, 72 NRC 49 (2010)

Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-222, 8 AEC 229, 236-37, *aff'd in part on other grounds,* CLI-74-35, 8 AEC 374 (1974)
diligent, even aggressive, probing for weaknesses in a witness's or counsel's position may be necessary if presiding officers are to fulfill their duty to develop an adequate record that will contribute to informed decisionmaking; CLI-10-17, 72 NRC 47 (2010)

Commonwealth Edison Co. (Zion Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000)
burden is on petitioner to allege a specific and plausible means by which contaminants from mining activities may adversely affect him or her; LBP-10-16, 72 NRC 384 (2010)

Communities, Inc. v. Busey, 956 F.2d 619, 626 (6th Cir. 1992)
NEPA requirements are tempered by a practical rule of reason; CLI-10-22, 72 NRC 208 (2010)
NEPA requires NRC to provide a reasonable mitigation alternatives analysis, containing reasonable estimates, including full disclosures of any known shortcomings in methodology, incomplete or unavailable information, and significant uncertainties; CLI-10-22, 72 NRC 209 (2010)

Consolidated Edison Co. of New York (Indian Point, Unit 2), CLI-85-6, 21 NRC 1043, 1084 (1985)
although the Federal Rules of Evidence are not mandated for NRC adjudicatory proceedings, the Commission has endorsed the use of the FRE as guidance for the boards with the express proviso that boards must apply the Part 2 rules with greater flexibility than the FRE; LBP-12-23, 72 NRC 705-06 (2010)

Consolidated Edison Co. of New York (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 227 (2001)
petitioners sought access to an unredacted version of the license transfer application in order to obtain confidential financial information relevant to the expected costs of the plant's operation and maintenance that had been redacted; CLI-10-24, 72 NRC 466 (2010)

Consolidated Edison Co. of New York (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 228-29 (2001)
licensing adjudication will not be held in abeyance pending completion of a related NRC enforcement action; CLI-10-17, 72 NRC 10 (2010)

Consolidated Edison Co. of New York (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 230 (2001)
petitioners asserted that they needed access to confidential commercial and financial information because without it they would be unable to submit sufficiently specific and supported contentions regarding the applicant's financial qualifications; CLI-10-24, 72 NRC 466 (2010)

Consolidated Edison Co. of New York (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 230-31 (2001)
upon a showing of need, petitioners' request to obtain access to an unredacted application was granted; CLI-10-24, 72 NRC 466 (2010)

Consolidated Edison Co. of New York (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 132-33 & nn.17-18 (2001)
the Commission disapproves of incorporation by reference in petitions for review, where it has the effect of bypassing the page limits set forth in NRC regulations; CLI-10-17, 72 NRC 45-46 n.247 (2010)

Consumers Energy Co. (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007)
an individual petitioner may not request to intervene in his or her own right while simultaneously authorizing other petitioners to represent his or her interests in the proceeding; LBP-10-16, 72 NRC 390 (2010)
in cases involving ISL uranium mining and other source materials licensing, petitioner must demonstrate injury, causation, and redressability because proximity to the proposed facility alone is not adequate to demonstrate standing; LBP-10-16, 72 NRC 384 (2010)

LEGAL CITATIONS INDEX

CASES

Consumers Energy Co. (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-21, 65 NRC 519, 522 (2007)
petitioners must seek leave to request reconsideration of a decision and set forth compelling circumstances that petitioners could not reasonably have anticipated and that would render the decision invalid; CLI-10-21, 72 NRC 201 n.15 (2010)
Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 408-09 (2007)
an organization seeking to establish representational standing must show that at least one of its members may be affected by the proceeding; LBP-10-16, 72 NRC 389-90 (2010)
Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007)
an organization must identify its authorizing member and show that the member has authorized the organization to represent him or her and request a hearing on his or her behalf; LBP-10-16, 72 NRC 390 (2010)
Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162 (1978)
if a board on remand were to rule in petitioners' favor regarding the admissibility of one contention, then the board should also reconsider its prior ruling that related contentions were admissible; CLI-10-21, 72 NRC 199 (2010)
Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-684, 16 NRC 162, 165 n.3 (1982)
only in truly extraordinary and unanticipated circumstances are late filings to be accepted; LBP-10-21, 72 NRC 637 (2010)
Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-72-29, 5 AEC 142, 143 (1972)
although the phrase "possession, custody, or control," is used, no relevant interpretation or construction of the phrase, or of the term control, is provided; LBP-12-23, 72 NRC 706 (2010)
Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009)
the Commission defers to a licensing board's rulings on contention admissibility unless an appeal points to an error of law or abuse of discretion; CLI-10-21, 72 NRC 200 (2010)
Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 343 (2009)
petitioner must make a fresh standing demonstration in each individual proceeding in which intervention is sought; LBP-10-21, 72 NRC 640 (2010)
Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 345 (2009)
a board's determination of standing 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-10-16, 72 NRC 382 (2010)
if none of the individuals in a materials licensing proceeding claims to live on or immediately adjacent to a proposed mining site, the board must determine whether petitioners have presented sufficient evidence to establish that a plausible pathway exists through which contaminants could migrate from the proposed mining site to the petitioners' water sources; LBP-10-16, 72 NRC 385 (2010)
Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 348-51 (2009)
Indian tribe's contention regarding compliance with the National Historic Preservation Act consultation requirements was not ripe for litigation; LBP-10-16, 72 NRC 419, 420, 421 (2010)
Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 351 (2009)
a tribe is free to file a contention later on in the proceeding if, after Staff releases its environmental documents, the tribe believes that the Staff has failed to satisfy its obligations under NEPA and the National Historic Preservation Act; LBP-10-16, 72 NRC 422, 440 (2010)
Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 356 (2009)
contention is rejected as lacking support for the premise that ongoing mining operations will drain or contaminate wetlands, such that their economic benefits will be decreased; LBP-10-16, 72 NRC 400 (2010)

LEGAL CITATIONS INDEX

CASES

Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 363-64 (2009)
board admission of late-filed contention was reversed because petitioners failed to support their fundamental premise that applicant's licensed activities have exposed petitioners and others to a toxic substance; CLI-10-20, 72 NRC 194 n.49 (2010)
Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 NRC 691, 730 (2008)
the board found the practice of incorporating by reference contrary to Commission case law and denied contentions on the basis on the dearth of information; LBP-10-16, 72 NRC 397 (2010)
Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549 (2009)
petitioner demonstrated good cause for its late filing; LBP-10-24, 72 NRC 731 (2010)
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 set out in 10 C.F.R. 2.309(c); LBP-10-24, 72 NRC 731, 769 (2010)
licensing boards and the Commission have considered the late-filing criteria even in cases where the factors were not fully addressed by petitioners and/or the NRC Staff or were not addressed at all; LBP-10-24, 72 NRC 743 (2010)
Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552 (2009)
licensing boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; LBP-10-14, 72 NRC 127 n.171 (2010)
to ensure a more efficient proceeding, the board merges two contentions; LBP-10-16, 72 NRC 406 (2010)
Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552-53 (2009)
boards have legal authority to reformulate contentions; LBP-10-16, 72 NRC 403 (2010)
Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552-54 (2009)
where the Commission found that the board did not provide clarity on the scope of admitted contentions, it exercised its authority to reformulate the contentions; CLI-10-18, 72 NRC 87 (2010)
Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009)
boards are authorized to hold prehearing conferences to simplify or clarify the issues for hearing, after which they may admit a revised contention, as long as the revised contention does not add material not raised by the intervenor to make it admissible; LBP-10-14, 72 NRC 127 n.171 (2010)
Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 566 (2009)
petitioner is free to file a contention later on in the proceeding if, after Staff releases its environmental documents, petitioner believes that the Staff has failed to satisfy its obligations under NEPA and the National Historic Preservation Act; LBP-10-16, 72 NRC 440 (2010)
Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 572 (2009)
mandatory disclosures, which apply to Subpart L proceedings, are wide-reaching; LBP-12-23, 72 NRC 701 (2010)
Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 573 (2009)
a board abused its discretion in reformulating and admitting contentions; LBP-10-16, 72 NRC 397 (2010)
Crow Butte Resources, Inc. (North Trend Expansion Project), LBP-08-6, 67 NRC 241, 278 (2008), *aff'd,* CLI-09-12, 69 NRC 535 (2009)
boards should afford greater latitude to a pleading submitted by a *pro se* petitioner; CLI-10-20, 72 NRC 189 (2010)
Crow Butte Resources, Inc. (North Trend Expansion Project), LBP-08-6, 67 NRC 241, 280 (2008)
petitioner is not required to go further at the threshold contention admission stage to establish injury in fact; LBP-10-16, 72 NRC 388 (2010)
Crow Creek Sioux Tribe v. Brownlee, 331 F.3d 912, 916 (D.C. Cir. 2003)
an Indian tribe does not have standing merely because it has statutory rights in burial remains and cultural artifacts, but rather, the tribe must show some actual or imminent injury; LBP-10-16, 72 NRC 392 n.112 (2010)
Cumis Insurance Society, Inc. v. South-Coast Bank, 610 F. Supp. 193, 196 (N.D. Ind. 1985)
the phrase "possession, custody, or control" is in the disjunctive, and only one of the enumerated requirements need be met; LBP-12-23, 72 NRC 707 (2010)

LEGAL CITATIONS INDEX

CASES

Curators of the University of Missouri (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395 (1995)
license applications may be modified or improved during the NRC review process; LBP-10-17, 72 NRC 514 (2010)

David Geisen, CLI-06-19, 64 NRC 9, 11 (2006)
the question whether to hold an NRC enforcement proceeding in abeyance pending a related criminal prosecution is generally suitable for interlocutory Commission review because, unlike most interlocutory questions, the abeyance issue cannot await the end of the proceeding (it becomes moot); CLI-10-29, 72 NRC 561 n.32 (2010)

Department of Transportation v. Public Citizen, 541 U.S. 752, 757 (2004)
Council on Environmental Quality regulations receive substantial deference from federal courts in interpreting the requirements of NEPA; LBP-10-16, 72 NRC 418 n.275 (2010)

Department of Transportation v. Public Citizen, 541 U.S. 752, 765 (2004)
primary obligation to satisfy the requirements of NEPA rests on the agency; CLI-10-18, 72 NRC 82 (2010)

Desert Palace v. Costa, 539 U.S. 90, 99-100 (2003)
plaintiff may prove his case by direct or circumstantial evidence; CLI-10-23, 72 NRC 242 n.157 (2010)

Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-470, 7 NRC 473, 474-75 (1978)
economic impact of a proposed action on ratepayers is outside the scope of a NEPA analysis; LBP-10-14, 72 NRC 126 (2010)

Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936 (1974)
even if offsite construction does not appear to be part of the plan, it does not follow that offsite consequences need not be considered; CLI-10-18, 72 NRC 91 (2010)

Doe v. United States Postal Service, 317 F.3d 339, 343 (D.C. Cir. 2003)
the court draws no distinction between the probative value of direct and circumstantial evidence; CLI-10-23, 72 NRC 242 n.157 (2010)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003)
rules on contention admissibility are strict by design; LBP-10-15, 72 NRC 278 (2010); LBP-10-16, 72 NRC 394 (2010)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367, 370 n.10 (2002)
appellate briefs *amicus curiae* are welcome from parties in other Commission adjudications that have presented similar issues; CLI-10-17, 72 NRC 6 n.16 (2010)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 233 (2008)
rules on contention admissibility are strict by design; LBP-10-15, 72 NRC 278 (2010)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120-21 (2009)
the Commission's referral of a motion to reopen to the ASLBP and subsequent establishment of the board gives the board jurisdiction over the motion; LBP-10-21, 72 NRC 642 n.11 (2010)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120-21, 124-25 (2009)
petitioners seeking to introduce new contentions after the board has denied their initial petition to intervene need to address the reopening standards; LBP-10-21, 72 NRC 642-43 (2010)
when the contested portion of a proceeding has been terminated following an unchallenged merits determination in favor of applicant regarding the proceeding's sole admitted contention, the board's focus must be on the requirements applicable to reopening a closed record set out in 10 C.F.R. 2.326; LBP-10-21, 72 NRC 644 (2010)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 123 n.39 (2009)
contentions that inappropriately focus on Staff's review of the application rather than on the errors and omissions of the application itself are inadmissible; CLI-10-27, 72 NRC 493 (2010)

LEGAL CITATIONS INDEX

CASES

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 124 (2009)
extended power uprate proceeding that has been terminated may not be reopened; CLI-10-17, 72 NRC 10-11 n.37 (2010)
when petitioner seeks to introduce a new contention after the record has been closed, it should address the reopening standards contemporaneously with a late-filed intervention petition, which must satisfy the standards for both contention admissibility and late filing; LBP-10-21, 72 NRC 643 (2010)
Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009)
to show good cause for the late filing of a contention, petitioner must show that the information on which the new contention is based was not reasonably available to the public, not merely that the petitioner recently found out about it; CLI-10-27, 72 NRC 496 n.70 (2010)
Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001)
rules on contention admissibility are strict by design; LBP-10-15, 72 NRC 278 (2010)
Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358-59 (2001)
rules on contention admissibility are strict by design; LBP-10-16, 72 NRC 394 (2010)
Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365-67 (2001)
a relatively high threshold exits for the admission of contentions alleging that applicant or its management lack integrity or are guilty of improprieties such that the license being sought should not be granted; LBP-10-15, 72 NRC 337 (2010)
historical actions by an applicant are not relevant to its current fitness unless there is some direct and obvious relationship between the asserted character issues and the licensing action in dispute; CLI-10-20, 72 NRC 194 n.48 (2010)
Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004)
failure to comply with any of the contention pleading requirements is grounds for rejecting a contention; LBP-10-15, 72 NRC 278 (2010); LBP-10-16, 72 NRC 395 (2010)
Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 637-38 (2004)
license renewal proceedings focus on the potential impacts of an additional 20 years of nuclear power plant operation, not on everyday operational issues; CLI-10-27, 72 NRC 492 (2010)
Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 638 (2004)
license renewal review does not focus on aging-related issues that are effectively addressed and maintained by ongoing agency oversight, review, and enforcement; CLI-10-27, 72 NRC 492 (2010)
Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 641 n.40 (2004)
the Commission disapproves of incorporation by reference in petitions for review, where it has the effect of bypassing the page limits set forth in NRC regulations; CLI-10-17, 72 NRC 45-46 n.247 (2010)
Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005)
the Commission has set forth a four-part test for grant of a rule waiver, and all four factors must be met; LBP-10-22, 72 NRC 688 (2010)
the conditions for grant of an exemption from or waiver of a rule are described; LBP-10-15, 72 NRC 279, 297, 303 (2010)
Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560 (2005)
in the context of a NEPA analysis, the question of whether application of a regulation would serve the purposes for which the rule or regulation was adopted can be addressed by examining the continued viability of the environmental analysis on which the regulation is based; LBP-10-15, 72 NRC 301 (2010)

petitioner has made a prima facie showing that the special circumstances that are the basis of the waiver request are unique to the facility rather than common to a large class of facilities; LBP-10-15, 72 NRC 304 (2010)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 35-36 (2006)

once a licensing board has concluded board action on a licensing case, jurisdiction to decide a motion to reopen regarding that proceeding passes to the Commission, which retains jurisdiction until the license in question has been issued; LBP-10-21, 72 NRC 642 n.11 (2010)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 89 & n.26 (2004)

it is a settled rule of practice that contentions ought to be interpreted in light of the required specificity, so that adjudicators and parties need not search out broader meanings than were clearly intended; LBP-10-16, 72 NRC 398 n.153 (2010)

Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 228-29 (2007)

a rule of reason applies to the assessment of the adequacy of a NEPA analysis; CLI-10-18, 72 NRC 74 (2010)

Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 265 (2004)

although a licensing board does not decide the merits or resolve conflicting evidence at the contention admissibility stage, materials cited as the basis for a contention are subject to scrutiny by the board to determine whether they actually support the facts alleged; LBP-10-24, 72 NRC 750 (2010)

Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 270 (2004)

absent a showing of special circumstances under 10 C.F.R. 2.335(b), challenges to regulations must be addressed through Commission rulemaking; LBP-10-16, 72 NRC 438 (2010)

Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 271, 276 (2004)

boards have legal authority to reformulate contentions; LBP-10-16, 72 NRC 403 (2010)

Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399-401 (2001), *reconsideration denied,* CLI-02-2, 55 NRC 5 (2002)

the Commission generally declines to hold proceedings in abeyance pending the outcome of other Commission actions or adjudications; CLI-10-17, 72 NRC 10 n.36 (2010)

Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 400 (2001), *reconsideration denied,* CLI-02-2, 55 NRC 5 (2002)

there is no reason to postpone the MOX fuel proceeding which will require resolution of many issues having nothing to do with terrorism; CLI-10-17, 72 NRC 10 n.34 (2010)

Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 67, 73 (2004)

a board's determination on a request for access to sensitive unclassified nonsafeguards information is reviewed de novo; CLI-10-24, 72 NRC 461 (2010)

Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 71 (2004)

review at the end of the case would be meaningless because the Commission cannot later, on appeal from a final board decision, rectify an erroneous disclosure order; CLI-10-29, 72 NRC 561 n.32 (2010)

Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004)

although the Federal Rules of Evidence are not mandated for NRC adjudicatory proceedings, the Commission has endorsed the use of the FRE as guidance for licensing boards; LBP-12-23, 72 NRC 705 (2010)

licensing boards normally have considerable discretion in making evidentiary rulings; CLI-10-18, 72 NRC 73 (2010)

the abuse of discretion standard properly applies to a board evidentiary ruling regarding expert qualification; CLI-10-24, 72 NRC 461 n.65 (2010)

the standard of review on appeal is abuse of discretion; CLI-10-24, 72 NRC 461 (2010)

LEGAL CITATIONS INDEX

CASES

Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27, 31 (2004)
a board's determination on a request for access to sensitive unclassified nonsafeguards information is reviewed *de novo*; CLI-10-24, 72 NRC 461 (2010)

Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 31 (2004)
for an issue involving access to safeguards information, the stated Commission practice is to review such issues closely; CLI-10-24, 72 NRC 461 n.65 (2010)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 212 (2001)
the scope of a license renewal proceeding under 10 C.F.R. Part 54 encompasses 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 time-limited aging analyses; CLI-10-17, 72 NRC 16 (2010)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 389-91 (2001)
the Commission generally declines to hold proceedings in abeyance pending the outcome of other Commission actions or adjudications; CLI-10-17, 72 NRC 10 n.36 (2010)

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)
severe accident mitigation alternatives are rooted in a cost-benefit assessment, the purpose of which is to identify plant changes whose costs would be less than their benefit, i.e., the potential for significantly improving severe accident safety performance; LBP-10-14, 72 NRC 127 n.171 (2010)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 9-10 (2002)
at the contention admissibility stage, intervenors are not required, under the rubric of materiality, to run a sensitivity analysis and/or to prove that alleged defects would change the result; LBP-10-14, 72 NRC 128 n.182 (2010)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 12 (2002)
the Commission is unwilling to throw open its hearing doors to petitioners who have done little in the way of research or analysis, provide no expert opinion, and rest merely on unsupported conclusions; LBP-10-15, 72 NRC 320 (2010)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382 (2002)
a contention challenging an applicant's environmental report can be superseded by the subsequent issuance of licensing-related documents, whether a draft environmental impact statement or an applicant's response to a request for additional information; LBP-10-14, 72 NRC 108, 112 (2010)
where a contention is superseded by the subsequent issuance of licensing-related documents, the contention must be disposed of or modified; LBP-10-17, 72 NRC 507 (2010)

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)
the Commission distinguishes 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; LBP-10-14, 72 NRC 108-09 (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)
if a contention of omission becomed moot because the missing information has been supplied by applicant or considered by Staff in a draft EIS, intervenors must timely file a new or amended contention in order to raise specific challenges regarding the new information; LBP-10-14, 72 NRC 109, 136 (2010)
if applicant cures the omission on which a contention is based, the contention will become moot; LBP-10-14, 72 NRC 109, 136 (2010); LBP-10-16, 72 NRC 395 (2010)

LEGAL CITATIONS INDEX

CASES

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002)
petitioner has an iron-clad obligation to examine the publicly available documentary material with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention; CLI-10-27, 72 NRC 496 (2010)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003)
a listing of issues with which petitioners disagree with the application is the form of notice pleading that the Commission has long held is insufficient; LBP-10-16, 72 NRC 414 (2010)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334-35 (1999)
rules on contention admissibility are strict by design; LBP-10-15, 72 NRC 278 (2010); LBP-10-16, 72 NRC 394 (2010)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 343 (1999)
in the area of waste storage, the Commission largely has chosen to proceed generically through the rulemaking process instead of litigating issues case-by-case in adjudicatory proceedings; CLI-10-19, 72 NRC 99 (2010)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999)
if petitioners or intervenors are dissatisfied with NRC's generic approach to a problem, their remedy lies in the rulemaking process, not in adjudication; CLI-10-19, 72 NRC 100 (2010)
under longstanding NRC policy, licensing boards should not accept in individual license proceedings contentions that are or are about to become the subject of general rulemaking by the Commission; CLI-10-19, 72 NRC 100 (2010)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 346 (1999)
it would be counterproductive and contrary to longstanding agency policy to initiate litigation on an issue that by all accounts very soon will be resolved generically; CLI-10-19, 72 NRC 100 (2010)

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985)
scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-10-17, 72 NRC 511 (2010)

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1043 (1983)
the unavailability of documents does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner; CLI-10-27, 72 NRC 496 n.69 (2010)

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983)
adequacy of NRC's environmental review as reflected in the adequacy of an environmental impact statement is an appropriate issue for litigation in a licensing proceeding; LBP-10-24, 72 NRC 746 (2010)

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983)
a contention challenging an applicant's environmental report can be superseded by the subsequent issuance of licensing-related documents, whether a draft environmental impact statement or an applicant's response to a request for additional information; LBP-10-14, 72 NRC 108 (2010)
where a contention is superseded by the subsequent issuance of licensing-related documents the contention must be disposed of or modified; LBP-10-17, 72 NRC 507 (2010)

Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982)
although the Federal Rules of Evidence are not mandated for NRC adjudicatory proceedings, the Commission has endorsed the use of the FRE as guidance for the boards with the express proviso that boards must apply the Part 2 rules with greater flexibility than the FRE; LBP-12-23, 72 NRC 705-06 (2010)
an abuse of discretion standard is applied to Commission review of decisions on evidentiary questions; CLI-10-18, 72 NRC 73 (2010)
licensing boards normally have considerable discretion in making evidentiary rulings; CLI-10-18, 72 NRC 73 (2010)

LEGAL CITATIONS INDEX

CASES

Duncan's Point Lot Owners Association, Inc. v. Federal Energy Regulatory Commission, 522 F.3d 371 (D.D.C. 2008)
tribes that have addressed procedural violations of the National Historic Preservation Act have uniformly been granted standing under the relaxed standard and have proceeded directly to the merits of the NHPA claim; LBP-10-16, 72 NRC 393 n.123 (2010)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 35 (2008)
the mere potential for legal error in a contention admissibility decision is not a ground for interlocutory review; CLI-10-30, 72 NRC 568 (2010)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010)
summary disposition rules 2.1205 and 2.710 are substantially similar; LBP-10-20, 72 NRC 579 n.10 (2010)

Energy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315 (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; LBP-10-15, 72 NRC 285 (2010)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 453-56 (2010)
broad-based issues akin to safety culture, such as operational history, quality assurance, quality control, management competence, and human factors, are beyond the bounds of a license renewal proceeding; CLI-10-27, 72 NRC 491 n.47 (2010)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 454 (2010)
the aging management review for license renewal does not focus on all aging-related issues; CLI-10-27, 72 NRC 492 n.53 (2010)
the only safety 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; CLI-10-27, 72 NRC 491 n.47 (2010)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 463 (2010)
the regulatory process continuously reassesses whether there is a need for additional oversight or regulations to protect public health and safety; CLI-10-27, 72 NRC 492 (2010)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 466 (2010)
the Atomic Safety and Licensing Board is considered to be a panel of experts; CLI-10-17, 72 NRC 49-50 n.276 (2010)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 471-75 (2010)
SAMA analyses are not required for the spent fuel storage impacts associated with license renewals; LBP-10-15, 72 NRC 308 (2010)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC 479, 482 (2010)
a listing of issues with which petitioners disagree with the application is the form of notice pleading that the Commission has long held is insufficient; LBP-10-16, 72 NRC 414 (2010)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 288-93 (2006)
although the terms "severe accident," "severe accident mitigation alternatives," and "SAMA" are not defined in NRC's NEPA regulations, the NRC policy documents that originated these terms clearly limit them to nuclear reactors, and do not include spent fuel pools or storage; LBP-10-15, 72 NRC 307 (2010)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 340 (2006)
probabilistic risk assessment is the Commission's accepted and standard practice in severe accident mitigation alternatives analyses; LBP-10-15, 72 NRC 282, 286 (2010)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 341 (2006)
boards have legal authority to reformulate contentions; LBP-10-16, 72 NRC 403 (2010)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 356 (2006)
the requirement under 10 C.F.R. 2.309(f)(1)(v) that contentions be supported by alleged facts or expert opinion generally is fulfilled when the sponsor of an otherwise acceptable contention provides a brief recitation of the factors underlying the contention or references to documents and text that provide such reasons; LBP-10-14, 72 NRC 129 (2010)

Entergy Nuclear Operations, Inc. (Big Rock Point Plant), CLI-08-19, 68 NRC 251, 258-59, 266 (2008)
when an organization requests a hearing, it may seek to establish standing either on its own behalf or on behalf of one or more of its members; LBP-10-16, 72 NRC 389 (2010)

LEGAL CITATIONS INDEX

CASES

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 192 (2008)
licensing boards have the authority to regulate the course of the proceeding, and the Commission generally defers to boards on case management decisions; CLI-10-28, 72 NRC 554 (2010)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-08-27, 68 NRC 655, 656 (2008)
licensing board decisions denying a petition for rule waiver generally are not appealable until the board has issued a final decision resolving the case, unless a party seeking review shows that one of the grounds for interlocutory review has been met; CLI-10-29, 72 NRC 560 (2010)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 132, 137 (2009)
because it disfavors piecemeal appeals, the Commission will grant interlocutory review only in extraordinary circumstances; CLI-10-29, 72 NRC 560(2010)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 133 (2009)
interlocutory review is granted only in extraordinary circumstances; CLI-10-30, 72 NRC 568 (2010)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 109-10 (2008)
petitioners fail to explain why more recent information regarding earthquakes would make a material change in the conclusions of the seismic severe accident mitigation alternatives analysis and fail to suggest feasible alternatives to address new risks or estimate costs of additional measures; LBP-10-15, 72 NRC 283 (2010)

Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 263 n.40 (2008)
licensing board decisions carry no precedential weight; CLI-10-23, 72 NRC 222 (2010)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 5 (2007)
interlocutory review is granted where the issues are significant, have potentially broad impact, and may well recur in the likely license renewal proceedings for other plants; CLI-10-27, 72 NRC 489 (2010)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1 (2010)
licensing boards have the authority to regulate the course of the proceeding, and the Commission generally defers to boards on case management decisions; CLI-10-28, 72 NRC 554 (2010)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 692 (2004)
the informal procedural rules of Part 2, Subpart L place greater emphasis and responsibility on the presiding officer to oversee the development of a full and complete record; CLI-10-17, 72 NRC 48 n.264 (2010)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 692-93 (2004)
as NRC hearings have moved away from the traditional trial-type adversarial format and toward a more informal model, the inquisitorial role of the presiding officer necessarily has increased; CLI-10-17, 72 NRC 47-48 (2010)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 704-06 (2004)
Subpart L and Subpart N cannot simultaneously govern license renewal proceedings for materials licensees; LBP-10-15, 72 NRC 344 (2010)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-04-33, 60 NRC 749, 754 (2004)
NRC regulations preserve the right to a hearing when an application is amended by allowing new or amended contentions to be filed in response to material new information; LBP-10-17, 72 NRC 515 (2010)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 (2005)
if a contention meets the 10 C.F.R. 2.309(f)(2) criteria, it is timely and the intervenor proffering the contention need not also make a showing under 10 C.F.R. 2.309(c); LBP-10-14, 72 NRC 108 n.27 (2010)

LEGAL CITATIONS INDEX

CASES

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572-74 (2006)
if a contention meets the 10 C.F.R. 2.309(f)(2) criteria, it is timely and the intervenor proffering the contention need not also make a showing under 10 C.F.R. 2.309(c); LBP-10-14, 72 NRC 108 (2010)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (2006)
submission of a new contention within 30 days of the event giving rise to that contention is timely; LBP-10-17, 72 NRC 509 n.25 (2010)
Entergy Nuclear Vermont Yankee (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 581 (2006)
pro se petitioners are held to less rigid pleading standards, so that parties with a clear but imperfectly stated interest in the proceeding are not excluded; CLI-10-20, 72 NRC 192 (2010)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 149 (2006)
a dispute is not material unless it involves a significant inaccuracy or omission and resolution of the dispute could affect the outcome of the licensing proceeding; LBP-10-14, 72 NRC 117 n.93 (2010)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 201-02 (2006)
in Subpart G proceedings, parties are permitted to propound interrogatories, take depositions, and cross-examine witnesses without leave of the board; LBP-10-15, 72 NRC 343 (2010); LBP-10-16, 72 NRC 442 (2010)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 202 (2006)
the board determines which hearing procedure to use on a contention-by-contention basis; LBP-10-15, 72 NRC 344 (2010)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 265 n.5 (2007)
if a contention meets the 10 C.F.R. 2.309(f)(2) criteria, it is timely and the intervenor proffering the contention need not also make a showing under 10 C.F.R. 2.309(c); LBP-10-14, 72 NRC 108 (2010)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 266 n.11 (2007)
unless a deadline has been specified in the scheduling order for the proceeding, the determination of timeliness is subject to a reasonableness standard that depends on the facts and circumstances of each situation; LBP-10-24, 72 NRC 731, 741 (2010)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 272 (2007)
selection of hearing procedures for contentions at the outset of a proceeding is not immutable because the availability of Subpart G procedures depends critically on whether the credibility of eyewitnesses is important in resolving a contention, and witnesses relevant to each contention are not identified until after contentions are admitted; LBP-10-15, 72 NRC 345 n.99 (2010); LBP-10-16, 72 NRC 443 n.471 (2010)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Plant), LBP-10-19, 72 NRC 529, 545 (2010)
in light of the requirements that any new contention be based on material information that was not previously available, the timeliness determination required under section 2.309(f)(2) and the section 2.326(a) reopening standard can be closely equated; LBP-10-21, 72 NRC 650 (2010)
Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Plant), LBP-10-19, 72 NRC 529, 545-50 (2010)
reopening standards are discussed and analyzed; LBP-10-21, 72 NRC 643 (2010)
Environmental Law and Policy Center v. NRC, 470 F.3d 676, 684 (7th Cir. 2006)
NRC may, consistent with NEPA, define baseload power generation as the purpose of and need for a project; LBP-10-24, 72 NRC 757 n.79 (2010)
Environmental Protection Information Center v. U.S. Forest Service, 451 F.3d 1005, 1016 (9th Cir. 2006)
the obligation of agencies to consider alternatives is a lesser one under an environmental assessment than under an environmental impact statement; CLI-10-18, 72 NRC 75 n.106 (2010)

LEGAL CITATIONS INDEX

CASES

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 805-08 (2005)
consideration of energy efficiency is not a reasonable alternative, where that alternative would not achieve applicant's goal of providing additional power to sell on the open market, and is not possible for an applicant who has no transmission or distribution system of its own, and no link to the ultimate power consumer; CLI-10-21, 72 NRC 199 n.7 (2010)
Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806-08 (2005)
the National Environmental Policy Act's rule of reason excludes consideration of demand-side management if the proposed new plant is intended to be a merchant plant, selling power on the open market, because it is not feasible for licensee to engage in demand-side management; CLI-10-21, 72 NRC 199 (2010)
Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 245, 252 (2004)
boards have legal authority to reformulate contentions; LBP-10-16, 72 NRC 403 (2010)
Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 154 (2005)
as an independent agency, NRC has the authority to promulgate its own regulations implementing NEPA and is only bound by Council on Environmental Quality regulations when the NRC expressly adopts them; LBP-10-16, 72 NRC 437 (2010)
Exelon Generation Co., LLC (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 581 (2005)
if petitioner cannot establish the elements of proximity-based standing, then he must establish standing according to traditional standing principles; CLI-10-20, 72 NRC 189 (2010)
Exxon Corp. v. Train, 554 F.2d 1310, 1312 (5th Cir. 1977)
the Clean Water Act does not authorize regulation of discharges to groundwater and so applicant's environmental report must address those discharges; LBP-10-14, 72 NRC 137 n.238 (2010)
Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)
petitioner's issue will be ruled inadmissible if petitioner has offered no tangible information, no experts, or no substantive affidavits; LBP-10-15, 72 NRC 290 n.34 (2010)
the affidavit must state with particularity the special circumstances alleged to justify the waiver and may involve the assertion of facts, but does not require the assertion of an expert opinion; LBP-10-15, 72 NRC 310 (2010)
Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003)
in the case of unexplained material submitted in support of a contention, the board declines to hunt for information that the agency's procedural rules require be explicitly identified and fully explained; LBP-10-21, 72 NRC 647 (2010)
petitioner has an obligation to explain why cited testimony provides a basis for its contention; LBP-10-17, 72 NRC 510 n.26 (2010)
Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989)
in proceedings involving nuclear power reactors, petitioner is presumed to have standing to intervene without the need to specifically plead injury, causation, and redressability if petitioner lives within 50 miles of the nuclear power reactor; LBP-10-16, 72 NRC 381 (2010)
proximity-based presumption of standing applies in proceedings for nuclear power plant construction permits, operating licenses, or significant amendments thereto; LBP-10-15, 72 NRC 276 (2010); LBP-10-16, 72 NRC 381 n.37 (2010); LBP-10-21, 72 NRC 639 (2010)
Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 530 (1991)
to establish organizational standing, an organization must demonstrate that the action at issue will cause an injury-in-fact to the organization's interests and the injury is within the zone of interests protected by NEPA or the AEA; LBP-10-16, 72 NRC 383 (2010)
Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 240 (1991)
counsel's alleged unfamiliarity with the agency's rules of practice or counsel's asserted busy schedule are not satisfactory explanations for late filings; LBP-10-21, 72 NRC 637 (2010)

unfamiliarity with NRC's Rules of Practice is not sufficient excuse for late filings, particularly where the order that is being challenged expressly advised petitioner of his appellate rights and of the time within which those rights had to be exercised; CLI-10-26, 72 NRC 476 (2010)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000)

to the degree that the general precept that a rule, including a design certification, cannot be challenged in an adjudication might be seen as placing such matters outside the scope of the proceeding; LBP-10-21, 72 NRC 654 n.24 (2010)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8 (2001)

challenges to the current licensing basis are outside the scope of a license renewal proceeding; LBP-10-15, 72 NRC 283 (2010)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 10 (2001)

adjudicatory hearings in individual license renewal proceedings will share the same scope of issues as the NRC Staff review; LBP-10-15, 72 NRC 333, 341 (2010)

perfect compliance by applicant is not required for license renewal; LBP-10-15, 72 NRC 335-36 (2010)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 13 (2001)

in the context of license renewal, the Commission's Atomic Energy Act aging-based safety review under Part 54 does not compromise or limit NEPA; LBP-10-15, 72 NRC 288, 296, 307 n.59 (2010)

the Atomic Energy Act and the National Environmental Policy Act contemplate separate NRC reviews of proposed licensing actions; CLI-10-18, 72 NRC 91 (2010)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 21 (2001)

Part 51 reference to SAMA analyses applies only to nuclear reactor accidents, not to spent fuel storage accidents; LBP-10-15, 72 NRC 295, 307 (2010)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 23, 24 n.18 (2001)

to the extent petitioner believes that NRC Staff has overlooked facts indicating an inadequate safety culture as a matter separate and apart from license renewal, then its remedy is to direct Staff's attention to the supporting facts via a petition for enforcement action; CLI-10-27, 72 NRC 492 (2010)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 24-25 (2001)

petitioner has an iron-clad obligation to examine the publicly available documentary material with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention; CLI-10-27, 72 NRC 496 (2010)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 152 (2001)

Part 54 is confined to issues uniquely relevant to the public health and safety during the period of extended operations; LBP-10-15, 72 NRC 327 (2010)

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 154 (2001)

contentions raising legal issues, like fact-based contentions, must fall within the allowable scope of the proceeding to be admissible; LBP-10-17, 72 NRC 511 (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-10-21, 72 NRC 651 (2010)

Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)

words of a statute must be read in their context and with a view to their place in the overall statutory scheme; LBP-10-20, 72 NRC 610 (2010)

LEGAL CITATIONS INDEX

CASES

Forest Guardians v. U.S. Forest Service, 495 F.3d 1162, 1172 (10th Cir. 2007)
NEPA requires federal agencies to consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-10-24, 72 NRC 729 n.16 (2010)

Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1065 (9th Cir.1998)
existence of reasonable but unexamined alternatives renders an environmental impact statement inadequate; LBP-10-24, 72 NRC 756 (2010)

General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987)
on appeal, the Commission refrains from exercising its authority to make de novo findings of fact in situations where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact; CLI-10-18, 72 NRC 72-73 (2010)
the Commission will not overturn a hearing judge's findings simply because the Commission might have reached a different result; CLI-10-23, 72 NRC 241 n.153 (2010)

Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)
although boards may view petitioner's supporting information in a light favorable to the petitioner, it cannot do so by ignoring our contention admissibility rules, which require petitioner (not the board) to supply all of the required elements for a valid intervention petition; CLI-10-20, 72 NRC 192 n.39 (2010)
an organization may base its standing on either immediate or threatened injury to its organizational interests, or to the interests of identified members; LBP-10-16, 72 NRC 382 n.49 (2010)
in determining whether petitioner has established standing, boards may construe the petition in favor of the petitioner; LBP-10-15, 72 NRC 276 (2010); LBP-10-21, 72 NRC 639-40 (2010)
licensing boards must assess intervention petitions to determine whether elements for standing are met even though if there are no objections to petitioner's standing; LBP-10-21, 72 NRC 639-40 (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; LBP-10-16, 72 NRC 382 n.49 (2010)
to establish organizational standing, an organization must demonstrate that the action at issue will cause an injury-in-fact to the organization's interests and the injury is within the zone of interests protected by NEPA or the AEA; LBP-10-16, 72 NRC 383 (2010)
where a facility will not be located within an Indian tribes boundaries, the tribe must meet the standing requirements imposed by 10 C.F.R. 2.309(d)(1); LBP-10-16, 72 NRC 390-91 (2010)

Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995)
in cases not involving nuclear power reactors, whether petitioner could be affected by the licensing action must be determined on a case-by-case basis, taking into account petitioner's distance from the source, the nature of the licensed activity, and the significance of the radioactive source; CLI-10-20, 72 NRC 188 (2010)

Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 118 (1995)
although the contention admissibility rule imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from applicant to petitioner; LBP-10-24, 72 NRC 756-57 (2010)
for factual disputes, petitioner need not proffer facts in formal affidavit or evidentiary form sufficient to withstand a summary disposition motion; LBP-10-24, 72 NRC 756-57 (2010)
petitioner is not required to prove its case at the contention admission stage; LBP-10-24, 72 NRC 756-57 (2010)
petitioner must present sufficient information to show a genuine dispute reasonably indicating that a further inquiry is appropriate; LBP-10-24, 72 NRC 756-57 (2010)
the level of support necessary for an admissible contention is explained; LBP-10-24, 72 NRC 756-57 (2010)

LEGAL CITATIONS INDEX

CASES

Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 120 (1995)
although applicant's past management practices may help indicate whether a licensee will comply with agency standards, that performance must bear on the licensing action currently under review; LBP-10-15, 72 NRC 330 n.86, 334-45 (2010)
as part of its licensing and oversight responsibilities, the Commission may consider the adequacy of a licensee's corporate organization and the integrity of its management; LBP-10-15, 72 NRC 337 (2010)
Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993)
although applicant's past management practices may help indicate whether a licensee will comply with agency standards, that performance must bear on the licensing action currently under review; LBP-10-15, 72 NRC 329-30 n.86 (2010)
Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 30 (1993)
as part of its licensing and oversight responsibilities, the Commission may consider the adequacy of a licensee's corporate organization and the integrity of its management; LBP-10-15, 72 NRC 337 (2010)
Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993)
a relatively high threshold exits for the admission of contentions alleging that applicant or its management lack integrity or are guilty of improprieties such that the license being sought should not be granted; LBP-10-15, 72 NRC 337 (2010)
Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994)
where the adverse impact of a release would occur now, the alleged harm is immediate for purpose of interlocutory appeal; CLI-10-29, 72 NRC 561 n.32 (2010)
Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-21, 38 NRC 143, 146 (1993)
it is a settled rule of practice that contentions ought to be interpreted in light of the required specificity, so that adjudicators and parties need not search out broader meanings than were clearly intended; LBP-10-16, 72 NRC 398 n.153 (2010)
Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 109 (1979)
to determine whether petitioners have standing, boards accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party; CLI-10-20, 72 NRC 192 n.39 (2010)
Gooden v. Neal, 17 F.3d 925, 935 (7th Cir. 1994)
a winner cannot appeal a judgment; CLI-10-17, 72 NRC 44 (2010)
GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 194 (2000)
an organization asserting representational standing must demonstrate that the interest of at least one of its members will be harmed and the member would have standing in his or her own right, identify that member by name and address, and demonstrate that the organization is authorized to request a hearing on behalf of that member; LBP-10-16, 72 NRC 383 (2010)
GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 204 n.6 (2000)
cursory, unsupported arguments will not be considered; CLI-10-23, 72 NRC 246 n.177 (2010); CLI-10-17, 72 NRC 30-31 n.172 (2010)
GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000)
in the absence of evidence to the contrary, NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises; LBP-10-20, 72 NRC 608 n.1 (2010)
petitioner's issue will be ruled inadmissible if petitioner has offered no tangible information, no experts, or no substantive affidavits; LBP-10-15, 72 NRC 290 n.34 (2010)
unsupported speculation that applicant will contravene NRC rules at some point in the future is not an adequate basis for a contention; LBP-10-15, 72 NRC 327, 328, 335 (2010)
Gray v. Faulkner, 148 F.R.D. 220, 223 (N.D. Ind. 1992)
a party must seek information reasonably available from employees, agents, or others subject to the party's control; LBP-12-23, 72 NRC 708 n.24 (2010)
Green v. Fulton, 157 F.R.D. 136, 142 (D. Me. 1994)
when a party has right, authority, or ability to obtain documents on demand, they will be deemed to be under party's control; LBP-12-23, 72 NRC 707 n.20 (2010)

LEGAL CITATIONS INDEX

CASES

Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994)
although the contention admissibility rule imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from applicant to petitioner; LBP-10-24, 72 NRC 756-57 (2010)
for factual disputes, petitioner need not proffer facts in formal affidavit or evidentiary form sufficient to withstand a summary disposition motion; LBP-10-24, 72 NRC 756-57 (2010)
petitioner is not required to prove its case at the contention admission stage; LBP-10-24, 72 NRC 756-57 (2010)
petitioner must present sufficient information to show a genuine dispute reasonably indicating that a further inquiry is appropriate; LBP-10-24, 72 NRC 756-57 (2010)
the level of support necessary for an admissible contention is explained; LBP-10-24, 72 NRC 756-57 (2010)

Hamm v. Members of Board of Regents of State of Florida, 708 F.2d 647, 651, *reh'g denied,* 715 F.2d 580 (11th Cir. 1983)
friction between the court and counsel, including intemperate and impatient remarks by the judge, does not constitute evidence of personal bias; CLI-10-17, 72 NRC 47 (2010)

Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990)
preservation of Native American cultural traditions is a protected interest under federal law; LBP-10-16, 72 NRC 391 (2010)

Hells Canyon Alliance v. United States Forest Service, 227 F.3d 1170, 1184-85 (9th Cir. 2000)
NEPA requirements are tempered by a practical rule of reason; CLI-10-22, 72 NRC 208 (2010)

Highway J Citizens Group v. Mineta, 349 F.3d 938, 960-61 (7th Cir. 2003)
in considering alternatives under NEPA, an agency is required to address the purpose of the proposed project, reasonable alternatives to the project, and to what extent the agency should explore each particular reasonable alternative; CLI-10-18, 72 NRC 77-78 n.119 (2010)

Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1365-67 (1982)
the disqualification standard under 28 U.S.C. § 455 is not directed to administrative judges, but the Commission and its adjudicatory boards have applied it in assessing a motion for disqualification under 10 C.F.R. 2.313, and it provides a helpful framework for such an assessment; CLI-10-22, 72 NRC 203 (2010)

Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1366 (1982)
extra-record conduct such as stares, glares, and scowls do not constitute evidence of personal bias, nor do occasional outbursts toward counsel; CLI-10-17, 72 NRC 47 (2010)

Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 566 (1979), *aff'd,* ALAB-575, 11 NRC 14 (1980)
collateral estoppel is applicable if the issue sought to be precluded is the same as that involved in the prior action, the issue was actually litigated in a prior action, there is a valid and final judgment in the prior action, and the determination was essential to the prior judgment; CLI-10-23, 72 NRC 249 (2010)

Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996)
the principal goals of an environmental impact statement are to force agencies to take a hard look at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency's decisionmaking process; LBP-10-24, 72 NRC 763 n.86 (2010)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326, 330 (1998)
the Commission does not use procedural technicalities to avoid addressing disqualification motions; CLI-10-17, 72 NRC 45 n.246 (2010)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326, 331 (1998)
the disqualification standard under 28 U.S.C. § 455 is not directed to administrative judges, but the Commission and its adjudicatory boards have applied it in assessing a motion for disqualification

under 10 C.F.R. 2.313, and it provides a helpful framework for such an assessment; CLI-10-22, 72 NRC 203 (2010)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 8 (1999)
section 40.31(h) applies to uranium mills, not to in situ leach facilities; LBP-10-16, 72 NRC 434 (2010)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 9 (1999)
the principal regulatory standards for in situ leach applications are 10 C.F.R. 40.32(c) and (d), which mandate protection of public health and safety; LBP-10-16, 72 NRC 434 (2010)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 240 n.15 (2000)
a surety arrangement is necessary as a prerequisite to operating, not as a prerequisite to licensing; LBP-10-16, 72 NRC 430 (2010)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 269 (1998), *rev'd on other grounds,* CLI-98-16, 48 NRC 119 (1998)
to assert an appropriate injury for organizational standing, an organization must demonstrate a palpable injury in fact to its organizational interests; LBP-10-16, 72 NRC 383 (2010)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998), *rev'd on other grounds,* CLI-98-16, 48 NRC 119 (1998)
to obtain standing, an organization must demonstrate an effect upon its organizational interests or show that at least one of its members would suffer injury as a result of the challenged action, sufficient to confer upon it representational standing; LBP-10-16, 72 NRC 389 (2010)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 272 (1998), *rev'd on other grounds,* CLI-98-16, 48 NRC 119 (1998)
a board's standing analysis must avoid the familiar trap of confusing the standing determination with the assessment of a petitioner's case on the merits; LBP-10-16, 72 NRC 388 (2010)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 275 (1998), *rev'd on other grounds,* CLI-98-16, 48 NRC 119 (1998)
standing can be granted to petitioner in a materials licensing case where that petitioner uses a substantial quantity of water personally or for livestock from a source that is reasonably contiguous to either the injection or processing sites; LBP-10-16, 72 NRC 384 (2010)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 280 (1998), *rev'd on other grounds,* CLI-98-16, 48 NRC 119 (1998)
the organization or format of an application is not germane to license issuance because the objection to the application's organization is not an objection to the licensing action at issue in the proceeding; LBP-10-16, 72 NRC 403 (2010)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-99-1, 49 NRC 29, 33 (1999)
although Part 40 generally applies to in situ leach mining, Appendix A to Part 40, including Criterion 1, was designed to address the problems related to mill tailings and not problems related to injection mining; LBP-10-16, 72 NRC 434 (2010)

Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 5 (2000)
an untimely motion to reopen must demonstrate that the issue raised is not merely significant but exceptionally grave; LBP-10-21, 72 NRC 643 (2010)

Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 44 (2001)
it is inappropriate, perhaps even impossible, for an intervenor to prove at the contention admissibility stage that correcting an error or omission in the environmental report or environmental impact statement would, in fact, change the NRC's ultimate decision; LBP-10-14, 72 NRC 129 n.182 (2010)

Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 53 (2001)
there is no per se regulatory bar that precludes the Staff from using the hearing process to clarify the administrative record supporting its final environmental assessment, and that record, along with any adjudicatory decision, becomes, in effect, part of the final environmental document; CLI-10-18, 72 NRC 68 (2010)

LEGAL CITATIONS INDEX

CASES

Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001)
when reviewing a discrete license application filed by a private applicant, a federal agency may appropriately accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project; CLI-10-18, 72 NRC 78 (2010); LBP-10-14, 72 NRC 110 (2010)

Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-04-33, 60 NRC 581, 596 (2004)
Staff guidance documents are not legally binding, but can be useful in instances where legal authority is lacking; LBP-10-16, 72 NRC 430 n.366 (2010)

Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-04-39, 60 NRC 657, 658 (2004)
licensing boards include two judges with technical expertise; CLI-10-17, 72 NRC 50 n.276 (2010)

Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), LBP-04-3, 59 NRC 84, 88 (2004)
applicant must establish a surety arrangement that ensures sufficient funds will be available for decommissioning and decontamination of an NRC-licensed source materials site; LBP-10-16, 72 NRC 430 (2010)

Hydro Resources, Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-1, 63 NRC 1, 2 (2006)
on appeal, the Commission defers to a board's factual findings, correcting only clearly erroneous findings, i.e., findings not even plausible in light of the record viewed in its entirety; CLI-10-18, 72 NRC 73 (2010)

Hydro Resources, Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-7, 63 NRC 165, 166 (2006)
Commission review is in the public interest if the decision could affect pending and future license renewal determinations; CLI-10-17, 72 NRC 13 (2010)

Hydro Resources, Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-14, 63 NRC 510, 516 (2006)
the plain language of a regulation is controlling; LBP-10-22, 72 NRC 672 n.37 (2010)

Hydro Resources, Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-05-26, 62 NRC 442, 450 (2005)
cultural and historic resources are to be considered as part of the environmental impacts assessment that must be completed; LBP-10-16, 72 NRC 418 (2010)

Hydro Resources, Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-06-19, 64 NRC 53, 62 n.3 (2006)
although NRC gives substantial deference to Council on Environmental Quality regulations, it is not bound to follow them; LBP-10-16, 72 NRC 437 (2010)

'Ilio'ulaokalani Coalition v. Rumsfeld, 464 F.3d 1083, 1092 (9th Cir. 2006)
primary obligation to satisfy the requirements of NEPA rests on the agency; CLI-10-18, 72 NRC 82 (2010)

Illinois Power Co. (Clinton Power Station, Units 1 and 2), ALAB-340, 4 NRC 27, 33-34 (1976)
computer models and associated documentation are within the scope of discovery under NRC regulations; LBP-12-23, 72 NRC 703 (2010)

Illinois Power Co. (Clinton Power Station, Units 1 and 2), ALAB-340, 4 NRC 27, 34 (1976)
intervenor's request that applicant bring to the evidentiary hearing the underlying data on computer models that applicant's expert had used in forecasting lifetime fuel cycle costs covered the source decks, data decks, computer programs, and documentation upon which the models were based; LBP-12-23, 72 NRC 703 (2010)

Illinois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1738 (1981)
although the phrase "possession, custody, or control," is used, no relevant interpretation or construction of the phrase, or of the term control, is provided; LBP-12-23, 72 NRC 706 (2010)

In re Aguinda, 241 F.3d 194, 201 (2d Cir. 2001)
under 28 U.S.C. § 455(a), a showing is required that would cause an objective, disinterested observer fully informed of the underlying facts to entertain significant doubt that justice would be done absent recusal; CLI-10-22, 72 NRC 206 (2010)

In re Aguinda, 241 F.3d 194, 204-05 (2d Cir. 2001)
mere experience or background in a relevant technical field does not imply knowledge of the specific disputed facts in a case; CLI-10-22, 72 NRC 206 (2010)

LEGAL CITATIONS INDEX

CASES

In re Bankers Trust Co., 61 F.3d 465, 469 (6th Cir. 1995)
production of documents is required if the party has practical ability to obtain the documents from another, irrespective of his legal entitlement to the documents; LBP-12-23, 72 NRC 708 n.22 (2010)

In re Domestic Air Transportation Antitrust Litigation, 142 F.R.D. 354, 356-57 (D. Ga. 1992)
defendants were required to request that their employees order a copy of transcripts of their deposition testimony given to a government agency; LBP-12-23, 72 NRC 708 n.23 (2010)

In re Sherwin-Williams Co., 607 F.3d 474, 477 (7th Cir. 2010)
that an unreasonable person, focusing on only one aspect of the story, might perceive a risk of bias is irrelevant; CLI-10-22, 72 NRC 206 (2010)

Indiana Lumbermens Mutual Insurance Co. v. Reinsurance Results, Inc., 513 F.3d 652, 658 (7th Cir.), *cert. denied,* 555 U.S. 884 (2008)
issues may arise about which the presiding judges lack specific expertise, but they use their training, experience, knowledge, and judgment to ask the right questions and reach sound decisions; CLI-10-17, 72 NRC 50 n.277 (2010)

Inquiry into Three Mile Island Unit 2 Leak Rate Data Falsification, LBP-87-15, 25 NRC 671, 783 (1987)
a board's findings regarding a particular witness's knowledge or state of mind generally depend largely on that witness's credibility; CLI-10-23, 72 NRC 226 n.65 (2010)

International Uranium (USA) Corp. (Request for Materials License Amendment), CLI-00-1, 51 NRC 9, 19 (2000)
guidance documents do not create binding legal requirements; CLI-10-24, 72 NRC 467 (2010)

International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 n.1 (1998)
in cases involving ISL uranium mining and other source materials licensing, petitioner must demonstrate injury, causation, and redressability because proximity to the proposed facility alone is not adequate to demonstrate standing; LBP-10-16, 72 NRC 384 (2010)

International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 30 (2001)
petitioner cannot base standing or a contention on the possibility that the licensee will violate the terms of its license; CLI-10-20, 72 NRC 193 n.45 (2010)

International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-02-13, 55 NRC 269, 273 (2002)
boards case management decisions, such as determinations of whether to permit additional slide shows or enlarged exhibits, lie well within the discretion of the board; CLI-10-17, 72 NRC 47 n.254 (2010)
in procedural and scheduling matters, where first-hand contact with and appreciation for all the circumstances surrounding a case are necessary, maximum reliance on the proper discretion of a presiding officer is essential; CLI-10-17, 72 NRC 47 n.255 (2010)

International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-01-8, 53 NRC 204, 207-08 (2001)
pro se petitioners are held to less rigid pleading standards, so that parties with a clear but imperfectly stated interest in the proceeding are not excluded; CLI-10-20, 72 NRC 192 (2010)

Japan Halon Co. v. Great Lakes Chemical Corp., 155 F.R.D. 626, 627 (N.D. Ind. 1993)
in the context of analyzing the "control" issue, Fed. R. Civ. P. 34 is to be liberally construed; LBP-12-23, 72 NRC 707 n.21 (2010)

Johnston v. Davis, 698 F.2d 1088, 1095 (10th Cir. 1983)
where the information in the initial environmental impact statement is so incomplete or misleading that the decisionmaker and the public cannot make an informed comparison of the alternatives, revision of an EIS may be necessary to provide a reasonable, good-faith, and objective presentation of the subjects required by NEPA; LBP-10-24, 72 NRC 762 (2010)

Joseph J. Macktal, CLI-89-14, 30 NRC 85, 91 (1989)
a judge's use of strong language toward a party or in expressing his views on matters before him do not constitute evidence of personal bias; CLI-10-17, 72 NRC 47 (2010)

Joseph J. Macktal, CLI-89-14, 30 NRC 85, 91-92 (1989)
to prevail on a disqualification motion, petitioner must show either a bias against petitioner or its counsel based on matters outside the record or a pervasive bias against petitioner based upon matters in the record; CLI-10-17, 72 NRC 46 n.252 (2010)

LEGAL CITATIONS INDEX

CASES

Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-327, 3 NRC 408, 411, 413 (1976)
certifying a matter involving a board decision directing unrestricted disclosure of a document the applicant claimed to be proprietary is appropriate when the interlocutory discovery order involved must be reviewed immediately or not at all; CLI-10-29, 72 NRC 561 n.32 (2010)

Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 124 (1977)
a filing that was 3 days late, which the board characterized as not excessively late, was accepted based on findings that intervenor offered a reasonable explanation for the delay and the delay did not prejudice any of the other parties; LBP-10-21, 72 NRC 637 (2010)

Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 125 (1977)
in the event of some eleventh hour unforeseen development, a party may tender a document belatedly, but the tender must be accompanied by a motion for leave to file out-of-time which satisfactorily explains not only the reason for the lateness, but also why a motion for an extension of time could not have been seasonably submitted; CLI-10-26, 72 NRC 477 n.17 (2010)

Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 126 (1977)
intervenor's appeal 3 days out of time was accepted when applicants' motion to strike failed to even hint at prejudice; LBP-10-21, 72 NRC 638 n.8 (2010)

Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-77-1, 5 NRC 1, 8 (1977)
even if offsite construction does not appear to be part of the plan, it does not follow that offsite consequences need not be considered; CLI-10-18, 72 NRC 91 (2010)

Kelley v. Selin, 42 F.3d 1501 (6th Cir. 1995)
in the area of waste storage, the Commission largely has chosen to proceed generically through the rulemaking process instead of litigating issues case-by-case in adjudicatory proceedings; CLI-10-19, 72 NRC 99 (2010)

Kelley v. Selin, 42 F.3d 1501, 1507-08 (6th Cir. 1995)
to determine whether petitioners have standing, boards accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party; CLI-10-20, 72 NRC 192 n.39 (2010)

Kelley v. Selin, 42 F.3d 1501, 1508 (6th Cir. 1995)
although boards may view petitioner's supporting information in a light favorable to petitioner, it cannot do so by ignoring contention admissibility rules, which require the petitioner (not the board) to supply all of the required elements for a valid intervention petition; CLI-10-20, 72 NRC 192 n.39 (2010)

Kennedy v. U.S. Construction Co., 545 F.2d 81, 84 n.1 (8th Cir. 1976)
the civil law concept of "assumption of risk" requires not merely general knowledge of a risk but also that the risk assumed be specifically known, understood, and appreciated; CLI-10-23, 72 NRC 223 (2010)

Kenneth G. Pierce (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995)
to show clear error, appellant must demonstrate that the board's findings are not even plausible in light of the record viewed in its entirety; CLI-10-23, 72 NRC 225 (2010)
the fact that the board accorded greater weight to one party's evidence than to the other's is not a basis for overturning the initial decision; CLI-10-23, 72 NRC 225 n.62 (2010)

King v. U.S. Department of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987)
a board's determination on a request for access to sensitive unclassified nonsafeguards information is reviewed *de novo*; CLI-10-24, 72 NRC 461 (2010)

Laguna Greenbelt, Inc. v. U.S. Department of Transportation, 42 F.3d 517, 528 (9th Cir. 1994)
NEPA requires NRC to provide a reasonable mitigation alternatives analysis, containing reasonable estimates, including full disclosures of any known shortcomings in methodology, incomplete or unavailable information and significant uncertainties; CLI-10-22, 72 NRC 209 (2010)

Lambert v. Will Bros. Co., 596 F.2d 799, 802 (8th Cir. 1979)
the civil law concept of "assumption of risk" requires not merely general knowledge of a risk but also that the risk assumed be specifically known, understood, and appreciated; CLI-10-23, 72 NRC 223 (2010)

LEGAL CITATIONS INDEX

CASES

Lands Council v. McNair, 537 F.3d 981, 1001-09 (9th Cir. 2008), *abrogated in part on other grounds by Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7 (2008)
NEPA requires NRC to provide a reasonable mitigation alternatives analysis, containing reasonable estimates, including full disclosures of any known shortcomings in methodology, incomplete or unavailable information and significant uncertainties; CLI-10-22, 72 NRC 209 (2010)

Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 725 (3d Cir. 1989)
NRC has recognized its obligation to comply with NEPA and has promulgated the regulations in Part 51, which govern the consideration of the environmental impact of the licensing and regulatory actions of the agency; LBP-10-16, 72 NRC 437 n.424 (2010)

Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 729-31 (3d Cir. 1989)
the Atomic Energy Act and the National Environmental Policy Act contemplate separate NRC reviews of proposed licensing actions; CLI-10-18, 72 NRC 91 (2010)

Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 739 (3d Cir. 1989)), *vacated on other grounds,* CLI-90-4, 31 NRC 333 (1990)
impacts that are remote and speculative or inconsequentially small need not be examined; LBP-10-14, 72 NRC 110 (2010)

Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 739, 745 (3d Cir. 1989)
NEPA does not require consideration of remote and speculative risks, but there must be a finding that something is remote and speculative to preclude it from further analysis, and there must be support in the agency's record of decision to justify this finding; LBP-10-14, 72 NRC 117 n.91 (2010)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983)
good cause for late filing is the most important factor, and failure to meet this factor considerably enhances the burden of showing that the other factors justify admission of a late-filed petition; LBP-10-21, 72 NRC 648 (2010)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399, 402 (1983)
factors (vii) and (viii) of 10 C.F.R. 2.309(c)(1) are generally considered to have the most significance in the balancing process in instances in which there are no other parties or ongoing related proceedings; LBP-10-21, 72 NRC 648 (2010)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984)
mere demonstration that a board erred is not sufficient to warrant appellate relief, but rather the complaining party must demonstrate actual prejudice, i.e., that the ruling had a substantial effect on the outcome of the proceeding; CLI-10-23, 72 NRC 245 n.175, 247 (2010)
to prevail in a disqualification motion, petitioner first must demonstrate that the purported instances of bias had a substantial impact on the outcome of the proceeding; CLI-10-17, 72 NRC 46 (2010)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1155-56 (1984)
appellant failed to make an offer of proof in connection with any affirmative expert testimony it would have put forward; CLI-10-23, 72 NRC 246 n.180 (2010)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-20, 20 NRC 1061, 1078 n.46 (1984)
the standard for disqualification of a judge under 28 U.S.C. § 455 is whether the reasonable person who knows all the circumstances, would harbor doubts about the judge's impartiality; CLI-10-22, 72 NRC 205 (2010)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 71 (1991)
NRC is not required to consider every imaginable alternative to a proposed action, but rather only reasonable alternatives; LBP-10-14, 72 NRC 110 (2010)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 471 (1991)
abeyance request is denied on the ground that there is nothing before the New York Court of Appeals that is central to the Commissions decisions; CLI-10-17, 72 NRC 10 n.34 (2010)
although a request for suspension of a proceeding does not fit cleanly into NRC procedural rules for stays, the Commission exercises discretion and consider petitioner's request; CLI-10-17, 72 NRC 10 n.32 (2010)

LEGAL CITATIONS INDEX

CASES

Los Angeles v. Lyons, 461 U.S. 95, 105-06 (1983)
standing generally has been denied when the threat of injury is not concrete and particularized; LBP-10-16, 72 NRC 381 (2010)

Louisiana Crawfish Producers Association–West v. Rowan, 463 F.3d 352, 357 n.2 (5th Cir. 2006)
agencies must consider a range of alternatives under NEPA and provide adequate explanation for their rejection; CLI-10-18, 72 NRC 84 (2010)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995)
because it disfavors piecemeal appeals, the Commission will grant interlocutory review only in extraordinary circumstances; CLI-10-29, 72 NRC 560 (2010)
licensing board decisions denying a petition for waiver are interlocutory and not immediately reviewable; CLI-10-29, 72 NRC 560 (2010)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-7, 45 NRC 437, 438-39 (1997)
NRC regulations contemplate *amicus curiae* briefs only after the Commission grants a petition for review, and do not provide for *amicus* briefs supporting or opposing petitions for review; CLI-10-17, 72 NRC 6-7 n.16 (2010)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87 (1998)
the principal goals of an environmental impact statement are to force agencies to take a hard look at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency's decisionmaking process; LBP-10-24, 72 NRC 763 n.86 (2010)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998)
primary obligation to satisfy the requirements of NEPA rests on the agency; CLI-10-18, 72 NRC 82 (2010)
there is no per se regulatory bar that precludes the Staff from using the hearing process to clarify the administrative record supporting its final environmental assessment, and that record, along with any adjudicatory decision, becomes, in effect, part of the final environmental document; CLI-10-18, 72 NRC 68 (2010)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93 (1998)
the Commission will not lightly reverse licensing board factual determinations and will not overturn a board's findings simply because the Commission might have reached a different result; CLI-10-18, 72 NRC 80 (2010)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93-94 (1998)
the Commission will not overturn a hearing judge's findings simply because the Commission might have reached a different result; CLI-10-23, 72 NRC 241 n.153 (2010)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 103 (1998)
the agency has broad discretion to determine how thoroughly it needs to analyze a particular subject for NEPA compliance; LBP-10-14, 72 NRC 110 (2010)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 104 (1998)
an environmental impact statement must include a detailed statement of reasonable alternatives to a proposed action; LBP-10-24, 72 NRC 755 (2010)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205, 212 (1994)
intervenor that has sufficient information to file a NEPA contention but delays that filing until publication of the environmental impact statement does so at its peril; LBP-10-24, 72 NRC 732 (2010)

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005)
an agency can dispense with an examination of these less significant impacts because NEPA requires only an estimate of anticipated, but not unduly speculative, impacts; LBP-10-14, 72 NRC 110 (2010)

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-05-28, 62 NRC 721, 723 (2005)
on appeal, the Commission refrains from exercising its authority to make *de novo* findings of fact in situations where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact; CLI-10-18, 72 NRC 72-73 (2010)

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005)
determination of economic benefits and costs that are tangential to environmental consequences are within a wide area of agency discretion; LBP-10-24, 72 NRC 771 (2010)

NEPA imposes procedural requirements on the NRC to take a hard look at the environmental impacts of building and operating a nuclear reactor; LBP-10-14, 72 NRC 110 (2010)

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-06-15, 63 NRC 687, 697 (2006)
licensing boards include two judges with technical expertise; CLI-10-17, 72 NRC 50 n.276 (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-10-18, 72 NRC 73 (2010)
on appeal, the Commission defers to a board's factual findings, correcting only clearly erroneous findings, i.e., findings not even plausible in light of the record viewed in its entirety; CLI-10-18, 72 NRC 73 (2010)

Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 72 & n.18 (2004)
although the phrase "possession, custody, or control," is used, no relevant interpretation or construction of the phrase, or of the term control, is provided; LBP-12-23, 72 NRC 706 (2010)

Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-06-8, 63 NRC 241, 257 n.14 (2006)
as an independent agency, NRC has the authority to promulgate its own regulations implementing NEPA and is only bound by Council on Environmental Quality regulations when the NRC expressly adopts them; LBP-10-16, 72 NRC 437 (2010)

Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-06-8, 63 NRC 241, 258-59 (2006)
the NEPA hard-look doctrine is subject to a rule of reason that the Commission has interpreted as obligating the agency to consider all reasonable alternatives to the proposed action; LBP-10-14, 72 NRC 110 (2010)

Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983)
mere demonstration that a board erred is not sufficient to warrant appellate relief, but rather the complaining party must demonstrate actual prejudice, i.e., that the ruling had a substantial effect on the outcome of the proceeding; CLI-10-23, 72 NRC 245 n.175 (2010)
to prevail in a disqualification motion, petitioner first must demonstrate that the purported instances of bias had a substantial impact on the outcome of the proceeding; CLI-10-17, 72 NRC 46 (2010)

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)
injury-in-fact is defined as an invasion of a legally protected interest that is concrete and particularized and actual or imminent rather than conjectural or hypothetical; LBP-10-16, 72 NRC 381 (2010)
to establish causation, petitioner must show that there is a causal connection between the injury and the conduct complained of, i.e., the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; LBP-10-16, 72 NRC 382 (2010)

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992)
an injury-in-fact must go beyond generalized grievances to affect a petitioner in a personal and individual way; LBP-10-16, 72 NRC 381 (2010)

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)
to establish standing in federal court, a party must show injury-in-fact, causation, and redressability; LBP-10-16, 72 NRC 380 (2010)

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)
where a facility will not be located within an Indian tribes boundaries, the tribe must meet the standing requirements imposed by 10 C.F.R. 2.309(d)(1); LBP-10-16, 72 NRC 390-91 (2010)

Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992)
a party claiming violations of their procedural right to protect their interests in cultural resources is to be accorded a special status when it comes to standing without meeting all the normal standards for redressability and immediacy; LBP-10-16, 72 NRC 393 (2010)

Lujan v. Defenders of Wildlife, 504 U.S. 555, 572-73 nn.7-8 (1992)
to establish an injury in fact, a party merely has to show some threatened concrete interest personal to the party that the National Historic Preservation Act was designed to protect; LBP-10-16, 72 NRC 393 (2010)

LEGAL CITATIONS INDEX

CASES

Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 n.7 (1992)
someone living adjacent to the site for proposed construction of a federally licensed facility has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the facility will not be completed for many years; LBP-10-24, 72 NRC 763 n.87 (2010)

Luminant Generation Co. (Comanche Peak Nuclear Power Plant, Units 3 and 4), LPB-10-10, 71 NRC 529, 588-89 (2010)
even if intervenor's support is not optimal at this point, it is sufficient 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; LBP-10-24, 72 NRC 765 (2010)

Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1007 (1973), *remanded on other grounds,* CLI-74-2, 7 AEC 2 (1974), *further statement of Appeal Board views,* ALAB-175, 7 AEC 62 (1974), *aff'd sub nom. Citizens for Safe Power v. NRC,* 524 F.2d 1291 (D.C. Cir. 1975)
the cost-benefit analysis involves the scrutiny of many factors, among them, offsetting benefits, available alternatives, and the possible means (and attendant costs) of reducing the environmental harm; LBP-10-24, 72 NRC 746 n.51 (2010)

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989)
NEPA requires federal agencies to consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-10-24, 72 NRC 729 n.16 (2010)

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371-72 (1989)
if new and significant information arises between the issuance of the environmental impact statement and the agency decision, then the agency must revise its EIS and consider such information; LBP-10-15, 72 NRC 304, 305-06 (2010)
when dealing with a request to waive an environmental regulation under 10 C.F.R. 2.335(b), NRC should use the significant new information criterion; LBP-10-15, 72 NRC 301 (2010)

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373-74 (1989)
NRC Staff is obliged under NEPA to supplement its environmental review documents if there is new and significant information; CLI-10-29, 72 NRC 563 (2010)

Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 815, 816 (9th Cir. 1987) *rev'd and remanded on other grounds, Robertson v. Methow Valley Citizens Council,* 490 U.S. 332 (1989), *aff'd on remand,* 879 F.2d 705, 706 (9th Cir. 1989)
although substantial weight is accorded to a license applicant's preferences, if the identified purpose of a proposed project reasonably may be accomplished at locations other than the proposed site, the board may require consideration of those alternative sites; CLI-10-18, 72 NRC 81 n.145 (2010)

Metropolitan Council of NAACP Branches v. Federal Communications Commission, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995)
the disqualification standard under 28 U.S.C. § 455 is not directed to administrative judges, but the Commission and its adjudicatory boards have applied it in assessing a motion for disqualification under 10 C.F.R. 2.313, and it provides a helpful framework for such an assessment; CLI-10-22, 72 NRC 203 (2010)

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982), *rev'd in part on other grounds,* CLI-83-22, 18 NRC 299 (1983)
the adequacy of guidance may be litigated in individual licensing proceedings; CLI-10-17, 72 NRC 32-33 n.185 (2010)

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-807, 21 NRC 1195, 1214 (1985)
protective orders and in camera proceedings are the customary and favored means of handling disputes that arise in which one party to a proceeding seeks purportedly proprietary information from another; CLI-10-24, 72 NRC 463 n.74 (2010)

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-5, 21 NRC 566, 569 (1985)
a judge's use of strong language toward a party or in expressing his views on matters before him do not constitute evidence of personal bias; CLI-10-17, 72 NRC 47 (2010)

LEGAL CITATIONS INDEX

CASES

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-85-30, 22 NRC 332, 396 (1985)
a board's findings regarding a particular witness's knowledge or state of mind depend, as a general rule, largely on that witness's credibility; CLI-10-23, 72 NRC 226 n.65 (2010)

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999)
by considering only a no-action alternative along with two virtually identical alternatives, the agency failed to consider a reasonable range of alternatives under NEPA; CLI-10-18, 72 NRC 84 n.162 (2010)
tribes that have addressed procedural violations of the National Historic Preservation Act have uniformly been granted standing under the relaxed standard and have proceeded directly to the merits of the NHPA claim; LBP-10-16, 72 NRC 393 n.123 (2010)

Naragansett Indian Tribe v. Warwick Sewer Authority, 334 F.3d 161 (1st Cir. 2003)
tribes that have addressed procedural violations of the National Historic Preservation Act have uniformly been granted standing under the relaxed standard and have proceeded directly to the merits of the NHPA claim; LBP-10-16, 72 NRC 393 n.123 (2010)

National Credit Union Administration v. First National Bank, 522 U.S. 479, 492 (1998)
to determine whether an interest is in the zone of interests of a statute, it is necessary first to discern the interests arguably to be protected by the statutory provision at issue and then to inquire whether petitioner's interests affected by the agency action are among them; LBP-10-16, 72 NRC 381 (2010)

National Wildlife Federation v. Andrus, 440 F. Supp. 1245, 1254 (D.D.C. 1977)
where the information in the initial environmental impact statement is so incomplete or misleading that the decisionmaker and the public cannot make an informed comparison of the alternatives, revision of an EIS may be necessary to provide a reasonable, good-faith, and objective presentation of the subjects required by NEPA; LBP-10-24, 72 NRC 762 (2010)

Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1245 (9th Cir. 2005)
it is not enough to consider only the proposed action and the no-action alternative in an environmental assessment; CLI-10-18, 72 NRC 84 (2010)

Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1246 (9th Cir. 2005)
adequacy of the NEPA alternatives analysis is judged on the substance of the alternatives rather than the sheer number of alternatives examined; CLI-10-18, 72 NRC 78 (2010)
as long as all reasonable alternatives have been considered and an appropriate explanation is provided as to why an alternative was eliminated, the regulatory requirement is satisfied; CLI-10-18, 72 NRC 78 (2010)
NRC regulations do not impose a numerical floor on alternatives to be considered; CLI-10-18, 72 NRC 78 (2010)

Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1247 (9th Cir. 2005)
alternatives that do not advance the purpose of the project will not be considered reasonable or appropriate; CLI-10-18, 72 NRC 78 (2010)

Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 22 F.3d 1125, 1134 (D.C. Cir. 1994)
an agency is not authorized to grant conditional approval to plans that do nothing more than promise to do tomorrow what the statute requires today; LBP-10-20, 72 NRC 602 n.36 (2010)

Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972)
the rule of reason is implicit in NEPA's requirement that an agency consider reasonable alternatives to a proposed action; CLI-10-18, 72 NRC 75 (2010)

Natural Resources Defense Council, Inc. v. U.S. Forest Service, 421 F.3d 797, 810-12 (9th Cir. 2005)
where the information in the initial environmental impact statement is so incomplete or misleading that the decisionmaker and the public cannot make an informed comparison of the alternatives, revision of an EIS may be necessary to provide a reasonable, good-faith, and objective presentation of the subjects required by NEPA; LBP-10-24, 72 NRC 762 (2010)

Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998)
under the National Environmental Policy Act, general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided; CLI-10-18, 72 NRC 74 (2010)

LEGAL CITATIONS INDEX

CASES

New England Power Co. (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 278-79 (1978)
boards do not direct the Staff in the performance of its administrative functions; LBP-10-17, 72 NRC 514 (2010)

New Jersey Department of Environmental Protection v. NRC, 561 F.3d 132 (3d Cir. 2009)
terrorist attacks are outside the scope of NEPA; LBP-10-15, 72 NRC 319 (2010)

New Jersey Department of Environmental Protection v. NRC, 561 F.3d 132, 139, 141 (3d Cir. 2009)
effects or impacts of risks that are too remote do not require a NEPA analysis; LBP-10-14, 72 NRC 117 n.91 (2010)

New Jersey Department of Environmental Protection v. NRC, 561 F.3d 132, 143-44 (3d Cir. 2009)
even if NEPA required an assessment of the environmental effects of a hypothetical terrorist attack on a nuclear facility, NRC has already made this assessment in the generic environmental Impact statement and a site-specific supplemental environmental impact statement; LBP-10-15, 72 NRC 319 (2010)

New Jersey Department of Environmental Protection v. NRC, 561 F.3d 132, 144 (3d Cir. 2009)
NEPA requires NRC to provide a reasonable mitigation alternatives analysis, containing reasonable estimates, including full disclosures of any known shortcomings in methodology, incomplete or unavailable information, and significant uncertainties; CLI-10-22, 72 NRC 209 (2010)

New Mexico ex rel. Richardson v. Bureau of Land Management, 565 F.3d 683, 703 (10th Cir. 2009)
NEPA requires federal agencies to consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-10-24, 72 NRC 729 n.16 (2010)

New York v. NRC, 589 F.3d 551 (2d Cir. 2009)
the Commission denied a petition for rulemaking asking it to reevaluate spent fuel storage impacts on a site-specific basis; LBP-10-15, 72 NRC 299 (2010)

New York v. NRC, 589 F.3d 551, 555 (2d Cir. 2009)
NRC required terrorism-related mitigation measures it studied to be implemented at all nuclear plants and site-specific studies demonstrated the effectiveness of those mitigation measures so that no additional plant-specific reviews were necessary; LBP-10-15, 72 NRC 314 (2010)
the standard of review of agency decisions in the Courts of Appeals is extremely deferential; LBP-10-15, 72 NRC 316 n.69 (2010)

Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 352-69 (1975)
the general rule applicable to cases involving differences or changes in demand forecasts is not whether applicant will need additional generating capacity but when; LBP-10-24, 72 NRC 749 (2010)

North Idaho Community Action Network v. U.S. Department of Transportation 545 F.3d 1147, 1153 (9th Cir. 2008)
although analysis provided in an environmental assessment does not have to be as comprehensive as the analysis provided in an environmental impact statement, there must be at least a brief discussion of reasonable alternatives; CLI-10-18, 72 NRC 85 (2010)
the alternatives provision of NEPA § 102(2)(E) applies both when an agency prepares an environmental impact statement and when it prepares an environmental assessment; CLI-10-18, 72 NRC 75 (2010)
to pass legal muster, regardless of whether it was preparing an environmental assessment or an environmental impact statement, Staff had to give full and meaningful consideration to all reasonable alternatives; CLI-10-18, 72 NRC 83 (2010)
when preparing an environmental assessment, the agency only must include a brief discussion of reasonable alternatives; CLI-10-18, 72 NRC 75 (2010)
when preparing an environmental impact statement, the agency must rigorously explore and objectively evaluate all reasonable alternatives; CLI-10-18, 72 NRC 75 (2010)

Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 132 (2000)
cursory, unsupported arguments will not be considered; CLI-10-17, 72 NRC 30-31 n.172 (2010); CLI-10-23, 72 NRC 246 n.177 (2010)

LEGAL CITATIONS INDEX

CASES

Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273, 286-87 (2001)
no rule or 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; LBP-10-14, 72 NRC 119 n.108 (2010)

Northern States Power Co. (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 316 (1989)
it would be detrimental to the process to have a person appear in the proceeding individually and to be represented by an organization; LBP-10-16, 72 NRC 390 n.98 (2010)

Novartis Corp. v. Ben Venue Laboratories, Inc., 271 F.3d 1043, 1054 (Fed. Cir. 2001)
without knowing the foundations of computer simulations, a court cannot evaluate whether the simulation is probative, and it would be unfair to render an expert's opinion immune to challenge because its methodology is hidden in an uncommented computer model; LBP-12-23, 72 NRC 704 n.16 (2010)

Nuclear Energy Institute, Inc. v. Environmental Protection Agency, 373 F.3d 1251, 1295 (D.C. Cir. 2004)
section 121 of the Nuclear Waste Policy Act does not require that each barrier provide either wholly independent protection or a specifically quantified amount of protection; LBP-10-22, 72 NRC 681 (2010)

Nuclear Fuel Services, Inc. (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004)
burden is on petitioner to allege a specific and plausible means by which contaminants from mining activities may adversely affect him or her; LBP-10-16, 72 NRC 384 (2010)

Nuclear Information and Resource Service v. NRC, 509 F.3d 562, 571 (D.C. Cir. 2007)
an agency official should be disqualified only where a disinterested observer may conclude that the official has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it; CLI-10-17, 72 NRC 46 n.252 (2010)
the disqualification standard under 28 U.S.C. § 455 is not directed to administrative judges, but the Commission and its adjudicatory boards have applied it in assessing a motion for disqualification under 10 C.F.R. 2.313, and it provides a helpful framework for such an assessment; CLI-10-22, 72 NRC 203 (2010)

Nuclear Management Co., LLC (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 163 (2006)
judicial concepts of standing are generally followed in NRC proceedings; LBP-10-15, 72 NRC 275 (2010)

Nuclear Management Co., LLC (Palisades Nuclear Plant), CLI 06-17, 63 NRC 727, 732 (2006)
a reply may include arguments and alleged facts that are focused on the legal or logical arguments presented in the answers; LBP-10-19, 72 NRC 544 (2010)
licensing boards and the Commission have considered the late-filing criteria even in cases where the factors were not fully addressed by petitioners and/or the NRC Staff or were not addressed at all; LBP-10-24, 72 NRC 743 (2010)

Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18 (1st Cir. 2007)
to establish an injury in fact, a party merely has to show some threatened concrete interest personal to the party that the National Historic Preservation Act was designed to protect; LBP-10-16, 72 NRC 393 (2010)

Oncology Services Corp., CLI-93-13, 37 NRC 419, 421 (1993)
the Commission may consider the criteria listed in 10 C.F.R. 2.786(b)(4) when reviewing interlocutory matters on the merits, but when determining whether to undertake such review the standards in section 2.786(g) control the determination; CLI-10-29, 72 NRC 561 n.28 (2010)

Oregon Natural Resources Council Fund v. Goodman, 505 F.3d 884, 897 (9th Cir. 2007)
NEPA requires NRC to provide a reasonable mitigation alternatives analysis, containing reasonable estimates, including full disclosures of any known shortcomings in methodology, incomplete or unavailable information and significant uncertainties; CLI-10-22, 72 NRC 209 (2010)

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 923 (1981)
the mere fact of adverse findings and rulings on the merits does not imply a biased attitude on the board's part; CLI-10-17, 72 NRC 46 (2010)

LEGAL CITATIONS INDEX

CASES

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1982)
prima facie evidence must be legally sufficient to establish a fact or case unless disproved; LBP-10-15, 72 NRC 279-80, 303 (2010)

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 337 (2002)
cursory, unsupported arguments will not be considered on appeal; CLI-10-17, 72 NRC 30-31 n.172 (2010); CLI-10-23, 72 NRC 246 n.177 (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-10-21, 72 NRC 651 (2010)

Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237-40 (2002)
the Commission generally declines to hold proceedings in abeyance pending the outcome of other Commission actions or adjudications; CLI-10-17, 72 NRC 10 n.36 (2010)

Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 239 (2002)
it is not sensible to postpone consideration and resolution of various issues having little or nothing to do with the Commission's ongoing review of security requirements following the September 11th attacks; CLI-10-17, 72 NRC 10 n.34 (2010)

Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-4, 57 NRC 273, 275-77 (2003)
the Commission generally declines to hold proceedings in abeyance pending the outcome of other Commission actions or adjudications; CLI-10-17, 72 NRC 10 n.36 (2010)

Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1 (2008)
because Staff failed to disclose data underlying its terrorism analysis in the final environmental assessment, it failed to meet the NEPA-mandated hard-look standard; CLI-10-18, 72 NRC 65 (2010)

Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 5-8 (2008)
if good cause for a late filing is not shown, the board may still permit the late filing, but petitioner must make a strong showing on the other late-filing factors; LBP-10-24, 72 NRC 731 (2010)

Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008)
a new contention is usually considered timely if filed within 30 days of publication of the draft environmental impact statement; LBP-10-16, 72 NRC 422 n.308 (2010)

Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-8, 67 NRC 193, 197 & n.26 (2008)
good cause is the factor given the greatest weight when ruling on motions for leave to submit late-filed contentions; CLI-10-17, 72 NRC 53 n.304 (2010)

Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 526 & n.87 (2008)
there is no per se regulatory bar that precludes the Staff from using the hearing process to clarify the administrative record supporting its final EA, and that record, along with any adjudicatory decision, becomes, in effect, part of the final environmental document; CLI-10-18, 72 NRC 68 (2010)

Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 NRC 47, 66 (2003)
the manner in which the Staff conducts its review is outside the scope of a proceeding; LBP-10-17, 72 NRC 512 (2010)

Pa'ina Hawaii, LLC, CLI-08-4, 67 NRC 171 (2008)
NEPA does not require the NRC to assess the potential health effects of consuming irradiated food; CLI-10-18, 72 NRC 65 (2010)

LEGAL CITATIONS INDEX

CASES

Pa'ina Hawaii, LLC, CLI-08-16, 68 NRC 221, 222-23, 230 (2008)
NEPA does not require the NRC to assess the potential health effects of consuming irradiated food; CLI-10-18, 72 NRC 65 (2010)
Pa'ina Hawaii, LLC, LBP-06-12, 63 NRC 403, 414 (2006)
if petitioner makes a prima facie allegation that the application omits information required by law, it necessarily presents a genuine dispute with applicant on a material issue in compliance and raises an issue plainly material to an essential finding of regulatory compliance needed for license issuance; LBP-10-16, 72 NRC 395 (2010)
pleading requirements calling for a recitation of facts or expert opinion supporting the issue raised are inapplicable to a contention of omission beyond identifying the legally required missing information; LBP-10-16, 72 NRC 395 (2010)
Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327-28, 331-32 (1979)
the party to be prevented from relitigating an issue must have been a party to the prior action, but the party seeking to prevent relitigation through the application of collateral estoppel need not have been a party; CLI-10-23, 72 NRC 249-50 (2010)
Perma Research & Development Co. v. Singer Co., 542 F.2d 111, 125 (2d Cir. 1976) (Van Graafeiland, J., dissenting)
a computer model is valid only insofar as it enables one to make valid inferences about the real-world system being simulated; LBP-12-23, 72 NRC 704 n.16 (2010)
Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 49 (1984)
a licensing board erred in holding that it lacked authority to consider contentions based on recent revisions to a license application, but the error was harmless because the intervenor had never submitted any contentions on the revisions; CLI-10-23, 72 NRC 246 n.180 (2010)
Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 21 (1986)
intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was publicly available for some time prior to the filing of the contention; CLI-10-27, 72 NRC 496 n.69 (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)
contentions that challenge applicable statutory requirements or the basic structure of the agency's regulatory process are inadmissible; LBP-10-21, 72 NRC 651 (2010)
intervenors are precluded from challenging ASME inspection requirements in a combined license proceeding because NRC regulations directly incorporate ASME inspection requirements by reference; LBP-10-21, 72 NRC 656 (2010)
Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 & n.33, *aff'd in part on other grounds,* CLI-74-32, 8 AEC 217 (1974)
contentions that simply state the petitioner's views about what regulatory policy should be do not present a litigable issue; LBP-10-21, 72 NRC 651-52 (2010)
Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962)
summary disposition may be granted only if the truth is clear; LBP-10-20, 72 NRC 579 (2010)
Porter County Chapter of the Izaak Walton League of America, Inc. v. NRC, 606 F.2d 1363, 1370 (D.C. Cir. 1979)
administrative regularity in the regulatory process is assumed, and review of the operating license application takes place independently of that associated with plant construction; CLI-10-29, 72 NRC 562 (2010)
Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976)
the Commission customarily follows judicial concepts of standing; LBP-10-16, 72 NRC 380 (2010)
Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976)
economic impact of a proposed action on ratepayers is outside the scope of a NEPA analysis; LBP-10-14, 72 NRC 126 (2010)
Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979)
any contention that falls outside the specified scope of the proceeding is inadmissible; LBP-10-17, 72 NRC 511 (2010)

LEGAL CITATIONS INDEX

CASES

Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)
under longstanding NRC policy, licensing boards should not accept in individual license proceedings contentions that are or are about to become the subject of general rulemaking by the Commission; CLI-10-19, 72 NRC 100 (2010)

Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974)
contentions that attack a Commission rule, or that seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, are inadmissible; LBP-10-21, 72 NRC 651 (2010)

Power Reactor Development Co. v. International Union of Electrical Workers, 367 U.S. 396, 415-16 (1961)
administrative regularity in the regulatory process is assumed, and review of the operating license application takes place independently of that associated with plant construction; CLI-10-29, 72 NRC 562 (2010)

Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC 361, 398 (2010)
in the case of unexplained material submitted in support of a contention, the board declines to hunt for information that the agency's procedural rules require be explicitly identified and fully explained; LBP-10-21, 72 NRC 647 (2010)

PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010)
because petitioner's circumstances may change from one proceeding to the next, it is important that the presiding officer have up-to-date information regarding any standing claims; LBP-10-21, 72 NRC 641 (2010)
it is generally insufficient to seek to establish standing in a proceeding by merely cross-referencing the showing made in another proceeding, rather than making a new presentation or at least providing a submission that updates the factual information that was provided previously; LBP-10-21, 72 NRC 641 (2010)
petitioner must make a fresh standing demonstration in each individual proceeding in which intervention is sought; LBP-10-21, 72 NRC 640 (2010)
the Commission generally defers to a board's rulings on standing in the absence of clear error or an abuse of discretion; CLI-10-20, 72 NRC 188 (2010)

PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010)
although boards should afford greater latitude to a pleading submitted by a *pro se* petitioner, that petitioner ultimately bears the burden to provide facts sufficient to show standing; CLI-10-20, 72 NRC 189 (2010)

PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139-40 (2010)
petitioner's standing showing can be corrected or supplemented to cure deficiencies by means of its reply pleading; LBP-10-21, 72 NRC 640 (2010)

PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 408-11 (2009)
applicant's COLA discussion of LLRW management contained no omission where the applicant addressed the closure of the Barnwell LLRW disposal facility, discussed in detail additional waste minimization measures, and committed to build an additional storage facility in accordance with NRC guidelines if further additional storage became necessary; LBP-10-20, 72 NRC 614 (2010)

PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 410-11 (2009)
low-level radioactive waste contentions were not admissible because of technical defects in the pleadings such as failure to satisfy 10 C.F.R. 2.309(f)(1)(vi), (i), or (ii); LBP-10-20, 72 NRC 600 n.34 (2010)

PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 411, 424 (2009)
regulations do not dictate the duration of onsite low-level radioactive waste storage capacity; LBP-10-20, 72 NRC 600 n.34 (2010)

PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 104 (2007)
an appeal that merely recites earlier arguments without explaining how they demonstrate legal error or abuse of discretion on the board's part does not satisfy NRC pleading standards; CLI-10-21, 72 NRC 200 n.14 (2010)

LEGAL CITATIONS INDEX

CASES

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)
failure to comply with any of the requirements of 10 C.F.R. 2.309(f)(1)(i)-(vi) is grounds for dismissing a contention; LBP-10-16, 72 NRC 416 (2010); LBP-10-21, 72 NRC 651 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000)
on appeal, legal issues are reviewed *de novo*; CLI-10-17, 72 NRC 11 n.40 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001)
the mere potential for legal error in a contention admissibility decision is not a ground for interlocutory review; CLI-10-30, 72 NRC 568 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001)
in the absence of evidence to the contrary, NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises; CLI-10-20, 72 NRC 194 n.48 (2010); LBP-10-20, 72 NRC 594 n.27, 608 n.1, 614 (2010)
petitioner cannot base standing or a contention on the possibility that the licensee will violate the terms of its license; CLI-10-20, 72 NRC 193 n.45 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001)
guidance documents cannot impose requirements; CLI-10-17, 72 NRC 39 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380-84 (2001)
the Commission generally declines to hold proceedings in abeyance pending the outcome of other Commission actions or adjudications; CLI-10-17, 72 NRC 10 n.36 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348 n.22 (2002)
although NRC gives substantial deference to Council on Environmental Quality regulations, it is not bound to follow them; LBP-10-16, 72 NRC 437 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003)
on appeal, the Commission refrains from exercising its authority to make *de novo* findings of fact in situations where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact; CLI-10-18, 72 NRC 72 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-27 (2003)
on appeal, the Commission is loath to address complaints concerning a board's skepticism of expert witness's testimony, given that the Commission lacks the board's ability to observe the demeanor of the parties' expert witnesses in general and petitioner's witness in particular; CLI-10-17, 72 NRC 46-47 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003)
licensing board findings of fact that turn on witness credibility receive the Commission's highest deference on appeal; CLI-10-23, 72 NRC 225 n.64 (2010)
the standard of clear error for overturning a board's factual findings is quite high; CLI-10-18, 72 NRC 73 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 46 (2004)
computer models and associated documentation are within the scope of discovery under NRC regulations; LBP-12-23, 72 NRC 704 n.14 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 145 (2004)
determination of economic benefits and costs that are tangential to environmental consequences are within a wide area of agency discretion; LBP-10-24, 72 NRC 771 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005)
to justify reopening the record to admit a new contention, the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition, and the new information must be

significant and plausible enough to require reasonable minds to inquire further; LBP-10-21, 72 NRC 643-44 (2010)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005)

rationale for the requirement that motions to reopen must address at least nineteen different regulatory factors is provided; LBP-10-19, 72 NRC 534 (2010)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005)

in the NRC adjudicatory process, the licensing board's principal role is to carefully review all of the evidence, including testimony and exhibits, and to resolve any factual disputes; CLI-10-18, 72 NRC 72 (2010)

on appeal, the Commission defers to a board's factual findings, correcting only clearly erroneous findings where the Commission has strong reason to believe that a board has overlooked or misunderstood important evidence; CLI-10-18, 72 NRC 73 (2010)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80 (1998), *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998)

the subject matter of a contention must impact the grant or denial of the pending license application; LBP-10-17, 72 NRC 514 (2010)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 244 (1998)

although the phrase "possession, custody, or control," is used, no relevant interpretation or construction of the phrase, or of the term control, is provided; LBP-12-23, 72 NRC 706 (2010)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000)

by defining significantly different information in the draft environmental impact statement as a permissible basis for filing a new contention, the Commission has in effect concluded that such new information is good cause for filing a new contention; LBP-10-24, 72 NRC 743 (2010)

intervenor that has sufficient information to file a NEPA contention but delays that filing until publication of the environmental impact statement does so at its peril; LBP-10-24, 72 NRC 732 (2010)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223-24 (2000)

even if a petitioner is unable to show that the NRC Staff's NEPA document differs significantly from the environmental report, it may still be able to meet the late-filed contention requirements; LBP-10-24, 72 NRC 731 n.18 (2010)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509 (2001)

summary disposition is not a tool for trying to convince a licensing board to decide, on written submissions, genuine issues of material fact that warrant resolution at a hearing; LBP-10-20, 72 NRC 579 (2010)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-20, 56 NRC 169, 182 (2002)

correctness of a prior decision is not a public policy factor upon which the application of the doctrine of collateral estoppel depends; CLI-10-23, 72 NRC 252 n.217 (2010)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-03-30, 58 NRC 454, 479 (2003)

an agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative; LBP-10-24, 72 NRC 764 (2010)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, 666 n.62 (2005)

computer models and associated documentation are within the scope of discovery under NRC regulations; LBP-12-23, 72 NRC 704 n.14 (2010)

LEGAL CITATIONS INDEX

CASES

Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 4 (2008)
a board could refer a contention relating to a certified design to the Staff for consideration in the design certification rulemaking and hold that contention in abeyance if the contention is otherwise admissible; LBP-10-21, 72 NRC 655 n.25 (2010)
in making the findings required for issuance of a combined license, the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification rule; LBP-10-21, 72 NRC 653, 654 (2010)
Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317, 324 (2009)
the Commission generally defers to a board's rulings on standing in the absence of clear error or an abuse of discretion; CLI-10-20, 72 NRC 188 (2010)
Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 1 and 2), CLI-09-8, 69 NRC 317, 329 (2009)
the design certification rulemaking and individual COL adjudicatory proceedings may proceed simultaneously, and issues raised in an adjudicatory proceeding that are appropriately addressed in the generic design certification rulemaking are to be referred to the rulemaking for resolution; LBP-10-17, 72 NRC 512 (2010)
Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 252 (2010)
petitioners must seek leave to request reconsideration of a decision and set forth compelling circumstances that petitioners could not reasonably have anticipated and that would render the decision invalid; CLI-10-21, 72 NRC 201 n.15 (2010)
Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 272 (2010)
challenges to regulations are not litigable; LBP-10-16, 72 NRC 438 (2010)
Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 278 n.205 (2010)
the Commission disapproves of incorporation by reference in petitions for review, where it has the effect of bypassing the page limits set forth in NRC regulations; CLI-10-17, 72 NRC 45-46 n.247 (2010)
Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 29 & n.4 (2010)
a successful challenge to a contention admissibility ruling must demonstrate that the ruling either constitutes clear error or reflects an abuse of discretion; CLI-10-17, 72 NRC 53 (2010)
when the Commission reviews board rulings on contention admissibility, it employs the clear error and abuse of discretion standards of review; CLI-10-17, 72 NRC 11 (2010)
Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 33 (2010)
although the duty to comply with NEPA falls upon the agency and not upon the applicant or licensee, the requirements of Part 51 must be met by the applicant; LBP-10-16, 72 NRC 418, 440 (2010)
to ensure a more efficient proceeding, the board merges two contentions; LBP-10-16, 72 NRC 406 (2010)
Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 34 (2010)
applicant is not bound by NEPA, but by NRC regulations in Part 51; LBP-10-16, 72 NRC 435 (2010)
Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 36 (2010)
using an atomizing approach, no single basis would be admissible as a contention; LBP-10-16, 72 NRC 413 (2010)
Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 106-07 (2009)
although the terms "severe accident," "severe accident mitigation alternatives," and "SAMA" are not defined in NRC's NEPA regulations, the NRC policy documents that originated these terms clearly

limit them to nuclear reactors, and do not include spent fuel pools or storage; LBP-10-15, 72 NRC 307 (2010)

Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 112 (2009)

the board recommends that the issue of waste disposal from in situ leach mining be considered when the mandatory review and hearing are conducted; LBP-10-16, 72 NRC 435 (2010)

Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640, 647 (2009)

submission of a new contention within 30 days of the event giving rise to that contention is timely; LBP-10-17, 72 NRC 509 n.25 (2010)

Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 636 (D. Minn. 2000)

"control" does not require that the party have legal ownership or actual physical possession of the documents at issue, but rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a nonparty to the action; LBP-12-23, 72 NRC 707 n.20 (2010)

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

NRC already addresses a spectrum of terrorist acts under its design basis threat programs, which have been found acceptable in the Ninth Circuit; LBP-10-15, 72 NRC 323 (2010)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-366, 5 NRC 39, 61-62 (1977)

a licensing board may disapprove a site for a new reactor only upon one of two findings; LBP-10-24, 72 NRC 746 n.51 (2010)

under NEPA, the NRC must balance the benefits of the project against its environmental costs; LBP-10-24, 72 NRC 746 (2010)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-366, 5 NRC 39, 62 (1977)

the cost-benefit analysis involves the scrutiny of many factors, among them, offsetting benefits, available alternatives, and the possible means (and attendant costs) of reducing the environmental harm; LBP-10-24, 72 NRC 746 n.51 (2010)

the purpose of the cost-benefit analysis called for by NEPA is to identify each significant environmental cost and to determine whether, all other factors considered, on balance the incurring of that cost is warranted; LBP-10-24, 72 NRC 746 n.51 (2010)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-748, 18 NRC 1184, 1187 (1983)

friction between the court and counsel, including intemperate and impatient remarks by the judge, does not constitute evidence of personal bias; CLI-10-17, 72 NRC 47 (2010)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-749, 18 NRC 1195, 1200 (1983)

to prevail on a disqualification motion, petitioner must show either a bias against petitioner or its counsel based on matters outside the record or a pervasive bias against petitioner based upon matters in the record; CLI-10-17, 72 NRC 46 n.252 (2010)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 78 (1988)

an untimely motion to reopen must demonstrate that the issue raised is not merely significant but exceptionally grave; LBP-10-21, 72 NRC 643 (2010)

when a reopening motion is untimely, the section 3.326(a)(1) "exceptionally grave circumstances" test supplants the "significant" issue standard under section 2.326(a)(2); LBP-10-21, 72 NRC 646 n.16 (2010)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 16 (1988), *aff'd,* CLI-88-10, 28 NRC 573 (1988), *reconsideration denied,* CLI-89-3, 29 NRC 234 (1989)

a petition to waive a Commission regulation can be granted only in unusual and compelling circumstances; LBP-10-22, 72 NRC 688 (2010)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 22 (1988)

a prima facie showing within the meaning of 10 C.F.R. 2.758(d) is one that is legally sufficient to establish a fact or case unless disproved; LBP-10-15, 72 NRC 280 n.20, 303 (2010)

LEGAL CITATIONS INDEX

CASES

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989)
it is not the Board's duty to forage through a petition in order to find statements or other support that may be located in various portions of the petition but not referenced in the contention; LBP-10-16, 72 NRC 398 n.153 (2010)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990)
as an exercise of the Commission's inherent supervisory authority over adjudicatory proceedings, the Commission directs the board to provide the Commission with a status report outlining the board's timetable for resolving all pending matters; CLI-10-18, 72 NRC 96 (2010)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 879 (1974)
amendments to license applications are not limited to minor details, but may include significant changes; LBP-10-17, 72 NRC 514 (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-10-21, 72 NRC 651 (2010)

Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487 (1973)
pro se petitioners are held to less rigid pleading standards, so that parties with a clear but imperfectly stated interest in the proceeding are not excluded; CLI-10-20, 72 NRC 192 (2010)

Puerto Rico Aqueduct & Sewer Authority v. Environmental Protection Agency, 35 F.3d 600, 607 (1st Cir. 1994)
when an adjudicating agency retroactively applies a new legal standard that significantly alters the rules of the game, the agency is obliged to give litigants proper notice and a meaningful opportunity to adjust; CLI-10-23, 72 NRC 224 (2010)

Puget Sound Power & Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-26, 15 NRC 742, 744 (1982)
economic impact of a proposed action on ratepayers is outside the scope of a NEPA analysis; LBP-10-14, 72 NRC 126 (2010)

Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998)
the Commission customarily follows judicial concepts of standing; LBP-10-16, 72 NRC 380 (2010)

Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998)
standing requires that petitioner allege a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; LBP-10-16, 72 NRC 380 (2010)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)
it is inappropriate, perhaps even impossible, for intervenor to prove at the contention admissibility stage that correcting an error or omission in the environmental report or environmental impact statement would, in fact, change the NRC's ultimate decision; LBP-10-14, 72 NRC 129 n.182 (2010)
publication of an environmental impact statement gives the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process and provides a springboard for public comment; LBP-10-24, 72 NRC 763 (2010)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-50 (1989)
the principal goals of an environmental impact statement are to force agencies to take a hard look at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency's decisionmaking process; LBP-10-24, 72 NRC 763 n.86 (2010)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)
NEPA itself does not mandate particular results, but simply prescribes the necessary process; LBP-10-24, 72 NRC 763 n.87 (2010)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 355-56 (1989)
Council on Environmental Quality regulations receive substantial deference from the federal courts; LBP-10-24, 72 NRC 755 n.74 (2010)

LEGAL CITATIONS INDEX

CASES

Rockford League of Women Voters v. NRC, 679 F.2d 1218, 1222-23 (7th Cir. 1982)
administrative regularity in the regulatory process is assumed, and review of the operating license application takes place independently of that associated with plant construction; CLI-10-29, 72 NRC 562 (2010)

Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993)
petitioner has an iron-clad obligation to examine the publicly available documentary material with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention; CLI-10-27, 72 NRC 496 (2010)

Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993)
even if petitioner is unable to show that the NRC Staff's NEPA document differs significantly from the environmental report, it may still be able to meet the late-filed contention requirements; LBP-10-24, 72 NRC 731 (2010)

Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1358-60 (9th Cir. 1994)
NEPA requires NRC to provide a reasonable mitigation alternatives analysis, containing reasonable estimates, including full disclosures of any known shortcomings in methodology, incomplete or unavailable information and significant uncertainties; CLI-10-22, 72 NRC 209 (2010)

San Francisco Baykeeper v. U.S. Army Corps of Engineers, 219 F. Supp. 2d 1001, 1013-16 (N.D. Calif. 2002)
NEPA requires NRC to provide a reasonable mitigation alternatives analysis, containing reasonable estimates, including full disclosures of any known shortcomings in methodology, incomplete or unavailable information and significant uncertainties; CLI-10-22, 72 NRC 209 (2010)

San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1028 (9th Cir. 2006)
NRC cannot categorically refuse to consider terrorist attacks under NEPA; LBP-10-15, 72 NRC 320-21 n.73 (2010)

San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1030 (9th Cir. 2006)
NRC must address the environmental impacts of a terrorist attack on nuclear facilities located in the Ninth Circuit; LBP-10-15, 72 NRC 317-18 (2010)

San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1031 (9th Cir. 2006)
it is possible to conduct a low-probability, high-consequence analysis without quantifying the precise probability of risk; LBP-10-15, 72 NRC 324 n.78 (2010)

San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1032-33 (9th Cir. 2006), *cert. denied,* 549 U.S. 1166 (2007)
Council on Environmental Quality regulations are entitled to substantial deference by NRC; LBP-10-15, 72 NRC 288 n.33 (2010)

San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1033 (9th Cir. 2006), *cert. denied sub nom. Pacific Gas & Electric. Co. v. San Luis Obispo Mothers for Peace,* 549 U.S. 1166 (2007)
impacts that are reasonably foreseeable under NEPA must be analyzed publicly, even if their probability of occurrence is low; CLI-10-18, 72 NRC 90 (2010)

San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1300-01 (D.C. Cir. 1984)
under NEPA's well-established probabilistic rule of reason, an agency need not address remote and speculative environmental consequences, nor must it discuss in detail events it believes have an inconsequentially small probability of occurring; LBP-10-14, 72 NRC 117 n.91 (2010)

Sao Paolo State of the Federative Republic of Brazil v. American Tobacco Co., Inc., 535 U.S. 232-33 (2002)
the proper inquiry under 28 U.S.C. § 455 is made from the perspective of a reasonable person, knowing all the circumstances; CLI-10-22, 72 NRC 206 (2010)

Scott v. Arex, Inc., 124 F.R.D. 39, 41 (D. Conn. 1989)
a party controls a document if it has right, authority, or ability to obtain the document on demand; LBP-12-23, 72 NRC 707 n.21 (2010)

Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 880 (1st Cir. 1978)
there is no absolute right to cross-examination; LBP-10-15, 72 NRC 344 (2010)

LEGAL CITATIONS INDEX

CASES

Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13-14 (2001)
redressability requires petitioner to show that its alleged injury-in-fact could be cured or alleviated by some action of the tribunal; LBP-10-16, 72 NRC 382 (2010)

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 74 (1994)
it is enough that petitioner has demonstrated a realistic threat of sustaining a direct injury as a result of contaminated groundwater flowing from the site to his property; LBP-10-16, 72 NRC 388 n.85 (2010)
petitioners are not required to demonstrate their asserted injury with certainty at the contention admission stage, or to provide extensive technical studies in support of their standing argument; LBP-10-16, 72 NRC 388 (2010)

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994)
a board's determination of standing 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-10-16, 72 NRC 382 (2010)
any potential harm associated with petitioner's use of water from a water source connecting to a mining site is fairly traceable to the proposed action; LBP-10-16, 72 NRC 385 (2010)
determination that the 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-10-16, 72 NRC 388 (2010)

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)
boards apply a proximity-plus test to establish standing in materials cases, where the petitioner must show that the proposed licensing action involves a significant source of radiation that has an obvious potential for offsite consequences; CLI-10-20, 72 NRC 189 (2010)

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994)
a board's standing analysis must avoid the familiar trap of confusing the standing determination with the assessment of a petitioner's case on the merits; LBP-10-16, 72 NRC 388 (2010)

Shaw AREVA MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009)
petitioner has an iron-clad obligation to examine the publicly available documentary material with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention; CLI-10-27, 72 NRC (2010)

Shaw AREVA MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 210 n.95 (2007)
if a contention meets the 10 C.F.R. 2.309(f)(2) criteria, it is timely and the intervenor proffering the contention need not also make a showing under 10 C.F.R. 2.309(c); LBP-10-14, 72 NRC 108 (2010)

Shaw AREVA MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 481-83 (2008)
boards have legal authority to reformulate contentions; LBP-10-16, 72 NRC 403 (2010)

Shaw AREVA MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 482 (2008)
licensing boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; LBP-10-14, 72 NRC 127 n.171 (2010)

Shieldalloy Metallurgical Corp. (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 (1999)
petitioners represented by counsel are held to higher standard of specificity in pleading; CLI-10-20, 72 NRC 189 n.15, 192 n.37 (2010)

Shieldalloy Metallurgical Corp. (Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 71 NRC 142, 147 (2010)
although a request for suspension of a proceeding does not fit cleanly into NRC procedural rules for stays, the Commission exercises discretion and consider petitioner's request; CLI-10-17, 72 NRC 10 n.32 (2010)

Sierra Club v. Environmental Protection Agency, 356 F.3d 296, 298 (D.C. Cir. 2004)
an agency is not authorized to grant conditional approval to plans that do nothing more than promise to do tomorrow what the statute requires today; LBP-10-20, 72 NRC 602 n.36 (2010)

LEGAL CITATIONS INDEX

CASES

Sierra Club v. Morton, 405 U.S. 727, 739 (1972)
the injury-in-fact necessary to establish organizational standing must be more than a mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem; LBP-10-16, 72 NRC 383 (2010)
to establish organizational standing, an organization must demonstrate that the action at issue will cause an injury-in-fact to the organization's interests and the injury is within the zone of interests protected by NEPA or the AEA; LBP-10-16, 72 NRC 383 (2010)

Sierra Club v. U.S. Department of Transportation, 310 F. Supp. 2d 1168, 1188 (D. Nev. 2004)
NEPA requires NRC to provide a reasonable mitigation alternatives analysis, containing reasonable estimates, including full disclosures of any known shortcomings in methodology, incomplete or unavailable information, and significant uncertainties; CLI-10-22, 72 NRC 209 (2010)

Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F.3d 28, 31 (3d Cir. 1995)
a basic tenet of statutory construction, equally applicable to regulatory construction, is that a text should be construed so that effect is given to all of its provisions, so no part will be inoperative or superfluous, void or insignificant; LBP-10-22, 72 NRC 671 n.25 (2010)

Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664, 668 (7th Cir. 1997)
in considering alternatives under NEPA, an agency is required to address the purpose of the proposed project, reasonable alternatives to the project, to what extent the agency should explore each particular reasonable alternative; CLI-10-18, 72 NRC 77-78 n.119 (2010)

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 (1976)
to establish causation, petitioner must show that there is a causal connection between the injury and the conduct complained of, i.e., the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; LBP-10-16, 72 NRC 382 (2010)

Smith v. United States, 508 U.S. 223, 228 (1993)
in the absence of a statutory definition, courts normally define a term by its ordinary meaning; LBP-10-24, 72 NRC 736 (2010)

Snoqualmie Indian Tribe v. Federal Energy Regulatory Commission, 45 F.3d 1207 (9th Cir. 2008)
tribes that have addressed procedural violations of the National Historic Preservation Act have uniformly been granted standing under the relaxed standard and have proceeded directly to the merits of the NHPA claim; LBP-10-16, 72 NRC 393 n.123 (2010)

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 3, 15 (2010)
need-for-power contention is dismissed because it calls for a more detailed analysis than NRC requires; LBP-10-24, 72 NRC 749 (2010)

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 (2010)
petitioner's standing showing can be corrected or supplemented to cure deficiencies by means of its reply pleading; LBP-10-21, 72 NRC 640 (2010)

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 17 (2010)
a need-for-power analysis should not involve burdensome attempts to precisely identify future conditions, but rather should be sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions; LBP-10-24, 72 NRC 776 (2010)

Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 695 (1982)
collateral estoppel doctrine has long been recognized as part of NRC adjudicatory practice; CLI-10-23, 72 NRC 249 (2010)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-64 (2008)
where intervenors have not sought to amend their contention as admitted, to the degree the contention is one of omission, it is subject to dismissal in connection with those aspects for which it is appropriately established that the Staff draft environmental impact statement provides any purported missing analysis or discussion; LBP-10-14, 72 NRC 109 n.31 (2010)

LEGAL CITATIONS INDEX

CASES

Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33, 37 (2009)
section 52.79(a)(3) 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; LBP-10-20, 72 NRC 601 (2010)
Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-3, 69 NRC 139, 153-54 (2009)
petitioner has an obligation to explain why cited testimony provides a basis for its contention; LBP-10-17, 72 NRC 510 n.26 (2010)
Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-8, 71 NRC 433, 443-44 (2010)
the language of 10 C.F.R. 52.79(a)(4) is contrasted with the "means" language of 10 C.F.R. 52.79(a)(3); LBP-10-20, 72 NRC 610 n.7 (2010)
Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-8, 71 NRC 433, 444 (2010)
detailed design, location, and health impacts information on low-level radioactive waste storage is not required in the combined license application; LBP-10-20, 72 NRC 583 (2010)
there is no prohibition on an applicant using a plan for compliance with section 52.79(a)(3) that includes contingent plans should future low-level radioactive waste storage become necessary; LBP-10-20, 72 NRC 585 (2010)
Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-8, 71 NRC 433, 445 (2010)
there is no requirement in section 52.79(a)(3) for applicant's FSAR to include details regarding building materials and high-integrity containers, exact location, or health impacts on employees for the contingent onsite long-term LLRW storage facility; LBP-10-20, 72 NRC 603 (2010)
Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 18-19 (1998)
in establishing and enforcing schedule deadlines, boards must take care not to compromise the Commission's fundamental commitment to a fair and thorough hearing process; LBP-10-21, 72 NRC 635 (2010)
Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 18-20 (1998)
in the interest of efficient case management and prompt resolution of adjudications, the Commission has generally enforced the 10-day deadline for appeals strictly, excusing it only in unavoidable and extreme circumstances; CLI-10-26, 72 NRC 476 (2010)
Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19 (1998)
licensing boards have substantial authority to regulate hearing procedures; LBP-10-21, 72 NRC 635 (2010)
the Commission has long endorsed a balanced approach to hearings that both expedites the hearing process and ensures fairness in order to produce a record that leads to high-quality decisions that adequately protect the public health and safety, the common defense and security, and the environment; LBP-10-21, 72 NRC 635-36 (2010)
Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998)
although participants generally must comply with the schedule established by the presiding officer, they might sometimes be unable to meet established deadlines; LBP-10-21, 72 NRC 635 (2010)
only in truly unavoidable and extreme circumstances are late filings to be accepted; LBP-10-21, 72 NRC 636 (2010)
Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998)
it is a contention's proponent, not the licensing board, that is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions; LBP-10-24, 72 NRC 775 (2010)
Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998)
Commission will take early review as to matters involving novel legal or policy questions; CLI-10-24, 72 NRC 465 n.82 (2010)
in its supervisory capacity, the Commission provides guidance on the "need for SUNSI" analysis, for use in those instances when an access order applies; CLI-10-24, 72 NRC 465 (2010)

LEGAL CITATIONS INDEX

CASES

Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981)
in establishing and enforcing schedule deadlines, boards must take care not to compromise the Commission's fundamental commitment to a fair and thorough hearing process; LBP-10-21, 72 NRC 635 (2010)
the Commission has long endorsed a balanced approach to hearings that both expedites the hearing process and ensures fairness in order to produce a record that leads to high-quality decisions that adequately protect the public health and safety, the common defense and security, and the environment; LBP-10-21, 72 NRC 635-36 (2010)
the Commission regards good sense, judgment, and managerial skills as the proper guideposts for conducting an efficient hearing; LBP-10-21, 72 NRC 636 (2010)
Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453-54 (1981)
licensing boards have substantial authority to regulate hearing procedures; LBP-10-21, 72 NRC 635 (2010)
requests for an extension of time should generally be in writing and should be received by the board well before the time specified expires; LBP-10-21, 72 NRC 635 (2010)
Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981)
a spectrum of sanctions from minor to severe may be employed by a board to assist in the management of a proceeding; LBP-10-21, 72 NRC 636 (2010)
counsel's alleged unfamiliarity with the agency's rules of practice or counsel's asserted busy schedule are not satisfactory explanations for late filings; LBP-10-21, 72 NRC 637 (2010)
examples of sanctions include warning a party that offending conduct will not be tolerated in the future, refusing to consider a filing, denying the right to cross-examine or present evidence, dismissing contentions, imposing sanctions on counsel, or dismissing the party from the proceeding; LBP-10-21, 72 NRC 636 n.3 (2010)
factors considered in selecting an appropriate sanction include relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances; LBP-10-21, 72 NRC 636 n.4 (2010)
the fact that a party may have other obligations does not relieve that party of its hearing obligations; CLI-10-26, 72 NRC 476 (2010)
with an eye toward mitigating prejudice to nonbreaching participants, boards must tailor sanctions to bring about improved future compliance; LBP-10-21, 72 NRC 636 (2010)
Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981)
a party at risk of filing out of time arguably never needs to file out of time because the party can first request an extension, doing so well before the time specified expires; LBP-10-21, 72 NRC 637 (2010)
parties are expected to file motions for extensions of time so that they are received by NRC well before the time specified expires; CLI-10-26, 72 NRC 477 n.17 (2010)
Stryker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980)
NEPA does not require agencies to elevate environmental concerns over other appropriate considerations; LBP-10-24, 72 NRC 729 n.16 (2010)
Sun Oil Co. v. Pierce, 224 F.2d 580, 585 (5th Cir. 1955)
the civil law concept of "assumption of risk" requires not merely general knowledge of a risk but also that the risk assumed be specifically known, understood, and appreciated; CLI-10-23, 72 NRC 223 (2010)
System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005)
a dispute is not material unless it involves a significant inaccuracy or omission and resolution of the dispute could affect the outcome of the licensing proceeding; LBP-10-14, 72 NRC 117 n.93 (2010)
although boards should not "flyspeck" environmental documents, petitioners may raise contentions seeking correction of significant inaccuracies and omissions in the environmental report; LBP-10-24, 72 NRC 762 (2010)
licensing boards do not sit to flyspeck environmental documents or to add details or nuances; LBP-10-14, 72 NRC 117 n.93 (2010)

LEGAL CITATIONS INDEX

CASES

System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 15 (2005)
the Commission explains why board decisions on contention admissibility are permissibly and customarily terse; LBP-10-16, 72 NRC 413 n.247 (2010)
Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-26, 72 NRC 474, 475-78 (2010)
the Commission elaborates on the standards for accepting an appeal filed out of time; LBP-10-21, 72 NRC 636 (2010)
Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-26, 72 NRC 474, 476 (2010)
strict enforcement of deadlines furthers the dual interests of efficient case management and prompt resolution of adjudications; LBP-10-21, 72 NRC 636 (2010)
Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-26, 72 NRC 474, 476-77 & n.18 (2010)
a motion to file late should generally be denied, except under extraordinary conditions; LBP-10-21, 72 NRC 635 (2010)
Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-26, 72 NRC 474, 477 (2010)
a party at risk of filing out of time arguably never needs to file out of time because the party can first request an extension, doing so well before the time specified expires; LBP-10-21, 72 NRC 637 (2010)
Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-26, 72 NRC 474, 477 n.17 (2010)
participant filing out of time must offer a satisfactory explanation for its lateness, including, if necessary, an account as to why a request for extension could not have been filed beforehand; LBP-10-21, 72 NRC 637 (2010)
Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 397 (2008)
in making the findings required for issuance of a combined license, the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification rule; LBP-10-21, 72 NRC 653 (2010)
Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 189 (2004)
licensing board findings of fact that turn on witness credibility receive the Commission's highest deference on appeal; CLI-10-23, 72 NRC 225 n.64 (2010)
the Commission generally defers to board findings of fact, unless they are clearly erroneous; CLI-10-17, 72 NRC 11 n.40 (2010)
the Commission will not overturn a hearing judge's findings simply because the Commission might have reached a different result; CLI-10-23, 72 NRC 241 n.153 (2010)
to satisfy the "clearly erroneous" standard, a litigant must show that the board's findings are not even plausible in light of the record viewed in its entirety; CLI-10-17, 72 NRC 11-12 nn.41 & 43 (2010); CLI-10-23, 72 NRC 225 (2010)
whether collateral estoppel should be applied is a legal question that the Commission reviews de novo; CLI-10-23, 72 NRC 250 (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)
legal questions are reviewed de novo and will be reversed if a licensing board's legal rulings are a departure from or contrary to established law; CLI-10-18, 72 NRC 73 (2010)
Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 189, 199 (2004)
on appeal, the Commission is loath to address complaints concerning a board's skepticism of expert witness's testimony, given that the Commission lacks the board's ability to observe the demeanor of the parties' expert witnesses in general and petitioner's witness in particular; CLI-10-17, 72 NRC 46-47 (2010)

LEGAL CITATIONS INDEX

CASES

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 individual proceeding in which intervention is sought; LBP-10-21, 72 NRC 640 (2010)

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 163 (1993)
it might be sufficient to allow petitioner to rely on a prior standing demonstration if that prior demonstration is specifically identified and shown to correctly reflect the current status of petitioner's standing; LBP-10-21, 72 NRC 642 n.10 (2010)

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-93-11, 37 NRC 251, 255 (1993)
in addressing the section 2.309(c)(1) factors, failure to provide any specific discussion of most of these items or the weight they should be given in the balance is a potentially fatal omission; LBP-10-21, 72 NRC 649 n.18 (2010)

Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-255, 1 NRC 3, 7 (1975)
if appellant had submitted an offer of proof, indicating what rebuttal evidence it would have offered to the board, then the Commission might have had some basis for determining whether that evidence would be substantial enough to justify a remand to the board; CLI-10-23, 72 NRC 246 (2010)

Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 561 (1977)
collateral estoppel doctrine precludes the relitigation of issues of law or fact that have been finally adjudicated by a tribunal of competent jurisdiction in a proceeding involving the same parties or their privies; CLI-10-23, 72 NRC 249 (2010)

Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 562-63 (1977)
in determining whether to apply collateral estoppel, a board should not look into the jury trial to determine whether the verdict was correct; CLI-10-23, 72 NRC 252 (2010)
licensing boards may give collateral estoppel effect to issues previously decided in a district court proceeding; CLI-10-23, 72 NRC 249 (2010)

Town of Winthrop v. Federal Aviation Administration, 553 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; LBP-10-15, 72 NRC 286 (2010)

Town of Winthrop v. Federal Aviation Administration, 533 F.3d 1, 13 (1st Cir. 2008)
an environmental impact statement is not intended to be a research document; CLI-10-22, 72 NRC 208 (2010)

U.S. Army (Jefferson Proving Ground Site), LBP-00-9, 51 NRC 159, 160-61 (2000)
standing was found for an organization representing three members living in close proximity to decommissioning site, who expressed concern that depleted uranium materials could affect a waterway abutting the property of two members; CLI-10-20, 72 NRC 189 n.13 (2010)

U.S. Army (Jefferson Proving Ground Site), LBP-06-27, 64 NRC 438, 447 (2006)
to be admissible, a contention must comply with every requirement listed in 10 C.F.R. 2.309(f)(1); LBP-10-16, 72 NRC 416 (2010)

U.S. Army Installation Command (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 195 (2010)
when a contested proceeding has been terminated following the resolution of all submitted contentions, an individual, group, or governmental entity that wishes to interpose an additional issue must submit a new intervention petition that addresses the standards in section 2.309(c)(1) that govern nontimely intervention petitions; LBP-10-21, 72 NRC 647 (2010)

U.S. Army Installation Command (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 195 & n.56 (2010)
to interpose a new contention after a proceeding has been terminated requires submission of a fresh intervention petition that fulfills the applicable standards for such filings, including an appropriate standing demonstration; LBP-10-21, 72 NRC 640 (2010)

LEGAL CITATIONS INDEX

CASES

U.S. Department of Energy (High-Level Waste Repository), CLI-08-20, 68 NRC 272, 274-75 (2008)
boards do not direct the Staff in the performance of its administrative functions; LBP-10-17, 72 NRC 513 (2010)
the decision to docket, and the subsequent handling of an application, is within the discretion of the Staff; LBP-10-17, 72 NRC 512 (2010)

U.S. Department of Energy (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 590 (2009)
NRC's procedural rules permit contentions that raise issues of law as well as contentions that raise issues of fact; LBP-10-17, 72 NRC 510 (2010)
requiring a petitioner to allege facts under section 2.309(f)(1)(v) or to provide an affidavit that sets out the factual and/or technical bases under section 51.109(a)(2) in support of a legal contention as opposed to a factual contention is not necessary; LBP-10-17, 72 NRC 510 (2010)

U.S. Department of Energy (High-Level Waste Repository), LBP-04-20, 60 NRC 300, 337 (2004)
applicant required consultants and contractors working on the application to submit all of the relevant documentary material in their possession; LBP-12-23, 72 NRC 710 n.27 (2010)

U.S. Department of Energy (High-Level Waste Repository), LBP-08-5, 67 NRC 205, 212 n.32, 221 (2008) (Karlin, J., dissenting)
state intervenor required its consultants and contractors to submit all of the relevant documentary material in their possession; LBP-12-23, 72 NRC 710 n.27 (2010)

U.S. Department of Energy (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 416 (2009)
applicant cannot, at the contention admissibility stage, demand that petitioners rerun a sensitivity analysis in order to demonstrate the impact of alleged defects; LBP-10-14, 72 NRC 128 n.182 (2010)

U.S. Department of Energy (High-Level Waste Repository), LBP-09-29, 70 NRC 1028, 1036 (2009)
in order to raise a timely contention, a party must piece together disparate shreds of information that, standing alone, have little apparent significance; CLI-10-27, 72 NRC 487 n.27 (2010)

U.S. Department of Transportation v. Public Citizen, 541 U.S. 752, 756-57 (2004)
NEPA requires federal agencies to consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-10-24, 72 NRC 729 n.16 (2010)

U.S. Department of Transportation v. Public Citizen, 541 U.S. 752, 757 (2004)
Council on Environmental Quality regulations receive substantial deference from federal courts; LBP-10-24, 72 NRC 755 n.74 (2010)

U.S. Enrichment Corp. (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001)
the Commission treats *pro se* litigants more leniently than litigants with counsel; CLI-10-17, 72 NRC 45 n.246 (2010)

U.S. Enrichment Corp. (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 273 (2001)
to determine whether an interest is in the zone of interests of a statute, it is necessary first to discern the interests arguably to be protected by the statutory provision at issue and then to inquire whether petitioner's interests affected by the agency action are among them; LBP-10-16, 72 NRC 381 (2010)

U.S. Enrichment Corp. (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 280 n.37 (2001)
the standard review plan provides guidance but does not impose requirements on license renewal applicants; CLI-10-17, 72 NRC 20 (2010)

U.S. Enrichment Corp. (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 242 (1996)
generalized claims that are vague and insufficiently supported and do not tend to establish any connection with the proposed license or potential harm to petitioner are insufficient to support a contention; CLI-10-20, 72 NRC 194 n.49 (2010)

Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1447 (D.C. Cir. 1984), *cert. denied,* 469 U.S. 1132 (1985)
issues material to the agency's licensing decision must be subject to adjudicatory challenge; LBP-10-21, 72 NRC 657 n.28 (2010)

United States v. Ahmed, 472 F.3d 427, 433 (6th Cir. 2006), *cert. denied,* 551 U.S. 1132 (2007)
a false statement charge, like a perjury charge, effectively demands an inquiry into defendant's state of mind and intent to deceive at the time the testimony was given, and the entire focus of a perjury inquiry centers upon what the testifier knew and when he knew it, in order to establish beyond a

reasonable doubt that he knew his testimony to be false when he gave it; CLI-10-23, 72 NRC 223 (2010)

United States v. Bonds, 18 F.3d 1327, 1330-31 (6th Cir. 1994)
mere experience or background in a relevant technical field does not imply knowledge of the specific disputed facts in a case; CLI-10-22, 72 NRC 206 (2010)

United States v. Burgos, 94 F.3d 849, 869 (4th Cir. 1996)
some circumstances surrounding a person's false statement may be so obvious that knowledge of its character may be fairly attributed to him; CLI-10-23, 72 NRC 223 n.52 (2010)

United States v. Curran, 20 F.3d 560, 567 (3d Cir. 1994)
to convict a person accused of making a false statement, the government must prove not only that the statement was false, but that the accused knew it to be false; CLI-10-23, 72 NRC 223 n.52 (2010)

United States v. Figueroa, 165 F.3d 111, 115-16 (2d Cir. 1998)
knowledge may suffice for criminal culpability if extensive enough to attribute to the knower a guilty mind, or knowledge that he or she is performing a wrongful act; CLI-10-23, 72 NRC 223 (2010)

United States v. Figueroa, 720 F.2d 1239, 1246 (11th Cir. 1983)
some circumstances surrounding a person's false statement may be so obvious that knowledge of its character may be fairly attributed to him; CLI-10-23, 72 NRC 223 n.52 (2010)

United States v. Gonsalves, 435 F.3d 64, 72 (1st Cir. 2006)
willfulness means nothing more in the context of a false statement than that the defendant knew that his statement was false when he made it or consciously disregarded or averted his eyes from its likely falsity; CLI-10-23, 72 NRC 223 n.52 (2010)

United States v. Jewell, 532 F.2d 697, 699 (9th Cir. 1976)
a defendant can be convicted if he was aware that a high probability existed of the fact or circumstances that would make his conduct criminal, but ignored that probability so he could disclaim knowledge later; CLI-10-23, 72 NRC 251 n.207 (2010)

United States v. Pend Oreille County Public Utility District No. 1, 585 F. Supp. 606 (D. Wash. 1984)
preservation of Native American cultural traditions is a protected interest under federal law; LBP-10-16, 72 NRC 391 (2010)

United States v. Picciandra, 788 F.2d 39, 46 (1st Cir.), *cert. denied,* 479 U.S. 847 (1986)
any reasonable person would realize that in today's society the bizarre bearing of shopping bags filled with large sums of cash signals some form of illegal activity; CLI-10-23, 72 NRC 223 n.52 (2010)

United States v. Skeddle, 176 F.R.D. 258, 261 (N.D. Ohio 1997)
production of documents is required if the party has practical ability to obtain the documents from another, irrespective of his legal entitlement to the documents; LBP-12-23, 72 NRC 708 n.22 (2010)

United States v. Wasserson, 418 F.3d 225, 237-39 (3d Cir. 2005)
a defendant can be convicted if he was aware that a high probability existed of the fact or circumstances that would make his conduct criminal, but ignored that probability so he could disclaim knowledge later; CLI-10-23, 72 NRC 251 n.207 (2010)

United States ex rel. Chunie v. Ringrose, 788 F.2d 638 (9th Cir. 1986)
preservation of Native American cultural traditions is a protected interest under federal law; LBP-10-16, 72 NRC 391 (2010)

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983)
plaintiff may prove his case by direct or circumstantial evidence; CLI-10-23, 72 NRC 242 n.157 (2010)

USEC Inc. (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311 (2005)
in a materials licensing case, petitioner must show a plausible mechanism through which those materials could harm him; CLI-10-20, 72 NRC 189 (2010)
in a materials licensing case, petitioner must show more than that he lives or works within a certain distance of the site where materials will be located; CLI-10-20, 72 NRC 188-89 (2010)
in cases not involving nuclear power reactors, whether petitioner could be affected by the licensing action must be determined on a case-by-case basis, taking into account petitioner's distance from the source, the nature of the licensed activity, and the significance of the radioactive source; CLI-10-20, 72 NRC 188 (2010)

LEGAL CITATIONS INDEX

CASES

USEC Inc. (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311-12 (2005)
in source materials cases, petitioner has the burden of showing a specific and plausible means by which the proposed license activities may affect him or her; LBP-10-16, 72 NRC 382 (2010)
proximity-based presumption of standing does not apply in source materials cases; LBP-10-16, 72 NRC 381 (2010)

USEC Inc. (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006)
NRC contention admissibility requirements are deliberately strict, and any contention that does not satisfy them will be rejected; CLI-10-21, 72 NRC 201 (2010)

USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006)
it is a contention's proponent, not the licensing board, that is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions; LBP-10-24, 72 NRC 775 (2010)

USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006)
absent extreme circumstances, the Commission will not consider on appeal either new arguments or new evidence supporting the contentions which a board never had the opportunity to consider; CLI-10-21, 72 NRC 201 n.16 (2010)

USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 460 (2006)
petitioners or intervenors may request and, where appropriate, obtain, under protective order or other measures, information withheld from the general public for proprietary or security reasons; CLI-10-24, 72 NRC 463 n.74 (2010)

Ute Indians v. United States, 28 Fed. Cl. 768 (1993)
preservation of Native American cultural traditions is a protected interest under federal law; LBP-10-16, 72 NRC 391-92 (2010)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978)
consideration of alternatives is bounded by a notion of feasibility; CLI-10-18, 72 NRC 78 (2010)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978)
it is the NRC Staff, not the intervenors, that has the burden of complying with NEPA; LBP-10-24, 72 NRC 764 (2010)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 555 (1978)
rationale for the requirement that motions to reopen must address at least nineteen different regulatory factors is provided; LBP-10-19, 72 NRC 534 (2010)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978)
the NEPA requirement to prepare an environmental impact statement is a procedural mechanism designed to ensure that agencies give proper consideration to the environmental consequences of their actions; LBP-10-24, 72 NRC 729 n.16 (2010)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station, ALAB-124, 6 AEC 358, 365 (1973)
a timely motion to reopen may be denied if it raises issues that are not of major significance to plant safety while a nontimely motion may be granted if it raises an issue of sufficient gravity; LBP-10-21, 72 NRC 643 (2010)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973)
a timely motion to reopen may be denied if it raises issues that are not of major significance to plant safety while a nontimely motion may be granted if it raises an issue of sufficient gravity; LBP-10-21, 72 NRC 643 (2010)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 44 (1989)
impacts that are remote and speculative or inconsequentially small need not be examined; LBP-10-14, 72 NRC 110 (2010)

LEGAL CITATIONS INDEX

CASES

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 83 (2000)
petitioner has a right to a reasoned adjudicatory decision; CLI-10-23, 72 NRC 224 n.58 (2010)
Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000)
an organization asserting representational standing must demonstrate that the interest of at least one of its members will be harmed and the member would have standing in his or her own right, identify that member by name and address, and demonstrate that the organization is authorized to request a hearing on behalf of that member; LBP-10-16, 72 NRC 383 (2010)
an organization must identify its authorizing member and show that the member has authorized the organization to represent him or her and request a hearing on his or her behalf; LBP-10-16, 72 NRC 390 (2010)
an organization seeking to establish representational standing must show that at least one of its members may be affected by the proceeding; LBP-10-16, 72 NRC 389-90 (2010)
when seeking to intervene in a representational capacity an organization must identify by name and address at least one member who is affected by the licensing action and who qualifies for standing in his or her own right, and show that the member has authorized the organization to intervene on his or her behalf; LBP-10-15, 72 NRC 276 (2010)
Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163-64 (2000)
an entity seeking to intervene on behalf of its members must show that it has an individual member who can fulfill all the necessary standing elements and who has formally authorized the organization to represent his or her interests; LBP-10-21, 72 NRC 639 (2010)
Village of Bensonville v. Federal Aviation Administration, 457 F.3d 52, 71 (D.C. Cir. 2006)
NEPA requires NRC to provide a reasonable mitigation alternatives analysis, containing reasonable estimates, including full disclosures of any known shortcomings in methodology, incomplete or unavailable information and significant uncertainties; CLI-10-22, 72 NRC 209 (2010)
Virginia Electric and Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 317 (2008)
if applicant cures the omission on which a contention is based, the contention will become moot; LBP-10-16, 72 NRC 395 (2010)
pleading requirements calling for a recitation of facts or expert opinion supporting the issue raised are inapplicable to a contention of omission beyond identifying the legally required missing information; LBP-10-16, 72 NRC 395 (2010)
Virginia Electric and Power Co. (North Anna Power Station, Unit 3), LBP-09-27, 70 NRC 992, 996 (2009)
the final safety analysis report was configured to accommodate at least 10 years of onsite storage; LBP-10-20, 72 NRC 600 n.33 (2010)
Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313, 314 (1974)
in procedural and scheduling matters, where first-hand contact with and appreciation for all the circumstances surrounding a case are necessary, maximum reliance on the proper discretion of a presiding officer is essential; CLI-10-17, 72 NRC 47 n.255 (2010)
Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1026-27 (9th Cir. 1980)
an agency would not proceed in the face of any substantial risk that a dam might fail, making consequences of such a failure remote and speculative; CLI-10-18, 72 NRC 90 n.192 (2010)
Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983)
the significance of the issue being raised by a new contention would be a relevant "good cause" consideration; LBP-10-21, 72 NRC 648-49 (2010)
Westinghouse Electric Corp. (Nuclear Fuel Export License for Czech Republic — Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331 (1994)
redressability requires petitioner to show that its alleged injury in fact could be cured or alleviated by some action of the tribunal; LBP-10-16, 72 NRC 382 (2010)

LEGAL CITATIONS INDEX

CASES

Westlands Water District v. U.S. Department of Interior, 376 F.3d 853, 868 (9th Cir. 2004)
NEPA's rule of reason does not require an agency to undertake a separate analysis of alternatives that are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences; CLI-10-18, 72 NRC 82 (2010)

Whitmore v. Arkansas, 495 U.S. 149, 158-59 (1990)
standing generally has been denied when the threat of injury is not concrete and particularized; LBP-10-16, 72 NRC 381 (2010)

Williams v. United States, 379 F.2d 719, 723 (5th Cir. 1967)
some circumstances surrounding a person's false statement may be so obvious that knowledge of its character may be fairly attributed to him; CLI-10-23, 72 NRC 223 n.52 (2010)

Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 929 (1974)
discovery is not permitted before a petition to intervene has been granted; CLI-10-24, 72 NRC 463 n.70 (2010)

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994)
an organization seeking to intervene in its own right must allege that the challenged action will cause a cognizable injury to its interests or to the interests of its members; LBP-10-15, 72 NRC 276 (2010)

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)
once parties demonstrate standing, they will then be free to assert any contention that, if proved, will afford them the relief they seek; LBP-10-15, 72 NRC 276 (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-10-15, 72 NRC 275 (2010); LBP-10-21, 72 NRC 639 (2010)

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996)
although the contention admissibility rule imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from applicant to petitioner; LBP-10-24, 72 NRC 756-57 (2010)
for factual disputes, petitioner must present sufficient information to show a genuine dispute; CLI-10-20, 72 NRC 193 n.42 (2010); LBP-10-24, 72 NRC 756-57 (2010)
for factual disputes, petitioner need not proffer facts in formal affidavit or evidentiary form sufficient to withstand a summary disposition motion; LBP-10-24, 72 NRC 756-57 (2010)
petitioner is not required to prove its case at the contention stage; LBP-10-24, 72 NRC 756-57 (2010)
the level of support necessary for an admissible contention is explained; LBP-10-24, 72 NRC 756-57 (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-10-21, 72 NRC 651 (2010)

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 194-95 (1998)
to establish organizational standing, an organization must demonstrate that the action at issue will cause an injury-in-fact to the organization's interests and the injury is within the zone of interests protected by NEPA or the AEA; LBP-10-16, 72 NRC 383 (2010)

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998)
where a facility will not be located within an Indian tribes boundaries, the tribe must meet the standing requirements imposed by 10 C.F.R. 2.309(d)(1); LBP-10-16, 72 NRC 390-91 (2010)

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195-96 (1998)
petitioner's claimed injury must be arguably within the zone of interests protected by the governing statute in the proceeding; LBP-10-16, 72 NRC 381 (2010)

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202 (1998)
in the interest of efficient case management and prompt resolution of adjudications, the Commission has generally enforced the 10-day deadline for appeals strictly, excusing it only in unavoidable and extreme circumstances; CLI-10-26, 72 NRC 476 (2010)

LEGAL CITATIONS INDEX

CASES

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202-03 (1998)
only in truly extraordinary and unanticipated circumstances are late filings to be accepted; LBP-10-21, 72 NRC 636-37 (2010)

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 n.30, *rev'd in part on other grounds,* CLI-96-7, 43 NRC 235 (1996)
boards may examine both the statements in the document that support the petitioner's assertions and those that do not; LBP-10-24, 72 NRC 750 (2010)

LEGAL CITATIONS INDEX
REGULATIONS

10 C.F.R. 2.4
"potential party" is defined; CLI-10-24, 72 NRC 454 n.12 (2010); CLI-10-25, 72 NRC 470 n.7 (2010)
10 C.F.R. 2.101(a-1)(2)
this provision pertains to early consideration of site suitability issues, allows a COL applicant requesting such consideration to submit its application in parts, and provides a schedule for submitting those parts of the application to the agency; LBP-10-17, 72 NRC 516 (2010)
10 C.F.R. 2.203
the board exercised its authority to request clarification from the parties regarding the extent that a proposed settlement agreement called upon licensee to take specific measures to avoid repetition of the storage drum mislabeling and insufficient operator training that led to a hydrofluoric acid spill event; LBP-10-18, 72 NRC 522 (2010)
10 C.F.R. 2.206
once a proceeding has been closed, petitioners will still have the opportunity to raise issues by using NRC enforcement procedures; CLI-10-17, 72 NRC 10 n.17 (2010)
petitioner's request for action concerning deficiencies in licensee's employee concerns program is denied; DD-10-1, 72 NRC 150-62 (2010)
petitioner's request that unescorted access authorization be restored so that he can perform his accepted job tasks with all record of denial removed from any and all records is denied; DD-10-2, 72 NRC 163-70 (2010)
petitioner's requests for enforcement action for alleged regulatory, criminal, and ethical misconduct and coverup by NRC Staff is denied; DD-10-3, 72 NRC 172-84 (2010); DD-10-3, 72 NRC 171 (2010)
process for considering petitions is discussed; DD-10-3, 72 NRC 174-75 (2010); DD-10-3, 72 NRC 171 (2010)
proper implementation of quality assurance requirements is a matter that may be raised in a subsequent Part 50 operating license proceeding or in a petition for agency action under 10 C.F.R. 2.206; CLI-10-26, 72 NRC 478 n.22 (2010)
to the extent petitioner believes that NRC Staff has overlooked facts indicating an inadequate safety culture as a matter separate and apart from license renewal, then its remedy is to direct Staff's attention to the supporting facts via a petition for enforcement action; CLI-10-27, 72 NRC 492 (2010)
10 C.F.R. 2.309(a)
a petition for review and request for hearing must include a showing that petitioner has standing and that the board should consider the nature of the petitioner's right under the AEA or NEPA 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 decision or order that may be issued in the proceeding on the petitioner's interest; LBP-10-16, 72 NRC 380 (2010)
for a request for hearing and petition to intervene to be granted, a petitioner must establish that it has standing and propose at least one admissible contention; CLI-10-26, 72 NRC 475 (2010); LBP-10-15, 72 NRC 275, 277 (2010); LBP-10-16, 72 NRC 394 (2010)
10 C.F.R. 2.309(c)
good cause is the most significant of the late-filing factors; LBP-10-24, 72 NRC 731, 769 (2010)
if a motion to reopen relates to a contention not previously in controversy among the parties, movant must meet the late-filing requirements; LBP-10-21, 72 NRC 643 (2010)
intervenors must move for leave to file an untimely new or amended contention under this section; LBP-10-14, 72 NRC 107 (2010)

motions to reopen must address eight separate factors that must be considered and balanced for any nontimely filing; LBP-10-19, 72 NRC 534-35 (2010)
no new contention will be admitted unless petitioner has satisfactorily provided the information required by this requlation; LBP-10-19, 72 NRC 535 (2010)
NRC regulations preserve the right to a hearing when an application is amended by allowing new or amended contentions to be filed in response to material new information; LBP-10-17, 72 NRC 515 (2010)
the regulation is potentially relevant to new NEPA contentions, given that it provides criteria for boards to apply in deciding whether to admit nontimely filings; LBP-10-24, 72 NRC 729 (2010)
this section governs the admission of contentions that do not satisfy 10 C.F.R. 2.309(f)(2); LBP-10-14, 72 NRC 108 n.27 (2010)
10 C.F.R. 2.309(c)(1)
boards must balance eight factors in evaluating nontimely intervention petitions, hearing requests, and contentions; LBP-10-24, 72 NRC 731 (2010)
10 C.F.R. 2.309(c)(1)(i)
a contention filed within 30 days of the issuance of a document that legitimately undergirds the contention would be timely and presumptively meet the good cause requirement; CLI-10-18, 72 NRC 87 (2010)
failure to meet the good cause factor considerably enhances the burden of showing that the other factors justify admission of a late-filed petition; LBP-10-21, 72 NRC 648 (2010)
good cause is the factor given the greatest weight when ruling on motions for leave to submit late-filed contentions; CLI-10-17, 72 NRC 53 n.304 (2010)
10 C.F.R. 2.309(d)
in determining whether an individual or organization should be granted party status based on standing of right, NRC applies contemporaneous judicial standing concepts; LBP-10-21, 72 NRC 639 (2010)
to be accorded intervenor status and a hearing, petitioner must demonstrate standing and proffer at least one admissible contention; CLI-10-26, 72 NRC 475 (2010)
10 C.F.R. 2.309(d)(1)
to establish organizational standing, an organization must demonstrate that the action at issue will cause an injury in fact to the organization's interests and the injury is within the zone of interests protected by NEPA or the AEA; LBP-10-16, 72 NRC 383 (2010)
10 C.F.R. 2.309(d)(1)(ii)-(iv)
a petition for review and request for hearing must include a showing that petitioner has standing and that the board should consider the nature of the petitioner's right under the AEA or NEPA 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 decision or order that may be issued in the proceeding on the petitioner's interest; LBP-10-16, 72 NRC 380 (2010)
information required to show standing includes the nature of petitioner's right under a relevant statute to be made a party, the nature and extent of petitioner's property, financial, or other interest in the proceeding, and the possible effect of any decision or order that might be issued on petitioner's interest; LBP-10-15, 72 NRC 275 (2010)
10 C.F.R. 2.309(d)(2)
a federally recognized Indian tribe may seek to participate in a proceeding; LBP-10-16, 72 NRC 390 (2010)
10 C.F.R. 2.309(f)
appeals of partial initial decisions are not the proper procedural context in which to revise contentions; CLI-10-17, 72 NRC 44 (2010)
10 C.F.R. 2.309(f)(1)
a single sentence labeled a contention, with no reference to the six elements of this section does not make an admissible contention; LBP-10-16, 72 NRC 396 (2010)
an admissible contention must meet all the requirements of this section; LBP-10-16, 72 NRC 394 (2010)
challenge to the technical adequacy of baseline water quality data and adequate confinement of the host aquifer in applicant's environmental report is admissible; LBP-10-16, 72 NRC 403 (2010)
contentions must meet six admissibility requirements; LBP-10-14, 72 NRC 109 (2010)

it is petitioner's burden of going forward at the contention admission stage to submit a complete, self-contained contention addressing each of the elements required by this section; LBP-10-16, 72 NRC 415-16 (2010)
motions to reopen must address the six criteria that all contentions must meet; LBP-10-19, 72 NRC 535 (2010)
new or amended contention, like any other, must comply with the admissibility requirements of this section; LBP-10-17, 72 NRC 515 (2010)
NRC contention admissibility requirements are deliberately strict, and any contention that does not satisfy them will be rejected; CLI-10-21, 72 NRC 201 (2010)
petitioner failed to identify any statute or NRC regulation to support its theory that applicant may not revise its application to include a different reactor design; LBP-10-17, 72 NRC 509-10 (2010)
petitioner raises a genuine dispute with the application with respect to the adequacy of information needed to characterize the site and offsite hydrogeology to ensure confinement of the extraction fluids; LBP-10-16, 72 NRC 426 (2010)
petitioner, especially one represented by counsel, bears the burden of going forward and specifically addressing each of the six elements in this section; LBP-10-16, 72 NRC 396 (2010)
the hearing process is only intended for issues that are appropriate for, and susceptible to, resolution in an NRC hearing; LBP-10-15, 72 NRC 278 (2010)
the purpose of contention pleading requirements is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-10-15, 72 NRC 278 (2010); LBP-10-16, 72 NRC 394 (2010)
where petitioner was admitted to the case as a party at the time it filed an amended contention, consideration of the contention's admissibility is governed by the provisions of this section as well as the general contention admissibility requirements of section 2.309(f)(2); CLI-10-18, 72 NRC 86 n.171 (2010)
10 C.F.R. 2.309(f)(1)(i)
contention raised the legal issue of whether the Staff's failure to consider alternative locations complied with NEPA; CLI-10-18, 72 NRC 82 n.151 (2010)
10 C.F.R. 2.309(f)(1)(i)-(ii)
contentions of omission must describe the information that should have been included in the environmental report and provide the legal basis that requires the omitted information to be included; LBP-10-16, 72 NRC 395 (2010)
10 C.F.R. 2.309(f)(1)(i)-(vi)
general contention admissibility requirements are described; CLI-10-27, 72 NRC 489-90 (2010); LBP-10-21, 72 NRC 651 (2010)
six basic requirements for an admissible contention can be summarized as specificity, brief explanation, within scope, materiality, concise statement of alleged facts or expert opinion, and genuine dispute; LBP-10-15, 72 NRC 277 (2010)
10 C.F.R. 2.309(f)(1)(ii)
petitioner described the legal basis for its contention under Ninth Circuit legal precedents; CLI-10-18, 72 NRC 82 n.151 (2010)
10 C.F.R. 2.309(f)(1)(iii)
contention satisfied scope and materiality requirements by raising a legal issue related to completeness of the environmental assessment and compliance with NEPA; CLI-10-18, 72 NRC 82 n.151 (2010)
economic impact of a proposed action on ratepayers is outside the scope of a NEPA analysis; LBP-10-14, 72 NRC 125-26 (2010)
petitioner must also demonstrate that its contention is within the scope of the proceeding; LBP-10-16, 72 NRC 395 (2010)
petitioner's assertion that terrorist-act-originated SAMA analysis is required by Ninth Circuit law satisfies the requirements that the issue be within the scope of a license renewal proceeding; LBP-10-15, 72 NRC 322 (2010)
10 C.F.R. 2.309(f)(1)(iv)
contention satisfied scope and materiality requirements by raising a legal issue related to completeness of the environmental assessment and compliance with NEPA; CLI-10-18, 72 NRC 82 n.151 (2010)

cost-risk calculations that intervenors propose in in their contention as they relate to the existing reactors are not material to the findings that the NRC must make to license the proposed reactors; LBP-10-14, 72 NRC 126 (2010)
10 C.F.R. 2.309(f)(1)(v)
in proffering contentions that challenge an application, petitioner or intervenor must provide support, including references to sources and documents on which it intends to rely and a guidance document could be one of those sources; CLI-10-24, 72 NRC 467 (2010)
petitioner must provide a concise statement of the alleged facts that support its position and upon which the petitioner intends to rely at the hearing; LBP-10-16, 72 NRC 395 (2010)
petitioner presented a legal contention of omission and a genuine dispute over compliance with NEPA; CLI-10-18, 72 NRC 82 n.154 (2010)
pleading requirements calling for a recitation of facts or expert opinion supporting the issue raised are inapplicable to a contention of omission beyond identifying the legally required missing information; LBP-10-16, 72 NRC 395 (2010)
the requirement that contentions be supported by alleged facts or expert opinion generally is fulfilled when the sponsor of an otherwise acceptable contention provides a brief recitation of the factors underlying the contention or references to documents and text that provide such reasons; LBP-10-14, 72 NRC 129 n.182 (2010)
the showing required for "need" for SUNSI could include, but does not require (nor is it limited to), an explanation that the information will be used as support for a contention; CLI-10-24, 72 NRC 465 n.85 (2010)
10 C.F.R. 2.309(f)(1)(vi)
a contention asserting that the application fails to contain information on a relevant matter as required by law must be supported by petitioner through identification of each failure and the supporting reasons for the petitioner's belief; LBP-10-15, 72 NRC 321 (2010)
a contention must challenge the license application; CLI-10-24, 72 NRC 467 (2010)
contentions of omission claim that the application fails to contain information on a relevant matter as required by law and provide the supporting reasons for petitioner's belief; LBP-10-16, 72 NRC 395 (2010)
failure to point to a regulation that requires the inclusion of omitted information in an application is fatal and thus precludes the admission of the contention; LBP-10-16, 72 NRC 411 (2010)
if petitioner makes a *prima facie* allegation that the application omits information required by law, it necessarily presents a genuine dispute with the applicant on a material issue in compliance and raises an issue plainly material to an essential finding of regulatory compliance needed for license issuance; LBP-10-16, 72 NRC 395 (2010)
petitioner presented a legal contention of omission and a genuine dispute over compliance with NEPA; CLI-10-18, 72 NRC 82 n.151 (2010)
10 C.F.R. 2.309(f)(1)(vii)
this section applies only to proceedings arising under 10 C.F.R. 52.103(b); CLI-10-27, 72 NRC 490 n.41 (2010)
10 C.F.R. 2.309(f)(2)
a contention must challenge the license application; CLI-10-24, 72 NRC 467 (2010)
although obligations under NEPA fall to the agency and therefore the NRC Staff, petitioners are required to raise environmental objections based on applicant's environmental report; LBP-10-15, 72 NRC 321 (2010); LBP-10-16, 72 NRC 437 (2010); LBP-10-24, 72 NRC 729 (2010)
contentions may be amended or new contentions filed, with permission from the presiding officer, if petitioner shows that information on which the contention is based was not previously available and is materially different than information previously available and the contention has been submitted in a timely fashion based on the availability of the subsequent information; CLI-10-18, 72 NRC 87 (2010); LBP-10-14, 72 NRC 107 (2010); LBP-10-17, 72 NRC 508 n.21 (2010)
if a motion to reopen and proposed new contention are based on material information that was not previously available, then it qualifies as timely; LBP-10-19, 72 NRC 545 (2010)
if intervenors fail to show that the draft environmental impact statement contains new data or conclusions that differ from those in the environmental report, the intervenor may file a new contention after the

initial docketing with leave of the presiding officer upon a showing on three factors; LBP-10-24, 72 NRC 730 (2010)
in light of the requirements that any new contention be based on material information that was not previously available, the timeliness determination required under this provision and the section 2.326(a) reopening standard can be closely equated; LBP-10-21, 72 NRC 650 (2010)
intervenors must move for leave to file a timely new or amended contention under this section; LBP-10-14, 72 NRC 107 (2010)
new or amended contentions may be filed in the event that there are data or conclusions in the NRC draft or final environmental impact statement that differ significantly from the data or conclusions in the applicant's documents; LBP-10-16, 72 NRC 438 (2010); LBP-10-17, 72 NRC 515 (2010); LBP-10-24, 72 NRC 729-30, 768 (2010)
once the deadline for filing an initial intervention petition has passed, a party wishing to submit new or amended contentions on matters not associated with issuance of the Staff's draft or final environmental impact statement must satisfy the requirements of this section; LBP-10-21, 72 NRC 650 (2010)
requirements for determining the timeliness of a new NEPA contention are set forth; LBP-10-24, 72 NRC 729 (2010)
the time for filing a new or an amended contention is triggered by different events; LBP-10-24, 72 NRC 738 (2010)
this amended rule is not intended to alter the standards in section 2.714(a) of its rules of practice as interpreted by NRC case law respecting late-filed contentions; LBP-10-17, 72 NRC 508 n.21 (2010)
use of the disjunctive phrase "data *or* conclusions" means that it is sufficient that either data or conclusions in the draft environmental impact statement differ significantly from those in the environmental report; LBP-10-24, 72 NRC 730 (2010)
where petitioner was admitted to the case as a party at the time it filed an amended contention, consideration of the contention's admissibility is governed by the provisions of this section as well as the general contention admissibility requirements of section 2.309(f)(1); CLI-10-18, 72 NRC 86 n.171 (2010)
whether and how the Staff fulfills its National Historic Preservation Act and NEPA obligations are issues that could form the basis of a new contention; LBP-10-16, 72 NRC 422 (2010)
10 C.F.R. 2.309(f)(2)(i)
new contentions based on assumptions that cannot be considered information that was not previously available or materially different than information previously available do not meet admissibility requirements; CLI-10-17, 72 NRC 29 (2010)
new contentions must be based on information not previously available; CLI-10-27, 72 NRC 496 (2010)
10 C.F.R. 2.309(f)(2)(i)-(iii)
if a contention based on new information fails to satisfy the three-part test of this section, it may be evaluated under section 2.309(c); LBP-10-24, 72 NRC 731, 769 (2010)
intervenor is entitled to submit a new safety contention, with leave of the board, upon three showings; CLI-10-17, 72 NRC 7 n.19 (2010)
showing that proponent of nontimely contentions must make is described; CLI-10-27, 72 NRC 490 (2010)
the time for filing a new or an amended contention is triggered by different events; LBP-10-24, 72 NRC 738 (2010)
10 C.F.R. 2.309(f)(2)(ii)
new contentions based on assumptions that cannot be considered information that was not previously available or materially different than information previously available do not meet admissibility requirements; CLI-10-17, 72 NRC 29 (2010)
10 C.F.R. 2.309(f)(2)(iii)
a contention based on new information will be considered timely if it is filed within 30 days of the availability of the new information; LBP-10-14, 72 NRC 107-08 (2010)
a contention filed within 30 days of the issuance of a document that legitimately undergirds the contention would be timely and presumptively meet the good cause requirement; CLI-10-18, 72 NRC 87 (2010)
intervenor must comply with procedural requirements for the filing of new or amended contentions, including the requirement that the contentions be submitted in a timely fashion based on the availability of the subsequent information; LBP-10-17, 72 NRC 515 (2010)

LEGAL CITATIONS INDEX

REGULATIONS

10 C.F.R. 2.309(g)
if petitioner relies upon 10 C.F.R. 2.310(d) in requesting a Subpart G proceeding, then petitioner must demonstrate, by reference to the contention, that its resolution necessitates resolution of material issues of fact which may best be determined through the use of the identified procedures; LBP-10-15, 72 NRC 344 (2010)
the board determines which hearing procedure to use on a contention-by-contention basis; LBP-10-15, 72 NRC 344 (2010)
10 C.F.R. 2.310
upon admission of a contention, the board must identify the specific hearing procedures to be used; LBP-10-15, 72 NRC 344 n.98 (2010)
10 C.F.R. 2.310(a)
if no particular procedure is compelled, the board must exercise its discretion and select the hearing procedure most appropriate for the newly admitted contentions; LBP-10-15, 72 NRC 344 (2010); LBP-10-16, 72 NRC 442 (2010)
10 C.F.R. 2.310(b)-(h)
if a contention does not fall within one of the categories listed in this section for specific situations, proceedings may be conducted under the procedures of Subpart L; LBP-10-15, 72 NRC 344 (2010)
10 C.F.R. 2.310(d)
Subpart G procedures will be used where resolution of a contention necessitates resolution of material issues of fact relating to the occurrence of a past activity where the credibility of an eyewitness may reasonably be expected to be at issue and/or issues of the motive or intent of the party or eyewitness material to the resolution of the contested matter; LBP-10-15, 72 NRC 344 (2010)
the board determines which hearing procedure to use on a contention-by-contention basis; LBP-10-15, 72 NRC 344 (2010)
10 C.F.R. 2.310(h)(1)
if a hearing on a contention is expected to take no more than 2 days to complete, the board can impose the Subpart N procedures for expedited proceedings with oral hearings specified by 10 C.F.R. 2.1400-1407; LBP-10-15, 72 NRC 343 n.95 (2010); LBP-10-16, 72 NRC 442 (2010)
10 C.F.R. 2.311(b)
petitioners have 10 days to appeal an order denying a petition to intervene and/or request for hearing; CLI-10-26, 72 NRC 475 n.5 (2010)
10 C.F.R. 2.311(c)
an order denying a petition to intervene and/or request for hearing may be appealed to the Commission on the question of whether the petition and/or request should have been granted; CLI-10-20, 72 NRC 188 (2010)
petitioners have 10 days to appeal an order denying a petition to intervene and/or request for hearing; CLI-10-26, 72 NRC 475 n.5 (2010)
10 C.F.R. 2.311(d)(2)
an appeal as of right by the NRC Staff is permitted on the question of whether a request for access to sensitive unclassified non-safeguards information should have been denied in whole or in part; CLI-10-24, 72 NRC 461 (2010)
10 C.F.R. 2.313(b)
licensing board judges remain under a continuing obligation to withdraw if a ground for disqualification arises; CLI-10-22, 72 NRC 207 (2010)
10 C.F.R. 2.313(b)(2)
if a licensing board member declines to grant a party's recusal motion, the motion is referred to the Commission to determine the sufficiency of the grounds alleged; CLI-10-22, 72 NRC 203 (2010)
10 C.F.R. 2.314(a)
parties and their representatives are expected to conduct themselves as they should before a court of law; LBP-10-21, 72 NRC 638 n.6 (2010)
10 C.F.R. 2.319
cross-examination occurs virtually automatically in Subpart G hearings, subject to normal judicial management and the requirement to file a cross-examination plan; LBP-10-15, 72 NRC 344 (2010)
licensing boards have authority to regulate the course of the proceeding, and the Commission generally defers to boards on case management decisions; CLI-10-28, 72 NRC 554 (2010)

licensing boards have authority to set a proceeding's schedule and to ensure compliance with that schedule; LBP-10-21, 72 NRC 635 (2010)
10 C.F.R. 2.319(d)
although the Federal Rules of Evidence are not mandated for NRC adjudicatory proceedings, the Commission has endorsed their use as guidance for the boards with the express proviso that boards must apply the Part 2 rules with greater flexibility than the FRE; LBP-12-23, 72 NRC 705-06 (2010)
licensing boards have the authority to regulate hearing procedures, and decisions on evidentiary questions fall within that authority; CLI-10-18, 72 NRC 73 (2010)
10 C.F.R. 2.319(i)
to enable presiding officers to fulfill their duty, they have been given broad authority to examine witnesses at evidentiary hearings; CLI-10-17, 72 NRC 47 (2010)
10 C.F.R. 2.319(j)
boards are authorized to hold prehearing conferences to simplify or clarify the issues for hearing, after which they may admit a revised contention, as long as the revised contention does not add material not raised by the intervenor to make it admissible; LBP-10-14, 72 NRC 127 n.171 (2010)
10 C.F.R. 2.319(k)
licensing boards have the authority to control the schedule for a proceeding to ensure that intervenors have adequate time to prepare new or amended contentions in response to new information; LBP-10-17, 72 NRC 515-16 (2010)
10 C.F.R. 2.323
motions filed under this section are not a legitimate means to bring challenges to board decisions to the Commission; CLI-10-28, 72 NRC 554 n.2 (2010)
10 C.F.R. 2.323(a)
motions are to be filed within 10 days of the event or circumstance from which they arise; LBP-12-23, 72 NRC 714 n.34 (2010)
10 C.F.R. 2.323(f)
decisions that involve significant and novel issues, the resolution of which would materially advance the orderly disposition of proceedings, should be referred to the Commission; LBP-10-20, 72 NRC 608-09 (2010)
10 C.F.R. 2.323(f)(1)
licensing boards are to refer novel issues of law to the Commission; LBP-10-15, 72 NRC 273 (2010)
10 C.F.R. 2.323(h)
a party seeking to challenge NRC Staff's claim of privilege or protected status may file a motion to compel production of the document; CLI-10-24, 72 NRC 463 (2010)
10 C.F.R. 2.325
summary disposition movant bears the burden of demonstrating that there is no genuine issue as to any material fact; LBP-10-20, 72 NRC 579 (2010)
10 C.F.R. 2.326
a proceeding will remain open during the pendency of a remand, during which time, petitioners are free to submit a motion to reopen the record should they seek to address any genuinely new issues related to the license renewal application that previously could not have been raised; CLI-10-17, 72 NRC 10 n.17 (2010)
motions to reopen a closed case for the consideration of a new contention must address the requirements of this section as well as two other regulations; LBP-10-19, 72 NRC 534, 535 (2010)
petitioners are free to submit a motion to reopen the record should they seek to address any genuinely new issues related to a license renewal application that previously could not have been raised; LBP-10-19, 72 NRC 533 (2010)
10 C.F.R. 2.326(a)
timeliness of a motion to reopen depends on what or when the trigger occurred that provided the footing for the new contention and whether the motion was timely filed after that trigger event; LBP-10-21, 72 NRC 644 (2010)
10 C.F.R. 2.326(a)(1)
although a motion to reopen must be timely, an exceptionally grave issue may be considered even if the motion is not timely; LBP-10-19, 72 NRC 547 n.20 (2010)

where a motion to reopen to introduce a new contention foundered on several of the initial criteria, the board found it unnecessary to analyze all of the other factors; LBP-10-19, 72 NRC 531-32 (2010)
10 C.F.R. 2.326(a)(1)-(3)
motions to reopen a closed record must be timely, address a significant safety or environmental issue, and demonstrate that a materially different result would have been likely; LBP-10-19, 72 NRC 535, 544, 545, 552 (2010)
once the record of a proceeding is closed, new information may not be considered in the proceeding unless the reopening standards of this section are met; LBP-10-21, 72 NRC 642-43 (2010)
10 C.F.R. 2.326(a)(2)
given that a motion to reopen fails to satisfy section 2.326(a)(1) and (3), it is unnecessary to decide this significance prong of the regulation; LBP-10-19, 72 NRC 549 (2010)
10 C.F.R. 2.326(a)(3)
movant must show that it is more probable than not that it would have prevailed on the merits of the proposed new contention; LBP-10-19, 72 NRC 549 (2010)
when a reopening motion is untimely, the section 3.326(a)(1) "exceptionally grave circumstances" test supplants the "significant issue" standard under section 2.326(a)(2); LBP-10-21, 72 NRC 646 n.16 (2010)
where a motion to reopen a proceeding to introduce a new contention foundered on several of the initial criteria, the board found it unnecessary to analyze all of the other factors; LBP-10-19, 72 NRC 531-32 (2010)
10 C.F.R. 2.326(b)
a motion to reopen must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied, including addressing each of the reopening criteria separately with a specific explanation of why it has been met; LBP-10-21, 72 NRC 643, 646-47 (2010)
affidavits supporting motions to reopen must separately address each of the criteria set forth in section 2.326(a)(1)-(3); LBP-10-19, 72 NRC 535 (2010)
motions to reopen must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of section 2.326(a) have been satisfied; LBP-10-19, 72 NRC 535, 544 (2010)
10 C.F.R. 2.326(d)
if a motion to reopen relates to a contention not previously in controversy among the parties, movant must meet the late-filing requirements of section 2.309(c)(1)(i)-(viii); LBP-10-19, 72 NRC 535 (2010); LBP-10-21, 72 NRC 643, 647 (2010)
10 C.F.R. 2.329(c)(1)
boards are authorized to hold prehearing conferences to simplify or clarify the issues for hearing, after which they may admit a revised contention, as long as the revised contention does not add material not raised by the intervenor to make it admissible; LBP-10-14, 72 NRC 127 n.171 (2010)
10 C.F.R. 2.331
presiding officers always have been entitled to question the parties' counsel at oral argument hearings; CLI-10-17, 72 NRC 47 (2010)
10 C.F.R. 2.332
licensing boards have authority to set a proceeding's schedule and to ensure compliance with that schedule; LBP-10-21, 72 NRC 635 (2010)
10 C.F.R. 2.334
licensing boards have authority to implement a hearing schedule for the proceeding; LBP-10-21, 72 NRC 635 (2010)
10 C.F.R. 2.335
challenges to regulations are not litigable; LBP-10-16, 72 NRC 437-48 (2010)
10 C.F.R. 2.335(a)
absent a waiver, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications; LBP-10-15, 72 NRC 278 (2010); LBP-10-16, 72 NRC 394-95 (2010); LBP-10-21, 72 NRC 651 (2010)

in making the findings required for issuance of a combined license, the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification rule; LBP-10-21, 72 NRC 653 (2010)
intervenors are precluded from challenging ASME inspection requirements in a combined license proceeding because NRC regulations directly incorporate ASME inspection requirements by reference; LBP-10-21, 72 NRC 656 (2010)
no rule or 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; LBP-10-14, 72 NRC 119 n.108 (2010)
10 C.F.R. 2.335(b)
a petition for waiver of rule must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation would not serve the purposes for which the rule or regulation was adopted; LBP-10-15, 72 NRC 279, 310 n.85 (2010)
the sole ground for a waiver of or exception from a regulation is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation would not serve the purposes for which the rule or regulation was adopted; LBP-10-15, 72 NRC 279 (2010)
10 C.F.R. 2.335(b)-(d)
petitioner has provided a prima facie showing that the relevant regulations should be waived; LBP-10-15, 72 NRC 273 (2010)
10 C.F.R. 2.335(c)
if a board rules that no prima facie showing has been made on a rule waiver request, then the board may not further consider the matter; CLI-10-29, 72 NRC 560 (2010); LBP-10-15, 72 NRC 279 (2010); LBP-10-22, 72 NRC 688 (2010)
10 C.F.R. 2.335(d)
determination as to whether the criteria for exemption from or waiver of a rule are met and a waiver is warranted is the sole province of the Commission; LBP-10-15, 72 NRC 279 (2010)
if a board concludes that petitioner has made a prima facie showing of special circumstances on a rule waiver request, then the board shall certify the matter directly to the Commission, which may grant or deny the waiver or make whatever determination it deems appropriate; LBP-10-15, 72 NRC 273, 279, 306 (2010); LBP-10-22, 72 NRC 688 (2010)
licensing board's role regarding rule waiver requests is limited to deciding whether the petitioner has made a prima facie showing that the criteria are satisfied; LBP-10-15, 72 NRC 279 (2010)
10 C.F.R. 2.336
applicant has control of a document if applicant has the practical ability to obtain it, albeit for a cost or fee, from the expert consulting firm that generated the document while performing work for the applicant; LBP-12-23, 72 NRC 711 (2010)
the discovery required by this section constitutes the totality of the discovery that may be obtained in informal proceedings; CLI-10-24, 72 NRC 462 (2010)
the relevance standard of this section is even more flexible than the relevance standard of Fed. R. Evid. 401; LBP-12-23, 72 NRC 705 (2010)
the term "document," includes computer models; LBP-12-23, 72 NRC 703 (2010)
the term "document" is not limited to paper documents; LBP-12-23, 72 NRC 703 (2010)
this is a discovery regulation, and the rules are clear that the scope of discovery is broader than the scope of admissible evidence; LBP-12-23, 72 NRC 706 (2010)
use of any proprietary information that is produced is strictly limited to the proceeding for which it is produced, and such information must be promptly returned at the close of this proceeding; LBP-12-23, 72 NRC 713 (2010)
10 C.F.R. 2.336(a)
parties other than the NRC Staff are required to disclose certain information relevant to the admitted contentions; CLI-10-24, 72 NRC 462 n.70 (2010)
10 C.F.R. 2.336(a)(2)(i)
a party may comply by merely providing a description by category and location of all documents subject to mandatory disclosure; LBP-12-23, 72 NRC 714 n.31 (2010)

availability, not possession, custody, or control, is the criterion for the NRC Staff's mandatory disclosure responsibilities; LBP-12-23, 72 NRC 715 n.35 (2010)
because applicant has the practical ability to obtain the groundwater models and supporting modeling information generated by its contractor during the contractor's performance of work in support of applicant's COLA, these documents are within applicant's control for purposes of disclosure; LBP-12-23, 72 NRC 709-10 (2010)
documents that are relevant to the admitted contentions must be disclosed; LBP-12-23, 72 NRC 705 (2010)
each party must make the mandatory disclosures automatically without the need for a party to file a discovery request; LBP-12-23, 72 NRC 701 (2010)
it would not be unduly burdensome or costly to require applicant to disclose models that are maintained under a quality assurance program relatively available for inspection and review by the NRC Staff; LBP-12-23, 72 NRC 714 (2010)
the disclosing party can either provide the other parties with an actual copy of the document or data compilation or can simply describe it and provide it if the other party requests it; LBP-12-23, 72 NRC 701 (2010)
the scope of mandatory disclosure includes computer models, including the underlying data used in a computer analysis or simulation, the programs and programming methods, the software that embodies the computer program, and the model's inputs and outputs; LBP-12-23, 72 NRC 704 (2010)
the third test for mandatory disclosure is that the document must be in the party's possession, custody, or control; LBP-12-23, 72 NRC 706 (2010)
to rule that disclosure is limited to formal contractual deliverables would ignore practical reality and encourage applicants to draft consulting contracts to insulate themselves from the obligation to disclose critical computer modeling information; LBP-12-23, 72 NRC 710 (2010)
within 30 days of admission of a contention, each party must disclose to the other parties all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions; LBP-12-23, 72 NRC 698, 701 (2010)
10 C.F.R. 2.336(a)(2)(iii)
if a requested document or data compilation is publicly available, then a citation to the document and a description of where it may be publicly obtained is sufficient; LBP-12-23, 72 NRC 701, 711 (2010)
10 C.F.R. 2.336(a)-(b)
the filing of a motion for reconsideration or an interlocutory appeal is not a basis for suspending mandatory disclosures or production of the hearing file; LBP-10-15, 72 NRC 346 (2010)
10 C.F.R. 2.336(b)
Staff's disclosure obligations are not tied to the admitted contentions, but rather, it must make available documents that relate to the application and its review as a whole; CLI-10-24, 72 NRC 462 n.70 (2010)
10 C.F.R. 2.336(b)(3)
availability, not possession, custody, or control, is the criterion for the NRC Staff's mandatory disclosure responsibilities; LBP-12-23, 72 NRC 715 n.35 (2010)
disclosures that NRC Staff must make after issuance of the order granting leave to intervene are described; CLI-10-24, 72 NRC 463 (2010)
if and when NRC Staff relies on a document, then the Staff itself is also obliged to disclose the document, to the extent it is available; LBP-12-23, 72 NRC 715 (2010)
NRC Staff is expected to identify the final version of its guidance document in its next mandatory disclosure update; CLI-10-25, 72 NRC 472 n.20 (2010)
NRC Staff is required to disclose all documents supporting its review of the application or proposed action that is the subject of the proceeding; CLI-10-24, 72 NRC 464 (2010); CLI-10-25, 72 NRC 472 n.17 (2010)
10 C.F.R. 2.336(b)(5)
for documents that are otherwise discoverable, but for which there is a claim of privilege or protected status, NRC Staff must list them and provide sufficient information for assessing their privilege or protected status; CLI-10-24, 72 NRC 463 (2010)
if Staff seeks to withhold a document, it is required to provide sufficient information to support the Staff's claim of protected status; CLI-10-24, 72 NRC 464, 465 n.82 (2010)

should the Staff seek to withhold a guidance document under a claim of privilege or protected status, the document must be identified as required in this section; CLI-10-25, 72 NRC 472 n.20 (2010)
10 C.F.R. 2.336(d)
because of the security-related SUNSI categorization of a Staff guidance document used to assess an application's compliance with NRC rules, the Staff would not have to produce the document but would be required to identify the document as part of its continuing duty of disclosure; CLI-10-24, 72 NRC 464 (2010)
mandatory disclosures are updated every month; LBP-12-23, 72 NRC 698 (2010)
NRC Staff is expected to identify the final version of its guidance document in its next mandatory disclosure update; CLI-10-25, 72 NRC 472 n.20 (2010)
10 C.F.R. 2.336(g)
in a Subpart L proceeding, mandatory disclosure is the only form of discovery allowed, and all other forms are expressly prohibited; LBP-12-23, 72 NRC 702 (2010)
in a Subpart L proceeding, the mandatory disclosure provisions of this section apply; CLI-10-24, 72 NRC 462 (2010); CLI-10-25, 72 NRC 471 (2010)
10 C.F.R. 2.337(f)
a board rested its findings regarding a contention, in part, on certain facts that it officially noticed; CLI-10-17, 72 NRC 6 n.12 (2010)
10 C.F.R. 2.338(g), (h)
upon review of a settlement agreement and the clarification that parties provided, the terms of a proposed settlement agreement satisfy the regulatory requirements; LBP-10-18, 72 NRC 524 (2010)
10 C.F.R. 2.338(i)
the board exercised its authority to request clarification from the parties regarding the extent that a proposed settlement agreement called upon licensee to take specific measures to avoid repetition of the storage drum mislabeling and insufficient operator training that led to a hydrofluoric acid spill event; LBP-10-18, 72 NRC 522 (2010)
10 C.F.R. 2.341(b)(1)
this section provides for discretionary Commission review of a presiding officer's initial decision; CLI-10-17, 72 NRC 11 (2010)
10 C.F.R. 2.341(b)(2)
petitions for review may not exceed 25 pages; CLI-10-17, 72 NRC 45-46 n.247 (2010)
10 C.F.R. 2.341(b)(4)
petition for review satisfies subsections (ii), (iii), and (v) of the standards for review because the challenged portions of the initial decision address significant issues of law and policy that lack governing precedent and raise issues that could affect other license renewal determinations; CLI-10-17, 72 NRC 13 (2010)
review of final initial decisions is granted on a discretionary basis, giving due weight to petitioner's showing that there is a substantial question with respect to one or more of the considerations in this section; CLI-10-18, 72 NRC 72 (2010)
the Commission may take discretionary review of a licensing board's initial decision; CLI-10-23, 72 NRC 219 (2010)
the Commission will consider a petition for review if it raises a substantial question with respect to one or more of the five paragraphs of this section; CLI-10-17, 72 NRC 11 (2010)
10 C.F.R. 2.341(b)(4)(i)
materiality is a requirement for any fact-based argument in a petition for review; CLI-10-17, 72 NRC 30 n.171 (2010)
10 C.F.R. 2.341(b)(4)(ii)
Staff's petition for review is granted on the grounds that the Staff has demonstrated substantial questions as to the Board's correct application of NEPA jurisprudence, and as to whether certain actions taken by the board constituted prejudicial procedural error; CLI-10-18, 72 NRC 73 (2010)
10 C.F.R. 2.341(b)(4)(iv)
petitioner's argument regarding rejection of its contention satisfies the prejudicial procedural error standard for review; CLI-10-17, 72 NRC 13 (2010)

Staff's petition for review is granted on the grounds that the Staff has demonstrated substantial questions as to the Board's correct application of NEPA jurisprudence, and as to whether certain actions taken by the board constituted prejudicial procedural error; CLI-10-18, 72 NRC 73 (2010)
10 C.F.R. 2.341(f)(1)
decisions that involve significant and novel issues, the resolution of which would materially advance the orderly disposition of proceedings, should be referred to the Commission; LBP-10-20, 72 NRC 608-09 (2010)
10 C.F.R. 2.341(f)(2)
interlocutory review will be granted only if petitioner demonstrates that the issue for which it seeks review 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 affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-10-30, 72 NRC 568 (2010)
it is within Commission discretion to grant interlocutory review; CLI-10-29, 72 NRC 560 (2010); CLI-10-30, 72 NRC 568 (2010)
petitions for interlocutory review should address the standards of this section; CLI-10-28, 72 NRC 554 n.2 (2010)
showing necessary for grant of a petition for interlocutory review is described; CLI-10-29, 72 NRC 560 (2010)
10 C.F.R. 2.342
although a request for suspension of a proceeding does not fit cleanly into NRC procedural rules for stays, the Commission exercises discretion and consider petitioner's request; CLI-10-17, 72 NRC 10 n.32 (2010)
10 C.F.R. 2.390
handling of confidential commercial or financial (proprietary) information that has been submitted to the agency is governed by this section; CLI-10-24, 72 NRC 454 n.11 (2010)
10 C.F.R. 2.390(b)
applicant requested that its mitigative strategies report be withheld from public disclosure because it contained security-related information; CLI-10-24, 72 NRC 456 (2010)
10 C.F.R. 2.390(b)(6)
if a board determines that the party is entitled to obtain access to a document that has been claimed as privileged or protected, the board may issue a protective order as necessary to prevent public disclosure of the document; CLI-10-24, 72 NRC 463 (2010)
10 C.F.R. 2.390(d)
applicant requested that its mitigative strategies report be withheld from public disclosure because it contained security-related information; CLI-10-24, 72 NRC 456 (2010)
10 C.F.R. 2.390(f)
if a board determines that the party is entitled to obtain access to a document that has been claimed as privileged or protected, the board may issue a protective order as necessary to prevent public disclosure of the document; CLI-10-24, 72 NRC 463 (2010)
10 C.F.R. 2.704(a)(2)
parties must disclose all relevant documents in their possession, custody, or control; LBP-12-23, 72 NRC 706 (2010)
10 C.F.R. 2.705(b)(1)
it is not a ground for objection to discovery that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; LBP-12-23, 72 NRC 706 (2010)
10 C.F.R. 2.705(b)(2)(iii)
disclosure is not required if the burden or expense of the proposed discovery outweighs its likely benefit; LBP-12-23, 72 NRC 714 n.33 (2010)
10 C.F.R. 2.707(a)(1)
a party may file a request for production of documents, and the party receiving such a request must produce any relevant document in its possession, custody, or control; LBP-12-23, 72 NRC 706 (2010)

LEGAL CITATIONS INDEX

REGULATIONS

10 C.F.R. 2.710(d)(2)
summary disposition movant must show that the matter entails no genuine issue as to any material fact and that movant is entitled to a decision as a matter of law; LBP-10-20, 72 NRC 579, 586, 590 (2010)
10 C.F.R. 2.711(c)
cross-examination occurs virtually automatically in Subpart G hearings, subject to normal judicial management and the requirement to file a cross-examination plan; LBP-10-15, 72 NRC 344 (2010)
10 C.F.R. 2.790(a)(4), (b)
financial information relevant to the expected costs of plant operation and maintenance would have been available to petitioners but for its being submitted to the NRC as confidential commercial and financial information; CLI-10-24, 72 NRC 466 (2010)
10 C.F.R. 2.802
anyone may petition the Commission directly for a change in a rule; LBP-10-22, 72 NRC 690 (2010)
if petitioners believe that the specification for climate change no longer provides a reasonable basis for demonstrating compliance based on new scientific evidence, they can petition NRC to amend the rules; LBP-10-22, 72 NRC 689 (2010)
once a proceeding has been closed, petitioners will still have the opportunity to raise issues by using NRC rulemaking procedures; CLI-10-17, 72 NRC 10 n.17 (2010)
10 C.F.R. 2.1203
Staff's disclosure obligations are not tied to the admitted contentions, but rather, it must make available documents that relate to the application and its review as a whole; CLI-10-24, 72 NRC 462 n.70 (2010)
10 C.F.R. 2.1203(a)
the filing of a motion for reconsideration or an interlocutory appeal is not a basis for suspending mandatory disclosures or production of the hearing file; LBP-10-15, 72 NRC 346 (2010)
10 C.F.R. 2.1203(d)
in a Subpart L proceeding, mandatory disclosure is the only form of discovery allowed, and all other forms are expressly prohibited; LBP-12-23, 72 NRC 702 (2010)
in Subpart L proceedings, discovery is generally prohibited except for specified mandatory disclosures under 10 C.F.R. 2.336(f), (a), and (b) and the mandatory production of the hearing file under 10 C.F.R. 2.1203(a); LBP-10-15, 72 NRC 343 (2010); LBP-10-16, 72 NRC 442 (2010)
in Subpart L proceedings, the Commission looks to the mandatory disclosure provisions of 10 C.F.R. 2.336; CLI-10-24, 72 NRC 462 (2010); CLI-10-25, 72 NRC 471 (2010)
10 C.F.R. 2.1204(b)
in Subpart L proceedings, a party seeking to conduct cross-examination must file a written motion and obtain leave of the board; LBP-10-15, 72 NRC 344 (2010)
10 C.F.R. 2.1205(c)
in a Subpart L proceeding, the board must apply the summary disposition standard set forth in Subpart G; LBP-10-20, 72 NRC 579 (2010)
movant must show that the matter entails no genuine issue as to any material fact and that movant is entitled to a decision as a matter of law; LBP-10-20, 72 NRC 586, 590 (2010)
10 C.F.R. 2.1206
once a hearing is granted under Subpart L, an informal oral hearing on the merits is required except in the limited circumstances described in this rule; CLI-10-18, 72 NRC 94 (2010)
10 C.F.R. 2.1207(b)(6)
under Subpart L procedures, the board has the principal responsibility to question the witnesses; LBP-10-15, 72 NRC 343 (2010); LBP-10-16, 72 NRC 442 (2010)
10 C.F.R. 2.1208(b)
to enable presiding officers to fulfill their duty, they have been given broad authority to examine witnesses at evidentiary hearings; CLI-10-17, 72 NRC 47 (2010)
10 C.F.R. 2.1213
although a request for suspension of a proceeding does not fit cleanly into NRC procedural rules for stays, the Commission exercises discretion and consider petitioner's request; CLI-10-17, 72 NRC 10 n.32 (2010)
10 C.F.R. 2.1402(b)
selection of hearing procedures for contentions at the outset of a proceeding is not immutable because the availability of Subpart G procedures depends critically on whether the credibility of eyewitnesses is

important in resolving a contention, and witnesses relevant to each contention are not identified until after contentions are admitted; LBP-10-15, 72 NRC 345 n.99 (2010); LBP-10-16, 72 NRC 443 n.471 (2010)
10 C.F.R. Part 20
petitioner alleges that routine unprotected handling of an unshielded neutron source by licensed operators and uncontrolled access by untrained and unlicensed facility visitors to this neutron source violated ALARA requirements; DD-10-3, 72 NRC 175, 180, 182-83 (2010); DD-10-3, 72 NRC 171 (2010)
10 C.F.R. 20.201(b)
each licensee must evaluate the extent of radiation hazards that may be present; DD-10-3, 72 NRC 180, 181 (2010)
10 C.F.R. 20.1002
the long-established regulatory history and precedent of Part 20 are extended to Part 63; LBP-10-22, 72 NRC 670 n.24 (2010)
10 C.F.R. 20.1003
a "member of the public" is any individual except when that individual is receiving an occupational dose; LBP-10-22, 72 NRC 670 n.24 (2010)
"occupational dose" is defined; LBP-10-22, 72 NRC 670 n.24 (2010)
the ALARA obligation is defined; LBP-10-22, 72 NRC 669 n.21 (2010)
10 C.F.R. 20.1101(b)
applicant must have a program to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable; LBP-10-20, 72 NRC 598 (2010)
contention challenges an element of repository design that does not fall within the ambit of the required procedures and engineering controls of this section; LBP-10-22, 72 NRC 670 (2010)
licensees, including Part 63 licensees, are required to use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable; LBP-10-22, 72 NRC 669 (2010)
plans or procedures are valid means by which radiation exposure may be controlled; LBP-10-20, 72 NRC 611 (2010)
the purpose of the procedures and engineer controls in this section is to ensure ALARA occupational doses and doses to members of the public; LBP-10-22, 72 NRC 670 n.24 (2010)
this section does not exist in isolation, but must be read in context; LBP-10-22, 72 NRC 671 (2010)
10 C.F.R. 20.1301(a)(1)
applicant shall conduct operations so that the total effective dose equivalent to individual members of the public does not exceed 100 millirems per year; LBP-10-20, 72 NRC 598 (2010)
10 C.F.R. 20.1301(e)
applicant shall provide reasonable assurance that the annual dose equivalent to members of the public from planned discharges does not exceed 25 millirems to the whole body; LBP-10-20, 72 NRC 598 (2010)
10 C.F.R. Part 20, Subpart F
each licensee must evaluate the extent of radiation hazards that may be present; DD-10-3, 72 NRC 180 (2010); DD-10-3, 72 NRC 171 (2010)
10 C.F.R. 30.4
byproduct material is defined; LBP-10-16, 72 NRC 376 n.6 (2010)
10 C.F.R. 40.4
byproduct material is defined; LBP-10-16, 72 NRC 376 n.6 (2010)
source material is defined; LBP-10-16, 72 NRC 376 n.6 (2010)
10 C.F.R. 40.9
a claim of inadequacy in the organization of the application cannot be the basis for a contention; LBP-10-16, 72 NRC 410 (2010)
10 C.F.R. 40.31(h)
this section applies to uranium mills, not to in situ leach facilities; LBP-10-16, 72 NRC 434 (2010)
10 C.F.R. 40.32(e)
preconstruction monitoring and testing to establish background information is exempted from the prohibition on commencement of construction; LBP-10-16, 72 NRC 424 (2010)

LEGAL CITATIONS INDEX

REGULATIONS

10 C.F.R. Part 40, App. A, Criterion 2
- byproduct material from in situ extraction operations must be disposed of at existing large mill tailings disposal sites; LBP-10-16, 72 NRC 434 (2010)

10 C.F.R. Part 40, App. A, Criterion 9
- a surety arrangement is necessary as a prerequisite to operating, not as a prerequisite to licensing; LBP-10-16, 72 NRC 430 (2010)
- applicant must establish a surety arrangement that ensures sufficient funds will be available for decommissioning and decontamination of an NRC-licensed source materials site; LBP-10-16, 72 NRC 430 (2010)
- surety arrangements are matters appropriately addressed after issuance of the license, and even after completion of a hearing; LBP-10-16, 72 NRC 430 (2010)

10 C.F.R. 50.5
- knowledge of a fact requires not only an awareness of that fact but also an understanding or recognition of its significance; CLI-10-23, 72 NRC 222 (2010)

10 C.F.R. 50.5(a)(2)
- any employee of a licensee may not deliberately submit to the NRC information that employee knows to be incomplete or inaccurate in some respect material to the NRC; CLI-10-23, 72 NRC 214 (2010)
- the sole issue is whether a person knew the information was materially incomplete and inaccurate at the time it was submitted to the NRC; CLI-10-23, 72 NRC 222 n.48 (2010)

10 C.F.R. 50.7(f)
- although not required by this regulation, settlement agreements that contain language reinforcing employees' rights to raise safety concerns and communicate with the NRC avoid the possibility of being construed in a way that could be a violation; DD-10-1, 72 NRC 158 (2010)
- nondisparagement clauses in retention bonus agreements are common in employment agreements and NRC should not interfere with these agreements unless it finds such a clause violates this regulation or is applied in a fashion that prevents or retaliates against an employee for engaging in protected activities such as communicating with the NRC; DD-10-1, 72 NRC 158, 162 (2010)
- the purpose of this section is to ensure that licensees do not enter into employment agreements that would prohibit, restrict, or otherwise discourage an employee or former employee from providing the NRC with information of regulatory significance; DD-10-1, 72 NRC 158 (2010)

10 C.F.R. 50.9(a)
- materially incorrect responses to the NRC's communications are violations; CLI-10-23, 72 NRC 217 (2010)

10 C.F.R. 50.54(hh)(2)
- the board issued a protective order governing access to and use of protected information in the correspondence from applicant to NRC Staff regarding the requirements under this section and any related documents; CLI-10-24, 72 NRC 456 (2010)

10 C.F.R. 50.55a(c)(1)
- for license renewal, feedwater, core spray, and reactor recirculation outlet nozzles, as part of the reactor coolant pressure boundary, must meet the metal-fatigue requirements for Class 1 components in section III of the ASME Code; CLI-10-17, 72 NRC 17 (2010)

10 C.F.R. 50.55a(g)(4)(v)(A)
- the containment vessel is identified as an ASME Code Class MC component in both the inservice inspection subsection of section 50.55a as well as the inspection requirements subsection of the AP1000 DCD; LBP-10-21, 72 NRC 656 n.27 (2010)

10 C.F.R. 50.59
- although the analysis required by this section is not the same as the final safety analysis, it is nevertheless a formal, written analysis involving safety issues (accident probabilities and/or consequences); LBP-10-20, 72 NRC 602 n.38 (2010)
- petitioner alleges failure to conduct safety review of the modification of the controlled access area by the addition of an undocumented roof access for a siphon breaker experiment; DD-10-3, 72 NRC 175, 176-78 (2010)
- the function of this section is to deal with changes to a nuclear power plant, and it requires, as a prerequisite to any such change, that licensee perform safety analyses in addition to those contained in the FSAR; LBP-10-20, 72 NRC 602 (2010)

LEGAL CITATIONS INDEX

REGULATIONS

10 C.F.R. 50.59(c)(1)
under certain conditions, licensee may implement changes to a nuclear power plant without obtaining a license amendment; LBP-10-20, 72 NRC 602 n.37 (2010)
10 C.F.R. 50.59(c)(2)
even if a license amendment is not required, licensee must still conduct such a safety analysis in addition to the original FSAR analysis, to assess the effect of a proposed amendment; LBP-10-20, 72 NRC 602 n.37 (2010)
licensee must apply for a license amendment and obtain NRC's approval before it can implement any proposed change; LBP-10-20, 72 NRC 602 n.37 (2010)
10 C.F.R. 50.59(c)(2)(i)-(viii)
under certain conditions, licensee may implement changes to a nuclear power plant without obtaining a license amendment; LBP-10-20, 72 NRC 602 n.37 (2010)
10 C.F.R. 50.59(d)(1)
even if a license amendment is not required, licensee must still conduct such a safety analysis in addition to the original FSAR analysis, to assess the effect of a proposed amendment; LBP-10-20, 72 NRC 602 n.37 (2010)
10 C.F.R. 50.90
licensee must apply for a license amendment and obtain NRC's approval before it can implement any proposed change; LBP-10-20, 72 NRC 602 n.37 (2010)
10 C.F.R. 50.109
NRC Staff could impose license conditions that are necessary to protect the environment under backfit procedures; CLI-10-30, 72 NRC 567 (2010)
10 C.F.R. Part 50, Appendix B, Criterion XVI
based on results of its problem identification and resolution biennial team inspections with annual followup of selected issues at licensed facilities, NRC takes any appropriate enforcement action to ensure compliance with this regulation; DD-10-1, 72 NRC 160 (2010)
operating reactor licensees are not required to implement an employee concerns program, but are required to establish and implement an effective corrective action program; DD-10-1, 72 NRC 155, 160 (2010)
10 C.F.R. 51.10(a)
NRC has an announced policy to take account of the Council on Environmental Quality regulations voluntarily, subject to certain conditions; CLI-10-18, 72 NRC 75 n.110 (2010); LBP-10-16, 72 NRC 418 n.275 (2010); LBP-10-24, 72 NRC 756 n.74 (2010)
10 C.F.R. 51.14(a)
categorical exclusion encompasses actions that do not individually or cumulatively have a significant effect on the human environment and which the Commission has found to have no such effect in accordance with procedures set out in 10 C.F.R. 51.22, and for which, therefore, neither an environmental assessment nor an environmental impact statement is required; CLI-10-18, 72 NRC 76 (2010)
Staff's obligations for preparation of an environmental assessment are discussed; CLI-10-18, 72 NRC 77 n.116 (2010)
10 C.F.R. 51.22(b)
the Commission may find special circumstances warranting a categorical exclusion upon its own initiative, or upon the request of an interested person; CLI-10-18, 72 NRC 76 n.112 (2010)
10 C.F.R. 51.22(c)(14)(vii)
a categorical exclusion exists for materials licenses associated with irradiators; CLI-10-18, 72 NRC 76 n.113 (2010)
10 C.F.R. 51.23
in the area of waste storage, the Commission largely has chosen to proceed generically through the rulemaking process instead of litigating issues case-by-case in adjudicatory proceedings; CLI-10-19, 72 NRC 99 (2010)
petitioner has made a *prima facie* case that there are special circumstances with regard to the environmental impacts and risks of earthquake-induced spent fuel pool accidents so as to warrant the waiver of portions of this regulation and classifying such spent fuel impacts as Category 1 and to warrant that these impacts be assessed on a site-specific basis; LBP-10-15, 72 NRC 306 (2010)

LEGAL CITATIONS INDEX

REGULATIONS

10 C.F.R. 51.30(a)
content of an environmental assessment for proposed actions is described; CLI-10-18, 72 NRC 77 (2010)
10 C.F.R. 51.30(a)(1)(ii)
NRC Staff is required under NEPA to evaluate reasonable technological and geographical alternatives to the proposed irradiator; CLI-10-18, 72 NRC 70 (2010)
10 C.F.R. 51.45
a claim of inadequacy in the organization of the application cannot be the basis for a contention; LBP-10-16, 72 NRC 410 (2010)
10 C.F.R. 51.45(b)(1)
applicant must discuss in its environmental report the impact of the proposed action on the environment; LBP-10-16, 72 NRC 418 (2010)
10 C.F.R. 51.45(c)
environmental reports must include an 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; LBP-10-16, 72 NRC 399 n.157 (2010)
10 C.F.R. 51.53(b)
further review of need for power and alternative energy sources are precluded once a construction permit has been issued; CLI-10-29, 72 NRC 558 (2010)
10 C.F.R. 51.53(c)(2)
petitioner has made a prima facie case that there are special circumstances with regard to the environmental impacts and risks of earthquake-induced spent fuel pool accidents so as to warrant the waiver of portions of this regulation and classifying such spent fuel impacts as Category 1 and to warrant that these impacts be assessed on a site-specific basis; LBP-10-15, 72 NRC 306 (2010)
10 C.F.R. 51.53(c)(3)(i)
if an environmental impact is designated as a Category 1 issue in Appendix B to Subpart A of Part 51, then the ER for a license renewal is not required to analyze that issue; LBP-10-15, 72 NRC 293 n.37 (2010)
10 C.F.R. 51.53(c)(3)(ii)(L)
a license renewal environmental report must include a SAMA analysis if not previously considered by the Staff; LBP-10-15, 72 NRC 287, 321 (2010)
applicant's environmental report for its license renewal application must include a severe accident mitigation alternatives analysis, outlining the costs and benefits of potential mitigation measures to reduce severe accident risk or consequences; CLI-10-30, 72 NRC 565 (2010)
because NRC regulations require that the ER and EIS include a SAMA analysis, the adequacy of that analysis is material to the findings NRC must make in a license renewal proceeding; LBP-10-15, 72 NRC 288 (2010)
petitioner asserts that applicant's SAMA analysis is not based on complete information that is necessary and applicant failed to acknowledge the absence of the information or demonstrate that the information is too costly to obtain; LBP-10-15, 72 NRC 287 (2010)
petitioner identified the absence of consideration of terrorist-originated core-damaging events from the applicant's SAMA analysis, and supported that assertion with reference to the relevant law; LBP-10-15, 72 NRC 321 (2010)
10 C.F.R. 51.53(c)(iv)
the generic environmental impact statement must be updated if new and significant information or changed circumstances would change the outcome of the environmental analysis; LBP-10-15, 72 NRC 301, 305-06 (2010)
10 C.F.R. 51.71(d)
important qualitative considerations or factors that cannot be quantified will be discussed in qualitative terms; LBP-10-15, 72 NRC 324 n.78 (2010)
this regulation incorporates not only ameliorative alternatives, but also preventive alternatives; LBP-10-15, 72 NRC 322 n.74 (2010)
10 C.F.R. 51.73
the minimum time required for a draft environmental impact statement comment period is 45 days; LBP-10-24, 72 NRC 741 n.39 (2010)

LEGAL CITATIONS INDEX

REGULATIONS

10 C.F.R. 51.92(a)(1)
NRC's NEPA-implementing regulations anticipate the possibility of substantial changes in the proposed action that are relevant to environmental concerns and provide that when this happens NRC Staff will prepare a supplement to a final environmental impact statement; LBP-10-17, 72 NRC 516 (2010)

10 C.F.R. 51.92(a)(2)
because NRC regulations require that the ER and EIS include a SAMA analysis, the adequacy of that analysis is material to the findings NRC must make in a license renewal proceeding; LBP-10-15, 72 NRC 288 (2010)
NRC Staff's obligation to consider significant new information in preparing NEPA documents follows from the agency's NEPA regulations; LBP-10-24, 72 NRC 748 (2010)
the generic environmental impact statement must be updated if new and significant information or changed circumstances would change the outcome of the environmental analysis; LBP-10-15, 72 NRC 301, 305-06 (2010)
when dealing with a request to waive an environmental regulation under 10 C.F.R. 2.335(b), NRC should use the significant new information criterion; LBP-10-15, 72 NRC 301 (2010)

10 C.F.R. 51.95(b)
further review of need for power and alternative energy sources are precluded once a construction permit has been issued; CLI-10-29, 72 NRC 558 (2010)
if NRC Staff concludes that the legal threshold for new and significant information has been met, it is authorized to supplement the final environmental statement; CLI-10-29, 72 NRC 563 (2010)

10 C.F.R. 51.107(a)
the board recommends that the issue of waste disposal from in situ leach mining be considered when the mandatory review and hearing are conducted; LBP-10-16, 72 NRC 435 (2010)

10 C.F.R. Part 51, Subpart A, App. A
the alternatives analysis is the heart of the environmental impact statement; LBP-10-14, 72 NRC 110 (2010)
the NEPA hard-look doctrine is subject to a rule of reason that the Commission has interpreted as obligating the agency to consider all reasonable alternatives to the proposed action; LBP-10-14, 72 NRC 110 (2010)

10 C.F.R. Part 51, Subpart A, App. B
petitioner has made a *prima facie* case that there are special circumstances with regard to the environmental impacts and risks of earthquake-induced spent fuel pool accidents so as to warrant the waiver of portions of this regulation and classifying such spent fuel impacts as Category 1 and to warrant that these impacts be assessed on a site-specific basis; LBP-10-15, 72 NRC 306 (2010)

10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1
spent fuel from an additional 20 years of operation can be stored safely, with small environmental effects, at all plants and such impacts are classified as Category 1 issues that are not within the scope of individual license renewal proceedings; LBP-10-15, 72 NRC 294-95 (2010)

10 C.F.R. 52.3(b)(2)
license applications may be modified or improved during the NRC review process; LBP-10-17, 72 NRC 517 n.70 (2010)

10 C.F.R. 52.55(c)
an applicant that references in its combined license application a design for which a design certification application has been docketed but not granted does so at its own risk; LBP-10-20, 72 NRC 581 n.13 (2010)

10 C.F.R. 52.63(a)(1)
the Commission generally refuses to modify, rescind, or impose new requirements on reactor design certification information, unless through rulemaking; LBP-10-21, 72 NRC 653 n.21, 654 (2010)

10 C.F.R. 52.63(a)(5)
in making the findings required for issuance of a combined license, the Commission shall treat as resolved those matters resolved in connection with issuance or renewal of a design certification rule; LBP-10-21, 72 NRC 653, 654 (2010)

LEGAL CITATIONS INDEX

REGULATIONS

10 C.F.R. 52.79
- the fact that an extended low-level radioactive waste storage plan is contingent does not mean that it does not need to comply with this regulation or that it is subject to a relaxed standard; LBP-10-20, 72 NRC 605 (2010)
- topics that must be covered in the FSAR and the level of information that is sufficient for each topic are specified; LBP-10-20, 72 NRC 590 (2010)

10 C.F.R. 52.79(a)
- applicant must submit its plans for managing low-level radioactive waste for a period of longer than the original AP1000 capacity, and its FSAR must contain information sufficient to reach a final conclusion on all safety matters before the issuance of the combined license; LBP-10-20, 72 NRC 602-03 (2010)
- applicant's combined license application fails to address the management of low-level radioactive waste plan for a longer term than envisioned in the COLA; LBP-10-20, 72 NRC 575, 576 (2010)
- COL applicants must include required information in its FSAR at a level sufficient to reach a final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license; LBP-10-20, 72 NRC 590, 609 (2010)

10 C.F.R. 52.79(a)(3)
- combined license applicant's FSAR must describe the kinds and quantities of radioactive materials expected to be produced in the operation and specify the means for controlling and limiting radiation exposures from low-level radioactive waste storage within the limits set forth in Part 20; LBP-10-20, 72 NRC 577, 590, 603, 604 (2010)
- detailed design, location, and health impacts information on low-level radioactive waste storage is not required in the combined license application; LBP-10-20, 72 NRC 582-83 (2010)
- low-level radioactive waste storage information required by this section is tied to the COL applicant's particular plans for compliance through design, operational organization, and procedures; LBP-10-20, 72 NRC 581 (2010)
- there is no requirement for applicant's FSAR to include details regarding building materials and high-integrity containers, exact location, or health impacts on employees for the contingent onsite long-term LLRW storage facility; LBP-10-20, 72 NRC 603 (2010)
- this 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; LBP-10-20, 72 NRC 601 (2010)

10 C.F.R. 52.79(a)(4)
- combined license applicant's FSAR must specify the design of the low-level radioactive waste storage facility and provide information relative to materials of construction, arrangement, and dimensions sufficient to give reasonable assurance that the design will conform to the design bases with adequate margin for safety; LBP-10-20, 72 NRC 604 (2010)

10 C.F.R. 52.79(a)(11)
- a combined license application must include a description of the programs, and their implementation, necessary to ensure that the systems and components meet the requirements of the ASME Boiler and Pressure Vessel Code in accordance with 10 C.F.R. 50.55a; LBP-10-21, 72 NRC 656 (2010)

10 C.F.R. 52.80(d)
- the board issued a protective order governing access to and use of protected information in the correspondence from applicant to NRC Staff regarding the requirements under this section and any related documents; CLI-10-24, 72 NRC 456 (2010)

10 C.F.R. 54.3
- time-limited aging analyses are defined as being contained in the current licensing basis; CLI-10-17, 72 NRC 33 (2010)

10 C.F.R. 54.3(a)
- time-limited aging analysis is defined; CLI-10-17, 72 NRC 12 n.48 (2010)

10 C.F.R. 54.4
- scope of a license renewal proceeding is limited to review of plant structures and components requiring an aging management review for the period of extended operation and to the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses; LBP-10-21, 72 NRC 654 n.24 (2010)

LEGAL CITATIONS INDEX

REGULATIONS

10 C.F.R. 54.21(a)
contention that license renewal applicant's aging management plan relating to aging and degradation of buried, below-grade, underground, or hard-to-access safety-related electrical cables due to submergence and wet environments is inadequate is inadmissible; LBP-10-19, 72 NRC 545 (2010)
scope of a license renewal proceeding is limited to review of plant structures and components requiring an aging management review for the period of extended operation and to the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses; LBP-10-21, 72 NRC 654 n.24 (2010)
10 C.F.R. 54.21(a)(3)
a license renewal applicant seeking to satisfy aging management requirements by reliance upon an aging management plan would rely on this section; CLI-10-17, 72 NRC 18 (2010)
aging management review addresses activities identified in this section regarding the integrated plant assessment; CLI-10-17, 72 NRC 16 (2010)
license renewal applicants must demonstrate that the effects of aging will be adequately managed so that the intended functions will be maintained consistent with the current licensing basis for the period of extended operation; LBP-10-15, 72 NRC 333 (2010)
10 C.F.R. 54.21(c)
scope of a license renewal proceeding is limited to review of plant structures and components requiring an aging management review for the period of extended operation and to the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses; LBP-10-21, 72 NRC 654 n.24 (2010)
10 C.F.R. 54.21(c)(1)
aging management review addresses activities identified in section regarding the evaluation of time-limited aging analyses; CLI-10-17, 72 NRC 16 (2010)
this section permits a demonstration after issuance of a renewed license, i.e., that applicant's use of an aging management program identified in the GALL Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period; CLI-10-17, 72 NRC 36 (2010)
10 C.F.R. 54.21(c)(1)(i)
a license renewal applicant seeking to satisfy aging management requirements by reliance upon existing time-limited aging analyses in its current licensing basis would rely on this section; CLI-10-17, 72 NRC 18 (2010)
if applicant can demonstrate by plant operating experience that the initially predicted number of stress cycles would not be exceeded even in the extended 20-year operating period, then this section would be satisfied; CLI-10-17, 72 NRC 19 n.82 (2010)
regarding use of the cumulative usage factor, an applicant who chooses to rely upon an existing time-limited aging analysis may demonstrate compliance with the rule by showing that the existing CUF calculations remain valid because the number of assumed transients would not be exceeded during the period of extended operation; CLI-10-17, 72 NRC 18 (2010)
10 C.F.R. 54.21(c)(1)(i)-(iii)
license renewal applications must include an evaluation of time-limited aging analyses demonstrating that the analyses will remain valid for the period of extended operation, have been projected to the end of the period of extended period of operation, or the effects of aging on the intended functions will be adequately managed for the period of extended operation; CLI-10-17, 72 NRC 18 (2010)
some license renewal applicants have sought to satisfy more than one of the three subsections; CLI-10-17, 72 NRC 18 (2010)
10 C.F.R. 54.21(c)(1)(ii)
a license renewal applicant seeking to satisfy aging management requirements by reliance upon existing time-limited aging analyses in its current licensing basis would rely on this section; CLI-10-17, 72 NRC 18 (2010)
applicant may demonstrate compliance with the rule by showing that the CUF calculations have been reevaluated based on an increased number of assumed transients to bound the period of extended operation and that the resulting CUF remains less than or equal to 1.0 for the period of extended operation; CLI-10-17, 72 NRC 19 (2010)

LEGAL CITATIONS INDEX

REGULATIONS

10 C.F.R. 54.21(c)(1)(iii)
- a license renewal applicant seeking to satisfy aging management requirements by reliance on an aging management plan would rely instead on this section; CLI-10-17, 72 NRC 18 (2010)
- a license renewal applicant who addresses the cumulative usage factor issue via an aging management program may reference Chapter X of the Generic Aging Lessons Learned Report; CLI-10-17, 72 NRC 19 (2010)
- an aging management program is intended to manage the effects of aging on a particular component by, e.g., ensuring that the fatigue usage factor for the component does not exceed the design code limit; CLI-10-17, 72 NRC 12 n.44 (2010)
- the "adequate management" requirement is generally accomplished by establishing a prospective aging management or similar plan; CLI-10-17, 72 NRC 18 (2010)
- the Generic Aging Lessons Learned Report sets forth three ways that a license renewal applicant proposing to use an aging management plan may comply with the requirements of this section; CLI-10-17, 72 NRC 12 (2010)

10 C.F.R. 54.29
- past actions and performance provide objective evidence as to future performance and can be used in the reasonable assurance determination; LBP-10-15, 72 NRC 340 (2010)
- this regulation must be read in conjunction with 10 C.F.R. 54.30; LBP-10-15, 72 NRC 338 (2010)

10 C.F.R. 54.29(a)
- a narrow and specific contention that alleges facts, with supporting documentation, of a longstanding and continuing pattern of noncompliance or management difficulties, that are reasonably linked to whether the licensee will actually be able to adequately manage aging in accordance with the current licensing basis during the period of extended operation, can be an admissible contention; LBP-10-15, 72 NRC 336 (2010)
- a reasonable assurance finding with regard to managing the effects of aging and time-limited aging analyses is required; CLI-10-17, 72 NRC 16 n.72 (2010)
- although license renewal review focuses on management of aging, aging is a continuous process and the aging in question does not need to be unique to the period of extended operation to be relevant; LBP-10-15, 72 NRC 340 (2010)
- applicant's metal fatigue analyses for core spray and reactor recirculation outlet nozzles failed to comply with all relevant requirements and therefore applicant could not demonstrate that there was a reasonable assurance of safety; LBP-10-19, 72 NRC 532 (2010)
- because a renewed license will incorporate the aging management programs, the extent to which a plant complies with the elements of its AMPs will be subject to NRC's continuing oversight activities during the period of extended operation and therefore cannot be considered under this section; LBP-10-15, 72 NRC 329 (2010)
- contention that license renewal applicant's aging management plan relating to aging and degradation of buried, below-grade, underground, or hard-to-access safety-related electrical cables due to submergence and wet environments is inadequate is inadmissible; LBP-10-19, 72 NRC 545 (2010)
- NRC must decide whether applicant has demonstrated that actions will be taken to manage the effects of aging during the period of extended operation such that there is reasonable assurance that activities that would be authorized by the renewed license will continue to be conducted in accordance with the current licensing basis; LBP-10-15, 72 NRC 331 (2010)
- this section speaks of both past and future actions, referring specifically to those that have been or will be taken with respect to managing the effects of aging and time-limited aging analyses; CLI-10-17, 72 NRC 33 (2010)
- under narrowly limited circumstances, the reasonable assurance determination can be informed by applicant's past performance if it is an ongoing pattern of difficulty in managing activities and compliance that have a direct link to the applicant's ability to implement its aging management program in accordance with the current licensing basis; LBP-10-15, 72 NRC 333 (2010)

10 C.F.R. 54.29(a)(1)-(2)
- aging management-related findings that the Commission must make to authorize renewal of an operating license are discussed; CLI-10-17, 72 NRC 17 (2010)

LEGAL CITATIONS INDEX

REGULATIONS

10 C.F.R. 54.30
licensee's compliance with its current licensing basis during the current licensing term is not within the scope of the license renewal review; LBP-10-15, 72 NRC 331 (2010)
10 C.F.R. 54.30(a)
licensee is obliged to correct current noncompliances now; LBP-10-15, 72 NRC 339 (2010)
10 C.F.R. 54.30(b)
whether or not licensee complies with its obligation to correct current noncompliances now is not within the scope of license renewal review; LBP-10-15, 72 NRC 339 (2010)
10 C.F.R. 54.33
in the license renewal context, licensee must comply with Part 50 regulations, including the provisions requiring compliance with the ASME Code, during the period of extended operation; CLI-10-17, 72 NRC 16-17 (2010)
10 C.F.R. 54.35
for license renewal, licensee must comply with Part 50 regulations, including provisions requiring compliance with the ASME Code, during the period of extended operation; CLI-10-17, 72 NRC 16-17 (2010)
10 C.F.R. Part 63
although the Commission no longer mandates separate construction and operating license applications for nuclear power plants, it nonetheless contemplated a multistage licensing scheme for the high-level waste repository expressly requiring DOE to submit additional design information and to update its application at later stages; LBP-10-22, 72 NRC 678 (2010)
10 C.F.R. 63.21
the Commission expressly addressed the distinction between a plan and a description of a plan; LBP-10-22, 72 NRC 682 (2010)
10 C.F.R. 63.21(a)
the high-level waste repository license application must be as complete as possible in light of the information that is reasonably available at the time of docketing; LBP-10-22, 72 NRC 677 (2010)
10 C.F.R. 63.21(c)(7)
had the Commission intended to require more than a description of retrieval plans, it could have said so explicitly, as it did in other parts of section 63.21 with respect to other plans; LBP-10-22, 72 NRC 682 (2010)
10 C.F.R. 63.21(c)(18)
the high-level waste repository license application must give special attention to those items that may significantly influence the final design; LBP-10-22, 72 NRC 677 (2010)
10 C.F.R. 63.24
before issuance of a license to receive and possess waste material, DOE must update its application; LBP-10-22, 72 NRC 686 (2010)
10 C.F.R. 63.24(b)(1)
before any waste may be received at the high-level waste repository, DOE must update its application with additional design data obtained during construction; LBP-10-22, 72 NRC 678 (2010)
10 C.F.R. 63.31(a)(2)
before authorizing construction of the proposed repository, the Commission must determine that there is reasonable expectation that the materials can be disposed of without unreasonable risk to the health and safety of the public; LBP-10-22, 72 NRC 685 (2010)
10 C.F.R. 63.41(a)
the Commission may issue a license to receive and possess high-level waste upon finding that the construction of the facility has been substantially completed; LBP-10-22, 72 NRC 685 (2010)
10 C.F.R. 63.41(a)(2)
before issuing a license to receive and possess high-level waste at the repository, the Commission must find that construction of any underground storage space required for initial operation has been substantially completed; LBP-10-22, 72 NRC 685 (2010)
10 C.F.R. 63.102
this section merely provides a functional overview of Subpart E; LBP-10-22, 72 NRC 676 (2010)

LEGAL CITATIONS INDEX

REGULATIONS

10 C.F.R. 63.102(c)
three phases of high-level waste repository operations are recognized; LBP-10-22, 72 NRC 685 n.118 (2010)
10 C.F.R. 63.102(j)
whether a feature, event, or process must be included in the performance assessment for the period after 10,000 years is not governed by this section; LBP-10-22, 72 NRC 676 (2010)
10 C.F.R. 63.111(a)(1)
the geologic repository operations area must meet the requirements of Part 20; LBP-10-22, 72 NRC 671 (2010)
10 C.F.R. 63.113
"adequate confidence" in the performance assessment is derived from sufficient analyses, data, and the technical basis offered to demonstrate compliance with postclosure performance objectives; LBP-10-22, 72 NRC 687 (2010)
the performance margins analysis cannot be used to validate or provide confidence in the total system performance assessment if its data and models are not qualified under DOE's quality assurance program; LBP-10-22, 72 NRC 686 (2010)
10 C.F.R. 63.114
the performance margins analysis cannot be used to validate or provide confidence in the total system performance assessment if its data and models are not qualified under DOE's quality assurance program; LBP-10-22, 72 NRC 686 (2010)
10 C.F.R. 63.114(a)(5)
only features, events, and processes that produce significant changes in releases or doses within the first 10,000 years after disposal must be included in performance assessments; LBP-10-22, 72 NRC 676 (2010)
10 C.F.R. Part 63, Subpart G
the performance margins analysis cannot be used to validate or provide confidence in the total system performance assessment if its data and models are not qualified under DOE's quality assurance program; LBP-10-22, 72 NRC 686 (2010)
10 C.F.R. 63.141
a quality assurance program is required to provide adequate confidence that the geologic repository and it structures, systems, or components will perform satisfactorily in service; LBP-10-22, 72 NRC 686-87 (2010)
10 C.F.R. 63.142
if the performance margins analysis is needed to establish adequate confidence in the total system performance assessment, then it is subject to the quality assurance requirements of this section; LBP-10-22, 72 NRC 687 (2010)
10 C.F.R. 63.142(a)
the quality assurance program must be applied to all structures, systems, and components that are important to waste isolation and to related activities, defined as including analyses of samples and data; LBP-10-22, 72 NRC 687 (2010)
10 C.F.R. 63.305
climate projections should be based on cautious but reasonable assumptions; LBP-10-22, 72 NRC 673 (2010)
this section does not say anything about analyzing future climate based upon the historical geologic record; LBP-10-22, 72 NRC 672 (2010)
10 C.F.R. 63.342
although the petition for rule waiver fails to satisfy the strict requirements for a waiver, the Commission might wish to revisit the rule on its own initiative; LBP-10-22, 72 NRC 666 (2010)
whether a feature, event, or process must be included in the performance assessment for the period after 10,000 years is governed by this section, not by section 63.102(j); LBP-10-22, 72 NRC 676 (2010)
10 C.F.R. 63.342(c)
analysis is required for the post-10,000-year period of certain specified features, events, and processes (which do not include erosion), as well as all FEPs that are screened in during the first 10,000 years pursuant to section 63.342(a); LBP-10-22, 72 NRC 675 (2010)

applicant must assess the effects of climate change during the 990,000-year period regardless of whether it necessarily must assess climate change during the initial 10,000-year period under the criteria set forth in section 63.342(a) and (b); LBP-10-22, 72 NRC 673-74 (2010)
erosion cannot be screened in under section 63.342(a) if there is no showing that erosion causes increases in radiological exposures or releases within the first 10,000 years; LBP-10-22, 72 NRC 666, 675, 676, 677 (2010)
10 C.F.R. 63.342(c)(2)
applicant may perform its climate change analysis using a specified percolation rate; LBP-10-22, 72 NRC 674 (2010)
applicant may simplify its assessment of climate change during the 990,000-year period; LBP-10-22, 72 NRC 674 (2010)
applicant's climate change analysis for the 990,000-year period may be limited to the effects of increased water flow through the repository as a result of climate change; LBP-10-22, 72 NRC 674 (2010)
DOE may elect to use the deep percolation flux to analyze the effects of climate change during the post-10,000-year period, regardless of whether it is required to analyze the effects of climate change during the initial 10,000-year period; LBP-10-22, 72 NRC 688 (2010)
10 C.F.R. Part 71
petitioner alleges release of controlled byproduct nuclear materials in containers not certified for transport of such materials on public roads and not labeled with the required labeling; DD-10-3, 72 NRC 175, 178-80 (2010)
10 C.F.R. 73.56
denial of unescorted access was based on an existing tax lien with the rationale that trustworthiness and reliability could not be assured because petitioner had not made an effort to resolve the tax lien; DD-10-2, 72 NRC 164 (2010)
10 C.F.R. 73.56(d)(5)
licensees, applicants, contractors, and vendors shall ensure that the full credit history of any individual who is applying for unescorted access or unescorted access authorization is evaluated; DD-10-2, 72 NRC 167 (2010)
36 C.F.R. 800.1(c)(2)(iii)
federal agencies should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties, and should invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement; LBP-10-16, 72 NRC 393 (2010)
36 C.F.R. 800.2(c)(2)(ii)
a tribe may become a consulting party if its property, potentially affected by a federal undertaking, has religious or cultural significance; LBP-10-16, 72 NRC 392 (2010)
36 C.F.R. 800.2(c)(2)(ii)(A)
a consulting tribe is entitled to a reasonable opportunity to identify its concerns about historic properties, to advise on the identification and evaluation of historic properties (including those of traditional religious and cultural importance), to articulate its views on the undertaking's effects on such properties, and to participate in the resolution of adverse effects; LBP-10-16, 72 NRC 392-93 (2010)
36 C.F.R. 800.2(c)(2)(ii)(D)
it is not the duty of applicant to consult with a Tribe regarding cultural resources at a proposed site, but instead is the duty of the agency to initiate and follow through with the consultation process; LBP-10-16, 72 NRC 422 n.303 (2010)
NEPA itself is binding only on the agency; LBP-10-16, 72 NRC 432 (2010)
40 C.F.R. 190.10
applicant shall provide reasonable assurance that the annual dose equivalent to members of the public from planned discharges not exceed 25 millirems to the whole body; LBP-10-20, 72 NRC 598 (2010)
40 C.F.R. 1500.1(b)
NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken; CLI-10-18, 72 NRC 93 n.207 (2010)
40 C.F.R. 1502.8
environmental documents must be written in plain language so that decisionmakers and the public can readily understand them; LBP-10-16, 72 NRC 432 (2010)

LEGAL CITATIONS INDEX

REGULATIONS

40 C.F.R. 1502.14
an environmental impact statement must include a detailed statement of reasonable alternatives to a proposed action; LBP-10-24, 72 NRC 755 (2010)
the alternatives analysis is the heart of the environmental impact statement; LBP-10-24, 72 NRC 756 (2010)
40 C.F.R. 1502.14(a)
NRC Staff is required under NEPA to evaluate reasonable technological and geographical alternatives to the proposed irradiator; CLI-10-18, 72 NRC 70 (2010)
40 C.F.R. 1502.16(g)
cultural and historic resources are to be considered as part of the environmental impacts assessment that must be completed; LBP-10-16, 72 NRC 418 (2010)
40 C.F.R. 1502.22
petitioner asserts that applicant's SAMA analysis is not based on complete information that is necessary and applicant failed to acknowledge the absence of the information or demonstrate that the information is too costly to obtain; LBP-10-15, 72 NRC 287 (2010)
40 C.F.R. 1502.22(a)
this section only applies if the incomplete information is essential to a reasoned choice among alternatives; LBP-10-15, 72 NRC 283 (2010)
40 C.F.R. 1502.22(b)(4)
impacts that are reasonably foreseeable under NEPA must be analyzed publicly, even if their probability of occurrence is low; CLI-10-18, 72 NRC 90 (2010)
40 C.F.R. 1508.4
certain actions are designated as categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement; CLI-10-18, 72 NRC 75 (2010)
40 C.F.R. 1508.8
indirect effects are distinguished from connected actions under 40 C.F.R. 1508.25(a)(1); CLI-10-18, 72 NRC 89 n.187 (2010)
40 C.F.R. 1508.9
one purpose of an environmental assessment is to facilitate preparation of an environmental impact statement when one is necessary; CLI-10-18, 72 NRC 77 n.116 (2010)
40 C.F.R. 1508.9(b)
NRC Staff is required under NEPA to evaluate reasonable technological and geographical alternatives to the proposed project; CLI-10-18, 72 NRC 70 (2010)
40 C.F.R. 1508.25(a)(1)
connected actions under 40 C.F.R. 1508.8 are distinguished from indirect effects; CLI-10-18, 72 NRC 89 n.187 (2010)

LEGAL CITATIONS INDEX
STATUTES

28 U.S.C. § 455
the disqualification standard under this section is not directed to administrative judges, but the Commission and its adjudicatory boards have applied it in assessing a motion for disqualification under 10 C.F.R. 2.313, and it provides a helpful framework for such an assessment; CLI-10-22, 72 NRC 203 (2010)
28 U.S.C. § 455(b)(1)
a judge should disqualify himself if he has personal knowledge of disputed evidentiary facts concerning the proceeding; CLI-10-22, 72 NRC 204 (2010)
Administrative Procedure Act, 5 U.S.C. § 552(a)(4)(B)
a board's determination on a request for access to sensitive unclassified nonsafeguards information is reviewed *de novo*; CLI-10-24, 72 NRC 461 (2010)
Administrative Procedure Act, 5 U.S.C. § 556(d)
the standard for allowing parties to conduct cross-examination is the same under Subparts G and L; LBP-10-15, 72 NRC 343-44 (2010)
there is no absolute right to cross-examination; LBP-10-15, 72 NRC 344 (2010)
Archaeological Resources Protection Act, 16 U.S.C. § 470aa-470mm
criteria and procedures pursuant to which a federal land manager may issue excavation permits for federal lands are provided as well as notification to Indian tribe if permits may result in harm to cultural or religious sites; LBP-10-16, 72 NRC 392 n.111 (2010)
Atomic Energy Act, 11(e)(2), 42 U.S.C. § 2014
byproduct material is defined; LBP-10-16, 72 NRC 376 n.5 (2010)
Atomic Energy Act, 11(z), 42 U.S.C. § 2014
source material is defined; LBP-10-16, 72 NRC 376 n.5 (2010)
Atomic Energy Act, 182, 42 U.S.C. § 2232
as part of its licensing and oversight responsibilities, the Commission may consider the adequacy of a licensee's corporate organization and the integrity of its management; LBP-10-15, 72 NRC 337 (2010)
decisions under the bad actor doctrine are generally quite fact specific; LBP-10-15, 72 NRC 337 n.91 (2010)
each application must specifically state such information as the Commission may determine to be necessary to decide the character of the applicant; LBP-10-15, 72 NRC 337 (2010)
Atomic Energy Act, 189a, 42 U.S.C. § 2239(a)(1)(A)
issues material to the agency's licensing decision must be subject to adjudicatory challenge; LBP-10-21, 72 NRC 657 n.28 (2010)
NRC must provide a hearing upon the request of any person whose interest may be affected by the proceeding; LBP-10-16, 72 NRC 380 (2010); LBP-10-17, 72 NRC 515 (2010)
Atomic Energy Act, 191(a), 42 U.S.C. § 2241(a)
Congress considers the Atomic Safety and Licensing Board to be a panel of experts; CLI-10-17, 72 NRC 49 (2010)
Clean Water Act, 521(c)(2), 33 U.S.C. § 1371(c)(2)
NRC is prohibited from using NEPA to impose additional effluent limitations on an applicant's wastewater discharges to surface waters; LBP-10-14, 72 NRC 136-37 (2010)
National Environmental Policy Act, 42 U.S.C. § 4331(b)
federal agencies are required to consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-10-24, 72 NRC 729 n.16 (2010)

LEGAL CITATIONS INDEX

STATUTES

National Environmental Policy Act, 42 U.S.C. § 4332
when an agency proposes a major federal action significantly affecting the quality of the human environment, preparation of an environmental impact statement is required; LBP-10-24, 72 NRC 729 n.16 (2010)

National Environmental Policy Act, 102(2)(C), 42 U.S.C. § 4332(2)(C)
federal agencies are required, to the fullest extent possible, to include in every recommendation or report on proposals for major federal actions significantly affecting the quality of the human environment a detailed statement on the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided, alternatives to the proposed action, relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action; CLI-10-18, 72 NRC 74 (2010)
primary obligation to satisfy the requirements of NEPA rests on the agency; CLI-10-18, 72 NRC 82 (2010)

National Environmental Policy Act, 102(2)(C)(iii), 42 U.S.C. § 4332(2)(C)(iii)
an environmental impact statement must include a detailed statement of reasonable alternatives to a proposed action; LBP-10-24, 72 NRC 755 (2010)

National Environmental Policy Act, 102(2)(E), 42 U.S.C. § 4332(2)(E)
although the discussion of alternatives in the environmental assessment need only be brief, it must be sufficient to fully comply with the requirement to study, develop, and describe appropriate alternatives; CLI-10-18, 72 NRC 70 (2010)
as long as all reasonable alternatives have been considered and an appropriate explanation is provided as to why an alternative was eliminated, the regulatory requirement is satisfied; CLI-10-18, 72 NRC 70 (2010)
federal agencies are required to study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources; CLI-10-18, 72 NRC 75 (2010)
the alternatives provision of this section applies both when an agency prepares an environmental impact statement and when it prepares an environmental assessment; CLI-10-18, 72 NRC 75 (2010)
the range of alternatives that must be considered need not extend beyond those reasonably related to the purposes of the project and a rule of reason necessarily informs that choice; CLI-10-18, 72 NRC 70 (2010)

National Historic Preservation Act, 106, 16 U.S.C. § 470f
Indian tribes have a procedural interest in identifying, evaluating, and establishing protections for historic and cultural resources; LBP-10-16, 72 NRC 391, 393 (2010)
prior to issuance of any license, federal agencies must take into account the effect of the federal action on any area eligible for inclusion in the National Register of Historic Places; LBP-10-16, 72 NRC 392 (2010)

National Historic Preservation Act, 16 U.S.C. § 470 to 470x-6
federal agencies must follow notification and consultation procedures prior to a federal undertaking to consider the undertaking's effect on historic properties; LBP-10-16, 72 NRC 392 n.111 (2010)

National Historic Preservation Act, 16 U.S.C. § 470(b)(4)
the nation's historical heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans; LBP-10-16, 72 NRC 392 (2010)

Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-13 (1990)
notification and inventory procedures are required so that Indian cultural objects and burial remains found on federal lands will be repatriated to the appropriate tribe; LBP-10-16, 72 NRC 392 n.111 (2010)

Nuclear Waste Policy Act, 121(b)(1)(B), 42 U.S.C. § 10141(b)(1)(B) (2009)
no requirement for a quantitative evaluation of an individual barrier's capabilities appears in the statutory language; LBP-10-22, 72 NRC 680 (2010)
NRC is given flexibility in determining how best to provide for the use of a system of multiple barriers in the design of the repository; LBP-10-22, 72 NRC 681 (2010)
NRC's licensing regulations must provide for the use of a system of multiple barriers in the design of the repository; LBP-10-22, 72 NRC 680 (2010)

LEGAL CITATIONS INDEX
OTHERS

American Heritage Dictionary of the English Language (4th ed. 2010)
a "means" either consists of or includes a "method" or "strategy" for achieving an end; LBP-10-20, 72 NRC 603 n.5 (2010)
a "means" is a method, a course of action, or an instrument by which an act can be accomplished or an end achieved; LBP-10-20, 72 NRC 603 n.5 (2010)
Black's Law Dictionary 153 (9th ed. 2009)
"authority" is defined as a legal writing taken as definitive or decisive, especially a judicial or administrative decision cited as a precedent, or a source, such as a statute, case, or treatise, cited in support of a legal argument; LBP-10-21, 72 NRC 652 n.20 (2010)
Black's Law Dictionary 1310 (9th ed. 2009)
"*prima facie* case" is defined; LBP-10-15, 72 NRC 279, 302-03 (2010)
Cambridge Dictionary of American English (2d ed. 2010)
a "means" is a method or way of doing something; LBP-10-20, 72 NRC 603 n.5 (2010)
Collins English Dictionary — Complete and Unabridged (2003)
a "means" is the medium, method, or instrument used to obtain a result or achieve an end; LBP-10-20, 72 NRC 603 n.5 (2010)
D.C. Rules of Prof'l Conduct R. 1.16
an attorney is not permitted to withdraw from representing a client unless withdrawal can be accomplished without material adverse effect to the client's interests; LBP-10-21, 72 NRC 638 n.6 (2010)
D.D.C. R. 83.6(c)
absent written consent of the party and the prior appearance of another attorney, many courts require that an attorney file a motion to withdraw; LBP-10-21, 72 NRC 638 n.6 (2010)
Fed. R. App. P. 28(j)
generally, an additional authorities filing would be a submission that is the functional equivalent of a letter supplementing authorities; LBP-10-21, 72 NRC 652 n.20 (2010)
Fed. R. Civ. P. 12(b)(6)
prima facie case is one that is sufficient to withstand a demurrer, and is akin to the Federal Rules that allow for the dismissal of a lawsuit (without ever getting to a trial or motion for summary judgment) for failure to state a claim upon which relief can be granted; LBP-10-15, 72 NRC 303 n.52 (2010)
Fed. R. Civ. P. 26(a)(1)(A)(ii)
parties are required to make an initial disclosure including a copy, or a description by category and location, of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control; LBP-12-23, 72 NRC 707 (2010)
Fed. R. Civ. P. 26(b)(1)
it is not a ground for objection to discovery that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; LBP-12-23, 72 NRC 706 (2010)
the "need for SUNSI" inquiry is essentially a relevance inquiry just as a federal court litigant must show that information sought in discovery is relevant to its claims or defenses; CLI-10-24, 72 NRC 460 (2010)
Fed. R. Civ. P. 34(a)(1)
a party can request and obtain a copy of any document in the possession, custody, or control of the party upon whom the request is served; LBP-12-23, 72 NRC 707 (2010)

the rule is essentially the same as NRC's "production of documents" regulation, 10 C.F.R. 2.707(a)(1); LBP-12-23, 72 NRC 707 (2010)

Fed. R. Evid. 201(e)
a board rested its findings regarding a contention, in part, on certain facts that it officially noticed; CLI-10-17, 72 NRC 6 n.12 (2010)

Fed. R. Evid. 401
"relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence; LBP-12-23, 72 NRC 705 (2010)

Federal Rules Decisions; Administrative Office of the U.S. Courts; Federal Rules of Civil Procedure; Adoption and Amendments to Civil Rules, 234 F.R.D. 219 (Apr. 12, 2006)
the Federal Rules of Civil Procedure were amended in 2006 to expressly include electronically stored information; LBP-12-23, 72 NRC 703 n.13 (2010)

James Wm. Moore et al., Moore's Federal Practice ¶34.12[2][a] (3d ed. 2010) at 34-71
the phrase "possession, custody, or control" is in the disjunctive, and only one of the enumerated requirements need be met; LBP-12-23, 72 NRC 707 (2010)

James Wm. Moore et al., Moore's Federal Practice ¶34.12[2][a] (3d ed. 2010) at 34-75
documents are deemed to be within the control of a party if the party has the right to obtain the documents on demand; LBP-12-23, 72 NRC 707-08 (2010)
the term "control" is broadly construed; LBP-12-23, 72 NRC 707 n.21 (2010)

James Wm. Moore et al., Moore's Federal Practice ¶34.12[2][a] (3d ed. 2010) at 34-79
the concept of control extends to situations in which the party has the practical ability to obtain materials in the possession of another, even if the party cannot compel the other person or entity to produce the requested materials; LBP-12-23, 72 NRC 708 n.23 (2010)

James Wm. Moore et al., Moore's Federal Practice ¶34.12[2][a] (3d ed. 2010) at 34-80
practical control by a party over the person in possession of the document is deemed sufficient to require that the party produce the document; LBP-12-23, 72 NRC 708 n.24 (2010)

James Wm. Moore et al., Moore's Federal Practice ¶34.12[2][a] (3d ed. 2010) at 37-73
legal ownership of documents for which discovery is sought is not required, nor is actual possession necessary if the party has control; LBP-12-23, 72 NRC 707 n.20 (2010)

James Wm. Moore et al., Moore's Federal Practice ¶34.12[2][a] (3d ed. 2010) at 37-74
a document is deemed to be within a party's control if it is held by the party's attorney, expert, insurance company, accountant, or agent; LBP-12-23, 72 NRC 708 n.23 (2010)

MacMillan English Dictionary (American English ed.) (2010)
a "means" is a method for doing or achieving something; LBP-10-20, 72 NRC 603 n.5 (2010)

Oxford Dictionaries Online, http://oxforddictionaries.com/view/entry/m_en_us1266773#m_en_us1266773
a "means" is an action or system by which a result is achieved — a method; LBP-10-20, 72 NRC 603 n.5 (2010)

Webster's Third New International Dictionary (Unabridged) 616 (1976)
the word "details" has a pejorative connotation, i.e., that intervenors or the board is asking for minutiae or matters that relate to minute points, small and subordinate parts, or minor parts; LBP-10-20, 72 NRC 599 (2010)

Webster's Third New International Dictionary 2116 (4th ed. 1976)
the ordinary meaning of "significant" is "having meaning," "full of import," "indicative," "having or likely to have influence or effect," "deserving to be considered; LBP-10-24, 72 NRC 736 (2010)

SUBJECT INDEX

ABEYANCE OF CONTENTION
a board could refer a contention relating to a certified design to the Staff for consideration in the design certification rulemaking and hold that contention in abeyance if the contention is otherwise admissible; LBP-10-21, 72 NRC 616 (2010)
ABEYANCE OF PROCEEDING
consideration of pending issues will not be postponed until the resolution of other issues unrelated to the adjudication; CLI-10-17, 72 NRC 1 (2010)
the question whether to hold an NRC enforcement proceeding in abeyance pending a related criminal prosecution is generally suitable for interlocutory Commission review because, unlike most interlocutory questions, the abeyance issue cannot await the end of the proceeding because it becomes moot; CLI-10-29, 72 NRC 556 (2010)
ABUSE OF DISCRETION
a board abused its discretion in reformulating and admitting contentions; LBP-10-16, 72 NRC 361 (2010)
the Commission applies this standard to review of decisions on evidentiary questions; CLI-10-18, 72 NRC 56 (2010)
the Commission generally defers to a board's rulings on standing in the absence of clear error or an abuse of discretion; CLI-10-17, 72 NRC 1 (2010); CLI-10-20, 72 NRC 185 (2010); CLI-10-21, 72 NRC 197 (2010)
ACCESS AUTHORIZATION
a person may be denied access at a licensee facility based on NRC requirements such as falsification of information, trustworthiness or reliability issues, and issues related to fitness for duty; DD-10-2, 72 NRC 163 (2010)
an individual requiring clarification or resolution of an access authorization concern must resolve the issue with the licensee where unescorted access was last held or otherwise denied; DD-10-2, 72 NRC 163 (2010)
each licensee must evaluate access denial status on a case-by-case basis and make a determination of trustworthiness and reliability; DD-10-2, 72 NRC 163 (2010)
nuclear industry was required to develop, implement, and maintain an industry database accessible by NRC-licensed facilities to share information, including determination of whether an individual is denied access at any other NRC-licensed facility; DD-10-2, 72 NRC 163 (2010)
potentially disqualifying information for unescorted access authorization may include unfavorable information from an employer, developed or disclosed criminal history, credit history, judgments, unfavorable reference information, evidence of drug or alcohol abuse, discrepancies between information disclosed and developed; DD-10-2, 72 NRC 163 (2010)
See also Controlled Access
ACCIDENTS, SEVERE
although "severe accident," "severe accident mitigation alternatives," and "SAMA" are not defined in NRC's NEPA regulations, the NRC policy documents that originated the terms clearly limit them to nuclear reactors and do not include spent fuel pools or storage; LBP-10-15, 72 NRC 257 (2010)
applicant's environmental report for its license renewal application must include a severe accident mitigation alternatives analysis, outlining the costs and benefits of potential mitigation measures to reduce severe accident risk or consequences; CLI-10-30, 72 NRC 564 (2010)
petitioner has presented a prima facie showing for waiver of the NRC regulation covering the environmental impacts of spent fuel pool accidents generically, and has shown that its contention

concerning earthquake-induced spent fuel pool accidents is otherwise admissible; LBP-10-15, 72 NRC 257 (2010)
ADJUDICATORY PROCEEDINGS
challenges to the Waste Confidence Rule must be made in the context of a rulemaking, not in the context of an adjudicative proceeding; CLI-10-19, 72 NRC 98 (2010)
if petitioners or intervenors are dissatisfied with NRC's generic approach to a problem, their remedy lies in the rulemaking process, not in adjudication; CLI-10-19, 72 NRC 98 (2010)
no rule or 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; LBP-10-14, 72 NRC 101 (2010)
See also Combined License Proceedings; Decommissioning Proceedings; Enforcement Proceedings; Informal Hearings; Informal Proceedings; License Renewal Proceedings; Materials License Proceedings; NRC Proceedings
ADMINISTRATIVE PROCEDURE ACT
if a board does not explain how it had arrived at its findings of fact, it would fail to comply with its responsibilities under the Act to issue a reasoned decision; CLI-10-23, 72 NRC 210 (2010)
there is no absolute right to conduct cross-examination; LBP-10-15, 72 NRC 257 (2010)
AFFIDAVITS
a petition for rule waiver must be accompanied by an affidavit, but affiant need not be an expert; LBP-10-15, 72 NRC 257 (2010)
for factual disputes, petitioner need not proffer facts in formal affidavit or evidentiary form sufficient to withstand a summary disposition motion; LBP-10-24, 72 NRC 720 (2010)
motions to reopen must be accompanied by affidavits that set forth the factual and/or technical bases for movant's claim that the criteria of section 2.326(a) have been satisfied, including addressing each of the reopening criteria separately with a specific explanation of why it has been met; LBP-10-19, 72 NRC 529 (2010); LBP-10-21, 72 NRC 616 (2010)
petitioner does not need to provide expert opinion or a substantive affidavit in order to satisfy 10 C.F.R. 2.309(f)(1)(v); LBP-10-15, 72 NRC 257 (2010)
AGING MANAGEMENT
a license renewal applicant seeking to satisfy aging management requirements by reliance on existing time-limited aging analyses in its current licensing basis would rely on 54.21(c)(1)(i) or (ii); CLI-10-17, 72 NRC 1 (2010)
a program for license renewal is intended to manage the effects of aging on a particular component by ensuring that the component does not exceed the design code limit; CLI-10-17, 72 NRC 1 (2010)
after issuance of a renewed license, licensee may demonstrate that its use of an aging management program identified in the GALL Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period; CLI-10-17, 72 NRC 1 (2010)
applicant may demonstrate compliance with 10 C.F.R. 54.21(c)(1)(ii) by showing that the cumulative usage factor calculations have been reevaluated based on an increased number of assumed transients to bound the period of extended operation and that the resulting CUF remains less than or equal to 1.0 for the period of extended operation; CLI-10-17, 72 NRC 1 (2010)
for license renewal, feedwater, core spray, and reactor recirculation outlet nozzles, as part of the reactor coolant pressure boundary, must meet the metal-fatigue requirements for Class 1 components in section III of the ASME Code; CLI-10-17, 72 NRC 1 (2010)
if applicant can demonstrate by plant operating experience that the initially predicted number of stress cycles would not be exceeded even in the extended 20-year operating period, then 10 C.F.R. 54.21(c)(1)(i) would be satisfied; CLI-10-17, 72 NRC 1 (2010)
license renewal applicant who addresses the cumulative usage factor issue via an aging management program may reference Chapter X of the Generic Aging Lessons Learned Report; CLI-10-17, 72 NRC 1 (2010)
license renewal applicant who chooses to rely upon an existing time-limited aging analysis may demonstrate compliance with 10 C.F.R. 54.21(c)(1)(i) by showing that the existing cumulative usage factor calculations remain valid because the number of assumed transients would not be exceeded during the period of extended operation; CLI-10-17, 72 NRC 1 (2010)

license renewal applications must include an evaluation of time-limited aging analyses demonstrating that the analyses will remain valid for the period of extended operation, have been projected to the end of the period of extended period of operation, or the effects of aging on the intended functions will be adequately managed for the period of extended operation; CLI-10-17, 72 NRC 1 (2010)
licensee must comply with Part 50 regulations, including the provisions requiring compliance with the ASME Code, during the period of extended operation; CLI-10-17, 72 NRC 1 (2010)
motion to reopen to introduce a new contention asserting issues related to aging management of effects of moist or wet environments on buried, below-grade, underground, or hard-to-access safety-related electrical cables is denied; LBP-10-19, 72 NRC 529 (2010)
review for operating license renewal addresses activities identified in 10 C.F.R. 54.21(a)(3) and (c)(1) regarding the integrated plant assessment; CLI-10-17, 72 NRC 1 (2010)
scope of a license renewal proceeding under 10 C.F.R. Part 54 encompasses 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 time-limited aging analyses; CLI-10-17, 72 NRC 1 (2010); LBP-10-21, 72 NRC 616 (2010)
section 54.29(a) speaks of both past and future actions, referring specifically to those that have been or will be taken with respect to managing the effects of aging and time-limited aging analyses; CLI-10-17, 72 NRC 1 (2010)
the aging management review for license renewal does not focus on all aging-related issues; CLI-10-27, 72 NRC 481 (2010)
the Generic Aging Lessons Learned Report sets forth three ways that a license renewal applicant proposing to use an aging management program may comply with the requirements of 10 C.F.R. 54.21(c)(1)(iii); CLI-10-17, 72 NRC 1 (2010)
the license renewal applicant's use of an aging management program identified in the Generic Aging Lessons Learned Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period; CLI-10-17, 72 NRC 1 (2010)
the only safety 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; CLI-10-27, 72 NRC 481 (2010)
the portion of the current licensing basis that can be affected by the detrimental effects of aging is limited to the design basis aspects of the CLB; LBP-10-15, 72 NRC 257 (2010)
the standard review plan presents one acceptable methodology for calculating the environmentally adjusted cumulative usage factor; CLI-10-17, 72 NRC 1 (2010)

AGREEMENTS
nondisparagement clauses in retention bonus agreements are common in employment agreements and NRC should not interfere with these agreements unless it finds such a clause violates 10 C.F.R. 50.7(f) or is applied in a fashion that prevents or retaliates against an employee for engaging in protected activities such as communicating with NRC; DD-10-1, 72 NRC 149 (2010)

ALARA
applicant must have a program to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable; LBP-10-20, 72 NRC 571 (2010)
DOE need not weigh ALARA considerations outside the geologic repository operations area for which it is responsible; LBP-10-22, 72 NRC 661 (2010)
each licensee must evaluate the extent of radiation hazards that may be present; DD-10-3, 72 NRC 171 (2010)
licensees, including Part 63 licensees, are required to use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable; LBP-10-22, 72 NRC 661 (2010)
petitioner alleges that routine unprotected handling of an unshielded neutron source by licensed operators and uncontrolled access by untrained and unlicensed facility visitors to this neutron source violated ALARA requirements; DD-10-3, 72 NRC 171 (2010)

ALARA PRINCIPLE
NRC regulations set a minimum standard for safety, not a maximum; LBP-10-22, 72 NRC 661 (2010)

SUBJECT INDEX

AMENDMENT
license applications may be modified or improved during the NRC review process and changed may be significant; LBP-10-17, 72 NRC 501 (2010)
AMENDMENT OF CONTENTIONS
for a contention of omission, if the information is later supplied by applicant or considered by Staff in a draft EIS, 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-10-14, 72 NRC 101 (2010)
intervenor must comply with procedural requirements for the filing of new or amended contentions, including the requirement that the contentions be submitted in a timely fashion based on the availability of the subsequent information; LBP-10-17, 72 NRC 501 (2010)
intervenors must move for leave to file a timely new or amended contention under 10 C.F.R. 2.309(c), (f)(2); LBP-10-14, 72 NRC 101 (2010)
new or amended contentions filed after the initial deadline may be admitted with leave of the presiding officer upon a showing that information on which the contention is based was not previously available and is materially different than information previously available and the contention has been submitted in a timely fashion; LBP-10-14, 72 NRC 101 (2010)
NRC regulations preserve the right to a hearing when an application is amended by allowing new or amended contentions to be filed in response to material new information; LBP-10-17, 72 NRC 501 (2010)
once the deadline for filing an initial intervention petition has passed, a party wishing to submit new or amended contentions on matters not associated with issuance of the Staff's draft or final environmental impact statement must satisfy the requirements of 10 C.F.R. 2.309(f)(2); LBP-10-21, 72 NRC 616 (2010)
AMICUS CURIAE
appellate briefs are welcomed from parties in other Commission adjudications that have presented similar issues; CLI-10-17, 72 NRC 1 (2010)
NRC regulations contemplate briefs only after the Commission grants a petition for review, and do not provide for amicus briefs supporting or opposing petitions for review; CLI-10-17, 72 NRC 1 (2010)
APPEALS
a board's determination on a request for access to sensitive unclassified nonsafeguards information is reviewed de novo; CLI-10-24, 72 NRC 451 (2010)
a successful challenge to a contention admissibility ruling must demonstrate that the ruling either constitutes clear error or reflects an abuse of discretion; CLI-10-17, 72 NRC 1 (2010)
a winner cannot appeal a judgment; CLI-10-17, 72 NRC 1 (2010)
an order denying a petition to intervene and/or request for hearing may be appealed to the Commission on the question of whether the petition and/or request should have been granted; CLI-10-20, 72 NRC 185 (2010)
in the event of some 11th hour unforeseen development, a party may tender a document belatedly, but the tender must be accompanied by a motion for leave to file out-of-time that satisfactorily explains not only the reason for the lateness, but also why a motion for an extension of time could not have been seasonably submitted; CLI-10-26, 72 NRC 474 (2010)
in the interest of efficient case management and prompt resolution of adjudications, the Commission has generally enforced the 10-day deadline for appeals strictly, excusing it only in unavoidable and extreme circumstances; CLI-10-26, 72 NRC 474 (2010)
motions filed under 10 C.F.R. 2.323 are not a legitimate means to bring challenges to board decisions to the Commission; CLI-10-28, 72 NRC 553 (2010)
NRC Staff is permitted an appeal as of right on the question of whether a request for access to sensitive unclassified nonsafeguards information should have been denied in whole or in part; CLI-10-24, 72 NRC 451 (2010)
parties are expected to file motions for extensions of time so that they are received by NRC well before the time specified expires; CLI-10-26, 72 NRC 474 (2010)
the fact that a party may have other obligations does not relieve that party of its hearing obligations; CLI-10-26, 72 NRC 474 (2010)
the standard of review on appeal is abuse of discretion; CLI-10-24, 72 NRC 451 (2010)

unfamiliarity with NRC's Rules of Practice is not sufficient excuse for late filings, particularly where the order that is being challenged expressly advised petitioner of his appellate rights and of the time within which those rights had to be exercised; CLI-10-26, 72 NRC 474 (2010)
See also Briefs, Appellate
APPEALS, INTERLOCUTORY
although review is denied, the Commission exercises its inherent supervisory authority over adjudications to take sua sponte review of a board Order; CLI-10-27, 72 NRC 481 (2010)
because it disfavors piecemeal appeals, the Commission will grant interlocutory review only in extraordinary circumstances; CLI-10-29, 72 NRC 556 (2010)
deferral of review of board denial of rule waiver petition did not cause irreparable injury; CLI-10-29, 72 NRC 556 (2010)
imminent mootness of an issue has been cause for taking interlocutory review if the issue sought to be reviewed would have become moot by the time the board issued a final decision; CLI-10-29, 72 NRC 556 (2010)
it is within Commission discretion to grant interlocutory review; CLI-10-29, 72 NRC 556 (2010)
licensing board decisions denying a petition for waiver are interlocutory and not reviewable until the board has issued a final decision resolving the case, unless a party seeking review shows that one of the grounds for interlocutory review has been met; CLI-10-29, 72 NRC 556 (2010)
review at the end of the case would be meaningless because the Commission cannot later, on appeal from a final board decision, rectify an erroneous disclosure order; CLI-10-29, 72 NRC 556 (2010)
review is granted where the issues are significant, have potentially broad impact, and may well recur in the likely license renewal proceedings for other plants; CLI-10-27, 72 NRC 481 (2010)
showing necessary for grant of a petition for interlocutory review is described; CLI-10-29, 72 NRC 556 (2010)
the Commission may consider the criteria listed in 10 C.F.R. 2.786(b)(4) when reviewing interlocutory matters on the merits, but when determining whether to undertake such review the standards in section 2.786(g) control the determination; CLI-10-29, 72 NRC 556 (2010)
the question whether to hold an NRC enforcement proceeding in abeyance pending a related criminal prosecution is generally suitable for interlocutory Commission review because, unlike most interlocutory questions, the abeyance issue cannot await the end of the proceeding because it becomes moot; CLI-10-29, 72 NRC 556 (2010)
APPEALS, UNTIMELY
intervenor's appeal 3 days out of time was accepted when applicants' motion to strike failed to even hint at prejudice; LBP-10-21, 72 NRC 616 (2010)
the Commission elaborates on the standards for accepting an appeal filed out of time; LBP-10-21, 72 NRC 616 (2010)
APPELLATE BRIEFS
an appeal that merely recites earlier arguments without explaining how they demonstrate legal error or abuse of discretion on the board's part does not satisfy NRC pleading standards; CLI-10-21, 72 NRC 197 (2010)
appeals of partial initial decisions are not the proper procedural context in which to revise contentions; CLI-10-17, 72 NRC 1 (2010)
because appellant submitted no offer of proof, its case could be so weak that the denial of a right to reply by the licensing board would have been harmless error; CLI-10-23, 72 NRC 210 (2010)
cursory, unsupported arguments will not be considered; CLI-10-17, 72 NRC 1 (2010)
materiality is a requirement for any fact-based argument in a petition for review; CLI-10-17, 72 NRC 1 (2010)
mere demonstration that a board erred is not sufficient to warrant appellate relief, but rather the complaining party must demonstrate actual prejudice, i.e., that the ruling had a substantial effect on the outcome of the proceeding; CLI-10-23, 72 NRC 210 (2010)
parties taking appeals on purely procedural points are expected to explain precisely what injury to them was occasioned by the asserted error; CLI-10-23, 72 NRC 210 (2010)
petitions for review may not exceed 25 pages; CLI-10-17, 72 NRC 1 (2010)
the Commission disapproves of incorporation by reference in petitions for review, where it has the effect of bypassing the page limits set forth in NRC regulations; CLI-10-17, 72 NRC 1 (2010)

SUBJECT INDEX

APPELLATE REVIEW
absent extreme circumstances, the Commission will not consider on appeal either new arguments or new evidence supporting the contentions which a board never had the opportunity to consider; CLI-10-21, 72 NRC 197 (2010)
an abuse of discretion standard is applied to Commission review of decisions on evidentiary questions; CLI-10-18, 72 NRC 56 (2010)
Commission review is in the public interest if the decision could affect pending and future license renewal determinations; CLI-10-17, 72 NRC 1 (2010)
Commission will take early review as to matters involving novel legal or policy questions; CLI-10-24, 72 NRC 451 (2010)
discretionary Commission review of a presiding officer's initial decision is allowed under 10 C.F.R. 2.341(b)(1); CLI-10-17, 72 NRC 1 (2010)
granting of petitions for review is discretionary, given due weight to the existence of a substantial question with respect to the five considerations listed in 10 C.F.R. 2.341(b)(4); CLI-10-18, 72 NRC 56 (2010)
if appellant had submitted an offer of proof, indicating what rebuttal evidence it would have offered to the board, then the Commission might have had some basis for determining whether that evidence would be substantial enough to justify a remand to the board; CLI-10-23, 72 NRC 210 (2010)
legal issues are reviewed de novo, but the Commission generally defers to board findings of fact, unless they are clearly erroneous; CLI-10-17, 72 NRC 1 (2010)
licensing board findings of fact that turn on witness credibility receive the Commission's highest deference on appeal; CLI-10-23, 72 NRC 210 (2010)
licensing boards have authority to regulate the course of proceedings, and the Commission generally defers to the boards on case management decisions; CLI-10-28, 72 NRC 553 (2010)
mere demonstration that a board erred is not sufficient to warrant appellate relief, but rather the complaining party must demonstrate actual prejudice, i.e., that the ruling had a substantial effect on the outcome of the proceeding; CLI-10-23, 72 NRC 210 (2010)
pendency of a petition for Commission review does not absolve petitioner of its duty to file a motion to reopen in a timely fashion; LBP-10-19, 72 NRC 529 (2010)
petition for review satisfies 10 C.F.R. 2.341(b)(4)(ii), (iii), and (v) of the standards for review because the challenged portions of the initial decision address significant issues of law and policy that lack governing precedent and raise issues that could affect other license renewal determinations; CLI-10-17, 72 NRC 1 (2010)
petitioner's argument regarding rejection of its contention satisfies the prejudicial procedural error standard for review; CLI-10-17, 72 NRC 1 (2010)
Staff's petition for review is granted on the grounds that Staff has demonstrated substantial questions as to the board's correct application of NEPA jurisprudence, and as to whether certain actions taken by the board constituted prejudicial procedural error; CLI-10-18, 72 NRC 56 (2010)
the Commission defers to a licensing board's rulings on contention admissibility unless an appeal points to an error of law or abuse of discretion; CLI-10-21, 72 NRC 197 (2010)
the Commission generally defers to a board's rulings on standing in the absence of clear error or an abuse of discretion; CLI-10-20, 72 NRC 185 (2010)
the Commission is loath to address complaints concerning a board's skepticism of expert witness's testimony, given that the Commission lacks the board's ability to observe the demeanor of the parties' expert witnesses in general and petitioner's witness in particular; CLI-10-17, 72 NRC 1 (2010)
the Commission may take discretionary review of a licensing board's initial decision; CLI-10-23, 72 NRC 210 (2010)
the Commission refrains from exercising its authority to make de novo findings of fact in situations where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact; CLI-10-18, 72 NRC 56 (2010)
the Commission reviews legal questions de novo and will reverse a licensing board's legal rulings if they are a departure from or contrary to established law; CLI-10-18, 72 NRC 56 (2010)
the Commission will consider a petition for review if it raises a substantial question with respect to one or more of the five paragraphs of 10 C.F.R. 2.341(b)(4); CLI-10-17, 72 NRC 1 (2010)
the Commission will not consider cursory, unsupported arguments; CLI-10-23, 72 NRC 210 (2010)

the Commission will not overturn a hearing judge's findings simply because the Commission might have reached a different result; CLI-10-23, 72 NRC 210 (2010)
the fact that the board accorded greater weight to one party's evidence than to the other's is not a basis for overturning the initial decision; CLI-10-23, 72 NRC 210 (2010)
the standard of clear error for overturning a board's factual findings is quite high; CLI-10-18, 72 NRC 56 (2010)
to satisfy the "clearly erroneous" standard, a litigant must show that the board's findings are not even plausible in light of the record viewed in its entirety; CLI-10-17, 72 NRC 1 (2010); CLI-10-23, 72 NRC 210 (2010)
unreviewed board rulings have no precedential effect; CLI-10-29, 72 NRC 556 (2010); CLI-10-30, 72 NRC 564 (2010)
when the Commission reviews board rulings on contention admissibility, it employs the clear error and abuse of discretion standards of review; CLI-10-17, 72 NRC 1 (2010)
whether collateral estoppel should be applied is a legal question that the Commission reviews de novo; CLI-10-23, 72 NRC 210 (2010)

APPLICANTS
although the contention admissibility rule imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from applicant to petitioner; LBP-10-24, 72 NRC 720 (2010)
although the duty to comply with NEPA falls upon the agency and not upon the applicant or licensee, the requirements of Part 51 must be met by the applicant; LBP-10-16, 72 NRC 361 (2010)
it is not the duty of applicant to consult with a tribe regarding cultural resources at a proposed site, but instead is the duty of the agency to initiate and follow through with the consultation process; LBP-10-16, 72 NRC 361 (2010)
See also Appeals

ARCHAEOLOGICAL RESOURCES PROTECTION ACT
criteria and procedures pursuant to which a federal land manager may issue excavation permits for federal lands are provided as well as notification to Indian tribes if permits may result in harm to cultural or religious sites; LBP-10-16, 72 NRC 361 (2010)

ASME CODE
a combined license application must include a description of the programs, and their implementation, necessary to ensure that the systems and components meet the requirements of the ASME Boiler and Pressure Vessel Code in accordance with 10 C.F.R. 50.55a; LBP-10-21, 72 NRC 616 (2010)
for license renewal, feedwater, core spray, and reactor recirculation outlet nozzles, as part of the reactor coolant pressure boundary, must meet the metal-fatigue requirements for Class 1 components in Section III of the Code; CLI-10-17, 72 NRC 1 (2010)
intervenors are precluded from challenging ASME inspection requirements in a combined license proceeding because NRC regulations directly incorporate ASME inspection requirements by reference; LBP-10-21, 72 NRC 616 (2010)
licensee must comply with Part 50 regulations, including the provisions requiring compliance with the ASME Code, during the period of extended operation; CLI-10-17, 72 NRC 1 (2010)
the containment vessel is identified as an ASME Code Class MC component in both the inservice inspection subsection of section 50.55a as well as the inspection requirements subsection of the AP1000 DCD; LBP-10-21, 72 NRC 616 (2010)

ASSUMPTION OF RISK
the civil law concept requires not merely general knowledge of a risk but also that the risk assumed be specifically known, understood, and appreciated; CLI-10-23, 72 NRC 210 (2010)

ATOMIC ENERGY ACT
Congress considers the Atomic Safety and Licensing Board to be a panel of experts; CLI-10-17, 72 NRC 1 (2010)
NRC must provide a hearing upon the request of any person whose interest may be affected by the proceeding; LBP-10-16, 72 NRC 361 (2010); LBP-10-17, 72 NRC 501 (2010)

ATTORNEY CONDUCT
absent written consent of the party and the prior appearance of another attorney, many courts require that an attorney file a motion to withdraw; LBP-10-21, 72 NRC 616 (2010)

an attorney is not permitted to withdraw from representing a client unless withdrawal can be accomplished without material adverse effect to the client's interests; LBP-10-21, 72 NRC 616 (2010)
counsel's alleged unfamiliarity with the agency's rules of practice or counsel's asserted busy schedule are not satisfactory explanations for late filings; LBP-10-21, 72 NRC 616 (2010)
parties and their representatives are expected to conduct themselves as they should before a court of law; LBP-10-21, 72 NRC 616 (2010)
BACKFITTING
NRC Staff could impose license conditions that are necessary to protect the environment under backfit procedures; CLI-10-30, 72 NRC 564 (2010)
BENEFIT-COST ANALYSIS
a SAMA analysis contention was found to be inadmissible because it lacked supporting information regarding the relative costs and benefits of the proposed alternative; LBP-10-15, 72 NRC 257 (2010)
contention is rejected as lacking support for the premise that ongoing mining operations will drain or contaminate wetlands, such that their economic benefits will be decreased; LBP-10-16, 72 NRC 361 (2010)
contention raising question of whether a quantitative as opposed to qualitative analysis of terrorist attacks and the alternatives for mitigation and prevention is necessary is referred to the Commission as a novel issue; LBP-10-15, 72 NRC 257 (2010)
determination of economic benefits and costs that are tangential to environmental consequences are within a wide area of agency discretion; LBP-10-24, 72 NRC 720 (2010)
inherent in any forecast of future electric power demands is a substantial margin of uncertainty; LBP-10-24, 72 NRC 720 (2010)
licensing board may disapprove a site for a new reactor only upon one of two findings; LBP-10-24, 72 NRC 720 (2010)
purpose of the analysis called for by NEPA is to identify each significant environmental cost and to determine whether, all other factors considered, on balance the incurring of that cost is warranted; LBP-10-24, 72 NRC 720 (2010)
severe accident mitigation alternatives analyses are rooted in a cost-benefit assessment and the purpose of the assessment is to identify plant changes whose costs would be less than their benefit; LBP-10-14, 72 NRC 101 (2010)
the analysis involves the scrutiny of many factors, among them, offsetting benefits, available alternatives, and the possible means (and attendant costs) of reducing the environmental harm; LBP-10-24, 72 NRC 720 (2010)
the general rule applicable to cases involving differences or changes in demand forecasts is not whether applicant will need additional generating capacity but when; LBP-10-24, 72 NRC 720 (2010)
BIAS
a judge's use of strong language toward a party or in expressing his views on matters before him does not constitute evidence of personal bias; CLI-10-17, 72 NRC 1 (2010)
an agency official should be disqualified only when a disinterested observer may conclude that the official has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it; CLI-10-17, 72 NRC 1 (2010)
extra-record conduct such as stares, glares, and scowls do not constitute evidence of personal bias, nor do occasional outbursts toward counsel; CLI-10-17, 72 NRC 1 (2010)
friction between the court and counsel, including intemperate and impatient remarks by the judge, does not constitute evidence of personal bias; CLI-10-17, 72 NRC 1 (2010)
mere experience or background in a relevant technical field does not imply knowledge of the specific disputed facts in a case; CLI-10-22, 72 NRC 202 (2010)
that an unreasonable person, focusing on only one aspect of the story, might perceive a risk of bias is irrelevant; CLI-10-22, 72 NRC 202 (2010)
the mere fact of adverse findings and rulings on the merits does not imply a biased attitude on the board's part; CLI-10-17, 72 NRC 1 (2010)
to prevail on a disqualification motion, petitioner first must demonstrate that the purported instances of bias had a substantial impact on the outcome of the proceeding; CLI-10-17, 72 NRC 1 (2010)

to prevail on a disqualification motion, petitioner must show either a bias against petitioner or its counsel based on matters outside the record or a pervasive bias against petitioner based upon matters in the record; CLI-10-17, 72 NRC 1 (2010)
BRIEFS, APPELLATE
amicus curiae briefs are welcomed from parties in other Commission adjudications that have presented similar issues; CLI-10-17, 72 NRC 1 (2010)
NRC regulations contemplate amicus curiae briefs only after the Commission grants a petition for review, and do not provide for amicus briefs supporting or opposing petitions for review; CLI-10-17, 72 NRC 1 (2010)
BURDEN OF PERSUASION
burden is on petitioner to allege a specific and plausible means by which contaminants from mining activities may adversely affect him or her; LBP-10-16, 72 NRC 361 (2010)
existence of a prima facie case is determined based on the sufficiency of the movant's assertions and informational/evidentiary support alone; LBP-10-15, 72 NRC 257 (2010)
in source materials cases, petitioner has the burden of showing a specific and plausible means by which the proposed license activities may affect him or her; LBP-10-16, 72 NRC 361 (2010)
prima facie case is defined as establishment of a legally required rebuttable presumption or a party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor; LBP-10-15, 72 NRC 257 (2010)
BURDEN OF PROOF
a board's standing analysis must avoid the familiar trap of confusing the standing determination with the assessment of a petitioner's case on the merits; LBP-10-16, 72 NRC 361 (2010)
although the contention admissibility rule imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from applicant to petitioner; LBP-10-24, 72 NRC 720 (2010)
it is enough that petitioner has demonstrated a realistic threat of sustaining a direct injury as a result of contaminated groundwater flowing from the site to his property; LBP-10-16, 72 NRC 361 (2010)
petitioner, especially one represented by counsel, bears the burden of going forward and specifically addressing each of the six elements in 10 C.F.R. 2.309(f)(1); LBP-10-16, 72 NRC 361 (2010)
petitioner is not required to prove its case at the contention admission stage; LBP-10-24, 72 NRC 720 (2010)
petitioners are not required to demonstrate their asserted injury with certainty at the contention admission stage, or to provide extensive technical studies in support of their standing argument; LBP-10-16, 72 NRC 361 (2010)
summary disposition movant bears the burden of demonstrating that there is no genuine issue as to any material fact; LBP-10-20, 72 NRC 571 (2010)
BYPRODUCT MATERIALS
petitioner alleges release of controlled byproduct nuclear materials in containers not certified for transport of such materials on public roads and not labeled with the required labeling; DD-10-3, 72 NRC 171 (2010)
CABLES
motion to reopen to introduce a new contention asserting issues related to aging management of effects of moist or wet environments on buried, below-grade, underground, or hard-to-access safety-related electrical cables is denied; LBP-10-19, 72 NRC 529 (2010)
CASE MANAGEMENT
a spectrum of sanctions from minor to severe may be employed by a board to assist in the management of a proceeding; LBP-10-21, 72 NRC 616 (2010)
boards are authorized to hold prehearing conferences to simplify or clarify the issues for hearing, after which they may admit a revised contention, as long as the revised contention does not add material not raised by the intervenor to make it admissible; LBP-10-14, 72 NRC 101 (2010)
boards' case management decisions, such as determinations of whether to permit additional slide shows or enlarged exhibits, lie well within the discretion of the board; CLI-10-17, 72 NRC 1 (2010)
examples of sanctions include warning a party that offending conduct will not be tolerated in the future, refusing to consider a filing, denying the right to cross-examine or present evidence, dismissing

contentions, imposing sanctions on counsel, or dismissing the party from the proceeding; LBP-10-21, 72 NRC 616 (2010)
if no particular procedure is compelled, the board must exercise its discretion and select the hearing procedure most appropriate for the newly admitted contentions; LBP-10-15, 72 NRC 257 (2010)
in establishing and enforcing schedule deadlines, boards must take care not to compromise the Commission's fundamental commitment to a fair and thorough hearing process; LBP-10-21, 72 NRC 616 (2010)
in procedural and scheduling matters, where first-hand contact with and appreciation for all the circumstances surrounding a case are necessary, maximum reliance on the proper discretion of a presiding officer is essential; CLI-10-17, 72 NRC 1 (2010)
in the interest of efficient case management and prompt resolution of adjudications, the Commission has generally enforced the 10-day deadline for appeals strictly, excusing it only in unavoidable and extreme circumstances; CLI-10-26, 72 NRC 474 (2010)
licensing boards have authority to control the schedule for a proceeding to ensure that intervenors have adequate time to prepare new or amended contentions in response to new information; LBP-10-17, 72 NRC 501 (2010)
licensing boards have authority to regulate the course of proceedings, and the Commission generally defers to the boards on case management decisions; CLI-10-28, 72 NRC 553 (2010)
licensing boards have substantial authority to regulate hearing procedures; LBP-10-21, 72 NRC 616 (2010)
licensing boards have the authority to regulate hearing procedure, and decisions on evidentiary questions fall within that authority; CLI-10-18, 72 NRC 56 (2010)
licensing boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; LBP-10-14, 72 NRC 101 (2010)
NRC's expanding adjudicatory docket makes it critically important that parties comply with NRC pleading requirements and that the board enforce those requirements; CLI-10-27, 72 NRC 481 (2010)
only in truly unavoidable and extreme circumstances are late filings to be accepted; LBP-10-21, 72 NRC 616 (2010)
selection of hearing procedures for contentions at the outset of a proceeding is not immutable because the availability of Subpart G procedures depends critically on whether the credibility of eyewitnesses is important in resolving a contention, and witnesses relevant to each contention are not identified until after contentions are admitted; LBP-10-16, 72 NRC 361 (2010)
strict enforcement of deadlines furthers the dual interests of efficient case management and prompt resolution of adjudications; LBP-10-21, 72 NRC 616 (2010)
the Commission regards good sense, judgment, and managerial skills as the proper guideposts for conducting an efficient hearing; LBP-10-21, 72 NRC 616 (2010)
upon admission of a contention in a licensing proceeding, the board must identify the specific hearing procedures to be used to settle the contention; LBP-10-16, 72 NRC 361 (2010)
with an eye toward mitigating prejudice to nonbreaching participants, boards must tailor sanctions to bring about improved future compliance; LBP-10-21, 72 NRC 616 (2010)
CATEGORICAL EXCLUSION
certain actions are designated as categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement; CLI-10-18, 72 NRC 56 (2010)
such actions do not individually or cumulatively have a significant effect on the human environment and thus neither an environmental assessment nor an environmental impact statement is required; CLI-10-18, 72 NRC 56 (2010)
the Commission may find special circumstances warranting a categorical exclusion upon its own initiative, or upon the request of an interested person; CLI-10-18, 72 NRC 56 (2010)
CERTIFICATION
because petitioner had not made a prima facie case for rule waiver, the Board declined to certify the matter to the Commission and found that it was prohibited from considering the matter further; CLI-10-29, 72 NRC 556 (2010)
if petitioner has made a prima facie showing of special circumstances for rule waiver, then the board certifies the matter to the Commission; LBP-10-15, 72 NRC 257 (2010)
See also Design Certification

SUBJECT INDEX

CERTIFIED QUESTIONS
the Commission addresses a certified question by a licensing board on the admissibility of proposed contentions involving the Waste Confidence Rule; CLI-10-19, 72 NRC 98 (2010)
CHEMICAL SPILLS
hydrofluoric acid exposure to licensee operators is assessed a civil monetary penalty in the amount of $32,500 on the basis of a determined Severity Level III violation; LBP-10-18, 72 NRC 519 (2010)
CIVIL PENALTIES
hydrofluoric acid exposure to licensee operators is assessed a civil monetary penalty in the amount of $32,500 on the basis of a determined Severity Level III violation; LBP-10-18, 72 NRC 519 (2010)
CLEAN WATER ACT
regulation of discharges to groundwater is not authorized by the act, and so applicant's environmental report must address those discharges; LBP-10-14, 72 NRC 101 (2010)
CLIMATE CHANGE
applicant may perform its climate change analysis for the high-level waste repository using a specified percolation rate; LBP-10-22, 72 NRC 661 (2010)
applicant's climate change analysis for the 990,000-year period may be limited to the effects of increased water flow through the repository as a result of climate change; LBP-10-22, 72 NRC 661 (2010)
climate projections should be based on cautious but reasonable assumptions; LBP-10-22, 72 NRC 661 (2010)
DOE may elect to use the method specified in 10 C.F.R. 63.342(c)(2) to analyze the effects of climate change during the post-10,000-year period, regardless of whether it is required to analyze the effects of climate change during the initial 10,000-year period; LBP-10-22, 72 NRC 661 (2010)
DOE must assess the effects of climate change during the 990,000-year period regardless of whether it necessarily must assess climate change during the initial 10,000-year period under the criteria set forth in section 63.342(a) and (b); LBP-10-22, 72 NRC 661 (2010)
the plain language of 10 C.F.R. 63.305 does not say anything about analyzing future climate based upon the historical geological record; LBP-10-22, 72 NRC 661 (2010)
COLLATERAL ESTOPPEL
correctness of a prior decision is not a public policy factor upon which the application of the doctrine depends; CLI-10-23, 72 NRC 210 (2010)
in determining whether to apply collateral estoppel, a board should not look into the jury trial to determine whether the verdict was correct; CLI-10-23, 72 NRC 210 (2010)
issues not decided by special verdict are difficult to decipher for collateral estoppel purposes because of the uncertainty whether the precise issue was actually determined in the prior criminal case; CLI-10-23, 72 NRC 210 (2010)
licensing boards may give collateral estoppel effect to issues previously decided in a district court proceeding; CLI-10-23, 72 NRC 210 (2010)
relitigation of issues of law or fact that have been finally adjudicated by a tribunal of competent jurisdiction in a proceeding involving the same parties or their privies is precluded; CLI-10-23, 72 NRC 210 (2010)
the doctrine has long been recognized as part of NRC adjudicatory practice; CLI-10-23, 72 NRC 210 (2010)
the doctrine is applicable if the issue sought to be precluded is the same as that involved in the prior action, the issue was actually litigated in a prior action, there is a valid and final judgment in the prior action, and the determination was essential to the prior judgment; CLI-10-23, 72 NRC 210 (2010)
the party to be prevented from relitigating an issue must have been a party to the prior action, but the party seeking to prevent relitigation through the application of collateral estoppel need not have been a party; CLI-10-23, 72 NRC 210 (2010)
whether collateral estoppel should be applied is a legal question that the Commission reviews de novo; CLI-10-23, 72 NRC 210 (2010)
COMBINED LICENSE APPLICATION
a COLA must include a description of the programs, and their implementation, necessary to ensure that the systems and components meet the requirements of the ASME Boiler and Pressure Vessel Code in accordance with 10 C.F.R. 50.55a; LBP-10-21, 72 NRC 616 (2010)

amendments to license applications are not limited to minor details, but may include significant changes; LBP-10-17, 72 NRC 501 (2010)
an agency is not authorized to grant conditional approval to plans that do nothing more than promise to do tomorrow what the statute requires today; LBP-10-20, 72 NRC 571 (2010)
an applicant that references in its COLA a design for which a design certification application has been docketed but not granted does so at its own risk; LBP-10-17, 72 NRC 501 (2010); LBP-10-20, 72 NRC 571 (2010)
applicant fails to address the management of low-level radioactive waste plan for a longer term than envisioned in the COLA; LBP-10-20, 72 NRC 571 (2010)
applicant must describe the means for controlling and limiting the radioactive effluents and radiation exposures from the proposed nuclear reactors; LBP-10-20, 72 NRC 571 (2010)
applicant must have a program to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable; LBP-10-20, 72 NRC 571 (2010)
applicant's COLA discussion of LLRW management contained no omission where the applicant addressed the closure of the Barnwell LLRW disposal facility, discussed in detail additional waste minimization measures, and committed to build an additional storage facility in accordance with NRC guidelines if further additional storage became necessary; LBP-10-20, 72 NRC 571 (2010)
applications may be modified or improved during the NRC review process; LBP-10-17, 72 NRC 501 (2010)
detailed design, location, and health impacts information on low-level radioactive waste storage is not required in the combined license application; LBP-10-20, 72 NRC 571 (2010)
low-level radioactive waste 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; LBP-10-20, 72 NRC 571 (2010)
the fact that an extended low-level radioactive waste storage plan is contingent does not mean that it does not need to comply with 10 C.F.R. 52.79 or that it is subject to a relaxed standard; LBP-10-20, 72 NRC 571 (2010)
the final safety analysis report must include the kinds and quantities of radioactive materials expected to be produced by low-level radioactive waste in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in 10 C.F.R. Part 20; LBP-10-20, 72 NRC 571 (2010)
the FSAR shall include a level of information sufficient to enable the Commission to reach a final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license; LBP-10-20, 72 NRC 571 (2010)
there is no prohibition on an applicant using a plan for compliance with section 52.79(a)(3) that includes contingent plans should future low-level radioactive waste storage become necessary; LBP-10-20, 72 NRC 571 (2010)
there is no requirement in section 52.79(a)(3) for applicant's FSAR to include details regarding building materials and high-integrity containers, exact location, or health impacts on employees for the contingent onsite long-term LLRW storage facility; LBP-10-20, 72 NRC 571 (2010)
topics that must be covered in the final safety analysis report and the level of information that is sufficient for each topic are specified in 10 C.F.R. 52.79; LBP-10-20, 72 NRC 571 (2010)
COMBINED LICENSE PROCEEDINGS
challenges to a severe accident mitigation design alternatives analysis are within the scope of COL proceedings; LBP-10-14, 72 NRC 101 (2010)
the design certification rulemaking and individual COL adjudicatory proceedings may proceed simultaneously, and issues raised in an adjudicatory proceeding that are appropriately addressed in the generic design certification rulemaking are to be referred to the rulemaking for resolution; LBP-10-17, 72 NRC 501 (2010)
to the degree the general precept that a rule, including a design certification, cannot be challenged in an adjudication might be seen as placing such matters outside the scope of the proceeding; LBP-10-21, 72 NRC 616 (2010)

SUBJECT INDEX

COMBINED LICENSES
in making the findings required for issuance of a combined license, the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification rule; LBP-10-21, 72 NRC 616 (2010)
COMPLIANCE
in the absence of evidence to the contrary, NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises; LBP-10-20, 72 NRC 571 (2010)
with an eye toward mitigating prejudice to nonbreaching participants, boards must tailor sanctions to bring about improved future compliance; LBP-10-21, 72 NRC 616 (2010)
COMPUTER MODELING
applicant's claim that computer models should be excused from the mandatory disclosure requirements because they entail proprietary information is rejected; LBP-10-23, 72 NRC 692 (2010)
applicant's "control" of computer models prepared by and in possession of a contractor is illustrated by the fact that if NRC Staff requested these documents, applicant could obtain and provide them; LBP-10-23, 72 NRC 692 (2010)
the term "document" as used in 10 C.F.R. 2.336 includes computer models and associated electronic inputs, outputs, data, and software; LBP-10-23, 72 NRC 692 (2010)
to rule that disclosure under 10 C.F.R. 2.336(a)(2)(i) is limited to formal contractual deliverables would encourage applicants to draft consulting contracts to insulate themselves from the obligation to disclose critical computer modeling information; LBP-10-23, 72 NRC 692 (2010)
CONCLUSIONS OF LAW
the Commission reviews legal questions de novo and will reverse a licensing board's legal rulings if they are a departure from or contrary to established law; CLI-10-18, 72 NRC 56 (2010)
CONDUCT OF PARTIES
parties and their representatives are expected to conduct themselves as they should before a court of law; LBP-10-21, 72 NRC 616 (2010)
CONFIDENTIAL INFORMATION
handling of confidential commercial or financial (proprietary) information that has been submitted to the agency is governed by 10 C.F.R. 2.390; CLI-10-24, 72 NRC 451 (2010)
CONSIDERATION OF ALTERNATIVES
a categorical exclusion exists for materials licenses associated with irradiators; CLI-10-18, 72 NRC 56 (2010)
a rule of reason is implicit in NEPA's requirement that an agency consider reasonable alternatives to a proposed action; CLI-10-18, 72 NRC 56 (2010); CLI-10-22, 72 NRC 202 (2010)
a SAMA analysis contention was found to be inadmissible because it lacked supporting information regarding the relative costs and benefits of that proposed alternative; LBP-10-15, 72 NRC 257 (2010)
adequacy of the draft environmental impact statement's evaluation of alternatives is a material issue in a licensing proceeding; LBP-10-24, 72 NRC 720 (2010)
adequacy of the NEPA alternatives analysis is judged on the substance rather than the sheer number of the alternatives examined; CLI-10-18, 72 NRC 56 (2010)
agencies are not allowed to define objectives of a project so narrowly as to preclude a reasonable consideration of alternatives; CLI-10-18, 72 NRC 56 (2010)
alternatives that do not advance the purpose of the project will not be considered reasonable or appropriate; CLI-10-18, 72 NRC 56 (2010)
although substantial weight is accorded to a license applicant's preferences, if the identified purpose of a proposed project reasonably may be accomplished at locations other than the proposed site, the board may require consideration of those alternative sites; CLI-10-18, 72 NRC 56 (2010)
although the discussion of alternatives in the environmental assessment need only be brief, it must be sufficient to fully comply with the requirement to study, develop, and describe appropriate alternatives; CLI-10-18, 72 NRC 56 (2010)
an agency is required to address the purpose of the proposed project, reasonable alternatives to the project, and to what extent the agency should explore each particular reasonable alternative; CLI-10-18, 72 NRC 56 (2010)
an agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative; LBP-10-24, 72 NRC 720 (2010)

an environmental impact statement must include a detailed statement of reasonable alternatives to a proposed action; LBP-10-24, 72 NRC 720 (2010)
analysis of alternatives is the heart of the environmental impact statement; LBP-10-24, 72 NRC 720 (2010)
as long as all reasonable alternatives have been considered and an appropriate explanation is provided as to why an alternative was eliminated, the regulatory requirement is satisfied; CLI-10-18, 72 NRC 56 (2010)
consideration of energy efficiency is not a reasonable alternative, where that alternative would not achieve applicant's goal of providing additional power to sell on the open market, and is not possible for an applicant who has no transmission or distribution system of its own, and no link to the ultimate power consumer; CLI-10-21, 72 NRC 197 (2010)
environmental reports must include an 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; LBP-10-16, 72 NRC 361 (2010)
existence of reasonable but unexamined alternatives renders an environmental impact statement inadequate; LBP-10-24, 72 NRC 720 (2010)
federal agencies are required to study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources; CLI-10-18, 72 NRC 56 (2010)
further review of need for power and alternative energy sources is precluded once a construction permit has been issued; CLI-10-29, 72 NRC 556 (2010)
inaccurate, incomplete, or misleading information in an environmental impact statement concerning the comparison of alternatives is itself sufficient to render the EIS unlawful and to compel its revision; LBP-10-24, 72 NRC 720 (2010)
it is not enough to consider only the proposed action and the no-action alternative in an environmental assessment; CLI-10-18, 72 NRC 56 (2010)
NEPA requires federal agencies to consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-10-24, 72 NRC 720 (2010)
NEPA requires the NRC to provide a reasonable mitigation alternatives analysis, containing reasonable estimates, including full disclosures of any known shortcomings in methodology, incomplete or unavailable information and significant uncertainties; CLI-10-22, 72 NRC 202 (2010)
NRC has broad discretion to determine how thoroughly it needs to analyze a particular subject for NEPA compliance; LBP-10-14, 72 NRC 101 (2010)
NRC is not required to consider every imaginable alternative to a proposed action, but rather only reasonable alternatives; LBP-10-14, 72 NRC 101 (2010)
NRC regulations do not impose a numerical floor on alternatives to be considered; CLI-10-18, 72 NRC 56 (2010)
NRC Staff is required under NEPA to evaluate reasonable technological and geographical alternatives to a proposed irradiator; CLI-10-18, 72 NRC 56 (2010)
project goals are to be determined by the applicant, not the agency; CLI-10-18, 72 NRC 56 (2010)
the alternatives provision of NEPA § 102(2)(E) applies both when an agency prepares an environmental impact statement and when it prepares an environmental assessment; CLI-10-18, 72 NRC 56 (2010)
the Commission may find special circumstances warranting a categorical exclusion upon its own initiative, or upon the request of an interested person; CLI-10-18, 72 NRC 56 (2010)
the National Environmental Policy Act's rule of reason excludes consideration of demand-side management if the proposed new plant is intended to be a merchant plant, selling power on the open market, because it is not feasible for licensee to engage in demand-side management; CLI-10-21, 72 NRC 197 (2010)
the NEPA hard-look doctrine is subject to a rule of reason that the Commission has interpreted as obligating the agency to consider all reasonable alternatives to the proposed action; LBP-10-14, 72 NRC 101 (2010)
the obligation of agencies to consider alternatives is a lesser one under an environmental assessment than under an environmental impact statement; CLI-10-18, 72 NRC 56 (2010)

the range of alternatives that must be considered need not extend beyond those reasonably related to the purposes of the project, and a rule of reason necessarily informs that choice; CLI-10-18, 72 NRC 56 (2010)
when reviewing a discrete license application filed by a private applicant, a federal agency may appropriately accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project; CLI-10-18, 72 NRC 56 (2010)
wind or solar power are not considered as stand-alone alternatives because neither source is deemed capable of serving the purpose and need of the project, generating 1600 MW(e) of baseload power; LBP-10-24, 72 NRC 720 (2010)
CONSTRUCTION
preconstruction monitoring and testing to establish background information is exempted from the prohibition on commencement of construction; LBP-10-16, 72 NRC 361 (2010)
CONSTRUCTION OF MEANING
concerning criminal guilt, the words "knowledge" and "knowingly" are normally associated with awareness, understanding, or consciousness; CLI-10-23, 72 NRC 210 (2010)
in determining whether petitioner has established standing, boards may construe the petition in favor of the petitioner; LBP-10-15, 72 NRC 257 (2010); LBP-10-21, 72 NRC 616 (2010)
in the absence of a statutory definition, courts normally define a term by its ordinary meaning; LBP-10-24, 72 NRC 720 (2010)
knowledge of a fact requires not only an awareness of that fact but also an understanding or recognition of its significance; CLI-10-23, 72 NRC 210 (2010)
the civil law concept of "assumption of risk" requires not merely general knowledge of a risk but also that the risk assumed be specifically known, understood, and appreciated; CLI-10-23, 72 NRC 210 (2010)
willfulness means nothing more in the context of a false statement than that the defendant knew that his statement was false when he made it or consciously disregarded or averted his eyes from its likely falsity; CLI-10-23, 72 NRC 210 (2010)
See also Definitions
CONSTRUCTION OF TERMS
use of the disjunctive phrase "data *or* conclusions" means that it is sufficient that either data or conclusions in the draft environmental impact statement differ significantly from those in the environmental report; LBP-10-24, 72 NRC 720 (2010)
CONSTRUCTION PERMITS
administrative regularity in the regulatory process is assumed, and review of the operating license application takes place independently of that associated with plant construction; CLI-10-29, 72 NRC 556 (2010)
before authorizing construction of the proposed repository, the Commission must determine that there is reasonable expectation that the materials can be disposed of without unreasonable risk to the health and safety of the public; LBP-10-22, 72 NRC 661 (2010)
further review of need for power and alternative energy sources are precluded once a construction permit has been issued; CLI-10-29, 72 NRC 556 (2010)
reinstatement of construction permits did not authorize construction of reactors, but rather was to place the facility in a terminated plant status; CLI-10-26, 72 NRC 474 (2010)
CONSULTATION DUTY
a consulting tribe is entitled to a reasonable opportunity to identify its concerns about historic properties, to advise on the identification and evaluation of them (including those of traditional religious and cultural importance), to articulate its views on the undertaking's effects on such properties, and to participate in the resolution of adverse effects; LBP-10-16, 72 NRC 361 (2010)
a tribe may become a consulting party if its property, potentially affected by a federal undertaking, has religious or cultural significance; LBP-10-16, 72 NRC 361 (2010)
federal agencies must follow notification and consultation procedures prior to a federal undertaking to consider the undertaking's effect on historic properties; LBP-10-16, 72 NRC 361 (2010)
federal agencies should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties, and should invite the governing

body of the responsible tribe to be a consulting party and to concur in any agreement; LBP-10-16, 72 NRC 361 (2010)
it is not the duty of applicant to consult with a tribe regarding cultural resources at a proposed site, but instead is the duty of the agency to initiate and follow through with the consultation process; LBP-10-16, 72 NRC 361 (2010)
CONTAINMENT
motion to reopen the record to admit new contention regarding adequacy of applicant's containment/coating inspection program for two new proposed units is denied; LBP-10-21, 72 NRC 616 (2010)
the containment vessel is identified as an ASME Code Class MC component in both the inservice inspection subsection of section 50.55a as well as the inspection requirements subsection of the AP1000 DCD; LBP-10-21, 72 NRC 616 (2010)
CONTENTIONS
a challenge to applicant's environmental report can be superseded by the subsequent issuance of licensing-related documents, whether a draft environmental impact statement or an applicant's response to a request for additional information; LBP-10-14, 72 NRC 101 (2010)
a contention may challenge a draft environmental impact statement even though its ultimate conclusion on a particular issue is the same as that in the environmental report, as long as the DEIS relies on significantly different data than the ER to support the determination; LBP-10-24, 72 NRC 720 (2010)
although the obligations under NEPA fall to the agency and therefore the NRC Staff, petitioners are required to raise environmental objections based on the applicant's environmental report; LBP-10-15, 72 NRC 257 (2010)
appeals of partial initial decisions are not the proper procedural context in which to revise contentions; CLI-10-17, 72 NRC 1 (2010)
boards have legal authority to reformulate contentions; LBP-10-16, 72 NRC 361 (2010)
contentions of omission claim that the application fails to contain information on a relevant matter as required by law and provide the supporting reasons for petitioner's belief; LBP-10-16, 72 NRC 361 (2010)
for a contention of omission, if the information is later supplied by applicant or considered by Staff in a draft environmental impact statement, 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-10-14, 72 NRC 101 (2010)
licensing boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; LBP-10-14, 72 NRC 101 (2010)
on issues arising under the National Environmental Policy Act, petitioner shall file contentions based on the applicant's environmental report; LBP-10-24, 72 NRC 720 (2010)
once parties demonstrate standing, they will then be free to assert any contention that, if proved, will afford them the relief they seek; LBP-10-15, 72 NRC 257 (2010)
petitioner may amend contentions based on the applicant's environmental report or file new contentions 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-10-24, 72 NRC 720 (2010)
the Commission distinguishes 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; LBP-10-14, 72 NRC 101 (2010)
to ensure a more efficient proceeding, the board merges two contentions; LBP-10-16, 72 NRC 361 (2010)
use of the disjunctive phrase "data *or* conclusions" means that it is sufficient that either data or conclusions in the draft environmental impact statement differ significantly from those in the environmental report; LBP-10-24, 72 NRC 720 (2010)
where a contention is superseded by the subsequent issuance of licensing-related documents, the contention must be disposed of or modified; LBP-10-17, 72 NRC 501 (2010)
where the Commission found that the board did not provide clarity on the scope of admitted contentions, it exercised its authority to reformulate the contentions; CLI-10-18, 72 NRC 56 (2010)

whether and how the Staff fulfills its National Historic Preservation Act and NEPA obligations are issues that could form the basis of a new contention; LBP-10-16, 72 NRC 361 (2010)
See also Amendment of Contentions
CONTENTIONS, ADMISSIBILITY
a board abused its discretion in reformulating and admitting contentions; LBP-10-16, 72 NRC 361 (2010)
a board could refer a contention relating to a certified design to the Staff for consideration in the design certification rulemaking and hold that contention in abeyance if the contention is otherwise admissible; LBP-10-21, 72 NRC 616 (2010)
a contention based on new information will be considered timely if it is filed within 30 days of the availability of the new information; LBP-10-14, 72 NRC 101 (2010); LBP-10-16, 72 NRC 361 (2010)
a contention filed within 30 days of the issuance of a document that legitimately undergirds the contention would be timely and presumptively meet the good cause requirement; CLI-10-18, 72 NRC 56 (2010)
a dispute is not material unless it involves a significant inaccuracy or omission and resolution of the dispute could affect the outcome of the licensing proceeding; LBP-10-14, 72 NRC 101 (2010)
a SAMA analysis contention was found to be inadmissible because it lacked supporting information regarding the relative costs and benefits of that proposed alternative; LBP-10-15, 72 NRC 257 (2010)
a single sentence labeled a contention, with no reference to the six elements of 10 C.F.R. 2.309(f)(1), is not admissible; LBP-10-16, 72 NRC 361 (2010)
a successful challenge to a contention admissibility ruling must demonstrate that the ruling either constitutes clear error or reflects an abuse of discretion; CLI-10-17, 72 NRC 1 (2010)
a timely motion to reopen may be denied if it raises issues that are not of major significance to plant safety whereas a nontimely motion may be granted if it raises an issue of sufficient gravity; LBP-10-21, 72 NRC 616 (2010)
absence of perfect compliance by licensee does not rebut the presumption of compliance or support admission of a contention that the application does not satisfy 10 C.F.R. 54.29(a), but a consistent, longstanding, and continuing pattern of problems in a specific area that is relevant to managing aging equipment will; LBP-10-15, 72 NRC 257 (2010)
absent a waiver, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
absent extreme circumstances, the Commission will not consider on appeal either new arguments or new evidence supporting the contentions which a board never had the opportunity to consider; CLI-10-21, 72 NRC 197 (2010)
accuracy and reliability of the agency's need-for-power determination, as reflected in the draft EIS, is material to the licensing decision; LBP-10-24, 72 NRC 720 (2010)
adequacy of the draft environmental impact statement's evaluation of alternatives is a material issue in the licensing proceeding; LBP-10-24, 72 NRC 720 (2010)
adequacy or inadequacy of applicant's severe accident mitigation alternatives analysis is certainly within the scope of a license renewal proceeding; LBP-10-15, 72 NRC 257 (2010)
allegation of facts, with supporting documentation, of a longstanding and continuing pattern of noncompliance or management difficulties that are reasonably linked to whether licensee will actually be able to adequately manage aging in accordance with the current licensing basis during the period of extended operation can be an admissible contention; LBP-10-15, 72 NRC 257 (2010)
allegation that the environmental report is based on incomplete information because a new earthquake fault has been discovered within 600 meters of nuclear reactors and the results of studies concerning the new fault will be available in the near term is admissible; LBP-10-15, 72 NRC 257 (2010)
although a board may view petitioner's supporting information in a light favorable to the petitioner, petitioner (not the board) is required to supply all of the required elements for a valid intervention petition; LBP-10-15, 72 NRC 257 (2010); CLI-10-20, 72 NRC 185 (2010); LBP-10-16, 72 NRC 361 (2010)
although a motion to reopen must be timely, an exceptionally grave issue may be considered even if the motion is not timely; LBP-10-19, 72 NRC 529 (2010)

although boards should not "flyspeck" environmental documents, petitioners may raise contentions seeking correction of significant inaccuracies and omissions in the environmental report; LBP-10-24, 72 NRC 720 (2010)
although the contention admissibility rule imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from applicant to petitioner; LBP-10-24, 72 NRC 720 (2010)
any contention that falls outside the specified scope of the proceeding is inadmissible; LBP-10-17, 72 NRC 501 (2010)
applicant's change of reactor design constitutes new and materially different information for the purposes of filing a new contention; LBP-10-17, 72 NRC 501 (2010)
at the admissibility stage, intervenors are not required, under the rubric of materiality, to run a sensitivity analysis and/or to prove that alleged defects would change the result; LBP-10-14, 72 NRC 101 (2010)
boards are authorized to hold prehearing conferences to simplify or clarify the issues for hearing, after which they may admit a revised contention, as long as the revised contention does not add material not raised by the intervenor to make it admissible; LBP-10-14, 72 NRC 101 (2010)
boards are obliged to evaluate the timeliness of a proposed contention even if no party raises the issue; LBP-10-17, 72 NRC 501 (2010)
boards may examine both the statements in the document that support the petitioner's assertions and those that do not; LBP-10-24, 72 NRC 720 (2010)
broad-based issues akin to safety culture, such as operational history, quality assurance, quality control, management competence, and human factors, are beyond the bounds of a license renewal proceeding; CLI-10-27, 72 NRC 481 (2010)
by defining significantly different information in the draft EIS as a permissible basis for filing a new contention, the Commission has in effect concluded that such new information is good cause for filing a new contention; LBP-10-24, 72 NRC 720 (2010)
challenge to the technical adequacy of baseline water quality data and adequate confinement of the host aquifer in applicant's environmental report is admissible; LBP-10-16, 72 NRC 361 (2010)
challenges to a severe accident mitigation design alternatives analysis are within the scope of a combined license proceeding; LBP-10-14, 72 NRC 101 (2010)
challenges to an issue already addressed in the Final Safety Evaluation Report for the ABWR Design Control Document are closed to licensing boards as an impermissible attack on the ABWR certified design; LBP-10-14, 72 NRC 101 (2010)
challenges to the current licensing basis are outside the scope of a license renewal proceeding; LBP-10-15, 72 NRC 257 (2010)
challenges to the Waste Confidence Rule must be made in the context of a rulemaking, not in an adjudicatory proceeding; CLI-10-19, 72 NRC 98 (2010)
contention is rejected as lacking support for the premise that ongoing mining operations will drain or contaminate wetlands, such that their economic benefits will be decreased; LBP-10-16, 72 NRC 361 (2010)
contention raising question of whether a quantitative as opposed to qualitative analysis of terrorist attacks and the alternatives for mitigation and prevention is necessary is referred to the Commission as a novel issue; LBP-10-15, 72 NRC 257 (2010)
contentions may be amended or new contentions filed, with permission from the presiding officer, if petitioner shows that information on which the contention is based was not previously available and is materially different than information previously available and the contention has been submitted in a timely fashion based on the availability of the subsequent information; CLI-10-18, 72 NRC 56 (2010)
contentions must meet the six requirements of 10 C.F.R. 2.309(f)(1); LBP-10-14, 72 NRC 101 (2010)
contentions raising legal issues, like fact-based contentions, must fall within the allowable scope of the proceeding to be admissible; LBP-10-17, 72 NRC 501 (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-10-21, 72 NRC 616 (2010)
contentions that attack a Commission rule, or that seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, are inadmissible; LBP-10-21, 72 NRC 616 (2010)

contentions that challenge applicable statutory requirements or the basic structure of the agency's regulatory process are inadmissible; LBP-10-21, 72 NRC 616 (2010)
contentions that inappropriately focus on Staff's review of the application rather than on the errors and omissions in the application itself are inadmissible; CLI-10-27, 72 NRC 481 (2010)
contentions that raise issues of law as well as contentions that raise issues of fact are permitted; LBP-10-17, 72 NRC 501 (2010)
contentions that simply state the petitioner's views about what regulatory policy should be do not present a litigable issue; LBP-10-21, 72 NRC 616 (2010)
cost-risk calculations that intervenors propose in in their contention as they relate to the existing reactors are not material to the findings that the NRC must make to license the proposed reactors; LBP-10-14, 72 NRC 101 (2010)
economic impact of a proposed action on ratepayers is outside the scope of a NEPA analysis; LBP-10-14, 72 NRC 101 (2010)
even if a petitioner is unable to show that the NRC Staff's NEPA document differs significantly from the environmental report, it may still be able to meet the late-filed contention requirements; LBP-10-24, 72 NRC 720 (2010)
failure to comply with any of the contention pleading requirements is grounds for rejecting a contention; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010); LBP-10-21, 72 NRC 616 (2010)
failure to point to a regulation that requires the inclusion of omitted information in an application is fatal and thus precludes the admission of the contention; LBP-10-16, 72 NRC 361 (2010)
fluctuations in demand that may occur over a period of several years, such as changes brought about by an economic recession, are not a legally sufficient ground for challenging the need-for-power analysis; LBP-10-24, 72 NRC 720 (2010)
for a contention regarding environmental impacts of spent fuel storage to be within the scope of an operating license renewal proceeding, petitioner must obtain a waiver under 10 C.F.R. 2.335(d); LBP-10-15, 72 NRC 257 (2010)
for a request for hearing and petition to intervene to be granted, petitioner must establish that it has standing and propose at least one admissible contention; LBP-10-15, 72 NRC 257 (2010)
for factual disputes, petitioner must present sufficient information to show a genuine dispute; CLI-10-20, 72 NRC 185 (2010)
for factual disputes, petitioner need not proffer facts in formal affidavit or evidentiary form sufficient to withstand a summary disposition motion; LBP-10-24, 72 NRC 720 (2010)
generalized claims that are vague and insufficiently supported and do not tend to establish any connection with the proposed license or potential harm to petitioner are insufficient to support a contention; CLI-10-20, 72 NRC 185 (2010)
given that consideration of terrorist attacks is part of the NRC's NEPA obligations in the Ninth Circuit, the issue of whether terrorist attacks have been fully considered in the NEPA analysis for a power plant in that jurisdiction is plainly material to the decision the NRC must make; LBP-10-15, 72 NRC 257 (2010)
good cause is the most significant of the late-filing factors set out in 10 C.F.R. 2.309(c); CLI-10-17, 72 NRC 1 (2010); LBP-10-24, 72 NRC 720 (2010)
historical actions by an applicant are not relevant to its current fitness unless there is some direct and obvious relationship between the asserted character issues and the licensing action in dispute; CLI-10-20, 72 NRC 185 (2010)
if a board on remand were to rule in petitioners' favor regarding the admissibility of one contention, then the board should also reconsider its prior ruling that related contentions were admissible; CLI-10-21, 72 NRC 197 (2010)
if a contention header uses a particular phrase, but the statement of the contention does not refer to the phrase or regulation, then the board may interpret the contention in accordance with the express statement of the contention; LBP-10-15, 72 NRC 257 (2010)
if a contention meets the 10 C.F.R. 2.309(f)(2) criteria, it is timely and the intervenor proffering the contention need not also make a showing under 10 C.F.R. 2.309(c); LBP-10-14, 72 NRC 101 (2010)
if applicant cures the omission on which a contention is based, the contention will become moot; LBP-10-16, 72 NRC 361 (2010)

if good cause for a late filing is not shown, the board may still permit the late filing, but petitioner must make a strong showing on the other factors; LBP-10-24, 72 NRC 720 (2010)
if petitioner makes a prima facie allegation that the application omits information required by law, it necessarily presents a genuine dispute with applicant on a material issue and raises an issue plainly material to an essential finding of regulatory compliance needed for license issuance; LBP-10-16, 72 NRC 361 (2010)
if the Commission were to permit fundamentally routine inspection findings and regulatory determinations to form the basis for safety culture contentions, this could lead to a never-ending stream of minitrials on operational issues, in which the applicant would be required to demonstrate how each issue was satisfactorily resolved; CLI-10-27, 72 NRC 481 (2010)
in addressing the section 2.309(c)(1) factors, failure to provide any specific discussion of most of these items or the weight they should be given in the balance is a potentially fatal omission; LBP-10-21, 72 NRC 616 (2010)
in making the findings required for issuance of a combined license, the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification rule; LBP-10-21, 72 NRC 616 (2010)
in order to raise a timely contention, a party must piece together disparate shreds of information that, standing alone, have little apparent significance; CLI-10-27, 72 NRC 481 (2010)
in proffering contentions that challenge an application, petitioner or intervenor must provide support, including references to sources and documents on which it intends to rely, and a guidance document could be one of those sources; CLI-10-24, 72 NRC 451 (2010)
incorporation by reference is contrary to Commission case law and will result in denial of contentions on the basis on the dearth of information; LBP-10-16, 72 NRC 361 (2010)
intervenor must comply with procedural requirements for the filing of new or amended contentions, including the requirement that the contentions be submitted in a timely fashion based on the availability of the subsequent information; LBP-10-17, 72 NRC 501 (2010)
intervenors are precluded from challenging ASME inspection requirements in a combined license proceeding because NRC regulations directly incorporate ASME inspection requirements by reference; LBP-10-21, 72 NRC 616 (2010)
it is a contention's proponent, not the licensing board, that is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions; LBP-10-24, 72 NRC 720 (2010)
it is a settled rule of practice that contentions ought to be interpreted in light of the required specificity, so that adjudicators and parties need not search out broader meanings than were clearly intended; LBP-10-16, 72 NRC 361 (2010)
it is not the board's duty to forage through a petition in order to find statements or other support that may be located in various portions of the petition but not referenced in the contention; LBP-10-16, 72 NRC 361 (2010)
license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to NRC ongoing compliance oversight activity; CLI-10-27, 72 NRC 481 (2010)
licensing boards and the Commission have considered the late-filing criteria even in cases where the factors were not fully addressed by petitioners and/or the NRC Staff or were not addressed at all; LBP-10-24, 72 NRC 720 (2010)
listing of issues with which petitioners disagree with the application is a form of notice pleading that the Commission has long held is insufficient; LBP-10-16, 72 NRC 361 (2010)
litigant opposing a licensing action is entitled to challenge the sufficiency of any guidance document on which a licensee or applicant relies, but it must do so with substantive support; CLI-10-17, 72 NRC 1 (2010)
low-level radioactive waste contentions were not admissible because of technical defects in the pleadings such as failure to satisfy 10 C.F.R. 2.309(f)(1)(vi), (i), or (ii); LBP-10-20, 72 NRC 571 (2010)
materials cited as the basis for a contention are subject to scrutiny by the board to determine whether they actually support the facts alleged; LBP-10-24, 72 NRC 720 (2010)
motion to reopen the record to admit new contention regarding adequacy of applicant's containment/coating inspection program for two new proposed units is denied; LBP-10-21, 72 NRC 616 (2010)

motion to reopen to introduce a new contention asserting issues related to aging management of effects of moist or wet environments on buried, below-grade, underground, or hard-to-access safety-related electrical cables is denied; LBP-10-19, 72 NRC 529 (2010)
motions to reopen a proceeding to introduce an entirely new contention must successfully navigate at least nineteen different regulatory factors under 10 C.F.R. 2.326, 2.309(c), and 2.309(f)(1); LBP-10-19, 72 NRC 529 (2010)
need-for-power contention that calls for a more detailed analysis than NRC requires is inadmissible; LBP-10-24, 72 NRC 720 (2010)
new contentions based on assumptions that cannot be considered information that was not previously available or materially different than information previously available do not meet admissibility requirements; CLI-10-17, 72 NRC 1 (2010)
new or amended contentions filed after the initial deadline may be admitted with leave of the presiding officer upon a showing that information on which the contention is based was not previously available and is materially different than information previously available and the contention has been submitted in a timely fashion; LBP-10-14, 72 NRC 101 (2010)
no rule or 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; LBP-10-14, 72 NRC 101 (2010)
NRC pleading requirements are deliberately strict, and any contention that does not satisfy them will be rejected; CLI-10-21, 72 NRC 197 (2010); LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
once the deadline for filing an initial intervention petition has passed, a party wishing to submit new or amended contentions on matters not associated with issuance of the Staff's draft or final environmental impact statement must satisfy the requirements of 10 C.F.R. 2.309(f)(2); LBP-10-21, 72 NRC 616 (2010)
petitioner cannot base standing or a contention on the possibility that the licensee will violate the terms of its license; CLI-10-20, 72 NRC 185 (2010)
petitioner does not need to provide expert opinion or a substantive affidavit in order to satisfy 10 C.F.R. 2.309(f)(1)(v); LBP-10-15, 72 NRC 257 (2010)
petitioner failed to identify any statute or NRC regulation to support its theory that applicant may not revise its application to include a different reactor design; LBP-10-17, 72 NRC 501 (2010)
petitioner has an obligation to explain why cited testimony provides a basis for its contention; LBP-10-17, 72 NRC 501 (2010)
petitioner has presented a prima facie showing for waiver of the NRC regulation covering the environmental impacts of spent fuel pool accidents generically, and has shown that its contention concerning earthquake-induced spent fuel pool accidents is otherwise admissible; LBP-10-15, 72 NRC 257 (2010)
petitioner is not required to prove its case at the contention admission stage; LBP-10-24, 72 NRC 720 (2010)
petitioner must demonstrate that its contention is within the scope of the proceeding; LBP-10-16, 72 NRC 361 (2010)
petitioner must establish standing and proffer at least one admissible contention that meets the requirements of 10 C.F.R. 2.309(f)(1); LBP-10-16, 72 NRC 361 (2010)
petitioner must present sufficient information to show a genuine dispute reasonably indicating that a further inquiry is appropriate; LBP-10-24, 72 NRC 720 (2010)
petitioner must provide a concise statement of the alleged facts that support its position and upon which the petitioner intends to rely at the hearing; LBP-10-16, 72 NRC 361 (2010)
petitioner need not submit a sensitivity analysis in order to establish that a SAMA-related contention is material; LBP-10-15, 72 NRC 257 (2010)
petitioner raises a genuine dispute with the application with respect to the adequacy of information needed to characterize the site and offsite hydrogeology to ensure confinement of the extraction fluids; LBP-10-16, 72 NRC 361 (2010)
petitioner, especially one represented by counsel, bears the burden of going forward and specifically addressing each of the six elements in 10 C.F.R. 2.309(f)(1); LBP-10-16, 72 NRC 361 (2010)

petitioner's argument regarding rejection of its contention satisfies the prejudicial procedural error standard for review; CLI-10-17, 72 NRC 1 (2010)
petitioner's argument that high-explosive munitions could fall onto depleted uranium, pulverizing and igniting the DU and generating aerosols that might travel through the air, providing an inhalation pathway for offsite exposure was contradicted by the Army's statement that it does not use high-impact explosives in the area where DU is present; CLI-10-20, 72 NRC 185 (2010)
petitioner's assertion that terrorist-act-originated SAMA analysis is required by Ninth Circuit law satisfies the requirements of 10 C.F.R. 2.309(f)(1)(iii) that the issue be within the scope of a license renewal proceeding; LBP-10-15, 72 NRC 257 (2010)
petitioner's issue will be ruled inadmissible if petitioner has offered no tangible information, no experts, or no substantive affidavits; LBP-10-15, 72 NRC 257 (2010)
petitioners seeking to introduce new contentions after the board has denied their initial petition to intervene need to address the reopening standards; LBP-10-21, 72 NRC 616 (2010)
pleading requirements calling for a recitation of facts or expert opinion supporting the issue raised are inapplicable to a contention of omission beyond identifying the legally required missing information; LBP-10-16, 72 NRC 361 (2010)
proponent of a motion to reopen must do more than simply raise a safety issue, but rather must show that the safety issue it raises is significant; LBP-10-19, 72 NRC 529 (2010)
requiring a petitioner to allege facts under section 2.309(f)(1)(v) or to provide an affidavit that sets out the factual and/or technical bases under section 51.109(a)(2) in support of a legal contention as opposed to a factual contention is not necessary; LBP-10-17, 72 NRC 501 (2010)
scope of a license renewal proceeding is limited to review of plant structures and components requiring an aging management review for the period of extended operation and to the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses; LBP-10-21, 72 NRC 616 (2010)
scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-10-17, 72 NRC 501 (2010)
six basic requirements for an admissible contention can be summarized as specificity, brief explanation, within scope, materiality, concise statement of alleged facts or expert opinion, and genuine dispute; LBP-10-15, 72 NRC 257 (2010)
someone living adjacent to the site for proposed construction of a federally licensed facility has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the facility will not be completed for many years; LBP-10-24, 72 NRC 720 (2010)
Staff's propositions at the contention admission stage regarding what would effectively cure an omission from a license renewal application are matters for a merits decision, not for a determination of whether a contention of omission is admissible; LBP-10-15, 72 NRC 257 (2010)
subject matter of a contention must impact the grant or denial of the pending license application; LBP-10-17, 72 NRC 501 (2010)
submission of a new contention within 30 days of the event giving rise to that contention is timely; LBP-10-17, 72 NRC 501 (2010)
sufficiency of an application is not a matter committed solely to the NRC Staff's discretion and thus is within the scope of an adjudicatory proceeding; LBP-10-17, 72 NRC 501 (2010)
the amended late-filed contentions rule, 10 C.F.R. 2.309(f)(2), is not intended to alter the standards in section 2.714(a) of its rules of practice as interpreted by NRC case law; LBP-10-17, 72 NRC 501 (2010)
the Commission addresses a certified question by a licensing board on the admissibility of proposed contentions involving the Waste Confidence Rule; CLI-10-19, 72 NRC 98 (2010)
the Commission defers to a licensing board's rulings on contention admissibility unless an appeal points to an error of law or abuse of discretion; CLI-10-21, 72 NRC 197 (2010)
the Commission generally refuses to modify, rescind, or impose new requirements on reactor design certification information, except through rulemaking; LBP-10-21, 72 NRC 616 (2010)
the design certification rulemaking and individual COL adjudicatory proceedings may proceed simultaneously, and issues raised in an adjudicatory proceeding that are appropriately addressed in the

generic design certification rulemaking are to be referred to the rulemaking for resolution; LBP-10-17, 72 NRC 501 (2010)
the manner in which the Staff conducts its review is outside the scope of a proceeding; LBP-10-17, 72 NRC 501 (2010)
the mere potential for legal error in a contention admissibility decision is not a ground for interlocutory review; CLI-10-30, 72 NRC 564 (2010)
the organization or format of an application is not germane to license issuance because the objection to the application's organization is not an objection to the licensing action at issue in the proceeding; LBP-10-16, 72 NRC 361 (2010)
the purpose of contention pleading requirements is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
the requirement that contentions be supported by alleged facts or expert opinion generally is fulfilled when the sponsor of an otherwise acceptable contention provides a brief recitation of the factors underlying the contention or references to documents and text that provide such reasons; LBP-10-14, 72 NRC 101 (2010)
threat of terrorist attack at spent fuel pools has been evaluated generically by NRC and special circumstances for rule waiver have not been shown; LBP-10-15, 72 NRC 257 (2010)
timeliness of a motion to reopen in which a new contention is proffered depends primarily on an assessment as to when the proponent of the motion first knew, or should have known, enough information to raise the issues presented in the new contention; LBP-10-19, 72 NRC 529 (2010)
timeliness of a new or amended contention based on material new information is based on the timing of the availability of the information on which the contention is based, not the timing of the NRC Staff NEPA document; LBP-10-24, 72 NRC 720 (2010)
to justify reopening the record to admit a new contention, the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition, and the new information must be significant and plausible enough to require reasonable minds to inquire further; LBP-10-21, 72 NRC 616 (2010)
to the degree that the general precept that a rule, including a design certification, cannot be challenged in an adjudication might be seen as placing such matters outside the scope of the proceeding; LBP-10-21, 72 NRC 616 (2010)
under longstanding NRC policy, licensing boards should not accept in individual license proceedings contentions that are or are about to become the subject of general rulemaking by the Commission; CLI-10-19, 72 NRC 98 (2010)
unless a deadline has been specified in the scheduling order for the proceeding, the determination of timeliness is subject to a reasonableness standard that depends on the facts and circumstances of each situation; LBP-10-24, 72 NRC 720 (2010)
when a new contention is filed challenging new data or conclusions in NRC's environmental documents, the timeliness of the new contention is based on whether it was filed promptly after the NRC's NEPA document became publicly available, not whether it was filed promptly after the information on which the intervenor bases its challenge became publicly available; LBP-10-24, 72 NRC 720 (2010)
where a motion to reopen a proceeding to introduce a new contention founders on several of the initial criteria, the board found it unnecessary to prolong the ruling by analyzing all of the other factors; LBP-10-19, 72 NRC 529 (2010)
where petitioner was admitted to the case as a party at the time it filed an amended contention, consideration of the contention's admissibility is governed by the provisions of this section as well as the general contention admissibility requirements of section 2.309(f)(1); CLI-10-18, 72 NRC 56 (2010)
CONTENTIONS, LATE-FILED
a new contention is usually considered timely if filed within 30 days of publication of the draft environmental impact statement; LBP-10-16, 72 NRC 361 (2010)
a new contention may be filed after the initial docketing with leave of the presiding officer upon a showing on three factors; LBP-10-17, 72 NRC 501 (2010)
a tribe is free to file a contention later on in the proceeding if, after Staff releases its environmental documents, the tribe believes that the Staff has failed to satisfy its obligations under NEPA and the National Historic Preservation Act; LBP-10-16, 72 NRC 361 (2010)

although a motion to reopen must be timely, an exceptionally grave issue may be considered even if the motion is not timely; LBP-10-19, 72 NRC 529 (2010); LBP-10-21, 72 NRC 616 (2010)
boards are obliged to evaluate the timeliness of a proposed contention even if no party raises the issue; LBP-10-17, 72 NRC 501 (2010)
boards must balance eight factors in evaluating nontimely intervention petitions, hearing requests, and contentions; LBP-10-24, 72 NRC 720 (2010)
by defining significantly different information in the draft EIS as a permissible basis for filing a new contention, the Commission has in effect concluded that such new information is good cause for filing a new contention; LBP-10-24, 72 NRC 720 (2010)
contentions may be amended or new contentions filed, with permission from the presiding officer, if petitioner shows that information on which the contention is based was not previously available and is materially different than information previously available and the contention has been submitted in a timely fashion based on the availability of the subsequent information; CLI-10-18, 72 NRC 56 (2010)
even if petitioner is unable to show that NRC Staff's NEPA document differs significantly from the environmental report, it may still be able to meet the late-filed contention requirements; LBP-10-24, 72 NRC 720 (2010)
factors (vii) and (viii) of 10 C.F.R. 2.309(c)(1) are generally considered to have the most significance in the balancing process in instances in which there are no other parties or ongoing related proceedings; LBP-10-21, 72 NRC 616 (2010)
failure to comply with any of the requirements of 10 C.F.R. 2.309(f)(1)(i)-(vi) is grounds for dismissing a contention; LBP-10-21, 72 NRC 616 (2010)
good cause is the factor given the greatest weight when ruling on motions for leave to submit late-filed contentions; CLI-10-17, 72 NRC 1 (2010); LBP-10-24, 72 NRC 720 (2010)
if a contention based on new information fails to satisfy the three-part test of 10 C.F.R. 2.309(f)(2)(i)-(iii), it may be evaluated under section 2.309(c); LBP-10-24, 72 NRC 720 (2010)
if a motion to reopen and the proposed new contention are based on material information that was not previously available, then it qualifies as timely; LBP-10-19, 72 NRC 529 (2010)
if a motion to reopen relates to a contention not previously in controversy among the parties, movant must meet the late-filing requirements of section 2.309(c); LBP-10-21, 72 NRC 616 (2010)
if good cause for a late filing is not shown, the board may still permit the late filing, but the petitioner must make a strong showing on the other factors; LBP-10-24, 72 NRC 720 (2010)
in addressing the section 2.309(c)(1) factors, failure to provide any specific discussion of most of these items or the weight they should be given in the balance is a potentially fatal omission; LBP-10-21, 72 NRC 616 (2010)
in light of the requirements that any new contention be based on material information that was not previously available, the timeliness determination required under 10 C.F.R. 2.309(f)(2) and the section 2.326(a) reopening standard can be closely equated; LBP-10-21, 72 NRC 616 (2010)
intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was publicly available for some time prior to the filing of the contention; CLI-10-27, 72 NRC 481 (2010)
intervenor is entitled to submit a new safety contention, with leave of the board, upon three showings; CLI-10-17, 72 NRC 1 (2010)
intervenor that has sufficient information to file a NEPA contention but delays that filing until publication of the environmental impact statement does so at its peril; LBP-10-24, 72 NRC 720 (2010)
intervenors must move for leave to file a timely new or amended contention under 10 C.F.R. 2.309(c), (f)(2); LBP-10-14, 72 NRC 101 (2010)
licensing boards and the Commission have considered the late-filing criteria even in cases where the factors were not fully addressed by petitioners and/or the NRC Staff or were not addressed at all; LBP-10-24, 72 NRC 720 (2010)
movant must show that it is more probable than not that it would have prevailed on the merits of the proposed new contention; LBP-10-19, 72 NRC 529 (2010)
NRC regulations preserve the right to a hearing when an application is amended by allowing new or amended contentions to be filed in response to material new information; LBP-10-17, 72 NRC 501 (2010)

once the deadline for filing an initial intervention petition has passed, a party wishing to submit new or amended contentions on matters not associated with issuance of the Staff's draft or final environmental impact statement must satisfy the requirements of 10 C.F.R. 2.309(f)(2); LBP-10-21, 72 NRC 616 (2010)
pendency of a petition for Commission review does not absolve petitioner of its duty to file a motion to reopen in a timely fashion; LBP-10-19, 72 NRC 529 (2010)
petitioner has an iron-clad obligation to examine the publicly available documentary material with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention; CLI-10-27, 72 NRC 481 (2010)
the amended late-filed contentions rule, 10 C.F.R. 2.309(f)(2), is not intended to alter the standards in section 2.714(a) of its rules of practice as interpreted by NRC case law; LBP-10-17, 72 NRC 501 (2010)
the significance of the issue being raised by a new contention would be a relevant "good cause" consideration; LBP-10-21, 72 NRC 616 (2010)
the timeliness of a motion to reopen depends on what/when was the trigger that provided the footing for the new contention and was the motion seeking record reopening/contention admission filed timely after that trigger event; LBP-10-21, 72 NRC 616 (2010)
the unavailability of documents does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner; CLI-10-27, 72 NRC 481 (2010)
there simply would be no end to NRC licensing proceedings if petitioners could disregard timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding; CLI-10-27, 72 NRC 481 (2010)
timeliness of a motion to reopen in which a new contention is proffered depends primarily on an assessment as to when the proponent of the motion first knew, or should have known, enough information to raise the issues presented in the new contention; LBP-10-19, 72 NRC 529 (2010)
timeliness of a new or amended contention based on material new information is based on the timing of the availability of the information on which the contention is based, not the timing of the NRC Staff NEPA document; LBP-10-24, 72 NRC 720 (2010)
to show good cause for the late filing of a contention, petitioner must show that the information on which the new contention is based was not reasonably available to the public, not merely that the petitioner recently found out about it; CLI-10-27, 72 NRC 481 (2010)
unless a deadline has been specified in the scheduling order for the proceeding, the determination of timeliness is subject to a reasonableness standard that depends on the facts and circumstances of each situation; LBP-10-24, 72 NRC 720 (2010)
when a new contention is filed challenging new data or conclusions in NRC's environmental documents, the timeliness of the new contention is based on whether it was filed promptly after NRC's NEPA document became publicly available, not whether it was filed promptly after the information on which the intervenor bases its challenge became publicly available; LBP-10-24, 72 NRC 720 (2010)
when a reopening motion is untimely, the section 3.326(a)(1) "exceptionally grave circumstances" test supplants the "significant issue" standard under section 2.326(a)(2); LBP-10-21, 72 NRC 616 (2010)

CONTROLLED ACCESS
petitioner alleges failure to conduct safety review of the modification of the controlled access area by the addition of an undocumented roof access for a siphon breaker experiment; DD-10-3, 72 NRC 171 (2010)
petitioner alleges that routine unprotected handling of an unshielded neutron source by licensed operators and uncontrolled access by untrained and unlicensed facility visitors to this neutron source violated ALARA requirements; DD-10-3, 72 NRC 171 (2010)
See also Access Authorization

CORRECTIVE ACTION PROGRAM
operating reactor licensees are not required to implement an employee concerns program, but are required to establish and implement an effective corrective action program; DD-10-1, 72 NRC 149 (2010)

SUBJECT INDEX

COSTS
disclosure is not required if the burden or expense of the proposed discovery outweighs its likely benefit; LBP-10-23, 72 NRC 692 (2010)
COUNCIL ON ENVIRONMENTAL QUALITY
CEQ regulations receive substantial deference from federal courts in interpreting the requirements of NEPA; LBP-10-16, 72 NRC 361 (2010); LBP-10-24, 72 NRC 720 (2010)
it is NRC's stated policy to take into account CEQ regulations voluntarily, subject to some conditions; CLI-10-18, 72 NRC 56 (2010); LBP-10-15, 72 NRC 257 (2010); LBP-10-24, 72 NRC 720 (2010)
COUNSEL
petitioners represented by counsel are held to higher standard of specificity in pleading; CLI-10-20, 72 NRC 185 (2010)
CREDIBILITY
a board's findings regarding a particular witness's knowledge or state of mind depend, as a general rule, largely on that witness's credibility; CLI-10-23, 72 NRC 210 (2010)
licensing board findings of fact that turn on witness credibility receive the Commission's highest deference on appeal; CLI-10-23, 72 NRC 210 (2010)
CRIMINAL GUILT
a defendant can be convicted if he was aware that a high probability existed of the fact or circumstances that would make his conduct criminal, but ignored that probability so he could disclaim knowledge later; CLI-10-23, 72 NRC 210 (2010)
knowledge may suffice for criminal culpability if extensive enough to attribute to the knower a guilty mind, or knowledge that he or she is performing a wrongful act; CLI-10-23, 72 NRC 210 (2010)
the words "knowledge" and "knowingly" are normally associated with awareness, understanding, or consciousness; CLI-10-23, 72 NRC 210 (2010)
CROSS-EXAMINATION
a party seeking to conduct cross-examination must file a written motion and obtain leave of the board; LBP-10-15, 72 NRC 257 (2010)
APA § 556(d) is a liberal standard, but does not provide an absolute right to conduct cross-examination; LBP-10-15, 72 NRC 257 (2010)
cross-examination occurs virtually automatically in Subpart G hearings, subject to normal judicial management and the requirement to file a cross-examination plan; LBP-10-15, 72 NRC 257 (2010)
the standard for allowing the parties to conduct cross-examination is the same under Subparts G and L; LBP-10-15, 72 NRC 257 (2010)
CULTURAL RESOURCES
a party claiming violations of their procedural right to protect their interests in cultural resources is to be accorded a special status when it comes to standing without meeting all the normal standards for redressability and immediacy; LBP-10-16, 72 NRC 361 (2010)
an Indian Tribe claims a procedural interest in identifying, evaluating, and establishing protections for historic and cultural resources; LBP-10-16, 72 NRC 361 (2010)
criteria and procedures pursuant to which a federal land manager may issue excavation permits for federal lands are provided as well as notification to Indian tribes if permits may result in harm to cultural or religious sites; LBP-10-16, 72 NRC 361 (2010)
cultural and historical resources are to be considered as part of the environmental impact assessment that must be completed; LBP-10-16, 72 NRC 361 (2010)
it is not the duty of applicant to consult with a tribe regarding cultural resources at a proposed site, but instead is the duty of the agency to initiate and follow through with the consultation process; LBP-10-16, 72 NRC 361 (2010)
notification and inventory procedures are required so that Indian cultural objects and burial remains found on federal lands will be repatriated to the appropriate tribe; LBP-10-16, 72 NRC 361 (2010)
preservation of Native American cultural traditions is a protected interest under federal law; LBP-10-16, 72 NRC 361 (2010)
CULTURAL SENSITIVITY
federal agencies should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties, and should invite the governing

body of the responsible tribe to be a consulting party and to concur in any agreement; LBP-10-16, 72 NRC 361 (2010)
CUMULATIVE USAGE FACTOR
a license renewal applicant who addresses the CUF issue via an aging management program may reference Chapter X of the Generic Aging Lessons Learned Report; CLI-10-17, 72 NRC 1 (2010)
an aging management program is intended to manage the effects of aging on a particular component by, e.g., ensuring that the fatigue usage factor for the component does not exceed the design code limit; CLI-10-17, 72 NRC 1 (2010)
applicant may demonstrate compliance with 10 C.F.R. 54.21(c)(1)(ii) by showing that the CUF calculations have been reevaluated based on an increased number of assumed transients to bound the period of extended operation and that the resulting CUF remains less than or equal to 1.0 for the period of extended operation; CLI-10-17, 72 NRC 1 (2010)
because environmentally adjusted CUFs are not contained in licensee's current licensing basis, they cannot be time-limited aging analyses and thereby a prerequisite to license renewal; CLI-10-17, 72 NRC 1 (2010)
license renewal applicant who chooses to rely upon an existing time-limited aging analysis may demonstrate compliance with 10 C.F.R. 54.21(c)(1)(i) by showing that the existing CUF calculations remain valid because the number of assumed transients would not be exceeded during the period of extended operation; CLI-10-17, 72 NRC 1 (2010)
metal fatigue that a particular component experiences during plant operation is quantified using this method; CLI-10-17, 72 NRC 1 (2010)
the standard review plan presents one acceptable methodology for calculating the environmentally adjusted cumulative usage factor; CLI-10-17, 72 NRC 1 (2010)
CURRENT LICENSING BASIS
a license renewal applicant seeking to satisfy aging management requirements by reliance upon existing time-limited aging analyses in its CLB would rely on 10 C.F.R. 54.21(c)(1)(i) or (ii); CLI-10-17, 72 NRC 1 (2010)
because environmentally adjusted cumulative usage factors are not contained in licensee's CLB, they cannot be time-limited aging analyses and thereby a prerequisite to license renewal; CLI-10-17, 72 NRC 1 (2010)
challenges to the CLB are outside the scope of a license renewal proceeding; LBP-10-15, 72 NRC 257 (2010)
the portion of the CLB that can be affected by the detrimental effects of aging is limited to the design bases aspects of the CLB; LBP-10-15, 72 NRC 257 (2010)
DEADLINES
a contention based on new information will be considered timely if it is filed within 30 days of the availability of the new information; CLI-10-18, 72 NRC 56 (2010); LBP-10-14, 72 NRC 101 (2010)
a filing that was 3 days late, which the board characterized as not excessively late, was accepted based on findings that intervenor offered a reasonable explanation for the delay and the delay did not prejudice any of the other parties; LBP-10-21, 72 NRC 616 (2010)
a party at risk of filing out of time can request an extension, doing so well before the time specified expires; LBP-10-21, 72 NRC 616 (2010)
although participants generally must comply with the schedule established by the presiding officer, they might sometimes be unable to meet established deadlines; LBP-10-21, 72 NRC 616 (2010)
counsel's alleged unfamiliarity with the agency's rules of practice or counsel's asserted busy schedule are not satisfactory explanations for late filings; LBP-10-21, 72 NRC 616 (2010)
in the event of some 11th-hour unforeseen development, a party may tender a document belatedly, but the tender must be accompanied by a motion for leave to file out-of-time which satisfactorily explains not only the reason for the lateness, but also why a motion for an extension of time could not have been seasonably submitted; CLI-10-26, 72 NRC 474 (2010)
in the interest of efficient case management and prompt resolution of adjudications, the Commission has generally enforced the 10-day deadline for appeals strictly, excusing it only in unavoidable and extreme circumstances; CLI-10-26, 72 NRC 474 (2010)
motions are to be filed within 10 days of the event or circumstance from which they arise; LBP-10-23, 72 NRC 692 (2010)

participant filing out of time must offer a satisfactory explanation for its lateness, including, if necessary, an account as to why a request for extension could not have been filed beforehand; LBP-10-21, 72 NRC 616 (2010)
parties are expected to file motions for extensions of time so that they are received by NRC well before the time specified expires; CLI-10-26, 72 NRC 474 (2010)
requests for an extension of time should generally be in writing and should be received by the board well before the time specified expires; LBP-10-21, 72 NRC 616 (2010)
strict enforcement of deadlines furthers the dual interests of efficient case management and prompt resolution of adjudications; LBP-10-21, 72 NRC 616 (2010)
submission of a new contention within 30 days of the event giving rise to that contention is timely; LBP-10-17, 72 NRC 501 (2010)
the fact that a party may have other obligations does not relieve that party of its hearing obligations; CLI-10-26, 72 NRC 474 (2010)
unfamiliarity with NRC's Rules of Practice is not sufficient excuse for late filings, particularly where the order that is being challenged expressly advised petitioner of his appellate rights and of the time within which those rights had to be exercised; CLI-10-26, 72 NRC 474 (2010)
unless a deadline has been specified in the scheduling order for the proceeding, the determination of timeliness is subject to a reasonableness standard that depends on the facts and circumstances of each situation; LBP-10-24, 72 NRC 720 (2010)
See also Extension of Time

DECOMMISSIONING FUNDING PLANS
a surety arrangement is necessary as a prerequisite to operating, not as a prerequisite to licensing; LBP-10-16, 72 NRC 361 (2010)
applicant must establish a surety arrangement that ensures sufficient funds will be available for decommissioning and decontamination of an NRC-licensed source materials site; LBP-10-16, 72 NRC 361 (2010)
surety arrangements are matters appropriately addressed after issuance of the license, and even after completion of a hearing; LBP-10-16, 72 NRC 361 (2010)

DECOMMISSIONING PROCEEDINGS
standing was found for an organization representing three members living in close proximity to a decommissioning site, who expressed concern that depleted uranium materials could affect a waterway abutting the property of two members; CLI-10-20, 72 NRC 185 (2010)

DEFINITIONS
"authority" is defined as a legal writing taken as definitive or decisive, especially a judicial or administrative decision cited as a precedent, or a source, such as a statute, case, or treatise, cited in support of a legal argument; LBP-10-21, 72 NRC 616 (2010)
"categorical exclusion" encompasses actions that do not individually or cumulatively have a significant effect on the human environment and therefore neither an environmental assessment nor an environmental impact statement is required; CLI-10-18, 72 NRC 56 (2010)
"details" has a pejorative connotation, i.e., that intervenors or the board are asking for minutiae or matters that relate to minute points, small and subordinate parts, or minor parts; LBP-10-20, 72 NRC 571 (2010)
"document" as used in 10 C.F.R. 2.336 includes computer models and associated electronic inputs, outputs, data, and software; LBP-10-23, 72 NRC 692 (2010)
"document" as used in 10 C.F.R. 2.336 is not limited to paper documents and it refers to information stored on any medium or form, including electronically stored information; LBP-10-23, 72 NRC 692 (2010)
in the absence of a statutory definition, courts normally define a term by its ordinary meaning; LBP-10-24, 72 NRC 720 (2010)
"injury in fact" is defined as an invasion of a legally protected interest that is concrete and particularized and actual or imminent rather than conjectural or hypothetical; LBP-10-16, 72 NRC 361 (2010)
"means" is defined; LBP-10-20, 72 NRC 571 (2010)
"member of the public" is any individual except when that individual is receiving an occupational dose; LBP-10-22, 72 NRC 661 (2010)
"potential party" is defined; CLI-10-24, 72 NRC 451 (2010); CLI-10-25, 72 NRC 469 (2010)

"prima facie" case is defined as establishment of a legally required rebuttable presumption or a party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor; LBP-10-15, 72 NRC 257 (2010)
"prima facie" showing merely requires the presentation of enough information to allow a board to infer (absent disproof) that special circumstances exist to support a rule waiver; LBP-10-15, 72 NRC 257 (2010)
"relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence; LBP-10-23, 72 NRC 692 (2010)
"significant" is ordinarily defined "having meaning," "full of import," "indicative," "having or likely to have influence or effect," "deserving to be considered; LBP-10-24, 72 NRC 720 (2010)
See also Construction of Meaning
DEMAND-SIDE MANAGEMENT
the National Environmental Policy Act's rule of reason excludes consideration of demand-side management if the proposed new plant is intended to be a merchant plant, selling power on the open market, because it is not feasible for licensee to engage in demand-side management; CLI-10-21, 72 NRC 197 (2010)
DEPLETED URANIUM
petitioner's argument that high-explosive munitions could fall onto DU, pulverizing and igniting the DU and generating aerosols that might travel through the air, providing an inhalation pathway for offsite exposure was contradicted by the Army's statement that it does not use high-impact explosives in the area where DU is present; CLI-10-20, 72 NRC 185 (2010)
DESIGN
before any waste may be received at the high-level waste repository, DOE must update its application with additional information, including, specifically, additional design data obtained during construction; LBP-10-22, 72 NRC 661 (2010)
NRC is given flexibility in determining how best to provide for the use of a system of multiple barriers in the design of the repository; LBP-10-22, 72 NRC 661 (2010)
NRC's licensing regulations must provide for the use of a system of multiple barriers in the design of the high-level waste repository; LBP-10-22, 72 NRC 661 (2010)
section 121 of the Nuclear Waste Policy Act does not require that each barrier provide either wholly independent protection or a specifically quantified amount of protection in the high-level waste repository; LBP-10-22, 72 NRC 661 (2010)
special attention must be given to those items that may significantly influence the final design of the high-level waste repository; LBP-10-22, 72 NRC 661 (2010)
DESIGN CERTIFICATION
a board could refer a contention relating to a certified design to the Staff for consideration in the design certification rulemaking and hold that contention in abeyance if the contention is otherwise admissible; LBP-10-21, 72 NRC 616 (2010)
applicant, at its own risk, may reference a pending design certification application in its combined license application; LBP-10-17, 72 NRC 501 (2010); LBP-10-20, 72 NRC 571 (2010)
challenges to an issue already addressed in the Final Safety Evaluation Report for the ABWR Design Control Document are closed to licensing boards as an impermissible attack on the ABWR certified design; LBP-10-14, 72 NRC 101 (2010)
in making the findings required for issuance of a combined license, the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification rule; LBP-10-21, 72 NRC 616 (2010)
the Commission generally refuses to modify, rescind, or impose new requirements on reactor design certification information, except through rulemaking; LBP-10-21, 72 NRC 616 (2010)
the design certification rulemaking and individual COL adjudicatory proceedings may proceed simultaneously, and issues raised in an adjudicatory proceeding that are appropriately addressed in the generic design certification rulemaking are to be referred to the rulemaking for resolution; LBP-10-17, 72 NRC 501 (2010)

to the degree that the general precept that a rule, including a design certification, cannot be challenged in an adjudication might be seen as placing such matters outside the scope of the proceeding; LBP-10-21, 72 NRC 616 (2010)

DISCLOSURE

a board's determination on a request for access to sensitive unclassified nonsafeguards information is reviewed de novo; CLI-10-24, 72 NRC 451 (2010)

a party is excused from producing a document if the document is publicly available and if the party specifies where the document may be found; LBP-10-23, 72 NRC 692 (2010)

a party may comply by merely providing a description by category and location of all documents subject to mandatory disclosure; LBP-10-23, 72 NRC 692 (2010)

although the phrase "possession, custody, or control" appears in 10 C.F.R. 2.336(a)(2)(i), 2.704(a)(2), and 2.707(a)(1)), no NRC decision has ever provided guidance as to what constitutes "control"; LBP-10-23, 72 NRC 692 (2010)

an appeal as of right by the NRC Staff is permitted on the question of whether a request for access to sensitive unclassified nonsafeguards information should have been denied in whole or in part; CLI-10-24, 72 NRC 451 (2010)

analysis of a motion to compel the mandatory disclosure of information under 10 C.F.R. 2.336(a) is contingent on six issues; LBP-10-23, 72 NRC 692 (2010)

applicant's "control" of computer models prepared by and in possession of a contractor is illustrated by the fact that if NRC Staff requested these documents, applicant could obtain and provide them; LBP-10-23, 72 NRC 692 (2010)

applicant's claim that computer models should be excused from the mandatory disclosure requirements because they entail proprietary information is rejected; LBP-10-23, 72 NRC 692 (2010)

availability, not possession, custody, or control, is the criterion for the NRC Staff's mandatory disclosure responsibilities; LBP-10-23, 72 NRC 692 (2010)

because of the security-related SUNSI categorization of a Staff guidance document used to assess an application's compliance with NRC rules, the Staff would not have to produce the document but would be required to identify the document as part of its continuing duty of disclosure; CLI-10-24, 72 NRC 451 (2010)

documents are deemed to be within the control of a party if the party has the right to obtain the documents on demand or if it is held by the party's attorney, expert, insurance company, accountant, or agent; LBP-10-23, 72 NRC 692 (2010)

each party to a proceeding must automatically disclose and provide all documents and data compilations in their possession, custody, or control that are relevant to the admitted contentions, without waiting for a party to file a discovery request; LBP-10-23, 72 NRC 692 (2010)

if a requested document or data compilation is publicly available, then a citation to the document and a description of where it may be publicly obtained are sufficient; LBP-10-23, 72 NRC 692 (2010)

if the burden or expense of the proposed discovery outweighs its likely benefit, disclosure is not required; LBP-10-23, 72 NRC 692 (2010)

in its supervisory capacity, the Commission provides guidance on the "need for SUNSI" analysis, for use in those instances when an access order applies; CLI-10-24, 72 NRC 451 (2010)

mandatory disclosure is the only form of discovery allowed in Subpart L proceedings, and all other forms are expressly prohibited; LBP-10-23, 72 NRC 692 (2010)

neither legal ownership nor title is required in order for a party to have "possession, custody, or control" of a document; LBP-10-23, 72 NRC 692 (2010)

once a petition to intervene has been granted, issues involving access to documents for use in the proceeding are governed by NRC discovery rules; CLI-10-24, 72 NRC 451 (2010)

petitioners or intervenors may request and, where appropriate, obtain, under protective order or other measures, information withheld from the general public for proprietary or security reasons; CLI-10-24, 72 NRC 451 (2010)

protective orders and in camera proceedings are the customary and favored means of handling disputes that arise in which one party to a proceeding seeks purportedly proprietary information from another; CLI-10-24, 72 NRC 451 (2010)

"relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence; LBP-10-23, 72 NRC 692 (2010)
Staff's disclosure obligations are not tied to the admitted contentions, but rather, it must make available documents that relate to the application and its review as a whole; CLI-10-24, 72 NRC 451 (2010); CLI-10-25, 72 NRC 469 (2010)
the board grants intervenors' motion to compel disclosure of certain groundwater modeling information associated with a combined license application; LBP-10-23, 72 NRC 692 (2010)
the concept of control extends to situations in which the party has the practical ability to obtain materials in the possession of another, even if the party does not have the legal right to compel the other person or entity to produce the requested materials; LBP-10-23, 72 NRC 692 (2010)
the disclosing party can either provide the other parties with an actual copy of the document or data compilation or can simply describe it and provide it if the other party requests it; LBP-10-23, 72 NRC 692 (2010)
the relevance standard of 10 C.F.R. 2.336 is more flexible than the relevance standard of Fed. R. Evid. 401; LBP-10-23, 72 NRC 692 (2010)
the scope of the mandatory disclosure obligations under 10 C.F.R. 2.336, which apply to Subpart L proceedings, are wide-reaching; LBP-10-23, 72 NRC 692 (2010)
the showing required for "need" for SUNSI could include, but does not require (nor is it limited to), an explanation that the information will be used as support for a contention; CLI-10-24, 72 NRC 451 (2010)
the term "document" as used in 10 C.F.R. 2.336 includes computer models and associated electronic inputs, outputs, data, and software; LBP-10-23, 72 NRC 692 (2010)
the use of any proprietary information that is produced is strictly limited to the proceeding for which it is produced, and such information must be promptly returned at the close of this proceeding; LBP-10-23, 72 NRC 692 (2010)
to rule that disclosure under 10 C.F.R. 2.336(a)(2)(i) is limited to formal contractual deliverables would encourage applicants to draft consulting contracts to insulate themselves from the obligation to disclose critical computer modeling information; LBP-10-23, 72 NRC 692 (2010)
upon a showing of need, petitioners' request to obtain access to an unredacted application was granted; CLI-10-24, 72 NRC 451 (2010)

DISCOVERY
analysis of a motion to compel the mandatory disclosure of information under 10 C.F.R. 2.336(a) is contingent on six issues; LBP-10-23, 72 NRC 692 (2010)
each party to a proceeding must automatically disclose and provide all documents and data compilations in their possession, custody, or control that are relevant to the admitted contentions, without waiting for a party to file a discovery request; LBP-10-23, 72 NRC 692 (2010)
if a requested document or data compilation is publicly available, then a citation to the document and a description of where it may be publicly obtained are sufficient; LBP-10-23, 72 NRC 692 (2010)
it is not a ground for objection to discovery that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; LBP-10-23, 72 NRC 692 (2010)
mandatory disclosure is the only form of discovery allowed in Subpart L proceedings, and all other forms are expressly prohibited; LBP-10-23, 72 NRC 692 (2010)
mandatory disclosures are updated every month; LBP-10-23, 72 NRC 692 (2010)
the "need for SUNSI" inquiry is essentially a relevance inquiry just as a federal court litigant must show that information sought in discovery is relevant to its claims or defenses; CLI-10-24, 72 NRC 451 (2010)
the disclosing party can either provide the other parties with an actual copy of the document or data compilation or can simply describe it and provide it if the other party requests it; LBP-10-23, 72 NRC 692 (2010)
the Federal Rules of Civil Procedure were amended in 2006 to expressly include electronically stored information; LBP-10-23, 72 NRC 692 (2010)
the scope of discovery is broader than the scope of admissible evidence; LBP-10-23, 72 NRC 692 (2010)

the scope of the mandatory disclosure obligations under 10 C.F.R. 2.336, which apply to Subpart L proceedings, is wide-reaching; LBP-10-23, 72 NRC 692 (2010)
when determining relevance of documents for discovery purposes in NRC proceedings, boards may look to the Federal Rules of Evidence for useful guidance; LBP-10-23, 72 NRC 692 (2010)
DISCOVERY AGAINST NRC STAFF
a party seeking to challenge NRC Staff's claim of privilege or protected status may file a motion to compel production of the document; CLI-10-24, 72 NRC 451 (2010)
availability, not possession, custody, or control, is the criterion for the NRC Staff's mandatory disclosure responsibilities; LBP-10-23, 72 NRC 692 (2010)
for documents that are otherwise discoverable, but for which there is a claim of privilege or protected status, NRC Staff must list them and provide sufficient information for assessing their privilege or protected status; CLI-10-24, 72 NRC 451 (2010); CLI-10-25, 72 NRC 469 (2010)
if and when NRC Staff relies on a document, then the Staff itself is also obliged to disclose the document, to the extent it is available; LBP-10-23, 72 NRC 692 (2010)
Staff's disclosure obligations are not tied to the admitted contentions, but rather, it must make available documents that relate to the application and its review as a whole; CLI-10-24, 72 NRC 451 (2010); CLI-10-25, 72 NRC 469 (2010)
DISQUALIFICATION
a judge should disqualify himself if he has personal knowledge of disputed evidentiary facts concerning the proceeding; CLI-10-22, 72 NRC 202 (2010)
an agency official should be disqualified only where a disinterested observer may conclude that the official has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it; CLI-10-17, 72 NRC 1 (2010)
if a licensing board member declines to grant a party's recusal motion, the motion is referred to the Commission to determine the sufficiency of the grounds alleged; CLI-10-22, 72 NRC 202 (2010)
that an unreasonable person, focusing on only one aspect of the story, might perceive a risk of bias is irrelevant; CLI-10-22, 72 NRC 202 (2010)
the Commission does not use procedural technicalities to avoid addressing disqualification motions; CLI-10-17, 72 NRC 1 (2010)
the disqualification standard under 28 U.S.C. § 455 is not directed to administrative judges, but the Commission and its adjudicatory boards have applied it in assessing a motion for disqualification under 10 C.F.R. 2.313, and it provides a helpful framework for such an assessment; CLI-10-22, 72 NRC 202 (2010)
the mere fact of adverse findings and rulings on the merits does not imply a biased attitude on the board's part; CLI-10-17, 72 NRC 1 (2010)
the standard for disqualification of a judge under 28 U.S.C. § 455 is whether the reasonable person who knows all the circumstances, would harbor doubts about the judge's impartiality; CLI-10-22, 72 NRC 202 (2010)
to prevail in a disqualification motion, petitioner first must demonstrate that the purported instances of bias had a substantial impact on the outcome of the proceeding; CLI-10-17, 72 NRC 1 (2010)
to prevail on a disqualification motion, petitioner must show either a bias against petitioner or its counsel based on matters outside the record or a pervasive bias against petitioner based upon matters in the record; CLI-10-17, 72 NRC 1 (2010)
DOCKETING
the decision to docket, and the subsequent handling of an application, is within the discretion of the Staff; LBP-10-17, 72 NRC 501 (2010)
DOCUMENT PRODUCTION
a party is excused from producing a document if the document is publicly available and if the party specifies where the document may be found; LBP-10-23, 72 NRC 692 (2010)
applicant's "control" of computer models prepared by and in possession of a contractor is illustrated by the fact that if NRC Staff requested these documents, applicant could obtain and provide them; LBP-10-23, 72 NRC 692 (2010)
applicant's claim that computer models should be excused from the mandatory disclosure requirements because they entail proprietary information is rejected; LBP-10-23, 72 NRC 692 (2010)

documents are deemed to be within the control of a party if the party has the right to obtain the documents on demand or if it is held by the party's attorney, expert, insurance company, accountant, or agent; LBP-10-23, 72 NRC 692 (2010)
if and when NRC Staff relies on a document, then the Staff itself is also obliged to disclose the document, to the extent it is available; LBP-10-23, 72 NRC 692 (2010)
neither legal ownership nor title is required in order for a party to have "possession, custody, or control" of a document; LBP-10-23, 72 NRC 692 (2010)
NRC's production-of-documents regulation, 10 C.F.R. 2.707(a)(1) is essentially the same as Fed. R. Civ. P. 34(a)(1); LBP-10-23, 72 NRC 692 (2010)
the concept of control extends to situations in which the party has the practical ability to obtain materials in the possession of another, even if the party does not have the legal right to compel the other person or entity to produce the requested materials; LBP-10-23, 72 NRC 692 (2010)
the Federal Rules of Civil Procedure were amended in 2006 to expressly include electronically stored information; LBP-10-23, 72 NRC 692 (2010)
the phrase "possession, custody, or control" as found in the Federal Rules of Civil Procedure and 10 C.F.R. 2.336(a) is in the disjunctive, and thus only one of the enumerated requirements needs to be met; LBP-10-23, 72 NRC 692 (2010)
the term "document" as used in 10 C.F.R. 2.336 includes computer models and associated electronic inputs, outputs, data, and software; LBP-10-23, 72 NRC 692 (2010)
the term "document" as used in 10 C.F.R. 2.336, is not limited to paper documents and it refers to information stored on any medium or form, including electronically stored information; LBP-10-23, 72 NRC 692 (2010)
to rule that disclosure under 10 C.F.R. 2.336(a)(2)(i) is limited to formal contractual deliverables would encourage applicants to draft consulting contracts to insulate themselves from the obligation to disclose critical computer modeling information; LBP-10-23, 72 NRC 692 (2010)
when determining relevance of documents for discovery purposes in NRC proceedings, boards may look to the Federal Rules of Evidence for useful guidance; LBP-10-23, 72 NRC 692 (2010)

DOSE LIMITS
a "member of the public" is any individual except when that individual is receiving an occupational dose; LBP-10-22, 72 NRC 661 (2010)
applicant shall conduct operations so that the total effective dose equivalent to individual members of the public does not exceed 100 millirems per year; LBP-10-20, 72 NRC 571 (2010)
applicant shall provide reasonable assurance that the annual dose equivalent to members of the public from planned discharges not exceed 25 millirems to the whole body; LBP-10-20, 72 NRC 571 (2010)
DOE need not weigh ALARA considerations outside the geologic repository operations area for which it is responsible; LBP-10-22, 72 NRC 661 (2010)
licensees, including Part 63 licensees, are required to use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable; LBP-10-22, 72 NRC 661 (2010)

DRAFT ENVIRONMENTAL IMPACT STATEMENT
a new contention is usually considered timely if filed within 30 days of publication of the DEIS; LBP-10-16, 72 NRC 361 (2010)

EARTHQUAKES
contention that the environmental report is based on incomplete information because a new earthquake fault has been discovered within 600 meters of nuclear reactors and the results of studies concerning the new fault will be available in the near term is admissible; LBP-10-15, 72 NRC 257 (2010)

ECONOMIC EFFECTS
impact of a proposed action on ratepayers is outside the scope of a NEPA analysis; LBP-10-14, 72 NRC 101 (2010)

ELECTRICAL EQUIPMENT
motion to reopen to introduce a new contention asserting issues related to aging management of effects of moist or wet environments on buried, below-grade, underground, or hard-to-access safety-related electrical cables is denied; LBP-10-19, 72 NRC 529 (2010)

SUBJECT INDEX

ELECTRONICALLY STORED INFORMATION
the Federal Rules of Civil Procedure were amended in 2006 to expressly include ESI; LBP-10-23, 72 NRC 692 (2010)
the term "document" as used in 10 C.F.R. 2.336, is not limited to paper documents and it refers to information stored on any medium or in any form, including ESI; LBP-10-23, 72 NRC 692 (2010)
EMPLOYEE PROTECTION
operating reactor licensees are not required to implement an employee concerns program, but are required to establish and implement an effective corrective action program; DD-10-1, 72 NRC 149 (2010)
petitioner's request for action concerning deficiencies in licensee's employee concerns program is denied; DD-10-1, 72 NRC 149 (2010)
the purpose of 10 C.F.R. 50.7(f) is to ensure that licensees do not enter into employment agreements that would prohibit, restrict, or otherwise discourage an employee or former employee from providing the NRC with information of regulatory significance; DD-10-1, 72 NRC 149 (2010)
ENERGY EFFICIENCY
the National Environmental Policy Act's rule of reason excludes consideration of demand-side management if the proposed new plant is intended to be a merchant plant, selling power on the open market, because it is not feasible for licensee to engage in demand-side management; CLI-10-21, 72 NRC 197 (2010)
ENFORCEMENT ACTIONS
a board did not commit clear error in finding that an enforcement action target did not know certain facts despite Staff's showing that the target was on the recipient list of documents and e-mails that included those facts; CLI-10-23, 72 NRC 210 (2010)
based on results of its problem identification and resolution biennial team inspections with annual followup of selected issues at licensed facilities, NRC takes any appropriate enforcement action to ensure compliance with 10 C.F.R. Part 50, Appendix B, Criterion XVI; DD-10-1, 72 NRC 149 (2010)
hydrofluoric acid exposure to licensee operators is assessed a civil monetary penalty in the amount of $32,500 on the basis of a determined Severity Level III violation; LBP-10-18, 72 NRC 519 (2010)
ENFORCEMENT PROCEEDINGS
board's finding that "knowledge" does not necessarily follow simply from previous exposure to individual facts, but rather an individual must have a current appreciation of those facts and their meaning in the circumstances presented is a finding of fact, not of law; CLI-10-23, 72 NRC 210 (2010)
knowledge of a fact requires not only an awareness of that fact but also an understanding or recognition of its significance; CLI-10-23, 72 NRC 210 (2010)
once a licensing proceeding has been closed, petitioners will still have the opportunity to raise issues by filing a request for action under 10 C.F.R. 2.206; CLI-10-17, 72 NRC 1 (2010)
ENVIRONMENTAL ASSESSMENT
although the discussion of alternatives in the environmental assessment need only be brief, it must be sufficient to fully comply with the requirement to study, develop, and describe appropriate alternatives; CLI-10-18, 72 NRC 56 (2010)
as long as all reasonable alternatives have been considered and an appropriate explanation is provided as to why an alternative was eliminated, the regulatory requirement is satisfied; CLI-10-18, 72 NRC 56 (2010)
certain actions are designated as categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement; CLI-10-18, 72 NRC 56 (2010)
content of an EA for proposed actions is described; CLI-10-18, 72 NRC 56 (2010)
cultural and historic resources are to be considered as part of the environmental impacts assessment that must be completed; LBP-10-16, 72 NRC 361 (2010)
federal agencies are required, to the fullest extent possible, to include in every recommendation or report on proposals for major federal actions significantly affecting the quality of the human environment a detailed statement on the environmental impact of the proposed action; CLI-10-18, 72 NRC 56 (2010)
general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided; CLI-10-18, 72 NRC 56 (2010)
it is not enough to consider only the proposed action and the no-action alternative in an EA; CLI-10-18, 72 NRC 56 (2010)

licensing boards do not sit to flyspeck environmental documents or to add details or nuances; LBP-10-14, 72 NRC 101 (2010)
NEPA does not require the NRC to assess the potential health effects of consuming irradiated food; CLI-10-18, 72 NRC 56 (2010)
NRC must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decisionmaking process; CLI-10-18, 72 NRC 56 (2010)
one purpose of an EA is to facilitate preparation of an environmental impact statement when one is necessary; CLI-10-18, 72 NRC 56 (2010)
Staff's failure to disclose data underlying its terrorism analysis in the final environmental assessment failed to meet the NEPA-mandated hard-look standard; CLI-10-18, 72 NRC 56 (2010)
Staff's obligations for preparation of an EA are discussed; CLI-10-18, 72 NRC 56 (2010)
the alternatives provision of NEPA § 102(2)(E) applies both when an agency prepares an environmental impact statement and when it prepares an environmental assessment; CLI-10-18, 72 NRC 56 (2010)
the obligation of agencies to consider alternatives is a lesser one under an environmental assessment than under an environmental impact statement; CLI-10-18, 72 NRC 56 (2010)
the range of alternatives that must be considered need not extend beyond those reasonably related to the purposes of the project and a rule of reason necessarily informs that choice; CLI-10-18, 72 NRC 56 (2010)
there is no per se regulatory bar that precludes the Staff from using the hearing process to clarify the administrative record supporting its final EA, and that record, along with any adjudicatory decision, becomes, in effect, part of the final environmental document; CLI-10-18, 72 NRC 56 (2010)
ENVIRONMENTAL EFFECTS
even if offsite construction does not appear to be part of the plan, it does not follow that offsite consequences need not be considered; CLI-10-18, 72 NRC 56 (2010)
impacts that are reasonably foreseeable under NEPA must be analyzed publicly, even if their probability of occurrence is low; CLI-10-18, 72 NRC 56 (2010)
impacts that are remote and speculative or inconsequentially small need not be examined; LBP-10-14, 72 NRC 101 (2010)
indirect effects are distinguished from connected actions under 40 C.F.R. 1508.25(a)(1); CLI-10-18, 72 NRC 56 (2010)
the central purpose of Part 51 rules is to allow NRC to comply with NEPA by identifying and evaluating environmental impacts that are generic to reactor license renewal proceedings and then allowing applicant and NRC to dispense with site-specific evaluations of such environmental impacts in situations covered by the generic analysis; LBP-10-15, 72 NRC 257 (2010)
the duty under NEPA to consider the environmental impacts of a proposed action incorporates, at least implicitly, considerations of the probability of a particular consequence occurring; LBP-10-15, 72 NRC 257 (2010)
the plain language of 10 C.F.R. 63.305 does not say anything about analyzing future climate based upon the historical geological record; LBP-10-22, 72 NRC 661 (2010)
ENVIRONMENTAL IMPACT STATEMENT
a contention may challenge a draft EIS even though its ultimate conclusion on a particular issue is the same as that in the ER, as long as the DEIS relies on significantly different data than the environmental report to support the determination; LBP-10-24, 72 NRC 720 (2010)
a detailed statement of reasonable alternatives to a proposed action must be included; LBP-10-24, 72 NRC 720 (2010)
a tribe is free to file a contention later on in the proceeding if, after Staff releases its environmental documents, the tribe believes that the Staff has failed to satisfy its obligations under NEPA and the National Historic Preservation Act; LBP-10-16, 72 NRC 361 (2010)
alternatives analysis is the heart of the EIS; LBP-10-24, 72 NRC 720 (2010)
an agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative; LBP-10-24, 72 NRC 720 (2010)
an EIS is not intended to be a research document; CLI-10-22, 72 NRC 202 (2010)
certain actions are designated as categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement; CLI-10-18, 72 NRC 56 (2010)

compliance with NEPA requires that, if new and significant information arises after the date of the issuance of the EIS and before the agency decision, then the agency must supplement or revise its EIS and consider such information; LBP-10-15, 72 NRC 257 (2010)
documents must be written in plain language so that decisionmakers and the public can readily understand them; LBP-10-16, 72 NRC 361 (2010)
existence of reasonable but unexamined alternatives renders an EIS inadequate; LBP-10-24, 72 NRC 720 (2010)
federal agencies are required, to the fullest extent possible, to include in every recommendation or report on proposals for major federal actions significantly affecting the quality of the human environment a detailed statement on the environmental impact of the proposed action; CLI-10-18, 72 NRC 56 (2010)
if significant new information becomes available, NRC Staff must explain how it took the new information into account in determining whether the additional generating capacity is required; LBP-10-24, 72 NRC 720 (2010)
inaccurate, incomplete, or misleading information in an EIS concerning the comparison of alternatives is itself sufficient to render the EIS unlawful and to compel its revision; LBP-10-24, 72 NRC 720 (2010)
it is the NRC Staff, not the intervenors, that has the burden of complying with NEPA; LBP-10-24, 72 NRC 720 (2010)
licensing boards do not sit to flyspeck environmental documents or to add details or nuances; LBP-10-14, 72 NRC 101 (2010)
NEPA requires federal agencies to consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-10-24, 72 NRC 720 (2010)
petitioner may amend contentions based on the applicant's environmental report or file new contentions if there are data or conclusions in the NRC draft or final EIS, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents; LBP-10-24, 72 NRC 720 (2010)
purpose of the cost-benefit analysis called for by NEPA is to identify each significant environmental cost and to determine whether, all other factors considered, on balance the incurring of that cost is warranted; LBP-10-24, 72 NRC 720 (2010)
someone living adjacent to the site for proposed construction of a federally licensed facility has standing to challenge the licensing agency's failure to prepare an EIS, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the facility will not be completed for many years; LBP-10-24, 72 NRC 720 (2010)
the alternatives provision of NEPA § 102(2)(E) applies both when an agency prepares an EIS and when it prepares an environmental assessment; CLI-10-18, 72 NRC 56 (2010)
the cost-benefit analysis involves the scrutiny of many factors, among them, offsetting benefits, available alternatives, and the possible means (and attendant costs) of reducing the environmental harm; LBP-10-24, 72 NRC 720 (2010)
the NEPA requirement to prepare an EIS is a procedural mechanism designed to ensure that agencies give proper consideration to the environmental consequences of their actions; LBP-10-24, 72 NRC 720 (2010)
the obligation of agencies to consider alternatives is a lesser one under an environmental assessment than under an environmental impact statement; CLI-10-18, 72 NRC 56 (2010)
under NEPA, the NRC must balance the benefits of the project against its environmental costs; LBP-10-24, 72 NRC 720 (2010)
use of the disjunctive phrase "data *or* conclusions" means that it is sufficient that either data or conclusions in the draft EIS differ significantly from those in the environmental report; LBP-10-24, 72 NRC 720 (2010)
whether and how the Staff fulfills its National Historic Preservation Act and NEPA obligations are issues that could form the basis of a new contention; LBP-10-16, 72 NRC 361 (2010)
See also Draft Environmental Impact Statement; Generic Environmental Impact Statement
ENVIRONMENTAL REPORT
a contention may challenge a draft environmental impact statement even though its ultimate conclusion on a particular issue is the same as that in the ER, as long as the DEIS relies on significantly different data than the ER to support the determination; LBP-10-24, 72 NRC 720 (2010)

although the obligations under NEPA fall to the agency and therefore the NRC Staff, petitioners are required to raise environmental objections based on the applicant's ER; LBP-10-15, 72 NRC 257 (2010)
analysis must consider and balance 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; LBP-10-16, 72 NRC 361 (2010)
applicant's license renewal application must include a severe accident mitigation alternatives analysis, outlining the costs and benefits of potential mitigation measures to reduce severe accident risk or consequences; CLI-10-30, 72 NRC 564 (2010)
challenge to the technical adequacy of baseline water quality data and adequate confinement of the host aquifer in applicant's ER is admissible; LBP-10-16, 72 NRC 361 (2010)
contention that the ER is based on incomplete information because a new earthquake fault has been discovered within 600 meters of nuclear reactors and the results of studies concerning the new fault will be available in the near term is admissible; LBP-10-15, 72 NRC 257 (2010)
documents must be written in plain language so that decisionmakers and the public can readily understand them; LBP-10-16, 72 NRC 361 (2010)
license renewal applications must include a severe accident mitigation alternatives analysis if not previously considered by NRC Staff; LBP-10-15, 72 NRC 257 (2010)
licensing boards do not sit to flyspeck environmental documents or to add details or nuances; LBP-10-14, 72 NRC 101 (2010)
on issues arising under the National Environmental Policy Act, petitioner shall file contentions based on the applicant's ER; LBP-10-24, 72 NRC 720 (2010)
petitioner may amend contentions based on the applicant's environmental report or file new contentions 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-10-24, 72 NRC 720 (2010)
the Clean Water Act does not authorize regulation of discharges to groundwater and so applicant's ER must address those discharges to groundwater; LBP-10-14, 72 NRC 101 (2010)
use of the disjunctive phrase "data *or* conclusions" means that it is sufficient that either data or conclusions in the draft environmental impact statement differ significantly from those in the ER; LBP-10-24, 72 NRC 720 (2010)
ENVIRONMENTAL REVIEW
NEPA review in the license renewal process is unlike the Commission's Part 54 review because the NEPA review covers all environmental impacts associated with license renewal and is not limited to aging-related issues; LBP-10-15, 72 NRC 257 (2010)
EROSION
the board may not consider that long-term erosion might entirely eliminate the proposed repository's upper geologic barrier unless the erosion is also shown to be a safety concern in the relatively near term; LBP-10-22, 72 NRC 661 (2010)
ERROR
a board did not commit clear error in finding that an enforcement action target did not know certain facts despite Staff's showing that the target was the recipient on a list of documents and e-mails that included those facts; CLI-10-23, 72 NRC 210 (2010)
a licensing board erred in holding that it lacked authority to consider contentions based on recent revisions to a license application, but the error was harmless because the intervenor had never submitted any contentions on the revisions; CLI-10-23, 72 NRC 210 (2010)
because appellant submitted no offer of proof, its case could be so weak that the denial of a right to reply by the licensing board would have been harmless error; CLI-10-23, 72 NRC 210 (2010)
mere demonstration that a board erred is not sufficient to warrant appellate relief, but rather the complaining party must demonstrate actual prejudice, i.e., that the ruling had a substantial effect on the outcome of the proceeding; CLI-10-23, 72 NRC 210 (2010)
parties taking appeals on purely procedural points are expected to explain precisely what injury to them was occasioned by the asserted error; CLI-10-23, 72 NRC 210 (2010)
petitioner's argument regarding rejection of its contention satisfies the prejudicial procedural error standard for review; CLI-10-17, 72 NRC 1 (2010)

Staff's petition for review is granted on the grounds that Staff has demonstrated substantial questions as to the Board's correct application of NEPA jurisprudence, and as to whether certain actions taken by the board constituted prejudicial procedural error; CLI-10-18, 72 NRC 56 (2010)
the Commission defers to a licensing board's rulings on contention admissibility unless an appeal points to an error of law or abuse of discretion; CLI-10-21, 72 NRC 197 (2010)
the Commission generally defers to a board's rulings on standing in the absence of clear error or an abuse of discretion; CLI-10-20, 72 NRC 185 (2010)
the fact that the board accorded greater weight to one party's evidence than to the other's is not a basis for overturning the initial decision; CLI-10-23, 72 NRC 210 (2010)
the mere potential for legal error in a contention admissibility decision is not a ground for interlocutory review; CLI-10-30, 72 NRC 564 (2010)
the standard of clear error for overturning a board's factual findings is quite high; CLI-10-18, 72 NRC 56 (2010)
to show clear error, appellant must demonstrate that the board's findings are not even plausible in light of the record viewed in its entirety; CLI-10-23, 72 NRC 210 (2010)
when the Commission reviews board rulings on contention admissibility, it employs the clear error and abuse of discretion standards of review; CLI-10-17, 72 NRC 1 (2010)
ETHICAL ISSUES
absent written consent of the party and the prior appearance of another attorney, many courts require that an attorney file a motion to withdraw; LBP-10-21, 72 NRC 616 (2010)
EVIDENCE
if appellant had submitted an offer of proof, indicating what rebuttal evidence it would have offered to the board, then the Commission might have some basis for determining whether that evidence would be substantial enough to justify a remand to the board; CLI-10-23, 72 NRC 210 (2010)
plaintiff may prove his case by direct or circumstantial evidence; CLI-10-23, 72 NRC 210 (2010)
the court draws no distinction between the probative value of direct and circumstantial evidence; CLI-10-23, 72 NRC 210 (2010)
the scope of discovery is broader than the scope of admissible evidence; LBP-10-23, 72 NRC 692 (2010)
EXTENSION OF TIME
a motion to file late should generally be denied, except under extraordinary conditions; LBP-10-21, 72 NRC 616 (2010)
a party at risk of filing out of time can request an extension, doing so well before the time specified expires; LBP-10-21, 72 NRC 616 (2010)
counsel's alleged unfamiliarity with the agency's rules of practice or counsel's asserted busy schedule are not satisfactory explanations for late filings; LBP-10-21, 72 NRC 616 (2010)
in the event of some 11th-hour unforeseen development, a party may tender a document belatedly, but the tender must be accompanied by a motion for leave to file out-of-time which satisfactorily explains not only the reason for the lateness, but also why a motion for an extension of time could not have been seasonably submitted; CLI-10-26, 72 NRC 474 (2010)
participant filing out of time must offer a satisfactory explanation for its lateness, including, if necessary, an account as to why a request for extension could not have been filed beforehand; LBP-10-21, 72 NRC 616 (2010)
parties are expected to file motions for extensions of time so that they are received by NRC well before the time specified expires; CLI-10-26, 72 NRC 474 (2010); LBP-10-21, 72 NRC 616 (2010)
See also Deadlines
FAIRNESS
in establishing and enforcing schedule deadlines, boards must take care not to compromise the Commission's fundamental commitment to a fair and thorough hearing process; LBP-10-21, 72 NRC 616 (2010)
the Commission has long endorsed a balanced approach to hearings that both expedites the hearing process and ensures fairness in order to produce a record that leads to high-quality decisions that adequately protect the public health and safety, the common defense and security, and the environment; LBP-10-21, 72 NRC 616 (2010)

SUBJECT INDEX

FAULTS
contention that the environmental report is based on incomplete information because a new earthquake fault has been discovered within 600 meters of nuclear reactors and the results of studies concerning the new fault will be available in the near term is admissible; LBP-10-15, 72 NRC 257 (2010)
FEDERAL RULES OF CIVIL PROCEDURE
neither legal ownership nor title is required in order for a party to have "possession, custody, or control" of a document; LBP-10-23, 72 NRC 692 (2010)
NRC generally applies the same standard for summary disposition that federal courts apply when ruling on motions for summary judgment under Fed. R. Civ. P. 56; LBP-10-20, 72 NRC 571 (2010)
NRC's production-of-documents regulation, 10 C.F.R. 2.707(a)(1) is essentially the same as Fed. R. Civ. P. 34(a)(1); LBP-10-23, 72 NRC 692 (2010)
the phrase "possession, custody, or control" as found in the Federal Rules of Civil Procedure and 10 C.F.R. 2.336(a) is in the disjunctive, and thus only one of the enumerated requirements needs to be met; LBP-10-23, 72 NRC 692 (2010)
the rules were amended in 2006 to expressly include electronically stored information; LBP-10-23, 72 NRC 692 (2010)
FEDERAL RULES OF EVIDENCE
"relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence; LBP-10-23, 72 NRC 692 (2010)
the relevance standard of 10 C.F.R. 2.336 is more flexible than the relevance standard of Fed. R. Evid. 401; LBP-10-23, 72 NRC 692 (2010)
when determining relevance of documents for discovery purposes in NRC proceedings, boards may look to the FRE for useful guidance; LBP-10-23, 72 NRC 692 (2010)
when the Commission endorsed the use of the Federal Rules of Evidence as guidance for the boards, it did so with the express proviso that boards must apply the Part 2 rules with *greater flexibility* than the FRE; LBP-10-23, 72 NRC 692 (2010)
FINAL ENVIRONMENTAL IMPACT STATEMENT
if NRC Staff concludes that the legal threshold for new and significant information has been met, it is authorized to supplement the FEIS; CLI-10-29, 72 NRC 556 (2010)
FINAL SAFETY ANALYSIS REPORT
the final safety analysis report shall include a level of information sufficient to enable the Commission to reach a final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license; LBP-10-20, 72 NRC 571 (2010)
the FSAR must include the kinds and quantities of radioactive materials expected to be produced by low-level radioactive waste in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in 10 C.F.R. Part 20; LBP-10-20, 72 NRC 571 (2010)
the FSAR was configured to accommodate at least 10 years of onsite storage; LBP-10-20, 72 NRC 571 (2010)
the function of 10 C.F.R. 50.59 is to deal with changes to a nuclear power plant, and it requires, as a prerequisite to any such change, that the licensee perform safety analyses in addition to those contained in the FSAR; LBP-10-20, 72 NRC 571 (2010)
there is no requirement in section 52.79(a)(3) for applicant's FSAR to include details regarding building materials and high-integrity containers, exact location, or health impacts on employees for the contingent onsite long-term LLRW storage facility; LBP-10-20, 72 NRC 571 (2010)
topics that must be covered in the FSAR and the level of information that is sufficient for each topic are specified in 10 C.F.R. 52.79; LBP-10-20, 72 NRC 571 (2010)
FINALITY
once a board has admitted original contentions, conducted the evidentiary hearing, and issued its ruling on the merits, and after the parties have appealed that decision, and the Commission has rendered its decision on the merits of the matter, the adjudicatory proceeding should be over, absent some extenuating circumstances; LBP-10-19, 72 NRC 529 (2010)

SUBJECT INDEX

FINDINGS OF FACT
a board rested its findings regarding a contention, in part, on certain facts that it officially noticed; CLI-10-17, 72 NRC 1 (2010)
a board's findings regarding a particular witness's knowledge or state of mind depend, as a general rule, largely on that witness's credibility; CLI-10-23, 72 NRC 210 (2010)
board's finding that "knowledge" does not necessarily follow simply from previous exposure to individual facts, but rather an individual must have a current appreciation of those facts and their meaning in the circumstances presented is a finding of fact, not of law; CLI-10-23, 72 NRC 210 (2010)
if a board does not explain how it had arrived at its findings of fact, it would fail to comply with its responsibilities under the Administrative Procedure Act to issue a reasoned decision; CLI-10-23, 72 NRC 210 (2010)
licensing board findings of fact that turn on witness credibility receive the Commission's highest deference on appeal; CLI-10-23, 72 NRC 210 (2010)
the Commission refrains from exercising its authority to make de novo findings of fact in situations where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact; CLI-10-18, 72 NRC 56 (2010)
the Commission will not overturn a hearing judge's findings simply because the Commission might have reached a different result; CLI-10-23, 72 NRC 210 (2010)
to show clear error, appellant must demonstrate that the board's findings are not even plausible in light of the record viewed in its entirety; CLI-10-23, 72 NRC 210 (2010)
FITNESS-FOR-DUTY PROGRAM
a person may be denied access at a licensee facility based on NRC requirements such as falsification of information, trustworthiness or reliability issues, and issues related to fitness for duty; DD-10-2, 72 NRC 163 (2010)
an individual requiring clarification or resolution of an access authorization concern must resolve the issue with the licensee where unescorted access was last held or otherwise denied; DD-10-2, 72 NRC 163 (2010)
each licensee must evaluate access denial status on a case-by-case basis and make a determination of trustworthiness and reliability; DD-10-2, 72 NRC 163 (2010)
nuclear industry was required to develop, implement, and maintain an industry database accessible by NRC-licensed facilities to share information, including determination of whether an individual is denied access at any other NRC-licensed facility; DD-10-2, 72 NRC 163 (2010)
potentially disqualifying information for unescorted access authorization may include unfavorable information from an employer, developed or disclosed criminal history, credit history, judgments, unfavorable reference information, evidence of drug or alcohol abuse, discrepancies between information disclosed and developed; DD-10-2, 72 NRC 163 (2010)
GENERIC ENVIRONMENTAL IMPACT STATEMENT
the GEIS must be updated if new and significant information or changed circumstances would change the outcome of the environmental analysis; LBP-10-15, 72 NRC 257 (2010)
GENERIC ISSUES
spent fuel from an additional 20 years of operation can be stored safely, with small environmental effects, at all plants, and such impacts are classified as Category 1 issues that are not within the scope of individual license renewal proceedings; LBP-10-15, 72 NRC 257 (2010)
the central purpose of Part 51 rules is to allow NRC to comply with NEPA by identifying and evaluating environmental impacts that are generic to reactor license renewal proceedings and then allowing applicant and NRC to dispense with site-specific evaluations of such environmental impacts in situations covered by the generic analysis; LBP-10-15, 72 NRC 257 (2010)
threat of terrorist attack at spent fuel pools has been evaluated generically by NRC and special circumstances for rule waiver have not been shown; LBP-10-15, 72 NRC 257 (2010)
GEOLOGIC CONDITIONS
the plain language of 10 C.F.R. 63.305 does not say anything about analyzing future climate based upon the historical geological record; LBP-10-22, 72 NRC 661 (2010)

SUBJECT INDEX

GEOLOGIC REPOSITORIES
the board may not consider that long-term erosion might entirely eliminate the proposed repository's upper geologic barrier unless the erosion is also shown to be a safety concern in the relatively near term; LBP-10-22, 72 NRC 661 (2010)
GROUNDWATER CONTAMINATION
it is enough that petitioner has demonstrated a realistic threat of sustaining a direct injury as a result of contaminated groundwater flowing from the site to his property; LBP-10-16, 72 NRC 361 (2010)
the Clean Water Act does not authorize regulation of discharges to groundwater and so applicant's environmental report must address those discharges; LBP-10-14, 72 NRC 101 (2010)
HAZARDOUS MATERIALS
hydrofluoric acid exposure to licensee operators is assessed a civil monetary penalty in the amount of $32,500 on the basis of a determined Severity Level III violation; LBP-10-18, 72 NRC 519 (2010)
HEARING PROCEDURES
if a contention does not fall within one of the categories of 10 C.F.R. 2.310(b)-(h), then proceedings may be conducted under Subpart L; LBP-10-15, 72 NRC 257 (2010)
if a hearing on a contention is expected to take no more than 2 days to complete, the board can impose the Subpart N procedures for expedited proceedings with oral hearings specified by 10 C.F.R. 2.1400-1407; LBP-10-16, 72 NRC 361 (2010)
if no particular procedure is compelled, the board must exercise its discretion and select the hearing procedure most appropriate for the newly admitted contentions; LBP-10-15, 72 NRC 257 (2010)
selection of hearing procedures for contentions at the outset of a proceeding is not immutable because the availability of Subpart G procedures depends critically on whether the credibility of eyewitnesses is important in resolving a contention, and witnesses relevant to each contention are not identified until after contentions are admitted; LBP-10-16, 72 NRC 361 (2010)
the board determines which procedure to use on a contention-by-contention basis; LBP-10-15, 72 NRC 257 (2010)
the Commission has long endorsed a balanced approach to hearings that both expedites the hearing process and ensures fairness in order to produce a record that leads to high-quality decisions that adequately protect the public health and safety, the common defense and security, and the environment; LBP-10-21, 72 NRC 616 (2010)
the Commission regards good sense, judgment, and managerial skills as the proper guideposts for conducting an efficient hearing; LBP-10-21, 72 NRC 616 (2010)
upon admission of a contention, the board must identify the specific hearing procedures to be used; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
HEARING REQUESTS, LATE-FILED
boards must balance eight factors in evaluating nontimely intervention petitions, hearing requests, and contentions; LBP-10-24, 72 NRC 720 (2010)
HEARING RIGHTS
a hearing in a licensing proceeding will be provided upon the request of any person whose interest may be affected by the proceeding; LBP-10-17, 72 NRC 501 (2010)
NRC regulations preserve the right to a hearing when an application is amended by allowing new or amended contentions to be filed in response to material new information; LBP-10-17, 72 NRC 501 (2010)
HIGH-LEVEL WASTE REPOSITORY
a quality assurance program is required to provide adequate confidence that the geologic repository and it structures, systems, or components will perform satisfactorily in service; LBP-10-22, 72 NRC 661 (2010)
adequate confidence in the performance assessment is derived from sufficient analyses, data, and the technical basis offered to demonstrate compliance with postclosure performance objectives; LBP-10-22, 72 NRC 661 (2010)
analysis is required of only those features, events, and processes that cannot be excluded on the basis of low probability of occurrence and whose exclusion would result in a significant change in the results of the performance assessment in the first 10,000-year period; LBP-10-22, 72 NRC 661 (2010)
applicant may perform its climate change analysis using a specified percolation rate; LBP-10-22, 72 NRC 661 (2010)

applicant's climate change analysis for the 990,000-year period may be limited to the effects of increased water flow through the repository as a result of climate change; LBP-10-22, 72 NRC 661 (2010)
because there is no requirement to demonstrate quantitatively the independent contribution of the drip shields, DOE need not perform a barrier neutralization analysis to ascertain each individual barrier's contribution to the repository's multiple barrier system; LBP-10-22, 72 NRC 661 (2010)
before authorizing construction of the proposed repository, the Commission must determine that there is reasonable expectation that the materials can be disposed of without unreasonable risk to the health and safety of the public; LBP-10-22, 72 NRC 661 (2010)
before issuing a license to receive and possess high-level waste at the repository, the Commission must find that construction of any underground storage space required for initial operation has been substantially completed; LBP-10-22, 72 NRC 661 (2010)
climate projections should be based on cautious, but reasonable assumptions; LBP-10-22, 72 NRC 661 (2010)
DOE may elect to use the method specified in 10 C.F.R. 63.342(c)(2) to analyze the effects of climate change during the post-10,000-year period, regardless of whether it is required to analyze the effects of climate change during the initial 10,000-year period; LBP-10-22, 72 NRC 661 (2010)
DOE must assess the effects of climate change during the 990,000-year period regardless of whether it necessarily must assess climate change during the initial 10,000-year period under the criteria set forth in sections 63.342(a) and (b); LBP-10-22, 72 NRC 661 (2010)
DOE need not weigh ALARA considerations outside the geologic repository operations area for which it is responsible; LBP-10-22, 72 NRC 661 (2010)
if the performance margins analysis is needed to establish adequate confidence in the total system performance assessment, then it is subject to the quality assurance requirements of 10 C.F.R. 63.142; LBP-10-22, 72 NRC 661 (2010)
licensees, including Part 63 licensees, are required to use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable; LBP-10-22, 72 NRC 661 (2010)
no requirement for a quantitative evaluation of an individual barrier's capabilities appears in the statutory language of the Nuclear Waste Policy Act; LBP-10-22, 72 NRC 661 (2010)
NRC is given flexibility in determining how best to provide for the use of a system of multiple barriers in the design of the repository; LBP-10-22, 72 NRC 661 (2010)
NRC's licensing regulations must provide for the use of a system of multiple barriers in the design of the repository; LBP-10-22, 72 NRC 661 (2010)
only features, events, and processes that produce significant changes in releases or doses within the first 10,000 years after disposal must be included in performance assessments; LBP-10-22, 72 NRC 661 (2010)
section 121 of the Nuclear Waste Policy Act does not require that each barrier provide either wholly independent protection or a specifically quantified amount of protection; LBP-10-22, 72 NRC 661 (2010)
the effects of the quality assurance program can be taken into account in determining the probability and consequences of a feature, event, or process; LBP-10-22, 72 NRC 661 (2010)
the performance margins analysis cannot be used to validate or provide confidence in the total systems performance assessment if its data and models are not qualified under DOE's quality assurance program; LBP-10-22, 72 NRC 661 (2010)
the plain language of 10 C.F.R. 63.305 does not say anything about analyzing future climate based upon the historical geological record; LBP-10-22, 72 NRC 661 (2010)
the quality assurance program must be applied to all structures, systems, and components that are important to waste isolation and to related activities, defined as including analyses of samples and data; LBP-10-22, 72 NRC 661 (2010)
three phases of operations are recognized; LBP-10-22, 72 NRC 661 (2010)
HIGH-LEVEL WASTE REPOSITORY APPLICATION
before any waste may be received at the high-level waste repository, DOE must update its application with additional information, including, specifically, additional design data obtained during construction; LBP-10-22, 72 NRC 661 (2010)

section 63.21(a) requires only that the application must be as complete as possible in light of the information that is reasonably available at the time of docketing; LBP-10-22, 72 NRC 661 (2010)
section 63.21(c)(7) requires that the license application include a description of plans for retrieval and alternate storage of the radioactive wastes, should retrieval be necessary; LBP-10-22, 72 NRC 661 (2010)
special attention must be given to those items that may significantly influence the final design; LBP-10-22, 72 NRC 661 (2010)
the board may not consider that long-term erosion might entirely eliminate the proposed repository's upper geologic barrier unless the erosion is also shown to be a safety concern in the relatively near term; LBP-10-22, 72 NRC 661 (2010)
HISTORIC SITES
cultural and historic resources are to be considered as part of the environmental impact assessment that must be completed; LBP-10-16, 72 NRC 361 (2010)
federal agencies must follow notification and consultation procedures prior to a federal undertaking to consider the undertaking's effect on historic properties; LBP-10-16, 72 NRC 361 (2010)
federal agencies should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties, and should invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement; LBP-10-16, 72 NRC 361 (2010)
prior to issuance of any license, federal agencies must take into account the effect of the federal action on any area eligible for inclusion in the National Register of Historic Places; LBP-10-16, 72 NRC 361 (2010)
HYDROFLUORIC ACID
chemical exposure to licensee operators is assessed a civil monetary penalty in the amount of $32,500 on the basis of a determined Severity Level III violation; LBP-10-18, 72 NRC 519 (2010)
HYDROGEOLOGY
petitioner raises a genuine dispute with the application with respect to the adequacy of information needed to characterize the site and offsite hydrogeology to ensure confinement of the extraction fluids; LBP-10-16, 72 NRC 361 (2010)
IMPARTIALITY
the standard for disqualification of a judge under 28 U.S.C. § 455 is whether a reasonable person who knows all the circumstances would harbor doubts about the judge's impartiality; CLI-10-22, 72 NRC 202 (2010)
IN SITU LEACH MINING
although Part 40 generally applies to in situ leach mining, Appendix A to Part 40, including Criterion 1, was designed to address the problems related to mill tailings and not problems related to injection mining; LBP-10-16, 72 NRC 361 (2010)
applicant must establish a surety arrangement that ensures sufficient funds will be available for decommissioning and decontamination of an NRC-licensed source materials site; LBP-10-16, 72 NRC 361 (2010)
burden is on petitioner to allege a specific and plausible means by which contaminants from mining activities may adversely affect him or her; LBP-10-16, 72 NRC 361 (2010)
byproduct material from in situ extraction operations must be disposed of at existing large mill tailings disposal sites; LBP-10-16, 72 NRC 361 (2010)
contention is rejected as lacking support for the premise that ongoing mining operations will drain or contaminate wetlands, such that their economic benefits will be decreased; LBP-10-16, 72 NRC 361 (2010)
in cases involving ISL uranium mining and other source materials licensing, petitioner must demonstrate injury, causation, and redressability because proximity to the proposed facility alone is not adequate to demonstrate standing; LBP-10-16, 72 NRC 361 (2010)
the principal regulatory standards for in situ leach applications are 10 C.F.R. 40.32(c) and (d), which mandate protection of public health and safety; LBP-10-16, 72 NRC 361 (2010)
INCORPORATION BY REFERENCE
the Commission disapproves of incorporation by reference in petitions for review, where it has the effect of bypassing the page limits set forth in NRC regulations; CLI-10-17, 72 NRC 1 (2010)

this practice is contrary to Commission case law and will result in denial of contentions on the basis on the dearth of information; LBP-10-16, 72 NRC 361 (2010)
INDIAN TRIBES
See Native Americans
INFORMAL HEARINGS
as NRC hearings have moved away from the traditional trial-type adversarial format and toward a more informal model, the inquisitorial role of the presiding officer necessarily has increased; CLI-10-17, 72 NRC 1 (2010)
the informal procedural rules of Part 2, Subpart L place greater emphasis and responsibility on the presiding officer to oversee the development of a full and complete record; CLI-10-17, 72 NRC 1 (2010)
INFORMAL PROCEEDINGS
once a hearing is granted under Subpart L, an informal oral hearing on the merits is required except in limited circumstances; CLI-10-18, 72 NRC 56 (2010)
See also Subpart L Proceedings
INHALATION PATHWAY
petitioner's argument that high-explosive munitions could fall onto depleted uranium, pulverizing and igniting the DU and generating aerosols that might travel through the air, providing an inhalation pathway for offsite exposure was contradicted by the Army's statement that it does not use high-impact explosives in the area where DU is present; CLI-10-20, 72 NRC 185 (2010)
INITIAL DECISIONS
the Commission may take discretionary review of a licensing board's initial decision; CLI-10-23, 72 NRC 210 (2010)
INJURY IN FACT
an injury in fact must go beyond generalized grievances to affect a petitioner in a personal and individual way; LBP-10-16, 72 NRC 361 (2010)
injury in fact is defined as an invasion of a legally protected interest that is concrete and particularized and actual or imminent rather than conjectural or hypothetical; LBP-10-16, 72 NRC 361 (2010)
parties taking appeals on purely procedural points are expected to explain precisely what injury to them was occasioned by the asserted error; CLI-10-23, 72 NRC 210 (2010)
petitioner's claimed injury must be arguably within the zone of interests protected by the governing statute in the proceeding; LBP-10-16, 72 NRC 361 (2010)
standing generally has been denied when the threat of injury is not concrete and particularized; LBP-10-16, 72 NRC 361 (2010)
the injury in fact necessary to establish organizational standing must be more than a mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem; LBP-10-16, 72 NRC 361 (2010)
to assert an appropriate injury for organizational standing, an organization must demonstrate a palpable injury in fact to its organizational interests; LBP-10-16, 72 NRC 361 (2010)
to establish an injury in fact, a party merely has to show some threatened concrete interest personal to the party that the National Historic Preservation Act was designed to protect; LBP-10-16, 72 NRC 361 (2010)
INSPECTION
intervenors are precluded from challenging ASME inspection requirements in a combined license proceeding because NRC regulations directly incorporate ASME inspection requirements by reference; LBP-10-21, 72 NRC 616 (2010)
motion to reopen the record to admit new contention regarding adequacy of applicant's containment/coating inspection program for two new proposed units is denied; LBP-10-21, 72 NRC 616 (2010)
the containment vessel is identified as an ASME Code Class MC component in both the inservice inspection subsection of section 50.55a as well as the inspection requirements subsection of the AP1000 DCD; LBP-10-21, 72 NRC 616 (2010)

SUBJECT INDEX

INSPECTION REPORTS
Green inspection finding indicates that the deficiency in licensee performance has a very low-risk significance and has little or no impact on safety, but White, Yellow, and Red findings indicate increasingly serious safety problems; CLI-10-27, 72 NRC 481 (2010)
INTEGRATED PLANT ASSESSMENT
aging management review for operating license renewal addresses activities identified in 10 C.F.R. 54.21(a)(3) and (c)(1); CLI-10-17, 72 NRC 1 (2010)
INTERPRETATION
if a contention header uses a particular phrase, but the statement of the contention does not refer to the phrase or regulation, then the board may interpret the contention in accordance with the express statement of the contention; LBP-10-15, 72 NRC 257 (2010)
See also Construction of Meaning; Regulations, Interpretation
INTERVENTION
NRC must provide a hearing upon the request of any person whose interest may be affected by the proceeding; LBP-10-16, 72 NRC 361 (2010)
INTERVENTION PETITIONS
although a board may view petitioner's supporting information in a light favorable to the petitioner, the petitioner (not the board) is required to supply all of the required elements for a valid intervention petition; CLI-10-20, 72 NRC 185 (2010); LBP-10-16, 72 NRC 361 (2010)
although boards should afford greater latitude to a pleading submitted by a pro se petitioner, that petitioner ultimately bears the burden to provide facts sufficient to show standing; CLI-10-20, 72 NRC 185 (2010)
because petitioner's circumstances may change from one proceeding to the next, it is important that the presiding officer have up-to-date information regarding any claims of standing; LBP-10-21, 72 NRC 616 (2010)
for a request for hearing and petition to intervene to be granted, petitioner must establish that it has standing and propose at least one admissible contention; LBP-10-15, 72 NRC 257 (2010)
it is generally not sufficient to seek to establish standing in a proceeding by merely cross-referencing the showing made in another proceeding, rather than making a new presentation or at least providing a submission that updates the factual information that was provided previously; LBP-10-21, 72 NRC 616 (2010)
it might be sufficient to allow petitioner to rely on a prior standing demonstration if that prior demonstration is specifically identified and shown to correctly reflect the current status of the petitioner's standing; LBP-10-21, 72 NRC 616 (2010)
petitioner must make a fresh standing demonstration in each individual proceeding in which intervention is sought; LBP-10-21, 72 NRC 616 (2010)
petitioner's standing showing can be corrected or supplemented to cure deficiencies by means of its reply pleading; LBP-10-21, 72 NRC 616 (2010)
to determine whether petitioners have standing, boards accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party; CLI-10-20, 72 NRC 185 (2010)
to interpose a new contention after a proceeding has been terminated requires submission of a fresh intervention petition that fulfills the applicable standards for such filings, including an appropriate standing demonstration; LBP-10-21, 72 NRC 616 (2010)
INTERVENTION PETITIONS, LATE-FILED
boards must balance eight factors in evaluating nontimely intervention petitions, hearing requests, and contentions; LBP-10-24, 72 NRC 720 (2010)
good cause for late filing is the most important factor, and failure to meet this factor considerably enhances the burden of showing that the other factors justify admission of a late-filed petition; LBP-10-21, 72 NRC 616 (2010)
when a contested proceeding has been terminated following the resolution of all submitted contentions, an individual, group, or governmental entity that wishes to interpose an additional issue must submit a new intervention petition that addresses the standards in section 2.309(c)(1) that govern nontimely intervention petitions; LBP-10-21, 72 NRC 616 (2010)

when petitioner seeks to introduce a new contention after the record has been closed, it should address the reopening standards contemporaneously with a late-filed intervention petition, which must satisfy the standards for both contention admissibility and late filing; LBP-10-21, 72 NRC 616 (2010)
INTERVENTION RULINGS
although boards may view petitioner's supporting information in a light favorable to the petitioner, it cannot do so by ignoring contention admissibility rules, which require the petitioner (not the board) to supply all of the required elements for a valid intervention petition; CLI-10-20, 72 NRC 185 (2010)
an order denying a petition to intervene and/or request for hearing may be appealed to the Commission on the question of whether the petition and/or request should have been granted; CLI-10-20, 72 NRC 185 (2010)
boards are to construe intervention petitions in favor of the petitioner; LBP-10-21, 72 NRC 616 (2010)
licensing boards must assess intervention petitions to determine whether elements for standing are met even if there are no objections to petitioner's standing; LBP-10-21, 72 NRC 616 (2010)
the Commission defers to a licensing board's rulings on contention admissibility unless an appeal points to an error of law or abuse of discretion; CLI-10-21, 72 NRC 197 (2010)
the Commission generally defers to a board's rulings on standing in the absence of clear error or an abuse of discretion; CLI-10-20, 72 NRC 185 (2010)
to determine whether petitioners have standing, boards accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party; CLI-10-20, 72 NRC 185 (2010)
IRRADIATED FOODS
NEPA does not require the NRC to assess the potential health effects of consuming irradiated food; CLI-10-18, 72 NRC 56 (2010)
IRRADIATOR
a categorical exclusion exists for materials licenses associated with irradiators; CLI-10-18, 72 NRC 56 (2010)
NRC Staff is required under NEPA to evaluate reasonable technological and geographical alternatives to the proposed irradiator; CLI-10-18, 72 NRC 56 (2010)
IRREPARABLE INJURY
deferral of review of board denial of rule waiver petition did not cause irreparable injury; CLI-10-29, 72 NRC 556 (2010)
See also Injury in Fact
JUDGES
See Licensing Board Judges; Presiding Officer
LEGAL AUTHORITIES
authorities may be binding, adverse, or merely persuasive, but all authorities must possess some legal and precedential/persuasive value; LBP-10-21, 72 NRC 616 (2010)
"authority" is defined as a legal writing taken as definitive or decisive, especially a judicial or administrative decision cited as a precedent, or a source, such as a statute, case, or treatise, cited in support of a legal argument; LBP-10-21, 72 NRC 616 (2010)
generally, an additional authorities filing would be a submission that is the functional equivalent of a letter supplementing authorities; LBP-10-21, 72 NRC 616 (2010)
LEGAL STANDARDS
when an adjudicating agency retroactively applies a new legal standard that significantly alters the rules of the game, the agency is obliged to give litigants proper notice and a meaningful opportunity to adjust; CLI-10-23, 72 NRC 210 (2010)
LICENSE AMENDMENTS
although the analysis required by 10 C.F.R. 50.59 is not the same as the final safety analysis, it is nevertheless a formal, written analysis involving safety issues (accident probabilities and/or consequences); LBP-10-20, 72 NRC 571 (2010)
licensee must apply for a license amendment and obtain NRC's approval before it can implement any proposed change; LBP-10-20, 72 NRC 571 (2010)
the function of 10 C.F.R. 50.59 is to deal with changes to a nuclear power plant, and it requires, as a prerequisite to any such change, that the licensee perform safety analyses in addition to those contained in the final safety analysis report; LBP-10-20, 72 NRC 571 (2010)

under certain conditions, licensee may implement changes to a nuclear power plant without obtaining a license amendment; LBP-10-20, 72 NRC 571 (2010)
LICENSE APPLICATIONS
the decision to docket, and the subsequent handling of an application, is within the discretion of the Staff; LBP-10-17, 72 NRC 501 (2010)
See also Combined License Application; License Renewal Applications; Materials License Applications
LICENSE CONDITIONS
NRC Staff could impose license conditions that are necessary to protect the environment under backfit procedures; CLI-10-30, 72 NRC 564 (2010)
LICENSE RENEWAL APPLICATIONS
although "severe accident," "severe accident mitigation alternatives," and "SAMA" are not defined in NRC's NEPA regulations, the NRC policy documents that originated the terms clearly limit them to nuclear reactors and do not include spent fuel pools or storage; LBP-10-15, 72 NRC 257 (2010)
applicant may demonstrate compliance with 10 C.F.R. 54.21(c)(1)(ii) by showing that the cumulative usage factor calculations have been reevaluated based on an increased number of assumed transients to bound the period of extended operation and that the resulting CUF remains less than or equal to 1.0 for the period of extended operation; CLI-10-17, 72 NRC 1 (2010)
applicant seeking to satisfy aging management requirements by reliance upon existing time-limited aging analyses in its current licensing basis would rely on 10 C.F.R. 54.21(c)(1)(i) or (ii); CLI-10-17, 72 NRC 1 (2010)
applicant who addresses the cumulative usage factor issue via an aging management program may reference Chapter X of the Generic Aging Lessons Learned Report; CLI-10-17, 72 NRC 1 (2010)
applicant who chooses to rely upon an existing time-limited aging analysis may demonstrate compliance with 10 C.F.R. 54.21(c)(1)(i) by showing that the existing cumulative usage factor calculations remain valid because the number of assumed transients would not be exceeded during the period of extended operation; CLI-10-17, 72 NRC 1 (2010)
applicant's environmental report must include a severe accident mitigation alternatives analysis, outlining the costs and benefits of potential mitigation measures to reduce severe accident risk or consequences; CLI-10-30, 72 NRC 564 (2010); LBP-10-15, 72 NRC 257 (2010)
contentions that inappropriately focus on Staff's review of the application rather than on the errors and omissions of the application itself are inadmissible; CLI-10-27, 72 NRC 481 (2010)
evaluation of time-limited aging analyses must demonstrate that the analyses will remain valid for the period of extended operation; CLI-10-17, 72 NRC 1 (2010)
if applicant can demonstrate by plant operating experience that the initially predicted number of stress cycles would not be exceeded even in the extended 20-year operating period, then 10 C.F.R. 54.21(c)(1)(i) would be satisfied; CLI-10-17, 72 NRC 1 (2010)
NEPA review in the license renewal process is unlike the Commission's Part 54 review because the NEPA review covers all environmental impacts associated with license renewal and is not limited to aging-related issues; LBP-10-15, 72 NRC 257 (2010)
potential scope of adjudicatory hearings in license renewal proceedings is the same as the scope of the Staff's review; LBP-10-15, 72 NRC 257 (2010)
severe accident mitigation alternatives analyses are not required for the spent fuel storage impacts associated with license renewals; LBP-10-15, 72 NRC 257 (2010)
the duty under NEPA to consider the environmental impacts of a proposed action incorporates, at least implicitly, considerations of the probability of a particular consequence occurring; LBP-10-15, 72 NRC 257 (2010)
the standard review plan presents one acceptable methodology for calculating the environmentally adjusted cumulative usage factor; CLI-10-17, 72 NRC 1 (2010)
use of an aging management program identified in the Generic Aging Lessons Learned Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period; CLI-10-17, 72 NRC 1 (2010)
See also Operating License Renewal
LICENSE RENEWAL PROCEEDINGS
adequacy or inadequacy of applicant's severe accident mitigation alternatives analysis is certainly within the scope of a license renewal proceeding; LBP-10-15, 72 NRC 257 (2010)

petitioner need not submit a sensitivity analysis in order to establish that a SAMA-related contention is material; LBP-10-15, 72 NRC 257 (2010)
proceeding will remain open during the pendency of a remand, during which time, petitioners are free to submit a motion to reopen the record should they seek to address any genuinely new issues related to the license renewal application that previously could not have been raised; CLI-10-17, 72 NRC 1 (2010)
scope of a license renewal proceeding is limited to review of plant structures and components requiring an aging management review for the period of extended operation and to the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses; LBP-10-21, 72 NRC 616 (2010)
LICENSEE CHARACTER
historical actions by an applicant are not relevant to its current fitness unless there is some direct and obvious relationship between the asserted character issues and the licensing action in dispute; CLI-10-20, 72 NRC 185 (2010)
in the absence of evidence to the contrary, NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises; CLI-10-20, 72 NRC 185 (2010); LBP-10-20, 72 NRC 571 (2010)
NRC is not barred from considering licensee's past and continuing managerial and performance problems when it determines whether licensee has demonstrated that actions will be taken to manage the effects of aging during the period of extended operation; LBP-10-15, 72 NRC 257 (2010)
petitioner cannot base standing or a contention on the possibility that the licensee will violate the terms of its license; CLI-10-20, 72 NRC 185 (2010)
potential scope of adjudicatory hearings in license renewal proceedings is the same as the scope of the Staff's review; LBP-10-15, 72 NRC 257 (2010)
LICENSEE EMPLOYEES
although not required by regulation, settlement agreements that contain language reinforcing employees' rights to raise safety concerns and communicate with the NRC avoid the possibility of being construed in a way that could be a violation; DD-10-1, 72 NRC 149 (2010)
employees may not deliberately submit to the NRC information that the employee knows to be incomplete or inaccurate in some respect material to the NRC; CLI-10-23, 72 NRC 210 (2010)
nondisparagement clauses in retention bonus agreements are common in employment agreements and NRC should not interfere with these agreements unless it finds such a clause violates 10 C.F.R. 50.7(f) or is applied in a fashion that prevents or retaliates against an employee for engaging in protected activities such as communicating with NRC; DD-10-1, 72 NRC 149 (2010)
operating reactor licensees are not required to implement an employee concerns program, but are required to establish and implement an effective corrective action program; DD-10-1, 72 NRC 149 (2010)
petitioner's request for action concerning deficiencies in licensee's employee concerns program is denied; DD-10-1, 72 NRC 149 (2010)
the purpose of 10 C.F.R. 50.7(f) is to ensure that licensees do not enter into employment agreements that would prohibit, restrict, or otherwise discourage an employee or former employee from providing the NRC with information of regulatory significance; DD-10-1, 72 NRC 149 (2010)
LICENSING BOARD DECISIONS
if a board does not explain how it has arrived at its findings of fact, it would fail to comply with its responsibilities under the Administrative Procedure Act to issue a reasoned decision; CLI-10-23, 72 NRC 210 (2010)
the Commission may take discretionary review of a licensing board's initial decision; CLI-10-23, 72 NRC 210 (2010)
the Commission refrains from exercising its authority to make de novo findings of fact in situations where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact; CLI-10-18, 72 NRC 56 (2010)
the Commission will not overturn a hearing judge's findings simply because the Commission might have reached a different result; CLI-10-23, 72 NRC 210 (2010)
the fact that the board accorded greater weight to one party's evidence than to the other's is not a basis for overturning the initial decision; CLI-10-23, 72 NRC 210 (2010)

unreviewed board rulings have no precedential effect; CLI-10-23, 72 NRC 210 (2010); CLI-10-29, 72 NRC 556 (2010); CLI-10-30, 72 NRC 564 (2010)
See also Initial Decisions
LICENSING BOARD JUDGES
a judge should disqualify himself if he has personal knowledge of disputed evidentiary facts concerning the proceeding; CLI-10-22, 72 NRC 202 (2010)
boards include two judges with technical expertise; CLI-10-17, 72 NRC 1 (2010)
if a licensing board member declines to grant a party's recusal motion, the motion is referred to the Commission to determine the sufficiency of the grounds alleged; CLI-10-22, 72 NRC 202 (2010)
issues may arise about which the presiding judges lack specific expertise, but they use their training, experience, knowledge, and judgment to ask the right questions and reach sound decisions; CLI-10-17, 72 NRC 1 (2010)
mere experience or background in a relevant technical field does not imply knowledge of the specific disputed facts in a case; CLI-10-22, 72 NRC 202 (2010)
the disqualification standard under 28 U.S.C. § 455 is not directed to administrative judges, but the Commission and its adjudicatory boards have applied it in assessing a motion for disqualification under 10 C.F.R. 2.313, and it provides a helpful framework for such an assessment; CLI-10-22, 72 NRC 202 (2010)
the standard for disqualification of a judge under 28 U.S.C. § 455 is whether the reasonable person who knows all the circumstances would harbor doubts about the judge's impartiality; CLI-10-22, 72 NRC 202 (2010)
LICENSING BOARD ORDERS
denial of a petition for rule waiver is interlocutory and not immediately reviewable; CLI-10-29, 72 NRC 556 (2010)
LICENSING BOARDS
Congress considers the Atomic Safety and Licensing Board to be a panel of experts; CLI-10-17, 72 NRC 1 (2010)
extra-record conduct such as stares, glares, and scowls do not constitute evidence of personal bias, nor do occasional outbursts toward counsel; CLI-10-17, 72 NRC 1 (2010)
friction between the court and counsel, including intemperate and impatient remarks by the judge, does not constitute evidence of personal bias; CLI-10-17, 72 NRC 1 (2010)
LICENSING BOARDS, AUTHORITY
a board abused its discretion in reformulating and admitting contentions; LBP-10-16, 72 NRC 361 (2010)
a board rested its findings regarding a contention, in part, on certain facts that it officially noticed; CLI-10-17, 72 NRC 1 (2010)
a licensing board erred in holding that it lacked authority to consider contentions based on recent revisions to a license application, but the error was harmless because intervenor had never submitted any contentions on the revisions; CLI-10-23, 72 NRC 210 (2010)
although a board may view petitioner's supporting information in a light favorable to petitioner, petitioner (not the board) is required to supply all of the required elements for a valid intervention petition; LBP-10-15, 72 NRC 257 (2010)
boards are authorized to hold prehearing conferences to simplify or clarify the issues for hearing, after which they may admit a revised contention, as long as the revised contention does not add material not raised by the intervenor to make it admissible; LBP-10-14, 72 NRC 101 (2010)
boards are obliged to evaluate the timeliness of a proposed contention even if no party raises the issue; LBP-10-17, 72 NRC 501 (2010)
boards' case management decisions, such as determinations of whether to permit additional slide shows or enlarged exhibits, lie well within the discretion of the board; CLI-10-17, 72 NRC 1 (2010)
boards control the schedule for a proceeding to ensure that intervenors have adequate time to prepare new or amended contentions in response to new information; LBP-10-17, 72 NRC 501 (2010)
boards do not direct the Staff in the performance of its administrative functions; LBP-10-17, 72 NRC 501 (2010)
boards do not sit to flyspeck environmental documents or to add details or nuances; LBP-10-14, 72 NRC 101 (2010)

boards have authority to set a proceeding's schedule and to ensure compliance with that schedule; LBP-10-21, 72 NRC 616 (2010)
boards have substantial authority to regulate hearing procedures; LBP-10-21, 72 NRC 616 (2010)
boards have the authority to regulate hearing procedure, and decisions on evidentiary questions fall within that authority; CLI-10-18, 72 NRC 56 (2010)
boards may disapprove a site for a new reactor only upon one of two findings; LBP-10-24, 72 NRC 720 (2010)
boards may not order the Staff to cease review of an applicant's revised application or direct the Staff to require an applicant to submit a new application; LBP-10-17, 72 NRC 501 (2010)
boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; LBP-10-14, 72 NRC 101 (2010); LBP-10-16, 72 NRC 361 (2010)
board's role in considering a petition for waiver under 10 C.F.R. 2.335 is limited to deciding whether petitioner has made a prima facie showing of special circumstances that would support a waiver; LBP-10-15, 72 NRC 257 (2010)
if no particular procedure is compelled, the board must exercise its discretion and select the hearing procedure most appropriate for the newly admitted contentions; LBP-10-15, 72 NRC 257 (2010)
in establishing and enforcing schedule deadlines, boards must take care not to compromise the Commission's fundamental commitment to a fair and thorough hearing process; LBP-10-21, 72 NRC 616 (2010)
materials cited as the basis for a contention are subject to scrutiny by the board to determine whether they actually support the facts alleged; LBP-10-24, 72 NRC 720 (2010)
NRC's expanding adjudicatory docket makes it critically important that parties comply with NRC pleading requirements and that the board enforce those requirements; CLI-10-27, 72 NRC 481 (2010)
principal role is to carefully review all of the evidence, including testimony and exhibits, and to resolve any factual disputes; CLI-10-18, 72 NRC 56 (2010)
the Commission generally defers to the boards on case management decisions; CLI-10-28, 72 NRC 553 (2010)
to ensure a more efficient proceeding, the board merges two contentions; LBP-10-16, 72 NRC 361 (2010)
upon admission of a contention in a licensing proceeding, the board must identify the specific hearing procedures to be used to settle the contention; LBP-10-16, 72 NRC 361 (2010)
LICENSING BOARDS, JURISDICTION
once a licensing board has concluded board action on a licensing case, jurisdiction to decide a motion to reopen regarding that proceeding passes to the Commission, which retains jurisdiction until the license in question has been issued; LBP-10-21, 72 NRC 616 (2010)
the Commission's referral of a motion to reopen to the ASLBP and subsequent establishment of the board gives the board jurisdiction over the motion; LBP-10-21, 72 NRC 616 (2010)
MANAGEMENT CHARACTER AND COMPETENCE
absence of perfect compliance by licensee does not rebut the presumption of compliance or support admission of a contention that the application does not satisfy 10 C.F.R. 54.29(a), but a consistent, longstanding, and continuing pattern of problems in a specific area that is relevant to managing aging equipment will; LBP-10-15, 72 NRC 257 (2010)
allegation of facts, with supporting documentation, of a longstanding and continuing pattern of noncompliance or management difficulties that are reasonably linked to whether licensee will actually be able to adequately manage aging in accordance with the current licensing basis during the period of extended operation can be an admissible contention; LBP-10-15, 72 NRC 257 (2010)
NRC is not barred from considering licensee's past and continuing managerial and performance problems when it determines whether licensee has demonstrated that actions will be taken to manage the effects of aging during the period of extended operation; LBP-10-15, 72 NRC 257 (2010)
potential scope of adjudicatory hearings in license renewal proceedings is the same as the scope of the Staff's review; LBP-10-15, 72 NRC 257 (2010)
MATERIAL CONTROL AND ACCOUNTING
petitioner alleges release of controlled byproduct nuclear materials in containers not certified for transport of such materials on public roads and not labeled with the required labeling; DD-10-3, 72 NRC 171 (2010)

SUBJECT INDEX

MATERIAL FALSE STATEMENTS
a false statement charge, like a perjury charge, effectively demands an inquiry into defendant's state of mind and intent to deceive at the time the testimony was given; CLI-10-23, 72 NRC 210 (2010)
board's finding that "knowledge" does not necessarily follow simply from previous exposure to individual facts, but rather an individual must have a current appreciation of those facts and their meaning in the circumstances presented, is a finding of fact, not of law; CLI-10-23, 72 NRC 210 (2010)
concerning criminal guilt, the words "knowledge" and "knowingly" are normally associated with awareness, understanding, or consciousness; CLI-10-23, 72 NRC 210 (2010)
knowledge of a fact requires not only an awareness of that fact but also an understanding or recognition of its significance; CLI-10-23, 72 NRC 210 (2010)
licensee employees may not deliberately submit to the NRC information that the employee knows to be incomplete or inaccurate in some respect material to the NRC; CLI-10-23, 72 NRC 210 (2010)
materially false, fictitious, or fraudulent statements or representations are prohibited in matters within the federal government's jurisdiction; CLI-10-23, 72 NRC 210 (2010)
materially incorrect responses to the NRC's communications are violations; CLI-10-23, 72 NRC 210 (2010)
some circumstances surrounding a person's false statement may be so obvious that knowledge of its character may be fairly attributed to him; CLI-10-23, 72 NRC 210 (2010)
the sole issue under 10 C.F.R. 50.5(a)(2) is whether a person knew the information was materially incomplete and inaccurate at the time it was submitted to the NRC; CLI-10-23, 72 NRC 210 (2010)
to convict a person accused of making a false statement, the government must prove not only that the statement was false, but that the accused knew it to be false; CLI-10-23, 72 NRC 210 (2010)
willfulness means nothing more in the context of a false statement than that the defendant knew that his statement was false when he made it or consciously disregarded or averted his eyes from its likely falsity; CLI-10-23, 72 NRC 210 (2010)
MATERIALITY
a dispute is not material unless it involves a significant inaccuracy or omission and resolution of the dispute could affect the outcome of the licensing proceeding; LBP-10-14, 72 NRC 101 (2010)
accuracy and reliability of the agency's need-for-power determination, as reflected in the draft EIS, is material to the licensing decision; LBP-10-24, 72 NRC 720 (2010)
adequacy of the draft environmental impact statement's evaluation of alternatives is a material issue in the licensing proceeding; LBP-10-24, 72 NRC 720 (2010)
any fact-based argument in a petition for review must satisfy the materiality requirement; CLI-10-17, 72 NRC 1 (2010)
applicant's change of reactor design constitutes new and materially different information for the purposes of filing a new contention; LBP-10-17, 72 NRC 501 (2010)
at the contention admissibility stage, intervenors are not required to run a sensitivity analysis and/or to prove that alleged defects would change the result; LBP-10-14, 72 NRC 101 (2010)
cost-risk calculations that intervenors propose in their contention as they relate to existing reactors are not material to the findings that NRC must make to license the proposed reactors; LBP-10-14, 72 NRC 101 (2010)
given that consideration of terrorist attacks is part of the NRC's NEPA obligations in the Ninth Circuit, the issue of whether terrorist attacks have been fully considered in the NEPA analysis for a power plant in that jurisdiction is plainly material to the decision the NRC must make; LBP-10-15, 72 NRC 257 (2010)
if petitioner makes a prima facie allegation that the application omits information required by law, it necessarily presents a genuine dispute with applicant on a material issue in compliance and raises an issue plainly material to an essential finding of regulatory compliance needed for license issuance; LBP-10-16, 72 NRC 361 (2010)
petitioner need not submit a sensitivity analysis in order to establish that a SAMA-related contention is material; LBP-10-15, 72 NRC 257 (2010)
subject matter of a contention must impact the grant or denial of the pending license application; LBP-10-17, 72 NRC 501 (2010)

SUBJECT INDEX

MATERIALS LICENSE APPLICATIONS
the organization or format of an application is not germane to license issuance because the objection to the application's organization is not an objection to the licensing action at issue in the proceeding; LBP-10-16, 72 NRC 361 (2010)
MATERIALS LICENSE PROCEEDINGS
boards apply a proximity-plus test to establish standing in materials cases, where the petitioner must show that the proposed licensing action involves a significant source of radiation that has an obvious potential for offsite consequences; CLI-10-20, 72 NRC 185 (2010)
no proximity presumption applies in source materials cases; LBP-10-16, 72 NRC 361 (2010)
standing was found for an organization representing three members living in close proximity to decommissioning site, who expressed concern that depleted uranium materials could affect a waterway abutting the property of two members; CLI-10-20, 72 NRC 185 (2010)
to establish standing, petitioner must show more than that he lives or works within a certain distance of the site where materials will be located; CLI-10-20, 72 NRC 185 (2010)
MATERIALS LICENSES
a categorical exclusion exists for materials licenses associated with irradiators; CLI-10-18, 72 NRC 56 (2010)
before issuing a license to receive and possess high-level waste at the repository, the Commission must find that construction of any underground storage space required for initial operation has been substantially completed; LBP-10-22, 72 NRC 661 (2010)
NRC Staff is required under NEPA to evaluate reasonable technological and geographical alternatives to a proposed irradiator; CLI-10-18, 72 NRC 56 (2010)
project goals are to be determined by the applicant, not the agency; CLI-10-18, 72 NRC 56 (2010)
METAL FATIGUE
a license renewal applicant who addresses the cumulative usage factor issue via an aging management program may reference Chapter X of the Generic Aging Lessons Learned Report; CLI-10-17, 72 NRC 1 (2010)
an aging management program is intended to manage the effects of aging on a particular component by, e.g., ensuring that the fatigue usage factor for the component does not exceed the design code limit; CLI-10-17, 72 NRC 1 (2010)
applicant may demonstrate compliance with 10 C.F.R. 54.21(c)(1)(ii) by showing that the cumulative usage factor calculations have been reevaluated based on an increased number of assumed transients to bound the period of extended operation and that the resulting CUF remains less than or equal to 1.0 for the period of extended operation; CLI-10-17, 72 NRC 1 (2010)
cumulative use factor is a means of quantifying the fatigue that a particular metal component experiences during plant operation; CLI-10-17, 72 NRC 1 (2010)
for any material, there is a characteristic number of stress cycles that it can withstand at a particular applied stress level before fatigue failure occurs; CLI-10-17, 72 NRC 1 (2010)
for license renewal, feedwater, core spray, and reactor recirculation outlet nozzles, as part of the reactor coolant pressure boundary, must meet the metal-fatigue requirements for Class 1 components in Section III of the ASME Code; CLI-10-17, 72 NRC 1 (2010)
if applicant can demonstrate by plant operating experience that the initially predicted number of stress cycles would not be exceeded even in the extended 20-year operating period, then 10 C.F.R. 54.21(c)(1)(i) would be satisfied; CLI-10-17, 72 NRC 1 (2010)
MONITORING
NRC continually takes measures to include the monitoring of safety culture in its oversight programs and internal management processes; CLI-10-27, 72 NRC 481 (2010)
preconstruction monitoring and testing to establish background information is exempted from the prohibition on commencement of construction; LBP-10-16, 72 NRC 361 (2010)
MOOTNESS
a contention challenging applicant's environmental report can be superseded by the subsequent issuance of licensing-related documents, whether a draft environmental impact statement or an applicant's response to a request for additional information; LBP-10-14, 72 NRC 101 (2010)

for a contention of omission, if the information is later supplied by applicant or considered by Staff in a draft EIS, 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-10-14, 72 NRC 101 (2010)
if applicant cures the omission on which a contention is based, the contention will become moot; LBP-10-16, 72 NRC 361 (2010)
imminent mootness of an issue has been cause for taking interlocutory review if the issue sought to be reviewed would have become moot by the time the board issued a final decision; CLI-10-29, 72 NRC 556 (2010)
the question whether to hold an NRC enforcement proceeding in abeyance pending a related criminal prosecution is generally suitable for interlocutory Commission review because, unlike most interlocutory questions, the abeyance issue cannot await the end of the proceeding because it becomes moot; CLI-10-29, 72 NRC 556 (2010)
where a contention is superseded by the subsequent issuance of licensing-related documents the contention must be disposed of or modified; LBP-10-17, 72 NRC 501 (2010)
MOTIONS
intervenors must move for leave to file a timely new or amended contention under 10 C.F.R. 2.309(c), (f)(2); LBP-10-14, 72 NRC 101 (2010)
motions are to be filed within 10 days of the event or circumstance from which they arise; LBP-10-23, 72 NRC 692 (2010)
MOTIONS FOR RECONSIDERATION
petitioners must seek leave to request reconsideration of a decision and set forth compelling circumstances that petitioners could not reasonably have anticipated and that would render the decision invalid; CLI-10-21, 72 NRC 197 (2010)
MOTIONS TO COMPEL
a party seeking to challenge NRC Staff's claim of privilege or protected status may file a motion to compel production of the document; CLI-10-24, 72 NRC 451 (2010)
the board grants intervenors' motion to compel disclosure of certain groundwater modeling information associated with a combined license application; LBP-10-23, 72 NRC 692 (2010)
MOTIONS TO REOPEN
a timely motion may be denied if it raises issues that are not of major significance to plant safety whereas a nontimely motion may be granted if it raises an issue of sufficient gravity; LBP-10-21, 72 NRC 616 (2010)
affidavits must set forth the factual and/or technical bases for the movant's claim that the criteria of 10 C.F.R. 2.326(a) have been satisfied, including addressing each of the reopening criteria separately with a specific explanation of why it has been met; LBP-10-19, 72 NRC 529 (2010); LBP-10-21, 72 NRC 616 (2010)
although the motion must be timely, an exceptionally grave issue may be considered even if the motion is not timely; LBP-10-19, 72 NRC 529 (2010)
an untimely motion must demonstrate that the issue raised is not merely significant but exceptionally grave; LBP-10-21, 72 NRC 616 (2010)
factors (vii) and (viii) of 10 C.F.R. 2.309(c)(1) are generally considered to have the most significance in the balancing process in instances in which there are no other parties or ongoing related proceedings; LBP-10-21, 72 NRC 616 (2010)
good cause for late filing is the most important factor, and failure to meet this factor considerably enhances the burden of showing that the other factors justify admission of a late-filed petition; LBP-10-21, 72 NRC 616 (2010)
if a motion to reopen and the proposed new contention are based on material information that was not previously available, then it qualifies as timely; LBP-10-19, 72 NRC 529 (2010)
if a motion to reopen relates to a contention not previously in controversy among the parties, movant must meet the late-filing requirements of section 2.309(c); LBP-10-21, 72 NRC 616 (2010)
in addressing the section 2.309(c)(1) factors, failure to provide any specific discussion of most of these items or the weight they should be given in the balance is a potentially fatal omission; LBP-10-21, 72 NRC 616 (2010)

in light of the requirements that any new contention be based on material information that was not previously available, the timeliness determination required under 10 C.F.R. 2.309(f)(2) and the section 2.326(a) reopening standard can be closely equated; LBP-10-21, 72 NRC 616 (2010)
movant must show that it is more probable than not that it would have prevailed on the merits of the proposed new contention; LBP-10-19, 72 NRC 529 (2010)
new contention asserting issues related to aging management of effects of moist or wet environments on buried, below-grade, underground, or hard-to-access safety-related electrical cables is denied; LBP-10-19, 72 NRC 529 (2010)
once a licensing board has concluded board action on a licensing case, jurisdiction to decide a motion to reopen regarding that proceeding passes to the Commission, which retains jurisdiction until the license in question has been issued; LBP-10-21, 72 NRC 616 (2010)
proceeding will remain open during the pendency of a remand, during which time, petitioners are free to submit a motion to reopen the record should they seek to address any genuinely new issues related to the license renewal application that previously could not have been raised; CLI-10-17, 72 NRC 1 (2010)
proponent of a motion to reopen must do more than simply raise a safety issue, but must show that the safety issue it raises is significant; LBP-10-19, 72 NRC 529 (2010)
the Commission's referral of a motion to reopen to the ASLBP and subsequent establishment of the board gives the board jurisdiction over the motion; LBP-10-21, 72 NRC 616 (2010)
the significance of the issue being raised by a new contention would be a relevant "good cause" consideration; LBP-10-21, 72 NRC 616 (2010)
timeliness of a new contention depends primarily on an assessment as to when the proponent of the motion first knew, or should have known, enough information to raise the issues presented in the new contention; LBP-10-19, 72 NRC 529 (2010)
timeliness of the motion depends on what/when was the trigger that provided the footing for the new contention and whether the motion was timely filed after that trigger event; LBP-10-21, 72 NRC 616 (2010)
to interpose a new contention after a proceeding has been terminated requires submission of a fresh intervention petition that fulfills the applicable standards for such filings, including an appropriate standing demonstration; LBP-10-21, 72 NRC 616 (2010)
to introduce an entirely new contention, petitioner must successfully navigate at least nineteen different regulatory factors under 10 C.F.R. 2.326, 2.309(c), and 2.309(f)(1); LBP-10-19, 72 NRC 529 (2010)
when a contested proceeding has been terminated following the resolution of all submitted contentions, an individual, group, or governmental entity that wishes to interpose an additional issue must submit a new intervention petition that addresses the standards in section 2.309(c)(1) that govern nontimely intervention petitions; LBP-10-21, 72 NRC 616 (2010)
when a reopening motion is untimely, the section 3.326(a)(1) "exceptionally grave circumstances" test supplants the "significant issue" standard under section 2.326(a)(2); LBP-10-21, 72 NRC 616 (2010)
when petitioner seeks to introduce a new contention after the record has been closed, it should address the reopening standards contemporaneously with a late-filed intervention petition, which must satisfy the standards for both contention admissibility and late filing; LBP-10-21, 72 NRC 616 (2010)
where a motion to introduce a new contention foundered on several of the initial criteria, the board found it unnecessary to analyze all of the other factors; LBP-10-19, 72 NRC 529 (2010)
MOTIONS TO STRIKE
intervenor's appeal 3 days out of time was accepted when applicants' motion to strike failed to even hint at prejudice; LBP-10-21, 72 NRC 616 (2010)
MOTIONS TO WITHDRAW
absent written consent of the party and the prior appearance of another attorney, many courts require that an attorney file a motion to withdraw; LBP-10-21, 72 NRC 616 (2010)
MUNITIONS
petitioner's argument that high-explosive munitions could fall onto depleted uranium, pulverizing and igniting the DU and generating aerosols that might travel through the air, providing an inhalation pathway for offsite exposure was contradicted by the Army's statement that it does not use high-impact explosives in the area where DU is present; CLI-10-20, 72 NRC 185 (2010)

SUBJECT INDEX

NATIONAL ENVIRONMENTAL POLICY ACT
a rule of reason applies to the assessment of the adequacy of a NEPA analysis; CLI-10-18, 72 NRC 56 (2010)
a rule of reason is implicit in NEPA's requirement that an agency consider reasonable alternatives to a proposed action; CLI-10-18, 72 NRC 56 (2010); CLI-10-22, 72 NRC 202 (2010)
a SAMA analysis contention was found to be inadmissible because it lacked supporting information regarding the relative costs and benefits of that proposed alternative; LBP-10-15, 72 NRC 257 (2010)
accuracy and reliability of the agency's need-for-power determination, as reflected in the draft EIS, is material to the licensing decision; LBP-10-24, 72 NRC 720 (2010)
adequacy of the NEPA alternatives analysis is judged on the substance of the alternatives rather than the sheer number of alternatives examined; CLI-10-18, 72 NRC 56 (2010)
agencies are not allowed to define objectives of a project so narrowly as to preclude a reasonable consideration of alternatives; CLI-10-18, 72 NRC 56 (2010)
alternatives analysis is the heart of the environmental impact statement; LBP-10-24, 72 NRC 720 (2010)
alternatives that do not advance the purpose of the project will not be considered reasonable or appropriate; CLI-10-18, 72 NRC 56 (2010)
although "severe accident," "severe accident mitigation alternatives," and "SAMA" are not defined in NRC's NEPA regulations, the NRC policy documents that originated the terms clearly limit them to nuclear reactors and do not include spent fuel pools or storage; LBP-10-15, 72 NRC 257 (2010)
although substantial weight is accorded to a license applicant's preferences, if the identified purpose of a proposed project reasonably may be accomplished at locations other than the proposed site, the board may require consideration of those alternative sites; CLI-10-18, 72 NRC 56 (2010)
although the discussion of alternatives in the environmental assessment need only be brief, it must be sufficient to fully comply with the requirement to study, develop, and describe appropriate alternatives; CLI-10-18, 72 NRC 56 (2010)
although the duty to comply with NEPA falls upon the agency and not upon the applicant or licensee, the requirements of Part 51 must be met by the applicant; LBP-10-16, 72 NRC 361 (2010)
although the obligations under NEPA fall to the agency and therefore the NRC Staff, petitioners are required to raise environmental objections based on the applicant's environmental report; LBP-10-15, 72 NRC 257 (2010)
an agency is required to address the purpose of the proposed project, reasonable alternatives to the project, and to what extent the agency should explore each particular reasonable alternative; CLI-10-18, 72 NRC 56 (2010)
an agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative; LBP-10-24, 72 NRC 720 (2010)
an environmental impact statement is not intended to be a research document; CLI-10-22, 72 NRC 202 (2010)
an environmental impact statement must include a detailed statement of reasonable alternatives to a proposed action; LBP-10-24, 72 NRC 720 (2010)
as long as all reasonable alternatives have been considered and an appropriate explanation is provided as to why an alternative was eliminated, the regulatory requirement is satisfied; CLI-10-18, 72 NRC 56 (2010)
by defining significantly different information in the draft EIS as a permissible basis for filing a new contention, the Commission has in effect concluded that such new information is good cause for filing a new contention; LBP-10-24, 72 NRC 720 (2010)
certain actions are designated as categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement; CLI-10-18, 72 NRC 56 (2010)
challenges to a severe accident mitigation design alternatives analysis are within the scope of a combined license proceeding; LBP-10-14, 72 NRC 101 (2010)
compliance with NEPA requires that, if new and significant information arises after the date of the issuance of the EIS and before the agency decision, then the agency must supplement or revise its EIS and consider such information; LBP-10-15, 72 NRC 257 (2010)
consideration of energy efficiency is not a reasonable alternative, where that alternative would not achieve applicant's goal of providing additional power to sell on the open market, and is not possible for an

applicant who has no transmission or distribution system of its own, and no link to the ultimate power consumer; CLI-10-21, 72 NRC 197 (2010)
contention raising question of whether a quantitative as opposed to qualitative analysis of terrorist attacks and the alternatives for mitigation and prevention is necessary is referred to the Commission as a novel issue; LBP-10-15, 72 NRC 257 (2010)
Council on Environmental Quality regulations receive substantial deference from federal courts in interpreting the requirements of NEPA; LBP-10-16, 72 NRC 361 (2010)
economic impact of a proposed action on ratepayers is outside the scope of a NEPA analysis; LBP-10-14, 72 NRC 101 (2010)
environmental review in the license renewal process is unlike the Commission's Part 54 review because the NEPA review covers all environmental impacts associated with license renewal and is not limited to aging-related issues; LBP-10-15, 72 NRC 257 (2010)
even if offsite construction does not appear to be part of the plan, it does not follow that offsite consequences need not be considered; CLI-10-18, 72 NRC 56 (2010)
existence of reasonable but unexamined alternatives renders an environmental impact statement inadequate; LBP-10-24, 72 NRC 720 (2010)
federal agencies are required to consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-10-24, 72 NRC 720 (2010)
federal agencies are required to study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources; CLI-10-18, 72 NRC 56 (2010)
federal agencies are required, to the fullest extent possible, to include in every recommendation or report on proposals for major federal actions significantly affecting the quality of the human environment a detailed statement on the environmental impact of the proposed action; CLI-10-18, 72 NRC 56 (2010)
for a contention regarding environmental impacts of spent fuel storage to be within the scope of an operating license renewal proceeding, petitioner must obtain a waiver under 10 C.F.R. 2.335(d); LBP-10-15, 72 NRC 257 (2010)
further review of need for power and alternative energy sources is precluded once a construction permit has been issued; CLI-10-29, 72 NRC 556 (2010)
general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided; CLI-10-18, 72 NRC 56 (2010)
given that consideration of terrorist attacks is part of the NRC's NEPA obligations in the Ninth Circuit, the issue of whether terrorist attacks have been fully considered in the NEPA analysis for a power plant in that jurisdiction is plainly material to the decision the NRC must make; LBP-10-15, 72 NRC 257 (2010)
if issuing a license involves oversight of a private project rather than a federally sponsored project, the agency is entitled to give the applicant's preferences substantial weight when considering project design alternatives; LBP-10-14, 72 NRC 101 (2010)
if significant new information becomes available, NRC Staff must explain how it took the new information into account in determining whether the additional generating capacity is required; LBP-10-24, 72 NRC 720 (2010)
impacts that are reasonably foreseeable under NEPA must be analyzed publicly, even if their probability of occurrence is low; CLI-10-18, 72 NRC 56 (2010)
impacts that are remote and speculative or inconsequentially small need not be examined; LBP-10-14, 72 NRC 101 (2010)
inherent in any forecast of future electric power demands is a substantial margin of uncertainty; LBP-10-24, 72 NRC 720 (2010)
intervenor that has sufficient information to file a NEPA contention but delays that filing until publication of the environmental impact statement does so at its peril; LBP-10-24, 72 NRC 720 (2010)
it is not enough to consider only the proposed action and the no-action alternative in an environmental assessment; CLI-10-18, 72 NRC 56 (2010)
it is the NRC Staff, not the intervenors, that has the burden of complying with NEPA; LBP-10-24, 72 NRC 720 (2010)
license renewal environmental reports must include a severe accident mitigation alternatives analysis if not previously considered by NRC Staff; LBP-10-15, 72 NRC 257 (2010)

licensing boards do not sit to flyspeck environmental documents or to add details or nuances; LBP-10-14, 72 NRC 101 (2010)
NRC has broad discretion to determine how thoroughly it needs to analyze a particular subject for NEPA compliance; LBP-10-14, 72 NRC 101 (2010)
NRC is not required to assess the potential health effects of consuming irradiated food; CLI-10-18, 72 NRC 56 (2010)
NRC is not required to consider every imaginable alternative to a proposed action, but rather only reasonable alternatives; LBP-10-14, 72 NRC 101 (2010)
NRC is prohibited from using NEPA to impose additional effluent limitations on an applicant's wastewater discharges to surface waters; LBP-10-14, 72 NRC 101 (2010)
NRC is required to provide a reasonable mitigation alternatives analysis, containing reasonable estimates, including full disclosures of any known shortcomings in methodology, incomplete or unavailable information, and significant uncertainties; CLI-10-22, 72 NRC 202 (2010)
NRC may, consistent with NEPA, define baseload power generation as the purpose of and need for a project; LBP-10-24, 72 NRC 720 (2010)
NRC regulations do not impose a numerical floor on alternatives to be considered; CLI-10-18, 72 NRC 56 (2010)
NRC Staff is required under NEPA to evaluate reasonable technological and geographical alternatives to the proposed irradiator; CLI-10-18, 72 NRC 56 (2010)
NRC Staff must balance the benefits of the project against its environmental costs; LBP-10-24, 72 NRC 720 (2010)
on issues arising under the National Environmental Policy Act, petitioner shall file contentions based on the applicant's environmental report; LBP-10-24, 72 NRC 720 (2010)
petitioner has alleged sufficient new information concerning the seismic situation to raise a prima facie showing that strict application of the generic NEPA analysis of the management of spent fuel in nuclear reactors would not serve the purpose for which Part 51 Appendix B and 10 C.F.R. 51.53(c)(2) were adopted; LBP-10-15, 72 NRC 257 (2010)
petitioner may amend contentions based on the applicant's environmental report or file new contentions 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-10-24, 72 NRC 720 (2010)
petitioner need not submit a sensitivity analysis in order to establish that a SAMA-related contention is material; LBP-10-15, 72 NRC 257 (2010)
project goals are to be determined by the applicant, not the agency; CLI-10-18, 72 NRC 56 (2010)
purpose of the cost-benefit analysis called for by NEPA is to identify each significant environmental cost and to determine whether, all other factors considered, on balance the incurring of that cost is warranted; LBP-10-24, 72 NRC 720 (2010)
severe accident mitigation alternatives analyses are rooted in a cost-benefit assessment and the purpose of the assessment is to identify plant changes whose costs would be less than their benefit; LBP-10-14, 72 NRC 101 (2010)
Staff's failure to disclose data underlying its terrorism analysis in the final environmental assessment failed to meet the NEPA-mandated hard-look standard; CLI-10-18, 72 NRC 56 (2010)
the alternatives provision of section 102(2)(E) applies both when an agency prepares an environmental impact statement and when it prepares an environmental assessment; CLI-10-18, 72 NRC 56 (2010)
the central purpose of Part 51 rules is to allow NRC to comply with NEPA by identifying and evaluating environmental impacts that are generic to reactor license renewal proceedings and then allowing applicant and NRC to dispense with site-specific evaluations of such environmental impacts in situations covered by the generic analysis; LBP-10-15, 72 NRC 257 (2010)
the Commission may find special circumstances warranting a categorical exclusion upon its own initiative, or upon the request of an interested person; CLI-10-18, 72 NRC 56 (2010)
the cost-benefit analysis involves the scrutiny of many factors, among them, offsetting benefits, available alternatives, and the possible means (and attendant costs) of reducing the environmental harm; LBP-10-24, 72 NRC 720 (2010)
the duty to consider the environmental impacts of a proposed action incorporates, at least implicitly, considerations of the probability of a particular consequence occurring; LBP-10-15, 72 NRC 257 (2010)

the general rule applicable to cases involving differences or changes in demand forecasts is not whether applicant will need additional generating capacity but when; LBP-10-24, 72 NRC 720 (2010)
the hard-look doctrine is subject to a rule of reason that the Commission has interpreted as obligating the agency to consider all reasonable alternatives to the proposed action; LBP-10-14, 72 NRC 101 (2010)
the NEPA requirement to prepare an environmental impact statement is a procedural mechanism designed to ensure that agencies give proper consideration to the environmental consequences of their actions; LBP-10-24, 72 NRC 720 (2010)
the obligation of agencies to consider alternatives is a lesser one under an environmental assessment than under an environmental impact statement; CLI-10-18, 72 NRC 56 (2010)
the range of alternatives that must be considered need not extend beyond those reasonably related to the purposes of the project and a rule of reason necessarily informs that choice; CLI-10-18, 72 NRC 56 (2010)
the rule of reason excludes consideration of demand-side management if the proposed new plant is intended to be a merchant plant, selling power on the open market, because it is not feasible for licensee to engage in demand-side management; CLI-10-21, 72 NRC 197 (2010)
the statute does not mandate particular results, but simply prescribes the necessary process; LBP-10-24, 72 NRC 720 (2010)
the statute imposes procedural requirements on the NRC to take a hard look at the environmental impacts of building and operating a nuclear reactor; LBP-10-14, 72 NRC 101 (2010)
there must be a finding that something is remote and speculative to preclude it from further analysis, and there must be support in the agency's record of decision to justify this finding; LBP-10-14, 72 NRC 101 (2010)
when a new contention is filed challenging new data or conclusions in NRC's environmental documents, the timeliness of the new contention is based on whether it was filed promptly after the NRC's NEPA document became publicly available, not whether it was filed promptly after the information on which the intervenor bases its challenge became publicly available; LBP-10-24, 72 NRC 720 (2010)
when reviewing a discrete license application filed by a private applicant, a federal agency may appropriately accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project; CLI-10-18, 72 NRC 56 (2010)
when there are substantial changes in a proposed action that are relevant to environmental concerns, NRC Staff will prepare a supplement to a final environmental impact statement; LBP-10-17, 72 NRC 501 (2010)
whether and how the Staff fulfills its National Historic Preservation Act and NEPA obligations are issues that could form the basis of a new contention; LBP-10-16, 72 NRC 361 (2010)
NATIONAL HISTORIC PRESERVATION ACT
an Indian tribe claims a procedural interest in identifying, evaluating, and establishing protections for historic and cultural resources; LBP-10-16, 72 NRC 361 (2010)
federal agencies must follow notification and consultation procedures prior to a federal undertaking to consider the undertaking's effect on historic properties; LBP-10-16, 72 NRC 361 (2010)
prior to issuance of any license, federal agencies must take into account the effect of the federal action on any area eligible for inclusion in the National Register of Historic Places; LBP-10-16, 72 NRC 361 (2010)
to establish an injury in fact, a party merely has to show some threatened concrete interest personal to the party that the National Historic Preservation Act was designed to protect; LBP-10-16, 72 NRC 361 (2010)
tribes that have addressed procedural violations of the National Historic Preservation Act have uniformly been granted standing under the relaxed standard and have proceeded directly to the merits of the NHPA claim; LBP-10-16, 72 NRC 361 (2010)
whether and how the Staff fulfills its National Historic Preservation Act and NEPA obligations are issues that could form the basis of a new contention; LBP-10-16, 72 NRC 361 (2010)
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT
NRC is prohibited from using NEPA to impose additional effluent limitations on an applicant's wastewater discharges to surface waters; LBP-10-14, 72 NRC 101 (2010)

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT
notification and inventory procedures are required so that Indian cultural objects and burial remains found on federal lands will be repatriated to the appropriate tribe; LBP-10-16, 72 NRC 361 (2010)
NATIVE AMERICANS
a consulting tribe is entitled to a reasonable opportunity to identify its concerns about historic properties, to advise on the identification and evaluation of them (including those of traditional religious and cultural importance), to articulate its views on the undertaking's effects on such properties, and to participate in the resolution of adverse effects; LBP-10-16, 72 NRC 361 (2010)
a federally recognized Indian tribe may seek to participate in a proceeding; LBP-10-16, 72 NRC 361 (2010)
a tribe is free to file a contention later in the proceeding if, after Staff releases its environmental documents, the tribe believes that the Staff has failed to satisfy its obligations under NEPA and the National Historic Preservation Act; LBP-10-16, 72 NRC 361 (2010)
a tribe may become a consulting party if its property, potentially affected by a federal undertaking, has religious or cultural significance; LBP-10-16, 72 NRC 361 (2010)
an Indian tribe claims a procedural interest in identifying, evaluating, and establishing protections for historic and cultural resources; LBP-10-16, 72 NRC 361 (2010)
criteria and procedures pursuant to which a federal land manager may issue excavation permits for federal lands are provided as well as notification to Indian tribes if permits may result in harm to cultural or religious sites; LBP-10-16, 72 NRC 361 (2010)
federal agencies must follow notification and consultation procedures prior to a federal undertaking to consider the undertaking's effect on historic properties; LBP-10-16, 72 NRC 361 (2010)
federal agencies should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties, and should invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement; LBP-10-16, 72 NRC 361 (2010)
it is not the duty of applicant to consult with a tribe regarding cultural resources at a proposed site, but instead is the duty of the agency to initiate and follow through with the consultation process; LBP-10-16, 72 NRC 361 (2010)
preservation of Native American cultural traditions is a protected interest under federal law; LBP-10-16, 72 NRC 361 (2010)
tribes that have addressed procedural violations of the National Historic Preservation Act have uniformly been granted standing under the relaxed standard and have proceeded directly to the merits of the NHPA claim; LBP-10-16, 72 NRC 361 (2010)
where a facility will not be located within an Indian tribe's boundaries, the tribe must meet the standing requirements imposed by 10 C.F.R. 2.309(d)(1); LBP-10-16, 72 NRC 361 (2010)
NEED FOR POWER
accuracy and reliability of the agency's need-for-power determination, as reflected in the draft EIS, is material to the licensing decision; LBP-10-24, 72 NRC 720 (2010)
contention that calls for a more detailed analysis than NRC requires is inadmissible; LBP-10-24, 72 NRC 720 (2010)
fluctuations in demand that may occur over a period of several years, such as changes brought about by an economic recession, are not a legally sufficient ground for challenging the need for power analysis; LBP-10-24, 72 NRC 720 (2010)
further review of need for power and alternative energy sources are precluded once a construction permit has been issued; CLI-10-29, 72 NRC 556 (2010)
if significant new information becomes available, NRC Staff must explain how it took the new information into account in determining whether the additional generating capacity is required; LBP-10-24, 72 NRC 720 (2010)
inherent in any forecast of future electric power demands is a substantial margin of uncertainty; LBP-10-24, 72 NRC 720 (2010)
the general rule applicable to cases involving differences or changes in demand forecasts is not whether applicant will need additional generating capacity but when; LBP-10-24, 72 NRC 720 (2010)

NOTICE AND COMMENT PROCEDURES
when an adjudicating agency retroactively applies a new legal standard that significantly alters the rules of the game, the agency is obliged to give litigants proper notice and a meaningful opportunity to adjust; CLI-10-23, 72 NRC 210 (2010)
NOTIFICATION
criteria and procedures pursuant to which a federal land manager may issue excavation permits for federal lands are provided as well as notification to Indian tribes if permits may result in harm to cultural or religious sites; LBP-10-16, 72 NRC 361 (2010)
federal agencies must follow notification and consultation procedures prior to a federal undertaking to consider the undertaking's effect on historic properties; LBP-10-16, 72 NRC 361 (2010)
NRC GUIDANCE DOCUMENTS
because of the security-related SUNSI categorization of a Staff guidance document used to assess an application's compliance with NRC rules, the Staff would not have to produce the document but would be required to identify the document as part of its continuing duty of disclosure; CLI-10-24, 72 NRC 451 (2010)
in proffering contentions that challenge an application, petitioner or intervenor must provide support, including references to sources and documents on which it intends to rely, and a guidance document could be one of those sources; CLI-10-24, 72 NRC 451 (2010)
litigant opposing a licensing action is entitled to challenge the sufficiency of any guidance document on which a licensee or applicant relies, but it must do so with substantive support; CLI-10-17, 72 NRC 1 (2010)
Staff guidance documents are not legally binding, but can be useful in instances where legal authority is lacking; CLI-10-24, 72 NRC 451 (2010); LBP-10-16, 72 NRC 361 (2010)
the standard review plan provides guidance but does not impose requirements on license renewal applicants; CLI-10-17, 72 NRC 1 (2010)
NRC INSPECTION
based on results of its problem identification and resolution biennial team inspections with annual followup of selected issues at licensed facilities, NRC takes any appropriate enforcement action to ensure compliance with 10 C.F.R. Part 50, Appendix B, Criterion XVI; DD-10-1, 72 NRC 149 (2010)
NRC POLICY
because it disfavors piecemeal appeals, the Commission will grant interlocutory review only in extraordinary circumstances; CLI-10-29, 72 NRC 556 (2010)
contentions that simply state the petitioner's views about what regulatory policy should be do not present a litigable issue; LBP-10-21, 72 NRC 616 (2010)
it is NRC stated policy to take into account Council on Environmental Quality regulations voluntarily, subject to some conditions; CLI-10-18, 72 NRC 56 (2010)
licensing boards should not accept in individual license proceedings contentions that are or are about to become the subject of general rulemaking by the Commission; CLI-10-19, 72 NRC 98 (2010)
the Commission has long endorsed a balanced approach to hearings that both expedites the hearing process and ensures fairness in order to produce a record that leads to high-quality decisions that adequately protect the public health and safety, the common defense and security, and the environment; LBP-10-21, 72 NRC 616 (2010)
NRC PROCEEDINGS
collateral estoppel doctrine has long been recognized as part of NRC adjudicatory practice; CLI-10-23, 72 NRC 210 (2010)
NRC STAFF
although the duty to comply with NEPA falls upon the agency and not upon the applicant or licensee, the requirements of Part 51 must be met by the applicant; LBP-10-16, 72 NRC 361 (2010)
an appeal as of right by the NRC Staff is permitted on the question of whether a request for access to sensitive unclassified nonsafeguards information should have been denied in whole or in part; CLI-10-24, 72 NRC 451 (2010)
it is not the duty of applicant to consult with a tribe regarding cultural resources at a proposed site, but instead is the duty of the agency to initiate and follow through with the consultation process; LBP-10-16, 72 NRC 361 (2010)

Staff has authority to recategorize a violation from a Severity Level III to a violation with no assigned severity level; LBP-10-18, 72 NRC 519 (2010)
the decision to docket, and the subsequent handling of an application, is within the discretion of the Staff; LBP-10-17, 72 NRC 501 (2010)
See also Discovery Against NRC Staff
NRC STAFF REVIEW
boards may not direct the Staff in the performance of its administrative functions; LBP-10-17, 72 NRC 501 (2010)
boards may not order the Staff to cease review of an applicant's revised application or direct the Staff to require an applicant to submit a new application; LBP-10-17, 72 NRC 501 (2010)
contentions that inappropriately focus on Staff's review of the application rather than on the errors and omissions of the application itself are inadmissible; CLI-10-27, 72 NRC 481 (2010)
determination of economic benefits and costs that are tangential to environmental consequences are within a wide area of agency discretion; LBP-10-24, 72 NRC 720 (2010)
if issuing a license involves oversight of a private project rather than a federally sponsored project, the agency is entitled to give the applicant's preferences substantial weight when considering project design alternatives; LBP-10-14, 72 NRC 101 (2010)
if significant new information becomes available, NRC Staff must explain how it took the new information into account in determining whether the additional generating capacity is required; LBP-10-24, 72 NRC 720 (2010)
it is the NRC Staff, not the intervenors, that has the burden of complying with NEPA; LBP-10-24, 72 NRC 720 (2010)
license applications may be modified or improved during the NRC review process; LBP-10-17, 72 NRC 501 (2010)
NEPA imposes procedural requirements on NRC to take a hard look at the environmental impacts of building and operating a nuclear reactor; LBP-10-14, 72 NRC 101 (2010)
NEPA requires evaluation of reasonable technological and geographical alternatives to a proposed irradiator; CLI-10-18, 72 NRC 56 (2010)
NRC Staff is obliged under NEPA to supplement its environmental review documents if there is new and significant information; CLI-10-29, 72 NRC 556 (2010)
potential scope of adjudicatory hearings in license renewal proceedings is the same as the scope of the Staff's review; LBP-10-15, 72 NRC 257 (2010)
the manner in which Staff conducts its review is outside the scope of a proceeding; LBP-10-17, 72 NRC 501 (2010)
there must be a finding that something is remote and speculative to preclude it from further analysis, and there must be support in the agency's record of decision to justify this finding; LBP-10-14, 72 NRC 101 (2010)
NUCLEAR POWER PLANTS
although "severe accident," "severe accident mitigation alternatives," and "SAMA" are not defined in NRC's NEPA regulations, the NRC policy documents that originated the terms clearly limit them to nuclear reactors and do not include spent fuel pools or storage; LBP-10-15, 72 NRC 257 (2010)
NUCLEAR REGULATORY COMMISSION, AUTHORITY
although a request for suspension of a proceeding does not fit cleanly into NRC procedural rules for stays, the Commission exercises discretion and consider petitioner's request; CLI-10-17, 72 NRC 1 (2010)
although interlocutory appeal is denied, the Commission exercises its inherent supervisory authority over adjudications to take sua sponte review of a board order; CLI-10-27, 72 NRC 481 (2010)
as an exercise of the Commission's inherent supervisory authority over adjudicatory proceedings, the Commission directs the board to provide the Commission with a status report outlining the board's timetable for resolving all pending matters; CLI-10-18, 72 NRC 56 (2010)
discretionary Commission review of a presiding officer's initial decision is allowed under 10 C.F.R. 2.341(b)(1); CLI-10-17, 72 NRC 1 (2010)
granting of petitions for review is discretionary, given due weight to the existence of a substantial question with respect to the five considerations listed in 10 C.F.R. 2.341(b)(4); CLI-10-18, 72 NRC 56 (2010)

in its supervisory capacity, the Commission provides guidance on the "need for SUNSI" analysis, for use in those instances when an access order applies; CLI-10-24, 72 NRC 451 (2010)
parties should not seek interlocutory review by invoking the grounds under which the Commission might exercise its supervisory authority; CLI-10-30, 72 NRC 564 (2010)
the agency has broad discretion to determine how thoroughly it needs to analyze a particular subject for NEPA compliance; LBP-10-14, 72 NRC 101 (2010)
the Commission may find special circumstances warranting a categorical exclusion upon its own initiative, or upon the request of an interested person; CLI-10-18, 72 NRC 56 (2010)
the Commission may take discretionary review of a licensing board's initial decision; CLI-10-23, 72 NRC 210 (2010)
the Commission may, at its discretion, grant a party's request for interlocutory review of a board decision; CLI-10-29, 72 NRC 556 (2010); CLI-10-30, 72 NRC 564 (2010)
the Commission refrains from exercising its authority to make de novo findings of fact in situations where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact; CLI-10-18, 72 NRC 56 (2010)
where the Commission found that the board did not provide clarity on the scope of admitted contentions, it exercised its authority to reformulate the contentions; CLI-10-18, 72 NRC 56 (2010)
NUCLEAR REGULATORY COMMISSION, JURISDICTION
once a licensing board has concluded board action on a licensing case, jurisdiction to decide a motion to reopen regarding that proceeding passes to the Commission, which retains jurisdiction until the license in question has been issued; LBP-10-21, 72 NRC 616 (2010)
the Commission's referral of a motion to reopen to the ASLBP and subsequent establishment of the board gives the board jurisdiction over the motion; LBP-10-21, 72 NRC 616 (2010)
NUCLEAR WASTE POLICY ACT
no requirement for a quantitative evaluation of an individual barrier's capabilities appears in the statutory language of the Nuclear Waste Policy Act; LBP-10-22, 72 NRC 661 (2010)
NRC is given flexibility in determining how best to provide for the use of a system of multiple barriers in the design of the high-level waste repository; LBP-10-22, 72 NRC 661 (2010)
section 121 does not require that each barrier provide either wholly independent protection or a specifically quantified amount of protection in the high-level waste repository; LBP-10-22, 72 NRC 661 (2010)
OFFER OF PROOF
because appellant submitted no offer of proof, its case could be so weak that the denial of a right to reply by the licensing board would have been harmless error; CLI-10-23, 72 NRC 210 (2010)
if appellant had submitted an offer of proof, indicating what rebuttal evidence it would have offered to the board, then the Commission might have some basis for determining whether that evidence would be substantial enough to justify a remand to the Board; CLI-10-23, 72 NRC 210 (2010)
OFFICIAL NOTICE
a board rested its findings regarding a contention, in part, on certain facts that it officially noticed; CLI-10-17, 72 NRC 1 (2010)
OPERATING LICENSE PROCEEDINGS
administrative regularity in the regulatory process is assumed, and review of the operating license application takes place independently of that associated with plant construction; CLI-10-29, 72 NRC 556 (2010)
further review of need for power and alternative energy sources are precluded once a construction permit has been issued; CLI-10-29, 72 NRC 556 (2010)
OPERATING LICENSE RENEWAL
after issuance of a renewed license, licensee may demonstrate that its use of an aging management program identified in the GALL Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period; CLI-10-17, 72 NRC 1 (2010)
aging management review addresses activities identified in 10 C.F.R. 54.21(a)(3) and (c)(1) regarding the integrated plant assessment; CLI-10-17, 72 NRC 1 (2010)
although "severe accident," "severe accident mitigation alternatives," and "SAMA" are not defined in NRC's NEPA regulations, the NRC policy documents that originated the terms clearly limit them to nuclear reactors and do not include spent fuel pools or storage; LBP-10-15, 72 NRC 257 (2010)

an aging management program is intended to manage the effects of aging on a particular component by, e.g., ensuring that the fatigue usage factor for the component does not exceed the design code limit; CLI-10-17, 72 NRC 1 (2010)
because environmentally adjusted cumulative usage factors are not contained in licensee's current licensing basis, they cannot be time-limited aging analyses and thereby a prerequisite to license renewal; CLI-10-17, 72 NRC 1 (2010)
Commission review is in the public interest if the decision could affect pending and future license renewal determinations; CLI-10-17, 72 NRC 1 (2010)
feedwater, core spray, and reactor recirculation outlet nozzles, as part of the reactor coolant pressure boundary, must meet the metal-fatigue requirements for Class 1 components in Section III of the ASME Code; CLI-10-17, 72 NRC 1 (2010)
licensee must comply with Part 50 regulations, including the provisions requiring compliance with the ASME Code, during the period of extended operation; CLI-10-17, 72 NRC 1 (2010)
NRC is not barred from considering licensee's past and continuing managerial and performance problems when it determines whether licensee has demonstrated that actions will be taken to manage the effects of aging during the period of extended operation; LBP-10-15, 72 NRC 257 (2010)
the aging management review for license renewal does not focus on all aging-related issues; CLI-10-27, 72 NRC 481 (2010)
the Generic Aging Lessons Learned Report sets forth three ways that a license renewal applicant proposing to use an aging management plan may comply with the requirements of 10 C.F.R. 54.21(c)(1)(iii); CLI-10-17, 72 NRC 1 (2010)
the only safety 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; CLI-10-27, 72 NRC 481 (2010)
the standard review plan provides guidance but does not impose requirements on license renewal applicants; CLI-10-17, 72 NRC 1 (2010)
OPERATING LICENSE RENEWAL PROCEEDINGS
absence of perfect compliance by licensee does not rebut the presumption of compliance or support admission of a contention that the application does not satisfy 10 C.F.R. 54.29(a), but a consistent, longstanding, and continuing pattern of problems in a specific area that is relevant to managing aging equipment will; LBP-10-15, 72 NRC 257 (2010)
allegation of facts, with supporting documentation, of a longstanding and continuing pattern of noncompliance or management difficulties that are reasonably linked to whether licensee will actually be able to adequately manage aging in accordance with the current licensing basis during the period of extended operation can be an admissible contention; LBP-10-15, 72 NRC 257 (2010)
broad-based issues akin to safety culture, such as operational history, quality assurance, quality control, management competence, and human factors, are beyond the bounds of a license renewal proceeding; CLI-10-27, 72 NRC 481 (2010)
challenges to the current licensing basis are outside the scope of a license renewal proceeding; LBP-10-15, 72 NRC 257 (2010)
for a contention regarding environmental impacts of spent fuel storage to be within the scope of an operating license renewal proceeding, petitioner must obtain a waiver under 10 C.F.R. 2.335(d); LBP-10-15, 72 NRC 257 (2010)
license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to NRC ongoing compliance oversight activity; CLI-10-27, 72 NRC 481 (2010)
petitioner has presented a prima facie showing for waiver of the NRC regulation covering the environmental impacts of spent fuel pool accidents generically, and has shown that its contention concerning earthquake-induced spent fuel pool accidents is otherwise admissible; LBP-10-15, 72 NRC 257 (2010)
petitioner's assertion that terrorist-act-originated SAMA analysis is required by Ninth Circuit law satisfies the requirements of 10 C.F.R. 2.309(f)(1)(iii) that the issue be within the scope of a license renewal proceeding; LBP-10-15, 72 NRC 257 (2010)
potential scope of adjudicatory hearings for license renewal is the same as the scope of the Staff's review; LBP-10-15, 72 NRC 257 (2010)

the portion of the current licensing basis that can be affected by the detrimental effects of aging is limited to the design bases aspects of the CLB; LBP-10-15, 72 NRC 257 (2010)
the scope of a proceeding under 10 C.F.R. Part 54 encompasses a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses; CLI-10-17, 72 NRC 1 (2010)
ORAL ARGUMENT
as NRC hearings have moved away from the traditional trial-type adversarial format and toward a more informal model, the inquisitorial role of the presiding officer necessarily has increased; CLI-10-17, 72 NRC 1 (2010)
diligent, even aggressive, probing for weaknesses in a witness's or counsel's position may be necessary if presiding officers are to fulfill their duty to develop an adequate record that will contribute to informed decisionmaking; CLI-10-17, 72 NRC 1 (2010)
once a hearing is granted under Subpart L, an informal oral hearing on the merits is required except in limited circumstances; CLI-10-18, 72 NRC 56 (2010)
to enable presiding officers to fulfill their duty, they have been given broad authority to examine witnesses at evidentiary hearings; CLI-10-17, 72 NRC 1 (2010)
PARTIES
the party to be prevented from relitigating an issue must have been a party to the prior action, but the party seeking to prevent relitigation through the application of collateral estoppel need not have been a party; CLI-10-23, 72 NRC 210 (2010)
PERFORMANCE ASSESSMENT
adequate confidence in the assessment for the high-level waste repository is derived from sufficient analyses, data, and the technical basis offered to demonstrate compliance with postclosure performance objectives; LBP-10-22, 72 NRC 661 (2010)
analysis is required of only those features, events, and processes that cannot be excluded on the basis of low probability of occurrence and whose exclusion would result in a significant change in the results of the performance assessment for the high-level waste repository in the first 10,000-year postclosure period; LBP-10-22, 72 NRC 661 (2010)
if the performance margins analysis for the high-level waste repository is needed to establish adequate confidence in the total system performance assessment, then it is subject to the quality assurance requirements of 10 C.F.R. 63.142; LBP-10-22, 72 NRC 661 (2010)
only features, events, and processes that produce significant changes in releases or doses within the first 10,000 years after disposal in the high-level waste repository must be included in performance assessments; LBP-10-22, 72 NRC 661 (2010)
the performance margins analysis cannot be used to validate or provide confidence in the total systems performance assessment if its data and models are not qualified under DOE's quality assurance program; LBP-10-22, 72 NRC 661 (2010)
PERJURY
the entire focus of a perjury inquiry centers on what the testifier knew and when he knew it, in order to establish beyond a reasonable doubt that he knew his testimony to be false when he gave it; CLI-10-23, 72 NRC 210 (2010)
PERMITS
criteria and procedures pursuant to which a federal land manager may issue excavation permits for federal lands are provided as well as notification to Indian tribes if permits may result in harm to cultural or religious sites; LBP-10-16, 72 NRC 361 (2010)
See also Construction Permits
PLEADINGS
a party at risk of filing out of time can request an extension, doing so well before the time specified expires; LBP-10-21, 72 NRC 616 (2010)
an appeal that merely recites earlier arguments without explaining how they demonstrate legal error or abuse of discretion on the board's part does not satisfy NRC pleading standards; CLI-10-21, 72 NRC 197 (2010)
counsel's alleged unfamiliarity with the agency's rules of practice or counsel's asserted busy schedule are not satisfactory explanations for late filings; LBP-10-21, 72 NRC 616 (2010)

it is not the board's duty to forage through a petition in order to find statements or other support that may be located in various portions of the petition but not referenced in the contention; LBP-10-16, 72 NRC 361 (2010)
participant filing out of time must offer a satisfactory explanation for its lateness, including, if necessary, an account as to why a request for extension could not have been filed beforehand; LBP-10-21, 72 NRC 616 (2010)
petitioners represented by counsel are held to higher standard of specificity in pleading; CLI-10-20, 72 NRC 185 (2010)
POWER UPRATE
extended power uprate proceeding that has been terminated may not be reopened; CLI-10-17, 72 NRC 1 (2010)
PRECEDENTIAL EFFECT
legal authorities may be binding, adverse, or merely persuasive, but all authorities must possess some legal and precedential/persuasive value; LBP-10-21, 72 NRC 616 (2010)
unreviewed board decisions lack precedential effect; CLI-10-23, 72 NRC 210 (2010); CLI-10-29, 72 NRC 556 (2010); CLI-10-30, 72 NRC 564 (2010)
PREJUDICE
Staff's petition for review is granted on the grounds that Staff has demonstrated substantial questions as to the board's correct application of NEPA jurisprudence, and as to whether certain actions taken by the board constituted prejudicial procedural error; CLI-10-18, 72 NRC 56 (2010)
to prevail on a disqualification motion, petitioner first must demonstrate that the purported instances of bias had a substantial impact on the outcome of the proceeding; CLI-10-17, 72 NRC 1 (2010)
PRESIDING OFFICER
a judge's use of strong language toward a party or in expressing his views on matters before him does not constitute evidence of personal bias; CLI-10-17, 72 NRC 1 (2010)
PRESIDING OFFICER, AUTHORITY
as NRC hearings have moved away from the traditional trial-type adversarial format and toward a more informal model, the inquisitorial role of the presiding officer necessarily has increased; CLI-10-17, 72 NRC 1 (2010)
diligent, even aggressive, probing for weaknesses in a witness's or counsel's position may be necessary if presiding officers are to fulfill their duty to develop an adequate record that will contribute to informed decisionmaking; CLI-10-17, 72 NRC 1 (2010)
in procedural and scheduling matters, where first-hand contact with and appreciation for all the circumstances surrounding a case are necessary, maximum reliance on the proper discretion of a presiding officer is essential; CLI-10-17, 72 NRC 1 (2010)
the informal procedural rules of Part 2, Subpart L place greater emphasis and responsibility on the presiding officer to oversee the development of a full and complete record; CLI-10-17, 72 NRC 1 (2010)
to enable presiding officers to fulfill their duty, they have been given broad authority to examine witnesses at evidentiary hearings; CLI-10-17, 72 NRC 1 (2010)
PRIMA FACIE SHOWING
a board's role in considering a petition for waiver under 10 C.F.R. 2.335 is limited to deciding whether petitioner has made a prima facie showing of special circumstances that would support a waiver; LBP-10-15, 72 NRC 257 (2010)
a prima facie showing merely requires the presentation of enough information to allow a board to infer (absent disproof) that special circumstances exist to support a rule waiver; LBP-10-15, 72 NRC 257 (2010)
because petitioner had not made a prima facie case for rule waiver, the board declined to certify the matter to the Commission and found that it was prohibited from considering the matter further; CLI-10-29, 72 NRC 556 (2010)
existence of a prima facie case is determined based on the sufficiency of the movant's assertions and informational/evidentiary support alone; LBP-10-15, 72 NRC 257 (2010)
petitioner has alleged sufficient new information concerning the seismic situation to raise a prima facie showing that strict application of the generic NEPA analysis of the management of spent fuel in

nuclear reactors would not serve the purpose for which Part 51 Appendix B and 10 C.F.R. 51.53(c)(2) were adopted; LBP-10-15, 72 NRC 257 (2010)
showing necessary for grant of a petition for interlocutory review is described; CLI-10-29, 72 NRC 556 (2010)
PRIVILEGE LOG
for documents that are otherwise discoverable, but for which there is a claim of privilege or protected status, NRC Staff must list them and provide sufficient information for assessing their privilege or protected status; CLI-10-24, 72 NRC 451 (2010); CLI-10-25, 72 NRC 469 (2010)
PRO SE LITIGANTS
although boards should afford greater latitude to a pleading submitted by a pro se petitioner, that petitioner ultimately bears the burden to provide facts sufficient to show standing; CLI-10-20, 72 NRC 185 (2010)
petitioners are held to less rigid pleading standards, so that parties with a clear but imperfectly stated interest in the proceeding are not excluded; CLI-10-20, 72 NRC 185 (2010)
petitioners represented by counsel are held to higher standard of specificity in pleading; CLI-10-20, 72 NRC 185 (2010)
the Commission treats pro se litigants more leniently than litigants with counsel; CLI-10-17, 72 NRC 1 (2010)
PROBABILISTIC RISK ASSESSMENT
PRA is the Commission's accepted and standard practice in severe accident mitigation alternatives analyses; LBP-10-15, 72 NRC 257 (2010)
PROPRIETARY INFORMATION
applicant's claim that computer models should be excused from the mandatory disclosure requirements because they entail proprietary information is rejected; LBP-10-23, 72 NRC 692 (2010)
handling of confidential commercial or financial proprietary information that has been submitted to the agency is governed by 10 C.F.R. 2.390; CLI-10-24, 72 NRC 451 (2010)
in licensing proceedings, protective orders provide an effective means for safeguarding proprietary information, where the party seeking discovery is not a competitor; CLI-10-24, 72 NRC 451 (2010)
protective orders and in camera proceedings are the customary and favored means of handling disputes that arise in which one party to a proceeding seeks purportedly proprietary information from another; CLI-10-24, 72 NRC 451 (2010)
the use of any proprietary information that is produced is strictly limited to the proceeding for which it is produced, and such information must be promptly returned at the close of this proceeding; LBP-10-23, 72 NRC 692 (2010)
PROTECTIVE ORDERS
in licensing proceedings, protective orders provide an effective means for safeguarding proprietary information, where the party seeking discovery is not a competitor; CLI-10-24, 72 NRC 451 (2010)
petitioners or intervenors may request and, where appropriate, obtain, under protective order or other measures, information withheld from the general public for proprietary or security reasons; CLI-10-24, 72 NRC 451 (2010)
the board issued a protective order governing access to and use of protected information in the correspondence from applicant to NRC Staff regarding the requirements under 10 C.F.R. 52.80(d) and any related documents; CLI-10-24, 72 NRC 451 (2010)
the use of any proprietary information that is produced is strictly limited to the proceeding for which it is produced, and such information must be promptly returned at the close of this proceeding; LBP-10-23, 72 NRC 692 (2010)
PROXIMITY PRESUMPTION
boards apply a proximity-plus test to establish standing in materials cases, where the petitioner must show that the proposed licensing action involves a significant source of radiation that has an obvious potential for offsite consequences; CLI-10-20, 72 NRC 185 (2010)
if petitioner cannot establish the elements of proximity-based standing, then he must establish standing according to traditional standing principles; CLI-10-20, 72 NRC 185 (2010)
in a materials licensing case, petitioner must show more than that he lives or works within a certain distance of the site where materials will be located; CLI-10-20, 72 NRC 185 (2010)

in cases involving ISL uranium mining and other source materials licensing, petitioner must demonstrate injury, causation, and redressability because proximity to the proposed facility alone is not adequate to demonstrate standing; LBP-10-16, 72 NRC 361 (2010)
in proceedings involving nuclear power reactors, petitioner is presumed to have standing to intervene without the need to specifically plead injury, causation, and redressability if petitioner lives within 50 miles of the proposed facility; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
no proximity presumption applies in source materials cases; LBP-10-16, 72 NRC 361 (2010)
presumption of standing applies in proceedings for nuclear power plant construction permits, operating licenses, or significant amendments thereto; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010); LBP-10-21, 72 NRC 616 (2010)
someone living adjacent to the site for proposed construction of a federally licensed facility has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the facility will not be completed for many years; LBP-10-24, 72 NRC 720 (2010)
standing was found for an organization representing three members living in close proximity to decommissioning site, who expressed concern that depleted uranium materials could affect a waterway abutting the property of two members; CLI-10-20, 72 NRC 185 (2010)
PUBLIC COMMENTS
when preparing an environmental assessment, an agency must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decisionmaking process; CLI-10-18, 72 NRC 56 (2010)
PUBLIC INTEREST
Commission review is in the public interest if the decision could affect pending and future license renewal determinations; CLI-10-17, 72 NRC 1 (2010)
QUALITY ASSURANCE PROGRAMS
DOE is required to provide adequate confidence that the geologic repository and it structures, systems, or components will perform satisfactorily in service; LBP-10-22, 72 NRC 661 (2010)
if the performance margins analysis for the high-level waste repository is needed to establish adequate confidence in the total system performance assessment, then it is subject to the quality assurance requirements of 10 C.F.R. 63.142; LBP-10-22, 72 NRC 661 (2010)
the effects of the high-level waste repository QA program can be taken into account in determining the probability and consequences of a feature, event, or process; LBP-10-22, 72 NRC 661 (2010)
the performance margins analysis cannot be used to validate or provide confidence in the total systems performance assessment if its data and models are not qualified under DOE's QA program; LBP-10-22, 72 NRC 661 (2010)
the program for the geologic repository must be applied to all structures, systems, and components that are important to waste isolation and to related activities, defined as including analyses of samples and data; LBP-10-22, 72 NRC 661 (2010)
RADIATION CONTROL PROGRAM
the combined license application must describe the means for controlling and limiting the radioactive effluents and radiation exposures from the proposed nuclear reactors; LBP-10-20, 72 NRC 571 (2010)
RADIATION PROTECTION PROGRAM
applicant must have a program to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable; LBP-10-20, 72 NRC 571 (2010)
DOE need not weigh ALARA considerations outside the geologic repository operations area for which it is responsible; LBP-10-22, 72 NRC 661 (2010)
how a 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 is governed by 10 C.F.R. 52.79(a)(3); LBP-10-20, 72 NRC 571 (2010)
plans or procedures are a valid means by which radiation exposure may be controlled; LBP-10-20, 72 NRC 571 (2010)
the final safety analysis report must include the kinds and quantities of radioactive materials expected to be produced by low-level radioactive waste in the operation and the means for controlling and limiting

radioactive effluents and radiation exposures within the limits set forth in 10 C.F.R. Part 20; LBP-10-20, 72 NRC 571 (2010)
RADIATION PROTECTION STANDARDS
licensees, including Part 63 licensees, are required to use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable; LBP-10-22, 72 NRC 661 (2010)
RADIATION SAFETY
each licensee must evaluate the extent of radiation hazards that may be present; DD-10-3, 72 NRC 171 (2010)
petitioner alleges that routine unprotected handling of an unshielded neutron source by licensed operators and uncontrolled access by untrained and unlicensed facility visitors to this neutron source violated ALARA requirements; DD-10-3, 72 NRC 171 (2010)
RADIOACTIVE EFFLUENTS
the combined license application must describe the means for controlling and limiting the radioactive effluents and radiation exposures from the proposed nuclear reactors; LBP-10-20, 72 NRC 571 (2010)
the final safety analysis report must include the kinds and quantities of radioactive materials expected to be produced by low-level radioactive waste in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in 10 C.F.R. Part 20; LBP-10-20, 72 NRC 571 (2010)
RADIOACTIVE RELEASES
only features, events, and processes that produce significant changes in releases or doses within the first 10,000 years after disposal in the high-level waste repository must be included in performance assessments; LBP-10-22, 72 NRC 661 (2010)
RADIOACTIVE WASTE STORAGE
an agency is not authorized to grant conditional approval to plans that do nothing more than promise to do tomorrow what the statute requires today; LBP-10-20, 72 NRC 571 (2010)
applicant's COLA discussion of LLRW management contained no omission where the applicant addressed the closure of the Barnwell LLRW disposal facility, discussed in detail additional waste minimization measures, and committed to build an additional storage facility in accordance with NRC guidelines if further additional storage became necessary; LBP-10-20, 72 NRC 571 (2010)
applicant's combined license application fails to address the management of low-level radioactive waste plan for a longer term than envisioned in the COLA; LBP-10-20, 72 NRC 571 (2010)
detailed design, location, and health impacts information on low-level radioactive waste storage is not required in the combined license application; LBP-10-20, 72 NRC 571 (2010)
low-level radioactive waste contentions were not admissible because of technical defects in the pleadings such as failure to satisfy 10 C.F.R. 2.309(f)(1)(vi), (i), or (ii); LBP-10-20, 72 NRC 571 (2010)
low-level radioactive waste 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; LBP-10-20, 72 NRC 571 (2010)
regulations do not dictate the duration of onsite low-level radioactive waste storage capacity; LBP-10-20, 72 NRC 571 (2010)
the fact that an extended low-level radioactive waste storage plan is contingent does not mean that it does not need to comply with 10 C.F.R. 52.79 or that it is subject to a relaxed standard; LBP-10-20, 72 NRC 571 (2010)
the FSAR was configured to accommodate at least 10 years of onsite storage; LBP-10-20, 72 NRC 571 (2010)
there is no prohibition on an applicant using a plan for compliance with section 52.79(a)(3) that includes contingent plans should future low-level radioactive waste storage become necessary; LBP-10-20, 72 NRC 571 (2010)
there is no requirement in section 52.79(a)(3) for applicant's FSAR to include details regarding building materials and high-integrity containers, exact location, or health impacts on employees for the contingent onsite long-term LLRW storage facility; LBP-10-20, 72 NRC 571 (2010)

SUBJECT INDEX

RADIOACTIVE WASTE, LOW-LEVEL
- applicant's COLA discussion of LLRW management contained no omission where the applicant addressed the closure of the Barnwell LLRW disposal facility, discussed in detail additional waste minimization measures, and committed to build an additional storage facility in accordance with NRC guidelines if further additional storage became necessary; LBP-10-20, 72 NRC 571 (2010)
- applicant's COLA fails to address the management of low-level radioactive waste plan for a longer term than envisioned in the COLA; LBP-10-20, 72 NRC 571 (2010)
- detailed design, location, and health impacts information on low-level radioactive waste storage is not required in the combined license application; LBP-10-20, 72 NRC 571 (2010)
- LLRW contentions were not admissible because of technical defects in the pleadings such as failure to satisfy 10 C.F.R. 2.309(f)(1)(vi), (i), or (ii); LBP-10-20, 72 NRC 571 (2010)
- 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; LBP-10-20, 72 NRC 571 (2010)
- regulations do not dictate the duration of onsite low-level radioactive waste storage capacity; LBP-10-20, 72 NRC 571 (2010)
- the fact that an extended LLRW storage plan is contingent does not mean that it does not need to comply with 10 C.F.R. 52.79 or that it is subject to a relaxed standard; LBP-10-20, 72 NRC 571 (2010)
- the final safety analysis report must include the kinds and quantities of radioactive materials expected to be produced by LLRW in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in 10 C.F.R. Part 20; LBP-10-20, 72 NRC 571 (2010)
- there is no prohibition on an applicant using a plan for compliance with section 52.79(a)(3) that includes contingent plans should future low-level radioactive waste storage become necessary; LBP-10-20, 72 NRC 571 (2010)

RADIOLOGICAL EXPOSURE
- applicant shall conduct operations so that the total effective dose equivalent to individual members of the public does not exceed 100 millirems per year; LBP-10-20, 72 NRC 571 (2010)
- applicant shall provide reasonable assurance that the annual dose equivalent to members of the public from planned discharges not exceed 25 millirems to the whole body; LBP-10-20, 72 NRC 571 (2010)
- petitioner's argument that high-explosive munitions could fall onto depleted uranium, pulverizing and igniting the DU and generating aerosols that might travel through the air, providing an inhalation pathway for offsite exposure was contradicted by the Army's statement that it does not use high-impact explosives in the area where DU is present; CLI-10-20, 72 NRC 185 (2010)
- the combined license application must describe the means for controlling and limiting the radioactive effluents and radiation exposures from the proposed nuclear reactors; LBP-10-20, 72 NRC 571 (2010)
- the final safety analysis report must include the kinds and quantities of radioactive materials expected to be produced by low-level radioactive waste in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in 10 C.F.R. Part 20; LBP-10-20, 72 NRC 571 (2010)

REACTOR COOLING SYSTEMS
- for license renewal, feedwater, core spray, and reactor recirculation outlet nozzles, as part of the reactor coolant pressure boundary, must meet the metal-fatigue requirements for Class 1 components in section III of the ASME Code; CLI-10-17, 72 NRC 1 (2010)

REACTOR DESIGN
- a board could refer a contention relating to a certified design to the Staff for consideration in the design certification rulemaking and hold that contention in abeyance if the contention is otherwise admissible; LBP-10-21, 72 NRC 616 (2010)
- an applicant that references in its combined license application a design for which a design certification application has been docketed but not granted does so at its own risk; LBP-10-20, 72 NRC 571 (2010)
- applicant's change of reactor design constitutes new and materially different information for the purposes of filing a new contention; LBP-10-17, 72 NRC 501 (2010)

in making the findings required for issuance of a combined license, the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification rule; LBP-10-21, 72 NRC 616 (2010)
petitioner failed to identify any statute or NRC regulation to support its theory that applicant may not revise its application to include a different reactor design; LBP-10-17, 72 NRC 501 (2010)
the Commission generally refuses to modify, rescind, or impose new requirements on reactor design certification information, except through rulemaking; LBP-10-21, 72 NRC 616 (2010)
to the degree that the general precept that a rule, including a design certification, cannot be challenged in an adjudication might be seen as placing such matters outside the scope of the proceeding; LBP-10-21, 72 NRC 616 (2010)
REASONABLE ASSURANCE
the license renewal applicant's use of an aging management program identified in the Generic Aging Lessons Learned Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period; CLI-10-17, 72 NRC 1 (2010)
REBUTTABLE PRESUMPTION
absence of perfect compliance by licensee does not rebut the presumption of compliance or support admission of a contention that the application does not satisfy 10 C.F.R. 54.29(a), but a consistent, longstanding, and continuing pattern of problems in a specific area that is relevant to managing aging equipment will; LBP-10-15, 72 NRC 257 (2010)
RECORD OF DECISION
there is no per se regulatory bar that precludes the Staff from using the hearing process to clarify the administrative record supporting its final EA, and that record, along with any adjudicatory decision, becomes, in effect, part of the final environmental document; CLI-10-18, 72 NRC 56 (2010)
there must be a finding that something is remote and speculative to preclude it from further analysis, and there must be support in the agency's record of decision to justify this finding; LBP-10-14, 72 NRC 101 (2010)
RECUSAL
a judge should disqualify himself if he has personal knowledge of disputed evidentiary facts concerning the proceeding; CLI-10-22, 72 NRC 202 (2010)
if a licensing board member declines to grant a party's recusal motion, the motion is referred to the Commission to determine the sufficiency of the grounds alleged; CLI-10-22, 72 NRC 202 (2010)
that an unreasonable person, focusing on only one aspect of the story, might perceive a risk of bias is irrelevant; CLI-10-22, 72 NRC 202 (2010)
the disqualification standard under 28 U.S.C. § 455 is not directed to administrative judges, but the Commission and its adjudicatory boards have applied it in assessing a motion for disqualification under 10 C.F.R. 2.313, and it provides a helpful framework for such an assessment; CLI-10-22, 72 NRC 202 (2010)
the proper inquiry under 28 U.S.C. § 455 is made from the perspective of a reasonable person, knowing all the circumstances; CLI-10-22, 72 NRC 202 (2010)
the standard for disqualification of a judge under 28 U.S.C. § 455 is whether the reasonable person who knows all the circumstances, would harbor doubts about the judge's impartiality; CLI-10-22, 72 NRC 202 (2010)
REDRESSABILITY
to establish standing, petitioner must show that its alleged injury in fact could be cured or alleviated by some action of the tribunal; LBP-10-16, 72 NRC 361 (2010)
REFERRAL OF RULING
contention raising question of whether a quantitative as opposed to qualitative analysis of terrorist attacks and the alternatives for mitigation and prevention is necessary is referred to the Commission as a novel issue; LBP-10-15, 72 NRC 257 (2010)
decisions that involve significant and novel issues, the resolution of which would materially advance the orderly disposition of proceedings, should be referred to the Commission; LBP-10-20, 72 NRC 571 (2010)
licensing boards are to refer novel issues of law to the Commission; LBP-10-15, 72 NRC 257 (2010)

SUBJECT INDEX

REGULATIONS
absent a waiver, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications; LBP-10-16, 72 NRC 361 (2010)
although Part 40 generally applies to in situ leach mining, Appendix A to Part 40, including Criterion 1, was designed to address the problems related to mill tailings and not problems related to injection mining; LBP-10-16, 72 NRC 361 (2010)
contentions that attack a Commission rule, or that seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, are inadmissible; LBP-10-21, 72 NRC 616 (2010)
Council on Environmental Quality regulations are entitled to substantial deference by NRC; LBP-10-15, 72 NRC 257 (2010)
Council on Environmental Quality regulations receive substantial deference from federal courts in interpreting the requirements of NEPA; LBP-10-16, 72 NRC 361 (2010); LBP-10-24, 72 NRC 720 (2010)
guidance documents do not create binding legal requirements; CLI-10-24, 72 NRC 451 (2010)
handling of confidential commercial or financial (proprietary) information that has been submitted to the agency is governed by 10 C.F.R. 2.390; CLI-10-24, 72 NRC 451 (2010)
it is NRC stated policy to take into account Council on Environmental Quality regulations voluntarily, subject to some conditions; CLI-10-18, 72 NRC 56 (2010)
motions to reopen a proceeding to introduce an entirely new contention must successfully navigate at least nineteen different regulatory factors under 10 C.F.R. 2.326, 2.309(c), and 2.309(f)(1); LBP-10-19, 72 NRC 529 (2010)
no rule or 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; LBP-10-14, 72 NRC 101 (2010)
Staff guidance documents are not legally binding, but can be useful in instances where legal authority is lacking; LBP-10-16, 72 NRC 361 (2010)
summary disposition rules 2.1205 and 2.710 are substantially similar; LBP-10-20, 72 NRC 571 (2010)
the central purpose of Part 51 rules is to allow NRC to comply with NEPA by identifying and evaluating environmental impacts that are generic to reactor license renewal proceedings and then allowing applicant and NRC to dispense with site-specific evaluations of such environmental impacts in situations covered by the generic analysis; LBP-10-15, 72 NRC 257 (2010)
the Commission has an announced policy to take account of Council on Environmental Quality regulations voluntarily, subject to certain conditions; LBP-10-24, 72 NRC 720 (2010)
the principal regulatory standards for in situ leach applications are 10 C.F.R. 40.32(c) and (d), which mandate protection of public health and safety; LBP-10-16, 72 NRC 361 (2010)
the standard review plan provides guidance but does not impose requirements on license renewal applicants; CLI-10-17, 72 NRC 1 (2010)
REGULATIONS, INTERPRETATION
a licensing board's interpretation of 10 C.F.R. 54.3, 54.21, 54.29 is challenged; CLI-10-17, 72 NRC 1 (2010)
a text should be construed so that effect is given to all of its provisions, so no part will be inoperative or superfluous, void or insignificant; LBP-10-22, 72 NRC 661 (2010)
although the phrase "possession, custody, or control" appears in 10 C.F.R. 2.336(a)(2)(i), 2.704(a)(2), and 2.707(a)(1)), no NRC decision has ever provided guidance as to what constitutes "control"; LBP-10-23, 72 NRC 692 (2010)
section 54.29(a) speaks of both past and future actions, referring specifically to those that have been or will be taken with respect to managing the effects of aging and time-limited aging analyses; CLI-10-17, 72 NRC 1 (2010)
the amended late-filed contentions rule, 10 C.F.R. 2.309(f)(2), is not intended to alter the standards in section 2.714(a) of its rules of practice as interpreted by NRC case law; LBP-10-17, 72 NRC 501 (2010)
the language of 10 C.F.R. 52.79(a)(4) is contrasted with the "means" language of 10 C.F.R. 52.79(a)(3); LBP-10-20, 72 NRC 571 (2010)

the phrase "possession, custody, or control" as found in the Federal Rules of Civil Procedure and 10 C.F.R. 2.336(a) is in the disjunctive, and thus only one of the enumerated requirements needs to be met; LBP-10-23, 72 NRC 692 (2010)
the plain language of 10 C.F.R. 63.305 does not say anything about analyzing future climate based upon the historical geological record; LBP-10-22, 72 NRC 661 (2010)
the relevance standard of 10 C.F.R. 2.336 is more flexible than the relevance standard of Fed. R. Evid. 401; LBP-10-23, 72 NRC 692 (2010)
the sole issue under 10 C.F.R. 50.5(a)(2) is whether a person knew the information was materially incomplete and inaccurate at the time it was submitted to the NRC; CLI-10-23, 72 NRC 210 (2010)
the term "document" as used in 10 C.F.R. 2.336 includes computer models and associated electronic inputs, outputs, data, and software; LBP-10-23, 72 NRC 692 (2010)
the term "document" as used in 10 C.F.R. 2.336 is not limited to paper documents and it refers to information stored on any medium or form, including electronically stored information; LBP-10-23, 72 NRC 692 (2010)
there is no prohibition on an applicant using a plan for compliance with 10 C.F.R. 52.79(a)(3) that includes contingent plans should future low-level radioactive waste storage become necessary; LBP-10-20, 72 NRC 571 (2010)
whether a feature, event, or process must be included in the performance assessment for the period after 10,000 years is governed by 10 C.F.R. 63.342, not by section 63.102(j); LBP-10-22, 72 NRC 661 (2010)
words of a statute must be read in their context and with a view to their place in the overall statutory scheme; LBP-10-20, 72 NRC 571 (2010)
REINSTATEMENT OF PERMIT
reinstatement of construction permits did not authorize construction of reactors, but rather was to place the facility in a terminated plant status; CLI-10-26, 72 NRC 474 (2010)
REMAND
if a board on remand were to rule in petitioners' favor regarding the admissibility of one contention, then the board should also reconsider its prior ruling that related contentions were admissible; CLI-10-21, 72 NRC 197 (2010)
if appellant had submitted an offer of proof, indicating what rebuttal evidence it would have offered to the board, then the Commission might have some basis for determining whether that evidence would be substantial enough to justify a remand to the Board; CLI-10-23, 72 NRC 210 (2010)
proceeding will remain open during the pendency of a remand, during which time, petitioners are free to submit a motion to reopen the record should they seek to address any genuinely new issues related to the license renewal application that previously could not have been raised; CLI-10-17, 72 NRC 1 (2010)
REOPENING A RECORD
extended power uprate proceeding that has been terminated may not be reopened; CLI-10-17, 72 NRC 1 (2010)
once the record of a proceeding is closed, new information may not be considered in the proceeding unless the reopening standards of this section are met; LBP-10-21, 72 NRC 616 (2010)
petitioners seeking to introduce new contentions after the board has denied their initial petition to intervene need to address the reopening standards; LBP-10-21, 72 NRC 616 (2010)
standards are discussed and analyzed; LBP-10-21, 72 NRC 616 (2010)
to justify reopening the record to admit a new contention, the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition, and the new information must be significant and plausible enough to require reasonable minds to inquire further; LBP-10-21, 72 NRC 616 (2010)
when the contested portion of a proceeding was terminated following an unchallenged merits determination in favor of applicant regarding the proceeding's sole admitted contention, the board's focus must be on the requirements applicable to reopening a closed record set out in 10 C.F.R. 2.326; LBP-10-21, 72 NRC 616 (2010)
REPLY BRIEFS
a motion to file late should generally be denied, except under extraordinary conditions; LBP-10-21, 72 NRC 616 (2010)

arguments and alleged facts should focus on the legal, factual, or logical arguments presented in the answers; LBP-10-19, 72 NRC 529 (2010)
because appellant submitted no offer of proof, its case could be so weak that the denial of a right to reply by the licensing board would have been harmless error; CLI-10-23, 72 NRC 210 (2010)
petitioner's standing showing can be corrected or supplemented to cure deficiencies by means of its reply pleading; LBP-10-21, 72 NRC 616 (2010)
REQUEST FOR ACTION
petitioner's request for action concerning deficiencies in licensee's employee concerns program is denied; DD-10-1, 72 NRC 149 (2010)
petitioner's request that unescorted access authorization be restored so that he could perform his accepted job tasks with all record of denial removed from any and all records is denied; DD-10-2, 72 NRC 163 (2010)
petitioner's requests for enforcement action for alleged regulatory, criminal, and ethical misconduct and coverup by NRC Staff is denied; DD-10-3, 72 NRC 171 (2010)
to the extent petitioner believes that NRC Staff has overlooked facts indicating an inadequate safety culture as a matter separate and apart from license renewal, then its remedy is to direct Staff's attention to the supporting facts via a petition for enforcement action; CLI-10-27, 72 NRC 481 (2010)
RESEARCH REACTORS
petitioner alleges failure to conduct safety review of the modification of the controlled access area by the addition of an undocumented roof access for a siphon breaker experiment; DD-10-3, 72 NRC 171 (2010)
REVIEW, DISCRETIONARY
Commission denies petitions for interlocutory review of a licensing board decision that admitted new and amended contentions; CLI-10-30, 72 NRC 564 (2010)
parties should not seek review by invoking the grounds under which the Commission might exercise its supervisory authority; CLI-10-30, 72 NRC 564 (2010)
petitioner must demonstrate that the issue for which it seeks review 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 affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-10-30, 72 NRC 564 (2010)
the Commission grants review only in extraordinary circumstances; CLI-10-30, 72 NRC 564 (2010)
the Commission may, at its discretion, grant a party's request for interlocutory review of a board decision; CLI-10-30, 72 NRC 564 (2010)
the mere potential for legal error in a contention admissibility decision is not a ground for review; CLI-10-30, 72 NRC 564 (2010)
RISK
See Assumption of Risk
RULE OF REASON
NEPA requirements are tempered by a practical rule of reason; CLI-10-22, 72 NRC 202 (2010)
the National Environmental Policy Act excludes consideration of demand-side management if the proposed new plant is intended to be a merchant plant, selling power on the open market, because it is not feasible for licensee to engage in demand-side management; CLI-10-21, 72 NRC 197 (2010)
the NEPA hard-look doctrine is subject to a rule of reason that the Commission has interpreted as obligating the agency to consider all reasonable alternatives to the proposed action; LBP-10-14, 72 NRC 101 (2010)
the range of alternatives that must be considered need not extend beyond those reasonably related to the purposes of the project and a rule of reason necessarily informs that choice; CLI-10-18, 72 NRC 56 (2010)
RULEMAKING
challenges to the Waste Confidence Rule must be made in the context of a rulemaking, not in the context of an adjudicative proceeding; CLI-10-19, 72 NRC 98 (2010)
if petitioners believe that the specification for climate change no longer provides a reasonable basis for demonstrating compliance based on new scientific evidence, they can petition NRC to amend the rules; LBP-10-22, 72 NRC 661 (2010)

if petitioners or intervenors are dissatisfied with NRC's generic approach to a problem, their remedy lies in the rulemaking process, not in adjudication; CLI-10-19, 72 NRC 98 (2010)
once a licensing proceeding has been closed, petitioners will still have the opportunity to raise issues by filing a petition under 10 C.F.R. 2.802; CLI-10-17, 72 NRC 1 (2010)
the Commission generally refuses to modify, rescind, or impose new requirements on reactor design certification information, unless through rulemaking; LBP-10-21, 72 NRC 616 (2010)
the design certification rulemaking and individual COL adjudicatory proceedings may proceed simultaneously, and issues raised in an adjudicatory proceeding that are appropriately addressed in the generic design certification rulemaking are to be referred to the rulemaking for resolution; LBP-10-17, 72 NRC 501 (2010)
under longstanding NRC policy, licensing boards should not accept in individual license proceedings contentions that are or are about to become the subject of general rulemaking by the Commission; CLI-10-19, 72 NRC 98 (2010)

RULES OF PRACTICE
a board's determination of standing 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-10-16, 72 NRC 361 (2010)
a board's determination on a request for access to sensitive unclassified nonsafeguards information is reviewed de novo; CLI-10-24, 72 NRC 451 (2010)
a board's standing analysis must avoid the familiar trap of confusing the standing determination with the assessment of a petitioner's case on the merits; LBP-10-16, 72 NRC 361 (2010)
a contention based on new information will be considered timely if it is filed within 30 days of the availability of the new information; LBP-10-14, 72 NRC 101 (2010)
a contention challenging applicant's environmental report can be superseded by the subsequent issuance of licensing-related documents, whether a draft environmental impact statement or an applicant's response to a request for additional information; LBP-10-14, 72 NRC 101 (2010)
a contention filed within 30 days of the issuance of a document that legitimately undergirds the contention would be timely and presumptively meet the good cause requirement; CLI-10-18, 72 NRC 56 (2010)
a filing that was 3 days late, which the board characterized as not excessively late, was accepted based on findings that intervenor offered a reasonable explanation for the delay and the delay did not prejudice any of the other parties; LBP-10-21, 72 NRC 616 (2010)
a motion to file late should generally be denied, except under extraordinary conditions; LBP-10-21, 72 NRC 616 (2010)
a motion to reopen must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of 10 C.F.R. 2.326(a) have been satisfied, including addressing each of the reopening criteria separately with a specific explanation of why it has been met; LBP-10-21, 72 NRC 616 (2010)
a new contention may be filed after the initial docketing with leave of the presiding officer upon a showing on three factors; LBP-10-17, 72 NRC 501 (2010)
a party at risk of filing out of time can request an extension, doing so well before the time specified expires; LBP-10-21, 72 NRC 616 (2010)
a party is excused from producing a document if the document is publicly available and if the party specifies where the document may be found; LBP-10-23, 72 NRC 692 (2010)
a party may comply by merely providing a description by category and location of all documents subject to mandatory disclosure; LBP-10-23, 72 NRC 692 (2010)
a petition for review and request for hearing must include a showing that petitioner has standing and that the board should consider the nature of the petitioner's right under the AEA or NEPA 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 decision or order that may be issued in the proceeding on the petitioner's interest; LBP-10-16, 72 NRC 361 (2010)
a petition to waive a Commission regulation can be granted only in unusual and compelling circumstances; LBP-10-22, 72 NRC 661 (2010)

SUBJECT INDEX

a prima facie showing merely requires the presentation of enough information to allow a board to infer (absent disproof) that special circumstances exist to support a rule waiver; LBP-10-15, 72 NRC 257 (2010)

a reply may include arguments and alleged facts that are focused on the legal or logical arguments presented in the answers; LBP-10-19, 72 NRC 529 (2010)

a SAMA analysis contention was found to be inadmissible because it lacked supporting information regarding the relative costs and benefits of that proposed alternative; LBP-10-15, 72 NRC 257 (2010)

a single sentence labeled a contention, with no reference to the six elements of 10 C.F.R. 2.309(f)(1) does not make an admissible contention; LBP-10-16, 72 NRC 361 (2010)

a timely motion to reopen may be denied if it raises issues that are not of major significance to plant safety whereas a nontimely motion may be granted if it raises an issue of sufficient gravity; LBP-10-21, 72 NRC 616 (2010)

absent a waiver, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)

absent extreme circumstances, the Commission will not consider on appeal either new arguments or new evidence supporting the contentions which a board never had the opportunity to consider; CLI-10-21, 72 NRC 197 (2010)

although a board may view petitioner's supporting information in a light favorable to the petitioner, petitioner (not the board) is required to supply all of the required elements for a valid intervention petition; LBP-10-15, 72 NRC 257 (2010); CLI-10-20, 72 NRC 185 (2010); LBP-10-16, 72 NRC 361 (2010)

although a motion to reopen must be timely, an exceptionally grave issue may be considered even if the motion is not timely; LBP-10-19, 72 NRC 529 (2010)

although a request for suspension of a proceeding does not fit cleanly into NRC procedural rules for stays, the Commission exercises discretion and consider petitioner's request; CLI-10-17, 72 NRC 1 (2010)

although interlocutory appeal is denied, the Commission exercises its inherent supervisory authority over adjudications to take sua sponte review of a board order; CLI-10-27, 72 NRC 481 (2010)

although the obligations under NEPA fall to the agency and therefore the NRC Staff, petitioners are required to raise environmental objections based on the applicant's environmental report; LBP-10-15, 72 NRC 257 (2010)

although the phrase "possession, custody, or control" appears in 10 C.F.R. 2.336(a)(2)(i), 2.704(a)(2), and 2.707(a)(1)), no NRC decision has ever provided guidance as to what constitutes "control"; LBP-10-23, 72 NRC 692 (2010)

amicus curiae briefs are contemplated only after the Commission grants a petition for review, not briefs supporting or opposing petitions for review; CLI-10-17, 72 NRC 1 (2010)

an appeal as of right by the NRC Staff is permitted on the question of whether a request for access to sensitive unclassified nonsafeguards information should have been denied in whole or in part; CLI-10-24, 72 NRC 451 (2010)

an entity seeking to intervene on behalf of its members must show that it has an individual member who can fulfill all the necessary standing elements and who has formally authorized the organization to represent his or her interests; LBP-10-21, 72 NRC 616 (2010)

an individual petitioner may not request to intervene in his or her own right while simultaneously authorizing other petitioners to represent his or her interests in the proceeding; LBP-10-16, 72 NRC 361 (2010)

an order denying a petition to intervene and/or request for hearing may be appealed to the Commission on the question of whether the petition and/or request should have been granted; CLI-10-20, 72 NRC 185 (2010)

an organization asserting representational standing must demonstrate that the interest of at least one of its members will be harmed and the member would have standing in his or her own right, identify that member by name and address, and demonstrate that the organization is authorized to request a hearing on behalf of that member; LBP-10-16, 72 NRC 361 (2010)

an organization seeking to intervene in its own right must allege that the challenged action will cause a cognizable injury to its interests or to the interests of its members; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
an untimely motion to reopen must demonstrate that the issue raised is not merely significant but exceptionally grave; LBP-10-21, 72 NRC 616 (2010)
analysis of a motion to compel the mandatory disclosure of information under 10 C.F.R. 2.336(a) is contingent on six factors; LBP-10-23, 72 NRC 692 (2010)
any contention that falls outside the specified scope of the proceeding is inadmissible; LBP-10-17, 72 NRC 501 (2010)
any doubt as to the existence of a genuine issue of material fact is resolved against the proponent of summary disposition; LBP-10-20, 72 NRC 571 (2010)
any potential harm associated with petitioner's use of water from a water source connecting to a mining site is fairly traceable to the proposed action; LBP-10-16, 72 NRC 361 (2010)
appellate briefs amicus curiae are welcomed from parties in other Commission adjudications that have presented similar issues; CLI-10-17, 72 NRC 1 (2010)
applicant's "control" of computer models prepared by and in possession of a contractor is illustrated by the fact that if NRC Staff requested these documents, applicant could obtain and provide them; LBP-10-23, 72 NRC 692 (2010)
applicant's change of reactor design constitutes new and materially different information for the purposes of filing a new contention; LBP-10-17, 72 NRC 501 (2010)
applicant's claim that computer models should be excused from the mandatory disclosure requirements because they entail proprietary information is rejected; LBP-10-23, 72 NRC 692 (2010)
availability, not possession, custody, or control, is the criterion for the NRC Staff's mandatory disclosure responsibilities; LBP-10-23, 72 NRC 692 (2010)
because it disfavors piecemeal appeals, the Commission will grant interlocutory review only in extraordinary circumstances; CLI-10-29, 72 NRC 556 (2010)
because petitioner's circumstances may change from one proceeding to the next, it is important that the presiding officer have up-to-date information regarding any standing claims; LBP-10-21, 72 NRC 616 (2010)
because the burden is on the summary disposition movant, the board must examine the record in the light most favorable to the nonmoving party and give the nonmoving party the benefit of all favorable inferences that can be drawn from the evidence; LBP-10-20, 72 NRC 571 (2010)
boards apply a proximity-plus test to establish standing in materials cases, where the petitioner must show that the proposed licensing action involves a significant source of radiation that has an obvious potential for offsite consequences; CLI-10-20, 72 NRC 185 (2010)
boards are obliged to evaluate the timeliness of a proposed contention even if no party raises the issue; LBP-10-17, 72 NRC 501 (2010)
boards are to construe intervention petitions in favor of the petitioner; LBP-10-21, 72 NRC 616 (2010)
boards must balance eight factors in evaluating nontimely intervention petitions, hearing requests, and contentions; LBP-10-24, 72 NRC 720 (2010)
board's role in considering a petition for waiver under 10 C.F.R. 2.335, is limited to deciding whether petitioner has made a prima facie showing of special circumstances that would support a waiver; LBP-10-15, 72 NRC 257 (2010)
by defining significantly different information in the draft EIS as a permissible basis for filing a new contention, the Commission has in effect concluded that such new information is good cause for filing a new contention; LBP-10-24, 72 NRC 720 (2010)
consideration of pending issues will not be postponed until the resolution of other issues unrelated to the adjudication; CLI-10-17, 72 NRC 1 (2010)
contention admissibility requirements are deliberately strict, and any contention that does not satisfy them will be rejected; CLI-10-21, 72 NRC 197 (2010)
contention raising question of whether a quantitative as opposed to qualitative analysis of terrorist attacks and the alternatives for mitigation and prevention is necessary is referred to the Commission as a novel issue; LBP-10-15, 72 NRC 257 (2010)

contention that the environmental report is based on incomplete information because a new earthquake fault has been discovered within 600 meters of nuclear reactors and the results of studies concerning the new fault will be available in the near term is admissible; LBP-10-15, 72 NRC 257 (2010)
contentions may be amended or new contentions filed, with permission from the presiding officer, if petitioner shows that information on which the contention is based was not previously available and is materially different than information previously available and the contention has been submitted in a timely fashion based on the availability of the subsequent information; CLI-10-18, 72 NRC 56 (2010)
contentions must meet six admissibility requirements; LBP-10-14, 72 NRC 101 (2010)
contentions ought to be interpreted in light of the required specificity, so that adjudicators and parties need not search out broader meanings than were clearly intended; LBP-10-16, 72 NRC 361 (2010)
contentions raising legal issues, like fact-based contentions, must fall within the allowable scope of the proceeding to be admissible; LBP-10-17, 72 NRC 501 (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-10-21, 72 NRC 616 (2010)
contentions that attack a Commission rule, or that seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, are inadmissible; LBP-10-21, 72 NRC 616 (2010)
contentions that challenge applicable statutory requirements or the basic structure of the agency's regulatory process are inadmissible; LBP-10-21, 72 NRC 616 (2010)
contentions that raise issues of law as well as contentions that raise issues of fact are permitted; LBP-10-17, 72 NRC 501 (2010)
contentions that simply state the petitioner's views about what regulatory policy should be do not present a litigable issue; LBP-10-21, 72 NRC 616 (2010)
counsel's alleged unfamiliarity with the agency's rules of practice or counsel's asserted busy schedule are not satisfactory explanations for late filings; LBP-10-21, 72 NRC 616 (2010)
disclosure is not required if the burden or expense of the proposed discovery outweighs its likely benefit; LBP-10-23, 72 NRC 692 (2010)
discretionary Commission review of a presiding officer's initial decision is allowed under 10 C.F.R. 2.341(b)(1); CLI-10-17, 72 NRC 1 (2010)
documents are deemed to be within the control of a party if the party has the right to obtain the documents on demand or if it is held by the party's attorney, expert, insurance company, accountant, or agent; LBP-10-23, 72 NRC 692 (2010)
each party to a proceeding must automatically disclose and provide all documents and data compilations in their possession, custody, or control that are relevant to the admitted contentions, without waiting for a party to file a discovery request; LBP-10-23, 72 NRC 692 (2010)
even if a petitioner is unable to show that the NRC Staff's NEPA document differs significantly from the environmental report, it may still be able to meet the late-filed contention requirements; LBP-10-24, 72 NRC 720 (2010)
existence of a prima facie case is determined based on the sufficiency of the movant's assertions and informational/evidentiary support alone; LBP-10-15, 72 NRC 257 (2010)
factors (vii) and (viii) of 10 C.F.R. 2.309(c)(1) are generally considered to have the most significance in the balancing process in instances in which there are no other parties or ongoing related proceedings; LBP-10-21, 72 NRC 616 (2010)
failure to comply with any of the contention pleading requirements is grounds for rejecting a contention; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010); LBP-10-21, 72 NRC 616 (2010)
for a contention regarding environmental impacts of spent fuel storage to be within the scope of an operating license renewal proceeding, petitioner must obtain a waiver under 10 C.F.R. 2.335(d); LBP-10-15, 72 NRC 257 (2010)
for a request for hearing and petition to intervene to be granted, a petitioner must establish that it has standing and propose at least one admissible contention; LBP-10-15, 72 NRC 257 (2010)
for factual disputes, petitioner must present sufficient information to show a genuine dispute; CLI-10-20, 72 NRC 185 (2010)
generalized claims that are vague and insufficiently supported and do not tend to establish any connection with the proposed license or potential harm to petitioner are insufficient to support a contention; CLI-10-20, 72 NRC 185 (2010)

given that consideration of terrorist attacks is part of the NRC's NEPA obligations in the Ninth Circuit, the issue of whether terrorist attacks have been fully considered in the NEPA analysis for a power plant in that jurisdiction is plainly material to the decision the NRC must make; LBP-10-15, 72 NRC 257 (2010)
good cause for late filing is the most important factor, and failure to meet this factor considerably enhances the burden of showing that the other factors justify admission of a late-filed petition; CLI-10-17, 72 NRC 1 (2010); LBP-10-21, 72 NRC 616 (2010); LBP-10-24, 72 NRC 720 (2010)
if a contention based on new information fails to satisfy the three-part test for admission, it may be evaluated under section 2.309(c); LBP-10-24, 72 NRC 720 (2010)
if a contention header uses a particular phrase, but the statement of the contention does not refer to the phrase or regulation, then the board may interpret the contention in accordance with the express statement of the contention; LBP-10-15, 72 NRC 257 (2010)
if a contention meets the 10 C.F.R. 2.309(f)(2) criteria, it is timely and the intervenor proffering the contention need not also make a showing under 10 C.F.R. 2.309(c); LBP-10-14, 72 NRC 101 (2010)
if a motion to reopen and the proposed new contention are based on material information that was not previously available, then it qualifies as timely; LBP-10-19, 72 NRC 529 (2010)
if a motion to reopen relates to a contention not previously in controversy among the parties, movant must meet the late-filing requirements of section 2.309(c); LBP-10-21, 72 NRC 616 (2010)
if a requested document or data compilation is publicly available, then a citation to the document and a description of where it may be publicly obtained is sufficient; LBP-10-23, 72 NRC 692 (2010)
if applicant cures the omission on which a contention is based, the contention will become moot; LBP-10-16, 72 NRC 361 (2010)
if good cause for a late filing is not shown, the board may still permit the late filing, but the petitioner must make a strong showing on the other factors; LBP-10-24, 72 NRC 720 (2010)
if petitioner cannot establish the elements of proximity-based standing, then he must establish standing according to traditional standing principles; CLI-10-20, 72 NRC 185 (2010)
if petitioner has made a prima facie showing of special circumstances for rule waiver, then the board certifies the matter to the Commission; LBP-10-15, 72 NRC 257 (2010); LBP-10-22, 72 NRC 661 (2010)
if petitioner makes a prima facie allegation that the application omits information required by law, it necessarily presents a genuine dispute with applicant and raises an issue plainly material to an essential finding of regulatory compliance needed for license issuance; LBP-10-16, 72 NRC 361 (2010)
if petitioners believe that the specification for climate change no longer provides a reasonable basis for demonstrating compliance based on new scientific evidence, they can petition NRC to amend the rules; LBP-10-22, 72 NRC 661 (2010)
if there is no prima facie showing for a rule waiver, the board may not further consider the matter; LBP-10-22, 72 NRC 661 (2010)
imminent mootness of an issue has been cause for taking interlocutory review if the issue sought to be reviewed would have become moot by the time the board issued a final decision; CLI-10-29, 72 NRC 556 (2010)
in a materials licensing case, petitioner must show more than that he lives or works within a certain distance of the site where materials will be located; CLI-10-20, 72 NRC 185 (2010)
in a Subpart L proceeding, the board must apply the summary disposition standard set forth in Subpart G; LBP-10-20, 72 NRC 571 (2010)
in a Subpart L proceeding, the mandatory disclosure provisions of 10 C.F.R. 2.336 apply; CLI-10-24, 72 NRC 451 (2010); CLI-10-25, 72 NRC 469 (2010)
in addressing the section 2.309(c)(1) factors, failure to provide any specific discussion of most of these items or the weight they should be given in the balance is a potentially fatal omission; LBP-10-21, 72 NRC 616 (2010)
in cases involving ISL uranium mining and other source materials licensing, petitioner must demonstrate injury, causation, and redressability because proximity to the proposed facility alone is not adequate to demonstrate standing; LBP-10-16, 72 NRC 361 (2010)
in cases involving possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been an essential element in establishing standing; LBP-10-21, 72 NRC 616 (2010)

in cases not involving nuclear power reactors, whether petitioner could be affected by the licensing action must be determined on a case-by-case basis, taking into account petitioner's distance from the source, the nature of the licensed activity, and the significance of the radioactive source; CLI-10-20, 72 NRC 185 (2010)
in determining whether an individual or organization should be granted party status based on standing of right, NRC applies contemporaneous judicial standing concepts; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010); LBP-10-21, 72 NRC 616 (2010)
in determining whether petitioner has established standing, boards may construe the petition in favor of the petitioner; LBP-10-15, 72 NRC 257 (2010)
in light of the requirements that any new contention be based on material information that was not previously available, the timeliness determination required under 10 C.F.R. 2.309(f)(2) and the section 2.326(a) reopening standard can be closely equated; LBP-10-21, 72 NRC 616 (2010)
in order to raise a timely contention, a party must piece together disparate shreds of information that, standing alone, have little apparent significance; CLI-10-27, 72 NRC 481 (2010)
in proceedings involving nuclear power reactors, petitioner is presumed to have standing to intervene without the need to specifically plead injury, causation, and redressability if petitioner lives within 50 miles of the proposed facility; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
in the context of a safety contention, petitioner must show a waiver of the regulation is necessary to reach a significant safety problem; LBP-10-15, 72 NRC 257 (2010)
in the event of some 11th-hour unforeseen development, a party may tender a document belatedly, but the tender must be accompanied by a motion for leave to file out-of-time which satisfactorily explains not only the reason for the lateness, but also why a motion for an extension of time could not have been seasonably submitted; CLI-10-26, 72 NRC 474 (2010)
in the interest of efficient case management and prompt resolution of adjudications, the Commission has generally enforced the 10-day deadline for appeals strictly, excusing it only in unavoidable and extreme circumstances; CLI-10-26, 72 NRC 474 (2010)
information required to show standing includes the nature of petitioner's right under a relevant statute to be made a party, the nature and extent of petitioner's property, financial, or other interest in the proceeding, and the possible effect of any decision or order that might be issued on petitioner's interest; LBP-10-15, 72 NRC 257 (2010)
interlocutory review is granted only in extraordinary circumstances; CLI-10-30, 72 NRC 564 (2010)
interlocutory review is granted where the issues are significant, have potentially broad impact, and may well recur in the likely license renewal proceedings for other plants; CLI-10-27, 72 NRC 481 (2010)
interlocutory review will be granted only if petitioner demonstrates that the issue for which it seeks review 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 affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-10-30, 72 NRC 564 (2010)
intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was publicly available for some time prior to the filing of the contention; CLI-10-27, 72 NRC 481 (2010)
intervenor is entitled to submit a new safety contention, with leave of the board, upon three showings; CLI-10-17, 72 NRC 1 (2010)
intervenor must comply with procedural requirements for the filing of new or amended contentions, including the requirement that the contentions be submitted in a timely fashion based on the availability of the subsequent information; LBP-10-17, 72 NRC 501 (2010)
intervenor's appeal 3 days out of time was accepted when applicants' motion to strike failed to even hint at prejudice; LBP-10-21, 72 NRC 616 (2010)
intervenors must move for leave to file a timely new or amended contention under 10 C.F.R. 2.309(c), (f)(2); LBP-10-14, 72 NRC 101 (2010)
it is a contention's proponent, not the licensing board, that is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions; LBP-10-24, 72 NRC 720 (2010)
it is enough that petitioner has demonstrated a realistic threat of sustaining a direct injury as a result of contaminated groundwater flowing from the site to his property; LBP-10-16, 72 NRC 361 (2010)

it is generally not sufficient to seek to establish standing in a proceeding by merely cross-referencing the showing made in another proceeding, rather than making a new presentation or at least providing a submission that updates the factual information that was provided previously; LBP-10-21, 72 NRC 616 (2010)
it is within Commission discretion to grant interlocutory review; CLI-10-29, 72 NRC 556 (2010)
it might be sufficient to allow petitioner to rely on a prior standing demonstration if that prior demonstration is specifically identified and shown to correctly reflect the current status of petitioner's standing; LBP-10-21, 72 NRC 616 (2010)
legal issues are reviewed de novo on appeal, but the Commission generally defers to board findings of fact, unless they are clearly erroneous; CLI-10-17, 72 NRC 1 (2010)
licensing board decisions denying a petition for waiver are interlocutory and not reviewable until the board has issued a final decision resolving the case, unless a party seeking review shows that one of the grounds for interlocutory review has been met; CLI-10-29, 72 NRC 556 (2010)
licensing boards and the Commission have considered the late-filing criteria even in cases where the factors were not fully addressed by petitioners and/or the NRC Staff or were not addressed at all; LBP-10-24, 72 NRC 720 (2010)
licensing boards are to refer novel issues of law to the Commission; LBP-10-15, 72 NRC 257 (2010)
licensing boards have authority to set a proceeding's schedule and to ensure compliance with that schedule; LBP-10-21, 72 NRC 616 (2010)
licensing boards have substantial authority to regulate hearing procedures; LBP-10-21, 72 NRC 616 (2010)
licensing boards must assess intervention petitions to determine whether elements for standing are met even though if there are no objections to petitioner's standing; LBP-10-21, 72 NRC 616 (2010)
mandatory disclosure is the only form of discovery allowed in Subpart L proceedings, and all other forms are expressly prohibited; LBP-10-23, 72 NRC 692 (2010)
mandatory disclosures are updated every month; LBP-10-23, 72 NRC 692 (2010)
motions filed under 10 C.F.R. 2.323 are not a legitimate means to bring challenges to board decisions to the Commission; CLI-10-28, 72 NRC 553 (2010)
motions to reopen a proceeding to introduce an entirely new contention must successfully navigate at least nineteen different regulatory factors under 10 C.F.R. 2.326, 2.309(c), and 2.309(f)(1); LBP-10-19, 72 NRC 529 (2010)
motions to reopen must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of section 2.326(a) have been satisfied; LBP-10-19, 72 NRC 529 (2010)
movant must show that it is more probable than not that it would have prevailed on the merits of the proposed new contention; LBP-10-19, 72 NRC 529 (2010)
neither legal ownership nor title is required in order for a party to have "possession, custody, or control" of a document; LBP-10-23, 72 NRC 692 (2010)
new contentions based on assumptions that cannot be considered information that was not previously available or materially different than information previously available do not meet admissibility requirements; CLI-10-17, 72 NRC 1 (2010)
new or amended contentions filed after the initial deadline may be admitted with leave of the presiding officer upon a showing that information on which the contention is based was not previously available and is materially different than information previously available and the contention has been submitted in a timely fashion; LBP-10-14, 72 NRC 101 (2010)
no proximity presumption applies in source materials cases; LBP-10-16, 72 NRC 361 (2010)
NRC's expanding adjudicatory docket makes it critically important that parties comply with NRC pleading requirements and that the board enforce those requirements; CLI-10-27, 72 NRC 481 (2010)
NRC's production-of-documents regulation, 10 C.F.R. 2.707(a)(1) is essentially the same as Fed. R. Civ. P. 34(a)(1); LBP-10-23, 72 NRC 692 (2010)
once a petition to intervene has been granted, issues involving access to documents for use in the proceeding are governed by NRC discovery rules; CLI-10-24, 72 NRC 451 (2010)
once the deadline for filing an initial intervention petition has passed, a party wishing to submit new or amended contentions on matters not associated with issuance of the Staff's draft or final environmental

impact statement must satisfy the requirements of 10 C.F.R. 2.309(f)(2); LBP-10-21, 72 NRC 616 (2010)
once the record of a proceeding is closed, new information may not be considered in the proceeding unless the reopening standards are met; LBP-10-21, 72 NRC 616 (2010)
only in truly unavoidable and extreme circumstances are late filings to be accepted; LBP-10-21, 72 NRC 616 (2010)
participant filing out of time must offer a satisfactory explanation for its lateness, including, if necessary, an account as to why a request for extension could not have been filed beforehand; LBP-10-21, 72 NRC 616 (2010)
parties are expected to file motions for extensions of time so that they are received by NRC well before the time specified expires; CLI-10-26, 72 NRC 474 (2010)
pendency of a petition for Commission review does not absolve petitioner of its duty to file a motion to reopen in a timely fashion; LBP-10-19, 72 NRC 529 (2010)
petitioner does not need to provide expert opinion or a substantive affidavit in order to satisfy 10 C.F.R. 2.309(f)(1)(v); LBP-10-15, 72 NRC 257 (2010)
petitioner has alleged sufficient new information concerning the seismic situation to raise a prima facie showing that strict application of the generic NEPA analysis of the management of spent fuel in nuclear reactors would not serve the purpose for which Part 51 Appendix B and 10 C.F.R. 51.53(c)(2) were adopted; LBP-10-15, 72 NRC 257 (2010)
petitioner has an iron-clad obligation to examine the publicly available documentary material with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention; CLI-10-27, 72 NRC 481 (2010)
petitioner has an obligation to explain why cited testimony provides a basis for its contention; LBP-10-17, 72 NRC 501 (2010)
petitioner has presented a prima facie showing for waiver of the NRC regulation covering the environmental impacts of spent fuel pool accidents generically, and has shown that its contention concerning earthquake-induced spent fuel pool accidents is otherwise admissible; LBP-10-15, 72 NRC 257 (2010)
petitioner must demonstrate that its contention is within the scope of the proceeding; LBP-10-16, 72 NRC 361 (2010)
petitioner must establish standing and proffer at least one admissible contention that meets the requirements of 10 C.F.R. 2.309(f)(1); LBP-10-16, 72 NRC 361 (2010)
petitioner must establish that it has suffered a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute and that the injury can fairly be traced to the challenged action and is likely to be redressed by a favorable decision; LBP-10-15, 72 NRC 257 (2010)
petitioner must make a fresh standing demonstration in each individual proceeding in which intervention is sought; LBP-10-21, 72 NRC 616 (2010)
petitioner must provide a concise statement of the alleged facts that support its position and upon which the petitioner intends to rely at the hearing; LBP-10-16, 72 NRC 361 (2010)
petitioner, especially one represented by counsel, bears the burden of going forward and specifically addressing each of the six elements in 10 C.F.R. 2.309(f)(1); LBP-10-16, 72 NRC 361 (2010)
petitioners are not required to demonstrate their asserted injury with certainty at the contention admission stage, or to provide extensive technical studies in support of their standing argument; LBP-10-16, 72 NRC 361 (2010)
petitioner's claimed injury must be arguably within the zone of interests protected by the governing statute in the proceeding; LBP-10-16, 72 NRC 361 (2010)
petitioner's issue will be ruled inadmissible if petitioner has offered no tangible information, no experts, or no substantive affidavits; LBP-10-15, 72 NRC 257 (2010)
petitioners must seek leave to request reconsideration of a decision and set forth compelling circumstances that petitioners could not reasonably have anticipated and that would render the decision invalid; CLI-10-21, 72 NRC 197 (2010)
petitioner's participation in a licensing proceeding hinges on a demonstration that the petitioner has standing; LBP-10-16, 72 NRC 361 (2010)

petitioners seeking to introduce new contentions after the board has denied their initial petition to intervene need to address the reopening standards; LBP-10-21, 72 NRC 616 (2010)
petitioner's standing showing can be corrected or supplemented to cure deficiencies by means of its reply pleading; LBP-10-21, 72 NRC 616 (2010)
pleading requirements calling for a recitation of facts or expert opinion supporting the issue raised are inapplicable to a contention of omission beyond identifying the legally required missing information; LBP-10-16, 72 NRC 361 (2010)
prima facie case is defined as establishment of a legally required rebuttable presumption or a party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor; LBP-10-15, 72 NRC 257 (2010)
proponent of a motion to reopen must do more than simply raise a safety issue, but must show that the safety issue it raises is significant; LBP-10-19, 72 NRC 529 (2010)
proximity-based presumption of standing applies in proceedings for nuclear power plant construction permits, operating licenses, or significant amendments thereto; LBP-10-16, 72 NRC 361 (2010)
requiring a petitioner to allege facts under section 2.309(f)(1)(v) or to provide an affidavit that sets out the factual and/or technical bases under section 51.109(a)(2) in support of a legal contention as opposed to a factual contention is not necessary; LBP-10-17, 72 NRC 501 (2010)
review at the end of the case would be meaningless because the Commission cannot later, on appeal from a final board decision, rectify an erroneous disclosure order; CLI-10-29, 72 NRC 556 (2010)
rules on contention admissibility are strict by design; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-10-17, 72 NRC 501 (2010)
showing necessary for grant of a petition for interlocutory review is described; CLI-10-29, 72 NRC 556 (2010)
six basic requirements for an admissible contention can be summarized as specificity, brief explanation, within scope, materiality, concise statement of alleged facts or expert opinion, and genuine dispute; LBP-10-15, 72 NRC 257 (2010)
Staff's propositions at the contention admission stage regarding what would effectively cure an omission from a license renewal application are matters for a merits decision, not for a determination of whether or not a contention of omission is admissible; LBP-10-15, 72 NRC 257 (2010)
standing generally has been denied when the threat of injury is not concrete and particularized; LBP-10-16, 72 NRC 361 (2010)
standing requires that petitioner allege a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; LBP-10-16, 72 NRC 361 (2010)
subject matter of a contention must impact the grant or denial of the pending license application; LBP-10-17, 72 NRC 501 (2010)
submission of a new contention within 30 days of the event giving rise to that contention is timely; LBP-10-17, 72 NRC 501 (2010)
sufficiency of an application is not a matter committed solely to the NRC Staff's discretion and thus is within the scope of an adjudicatory proceeding; LBP-10-17, 72 NRC 501 (2010)
summary disposition is not a tool for trying to convince a licensing board to decide, on written submissions, genuine issues of material fact that warrant resolution at a hearing; LBP-10-20, 72 NRC 571 (2010)
summary disposition may be granted only if the truth is clear; LBP-10-20, 72 NRC 571 (2010)
summary disposition movant must show that the matter entails no genuine issue as to any material fact and that movant is entitled to a decision as a matter of law; LBP-10-20, 72 NRC 571 (2010)
summary disposition rules 2.1205 and 2.710 are substantially similar; LBP-10-20, 72 NRC 571 (2010)
the affidavit accompanying a petition for rule waiver need not be prepared by an expert; LBP-10-15, 72 NRC 257 (2010)
the amended late-filed contentions rule, 10 C.F.R. 2.309(f)(2), is not intended to alter the standards in section 2.714(a) of its rules of practice as interpreted by NRC case law; LBP-10-17, 72 NRC 501 (2010)
the board grants intervenors' motion to compel disclosure of certain groundwater modeling information associated with a combined license application; LBP-10-23, 72 NRC 692 (2010)

the Commission elaborates on the standards for accepting an appeal filed out of time; LBP-10-21, 72 NRC 616 (2010)
the Commission generally applies the same standard for summary disposition that federal courts apply when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; LBP-10-20, 72 NRC 571 (2010)
the Commission has set forth a four-part test for grant of a rule waiver, and all four factors must be met; LBP-10-22, 72 NRC 661 (2010)
the Commission may consider the criteria listed in 10 C.F.R. 2.786(b)(4) when reviewing interlocutory matters on the merits, but when determining whether to undertake such review, the standards in section 2.786(g) control the determination; CLI-10-29, 72 NRC 556 (2010)
the Commission may, at its discretion, grant a party's request for interlocutory review of a board decision; CLI-10-30, 72 NRC 564 (2010)
the Commission will consider a petition for review if it raises a substantial question with respect to one or more of the five paragraphs of 10 C.F.R. 2.341(b)(4); CLI-10-17, 72 NRC 1 (2010)
the concept of control extends to situations in which the party has the practical ability to obtain materials in the possession of another, even if the party does not have the legal right to compel the other person or entity to produce the requested materials; LBP-10-23, 72 NRC 692 (2010)
the disclosing party can either provide the other parties with an actual copy of the document or data compilation or can simply describe it and provide it if the other party requests it; LBP-10-23, 72 NRC 692 (2010)
the fact that a party may have other obligations does not relieve that party of its hearing obligations; CLI-10-26, 72 NRC 474 (2010)
the injury-in-fact necessary to establish organizational standing must be more than a mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem; LBP-10-16, 72 NRC 361 (2010)
the manner in which the Staff conducts its review is outside the scope of a proceeding; LBP-10-17, 72 NRC 501 (2010)
the mere potential for legal error in a contention admissibility decision is not a ground for interlocutory review; CLI-10-30, 72 NRC 564 (2010)
the phrase "possession, custody, or control" as found in the Federal Rules of Civil Procedure and 10 C.F.R. 2.336(a) is in the disjunctive, and thus only one of the enumerated requirements needs to be met; LBP-10-23, 72 NRC 692 (2010)
the proximity presumption of standing applies in proceedings for nuclear power plant construction permits, operating licenses, or significant amendments thereto; LBP-10-15, 72 NRC 257 (2010)
the purpose of contention pleading requirements is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
the question whether to hold an NRC enforcement proceeding in abeyance pending a related criminal prosecution is generally suitable for interlocutory Commission review because, unlike most interlocutory questions, the abeyance issue cannot await the end of the proceeding because it becomes moot; CLI-10-29, 72 NRC 556 (2010)
the regulations do not define the phrase "differ significantly" but in the absence of a statutory definition, courts normally define a term by its ordinary meaning; LBP-10-24, 72 NRC 720 (2010)
the relevance standard of 10 C.F.R. 2.336 is more flexible than the relevance standard of Fed. R. Evid. 401; LBP-10-23, 72 NRC 692 (2010)
the requirement that contentions be supported by alleged facts or expert opinion generally is fulfilled when the sponsor of an otherwise acceptable contention provides a brief recitation of the factors underlying the contention or references to documents and text that provide such reasons; LBP-10-14, 72 NRC 101 (2010)
the scope of discovery is broader than the scope of admissible evidence; LBP-10-23, 72 NRC 692 (2010)
the scope of the mandatory disclosure obligations under 10 C.F.R. 2.336, which apply to Subpart L proceedings, is wide-reaching; LBP-10-23, 72 NRC 692 (2010)
the significance of the issue being raised by a new contention would be a relevant "good cause" consideration; LBP-10-21, 72 NRC 616 (2010)
the standard of review on appeal is abuse of discretion; CLI-10-24, 72 NRC 451 (2010)

the timeliness of a motion to reopen depends on what/when was the trigger that provided the footing for the new contention and was the motion seeking record reopening/contention admission timely filed after that trigger event; LBP-10-21, 72 NRC 616 (2010)
the unavailability of documents does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner; CLI-10-27, 72 NRC 481 (2010)
there simply would be no end to NRC licensing proceedings if petitioners could disregard timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding; CLI-10-27, 72 NRC 481 (2010)
threat of terrorist attack at spent fuel pools has been evaluated generically by NRC, and special circumstances for rule waiver have not been shown; LBP-10-15, 72 NRC 257 (2010)
timeliness of a motion to reopen in which the proponent of the motion proffers a new contention depends primarily on an assessment as to when the proponent of the motion first knew, or should have known, enough information to raise the issues presented in the new contention; LBP-10-19, 72 NRC 529 (2010)
timeliness of a new or amended contention based on material new information is based on the timing of the availability of the information on which the contention is based, not the timing of the NRC Staff NEPA document; LBP-10-24, 72 NRC 720 (2010)
to assert an appropriate injury for organizational standing, an organization must demonstrate a palpable injury in fact to its organizational interests; LBP-10-16, 72 NRC 361 (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; LBP-10-16, 72 NRC 361 (2010)
to determine whether an interest is in the zone of interests of a statute, it is necessary first to discern the interests arguably to be protected by the statutory provision at issue and then to inquire whether petitioner's interests affected by the agency action are among them; LBP-10-16, 72 NRC 361 (2010)
to determine whether petitioners have standing, boards accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party; CLI-10-20, 72 NRC 185 (2010)
to establish causation, petitioner must show that there is a causal connection between the injury and the conduct complained of; LBP-10-16, 72 NRC 361 (2010)
to establish organizational standing, an organization must demonstrate that the action at issue will cause an injury in fact to the organization's interests and the injury is within the zone of interests protected by NEPA or the AEA; LBP-10-16, 72 NRC 361 (2010)
to establish standing in federal court, a party must show injury-in-fact, causation, and redressability; LBP-10-16, 72 NRC 361 (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-10-21, 72 NRC 616 (2010)
to establish standing, petitioner must show that its alleged injury in fact could be cured or alleviated by some action of the tribunal; LBP-10-16, 72 NRC 361 (2010)
to interpose a new contention after a proceeding has been terminated requires submission of a fresh intervention petition that fulfills the applicable standards for such filings, including an appropriate standing demonstration; LBP-10-21, 72 NRC 616 (2010)
to justify reopening the record to admit a new contention, the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition, and the new information must be significant and plausible enough to require reasonable minds to inquire further; LBP-10-21, 72 NRC 616 (2010)
to rule that disclosure under 10 C.F.R. 2.336(a)(2)(i) is limited to formal contractual deliverables would encourage applicants to draft consulting contracts to insulate themselves from the obligation to disclose critical computer modeling information; LBP-10-23, 72 NRC 692 (2010)
to satisfy the "clearly erroneous" standard, a litigant must show that the board's findings are not even plausible in light of the record viewed in its entirety; CLI-10-17, 72 NRC 1 (2010)

to show good cause for the late filing of a contention, petitioner must show that the information on which the new contention is based was not reasonably available to the public, not merely that the petitioner recently found out about it; CLI-10-27, 72 NRC 481 (2010)
unfamiliarity with NRC's Rules of Practice is not sufficient excuse for late filings, particularly when the order that is being challenged expressly advised petitioner of his appellate rights and of the time within which those rights had to be exercised; CLI-10-26, 72 NRC 474 (2010)
unless a deadline has been specified in the scheduling order for the proceeding, the determination of timeliness is subject to a reasonableness standard that depends on the facts and circumstances of each situation; LBP-10-24, 72 NRC 720 (2010)
when a contested proceeding has been terminated following the resolution of all submitted contentions, an individual, group, or governmental entity that wishes to interpose an additional issue must submit a new intervention petition that addresses the standards in section 2.309(c)(1) that govern nontimely intervention petitions; LBP-10-21, 72 NRC 616 (2010)
when a new contention is filed challenging new data or conclusions in NRC's environmental documents, the timeliness of the new contention is based on whether it was filed promptly after the NRC's NEPA document became publicly available, not whether it was filed promptly after the information on which the intervenor bases its challenge became publicly available; LBP-10-24, 72 NRC 720 (2010)
when a reopening motion is untimely, the section 3.326(a)(1) "exceptionally grave circumstances" test supplants the "significant issue" standard under section 2.326(a)(2); LBP-10-21, 72 NRC 616 (2010)
when petitioner seeks to introduce a new contention after the record has been closed, it should address the reopening standards contemporaneously with a late-filed intervention petition, which must satisfy the standards for both contention admissibility and late filing; LBP-10-21, 72 NRC 616 (2010)
when seeking to intervene in a representational capacity, an organization must identify by name and address at least one member who is affected by the licensing action and who qualifies for standing in his or her own right, and show that the member has authorized the organization to intervene on his or her behalf; LBP-10-15, 72 NRC 257 (2010)
when the Commission endorsed the use of the Federal Rules of Evidence as guidance for the boards, it did so with the express proviso that boards must apply the Part 2 rules with greater flexibility than the FRE; LBP-10-23, 72 NRC 692 (2010)
when the Commission reviews board rulings on contention admissibility, it employs the clear error and abuse of discretion standards of review; CLI-10-17, 72 NRC 1 (2010)
when the contested portion of a proceeding is terminated following an unchallenged merits determination in favor of applicant regarding the proceeding's sole admitted contention, the board's focus must be on the requirements applicable to reopening a closed record set out in 10 C.F.R. 2.326; LBP-10-21, 72 NRC 616 (2010)
where a contention is superseded by the subsequent issuance of licensing-related documents, the contention must be disposed of or modified; LBP-10-17, 72 NRC 501 (2010)
where a motion to reopen a proceeding to introduce a new contention founders on several of the initial criteria, the board find it unnecessary to prolong the ruling by analyzing all of the other factors; LBP-10-19, 72 NRC 529 (2010)
where petitioner was admitted to the case as a party at the time it filed an amended contention, consideration of the contention's admissibility is also governed by the general contention admissibility requirements of section 2.309(f)(1); CLI-10-18, 72 NRC 56 (2010)
RULES OF PROCEDURE
granting of petitions for review is discretionary, given due weight to the existence of a substantial question with respect to the five considerations listed in 10 C.F.R. 2.341(b)(4); CLI-10-18, 72 NRC 56 (2010)
the informal procedural rules of Part 2, Subpart L place greater emphasis and responsibility on the presiding officer to oversee the development of a full and complete record; CLI-10-17, 72 NRC 1 (2010)
SAFEGUARDS INFORMATION
applicant requested that its mitigative strategies report be withheld from public disclosure because it contained security-related information; CLI-10-24, 72 NRC 451 (2010)

SUBJECT INDEX

SAFETY ANALYSIS
although the analysis required by 10 C.F.R. 50.59 is not the same as the final safety analysis, it is nevertheless a formal, written analysis involving safety issues (accident probabilities and/or consequences); LBP-10-20, 72 NRC 571 (2010)
the function of 10 C.F.R. 50.59 is to deal with changes to a nuclear power plant, and it requires, as a prerequisite to any such change, that the licensee perform safety analyses in addition to those contained in the final safety analysis report; LBP-10-20, 72 NRC 571 (2010)
SAFETY CULTURE
although not required by regulation, settlement agreements that contain language reinforcing employees' rights to raise safety concerns and communicate with the NRC avoid the possibility of being construed in a way that could be a violation; DD-10-1, 72 NRC 149 (2010)
broad-based issues akin to safety culture, such as operational history, quality assurance, quality control, management competence, and human factors, are beyond the bounds of a license renewal proceeding; CLI-10-27, 72 NRC 481 (2010)
Green inspection finding indicates that the deficiency in licensee performance has a very low-risk significance and has little or no impact on safety, but White, Yellow, and Red findings indicate increasingly serious safety problems; CLI-10-27, 72 NRC 481 (2010)
if the Commission were to permit fundamentally routine inspection findings and regulatory determinations to form the basis for safety culture contentions, this result could lead to a potentially never-ending stream of minitrials on operational issues, in which the applicant would be required to demonstrate how each issue was satisfactorily resolved; CLI-10-27, 72 NRC 481 (2010)
nondisparagement clauses in retention bonus agreements are common in employment agreements and NRC should not interfere with these agreements unless it finds such a clause violates 10 C.F.R. 50.7(f) or is applied in a fashion that prevents or retaliates against an employee for engaging in protected activities such as communicating with NRC; DD-10-1, 72 NRC 149 (2010)
NRC continually takes measures to include the monitoring of safety culture in its oversight programs and internal management processes; CLI-10-27, 72 NRC 481 (2010)
operating reactor licensees are not required to implement an employee concerns program, but are required to establish and implement an effective corrective action program; DD-10-1, 72 NRC 149 (2010)
petitioner's request for action concerning deficiencies in licensee's employee concerns program is denied; DD-10-1, 72 NRC 149 (2010)
the purpose of 10 C.F.R. 50.7(f) is to ensure that licensees do not enter into employment agreements that would prohibit, restrict, or otherwise discourage an employee or former employee from providing the NRC with information of regulatory significance; DD-10-1, 72 NRC 149 (2010)
to the extent petitioner believes that NRC Staff has overlooked facts indicating an inadequate safety culture as a matter separate and apart from license renewal, then its remedy is to direct Staff's attention to the supporting facts via a petition for enforcement action; CLI-10-27, 72 NRC 481 (2010)
SAFETY ISSUES
a timely motion to reopen may be denied if it raises issues that are not of major significance to plant safety whereas a nontimely motion may be granted if it raises an issue of sufficient gravity; LBP-10-21, 72 NRC 616 (2010)
in the context of a safety contention, petitioner must show that a waiver of the regulation is necessary to reach a significant safety problem; LBP-10-15, 72 NRC 257 (2010)
proponent of a motion to reopen must do more than simply raise a safety issue, but must show that the safety issue it raises is significant; LBP-10-19, 72 NRC 529 (2010)
the board may not consider that long-term erosion might entirely eliminate the proposed repository's upper geologic barrier unless the erosion is also shown to be a safety concern in the relatively near term; LBP-10-22, 72 NRC 661 (2010)
the only safety 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 during the period of extended operations; CLI-10-27, 72 NRC 481 (2010)
SAFETY REVIEW
petitioner alleges failure to conduct safety review of the modification of the controlled access area by the addition of an undocumented roof access for a siphon breaker experiment; DD-10-3, 72 NRC 171 (2010)

the aging management review for license renewal does not focus on all aging-related issues; CLI-10-27, 72 NRC 481 (2010)
SAFETY-RELATED
motion to reopen to introduce a new contention asserting issues related to aging management of effects of moist or wet environments on buried, below-grade, underground, or hard-to-access safety-related electrical cables is denied; LBP-10-19, 72 NRC 529 (2010)
SANCTIONS
a spectrum of sanctions from minor to severe may be employed by a board to assist in the management of a proceeding; LBP-10-21, 72 NRC 616 (2010)
examples include warning a party that offending conduct will not be tolerated in the future, refusing to consider a filing, denying the right to cross-examine or present evidence, dismissing contentions, imposing sanctions on counsel, or dismissing the party from the proceeding; LBP-10-21, 72 NRC 616 (2010)
factors considered in selecting an appropriate sanction include relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances; LBP-10-21, 72 NRC 616 (2010)
with an eye toward mitigating prejudice to nonbreaching participants, boards must tailor sanctions to bring about improved future compliance; LBP-10-21, 72 NRC 616 (2010)
SCHEDULE, BRIEFING
although participants generally must comply with the schedule established by the presiding officer, they might sometimes be unable to meet established deadlines; LBP-10-21, 72 NRC 616 (2010)
in establishing and enforcing schedule deadlines, boards must take care not to compromise the Commission's fundamental commitment to a fair and thorough hearing process; LBP-10-21, 72 NRC 616 (2010)
licensing boards have authority to set a proceeding's schedule and to ensure compliance with that schedule; LBP-10-21, 72 NRC 616 (2010)
SCHEDULING
licensing boards have authority to control the schedule for a proceeding to ensure that intervenors have adequate time to prepare new or amended contentions in response to new information; LBP-10-17, 72 NRC 501 (2010)
SECURITY
a person may be denied access at a licensee facility based on falsification of information, trustworthiness or reliability issues, and issues related to fitness for duty; DD-10-2, 72 NRC 163 (2010)
an individual requiring clarification or resolution of an access authorization concern must resolve the issue with the licensee where unescorted access was last held or otherwise denied; DD-10-2, 72 NRC 163 (2010)
each licensee must evaluate access denial status on a case-by-case basis and make a determination of trustworthiness and reliability; DD-10-2, 72 NRC 163 (2010)
nuclear industry was required to develop, implement, and maintain an industry database accessible by NRC-licensed facilities to share information, including determination of whether an individual is denied access at any other NRC-licensed facility; DD-10-2, 72 NRC 163 (2010)
petitioner alleges failure to conduct safety review of the modification of the controlled access area by the addition of an undocumented roof access for a siphon breaker experiment; DD-10-3, 72 NRC 171 (2010)
potentially disqualifying information for unescorted access authorization may include unfavorable information from an employer, developed or disclosed criminal history, credit history, judgments, unfavorable reference information, evidence of drug or alcohol abuse, discrepancies between information disclosed and developed; DD-10-2, 72 NRC 163 (2010)
SEISMIC ISSUES
petitioner has alleged sufficient new information concerning the seismic situation to raise a prima facie showing that strict application of the generic NEPA analysis of the management of spent fuel in nuclear reactors would not serve the purpose for which Part 51 Appendix B and 10 C.F.R. 51.53(c)(2) were adopted; LBP-10-15, 72 NRC 257 (2010)

petitioner has presented a prima facie showing for waiver of the NRC regulation covering the environmental impacts of spent fuel pool accidents generically, and has shown that its contention concerning earthquake-induced spent fuel pool accidents is otherwise admissible; LBP-10-15, 72 NRC 257 (2010)
See also Earthquakes
SENSITIVE UNCLASSIFIED NONSAFEGUARDS INFORMATION
a board's determination on a request for access is reviewed de novo; CLI-10-24, 72 NRC 451 (2010)
an appeal as of right by NRC Staff is permitted on the question of whether a request for access to SUNSI should have been denied in whole or in part; CLI-10-24, 72 NRC 451 (2010)
because of the security-related SUNSI categorization of a Staff guidance document used to assess an application's compliance with NRC rules, the Staff would not have to produce the document but would be required to identify the document as part of its continuing duty of disclosure; CLI-10-24, 72 NRC 451 (2010)
for documents that are otherwise discoverable, but for which there is a claim of privilege or protected status, NRC Staff must list them and provide sufficient information for assessing their privilege or protected status; CLI-10-24, 72 NRC 451 (2010); CLI-10-25, 72 NRC 469 (2010)
handling of confidential commercial or financial (proprietary) information that has been submitted to the agency is governed by 10 C.F.R. 2.390; CLI-10-24, 72 NRC 451 (2010)
in its supervisory capacity, the Commission provides guidance on the "need for SUNSI" analysis, for use in those instances when an access order applies; CLI-10-24, 72 NRC 451 (2010)
the "need for SUNSI" inquiry is essentially a relevance inquiry just as a federal court litigant must show that information sought in discovery is relevant to its claims or defenses; CLI-10-24, 72 NRC 451 (2010)
the showing required for "need" for SUNSI could include, but does not require (nor is it limited to), an explanation that the information will be used as support for a contention; CLI-10-24, 72 NRC 451 (2010)
upon a showing of need, petitioners' request to obtain access to an unredacted application was granted; CLI-10-24, 72 NRC 451 (2010)
SETTLEMENT AGREEMENTS
although not required by regulation, settlement agreements that contain language reinforcing employees' rights to raise safety concerns and communicate with the NRC avoid the possibility of being construed in a way that could be a violation; DD-10-1, 72 NRC 149 (2010)
Severity Level III violation for licensee's failure to develop and implement a formalized procedure to neutralize a spill involving hydrofluoric acid, resulting in exposure to licensee operators, is recategorized to a violation with no assigned severity level; LBP-10-18, 72 NRC 519 (2010)
SEVERE ACCIDENT MITIGATION ALTERNATIVES ANALYSIS
a SAMA analysis contention was found to be inadmissible because it lacked supporting information regarding the relative costs and benefits of that proposed alternative; LBP-10-15, 72 NRC 257 (2010)
adequacy or inadequacy of applicant's SAMA analysis is certainly within the scope of a license renewal proceeding; LBP-10-15, 72 NRC 257 (2010)
although "severe accident," "severe accident mitigation alternatives," and "SAMA" are not defined in NRC's NEPA regulations, the NRC policy documents that originated the terms clearly limit them to nuclear reactors and do not include spent fuel pools or storage; LBP-10-15, 72 NRC 257 (2010)
analyses are not required for the spent fuel storage impacts associated with license renewals; LBP-10-15, 72 NRC 257 (2010)
analyses are rooted in a cost-benefit assessment, and the purpose of the assessment is to identify plant changes whose costs would be less than their benefit; LBP-10-14, 72 NRC 101 (2010)
applicant requested that its mitigative strategies report be withheld from public disclosure because it contained security-related information; CLI-10-24, 72 NRC 451 (2010)
applicant's environmental report for its license renewal application must include a SAMA analysis, outlining the costs and benefits of potential mitigation measures to reduce severe accident risk or consequences; CLI-10-30, 72 NRC 564 (2010)
contention raising question of whether a quantitative as opposed to qualitative analysis of terrorist attacks and the alternatives for mitigation and prevention is necessary is referred to the Commission as a novel issue; LBP-10-15, 72 NRC 257 (2010)

environmental reports must include an 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; LBP-10-16, 72 NRC 361 (2010)
license renewal environmental reports must include a SAMA analysis if not previously considered by NRC Staff; LBP-10-15, 72 NRC 257 (2010)
NEPA requires the NRC to provide a reasonable mitigation alternatives analysis, containing reasonable estimates, including full disclosures of any known shortcomings in methodology, incomplete or unavailable information and significant uncertainties; CLI-10-22, 72 NRC 202 (2010)
petitioner need not submit a sensitivity analysis in order to establish that a SAMA-related contention is material; LBP-10-15, 72 NRC 257 (2010)
probabilistic risk assessment is the Commission's accepted and standard practice in SAMA analyses; LBP-10-15, 72 NRC 257 (2010)
SEVERE ACCIDENT MITIGATION DESIGN ALTERNATIVES ANALYSIS
challenges to a SAMDA analysis are within the scope of a combined license proceeding; LBP-10-14, 72 NRC 101 (2010)
SITE CHARACTERIZATION
petitioner raises a genuine dispute with the application with respect to the adequacy of information needed to characterize the site and offsite hydrogeology to ensure confinement of the extraction fluids; LBP-10-16, 72 NRC 361 (2010)
SITE SELECTION
although substantial weight is accorded to a license applicant's preferences, if the identified purpose of a proposed project reasonably may be accomplished at locations other than the proposed site, the board may require consideration of those alternative sites; CLI-10-18, 72 NRC 56 (2010)
SITE SUITABILITY
licensing board may disapprove a site for a new reactor only upon one of two findings; LBP-10-24, 72 NRC 720 (2010)
SOLAR POWER
wind or solar power are not considered as stand-alone alternatives because neither source is deemed capable of serving the purpose and need of the project, generating 1600 MWe of baseload power; LBP-10-24, 72 NRC 720 (2010)
SOURCE MATERIAL
petitioner alleges that routine unprotected handling of an unshielded neutron source by licensed operators and uncontrolled access by untrained and unlicensed facility visitors to this neutron source violated ALARA requirements; DD-10-3, 72 NRC 171 (2010)
SOURCE MATERIALS LICENSES
burden is on petitioner to allege a specific and plausible means by which contaminants from mining activities may adversely affect him or her; LBP-10-16, 72 NRC 361 (2010)
in cases involving ISL uranium mining and other source materials licensing, petitioner must demonstrate injury, causation, and redressability because proximity to the proposed facility alone is not adequate to demonstrate standing; LBP-10-16, 72 NRC 361 (2010)
intervention petitioner has the burden of showing a specific and plausible means by which the proposed license activities may affect him or her; LBP-10-16, 72 NRC 361 (2010)
no proximity presumption applies in source materials cases; LBP-10-16, 72 NRC 361 (2010)
SPENT FUEL POOLS
petitioner has presented a prima facie showing for waiver of the NRC regulation covering the environmental impacts of spent fuel pool accidents generically, and has shown that its contention concerning earthquake-induced spent fuel pool accidents is otherwise admissible; LBP-10-15, 72 NRC 257 (2010)
threat of terrorist attack at spent fuel pools has been evaluated generically by NRC and special circumstances for rule waiver have not been shown; LBP-10-15, 72 NRC 257 (2010)
SPENT FUEL STORAGE
although "severe accident," "severe accident mitigation alternatives," and "SAMA" are not defined in NRC's NEPA regulations, the NRC policy documents that originated the terms clearly limit them to nuclear reactors and do not include spent fuel pools or storage; LBP-10-15, 72 NRC 257 (2010)

for a contention regarding environmental impacts of spent fuel storage to be within the scope of an operating license renewal proceeding, petitioner must obtain a waiver under 10 C.F.R. 2.335(d); LBP-10-15, 72 NRC 257 (2010)
severe accident mitigation alternatives analyses are not required for the spent fuel storage impacts associated with license renewals; LBP-10-15, 72 NRC 257 (2010)
spent fuel from an additional 20 years of operation can be stored safely, with small environmental effects, at all plants and such impacts are classified as Category 1 issues that are not within the scope of individual license renewal proceedings; LBP-10-15, 72 NRC 257 (2010)
STANDARD OF PROOF
plaintiff may prove his case by direct or circumstantial evidence; CLI-10-23, 72 NRC 210 (2010)
to convict a person accused of making a false statement, the government must prove not only that the statement was false, but that the accused knew it to be false; CLI-10-23, 72 NRC 210 (2010)
STANDARD OF REVIEW
a board's determination on a request for access to sensitive unclassified nonsafeguards information is reviewed de novo; CLI-10-24, 72 NRC 451 (2010)
although boards should not "flyspeck" environmental documents, petitioners may raise contentions seeking correction of significant inaccuracies and omissions in the environmental report; LBP-10-24, 72 NRC 720 (2010)
an abuse of discretion standard is applied to Commission review of decisions on evidentiary questions; CLI-10-18, 72 NRC 56 (2010)
because the burden is on the summary disposition movant, the board must examine the record in the light most favorable to the nonmoving party and give the nonmoving party the benefit of all favorable inferences that can be drawn from the evidence; LBP-10-20, 72 NRC 571 (2010)
if issuing a license involves oversight of a private project rather than a federally sponsored project, the agency is entitled to give the applicant's preferences substantial weight when considering project design alternatives; LBP-10-14, 72 NRC 101 (2010)
interlocutory review is granted only in extraordinary circumstances; CLI-10-30, 72 NRC 564 (2010)
interlocutory review will be granted only if petitioner demonstrates that the issue for which it seeks review 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 affects the basic structure of the proceeding in a pervasive or unusual manner; CLI-10-30, 72 NRC 564 (2010)
legal issues are reviewed de novo on appeal, but the Commission generally defers to board findings of fact, unless they are clearly erroneous; CLI-10-17, 72 NRC 1 (2010)
licensing board findings of fact that turn on witness credibility receive the Commission's highest deference on appeal; CLI-10-23, 72 NRC 210 (2010)
licensing boards have authority to regulate the course of proceedings, and the Commission generally defers to the boards on case management decisions; CLI-10-28, 72 NRC 553 (2010)
NEPA imposes procedural requirements on the NRC to take a hard look at the environmental impacts of building and operating a nuclear reactor; LBP-10-14, 72 NRC 101 (2010)
NRC has broad discretion to determine how thoroughly it needs to analyze a particular subject for NEPA compliance; LBP-10-14, 72 NRC 101 (2010)
on appeal, abuse of discretion is the standard; CLI-10-24, 72 NRC 451 (2010)
petition for review satisfies 10 C.F.R. 2.341(b)(4)(ii), (iii), and (v) of the standards for review because the challenged portions of the initial decision address significant issues of law and policy that lack governing precedent and raise issues that could affect other license renewal determinations; CLI-10-17, 72 NRC 1 (2010)
petitioner's argument regarding rejection of its contention satisfies the prejudicial procedural error standard for review; CLI-10-17, 72 NRC 1 (2010)
the Commission defers to a licensing board's rulings on contention admissibility unless an appeal points to an error of law or abuse of discretion; CLI-10-21, 72 NRC 197 (2010)
the Commission elaborates on the standards for accepting an appeal filed out of time; LBP-10-21, 72 NRC 616 (2010)
the Commission generally defers to a board's rulings on standing in the absence of clear error or an abuse of discretion; CLI-10-20, 72 NRC 185 (2010)

the Commission may consider the criteria listed in 10 C.F.R. 2.786(b)(4) when reviewing interlocutory matters on the merits, but when determining whether to undertake such review the standards in section 2.786(g) control the determination; CLI-10-29, 72 NRC 556 (2010)
the Commission refrains from exercising its authority to make de novo findings of fact in situations where a licensing board has issued a plausible decision that rests on carefully rendered findings of fact; CLI-10-18, 72 NRC 56 (2010)
the Commission reviews legal questions de novo and will reverse a licensing board's legal rulings if they are a departure from or contrary to established law; CLI-10-18, 72 NRC 56 (2010)
the Commission will consider a petition for review if it raises a substantial question with respect to one or more of the five paragraphs of 10 C.F.R. 2.341(b)(4); CLI-10-17, 72 NRC 1 (2010)
the Commission will not consider cursory, unsupported arguments; CLI-10-23, 72 NRC 210 (2010)
the Commission will not overturn a hearing judge's findings simply because the Commission might have reached a different result; CLI-10-23, 72 NRC 210 (2010)
the fact that the board accorded greater weight to one party's evidence than to the other's is not a basis for overturning the initial decision; CLI-10-23, 72 NRC 210 (2010)
the mere potential for legal error in a contention admissibility decision is not a ground for interlocutory review; CLI-10-30, 72 NRC 564 (2010)
the standard of clear error for overturning a board's factual findings is quite high; CLI-10-18, 72 NRC 56 (2010)
to satisfy the "clearly erroneous" standard, a litigant must show that the board's findings are not even plausible in light of the record viewed in its entirety; CLI-10-17, 72 NRC 1 (2010); CLI-10-23, 72 NRC 210 (2010)
when the Commission reviews board rulings on contention admissibility, it employs the clear error and abuse of discretion standards of review; CLI-10-17, 72 NRC 1 (2010)
STANDARD REVIEW PLANS
one acceptable methodology for calculating the environmentally adjusted cumulative usage factor is presented in the SRP; CLI-10-17, 72 NRC 1 (2010)
the plan provides guidance but does not impose requirements on license renewal applicants; CLI-10-17, 72 NRC 1 (2010)
STANDING TO INTERVENE
a board's determination of standing 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-10-16, 72 NRC 361 (2010)
a board's standing analysis must avoid the familiar trap of confusing the standing determination with the assessment of a petitioner's case on the merits; LBP-10-16, 72 NRC 361 (2010)
a federally recognized Indian tribe may seek to participate in a proceeding; LBP-10-16, 72 NRC 361 (2010)
a party claiming violations of their procedural right to protect their interests in cultural resources is to be accorded a special status when it comes to standing, without meeting all the normal standards for redressability and immediacy; LBP-10-16, 72 NRC 361 (2010)
although boards should afford greater latitude to a pleading submitted by a pro se petitioner, that petitioner ultimately bears the burden to provide facts sufficient to show standing; CLI-10-20, 72 NRC 185 (2010)
an Indian tribe claims a procedural interest in identifying, evaluating, and establishing protections for historic and cultural resources; LBP-10-16, 72 NRC 361 (2010)
an individual petitioner may not request to intervene in his or her own right while simultaneously authorizing other petitioners to represent his or her interests in the proceeding; LBP-10-16, 72 NRC 361 (2010)
an injury in fact must go beyond generalized grievances to affect a petitioner in a personal and individual way; LBP-10-16, 72 NRC 361 (2010)
any potential harm associated with petitioner's use of water from a water source connecting to a mining site is fairly traceable to the proposed action; LBP-10-16, 72 NRC 361 (2010)
because petitioner's circumstances may change from one proceeding to the next, it is important that the presiding officer have up-to-date information regarding any standing claims; LBP-10-21, 72 NRC 616 (2010)

boards apply a proximity-plus test to establish standing in materials cases, where the petitioner must show that the proposed licensing action involves a significant source of radiation that has an obvious potential for offsite consequences; CLI-10-20, 72 NRC 185 (2010)
burden is on petitioner to allege a specific and plausible means by which contaminants from mining activities may adversely affect him or her; LBP-10-16, 72 NRC 361 (2010)
for a request for hearing and petition to intervene to be granted, petitioner must establish that it has standing and propose at least one admissible contention; LBP-10-15, 72 NRC 257 (2010)
if petitioner cannot establish the elements of proximity-based standing, then he must establish standing according to traditional standing principles; CLI-10-20, 72 NRC 185 (2010)
in a materials licensing case, petitioner must show more than that he lives or works within a certain distance of the site where materials will be located; CLI-10-20, 72 NRC 185 (2010)
in cases involving ISL uranium mining and other source materials licensing, petitioner must demonstrate injury, causation, and redressability because proximity to the proposed facility alone is not adequate to demonstrate standing; LBP-10-16, 72 NRC 361 (2010)
in cases involving possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been an essential element in establishing standing; LBP-10-21, 72 NRC 616 (2010)
in cases not involving nuclear power reactors, whether petitioner could be affected by the licensing action must be determined on a case-by-case basis, taking into account petitioner's distance from the source, the nature of the licensed activity, and the significance of the radioactive source; CLI-10-20, 72 NRC 185 (2010)
in determining whether an individual or organization should be granted party status based on standing of right, NRC applies contemporaneous judicial standing concepts; LBP-10-21, 72 NRC 616 (2010)
in determining whether petitioner has established standing, boards may construe the petition in favor of the petitioner; LBP-10-15, 72 NRC 257 (2010)
in proceedings involving nuclear power reactors, petitioner is presumed to have standing to intervene without the need to specifically plead injury, causation, and redressability if petitioner lives within 50 miles of the proposed facility; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
in source materials cases, petitioner has the burden of showing a specific and plausible means by which the proposed license activities may affect him or her; LBP-10-16, 72 NRC 361 (2010)
information required to show standing includes the nature of petitioner's right under a relevant statute to be made a party, the nature and extent of petitioner's property, financial, or other interest in the proceeding, and the possible effect of any decision or order that might be issued on petitioner's interest; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
injury in fact is defined as an invasion of a legally protected interest that is concrete and particularized and actual or imminent rather than conjectural or hypothetical; LBP-10-16, 72 NRC 361 (2010)
it is enough that petitioner has demonstrated a realistic threat of sustaining a direct injury as a result of contaminated groundwater flowing from the site to his property; LBP-10-16, 72 NRC 361 (2010)
it is generally not sufficient to seek to establish standing in a proceeding by merely cross-referencing the showing made in another proceeding, rather than making a new presentation or at least providing a submission that updates the factual information that was provided previously; LBP-10-21, 72 NRC 616 (2010)
it might be sufficient to allow petitioner to rely on a prior standing demonstration if that prior demonstration is specifically identified and shown to correctly reflect the current status of the petitioner's standing; LBP-10-21, 72 NRC 616 (2010)
judicial concepts of standing are generally followed in NRC proceedings; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
licensing boards must assess intervention petitions to determine whether elements for standing are met even though if there are no objections to petitioner's standing; LBP-10-21, 72 NRC 616 (2010)
no proximity presumption applies in source materials cases; LBP-10-16, 72 NRC 361 (2010)
petitioner cannot base standing or a contention on the possibility that the licensee will violate the terms of its license; CLI-10-20, 72 NRC 185 (2010)
petitioner must allege a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; LBP-10-16, 72 NRC 361 (2010)

petitioner must establish standing and proffer at least one admissible contention that meets the requirements of 10 C.F.R. 2.309(f)(1); LBP-10-16, 72 NRC 361 (2010)
petitioner must make a fresh standing demonstration in each individual proceeding in which intervention is sought; LBP-10-21, 72 NRC 616 (2010)
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-10-15, 72 NRC 257 (2010); LBP-10-21, 72 NRC 616 (2010)
petitioners are not required to demonstrate their asserted injury with certainty at the contention admission stage, or to provide extensive technical studies in support of their standing argument; LBP-10-16, 72 NRC 361 (2010)
petitioner's claimed injury must be arguably within the zone of interests protected by the governing statute in the proceeding; LBP-10-16, 72 NRC 361 (2010)
petitioner's participation in a licensing proceeding hinges on a demonstration that the petitioner has standing; LBP-10-16, 72 NRC 361 (2010)
petitioner's standing showing can be corrected or supplemented to cure deficiencies by means of its reply pleading; LBP-10-21, 72 NRC 616 (2010)
preservation of Native American cultural traditions is a protected interest under federal law; LBP-10-16, 72 NRC 361 (2010)
proximity-based presumption of standing applies in proceedings for nuclear power plant construction permits, operating licenses, or significant amendments thereto; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
redressability requires petitioner to show that its alleged injury in fact could be cured or alleviated by some action of the tribunal; LBP-10-16, 72 NRC 361 (2010)
someone living adjacent to the site for proposed construction of a federally licensed facility has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the facility will not be completed for many years; LBP-10-24, 72 NRC 720 (2010)
standing generally has been denied when the threat of injury is not concrete and particularized; LBP-10-16, 72 NRC 361 (2010)
the Commission generally defers to a board's rulings on standing in the absence of clear error or an abuse of discretion; CLI-10-20, 72 NRC 185 (2010)
to determine whether an interest is in the zone of interests of a statute, it is necessary first to discern the interests arguably to be protected by the statutory provision at issue and then to inquire whether petitioner's interests affected by the agency action are among them; LBP-10-16, 72 NRC 361 (2010)
to determine whether petitioners have standing, boards accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party; CLI-10-20, 72 NRC 185 (2010)
to establish an injury in fact, a party merely has to show some threatened concrete interest personal to the party that the National Historic Preservation Act was designed to protect; LBP-10-16, 72 NRC 361 (2010)
to establish causation, petitioner must show that there is a causal connection between the injury and the conduct complained of; LBP-10-16, 72 NRC 361 (2010)
to establish standing in federal court, a party must show injury in fact, causation, and redressability; LBP-10-16, 72 NRC 361 (2010)
to interpose a new contention after a proceeding has been terminated requires submission of a fresh intervention petition that fulfills the applicable standards for such filings, including an appropriate standing demonstration; LBP-10-21, 72 NRC 616 (2010)
tribes that have addressed procedural violations of the National Historic Preservation Act have uniformly been granted standing under the relaxed standard and have proceeded directly to the merits of the NHPA claim; LBP-10-16, 72 NRC 361 (2010)
where a facility will not be located within an Indian tribe's boundaries, the tribe must meet the standing requirements imposed by 10 C.F.R. 2.309(d)(1); LBP-10-16, 72 NRC 361 (2010)

STANDING TO INTERVENE, ORGANIZATIONAL
an organization may base its standing on immediate or threatened injury to either its organizational interests or to the interests of identified members; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
an organization must demonstrate that the action at issue will cause an injury in fact to the organization's interests and the injury is within the zone of interests protected by NEPA or the AEA; LBP-10-16, 72 NRC 361 (2010)
standing was found for an organization representing three members living in close proximity to a decommissioning site, who expressed concern that depleted uranium materials could affect a waterway abutting the property of two members; CLI-10-20, 72 NRC 185 (2010)
the injury-in-fact necessary to establish organizational standing must be more than a mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem; LBP-10-16, 72 NRC 361 (2010)
to assert an appropriate injury, an organization must demonstrate a palpable injury in fact to its organizational interests; LBP-10-16, 72 NRC 361 (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; LBP-10-16, 72 NRC 361 (2010)
STANDING TO INTERVENE, REPRESENTATIONAL
an individual petitioner may not request to intervene in his or her own right while simultaneously authorizing other petitioners to represent his or her interests in the proceeding; LBP-10-16, 72 NRC 361 (2010)
an organization asserting representational standing must demonstrate that the interest of at least one of its members will be harmed and the member would have standing in his or her own right, identify that member by name and address, and demonstrate that the organization is authorized to request a hearing on behalf of that member; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010); LBP-10-21, 72 NRC 616 (2010)
STATUTES
contentions that challenge applicable statutory requirements or the basic structure of the agency's regulatory process are inadmissible; LBP-10-21, 72 NRC 616 (2010)
STATUTORY CONSTRUCTION
a text should be construed so that effect is given to all of its provisions, so no part will be inoperative or superfluous, void or insignificant; LBP-10-22, 72 NRC 661 (2010)
words of a statute must be read in their context and with a view to their place in the overall statutory scheme; LBP-10-20, 72 NRC 571 (2010)
STAY
although a request for suspension of a proceeding does not fit cleanly into NRC procedural rules for stays, the Commission exercises discretion and consider petitioner's request; CLI-10-17, 72 NRC 1 (2010)
SUBPART G PROCEDURES
in a Subpart L proceeding, the board must apply the summary disposition standard set forth in Subpart G; LBP-10-20, 72 NRC 571 (2010)
parties are permitted to propound interrogatories, take depositions, and cross-examine witnesses without leave of the board; LBP-10-16, 72 NRC 361 (2010)
the standard for allowing the parties to conduct cross-examination is the same under Subparts G and L; LBP-10-15, 72 NRC 257 (2010)
SUBPART G PROCEEDINGS
cross-examination occurs virtually automatically, subject to normal judicial management and the requirement to file a cross-examination plan; LBP-10-15, 72 NRC 257 (2010)
SUBPART L PROCEDURES
the board has the primary responsibility for questioning the witnesses at any evidentiary hearing; LBP-10-16, 72 NRC 361 (2010)
the standard for allowing the parties to conduct cross-examination is the same under Subparts G and L; LBP-10-15, 72 NRC 257 (2010)

SUBJECT INDEX

SUBPART L PROCEEDINGS
a party seeking to conduct cross-examination must file a written motion and obtain leave of the board; LBP-10-15, 72 NRC 257 (2010)
boards must apply the summary disposition standard set forth in Subpart G; LBP-10-20, 72 NRC 571 (2010)
discovery is generally prohibited except for specified mandatory disclosures under 10 C.F.R. 2.336(f), (a), and (b) and the mandatory production of the hearing file under 10 C.F.R. 2.1203(a); LBP-10-16, 72 NRC 361 (2010)
mandatory disclosure is the only form of discovery allowed, and all other forms are expressly prohibited; LBP-10-23, 72 NRC 692 (2010)
the mandatory disclosure provisions of 10 C.F.R. 2.336 apply; CLI-10-24, 72 NRC 451 (2010); CLI-10-25, 72 NRC 469 (2010)
SUBPART N PROCEDURES
if a hearing on a contention is expected to take no more than 2 days to complete, the board can impose the Subpart N procedures for expedited proceedings with oral hearings specified at 10 C.F.R. 2.1400-1407; LBP-10-16, 72 NRC 361 (2010)
SUMMARY DISPOSITION
any doubt as to the existence of a genuine issue of material fact is resolved against the proponent of summary disposition; LBP-10-20, 72 NRC 571 (2010)
because the burden is on the summary disposition movant, the board must examine the record in the light most favorable to the nonmoving party and give the nonmoving party the benefit of all favorable inferences that can be drawn from the evidence; LBP-10-20, 72 NRC 571 (2010)
in a Subpart L proceeding, the board must apply the summary disposition standard set forth in Subpart G; LBP-10-20, 72 NRC 571 (2010)
motions may be granted only if the truth is clear; LBP-10-20, 72 NRC 571 (2010)
movant must show that the matter entails no genuine issue as to any material fact and that movant is entitled to a decision as a matter of law; LBP-10-20, 72 NRC 571 (2010)
such motions are not a tool for trying to convince a licensing board to decide, on written submissions, genuine issues of material fact that warrant resolution at a hearing; LBP-10-20, 72 NRC 571 (2010)
summary disposition rules 2.1205 and 2.710 are substantially similar; LBP-10-20, 72 NRC 571 (2010)
the Commission generally applies the same standard for summary disposition that federal courts apply when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; LBP-10-20, 72 NRC 571 (2010)
to justify reopening the record to admit a new contention, the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition, and the new information must be significant and plausible enough to require reasonable minds to inquire further; LBP-10-21, 72 NRC 616 (2010)
SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT
compliance with NEPA requires that, if new and significant information arises after the date of the issuance of the EIS and before the agency decision, then NRC Staff must supplement or revise its EIS and consider such information; CLI-10-29, 72 NRC 556 (2010); LBP-10-15, 72 NRC 257 (2010); LBP-10-17, 72 NRC 501 (2010)
SUSPENSION OF PROCEEDING
although a request for suspension of a proceeding does not fit cleanly into NRC procedural rules for stays, the Commission exercises discretion and consider petitioner's request; CLI-10-17, 72 NRC 1 (2010)
consideration of pending issues will not be postponed until the resolution of other issues unrelated to the adjudication; CLI-10-17, 72 NRC 1 (2010)
TERMINATION OF PROCEEDING
extended power uprate proceeding that has been terminated may not be reopened; CLI-10-17, 72 NRC 1 (2010)
TERRORISM
contention raising question of whether a quantitative as opposed to qualitative analysis of terrorist attacks and the alternatives for mitigation and prevention is necessary is referred to the Commission as a novel issue; LBP-10-15, 72 NRC 257 (2010)

given that consideration of terrorist attacks is part of the NRC's NEPA obligations in the Ninth Circuit, the issue of whether terrorist attacks have been fully considered in the NEPA analysis for a power plant in that jurisdiction is plainly material to the decision the NRC must make; LBP-10-15, 72 NRC 257 (2010)
petitioner's assertion that terrorist-act-originated SAMA analysis is required by Ninth Circuit law satisfies the requirements of 10 C.F.R. 2.309(f)(1)(iii) that the issue be within the scope of a license renewal proceeding; LBP-10-15, 72 NRC 257 (2010)
Staff failed to disclose data underlying its terrorism analysis in the final environmental assessment and thus failed to meet the NEPA-mandated hard-look standard; CLI-10-18, 72 NRC 56 (2010)
threat of terrorist attack at spent fuel pools has been evaluated generically by NRC and special circumstances for rule waiver have not been shown; LBP-10-15, 72 NRC 257 (2010)
TESTING
preconstruction monitoring and testing to establish background information is exempted from the prohibition on commencement of construction; LBP-10-16, 72 NRC 361 (2010)
TIME LIMITED AGING ANALYSES
a license renewal applicant seeking to satisfy aging management requirements by reliance upon existing TLAAs in its current licensing basis would rely on 10 C.F.R. 54.21(c)(1)(i) or (ii); CLI-10-17, 72 NRC 1 (2010)
because environmentally adjusted cumulative usage factors are not contained in licensee's current licensing basis, they cannot be TLAAs and thereby a prerequisite to license renewal; CLI-10-17, 72 NRC 1 (2010)
license renewal applicant who chooses to rely upon an existing TLAA may demonstrate compliance with 10 C.F.R. 54.21(c)(1)(i) by showing that the existing cumulative usage factor calculations remain valid because the number of assumed transients would not be exceeded during the period of extended operation; CLI-10-17, 72 NRC 1 (2010)
license renewal applications must include an evaluation of TLAAs demonstrating that the analyses will remain valid for the period of extended operation, have been projected to the end of the period of extended period of operation, or the effects of aging on the intended functions will be adequately managed for the period of extended operation; CLI-10-17, 72 NRC 1 (2010)
section 54.29(a) speaks of both past and future actions, referring specifically to those that have been or will be taken with respect to managing the effects of aging and TLAAs; CLI-10-17, 72 NRC 1 (2010)
the scope of a license renewal proceeding under 10 C.F.R. Part 54 encompasses 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 TLAAs; CLI-10-17, 72 NRC 1 (2010)
TRANSPORTATION OF RADIOACTIVE MATERIALS
petitioner alleges release of controlled byproduct nuclear materials in containers not certified for transport of such materials on public roads and not labeled with the required labeling; DD-10-3, 72 NRC 171 (2010)
URANIUM MILL TAILINGS DISPOSAL
byproduct material from in situ extraction operations must be disposed of at existing large mill tailings disposal sites; LBP-10-16, 72 NRC 361 (2010)
URANIUM MINING AND MILLING
in cases involving ISL uranium mining and other source materials licensing, petitioner must demonstrate injury, causation, and redressability because proximity to the proposed facility alone is not adequate to demonstrate standing; LBP-10-16, 72 NRC 361 (2010)
VIOLATIONS
any employee of a licensee may not deliberately submit to the NRC information that employee knows to be incomplete or inaccurate in some respect material to the NRC; CLI-10-23, 72 NRC 210 (2010)
in the absence of evidence to the contrary, NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises; CLI-10-20, 72 NRC 185 (2010)
licensee's failure to develop and implement a formalized procedure to neutralize a spill involving hydrofluoric acid, resulting in exposure to licensee operators, is a Severity Level III violation; LBP-10-18, 72 NRC 519 (2010)

materially incorrect responses to the NRC's communications are violations; CLI-10-23, 72 NRC 210 (2010)
Severity Level III violation is recategorized to a violation with no assigned severity level, based on settlement agreement; LBP-10-18, 72 NRC 519 (2010)
WAIVER OF RULE
a petition to waive a Commission regulation can be granted only in unusual and compelling circumstances; LBP-10-22, 72 NRC 661 (2010)
a prima facie showing merely requires the presentation of enough information to allow a board to infer (absent disproof) that special circumstances exist to support a rule waiver; LBP-10-15, 72 NRC 257 (2010)
absent a waiver, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications; LBP-10-15, 72 NRC 257 (2010); LBP-10-16, 72 NRC 361 (2010)
because petitioner had not made a prima facie case for rule waiver, the Board declined to certify the matter to the Commission and found that it was prohibited from considering the matter further; CLI-10-29, 72 NRC 556 (2010)
board's role in considering a petition for waiver under 10 C.F.R. 2.335 is limited to deciding whether petitioner has made a prima facie showing of special circumstances that would support a waiver; LBP-10-15, 72 NRC 257 (2010)
deferral of review of board denial of rule waiver petition did not cause irreparable injury; CLI-10-29, 72 NRC 556 (2010)
for a contention regarding environmental impacts of spent fuel storage to be within the scope of an operating license renewal proceeding, petitioner must obtain a waiver under 10 C.F.R. 2.335(d); LBP-10-15, 72 NRC 257 (2010)
if petitioner has made a prima facie showing of special circumstances for rule waiver, then the board certifies the matter to the Commission; LBP-10-15, 72 NRC 257 (2010); LBP-10-22, 72 NRC 661 (2010)
if there is no prima facie showing for a rule waiver, the board may not further consider the matter; LBP-10-22, 72 NRC 661 (2010)
in the context of a safety contention, petitioner must show a waiver of the regulation is necessary to reach a significant safety problem; LBP-10-15, 72 NRC 257 (2010)
licensing board decisions denying a petition for waiver are interlocutory and not immediately reviewable; CLI-10-29, 72 NRC 556 (2010)
petitioner has alleged sufficient new information concerning the seismic situation to raise a prima facie showing that strict application of the generic NEPA analysis of the management of spent fuel in nuclear reactors would not serve the purpose for which Part 51 Appendix B and 10 C.F.R. 51.53(c)(2) were adopted; LBP-10-15, 72 NRC 257 (2010)
petitioner has presented a prima facie showing for waiver of the NRC regulation covering the environmental impacts of spent fuel pool accidents generically, and has shown that its contention concerning earthquake-induced spent fuel pool accidents is otherwise admissible; LBP-10-15, 72 NRC 257 (2010)
the affidavit accompanying a petition for rule waiver need not be prepared by an expert; LBP-10-15, 72 NRC 257 (2010)
the Commission has set forth a four-part test for grant of a rule waiver, and all four factors must be met; LBP-10-22, 72 NRC 661 (2010)
threat of terrorist attack at spent fuel pools has been evaluated generically by NRC and special circumstances for rule waiver have not been shown; LBP-10-15, 72 NRC 257 (2010)
WASTE CONFIDENCE RULE
challenges to the Waste Confidence Rule must be made in the context of a rulemaking, not in the context of an adjudicatory proceeding; CLI-10-19, 72 NRC 98 (2010)
the Commission addresses a certified question by a licensing board on the admissibility of proposed contentions involving the Waste Confidence Rule; CLI-10-19, 72 NRC 98 (2010)

SUBJECT INDEX

WASTE DISPOSAL
before any waste may be received at the high-level waste repository, DOE must update its application with additional information, including, specifically, additional design data obtained during construction; LBP-10-22, 72 NRC 661 (2010)
byproduct material from in situ extraction operations must be disposed of at existing large mill tailings disposal sites; LBP-10-16, 72 NRC 361 (2010)
WASTEWATER
NRC is prohibited from using NEPA to impose additional effluent limitations on an applicant's wastewater discharges to surface waters; LBP-10-14, 72 NRC 101 (2010)
WATER
applicant's climate change analysis for the 990,000-year period may be limited to the effects of increased water flow through the high-level waste repository as a result of climate change; LBP-10-22, 72 NRC 661 (2010)
WATER POLLUTION
any potential harm associated with petitioner's use of water from a water source connecting to a mining site is fairly traceable to the proposed action; LBP-10-16, 72 NRC 361 (2010)
contention is rejected as lacking support for the premise that ongoing mining operations will drain or contaminate wetlands, such that their economic benefits will be decreased; LBP-10-16, 72 NRC 361 (2010)
NRC is prohibited from using NEPA to impose additional effluent limitations on applicant's wastewater discharges to surface waters; LBP-10-14, 72 NRC 101 (2010)
standing was found for an organization representing three members living in close proximity to decommissioning site, who expressed concern that depleted uranium materials could affect a waterway abutting the property of two members; CLI-10-20, 72 NRC 185 (2010)
See also Groundwater Contamination
WATER QUALITY
challenge to the technical adequacy of baseline water quality data and adequate confinement of the host aquifer in applicant's environmental report is admissible; LBP-10-16, 72 NRC 361 (2010)
WETLANDS
contention is rejected as lacking support for the premise that ongoing mining operations will drain or contaminate wetlands, such that their economic benefits will be decreased; LBP-10-16, 72 NRC 361 (2010)
WHISTLEBLOWERS
although not required by regulation, settlement agreements that contain language reinforcing employees' rights to raise safety concerns and communicate with the NRC avoid the possibility of being construed in a way that could be a violation; DD-10-1, 72 NRC 149 (2010)
nondisparagement clauses in retention bonus agreements are common in employment agreements and NRC should not interfere with these agreements unless it finds such a clause violates 10 C.F.R. 50.7(f) or is applied in a fashion that prevents or retaliates against an employee for engaging in protected activities such as communicating with NRC; DD-10-1, 72 NRC 149 (2010)
the purpose of 10 C.F.R. 50.7(f) is to ensure that licensees do not enter into employment agreements that would prohibit, restrict, or otherwise discourage an employee or former employee from providing the NRC with information of regulatory significance; DD-10-1, 72 NRC 149 (2010)
WIND POWER
wind or solar power are not considered as stand-alone alternatives because neither sources is deemed capable of serving the purpose and need of the project, generating 1600 MWe of baseload power; LBP-10-24, 72 NRC 720 (2010)
WITHDRAWAL
an attorney is not permitted to withdraw from representing a client unless withdrawal can be accomplished without material adverse effect to the client's interests; LBP-10-21, 72 NRC 616 (2010)
See also Motions to Withdraw
WITNESSES
a board's findings regarding a particular witness's knowledge or state of mind depend, as a general rule, largely on that witness's credibility; CLI-10-23, 72 NRC 210 (2010)

diligent, even aggressive, probing for weaknesses in a witness's or counsel's position may be necessary if presiding officers are to fulfill their duty to develop an adequate record that will contribute to informed decisionmaking; CLI-10-17, 72 NRC 1 (2010)
licensing board findings of fact that turn on witness credibility receive the Commission's highest deference on appeal; CLI-10-23, 72 NRC 210 (2010)
WITNESSES, EXPERT
on appeal, the Commission is loath to address complaints concerning a board's skepticism of expert witness's testimony, given that the Commission lacks the Board's ability to observe the demeanor of the parties' expert witnesses in general and petitioner's witness in particular; CLI-10-17, 72 NRC 1 (2010)
petitioner does not need to provide expert opinion or a substantive affidavit in order to satisfy 10 C.F.R. 2.309(f)(1)(v); LBP-10-15, 72 NRC 257 (2010)
ZONE OF INTERESTS
petitioner's claimed injury must be arguably within the zone of interests protected by the governing statute in the proceeding; LBP-10-16, 72 NRC 361 (2010)
preservation of Native American cultural traditions is a protected interest under federal law; LBP-10-16, 72 NRC 361 (2010)
to determine whether an interest is in the zone of interests of a statute, it is necessary first to discern the interests arguably to be protected by the statutory provision at issue and then to inquire whether petitioner's interests affected by the agency action are among them; LBP-10-16, 72 NRC 361 (2010)

FACILITY INDEX

BELLEFONTE NUCLEAR PLANT, Units 1 and 2; Docket Nos. 50-438-CP, 50-439-CP
CONSTRUCTION PERMIT; September 29, 2010; MEMORANDUM AND ORDER; CLI-10-26, 72 NRC 474 (2010)
CALVERT CLIFFS NUCLEAR POWER PLANT, Unit 3; Docket No. 52-016-COL
COMBINED LICENSE; December 28, 2010; ORDER (Ruling on Intervenors' Proposed New Contention 10); LBP-10-24, 72 NRC 720 (2010)
COMANCHE PEAK NUCLEAR POWER PLANT, Units 3 and 4; Docket Nos. 52-034-COL, 52-035-COL
COMBINED LICENSE; September 29, 2010; MEMORANDUM AND ORDER; CLI-10-25, 72 NRC 469 (2010)
DEWEY-BURDOCK IN SITU URANIUM RECOVERY FACILITY; Docket No. 40-9075-MLA
MATERIALS LICENSE AMENDMENT; August 5, 2010; MEMORANDUM AND ORDER (Ruling on Petitions to Intervene and Requests for Hearing); LBP-10-16, 72 NRC 361 (2010)
DIABLO CANYON NUCLEAR POWER PLANT, Units 1 and 2; Docket Nos. 50-275-LR, 50-323-LR
LICENSE RENEWAL; August 4, 2010; MEMORANDUM AND ORDER (Rulings on Standing, Contention Admissibility, Waiver Petition, and Selection of Hearing Procedures); LBP-10-15, 72 NRC 257 (2010)
HIGH-LEVEL WASTE REPOSITORY; Docket No. 63-001-HLW
CONSTRUCTION AUTHORIZATION; December 14, 2010; MEMORANDUM AND ORDER (Deciding Phase I Legal Issues and Denying Rule Waiver Petitions); LBP-10-22, 72 NRC 661 (2010)
IDAHO STATE UNIVERSITY AGN-201; Docket No. 50-284
REQUEST FOR ACTION; July 30, 2010; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-10-3, 72 NRC 171 (2010)
INDIAN POINT, Units 2 and 3; Docket Nos. 50-247-LR, 50-286-LR
LICENSE RENEWAL; July 8, 2010; MEMORANDUM AND ORDER; CLI-10-19, 72 NRC 98 (2010)
LICENSE RENEWAL; November 30, 2010; MEMORANDUM AND ORDER; CLI-10-30, 72 NRC 564 (2010)
LEVY COUNTY NUCLEAR POWER PLANT, Units 1 and 2; Docket Nos. 52-029-COL, 52-030-COL
COMBINED LICENSE; November 18, 2010; MEMORANDUM AND ORDER (Denying Motion for Summary Disposition of Contention 8A); LBP-10-20, 72 NRC 571 (2010)
COMBINED LICENSE; December 22, 2010; MEMORANDUM AND ORDER (Granting Motion to Compel Disclosure of Groundwater Modeling Information); LBP-10-23, 72 NRC 692 (2010)
NORTH ANNA POWER STATION, Unit 3; Docket No. 52-017-COL
COMBINED LICENSE; September 2, 2010; MEMORANDUM AND ORDER (Rulings on Motion to Dismiss Contention 10 and Proposed New Contention 11); LBP-10-17, 72 NRC 501 (2010)
PILGRIM NUCLEAR POWER STATION; Docket No. 50-293-LR
LICENSE RENEWAL; August 27, 2010; MEMORANDUM AND ORDER; CLI-10-22, 72 NRC 202 (2010)
LICENSE RENEWAL; November 5, 2010; MEMORANDUM AND ORDER; CLI-10-28, 72 NRC 553 (2010)
POHAKULOA TRAINING AREA, Island of Hawaii, Hawaii; Docket No. 40-9083
MATERIALS LICENSE; August 12, 2010; MEMORANDUM AND ORDER; CLI-10-20, 72 NRC 185 (2010)

FACILITY INDEX

PRAIRIE ISLAND NUCLEAR GENERATING PLANT, Units 1 and 2; Docket Nos. 50-282-LR, 50-306-LR
LICENSE RENEWAL; September 30, 2010; MEMORANDUM AND ORDER; CLI-10-27, 72 NRC 481 (2010)
REQUEST FOR ACTION; July 20, 2010; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-10-2, 72 NRC 163 (2010)
SCHOFIELD BARRACKS, Oahu, Hawaii; Docket No. 40-9083
MATERIALS LICENSE; August 12, 2010; MEMORANDUM AND ORDER; CLI-10-20, 72 NRC 185 (2010)
SOUTH TEXAS PROJECT, Units 3 and 4; Docket Nos. 52-12-COL, 52-13-COL
COMBINED LICENSE; July 2, 2010; MEMORANDUM AND ORDER (Rulings on Motions to Dismiss Contentions 8, 9, 14, 16, 21; Amended Contentions 8 and 21; New Colocation Contentions; and New Main Cooling Reservoir Contentions); LBP-10-14, 72 NRC 101 (2010)
COMBINED LICENSE; September 29, 2010; MEMORANDUM AND ORDER; CLI-10-24, 72 NRC 451 (2010)
TURKEY POINT NUCLEAR GENERATING PLANT, Units 3 and 4; Docket Nos. 50-250, 50-251
REQUEST FOR ACTION; July 9, 2010; DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206; DD-10-1, 72 NRC 149 (2010)
VERMONT YANKEE NUCLEAR POWER STATION; Docket No. 50-271-LR
LICENSE RENEWAL; July 8, 2010; MEMORANDUM AND ORDER; CLI-10-17, 72 NRC 1 (2010)
LICENSE RENEWAL; October 28, 2010; MEMORANDUM AND ORDER (Ruling on Motion to Reopen Proffering New Contention); LBP-10-19, 72 NRC 529 (2010)
VIRGIL C. SUMMER NUCLEAR STATION, Units 2 and 3; Docket Nos. 52-027-COL, 52-028-COL
COMBINED LICENSE; August 27, 2010; MEMORANDUM AND ORDER; CLI-10-21, 72 NRC 197 (2010)
VOGTLE ELECTRIC GENERATING PLANT, Units 3 and 4; Docket Nos. 52-025-COL, 52-026-COL
COMBINED LICENSE; November 30, 2010; MEMORANDUM AND ORDER (Ruling on Request to Admit New Contention); LBP-10-21, 72 NRC 616 (2010)
WATTS BAR NUCLEAR PLANT, Unit 2; Docket No. 50-391-OL
OPERATING LICENSE; November 30, 2010; MEMORANDUM AND ORDER; CLI-10-29, 72 NRC 556 (2010)