NUCLEAR REGULATORY COMMISSION ISSUANCES

OPINIONS AND DECISIONS OF THE NUCLEAR REGULATORY COMMISSION WITH SELECTED ORDERS

January 1, 2011 – March 31, 2011

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PREFACE

This is Book I of the seventy-third volume of issuances (1–390) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from January 1, 2011, to March 31, 2011. Book II covers the period from April 1, 2011 to June 30, 2011.

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

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

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

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

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

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

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

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of **Docket No. PRM-54-6**

PETITION FOR RULEMAKING TO
AMEND 10 C.F.R. § 54.17(c) **January 24, 2011**

COMMISSIONER: SUPERVISORY AUTHORITY; ABEYANCE OF PROCEEDING

Even absent an express provision authorizing such relief, the Commission has occasionally considered requests to suspend proceedings or hold them in abeyance in the exercise of its inherent supervisory powers over proceedings.

ABEYANCE OF PROCEEDING: DELAY OF PROCEEDING

Longstanding practice of the Commission has been to limit orders delaying proceedings to the duration and scope necessary to promote the Commission's dual goals of public safety and timely adjudication.

ABEYANCE OF PROCEEDING: DELAY OF PROCEEDING

Absent extraordinary cause, the Commission seldom interrupts licensing reviews or adjudications — particularly by an indefinite or very lengthy stay — pending the outcome of other Commission actions or adjudications.

ABEYANCE OF PROCEEDING: DELAY OF PROCEEDING

Suspension of licensing proceedings is a drastic action that is not warranted absent immediate threats to public health and safety.

ABEYANCE OF PROCEEDING: DELAY OF PROCEEDING

Interim docketing and Staff review of the Seabrook and similarly situated renewal applications would not jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from ongoing Commission evaluation of licensing policies.

ABEYANCE OF PROCEEDING: DELAY OF PROCEEDING

Holding relicensing applications in abeyance pending petitioners' rulemaking request was unjustified because the Commission would have the opportunity to take a fresh look at petitioners' concerns once rulemaking petitions have been scrutinized by public comment and agency review. Such relief would upset the status quo by effectively overturning the license renewal rule in the interim.

PARTIES: IRREPARABLE HARM

No harm, much less irreparable harm, will occur to petitioners or others by mere continuation of the Staff's customary license renewal review process.

ABEYANCE OF PROCEEDING: DELAY OF PROCEEDING

Ordinary burden to parties in pursuing litigation pending rulemaking does not justify disrupting ongoing review of license renewal applications in that litigation.

MEMORANDUM AND ORDER

Individuals and groups in proximity to the Seabrook Nuclear Generating Station have submitted a petition for rulemaking[1] pursuant to 10 C.F.R. § 2.802.

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[1] *See* Petition for Rulemaking Pursuant to 10 CFR § 2.802; Seeking to Amend 10 CFR § 54.17(c) (Aug. 17, 2010) (ADAMS Accession No. ML102380379) (Petition for Rulemaking). Petitioners are Earth Day Commitment/Friends of the Coast, Beyond Nuclear, Seacoast Anti-Pollution League,

(Continued)

Petitioners request that the NRC amend its regulations in 10 C.F.R. § 54.17(c) to permit a reactor licensee to file a license renewal application no sooner than 10 years before the expiration of the current license. Though their concerns are aimed principally at the Seabrook plant, Petitioners would have NRC apply their amended rule to all license renewal applications that have not yet been issued an NRC Staff Final Safety Evaluation Report (FSER). Essentially, Petitioners assert that the NRC's current regulation 10 C.F.R. § 54.17(c), by allowing a licensee to seek renewal 20 years prior to license expiration, results in unreliable application information with respect to environmental considerations, aging analysis and management, regulatory compliance, and other factors.

Related to their petition, Petitioners have also requested that the Commission suspend license renewal reviews pending disposition of their rulemaking petition. Recognizing that they are not "parties" to a proceeding because the license renewal proceeding for the Seabrook plant, while noticed,[2] has yet been formally convened,[3] Petitioners nonetheless ask us to treat their circumstances as analogous to those contemplated by 10 C.F.R. § 2.802(d), and to "suspend[ ] review of all license renewal applications submitted more than 10 years in advance of current license expiration until resolution of this petition."[4]

As Petitioners recognize, their request for relief does not fall within the terms of 10 C.F.R. § 2.802(d). But even if it did,[5] our "longstanding practice has been to limit orders delaying proceedings to the duration and scope necessary to

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C-10 Research and Education Foundation, Pilgrim Watch, and New England Coalition. Later, by letter dated August 18, 2010, Robin Read, State Representative for New Hampshire, requested to be included as a petitioner (ADAMS Accession No. ML102380380). The NRC has docketed the petition as PRM-54-6. *See generally* Earth Day Commitment/Friends of the Coast, Beyond Nuclear, Seacoast Anti-Pollution League, C-10 Research and Education Foundation, Pilgrim Watch, and New England Coalition; Notice of Receipt of Petition for Rulemaking, 75 Fed. Reg. 59,158 (Sept. 27, 2010).

[2] After the NRC Staff determined that the application was sufficiently complete to be acceptable for docketing, the Staff noticed the opportunity for hearing and request for intervention in the license renewal proceeding at 75 Fed. Reg. 42,462 (July 21, 2010).

[3] Some petitioners in this proposed rulemaking have requested a hearing and petitioned for intervention in the Seabrook license renewal proceeding. But the Atomic Safety and Licensing Board has not yet determined whether Petitioners have standing and have filed admissible contentions.

[4] Petition for Rulemaking at 12. Petitioners state that of 32 license renewals already granted by the NRC, most were filed within 10 years of original license expiration. A survey of Appendix A of NUREG-1350, the Commission's Information Digest, shows that six license renewal applications were submitted more than 18 years before expiration of their existing licenses. Further, of the fifteen pending license renewal applications, four (including Seabrook's) were submitted 15 years or more before expiration of the existing license, and one was submitted 13 years in advance.

[5] Even absent an express provision authorizing such relief, "we have occasionally considered similar requests to suspend proceedings or hold them in abeyance in the exercise of our inherent supervisory powers over proceedings," *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484-85 (2008), and we do so here.

promote the Commission's dual goals of public safety and timely adjudication."[6] Ours is a dynamic regulatory process and we constantly reevaluate our rules and procedures, both on our own initiative and at the suggestion of others. Absent extraordinary cause, however, seldom do we interrupt licensing reviews or our adjudications — particularly by an indefinite or very lengthy stay as contemplated here — on the mere possibility of change. Otherwise, the licensing process would face endless gridlock. As we recently summarized in *Vermont Yankee,* "we generally have declined to hold proceedings in abeyance pending the outcome of other Commission actions or adjudications."[7]

Just a few years ago, we denied a general stay of license renewal proceedings pending proposed rulemaking when intervenors in the *Oyster Creek* and other pending license renewal cases urged upon us their proposal for changes in the license renewal process.[8] As we stated in *Oyster Creek,* we continue to consider "suspension of licensing proceedings a 'drastic' action that is not warranted absent 'immediate threats to public health and safety.'"[9]

Our reasoning is supported by the Commission's refusal to suspend the combined license (COL) proceeding for the Shearon Harris plant pending completion of our design certification review of the AP1000 reactor, Revision 16.[10] There, we pointed out that lack of finality in the design certification process had been anticipated in the COL rulemaking, and that hearing procedures could be adjusted to account for any new or amended contentions based on information relating to design certification.[11] Accordingly, we found "no basis to hold [the *Shearon Harris*] notice of hearing in abeyance pending completion of the design certification

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[6] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 381 (2001).

[7] *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 10 & n.36 (2010) (citing authorities).

[8] *See* Petition for Rulemaking: Denial, 71 Fed. Reg. 74,848 (Dec. 13, 2006).

[9] *Oyster Creek,* CLI-08-23, 68 NRC at 484 (citing *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000) (refusing to suspend all license transfer proceedings pending analysis of limited liability companies)).

[10] *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1 (2008).

[11] *Id.* at 4. Consistent with *Shearon Harris,* we likewise declined to suspend the *Fermi* proceeding pending outcome of the ESBWR design certification process. *See Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-09-4, 69 NRC 80, 85 (2009).

rulemaking."[12] We likewise took the same approach years ago in declining to stay dry cask storage proceedings pending requested rule changes.[13]

Here, as in those earlier cases, Petitioners' concerns are untested and remain to be examined after receipt of comments on the rulemaking petition. If, upon closer examination, the NRC determines that proposing changes in its current rules and noticing a proposed rulemaking are warranted,[14] we can revisit whether Seabrook or other reviews should be held in abeyance pending the outcome of the rulemaking. Petitioners have not shown that interim docketing and Staff review of the Seabrook and similarly situated renewal applications would "jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation" of licensing policies,[15] as ample time exists to decide this rulemaking before the Seabrook license may be renewed.

Thus, because we will have an opportunity to take a fresh look at the concerns Petitioners have expressed once the particulars of their rulemaking petition have been scrutinized by public comment and agency review, "holding up these proceedings is not necessary to ensure that the public will realize the full benefit of our ongoing regulatory review."[16] Conversely, the interim relief requested by Petitioners would upset the status quo by effectively overturning a rule — for a period of indefinite duration — that was the product of carefully considered rulemaking.[17] No harm, much less irreparable harm, will occur to Petitioners or others by mere continuation of the Staff's customary license renewal review

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[12] *Shearon Harris,* CLI-08-15, 68 NRC at 4. When intervenors there renewed their request, we found "no new justification as to why these decisions deserve reconsideration," nor any changed circumstances that could not previously have been brought to us, and we therefore declined to disturb our ruling. *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 252 (2010).

[13] *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-4, 57 NRC 273, 277 (2003); *Private Fuel Storage,* CLI-01-26, 54 NRC at 380-81.

[14] We observe that, apart from individual license renewal proceedings, an update to the environmental GEIS is ongoing. *See* Proposed Rule: "Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses," 74 Fed. Reg. 38,117 (July 31, 2009).

[15] *Private Fuel Storage,* CLI-01-26, 54 NRC at 380.

[16] *Id.* at 383.

[17] *See* Final Rule: "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461, 22,487-88 (May 8, 1995); Final Rule: "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,963 (Dec. 13, 1991).

process. Nor does the ordinary burden to parties in pursuing litigation pending rulemaking justify disrupting our ongoing review.[18]

We therefore *deny* Petitioners' request for an interim suspension of operating license renewal applications and review pending resolution of their rulemaking petition.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of January 2011.

[18] *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 135 & n.25 (2009).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Eric J. Leeds, Director

In the Matter of **Docket No. 50-271**
(License No. DPR-28)

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power Station) **January 27, 2011**

By letter dated April 19, 2010, Congressman Paul W. Hodes, U.S. House of Representatives, filed a Petition pursuant to Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 2.206, with the Nuclear Regulatory Commission (NRC). The Petition requested that the NRC not allow the Vermont Yankee Nuclear Power Station to restart after its scheduled refueling outage until all environmental remediation work and relevant reports on leaking tritium at the plant have been completed. Specifically, the Petition requested that Vermont Yankee be prevented from resuming power production until the following efforts have been completed to the Commission's satisfaction: (1) the tritiated groundwater remediation process; (2) the soil remediation process scheduled to take place during the refueling outage, to remove soil containing not only tritium, but also radioactive isotopes of cesium, manganese, zinc, and cobalt; (3) the ongoing root cause analysis being performed by Entergy; and (4) the Commission's review of the documents presented by Entergy as a result of the Commission's Demand for Information, which was imposed on the Licensee on March 1, 2010.

This Petition was assigned to the NRC's Office of Nuclear Reactor Regulation (NRR) for review. NRR's Petition Review Board's recommendation was to accept the Petition for review, but not to prohibit restart of Vermont Yankee as there was reasonable assurance that the health and safety of the public was being protected and there were no immediate safety concerns.

The final Director's Decision (DD) was issued on January 27, 2011. The final DD stated that the NRC did not see cause to prohibit the restart of Vermont Yankee. The final DD also stated that the activities requested by the Petitioner have been completed with the exception of preventing the restart of Vermont Yankee. Therefore, NRR staff concluded that the Petition has been granted in part and denied in part.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated April 19, 2010, Congressman Paul W. Hodes, U.S. House of Representatives, filed a Petition pursuant to Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 2.206, "Requests for action under this subpart," with the Nuclear Regulatory Commission (NRC or the Commission). The Petition requested that the NRC not allow the Vermont Yankee Nuclear Power Station (Vermont Yankee), operated by Entergy Nuclear Operations, Inc. (Entergy or the Licensee), to restart in May 2010 after its scheduled refueling outage until the completion of all environmental remediation work and relevant reports on leaking tritium at the plant. Specifically, the Petition asked the NRC to prevent Vermont Yankee from resuming power production until the following efforts have been completed to the Commission's satisfaction: (1) the tritiated groundwater remediation process; (2) the soil remediation process scheduled to take place during the refueling outage, to remove soil containing tritium and radioactive isotopes of cesium, manganese, zinc, and cobalt; (3) Entergy's root cause analysis; and (4) the Commission's review of the documents presented by Entergy as a result of the Commission's Demand for Information (DFI) imposed on the Licensee on March 1, 2010.

This Petition was assigned to the NRC's Office of Nuclear Reactor Regulation (NRR) for review. NRR's Petition Review Board (PRB) met on May 3, 2010, and made an initial recommendation to accept this Petition for review. The NRC communicated this decision to the Petitioner's staff, who told the PRB that the Petitioner did not desire to address the PRB. The PRB's final recommendation was to accept the Petition for review. By letter dated May 20, 2010, Agencywide Documents Access and Management System (ADAMS) Accession No. ML101310049, the NRC informed the Petitioner of the PRB's recommendation and also stated that the NRC did not find cause to prohibit the restart of Vermont Yankee.

By letters dated May 14 and June 16, 2010, the Petitioner provided the NRC with supplements to his Petition. After full consideration of the Petition and

supplements, NRR has concluded that the actions requested in the Petition have been taken, with the exception of preventing the restart of Vermont Yankee. Therefore, NRR concludes that the Petition has been granted in part and denied in part, as explained below.

Copies of the Petition are available for inspection at the Commission's Public Document Room (PDR) at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and from the NRC's ADAMS Public Electronic Reading Room on the NRC Web site at http://www.nrc.gov/reading-rm/adams.html under ADAMS Accession No. ML101120663. The supplemental letters are under ADAMS Accession Nos. ML101370031 and ML101720485. NRC Management Directive 8.11, "Review Process for 10 C.F.R. 2.206 Petitions," ADAMS Accession No. ML041770328, describes the petition review process. Persons who do not have access to ADAMS or who have problems accessing the documents in ADAMS should contact the NRC PDR reference staff by telephone at 1-800-397-4209 or 301-415-4737, or by e-mail to pdr@nrc.gov.

The NRC sent a copy of the proposed Director's Decision to the Petitioner for comment on November 18, 2010, and to the Licensee for comment on November 29, 2010. The Petitioner did not provide any comments. By e-mail dated December 21, 2010, ADAMS Accession No. ML110050341, the Licensee provided minor comments. The Licensee's comments and the NRC staff responses are discussed in the Attachment to this Director's Decision.

II. DISCUSSION

On January 7, 2010, Entergy reported to the NRC that water samples taken from groundwater monitoring well GZ-3 onsite at Vermont Yankee showed tritium levels above background. GZ-3 is about 70 feet from the Connecticut River. Tritium is another name for the radioactive nuclide hydrogen-3. Tritium occurs naturally in the environment because of cosmic ray interactions. It is also produced by nuclear reactor operations, and can be legally discharged as a radioactive effluent under NRC regulations. Tritium is chemically identical to normal hydrogen (hydrogen-1), and, like normal hydrogen, tends to combine with oxygen to form water, which is referred to as tritiated water. The detection of tritiated water in the monitoring well indicated abnormal leakage from the nuclear plant. The Environmental Protection Agency's (EPA's) regulatory standard for tritium in drinking water is 20,000 picocuries per liter (pCi/L). Tritium was initially measured at levels up to about 17,000 pCi/L in monitoring well GZ-3. Water from monitoring well GZ-3 is not used for drinking water. Samples at other monitoring wells have also shown some tritium. The highest reading from any monitoring well has been about 2.5 million pCi/L, from monitoring well GZ-10.

Entergy immediately started an investigation to identify the source of the tritium, and later installed additional monitoring wells to help locate the source.

Upon notification, the NRC Staff initiated actions to review and assess the condition, including review of all available sampling data, hydrologic information and analyses, onsite inspection and assessment of Entergy's plans and process for investigating the condition, and independent determination of public health and safety consequences based on available information. NRC inspectors provided close regulatory oversight of Entergy's investigation in order to independently ensure conformance with applicable NRC regulatory requirements, assess Licensee performance, and evaluate the condition with respect to NRC's radiological release limits.

On February 27, 2010, following excavation and leak testing of the Advanced Off-Gas (AOG) system pipe tunnel, Entergy reported that it had identified leakage into the surrounding soil, and therefore to the groundwater, from an unsealed joint in the concrete tunnel wall. The AOG pipe tunnel is located about 15 feet underground. Also, piping inside the tunnel had previously been found to be leaking, and the drain inside the tunnel had been found to be clogged. Soil samples in the vicinity showed traces of radioactive isotopes. Entergy reported that the leakage to the environment had been stopped by isolating the piping and containing the water leaking from the AOG pipe tunnel. However, on May 28, 2010, Entergy reported a second leak from AOG piping into the soil. Entergy quickly isolated this leak and has sealed off that piping to prevent further leaks in that area. On June 8, 2010, Entergy reported a leak in the reactor building, which was not associated with the AOG system. The leak reported on June 8th was from a relief valve on a heat exchanger that started leaking to the building drain system. This leakage was collected and processed through the radioactive waste treatment system, and had no effect on the environment. The relief valve was replaced.

As part of its oversight effort, NRC Staff conducted an evaluation in accordance with NRC Manual Chapter 0309, "Reactive Inspection Decision Basis for Reactors," to determine if the occurrence with the AOG piping constituted a significant operational event (i.e., a radiological, safeguards, or other safety-related operational condition) that posed an actual or potential hazard to public health and safety, property, or the environment. The evaluation reviewed the condition against the specified deterministic criteria, which are based on regulatory safety limits, and determined that none of the criteria were met. Notwithstanding that determination, NRC Staff continued ongoing review, oversight, and assessment of the condition, including independent evaluation of any potential public health and safety consequence. These activities included:

1. Several onsite inspections and reviews to assess radiological and hydrological data to establish reasonable assurance that members of the

public were not, nor expected to be, exposed to radiation in excess of the dose limits for individual members of the public specified in 10 C.F.R. § 20.1301, 100 millirem in a year; and determine if the Licensee's performance was in conformance with applicable regulatory requirements.

2. Engagement of hydrological scientists from NRC's Office of Nuclear Reactor Regulation, Office of Regulatory Research, and the U.S. Geological Survey to independently assess the Licensee's hydrological and geological data and conclusions on groundwater flow characteristics of the area.

3. Inspection in accordance with NRC Temporary Instruction TI-2515/173, "Review of the Implementation of the Industry Ground Water Protection Voluntary Initiative," to determine the Licensee's implementation of the specifications in the industry's groundwater initiative document Nuclear Energy Institute (NEI)-07-07, "Industry Groundwater Protection Initiative — Final Guidance Document," ADAMS Accession No. ML072610036.

4. Independent confirmation of the basis, calculation methodology, and results obtained by the Licensee to estimate a contaminated groundwater effluent release and off-site dose consequence to members of the public.

5. Independent analysis of selected groundwater and environmental samples to aid in determining the adequacy of the Licensee's analytical methods.

6. Establishment of an approved deviation from NRC's normal Reactor Oversight Process in order to expend additional NRC inspection resources to fully evaluate and provide continuing regulatory oversight of the Licensee's investigation and remediation activities.

7. Documentation of inspection scope and conclusions in publicly available NRC Inspection Reports.

As a result of these activities, the NRC established reasonable assurance, in a timely manner, that this groundwater condition would not result in any dose consequence that would jeopardize public health and safety. To date, information and data continue to support the finding that the dose consequence attributable to the groundwater condition at Vermont Yankee remains well below the "as low as reasonably achievable" (ALARA) dose objectives specified in 10 C.F.R. Part 50, Appendix I; and that the NRC regulatory criteria of 10 C.F.R. § 20.1301, "Dose limits for individual members of the public," were never approached.

In addition, the State of Vermont has provided support from the Vermont Department of Health, Office of Public Health Preparedness. The State of Vermont's Radiological Health Chief participated in the oversight of the tritium investigation, with direct onsite participation in inspections and data analysis. In

addition, the State of Vermont has performed independent split sampling analyses of the groundwater monitoring samples.

A. The Tritiated Groundwater Remediation Process

On March 24, 2010, Entergy began removing tritiated water from extraction well GZ-EW1. On April 7, 2010, Entergy placed into service a second extraction well, GZ-EW1A, with a higher flow capacity. As the highest plume concentration progressed toward the Connecticut River, the extraction wells were sited accordingly, with GZ-15 being used for groundwater extraction at various times starting on July 28, 2010, followed by installation of extraction well EW-2, which began operation along with GZ-14 on September 13, 2010. As of December 21, 2010, Entergy had pumped approximately 307,000 gallons of groundwater out of these wells to reduce the amount of tritiated water in the groundwater. About 298,000 gallons of the extracted water has been shipped offsite for disposal at a licensed waste disposal facility, and the remainder was processed in the station's radioactive waste system. Entergy recently announced it intends to make additional groundwater withdrawals going forward. A plume of tritiated groundwater extends from the source of the leak to the Connecticut River, which is the direction of flow for the groundwater in this location. Although no detectable tritium has been found in the Connecticut River, the hydrology model indicates that there has been some flow into the river, and some flow will continue as rainwater recharges the groundwater. The NRC's inspections indicate that no federal regulatory limits have been or are expected to be exceeded, and there are no health or safety concerns for members of the public or plant workers.

B. The Soil Remediation Process

The soil in the vicinity of the leak was contaminated with small amounts of other radioactive nuclides associated with nuclear plant operations, including manganese-54, cobalt-60, zinc-65, strontium-90, and cesium-137. Sampling indicated very little migration in the immediate area, which is typical for these radionuclides. Entergy has removed about 150 cubic feet of contaminated soil, and packaged it for disposal at a licensed disposal facility. Although some minor amounts of soil contaminated with these other radionuclides may remain, NRC inspections indicate that this soil poses no threat to public health and safety. Areas of minor contamination are evaluated and remediated as needed during plant decommissioning in accordance with 10 C.F.R. § 50.82. The NRC's experience with decommissioning nuclear plants such as Maine Yankee, Haddam Neck, and Yankee Rowe indicates that these areas can be successfully remediated at that time. The NRC's inspections indicate that no federal regulatory limits have been

exceeded, and there are no health or safety concerns for members of the public or plant workers. The initial NRC inspection covered the period of January 25 through April 14, 2010. Inspection results were initially discussed in an NRC letter with preliminary results, dated April 16, 2010, ADAMS Accession No. ML101060419. The NRC issued its completed report on May 20, 2010, ADAMS Accession No. ML101400040, and continues to inspect the Licensee's actions in these areas.

C. Entergy's Root Cause Analysis

As part of its corrective action program, Entergy performed a root cause analysis (RCA) of the leakage event. The NRC assessed the comprehensiveness of this analysis and documented this review in NRC Inspection Report 05000271/2010009 dated October 13, 2010, ADAMS Accession No. ML102860037. The NRC concluded that Entergy's root and apparent cause evaluations for the tritium groundwater leakage events were appropriate, although the agency noted some performance deficiencies. No violation of NRC requirements was identified.

D. The NRC's Demand for Information

On February 24, 2010, Entergy informed the NRC that it had removed some employees at Vermont Yankee from their site positions and placed them on administrative leave. Entergy took these actions as a result of its independent internal investigation into alleged contradictory or misleading information provided to the State of Vermont that was not corrected. In light of Entergy's investigation and resulting actions, the NRC issued a DFI dated March 1, 2010, ADAMS Accession No. ML100570237, requiring Entergy to confirm whether communications over the past 5 years to the NRC by these individuals, that were material to NRC-regulated activities, were complete and accurate. Entergy responded to the NRC on March 31, 2010, ADAMS Accession No. ML100910420. The NRC's review of Entergy's DFI response and Entergy's communications did not identify any cases of incomplete or inaccurate statements to the NRC. The NRC closed the review of the DFI response in a letter to Entergy dated June 17, 2010, ADAMS Accession No. ML101670271. Based on this review, the NRC concludes that Entergy's communications with the NRC have been accurate and have met regulatory requirements. The NRC also concluded that the site employees continue to demonstrate an appropriate safety culture.

E. NRC Actions Pertaining to Groundwater Contamination

In March of 2010, NRC's Executive Director of Operations (EDO) established a Groundwater Task Force (GTF) to review the NRC's approach to overseeing buried pipes given the recent incidents of leaking buried pipes at commercial nuclear power plants. The charter of the Task Force was to reevaluate the recommendations made in the Liquid Radioactive Release Lessons Learned Task Force Final Report dated September 1, 2006, ADAMS Accession No. ML062650312; review the actions taken in the Commission paper SECY-09-0174 (Staff Progress in Evaluation of Buried Piping at Nuclear Reactor Facilities, dated December 2, 2009, ADAMS Accession No. ML093160004); and review the actions taken in response to recent releases of tritium into groundwater by nuclear facilities.

The GTF completed its work in June 2010 and provided its report to the EDO. The report characterized a variety of issues ranging from policy issues to communications improvement opportunities. The complete report may be found under ADAMS Accession No. ML101680435. The GTF determined that the NRC is accomplishing its stated mission of protecting public health, safety, and protection of the environment through its response to groundwater leaks/spills. Within the current regulatory structure, the NRC is correctly applying requirements and properly characterizing the relevant issues. However, the GTF reported that there are further observations, conclusions, and recommendations that the NRC should consider in its oversight of licensed material outside of its design confinement.

The EDO appointed a group of NRC senior executives to review the report and consider its findings. Over the past several months, the group has been reviewing the GTF final report, including the conclusions, recommendations, and their bases. They identified conclusions and recommendations that do not involve policy issues, and tasked the NRC Staff to address them. They have also identified policy issues, are developing options to address them, and will send a policy paper to the Commission discussing those options.

The NRC held a public workshop on October 4, 2010, with external stakeholders to discuss the findings of the GTF report and to receive input on the potential policy issues. In addition, a request for public comment was published in the *Federal Register* (75 Fed. Reg. 57,987 (Sept. 23, 2010)). These efforts help to ensure the NRC is considering the right issues on which to focus its attention as it moves forward. The transcript from this meeting is available on the NRC's Web site at http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/buried-pipes-tritium.html.

III. CONCLUSION

Based on the information summarized above, the NRC Staff concludes that the activities requested by the Petitioner have been completed, with the exception of preventing the restart of Vermont Yankee. Therefore, NRR concludes that the Petition has been granted in part and denied in part. Related documentation includes an NRC letter to Entergy on increased oversight dated April 8, 2010, ADAMS Accession No. ML100990458.

As provided in 10 C.F.R. § 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Eric J. Leeds, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 27th day of January 2011.

ATTACHMENT TO FINAL DIRECTOR'S DECISION

Discussion of Comments on the Proposed Director's Decision from the Licensee, and the NRC Staff Responses

By e-mail dated December 21, 2010, ADAMS Accession No. ML110050341, the Licensee provided comments on the proposed Director's Decision on the Petition filed by Congressman Paul Hodes pursuant to 10 C.F.R. § 2.206, "Requests for action under this subpart." The Licensee's comments and corresponding response from the NRC staff are provided below:

Comment 1

Section II, "Discussion"

(a) GZ-3 is actually located approximately 70 ft from the Connecticut River. Actual distance depends on river stage.

(b) The highest reading from any monitoring well has been 2.52 million pci/L (measured on 2/8/2010) from monitoring well GZ-10.

(c) On June 8th, Entergy reported a leak in the reactor building (June 8th was the date that RHR relief valve leakage was discovered. This required a 4-hour notification to the NRC).

The NRC Staff Response

Revised the Director's Decision to reflect the comments.

Comment 2

A. The Tritiated Groundwater Remediation Process:

(a) Monitoring well GZ-15 was utilized for groundwater extraction from July 28, 2010, until September 2, 2010, and again from October 28, 2010, until November 8, 2010.

(b) As of December 21, 2010, Entergy has pumped 307,000 gallons of groundwater.

(c) About 298,000 gallons of water was shipped offsite for disposal and 9,000 gallons was returned to the station's liquid radioactive waste system for in-plant use.

(d) Evaluation of continued extraction is on-going.

(e) On March 23, 2010, Entergy installed an extraction well (GZ-EW1). (The well was installed on 3/23 and placed in service on 3/24).

The NRC Staff Response

Revised the Director's Decision to reflect the comments.

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)
(Combined License Application)

PROGRESS ENERGY FLORIDA, INC.
(Levy County Nuclear Power
Plant, Units 1 and 2) **February 2, 2011**

RULES OF PRACTICE: MOTIONS TO DISMISS CONTENTION (ENVIRONMENTAL MATTERS; MIGRATION OF ISSUES; MOOTNESS)

In this decision, the Board concludes that Intervenors' challenges to the adequacy of the Applicant's environmental report (ER) with respect to the environmental impacts of dewatering associated with the proposed Levy Nuclear Plant (LNP) continue to serve as viable challenges to the similar sections of the Staff's draft environmental impact statement (DEIS) and thus are not moot. The Applicant, Progress Energy Florida (PEF), has not shown that the differences between the DEIS and the ER (e.g., relocation of LNP production wells, DEIS discussion of certain groundwater use conditions imposed by the State of Florida) establish a change in circumstances sufficient to render this Contention 4 (C-4) moot.

RULES OF PRACTICE: CONTENTIONS (ENVIRONMENTAL MATTERS; MOOTNESS; NEED FOR NEW OR AMENDED CONTENTION)

Publication of the NRC Staff's DEIS in a proceeding may moot a contention challenging the environmental analysis in the applicant's ER, if the DEIS dispenses with the issues raised in the original contention challenging the ER. In such a case, the intervenor may file a new or amended contention challenging the relevant new or differing portion of the DEIS.

NEPA: ANALYSIS OF ENVIRONMENTAL IMPACTS

The DEIS, like the ER, must cover all significant environmental impacts associated with the LNP project, including offsite environmental impacts.

RULES OF PRACTICE: CONTENTIONS (ENVIRONMENTAL MATTERS; ANALYSIS OF ENVIRONMENTAL IMPACTS; MOOTNESS)

Contention 4, which challenges the adequacy of the analysis of the environmental impacts associated with dewatering, is not rendered moot by the fact that PEF proposes to move its groundwater production wells from the site to an adjacent property.

NEPA: ENIVRONMENTAL IMPACT STATEMENT ("HARD LOOK")

Although the NRC Staff does not need to duplicate the environmental studies done by the State of Florida and may reference and rely on the groundwater use conditions imposed by the State, such studies and conditions do not relieve the NRC of its duty under NEPA to conduct an independent "hard look" analysis of all environmental impacts related to active dewatering during operations at the LNP. The existence of a state study or state conditions does not moot NRC's obligations under NEPA.

RULES OF PRACTICE: CONTENTIONS (ENVIRONMENTAL MATTERS; MOOTNESS)

PEF has not shown that the aspects of the NRC Staff's DEIS that differ from PEF's ER sufficiently moot or resolve the issue of adequacy of the environmental impact assessment.

RULES OF PRACTICE: CONTENTIONS (ENVIRONMENTAL MATTERS; MIGRATION OF ISSUES)

The Commission's "migration tenet" applies to C-4 in this proceeding, in that once the NRC Staff issues its DEIS, a contention that was originally admitted as a challenge to the ER may be treated as a challenge to the similar section of the DEIS.

RULES OF PRACTICE: CONTENTIONS (ENVIRONMENTAL MATTERS; MIGRATION OF ISSUES)

The migration tenet obviates the requirement to file the same contention (and litigate its admissibility) three times — once against the ER, once against the DEIS, and once against the final environmental impact statement (FEIS).

RULES OF PRACTICE: CONTENTIONS (ENVIRONMENTAL MATTERS; MIGRATION OF ISSUES)

The migration tenet applies where, as here, the information in the DEIS is sufficiently similar to the information in the ER.

MEMORANDUM AND ORDER

(Denying Motion to Dismiss Portions of Contention 4 as Moot)

Before the Board is a motion by Progress Energy Florida, Inc. (PEF) to dismiss as moot the aspects of Contention 4 (C-4) that relate to the adequacy of PEF's Environmental Report with regard to its analysis of active dewatering during operation of the proposed Levy Nuclear Plant (LNP) in Levy County, Florida.[1] The Ecology Party of Florida, the Green Party of Florida, and the Nuclear Information and Resource Service (collectively, Intervenors) oppose the motion.[2] The NRC Staff agrees with PEF that this portion of C-4 is moot, but notes that Intervenors still have an opportunity either to amend Contention 4 to challenge the

[1] Motion to Dismiss as Moot the Aspects of Contention 4 Related to Active Dewatering During Levy Nuclear Plant Operations (Sept. 30, 2010) at 1 (Motion).

[2] Co-Interveners' [sic] Answer to Progress Energy Florida Motion to Dismiss as Moot the Aspects of Contention 4 Related to Active Dewatering During Levy County Units 1 & 2 Nuclear Operations (Nov. 15, 2010) at 1 (Intervenors Answer).

Staff's draft environmental impact statement (DEIS), or to file a new contention on this topic.[3]

For the reasons set forth below, the motion is denied.[4]

I. BACKGROUND

On December 8, 2008, the NRC published a notice of hearing and opportunity to petition for leave to intervene in the PEF combined license application (COLA) proceeding. 73 Fed. Reg. 74,532 (Dec. 8, 2008). This Board was established on February 23, 2009. 74 Fed. Reg. 9113 (Mar. 2, 2009). On July 8, 2009, we ruled that the Intervenors had demonstrated standing and had submitted three admissible contentions. LBP-09-10, 70 NRC 51, 147 (2009). We therefore granted their petition to intervene. *Id.*

One of the three admitted contentions, Contention 4 (C-4), addressed the issue of environmental impacts to surface and groundwater resources resulting from the construction and operation of the LNP. C-4 states, in pertinent part, as follows:

> Progress Energy Florida's (PEF's) Environmental Report fails to comply with 10 C.F.R. Part 51 because it fails to adequately address, and inappropriately characterizes as SMALL, certain direct, indirect, and cumulative impacts, onsite and offsite, of constructing and operating the proposed LNP facility:
>
> A Impacts to wetlands, floodplains, special aquatic sites, and other waters, associated with dewatering, specifically:
>
> 1. Impacts resulting from active and passive dewatering[.]

Id. The Commission affirmed the admission of C-4. *See* CLI-10-2, 71 NRC 27, 30-41 (2010).

On August 5, 2010, the NRC Staff issued its DEIS regarding PEF's COLA

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[3] NRC Staff Answer to Progress Energy Florida's Motion to Dismiss as Moot Certain Aspects of Contention 4 (Oct. 12, 2010) at 1 (Staff Answer).

[4] In addition to the instant motion, two other motions concerning the subject matter of C-4 are currently pending before this Board. On October 4, 2010, PEF moved for summary disposition concerning certain other aspects of C-4 (relating to salt drift and passive dewatering). *See* Progress Energy's Motion for Summary Disposition of Contention 4 (Environmental Impacts of Dewatering and Salt Drift) with Regard to Salt Drift and Passive Dewatering (Oct. 4, 2010). On November 15, 2010, the Intervenors sought admission of a new contention, C-4A, alleging that the NRC's recently issued DEIS suffers from many of the same deficiencies as alleged in C-4 concerning PEF's Environmental Report (ER). *See* 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). We are issuing our rulings on these motions simultaneously.

for LNP Units 1 and 2.[5] In the DEIS, the NRC Staff discusses environmental impacts to surface and groundwater resources resulting from the proposed LNP construction and operation. The discussion refers to information not included in PEF's Environmental Report (ER), including certain groundwater modeling analyses and a Site Certification Order with associated conditions of certification (COC) issued by the State of Florida.[6]

On September 30, 2010, PEF filed the instant motion to dismiss the portions of C-4 that relate to active dewatering activities during LNP operations, arguing that three fundamental changes have taken place since its submission of the ER for the LNP Units 1 and 2 that moot the active dewatering portions of C-4. Motion at 1. First, PEF states that it changed the proposed location of the four groundwater production wells (which would draw water from the upper Floridan aquifer when the LNP is in operation) by moving these wells off the LNP site to an adjacent PEF-owned property. *Id.* Second, PEF notes that the DEIS is different from the ER because the DEIS relies, in part, on the COC (and associated Site Certification Order). *Id.* Third, PEF points to alleged differences in the DEIS and ER with regard to groundwater modeling and the reliance on the COC. *Id.*

The NRC Staff filed its response to the motion on October 12, 2010, in which it expresses its view that the active dewatering aspects of C-4 are now moot, but notes that Intervenors have an opportunity to amend C-4 or submit a new contention based on this issue as it is discussed in the DEIS. On November 15, 2010, Intervenors submitted their answer opposing the motion.[7]

II. ANALYSIS

There are circumstances under which the NRC Staff's publication of a DEIS can render moot a contention challenging the adequacy of the applicant's ER. The

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[5] *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 (Aug. 13, 2010).

[6] *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, 4-15 to 4-26, 5-5 to 5-9, 5-43, 5-57, 5-122 to 5-124, 7-13 to 7-19 (Aug. 2010) (DEIS); Motion, Attachment B, Florida Department of Environmental Protection Orders of January 12, 2010 and February 23, 2010, Revised Conditions of Certification (Feb. 23, 2010).

[7] Intervenors Answer at 1. On October 7, 2010, the Board granted Intervenors a 40-day extension in which to submit their answer to the instant motion. *See* Licensing Board Order (Granting Motions for Extensions of Time) (Oct. 7, 2010) at 2 (unpublished). The October 12, 2010 filing deadline for answers to PEF's motion was otherwise established under 10 C.F.R. § 2.323 and the Board's initial scheduling order for this proceeding. *See* Initial Scheduling Order, LBP-09-22, 70 NRC 640, 648 (2009).

instant proceeding is not such a case. We therefore deny PEF's motion to dismiss portions of C-4 related to active dewatering during operations at the LNP.

The Board concludes that PEF (the movant) has not established that the relocation of production wells at the LNP, the State of Florida's imposed conditions on groundwater use at the LNP, or the differences between the DEIS and the ER, establish a change in circumstances significant enough to render the active dewatering portions of C-4 moot. First, relocation of production wells to PEF property that is immediately adjacent to the LNP site does not alter Intervenors' allegation in C-4 that the environmental impacts of active dewatering are inadequately assessed. PEF states that the production wells "have been relocated off-site to minimize environmental impacts," and that this effects a "fundamental change in how active dewatering will support operation of Levy." Motion at 6. Yet these wells were merely moved to "adjacent Progress properties." *Id.* (citing DEIS, Figure 2-12). While PEF alleges that the well relocation will "minimize" environmental impacts to wetlands resulting from groundwater drawdown, *id.,* PEF fails to articulate precisely how relocation to adjacent property causes a change sufficient to moot Intervenors' challenge of the adequacy of the impacts analysis relating to active dewatering at the LNP site. C-4 refers specifically to the environmental impacts "onsite and offsite." LBP-09-10, 70 NRC at 149.

Intervenors argue, and we agree, that PEF has not sufficiently explained how movement of the wells across a property boundary effects a substantial alteration, either to minimize or to increase, the groundwater impacts resulting from active dewatering during LNP operations.[8] A dismissal of the portions of C-4 addressing active dewatering merely because four active dewatering production wells were moved "offsite" would assume that the resulting groundwater impacts are only relevant if initiated at a location strictly within the LNP site property boundary. *See id.* at 4. As we stated when we admitted C-4, the "requirement of Part 51 that the ER cover all significant environmental impacts associated with a project is not limited to onsite environmental impacts." LBP-09-10, 70 NRC at 99. The same holds true for the DEIS. The movement of the groundwater production wells from one section of PEF's property to an adjacent section, does not moot C-4.

Second, the NRC Staff's reference to, and reliance in its DEIS on, the State of Florida's issuance of its site certification order and associated COC on groundwater use does not dispense with the NRC's duty under NEPA to conduct adequately an independent "hard look" analysis of environmental impacts related

[8] *See* Intervenors Answer at 3-4. In their answer, Intervenors argue that "the concern about hydrological impacts . . . is based on the fact that while boundaries may be drawn on the surface of the ground, such boundaries have no relationship . . . to waters under those boundaries." *Id.* at 3. Intervenors further argue that PEF's movement of the four production wells "may, in fact increase the impact of dewatering," and that "the necessary analysis to make the case either way has not been provided by PEF. . . . It simply assumes that such relocation settles the matter.'" *Id.* We agree.

to active dewatering during operations at the LNP.[9] Certainly the NRC may reference the COC and need not duplicate a prior state analysis, but the NRC also cannot overrely on that state analysis in conducting its independent assessment. *See id.* PEF argues, *inter alia,* that unlike its ER, the NRC Staff's DEIS considers the COC in its discussion of environmental impacts related to active dewatering. Motion at 9. Therefore, PEF argues, the aspects of C-4 related to active dewatering are now moot. *Id.* However, whether the analysis of environmental impacts resulting from active dewatering during operations at LNP is adequate under NEPA, even recognizing the NRC Staff's consideration in its DEIS of the COC, remains at issue in this proceeding. Merely considering additional state-imposed conditions does not dispose of the issue of whether the analysis as a whole is adequate under NEPA.[10]

Third, although the NRC Staff's DEIS reflects an analysis differing in certain respects from that in PEF's ER (e.g., the DEIS incorporates different groundwater modeling analyses and consideration of the State of Florida's COC conditions), it does not moot the issue that is at the heart of this part of C-4 — the adequacy of the assessment of environmental impacts resulting from active dewatering during operations at the LNP. Merely conducting an alternative analysis, which Intervenors have not yet had the opportunity to review,[11] does not obviate the need to ensure that the relevant entity (either PEF or the NRC Staff) has conducted a proper assessment of environmental impacts resulting from active dewatering activity during LNP operations. Intervenors continue to contest PEF's position that a sufficient assessment of the active dewatering impacts has been conducted, and PEF has not shown that the aspects of the NRC Staff's DEIS that differ from PEF's ER sufficiently resolve the issue of adequacy of the impacts assessment.

Commission precedent specifies that, once the NRC Staff issues the DEIS, a contention that was originally admitted as a challenge to the ER may be treated

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[9] *See Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-8, 63 NRC 241, 259 (2006) (citing *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), LBP-78-28, 8 NRC 281, 282 (1978); 10 C.F.R. § 51.70(b)) ("[I]n conducting its environmental review, an agency may, in its discretion, rely on data, analyses, or reports prepared by persons or entities other than agency staff, including competent and responsible state authorities . . . provided, however, that the Staff independently evaluates and takes responsibility for the pertinent information before relying on it in an EIS . . . . In other words, the Staff need not replicate the work completed by another entity, but rather must independently review and find relevant and scientifically reasonable any outside reports or analyses on which it intends to rely.").

[10] *See* LBP-09-10, 70 NRC at 100 (citing Tr. at 97) ("[T]he fact that an agency (other than NRC) has jurisdiction to issue a permit concerning a certain environmental impact of the PEF project does not mean that the subject may be excluded from the ER or EIS.").

[11] As of the briefing of this matter, PEF had not yet made its new groundwater modeling analysis available to Intervenors for review. *See* LBP-10-23, 72 NRC 692 (2010).

as a challenge to the similar section of the DEIS.[12] This has been referred to as the "migration tenet,"[13] and we find that it is applicable here. The migration tenet obviates the requirement to file the same contention (and litigate its admissibility) three times — once against the ER, once against the DEIS, and once against the final environmental impact statement (FEIS). The migration tenet applies where, as here, the information in the DEIS is sufficiently similar to the information in the ER.[14] This is not a case where the information in the DEIS is so different from the information in the ER that the DEIS dispenses with and moots the issues raised in the original contention and requires (if the intervenor wishes to continue) that the intervenor file a new or amended contention against the DEIS.[15] Therefore, we conclude that the aspects of C-4 challenging the adequacy of the ER analysis of the environmental impacts of active dewatering activities during LNP operations

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[12] *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998) ("In this proceeding, CANT filed most of its environmental contentions on the basis of LES's ER. But by the time the various NEPA issues came before the Board on the merits, the NRC Staff had issued its FEIS. In LBP-96-25 and LBP-97-8, therefore, the Board appropriately deemed all of CANT's environmental contentions to be challenges to the FEIS."); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382, 383 n.44 (2002) ("While a contention contesting an applicant's environmental report generally may be viewed as a challenge to the NRC Staff's subsequent draft EIS, *new* claims must be raised in a new or amended contention. . . . In contrast, as the PFS Board explained, a contention 'initially framed as a challenge to the substance of an applicant's ER analysis of particular matters would not necessarily require a late-filed revision or substitution to constitute a litigable issue statement relative to the substance of the Staff's DEIS (or final environmental impact statement) analysis of the same matter.'").

[13] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001) (citing *Claiborne,* CLI-98-3, 47 NRC at 84 ("[T]he Commission has recognized that a contention contesting an applicant's ER may be viewed as a challenge to the Staff's subsequently issued DEIS/EIS. . . . This 'migration' tenet does not, however, change the basic form of the contention, i.e., whether it challenges the soundness of the information provided or claims that necessary information has been omitted (or some combination of the two).").

[14] *See Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-64 (2008) (citing *McGuire/Catawba,* CLI-02-28, 56 NRC at 383) ("The Board may consider environmental contentions made against an applicant's ER as challenges to an agency's subsequent DEIS. . . . This is appropriate, however, only so long as the DEIS analysis or discussion at issue is essentially *in para materia* with the ER analysis or discussion that is the focus of the contention. If it is not, an intervenor attempting to litigate an issue based on expressed concerns about the DEIS may need to amend the admitted contention or, if the information in the DEIS is sufficiently different from that in the ER that supported the contention's admission, submit a new contention.").

[15] *See McGuire/Catawba,* CLI-02-28, 56 NRC at 383; *Private Fuel Storage* (Independent Spent Fuel Storage Facility), LBP-01-22, 54 NRC 155, 161 (2001); *Vogtle,* LBP-08-2, 67 NRC at 63-64; 10 C.F.R. § 2.309(f)(2); 42 U.S.C. § 4321 (2006).

migrate to, and remain as viable challenges to the adequacy of the DEIS, and are not moot.[16]

III. CONCLUSION

Progress Energy Florida, Inc. has failed to show that the aspects of Contention 4 in the instant proceeding relating to active dewatering activities during operation of the LNP are now moot by virtue of (1) relocation of four production wells to an immediately adjacent PEF-owned property; (2) consideration in the NRC Staff DEIS of State of Florida imposed conditions associated with the COC; or (3) differences in the DEIS from the ER. These portions of Contention C-4, which focused on the ER, migrate and will now be treated as challenges to the DEIS as well. We therefore *deny* PEF's motion to dismiss.[17]

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
February 2, 2011

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[16] The fact that the Intervenors, out of an abundance of caution, filed a new and amended contention C-4A challenging the DEIS, does not alter our ruling here — that these aspects of C-4 were not mooted by the issuance of the DEIS. While C-4 (challenging the ER) is not dismissed as moot, as we stated in our ruling admitting parts of C-4A (challenging the DEIS), for purposes of the evidentiary hearing and merits decisions, the admitted portions of C-4A will supersede the previously admitted counterparts of C-4. Memorandum and Order (Admitting Contention 4A) at 22 (Feb. 2, 2011) (unpublished).

[17] Our ruling, that the C-4 challenges to the ER migrate to serve as challenges to the DEIS, does not mean that the same will necessarily hold true with regard to the FEIS. Any such determination will depend, in significant part, as to whether the FEIS is, in pertinent parts, substantially the same as the DEIS.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Michael F. Kennedy
Dr. Richard E. Wardwell

In the Matter of **Docket No. 50-443-LR**
(ASLBP No. 10-906-02-LR-BD01)

NEXTERA ENERGY SEABROOK, LLC
(Seabrook Station, Unit 1) **February 15, 2011**

This 10 C.F.R. Part 54 proceeding concerns the application of NextEra Energy Seabrook, LLC, to renew the operating license for Seabrook Station, Unit 1, a nuclear power reactor located in Rockingham County, New Hampshire. Two groups petitioned to intervene and requested a hearing: (1) Beyond Nuclear, the Seacoast Anti-Pollution League, and the New Hampshire Sierra Club; and (2) Friends of the Coast and the New England Coalition. Having determined that each of the petitioning organizations demonstrated standing and that the sole contention proffered by the first group and three of the four contentions proffered by the second group are admissible, in whole or in part, under 10 C.F.R. § 2.309(f)(1), the Board grants the petitions and admits each petitioner as a party.

RULES OF PRACTICE: REQUIREMENTS FOR INTERVENTION

To intervene as a party in an adjudicatory proceeding addressing a proposed license action, a petitioner must (1) establish it has standing; and (2) proffer at least one admissible contention. 10 C.F.R. § 2.309(a).

RULES OF PRACTICE: INTERVENTION PETITION (GOOD CAUSE FOR LATE FILING)

To determine whether a late-filed petition will be considered, the licensing board must balance the eight factors set out in 10 C.F.R. § 2.309(c)(1), of which "good cause . . . for the failure to file on time" is the most important. *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549 n.61 (2009) (referring to 10 C.F.R. § 2.309(c)(1)(i)).

RULES OF PRACTICE: INTERVENTION PETITION (GOOD CAUSE FOR LATE FILING)

Persistent difficulties with the NRC electronic filing system despite good-faith efforts shows good cause for submitting a petition shortly after the deadline, especially in light of petitioners' having served all parties by e-mail just minutes after the deadline.

LICENSING BOARD: DISCRETION IN MANAGING PROCEEDINGS

Where the board allowed petitioners to file a corrected version of an expert declaration that contained numerous typographical errors, and where some of petitioners' corrections clearly went beyond what the board expected, the board did not try to parse which changes were authorized and did not consider or rely on the corrected version.

RULES OF PRACTICE: STANDING TO INTERVENE (REPRESENTATIONAL STANDING)

An organization may represent the interests of its members using representational standing if it can: (1) show that the interests it seeks to protect are germane to its own purpose; (2) identify, by name and address, at least one member who qualifies for standing in his or her own right; (3) show that it is authorized by that member to request a hearing on his or her behalf; and (4) show that neither the claim asserted nor the relief requested requires an individual member's participation in the organization's legal action. *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007) (citations omitted).

RULES OF PRACTICE: STANDING AS OF RIGHT (INJURY IN FACT AND ZONE OF INTERESTS)

Traditional judicial standing concepts require a showing that the individual

has suffered or might suffer a concrete and particularized injury that is (1) fairly traceable to the challenged action; (2) likely redressible by a favorable decision, *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)); and (3) arguably within zone of interests protected by the governing statutes, *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (quoting *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983)) — here the Atomic Energy Act (AEA), 42 U.S.C. §§ 2011-2297, and the National Environmental Policy Act (NEPA). 42 U.S.C. §§ 4321-4347.

RULES OF PRACTICE: STANDING TO INTERVENE (PROXIMITY)

The NRC presumes that an individual has standing to intervene without the need to address traditional standing concepts upon a showing that he or she lives within, or otherwise has frequent contacts with, a geographic zone of potential harm. *St. Lucie,* CLI-89-21, 30 NRC at 329. The pertinent zone in operating license renewal proceedings and other power reactor license matters is the area within a 50-mile radius of the site. *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 917 (2009).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

An admissible contention must: (1) state the specific legal or factual issue sought to be raised; (2) briefly explain the basis for the contention; (3) demonstrate that the issue raised is within the proceeding's scope; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) concisely state the alleged facts or expert opinions that support the petitioner's position and upon which the petitioner intends to rely at the hearing, including references to the specific sources and documents on which the petitioner intends to rely; and (6) show that a genuine dispute exists on a material issue of law or fact by referring to specific portions of the application that the petitioner disputes or, if the application is alleged to be deficient, by identifying such deficiencies and the supporting reasons for this allegation. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

RULES OF PRACTICE: CONTENTIONS (CHALLENGES TO COMMISSION REGULATIONS)

"[N]o rule or regulation of the Commission . . . is subject to attack . . . in any

adjudicatory proceeding" unless the petitioner first obtains a waiver. 10 C.F.R. § 2.335(a).

RULES OF PRACTICE (ADMISSIBILITY)

When a contention alleges the need for further study of an alternative, from an environmental perspective, "such reasonableness determinations are the merits, and should only be decided *after* the contention is admitted." *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 86 (2009) (emphasis in original), *rev'd in part on other grounds,* CLI-10-2, 71 NRC 27, 29 (2010).

NEPA: CONSIDERATION OF ALTERNATIVES

Although "remote and speculative" alternatives need not be addressed in an applicant's environmental report, *see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 551 (1978) (quoting *Natural Resources Defense Council, Inc. v. Morton,* 458 F.2d 827, 837-38 (1972)), there is an the obligation to consider alternatives "as they exist and are likely to exist." *Carolina Environmental Study Group v. United States,* 510 F.2d 796, 801 (D.C. Cir. 1975).

LICENSE RENEWAL: AGING MANAGEMENT PLAN

Just as the NRC Staff does not accept an applicant's representation that an aging management plan is consistent with the GALL Report without its own, independent confirmation of the facts, petitioners are not foreclosed from asserting a contention that, at a minimum, likewise requires such confirmation.

LICENSE RENEWAL: AGING MANAGEMENT PLAN

Whether electrical transformers are active or passive components remains an unresolved issue because the Commission has never directly spoken to the issue. Only passive components are subject to aging management review.

LICENSE RENEWAL: AGING MANAGEMENT PLAN

The key functions of buried systems, structures, and components that are the focus of the license renewal safety review under 10 C.F.R. Part 54 do not include the prevention of inadvertent radioactive leaks. *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station) CLI-10-14, 71 NRC 449, 461 (2010). Buried

pipelines, channels, and tanks that fall under aging management provide safety-related functions by maintaining adequate flow and pressure.

NEPA: SEVERE ACCIDENT MITIGATION ALTERNATIVES (SAMAS)

In order to demonstrate that their concerns raise a material dispute with a SAMA analysis, petitioners must provide sufficient information to show that, if their proposed refinements were incorporated, it is "genuinely plausible" that cost-benefit conclusions might change.

NEPA: ENVIRONMENTAL REPORT (SABOTAGE)

"NEPA 'imposes no legal duty on the NRC to consider intentional malevolent acts . . . in conjunction with commercial power reactor license renewal applications.'" *Pilgrim,* CLI-10-14, 71 NRC at 476 (quoting *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007)).

NEPA: ENVIRONMENTAL REPORT (SPENT FUEL POOL)

Spent fuel pool storage is exempt from required analysis of alternatives to mitigate severe accidents because it is a Category 1 issue. 10 C.F.R. Part 51, Subpart A, Appendix B.

RULES OF PRACTICE (ADMISSIBILITY)

Citation of studies indicating that source terms from the Modular Accident Analysis Progression (MAAP) code are lower than results from Source Term Code Package or NUREG-1150 satisfies the requirements of 10 C.F.R. § 2.309(f)(1)(v).

NEPA: ENVIRONMENTAL REPORT (RADIOACTIVE WASTE DISPOSAL)

A contention that applicant's SAMA analysis improperly ignored radioactive waste disposal is outside the scope of the proceeding because it directly challenges the generic determinations in Table B-1 of Appendix B to Part 51.

RULES OF PRACTICE (ADMISSIBILITY)

Challenges to the $2000/person-rem conversion factor, to use of a single dose-rate reduction effectiveness factor, and to evacuation times and assumptions

are not admissible because petitioners presented no facts or expert opinion of error.

RULES OF PRACTICE (ADMISSIBILITY)

Contention that other costs were ignored is not admissible because petitioners presented no facts or expert opinion that show it to be plausible that including them might affect the outcome of the SAMA analysis.

RULES OF PRACTICE

In the absence of any assertion that Subpart G procedures should be used to resolve any of the admitted contentions, the Subpart L hearing procedures will be used to adjudicate each admitted contention.

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

Before the Board are two petitions to intervene and requests for a hearing concerning the application (Application) of NextEra Energy Seabrook, LLC (NextEra or Applicant) to renew the operating license for Seabrook Station, Unit 1 (Seabrook), a nuclear power reactor located in Rockingham County, New Hampshire. Beyond Nuclear, the Seacoast Anti-Pollution League, and the New Hampshire Sierra Club (collectively, the Beyond Nuclear petitioners) jointly filed a petition proffering one contention. Friends of the Coast and the New England Coalition (collectively, Friends/NEC) jointly filed a second petition proffering four contentions.[1]

NextEra and the NRC Staff contend that every proffered contention is inadmissible on one or more grounds. NextEra also contends that Friends/NEC have failed to demonstrate standing.

The Board concludes that each of the five petitioners has demonstrated standing and that the sole contention proffered by the Beyond Nuclear petitioners, as well as three of the four contentions proffered by Friends/NEC, are admissible, in whole or in part, pursuant to 10 C.F.R. § 2.309(f). In accordance with 10 C.F.R. § 2.309(a), we therefore grant the petitions and admit each petitioner as a party to this proceeding. As limited by the Board, the admitted contentions will be heard under the procedures set forth at 10 C.F.R. Part 2, Subpart L.

[1] Friends/NEC Contention 4 contains six subparts, which the Board addresses individually.

I. BACKGROUND

On May 25, 2010, the NRC received an application from NextEra to renew the Seabrook operating license, which expires on March 15, 2030.[2] The NRC published notice in the *Federal Register* on July 21, 2010, that the NRC Staff would review the Application and that persons whose interests might be affected by the proposed license renewal would have until September 20, 2010, to request a hearing or to petition to intervene in the proceeding.[3] At the petitioners' request,[4] the Secretary to the Commission subsequently extended the filing period by 30 days to October 20, 2010.[5]

On October 20, the Beyond Nuclear petitioners timely filed their petition, which proffers one contention alleging that the Application's environmental report (ER) fails to consider adequately, as a reasonable alternative source of baseload power, an allegedly environmentally superior system of renewable energy — in particular, interconnected offshore wind farms.[6]

Friends/NEC jointly submitted their petition by e-mail and electronic filing on October 21.[7] The petition contains three safety-related contentions concerning management of aging plant systems, structures, and components, and one six-part contention regarding severe accident mitigation analysis (SAMA).[8] On

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[2] NextEra Energy Seabrook, LLC; Notice of Receipt and Availability of Application for Renewal of Seabrook Station, Unit 1 Facility Operating License No. NPF-86 for an Additional 20-Year Period, 75 Fed. Reg. 34,180 (June 16, 2010).

[3] Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. NPF-86 for an Additional 20-Year Period; NextEra Energy Seabrook, LLC; Seabrook Station, Unit 1, 75 Fed. Reg. 42,462, 42,462-63 (July 21, 2010).

[4] Beyond Nuclear Reply in Support of the New Hampshire Office of Attorney General Request for a Ninety (90) Day Extension of Time to File Petition for Leave to Intervene (Sept. 14, 2010) at 4; Friends of the Coast and New England Coalition's Answer to New Hampshire Attorney General's Request for Extension (Sept. 15, 2010) at 1; New Hampshire Sierra Club Request for an Extension for Filing Petition for Leave to Intervene and Request for Public Hearing (Sept. 17, 2010) at 2; Seacoast Anti-Pollution League Request for an Extension in the Filing of the Request for Public Hearing and Petition to Intervene (Sept. 17, 2010) at 2.

[5] Order of the Secretary (Sept. 17, 2010); Order of the Secretary (Sept. 20, 2010).

[6] Beyond Nuclear, Seacoast Anti-Pollution League and New Hampshire Sierra Club Request for Public Hearing and Petition to Intervene (Oct. 20, 2010) at 6, 11-12, 21, 23, 33 [hereinafter Beyond Nuclear Petition].

[7] E-mail from Raymond Shadis, *Pro Se* Representative for Friends of the Coast/New England Coalition, to Seabrook service list (Oct. 21, 2010); Friends of the Coast and New England Coalition Petition for Leave to Intervene, Request for Hearing, and Admission of Contentions (Oct. 21, 2010) [hereinafter Friends/NEC Petition].

[8] Friends/NEC Petition at 10-11, 20, 22-23, 33-34.

October 22, Friends/NEC requested the petition filing period be extended by 1 day to include October 21.[9]

On October 29, 2010, NextEra filed with the NRC a supplement to its Application, which reflected amendments to two aging management programs.[10]

On November 15, 2010, NextEra and the NRC Staff filed timely answers to the petitions.[11] The Beyond Nuclear petitioners timely replied on November 22, 2010.[12] Friends/NEC submitted a reply at 12:10 a.m. on November 23, 2010.[13] Before noon on the same day, Friends/NEC submitted a revised reply and requested a 1-day extension of the reply filing period to include November 23.[14]

The Board heard oral argument on the petitions in Portsmouth, New Hampshire, on November 30, 2010.[15] At that time, the Board allowed Friends/NEC 7 days to submit a revised declaration from Mr. Paul Blanch and allowed the other parties 7 additional days to object to that submission.[16]

On December 6, 2010, Friends/NEC submitted a revised Blanch declaration, an NRC information notice concerning electrical cables, and a document titled "Supplement to [Friends/NEC Petition] — Errors and Corrections and

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[9] Friends of the Coast/New England Coalition's Request for Extension of Time (Oct. 22, 2010) [hereinafter Friends/NEC Petition Extension Request].

[10] *See* NextEra Energy Seabrook, LLC's Answer Opposing the Petition to Intervene and Request for Hearing of Friends of the Coast and the New England Coalition (Nov. 15, 2010) [hereinafter NextEra Answer to Friends/NEC Petition], Attach. 1, Letter from Paul O. Freeman, Site Vice President of NextEra Energy Seabrook, LLC, to NRC Document Control Desk at 1 (Oct. 29, 2010).

[11] NextEra Energy Seabrook, LLC's Answer Opposing the Petition to Intervene and Request for Hearing of Beyond Nuclear, Seacoast Anti-Pollution League, and New Hampshire Sierra Club (Nov. 15, 2010) [hereinafter NextEra Answer to Beyond Nuclear Petition]; NextEra Answer to Friends/NEC Petition at 26-28; NRC Staff's Answer to Petitions to Intervene and Requests for Hearing Filed by (1) Friends of the Coast and New England Coalition and (2) Beyond Nuclear, Seacoast Anti-Pollution League, and New Hampshire Sierra Club (Nov. 15, 2010) [hereinafter NRC Staff Answer].

[12] Combined Reply of Joint Petitioners (Beyond Nuclear, Seacoast Anti-Pollution League and New Hampshire Sierra Club) to Answers of NextEra Energy Seabrook, LLC and the United States Nuclear Regulatory Commission (Nov. 22, 2010) [hereinafter Beyond Nuclear Reply].

[13] Friends of the Coast and New England Coalition Reply to NextEra and NRC Staff Answers to Friends of the Coast and New England Coalition Petition for Leave to Intervene, Request for Hearing, and Admission of Contentions (submitted Nov. 23, 2010) [hereinafter Friends/NEC Initial Reply].

[14] Friends of the Coast and New England Coalition Reply to NextEra and NRC Staff Answers to Friends of the Coast and New England Coalition Petition for Leave to Intervene, Request for Hearing, and Admission of Contentions (submitted Nov. 23, 2010) [hereinafter Friends/NEC Revised Reply]; Friends of the Coast/New England Coalition's Request for Extension of Time (Nov. 23, 2010) [hereinafter Friends/NEC Reply Extension Request].

[15] Tr. at 1, 8.

[16] Tr. at 68.

New Information."[17] NextEra and the NRC Staff filed objections to Friends/NEC's submittals on December 13.[18] On December 20, Friends/NEC moved for leave to reply to NextEra and the NRC Staff's objections and simultaneously filed the reply.[19] NextEra and the NRC Staff filed oppositions to Friends/NEC's motion for leave to reply on December 22.[20]

On January 14, 2011, NextEra submitted a letter to the Board, transmitting new information purportedly relevant to the admission of contentions.[21] On January 24, Friends/NEC filed an objection to NextEra's letter.[22] The NRC Staff filed a response to Friends/NEC's objection on January 28, 2011.[23]

II. ANALYSIS

To intervene as a party in an adjudicatory proceeding addressing a proposed license action, a petitioner must (1) establish it has standing; and (2) proffer at least one admissible contention.[24] Before analyzing standing and contention admissibility, we first address the timeliness of Friends/NEC's petition and other filings.

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[17] Declaration of Paul Blanch (Dec. 6, 2010); NRC Information Notice 20 10-26: Submerged Electrical Cables (Dec. 2, 2010); Supplement to Friends of the Coast and New England Coalition Petition for Leave to Intervene, Request for Hearing, and Admission of Contentions — Errors and Corrections and New Information (Dec. 6, 2010) [hereinafter Friends/NEC Supplement — Errors and Corrections and New Information].

[18] NextEra Energy Seabrook, LLC's Response Opposing NEC/Friends of the Coast's Supplement to Its Petition (Dec. 13, 2010) [hereinafter NextEra Objections to Supplement]; NRC Staff's Objections to the Friends of the Coast and New England Coalition's Supplement (Dec. 13, 2010) [hereinafter NRC Staff Objections to Supplement].

[19] Motion by Friends of the Coast and New England Coalition for Leave to Reply to NRC Staff Objections; NextEra Energy Seabrook, LLC. Response in Opposition to the Friends of the Coast and New England Coalition Supplement to Its Petition (Dec. 20, 2010) [hereinafter Friends/NEC Motion to Reply]; Friends of the Coast and New England Coalition's Reply to NRC Staff Objections; and NextEra Energy Seabrook, LLC. Response in Opposition to the Friends of the Coast and New England Coalition's Supplement to Its Petition (Dec. 20, 2010) [hereinafter Friends/NEC Reply to Objections].

[20] NextEra Energy Seabrook, LLC's Answer to NEC/Friends of the Coast's Motion for Leave to File a Reply (Dec. 22, 2010) [hereinafter NextEra Opposition to Reply]; NRC Staff's Response in Opposition to Friends of the Coast and New England Coalition's Motion for Leave to Reply (Dec. 22, 2010) [hereinafter NRC Staff Opposition to Reply].

[21] Letter from Steven Hamrick, NextEra Energy Seabrook, to Licensing Board (Jan. 14, 2011).

[22] Friends of the Coast and New England Coalition's Objection to NextEra Energy Seabrook, LLC's January 14, 2011 Letter Filing of Purported Material New Information (Jan. 24, 2011).

[23] NRC Staff's Response to the Friends of the Coast and New England Coalition's Objection (Jan. 28, 2011).

[24] 10 C.F.R. § 2.309(a).

A. Timeliness

NextEra contends that Friends/NEC's petition is untimely because it was not filed on or before October 20, 2010.[25] Friends/NEC e-mailed their petition to the NRC and NextEra 14 minutes after the filing period ended.[26] In the e-mail, Friends/NEC explained they had attempted without success to file the petition electronically for 2 hours before the midnight deadline and would communicate with the NRC the following day during business hours to determine how to proceed.[27] Friends/NEC electronically filed the petition early the next afternoon. On October 22, Friends/NEC moved to extend the filing period by 1 day to include October 21.[28] NextEra did not file any objection to the extension request, and Friends/NEC assert that the NRC Staff did not oppose their request when consulted.[29] NextEra does challenge the timeliness of Friends/NEC's petition in its answer.[30]

To determine whether Friends/NEC's late-filed petition will be considered in this proceeding, we must balance the eight factors set out in 10 C.F.R. § 2.309(c)(1), of which "good cause . . . for the failure to file on time" is the most important.[31] We are also mindful of the Commission's direction that, although *pro se* litigants are expected to comply with its procedural rules, they are generally extended some latitude.[32]

NextEra contends that Friends/NEC have not addressed the eight relevant factors as required by 10 C.F.R. § 2.309(c)(2).[33] However, Friends/NEC explain in their extension request that their failure to file on time was caused by persistent difficulties with the NRC electronic filing system despite their good-faith efforts.[34] We are satisfied that Friends/NEC have shown good cause for submitting their petition shortly after the deadline, especially in light of their having served all

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[25] NextEra Answer to Friends/NEC Petition at 3-4.

[26] E-mail from Raymond Shadis, *Pro Se* Representative for Friends/NEC, to Seabrook service list (Oct. 21, 2010).

[27] *Id.*

[28] Friends/NEC Petition Extension Request at 1.

[29] *Id.* at 3.

[30] NextEra Answer to Friends/NEC Petition at 3-4.

[31] *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549 n.61 (2009) (referring to 10 C.F.R. § 2.309(c)(1)(i)).

[32] *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 6 (2010) (citations omitted).

[33] NextEra Answer to Friends/NEC Petition at 4.

[34] Friends/NEC Petition Extension Request at 1-2.

parties by e-mail just minutes after midnight. We therefore grant Friends/NEC's request and accept their petition.[35]

No other party having objected, we also grant Friends/NEC's request for an extension of time in which to file its reply.

B. Supplemental Filings

NRC regulations provide for petitions, answers, and replies unless otherwise specified by the Commission or the presiding officer,[36] and state: "No other written answers or replies will be entertained."[37] At oral argument the Board identified numerous typographical errors in the sworn declaration of Mr. Blanch that accompanied Friends/NEC's original submission, and stated that we would allow Friends/NEC 7 days in which to file a corrected version.[38] The Board also ruled that we would permit the Applicant and the NRC Staff, within a further 7-day period, to object to any changes that they viewed as beyond the Board's intent or that unfairly introduced new arguments.[39] We stated: "[I]t is not the Board's intent to encourage the filing of a declaration that presents new arguments, [or] new issues . . . ."[40]

Unfortunately, the Board's largess precipitated the filing of more than 150 pages of corrections, objections to corrections, responses to the objections, and objections to the responses.[41] Although some of Friends/NEC's numerous corrections appear to be of the sort the Board expected, others — such as bolstering the description of Mr. Blanch's credentials to opine concerning subjects on which his expertise had been questioned during oral argument[42] — clearly go further. In the circumstances, the Board will not try to parse through which of Friends/NEC's changes constitute authorized corrections and which improperly go beyond what the Board intended.

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[35] As we did at oral argument, however, we again caution petitioners that late filings burden the other parties and the Board. Tr. at 60.

[36] 10 C.F.R. § 2.309(h).

[37] *Id.* § 2.309(h)(3).

[38] Tr. at 69-70.

[39] *Id.*

[40] Tr. at 70.

[41] Declaration of Paul Blanch (Dec. 6, 2010); NRC Information Notice 20 10-26: Submerged Electrical Cables (Dec. 2, 2010); Friends/NEC Supplement — Errors and Corrections and New Information; NextEra Objections to Supplement; NRC Staff Objections to Supplement; Friends/NEC Motion to Reply; Friends/NEC Reply to Objections; NextEra Opposition to Reply; NRC Staff Opposition to Reply.

[42] *Compare* Tr. at 125 *with* Friends/NEC Supplement — Errors and Corrections and New Information at 3-4.

Accordingly, in ruling on Friends/NEC's petition, we have not considered or relied upon their submissions subsequent to their original petition and reply. We do draw reasonable inferences where their original filings contain obvious typographical errors.

C. Standing

Friends/NEC and the Beyond Nuclear petitioners assert they have standing to intervene as representatives of their members living in the vicinity of Seabrook.[43] An organization may represent the interests of its members using representational standing if it can: (1) show that the interests it seeks to protect are germane to its own purpose; (2) identify, by name and address, at least one member who qualifies for standing in his or her own right; (3) show that it is authorized by that member to request a hearing on his or her behalf; and (4) show that neither the claim asserted nor the relief requested requires an individual member's participation in the organization's legal action.[44]

As to whether an individual member of a petitioning organization qualifies for standing in his or her own right, traditional judicial standing concepts require a showing that the individual has suffered or might suffer a concrete and particularized injury that is (1) fairly traceable to the challenged action; (2) likely redressible by a favorable decision;[45] and (3) arguably within the zone of interests protected by the governing statutes[46] — here the Atomic Energy Act (AEA)[47] and the National Environmental Policy Act (NEPA).[48] Although the NRC applies these traditional standing concepts,[49] in proceedings such as this it presumes

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[43] Friends/NEC Petition at 2; Beyond Nuclear Petition at 5.

[44] *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007) (citations omitted); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 181 (2000) ("An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit" (citing *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343 (1977))).

[45] *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).

[46] *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (quoting *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983)).

[47] 42 U.S.C. §§ 2011-2297.

[48] *Id.* §§ 4321-4347.

[49] *Georgia Tech,* CLI-95-12, 42 NRC at 115 (citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)); *St. Lucie,* CLI-89-21, 30 NRC

(Continued)

that an individual has standing to intervene without the need to address them upon a showing that he or she lives within, or otherwise has frequent contacts with, a geographic zone of potential harm.[50] The pertinent zone in operating license renewal proceedings and other power reactor license matters is the area within a 50-mile radius of the site.[51] The Commission also directs us to "construe the petition in favor of the petitioner" in determining whether a petitioner has demonstrated standing.[52]

1. The Beyond Nuclear Petitioners Have Demonstrated Representational Standing

Although neither NextEra nor the NRC Staff objects to the Beyond Nuclear petitioners' representational standing,[53] we have an independent obligation to determine whether they have adequately demonstrated standing.[54] The Seacoast Anti-Pollution League asserts it is "a not-for-profit organization based in Portsmouth, New Hampshire that has worked since 1969 to protect the health, safety and general well-being of the New Hampshire Seacoast community from nuclear pollution and other threats to the environment."[55] The New Hampshire Sierra Club asserts it is "a not-for-profit organization based in Concord, NH" working "to protect . . . environmental quality, and working for a clean renewable energy future."[56] Beyond Nuclear asserts it is "a not-for-profit organization," and we infer from its name that the organization is concerned about nuclear issues.[57]

The injury to their members on which the Beyond Nuclear petitioners base their claim to representational standing is the risk that extended operation of the plant

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at 329; *see also* 10 C.F.R. § 2.309(d)(1) (requiring that petition state the petitioner's right under the Atomic Energy Act to be a party, the petitioner's interest in the proceeding, and the possible effect of a decision on the petitioner's interests).

[50] *St. Lucie,* CLI-89-21, 30 NRC at 329.

[51] *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 917 (2009) (explaining the presumption's rationale is, "in construction permit and operating license cases, that persons living within the roughly 50-mile radius of the facility 'face a realistic threat of harm' if a release from the facility of radioactive material were to occur" (citation omitted)).

[52] *Georgia Tech,* CLI-95-12, 42 NRC at 115.

[53] NextEra Answer to Beyond Nuclear Petition at 3 n.1; NRC Staff Answer at 8.

[54] 10 C.F.R. § 2.309(d)(3); *see also Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 303 (2008) (noting that although "[n]either the Applicant nor the NRC Staff challenges [the petitioner's] standing," the board must "make [its] own determination whether [the petitioner] has satisfied standing requirements").

[55] Beyond Nuclear Petition at 4.

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

[57] *Id.* at 4.

may "pose an undue and unacceptable risk to the environment and jeopardize the health, safety and welfare of [their] members who live, recreate and conduct their business" nearby.[58] To demonstrate this injury, the organizations have submitted sworn declarations from two Beyond Nuclear members,[59] one New Hampshire Sierra Club member,[60] and seven Seacoast Anti-Pollution League members[61] who all acknowledge their membership and state that their interests will not be adequately represented unless their respective organizations participate in this proceeding on their behalf, impliedly authorizing the organizations to represent them.[62] All of these declarants provide home addresses within 30 miles of the site and state their concern that the plant's extended operation may "pose an unacceptable risk to the environment and . . . public health and safety."[63]

Beyond Nuclear, the New Hampshire Sierra Club, and the Seacoast Anti-Pollution League's individual declarants have established standing to intervene in their own right and have authorized the organizations to represent their interests. Accordingly, each organization has demonstrated representational standing.

2. Friends/NEC Have Demonstrated Representational Standing

Friends/NEC assert they have representational standing on behalf of "members that reside within Seabrook Station's affected vicinity and whose particular interests are directly affected by this matter."[64] Friends/NEC also seek discretionary intervention under 10 C.F.R. § 2.309(e).[65] Although the NRC Staff agrees that Friends/NEC have shown representational standing,[66] NextEra contends their

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[58] *Id.* at 5.

[59] Declaration of Christopher Nord (dated Oct. 16, 2010; submitted Oct. 20, 2010); Declaration of Kristie A. Conrad (dated Sept. 12, 2010; submitted Oct. 20, 2010) [collectively, hereinafter Beyond Nuclear Declarations].

[60] Declaration of Kurt Ehrenberg (dated Sept. 17, 2010; submitted Oct. 20, 2010).

[61] Declaration of Phyllis Killen-Abell (dated Sept. 16, 2010; submitted Oct. 20, 2010); Declaration of Patricia L. Warren (dated Sept. 16, 2010; submitted Oct. 20, 2010); Declaration of Douglas K. Bogen (dated Sept. 16, 2010; submitted Oct. 20, 2010); Declaration of Herbert S. Moyer (dated Sept. 16, 2010; submitted Oct. 20, 2010); Declaration of Virginia S. Cole (dated Sept. 16, 2010; submitted Oct. 20, 2010); Declaration of Lee Roberts (dated Sept. 17, 2010; submitted Oct. 20, 2010); Declaration of David Diamond (dated Sept. 16, 2010; submitted Oct. 20, 2010) [collectively, hereinafter Seacoast Anti-Pollution League Declarations].

[62] Beyond Nuclear Declarations; Declaration of Kurt Ehrenberg; Seacoast Anti-Pollution League Declarations.

[63] Beyond Nuclear Declarations; Declaration of Kurt Ehrenberg; Seacoast Anti-Pollution League Declarations.

[64] Friends/NEC Petition at 3.

[65] *Id.*

[66] NRC Staff Answer at 2, 7.

petition should be denied for lack of standing because no "valid handwritten or electronic signatures" appear on the member declarations submitted with it.[67]

New England Coalition asserts it is "a Vermont not-for-profit corporation" whose purpose is "to oppose nuclear hazards and advocate for sustainable energy alternatives to nuclear power."[68] Friends of the Coast asserts that it is a "non-profit membership organization" incorporated in Maine.[69] Friends/NEC assert that "oppos[ing] nuclear hazards" is a purpose Friends of the Coast shares with its co-petitioner.[70]

On behalf of members living near the facility, Friends/NEC seek to avert the threat of "radiological contamination, evacuation, loss of property, or other harms in the event of any mishap at the plant."[71] Friends/NEC also assert that members "use and enjoy the segment of the New Hampshire, Maine, and Massachusetts seacoast adjacent to Seabrook Station for social activities, work, recreation, and the gathering of natural provender."[72] Friends/NEC submitted declarations with their petition under the name of one New England Coalition member[73] and five Friends of the Coast members.[74] The declarations submitted with Friends/NEC's petition state that the declarants live between 4 and 40 miles of Seabrook, enjoy outdoor activities, rely on local produce suppliers and local drinking water supplies, are members of the petitioning entities, and have authorized their respective entities to represent them in this proceeding.[75]

None of the declarations submitted with Friends/NEC's petition includes a handwritten signature or digital ID certificate.[76] Section 2.304(d) of 10 C.F.R. requires that submitted documents be signed. This subsection allows persons without digital ID certificates to sign electronically by typing "Executed in Accord with 10 C.F.R. § 2.304(d)" or its equivalent on the signature line and including the date of signature and the signatory's name, capacity, address, phone number, and e-mail address,[77] but Friends/NEC and their declarants did not avail themselves of

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[67] NextEra Answer to Friends/NEC at 4-6.

[68] Friends/NEC Petition at 2.

[69] *Id.*

[70] *Id.* at 3.

[71] *Id.* at 4.

[72] *Id.*

[73] Declaration of Karen Stewart (dated Sept. 29, 2010; submitted Oct. 21, 2010).

[74] Declaration of Saudra Gavutis (dated Oct. 18, 2010; submitted Oct. 21, 2010); Declaration of Deborah Breen (dated Oct. 18, 2010; submitted Oct. 21, 2010); Declaration of Deborah Grinnell (dated Oct. 18, 2010; submitted Oct. 21, 2010); Declaration of Diane M. Teed (dated Oct. 12, 2010; submitted Oct. 21, 2010); Declaration of Peter Kellman (dated Sept. 30, 2010; submitted Oct. 21, 2010) [collectively, hereinafter Friends Declarations].

[75] Declaration of Karen Stewart; Friends Declarations.

[76] Declaration of Karen Stewart; Friends Declarations.

[77] 10 C.F.R. § 2.304(d)(1)(ii).

this option. Instead Friends/NEC offered in their petition's certificate of service to "promptly provide via First Class U.S. Mail, postage prepaid," "record hardcopies of declarations bearing hand signatures of and [sic] expert witness and represented members" to the Commission "[s]hould the Commission require it."[78]

With their reply memorandum, Friends/NEC resubmitted images of their initial six member declarations scanned so that handwritten signatures are visible.[79] Five of the six declarations were hand-signed, but the name of Deborah Breen, purported Friends of the Coast member, was typed in a cursive font instead of hand-signed and was not accompanied by any statement that she had signed pursuant to 10 C.F.R. § 2.304(d)(1)(ii).[80] Friends/NEC also submitted a new seventh declaration with their reply without acknowledging that it had not been submitted with their petition.[81] Neither NextEra nor the NRC Staff objected to the resubmitted member declarations.

Regardless of whether Deborah Breen's declaration lacks a valid signature and whether the previously unfiled seventh declaration is untimely, the other five declarations show that individual members of Friends of the Coast and the New England Coalition have standing to intervene in their own right and have authorized the organizations to represent their interests. Accordingly, each organization has demonstrated representational standing, and we need not reach Friends/NEC's request for discretionary intervention.

D. Contention Admissibility

An admissible contention must: (1) state the specific legal or factual issue sought to be raised; (2) briefly explain the basis for the contention; (3) demonstrate that the issue raised is within the proceeding's scope; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) concisely state the alleged facts or expert opinions that support the petitioner's position and upon which the petitioner intends to rely at the hearing, including references to the specific sources and documents on which the petitioner intends to rely; and (6) show that a genuine dispute exists on a material issue of law or fact by referring to specific portions

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[78] Certificate of Service (Oct. 21, 2010).

[79] Declaration of Deborah Grinnell (dated Oct. 18, 2010; submitted Nov. 23, 2010); Declaration of Diane M. Teed (dated Oct. 12, 2010; submitted Nov. 23, 2010); Declaration of Deborah Breen (dated Oct. 18, 2010; submitted Nov. 23, 2010); Declaration of Peter Kellman (dated Sept. 30, 2010; submitted Nov. 23, 2010); Declaration of Sandra Gavutis (dated Oct. 18, 2010; submitted Nov. 23, 2010); Declaration of Karen Stewart (dated Sept. 29, 2010; submitted Nov. 23, 2010) [collectively, hereinafter Resubmitted Friends/NEC Declarations].

[80] Resubmitted Friends/NEC Declarations.

[81] Declaration of Mary Lampert (dated Sept. 20, 2010; submitted Nov. 23, 2010).

of the application that the petitioner disputes or, if the application is alleged to be deficient, by identifying such deficiencies and the supporting reasons for this allegation.[82]

The Commission's regulations permit admission of a contention only if it meets these requirements because the agency "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."[83] "Mere 'notice pleading' is insufficient,"[84] but a petitioner does not have to prove its contentions at the admissibility stage,[85] and we do not adjudicate disputed facts at this juncture.[86]

The factual support required is "'a minimal showing that material facts are in dispute.'"[87] The necessary factual support "need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion."[88]

Among the limited issues within the scope of a license renewal proceeding are alternatives for reducing adverse environmental impacts listed as Category 2 issues in appendix B to Subpart A of 10 C.F.R. Part 51,[89] including cost-effective alternatives for mitigating severe accidents,[90] and plans to manage the effects of aging on enumerated functions of certain systems, structures, and components during the period of extended operation.[91] Safety issues that are routinely addressed through the agency's ongoing regulatory oversight are outside the scope of license renewal proceedings because considering them here would be "unnecessary and wasteful."[92]

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[82] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[83] Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

[84] *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003).

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

[86] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 244 (2006) (citing *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973)).

[87] *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994) (quoting Final Rule: "Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989)).

[88] Final Rule: "Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process," 54 Fed. Reg. at 33,171.

[89] 10 C.F.R. §§ 54.29(b), 51.53(c)(3)(iii); NEPA, 42 U.S.C. § 4332(2)(C)(iii).

[90] 10 C.F.R. §§ 54.29(b), 51.53(c)(2), 51.53(c)(3)(ii)(L).

[91] *Id.* §§ 54.4, 54.29(a)(1).

[92] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 363-64 (2002) (citation omitted); *see also Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8 (2001) ("For

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Additionally, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding" unless the petitioner first obtains a waiver.[93] One such regulation that cannot be challenged is the determination that, for any license renewal of a nuclear power plant, the probability-weighted consequences of a severe accident are small.[94]

Although a challenge to the generic determination of the environmental impact of a severe accident would be outside the scope of a license renewal proceeding, the Commission's regulations do not generically determine cost-effective severe accident mitigation alternatives across all plants.[95] But the Commission cautioned in *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station) (*Pilgrim I*) that a SAMA contention is admissible only if "it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated."[96]

1. Mootness

On October 29, 2010 — after the deadline for filing timely petitions but before the time for answers and replies — NextEra submitted a supplement to the Application that relates to the subject matter of Friends/NEC Contentions 1 and 3. In their answers, NextEra and the NRC Staff assert that this supplement moots many of petitioners' claims.[97] While choosing not to do so, Friends/NEC had the opportunity to address these mootness arguments in their reply or to move to amend their original contentions. The Board therefore considers these mootness arguments in our analysis of Friends/NEC Contention 1. Because we do not admit Friends/NEC Contention 3 for other reasons, we do not address mootness in connection with that contention.

On January 14, 2011 — long after briefing and oral argument were completed — NextEra submitted a letter supplying the Board with new information that allegedly "has the potential to moot or resolve" some of petitioners' claims relating

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license renewal, the Commission found that it would be unnecessary to include in our review all those issues already monitored, reviewed, and commonly resolved as needed by ongoing regulatory oversight.").

[93] 10 C.F.R. § 2.335(a).

[94] 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 ("Severe accidents[:] The probability weighted consequences of atmospheric releases, fallout onto open bodies of water, releases to ground water, and societal and economic impacts from severe accidents are small for all plants.").

[95] *Id.* ("[A]lternatives to mitigate severe accidents must be considered for all plants that have not considered such alternatives." (citing 10 C.F.R. § 51.53(c)(3)(ii)(L))).

[96] CLI-10-11, 71 NRC 287, 317 (2010).

[97] NextEra Answer to Friends Petition at 41-42; NRC Staff Answer at 19.

to SAMA analyses challenged in Friends/NEC Contention 4.[98] NextEra properly submitted this information in the belief that "[a] party to an NRC proceeding is obligated to keep the Board informed of relevant and material new information."[99]

The significance of NextEra's new information, however, is vigorously disputed by Friends/NEC.[100] NextEra does not expressly ask the Board to act upon its new information and, at this stage of the proceeding, such a request should be in the form of a motion. Under 10 C.F.R. § 2.323(b), all motions must include a certification that "the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful."[101] Motion practice ensures compliance with the Commission's preference for an initial attempt at voluntary resolution and, if that is not possible, that claims are presented to the Board with specificity and that participants are given an opportunity to respond. Because NextEra did not comply with 10 C.F.R. § 2.323(b), the Board does not consider the information supplied with NextEra's January 14, 2011 letter in connection with our analysis of Friends/NEC Contention 4.

2. Beyond Nuclear Contention

The Beyond Nuclear petitioners' sole contention states:

> The NextEra Environmental Report fails to evaluate the potential for renewable energy to offset the loss of energy production from the Seabrook nuclear power plant and to make the requested license renewal action for 2030 unnecessary. In violation of the requirements of 10 C.F.R. § 51.53(c)(3)(iii) and of the GEIS § 8.1, the NextEra Environmental Report (§ 7.2) treats all of the alternatives to license renewal except for natural gas and coal plants as unreasonable and does not provide a substantial analysis of the potential for significant alternatives which are being aggressively planned and developed in the Region of Interest for the requested relicensing period of 2030-2050. The scope of the SEIS is improperly narrow, and the issue of the need for Seabrook as a means of satisfying demand forecasts for the relicensing period must be revisited due to dramatically-changing circumstances in the regional energy mix throughout the two decades preceding the relicensing period.[102]

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[98] Letter from Steven Hamrick, NextEra Energy Seabrook, to Licensing Board, *supra* note 19, at 4.

[99] *Id.* at 1.

[100] Friends of the Coast and New England Coalition's Objection to NextEra Energy Seabrook, LLC's January 14, 2011 Letter Filing of Purported Material New Information at 2.

[101] 10 C.F.R. § 2.323(b).

[102] Beyond Nuclear Petition at 6.

The Beyond Nuclear petitioners acknowledge[103] that, in declining to analyze wind power as a reasonable alternative, the Applicant relied[104] in part on the NRC's own generic environmental impact statement (GEIS), which concludes that the technology is "an inappropriate choice for baseload power."[105] As observed by the NRC Staff during oral argument, however, the GEIS is not binding and its conclusion concerning the practicality of wind power has not been revised in the past 15 years.[106]

In contrast, the Beyond Nuclear petitioners support their contention with twenty exhibits purporting to demonstrate that, within the foreseeable future, an environmentally superior system of interconnected offshore wind farms might provide baseload power in the relevant region and thus should have been evaluated in greater detail in the Applicant's environmental report. Petitioners cite various examples, including:

a. The Department of Energy's National Renewable Energy Laboratory has stated that, although large-scale deployment of wind energy is often thought to be limited by its intermittent output, in fact "[w]ind energy systems that combine wind turbine generation with energy storage and long-distance transmission may overcome these obstacles and provide a source of power that is functionally equivalent to a conventional baseload electric power plant."[107]

b. A manuscript published in Stanford University's *Journal of Applied Meteorology and Climatology* has recognized that "[a] solution to improve wind power reliability is interconnected wind power" because, "by linking multiple wind farms together it is possible to improve substantially the overall performance of the interconnected system (i.e., array) when compared with that of any individual wind farm."[108]

c. Google corporation has publicly announced its investment in a consortium to build an offshore "backbone transmission project" to stimulate

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[103] *Id.* at 17.

[104] NextEra Energy Seabrook, LLC, Environmental Report - Operating License Renewal Stage Seabrook Station (May 25, 2010) at 7-12 (ADAMS Accession Nos. ML101590092 and ML101590089) [hereinafter ER].

[105] NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Vol. 1, § 8.3.1 (May 1996) [hereinafter GEIS].

[106] Tr. at 31-32.

[107] Beyond Nuclear Petition, Exh. 3, National Renewable Energy Laboratory, U.S. Department of Energy, Creating Baseload Wind Power Systems Using Advanced Compressed Air Energy Storage Concepts (Oct. 3, 2006).

[108] Beyond Nuclear Petition, Exh. 4, Cristina L. Archer & Mark Z. Jacobson, *Supplying Baseload Power and Reducing Transmission Requirements by Interconnecting Wind Farms,* 46 J. Appl. Meteorol. & Climatol. 1701, 1702 (Nov. 2007).

development of East Coast wind farms (a decade before the current Seabrook operating license expires).[109] As reported in the *Washington Post,* "[t]he transmission line would address the problem of wind's intermittent supply by tapping into a much broader swath of the coast to meet consumer demand."[110]

d. By way of a comparative demonstration of the perceived practical importance of wind power and other renewable sources of energy, nine European North Sea nations (Germany, France, Belgium, Denmark, Sweden, Norway, Luxembourg, the United Kingdom, and the Netherlands) were drawing up formal plans as of January 2010 to build a $40 billion undersea energy grid for dedicated transmission of power from such sources.[111]

e. Worldwide, it has been asserted, wind power might rival or exceed nuclear power as a source of electricity as early as 2014.[112] According to the Global Wind Energy Council, installed wind capacity will reasonably reach 400 gigawatts by 2014, whereas, according to the World Nuclear Association, current nuclear power capacity is about 376 gigawatts.[113]

f. Closer to home, a study by researchers at the University of Delaware and Stony Brook University analyzed historical wind data from eleven meteorological stations distributed along the U.S. East Coast, calculated the potential hourly power output at each site, and then simulated a power line connecting the sites.[114] Based on these calculations, the study concluded that "[t]he variability of wind power is not as problematic as is often supposed."[115]

g. On June 8, 2010, the United States Department of the Interior and ten East Coast states — four of which (Maine, New Hampshire, Massachusetts, and Rhode Island) are within the Applicant's region of interest — signed a Memorandum of Understanding to establish the Atlantic Offshore Wind Energy Consortium to promote and to accelerate the development of the "exceptional

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[109] Beyond Nuclear Petition, Exh. 5, Juliet Eilperin, *Google Backs "Superhighway" for Wind Power,* Washington Post, Oct. 13, 2010.

[110] *Id.*

[111] Beyond Nuclear Petition, Exh. 6, Tali Aaron, *European Countries Unite to Invest $40 Billion in Huge Off-Shore Renewable Energy Super-Grid,* Buildaroo.com, Jan. 6, 2010.

[112] Beyond Nuclear Petition, Exh. 10, Jeremy van Loon, *Global Wind Power Capacity May Rival Nuclear Within Four Years,* Bloomberg News, Sept. 23, 2010.

[113] *Id.*

[114] Beyond Nuclear Petition, Exh. 8, Willett Kempton et al., Electric Power from Offshore Wind via Synoptic-Scale Interconnection," PNAS Early Edition (April 2010) at 1.

[115] *Id.*

wind energy resources off [the] coast."[116] Allegedly, the proposed consortium was publicized months before formal execution of the Memorandum of Understanding and months before NextEra filed its renewal application,[117] but is neither discussed nor acknowledged in the Applicant's environmental report.

Although not all of the Beyond Nuclear petitioners' twenty exhibits directly address the region of interest, we agree that, taken together, they provide the required "minimal" factual support for admitting their contention, and that the contention otherwise satisfies each of the requirements of 10 C.F.R. § 2.309(f)(1). The arguments against admissibility advanced by the Applicant and by the NRC Staff are not persuasive.

First, in challenging admissibility, the Applicant and the Staff conflate the merits of the contention with the adequacy of its pleading. The Applicant correctly points out that "[a]lternatives that are not reasonable can be eliminated from further study"[118] and argues that "petitioners have not demonstrated that baseload wind generation is a reasonable alternative."[119] But whether an interconnected system of offshore wind farms constitutes a "reasonable" alternative is the very issue on which the Beyond Nuclear petitioners seek a hearing. When a contention alleges the need for further study of an alternative, from an environmental perspective, "such reasonableness determinations are the merits, and should only be decided *after* the contention is admitted."[120] To be entitled to a hearing, petitioners need not demonstrate that they will necessarily prevail, but only that there is at least some minimal factual support for their position. The Commission has cautioned that "complex, fact-intensive issues" are rarely appropriate for summary disposition,[121] much less for resolution on the initial pleadings.

Thus, many of the Applicant's and the Staff's arguments improperly address the merits of the Beyond Nuclear petitioners' contention, rather than whether petitioners have provided "'a minimal showing that material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate.'"[122] For example,

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[116] Beyond Nuclear Petition, Exh. 13, Salazar Signs Agreement with 10 East Coast Governors to Establish Atlantic Offshore Wind Energy Consortium, Press Release, Department of Interior (June 8, 2010).

[117] *Id.*

[118] NextEra Answer to Beyond Nuclear Petition at 15.

[119] *Id.* at 18 (capitalization omitted).

[120] *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 86 (2009) (emphasis in original), *rev'd in part on other grounds,* CLI-10-2, 71 NRC 27, 29 (2010).

[121] *Pilgrim I,* CLI-10-11, 71 NRC at 305.

[122] Final Rule: "Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process," 54 Fed. Reg. at 33,171 (quoting *Connecticut Bankers Ass'n v. Board of Governors,* 627 F.2d 245, 251 (D.C. Cir. 1980)).

although the Applicant concedes that "[p]etitioners have presented information to show that generation of baseload energy from wind is theoretically possible,"[123] it asserts that "[t]he proposal for offshore interconnected wind farms . . . faces steep technological hurdles"[124] and "such an interconnected system would be exorbitantly expensive."[125] Petitioners may face a difficult task in trying to demonstrate that such a system is both practical and environmentally superior to the continued operation of Seabrook as an existing facility. Such disputed facts are not appropriately resolved, however, in connection with the Board's determination of whether petitioners have made the necessary showing to warrant admission of a contention.

It is not the case, as the NRC Staff appears to contend, that the Beyond Nuclear petitioners must first *demonstrate* "that NextEra is required to include an alternatives analysis in its ER beyond that which was already included"[126] in order to have a hearing on *whether* NextEra is required to include such an analysis. At this stage, it is sufficient for the Beyond Nuclear petitioners to proffer some "minimal" factual support for that proposition.

Second, the Staff argues — and the Applicant suggests[127] — that the Beyond Nuclear petitioners must show "that wind is a feasible alternative at the present time."[128] Although "remote and speculative" alternatives need not be addressed in an applicant's environmental report,[129] the relevant time frame is considerably broader than "the present time." As stated in *Carolina Environmental Study Group v. United States*[130] — a case on which the Applicant itself relies[131] — the obligation is to consider alternatives "as they exist *and are likely to exist*."[132] Allegedly, some of the Beyond Nuclear petitioners' supporting references show

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[123] NextEra Answer to Beyond Nuclear Petition at 18.

[124] *Id.* at 20.

[125] *Id.* at 22.

[126] NRC Staff Answer at 94.

[127] *See* Tr. at 29.

[128] NRC Staff Answer at 102.

[129] *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 551 (1978) (quoting *Natural Resources Defense Council, Inc. v. Morton,* 458 F.2d 827, 837-38 (1972)).

[130] 510 F.2d 796 (D.C. Cir. 1975).

[131] NextEra Answer to Beyond Nuclear Petition at 23.

[132] *Carolina Envtl. Study Group,* 510 F.2d at 801 (emphasis added). Indeed, at argument, the Applicant expressly agreed that the *Carolina Environmental Study Group* test is the appropriate standard. Tr. at 28-29. Likewise, the NRC Staff — which appeared to contend in its answer that *Kleppe v. Sierra Club,* 427 U.S. 390, 405-06 (1976) holds otherwise, NRC Staff Answer at 96 — acknowledged at argument that *Kleppe* speaks only to when an environmental analysis must be prepared, and does not address whether the content of such an analysis should address alternatives that are reasonably likely to become available in the future. Tr. at 171.

that an integrated system of offshore wind farms could be a viable source of baseload power in the region as early as 2015.[133] Whether this is so remains to be seen. In the Board's view, however, petitioners have proffered sufficient "minimal" evidence to warrant further inquiry as to whether such a system might be "likely to exist" during the relevant time period.[134]

Third, contrary to arguments by the Applicant and the NRC Staff,[135] we are not persuaded that, as a matter of law, an integrated system of offshore wind farms could not constitute a single, discrete source for baseload energy. Absent further information about such a system, this seems to pose, at a minimum, a disputed question of fact. Certainly, such a system, if constructed, would be unlike the proposed alternative that was rejected by the *Indian Point* Board, which involved an allegation that multiple, unrelated sources of electricity ought to be evaluated collectively.[136]

Finally, contrary to the Applicant's and the Staff's arguments,[137] the contention is not a prohibited challenge to a Commission regulation. Petitioners apparently know how to challenge a Commission regulation, given that they have done so in a separate proceeding that questions whether the NRC should accept license renewal applications as early as 20 years before expiration of the existing license.[138] Both in their pleadings[139] and at oral argument[140] the Beyond Nuclear petitioners disavow any attempt to challenge a Commission regulation in this proceeding. Rather, their point here is simply that decisions have consequences. They contend that, if an applicant chooses to seek renewal as early as 20 years prior to expiration — as it clearly is entitled to do under the Commission's existing rules[141] — then perhaps its ability to criticize as "speculative" a petitioner's claims about

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[133] Tr. at 24, 34.

[134] For purposes of deciding the admissibility of the proffered contention, the Board need not decide the exact date by which an integrated system of offshore wind farms would have to be found "likely to exist." That issue will doubtlessly turn on disputed fact questions that cannot appropriately be resolved on the pleadings.

[135] NextEra Answer to Beyond Nuclear Petition at 27-31; NRC Staff Answer at 99.

[136] *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 95-96 (2008).

[137] NextEra Answer to Beyond Nuclear Petition at 34-36; NRC Staff Answer at 99-103.

[138] *See* Beyond Nuclear Petition, Exh. 2, Earth Day Commitment/Friends of the Coast, Beyond Nuclear, Seacoast Anti-Pollution League, C-10 Research and Education Foundation, Pilgrim Watch, and New England Coalition; Notice of Receipt of Petition for Rulemaking, 75 Fed. Reg. 59,158 (Sept. 27, 2010).

[139] Beyond Nuclear Petition at 14-16; Beyond Nuclear Reply at 36-38.

[140] Tr. 12-14.

[141] *See* 10 C.F.R. § 54.17(c).

the necessarily distant extended operational period is somewhat attenuated.[142] In any event, because the Beyond Nuclear petitioners have demonstrated some possibility that wind power might be a reasonable alternative as early as 2015, we need not necessarily accept this argument in order to admit their contention.

We agree with the Applicant and the NRC Staff, however, that, although the contention itself might be read more broadly, petitioners' supporting facts focus exclusively on wind power generation, and thus the scope of the admitted contention must be so limited.[143] Likewise, the NRC Staff points out that an application for renewal of an operating license need not discuss the need for power.[144] Unlike the NRC Staff,[145] we do not read the contention as challenging NextEra's failure to discuss the need for power. If so construed, however, we agree that such a challenge would be outside the scope of this proceeding.

As so limited, we admit the Beyond Nuclear petitioners' contention.

3. Friends/NEC Contention 1

Friends/NEC Contention 1 states:

> The license renewal application for Seabrook Station fails to comply with the requirements of 10 C.F.R. §§ 54.21(a) and 54.29 because applicant has not proposed an adequate or sufficiently specific plan for aging management of non-environmentally qualified inaccessible electrical cables and wiring for which such aging management is required. Without an adequate plan for aging management of non-environmentally qualified inaccessible electrical cables protection of public health and safety cannot be assured.[146]

Friends/NEC allege that NextEra's aging management program (AMP) for non-environmentally qualified inaccessible cables and wiring does not comply with 10 C.F.R. §§ 54.21(a) and 54.29 because it does not: (1) address specific recommendations in two reports from the national laboratories at Sandia and Brookhaven;[147] (2) identify testing methods that would adequately assure that

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[142] *See, e.g.,* Beyond Nuclear Petition at 14 (contending that applying to renew a license 20 years before its expiration "adversely affects the quality of the submittal and veracity of the applicant's claims pertaining to the reviewed alternatives to the proposed federal relicensing action").

[143] *See* NextEra Answer to Beyond Nuclear Petition at 17 n.7; NRC Staff Answer at 106-07.

[144] NRC Staff Answer at 107 (citing 10 C.F.R. § 51.53(c)(2)).

[145] *Id.* ("Although it is unclear, the contention appears to suggest in part that the Applicant's ER is deficient for failing to consider the need for Seabrook as a source of power for the [region of interest].").

[146] Friends/NEC Petition at 10-11.

[147] *Id.* at 12, 15-16 (citing Ogden Environmental and Energy Services Co., Inc., Aging Management

(Continued)

submerged or previously submerged cables will perform their functions for the duration of a postulated accident;[148] (3) provide measures to detect cable degradation prior to failure by using techniques for measuring and trending the condition of cable insulation, such as partial discharge testing, time domain reflectometry, dissipation factor testing, and low-frequency alternating current testing;[149] and (4) identify the location and extent of Non-EQ Inaccessible Cables in use at Seabrook.[150]

In alleging these deficiencies in the Seabrook AMP for inaccessible cables, Friends/NEC assert that "[w]ith respect to adequate assurance of public health and safety and to comply with . . . referenced guidance, [NextEra] must either replace all cables (and splices) that have been exposed to submergence or develop a comprehensive aging management program to *preclude* moisture and adequately test all cables that have been exposed to an environment for which it was not designed."[151] Petitioners focus on the alleged lack of preventative strategies to preclude submergence or exposure of the cables to a moist environment and of an effective cable testing program to detect the degradation of the cable insulation prior to failure.

Friends/NEC Contention 1 meets the requirements of 10 C.F.R. § 2.309(f)(1)(i) through (iv) by providing a specific statement of the contention and by challenging the adequacy of the proposed AMP in the Application to manage aging effects for Non-EQ Inaccessible Cables. Friends/NEC provide references to the appropriate sections of the Application[152] and supporting documents including the Blanch declaration, thereby demonstrating that Friends/NEC have raised a genuine dispute concerning a material issue in accordance with 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Both NextEra and NRC Staff assert that this contention should not be admitted. NextEra contends that "[p]etitioners fail to provide sufficient factual assertions or expert opinion to demonstrate a genuine, material dispute in these aspects of Contention 1"[153] as required by 10 C.F.R. § 2.309(f)(1)(v) and (vi). NextEra

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Guideline for Commercial Nuclear Power Plants — Electrical Cable and Terminations, SAND96-0344, at 6-4 (Sept. 1996) (ADAMS Accession No. ML031140264) and M. Villaran & R. Lofaro, Brookhaven National Laboratory, Essential Elements of an Electrical Cable Condition Monitoring Program, NUREG/CR-7000 (Jan. 2010) (ADAMS Accession No. ML100540050)).

[148] *Id.* at 14.

[149] *Id.* at 17. Friends/NEC point out that the NRC recommended these techniques in a generic letter. *Id.* (quoting NRC Generic Letter 2007-01: Inaccessible or Underground Power Cable Failures That Disable Accident Mitigation Systems or Cause Plant Transients at 4 (Feb. 7, 2007)).

[150] *Id.* at 12.

[151] *Id.* at 20 (emphasis in original).

[152] *See, e.g.,* Friends/NEC Petition at 13-14 (quoting NextEra Energy Seabrook, LLC, et al., License Renewal Application, Seabrook Station Unit 1 at B-180 through B-182 [hereinafter Application]).

[153] NextEra Answer to Friends/NEC Petition at 28.

challenges the adequacy of the support provided by petitioners' expert, stating that "Mr. Blanch does not even claim to have read the Seabrook LRA [license renewal application]."[154] NextEra further conjectures that this is the reason that Mr. Blanch claims to have not found a Time Limited Aging Analysis or AMP for electrical cables.[155]

The Board disagrees. Petitioners' references to various technical documents as well as the declaration from Mr. Blanch adequately support admission of this contention. Ultimately, of course, petitioners might not prevail on their factual allegations. Petitioners nonetheless raise a genuine dispute with the Application by effectively challenging the adequacy of the AMP to manage the aging effects on the cable insulation related to either submersion or exposure to a moist environment. Petitioners have also challenged the lack of an adequate testing program to detect the potential failure of the cables before they are required to perform their intended function.

The Board recognizes that Friends/NEC Contention 1 challenges an AMP that allegedly is consistent with the GALL Report.[156] The GALL Report, developed at the Commission's direction, identifies generic AMPs acceptable to the NRC Staff and documents the technical bases for determining the adequacy of these AMPs to effectively manage the effects of aging during the period of extended plant operation.[157]

As the Commission has explained, "a commitment to implement an AMP that the NRC *finds* is consistent with the GALL Report constitutes one acceptable method" for demonstrating that the effects of aging will be adequately managed.[158] As NextEra acknowledges, "[r]eferencing a program described in the GALL Report does not insulate a program from an adequately supported challenge at a hearing."[159] Just as the NRC Staff does not accept a representation of consistency from an applicant without its own, independent confirmation of the facts,[160] petitioners are not foreclosed from asserting a contention that, at a minimum, likewise requires such confirmation. If adequately supported, such a contention raises a valid question of fact.

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[154] *Id.* at 26.

[155] *Id.* at 27.

[156] Application at B-180, B-182.

[157] Division of Regulatory Improvement Programs, Generic Aging Lessons Learned (GALL) Report, NUREG-1801, Rev. 1, at iii, 1 (Sept. 2005) [hereinafter GALL Report].

[158] *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 36 (2010) (emphasis added).

[159] NextEra Answer to Friends/NEC Petition at 18 n.5 (citing *Vermont Yankee,* CLI-10-17, 72 NRC at 38).

[160] Tr. at 74.

The Board further recognizes that petitioners support Friends/NEC Contention 1 with factual assertions that to some extent have been mooted by NextEra's October 29, 2010 supplement to the Application. For example, petitioners challenged the original AMP because it defined significant voltage exposure as "'being subjected to system voltage for more than twenty-five percent of the time,'"[161] but, by eliminating this 25% threshold, NextEra's new program applies to cables exposed to significant moisture regardless of the frequency of energization.[162] Similarly, petitioners challenged whether manhole inspections with a maximum frequency of every 2 years would be sufficient to manage aging effects on cable insulation,[163] but NextEra's revised AMP has reduced the frequency to at least one per year and adds event-driven inspections.[164]

The Board admits contentions, however, and not their supporting bases.[165] Although NextEra's October 29, 2010 supplement might moot "many" of petitioners' claims,[166] their remaining allegations still supply the required "minimal" support for Friends/NEC Contention 1, as limited by the Board.

We admit Friends/NEC Contention 1 insofar as it challenges the adequacy of the Seabrook AMP for Non-EQ Inaccessible Cables to manage the age-related degradation of the cable insulation due to exposure to a wet or moist environment. Insofar as the contention alleges that cables are currently being operated in violation of NRC regulations or that Seabrook is otherwise not in compliance with its current licensing basis (CLB), however, we agree with the Applicant[167] that such claims are beyond the scope of this license renewal proceeding.[168]

4. Friends/NEC Contention 2

Friends/NEC Contention 2 states:

> The LRA for Seabrook violates 10 C.F.R. §§ 54.21(a) and 54.29 because it fails

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[161] Friends/NEC Petition at 14 (quoting Application at B-180 through B-181).

[162] NextEra Answer to Friends/NEC Petition, Attach. 1, Supplement to the NextEra Energy Seabrook, LLC Seabrook Station License Renewal Application, Encl. 2 at 6 (Oct. 29, 2010) [hereinafter Application Supplement].

[163] Friends/NEC Petition at 15.

[164] Application Supplement, Encl. 2 at 6.

[165] *Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 447 (2008).

[166] NRC Staff Answer at 19.

[167] NextEra Answer to Friends/NEC Petition at 39-40.

[168] *See* 10 C.F.R. § 54.30(b) ("The licensee's compliance with the obligation . . . to take measures under its current license is not within the scope of the license renewal review.").

to include an aging management plan for each electrical transformer whose proper function is important for plant safety.[169]

The contention hinges on whether transformers are active or passive components. The Applicant and the NRC Staff do not dispute that the Application contains no AMP for electrical transformers whose function is important to safety. They say no such plan is necessary because transformers are active components that are not subject to aging management review.[170] Friends/NEC say that transformers are passive components that are subject to aging management review.[171]

The dispositive question is whether petitioners have adequately raised an issue as to whether transformers constitute active or passive components. Like the Board in the *Indian Point* proceeding — where a nearly verbatim contention was admitted[172] and survived a motion for summary disposition[173] — we conclude that they have.

Structures and components that are subject to aging management review include those that perform certain safety-related functions "without moving parts or without a change in configuration or properties."[174] In contrast to such "passive" components, "active" components are not subject to an aging management review because, as the Commission stated in *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station) (*Pilgrim II*), "[e]xisting regulatory programs, including required maintenance programs, can be expected to 'directly detect the effects of aging' on active functions."[175]

In support of the proposition that transformers are passive components, both the petition and the declaration of Mr. Blanch (a professional engineer with substantial experience in the nuclear industry[176]) assert that transformers function without moving parts and without a change in configuration or properties and that failure properly to manage aging of transformers will compromise safety.[177]

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[169] Friends/NEC Petition at 20 (capitalization omitted).

[170] NextEra Answer to Friends/NEC Petition at 43-47; NRC Staff Answer at 26-30.

[171] Friends/NEC Petition at 22 (asserting transformers "are passive devices in that they contain no moving parts and do not undergo a change of properties or state").

[172] *See Indian Point,* LBP-08-13, 68 NRC at 89.

[173] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) (Ruling on Motions for Summary Disposition) (Nov. 3, 2009) at 3-8 (unpublished).

[174] 10 C.F.R. 54.21(a)(1)(i).

[175] CLI-10-14, 71 NRC 449, 454 (2010) (quoting 60 Fed. Reg. 22,461, 22,472 (May 8, 1995)).

[176] *See* Declaration of Paul Blanch ¶¶ 3-12 (Oct. 18, 2010) [hereinafter Blanch Decl.].

[177] *See* Friends/NEC Petition at 22; Blanch Decl. ¶¶ 28, 35.

Citing a contrary view found in nonbinding Staff guidance,[178] the Applicant and the NRC Staff say that Friends/NEC are simply wrong.[179] During oral argument, however, the Applicant agreed that the Commission has never directly spoken to the issue.[180] Thus, like the *Indian Point* Board,[181] we conclude that whether transformers are active or passive components remains an unresolved issue. In the absence of a definitive designation for transformers, this contention requires fact-based determinations best left to further adjudicatory proceedings.

The Applicant and the NRC Staff seize upon obvious typographical errors in the petition and in the Blanch declaration, arguing that such errors are fatal to admissibility of the contention.[182] For reasons previously explained, we decline to accept petitioners' belated submission of a corrected version of the Blanch declaration. We need not see a corrected version, however, to accept petitioners' representation at oral argument[183] — or to infer on our own initiative — that neither the petitioners nor Mr. Blanch intended to reference transformers as "active" components when the fundamental thrust of Mr. Blanch's declaration and of the contention itself are just the opposite. Nor do we believe — in light of the common use of word processors — that Mr. Blanch's earlier inadvertent reference to the *Indian Point* proceeding[184] (in which he also submitted a declaration) means that he did not actually consider the Seabrook Application. The relevant portion of the declaration expressly references Seabrook.[185] In any event, the Applicant and the Staff do not dispute Mr. Blanch's claim that the Seabrook Application fails to include an aging management review for safety-related transformers, but dispute only whether such a review is required.

We admit Friends/NEC Contention 2.

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[178] Letter from Christopher I. Grimes, NRC License Renewal Project Directorate, to Douglas J. Walters, Nuclear Energy Institute, "Determination of Aging Management Review for Electrical Components" (Sept. 19, 1997) at 2, *in* Nuclear Energy Institute, NEI 95-10, "Industry Guideline for Implementing the Requirements of 10 C.F.R. Part 54 — The License Renewal Rule," Rev. 3 (Mar. 2001) Appendix C, "References" at C-8 through C-14 (ADAMS Accession No. ML01110576) (NEI Guidelines).

[179] NextEra Answer to Friends/NEC Petition at 44-46; NRC Staff Answer at 27-30.

[180] Tr. at 104.

[181] *Indian Point,* LBP-08-13, 68 NRC at 89.

[182] *E.g.,* NextEra Answer to Friends/NEC Petition at 46 ("[B]oth Petitioners and Mr. Blanch contradict their own positions by admitting that 'transformers are active devices. . . .'" (citations omitted)); NRC Staff Answer at 30-31 (noting that, after both the petition and the Blanch declaration assert transformers are passive devices, "[t]he very next sentences of both . . . acknowledge that transformers are 'active devices'" (citations omitted)).

[183] Tr. at 106-08.

[184] Blanch Decl. ¶ 13.

[185] *Id.* ¶ 1 (stating Friends/NEC retained Mr. Blanch "to provide expert services in connection with . . . an application to add 20 years to the operating license of Seabrook Station").

5. *Friends/NEC Contention 3*

Friends/NEC Contention 3 states:

> The aging management plan contained in the license renewal application violates 10 C.F.R. §§ 54.21 and 54.29(a) because it does not provide adequate inspection and monitoring for corrosion, structural failure, degradation, or leaks in all buried systems, structures, and components [SSCs] that may convey or contain radioactively-contaminated water or other fluids and/or may be important for plant safety.[186]

Friends/NEC allege that NextEra's AMP for buried SSCs violates 10 C.F.R. §§ 54.21 and 54.29(a) because:

> (1) it does not provide for adequate inspection of all [SSCs] that may contain or convey water, radioactively-contaminated water, and/or other fluids; (2) there is no adequate leak prevention or detection programs designed to replace such [SSCs] before leaks occur; . . . (3) there is no adequate monitoring to determine if and when leakage from these [SSCs] occurs[,] [and] (4) [t]here is no identification within the LRA of the specific piping systems and tanks covered by this AMP.[187]

Despite briefly positing that "leaks and corrosion threaten the integrity of such systems and compromise their ability to achieve their intended function,"[188] the contention focuses on controlling the unintentional release of radionuclides into the environment. The heart of Friends/NEC Contention 3 is that "deficiencies in the [AMP] concerning the detection of leaks or corrosion in other [SSCs] containing radioactive water could endanger the safety and welfare of the public."[189] More specifically, Friends/NEC Contention 3 contends that "leaks of underground pipes and tanks can result in the release of significant amounts of radioactive materials into the groundwater or the atmosphere[ ] [and] [e]xposure to this radiation can threaten human health."[190]

Friends/NEC Contention 3 is inadmissible because radioactive leaks are outside the scope of the proceeding and petitioners do not provide any alleged facts or expert opinion indicating that significant deterioration in buried structures at Seabrook could impair their only function that is appropriately before us in this license renewal proceeding: i.e., to maintain pressure and to provide flow.

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[186] Friends/NEC Petition at 22-23 (capitalization omitted).
[187] *Id.* at 23.
[188] *Id.* at 24.
[189] *Id.*
[190] *Id.*

Friends/NEC focus their arguments on the risk of leaks, stating that NextEra's application "fails to include a comprehensive program of leak detection and prevention" and that "a laissez-faire inspection program will be ineffective at prevention or early detection of leaks from pipes that carry radioactive water or are otherwise important for plant safety."[191] Friends/NEC assume that the control of leaks is the intended function of buried SSCs, but such is not the case. In *Pilgrim II,* the Commission pointed out that 10 C.F.R. § 54.21(a)(3) requires an applicant to demonstrate the effects of aging will be managed "so that the *intended function(s)* will be maintained consistent with the CLB" and that the intended functions are described in section 54.4(a)(1)-(3).[192] The Commission clarified that the key functions of buried SSCs that are the focus of the license renewal safety review under Part 54 *do not* include the prevention of inadvertent radioactive leaks from buried structures that Friends/NEC contend are the driving reason for requiring this AMP at Seabrook.[193]

Detection, monitoring, and maintenance of leakage from these structures are part of the NRC's ongoing regulatory process to assure compliance with public dose limits.[194] Conversely, buried pipelines, channels, and tanks that fall under aging management provide safety-related functions by maintaining adequate flow and pressure. Because the issue raised by Friends/NEC Contention 3 (i.e., the inadvertent release of radioactivity) does not specifically relate to the ability of buried structures to perform their intended functions as defined by 10 C.F.R. § 54.4(a)(1)-(3), the contention is not within the scope of this license renewal proceeding, as required by section 2.309(f)(1)(iii).

Further, Friends/NEC fail to support their claim that there is not reasonable assurance that NextEra will manage the effects of aging on the intended function of buried SSCs.[195] In *Pilgrim II,* the Commission summarized an evaluation of site-specific conditions and reviewed the applicant's monitoring/inspection program in assessing whether it was likely that the integrity of any buried SSCs had deteriorated sufficiently to prevent it from serving its intended function.[196] Friends/NEC's support for this contention is a verbatim repetition of general

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[191] *Id.* at 24-25.

[192] CLI-10-14, 71 NRC at 462 (quoting 10 C.F.R. § 54.21(a)(3)) (emphasis in original).

[193] *Id.* at 461.

[194] *Id.* ("Through the regulatory process, which includes plant inspections, notice and guidance to licensees, and enforcement actions, the NRC takes a host of measures to improve the ability to timely detect and correct inadvertent leaks to assure compliance with public dose limits.").

[195] *See* 10 C.F.R. § 54.29 (requiring, for license renewal, that there be "reasonable assurance" that the applicant will manage the effects of aging on certain structures and components during extended operation).

[196] CLI-10-14, 71 NRC at 466.

and conclusory statements from the Blanch declaration.[197] Neither Friends/NEC Contention 3 nor the Blanch declaration directly asserts that the intended function of any buried structures at Seabrook might fail. Instead they rely on reports of released radioactivity from other plants in the country to infer similar problems at the New Hampshire facility.[198] The existence of leaking pipes and tanks at other plants falls well short of providing support for alleging that the buried structures at Seabrook might not perform their intended function. By failing to provide any support that the integrity of leaking structures at Seabrook has the potential to prevent them from maintaining pressure, providing flow, or both, Friends/NEC do not present the requisite factual bases required by 10 C.F.R. § 2.309(f)(1)(v).

Friends/NEC's Contention 3 presents an issue that is not within the scope of the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii), and is not supported by adequate factual allegations, as required by 10 C.F.R. § 2.309(f)(1)(v). For these reasons, we do not admit it.

6. Friends/NEC Contention 4

Friends/NEC Contention 4 states:

> The Environmental Report is inadequate because it underestimates the true cost of a severe accident at Seabrook Station in violation of 10 C.F.R. 51.53(c)(3)(ii)(L) and further analysis by the Applicant is called for.[199]

The contention contains six subparts. Because the Applicant and the NRC Staff challenge the materiality of each subpart, we first consider the general concept of materiality in connection with contentions that challenge the adequacy of the discussion of severe accident mitigation alternatives in a renewal applicant's environmental report. We then separately address the admissibility of each subpart.

a. Materiality

As the Applicant and the NRC Staff emphasize,[200] a SAMA analysis is mandated by NEPA considerations and thus subject to a rule of reason.[201] In discussing

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[197] *Compare* Friends/NEC Petition at 23-26 *with* Blanch Decl. ¶¶ 41-53.

[198] *See* Friends/NEC Petition at 26-30; Blanch Decl. ¶¶ 41-53.

[199] Friends/NEC Petition at 33-34 (capitalization omitted).

[200] NextEra Answer to Friends/NEC Petition at 65; NRC Staff Answer at 56.

[201] *See 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) (applying "rule of reason governing NEPA" to SAMA analysis).

a SAMA contention in another proceeding, the Commission stated that it has "long stressed that NRC adjudicatory hearings are not EIS [environmental impact statement] editing sessions."[202] Specifically, the ultimate issue "is whether any additional SAMA should have been identified as potentially cost-beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis."[203] Thus, as the Commission stated in *Pilgrim I,* "[u]nless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated, no purpose would be served to further refine the SAMA analysis, whose goal is only to determine what safety enhancements are cost-effective to implement."[204] In order to demonstrate that their concerns raise a material dispute with an application, therefore, petitioners must provide sufficient information to show that, if their proposed refinements were incorporated, it is "genuinely plausible" that cost-benefit conclusions might change.

That said, the Commission's clarification in *Pilgrim I* did not revise the rules for admitting contentions. Indeed, in *Pilgrim I,* the Licensing Board had *admitted* a SAMA contention,[205] which it subsequently dismissed on summary disposition,[206] and the Commission *reversed* the Board for granting summary disposition.[207] Especially at the contention admissibility stage, appropriate latitude must be given petitioners in the methods by which they may show "genuine plausibility." Petitions need not — as both the Applicant and the NRC Staff acknowledged at oral argument[208] — rerun the Applicant's own cost-benefit calculations.

b. Friends/NEC Contention 4A

Friends/NEC Contention 4A states:

> NextEra's use of probabilistic modeling underestimated the true consequences of a severe accident.[209]

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[202] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-09-11, 69 NRC 529, 533 (2009) (citation and internal quotation marks omitted).

[203] *Id.*

[204] CLI-10-11, 71 NRC at 317.

[205] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 341 (2006).

[206] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-07-13, 66 NRC 131, 137 (2007).

[207] CLI-10-11, 71 NRC at 307.

[208] Tr. at 138-42.

[209] Friends/NEC Petition at 37 (capitalization omitted).

Friends/NEC Contention 4A consists of two distinct challenges. First, Friends/NEC allege that NextEra's use of probabilistic modeling underestimates the consequences of a severe accident and that, "[b]y multiplying high consequence values with low probability numbers, the consequences figures appear far less startling."[210] Second, Friends/NEC allege that "NextEra failed to model intentional acts in its analysis of external events."[211] Friends/NEC Contention 4A is inadmissible as outside the scope of this proceeding.

Friends/NEC's first challenge — to the use of probability-weighted consequences — is contrary to the Commission's statement that "[w]hether a SAMA may be worthwhile to implement is based upon a cost-benefit analysis — a weighing of the cost to implement . . . with the reduction in *risks* to public health, occupational health, and offsite and onsite property."[212] Consistent with the regulations for severe accidents,[213] the Commission has previously noted that the very essence of severe accident mitigation analysis is to assess "to what extent the *probability-weighted consequences* of the analyzed severe accident sequences would decrease if a specific SAMA were implemented."[214] Allegations against the fundamental procedure for analyzing severe accidents and resulting mitigation alternatives are outside the scope of the proceeding.

Furthermore, including probability-weighted consequences into SAMA analyses does not reduce the consequences so low as to "reject all possible mitigation as too costly"[215] — as evidenced by the results presented by the applicants in several recent cases.[216] Conversely, ignoring risk (*i.e.,* the probability-weighted accidents) in favor of deterministic consequences that do not consider the frequency of occurrence might just as likely distort the analysis by making all mitigation appear so highly cost-effective as to be of little use in discriminating between alternatives in this NEPA decision-making process.

As the NRC Staff points out,[217] the use of probability-weighted consequences is consistent with the longstanding NEPA "rule of reason" that requires reasonable consideration of alternative mitigation measures, but does not require that any

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[210] *Id.* at 39.

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

[212] *McGuire/Catawba,* CLI-02-17, 56 NRC at 7-8 (emphasis added). "[A]s a logical proposition, . . . risk equals the likelihood of an occurrence times the severity of the consequences . . . ." *Limerick Ecology Action, Inc. v. NRC,* 869 F.2d 719, 738 (3d Cir. 1989) (citing *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 104-05 (1983)).

[213] 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1.

[214] *Pilgrim I,* CLI-10-11, 71 NRC at 291 (emphasis added).

[215] Friends/NEC Petition at 39.

[216] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-10-13, 71 NRC 673, 680-81 (2010); Applicant's Environmental Report — Operating License Renewal Stage — Pilgrim Nuclear Power Station at 4-48 to 4-51 (ADAMS Accession No. ML060830611).

[217] NRC Staff Answer at 56-57.

specific plan be implemented. Rather, a SAMA analysis need only assure that the environmental consequences of the project have been fairly evaluated.[218]

Friends/NEC's second challenge — to the failure of NextEra to consider intentional acts such as terrorist attacks as part of the external events analysis — is likewise outside the scope of this proceeding. In the recent *Pilgrim II* decision, the Commission stated that "NEPA 'imposes no legal duty on the NRC to consider intentional malevolent acts . . . in conjunction with commercial power reactor license renewal applications.'"[219] The Commission also noted that the NRC had analyzed terrorist acts in connection with license renewal and concluded "that the core damage and radiological release from such acts would be no worse than the damage and release expected from internally initiated events."[220]

We do not admit Friends/NEC Contention 4A.

c. Friends/NEC Contention 4B

Friends/NEC Contention 4B states:

> The SAMA analysis for Seabrook minimizes the potential amount of radioactive release in a severe accident.[221]

Friends/NEC allege that NextEra's SAMA analysis minimizes the potential amount of radioactive release during a severe accident by not considering such events in the spent fuel pool (SFP) and by using source terms for the fission product releases that "are smaller for key radionuclides than the release fractions specified in NRC guidance . . . and its recent reevaluation for high-burnup fuel."[222]

First, Friends/NEC contend that, because severe accidents at spent fuel pools are reasonably foreseeable, NextEra must consider these severe accidents, whether resulting from human error, mechanical failure, or an act of malice.[223] The petitioners imply that the Applicant must also consider the potential interactions between the pool and the reactor in the context of these accidents.[224] Friends/NEC

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[218] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003) (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 352 (1989)).

[219] CLI-10-14, 71 NRC at 476 (quoting *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007)).

[220] *Id.* (citing *Oyster Creek,* CLI-07-8, 65 NRC at 131).

[221] Friends/NEC Petition at 41 (capitalization omitted).

[222] Friends/NEC Petition at 41.

[223] *Id.*

[224] *See id.* at 42 ("NextEra did not consider the potential interactions between the pool and the reactor in the context of severe accidents at Seabrook.").

contend that the definition of "severe accidents" includes SFP accidents, noting that "[n]othing in Section 5 [of the GEIS] excludes severe accidents involving . . . the spent fuel pool."[225]

Second, Friends/NEC contend that "[t]he source terms used by NextEra to estimate the consequences of severe accidents . . . has not been validated by NRC" and that these release fractions are consistently smaller for key radionuclides than those specified in NUREG-1465.[226] The petitioners allege that, because the Applicant used small values, the SAMA analysis resulted in lower consequences than would be obtained from using the source terms presented in the guidance documents.[227]

Friends/NEC's Contention 4B is inadmissible as to allegations associated with spent fuel pool accidents, which are outside the scope of this proceeding and a direct challenge to NRC regulations. This contention is admissible to the limited extent that it relates to the selection of the source term release fractions.

(i) SAMA ANALYSIS OF THE RISKS FROM SPENT FUEL POOLS (SFP)

Friends/NEC's assertion that severe accidents from SFP must be considered in NextEra's SAMA analysis is in direct conflict with NRC regulations. While a consideration of alternatives to mitigate severe accidents must be provided if not previously performed,[228] NRC regulations only require an applicant to provide this analysis "for those issues identified as Category 2 issues in appendix B to subpart A" of Part 51.[229] Spent fuel pool storage is a Category 1 issue,[230] and thereby exempt from this analysis.

The Commission has confirmed this interpretation of its regulations in several cases. In *Turkey Point,* it held that license renewal boards cannot admit environmental challenges regarding spent fuel pool issues: "Part 51's license renewal provisions cover environmental issues relating to onsite spent fuel storage generically" and "[a]ll such issues, including accident risk, fall outside the scope of license renewal proceedings."[231] More recently, the Commission stated in *Pilgrim I* that "SAMAs do not encompass spent fuel pool accidents."[232] Clearly, SFP

[225] *Id.* at 44.

[226] *Id.* (referring to L. Soffer et al., Accident Source Terms for Light-Water Nuclear Power Plants, NUREG-1465 (Feb. 1995) (ADAMS Accession No. ML041040063).

[227] *Id.*

[228] 10 C.F.R. § 51.53(c)(3)(ii)(L).

[229] *Id.* § 51.53(c)(3)(ii).

[230] 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 ("On-site spent fuel").

[231] CLI-01-17, 54 NRC at 23.

[232] CLI-10-11, 71 NRC at 306.

SAMA analysis is not required by regulation, and a contention alleging such a requirement is not admissible in a license renewal proceeding.

Friends/NEC raise the issue of the impacts of potential interaction between the pool and the reactor on severe accidents at Seabrook, citing a report by Dr. Gordon Thompson that was prepared for site-specific conditions at Vermont Yankee and Pilgrim.[233] However, the Commission clearly stated in *Turkey Point* that Part 51's reference to SAMA deals only with "nuclear *reactor* accidents, not spent fuel storage accidents,"[234] and that "Part 51 treats all spent fuel pool accidents, whatever their cause, as generic, Category 1 events not suitable for case-by-case adjudication."[235] Consistent with the rejection of the Thompson arguments by the *Vermont Yankee*[236] and *Pilgrim*[237] Boards, we conclude that any consideration of an SFP in a SAMA analysis is preempted by regulation.

Finally, Friends/NEC argue that section 6 of the GEIS (which discusses the Category 1 finding for onsite spent fuel storage) applies only to normal operations and that section 5 of the GEIS (discussing severe accidents) is silent on the exclusion of SFP from severe accident analysis.[238] The Commission recently rejected this very argument in *Pilgrim II,* however, where it clarified that "[c]hapter six clearly is not limited to discussing only 'normal operations,' but also discusses potential accidents and other nonroutine events," and that "[t]he Category 1 finding for onsite spent fuel storage (and chapter six of the GEIS upon which the finding is based) is not limited to routine or 'normal operations.'"[239]

(ii) SOURCE TERMS USED IN NEXTERA SAMA ANALYSIS

Friends/NEC allege that the source terms used by NextEra in its SAMA analysis, as generated by the Modular Accident Analysis Progression code (MAAP code), "appear[ ] to lead to anomalously low consequences when compared to source terms generated by NRC Staff," and that "NRC has been aware of this

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[233] Friends/NEC Petition at 42 (citing Gordon R. Thompson, Institute for Resource and Security Studies, Risks and Risk-Reducing Options Associated with Pool Storage of Spent Nuclear Fuel at Pilgrim and Vermont Yankee Nuclear Power Plants at 12, 16 (2006) (ADAMS Accession No. ML061630088)).

[234] CLI-01-17, 54 NRC at 21 (emphasis in original).

[235] *Id.* at 22 (citation omitted).

[236] *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 152-55 (2006) (ruling that contention regarding severe spent fuel pool accidents is not admissible in license renewal proceeding because it is a Category 1 issue), *rev'd on other grounds,* CLI-07-16, 65 NRC 371, 375 (2007).

[237] *Pilgrim I,* LBP-06-23, 64 NRC at 288 ("[T]hese arguments fail because of Commission precedent interpreting the term, 'severe accidents,' to encompass only reactor accidents and not spent fuel pool accidents . . . .").

[238] Friends/NEC Petition at 42-44 (citing GEIS §§ 5.2.1, 6.1).

[239] CLI-10-14, 71 NRC at 474.

discrepancy for at least two decades."[240] Friends/NEC posit that the source terms NextEra used are consistently smaller for key radionuclides than the release fractions specified in NUREG-1465.[241]

NextEra argues that the petitioners provide "no fact or expert opinion in support of this contention, as required by 10 C.F.R. § 2.309(f)(1)(v), only their own unsupported speculation."[242] NextEra asserts that, "[w]ithout expert opinion or a similar plant-specific SAMA analysis, Petitioners cannot show that their claims, as applied to Seabrook, are based upon anything other than their own uninformed speculation."[243] The NRC Staff concludes otherwise, stating that "F[riends]/NEC ha[ve] provided some support for the argument that MAAP may lead to lower consequences when compared to source terms generated by NRC Staff."[244]

Friends/NEC support the source term basis of Contention 4B by citing a published draft of NUREG-1150 in which the NRC observed, in the context of the Zion Nuclear Power Plant, that "comparisons made between the Source Term Code Package results and MAAP results indicate that the MAAP estimates for environmental release fractions were significantly smaller."[245] Friends/NEC also cite a Brookhaven National Laboratory study that determined that dose results reported by the applicant for license renewal at the Catawba and McGuire Plants were less by a factor of 3 to 4 than those calculated consistent with NUREG-1150.[246] The NRC Staff recognizes that these studies indicate that applicants' use of source terms generated by the MAAP code at these plants resulted in "lower consequences when compared to the source terms in NUREG-1465."[247] The alleged facts Friends/NEC proffer here meet the requirements of 10 C.F.R. 2.309(f)(1)(v).[248]

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[240] Friends/NEC Petition at 45 (citing Office of Nuclear Regulatory Research, Draft for Comment, Reactor Risk Reference Document, NUREG-1150, Vol. 1, at 5-14 (Feb. 1987) (ADAMS Accession No. ML063540601) [hereinafter Draft for Comment, NUREG-1150, Vol. 1]).

[241] *Id.* at 44 (citing ER at F-32, F-45 to F-48).

[242] NextEra Answer to Friends/NEC Petition at 75.

[243] *Id.* at 76.

[244] NRC Staff Answer at 62.

[245] Friends/NEC Petition at 45 (quoting Draft for Comment, NUREG-1150, Vol. 1, at 5-14) (capitalization altered by Friends/NEC Petition).

[246] *Id.* at 44-45 (citing John R. Lehner et al., Brookhaven National Laboratory, Benefit Cost Analysis of Enhancing Combustible Gas Control Availability at Ice Condenser and Mark III Containment Plants at 17 (Dec. 2002) (ADAMS Accession No. ML031700011)).

[247] NRC Staff Answer at 62-63.

[248] NextEra points out that many of Friends/NEC's arguments were copied from an expert report prepared for site-specific conditions in a license renewal proceeding at another plant. NextEra Answer

(Continued)

The NRC Staff nevertheless opposes admission, arguing that Friends/NEC "ha[ve] not demonstrated that the use of MAAP is unreasonable or inappropriate in this case" and disputing the relevance of NUREG-1465 on technical grounds.[249] Both NextEra and the NRC Staff point out that the same arguments Friends/NEC present here were rejected by the *Indian Point* licensing board for a variety of technical reasons.[250] Again, the Applicant and the NRC Staff confuse the merits with the "minimal" factual showing necessary to admit a contention. Their technical responses to the petitioners' position require further exploration.

Moreover, to proffer an admissible contention, Friends/NEC need not perform their own plant-specific SAMA. As discussed above, petitioners do not have to rerun the entire SAMA analysis to show that there might be a material difference in the outcome when using the suggested changes in the source terms advocated by Friends/NEC. The alleged fact that the source terms provided by MAAP are lower than those produced by the methodology used in NRC studies (resulting in consequence values that are lower by a factor of 3 and 4 according to the Brookhaven study) raises sufficient question concerning whether the calculated consequences and resulting cost-benefit analyses at Seabrook are adequate for rendering decisions on potential mitigation alternatives.

(iii) SUMMARY OF RULING ON CONTENTION 4B

We do not admit those aspects of Friends/NEC Contention 4B concerning spent fuel pools because they constitute a direct challenge to NRC regulations and are not within the scope of the proceeding as required by 10 C.F.R. § 2.309(f)(1)(iii). We admit the portion of this contention dealing with the adequacy of the source terms that are generated by the MAAP code and used by NextEra to calculate the consequences in the Applicant's SAMA analysis.

d. Friends/NEC Contention 4C

Friends/NEC Contention 4C states:

> The SAMA Analysis for Seabrook uses an outdated and inaccurate proxy to perform its SAMA analysis, the MACCS2 computer program.[251]

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to Friends/NEC Petition at 75-76. However, the possibility that Friends/NEC may have used another expert report as the template for this contention does not negate the support provided by NUREG-1150 and the Brookhaven study.

[249] NRC Staff Answer at 63.

[250] NextEra Answer to Friends/NEC Petition at 76-77 (discussing *Indian Point,* LBP-08-13, 68 NRC at 185); NRC Staff Answer at 64 (quoting *Indian Point,* LBP-08-13, 68 NRC at 187).

[251] Friends/NEC Petition at 46 (capitalization omitted).

Contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi), with one exception petitioners do not raise any specific challenge to the Applicant's SAMA analysis in Friends/NEC Contention 4C. Rather, petitioners make general and insufficiently supported assertions concerning the MACCS2 code that the Applicant employed in conducting its analysis. Petitioners' specific claim that the model was not subjected to quality assurance requirements is deficient on its face, as a SAMA analysis is not subject to such requirements.[252]

We do not admit Friends/NEC Contention 4C. As discussed below, however, certain allegations concerning the alleged consequences of using the MACCS2 code are adequately set forth in Friends/NEC Contentions 4D and in the admissible portions of 4E.

e. Friends/NEC Contention 4D

Friends/NEC Contention 4D states:

> Use of an inappropriate air dispersion model, the straight-line Gaussian plume, and meteorological data inputs that did not accurately predict the geographic dispersion and deposition of radionuclides at Seabrook's coastal location.[253]

Friends/NEC allege that NextEra used an atmospheric dispersion model, ATMOS, that is not appropriate for determining the geographic concentration of radionuclides released in a severe accident at Seabrook.[254] Specifically, Friends/NEC argue that the use of the steady-state, straight-line Gaussian plume modeled by ATMOS is not adequate to represent Seabrook's complex coastal site, thereby underestimating "the area likely to be affected in a severe accident and the dose likely to be received in those areas."[255]

According to Friends/NEC, the Applicant's use of the ATMOS model to predict radionuclide dispersion is unacceptable because the Gaussian dispersion model assumes that a released radioactive plume travels in a steady-state straight line (analogous to a beam from a flashlight).[256] The use of the ATMOS model (which is incorporated into the MACCS2 code) to accurately predict impacts to the large population in a 50-mile radius of the plant is allegedly inappropriate given the recognized limitations of the model beyond a 10- to 15-mile radius.[257] Petitioners

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[252] *See* 10 C.F.R. Part 50, Appendix B (requiring quality assurance description in safety analysis report, but not addressing SAMA analysis).

[253] Friends/NEC Petition at 47 (capitalization omitted).

[254] *Id.* at 47-48.

[255] *Id.* at 47.

[256] *Id.* at 48.

[257] *Id.* at 52.

point out that the Environmental Protection Agency (EPA) no longer approves of the use of one-dimensional models for air dispersion analyses beyond a 32-mile radius,[258] and discuss other codes (e.g., AERMOD and CALPUFF) that do not have the modeling limitations of ATMOS.[259] Citing several meteorological research studies at coastal sites,[260] Friends/NEC assert that NextEra used inappropriate meteorological inputs that are steady in time and are spatially uniform across the study region.[261] Petitioners contend that, as a result, actual doses will be more concentrated than those modeled and will extend over a larger area due to effects of variable winds, sea breezes, plume behavior over water, and terrain.[262] Furthermore, petitioners assert, "[a]nother significant defect in Applicant's model is that its meteorological inputs . . . are based on data collected by Applicant at a single, on-site anemometer for a single year, 2005."[263]

Friends/NEC Contention 4D is admissible. To satisfy the requirement of 10 C.F.R. § 2.309(f)(1)(i) through (iv), Friends/NEC provide a specific statement of the contention and question the accuracy of the SAMA results given the geographic location and variable meteorological conditions at the site and the large population base surrounding the plant.[264] The statement of facts presented by Friends/NEC, backed by references to the Applicant's ER and supporting documents, demonstrates that the petitioners have raised a genuine dispute of a material issue in accordance with 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Both NextEra and the NRC Staff assert that the contention should not be admitted.[265] They maintain that Friends/NEC have not demonstrated this contention concerns a material issue. NextEra contends that the "Petitioners have provided sufficient information to show that the sea breeze is a real phenomenon, but have provided no evidence, no allegations of fact or expert opinion, as to the effect that a sea breeze would have on the cost-benefit conclusions in NextEra's SAMA analysis."[266] NextEra argues that the documents Friends/NEC offer in support of their claim that plume behavior over water leads to radioactive hot spots does not show "that it is *genuinely plausible* that modif[ication] . . . would result in a change to NextEra's cost-benefit model."[267] NextEra argues that Friends/NEC have not shown materiality because they have not shown, through "expert or

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[258] *Id.* at 48.
[259] *Id.* at 47, 51-52, 57-58.
[260] *Id.* at 47 & n.21.
[261] *Id.* at 48.
[262] *Id.* at 48-53.
[263] *Id.* at 53.
[264] *See id.* at 47.
[265] NextEra Answer to Friends/NEC Petition at 79; NRC Staff Answer at 68.
[266] NextEra Answer to Friends/NEC Petition at 79-80.
[267] *Id.* at 84-85 (emphasis in original) (footnote omitted).

[other] review of NextEra's SAMA analysis," that using a different air dispersion model might change the cost-benefit conclusions in the Application.[268] The NRC Staff similarly argues that the contention is not material (even though it admits that Friends/NEC provide an adequate factual basis for their claim that the SAMA analysis is inadequate because it does not adequately account for sea breeze, behavior of plumes over water, or terrain impacts) because petitioners have "not shown that any of these asserted errors in the SAMA analysis would be likely to lead to the identification of another cost-beneficial SAMA."[269]

We disagree. Friends/NEC provide sufficient information to indicate that it is more than plausible that the use of an alternative model has the potential to change the cost-benefit conclusions for the SAMA candidates evaluated by NextEra. The petitioners are not required to redo the SAMA analyses in order to raise a material issue. To require a petitioner to perform such a reanalysis is an undue burden, especially when dealing with an admittedly very complex model like the MACCS2 code.[270] Friends/NEC sufficiently support their allegation that use of the ATMOS model might significantly distort the Seabrook SAMA analysis.

In response to the suggestion that NextEra should have considered use of alternative models like AERMOD or CALPUFF,[271] NextEra points out that the Commission has verified that NEPA allows agencies "to select their own methodology as long as that methodology is reasonable."[272] Once challenged by an adequately supported contention, however, an applicant must defend its choice.[273] The NRC Staff concedes that Friends/NEC have adequately supported their claim that "features of the Seabrook site . . . could impact the ATMOS model [in ways] that the ER has not accounted for, such as the sea breeze effect, the varied terrain at Seabrook and the possibility of hot spots."[274] Friends/NEC have raised plausible limitations of air dispersion modeling at the site. It is now the Applicant's burden to defend its use of ATMOS against the evidence and testimony submitted by Friends/NEC in further adjudicatory proceedings.

NextEra claims that the "Petitioners assert that NextEra should simply replace the ATMOS module in MACCS2 with AERMOD or CALPUFF," and that the

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[268] *See id.* at 80.

[269] NRC Staff Answer at 68.

[270] As NextEra aptly stated at oral argument: "The SAMA analysis is a very complicated beast." Tr. at 137.

[271] Friends/NEC Petition at 47.

[272] NextEra Answer to Friends/NEC Petition at 81 (quoting *Pilgrim I,* CLI-10-11, 71 NRC at 316).

[273] *See Pilgrim I,* CLI-10-11, 71 NRC at 301 (stating that the Gaussian plume model's incorporation in the MACCS2 code and the wide, customary use of the code "are not a sufficient ground to exclude the code's integral dispersion model from all challenge[ ] if adequate support is provided for a contention").

[274] NRC Staff Answer at 68.

Commission has noted "'it is not possible simply to "plug in" and run a different atmospheric dispersion model in the MACCS2 code.'"[275] Friends/NEC do not suggest that the MACCS2 code should be modified but only that alternative air dispersion models without ATMOS's flaws exist.[276] There is no regulatory requirement that applicants use MACCS2 for their SAMA analyses. If it can be shown that the one-dimensional constraints of the ATMOS model are inappropriate for a site and that it is truly impossible to replace ATMOS within the MACCS2 code, then it is incumbent upon the Applicant to seek other options besides MACCS2 to perform the remaining cost-benefit analysis rather than relying on a deficient ATMOS code just because it is embedded within the familiar MACCS2 model.

The NRC Staff argues that "to the extent F[riends]/NEC ha[ve] alleged that the use of the ATMOS model is categorically inapplicable to the Seabrook site, F[riends]/NEC has not adequately supported [their] claim."[277] However, Friends/NEC support their claim that ATMOS is inappropriate for Seabrook, quoting the MACCS2 User Guide: "'The atmospheric model included in the code does not model the impact of terrain effects on atmospheric dispersion.'"[278] Moreover, Friends/NEC's criticisms of the Gaussian model all apply to the ATMOS model because ATMOS is a steady-state straight-line Gaussian model.

NextEra and the NRC Staff say that Friends/NEC do not provide factual or expert support for their claim that reliance on only one meteorological measurement point makes NextEra's SAMA analysis deficient.[279] It seems self-evident, however, that the use of only one data point might have some potential to affect the accuracy of the final result, which, in turn, might affect the resulting cost-benefit values calculated by the model. Whether this is true is a merits issue to be addressed in further adjudicatory proceedings.

The NRC Staff notes that the Lawrence Livermore study Friends/NEC cite in support of their arguments relating to complex terrain[280] was "specifically undertaken by the NRC to address concerns regarding the use of the Gaussian plume in the MACCS2 code."[281] The Staff asserts that, because this report also

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[275] NextEra Answer to Friends/NEC Petition at 82 (quoting *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010) (emphasis by NextEra omitted)).

[276] *See* Friends/NEC Petition at 52.

[277] NRC Staff Answer at 68.

[278] Friends/NEC Petition at 51 (quoting D. Chanin & M.L. Young, Code Manual for MACCS2 User's Guide, NUREG/CR-6613, Vol. 1, at 7-10 (May 1998) (ADAMS Accession No. ML063550020)).

[279] NextEra Answer to Friends/NEC Petition at 88-89; NRC Staff Answer at 76.

[280] Friends/NEC Petition at 54 (citing C. R. Molenkamp, et al., Lawrence Livermore National Laboratory, Comparison of Average Transport and Dispersion Among a Gaussian, a Two-Dimensional and a Three-Dimensional Model, NUREG/CR-6853 (Oct. 2004) (ADAMS Accession No. ML043240034) [hereinafter NUREG/CR-6853]).

[281] NRC Staff Answer at 70 (citing NUREG/CR-6853, at xi, 41).

concluded that the MACCS2 code with the ATMOS model is accurate at distances up to 200 miles,[282] Friends/NEC's "evidence does not indicate that the ATMOS model is inaccurate at distances over 31 miles"[283] but that "the ATMOS model may be used at much greater distances for SAMA analyses."[284] In a footnote, the NRC Staff acknowledges that Friends/NEC assert that a June 2004 MACCS2 guidance report recognizes that the "code should be applied with caution at distances greater than ten to fifteen miles."[285] Similarly, NextEra responds to Friends/NEC's terrain allegation with technical arguments and admonishes the petitioners for not addressing sensitivity analyses NextEra performed.[286] Although proffering reasonable counterarguments, NextEra's and the NRC Staff's detailed discussion of the technical issues raised by Friends/NEC supports petitioners' position that they have raised genuine disputes as to material facts that are appropriately addressed in an adjudicatory hearing. The discrepancy between the positions advanced by Friends/NEC, NextEra and the NRC Staff will be addressed in further proceedings.

In summary, Friends/NEC present and support numerous material factual issues relating to the appropriateness of NextEra's use of the one-dimensional, air dispersion model ATMOS at Seabrook — an allegedly complex geographic and meteorological site. NextEra and the NRC Staff raise counterarguments, but the difference between these positions is merits-based and properly addressed in further adjudicatory proceedings.

We admit Friends/NEC Contention 4D.

f. Friends/NEC Contention 4E

Friends/NEC Contention 4E states:

> Use of inputs that minimized and inaccurately reflected the economic consequences of a severe accident, including decontamination costs, cleanup costs and health costs, and that either minimized or ignored a host of other costs.[287]

Friends/NEC Contention 4E consists of three challenges related to the costs of a potential severe accident. First, Friends/NEC allege that because it "uses the outdated and inaccurate MACCS2 code to calculate decontamination and

[282] *Id.* (citing NUREG/CR-6853, at 72).
[283] *Id.* at 70-71.
[284] *Id.* at 71.
[285] *Id.* at 70 n.91 (citing Friends/NEC Petition at 52).
[286] NextEra Answer to Friends/NEC Petition at 87-88.
[287] Friends/NEC Petition at 61 (capitalization omitted).

clean up costs,"[288] NextEra employs an inapplicable particle size, ignores the difficulty of cleanup in an urban area, and does not consider the effects of radiological waste disposal.[289] Further, they allege, the "cost formula used in the MACCS2 underestimates costs likely to be incurred as a result of a dispersion of radiation."[290] Second, Friends/NEC allege that "[t]he current ER assigns a value of $2000 per person[-]rem"[291] and that using this value "to estimate the cost of the health effects generated by radiation exposure is based on a deeply flawed analysis and seriously underestimates the cost of the health consequences of severe accidents."[292] Third, Friends/NEC allege that a number of other economic costs, such as job training and unemployment payments, "were underestimated or totally ignored by the applicant that when added together would in all likelihood add up collectively to a significant amount."[293]

Friends/NEC Contention 4E is admissible as to allegations associated with the decontamination and cleanup costs of severe accidents associated with particle size and remediation difficulty in urban areas, but is not admissible with regard to waste disposal. This contention also is inadmissible as to the other two cost-related allegations: that is, underestimating health costs using the $2000 per person-rem factor and excluding other economic costs such as job retraining and unemployment payments.

(i) DECONTAMINATION AND CLEANUP COSTS

Friends/NEC allege that the decontamination and cleanup costs NextEra calculated in its SAMA analysis are underestimated by the MACCS2 code.[294] NextEra and the NRC Staff both oppose admitting this portion of Friends/NEC Contention 4E.[295]

Noting that the MACCS2 User's Guide indicates that the decontamination processes are based on the WASH-1400 economic cost model,[296] Friends/NEC cite a Sandia study that allegedly "recognized that earlier estimates (such as incorporated in WASH-1400 and up through and including MACCS2) of decontamination costs are incorrect because they examined fallout from nuclear weapons explosions that

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[288] *Id.* at 62.
[289] *Id.* at 62-64.
[290] *Id.* at 62.
[291] *Id.* at 68.
[292] *Id.*
[293] *Id.* at 73 (emphasis omitted).
[294] *Id.* at 62.
[295] NextEra Answer to Friends/NEC Petition at 100; NRC Staff Answer at 77.
[296] Friends/NEC Petition at 62 (citing D. Chanin & M.L. Young, Code Manual for MACCS2 User's Guide, NUREG/CR-6613, Vol. 1, at 7-10 (May 1998) (ADAMS Accession No. ML063550020)).

produce large particle sizes and high mass loadings."[297] Friends/NEC assert that, because reactor accident radionuclide particles are smaller than nuclear explosion particles, reactor accident releases are more difficult to decontaminate and clean up, presumably resulting in higher costs.[298]

Friends/NEC also allege that NextEra did not consider that urban areas are "more expensive and time consuming to decontaminate and clean than rural areas" and did not account for the differences in the EPA and NRC cleanup standards on the ultimate cost of the cleanup.[299] Friends/NEC provides support for these allegations by citing a study by Pacific Northwest National Laboratory that indicated a significant difference in costs depending on the population density and cleanup standard.[300] We agree with the NRC Staff's conclusion that Friends/NEC have "provided adequate support for its assertion that smaller particles will create higher cleanup costs, and that urban areas are more costly to clean up than rural areas."[301]

The NRC Staff contends, however, that Friends/NEC have not provided sufficient information to demonstrate that the cost impact of the smaller particle size or other considerations raises a material issue.[302] NextEra likewise contends that Friends/NEC "fall far short" of showing "'it looks *genuinely plausible*'" that including proffered information may change the outcome of the SAMA analysis.[303] We disagree. Petitioners dispute sufficiently important assumptions in the calculation of severe accident decontamination and cleanup costs to make it plausible that another SAMA candidate might be cost-effective.

Insofar as Friends/NEC contend that NextEra's SAMA analysis improperly "ignored . . . radioactive waste disposal,"[304] their claim is outside the scope of this proceeding as it directly challenges the generic determinations in Table B-1 of Appendix B to Part 51 concerning uranium fuel cycle and waste management.

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[297] *Id.* at 66 (citing David I. Chanin & Walter B. Murfin, Site Restoration: Estimation of Attributable Costs from Plutonium-Dispersal Accidents (May 1996) *available at* http://chaninconsulting.com/downloads/sand96-0957.pdf). NextEra contends that Friends/NEC should have explained how the Sandia study, which addresses plutonium dispersal accidents, is relevant to reactor accidents. NextEra Answer to Friends/NEC Petition at 89-91. NextEra's technical objection to the relevance of supporting documents Friends/NEC proffer is a merits issue appropriately addressed at hearing.

[298] Friends/NEC Petition at 62-63.

[299] *Id.* at 64-65.

[300] *Id.* at 64-65 (citing Friends/NEC Petition, Attach. C, Barbara Reichmuth et al., Economic Consequences of a Rad/Nuc Attack: Cleanup Standards Significantly Affect Costs, at 6 tbl.1, 12 (April 2005)).

[301] NRC Staff Answer at 80.

[302] *Id.* at 78.

[303] NextEra Answer to Friends/NEC Petition at 91 (quoting *Pilgrim I,* CLI-10-11, 71 NRC at 317 (emphasis added by NextEra)).

[304] Friends/NEC Petition at 63.

Table B-1 codifies the Commission's determination, supported by the GEIS, that all uranium fuel cycle and waste management issues, including low-level waste storage and disposal, mixed waste storage and disposal, onsite spent fuel storage, and transportation, are Category 1 issues with a small impact.[305] Thus, NextEra can incorporate the GEIS's analysis into its ER and not offer any additional analysis on these issues.[306]

(ii) HEALTH COSTS

Friends/NEC claim that NextEra "underestimates the population-dose related costs of a severe accident by relying inappropriately on a $2000/person-rem conversion factor."[307] Friends/NEC assert that this conversion factor is inappropriate because it "does not take into account the significant loss of life associated with early fatalities from acute radiation exposure"[308] and "underestimates the generation of stochastic health effects by failing to take into account the fact that some members of the public exposed to radiation after a severe accident will receive doses above the threshold level for application of a dose- and dose-rate reduction effectiveness factor (DDREF)."[309] Friends/NEC also claim "that the Applicant's evacuation time input data into the code were unrealistically low and unsubstantiated; and that if correct evacuation times and assumptions regarding evacuation had been used, the analysis would show far fewer will evacuate in a timely manner, increasing health-related costs."[310]

Friends/NEC do not cite any alleged facts or expert opinion indicating error in the $2000/person-rem conversion factor, in the use of a single DDREF, or in the evacuation times or assumptions. Instead, Friends/NEC cite a study allegedly estimating the total number of cancer deaths in a severe accident at Seabrook and suggest that "[a] better way to evaluate the cost equivalent of the health consequences resulting from a severe accident is simply to sum the total number of . . . fatalities . . . and multiply by . . . $3 million,"[311] an estimate of the value of a statistical life.[312] This argument is a recasting of the petitioners' challenge to the use of probability-weighted consequences in Friends/NEC Contention 4A, which, as discussed previously, is outside the scope of this proceeding.

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[305] 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1.

[306] *See Turkey Point,* CLI-01-17, 54 NRC at 11 ("[L]icense renewal applicants need not submit in their site-specific Environmental Reports an analysis of Category 1 issues.").

[307] Friends/NEC Petition at 68.

[308] *Id.*

[309] *Id.* at 68-69.

[310] *Id.* at 72.

[311] *Id.* at 71 (citing Sandia National Laboratory, Calculation of Reactor Accident Consequences, U.S. Nuclear Power Plants (CRAC-2) (1982)).

[312] *Id.* at 69.

(iii) OTHER COSTS

Friends/NEC assert that "NextEra did not appear to include in their economic cost estimates the business value of property and the incurred costs such as costs required from job retraining, unemployment payments, and inevitable litigation."[313]

This aspect of Friends/NEC Contention 4E is not admissible because petitioners have presented no facts or expert opinion concerning such costs that show it to be plausible that including them might affect the outcome of the SAMA analysis.

In summary, we admit Friends/NEC Contention 4E only in regard to the effects of particle size and difficulties with urban cleanup on decontamination costs.

g. Friends/NEC Contention 4F

Friends/NEC Contention 4F states:

> Use of inappropriate statistical analysis of the data specifically the Applicant chose to follow NRC practice, not NRC regulation, regarding SAMA analyses by using mean consequence values instead of, for example, 95 percentile values.[314]

Friends/NEC criticize NextEra for failing to consider that using only mean values of meteorological data results in uncertainties in the calculation of population dose and offsite economic cost.[315] Friends/NEC contend that "Seabrook's SAMA cost-benefit evaluation should be based on the 95th percentile of the meteorological distribution to be consistent with the approach taken in the License Renewal GEIS, which refers repeatedly to the 95th percentile of the risk uncertainty distribution as an appropriate 'upper confidence bound' in order not to 'underestimate potential future environmental impacts.'"[316] The Commission has specifically rejected this argument, however, explaining that "license renewal applicants are not required to base their SAMA analysis upon consequence values at the 95th percentile consequence level (the level used for the GEIS severe accident environmental impacts analysis)."[317]

We do not admit Friends/NEC Contention 4F because the Commission has ruled that the claim petitioners make is not material and does not satisfy 10 C.F.R. § 2.309(f)(1)(iv).

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[313] *Id.* at 73.

[314] *Id.* at 74 (capitalization omitted).

[315] *Id.*

[316] *Id.* at 75-76 (quoting GEIS § 5.3.3.2.1).

[317] *Pilgrim I,* CLI 10-11, 71 NRC at 316-17.

7. Additional Claims

At the conclusion of their petition, the Friends/NEC petitioners request that, in considering their proffered contentions, the Commission "also consider the interplay between current design basis (CLB) and aging management through the period of extended operation."[318]

Friends/NEC's claims in this regard have not been proffered as contentions that purport to satisfy the requirements of 10 C.F.R. § 2.309(f)(1), and the Board will not consider them.

E. Ruling on Petitions

As set forth above, Beyond Nuclear, the Seacoast Anti-Pollution League, the New Hampshire Sierra Club, Friends of the Coast, and the New England Coalition have each proffered at least one admissible contention meeting the requirements of 10 C.F.R. § 2.309(f) and have demonstrated standing in accordance with 10 C.F.R. § 2.309(d). Therefore, in accordance with 10 C.F.R. § 2.309(a), the Board grants the requests for hearing and petitions for leave to intervene and admits the five named organizations as parties to this proceeding.

F. Hearing Procedure

Upon admission of a contention the Board must identify the specific hearing procedures to be used.[319] Section 2.310(d) of 10 C.F.R provides that, in license renewal proceedings and other reactor licensing matters, the relatively formal procedures provided in Subpart G of 10 C.F.R. Part 2 govern if a contention "necessitates resolution of issues of material 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 motive or intent of the party or eyewitness material to the resolution of the contested matter."[320]

A petitioner requesting Subpart G based on section 2.310(d) must demonstrate "by reference to the contention and the bases provided and the specific procedures in [S]ubpart G" that resolving the contention will require "resolution of material issues of fact which may be best determined through the use of the identified procedures."[321] Unless the Board determines that section 2.310(d) or other relevant

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[318] Friends/NEC Petition at 77.

[319] 10 C.F.R. § 2.310(a).

[320] *Id.* § 2.310(d).

[321] *Id.* § 2.309(g).

regulations require otherwise,[322] a license renewal proceeding may be conducted under the relatively informal procedures of Subpart L of 10 C.F.R. Part 2.[323]

Friends/NEC and the Beyond Nuclear petitioners do not address the selection of hearing procedures in their petitions or replies. NextEra argues that Subpart L procedures should be used because the petitioners did not demonstrate that the facts at issue in this case would best be resolved through the more formal Subpart G procedures.[324] The NRC Staff does not address the issue.

In the absence of any assertion that Subpart G procedures should be used to resolve any of the admitted contentions, the Subpart L hearing procedures will be used to adjudicate each admitted contention.

III. ORDER

For the foregoing reasons:

A. Friends/NEC's request to extend the filing period for petitions is *granted.*

B. Friends/NEC's unopposed request to extend the filing period for replies is *granted.*

C. The petitions to intervene and requests for hearing of the Beyond Nuclear petitioners and Friends/NEC are *granted.*

D. As limited by the Board's foregoing discussion, the Beyond Nuclear Contention, Friends/NEC Contention 1, Friends/NEC Contention 2, Friends/NEC Contention 4B, Friends/NEC Contention 4D, and Friends/NEC Contention 4E are *admitted.*

E. Friends/NEC Contention 3, Friends/NEC Contention 4A, Friends/NEC Contention 4C, and Friends/NEC Contention 4F are *not admitted.*

F. Because the Board declines to consider the revised declaration of Paul Blanch and other materials submitted by Friends/NEC on December 6, 2010, Friends/NEC's motion for leave to reply is *denied* as moot.

G. The admitted contentions will be adjudicated under the procedures set forth at 10 C.F.R. Part 2, Subpart L.

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[322] *See, e.g., id.* § 2.310(b)-(c) (providing that unless the parties agree otherwise, enforcement matters and licensing of uranium enrichment facility construction and operation must be conducted under Subpart G).

[323] *Id.* § 2.310(a).

[324] NextEra Answer to Beyond Nuclear Petition at 36; NextEra Answer to Friends/NEC Petition at 105.

In accordance with the provisions of 10 C.F.R. § 2.311, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 15, 2011

Cite as 73 NRC 81 (2011) **LBP-11-3**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of **Docket No. 30-20836-EA**
(ASLBP No. 10-905-02-EA-BD01)

MATTINGLY TESTING SERVICES, INC.
(Molt and Billings, Montana) **February 22, 2011**

MEMORANDUM AND ORDER
(Accepting Proposed Settlement and Dismissing Proceeding)

1. On September 2, 2010, the NRC Staff issued an Order Revoking License (Effective Immediately) to Mattingly Testing Services, Inc. ("MTS").[1] On the same day, the NRC Staff issued an Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) for a period of 7 years to Mr. Mark Ficek, president and owner of MTS.[2]

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[1] Order Revoking License (Effective Immediately) EA-10-100 (Sept. 2, 2010) (ADAMS Accession No. ML102440234) [hereinafter MTS Order]; In the Matter of Mattingly Testing Services, Inc. Molt, MT; Order Revoking License (Effective Immediately), 75 Fed. Reg. 55,360 (Sept. 10, 2010).

[2] Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) IA-10-028 (Sept. 2, 2010) (ADAMS Accession No. ML102440353) [hereinafter Ficek Order]; In the Matter of Mark M. Ficek; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 75 Fed. Reg. 55,366, 55,366, 55,369 (Sept. 10, 2010).

2. On September 22, 2010, Mr. Ficek requested a hearing on both orders,[3] while Ms. Dayna Thompson requested a hearing on the order issued to MTS and also requested that the immediate effectiveness of that order be set aside.[4]

3. On October 6, 2010, this Atomic Safety and Licensing Board ("Board"), established to preside over MTS's and Mr. Ficek's enforcement proceedings,[5] denied Ms. Thompson's request to set aside the immediate effectiveness of the MTS Order,[6] but granted Mr. Ficek's hearing requests.[7] On October 21, 2010, the Board granted Ms. Thompson's hearing request and consolidated the proceedings.[8]

4. On November 4, 2010, the parties jointly moved to hold the proceeding in abeyance while they engaged in settlement negotiations in an attempt to resolve both of the Orders without a hearing.[9]

5. On November 9, 2010, the Board issued an Order holding the proceeding in abeyance until such time as the parties reached settlement or informed the Board that settlement was not possible.[10]

6. On December 8, 2010, the parties informed the Board that negotiations were ongoing, and stated that a settlement agreement would be filed with the Board before the end of February 2011.[11]

7. On December 9, 2010, the Board issued an Order continuing to hold the proceeding in abeyance, and providing the parties a deadline of noon on February 7, 2011, to reach a settlement.[12]

8. On February 4, 2011, the parties submitted a Joint Motion to Approve the Settlement Agreement and Terminate the Proceeding, to which they attached their Settlement Agreement and proposed Board order.[13] In the Joint Motion,

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[3] E-mails from Mark Ficek to Vivian Campbell (Sept. 22, 2010) (ADAMS Accession Nos. ML-102670716 and ML102670711).

[4] Letter from Dayna C. Thompson (Sept. 22, 2010) (ADAMS Accession No. ML102650636).

[5] Establishment of Atomic Safety and Licensing Board (Sept. 27, 2010) (unpublished).

[6] Licensing Board Order (Denying Dayna Thompson's Request to Set Aside the Immediate Effectiveness of the Order Revoking License) (Oct. 6, 2010) at 3-4 (unpublished).

[7] Licensing Board Order (Granting Hearing Requests, and Scheduling Telephone Prehearing Conference) (Oct. 6, 2010) at 2 (unpublished).

[8] Licensing Board Order (Granting Dayna Thompson's Request to Participate in the License-Revocation Phase of the Proceeding as a Party, and Directing Parties to Negotiate a Schedule for Further Proceedings, as Discussed at Prehearing Telephone Conference) (Oct. 12, 2010) at 1-2 (unpublished).

[9] Joint Motion to Postpone Discovery and Hold Proceedings in Abeyance (Nov. 5, 2010).

[10] Licensing Board Order (Holding the Proceeding in Abeyance) (Nov. 9, 2010) at 3 (unpublished).

[11] Letter from Molly Barkman Marsh, Counsel for NRC Staff, to Licensing Board (Dec. 8, 2010).

[12] Licensing Board Order (Continuing to Hold Proceeding in Abeyance) (Dec. 9, 2010) at 3 (unpublished).

[13] Joint Motion to Approve Settlement Agreement and Terminate Proceedings (Feb. 4, 2011).

the parties stated that their Settlement Agreement will achieve the purposes of the NRC enforcement program — to deter noncompliance with regulatory requirements and to encourage prompt, comprehensive corrective actions — without the likely risks and resource costs to both parties in litigating the NRC Staff's enforcement orders, and that it is in the public interest for the Board to approve the Settlement Agreement and dismiss this proceeding.[14]

9. Upon review of the Settlement Agreement, the Board is satisfied that its terms reflect a fair and reasonable settlement of these matters, 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 Settlement Agreement is *approved* pursuant to 10 C.F.R. § 2.338(i).

10. The September 2, 2010 enforcement orders to MTS and Mr. Ficek are superseded by this Order approving and incorporating the Settlement Agreement.

11. The Settlement Agreement, attached hereto, is incorporated into this Order.

12. 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.*

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

E. Roy Hawkens
ADMINISTRATIVE JUDGE

Nicholas Tsoulfanidis
ADMINISTRATIVE JUDGE

Rockville, MD
February 22, 2011

[14] *Id.* at 2.

ATTACHMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of **Docket No. 30-20836-EA**
(ASLBP No. 10-905-02-EA-BD01)

MATTINGLY TESTING SERVICES, INC.
(Molt and Billings, Montana)

SETTLEMENT AGREEMENT

1. On September 2, 2010, the staff of the U.S. Nuclear Regulatory Commission ("NRC") ("NRC Staff") issued an Order Revoking License (Effective Immediately) to Mattingly Testing Services, Inc. ("MTS").[1]

2. As detailed in the MTS Order issued on September 2, 2010, the NRC Staff found that MTS violated several NRC regulations, a Confirmatory Order issued to MTS or March 8, 2009,[2] and a Security Order.[3] Specifically, the NRC Staff found that:

a. MTS deliberately violated the MTS Confirmatory Order by knowingly allowing the deadlines in the MTS Confirmatory Order to lapse.
b. MTS deliberately violated the IC Order from May 13, 2006, through September 9, 2009, by failing to establish and maintain a prearranged

[1] Order Revoking License (Effective Immediately) EA-10-100 (Sept. 2, 2010) (ML102440234) ("MTS Order"); In the Matter of Mattingly Testing Services, Inc. Molt, MT; Order Revoking License (Effective Immediately), 75 Fed. Reg. 55,360 (Sept. 10, 2010).

[2] Confirmatory Order Modifying License (Effective Immediately) EA-08-271 (Mar. 6, 2009) (ML-090700077) ("MTS Confirmatory Order").

[3] Order Imposing Increased Controls (Effective Immediately) EA-05-090 (Nov. 14, 2005) (ML-053130218) ("IC Order"); In the Matter of All Licensees Authorized To Possess Radioactive Material Quantities of Concern, Order Imposing Increased Controls (Effective Immediately), 70 Fed. Reg. 72,128 (Dec. 1, 2005).

plan with the local law enforcement agency ("LLEA") to respond to any attempt to gain unauthorized access to radioactive materials, as required by the IC Order.

c. On March 6, 2007 and October 22, 2009, MTS deliberately provided false information to an NRC inspector and investigator, in violation of 10 C.F.R. § 30.9, by stating that it had established a prearranged plan with the LLEA in accordance with the IC Order.

d. On July 4 and 16, 2009, and August 29-30, 2009, MTS failed to implement the IC Order, Appendix B, Section IC-2(c) requirement to have a dependable means to transmit information between and among the various components used to detect and identify an unauthorized intrusion, to inform the assessor, and to summon the appropriate responder at all times.

e. On June 22, 2009, MTS failed to properly secure a radiographic exposure device for transport, contrary to 10 C.F.R. §§ 20.1802, 34.35(d), and 71.5. As a result, the device fell off a vehicle on a road in Moll, Montana, and it was temporarily lost and recovered by a member of the public.

f. On June 22, 2009, MTS willfully violated the immediate reporting requirement for lost radioactive materials, 10 C.F.R. § 20.2201, for the lost radiographic exposure device.

3. Also on September 2, 2010, the NRC Staff issued an order to Mark Ficek, president and owner of MTS, prohibiting him from involvement in any NRC-licensed activities, effectively immediately, for a period of seven years from the date of the order.[4]

4. The Ficek Order contained the NRC Staff's conclusion that Mr. Ficek had violated 10 C.F.R. § 30.10. The Ficek Order also stated that the NRC Staff had determined that Mr. Ficek violated a Confirmatory Order issued to him on March 6, 2009,[5] by engaging in NRC-licensed activities while he was prohibited from such activities.

5. The MTS Order provided that all radiographic operations authorized under MTS's license involving the use of NRC-licensed material were suspended, including the use of the license to conduct radiographic operations under reciprocity

[4] Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) IA-10-028 (Sept. 2, 2010) (ML102440353) ("Ficek Order"); In the Matter of Mark M. Ficek; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 75 Fed. Reg. 55,366 (Sept. 10, 2010).

[5] Confirmatory Order (Effective Immediately) IA-08-055 (Mar. 6, 2009) (ML090700068) ("Ficek Confirmatory Order"); In the Matter of Mark M. Ficek; Confirmatory Order (Effective Immediately), 74 Fed. Reg. 11,772 (Mar. 19, 2009).

in an Agreement State. The MTS Order required MTS to transfer possession of all NRC-licensed material within 30 days of the date of the MTS Order.[6]

6. On November 5, 2010, the RSO of MTS informed the NRC Region IV that all of its licensed material had been transferred to the manufacturers of the radiographic exposure devices on November 1, 2010. NRC Region IV inspectors confirmed that all of the devices had been transferred by contacting the manufacturers and conducting a physical inspection of MTS on November 9, 2010.

7. On September 22, 2010, Mr. Ficek requested a hearing on both Orders.

8. On September 22, 2010, Ms. Dayna Thompson requested a hearing on the MTS Order and also requested that the immediate effectiveness of the MTS Order be set aside.

9. On October 6, 2010, the Atomic Safety and Licensing Board ("Board") denied Ms. Thompson's request to set aside the immediate effectiveness of the MTS Order, but granted Mr. Ficek's hearing requests.

10. On October 21, 2010, the Board granted Ms. Thompson's hearing request and consolidated the proceedings.

11. On November 5, 2010, the parties moved the board to hold the proceeding in abeyance while they engaged in settlement negotiations in an attempt to resolve both of the Orders without a hearing. On November 9, 2010, the Board issued an Order holding the proceeding in abeyance until such time as the parties reached settlement or informed the Board that settlement was not possible.

12. On December 8, 2010, the parties informed the Board that negotiations were ongoing, and stated that a settlement agreement would be filed with the Board before the end of February 2011. On December 9, 2010, the Board issued an Order continuing to hold the proceeding in abeyance, and giving the parties a deadline of noon on February 11, 2011, to file a settlement agreement.

13. The NRC Staff, Mr. Ficek, and Ms. Thompson have engaged in negotiations and agree that it is in the public interest to terminate this proceeding without further litigation subject to the following stipulations.

THE PARTIES AGREE AND STIPULATE AS FOLLOWS:

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[6] On September 23, 2010, by e-mail to Art Howell, Charles Cain, Vivian Campbell, and Elmo Collins, Danny Schroeder, MTS Operations Manager and Radiation Safety Officer ("RSO"), requested relaxation of this requirement in the MTS Order. Mr. Schroeder requested to extend the amount of time allowed for the licensee to remove from its possession all NRC-licensed material acquired or possessed under the license, from 30 days to 60 days (ML102700374). On September 24, 2010, the NRC responded, granting the requested relaxation based upon a determination that there are no immediate safety concerns regarding the storage of the licensed material at the Billings, Montana facility (ML102700226).

14. None of the parties to this agreement admit facts or agree to conclusions of law other than those specifically stipulated herein.

15. The parties agree to disagree on the conclusions of fact and law contained in the MTS Order and Ficek Order.

16. MTS was required to comply with the MTS Confirmatory Order.

17. MTS did not comply with all requirements of the MTS Confirmatory Order in a timely manner.

18. Mr. Ficek and Ms. Thompson maintain that all requirements of the Confirmatory Order were met and that procedures implemented exceeded the requirements of the Order.

19. MTS was required to comply with the IC Order.

20. MTS did not have an LLEA plan in place by March 6, 2007, as required by the IC Order.

21. On July 4 and 16, 2009, and August 29-30, 2009, an MTS radiographer failed to ensure that a radiography truck had a dependable means to transmit information between and among the various components used to detect and identify an unauthorized intrusion, to inform the assessor, and to summon the appropriate responder at all times, thus placing MTS in violation of IC Order, Appendix B, Section IC 2(c).

22. MTS was required to provide the NRC information that was complete and accurate in all material respects, in accordance with 10 C.F.R. § 30.9.

23. The NRC Staff maintains that the information Mr. Ficek provided to the NRC on behalf of MTS on March 6, 2007, and October 22, 2009, was not complete and accurate in all material respects.

24. Mr. Ficek and Ms. Thompson maintain that material misstatements were not made, that Mr. Ficek did believe that the appropriate arrangement with the LLEA was in place, and that upon learning that it was not developed a new plan with the appropriate LLEA and notified the NRC of the change.

25. MTS was required to comply with 10 C.F.R. §§ 20.1802, 20.2201, 34.35, and 71.5.

26. On June 22, 2009, MTS failed to properly secure a radiographic exposure device for transport, contrary to 10 C.F.R. §§ 20.1802, 34.35(d), and 71.5.

27. Mr. Ficek and Ms. Thompson maintain that the exposure device was lost on MTS's property and not in the public domain as the Order states.

28. On June 22, 2009, MTS failed to comply with the immediate reporting requirement for lost radioactive materials, 10 C.F.R. § 20.2201, for the lost radiographic exposure device.

29. Mr. Ficek and Ms. Thompson maintain that the RSO caused MTS to violate 10 C.F.R. § 20.2201, and not Mr. Ficek as the Order states.

30. Mr. Ficek and Ms. Thompson maintain that none of these violations were willful or deliberate.

31. MTS and Mr. Ficek have not had possession of NRC-licensed material since November 1, 2010.

IN CONSIDERATION OF THE ABOVE, THE NRC STAFF, MR. FICEK, AND MS. THOMPSON AGREE TO THE FOLLOWING IN SETTLEMENT OF EA-10-100, AND IA-10-028:

32. During settlement negotiations, the parties agreed that Mr. Ficek, as sole shareholder of MTS, could continue to own MTS's radiographic exposure devices, which are and were stored at the manufacturer's facility, until settlement was approved or the hearing resumed. The Ficek Order prohibits Mr. Ficek from NRC generally licensed activities, which includes ownership of source and byproduct material pursuant to 10 C.F.R. §§ 31.9 and 40.21.

33. The NRC will not take enforcement action against Mr. Ficek, as sole shareholder to MTS, for owning radiographic exposure devices he does not possess during settlement negotiations.

34. Mr. Ficek, as sole shareholder to MTS, may sell the radiographic exposure devices currently owned by MTS to an NRC licensee in exchange for a non-controlling share of an NRC licensee. Mr. Ficek may not own a controlling share and/or interest of an NRC licensee.

35. The NRC Staff's main concern is with the possession and control of licensed material rather than the ownership of the material. The NRC Staff did not and does not find an imminent threat to the public health and safety if Mr. Ficek owns source and byproduct material as a result of being part owner and/or shareholder of an NRC licensee as long as he does not personally possess or control the material or otherwise use or direct the use of others in licensed activities.

36. With the exception of ownership of NRC-licensed materials outlined in paragraphs 34 and 35, Mr. Ficek will refrain from engaging in NRC-licensed activities until September 2, 2017. NRC-licensed activities include, but are not limited to, the following:

a. Conducting radiography or a radiographer's duties, or assisting, directing, or supervising such activities in an NRC jurisdiction under an NRC license or an agreement state license under the authority granted by 10 C.F.R. § 150.20, or in an agreement state under reciprocity agreement issued pursuant to an NRC license.
b. Performing, directing, or supervising activities that are the responsibility of an RSO or assistant RSO including making radiation safety determinations, ensuring an NRC licensee's compliance with NRC requirements, making reports or filing documents with the NRC, except as specifically required herein, and recordkeeping.
c. Scheduling radiography jobs.

d. Securing radiographic exposure devices and/or ensuring compliance with security requirements.
e. This list is not exhaustive. If Mr. Ficek is unsure whether he is prohibited from an activity, he is to contact the Region IV Director of the Division of Nuclear Materials Safety. The NRC will respond to Mr. Ficek's inquiry within 5 days.

37. Mr. Ficek may be part owner, as described in paragraphs 34 and 35, and/or an officer or director of an NRC licensee only if the following conditions are met:

a. Prior to becoming part owner of an NRC licensee or accepting employment with an NRC licensee as an officer or director, Mr. Ficek will provide that licensee with a copy of the Board Order approving this Settlement Agreement with this Settlement Agreement attached.
b. Prior to becoming part owner of an NRC licensee or accepting employment with an NRC licensee as an officer or director, Mr. Ficek will also notify in writing the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, with a copy to the Director, Division of Nuclear Materials Safety, U.S. Regulatory Commission Region IV Office, Arlington, TX 78011, of the name, location, and telephone number of the NRC-licensed employer, as well as the expected start date of the employment or ownership agreement. In the written notification, Mr. Ficek will confirm that the Board Order and Settlement Agreement have been provided to the NRC licensee.

38. For a 3-year period after September 2, 2017, Mr. Ficek shall, at least 10 days prior to beginning employment involving NRC-licensed activities, as defned in paragraph 36 above, provide notice to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, of the name, address, and telephone number of the employer or the entity where he is, or will be, involved in NRC-licensed activities.

39. MTS's license has been revoked and the parties agree that it will not be reinstated.

40. The parties will submit this Settlement Agreement to the Board for approval with a joint motion requesting approval of the settlement and termination of the proceeding with prejudice based on resolution of the matters in this Settlement Agreement. This Settlement Agreement will become effective upon its execution by all parties; however, the agreement is contingent upon approval by this Board pursuant to 10 C.F.R. § 2.203. Upon approval by this Board, this Settlement Agreement will have the same force and effect as an Order made after a full hearing.

41. The parties agree that all further procedural steps before this Board

and any right to challenge or contest the validity of the Order entered into in accordance with this Settlement Agreement, and all the rights to seek judicial review or otherwise to contest the validity of the Order are expressly waived.

IN WITNESS THEREOF Mr. Mark Ficek, on behalf of himself and MTS, Ms. Dayna Thompson, and the NRC Staff have caused this Settlement Agreement to be executed on this 3rd day of February, 2011.

Respectfully submitted

Roy Zimmerman, Director 2/4/11
Office of Enforcement

Mark Ficek, President
Mattingly Testing Services, Inc.

Dayna Thompson

Dated at Rockville, MD and Billings, MT
this 3rd day of February, 2011.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Dr. Gary S. Arnold
Dr. Alice C. Mignerey

In the Matter of **Docket Nos. 52-034-COL**
52-035-COL
(ASLBP No. 09-886-09-COL-BD01)

LUMINANT GENERATION COMPANY, LLC
(Comanche Peak Nuclear Power Plant, Units 3 and 4) **February 24, 2011**

The Licensing Board grants the Applicant's motion for summary disposition of the last remaining contention in the proceeding, which concerns: (1) Intervenors' allegation that Applicant had not considered the feasibility under NEPA of an alternative consisting of a combination of solar and wind energy, energy storage methods, and natural gas supplementation, to produce baseload power; (2) the reasonable availability of the parts of the combination for consolidation into an integrated system; (3) the feasibility of the use of the combination in the area served by Applicant's plant; (4) the extent to which there might be efficiencies arising from overlapping uses of land for each of the four parts of the combination as well as for other reasonable purposes; and, (5) if shown to be environmentally preferable, the extent to which operation and maintenance costs of solar in such combination might be a comparative benefit. Alternatively, the Board finds the contention moot, based on the NRC Staff's consideration of these matters in its DEIS, and Applicant's motion and support therefor.

RULES OF PRACTICE: SUMMARY DISPOSITION

In 10 C.F.R. Part 2, Subpart L proceedings, NRC regulations require, in 10 C.F.R. § 2.1205(c), that in ruling on motions for summary disposition licensing boards are to apply the standards of 10 C.F.R. Part 2, Subpart G, which in section 2.710(d)(2) provides that summary disposition should be granted "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."

RULES OF PRACTICE: SUMMARY DISPOSITION

In ruling on summary disposition motions it is appropriate for licensing boards to look to NRC regulatory and case law, and also to federal court case law on summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010).

RULES OF PRACTICE: SUMMARY DISPOSITION

The party moving for summary disposition bears the burden of demonstrating that there is no genuine issue as to any material fact and that it is entitled to a decision in its favor. If the proponent of the motion fails to make the requisite showing, the licensing board must deny the motion — even if the opposing party chooses not to respond or its response is inadequate. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

RULES OF PRACTICE: SUMMARY DISPOSITION

In assessing whether a party moving for summary judgment has met his or her burden, all inferences to be drawn from underlying facts must be viewed in the light most favorable to the party opposing the motion. "'[T]he record must show the movant's right to [summary judgment] "with such clarity as to leave no room for controversy," and must demonstrate that his opponent "would not be entitled to [prevail] under any discernible circumstances."'" Summary judgment "'should be awarded only when the truth is quite clear.'" "If the moving party meets its burden, then and only then is the nonmoving party required to proffer evidence that contradicts the moving party's showing and that proves the existence of a genuine issue of material fact. . . . If the moving party does not meet its burden, however, the nonmoving party is, without making any showing, entitled to a

denial of the motion. . . . Although it is risky for a nonmoving party to fail to proffer evidence in response to the moving party's showing, such a failure does not automatically mandate granting of the motion." *McKinney v. Dole,* 765 F.2d 1129, 1135 (D.C. Cir. 1985).

RULES OF PRACTICE: SUMMARY DISPOSITION

If, considering only the moving party's support for its motion, the board determines that it has met its burden, the board then looks to whether an opponent of the motion has overcome the movant's case by showing a genuine dispute on a material issue of fact.

RULES OF PRACTICE: SUMMARY DISPOSITION

In attempting to overcome a movant's case, "'a party opposing the motion may not rest upon [ ] mere allegations or denials,' but must state 'specific facts showing that there is a genuine issue of fact' for hearing. It is not sufficient . . . for there merely to be the existence of *some* alleged factual dispute between the parties, for 'the requirement is that there be no *genuine* issue of *material* fact.' 'Only disputes over facts that might affect the outcome' of a proceeding would preclude summary disposition. 'Factual disputes that are . . . unnecessary will not be counted.' . . . If the evidence in favor of the nonmoving party is 'merely colorable' or 'not significantly probative,' summary disposition may be granted." *Pilgrim,* CLI-10-11, 71 NRC at 297 (quoting 10 C.F.R. § 2.710(b), (d)(2); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-52 (1986) (noting emphasis in original)).

RULES OF PRACTICE: SUMMARY DISPOSITION

If the question is a close one it must be carefully ascertained whether any factual disputes asserted are genuine and relate to a material issue or issues. If the opposing party fails to meet this standard, *and* the moving party has successfully shown that there is no genuine dispute on a material issue of fact and that it is entitled to a decision as a matter of law, then the motion must be granted, but any doubt as to the existence of a genuine issue of material fact is resolved against the moving party.

RULES OF PRACTICE: SUMMARY DISPOSITION; NATIONAL ENVIRONMENTAL POLICY ACT

In this proceeding Applicant agrees that the four-part combination alternative at issue is developed, proven, available, and reasonable, if natural gas provides

the majority of the power, and concedes that, even if natural gas does not provide the majority of power, the four-part combination is at least theoretically feasible, but also points out that no such combination exists anywhere in the world, shows that a wind-solar-storage combination would produce less than half the 3200 MWe the proposed units would produce, and states that it is not reasonable or prudent for a utility or merchant generator to use a technology that has not been demonstrated, either at an existing commercial generating facility or in a pilot project or small-scale facility that shows it works and is cost-effective. Applicant goes into detail on the environmental impacts of the four-part combination, compares these impacts to those of the proposed new units, and concludes that the impacts of the combination would be greater, primarily as to land use and aesthetics.

RULES OF PRACTICE: SUMMARY DISPOSITION; NATIONAL ENVIRONMENTAL POLICY ACT

Intervenors make various arguments but provide little in the way of facts to support their arguments, and contest only five provisions of Applicant's statement of material facts. Intervenors contest neither any part of the environmental impacts section of Applicant's statement, nor the final comparison in Applicant's statement of the environmental effects of the two new proposed units and the four-part combination.

RULES OF PRACTICE: SUMMARY DISPOSITION; NATIONAL ENVIRONMENTAL POLICY ACT

The Licensing Board finds that Applicant considered all material facts, showed that there existed no genuine issue of material fact, and showed that a decision in its favor was warranted as a matter of law. Considering (1) the only facts in Applicant's Statement of Material Facts that Intervenors did contest and the manner in which they contested them, and (2) any other parts of Intervenors' submissions that even arguably contradicted any of the showings of the Applicant, the board finds these do not rise to a level of materiality that would establish a genuine dispute on a material issue of fact. Thus, the Licensing Board finds that Intervenors, in addition to being disorganized and incomplete in some instances, failed to demonstrate any genuine dispute on any material issue of fact, so as to overcome Applicant's showing of no genuine dispute on a material issue of fact. It may be that future technology will produce renewable energy alternatives or combination alternatives that are environmentally preferable to nuclear and that can also produce equivalent power, but based on the record before the Licensing Board, this is not the case at the present time, even resolving all doubts in

Intervenors' favor. The Board's preliminary conclusion that Applicant met its burden, of showing that there existed no genuine issue as to any material fact and that it was entitled to a decision in its favor as a matter of law, therefore remains its conclusion, even considering Intervenors' submissions and resolving any doubts in a light most favorable to them.

RULES OF PRACTICE: SUMMARY DISPOSITION; RIGHTS OF PARTIES

In view of the provision of 10 C.F.R. § 2.710(a) that "[a]ll material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party," and the provision that requires a party opposing summary disposition to provide a "statement of the material facts as to which it is contended there exists a genuine issue to be heard," if a movant for summary disposition asserts certain facts in its statement of material facts, this makes such facts at least arguably material to matters within the scope of the contention, and therefore subject to being disputed and controverted by the opponent of summary disposition, until and unless they are subsequently found to be immaterial by the body deciding the matter. If any response goes beyond the scope of the fact(s) being responded to, then that portion that goes beyond that scope may be ruled inadmissible on that ground, and a party responding to a summary disposition motion may not raise "distinctly new asserted deficiencies." *See Pilgrim,* CLI-10-11, 71 NRC at 310. But a party, which has certain rights in an NRC proceeding, could not appropriately be foreclosed from responding at all, by simply and straightforwardly disputing a statement put forward by an opposing party as a material fact. Intervenors were not denied the right to respond to Applicant's statement of material facts.

RULES OF PRACTICE: SUMMARY DISPOSITION; MOOTNESS

In ruling on whether a contention is moot, a licensing board looks to whether a "justiciable controversy" still exists, and whether an issue is still "live," such that a party still has a legal interest in the issue. The Licensing Board in this case finds, based on both the NRC Staff's DEIS and the Applicant's consideration of the matters at issue in its motion for summary disposition and supporting documents, that no justiciable controversy still exists with respect to the contention at issue and that none of the issues contained within the contention are still "live," such that Intervenors have any further legal interest in those issues.

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MEMORANDUM AND ORDER

(Ruling on Motion for Summary Disposition of Contention 18 and Alternatives Contention A)

I. INTRODUCTION AND BACKGROUND

The Licensing Board rules herein on Luminant's Motion for Summary Disposition of Contention 18 and Alternatives Contention A,[1] in this matter involving the Combined License (COL) Application of Luminant Generation Company (Luminant or Applicant) for two new nuclear reactors at its Comanche Peak site, designated as proposed Comanche Peak Nuclear Power Plant (CPNPP) Units 3 and 4.[2] Intervenors Sustainable Energy and Economic Development (SEED) Coalition, Public Citizen, True Cost of Nukes, and Texas State Representative Lon Burnam have challenged this Application and shown standing to participate

[1] Luminant's Motion for Summary Disposition of Contention 18 and Alternatives Contention A (Aug. 26, 2010) [hereinafter Motion].

[2] *See* Letter from M.L. Lucas, Luminant Vice President, Nuclear Engineering & Support, to Document Control Desk, U.S. NRC (Sept. 19, 2008), Transmitting Combined License Application for Comanche Peak Nuclear Power Plant, Units 3 & 4 (ADAMS Accession No. ML082680250); http://www.nrc.gov/reactors/new-reactors/col/comanche-peak/documents.html [hereinafter Application or COLA]; *see also* Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 66,276 (Nov. 7, 2008).

collectively as a party in the proceeding.[3] Intervenors oppose Luminant's motion;[4] the NRC Staff supports it, arguing also that the last remaining contention in the proceeding is moot.[5]

We originally admitted two contentions, one concerning the environmental impacts of a severe radiological accident at one unit on operation of the other units also located at the Comanche Peak site (original Contention 13), and one concerning alternatives to the proposed new units consisting of combinations of renewable energy sources including wind and solar power with certain storage methods and supplemental use of natural gas to create baseload power (original Contention 18).[6] Applicant subsequently amended its Environmental Report (ER)[7] to include discussion related to these issues, and moved to dismiss the two original admitted contentions on the basis of mootness.[8] We granted this motion as to Contention 13, and granted it in part as to Contention 18.[9] We also denied admission of certain new environmental contentions,[10] but admitted portions of others as Alternatives Contention A, which we found to be co-extensive with that part of original Contention 18 not dismissed as moot. The remaining parts of Contention 18 and Alternatives Contention A were thus to be adjudicated as one contention, which we limited and reformulated as follows:

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[3] *See* LBP-09-17, 70 NRC 311, 321-22, 382 (2009).

[4] *See* Intervenors' Response to Luminant's Motion for Summary Disposition of Contention 18 and Alternatives Contention A (Sept. 15, 2010) [hereinafter Intervenors' Response].

[5] *See* NRC Staff Answer to Luminant's Motion for Summary Disposition of Contention 18 and Alternatives Contention A (Sept. 15, 2010) [hereinafter Staff Response].

[6] *See* LBP-09-17, 70 NRC at 365-69, 375-80, 382.

[7] Comanche Peak Nuclear Power Plant Units 3 and 4, COL Application Environmental Report (rev. 1, Nov. 20, 2009) [hereinafter ER], *available at* http://adamswebsearch2.nrc.gov/idmws/ViewDocByAccession.asp?AccessionNumber=ML100081557.

[8] *See* Letter from Jonathan M. Rund, Counsel for Luminant, to Ann Marshall Young *et al.* (Dec. 8, 2009), with attached Letter from Rafael Flores to NRC Document Control Desk (Dec. 8, 2009), with attached COL Application Part 3, Environmental Report Revision 1, Update Tracking Report Revision 0 (Dec. 7, 2009) (ADAMS Accession No. ML093440179) [hereinafter ER Update]; Luminant's Motion to Dismiss Contention 18 as Moot (Dec. 14, 2009); Letter from Jonathan M. Rund, Counsel for Luminant, to Ann Marshall Young *et al.* (Jan 15, 2010), with attached Letter from Rafael Flores to NRC Document Control Desk (Jan. 15, 2010), with attached COL Application Part 3, Environmental Report Revision 1, Update Tracking Report, Contention 13 (Jan. 15, 2010) (ADAMS Accession No. ML100191529); Letter from Jonathan M. Rund, Counsel for Luminant, to Ann Marshall Young *et al.* (Jan. 19, 2010), with attached Letter from Rafael Flores to NRC Document Control Desk (Jan. 19, 2010), with attached COL Application Part 3, Environmental Report Revision 1, Update Tracking Report Revision 2 (Jan. 19, 2010) (ADAMS Accession No. ML100192101) [hereinafter Co-Location ER Revision or ER Revision]; Luminant's Motion to Dismiss Contention 13 as Moot (Jan. 25, 2010) [hereinafter Motion to Dismiss Contention 13].

[9] LBP-10-10, 71 NRC 529, 539, 546 (2010).

[10] *Id.* at 600-01.

Alternatives Contention A

The Applicant has not considered the feasibility under NEPA of an alternative consisting of a combination of solar and wind energy, energy storage methods including CAES and molten salt storage, and natural gas supplementation, to produce baseload power, with specific regard to

(a) the reasonable availability of the four parts of such combination for consolidation into an integrated system to produce baseload power;

(b) the feasibility of the use of such combination in the area of Texas served by the Comanche Peak plant;

(c) the extent to which there may be efficiencies arising from overlapping uses of land for each of the four parts of the combination as well as for other reasonable purposes; and

(d) if it is shown that such an alternative is environmentally preferable, the extent to which operation and maintenance costs of solar in such combination may be a comparative benefit.[11]

We have also denied admission of several additional contentions filed by Intervenors, finding that they did not meet the contention admissibility criteria of 10 C.F.R. § 2.309(f).[12]

Based on the analysis provided in Section VI.A, we find Luminant's pending Motion has merit and therefore grant summary disposition of Contention 18 and Alternatives Contention A. Alternatively, as discussed in Section VI.B, we find the contentions moot and dismiss them on this basis. Finally, no further matters remaining for adjudication in the matter, we terminate this proceeding.

II. LEGAL STANDARDS FOR SUMMARY DISPOSITION

In this 10 C.F.R. Part 2, Subpart L proceeding, NRC regulations require, at 10 C.F.R. § 2.1205(c), that in ruling on a motion for summary disposition we apply the standards of Subpart G. Subpart G in section 2.710(d)(2) provides that summary disposition should be granted:

if the filings in the proceeding, depositions, answers to interrogatories, and admis-

[11] *Id.* at 601. "NEPA" stands for National Environmental Policy Act, found at 42 U.S.C. 4321 *et seq.* "CAES" stands for Compressed Air Energy Storage.

[12] *See* LBP-10-5, 71 NRC 329 (2010) (ADAMS Accession No. ML1007005230) (public redacted version); Licensing Board Memorandum and Order (Ruling on New Contentions Based on the Draft Environmental Impact Statement) (Dec. 28, 2010) (unpublished) (ADAMS Accession No. ML1036205010) [hereinafter 12/28/10 Memorandum and Order].

> sions 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.

The Commission has ruled that, in applying this standard, it is appropriate for the Board to look not only to NRC regulatory and case law, but also to federal court case law on summary judgment under Rule 56 of the Federal Rules of Civil Procedure.[13] We note in this regard the U.S. Supreme Court's recognition that summary judgment, which is appropriate "upon proper showings of the lack of a genuine, triable issue of material fact," is "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"[14] The same might thus be observed about summary disposition in NRC proceedings.

The party moving for summary disposition bears the burden of demonstrating that there is no genuine issue as to any material fact and that it is entitled to a decision in its favor. As the Commission has said, "if the proponent of the motion fails to make the requisite showing, the Board must deny the motion — even if the opposing party chooses not to respond or its response is inadequate."[15] This approach is supported by case law from the District of Columbia Circuit Court of Appeals, which has observed:

> In assessing whether a party moving for summary judgment has met his or her burden, a court must view all inferences to be drawn from underlying facts in the light most favorable to the party opposing the motion. . . . In fact, "'the record must show the movant's right to [summary judgment] "with such clarity as to leave no room for controversy," and must demonstrate that his opponent "would not be entitled to [prevail] under any discernible circumstances."'" . . . . Summary judgment "'should be awarded only when the truth is quite clear.'" . . . .
>
> If the moving party meets this burden, then and only then is the nonmoving party required to proffer evidence that contradicts the moving party's showing and that proves the existence of a genuine issue of material fact. . . . If the moving party does not meet its burden, however, the nonmoving party is, without making any showing, entitled to a denial of the motion. . . . Although it is risky for a nonmoving party to fail to proffer evidence in response to the moving party's showing, such a failure does not automatically mandate granting of the motion.[16]

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[13] *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010); *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

[14] *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986).

[15] *Advanced Med. Sys.,* CLI-93-22, 38 NRC at 102.

[16] *McKinney v. Dole,* 765 F.2d 1129, 1135 (D.C. Cir. 1985). We note the Supreme Court's ruling in

(Continued)

If, considering only the moving party's support for its motion, we determine that it has met its burden, we then look to whether an opponent of the motion has overcome the movant's case by showing a genuine dispute on a material issue of fact. We note in this regard the following recent statements of the Commission:

> When a motion for summary disposition is made and supported as described in our regulations, "a party opposing the motion may not rest upon [ ] mere allegations or denials," but must state "specific facts showing that there is a genuine issue of fact" for hearing. It is not sufficient, however, for there merely to be the existence of "*some* alleged factual dispute between the parties, for "the requirement is that there be no *genuine* issue of *material* fact." "Only disputes over facts that might affect the outcome" of a proceeding would preclude summary disposition. "Factual disputes that are . . . unnecessary will not be counted."
>
> . . . . At issue is not whether evidence "unmistakably favors one side or the other," but whether "there is sufficient evidence favoring the nonmoving party" for a reasonable trier of fact to find in favor of that party. If the evidence in favor of the nonmoving party is "merely colorable" or "not significantly probative," summary disposition may be granted.[17]

Thus, if the question is a close one we must, in considering the motion opponent's submission, carefully ascertain whether any factual disputes asserted are genuine and relate to a material issue or issues, i.e., issues that would affect the outcome of the proceeding under relevant substantive law.[18] If the opposing party fails to meet this standard, *and* the moving party has successfully shown that there is no genuine dispute on a material issue of fact and that it is entitled to a decision as a matter of law, then we must grant the motion.[19] Any doubt as to the existence of a genuine issue of material fact is, however, resolved against the moving party.[20]

Celotex that, when the issue on which summary judgment is sought is one on which the nonmoving party bears the burden of proof, the "burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 325. In this proceeding, however, the Applicant of course bears the burden of proof on all issues admitted for hearing. *See, e.g. Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-12, 61 NRC 319, 326, *aff'd,* CLI-05-19, 62 NRC 403 (2005) ("While an applicant has the ultimate burden of proof on any issues upon which a hearing is held, hearings are held on only those issues that an intervenor brings to the fore.").

[17] *Pilgrim,* CLI-10-11, 71 NRC at 287 (quoting 10 C.F.R. § 2.710(b), (d)(2); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-52 (1986) (noting emphasis in original)).

[18] *Liberty Lobby,* 477 U.S. at 248.

[19] *See also Advanced Med. Sys.,* 38 NRC at 102 ("[I]f the movant makes a proper showing for summary disposition, and if the party opposing the motion does not show that a genuine issue of material fact exists, the Board may summarily dispose of all arguments on the basis of the pleadings.").

[20] *Id.*

In other words, we must in evaluating the motion and responses to it look at *whether "the Applicant has . . . considered the feasibility under NEPA of an alternative consisting of a combination of solar and wind energy, energy storage methods including CAES and molten salt storage, and natural gas supplementation, to produce baseload power, with specific regard to" the four subparts of Alternatives Contention A,* as stated above.[21] And we must look at whether Applicant has considered this sufficiently to leave no genuine issue of material fact remaining for adjudication in this proceeding, and to show that it is entitled to a decision in its favor as a matter of law.[22] Of course, as we discussed in admitting Alternatives Contention A, in considering this question we are governed by NEPA and related case law, and NEPA's "rule of reason."[23]

With these principles in mind, we turn now to Luminant's Motion, responses to it, and our analysis and ruling on it.

III. LUMINANT'S MOTION

Luminant contends that it demonstrates in its motion and the support therefor that "no genuine issue of material fact exists regarding (1) the feasibility and availability of the four-part combination of solar, wind, energy storage, and natural gas supplementation to generate baseload power; and (2) the environmental impacts of the four-part combination, accounting for the possibility of overlapping land uses."[24] It argues that "the undisputed material facts show" that:

> (1) Because natural gas is developed, proven, and available for producing baseload power, combinations involving natural gas (including the four-part combination that is the subject of Alternatives Contention A) are also developed, proven, and available for producing baseload power, provided that natural gas supplies the majority of the electricity. Furthermore, because wind, solar, energy storage, and natural gas are each proven and available means for generating electricity, a four-part combination involving wind, solar, energy storage, and natural gas is a feasible and available

[21] *See supra* text accompanying note 11 (emphasis added).

[22] We note that it might theoretically be argued that essentially any "consideration" (by Applicant or by the NRC Staff in the DEIS) would moot the contention at issue, and note the Staff's argument that in fact the contention at issue is moot. *See* Staff Response at 7-10. We find it appropriate, however, to address first the substance of Applicant's Motion, by looking to how — and how well, in the sense of demonstrating that no genuine dispute exists on any material fact and that it is entitled to judgment in its favor as a matter of law — Applicant in its Motion and supporting documents has considered the multiple substantive issues contained within the contention. Our analysis of the substance of Applicant's Motion and responses to the same is found in Section VI.A of this Memorandum; we address the Staff's mootness argument in Section VI.B.

[23] *See* LBP-10-10, 71 NRC at 580-88.

[24] Motion at 12-13 (footnote omitted).

> method for producing baseload power in Texas, even if natural gas does not supply the majority of the electricity. However, such a combination does not exist and has not been proven for producing baseload power.
>
> (2) Combinations of wind and solar power with storage, supplemented with natural gas are not environmentally preferable to CPNPP Units 3 and 4, even assuming overlapping land uses.[25]

Applicant argues that, "[b]ased upon these undisputed facts, Luminant is entitled to judgment as a matter of law," adding that "Issue (d) in Alternatives Contention A regarding the costs of solar power is not relevant or material, given that the four-part combination is not environmentally preferable to CPNPP Units 3 and 4."[26]

Applicant includes in its Motion a section entitled "Uncontested Facts Regarding Proposed CPNPP Units 3 and 4," which begins with the statement that the "Intervenors have not contested the location, purpose, capacity, or the significance level of the environmental impacts of CPNPP Units 3 and 4 as described in the ER."[27] In this section Applicant recounts these impacts, noting with regard to land use that, of the 7950 acres of the present Comanche site, the "total area to be disturbed during construction of CPNPP Units 3 and 4 is 675 acres, including permanent structures, the blowdown treatment facility area, and construction laydown areas."[28] Further, the purpose of the new units is "to operate as an independent merchant baseload plant," which would produce power to be sold in the "Electric Reliability Council of Texas ('ERCOT') wholesale market."[29] Each unit would have a "net electrical output of approximately 1600 electric megawatts ('MWe')" and, "[b]ased upon a capacity factor of 93% . . . will have a combined average annual energy output of approximately 25,500,000 megawatt-hours ('MWH')."[30]

In the same "Uncontested Facts" section, Applicant makes the following statements about the environmental impacts of the new proposed units:

> The adverse environmental impacts of CPNPP Units 3 and 4 upon aesthetics, waste management, environmental justice, historic and cultural resources, air quality, and

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[25] *Id.* at 13.

[26] *Id.*

[27] *Id.* at 14.

[28] *Id.*

[29] *Id.* at 14. According to the ER, and as Intervenors point out, ERCOT is a "membership-based, not-for-profit corporation, overseen by the [Texas Public Utility Commission], that manages the flow of electric power, ensures transmission reliability, and serves as the central hub for retail transactions." ER at 8.1-6; Intervenors' Response at 2.

[30] Motion at 14.

> human health each will be SMALL. The adverse environmental impacts of CPNPP Units 3 and 4 upon land use, water use and quality, and ecological resources may be MODERATE. Living organisms in and around CPNPP Units 3 and 4 would be exposed to low-levels of radiation and radiological effluents. Exposure from liquid pathways, gaseous pathways, or direct radiation from the station operation would be within the limits specified by NRC and EPA regulations. Accordingly, human health impacts and environmental impacts from radiological effluents from CPNPP Units 3 and 4 would be SMALL. Similarly, the risk-based radiological impacts of accidents at CPNPP Units 3 and 4 will be SMALL.[31]

Applicant cites various parts of its ER and the NRC Staff's Draft Environmental Impact Statement (DEIS)[32] in support of the preceding statement.[33] Applicant also provides, as a backdrop for both this and parts of its Statement of Material Facts, a summary explanation of the significance levels of environmental impacts that are used, which are taken from a table appended to certain NRC environmental regulations relating to license renewal of power plants.[34] A footnote to this table refers to the significance levels of impacts; indicates that "[u]nless the significance level is identified as beneficial, the impact is adverse, or in the case of 'small,' may be negligible"; and further provides the following "definitions of significance":

> SMALL — For the issue, environmental effects are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute of the resource. For the purposes of assessing radiological impacts, the Commission has concluded that those impacts that do not exceed permissible levels in the Commission's regulations are considered small as the term is used in this table.
>
> MODERATE — For the issue, environmental effects are sufficient to alter noticeably, but not to destabilize, important attributes of the resource.
>
> LARGE — For the issue, environmental effects are clearly noticeable and are sufficient to destabilize important attributes of the resource.[35]

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[31] *Id.* at 15 (footnotes omitted).

[32] NUREG-1943, "Environmental Impact Statement for the Combined Licenses (COLs) for Comanche Peak Nuclear Power Plant Units 3 and 4 — Draft Report for Comment" (Aug. 2010) (ADAMS Accession No. ML102170030) [hereinafter DEIS].

[33] Motion at 15 nn.79-84. In footnote 80 of the Motion, Applicant cites the DEIS at 9-32, and goes on the state that its own "ER determined that the adverse environmental impacts of CPNPP Units 3 and 4 upon land use, water use and quality, and ecological resources will each be SMALL. . . . Although the Intervenors did not challenge these conclusions, this Motion conservatively assumes that the characterization of these impacts in the DEIS as MODERATE is correct." *Id.* at 15 n.80 (citing ER, tbl. 9.2-1).

[34] *Id.* at 12. *See also infra* note 55.

[35] 10 C.F.R. Part 51, Subpart A, App. B, Table B-1, n.3.

Asserting that there is "No Issue of Material Fact Regarding the Feasibility and Availability of the Four-Part Combination,"[36] Applicant discusses such feasibility and availability in its Motion and goes on to assert further that there is no issue of material fact as to the environmental impacts of wind, solar, natural gas power, and energy storage taken either separately or as a four-part combination.[37] Regarding the four-part combination, Applicant states that "[t]here are many possible combinations of wind and solar power, storage, and natural gas," notes NEPA case law and Council on Environmental Quality guidance that it is not necessary to examine "every possible combination," and presents two "bounding cases" for the purpose of "illustrat[ing] the range of combinations."[38]

The first of Applicant's "bounding cases" assumes the amounts of energy provided by the largest existing wind and solar facilities (735 MWe and 354 MWe, respectively), combined with storage (assumed to be 100% efficient with no environmental impacts) and supplemented with natural gas.[39] The second case assumes:

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[36] Motion at 16.

[37] *Id.* at 22, 32; *see id.* at 16-43.

[38] *Id.* at 34 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-30, 58 NRC 454, 479 (2003); Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981); Motion, Attached Joint Affidavit of Donald R. Woodlan, John T. Conly, Ivan Zujovic, David J. Bean, John E. Forsythe, and Kevin Flanagan (Aug. 26, 2010) ¶¶ 74-75 [hereinafter Joint Affidavit]); *see id.* ¶¶ 74-80; *see also* 40 C.F.R. § 1502.14. We note, regarding the Joint Affidavit, that Mr. Woodlan is the Manager of Nuclear Regulatory Affairs NuBuild for Luminant, has over 35 years' experience in the commercial nuclear industry, and has an M.S. in Electrical Engineering. Mr. Conly is Luminant's COL Application Project Manager, also has over 35 years' experience in the nuclear industry, and has a B.S. in Electrical Engineering. Mr. Zujovic is a Lead Engineer for Enercon Services, Inc. (apparently a contractor that assisted in the preparation of the Application at issue, including the ER), and the lead author of the Application section on alternative energy sources; he has over 13 years' experience in "process evaluation and engineering, remediation design, site assessment, and environmental compliance and permitting," and is a Florida-licensed Professional Engineer with a B.S.E. and M.S. in chemical engineering. Mr. Bean is a Senior Technical Specialist with Enercon Services who provides technical and environmental support for the preparation of COL applications; he has over 33 years' experience in the environmental industry, a B.S. in biology, and an M.S. in zoology. Mr. Forsythe is a Project Director for Enercon with more than 20 years' experience in environmental planning projects and environmental compliance studies, a B.S. in Environmental Studies and Planning, and a Master's in City and Regional Planning. Mr. Flanagan is a Senior Project Manager for Enercon with over 20 years' experience performing geological, hydrogeological, and environmental evaluations, and B.S. and M.S. degrees in geology. Joint Affidavit ¶¶ 1-18.

[39] Motion at 34. In this case Applicant assumes a "conservative capacity factor for a wind facility in Texas of 55% (which is the maximum seasonal capacity factor for a wind facility in Texas) and no energy loss during storage and conversion," which would result in the wind/CAES portion of the

(Continued)

> the use of a wind plant and CAES facility with a nameplate capacity of 3200 MWe, a solar power and molten salt storage facility with a nameplate capacity of 3200 MWe, and a natural-gas fired plant that supplies the difference between available energy from both wind and solar and the total energy required, i.e. the energy that would be generated annually by CPNPP Units 3 and 4. Again, the amount and type of storage in this Bounding Case are not material since the Bounding Case assumes that the storage is 100% efficient and has no environmental impacts.[40]

Applicant discusses in its Motion the environmental impacts of both cases,[41] and summarizes the impacts in a table taken from the Joint Affidavit of its experts.[42] This table provides:

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combination generating "approximately 3,600,000 MWh annually. *Id.* at 34-35. Further, according to Applicant, "[b]ased upon maximum capacity factor for a solar facility (32%) and no energy loss during energy storage and conversion, the solar power and molten salt storage facility portion of the combination would generate approximately 990,000 MWh annually." *Id.* at 35. This leads Applicant to the conclusion that "[n]atural gas would be used to provide energy in sufficient quantity to supply the difference between the annual energy production of CPNPP Units 3 and 4 (25,500,000 MWh) and the energy produced by the combination of wind, CAES, solar, and molten salt storage." *Id.* Thus, Applicant states, "natural gas would provide approximately 21,000,000 MWh of electricity per year, requiring a 2800-MWe natural-gas fired plant (assuming an 85% capacity factor)." *Id.* Applicant based these assumptions on facts stated in its experts' Joint Affidavit, *id.* at 34-35 nn.201-204 (citing Joint Affidavit ¶ 75), and also notes that bounding case 1 is "similar to the combination evaluated in the DEIS, which assumed 650 net MWe of wind with storage and 330 net MWe of solar with storage, with the remaining energy predominately supplied by natural gas." Motion at 34 (citing DEIS at 9-28 to 9-29).

[40] *Id.* at 38 (citing Joint Affidavit ¶ 76). In this case Applicant assumes, as with the first case, "a conservative capacity factor for a wind facility in Texas of 55% . . . and no energy loss during storage and conversion." Motion at 38. Under these assumptions, Applicant states that the "combined wind and CAES facility would generate approximately 15,500,000 MWh annually," and that, "[b]ased upon the maximum capacity factor for a solar facility (32%) and no energy loss during energy storage and conversion, the combined solar power and molten salt storage facility would generate approximately 9,000,000 MWh annually." *Id.* Further, "[n]atural gas would be used to provide energy in sufficient quantity to supply the difference between the annual energy production of CPNPP Units 3 and 4 (25,500,000 MWh) and the energy produced by the combination of wind, CAES, solar, and molten salt storage," and thus "natural gas would need to provide approximately 1,000,000 MWh of electricity per year, requiring approximately one 135-MWe natural-gas fired plant (assuming an 85% capacity factor)." *Id.*

[41] *Id.* at 35-37, 39-41.

[42] *Id.* at 40-42; *see* Joint Affidavit ¶ 80.

Category	Nuclear	Bounding Case 1	Bounding Case 2
Air Quality	SMALL	SMALL to MODERATE	SMALL
Land Use	MODERATE	LARGE	LARGE
Ecology	MODERATE	MODERATE	MODERATE
Water Use and Quality	MODERATE	MODERATE	SMALL to MODERATE
Waste Management	SMALL	SMALL	SMALL
Radiological Impacts	SMALL	SMALL	SMALL
Human Health	SMALL	SMALL	SMALL
Socioeconomic	MODERATE (Beneficial)	MODERATE (Beneficial)	MODERATE (Beneficial)
Aesthetics	SMALL	LARGE	LARGE
Historic and Cultural Resources	SMALL	SMALL	SMALL
Environmental Justice	SMALL	SMALL	SMALL[43]

Applicant supports its Motion with a Statement of Material Facts,[44] which includes sections on the feasibility of the four-part combination, the environmental impacts of wind and solar power as well as of natural gas alone, energy storage, overlapping land uses, and the relative environmental impacts of the four-part combination as compared to the proposed new Comanche Peak Units 3 and 4.[45] The Statement is supported with specific and detailed citations to the Joint Affidavit, Applicant's ER (including a December 2009 update that created a new section, section 9.2.2.11[46]), and the NRC Staff's August 2010 DEIS.

In the first section of its Statement, Applicant states among other things that both wind and solar power are "developed and proven" technologies used in the ERCOT area, most of the generation capacities of which are in western Texas and the western part of the ERCOT region, but that neither used alone is capable

[43] Motion at 42; Joint Affidavit ¶ 80. In the table, the radiological impacts for the bounding cases are assumed to be zero. *Id.*; Motion at 42 n.233. Also, Applicant points out that the table assumes the beneficial socioeconomic impacts of CPNPP Units 3 and 4 will be moderate, to be conservative, in contrast to the DEIS assignment of large beneficial socioeconomic impacts. Motion at 42 n.234; Joint Affidavit ¶ 80.

[44] Motion, Attached Statement of Material Facts on Which There Is No Genuine Issue to Be Heard (Aug. 26, 2010) [hereinafter Luminant Statement or Statement].

[45] *Id.* at 2-14.

[46] *See* ER Update.

of producing baseload power.[47] Applicant goes into some detail in this section about the capacities of a number of installed and in-development projects.[48] In the first section Applicant also states that, while pumped hydropower storage is not available in the ERCOT area, both compressed air energy storage and molten salt thermal storage are promising storage mechanisms that exist; that several combined renewable energy and CAES projects are under development; and that combined solar-molten salt storage plants have been proposed.[49]

Applicant recognizes that the four-part combination at issue is "developed, proven and available (i.e., reasonable) for producing baseload power, provided that natural gas supplies the majority of the electricity."[50] Further, Applicant indicates, while a four-part combination of wind, solar, energy storage, and supplemental natural gas (not producing the majority of the electricity) does not currently exist anywhere in the world, it is a "theoretically feasible and available method for producing baseload power in Texas."[51] However, according to Applicant's Statement,

> A four-part combination involving wind, solar, and natural gas, in which natural gas does not supply the majority of the electricity, does not exist anywhere in the world.[52]

In addition:

> If the largest wind, solar, CAES, and molten salt storage facilities were combined to produce baseload power, their total capacity would be less than 1100 MWe. Given the capacity factors of the individual elements, the combination would be able to generate less than half of the energy to be generated by CPNPP Units 3 and 4 [which, according to the ER Introduction at 1.0, will each have "a net electrical output of approximately 1600 MWe," or a total of 3200 MWe].[53]

Further, according to Applicant:

> Utilities and merchant generators use proven technologies for large generating facil-

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[47] Luminant Statement ¶¶ I.A.1-4, I.B.1-4, at 2-3.

[48] *See id.*

[49] *Id.* ¶¶ I.C.1-5, at 3-4.

[50] *Id.* ¶ I.F.1, at 4-5.

[51] *Id.* ¶ I.F.2, at 5. We note that in its Motion, Applicant omits the qualifier, "theoretically," and states that "the four-part combination (with natural gas producing less than half of the electrical energy) is technologically feasible and available, but is not proven for generating baseload power." Motion at 21; *see also supra* text accompanying note 25.

[52] Luminant Statement ¶ I.F.3, at 5.

[53] *Id.* ¶ I.F.5, at 5.

ities. Before committing to a technology (including a combination of technologies) for a large generating facility, it is typical and prudent for a utility or merchant generator to establish that the technology has been demonstrated at an existing commercial generating facility, or to develop a pilot project or a small-scale facility to prove that the technology works and is cost-effective.[54]

The second section of Applicant's Statement concerns the environmental impacts of wind, solar, and natural gas power. To illustrate its level of detail, we find it appropriate to quote it in full:

A. Wind Power

1. Wind turbines vary in size, typically from about 1.5 to 2.5 MWe (and some are larger). The height of towers varies, typically from 200 to 300 feet tall.

2. A wind-power project of nameplate capacity comparable to the proposed CPNPP Units 3 and 4 would require approximately 1600 above-ground towers, assuming that each tower supported a 2-MWe wind turbine.

3. The 735-MWe Horse Hollow Wind Energy Center utilizes a total land area of 47,000 acres.

4. Wind turbines must be sufficiently spaced to maximize capture of wind energy. Typically, 100 acres of unobstructed area is needed around each wind turbine, of which a quarter to half acre is needed for actual placement and support of the wind tower.

5. About 2 to 5% of the land needed for a wind farm is used for towers, roads, and support facilities. The remaining land can be used for other purposes, such as agriculture and ranching, provided that the use does not interfere with wind flow. However, a wind facility would preclude a number of land uses, particularly uses requiring above-ground structures that could interfere with, or disrupt, the wind flow patterns driving the turbines.

6. A wind facility with a capacity equivalent to CPNPP Units 3 and 4 would cover approximately 204,000 acres of land, of which approximately 4100 to 10,200 acres would be occupied by wind turbines, support facilities, and roads.

7. Operation of wind facilities comparable in capacity to CPNPP Units 3 and 4 likely would necessitate construction and operation of new transmission lines from western Texas (where most of the wind potential is located) to eastern Texas (where most of the demand is located). Construction and operation of new transmission lines likely would entail additional land use and terrestrial impacts.

8. Potential adverse impacts of wind power on water quality, air quality, human health, and waste management are SMALL.

9. A wind power facility with a capacity of 3200 MWe would have a LARGE impact on land use based upon the following considerations:

a. The total amount of land for the facility would be approximately 204,000 acres.

[54] *Id.* ¶ I.F.6, at 5 (footnote omitted).

b. About 2 to 5% of the total amount of land would be occupied by the wind towers, roads, and support facilities for the wind farm, or approximately 4100 acres to 10,200 acres. This land would not be available for other uses.
c. Some compatible land uses, such as agriculture and ranching, could utilize the land not occupied by the wind towers, roads, and support facilities.
d. A number of land uses, particularly uses requiring above-ground structures that could interfere with, or disrupt, the wind flow patterns driving the turbines, would not be compatible for land not occupied by the wind towers, roads, and support facilities.

10. A wind power facility with a capacity of 3200 MWe likely would have MODERATE impacts on ecological resources, protected species, and cultural resources, depending upon the location of the facility, due to the large amounts of land that would be disturbed for such a facility. Additionally, depending on location, some wind farms have caused bird kills.

11. A wind power facility with a capacity of 3200 MWe would have a LARGE adverse impact on aesthetics due to the visibility of a large number of the tall towers and blades spread over hundreds of thousands of acres.

12. A wind power facility with a capacity of 3200 MWe would have a MODERATE beneficial impact on socioeconomics.

B. Solar Power

1. There are two types of solar plants: solar thermal and photovoltaic cells. Solar thermal power systems convert sunlight into electricity using heat as an intermediate step. Photovoltaic cells convert sunlight directly into electricity using semiconducting materials.

2. Operation of solar facilities with a capacity of 3200 MWe likely would necessitate construction and operation of new transmission lines from western Texas (where most of the solar potential is located) to eastern Texas (where most of the demand is located).

3. The area of land required for a solar plant depends on the available solar insolation and type of plant. Current solar power plants utilize from approximately 3.8 to 10 acres per MWe.

4. Based on the 3.8 to 10 acre per MWe, a 354-MWe solar facility would utilize approximately 1350 to 3500 acres of land.

5. A solar plant with a capacity equivalent to CPNPP Units 3 and 4 would require approximately 38,000 acres.

6. The potential adverse impacts of solar power on air quality, human health, and waste management would be SMALL.

7. The potential adverse impacts of solar power on water quality would be SMALL for a facility using photovoltaics or dry cooling.

8. A 3200-MWe solar thermal facility with wet cooling would require roughly the same amount of water as CPNPP Units 3 and 4. Such a facility likely would cause MODERATE adverse impacts on water use and quality.

9. A solar power facility with a capacity of 3200 MWe would have a LARGE

adverse impact on land use and aesthetics due to the large number of solar panels or reflectors covering tens of thousands of acres required for the solar facility.

10. A solar power facility with a capacity of 3200 MWe likely would have MODERATE impacts on ecological resources, protected species, and cultural resources, depending upon the location of the facility, due to the large amounts of land that would be disturbed for such a facility.

11. A solar facility with a capacity of 3200 MWe would have a MODERATE beneficial impact on socioeconomics due to job creation.

C. Natural Gas

1. A 3200 MWe natural gas-fired alternative to CPNPP Units 3 and 4 would have SMALL to MODERATE impacts on air quality due to the following emissions:

SO_x = 253 tons per year ("Tpy")
NO_x = 2676 Tpy
CO = 1115 Tpy
PM = 142 Tpy (all particulates are PM2.5)
CO_2 = 8.2 million Tpy

These air quality impacts are substantially greater than those caused by nuclear generation.

2. Land-use impacts for construction and operation of a 3200-MWe natural gas-fired plant would be MODERATE due to the following:

a. A 3200-MWe natural gas-fired plant would require approximately 350 acres, based on the NUREG-1437 factor of 0.11 acre/MWe as the land use requirement for gas-fired plants.
b. A 3200-MWe natural gas-fired plant at the proposed CPNPP Units 3 and 4 site would require approximately 11,500 acres of additional land for natural gas wells, collection stations and pipelines, based on the NUREG-1437 factor of 3.6 acres/MWe as the additional land use requirement for gas-fired plants.

3. Overall, a 3200-MWe natural-gas fired plant would cause MODERATE adverse impacts to land use, water use and quality, and ecology.

4. A natural-gas fired plant likely would produce SMALL adverse impacts on waste management, human health, aesthetics, environmental justice, and historical and cultural resources.[55]

Regarding CAES, Applicant states that this involves "using compressors powered by the generation source to pump air into a storage facility, such as an

[55] Luminant Statement at 6-10 (citations omitted). Applicant explains at the beginning of its Statement that its use of the SMALL, MODERATE, and LARGE environmental effects classifications is taken from significance levels established by the NRC. *Id.* at 1; *see supra* text accompanying note 35.

underground cavern."[56] The compressed air is then "used in combination with a heat source, such as natural gas, to drive turbines and generate electricity"; some energy is lost during the storage and conversion process.[57] If natural gas is the heat source, between one-third and one-half of that needed in a natural gas plant is required for generating electricity from the CAES, according to Applicant, and both existing CAES facilities use natural gas as the heat source.[58] This use of natural gas will cause air quality impacts, and there are also possible water quality and waste management impacts depending on the geological formation that is used.[59]

Applicant concludes its Statement of Material Facts as follows:

> Relative to CPNPP Units 3 and 4, four-part combinations of wind, solar, energy storage, and natural gas that would produce an equivalent amount of baseload power would have greater environmental impacts in the areas of land use and aesthetics; and would possibly have greater environmental impacts in the area of air quality (depending upon the amount of natural gas used).[60]

Applicant in its Motion argues, regarding subissue (d) of Alternatives Contention A,[61] that "[t]he extent to which operation and maintenance costs of a solar facility may present a comparative benefit is immaterial since the four-part combination is not environmentally preferable to CPNPP Units 3 and 4."[62]

IV. INTERVENORS' RESPONSE TO MOTION

Intervenors respond to Applicant's motion by among other things arguing that it is merely a "rehash of points and arguments raised [in Applicant's] objections to the admission of Contention 18 and Alternatives Contention A," providing "little new information," and that the "new information, such as the bounding cases, are defective both methodologically and analytically."[63] They rely on an argument that the four-part combination exists "in the makeup of the ERCOT grid, presently."[64] They assert:

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[56] *Id.* ¶ III.A.1, at 10.

[57] *Id.* at 11.

[58] *Id.* ¶¶ III.A.2, III.A.3, at 11.

[59] *Id.* ¶¶ III.A.4, III.A.8, at 11-12.

[60] *Id.* ¶ V.A, at 13-14.

[61] *See supra* text accompanying note 11.

[62] Motion at 44; *see id.* (citing *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 23-24 (2010)).

[63] Intervenors' Response at 1-2.

[64] *Id.* at 5; *see id.* at 3-5.

> The Applicant's argument hinges on whether the four part alternative is proven and exists. But the material legal question is whether the four part alternative is feasible, and it is. Based the [sic] foregoing the Applicant is not entitled to summary disposition on the issue of whether the four part alternative exists because it has conceded that it is feasible.[65]

Intervenors further urge, in their legal argument, that the proposed new Comanche Peak units "are not more environmentally preferable [sic] than combinations of alternatives,"[66] that aesthetic impacts may vary according to individual location,[67] that Applicant's comparison of water-related impacts is "imprecise and inconsistent,"[68] that certain advantages of solar are not considered by Applicant,[69] and that Applicant did not take into account that "the cumulative effects of a nuclear plant include the permanent loss of land for waste disposal."[70]

Intervenors provide little support in the way of facts, however, for their arguments and allegations. In their actual Response to Applicant's Statement of Material Fact, they contest only five of its provisions.[71] First, they challenge Applicant's statement that "[p]umped hydropower storage is not available in the ERCOT area,"[72] averring that this is not stated in the citation provided for the statement.[73] (Applicant at oral argument responded with citations to parts of its ER and ER Update.[74]) Next, Intervenors challenge Applicant's statement that "[s]everal combined renewable energy and CAES projects are under development,"[75] urging the following:

> The Affiants at ¶ 53 state that the Luminant-Shell wind CAES project is not for baseload generation with no citation to supporting documentation or other evidence. Moreover, the Affiants do not state that the project is technically unable to provide

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[65] *Id.* at 6.

[66] *Id.*

[67] *Id.* at 7 (citing *Utahans for Better Transportation v. U.S. Department of Transportation,* 305 F.3d 1152, 1172 (10th Cir. 2002); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-471, 7 NRC 477, 504-08 (1978)).

[68] *Id.* at 9. Regarding Intervenors' arguments about water usage, at oral argument Applicant's counsel pointed out that Intervenors' assertion that the proposed new units will "consume" 1,317,720 gallons per minute, *see id.,* was incorrect, as the figure is for "system flow rate, not a water consumption rate." Transcript (Tr.) at 1018.

[69] Intervenors' Response at 10-11.

[70] *Id.* at 8 (citing ER, Table 10.1-2, at 10.1-22).

[71] *See id.,* Attached Response to Applicant's Statement of Facts Pursuant to 10 C.F.R. 2.710(a) (Sept. 15, 2010) [hereinafter Intervenors' Response Statement].

[72] *See* Statement at 3.

[73] Intervenors' Response Statement at 1.

[74] Tr. at 1030 (citing ER at 9.2-12, 9.2-13), 1037 (citing ER Update at 9.2.2.11.2.1).

[75] *See* Statement at 3.

> dispatchable power at competitive costs. Therefore, this statement of fact is controverted.[76]

Further, Intevenors controvert Applicant's statement that "[m]ost of the available wind and solar power in Texas is in the western portion of the state" and that "[t]here currently is transmission congestion in the ERCOT region,"[77] stating as follows:

> CAES facilitates transmission and provides ancilliary [sic] that would help to relieve congestion. Dr. Ray Dean Report (II), p.*, attached. To the extent Applicant has failed to acknowledge such this statement of fact is controverted as incomplete.[78]

Intervenors also challenge Applicant's statement that "[w]ith a few exceptions, wind, solar, and natural gas have been operated as independent projects rather than as part of a combination,"[79] arguing that "[t]his statement is inherently misleading in light of the fact that there are combinations of various generating modes on ERCOT's system at any given time."[80] Finally, Intervenors contest Applicant's statement that, "[i]f natural gas is used as the heat source for CAES, the natural gas usage for generating electricity from CAES is between one third and one half that needed to generate the same amount of electricity at a natural gas plant,"[81] asserting that the "average output of a CAES plant is lower than its maximum output and the gas consumption is only approximately 10% of a comparably sized gas plant."[82]

Intervenors contest neither any part of the environmental impacts section of Applicant's Statement, nor the final comparison in Applicant's Statement of the environmental effects of the two new proposed units and the four-part combination.[83] They do, however, provide comments by Ray Dean, Ph.D., critiquing various parts of Applicant's Motion.[84]

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[76] Intervenors' Response Statement at 1.

[77] *See* Statement at 4.

[78] Intervenors' Response Statement at 1. At oral argument, Intervenors clarified that the word "services" was intended to be included after the word "ancilliary" (which we take as intended to be "ancillary") and that the reference to Dr. Dean's report was to page 4 of Dr. Ray Dean's September 15, 2010, Report. Tr. at 1032-33.

[79] Statement at 5.

[80] Intervenors' Response Statement at 2. Intervenors make similar arguments in their Response. Intervenors' Response at 3-5; *see also* Tr. at 1014, 1024, 1034-35.

[81] *See* Statement at 11.

[82] Intervenors' Response Statement at 2.

[83] *See* Intervenors' Response Statement.

[84] Intervenors' Response, Attached Response to Luminant's [Motion], Ray Dean (Sept. 15, 2010)

(Continued)

Dr. Dean in two reports submitted with Intervenors' Response[85] addresses land use relating to CAES,[86] and critiques in a general way Applicant's "bounding cases," touching on issues including: (1) environmental impacts of renewable energy alternatives; (2) how proximity to water affects the value of land; (3) feasibility of placing wind and solar facilities in desert areas; (4) land location and quality, and their relation to land values; (5) placement of wind turbines as it affects land use impacts; (6) the current greater competitiveness of wind power over solar power and the impact of this; (7) the ability of solar power to replace natural gas consumption in CAES; and (8) the benefits of placing solar collectors over already-developed land and the related ability to reduce (a) peak currents in distribution and transmission systems, (b) transmission problems, and (c) land use impacts.[87]

In oral argument, Intervenors' Counsel further urged among other things that Applicant had not met its burden of showing no genuine dispute on a material issue of fact,[88] because it did not consider aesthetic impacts on a location-specific basis,[89] and because of an asserted great difference between the water use and quality impacts of nuclear compared to a combination alternative.[90] Counsel, however, at one point conceded that issues (a), (b), and (c) of Alternatives Contention A were not in dispute. In response to a question on what would remain for hearing on the contention, he stated, "It appears that we have agreed that there is really no contest on parts A, B, and C. Part D as to the reasonableness, there does appear to be a contested issue of fact in that regard."[91] Counsel argued that if

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[hereinafter Dean 9/15/10 Report]; Attached Raymond H. Dean, Ph.D., Comments Regarding Luminant's Revision to the Comanche Peak Nuclear Power Plant, Units 3 & 4 COL Application Part 3 — Environmental Report (undated) [hereinafter Dean Undated Report]; *see also* Affidavit of Raymond Dean, Ph.D. (Sept. 24, 2010), in which Dr. Dean attests that the two reports both "contain information and opinions that are true and correct to the best of [his] personal and professional knowledge." According to his Resume, Dr. Dean is Professor Emeritus, Electrical Engineering and Computer Science, University of Kansas; has an M.S. in nuclear reactor design, control theory and acoustics, and a Ph.D. in plasma physics and solid-state devices; and pre-retirement was a Registered Professional Engineer. In addition, while he was at the University of Kansas, he was a faculty advisor for a team of students who "designed, built, and operated a small concentrating solar power system for the 1994 'Solar Two Challenge,'" which won second place in a contest "conducted at the site of the Solar II facility near Barstow, CA," and sponsored by the Department of Energy and several utilities. *See* Resume of Raymond H. Dean (Jan. 4, 2010).

[85] *See* Dean 9/15/2010 Report; Dean Undated Report.

[86] Dean Undated Report at 5-7.

[87] Dean 9/15/2010 Report at 1-6.

[88] *See* Tr. at 972.

[89] *See, e.g.,* Tr. at 979-80, 988-93.

[90] *See* Tr. at 995-98.

[91] Tr. at 1028.

Applicant's impacts comparison table[92] were modified to make the water impacts of both combination bounding cases "small," this "would begin again to tip the balance in favor of renewables."[93] Further, he urged:

> I think that we have shown that it is preferable . . . it's preferable on the aesthetics for the reasons we have argued and as a legal matter they've not carried their burden in that regard. And in terms of the more specific environmental piece, in terms of water usage, again we think that their table is not adequate to prove that the four-part alternative is not environmentally preferable.[94]

V. NRC STAFF'S RESPONSE TO MOTION; MOOTNESS ARGUMENTS

The NRC Staff supports Applicant's Motion and also argues that Contention 18 and Alternatives Contention A are moot, based on the Staff's consideration in the DEIS of a combination alternative including solar and wind power, energy storage, and natural gas supplementation.[95]

In the DEIS, the Staff posits that "while individual alternatives may not be economically or technologically competitive for baseload power generation, it is conceivable that a combination of alternatives might be cost effective as an alternative to the 3200 MW(e) that would be generated from the new units."[96] The Staff's

> review team considered a spectrum of energy alternatives that were reasonable for the ERCOT region and developed a combination of alternatives comprised of 650 net MW(e) wind power generation with storage (for example, CAES involving caverns or salt domes in Texas); 430 net MW(e) biomass, municipal solid waste, geothermal, and solar with energy storage; and four 530 MW(e) [2120 net MW(e)] natural-gas-fired, combined-cycle generating units using closed-cycle cooling with cooling towers at the CPNPP site.[97]

The Staff analyzed the availability and feasibility of this combination,[98] noted that a "portion of the land required may be available for other compatible uses such

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[92] *See supra* text accompanying note 43.
[93] Tr. at 996.
[94] Tr. at 1028-29.
[95] Staff Response at 2, 8-10.
[96] DEIS at 9-28.
[97] *Id.*
[98] *Id.* at 9-28 to 9-30.

as agriculture,"[99] but ultimately concluded that the combination alternative would involve greater land use,[100] and that "there are no environmentally preferable, technically reasonable alternatives to baseload nuclear power."[101]

Intervenors challenge the mootness argument, contending that there remain issues of site-specific aesthetic impacts and the practicability of the alternatives.[102] Staff responds, arguing among other things that Intervenors did not include site-specific aesthetic impacts in their alternatives contention, and in any event that this was considered in the DEIS and the ER.[103] Applicant responds that Intervenors' arguments are supported only by general authority that does not support the proposition that there is any "continuing controversy related to (1) the site-specific aesthetic impacts of the four-part combination of wind, solar, storage, and natural gas supplementation; and (2) the practicability of the four-part combination."[104] Among other things, Luminant points out that the DEIS addresses aesthetic impacts of the Staff's examined combination; that Luminant addresses the characteristics of a site in west Texas for the four-part combination it evaluated, and compared these to the aesthetic impacts of the proposed new Comanche Peak units; and that Intervenors did not contest Applicant's Statement of Material Fact V.A,[105] in which it addressed a comparison between the environmental impacts of the proposed new units and the four-part combination, including aesthetic impacts.[106] In addition, according to Applicant, issues relating to the reasonableness of the four-part combination, including practicability, are also moot, based on the DEIS's discussion of reasonableness of the combination examined therein, and Luminant's discussion on the reasonableness of the four-part combination.[107]

VI. LICENSING BOARD'S ANALYSIS AND RULING

We conclude that Applicant has shown that there exists no genuine dispute of material fact on the issues contained in Alternatives Contention A and those re-

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[99] *Id.* at 9-31.

[100] *Id.* at 9-32.

[101] *Id.*

[102] Letter from Robert V. Eye, Kauffman & Eye, to Ann Marshall Young *et al.,* Re: Mootness question from oral argument on Oct. 28, 2010 (Nov. 4, 2010); *see also* Tr. at 1007.

[103] NRC Staff Response to Intervenors' Letter on Mootness (Nov. 10, 2010) at 7-10 (citing LBP-09-17, 70 NRC at 380, 382; LBP-10-10, 71 NRC at 592, 601; ER at 9.2-9, 9.2-11; DEIS at 9-23, 9-30, 9-31; 10 C.F.R. § 2.309(f)(2)).

[104] Letter from Steven P. Frantz, Partner, Morgan, Lewis & Bockius, to Ann Marshall Young *et al.* (Nov. 11, 2010) at 1 [hereinafter Frantz Letter].

[105] *See supra* note 60 and accompanying text.

[106] Frantz Letter at 2; *see also* Tr. at 1008.

[107] Frantz Letter at 3.

maining parts of Contention 18 that are coextensive with Alternatives Contention A, and that Applicant is entitled to a favorable decision on its Motion as a matter of law. Moreover, the contentions are in any event moot. These conclusions are based on the following analysis.

A. There Is No Genuine Issue of Material Fact

First, considering Applicant's Motion and supporting Statement and Affidavit standing alone, we find that Applicant has shown that no genuine dispute exists on any material issue of fact. Its Motion, Statement of Material Facts, and supporting Joint Affidavit are detailed and extensively address all relevant issues.[108] Applicant agrees that the four-part combination at issue is developed, proven, available, and reasonable, if natural gas provides the majority of the power.[109] It also concedes that, even if natural gas does not provide the majority of power, the four-part combination is at least theoretically feasible, but points out that no such combination exists anywhere in the world.[110] It shows that a wind-solar-storage combination would produce less than half the 3200 MWe the proposed units would produce.[111] Applicant states that it is not reasonable or prudent for a utility or merchant generator to use a technology that has not been demonstrated, either at an existing commercial generating facility or in a pilot project or small-scale facility that shows it works and is cost-effective.[112] Applicant goes into detail on the environmental impacts of the four-part combination and compares these impacts to those of the proposed new units, concluding that the impacts of the combination would be greater, primarily as to land use and aesthetics.[113]

We note with regard to land use that Applicant has not quantified the amounts of land in a wind farm that might be used for overlapping purposes. However, it has not been disputed that the area involved with the new units is between 675 and 7950 acres (the latter figure being the total area of the site, including both existing and proposed new units) — much less than the undisputed figure of 204,000 acres for a 3200-MWe-capacity wind farm.[114] Even giving the Intervenors the benefit of the doubt by, for example, halving the latter figure and then very conservatively assuming that 75% of a 102,000-acre wind farm has overlapping

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[108] We note that, while we recount Applicant's bounding cases and impacts comparison table in our summary of Applicant's motion, we base our conclusions here primarily on those parts of Applicant's Statement of Material Facts that Intervenors have not responded to or controverted in any way.

[109] *See supra* text accompanying note 50.

[110] *See supra* text accompanying notes 51, 52.

[111] *See supra* text accompanying note 53.

[112] *See supra* text accompanying note 54.

[113] *See supra* text accompanying notes 55, 60; *see also* text accompanying note 43.

[114] *See supra* text accompanying notes 28, 55 (¶ A.9.a).

usage, this would still leave the remaining 25,000 acres greatly outweighing the acreage involved with the proposed new units. Thus, even further discounting Applicant's Statement of Material Facts insofar as it attributes greater impacts to the combination on aesthetics and possibly greater impacts as to air quality, the land use impacts difference is significant.

Based on the preceding, without considering Intervenors' submissions, we would conclude that Applicant has reasonably and sufficiently "considered the feasibility under NEPA of an alternative consisting of a combination of solar and wind energy, energy storage methods including CAES and molten salt storage, and natural gas supplementation, to produce baseload power," with specific regard to:

(a) the reasonable availability of the four parts of such combination for consolidation into an integrated system to produce baseload power;

(b) the feasibility of the use of such combination in the area of Texas served by the Comanche Peak plant; and

(c) the extent to which there may be efficiencies arising from overlapping uses of land for each of the four parts of the combination as well as for other reasonable purposes.[115]

Regarding subissue (d), which requires consideration, "if it is shown that such an alternative is environmentally preferable, of the extent to which operation and maintenance costs of solar in such combination may be a comparative benefit,"[116] Applicant has also demonstrated that this is immaterial because of its showing that the combination alternative is not environmentally preferable.

All material facts having been considered by Applicant, and Applicant having shown that there exists no genuine issue of material fact and that a decision in its favor is warranted as a matter of law, it is entitled to such a decision, unless Intervenors have overcome Applicant's showings with their own submissions. We look now to whether Intervenors have succeeded in doing this.

We begin by considering the only facts in Applicant's Statement of Material Facts that Intervenors do contest. First, on the availability of hydropower storage,[117] Intervenors have not shown that this is material, or indeed how it could in any way materially affect the outcome of this proceeding, whether or not it is referenced in Luminant's citation for the statement on hydropower.[118] Next, Intervenors dispute the seemingly straightforward statement that "[s]everal combined renewable energy and CAES projects are under development," by

[115] *See supra* text accompanying note 11.
[116] *See id.*
[117] *See supra* text accompanying notes 72, 73.
[118] *See id.*

challenging the authority for a statement of two of Luminant's witnesses, on Luminant's joint project with Shell to develop wind farms, that the CAES in this project is "not for the generation of baseload power."[119] However, as Applicant contended in oral argument,[120] given that what is at issue in this instance is a Luminant project, it is reasonable for its own witnesses' statement as to the purpose of the project to stand on its own, without the need for further citation — particularly given that the Affidavit statement is offered as support for the simple statement of material fact that "[s]everal combined renewable energy and CAES projects are under development."

Moving on to the transmission congestion issue — in which Applicant states that most of available wind and solar power in Texas is in west Texas, and that there is currently transmission congestion in the ERCOT region[121] — Intervenors in response state that "CAES facilitates transmission and provides ancilliary [sic] [services] that would help to relieve congestion."[122] But the only reference offered by Intervenors' Counsel at oral argument[123] for the omitted page reference for Dr. Dean's report was to the following language of Dr. Dean:

> Although there is a first-cost economic advantage in clustering wind turbines, operationally we would much rather have electrically-associated wind turbines be widely dispersed in space. That's because disbursing [sic] wind turbines smoothes their composite variation and substantially reduces the ramp rates of whatever system components compensate for their variation. This dispersion logic creates another problem for the applicant, because it blows away the argument that allows them to assign a LARGE impact to wind power in low-value locations.[124]

Although the final sentence of this quoted language would seem to be material to the environmental impacts of wind power, Intervenors did not, as noted above, contest the environmental impacts part of Luminant's Statement of Material Facts in any way. And although we do not as a result automatically discount Dr. Dean's statement, we find it to be not at all specific or sufficient to overcome Applicant's specific showings of material fact on impacts, even were we to consider it as a response to any part of Applicant's Statement as to environmental impacts.[125] Nor can it be said that Intervenors have shown in any meaningful way that

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[119] *See supra* notes 75, 76, and accompanying text; Joint Affidavit ¶ 53.

[120] Tr. at 1031.

[121] *See supra* text accompanying note 77.

[122] Intervenors' Response Statement at 1.

[123] *See* Tr. at 1032-33.

[124] Dean 9/15/2010 Report at 4. We note that the style and substance of this excerpt is consistent with the overall contents of Dr. Dean's Reports.

[125] *See supra* note 17 and accompanying text; *see also* text accompanying note 114.

different details regarding transmission congestion would change the outcome of this proceeding. Any dispute that exists is therefore immaterial.

Regarding the dispute with Applicant's statement that wind, solar, and natural gas plants have largely been "operated as independent projects rather than as part of a combination,"[126] we find Intervenors' argument that this statement is "inherently misleading in light of the fact that there are combinations of various generating modes on ERCOT's system at any given time"[127] to be disingenuous at best. Clearly, the fact that various sources of power may be coordinated on the large ERCOT grid to produce power for consumers is a very different matter than whether there are any combination "projects" that are distinguishable from the "independent projects" Applicant references.[128]

Finally, on Intervenors's dispute with Applicant's statement on the natural gas usage for generating electricity from CAES being "between one third and one half that needed to generate the same amount of electricity at a natural gas plant," with Intervenors contending that the "average output of a CAES plant is lower than its maximum output and the gas consumption is only approximately 10% of a comparably sized gas plant,"[129] we also find this not to be a material dispute, in view of the undisputed facts relating to environmental impacts that are discussed at the beginning of this analysis. Moreover, although in its Statement of Material Facts Luminant attributes a "moderate" impact of CAES on water quality and waste management ("depending upon the host geological formation"),[130] in its comparison of impacts of the four-part combination to those of the proposed new units this is not included.[131]

Even assuming that the combination alternative overall had lower water use and quality impacts, Intervenors have not shown that this would outweigh the land use imbalance in favor of the proposed new units. We note their Counsel's statements in oral argument that lowering the water impacts of any combination to "small" would "*begin . . . to tip the balance* in favor of renewables."[132] But Intervenors did not contest Applicant's indication in its table[133] that the water use and quality impacts of nuclear are "moderate" and that those of combinations would be "moderate" or "small to moderate," nor have they contested Applicant's

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[126] Statement ¶ 4 at 5.

[127] *See supra* text accompanying note 80.

[128] Also, as Applicant pointed out in oral argument, there is a question whether solar storage or CAES had at that time actually been used in Texas, which Intervenors' counsel did not contradict. Tr. at 1035.

[129] *See supra* text accompanying notes 81, 82.

[130] Statement ¶ III.A.8, at 11-12.

[131] *See supra* text accompanying note 60; *see also* text accompanying note 43.

[132] *See supra* note 93 and accompanying text (emphasis added).

[133] *See supra* text accompanying note 43.

Statement of Material Facts regarding the impacts of wind, solar, and natural gas power, or its comparison therein of impacts of alternative combinations relative to those of the proposed units.

Looking further, to the various issues raised by Intervenors in their Response in the manner of argument,[134] we also find none of these to be material issues, with the possible exception of their arguments on environmental preferability of nuclear versus renewable energy alternatives, aesthetic impacts, water use and quality impacts, and "permanent loss of land for waste disposal."[135] On none, however, including these four, have Intervenors presented any statement of facts, formal or otherwise, to show any genuine dispute with those facts presented by Applicant, in its consideration of the matters at issue in all relevant parts of Alternatives Contention A, as discussed above.

We do note the two Reports of Dr. Dean, which raise some interesting points that, if further developed, Intervenors might possibly have used in more directly and specifically attempting to controvert Applicant's Statement of Material Facts. However, these are in no way tied to specific points on environmental impacts as set forth in Applicant's Statement of Material Facts, nor do they dispute any of Applicant's Statement or other showings with any specificity, including Applicant's ultimate comparison of the environmental impacts of the four-part combination with those of the proposed new units. Dr. Dean seems to imply that the four-part combination is preferable, but does not say this explicitly.[136]

In addition, although Intervenors have made general references to differences in water usage and quality impacts that might theoretically favor a combination alternative, these are not specific at all, even overlooking the fact that Intervenors did not formally dispute any of Applicant's Statement in this regard. Thus they do not overcome Applicant's showing of no genuine dispute on a material issue of fact in this respect. Nor do they overcome or even contest Applicant's showing in its Statement of Material Facts that it is not reasonable or prudent for a utility or merchant generator to use a technology that has not been demonstrated, either at an existing commercial generating facility or in a pilot project or small-scale facility that shows it works and is cost-effective.[137]

In short, Intervenors have not overcome Applicant's showing of a lack of any

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[134] *See supra* text accompanying notes 63-70.

[135] *See supra* text accompanying notes 66-68, 70.

[136] *See* Dean 9/15/10 Report; Dean Undated Report; *see also* Tr. at 1001 (Intervenors' counsel conceded that this was not stated "flat out," but argued it was "inherent in the argument" as to water and aesthetic impacts.).

[137] We note Intervenors' statement through counsel that this is "just almost common knowledge," but that the parts of the combination have "been proven in their individual capacities" and applied in the ERCOT area. Tr. at 1023. However, for reasons stated in the text, we do not find this argument persuasive.

genuine dispute of material fact, with regard to any of Alternatives Contention A and its subparts. Their showings in their Response and related documents, in addition to being disorganized and incomplete in some instances, fail to demonstrate any genuine dispute on any material issue of fact. Even discounting their Counsel's concession that they do not successfully contest Applicant's showings on subparts (a), (b), and (c) of the contention at issue, they have failed in any way to controvert any facts relevant and material to these. And regarding subpart (d), Intervenors not only have not disputed Applicant's Statement of Material Facts, they have not otherwise in their Response to the Motion or in Dr. Dean's two Reports specifically shown or in any way explicitly even asserted either that a combination alternative is preferable, or that a combination would be equivalent in impacts to the proposed new units — the latter of which would not in any event overcome Applicant's showing that an appropriate combination is *not* environmentally preferable. It may be that future technology will produce renewable energy alternatives or combination alternatives that are environmentally preferable to nuclear and that can also produce equivalent power, but based on the record before us, this is not the case at the present time, even resolving all doubts in favor of Intervenors.

Considering, then, (1) the only facts in Applicant's Statement of Material Facts that Intervenors do contest and the manner in which they contest them, and (2) any other parts of Intervenors' submissions that even arguably contradict any of the showings that Applicant has made, we find that these do not rise to a level of materiality that would establish a genuine dispute on a material issue of fact. Our preliminary conclusion that Applicant has met its burden of showing that there exists no genuine issue as to any material fact and that it is entitled to a decision in its favor as a matter of law therefore remains our conclusion, even considering Intervenors' submissions and resolving any doubts in a light most favorable to them.

In this final regard, we find it appropriate to comment on one additional circumstance relating to Intervenors' failure to show a genuine material dispute. We note that Intervenors' Counsel at various points in the oral argument on Luminant's Motion indicated some understanding or perception on his part that Intervenors could not contest any factual matter if it was found in Applicant's ER.[138] Because the Board has not denied Intervenors any opportunity to contest any matter in this proceeding,[139] it appears that Intervenors' Counsel made his statements about essentially being prevented from contesting various facts asserted by Applicant, based on an argument of Applicant. Specifically, Applicant argued

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[138] *See, e.g.,* Tr. at 971-73, 978-80, 988-89.

[139] Although no party can be sure of succeeding in any argument, and Boards must rule on all matters in accordance with their best understanding of the law, parties always have the right to raise and contest factual assertions and legal arguments.

in its Motion that, "[b]ecause there are no admitted contentions related to the environmental impacts of CPNPP Units 3 and 4, or the information from the ER that is provided above, that information is not open to dispute in response to this Motion."[140] Applicant cited in support of this argument a Licensing Board decision in another proceeding, characterizing a relevant ruling therein as "refusing to consider new bases that were included in an answer to summary disposition motion and were outside the scope of the original contention."[141]

We note, however, that, while that Board did ultimately decline to consider certain information provided by the Intervenors in that case, it also, in addressing the argument of those Intervenors that "if an issue was first raised by the movant in a summary disposition motion . . . discussion of that issue in a response should not be stricken," stated the following:

> [A movant's] discussion does not necessarily establish that the matter is within the scope of a contention given that the movant's discussion may also be outside the scope of the contention. *Nonetheless, if a movant discusses a matter in its statement of undisputed facts, it would not be untoward for the Board to view with skepticism any later argument by that movant that a response regarding that issue is outside the scope of the contention, particularly given the onus that is placed upon an opposing party to respond to such a statement. See* 10 C.F.R. § 2.710(a) ("All material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party").[142]

We must presume that Intervenors' Counsel was aware of the quoted provision of 10 C.F.R. § 2.710(a), as well as the provision therein which *requires* a party opposing summary disposition to provide a "statement of the material facts as to which it is contended there exists a genuine issue to be heard."[143] Counsel might also have considered that, in meeting a party's obligation to controvert any facts with which the party disagrees, materiality and scope are not always clear-cut, indisputable matters. Indeed, if a movant for summary disposition puts forward facts in any manner that it appears to consider necessary to any determination of an issue raised in a contention, it is plausible to start with the presumption that asserting such facts makes them at least arguably material to matters within the scope of the contention, and therefore subject to being disputed and controverted, until and unless they are subsequently found to be immaterial by the body deciding the matter.

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[140] Motion at 15.

[141] Applicant cites *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 78 (2008). Motion at 15 n.85.

[142] *Vogtle,* LBP-08-2, 67 NRC at 67-68 n.9 (emphasis added).

[143] 10 C.F.R. § 2.710(a).

We note also that NRC regulations recognize that "parties" have "rights" in NRC proceedings. For example, 10 C.F.R. § 2.316, on consolidation of parties, addresses the consolidation of multiple parties' presentations of evidence, etc., noting as well that "any consolidation that would prejudice the *rights of any party*" may not be ordered.[144] It might also be fairly said that section 2.710(a) establishes not only an obligation but also a right to respond in a summary disposition context, just as, in a hearing, section 2.337 defines the evidentiary standard of "relevant, material, and reliable evidence" being admissible in a hearing, and thereby establishes the right of all parties to present such admissible evidence.[145]

While certainly, if any response goes beyond the scope of the fact(s) being responded to, then that portion that goes beyond that scope may be ruled inadmissible on that ground. And of course, as the Commission has noted, a party responding to a summary disposition motion may not raise "distinctly new asserted deficiencies."[146] But a party could not appropriately be foreclosed from responding at all, by simply and straightforwardly disputing a statement put forward by an opposing party as a material fact.[147] Nor did this Board deny any

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[144] 10 C.F.R. § 2.316 (emphasis added).

[145] Such evidence would, of course, have to be relevant to the contention that is the subject of the hearing, and material to the outcome of the hearing on that contention.

[146] *See Pilgrim,* CLI-10-11, 71 NRC at 310.

[147] There would indeed seem to be due process considerations relating to anything that would effectively deny a party — who has been formally admitted to a proceeding *as a party,* based on a showing of an *interest* sufficient to confer standing — the right to respond to facts put forward by an opposing party, whether those facts are asserted in support of a motion for summary disposition or in a hearing, including in a 10 C.F.R. Part 2, Subpart L proceeding. Any party in a legal proceeding has a legitimate expectation that all stages of the proceeding will be conducted in a manner that complies with due process, the fundamental basics of which are, of course, notice and *opportunity to respond.*

We note that the Commission has, in its Statement of Considerations for its 2004 changes to the NRC procedural rules, stated that "intervenors in reactor licensing proceedings (as opposed to reactor license applicants, and those who are the subject of an NRC enforcement action) *ordinarily* cannot raise constitutional Due Process issues with respect to NRC hearing procedures, inasmuch as intervenors cannot claim government deprivation of 'life, liberty or property' as a result of the NRC's licensing action." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2192 (Jan. 14, 2004) (emphasis added) (citing *City of West Chicago v. NRC,* 701 F.2d 632, 645 (7th Cir. 1983)).

In *West Chicago,* the Court considered objections of the city to the Commission's not having provided a formal hearing in response to its request for hearing. *West Chicago,* 701 F.2d at 637. The Commission had, however, actually accepted and addressed the contentions of the city that were raised in its written materials. *Id.* The Court pointed out that what the parties were "arguing about [was] the *kind of 'hearing'* the NRC is required to conduct when issuing an amendment to a source materials license." *Id.* at 638 (emphasis added). The NRC had argued that "the NRC may hold an informal hearing in which it requests and considers written materials without providing for traditional trial-type procedures such as oral testimony and cross-examination." *Id.* The Court ruled that the NRC hearing procedures in effect at the time "satisfy the requirements of due process," and that "generalized

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such opportunity. We will presume that Counsel understood this,[148] but given

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health, safety and environmental concerns do not constitute liberty or property subject to due process protection." *Id.* at 645. (The Court went on to state that, "[e]ven if we were to find a protected liberty or property interest in this case, we would hold that Commission procedures constituted sufficient process." *Id.*)

We note also the First Circuit's ruling in *Citizens Awareness Network v. NRC,* 391 F.3d 338 (1st Cir. 2004), that "there is no fundamental right to participate in administrative adjudications." *Id.* at 354. The Court then applied a "rational basis review" to CAN's challenge to the NRC's 2004 changes to its procedural rules, citing cases involving challenges to laws regulating aspects of prisoners' right to access to the courts, *id.* at 355 (citing *Bolvin v. Black,* 225 F.3d 36, 42 (1st Cir. 2000)); *see Bolvin,* 225 F.3d at 42-43, and business closing laws, *CAN,* 391 F.3d at 355 (citing *Montalvo-Huertas v. Rivera-Cruz,* 885 F.3d 971, 978-79 (1st Cir. 1989)), and found that the Commission's action in adopting the new rules met the rational basis test. *Id.* The Court did note, however, regarding the compliance of NRC's procedural rules with the Federal Administrative Procedure Act (APA), that, "[s]hould the agency's administration of the new rules contradict its present representations [that cross-examination will be allowed under the rules when required for a full and true disclosure of the facts] or otherwise flout this principle, nothing in this opinion will inoculate the rules against future challenges." *Id.* at 354.

Significantly, neither *West Chicago* nor *CAN* addresses standing, or the "interest" that must be shown to demonstrate standing, or the rights of parties once they have shown standing and been admitted to a proceeding as parties. In contrast, Intervenors herein, in this 10 C.F.R. Part 2, Subpart L proceeding, raised more than "generalized concerns" and in fact demonstrated an *interest* sufficient to establish their standing to participate in this proceeding as parties. *See* LBP-09-17, 70 NRC at 321-22, wherein we recognized that "[a]ll of the Petitioners herein, either on their own or through individual members, have demonstrated residence within 50 miles of the proposed units," which we found constituted a sufficient showing of an interest to establish standing. *Id.* at 322.

The Tenth Circuit has described the nature of the interest that a prospective intervenor must show as "direct, substantial, and *legally protectable,*" the test for which is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is *compatible with efficiency and due process.*" *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior,* 100 F.3d 837, 840-41 (10th Cir. 1996) (internal quotation marks omitted) (citations omitted) (emphasis added). (As we have earlier noted, in ruling on standing under 10 C.F.R. § 2.309(d)(1)(ii)-(iv) and "determining whether a petitioner in an NRC proceeding has established the necessary 'interest' under the rule, licensing boards are directed to follow the guidance found in judicial concepts of standing, as stated in federal court case law." LBP-09-17, 70 NRC at 321-22 n.30.)

Once such a legally protectable interest is shown and intervenors are admitted as parties, with all the rights under NRC rules that are tied to party status — including the right to respond simply and straightforwardly to facts put forth by an opposing party in support of a motion for summary disposition or in direct testimony in a hearing, *see supra* text accompanying notes 144, 145 — then it would seem that those rules could not be administered in such a manner as to deprive Intervenors of their interest in such rights without due process of law, or without arguably running afoul of the APA in the manner described by the Court in *CAN,* 391 F.3d at 354.

[148] Even if counsel did not understand this, he certainly waived any right to respond to anything

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some apparent confusion on the matter in this case, we find the preceding points warrant clarification.[149]

B. Alternatives Contention A Is Moot

Finally, even assuming arguendo that summary disposition should be denied based upon a finding of some doubt sufficient to leave a genuine dispute on some material issue of fact, we find the contention in question to be moot based on Staff's consideration of these matters in its DEIS (based as well, we note, on Applicant's consideration of the matters at issue in Alternatives Contention A in its Motion and supporting documents). Clearly, in the DEIS the Staff considers these aspects of the contention:

> the feasibility under NEPA of an alternative consisting of a combination of solar and wind energy, energy storage methods including CAES and molten salt storage, and natural gas supplementation, to produce baseload power, with specific regard to
>
> (a) the reasonable availability of the four parts of such combination for consolidation into an integrated system to produce baseload power;
>
> (b) the feasibility of the use of such combination in the area of Texas served by the Comanche Peak plant; and
>
> (c) the extent to which there may be efficiencies arising from overlapping uses of land for each of the four parts of the combination as well as for other reasonable purposes.[150]

In addition, regarding subissue (d) of the contention, requiring consideration of the extent to which operation and maintenance costs of solar in such combination may be a comparative benefit "if it is shown that such an alternative is environmentally preferable," Staff provides a demonstration in the DEIS that the combination alternative is not environmentally preferable.[151]

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not already addressed in Intervenors' Response (and related documents) to Applicant's Motion (and related documents), in view of the provisions of 10 C.F.R. § 2.710(a), which he must be presumed to know.

[149] We provide the preceding analysis, *see* notes 138-148 and accompanying text, also in order to be as clear as possible on these rather complex issues in the event of any appeal in which they might arise.

[150] *See supra* text accompanying note 11; DEIS at 9-19 through 9-32; *see also supra* Sections III, VI.A.

[151] *See supra* text accompanying note 11; DEIS at 9-19 through 9-32. We note, as indicated above, that Intervenors filed contentions challenging the DEIS in several particulars, but we found none of these to be admissible. *See* 12/28/10 Memorandum and Order.

Regarding Intervenors' challenge of mootness on the grounds that there remain issues of site-specific aesthetic impacts and the practicability of the alternatives, we find it to be without merit. Although Applicant and Staff may not have considered these issues precisely as Intervenors would wish, as Luminant points out, the DEIS addressed aesthetic impacts of the Staff's examined combination, and Luminant addressed the characteristics of a site in west Texas for the four-part combination it evaluated, and compared these to the aesthetic impacts of the proposed new Comanche Peak units. Also, Intervenors did not contest Applicant's Statement of Material Fact V.A,[152] in which it addressed a comparison between the environmental impacts of the proposed new units and the four-part combination, including aesthetic impacts. In addition, according to Applicant, issues relating to the reasonableness of the four-part combination, including practicability, are also moot, based on the DEIS's discussion of reasonableness of the combination examined therein, and Luminant's discussion on the reasonableness of the four-part combination.

As we noted in LBP-10-10, in ruling on whether a contention is moot, we look to whether a "justiciable controversy" still exists,[153] and whether an issue is still "live," such that a party still has a legal interest in the issue.[154] The mootness doctrine in NRC proceedings relates primarily to "contentions of omission," which Alternatives Contention A is, asserting the omission of the Applicant's consideration of the feasibility of the four-part combination and related issues. As we stated in LBP-10-10,

> If all matters at issue in a "contention of omission" are addressed by an applicant through the actual (not "'purport[ed]'" or "'claim[ed]'") provision of information on all such matters, then no legal interest in that contention remains, and the contention is moot. The information need not be such that an intervenor agrees with it, but it must actually address in some way *all* of the issues encompassed within the admitted contention it purports to moot. If, on the other hand, not all matters at issue in such a contention are addressed in information submitted by Applicant, then Intervenors retain a legal interest in having any unaddressed matter(s) appropriately resolved.[155]

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[152] *See supra* note 60 and accompanying text.

[153] *See* LBP-10-10, 71 NRC at 590 (internal quotation marks omitted) (citing Intervenors' Response Opposing Applicant's Motion to Dismiss Contention 18 as Moot (Jan. 4, 2010) at 1; *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-19, 42 NRC 191, 194 (1995)).

[154] *Id.* (internal quotation marks omitted) (citing *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993)).

[155] *Id.* at 540-41. Also, because a contention originally directed at an Applicant's ER is subsequently deemed to be a challenge to the Staff's DEIS and FEIS when they are issued (unless there are relevant

(Continued)

In this case, we find that no justiciable controversy still exists regarding Alternatives Contention A or those parts of original Contention 18 that were coextensive with Alternatives Contention A. For the reasons we state above, none of the issues contained within the contention are still "live," such that Intervenors have any further legal interest in those issues.

In conclusion, we find that there is no remaining genuine dispute of material fact and no remaining justiciable controversy regarding Alternatives Contention A or those parts of original Contention 18 that were coextensive with Alternatives Contention A.

VII. ORDER

1. Having found that Applicant has shown that there remains no genuine dispute on any material fact relating to Contention 18 and Alternatives Contention A, and that Applicant is entitled to a decision in its favor as a matter of law, we hereby GRANT Luminant's Motion for Summary Disposition.

2. Having further found the contentions to be moot, we alternatively DISMISS Alternatives Contention A and the remaining parts of Contention 18 that were coextensive with Alternatives Contention A.

3. There being no remaining matters to be adjudicated in this proceeding on either or both of the preceding grounds, we therefore ORDER that this matter be terminated.

4. As this Memorandum and Order concludes this proceeding, in that no admitted contentions remain for litigation, any petition for review must be filed within fifteen (15) days after this issuance is served, as required by 10 C.F.R. § 2.341(b)(1).

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changes therein), the same principle we quote in the text applies with regard to matters addressed by the Staff in the DEIS. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Dr. Alice C. Mignerey
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 24, 2011[156]

[156] Copies of this Memorandum and Order were filed this date with the agency's E-filing system for service to all parties.

Separate Statement of Administrative Judge Gary S. Arnold

Although I agree with the decision of this Order, and the legal arguments in support of that decision, this order contains a discussion that I consider dictum and with which I do not agree.

A problem was hypothesized by the Board in noting the reluctance of Intervenor's Attorney to challenge some of the items in Applicant's Statement of Material Facts. The Board noted that in several instances the utterances of Intervenors' Counsel indicated that he felt, in some way, restricted from challenging certain items. In reply to this, the Board majority provided a four-page explanation of Intervenors right to respond, much of which is contained in footnotes. I consider this excessive. It would have been sufficient to note that the Board at no time restricted the pleadings or arguments of Intervenors.

The issue here is whether or not Intervenors may challenge, at the summary disposition stage, existing facts that they had not previously contested. While this is a significant issue, it was never raised in pleadings or at oral arguments. No parties provided briefs on this issue. A legal opinion regarding this issue is not necessary for this Order. And the issue is sufficiently complex that I do not wish to affix my name to its discussion without greater understanding.

Cite as 73 NRC 131 (2011) **LBP-11-5**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Nicholas G. Trikouros
Dr. Paul B. Abramson

In the Matter of **Docket Nos. 50-275-LR**
50-323-LR
(ASLBP No. 10-890-01-LR-BD01)

PACIFIC GAS AND ELECTRIC COMPANY
(Diablo Canyon Nuclear Power Plant, Units 1 and 2) **February 25, 2011**

PROTECTIVE ORDERS

The Board declines to issue a proposed protective order jointly submitted by all of the parties where it failed to require the privilege claimant to identify the legal basis for the claim that the document should be protected.

PROTECTIVE ORDERS

The Board declines to issue a proposed protective order jointly submitted by all of the parties where it provided circular definitions to certain key terms, and failed to define certain other important terms, such as the terms "sensitive unclassified non-safeguards security information" and "SUNSI," that were used in the proposed order. The Board will not issue a proposed protective order that it does not understand.

PROTECTIVE ORDERS

The Board declines to issue a proposed protective order jointly submitted by the Staff and all of the parties because the Board is concerned that the proposed protective order would violate NRC's strong policy in favor of openness and transparency and cast too broad a cloak of secrecy over adjudicatory hearings that are required to be public under section 181 of the Atomic Energy Act and 10 C.F.R. § 2.328.

PROTECTIVE ORDERS

In lieu of issuing the problematic protective order proposed jointly by all of the parties, the Board issues a protective order and nondisclosure agreement that it considers to be clear and legally sound.

MEMORANDUM AND ORDER
(Concerning Protective Order and Nondisclosure Agreement)

This Memorandum and Order addresses the issuance of a protective order and nondisclosure agreement to govern the mandatory disclosure, use, and dissemination of documents in this proceeding that a party claims contain "Protected Information" as that term is defined in the protective order. Pursuant to the attached protective order and nondisclosure agreement, parties shall be permitted access to such documents upon the conditions set forth therein.

On September 15, 2010, the Board issued an initial scheduling order (ISO),[1] in which the Board noted that the law requires that each party to this proceeding disclose all documents relevant to the admitted contentions, except those documents for which a claim of privilege or protected status is made. ISO § II.A (citing 10 C.F.R. § 2.336). In the case of documents claimed to be privileged or protected, the party must list such documents on a privilege log. *Id.* § II.A.3 (citing 10 C.F.R. § 2.336(a)(3)). The ISO covers a number of case management matters relevant to these mandatory disclosure requirements, including the scope of disclosure, *id.* § II.A.4, certain exemptions from disclosure, *id.* § II.A.4, and the procedures to be followed in handling disclosure disputes and motions to compel, *id.* § II.C. These requirements continue to govern this proceeding.

In addition, the ISO directed the parties to confer with one another for the purpose of discussing and developing a joint proposed protective order and nondisclosure agreement for the "handling (and redaction) of documents that

[1] Initial Scheduling Order (Sept. 15, 2010) (unpublished).

are listed on the privilege logs." *Id.* § II.B. The ISO stated that, pursuant to an agreement among the parties, "the parties shall not be required to produce privilege logs for documents claimed to qualify for the attorney-client, attorney work product, or deliberative process privileges." *Id.* § II.A.3. However, as also agreed by the parties, the ISO specified that they "shall produce, as part of their mandatory disclosures, privilege logs covering any documents claimed to qualify for protected status as security-related information and/or as protected information under 10 C.F.R. § 2.390(a)(1), (3), and (4) and (d)(1)." *Id.* § II.A.3. The ISO also required that "[e]ach privilege log shall identify the statute or regulation that provides the legal basis for the claimed privilege, and shall provide, for each document listed, sufficient information for the other parties, and the Board, to assess the validity of the claim of privilege or protected status." *Id.* § II.A.3.

Pursuant to the ISO, the parties jointly submitted a proposed protective order and nondisclosure agreement on November 9, 2010.[2] Although the proposed protective order contains a number of useful proposals, the Board found it to be problematic. First, it did not seem to reflect certain important ISO instructions, e.g., the requirement, both in the ISO and in the regulations, to identify the legal and statutory basis for any claim that a document should be protected. Second, the proposed protective order used important terms that were undefined, e.g., "sensitive unclassified non-safeguards security information."[3] Proposed PO at 2. Third, the proposed protective order contained certain definitions that the Board finds confusing or circular, e.g., "'Protected Materials' means materials . . . designated by such party as 'Protected Materials.'" Proposed PO at 2. Fourth, the proposed protective order purported to cover attorney work product information, whereas the parties have agreed that attorney work product need not be disclosed or listed on a privilege log. *Compare* Proposed PO at 5 *with* ISO § II.A.3. Fifth, the proposed protective order specified dispute resolution procedures that appear inconsistent with the ISO procedures. *Compare* Proposed PO at 7 *with* ISO § II.C. Sixth, the NRC Staff was exempted from the obligations of the proposed protective order, Proposed PO at 2, even though the Staff might hold many documents that are subject to the mandatory disclosure requirements of 10 C.F.R. § 2.336(b). These are only a few examples of the Board's difficulties with the proposed protective order.

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[2] Joint Motion for Protective Order (Attach.) (Nov. 9, 2010) (Proposed PO).

[3] We note, *inter alia,* that the term "sensitive unclassified non-safeguards *security* information" or "SUNSI" as used in the proposed protective order is confusingly different from the term used in COMSECY-05-0054, the NRC's "Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (SUNSI)" issued on October 26, 2005 (ADAMS Accession No. ML052520181). The proposed protective order and the NRC Policy use the same acronym ("SUNSI") to cover different terms.

In addition, the Board has some concern that the protective order proposed by the parties would cast too broad a cloak of secrecy over adjudicatory proceedings that are required to be public. NRC regulations governing our adjudications mandate that "all hearings will be public." 10 C.F.R. § 2.328. There are only two exceptions to this public visibility, neither of which applies here.[4] Likewise, the regulations mandate that "[e]xcept as limited by section 181 of the Act or order of the Commission, the transcript [of Atomic Safety and Licensing Board hearings] will be available for inspection in the agency's public records system." 10 C.F.R. § 2.327(b). Again, neither exception applies. These regulations reflect NRC's strong policy in favor of openness and transparency.[5] We agree.[6]

Accordingly, the Board crafted a revised protective order and on February 3, 2011, provided it to the parties and offered them an opportunity to submit written comments, suggestions, and objections. Notice of Planned Protective Order (Feb. 3, 2011) (unpublished). The Intervenor and the Staff provided such comments and the Applicant informed the Board that it had no comments.

After due consideration of the comments and suggestions of the parties, the public interest in an open and public hearing, and the practical and efficient conduct of this proceeding, the Board hereby issues the attached protective order.

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[4] A Board may exclude the public from an adjudicatory hearing in only two circumstances. First, the public may be excluded "as may be requested under section 181 of the Act." 10 C.F.R. § 2.328. That section deals with "proceedings or actions which involve Restricted Data, defense information, safeguards information protected from disclosure under the authority of section 147 or information protected from disclosure under the authority of section 148." 42 U.S.C. § 2231. "SUNSI" is not covered by section 181 of the Atomic Energy Act (AEA). The second situation in which an adjudicatory hearing can be closed is if the Commission orders it. 10 C.F.R. § 2.328. Neither exception applies here.

[5] *Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-26, 72 NRC 474, 478 n.23 (2010); *cf.* Enhancing Public Participation in NRC Meetings; Policy Statement, 67 Fed. Reg. 36,920, 36,920 (May 28, 2002).

[6] "The principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials." *Sheppard v. Maxwell,* 384 U.S. 333, 349 (1966); *see also South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), LBP-10-2, 71 NRC 190, 205-09 (2010), *rev'd on other grounds,* CLI-10-24, 72 NRC 451, 461-64 (2010).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 25, 2011

ATTACHMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Nicholas G. Trikouros
Dr. Paul B. Abramson

In the Matter of	**Docket Nos. 50-275-LR** **50-323-LR** **(ASLBP No. 10-890-01-LR-BD01)**
PACIFIC GAS AND ELECTRIC COMPANY **(Diablo Canyon Nuclear Power Plant, Units 1 and 2)**	**February 25, 2011**

PROTECTIVE ORDER

This protective order governs the mandatory disclosure, use, and dissemination of documents in this proceeding that a party claims contain "Protected Information" as that term is hereinafter defined. Pursuant to this protective order, parties shall be permitted access to such documents upon the conditions set forth herein.

I. DEFINITIONS

For purposes of this protective order, the following definitions apply.

A. The term "Disclosing Party" means the party required to make mandatory disclosure pursuant to 10 C.F.R. § 2.336.

B. The term "document" means any medium (electronic, paper, or of any other kind) that contains or stores any information, including text, data, audio,

video, computer software, or computer modeling information.[7] The term "document" shall be interpreted consistently with the scope of disclosure specified in ISO § II.A.4.

C. The term "Nondisclosure Agreement" means the Nondisclosure Agreement that is Attachment A to this order.

D. The term "party" means the Applicant, the Intervenors, or the NRC Staff.[8]

E. The term "Protected Document" means any document that contains Protected Information, including both documents provided by a Disclosing Party and derivative documents generated by the Receiving Party that copy or contain Protected Information, such as notes of Protected Information. Unless otherwise specified or required by the context, the term "Protected Document" refers to a version of a document that has not been redacted to remove the Protected Information.

F. The term "Protected Information" means information that qualifies for one or more of the following privileges recognized and established by law:

1. Information compiled by the NRC or any government agency for law enforcement purposes, including investigation or allegation information, provided that it qualifies for the exemption specified at 10 C.F.R. § 2.390(a)(7);
2. "Trade secrets and commercial or financial information" that is "privileged or confidential," provided that it qualifies for the exemption specified at 10 C.F.R. § 2.390(a)(4) and meets the criteria of 10 C.F.R. § 2.390(b)(4)(i)-(v);
3. "Correspondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's physical protection, classified matter protection, or material control and accounting program for special nuclear material not otherwise designated as Safeguards Information or classified as National Security

[7] *See Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-23, 72 NRC 692, 703-04 (2010).

[8] Although the Staff is covered by this protective order and required to make its disclosures in accordance herewith, the provisions of this order do not restrict the *use* by NRC counsel, witnesses, employees, consultants, and others representing the NRC Staff of documents containing Protected Information that the *NRC is entitled to receive apart from its role as a litigant* in this proceeding (e.g., documents containing information required to be submitted to the NRC by statute, regulation, or license condition or information submitted to or acquired by the NRC in support of a requested licensing action or in fulfillment of its regulatory responsibilities). Rather, NRC's use of such documents is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, and 9.25. The provisions of this protective order apply to NRC counsel, witnesses, employees, consultants, and others representing the NRC Staff with respect to (a) the use and management of documents containing Protected Information that NRC receives solely pursuant to 10 C.F.R. § 2.336 and this protective order, and (b) the disclosure of documents in the Staff's possession, custody, or control that contain Protected Information.

Information or Restricted Data," provided that it qualifies for the exemption specified at 10 C.F.R. § 2.390(d)(1);

4. Information submitted in confidence to the NRC by a foreign source, 10 C.F.R. § 2.390(d)(2);
5. Information specifically exempted from disclosure by the Privacy Act, 5 U.S.C. § 552a, provided that it qualifies for the exemption at 10 C.F.R. § 2.390(a)(3); or
6. Internal NRC information that qualifies for the exemption specified at 10 C.F.R. § 2.390(a)(2).

G. The term "Protected Information" does not include:

1. Information that qualifies as safeguards information under 42 U.S.C. § 2167 and 10 C.F.R. § 73.22(a);[9]
2. Information that qualifies as national security information or restricted data under 10 C.F.R. Part 2, Subpart I;[10]
3. Information that qualifies as attorney work product, attorney-client communications, or deliberative process information;[11] and
4. Information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this protective order or in violation of other applicable legal obligations of nondisclosure.

H. The term "Qualified Reviewer" means a person who has signed the Nondisclosure Agreement[12] and who is:

1. A Representative;

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[9] The term "sensitive unclassified *non-safeguards information*" or "SUNSI," as hereinafter defined, necessarily excludes *safeguards information.* However, this case may involve safeguards information because admitted Contention EC-4 concerns the environmental impact associated with a terrorist attack on the Diablo Canyon reactor. If safeguards information arises in this case, then appropriate procedures will be implemented.

[10] There is no indication that this case involves any national security information or restricted data, i.e., "classified information." Meanwhile, SUNSI, by its very name, i.e., sensitive *unclassified* non-safeguards information, excludes classified information. If national security information or restricted data arise in this case, the parties should promptly notify the Board and appropriate procedures, such as those set forth in 10 C.F.R. Part 2, Subpart I ("Special Procedures Applicable to Adjudicatory Proceedings Involving Restricted Data and/or National Security Information") will be implemented.

[11] The ISO notes that, pursuant to an agreement among the parties, "the parties shall not be required to produce privilege logs for documents claimed to qualify for the attorney-client, attorney work product, or deliberative process privileges." ISO § II.A.3.

[12] Although the NRC Staff has chosen to be a party to this proceeding and is subject to the terms of this protective order, individual members of the NRC Staff and Staff counsel need not sign the Nondisclosure Agreement in order to be a Qualified Reviewer. This is because the NRC Staff and

(Continued)

2. An attorney, paralegal, or other employee associated with a law firm representing a party;
3. An official or employee of a party;
4. A consultant, employee of a consultant, expert, or other person (whether paid or unpaid) retained by a party or a party's law firm to assist, advise, or testify on behalf of a party in this proceeding;
5. A person designated as a Qualified Reviewer by the Board or the Commission;
6. Court reporters or information technology personnel engaged for depositions or to record proceedings;[13] or
7. Any other individual that the Disclosing Party and Receiving Party agree, in writing, may serve as a Qualified Reviewer.

I. The term "Receiving Party" means the party to whom the mandatory disclosure pursuant to 10 C.F.R. § 2.336 must be made.

J. The term "Redacted Protected Document" means a version of a Protected Document that is complete except for the words, sentences, or paragraphs that actually consist of the Protected Information.[14]

K. The term "Representative" means the attorney or other authorized representative of a party who has entered a notice of appearance in accordance with 10 C.F.R. § 2.314. In case of a *pro se* party, the *pro se* individual is deemed the Representative.

L. The term "sensitive unclassified non-safeguards information" or "SUNSI" is defined in NRC's current interim "NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information" as "any information of which the loss, misuse, modification, or unauthorized access can reasonably be foreseen to harm the public interest, the commercial or financial interests of the entity to whom the information pertains, the conduct of NRC and Federal programs, or the personal privacy of individuals."[15] The SUNSI Policy lists seven categories of information that comprise SUNSI. *Id.* However the SUNSI Policy

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its counsel (like the Board and its staff) are federal government employees and are thus subject to other stringent sanctions for the unauthorized disclosure of the Protected Information or Protected Documents. *See e.g.,* Trade Secrets Act, 18 U.S.C. § 1905.

[13] Court reporters retained by the Board do not need to sign the Nondisclosure Agreement.

[14] The Freedom of Information Act, 5 U.S.C. § 552(b)(9), mandates that "any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions which are exempt." *See also* 10 C.F.R. § 9.19(b); *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC 451, 468 n.99 (2010).

[15] NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information at 1 (ADAMS Accession No. ML052990146), *forwarded as attachment to* COMSECY-05-0054, "Policy Revision: Handling, Marking and Protecting Sensitive Unclassified Non-safeguards Information (SUNSI)" (Oct. 26, 2005) (ADAMS Accession No. ML052520181) (SUNSI Policy).

does not expand upon or create any new category of legally privileged or confidential information that is exempt from discovery or from mandatory disclosure under 10 C.F.R. §§ 2.336 or 2.390(a)(1)-(9). *See South Texas,* CLI-10-24, 72 NRC at 454 ("The SUNSI Policy does not change any of the statutory, regulatory, or other obligations of the agency with respect to the handling of information."). SUNSI is not a separate legal privilege, but is a catchall term, created by NRC to cover several statutory or regulatory privileges.[16] Merely identifying a document as "SUNSI" does not, in itself, (1) satisfy the requirement that the privilege claimant "identify the statute or regulation that provides the legal basis for the claimed privilege," ISO § II.A.3; (2) provide "sufficient information for assessing the claim of privilege or protected status of the document" as required by 10 C.F.R. § 2.336(a)(3) and (b)(5); or (3) qualify the information as Protected Information or the document as a Protected Document hereunder. A privilege claimant must identify one of the specific privileges listed in Section I.F, above, in order for information to be deemed Protected Information hereunder, and must provide sufficient information to support that claim.

II. TERMS AND CONDITIONS OF PROTECTIVE ORDER

A. The Disclosing Party shall disclose Protected Information and Protected Documents in accordance with this order.

B. The Receiving Parties and Qualified Reviewers shall manage and protect the confidentiality of Protected Information and Protected Documents in accordance with this order.

C. If the Representative for the Disclosing Party in good faith believes that (1) a document qualifies as a Protected Document, (2) the Protected Information in the document has, in fact, been kept in confidence, and (3) that the document and the Protected Information therein is not publically available or found in public sources, then the Disclosing Party may designate the document as such a Protected Document, and shall mark it and list it as specified in the following Section II.D. Unless this designation is disputed and overturned, the designated document shall be deemed to qualify as a Protected Document and shall be protected as such in accordance with the terms and conditions of this order.

D. The Disclosing Party shall:

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[16] Executive Order 13556, "Controlled Unclassified Information," discourages "ad hoc, agency-specific policies, procedures and markings" of information asserting that such policies have led to an "inefficient, confusing patchwork" and "unclear or unnecessarily restrictive dissemination policies." 75 Fed. Reg. 68,675, 68,675 (Nov. 4, 2010). The order restricts the use of agency-specific policies and mandates that in order to restrict access to information, executive departments and agencies must "identify the basis in law, regulation or Government-wide policy" that justifies the restriction. *Id.*

1. Prominently and conspicuously mark each page of the Protected Document, including the cover page, with the word "PROTECTED DOCUMENT," "PROTECTED," "CONFIDENTIAL," or words of similar import, and
2. List each Protected Document on a privilege log that shall be provided to all parties of this proceeding,[17]

E. If a party requests a Protected Document, then the Disclosing Party shall, within ten (10) days, provide a copy of that document to the Representative of that party (i.e., the Receiving Party) provided it has a Qualified Reviewer. Such requests shall be filed within sixty (60) days of the listing of the Protected Document on the privilege log and, in any event, no later than (10) days after the deadline for filing rebuttal testimony pursuant to 10 C.F.R. § 2.1207(a)(2). The Representative of the Receiving Party shall be responsible for distributing the Protected Document to the Receiving Party's other Qualified Reviewers. The Receiving Party and its Representative and Qualified Reviewers shall hold such documents in confidence and in compliance with the terms and conditions of this order.[18]

F. If a party requests a Redacted Protected Document (e.g., for the filing of a public pleading herein, or for use by persons who are not Qualified Reviewers), then the Disclosing Party shall, within twenty (20) days of the request, redact the Protected Document and provide that party with the Redacted Protected Document. Such requests shall be filed within sixty (60) days of the listing of the Protected Document on the privilege log or thirty (30) days after receipt of the unredacted version of the Protected Document pursuant to the preceding paragraph, whichever is later, and in any event no later than ten (10) days after the deadline for filing rebuttal testimony pursuant to 10 C.F.R. § 2.1207(a)(2).

G. Only Qualified Reviewers may have access to Protected Documents and they shall only be used as necessary for the conduct of this proceeding.[19] Protected Documents shall not be disclosed in any manner to any person except (1) the Board and its staff, and (2) Qualified Reviewers who need to know the information contained in the Protected Documents in order to assist the party or otherwise carry out their responsibilities in this proceeding. Qualified Reviewers may make

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[17] As specified above, the privilege log shall provide sufficient information for assessing the claim that the document or relevant portion of the document is entitled to be treated as protected.

[18] This order, and the good-faith representation and designation of documents as Protected Documents, serves in lieu of the requirement for marking and for an affidavit under 10 C.F.R. § 2.390(b) and allows the Staff to receive Protected Documents and to protect their confidentiality under FOIA.

[19] Alternatively, if NRC Staff is amenable, a Party may make Protected Documents available to NRC Staff, for inspection at the Party's offices, in lieu of physically delivering the Protected Documents to the possession or custody of the NRC Staff.

notes of Protected Information, but such notes constitute Protected Documents subject to the terms of this order.

H. Qualified Reviewers shall maintain the confidentiality of the information contained therein as required in the Nondisclosure Agreement, the terms of which are incorporated herein.

I. The Receiving Parties shall maintain the Protected Documents in a secure place; shall limit access to Protected Documents to the Qualified Reviewers; and shall take all reasonable precautions necessary to assure that Protected Documents and the Protected Information are not distributed to unauthorized persons.

J. Subject to Section V, below, the Receiving Parties, and their Qualified Reviewers, shall be entitled to retain filings, official transcripts and exhibits in this proceeding that contain Protected Documents or Protected Information, provided that the Receiving Party and its Qualified Reviewers shall not disclose the portions of those filings, transcripts, and exhibits containing Protected Documents or Protected Information, except pursuant to a court order, or agreement with the Disclosing Party.

K. The Receiving Party and Qualified Reviewer may not use Protected Information to give any person or competitor of any party a commercial advantage.

L. A Qualified Reviewer may disclose Protected Information or Protected Documents to any other Qualified Reviewer.

M. In the event that any Qualified Reviewer to whom Protected Information or Protected Documents have been disclosed ceases to be engaged in this proceeding, or is employed or retained for a position whose occupant is not qualified as a Qualified Reviewer, then access to Protected Information and Protected Documents shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Nondisclosure Agreement shall continue to be bound by the provisions of that agreement and this order.

N. Attorneys who serve as the Representative of the Receiving Party or as a Qualified Reviewer are responsible for using reasonable efforts to ensure that persons under their supervision or control comply with this order. If an attorney meets the foregoing requirement, then he or she shall not be held liable for violations of this order by a party or other Qualified Reviewer.

O. If a party files a timely objection to the listing or designation of a document as a Protected Document then, ten (10) days after the objection, the protections of this order shall automatically cease to apply to that document, unless the Disclosing Party has, within that ten (10) day period, filed a motion, with a supporting affidavit specifying those portions of the Protected Document that should be protected and demonstrating that the information in the Protected Document qualifies as Protected Information.

P. If the Disclosing Party has filed a motion under the preceding paragraph then, pending a ruling by the Board, the Protected Documents in question

shall continue to be protected in accordance with this Protective Order and Nondisclosure Agreement.

Q. Unless the Board otherwise specifies, if the Board rules, at any time, that all or part of any document or information claimed to be protected does not qualify as a Protected Document or Protected Information, then that document or information shall nevertheless continue to be protected under this order for ten (10) days from the date of issuance of the ruling and, if the party seeking protection files an interlocutory petition for review or requests that the issue be certified to the Commission, for an additional ten (10) days. The parties do not waive any rights they may have to seek additional administrative or judicial remedies after the Board's decision or the Commission's denial of any appeal thereof.

R. The Representative of a Receiving Party intending to file or submit any pleading, testimony, exhibit, or correspondence in this proceeding that contains a Protected Document or Protected Information shall notify the Representative of the Disclosing Party in writing, as soon as the Receiving Party is aware of the intended use of the Protected Document and, to the fullest extent possible, no less than five (5) working days prior to the date of the intended filing.

S. All pleadings, testimony, exhibits, and correspondence filed in the adjudicatory record of this proceeding that contain Protected Information derived from a Protected Document shall:

1. Be provided to the NRC's Electronic Information Exchange (EIE) for service, but shall be excluded from the public docket for this proceeding by selecting the nonpublic "Protective Order" filing option on the EIE website;
2. Include an attached cover sheet identifying the pleading, testimony, exhibit, or correspondence as containing a Protected Document or Protected Information derived therefrom, and a cover letter that describes the contents of the pleading or correspondence without reference to such information, and, in the subject line of the EIE filing, a statement that the electronic filing contains Protected Information;
3. Specifically designate, by highlighting, marginalia, or other appropriate markings, the portion of the pleading, testimony, exhibit, or correspondence, that contains a Protected Document or Protected Information derived therefrom;
4. Be served only on the Board, the Board's law clerks, the NRC's

Office of the Secretary, and the individuals on the E-Filing public document service list who are also Qualified Reviewers;[20] and

5. Be accompanied by a Redacted Public Document or version of the pleading, testimony, exhibit, and/or correspondence with the Protected Information redacted, unless the Representative of the party filing the pleading, testimony, exhibit, and/or correspondence certifies, in good faith, that such a redacted version cannot be prepared without undue burden or expense.[21] The Redacted Public Document shall likewise be E-Filed.

T. Each party shall file with the NRC's Office of the Secretary a list of the individuals on the E-Filing public document service list who are also Qualified Reviewers and who therefore may receive filings pursuant to this protective order.

U. At any hearing or conference in this proceeding in which Protected Information is discussed, the discussion, argument and/or testimony concerning the Protected Information shall be given *in camera* or under other suitable conditions as this Board may establish, and the record of that portion of the hearing and any transcript thereof shall be withheld from distribution to the public. It shall be the duty of the party who intends to discuss or present testimony concerning Protected Information to notify the Board and the parties that such testimony or statement will contain Protected Information, prior to the testimony or statement being made.[22]

V. Protected Documents shall remain available until the date that an order terminating this proceeding is no longer subject to judicial review. The parties shall, within fifteen (15) days of that date, return the Protected Documents to the Representative of the Disclosing Party, or shall destroy that material, except that copies of filings, transcripts, and exhibits in this proceeding that contain either Protected Documents or Protected Information may be retained if they are maintained in a secure place such that no distribution of the information to unauthorized individuals will occur. Within the fifteen (15) day time period, the Representative of each Receiving Party shall submit to each Disclosing Party an

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[20] There is no requirement that a Qualified Reviewer be on the E-Filing public document service list. Indeed, it is preferable to restrict the service list to the Representatives (who are Qualified Reviewers) and for the Representative to then distribute the Protected Document to the other Qualified Reviewers working on the matter.

[21] If the party filing the pleading, testimony, exhibit, and/or correspondence is not the Disclosing Party (i.e., the party that originally claimed that the document contains Protected Information, then the filer should contact the Disclosing Party and request that it provide the redacted version of the document.

[22] Similarly, a party who wishes to serve a document upon the Board only, i.e., an *in camera* filing, may do so in the E-Filing system by choosing "Legal-In Camera Filing" from the document drop down list.

affidavit stating that, to the best of his or her knowledge, all of the foregoing materials have been returned or destroyed, or, if filings, transcripts, exhibits, or notes in this proceeding, will be maintained in a secure place such that no distribution of the information to unauthorized individuals will occur. To the extent that such filings, transcripts, exhibits, and notes are not returned or destroyed, they shall remain subject to the provisions of this protective order.

W. Counsel, consultants, employees, or any other individuals representing a Receiving Party who have reason to believe that Protected Documents might have been lost or misplaced or may have otherwise become available to unauthorized persons during the pendency of this proceeding shall notify the Board and counsel for the Disclosing Party promptly of their concerns and the reasons for them.

X. Any violation of the terms of this protective order or a nondisclosure agreement executed in furtherance of this order may result in the imposition of such sanctions as the Board may deem appropriate, including but not limited to (1) referral of the violation to appropriate bar associations or other disciplinary authorities, (2) ordering the return of all Protected Documents, or (3) dismissing or narrowing any admitted contention related to the Protected Information or Protected Documents.

Y. The Board may alter or amend this protective order as circumstances warrant at any time during the course of this proceeding. Each party has the right to move to amend this protective order.

Z. Nothing in this protective order shall prevent any party from seeking public disclosure of any Protected Document or Protected Information in accordance with any other NRC regulatory procedures (e.g., 10 C.F.R. Part 9) or other applicable law (e.g., the Freedom of Information Act). Nor shall this protective order preclude any party from independently seeking, through discovery in any other administrative or judicial proceeding, any Protected Document or Protected Information produced in this proceeding under this protective order. In addition, if documents identified in this proceeding as Protected or some or all of the information contained in such documents comes into the possession of or is known by any party independently of the Protected Document produced in this proceeding, use of that document or information in this proceeding, without compliance with the terms of this protective order, shall not be a violation of the terms of this protective order. The party asserting independent knowledge of the contents of Protected Documents or independent access to such documents shall have the burden of proving that such information was independently obtained in the event that the Disclosing Party asserts that disclosure of such information or document was a violation of this order. The Board will resolve any disputes arising under this protective order in accordance with the dispute resolution procedures specified in the ISO. Regardless of whether the disclosure dispute arises in the context of a motion to compel or a motion for protection under this order or

otherwise, the party asserting that a document is a Protected Document or that information is Protected Information bears the burden of proof. *See* ISO § II.C.1.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 25, 2011

ATTACHMENT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Nicholas G. Trikouros
Dr. Paul B. Abramson

In the Matter of	**Docket Nos. 50-275-LR** **50-323-LR** **(ASLBP No. 10-890-01-LR-BD01)**
PACIFIC GAS AND ELECTRIC COMPANY **(Diablo Canyon Nuclear Power Plant, Units 1 and 2)**	

NONDISCLOSURE AGREEMENT

Under penalty of perjury under the laws of the United States, I hereby certify pursuant to 28 U.S.C. § 1746 that (1) access to Protected Documents and Protected Information is provided to me pursuant to the terms and restrictions of the Atomic Safety and Licensing Board's protective order, dated February 25, 2011, in this proceeding; (2) I have been given a copy and have read said protective order; and that I agree to be bound by it; (3) I understand and agree that I will hold Protected Documents and Protected Information, and any notes or copies thereof, in confidence and in accordance with the terms and requirements of the protective order; and (4) I acknowledge that a violation of this agreement or the protective order, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of such sanctions as the Board, the Commission, or a court of competent jurisdiction may deem to be appropriate.

WHEREFORE, I do solemnly agree to protect such Protected Documents and

Protected Information as may be disclosed to me in this NRC proceeding, in accordance with the terms of this agreement.

_____

Signature

_____

Name (printed)

_____

Title/Identification

_____

Date

Cite as 73 NRC 149 (2011) **LBP-11-6**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Michael F. Kennedy
Dr. William C. Burnett

In the Matter of **Docket Nos. 52-040-COL**
52-041-COL
(ASLBP No. 10-903-02-COL-BD01)

FLORIDA POWER & LIGHT COMPANY
(Turkey Point Nuclear Generating Plant, Units 6 and 7) **February 28, 2011**

RULES OF PRACTICE: CONTENTION REQUIREMENTS FOR INTERVENTION; INTERVENTION PETITIONS

To participate in a proceeding as an intervenor, a petitioner must (1) establish standing and (2) proffer at least one admissible contention. *See* 10 C.F.R. § 2.309(a).

ATOMIC ENERGY ACT: STANDING TO INTERVENE

RULES OF PRACTICE: STANDING TO INTERVENE

The standing requirements for NRC adjudicatory proceedings derive from the Atomic Energy Act (AEA), which requires the NRC to provide a hearing "upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1)(A).

RULES OF PRACTICE: STANDING TO INTERVENE

Under the general standing requirements in our implementing regulations, a petitioner must state (10 C.F.R. § 2.309(d)(1)): "(i) The name, address and telephone number of the requestor or petitioner; (ii) The nature of the requestor's/petitioner's right under the [relevant statute] to be made a party to the proceeding; (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest."

RULES OF PRACTICE: STANDING TO INTERVENE AND PROXIMITY RULE

In determining whether a petitioner has demonstrated standing, the Commission applies contemporaneous judicial concepts of standing, which require a petitioner to "(1) allege an 'injury in fact' that is (2) 'fairly traceable to the challenged action' and (3) is 'likely' to be 'redressed by a favorable decision.'" *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted)). In the context of reactor licensing proceedings, however, a petitioner is deemed to have standing pursuant to the Commission's so-called "proximity" presumption rule by showing that he or she resides in, or frequents the area within, a 50-mile radius of the facility. *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010).

RULES OF PRACTICE: REPRESENTATIONAL STANDING OF ORGANIZATION

An organization may establish standing to intervene based on a theory of representational standing. To demonstrate representational standing, an organization must: (1) show that at least one of its members might be affected by the proceeding, which can be accomplished by showing that a member satisfies either the 50-mile "proximity" presumption or traditional standing elements; (2) identify that member by name and address; and (3) show that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf. *See Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000). Additionally, the interests the "organization seeks to protect must be germane to its own purpose," and "neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action." *Palisades,* CLI-07-18, 65 NRC at 409; *see*

also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

RULES OF PRACTICE: ORGANIZATIONAL STANDING

An organization may establish organizational standing. *See International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001).

RULES OF PRACTICE: LOCAL GOVERNMENT STANDING TO INTERVENE; STANDING TO INTERVENE AND PROXIMITY RULE (LOCAL GOVERNMENTAL ENTITY)

Pursuant to Commission regulation, a municipality is deemed to have standing in a reactor licensing proceeding that involves a facility located within its boundaries. *See* 10 C.F.R. § 2.309(d)(2). Where a municipality seeks to participate in a reactor licensing proceeding that does not involve a facility within the municipality's boundaries, it can, for purposes of establishing standing, rely on the 50-mile "proximity" presumption to the same extent as an individual or an organization. Thus, a municipality satisfies Commission standing requirements in a reactor licensing proceeding by showing either that its residents live within 50 miles of the facility, or that its boundaries extend to within 50 miles of the facility.

RULES OF PRACTICE: INTERESTED LOCAL GOVERNMENTAL ENTITY; REPRESENTATIONAL STANDING OF MUNICIPALITY

Pursuant to the rationale in *Private Fuel Storage,* it may reasonably be presumed that the interests a municipality seeks to represent on behalf of its residents are germane to its own purposes. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 32 (1998); *accord Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29 (1999).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

For a timely filed contention to be admissible, it must satisfy the requirements in 10 C.F.R. § 2.309(f). Pursuant to those standards, an admissible contention must: (1) "[p]rovide a specific statement of the issue of law or fact to be raised"; (2) "[p]rovide a brief explanation of the basis for the contention"; (3) "[d]emonstrate that the issue raised in the contention is within the scope of the

proceeding"; (4) "[d]emonstrate that the issue raised . . . is material to the findings the NRC must make to support the action that is involved in the proceeding"; (5) "[p]rovide a concise statement of the alleged facts or expert opinions . . . together with references to the specific sources and documents on which the requestor/petitioner intends to rely"; and (6) "provide sufficient information to show that a genuine dispute exists . . . on a material issue of law or fact," including "references to specific portions of the application . . . the petitioner disputes . . . or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure . . . ." 10 C.F.R. § 2.309(f)(1).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY); CONTENTIONS (CHALLENGE OF COMMISSION RULE)

A contention must be rejected if: (1) it constitutes an attack on applicable statutory requirements; (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations; (3) it merely expresses the petitioner's view of what a governing policy ought to be; (4) it seeks to raise an issue improper for adjudication in the proceeding or not applicable to the facility in question; or (5) it seeks to raise an issue that is not concrete or is otherwise not litigable. *See Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

RULES OF PRACTICE: CONTENTION REQUIREMENTS FOR INTERVENTION

The multifactor contention admissibility test in section 2.309(f)(1) — which is "'strict by design'" (*AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006)) — was crafted by the Commission to "raise the threshold bar for an admissible contention." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). Under the previous contention-admissibility rule, a contention could be admitted and litigated "based on little more than speculation . . . . Admitted intervenors often had negligible knowledge of nuclear power issues and, in fact, no direct case to present, but instead attempted to unearth a case through cross-examination." *Id.* "Congress therefore called upon the Commission to make 'fundamental changes' in its public hearing process to ensure that 'hearings serve the purpose for which they were intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors.'" *Id.* (quoting H.R. Rep. No. 97-177, at 151 (1981)).

RULES OF PRACTICE: CONTENTION REQUIREMENTS FOR INTERVENTION

The contention admissibility rule serves to ensure that admitted contentions (1) focus on real disputes that can be resolved in an adjudication, (2) establish a sufficient factual and legal foundation to warrant further inquiry, and (3) put other parties on notice of the disputed issues so they will know precisely those claims they must support or oppose. *See Oconee,* CLI-99-11, 49 NRC at 334.

COMBINED LICENSE APPLICATIONS: ENVIRONMENTAL REPORT; NEPA AND PART 51 REQUIREMENTS

Pursuant to Commission regulations that implement the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4331 et seq., every COL application must be accompanied by an ER to aid the Commission in its preparation of an Environmental Impact Statement (EIS) in compliance with section 102(2) of NEPA. *See* 10 C.F.R. § 51.14(a). An ER must discuss: (1) the impacts of the proposed action on the environment; (2) adverse environmental effects of the proposed action that cannot be avoided; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources associated with the proposed action. *See* 10 C.F.R. § 51.45(b). The ER shall "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." *Id.* § 51.45(c). The ER "must also contain an analysis of the cumulative impacts of the activities to be authorized by the [COL]." *Id.* The ER shall discuss environmental impacts "in proportion to their significance" (10 C.F.R. § 51.45(b)(1)), and it "should contain sufficient data to aid the Commission in its development of an independent analysis." *Id.* § 51.45(c).

NEPA: NRC RESPONSIBILITIES

In enacting NEPA, Congress's twin aims were to: (1) require an agency to consider every significant aspect of the environmental impact of a proposed action; and (2) ensure the agency will inform the public that it has considered environmental concerns in its decisionmaking process. *See Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 97 (1983). To effect these aims, NEPA requires an agency to "take a 'hard look' at the environmental consequences before taking a major action" and to report the result of that hard look in an EIS. *Id.* Section 102(2) of NEPA, 42 U.S.C. § 4332(2),

prescribes the scope of environmental concerns that must be considered in the EIS.

RULES OF PRACTICE: INTERVENTION PETITIONS

In analyzing the admissibility of a proffered contention, a licensing board need not turn a blind eye to those portions of a petitioner's exhibits that might militate against admissibility. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated on other grounds,* CLI-90-4, 31 NRC 333 (1990) ("[B]oards must do more than uncritically accept a party's mere assertion that a particular document supplies the basis for its contention, without even reviewing the document itself to determine if it . . . appears to support a litigable contention.").

NEPA: CONTENTIONS (AMENDMENT); ENVIRONMENTAL IMPACT STATEMENT; NRC RESPONSIBILITIES; PROCEDURES

RULES OF PRACTICE: NEW AND AMENDED CONTENTIONS

Preparation of the ER is the first step in the NEPA process. Its purpose is to aid the NRC Staff in the performance of its NEPA responsibilities, which consist of preparing the draft EIS (10 C.F.R. §§ 51.70, 51.71), releasing the draft EIS to the public for comments (*id.* §§ 51.73, 51.74), and preparing and distributing the final EIS after receipt and consideration of comments. *Id.* §§ 51.90, 51.91, 51.93, 51.94. A decision by a licensing board rejecting a contention challenging the adequacy of a portion of an ER does not necessarily mean the NRC will satisfy its NEPA obligations by simply importing that portion of the ER into the EIS. Rather, the EIS must comply with NEPA and the above-cited Commission regulations, which describe the scope of the "detailed statement" (42 U.S.C. § 4332(2)(C)) that must be contained in the EIS. When the NRC Staff issues the EIS, Commission regulations provide an opportunity to either amend admitted contentions or proffer new contentions based on "data or conclusions in the NRC draft or final [EIS] . . . 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).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY); RAIS

The mere existence of requests for additional information, if generated by the NRC Staff, do not, in and of themselves, establish grounds for a litigable contention. *See Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 164 (2006). This principle applies *a fortiori* in the

context of comments and questions generated by a state agency that is examining a state application to determine compliance with state legal and technical standards.

NEPA: CONSIDERATION OF ALTERNATIVES (SECTION 102(2)(E)); ENVIRONMENTAL REPORT; SCOPE OF ENVIRONMENTAL ANALYSIS (REQUIREMENTS)

The NRC regulations implementing NEPA require an applicant to submit an ER discussing "[t]he impact of the proposed action *on the environment*" (10 C.F.R. § 51.45(b)(1) (emphasis added)) and "'appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources'" (*id.* § 51.45(b)(3)) (citing NEPA § 102(2)(E), 42 U.S.C. § 4332(2)(E)). This regulation requires an analysis of the *environmental* impacts of and alternatives to the proposed action; it does *not* extend to the impacts on another ongoing or proposed restoration effort in isolation from environmental impacts.

RULES OF PRACTICE: CONTENTIONS (CONTENTIONS OF OMISSION)

A contention of omission is one that alleges an application suffers from an improper omission, whereas a contention of adequacy raises a specific substantive challenge to how particular information or issues have been discussed in the application. *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 (2006). A contention can contain an omission component and an adequacy component. *See id.* at 742 n.7.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

A contention must "identify the disputed portion of the application, and provide 'supporting reasons' for the challenge to the application. Similarly if a petitioner believes that an application fails to contain information on a 'relevant matter as required by law,' the contention must identify each failure and the supporting reasons for the petitioner's belief." *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 456 (2006) (internal footnotes omitted).

NEPA: ENVIRONMENTAL REPORT; SCOPE OF ENVIRONMENTAL ANALYSIS (REQUIRED)

An ER need only discuss reasonably foreseeable environmental impacts of a

proposed action. *See, e.g., Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 46 (2010).

DESIGN BASIS ACCIDENTS: FLOOD PROTECTION

ENFORCEMENT PETITIONS

The NRC Staff, incident to its preparation of the Safety Evaluation Report, has an obligation to ensure an applicant's proposed plant's design basis will protect public health and safety (*see* 10 C.F.R. § 52.97(a)(1)(v)), and the Staff accomplishes this objective by, *inter alia,* verifying that the design basis will withstand maximum flooding events. *See id.* Part 50, App. A, § I, Criterion 2 ("Structures, systems, and components important to safety shall be designed to withstand the effects of natural phenomena such as earthquakes, tornadoes, hurricanes, floods, tsunami, and seiches without loss of capability to perform their safety functions."). An applicant has a continuing obligation to ensure its design basis will withstand such events. *Cf.* Supplemental Staff Guidance to NUREG 1555, "Environmental Standard Review Plan," for Consideration of the Effects of Greenhouse Gases and of Climate Change at 11 (Apr. 8, 2010) ("If it becomes evident that long-term climate changes influence the most severe of natural phenomena reported in the site vicinity, then a license holder may need to take action to ensure the licensing basis is preserved."). To the extent future climate-related evidence might indicate the design basis of a nuclear power plant will not withstand a maximum flooding event, Commission regulations provide a remedial mechanism for members of the public whereby "[a]ny person may file a request to institute a proceeding . . . to modify, suspend or revoke a license . . . ." 10 C.F.R. § 2.206(a).

NEED FOR POWER: APPLICABLE STANDARD

NEPA: COST-BENEFIT ANALYSIS (BALANCE); NEED FOR POWER

NEPA "itself does not mandate a cost-benefit analysis," but the statute "is generally regarded as calling for some sort of a weighing of the environmental costs against the economic, technical, or other public benefits of a proposal." *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88 (1998) (citations omitted). "'Need for power' is a shorthand expression for the 'benefit' side of the cost-benefit balance which NEPA mandates for a proceeding considering the licensing of a nuclear power plant." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-422, 6

NRC 33, 90 (1977), *aff'd, New England Coalition on Nuclear Pollution v. NRC,* 582 F.2d 87 (1st Cir. 1978)).

NEED FOR POWER: APPLICABLE STANDARD; FORECASTING FUTURE DEMAND

NEPA: NRC RESPONSIBILITIES; NEED FOR POWER

The Commission has explained that preparing a "need for power" discussion should not be an onerous task: "[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." Nuclear Energy Institute; Denial of Petition for Rulemaking, 68 Fed. Reg. 55,905, 55,910 (Sept. 29, 2003); *see also South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 17 (2010). A state public service commission's determination of need for power may be relied on by the NRC in its own analysis, as long as that determination "is neither shown nor appears on its face to be seriously defective." *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-490, 8 NRC 234, 241 (1978). The NRC Staff has issued guidance for how it evaluates the adequacy of a state determination of need for power; namely, the state's process must be "(1) systematic, (2) comprehensive, (3) subject to confirmation, and (4) responsive to forecasting uncertainty." U.S. Nuclear Regulatory Commission, Environmental Standard Review Plan, Standard Review Plans for Environmental Reviews for Nuclear Power Plants, NUREG-1555, at 8.1-2 (Oct. 1999).

NEED FOR POWER: FORECASTING FUTURE DEMAND

"[I]nherent in any forecast of future electric power demands is a substantial margin of uncertainty." *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 365 (1975).

REGULATORY GUIDES: APPLICATION

RULES OF PRACTICE: CONTENTIONS

Although NUREGs are not legally binding, they are guidance documents (*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-

01-22, 54 NRC 255, 264 (2001)), and an applicant's failure to comply with such documents can potentially give rise to an admissible contention.

NEED FOR POWER: FORECASTING FUTURE DEMAND

The Commission has long acknowledged the uncertainty inherent in long-range demand forecasts: "[E]very prediction has associated uncertainty and . . . long-range forecasts of this type 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 continued use from historical data, range of years considered, the area considered, extrapolations from usage in residential, commercial, and industrial sectors, etc." *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609-10 (1979).

NEPA: ENVIRONMENTAL REPORT; SCOPE OF ENVIRONMENTAL ANALYSIS (REQUIREMENTS)

The possible impact of proposed legislation and regulations need not be addressed in the ER, because any effect they might have is not "reasonably foreseeable" until they are enacted or promulgated.

NEPA: CONSIDERATION OF ALTERNATIVES; ENVIRONMENTAL REPORT

An alternative that fails to meet the purpose of the project does not need to be further examined in the ER. *See Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806-08 (2005).

COMBINED LICENSE APPLICATIONS: EMERGENCY PLANNING

EMERGENCY PLANNING: FEMA FINDING (REBUTTABLE PRESUMPTION)

NUCLEAR REGULATORY COMMISSION: HEALTH AND SAFETY RESPONSIBILITIES

Before issuing a COL under Part 52, the NRC must conclude "there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. § 50.47(a)(1)(ii). The NRC is to "base its finding on a review of the Federal Emergency Management Agency

(FEMA) findings," and "[i]n any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability." *Id.* § 50.47(a)(2).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

As the Commission stated in *American Centrifuge,* CLI-06-10, 63 NRC at 457: "It is simply insufficient . . . for a petitioner to point to an Internet Web site or article and expect the Board on its own to discern what particular issue a petitioner is raising, including what section of the application, if any, is being challenged as deficient and why. A contention must make clear why cited references provide a basis for a contention."

RULES OF PRACTICE: REPLY BRIEFS

Governing case law requires a petitioner's reply to "be 'narrowly focused on the legal or logical arguments presented in the [applicant] or NRC staff answer.'" *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (citations omitted).

EMERGENCY PLAN: CONTENT (EVACUATION)

NUREG-0654, which discusses evacuation or sheltering in the context of a general emergency, states in relevant part: "The general emergency class involves actual or imminent substantial core degradation or melting with the potential for loss of containment. The preferred initial protective action for this class is to evacuate immediately about 2 miles in all directions from the plant and about 5 miles downwind, unless other conditions make evacuation dangerous." NUREG-0654, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," Rev. 1, Supplement 3, App. 2 at 1-3 (July 1996).

EMERGENCY PLAN: CONTENT

Governing regulations (10 C.F.R. § 50.47(b)(10)) require that sheltering be considered in developing the recommended range of protective actions in the emergency plan.

RULES OF PRACTICE: CONTENTIONS (CONTENTIONS OF OMISSION)

A contention of omission may be summarily rejected as inadmissible if (1) there is no requirement to address the topic allegedly omitted from the application, or (2) the topic that allegedly is omitted is, in fact, included in the application. *See American Centrifuge,* CLI-06-10, 63 NRC at 456.

NUCLEAR REGULATORY COMMISSION: PERMITTING BY OTHER REGULATORY AUTHORITIES

It is not the province of the NRC (and thus this Board) to enforce another agency's regulations. *See Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120-22 & n.3 (1998).

COMBINED LICENSE APPLICATIONS: CONTENTS (LONG-TERM LOW-LEVEL RADIOACTIVE WASTE STORAGE)

RULES OF PRACTICE: SCOPE OF PROCEEDING

Because Greater-Than-Class-C Low-Level Radioactive Waste (LLRW) "is the responsibility of the federal government" and thus unaffected by the closure of the Barnwell facility, the Commission has held that challenges to a COL applicant's failure to provide information on long-term storage of Greater-Than-Class-C LLRW are outside the scope of a COL proceeding. *See Levy County,* CLI-10-2, 71 NRC at 47-48.

NEPA: ENVIRONMENTAL ANALYSIS; ENVIRONMENTAL REPORT

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

Applicants are obligated under 10 C.F.R. § 51.45(b) to prepare Environmental Reports that discuss, *inter alia,* "[t]he impact of the proposed action on the environment" and "[a]ny adverse environmental effects which cannot be avoided should the proposal be implemented." 10 C.F.R. § 51.45(b)(1)-(2).

LICENSING BOARDS: RESPONSIBILITIES; SCOPE OF REVIEW (INTERVENTION PETITION)

It is not the function of a licensing board to comb through the record searching for arguments in support of a proffered contention. *See, e.g., SmithKline Beecham Corp. v. Apotex Corp.,* 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("'Judges are not

like pigs, hunting for truffles buried in briefs.'") (quoting *United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir. 1991)).

COMBINED LICENSE APPLICATIONS: CONTENTS

TECHNICAL ISSUES: LOW-LEVEL RADIATION RELEASES; SAFETY STANDARDS

NRC regulations require that a COLA contain an FSAR that includes "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 . . . [regarding t]he 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). NRC regulations also require a COLA to "identify . . . the means to be employed, for keeping levels of radioactive material in effluents to unrestricted areas as low as is reasonably achievable [or ALARA]." *Id.* § 50.34a(a).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

Section 2.309(c)(1) requires balancing the following factors to the extent they apply to the particular late-filed contention: (1) the existence *vel non* of good cause; (2) the nature of the petitioner's right to be a party to the proceeding; (3) the nature and extent of the petitioner's interest in the proceeding; (4) the possible effect of the proceeding's outcome on the petitioner's interest; (5) the availability of other means to protect the petitioner's interest; (6) the extent the petitioner's interest will be represented by existing parties; (7) the extent the petitioner's participation will broaden the issues or delay the proceeding; and (8) the extent the petitioner's participation might assist in developing a sound record. The Commission has instructed that "good cause" is the most important factor. *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY); RAIs

Although citations to factually supported concerns raised by a state agency reviewing a proposed project are not necessarily insufficient to satisfy section 2.309(f)(1)(v), a petitioner may not rely on a document generated by a state agency if that document contains nothing more than a request for information. *See, e.g.,*

Crow Butte Resources., Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 550-52 (2009).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

"A petitioner's issue will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.'" *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003) (quoting *Oyster Creek,* CLI-00-6, 51 NRC at 208).

RULES OF PRACTICE: INTERESTED LOCAL GOVERNMENTAL ENTITY

If at least one petitioner demonstrates standing and proffers an admissible contention so that its petition to intervene is granted, section 2.315(c) allows an interested local governmental body that has not been admitted as a party to participate in a hearing as an interested nonparty. A local governmental body that is participating as an interested nonparty may designate a single representative "to introduce evidence, [to] interrogate witnesses" (if the admitted parties are permitted cross-examination), to "advise the Commission without requiring the [local governmental body's] representative to take a position with respect to the issue, [to] file proposed findings in those proceedings where findings are permitted, and [to] petition for review by the Commission under [10 C.F.R.] § 2.341 with respect to the admitted contentions." 10 C.F.R. § 2.315(c).

RULES OF PRACTICE: SELECTION OF HEARING PROCEDURES

Section 2.310(a) provides that the hearing procedures in Subpart L of 10 C.F.R. Part 2 will ordinarily be used in proceedings for the "grant, renewal, licensee-initiated amendment, or termination of licenses or permits." *See* 10 C.F.R. § 2.310(a). Section 2.310(d) describes an exception to this rule in cases where the presiding officer determines by order that a contested matter necessitates resolution of a material issue of fact relating to a past activity "where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter" (*id.* § 2.310(d)), in which case the hearing for resolution of the contested matter will be conducted under Subpart G of 10 C.F.R. Part 2. *See id.* Section 2.309(g) permits a petitioner to "address the selection of hearing procedures, taking into account the provisions of [10 C.F.R.] § 2.310 . . . ."

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MEMORANDUM AND ORDER
(Ruling on Petitions to Intervene)

INTRODUCTION

Pending before this Licensing Board are three Petitions to Intervene challenging a combined license application (COLA) filed by Florida Power & Light Company (FPL) for two nuclear power reactors, Turkey Point Units 6 and 7, to be located near Homestead, Florida. The Petitions to Intervene were filed by: (1) Mark Oncavage, Dan Kipnis, Southern Alliance for Clean Energy, and National Parks Conservation Association (hereinafter referred to collectively as

Joint Petitioners); (2) Citizens Allied for Safe Energy, Inc. (CASE); and (3) Village of Pinecrest, Florida (Pinecrest), which also requests, in the alternative, to participate as an interested local governmental body.

For the reasons discussed below, we conclude: (1) Joint Petitioners establish standing and proffer one admissible contention; (2) CASE establishes standing and proffers two admissible contentions; and (3) Pinecrest establishes standing but fails to proffer an admissible contention. We therefore grant Joint Petitioners' and CASE's Petitions to Intervene, and we deny Pinecrest's Petition to Intervene. We grant, however, Pinecrest's request to participate as an interested local governmental body.

I. PROCEDURAL BACKGROUND

On June 30, 2009, FPL submitted an Application for a combined license (COL) for two AP1000 pressurized water nuclear reactors to be located adjacent to the existing Turkey Point power plants, Units 1 through 5, at the Turkey Point site near Homestead, Florida. *See* Letter from Mano K. Nazar, Senior Vice President and Chief Nuclear Officer, FPL, to Michael Johnson, Director, NRC Office of New Reactors (June 30, 2009). The Application references the standard design certification for the AP1000 issued to Westinghouse Electric Company, as amended, including Revisions 16 and 17. The proposed nuclear reactors would be known as Turkey Point Units 6 and 7.[1]

On August 3, 2009, the NRC Staff published a notice in the *Federal Register* of the receipt and availability of the Application. *See* 74 Fed. Reg. 38,477 (Aug. 3, 2009). On September 4, 2009, the Staff accepted the Application for docketing. *See* 74 Fed. Reg. 51,621 (Oct. 7, 2009).

On June 14, 2010, the NRC issued a Notice of Hearing and Opportunity to Petition for Leave to Intervene, which provided members of the public 60 days from the date of publication to file a petition for leave to intervene in this proceeding. *See* Florida Power & Light Company, Combined License Application for the Turkey Point Units 6 & 7, Notice of Hearing, Opportunity to Petition for Leave to Intervene and Associated Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information

[1] Units 6 and 7 would, as planned, be located on a 218-acre plant area situated within the approximately 11,000-acre Turkey Point plant property in Miami-Dade County, Florida, located about 25 miles south of Miami and 9 miles southeast of Homestead. Units 1 through 5 occupy about 195 acres on the Turkey Point plant property. Units 1 and 2 are natural gas/oil steam electric generating units that have been in service since 1967 and 1968, respectively. Units 3 and 4 are pressurized water nuclear reactor units that have been in service since 1972 and 1973, respectively. Unit 5 is a natural gas combined-cycle unit that began operating in 2007. *See* Turkey Point Units 6 & 7 COL Application, Part 3 — Environmental Report, Rev. 0 at 3.1-1 [hereinafter cited as ER].

for Contention Preparation, 75 Fed. Reg. 34,777 (June 18, 2010) [hereinafter Notice of Hearing].

In response to the Notice of Hearing, the following entities filed a Petition to Intervene: (1) Joint Petitioners;[2] (2) CASE;[3] and (3) Pinecrest, which requested, in the alternative, to participate as an interested local governmental body pursuant to 10 C.F.R. § 2.315(c).[4]

FPL opposes all three Petitions, arguing that none proffers an admissible contention.[5] The NRC Staff opposes the Petitions of Joint Petitioners and Pinecrest on the ground that they fail to proffer an admissible contention.[6] The NRC Staff avers, however, that CASE proffers two admissible contentions and, accordingly,

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[2] Joint Petitioners' Petition for Intervention (Aug. 17, 2010) [hereinafter Joint Pet.].

[3] CASE [Revised] Petition to Intervene and Request for a Hearing (dated Aug. 17, 2010) [hereinafter CASE Rev. Pet.]. CASE filed its Revised Petition on August 20 to replace its original August 17 Petition, which may be fairly characterized as a working draft rather than a finished product. *Compare* CASE Rev. Pet. *with* CASE Petition to Intervene and Request for a Hearing (Aug. 17, 2010). As FPL correctly states, the Revised Petition "corrects many of the numerous errors in the original Petition, making CASE's Petition easier to follow and more readable." FPL's Motion to Strike Proposed Contention 8 in CASE's Revised Petition to Intervene in Turkey Point Units 6 and 7 Combined Construction and Operating License Application (Sept. 13, 2010) at 1 n.1 [hereinafter FPL Motion to Strike Proposed Contention 8]. For that reason, neither FPL nor the NRC Staff objects to CASE's reliance on the Revised Petition, to the extent the Revised Petition does not advance late-filed arguments that were not included in the original Petition. *See id.* at 1-2; NRC Staff's Answer to FPL Motion to Strike (Sept. 21, 2010). We agree that CASE's Revised Petition is "easier to follow and more readable," and we therefore will treat it as CASE's originally filed Petition, except to the extent it advances late-filed arguments.

[4] Petition by the Village of Pinecrest, Florida for Leave to Intervene in a Hearing on FPL's Combined Construction and Operating License Application for Turkey Point Units 6 & 7, or in the Alternative, Participate as a Non-Party Local Government (Aug. 16, 2010) [hereinafter Pinecrest Pet.]. Pursuant to section 2.315(c), a local governmental body that is not admitted as a party shall, upon request, be permitted to participate in a hearing as an interested nonparty. In that capacity, its representative may, *inter alia,* "introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, advise the Commission without [being required] to take a position with respect to the issue, file proposed findings . . . , and petition for review by the Commission . . . ." 10 C.F.R. § 2.315(c).

[5] FPL's Answer Opposing Joint Petitioners' Petition to Intervene and Request for Hearing on Turkey Point Units 6 & 7 Combined Construction and Operating License Application (Sept. 13, 2010) at 4 [hereinafter FPL Answer to Joint Pet.]; FPL's Answer Opposing CASE's Revised Petition to Intervene and Request for Hearing in Turkey Point Units 6 and 7 Combined Construction and Operating License Application (Sept. 13, 2010) at 2 [hereinafter FPL Answer to CASE Rev. Pet.]; FPL's Answer Opposing Pinecrest's Petition to Intervene in the Turkey Point Units 6 & 7 Combined Construction and Operating License Application Proceeding (Sept. 9, 2010) at 2 [hereinafter FPL Answer to Pinecrest Pet.].

[6] NRC Staff's Answer to "Petition for Intervention" of Joint Petitioners (Sept. 13, 2010) at 1 [hereinafter NRC Staff Answer to Joint Pet.]; NRC Staff's Answer to Petition to Intervene by Pinecrest (Sept. 10, 2010) at 1 [hereinafter NRC Staff Answer to Pinecrest Pet.].

the Staff does not oppose granting CASE's Petition.[7] And if a hearing is granted, the Staff does not oppose Pinecrest's request to participate as an interested local governmental body. *See* NRC Staff Answer to Pinecrest Pet. at 17.

Joint Petitioners and CASE filed timely Replies, reiterating that they satisfy the requirements to intervene in this proceeding.[8] Pinecrest also filed a timely Reply, arguing principally that it desires to participate as an interested local governmental body pursuant to 10 C.F.R. § 2.315(c) (*see supra* note 4) even if its contentions are deemed inadmissible.[9]

On October 12, 2010, FPL moved to strike portions of the Replies filed by Joint Petitioners and CASE, arguing that the Replies included new issues and claims not found in, and beyond the scope of, the Petitions to Intervene.[10] The NRC Staff agrees in part with FPL's motions.[11] Joint Petitioners and CASE oppose FPL's motions.[12]

On November 8, 2010, this Board issued an Order that listed questions on contention admissibility for the participants to address at oral argument. *See* Licensing Board Order (Outlining Format and Questions for Oral Argument) (Nov. 8, 2010) (unpublished). On November 19, 2010, we held oral argument in

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[7] NRC Staff's Answer to CASE Petition to Intervene and Request for a Hearing (Sept.13, 2010) at 1, 49, 59 [hereinafter NRC Staff Answer to CASE Rev. Pet.].

[8] Joint Petitioners' Reply to FPL Answer Opposing Petition to Intervene and NRC Staff Answer to Petition for Intervention (Oct. 1, 2010) at 1 [hereinafter Joint Petitioners' Reply]; CASE Reply to FPL's Answer Opposing CASE's Revised Petition to Intervene and Request for Hearing in Turkey Point Units 6 and 7 Combined Construction and Operating License Application (Sept. 29, 2010) at 45 [hereinafter CASE Reply to FPL Answer]; CASE Reply to NRC Staff's Answer to "CASE Petition to Intervene and Request for a Hearing" (Sept. 29, 2010) [hereinafter CASE Reply to NRC Staff Answer]. The Replies filed by Joint Petitioners and CASE were timely pursuant to this Board's unpublished Order granting an extension of time. *See* Licensing Board Order (Granting, in Part, Joint Petitioners' and CASE's Motions for Extension of Time) (Sept. 17, 2010) (unpublished).

[9] Pinecrest's Reply to FP&L's Answer Opposing Its Petition to Intervene in the Turkey Point Units 6 & 7 Combined Construction and Operating License Application Proceeding (Sept. 16, 2010) at 1 [hereinafter Pinecrest Reply].

[10] FPL's Motion to Strike Portions of Joint Petitioners' Reply to FPL Answer Opposing Petition to Intervene and NRC Staff Answer to Petition to Intervene (Oct. 12, 2010) at 1 [hereinafter FPL Motion to Strike Portions of Joint Petitioners' Reply]; FPL's Motion to Strike Portions of CASE's Reply to FPL's Answer Opposing Revised Petition to Intervene and Request for Hearing (Oct. 12, 2010) at 1 [hereinafter FPL Motion to Strike Portions of CASE Reply].

[11] NRC Staff's Answer to FPL Motion to Strike Portions of Joint Petitioners' Reply (Oct. 21, 2010) at 1; NRC Staff's Answer to FPL Motion to Strike Portions of CASE's Reply (Oct. 21, 2010) at 1.

[12] Joint Petitioners' Answer in Opposition to FPL Motion to Strike Portions of Joint Petitioners' Reply to FPL Answer Opposing Petition to Intervene and NRC Staff Answer to Petition to Intervene (Oct. 22, 2010) at 1; CASE Answer in Opposition to FPL Motion to Strike Portions of CASE's Reply to FPL's Answer to CASE's Answer to FPL's Answer Opposing Revised Petition to Intervene and Request for Hearing (Oct. 22, 2010) at 2 [hereinafter CASE Answer to FPL Motion to Strike Portions of CASE Reply].

Homestead, Florida. *See* Licensing Board Transcript, FPL Turkey Point, Units 6 & 7 at 18-265 (Nov. 19, 2010) [hereinafter cited as Tr.].

II. APPLICABLE LEGAL STANDARDS

To participate in this proceeding as an intervenor, a petitioner must (1) establish standing and (2) proffer at least one admissible contention. *See* 10 C.F.R. § 2.309(a). Immediately below, we summarize the legal standards governing standing and contention admissibility. We then apply these standards to the Petitions to Intervene filed by Joint Petitioners (*infra* Part III), CASE (*infra* Part IV), and Pinecrest (*infra* Part V).

A. Legal Standards Governing Standing

In this case, the following three categories of petitioners seek to establish standing: (1) individuals who live within 50 miles of the proposed reactors, (2) organizations seeking representational standing on behalf of members who live within 50 miles of the proposed reactors, and (3) a municipality whose residents live within 50 miles of the proposed reactors. We discuss the legal standards governing standing for each of these entities in turn.

1. Legal Standards Governing Standing for Individuals

The standing requirements for NRC adjudicatory proceedings derive from the Atomic Energy Act (AEA), which requires the NRC to provide a hearing "upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1)(A).

Under the general standing requirements in our implementing regulations, a petitioner must state (10 C.F.R. § 2.309(d)(1)):

> (i) The name, address and telephone number of the requestor or petitioner;
> (ii) The nature of the requestor's/petitioner's right under the [relevant statute] to be made a party to the proceeding;
> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
> (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

In determining whether a petitioner has demonstrated standing, the Commission applies contemporaneous judicial concepts of standing, which require a petitioner to "(1) allege an 'injury in fact' that is (2) 'fairly traceable to the

challenged action' and (3) is 'likely' to be 'redressed by a favorable decision.'" *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted)). In the context of reactor licensing proceedings, however, a petitioner is deemed to have standing pursuant to the Commission's so-called "proximity" presumption rule by showing that he or she resides in, or frequents the area within, a 50-mile radius of the facility. *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010).

2. Legal Standards Governing Representational Standing for Organizations

An organization may establish standing to intervene based on a theory of representational standing. To demonstrate representational standing, an organization must: (1) show that at least one of its members might be affected by the proceeding, which can be accomplished by showing that a member satisfies either the 50-mile "proximity" presumption or traditional standing elements; (2) identify that member by name and address; and (3) show that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf. *See Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000). Additionally, the interests the "organization seeks to protect must be germane to its own purpose," and "neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action." *Palisades,* CLI-07-18, 65 NRC at 409; *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).[13]

3. Legal Standards Governing Standing for Municipalities

Pursuant to Commission regulation, a municipality is deemed to have standing in a reactor licensing proceeding that involves a facility located within its boundaries. *See* 10 C.F.R. § 2.309(d)(2).

Where, as here, a municipality seeks to participate in a reactor licensing proceeding that does not involve a facility within the municipality's boundaries, it can, for purposes of establishing standing, rely on the 50-mile "proximity"

[13] An organization may also establish organizational standing. *See International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001). Organizational standing, however, is not implicated in this proceeding.

presumption to the same extent as an individual[14] or an organization.[15] Thus, a municipality satisfies Commission standing requirements in a reactor licensing proceeding by showing either that its residents live within 50 miles of the facility, or that its boundaries extend to within 50 miles of the facility.

B. Legal Standards Governing Contention Admissibility

For a timely filed contention to be admissible, it must satisfy the requirements in 10 C.F.R. § 2.309(f). Pursuant to those standards, an admissible contention must: (1) "[p]rovide a specific statement of the issue of law or fact to be raised"; (2) "[p]rovide a brief explanation of the basis for the contention"; (3) "[d]emonstrate that the issue raised in the contention is within the scope of the proceeding"; (4) "[d]emonstrate that the issue raised . . . is material to the findings the NRC must make to support the action that is involved in the proceeding"; (5) "[p]rovide a concise statement of the alleged facts or expert opinions . . . together with references to the specific sources and documents on which the requestor/petitioner intends to rely"; and (6) "provide sufficient information to show that a genuine dispute exists . . . on a material issue of law or fact," including "references to specific portions of the application . . . the petitioner disputes . . . or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure . . . ." 10 C.F.R. § 2.309(f)(1).[16]

The multi-factor contention-admissibility test in section 2.309(f)(1) — which is "'strict by design'" (*AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating

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[14] *See Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 295 (2000) (Commission recognizes that the Town of Cortlandt established standing in a license transfer proceeding because it is the "locus of the Indian Point 3 plant and therefore is in a position analogous to that of an individual living or working within a few miles of a plant").

[15] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 33-34 (1998) (Commission recognizes that a governmental body's interest in protecting the individuals and territory that fall under that body's authority establishes an organizational interest for standing purposes). Pursuant to the rationale in *Private Fuel Storage,* it may reasonably be presumed that the interests a municipality seeks to represent on behalf of its residents are germane to its own purposes. *See id.* at 32; *accord Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29 (1999).

[16] A contention must be rejected if: (1) it constitutes an attack on applicable statutory requirements; (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations; (3) it merely expresses the petitioner's view of what a governing policy ought to be; (4) it seeks to raise an issue improper for adjudication in the proceeding or not applicable to the facility in question; or (5) it seeks to raise an issue that is not concrete or is otherwise not litigable. *See Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

Station), CLI-06-24, 64 NRC 111, 118 (2006)) — was crafted by the Commission to "raise the threshold bar for an admissible contention." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). Under the previous contention-admissibility rule, a contention could be admitted and litigated "based on little more than speculation . . . . Admitted intervenors often had negligible knowledge of nuclear power issues and, in fact, no direct case to present, but instead attempted to unearth a case through cross-examination." *Id.* "Congress therefore called upon the Commission to make 'fundamental changes' in its public hearing process to assure that 'hearings serve the purpose for which they were intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors.'" *Id.* (quoting H.R. Rep. No. 97-177, at 151 (1981)). The Commission thus "toughened its contention [admissibility] rule [in 1989 to] . . . ensure that only intervenors with genuine and particularized concerns participate in NRC hearings." *Id.*[17]

That the Commission's contention admissibility rule is designedly strict is not to say that it should serve as a "fortress to deny intervention." *Oconee,* CLI-99-11, 49 NRC at 335 (quoting *Peach Bottom,* 8 AEC at 21). Rather, consistent with section 2.309(f), licensing boards are bound to admit for litigation "contentions that are material and supported by reasonably specific factual and legal allegations." *Id.*

III. JOINT PETITIONERS ESTABLISH STANDING, AND THEY PROFFER ONE CONTENTION, CONTENTION 2, THAT IS ADMISSIBLE IN PART

A. Joint Petitioners Establish Standing

Joint Petitioners consist of two individuals, Mark Oncavage and Dan Kipnis, and two organizations, Southern Alliance for Clean Energy (SACE) and National Parks Conservation Association (NPCA). We conclude that all four entities satisfy Commission standing requirements.[18]

First, Mr. Oncavage and Mr. Kipnis established their standing pursuant to the proximity presumption rule (*see supra* Part II.A.1), because they both submitted declarations demonstrating they live within 50 miles of the Turkey Point site.

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[17] As the Commission has instructed, the contention admissibility rule serves to ensure that admitted contentions (1) focus on real disputes that can be resolved in an adjudication, (2) establish a sufficient factual and legal foundation to warrant further inquiry, and (3) put other parties on notice of the disputed issues so they will know precisely those claims they must support or oppose. *See Oconee,* CLI-99-11, 49 NRC at 334.

[18] Neither FPL nor the NRC Staff challenges the standing of the four entities who comprise Joint Petitioners. *See* FPL Answer to Joint Pet. at 7; NRC Staff Answer to Joint Pet. at 9-10.

See Joint Pet., Exh. 1, Declaration of Mark Peter Oncavage ¶ 2 (Aug. 13, 2010); Declaration of Daniel C. Kipnis ¶ 2 (Aug. 12, 2010) [hereinafter Joint Pet. Exh. 1].

Relying on the theory of representational standing (*see supra* Part II.A.2), SACE and NPCA both showed the interests they seek to protect in this proceeding are germane to their organizational purposes,[19] and they both provided the names of members who (1) established standing to intervene in their own right by satisfying the proximity presumption rule, and (2) authorized SACE and NPCA, as appropriate, to represent their interests in this proceeding, thus absolving them from participating as individuals. *See* Joint Pet. Exh. 1. SACE and NPCA therefore satisfy the standards for representational standing.

B. Joint Petitioners Proffer One Contention, Contention 2, That Is Admissible in Part

Each of Joint Petitioners' proffered contentions alleges a deficiency in FPL's Environmental Report (ER). Before addressing the admissibility of those contentions, we provide a brief discussion of the standards governing the environmental documents prepared by an applicant and the NRC Staff.

Pursuant to Commission regulations that implement the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4331 *et seq.,* every COL application must be accompanied by an ER to aid the Commission in its preparation of an Environmental Impact Statement (EIS) in compliance with section 102(2) of NEPA. *See* 10 C.F.R. § 51.14(a).[20] An ER must discuss: (1) the impacts of the proposed action on the environment; (2) adverse environmental effects of the proposed action that cannot be avoided; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources associated with the proposed action.

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[19] SACE identifies itself as a nonprofit, public-interest organization that "promotes responsible energy choices to solve global warming problems and ensure[s] clean, safe, and healthy communities throughout the southeast." Joint Pet. at 2. NPCA identifies itself as a nonprofit, public interest organization that is committed to preserving our nation's parks, including Biscayne National Park and Everglades National Park. *Id.* at 2-3.

[20] In enacting NEPA, Congress's twin aims were to: (1) require an agency to consider every significant aspect of the environmental impact of a proposed action; and (2) ensure the agency will inform the public that it has considered environmental concerns in its decision-making process. *See Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 97 (1983). To effect these aims, NEPA requires an agency to "take a 'hard look' at the environmental consequences before taking a major action" and to report the result of that hard look in an EIS. *Id.* Section 102(2) of NEPA, 42 U.S.C. § 4332(2), prescribes the scope of environmental concerns that must be considered in the EIS.

See 10 C.F.R. § 51.45(b). The ER shall "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." *Id.* § 51.45(c). The ER "must also contain an analysis of the cumulative impacts of the activities to be authorized by the [COL]." *Id.* The ER shall discuss environmental impacts "in proportion to their significance" (10 C.F.R. § 51.45(b)(1)), and it "should contain sufficient data to aid the Commission in its development of an independent analysis." *Id.* § 51.45(c).

Guided by the above standards, we now analyze the admissibility of the NEPA contentions proffered by Joint Petitioners.

1. Contention NEPA 1 Is Not Admissible

Joint Petitioners proffer the following contention, which they characterize as Contention NEPA 1, relating to the alleged environmental impacts of FPL's proposed radial collector wells: "The ER fails to adequately address direct, indirect, and cumulative impacts of the radial collector wells on the Biscayne Aquifer and the Biscayne Bay Ecosystem." Joint Pet. at 9. In support of Contention NEPA 1, Joint Petitioners advance five discrete underlying contentions, which they label as Contentions NEPA 1.1 through NEPA 1.5. We address these five underlying contentions in turn, concluding that none is admissible and, accordingly, that Contention NEPA 1 is not admissible.

Preliminarily, because all five contentions underlying Contention NEPA 1 concern FPL's proposed radial collector wells, we will examine the purpose and construction of those wells as described in the ER. During normal operations of proposed Units 6 and 7, FPL intends to dissipate waste heat by mechanical draft cooling towers. Two sources of makeup cooling water will be available: (1) the primary source will consist of reclaimed water (discussed *infra* Part III.B.2) that will be used after it is processed by the Miami-Dade Water and Sewer Department (MDWASD) and conveyed via pipelines to the Turkey Point site; and (2) the secondary source — which will be used when reclaimed water is inadequate in quantity or quality to meet the needs of the cooling system — will consist of four radial collector wells designed principally to withdraw seawater from under Biscayne Bay. *See* ER at 5.2-1, 5.2-8.

The radial collector wells will be located on the Turkey Point peninsula adjacent to Biscayne Bay. *See* ER Figure 3.1-3. Each well will consist of a central reinforced concrete caisson extending below ground level with lateral pipes projecting from the caisson and extending horizontally for a length of up to 900 feet in the Biscayne Aquifer at a depth of about 40 feet below the bottom of Biscayne Bay. The radial collector wells are designed to withdraw seawater from the Biscayne Aquifer, which would be recharged by water flowing downward

from Biscayne Bay. As designed, the four wells collectively would provide up to about 86,400 gallons/minute of cooling water — or approximately 124 million gallons/day — and would meet 100% of the cooling tower needs to operate Units 6 and 7 if the primary source of cooling water were unavailable. *See* ER at 2.3-2, 2.3-46, 5.2-8, tbl. 3.3-2.[21]

a. Contention NEPA 1.1 Is Not Admissible

Contention NEPA 1.1 alleges that "[t]he ER provides insufficient data to aid the Commission in assessing the impacts of the radial collector well system to the Biscayne Bay ecosystem due to the ER's failure to specify the frequency and amount of water the radial collector wells will withdraw from the Biscayne Aquifer." Joint Pet. at 10. Joint Petitioners advance the following three arguments for this contention. First, Joint Petitioners claim the ER fails adequately to discuss whether the amount of reclaimed water from MDWASD will be sufficient to serve as the primary source of cooling water for Units 6 and 7, and relatedly, it fails adequately to discuss whether the radial collector wells will be a feasible, secondary source of cooling water. *See id.* at 15. Second, Joint Petitioners assert that "[w]ithout any information on the amount of water that will be withdrawn [by the radial collector wells] and how often it will be withdrawn," FPL fails to provide the NRC with adequate information to assess the impacts on the "salinity regime of the Bay and the benthic flora and fauna that may be adversely affected by a disruption of this regime." *Id.* at 11-12. Third, Joint Petitioners assert that, contrary to FPL's assumption, the radial collector wells might withdraw freshwater from the Biscayne Aquifer or Biscayne Bay, which might, in turn, affect the salinity of the Bay and impact the Bay's ecosystem. *See id.* at 13-14.

FPL and the NRC Staff argue that Contention NEPA 1.1 is inadmissible. *See* FPL Answer to Joint Pet. at 26-40; NRC Staff Answer to Joint Pet. at 12-18. We agree.

First, contrary to Joint Petitioners' assertion, the ER comprehensively discusses (1) whether reclaimed water from MDWASD will be adequate to serve as the primary source of cooling water for Units 6 and 7, and (2) whether the radial collector wells will be a feasible, secondary source of cooling water. As discussed in the ER (*see* ER at 5.2-16), the South Florida Water Management District (SFWMD) water use permit — which expires in 2027 — requires MDWASD to

[21] The ER indicates that about 60 million gallons/day of reclaimed water would be necessary to provide cooling for the operation of Units 6 and 7 (ER at 5.2-16), whereas the amount of seawater makeup from the radial collector wells to provide such cooling could be up to about 124 million gallons/day. *See* ER at 5.2-17; Tr. at 203. The difference in required makeup water to provide cooling is the result of the higher blowdown flow necessary when seawater is used in the cooling system. *See* ER at 3.4-2 to 3.4-3.

increase the use of reclaimed water to at least 170 million gallons/day for reuse projects.[22] Also included in the permit "is the requirement that MDWASD work with FPL to provide up to 70 [million gallons/day] of reclaimed water" (*id.*), which would be more than enough for the operation of Units 6 and 7. *See id.* (the ER indicates the amount of reclaimed water FPL would need from MDWASD for the operation of Units 6 and 7 would be about 60 million gallons/day); *accord* ER at 3.4-2. The ER acknowledges that occasions might arise when, in light of demands from other reuse projects, reclaimed water from MDWASD "may not be sufficient to meet all of the water demand for the operation of Units 6 and 7." ER at 5.2-16. "To compensate for this potential shortfall, a second source for makeup water would consist of [four] radial collector wells that would withdraw saltwater from under Biscayne Bay." *Id.* The ER indicates the four wells collectively would be able to provide 100 percent of the cooling water necessary for operation of Units 6 and 7. *See* ER at 5.2-17. We conclude the above discussion in the ER refutes the first argument underlying NEPA Contention 1.1. To the extent Joint Petitioners attempt to rely on that argument, NEPA Contention 1.1 is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi) for failure to identify a genuine dispute regarding a material issue of law or fact. *See* FPL Answer to Joint Pet. at 26-30; NRC Staff Answer to Joint Pet. at 16-18.[23]

Nor does the admissibility of NEPA Contention 1.1 fare any better under the second argument advanced by Joint Petitioners. Joint Petitioners criticize the ER for failing to provide "any information on the amount of water that will be withdrawn [by the radial collector wells] and how often it will be withdrawn" (Joint Pet. at 11) — a failure Joint Petitioners assert deprives the NRC Staff of information it needs to assess the impacts on the salinity regime of the Biscayne Bay ecosystem. *Id.* at 11-12. Once again, Joint Petitioners' assertion ignores critical factual information in the ER. Although it is true that it fails to specify the volume of water that will be withdrawn by the radial collector wells at any given time, the ER indicates a total maximum flow rate using all four wells of 124 million gallons/day, which assumes no reclaimed water is provided by MDWASD. *See* ER at 2.3-46, 3.4-3; *see also supra* note 21. Joint Petitioners do not dispute this analysis. Nor do they provide supporting information to dispute the ER's conclusion that effects on the salinity regime of Biscayne Bay based on operation of the radial collector wells at maximum flow rate will be minimal.

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[22] *See also* ER at 5.2-16 (SFWMD estimates that by 2025 MDWASD will increase the reclaimed water available for reuse to 193 million gallons/day).

[23] To the extent Joint Petitioners assert the ER fails to consider alternative sources of cooling water (Joint Pet. at 15), they ignore the ER's discussion on that topic. *See* ER at 9.4-17 to 9.4-21, tbl. 9.4-4. Joint Petitioners fail to challenge any aspect of that discussion and, thus, fail to identify a genuine dispute with the ER, contrary to 10 C.F.R. § 2.309(f)(1)(vi). *See* FPL Answer to Joint Pet. at 38-40; NRC Staff Answer to Joint Pet. at 17-18.

The ER states in pertinent part:

> Operation of radial collector wells installed beneath Biscayne Bay would not impact the water quality of the Bay. Although recharge would occur from the bay, it is estimated to be a small percentage of natural freshwater recharge. Effects on salinity of the bay, based on the predicted amount of withdrawal versus the natural recharge, would be minimal.
>
> Monitoring wells would be installed and used to monitor the groundwater level and water quality at and near the radial collector well locations to ensure impacts to local water quality, particular[ly] surface water quality, are minimal.
>
> Impacts to water quality from operation of the radial collector wells would be SMALL and not require mitigation.

ER at 5.2-21.[24] The ER also states:

> Based on groundwater modeling . . . , the radial collector wells would be recharged at a rate ranging from 92 to 100 percent (114 [million gallons/day] to 124 [million gallons/day at maximum flow]) from Biscayne Bay. This would be predominantly localized in the area of the radial collector wells. The remaining recharge would be from groundwater beneath the plant property. The amount of saltwater used (up to approximately 124 [million gallons/day] if 100 percent saltwater) compared to the size of the saltwater resource available would be insignificant. Impacts to Biscayne Bay surface waters would be SMALL and would not require mitigation.

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[24] Notably, as FPL explains, the ER's conclusion that the radial collector wells would have minimal "[e]ffects on salinity of the Bay" (ER at 5.2-21) is consistent with the findings of a salinity impact analysis FPL included with material it provided to the State of Florida in its Site Certification Application, which stated:

> The salinity impact analysis shows that operation of the radial collector wells will have no significant adverse impact on the average salinity of the Bay. Salinity changes attributable to the radial collector wells (changes that are calculable, but not likely measureable), tend to moderate the extreme salinity variations. Because the radial collector wells reduce the salinity extremes, they tend to move the system back toward the more natural salinity condition that existed before the development.

FPL Answer to Joint Pet. at 36 n.12 (quoting Joint Pet., Exh. 23, Florida Department of Environmental Protection, 3rd Round Plant and Non-Transmission Completeness Responses FPL-Turkey Point Units 6 & 7 Site Certification Application at 8 (July 2010)). Although this analysis is not discussed in the ER, Joint Petitioners provided a general discussion of it in their Exhibit 23. In analyzing the admissibility of a proffered contention, a licensing board need not turn a blind eye to those portions of a petitioner's exhibits that might militate against admissibility. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated on other grounds,* CLI-90-4, 31 NRC 333 (1990) ("[B]oards must do more than uncritically accept a party's mere assertion that a particular document supplies the basis for its contention, without even reviewing the document itself to determine if it . . . appears to support a litigable contention.").

> Monitoring of the water quality from radial collector wells would be performed to determine whether the water being pumped is saltwater by monitoring the groundwater elevation data in the near shore areas adjacent to the radial collector well locations.

ER at 5.2-17. To the extent Contention NEPA 1.1 asserts the ER fails to provide information regarding the amount of water the radial collector wells will withdraw and the impact of such withdrawal on the salinity of the Biscayne Bay ecosystem, that assertion is refuted by the above discussion in the ER. Accordingly, we conclude this aspect of Contention NEPA 1.1 is not admissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi) for failing to identify a genuine dispute regarding a material issue of law or fact. *See* FPL Answer to Joint Pet. at 32; NRC Staff Answer to Joint Pet. at 13-16.[25]

Finally, we conclude Contention NEPA 1.1 is not admissible pursuant to the third argument advanced by Joint Petitioners, who allege that, contrary to FPL's assumption, the radial collector wells might withdraw freshwater from the Biscayne Aquifer and Biscayne Bay, which might, in turn, affect the salinity of the Bay and impact the Bay's ecosystem. *See* Joint Pet. at 13-14. To the extent Joint Petitioners allege the ER does not contemplate the possibility of withdrawing freshwater, they are incorrect. The ER explicitly states the radial collector wells will withdraw water from the Biscayne Aquifer which, in turn, will be recharged from Biscayne Bay, and that the recharge from the Bay would include some freshwater. *See* ER at 5.2-21. But the ER states the freshwater recharge from the bay is "estimated to be a small percentage of natural freshwater recharge" and, accordingly, the impact on the salinity of the Bay "would be minimal." *Id.* Thus, the predicate of the claim underlying Joint Petitioners' contention (i.e., that the ER does not contemplate that the radial collector wells will withdraw freshwater) is factually incorrect. Moreover, Joint Petitioners fail to refute with supporting facts the ER's conclusion that the impact of any withdrawal of freshwater by the

[25] We emphasize that, as relevant here, preparation of the ER is the first step in the NEPA process. Its purpose is to aid the NRC Staff in the performance of its NEPA responsibilities, which consist of preparing the draft EIS (10 C.F.R. §§ 51.70, 51.71), releasing the draft EIS to the public for comments (*id.* §§ 51.73, 51.74), and preparing and distributing the final EIS after receipt and consideration of comments. *Id.* §§ 51.90, 51.91, 51.93, 51.94. A decision by a licensing board rejecting a contention challenging the adequacy of a portion of an ER does not necessarily mean the NRC will satisfy its NEPA obligations by simply importing that portion of the ER into the EIS. Rather, the EIS must comply with NEPA and the above-cited Commission regulations, which describe the scope of the "detailed statement" (42 U.S.C. § 4332(2)(C)) that must be contained in the EIS. When the NRC Staff issues the EIS, Commission regulations provide an opportunity to either amend admitted contentions or proffer new contentions based on "data or conclusions in the NRC draft or final [EIS] . . . 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).

wells will be minimal. We therefore conclude Contention NEPA 1.1, pursuant to its third underlying argument, fails to identify a genuine dispute regarding a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi). *See* FPL Answer to Joint Pet. at 36-38; NRC Staff Answer to Joint Pet. at 13-14.[26]

b. Contention NEPA 1.2 Is Not Admissible

Contention NEPA 1.2 alleges that "[t]he ER provides insufficient data to aid the Commission in assessing the impacts of the radial collector well system on the Biscayne Bay ecosystem due to the ER's failure to provide sufficient aquifer testing and groundwater modeling to support the ER's conclusions." Joint Pet. at 15. Joint Petitioners advance two arguments for this contention. First, they assert that the ER's reliance on the results of an Aquifer Performance Test (APT) is misplaced, because the APT used a well-pumping rate that was about 1/10th of the pumping rate of the radial collector wells, and the APT's geological interpretations of the Biscayne Aquifer are flawed in any event. *Id.* at 15-18. Second, they allege that the ER's reliance on groundwater modeling is misplaced, because the model's assumptions of steady state, constant-head boundary, and constant density do not represent actual conditions and, accordingly, cannot predict environmental impacts caused by operation of the radial collector wells. *See id.* at 18-20.

FPL and the NRC Staff argue that Contention NEPA 1.2 is inadmissible. *See* FPL Answer to Joint Pet. at 41-46; NRC Staff Answer to Joint Pet. at 18-21. We agree.

First, we agree with FPL that Joint Petitioners' attack on the ER's alleged reliance on the APT is "unfounded." *See* FPL Answer to Joint Pet. at 41. FPL points out that the APT referred to by Joint Petitioners "is not a part of FPL's ER," because the APT report was not completed until August 2009, several months *after* the filing of the COL Application in June 2009. *Id.*[27] Accordingly, states FPL,

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[26] In their effort to support the admissibility of Contention NEPA 1.1, Joint Petitioners rely on comments and questions provided to FPL by state agencies in the context of FPL's separate Site Certification Application. *See, e.g.,* Joint Pet. at 12-14. It is well established, however, that the mere existence of such comments and questions, if generated by the NRC Staff, do not, in and of themselves, establish grounds for a litigable contention. *See Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 164 (2006). This principle applies *a fortiori* in the context of comments and questions generated by a state agency that is examining a state application to determine compliance with state legal and technical standards. Here, Joint Petitioners fail to explain why these comments and questions proffered by the state agency demonstrate a material deficiency in FPL's COL Application.

[27] FPL explains the APT was part of a report it provided to the Florida Department of Environmental Protection, which administers and oversees the processing of FPL's Site Certification Application

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the ER neither refers to nor relies on the APT, and contrary to Joint Petitioners' assertion, the APT "could not have had any bearing on the conclusions reached in the ER regarding the salinity effects of radial collector well operation." *Id.* Joint Petitioners do not challenge FPL's statement that the ER neither refers to nor relies on the APT. We therefore conclude that Joint Petitioners' first argument in support of Contention NEPA 1.2 fails to demonstrate a genuine dispute with the ER involving the APT. *See* 10 C.F.R. § 2.309(f)(1)(vi).

Joint Petitioners' second argument in support of Contention NEPA 1.2 claims the ER relies on a groundwater model that uses flawed assumptions. Unlike the APT, the groundwater model is referenced and relied on in the ER. *See* ER at 2.3-35 to 2.3-36. But, in attacking the groundwater model, Joint Petitioners fail to identify specific portions of the ER they dispute, relying instead almost exclusively on comments from state agencies seeking additional information as part of their review of FPL's site certification application under Florida's Power Plant Siting Act. *See* Joint Pet. at 18-20. Neither Joint Petitioners, nor the relevant portions of the state agency comments referenced by Joint Petitioners, explain how any alleged deficiencies in the groundwater modeling assumptions in the ER are significant for purposes of NEPA review and, thus, material to this proceeding.[28]

Moreover, Joint Petitioners fail directly to challenge the explanations FPL provided in its COL Application for the groundwater modeling assumptions it employed and the conclusions it reached. In this regard, FPL used a MOD-FLOW groundwater model, which the ER describes as "a constant-density, three-dimensional finite-difference model, with modular capability to add various equation solvers and boundary conditions to the basic model." ER at 2.3-34. As Joint Petitioners observe, FPL used this groundwater model "to evaluate the origin of the water when the radial collector wells would be in operation and the resultant drawdown and velocities where the bay and aquifer meet." Joint Pet. at 18.[29] Despite stating the model's particularized purpose, Joint Petitioners fail to

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under Florida's Power Plant Siting Act. *See* FPL Answer to Joint Pet. at 20-22, 41 n.16. FPL observes (*id.* at 42) that Joint Petitioners discuss Miami-Dade County's comments, but they fail "to tie the County's comments to the ER's discussion of the environmental impacts" in a manner that satisfies Commission admissibility standards. We agree.

[28] To the extent Joint Petitioners rely on documents that did not originate with Florida agencies (*see* Joint Pet. at 19) (citing Joint Pet., Exh. 7, Joan A. Browder et al., *Biscayne Bay Conceptual Ecological Model,* 25 Wetlands 854 (2005); Joint Pet., Exh. 8, Environmental Changes Associated with a Florida Power Plant), those documents — like the documents from the state agencies — fail to explain how alleged deficiencies in the groundwater modeling assumptions would likely be material to *this* proceeding. Nor do Joint Petitioners allege facts or provide expert opinions in support of such an explanation. *See* NRC Staff Answer to Joint Pet. at 20 n.9.

[29] In addition to simulating the impacts of operation of the radial collector wells, FPL states that it

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challenge its determination that "approximately 92 to 100 percent of recharge to the radial collector wells would come from Biscayne Bay and up to 8 percent" would come from groundwater. ER at 5.2-9. Nor do Joint Petitioners challenge the ER's determination that the "flow rate at the sediment-water interface resulting from the radial collector well operation would be approximately 0.00001 foot per second." ER at 5.3-2.

Finally, Joint Petitioners fail to challenge the reasons underlying FPL's decision to employ model assumptions based on steady state, constant-head boundary, and constant density. For example, regarding the steady-state assumption, the COL Application explains that the average groundwater levels measured between June 2008 and January 2009 are assumed to represent steady-state conditions for the Units 6 and 7 site and can therefore be used as the calibration targets for a steady-state simulation. *See* Turkey Point Units 6 and 7 COL Application, Part 2 FSAR [Final Safety Analysis Report] § 2.4.12, App. 2CC, Rev. 0, at 2CC-25 [hereinafter FSAR]. Regarding FPL's use of the constant-head boundary assumption, the COL Application states that the model assumes the "groundwater level in the grid cells coinciding with Biscayne Bay" is fixed, and it explains this level "is based on the average level from tidal monitoring at Virginia Key." *See* FSAR § 2.4.5, App. 2CC at 2CC-22. Regarding the constant-density assumption, the COL Application indicates that for the limited purposes of the model — i.e., evaluating the zone of influence of the radial collector wells and the approach velocity of the water — FPL concluded the density variations would be insignificant compared to the hydraulic gradient caused by the pumping and, accordingly used a constant-density model, choosing seawater as the reference fluid. *See* FSAR § 2.4.5, App. 2CC at 2CC-7, 2CC-26.

Joint Petitioners fail to explain why the assumptions underlying FPL's groundwater model are deficient, nor do they point to specific errors in the model, much less provide alleged facts or expert opinions to support a position that a specified error exists. We therefore conclude that Contention NEPA 1.2, to the extent it is grounded on alleged flawed assumptions in the groundwater model, fails to explain the materiality of the claim (10 C.F.R. § 2.309(f)(1)(iv)), fails to provide facts or expert opinions to support a position (*id.* § 2.309(f)(1)(v)), and fails to identify a genuine dispute with the ER. *Id.* § 2.309(f)(1)(vi).[30]

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used the MODFLOW model "to simulate the impacts of construction dewatering, [and] construction of Units 6 [and] 7 (site grade increase and use of diaphragm walls for groundwater control)." ER at 2.3-35. As stated in the ER (*id.*), the results of the model simulations are in the COL Application in FPL's Final Safety Analysis Report § 2.4.12, Appendix 2CC.

[30] Joint Petitioners also attack the MODFLOW groundwater model because it does "not assess the changes in salinity over time and space in the Bay." Joint Pet. at 20. As discussed above in text, however, the groundwater model is not intended to analyze the salinity regime in Biscayne Bay or the

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c. Contention NEPA 1.3 Is Not Admissible

Contention NEPA 1.3 asserts "[t]he ER provides insufficient data on the current species diversity, abundance, and habitat utilization in Biscayne Bay, and particularly in the vicinity of the radial wells, to aid the Commission in assessing the impacts of the radial collector well system to the Biscayne Bay ecosystem." Joint Pet. at 20. Underlying this contention are two arguments. First, in what we will refer to as the "wildlife species" argument, Joint Petitioners assert the ER lacks "comprehensive, seasonally based biological studies on . . . wildlife utilization . . . and . . . species abundance for the area within and surrounding the proposed radial wells." *Id.* Joint Petitioners acknowledge the ER includes avian surveys from 1972 and between 2005 and 2009, but they view those surveys as deficient for not including "any information on bird utilization of the area surrounding the plant site during the April-June breeding season," as well as details on the level of site usage by the wood stork. *Id.* at 21 (referencing, *inter alia,* ER tbl. 2.4-1). Second, in what we will refer to as the "seagrass and benthic fauna" argument, Joint Petitioners complain that the ER improperly lacks a "baseline survey of seagrass cover and benthic fauna in the vicinity of the proposed radial collector wells." *Id.* at 20-21. Without these data, Joint Petitioners assert the ER lacks an environmental baseline for purposes of evaluating the environmental impacts from the radial collector wells. *Id.* at 21-22.

FPL and the NRC Staff argue that Contention NEPA 1.3 is not admissible. *See* FPL Answer to Joint Pet. at 46-52; NRC Staff Answer to Joint Pet. at 22-25. We agree.

With regard to Joint Petitioners' "wildlife species" argument, we find it significant that the ER states "[w]ildlife species existing near the radial collector wells and associated pipeline corridor would be similar to those observed on the Turkey Point plant property." ER at 2.4-16. Joint Petitioners do not attack the ER's conclusion that wildlife species existing near the radial collector wells "would be similar" to those species on the rest of the plant property. *See id.* Nor do they attack the ER's analyses of wildlife species on the rest of the plant property.[31]

Biscayne Aquifer. Rather, it analyzes the origin of the water when the radial collector wells are in operation and the resultant drawdown and velocities where the Bay and aquifer meet. A discussion of the impact of the wells on the salinity regime is provided elsewhere in the ER. *See supra* Part III.B.1.a.

[31] *See, e.g.,* ER at 2.4-8 ("Wildlife species found within the Turkey Point plant property are common to the region and would be expected to be found in off-site project areas associated with Units 6 & 7: access roads, reclaimed water pipelines, transmission corridors and FPL owned fill source. . . . Although the Turkey Point plant property hosts such potential disease vectors as ticks and mosquitoes, no vector-borne diseases resulting from them are known.); ER at 2.4-9 ("Four federally-listed species have been observed within the Turkey Point plant property: American crocodile, Eastern indigo snake, Florida manatee, and wood stork. As described below, several state-listed species have also been

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Rather, Joint Petitioners would prefer if the ER contained particularized studies that focused on species near the radial collector wells. In an effort to support that preference, Joint Petitioners rely on the following statement made by Miami-Dade County incident to its review of FPL's Site Certification Application: "studies are needed to properly document the use and value of the habitat in order to understand the potential impacts of the proposed project on flora and fauna of the region." Joint Pet., Exh. 3, Miami-Dade County Third Completeness Comments for Plant and Non-Transmission Line Portions of the FPL Site Certification Application — Turkey Point Units 6 & 7 at 9 (May 28, 2010). That statement, however, falls far short of rendering Contention NEPA 1.3 admissible. That statement — which was made by a state agency requesting additional information in the context of a state licensing proceeding (*see supra* note 26) — does not suggest that wildlife species near the radial collector wells are significantly different from, or exist at significantly different population levels than, wildlife species in other areas of the Turkey Point property. Nor does that statement indicate it is reasonably foreseeable that wildlife species on the Turkey Point property (or near the radial collector wells) will be impacted by the radial collector well system. Accordingly, we conclude that Contention NEPA 1.3, to the extent it is grounded on the "wildlife species" argument, is not admissible because Joint Petitioners fail to raise a genuine dispute of material fact with the ER, contrary to 10 C.F.R. § 2.309(f)(1)(vi). *See* FPL Answer to Joint Pet. at 46-48; NRC Staff Answer to Joint Pet. at 22-23.[32]

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observed. Approximately 170 animal and plant species are either federal- or state-listed as endangered, threatened, or candidates, or designated (not listed) species of concern for Miami-Dade County, with the vast majority being plant species."); ER at 2.4-15 ("The industrial wastewater facility supports a variety of aquatic species typical of a shallow, subtropical, hypersaline environment, including phytoplankton, zooplankton, marine algae, rooted plants, crabs, and estuarine fish . . . .").

[32] We note that Joint Petitioners' arguments challenging the ER's avian surveys are inadequate to render Contention NEPA 1.3 admissible. Joint Petitioners assert (Joint Pet. at 21) that the ER's avian surveys — located in Table 2.4-1 — should include numbers during the April-June breeding season, as well as surveys beyond 1972 and 2005-2009. But Joint Petitioners do not identify a deficiency in the "recent, but limited surveys between 2005-2009" (*id.*), nor do they say what is wrong with the avian studies that have been conducted during the months of April through June (*see* ER tbl. 2.4-1), aside from baldly asserting the studies should include "comprehensive seasonal data." Joint Pet. at 21. Joint Petitioners dismiss the ER's discussion of the wood stork as nothing more than "opportunistic observations" (*id.*), but they fail to acknowledge that the ER summarizes the presence of the wood stork near Turkey Point (*see* ER at 2.4-10) and that the wood stork is included in FPL's general avian surveys. *See* ER tbl. 2.4-1. Finally, Joint Petitioners fail to explain why information regarding avian "feeding, roosting, nesting, and breeding behavior" (Joint Pet. at 21) is required to appear in the ER beyond what already appears for the wood stork specifically (*see* ER at 2.4-10) and birds in general (ER tbl. 2.4-1) to develop a sufficient baseline for understanding impacts of the proposed action on such species. Accordingly, Joint Petitioners have not raised a genuine dispute of material fact or law with this aspect of Contention NEPA 1.3.

With regard to Contention NEPA 1.3's "seagrass and benthic fauna" argument, the ER notes the presence of seagrasses near Turkey Point (*see* ER at 2.4-15, 2.4-16, 2.4-19), and, based on groundwater modeling, it specifically concludes the impact of the radial collector wells on aquatic vegetation in general, as well as on "aquatic species," will be small. *See* ER at 5.3-3. Joint Petitioners provide no alleged facts or expert opinions to challenge that modeling or conclusion. Although they allege that "[h]ypersaline conditions resulting from the withdrawal of freshwater via radial wells may adversely affect those seagrass communities" (Joint Pet. at 22), this allegation rests on and simply repeats an underlying assertion (i.e., that the radial collector wells may create harmful hypersaline conditions) for which Joint Petitioners failed to provide adequate support in Contention NEPA 1.1 (*see supra* Part III.B.1.a), and for which they fail to provide adequate support here. We therefore conclude that Contention NEPA 1.3, as explained by the "seagrass and benthic fauna" argument, is not admissible because it fails to show a genuine dispute exists on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).[33]

Contention NEPA 1.3 is therefore not admissible.

d. Contention NEPA 1.4 Is Not Admissible

Contention NEPA 1.4 asserts "[t]he ER [at 2.4-14 to 2.4-31] provides insufficient data on the habitat conditions and habitat requirements in the Biscayne Bay, and particularly in the vicinity of the radial wells, to aid the Commission in assessing the impacts of the radial collector well system to the Biscayne Bay ecosystem." Joint Pet. at 22. This contention is grounded on an argument that is substantially identical to the "seagrass and benthic fauna" argument underlying Contention NEPA 1.3; namely, according to Joint Petitioners, "[s]uch data is necessary to [establish an environmental baseline and to] determine the extent to which the radial wells' disruption of the Bay's salinity regime may impact specific species and their habitats." *Id.* In particular, Joint Petitioners assert that [h]ypersaline conditions resulting from the withdrawal of fresh water via radial wells may adversely affect th[e] seagrass communities." *Id.*

FPL and the NRC Staff argue that Contention NEPA 1.4 is not admissible. *See*

[33] Joint Petitioners juxtapose seemingly inconsistent arguments regarding the salinity conditions required for the survival of seagrasses. On the one hand, they claim that seagrasses "require a *consistent* salinity regime" (Joint Pet. at 21) (emphasis added), and shortly thereafter they declare that "sensitive seagrasses require a *variable* salinity regime." *Id.* at 22 (emphasis added). From these disparate statements, one might reasonably conclude that the "seagrass" component of Contention NEPA 1.3 is also not admissible because it fails to provide a "specific statement of the issue of law or fact to be raised." 10 C.F.R. § 2.309(f)(1)(i).

FPL Answer to Joint Pet. at 53-57; NRC Staff Answer to Joint Pet. at 25-26. We agree.

Contention NEPA 1.4, like Contentions NEPA 1.1 and 1.3, arises from a concern that the radial collector wells will change the "Bay's salinity regime" and thereby impact aquatic species and their habitats. *See* Joint Pet. at 22. For the same reason we concluded Contention NEPA 1.3 is not admissible (*supra* Part III.B.1.c), Contention NEPA 1.4 is not admissible; namely, contrary to 10 C.F.R. § 2.309(f)(1)(vi), Joint Petitioners fail to show a genuine dispute exists on a material issue of law or fact. Additionally, Contention NEPA 1.4 is inadmissible because, contrary to 10 C.F.R. § 2.309(f)(1)(v), Joint Petitioners fail to provide alleged facts or expert opinions for the notion that the radial collector wells will have an impact, much less a significant impact, on the Bay's salinity regime.[34]

e. Contention NEPA 1.5 Is Not Admissible

Contention NEPA 1.5 asserts that "[t]he ER provides insufficient data on the direct, indirect and cumulative impacts of the radial collector wells." Joint Pet. at 23. Joint Petitioners raise the following claims of omission in support of this contention: (1) the ER fails to discuss the existing hypersaline plume emanating from the current cooling canal operations that might, in combination with the radial collector wells, impact the groundwater and surface water (*id.* at 23-24); (2) the ER fails to discuss how the radial collector wells may adversely affect the successful implementation of the Comprehensive Everglades Restoration Plan (CERP), and specifically the Biscayne Bay Coastal Wetlands (BBCW) Project (*id.* at 24-25);[35] and (3) the ER fails to discuss the potential impacts of sea level rise on the radial collector well system. *Id.* at 25-26.[36]

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[34] Joint Petitioners assert (Joint Pet. at 22) that seagrass communities may be affected by "[h]yper saline conditions resulting from the withdrawal of fresh water via radial wells." But they allege no facts or expert opinions to support a conclusion that the withdrawal of freshwater by the radial wells will create hypersaline conditions. Nor do they address the ER's conclusion (ER at 5.2-21) that the impact of any withdrawal of freshwater by the radial wells will be minimal. *See supra* Part III.B.1.a.

[35] The ER states that, pursuant to the Federal Water Resources Development Act, CERP was authorized in 2000 "to guide the restoration, protection, and preservation of the water resources of central and southern Florida." ER at 2.3-5. CERP will include more than 60 projects that will necessitate more than 30 years of construction. *See id.* These projects will accomplish CERP's goal by "captur[ing] and stor[ing] freshwater flows in surface and subsurface reservoirs" and "direct[ing the freshwater] to the wetlands, lakes, rivers, and estuaries of south Florida while also ensuring future urban and agricultural water supplies." *Id.* The BBCW Project is one such project, which "is designed to rehydrate wetlands and reduce point source discharge to Biscayne Bay by the installation of spreader swales, flow ways, levees, culverts, and filling existing canals. The project [covers 13,600 acres and] includes the operation of pump stations and stormwater treatment areas." ER at 5.11-2.

[36] To the extent Contention NEPA 1.5 also argues the ER contains no discussion of the direct,

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FPL and the NRC Staff argue that Contention NEPA 1.5 is not admissible. *See* FPL Answer to Joint Pet. at 57-63; NRC Staff Answer to Joint Pet. at 27-36. We agree.

First, Joint Petitioners err in claiming (Joint Pet. at 23-24) the ER fails to discuss the hypersaline plume beneath the Turkey Point plant that might, in combination with the radial collector wells, impact the groundwater and surface water. The ER explicitly discusses the possibility of discharges of hypersaline water from the cooling canals into the aquifer. *See* ER at 5.2-22.[37] Further, the ER explicitly concludes that impacts on groundwater quality due to operation of the radial collector wells will be small (*see* ER at 5.2-23), and impacts on surface water quality due to operation of the radial collector wells will be minimal. *See* ER at 5.2-21; *see also* ER at 5.2-17, 5.2-19. Joint Petitioners do not address these portions of the ER, nor do they provide adequate information to show a genuine dispute with the ER. This aspect of Contention NEPA 1.5 is therefore not admissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi). Moreover, because Joint Petitioners fail to explain why a radial collector well's capture or redirection of water affected by hypersaline water, even if it were to occur, would be significant to FPL's conclusion regarding groundwater quality, this aspect of their contention is not admissible pursuant to 10 C.F.R. § 2.309(f)(1)(iv). *See* FPL Answer to Joint Pet. at 60-61; NRC Staff Answer to Joint Pet. at 30-31.

In their second argument underlying Contention NEPA 1.5, Joint Petitioners claim (Joint Pet. at 24-25) the ER fails to discuss how the radial collector wells may adversely affect the successful implementation of CERP, and specifically the BBCW Project. They are incorrect. The ER, in fact, discusses the cumulative environmental impact of radial collector wells and CERP. In its analysis of cumulative surface water effects, the ER states that "CERPs would rehydrate wetlands that provide water flow into Biscayne Bay, positively impacting Biscayne Bay." ER at 5.11-5. After mentioning the potential cumulative impact from the Everglades Mitigation Bank (EMB) and reiterating that impacts "on

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indirect, and cumulative impacts the operation of the radial collector wells might have on groundwater, surface water, disruption of saltwater regime, and benthic flora and fauna (*see* Joint Pet. at 23), this argument is substantially identical to claims raised and rejected in Contentions NEPA 1.2 and 1.3. *See supra* Parts III.B.1.b and III.B.1.c. To the extent Contention NEPA 1.5 argues the ER fails to discuss environmental impacts that might result from *construction* of the radial wells (Joint Pet. at 23), it is factually incorrect. *See, e.g.,* ER at 4.3-23.

[37] The ER does not use the term "hypersaline plume." Rather, it observes that "water in the industrial wastewater facility is hypersaline with salinity concentrations approximately twice that of Biscayne Bay." ER at 2.3-11. Because the "Biscayne aquifer beneath the Turkey Point plant property is connected hydrologically to both Biscayne Bay and the cooling canals of the industrial wastewater facility," the ER acknowledges that "[p]otential seepage would flow into the Biscayne aquifer which contains saltwater and receives hypersaline water from the industrial wastewater facility." ER at 5.2-22 to 5.2-23; *see also infra* note 70 (describing cooling canals).

Biscayne Bay from operation of the radial collector wells would be SMALL" (*id.*), the ER concludes that "the cumulative impact on Biscayne Bay would be SMALL." *Id.* In its analysis of cumulative groundwater effects, the ER states that, "[c]onsidering the impact from the radial collector wells and the impacts to groundwater resources from the other projects considered for cumulative impacts [e.g., CERPs and EMB], the cumulative impact to groundwater resources would be SMALL." ER at 5.11-6; *see also* ER at 5.11-7. In their discussion of Contention NEPA 1.5, Joint Petitioners do not cite any of these portions of the ER, nor do they contradict FPL's reasoning and conclusions with respect to the anticipated positive impacts of CERP regarding cumulative impacts.

In sum, although Joint Petitioners assert that radial collector well operations may disadvantage CERPs by "extract[ing] fresh water from the aquifer" (Joint Pet. at 25), they fail, contrary to 10 C.F.R. § 2.309(f)(1)(vi), to provide sufficient information showing either that (1) the likely effects of such extractions would adversely impact the implementation of CERP or the BBCW Project, or (2) the ER is flawed in concluding that operation of the radial collector wells, when considered in conjunction with the "positive impacts to water quality" resulting from CERP, would have no adverse cumulative impacts. Contention NEPA 1.5 is therefore not admissible pursuant to Joint Petitioners' second argument.[38]

Finally, the third argument underlying Contention NEPA 1.5 does not render the contention admissible. Joint Petitioners claim that "sea level rise could affect these radial well operations. . . . during a time when the ecosystem will be subject to increased saltwater intrusion." Joint Pet. at 25-26. But they provide no alleged facts or expert opinions to support the notion that radial collector well operations might be affected by sea level rise, contrary to 10 C.F.R. § 2.309(f)(1)(v). Additionally, they provide no explanation of what "direct, indirect, or cumulative impact" has been omitted from the ER or why such an omission would be environmentally significant and thus material to the outcome of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iv) and (vi). *See* FPL Answer to Joint Pet. at 62-63; NRC Staff Answer to Joint Pet. at 34-36.

Contention NEPA 1.5 is therefore not admissible.[39]

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[38] Relying on Exhibit 10 (Joint Pet. at 24) (citing Joint Pet., Exh. 10, Florida Department of Environmental Protection, FPL Turkey Point 6 & 7 Completeness Determination (Plant) at 4 (Jan. 13, 2010)), Joint Petitioners assert that operation of the radial collector wells could be "detrimental to CERP objectives of restoring more fresh water flow to Biscayne Bay." Even if we assumed *arguendo* that this exhibit provided the necessary alleged facts to satisfy section 2.309(f)(1)(iv) and (v), we would still rule this aspect of Contention NEPA 1.5 is not admissible pursuant to section 2.309(f)(1)(vi), because Joint Petitioners fail to show the existence of a genuine dispute of fact with the ER's relevant analyses and conclusions.

[39] FPL has moved to strike portions of Joint Petitioners' Reply that allegedly add new assertions regarding (1) the adequacy of the ER's analysis of the impacts to Biscayne Bay salinity levels (Joint

(Continued)

2. Contention NEPA 2 Is Admissible in Part

In Contention NEPA 2, Joint Petitioners allege "[t]he ER fails to adequately address the direct, indirect, and cumulative impacts of the reclaimed wastewater system on groundwater, air, surface water, wetlands, and CERP." Joint Pet. at 26. Joint Petitioners then break this contention into three underlying contentions — Contentions NEPA 2.1 through NEPA 2.3 — that challenge various aspects of the ER's discussion of the reclaimed wastewater system. We address the three underlying contentions in turn, concluding that Contention NEPA 2.1 is admissible in part, but the remainder of Contention NEPA 2 is not admissible.

At the outset, to provide a factual backdrop for our analysis, we examine the purpose and proposed operation of the reclaimed wastewater system. As stated in the ER and as previously noted (*supra* Part III.B.1), FPL plans to use reclaimed wastewater from MDWASD as the principal source of makeup cooling water for mechanical draft towers that would dissipate waste heat generated by proposed Units 6 and 7. *See* ER at 1.1-3. The reclaimed wastewater will be conveyed by pipelines to the Turkey Point site after it is processed by MDWASD. *See* ER at 5.2-1, 5.2-7. FPL plans to discharge some of the reclaimed wastewater into the Boulder Zone of the Lower Floridan Aquifer, which is approximately 2,800 feet below ground, via underground injection wells. *See* ER at 2.3-2, 2.3-15 to 2.3-16, 5.2-9. The Floridan Aquifer is one of two aquifers under proposed Units 6 and 7 at Turkey Point, and is divided into the following three levels, in descending order: the Upper Floridan Aquifer, the middle confining unit, and the Lower Floridan Aquifer. *See* ER at 2.3-16, 2.3-18 to 2.3-19, 2.3-32. The ER describes the Floridan Aquifer as "a vertically continuous sequence of interbedded carbonate rocks of Tertiary age that are hydraulically interconnected by varying degrees and with permeabilities several orders of magnitude greater than the hydrogeologic systems above and below." ER at 2.3-15. The "highly permeable" Boulder Zone of the Lower Floridan Aquifer is capped by "thick confining units." ER at 2.3-19. The ER indicates the "Upper Floridan Aquifer is a major source of potable groundwater in much of Florida." ER at 2.3-18, 2.3-32.

Petitioners Reply at 12-13; FPL Motion to Strike Portions of Joint Petitioners' Reply at 6); (2) unaddressed concerns by Florida regarding the saltwater plume underneath Turkey Point (*see* Joint Petitioners Reply at 15-17; FPL Motion to Strike Portions of Joint Petitioners' Reply at 7), and (3) sea level rise leading to increased groundwater intrusion. *See* Joint Petitioners Reply at 23-24; FPL Motion to Strike Portions of Joint Petitioners' Reply at 7-8). We grant FPL's motion pertaining to the first two matters, because those assertions did not appear in the Joint Petitioners' original Petition. With regard to the third matter, we deny FPL's motion, finding that, contrary to FPL's assertion, Joint Petitioners referred to increased saltwater intrusion as a result of sea level rise in their Petition to Intervene, which could plausibly entail increased saltwater intrusion into groundwater. *See* Joint Pet. at 25. Nevertheless, even considering the information in Joint Petitioners' Reply, we conclude Contention 1.5 is not admissible for the reasons discussed above in text.

Under a delegation by the U.S. Environmental Protection Agency (EPA), the Florida Department of Environmental Protection (FDEP) controls the permitting of discharge of wastewater via injection wells into the Boulder Zone in Florida. *See* ER at 2.3-19; Joint Pet. Exh. 12, 70 Fed. Reg. 70,513, 70,515-16 (Nov. 22, 2005). As Class I injection wells under EPA regulations, FPL's injection wells at Turkey Point would be "required to have a dual-zone monitoring system that consists of a zone open below the deepest USDW [Underground Source of Drinking Water] and a zone located in the USDW for geochemical and pressure monitoring." ER at 2.3-47. Further, the ER states that

> [t]he injection wells would be installed in accordance with an FDEP underground injection well permit and local permit requirements. The injection casing in the deep injection wells for Units 6 & 7 would be seated at a greater depth than other regional injection wells to maximize the thickness of the confining strata between the injection zone and base of the USDW. The current standard practice of grouting the pilot hole would also be employed to prevent the possible development of the double borehole conditions.
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> . . . . The monitoring program objective would be to detect vertical migration of injected fluids into the Upper Floridan aquifer through the confining layer overlying the Boulder Zone.

ER at 5.2-11. Based on the requirements of this monitoring program and results obtained from the program, the ER concludes that "potential impacts from the operation of the deep well injection wells to groundwater would be SMALL and not warrant mitigation beyond that described previously." *Id.*

a. Contention NEPA 2.1 Is Admissible in Part

In Contention NEPA 2.1, Joint Petitioners assert "[t]he ER fails to adequately identify, analyze, and discuss the potential impacts on groundwater quality of injecting polluted wastewater into the Floridan Aquifer via underground injection wells." Joint Pet. at 26. This contention focuses on alleged impacts from the "upward migration of injectate and infiltration of contaminants" caused by use of underground injection wells to insert "plant liquid effluents, including chemical and radioactive waste, into the Lower Floridan Aquifer." Joint Pet. at 26. First, Joint Petitioners insist the ER does not explain what the impacts to groundwater would be from injection of radioactive isotopes. *Id.* at 30. Second, Joint Petitioners argue that the ER does not disclose "a complete and accurate assessment" of the final destinations, types, formulations, and toxicities of pollutants which the treated wastewater would emit. *Id.* at 28-30. Third, Joint Petitioners challenge FPL's assumption that treated wastewater inserted by the proposed injection wells

into the Boulder Zone would remain separate from groundwater and sources of drinking water, citing documents from the EPA concerning nearby sites that experienced vertical migration of water between the Boulder Zone and Upper Floridan water when injection wells such as those proposed for Turkey Point were used. *Id.* at 27-28.

FPL and the NRC Staff argue that Contention NEPA 2.1 is not admissible. *See* FPL Answer to Joint Pet. at 66-76; NRC Staff Answer to Joint Pet. at 38-46. We conclude that Contention NEPA 2.1 is admissible in part.

We begin by addressing those aspects of Contention NEPA 2.1 that are *not* admissible, followed by that aspect of the contention we conclude is admissible. First, Joint Petitioners claim the ER "does [not] discuss potential impacts to groundwater quality of discharging radioactive materials into the Lower Floridan Aquifer." Joint Pet. at 30. They are incorrect. Regarding radioactive effluents, the ER states the "Boulder Zone is currently not a source for potable water and there is no viable pathway for the injection well releases to reach potable water. Hence, there is no liquid effluent pathway dose due to normal plant operations." ER at 5.4-2. For so-called "off-normal operations," the ER includes a "conceptual exposure scenario[, which] considers a receptor created by the drilling of a water supply well into the Boulder Zone for potable water use," and declares that this hypothetical, "[a]lthough unrealistic, . . . is considered to *bound* any other potential exposure scenarios, such as vertical migration from the Boulder Zone to potable water aquifers despite the presence of dual zone monitoring wells." *Id.* (emphasis added). Using the LADTAP II computer program, FPL concludes that

> [t]he resulting maximum doses per unit are 2.5 mrem to the total body, 2.4 mrem to the thyroid, and 3.1 mrem to the liver of a child. Even though these doses are not due to normal operations, they conform to the 10 CFR 50, Appendix I guidelines of 3 mrem total body and 10 mrem organ.

ER at 5.4-3.

Joint Petitioners neither acknowledge nor challenge this bounding analysis or its conclusion.[40] Although they cite Revision 17 of the AP1000 Design Control Document (DCD) (*see* Joint Pet. at 29-30), they ignore the fact that it contains the radiological effluents expected to be emitted. *See* Westinghouse AP1000 Design Control Document Rev. 17 — Tier 2 Ch.11 — Radioactive Waste Management — Section 11.2, Liquid Waste Management Systems (Sept. 22, 2008) tbl. 11.2-7. Because the ER, through its reference to the DCD, in fact, contains the discussion

[40] In their Reply Brief, Joint Petitioners challenge for the first time FPL's reliance on the LADTAP II computer program. *See* Joint Petitioners' Reply at 28. We agree with FPL that this new argument exceeds the scope of what Joint Petitioners advanced in their original Petition, and we therefore decline to consider it. *See* FPL Motion to Strike Portions of Joint Petitioners' Reply at 8.

on radiological constituents and radiological impacts that Joint Petitioners claim is missing, this aspect of Contention NEPA 2.1 is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi) for failing to raise a genuine dispute of material fact or law with the ER.

Second, Joint Petitioners claim that FPL's ER fails to address certain chemicals typically found in treated wastewater, such as "arsenic, cadmium, copper, lead, manganese, mercury, nickel, silver, and zinc." Joint Pet. at 28. Joint Petitioners again are incorrect. The ER contains a list of chemicals and their respective concentrations that FPL anticipates will be in the wastewater (*see* ER tbl. 3.6-2), and that list includes each of the above chemicals (although it omits some other constituents that we discuss below). This aspect of Contention NEPA 2.1 is thus not admissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi) for failing to raise a genuine dispute of material fact or law with the ER.

Third, Joint Petitioners claim the ER fails to analyze the presence of "pharmaceuticals and personal care products ('PPCPs') [that] are routinely found in treated municipal wastewater." Joint Pet. at 28-29. But Joint Petitioners fail to support their assertion that PPCPs routinely are found in treated municipal wastewater.[41] This aspect of Contention NEPA 2.1 is thus not admissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi) for failing to provide adequate supporting information to demonstrate a genuine dispute of material fact or law.

We now turn to the admissible aspect of Contention NEPA 2.1. First, we conclude Contention NEPA 2.1 presents "a specific statement of the issue of law or fact to be raised or controverted" (10 C.F.R. § 2.309(f)(1)(i)), as we have revised and narrowed it: namely, the ER fails to analyze and discuss the potential impacts on groundwater quality of injecting into the Floridan Aquifer via underground injection wells heptachlor, ethylbenzene, toluene, selenium, thallium, and tetrachloroethylene, which have been found in injection wells in Florida but are not listed in FPL's ER as wastewater constituent chemicals. *See* Joint Pet. at 26, 28 (citing EPA Relative Risk Assessment, App. 1, tbl. 1-1 and 1-2).

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[41] In an effort to support their assertion that PPCPs are routinely found in municipal wastewater, Joint Petitioners provide an "*id.*" cite (Joint Pet. at 29) that refers to two tables in their Exhibit 14, which is entitled "United States Environmental Protection Agency, EPA 816-R-03-010, Relative Risk Assessment of Management Options for Treated Wastewater in South Florida (Apr. 2003)" [hereinafter EPA Relative Risk Assessment]. We were unable to find a reference to PPCPs in those tables. Although Joint Petitioners' Exhibit 12, entitled "Underground Injection Control Program — Revision to the Federal Underground Injection Control Requirements for Class I Municipal Disposal Wells in Florida, 70 Fed. Reg. 70,513 (Nov. 22, 2005)" [hereinafter EPA Final Rule], states that pharmaceutical products and disinfection byproducts "*may* be present in treated municipal wastewater" (70 Fed. Reg. at 70,525) (emphasis added), Joint Petitioners did not ground this aspect of their contention on the EPA Final Rule, which appears to provide only conjectural support in any event.

Second, Contention NEPA 2.1 includes "a brief explanation of [its] basis" (10 C.F.R. § 2.309(f)(1)(ii)) insofar as Joint Petitioners assert that there has been migration of fluid between the Boulder Zone and the Upper Floridan Aquifer and FPL's ER improperly fails to discuss the impact to the Upper Floridan Aquifer of the above-specified chemicals that have been typically found in Florida wastewater. *See* Joint Pet. at 26-28.

Third, Contention NEPA 2.1 is within the scope of this proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii). The Notice of Hearing states it concerns FPL's COL Application for Turkey Point Units 6 and 7. *See* Notice of Hearing, 75 Fed. Reg. at 34,778. Because Contention NEPA 2.1 raises a challenge to FPL's ER, which is a required portion of FPL's COL Application (*see* 10 C.F.R. § 51.50(c)), Contention NEPA 2.1 is within the scope of this proceeding.

Fourth, Contention NEPA 2.1 satisfies the materiality requirement of 10 C.F.R. § 2.309(f)(1)(iv). As previously stated (*supra* Section III.B), FPL's ER must describe, *inter alia,* (1) reasonably foreseeable environmental impacts, which shall be discussed in proportion to their significance; and (2) adverse environmental effects that cannot be avoided should the proposal be implemented. *See* 10 C.F.R. § 51.45(b)(1)-(2). Here, Joint Petitioners have asserted (with adequate supporting information, as discussed below) that certain specified chemicals might be in the wastewater discharged via deep injection wells into the Boulder Zone of the Lower Floridan Aquifer, and that the wastewater could possibly migrate into the Upper Floridan Aquifer, contaminating the groundwater (including potential drinking water) with these chemicals. Although FPL's ER discusses other chemicals in the wastewater (ER tbl. 3.6-2), it fails to address the particular chemicals identified by Joint Petitioners, let alone analyze the likely impact of those particular chemicals on the groundwater. It cannot be gainsaid that, to the extent these chemicals are in the wastewater, their impact on groundwater — if significant — is material to the findings the NRC must make in deciding whether to grant FPL's COL Application. FPL has an obligation to discuss in the ER any such environmental impact caused by these chemicals in proportion to their significance. The ER is silent, however, with respect to these particular chemicals and their resulting impact.

Fifth, Contention NEPA 2.1 provides alleged facts or expert opinions as required by 10 C.F.R. § 2.309(f)(1)(v) to support the claims that the wastewater contains chemical contaminants that are not discussed in the ER, and that when FPL discharges the wastewater via the deep injection wells, the chemicals might migrate from the Boulder Zone to the Upper Floridan Aquifer. Joint Petitioners attached three documents to support these assertions: two sections from an EPA Relative Risk Assessment of the threat from deep injection wells in Florida (*see* EPA Relative Risk Assessment) and an announcement of a final rule issued by the EPA, based on that assessment, to impose an alternative method that operators of such wells may use when dealing with these threats. *See* EPA Final Rule.

The EPA Relative Risk Assessment lists chemical effluents — including those specified in Contention NEPA 2.1 as revised — that have been found in treated wastewater in Miami-Dade County, Florida, where FPL seeks to build Units 6 and 7. *See* EPA Relative Risk Assessment at A1-6 to A1-11. And the EPA Final Rule acknowledges that fluids discharged via deep injection wells have migrated in some cases from the Boulder Zone to the Upper Floridan Aquifer. *See* EPA Final Rule, 70 Fed. Reg. at 70,516. Moreover, FPL's ER also supports the possibility that fluids could migrate from the Boulder Zone to the Upper Floridan Aquifer. *See* ER at 2.3-15 (describing Floridan Aquifer as "a vertically continuous sequence of interbedded carbonate rocks of Tertiary age that are hydraulically interconnected by varying degrees").

In our view, the above documents are adequate at the contention admissibility stage to support a claim that (1) it is reasonably foreseeable that the chemicals specified by Joint Petitioners are in the wastewater, and (2) the release of these chemicals into the Boulder Zone by the injection wells may have an environmental impact. Accordingly, we believe Joint Petitioners have provided "a concise statement of the alleged facts . . . which support [their] position on the issue" as well as specific references to "sources and documents on which" they purport "to rely to support [their] position on the issue." *See* 10 C.F.R. § 2.309(f)(1)(v).[42]

Finally, Contention NEPA 2.1 satisfies the requirement in 10 C.F.R. § 2.309(f)(1)(vi) to show that a genuine dispute exists on a material issue of law or fact. Contention NEPA 2.1 hinges on the premise that wastewater injected into the Boulder Zone can migrate, with its chemical contaminants, up to the Upper Floridan Aquifer, which could be a source of drinking water.[43] In

[42] To be sure, the presence of these chemicals in wastewater in Miami-Dade County does not necessarily mean they will be present in the wastewater at the Turkey Point site. Nor is it clear that any such chemicals, to the extent they are present in the wastewater, will necessarily have a significant environmental impact. Nevertheless, Turkey Point's location within Miami-Dade County at least raises a question whether these chemicals are constituents of the wastewater at Turkey Point. And if these chemicals are in the wastewater, the information provided by Joint Petitioners provides adequate support under 10 C.F.R. § 2.309(f)(1)(v) for their claim that wastewater and its chemical contaminants can migrate to the Upper Floridan Aquifer.

[43] Joint Petitioners refer to the Lower Floridan Aquifer as a source of drinking water. *See* Joint Pet. at 26-27. We agree with the NRC Staff (NRC Staff Answer to Joint Pet. at 38 n.18) that Joint Petitioners intended to refer, instead, to the *Upper* Floridan Aquifer as a possible source of drinking water. *See* ER at 2.3-18, 2.3-32. Although there is information in the ER discounting the possibility that the Upper Floridan Aquifer in the vicinity of Turkey Point is a possible source of drinking water (*see* ER at 2.3-31, 2.3-48), there is no question that the "Upper Floridan aquifer is a major source of potable groundwater in much of Florida." ER at 2.3-18, 2.3-32. Under these circumstances, we believe that, if FPL's wastewater contains chemical contaminants that migrate to the Upper Floridan Aquifer, there is a genuine dispute of fact as to the impact of such migration on drinking water. In any event, FPL's failure to discuss the impact, *vel non,* of the migration of the specified chemicals on groundwater renders the ER deficient.

particular, Joint Petitioners have shown that a genuine dispute of fact exists as to (1) whether the wastewater used by FPL will, like other wastewater found in Miami-Dade County, contain heptachlor, ethylbenzene, toluene, selenium, thallium, and tetrachloroethylene, which are not listed in FPL's ER as wastewater constituent chemicals (*see* Joint Pet. at 28) (citing EPA Relative Risk Assessment, App. 1, tbl. 1-1 and 1-2); and (2) whether the wastewater discharged via deep-well injection will, along with these particular chemical contaminants, migrate from the Boulder Zone to the Upper Floridan Aquifer. *See id.* at 27-28. The ER fails to discuss these chemicals or their impact on the groundwater.

FPL and the NRC Staff point to the effectiveness of FPL's monitoring programs to avoid environmental impacts (including the comprehensiveness of the Florida licensing process required to obtain permits for these deep injection wells) and the fact that the Boulder Zone lies deep below the Upper Floridan Aquifer, to demonstrate that migration and its related environmental impacts are not likely. *See* FPL Answer to Joint Pet. at 69-72; NRC Staff Answer to Joint Pet. at 39-40. To the extent the chemicals specified by Joint Petitioners are in the wastewater, however, we do not view the existence of the monitoring programs to necessarily be an adequate substitute for the ER's failure to discuss these chemicals and their potential impacts. This is especially so in light of the ER's explicit analyses of other specific chemicals expected to be discharged and their respective concentrations. *See* ER tbl. 3.6-2.

Nor is the admissibility of Contention NEPA 2.1 foreclosed by the ER's conclusion that "[b]ased on the above analyses, potential impacts from the operation of the deep-well injection wells to groundwater would be SMALL and not warrant mitigation beyond that described previously." ER at 5.2-11. The concerns embedded in this contention, which are adequately supported for purposes of contention admissibility, are that (1) the ER does not exclude the possibility that wastewater can migrate to the Upper Floridan Aquifer, and (2) the ER's failure to mention particular chemical contaminants that are likely contained in the wastewater renders the ER's analyses deficient and its conclusion questionable.[44]

We therefore conclude that Contention NEPA 2.1, as revised *supra* p. 190, is admissible. *See Crow Butte Resources, Inc.* (North Trend Expansion Project),

[44] It is to be acknowledged that there is information in the record that tends to weaken a conclusion that wastewater will migrate to the Upper Floridan Aquifer and cause environmental harm. *See, e.g.,* EPA Final Rule, 70 Fed. Reg. at 70,518-19; Tr. at 223-25. At this juncture, however, Joint Petitioners need not *prove* wastewater will migrate to the Upper Floridan Aquifer and adversely impact the environment. They need simply provide sufficient support to raise a genuine issue of disputed fact. In our judgment, they have satisfied that burden. In this regard, we note that the ER contains a bounding analysis that purports to show the environmental impact of radiological effluents would not be significant (*see* ER at 5.4-2 to 5.4-3), but it contains no analogous analysis showing the environmental impact of nonradiological chemical effluents would not be significant.

CLI-09-12, 69 NRC 535, 552 (2009) (citations omitted) ("Our boards may reformulate contentions to 'eliminate extraneous issues or to consolidate issues for a more efficient proceeding.'").

b. Contention NEPA 2.2 Is Not Admissible

Contention NEPA 2.2 is a contention of omission alleging that "[t]he ER fails to discuss the impacts associated with the construction of pipelines to convey the reclaimed wastewater to the plant's wastewater treatment facility." Joint Pet. at 30. This contention has three underlying arguments: (1) "there is no discussion in the ER as to how the construction and operation of pipelines within [the wetlands south of SW 256 Street] will impact these wetlands" (Joint Pet. at 30); (2) "the ER fails to discuss how the construction and operation of pipelines within the nearly 5 mile long segment of the corridor that is collocated with the existing FPL transmission right-of-way will impact the extensive mangrove wetlands" (*id.* at 30-31); and (3) "[t]here is no mention in the ER of the potential conflict the placement of these pipelines [on the east side of the L-31 right-of-way for the Comprehensive Everglades Restoration Project (CERP) Biscayne Bay Coastal Wetlands (BBCW) Project] poses to [that] Project." *Id.* at 31.

FPL and the NRC Staff argue that Contention NEPA 2.2 is not admissible. *See* FPL Answer to Joint Pet. at 76-80; NRC Staff Answer to Joint Pet. at 47-50. We agree.

Regarding the first two arguments underlying Contention NEPA 2.2, Joint Petitioners err in asserting (1) the ER contains "no discussion" as to impact of the pipelines on wetlands south of SW 256 Street (Joint Pet. at 30), and (2) the ER "fails to discuss" how the construction and operation of these pipelines within the corridor that is collocated with the existing FPL transmission right-of-way will impact the mangrove wetlands. *Id.* at 30-31. The ER describes the pipelines as being "72-inch diameter or equivalent," and states they "would extend approximately 9 miles to bring reclaimed water from the SDWWTP [South District Wastewater Treatment Plant] to the FPL reclaimed water treatment facility." ER at 4.3-10.[45] The ER then discusses the impact of the pipelines and measures to mitigate such impacts:

> For about 6.5 miles of their length, the pipelines would be collocated with the existing Clear Sky-to-Davis transmission line right-of-way and adjacent road and canal rights-of-way, although most of the route is classified as wetland habitat. The pipelines would generally be trenched beneath an existing access road on the west side of the transmission line right-of-way. Upon completion, the disturbed portions

[45] *See also* ER at 4.3-9 (discussing overall impacts on wetland habitats of construction of Units 6 and 7 and ancillary facilities, and a three-pronged approach to wetland mitigation that FPL will employ).

> of the corridor would be graded to the contours of the surrounding landscape and allowed to revegetate or returned to previous land uses where appropriate. Clearing of new corridors and/or expansion of existing corridors would include use of standard industry construction practices to reduce impacts to sensitive habitats. . . . [including] employing silt fences, mulching, slope texturing, vegetated buffer strips, reseeding areas of disturbed soils, and avoiding wetlands and other sensitive habitats to the extent practical. Endangered manatees may exist in any of the SFWMD canals crossed by this pipeline corridor. Any required mitigation for wetland loss would likely include wetland enhancement, land swapping, and/or purchase of [Everglades Mitigation Bank (EMB)] credits.

Id. The ER concludes that, because "the pipelines would be collocated with existing rights-of-way along much (approximately 6.5 miles) of its route, disturbed soils would be revegetated, and standard industry construction practices would be employed . . . , impacts of the reclaimed water pipelines on terrestrial resources would be SMALL." *Id.*

The ER acknowledges that construction of the reclaimed water pipelines generally "would alter the surface water flow in the vicinity during construction activities." ER at 4.2-19. In particular, "the storage of excavated soils and/or spoils, stockpiling fill material, and the storage of equipment and supplies could impact surface water flow." *Id.* "Use of a stormwater detention basin would also alter the surface water flow." *Id.* Dewatering of surface water could also be required during the excavation necessary to trench pipelines beneath an existing access road, and the ER states that "[d]isposal of the water after it passes through a detention basin could alter the surface drainage downstream of the detention basin." *Id.* The ER concludes, however, that the impacts on surface water from these construction activities would be temporary because "disturbed areas would be recontoured and restored to preconstruction conditions." *Id.* In short, states the ER, impacts to surface water "would be SMALL and would not require additional mitigation other than those described above." *Id.*[46]

The ER also acknowledges possible impacts to wetlands from drainage ditches

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[46] Regarding mitigative measures to ameliorate the impact on surface waters, the ER states (ER at 4.2-23):

> During any required dewatering activities along the . . . water pipelines, surface water flow could be affected because of the release of groundwater to the ground surface or to nearby surface water bodies. As a mitigative measure, sheet piles could be used to limit the extent of potential impacts to surrounding areas where needed. Water from potential dewatering activities along the corridors could be released to a detention pond, surface pool, or other type of sediment trap before the release to a permitted outfall under any required NPDES [National Pollutant Discharge Elimination System] permit requirements and SWPPPs [Stormwater Pollution Prevention Plans] for the construction activities.

constructed during installation of the pipelines, but observes that such impacts would be mitigated by

> restoration of the excavated trench with native wetland soils. Wetland soils removed during trench excavation would be stockpiled and replaced following pipeline installation to allow the natural vegetative community to re-establish on the canal bank. The replacement of native soils at original grade would result in no net loss of wetland acreage or wetland functions following pipeline installation.

ER at 4.3-22.

The above discussion reveals that Joint Petitioners are incorrect in claiming the ER fails to discuss impacts to wetlands related to the construction and operation of the reclaimed water pipelines. Moreover, Joint Petitioners neither explain how an environmental impact attributable to the proposed action has been inadequately addressed in the ER, nor do they identify a dispute with the conclusions in the ER. Accordingly, to the extent Contention NEPA 2.2 is grounded on the first two arguments advanced by Joint Petitioners, it is not admissible for failing to raise a genuine dispute of material fact or law, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

Regarding the third argument underlying Contention NEPA 2.2, Joint Petitioners fail to provide alleged facts or expert opinions to support the existence of a "potential conflict" between placement of the pipelines and the CERP BBCW Project. *See* Joint Pet. at 31. Joint Petitioners rely on their Exhibit 15 to support the existence of a "potential conflict."[47] That reliance is misplaced, because Exhibit 15 appears to contemplate that FPL's use of the right-of-way can be accomplished without affecting the CERP BBCW Project. *See* Joint Pet., Exh. 15 at 14 ("[P]lease provide documentation demonstrating that the use of the L-31E Canal right-of-way is unavoidable and that the pipeline project will be designed, installed, operated, and maintained in such a way as to avoid impacts to . . . CERP [BBCW] Project . . . ."). In any event, Joint Petitioners fail to provide alleged facts or expert opinions, via Exhibit 15 or any other submission, necessary to show that it is reasonably foreseeable, rather than simply speculative, that installation of the reclaimed water pipelines would result in a conflict with the CERP BBCW Project. This aspect of Contention 2.2 is therefore not admissible pursuant to 10 C.F.R. § 2.309(f)(1)(v).[48]

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[47] *See* Joint Pet. at 31 (citing Joint Pet., Exh. 15, South Florida Water Management District Third Completeness Review — Part A Responses, FPL Turkey Point Units 6 & 7, PAO3-45A3, Site Certification Application, Power Plant & Associated Facilities (Non-Electrical) at 14 (May 28, 2010) [hereinafter Joint Pet., Exh. 15]).

[48] Even if Joint Petitioners had alleged facts or expert opinions to support the existence of a "potential conflict," they fail to explain why the environmental significance of these impacts would contradict the ER's conclusions, contrary to 10 C.F.R. § 2.309(f)(1)(iv).

Contention 2.2 is thus not admissible.[49]

c. Contention NEPA 2.3 Is Not Admissible

Contention NEPA 2.3 asserts that "[t]he ER fails to discuss the impacts to CERP associated with the use of reclaimed wastewater to cool Units 6 [and] 7." Joint Pet. at 31. Specifically, Joint Petitioners allege that the ER "fails to discuss" whether the use of up to 90 million gallons daily of reclaimed water from the South District Water Treatment Plant would adversely affect the CERP, and specifically the BBCW Project, whose objective "is to restore fresh water flows in and around the littoral zone of Biscayne Bay." *Id.* at 31-32. *See supra* note 35 (discussing CERP and BBCW Project).

FPL and the NRC Staff argue that Contention NEPA 2.3 is not admissible. *See* FPL Answer to Joint Pet. at 80-83; NRC Staff Answer to Joint Pet. at 51-54. We agree.[50]

First, Contention NEPA 2.3 is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v), because Joint Petitioners fail to allege facts or proffer expert opinions to support their assertion that FPL's use of reclaimed water might adversely affect the ability of Miami-Dade County to restore freshwater flows in and around the littoral zone of Biscayne Bay by providing freshwater to the CERP BBCW Project. *See* Joint Pet. at 31-32. Joint Petitioners refer to their Exhibits

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[49] We grant FPL's request to disregard arguments at pages 30-32 in Joint Petitioners' Reply to the extent they seek to expand the scope of Contention NEPA 2.2 from a contention of omission to a contention of adequacy. *See infra* note 53 (discussing distinction between contentions of omission and adequacy); FPL Motion to Strike Portions of Joint Petitioners' Reply at 8; *see* Tr. at 226-27.

[50] If Contention NEPA 2.3 were construed, *arguendo,* to fault FPL for failing to discuss the impact of its proposed project solely on Florida's restoration projects, we believe it would not raise a disputed issue of *material* fact or law. The NRC regulations implementing NEPA require an applicant to submit an ER discussing "[t]he impact of the proposed action *on the environment*" (10 C.F.R. § 51.45(b)(1) (emphasis added)) and "'appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources'" (*id.* § 51.45(b)(3)) (citing NEPA § 102(2)(E), 42 U.S.C. § 4332(2)(E)). We agree with FPL and the NRC Staff that this regulation requires an analysis of the *environmental* impacts of and alternatives to the proposed action; it does *not* extend to the impacts on another ongoing or proposed restoration effort in isolation from environmental impacts. *See* FPL Answer to Joint Pet. at 80-81; NRC Staff Answer to Joint Pet. at 51. This conclusion does not mandate summary rejection of Contention NEPA 2.3, however, because we construe it as arguing that the ER failed to discuss the impact the use of reclaimed water will have on freshwater flows around Biscayne Bay due to its impact on the CERP BBCW Project. So viewed, we believe this contention warrants further analysis regarding its admissibility.

Curiously, Joint Petitioners premise Contention NEPA 2.3 on the notion that Units 6 and 7 will use "as many as 90 million gallons of reclaimed water per day." Joint Pet. at 32. As discussed *supra* note 21, however, the ER contemplates that only 60 million gallons of reclaimed water per day will be necessary to provide cooling for the operation of Units 6 and 7. *See also supra* Part III.B.1.a.

16 and 40[51] to support this assertion, but neither of these documents supports the notion that the BBCW Project (and hence, the freshwater flows around Biscayne Bay) would likely be adversely affected by FPL's use of reclaimed water. Moreover, contrary to Joint Petitioners' apparent belief that the BBCW Project is wholly dependent on treated wastewater from Miami-Dade County, Exhibit 16 states (Joint Pet., Exh. 16 at 16) that "due to the water quality issues . . . other potential sources of water to provide required freshwater flows to southern and central Biscayne Bay should be investigated before pursuing the reuse facility as a source [for BBCW]."

Second, because Joint Petitioners fail to explain the potential impact of FPL's proposed use of treated wastewater on the CERP BBCW Project (and hence on the environment), they also fail to demonstrate that any such impact would be material to the findings the NRC must make in this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iv). And even if *some* impact were reasonably foreseeable, Joint Petitioners do not explain why such impacts would be so potentially significant as to warrant analysis in the ER. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348 (2002) (NEPA demands a discussion on the environmental impact of any proposed major federal action "'significantly affecting the quality of the human environment.'") (quoting 42 U.S.C. § 4332(2)(C)(i)).

Finally, Joint Petitioners err in asserting the ER contains "no discussion" of other potential sources of water that could be used instead of reclaimed water. *See* Joint Pet. at 32. Section 3.3 of the ER contains an extensive discussion of the radial collector wells, which FPL will use as an alternative or supplemental source of water. Additionally, section 9.4.2.3 of the ER states:

> Potential [circulating water system] sources were identified and organized into five categories based on the original source of the makeup water supply. These identified potential alternative makeup water sources are those water bodies or water sources within proximity to the proposed plant site that are capable of supplying the makeup water needs of the units.

ER at 9.4-15. The ER considered marine sources, groundwater sources, reclaimed water sources, onsite surface water sources, and offsite surface water sources, and it performed an "initial environmental screening of the alternative designs . . . to eliminate those systems that are unsuitable for use at the Units 6 [and] 7 site." *Id.* Contention NEPA 2.3 fails to acknowledge these analyses, much less identify a

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[51] *See* Joint Pet. at 31-32 (citing Joint Pet., Exh. 16, Central and Southern Florida Project, Comprehensive Everglades Restoration Plan, Project Management Plan, Biscayne Bay Coastal Wetlands (Aug. 2002) [hereinafter Joint Pet., Exh. 16], and Joint Pet., Exh. 40, MWH, Biscayne Bay Coastal Wetlands Rehydration Pilot Project, Preliminary Engineering Report (June 2009)).

genuine dispute with them, thus rendering this contention inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi). We thus conclude Contention NEPA 2.3 is not admissible.

In sum, we conclude Contention NEPA 2 is admissible in part. Specifically, Contention NEPA 2.1, as revised *supra* p. 190, is admissible; however, the remainder of Contention NEPA 2 is not admissible.

3. Contention NEPA 3 Is Not Admissible

Contention NEPA 3 asserts the "ER fails to adequately address the direct, indirect, and cumulative impacts of constructing and operating the transmission lines associated with Units 6 and 7 on [1] wetlands (including the Everglades), [2] wildlife (including wading birds, migratory birds, and federally endangered and threatened species), and [3] CERP," the Comprehensive Everglades Restoration Plan. Joint Pet. at 32. Regarding impacts to wetlands, Joint Petitioners claim the ER fails to address impacts the transmission lines will have on sheet flow, vegetation, hydrology, and floodplain characteristics, which Joint Petitioners claim could "result in decreased stormwater capacity and altered surface water flows," as well as "visual impacts to visitors of Everglades National Park." *Id.* at 34-35. Regarding impacts to wildlife, Joint Petitioners claim the ER fails to discuss the effect the transmission lines will have on "aquatic species (fisheries, amphibians, invertebrates), birds (including tree island rookeries), and . . . federally listed species, including the wood stork, eastern indigo snake, and Florida panther." *Id.* at 34. Finally, Joint Petitioners state that construction of the transmission lines might require FPL to construct fill roads that may impede implementation of "Alternative O" to CERP, which "calls for additional surface water flows east of U.S. [Route] 1 to be diverted southward through existing wetland slough systems to hydrate wetlands to the south." *Id.* at 35-36. Joint Petitioners claim the "ER fails to discuss the potential impacts of constructing fill roads in this area." *Id.* at 36.[52]

FPL and the NRC Staff argue that Joint Petitioners' Contention NEPA 3 is not admissible. *See* FPL Answer to Joint Pet. at 84-91; NRC Staff Answer to Joint Pet. at 54-64. We agree.

We begin our analysis by examining the nature of Contention NEPA 3 to determine whether it should be characterized as a contention of omission, a

[52] Joint Petitioners acknowledge FPL has not selected the route it will use for its transmission lines, and the choice of the corridor is within the jurisdiction of state agencies. They correctly observe, however, that the impacts of the possible routes must be analyzed for FPL to give the NRC the requisite information to make an informed decision on FPL's license. *See* Joint Pet. at 36 & n.6 (citing *Calvert Cliffs' Coordinating Committee, Inc. v. AEC,* 449 F.2d 1109, 1123 (D.C. Cir. 1971)).

contention of adequacy, or both.[53] We conclude it is one of omission. Our conclusion is driven by our examination of the contention, including its underlying arguments. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 n.45 (2002).

First, with regard to the impacts on wetlands, Joint Petitioners assert the ER contains "*no discussion* of the impacts from the construction, operation, and maintenance of the lines other than general statements that the corridor would traverse wetlands and that these wetlands would be impacted. There is *no discussion* with respect to the specific impacts to these wetlands . . . ." Joint Pet. at 33-34 (emphasis added).[54] Second, with regard to the impacts on wildlife, Joint Petitioners assert the ER contains "*no discussion* of the potential impacts to federally listed species, including the wood stork, eastern indigo snake, and Florida panther." *Id.* at 34 (emphasis added). Nor, assert Joint Petitioners, does the ER contain any discussion regarding the impacts on "aquatic species" or "birds." *Id.*[55] Third, Joint Petitioners claim the "ER *fails to discuss* the potential impacts of constructing fill roads" on "Alternative O" of the CERP. *Id.* at 36 (emphasis added).[56] When we examine Contention NEPA 3 in its entirety, we are compelled to characterize it as a contention of omission.[57]

So viewed, it is not admissible pursuant to its underlying three arguments. First, Joint Petitioners err in asserting the ER contains "no discussion" (Joint

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[53] A contention of omission is one that alleges an application suffers from an improper omission, whereas a contention of adequacy raises a specific substantive challenge to how particular information or issues have been discussed in the application. *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 (2006). It is possible for a contention to contain an omission component and an adequacy component. *See id.* at 742 n.7.

[54] *See also* Joint Pet. at 33 ("Although the transmission line component of the project threatens to impact more than 300 acres of wetlands . . . the ER fails to discuss . . . impacts of constructing and operating the transmission lines . . . ."); *id.* at 35 ("[T]ransmission lines could alter the hydrology and flood plain characteristics within these areas. . . . None of these impacts [is] considered.").

[55] *See also* Joint Pet. at 34 ("There is no discussion of the potential impacts to [Wood Stork] rookeries."); *id.* at 35 ("The ER fails to discuss . . . the potential impacts to the panther and other protected species.").

[56] *See also* Joint Pet. at 36 ("The ER's failure to discuss the specific impacts of [the] transmission lines in these corridors violates 10 C.F.R. § 51.45 because it fails to provide the Commission with the necessary information [with] which to make an informed decision of the impacts and alternatives of the project.").

[57] The sole indicia that conceivably could militate in favor of construing Contention NEPA 3 as a contention of adequacy is where Joint Petitioners use the phrase "fails to adequately address" (Joint Pet. at 32) in the contention itself. But when this isolated phrase is juxtaposed against the remainder of Joint Petitioners' discussion of Contention NEPA 3, it is simply not enough, standing alone, to add an adequacy component to the contention. Moreover, Joint Petitioners' use of this phrase can be reconciled with our conclusion that Contention NEPA 3 is a contention of omission, because if an ER improperly omits discussion of a topic, it fails *a fortiori* adequately to address that topic.

Pet. at 34) regarding the impacts the proposed transmission lines will have on wetlands. For example, the ER states:

> Although impacts to wetlands could potentially occur, they would be limited by careful siting and construction practices to avoid and minimize adverse effects. Where wetland impacts do occur, compensatory mitigation, as required by state and federal agencies, would be provided. Given the careful consideration of land use in the route selection process (Subsection 2.2.2) and the availability of a viable method for mitigation, impacts to offsite land use would be SMALL.

ER at 4.1-7.[58] The ER contains extensive discussion of practices that will be employed during construction of the transmission lines. *See* ER at 4.2-14 to 4.2-18. With regard to wetlands, the ER states FPL would use "restrictive land-clearing processes in forested wetland areas" and "turbidity screens and erosion-control devices in areas of wetlands and water resources" (ER at 4.1-6, 4.2-15), concluding that the impacts from construction of the transmission lines would be small. ER at 4.2-18.

The ER also addresses reasonably foreseeable impacts on surface and groundwater resources from operation of the transmission lines. It states in relevant part:

> Potential operational impacts along the offsite portions of the proposed transmission rights-of-way would be similar to the segments on the Turkey Point plant property. During operations, potential impacts from maintaining hydrologic flow could occur. As described in Section 3.7, FPL regularly inspects transmission lines. Vehicular traffic could result in the rutting of the access roads along the rights-of-way, which could impact surface flow in the vicinity of disturbances. Should soil disturbance be required during maintenance operations within the rights-of-way, silt fence technology would be used to minimize impacts to nearby surface waterbodies/drainage features.
>
> To reduce the potential for erosion through surface water runoff, areas of disturbed soils would be repaired, areas recontoured, and vegetative cover reestablished, if necessary, in a timely manner. Accordingly, impacts to hydrologic flow from operation of the offsite transmission lines would be SMALL and would not require further mitigation.
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> * * * *
>
> It could be necessary to perform maintenance that would require excavating and dewatering along the transmission lines. The dewatering activity could create temporary drawdown of the water table. Dewatering could impact areas off the right-of-way. However, the water table and flow would return to normal once

[58] Joint Petitioners do *not* challenge the ER's conclusion that compliance with state and federal requirements will ultimately lead to small impacts.

> dewatering ceased. Impacts to groundwater hydrologic flow from operation of the offsite transmission lines would be SMALL and would not require mitigation.

ER at 5.2-13. Finally, in its discussion of the transmission corridors, the ER acknowledges the possibility for visual impacts to occur, and concludes that such impacts will be small. *See* ER at 4.4-5 to 4.4-7 (concluding "the presence of these new lines would have a SMALL impact and would not warrant additional mitigation measures").

In short, the ER contains a relatively extensive discussion regarding the impact of transmission lines on wetlands. Joint Petitioners' assertion to the contrary is factually incorrect, and to the extent Contention NEPA 3 is premised on that error, it is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi) for failing to raise a genuine dispute of fact.

Contention NEPA 3 is likewise inadmissible as a contention of omission to the extent it argues that FPL's ER contains "no discussion" of the potential impacts to federally listed species (e.g., the wood stork, the eastern indigo snake, and the Florida panther), to aquatic species, or to birds. *See* Joint Pet. at 34. Chapter 2 of the ER provides extensive information on wood storks, the eastern indigo snake, and the Florida panther, stating in relevant part:

> [Wood storks] feed by touch, literally bumping into their prey, and thus require shallow wetlands relatively clear of vegetation in order to forage efficiently. They are seen in low numbers in the shallow portions of the industrial wastewater facility during the winter months. . . . They do not nest on or near the Turkey Point plant property but have historically nested in two colonies . . . near (within 5 miles) the proposed Turkey Point-to-Levee transmission corridors[.] Portions of both corridors fall within the core foraging areas of both colonies (radius of 18.4 miles around each colony). Wood storks could also be found within aquatic habitats associated with the access roads, reclaimed water pipelines, and FPL-owned fill source . . . .
>
> The Eastern indigo snake . . . inhabits a variety of habitats in the southeastern United States from scrub and sandhill to wet prairies and mangrove swamps. Their existence is frequently linked to gopher tortoise populations and use of their subterranean burrows. Indigo snakes have been observed south of the industrial wastewater facility in the Everglades Mitigation Bank (in 2004) and within an area . . . adjacent to the FPL child daycare facility (in 1981). Eastern indigo snakes could also be found within appropriate habitats found near the access roads, reclaimed water pipelines, FPL-owned fill source, and transmission corridors. . . .
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> * * * *
>
> The Florida panther . . . inhabits the Everglades region. Their population size within the region is estimated at fewer than 60 animals. They use a combination of upland hammocks and dense saw palmetto thickets and prey on deer and feral hogs. While there have been no confirmed sightings on the Turkey Point plant property, there have been more than 60 sightings of panthers over the last 20 years in the

> Everglades National Park (ENP) area crossed by the two alternative routes for the Clear Sky-to-Levee transmission corridor.

ER at 2.4-10 to 2.4-11.

In addition to discussing the local population of wood storks, eastern indigo snakes, and Florida panthers, the ER describes FPL's conclusions as to the impacts of construction of the transmission lines on these species, concluding that the impacts due to temporary disturbance to the wetlands would be "SMALL and mitigated by standard industry construction practices." *See* ER at 4.3-14. As to impacts on these species resulting from the operation of the transmission lines, the ER states:

> Based on the maintenance procedures established by FPL and the analysis of transmission system operation impacts on terrestrial resources the NRC completed for the [Generic Environmental Impact Statement (GEIS)] (NUREG-1437), potential impacts associated with routine right-of-way maintenance activities on terrestrial resources would be SMALL. However, the presence of known populations of certain threatened and endangered species near these right-of-way would result in agency consultations and possible mitigation actions, as discussed in Subsection 4.3.1.3.1.

ER at 5.6-4. *See also* ER § 4.3.1.3 (terrestrial ecological impacts, including with respect to animal species); ER § 4.3.2.3.3 (aquatic ecological impacts including with respect to aquatic species); ER § 5.6.1 (environmental impacts of transmission systems on terrestrial resources, including with respect to avian species).

In short, contrary to the second argument underlying Contention NEPA 3, FPL's ER contains information — indeed, a significant amount of information — regarding the impact of transmission lines on endangered species, aquatic species, and birds. Because Joint Petitioners fail to raise a genuine dispute of fact with regard to FPL's conclusions or the information leading to these conclusions, this aspect of Contention NEPA 3 is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi).

Finally, in the third argument underlying Contention NEPA 3, Joint Petitioners state the "ER fails to discuss the potential impacts [on Alternative O to CERP] of constructing fill roads" incident to building the transmission lines. *See* Joint Pet. at 35-36. Joint Petitioners are incorrect. Incident to the ER's analysis of the cumulative impact on the wetlands of constructing the transmission lines, the ER observes that (1) the purpose of CERP "is to make beneficial hydrologic alterations that would have large beneficial surface water impacts," and (2) the Everglades Mitigation Bank (EMB) "continue[s] to preserve wetlands and would not contribute or detract from surface water and water use impacts." ER at 4.7-5. In constructing the transmission lines, states the ER, FPL would use "environmental best management practices, including erosion-control devices, matting to reduce

compaction caused by equipment, use of wide-track vehicles when crossing wetlands, and restoration activities after construction," and the impacts caused by such construction would be "temporary and localized." *Id.* The ER concludes the "cumulative impacts to surface water [of building the transmission lines] would be positive and LARGE owing to the EMB and CERP projects. The hydrologic alterations resulting from construction of Units 6 [and] 7 would be only a SMALL detractor to this overall beneficial impact of restoring wetlands in the area." ER at 4.7-5 to 4.7-6.[59]

Although the ER does not specifically mention "Alternative O" to CERP, Joint Petitioners fail to show the absence of a specific discussion of Alternative O is a material omission, and they fail to provide supporting information to show a genuine factual dispute with the analysis and conclusion in the ER as to the cumulative impacts (taking CERP into account) of constructing the transmission lines. These failures are fatal to the admissibility of Contention NEPA 3, as propounded by its third argument, pursuant to 10 C.F.R. § 2.309(f)(1)(iv) and (vi).[60]

4. Contention NEPA 4 Is Not Admissible

Contention NEPA 4 claims "[t]he ER fails to adequately address the direct, indirect, and cumulative impacts of constructing and operating the access roads associated with Units 6 [and] 7 on wetlands and wildlife." Joint Pet. at 36. Joint Petitioners acknowledge the ER states that construction and operation of access roads could result in "vegetation loss and temporary habitat destruction." *Id.* at 37 (quoting ER at 4.1-6). They also acknowledge the ER concludes that "land use impacts from the improvements associated with the construction of Units 6 [and] 7 would be SMALL and not require additional mitigation." *Id.*

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[59] The ER also includes a discussion of the impact from transmission line corridors on water quality in relation to CERP. *See* ER at 4.7-7 ("The application of the erosion and pollution prevention plans and environmental best management practices to the CERP projects would minimize impacts to water quality to those that are SMALL and temporary. The cumulative impact to surface water quality, should any of these individual SMALL, temporary impacts become additive, would also be SMALL given the application of control measures that protect water quality.").

[60] In their Reply, Joint Petitioners argue Contention NEPA 3 is not merely a contention of omission; rather, it "raises a clear issue with the ER's adequacy . . . ." Joint Petitioners' Reply at 41. We disagree. As explained *supra* notes 54-57 and accompanying text, guided by the fact that all three arguments underlying Contention NEPA 3 explicitly assert omissions in the ER, coupled with the fact that, as originally pleaded, Contention NEPA 3 did not identify an allegedly deficient portion of the ER, much less explain or discuss with specificity the alleged deficiency, we conclude Contention NEPA 3 is fairly characterized as a contention of omission. We therefore grant FPL's request that we disregard Joint Petitioners' belated attempt in their Reply to expand the scope of Contention NEPA 3 by alleging it contains an inadequacy component. *See* FPL Motion to Strike Portions of Joint Petitioners' Reply at 9.

(quoting ER at 4.1-11). Joint Petitioners nevertheless assert the ER's conclusion is deficient, because it allegedly lacks "any support or analysis — besides the bare assurance of local government approval, the granting of easements, and the use of best management practices." Joint Pet. at 37. Additionally, Joint Petitioners claim section 4.1 of the ER is deficient because it fails to consider that access road construction and operation will result in the "disruption of ecological corridors, disruption of sheetflow, degradation of conservation lands (due to the disruption of management activities from access limitations), increased road-kill, increased colonization of invasive/exotic plant species, and increased dumping and all terrain vehicle/off road vehicle use (by providing access opportunities for unauthorized persons)." *Id.*; Tr. at 174.

FPL and the NRC Staff argue that Contention NEPA 4 is not admissible. *See* FPL Answer to Joint Pet. at 92-104; NRC Staff Answer to Joint Pet. at 64-70. We agree.

First, contrary to Joint Petitioners' position, the ER provides substantial "support [and] analysis" for FPL's conclusion that the impacts of the access roads on wetlands and wildlife will be small. For example, the ER (1) describes the extent of the road expansion, i.e., how long the roads will be, over how many acres they are expected to traverse, and where they are expected to traverse (*see* ER at 2.4-5 to 2.4-6, 4.1-4, 4.3-1, 5.1-5); (2) outlines what mitigative measures are likely to be taken on wetlands due to road expansion (*see* ER at 2.4-16, 4.1-9 to 4.1-11, 4.2-6, 4.3-8 to 4.3-9, 4.3-25, 4.6-6, 10.1-4); and (3) acknowledges permanent and temporary wetland habitat losses will occur as a result of this expansion. *See* ER at 4.3-9, 4.3-14 to 4.3-15; *see also* FPL Answer to Joint Pet. at 95-98; NRC Staff Answer to Joint Pet. at 66 n.25. Unlike Joint Petitioners, we view the above-cited sections of the ER as more than a consideration of simply "'vegetation loss and temporary habitat destruction'" (Joint Pet. at 37) (quoting ER at 4.1-6), or "the bare assurance of local government approval, the granting of easements, and the use of best management practices." *Id.* Accordingly, to the extent Contention NEPA 4 attacks as deficient FPL's discussion in support of its conclusion that the impacts of the access roads on wetlands and wildlife will be small, we conclude it fails to raise a genuine dispute of material fact with the relevant portions of the ER, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

The remainder of Contention NEPA 4 is in the nature of a contention of omission, alleging the ER fails to discuss specific aspects of the impact of access roads on wildlife and wetlands.[61] Yet, the ER contains much of what the Joint

[61] In support of the contention, Joint Petitioners use language such as "there is also no information in the ER regarding," "the ER also contains no information on," "[t]here is no discussion and analysis of . . . nor discussion of," and "the ER fails to consider." Joint Pet. at 37-38. In particular, Joint Petitioners assert the ER does not include information "regarding the potential overlap of wildlife

(Continued)

Petitioners assert is absent. The ER, in fact, addresses the impacts FPL's access roads will have on wildlife. In particular, the ER: (1) surveys avian and reptile populations in existing access roads and the transmission line corridors (*see* ER at 2.4-7 to 2.4-8); (2) describes the possible path for new roads and road improvements to assist in minimizing environmental impacts by preferring to use existing rights-of-way (*see* ER at 4.1-10); (3) identifies species that have, or have had, habitats proximate to access roads, such as crocodiles, wood storks, eastern indigo snakes, and Florida panthers (*see* ER at 2.4-10 to 2.4-11, 2.4-13, 4.3-5, 4.3-14); and (4) recognizes the threat that traffic on these roads would pose to crocodiles. *See* ER at 4.3-15, 4.6-6. Moreover, the ER includes plans for mitigating impacts to wildlife and wildlife habitats from access roads such as: (1) monitoring for species occurrence (*see* ER at 4.3-5); (2) installing warning signs (*see* ER at 4.6-6); (3) reducing speed limits (*see* ER at 4.3-12); (4) constructing wildlife corridors to mitigate threats from traffic (*see* ER at 4.6-6, 10.1-7); (5) installing ditches, swales, and culverts to manage surface water runoff (*see* ER at 4.1-11, 4.2-6, 4.2-20, 4.3-8) and to allow sheet flow of water (*see* ER at 4.3-9); and (6) removing access roads after construction is completed. *See* ER at 5.1-5; *see also* FPL Answer to Joint Pet. at 99-103. Joint Petitioners erroneously allege the ER fails to address these topics. This error renders Contention NEPA 4 inadmissible pursuant to section 2.309(f)(1)(vi).

Contention NEPA 4 is, therefore, not admissible.

5. Contention NEPA 5 Is Not Admissible

Contention NEPA 5 alleges FPL's "ER fails to adequately address (1) all reasonable alternatives to the proposed transmission line corridors and associated access roads, and (2) how the applicant will avoid and/or minimize impacts to wetlands caused by construction and operation of these transmission line corridors and associated access roads." Joint Pet. at 38.

FPL and the NRC Staff argue that Contention NEPA 5 is not admissible. *See* FPL Answer to Joint Pet. at 104-15; NRC Staff Answer to Joint Pet. at 71-80. We agree.[62]

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corridors with the proposed access roads," as well as endangered species affected by the roads such as the eastern indigo snake and Florida panther. *Id.* at 37. They also assert "the ER fails to consider the implementation of wildlife protection measures such as fencing, signage, reduced speed limits, and wildlife underpasses to eliminate or minimize mortalities from road-kill." *Id.* at 38.

[62] In Contention NEPA 5, Joint Petitioners also reassert claims they previously advanced in Contentions NEPA 3 and 4: namely, they allege the ER fails to "discuss and analyze any specific impacts of [the] transmission line corridor and access road construction on wetlands." *See* Joint Pet. at 41. For the reasons discussed *supra* Parts III.B.3 and III.B.4, we conclude this aspect of Contention NEPA 5 is not admissible. *See* FPL Answer to Joint Pet. at 105-06 nn.39 & 40.

In the first argument underlying Contention NEPA 5, Joint Petitioners attack the ER for allegedly failing to consider "all reasonable alternatives to the proposed transmission line corridors and associated access roads." Joint Pet. at 38.[63] We believe this attack is misguided. The ER explains that "[a]pproval of the proposed transmission line corridors is under the authority of the Florida Power Plant Siting Act." ER at 3.7-3. In its quest to minimize impacts to the environment as part of that state approval, FPL performed a corridor selection process in which a route "study area was defined, candidate routes were delineated, and routes evaluated using both qualitative and quantitative criteria. . . . The end result of the selection process was the identification of a preferred corridor to submit for licensing approval for each transmission line." ER at 3.7-3.

The ER further provides a description of the methodology and criteria used during the corridor selection process and the results of the analyses. *See* ER § 9.4.3. For example, the ER states the "corridor selection process was based primarily on the geographic location of the starting and ending substations," and because "much of the west study area is dominated by low-density residential development, agricultural and nursery operations, conservation lands, mining activities, and relatively few existing linear features (roads, other transmission lines) with which to collocate, there were immediately only a few obvious choices for routes." ER at 9.4-27.

After identifying the alternative routes that it determined would minimize environmental impacts (*see* ER Figures 9.4-11 and 9.4-12), FPL identified several route segments using predetermined route selection guidelines. For the two main route alternatives selected, this effort produced 99 and 134 potential alternative route alignments between the Clear Sky substation and the preexisting substations to which it would connect. FPL then developed alternative route segments that could connect those substations when combined (*see* ER at 9.4-28), with the objective of selecting preferred East and West Corridors. In achieving that objective, FPL performed a "systematic, quantitative evaluation of each route alternative using environmental, land use, cost, and engineering criteria." *Id.* The proposed siting criteria included (1) length of wetlands crossed; (2) land use considerations to minimize potential disruption to such areas as parks,

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[63] The NRC Staff argues that NEPA's requirement to discuss alternatives "to the proposed action" does not extend to the construction of transmission line corridors, which, according to the NRC Staff, is not "construction" as defined in 10 C.F.R. § 50.10 and, accordingly, is not considered to be part of the "major Federal action" that is approved by the Commission if a COL is issued. *See* NRC Staff Answer to Joint Pet. at 78; Tr. at 250-53. Although the NRC Staff's argument appears to have some weight (*but cf. Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 82-90 (1977), *aff'd, New England Coalition on Nuclear Pollution v. NRC,* 582 F.2d 87 (1st Cir. 1978)), we need not resolve it, because, as discussed above in text, we conclude this aspect of Contention NEPA 5 is inadmissible for failing to raise a genuine dispute of material fact or law with the ER. *See* FPL Answer to Joint Pet. at 110-15; NRC Staff Answer to Joint Pet. at 79-80.

wildlife refuges, estuarine sanctuaries, landmarks, and historical sites; and (3) opportunities to collocate with existing linear facilities (e.g., farm roads, canals, railroads, FPL transmission lines, and other transportation rights-of-way). *See* ER tbl. 9.4-7; ER at 4.1-4, 4.1-5.[64] These evaluations, which FPL states "included numerous meetings and extensive feedback from interested parties" (FPL Answer to Joint Pet. at 114), resulted in a selection of "the West Preferred, West Secondary and East Preferred routes." ER at 9.4-29; *see also* ER § 9.4.3.2.

Although Joint Petitioners attack as deficient the number of alternatives considered by FPL, and although they complain FPL relied too much on its state power plant siting application to explain the alternatives it considered, Joint Petitioners fail to identify any reasonable alternative route that was not considered in the ER (Tr. at 185), nor do they raise any specific dispute with the transmission line corridor selection methodology described in the ER. In these circumstances, we conclude Joint Petitioners fail to raise a genuine dispute of material fact or law with alternatives to transmission line corridors and associated access roads considered in FPL's ER. Contention NEPA 5, as described by its first argument, is thus not admissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi). *See Mt. Lookout-Mt. Nebo Property Protection Ass'n v. Federal Energy Regulatory Commission,* 143 F.3d 165, 172-73 (4th Cir. 1998) (holding that the Federal Energy Regulatory Commission's consideration of three alternative routes was sufficient to meet the agency's NEPA obligations to consider reasonable transmission line route alternatives).[65]

Nor is Contention NEPA 5 admissible pursuant to its second argument, which challenges the adequacy of the ER's discussion of mitigation measures for construction of the transmission corridors and access roads. Specifically, Joint Petitioners assert the "ER states only that a three-pronged approach to mitigation would be used: active mitigation, 'land-swapping,' and the purchase of wetland credits from the Everglades Mitigation Bank." Joint Pet. at 43 (quoting ER at 4.3-9). Joint Petitioners claim FPL's failure to elaborate on these mitigation measures renders the ER noncompliant with 10 C.F.R. § 51.45(c), which requires a "full discussion" of mitigation plans. *See id.*

The flaw in Joint Petitioners' argument is that it overlooks those portions of the ER that, in fact, elaborate on these mitigation measures. Specific examples of active mitigation to the impacts of transmission line corridors and their associated

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[64] "As part of the transmission corridor selection process, ecological . . . surveys were performed along the proposed corridors." ER at 3.7-3.

[65] Although Joint Petitioners correctly assert (Joint Pet. at 42) the NRC cannot "abdicate its responsibilities under NEPA" by blindly accepting Florida's certification of the transmission line corridors, that assertion is beside the point. We do not analyze here the not-yet-ripe issue of whether the NRC will properly perform its NEPA review; rather, we analyze whether Joint Petitioners have demonstrated that Contention NEPA 5 is admissible. We resolve the latter issue in the negative.

access roads include "restrictive land-clearing processes in forested wetland areas (right-of-way clearing and preparation)," "turbidity screens and erosion-control devices in areas of wetlands and water resources (access road/structure pad construction)," "existing access roads for ingress and egress to rights-of-way where available (access road/structure pad construction)," "erosion-control devices, matting to reduce compaction caused by equipment, use of wide-track vehicles when crossing wetlands, and restoration activities after construction." ER at 4.1-6 to 4.1-7; *see also* FPL Answer to Joint Pet. at 107 & n.41. The ER addresses implementation of mitigation measures such as removing excavated soils, recontouring affected construction areas as necessary, restoring the corridor to preconstruction conditions, restoring vegetative cover where needed (*see* ER at 4.2-15), and "employing silt fences, mulching, and avoiding wetlands and other sensitive habitats to the extent practicable." ER at 4.3-12; *see also* FPL Answer to Joint Pet. at 106, 108. Further, the ER describes a land exchange proposal that would avoid and reduce potential wetlands impacts by relocating an 8-mile segment of the corridor from within the Everglades National Park to the periphery of the Park. *See* ER at 2.4-6; FPL Answer to Joint Pet. at 106-07. The ER also describes the Everglades Mitigation Bank (EMB), which FPL can use as mitigation credit for impacts to wetlands. The EMB "contains approximately 13,000 acres of relatively undisturbed freshwater and estuarine wetlands west and south of the industrial wastewater facility. . . . This land is owned and managed by FPL and it operates as a commercial mitigation bank with wetland habitat credits that can be purchased to offset regional wetland impacts." ER at 2.4-13.[66]

In short, Joint Petitioners err in claiming the ER provides only "cursory" (Joint Pet. at 43) references to mitigation plans for construction of the transmission corridors and access roads. Because Joint Petitioners fail to acknowledge the above mitigation plans, much less raise a specific challenge to them, Contention NEPA 5, as grounded on its second argument, is inadmissible for failing to demonstrate a genuine dispute with the ER on a material issue. *See* 10 C.F.R. § 2.309(f)(1)(vi).

6. Contention NEPA 6 Is Not Admissible

Contention NEPA 6 asserts that FPL's "ER fails to adequately address the cumulative impacts of constructing and operating Units 6 and 7 on salinity levels in groundwater, surface water, Biscayne Aquifer, and Biscayne Bay; wetlands;

[66] Regarding the mitigative benefits of the EMB, the ER also states: "The EMB contains the following vegetative habitats: sawgrass marsh, wet prairie, hypersaline mangrove, tidal mangrove, coastal band mangrove, and coastal ridge mangrove. . . . The EMB is home to 14 species of amphibians, 39 species of reptiles, 14 species of terrestrial mammals, and approximately 150 species of birds." ER at 2.4-13; *see also* ER at 2.4-22.

and wildlife." Joint Pet. at 47. This contention repeats the same salinity concerns raised in Contention NEPA 1, but it frames them in terms of attacking the ER's alleged failure to address several impacts that, when coupled with the "existing plume of saltwater that is found underneath the plant" (*id.*), may "have the cumulative effect of increasing salinities in the project area." *Id.* at 48. Specifically, Joint Petitioners argue the ER's cumulative impacts analysis fails to consider salinity increases due to: (1) salt drift from cooling tower operations (*id.*); (2) the extraction of freshwater by radial collector wells from the Biscayne Aquifer and Biscayne Bay (*id.*); (3) the consumption of municipal wastewater that may otherwise be used to supply freshwater into Biscayne Bay (*id.*); (4) sea level rise and storm surge that may result in the cooling canals becoming part of Biscayne Bay (*id.*); (5) the use of injection wells that may increase salinities in the Floridan Aquifer (*id.*); and (6) the annual agricultural drawdowns of the groundwater in Southern Miami-Dade County. *Id.* at 49-50.

FPL and the NRC Staff argue that Contention NEPA 6 is not admissible. *See* FPL Answer to Joint Pet. at 116-29; NRC Staff Answer to Joint Pet. at 81-96. We agree.

To facilitate our analysis of the admissibility of Contention NEPA 6, we will examine each of the six discrete arguments on which it is grounded. As shown below, none of the arguments — viewed individually or cumulatively — explains how, much less provides sufficient information to show that, Contention NEPA 6 raises a genuine dispute with any of the analyses and conclusions in the ER, contrary to 10 C.F.R. § 2.309(f)(1)(vi).[67]

First, Joint Petitioners provide no alleged facts or expert opinions for the proposition that "drift from cooling tower operations" would have the potential to affect salinity levels in surrounding waters. Joint Pet. at 48.[68] The ER analyzes salt drift from the cooling system, stating that the "AERMOD model was used to predict the amount of salt deposits from operation of Units 6 [and] 7 cooling towers" and that, based on conservative deposition rates, "[s]ignificant salt deposition is predicted at the makeup water reservoir (up to 900 kg/ha/mo)," but that "[b]eyond the makeup water reservoir, the deposition rates are predicted to decrease rapidly." ER at 5.3-8, 5.3-9. The ER states that "monthly salt deposition in the cooling canals of the industrial wastewater facility ranges from 10 to 80 kg/ha/month. Salt deposition of 10 kg/ha/mo would generally be confined to the

[67] In this contention, Joint Petitioners once again assert (Joint Pet. at 47) the ER fails to acknowledge a hypersaline plume beneath the Turkey Point site. As discussed *supra* Part III.B.1.e, this assertion is wrong.

[68] Although Joint Petitioners attach several exhibits in support of Contention NEPA 6, they cite none of them specifically in support of this argument. Nor do they dispute any portion of the ER where the impacts of salt drift are discussed.

plant property, with the exception of the adjacent southeastern perimeter." ER at 5.3-9.

The ER evaluates the impacts of salt drift on wildlife at the wastewater facility, stating that "[g]iven FPL's ongoing management activities that include providing freshwater habitats for young crocodiles, salt deposits from operation of the Units 6 [and] 7 cooling towers into the industrial wastewater facility would not impact the salinity sufficiently to impact existing crocodile growth and/or survival rates," and that "[s]alt deposits would not impact canal salinities sufficiently to eliminate or reduce fish populations and, therefore would not impact waterbird use of the industrial wastewater facility." ER at 5.3-9. The ER concludes that "impacts from salt drift on local terrestrial ecosystems would be SMALL and would not warrant mitigation beyond the crocodile management program identified above." *Id.* Regarding impacts on vegetation, the ER concludes that "[c]onsidering the existing salt-tolerant vegetative community surrounding the plant area, the potential impacts of salt drift to vegetation would be SMALL and not warrant mitigation." *Id.*

Because Joint Petitioners fail to provide any information supporting their claim that salt drift might affect the salinity of surrounding waters, and because they fail to specify the relevant portions of the ER whose analyses they dispute, this aspect of their contention is not admissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi). *See* FPL Answer to Joint Pet. at 118-119; NRC Staff Answer to Joint Pet. at 82-84.

Regarding the second argument underlying Contention NEPA 6, as discussed *supra* Part III.B.1.a, Joint Petitioners provide no alleged facts or expert opinions in support of the proposition that the salinity of surrounding waters could increase from the "use of radial wells that could extract freshwater from the Biscayne Aquifer and Biscayne Bay" (Joint Pet. at 48) and, accordingly, this aspect of their contention is not admissible pursuant to 10 C.F.R. § 2.309(f)(1)(v). Moreover, Joint Petitioners fail to address or to dispute the ER's conclusion that the impact of radial collector wells will be minimal. Specifically, the ER states: (1) "the impacts to aquatic life as a result of radial collector well operation would be SMALL and not warrant mitigation" (ER at 5.3-3); (2) "[t]he operation of the radial collector wells and the potential impacts on water bodies including Biscayne Bay and the cooling canals in the industrial wastewater facility have been evaluated through groundwater modeling" and "[b]ased on the evaluation, impacts with respect to aquatic vegetation (e.g., shoreline mangroves) would be SMALL and not warrant mitigation" (*id.*); and (3) "impacts to important aquatic species from operation of the radial collector wells would be SMALL and would not require mitigation." *Id.* Joint Petitioners' failure to specify a deficiency in the ER's analyses and conclusions renders this aspect of Contention NEPA 6 inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi) for failing to identify a genuine dispute with the ER's conclusions (ER § 5.11) that the impacts to water quality or aquatic resources,

cumulative or otherwise, would be small. *See* FPL Answer to Joint Pet. at 119; NRC Staff Answer to Joint Pet. at 84-85.

With regard to the third argument underlying Contention NEPA 6, Joint Petitioners fail to provide alleged facts or expert opinions to support their claim that cumulative salinities, including the "existing problems posed by the groundwater plume," could be affected by "the reservation of municipal wastewater that may otherwise be used to supply freshwater into the littoral zone of Biscayne Bay through the CERP BBCW project" (Joint Pet. at 48), thus rendering this subcontention inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v).[69] Moreover, in advancing this argument, Joint Petitioners fail to acknowledge those portions of the ER that discuss CERP, including an analysis of cumulative impacts. *See, e.g.,* ER at 5.11-5 (stating, in its analysis of cumulative surface water impacts, the "CERPs would rehydrate wetlands that provide water flow into Biscayne Bay, positively impacting Biscayne Bay"); ER at 5.11-6 (stating, in its analysis of cumulative groundwater impacts, that "other projects considered for cumulative impacts, EMB and CERPs, would not withdraw groundwater and would not have groundwater injection wells. The wetlands involved in these projects would likely positively impact groundwater resources since they would promote recharge to groundwater rather than runoff"); *id.* ("Considering the . . . impacts to groundwater resources from the other projects considered for cumulative impacts, the cumulative impact to groundwater resources would be SMALL."); *id.* (stating, regarding water quality, that "non-Turkey Point projects considered for cumulative impacts, CERPs and EMB, would not withdraw water from surface water or groundwater sources. The CERPs would provide stormwater treatment to minimize negative impacts to waters ultimately receiving the treated stormwater, such as the Biscayne Bay and underlying groundwater. Therefore, adverse impacts to surface water or groundwater resources from these projects are not expected."). Having failed to challenge the relevant analyses and conclusions in the ER (*see* ER § 5.11), the third aspect of Contention NEPA 6 fails to identify a genuine dispute with the ER on a material issue of law or fact, rendering it inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi). *See* FPL Answer to Joint Pet. at 126-27; NRC Staff Answer to Joint Pet. at 86-88.

In the fourth argument underlying Contention NEPA 6, Joint Petitioners assert the cooling canals used to cool the existing Units 1 through 4 could, as a result of saltwater intrusion from "sea level rise and storm surge," become "essentially

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[69] Joint Petitioners fail to explain how the CERP BBCW project could potentially be affected by FPL's "reservation of municipal wastewater," other than to say the wastewater "may otherwise be used to supply freshwater into . . . Biscayne Bay" (Joint Pet. at 48), and they thus fail to explain their assertion that the environmental impact of FPL's wastewater allotment could or would be significant. This failure renders this aspect of Contention NEPA 6 inadmissible for failing to demonstrate the issue is material to the granting of the COL. *See* 10 C.F.R. § 2.309(f)(1)(iv).

part of the Bay" due to the failure of FPL to "elevate the entire project area." *See* Joint Pet. at 48. But Joint Petitioners do not explain why FPL's discussion of the cooling canals is inadequate, rendering this aspect of their contention inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi).

The ER discusses the cooling canals in the section entitled "Hydrology" (ER § 2.3.1) and the section entitled "Cumulative Impacts Related to Station Operation" (ER § 5.11).[70] Significantly, with regard to cumulative impacts on surface water, the ER states the "cooling canals of the industrial wastewater facility would be impacted by salt deposition from operation of the Units 6 [and] 7 cooling towers . . . . However, . . . [w]ith continued implementation of the management/conservation plan, the cumulative impact . . . would be SMALL." ER at 5.11-5. With regard to cumulative impacts on groundwater, the ER concludes that "[c]onsidering the impact from the radial collector wells and the impacts to groundwater resources from the other projects considered for cumulative impacts, the cumulative impact to groundwater resources would be SMALL." ER at 5.11-6. And with regard to cumulative impacts on water quality, the ER concludes that "[c]onsidering that the existing units use of groundwater does not overlap with the uses for operation of Units 6 [and] 7 . . . and that the non-Turkey Point projects would have positive impacts to water quality, cumulative impacts to groundwater quality would not result." ER at 5.11-7.

Joint Petitioners do not cite any of these portions of the ER, nor do they dispute the reasoning and conclusions with respect to the impacts relating to the cooling canals, thus rendering Contention NEPA 6, to the extent it is grounded on the fourth argument, inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi). Moreover, Joint Petitioners fail to explain how construction and operation of Units 6 and 7 would affect, much less increase, salinity levels in the cooling canals and, accordingly, their assertion that elevation of the "entire project area" (Joint Pet. at 48) is a topic that should have been included in the ER in the event sea level rise or storm surge causes the cooling canals to become "essentially part of the Bay" (*id.*) is also unsupported, contrary to 10 C.F.R. § 2.309(f)(1)(vi). *See* FPL Answer to Joint Pet. at 127; NRC Staff Answer to Joint Pet. at 88-90.

In the fifth argument underlying Contention NEPA 6, Joint Petitioners allege the ER fails adequately to consider the "use of injection wells that may result in increased salinities in the Floridan Aquifer." Joint Pet. at 48. However, Joint

[70] The feeder and return canals are described in the ER as "shallow, generally 1 to 3 feet deep, with the exception of the westernmost return canal . . . , which extends to a depth of –18 feet [National Geodetic Vertical Datum of 1929 (NGVD 29)] (–19.6 feet NAVD 88)." ER at 2.3-10. These canals have water levels that "rise and fall with the tide in Biscayne Bay," with groundwater flow interacting with water in the unlined cooling canals. ER at 2.3-11. "The cooling canals also experience losses as a result of evaporation and seepage. Makeup water for the industrial wastewater facility comes from treated process wastewater, rainfall, stormwater runoff, and groundwater infiltration." *Id.*

Petitioners provide no alleged facts or expert opinions in support of the notion that there is a relationship between the injection wells and increased salinities in the Floridan Aquifer, contrary to 10 C.F.R. § 2.309(f)(1)(v). *See* NRC Staff Answer to Joint Pet. at 90.

Finally, regarding the sixth argument underlying Contention NEPA 6, Joint Petitioners assert the ER improperly fails to discuss the cumulative impact of the annual agricultural drawdowns of the groundwater in Southern Miami-Dade County on local salinity levels in the Biscayne Aquifer and Biscayne Bay. *See* Joint Pet. at 49-50.[71] But the flaw in this argument is Joint Petitioners' failure to explain the connection between this alleged deficiency, the ER, and the proposed action. The Commission has admonished that a contention must "identify the disputed portion of the application, and provide 'supporting reasons' for the challenge to the application. Similarly if a petitioner believes that an application fails to contain information on a 'relevant matter as required by law,' the contention must identify each failure and the supporting reasons for the petitioner's belief." *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 456 (2006) (internal footnotes omitted). In the instant case, Joint Petitioners fail to explain how the seasonal drawdowns would exacerbate, or even interact with, impacts from construction and operation of Units 6 and 7. Nor do Joint Petitioners explain how the seasonal drawdowns affect the ER's conclusions regarding the significance of the proposed action's impact, or how that cumulative impact might be different from any potential significance attributable to these drawdowns that are entirely independent of the proposed action. Hence, to the extent Contention NEPA 6 is grounded on the sixth argument, it is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi). *See* FPL Answer to Joint Pet. at 120-23; NRC Staff Answer to Joint Pet. at 91-93.[72]

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[71] Joint Petitioners state (Joint Pet. at 49) that water managers from the South Florida Water Management District conduct annual agricultural drawdowns in the autumn in Southern Miami-Dade County to "manipulate groundwater storage . . . to support agricultural interests." The drawdowns are based on "demands for lower groundwater stages at the end of the wet season to support the production of row crops such as potatoes. Farmers assert that lower groundwater levels are needed to assist farmers in reaching their farmlands by tractor to plant potatoes and other deep-rooted crops[, which] need lower water levels to grow." *Id.* Joint Petitioners claim an average of 21.4 billion gallons of freshwater from the Biscayne Aquifer are released annually into Biscayne Bay to accomplish the draw down. *See id.*

[72] We note that the long history of environmental impacts caused by management of the Everglades is discussed in the ER. *See* ER at 2.3-3 to 2.3-5. The ER also acknowledges that local pumping lowers the groundwater levels, which, together with the high permeability of the Biscayne aquifer, has led to saltwater intrusion that affects the entire coastal zone. *See* ER at 2.3-17. And FPL's Final Safety Analysis Report (FSAR) explicitly discusses local groundwater pumping for agricultural purposes, observing that this takes place during the dry season, which amplifies its effects. *See* FSAR at 2.4.12-11. Contrary to Joint Petitioners' assertion, these discharges to surface water and

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In short, none of the individual arguments underlying Contention NEPA 6 renders it admissible. Nor do these arguments, when viewed jointly, warrant admitting Contention NEPA 6. Contention NEPA 6 is therefore not admissible.[73]

7. Contention NEPA 7 Is Not Admissible

Contention NEPA 7 alleges that the "ER fails to address the direct, indirect, and cumulative impacts of sea level rise on the construction and operation of Units 6 [and] 7 and the ancillary facilities." Joint Pet. at 52. In particular, Joint Petitioners assert the "ER entirely fails to discuss and analyze the potential impacts of [a predicted] 1.5 to 5 foot rise in sea level on Units 6 [and] 7." *Id.* Although Joint Petitioners acknowledge (*see id.*) the power plant would be constructed at an elevation of 19.0 to 25.5 feet NAVD 88 (which stands for North American Vertical Datum of 1988), they state that other associated facilities, "including the containment building, auxiliary building, and turbine building . . . will be located below plant grade," and that the ER fails to discuss the impacts of sea level rise on these facilities, which Joint Petitioners claim "violates 10 C.F.R. § 51.45(b)." *Id.* at 53.

FPL and the NRC Staff argue that Contention NEPA 7 is not admissible. *See* FPL Answer to Joint Pet. at 129-34; NRC Staff Answer to Joint Pet. at 97-102. We agree.

Joint Petitioners characterize Contention NEPA 7 as an environmental contention, alleging the ER violates 10 C.F.R. § 51.45(b) because it fails to address

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groundwater are incorporated into the baseline for the ER's cumulative impacts analysis (*see* ER at 5.11-1), which strengthens our conclusion that Contention NEPA 6, as characterized by the sixth argument, is inadmissible for failing to demonstrate a genuine dispute with the COLA regarding agricultural drawdowns. We also agree with FPL that Joint Petitioners raise for the first time and without justification in their Reply new issues regarding the cumulative effects of drawdowns, and we decline to consider those untimely issues. *See* FPL Motion to Strike Portions of Joint Petitioners Reply at 9-10.

[73] Joint Petitioners also assert that the potentially large increase in salinity levels around the Turkey Point site could adversely impact the "native ecosystem and the wildlife" (Joint Pet. at 51) and, accordingly, must be analyzed. *Id.* at 52. As discussed above, however, Joint Petitioners fail to support their assertion in Contention NEPA 6 that construction and operation of proposed Units 6 and 7 would result in a large increase in salinity levels around the Turkey Point site. The ER nevertheless provides an extensive discussion of the cumulative impacts of construction and operation of the proposed Units on the ecosystem and wildlife. *See* ER at 5.3-9, 5.11-5; FPL Answer to Joint Pet. at 123-26, 128; NRC Staff Answer to Joint Pet. at 94-95.

Nor is Contention NEPA 6 rendered admissible by Joint Petitioners' assertion that "increased mining operations . . . could also accelerate the mixing of surface water and salt-intruded aquifers." *See* Joint Pet. at 50 (citing Joint Pet. Exh. 25, South Florida Water Management District, Miami-Dade Canal Agricultural Drawdown Study (Feb. 12, 2008)). Joint Petitioners fail to explain how this assertion supports a conclusion that FPL's ER incorrectly omitted a cumulative impacts analysis.

the impact of sea level rise on the construction and operation of Units 6 and 7 and the ancillary facilities. *See* Joint Pet. at 53. It appears, however, that Joint Petitioners' concern underlying Contention NEPA 7 is the operational *safety* of Units 6 and 7 in light of the possibility of sea level rise. In other words, Contention NEPA 7 is concerned with the adequacy of the ER's safety analysis. The ER is *not* the vehicle for the NRC Staff's safety review, and Joint Petitioners fail to explain why section 51.45(b) — which is a NEPA-implementing regulation that requires an applicant to discuss the impact of the proposed action "*on the environment*" (10 C.F.R. § 51.45(b)(1) (emphasis added)) — requires the ER to discuss the impacts of sea level rise on the safe operation of the plant. Accordingly, to the extent Contention NEPA 7 alleges an operational safety matter has not been adequately analyzed in the ER, it fails to demonstrate the issue is material to the findings the NRC Staff must make to support its environmental review, contrary to 10 C.F.R. § 2.309(f)(1)(iv). *See* FPL Answer to Joint Pet. at 131-32; NRC Staff Answer to Joint Pet. at 97.[74]

We note, moreover, that Joint Petitioners ignore the extensive safety analysis in FPL's FSAR regarding protection against maximum flooding events. Guided by NRC Regulatory Guide 1.59, FPL analyzed the Probable Maximum Storm Surge (PMSS) by, first, using the 10% exceedance high spring tide, 2.6 feet NAVD 88, as the antecedent water level. *See* FSAR at 2.4.5-5.[75] FPL adjusted the antecedent water level to account for expected sea level rise over the design life of the plant, taking the long-term trend in sea level rise in the Miami area, 0.78 foot per century, and conservatively rounding that value up to 1 foot per century. *See* FSAR at 2.4.5-5 to 2.4.5-6.[76] FPL added this 1-foot sea level rise factor to the 2.6 feet NAVD 88 10% exceedance high spring tide, generating a 3.6-foot NAVD 88 sea level rise antecedent water level, which FPL used as the initial water level condition in its model to calculate the PMSS height of 21.1 feet NAVD 88. *See* FSAR at 2.4.5-6, 2.4.5-10.[77] Combining the PMSS with the

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[74] To the extent Joint Petitioners meant to suggest that the environmental impacts of a potential sea level rise would be impacted, or exacerbated, by construction and operation of Units 6 and 7, they fail to provide supporting information, contrary to 10 C.F.R. § 2.309(f)(1)(vi). Joint Petitioners' reliance on the South Florida Water Management District (SFWMD) First Completeness Review (*see* Joint Pet. at 53) is unavailing, because they fail to explain how the comments posed by SFWMD with respect to its review of FPL's Site Certification Application support a conclusion that construction of Units 6 and 7 would impact a potential sea level rise or otherwise relate to information that would be required in FPL's ER. *See* FPL Answer to Joint Pet. at 133; NRC Staff Answer to Joint Pet. at 100-01.

[75] The 10% exceedance high spring tide is the high tide level that is equaled or exceeded by 10% of the maximum monthly tides over a continuous 21-year period. *See* FSAR at 2.4.5-5.

[76] FPL represents that it extrapolated data from the National Oceanic and Atmospheric Administration (NOAA) to account for future sea level rise. *See* FPL Answer to Joint Pet. at 130 n.50.

[77] FPL determined the PMSS using NOAA's SLOSH ("Sea, Lake, and Overland Surges from Hurricanes") model, which is used to forecast hurricane storm surges. *See* FSAR at 2.4.5-6.

3.7-foot maximum wave runup that would be caused by the maximum hurricane wind speed, FPL concluded the maximum water level due to a probable maximum hurricane, adjusted to account for sea level rise, would be 24.8 feet NAVD 88. *See* FSAR at 2.4.5-11 to 2.4.5-12. The power plant design for Units 6 and 7 incorporated this analysis, providing that the elevations of floor entrances and openings for all safety-related structures are 26 feet NAVD 88. *See* FSAR at 2.4.10-1. Because FPL's FSAR provides an analysis supporting the protection of its proposed facility from sea level rise, a NEPA analysis of the effects of sea level rise on the facility cannot be material to the NRC Staff's environmental licensing decision, rendering Contention NEPA 7 inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(iv). Additionally, because Joint Petitioners neither acknowledge nor challenge FPL's sea level rise analysis, Contention NEPA 7 is also inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi) for failing to raise a genuine dispute of material fact. *See* FPL Answer to Joint Pet. at 130-31; NRC Staff Answer to Joint Pet. at 99-100.[78]

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[78] It is, of course, well established that an ER need only discuss reasonably foreseeable environmental impacts of a proposed action. *See, e.g., Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 46 (2010). Hence, Contention NEPA 7 might have been admissible if Joint Petitioners had provided support for a conclusion that FPL's design basis elevation in the FSAR was flawed and that, as a result, a maximum flooding event could inundate Units 6 and 7 and thereby cause an environmental impact. Joint Petitioners fell far short of making such a showing. Further, we agree with FPL that Joint Petitioners, for the first time in their Reply, raised new challenges to the ER's cumulative impacts analysis of sea level rise, and we decline to consider those arguments. *See* Joint Petitioners Reply at 84-85; FPL Motion to Strike Portions of Joint Petitioners' Reply at 10-12.

We note that the NRC Staff, incident to its preparation of the Safety Evaluation Report, has an obligation to ensure FPL's design basis for Units 6 and 7 will protect public health and safety (*see* 10 C.F.R. § 52.97(a)(1)(v)), and the Staff accomplishes this objective by, *inter alia,* verifying that the design basis will withstand maximum flooding events. *See id.* Part 50, App. A, Section I, Criterion 2 ("Structures, systems, and components important to safety shall be designed to withstand the effects of natural phenomena such as earthquakes, tornadoes, hurricanes, floods, tsunami, and seiches without loss of capability to perform their safety functions."). Moreover, FPL has a continuing obligation to ensure its design basis will withstand such events. *Cf.* Supplemental Staff Guidance to NUREG 1555, "Environmental Standard Review Plan," for Consideration of the Effects of Greenhouse Gases and of Climate Change at 11 (Apr. 8, 2010) ("If it becomes evident that long-term climate changes influence the most severe of natural phenomena reported in the site vicinity, then a license holder may need to take action to ensure the licensing basis is preserved."). Finally, to the extent future climate-related evidence might indicate the design basis of a nuclear power plant will not withstand a maximum flooding event, Commission regulations provide a remedial mechanism for members of the public whereby "[a]ny person may file a request to institute a proceeding . . . to modify, suspend or revoke a license . . . ." 10 C.F.R. § 2.206(a).

8. Contention NEPA 8 Is Not Admissible

Contention NEPA 8 alleges that "FPL fails to adequately address the need for power in its ER. In particular, the ER fails to consider the drop in electricity demand in FPL's service area since 2008, and it relies on erroneous claims that state and regional evaluations satisfy NUREG-1555." Joint Pet. at 53. In support of Contention NEPA 8, Joint Petitioners advance two underlying contentions, which they label as Contention NEPA 8.1 and Contention NEPA 8.2. We address these two contentions in turn, concluding that neither is admissible and, accordingly, that Contention NEPA 8 is not admissible.

Preliminarily, we provide the analytic framework for NEPA "need for power" determinations. NEPA "itself does not mandate a cost-benefit analysis," but the statute "is generally regarded as calling for some sort of a weighing of the environmental costs against the economic, technical, or other public benefits of a proposal." *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88 (1998) (citations omitted). "'Need for power' is a shorthand expression for the 'benefit' side of the cost-benefit balance which NEPA mandates for a proceeding considering the licensing of a nuclear power plant." *Seabrook,* ALAB-422, 6 NRC at 90.

The Commission has explained that preparing a "need for power" discussion should not be an onerous task:

> [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.

Nuclear Energy Institute; Denial of Petition for Rulemaking, 68 Fed. Reg. 55,905, 55,910 (Sept. 29, 2003); *see also South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 17 (2010). Moreover, a state public service commission's determination of need for power may be relied on by the NRC in its own analysis, as long as that determination "is neither shown nor appears on its face to be seriously defective." *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-490, 8 NRC 234, 241 (1978). The NRC Staff has issued guidance for how it evaluates the adequacy of a state determination of need for power; namely, the state's process must be "(1) systematic, (2) comprehensive, (3) subject to confirmation, and (4) responsive to forecasting uncertainty." U.S. Nuclear Regulatory Commission, Environmental Standard Review Plan, Standard Review Plans for Environmental Reviews for Nuclear Power Plants, NUREG-1555 at 8.1-2 (Oct. 1999) [hereinafter NUREG-1555].

With this analytic framework in mind, we examine Contentions NEPA 8.1 and NEPA 8.2.

a. Contention NEPA 8.1 Is Not Admissible

Contention NEPA 8.1 asserts the "ER provides insufficient data and an outdated energy demand forecast that do not aid the Commission in determining the need for power in FPL's service area." Joint Pet. at 54. Joint Petitioners claim that electricity demand has "dramatically" dropped in South Florida due to the ongoing recession. *Id.* Joint Petitioners observe that the ER estimated energy demand in 2009 to have a 121,852 GWh net energy load, but the actual energy demand that year was 111,304 GWh. *See id.* at 55 (citing ER at 8.2-11; Joint Pet., Exh. 29, FPL Ten Year Site Plan 2010-2019 at 44 (Apr. 2010)). Joint Petitioners fault the ER for "fail[ing] to identify any elements that have contributed to diminished growth, such as population, number of households, per capita income, trends in size of households, or per household energy use trends." *Id.* at 56. Joint Petitioners also criticize FPL for having a weak Demand Side Management (DSM) program that allegedly is inadequate under the Florida Public Service Commission's (PSC's) goals for investor-owned utilities (such as FPL), and for "provid[ing] no discussion, let alone an adequate analysis, on the new efficiency goals set by the [Florida] PSC." *Id.* at 57. Finally, Joint Petitioners claim the ER improperly fails to account for proposed federal legislation passed by the U.S. House of Representatives imposing stricter requirements on utilities to generate renewable energy or, in the alternative, energy efficiency. *See id.*[79]

FPL and the NRC Staff argue that Contention NEPA 8.1 is not admissible. *See* FPL Answer to Joint Pet. at 134-46; NRC Staff Answer to Joint Pet. at 104-13. We agree.

The Florida PSC determined that "FPL has a need for 8,350 MW of additional capacity beginning in the 2011 through 2020 period" and "a reliability need for either the 1,100 MW or 1,520 MW units (referring to the AP1000 or ESBWR designs respectively considered [by FPL]) in 2018 and 2020." ER at 8.1-4 to 8.1-5. Although Joint Petitioners argue this determination fails to take into account recent drops in demand, they do not show these drops will remain in effect when FPL's proposed reactors are expected to begin operation. Equally important, they do not demonstrate a flaw in FPL's "need for power" predictions based on any alleged facts or expert opinions. "[I]nherent in any forecast of future electric power demands is a substantial margin of uncertainty." *Niagara Mohawk Power*

[79] To the extent Joint Petitioners argue in Contention NEPA 8.1 that Florida's procedure underlying its "need for power" determination is inherently inadequate (Joint Pet. at 57-58), we address those arguments *infra* in our examination of Contention NEPA 8.2.

Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 365 (1975). Contrary to Joint Petitioners' apparent understanding, the fact that FPL's *recent* need for power prediction was about 10% high (*see* Joint Pet. at 55-56) is not, standing alone, sufficient to render deficient the ER's need for power discussion given (1) the margin of uncertainty inherent in these predictions, and (2) the latitude afforded by the Commission to these kinds of discussions in the ER.[80]

Significantly, Joint Petitioners overlook that the Florida PSC process explicitly considered the effects of dropoffs in demand and substantial increases in DSM, concluding that if these dropoffs significantly reduced FPL's load forecast, FPL would likely cancel "gas-fired combined cycle plants that have not yet been certified" rather than cancel construction of new nuclear plants. *See* ER at 8.1-4 to 8.1-5. Nor do Joint Petitioners address the Florida PSC finding that Units 6 and 7 will be used to satisfy baseload demand — i.e., demand for power that is not directly dependent on the magnitude of the system's peak demand. *See* ER at 8.1-5. Moreover, the Florida PSC considered a projected drop in peak summer demand of approximately 1900 MW by 2020 due to DSM and other conservation measures, but it still found that this drop in peak power was not enough to "mitigate FPL's need for Turkey Point [Units] 6 and 7." ER at 8.1-5 to 8.1-6. Joint Petitioners do not challenge these determinations and thus raise no genuine dispute of material fact with the ER's "need for power" discussion pursuant to 10 C.F.R. § 2.309(f)(1)(vi). Likewise, regarding the change in demand, Joint Petitioners have not demonstrated under 10 C.F.R. § 2.309(f)(1)(iv) that their contention is

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[80] We reject Joint Petitioners' argument that FPL conceded a "lack of need for power" in its cost recovery proceeding for Turkey Point Units 6 and 7 regarding the uncertainties of completion of construction. *See* Joint Pet. at 58 (citing Joint Pet., Exh. 31, [FPL's] Petition for Approval of Nuclear Power Plant Cost Recovery Amount for the Period January–December 2011 at 8 (May 3, 2010) [hereinafter Joint Pet., Exh. 31]). FPL simply advised it had pushed back its expected date for commencement of construction (Joint Pet., Exh. 31 at 8); it did not suggest that its need for power prediction was deficient or that it intends to abandon the project. *Cf. Nine Mile Point,* ALAB-264, 1 NRC at 365-66 (holding an applicant's expected delay of operations by at least 2 years is reasonably within the margin of uncertainty for predicting need for power).

In Joint Petitioners' Reply, they argue that the delayed startup date for FPL's new reactors means FPL will be able — without Units 6 and 7 — to meet demand for power by energy efficiency, renewable energy technologies, and construction of natural gas plants. *See* Joint Petitioners' Reply at 97-98 (citing Joint Pet., Exh. 30, Declaration of Dr. Mark A. Cooper, para. 7 (Aug. 17, 2010) & Attach. 1 at 38). We agree with FPL that this argument was not fairly discernable in Joint Petitioners' Petition and that Joint Petitioners' Reply did not endeavor to justify this belated argument under 10 C.F.R. § 2.309(c)(1). *See* Joint Petitioners' Reply at 97-98. We therefore decline to consider this argument. *See* FPL Motion to Strike Portions of Joint Petitioners' Reply at 13-14; *cf. Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989) ("The Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point.").

material to the NRC's licensing decision in this proceeding, because they have not demonstrated how any of their assertions would change the determination of whether there is, on balance, a need for power. *See* FPL Answer to Joint Pet. at 140-41.

Finally, Joint Petitioners' claim that FPL ignores *proposed* federal legislation and energy efficiency goals (*see* Joint Pet. at 57) is, at best, premature. The proposed legislation does not, until enacted, impose any enforceable obligations on FPL to adopt renewable energy or energy efficiency standards. This claim by Joint Petitioners is therefore inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v), because it is speculative and not grounded on any alleged facts or expert opinions.

We therefore conclude Contention NEPA 8.1 is not admissible.

b. Contention NEPA 8.2 Is Not Admissible

Contention NEPA 8.2 attacks the Florida PSC's "need for power" analysis, claiming that the "evaluations of the need for power fail to satisfy the requirements for NUREG-1555's exclusion of NRC independent review because they are not: (1) systematic, (2) comprehensive, (3) subject to confirmation, or (4) responsive to forecasting uncertainty." Joint Pet. at 58.[81] In particular, Joint Petitioners allege the PSC's *process* is deficient because, *inter alia,* the PSC's "need for power" determination is "wholly in the hands of the utility" and cannot be challenged (Joint Pet. at 59-60), the PSC has no authority to rescind or change "need for power" determinations after review of a 10-year site plan, which is a "document based on limited information and no stakeholder input through evidentiary hearings" (*id.* at 59), and the PSC's determination regarding need for power is highly speculative. *Id.* at 60-61.

FPL and the NRC Staff argue that Contention NEPA 8.2 is not admissible. *See* FPL Answer to Joint Pet. at 146-57; NRC Staff Answer to Joint Pet. at 115-22. We agree.

Section 8.3 of the ER describes in detail the comprehensiveness and systemic nature of Florida's regulatory process for analyzing the need for power. The process considers the need for power in a state, its region, and the country as a whole. *See* ER § 8.3.1. The need for power must be reflected in an annually updated 10-year site plan submitted by the utility to the Florida PSC, which evaluates the plan based on the need for electrical power, the plan's effect on fuel diversity in Florida, environmental impact of the proposed site, possible alternatives to the proposed plan, and consistency with the state comprehensive

[81] Although NUREGs are not legally binding, they are guidance documents (*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001)), and an applicant's failure to comply with such documents can potentially give rise to an admissible contention.

plan. *See* ER at 8.1-2. Proposed units are also subjected to a specific determination of need that, in this case, entailed the submission by FPL of a Need Study for Electrical Power and the testimony of 15 witnesses. *See* ER at 8.1-3 to 8.1-4. Further, several parties intervened in the proceeding, including the Florida Office of Public Counsel, which advocates on behalf of utility customers. *See* ER at 8.1-1, 8.1-4. And a hearing was held to enable members of the public to provide testimony. *See* ER at 8.1-4.[82] Notably, the ER describes how the Florida process is responsive to forecasting uncertainty, explaining that FPL "uses statistical modeling to quantify and qualify data inputs, such as economic projections and population trends in terms of their impact on the future demand for electricity." ER at 8.3-3. Ultimately, the Florida PSC reviewed and independently analyzed the information and testimony provided by all the participants, and it issued an order granting the determination of need. *See* ER at 8.1-4.[83]

Joint Petitioners' effort to raise an admissible challenge to the above process is unavailing. As demonstrated by the discussion in the preceding paragraph, Joint Petitioners err in suggesting (Joint Pet. at 59-61) that the Florida PSC "need for power" determination lacks any supporting data, stakeholder input, or a public hearing. *See* FPL Answer to Joint Pet. at 149-53; NRC Staff Answer to Joint Pet. at 118-19. Nor do Joint Petitioners allege facts or expert opinions to support their assertion that the Florida PSC determination is not entitled to deference. They do not explain, for example, why the inability of the state process to rescind a determination of need for power necessarily renders that determination deficient. Nor do they explain why the fact that the PSC is the only process by which a need determination is made renders that determination deficient. Likewise, given the degree of uncertainty in need for power forecasting (*Nine Mile Point,* ALAB-264, 1 NRC at 365-66), Joint Petitioners do not explain why the forecast made in this case — which is made more than 10 years prior to construction of the proposed

[82] FPL's "need for power" determination, as submitted to the Florida PSC Staff, is thus arguably subject to confirmation, as it is reviewed by independent parties, including the Florida Office of Public Counsel, stakeholders, and the Florida PSC itself. *See* ER at 8.1-4, 8.3-2. Meanwhile, the determination of need plausibly yields "publicly reviewable data and forecasts," and FPL's forecasts can be compared to those of the Florida Reliability Coordinating Council (FRCC) composite forecasts and to overall regional information. *See* ER at 8.3-2.

[83] In the Florida PSC "need for power" determination process, the FRCC compiles data from utilities' 10-year plans and annually produces a Load and Resource Plan, which addresses, among other things, regional firm peak demand, available capacity, and reserve margin. *See* ER at 8.1-7.

Units — is deficient.[84] Finally, although Florida's "need for power" determination process *might* diverge from future DSM goals, Joint Petitioners have not shown how this assertion, which is premised on speculation, renders the need for power determination deficient.[85]

It is true, as Joint Petitioners state (*see* Joint Pet. at 59), that the Florida PSC is not able to predict the future need for power with mathematical precision or certainty. But that is beside the point. Pursuant to established precedent, the NRC Staff may rely on a state's "need for power" analysis if the process (and, hence, the ultimate determination) "is neither shown nor appears on its face to be seriously defective." *Shearon Harris,* ALAB-490, 8 NRC at 241. Here, Joint Petitioners fail to allege facts or expert opinion showing that the "need for power" process used by the Florida PSC is "seriously defective," contrary to 10 C.F.R. § 2.309(f)(1)(v), nor do they raise a genuine dispute of material fact or law with regard to adequacy of the Florida PSC process or FPL's application, contrary to 10 C.F.R. § 2.309(f)(1)(vi). *See* FPL Answer to Joint Pet. at 146-57; NRC Staff Answer to Joint Pet. at 115-22.[86]

We therefore conclude Contention NEPA 8.2 is not admissible.

9. Contention NEPA 9 Is Not Admissible

Contention NEPA 9 asserts that "FPL failed to adequately address in its ER all reasonable [demand-side management (DSM)] and renewable energy alternatives

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[84] The Commission has long acknowledged the uncertainty inherent in long-range demand forecasts:

> [E]very prediction has associated uncertainty and . . . long-range forecasts of this type 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 continued use from historical data, range of years considered, the area considered, extrapolations from usage in residential, commercial, and industrial sectors, etc.

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609-10 (1979).

[85] In their Reply, Joint Petitioners attempt to fault the PSC process on the ground that "FPL fought an increase in DSM because it would harm its resource need for nuclear plants." Joint Petitioners' Reply at 100 (citations omitted). FPL asks that this argument be struck as untimely. *See* FPL Motion to Strike Portions of Joint Petitioners' Reply at 12-13. We dismiss FPL's request as moot, because even assuming *arguendo* that Joint Petitioners' argument were timely, our consideration of it would not alter our conclusion that Contention NEPA 8.2 is not admissible. The fact that FPL disagrees with DSM increases does not, in our view, create a genuine issue of material fact as to whether the PSC process itself is seriously defective.

[86] Restated, Joint Petitioners fail to carry their burden of providing sufficient information to raise a genuine dispute of material law or fact as to whether the Florida PSC process for determining need for power is (1) systematic, (2) comprehensive, (3) subject to confirmation, and (4) responsive to forecasting uncertainty.

to the construction and operation of Units 6 [and] 7." Joint Pet. at 61. Joint Petitioners claim that, despite FPL's determination that DSM would not be a replacement for the proposed reactors, "the ER must still consider how DSM could be used to mitigate impacts of the proposed action." *Id.* at 62. Joint Petitioners assert the ER must include more information regarding the energy savings achieved by FPL's DSM goals or explore how the DSM plans could be improved. *See id.* Joint Petitioners rely on various studies for the proposition that energy efficiency is indeed a viable alternative to FPL's proposed reactors, arguing that energy efficiency could reduce energy consumption between 8 and 30%. *See id.* at 63 (citations omitted). Finally, like Contention NEPA 8.1, Contention NEPA 9 faults FPL for ignoring *proposed* federal legislation and *potential* regulatory energy efficiency requirements, which Joint Petitioners contend could push back the date when there is a need for FPL's proposed reactors. *See id.* 63-65 (citations omitted).

FPL and the NRC Staff argue that Contention NEPA 9 is not admissible. *See* FPL Answer to Joint Pet. at 158-65; NRC Staff Answer to Joint Pet. at 123-28. We agree.

FPL is a state-regulated utility, which places it "in a position to implement and promote programs such as energy conservation, efficiency, and load management such that the need for additional generation capacity may be reduced." *Summer,* CLI-10-1, 71 NRC at 20-21; *see* ER at 8.1-1 ("FPL is a regulated Florida electric utility . . . ."). Therefore, "NEPA's 'rule of reason' would not exclude consideration of demand-side management as part of an alternatives analysis *per se*." *Summer,* CLI-10-1, 71 NRC at 21. Consistent with the Commission's decision in *Summer,* FPL's ER purports to consider DSM as part of an alternatives analysis.

In the ER, FPL considers DSM programs it already has implemented for both residential and business applications. *See* ER at 9.2-5 to 9.2-6. FPL stresses, however, that

> [w]hile demand side management programs will continue as an option to eliminate the need for additional capacity for FPL, they will not be adequate to eliminate the required increase baseload capacity. Therefore implementing further demand side management programs is not considered a potentially competitive option to the baseload generation capacity of the proposed project.

ER at 9.2-6.

FPL thus concludes that DSM programs are not a reasonable alternative for baseload electrical power, and Joint Petitioners fail in Contention NEPA 9 to provide alleged facts or expert opinions undermining that conclusion. Although Joint Petitioners correctly state an applicant may not disregard an alternative merely because it does not offer a complete solution to the problem (Joint Pet. at

62), they ignore that an alternative that fails to meet the purpose of the project does not need to be further examined in the ER. *See Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806-08 (2005). Because FPL determined that DSM would not fulfill the needs of the proposed action, Contention NEPA 9 is not admissible pursuant to 10 C.F.R. § 2.309(f)(1)(iv) for failing to show that the issue raised is material to the findings the NRC must make, and pursuant to 10 C.F.R. § 2.309(f)(1)(vi) for failing to show that a genuine dispute exists on a material issue of law or fact. Joint Petitioners also fail to specify why FPL's current DSM program, as discussed in the ER, is deficient. They thus fail to raise a genuine dispute with this aspect of FPL's analysis of DSM as an alternative for providing baseload power.

Although Joint Petitioners assert that "FPL's references to its ten year site plan for past DSM achievements do not relieve its duty . . . to fully analyze the DSM alternative" (Joint Pet. at 62), the ER, in fact, discusses DSM as an alternative for providing baseload power (ER at 9.2-5 to 9.2-6), describes specific measures in FPL's existing DSM program, and explicitly states the energy savings already achieved by that program:

> FPL's demand side management efforts through 2008 have resulted in a cumulative summer peak reduction of approximately 4109 MW at the generator and an estimated cumulative energy saving of approximately 46,646 gigawatt hour at the generator. Accounting for reserve margin requirements, FPL's demand side management efforts through 2008 have eliminated the need to construct the approximate equivalent of 12 new 400 MW generating units . . . .

ER at 9.2-6. Further, contrary to Joint Petitioners' intimations (*see* Joint Pet. at 63), the ER discusses the amount of energy savings it expects to be realized from 2007 to 2020 as a result of DSM programs, with both summer and winter forecasts. *See* ER tbl. 8.2-2.

In sum, many of the so-called deficiencies alleged in Contention NEPA 9 to exist in the ER's discussion of FPL's DSM program do not, in fact, exist. Moreover, Contention NEPA 9 fails to specify how other efficiency programs actually controvert the ER's projections, or why implementation of such programs would represent a viable alternative to the proposed action of producing additional baseload generation. We thus conclude that Joint Petitioners fail to raise a genuine dispute of material fact or law with this portion of FPL's ER, contrary of 10 C.F.R. § 2.309(f)(1)(vi).[87]

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[87] Joint Petitioners assert for the first time in their Reply (*see* Joint Petitioners Reply at 104-06) that DSM, when combined with other sources of electricity, can displace the need for baseload power. We decline to consider this assertion because it is late-filed without any explanation under section 2.309(c)(1). *See* FPL Motion to Strike Portions of Joint Petitioners' Reply at 12-13.

Regarding FPL's alleged failure to address *proposed* federal legislative and *proposed* regulatory requirements, we reiterate our conclusion (*supra* Part III.B.8.a) that proposed legislation does not, until enacted, impose enforceable obligations. The same applies to regulations that have not been finalized and issued. Because the significance of proposed legislation and regulations is a matter of conjecture, they and their possible impact need not be addressed in the ER, because any effect they might have is not "reasonably foreseeable" until they are either enacted or promulgated. Accordingly, to the extent Contention NEPA 9 relies on proposed legislation and regulations, it is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(iv), because it is speculative and not grounded on any alleged facts or expert opinions.

Contention NEPA 9 is therefore not admissible.

10. Summary of Rulings on Joint Petitioners' Intervention Petition

In fine, we conclude Joint Petitioners have demonstrated standing (*supra* Part III.A), and one of their contentions — Contention NEPA 2.1, as revised (*supra* Part III.B.2.a) — is admissible.

IV. CASE ESTABLISHES STANDING, AND IT PROFFERS TWO CONTENTIONS, CONTENTIONS 6 AND 7, THAT ARE ADMISSIBLE IN PART

A. CASE Establishes Representational Standing

CASE — a Florida nonprofit corporation with about 125 members (CASE Rev. Pet. at 3) — seeks to establish representational standing.[88] To that end, CASE states it was created "to oppose the licensure and construction of two Westinghouse AP1000 nuclear reactors at Turkey Point, Florida and to advocate for the safe and sustainable use of renewable energy, distributed production of energy as well as energy conservation at the point of use and energy efficiency at the point of production" (CASE Reply to FPL Answer at 2), thus satisfying the requirement that the interests it seeks to protect in this proceeding are germane to its organizational purposes. CASE also provides names of members who (1) establish standing to intervene in their own right by showing they live within 50 miles of the Turkey Point site, thus satisfying the proximity presumption rule, and (2) authorize CASE to represent their interests in this proceeding, thus absolving

[88] The legal standards governing representational standing are discussed *supra* Part II.A.2.

them from participating as individuals. *See* CASE Rev. Pet. at 3.[89] We conclude CASE has demonstrated representational standing. Neither FPL nor the NRC Staff argues to the contrary. *See* FPL Answer to CASE Rev. Pet.; NRC Staff Answer to CASE Rev. Pet. at 10-11.

B. CASE Proffers Two Contentions, Contentions 6 and 7, That Are Admissible in Part

1. Contention 1 Is Not Admissible

CASE proffers the following contention alleging that FPL's COLA does not contain an adequate safety plan: "The emergency plan on file with Miami-Dade County does [not] adequately protect public health of people in the Turkey Point Plume Exposure Zone following an accidental radiation release from FPL's nuclear reactor facilities at Turkey Point." CASE Rev. Pet. at 11. This contention appears to be grounded on the following four arguments (*id.* at 11-12): (1) FPL's evacuation plan will not be carried out in a timely manner for all those who could be affected by a radiation release; (2) FPL's plans for evacuation screening and shelter contain inadequate capacity for those living in the evacuation zone; (3) potassium iodide (KI) cannot be delivered to all those affected in a timely manner; and (4) because the design for Units 6 and 7 at Turkey Point increases the risk of radiation release, the importance of evacuation and KI distribution is enhanced.

FPL and the NRC Staff argue that Contention 1 is not admissible. *See* FPL Answer to CASE Rev. Pet. at 14-26; NRC Staff Answer to CASE Rev. Pet. at 14-22. We agree.

Before issuing a COL under Part 52, the NRC must conclude "there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. § 50.47(a)(1)(ii). The NRC is to "base its finding on a review of the Federal Emergency Management Agency (FEMA) findings," and "[i]n any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability." *Id.* § 50.47(a)(2). In this case, FEMA sent a letter to the NRC indicating that, based on its "thorough review," FPL's emergency evacuation "plans [for Turkey Point Units 6 and 7] are adequate, and there is Reasonable Assurance that the plans can be implemented with no corrections needed."[90] As we

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[89] Although CASE seeks to establish representational standing on behalf of twenty-five of its members (CASE Rev. Pet. at 3), only seventeen members filed declarations containing their addresses and attesting they live within 50 miles of the Turkey Point site. *See* NRC Staff Answer to CASE Rev. Pet. at 10-11 & nn.4-5 (citing relevant declarations).

[90] FPL Answer to CASE Rev. Pet., Exh. 2, Letter from Vanessa E. Quinn, Chief, Radiological

(Continued)

now show, CASE's Contention 1, as grounded on the four arguments advanced by CASE, does not raise a specific challenge to any particular portion of FPL's COLA, thus failing to rebut FEMA's finding or the information underlying that finding, and thereby rendering Contention 1 inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi) for failing to raise a genuine dispute of material fact with FPL's COLA.[91]

With respect to the first argument underlying Contention 1 — which asserts that FPL's evacuation plan will not be carried out in a timely manner — CASE provides only general statements regarding, *inter alia,* evacuation routes, evacuation times, radiation plume dispersal due to wind, and the possible effects of parents driving into the evacuation zone to pick up their children. *See* CASE Rev. Pet. at 13. CASE fails, however, to explain how these statements controvert the emergency plan in FPL's COLA, nor does CASE otherwise raise a genuine dispute of material fact with the plan regarding evacuation, which is fatal to the admissibility of CASE's contention pursuant to section 2.309(f)(1)(vi). *See* FPL Answer to CASE Rev. Pet. at 18-20; NRC Staff Answer to CASE Rev. Pet. at 16.

Contention 1's admissibility fares no better under CASE's second argument, which alleges that FPL's plans for evacuation screening and sheltering contain inadequate capacity for those living in the evacuation zone. Focusing on a single shelter, the Tamiami Park Emergency Reception Center, CASE asserts this facility has a "host capacity for 1000 evacuees and a reported usage capacity of 2450," and CASE then concludes that FPL's "plans to evacuate people in the radiation plume could not accommodate 98% of residents in the 10-mile EPZ." CASE Rev. Pet. at 13-14. But contrary to section 2.309(f)(1)(vi), CASE fails to

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Emergency Preparedness Branch, FEMA, to Kevin Williams, Chief, Licensing and Inspection Branch, Division of Preparedness and Response, Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission (Dec. 23, 2009).

[91] CASE's attempt to challenge FPL's current emergency plan "on file with Miami-Dade County" (CASE Rev. Pet. at 11, 14) fails to raise a genuine dispute of material fact under section 2.309(f)(1)(vi) with FPL's COLA, because there is no indication the extant plan on file with Miami-Dade County is encompassed in FPL's COLA.

In the context of raising general issues with FPL's current emergency plan, CASE quotes a September 2008 letter purporting to be from the Commander of the Seventh Coast Guard District to FPL explaining why the "Coast Guard is unable to act as the primary responder for nuclear power plant disasters." CASE Rev. Pet. at 15. CASE fails, however, to connect the relevance of this letter to any specific complaint CASE has with FPL's proposed emergency plan. The letter thus fails to provide supporting facts adequate to demonstrate a genuine issue of material fact regarding a particularized provision of the emergency plan. As the Commission stated in *American Centrifuge,* CLI-06-10, 63 NRC at 457:

> It is simply insufficient . . . for a petitioner to point to an Internet Web site or article and expect the Board on its own to discern what particular issue a petitioner is raising, including what section of the application, if any, is being challenged as deficient and why. A contention must make clear why cited references provide a basis for a contention.

demonstrate a genuine dispute with FPL's emergency plan on a material issue of fact, because it fails to explain why it focuses on the Tamiami Park facility to the exclusion of over 50 other shelters in Miami-Dade County, and it also fails to explain why its singular concern with the Tamiami Park facility counters any assumption, analysis, or conclusion in the COLA. *See* FPL Answer to CASE Rev. Pet. at 21-22; NRC Staff Answer to CASE Rev. Pet. at 17-18.

Contention 1 is likewise inadmissible under CASE's third argument, which alleges that KI cannot be delivered in a timely manner to all those affected by an emergency radiation release. This aspect of Contention 1 is inadmissible pursuant to section 2.309(f)(1)(vi) for failing to establish a genuine dispute of material law or fact, because it (1) fails to explain why evacuation times "would be too great to prevent initial exposure to inhaled radioiodines" (CASE Rev. Pet. at 14), and (2) fails to reference the COLA to identify a faulty analysis or conclusion. *See* FPL Answer to CASE Rev. Pet. at 22-23; NRC Staff Answer to CASE Rev. Pet. at 18-19.

Finally, CASE asserts that FPL's emergency plan is inadequate because the AP1000 design for the proposed Turkey Point Units increases the risk of radiation release. *See* CASE Rev. Pet. at 14. Even assuming the correctness of CASE's premise regarding the increased risk of radiation release, CASE fails to explain why that fact undermines any assumption, analysis, or conclusion in the emergency plan. Nor does CASE reference any portion of FPL's COLA with which it disagrees. Although it asserts that the "needs for more effective plans for evacuation and KI distribution are more compelling for [Turkey Point Units] 6 & 7 than for [older] reactors" (*id.*), CASE fails to explain how the alleged design issue would alter any emergency planning provisions for the proposed units, or in what way the emergency plan is deficient, thus rendering Contention 1 inadmissible pursuant to section 2.309(f)(1)(vi). *See* FPL Answer to CASE Rev. Pet. at 24-25; NRC Staff Answer to CASE Rev. Pet. at 19-21.[92]

For the foregoing reasons, we conclude Contention 1 is not admissible.[93]

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[92] To the extent CASE intends Contention 1 to encompass a challenge to the adequacy of the AP1000 design, it is outside the scope of this proceeding and thus inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(iii). *See* NRC Staff Answer to CASE Rev. Pet. at 20-21 n.15.

[93] As indicated *supra* note 10, FPL filed a motion to strike portions of CASE's Reply. As relevant to Contention 1, FPL argues that CASE's Reply exceeds the scope of Contention 1 as framed in CASE's Revised Petition, which focuses solely on an "emergency plan on file with Miami-Dade County," whereas the Reply raises challenges to, *inter alia,* FPL's evacuation time estimates (ETEs). *See* CASE Reply to FPL Answer at 7-11; FPL Motion to Strike Portions of CASE Reply at 10-11. We agree. Governing case law requires a petitioner's reply to "*be* 'narrowly focused on the legal or logical arguments presented in the [applicant] or NRC staff answer.'" *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (citations omitted). To the extent

(Continued)

2. *Contention 2 Is Not Admissible*

Contention 2 raises the following challenge to FPL's evacuation plan:

> The evacuation plan does not meet the criteria of protect(ing) the health and safety of the public prescribed by the Atomic Energy Act of 1954, and as exemplified by 10 C.F.R. § 50.47. In addition, the increase in population, and findings of studies of actual population and institutional response to actual emergencies are not adequately reflected in the FPL emergency response plan. The plan, particularly with respect to evacuation/population response is therefore incomplete and also does not follow NUREG 0654 guidelines.

CASE Rev. Pet. at 16. CASE thus uses Contention 2 as a vehicle to continue its assault on FPL's evacuation plan, advancing the following three arguments: (1) the plan "does not reflect the LARGE expansion in permanent population that has occurred between 1970 and now" (*id.*) (emphasis in original); (2) the plan improperly accepts sheltering over evacuation as an option in an emergency, thus rendering the plan inadequate under NUREG-0654 (*id.* at 16, 19); and (3) the plan disregards the results of studies dealing with responses to actual emergencies (*id.* at 22-25).[94]

FPL and the NRC Staff argue that Contention 2 is not admissible. *See* FPL Answer to CASE Rev. Pet. at 27-32; NRC Staff Answer to CASE Rev. Pet. at 25-33. We agree.

Regarding the first argument, CASE is simply wrong in asserting the "plan does not reflect the LARGE expansion in permanent population that has occurred between 1970 and now." CASE Rev. Pet. at 16 (emphasis in original). In fact, the COLA provides population estimates as of 2009. Specifically, FPL's emergency plan states that the "Permanent Resident Population Basis" was based on the "2000 Census, extrapolated to 2009." *See* Emergency Plan, Part 5, Supplement 1, Turkey Point Nuclear Power Plant Development of Evacuation Time Estimates, Rev. 0 (Mar. 2009), tbl. 1-1, at 1-9 [hereinafter Evacuation Time Estimates]. Thus, to the extent the first argument of Contention 2 is premised on the incorrect notion that FPL's emergency plan ignored the present population, it may be summarily rejected. To the extent CASE is asserting that FPL's proposed evacuation plan

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CASE's Reply raises disputes with FPL's ETEs, it exceeds — without justification — the scope of the original contention. Accordingly, in our consideration of Contention 1, we do not consider the challenges to FPL's ETEs raised for the first time in CASE's Reply.

[94] To the extent Contention 2 repeats generalized challenges that were included in Contention 1, we reject them for the reasons discussed *infra* Part IV.B.1. *See* CASE Rev. Pet. at 16 (broadly alleging, without referencing a disputed portion of the evacuation plan, that evacuation times are too long to protect public health and safety); *id.* (challenging FPL's alleged "use of the existing . . . evacuation plan" rather than referencing FPL's proposed evacuation plan).

is deficient because it contains only "minor" modifications from its existing plan despite the significant expansion of population near Turkey Point (CASE Rev. Pet. at 18), CASE fails to identify the "minor" modifications it finds objectionable, much less explain why they are deficient. We therefore conclude this aspect of Contention 2 is inadmissible for failing to show a genuine dispute of fact on a material issue that includes references to specific portions of the application in dispute, contrary to 10 C.F.R. § 2.309(f)(1)(vi).[95]

CASE also objects to FPL's evacuation plan on the ground that "NUREG-0654 advocates evacuation over sheltering yet the FPL COL[A] indicates that sheltering is an acceptable alternative for some part of the population." *See* CASE Rev. Pet. at 16. This objection is insubstantial. NUREG-0654, which discusses evacuation or sheltering in the context of a general emergency, states in relevant part:

> The general emergency class involves actual or imminent substantial core degradation or melting with the potential for loss of containment. The preferred initial protective action for this class is to evacuate immediately about 2 miles in all directions from the plant and about 5 miles downwind, unless other conditions make evacuation dangerous.

Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants, NUREG-0654, Rev. 1, Supplement 3 App. 2 at 1-3 (July 1996).

Contrary to CASE's assertion (CASE Rev. Pet. at 16), FPL's emergency plan embodies this NUREG guidance, stating that "[a]t a General Emergency classification, Turkey Point will provide the state and counties with [Protective Action Recommendations (PARs)] for the public. For incidents involving actual, potential, or imminent releases of radioactive material to the atmosphere, EPA 400-R-92-001 and NUREG-0654, Supplement 3, are used as the basis for the general PARs." Turkey Point Plant COL Application, Part 5, Radiological Emergency Plan, Rev. 0 at J-7 [hereinafter Emergency Plan]. The emergency plan also provides a flow chart indicating that, in the event of a general emergency where there is actual or projected severe core damage or loss of physical control of the plant, evacuation will commence at 0-2 miles in all directions from the plant, and 2-5 miles downwind; beyond those distances, sheltering is recommended. *Id.* at J-10. Because CASE fails to explain why FPL's plan contravenes NUREG-0654 or is otherwise deficient, Contention 2, as supported by its second argument, is

[95] CASE incorrectly asserts (CASE Rev. Pet. at 17) that the census figures cited in FPL's COLA "do not include seasonal visitors, migrant workers, or people attending sports events and visiting parks and tourist attractions." FPL's Evacuation Time Estimate study specifically includes a section on "transient populations." *See* Evacuation Time Estimates at 3-3 to 3-10. CASE's erroneous assertion does not raise a genuine dispute of material fact under section 2.309(f)(1)(vi).

inadmissible for failing to raise a genuine issue of material fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).[96]

Finally, the third argument on which CASE attempts to ground Contention 2 is that FPL's evacuation plan is inadequate because it disregards the results of studies dealing with responses to actual emergencies. *See* CASE Rev. Pet. at 22-25. CASE essentially argues that panic, fear, and self-interest will prevail during a reactor-related emergency, rendering an orderly evacuation impossible. *Id.* at 22. But CASE provides no facts or expert opinions that connect this argument to an alleged deficiency in FPL's emergency plan. Nor does CASE explain how its arguments contradict a particular provision of that plan. To the extent it roots its argument on quoted excerpts from a "study into the human response in the aftermath of [Three Mile Island]" (*id.* at 23-25), CASE fails to explain why those excerpts give rise to a specific, litigable disagreement with an assumption, analysis, or conclusion in FPL's emergency plan. Rather, CASE's argument appears to amount to little more than a conclusory assertion that any proposed evacuation plan formulated by FPL would, in light of human nature, be "impossible" and "[un]realistic." *See id.* at 22, 25. Such a generalized contention is inadmissible for failing to raise a genuine dispute of material fact with a particular portion of the COLA. *See* 10 C.F.R. § 2.309(f)(1)(vi).

For the foregoing reasons, we conclude Contention 2 is inadmissible.[97]

3. Contention 3 Is Not Admissible

CASE's third contention asserts that operation of the proposed new units will, in violation of the AEA, impair public health and safety by annually releasing aerosol into the atmosphere that contains 471.6 tons of particulates. *See* CASE Rev. Pet. at 26-27. Specifically, the contention states (*id.* at 26):

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[96] Governing regulations (10 C.F.R. § 50.47(b)(10)) require that sheltering be considered in developing the recommended range of protective actions in the emergency plan. FPL's COLA includes such a discussion (Emergency Plan, section J), and CASE neither addresses why that discussion is deficient, nor does it provide supporting facts or expert opinions to raise a genuine dispute regarding the adequacy of that discussion.

[97] FPL has moved to strike portions of CASE's Reply that allegedly exceed the original scope of Contention 2 including, for example, allegations by CASE concerning "wind speed impacts on the spread of the radioactive plume and evacuation effectiveness." FPL Motion to Strike Portions of CASE Reply at 11. CASE responds that the mention in its Reply of wind speed was utilized only to demonstrate its "initial statement that '[e]ven a moderate wind from the south would overtake people fleeing the evacuation area.'" CASE Answer to FPL Motion to Strike Portions of CASE Reply at 5-6. CASE's allegation of wind speed appears in Contention 1. *See* CASE Rev. Pet. at 13. We decline to consider a second time CASE's reiteration of points raised in Contention 1. FPL's motion to strike that portion of CASE's Reply is thus moot.

> The six cooling towers for the two proposed AP1000 nuclear reactors at Turkey Point will release tons of particulates annually from treated waste water or sea water (plus added chemicals for functional purposes) into the atmosphere per day threatening the health and safety of Turkey Point employees and the surrounding population and visitors and could contaminate all land and water surfaces in the area including 65,000 acres of agricultural land.

Although CASE concedes the aerosol from the proposed units "will meet state air quality standards" and, indeed, "the particulate concentration will be . . . far below the State permitted limit" (*id.* at 28), CASE nevertheless asserts the impact of this aerosol will "violate the criteria of protect(ing) the health and safety of the public prescribed by the Atomic Energy Act of 1954." *Id.* at 27.

FPL and the NRC Staff argue that Contention 3 is not admissible. *See* FPL Answer to CASE Rev. Pet. at 33-42; NRC Staff Answer to CASE Rev. Pet. at 35-38. We agree.

The AEA provisions relied on by CASE regarding public health and safety (CASE Rev. Pet. at 27), as well as the associated NRC regulation cited by CASE (*id.* at 28), relate to *radiological* health and safety. *See Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 249 (1984) (the AEA is designed to "'regulate the radiological safety aspects involved . . . in the construction and operation of a nuclear plant'"). However, the only portion of the COLA cited by CASE in support of its contention is an excerpt from FPL's FSAR regarding water chemistry. *See* CASE Rev. Pet. at 30-31. CASE neglects to discuss how any of the substances or particulate releases described in the contention present genuine issues of *radiological* health and safety or safe operation of the proposed Units, nor does CASE specify what statutory or regulatory provision either prohibits FPL making such releases or requires FPL to discuss further the release or the effects of such chemicals or particulates. CASE thus fails to explain what law or regulation makes this contention material to the findings the NRC must make in its safety review, rendering Contention 3 inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(iv). *See* FPL Answer to CASE Rev. Pet. at 34-35; NRC Staff Answer to CASE Rev. Pet. at 35.

CASE nevertheless attempts to show that Contention 3 raises a material safety and health issue by relying on a diagram from an August 2010 FPL presentation that, according to CASE, shows wind conditions on many days would cause the aerosol particulates to be dispersed principally "over the employees at Turkey Point and the 187,000 people within ten miles of Turkey Point and over 65,000 acres in agriculture in south Miami-Dade County." CASE Rev. Pet. at 27. But CASE provides no alleged facts or expert opinions to support a conclusion that such dispersion would be inimical to public health and safety. Indeed, the admissibility of Contention 3 appears to be fatally undermined by CASE's own factual assertions that the aerosol "will meet state air quality standards" and the

"particulate concentration will be . . . far below the State permitted limit." *See* CASE Rev. Pet. at 28.[98]

CASE's failure to provide supporting alleged facts or expert opinion renders Contention 3 inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v), and also is fatal to CASE's ability to show a genuine dispute of material fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi). *See* FPL Answer to CASE Rev. Pet. at 38-42; NRC Staff Answer to CASE Rev. Pet. at 36.[99]

4. Contention 4 Is Not Admissible

CASE characterizes Contention 4 as a contention of omission (Tr. at 130), asserting the ER improperly "fails to completely address the radiation exposure that would be caused by a radiological accident. Specifically, there is no radiation dosage given for persons (a) fishing and/or (b) consuming marine-based food." CASE Rev. Pet. at 32. In support of this contention, CASE states the ER shows that FPL uses the MACCS2 computer code to evaluate radiation doses, and the MACCS2 code "only calculates the dose from drinking the water. Surface water exposure pathways involving swimming, fishing, boating, and performing activities near the shoreline are not modeled by MACCS2." *Id.* at 33 (quoting ER at 7.2-5). CASE argues that FPL's "use of an inappropriate or inadequate computer code to evaluate radiological hazards cannot be used as an excuse to avoid calculating the dosage to large at-risk population[s] through one of the most likely and concentrated exposure pathways." *Id.*

FPL and the NRC Staff argue that Contention 4 is not admissible. *See* FPL Answer to CASE Rev. Pet. at 43-48; NRC Staff Answer to CASE Rev. Pet. at 39-41. We agree.

A contention of omission may be summarily rejected as inadmissible if (1) there is no requirement to address the topic allegedly omitted from the application,

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[98] CASE fails to mention that the same presentation on which it relies also stated that the "'aerosol drift outside FPL property is lower than natural background deposition that occurs in south Florida.'" *See* CASE Rev. Pet., Turkey Point Units 6 & 7 Nuclear Project, Presentation by Steve Scroggs, FPL Senior Director, and Ken Kosky, Golder Associates at 8 (Aug. 13, 2010); NRC Staff Answer to CASE Rev. Pet. at 36.

[99] CASE's Reply references medical studies that show a higher incidence of cancer near nuclear power plants and power lines, as well as unsupported claims that the MDWASD will lack the requisite funds to construct a facility to provide cooling water for the new Units. *See* CASE Reply to FPL Answer at 25-28. FPL has moved to strike these statements (and supporting attachments) as untimely and beyond the scope of the arguments in CASE's Revised Petition. *See* FPL Motion to Strike Portions of CASE Reply at 12. We need not grant FPL's Motion, because even assuming *arguendo* that CASE's assertions were timely and within the scope of their original argument, we are not persuaded the assertions provide the requisite support for Contention 3 because they do not show any deficiencies in FPL's COLA.

or (2) the topic that allegedly is omitted is, in fact, included in the application. *See USEC,* CLI-06-10, 63 NRC at 456. Here, contrary to CASE's assertion, the allegedly omitted discussion of radiological exposure is, in fact, included in the COLA. As FPL correctly states (FPL Answer to CASE Rev. Pet. at 44), the ER includes the radiation exposure attributable to fishing and other surface water activities at page 7.2-5 via its reference to the dosage listed for recreation activities in the GEIS for License Renewals. Contention 4 is therefore inadmissible for failing to raise a genuine dispute of material fact under 10 C.F.R. § 2.309(f)(1)(vi). *See* FPL Answer to CASE Rev. Pet. at 47-48; NRC Staff Answer to CASE Rev. Pet. at 40.[100]

5. Contention 5 Is Not Admissible

Contention 5 arises from concerns expressed by Dr. Harold R. Wanless regarding the impact of sea level rise on the proposed Turkey Point Units.[101] Specifically, Contention 5 asserts the COLA is deficient because, in derogation of 10 C.F.R. § 52.79, it fails to consider "any scientifically valid projection for sea level rise through this century and beyond." CASE Rev. Pet. at 33. Dr. Wanless cites predictions that sea levels in South Florida will rise at least 1.5 feet in the next 50 years and at least 3-5 feet by the end of century. *Id.* at 34. The sea level rise, asserts Dr. Wanless, will affect the proposed Turkey Point units in the following ways (*id.* at 35): (1) a diminished population in south Florida will impact future power needs; (2) the proposed units will become increasingly isolated from the mainland; (3) the safety of the proposed units will be threatened during major storms and terrorist threats; (4) the ability of the cooling complex to function and to remain isolated from the adjacent marine environment will be threatened; and (5) making structural adjustments in the proposed facility to accommodate sea level rise will change the ability of the facility to contain nuclear accidents.

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[100] CASE's Reply raises a challenge to FPL's reliance on the NRC's GEIS for License Renewals. *See* CASE Reply to FPL Answer at 30-31. FPL has moved to strike this portion of CASE's Reply on the ground that it raises — without justification or explanation — new arguments that are beyond the scope of CASE's Revised Petition. *See* FPL Motion to Strike Portions of CASE Reply at 12-13. We agree that CASE, having failed in its Revised Petition to challenge FPL's reliance on the GEIS, cannot raise that challenge for the first time in its Reply. *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009) (citations omitted).

[101] Although Dr. Wanless asserts he is proffering Contention 5 on behalf of CASE (CASE Rev. Pet. at 33), we assume — consistent with CASE's standing argument — that CASE is the proponent of Contention 5 and that CASE is using Dr. Wanless's views in an effort to provide supporting facts or expert opinion. Dr. Wanless states he is (1) a Professor and Chair of the Department of Geological Sciences at the University of Miami, and (2) Chair of the Science Committee of the Miami-Dade County Climate Change Advisory Task Force. *See* CASE Rev. Pet. at 33, 36.

According to Contention 5, the alleged failure of FPL's COLA to focus on these issues renders the Application deficient. *Id.* at 33-35.

FPL and the NRC Staff argue that Contention 5 is not admissible. *See* FPL Answer to CASE Rev. Pet. at 48-59; NRC Staff Answer to CASE Rev. Pet. at 42-47. We agree.[102]

Although 10 C.F.R. § 52.79 does not expressly require the COLA to consider sea level rise, we assume for present purposes that the issue of sea level rise is a matter that must be considered in the COLA and, thus, is within the scope of this proceeding. *See supra* note 78.[103] We conclude, however, that Contention 5 is inadmissible because its underlying factual predicate is error. CASE asserts (CASE Rev. Pet. at 33) that FPL's COLA contains no sea level rise analysis. Contrary to CASE's assertion, FPL's COLA does, in fact, take into account sea level rise.

As FPL explains (FPL Answer to CASE Rev. Pet. at 53), "COL applicants must demonstrate that [proposed] reactors would be protected against hurricanes, earthquakes, tornadoes, extreme temperature, and other environmental conditions," and "these analyses require the applicant to determine the design basis flood elevation." The COLA therefore accounts for predicted sea level rise, and the "detailed consideration of sea level rise in the plant design led directly to the plant's choice of elevation for its structures." *Id.* at 50. Section 2.4 of the FSAR addresses the "probable maximum flooding as a result of hurricanes, tsunamis, seiches, and other flooding events." *Id.* at 53. As discussed *supra* Part III.B.7, FPL represents that, consistent with NRC guidance documents, based on an initial sea level rise of 3.6 feet, it determined a Probable Maximum Storm Surge (PMSS) still water level of 21.1 feet, which FPL combined with a 3.7 feet maximum wave

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[102] Relying on a 2009 circular from the U.S. Army Corps of Engineers (USACE) that requires consideration of impacts due to sea level rise in all USACE projects, CASE argues that "a major addition to a nuclear power plant facility" such as the proposed Turkey Point facility must do the same. *See* CASE Rev. Pet. at 34. CASE's demand for compliance with USACE requirements is not within the scope of this proceeding, because it is not the province of the NRC (and thus this Board) to enforce another agency's regulations. *See Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120-22 & n.3 (1998).

[103] FPL argues that Contention 5 should be rejected in its entirety because CASE fails to point to the specific regulatory provision that requires the COLA to contain a sea level rise analysis. *See* FPL Answer to CASE Rev. Pet. at 50-51. Because it is undisputed that the COLA must include a sea water rise analysis, we decline to reject Contention 5 on the ground urged by FPL.

As discussed *infra,* FPL's sea level rise analysis is located in the FSAR. FPL argues that a NEPA-driven review of sea level rise impacts is unnecessary in light of (1) relevant NRC guidance documents that address COLA contents, (2) the sea level rise analysis in the FSAR, and (3) the NRC's ongoing oversight authority under the AEA. *See* FPL Answer to CASE Rev. Pet. at 57-58. We need not, and do not, conclude that a NEPA-driven review of sea level rise is never required for a COLA; rather, we conclude that, in the present circumstance, CASE has not demonstrated that FPL's unchallenged sea level rise analysis in the FSAR must be supplemented with an analysis in the ER. *See supra* note 78.

runup, concluding that the maximum water level due to a probable maximum hurricane, including coincidental wind-wave runup, would be 24.8 feet NAVD 88. *See* FSAR at 2.4.5-12. FPL designed the proposed plant area elevation based on this analysis and, accordingly, the elevations of floor entrances and openings for all safety-related facilities would be at 26 feet NAVD 88. *See* FSAR at 2.4.5-12, 2.4.10-1.[104]

Because Contention 5 erroneously asserts that FPL's COLA does not address sea level rise, and because it fails directly to controvert FPL's sea level rise analysis, we conclude Contention 5 is inadmissible for failing to raise a genuine dispute of material fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi). *See* FPL Answer to CASE Rev. Pet. at 53-55; NRC Staff Answer to CASE Rev. Pet. at 46-47. Moreover, even assuming the accuracy of Dr. Wanless's predictions regarding sea level rise, CASE fails to articulate why such a rise would make a difference to any specific aspect of FPL's evaluation of population trends, future power needs, nuclear safety, nuclear cooling systems, and nuclear accidents. CASE thus fails to demonstrate why its broad and unsupported assertions regarding the implications of sea level rise (CASE Rev. Pet. at 35) would be material to the NRC's analysis of the COLA, contrary to 10 C.F.R. § 2.309(f)(1)(iv). *See* FPL Answer to CASE Rev. Pet. at 51-52, 55, 58-59; NRC Staff Answer to CASE Rev. Pet. at 43-46.

Contention 5 is therefore inadmissible.[105]

6. Contention 6 Is Admissible in Part

Contention 6 alleges (CASE Rev. Pet. at 39):

> The [COLA] is inadequate because the Environmental Report (Chapter 3 section 3.5.3) assumes that the classes B and C so-called "low-level" radioactive waste (LLRW) generated by proposed Turkey Point Units 1 and 2 [sic] will be promptly (e.g., in approximately two years) shipped offsite and fails to address the environ-

[104] As explained in the FSAR at 2.4.5-5 to 2.4.5-6, and as previously discussed *supra* Part III.B.7, the initial starting point for the PMSS calculation was 3.6 feet, which was determined by using the 10% exceedance high spring tide (2.6 feet NAVD 88), to which FPL states it added a conservative value (1 foot) for sea level rise over the design life of the plant.

[105] In its Reply Brief, CASE attacks for the first time FPL's sea level rise analysis and its decision to raise the elevation of the proposed facility to protect against flooding, arguing that FPL's elevation of the proposed facility would not make the project any more viable. *See* CASE Reply to FPL Answer at 32. But NRC regulations "do not allow . . . using reply briefs to provide, for the first time, the necessary threshold support for contentions." *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004). We agree with FPL (FPL Motion to Strike Portions of CASE Reply at 13) that the new arguments in CASE's Reply exceed the scope of Contention 5 as it was originally proffered, and we decline to consider them.

> mental impacts in the event that PEF [sic][106] will need to manage such LL[R]W on the Turkey Point site for a more extended period of time. In addition it is assumed that extended storage and forms of so-called "low-level" waste management on the site that might be triggered by or associated with extended storage, such as processing, treatment or possible burial or incineration will have no environmental impact — and FPL omits any reference to these in Chapter 5 of the ER, Environmental Impacts.

As CASE explains (*id.* at 38), at the root of Contention 6 is the fact that "Florida is in the Southeast Compact which does not have a disposal site to which it can send Class B and C, or Greater than C [LLRW]." Accordingly, it may reasonably be concluded that FPL will be required to provide long-term onsite storage for the LLRW it generates at proposed Units 6 and 7.

Contention 6 thus challenges, on several grounds, the adequacy of the ER's consideration of the impact of long-term onsite storage of LLRW at the proposed facility. CASE relies on the declaration of Diane D'Arrigo, who claims to be "an expert on the policy aspects and general technical characteristics of so-called [LLRW]" (CASE Rev. Pet., Declaration of Diane D'Arrigo in Support of [CASE ¶ 2 (Aug. 17, 2010) [hereinafter D'Arrigo Decl.]), and who advances the following three arguments in support of Contention 6. First, CASE attacks FPL's failure to consider the potential consequences of projected sea level rise, storm surge, and site inundations that could result in the dispersal of LLRW off the Turkey Point site in violation of "52.79(iii)" (*see* CASE Rev. Pet. at 40-41), especially if the LLRW were stored outdoors on a concrete pad. *Id.* Second, CASE attacks FPL's failure to consider "processes that FPL may use to concentrate or otherwise alter this waste stream. Of particular concern is any plan to bury onsite or incinerate this material." *Id.* at 39. Third, CASE alleges the ER is deficient because it fails to consider "[s]ynergistic health and physical chemical impacts" (D'Arrigo Decl. ¶ 32), the "special location of the site on water" (*id.* ¶ 34), or the existence of another reactor in the same watershed. *Id.*

FPL argues that Contention 6 is inadmissible. *See* FPL Answer to CASE Rev. Pet. at 60-65. The NRC Staff, however, views Contention 6 as being admissible in part. *See* NRC Staff Answer to CASE Rev. Pet. at 49-57. We agree with the NRC Staff that Contention 6 is admissible in part.

Before embarking on our analysis of Contention 6, we note that the Commission and several licensing boards have authorized the admission of contentions challenging the ability of COL applicants to handle onsite storage of Classes B and C LLRW, as well as the attendant potential environmental impacts of such storage in the wake of the closure of the Barnwell facility in South Carolina

[106] We assume that CASE, in Contention 6, meant to refer to Turkey Point Units 6 and 7 rather than to Units 1 and 2, and meant to refer to FPL rather than to PEF, which is likely an abbreviation for Progress Energy Florida, Inc.

to states outside of the Atlantic Compact (which is comprised of New Jersey, Connecticut, and South Carolina). *See, e.g., Levy County,* CLI-10-2, 71 NRC at 46-47; *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 219-20, 224, *aff'd,* CLI-09-20, 70 NRC 911, 921-24 (2009). In *Levy County,* a proceeding that involved a COL application referencing the same AP1000 design referenced in FPL's COLA, the Commission affirmed the admission of a contention similar to CASE's Contention 6 involving the environmental consequences of long-term onsite storage of LLRW. Notably, the Commission in *Levy County* stated 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 [the applicant's] COL application." *Levy County,* CLI-10-2, 71 NRC at 46.

Against this background, we now identify those aspects of Contention 6 that are not admissible, and we then specify the aspect of Contention 6 that is admissible. First, regarding Contention 6's concern with FPL's failure to consider the impact of projected sea level rise, storm surge, and site inundations that could result in the dispersal of LLRW off the Turkey Point site (CASE Rev. Pet. at 40-41), we conclude CASE fails to explain why such a scenario is plausible, much less reasonably foreseeable. *See Private Fuel Storage,* CLI-02-25, 56 NRC at 348-49 (ER need only consider environmental impacts that are "reasonably foreseeable"); *see also* FPL Answer to CASE Rev. Pet. at 63-64; NRC Staff Answer to CASE Rev. Pet. at 54-56.[107] Moreover, CASE's concern appears to be premised on the notion that FPL plans to store LLRW outdoors on a concrete pad (CASE Rev. Pet. at 40), but CASE concedes (*id.*) it found nothing in FPL's COLA indicating a plan to store LLRW on a concrete pad. This aspect of the contention thus appears § 2.309(f)(1)(v) for failing to provide supporting facts or expert opinion, and for failing to raise a genuine dispute of material fact or law with FPL's COLA pursuant to 10 C.F.R. § 2.309(f)(1)(vi).[108]

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[107] Ms. D'Arrigo's generalized references to "environmental, security and safety related problems" (D'Arrigo Decl. ¶ 29) are too vague to understand exactly which problems CASE would like FPL to address and why those problems raise a genuine dispute of material fact pursuant to 10 C.F.R. § 2.309(f)(1)(vi) with FPL's COLA.

[108] CASE's assertion (CASE Rev. Pet. at 40) that FPL's COLA violates section "52.79(iii)" insofar as the ER fails to analyze the environmental impact of the dispersal of LLRW caused by storm surges is puzzling, because Commission regulations do not include a section 52.79(iii). To the extent CASE intended to cite 10 C.F.R. § 52.79(a)(3), such a cite would not salvage this aspect of Contention 6. Section 52.79(a)(3) is a safety regulation that is inapposite to FPL's fulfillment of its NEPA responsibilities and, thus, is irrelevant to Contention 6. We note, however, that CASE's Contention 7 advances a safety-related challenge to FPL's long-term storage of LLRW, and as discussed *infra* Part IV.B.7, we conclude Contention 7 is admissible in part.

Second, regarding Contention 6's concern with FPL's failure to consider the impacts from processes to concentrate or otherwise alter its LLRW stream, including onsite burial or incineration of LLRW (CASE Rev. Pet. at 39-40), CASE fails to identify any portion of FPL's COLA that suggests FPL intends to use these techniques, nor does CASE allege any facts or expert opinions that would lead us to conclude FPL intends to use them. This aspect of Contention 6 is therefore inadmissible for failure to provide alleged facts or expert opinions under 10 C.F.R. § 2.309(f)(1)(v) and for failure to raise a genuine dispute of material fact or law with FPL's COLA under 10 C.F.R. § 2.309(f)(1)(vi). *See* FPL Answer to CASE Rev. Pet. at 64-65; NRC Staff Answer to Rev. Pet. at 51-52.

The third argument underlying Contention 6 consists of several asserted deficiencies advanced by Ms. D'Arrigo, who claims the ER improperly fails adequately to consider long-term onsite storage of LLRW vis a vis "[s]ynergistic health and physical chemical impacts" (D'Arrigo Decl. ¶ 32), the "special location of the [proposed Turkey Point] site on water" (*id.* ¶ 34), or the existence of another reactor in the same watershed. *Id.* But none of these claims is adequately supported, nor does CASE explain how any of the omitted analyses would controvert any analysis or conclusion in the ER. Specifically, CASE fails to specify the types of "synergistic health and physical chemical impacts" that could be expected to occur from the storage of LLRW, or how such unspecified impacts from the storage of LLRW might have environmental significance, or why those impacts would be material to the decision on the instant Application. CASE likewise fails to explain why management of LLRW is impacted either by the fact that the proposed site is on water or the fact that another reactor is in the same watershed. Nor does CASE explain why these facts should affect the level of detail included in the ER.

In short, Ms. D'Arrigo's claims that the ER is deficient on these matters may fairly be characterized as conclusory assertions. As the Commission has ruled, a conclusory assertion, even if made by an expert, "'is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion.'" *American Centrifuge,* CLI-06-10, 63 NRC at 472. This aspect of Contention 6 is therefore inadmissible for failing to provide supporting information sufficient to establish a genuine dispute of material fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).[109]

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[109] Because Greater-Than-Class-C LLRW "is the responsibility of the federal government" and thus unaffected by the closure of the Barnwell facility, the Commission has held that challenges to a COL applicant's failure to provide information on long-term storage of Greater-Than-Class-C LLRW are outside the scope of a COL proceeding. *See Levy County,* CLI-10-2, 71 NRC at 47-48. Therefore, we do not admit Contention 6 to the extent it involves claims regarding Greater-Than-Class-C LLRW (*see* D'Arrigo Decl. ¶¶ 4, 5, 7, 8, 10, 11, 35, 38), because such claims are outside the scope of this proceeding pursuant 10 C.F.R. § 2.309(f)(1)(iii).

After carving out the above inadmissible portions of Contention 6, we are left with the following revised Contention 6:

> Because there currently is no access to an offsite LLRW disposal facility for proposed Units 6 and 7, and because it is reasonably foreseeable that LLRW generated by normal operations will need to be stored at the proposed site for longer than the two-year period contemplated in FPL's ER, the analysis in the ER is inadequate because it fails to address environmental impacts in the event the applicant will need to manage Class B and Class C LLRW on the Turkey Point site for a more extended period of time.

As explained below, we believe Contention 6, as revised above, is admissible pursuant to 10 C.F.R. § 2.309(f)(1).

First, Contention 6 provides a specific statement of the issue of fact to be litigated pursuant to section 2.309(f)(1)(i): namely, whether FPL's ER adequately discusses the environmental impacts of onsite LLRW storage after 2 years of generating such waste.

Second, Contention 6 provides a brief explanation of its basis pursuant to section 2.309(f)(1)(ii). As CASE explains, because there currently is no access to an offsite LLRW disposal facility for proposed Units 6 and 7, it is reasonably foreseeable that LLRW generated by normal operations will need to be stored at the proposed site for longer than the 2-year period contemplated in FPL's ER. FPL implicitly challenges this basis, pointing to its letter of intent with Studsvik, Inc., and asserting it will be able to ship LLRW waste offsite. *See* FPL Answer to CASE Rev. Pet. at 70-72. At this juncture of the proceeding, however, we are not able to conclude, based on the present record, that FPL will in fact be able to do so.

At oral argument, FPL's counsel conceded that FPL only referenced a letter of intent with Studsvik to receive its LLRW because "[w]e actually today can't predict what the contingencies will be for this plant decades from now." Tr. at 108. FPL's counsel also represented that the Commission in *Calvert Cliffs* said that a long-term LLRW plan to transfer title to waste shipped offsite would resolve this issue. Tr. at 111. Counsel is only partially correct. The Commission provided that "an adequate plan to transfer [LLRW] to a particular treatment facility would resolve the issue," but held that even if an applicant had such a plan, the determination of the plan's adequacy is a merits determination that cannot be resolved at the contention admissibility stage of the proceeding. *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 924 (2009). Therefore, CASE has sufficiently specified the basis of Contention 6.

Third, Contention 6 is within the scope of this proceeding pursuant to section 2.309(f)(1)(iii). The Notice of Hearing in this proceeding specified that the subject

of the proceeding is FPL's COLA (Notice of Hearing, 75 Fed. Reg. at 34,778), and Contention 6 raises a dispute with a particularized portion of FPL's COLA — its ER.

Fourth, the analysis CASE claims is missing from the ER is material to the NRC's licensing decision under section 2.309(f)(1)(iv). Applicants are obligated under 10 C.F.R. § 51.45(b) to prepare Environmental Reports that discuss, *inter alia,* "[t]he impact of the proposed action on the environment" and "[a]ny adverse environmental effects which cannot be avoided should the proposal be implemented." 10 C.F.R. § 51.45(b)(1)-(2). Moreover, the Commission has upheld the admission of contentions similar to Contention 6 that challenged COL applicants' analyses (or lack thereof) of the environmental impacts of long-term onsite storage of LLRW. *See Levy County,* CLI-10-2, 71 NRC at 46; *Calvert Cliffs,* CLI-09-20, 70 NRC at 924. In our judgment, a full discussion of this issue in FPL's ER is required to assist the NRC Staff in its preparation of its EIS. *See* 10 C.F.R. § 51.45(c) ("The environmental report should contain sufficient data to aid the Commission in its development of an independent analysis."). Because of Contention 6's focus on the environmental impacts of long-term onsite LLRW storage and Commission precedent supporting admission of such contentions, we find the environmental aspects of Contention 6, as revised, material to the NRC's licensing decision in this proceeding.

Fifth, CASE has submitted alleged facts or expert opinions to support Contention 6 in satisfaction of section 2.309(f)(1)(v). Specifically, CASE points out that the AP1000 DCD cited in FPL's COLA provides for only 2 years of onsite storage. *See* D'Arrigo Decl. ¶ 27. CASE has adequately alleged facts showing that — notwithstanding FPL's letter of intent with Studsvik — FPL will likely need to store LLRW onsite for more than 2 years. And CASE has correctly alleged that, if LLRW were to be stored onsite for more than 2 years, the impacts of such storage should be discussed in the ER. The ER, however, contains no such discussion. *See* CASE Rev. Pet. at 39-40; D'Arrigo Decl. ¶¶ 9, 10, 22, 28.

Finally, we conclude Contention 6, as a contention of omission, raises a genuine dispute of material fact with FPL's COLA under section 2.309(f)(1)(vi). It claims that a specific portion of FPL's ER, specifically section 3.5.3, assumes that Class B and Class C LLRW generated by proposed Turkey Point Units 6 and 7 will be shipped offsite within 2 years, and that the ER fails to address the environmental impacts in the event FPL will need to manage such LLRW on the Turkey Point site for a more extended period of time. *See* CASE Rev. Pet. at 39. FPL asserts its letter of intent to ship LLRW to Studsvik obviates the need to analyze environmental impacts of long-term onsite LLRW storage. *See* Tr. at 104, 111. But the mere existence of the letter of intent to ship LLRW to Studsvik does not, at this juncture, answer such questions as (1) whether such a plan will ultimately result in a transfer of LLRW title and permanent offsite disposition of the LLRW, and (2) whether nontransfer of title will result in environmental

impacts. These are genuine issues of material fact that cannot be resolved on the present record. *See Calvert Cliffs,* CLI-09-20, 70 NRC at 924. And until these factual disputes are resolved, whether FPL's plan as a whole has adequately considered the environmental consequences of what it intends to do with its LLRW under NRC regulations is a litigable issue of law. Therefore, we conclude CASE has proffered a material issue of law and fact with FPL's ER under section 2.309(f)(1)(vi).

We therefore admit Contention 6 in part, as revised *supra* p. 241.

7. Contention 7 Is Admissible in Part

Whereas Contention 6 raises a challenge based on *environmental* concerns relating to the long-term, onsite storage of LLRW, Contention 7 raises a challenge based on *safety* concerns arising from such storage. In Contention 7, CASE attacks FPL's FSAR as follows (CASE Rev. Pet. at 41):

> FPL's application (FSAR Chapter 11, section 4.6) is inadequate because the Safety Analysis Report assumes that the Class B and C so-called "low-level" radioactive waste generated by the proposed Turkey Point Units 6 & 7 will be promptly (e.g. in approximately 2 years per the AP1000 DCD: page 11.4-6) shipped offsite despite lack [of] access for disposal. The FSAR fails to address compliance with Part 20 and Part 50 Appendix I (ALARA) in the event that PEF[110] will need to manage such waste on the Turkey Point Site for a more extended period of time, possibly its entire licensed operating period or longer.
>
> The invocation of a letter with a third party for off-site management of waste generated by Turkey Point 6 and 7 does not validate that an actual transfer of title and physical transfer of the waste will occur; return of such waste to the Turkey Point site is required in the absence of disposal site access. The waste could come back from 3rd party processors since they are only licensed to store for 365 days and have limited storage capacity.
>
> In order to meet the requirements of 52.79, NRC staff must be able to assess "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 CFR 52.79(a)(3) specifies that the FSAR must include: "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."

CASE states that the Westinghouse AP1000 DCD upon which FPL's COLA relies

[110] We assume CASE mistakenly referred to PEF, and that it intended to refer to FPL. *See supra* note 106.

for its LLRW estimates provides for approximately 2 years of onsite storage, but during that 2-year period and afterward, FPL has no offsite disposal option for the LLRW it generates. "[T]wo years," states CASE, "is not a credible time span to generate a new off-site disposal option." *Id.* at 42-43. CASE insists that FPL's COLA violates 10 C.F.R. § 52.79(a)(3) for failure "to offer any details whatsoever about waste management and storage beyond two years," because the NRC has no "basis for evaluating the adequacy of the COLA with respect to long-term radioactive waste storage." *Id.* at 43. Finally, CASE argues that FPL's expected use of offsite storage through reliance on its contract with Studsvik in Tennessee will in all likelihood not come to fruition because Studsvik would only accept up to 1 year worth of LLRW and it does not have access to offsite permanent disposal options. *Id.* at 44-45.[111]

FPL argues that Contention 7 is inadmissible. *See* FPL Answer to CASE Rev. Pet. at 66-74. The NRC Staff views Contention 7 as being admissible in part. *See* NRC Staff Answer to CASE Rev. Pet. at 59-72. We agree with the NRC Staff that Contention 7 is admissible in part.

First, CASE's specific statement of the issue to be raised satisfies section 2.309(f)(1)(i). In this regard, CASE states that FPL's FSAR is inadequate because it does not account for the possibility of long-term onsite storage of LLRW due to the closure of Barnwell and thus the FSAR does not explain how FPL will comply with Part 20 and Part 50, Appendix I (ALARA). *See* CASE Rev. Pet. at 41.

Second, in compliance with section 2.309(f)(1)(ii), CASE has provided a brief explanation of Contention 7's basis. Specifically, CASE claims FPL has no guaranteed offsite disposal option, including Studsvik, to handle the Class B and Class C LLRW generated at Turkey Point after 2 years of generation. CASE claims FPL's failure to address that potentiality in the COLA violates 10 C.F.R. § 52.79(a)(3) and that regulation's references to Parts 20 and 50 Appendix I. *See* CASE Rev. Pet. at 43-45.

Third, we conclude that CASE's safety challenge to FPL's FSAR, which is part of FPL's COLA, is within the scope of this proceeding pursuant to section 2.309(f)(1)(iii). *See* Notice of Hearing, 75 Fed. Reg. at 34,778.

Fourth, in accordance with section 2.309(f)(1)(iv), CASE has raised an issue

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[111] In support of Contention 7, CASE relies on Ms. D'Arrigo's Declaration. *See* CASE Rev. Pet. at 41, 43, 44-45. We do not read CASE's Revised Petition as advancing arguments beyond those discussed above in text. To the extent CASE intended this Board to conduct an independent search of Ms. D'Arrigo's Declaration for the purpose of finding other arguments, we decline to do so. It is not the function of a licensing board to comb through the record searching for arguments in support of a proffered contention. *See, e.g., SmithKline Beecham Corp. v. Apotex Corp.,* 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("'Judges are not like pigs, hunting for truffles buried in briefs.'") (quoting *United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir. 1991)).

that is material to the findings the NRC must make to grant the COL Application. NRC regulations require that a COLA contain an FSAR that includes

> 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 . . . [regarding t]he 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). NRC regulations also require a COLA to "identify . . . the means to be employed, for keeping levels of radioactive material in effluents to unrestricted areas as low as is reasonably achievable [or ALARA]." *Id.* § 50.34a(a). Contention 7 asserts that, at this juncture and on this record, FPL's COLA fails to provide information sufficient to enable the NRC to reach a final conclusion on safety matters regarding the means for controlling and limiting radioactive material and effluents and radiation exposures within the limits set forth in Part 20 and ALARA in the event FPL needs to manage waste for an extended period. *See* CASE Rev. Pet. at 41. We agree, and we conclude this satisfies the materiality requirement in section 2.309(f)(1)(iv).[112]

Fifth, we find that through the D'Arrigo Declaration, Contention 7 provides the requisite alleged facts or expert opinions regarding the safety consequences of long-term onsite LLRW storage under section 2.309(f)(1)(v). CASE has alleged that the closure of the Barnwell facility eliminates the prospect for long-term, offsite LLRW storage, that the Studsvik site in Tennessee can only accommodate up to 1 year of waste, and that the Waste Control Specialists (WCS) site in Texas, to where processed LLRW would ultimately be sent, is not licensed to handle waste from a facility such as Turkey Point Units 6 and 7. *See* CASE Rev. Pet. at 41-45; D'Arrigo Decl. ¶¶ 11-26. Further, the D'Arrigo Declaration mentions the safety implications that arise with the presence of onsite LLRW and explains why FPL's COLA is deficient under NRC regulations. *See* D'Arrigo Decl. ¶¶ 9-10, 28-30. Therefore, Contention 7 satisfies section 2.309(f)(1)(v), containing alleged facts or expert opinions to support CASE's position on this issue.

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[112] To be clear, there is an aspect of Contention 7 we conclude does not satisfy the materiality requirement of section 2.309(f)(1)(iv). FPL already has described "the kinds and quantities of radioactive materials expected to be produced in the operation" to the extent its COLA references a standardized design. *Cf. Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-20, 72 NRC 571, 590 (2010). Because FPL has referenced the AP1000 standardized design and CASE's challenge to the "kinds and quantities" expected to be produced by FPL at proposed Units 6 and 7 contains no challenge to the LLRW produced in the AP1000 standardized design that would otherwise be admissible, CASE has not raised any material challenges to that aspect of FPL's COLA.

Finally, Contention 7 raises a genuine dispute on a material issue of fact and law with FPL's COLA under section 2.309(f)(1)(vi). CASE challenges FPL's FSAR, Chapter 11, pages 11.4-2 and 11.4-3 (section 11.4.6), which relies on FPL's letter of intent with Studsvik to transfer and dispose of FPL's LLRW generated at Turkey Point Units 6 and 7. *See* CASE Rev. Pet. at 41-42, 44-45. As a factual matter, CASE argues that FPL's AP1000 design will not be able to handle more than 2 years of LLRW generated onsite and that Studsvik will not be able to accommodate more than 1 year worth of LLRW generated at Turkey Point Units 6 and 7, thus inevitably leading to long-term storage of LLRW at Turkey Point. *See id.* FPL responds that the existence of its letter of intent with Studsvik demonstrates it will be able to transfer LLRW offsite and to WCS if necessary. *See* FPL Answer to CASE Rev. Pet. at 70-72. But whether FPL's plans adequately establish where LLRW generated at its facility will be disposed of while maintaining compliance with Part 20 and ALARA is a genuine dispute of material fact that cannot be resolved at this juncture on this record. And the sufficiency under 10 C.F.R. § 52.79(a)(3) of FPL's plan to send its LLRW to Studsvik and, if necessary, conduct more safety analyses and/or apply for a license amendment raises a genuine dispute.

We thus conclude that Contention 7 is admissible, in part, as follows:

> FPL's COLA fails to provide information sufficient to enable the NRC to reach a final conclusion on safety matters regarding the means for controlling and limiting radioactive material and effluents and radiation exposures within the limits set forth in Part 20 and ALARA in the event FPL needs to manage Class B and Class C LLRW for an extended period.

8. Contention 8 Is Not Admissible

CASE's Revised Petition (*see supra* note 3) contains Contention 8, which was *not* included in CASE's original petition. CASE states that Contention 8 "adds to our petition a request that NRC deny the request from FPL to begin construction of the non-nuclear portions of this project (limited work authorization, LWA)," because authorizing FPL to begin such work "would negatively impact wetlands, coastal estuary and other sensitive areas." CASE Rev. Pet. at 45-46.

We summarily reject Contention 8 as nontimely pursuant to 10 C.F.R. § 2.309(c)(1), which states that a late-filed contention shall not be considered by a licensing board unless the petitioner demonstrates that a multifactor balancing test weighs in favor of consideration.[113] CASE made no attempt in its

[113] Section 2.309(c)(1) requires balancing the following factors to the extent they apply to the particular filing: (1) the existence *vel non* of good cause; (2) the nature of the petitioner's right to be a

(Continued)

Revised Petition to explain its belated filing of Contention 8. In response to FPL's Motion to Strike Contention 8 (*see supra* note 3), CASE asserted it had "good cause" for submitting Contention 8 after the filing deadline of August 17, 2010 due to difficulties it encountered with NRC's e-filing system. *See* [CASE] Response to [FPL's] Motion to Strike Proposed Contention 8 in CASE's [Rev. Pet.] to Intervene in Turkey Point Units 6 and 7 Combined Construction and Operating License Application (Sept. 20, 2010) at 4. Although CASE might have experienced initial difficulties with the e-filing system when filing its original petition, we do not accept CASE's belated explanation that those difficulties were the cause of its failure to include Contention 8 in its initial filing, which failed even to allude to Contention 8. Rather, we attribute this omission to CASE's careless "inadverten[ce]" (Tr. at 75), a conclusion that is strengthened when we consider the unfinished condition of CASE's originally filed petition. *See supra* note 3. We therefore conclude Contention 8 is untimely both for lack of a good cause showing under 10 C.F.R. § 2.309(c)(1)(i) and because CASE failed to address the other factors of 10 C.F.R. § 2.309(c)(1)(ii)-(viii). *See Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 NRC 30, 34 (2006).

Even if we assumed *arguendo* that Contention 8 were timely, we would reject it as inadmissible. In Contention 8, CASE seeks to have the NRC deny FPL's LWA request. But FPL's COLA no longer contains an LWA request, because FPL withdrew it on November 10, 2009. *See* FPL Answer to CASE Rev. Pet. at 75-76 (citing Letter from William Maher, Senior Licensing Director — New Nuclear Projects, FPL, to U.S. Nuclear Regulatory Commission (Nov. 10, 2009)). Because Contention 8 contains no challenge to the currently pending COLA, it is inadmissible for failing to raise a genuine dispute of material fact or law with FPL's COLA under 10 C.F.R. § 2.309(f)(1)(vi).[114]

Because we reject Contention 8 on the alternative grounds that it is nontimely and inadmissible, we dismiss as moot FPL's Motion to Strike Proposed Contention 8. *See supra* note 3.

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party to the proceeding; (3) the nature and extent of the petitioner's interest in the proceeding; (4) the possible effect of the proceeding's outcome on the petitioner's interest; (5) the availability of other means to protect the petitioner's interest; (6) the extent the petitioner's interest will be represented by existing parties; (7) the extent the petitioner's participation will broaden the issues or delay the proceeding; and (8) the extent the petitioner's participation might assist in developing a sound record. The Commission has instructed that "good cause" is the most important factor. *See Oyster Creek,* CLI-09-7, 69 NRC at 261.

[114] Although we express no view on the matter, we note that FPL represented at oral argument that if it were to submit a new LWA request, a person whose interest was affected by the request "could file contentions just based on that." Tr. at 126.

9. Summary of Rulings on CASE's Intervention Petition

In fine, we conclude CASE has demonstrated standing (*supra* Part IV.A), and two of its contentions — Contentions 6 and 7, as revised (*supra* Parts IV.B.6 and IV.B.7) — are admissible.

V. PINECREST ESTABLISHES STANDING, BUT FAILS TO PROFFER AN ADMISSIBLE CONTENTION; IT IS NEVERTHELESS ELIGIBLE TO PARTICIPATE AS AN INTERESTED LOCAL GOVERNMENTAL BODY

A. Pinecrest Establishes Standing

As discussed *supra* Part II.A.3, a municipality can establish standing in a reactor licensing proceeding by showing either that its residents live within 50 miles of the facility, or that its boundaries extend to within 50 miles of the facility. Here, Pinecrest makes the undisputed representation that it is a Florida municipal corporation populated by about 20,000 residents and situated in its entirety within 20 miles of the Turkey Point site. *See* Pinecrest Pet. at 3. Based on that representation, we conclude Pinecrest has standing to intervene in this proceeding. Neither FPL nor the NRC Staff argues to the contrary. *See* FPL Answer to Pinecrest Pet. at 4; NRC Staff Answer to Pinecrest Pet. at 9.

B. Pinecrest Fails to Proffer an Admissible Contention

1. Contention 1 Is Not Admissible

Contention 1 asserts that "FPL's [ER] fails to sufficiently describe the impact of construction and operation of the proposed nuclear generating units on local surface waters and groundwater so that the Commission can prepare an adequate [EIS] and propose adequate mitigation alternatives in its Environmental Protection Plan required under NEPA." Pinecrest Pet. at 7. Pinecrest concedes FPL has concluded that the "relative impacts would be SMALL" (*id.*), but Pinecrest nevertheless asserts that "state agencies continue in their attempts to ascertain all of the necessary information to complete Florida's Power Plant Siting Act process." *Id.* Pinecrest then proceeds to list several examples of alleged concerns held by state agencies, although it fails to cite to any particular document or any specific factual source. *Id.* at 7-8.

FPL and the NRC Staff argue that Contention 1 is inadmissible. *See* FPL Answer to Pinecrest Pet. at 13-20; NRC Staff Answer to Pinecrest Pet. at 10-12. We agree.

Although Pinecrest summarizes several types of information that state agencies

allegedly are seeking to obtain relating to FPL's proposed Units 6 and 7 (Pinecrest Pet. at 7-8), it neither cites any documents generated by these agencies nor specifies any factual allegations or conclusions attributable to these agencies, thereby failing to provide alleged facts or expert opinions to support Contention 1, contrary to 10 C.F.R. § 2.309(f)(1)(v).[115] Contention 1 also fails to satisfy section 2.309(f)(1)(vi), because Pinecrest fails to identify any portion of FPL's COLA that it disputes, and it thereby fails to show a genuine dispute with FPL on a material issue of fact or law. Contention 1 is thus not admissible.

2. Contention 2 Is Not Admissible

Contention 2 asserts that "FPL's ER fails to adequately address the potential safety impacts certain of its proposed transmission facilities might have on Village emergency operations by failing to specifically address how or to what extent they might interfere with law enforcement and emergency response communications occurring within proposed transmission corridors." Pinecrest Pet. at 8. In particular, although Pinecrest concedes that FPL's "ER addressed [FPL's] compliance with Florida laws concerning magnetic field exposure" (*id.*), it faults the ER for "fail[ing] to address the impact a 230kV transmission facility across the street from the Police Department will have on emergency communications." *Id.*

FPL and the NRC Staff argue that Contention 2 is not admissible. *See* FPL Answer to Pinecrest Pet. at 20-23; NRC Staff Answer to Pinecrest Pet. at 12-14. We agree.

First, contrary to 10 C.F.R. § 2.309(f)(1)(vi), Pinecrest fails to identify any law or regulation explicitly requiring the ER to analyze electromagnetic interference with emergency communications. Additionally, and also contrary to section 2.309(f)(1)(vi), Pinecrest neglects to specify any portion of FPL's COLA that Pinecrest disputes or that allegedly omits information that should have been included.

Moreover, even if we were to assume *arguendo* that electromagnetic interference on emergency communications caused by Turkey Point's proposed offsite transmission lines could be considered a significant environmental impact under

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[115] Although citations to factually supported concerns raised by a state agency reviewing a proposed project are not necessarily insufficient to satisfy section 2.309(f)(1)(v), a petitioner may not rely on a document generated by a state agency if that document contains nothing more than a request for information. *See, e.g., Crow Butte,* CLI-09-12, 69 NRC at 550-52. To satisfy section 2.309(f)(1)(v), Pinecrest was required to provide some explanation as to how a Florida agency's inquiry into whether FPL complies with Florida's Power Plant Siting Act is relevant to findings the NRC must make. This Pinecrest failed to do. *Cf. PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 105 (2007) ("NRC's adjudicatory process [i]s not the proper forum for investigating alleged violations that are primarily the responsibility of other Federal, state, or local agencies.").

10 C.F.R. § 51.45(b) sufficient to render the analysis of such interference within the scope of and material to the NRC's licensing decision in this proceeding,[116] we would find Contention 2 inadmissible pursuant to section 2.309(f)(1)(v), because Pinecrest fails to allege any facts or expert opinions showing the possibility of an impact on emergency communications. Rather, Contention 2 contains the bare assertion that an impact analysis "should" be performed due to "the intensity of urban development in [FPL's transmission line] corridor." Pinecrest Pet. at 8. This unsupported assertion is insufficient to satisfy the Commission's stringent admissibility standards. As the Commission has admonished, "[a] petitioner's issue will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.'" *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003) (quoting *Oyster Creek,* CLI-00-6, 51 NRC at 208).

3. Contention 3 Is Not Admissible

Contention 3 asserts that "FPL's proposed East Corridor for associated 230kV transmission facilities has an economic impact on [Pinecrest] which is out of proportion with any benefit the proposed Turkey Point Units 6 [and] 7 and any associated facilities might have for [Pinecrest] and its residents." Pinecrest Pet. at 8. In support of Contention 3, Pinecrest states the proposed transmission line will run along the commercial zone in Pinecrest's northern border, which "*may* prove inconsistent with [possible] redevelopment efforts" consisting of "*proposed* upgrades in the busway and extension of rail transit." *Id.* at 9 (emphasis added).

FPL and the NRC Staff argue that Contention 3 is not admissible. See FPL Answer to Pinecrest Pet. at 24-27; NRC Staff Answer to Pinecrest Pet. at 15-16. We agree.

Contention 3 is not admissible for three independent reasons. First, although Pinecrest asserts that FPL's proposed transmission corridor will run adjacent to a commercial zone that Pinecrest hopes to develop, it fails to explain in what way any potential inconsistencies between the transmission corridor and its development plans are material to the findings the NRC must make with regard to FPL's COLA, as required by section 2.309(f)(1)(iv). Second, Pinecrest fails to provide any alleged facts or expert opinions, as required by section 2.309(f)(1)(v), in support of its claim that the proposed transmission facility would result in an adverse impact on Pinecrest's existing or planned commerce or transportation. Rather, Contention 3 is grounded on Pinecrest's speculation that

[116] *Cf. Seabrook,* ALAB-422, 6 NRC at 83 ("NRC authority to review . . . offsite impacts [of transmission lines] goes beyond merely factoring them into a final cost-benefit balance . . . and includes as well the authority 'where necessary [to] impose license conditions to minimize those impacts.'").

FPL's proposed transmission facility "may" prove inconsistent with "proposed" development efforts that Pinecrest hopes to implement. *See* Pinecrest Pet. at 9. Such unsupported conjecture falls far short of satisfying section 2.309(f)(1)(v). Finally, Contention 3 is inadmissible pursuant to section 2.309(f)(1)(vi), because Pinecrest fails to identify any portion of FPL's COLA that Pinecrest claims is deficient.

Because none of Pinecrest's three contentions is admissible, we deny Pinecrest's request to intervene as a party under 10 C.F.R. § 2.309(a). As we explain below, however, Pinecrest may participate in this proceeding as an interested local governmental body.

C. Pinecrest Satisfies the Requirements for Participating as an Interested Local Governmental Body

Pinecrest requests that, if it is not admitted as a party, it be allowed to participate as an interested local governmental body pursuant to 10 C.F.R. § 2.315(c). *See* Pinecrest Pet. at 9. As discussed *supra* note 4, if at least one petitioner demonstrates standing and proffers an admissible contention so that its petition to intervene is granted, section 2.315(c) allows an interested local governmental body that has not been admitted as a party to participate in a hearing as an interested nonparty. A local governmental body that is participating as an interested nonparty may designate a single representative "to introduce evidence, [to] interrogate witnesses" (if the admitted parties are permitted cross-examination), to "advise the Commission without requiring the [local governmental body's] representative to take a position with respect to the issue, [to] file proposed findings in those proceedings where findings are permitted, and [to] petition for review by the Commission under [10 C.F.R.] § 2.341 with respect to the admitted contentions." 10 C.F.R. § 2.315(c).

We previously determined, *supra* Part V.A, that Pinecrest demonstrated an interest sufficient to satisfy Commission standing requirements. We therefore conclude that Pinecrest is eligible to participate in this proceeding as an interested local governmental body, and we grant its request to do so. Pursuant to section 2.315(c), and within 2 weeks of the issuance of this decision, Pinecrest shall notify this Board, Joint Petitioners, and CASE of the contentions on which it will participate.

VI. CONCLUSION

For the foregoing reasons, we (1) *grant* Joint Petitioners' Petition to Intervene, admitting Contention 2.1 as revised (*supra* Part III), (2) *grant* CASE's Petition to Intervene, admitting Contention 6 as revised and Contention 7 as revised (*supra*

Part IV), and (3) *deny* Pinecrest's Petition to Intervene, but *grant* its request to participate as an interested local governmental body pursuant to 10 C.F.R. § 2.315(c), directing it to notify the Board, Joint Petitioners, and CASE within 2 weeks of the contentions on which it plans to participate (*supra* Part V).

Regarding pending motions, we (1) *deny* as moot FPL's Motion to Strike Proposed Contention 8 (Sept. 13, 2010) (*supra* Part IV.B.8), (2) *grant in part and deny in part* FPL's Motion to Strike Portions of Joint Petitioners' Reply (*supra* notes 39, 40, 49, 60, 72, 78, 80, 85, 87), and (3) *grant in part and deny in part* FPL's Motion to Strike Portions of CASE's Reply (*supra* notes 93, 97, 99, 100, 105).

Absent contrary direction from this Licensing Board, the hearing shall be conducted in accordance with the informal adjudicatory procedures described in Subpart L of 10 C.F.R. Part 2.[117]

This Memorandum and Order is subject to appeal and interlocutory review in accordance with the provisions in 10 C.F.R. §§ 2.311 and 2.341(f)(2). Appeals that meet the requirements of section 2.311 must be filed within ten days of service of this Memorandum and Order, and petitions for review that meet the requirements of section 2.341(f)(2) must be filed within 15 days of service of this Memorandum and Order.

[117] Section 2.310(a) provides that the hearing procedures in Subpart L of 10 C.F.R. Part 2 will ordinarily be used in proceedings for the "grant, renewal, licensee-initiated amendment, or termination of licenses or permits." *See* 10 C.F.R. § 2.310(a). Section 2.310(d) describes an exception to this rule in cases where the presiding officer determines by order that a contested matter necessitates resolution of a material issue of fact relating to a past activity "where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter" (*id.* § 2.310(d)), in which case the hearing for resolution of the contested matter will be conducted under Subpart G of 10 C.F.R. Part 2. *See id.* Section 2.309(g) permits a petitioner to "address the selection of hearing procedures, taking into account the provisions of [10 C.F.R.] § 2.310," but no party has yet intimated a reason for not applying the Subpart L hearing procedures.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Dr. William C. Burnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 28, 2011[118]

[118] Copies of this Memorandum and Order were sent this date by the agency's e-filing system to: (1) counsel for Joint Petitioners; (2) counsel for Pinecrest; (3) the representative for CASE; (4) counsel for FPL; and (5) counsel for the NRC Staff.

Cite as 73 NRC 254 (2011) **LBP-11-7**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Gary S. Arnold
Dr. Randall J. Charbeneau

In the Matter of **Docket Nos. 52-12-COL**
52-13-COL
(ASLBP No. 09-885-08-COL-BD01)

NUCLEAR INNOVATION NORTH AMERICA LLC
(South Texas Project, Units 3 and 4) **February 28, 2011**

In this 10 C.F.R. Part 52 proceeding regarding the application of Nuclear Innovation North America LLC (NINA or Applicant) for combined licenses (COL) to construct and operate two new nuclear units, using the Advanced Boiling Water Reactor (ABWR) certified design, at its site in Matagorda County, Texas, ruling on motions by Intervenors seeking to admit six new contentions, and by Applicant and Staff seeking summary disposition of a previously admitted contention, as well as ruling on a matter remanded by the Commission regarding access to a draft guidance document, the Licensing Board (1) grants Intervenors' motion in part, admitting Contention DEIS-1, as narrowed by the Board; (2) denies Applicant's and Staff's motion for summary disposition of Contention CL-2; (3) and concludes the matter of Intervenors' access to the draft document is moot because Intervenors' have since waived access to it.

RULES OF PRACTICE: SUMMARY DISPOSITION

Summary disposition, like summary judgment, is an extreme remedy, which should be granted with caution, especially before the parties have been afforded an opportunity to marshal their evidence. Additionally, when presented with conflicting expert opinions, licensing boards should be mindful that summary disposition is rarely proper. During summary disposition, it is not appropriate for boards "to untangle the expert affidavits and decide 'which experts are more correct.'" *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509 (2001) (quoting *Norfolk Southern Corp. v. Oberly,* 632 F. Supp. 1225, 1243 (D. Del. 1986)).

STANDARD OF REVIEW: SEVERE ACCIDENT MITIGATION ALTERNATIVES ANALYSIS

As applied specifically to Severe Accident Mitigation Alternatives (SAMA) analyses, the Commission has explained that a licensing board's inquiry should not be whether there are "plainly better" methodologies or "whether the SAMA analysis can be refined further." Rather, a licensing board's inquiry is to be whether the SAMA analysis resulted in erroneous conclusions on which SAMAs and Severe Accident Mitigation Design Alternatives (SAMDAs) are found cost-beneficial to implement. Accordingly, there is no purpose for further refining a SAMDA analysis, "[u]nless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated." *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 317 (2010).

REGULATIONS: INTERPRETATION (10 C.F.R. PART 52, APPENDIX A, § VI.B.7)

After reviewing the Technical Support Document (TSD) for the ABWR, the Commission determined that General Electric's SAMDA analysis conclusion that there are no additional cost-beneficial SAMDAs for the ABWR should be applied in future licensing proceedings referencing the ABWR certified design as long as that facility's site parameters are within the range specified in the TSD. *See* Standard Design Certification for the U.S. Advanced Boiling Water Reactor Design, 62 Fed. Reg. 25,800, 25,827 (May 12, 1997). However, because there is no list of site parameters specified in the TSD, a prerequisite for resolving SAMDA issues by rule is lacking. It is therefore impossible to demonstrate that the South Texas Project site parameters fall within the envelope defined by that list. This renders impossible the application of 10 C.F.R. Part 52, Appendix A,

§ VI.B.7 to resolve SAMDA issues by rule. NRC Staff's creation of a list of site parameters for use in this proceeding cannot cure the absence of a list of site parameters in the TSD.

REGULATIONS: INTERPRETATION (10 C.F.R. § 51.107(a)(3))

Although NEPA does not explicitly mention cost-benefit balancing, courts have interpreted the statute as requiring federal agencies to balance the environmental costs against the anticipated benefits of a proposed action. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88 (1998) (citations omitted). Section 51.107(a)(3) of the NRC's rules addresses this mandate by requiring a "weighing [of] the environmental, economic, technical, and other benefits against environmental and other costs." 10 C.F.R. § 51.107(a)(3). Therefore, as part of the NRC's NEPA analysis for licensing a nuclear power plant, the agency must balance the costs and benefits resulting from issuance of a license.

10 C.F.R. PART 51: NEED FOR POWER ASSESSMENT

When balancing benefits and costs under section 51.107(a)(3), one significant benefit of a combined license is the capacity of a new nuclear power plant to satisfy a need for additional electric power. *See Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979). Concomitantly, the NRC must address any purported need for additional power during its environmental review of the combined license application. *See* 10 C.F.R. § 51.71(d) (requiring the Draft EIS to "consider[ ] . . . the economic, technical, and other benefits and costs of the proposed action"); *see also id.* § 51.103(a)(3) (requiring the record of decision to discuss "relevant factors including economic and technical considerations" among alternatives).

10 C.F.R. PART 51: NEED FOR POWER ASSESSMENT

A need for power assessment need not "precisely identify future market conditions and energy demand, or . . . 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." *See, e.g.,* 68 Fed. Reg. at 55,910 (citing *Claiborne,* CLI-98-3, 47 NRC at 88, 94). Rather, it is sufficient if the need for power analysis is at a level of detail "sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions." *South Carolina Electric & Gas Co.* (Virgil C.

Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 17 (2010) (citing 68 Fed. Reg. at 55,910). Otherwise "[q]uibbling over the details of an economic analysis" would effectively "stand[ ] NEPA on its head by asking that the license be rejected not due to environmental costs, but because the economic benefits are not as great as estimated." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 145 (2004) (internal quotation marks omitted). Finally, we note that because a need for power assessment necessarily entails forecasting power demands in light of substantial uncertainty and the duty of providing adequate and reliable service to the public, need for power assessments are inherently conservative. *See Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 365-68 (1975), *cited with approval in Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609-10 (1979).

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.309(f)(1)(iv))

CONTENTION ADMISSIBILITY: MATERIALITY

Among other requirements for admitting a contention, Intervenors must demonstrate that the issue raised in the contention is material to a licensing decision, i.e., that the *issue would make a difference* in the licensing decision. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999). Intervenors need not demonstrate that the *issue will make a difference* in the licensing decision. As a recent Board enunciated, at the contention admissibility stage of a proceeding, Intervenors need not marshal their evidence as though preparing for an evidentiary hearing. *See, e.g., Department of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 416 (2009) (noting that requiring petitioners to proffer additional and conclusive support for the effect of their proposed contention "would improperly require . . . Boards to adjudicate the merits of contentions before admitting them"). Our regulations prudently avoid litigating issues whose resolution would not affect the outcome of a proceeding, but also contemplate that a fuller decision may be made at a later stage in litigation and on the merits.

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MEMORANDUM AND ORDER

(Rulings on Question Regarding Intervenors' Challenge to NRC Staff Denial of Documentary Access, on Motions for the Summary Disposition of Contention CL-2, and on the Admissibility of New DEIS Contentions)

This proceeding arises from the application of Nuclear Innovation North America LLC[1] (Applicant) for combined licenses (COL) that would authorize Applicant to construct and operate two new nuclear reactor units on its existing site near Bay City, Texas. Before the Board are three matters for resolution. First, as discussed in Part II, we resolve as moot a question that the Commission remanded to the Board regarding access to a draft guidance document.[2] Second, both NRC Staff and Applicant have moved for summary disposition of Contention CL-2.[3] As discussed in Part III, we deny both motions for summary disposition. Third, Intervenors[4] have proffered six new contentions based on NRC Staff's March 2010 Draft Environmental Impact Statement (DEIS).[5] As discussed in Part IV, we conclude that five of the newly proffered contentions are inadmissible and admit one new contention as limited by the Board.

I. BACKGROUND

As detailed in this Board's previous Orders, Intervenors challenge Applicant's COL application to construct and to operate two additional reactor units, STP Units 3 and 4, at its site where it currently operates existing reactors STP Units 1 and

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[1] By letter dated January 21, 2011, counsel for STP Nuclear Operating Company notified the Board that Nuclear Innovation North America has replaced STP Nuclear Operating Company as the lead applicant seeking combined operating licenses for South Texas Project (STP) Units 3 and 4. *See* Letter from Steven P. Frantz, Counsel for STP Nuclear Operating Company, to Licensing Board at 1 (Jan. 21, 2011).

[2] *See* CLI-10-24, 72 NRC 451, 464 (2010).

[3] *See* NRC Staff Motion for Summary Disposition (July 22, 2010) [hereinafter NRC Staff Summary Disposition Motion]; STP Nuclear Operating Company's Motion for Summary Disposition of Contention CL-2 (Sept. 14, 2010) [Applicant Summary Disposition Motion].

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

[5] *See* Intervenors' Motion for Leave to File New Contentions Based on the Draft Environmental Impact Statement (May 19, 2010) [hereinafter Motion for New Contentions]; Environmental Impacts Statements; Notice of Availability, 75 Fed. Reg. 14,594, 14,595 (Mar. 26, 2010).

2.[6] Proposed STP Units 3 and 4 would utilize the Advanced Boiling Water Reactor (ABWR) certified design, which Applicant incorporated by reference in its COL application.[7] On August 27, 2009, and September 29, 2009, this Board issued rulings on Intervenors' intervention petition, conferring standing on Intervenors and admitting five of their original twenty-eight contentions.[8] Included among the original admitted contentions was Contention 21, which challenged Applicant's Environmental Report (ER) for failing to consider impacts from severe radiological accident scenarios on the operation of other units at the STP site.[9]

On November 11, 2009, Applicant supplemented its ER and moved to dismiss Contention 21 as moot.[10] This ER supplement added section 7.5S ("Evaluation of Impacts of Severe Accidents on Safe Shutdown of Other Units") which updated Applicant's severe accident mitigation design alternatives (SAMDA) analysis[11] to address whether a radiological incident at one reactor unit might impact the other reactor units at the STP site.[12]

On July 2, 2010, the Board dismissed Contention 21 as moot because the ER supplement cured the omission alleged in that contention (i.e., the impacts of a severe radiological incident on the other colocated STP units).[13] Meanwhile, in response to Applicant's ER supplement, Intervenors filed nine new contentions and two amended contentions contesting the adequacy of Applicant's ER supplement.[14] The Board admitted three of those contentions in part, and reformulated them into one contention — Contention CL-2 — which challenges the replacement power cost input in the Applicant's SAMDA analysis.[15] As reformulated, Contention CL-2 alleges:

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[6] A full accounting of the procedural history of this proceeding is set forth in our prior orders and need not be repeated here. *See* LBP-09-21, 70 NRC 581 (2009); LBP-09-25, 70 NRC 867 (2009); LBP-10-2, 71 NRC 190 (2010); LBP-10-14, 72 NRC 101 (2010).

[7] *See* LBP-09-21, 70 NRC at 588; *see also* South Texas Project, Units 3 and 4 Combined License Application, Part 1, General and Financial Information, Rev. 3 at 1.0-1 (Sept. 16, 2009) (ADAMS Accession No. ML092931176) (incorporating 10 C.F.R. Part 52, Appendix A by reference).

[8] *See* LBP-09-21, 70 NRC at 638; LBP-09-25, 70 NRC at 896.

[9] *See* LBP-09-21, 70 NRC at 617.

[10] *See* LBP-10-14, 72 NRC at 111.

[11] *See* Part III.C for background regarding Applicant's SAMDA analysis.

[12] *See* LBP-10-14, 72 NRC at 111; Letter from Stephen Burdick, STPNOC Counsel, to Licensing Board, notification of Filing Related to Contention 21 (Nov. 11, 2009), Attach., Letter from Scott Head, Manager, Regulatory Affairs, STP Units 3 & 4, to NRC, Proposed Revision to Environmental Report (Nov. 10, 2009), Attach., ER § 7.5S at 7.5S-1 [hereinafter ER § 7.5S].

[13] *See* LBP-10-14, 72 NRC at 147. In that same order, the Board also dismissed the other four admitted contentions proffered in the Intervenors' intervention petition. *Id.*

[14] *Id.* at 106.

[15] *See id.* at 127-28.

> The Applicant's calculation in ER Section 7.5S of replacement power costs in the event of a forced shutdown of multiple STP Units is erroneous because it underestimates replacement power costs and fails to consider disruptive impacts, including ERCOT [the Electric Reliability Council of Texas][16] market price spikes.[17]

Prior to this Order, Contention CL-2 was the only remaining admitted contention in this proceeding. On March 26, 2010, the NRC issued its DEIS for proposed STP Units 3 and 4.[18] In response, on May 19, 2010, Intervenors filed six new contentions challenging the DEIS.[19] NRC Staff and Applicant oppose the admission of all six new contentions.[20] On June 21, 2010, Intervenors filed a consolidated response to Applicant's and NRC Staff's answers opposing admission of Intervenors' proposed new contentions.[21]

On July 22, 2010, NRC Staff moved for summary disposition of Contention CL-2.[22] Applicant also moved for summary disposition of Contention CL-2 on September 14, 2010, arguing alternative grounds for dismissing that contention.[23] Intervenors contend that both motions should be denied.[24]

Finally, on September 29, 2010, the Commission remanded to the Board the question of whether NRC Staff erred in denying Intervenors access to a draft interim staff guidance document.[25] On October 21, 2010, this Board held oral argument in Bay City, Texas, on the admissibility of the new contentions, the two

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[16] According to the DEIS, ERCOT is the independent system operator for the electrical grid for most of Texas. The DEIS also indicates that Texas State law confers responsibility on ERCOT for central planning and analysis of the resources needed for the electric system in the ERCOT region. *See* Draft Environmental Impact Statement for Combined Licenses (COLs) for South Texas Project Electric Generating Station Units 3 and 4, NUREG-1937, at 8-3 to 8-4 (Mar. 2010) (ADAMS Accession Nos. ML100700327, Vol. 1; ML100700333, Vol. 2) [hereinafter DEIS].

[17] LBP-10-14, 72 NRC at 127.

[18] *See* 75 Fed. Reg. at 14,595.

[19] *See* Motion for New Contentions.

[20] *See* NRC Staff's Answer to Intervenors' Motion for Leave to File New Contentions Based on the Draft Environmental Impact Statement (June 14, 2010) at 1 [hereinafter NRC Staff Answer]; STP Nuclear Operating Company's Answer Opposing New Contentions Based on the Draft Environmental Impact Statement (June 14, 2010) at 2 [hereinafter Applicant Answer].

[21] *See* Intervenors' Consolidated Response to the Applicant's and Staff's Answers in Opposition to the Intervenors' Proposed Contentions Based on the Draft Environmental Impact Statement (June 21, 2010) [hereinafter New Contentions Reply].

[22] *See* NRC Staff Summary Disposition Motion.

[23] *See* Applicant Summary Disposition Motion.

[24] *See* Intervenors' Response to Staff's Motion for Summary Disposition (Aug. 11, 2010) [hereinafter Intervenor Response to Staff Motion]; Intervenors' Response to Applicant's Motion for Summary Disposition of Contention CL-2 (Oct. 8, 2010) [hereinafter Intervenor Response to Applicant Motion].

[25] *See* CLI-10-24, 72 NRC at 464.

motions for summary disposition, and the remanded question regarding access to draft ISG-016.[26]

II. INTERVENORS' CHALLENGE TO STAFF DENIAL OF DOCUMENTARY ACCESS

NRC Staff denied Intervenors access to a draft interim staff guidance, "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) (Draft ISG-016).[27] As grounds for its denial, NRC Staff asserted the entire document was Sensitive Unclassified Non-Safeguards Information (SUNSI) and Intervenors failed to show a need for the document.[28] By order dated January 29, 2010, we directed NRC Staff to provide the Intervenors with a copy of all non-SUNSI portions of the draft document and reevaluate Intervenors' request for access to Draft ISG-016, pursuant to the standard for access to SUNSI articulated in that Order.[29] NRC Staff appealed this order and on September 29, 2010, the Commission directed the Board to consider on remand Intervenors' challenge to the denial of access.[30] Subsequently, Intervenors advised that it would waive access to Draft ISG-016 because the final version of ISG-016 had since been issued.[31] Accordingly, we conclude that the remanded question is moot.

III. MOTIONS FOR SUMMARY DISPOSITION OF CONTENTION CL-2

A. Legal Standards Governing Summary Disposition

The standards for summary disposition in Subpart L proceedings are set forth in 10 C.F.R. § 2.1205. That rule directs licensing boards to apply the same standards for granting or denying summary disposition as would be applied in proceedings conducted under Subpart G of the Rules, which are set forth in

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[26] Licensing Board Notice (Regarding Oral Argument) (July 30, 2010) at 1 (unpublished); *see* Tr. at 1029 (Oct. 21, 2010).

[27] *See* CLI-10-24, 72 NRC at 457-59.

[28] *Id.* at 458-59.

[29] *See* LBP-10-2, 71 NRC at 210.

[30] CLI-10-24, 72 NRC at 464.

[31] *See* Tr. at 1220 (explaining that Intervenors request the unredacted version of the final ISG-016, not the draft version); *see also* CLI-10-24, 72 NRC at 464-65 n.81.

section 2.710.[32] In turn, section 2.710(d)(2) provides that a moving party may obtain summary disposition "if the filings in the proceeding, . . . 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." In NRC adjudicatory proceedings, the Commission's standards for ruling on summary disposition motions are analogous to the standards for granting summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure in Federal courts.[33] The moving party bears the initial burden of "showing the absence of a genuine issue as to any material fact" and that it is entitled to a decision as a matter of law.[34] If the moving party meets its burden, the party opposing the motion must "set forth specific facts showing that there is a genuine issue," and may not rely on "mere allegations or denials,"[35] but "no defense to an insufficient showing is required."[36] If no genuine dispute remains, then the Board may dispose of all arguments based on the pleadings.[37]

Summary disposition, like summary judgment, is an extreme remedy,[38] that should be granted with caution,[39] especially before the parties have been afforded an opportunity to marshal their evidence.[40] Additionally, when presented with conflicting expert opinions, licensing boards should be mindful that summary disposition is rarely proper.[41] During summary disposition, it is not appropriate for boards "to untangle the expert affidavits and decide 'which experts are more correct.'"[42] As the Commission has explained:

> a licensing board (or presiding officer) should not . . . conduct a trial on affidavits. At

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[32] *See* 10 C.F.R. § 2.1205(c) ("In ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part.").

[33] *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

[34] *Id.*

[35] *Id.*

[36] *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1977) (internal citations omitted).

[37] *Advanced Medical Systems,* 38 NRC at 102.

[38] *See Moore v. Jackson,* 123 F.3d 1082, 1086 (8th Cir. 1997); *SRI International v. Matsushita Electric Corp. of America,* 775 F.2d 1107, 1116 (9th Cir. 1985) (explaining that summary judgment is a "lethal weapon"); *Transource International., Inc. v. Trinity Industries, Inc.,* 725 F.2d 274, 279 (5th Cir. 1984) (describing summary judgment as "drastic relief"); *United States v. Bosurgi,* 530 F.2d 1105, 1110 (2d. Cir. 1976) ("summary judgment is a drastic remedy").

[39] *Flaherty v. Coughlin,* 713 F.2d 10, 13 (2d. Cir. 1983); *McSpadden v. Mullins,* 456 F.2d 428, 430 (8th Cir. 1972); *James v. Honaker Drilling, Inc.,* 254 F.2d 702, 706 (10th Cir. 1958).

[40] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

[41] *See Phillips v. Cohen,* 400 F.3d 388, 399 (6th Cir. 2005).

[42] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509 (2001) (quoting *Norfolk Southern Corp. v. Oberly,* 632 F. Supp. 1225, 1243 (D. Del. 1986)).

> this stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for [hearing]. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. If reasonable minds could differ as to the import of the evidence, summary disposition is not appropriate. Caution should be exercised in granting summary disposition, which may be denied if there is reason to believe that the better course would be to proceed to a full [hearing].[43]

B. National Environmental Policy Act Standards Governing the Severe Accident Mitigation Design Alternatives Analysis

The National Environmental Policy Act (NEPA) establishes a "broad national commitment to protecting and promoting environmental quality."[44] NEPA's requirement that federal agencies prepare an Environmental Impact Statement (EIS) when considering a major action serves the statute's "action-forcing" purpose in two ways.[45] "First, it 'places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.' Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process."[46] NEPA's mandate is "essentially procedural,"[47] and "it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."[48]

One important component of an EIS is the discussion of possible actions that might mitigate adverse environmental consequences.[49] The NRC's regulations expressly require the Commission to consider "alternatives available for reducing or avoiding adverse environmental effects."[50] One such study of mitigation

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[43] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297-98 (2010) (internal citations omitted).

[44] *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 348 (1989); *see* 42 U.S.C. § 4331.

[45] *See Robertson,* 490 U.S. at 350.

[46] *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 97 (1983) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 553 (1978) (citing *Weinberger v. Catholic Action of Hawaii,* 454 U.S. 139, 143 (1981)).

[47] *Vermont Yankee,* 435 U.S. at 558.

[48] *Robertson,* 490 U.S. at 350 (citing *Strycker's Bay Neighborhood Council, Inc. v. Karlen,* 444 U.S. 223, 227-28 (1980) and *Vermont Yankee,* 435 U.S. at 558).

[49] *Robertson,* 490 U.S. at 351. The NRC's regulations expressly require the Commission to consider "alternatives available for reducing or avoiding adverse environmental effects." *See* 10 C.F.R. § 51.71(d) (incorporated by reference in 10 C.F.R. § 51.90).

[50] *See* 10 C.F.R. § 51.71(d) (incorporated by reference in 10 C.F.R. § 51.90).

alternatives in NRC practice is the SAMDA analysis.[51] The SAMDA analysis is the portion of the Severe Accident Mitigation Alternatives (SAMA) analysis that focuses on design and hardware issues.[52]

NEPA, however, only requires that mitigation be discussed in "sufficient detail to ensure that environmental consequences have been fairly evaluated."[53] NEPA does not "demand the presence of a fully developed plan" or a "detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts of a proposed action."[54] Moreover, as a mitigation analysis, "SAMA analysis is neither a worst-case nor a best-case impacts analysis."[55]

NEPA permits agencies "to select their own methodology as long as that methodology is reasonable."[56] While there "will always be more data that could be gathered, agencies must have some discretion to draw the line and move forward with decisionmaking."[57]

As applied specifically to SAMA analysis, the Commission has explained that a licensing board's inquiry should not be whether there are "plainly better" methodologies or "whether the SAMA analysis can be refined further."[58] Rather, a licensing board's inquiry is to be whether the SAMA analysis resulted in erroneous conclusions on which SAMAs and SAMDAs are found cost-beneficial to implement.[59] Accordingly, there is no purpose for further refining a SAMDA analysis, "[u]nless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated."[60]

C. The Applicant's SAMDA Analysis

Because Contention CL-2 alleges that Applicant's estimate of replacement

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[51] *See Pilgrim,* CLI-10-11, 71 NRC at 316; *see also* Nuclear Energy Institute; Denial of Petition for Rulemaking, 66 Fed. Reg. 10,834, 10,834 (Feb. 20, 2001) (explaining that the NRC is required to consider SAMAs in issuing a new operating license).

[52] *See* Licenses, Certifications and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,426 (Aug. 28, 2007).

[53] *Robertson,* 490 U.S. at 352.

[54] *Id.* at 352-53 (emphasis in original) (internal citations omitted).

[55] *Pilgrim,* CLI-10-11, 71 NRC at 316; *see also Robertson,* 490 U.S. at 354.

[56] *Pilgrim,* CLI-10-11, 71 NRC at 316 (citing *Town of Winthrop v. Federal Aviation Administration,* 535 F.3d 1, 11-13 (1st Cir. 2008)).

[57] *Id.* at 315 (internal citations omitted).

[58] *Id.*

[59] *Id.* Although in *Pilgrim,* the Commission spoke only of the SAMA analysis, we consider its analysis to be equally applicable to the SAMDA analysis, which is a subpart or element of a SAMA analysis. *See* 72 Fed. Reg. at 49,426.

[60] *Pilgrim,* CLI-10-11, 71 NRC at 317.

power costs in its SAMDA analysis is inadequate, it is appropriate for us to define and briefly describe the SAMDA analysis. The purpose of a SAMDA analysis is to identify and evaluate design alternatives that prevent a severe accident or mitigate the impacts of such an accident.[61] To perform the SAMDA analysis, Applicant compared the cost of each SAMDA against the benefit of implementing the SAMDA.[62] If the benefit from averting severe accidents was greater than the SAMDA cost (i.e., cost-beneficial), then Applicant considered implementing the SAMDA.[63]

Because proposed STP Units 3 and 4 would utilize the ABWR certified design, Applicant asserts that the SAMDA costs were determined during the ABWR design certification process and are listed in the Technical Support Document (TSD) for the ABWR.[64] The TSD is one of the components of the design certification application.[65] Of the listed potential SAMDAs for the ABWR, Applicant maintains that implementing the least expensive SAMDAs (i.e., lowest cost SAMDAs) would cost $100,000 (in 1991 dollars).[66]

Applicant asserts that the benefits of the SAMDAs are bounded by estimating the maximum averted cost of a severe accident using a probabilistic approach (i.e., total monetized impacts cost).[67] In its ER supplement, Applicant calculated a site-specific benefit that included the costs of a potential accident at one STP unit impacting the colocated STP units.[68] Applicant performed this calculation by totaling the onsite exposure costs, the onsite cleanup costs, the offsite costs,

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[61] U.S. Nuclear Regulatory Commission, Environmental Standard Review Plan, NUREG-1555, at 7.3-1 (Oct. 1999) (ADAMS Accession No. ML003702134, Vol. 1; ADAMS Accession No. ML003701937, Vol. 2).

[62] *See* Applicant Summary Disposition Motion at 11; *id.,* Attach. 2, Joint Affidavit of Jeffrey L. Zimmerly and Adrian Pieniazek ¶ 11 (Sept. 14, 2010) [hereinafter Applicant Joint Aff.].

[63] *See* Applicant Summary Disposition Motion at 11.

[64] *See id.*; *see also* Letter from J. F. Quirk, Project Manager, ABWR Certification, to R. W. Borchardt, Director, Standardization Project Directorate, U.S. Nuclear Regulatory Commission, Attach. 1, Technical Support Document for the U.S. ABWR (Dec. 21, 1994) (ADAMS Accession No. ML100210563) [hereinafter TSD].

[65] *See* Standard Design Certification for the U.S. Advanced Boiling Water Reactor Design, 62 Fed. Reg. 25,800, 25,827 (May 12, 1997).

[66] *See* TSD at 61 tbl.A-6.

[67] NRC Staff guidance suggests that SAMDA analysis should consider the following costs: public health costs, occupational health costs, offsite property costs, onsite property costs (which includes cleanup costs), long-term replacement power costs, and repair costs. *See* U.S. Nuclear Regulatory Commission, Office of Nuclear Regulatory Research, Regulatory Analysis Technical Evaluation Handbook, NUREG/BR-0184, at 5.20 to 5.52 (Jan. 1997) (ADAMS Accession No. ML050190193) [hereinafter NUREG/BR-0184].

[68] *See* LBP-10-14, 72 NRC at 111.

and the replacement power costs for outages both at the affected unit and at the unaffected units.[69]

D. Applicant's Motion for Summary Disposition of Contention CL-2

As explained above, Contention CL-2 challenges the adequacy of Applicant's estimation of replacement power costs in its SAMDA analysis. Specifically, Contention CL-2 alleges:

> The Applicant's calculation in ER Section 7.5S of replacement power costs in the event of a forced shutdown of multiple STP Units is erroneous because it underestimates replacement power costs and fails to consider disruptive impacts, including ERCOT market price spikes.[70]

Applicant's motion for summary disposition argues that Contention CL-2 should be dismissed because there is no genuine issue as to any material fact that (1) Applicant's estimate of replacement power costs in its ER is reasonable; and (2) refining its replacement power cost calculation to account for the challenges alleged in Contention CL-2 does not change its SAMDA analysis conclusion that there is no cost-effective SAMDA.[71] Accordingly, Applicant contends it is entitled to a decision as a matter of law.[72] NRC Staff supports the motion for summary disposition.[73]

Even though Applicant has presented a number of undisputed facts that Intervenors do not contest, we nonetheless decline to grant Applicant's motion for summary disposition of Contention CL-2. We conclude that Intervenors' answer in response to the motion, including an affidavit of its expert, raises a genuine dispute regarding key material facts.

1. Applicant's Arguments in Support of Summary Disposition

In support of its motion, Applicant submitted a joint affidavit of Jeffrey L. Zimmerly and Adrian Pieniazek.[74] Mr. Zimmerly is an environmental engineer and corporate quality assurance manager for Tetra Tech NUS, Inc., which is a

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[69] *See* Applicant Summary Disposition Motion at 14.

[70] *See* LBP-10-14, 72 NRC at 127.

[71] *See* Applicant Summary Disposition Motion at 14-16.

[72] *See id.* at 2.

[73] *See* NRC Staff Answer to Applicant's Motion for Summary Disposition of Contention CL-2 (Oct. 7, 2010) at 2.

[74] *See* Applicant Joint Aff. ¶ 1.

contractor for Applicant.[75] Mr. Zimmerly participated in the preparation of the ER for STP Units 3 and 4.[76] Ms. Pieniazek is the director of market policy for NRG LLC.[77] Ms. Pieniazek represents NRG Texas' interests before ERCOT and the Public Utility Commission of Texas and provides policy analysis on wholesale electricity market design issues.[78]

In arguing that no genuine issue of material fact exists, Applicant first points to the replacement power estimate that it submitted in ER § 7.5S and claims that it is reasonable under NEPA.[79] Although this is the exact estimate that Contention CL-2 alleges is inadequate, Applicant now urges that its cost estimate is adequate because it followed the NRC methodology (as set forth in NUREG/BR0184) to calculate the replacement power costs.[80] And while Applicant acknowledges that Intervenors argue that actual ERCOT replacement power costs would be higher than the costs in NUREG/BR0184, Applicant faults Intervenors for not claiming that the costs in NUREG/0184 are unreasonable.[81] Additionally, Applicant claims its cost estimate is reasonable because NUREG-0184 specifies replacement power costs in a similar time period as the SAMDA costs listed in the TSD (i.e., replacement power costs in 1993 dollars compared to the SAMDA costs which are in 1991 dollars).[82] Applicant argues that the 2008 replacement power costs suggested by Intervenors should not be directly compared to the SAMDA costs which were calculated in 1991 dollars.[83]

Second, Applicant contends that there is no genuine issue of material fact with regard to the adequacy of its replacement power cost calculation because, as a factual matter, none of the challenges advanced by Intervenors in Contention CL-2 change its SAMDA analysis conclusion that there is no cost-effective SAMDA.[84] Accordingly, Applicant argues that Intervenors' positions are bounded by Applicant's SAMDA analysis conclusion and there is no genuine dispute that will affect the outcome of the proceeding.[85]

To demonstrate this, Applicant performed a series of calculations to refine its

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[75] *Id.*

[76] *Id.* ¶ 2.

[77] *Id.* ¶ 5.

[78] *Id.*

[79] *See* Applicant Summary Disposition Motion at 14.

[80] *See id.* Applicant notes that NUREG-1555, "Standard Review Plans for Environmental Reviews for Nuclear Power Plants" specifically permits the use of the methodology set forth in NUREG/BR0184 to estimate replacement power costs.

[81] *See id.* at 15.

[82] *Id.*

[83] *Id.*

[84] *See id.* at 16.

[85] *See id.* at 2, 16-21.

replacement power cost input to account for the challenges raised by Contention CL-2.[86] Based on Intervenors' Contention CL-2 pleadings,[87] Applicant dissects Intervenors' position into the following challenges: (1) the replacement power cost input should be specific ERCOT region power costs or the specific power cost suggested by Intervenors; (2) the replacement power cost input should account for the market effects of an outage at the STP site; (3) the replacement power cost input should account for ERCOT price spikes; and (4) the replacement power cost input should account for the loss of the ERCOT grid.[88] We summarize briefly Intervenors' Contention CL-2 challenges and how Applicant refined its cost calculation to address those challenges below.

Intervenors' first argument in support of Contention CL-2 is that, rather than use the replacement power costs specified in NUREG/BR0184, Applicant should have used either ERCOT 2008 or 2009 price data or Intervenors' suggested price forecast to calculate the replacement power cost input.[89] In its motion, Applicant counters that, even were the replacement power costs increased as Intervenors have sought, the resulting total monetized impacts would be less than the lowest-cost SAMDA.[90] To make this determination, Applicant used the consumer price index (CPI) to adjust the cost of the SAMDAs (which the TSD lists in 1991 dollars) for inflation.[91] After adjusting for inflation, Applicant calculated the lowest-cost SAMDA to be $158,000[92] and concludes that the total monetized cost would be less than the lowest-cost SAMDA (i.e., there are no cost-effective SAMDAs given the above assumptions).[93]

Intervenors' second argument in support of Contention CL-2 is that Applicant's replacement power cost calculation is inadequate because "it does not take into account the increase of ERCOT market prices due to the market effects of a STP outage."[94] In response, Applicant first contends that the loss of STP units would not have long-term market effects in the ERCOT region and would not increase annualized replacement power costs because the region has adequate

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[86] *See id.* at 16-21.

[87] Applicant notes that to date, Intervenors have provided no information during discovery. *See id.* at 16. As such, Applicant addresses only the arguments that Intervenors raised in proffering Contention CL-2. *Id.*

[88] *See id.* at 16-26.

[89] *See id.* at 16-27.

[90] *See* Applicant Summary Disposition Motion, Attach. 1, Statement of Material Facts on Which No Genuine Issue Exists in Support of STP Nuclear Operating Company's Motion for Summary Disposition of Contention CL-2 (Sept. 14, 2010) ¶¶ IV.A to B, V.B. [hereinafter Statement of Material Facts].

[91] *See* Statement of Material Facts ¶ II.C; Applicant Joint Aff. ¶ 30.

[92] Statement of Material Facts ¶ II.C.

[93] *See id.* ¶¶ IV-V.

[94] Applicant Summary Disposition Motion at 19.

reserve margins to offset the lost generation.[95] Nonetheless, Applicant estimated the market effects of an outage by calculating the difference between the 2009 ERCOT prices — assuming all four units are operating, and 2009 ERCOT prices — assuming all four units are shut down for a year.[96] To quantify this difference, Applicant "developed a simplified dispatch model that compares the annual load-weighted average wholesale market price under two scenarios: (1) the price with all four STP units available, and (2) the price with all four STP units removed from service."[97] Applicant contends that even if it adds the economic impact of that change in price to its replacement power costs, using the ERCOT 2008 prices, the total monetized impacts are still below the lowest-cost SAMDA.[98]

Intervenors' third argument in support of Contention CL-2 is that Applicant's calculation of replacement power cost is inadequate because it does not account for "disruptive impacts of potential price spikes and grid outages, which could be triggered by the simultaneous shutdown of all four STP units."[99] In attempting to demonstrate that there is no genuine dispute, Applicant first asserts that price spike impacts are already accounted for in ERCOT average prices.[100] Nonetheless, Applicant refined its replacement power cost estimate to account for an additional 20% increase in ERCOT prices to account conservatively for price spikes.[101] Even accounting for these additional price spikes, using the 2008 ERCOT prices, Applicant contends that the total monetized impacts are still below the lowest-cost SAMDA.[102]

Intervenors' final argument in support of Contention CL-2 is that Applicant's replacement power cost calculation is inadequate because it does not account for "the likelihood of outages on the ERCOT grid which result in load shedding, or even uncontrolled blackouts."[103] To demonstrate no genuine dispute, Applicant first claims that it need not consider grid outages.[104] Nevertheless, Applicant refined its replacement power cost estimate to account for grid outages[105] by estimating the cost of grid outages to be $10 billion (similar to the 2003 Northeast blackout impacts).[106] Applicant contends that even after adding this impact to the

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[95] *See id.* at 19-20.
[96] *Id.* at 20.
[97] Applicant Joint Aff. ¶ 47.
[98] Applicant Summary Disposition Motion at 20.
[99] *Id.* at 21.
[100] *See id.* at 22.
[101] *Id.*
[102] *Id.* at 23.
[103] *Id.*
[104] *Id.* at 24-26.
[105] *Id.* at 23-24.
[106] *Id.* at 26.

replacement power cost using "2008 ERCOT pricing data, and accounting for the consumer impacts due to market effects and increases in price spikes" the total monetized impacts remain below the lowest cost of the SAMDAs.[107]

In sum, even after refining replacement power costs as summarized above, Applicant claims Contention CL-2 challenges can make no difference to its overall conclusion that there is no cost-effective SAMDA.[108] Therefore, Applicant contends that Intervenors' position is bounded by its SAMDA analysis conclusions and summary disposition is warranted.[109]

2. Intervenors' Answer to Applicant's Motion for Summary Disposition

In opposing Applicant's motion for summary disposition, Intervenors present a response to Applicant's Statement of Material Facts[110] that is supported by the Affidavit of Clarence L. Johnson.[111] Mr. Johnson provides electric utility and energy policy advice through his consultancy practice, CJ Energy.[112] Mr. Johnson has testified in over 100 electric utility proceedings before state utility commissions.[113]

Intervenors dispute Applicant's claim that after refining its replacement power cost to account for Intervenors' challenges, the SAMDA analysis conclusion does not change.[114] In Mr. Johnson's professional opinion, Applicant used the wrong inflation rate to escalate the SAMDA costs to 2009 dollars and thus Applicant has erred in claiming the lowest-cost SAMDA is $158,000 (in 2009 dollars).[115] According to Mr. Johnson, Applicant inappropriately used the consumer price index (CPI) as the inflation rate to escalate the cost of the SAMDAs to 2009

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[107] *Id.*

[108] *See* Applicant Summary Disposition Motion at 17.

[109] *See id.* at 17 (citing *Anderson,* 477 U.S. at 248, for the proposition that "[o]nly disputes over fact that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted").

[110] Intervenor Response to Applicant Motion, Attach. 1, Intervenors' Response to Applicant's Statement of Facts Pursuant to 10 C.F.R. 2.710 (Oct. 8, 2010).

[111] *See* Intervenor Response to Applicant Motion, Attach. 2, In the Matter of Docket Nos. 52-102 (CL) and 52-103 (CL), Affidavit in Response to Motion for Summary Disposition, Clarence L. Johnson (Oct. 6, 2010) [hereinafter Johnson Aff.].

[112] Johnson Aff. at 1.

[113] *Id.*

[114] We note that in opposing Applicant's summary disposition motion, Intervenors have proffered arguments that seem to be outside the scope of admitted Contention CL-2. For example, Intervenors now challenge Applicant's use of a probabilistic risk assessment, a claim that is not fairly encompassed by Contention CL-2.

[115] Johnson Aff. ¶¶ 1-4.

dollars.[116] For its part, NRC Staff agrees that Applicant used an incorrect inflation rate in escalating the cost of the SAMDAs, but asserts that a higher inflation rate is appropriate rather than the lower rate suggested by Intervenors.[117]

Mr. Johnson opines that the "weakness of the CPI is that it is based on fixed proportions of expenditures components and does not account for households' ability to change those proportions over time in response to price or other factors," and it is sensitive to "volatile price components."[118] Claiming that the SAMDA cost is sensitive to inflation rates, in Mr. Johnson's opinion, rather than the CPI, the Applicant should have used one of the following inflation rates: (1) the Gross Domestic Product Implicit Price Deflator; (2) the Personal Consumption Expenditures price index; or (3) the Core Personal Consumption Expenditures (Core PCE) price index.[119] Mr. Johnson opines that the cost of the SAMDA, as adjusted for inflation using the Core PCE, could be $143,000 (in 2008 dollars), which is very close to Applicant's monetized impact of $141,211.[120]

In Mr. Johnson's opinion, the SAMDA costs also should have been adjusted to account for regional consumer price variations by applying a cost of living differential that would have resulted in the lowest-cost SAMDA costing $131,000 (in 2009 dollars).[121] Such a SAMDA cost would be lower than Applicant's monetized impact of $141,211 and thus, in Mr. Johnson's opinion, the SAMDA would be cost-effective to implement.[122]

Additionally, Mr. Johnson offered his opinion that Applicant's dispatch model used to simulate the impact of market effects on ERCOT power prices was not realistic.[123] Mr. Johnson opines that Applicant's dispatch model is flawed because it: (1) employs an incorrect wind capacity factor, (2) contains a simplistic treatment of ancillary services, and (3) assumes perfect competition.[124] In Mr. Johnson's opinion, "competitive power markets are susceptible to market power, because one or more suppliers will be pivotal in certain hours."[125] As a consequence, Mr.

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[116] *Id.*

[117] *See* NRC Staff Answer to Applicant's Motion for Summary Disposition of Contention CL-2 (Oct. 7, 2010) at 11. NRC Staff claims that Applicant should have used the Bureau of Economic Analysis' Gross Domestic Product Implicit Price Deflator for Nonresidential Structures to adjust the SAMDA costs for inflation. *See id.,* Attach. 1, Affidavit of James V. Ramsdell and David M. Anderson Concerning the Staff's Review of STPNOC's Updated SAMDA Evaluation ¶ 4(c) (Oct. 7, 2010).

[118] Johnson Aff. ¶ 2.

[119] *Id.* ¶ 3.

[120] *Id.* ¶ 4.

[121] *Id.* ¶ 5. Specifically, in Mr. Johnson's judgment, Applicant should have used the cost of living index for Houston-Sugarland-Baytown which is 90.7 (whereas the national average is 100). *Id.*

[122] *Id.*

[123] *Id.* ¶ 10.

[124] *Id.*

[125] *Id.*

Johnson concludes that the Applicant's dispatch model erroneously assumes that market power will not affect power prices.[126]

3. Analysis and Ruling

Based on Intervenors' pleadings and expert affidavit, we conclude that genuine issues of material fact remain in dispute regarding whether Intervenors' challenges to the replacement power costs estimate are bounded by Applicant's SAMDA analysis conclusion. For example, the parties dispute the inflation rate that should be used to adjust the cost of the SAMDAs, the necessity of adjusting SAMDA cost to account for regional price differences, and the reasonableness of the model used to estimate the impact of market effects on ERCOT power prices. These conflicting opinions demonstrate that genuine issues of material fact remain in dispute regarding Contention CL-2.[127] These disputes among the experts can best be resolved after an evidentiary hearing where we can weigh the factual claims and resolve those claims with merits finding.

Finally, because we believe that genuine disputes over issues of material fact remain regarding whether Intervenors' Contention CL-2 challenges are bounded by the Applicant's SAMDA analysis conclusion, we cannot address Applicant's first argument, that its replacement power cost calculation is reasonable as a matter of law. In our view, this legal conclusion is so closely intertwined with the factual disputes remaining before the Board that it must be made after the factual disputes are resolved at hearing.[128]

Based on the foregoing analysis, Applicant's motion for summary disposition of Contention CL-2 is denied.

E. NRC Staff's Motion for Summary Disposition of Contention CL-2

NRC Staff's motion is accompanied by an affidavit whose two affiants participated in the preparation of DEIS § 5.11, "Environmental Impacts of Postulated Accidents."[129] Rather than argue that there is no material dispute as to the ade-

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[126] *Id.*

[127] *See Phillips,* 400 F.3d at 399; *Private Fuel Storage,* LBP-01-39, 54 NRC at 509.

[128] In *Pilgrim,* the Commission explained that a SAMA analysis might be reasonable "[u]nless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-beneficial conclusions for the SAMA analysis." *Pilgrim,* CLI-10-11, 71 NRC at 317. Accordingly, we must first determine whether it is genuinely plausible that refining the replacement power cost input might change the Applicant's SAMDA analysis conclusion before we determine whether the SAMDA analysis is reasonable under NEPA.

[129] NRC Staff Summary Disposition Motion, Attach. 2, Affidavit of Richard L. Emch, Jr. and James V. Ramsdell, Jr. Concerning the Finality of SAMDA Conclusions in ABWR Design Certification as Applied to STP Units 3 and 4 ¶ 1 (July 2, 2010) [hereinafter NRC Staff Joint Affidavit].

quacy of the replacement power cost calculation in Applicant's SAMDA analysis, NRC Staff contends that the Commission has resolved all environmental issues regarding SAMDAs in this proceeding by rule.[130]

NRC Staff's claim is predicated upon a generic SAMDA analysis that GE Nuclear Energy (GE) performed as part of the environmental assessment for the ABWR design certification.[131] GE's SAMDA analysis is contained in the TSD, one component of the ABWR design certification application.[132] After reviewing the TSD, the Commission determined that GE's SAMDA analysis conclusion that there are no additional cost-beneficial SAMDAs for the ABWR should be applied in future licensing proceedings referencing the ABWR certified design as long as that facility's site parameters are within the range specified in the TSD.[133]

NRC Staff asserts that the Commission codified this determination in 10 C.F.R. Part 52, Appendix A, which sets forth the finality of SAMDA issues for the ABWR certified design.[134] NRC Staff contends that the ABWR design certification rule resolves "all environmental issues" regarding SAMDAs for plants referencing the ABWR certified design *whose site parameters are within those specified in the TSD.*[135] NRC Staff also points to 10 C.F.R. § 52.63(a)(5), which affords finality to those matters resolved in connection with a design certification.[136]

Because Applicant's COL application references the ABWR certified design, the DEIS only considered whether the site characteristics for the STP site are

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[130] *See* NRC Staff Summary Disposition Motion at 6. For its part, Applicant supports NRC Staff's motion for summary disposition. *See* STP Nuclear Operating Company's Answer Supporting the NRC Staff Motion for Summary Disposition of Contention CL-2 (July 29, 2010) at 2.

[131] NRC Staff Summary Disposition Motion at 8.

[132] *See* 62 Fed. Reg. at 25,827.

[133] *See id.*

[134] NRC Staff Summary Disposition Motion at 9.

[135] *See id.* at 10 (emphasis added). The ABWR design certification rule provides in relevant part:

> B. The Commission considers the following matters resolved within the meaning of 10 CFR 52.63(a)(5) in subsequent proceedings for issuance of a combined license . . . involving plants referencing this appendix . . . .
>
> 7. All environmental issues concerning severe accident mitigation design alternatives associated with the information in the NRC's final environmental assessment for the U.S. ABWR design and Revision 1 of the technical support document for the U.S. ABWR, dated December 1994, for plants referencing this appendix whose site parameters are within those specified in the technical support document.

10 C.F.R. Part 52, Appendix A, §§ VI.B & VI.B.7.

[136] *See* NRC Staff Summary Disposition Motion at 9. Section 52.63(a)(5) states that "[e]xcept as provided in 10 CFR 2.335, 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."

within the site parameters specified in the TSD.[137] NRC Staff asserted that as long as it concluded the STP site was bounded by the ABWR site parameters, it could invoke the finality that the ABWR design certification rule afforded.[138] NRC Staff further asserts the "population dose risk is the appropriate TSD site parameter to use for comparison with the STP site characteristics"[139] because the "population dose risk parameter includes all of the site-specific information used in the evaluation of SAMDAs in the TSD, whereas the remaining values in the SAMDA evaluation are either constants or not related to the site."[140] Once NRC Staff concluded the probability-weighted population dose risk at the STP site is lower than that used in the ABWR SAMDA analysis, it could state in the DEIS "'that the STP site characteristics are bounded by the site parameters considered during the ABWR design certification, and that the environmental issues related to the SAMDAs have been resolved by rule.'"[141] Asserting its analysis of the SAMDA issue is correct, NRC Staff contends that the issue raised by Contention CL-2 is resolved by rule and not material to this proceeding.[142] Accordingly, NRC argues that Contention CL-2 should be dismissed as a matter of law.[143]

Intervenors argue that NRC Staff's motion for summary disposition should be denied because Contention CL-2 does not fall within the ambit of issues resolved by the ABWR design certification rule.[144] We agree that NRC Staff's motion should be denied, but on different grounds.

NRC Staff's conclusion that the STP site characteristics are bounded by the site parameters listed in the ABWR TSD is erroneous. In the DEIS, NRC Staff admits that "[t]he technical support document does not contain a specific list of site parameters."[145] Thus NRC Staff used its own judgment to determine the correct specific site parameters. To the contrary, because there is no list of site parameters specified in the TSD, a prerequisite necessary for resolving SAMDA issues by rule is lacking. It is therefore impossible to demonstrate that the STP site parameters fall within the envelope defined by that list. This renders impossible the application of 10 C.F.R. Part 52, Appendix A, § VI.B.7 to resolve SAMDA

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[137] *See* NRC Staff Summary Disposition Motion at 10.

[138] *See id.*

[139] *See id.* at 11 (citing the DEIS at 5-110). NRC Staff Joint Affidavit defines population dose risk as "the product of the probability of a radiological release following a severe accident and the population dose within 50 miles that would result from that release." NRC Staff Joint Affidavit ¶ 3.

[140] NRC Staff Summary Disposition Motion at 13.

[141] *Id.* (quoting the DEIS at 5-111).

[142] *Id.* at 11.

[143] *See id.*

[144] *See* Intervenor Response to Staff Motion at 2-3.

[145] *See* DEIS at 5-110; NRC Staff Motion for Summary Disposition at 11.

issues by rule. NRC Staff's creation of a list of site parameters for use in this proceeding cannot cure the absence of a list of site parameters in the TSD.[146]

In addition, NRC Staff fails to demonstrate that the population dose risk is the appropriate TSD site parameter to compare to the STP site for purposes of the design certification rule. The population dose risk parameter constitutes the offsite radiological consequences to the public of a severe accident.[147] Contrary to NRC Staff's claim, that parameter does not include all of the site-specific information used in the evaluation of SAMDAs in the TSD. Rather, GE also considered "onsite costs including economic losses, replacement power costs and direct accident costs" in its SAMDA evaluation.[148] NRC Staff provides no explanation for why these additional costs are not relevant in determining the appropriate TSD site parameters to compare to the STP site. Accordingly, we reject NRC Staff's claim that the population dose risk is the appropriate TSD site parameter for purposes of the ABWR design certification rule.

Because the ABWR TSD contains no specific list of site parameters and because even if the NRC Staff were permitted to generate its own list of site parameters, NRC Staff does not demonstrate that population dose risk is the appropriate TSD site parameter, we conclude that NRC Staff fails to show that the STP site parameters are bounded by the TSD site parameters. Accordingly, the ABWR design certification rule does not resolve Contention CL-2 in this proceeding.

Finally, we note that NRC Staff urges that because the DEIS does not contain any analysis of the issue raised in Contention CL-2, Intervenors should have filed a new contention based on this DEIS omission.[149] We disagree.

The Commission has never, by rule or decision, suggested that contentions based upon Applicant's ER are *per se* resolved by NRC Staff's environmental documents issued pursuant to NEPA. In fact, the Commission's regulations explicitly obligate petitioners and intervenors to challenge the Applicant's ER.[150] We reject NRC Staff's position that contentions of inadequacy challenging the ER (and Contention CL-2 is a contention of inadequacy) are automatically resolved by the mere publication of NRC Staff's environmental documents.

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[146] *See* Appendix Concerning the NRC Staff Motion for Summary Disposition of Contention CL-2.

[147] *See* NUREG/BR1084 at 5.10.

[148] *See* TSD at 32.

[149] *See* NRC Staff Summary Disposition Motion at 10 n.9.

[150] 10 C.F.R. § 2.309(f)(2). The DEIS might cure alleged omissions or deficiencies in the ER by including additional analysis that addresses such omissions or deficiencies. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 130 (2004); *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).

Indeed, NRC Staff's DEIS did not even address the NEPA challenge alleged by Contention CL-2. Rather, NRC Staff simply excluded any mention of the Applicant's site-specific SAMDA analysis, which Contention CL-2 challenges, apparently based on NRC Staff's view that Applicant's analysis was not required by law. NRC Staff's position creates the unfortunate appearance that NRC Staff can avoid its obligation to take a "hard look" at the environmental issues raised by Contention CL-2 by simply omitting the challenged analysis from the DEIS.

Based on the foregoing reasons, NRC Staff's motion is denied.

IV. NEW CONTENTIONS BASED ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT

A. Legal Standards Governing Admissibility of Intervenors' Proposed Contentions

Three regulations govern the admissibility of new or amended contentions to a licensing proceeding: 10 C.F.R. § 2.309(f)(2), which establishes when a new or amended contention may be filed; 10 C.F.R. § 2.309(c), which establishes the criteria for admitting nontimely contentions; and 10 C.F.R. § 2.309(f)(1), which establishes the criteria that all contentions must meet in order to be admissible.

1. Timely New Contentions Under 10 C.F.R. § 2.309(f)(2)

On issues arising under the NEPA, an intervenor must file contentions based on the applicant's ER, but may amend those contentions or file new contentions pursuant to 10 C.F.R. § 2.309(f)(2). In this regard, section 2.309(f)(2) addresses admitting new or amended contentions in two different situations. First, an intervenor may propose new or amended contentions based on 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 environmental documents.[151] Otherwise, an intervenor may propose new contentions, subject to leave of the Board, provided that intervenor shows:

> (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

[151] *See* 10 C.F.R. § 2.309(f)(2); *see also Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-10-24, 72 NRC 720, 729-31 (2010).

(iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.[152]

In either situation, newly proposed environmental contentions must be submitted promptly after the NRC's environmental documents are issued or new information becomes available.[153]

By prior order in this proceeding,[154] a proposed new contention will be considered timely if it is filed either within thirty (30) days of the date on which the subject new and material information first becomes available, or within forty (40) days of the issuance of the DEIS with respect to any new and material information contained therein. By subsequent order dated April 14, 2010,[155] the Board granted Intervenors an additional fourteen (14) days within which to file new contentions based on the DEIS. Because Intervenors filed their contentions on May 19, 2010,[156] their contentions challenging data or conclusions that differ significantly between the ER and the DEIS are timely filed, i.e., within the 54-day window. On the other hand, contentions challenging new information must be based on materially different new information not available before April 19, 2010 to be considered timely.

2. Nontimely Additional Contentions Under 10 C.F.R. § 2.309(c)

If a proposed contention does not qualify as timely filed under 10 C.F.R. § 2.309(f)(2), it may still be admissible if it satisfies the criteria set forth in 10 C.F.R. § 2.309(c), which deals with nontimely filings. In accordance with section 2.309(c)(1), the Board may admit a nontimely filed contention after balancing eight factors:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

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[152] 10 C.F.R. § 2.309(f)(2)(i)-(iii).

[153] *See* Changes to Adjudicatory Process (Final Rule), 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

[154] *See* Licensing Board Initial Scheduling Order (Oct. 20, 2009) at 8 (unpublished) [hereinafter Initial Scheduling Order].

[155] *See* Licensing Board Order (Granting Intervenors' Motion for Extension of Time to File New Contentions Based on DEIS) (Apr. 14, 2010) at 1 (unpublished).

[156] *See* Motion for New Contentions.

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

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

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

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.[157]

Intervenors seeking admission of a nontimely filed contention bear the burden of showing that, on balance, the section 2.309(c)(1) factors weigh in favor of admitting the proposed contention.[158] Longstanding NRC practice dictates that an intervenor's failure to affirmatively address the section 2.309(c) factors serves as a sufficient basis for dismissal.[159]

The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight.[160] In addressing the good cause factor, a petitioner must explain not only why it failed to file within the time required, but also why it did not file as soon thereafter as possible.[161] The availability of new information may provide good cause for nontimely filing, but the test for good cause is not simply when the intervenor became aware of the material sought to be introduced. Instead, the test is when the information became available and when the intervenor reasonably should have become aware of the information.[162] That is, not only must the intervenor have acted promptly after learning of the new information, but the information itself must be new information, not information already in the

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[157] 10 C.F.R. § 2.309(c)(1).

[158] *See, e.g., Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 & n.9 (1998), *aff'd, National Whistleblower Center v. NRC,* 208 F.3d 256 (D.C. Cir. 2000).

[159] *See Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 NRC 30, 33-34 (2006) (failure to comply with pleading requirements for late filings constitutes sufficient grounds for rejecting intervention and hearing requests); *see also Calvert Cliffs,* CLI-98-25, 48 NRC at 347-48 (noting that the Commission has summarily dismissed petitioners who failed to address the factors for a late-filed petition).

[160] *See, e.g., State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993).

[161] *See Westinghouse Electric Corp.* (Nuclear Fuel Export License for Czech Republic — Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 329 (1994) ("Even if these Petitioners did not learn about Westinghouse's application 'until mid-March,' they made no effort whatsoever to explain why, upon learning of Westinghouse's application, they waited over a month to file their very perfunctory petitions.").

[162] *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-70 (1992) (noting that the discovery of information publicly available 6 months prior to the date of the petition has been held insufficient to establish good cause for late intervention).

public domain.[163] Where the intervenor fails to tender a showing of good cause, an intervenor's demonstration on the other factors must be particularly strong.[164]

3. Contention Admissibility Requirements of 10 C.F.R. § 2.309(f)(1)

Regardless of when filed, all proposed contentions must comply with the general contention admissibility criteria set forth in 10 C.F.R. § 2.309(f)(1):

(i) *Specificity*: "Provide a specific statement of the issue of law or fact to be raised or controverted";

(ii) *Brief Explanation*: "Provide a brief explanation of the basis for the contention";

(iii) *Within Scope*: "Demonstrate that the issue raised in the contention is within the scope of the proceeding";

(iv) *Materiality*: "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) *Concise Statement of Alleged Facts or Expert Opinion*: "Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue"; and

(vi) *Genuine Dispute*: "[P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief."[165]

Failure to comply with any of these requirements precludes admission of a contention.[166]

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[163] *Id.*

[164] *See, e.g., id.* at 73.

[165] *See* 10 C.F.R. § 2.309(f)(1).

[166] *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)).

B. Board Analysis and Rulings on Intervenors' Proposed Contentions

1. DEIS-1 (Need for Power)

Contention DEIS-1: The DEIS analysis of the need for power is flawed and incomplete.[167]

Intervenors contend that NRC Staff's need for power assessment in the DEIS is flawed and incomplete because it does not adequately address a variety of topics that would reduce or eliminate the need for power that proposed STP Units 3 and 4 would meet. Before addressing their specific challenges, we turn first to the role of the need for power analysis in the NRC's compliance with NEPA.

a. Need for Power Assessment Under NEPA

Unlike other environmental statutes, NEPA mandates particular procedures, not particular results.[168] Chief among these procedures is the EIS, which NEPA requires federal agencies to prepare for those proposed actions that have the potential to significantly affect the quality of the human environment.[169] The EIS must describe the potential environmental impact of the proposed action and discuss any reasonable alternatives.[170]

Although NEPA does not explicitly mention cost-benefit balancing, courts have interpreted the statute as requiring federal agencies to balance the environmental costs against the anticipated benefits of a proposed action.[171] Section 51.107(a)(3) of the NRC's rules addresses this mandate by requiring a "weighing [of] the environmental, economic, technical, and other benefits against environmental and other costs."[172] Therefore, as part of the NRC's NEPA analysis for licensing a nuclear power plant, the agency must balance the costs and benefits resulting from issuance of a license.[173]

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[167] Motion for New Contentions at 2.

[168] *See Robertson,* 490 U.S. at 350-51 ("If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.") (citing *Strycker's Bay,* 444 U.S. at 227-28 and *Vermont Yankee,* 435 U.S. at 558).

[169] 42 U.S.C. § 4332(2)(C).

[170] *See* 42 U.S.C. § 4332.

[171] *Claiborne,* CLI-98-3, 47 NRC at 88 (citing *Idaho By and Through Idaho Public Utilities Commission v. Interstate Commerce Commission,* 35 F.3d 585, 595 (D.C. Cir. 1994) and *Calvert Cliffs' Coordinating Committee, Inc. v. AEC,* 449 F.2d 1109, 1123 (D.C. Cir. 1971)).

[172] 10 C.F.R. § 51.107(a)(3).

[173] The EIS need not, however, always contain a formal or mathematical cost-benefit analysis.

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When balancing benefits and costs under section 51.107(a)(3), one significant benefit of a combined license is the capacity of a new nuclear power plant to satisfy a need for additional electric power.[174] Concomitantly, the NRC must address any purported need for additional power during its environmental review of the combined license application.[175] Therefore, because the EIS contains an analysis of the need for power, it is appropriate for a party to file contentions on the issue of need for power.[176]

Although NEPA obligates the Commission to satisfy itself that there is a need for the power a proposed nuclear facility will generate, in preparing a need for power assessment NRC Staff may nonetheless rely on studies and forecasts prepared by expert, independent agencies "charged with the duty of insuring that the utilities within their jurisdiction fulfill the legal obligation to meet customer demands."[177] NRC Staff's need for power analysis may accord such an agency's forecasts and studies "great weight" and may give "heavy reliance" to those forecasts and studies absent a showing they contain a "fundamental error."[178]

Claiborne, CLI-98-3, 47 NRC at 88; *see also Sierra Club v. Lynn,* 502 F.2d 43, 61 (5th Cir. 1974) ("NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula"), *cert. denied,* 422 U.S. 1049 (1975); Council on Environmental Quality (CEQ) Regulations, 40 C.F.R. § 1502.23 ("the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations"). Commission regulations direct NRC Staff to consider and weigh the environmental, technical, and other costs and benefits of a proposed action and alternatives, and, "to the fullest extent practicable, quantify the various factors considered." 10 C.F.R. § 51.71(d). If important factors cannot be quantified, they may be discussed qualitatively. *Id.*

[174] In the past, the NRC equated the need for power with the benefits of the proposed action, *see, e.g., Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979) ("The demand for electricity is of course the justification for building any power plant. Satisfaction of that demand is the principal beneficial factor weighed against the environmental costs in striking the balance the National Environmental Policy Act requires."), although other benefits have been considered, *see Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 327 (1978).

[175] *See* 10 C.F.R. § 51.71(d) (requiring the Draft EIS to "consider[ ] . . . the economic, technical, and other benefits and costs of the proposed action"); *see also id.* § 51.103(a)(3) (requiring the record of decision to discuss "relevant factors including economic and technical considerations" among alternatives); *see also* NUREG-1555, at 8.0-1.

[176] *See* Nuclear Energy Institute; Denial of Petition for Rulemaking, 68 Fed. Reg. 55,905, 55,911 (Sept. 29, 2003) (declining a rulemaking petition to remove need for power analysis from NRC's NEPA regulations).

[177] *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-490, 8 NRC 234, 241 (1978).

[178] *See id.* at 240-41; *see also* 69 Fed. Reg. at 55,909 ("in considering the need for power as part of the NEPA process, the NRC does not supplant the States, which have traditionally been responsible

(Continued)

Regardless of whether the NRC itself conducts the need for power assessment, or relies on another agency's forecasts and studies, that assessment need only be reasonable.[179] In this regard, the Commission has emphasized the need for power assessment need not "precisely identify future market conditions and energy demand, or . . . 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."[180] Rather, it is sufficient if the need for power analysis is at a level of detail "sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions."[181] Otherwise "[q]uibbling over the details of an economic analysis" would effectively "stand[ ] NEPA on its head by asking that the license be rejected not due to environmental costs, but because the economic benefits are not as great as estimated."[182] Finally, we note that because a need for power assessment necessarily entails forecasting power demands in light of substantial uncertainty and the duty of providing adequate and reliable service to the public, need for power assessments are inherently conservative.[183]

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for assessing the need for power generating facilities, their economic feasibility and for regulating rates and services").

[179] *See Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 366-67 (1975) *cited with approval in United States Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 77 (1976); *see also Kansas Gas & Electric,* ALAB-462, 7 NRC at 328 ("Given the legal responsibility imposed upon a public utility to provide at all times adequate, reliable service — and the severe consequences which may attend upon a failure to discharge that responsibility — the most that can be required is that the forecast be a reasonable one in the light of what is ascertainable at the time made."); 68 Fed. Reg. at 55,909 ("The NRC has acknowledged the primacy of State regulatory decisions regarding future energy options. However, this acknowledgment does not relieve the NRC from the need to perform a reasonable assessment of the need for power.").

[180] *See, e.g.,* 68 Fed. Reg. at 55,910 (citing *Claiborne,* CLI-98-3, 47 NRC at 88, 94).

[181] *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 17 (2010) (citing 68 Fed. Reg. at 55,910) (rejecting a need for power-related contention because, in part, the Joint Petitioners' load forecast claim called for a more detailed need for power analysis than the NRC requires).

[182] *Private Fuel Storage,* CLI-04-22, 60 NRC at 145 (internal quotation marks omitted).

[183] *See Nine Mile Point,* ALAB-264, 1 NRC at 365-68, *cited with approval in Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609-10 (1979); *see also Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 410 (1976) ("To be sure, if demand does turn out to be less than predicted it can be argued . . . that the cost of the unneeded generating capacity may turn up in the customers' electric bills. This is not an ineluctable result, for oft times the surplus can be profitably marketed to other systems or the new capacity can replace older, less efficient units. But should the opposite occur and demand outstrip capacity, the consequences are far more serious.").

b. Need for Power Assessment for Proposed STP Units 3 and 4

Chapter 8 of the DEIS addresses the need for power.[184] It projects a future shortage of baseload power of up to 4400 MW of baseload generation during the period 2014-2019[185] — when proposed STP Units 3 and 4 are scheduled to come on line — and a need for additional power of 10,417 MW by 2024.[186] The DEIS also concludes that proposed STP Units 3 and 4 could partially satisfy this shortage,[187] so that "there is a justified need for new baseload generating capacity in the ERCOT region in excess of the planned 2740-MW capacity output of proposed Units 3 and 4 at STP."[188]

NRC Staff claims it conducted an independent review of ERCOT's studies and concluded they were systematic, comprehensive, subject to confirmation, and responsive to forecasting uncertainty.[189] In addition to its review of these ERCOT studies, NRC Staff claims that it conducted its own assessments of the risk of retiring generating units,[190] the longer-term effects of the 2008 to 2009 recession,[191] the impact of Texas's energy conservation plan,[192] and the expanded role of wind power in Texas.[193] On this basis, NRC Staff submits its need for power analysis is adequate.

c. Allegations Regarding DEIS-1

With this background, we now turn to the specific allegations Intervenors

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[184] DEIS at 8-1.

[185] *Id.* at 8-25. As explained in the DEIS, the DEIS focuses on baseload power needs. *See id.* at 8-8, 8-25 to 8-26. Proposed Units 3 and 4 at the STP site would be baseload merchant power plants, which means they would operate most cost-effectively by producing power more than 90% of the time. DEIS at 8-8. As a result, and like any other baseload provider, proposed Units 3 and 4 would satisfy the alleged growing need for power at near-minimum demand hours, typically nighttime. In contrast, ERCOT emphasizes peak load demand because of ERCOT's institutional responsibilities for meeting peak demand and reserve margin. DEIS at 8-8. In contrast to baseload demand, peak power demand reflects short bursts of high power demand, typically during daytime hours. The ability to satisfy the comparatively short bursts of intense demand requires only power providers that may operate intermittently. To ensure that more than enough providers can satisfy the peak demand, ERCOT mandates that more power is available at any one time than may be demanded, i.e., a reserve margin requirement of 12.5%. DEIS at 8-14.

[186] *Id.* at 8-23.

[187] *Id.* at 8-25.

[188] *Id.* at 8-26.

[189] *See id.* at 8-5 to 8-7.

[190] *See id.* at 8-23.

[191] *See id.* at 8-24.

[192] *See id.*

[193] *See id.*

assert as support for this contention that challenges NRC Staff's need for power analysis in the DEIS. Intervenors present eight independent arguments in support of proposed contention DEIS-1. Each allegation falls into one of two categories: (1) the DEIS need for power analysis fails to account for ongoing efforts to reduce demand; or (2) the DEIS need for power analysis fails to account for power obtained from other generating sources. Intervenors have asserted as much themselves.[194] Accordingly, we have grouped these allegations together as those relating to reduction of demand (1-A, 1-B, and 1-G), followed by those relating to other sources of available power (1-C, 1-D, 1-E, 1-F, and 1-H). For the reasons set forth below, the Board admits one aspect of this contention related to Intervenors' DEIS-1-G arguments, but declines to admit the remainder.

(i) ALLEGATIONS RELATED TO REDUCTION OF DEMAND

DEIS-1-A: The DEIS analysis of the need for power is incomplete because it accounts only for decline in demand attributable to demand side management from the requirements of Texas House Bill 3693. The DEIS does not account for reduced demand caused by funds for energy efficiency programs under the American Recovery and Reinvestment Act nor additional funds for the same purpose as proposed in the recently passed U.S House of Representatives HB 5019. Additionally, the DEIS does not address the recent energy efficiency experiences of the San Antonio municipal utility that yielded a peak reduction of 44.7 MW and anticipated energy savings of 86,712,978 KWh at a cost of $0.032/KWh. The DEIS's attenuated consideration of the effects of energy efficiency/demand side management programs has the effect of overstating the Applicant's need for power.[195]

DEIS-1-B: The DEIS analysis of the need for power is flawed because it does not consider the most recent energy forecast from ERCOT [the Electricity Reliability Council of Texas]. The DEIS assumes that peak demand in 2015 will be 72,172 MW. However, the most recent ERCOT forecast actually projects peak demand in 2015 at 70,517 MW or a 1655 MW/ 2.2% reduction in peak demand. The failure to consider this more recent energy forecast has the effect of overstating the Applicant's need for power.[196]

DEIS-1-G: The DEIS does not account for reduced demand caused by the adoption of the International Energy Conservation Code. The IECC building code has the potential to reduce peak demand by 2,362 MW annually by 2023 in the ERCOT region. The failure of the DEIS to account for this reduction in peak demand has the effect of understating the total capacity available in the ERCOT region.[197]

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[194] *See* New Contentions Reply at 4; Tr. at 1122.
[195] Motion for New Contentions at 2-3.
[196] *Id.* at 3.
[197] *Id.* at 4.

(1) DEIS-1-A Arguments

With DEIS-1-A, Intervenors claim that the DEIS overstates the need for power by failing to account for federal legislation and municipal programs that might reduce the demand for power in the subject area.[198] Specifically, Intervenors assert that although the DEIS does account for demand-side management pursuant to Texas House Bill 3693,[199] it fails to consider energy efficiency programs arising under either the American Recovery and Reinvestment Act (ARRA)[200] or U.S. House of Representatives Bill 5019 (H.R. 5019).[201] Likewise, Intervenors assert that the track record of the San Antonio, Texas municipal utility suggests energy demand will not be as high as the DEIS projects.[202]

Intervenors largely do not address the timeliness criteria of 10 C.F.R. § 2.309(c) and 10 C.F.R. § 2.309(f)(2) for the information relied upon in DEIS-1-A.[203] For the first time in their reply and later at oral argument,[204] Intervenors assert that they filed proposed contention DEIS-1 in response to new information, specifically the enactment of ARRA on February 17, 2009, and the publication of the Nexant Report on April 26, 2010. However, neither the enactment of ARRA nor the publication of Nexant's Measurement and Verification Report supports the timeliness of proposed contention DEIS-1. Intervenors' suggestion of H.R.

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[198] *See id.* at 2-3; Motion for New Contentions, Attach., David Power, Comments Regarding Draft Environmental Impact Statement for Combined Licenses for South Texas Project Units 3 & 4, at 2, 6 (May 19, 2010) [hereinafter David Power Report].

[199] The DEIS accounts for reduced demand by relying upon 2009 ERCOT forecasts that account for demand side management (DSM) programs. *See* DEIS at 8-15. These DSM programs, pursuant to Texas House Bill 3693 (signed into law in 2007), require regulated utilities in the ERCOT region and integrated utilities outside the ERCOT region to offer DSM programs sufficient to offset 15% of the growth in demand by December 31, 2008, and 20% of the growth in demand by December 31, 2009. *See* 2007 Tex. Sess. Law Serv. Ch. 939 (West) (codified as Tex. Util. Code Ann. § 39.905(a)(3)(B), (C) (2007), approved June 1, 2007, effective Sept. 1, 2007).

[200] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (enacted on Feb. 17, 2009) [hereinafter ARRA].

[201] Home Star Energy Retrofit Act of 2010, H.R. 5019, 111th Cong. (2010).

[202] *See* Nexant "Measurement and Verification of CPS Energy's 2009 DSM Program Offerings" (April 26, 2010) [hereinafter Nexant Report], *cited by* David Power Report at 2.

[203] With respect to contentions filed after the initial petition, Intervenors have the burden to show they meet the criteria of 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), where appropriate. To the extent that they have not done so, their proposed contentions will not be timely filed. *See, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009) ("The Board correctly found that failure to address the requirements [of 10 C.F.R. § 2.309(c) and 10 C.F.R. § 2.309(f)(2)] was reason enough to reject the proposed new contentions.").

[204] *See* New Contentions Reply at 2, 4-5; Tr. at 1151, 1153. Intervenors previously indicated their "new contentions . . . are derived from the [DEIS]." *See* Motion for New Contentions at 1.

5019[205] is even less convincing because H.R. 5019 has not even been enacted into law.[206]

For ARRA, Intervenors recognize that they previously raised the topic of federal funding for energy efficiency programs in Contention 26 of their initial petition,[207] which the Board found inadmissible.[208] In conjunction with this new proposed contention, Intervenors argue that the precise funding levels in ARRA for energy efficiency programs support the admissibility of proposed contention DEIS-1.[209] Yet, the President signed ARRA into law in February 2009 and Intervenors provide no indication as to when Congress appropriated funds. Intervenors have failed to show that the funding of ARRA is new information that arose within 30 days of the date this new proposed contention was filed, and so it must be measured by the 10 C.F.R. § 2.309(c)(1) criteria.[210]

For the Nexant Report, Intervenors claim that affordable DSM programs can reduce peak demand, e.g., a DSM program in San Antonio reduced peak demand by 44.7 MW.[211] But Intervenors fail to show how this information materially differs from information previously available. In fact, Nexant has long provided information regarding affordable DSM programs capable of reducing peak demand in the range of 40 MW.[212] As a result, Intervenors have failed to show that the subject information from the Nexant Report is new information that arose within 30 days of the date this new proposed contention was filed, and so it must be measured by 10 C.F.R. § 2.309(c)(1).

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[205] *See* Motion for New Contentions at 3; David Power Report at 6.

[206] During the 111th Congress, House Bill 5019 passed the House of Representatives, was referred to the Senate, and was received by the Senate Committee on Finance; however, H.R. 5019 has not been enacted into law. *See* Applicant Answer, Attach. 11, Summary of H.R. 5019, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05019:@@@Rl/home/LegislativeData.phpl. While we recognize the DEIS may reasonably consider information other than the product of formal legislative action, the DEIS can scarcely be faulted for declining to engage in speculation regarding the likely outcome of pending legislation. *See Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 410 (2008) (noting that potential legislative action that might result in a reduction in demand is speculative and therefore does not provide a basis for admission of a contention on need for power).

[207] *See* Petition for Intervention and Request for Hearing (Apr. 21, 2009) at 63.

[208] *See* LBP-09-21, 70 NRC at 633.

[209] *See* New Contentions Reply at 4-5; Tr. at 1151.

[210] *See* 10 C.F.R. § 2.309(f)(2)(iii); Initial Scheduling Order at 8 (stating that a proposed new contention will be considered timely if it is filed within thirty (30) days of the date when the new and material information on which the proposed contention is based first becomes available).

[211] *See* David Power Report at 2.

[212] Applicant Answer, Attach. 3, Nexant, Demand Side Management Potential Study at 14 (Nov. 24, 2008), *available at* http://www.cpsenergy.com/files/Nexant_Market_Potential.pdf (discussing affordable DSM programs for reducing peak demand).

With respect to both the ARRA and the Nexant Report information, Intervenors have not justified their nontimely filing under 10 C.F.R. § 2.309(c). Intervenors have not demonstrated good cause based on the availability of new information regarding either ARRA's precise funding estimate or affordable DSM programs capable of reducing peak demand in the Nexant Report. And Intervenors offer no explanation for why they failed to file the proposed contention within the time required or as soon as possible thereafter.[213] Moreover, Intervenors' failure to specify how ARRA funding or the lessons from the Nexant Report could result in energy savings risks unnecessarily broadening this proceeding and compromising the development of a sound record.[214] For the above reasons, Intervenors' DEIS-1-A arguments fail to support the admissibility of proposed contention DEIS-1.

(2) DEIS-1-B Arguments

With DEIS-1-B, Intervenors claim that the DEIS overstates the need for power by failing to consider ERCOT's May 2010 energy forecasts. According to Intervenors, the DEIS erroneously relies upon ERCOT's 2009 forecast that projects peak demand in 2015 of 72,172 MW.[215] Instead, Intervenors assert, a more recent ERCOT projection indicates that peak demand in 2015 will be 70,517 MW,[216] a 1655 MW (2.2%) reduction in peak demand from ERCOT's 2009 forecast.[217]

Intervenors largely do not address the timeliness criteria of 10 C.F.R. § 2.309(c) and 10 C.F.R. § 2.309(f)(2) for the information relied upon in DEIS-1-B.[218] For the first time in their reply and later at oral argument, Intervenors assert that they filed proposed contention DEIS-1 in response to new information, specifically ERCOT's May 2010 Report.[219] However, merely referring to ERCOT's May 2010 Report does not support the timeliness of proposed contention DEIS-1. Intervenors fail to show that this information supports their contention and that it materially differs from information that was previously available, and upon

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[213] *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564-65 (2005) (defining "good cause" as a showing that the petitioner (1) could not have met the filing deadline and (2) "filed as soon as possible thereafter").

[214] *See* 10 C.F.R. § 2.309(c)(1)(vii), (viii).

[215] *See* DEIS at 8-9 (citing ERCOT, Long-Term Hourly Peak Demand and Energy Forecast (May 2009)).

[216] *See* Motion for New Contentions, Attach. A, Dan Woodfin, Director, System Planning, ERCOT, May 2010 Load Forecast and Reserve Margin Update at 7 (May 18, 2010) [hereinafter ERCOT's May 2010 Report].

[217] *See* Motion for New Contentions at 3; David Power Report at 3.

[218] *See supra* note 203.

[219] *See* New Contentions Reply at 2; Tr. at 1152. Intervenors previously indicated their "new contentions . . . are derived from the [DEIS]." *See* Motion for New Contentions at 1.

which NRC Staff claims it relied in preparing the DEIS.[220] In fact, although Intervenors suggest ERCOT's May 2010 Report projects a lower need for power than ERCOT's May 2009 Report, a review of the entire document suggests exactly the opposite result. Intervenors' reference to ERCOT's May 2010 Report omits revised forecasts showing total generating resources declining (in 2014 from 79,123 MW[221] to 76,893 MW[222] and in 2015 from 78,017 MW[223] to 77,543 MW[224]), and revised forecasts showing reserve margin in 2014 declining (from 13.9%[225] to 13.7%[226]). As a result, Intervenors have failed to show that the subject information from ERCOT's May 2010 Report is new supporting information that arose within 30 days of the date this new proposed contention was filed, and so their contention must be measured by the 10 C.F.R. § 2.309(c)(1) criteria. But Intervenors have not justified their nontimely filing under 10 C.F.R. § 2.309(c)(1), even though they bear the burden of doing so.[227] As such, Intervenors' DEIS-1-B arguments do not support the admissibility of proposed contention DEIS-1.

(3) DEIS-1-G Arguments

With DEIS-1-G, Intervenors claim that the DEIS overstates the need for power by failing to account for the reduced demand that would result from the proposed adoption of an energy efficient building code based on the International Energy Conservation Code (IECC).[228] According to Intervenors, adoption of an energy

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[220] *See* 10 C.F.R. § 2.309(f)(2)(ii).

[221] *See* DEIS at 8-20 (citing Applicant Answer, Attach. 4, ERCOT, Report on the Capacity, Demand, and Reserves in the ERCOT Region at 8 (May 2009) [hereinafter ERCOT's May 2009 Report]).

[222] *See* ERCOT's May 2010 Report at 7.

[223] *See* Applicant Answer, Attach. 16, ERCOT, Report on the Capacity, Demand and Reserves in the ERCOT Region at 4 (Dec. 2009) [hereinafter ERCOT's December 2009 Report].

[224] *See* ERCOT's May 2010 Report at 7.

[225] DEIS at 8-16 (citing ERCOT's May 2009 Report at 8).

[226] *See* ERCOT's May 2010 Report at 7. Both Applicant and Intervenors provide ERCOT's May 2010 Report as attachments to their respective pleadings. *See* Applicant Answer, Attach. 5; Motion for New Contentions, Attach. A. However, the attachments are not identical. Applicant provides a version that reports a reserve margin in 2014 of 13.7% and Intervenors provide a version that reports a reserve margin in 2014 of 13.5%. Although neither party offers an explanation for the difference, for our purposes no explanation is necessary. We used 13.7% for our consideration of this contention because the value both favors Intervenors and was reported by Applicant.

[227] The Commission has affirmed rejection of late-filed contentions that did not address these late-filing criteria. *See Millstone,* CLI-09-5, 69 NRC at 126 ("The Board correctly found that failure to address the requirements [of 10 C.F.R. § 2.309(c) and 10 C.F.R. § 2.309(f)(2)] was reason enough to reject the proposed new contentions."); *see also Calvert Cliffs,* CLI-98-25, 48 NRC at 347.

[228] *See* Motion for New Contentions at 4; David Power Report at 4.

efficient building code, such as the IECC, has the potential to reduce peak demand by 2362 MW annually in Texas by the year 2023.[229]

At the time Intervenors filed their Motion for New Contentions, Texas had only proposed building code changes.[230] We take notice[231] that, on June 4, 2010, subsequent to Intervenors filing new contentions, Texas adopted energy efficient building code rules.[232] As we stand informed, Intervenors present a timely contention under 10 C.F.R. § 2.309(f)(2) and our Initial Scheduling Order.[233]

Section 2.309(f)(1) governs the admissibility of contentions, by listing six criteria that contentions must meet. Guided by Intervenors' Part G arguments, we find DEIS-1, as narrowed by the Board, to meet those contention admissibility criteria.

First, DEIS-1 contains a "specific statement of the issue of law or fact" sought to be litigated, as required by 10 C.F.R. § 2.309(f)(1)(i). It asserts, in relevant part, that NRC Staff's need for power assessment is incomplete because the DEIS does not account for reduced demand from adoption of an energy efficient building code.[234]

Second, Intervenors provide a "brief explanation of the basis for the contention" as required by 10 C.F.R. § 2.309(f)(1)(ii). Intervenors explain that failure to

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[229] Motion for New Contentions at 4; David Power Report at 4 (citing Motion for New Contentions, Attach. D, American Council for an Energy-Efficient Economy, Potential for Energy Efficiency, Demand Response, and Onsite Renewable Energy to Meet Texas's Growing Electricity Needs (Mar. 2007) [hereinafter ACEEE Report]).

[230] *See* SECO Proposes Updates to Building Energy Performance Standards (filed on Mar. 11, 2010), http://www.seco.cpa.state.tx.us/news/2010/seco_ch19.php, *cited by* David Power Report at 4 n.10.

[231] *See* 10 C.F.R. § 2.337(f). Although section 2.337(f), by its terms, applies to "evidence at hearings," the bounds this rule places on official notice is also appropriate for the contention admissibility stage of a proceeding. Here, the promulgation of state regulations falls within the broad reach of "any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body." *Id.; see also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 66, 74-75 (1991) ("The Commission, in deciding an issue, can take into consideration 'a matter beyond reasonable controversy' and one that is 'capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy."); Fed. R. Evid. 201(b), (f) ("Judicial notice may be taken at any stage of the proceeding.").

[232] *See* 35 Tex. Reg. 4727, 4728 (June 4, 2010) (adopting Final Rule, 34 Tex. Admin. Code § 19.53).

[233] For the same reasoning that a proposed rule or proposed law may not support an admissible contention, i.e., its ultimate effect is at best speculative, a newly adopted rule or law may support an admissible contention, i.e., it now has indisputable legal effect. Here, the adoption of building code rules by Texas presents new and materially different information not previously available, upon which Intervenors may rest their proposed contention. *See* 10 C.F.R. § 2.309(f)(2)(i), (ii); *see also Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010).

[234] Motion for New Contentions at 2, 4.

account for the adoption of an energy efficient building code results in the DEIS overstating future demand and therefore inflating the projected need for power that proposed STP Units 3 and 4 could satisfy.[235] According to Intervenors, not only would a building code, adopted today, result in substantial energy savings in the future, i.e., approximately 2362 MW annually of peak summer demand by 2023,[236] but also savings in the near term as more buildings come into compliance.[237] Neither Applicant nor NRC Staff disputes the near-term and long-term savings that implementation of an energy efficient building code offer.[238] They argue only that building code changes alone will not entirely satisfy the projected need for power otherwise met by proposed STP Units 3 and 4. But Intervenors do not purport to offer, as the basis for their proposed contention, the entire satisfaction of an unmet need for power.[239]

Third, DEIS-1 is "within the scope" of this proceeding.[240] As discussed earlier,[241] NRC Staff's need for power assessment is vital to balancing the costs versus benefits of the proposed licensing action under section 51.107(a)(3) of the Commission's regulations.[242] Therefore, Intervenors may contest the issue of need for power in the course of this licensing proceeding.[243]

Fourth, Intervenors demonstrate that the "issue raised in [DEIS-1] is material to the findings the NRC must make to support" granting the proposed license.[244] Inasmuch as NRC Staff relies upon the benefits of proposed STP 3 and 4 in satisfying an otherwise unmet need for power, the adequacy of the need for power assessment is material to granting the proposed combined license.[245] In other words, if proposed STP Units 3 and 4 satisfy an unmet need for power, the Commission may consider that these units accrue a benefit when balancing the costs versus benefits under NEPA. On the other hand, that purported benefit may be challenged if facts suggest that the need for power assessment is inadequate.

It is the adequacy of the need for power assessment that Intervenors challenge in their DEIS-1-G arguments. According to Intervenors, the DEIS need for

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[235] *See* New Contentions Reply at 7.

[236] *See* David Power Report at 4.

[237] *See* New Contentions Reply at 7; Tr. at 1143-44.

[238] *See* Applicant Answer at 27-28; NRC Staff Answer at 20-21.

[239] *See* Tr. at 1146-47.

[240] Neither Applicant nor NRC Staff disputes this point.

[241] *See supra* Part IV.B.1.a.

[242] *See, e.g., Black Fox Station,* ALAB-573, 10 NRC at 804 ("The demand for electricity is of course the justification for building any power plant. Satisfaction of that demand is the principal beneficial factor weighed against the environmental costs in striking the balance the National Environmental Policy Act requires.").

[243] *See* 68 Fed. Reg. at 55,911.

[244] *See* 10 C.F.R. § 2.309(f)(1)(iv).

[245] *See, e.g., Black Fox Station,* ALAB-573, 10 NRC at 804.

power assessment is inadequate for failing to consider the effects of an energy efficient building code.[246] In particular, Intervenors claim the failure to consider the reduced demand associated with adoption of an energy efficient building code may have a substantial effect on the DEIS need for power assessment[247] because of the "significant energy savings" associated with implementing energy efficient building codes.[248]

NRC Staff and Applicant challenge neither that need for power assessments are material to the grant of a license nor that Intervenors may contest a need for power assessment. Applicant, however, does assert that Intervenors have not raised a material issue. Applicant argues that the peak demand savings from implementing the building code would be insufficient to affect the need for power assessment that includes the addition of the generating capacity from proposed STP Units 3 and 4. Stated otherwise, Applicant claims the implementation of the building code could not make a difference in the outcome of the proceeding, i.e., it cannot be material.[249]

Were we to adopt Applicant's articulation of materiality, however, we would be compelled to find that only those issues determined to have a conclusive effect on an ultimate licensing decision are material. In our estimation, materiality here refers rather to those issues whose resolution would make a difference in the outcome of a licensing proceeding. In other words, Applicant erroneously seeks us to utilize an outcome determinative material-effect test, rather than the material-issue test as the regulations direct us.[250]

As we read 10 C.F.R. § 2.309(f)(1)(iv), Intervenors need only demonstrate that the issue raised in the contention is material to a licensing decision, i.e., that the *issue would make a difference* in the licensing decision.[251] This, Intervenors have done. Intervenors need not demonstrate that the *issue will make a difference* in the licensing decision. As a recent Board enunciated, at the contention admissibility stage of a proceeding, Intervenors need not marshal their evidence as though

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[246] *See* Motion for New Contentions at 2, 4; Tr. at 1122, 1142.

[247] *See* New Contentions Reply at 7.

[248] *See* David Power Report at 4 (internal quotation marks omitted).

[249] *See* Applicant Answer at 27-28 (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999)).

[250] *See, e.g., U.S. Department of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 413-16 (2009) (rejecting a test for materiality that would require petitioners to demonstrate quantitatively how an alleged defect would result in a violation of pertinent requirements; noting that instead, under 10 C.F.R. § 2.309(f)(1) a petitioner need only properly allege a defect in meeting pertinent requirements); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80, *aff'd as to other matters,* CLI-98-13, 48 NRC 26 (1998).

[251] *Oconee,* CLI-99-11, 49 NRC at 333-34.

preparing for an evidentiary hearing.[252] Our regulations prudently avoid litigating issues whose resolution would not affect the outcome of a proceeding, but also contemplate that a fuller decision may be made at a later stage in litigation and on the merits.

Fifth, Intervenors provide a "concise statement of the alleged facts or expert opinions which support [their] position"[253] that the DEIS is inadequate because it fails to consider the effects of an energy efficient building code in the ERCOT region. For instance, Intervenors reference an ACEEE Report indicating that "Texas could save . . . 2362 megawatts annually of peak summer demand by 2023."[254] As the DEIS factored peak demand into assessing the need for power,[255] Intervenors' undisputed factual statement supports their position that the DEIS need for power assessment is inadequate.

Sixth, Intervenors "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact."[256] For a contention of omission, as here, Intervenors need only "identif[y] . . . each failure [to include the required information] and the supporting reasons for [Intervenors'] belief" that such a failure exists.[257] This Intervenors have done. Intervenors contend that the DEIS fails to consider the effects of an energy efficient building code as part of its need for power assessment. Neither NRC Staff nor Applicant disputes the DEIS omission. At oral argument, NRC Staff conceded that the DEIS does not consider the effects of an energy efficient building code in the ERCOT region. The principal reason for this omission is that Texas only adopted an energy efficient building code after publication of the DEIS.[258]

Conceding that the DEIS omits any discussion of building codes, NRC Staff proceeds to claim Intervenors nonetheless fail to raise a genuine dispute of material fact because (1) the documents upon which Intervenors rely do not accurately forecast the projected energy savings that would result from the building code Texas ultimately adopted; and (2) Intervenors do not explain how the alleged summer peak demand energy reductions in 2023 would materially affect the DEIS conclusions regarding the need for baseload power in the years 2014-2019, which span the potential completion dates for proposed STP Units 3 and 4.[259]

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[252] *See, e.g., Dep't of Energy,* LBP-09-6, 69 NRC at 416 (noting that requiring petitioners to proffer additional and conclusive support for the effect of their proposed contention "would improperly require . . . Boards to adjudicate the merits of contentions before admitting them").

[253] 10 C.F.R. § 2.309(f)(1)(v).

[254] David Power Report at 4.

[255] *See* DEIS at 8-25.

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

[257] *See id.*

[258] *See* Tr. at 1145, 1148.

[259] *See* NRC Staff Answer at 21.

Treating NRC Staff's arguments in order: first, we are scarcely surprised that Intervenors' supporting documents do not perfectly forecast demand savings or that the documents make certain inapplicable assumptions about the implementation of an energy efficient building code in Texas. The ACEEE Report, after all, was published in 2007 and purports to suggest policy recommendations that were seen as both "effective and politically viable in Texas."[260] The ACEEE Report is prophetic in this regard because in June 2010 Texas did adopt an energy efficient building code.[261] More importantly, however, at the contention admissibility stage, Intervenors need only raise a genuine dispute of material fact; they need not prove their contention is correct. Second, NRC Staff rephrases Applicant's argument that Intervenors' failure to prove the conclusive effects of their contention precludes the admissibility of their contention. For the same reasons we earlier rejected Applicant's argument, we now reject NRC Staff's argument.[262]

Accordingly, we conclude that DEIS-1 satisfies the contention admissibility criteria of 10 C.F.R. § 2.309(f)(1)(i)-(vi) and therefore admit the contention as a contention of omission. Based on the arguments proffered by Intervenor, we reformulate DEIS-1 as follows:

> NRC Staff's DEIS analysis of the need for power is incomplete because it fails to account for reduced demand caused by the adoption of an energy efficient building code in Texas, the implementation of which could significantly reduce peak demand in the ERCOT region.

(ii) ALLEGATIONS RELATED TO OTHER SOURCES OF AVAILABLE POWER

> *DEIS-1-C*: The DEIS analysis does not account for increases in wind carrying capacity. The most recent ERCOT analysis indicates that wind carrying capacity has increased from 708 MW to 793 MW so far this year and is expected to increase another 115 MW by 2015. The failure of the DEIS to account for this increase has the effect of understating the total generation capacity available in the ERCOT region.[263]
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> *DEIS-1-D*: The DEIS fails to account for the addition of 2,073 MW of non-nuclear capacity to the ERCOT generation portfolio. This additional capacity was not accounted for in the need for power discussion in the DEIS. The failure of the DEIS

[260] *See* ACEEE Report at viii.

[261] *See id.* at 25, 48 (recommending adoption of "more stringent building energy codes").

[262] *See supra* pp. 291-93 (analyzing "materiality" contention admissibility criteria).

[263] Motion for New Contentions at 3.

to account for this increase has the effect of understating the total capacity available in the ERCOT region.[264]

DEIS-1-E: The DEIS does not account for 31,757 MW of additional capacity through interconnections in the ERCOT region by 2015. The addition of this capacity will create a reserve capacity of 51% in the ERCOT region. The failure of the DEIS to account for this increase has the effect of understating the total capacity available in the ERCOT region without the addition of STP Units 3 & 4.[265]

DEIS-1-F: The DEIS does not account for a non-wind renewable capacity mandate under consideration by the Texas PUC [Public Utility Commission]. Adoption of this renewable portfolio standard would add 500 MW of capacity in the ERCOT region. The failure of the DEIS to account for this increase has the effect of understating the total capacity available in the ERCOT region.[266]

DEIS-1-H: The DEIS does not account for a compressed air energy storage (CAES) project planned for Texas by ConocoPhillips/General Compression that will be available for baseload capacity. This recently announced project is proof that the combination of wind capacity and CAES is a viable means of generating baseload power. The failure of the DEIS to account for this source of baseload capacity has the effect of understating the future total generating capacity in the ERCOT region.[267]

(1) DEIS-1-C Arguments

With DEIS-1-C, Intervenors claim the DEIS overstates the need for power by failing to account for increases in wind carrying capacity.[268] Specifically, Intervenors point to ERCOT increasing its estimated wind carrying capacity by 85 MW from 708 MW (March 2010 Report) to 793 MW (May 2010 Report), as well as an additional 115 MW of planned wind units by 2015, totaling 908 MW.[269]

Contrary to Intervenors' claim, however, the DEIS does account for increases in wind carrying capacity. The DEIS agrees with Intervenors that "[l]arge amounts of wind energy have entered or are about to enter the ERCOT region" and later accounts for such additions in its need for power assessment.[270] Thus, by 2014 the

[264] *Id.* at 4.
[265] *Id.*
[266] *Id.*
[267] *Id.* at 5.
[268] *See* Motion for New Contentions at 3; David Power Report at 3.
[269] *See* David Power Report at 3.
[270] DEIS at 8-17.

DEIS projects 708 MW of effective load carrying capacity (ELCC)[271] for wind units, as well as an additional 211 MW of planned ELCC,[272] which totals 919 MW of ELCC. And by 2019 the DEIS projects the ELCC of planned wind units will rise substantially to 1606 MW, totaling 2314 MW of ELCC.[273] In effect, during the period 2014-2019, the DEIS forecasts a greater increase in wind unit capacity in the ERCOT region than Intervenors sought through this contention. As such, Intervenors' DEIS-1-C arguments do not support the admissibility of proposed contention DEIS-1.[274]

(2) DEIS-1-D Arguments

With DEIS-1-D, Intervenors claim the DEIS overstates the need for power by failing to account for 2073 MW of additional generation that ERCOT projects.[275] Specifically, Intervenors point to ERCOT's May 2010 report identifying new generation from Coleto Creek Unit 2 (756 MW), Papalote Creek Wind (17 MW), and Panda Temple Power (1300 MW).[276]

Intervenors largely do not address the timeliness criteria of 10 C.F.R. § 2.309(c) and 10 C.F.R. § 2.309(f)(2) for the information relied upon in DEIS-1-D.[277] Once again, for the first time at oral argument, Intervenors assert that they filed proposed contention DEIS-1 in response to new information, specifically ERCOT's May 2010 Report.[278] However, merely referring to ERCOT's May 2010 Report does not support the timeliness of proposed contention DEIS-1. Intervenors fail to show how this information supports their contention and materially differs from information previously available. In fact, although Intervenors suggest ERCOT's May 2010 Report projects a lower need for power than previous studies, just the opposite is indicated in reviewing the entire document. Notably, in addition to identifying new generation, ERCOT's May 2010 Report also identifies lost generation from cancelled projects, including Sterling Energy Center (26 MW) and Lenorah Wind Project (22 MW), as well as mothballed units, Valley 1, 2, & 3 (1069 MW), Tradinghouse 2 (787 MW), Spencer 4 (and 5 after 2010) (122 MW), and North Texas 1, 2, & 3 (75 MW).[279] As a whole, therefore, ERCOT's May 2010

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[271] ERCOT defines ELCC as "8.7% of the nameplate capacity," as recommended by the Generation Adequacy Task Force (GATF). *See* ERCOT's May 2009 Report at 6.

[272] *See* DEIS at 8-20.

[273] *See id.*

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

[275] *See* Motion for New Contentions at 4; David Power Report at 4 & n.7.

[276] *See* ERCOT's May 2010 Report at 4.

[277] *See supra* note 203.

[278] *See* Tr. at 1153. Intervenors previously indicated their "new contentions . . . are derived from the [DEIS]." *See* Motion for New Contentions at 1.

[279] *See* ERCOT's May 2010 Report at 4.

Report, relied upon by Intervenors, projects not a net gain, but rather a net loss (446 MW), in available generating capacity from the previous December 2009 update.[280] As a result, Intervenors have failed to show that the subject information from ERCOT's May 2010 Report is new supporting information that arose within 30 days of the date this new proposed contention was filed. This contention must be measured by the 10 C.F.R. § 2.309(c)(1) criteria. But Intervenors have not justified their nontimely filing under 10 C.F.R. § 2.309(c)(1),[281] even though they bear the burden of doing so.[282] As such, Intervenors' DEIS-1-D arguments do not support the admissibility of proposed contention DEIS-1.

(3) DEIS-1-E Arguments

With DEIS-1-E, Intervenors claim the DEIS overstates the need for power by failing to account for 31,757 MW of additional capacity through alleged interconnections that could be available in the ERCOT region by 2015.[283] Intervenors assert that accounting for these interconnections would increase reserve margin to 51% in the ERCOT region.[284]

Intervenors largely do not address the timeliness criteria of 10 C.F.R. § 2.309(c) and 10 C.F.R. § 2.309(f)(2) for the information relied upon in DEIS-1-E.[285] Once again, for the first time at oral argument, Intervenors assert that they filed proposed contention DEIS-1 in response to new information, specifically ERCOT's May 2010 Report.[286]

However, merely referring to ERCOT's May 2010 Report does not support the timeliness of proposed contention DEIS-1. Intervenors fail to show how this information supports their contention and materially differs from information previously available. Notably, both the May 2009 and 2010 ERCOT studies considered the potential capacity additions that Intervenors seek to have considered, but ERCOT concluded neither was sufficiently reliable to be considered "available" during the pertinent period for purposes of calculating "total resources" or "reserve margin."[287] Essentially, Intervenors assert that the DEIS is inadequate because it fails to consider certain potential future capacity, but they do not address either why that potential future capacity should be considered or

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[280] *See id.*

[281] *See* Tr. at 1153.

[282] *See supra* note 227.

[283] Motion for New Contentions at 4; David Powers Report at 4 & n.8.

[284] Motion for New Contentions at 4; David Powers Report at 4 & n.8.

[285] *See supra* note 203.

[286] *See* Tr. at 1153. Intervenors previously indicated their "new contentions . . . are derived from the [DEIS]." *See* Motion for New Contentions at 1.

[287] *Compare* ERCOT's May 2010 Report at 7, *with* ERCOT's May 2009 Report at 8.

why ERCOT's, and thereby the DEIS, assessment is inadequate. As a result, Intervenors have failed to show that the subject information from ERCOT's May 2010 Report is new supporting information that arose within 30 days of the date this new proposed contention was filed, and so it must be measured by the 10 C.F.R. § 2.309(c)(1) criteria. But Intervenors have not justified their nontimely filing under 10 C.F.R. § 2.309(c)(1),[288] even though they bear the burden of doing so.[289] As such, Intervenors' DEIS-1-E arguments do not support the admissibility of proposed contention DEIS-1.

(4) DEIS-1-F Arguments

With DEIS-1-F, Intervenors claim that the DEIS overstates the need for power by failing to account for 500 MW of nonwind renewable capacity.[290] Specifically, Intervenors note that the Texas Public Utility Commission (PUC) is considering adding a renewable energy mandate to the state's existing renewable portfolio standard, having issued a draft, so-called strawman rule.[291]

The mandate to which Intervenors refer[292] is a draft rule subject to PUC rulemaking.[293] As Intervenors themselves recognize, although a hearing was held on April 30, 2010, and final comments were received on May 11, 2010,[294] no rule has been promulgated.[295] Contrary to Intervenors' claim, the DEIS cannot be faulted for declining to speculate on the outcome of a proposed rulemaking.[296] Moreover and contrary to what Intervenors claim, the terms of the proposed rule would not result in 500 MW of additional capacity even were the rule issued in its draft form. The draft rule does not set forth requirements for renewable energy capacity, but only seeks to "establish renewable energy credits to serve as the enforcement mechanism for the [existing] 500 megawatt non-wind renewable

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[288] *See* Tr. at 1153.

[289] *See supra* note 227.

[290] Motion for New Contentions at 4.

[291] David Power Report at 4.

[292] *See id.*

[293] *See* Applicant Answer, Attach. 12, Public Utility Commission of Texas, Rulemaking to Relating to the Goal for Renewable Energy, Project #35792, *available at* http://www.puc.state.tx.us/rules/rulemake/35792/Strawman_122009.pdf [hereinafter Texas PUC Strawman].

[294] *See* David Power Report at 4.

[295] *See* Tr. at 1153-54. At the time this order was published, Texas had not adopted the draft rule.

[296] *See Bellefonte,* LBP-08-16, 68 NRC at 410 (noting that potential legislative action that might result in a reduction in demand is speculative and therefore does not provide a basis for admission of a contention on need for power); *see also Summer,* CLI-10-1, 71 NRC at 18-19 & n.84 (rejecting a proposed need for power contention based on "merely conclusory statements, without supporting facts or detail").

energy target in [Texas Public Utility Regulatory Act] § 39.904."[297] Accordingly, Intervenors fail to show how the draft rule materially differs from information previously available. As a result, Intervenors have failed to show that the draft rule is new information that arose within 30 days of the date this new proposed contention was filed, and so it must be measured by the 10 C.F.R. § 2.309(c)(1) criteria. But Intervenors have not justified their nontimely filing under 10 C.F.R. § 2.309(c)(1), even though they bear the burden of doing so.[298] We therefore must conclude that Intervenors' DEIS-1-F arguments do not support the admissibility of proposed contention DEIS-1.

(5) DEIS-1-H Arguments

With DEIS-1-H, Intervenors claim that the DEIS overstates the need for power by failing to account for additional available baseload power generated by a compressed air energy storage (CAES) pilot project.[299] In particular, Intervenors rely on an April 14, 2010 announcement indicating that ConocoPhillips and General Compression have entered into an agreement to develop CAES projects, beginning with the "evaluat[ion of] a multi-phase pilot project in Texas."[300]

Intervenors largely do not address the timeliness criteria of 10 C.F.R. § 2.309(c) and 10 C.F.R. § 2.309(f)(2) for the information relied upon in DEIS-1-H.[301] Once again, for the first time at oral argument, Intervenors assert that they filed proposed contention DEIS-1 in response to new information, specifically an April 14, 2010 announcement indicating that ConocoPhillips and General Compression entered into an agreement to evaluate building a CAES pilot project in Texas.[302] However, merely referring to the ConocoPhillips announcement does not support the timeliness of proposed contention DEIS-1. Intervenors fail to show how this information materially differs from information previously available.[303] In fact,

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[297] *See* Texas PUC Strawman.

[298] *See supra* note 227.

[299] Motion for New Contentions at 5; David Power Report at 6-7.

[300] David Power Report at 6; Applicant Answer, Attach. 14, PrairieGold Venture Partners, General Compression Signs Agreement with ConocoPhillips to Develop CAES Projects (Apr. 14, 2010), *available at* http://www.pgvp.com/news/index.php?newsid=15 [hereinafter ConocoPhillips Announcement].

[301] *See supra* note 203.

[302] *See* Tr. at 1131-32, 1154. Intervenors previously indicated their "new contentions . . . are derived from the [DEIS]." *See* Motion for New Contentions at 1.

[303] While Intervenors at least impliedly addressed the filing deadline requirement of 10 C.F.R. § 2.309(f)(2)(iii) by noting that the April 14, 2010 announcement date came "pretty close" to being within the filing window, Intervenors failed to address whether the information upon which the new contention was based was not previously available, *see* 10 C.F.R. § 2.309(f)(2)(i), and whether the information upon which the new contention was based is materially different than information previously available, *see* 10 C.F.R. § 2.309(f)(2)(ii).

Intervenors also reference a 2007 Luminant press release for the same purpose as the ConocoPhillips press release, i.e., to demonstrate progress in compressed air energy storage systems.[304]

As a result, Intervenors have failed to show that the subject information from the ConocoPhillips press release is new information that arose within 30 days of the date this new proposed contention was filed, and so it must be measured by the 10 C.F.R. § 2.309(c)(1) criteria. But Intervenors have not justified their nontimely filing under 10 C.F.R. § 2.309(c)(1),[305] even though they bear the burden of doing so.[306] As such, Intervenors' DEIS-1-H arguments do not support the admissibility of proposed contention DEIS-1.

2. DEIS-2 (Global Warming)

> *Contention DEIS-2*: The DEIS understates the effect of global warming on the cumulative impacts of the operation of STP 3 & 4.[307]

As with proposed contention DEIS-1, Intervenors present several arguments to support their proposed contention.

> *DEIS-2-A*: The DEIS conclusion that cumulative effects of greenhouse gas emissions are projected to be "noticeable but not destabilizing" is contradicted by the EPA [Environmental Protection Agency]'s April 27, 2010 report "Climate Change Indicators in the United States". Inter alia, the EPA report finds compelling evidence that composition of the atmosphere and many fundamental measures of climate are changing. By understating the effects of climate change the DEIS effectively minimizes the contributions to the GHG inventory attributable to operation of STP Units 3&4. This has the further effect of minimizing the importance of selecting the lowest GHG alternatives to generate electricity. A full accounting for all stages of the UFC shows that nuclear power has significantly greater GHG burdens than wind, solar power or geothermal. The DEIS did not make any such comparison, however.[308]
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> *DEIS-2-B*: The DEIS acknowledges that a rising sea level caused by climate change could cause salt water to flow farther up the Colorado River towards the Reservoir Makeup Pumping Facility but does not consider the increased salinity of the water on plant operations. Increased salinity of water from the Colorado River could have adverse effects on plant operations.[309]

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[304] *See* Applicant Answer, Attach. 19, Luminant, Luminant and Shell Join Forces to Develop a Texas-Sized Wind Farm (July 27, 2007), *available at* http://www.luminant.com/news/newsrel/detail.aspx?prid=1087 [hereinafter Luminant Announcement], *cited in* David Power Report at 7.

[305] *See* Tr. at 1154.

[306] *See supra* note 227.

[307] Motion for New Contentions at 5.

[308] *Id.* at 5-6.

[309] *Id.* at 6.

DEIS-2-C: The DEIS describes STP 3 & 4 cumulative impacts on surface water and groundwater quality but fails to compare cumulative impacts to surface water quality from alternatives such as wind and solar. The failure to compare water quality impacts from alternatives including wind, solar, geothermal, etc. has the effect of distorting the relative advantages of nuclear power.[310]

DEIS-2-D: The DEIS fails to consider the effect of global warming on operations of STP Units 3 & 4 related to 1) water availability and 2) increased ambient temperatures of air and the effect of higher cooling water temperatures. The failure to consider these adverse impacts has the effect of omitting material information concerning water usage and temperature thereof and effects on plant operations. This omission has the effect of overstating relative advantages of nuclear power and understating environmental impacts.[311]

a. DEIS-2-A Arguments

With DEIS-2-A, Intervenors claim the DEIS understates the cumulative impact of greenhouse gas (GHG) emissions by wrongly concluding GHG emissions will have a "noticeable but not destabilizing" worldwide impact.[312] As a result of this alleged understatement, Intervenors claim (1) the DEIS artificially reduces the contribution of proposed STP Units 3 and 4 to the worldwide GHG inventory and (2) the DEIS improperly restricts the comparison of renewable generating alternatives, such as wind, solar, and geothermal.[313]

Under NEPA, NRC Staff must consider a proposed facility's cumulative impacts,[314] including GHG emissions.[315] NRC Staff asserted in the DEIS that it considered the effects of preconstruction, construction, and operation of proposed STP Units 3 and 4 on various natural resources, including land use, water use and

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[310] *Id.*

[311] *Id.*

[312] *See* Motion for New Contention at 5-6; David Power Report at 8-9; Tr. at 1174-76.

[313] *See* Motion for New Contentions at 5-6.

[314] In implementing its NEPA obligations, the NRC expressly adopts certain definitions promulgated by the Council on Environmental Quality (CEQ) including 40 C.F.R. §§ 1508.7, 1508.8, and 1508.25. 10 C.F.R. § 51.14(b). CEQ regulations state that an EIS must consider the direct, indirect, and cumulative impacts of an action. *See* 40 C.F.R. § 1508.25(c). Direct impacts are those caused by the federal action, and occurring at the same time and place as that action, while indirect impacts are caused by the action at a later time or more distant place, yet are still reasonably foreseeable. *See id.* § 1508.8. Cumulative impacts are those "which result[ ] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or nonfederal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* § 1508.7. Yet if the impacts are remote or speculative, the EIS need not discuss them. *See Vermont Yankee,* 435 U.S. at 551.

[315] *See Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), CLI-09-21, 70 NRC 927, 931 (2009).

quality, ecology, and air quality.[316] According to the DEIS, cumulative impacts result when the effects of an action are added to, or interact with, other past, present, and reasonably foreseeable future effects on the same resources.[317] By their nature, therefore, cumulative impacts can result from individually minor, but collectively significant, actions taking place over time.[318]

In evaluating the significance of potential cumulative impacts, the DEIS establishes a ranking system with three significance levels, small, medium, and large.[319] However, the DEIS cautions that an action that has a small impact, when viewed in isolation, could result in a moderate or large cumulative impact, when viewed in combination with the impacts of other actions on the affected resource.[320] In other words, the DEIS does not and "cannot treat the identified environmental concern in a vacuum."[321]

In Chapter 7 of the DEIS, NRC Staff maintains that the cumulative impacts of GHG emissions from proposed STP Units 3 and 4, "for the full plant lifecycle are minimal."[322] Asserting the national and worldwide cumulative impacts of GHG emissions are noticeable, but not destabilizing, the DEIS concludes that the additional GHG emissions of proposed STP Units 3 and 4 would not appreciably change this conclusion.[323] As support for this position, the DEIS purports to rely on a U.S. Global Change Research Program report[324] (GCRP Report) that synthesized the results of numerous climate modeling studies.[325] NRC Staff also notes that

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[316] DEIS at 7-54.

[317] *Id.* at 7-1 to -2 (adopting the same definition of "cumulative" as under CEQ regulations). The DEIS lists the particular actions considered by NRC Staff in the cumulative analysis in Table 7-1 of the DEIS. *Id.* at 7-3 to 7-6.

[318] *Id.* at 7-1 to -2 (adopting the same definition of "cumulative" as under CEQ regulations).

[319] *Id.* at 7-1 to -2.

[320] *Id.* at 7-2.

[321] *See Taxpayers of Michigan Against Casinos v. Norton,* 433 F.3d 852, 864 (D.C. Cir. 2006) (quoting *Grand Canyon Trust v. Federal Aviation Administration,* 290 F.3d 339, 341, 346 (D.C. Cir. 2002)).

[322] DEIS at 7-43. According to the DEIS significance ranking system, the cumulative impacts from other past, present, and reasonably foreseeable future actions on air quality resources in the geographic areas of interest would be moderate, and the incremental contribution of impacts on air quality resources from proposed STP Units 3 and 4 would be small. *See id.* at 7-45.

[323] *Id.* at 7-44.

[324] U.S. Global Change Research Program, Global Climate Change Impacts in the United States (Thomas R. Karl et al. eds., 2009) (ADAMS Accession No. ML100580077), *available at* http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf [hereinafter GCRP Report], *cited by* DEIS at 7-44.

[325] DEIS at 7-44.

EPA, the U.S. agency with the primary role in evaluating GHG emissions, relied on this GCRP Report in its assessment of climate change.[326]

Rather than challenging the DEIS conclusions that proposed STP Units 3 and 4 would cause minimal cumulative impact, Intervenors challenge the DEIS characterization of the worldwide impacts of GHG emissions as "noticeable, but not destabilizing." In support of this claim, Intervenors assert this DEIS conclusion contradicts EPA's characterization of the worldwide impacts of GHG emissions. According to Intervenors, "[i]t's hard to conclude that changes in temperature that 'can disrupt a wide range of natural processes' and 'cause illness and death in vulnerable populations' are not destabilizing."[327]

Intervenors for the first time in their reply and later at oral argument assert that they filed proposed contention DEIS-2 in response to new information, specifically the publication of the EPA Report in April 2010.[328] Specifically, Intervenors claim that the EPA Report now relies upon better climate change indicators than it would have in the past.[329] But Intervenors do not connect the purported new information to their proffered contention. That is, Intervenors do not explain how the EPA's use of better climate change indicators contradicts the DEIS characterization of the worldwide impacts by GHG emissions as "noticeable, but not destabilizing."[330] As Intervenors articulate their contention, they could have filed their proposed contention any time before publication of the EPA Report.

Moreover, Intervenors offer no explanation as to how EPA's use of better climate change indicators contradicts the DEIS and results in the DEIS (1) artificially reducing the contribution of proposed STP Units 3 and 4 to the worldwide GHG inventory or (2) improperly restricting the comparison of renewable generating alternatives, such as wind, solar, and geothermal. Not only do Intervenors fail to establish the nexus, but they likely could not. As a practical matter, the DEIS assessment of the annual GHG emission rate from a nuclear power plant is independent of the DEIS characterization of the cumulative worldwide impact of GHG emissions.[331] And Intervenors' DEIS-2-A arguments appear to center not

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[326] *See* Applicant Answer, Attach 7, Environmental Protection Agency, Climate Change Indicators in the United States 68 (Apr. 2010) ("Assessment reports from the Intergovernmental Panel on Climate Change and the U.S. Global Change Research Program have linked many of these changes to increasing greenhouse gas emissions from human activities, which are also documented in this report."), *available at* http://www.epa.gov/climatechange/indicators/pdfs/CIconclusion.pdf [hereinafter EPA Report].

[327] David Power Report at 8-9 (citing DEIS at 7-44).

[328] *See* Tr. at 1163, 1180. Intervenors previously indicated their "new contentions . . . are derived from the [DEIS]." *See* Motion for New Contentions at 1.

[329] *See* New Contentions Reply at 3; Tr. at 1181.

[330] *See* New Contentions Reply at 3; Tr. at 1181.

[331] *Compare* DEIS at 7-44 (comparison of annual carbon dioxide emission rates) *and* DEIS Appendix I (noting that the carbon dioxide footprint estimates for a 1000-MW(e) light water reactor were based

(Continued)

on the EPA's recent pronouncement of better climate change indicators, but on NRC Staff's discretion in narrowing the comparison of viable NEPA alternatives to baseload power generators.[332] Even so, Commission case law provides that NRC Staff may "accord[ ] substantial weight" to the stated purpose of the project, i.e., to provide additional baseload electrical generation capacity for use in the owner's current markets and/or for potential sale on the wholesale market.[333] For the above reasons, Intervenors' reference to the EPA Report does not support the admissibility of proposed contention DEIS-2.[334]

b. DEIS-2-B Arguments

With DEIS-2-B, Intervenors claim the DEIS does not consider "increased salinity of . . . water [from the Colorado River] on plant operations" even though it could have "adverse effects on plant operations."[335] Specifically, Intervenors maintain the DEIS fails to analyze the "impact of the salt water incursion into the Reservoir Makeup Pumping Facility or the increased salinity of the groundwater used for makeup."[336] Were such increased salinity to occur, Intervenors assert "the current freshwater-based cooling system will be subject to corrosion and may become inoperable or need to be replaced by a desalinization facility."[337]

Intervenors largely do not address the timeliness criteria of 10 C.F.R. § 2.309(c) and 10 C.F.R. § 2.309(f)(2) for the information relied upon in DEIS-2-B.[338] Once again, Intervenors for the first time at oral argument assert that they filed proposed contention DEIS-2 in response to new information, specifically the publication

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on summing the individual carbon emissions from each stage of the life cycle) *with* DEIS at 7-44 (noting that the national and worldwide cumulative impacts of GHG emissions were based on the GCRP report).

[332] *See* Motion for New Contentions at 5-6.

[333] *See* 68 Fed. Reg. at 55,909 (citing *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001)); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806-08 (2005) (excluding the energy efficiency alternative because it would not advance the applicant's goals), *aff'd, Environmental Law and Policy Center v. NRC,* 470 F.3d 676 (7th Cir. 2006).

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

[335] Motion for New Contentions at 6 (citing U.S. Nuclear Regulatory Commission, Information Notice No. 84-71: Graphitic Corrosion of Cast Iron in Salt Water (Sept. 6, 1984) (ADAMS Accession No. ML082700134), *available at* http://www.nrc.gov/reading-rm/doc-collections/gen-comm/info-notices/1984/in84071.html and Applicant Answer, Attach. 26, John A. Nelson, The Marley Cooling Tower Company, Cooling Towers & Salt Water (Nov. 5, 1986) (republished SPX Cooling Technologies, 2005), *available at* http://spxcooling.com/pdf/CTs-and-Salt-Water.pdf.

[336] David Power Report at 10.

[337] *Id.*

[338] *See supra* note 203.

of the EPA Report in April 2010.[339] Yet although Intervenors at oral argument asserted their DEIS-2-B arguments were based on the EPA Report, they made no reference to the EPA Report in articulating their argument. Instead, Intervenors referenced the GCRP Report from 2009, an NRC Information Notice from 1984, and sales literature regarding cooling towers from 1986.[340] Therefore, Intervenors have failed to show what information arose within 30 days of the date this new proposed contention was filed, and so it must be measured by the 10 C.F.R. § 2.309(c)(1) criteria. But Intervenors have not justified their nontimely filing under 10 C.F.R. § 2.309(c)(1),[341] even though they bear the burden of doing so.[342] Intervenors essentially conceded as much during oral argument, noting that contention DEIS-2 relative to their salinity arguments is just a "refinement" of prior-Contention 11, without the support of any new information or difference between the DEIS and the ER.[343] As such, Intervenors' DEIS-2-B arguments do not support the admissibility of proposed contention DEIS-2.

c. DEIS-2-C Arguments

With DEIS-2-C, Intervenors claim the DEIS failed to compare the cumulative impacts on surface water quality of a nuclear plant on the STP site with similar impacts resulting from the use of renewable energy sources, i.e., wind, solar, and geothermal. According to Intervenors, this omission in the DEIS distorts the relative advantages of nuclear power.

Intervenors largely do not address the timeliness criteria of 10 C.F.R. § 2.309(c) and 10 C.F.R. § 2.309(f)(2) for the information relied upon in DEIS-2-C.[344] Once again, Intervenors for the first time at oral argument assert that they filed proposed contention DEIS-2 in response to new information, specifically the publication of the EPA Report in April 2010.[345] Yet although Intervenors at oral argument asserted their DEIS-2-C arguments were based on the EPA Report, they made no reference to the EPA Report in articulating their argument, instead exclusively citing the DEIS.[346] As a contention based on "new information," Intervenors have failed to show what information arose within 30 days of the date this new

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[339] *See* Tr. at 1180. Intervenors previously indicated their "new contentions . . . are derived from the [DEIS]." *See* Motion for New Contentions at 1.

[340] *See* Motion for New Contentions at 6; David Power Report at 9-10.

[341] *See* Tr. at 1169-71, 1180-81.

[342] *See supra* note 227.

[343] *See* Tr. at 1171-77.

[344] *See supra* note 203.

[345] *See* Tr. at 1180. Intervenors previously indicated their "new contentions . . . are derived from the [DEIS]." *See* Motion for New Contentions at 1.

[346] *See* Motion for New Contentions at 6.

proposed contention was filed. As a contention based on the DEIS, Intervenors have failed to show what data or conclusions in the DEIS differ significantly from the Applicant's ER. Intervenors conceded the latter during oral argument, noting that the DEIS and ER are "essentially the same" with respect to their assessment of impacts on surface and groundwater.[347] However, in either case, whether filed in response to new information or the DEIS, the contention must be measured by the 10 C.F.R. § 2.309(c)(1) criteria. But, Intervenors have not justified their nontimely filing under 10 C.F.R. § 2.309(c)(1),[348] even though they bear the burden of doing so.[349] As such, Intervenors' DEIS-2-C arguments do not support the admissibility of proposed contention DEIS-2.

d. DEIS-2-D Arguments

With DEIS-2-D, Intervenors claim the DEIS fails to consider the effects of global warming on the availability and temperature of cooling water required to operate proposed STP Units 3 and 4.[350] As a consequence, according to Intervenors, the DEIS overstates the advantages of nuclear power and understates environmental impacts, such as the risk of noncompliance with thermal discharge limits.[351]

Intervenors largely do not address the timeliness criteria of 10 C.F.R. § 2.309(c) and 10 C.F.R. § 2.309(f)(2) for the information relied upon in DEIS-2-D.[352] Once again, Intervenors for the first time at oral argument assert that they filed proposed contention DEIS-2 in response to new information, specifically the publication of the EPA Report in April 2010.[353] Yet although Intervenors at oral argument asserted their DEIS-2-D arguments were based on the EPA Report, they made no reference to the EPA Report in articulating their DEIS-2-D arguments, instead citing the DEIS, the 2009 GCRP Report, and two studies by the University of Texas, published in 2009 and 2008.[354] To the extent this contention is based on "new information," Intervenors have failed to show what information arose within

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[347] *See* Tr. at 1173.

[348] *See* Tr. at 1173, 1176, 1180.

[349] *See supra* note 227.

[350] *See* Motion for New Contentions at 6; David Power Report at 10-11. According to Intervenors, their discussion of "increased ambient air . . . temperatures" relates to their discussion of "higher [cooling water] temperatures" because of "the impact of increased ambient temperature on the temperature of the cooling water reservoir." *See* David Power Report at 10.

[351] *See* David Power Report at 10-11.

[352] *See supra* note 203.

[353] *See* Tr. at 1180. Intervenors previously indicated their "new contentions . . . are derived from the [DEIS]." *See* Motion for New Contentions at 1.

[354] *See* Motion for New Contentions at 6; David Power Report at 10-11.

30 days of the date this new proposed contention was filed. To the extent this contention is based on the DEIS, Intervenors have failed to show what data or conclusions in the DEIS differ significantly from the Applicant's ER. Intervenors essentially conceded as much during oral argument, agreeing that they identified no new information or differences between the DEIS and ER with respect to the effects of global warming on the availability and temperature of cooling water for the operation of STP Units 3 and 4.[355] Therefore, the contention must be measured by the 10 C.F.R. § 2.309(c)(1) criteria. But, Intervenors have not justified their nontimely filing under 10 C.F.R. § 2.309(c)(1),[356] even though they bear the burden of doing so.[357] As such, Intervenors' DEIS-2-D arguments do not support the admissibility of proposed contention DEIS-2.

3. DEIS-3 (Comparison of Greenhouse Gas Emissions)

> *Contention DEIS-3*: The DEIS fails to compare the CO2 emissions of the UFC [uranium fuel cycle] to the CO2 emissions of wind and solar power.[358]

Intervenors contend the DEIS does not adequately compare the GHG emissions of the UFC with the GHG emissions of renewable energy sources, such as wind and solar.[359] For example, Intervenors claim the DEIS lacks a "meaningful discussion" because it does not quantitatively compare the GHG emissions of the UFC with the GHG emissions of renewable energy sources.[360]

Intervenors argue the DEIS "mistakenly assumes that alternatives such as wind, solar and geothermal (or combinations thereof) are not viable baseload alternatives."[361] As support for their assertion that such renewable energy sources are viable baseload alternatives, Intervenors rely upon a series of press releases that discuss compressed air energy storage (CAES) projects.[362]

Under NEPA, NRC Staff must consider the cumulative impact of GHG emissions from a proposed facility.[363] NRC Staff maintains it has done precisely that in the DEIS. In reaching its conclusion that the cumulative impacts of GHG

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[355] *See* Tr. at 1169, 1172.

[356] *See* Tr. at 1169, 1172, 1180.

[357] *See supra* note 227.

[358] Motion for New Contentions at 7-8.

[359] *See id.* at 7.

[360] *See id.* Although offering their contention as one of omission, Intervenors appear to concede that the DEIS compares GHG emissions between nuclear power and renewable alternatives. *See id.* (citing DEIS § 9.2.5 and DEIS Appendix I).

[361] Motion for New Contentions at 7.

[362] *See* Motion for New Contentions at 7-8; David Power Report at 6-7.

[363] *See William States Lee III,* CLI-09-21, 70 NRC at 931.

emissions from proposed STP Units 3 and 4, "for the full plant lifecycle [would be] minimal,"[364] the DEIS asserts that a nuclear plant at the STP site would result in the "lowest level of emissions of [GHG] among the viable alternatives."[365] Moreover, according to the DEIS, because the proposed "objective is for a new baseload generation facility, a fossil energy source, most likely coal or natural gas, would need to be a significant contributor to any reasonable alternative energy combination."[366]

Contrary to Intervenors' assertion, the DEIS does compare the GHG emissions of nuclear generation (considering the UFC) with the GHG emissions of various generating alternatives and combinations thereof. The DEIS analyzes renewable energy sources, including wind, solar, and hydropower, by comparing their GHG emissions to those of nuclear power.[367] The DEIS focuses on GHG emissions from renewable energy sources during their construction (including workforce transportation) and decommissioning.[368] In the estimation of NRC Staff, total GHG emissions associated with renewable energy sources would have minimal cumulative impact.[369] With respect to other alternative sources, including combustion of oil, wood waste, municipal solid waste, or biomass-derived fuels, the DEIS concludes that these would produce GHG emissions from combustion similar in magnitude to traditional fossil-fuel generating alternatives (e.g., coal or natural gas).[370] The DEIS stops there, however.

NRC Staff has the discretion to distinguish between baseload sources and non-baseload sources.[371] At this point, NRC Staff deems viable only those baseload power alternatives that utilize at least some fossil fuel source, i.e., NRC Staff claims it has not discovered any viable renewable-only energy system that pro-

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[364] DEIS at 7-43. According to the DEIS significance ranking system, the cumulative impacts from other past, present, and reasonably foreseeable future actions on air quality resources in the geographic areas of interest would be moderate, and the incremental contribution of impacts on air quality resources from STP Units 3 and 4 would be small. *See id.* at 7-45.

[365] *See id.* at 9-31. The DEIS reached the same conclusion, i.e., that the nuclear alternative would produce the lowest GHG emissions, comparing the alternatives both during their operating lives as well as during their entire life cycle (for nuclear facilities, this includes the uranium fuel cycle). *See id.* at 9-29.

[366] *Id.* at 9-27.

[367] *See id.* at 9-30.

[368] *See id.*

[369] *See id.*

[370] *See id.* at 9-30, 9-31.

[371] *See Clinton ESP,* CLI-05-29, 62 NRC at 810 ("Because a solely wind- or solar-powered facility could not satisfy the project's purpose, there was no need to compare the impact of such facilities to the impact of the proposed nuclear plant."). Under NEPA, an agency need not compare the environmental impacts of the proposed action with the environmental impacts of alternatives that are not reasonable or feasible. *See, e.g., Fuel Safe Washington v. Federal Energy Regulatory Commission,* 389 F.3d 1313, 1323 (10th Cir. 2004).

duces baseload power.[372] Therefore, as described in the DEIS, only in combination with a fossil fuel backup power supply can solar and wind provide baseload power. For example, the DEIS evaluates a representative, cost-effective combination of alternatives capable of providing baseload power, such as hydropower, biomass sources, conservation and demand-side management, and wind power, supplemented with natural gas. It concludes that this alternative would produce approximately 190,000,000 metric tons of carbon dioxide during operation and result in small to moderate impacts on air quality.[373] This alternative, however, would produce substantially more GHG emissions than nuclear power which, according to the DEIS, would produce only 20,000 metric tons of carbon dioxide emissions during operation, something the DEIS characterizes as a small impact on air quality.[374]

Nonetheless, Intervenors proceed to argue that renewable sources alone can produce baseload power in combination with a CAES system.[375] However, Intervenors do not address the DEIS discussion of such combinations. In Chapter 9, the DEIS evaluates the use of CAES in combination with wind generation, identifying two existing CAES plants (one of which would generate 290 MW, the other 110 MW), as well as a proposal for a 268-MW CAES plant in Iowa.[376] However, the DEIS maintains that neither of the existing CAES plants produces baseload power,[377] nor has a CAES facility been contemplated that generates the 2700-MW baseload capacity of proposed STP Units 3 and 4. On that basis, the DEIS concludes that CAES in conjunction with wind power is not likely to produce 2700 MW of baseload power in Texas.[378] What support Intervenors do offer for a renewable-CAES baseload facility is vague and uninformative.[379] Consequently,

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[372] *See* DEIS at 9-27, 9-31.

[373] *See id.* at 9-30.

[374] *See id.*

[375] Intervenors largely track arguments they previously made in support of their original Contention 23, where they claimed, *inter alia,* that STP's ER improperly excluded renewable energy alternatives from comparison as intermittent and too unreliable for baseload power. *See* LBP-09-21, 70 NRC at 620-27. We found that contention inadmissible because it neither disputed the ER's evaluation of alternatives nor did it offer any information suggesting the feasibility of renewable alternatives providing baseload power. *Id.,* 70 NRC at 625-26.

[376] *See* DEIS at 9-21.

[377] *See* Applicant Answer, Attach. 20, Boise State University, Overview of Compressed Air Energy Storage at 2 (Dec. 2007), *available at* http://coen.boisestate.edu/WindEnergy/resources/ER-07-001.pdf.

[378] *See* DEIS at 9-21.

[379] For example, Intervenors rely upon press releases announcing two agreements — one between ConocoPhillips and General Compression and a second between Shell and Luminant — to claim that

(Continued)

in light of the facts that (1) NRC Staff performed the allegedly omitted comparison of GHG emissions from renewable sources, and (2) Intervenors provide no legal support for the claim that NRC Staff is required to further quantitatively compare the GHG emissions of renewable sources, Intervenors' proposed contention fails for lack of legal support.[380]

4. DEIS-4 (Greenhouse Gas Mitigation)

Contention DEIS-4: The DEIS analysis of STP 3 & 4 construction impacts related to GHG emissions assumes appropriate mitigation measures would be adopted but

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CAES units support baseload generation. *See* David Power Report at 6-7 (citing General Compression, Expanding Clean Power, http://www.generalcompression.com/gcaes.html) and ConocoPhillips Announcement and Luminant Announcement). But the announcements specify no construction or operation schedule. The announcement by ConocoPhillips and General Compression indicates merely that the companies have agreed "to develop compressed air energy storage projects," beginning with the "evaluat[ion of] a multi-phase pilot project in Texas." *See* ConocoPhillips Announcement. The announcement by Shell and Luminant only indicates that the companies "will . . . explore the use of compressed air storage." *See* Luminant Announcement. In sum, neither announcement indicates that a CAES facility is likely to be built in the immediately foreseeable future in Texas.

Intervenor's reliance on a National Renewable Energy Laboratory concept poster and comments from Raymond Dean is similarly misplaced. *See* Applicant Answer, Attach. 18, National Renewable Energy Laboratory, Creating Baseload Wind Power Systems Using Advanced Compressed Air Energy Storage Concepts, (Oct. 3, 2006), *available at* http://www.nrel.gov/docs/fy07osti/40674.pdf [hereinafter NREL Poster], *cited by* Motion for New Contentions at 8; Motion for New Contentions, Attach. E, Raymond H. Dean, Ph.D., Comments Regarding Luminant's Revision to the Comanche Peak Nuclear Power Plant, Units 3 & 4 COL Application Part 3 Environmental Report, at 4-5 [hereinafter Dean Report], *cited by* David Power Report at 7. The NREL Poster discusses wind generation combined with CAES as only a "concept." *See* NREL Poster. The NREL Poster proceeds to explain the conceptual nature of the technology by noting that "[d]evelopment of the 'baseload' wind concept will require a greater understanding of the local geologic compatibility of air storage, and additional work will be required to examine the feasibility of advanced wind/CAES concepts described here." *See* NREL Poster. And the Dean comments offer only theoretical suggestions regarding the combination of CAES with another source, without identifying any existing baseload CAES facilities. *See* Dean Report at 4-5. But in order to challenge an EIS, an intervenor must provide more than just conclusory statements or anecdotal references; there must be supporting facts or detail. *See Summer,* CLI-10-1, 71 NRC at 18-19 & n.84.

[380] *See* 10 C.F.R. § 2.309(f)(1)(vi). Additionally, Intervenors fail to explain why the contention should be considered timely under section 2.309(f)(2) and how their filing satisfies the nontimely filing criteria under section 2.309(c)(1). Intervenors conceded as much during oral argument, agreeing that they identified no new information or differences between the DEIS and ER with respect to comparing the GHG emissions of the uranium fuel cycle (UFC) with the GHG emissions of alternative generating sources, such as wind and solar power, even though they claim to have based DEIS-3 on a difference between the ER and DEIS. *See* Tr. at 1186-88. As such, Intervenors submit DEIS-3 nontimely, but do not address the nontimely filing criteria of 10 C.F.R. § 2.309(c)(1), even though they bear the burden of doing so. Consequently, proposed contention DEIS-3 is nontimely, and hence inadmissible for this additional reason.

fails to discuss what mitigation measures would be available to minimize GHG emissions during construction.[381]

Intervenors contend that, in contravention of 10 C.F.R. § 51.70(b), the DEIS is not sufficiently "analytic" in its discussion of the impact of GHG emissions during construction. As grounds for this claim, Intervenors assert the DEIS "makes no attempt to determine what mitigation measures/alternatives are available [during the construction phase] let alone what actual effects on GHG emissions would be realized by such."[382]

The Board notes that Intervenors' proposed contention is based on a misreading of the DEIS — as counsel for Intervenors conceded during oral argument[383] — that conflates the DEIS discussion of GHG emissions with the DEIS discussion of overall air quality. In addressing overall air quality, the DEIS states "impacts from STP Units 3 and 4 construction and preconstruction activities *on air quality* would not be noticeable because *appropriate mitigation measures would be adopted*."[384] But, in assessing GHG emissions, (principally CO_2), the DEIS estimates that the "total construction equipment CO_2 emission footprint for building two nuclear power plants at the STP site would be of the order of 70,000 metric tons, as compared to a total United States annual CO_2 emission rate of 6,000,000,000 metric tons."[385] On that basis, the DEIS concludes that the "impacts of [GHG emissions] from construction and preconstruction activities would not be noticeable and no additional mitigation would be warranted."[386]

In light of the facts that (1) Intervenors have not sought to challenge the DEIS conclusion that no mitigation of GHG emissions is warranted for preoperational activities, and (2) the overall air quality mitigation measures are focused on pollutants other than GHG emissions, e.g., fugitive dust,[387] there is nothing in dispute in this regard. Consequently, there being no genuine dispute of material fact, this contention may not be admitted.[388]

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[381] Motion for New Contentions at 8-9.

[382] *Id.* at 8-9.

[383] *See* Tr. at 1203.

[384] DEIS at 4-63 (emphasis added).

[385] *Id.*

[386] DEIS at 4-63; *see also id.* at 4-64 (same conclusion for construction workforce transportation); DEIS at 4-65 ("[T]he review team concludes that the impacts of STP site development on air quality from emissions of criteria pollutants and CO_2 emissions are SMALL and that no further mitigation is warranted.").

[387] *See id.* at 4-62 to 4-63.

[388] *See* 10 C.F.R. § 2.309(f)(1)(vi). Initially, Intervenors asserted that proposed contention DEIS-4 was based on a difference between the DEIS and the ER. *See* Tr. at 1197. But once conceding their

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5. DEIS-5 (Climate Change)

> *Contention DEIS-5*: The DEIS conclusion that impacts caused by changes in global climate change "may not be insignificant" fails to meet the requirements of 10 CFR 51.70(b) to be "clear and analytic".[389]

Intervenors contend that, in contravention of 10 C.F.R. § 51.70(b), the DEIS is not sufficiently "clear and analytic" in concluding, on the one hand that climate change impacts are "not insignificant," and on the other that the cumulative impacts on groundwater use and nonradiological health are small.[390] During oral argument, NRC Staff explained that the DEIS characterization of climate change impacts as "not insignificant" referred to global conditions, while its characterization of groundwater use and nonradiological health impacts as "small" referred to local conditions at the STP site.[391] Accordingly, there being no genuine dispute of material fact, we will not admit proposed contention DEIS-5.[392] Nevertheless, we urge NRC Staff to clarify in the Final EIS that the phrase "not insignificant" refers to global climate change, while "small" refers to the impacts on local groundwater and radiological health.

6. DEIS-6 (Water Needs)

> *Contention DEIS-6*: The DEIS analysis of surface water availability fails to account for the sale of 19,356 acre ft/yr from the Colorado River to the Las Brisas coal-fired power plant.[393]

Intervenors contend that the DEIS fails to account for the sale of 19,356 acre-feet/year of water from the Colorado River for use by the Las Brisas Energy Center.[394] As a consequence of this omission, Intervenors claim the DEIS does not adequately analyze the availability of makeup water from the Colorado River for proposed STP Units 3 and 4.

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error at oral argument, it is beyond dispute that Intervenors show no material difference between the DEIS and the ER with respect to GHG mitigation measures. *See* Tr. at 1203. As such, DEIS-4 was also nontimely, and hence inadmissible for that reason as well. *See* 10 C.F.R. § 2.309(f)(2)(ii).

[389] Motion for New Contentions at 9-10.

[390] *See id.*

[391] *See* Tr. at 1205.

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

[393] Motion for New Contentions at 10-11.

[394] *See* Motion for New Contentions at 10-11; David Power Report at 1, 11-12. Las Brisas is a proposed power plant that would be fueled by petroleum coke, a product of refining oil. *See* Applicant Answer, Attach. 8, *Corpus Christi City Council to Discuss Las Brisas Water Incentives,* Corpus Christi Caller (Mar. 26, 2010), *available at* http://www.caller.com/news/2010/mar/26/corpus-christi-city-council-to-discusslas-water/.

Contrary to Intervenors' allegation, the DEIS does account for the sale of water rights to the Las Brisas plant.[395] The water right at issue is a portion of the Garwood water right owned by the city of Corpus Christi.[396] This water right is accounted for in the 2006 Lower Colorado Regional Water Planning Group (LCRWPG) Region K Water Plan.[397] The DEIS relies upon this plan in assessing the surface water use impacts of proposed STP Units 3 and 4.[398] Specifically, the LCRWPG Plan states: "Water rights are considered property rights and can be bought, sold, or transferred with state approval . . . . Water availability will be based on the assumption that all senior water rights in the basin are being fully utilized. That is, water user groups cannot depend on 'borrowing' water from unused water rights."[399] Consequently, the sale of the Corpus Christi Garwood water right to the Las Brisas plant would not alter the conclusions in the DEIS, because use of this water is already accounted for in the LCRWPG Plan and the DEIS.[400]

Intervenors, having failed to provide adequate factual or legal support for this proposed contention, do not raise a genuine dispute as to material fact or law.[401]

V. CONCLUSION

For the foregoing reasons:

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[395] By this we mean the DEIS accounts for the ability to sell the water rights at issue, either now or in the future, given Texas's water management laws. Although the timing of the sale does not affect our analysis, as of the date of the pleadings, Corpus Christi had apparently not yet sold water rights to the Las Brisas plant. *See* Applicant Answer, Attach. 24, Denise Malan, *Corpus Christi Council Gives City Manager Authority to Sell Water to Las Brisas Energy Center,* Corpus Christi Caller Times (May 11, 2010), *available at* http://www.caller.com/news/2010/may/11/corpus-christi-council-gives-city-manager-to-to/.

[396] *See* Applicant Answer, Attach. 22, Fanny S. Chirinos, *Las Brisas Proposes Water Pipeline,* Corpus Christi Caller Times (Feb. 11, 2009), *available at* http://www.caller.com/news/2009/feb/11/las-brisas-proposes-water-pipeline/?print=1.

[397] *See* Applicant Answer, Attach. 23, Lower Colorado Regional Water Planning Group, 2006 Region "K" Water Plan for the Lower Colorado Regional Water Planning Group, at 3-12 (Jan. 2006), *available at* http://www.twdb.state.tx.us/rwpg/2006_RWP/RegionK/Chapter%203.pdf (identifying major run-of-the-river rights in the Colorado Basin) [hereinafter LCRWPG Plan].

[398] Specifically, the DEIS relies upon the LCRWPG Plan in section 2.3.2.1, which "serves as a baseline for the [DEIS] cumulative impacts assessments [regarding surface water use]." DEIS 7-9; *see also* DEIS 2-33 ("The total water demand for Matagorda County includes the STPNOC water rights of 102,000 ac-ft per year (LCRWPG 2006).").

[399] LCRWPG Plan at 3-2.

[400] *See* Tr. at 1210-13.

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

A. Intervenors' challenge to NRC Staff's denial of documentary access is *moot.*

B. The Applicant's motion for summary disposition of Contention CL-2 is *denied.*

C. NRC Staff's motion for summary disposition of Contention CL-2 is *denied.*

D. Proposed Contention DEIS-1 is *admitted, as narrowed by the Board.*

E. Proposed Contentions DEIS-2 through 6 are *inadmissible* and, as such, will not be further considered in this proceeding.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

Gary S. Arnold
ADMINISTRATIVE JUDGE

Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 28, 2011

Dissenting Opinion of Judge Gary S. Arnold

While I agree with my colleagues concerning most of this Order, I would grant Applicant's motion for summary disposition. As the Order points out, there is no purpose for further refining a SAMDA analysis,

> [u]nless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-beneficial conclusions for the SAMA analysis candidates evaluated.[402]

In this case, Applicant has demonstrated that even if every claim made by Intervenor is true, no SAMDA becomes cost-effective.

The claims made by Intervenors are:

1. The 1991 cost of the SAMDAs should be projected to the year 2009 using a refined Core Index of Personal Consumption Expenditures to a 2009 cost of $131,000.[403]
2. Replacement power costs should be based on actual ERCOT prices and should not use 2009 prices which are nonrepresentatively low.
3. Applicant's understatement of market effects is unrealistic.[404] Applicant's expert provides suggestions for better incorporation of market effects.
4. "Applicant's conclusions related to the effect of price spikes are understated."[405]
5. "Applicant's assessment of the consequences of the loss of the grid[406] understate the economic effects from such an occurrence."[407]

The table below extracts from the affidavit supplied with Applicant's Motion calculated expected benefits of the lowest cost SAMDAs using several assumptions. The last row in this table incorporates claims 2-5 made by Intervenors, and hence represents the greatest SAMDAs savings that could be obtained if all of Intervenors claims were found valid.

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[402] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 317 (2010).

[403] *See* Intervenors' Response to Applicant's Motion for Summary Disposition of Contention CL-2 (Oct. 8, 2010) at 4-5 [hereinafter Intervenor Answer to Applicant Motion].

[404] *Id.* at 6.

[405] *Id.* at 7.

[406] A loss of grid does not affect "replacement power cost," but instead should be included in offsite economic costs. Hence, strictly speaking, this cost is out of scope of this contention. However, to be generous to Intervenors, it is considered herein.

[407] Intervenor Answer to Applicant Motion at 8.

Table/ Paragraph[408]	Characteristics	3% Discount Rate[409]	7% Discount Rate
1	NUREG/BR-0184 in 1993 dollars	$23,015	$13,377
2	NUREG/BR-0184 in 2009 dollars	$28,656	$16,945
3	2009 ERCOT pricing in 2009 dollars	$40,783	$24,615
4	2008 ERCOT pricing in 2009 dollars	$82,416	$50,947
5	Johnson Report Pricing	$57,351	$35,094
6	2008 ERCOT pricing with NINA accounting for market effect in 2009 dollars	$83,972	$51,930
¶ 58	2008 ERCOT pricing with Johnson Report accounting for market effects in 2009 dollars	$103,139	$71,669
¶ 65	2008 ERCOR pricing with Johnson Report accounting for market effects and 20% effect for price spikes in 2009 dollars	$134,971	$103,501
¶ 74	2008 ERCOR pricing with Johnson Report accounting for market effects, 20% effect for price spikes and loss of grid in 2009 dollars	$141,211	$109,741

Although Intervenors challenge Applicant's use of a 3% discount rate in its sensitivity calculations, they fail to challenge the use of a 7% discount rate in Applicant's main calculations. The term "sensitivity calculation" is typically used as a calculation to evaluate the effects of a change of input on the output of some function. A sensitivity calculation does not imply either a bounding calculation or the most realistic calculation. It has not been challenged in this proceeding that NEPA requires a realistic calculation, and not a worst-case calculation. The result of the main SAMDA benefit calculation, purportedly the most realistic calculation, is used for comparison with the SAMDA cost in the SAMDA analysis.[410] The sensitivity calculation is not used. Thus, in the table

[408] Table/paragraph numbers reference the tables or paragraphs in Joint Affidavit of Jeffrey L Zimmerly and Adrian Pieniazek submitted as Attachment 2 of STP Nuclear Operating Company's Motion for Summary Disposition of Contention CL-2 (Sept. 14, 2010) [hereinafter Applicant Joint Aff.].

[409] The 3% values represent a sensitivity calculation only. *See* STP Nuclear Operating Company's Motion for Summary Disposition of Contention CL-2 (Sept. 14, 2010) at 27.

[410] Applicants' use of the 3% discount rate value for comparison in its motion is perplexing. But their incorrect comparison is no reason why we should similarly err.

above, it is the figures in the rightmost column that must be used in the cost/benefit comparison of the SAMDA analysis. Intervenors have not challenged this. This leads to a cost/benefit analysis, assuming all of Intervenors' claims are correct, of a SAMDA cost of $131,000 versus an expected benefit of only $109,741. Hence, even if all of Intervenors' claims were found to be true, no new SAMDAs would be found cost-effective.

This conclusion is made without any weighing of evidence; I simply assume Intervenors to be correct on every claim they make. Applicant's Motion contains the calculation of SAMDA expected savings for this condition, and it is less than the cost of implementation put forth by Intervenors. There can be no other conclusion than that assuming all Intervenors' claims are correct, there is no genuine issue as to any material fact and Applicant is entitled to a decision as a matter of law.

Applicant provides additional information that illustrates that the SAMDA cost-benefit comparison strongly demonstrates that there exists no cost-beneficial SAMDA. In the Affidavit, Applicant submitted with the motion, the conservatism associated with the calculated averted cost of a severe accident used in the SAMDA analysis was explained:

> 14. This methodology of comparing the costs and benefits for a SAMDA is conservative, because in actuality there are no SAMDAs that would prevent all severe accidents, and therefore there will always be some cost-risk that cannot be averted. In other words, implementing a SAMDA will not realize all of the benefits of avoiding the severe accidents, but will only achieve a portion of those benefits. Therefore, if the benefits of a SAMDA are shown to be higher than the cost of a SAMDA using the above methodology, then further evaluation would be necessary to determine how much of the benefit actually would be achieved by implementing the SAMDA (i.e., how much the severe accident risk would be reduced by the SAMDA).[411]

A quantification of the conservatism associated with this assumption was provided at oral argument. Regarding the assumption that a SAMDA would avert all severe accident costs, Applicant stated:

> that's also an extremely conservative assumption. For example, there are approximately, I believe, four different SAMDAs that cost less than $299,000. The best one, the very best one, only mitigates around 2 percent of the total core damage frequency.[412]

[411] Applicant Joint Aff. ¶ 14.
[412] Tr. at 1084.

This was clarified at oral argument when Applicant was asked what Applicant's response would be if an additional SAMDA were found to be cost-effective:

> Oh, we would definitely refine our analysis and take advantage of the 2 percent cost. That's a factor of 50 right there, that when you apply that, there's obviously no cost-beneficial SAMDA, so we would simply refine — sharpen — our pencils and refine our analysis.[413]

In other words, the cost of a severe accident would have to increase by a factor of 50 before the SAMDA cost-benefit analysis could possibly indicate a cost-beneficial SAMDA.

Clearly the motion for summary disposition includes the concept that the SAMDA-calculated averted cost of a severe accident includes significant conservatism. Additionally it encompasses the concept that if an apparently cost-effective SAMDA were to be identified, a revision of the averted cost calculation would be used to demonstrated that the SAMDA was not, in fact, cost-effective. This was not challenged by Intervenors. In light of these facts it is difficult to fathom how this motion could be denied.

[413] Tr. at 1092.

APPENDIX CONCERNING NRC STAFF MOTION FOR SUMMARY DISPOSITION OF CONTENTION CL-2

We take this opportunity to explain a potential problem with applying the ABWR SAMDA analysis to other plants in the manner that NRC Staff suggests. As noted in our Order, NRC Staff's argument for summary disposition is based upon the design certification rule for the ABWR.[414]

Staff acknowledged in the DEIS that "[t]he technical support document does not contain a specific list of site parameters."[415] Thus NRC Staff had to use its own judgment to determine correct specific site parameters. NRC Staff asserts that "[t]he probability-weighted population dose risk parameter includes all of the site-specific information used in the evaluation of SAMDAs in the TSD, whereas the remaining values in the SAMDA evaluation are either constants or not related to the site."[416] The purpose of this Appendix is to explain that, in the Board's opinion, this assertion is likely erroneous.

A SAMDA analysis is performed to determine if there are any additional cost-effective design alternatives that would prevent or combat the effects of a severe accident. To be cost-effective, the cost of implementing the alternative must be less than the total averted expected cost of a severe accident.[417] In order to perform the SAMDA evaluation, one must have extensive knowledge of the various ways that costs can be incurred due to a severe accident. The costs to be considered are provided by the guidance document NUREG/BR-0184.[418] Although this reference was not available during performance of the ABWR SAMDA analysis, it now provides the current best guidance. The costs of an accident are enumerated within this document in the following sections:

5.7.1 Public Health — the cost due to exposing the public to radiation

5.7.3 Occupational Health — the cost due to exposing plant workers to radiation

5.7.5 Offsite Property — cost to remediate damage to offsite property

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[414] *See* NRC Staff Motion for Summary Disposition Motion (July 22, 2010) at 5 [hereinafter NRC Staff Summary Disposition Motion]; 10 C.F.R. Part 52, Appendix A, § VI.B & VI.B.7.

[415] *See* DEIS at 5-110.

[416] NRC Staff Summary Disposition Motion at 13.

[417] The expected cost of a severe accident is the sum over all possible severe accidents of the product of the probability of the specific accident times the cost of the consequences of the accident. The averted expected cost is the reduction in the expected cost due to implementing an alternative.

[418] *See* U.S. Nuclear Regulatory Commission, Office of Nuclear Regulatory Research, Regulatory Analysis Technical Evaluation Handbook, NUREG/BR-0184 (Jan. 1997) (ADAMS Accession No. ML050190193).

5.7.6 Onsite Property — cost to remediate damage to onsite property, which includes:

5.7.6.1 Cleanup and decontamination

5.7.6.2 Long-term replacement power

5.7.6.3 Repair and refurbishment

There might be additional costs associated with short-term replacement power and premature facility closure, but these will be neglected in this discussion. To be consistent with Table 7.3-1 of the STP ER, which addresses costs of a severe accident, we refer to these costs respectively as:

1. Offsite exposure cost (Public Health)
2. Onsite exposure cost (Occupational Health)
3. Offsite economic cost (Offsite Property)
4. Onsite cleanup cost (including cleanup, decontamination, repair, and refurbishment)
5. Replacement power costs

Evaluation of these costs requires some knowledge of the site and the area surrounding it. Determination of offsite exposure requires knowledge of the population density around the site. Onsite exposure costs are dependent on the number of people on the site. Offsite economic cost is dependent on the nature and amount of property surrounding the site. Calculation of onsite cleanup or equipment refurbishment requires knowledge of the amount and type of equipment onsite. And finally, calculation of replacement power cost requires knowledge of the amount of power that needs replacement.

By letter dated December 21, 1994, GE provided NRC Staff with details of the SAMDA analysis for the ABWR design certification.[419] This document provides the treatment of accident costs considered in the ABWR SAMDA analysis.

"[O]nsite costs including economic losses, replacement power costs and direct accident costs are considered in this evaluation as credits against the cost of the modification."[420] These onsite costs, including both onsite exposure and onsite cleanup, were calculated assuming a single ABWR plant with the number of onsite personnel appropriate for a single unit. "Replacement power was based

[419] Letter from J. F. Quirk, Project Manager, ABWR Certification, to R. W. Borchardt, Director, Standardization Project Directorate, U.S. Nuclear Regulatory Commission, Attach. 1, Technical Support Document for the U.S. ABWR (Dec. 21, 1994) (ADAMS Accession No. ML100210563) [hereinafter TSD].

[420] *See* TSD at 32.

on a rate of $.013/kW-h differential as bar cost."[421] The power-replacement cost was calculated as the product of the output of one ABWR times the duration replacement power was needed times this monetary factor. Thus the evaluations of onsite costs did not account for the greater number of personnel at the STP site (which would result in greater onsite exposure), the much larger value of equipment at STP, nor the much greater cost of replacing power from four reactors at the STP site.

GE stated, "Offsite factors evaluated were limited to health effects to the general public based on total exposure (in person-rem) to the population within 50 miles of the site."[422] "The offsite costs for other items such as relocation of local residents, elimination of land use and decontamination of contaminated land were not considered."[423] That is, the ABWR SAMDA considered offsite exposure cost, but did not consider the offsite economic cost.

The costs assumed by the ABWR SAMDA analysis and the costs that would have to be considered in a SAMDA analysis for the STP site are compared in the table below.

	ABWR SAMDA	**STP Site**
Offsite exposure cost[424]	4.5×10^{-3} person-rem/yr	4.2×10^{-3} person-rem/yr
Onsite exposure cost	Exposure to staff of a single ABWR	Exposure to staffs of two ABWRs and two PWRs
Offsite economic cost	Neglected	Small
Onsite cleanup cost	Appropriate for cleanup of one ABWR	Appropriate for cleanup of two ABWRs and two PWRs
Replacement power costs	For 1300 MWe	For up to 5420 MWe[425]

The Staff's assertion that population dose risk is the appropriate TSD site parameter to use for comparison with the STP site characteristics neglects major costs due to the STP site having four units instead of just one. This assertion appears in error. The appropriate site-specific parameter list that should have

[421] *Id.* at 33.

[422] *Id.* at 31.

[423] *Id.* at 32.

[424] In this table, the offsite exposure cost already accounts for the low probability of fission product release from an accident at an ABWR. Other costs in this table must be multiplied by this low probability before they are summed to yield the expected cost of a severe accident.

[425] The total electrical output of four STP units.

been present in the TSD, and against which the Staff should have judged the applicability of the ABWR SAMDA evaluation should have been:

Offsite exposure	Less than 4.5×10^{-3} person-rem/yr
No. of reactors onsite	one ABWR[426]
Offsite economic cost	negligible

It appears that proposed STP Units 3 and 4 would not fall within the correct site parameter envelope defined by the generic ABWR SAMDA evaluation. In fact, by Applicant's accounting, offsite exposure constitutes only about 1% of the cost of a severe accident while onsite cleanup cost and replacement power cost constitute 97% of the cost.[427] This strongly suggests that use of the offsite exposure cost alone as the criterion used to determine applicability of the ABWR SAMDA evaluation is likely to lead to an incorrect conclusion.

[426] The number of units onsite is site-specific information apparently not considered in NRC Staff's DEIS evaluation.

[427] *See* ER tbls. 7.3-1 and 7.3-5.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Eric J. Leeds, Director

In the Matter of **Docket No. 50-346**
(License No. NPF-3)

FIRSTENERGY NUCLEAR OPERATING COMPANY
(Davis-Besse Nuclear Power Station, Unit 1) **February 15, 2011**

The Petition requested that the NRC issue a Show Cause Order, or comparable enforcement action, preventing the DBNPS from restarting following the shutdown in February 2010, until adequate protection standards were met. As the basis for the April 5, 2010, request, the Petitioner states that FirstEnergy Nuclear Operating Company (the Licensee for DBNPS) has violated federal regulations and the explicit conditions of its operating license by operating for longer than 6 hours with pressure boundary leakage.

The final Director's Decision was issued on February 15, 2011. The Petitioner raised issues related to the DBNPS adequate protection standard regarding zero pressure boundary leakage and operation of the reactor at DBNPS. NRC Region III Inspection Report 05000346/2010-008(DRS) issued October 22, 2010 (ADAMS Accession No. ML102930380), focused on these concerns. The NRC Special Inspection Team was chartered to assess the circumstances surrounding the identification of the flaws in the RVCH CRDM nozzle penetrations at DBNPS.

The NRC has found the Licensee response to the identified conditions to be reasonable and technically sound. The NRC has reviewed in detail the CRDM nozzle cracking, as well as the circumstances surrounding the causes of this cracking and previous opportunities for identification and intervention. The NRC's inspection determined that the public health and safety have not been, nor are likely to be, adversely affected. The inspection determined that the Licensee conformed to the subject NRC regulatory requirements pertinent in this

circumstance and applicable to assessing the cause and effect of the CRDM nozzle cracking conditions.

Accordingly, NRC denied the Petitioner's requests as stated above.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter to R. William Borchardt, Executive Director for Operations at the U.S. Nuclear Regulatory Commission (NRC), regarding the Davis-Besse Nuclear Power Station, Unit 1 (DBNPS), dated April 5, 2010, David Lochbaum (the Petitioner) of the Union of Concerned Scientists (UCS) filed a Petition pursuant to Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 2.206, "Requests for Action Under This Subpart."

In a letter dated July 13, 2010, the NRC informed the Petitioner that it had denied his request for the issuance of a Show Cause Order, or comparable enforcement action, to the Licensee for the DBNPS that would prevent the reactor from restarting and that the issues in the Petition were being referred to the Office of Nuclear Reactor Regulation for appropriate action.

A. Action Requested

The Petitioner requested that the NRC issue a Show Cause Order, or comparable enforcement action, to the Licensee for the DBNPS in the state of Ohio, preventing the reactor from restarting until such time that the NRC determines that applicable adequate protection standards have been met and reasonable assurance exists that these standards will continue to be met after operation is resumed.

B. Petitioner's Bases for the Requested Action

The Petitioner states that the NRC's regulations and the operating license that the NRC issued for DBNPS define adequate protection standards, which include zero reactor coolant pressure boundary leakage during operation, with the requirement to shut down the reactor within 6 hours if such leakage exists. The Petitioner states that the Licensee for DBNPS has repeatedly violated federal regulations and the explicit conditions of its operating license by operating the reactor longer than 6 hours with pressure boundary leakage. In doing so, the Petitioner states that the public was exposed to elevated and undue risk.

The Petitioner compares a Show Cause Order previously issued to the Licensee of the Surry Nuclear Plant requiring both reactors to be shut down and remain

shut down until a potential safety problem was remedied. In the Surry case, the Petitioner states that nonconservative mistakes in computer studies prevented a determination that the adequate protection standard was met, and the NRC did not allow the reactors to operate until this shortcoming was rectified. The Petitioner states that in the DBNPS case, ample evidence clearly demonstrates that the adequate protection standard was not met on multiple occasions and that it is imperative for the NRC to act now to protect the public from an actual hazard as the NRC acted in the Surry case to protect the public from a potential one.

II. DISCUSSION

On March 12, 2010, during ultrasonic testing of reactor pressure vessel head control rod drive mechanism (CRDM) nozzles (while the reactor was in a cold shutdown mode), the Licensee identified certain nozzles that did not meet acceptance criteria. Additionally, the Licensee identified boric acid deposits on the reactor pressure vessel head that were indicative of reactor coolant system (RCS) leakage.

The circumstances associated with this cracking were evaluated against the criteria in Management Directive 8.3, "NRC Incident Investigation Program," and Inspection Manual Chapter 0309, "Reactive Inspection Decision Basis for Reactors." The NRC made the determination that a Special Inspection would be conducted on March 16, 2010, to evaluate the facts and circumstances surrounding the March 12, 2010, identification of cracks in the reactor vessel head control rod drive penetration nozzles and J-groove welds.

The Special Inspection Team reviewed selected procedures and records, observed activities, and interviewed personnel with a focus on the areas described in the Special Inspection Charter. The NRC confirmed that the nondestructive examinations of the nozzles and J-groove welds met NRC requirements and were successful in identifying cracks at an early stage, such that plant safety was not challenged. The NRC concluded that the Licensee for DBNPS had established a strong basis for the direct cause of this cracking, which was primary water stress-corrosion cracking (PWSCC). The NRC confirmed that appropriate nozzles were repaired in accordance with NRC requirements and concluded that the repaired vessel head was suitable to return to service. Further, based on crack growth analyses and the shortened operating period for the reactor vessel closure head (RVCH) (confirmed in Confirmatory Action Letter (CAL) 3-10-001, issued on June 23, 2010), the NRC concluded that margins existed such that the likelihood of PWSCC-induced nozzle leakage would remain low for the remaining planned RVCH operating service period. The CAL included a commitment by the Licensee to shut down the unit no later than October 1, 2011, to replace the reactor pressure vessel head with one manufactured using materials resistant to

PWSCC. The inspection report, which was issued October 22, 2010, documents the inspection results that were discussed with the Licensee at the exit meeting held on September 9, 2010, which was open to the public.

A self-revealed violation of Technical Specification (TS) 3.4.13, "RCS Operational Leakage," was identified. This violation was associated with pressure boundary leakage through cracked CRDM penetration nozzles during the prior operating cycle. As discussed in greater detail below, because the Licensee appropriately implemented its quality control program, and because this violation resulted from equipment failure that was not avoidable by reasonable Licensee quality assurance measures, the NRC elected to exercise enforcement discretion and not issue a violation.

The NRC reviewed the root cause analysis of the event and RCS leakage data from previous operating cycles and concluded that the equipment failure (cracked CRDM nozzles) could not have been avoided or detected by the Licensee's quality assurance program or other related control measures. The direct cause of this event was PWSCC of the CRDM nozzles and J-groove welds, and the Licensee identified and repaired a total of twenty-four CRDM nozzles with PWSCC in the nozzle or J-groove welds. The NRC evaluated the safety significance of this cracking and concluded that the cracking was identified early enough that plant safety was not challenged. Because the PWSCC identified in the CRDM nozzles was well below the crack sizes required for nozzle ejection or sizes that would challenge structural integrity, and there was no discernible head wastage, the NRC concluded that this issue was of very low safety significance.

TS 3.4.13 requires that RCS operational leakage be limited to "no pressure boundary leakage" when in Modes 1 through 4 (power operation, startup, hot standby, and hot shutdown, respectively). Contrary to this requirement, during Operating Cycle No. 16, which ended February 28, 2010, the Licensee operated the DBNPS in Mode 1 with pressure boundary leakage from cracked CRDM nozzles Nos. 4 and 67.

Because the Licensee met all associated NRC regulations with regard to CRDM nozzle inspections and the violation resulted from equipment failure that was not avoidable by reasonable Licensee quality assurance programs or other related control measures, the NRC elected to apply section VII.B.6, "Violations Involving Special Circumstances," of the Enforcement Policy (November 28, 2008), and exercise enforcement discretion to not issue a violation. In addition, the Licensee did not miss any available indicators of leakage such that it could have identified the leakage earlier.

A. Comments on the Proposed Director's Decision

This section documents the NRC Staff's response to the Petitioner's comments on the proposed Director's Decision. The NRC issued the proposed Director's

Decision on November 10, 2010 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML103020411). The NRC received comments from the Petitioner on November 23, 2010 (ADAMS Accession No. ML103340455). The Licensee did not provide any comments to the NRC on the proposed Director's Decision. The NRC Staff has amended the proposed Director's Decision to acknowledge the Petitioner's comments; however, the NRC Staff has determined that the comments provided by the Petitioner did not provide any relevant additional information and support for the Petition that had not already been considered. Thus, the comments did not change the conclusion of the proposed Director's Decision, and the final Director's Decision denies the Petitioner's request for enforcement action. A summary of the Petitioner's comments and the NRC Staff's response to them is presented below.

1. Summary of Comments

In summary, the Petitioner states the following:

(1) "the NRC failed to address key elements of our petition and acted to deprive UCS of our legal rights. . . ." The Petitioner states that the proposed Director's Decision failed to mention the third commitment from the CAL. The Petitioner states, "The CAL's third commitment was either a *de facto* technical specification change or a *de facto* NRC order, but without the attendant legal protections these processes guarantee. In our opinion, the CAL's third commitment illegally circumvented established legal processes and, in so doing, deprived us [UCS] of our legal rights." The Petitioner challenges the legal authority of the NRC in replacing TS Limiting Condition for Operation 3.4.13 with the provision of the CAL's third commitment.

(2) The CAL's third commitment is defective because it is triggered only when Action Level 3 in a nonpublic licensee procedure is reached and because it allows continued reactor operation for up to 30 days beyond attainment of Action Level 3.

(3) "Existing technical specification 3.4.13 requires Davis-Besse to be shut down within 6 hours after the onset of pressure boundary leakage." The Petitioner states, "the public had every right to expect that the NRC would enforce this safety requirement."

(4) The acceptance criterion for General Design Criterion (GDC) 30, "Quality of Reactor Coolant Pressure Boundary," in Appendix A, "General Design Criteria for Nuclear Power Plants," to 10 C.F.R. Part 50, "Domestic Licensing of Production and Utilization Facilities," states that "Means shall be provided for detecting, and to the extent practical, identifying the

location of the source of reactor coolant leakage." Further, satisfaction of GDC 30 is based on meeting the guidelines of Regulatory Guide (RG) 1.45, "Guidance on Monitoring and Responding to Reactor Coolant System Leakage." The Petitioner emphasizes that RG 1.45 states, "Plants should monitor critical components of the RCPB [Reactor Coolant Pressure Boundary] for leakage. . . . In currently operating reactors, the critical RCPB components include, but may not be limited to, the reactor vessel head, control rod penetration nozzles. . . ." The Petitioner states, "[t]he NRC staff position expressed in the proposed Director's Decision contradicts previously established and not abandoned staff positions."

2. NRC Response to Comments

The NRC response to the Petitioner's first three summarized comments follows. The third commitment of the CAL states the following:

> Beginning with reactor startup (Mode 2) and until RPV head replacement, upon reaching Action Level 3 of EN-DP-01171, "Engineering Implementation of the RCS Integrated Leakage Program," the plant shall be shutdown in 30 days if RPV head leakage cannot be ruled out. During subsequent shutdown as part of the containment inspection for RCS leakage, if RPV head leakage cannot be ruled out a bare metal visual examination for the RPV head will be performed per applicable ASME Code Case and 10 CFR 50.55a(g)(6)(ii)(D).

The purpose of the RCS operational leakage limiting condition for operation is to limit system operation in the presence of leakage either from normal operational wear or mechanical deterioration to amounts that do not compromise safety. The commitments in the CAL do not replace or relax any TS requirements, and the Licensee for DBNPS is required to comply with the TS. A CAL is an administrative action that is used by the NRC to confirm a licensee's agreement to take certain actions in order to ensure public health and safety. In this instance, it was properly applied and does not replace any requirements, but rather confirms additional commitments to which the NRC expects the Licensee to adhere.

In addition to the TS regarding unidentified leakage and the third commitment in the CAL, the NRC's baseline inspection program includes a daily review by the NRC resident inspectors of licensee-reported data concerning unidentified leakage. As part of that review, if unidentified leakage has a statistically significant increase, either as a step change in a single day or as a slow rise over a period of time, then the NRC resident inspectors will evaluate the licensee's actions to determine the cause and source of the increase and will notify senior NRC management of the change.

In the case of DBNPS, a statistically significant increase in unidentified leakage

can be as small as a few hundredths of a gallon per minute. The NRC resident inspectors' daily review of leakage data ensures that each licensee has an adequate process for monitoring leakage and identifying unexplained significant increases in leakage and takes appropriate steps before the leakage becomes significant. For any case in which a licensee determines that unidentified leakage is from pressure boundary leakage, the licensee must take the actions required by its TS. For DBNPS, if the Licensee is unable to rule out pressure boundary leakage as part of its unidentified leakage monitoring program, the Licensee must take the additional steps described in the CAL's third commitment.

The NRC can address noncompliance with a commitment in a CAL through various means, such as an order or demand for information. Issuance of a CAL does not preclude issuance of an order formalizing commitments or requiring other actions on the part of the licensee.

The NRC views nuclear regulation as the public's business and, as such, believes it should be transacted as openly and candidly as possible to maintain and enhance the public's confidence. Ensuring appropriate openness explicitly recognizes that the public must be informed about, and have a reasonable opportunity to participate meaningfully in, the NRC's regulatory processes. The NRC considers public involvement in, and information about, its activities to be a cornerstone of strong, fair regulation of the nuclear industry. The NRC recognizes the public's interest in the proper regulation of nuclear activities and provides opportunities for citizens to be heard. Information on public involvement can be found at http://www.nrc.gov/public-involve.html. The NRC affords the public opportunities to comment on proposed rules and policies, licensing actions, and draft technical documents, and information on these opportunities can be found at http://www.nrc.gov/public-involve/doc-comment.html. Information on public involvement in enforcement-related activities can be found at http://www.nrc.gov/public-involve/doc-comment.html.

On June 3 and September 9, 2010, the NRC held public meetings regarding the recent CRDM nozzle cracking issue, giving the public opportunity to comment and ask the NRC questions. Throughout the process of the NRC review of the Petitioner's 10 C.F.R. § 2.206 Petition, the NRC has given the Petitioner opportunities to address the NRC regarding the Petition.

The NRC response to the Petitioner's fourth summarized comment follows.

DBNPS is licensed for compliance with GDC 30. Appendix 3D to the updated final safety analysis report (UFSAR) describes compliance with all the GDC and, specifically, section 3.D.1.26 describes compliance with GDC 30. Section 3.D.1.26 states the following:

> Components which are part of the reactor coolant pressure boundary are designed, fabricated, erected, and tested to the highest quality standards practical. Means are

provided for detecting and, to the extent practical, identifying the location of the source of reactor coolant leakage.

A public version of the UFSAR is available in the NRC Public Document Room (PDR). Documents may be examined, and/or copied for a fee, at the NRC's PDR, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, or you can contact the NRC PDR Reference staff by telephone at 1-800-397-4209 or 301-415-4737, or send an e-mail to pdr.resource@nrc.gov.

The NRC guidance (NUREG-0800, "Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants: LWR Edition") dated May 2008, referenced in the Petition is applicable to new reactors. NRC Staff positions in the proposed Director's Decision do not contradict any previous NRC guidance, including NUREG-0800.

III. CONCLUSION

The Petitioner raised issues related to the DBNPS adequate protection standard regarding zero pressure boundary leakage and operation of the reactor at DBNPS. NRC Region III Inspection Report 05000346/2010-008(DRS) issued October 22, 2010 (ADAMS Accession No. ML102930380), focused on these concerns.

The NRC Special Inspection Team was chartered to assess the circumstances surrounding the identification of the flaws in the RVCH CRDM nozzle penetrations at DBNPS. The Special Inspection included the following items:

(1) Establish the pertinent examination chronology/history of the replacement RVCH.

(2) Compare current examination results with samples of the 2005 to 2008 examination records and preservice records to determine whether the conditions were preexisting.

(3) Evaluate the adequacy of the Licensee's plan for assessing the causes of flaws and the Licensee's rationale regarding acceptability of the head for continued service.

(4) Review current examination results and monitor in-progress examination and analysis activities to ensure that they are adequately conducted. Based on the review of the examination results, confirm that the Licensee has identified appropriate nozzles for repair and the acceptability of the remaining nozzles for service.

(5) Evaluate the adequacy of the repair activities and monitor implementa-

tion. Confirm that the repair implemented complies with NRC requirements.

The NRC has found the Licensee response to the identified conditions to be reasonable and technically sound. The NRC has reviewed in detail the CRDM nozzle cracking, as well as the circumstances surrounding the causes of this cracking and previous opportunities for identification and intervention. The NRC's inspection determined that the public health and safety have not been, nor are likely to be, adversely affected. The inspection determined that the Licensee conformed to the subject NRC regulatory requirements pertinent in this circumstance and applicable to assessing the cause and effect of the CRDM nozzle cracking conditions.

Based on the above, the Office of Nuclear Reactor Regulation has decided to deny the Petitioner's request for the issuance of a Show Cause Order or comparable enforcement-related action to the Licensee of DBNPS. The Petitioner cites an example of the NRC issuing a Show Cause Order that required the Surry Power Station, Unit 2, to be shut down until a potential safety concern was remedied. The referenced Show Cause Order ordered the licensee for Surry to provide specific information to the NRC. In this case, a Show Cause Order is not needed since the NRC used a Special Inspection to obtain the same information that it might have requested in an Order. An inspection has an added advantage, in that the findings are in part based on the NRC's own observations. The NRC has completed a rigorous Special Inspection and determined that enforcement action was not appropriate for this matter. The NRC has reasonable assurance that adequate protection standards have been met and will continue to be met. The Petitioner's concern regarding the plant's not meeting the adequate protection of zero pressure boundary leakage has been adequately resolved such that no further action is required.

As provided in 10 C.F.R. § 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, this Decision will constitute the final action of the Commission 25 days after the date of the Decision unless the Commission, on its own motion, institutes a review of the decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Eric J. Leeds, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 15th day of February 2011.

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. 50-271-LR**

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power Station) **March 10, 2011**

RULES OF PRACTICE: PETITIONS FOR REVIEW; APPELLATE REVIEW

A Petition for Review falls short of satisfying 10 C.F.R. § 2.341(b)(4) if it does not specify the subsections upon which it relies and instead merely sets forth a series of general grievances fundamentally going to the correctness of the Board's decision.

RULES OF PRACTICE: LATE-FILED CONTENTIONS; MOTION TO REOPEN THE RECORD

The Commission generally disfavors the filing of new contentions at the eleventh hour of an adjudication. This policy is grounded in the doctrine of finality, which states that at some point, an adjudicatory proceeding must come to an end. The Commission considers reopening the record for any reason to be an extraordinary action, and the Commission therefore imposes a deliberately heavy burden upon an intervenor who seeks to supplement the evidentiary record after it has been closed, even with respect to an existing contention.

RULES OF PRACTICE: LATE-FILED CONTENTIONS

The Commission frowns on intervenors seeking to introduce a new contention later than the deadline established by our regulations, and the Commission accordingly holds them to a higher standard for the admission of such contentions.

RULES OF PRACTICE: NEW INFORMATION; TIMELINESS

The Commission and its Licensing Boards generally consider approximately 30-60 days as the limit for timely filings based on new information. *See, e.g., Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 494 (2010) (a 2-month delay is too long); Initial Scheduling Order (Nov. 17, 2006) at 7.

RULES OF PRACTICE: TIMELINESS; NEW INFORMATION

The Commission recognizes that 10 C.F.R. § 2.326(a)(1) provides an exception to the "timeliness" requirement in those rare instances where a petitioner raises an "exceptionally grave issue."

RULES OF PRACTICE: NEW INFORMATION; TIMELINESS

Documents merely summarizing earlier documents or compiling preexisting, publicly available information into a single source do not render "new" the summarized or compiled information. The tardy filing of a contention may be excusable only where the facts upon which the amended or new contention is based were previously unavailable.

RULES OF PRACTICE: APPLICATION (AMENDMENT)

Nothing in our rules prevents an applicant from amending its application at any time. Permitting an application to be "modified or improved" throughout the NRC's review is compatible with the dynamic licensing process followed in Commission licensing proceedings.

RULES OF PRACTICE: MOTION TO REOPEN THE RECORD

Section 2.326(a)(3) of the Commission's procedural rules provides that the proponent of a motion to reopen the record must demonstrate that a materially different result would have been likely had the newly proffered evidence been considered initially. The burden of satisfying this requirement (as is the case for each of the reopening requirements) is a heavy one. And, as the Commission

recently reiterated, bare assertions and speculation do not supply the requisite support. To justify reopening the record, the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition.

MEMORANDUM AND ORDER

We have before us a petition for review in which Intervenor New England Coalition (NEC) challenges the Licensing Board's refusal to reopen this adjudication and admit for litigation NEC's latest proposed contention.[1] This contention, which was submitted simultaneously with the Motion to Reopen on August 20, 2010,[2] addresses "the effects of moist or wet environments on buried, below grade, underground, or hard-to-access safety-related electrical cables."[3] The Board concluded that NEC had failed to satisfy our standards for reopening in two respects: NEC's motion was untimely, and NEC had failed to "demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially."[4] We affirm.

I. BACKGROUND

Over the course of a lengthy and complex hearing on Entergy Nuclear Vermont Yankee's (Entergy) license renewal application,[5] the Board issued two initial decisions, ultimately finding in Entergy's favor with respect to all of NEC's substantive arguments.[6] Following appeals of the Board's initial decisions, we issued CLI-10-17, upholding the Board on all but one of the appealed issues. As for that issue, we found that the Board had not provided NEC its promised opportunity to revise a contention challenging the metal-fatigue portion of Entergy's

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[1] LBP-10-19, 72 NRC 529 (2010).

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

[3] Petition for Commission Review of ASLBP Memorandum and Order (Ruling on New England Coalition Motion to Reopen and Proffering New Contention) (Nov. 12, 2010) at 1 (Petition), citing Motion to Reopen at 8. NEC subsequently filed a "supplement" to its petition. *See* Supplement to New England Coalition's Petition for Commission Review of ASLBP Memorandum and Order (Ruling on New England Coalition Motion to Reopen and Proffering New Contention) (Dec. 13, 2010) (NEC Supplemental Filing).

[4] LBP-10-19, 72 NRC at 549 (quoting 10 C.F.R. § 2.326(a)(3)).

[5] *See generally* Entergy License Renewal Application: Vermont Yankee Nuclear Power Station (Jan. 25, 2006) (ADAMS Accession No. ML060300085) (Application). The Application has since been revised and supplemented. *See, e.g.,* note 55, *infra.*

[6] *See* LBP-08-25, 68 NRC 763 (2008); LBP-09-9, 70 NRC 41 (2009).

Application. We therefore remanded the case with instructions that the Board give NEC that opportunity.[7] We also stated that, if NEC wished to raise "any *genuinely new* issues," it could move to reopen the record.[8]

NEC declined to submit a revised metal-fatigue contention. But it did move to reopen the record for the purpose of proffering a new contention (designated by the Board as "Contention 7") challenging the adequacy of the Application's aging management program (AMP) and/or time-limited aging analysis (TLAA) regarding the effects of moist or wet environments on various safety-related electrical cables. Contention 7 reads, in its entirety:

> 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[. T]hus the applicant does not comply with NRC regulation (10 CFR § 54.21(a)[)] and guidance and/or provide adequate assurance of protection of public health and safety (54.21(a)[)].[9]

Both the NRC Staff and Entergy opposed NEC's Motion to Reopen.[10]

In LBP-10-19, the Board concluded that NEC's Motion to Reopen was neither timely nor, if granted, would be likely to change the result in this proceeding. NEC seeks review of the Board's decision. Both the Staff and Entergy oppose NEC's petition for review.[11]

II. DISCUSSION

Under section 2.341(b)(4) of our procedural rules, we may grant a petition for

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[7] CLI-10-17, 72 NRC 1, 41-42 (2010).

[8] *Id.* at 10 n.37 (emphasis in original).

[9] Motion to Reopen at 8.

[10] Entergy's Answer Opposing New England Coalition's Motion to Reopen (Sept. 14, 2010); NRC Staff's Opposition to the New England Coalition's Motion to Reopen the Hearing and Answer to Proposed New Contention (Sept. 14, 2010). NEC replied to these two filings. 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. 20, 2010) (Reply I).

[11] Entergy's Answer Opposing New England Coalition's Petition for Commission Review of LBP-10-19 (Nov. 22, 2010) (Entergy Answer); NRC Staff's Answer in Opposition to New England Coalition's Petition for Review of Licensing Board Memorandum and Order LBP-10-19 (Nov. 22, 2010) (Staff Answer). NEC replied to these two Answers. New England Coalition's Reply to NRC Staff's and Entergy's Answer in Opposition to New England Coalition's Petition for Review of Licensing Board Memorandum and Order LBP-10-19 (Nov. 26, 2010) (Reply II).

review if it presents "a substantial question" with respect to one or more of the following considerations:

> (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
> (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
> (iii) A substantial and important question of law, policy, or discretion has been raised;
> (iv) The conduct of the proceeding involved a prejudicial procedural error; or
> (v) Any other consideration which the Commission may deem to be in the public interest.[12]

NEC's Petition falls short of satisfying section 2.341(b)(4). The Petition does not specify the subsections upon which it relies, but instead sets forth a series of general grievances fundamentally going to the correctness of the Board's decision denying its Motion to Reopen.[13] NEC has thus failed in its obligation to provide us a clear statement of its position on why it satisfies our standards for granting a petition for review.[14] Further, NEC has not demonstrated that the Board either made clearly erroneous findings of material fact, or drew legal conclusions that depart from, or are contrary to, established law. We find no error in the Board's decision.

We generally disfavor the filing of new contentions at the eleventh hour of an adjudication. This policy is grounded in the doctrine of finality, which states that at some point, an adjudicatory proceeding must come to an end.[15] We

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[12] 10 C.F.R. § 2.341(b)(4). *See also* 10 C.F.R. § 2.1212.

[13] *See* Petition at 2. NEC offers a general challenge to the Board's findings of fact, arguing, without elaboration, that "the Board made several gross factual errors in its summation of the parties' positions and in its conclusions regarding them, which, in turn informed an erroneous analysis and ruling denying NEC's Motion to Reopen." Petition at 11.

Among other things, NEC also disagrees with the Board's conclusions as to whether the safety issue it raises in Contention 7 is "significant" for purposes of reopening the record. Petition at 17-19. However, the Board expressly declined to rule on the "significance" factor. *See* LBP-10-19, 72 NRC at 547 n.20, 549. Absent an actual ruling adverse to NEC, the "significance" issue is not properly before us on appeal.

[14] *See, e.g., AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 277 n.240 (2009) ("The burden of setting forth a clear and coherent argument . . . is on the petitioner. It should not be necessary to speculate about what a pleading is supposed to mean. . . . [T]he Commission will not accept the filing of a vague, unparticularized issue." (citations and internal quotation marks omitted)).

[15] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) ("Obviously, 'there would be little hope' of completing administrative

(Continued)

consider reopening the record for any reason to be "an 'extraordinary' action"[16] and we therefore impose a "deliberately heavy" burden[17] upon an intervenor who seeks to supplement the evidentiary record after it has been closed, even with respect to an existing contention.[18] We likewise frown on intervenors seeking to introduce a new contention later than the deadline established by our regulations, and we accordingly hold them to a higher standard for the admission of such contentions.[19] Because NEC here seeks both to reopen the record and to submit a late contention, it must successfully satisfy both of these elevated standards.[20] The Board, in concluding that NEC failed to meet these burdens, focused on the reopening standard, and, in particular, on two requirements of that rule — a motion to reopen must be timely and the newly proffered information and/or argument would likely have resulted in a materially different outcome in the adjudication.[21] We consider each in turn.

A. Timeliness

As we 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

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proceedings if each newly arising allegation required an agency to reopen its hearings" (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 555 (1978))), *petition for review held in abeyance sub nom. Ohngo Gaudadeh Devia v. NRC,* 492 F.3d 421 (D.C. Cir. 2007). *See also* Final Rule: "Criteria for Reopening Records in Formal Licensing Proceedings," 51 Fed. Reg. 19,535, 19,538 (applying "[p]rinciples of finality" to intervenors in the context of motions to reopen the record), 19,539 ("The purpose of this rule is . . . to ensure that, once a record has been closed and all timely-raised issues have been resolved, finality will attach to the hearing process. Otherwise it is doubtful whether a proceeding could ever be completed.") (May 30, 1986) (Criteria for Reopening Records).

[16] Criteria for Reopening Records, 51 Fed. Reg. at 19,538.

[17] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 674 (2008). *Accord Oyster Creek,* CLI-09-7, 69 NRC at 287.

[18] 10 C.F.R. § 2.326(a).

[19] 10 C.F.R. § 2.309(c).

[20] *Oyster Creek,* CLI-08-28, 68 NRC at 668. *See also Private Fuel Storage,* CLI-05-12, 61 NRC at 350 ("Commission practice holds that the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention"). *Accord Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982).

[21] To the extent that NEC challenges the Board's decision to apply strictly the reopening standards (*see* Petition at 10), its challenge constitutes an improper collateral attack on our regulations. *See* 10 C.F.R. § 2.335(a).

> 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.[22]

This policy underpins our regulatory requirement that motions to reopen be "timely" filed.[23] It likewise undergirds our regulation permitting the admission of late-filed contentions "only . . . upon a showing that –

> (i) The information upon which the . . . new contention is based was not previously available;
>
> (ii) The information upon which the . . . new contention is based is materially different than information previously available; and
>
> (iii) The . . . new contention has been submitted in a timely fashion based on the availability of the subsequent information."[24]

As the Board correctly concluded, timeliness turns here on the threshold question of when NEC first had access to information sufficient to enable it to proffer Contention 7.[25]

1. Motion to Reopen

NEC claimed to have filed its Motion to Reopen (and, with it, Contention 7) "as soon as sufficient evidence had accrued to adduce the basis and substance of the contention" and that "no relevant evidence was available" by the deadline for filing its initial intervention petition.[26] According to NEC, the first available, relevant factual information that triggered the filing of Contention 7 was a May 10,

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[22] *Oyster Creek,* CLI-09-7, 69 NRC at 271-72 (footnotes, internal quotation marks, and citations omitted). *See generally Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010) (stating, in the context of a new contention filed after the initial petition, that the Commission has a "*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'") (quoting *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993)); *Three Mile Island Alert v. NRC,* 771 F.2d 720, 728 (3d Cir. 1985), *cert. denied sub nom. Aamodt v. NRC,* 475 U.S. 1082, *reh'g denied,* 476 U.S. 1179 (1986).

[23] 10 C.F.R. § 2.326(a)(1).

[24] 10 C.F.R. § 2.309(f)(2)(i)-(iii).

[25] LBP-10-19, 72 NRC at 545.

[26] Motion to Reopen at 5.

2010 NRC Inspection Report.[27] Among other things, the Inspection Report indicated that, on November 29, 2009, an NRC inspection had revealed submerged safety-related cables. According to NEC, this information was contained in an "AMP" dated November 2009, and first came to NEC's attention through the Inspection Report.[28] NEC also asserted that it considered the information in the Inspection Report insufficient grounds for a new contention, so it continued to seek additional supporting information during the 3 months following the issuance of the Inspection Report.[29]

2. LBP-10-19

The Board rejected NEC's argument regarding timeliness, observing that the potential for submerged safety-related cables and the consequent need to manage and address the risks stemming from submergence have "been apparent from the outset of this proceeding."[30] The Board pointed specifically to the Application's AMP for medium-voltage cables, which provides for periodic inspections of manholes, draining of water as needed and periodic cable testing.[31] Further, the Board noted that the issues raised in Contention 7 were addressed in numerous NRC and industry documents well prior to the May 10 Inspection Report.[32] Based on these factors, the Board concluded that the May 10 Inspection Report "is not an unexpected revelation that entitles NEC to raise these issues now."[33]

3. Petition for Review

NEC's Petition for Review targets the Board's dual conclusions that NEC earlier had sufficient factual basis to submit Contention 7 and that NEC's Motion to Reopen was, therefore, untimely. NEC argues that the Application "only

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[27] *See* Motion to Reopen at 5 (citing NRC Inspection Report 0500271/2010002 (May 10, 2010) (ADAMS Accession No. ML101300363) (Inspection Report)). The Motion to Reopen (at 10-13) quotes at length from the Inspection Report (specifically, pp. 4-5 and 19-21).

[28] *See* Petition at 6 (referring to a "newly deployed (November 2009) AMP for cables susceptible to wetting or submergence"). Although NEC provides no citation for this document, it appears to refer to an Entergy condition report, CR-VTY-2009-04142, cited in NEC's earlier Motion to Reopen at 11-12.

[29] Motion to Reopen at 5; Petition at 14; Reply I at 3 (describing the Inspection Report as "itself inadequate to lay the basis for a contention"), 8 (similar language). This search period continued until mid-August 2010, when NEC filed its Motion to Reopen. *See* Motion to Reopen at 5; Reply I at 3-4.

[30] LBP-10-19, 72 NRC at 546.

[31] *Id.* Entergy's initial Application included an AMP for non-environmentally-qualified inaccessible medium voltage cable. *See* Application, App. B, § B.1.17, at B-61 (Non-EQ Inaccessible Cable AMP).

[32] LBP-10-19, 72 NRC at 547.

[33] *Id.*

vaguely described or [did] not describe[ ] at all" Entergy's proposed "aging management of safety-related electrical [cables] susceptible to submergence."[34] According to NEC, detailed information became available only upon the issuance of the May 10 Inspection Report.[35]

4. Analysis

To determine timeliness, we examine the information and authority that NEC cites in its Motion to Reopen and that it preserves as a basis for its Petition. In support of Contention 7, NEC fundamentally relies on the May 10, 2010 Inspection Report.[36] In an effort to satisfy the timeliness criterion, NEC asserts that the Inspection Report provided it with insufficient factual grounds for Contention 7[37] and that NEC therefore spent the next 3 months searching for additional support by conferring with NRC's Region I and the Staff of NRC's Office of Nuclear Reactor Regulation, searching NRC, academic, and trade literature, and monitoring Vermont Yankee's communications and public statements.[38] NEC relies upon the results of these efforts as support for its claim that it timely filed its Motion to Reopen.

NEC's argument is flawed in several critical respects. The first and most significant difficulty is that Contention 7 is based on the premise that the cable AMP in Entergy's Application is incomplete[39] — an assertion that, if true today, was equally true when Entergy filed its Application in 2006. Consequently, NEC could have raised the contention in its Petition to Intervene, or any time after that pleading's filing date. The fact that the May 10 Inspection Report revealed that certain safety-related electrical cables had, in fact, been exposed to submerged conditions does not inform the issue of timeliness. As the Board explained, the fact that long-term submergence of safety-related cables was a possibility has

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[34] Petition at 13.

[35] *Id.* at 13-14, 16; Reply II at unnumbered p. 3.

[36] Motion to Reopen at 5, 7, 10-13, 17-18, 22; Declaration and Affidavit of Paul Blanch (Aug. 20, 2010), at 5-6 (Blanch Declaration) (ADAMS Accession No. ML102420042), appended to Motion to Reopen.

[37] *See, e.g.,* Petition at 7, 14.

[38] Petition at 7; Reply I at 8.

[39] *See, e.g.,* Motion to Reopen at 13-14 (NEC "disputes . . . the applicant's attestation that their [sic] [Application] is accurate and complete" and "the applicant has not included . . . adequate consideration of environmentally accelerated age-related degradation"), 16 (NEC's "contention concerns the unanalyzed, unplanned[-]for aging of wetted or submerged safety related electrical cables"), 19 (the Application "'is inaccurate and incomplete'" (quoting, but not citing, Blanch Declaration at 8)), 22 (the Application lacks "important and telling detail" regarding "period[ic] inspections and 'de-waterings'" and the Application "lacks a complete and accurate description of its cable aging management programs").

been evident since the outset of the proceeding, as evidenced by both Entergy's 2006 AMP[40] and the guidance in the 2005 GALL Report.[41] Stated differently, the contention raises the question of whether the AMP in the Application adequately addresses the issue of submerged electric cables during the 20-year period of extended operation — an issue of which NEC should have been aware since the filing of the 2006 Application.[42]

The second difficulty is that ten of the fifteen documents or events on which NEC relies as "new information" in its Motion to Reopen (or in later filings) have been publicly available for too long to be considered "new information." NEC filed its Motion to Reopen more than 100 days after the issuance of the May 10 Inspection Report, the document upon which NEC relies most heavily. So, even had that Report contained information providing a sufficient factual basis for Contention 7, the Motion to Reopen still would have been untimely — at least insofar as it relies on the May 10 Inspection Report.[43] Therefore, to the extent NEC relies on the May 10 Inspection Report to demonstrate timeliness of Contention 7 and the Motion to Reopen, we do not find fault with the Board's rejection of NEC's position. Likewise, most of the remaining information on which NEC relies in its Motion to Reopen and accompanying Declaration was available to the

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[40] *See generally* Non-EQ Inaccessible Cable AMP, *supra* note 31.

[41] *See* NUREG-1801, "Generic Aging Lessons Learned (GALL) Report" (Rev. 1, Sept. 2005), Vol. 2, at XI E-7 through XI E-9 (§ XI.E3: Inaccessible Medium-Voltage Cables not Subject to 10 CFR 50.49 Environmental Qualification Requirements) (ADAMS Accession No. ML052780376) (GALL Report). *See also id.,* Vol. 1, at 91 (Table 6: Summary of Aging Management Programs for the Electrical Components Evaluated in Chapter VI of the GALL Report) (ADAMS Accession No. ML052770419).

[42] NEC's conclusion that the Inspection Report revealed "newly discovered vulnerability" in the electrical cable AMP (Motion to Reopen at 13) is contradicted by its many references to earlier agency and industry documents expressing concern over the same issue. *See, e.g.,* Motion to Reopen at 17-18, 20 (citing GALL Report); Blanch Declaration at 5, 10 (citing same). *See also* LBP-10-19, 72 NRC at 547 (citing Motion to Reopen at 14).

[43] We and our Licensing Boards generally consider approximately 30-60 days as the limit for timely filings based on new information. *See, e.g., Prairie Island,* CLI-10-27, 72 NRC at 494 (a 2-month delay is too long); Initial Scheduling Order (Nov. 17, 2006) at 7 (unpublished) ("A motion and proposed contention . . . shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii), if it is filed within thirty . . . days of the date when the new and material information on which it is based first becomes available.").

Separately, we recognize that 10 C.F.R. § 2.326(a)(1) provides an exception to the "timeliness" requirement in those rare instances where a petitioner raises an "exceptionally grave issue." NEC referred to this standard, but makes little, if any, effort to explain its applicability. The Board addressed the standard briefly in *dictum,* stating merely that "[w]e have no doubt in concluding that NEC has failed to show that the issues raised in Contention 7 are "'exceptionally grave.'" LBP-10-19, 72 NRC at 547 n.20 (quoting 10 C.F.R. § 2.326(a)(1)). Given the thinness of NEC's evidentiary presentation supporting its motion to reopen, including the absence of expert support, we are inclined to agree with the Board. *See generally* 10 C.F.R. § 2.326(b).

public well before even the May 10 Inspection Report.[44] Consequently, neither Contention 7 nor the Motion to Reopen can be considered timely filed to the extent they are grounded on these additional, still-older pieces of information. So here, too, we find no error on the Board's part.

The third difficulty relates to three pieces of purportedly "new information" that NEC cites on appeal — pieces that were made publicly available *after* May 10, 2010. Our ruling on these remaining sources of information turns not on the timeliness with which NEC raised them, but rather on the information's failure to support Contention 7.

NEC alludes to a June 2010 public meeting.[45] Yet NEC states merely that this was an example of its efforts to determine whether Entergy had amended the relevant AMP to address the issues that formed the bases of Contention 7.[46] Thus, this does not constitute information (new or otherwise) supportive of Contention 7.

NEC also cites a June 2010 Report by the Electric Power Research Institute

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[44] *See* Motion to Reopen at 6, 9, 13-14, 17-23; Blanch Declaration at 5, 8-10 & n.2, 11-13. Documents cited include: Information Notice 1989-63, "Possible Submergence of Electrical Circuits Located Above the Flood Level Because of Water Intrusion and Lack of Drainage," (Sept. 5, 1989) (Legacy Library Accession No. 8908290014); Information Notice 2002-12, "Submerged Safety-Related Electrical Cables" (Mar. 21, 2002) (ADAMS Accession No. ML020790238); GALL Report (Sept. 2005), *supra* note 41; Application (Jan. 25, 2006), *supra* note 5; Generic Letter 2007-01, "Inaccessible or Underground Power Cable Failures That Disable Accident Mitigation Systems or Cause Plant Transients" (Feb. 7, 2007) (ADAMS Accession No. ML070360665); NUREG-1907, "Staff Safety Evaluation Report, Related to the License Renewal of Vermont Yankee Nuclear Power Station" (May 2008) (Vol. 1: ADAMS Accession No. ML081430057; Vol. 2: ADAMS Accession No. ML081430109); Generic Letter 2007-01, "Inaccessible or Underground Power Cable Failures that Disable Accident Mitigation Systems or Cause Plant Transients": Summary Report (Nov. 12, 2008) (ADAMS Accession No. ML082760385); NUREG/CR 7000, "Essential Elements of an Electric Cable Condition Monitoring Program" (Jan. 2010) (ADAMS Accession No. ML100540050). *See also* Petition at 14 (referring to "a PowerPoint presentation from an August 2010 NRC meeting led by NRC Staff's expert witness, Roy K. Matthew [sic]"). The Staff actually made the presentation a year earlier, on August 19, 2009, in conjunction with a public meeting to discuss a submerged cable pilot project. *See* "Regulatory Issue Resolution Protocol, Inaccessible or Underground Cable Performance Issues at Nuclear Power Plants" (Aug. 19, 2009) (ADAMS Accession No. ML092460425); Memorandum, "Summary of August 19, 2009, Second Public Meeting with Stakeholders to Discuss Submerged Cables Pilot Project — Regulatory Issue Resolution Protocol (RIRP)" (Sept. 10, 2009) (ADAMS Accession No. ML092460408).

[45] *See* Petition at 7 (referring to a June 14, 2010 Annual Assessment Meeting). *See also* Motion to Reopen at 13 (referring to a June 22, 2010 Annual Assessment Meeting). The meeting occurred on June 22, 2010. *See* Meeting Summary, "Summary of the June 22, 2010, Annual Assessment Open House and Public Meeting" (Aug. 10, 2010) (ADAMS Accession No. ML102220455).

[46] Motion to Reopen at 13.

(EPRI).[47] The cited portion of the EPRI Report addresses only the increasing general concern of regulators and industry alike, over the last "5-10 years," regarding reliability of wetted medium-voltage cables.[48] By its terms, this is not "new" information, nor does it specifically relate to the Vermont Yankee facility or Entergy's Application at issue here. It therefore does not provide support for either NEC's Motion to Reopen or its Contention 7.

Third, NEC filed an additional pleading on December 13, 2010. NEC's filing directs our attention to language in NRC Information Notice 2010-26.[49] Arguing that the Information Notice "corroborate[s] many of the concerns and assessments in NEC's Motion to Reopen," NEC presents the Information Notice to us as "new" information supporting its petition and Motion to Reopen.[50]

The Information Notice merely summarizes information from documents previously available well prior to NEC's Motion to Reopen.[51] We find unconvincing NEC's argument that the December 2, 2010 date on the Information Notice renders the information in that document "new" for purposes of timeliness.[52] As we recently have reiterated, documents merely summarizing earlier documents or compiling preexisting, publicly available information into a single source do not render "new" the summarized or compiled information.[53] The tardy filing of a contention may be excusable only where the facts upon which the amended or new contention is based were previously unavailable.[54]

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[47] NEC alludes to the June 2010 EPRI Report in its Petition for Review (at 17), but only in general terms. NEC, however, did specifically cite that report in its Motion to Reopen. *See* Motion to Reopen at 5-7, 23 (all referencing or quoting EPRI Report 1020805, "Plant Support Engineering, Aging Management Program Guidance for Medium-Voltage Cable Systems for Nuclear Power Plants" (June 10, 2010) (EPRI Report) (made available in ADAMS on August 11, 2010, as an attachment to "Note to File" from Brian Holian, Director, Division of License Renewal, Office of Nuclear Reactor Regulation, "Documents to Be Declared Public" (Aug. 6, 2010) (ADAMS Accession No. ML102210457)). Although we justifiably could disregard NEC's general reference to the EPRI Report, we assume that the June Report was the one to which NEC intends to direct our attention on appeal.

[48] Motion to Reopen at 6 (quoting EPRI Report, *supra* note 47, at v (miscited as page 1)).

[49] "Submerged Electrical Cables" (Dec. 2, 2010) (ADAMS Accession No. ML102800456) (Information Notice).

[50] NEC Supplemental Filing at 2-3.

[51] *See* Information Notice at A-1 to A-2 (listing documents dated from April 21, 2008, through May 11, 2010).

[52] New England Coalition's Reply to NRC Staff's Objection to NEC's Notification of Information Notice 2010-26 and Entergy's Response to the Supplement to NEC's Petition for Commission Review of LBP-10-19 (Dec. 30, 2010), at 4.

[53] *See Prairie Island,* CLI-10-27, 72 NRC 493-96 (finding that a contention based on preexisting information compiled in a safety evaluation report was untimely).

[54] *See System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 146 (2007).

Finally, NEC cites Entergy's September 3, 2010 Supplement to the Application, which amended the Application by expanding the medium-voltage electrical cable AMP to include certain low-voltage cables.[55] Entergy argued, in opposing NEC's Motion to Reopen, that the September 3 Supplement rendered Contention 7 moot, to the extent that NEC asserted the AMP should address low-voltage cables.[56] The Board agreed with Entergy in *dictum.*[57] NEC complains that the Board should not have "accepted" the Supplement.[58] We see no merit in NEC's position. Nothing in our rules prevents an applicant from amending its application at any time. Permitting an application to be "modified or improved" throughout the NRC's review is compatible "with the dynamic licensing process followed in Commission licensing proceedings."[59]

Notwithstanding NEC's argument to the contrary,[60] NEC has not shown that it has been harmed or prejudiced by the agency's consideration of the Supplement. NEC has had ample time to review, and adequate means by which to address, the Supplement.[61] Specifically, NEC could either have filed a second motion to reopen the proceeding on the basis of the Supplement, or requested leave to amend its August 20 Motion to Reopen, and (either way) to file a revised Contention 7. NEC has taken none of these steps.

In sum, the Board did not err in determining that NEC offered no "new" information supporting Contention 7 and that the information therefore did not support NEC's Motion to Reopen.

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[55] Petition at 8, 18. Specifically, Entergy expanded its "Non-EQ Inaccessible Medium-Voltage Cable" program in section B.1.17 to include certain low-voltage cables. *See* Letter from Michael J. Colomb to Document Control Desk, "License Renewal Application Supplemental Information" (Sept. 3, 2010) (ADAMS Accession No. ML102500065) (Supplement). Attachment 1 to that letter (at 2) shows the provisions in section B.1.17 as currently amended. The Supplement was prompted by "information provided in the industry responses to G[eneric] L[etter] 2007-01, recent NRC and [EPRI] guidance documents, and recent industry/NRC meetings on this topic" (Supplement, Att. 1 at 1), and also in anticipation of the Staff's then-impending issuance of a Revised GALL Report (Entergy Answer at 4 n.7). The NRC Staff issued Revision 2 of the GALL Report in December 2010. *See* NUREG-1801, "Final Report, Generic Aging Lessons Learned Report" (Rev. 2, Dec. 2010) (ADAMS Accession No. ML103490041).

[56] Entergy's Answer Opposing New England Coalition's Motion to Reopen (Sept. 14, 2010) at 39.

[57] LBP-10-19, 72 NRC at 548.

[58] *See* Petition at 8, 11; NEC Reply I at 11-12 (raising questions as to the appropriateness of Entergy's submittal of the Supplement).

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

[60] Petition at 18.

[61] *See* 10 C.F.R. §§ 2.326, 2.309(f)(2).

B. The Likelihood of a Materially Different Result

Section 2.326(a)(3) of our procedural rules provides that the proponent of a motion to reopen the record must demonstrate that a materially different result . . . would have been likely had the newly proffered evidence been considered initially."[62] The burden of satisfying this requirement (as is the case for each of the reopening requirements) is a heavy one.[63] And, as we recently reiterated, "[b]are assertions and speculation . . . do not supply the requisite support.'"[64] To justify reopening the record, "the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition."[65]

The entire argument on this issue in NEC's Motion to Reopen consisted of the following brief discussion:

> 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)[)].[66]

The Petition's discussion with respect to this factor is even shorter:

> NEC has presented the testimony of a credentialed electrical engineer with more than 40 years of experience in nuclear power generation, and cited in support of its pleadings numerous authorities, including NRC's own technical studies, all of it more than sufficient to show that its proposed contention has merit sufficient to be heard and at some level to raise issues requiring, if nothing more, additional analysis and/or improvements to the cable amps. NEC cannot be expected to prove its case at this point for that would be an impossibly high standard; one negating the basic purpose of the hearing for which NEC is asking.[67]

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[62] 10 C.F.R. § 2.326(a)(3).

[63] *Oyster Creek,* CLI-09-7, 69 NRC at 287 (quoting *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986)).

[64] *Oyster Creek,* CLI-09-7, 69 NRC at 287 (quoting *Oyster Creek,* CLI-08-28, 68 NRC at 674). *See generally* 10 C.F.R. § 2.326(b).

[65] *Private Fuel Storage,* CLI-05-12, 61 NRC at 350 (internal quotations omitted).

[66] Motion to Reopen at 7.

[67] Petition for Review at 19.

We agree with the Board that the Motion to Reopen's language is cursory in the extreme, consisting merely of "conclusory assumptions and predictions"[68] rather than the kind of substantive information and argument that would constitute a successful demonstration of "likelihood" under section 2.326(a)(3). We rejected a similarly cursory argument in *Oyster Creek* regarding that same regulation, concluding that the intervenor's argument "falls far short of meeting its burden."[69] Our conclusion in *Oyster Creek* applies here as well.

NEC's appellate argument is likewise "too thinly supported" to pass regulatory muster under the rigorous standards established in section 2.326(a)(3).[70] NEC's general references to authorities in support of Contention 7 are insufficient to meet NEC's burden under section 2.326(a) to show *likelihood* of a materially changed result. NEC argues that its supporting evidence is "more than sufficient to show that its proposed contention has *merit sufficient to be heard.*"[71] But by arguing about whether its new contention has "merit sufficient to be heard," NEC confuses the standard for contention admissibility (section 2.309(f)) with the more rigorous evidentiary standard for reopening the record, i.e., a *likely* material change of result, pursuant to section 2.326(a). NEC is similarly incorrect that the Board improperly imposed upon it the standard of proof for actual success on the merits (to "prove its case at this point"[72]), as it disregards the Board's repeated references to the "likelihood" standard applicable to its Motion to Reopen.[73]

We also reject NEC's assertion that Information Notice 2010-26 "corroborates" many of the concerns that NEC set forth in its Motion to Reopen and is therefore "material" to NEC's instant appeal.[74] NEC directs our attention to four generic statements in the Information Notice. Yet these statements make no mention of either the Vermont Yankee facility generally or the Vermont Yankee

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[68] LBP-10-19, 72 NRC at 549.

[69] CLI-09-7, 69 NRC at 291 (rejecting the intervenor's cursory argument, the entirety of which was that "this prong of the reopening test is met"). Elsewhere in that same proceeding, we held that

> Bare assertions and speculation, such as Citizens' expert's speculation that "*[i]t is . . . likely* that an analysis that complies with the ASME Code would predict that the [cumulative usage factor] would become greater than one during the proposed period of extended operation," and that "the environmental factors in the [license renewal application] and the [request for additional information] *are probably* non-conservative," do not supply the requisite support.

CLI-08-28, 68 NRC at 674 (emphases and ellipsis in original, footnotes omitted).

[70] *Private Fuel Storage,* CLI-05-12, 61 NRC at 355.

[71] Petition for Review at 19 (emphasis added).

[72] *Id.*

[73] LBP-10-19, 72 NRC at 549-50.

[74] NEC Supplemental Filing at 2-3; New England Coalition's Motion for Leave to Reply to NRC Staff's Objection to NEC's Notification of Information Notice 2010-26 and Entergy's Response to the Supplement to NEC's Petition for Commission Review of LBP-10-19 (Dec. 30, 2010), at 3.

license renewal application in particular.[75] Consequently, they are too general to satisfy our requirement of materiality — either as a requirement for contention admissibility or as part of the required showing that new evidence would be likely to lead to a "materially different result" in the case.[76] As Entergy correctly points out, "while the information notice may show that it is important to monitor and maintain safety-related cable, the information notice says nothing bearing on whether NEC had identified any significant deficiency in the AMP [and] has no bearing on the Licensing Board's rulings in LBP-10-19 that NEC's motion to reopen had failed to satisfy the requirements of 10 C.F.R. § 2.326(a)(1) and (3)."[77]

In sum, NEC does not come close to demonstrating a likelihood that it would have prevailed on the merits of Contention 7 and that its success would have materially altered the outcome of this proceeding. Nor does our independent review of the record reveal any such likelihood.[78]

III. CONCLUSION

For the foregoing reasons, we *deny* NEC's petition for review, *affirm* LBP-10-19, and *terminate* this proceeding.

IT IS SO ORDERED.[79]

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of March 2011.

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[75] *See* NEC Supplemental Filing at 4-5.

[76] *See* 10 C.F.R. §§ 2.309(f)(1)(iv), 2.326(a)(3).

[77] Entergy's Response to the Supplement to New England Coalition's Petition for Commission Review of LBP-10-19 (Dec. 23, 2010) at 2. Moreover, the four generic statements in the Information Notice address current operating issues which are, by their very nature, beyond the scope of this license renewal proceeding. *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 461-62 (2010) (stating that license renewal is limited to age-related issues, not issues already monitored and reviewed in the ongoing regulatory oversight processes). We also observe that the single reference to Vermont Yankee in the Information Notice merely describes the content of the May 10, 2010 Inspection Report, *supra,* and therefore does not qualify as "new information." *See* Information Notice at 5.

[78] We observe, without ruling on the merits, that Entergy's and the Staff's initial arguments on the admissibility of Contention 7 appear to be sufficiently strong that we cannot conclude that NEC likely would have succeeded on its merits.

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael C. Farrar, Chairman
E. Roy Hawkens
Nicholas G. Trikouros

In the Matter of **Docket No. IA-05-052**
(ASLBP No. 06-845-01-EA)

DAVID GEISEN **March 10, 2011**

EQUAL ACCESS TO JUSTICE ACT: ADVERSARY ADJUDICATION

By its terms, EAJA applies to any "adjudication required by statute to be determined on the record" in which the government is represented by counsel. *See* 5 U.S.C. §§ 504(b)(1)(C) and 554. Insofar as is relevant here, the NRC's regulations explain that the foregoing statutory language is meant to include "[a]dversary adjudications conducted by the Commission pursuant to any other statutory provision that requires a proceeding before the [NRC] to be so conducted as to fall within the meaning of 'adversary adjudication' under [EAJA]." 10 C.F.R. § 12.103.

EQUAL ACCESS TO JUSTICE ACT: ADVERSARY ADJUDICATION

EAJA provides four distinct definitions of "adversary adjudication," including, as pertinent here, "an adjudication under section 554 of [the Administrative Procedure Act ("APA")] in which the position of the United States is represented by counsel or otherwise." 5 U.S.C. § 504(b)(1)(C). In turn, section 554 of the APA applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a).

EQUAL ACCESS TO JUSTICE ACT: COVERAGE

After analyzing the relevant statutory provisions, the Commission stated "it is not unreasonable to conclude that no NRC proceeding other than an appeal to a board of contract appeals under the Contract Disputes Act or a Program Fraud Civil Remedies Act hearing is covered by the EAJA." Equal Access to Justice Act: Implementation, 59 Fed. Reg. 23,119, 23,120 (May 5, 1994).

EQUAL ACCESS TO JUSTICE ACT: COVERAGE

The Appeal Board in *Advanced Medical Systems* thus held that materials license suspension proceedings are not covered by EAJA even though the NRC may voluntarily choose to employ on-the-record formal procedures, because such proceedings are not *required* by statute to be APA § 554 on-the-record hearings. *Advanced Med. Systems, Inc.* (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 291 (1990).

EQUAL ACCESS TO JUSTICE ACT: COVERAGE

The Applicant's argument that EAJA should apply to the enforcement proceeding brought against him because it was in fact "an on-the-record hearing that was very much like a trial proceeding," regardless of whether or not it was statutorily required to be so, runs headlong into holdings that an agency's discretionary choice to conduct a formal on-the-record hearing is irrelevant when determining whether EAJA applies to a particular proceeding. *See, e.g., Ardestani v. Immigration and Naturalization Service,* 502 U.S. 129, 137 (1991); *Friends of the Earth v. O'Reilly,* 966 F.2d 690, 695 (D.C. Cir. 1992); *Advanced Med. Sys.,* ALAB-929, 31 NRC at 289-91 (citing *St. Louis Fuel and Supply Co. v. Federal Energy Regulatory Commission,* 890 F.2d 446, 448-49 (D.C. Cir. 1989); *Owens v. Brock,* 860 F.2d 1363, 1366 (6th Cir. 1988); *Smeldberg Machine & Tool, Inc. v. Donovan,* 730 F.2d 1089, 1092-93 (7th Cir. 1984)); *see also Ardestani,* 502 U.S. at 134.

EQUAL ACCESS TO JUSTICE ACT: COVERAGE

Even if due process did mandate an on-the-record hearing conducted according to APA § 554 in this case, such procedural requirements stemming from the Constitution alone would not suffice to make Mr. Geisen eligible for an EAJA award. Rather, EAJA applies only when an adjudication is "required by statute" to be conducted on the record, and, peculiarly, not when it is so required by the higher authority of the Constitution. *See Advanced Med. Sys.,* ALAB-929, 31 NRC at 291 n.14.

EQUAL ACCESS TO JUSTICE ACT: PURPOSE

The underlying purpose of EAJA is twofold: (1) "to eliminate financial disincentives for those who would defend against unjustified governmental action"; and thereby (2) "to deter the unreasonable exercise of Government authority." *See Ardestani,* 502 U.S. at 138.

EQUAL ACCESS TO JUSTICE ACT: INCURRING FEES

With regard to the assertion that the meaning of "incur" in the context of EAJA is clear, "[n]either EAJA nor the legislative history provides a definition of the word 'incur[,]'" and courts of appeals have interpreted and applied the term differently. *Securities and Exchange Commission v. Comserv,* 908 F.2d 1407, 1413 (8th Cir. 1990); *see also Ed A. Wilson, Inc. v. General Services Administration,* 126 F.3d 1406, 1408 (Fed. Cir. 1997). For instance, although the Fourth Circuit and the Eighth Circuit, through *Paisley* and *Comserv,* have held that otherwise eligible applicants who have been indemnified by an ineligible third party have not "incurred" fees under EAJA, the Seventh Circuit and the Federal Circuit have held that eligible applicants who have had their fees paid by ineligible third parties did "incur" fees under EAJA. *See, e.g., United States v. Thouvenot, Wade & Moerschen, Inc.,* 596 F.3d 378, 383 (7th Cir. 2010); *Wilson,* 126 F.3d at 1410; *cf. Morrison v. Commissioner of Internal Revenue,* 565 F.3d 658, 666 (9th Cir. 2009).

EQUAL ACCESS TO JUSTICE ACT: SUBSTANTIAL JUSTIFICATION

According to the Supreme Court, for the purposes of EAJA, the government's position should be considered substantially justified if "a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood,* 487 U.S. 552, 566 n.2 (1988). Thus, for the NRC Staff's position in this case to have been substantially justified, it did not have to be "'justified to a high degree,'" but instead only had to be "'justified in substance or in the main' — that is, justified to a degree that could satisfy a reasonable person." *Id.* at 565.

EQUAL ACCESS TO JUSTICE ACT: SUBSTANTIAL JUSTIFICATION

In determining whether the government's position was substantially justified, courts must look to the totality of the circumstances. *Roanoke River Basin Association v. Hudson,* 991 F.2d 132, 139 (4th Cir. 1993). Thus, the Board "must examine the government's conduct in both the prelitigation and litigation

contexts." *United States v. Hallmark Construction Co.,* 200 F.3d 1076, 1080 (7th Cir. 2000) (citation omitted); *see also Role Models America, Inc. v. Brownlee,* 353 F.3d 962, 967 (D.C. Cir. 2004). In doing so, however, the Board "does not make separate determinations regarding each stage but 'arrive[s] at one conclusion that simultaneously encompasses and accommodates the entire civil action.'" *Hallmark,* 200 F.3d at 1080 (quoting *Jackson v. Chater,* 94 F.3d 274, 278 (7th Cir. 1996)). This determination is made on the basis of the written record, and, in this case, oral argument. 10 C.F.R. § 12.306(a).

EQUAL ACCESS TO JUSTICE ACT: SUBSTANTIAL JUSTIFICATION

A judgment against the government on the merits, such as is the case here, does not create a presumption that the government's case was not substantially justified. *Scarborough v. Principi,* 541 U.S. 401, 415 (2004) (citations omitted); *Pierce,* 487 U.S. at 569. "While a court's 'merits reasoning may be quite relevant to the resolution of the substantial justification question,' we have cautioned that '[t]he inquiry into the reasonableness of the Government's position . . . may not be collapsed into our antecedent evaluation of the merits.'" *Halverson v. Slater,* 206 F.3d 1205, 1208 (D.C. Cir. 2000) (quoting *F.J. Vollmer Co., Inc. v. Magaw,* 102 F.3d 591, 595 (D.C. Cir. 1996)).

MEMORANDUM AND ORDER
(Denying Application for Attorneys' Fees)

This proceeding concerns an application by David Geisen, a former employee at the Davis-Besse Nuclear Power Station ("Davis-Besse"), for attorneys' fees and expenses pursuant to the Equal Access to Justice Act ("EAJA") in connection with his successful defense against the NRC Staff's immediately effective Enforcement Order against him. The Board holds that (1) EAJA does not apply to NRC enforcement adjudications of this nature, and (2) even if EAJA did apply, the NRC Staff's position in this proceeding was "substantially justified" within the meaning of EAJA and, thus, any claim for attorneys' fees must fail.[1]

[1] We decline to resolve whether Mr. Geisen's EAJA application should also be denied on the ground that he failed to "incur" fees within the meaning of EAJA, because (1) his application fails in any event for either of the two above-mentioned reasons, and (2) as discussed in Part III, below, whether Mr. Geisen "incurred" fees is, in our view, a problematic issue.

I. INTRODUCTION

On September 27, 2010 — and, as prescribed by 10 C.F.R. § 12.204(a), within 30 days of the Commission's decision upholding this Board's Majority Decision[2] setting aside the NRC Staff's immediately effective Enforcement Order[3] against him — Mr. Geisen applied for an award of over $250,000 in attorneys' fees pursuant to 10 C.F.R. Part 12, which implements EAJA.[4]

On October 27, 2010, the NRC Staff timely filed its Answer, taking the position that Mr. Geisen's application should be denied on four independent grounds: (1) EAJA does not (and thus 10 C.F.R. Part 12 cannot) apply to NRC enforcement actions; (2) Mr. Geisen has not demonstrated, as is required by EAJA, that he (rather than his former employer) actually "incurred" the costs for which he seeks an award; (3) Mr. Geisen has not documented the fees and expenses he is claiming; and (4) the NRC Staff's position on the merits of the case was "substantially justified" within the meaning of the statutory ban on recovery.[5]

Mr. Geisen timely filed a Reply on November 12, 2010, supplying therein additional arguments and exhibits. These included such things as his indemnification agreement with his Davis-Besse employer, FirstEnergy Nuclear Operating Company ("FENOC"), and the relevant attorneys' fees invoices, which had not been presented with the original Application.[6]

Based on the new information contained in Mr. Geisen's Reply, the NRC Staff filed on November 22, 2010, a Request for Leave to Respond to Mr. Geisen's Reply, together with the corresponding Response itself.[7] The Board granted the NRC Staff permission to file its responsive brief.[8]

In a December 2, 2010 Order, the Board advised the parties that oral argument

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[2] *See* CLI-10-23, 72 NRC 210 (2010); LBP-09-24, 70 NRC 676 (2009).

[3] *See* Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) (Jan. 4, 2006) [hereinafter Enforcement Order].

[4] *See* David Geisen's Application for Award of Attorneys' Fees (Sept. 27, 2010) at 1.

[5] *See* NRC Staff's Response in Opposition to David Geisen's Application for Award of Attorney's Fees (Oct. 27, 2010) at 1 [hereinafter NRC Staff Response].

[6] *See* David Geisen's Reply in Support of his Application for Award of Attorneys' Fees (Nov. 12, 2010) at 42 [hereinafter Geisen Reply]; Geisen Reply, Exh.1, Geisen Summary of Fees and Expenses Claimed Under EAJA (Nov. 12, 2010); Geisen Reply, Exh. 2, Declaration of Richard A. Hibey in Support of David Geisen's Application for Award of Attorneys' Fees (Nov. 12, 2010); Geisen Reply, Exh. 3, Undertaking (July 11, 2006).

[7] *See* NRC Staff's Request for Leave to Respond to David Geisen's Reply in Support of His Application for Award of Attorney's Fees (Nov. 22, 2010) at 1-2; NRC Staff's Response to David Geisen's Reply in Support of His Application for Award of Attorney's Fees (Nov. 22, 2010) at 1 [hereinafter NRC Staff Response to Reply].

[8] Licensing Board Order (Scheduling Oral Argument and Granting Request for Leave to Respond) (Dec. 2, 2010) at 2 (unpublished) [hereinafter Scheduling Order].

was necessary for the full and fair adjudication of this matter.[9] In that Order, the Board also notified the parties that in light of the expedited scheduling of the oral argument, and hence the limited preparation time afforded to counsel, the Board would defer, pending further order, any consideration of issues relating to the reasonableness of the particular amount of fees and expenses requested by Mr. Geisen.[10]

The Board heard oral argument on December 14, 2010, in the Atomic Safety and Licensing Board Panel's Hearing Room, located at the NRC Headquarters in Rockville, Maryland. Our reasoning for denying Mr. Geisen's claim appears below.

II. EAJA COVERAGE

EAJA, which is implemented by the NRC regulations contained in 10 C.F.R. Part 12, allows certain parties who prevail against the government in certain types of agency proceedings to recover attorneys' fees and other expenses incurred in connection with the proceeding unless the government's position was substantially justified, or other special circumstances render an award unjust.[11] By its terms, EAJA applies to any "adjudication required by statute to be determined on the record" in which the government is represented by counsel.[12] Insofar as is relevant here, the NRC's regulations explain that the foregoing statutory language is meant to include "[a]dversary adjudications conducted by the Commission pursuant to any other statutory provision that requires a proceeding before the [NRC] to be so conducted as to fall within the meaning of 'adversary adjudication' under [EAJA]."[13]

EAJA provides four distinct definitions of "adversary adjudication," including, as pertinent here, "an adjudication under section 554 of [the Administrative Procedure Act ("APA")] in which the position of the United States is represented by counsel or otherwise."[14] In turn, section 554 of the APA applies "in every

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

[10] *Id.* at 3.

[11] 5 U.S.C. § 504(a)(1); 10 C.F.R. § 12.101.

[12] *See* 5 U.S.C. §§ 504(b)(1)(C) and 554.

[13] 10 C.F.R. § 12.103. In addition, NRC regulations specify two other types of proceedings to which EAJA applies, neither of which is relevant here. *See id.*

[14] 5 U.S.C. § 504(b)(1)(C). The Supreme Court has explained that "the most natural reading of the EAJA's applicability to adjudications 'under section 554' is that those proceedings must be 'subject to' or 'governed by' § 554." *Ardestani v. INS,* 502 U.S. 129, 135 (1991). This limitation is a key one.

case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[15]

The NRC Staff argues that, although Mr. Geisen's enforcement proceeding was conducted as an "on-the-record" matter with all the APA protections, it was not *required by statute* to be an APA § 554 proceeding, and thus that Mr. Geisen's application for attorneys' fees and expenses should be denied because neither EAJA nor 10 C.F.R. Part 12 applies to his enforcement proceeding.[16] In support of this position, the NRC Staff quotes the Commission's 1994 Statement of Considerations for the final rule promulgating the regulations implementing EAJA. After analyzing the relevant statutory provisions, the Commission stated "it is not unreasonable to conclude that no NRC proceeding other than an appeal to a board of contract appeals under the Contract Disputes Act or a Program Fraud Civil Remedies Act hearing is covered by the EAJA."[17]

To further support its claim that EAJA does not apply to Mr. Geisen's enforcement proceeding, the NRC Staff relies upon *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, OH 44041). An Atomic Safety and Licensing Appeal Board ("Appeal Board") issued that decision in 1990, prior to the NRC's adoption of regulations implementing EAJA (10 C.F.R. Part 12), so that case was decided directly under EAJA.[18]

In *Advanced Medical Systems,* the Appeal Board reviewed an EAJA application for attorneys' fees arising from a materials license suspension proceeding.[19] Although it acknowledged that, upon initial examination, a materials license suspension proceeding appeared "to be precisely the type of proceeding to which Congress intended the EAJA to apply," the Appeal Board ultimately held that EAJA did not apply to such a proceeding, finding that "a materials license suspension proceeding is not an 'adversary adjudication' for purposes of the EAJA because the Atomic Energy Act of 1954, as amended, does not require such a hearing to be on the record pursuant to APA section 554."[20]

In reaching that holding, the Appeal Board examined not only the legislative history of EAJA, but also the statutory language and legislative history of the Atomic Energy Act ("AEA"), along with the statutory language of the APA and pertinent case law. The Appeal Board concluded that "neither the [AEA] and its legislative history nor the APA and relevant case law reflect congressional intent

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[15] 5 U.S.C. § 554(a). There are six exceptions to this definition, none of which is applicable here. *See id.*

[16] NRC Staff Response at 2-7.

[17] Equal Access to Justice Act: Implementation, 59 Fed. Reg. 23,119, 23,120 (May 5, 1994).

[18] *See* ALAB-929, 31 NRC 271 (1990).

[19] *Id.* at 276-77.

[20] *Id.* at 281-82.

that formal, on-the-record hearings conducted under section 554 of the APA are required for materials license suspension cases."[21]

The Appeal Board then considered "whether the EAJA nonetheless applies when the Commission conducts formal, on-the-record hearings in the absence of a statutory requirement for such."[22] It first examined the Administrative Conference of the United States ("ACUS") 1981 and 1985 Model Rules, which were designed to aid agencies in implementing their own respective EAJA regulations.[23] In both Model Rules, the ACUS rejected language that would have extended EAJA's applicability to proceedings in which an agency observes formal APA § 554 procedures as a matter of discretion.[24]

The Appeal Board also cited numerous federal appellate decisions that adopted the same principle in holding that EAJA does not apply when an agency merely voluntarily chooses to abide by formal APA § 554 procedures, despite lacking a statutory mandate to do so.[25] For instance, the Appeal Board quoted the decision in *St. Louis Fuel and Supply Co. v. FERC,* in which the District of Columbia Circuit held that:

> Congress wrote into EAJA a bright-line rule. Attorneys' fees may be awarded in adversary adjudications that are governed by APA section 554; they may not be awarded in adversary adjudications that Congress did not subject to that section.[26]

Based on the weight of judicial authority and the interpretations of the ACUS, the Appeal Board rejected a more liberal interpretation of EAJA, holding that:

> Despite the fact that, although not required by statute, the Commission conducts materials license suspension cases as formal, on-the-record hearings like those

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[21] *Id.* at 288.

[22] *Id.*

[23] *Id.* at 288-89.

[24] *See id.* at 289.

[25] *Id.* at 289-91.

[26] *Id.* at 291 (quoting *St. Louis Fuel and Supply Co. v. Federal Energy Regulatory Commission,* 890 F.2d 446, 451 (D.C. Cir. 1989)). As the NRC Staff correctly points out, this narrow interpretation of EAJA was subsequently confirmed by the D.C. Circuit in *Friends of the Earth v. O'Reilly*:

> [A] proceeding is an adversary adjudication under the EAJA only if Congress intended that the proceeding be 'subject to' section 554. An agency's decision to 'add protections matching those of' section 554 is irrelevant absent Congress's having 'compelled the augmentation.' It is similarly irrelevant that the . . . proceeding may be the functional equivalent of a section 554 hearing.

NRC Staff Response at 5-6 (quoting *Friends of the Earth v. O'Reilly,* 966 F.2d 690, 695 (D.C. Cir. 1992) (internal citations omitted)).

> described by section 554 of the APA, the EAJA does not apply to such proceedings and may not serve as the basis for an award of attorney's fees.[27]

In justifying its narrow construction, the Appeal Board noted that because EAJA operates as a waiver of sovereign immunity it must be narrowly construed "to avoid creating a waiver of sovereign immunity that Congress did not intend."[28]

Finally, the Appeal Board rejected the notion that EAJA extends to cases where due process itself requires an APA § 554 hearing, stating that "we have discovered nothing in the legislative history of the EAJA or the pertinent case law to suggest a congressional intent to extend the EAJA to cases in which due process, rather than a statute, requires an APA § 554 hearing."[29] The Appeal Board explained that "[i]nasmuch as litigants against the government manifestly have no constitutional right to be compensated out of public funds for their attorneys' fees, it cannot be doubted that Congress has the power to limit the reach of the EAJA in this fashion."[30]

The Appeal Board thus held that materials license suspension proceedings are not covered by EAJA even though the NRC may voluntarily choose to employ on-the-record formal procedures, because such proceedings are not required by statute to be APA § 554 on-the-record hearings.[31]

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[27] *Advanced Med. Sys.,* ALAB-929, 31 NRC at 291.

[28] *Id.* As the NRC Staff points out, the Appeal Board's application of sovereign immunity principles to EAJA was subsequently reiterated by the Supreme Court: "EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States." NRC Staff Response at 6 n.20 (quoting *Ardestani,* 502 U.S. at 137).

[29] *Advanced Med. Sys.,* ALAB-929, 31 NRC at 291 n.14.

[30] *Id.*

[31] *Id.* In reaching its holding, the Appeal Board in *Advanced Medical Systems* acknowledged legislative history that appears to conflict with that holding. Specifically, the staff of the congressional Joint Committee on Atomic Energy stated that "'[i]n cases involving license suspension or revocation, where the AEC's staff is cast in an accusatory role, the precautions prescribed by the Administrative Procedure Act should be carefully observed.'" *Id.* at 284 (quoting 1 Staff of Joint Committee on Atomic Energy, 87th Cong., 1st Sess., *Improving the AEC Regulatory Process* (Joint Comm. Print 1961)). The Joint Committee itself reiterated this view, stating that "'[w]ithout question, more formal procedures *are required* in contested cases, especially those involving compliance.'" *Id.* (quoting S. Rep. No. 1677, 87th Cong., 2d Sess., *reprinted in* 1962 *U.S. Code Cong. & Admin. News* 2207, 2213) (emphasis added). Although the Appeal Board noted these statements, it summarily dismissed them on the ground that Congress' focus in drafting the AEA § 189(a) hearing requirements was on reactor safety and licensing issues, and thus "the few passing references in the legislative history to enforcement actions cannot reasonably support an inference that Congress affirmatively intended section 189a(1) to require a formal on-the-record hearing under the APA for a challenge to a materials license suspension." *Id.; cf. Ardestani,* 502 U.S. at 136 (only in rare cases does legislative history overcome the strong presumption that "the legislative purpose is expressed by the ordinary meaning

(Continued)

The rationale and ruling in *Advanced Medical Systems* are controlling here. In this regard, when the Appeal Panel was abolished in 1991, the Commission explicitly directed that the decisions of its Boards were still to carry precedential weight.[32]

Our view of the continuing vitality of the rationale in *Advanced Medical Systems* is informed by the Commission's recent interpretation of the procedural processes mandated by the AEA. Under the statute, the Commission is required to "grant a hearing upon the request of any person whose interest may be affected" by certain agency proceedings.[33] As the court of appeals pointed out in *Citizens Awareness Network, Inc. v. NRC,* the NRC's predecessor agency, the Atomic Energy Commission ("AEC"), originally interpreted this as requiring formal APA § 554 on-the-record hearings.[34] However, beginning in 1982, the NRC started to relax the procedural requirements for certain types of proceedings.[35] This was then followed in January 1999 by a legal memorandum prepared by the NRC general counsel, concluding that the AEA did not mandate on-the-record hearings for reactor licensing proceedings and that the Commission therefore had the option of replacing the existing procedural requirements with more informal ones.[36]

Building on the January 1999 legal memorandum, in April 2001 the NRC published a notice of rulemaking that proposed major changes in the NRC's hearing procedures, along with an accompanying statement taking the position that section 189 of the AEA does *not* require on-the-record reactor licensing proceedings.[37] Aside from minor alterations, the final rule mirrored the proposed rule and took effect in February 2004.[38]

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of the [statutory language]") (internal quotation marks omitted). This Board is bound by the Appeal Board's ruling. *It remains open to Congress, however, to consider whether that ruling comports with actual legislative intent (see note 55, below) and, if appropriate, to enact clarifying legislation that, consistent with above-cited legislative history, mandates APA § 554 hearings in AEA enforcement proceedings,* thus ensuring "the precautions prescribed by the [APA will be] carefully observed" in AEA enforcement actions. *See* 1 Staff of Joint Committee on Atomic Energy, 87th Cong., 1st Sess., *Improving the AEC Regulatory Process* (Joint Comm. Print 1961).

[32] *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 n.2 (1994); *accord Shaw AREVA MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 63 n.33 (2009).

[33] 42 U.S.C. § 2239(a)(1)(A).

[34] *Citizens Awareness Network, Inc. v. NRC,* 391 F.3d 338, 343 (1st Cir. 2004) (citing Hearings Before the Subcommittee on Legislation, Joint Committee on Atomic Energy, 87th Cong. 60 (1962) (letter of AEC Commissioner Loren K. Olsen)).

[35] *Id.* (citing *In re Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 235 (1982)).

[36] *Id.* at 344.

[37] *Id.*

[38] *Id.*

In *Citizens Awareness Network, Inc.,* the petitioners challenged the NRC's new procedural rules, arguing that the AEA requires the NRC's licensing hearings to be on-the-record.[39] In doing so, the petitioners contended that the NRC had exceeded its authority in promulgating the new procedural rules, and thus that the new rules should be held invalid.[40] The court found that the NRC's new procedural rules met the requirements for APA § 554 on-the-record formal hearings, *but declined to resolve the question of whether the AEA in fact requires NRC hearings to be on-the-record.*[41] In other words, the court did not address the validity of the NRC's interpretation of the AEA, which maintains that the formal APA on-the-record hearings are not required for NRC proceedings. Thus, the NRC's current reading of the AEA as not requiring formal APA on-the-record hearings — a reading not set aside in *Citizens Awareness Network, Inc.* — reinforces the Appeal Board's holding in *Advanced Medical Systems.*

Despite *Advanced Medical Systems*' seemingly dispositive holding, Mr. Geisen argues that this Board is not bound by that decision, claiming instead that "it is quite clear that the only holding from *Advanced Medical Systems* that definitely applies in this case — assuming that section 189 applies here at all — is the [Appeal Board's] determination that the statute is 'ambiguous as to the sort of hearing that is required.'"[42] Moreover, Mr. Geisen points out that the materials license suspension proceeding in *Advanced Medical Systems* was governed by section 189 of the AEA, while here, in contrast, the statutory authority for the enforcement action is section 161(i)(3) of the AEA.[43]

The latter point is true. As Mr. Geisen acknowledges, however, the statutory language and legislative history of section 161 of the AEA are completely silent with regard to whether proceedings under it must be governed by APA § 554.[44] Mr. Geisen concedes that "[i]n short, there is no authority in the statutes, case law or regulations that is dispositive on the issue."[45] Such a lack of clear statutory intent and legislative history, particularly in the context of a waiver of sovereign immunity, is precisely what ultimately led the Appeal Board in *Advanced Medical Systems* to conclude that proceedings conducted under section 189 of the AEA

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[39] *Id.* at 347.

[40] *See id.* at 351.

[41] *Id.* at 348.

[42] Geisen Reply at 7 (quoting *Advanced Med. Sys.,* ALAB-929, 31 NRC at 283); *see also* Tr. at 2503 ("MR. HIBEY: Well, what I'm suggesting is that the [*Advanced Medical Systems*] case should not be the authority or the point of departure for determining this question . . . .").

[43] Geisen Reply at 5-7.

[44] Tr. at 2496-97.

[45] Geisen Reply at 10.

were not statutorily required to be conducted pursuant to APA on-the-record procedures.[46]

Mr. Geisen nevertheless asserts that, although the statutory language and legislative history of the AEA might not require enforcement proceedings under section 161 to be conducted in accordance with the procedural protections of section 554 of the APA, there remain alternative reasons for applying section 554 to such proceedings.

To begin, Mr. Geisen argues that EAJA should apply to this enforcement proceeding because it was in fact "an on-the-record hearing that was very much like a trial proceeding," regardless of whether or not it was statutorily required to be so.[47] This justification, however, runs headlong into precedent cited by both the NRC Staff and the Appeal Board in *Advanced Medical Systems,* which hold that an agency's discretionary choice to conduct a formal on-the-record hearing is irrelevant when determining whether EAJA applies to a particular proceeding.[48]

In an attempt to differentiate the case at hand, Mr. Geisen claims that much of the contrary precedent is based on a misplaced reading of the canon of sovereign immunity.[49] According to Mr. Geisen, many of the cases cited by the NRC Staff and the Appeal Board in *Advanced Medical Systems* are overly dependent on the tenet that waivers of sovereign immunity must be strictly construed. Mr. Geisen suggests that, instead, the contravening canon of statutory construction that "once Congress has waived sovereign immunity over certain subject matter, a court should be careful not to assume the authority to narrow the waiver that Congress intended" may be controlling in this case.[50] With this in mind, Mr. Geisen contends that

> if an argument can be made that a proceeding is required by statute to be determined on the record after opportunity for an agency hearing, the EAJA applies to that

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[46] As the Supreme Court repeatedly has admonished, "[w]aivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed.'" *United States v. Nordic Village Inc.,* 503 U.S. 30, 33 (1992) (quoting *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95 (1990), and *United States v. King,* 395 U.S. 1, 4 (1969)).

[47] Geisen Reply at 10.

[48] *See, e.g.,* NRC Staff Response at 5-6 (citing *Ardestani,* 502 U.S. at 137; *Friends of the Earth,* 966 F.2d at 695); *Advanced Med. Sys.,* ALAB-929, 31 NRC at 289-91 (citing *St. Louis Fuel and Supply Co.,* 890 F.2d at 448-49; *Owens v. Brock,* 860 F.2d 1363, 1366 (6th Cir. 1988); *Smeldberg Machine & Tool, Inc. v. Donovan,* 730 F.2d 1089, 1092-93 (7th Cir. 1984)); *see also Ardestani,* 502 U.S. at 134 (EAJA does not apply to a proceeding that is "not governed by the provisions of § 554" even if the procedures governing the proceeding substantially conform "to the procedures required for formal adjudication under the APA").

[49] *See* Geisen Reply at 12-14.

[50] *Id.* at 12-13 (quoting *Five Points Road Joint Venture v. Johanns,* 542 F.3d 1121, 1124 n.3 (7th Cir. 2008) (internal citations omitted)).

> proceeding even without an unambiguous statement from Congress, as long as there is not an unambiguous statement from Congress to the contrary.[51]

Based upon this analysis, Mr. Geisen then claims that, because the Enforcement Order "immediately deprived [him] of his legally-protected right to earn a living," due process concerns mandated a formal APA § 554 on-the-record hearing.[52]

Mr. Geisen's attempt to differentiate the case at hand from *Advanced Medical Systems* has more than a little plausibility. But his reliance on a due process theory must fail.

In claiming that hearings mandated by due process might require formal APA on-the-record hearings, Mr. Geisen cites *City of West Chicago v. NRC* for the proposition that "if a formal adjudicatory hearing is mandated by the due process clause, the absence of the 'on the record' requirement will not preclude application of the APA."[53] But to the extent that proposition had initial validity, it has since been called into question (*see* note 53, above) and in any event was rejected by the Appeal Board in Advanced Medical Systems:

> [W]e have discovered nothing in the legislative history of the EAJA or the pertinent case law to suggest a congressional intent to extend the EAJA to cases in which due process, rather than a statute, requires an APA section 554 hearing. Inasmuch as litigants against the government manifestly have no constitutional right to be compensated out of public funds for their attorneys' fees, it cannot be doubted that Congress has the power to limit the reach of the EAJA in this fashion.[54]

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[51] *Id.* at 13.

[52] *See id.* at 13-14. Counsel for Mr. Geisen elaborated on this point at oral argument:

> JUDGE FARRAR: So you're saying the procedure we followed in the Commission regs that directed that procedure were not optional to the Commission. They were required by the Constitution.
>
> MR. HIBEY: By the Due Process Clause of the Constitution.
>
> JUDGE FARRAR: And that's as good as being required by the Atomic Energy Act.
>
> MR. HIBEY: Yes.

Tr. at 2500.

[53] *City of West Chicago v. NRC,* 701 F.2d 632, 644 n.11 (7th Cir. 1983) (citing *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950)). The court in *City of West Chicago,* though, based this assertion on the court's ruling in *Wong Yang Sung v. McGrath,* which was overruled by Congress. *Marcello v. Bonds,* 349 U.S. 302, 310 (1955). Although Mr. Geisen acknowledges that *Wong Yang Sung* has been overruled, he contends that the relevant portions cited are still applicable here. *See* Geisen Reply at 13 n.52; Tr. at 2506. Given that Mr. Geisen's attempt to differentiate the present case from *Advanced Medical Systems* fails even if the relevant holdings of *Wong Yang Sung* are in fact binding on this Board, the Board will refrain from debating the precedential value of those holdings.

[54] *Advanced Med. Sys.,* ALAB-929, 31 NRC at 291 n.14.

Thus, the present case cannot be differentiated from *Advanced Medical Systems* on the basis of due process requirements.[55]

Furthermore, even if due process did mandate an on-the-record hearing conducted according to APA § 554 in this case, such procedural requirements stemming from the Constitution alone would not suffice to make Mr. Geisen eligible for an EAJA award.[56] As the Appeal Board in *Advanced Medical Systems* ruled, EAJA applies only when an adjudication is "required by statute," not when required by the Constitution, to be conducted on the record.[57] Thus, even if Mr. Geisen was entitled to an on-the-record hearing based on due process considerations (and we believe he was), under controlling precedent, EAJA would still not apply to that hearing unless it was also required by statute.[58]

Consequently, Mr. Geisen's attempt to differentiate the case at hand from the Appeal Board's ruling in *Advanced Medical Systems* fails. That rationale in that decision is thus binding on this Board. Because neither EAJA nor 10 C.F.R. Part 12 applies to Mr. Geisen's enforcement proceeding, his application for attorneys' fees and expenses under EAJA must be denied.

III. INCURRING FEES

Under the NRC regulations implementing EAJA, for a prevailing applicant to recover attorneys' fees and expenses, the applicant must have incurred those fees and expenses in connection with the adversary adjudication in question. "A *prevailing applicant* may receive an award for fees and expenses *incurred* in connection with a proceeding or a significant and discrete substantive portion of the proceeding, unless the position of the Commission over which the applicant has prevailed was substantially justified."[59] This is in keeping with the EAJA

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[55] Although we are bound by the holding in *Advanced Medical Systems,* we point out that, for us, the issue is not, as the Appeal Board reasoned, whether litigants in enforcement actions have a "constitutional right to be compensated out of public funds for their attorneys fees." Of course they have no such right. *Rather, as we see it, the question involved here is whether Congress intended to make EAJA awards available only when the governing statute expressly mandates on-the-record hearings, to the exclusion of cases — like Mr. Geisen's — where such hearings are required by due process.* The Appeal Board resolved that question in the affirmative. *Were there no precedent binding on us, our legal analysis would start with noting that no obvious reason appears for disfavoring impecunious litigants whose rights to an on-the-record hearing are required by a higher authority — the Constitution — rather than by a statute. But, as indicated earlier in note 31, that is a matter whose resolution resides with Congress, not with a subordinate adjudicatory tribunal.*

[56] *See* Tr. at 2500-01.

[57] *See Advanced Med. Sys.,* ALAB-929, 31 NRC at 291 n.14.

[58] *See id.* ("For, to repeat, the waiver of sovereign immunity contained in the EAJA is confined to situations in which there is a *statutory* requirement for such a hearing.") (emphasis in original).

[59] 10 C.F.R. § 12.105(a).

authorizing statute, which allows a prevailing party to recover attorneys' fees and expenses incurred under EAJA: "[a]n agency that conducts an adversary adjudication shall award, to a *prevailing party* other than the United States, fees and other expenses *incurred by that party* in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust."[60]

The NRC Staff contends that federal case law interpreting the term "incur" within the context of EAJA is "clear."[61] The NRC Staff claims that federal law unambiguously holds that "an individual who is a prevailing party meeting the financial qualification of the EAJA is ineligible to receive an EAJA award when that individual was not responsible for the costs of the attorney's fees."[62] In support of this argument, the NRC Staff cites to two federal appeals court decisions — *United States v. Paisley* and *SEC v. Comserv Corporation.*[63]

In *Paisley,* the Fourth Circuit was confronted with an EAJA application from five individuals who had successfully defended against a government action to recover a civil penalty from both them and their former employer.[64] The former employer advanced the attorneys' fees and expenses of four of the five individuals pursuant to agreements requiring them to repay the advancements unless Delaware law required their employer to indemnify them.[65] In reviewing the case, the court determined that Delaware law unconditionally required the individuals' former employer to indemnify them for all of their attorneys' fees and expenses.[66] As a result, the court denied the individuals' EAJA application, holding that "a claimant with a legally enforceable right to full indemnification of attorney fees from a solvent third party cannot be deemed to have incurred that expense for purposes of the EAJA, hence is not eligible for an award of fees under that Act."[67]

Similarly, in *Comserv,* the Eighth Circuit was faced with an EAJA application from an indemnified corporate officer who successfully defended against an action brought by the Securities and Exchange Commission ("SEC").[68] Under the indemnification agreement, the officer's former employer, as part of a severance

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[60] 5 U.S.C. § 504(a)(1) (emphasis added). The underlying purpose of EAJA is twofold: (1) "to eliminate financial disincentives for those who would defend against unjustified governmental action"; and thereby (2) "to deter the unreasonable exercise of Government authority." *See Ardestani,* 502 U.S. at 138.

[61] NRC Staff Response at 7.

[62] *Id.*

[63] *Id.* at 7 n.24.

[64] *United States v. Paisley,* 957 F.2d 1161, 1163 (4th Cir. 1992).

[65] *See id.*

[66] *Id.* at 1163-64.

[67] *Id.* at 1164.

[68] *Securities and Exchange Commission v. Comserv Corp.,* 908 F.2d 1407, 1409-10, 1413-14 (8th Cir. 1990).

agreement, agreed to and did pay the officer's legal fees and expenses related to the litigation in that case.[69] Based on the indemnification agreement, the court held that the officer had not incurred the fees in question, as required under EAJA, and thus that "the fee-deterrent-removal purpose of EAJA would not be served by an award of fees to an individual whose fees are fully paid by a noneligible organization."[70]

The NRC Staff points out that, as of February 2002, Mr. Geisen — similar to the employees in *Paisley* and *Comserv* — had an indemnification agreement with his former employer, FENOC, that covers Mr. Geisen's legal fees and expenses relating to the NRC investigation into Mr. Geisen's involvement in the Davis-Besse incident and the subsequent litigation.[71] Consequently, the NRC Staff urges that "[b]ecause Mr. Geisen appears to have been indemnified by his former employer, and thus did not suffer any deterrent effect on his 'willingness and ability to litigate meritorious . . . defenses against the Government,' he therefore cannot recover any award under the EAJA."[72]

Although the NRC Staff claims that the meaning of "incur" in the context of EAJA is clear, "[n]either EAJA nor the legislative history provides a definition of the word 'incur[,]'"[73] and courts of appeals have interpreted and applied the term differently. For instance, although the Fourth Circuit and the Eighth Circuit, through *Paisley* and *Comserv,* have held that otherwise eligible applicants who have been indemnified by an ineligible third party have not "incurred" fees under EAJA, the Seventh Circuit and the Federal Circuit have held that eligible applicants who have had their fees paid by ineligible third parties did "incur"

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[69] *See id.* at 1413.

[70] *Id.* at 1416.

[71] NRC Staff Response at 8. FENOC explained the extent of the indemnification agreement in a letter to Mr. Geisen in February of 2002:

> With respect to any ongoing investigations, should you be asked to testify by the NRC Office of Investigations, or become involved in any review into your role in these events, FirstEnergy will make available to you expert outside counsel, at the Company's expense, to represent you personally in any investigation, unless it is later determined by the Company that you engaged in deliberate misconduct. At this juncture, the Company determined that although your performance fell below its expectations, you did not engage in deliberate misconduct.

NRC Staff Response, Exh.1, Letter from Lew W. Myers, FENOC Chief Operating Officer, to David C. Geisen at 1 (Feb. 24, 2002).

[72] NRC Staff Response at 9 (citing *Paisley,* 957 F.2d at 1164) (internal citation omitted).

[73] *Comserv,* 908 F.2d at 1413; *see also Ed A. Wilson, Inc. v. General Services Administration,* 126 F.3d 1406, 1408 (Fed. Cir. 1997).

fees under EAJA.[74] In his Reply, Mr. Geisen notes the lack of accord among the Circuits on this issue and emphasizes the similarities between Mr. Geisen's situation and the cases from the Seventh Circuit and the Federal Circuit addressing situations where attorneys' fees were paid for by insurance policies.[75]

In *United States v. Thouvenot, Wade, & Moerschen, Inc.,* the Seventh Circuit determined that an applicant whose attorneys' fees and expenses were paid by an insurance policy is nonetheless entitled to recover fees under EAJA: "an award of attorneys' fees under the Equal Access to Justice Act can include fees incurred by the party's liability insurer."[76] The Seventh Circuit analogized a policyholder to an applicant who pays his legal fees using money borrowed from an otherwise ineligible wealthy relative on the condition that the applicant would pay the loan back if he is successful and receives a fee award.[77] According to the Seventh Circuit, the policyholder would still be entitled to recover those legal fees under EAJA, because "[n]othing in the Equal Access to Justice Act suggests a purpose to prevent such a contractual agreement, or more broadly, to discourage the purchase of liability insurance."[78] The court reasoned that "in an actuarial sense the cost of the defense, to the extent borne by the insurance company, is a cost that the insured paid for, just as he would have paid a lawyer for his defense had he had no insurance."[79] Although the Seventh Circuit based its analysis in the context of insurance, *it noted that it could not "see what difference it makes who the indemnitor is."*[80]

Similarly, in *Ed A. Wilson, Inc. v. General Services Administration,* the Federal Circuit noted that "[g]enerally, 'awards of attorneys' fees where otherwise authorized are not obviated by the fact that individual plaintiffs are not obligated

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[74] *See, e.g., United States v. Thouvenot, Wade & Moerschen, Inc.,* 596 F.3d 378, 383 (7th Cir. 2010) (stating that an award of attorneys' fees under EAJA can include fees paid by a third party liability insurer); *Wilson,* 126 F.3d at 1410 ("both the union employee and the insured can be viewed as having incurred legal fees insofar as they have paid for legal services in advance as a component of the union dues or insurance premiums"); *cf. Morrison v. Commissioner of Internal Revenue,* 565 F.3d 658, 666 (9th Cir. 2009) ("when a third party who has no direct interest in the litigation pays fees on behalf of a taxpayer, the taxpayer 'incurs' the fees so long as he assumes: (1) an absolute obligation to repay the fees . . . ; or (2) a contingent obligation to pay the fees in the event that he is able to recover them").

Further adding to the uncertaintly of the meaning of the term "incur" is legislative history "which suggests that awards to pro bono organizations were contemplated by Congress." *Comserv,* 908 F.2d at 1415. Based on that history, many courts have "held that where a pro bono attorney 'forgives' a fee to a client unable to afford legal expenses, that client is eligible for an EAJA award on the basis of that arrangement with the attorney." *Id.* (citing cases).

[75] Geisen Reply at 16-21.

[76] *Thouvenot,* 596 F.3d at 383.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

to compensate their counsel. The presence of an attorney-client relationship suffices to entitle prevailing litigants to receive fee awards."[81] Specifically, the court found that courts typically allow applicants to recover EAJA awards in cases where their counsel appears pro bono (*see* note 74, above), as well as cases where applicants are represented by counsel salaried by their union.[82] After comparing the cases where counsel was salaried by an applicant's union with the cases where counsel was paid for under an applicant's insurance policy, the court could ascertain no material distinction between the two: "both the union employee and the insured can be viewed as having incurred fees insofar as they have paid for legal services in advance as a component of the union dues or insurance premiums."[83] Furthermore, the Federal Circuit found that denying EAJA awards in insurance contexts would undermine the dual purposes of EAJA by both maintaining financial deterrents for those who would want to challenge unjust government action and not deterring unreasonable government actions.[84]

Relying on the decisions in *Thouvenot* and *Wilson,* Mr. Geisen claims that he did, in fact, "incur" attorneys' fees and expenses for the purposes of EAJA, and thus that his application for legal fees under EAJA should be granted.[85] He equates a company's indemnification agreement with an insurer's policy terms, thus concluding that his application should be treated the same as one where an applicant's counsel was paid by an insurer, viz., "instead of money, [Mr. Geisen] exchanged the performance of his duties for the protection of the company if the performance of those duties resulted in his involvement in a proceeding against the government."[86] Moreover, he argues that a denial of an EAJA award based on his indemnification agreement would undermine the dual purposes of EAJA because "[i]f the government knows in advance that an individual has insurance [or other indemnification], it can take unreasonable or extreme positions with impunity."[87] Mr. Geisen thus asserts that, contrary to the NRC Staff's claim, it is

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[81] *Wilson,* 126 F.3d at 1409 (quoting *Rodriguez v. Taylor,* 569 F.2d 1231, 1245 (3d Cir. 1977)).

[82] *Id.*

[83] *Id.* at 1410.

[84] *See id.* Mr. Geisen concedes, however, that the Federal Circuit specifically distinguished its reasoning from those cases involving attorneys' fees paid for as a result of corporate indemnification agreements: "'It is [the applicant's] exposure to increased premiums and our view that it effectively incurred attorney fees by prepaying them via its premium payments that distinguishes this case from [cases in which the applicant's fees were paid by his employer].'" Geisen Reply at 19 (quoting *Wilson,* 126 F.3d at 1411) (alterations in Geisen Reply).

[85] *See* Geisen Reply at 20-21.

[86] *Id.* at 21.

[87] *Id.*

not entirely clear whether an applicant who is indemnified by an ineligible third party might still be said to have "incurred" fees for the purposes of EAJA.[88]

Although the NRC Staff is correct in noting that *Paisley* and *Comserv,* the only cases directly on point, both denied EAJA awards based on indemnification agreements,[89] this fails adequately to account for the other federal appellate decisions in which courts found that applicants whose fees were paid by otherwise ineligible third parties were nonetheless entitled to EAJA awards.

On the other hand, the Board is not convinced that Mr. Geisen's position is correct. Although Mr. Geisen relies upon federal appellate cases allowing EAJA awards even when attorneys' fees were paid by an ineligible third party, none of the cases he cites specifically involves employment indemnification agreements.[90]

For Mr. Geisen to succeed in receiving an award of attorneys' fees and expenses under EAJA, all four of the NRC Staff's independent arguments against his entitlement to that award (*see* Part I, above) must fail; in other words, finding validity in any *one* of those independent arguments would defeat Mr. Geisen's EAJA application. As indicated above, this Board has already concluded that Mr. Geisen's application for legal fees should be denied because EAJA does not apply to Mr. Geisen's enforcement proceeding. Furthermore, the Board believes, as explained in the next part of this decision, that Mr. Geisen's application must also be rejected on the ground that the NRC Staff's position was substantially justified. Given the two alternative independent grounds for disposing of this case, and the apparent circuit-split and resulting confusion concerning the scope of the term "incur" under EAJA, the Board declines to pass judgment on the issue of whether Mr. Geisen "incurred" attorneys' fees and expenses within the meaning of EAJA.[91]

IV. SUBSTANTIAL JUSTIFICATION

Even if EAJA did apply to Mr. Geisen's enforcement proceeding (*but see* Part II, above) and he did in fact "incur" the attorneys' fees and expenses in question,

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[88] In *Thouvenot,* the Seventh Circuit noted the split among the circuits on this issue, which led it to the analogy (discussed above in text accompanying note 77) concerning indemnification by a wealthy relative. *See Thouvenot,* 596 F.3d at 383 ("But the issue is a recurrent one that has divided the circuits to have considered it . . . .").

[89] *See* NRC Staff Response to Reply at 3-5; Tr. at 2554, 2560-61.

[90] At oral argument, counsel for Mr. Geisen acknowledged that there were no cases directly on point that support his position. *See* Tr. at 2537. The NRC Staff also found no cases specifically involving employment indemnifications that support Mr. Geisen's position. *See* Tr. at 2560.

[91] It is similarly unnecessary for the Board to address the NRC Staff's arguments challenging the specifics of the filing, adequacy, and reasonableness of Mr. Geisen's fee request. *See* NRC Staff Response at 9-12; NRC Staff Response to Reply at 7-10.

Mr. Geisen's EAJA application would still fail because the NRC Staff's position in the enforcement proceeding was substantially justified.

Under EAJA, a prevailing party is not entitled to an award for attorneys' fees and expenses if "the position of the Commission over which the applicant has prevailed was substantially justified."[92] By definition, the position of the government includes "the position taken by the [agency Staff] in the adversary adjudication [and] the action or failure to act by the [agency Staff] upon which the adversary adjudication is based."[93] According to the Supreme Court, for the purposes of EAJA, the government's position should be considered substantially justified if "a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact."[94] Thus, for the NRC Staff's position in this case to have been substantially justified, it did not have to be "'justified to a high degree,'" but instead only had to be "'justified in substance or in the main' — that is, justified to a degree that could satisfy a reasonable person."[95]

In determining whether the government's position was substantially justified, courts must look to the totality of the circumstances.[96] Thus, the Board "must examine the government's conduct in both the prelitigation and litigation contexts."[97] In doing so, however, *the Board "does not make separate determinations regarding each stage but 'arrive[s] at one conclusion that simultaneously encompasses and accommodates the entire civil action.'"* [98] This determination is made on the basis of the written record, and, in this case, oral argument.[99]

Consequently, a judgment against the government on the merits, such as is the case here, does not create a presumption that the government's case was not substantially justified.[100] "While a court's 'merits reasoning may be quite relevant

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[92] 10 C.F.R. § 12.105(a). Under EAJA, the government bears the burden of establishing that its position was substantially justified. *Id.; Scarborough v. Principi,* 541 U.S. 401, 414 (2004).

[93] 10 C.F.R. § 12.105(a).

[94] *Pierce v. Underwood,* 487 U.S. 552, 566 n.2 (1988).

[95] *Id.* at 565. The Supreme Court in *Pierce* equated this with the "reasonable basis both in law and fact" standard that had been applied previously by a majority of federal appellate courts. *Id.* at 565-66.

[96] *Roanoke River Basin Ass'n v. Hudson,* 991 F.2d 132, 139 (4th Cir. 1993).

[97] *United States v. Hallmark Construction Co.,* 200 F.3d 1076, 1080 (7th Cir. 2000) (citation omitted); *see also Role Models America, Inc. v. Brownlee,* 353 F.3d 962, 967 (D.C. Cir. 2004) ("The government, however, must demonstrate the reasonableness not only of its litigation position, but also of the agency's actions . . . .").

[98] *Hallmark,* 200 F.3d at 1080 (quoting *Jackson v. Chater,* 94 F.3d 274, 278 (7th Cir. 1996)).

[99] 10 C.F.R. § 12.306(a).

[100] *Scarborough,* 541 U.S. at 415 ("Congress did not, however, want the 'substantially justified' standard to 'be read to raise a presumption that the Government position was not substantially justified simply because it lost the case . . . .'") (citations omitted); *Pierce,* 487 U.S. at 569 ("Obviously, the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified.").

to the resolution of the substantial justification question,' we have cautioned that '[t]he inquiry into the reasonableness of the Government's position . . . may not be collapsed into our antecedent evaluation of the merits.'"[101] Instead, the legal standard governing the determination of substantial justification — reasonableness — is "separate and distinct" from the legal standard used in assessing the merits phase of a proceeding.[102]

Applying the reasonableness standard to the totality of circumstances before us, we conclude that the NRC Staff's position was substantially justified. Although a majority of this Board ultimately ruled against the NRC Staff, finding it had not demonstrated by a preponderance of the evidence that Mr. Geisen had committed the alleged knowing misrepresentations, statements from the Majority Opinion, Dissenting Opinion, Commission Opinion, and Mr. Geisen's criminal case (*see* text accompanying notes 128-29, below) all indicate that a reasonable person could believe that the NRC Staff's position was in fact correct.

Mr. Geisen disagrees, claiming instead that "the Staff's overreach in the issuance of the [Enforcement] Order and in its litigation positions show that its actions were not substantially justified."[103] Specifically, Mr. Geisen asserts that the accusations against him contained in that Order were "without any basis in fact or law,"[104] and that, consequently, the NRC Staff's litigation position "was condemned to failure by wooden adherence to what preceded it."[105]

Under the agency's regulations, the NRC Staff is authorized to issue immediately effective enforcement orders to both licensed and unlicensed individuals in certain circumstances.[106] The standard that must be met before issuing an immediately effective enforcement order is one of "adequate evidence," which is akin to the test for probable cause.[107] According to this standard, immediately effective enforcement orders must be "based on preliminary investigation or other emerging information that is reasonably reliable and indicates the need for immediate action."[108] Nonetheless, the Commission has made clear that "[t]his

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[101] *Halverson v. Slater,* 206 F.3d 1205, 1208 (D.C. Cir. 2000) (quoting *F.J. Vollmer Co., Inc. v. Magaw,* 102 F.3d 591, 595 (D.C. Cir. 1996)).

[102] *Id.; Federal Election Commission v. Rose,* 806 F.2d 1081, 1087 (D.C. Cir. 1986).

[103] Geisen Reply at 3.

[104] *Id.* at 24.

[105] *Id.* at 41.

[106] *See* 10 C.F.R. § 2.202.

[107] *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, OH 44041), CLI-94-6, 39 NRC 285, 301 (1994).

[108] *Id.* According to the Commission, adequate evidence is deemed to exist

> when facts and circumstances within the NRC Staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe

(Continued)

standard does not suggest an absence of controversy over such evidence or over the need for immediate action."[109]

Although it was ultimately found to be insufficient to sustain the underlying charge, the evidence contained in the Enforcement Order was on its face adequate to make the initiation of the proceeding substantially justified.[110] In the Enforcement Order, the NRC Staff details the incomplete and inaccurate responses it received regarding Davis-Besse, Mr. Geisen's involvement with those responses, and the material nature of those responses.[111] Highlighted in the Enforcement Order were seven specific examples that, in the NRC Staff's view, demonstrated Mr. Geisen's awareness of the state of the Davis-Besse reactor head, thereby strongly implying that Mr. Geisen knowingly conveyed inaccurate and incomplete information to the NRC in his responses concerning the reactor head.[112] These seven specific examples were the result of an extensive investigation, subject to broad agency oversight, that was conducted over the course of multiple years. Even the Majority of the Board, in ruling against the NRC Staff, found that "it is fully understandable why the Staff investigation would, at its outset, have focused on Mr. Geisen as a likely source of the falsified information."[113]

To be sure, members of this Board had misgivings about the process leading up to the issuance of Mr. Geisen's Enforcement Order.[114] Even the NRC Staff itself admits that the process leading up to the issuance of the Enforcement Order in this case "could have been better."[115] Whatever may be said, however, about the launching of the Enforcement Order, we conclude that the evidence on which it was based was facially adequate to render the initiation of the proceeding substantially justified within the meaning of EAJA.

> that the charges are true and that the order is necessary to protect the public health, safety, or interest.

Id. (quoting Revisions to Procedures to Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,196 (May 12, 1992)).

[109] *Id.*

[110] What some of the evidence stated on its face did not, however, necessarily capture the true situation. For instance, the Majority ultimately found that the document containing John Martin's interview with Mr. Geisen, which at first seemed to establish requisite knowledge, was "*irrefutably inconsistent with the body of other evidence about Mr. Geisen's activities in August of 2001, and thus can carry no weight, notwithstanding the inherent credibility of its author.*" LBP-09-24, 70 NRC at 741, 744 (emphasis in original).

[111] *See* Enforcement Order.

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

[113] LBP-09-24, 70 NRC at 786.

[114] *See* note 110, above; Tr. at 2567; LBP-09-24, 70 NRC at 852 n.45 (Hawkens, J., dissenting) (noting that the NRC Staff had "ample time" prior to the issuance of the immediately-effective Enforcement Order to have provided Mr. Geisen with some type of predeprivation hearing); *accord id.* at 801 n.11 (Farrar, J., separate statement).

[115] Tr. at 2570.

After the Enforcement Order was issued, Mr. Geisen and the NRC Staff entered into a lengthy stipulation whereby Mr. Geisen acknowledged that certain statements he had made to the NRC concerning the Davis-Besse reactor head were in fact false.[116] The crux of the litigation phase of the enforcement proceeding, therefore, was to determine whether Mr. Geisen in fact knew that these statements were false at the time that he made them. Because findings concerning personal knowledge are "'entirely factual'"[117] and largely dependent on witness credibility,[118] a 5-day evidentiary hearing was conducted.[119] During the evidentiary hearing, the NRC Staff presented numerous witnesses, reports, memoranda, e-mails, and photos in an attempt to show that Mr. Geisen's inaccurate statements to the NRC were made with a "deliberate" and "knowing" state of mind.[120] Although a Majority of the Board ultimately ruled in favor of Mr. Geisen, the Majority noted that the NRC Staff Counsel had produced an "abundance of circumstantial evidence" and praised them for a "commendable effort."[121]

The evidence presented by the NRC Staff was sufficiently abundant that it persuaded a member of this Board to issue a detailed Dissenting Opinion in which he found that the NRC Staff's position was correct.[122] The Dissent stated:

> I would sustain the charge in the Enforcement Order [ ] because a preponderance of the evidence shows Mr. Geisen acted knowingly when he provided the NRC with materially incomplete and inaccurate information regarding the scope and efficacy of the Davis-Besse nozzle inspections. That Mr. Geisen had such knowledge is based on an abundance of record evidence that Mr. Geisen concedes he read, closely reviewed, discussed, or approved.[123]

That the Dissenting Opinion contained a thorough analysis in favor of the NRC Staff's position prima facie supports a conclusion that a "reasonable person could think" — the test adopted by the Supreme Court (*see* text accompanying note 94, above) — the NRC Staff's position to be correct.

If more were needed to confirm that the NRC Staff's position was substantially justified, it was provided when the Commission ultimately affirmed this Board's ruling. In doing so, the Commission repeatedly noted the strength of the NRC

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[116] LBP-09-24, 70 NRC at 689.

[117] *Id.* at 707-08 (quoting *Ziegler v. Connecticut General Life Insurance Co.,* 916 F.2d 548, 553 (9th Cir. 1990)).

[118] CLI-10-23, 72 NRC at 225-26.

[119] LBP-09-24, 70 NRC at 689.

[120] *See id.* at 695-99.

[121] *Id.* at 786-87.

[122] *Id.* at 809-57 (Hawkens, J., dissenting).

[123] *Id.* at 824.

Staff's position. At numerous points throughout its opinion, the Commission reiterated the close nature of the case, indicating that it seemingly could have gone either way. The Commission made this explicit when it stated that:

> Indeed, we have no doubt that based on the record, the Board permissibly could have inferred that Mr. Geisen knowingly misled the NRC, and that the outcome of this proceeding plausibly could have been different. But this is not a reason to reverse the majority. In as hard-fought a case as this, we would not expect the record to support one party only. The fact that the majority accorded greater weight to one party's evidence than to the other's is not a basis for overturning the initial decision.[124]

In support of this position, the Commission pointed to the plethora of evidence submitted by both the NRC Staff and Mr. Geisen — a 5-day oral hearing, hundreds of pages of documentary evidence, transcripts from investigative interviews, and a related criminal case.[125]

The Commission again emphasized the close nature of Mr. Geisen's case, and hence the strength of the NRC Staff's position, when it stated that

> [b]ased on the record, the Board might well have determined that Mr. Geisen's testimony was not credible and ruled in favor of the Staff. But this possible alternative resolution of the case does not equate to finding no evidence in the record supporting the majority's view.[126]

Even the Commission's conclusion, which affirmed the Board's Order in favor of Mr. Geisen, acknowledged the strength of the NRC Staff's position when it stated that it would uphold the Majority's Decision "[r]egardless of whether we would have made the same findings as the majority were we in its position."[127]

Additionally, while not dispositive of the issue of whether the NRC Staff's position was substantially justified, the Board cannot completely disregard that Mr. Geisen was convicted of criminal charges in conjunction with this proceeding. Specifically, prior to the conclusion of the enforcement proceeding in question, Mr. Geisen was convicted on three criminal counts of concealing a material fact and making a false statement to the NRC in violation of 18 U.S.C. §§ 1001 and 1002.[128] On appeal, the Sixth Circuit affirmed Mr. Geisen's conviction.[129] These criminal convictions stemmed from essentially the same written and oral commu-

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[124] CLI-10-23, 72 NRC at 225.
[125] *Id.* at 225.
[126] *Id.* at 241.
[127] *Id.*
[128] *See United States v. Geisen,* 612 F.3d 471, 475 (6th Cir. 2010).
[129] *Id.*

nications that formed the basis of the NRC Staff's position in this enforcement proceeding.

To be sure, it seemed plain from the transcript of the Hearing on the Motion to Set Aside the Jury Verdict that the district judge entertained some doubt about the soundness of that verdict[130] (and a Majority of this Board found that it was not bound, under the doctrine of collateral estoppel, by the district court's judgment[131]). Nonetheless, that judgment, and its subsequent affirmation by the Sixth Circuit, provides additional support for concluding that the NRC Staff's position — in parallel with that of the prosecutors' — was substantially justified.

Thus, although this Board and the Commission both declined to adopt the NRC Staff's position in Mr. Geisen's enforcement proceeding, a review of the prelitigation and litigation phases of Mr. Geisen's enforcement proceedings, along with the statements from the Majority Opinion, the Dissenting Opinion, the Commission, and Mr. Geisen's criminal proceeding in this matter, indicates that the NRC Staff's position in this proceeding was substantially justified. This provides a second independent ground for denying Mr. Geisen's EAJA application.

V. CONCLUSION

For the reasons stated above, Mr. Geisen's application for attorneys' fees pursuant to EAJA and 10 C.F.R. Part 12 is hereby DENIED.

In accordance with 10 C.F.R. § 12.308, this decision will constitute final agency action on Mr. Geisen's EAJA application 40 days after its issuance, unless: (1) a party files a petition for Commission review within 15 days of the issuance of this decision; or (2) the Commission, at its discretion, determines that review is warranted within 40 days of the issuance of this decision.[132] A party who seeks judicial review of this decision must first seek Commission review, unless otherwise authorized by law.[133]

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[130] *See United States v. Geisen,* 2008 WL 1840759, at *1 (N.D. Ohio Apr. 22, 2008) (acknowledging that this was a "close case").

[131] LBP-09-24, 70 NRC at 711.

[132] 10 C.F.R § 12.308; 10 C.F.R. § 2.341(b)(1). Section 12.308 states that the review process for EAJA proceedings is governed by 10 C.F.R. § 2.786, but the latter section no longer exists in the current regulations. Because section 2.786 previously contained the general rules governing the timing of appeals, we assume the reference in section 12.308 should be to 10 C.F.R. § 2.341.

[133] *See* 10 C.F.R. § 12.308(a).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

E. Roy Hawkens
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 10, 2011

Copies of this Order were sent this date by e-mail transmission to counsel for Mr. Geisen and for the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Office of Nuclear Reactor Regulation

Eric J. Leeds, Director

In the Matter of **Docket No. 50-271**
(License No. DPR-28)

ENTERGY NUCLEAR VERMONT YANKEE, LLC, and ENTERGY NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power Station) **March 11, 2011**

The Petitioners requested that the Nuclear Regulatory Commission (NRC) take enforcement actions against Entergy Nuclear Operations, Inc., the operator of Vermont Yankee, as result of a tritium leak. Mr. Mulligan requested in his petition that: (1) the radioactive leak into the environment of VY be immediately stopped, VY be immediately shut down, and all leaking paths be isolated; and (2) VY disclose its preliminary "root cause analysis," and the NRC release its preliminary investigative report on that analysis before plant startup. Mr. Shadis on behalf of New England Coalition (NEC) requested in his petition that the NRC: (1) require VY to go into cold shutdown and depressurize all systems in order to slow or stop the leak; (2) act promptly to stop or mitigate the leak(s); (3) require VY to reestablish its licensing basis by physically tracing records and reporting physical details of all plant systems that would be within scope as "Buried Pipes and Tanks," in NUREG-1801, "Generic Aging Lessons Learned (GALL) Report," and under the requirements of 10 C.F.R. § 50.54, "Conditions of licenses"; (4) investigate and determine why Entergy has been allowed to operate VY since 2002 without a working knowledge of all plant systems and why the NRC's Reactor Oversight Process (ROP) and review process for license renewal amendment did not detect this dereliction; (5) take notice of VY's many maintenance and management failures (from 2000 to 2010) and the ROP's failure to detect them early and undertake a full diagnostic evaluation team inspection

using NRC Inspection Procedure 95003, "Supplemental Inspection for Repetitive Degraded Cornerstones, Multiple Degraded Cornerstones, Multiple Yellow Inputs or One Red Input"; and (6) require VY to apply for an amendment to its license renewal application that would address both aging analysis and aging management of all buried piping carrying or with the potential to carry radionuclides and/or the potential to interact with any safety or safety-related system. Mr. Saporito requested in his petition that the NRC: (1) order a cold shutdown mode of operation for VY because of leaking radioactive tritium; and (2) issue a confirmatory order modifying the NRC-issued license for VY so that the Licensee must bring the nuclear reactor to a cold shutdown mode of operation until the Licensee can provide definitive reasonable assurance to the NRC, under affirmation, that the reactor will be operated in full compliance with the regulations in 10 C.F.R. Part 50, "Domestic Licensing of Production and Utilization Facilities," and Appendix A, "General Design Criteria for Nuclear Power Plants," to 10 C.F.R. Part 50, Criterion 60, "Control of Releases of Radioactive Materials to the Environment," and Criterion 64, "Monitoring Radioactivity Releases," and other NRC regulations and authority.

The final Director's Decision on this petition was issued on March 11, 2011. On January 7, 2010, Entergy reported to the NRC that water samples taken from groundwater monitoring well GZ-3 onsite at VY showed tritium levels above background. GZ-3 is about 70 feet from the Connecticut River. Tritium was initially measured at levels up to about 17,000 pCi/L in monitoring well GZ-3, which is not used for drinking water. Samples at other monitoring wells have also shown some tritium. The highest reading from any monitoring well has been about 2.5 million pCi/L, from monitoring well GZ-10. Entergy immediately started an investigation to identify the source of the tritium, and later installed additional monitoring wells to help locate the source. Upon notification on January 7, 2010, of the detection of tritium in the monitoring well, the NRC Staff initiated actions to review and assess the condition, by reviewing all available sampling data, hydrologic information, and analyses; conducting an onsite inspection and assessment of Entergy's plans and process for investigating the condition; and making an independent determination of public health and safety consequence based on available information. NRC inspectors provided close regulatory oversight of Entergy's investigation in order to independently assure conformance with applicable NRC regulatory requirements, assess Licensee performance, and evaluate the condition with respect to NRC's radiological release limits. On February 27, 2010, following excavation and leak testing of the Advanced Off Gas (AOG) system pipe tunnel, Entergy reported that it had identified leakage into the surrounding soil, and therefore to the groundwater, from an unsealed joint in the concrete tunnel wall. The AOG pipe tunnel is located about 15 feet underground. Also, piping inside the tunnel had previously been found to be leaking, and the drain inside the tunnel had been found to be clogged. Soil

samples in the vicinity showed traces of radioactive isotopes. Entergy reported that the leakage to the environment had been stopped by isolating piping and containing the water leaking from the AOG pipe tunnel. However, on May 28, 2010, Entergy reported a second leak from AOG piping into the soil. Entergy quickly isolated this leak and has sealed off that piping to prevent further leaks in that area. The contaminated soil was removed from the excavated area and is being stored in containers onsite for eventual disposal in accordance with NRC regulatory requirements. As part of its oversight effort, NRC Staff conducted an evaluation in accordance with NRC Manual Chapter 0309, "Reactive Inspection Decision Basis for Reactors," from January 25 to April 10, 2010, to determine if the occurrence with the AOG piping constituted a significant operational event (i.e., a radiological, safeguards, or other safety-related operational condition) that posed an actual or potential hazard to public health and safety, property, or the environment. The evaluation reviewed the condition against the specified deterministic criteria that are based on regulatory safety limits, and determined that none of the criteria were met. Notwithstanding that determination, the NRC Staff continued its review, oversight, and assessment of the condition, including an independent evaluation of any potential public health and safety consequences. The Staff's activities included:

1. Several onsite inspections and reviews to assess radiological and hydrological data to establish reasonable assurance that members of the public were not, nor were they expected to be, exposed to radiation in excess of the dose limits for individual members of the public specified in 10 C.F.R. § 20.1301 (i.e., 100 millirem in a year) or the As Low As Is Reasonably Achievable (ALARA) dose objectives specified in 10 C.F.R. Part 50, Appendix I.

2. Engagement of hydrological scientists from NRC's Office of Nuclear Reactor Regulation, Office of Regulatory Research, and the U.S. Geological Survey to independently assess the Licensee's hydrological and geological data and conclusions on groundwater flow characteristics of the area.

3. Inspection in accordance with NRC Temporary Instruction TI-2515/173, "Review of the Implementation of the Industry Ground Water Protection Voluntary Initiative," to determine the Licensee's implementation of the specifications in the industry's groundwater initiative document NEI-07-07, "Industry Ground Water Protection Initiative — Final Guidance Document" (ADAMS Accession No. ML072610036).

4. Confirmation of the basis, calculational methodology, and results obtained by the Licensee to estimate a contaminated groundwater effluent release and off-site dose consequence to members of the public.

5. Analysis of selected groundwater and environmental samples to aid in determining the adequacy of the Licensee's analytical methods.
6. Approval for additional NRC inspection resources above the baseline inspection program to fully evaluate and provide continuing regulatory oversight of the Licensee's investigation and remediation activities.
7. Documentation of the inspection scope and conclusions in publicly available NRC Inspection Reports.

As a result of these activities, the NRC established reasonable assurance, in a timely manner, that this groundwater condition would not result in any dose consequence that would jeopardize public health and safety. To date, information and data continue to support that the dose consequence attributable to the groundwater condition at VY remains well below the "As Low As Reasonably Achievable" (ALARA) dose objectives specified in 10 C.F.R. Part 50, Appendix I; and that the NRC regulatory criteria of 10 C.F.R. § 20.1301, "Dose limits for individual members of the public," was never approached.

The NRC Staff did not identify any violations and the public health and safety remain reasonably assured. Thus, no enforcement action against VY is warranted. The NRC Staff concludes that the Petitioners' concerns have been addressed and resolved such that no further action is needed in response to the petitions.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letters dated January 12, 2010, from Mr. Michael Mulligan, February 8, 2010, from Mr. Raymond Shadis, and February 20, 2010, from Mr. Thomas Saporito, these individuals (collectively "Petitioners") filed separate petitions pursuant to Title 10 of the *Code of Federal Regulations* (10 C.F.R.), section 2.206, requesting that the Nuclear Regulatory Commission (NRC or the Commission) take actions with regard to the Vermont Yankee Nuclear Power Station (VY).

Mr. Mulligan requested in his petition that: (1) the radioactive leak into the environment of VY be immediately stopped, VY be immediately shut down, and all leaking paths be isolated; and (2) VY disclose its preliminary "root cause analysis," and the NRC release its preliminary investigative report on that analysis before plant startup.

Mr. Shadis on behalf of New England Coalition (NEC) requested in his petition that the NRC: (1) require VY to go into cold shutdown and depressurize all systems in order to slow or stop the leak; (2) act promptly to stop or mitigate the leak(s); (3) require VY to reestablish its licensing basis by physically tracing records

and reporting physical details of all plant systems that would be within scope as "Buried Pipes and Tanks," in NUREG-1801, "Generic Aging Lessons Learned (GALL) Report," and under the requirements of 10 C.F.R. § 50.54, "Conditions of licenses"; (4) investigate and determine why Entergy has been allowed to operate VY since 2002 without a working knowledge of all plant systems and why the NRC's Reactor Oversight Process (ROP) and review process for license renewal amendment did not detect this dereliction; (5) take notice of VY's many maintenance and management failures (from 2000 to 2010) and the ROP's failure to detect them early and undertake a full diagnostic evaluation team inspection using NRC Inspection Procedure 95003, "Supplemental Inspection for Repetitive Degraded Cornerstones, Multiple Degraded Cornerstones, Multiple Yellow Inputs or One Red Input"; and (6) require VY to apply for an amendment to its license renewal application that would address both aging analysis and aging management of all buried piping carrying or with the potential to carry radionuclides and/or the potential to interact with any safety or safety-related system.

Mr. Saporito requested in his petition that the NRC: (1) order a cold shutdown mode of operation for VY because of leaking radioactive tritium; and (2) issue a confirmatory order modifying the NRC-issued license for VY so that the Licensee must bring the nuclear reactor to a cold shutdown mode of operation until the Licensee can provide definitive reasonable assurance to the NRC, under affirmation, that the reactor will be operated in full compliance with the regulations in 10 C.F.R. Part 50, "Domestic Licensing of Production and Utilization Facilities," and Appendix A, "General Design Criteria for Nuclear Power Plants," to 10 C.F.R. Part 50, Criterion 60, "Control of Releases of Radioactive Materials to the Environment," and Criterion 64, "Monitoring Radioactivity Releases," and other NRC regulations and authority.

Mr. Shadis stated during a public teleconference with the PRB on March 3, 2010, that the tritium leak is just one example of many maintenance and management failures at VY. All three Petitioners raised a concern regarding what they perceive as the NRC's failure to examine the deficiencies at VY in an integrated manner. This concern has met the criteria for review in accordance with NRC's Management Directive (MD) 8.11 "Review Process for 10 CFR 2.206 Petitions."

In an acknowledgment letter dated June 25, 2010, the Petitioners were informed of the PRB's decision to deny the request for an immediate cold shutdown of VY because the PRB did not identify any urgent safety concerns. The NRC also informed the Petitioners that their petitions were consolidated per the guidance in MD 8.11. The consolidated petition was accepted for review for the following specific issues and concerns stated by the Petitioners in the petitions and/or supplemented during the teleconferences:

1. Increasing concentrations of radiocontaminants in the soil and groundwater at VY, as well as an increasing area of contamination, are manifest on

a daily basis. VY risks aggravating the contamination by continuing to run the reactor at full power while attempting over a period of a month to triangulate the location of a presumed leak by drilling a series of test wells in the affected area.

2. During the license renewal application proceeding, the Licensee averred that it was unaware of the existence of some buried pipes, now uncovered, and it has yet to discover their path and purpose.

3. Entergy has, in 8 years of ownership, failed to learn and understand VY's design, layout, and construction. This failure to comprehend and understand the layout, function, and potentially the interaction of the plant's own piping systems constitutes a loss of design basis.

4. The NRC's ROP has apparently failed to capture, anticipate, and prevent ongoing maintenance, engineering, quality assurance, and operation issues that have manifested themselves in a series of high-profile incidents since Entergy took over VY. The agency has repeatedly failed to detect root-cause trends until they have, as in this instance, become grossly self-revealing.

5. The NRC should ensure that Entergy has adequate decommissioning funds. The tritium leak will increase decommissioning costs because of the need for site radiological examination and soil remediation.

Copies of the petitions are available for inspection at the Commission's Public Document Room (PDR) at One White Flint North, Room O1-F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852, and from the NRC's Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the NRC Web site at http://www.nrc.gov/reading-rm/adams.html under ADAMS Accession Nos. ML100190688, ML100470430, and ML100621374. Refer to NRC's Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions" (ADAMS Accession No. ML041770328), for a description of the petition review process. Persons who do not have access to ADAMS or who have problems in accessing the documents in ADAMS should contact the NRC PDR reference staff by telephone at 1-800-397-4209 or 301-415-4737, or by e-mail to pdr.resource@nrc.gov.

II. DISCUSSION

On January 7, 2010, Entergy reported to the NRC that water samples taken from groundwater monitoring well GZ-3 onsite at VY showed tritium levels above background. GZ-3 is about 70 feet from the Connecticut River. Tritium is another name for the radioactive nuclide hydrogen-3. Tritium occurs naturally in

the environment because of cosmic ray interactions. It is also produced by nuclear reactor operations, and can be legally discharged as a radioactive effluent under NRC regulations. Tritium is chemically identical to normal hydrogen (hydrogen-1), and, like normal hydrogen, tends to combine with oxygen to form water, which is referred to as tritiated water. The detection of tritiated water in the monitoring well indicated abnormal leakage from the nuclear plant. The Environmental Protection Agency's (EPA's) regulatory standard for tritium in drinking water is 20,000 picocuries per liter (pCi/L). Tritium was initially measured at levels up to about 17,000 pCi/L in monitoring well GZ-3, which is not used for drinking water. Samples at other monitoring wells have also shown some tritium. The highest reading from any monitoring well has been about 2.5 million pCi/L, from monitoring well GZ-10. Entergy immediately started an investigation to identify the source of the tritium, and later installed additional monitoring wells to help locate the source.

Upon notification on January 7, 2010, of the detection of tritium in the monitoring well, the NRC Staff initiated actions to review and assess the condition, by reviewing all available sampling data, hydrologic information, and analyses; conducting an onsite inspection and assessment of Entergy's plans and process for investigating the condition; and making an independent determination of public health and safety consequence based on available information. NRC inspectors provided close regulatory oversight of Entergy's investigation in order to independently assure conformance with applicable NRC regulatory requirements, assess Licensee performance, and evaluate the condition with respect to NRC's radiological release limits.

On February 27, 2010, following excavation and leak testing of the Advanced Off Gas (AOG) system pipe tunnel, Entergy reported that it had identified leakage into the surrounding soil, and therefore to the groundwater, from an unsealed joint in the concrete tunnel wall. The AOG pipe tunnel is located about 15 feet underground. Also, piping inside the tunnel had previously been found to be leaking, and the drain inside the tunnel had been found to be clogged. Soil samples in the vicinity showed traces of radioactive isotopes. Entergy reported that the leakage to the environment had been stopped by isolating piping and containing the water leaking from the AOG pipe tunnel. However, on May 28, 2010, Entergy reported a second leak from AOG piping into the soil. Entergy quickly isolated this leak and has sealed off that piping to prevent further leaks in that area. The contaminated soil was removed from the excavated area and is being stored in containers onsite for eventual disposal in accordance with NRC regulatory requirements.

As part of its oversight effort, NRC Staff conducted an evaluation in accordance with NRC Manual Chapter 0309, "Reactive Inspection Decision Basis for Reactors," from January 25 to April 10, 2010, to determine if the occurrence with the AOG piping constituted a significant operational event (i.e., a radiological,

safeguards, or other safety-related operational condition) that posed an actual or potential hazard to public health and safety, property, or the environment. The evaluation reviewed the condition against the specified deterministic criteria that are based on regulatory safety limits, and determined that none of the criteria were met. Notwithstanding that determination, the NRC Staff continued its review, oversight, and assessment of the condition, including an independent evaluation of any potential public health and safety consequences. The Staff's activities included:

1. Several onsite inspections and reviews to assess radiological and hydrological data to establish reasonable assurance that members of the public were not, nor were they expected to be, exposed to radiation in excess of the dose limits for individual members of the public specified in 10 C.F.R. § 20.1301 (i.e., 100 millirem in a year) or the As Low As Is Reasonably Achievable (ALARA) dose objectives specified in 10 C.F.R. 50, Appendix I.

2. Engagement of hydrological scientists from NRC's Office of Nuclear Reactor Regulation, Office of Regulatory Research, and the U.S. Geological Survey to independently assess the Licensee's hydrological and geological data and conclusions on groundwater flow characteristics of the area.

3. Inspection in accordance with NRC Temporary Instruction TI-2515/173, "Review of the Implementation of the Industry Ground Water Protection Voluntary Initiative," to determine the Licensee's implementation of the specifications in the industry's groundwater initiative document NEI-07-07, "Industry Ground Water Protection Initiative — Final Guidance Document" (ADAMS Accession No. ML072610036).

4. Confirmation of the basis, calculational methodology, and results obtained by the Licensee to estimate a contaminated groundwater effluent release and offsite dose consequence to members of the public.

5. Analysis of selected groundwater and environmental samples to aid in determining the adequacy of the Licensee's analytical methods.

6. Approval for additional NRC inspection resources above the baseline inspection program to fully evaluate and provide continuing regulatory oversight of the Licensee's investigation and remediation activities.

7. Documentation of the inspection scope and conclusions in publicly available NRC Inspection Reports.

As a result of these activities, the NRC established reasonable assurance, in a timely manner, that this groundwater condition would not result in any

dose consequence that would jeopardize public health and safety. To date, information and data continue to support that the dose consequence attributable to the groundwater condition at VY remains well below the "As Low As Reasonably Achievable" (ALARA) dose objectives specified in 10 C.F.R. Part 50, Appendix I; and that the NRC regulatory criteria of 10 C.F.R. § 20.1301, "Dose limits for individual members of the public," was never approached.

In addition, representatives from the State of Vermont observed NRC inspection activities and conducted independent analyses of collected groundwater samples.

As discussed in Section I, the specific concerns raised by the Petitioners which are used as the basis for their requests are discussed in the following paragraphs.

A. NRC Response to the Consolidated Petition

1. Concern 1 — Increasing Concentrations of Radiocontaminants in the Soil and Groundwater at VY

In order to address/remove the onsite contamination, Entergy installed an extraction well (GZ-EW1) on March 23, 2010. On April 7, 2010, Entergy placed into service a second extraction well (GZ-EW1A), with a higher flow capacity. As the plume progressed toward the Connecticut River, the extraction wells were sited accordingly, with GZ-15 being utilized for groundwater extraction at various times starting on July 28, 2010, followed by installation of extraction well EW-2 which began operation along with GZ-14 on September 13, 2010. As of December 21, 2010, Entergy has pumped approximately 307,000 gallons of groundwater out of these wells in order to reduce the amount of tritiated water in the groundwater. About 9000 gallons of the extracted water were recycled to the facility, and about 298,000 gallons of the extracted water have been shipped offsite for processing. Data indicate that the remaining residual plume of tritiated groundwater is currently migrating from the source of the leak to the Connecticut River, which is the direction of flow for the groundwater in this location. Notwithstanding the hydrology, no detectable tritium has been found in the Connecticut River. The NRC's inspections to date confirm that no federal regulatory limits have been exceeded, and public health and safety remain unaffected.

The soil in the vicinity of the leak was contaminated with small amounts of radioactive particulates associated with nuclear plant operations, including manganese-54, cobalt-60, zinc-65, strontium-90, and cesium-137. Sampling indicated very little migration in the immediate area, which is typical for these radionuclides. Entergy has removed about 150 cubic feet of contaminated soil and packaged it for eventual disposal in accordance with NRC regulatory requirements. Although some minor amounts of contaminated soil may remain,

NRC inspections indicate that this soil poses no threat to public health and safety. Areas of remaining minor contamination are expected to be evaluated and, as appropriate, remediated during plant decommissioning. The NRC's experience with decommissioned nuclear plants such as Maine Yankee, Haddam Neck, and Yankee Rowe indicates that these areas can be successfully remediated during decommissioning. The NRC's inspections indicate that no federal regulatory limits have been exceeded, and there are no health or safety concerns for members of the public or plant workers. The initial NRC inspection covered the period of January 25 through April 14, 2010. Inspection results were initially discussed in an NRC inspection report with preliminary results, dated April 16, 2010 (ADAMS Accession No. ML101060419). The NRC issued its completed report on May 20, 2010 (ADAMS Accession No. ML101400040), and continued to inspect the Licensee's actions in these areas. The followup NRC Inspection Report 05000271/2010010 was issued on January 7, 2011 (ADAMS Accession No. ML110070085).

As part of its corrective action program, Entergy performed a root-cause analysis (RCA) of the leakage event. The NRC assessed the comprehensiveness of this analysis and documented this review in NRC Inspection Report 05000271/2010009 dated October 13, 2010 (ADAMS Accession No. ML102860037). The NRC concluded that Entergy's root and apparent cause evaluations for the tritium groundwater leakage events were appropriate and no violation of NRC requirements was identified.

As discussed, Entergy has identified the source of the leak and stopped it, and has reduced the onsite contamination by pumping out contaminated groundwater and removing about 150 cubic feet of contaminated soil. The NRC's inspections confirm that no federal regulatory limits have been exceeded, and the public health and safety remain unaffected. Thus, no enforcement action is warranted for this concern.

2. Concern 2 — VY Was Unaware of the Existence of Some Buried Pipes During License Renewal Application Proceeding

On February 24, 2010, Entergy informed the NRC that some employees at VY had been removed from their site positions and placed on administrative leave. Entergy took these actions as a result of Entergy's independent internal investigation into alleged contradictory or misleading information provided to the State of Vermont that was not corrected. On May 27, 2010, an NRC audit team completed an onsite audit to independently verify that information provided by Entergy material to the renewal of the VY operating license was complete and accurate. The NRC Staff reviewed the VY yard piping drawings to independently identify buried and underground piping located onsite. The NRC Staff performed walkdowns of yard areas and conducted interviews with the buried

piping program engineer. The NRC Staff also reviewed the results of system walkdowns previously performed by NRC inspectors during the performance of NRC Inspection Procedure (IP) 71002, "License Renewal Inspection," as documented in NRC Inspection Report 05000271/2007006, dated June 4, 2007 (ADAMS Accession No. ML071550330). Additionally, the NRC Staff had the opportunity to observe exposed portions of buried piping that had been previously excavated by Entergy in conjunction with actions taken to investigate the cause of a leak from an underground portion of piping in the AOG system. The NRC Staff compared the results of this review to a list of buried and underground piping Entergy had provided in preparation of the audit. The NRC Staff did not find any discrepancies between Entergy's current accounting of buried and underground safety-related piping and the description contained in the license renewal application, and so concluded that all information provided to the NRC in the license renewal application was complete and accurate in accordance with 10 C.F.R. § 50.9. Note that nonsafety underground piping is excluded from the license renewal process. The complete audit report dated September 3, 2010, may be found under ADAMS Accession No. ML102070412. Because the NRC Staff did not identify a violation of NRC requirements, no enforcement action is warranted for this concern.

3. Concern 3 — Entergy's Failure to Comprehend and Understand the Layout, Function, and Potentially the Interaction of the Plant's Own Piping Systems Constitutes a Loss of Design Basis

The design basis for VY is the information that "identifies the specific functions to be performed by a structure, system or component of a facility, and the specific values or ranges of values chosen for controlling parameters as reference bounds for design." The design basis is submitted to the NRC and is approved by the NRC by issuance of the facility operating license. Any changes to the facility as described in the final safety analysis report (FSAR) must be either submitted to the NRC for approval through a license amendment, or changed in accordance with the provisions of 10 C.F.R. § 50.59. Licensees are required under 10 C.F.R. § 50.71(e) to update the FSAR, which was originally submitted as part of the application for the license, to assure that the information included in the FSAR contains the latest information developed. These submittals contain all the changes necessary to reflect information and analyses submitted to the Commission since the last update to the FSAR. The submittal includes the effects of all changes made in the facility or procedures as described in the FSAR and all safety analyses and evaluations performed by the Licensee in support of approved license amendments or in support of conclusions that the plant design change did not require a license amendment.

As discussed in previous Section A.2, an NRC audit team compared the

information Entergy provided in the license renewal application to the VY Technical Specifications and the FSAR. The NRC Staff determined that the information in the FSAR would meet the requirements of 10 C.F.R. § 50.71(e) regarding maintenance of design basis information, consistent with the definition of "design bases" in 10 C.F.R. § 50.2, and reflects current plant design. Both safety and nonsafety underground yard piping are depicted on drawings in the VY's controlled drawings system. The Staff concluded that the information reviewed was accurate and complete and the NRC Staff did not identify any loss of the design basis. Because no violations of NRC requirements were identified, enforcement action is not warranted for this concern.

4. Concern 4 — The NRC's ROP Failure to Detect Root Cause Trends of a Series of High-Profile Incidents

While a failure of the NRC's ROP is not something for which the NRC could take enforcement action against VY, the NRC Staff is responding to the Petitioners' concern. Objectives of the ROP include: (1) improving the objectivity of reactor oversight so that subjective decisions and judgment are not central process features; (2) improving the scrutability of reactor oversight so that NRC actions have a clear tie to licensee performance; and (3) risk-informing reactor oversight so that NRC and licensee resources are focused on those aspects of performance having the greatest impact on safe plant operation.

The ROP evaluates plant performance using objective, risk-informed thresholds, which include the safety significance of inspection findings and performance indicators (PIs). Objective performance thresholds are intended to help determine the level of regulatory engagement appropriate to licensee performance in each cornerstone area. The thresholds were established so that sufficient margin existed between nominal performance bands to allow for licensee initiatives to correct performance problems before they warrant escalated regulatory involvement. Sufficient margin exists to allow for both NRC and licensee corrective actions to be taken in response to declining performance before plant operation becomes unsafe. Under the ROP, performance deficiencies that have no impact on safety are considered minor and are entered into a licensee's corrective action program for appropriate attention, but they do not result in any specific action by the NRC. However, the NRC reviews the licensee's corrective action program on a routine basis while performing the baseline inspection program, and the Staff performs more in-depth reviews on a periodic basis while performing the inspection procedure, "Problem Identification and Resolution."

In addition to continuous inspection and assessment of VY performance, annual and mid-cycle assessments of VY performance are conducted. Annual and mid-cycle assessments involve review of the safety significance and common factors associated with inspection findings, and review of licensee objective

performance indicators. The results associated with the last several reviews indicate that VY is being operated in a manner which preserves public health and safety. The high-profile events referenced by the Petitioners were inspected by a combination of specialist inspectors from both the NRC regional office and NRC headquarters, and by the onsite resident inspector staff. These events were determined to either not involve systems important to plant safety, or involved performance deficiencies of very low safety significance. In June 2009, the NRC conducted a Problem Identification and Resolution inspection at VY. The results of this inspection indicated that VY was generally effective in the implementation of its corrective action program; additionally, the safety culture of station employees, including station management, indicated that personnel had a willingness to identify, evaluate, and resolve plant deficiencies. The current and past performance information, including the Mid-Cycle and Annual Assessment Letters and inspection reports issued to VY and other licensees, are publicly available and presented on the NRC's public Web site.

The ROP Action Matrix is used to determine the level of regulatory oversight warranted for varying levels of performance. VY is in Column 1 (Licensee Response Column) of the ROP Action Matrix because all inspection findings and PIs at this site have very low (i.e., green) safety significance. In accordance with Inspection Manual Chapter (IMC) 0305, "Operating Reactor Assessment Program," plants in Column 1 meet all cornerstone objectives and receive the NRC's baseline inspection program.

The deviation process described in IMC 0305 is used to address unique situations where the oversight defined by the ROP Action Matrix column might not be appropriate or sufficient. Even though performance at VY had not crossed any thresholds warranting additional regulatory oversight, the Staff considered it appropriate to apply additional resources to monitor the Licensee's efforts to address the onsite groundwater contamination and to follow up on the Licensee's response to the NRC's Demand for Information dated March 1, 2010 (ADAMS Accession No. ML100570237). The Staff requested and received authorization from the NRC's Executive Director for Operations (EDO) on April 5, 2010 (ADAMS Accession No. ML100960321), to deviate from the ROP Action Matrix to apply additional resources in these areas of Licensee performance.

Although tritium has been found in onsite monitoring wells, the Staff has not identified a hazard to public health and safety, and the Staff expects any offsite radiological releases to be very small (i.e., offsite doses, if any, would be negligible with respect to those received from normal background radiation levels). Nevertheless, as noted in the Action Matrix deviation memorandum, increased NRC oversight of the characterization, mitigation, and remediation of the tritium contamination was warranted given the extraordinary level of interest and concern by stakeholders. Although there is not currently, nor is there likely to be, a public health and safety issue, the NRC is conducting additional independent

inspections and assessments of the Licensee's activities, and has increased external stakeholder communications and outreach, to respond to stakeholder concerns and maintain public confidence.

The NRC Staff considers the ROP adequate for ensuring public health and safety and notes that the groundwater contamination at VY does not pose a public health or safety hazard. The Staff further notes that it has exercised its authority to deviate from the ROP Action Matrix to be responsive to unique circumstances and stakeholder concerns. The NRC Staff conducts annual ROP self-assessments, which include evaluations of deviations from the Action Matrix to see if improvements are warranted in the ROP. The results of the calendar year 2010 self-assessment will be included in the annual Commission paper and metric report, which will be issued in early April of 2011 and discussed during the Agency Action Review Meeting (AARM): a meeting of senior NRC managers to confirm the results and effectiveness of the ROP. The results of the AARM will be presented to the Commission in a public meeting in May 2011.

5. Concern 5 — VY's Decommissioning Fund Is Inadequate Due to the Increase in Decommissioning Costs

NRC establishes requirements for licensees to provide reasonable assurance that funds will be available for the decommissioning process. Reasonable assurance consists of a series of steps outlined in 10 C.F.R. § 50.75, "Reporting and record keeping for decommissioning planning." VY must file an annual report to the NRC containing a certification that financial assurance for decommissioning will be or has been provided in an amount which may be more, but not less, than the amount stated in the regulations, adjusted as appropriate for changes in labor, energy, and waste burial costs. The formula for adequate decommissioning funds includes an estimated waste disposal volume based on the plant design. The actual waste disposal volume may increase due to a leak or spill at a level that requires remediation. The licensee is responsible for payment of any increased waste disposal costs, whether paid for out of the allocated funds from the decommissioning fund or other assets. The current remediation of the tritium in soil and groundwater at VY has been funded as an operating expense and no money was used from the decommissioning trust fund. VY previously submitted a site-specific decommissioning cost analysis, which was approved by the NRC by letter dated February 3, 2009 (ADAMS Accession No. ML083390193). VY must address any required changes in their next annual report. Because no violations of NRC requirements were identified, enforcement action is not warranted for this concern.

B. Additional NRC Actions Pertaining to Groundwater Contamination

In March of 2010, NRC's EDO established a Groundwater Task Force (GTF) to review the NRC's approach to groundwater contamination conditions, given the recent incidents of leaking buried pipes at commercial nuclear power plants. The charter of the Task Force was to reevaluate the recommendations made in the Liquid Radioactive Release Lessons Learned Task Force Final Report dated September 1, 2006 (ADAMS Accession No. ML062650312); review the actions taken in Commission Paper SECY-09-0174 "Staff Progress in Evaluation of Buried Piping at Nuclear Reactor Facilities" (ADAMS Accession No. ML093160004); and review the actions taken in response to recent releases of tritium into groundwater by nuclear facilities.

The GTF completed its work in June 2010 and provided its report to the EDO. The report characterized a variety of issues ranging from policy issues to communications improvement opportunities. The complete report may be found under ADAMS Accession No. ML101740509. The GTF determined that the NRC is accomplishing its stated mission of protecting public health, safety, and protection of the environment through its response to groundwater leaks/spills. Within the current regulatory structure, the NRC is correctly applying requirements and properly characterizing the relevant issues. However, the GTF reported that there are further observations, conclusions, and recommendations that the NRC should consider in its oversight of groundwater contamination incidents.

The EDO appointed a group of NRC senior executives to review the report and consider its findings. The group reviewed the GTF final report, including the conclusions, recommendations, and their bases. They identified conclusions and recommendations that do not involve policy issues, and tasked the NRC Staff to address them. They have also identified policy issues, and a policy paper has been sent to the Commission discussing those issues.

A public workshop was held on October 4, 2010, with external stakeholders to discuss the findings of the GTF Report and to receive input on the potential policy issues. In addition, a request for public comment was published in the *Federal Register* (75 Fed. Reg. 57,987). These efforts help to ensure the NRC is considering the right issues on which to focus its attention as it moves forward. The transcript from this meeting is available on the NRC's web site at: http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/buried-pipes-tritium.html.

III. CONCLUSION

As summarized above, the NRC Staff did not identify any violations and the public health and safety remain reasonably assured. Thus, no enforcement action

against VY is warranted. The NRC Staff concludes that the Petitioners' concerns have been addressed and resolved such that no further action is needed in response to the petitions.

As provided in 10 C.F.R.§ 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

Eric J. Leeds, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 11th day of March 2011.

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Advanced Medical Systems, Inc. (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 281-82 (1990)
a materials license suspension proceeding is not an adversary adjudication for purposes of the Equal Access to Justice Act because the Atomic Energy Act of 1954, as amended, does not require such a hearing to be on the record pursuant to Administrative Procedure Act § 554; LBP-11-8, 73 NRC 355 (2011)
Advanced Medical Systems, Inc. (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 284 (1990)
in cases involving license suspension or revocation, where the Atomic Energy Commission's staff is cast in an accusatory role, the precautions prescribed by the Administrative Procedure Act should be carefully observed; LBP-11-8, 73 NRC 357 n.31 (2011)
Advanced Medical Systems, Inc. (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 289 (1990)
the Administrative Conference of the United States 1981 and 1985 Model Rules rejected language that would have extended the Equal Access to Justice Act's applicability to proceedings in which an agency observes formal Administrative Procedure Act § 554 procedures as a matter of discretion; LBP-11-8, 73 NRC 356 (2011)
Advanced Medical Systems, Inc. (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 289-91 (1990)
an agency's discretionary choice to conduct a formal on-the-record hearing is irrelevant when determining whether the Equal Access to Justice Act applies to a particular proceeding; LBP-11-8, 73 NRC 360 (2011)
the Equal Access to Justice Act does not apply when an agency merely voluntarily chooses to abide by formal Administrative Procedure Act § 554 procedures, despite lacking a statutory mandate to do so; LBP-11-8, 73 NRC 356 (2011)
Advanced Medical Systems, Inc. (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 291 (1990)
attorneys' fees may be awarded in adversary adjudications that are governed by Administrative Procedure Act § 554, but they may not be awarded in adversary adjudications that Congress did not subject to that section; LBP-11-8, 73 NRC 356 (2011)
because the Equal Access to Justice Act operates as a waiver of sovereign immunity it must be narrowly construed to avoid creating a waiver of sovereign immunity that Congress did not intend; LBP-11-8, 73 NRC 357 (2011)
despite the fact that, although not required by statute, the Commission conducts materials license suspension cases as formal, on-the-record hearings like those described by Administrative Procedure Act § 554, the Equal Access to Justice Act does not apply to such proceedings and may not serve as the basis for an award of attorney's fees; LBP-11-8, 73 NRC 356-57 (2011)
Advanced Medical Systems, Inc. (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 291 n.14 (1990)
inasmuch as litigants against the government manifestly have no constitutional right to be compensated out of public funds for their attorneys' fees, it cannot be doubted that Congress has the power to limit the reach of the Equal Access to Justice Act; LBP-11-8, 73 NRC 357, 361 (2011)
the Equal Access to Justice Act applies only when an adjudication is required by statute, not when required by the Constitution, to be conducted on the record; LBP-11-8, 73 NRC 362 (2011)

there is nothing in the legislative history of the Equal Access to Justice Act or the pertinent case law to suggest a congressional intent to extend the EAJA to cases in which due process, rather than a statute, requires an Administrative Procedure Act § 554 hearing; LBP-11-8, 73 NRC 357 (2011)

Advanced Medical Systems, Inc. (One Factory Row, Geneva, OH 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 summary disposition movant; LBP-11-4, 73 NRC 100 (2011)

because the initial burden rests on the summary disposition movant, a licensing board must examine the record in the light most favorable to the nonmoving party and all justifiable inferences must be drawn in favor of the nonmoving party; LBP-11-14, 73 NRC 595 (2011)

if a summary disposition proponent fails to make the requisite showing, the board must deny the motion even if the opposing party chooses not to respond or its response is inadequate; LBP-11-4, 73 NRC 99 (2011); LBP-11-14, 73 NRC 595 (2011)

if movant makes a proper showing for summary disposition, and if the opposing party does not show that a genuine issue of material fact exists, the board may summarily dispose of all arguments on the basis of the pleadings; LBP-11-4, 73 NRC 100 n.19 (2011); LBP-11-7, 73 NRC 263 (2011)

NRC standards for ruling on summary disposition motions are analogous to the standards for granting summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure; LBP-11-7, 73 NRC 263 (2011)

summary judgment should be granted only where the truth is clear; LBP-11-14, 73 NRC 595 (2011)

summary judgment, which is appropriate upon proper showings of the lack of a genuine, triable issue of material fact, is an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action; LBP-11-4, 73 NRC 99 (2011)

Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993)

when ruling on motions for summary disposition, the Commission applies standards analogous to those used by federal courts when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; LBP-11-14, 73 NRC 595 (2011)

Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 301 (1994)

immediately effective enforcement orders must be based on preliminary investigation or other emerging information that is reasonably reliable and indicates the need for immediate action; LBP-11-8, 73 NRC 369-70 (2011)

the standard that must be met before NRC Staff can issue an immediately effective enforcement order is one of adequate evidence, which is akin to the test for probable cause; LBP-11-8, 73 NRC 9 (2011)

Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306 n.31 (1994)

even if a witness's testimony was entirely hearsay, evidence of that kind is generally admissible in administrative proceedings; LBP-11-14, 73 NRC 600 n.59 (2011)

Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1994)

in upholding summary disposition in a proceeding to enforce a suspension order, the Commission ruled that the hearsay nature of a witness's statement did not preclude the licensing board from considering it, at least in the absence of evidence questioning its reliability; LBP-11-14, 73 NRC 600 n.59 (2011)

Advanced Nuclear Fuels Corp. (Import of South African Enriched Uranium Hexafluoride), CLI-87-9, 26 NRC 109 (1987)

a discretionary hearing on an import/export license application was allowed where the Commission was concerned with legal interpretations of the Anti-Apartheid Act, and the hearing involved written submissions on this issue; CLI-11-3, 73 NRC 625 n.62 (2011)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006)

the multifactor contention admissibility test in 10 C.F.R. 2.309(f)(1) is strict by design; LBP-11-6, 73 NRC 170-71 (2010)

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AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 123 n.71 (2006)

petitioners have an affirmative obligation to request confidential and proprietary information that has not been made publicly available, in order to support a proposed contention; LBP-11-9, 73 NRC 416 (2011)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007)

NEPA imposes no legal duty on NRC to consider intentional malevolent acts in conjunction with commercial power reactor license renewal applications; LBP-11-2, 73 NRC 64 (2011); LBP-11-13, 73 NRC 571 (2011)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 131 (2007)

NRC has analyzed terrorist acts in connection with license renewal and concluded that the core damage and radiological release from such acts would be no worse than the damage and release expected from internally initiated events; LBP-11-2, 73 NRC 64 (2011)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484 (2008)

suspension of licensing proceedings is considered a drastic action that is not warranted absent immediate threats to public health and safety; CLI-11-1, 73 NRC 4 (2011)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484-85 (2008)

the Commission has occasionally considered requests to suspend proceedings or hold them in abeyance in the exercise of its inherent supervisory powers over proceedings; CLI-11-1, 73 NRC 3 n.5 (2011)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668 (2008)

because petitioner seeks both to reopen the record and to submit a late contention, it must successfully satisfy two elevated standards; CLI-11-2, 73 NRC 338 (2011)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 674 (2008)

bare assertions and speculation do not supply the requisite support for a motion to reopen; CLI-11-2, 73 NRC 346 (2011)

NRC imposes a deliberately heavy burden on petitioners seeking to reopen a record; CLI-11-2, 73 NRC 338 (2011)

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; LBP-11-16, 73 NRC 655 (2011)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009)

because petitioner made no effort to demonstrate that its contention, despite its lateness, should be considered for admission pursuant to 10 C.F.R. 2.309(c)(1), it is rejected as inexcusably late; LBP-11-15, 73 NRC 637, 643 n.23 (2011)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009)

good cause for failure to file on time is the most important factor of the 10 C.F.R. 2.309(c) analysis; LBP-11-6, 73 NRC 247 n.113 (2010); LBP-11-9, 73 NRC 401 (2011); LBP-11-10, 73 NRC 446 (2011)

petitioner, having failed in its revised petition to challenge applicant's reliance on the generic environmental impact statement cannot raise that challenge for the first time in its reply; LBP-11-6, 73 NRC 235 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-72 (2009)

NRC's expanding adjudicatory docket makes it critically important that parties comply with its pleading requirements and that boards enforce those requirements; CLI-11-2, 73 NRC 339 n.22 (2011)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 277 n.240 (2009)

the burden of setting forth a clear and coherent argument is on petitioner, and it should not be necessary to speculate about what a pleading is supposed to mean; CLI-11-2, 73 NRC 337 n.14 (2011)

the Commission will not accept the filing of a vague, unparticularized issue; CLI-11-2, 73 NRC 337 n.14 (2011)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 287 (2009)

bare assertions and speculation do not supply the requisite support for a motion to reopen; CLI-11-2, 73 NRC 346 (2011)

NRC imposes a deliberately heavy burden on an intervenor who seeks to supplement the evidentiary record after it has been closed, even with respect to an existing contention; CLI-11-2, 73 NRC 338 (2011)

the burden of satisfying the requirement for reopening a record is a heavy one; CLI-11-2, 73 NRC 346 (2011)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 (2006)

a contention of omission alleges that an application suffers from an improper omission, whereas a contention of adequacy raises a specific substantive challenge to how particular information or issues have been discussed in the application; LBP-11-6, 73 NRC 200 n.53 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 n.7 (2006)

it is possible for a contention to contain an omission component and an inadequacy component; LBP-11-6, 73 NRC 200 n.53 (2010)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 244 (2006)

petitioner need not prove its contentions at the admissibility stage because boards do not adjudicate disputed facts at that juncture; LBP-11-2, 73 NRC 45 (2011); LBP-11-16, 73 NRC 655 (2011)

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 246 (2006), *aff'd,* CLI-09-7, 69 NRC 235, 274 (2009)

as a matter of law and logic if applicant's enhanced program is inadequate, then applicant's unenhanced program is a fortiori inadequate, and intervenor has a regulatory obligation to challenge it in its original petition to intervene; LBP-11-9, 73 NRC 417 (2011)

Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 247-52 (1986)

at issue is not whether evidence unmistakably favors one side or the other, but whether there is sufficient evidence favoring the summary disposition opponent for a reasonable trier of fact to find in favor of that party; LBP-11-4, 73 NRC 100 (2011)

if evidence in favor of the summary disposition opponent is merely colorable or not significantly probative, summary disposition may be granted; LBP-11-4, 73 NRC 100 (2011)

only disputes over facts that might affect the outcome of a proceeding would preclude summary disposition; LBP-11-4, 73 NRC 100 (2011)

Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 (1986)

if the question is a close one, boards must, in considering summary disposition opponent's submission, carefully ascertain whether any factual disputes asserted are genuine and relate to issues that would affect the outcome of the proceeding under relevant substantive law; LBP-11-4, 73 NRC 100 (2011)

summary disposition, like summary judgment, is an extreme remedy that should be granted with caution especially before the parties have been afforded an opportunity to marshal their evidence; LBP-11-7, 73 NRC 263 (2011)

Ardestani v. Immigration and Naturalization Service, 502 U.S. 129, 134 (1991)

the Equal Access to Justice Act does not apply to a proceeding that is not governed by the provisions of Administrative Procedure Act § 554 even if the procedures governing the proceeding substantially conform to the procedures required for formal adjudication under the APA; LBP-11-8, 73 NRC 360 n.48 (2011)

Ardestani v. Immigration and Naturalization Service, 502 U.S. 129, 135 (1991)

the most natural reading of the Equal Access to Justice Act's applicability to adjudications under Administrative Procedure Act § 554 is that those proceedings must be subject to or governed by § 554; LBP-11-8, 73 NRC 354-55 n.14 (2011)

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Ardestani v. Immigration and Naturalization Service, 502 U.S. 129, 137 (1991)
an agency's discretionary choice to conduct a formal on-the-record hearing is irrelevant when determining whether the Equal Access to Justice Act applies to a particular proceeding; LBP-11-8, 73 NRC 360 (2011)
only in rare cases does legislative history overcome the strong presumption that the legislative purpose is expressed by the ordinary meaning of the statutory language; LBP-11-8, 73 NRC 357 n.31 (2011)
the Equal Access to Justice Act renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity, and any such waiver must be strictly construed in favor of the United States; LBP-11-8, 73 NRC 357 n.28 (2011)

Ardestani v. Immigration and Naturalization Service, 502 U.S. 129, 138 (1991)
the underlying purpose of the Equal Access to Justice Act is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of government authority; LBP-11-8, 73 NRC 363 n.60 (2011)

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) precludes admission of a contention; LBP-11-7, 73 NRC 280 (2011)

Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 84 (1993)
even if an import or export license authorized possession and/or use of the low-level radioactive waste, the petition does not assert how the LLRW is a significant source of radioactivity or provide any scenario in which the import or export of the LLRW would result in an accident that could produce obvious offsite consequences; CLI-11-3, 73 NRC 622 n.46 (2011)

Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 87-88 (1993)
mere potential exposure to minute doses of radiation within regulatory limits does not constitute a distinct and palpable injury on which standing can be founded; CLI-11-3, 73 NRC 623 n.51 (2011)

Babcock & Wilcox Co. v. United Technologies Corp., 435 F. Supp. 1249, 1256 (N.D. Ohio 1977)
baseload generation is different than peaking power, which provides supplemental power during hours of the day when demand is highest; LBP-11-13, 73 NRC 563 (2011)

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983)
in enacting NEPA, Congress's twin aims were to require an agency to consider every significant aspect of the environmental impact of a proposed action and ensure that the agency will inform the public that it has considered environmental concerns in its decisionmaking process; LBP-11-6, 73 NRC 172 n.20 (2010); LBP-11-7, 73 NRC 264 (2011)
NEPA requires an agency to take a hard look at the environmental consequences before taking a major action and to report the result of that hard look in an environmental impact statement; LBP-11-6, 73 NRC 172 n.20 (2010)

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 104-05 (1983)
as a logical proposition, risk equals the likelihood of an occurrence times the severity of the consequences; LBP-11-2, 73 NRC 63 n.212 (2011)

Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 (1998), *aff'd, National Whistleblower Center v. NRC,* 208 F.3d 256 (D.C. Cir. 2000)
with respect to contentions filed after the initial petition, failure to address the requirements of 10 C.F.R. 2.309(c) and 2.309(f)(2) is reason enough to reject the new contentions; LBP-11-7, 73 NRC 289 n.227 (2011)

Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 & n.9 (1998), *aff'd, National Whistleblower Center v. NRC,* 208 F.3d 256 (D.C. Cir. 2000)
intervenors seeking admission of a nontimely filed contention bear the burden of showing that, on balance, the section 2.309(c)(1) factors weigh in favor of admitting the proposed contention; LBP-11-7, 73 NRC 279 (2011)

Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347-48 (1998), *aff'd, National Whistleblower Center v. NRC,* 208 F.3d 256 (D.C. Cir. 2000)
the Commission has summarily dismissed petitioners who failed to address the factors for a late-filed petition; LBP-11-7, 73 NRC 279 n.159 (2011)

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Bennett v. Spear, 520 U.S. 154, 175 (1997)
when no proximity presumption applies, petitioner must assert some specific injury in fact that will result from action taken; CLI-11-3, 73 NRC 622 n.47 (2011)

Bolvin v. Black, 225 F.3d 36, 42-43 (1st Cir. 2000)
the Commission's action in adopting new procedural rules meets the rational basis test; LBP-11-4, 73 NRC 125 n.147 (2011)

Braunkohle Transport, USA (Import of South African Uranium Ore Concentrate), CLI-87-6, 25 NRC 891, 893-94 (1987)
formal adjudicatory procedures are inappropriate in export or import licensing proceedings; CLI-11-3, 73 NRC 623-24 n.53 (2011)

Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009)
the proximity presumption applies if petitioner has frequent contacts with the geographic zone of potential harm; LBP-11-13, 73 NRC 546 (2011)

Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915-16 (2009)
standing based on the proximity presumption has been found if petitioner or a representative of a petitioner organization resides within approximately 50 miles of the facility in question; LBP-11-13, 73 NRC 546, 548 (2011); LBP-11-16, 73 NRC 653 (2011)

Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 917 (2009)
the proximity presumption's rationale is that in construction permit and operating license cases, persons living within the roughly 50-mile radius of the facility face a realistic threat of harm if a release from the facility of radioactive material were to occur; LBP-11-2, 73 NRC 41 n.51 (2011); LBP-11-13, 73 NRC 546 (2011)

Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 924 (2009)
contentions challenging the ability of combined license applicants to handle onsite storage of Classes B and C low-level radioactive waste, as well as the attendant potential environmental impacts of such storage in the wake of the closure of the Barnwell facility in South Carolina to states outside of the Atlantic Compact are admissible; LBP-11-6, 73 NRC 242 (2010)
mere existence of the letter of intent to ship low-level radioactive waste to a disposal facility does not answer questions as to whether such a plan will ultimately result in a transfer of LLRW title and permanent offsite disposition of the LLRW and whether nontransfer of title will result in environmental impacts; LBP-11-6, 73 NRC 242 (2010)
merits determination cannot be resolved at the contention admissibility stage of the proceeding; LBP-11-6, 73 NRC 241 (2010)

Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 183 (2009)
the proximity presumption's rationale is that persons living within the roughly 50-mile radius of the facility face a realistic threat of harm if a release from the facility of radioactive material were to occur; LBP-11-13, 73 NRC 546 (2011)

Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 219-20, 224, *aff'd,* CLI-09-20, 70 NRC 911, 921-24 (2009)
contentions challenging the ability of combined license applicants to handle onsite storage of Classes B and C low-level radioactive waste, as well as the attendant potential environmental impacts of such storage in the wake of the closure of the Barnwell facility in South Carolina to states outside of the Atlantic Compact are admissible; LBP-11-6, 73 NRC 239 (2010)

Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-10-24, 72 NRC 720, 729-31 (2010)
intervenor may propose new or amended contentions based on 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 environmental documents; LBP-11-7, 73 NRC 277 (2011)

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Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1123 (D.C. Cir. 1971)
although NEPA does not explicitly mention cost-benefit balancing, courts have interpreted the statute as requiring federal agencies to balance the environmental costs against the anticipated benefits of a proposed action; LBP-11-7, 73 NRC 281 (2011)
impacts of the possible routes that applicant will use for its transmission lines must be analyzed for applicant to give the NRC the requisite information to make an informed decision on its license; LBP-11-6, 73 NRC 199 n.52 (2010)

Carolina Environmental Study Group v. United States 510 F.2d 796, 801 (D.C. Cir. 1975)
applicant's obligation is to consider alternatives as they exist and are likely to exist; LBP-11-2, 73 NRC 51 (2011); LBP-11-13, 73 NRC 563 (2011)

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 544-45 (1986)
although boards may give reasonable deference to NRC guidance, such agency guidance does not substitute for regulations, is not binding authority, and does not prescribe NRC requirements; LBP-11-16, 73 NRC 661, 670 (2011)

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29 (1999)
the interests a municipality seeks to represent on behalf of its residents are germane to its own purposes in the context of standing; LBP-11-6, 73 NRC 170 n.15 (2010)

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-490, 8 NRC 234, 240-41 (1978)
NRC Staff's need-for-power analysis may accord an expert, independent agency's forecasts and studies great weight and may give heavy reliance to those forecasts and studies absent a showing that they contain a fundamental error; LBP-11-7, 73 NRC 282-83 n.178 (2011)

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-490, 8 NRC 234, 241 (1978)
a state public service commission's determination of need for power may be relied on by the NRC in its own analysis, as long as that determination is neither shown nor appears on its face to be seriously defective; LBP-11-6, 73 NRC 218, 223 (2010)
in its need-for-power analysis, NRC Staff may rely on studies and forecasts prepared by expert, independent agencies charged with the duty of ensuring that the utilities within their jurisdiction fulfill the legal obligation to meet customer demands; LBP-11-7, 73 NRC 282 (2011)

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-79-5, 9 NRC 607, 609-10 (1979)
because need-for-power assessments necessarily entail forecasting power demands in light of substantial uncertainty and the duty of providing adequate and reliable service to the public, they are inherently conservative; LBP-11-7, 73 NRC 283 (2011)
long-range forecasts of demand for power 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-11-6, 73 NRC 223 n.84 (2010)

Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)
when the issue on which summary judgment is sought is one on which the nonmoving party bears the burden of proof, the burden on the moving party may be discharged by showing that there is an absence of evidence to support the nonmoving party's case; LBP-11-4, 73 NRC 100 n.16 (2011)

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)
summary judgment, which is appropriate upon proper showings of the lack of a genuine, triable issue of material fact, is an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action; LBP-11-4, 73 NRC 99 (2011)

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir. 1991)
agencies need only discuss those alternatives that are reasonable and will bring about the ends of the proposed action; LBP-11-13, 73 NRC 553 n.114 (2011)

Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 343 (1st Cir. 2004)
in 1982, NRC started to relax the procedural requirements for certain types of proceedings; LBP-11-8, 73 NRC 358 (2011)

the Atomic Energy Act requirement that NRC grant a hearing upon the request of any person whose interest may be affected by certain agency proceedings is interpreted as requiring formal Administrative Procedure Act § 554 on-the-record hearings; LBP-11-8, 73 NRC 358 (2011)

Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 344 (1st Cir. 2004)

the Atomic Energy Act does not mandate on-the-record hearings for reactor licensing proceedings and the Commission therefore has the option of replacing existing procedural requirements with more informal ones; LBP-11-8, 73 NRC 358 (2011)

Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 351 (1st Cir. 2004)

NRC's new procedural rules meet the requirements for Administrative Procedure Act § 554 on-the-record formal hearings but the question of whether the Atomic Energy Act requires NRC hearings to be on-the-record was not resolved; LBP-11-8, 73 NRC 359 (2011)

Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 354 (1st Cir. 2004)

once a legally protectable interest is shown and intervenors are admitted as parties, the procedural rules cannot be administered so as to deprive intervenors of their interest in such rights without due process of law, or without arguably running afoul of the Administrative Procedure Act; LBP-11-4, 73 NRC 125 n.147 (2011)

should the agency's administration of its new procedural rules contradict its present representations that cross-examination will be allowed under the rules when required for a full and true disclosure of the facts or otherwise flout this principle, the rules may be subject to future challenges; LBP-11-4, 73 NRC 125 n.147 (2011)

there is no fundamental right to participate in administrative adjudications; LBP-11-4, 73 NRC 125 n.147 (2011)

Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 355 (1st Cir. 2004)

the Commission's action in adopting new procedural rules meets the rational basis test; LBP-11-4, 73 NRC 125 n.147 (2011)

the Court applied a rational basis review to intervenor's challenge to NRC's 2004 changes to its procedural rules, citing cases involving challenges to laws regulating aspects of prisoners' right to access to the courts; LBP-11-4, 73 NRC 125 n.147 (2011)

City of Carmel-by-the-Sea v. Department of Transportation, 123 F.3d 1142, 1155 (9th Cir. 1997)

applicant's alternatives analysis need not discuss every conceivable alternative to the proposed action, but rather only feasible, nonspeculative, and reasonable alternatives; LBP-11-13, 73 NRC 553 (2011)

City of West Chicago v. NRC, 701 F.2d 632, 638 (7th Cir. 1983)

NRC may hold an informal hearing in which it requests and considers written materials without providing for traditional trial-type procedures such as oral testimony and cross-examination; LBP-11-4, 73 NRC 124 n.147 (2011)

City of West Chicago v. NRC, 701 F.2d 632, 642 (7th Cir. 1983)

formal adjudicatory procedures are inappropriate in export or import licensing proceedings; CLI-11-3, 73 NRC 623-24 n.53 (2011)

City of West Chicago v. NRC, 701 F.2d 632, 644 n.11 (7th Cir. 1983)

if a formal adjudicatory hearing is mandated by the due process clause, the absence of the on-the-record requirement will not preclude application of the Administrative Procedure Act; LBP-11-8, 73 NRC 361 (2011)

City of West Chicago v. NRC, 701 F.2d 632, 645 (7th Cir. 1983)

health, safety, and environmental concerns do not constitute liberty or property subject to due process protection; LBP-11-4, 73 NRC 124-25 n.147 (2011)

intervenors in reactor licensing proceedings ordinarily cannot raise constitutional due process issues with respect to NRC hearing procedures, inasmuch as intervenors cannot claim government deprivation of life, liberty or property as a result of the NRC's licensing action; LBP-11-4, 73 NRC 124 n.147 (2011)

Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985)

equal protection principles require that all persons similarly situated shall be treated alike; LBP-11-15, 73 NRC 639 n.20 (2011)

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)

NRC generally applies traditional judicial standing concepts which require a showing that the individual has suffered or might suffer a concrete and particularized injury that is fairly traceable to

the challenged action, likely redressible by a favorable decision, and arguably within the zone of interests protected by the governing statutes; LBP-11-2, 73 NRC 40 (2011); LBP-11-13, 73 NRC 546 (2011)

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 (1993)
in cases involving the possible construction or operation of a nuclear power reactor, the NRC considers proximity to the proposed facility to be sufficient to establish standing; LBP-11-16, 73 NRC 653 (2011)

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1977)
if summary disposition proponent meets its burden, the party opposing the motion must set forth specific facts showing that there is a genuine issue, and may not rely on mere allegations or denials, but no defense to an insufficient showing is required; LBP-11-7, 73 NRC 263 (2011); LBP-11-14, 73 NRC 595 (2011)

Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior, 100 F.3d 837, 840-41 (10th Cir. 1996)
a prospective intervenor must show a direct, substantial, and legally protectable interest, the test for which is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process; LBP-11-4, 73 NRC 125 n.147 (2011)

Connecticut Bankers Association v. Board of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980)
at the admission stage, petitioners should provide a minimal showing that material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate; LBP-11-2, 73 NRC 50 n.122 (2011); LBP-11-13, 73 NRC 564 n.196 (2011)

Consolidated Edison Co. of New York (Indian Point, Unit 3), CLI-74-28, 8 AEC 7, 8 (1974)
it is not enough, in an agency that values the hearing process and has preserved the opportunity for boards to look at matters on their own motion, just to refer safety matters to the Staff for resolution; LBP-11-9, 73 NRC 421 (2011)

Consolidated Edison Co. of New York (Indian Point, Unit 3), CLI-74-28, 8 AEC 7, 8-9 (1974)
to tie a board's hands when it sees an issue that needs to be explored would be utterly inconsistent with its stature and the responsibility of these expert tribunals, and simply referring such a matter to the Staff for resolution would not be an adequate solution; LBP-11-9, 73 NRC 418 n.12 (2011)

Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007)
interests that an organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action; LBP-11-6, 73 NRC 169 (2010)
to demonstrate representational standing, an organization must show that at least one of its members might be affected by the proceeding, identify that member by name and address, and show that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf; LBP-11-2, 73 NRC 40 (2011); LBP-11-6, 73 NRC 169 (2010); LBP-11-13, 73 NRC 545 (2011); LBP-11-16, 73 NRC 653 (2011)

Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549 n.61 (2009)
good cause for failure to file on time is the most important factor of the 10 C.F.R. 2.309(c) analysis; LBP-11-2, 73 NRC 38 (2011); LBP-11-9, 73 NRC 401 (2011); LBP-11-13, 73 NRC 543 (2011)

Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 550-52 (2009)
petitioner may not rely on a document generated by a state agency if that document contains nothing more than a request for information; LBP-11-6, 73 NRC 249 n.115 (2010)

Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552 (2009)
boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; LBP-11-6, 73 NRC 193-94 (2010); LBP-11-13, 73 NRC 556 n.133, 568 n.222 (2011)

Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 569 (2009)
it is presumed that applicants intend to comply with state law; LBP-11-16, 73 NRC 678 n.185 (2011)

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Crowe Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 571 (2009)
materials license regulations contain no express prohibition on foreign ownership, but require Staff to make a finding that license issuance will not be inimical to the common defense and security or the health and safety of the public; LBP-11-11, 73 NRC 488 (2011)

Curators of the University of Missouri (TRUMP-S Project), CLI-95-1, 41 NRC 71, 98 (1995)
although boards may give reasonable deference to NRC guidance, such agency guidance does not substitute for regulations, is not binding authority, and does not prescribe NRC requirements; LBP-11-16, 73 NRC 661, 670 (2011)

Curators of the University of Missouri (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395 (1995)
permitting an application to be modified or improved throughout the NRC's review is compatible with the dynamic licensing process followed in Commission licensing proceedings; CLI-11-2, 73 NRC 345 (2011)

Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988)
when no proximity presumption applies, petitioner must assert some specific injury in fact that will result from action taken; CLI-11-3, 73 NRC 622 n.47 (2011)

Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 583 (1978)
an organization's standing can be demonstrated through the interests of its members, but if a member acts or speaks on behalf of the organization, that member must also demonstrate authorization by that organization to represent it; LBP-11-13, 73 NRC 548-49 (2011)

Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), CLI-09-4, 69 NRC 80, 85 (2009)
the Commission refused to suspend the combined license proceeding pending completion of the design certification review of the ESBWR design certification process; CLI-11-1, 73 NRC 4 n.11 (2011)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003)
the rules on contention admissibility are strict by design; LBP-11-16, 73 NRC 655 (2011)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 124 (2009)
section 2.309(f)(1) establishes the basic admissibility criteria that all contentions must satisfy; LBP-11-9, 73 NRC 400 n.55 (2011)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009)
with respect to contentions filed after the initial petition, failure to address the requirements of 10 C.F.R. 2.309(c) and 2.309(f)(2) is reason enough to reject proposed new contentions; LBP-11-7, 73 NRC 286 n.203, 289 n.227 (2011)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358-59 (2001)
the rules on contention admissibility are strict by design; LBP-11-16, 73 NRC 655 (2011)

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-11-16, 73 NRC 655 (2011)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564 (2005)
if good cause is not shown, a board may still permit the late filing, but petitioner or intervenor must make a strong showing on the other factors of 10 C.F.R. 2.309(c); LBP-11-9, 73 NRC 401 (2011)

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564-65 (2005)
"good cause" for late filing is defined as a showing that petitioner could not have met the filing deadline and filed as soon as possible thereafter; LBP-11-7, 73 NRC 288 n.213 (2011)

Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-07-9, 65 NRC 539, *permit issuance authorized,* CLI-07-27, 66 NRC 215 (2007)
mandatory proceedings for licensing of proposed uranium enrichment facility sites were conducted; LBP-11-11, 73 NRC 475 (2011)

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Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-07-9, 65 NRC 539, 559-60, *permit issuance authorized,* CLI-07-27, 66 NRC 215 (2007)
relative to NEPA, in mandatory hearings, boards are to determine whether the review conducted by NRC Staff has been adequate, but they need not rethink or redo every aspect of Staff's environmental findings or undertake their own fact-finding activities; LBP-11-11, 73 NRC 476 (2011)
Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 and 2), CLI-09-21, 70 NRC 927, 931 (2009)
if impacts are remote or speculative, the environmental impact statement need not discuss them, including greenhouse gas emissions; LBP-11-7, 73 NRC 301 (2011)
under NEPA, NRC Staff must consider the cumulative impact of greenhouse gas emissions from a proposed facility; LBP-11-7, 73 NRC 307 (2011)
Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 447 (2008)
boards admit contentions, not their supporting bases; LBP-11-2, 73 NRC 56 (2011)
Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 67 (2004)
board determination of expert's need to know with regard to a document withheld as safeguards information was reversed; LBP-11-9, 73 NRC 405 n.87 (2011)
Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 67-69 (2004)
petitioner was denied access to a safeguards-protected design-related document on the basis of his lacking a need to know; LBP-11-9, 73 NRC 410 (2011)
Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27-28, *aff'g* LBP-04-13, 60 NRC 33, 36-37 (2004)
intervenors have demonstrated their ability to contribute to the development of a sound record where they have put forward in support of those contentions the views of a witness whose expertise has been recognized in other NRC proceedings; LBP-11-9, 73 NRC 413 n.123 (2011)
Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 4 (2002)
cost-effective candidate severe accident mitigation alternatives are identified by comparing the annualized cost of the mitigation measure with the benefit as determined by the averted cost of severe accidents (consequences), as weighted by the probability of the accidents' occurrence; LBP-11-13, 73 NRC 565 (2011)
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 analyses identify and assess possible plant changes, such as hardware modifications and improved training or procedures, that could cost-effectively reduce the radiological risk from a severe accident; LBP-11-13, 73 NRC 565 (2011)
Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 7 (2002)
a SAMA analysis fulfills the requirement to provide a consideration of alternatives to mitigate severe accidents and therefore is governed by NEPA's rule of reason; LBP-11-13, 73 NRC 566 (2011)
Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 7-8 (2002)
whether a SAMA may be worthwhile to implement is based upon a cost-benefit analysis, i.e., a weighing of the cost to implement with the reduction in risks to public health, occupational health, and offsite and onsite property; LBP-11-2, 73 NRC 63 (2011)
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)
a severe accident mitigation alternatives analysis is mandated by NEPA considerations and thus subject to a rule of reason; LBP-11-2, 73 NRC 61 (2011)
Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 363-64 (2002)
safety issues that are routinely addressed through the agency's ongoing regulatory oversight are outside the scope of license renewal proceedings because considering them in that context would be unnecessary and wasteful; LBP-11-2, 73 NRC 45 (2011)

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Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002)
the scope of an admitted contention is determined by the bases set forth in support of the contention; LBP-11-14, 73 NRC 609 (2011)

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)
the draft environmental impact statement might cure alleged omissions or deficiencies in the environmental report by including additional analysis that addresses such omissions or deficiencies; LBP-11-7, 73 NRC 276 n.150 (2011)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382, 383 n.44 (2002)
a contention contesting an applicant's environmental report generally may be viewed as a challenge to the NRC Staff's subsequent draft EIS, but new claims must be raised in a new or amended contention; LBP-11-1, 73 NRC 26 n.12 (2011)

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)
a contention based solely upon omissions from the environmental report is rendered moot when the missing information is supplied; LBP-11-14, 73 NRC 598 (2011)

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)
the board may consider environmental contentions made against an applicant's ER as challenges to an agency's subsequent DEIS only as long as the DEIS analysis or discussion at issue is essentially *in para materia* with the ER analysis or discussion that is the focus of the contention; LBP-11-1, 73 NRC 26 n.14 (2011)
where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant, the contention is moot; LBP-11-16, 73 NRC 705 (2011)
where the information in the DEIS is so different from the information in the ER that the DEIS dispenses with and moots the issues raised in the original contention, intervenor must file a new or amended contention against the DEIS; LBP-11-1, 73 NRC 26 (2011)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 n.45 (2002)
a board's conclusion that a contention is one of omission is driven by its examination of the contention, including its underlying arguments; LBP-11-6, 73 NRC 200 (2010)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002)
hearing petitioners have an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to uncover any information that could serve as the foundation for a specific contention; LBP-11-9, 73 NRC 403 n.73, 405 (2011)

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003)
a SAMA analysis need only ensure that the environmental consequences of the project have been fairly evaluated; LBP-11-2, 73 NRC 64 (2011)
contentions must directly controvert relevant sections of the environmental report; LBP-11-16, 73 NRC 677 (2011)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999)
under 10 C.F.R. 2.309(f)(1)(iv), intervenors need only demonstrate that the issue raised in the contention is material, i.e., that it would make a difference in the licensing decision; LBP-11-7, 73 NRC 292 (2011)
where implementation of a building code could not make a difference in the outcome of the proceeding, it cannot be material; LBP-11-7, 73 NRC 292 (2011)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)
Congress called upon the Commission to make fundamental changes in its public hearing process to ensure that hearings adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors; LBP-11-6, 73 NRC 171 (2010)

the Commission toughened its contention admissibility rule in 1989 to ensure that only intervenors with genuine and particularized concerns participate in NRC hearings; LBP-11-6, 73 NRC 171 (2010)
the contention admissibility rule serves to ensure that admitted contentions focus on real disputes that can be resolved in an adjudication, establish a sufficient factual and legal foundation to warrant further inquiry, and put other parties on notice of the disputed issues so they will know precisely those claims they must support or oppose; LBP-11-6, 73 NRC 171 n.17 (2010)
the multifactor contention admissibility test in section 2.309(f)(1) was crafted by the Commission to raise the threshold bar for an admissible contention; LBP-11-6, 73 NRC 170-71 (2010)
under the previous contention admissibility rule, a contention could be admitted and litigated based on little more than speculation, with parties attempting to unearth a case through cross-examination; LBP-11-6, 73 NRC 171 (2010)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334-35 (1999)
the rules on contention admissibility are strict by design; LBP-11-16, 73 NRC 655 (2011)

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999)
that the contention admissibility rule is designedly strict is not to say that it should serve as a fortress to deny intervention; LBP-11-6, 73 NRC 171 (2010)

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 410 (1976)
because need-for-power assessments necessarily entail forecasting power demands in light of substantial uncertainty and the duty of providing adequate and reliable service to the public, they are inherently conservative; LBP-11-7, 73 NRC 283 n.183 (2011)

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 412 (1976)
even if a witness's testimony was entirely hearsay, evidence of that character is generally admissible in administrative proceedings; LBP-11-14, 73 NRC 600 n.59 (2011)

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983)
putative intervenors must raise issues as early as possible; LBP-11-9, 73 NRC 417 (2011)

Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977)
where good cause is not shown for the late filing of a contention, the requestor's demonstration on the other factors must be particularly strong; LBP-11-15, 73 NRC 634-35 (2011)

Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-408, 5 NRC 1383, 1385 (1977)
boards' authority to seek to trigger review in extraordinary circumstances remains and has been put to good use; LBP-11-9, 73 NRC 418 n.13 (2011)

Ed A. Wilson, Inc. v. General Services Administration, 126 F.3d 1406, 1408 (Fed. Cir. 1997)
neither the Equal Access to Justice Act nor the legislative history provides a definition of the word "incur"; LBP-11-8, 73 NRC 364 (2011)

Ed A. Wilson, Inc. v. General Services Administration, 126 F.3d 1406, 1409 (Fed. Cir. 1997)
the presence of an attorney-client relationship suffices to entitle prevailing litigants to receive fee awards; LBP-11-8, 73 NRC 366 (2011)

Ed A. Wilson, Inc. v. General Services Administration, 126 F.3d 1406, 1410 (Fed. Cir. 1997)
both the union employee and the insured can be viewed as having incurred legal fees insofar as they have paid for legal services in advance as a component of the union dues or insurance premiums; LBP-11-8, 73 NRC 365 n.74 (2011)
denying Equal Access to Justice Act awards in insurance contexts would undermine the dual purposes of EAJA by both maintaining financial deterrents for those who would want to challenge unjust government action and not deterring unreasonable government actions; LBP-11-8, 73 NRC 366 (2011)

Edlow International Co. (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976)
mere interest in a problem is not sufficient by itself to render the organization adversely affected or aggrieved within the meaning of the Administrative Procedure Act; CLI-11-3, 73 NRC 622 n.41 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-09-11, 69 NRC 529, 533 (2009)
NRC adjudicatory hearings are not environmental impact statement editing sessions; LBP-11-2, 73 NRC 62 (2011)

petitioners have not established that use of another source term would identify additional cost-beneficial severe accident mitigation alternatives; LBP-11-13, 73 NRC 579 n.323 (2011)
the ultimate issue on severe accident mitigation alternatives analysis is whether any additional SAMA should have been identified as potentially cost-beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis; LBP-11-2, 73 NRC 62 (2011); LBP-11-13, 73 NRC 566 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 287 (2010)
at issue is not whether evidence unmistakably favors one side or the other, but whether there is sufficient evidence favoring the summary disposition opponent for a reasonable trier of fact to find in favor of that party; LBP-11-4, 73 NRC 100 (2011)
if evidence in favor of the summary disposition opponent is merely colorable or not significantly probative, summary disposition may be granted; LBP-11-4, 73 NRC 100 (2011)
only disputes over facts that might affect the outcome of a proceeding would preclude summary disposition; LBP-11-4, 73 NRC 100 (2011)
summary disposition opponent may not rest upon mere allegations or denials, but must state specific facts showing that there is a genuine issue of fact for hearing; LBP-11-4, 73 NRC 100 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 291 (2010)
the very essence of severe accident mitigation analysis is to assess to what extent the probability-weighted consequences of the analyzed severe accident sequences would decrease if a specific SAMA were implemented; LBP-11-2, 73 NRC 63 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010)
in applying the summary disposition standard, it is appropriate for the board to look not only to NRC regulatory and case law, but also to federal court case law on summary judgment under Rule 56 of the Federal Rules of Civil Procedure; LBP-11-4, 73 NRC 99 (2011)
when considering a motion for summary disposition, the function of the board is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for hearing; LBP-11-14, 73 NRC 601 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297-98 (2010)
at the summary disposition stage, the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for hearing; LBP-11-14, 73 NRC 595 (2011)
caution should be exercised in granting summary disposition, which may be denied if there is reason to believe that the better course would be to proceed to a full hearing; LBP-11-7, 73 NRC 264 (2011)
if reasonable minds could differ as to the import of the evidence, summary disposition is not appropriate; LBP-11-14, 73 NRC 595 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 301 (2010)
the Gaussian plume model's incorporation in the MACCS2 code and the wide, customary use of the code are not sufficient grounds to exclude the code's integral dispersion model from all challenge if adequate support is provided for a contention; LBP-11-2, 73 NRC 71 n.301 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 303, 305 (2010)
it is rarely appropriate to resolve complex, fact-intensive issues on the initial pleadings; LBP-11-13, 73 NRC 564 n.195 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 303, 317 (2010)
a SAMA contention is admissible only if it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated; LBP-11-13, 73 NRC 566 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 305 (2010)
complex, fact-intensive issues are rarely appropriate for summary disposition, much less for resolution on the initial pleadings; LBP-11-2, 73 NRC 50 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 306 (2010)
severe accident mitigation alternatives do not encompass spent fuel pool accidents; LBP-11-2, 73 NRC 65 (2011)

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Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 307 (2010)
the Commission reversed the board's grant of summary disposition of a severe accident mitigation alternatives contention; LBP-11-2, 73 NRC 62 (2011)
Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 310 (2010)
a party responding to a summary disposition motion may not raise distinctly new asserted deficiencies; LBP-11-4, 73 NRC 124 (2011)
Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 312 (2010)
claim that SAMA analysis is deficient for failing to address potential spent fuel pool accidents falls beyond the scope of NRC SAMA analysis and impermissibly challenges NRC regulations; LBP-11-13, 73 NRC 570 n.245 (2011)
Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315 (2010)
a licensing board's inquiry should not be whether there are plainly better methodologies or whether the severe accident mitigation alternatives analysis can be refined further, but rather whether the SAMA analysis resulted in erroneous conclusions on which SAMAs and SAMDAs are found cost-beneficial to implement; LBP-11-7, 73 NRC 265 (2011)
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-11-7, 73 NRC 265 (2011)
Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 316 (2010)
a severe accident mitigation alternatives analysis is neither a worst-case nor a best-case impacts analysis; LBP-11-7, 73 NRC 265 (2011)
NEPA permits agencies to select their own methodology for mitigation analysis as long as that methodology is reasonable; LBP-11-2, 73 NRC 71 (2011); LBP-11-7, 73 NRC 265 (2011)
NRC is required to consider severe accident mitigation alternatives in issuing a new operating license; LBP-11-7, 73 NRC 264-65 (2011)
Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 316-17 (2010)
license renewal applicants are not required to base their SAMA analysis on consequence values at the 95th percentile consequence level; LBP-11-2, 73 NRC 77 (2011)
Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 317 (2010)
severe accident mitigation alternatives contentions are admissible only if it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated; LBP-11-2, 73 NRC 46, 62 (2011); LBP-11-7, 73 NRC 265, 273 n.128, 315 (2011); LBP-11-13, 73 NRC 579 (2011)
Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 454 (2010)
active components are not subject to an aging management review because existing regulatory programs, including required maintenance programs, can be expected to directly detect the effects of aging on active functions; LBP-11-2, 73 NRC 57 (2011)
Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 461 (2010)
key functions of buried structures, systems, and components that are the focus of the license renewal safety review under Part 54 do not include the prevention of inadvertent radioactive leaks from buried structures; LBP-11-2, 73 NRC 60 (2011)
through the regulatory process, which includes plant inspections, notice and guidance to licensees, and enforcement actions, NRC takes a host of measures to improve the ability to timely detect and correct inadvertent leaks to assure compliance with public dose limits; LBP-11-2, 73 NRC 60 n.194 (2011)
Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 461-62 (2010)
current operating issues are, by their very nature, beyond the scope of a license renewal proceeding; CLI-11-2, 73 NRC 348 n.77 (2011)
license renewal is limited to aging-related issues, not issues already monitored and reviewed in the ongoing regulatory oversight processes; CLI-11-2, 73 NRC 348 n.77 (2011)
Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 462 (2010)
applicant must demonstrate that the effects of aging will be managed so that the intended function(s) will be maintained consistent with the current licensing basis and that the intended functions are described in section 54.4(a)(1)-(3); LBP-11-2, 73 NRC 60 (2011)

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Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 474 (2010)
chapter 6 of the generic environmental impact statement clearly is not limited to discussing only normal operations, but also discusses potential accidents and other nonroutine events, and the Category 1 finding for onsite spent fuel storage is not limited to routine or normal operations; LBP-11-2, 73 NRC 66 (2011); LBP-11-13, 73 NRC 570 n.248 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 476 (2010)
NEPA imposes no legal duty on NRC to consider intentional malevolent acts in conjunction with commercial power reactor license renewal applications; LBP-11-2, 73 NRC 64 (2011); LBP-11-13, 73 NRC 571 (2011)
NRC has analyzed terrorist acts in connection with license renewal and concluded that the core damage and radiological release from such acts would be no worse than the damage and release expected from internally initiated events; LBP-11-2, 73 NRC 64 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 207 n.34 (2010)
petitioner may question the practice for severe accident mitigation alternatives analysis to utilize mean consequence values, which results in an averaging of potential consequences; LBP-11-13, 73 NRC 576 n.296 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010)
it is not possible simply to plug in and run a different atmospheric dispersion model in the MACCS2 code; LBP-11-2, 73 NRC 72 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 288 (2006)
Commission precedent interprets the term, "severe accidents," to encompass only reactor accidents and not spent fuel pool accidents; LBP-11-2, 73 NRC 66 n.237 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 341 (2006)
a severe accident mitigation alternatives contention was admitted; LBP-11-2, 73 NRC 62 (2011)

Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-07-13, 66 NRC 131, 137 (2007)
a severe accident mitigation alternatives contention was summarily dismissed; LBP-11-2, 73 NRC 62 (2011)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 135 & n.25 (2009)
the ordinary burden on parties in pursuing litigation pending rulemaking does not justify disrupting ongoing license review; CLI-11-1, 73 NRC 6 (2011)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 89 (2008)
whether petitioners have adequately raised an issue as to whether transformers constitute active or passive components survived a motion for summary disposition; LBP-11-2, 73 NRC 57 (2011)
whether transformers are active or passive components remains an unresolved issue and thus requires fact-based determinations best left to further adjudicatory proceedings; LBP-11-2, 73 NRC 58 (2011)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 95 (2008)
applicant's alternatives analysis need not discuss every conceivable alternative to the proposed action, but rather only feasible, nonspeculative, and reasonable alternatives; LBP-11-13, 73 NRC 553 (2011)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 95-96 (2008)
allegation that multiple, unrelated sources of electricity ought to be evaluated collectively is inadmissible; LBP-11-2, 73 NRC 52 (2011)

Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), LBP-10-13, 71 NRC 673, 680-81 (2010)
including probability-weighted consequences into SAMA analyses does not reduce the consequences so low as to reject all possible mitigation as too costly; LBP-11-2, 73 NRC 63 (2011)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 10 & n.36 (2010)
the Commission generally has declined to hold proceedings in abeyance pending the outcome of other Commission actions or adjudications; CLI-11-1, 73 NRC 4 (2011)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 36 (2010)
commitment to implement an aging management plan that NRC finds is consistent with the GALL Report constitutes one acceptable method for demonstrating that the effects of aging will be adequately managed; LBP-11-2, 73 NRC 55 (2011)

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Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 38 (2010)
referencing an aging management program described in the GALL Report does not insulate a program from an adequately supported challenge at a hearing; LBP-11-2, 73 NRC 55 (2011)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 45 n.246 (2010)
pro se litigants are to be treated more leniently than litigants with counsel; LBP-11-9, 73 NRC 408 (2011)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 152-55 (2006), *rev'd on other grounds,* CLI-07-16, 65 NRC 371, 375 (2007)
contention regarding severe spent fuel pool accidents is not admissible in license renewal proceeding because it is a Category 1 issue; LBP-11-2, 73 NRC 66 n.236 (2011)

Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 201 (2006)
Subpart G procedures are mandated for certain proceedings and parties are permitted to propound interrogatories, take depositions, and cross-examine witnesses without leave of the board; LBP-11-13, 73 NRC 587 (2011)

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 availability of Subpart G procedures under 10 C.F.R. 2.310(d) depends critically on whether the credibility of eyewitnesses is important in resolving a contention, and witnesses relevant to each contention are not identified, under 10 C.F.R. 2.336(a)(1), until after contentions are admitted; LBP-11-13, 73 NRC 588 n.389 (2011)

Environmental Law & Policy Center v. NRC, 470 F.3d 676, 684 (7th Cir. 2006)
generation of baseload power is an acceptable purpose for a licensing action and has been determined to be broad enough to permit consideration of a host of energy-generating alternatives; LBP-11-13, 73 NRC 553 (2011)

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 39 (2005)
for mandatory proceedings, licensing boards are to conduct a simple sufficiency review rather than a de novo review on both AEA and NEPA issues; LBP-11-11, 73 NRC 475, 526 (2011)
in mandatory proceedings, boards should inquire whether the NRC Staff performed an adequate review and made findings with reasonable support in logic and fact; LBP-11-11, 73 NRC 475-76 (2011)

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 39-40 (2005)
the board's role in mandatory hearings is to carefully probe NRC Staff findings by asking appropriate questions and by requiring supplemental information when necessary, but Staff's underlying technical and factual findings are not open to board reconsideration unless, after a review of the record, the board finds the Staff review inadequate or its findings insufficient; LBP-11-11, 73 NRC 476 (2011)

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 806-08 (2005)*aff'd, Environmental Law and Policy Center v. NRC,* 470 F.3d 676 (7th Cir. 2006)
an alternative that fails to meet the purpose of the project does not need to be further examined in the environmental report; LBP-11-6, 73 NRC 225 (2010)
energy efficiency alternative is excluded because it would not advance applicant's goal to provide additional baseload electrical generation capacity for use in the owner's current markets and/or for potential sale on the wholesale markets; LBP-11-7, 73 NRC 304 n.333 (2011)

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 810 (2005)*aff'd, Environmental Law and Policy Center v. NRC,* 470 F.3d 676 (7th Cir. 2006)
because a solely wind- or solar-powered facility could not satisfy the project's purpose, there was no need to compare the impact of such facilities to the impact of the proposed nuclear plant; LBP-11-7, 73 NRC 308 n.371 (2011)

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-06-20, 64 NRC 15, 21-22 (2006)
based on Staff's and applicant's written responses to board questions, and on the resumes, CVs, and SPQs admitted as part in the evidentiary record to respond to the questions, the board considers safety issues resolved for the proceeding; LBP-11-11, 73 NRC 514, 525-26, 529 (2011)

highly site-specific seismic hazard analysis reflects consideration not only of the location and magnitude of historic earthquakes, but also the nature of the bedrock and the style of faulting in the surrounding region; LBP-11-11, 73 NRC 519 (2011)

in a mandatory hearing, licensing boards must narrow their inquiry to topics or sections in Staff documents that they deem most important and should concentrate on portions of the documents that do not on their face adequately explain the logic, underlying facts, and applicable regulations and guidance; LBP-11-11, 73 NRC 476 (2011)

Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-06-28, 64 NRC 460 (2006), *permit issuance authorized,* CLI-07-12, 65 NRC 203 (2007)

mandatory proceedings for licensing of proposed uranium enrichment facility sites were conducted; LBP-11-11, 73 NRC 475 (2011)

F.J. Vollmer Co., Inc. v. Magaw, 102 F.3d 591, 595 (D.C. Cir. 1996)

although a court's merits reasoning may be quite relevant to the resolution of the substantial justification question, the inquiry into the reasonableness of the government's position may not be collapsed into an antecedent evaluation of the merits; LBP-11-8, 73 NRC 368-69 (2011)

Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)

boards must not adjudicate the merits of allegations at the contention admissibility stage, but, to be admissible, a contention must provide more than a bare assertion, and must explain the supporting reasons for the dispute raised in that contention; LBP-11-16, 73 NRC 667, 677 (2011)

mere notice pleading is insufficient for contention admission; LBP-11-2, 73 NRC 45 (2011); LBP-11-13, 73 NRC 551 (2011); LBP-11-16, 73 NRC 655 (2011)

petitioner's issue will be ruled inadmissible if petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation; LBP-11-6, 73 NRC 250 (2010)

Federal Election Commission v. Rose, 806 F.2d 1081, 1087 (D.C. Cir. 1986)

reasonableness, the legal standard governing the determination of substantial justification, is separate and distinct from the legal standard used in assessing the merits phase of a proceeding; LBP-11-8, 73 NRC 369 (2011)

Five Points Road Joint Venture v. Johanns, 542 F.3d 1121, 1124 n.3 (7th Cir. 2008)

once Congress has waived sovereign immunity over certain subject matter, a court should be careful not to assume the authority to narrow the waiver that Congress intended; LBP-11-8, 73 NRC 360 (2011)

Flaherty v. Coughlin, 713 F.2d 10, 13 (2d. Cir. 1983)

summary disposition, like summary judgment, is an extreme remedy that should be granted with caution; LBP-11-7, 73 NRC 263 (2011)

Florida Power & Light Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 NRC 30, 33-34 (2006)

failure to comply with pleading requirements for late filings constitutes sufficient grounds for rejecting intervention and hearing requests; LBP-11-7, 73 NRC 279 n.159 (2011)

Florida Power & Light Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 NRC 30, 34 (2006)

a late-filed contention is inadmissible both for lack of a good cause showing and for failure to address the other factors of 10 C.F.R. 2.309(c)(1); LBP-11-6, 73 NRC 247 (2010)

Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989)

although NRC applies traditional standing concepts, it presumes that an individual has standing to intervene without the need to address them upon a showing that he or she lives within, or otherwise has frequent contacts with, a geographic zone of potential harm; LBP-11-2, 73 NRC 41 (2011); LBP-11-16, 73 NRC 653 (2011)

traditional judicial standing concepts require a showing that the individual has suffered or might suffer a concrete and particularized injury that is fairly traceable to the challenged action, likely to be redressed by a favorable decision, and arguably within the zone of interests protected by the governing statutes; LBP-11-2, 73 NRC 40 (2011)

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Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8 (2001)
for license renewal, it is unnecessary to review all those issues already monitored, reviewed, and commonly resolved as needed by ongoing regulatory oversight; LBP-11-2, 73 NRC 45-46 n.92 (2011)
Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11 (2001)
Category 1 issues are not subject to challenge in a relicensing proceeding because they involve environmental effects that are essentially similar for all plants and need not be assessed repeatedly on a site-specific basis; LBP-11-13, 73 NRC 551 (2011)
license renewal applicants need not submit in their site-specific environmental reports an analysis of Category 1 issues; LBP-11-2, 73 NRC 76 n.306 (2011)
Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 21 (2001)
Part 51's reference to severe accident mitigation alternatives deals only with nuclear reactor accidents, not spent fuel storage accidents; LBP-11-2, 73 NRC 66 (2011)
Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 22 (2001)
Part 51 treats all spent fuel pool accidents, whatever their cause, as generic, Category 1 events not suitable for case-by-case adjudication; LBP-11-2, 73 NRC 66 (2011)
Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 23 (2001)
license renewal boards cannot admit environmental challenges regarding spent fuel pool issues; LBP-11-2, 73 NRC 65 (2011)
Part 51's license renewal provisions cover environmental issues relating to onsite spent fuel storage generically and all such issues, including accident risk, fall outside the scope of license renewal proceedings; LBP-11-13, 73 NRC 570 n.244 (2011)
Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 6 and 7), LBP-11-6, 73 NRC 149, 244 n.111 (2011)
board members are not required to comb through the record seeking support for contentions; LBP-11-13, 73 NRC 575 n.287 (2011)
judges are not like pigs, hunting for truffles buried in briefs; LBP-11-14, 73 NRC 608 n.106 (2011)
Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 181 (2000)
an association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit; LBP-11-2, 73 NRC 40 (2011); LBP-11-13, 73 NRC 545 n.52 (2011); LBP-11-16, 73 NRC 653 (2011)
Friends of the Earth, Inc. v. O'Reilly, 966 F.2d 690, 695 (D.C. Cir. 1992)
a proceeding is an adversary adjudication under the Equal Access to Justice Act only if Congress intended that the proceeding be subject to Administrative Procedure Act § 554; LBP-11-8, 73 NRC 356 n.26 (2011)
an agency's decision to add protections matching those of Administrative Procedure Act § 554 is irrelevant absent Congress's having compelled the augmentation; LBP-11-8, 73 NRC 356 n.26 (2011)
an agency's discretionary choice to conduct a formal on-the-record hearing is irrelevant when determining whether the Equal Access to Justice Act applies to a particular proceeding; LBP-11-8, 73 NRC 360 (2011)
Fuel Safe Washington v. Federal Energy Regulatory Commission, 389 F.3d 1313, 1323 (10th Cir. 2004)
under NEPA, an agency need not compare the environmental impacts of the proposed action with the environmental impacts of alternatives that are not reasonable or feasible; LBP-11-7, 73 NRC 308 n.371 (2011)
General Motors Corp. v. Federal Energy Regulatory Commission, 656 F.2d 791, 795 & n.7 (D.C. Cir. 1981)
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Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)
boards are to construe intervention petitions in favor of petitioners in determining whether petitioner has demonstrated standing; LBP-11-2, 73 NRC 41 (2011); LBP-11-13, 73 NRC 548 (2011); LBP-11-16, 73 NRC 653 (2011)
essential to establishing standing are findings of injury, causation, and redressability; CLI-11-3, 73 NRC 621 (2011)
NRC generally applies traditional judicial standing concepts which require a showing that the individual has suffered or might suffer a concrete and particularized injury that is fairly traceable to the challenged action and likely redressible by a favorable decision; LBP-11-2, 73 NRC 40 (2011); LBP-11-13, 73 NRC 545-46 (2011)
organizational standing requirements are outlined; CLI-11-3, 73 NRC 621 n.38 (2011)
Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116-17 (1995)
no proximity presumption applies in an import/export licensing case because petitioners have not shown that the import or export involves a significant source of radioactivity producing an obvious potential for offsite consequences; CLI-11-3, 73 NRC 622 (2011)
Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-19, 42 NRC 191, 194 (1995)
in ruling on whether a contention is moot, boards look to whether a justiciable controversy still exists and whether an issue is still live, such that a party still has a legal interest in the issue; LBP-11-4, 73 NRC 127 (2011)
GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000)
to demonstrate representational standing, an organization must show that at least one of its members might be affected by the proceeding, identify that member by name and address, and show that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf; LBP-11-6, 73 NRC 169 (2010)
GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)
petitioner's issue will be ruled inadmissible if petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only 'bare assertions and speculation; LBP-11-6, 73 NRC 250 (2010)
Grand Canyon Trust v. Federal Aviation Administration, 290 F.3d 339, 341, 346 (D.C. Cir. 2002)
a draft environmental impact statement does not and cannot treat identified environmental concerns in a vacuum; LBP-11-7, 73 NRC 302 (2011)
Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994)
factual support required for a contention at the admission stage is a minimal showing that material facts are in dispute; LBP-11-2, 73 NRC 45 (2011); LBP-11-13, 73 NRC 551 (2011); LBP-11-14, 73 NRC 609 (2011); LBP-11-16, 73 NRC 655 (2011)
Halverson v. Slater, 206 F.3d 1205, 1208 (D.C. Cir. 2000)
although a court's merits reasoning may be quite relevant to the resolution of the substantial justification question, the inquiry into the reasonableness of the government's position may not be collapsed into an antecedent evaluation of the merits; LBP-11-8, 73 NRC 368-69 (2011)
Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 395-96 (1979)
although an allegation that a purported representative is acting without his or her organization's authorization, i.e., is acting *ultra vires*, is distinct from a challenge to the organization's standing, petitioner may cure such a defect in representation as well; LBP-11-13, 73 NRC 549 (2011)
authority of an officer or attorney to sign a petition is distinguished from an authorization addressed to the organization's standing to intervene; LBP-11-13, 73 NRC 549 (2011)
Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382, 384-85 (1985)
issues originally raised by a later-withdrawing party have been remanded to the board for further consideration of whether issues presented serious safety or environmental questions that warrant Board examination pursuant to its sua sponte authority; LBP-11-9, 73 NRC 414 n.125 (2011)

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Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir.1996)
the principal goals of NEPA's environmental impact statement requirement 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-11-14, 73 NRC 598 (2011)

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977)
an association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit; LBP-11-2, 73 NRC 40 (2011); LBP-11-13, 73 NRC 545 n.52 (2011)

Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120-22 & n.3 (1998)
petitioner's demand for compliance with U.S. Army Corps of Engineers requirements is not within the scope of a combined license proceeding, because it is not the province of NRC to enforce another agency's regulations; LBP-11-6, 73 NRC 236 n.102 (2010)

Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001)
an environmental report need only consider the range of alternatives that are capable of achieving the goals of the proposed action; LBP-11-13, 73 NRC 553 n.114 (2011)
NRC Staff may accord substantial weight to the stated purpose of the project, i.e., to provide additional baseload electrical generation capacity for use in the owner's current markets and/or for potential sale on the wholesale market; LBP-11-7, 73 NRC 304 (2011)

Idaho By and Through Idaho Public Utilities Commission v. Interstate Commerce Commission, 35 F.3d 585, 595 (D.C. Cir. 1994)
although NEPA does not explicitly mention cost-benefit balancing, courts have interpreted the statute as requiring federal agencies to balance the environmental costs against the anticipated benefits of a proposed action; LBP-11-7, 73 NRC 281 (2011)

International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001)
as a matter of law and logic, if applicant's enhanced program is inadequate, then applicant's unenhanced program is a fortiori inadequate, and intervenor has a regulatory obligation to challenge it in its original petition to intervene; LBP-11-9, 73 NRC 417 (2011)

International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001)
an organization may establish organizational standing; LBP-11-6, 73 NRC 169 (2010)

International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001)
speculation about accidents along feed material's transport routes does not establish standing; CLI-11-3, 73 NRC 623 n.50 (2011)

Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990)
waivers of the government's sovereign immunity, to be effective, must be unequivocally expressed; LBP-11-8, 73 NRC 360 n.46 (2011)

Jackson v. Chater, 94 F.3d 274, 278 (7th Cir. 1996)
in determining whether the government's position was substantially justified, the board does not make separate determinations regarding each stage but arrives at one conclusion that simultaneously encompasses and accommodates the entire civil action; LBP-11-8, 73 NRC 368 (2011)

James v. Honaker Drilling, Inc., 254 F.2d 702, 706 (10th Cir. 1958)
summary disposition, like summary judgment, is an extreme remedy that should be granted with caution; LBP-11-7, 73 NRC 263 (2011)

Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 327 (1978)
demand for electricity is of course the justification for building any power plant, although other benefits have been considered; LBP-11-7, 73 NRC 282 n.174 (2011)

Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 328 (1978)
given the legal responsibility imposed upon a public utility to provide at all times adequate, reliable service, and the severe consequences that may attend upon a failure to discharge that responsibility, the most that can be required is that the forecast be a reasonable one in light of what is ascertainable at the time made; LBP-11-7, 73 NRC 283 n.179 (2011)

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Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 235 (1982)
NRC started to relax the procedural requirements for certain types of proceedings; LBP-11-8, 73 NRC 358 (2011)

Kleppe v. Sierra Club, 427 U.S. 390, 405-06 (1976)
applicant's obligation is to consider alternatives as they exist and are likely to exist; LBP-11-2, 73 NRC 51 n.132 (2011)

Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)
if the adverse environmental impacts of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs; LBP-11-14, 73 NRC 605 (2011)

Laguna Greenbelt, Inc. v. U.S. Department of Transportation, 42 F.3d 517, 528 (9th Cir. 1994)
NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act, but only requires that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated; LBP-11-14, 73 NRC 607 (2011)

Legal Environmental Assistance Foundation, Inc. v. Environmental Protection Agency, 400 F.3d 1278, 1279 (11th Cir. 2005)
a source permit is an operating permit that the Clean Air Act requires major stationary sources of air pollution to obtain; LBP-11-13, 73 NRC 583 n.356 (2011)

Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 738 (3d Cir. 1989)
as a logical proposition, risk equals the likelihood of an occurrence times the severity of the consequences; LBP-11-2, 73 NRC 63 n.212 (2011)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 66, 74-75 (1991)
the Commission, in deciding an issue, can take into consideration a matter beyond reasonable controversy and one that is capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy; LBP-11-7, 73 NRC 290 n.231 (2011)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 71 (1991)
applicant's alternatives analysis need not discuss every conceivable alternative to the proposed action, but rather only feasible, nonspeculative, and reasonable alternatives; LBP-11-13, 73 NRC 553 (2011)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 72 n.3 (1991)
although boards may give reasonable deference to NRC guidance, such agency guidance does not substitute for regulations, is not binding authority, and does not prescribe NRC requirements; LBP-11-16, 73 NRC 670 (2011)

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 195 (1991)
NRC is lenient in permitting pro se petitioners the opportunity to cure procedural defects in petitions to intervene regarding standing; LBP-11-13, 73 NRC 549 (2011)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998)
a contention contesting applicant's environmental report may be viewed as a challenge to the Staff's subsequently issued DEIS/EIS, but this "migration" tenet does not change the basic form of the contention, i.e., whether it challenges the soundness of the information provided or claims that necessary information has been omitted (or some combination of the two); LBP-11-1, 73 NRC 26 n.13 (2011)
if all matters at issue in a contention of omission are addressed by NRC Staff in its DEIS through the actual provision of information on all such matters, then no legal interest in that contention remains, and the contention is moot; LBP-11-4, 73 NRC 127-28 n.155 (2011)
once NRC Staff issues the draft EIS, a contention that was originally admitted as a challenge to the environmental report may be treated as a challenge to the similar section of the DEIS; LBP-11-1, 73 NRC 26 n.12 (2011)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87 (1998)
the principal goals of NEPA's environmental impact statement requirement 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-11-14, 73 NRC 598 (2011)

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Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88 (1998)
although NEPA does not explicitly mention cost-benefit balancing, courts have interpreted the statute as requiring federal agencies to balance the environmental costs against the anticipated benefits of a proposed action; LBP-11-7, 73 NRC 281 (2011)
as part of NRC's NEPA analysis for licensing a nuclear power plant, the agency must balance the costs and benefits resulting from issuance of a license, but the EIS need not always contain a formal or mathematical cost-benefit analysis; LBP-11-7, 73 NRC 281-82 n.173 (2011)
NEPA itself does not mandate a cost-benefit analysis, but the statute is generally regarded as calling for some sort of a weighing of the environmental costs against the economic, technical, or other public benefits of a proposal; LBP-11-6, 73 NRC 218 (2010)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88, 94 (1998)
the need-for-power assessment need not precisely identify future market conditions and energy demand, or 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; LBP-11-7, 73 NRC 283 (2011)

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 339 (1991)
although boards may give reasonable deference to NRC guidance, such agency guidance does not substitute for regulations, is not binding authority, and does not prescribe NRC requirements; LBP-11-16, 73 NRC 670, 674 (2011)

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004)
petitioner's reply must be narrowly focused on the legal or logical arguments presented in the applicant's or NRC Staff's answer; LBP-11-6, 73 NRC 229 n.93 (2010)

Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004)
NRC regulations do not allow use of reply briefs to provide, for the first time, the necessary threshold support for contentions; LBP-11-6, 73 NRC 237 n.105 (2010)

Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-06-8, 63 NRC 241, 259 (2006)
NRC Staff's reference to, and reliance in its DEIS on, state issuance of a site certification order and associated certificate of compliance on groundwater use does not dispense with NRC's duty under NEPA to conduct an independent hard look at environmental impacts related to active dewatering during operations at a nuclear plant; LBP-11-1, 73 NRC 25 (2011)

Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-06-17, 63 NRC 747 (2006)
mandatory proceedings for licensing of proposed uranium enrichment facility sites were conducted; LBP-11-11, 73 NRC 475 (2011)

Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986)
the burden of satisfying the requirement for reopening a record is a heavy one; CLI-11-2, 73 NRC 346 (2011)

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)
contemporaneous judicial concepts of standing require a petitioner to allege an injury in fact that is fairly traceable to the challenged action and likely to be redressed by a favorable decision
NRC generally applies traditional judicial standing concepts which require a showing that the individual has suffered or might suffer a concrete and particularized injury that is fairly traceable to the challenged action and likely redressible by a favorable decision; LBP-11-2, 73 NRC 40 (2011); LBP-11-6, 73 NRC 168-69 (2010); LBP-11-13, 73 NRC 545-46 (2011); LBP-11-16, 73 NRC 652 (2011)

Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-03-23, 58 NRC 372, 378 (2003)
petitioners who are proceeding pro se should be shown greater leeway on the question of whether they have demonstrated good cause for lateness than petitioners represented by counsel; LBP-11-13, 73 NRC 543 (2011)

McKinney v. Dole, 765 F.2d 1129, 1135 (D.C. Cir. 1985)
although it is risky for a nonmoving party to fail to proffer evidence in response to the summary judgment movant's showing, such a failure does not automatically mandate granting of the motion; LBP-11-4, 73 NRC 100 n.16 (2011)

if summary judgment movant does not meet its burden, the nonmoving party is, without making any showing, entitled to a denial of the motion; LBP-11-4, 73 NRC 100 n.16 (2011)
in assessing whether a summary judgment movant has met his or her burden, a court must view all inferences to be drawn from underlying facts in the light most favorable to the party opposing the motion; LBP-11-4, 73 NRC 99-100 n.16 (2011)
only when the summary judgment movant meets its burden is the nonmoving party required to proffer evidence that contradicts the moving party's showing and that proves the existence of a genuine issue of material fact; LBP-11-4, 73 NRC 100 n.16 (2011)
summary judgment should be awarded only when the truth is quite clear; LBP-11-4, 73 NRC 100 n.16 (2011)
the record must show movant's right to summary judgment with such clarity as to leave no room for controversy, and must demonstrate that his opponent would not be entitled to prevail under any discernible circumstances; LBP-11-4, 73 NRC 100 n.16 (2011)

McSpadden v. Mullins, 456 F.2d 428, 430 (8th Cir. 1972)
summary disposition, like summary judgment, is an extreme remedy that should be granted with caution; LBP-11-7, 73 NRC 263 (2011)

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983)
traditional judicial standing concepts require a showing that the individual has suffered or might suffer a concrete and particularized injury that is fairly traceable to the challenged action, likely redressible by a favorable decision, and arguably within the zone of interests protected by the governing statutes; LBP-11-2, 73 NRC 40 (2011)

Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973)
boards do not adjudicate disputed facts at the contention admission stage; LBP-11-2, 73 NRC 45 (2011); LBP-11-13, 73 NRC 551 (2011)
petitioner does not have to prove its contentions at the admissibility stage; LBP-11-14, 73 NRC 609 (2011)

Montalvo-Huertas v. Rivera-Cruz, 885 F.3d 971, 978-79 (1st Cir. 1989)
the Commission's action in adopting new procedural rules meets the rational basis test; LBP-11-4, 73 NRC 125 n.147 (2011)

Moore v. Jackson, 123 F.3d 1082, 1086 (8th Cir. 1997)
summary disposition, like summary judgment, is an extreme remedy; LBP-11-7, 73 NRC 263 (2011)

Morrison v. Commissioner of Internal Revenue, 565 F.3d 658, 666 (9th Cir. 2009)
when a third party who has no direct interest in the litigation pays fees on behalf of a taxpayer, the taxpayer incurs the fees so long as he assumes an absolute obligation to repay the fees or a contingent obligation to pay the fees in the event that he is able to recover them; LBP-11-8, 73 NRC 365 n.74 (2011)

Mt. Lookout-Mt. Nebo Property Protection Assosiation v. Federal Energy Regulatory Commission, 143 F.3d 165, 172-73 (4th Cir. 1998)
agency's consideration of three alternative routes is sufficient to meet its NEPA obligations to consider reasonable transmission line route alternatives; LBP-11-6, 73 NRC 208 (2010)

Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 294 (D.C. Cir. 1988)
NEPA requires that an environmental review provide a sufficient discussion of alternatives to enable the decisionmaker to take a hard look at environmental factors, and to make a reasoned decision; LBP-11-13, 73 NRC 552 (2011)

Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 837-38 (1972)
remote and speculative alternatives need not be addressed in applicant's environmental report; LBP-11-2, 73 NRC 51 (2011)

New Jersey v. NRC, 526 F.3d 98, 102 (3d Cir. 2008)
although boards may give reasonable deference to NRC guidance, such agency guidance does not substitute for regulations, is not binding authority, and does not prescribe NRC requirements; LBP-11-16, 73 NRC 670, 674 (2011)
regulatory guidance is not binding on applicants; LBP-11-16, 73 NRC 661 (2011)

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NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), LBP-11-2, 73 NRC 28, 47, 53 (2011)
at the contention admission stage, it is sufficient for petitioners to proffer some minimal factual support for their contention; LBP-11-13, 73 NRC 564 (2011)

NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), LBP-11-2, 73 NRC 28, 47, 62 (2011)
the materiality standard requires only that petitioners provide sufficient information to show that, if their proposed refinements were incorporated, it is genuinely plausible that cost-benefit conclusions might change; LBP-11-13, 73 NRC 580 (2011)

Nguyen v. Immigration and Naturalization Service, 533 U.S. 53, 63 (2001)
equal protection principles require that all persons similarly situated shall be treated alike; LBP-11-15, 73 NRC 639 n.20 (2011)

Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 365 (1975)
inherent in any forecast of future electric power demands is a substantial margin of uncertainty; LBP-11-6, 73 NRC 219-20 (2010)

Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 365-66 (1975)
forecasting of need for power is inherently uncertain; LBP-11-6, 73 NRC 222 (2010)

Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 365-68 (1975)
because need-for-power assessments necessarily entail forecasting power demands in light of substantial uncertainty and the duty of providing adequate and reliable service to the public, they are inherently conservative; LBP-11-7, 73 NRC 283 (2011)

Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 366-67 (1975)
regardless of whether NRC itself conducts the need-for-power assessment or relies on another agency's forecasts and studies, that assessment need only be reasonable; LBP-11-7, 73 NRC 283 (2011)

Norfolk Southern Corp. v. Oberly, 632 F. Supp. 1225, 1243 (D. Del. 1986), *aff'd on other grounds,* 822 F.2d 3888 (3d Cir. 1987)
summary disposition is particularly inappropriate when a licensing board is presented with conflicting expert testimony, for at that stage of a proceeding it is not the role of licensing boards to untangle the expert affidavits and decide which experts are more correct; LBP-11-7, 73 NRC 263 (2011); LBP-11-14, 73 NRC 595 (2011)

North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 223 (1999)
petitioner lacked good cause for a hearing request filed 7 days after the filing deadline when the argument relied on a misimpression of due dates; LBP-11-9, 73 NRC 403, 409 n.107 (2011)

Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202, 213 (1992)
even if an import or export license authorized possession and/or use of the low-level radioactive waste, the petition does not assert how the LLRW is a significant source of radioactivity or provide any scenario in which the import or export of the LLRW would result in an accident that could produce obvious offsite consequences; CLI-11-3, 73 NRC 622 n.46 (2011)

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 494 (2010)
NRC generally considers approximately 30-60 days as the limit for timely filings based on new information; CLI-11-2, 73 NRC 342 n.43 (2011)

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010)
adoption of building code rules by a state presents new and materially different information not previously available, upon which intervenors may rest their proposed contention; LBP-11-7, 73 NRC 290 n.233 (2011)
in the context of a new contention filed after the initial petition, the Commission has a longstanding policy that 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-11-2, 73 NRC 339 n.22 (2011)

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Nuclear Fuel Services, Inc. (Erwin, Tennessee), LBP-04-5, 59 NRC 186, 195 (2004), *aff'd,* CLI-04-13, 59 NRC 244 (2004)

mere potential exposure to minute doses of radiation within regulatory limits does not constitute a distinct and palpable injury on which standing can be founded; CLI-11-3, 73 NRC 623 n.51 (2011)

petitioners have offered conclusory statements of harm, but no plausible explanation for why emissions from incinerating imported low-level radioactive waste would reach any of its members or prove harmful 10, 17, or 25 miles away from the site; CLI-11-3, 73 NRC 622-23 n.48 (2011)

Nuclear Management Co., LLC (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 163 (2006)

in determining whether an individual member of an organization qualifies for standing in his or her own right, NRC generally applies traditional judicial standing concepts; LBP-11-13, 73 NRC 545 (2011)

Nuclear Management Co., LLC (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 164 (2006)

mere existence of comments and questions generated by NRC Staff do not, in and of themselves, demonstrate a material deficiency in applicant's combined license application; LBP-11-6, 73 NRC 178 n.26 (2010)

Nuclear Management Co., LLC (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 753 (2005)

applicant's alternatives analysis need not discuss every conceivable alternative to the proposed action, but rather only feasible, nonspeculative, and reasonable alternatives; LBP-11-13, 73 NRC 553 (2011)

Office of Disciplinary Counsel v. Bursey, 919 N.E.2d 198, 204-06 (Ohio 2009)

an attorney whose violations of the Rules of Professional Conduct included negotiating a settlement for a client that had never given him settlement authority, forging client's name on settlement check, and depositing it into attorney's bank account was disbarred permanently; LBP-11-13, 73 NRC 549 (2011)

Owens v. Brock, 860 F.2d 1363, 1366 (6th Cir. 1988)

an agency's discretionary choice to conduct a formal on-the-record hearing is irrelevant when determining whether the Equal Access to Justice Act applies to a particular proceeding; LBP-11-8, 73 NRC 360 (2011)

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982)

the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention; CLI-11-2, 73 NRC 338 n.20 (2011)

Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-4, 57 NRC 273, 277 (2003)

the Commission declined to stay dry cask storage proceedings pending requested rule changes; CLI-11-1, 73 NRC 5 (2011)

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 is not shown, a board may still permit the late filing, but petitioner or intervenor must make a strong showing on the other factors of 10 C.F.R. 2.309(c); LBP-11-9, 73 NRC 401 (2011)

Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-96 (1979)

although a licensing board is not required to recast contentions to make them acceptable, it is also not precluded from doing so; LBP-11-13, 73 NRC 565 n.199 (2011)

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)

a contention must be rejected if it attacks applicable statutory requirements or regulations, challenges the basic structure of the regulatory process, merely expresses petitioner's view of policy, seeks to raise an issue improper for adjudication in the proceeding or not applicable to the facility in question, or raises an issue that is not concrete or is otherwise not litigable; LBP-11-6, 73 NRC 170 n.16 (2010)

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974)

that the contention admissibility rule is designedly strict is not to say that it should serve as a fortress to deny intervention; LBP-11-6, 73 NRC 171 (2010)

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Phillips v. Cohen, 400 F.3d 388, 399 (6th Cir. 2005)
when presented with conflicting expert opinions, licensing boards should be mindful that summary disposition is rarely proper; LBP-11-7, 73 NRC 263 (2011)

Pierce v. Underwood, 487 U.S. 552, 565-66 (1988)
justification "in substance or in the main" is equated with the "reasonable basis both in law and fact" standard that has been applied by a majority of federal appellate courts; LBP-11-8, 73 NRC 368 n.95 (2011)

Pierce v. Underwood, 487 U.S. 552, 566 n.2 (1988)
for the purposes of the Equal Access to Justice Act, the government's position should be considered substantially justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact; LBP-11-8, 73 NRC 368 (2011)

Pierce v. Underwood, 487 U.S. 552, 569 (1988)
the fact that one other court agreed or disagreed with the government does not establish whether its position was substantially justified; LBP-11-8, 73 NRC 368 n.100 (2011)

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962)
summary judgment should be granted only where the truth is clear; LBP-11-14, 73 NRC 595 (2011)

Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000)
an organization that seeks to intervene in a representative capacity must show that the interests it seeks to protect are germane to its own purpose, and identify, by name and address at least one member who qualifies for standing in his or her own right; LBP-11-13, 73 NRC 545 (2011)

Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 295 (2000)
where a municipality seeks to participate in a reactor licensing proceeding that does not involve a facility within the municipality's boundaries, it can, for purposes of establishing standing, rely on the 50-mile proximity presumption to the same extent as an individual or an organization; LBP-11-6, 73 NRC 170 n.14 (2010)

Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC 361, 390 (2010)
an individual may not intervene in his or her own right while simultaneously being represented by another petitioner in the same proceeding; LBP-11-13, 73 NRC 550 n.90 (2011)

PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010)
the proximity presumption applies when an individual or organization, or an individual authorizing an organization to represent his or her interests seeks to establish its representational standing, resides within 50 miles of the proposed facility, or has frequent contacts with the area affected by the proposed facility; LBP-11-6, 73 NRC 169 (2010); LBP-11-16, 73 NRC 653 (2011)

PPL Bell Bend LLC (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 396 (2009)
NRC is lenient in permitting pro se petitioners the opportunity to cure procedural defects in petitions to intervene regarding standing; LBP-11-13, 73 NRC 549 (2011)

PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 105 (2007)
NRC's adjudicatory process is not the proper forum for investigating alleged violations that are primarily the responsibility of other federal, state, or local agencies; LBP-11-6, 73 NRC 249 n.115 (2010)

PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units, 1 and 2), LBP-07-10, 66 NRC 1, 11 (2007)
even if undisputed, the jurisdictional nature of standing in NRC Proceedings requires independent examination by presiding officer; LBP-11-16, 73 NRC 653-54 (2011)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998)
organizational standing requirements are outlined; CLI-11-3, 73 NRC 621 n.39 (2011)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 32 (1998)
the interests a municipality seeks to represent on behalf of its residents are germane to its own purposes in the context or standing; LBP-11-6, 73 NRC 170 n.15 (2010)

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Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 33-34 (1998)
a governmental body's interest in protecting the individuals and territory that fall under that body's authority establishes an organizational interest for standing purposes; LBP-11-6, 73 NRC 170 n.15 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999)
interests that an organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action; LBP-11-6, 73 NRC 169 (2010)
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) precludes admission of a contention; LBP-11-7, 73 NRC 280 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001)
it is presumed that applicants intend to comply with state law; LBP-11-16, 73 NRC 678 n.185 (2011)
petitioner impermissibly assumes that applicant will violate applicable state law regarding its treatment of wells at the site; LBP-11-16, 73 NRC 676 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 474 (2001)
the choice between rulemaking and adjudication (i.e., issuing orders or other license revisions) is within the agency's discretion; LBP-11-11, 73 NRC 505-06 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001)
although NUREGs are not legally binding, they are guidance documents, and applicant's failure to comply with such documents could give rise to an admissible contention; LBP-11-6, 73 NRC 221 n.81 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001)
petitioners have not shown that interim docketing and Staff review of license renewal applications would jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from ongoing evaluation of licensing policies; CLI-11-1, 73 NRC 5 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380-81 (2001)
the Commission declined to stay dry cask storage proceedings pending requested rule changes; CLI-11-1, 73 NRC 5 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 381 (2001)
longstanding NRC practice has been to limit orders delaying proceedings to the duration and scope necessary to promote the Commission's dual goals of public safety and timely adjudication; CLI-11-1, 73 NRC 3-4 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 383 (2001)
because the Commission will have an opportunity to take a fresh look at concerns petitioners have expressed once the particulars of their rulemaking petition have been scrutinized by public comment and agency review, holding up proceedings is not necessary to ensure that the public will realize the full benefit of ongoing regulatory review; CLI-11-1, 73 NRC 5 (2011)

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Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348 (2002)
NEPA demands a discussion of the environmental impact of any proposed major federal action significantly affecting the quality of the human environment; LBP-11-6, 73 NRC 198 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348 n.22 (2002)
although boards may give reasonable deference to NRC guidance, such agency guidance does not substitute for regulations, is not binding authority, and does not prescribe NRC requirements; LBP-11-16, 73 NRC 670, 674 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348-49 (2002)
an environmental report need only consider environmental impacts that are reasonably foreseeable; LBP-11-6, 73 NRC 239 (2010)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 130 (2004)
the draft environmental impact statement might cure alleged omissions or deficiencies in the environmental report by including additional analysis that addresses such omissions or deficiencies; LBP-11-7, 73 NRC 276 n.150 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004)
petitioner does not have to prove its contentions at the admissibility stage; LBP-11-2, 73 NRC 45 (2011); LBP-11-13, 73 NRC 551 (2011); LBP-11-16, 73 NRC 655 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 145 (2004)
quibbling over the details of an economic analysis would effectively stand NEPA on its head by asking that the license be rejected not due to environmental costs, but because the economic benefits are not as great as estimated; LBP-11-7, 73 NRC 283 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005)
the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention; CLI-11-2, 73 NRC 338 n.20 (2011)
to justify reopening the record, the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition; CLI-11-2, 73 NRC 346 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005)
NRC generally disfavors the filing of new contentions at the eleventh hour of an adjudication, a policy that is grounded in the doctrine of finality, which states that at some point, an adjudicatory proceeding must come to an end; CLI-11-2, 73 NRC 337-38 n.15 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 355 (2005)
petitioner's appellate argument must pass regulatory muster under the rigorous standards of 10 C.F.R. 2.326(a)(3); CLI-11-2, 73 NRC 347 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80, *aff'd as to other matters,* CLI-98-13, 48 NRC 26 (1998)
under 10 C.F.R. 2.309(f)(1), petitioner need only properly allege a defect in meeting the materiality requirement; LBP-11-7, 73 NRC 292 n.250 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-32, 50 NRC 155, 158 (1999)
summary judgment should be granted only where the truth is clear; LBP-11-14, 73 NRC 595 (2011)
Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000)
contentions that address an important security issue regarding Part 74's strict requirements for the proposed facility, which applicant previously admitted it failed to satisfy, are admissible; LBP-11-9, 73 NRC 412 n.119 (2011)

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Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-22, 54 NRC 155, 161 (2001)

where the information in the DEIS is so different from the information in the environmental report that the DEIS dispenses with and moots the issues raised in the original contention, intervenor must file a new or amended contention against the DEIS; LBP-11-1, 73 NRC 26 (2011)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001)

a contention contesting applicant's environmental report may be viewed as a challenge to the Staff's subsequently issued DEIS/EIS, but this "migration" tenet does not change the basic form of the contention, i.e., whether it challenges the soundness of the information provided or claims that necessary information has been omitted (or some combination of the two); LBP-11-1, 73 NRC 26 n.13 (2011)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-30, 54 NRC 231, 235 (2001)

if summary disposition movant meets its burden, the nonmoving party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation and cannot rely on mere allegations or denials, or the facts in controversy will be deemed admitted; LBP-11-14, 73 NRC 595 (2011)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509 (2001)

during summary disposition, it is not appropriate for boards to untangle the expert affidavits and decide which experts are more correct; LBP-11-7, 73 NRC 263 (2011)

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-11-14, 73 NRC 595 (2011)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 510 (2001)

summary disposition is particularly inappropriate when a licensing board is presented with conflicting expert testimony, for at that stage of a proceeding it is not the role of licensing boards to untangle the expert affidavits and decide which experts are more correct; LBP-11-14, 73 NRC 595 (2011)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-03-8, 57 NRC 293, 319-20, *review denied,* CLI-03-8, 58 NRC 11 (2003)

regulatory guidance is not binding on applicants; LBP-11-16, 73 NRC 661 (2011)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-03-8, 57 NRC 293, 320, *review denied* CLI-03-8, 58 NRC 11 (2003)

although boards may give reasonable deference to NRC guidance, such agency guidance does not substitute for regulations, is not binding authority, and does not prescribe NRC requirements; LBP-11-16, 73 NRC 670, 674 (2011)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-03-30, 58 NRC 454, 479 (2003)

although there are many possible combinations of wind and solar power, storage, and natural gas, it is not necessary to examine every possible combination; LBP-11-4, 73 NRC 104 (2011)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-12, 61 NRC 319, 326, *aff'd,* CLI-05-19, 62 NRC 403 (2005)

although an applicant has the ultimate burden of proof on any issues on which a hearing is held, hearings are held on only those issues that an intervenor brings to the fore; LBP-11-4, 73 NRC 100 n.16 (2011)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, 710 & n.12 (2005)

if NRC Staff detects deficiencies in an application before or after a notice of hearing opportunity is issued, the applicant will freely be given (outside the adjudicatory process) ample opportunity to amend it; LBP-11-9, 73 NRC 412 n.118 (2011)

the public interest can well be served by revisions to an application that end up "getting it right" and by the Staff's expected thorough analysis of such revisions; LBP-11-9, 73 NRC 412 (2011)

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Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1 (2008)
the Commission refused to suspend the combined license proceeding pending completion of the design certification review of the AP1000 reactor; CLI-11-1, 73 NRC 4 (2011)
Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 4 (2008)
lack of finality in the design certification process is anticipated in the rulemaking, and hearing procedures can be adjusted to account for any new or amended contentions based on information relating to design certification; CLI-11-1, 73 NRC 4 (2011)
there is no basis to hold a notice of hearing in abeyance pending completion of the design certification rulemaking; CLI-11-1, 73 NRC 4-5 (2011)
Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 252 (2010)
when intervenors renewed a request to hold a proceeding in abeyance pending completion of the design certification rulemaking, the Commission found no new justification for reconsideration or any changed circumstances that could not previously have been brought; CLI-11-1, 73 NRC 5 n.12 (2011)
Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 34 (2010)
an environmental report's adequacy is examined under NEPA as well as under Part 51 because the ER is the basis upon which the NRC's environmental impact statement will be prepared; LBP-11-13, 73 NRC 552 n.110 (2011); LBP-11-14, 73 NRC 598 (2011)
Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 46 (2010)
absent a licensed low-level radioactive waste disposal facility that will accept waste from the proposed 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 applicant's combined license application; LBP-11-6, 73 NRC 239 (2010)
an environmental report need only discuss reasonably foreseeable environmental impacts of a proposed action; LBP-11-6, 73 NRC 217 n.78 (2010)
Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 46-47 (2010)
contentions challenging the ability of combined license applicants to handle onsite storage of Classes B and C low-level radioactive waste, as well as the attendant potential environmental impacts of such storage in the wake of the closure of the Barnwell facility in South Carolina to states outside of the Atlantic Compact are admissible; LBP-11-6, 73 NRC 239 (2010)
Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 47-48 (2010)
challenges to a combined license applicant's failure to provide information on long-term storage of Greater-Than-Class-C radioactive waste are outside the scope of a combined license proceeding; LBP-11-6, 73 NRC 240 n.109 (2010)
Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 86 (2009), *rev'd in part on other grounds,* CLI-10-2, 71 NRC 27, 29 (2010)
when a contention alleges the need for further study of an alternative, from an environmental perspective, such reasonableness determinations are the merits, and should only be decided after the contention is admitted; LBP-11-2, 73 NRC 50 (2011); LBP-11-13, 73 NRC 564 (2011)
Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 86-87 (2009)
at the contention admissibility stage, boards merely decide whether a contention satisfies the six pleading criteria of 10 C.F.R. 2.309(f)(1)(i)-(vi); LBP-11-16, 73 NRC 690 (2011)
Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-20, 72 NRC 571, 590 (2010)
applicant has described the kinds and quantities of radioactive materials expected to be produced in the operation to the extent its combined license application references a standardized design; LBP-11-6, 73 NRC 245 n.112 (2010)

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Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-23, 72 NRC 692, 703-04 (2010)
"document" means any medium (electronic, paper, or of any other kind) that contains or stores any information, including text, data, audio, video, computer software, or computer modeling information; LBP-11-5, 73 NRC 137 (2011)

Public Citizen, Inc. v. National Highway Traffic Safety Administration, 513 F.3d 234, 237 (D.C. Cir. 2008)
mere potential exposure to minute doses of radiation within regulatory limits does not constitute a distinct and palpable injury on which standing can be founded; CLI-11-3, 73 NRC 623 n.51 (2011)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 82-90 (1977), *aff'd, New England Coalition on Nuclear Pollution v. NRC,* 582 F.2d 87 (1st Cir. 1978)
although NRC Staff's argument against contention admission appears to have some weight, the board need not resolve it, because the contention is inadmissible for failing to raise a genuine dispute of material fact or law with the environmental report; LBP-11-6, 73 NRC 207 n.63 (2010)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 83 (1977), *aff'd, New England Coalition on Nuclear Pollution v. NRC,* 582 F.2d 87 (1st Cir. 1978)
NRC authority to review offsite impacts of transmission lines goes beyond merely factoring them into a final cost-benefit balance and includes as well the authority where necessary to impose license conditions to minimize those impacts; LBP-11-6, 73 NRC 250 n.116 (2010)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 90 (1977), *aff'd, New England Coalition on Nuclear Pollution v. NRC,* 582 F.2d 87 (1st Cir. 1978)
need for power is a shorthand expression for the benefit side of the cost-benefit balance that NEPA mandates for a proceeding considering the licensing of a nuclear power plant; LBP-11-6, 73 NRC 218 (2010)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 111 (1977)
boards' authority to seek to trigger review in extraordinary circumstances remains and has been put to good use; LBP-11-9, 73 NRC 418-19 n.13 (2011)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-471, 7 NRC 477, 504-08 (1978)
aesthetic impacts of energy sources may vary according to individual location; LBP-11-4, 73 NRC 112 (2011)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 596-97 (1988)
rule waivers are not granted where the circumstances on which the waiver's proponent relies are common to a large class of applicants or facilities; LBP-11-16, 73 NRC 702 n.351 (2011)

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989)
parties are expected to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point; LBP-11-6, 73 NRC 220 n.80 (2010)

Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979)
demand for electricity is of course the justification for building any power plant, and satisfaction of that demand is the principal beneficial factor weighed against the environmental costs in striking the balance that NEPA requires; LBP-11-7, 73 NRC 282 n.174, 291 n.242 (2011)
inasmuch as NRC Staff relies on the benefits of proposed units to satisfy an otherwise unmet need for power, the adequacy of the need-for-power assessment is material to granting the proposed combined license; LBP-11-7, 73 NRC 291 (2011)

Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), LBP-78-28, 8 NRC 281, 282 (1978)
NRC Staff need not replicate the work completed by another entity, but rather must independently review and find relevant and scientifically reasonable any outside reports or analyses on which it intends to rely in its environmental impact statement; LBP-11-1, 73 NRC 25 n.9 (2011)

Roanoke River Basin Association v. Hudson, 991 F.2d 132, 139 (4th Cir. 1993)
in determining whether the government's position was substantially justified, courts must look to the totality of the circumstances; LBP-11-8, 73 NRC 368 (2011)

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Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 334, 355-56 (1989)
although boards may give reasonable deference to NRC guidance, such agency guidance does not substitute for regulations, is not binding authority, and does not prescribe NRC requirements; LBP-11-16, 73 NRC 670, 674 (2011)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989)
NEPA establishes a broad national commitment to protecting and promoting environmental quality; LBP-11-7, 73 NRC 264 (2011)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-50 (1989)
the principal goals of NEPA's environmental impact statement requirement 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-11-14, 73 NRC 598 (2011)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)
if the adverse environmental impacts of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs; LBP-11-14, 73 NRC 605 (2011)
NEPA itself does not mandate particular results, but simply prescribes the necessary process; LBP-11-7, 73 NRC 264 (2011)
NEPA's requirement that federal agencies prepare an environmental impact statement when considering a major action serves the statute's action-forcing purpose in two ways; LBP-11-7, 73 NRC 264 (2011)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989)
if the adverse environmental effects of a proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs; LBP-11-7, 73 NRC 281 n.168 (2011)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989)
one important component of an environmental impact statement is the discussion of possible actions that might mitigate adverse environmental consequences; LBP-11-7, 73 NRC 264 (2011)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989)
NEPA only requires that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated; LBP-11-2, 73 NRC 64 (2011); LBP-11-7, 73 NRC 265 (2011); LBP-11-13, 73 NRC 566 (2011)
there is a fundamental distinction between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other; LBP-11-14, 73 NRC 607 n.104 (2011)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352-53 (1989)
NEPA does not demand the presence of a fully developed plan or a detailed explanation of specific measures that will be employed to mitigate the adverse impacts of a proposed action; LBP-11-7, 73 NRC 265 (2011)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 n.16 (1989)
NEPA imposes no substantive requirement that mitigation measures actually be taken; LBP-11-14, 73 NRC 607 (2011)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354 (1989)
as a mitigation analysis, a severe accident mitigation alternatives analysis is neither a worst-case nor a best-case impacts analysis; LBP-11-7, 73 NRC 265 (2011)

Rodriguez v. Taylor, 569 F.2d 1231, 1245 (3d Cir. 1977)
the presence of an attorney-client relationship suffices to entitle prevailing litigants to receive fee awards; LBP-11-8, 73 NRC 366 (2011)

Role Models America, Inc. v. Brownlee, 353 F.3d 962, 967 (D.C. Cir. 2004)
the government must demonstrate the reasonableness not only of its litigation position, but also of the agency's actions; LBP-11-8, 73 NRC 368 n.97 (2011)

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Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992)
in determining whether an individual member of an organization qualifies for standing in his or her own right, NRC generally applies traditional judicial standing concepts; LBP-11-13, 73 NRC 545 (2011)

Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993)
in the context of a new contention filed after the initial petition, 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-11-2, 73 NRC 339 n.22 (2011)

Scarborough v. Principi, 541 U.S. 401, 414 (2004)
under the Equal Access to Justice Act, the government bears the burden of establishing that its position was substantially justified; LBP-11-8, 73 NRC 368 (2011)

Scarborough v. Principi, 541 U.S. 401, 415 (2004)
Congress did not want the "substantially justified" standard to be read to raise a presumption that the government position was not substantially justified simply because it lost the case; LBP-11-8, 73 NRC 368 n.100 (2011)

Schweiker v. Wilson, 450 U.S. 221, 226 & n.6 (1981)
the equal protection component of the Fifth Amendment's Due Process Clause applies to federal action, and the Equal Protection Clause of the Fourteenth Amendment applies to state action; LBP-11-15, 73 NRC 639 n.20 (2011)

Securities and Exchange Commission v. Comserv Corp., 908 F.2d 1407, 1409-10, 1413 (8th Cir. 1990)
neither the Equal Access to Justice Act nor the legislative history provides a definition of the word "incur"; LBP-11-8, 73 NRC 363-64 (2011)

Securities and Exchange Commission v. Comserv Corp., 908 F.2d 1407, 1409-10, 1415 (8th Cir. 1990)
where a pro bono attorney forgives a fee to a client unable to afford legal expenses, that client is eligible for an Equal Access to Justice Act award on the basis of that arrangement with the attorney; LBP-11-8, 73 NRC 365 n.74 (2011)

Securities and Exchange Commission v. Comserv Corp., 908 F.2d 1407, 1409-10, 1416 (8th Cir. 1990)
the fee-deterrent-removal purpose of the Equal Access to Justice Act would not be served by an award of fees to an individual whose fees are fully paid by a ineligible organization; LBP-11-8, 73 NRC 363 (2011)

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 n.2 (1994)
although the Appeal Panel was abolished in 1991, the Commission explicitly directed that the decisions of its boards were still to carry precedential weight; LBP-11-8, 73 NRC 358 (2011)

Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994)
NRC applies judicial standing concepts that require a participant to establish that it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing, the injury is fairly traceable to the challenged action, and the injury is likely to be redressed by a favorable decision; LBP-11-6, 73 NRC 168-69 (2010); LBP-11-16, 73 NRC 652 (2011)

Shaw AREVA MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 63 n.33 (2009)
although the Appeal Panel was abolished in 1991, the Commission explicitly directed that the decisions of its boards were still to carry precedential weight; LBP-11-8, 73 NRC 358 (2011)

Shaw AREVA MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009)
hearing petitioners have an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to uncover any information that could serve as the foundation for a specific contention; LBP-11-9, 73 NRC 403 n.73 (2011)

Shaw AREVA MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 482 (2008)
boards may reformulate contentions to consolidate issues for a more efficient proceeding; LBP-11-13, 73 NRC 556 n.133, 568 n.222 (2011)

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Sheppard v. Maxwell, 384 U.S. 333, 349 (1966)
the principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials; LBP-11-5, 73 NRC 134 n.6 (2011)

Siegel v. AEC, 400 F.2d 778, 785-86 (D.C. Cir. 1968)
formal adjudicatory procedures are inappropriate in export or import licensing proceedings; CLI-11-3, 73 NRC 623-24 n.53 (2011)

Sierra Club v. Georgia Power Co., 443 F.3d 1346, 1348 (11th Cir. 2006)
a source permit is an operating permit that the Clean Air Act requires major stationary sources of air pollution to obtain; LBP-11-13, 73 NRC 583 n.356 (2011)

Sierra Club v. Lynn, 502 F.2d 43, 61 (5th Cir. 1974), *cert. denied,* 422 U.S. 1049 (1975)
NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula; LBP-11-7, 73 NRC 282 n.173 (2011)

Sierra Club v. Morton, 405 U.S. 727 (1972)
petitioners cannot assert organizational standing both in their own capacity and as members of an organization; CLI-11-3, 73 NRC 621 n.38 (2011)

Sierra Club v. Morton, 405 U.S. 727, 739 (1972)
mere interest in a problem is not sufficient by itself to render the organization adversely affected or aggrieved within the meaning of the Administrative Procedure Act; CLI-11-3, 73 NRC 622 n.41 (2011)

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 249 (1984)
the Atomic Energy Act is designed to regulate the radiological safety aspects involved in the construction and operation of a nuclear plant; LBP-11-6, 73 NRC 233 (2010)

Smeldberg Machine & Tool, Inc. v. Donovan, 730 F.2d 1089, 1092-93 (7th Cir. 1984)
an agency's discretionary choice to conduct a formal on-the-record hearing is irrelevant when determining whether the Equal Access to Justice Act applies to a particular proceeding; LBP-11-8, 73 NRC 360 (2011)

SmithKline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1320 (Fed. Cir. 2006)
it is not the function of a licensing board to comb through the record searching for arguments in support of a proffered contention; LBP-11-6, 73 NRC 244 n.111 (2010); LBP-11-13, 73 NRC 575 n.287 (2011)

South Carolina v. O'Leary, 64 F.3d 892, 899 (4th Cir. 1995)
for an environmental impact statement, separate actions may be considered connected if, among other things, they are interdependent parts of a larger action and depend on the larger action for their justification; LBP-11-10, 73 NRC 441 (2011)

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n.5 (1981)
contentions that address an important security issue regarding Part 74's strict requirements for the proposed facility, which applicant previously admitted it failed to satisfy, are admissible; LBP-11-9, 73 NRC 412 n.119 (2011)

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 6 (2010)
although pro se litigants are expected to comply with procedural rules, they are generally extended some latitude; LBP-11-2, 73 NRC 38 (2011); LBP-11-13, 73 NRC 543 (2011)

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 6-7 (2010)
petitioner was allowed to clarify standing declarations by submitting revised declarations with reply; LBP-11-13, 73 NRC 549 (2011)

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 17 (2010)
discussion of need for power is required in an environmental report, but applicant need not precisely identify future market conditions and energy demand or develop other detailed analyses in order to establish with certainty that construction and operation of a nuclear power plant is the most economical alternative; LBP-11-6, 73 NRC 218 (2010)

it is sufficient if the need-for-power analysis is at a level of detail sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions; LBP-11-7, 73 NRC 283 n.181 (2011)

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 18-19 & n.84 (2010)

proposed need-for-power contention based on merely conclusory statements, without supporting facts or detail, is inadmissible; LBP-11-7, 73 NRC 298 n.296 (2011)

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 20-21 (2010)

applicant who is a state-regulated utility is in a position to implement and promote programs such as energy conservation, efficiency, and load management such that the need for additional generation capacity may be reduced; LBP-11-6, 73 NRC 224 (2010)

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 21 (2010)

NEPA's rule of reason would not exclude consideration of demand-side management as part of an alternatives analysis when applicant is a state-regulated utility; LBP-11-6, 73 NRC 224 (2010)

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 23-24 (2010)

the extent to which operation and maintenance costs of a solar facility may present a comparative benefit is immaterial since the four-part combination of alternative energy sources is not environmentally preferable to two new nuclear units; LBP-11-4, 73 NRC 111 (2011)

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-2, 69 NRC 87, 100 (2009), *aff'd in part and rev'd and remanded on other grounds,* CLI-10-1, 71 NRC 1 (2010)

a combined license applicant will have to demonstrate that the site-specific parameters are bounded by the parameters developed for the certified design; LBP-11-10, 73 NRC 450 (2011)

each combined license applicant will have to determine whether it will adopt in toto the certified design, or whether it will take exemptions thereto and/or departures therefrom; LBP-11-10, 73 NRC 450 (2011)

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-2, 69 NRC 87, 110 (2009)

NRC generally defers to an applicant's stated purpose as long as that purpose is not so narrow as to eliminate alternatives; LBP-11-13, 73 NRC 553 (2011)

South Texas Project Nuclear Operating Co. (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC 451, 453-55 (2010)

lack of clarity in the terms and application of the agency's newly established SUNSI policy contributed to Intervenors' misapprehension that they were required to demonstrate a need for the information in order to request SUNSI documents; LBP-11-9, 73 NRC 410 (2011)

South Texas Project Nuclear Operating Co. (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC 451, 454 (2010)

the SUNSI policy does not change any of the statutory, regulatory, or other obligations of the agency with respect to the handling of information; LBP-11-5, 73 NRC 140 (2011)

South Texas Project Nuclear Operating Co. (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC 451, 454-55 (2010)

rules governing access to SUNSI apply only to potential parties, whereas party access to SUNSI is governed by protective orders and nondisclosure agreements; LBP-11-9, 73 NRC 410 (2011)

South Texas Project Nuclear Operating Co. (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC 451, 465-68 (2010)

NRC Staff was admonished for having imposed a stricter-than-necessary standard of "need" for access to SUNSI; LBP-11-9, 73 NRC 410 (2011)

South Texas Project Nuclear Operating Co. (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC 451, 468 n.99 (2010)

any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions that are exempt; LBP-11-5, 73 NRC 139 n.14 (2011)

board requests that applicant and NRC Staff review the nonpublic appendix within 7 days of the date of issuance of the decision and provide the board with a joint report indicating whether all, or any

portion, of the appendix can be publicly released, and in the event portions of the appendix can be made publicly available, indicate what redactions are appropriate; LBP-11-11, 73 NRC 525 n.36 (2011)

South Texas Project Nuclear Operating Co. (South Texas Project, Units 3 and 4), LBP-10-2, 71 NRC 190, 205-09 (2010), *rev'd on other grounds,* CLI-10-24, 72 NRC 451, 461-64 (2010)

the principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials; LBP-11-5, 73 NRC 134 n.6 (2011)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 247 (2007)

an ESP essentially allows an entity to bank a site for the possible future construction of a specified number of new nuclear power generation facilities; LBP-11-16, 73 NRC 650-51 (2011)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 249-50 (2007)

in cases involving the possible construction or operation of a nuclear power reactor, NRC considers proximity to the proposed facility to be sufficient to establish standing; LBP-11-16, 73 NRC 653 (2011)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 250 (2007)

an organization that seeks to establish representational standing must show that at least one of its members would be affected by the proceeding and must identify that member by name and address, show that the member would have standing to intervene in his or her own right, and that the identified members have authorized the organization to request a hearing on their behalf; LBP-11-16, 73 NRC 653 (2011)

to determine whether the elements for standing are met, boards are to construe the petition in favor of the petitioner; LBP-11-16, 73 NRC 653 (2011)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 255 (2007)

boards have authority under 10 C.F.R. 2.316, 2.319, 2.329 to further define petitioners' admitted contentions when redrafting would clarify the scope of the contentions; LBP-11-13, 73 NRC 565 n.199 (2011)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-64 (2008)

the migration tenet applies where the information in the DEIS is sufficiently similar to the information in the environmental report; LBP-11-1, 73 NRC 26 n.14 (2011)

where the information in the DEIS is so different from the information in the environmental report that the DEIS dispenses with and moots the issues raised in the original contention, intervenor must file a new or amended contention against the DEIS; LBP-11-1, 73 NRC 26 (2011)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 66-67 (2008)

the proper method for raising an issue addressed in a motion to strike is to seek leave to file a reply in support of the summary disposition motion; LBP-11-14, 73 NRC 608 n.108 (2011)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 67-68 n.9 (2008)

if summary disposition movant discusses a matter in its statement of undisputed facts, the board may view with skepticism any later argument by that movant that a response regarding that issue is outside the scope of the contention, particularly given the onus that is placed upon an opposing party to respond to such a statement; LBP-11-4, 73 NRC 123 (2011)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 78 (2008)

the board refused to consider new bases that were included in an answer to a summary disposition motion and were outside the scope of the original contention; LBP-11-4, 73 NRC 123 (2011)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-09-7, 69 NRC 613, 719 (2009)

NRC's environmental analysis need only consider environmental impacts that are reasonably foreseeable, and need not consider remote and speculative scenarios; LBP-11-16, 73 NRC 690-91 (2011)

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Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-09-19, 70 NRC 433 (2009)
mandatory hearings have been conducted by licensing boards in 10 C.F.R. Part 52 early site permit proceedings; LBP-11-11, 73 NRC 475 (2011)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-09-19, 70 NRC 433, 503-04 (2009)
there is no NRC requirement that applicant submit a redress plan relative to preconstruction activities or, absent state or local requirements, take any remediation action regarding preconstruction activities if it decides not to complete the project or is denied agency authorization to construct and operate the facility; LBP-11-11, 73 NRC 507 (2011)

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-09-19, 70 NRC 433, 540 (2009)
license conditions imposed on an applicant as a result of the Staff's review process and applicant-requested exemptions from agency regulatory requirements that are granted by the Staff have a strong potential to fall into a "non-routine matter" category; LBP-11-11, 73 NRC 494-95 (2011)

SRI International v. Matsushita Electric Corp. of America, 775 F.2d 1107, 1116 (9th Cir. 1985)
summary disposition, like summary judgment, is an extreme remedy; LBP-11-7, 73 NRC 263 (2011)

St. Louis Fuel and Supply Co. v. Federal Energy Regulatory Commission, 890 F.2d 446, 448-91 (D.C. Cir. 1989)
an agency's discretionary choice to conduct a formal on-the-record hearing is irrelevant when determining whether the Equal Access to Justice Act applies to a particular proceeding; LBP-11-8, 73 NRC 360 (2011)

St. Louis Fuel and Supply Co. v. Federal Energy Regulatory Commission, 890 F.2d 446, 451 (D.C. Cir. 1989)
attorneys' fees may be awarded in adversary adjudications that are governed by Administrative Procedure Act § 554, but they may not be awarded in adversary adjudications that Congress did not subject to that section; LBP-11-8, 73 NRC 356 (2011)

State of New Jersey (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993)
good cause for failure to file on time is entitled to the most weight; LBP-11-7, 73 NRC 279 (2011); LBP-11-15, 73 NRC 634 (2011)

Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22-23 (1998)
boards are not to proceed with sua sponte issues absent the Commission's approval; LBP-11-9, 73 NRC 419 n.13 (2011)

Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980)
if the adverse environmental effects of a proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs; LBP-11-7, 73 NRC 281 n.168 (2011); LBP-11-14, 73 NRC 605 (2011)
NEPA itself does not mandate particular results, but simply prescribes the necessary process; LBP-11-7, 73 NRC 264 (2011)

System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005)
boards do not sit to flyspeck environmental documents or to add details or nuances; LBP-11-16, 73 NRC 676 (2011)

System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 146 (2007)
tardy filing of a contention may be excusable only where the facts upon which the amended or new contention is based were previously unavailable; CLI-11-2, 73 NRC 344 (2011)

System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), LBP-07-1, 65 NRC 27, *permit issuance authorized,* CLI-07-14, 65 NRC 216 (2007)
mandatory proceedings for licensing of proposed uranium enrichment facility sites were conducted; LBP-11-11, 73 NRC 475 (2011)

Taxpayers of Michigan Against Casinos v. Norton, 433 F.3d 852, 864 (D.C. Cir. 2006)
a draft environmental impact statement does not and cannot treat identified environmental concerns in a vacuum; LBP-11-7, 73 NRC 302 (2011)

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Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 75 n.38 (2009)

rule waivers are not granted where the circumstances on which the waiver's proponent relies are common to a large class of applicants or facilities; LBP-11-16, 73 NRC 702 n.351 (2011)

Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 1 and 2), CLI-10-26, 72 NRC 474, 478 n.23 (2010)

NRC has a strong policy in favor of openness and transparency; LBP-11-5, 73 NRC 134 (2011)

Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 410 (2008)

potential legislative action that might result in a reduction in demand is speculative and therefore does not provide a basis for admission of a contention on need for power; LBP-11-7, 73 NRC 287 n.206, 298 n.296 (2011)

Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), LBP-76-44, 4 NRC 637, 648-49 (1976)

boards' authority to seek to trigger review in extraordinary circumstances remains and has been put to good use; LBP-11-9, 73 NRC 418 n.13 (2011)

Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 25 (2002)

even if an import or export license authorized possession and/or use of the low-level radioactive waste, the petition does not assert how the LLRW is a significant source of radioactivity or provide any scenario in which the import or export of the LLRW would result in an accident that could produce obvious offsite consequences; CLI-11-3, 73 NRC 622 n.46 (2011)

Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 323 (2010)

if good cause is not shown, a board may still permit the late filing, but petitioner or intervenor must make a strong showing on the other factors of 10 C.F.R. 2.309(c); LBP-11-9, 73 NRC 401 (2011)

Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977)

an organization's standing can be demonstrated through the interests of its members, but if a member acts or speaks on behalf of the organization, that member must also demonstrate authorization by that organization to represent it; LBP-11-13, 73 NRC 548-49 (2011)

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993)

in ruling on whether a contention is moot, boards look to whether an issue is still live, such that a party still has a legal interest in the issue; LBP-11-4, 73 NRC 127 (2011)

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-70 (1992)

availability of new information may provide good cause for nontimely filing, but the test for good cause is not simply when the intervenor became aware of the material sought to be introduced but when the information became available and when the intervenor reasonably should have become aware of the information; LBP-11-7, 73 NRC 279 n.162 (2011)

not only must intervenor act promptly after learning of new information, but the information itself must be new information, not information already in the public domain; LBP-11-7, 73 NRC 279-80 n.162 (2011)

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 73 (1992)

if intervenor fails to show good cause for a late filing, its demonstration on the other late-filing factors must be particularly strong; LBP-11-7, 73 NRC 280 (2011) ; LBP-11-15, 73 NRC 634-35 (2011)

Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614 (1981)

rulings seeking to invoke sua sponte review must be transmitted to the Commission for approval; LBP-11-9, 73 NRC 419 n.13 (2011)

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Three Mile Island Alert v. NRC, 771 F.2d 720, 728 (3d Cir. 1985), *cert. denied sub nom. Aamodt v. NRC,* 475 U.S. 1082, *reh'g denied,* 476 U.S. 1179 (1986)
in the context of a new contention filed after the initial petition, 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-11-2, 73 NRC 339 n.22 (2011)

Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 561 (1977)
relitigation of an issue previously decided by a licensing board or the Commission may also be barred by the doctrine of collateral estoppel; LBP-11-10, 73 NRC 433 n.47 (2011)

Tongass Conservation Society v. Cheney, 924 F.2d 1137, 1140 (D.C. Cir. 1991)
NEPA requires that an environmental review provide a sufficient discussion of alternatives to enable the decisionmaker to take a hard look at environmental factors, and to make a reasoned decision; LBP-11-13, 73 NRC 552 (2011)

Town of Huntington v. Marsh, 859 F.2d 1134, 1142 (2d Cir. 1988)
for an environmental impact statement, separate actions may be considered connected if, among other things, they are interdependent parts of a larger action and depend on the larger action for their justification; LBP-11-10, 73 NRC 441 (2011)

Town of Winthrop v. Federal Aviation Administration, 535 F.3d 1, 11-13 (1st Cir. 2008)
NEPA permits agencies to select their own methodology for mitigation analysis as long as that methodology is reasonable; LBP-11-7, 73 NRC 265 (2011)

Transnuclear, Inc. (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1, 3 (1994)
in assessing whether a petitioner has set forth a sufficient interest to qualify for a hearing as a matter of right in a licensing proceeding, the Commission has long applied contemporaneous judicial concepts of standing; CLI-11-3, 73 NRC 621 (2011)

Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-99-15, 49 NRC 366, 367 (1999)
essential to establishing standing are findings of injury, causation, and redressability; CLI-11-3, 73 NRC 621 (2011)

Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-99-15, 49 NRC 366, 368 (1999)
where petitioners do not claim to have special knowledge on any of the issues raised by an import/export application or present any significant information not already available to and considered by the Commission in assessing the applications, a discretionary hearing would impose unnecessary burdens on the participants without assisting in the Commission in making the requisite findings; CLI-11-3, 73 NRC 625 (2011)

Transnuclear, Inc. (Export of 93.3% Enriched Uranium), CLI-00-16, 52 NRC 68, 72 (2000)
where petitioners do not claim to have special knowledge on any of the issues raised by an import/export application or present any significant information not already available to and considered by the Commission in assessing the applications, a discretionary hearing would impose unnecessary burdens on the participants without assisting in the Commission in making the requisite findings; CLI-11-3, 73 NRC 625 (2011)

Transource International., Inc. v. Trinity Industries, Inc., 725 F.2d 274, 279 (5th Cir. 1984)
summary disposition, like summary judgment, is an extreme remedy; LBP-11-7, 73 NRC 263 (2011)

United States v. Bosurgi, 530 F.2d 1105, 1110 (2d. Cir. 1976)
summary disposition, like summary judgment, is an extreme remedy; LBP-11-7, 73 NRC 263 (2011)

United States v. Cinergy Corp., 623 F.3d 455, 459-60 (7th Cir. 2010)
baseload generation is different than peaking power, which provides supplemental power during hours of the day when demand is highest; LBP-11-13, 73 NRC 563 (2011)

United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991)
judges are not like pigs, hunting for truffles buried in briefs; LBP-11-6, 73 NRC 244 n.111 (2010); LBP-11-14, 73 NRC 608 n.106 (2011)

United States v. Hallmark Construction Co., 200 F.3d 1076, 1080 (7th Cir. 2000)
in determining whether the government's position was substantially justified, the board does not make separate determinations regarding each stage but arrives at one conclusion that simultaneously encompasses and accommodates the entire civil action; LBP-11-8, 73 NRC 368 (2011)

the government must demonstrate the reasonableness not only of its litigation position, but also of the agency's actions; LBP-11-8, 73 NRC 368 (2011)

United States v. Idaho, 135 Idaho 655, 661 (2001)
the purpose of the Migratory Bird Conservation Act is to provide sanctuaries where birds cannot be molested by hunters; LBP-11-16, 73 NRC 689 (2011)

United States v. Idaho, 135 Idaho 655, 665 (2001)
the primary purpose of the Migratory Bird Conservation Act will not be defeated without a federal reserved water right; LBP-11-16, 73 NRC 689 (2011)

United States v. King, 395 U.S. 1, 4 (1969)
waivers of the government's sovereign immunity, to be effective, must be unequivocally expressed; LBP-11-8, 73 NRC 360 (2011)

United States v. New Mexico, 438 U.S. 696, 700 & n.4 (1978)
where the federal government reserves land, a water right may be implied only where the underlying purposes of the reservation of land are entirely defeated absent such a water right; LBP-11-16, 73 NRC 689 (2011)

United States v. Nordic Village Inc., 503 U.S. 30, 33 (1992)
waivers of the government's sovereign immunity, to be effective, must be unequivocally expressed; LBP-11-8, 73 NRC 360 n.46 (2011)

United States v. Paisley, 957 F.2d 1161, 1163-64 (4th Cir. 1992)
the term "incur" within the context of Equal Access to Justice Act means that an individual who is a prevailing party meeting the financial qualification of the EAJA is ineligible to receive an EAJA award when that individual was not responsible for the costs of the attorney's fees; LBP-11-8, 73 NRC 363 (2011)

United States v. Paisley, 957 F.2d 1161, 1164 (4th Cir. 1992)
claimant with a legally enforceable right to full indemnification of attorney fees from a solvent third party cannot be deemed to have incurred that expense for purposes of the Equal Access to Justice Act, hence is not eligible for an award of fees under that Act; LBP-11-8, 73 NRC 363 (2011)

United States v. Thouvenot, Wade & Moerschen, Inc., 596 F.3d 378, 383 (7th Cir. 2010)
an award of attorneys' fees under the Equal Access to Justice Act can include fees paid by a third-party liability insurer; LBP-11-8, 73 NRC 365 n.74 (2011)
in an actuarial sense the cost of the defense, to the extent borne by the insurance company, is a cost that the insured paid for, just as he would have paid a lawyer for his defense had he had no insurance; LBP-11-8, 73 NRC 365 (2011)
nothing in the Equal Access to Justice Act suggests a purpose to prevent a contractual agreement, or more broadly, to discourage the purchase of liability insurance; LBP-11-8, 73 NRC 365 (2011)

United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 77 (1976)
regardless of whether NRC itself conducts the need-for-power assessment or relies on another agency's forecasts and studies, that assessment need only be reasonable; LBP-11-7, 73 NRC 283 (2011)

U.S. Army Installation Command (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 194 (2010)
it is presumed that applicants intend to comply with state law; LBP-11-16, 73 NRC 678 n.185 (2011)

U.S. Department of Energy (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 413-16 (2009)
a test for materiality that would require petitioners to demonstrate quantitatively how an alleged defect would result in a violation of pertinent requirements is rejected; LBP-11-7, 73 NRC 292 n.250 (2011)

U.S. Department of Energy (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 416 (2009)
requiring petitioners to proffer additional and conclusive support for the effect of their proposed contention would improperly require boards to adjudicate the merits of contentions before admitting them; LBP-11-7, 73 NRC 292-93 n.252 (2011)

U.S. Department of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 363 (2004)
in determining whether an individual member of an organization qualifies for standing in his or her own right, NRC generally applies traditional judicial standing concepts; LBP-11-13, 73 NRC 545 (2011)

mere interest in a problem is not sufficient by itself to render the organization adversely affected or aggrieved within the meaning of the Administrative Procedure Act; CLI-11-3, 73 NRC 622 n.41 (2011)

U.S. Department of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 364-65 (2004)
when no proximity presumption applies, petitioner must assert some specific injury in fact that will result from the action taken; CLI-11-3, 73 NRC 622 n.47 (2011)

U.S. Department of Energy (Plutonium Export License), CLI-04-17, 59 NRC 357, 365 (2004)
no proximity presumption applies in an import/export licensing case because petitioners have not shown that the import or export involves a significant source of radioactivity producing an obvious potential for offsite consequences; CLI-11-3, 73 NRC 622 (2011)

U.S. Enrichment Corp. (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001)
pro se litigants are to be treated more leniently than litigants with counsel; LBP-11-9, 73 NRC 408 (2011)

USEC Inc. (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311 (2005)
in cases involving the possible construction or operation of a nuclear power reactor, the NRC considers proximity to the proposed facility to be sufficient to establish standing; LBP-11-16, 73 NRC 653 (2011)

USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 456 (2006)
a contention of omission may be summarily rejected as inadmissible if there is no requirement to address the topic allegedly omitted from the application or the topic that allegedly is omitted is, in fact, included in the application; LBP-11-6, 73 NRC 235 (2010)
if petitioner believes that an application fails to contain information on a relevant matter as required by law, the contention must identify each failure and the supporting reasons for the petitioner's belief; LBP-11-6, 73 NRC 214 (2010)

USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006)
it is insufficient for petitioner to point to an Internet Web site or article and expect the board on its own to discern what particular issue a petitioner is raising, including what section of the application, if any, is being challenged as deficient and why; LBP-11-6, 73 NRC 228 n.91 (2010)

USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 460 (2006)
petitioners have an affirmative obligation to request confidential and proprietary information that has not been made publicly available in order to support a proposed contention; LBP-11-9, 73 NRC 405, 416 (2011)

USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006)
a conclusory assertion, even if made by an expert, is inadequate because it deprives the board of the ability to make the necessary, reflective assessment of the opinion; LBP-11-6, 73 NRC 240 (2010)

USEC Inc. (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 597 (2005), *aff'd,* CLI-06-10, 63 NRC 451 (2006)
boards must not adjudicate the merits of allegations at the contention admissibility stage, but, to be admissible, a contention must provide more than a bare assertion, and must explain the supporting reasons for the dispute raised; LBP-11-16, 73 NRC 667 (2011)

USEC Inc. (American Centrifuge Plant), LBP-07-6, 65 NRC 429 (2007)
mandatory proceedings for licensing of proposed uranium enrichment facility sites were conducted; LBP-11-11, 73 NRC 475 (2011)

USEC Inc. (American Centrifuge Plant), LBP-07-6, 65 NRC 429, 440 n.31 (2007)
although boards may give reasonable deference to NRC guidance, such guidance does not substitute for regulations, is not binding authority, and does not prescribe NRC requirements; LBP-11-16, 73 NRC 670, 674 (2011)
regulatory guidance is not binding on applicants; LBP-11-16, 73 NRC 661 (2011)

USEC Inc. (American Centrifuge Plant), LBP-07-6, 65 NRC 429, 442-46 (2007)
license conditions imposed on an applicant as a result of NRC Staff's review process and applicant-requested exemptions from agency regulatory requirements that are granted by Staff have a strong potential to fall into a "non-routine matter" category; LBP-11-11, 73 NRC 494-95 (2011)

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aesthetic impacts of energy sources may vary according to individual location; LBP-11-4, 73 NRC 112 (2011)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 515 (1978)
NRC's environmental analysis need only consider environmental impacts that are reasonably foreseeable, and need not consider remote and speculative scenarios; LBP-11-16, 73 NRC 690-91 (2011)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 547 (1978)
formal adjudicatory procedures are inappropriate in export or import licensing proceedings; CLI-11-3, 73 NRC 623-24 n.53 (2011)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978)
if impacts are remote or speculative, the environmental impact statement need not discuss them, including greenhouse gas emissions; LBP-11-7, 73 NRC 301 n.314 (2011)
remote and speculative alternatives need not be addressed in an applicant's environmental report; LBP-11-2, 73 NRC 51 (2011)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978)
NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action and ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process; LBP-11-7, 73 NRC 264 (2011)
the concept of alternatives evolves, and agencies must explore alternatives as they become better known and understood; LBP-11-13, 73 NRC 562 (2011)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 555 (1978), *petition for review held in abeyance sub nom. Ohngo Gaudadeh Devia v. NRC,* 492 F.3d 421 (D.C. Cir. 2007)
there would be little hope of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings; CLI-11-2, 73 NRC 337-38 n.15 (2011)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978)
if the adverse environmental effects of a proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs; LBP-11-7, 73 NRC 281 n.168 (2011)
NEPA itself does not mandate particular results, but simply prescribes the necessary process; LBP-11-7, 73 NRC 264 (2011)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated on other grounds,* CLI-90-4, 31 NRC 333 (1990)
boards must do more than uncritically accept a party's mere assertion that a particular document supplies the basis for its contention, without even reviewing the document itself to determine if it appears to support a litigable contention; LBP-11-6, 73 NRC 176 n.24 (2010)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000)
an organization that seeks to establish representational standing must show that at least one of its members would be affected by the proceeding, identify that member by name and address, and show that the member would have standing to intervene in his or her own right and that the member has authorized the organization to request a hearing; LBP-11-16, 73 NRC 653 (2011)

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000)
the Commission refused to suspend all license transfer proceedings pending analysis of limited liability companies; CLI-11-1, 73 NRC 4 (2011)

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Virginia Electric and Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 303 (2008)
although neither applicant nor NRC Staff challenges petitioner's standing, the board must make its own determination whether petitioner has satisfied standing requirement; LBP-11-2, 73 NRC 41 n.54 (2011)

Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 143 (1981)
NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action and ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process; LBP-11-7, 73 NRC 264 (2011)

Westinghouse Electric Corp. (Nuclear Fuel Export License for Czech Republic — Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 329 (1994)
in addressing the good cause factor for late filing, petitioner must explain not only why it failed to file within the time required, but also why it did not file as soon thereafter as possible; LBP-11-7, 73 NRC 279 n.161 (2011)

Westinghouse Electric Corp. (Nuclear Fuel Export License for Czech Republic — Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331 (1994)
if it is not clear that denying an import/export application would avoid the harms that petitioners assert for standing purposes, then the redressibility standard is not met; CLI-11-3, 73 NRC 623 n.51 (2011)

Westinghouse Electric Corp. (Nuclear Fuel Export License for Czech Republic — Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331-32 (1994)
standing is not a mere legal technicality; CLI-11-3, 73 NRC 621 n.37 (2011)

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950)
if a formal adjudicatory hearing is mandated by the due process clause, the absence of the on-the-record requirement will not preclude application of the Administrative Procedure Act; LBP-11-8, 73 NRC 361 n.53 (2011)

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)
NRC generally applies traditional judicial standing concepts which require a showing that the individual has suffered or might suffer a concrete and particularized injury that is fairly traceable to the challenged action, likely redressible by a favorable decision, and arguably within the zone of interests protected by the governing statutes; LBP-11-13, 73 NRC 546 (2011)

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-04-27, 60 NRC 530, 542 n.3 (2004)
even if undisputed, the jurisdictional nature of standing in NRC proceedings requires independent examination by presiding officer; LBP-11-16, 73 NRC 654 n.21 (2011)

Ziegler v. Connecticut General Life Insurance Co., 916 F.2d 548, 553 (9th Cir. 1990)
findings concerning personal knowledge are entirely factual and largely dependent on witness credibility; LBP-11-8, 73 NRC 371 (2011)

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10 C.F.R. 2.203
the public interest does not require additional adjudication of an enforcement matter and, given that all matters required to be adjudicated as part of this proceeding have been resolved, the proceeding is dismissed; LBP-11-3, 73 NRC 83 (2011)
10 C.F.R. 2.206
dissatisfaction with regulatory requirements of 10 C.F.R. 50.75 is outside an enforcement petition; DD-11-4, 73 NRC 726 (2011)
petition requesting that the NRC not allow restart after scheduled refueling outage until completion of all environmental remediation work and relevant reports on leaking tritium at the plant is denied; DD-11-1, 73 NRC 8-17 (2011)
petitioners' request for cold shutdown because of tritium contamination of groundwater is denied; DD-11-3, 73 NRC 378-90 (2011)
request for enforcement action to prevent reactor restart until applicable adequate protection standards regarding zero pressure boundary leakage and operation of the reactor have been met is denied; DD-11-2, 73 NRC 324-31 (2011)
request that NRC issue a demand for information from licensee relating to adequacy of financial assurances for decommissioning is denied; DD-11-4, 73 NRC 714-27 (2011)
10 C.F.R. 2.206(a)
any person may file a request to institute a proceeding to modify, suspend, or revoke a license; LBP-11-6, 73 NRC 217 n.78 (2010)
if evidence subsequently indicates that the design basis of an operating nuclear power plant will not withstand a maximum flooding event, members of the public may file a request to institute a proceeding to modify, suspend, or revoke a license; LBP-11-15, 73 NRC 643 n.23 (2011)
10 C.F.R. 2.302(d)(1)
an electronic filing is only complete when the filer performs the last act that it must perform to transmit a document in its entirety; LBP-11-13, 73 NRC 543 (2011)
10 C.F.R. 2.304(d)
submitted documents must be signed; LBP-11-2, 73 NRC 43 (2011)
10 C.F.R. 2.304(d)(1)(ii)
persons without digital ID certificates may sign electronically by typing "Executed in Accord with 10 C.F.R. 2.304(d)" or its equivalent on the signature line and including the date of signature and the signatory's name, capacity, address, phone number, and e-mail address; LBP-11-2, 73 NRC 43 (2011)
10 C.F.R. 2.309(a)
to intervene as a party in an adjudicatory proceeding addressing a proposed licensing action, petitioner must establish standing and proffer at least one admissible contention; LBP-11-2, 73 NRC 37 (2011); LBP-11-6, 73 NRC 168 (2010); LBP-11-13, 73 NRC 542 (2011); LBP-11-16, 73 NRC 652, 654 (2011)
10 C.F.R. 2.309(c)
good cause for failure to file on time is the most important factor of the late-filing criteria; LBP-11-9, 73 NRC 401 (2011)
if good cause for a late filing is not shown, a board may still permit the late filing, but petitioner or intervenor must make a strong showing on the other factors; LBP-11-9, 73 NRC 401 (2011)
NRC frowns on intervenors seeking to introduce a new contention later than the deadline established by its regulations, and it accordingly holds them to a higher standard for the admission of such contentions; CLI-11-2, 73 NRC 338 (2011)

this section deals with the admission of nontimely contentions; LBP-11-9, 73 NRC 400 (2011)
with respect to contentions filed after the initial petition, intervenors have the burden to show that they meet the criteria of this section; LBP-11-7, 73 NRC 286 n.203 (2011)
10 C.F.R. 2.309(c)(1)
a late-filed contention shall not be considered by a licensing board unless the petitioner demonstrates that a multifactor balancing test weighs in favor of consideration; LBP-11-2, 73 NRC 38 (2011); LBP-11-6, 73 NRC 246 (2010); LBP-11-7, 73 NRC 278-79 (2011)
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good cause for failure to file on time is the most important of the late-filing criteria; LBP-11-2, 73 NRC 38 (2011)
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if any portion of a filing is untimely tendered, it must be accompanied by a motion to file out of time; LBP-11-13, 73 NRC 545 (2011)
prejudice is not a factor in the balancing test for nontimely filings; LBP-11-13, 73 NRC 543 n.37 (2011)
10 C.F.R. 2.309(c)(1)(i)
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10 C.F.R. 2.309(c)(1)(i)-(viii)
good cause for late filing is entitled to the most weight; LBP-11-15, 73 NRC 634 (2011)
10 C.F.R. 2.309(c)(2)
persistent difficulties with the NRC electronic filing system despite petitioners' good-faith efforts is good cause for late filing; LBP-11-2, 73 NRC 38 (2011)
10 C.F.R. 2.309(d)(1)
petitioners must state their name, address, and telephone number, the nature of their right to be made a party, the nature and extent of their 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 their interest; LBP-11-2, 73 NRC 41 n.49 (2011); LBP-11-6, 73 NRC 168 (2010); LBP-11-16, 73 NRC 652 (2011)
10 C.F.R. 2.309(d)(1)(ii)-(iv)
in ruling on standing and determining whether petitioner has established the necessary interest, licensing boards are directed to follow the guidance found in judicial concepts of standing; LBP-11-4, 73 NRC 125 n.147 (2011)
NRC generally applies traditional judicial standing concepts which require a showing that the individual has suffered or might suffer a concrete and particularized injury that is fairly traceable to the challenged action, likely redressible by a favorable decision, and arguably within the zone of interests protected by the governing statutes; LBP-11-13, 73 NRC 546(2011)
10 C.F.R. 2.309(d)(2)
a municipality is deemed to have standing in a reactor licensing proceeding that involves a facility located within its boundaries; LBP-11-6, 73 NRC 169 (2010)
10 C.F.R. 2.309(d)(3)
even if there are no objections to petitioners' representational standing, boards have an independent obligation to determine whether they have adequately demonstrated standing; LBP-11-2, 73 NRC 41 (2011)
10 C.F.R. 2.309(f)
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10 C.F.R. 2.309(f)(1)
any person or organization seeking to intervene as a party in an NRC adjudicatory proceeding addressing a proposed licensing action must establish standing and proffer at least one admissible contention; LBP-11-13, 73 NRC 550 (2011)
contention asserting that the applicant's environmental report fails to address the reasonably foreseeable impacts of climate change on water availability is admissible; LBP-11-16, 73 NRC 692 (2011)
for a timely filed contention to be admissible, it must satisfy six pleading requirements; LBP-11-6, 73 NRC 170 (2010); LBP-11-16, 73 NRC 654-55 (2011)

new and amended contentions submitted after an intervenor's initial hearing request are evaluated under 10 C.F.R. 2.309(f)(2) for timeliness and, if found timely, their general admissibility is analyzed; LBP-11-10, 73 NRC 445 (2011)
regardless of when filed, all proposed contentions must comply with the general contention admissibility criteria of this section; LBP-11-7, 73 NRC 280 (2011); LBP-11-9, 73 NRC 400 n.55 (2011)
the Commission's intent is to focus litigation on concrete issues and result in a clearer and more focused record for decision and to ensure that the Commission expends resources to support the hearing process only for issues that are appropriate for, and susceptible to, resolution in an NRC hearing; LBP-11-16, 73 NRC 655 (2011)
10 C.F.R. 2.309(f)(1)(i)-(iv)
an admissible contention must satisfy six pleading requirements; LBP-11-2, 73 NRC 44-45 (2011); LBP-11-13, 73 NRC 550 (2011)
at the contention admissibility stage, boards merely decide whether a contention satisfies the six pleading criteria; LBP-11-16, 73 NRC 690 (2011)
contention questioning the accuracy of the SAMA results, given the geographic location and variable meteorological conditions at the site and the large population base surrounding the plant, is admissible; LBP-11-2, 73 NRC 70 (2011)
to be admitted for adjudication, a contention, regardless of when it is filed, must also satisfy the requirements of this section; LBP-11-15, 73 NRC 635 (2011)
10 C.F.R. 2.309(f)(1)(ii)
a brief explanation of the basis for a contention is required; LBP-11-13, 73 NRC 558 (2011)
10 C.F.R. 2.309(f)(1)(iii)
applicant's rule exemption request could be subject to litigation in a combined license proceeding, and thus is within the scope of the proceeding; LBP-11-10, 73 NRC 452 (2011)
because petitioner's issue of the inadvertent release of radioactivity does not specifically relate to the ability of buried structures to perform their intended functions as defined by 10 C.F.R. 54.4(a)(1)-(3), the contention is not within the scope of a license renewal proceeding; LBP-11-2, 73 NRC 60 (2011)
contention asserting that a license renewal environmental report must include a discussion of need for power is inadmissible; LBP-11-13, 73 NRC 556-57 (2011)
contention that wastewater contains chemical contaminants that are not discussed in the environmental report, and that when the wastewater is discharged via deep injection wells, the chemicals might migrate to an aquifer is within the scope of a combined license proceeding; LBP-11-6, 73 NRC 191 (2010)
10 C.F.R. 2.309(f)(1)(iv)
intentional malevolent acts, such as sabotage and terrorism, are not material to the SAMA findings the NRC must make in deciding whether to extend an operating license; LBP-11-13, 73 NRC 571 (2011)
intervenors need only demonstrate that the issue raised in the contention is material to a licensing decision, i.e., would make a difference in the licensing decision; LBP-11-7, 73 NRC 292 (2011)
petitioners did not demonstrate that the issue of whether the MACCS2 code was subject to quality assurance is material to the findings the NRC must make under NEPA to support the requested license extension; LBP-11-13, 73 NRC 571 (2011)
whether the safe shutdown earthquake exceedance in applicant's exemption request does in fact comply with 10 C.F.R. Part 50, Appendix S and 10 C.F.R. 100.23 is a question currently before the NRC Staff and is thus material to the NRC's licensing decision in this proceeding; LBP-11-10, 73 NRC 452 (2011)
10 C.F.R. 2.309(f)(1)(v)
by failing to provide any support that the integrity of leaking structures has the potential to prevent licensee from maintaining pressure, providing flow, or both, petitioners do not present the requisite factual bases; LBP-11-2, 73 NRC 61 (2011)
petitioner may question the practice for severe accident mitigation alternatives analysis to utilize mean consequence values, which results in an averaging of potential consequences, but must support such a challenge with alleged facts or expert opinion; LBP-11-13, 73 NRC 576 n.296 (2011)
petitioners do not provide any alleged facts or expert support indicating that the river valley is within the geographic area for which applicant was required to model atmospheric dispersion; LBP-11-13, 73 NRC 573 (2011)

petitioners must provide alleged facts or expert opinion to support their claims; LBP-11-13, 73 NRC 572 (2011)
10 C.F.R. 2.309(f)(1)(vi)
a vague accusation does not rise to the level of an admissible genuine dispute of material fact or law; LBP-11-10, 73 NRC 452 (2011)
boards must not adjudicate the merits of allegations at the contention admissibility stage of an NRC proceeding, but, to be admissible, a contention must provide more than a bare assertion, and must explain the supporting reasons for the dispute raised in that contention; LBP-11-16, 73 NRC 664, 667 (2011)
contention is inadmissible because it fails to controvert a specific portion of the combined license application or otherwise explain why applicant's analyses or conclusions are incorrect or inadequate; LBP-11-15, 73 NRC 643 (2011)
contention that fails to provide sufficient information to show that a genuine dispute exists with a combined license application on a material issue of law or fact is inadmissible; LBP-11-15, 73 NRC 637, 638 n.17 (2011)
to the extent a contention is premised on error, it is inadmissible for failing to raise a genuine dispute of fact; LBP-11-6, 73 NRC 202 (2010)
10 C.F.R. 2.309(f)(2)
although petitioner proffered a contention within 30 days of events that prompted it, this does not automatically render a newly proffered contention timely; LBP-11-15, 73 NRC 636 (2011)
intervenor may propose new or amended contentions based on 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 environmental documents; LBP-11-6, 73 NRC 177 n.25 (2010); LBP-11-7, 73 NRC 277 (2011)
new and amended contentions submitted after an intervenor's initial hearing request are evaluated under this section for timeliness and, if found timely, their general admissibility is analyzed pursuant to 10 C.F.R. 2.309(f)(1); LBP-11-10, 73 NRC 445 (2011)
new or amended contentions are considered to be timely if filed within 60 days of any triggering event; LBP-11-9, 73 NRC 397 (2011)
petitioner or intervenor may file timely new or amended contentions, with leave of the board, if the three requirements of this section are met; LBP-11-9, 73 NRC 400-01 (2011)
petitioners and intervenors are obliged to challenge applicant's environmental report; LBP-11-7, 73 NRC 276 (2011)
this section deals with the factors that govern the admission of timely new or amended contentions; LBP-11-9, 73 NRC 400 (2011)
where the information in the draft environmental impact statement is so different from the information in the environmental report that the DEIS dispenses with and moots the issues raised in the original contention, intervenor must file a new or amended contention against the DEIS; LBP-11-1, 73 NRC 26 (2011)
with respect to contentions filed after the initial petition, intervenors have the burden to show that they meet the criteria of this section; LBP-11-7, 73 NRC 286 n.203 (2011)
10 C.F.R. 2.309(f)(2)(i)
for a newly proffered contention to be timely, it must be based on information that was not previously available; LBP-11-15, 73 NRC 636 (2011)
10 C.F.R. 2.309(f)(2)(i)-(iii)
a new or amended contention may be filed after initial docketing with leave of the presiding officer upon a showing that the information upon which the contention is based was not previously available, is based on materially different information previously unavailable, and has been submitted in a timely fashion based on the availability of the subsequent information; CLI-11-2, 73 NRC 339 (2011); LBP-11-7, 73 NRC 277-78 (2011); LBP-11-10, 73 NRC 445 (2011)
if, within 60 days after pertinent information supporting a new contention first becomes available, Intervenors submit a particularized and otherwise admissible contention regarding construction of a mixed oxide facility, then the contention will be deemed timely without the need to satisfy the balancing test for late-filing requirements or the requirements for reopening the record; LBP-11-9, 73 NRC 401 (2011)

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10 C.F.R. 2.309(f)(2)(i), (ii)
adoption of building code rules by a state presents new and materially different information not previously available, upon which intervenors may rest their proposed contention; LBP-11-7, 73 NRC 290 n.233 (2011)

10 C.F.R. 2.309(f)(2)(ii)
for a newly proffered contention to be timely, it must be based on information that is materially different than information previously available; LBP-11-15, 73 NRC 636 (2011)

10 C.F.R. 2.309(f)(2)(iii)
a proposed new contention will be considered timely if it is filed within 30 days of the date when the new and material information on which the proposed contention is based first becomes available; LBP-11-7, 73 NRC 287 (2011)

10 C.F.R. 2.309(g)
petitioner may address the selection of hearing procedures, taking into account the provisions of 10 C.F.R. 2.310; LBP-11-16, 73 NRC 706 (2011)
petitioner requesting Subpart G procedures must demonstrate by reference to the contention and the bases provided and the specific procedures in Subpart G that resolving the contention will require resolution of material issues of fact that may be best determined through use of the identified procedures; LBP-11-2, 73 NRC 78 (2011)

10 C.F.R. 2.309(h)(3)
petitions, answers, and replies are allowed unless otherwise specified by the Commission or the presiding officer, but no other written answers or replies will be entertained; LBP-11-2, 73 NRC 39 (2011)

10 C.F.R. 2.310
upon admission of a contention, a board must identify the specific hearing procedure to be used in the adjudication; LBP-11-16, 73 NRC 706 (2011)

10 C.F.R. 2.310(a)
a license renewal proceeding may be conducted under the relatively informal procedures of Subpart L; LBP-11-2, 73 NRC 79 (2011)
hearing procedures in Subpart L of 10 C.F.R. Part 2 may be used in proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits; LBP-11-16, 73 NRC 706 (2011)
upon admission of a contention in a licensing proceeding, the board must identify the specific hearing procedures to be used to adjudicate the contention; LBP-11-2, 73 NRC 78 (2011); LBP-11-13, 73 NRC 587 (2011)

10 C.F.R. 2.310(b)-(c)
unless the parties agree otherwise, enforcement matters and licensing of uranium enrichment facility construction and operation must be conducted under Subpart G; LBP-11-2, 73 NRC 79 n.322 (2011)

10 C.F.R. 2.310(d)
in reactor licensing matters, the relatively formal procedures provided in Subpart G of Part 2 govern if a contention necessitates resolution of issues of material 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 motive or intent of the party or eyewitness material to the resolution of the contested matter; LBP-11-2, 73 NRC 78 (2011); LBP-11-16, 73 NRC 706 (2011)

10 C.F.R. 2.310(h)(1)
if the 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 in 10 C.F.R. 2.1400-.1407; LBP-11-13, 73 NRC 587 (2011)

10 C.F.R. 2.314
"representative" means the attorney or other authorized representative of a party who has entered a notice of appearance; LBP-11-5, 73 NRC 139 (2011)

10 C.F.R. 2.314(b)
a duly authorized member or officer may represent his or her partnership, corporation, or unincorporated association even if he or she is not an attorney at law, but the representative's notice of appearance must state the basis of his or her authority to act on behalf of the party; LBP-11-13, 73 NRC 548 (2011)

an officer, member, or attorney representing an organization in a proceeding must file a written notice of appearance stating, among other things, his or her basis for representing the organization; LBP-11-13, 73 NRC 542-43 (2011)
10 C.F.R. 2.315(a)
no duty is imposed on a board to respond to limited appearance statements as litigable concerns; LBP-11-11, 73 NRC 521 n.31 (2011)
10 C.F.R. 2.315(c)
a local governmental body that is not admitted as a party shall, upon request, be permitted to participate in a hearing as an interested nonparty; LBP-11-6, 73 NRC 166 n.4 (2010)
an interested governmental entity may introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, advise the Commission without being required to take a position with respect to the issue, file proposed findings, and petition for review by the Commission; LBP-11-6, 73 NRC 166 n.4 (2010)
10 C.F.R. 2.316
any consolidation of multiple parties' presentations of evidence that would prejudice the rights of any party may not be ordered; LBP-11-4, 73 NRC 124 (2011)
10 C.F.R. 2.319(d)
boards are not precluded from considering documents despite their hearsay nature; LBP-11-14, 73 NRC 600 n.59 (2011)
boards may on motion or on their own initiative strike any portion of a written presentation that is unreliable; LBP-11-14, 73 NRC 600 n.59 (2011)
in proceedings under Part 2, strict rules of evidence do not apply to written submissions; LBP-11-14, 73 NRC 600 n.59 (2011)
10 C.F.R. 2.319(e)
the presiding officer may restrict irrelevant, immaterial, unreliable, duplicative, or cumulative evidence and/or arguments; LBP-11-13, 73 NRC 556 n.134 (2011)
10 C.F.R. 2.323
if any portion of a filing is untimely tendered, it must be accompanied by a motion to file out of time; LBP-11-13, 73 NRC 545 (2011)
10 C.F.R. 2.323(b)
a motion must be rejected if it does not include a certification that movant has made a sincere effort to contact other parties and resolve the issues raised in the motion; LBP-11-15, 73 NRC 635 n.13 (2011)
all motions must include a certification that movant has made a sincere effort to contact other parties in the proceeding and resolve the issue raised in the motion, and that the movant's efforts to resolve the issue have been unsuccessful; LBP-11-2, 73 NRC 47 (2011)
because applicant did not comply with this section, the board does not consider information supplied with applicant's letter in connection with the board's analysis of petitioner's contention; LBP-11-2, 73 NRC 47 (2011)
10 C.F.R. 2.323(e)
motions for reconsideration must be filed within 10 days of a board's decision; LBP-11-15, 73 NRC 616 n.16 (2011)
motions for reconsideration require a showing of compelling circumstances, such as the existence of a clear and material error in a decision that renders the decision invalid; LBP-11-15, 73 NRC 616 n.16 (2011)
10 C.F.R. 2.325
summary disposition movant bears the initial burden of demonstrating that no genuine issue as to any material fact exists and that it is entitled to judgment as a matter of law; LBP-11-14, 73 NRC 595 (2011)
10 C.F.R. 2.326(a)
NRC imposes a deliberately heavy burden on an intervenor who seeks to supplement the evidentiary record after it has been closed, even with respect to an existing contention; CLI-11-2, 73 NRC 338 (2011)
10 C.F.R. 2.326(a)(1)
motions to reopen must be timely filed; CLI-11-2, 73 NRC 339 (2011)

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NRC recognizes an exception to the timeliness requirement in rare instances in which petitioner raises an exceptionally grave issue; CLI-11-2, 73 NRC 342 n.43 (2011)

10 C.F.R. 2.326(a)(3)

petitioner failed to satisfy NRC standards for reopening because its motion was untimely and it failed to demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially; CLI-11-2, 73 NRC 335 (2011)

proponent of a motion to reopen the record must demonstrate that a materially different result would have been likely had the newly proffered evidence been considered initially; CLI-11-2, 73 NRC 346 (2011)

10 C.F.R. 2.326(b)

bare assertions and speculation do not supply the requisite support for a motion to reopen; CLI-11-2, 73 NRC 346 (2011)

10 C.F.R. 2.327(b)

transcript of Atomic Safety and Licensing Board hearings will be available for inspection in the agency's public records system; LBP-11-5, 73 NRC 134 (2011)

10 C.F.R. 2.328

all hearings will be public; LBP-11-5, 73 NRC 134 (2011)

an adjudicatory hearing can be closed if the Commission orders it; LBP-11-5, 73 NRC 134 n.4 (2011)

boards may exclude the public from adjudicatory hearings or actions that involve restricted data, defense information, safeguards information protected from disclosure under the authority of AEA § 147, or information protected from disclosure under the authority of section 148; LBP-11-5, 73 NRC 134 n.4 (2011)

10 C.F.R. 2.335

absent a waiver, no rule or regulation of the Commission is subject to challenge in an adjudicatory proceeding; LBP-11-13, 73 NRC 568 (2011)

Category 1 issues are not subject to challenge in a relicensing proceeding because they involve environmental effects that are essentially similar for all plants and need not be assessed repeatedly on a site-specific basis; LBP-11-13, 73 NRC 551 (2011)

Part 51's license renewal provisions cover environmental issues relating to onsite spent fuel storage generically and all such issues, including accident risk, fall outside the scope of license renewal proceedings; LBP-11-13, 73 NRC 570 (2011)

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-11-2, 73 NRC 46 (2011); LBP-11-13, 73 NRC 550, 553, 566 n.204 (2011); LBP-11-16, 73 NRC 655 701, 702 (2011)

contention that, in the event of a core melt accident, applicant's emergency plan should order an evacuation of persons within a 10-mile radius of the facility attacks NRC's emergency planning regulation; LBP-11-15, 73 NRC 638 (2011)

to the extent petitioner seeks to raise a generic challenge to the 10-mile plume exposure pathway EPZ, such an argument constitutes an impermissible challenge to 10 C.F.R. 50.47(c)(2); LBP-11-15, 73 NRC 642 n.22 (2011)

to the extent that petitioner challenges the board's decision to apply the reopening standards strictly, its challenge constitutes an improper collateral attack on NRC regulations; CLI-11-2, 73 NRC 338 n.21 (2011)

10 C.F.R. 2.335(b)

any request for a rule waiver or exception must be accompanied by an affidavit that identifies the subject matter of the proceeding as to which the application of the regulation would not serve the purposes for which the regulation was adopted, and the affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested; LBP-11-16, 73 NRC 702 n.351 (2011)

contentions challenging NRC rules and regulations are impermissible and may not be admitted absent a waiver or exception; LBP-11-16, 73 NRC 702 (2011)

10 C.F.R. 2.336

"disclosing party" means the party required to make mandatory disclosure; LBP-11-5, 73 NRC 136 (2011)

each party to a proceeding must disclose all documents relevant to the admitted contentions, except those documents for which a claim of privilege or protected status is made; LBP-11-5, 73 NRC (2011)

"receiving party" means the party to whom the mandatory disclosure must be made; LBP-11-5, 73 NRC 139 (2011)
the SUNSI policy does not expand upon or create any new category of legally privileged or confidential information that is exempt from discovery or from mandatory disclosure; LBP-11-5, 73 NRC 139-40 (2011)
10 C.F.R. 2.336(a)(3)
parties must list documents claimed to be privileged or protected on a privilege log; LBP-11-5, 73 NRC (2011)
10 C.F.R. 2.336(b)
NRC Staff is exempted from the obligations of the protective order, even though Staff might hold many documents that are subject to the mandatory disclosure requirements; LBP-11-5, 73 NRC 133 (2011)
10 C.F.R. 2.337
this section, in establishing the evidentiary standard of "relevant, material, and reliable evidence" being admissible in a hearing, thereby establishes the right of all parties to present such admissible evidence; LBP-11-4, 73 NRC 124 (2011)
10 C.F.R. 2.337(f)
although this section, by its terms, applies to evidence at hearings, the bounds this rule places on official notice is also appropriate for the contention admissibility stage of a proceeding; LBP-11-7, 73 NRC 290 n.231 (2011)
promulgation of state regulations falls within the broad reach of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body; LBP-11-7, 73 NRC 290 n.231 (2011)
10 C.F.R. 2.338(i)
upon review of a settlement agreement, the board is satisfied that its terms reflect a fair and reasonable settlement 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); LBP-11-3, 73 NRC 83 (2011)
10 C.F.R. 2.340(a)
boards have limited authority to consider matters in addition to those properly put into controversy by the parties; LBP-11-9, 73 NRC 417-18 (2011)
boards may consider any matter, but only to the extent that the board determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the board; LBP-11-9, 73 NRC 418 (2011)
requesting authorization from the Commission for the board, on its own motion, to examine and decide the serious safety or common defense and security matters underlying contentions is allowed to be used for matters that were initially raised by a party, where that party later withdrew; LBP-11-9, 73 NRC 414 (2011)
10 C.F.R. 2.341(b)(4)
a petition for review may be granted if it presents a substantial question with respect to one or more of five considerations; CLI-11-2, 73 NRC 336-37 (2011)
10 C.F.R. 2.390(a)(1)-(9)
the SUNSI policy does not expand upon or create any new category of legally privileged or confidential information that is exempt from discovery or from mandatory disclosure; LBP-11-5, 73 NRC 139-40 (2011)
10 C.F.R. 2.390(a)(1), (3), (4)
parties shall produce, as part of their mandatory disclosures, privilege logs covering any documents claimed to qualify for protected status as security-related information and/or as protected information; LBP-11-5, 73 NRC 133 (2011)
10 C.F.R. 2.390(b)
the protective order, and the good-faith representation and designation of documents as protected documents, serves in lieu of the requirement for marking and for an affidavit; LBP-11-5, 73 NRC 141 n.18 (2011)

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10 C.F.R. 2.390(d)(1)
parties shall produce, as part of their mandatory disclosures, privilege logs covering any documents claimed to qualify for protected status as security-related information and/or as protected information under; LBP-11-5, 73 NRC 133 (2011)

10 C.F.R. 2.710(a)
all material facts set forth in the statement required to be served by summary disposition movant will be considered to be admitted unless controverted by the statement required to be served by the opposing party; LBP-11-4, 73 NRC 123 (2011)
if summary disposition movant meets its burden, the nonmoving party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation and cannot rely on mere allegations or denials, or the facts in controversy will be deemed admitted; LBP-11-14, 73 NRC 595 (2011)
this section establishes not only an obligation but also a right to respond in a summary disposition context; LBP-11-4, 73 NRC 124 (2011)

10 C.F.R. 2.710(b)
at issue is not whether evidence unmistakably favors one side or the other, but whether there is sufficient evidence favoring the summary disposition opponent for a reasonable trier of fact to find in favor of that party; LBP-11-4, 73 NRC 100 (2011)
if evidence in favor of the summary disposition opponent is merely colorable or not significantly probative, summary disposition may be granted; LBP-11-4, 73 NRC 100 (2011)
only disputes over facts that might affect the outcome of a proceeding would preclude summary disposition; LBP-11-4, 73 NRC 100 (2011)

10 C.F.R. 2.710(d)(2)
at issue is not whether evidence unmistakably favors one side or the other, but whether there is sufficient evidence favoring the summary disposition opponent for a reasonable trier of fact to find in favor of that party; LBP-11-4, 73 NRC 100 (2011)
if evidence in favor of the summary disposition opponent is merely colorable or not significantly probative, summary disposition may be granted; LBP-11-4, 73 NRC 100 (2011)
movant may obtain summary disposition if the filings in the proceeding, 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; LBP-11-7, 73 NRC 263 (2011); LBP-11-14, 73 NRC 594 (2011)
only disputes over facts that might affect the outcome of a proceeding would preclude summary disposition; LBP-11-4, 73 NRC 100 (2011)
summary disposition should be granted if filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with statements of parties and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law; LBP-11-4, 73 NRC 98-99 (2011)

10 C.F.R. 2.802
if petitioner wishes to challenge an NRC regulation, its recourse is to petition for a rule change; LBP-11-15, 73 NRC 638 (2011)
petitioners request that NRC amend 10 C.F.R. 54.17(c) to permit a reactor licensee to file a license renewal application no sooner than 10 years before the expiration of the current license; CLI-11-1, 73 NRC 2-3 (2011)

10 C.F.R. 2.1203(d)
Subpart L procedures provide for a more informal proceeding in which discovery is generally prohibited except for specified mandatory disclosures under 10 C.F.R. 2.336 and the mandatory production of the hearing file under 10 C.F.R. 2.1203(a); LBP-11-13, 73 NRC 587 (2011)

10 C.F.R. 2.1205
in Subpart L proceedings, licensing boards must apply the summary disposition standard for Subpart G proceedings, found in 10 C.F.R. 2.710; LBP-11-14, 73 NRC 594 (2011)

10 C.F.R. 2.1205(c)
in ruling on a motion for summary disposition, boards apply the standards of Subpart G; LBP-11-4, 73 NRC 98 (2011)

licensing boards are to apply the same standards for granting or denying summary disposition as would be applied in proceedings conducted under Subpart G, which are set forth in section 2.710; LBP-11-7, 73 NRC 263 (2011)
10 C.F.R. 2.1207(a)(2)
requests for protected documents shall be filed within 60 days of the listing of the document on the privilege log and, in any event, no later than 10 days after the deadline for filing rebuttal testimony; LBP-11-5, 73 NRC 141 (2011)
10 C.F.R. 2.1207(b)(6)
when using Subpart L procedures, the board has the primary responsibility for questioning the witnesses at any evidentiary hearing; LBP-11-13, 73 NRC 587 (2011)
10 C.F.R. 2.1212
a petition for review may be granted if it presents a substantial question with respect to one or more five considerations; CLI-11-2, 73 NRC 336-37 (2011)
10 C.F.R. 2.1402(b)
selection of hearing procedures for contentions at the outset of a proceeding is not immutable because availability of Subpart G procedures under 10 C.F.R. 2.310(d) depends critically on whether the credibility of eyewitnesses is important in resolving a contention, and witnesses relevant to each contention are not identified, under 10 C.F.R. 2.336(a)(1), until after contentions are admitted; LBP-11-13, 73 NRC 588 n.389 (2011)
10 C.F.R. 9.19(b)
any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions that are exempt; LBP-11-5, 73 NRC 139 n.14 (2011)
10 C.F.R. 12.101
parties who prevail against the government in certain types of agency proceedings are allowed to recover attorneys' fees and other expenses incurred in connection with the proceeding unless the government's position was substantially justified, or other special circumstances render an award unjust; LBP-11-8, 73 NRC 354 (2011)
10 C.F.R. 12.103
adversary adjudications conducted by the Commission pursuant to any other statutory provision that requires a proceeding before the NRC to be so conducted as to fall within the meaning of adversary adjudication under Equal Access to Justice Act are included; LBP-11-8, 73 NRC 354 (2011)
10 C.F.R. 12.105(a)
a prevailing party is not entitled to an award for attorneys' fees and expenses if the position of the Commission over which the applicant has prevailed was substantially justified; LBP-11-8, 73 NRC 368 (2011)
for a prevailing party to recover attorneys' fees and expenses, the party must have incurred those fees and expenses in connection with the adversary adjudication in question; LBP-11-8, 73 NRC 362 (2011)
10 C.F.R. 12.204(a)
within 30 days of the Commission's decision upholding the board majority decision setting aside the NRC Staff's immediately effective enforcement order, petitioner applied for an award of over $250,000 in attorneys' fees; LBP-11-8, 73 NRC 353 (2011)
10 C.F.R. 12.306(a)
the board's determination of whether the government's position was substantially justified is made on the basis of the written record and oral argument; LBP-11-8, 73 NRC 368 (2011)
10 C.F.R. 20.1301
dose limits for individual members of the public are 100 millirem in a year; DD-11-3, 73 NRC 382 (2011)
dose limits from tritium in groundwater for individual members of the public were never approached; DD-11-1, 73 NRC 11 (2011)
10 C.F.R. Part 20, Appendix B, tab. 2, col. 2
discharges of chemicals and other effluents from the cooling basin to groundwater or surface water must remain within limits stated in this table; LBP-11-16, 73 NRC 679 (2011)

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10 C.F.R. 21.3
applicant requests an exemption from the definitions of "commercial grade items," "basic component," "critical characteristic," "dedication," and "dedicated entity" to permit applicant to have some procurement flexibility; LBP-11-11, 73 NRC 504 (2011)

10 C.F.R. 30.4
applicant seeks an exemption from the requirements of this section to permit it to begin certain preconstruction activities at the site before completion of NRC's environmental review under Part 51; LBP-11-11, 73 NRC 503-04 (2011)
"commencement of construction" is defined to include clearing of land, excavation, or other substantial action that would adversely affect the environment of the site; LBP-11-11, 73 NRC 506 (2011)

10 C.F.R. 30.11(a)
NRC may grant an exemption from the regulatory requirements if it determines the exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest; LBP-11-11, 73 NRC 497 (2011)

10 C.F.R. 30.33(a)(5)
applicant seeks an exemption from the requirements of this section to permit it to begin certain preconstruction activities at the site before completion of NRC's environmental review under Part 51; LBP-11-11, 73 NRC 503-04 (2011)
for a proposed nuclear materials-related activity, including uranium enrichment, commencement of construction prior to a favorable Staff conclusion regarding the NEPA cost-benefit balance is grounds for denial of the authorization to conduct that activity; LBP-11-11, 73 NRC 506 (2011)

10 C.F.R. 30.34(e)
NRC may issue a license to impose such additional conditions, requirements, and limitations as may be necessary to effectuate the purposes of the Atomic Energy Act and the agency's regulations; LBP-11-11, 73 NRC 497 (2011)

10 C.F.R. 40.4
applicant seeks an exemption from the requirements of this section to permit it to begin certain preconstruction activities at the site before completion of NRC's environmental review under Part 51; LBP-11-11, 73 NRC 503-04 (2011)
"commencement of construction" is defined to include clearing of land, excavation, or other substantial action that would adversely affect the environment of the site; LBP-11-11, 73 NRC 506 (2011)

10 C.F.R. 40.14(a)
NRC may grant an exemption from regulatory requirements if it determines that the exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest; LBP-11-11, 73 NRC 497 (2011)

10 C.F.R. 40.32(e)
applicant seeks an exemption from the requirements of this section to permit it to begin certain preconstruction activities at the site before completion of NRC's environmental review under Part 51; LBP-11-11, 73 NRC 503-04 (2011)
for a proposed nuclear materials-related activity, including uranium enrichment, commencement of construction prior to a favorable Staff conclusion regarding the NEPA cost-benefit balance is grounds for denial of the authorization to conduct that activity; LBP-11-11, 73 NRC 506 (2011)

10 C.F.R. 40.36(d)
applicant seeks authorization to provide financial assurance for decommissioning funding on a forward-looking, incremental basis; LBP-11-11, 73 NRC 503 (2011)

10 C.F.R. 40.38(a)
this section applies on;y to enrichment facility licensee USEC, and it has no relevance to any other enrichment facility applicant; LBP-11-11, 73 NRC 488 n.16 (2011)

10 C.F.R. 40.41(e)
NRC may issue a license to impose such additional conditions, requirements, and limitations as may been necessary to effectuate the purposes of the Atomic Energy Act and the agency's regulations; LBP-11-11, 73 NRC 497 (2011)

10 C.F.R. 40.41(g)
a uranium enrichment facility cannot be operated until the agency verifies through inspection that the facility has been constructed in accordance with the license; LBP-11-11, 73 NRC 509 (2011)

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10 C.F.R. 50.10

NEPA's requirement to discuss alternatives to the proposed action does not extend to the construction of transmission line corridors, because it is not "construction" as defined in the regulation; LBP-11-6, 73 NRC 207 n.63 (2010)

10 C.F.R. 50.10(a)(2)

activities that are no longer considered "construction" are listed; LBP-11-11, 73 NRC 506 n.23 (2011)

10 C.F.R. 50.10(d)

certain "construction" activities are allowed at a reactor site pursuant to a limited work authorization as long as a site redress plan is submitted; LBP-11-11, 73 NRC 507 (2011)

10 C.F.R. 50.10(g)

certain "construction" activities are allowed at a reactor site pursuant to a limited work authorization as long as a site redress plan is submitted; LBP-11-11, 73 NRC 507 (2011)

10 C.F.R. 50.12(a)(1)

exemption from a regulation will be granted when the request is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security; LBP-11-10, 73 NRC 451 n.158 (2011)

10 C.F.R. 50.12(a)(2)(i)-(vi)

exemption from a regulation will be granted if application of the regulation in the particular circumstances conflicts with other NRC rules or requirements, would not serve or is not necessary to achieve the underlying purpose of the rule, would result in undue hardship or other costs, would not benefit public health and safety, would provide only temporary relief, or there is present any other material circumstance not considered when the regulation was adopted; LBP-11-10, 73 NRC 451 n.158 (2011)

10 C.F.R. 50.34a(a)

a combined license application must identify the means for keeping levels of radioactive material in effluents to unrestricted areas as low as is reasonably achievable; LBP-11-6, 73 NRC 245 (2010)

10 C.F.R. 50.47(a)(1)(ii)

before issuing a combined license, NRC must conclude that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency; LBP-11-6, 73 NRC 227 (2010)

10 C.F.R. 50.47(a)(2)

in any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability; LBP-11-6, 73 NRC 227 (2010)

10 C.F.R. 50.47(b)(10)

contention that, in the event of a core-melt accident, applicant's emergency plan should order an evacuation of persons within a 10-mile radius of the facility attacks this emergency planning regulation; LBP-11-15, 73 NRC 638 (2011)

sheltering must be considered in developing the recommended range of protective actions in an emergency plan; LBP-11-6, 73 NRC 232 n.96 (2010)

10 C.F.R. 50.47(c)(2)

NRC provides for a plume exposure pathway emergency planning zone and an ingestion exposure pathway EPZ around nuclear power plants in the event of a nuclear accident; LBP-11-15, 73 NRC 640 (2011)

to the extent petitioner seeks to raise a generic challenge to the 10-mile plume exposure pathway EPZ, such an argument constitutes an impermissible challenge to this regulation; LBP-11-15, 73 NRC 642 n.22 (2011)

10 C.F.R. 50.59

any changes to the facility as described in the final safety analysis report must be either submitted to the NRC for approval through a license amendment or changed in accordance with the provisions of this section; DD-11-3, 73 NRC 385 (2011)

10 C.F.R. 50.71(e)

licensees are required to update their final safety analysis report, which was originally submitted as part of the application for the license, to ensure that the information included in the FSAR contains the latest information developed; DD-11-3, 73 NRC 385 (2011)

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10 C.F.R. 50.75

licensee must file an annual report to NRC certifying that financial assurance for decommissioning will be or has been provided in an amount that may be more, but not less, than the amount stated in the regulations, adjusted as appropriate for changes in labor, energy, and waste burial costs; DD-11-3, 73 NRC 388 (2011)

the financial qualifications review for decommissioning funding assurance is revisited every year until the license is terminated; DD-11-4, 73 NRC 718 (2011)

10 C.F.R. 50.75(e)(1)(ii)

licensee who has collected funds based on a site-specific estimate under section 50.75(b)(1) may take credit for projected earnings on the external sinking funds using up to a 2% annual real rate of return from the time of future funds' collection through the decommissioning period, provided that the site-specific estimate is based on a period of safe storage that is specifically described in the estimate; DD-11-4, 73 NRC 717-18 (2011)

use of the 4.81% forecast interest rate and the 2.81% annual inflation rate is in compliance; DD-11-4, 73 NRC 718 (2011)

10 C.F.R. 50.75(e)(2)

if NRC Staff makes a finding of no reasonable assurance, NRC reserves the right to take steps to ensure a licensee's adequate accumulation of decommissioning funds; DD-11-4, 73 NRC 718 (2011)

10 C.F.R. 50.75(f)

an annual report on recalculations of decommissioning cost estimates and projected available decommissioning funding must be submitted by a licensee for a plant that has closed before the end of its licensed life; DD-11-4, 73 NRC 716-17 (2011)

10 C.F.R. 50.75(f)(2)

power reactor licensees must report to the NRC at least once every 2 years on the status of their decommissioning funding for each reactor or part of a reactor that they own; DD-11-4, 73 NRC 716 (2011)

10 C.F.R. 50.82

areas of minor radioactive contamination are evaluated and remediated as needed during plant decommissioning; DD-11-1, 73 NRC 12 (2011)

10 C.F.R. Part 50, App. A, § I, Criterion 2

NRC Staff ensures that applicant's design basis for the new units will protect public health and safety by verifying that the design basis will withstand maximum flooding events; LBP-11-6, 73 NRC 217 n.78(2010)

10 C.F.R. Part 50, App. E

NRC provides for a plume exposure pathway emergency planning zone and an ingestion exposure pathway EPZ around nuclear power plants in the event of a nuclear accident; LBP-11-15, 73 NRC 640 (2011)

10 C.F.R. Part 50, App. E, § IV.A

during a nuclear emergency in the United States, the individual licensee and the appropriate state and local government officials have direct responsibilities for the coordinated response to the event; LBP-11-15, 73 NRC 641 (2011)

10 C.F.R. Part 50, App. E, § IV.E.9

combined license applicant's emergency plan must contain and describe adequate provisions for emergency facilities and equipment, including at least one onsite and one offsite communications system, each of which shall have a backup power source; LBP-11-15, 73 NRC 637 (2011)

10 C.F.R. Part 50, App. E, § VI

NRC, in its capacity as the federal agency charged with regulating the nuclear industry in a manner that protects public health and safety, monitors nuclear emergencies; LBP-11-15, 73 NRC 641 (2011)

10 C.F.R. Part 50, App. B

petitioners' assertions that the MACCS2 code was not subjected to quality assurance requirements is deficient because a SAMA analysis is not subject to such requirements; LBP-11-2, 73 NRC 69 (2011)

10 C.F.R. Part 50, App. I

NRC established reasonable assurance that the dose consequence attributable to tritium in groundwater remains well below the ALARA dose objectives; DD-11-1, 73 NRC 11 (2011)

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10 C.F.R. Part 50, App. S, § III
safe shutdown earthquake is defined; LBP-11-10, 73 NRC 452 (2011)
10 C.F.R. Part 51
relative to NEPA, in mandatory hearings, boards are to determine whether the review conducted by NRC Staff has been adequate, but they need not rethink or redo every aspect of the NRC Staff's environmental findings or undertake their own fact-finding activities; LBP-11-11, 73 NRC 476 n.10 (2011)
10 C.F.R. 51.1(a)
severe accident mitigation alternatives analyses are required pursuant to NEPA; LBP-11-13, 73 NRC 571 (2011)
10 C.F.R. 51.10(a)
the Commission shall prepare an environmental impact statement during review of the early site permit application; LBP-11-10, 73 NRC 440 n.93 (2011)
10 C.F.R. 51.14(a)
every combined license application must be accompanied by an environmental report to aid the Commission in its preparation of an environmental impact statement; LBP-11-6, 73 NRC 172 (2010)
10 C.F.R. 51.14(b)
applicant's environmental report is not the vehicle for the NRC Staff's safety review; LBP-11-6, 73 NRC 216 (2010)
in implementing its NEPA obligations, NRC expressly adopts certain definitions promulgated by the Council on Environmental Quality; LBP-11-7, 73 NRC 301 n.314 (2011)
the scope of environmental concerns that must be considered in the environmental impact statement are discussed; LBP-11-6, 73 NRC 172-73 (2010)
10 C.F.R. 51.20(b)(1)
actions requiring an environmental impact statement or a supplement to an EIS are a limited work authorization, construction permit for a nuclear power reactor, testing facility, or fuel reprocessing plant, or an early site permit; LBP-11-10, 73 NRC 440 n.93 (2011)
10 C.F.R. 51.22(b)
petitioners' request for waiver of 10 C.F.R. 51.22(c)(15) has not shown that there are unresolved conflicts concerning alternative uses of available resources; CLI-11-3, 73 NRC 621 n.33 (2011)
10 C.F.R. 51.22(c)(15)
a categorical exclusion from the NEPA requirement to prepare an environmental assessment or environmental impact statement for the issuance of import licenses involving low-level radioactive waste is provided; CLI-11-3, 73 NRC 619, 620 (2011)
request for rule waiver is denied; CLI-11-3, 73 NRC 616 (2011)
10 C.F.R. 51.23(a)
the Commission believes there is reasonable assurance that sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time; LBP-11-16, 73 NRC 701 (2011)
10 C.F.R. 51.23(b)
discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations for the period following the term of the reactor operating license or amendment, reactor combined license or amendment, or initial ISFSI license or amendment for which application is made, is required in any environmental report, environmental impact statement, environmental assessment, or other analysis; LBP-11-16, 73 NRC 701 (2011)
10 C.F.R. 51.29(a)(1)
the scope of an environmental impact statement is governed by the provisions of 40 C.F.R. 1502.4; LBP-11-10, 73 NRC 440 (2011)
10 C.F.R. 51.45
a mere promise by applicant to follow applicable regulations in capping and abandoning active and inactive oil and gas wells in the footprint of the cooling basin and plant is insufficient to satisfy the NRC's regulations; LBP-11-16, 73 NRC 678 (2011)
contention alleging that applicant's environmental report does not evaluate the impacts on water availability fails to show a genuine dispute; LBP-11-16, 73 NRC 682-83, 685 (2011)

contention asserting that the applicant's environmental report fails to address the reasonably foreseeable impacts of climate change on water availability is admissible; LBP-11-16, 73 NRC 692 (2011)
contention claiming that the environmental report's discussion of environmental effects and cumulative impacts of seepage from the cooling basin into groundwater and surface water through undocumented or unplugged oil and gas wells and borings fails to comply with the requirements of this section is admissible; LBP-11-16, 73 NRC 675, 677 (2011)
10 C.F.R. 51.45(b)(1)
an environmental report must discuss environmental impacts in proportion to their significance; LBP-11-6, 73 NRC 173 (2010)
applicant must submit an environmental report discussing the impact of the proposed action on the environment; LBP-11-6, 73 NRC 197 n.50, 216(2010)
10 C.F.R. 51.45(b)(1)-(2)
applicant's environmental report must describe reasonably foreseeable environmental impacts, discussed in proportion to their significance, and adverse environmental effects that cannot be avoided should the proposal be implemented; LBP-11-6, 73 NRC 191, 242 (2010); LBP-11-16, 73 NRC 678 (2011)
10 C.F.R. 51.45(b)(3)
applicant's alternatives analysis must be sufficiently complete to aid the Commission in developing and exploring appropriate alternatives to the proposed action; LBP-11-13, 73 NRC 552 (2011)
applicant's environmental report must discuss appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources; LBP-11-6, 73 NRC 197 n.50 (2010)
merely describing an alternative is insufficient to comply with NEPA; LBP-11-14, 73 NRC 605 n.92 (2011)
10 C.F.R. 51.45(c)
an environmental report must contain a full discussion of mitigation plans; LBP-11-6, 73 NRC 208 (2010)
an environmental report must contain an analysis of the cumulative impacts of the activities to be authorized by a combined license; LBP-11-6, 73 NRC 173 (2010)
an environmental report 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-11-6, 73 NRC 173 (2010); LBP-11-13, 73 NRC 552 (2011)
an environmental report should contain sufficient data to aid the Commission in its development of an independent analysis; LBP-11-6, 73 NRC 173, 242 (2010)
applicant's environmental report must contain a sufficient analysis of potential environmental consequences and alternatives to enable the NRC Staff to prepare an environmental impact statement that fulfills the agency's obligations under NEPA; LBP-11-14, 73 NRC 598 (2011)
merely describing an alternative is insufficient to comply with NEPA; LBP-11-14, 73 NRC 605 n.92 (2011)
10 C.F.R. 51.45(d)
applicant's environmental report must identify and discuss the status of all permits, licenses, and other approvals that are required from federal, state, and local agencies; LBP-11-16, 73 NRC 704 n.364 (2011)
10 C.F.R. 51.50
contention alleging that applicant's environmental report does not evaluate the impacts on water availability fails to show a genuine dispute; LBP-11-16, 73 NRC 682-83, 685 (2011)
10 C.F.R. 51.50(b)(1)
applicant's environmental report must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed; LBP-11-16, 73 NRC 697 (2011)
early site permit applicant is required to evaluate alternative sites to determine whether there is any obviously superior alternative to the site proposed; LBP-11-16, 73 NRC 699 (2011)
10 C.F.R. 51.50(b)(2)
applicant's environmental report need not include an assessment of the economic, technical, or other benefits (e.g., need for power) and costs of the proposed action; LBP-11-16, 73 NRC 696 (2011)

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10 C.F.R. 51.53(c)(2)
a license renewal environmental report is not required to include a discussion of need for power; LBP-11-13, 73 NRC 556-57 (2011)
alternatives for reducing adverse environmental impacts, including impacts of severe accidents, are among the limited issues within the scope of a license renewal proceeding; LBP-11-13, 73 NRC 550 (2011)
among the limited issues within the scope of a license renewal proceeding are cost-effective alternatives for mitigating severe accidents; LBP-11-2, 73 NRC 45 (2011)
operating license renewal applications need not discuss the need for power; LBP-11-2, 73 NRC 53 (2011)
10 C.F.R. 51.53(c)(3)(ii)(L)
a SAMA analysis fulfills the requirement to provide a consideration of alternatives to mitigate severe accidents; LBP-11-13, 73 NRC 566 (2011)
alternatives for reducing adverse environmental impacts, including impacts of severe accidents, are among the limited issues within the scope of a license renewal proceeding; LBP-11-13, 73 NRC 550 (2011)
alternatives to mitigate severe accidents must be considered for all plants that have not considered such alternatives; LBP-11-2, 73 NRC 46 (2011); LBP-11-13, 73 NRC 566 (2011)
although a consideration of alternatives to mitigate severe accidents must be provided if not previously performed, applicant must provide this analysis only for those issues identified as Category 2 issues in Appendix B to Subpart A of Part 51; LBP-11-2, 73 NRC 65 (2011)
among the limited issues within the scope of a license renewal proceeding are cost-effective alternatives for mitigating severe accidents; LBP-11-2, 73 NRC 45 (2011)
petitioner's assertion that severe accidents from spent fuel pools must be considered in applicant's SAMA analysis is in direct conflict with NRC regulations; LBP-11-2, 73 NRC 65 (2011)
severe accident mitigation alternatives analyses are required pursuant to NEPA; LBP-11-13, 73 NRC 571 (2011)
10 C.F.R. 51.53(c)(3)(iii)
among the limited issues within the scope of a license renewal proceeding are alternatives for reducing adverse environmental impacts listed as Category 2 issues in Appendix B to Subpart A of 10 C.F.R. Part 51; LBP-11-2, 73 NRC 45 (2011); LBP-11-13, 73 NRC 550 (2011) 10 C.F.R. 51.70
NRC Staff's NEPA responsibilities for preparing an environmental impact statement are described; LBP-11-6, 73 NRC 177 n.25 (2010)
10 C.F.R. 51.70(b)
NRC Staff need not replicate the work completed by another entity, but rather must independently review and find relevant and scientifically reasonable any outside reports or analyses on which it intends to rely in its environmental impact statement; LBP-11-1, 73 NRC 25 n.9 (2011)
10 C.F.R. 51.71
NRC Staff's NEPA responsibilities for preparing an environmental impact statement are described; LBP-11-6, 73 NRC 177 n.25 (2010)
10 C.F.R. 51.71(d)
if important factors in the cost-benefit balancing cannot be quantified, they may be discussed qualitatively; LBP-11-7, 73 NRC 282 n.173 (2011)
NRC is required to consider alternatives available for reducing or avoiding adverse environmental effects; LBP-11-7, 73 NRC 264 n.49 (2011)
NRC must address any purported need for additional power during its environmental review of a combined license application; LBP-11-7, 73 NRC 282 n.175 (2011)
NRC Staff is to consider and weigh the environmental, technical, and other costs and benefits of a proposed action and alternatives, and, to the fullest extent practicable, quantify the various factors considered; LBP-11-7, 73 NRC 282 n.173 (2011)
the draft environmental impact statement must consider the economic, technical, and other benefits and costs of the proposed action; LBP-11-7, 73 NRC 282 n.175 (2011)
10 C.F.R. 51.73, 51.74
NRC Staff's NEPA responsibilities for preparing an environmental impact statement are described; LBP-11-6, 73 NRC 177 n.25 (2010)
10 C.F.R. 51.90, 51.91, 51.93, 51.94
NRC Staff's NEPA responsibilities for preparing an environmental impact statement are described; LBP-11-6, 73 NRC 177 n.25 (2010)

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10 C.F.R. 51.103(a)(3)
the record of decision must discuss relevant factors including economic and technical considerations among alternatives; LBP-11-7, 73 NRC 282 n.175 (2011)
10 C.F.R. 51.105(b)
the presiding officer in an early site permit hearing shall not admit contentions proffered by any party concerning the benefits assessment if those issues were not addressed by applicant in the early site permit application; LBP-11-16, 73 NRC 696 (2011)
10 C.F.R. 51.107(a)(3)
environmental, economic, technical, and other benefits must be weighed against environmental and other costs for each proposed action; LBP-11-7, 73 NRC 281 (2011)
10 C.F.R. 51.107(b)(3)
a matter resolved in an early site permit proceeding may be revisited in the combined license proceeding when new and significant information is presented; LBP-11-10, 73 NRC 431 (2011)
10 C.F.R. Part 51, Subpart A, App. A, § 5
the alternatives analysis is the heart of the environmental impact analysis; LBP-11-16, 73 NRC 699 (2011)
10 C.F.R. Part 51, Subpart A, App. B n.2
Category 2 issues must be reviewed on a site-specific basis because they have not been determined to be essentially similar for all plants; LBP-11-13, 73 NRC 551 (2011)
issues that require site-specific analysis are identified as Category 2 issues; LBP-11-13, 73 NRC 551 (2011)
the Commission has codified generic determinations for certain environmental issues, identified as Category 1 issues, for license renewal proceedings; LBP-11-13, 73 NRC 551 (2011)
10 C.F.R. Part 51, Subpart A, App. B, tbl. B-1
all uranium fuel cycle and waste management issues, including low-level waste storage and disposal, mixed waste storage and disposal, onsite spent fuel storage, and transportation, are Category 1 issues with a small impact; LBP-11-2, 73 NRC 75-76 (2011)
for all plants, onsite dry or pool storage can safely accommodate spent fuel accumulated from a 20-year license extension with small environmental effects; LBP-11-13, 73 NRC 570 (2011)
for Category 1 issues, mitigation of adverse impacts has already been generically analyzed and it has already been determined that additional plant-specific mitigation measures are likely not to be sufficiently beneficial to warrant implementation; LBP-11-13, 73 NRC 570 (2011)
probability-weighted consequences of a severe accident (risk) are small in the context of a license renewal proceeding; LBP-11-13, 73 NRC 566 n.203, 568 (2011)
the determination that, for any license renewal of a nuclear power plant, the probability-weighted consequences of a severe accident are small cannot be challenged; LBP-11-2, 73 NRC 46 (2011)
the very essence of severe accident mitigation analysis is to assess to what extent the probability-weighted consequences of the analyzed severe accident sequences would decrease if a specific SAMA were implemented; LBP-11-2, 73 NRC 63 (2011)
10 C.F.R. Part 51, Subpart A, App. B, tbl. B-1, n.3
definitions of "significance"are provided; LBP-11-4, 73 NRC 103 (2011)
10 C.F.R. 52.1(a)
an early site permit authorizes the use of a specific site for the construction and operation of a new nuclear power plant, with the actual construction and operation authorized by a subsequently issued combined license; LBP-11-10, 73 NRC 441 (2011)
10 C.F.R. Part 52, Subpart A
an ESP essentially allows an entity to bank a site for the possible future construction of a specified number of new nuclear power generation facilities; LBP-11-16, 73 NRC 650-51 (2011)
10 C.F.R. 52.12
an early site permit authorizes the use of a specific site for the construction and operation of a new nuclear power plant, with the actual construction and operation authorized by a subsequently issued combined license; LBP-11-10, 73 NRC 441 (2011)
10 C.F.R. 52.17
information regarding control room habitability and ventilation system design is not required in a site safety analysis report at the early site permit stage; LBP-11-16, 73 NRC 668 (2011)

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10 C.F.R. 52.18
to issue an early site permit, NRC must comply with the National Environmental Policy Act; LBP-11-10, 73 NRC 440 n.93 (2011)
10 C.F.R. 52.21
an uncontested early site permit proceeding is subject to mandatory hearing requirements; LBP-11-10, 73 NRC 436 (2011)
the presiding officer in an early site permit hearing shall not admit contentions proffered by any party concerning the benefits assessment if those issues were not addressed by the applicant in the early site permit application; LBP-11-16, 73 NRC 696 (2011)
10 C.F.R. 52.23(a)
an early site permit is valid for 20 to 40 years from the date of issuance; LBP-11-16, 73 NRC 686 (2011)
10 C.F.R. 52.33
an early site permit is valid for 20 to 40 years from the date of issuance; LBP-11-16, 73 NRC 686 (2011)
10 C.F.R. 52.39
insofar as a contention requests consideration of a dry cooling design alternative, that matter must be considered resolved in the early site permit proceeding; LBP-11-10, 73 NRC 431 (2011)
10 C.F.R. 52.39(a)(2)
a contention should be deemed resolved during the early site permit proceeding if the subject of the contention was actually litigated and decided during the ESP proceeding, or the subject of the contention, although not actually litigated, was decided by the Staff, was necessary for the Staff to resolve in the ESP proceeding, and was within the scope of that proceeding as defined in the *Federal Register* notice of opportunity for a hearing; LBP-11-10, 73 NRC 433 (2011)
if a matter is resolved in an early site permit proceeding, then it is considered resolved in a subsequent combined license proceeding when the COLA references the ESP, subject to certain exceptions; LBP-11-10, 73 NRC 433 (2011)
10 C.F.R. 52.39(c)(1)
in any combined license proceeding referencing an early site permit, any significant environmental issue that was not resolved in the ESP proceeding, or any issue involving the impacts of construction and operation of the facility that was resolved in the ESP for which significant new information has been identified, may be litigated; LBP-11-10, 73 NRC 442 (2011)
in any combined license proceeding referencing an early site permit, contentions may be litigated on whether the nuclear power reactor proposed to be built does not fit within one or more of the site characteristics or design parameters included in the early site permit; LBP-11-10, 73 NRC 442 (2011)
10 C.F.R. 52.39(c)(1)(v)
a matter resolved in an early site permit proceeding may be revisited in the combined license proceeding when new and significant information is presented; LBP-11-10, 73 NRC 431 (2011)
10 C.F.R. 52.55(c)
a combined license applicant may reference a docketed-but-not-yet-certified design in its application, but does so at its own risk; LBP-11-10, 73 NRC 450 (2011)
10 C.F.R. 52.63(a)(5)
in making the findings required for issuance of a combined license, finality is afforded to those matters resolved in connection with a design certification; LBP-11-7, 73 NRC 274 (2011)
10 C.F.R. 52.63(b)(1)
exemption requests are subjected to the same level of litigation as other issues that could be admissibly raised in a COL proceeding; LBP-11-10, 73 NRC 451 n.157, 452 (2011)
grants of exemptions from referenced design certification rules are conditioned on the Commission's finding that the request complies with section 52.7 and that the special circumstances provided for section 52.7 outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption; LBP-11-10, 73 NRC 451 (2011)
10 C.F.R. 52.73
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10 C.F.R. 52.79
although the combined license application is not expressly required to consider sea level rise, the board decides that the issue is within the scope of a combined license proceeding; LBP-11-6, 73 NRC 236 (2010)

10 C.F.R. 52.79(a)(3)
the final safety analysis report for a combined license must include information regarding 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; LBP-11-6, 73 NRC 245 (2010)

10 C.F.R. 52.93(a)(1)
a combined license applicant incorporating a certified design may include in its COLA a request for an exemption from any part of a referenced design certification rule, which may be granted if NRC determines that the exemption complies with any exemption provisions of the referenced design certification rule, or with 10 C.F.R. 52.63 if there are no applicable exemption provisions in the referenced design certification rule; LBP-11-10, 73 NRC 451 (2011)

10 C.F.R. 52.97(a)(1)(v)
NRC Staff, incident to its preparation of the safety evaluation report, is obliged to ensure that applicant's design basis for the new units will protect public health and safety; LBP-11-6, 73 NRC 217 n.78 (2010)

10 C.F.R. Part 52, App. A, §§ VI.B
all environmental issues concerning severe accident mitigation design alternatives associated with the information in NRC's final environmental assessment for certified reactor design are deemed resolved for plants referencing this appendix whose site parameters are within those specified in the technical support document; LBP-11-7, 73 NRC 274 n.135 (2011)

10 C.F.R. Part 52, App. A, § VI.B.7
NRC Staff's creation of a list of site parameters for use in the combined license proceeding cannot cure the absence of a list of site parameters in the technical support document, rendering it impossible to resolve SAMDA issues by rule; LBP-11-7, 73 NRC 275-76 (2011)

10 C.F.R. 54.17(c)
applicant may seek license renewal as early as 20 years prior to expiration; LBP-11-2, 73 NRC 52 (2011)

10 C.F.R. 54.21(a)(1)(i)
structures and components that are subject to aging management review include those that perform certain safety-related functions without moving parts or without a change in configuration or properties; LBP-11-2, 73 NRC 57 (2011)

10 C.F.R. 54.21(a)(3)
applicant must demonstrate that the effects of aging will be managed so that the intended function(s) will be maintained consistent with the current licensing basis; LBP-11-2, 73 NRC 60 (2011)

10 C.F.R. 54.29
for license renewal, there must be reasonable assurance that applicant will manage the effects of aging on certain structures and components during extended operation; LBP-11-2, 73 NRC 60 n.195 (2011)

10 C.F.R. 54.29(a)(1)
among the limited issues within the scope of a license renewal proceeding are plans to manage the effects of aging on enumerated functions of certain systems, structures, and components during the period of extended operation; LBP-11-2, 73 NRC 45 (2011)

10 C.F.R. 54.29(b)
alternatives for reducing adverse environmental impacts, including impacts of severe accidents, are among the limited issues within the scope of a license renewal proceeding; LBP-11-13, 73 NRC 550 (2011)
among the limited issues within the scope of a license renewal proceeding are alternatives for reducing adverse environmental impacts listed as Category 2 issues in Appendix B to Subpart A of 10 C.F.R. Part 51; LBP-11-2, 73 NRC 45 (2011)
among the limited issues within the scope of a license renewal proceeding are cost-effective alternatives for mitigating severe accidents; LBP-11-2, 73 NRC 45 (2011)

10 C.F.R. 54.30(b)
the licensee's compliance with the obligation to take measures under its current license is not within the scope of the license renewal review; LBP-11-2, 73 NRC 56 n.168 (2011)

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10 C.F.R. 54.4
among the limited issues within the scope of a license renewal proceeding are plans to manage the effects of aging on enumerated functions of certain systems, structures, and components during the period of extended operation; LBP-11-2, 73 NRC 45 (2011)

10 C.F.R. 54.4(a)(1)-(3)
because petitioner's issue of the inadvertent release of radioactivity does not specifically relate to the ability of buried structures to perform their intended functions, the contention is not within the scope of a license renewal proceeding; LBP-11-2, 73 NRC 60 (2011)

10 C.F.R. 70.4
applicant seeks an exemption from the requirements of this section to permit it to begin certain preconstruction activities at the site before completion of NRC's environmental review under Part 51; LBP-11-11, 73 NRC 503-04 (2011)
"commencement of construction" is defined to include clearing of land, excavation, or other substantial action that would adversely affect the environment of the site; LBP-11-11, 73 NRC 506 (2011)

10 C.F.R. 70.17(a)
NRC may grant an exemption from regulatory requirements if it determines such an exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest; LBP-11-11, 73 NRC 497 (2011)

10 C.F.R. 70.22(a)(3)
applicant must indicate the period of time for which a Part 70 license is requested; LBP-11-11, 73 NRC 503 (2011)

10 C.F.R. 70.22(b)
materials license amendment applications must contain a full description of the applicant's program for control and accounting of special nuclear material to show how it will comply with the 10 C.F.R. Part 74 requirements; LBP-11-9, 73 NRC 394 n.1 (2011)

10 C.F.R. 70.22(m)
application for a uranium enrichment facility is required to contain a description of the security program to protect against unauthorized disclosure of classified matter in accord with Part 95; LBP-11-11, 73 NRC 489, 490 (2011)

10 C.F.R. 70.23(a)(7)
applicant seeks an exemption from the requirements of this section to permit it to begin certain preconstruction activities at the site before completion of NRC's environmental review under Part 51; LBP-11-11, 73 NRC 503-04 (2011)
for a proposed nuclear materials-related activity, including uranium enrichment, commencement of construction relative to that activity prior to a favorable Staff conclusion regarding the NEPA cost-benefit balance is grounds for denial of the authorization to conduct that activity; LBP-11-11, 73 NRC 506 (2011)

10 C.F.R. 70.25(e)
applicant seeks authorization to provide financial assurance for decommissioning funding on a forward-looking, incremental basis; LBP-11-11, 73 NRC 503 (2011)

10 C.F.R. 70.31(a)
NRC may issue a license to impose such additional conditions, requirements, and limitations as may been necessary to effectuate the purposes of the Atomic Energy Act and the agency's regulations; LBP-11-11, 73 NRC 497 (2011)

10 C.F.R. 70.31(b)(2)
NRC may issue a license to impose such additional conditions, requirements, and limitations as may been necessary to effectuate the purposes of the Atomic Energy Act and the agency's regulations; LBP-11-11, 73 NRC 497 (2011)

10 C.F.R. 70.32(c)
a uranium enrichment facility license must have a condition requiring the licensee to maintain and follow a source material control and accounting program and maintain records of any MC&A program changes made without Commission approval for 5 years from the date of the change; LBP-11-11, 73 NRC 501-02 (2011)

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10 C.F.R. 70.32(c)(2)
reports to the agency regarding unapproved changes made to the material control and accounting program must be filed no more than 6 months after the changes; LBP-11-11, 73 NRC 502 (2011)
10 C.F.R. 70.32(k)
a uranium enrichment facility cannot be operated until the agency verifies through inspection that the facility has been constructed in accordance with the license; LBP-11-11, 73 NRC 509 (2011)
although construction of a fuel cycle facility can begin as soon as the license authorizing the facility is granted, prior to the introduction of UF_6 into any EREF module, NRC must verify through inspection that the facility was constructed in accordance with the agency's regulatory requirements and license requirements; LBP-11-11, 73 NRC 502 (2011)
applicant is to provide an items-relied-on-for-safety boundary package to verify that a facility is constructed in accord with all license requirements; LBP-11-11, 73 NRC 500 (2011)
10 C.F.R. 70.40
this section applies only to enrichment facility licensee USEC and has no relevance to any other enrichment facility applicant; LBP-11-11, 73 NRC 488 n.16 (2011)
10 C.F.R. 70.61
analysis of potential volcanic hazard at applicant's site raises the question whether the probability of such an event is sufficiently low to be considered "highly unlikely"; LBP-11-11, 73 NRC 518-19 (2011)
under risk-informed performance-based requirements, applicants must ensure that each item relied on for safety will be available and reliable to perform its function when needed; LBP-11-11, 73 NRC 500 (2011)
10 C.F.R. 70.62(c)
applicant for a Part 70 license is required to establish and maintain a safety program, which includes performing an integrated safety analysis; LBP-11-11, 73 NRC 480 (2011)
items relied on for safety that are a central focus of the integrated safety analysis process are the subject of three proposed license conditions; LBP-11-11, 73 NRC 500 (2011)
10 C.F.R. 70.62(c)(1)(iv)
applicant's integrated safety analysis must consider potential accident sequences caused either by deviations in the processes that will be conducted at the proposed facility or by credible external events, including natural phenomena; LBP-11-11, 73 NRC 480 (2011)
10 C.F.R. 70.65(b)
along with the requirement to perform an integrated safety analysis is the requirement for applicant to provide the NRC Staff with an ISA summary, the content of which is specified; LBP-11-11, 73 NRC 481 (2011)
10 C.F.R. 70.72
Staff proposes to include a condition in the license that incorporates a special authorization to permit applicant to make changes to its SAR without seeking prior NRC approval; LBP-11-11, 73 NRC 505 (2011)
10 C.F.R. 74.51(a)
applicant is required to establish, implement, and maintain a Commission-approved material control and accounting system that will achieve the five objectives of this section; LBP-11-9, 73 NRC 419 (2011)
10 C.F.R. 74.55(b)
the ability to detect the loss of plutonium in a timely manner, to allow for an effective response, is a crucial security requirement; LBP-11-9, 73 NRC 420 (2011)
10 C.F.R. 74.57(b)
the ability to resolve within approved time periods the nature and cause of any materials control and accounting alarm signaling the possible loss or theft of strategic special nuclear material, to allow for an effective response, is a crucial security requirement; LBP-11-9, 73 NRC 420 (2011)
10 C.F.R. Part 95
relative to the issue of foreign ownership or control, NRC imposes restrictions on the physical security and control of information at licensed facilities to safeguard restricted data and national security information; LBP-11-11, 73 NRC 489 (2011)
Staff imposed a license condition to ensure that clearances are obtained before classified matter is processed, stored, reproduced, transmitted, handled, or accessed; LBP-11-11, 73 NRC 484-85 (2011)

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10 C.F.R. 95.15

a Pentapartite Agreement between the United States and four European governments to prevent new restricted data from being disseminated to European nationals will be a prerequisite to the NRC Staff issuing a facility clearance; LBP-11-11, 73 NRC 485 (2011)

10 C.F.R. 95.17

applicant must obtain a facility security clearance, which would include a determination that granting the clearance would not be inconsistent with the national interest, including a finding that the facility is not under foreign ownership, control, or influence to such a degree that a determination could not be made; LBP-11-11, 73 NRC 490 (2011)

10 C.F.R. 95.17(d)(1)

an enrichment facility security clearance requires a determination that granting the clearance would not be inconsistent with the national interest, including a finding that the facility is not under foreign ownership, control, or influence to such a degree that a determination could not be made; LBP-11-11, 73 NRC 489 (2011)

10 C.F.R. 100.20(b)

applicant must assess oil and gas wells and borings on and near the proposed site; LBP-11-16, 73 NRC 668 (2011)

10 C.F.R. 100.21(e)

applicant must assess oil and gas wells and borings on and near the proposed site and include them in the site safety evaluation report; LBP-11-16, 73 NRC 668 (2011)

10 C.F.R. 100.23

the principal geologic and seismic considerations that guide the Commission in its evaluation of the suitability of a proposed site and adequacy of the design bases are set forth; LBP-11-16, 73 NRC 658 (2011)

10 C.F.R. 100.23(c)

applicant shall investigate all geologic and seismic factors (e.g., volcanic activity) that may affect the design and operation of the proposed nuclear power plant irrespective of whether such factors are explicitly included in this section; LBP-11-16, 73 NRC 660 (2011)

geological, seismological, and engineering characteristics of a site and its environs must be investigated in sufficient scope and detail; LBP-11-10, 73 NRC 452 (2011)

10 C.F.R. 100.23(d)

factors used for a site geological and seismological evaluation are stated; LBP-11-10, 73 NRC 452 n.160 (2011)

geologic and seismic siting factors that must be considered for design are set forth; LBP-11-16, 73 NRC 659 (2011)

sufficient geological, seismological, and geophysical data must be provided to clearly establish whether there is a potential for surface deformation; LBP-11-16, 73 NRC 659 (2011)

the geologic and seismic siting factors considered for design must include a determination of the safe shutdown earthquake ground motion for the site and the potential for surface tectonic and nontectonic deformations; LBP-11-16, 73 NRC 659 (2011)

10 C.F.R. 100.23(d)(2)

applicant's site safety analysis report must provide sufficient data to enable the requisite determination of the potential for surface deformation as a result of growth faults at the site; LBP-11-16, 73 NRC 656, 658 (2011)

contention that applicant's site assessment has inadequately characterized the rate of movement of growth faults at the site, as it relates to its analysis of surface deformation is admissible; LBP-11-16, 73 NRC 663-64 (2011)

10 C.F.R. Part 100, Appendix A

applicant's site safety analysis report must provide sufficient data to enable the requisite determination of the potential for surface deformation as a result of growth faults at the site; LBP-11-16, 73 NRC 658 (2011)

application of the operating basis earthquake analysis is restricted to those features of a nuclear power plant that are safety-related, as opposed to the operability of structures, systems, and components necessary for power generation; LBP-11-16, 73 NRC 660 (2011)

even though a cooling pond is not a safety-related structure, knowledge of faulting under the pool and the impact this faulting might have on the pool's operation are required; LBP-11-16, 73 NRC 660 (2011)
the purpose of the seismic and geologic siting criteria is set forth; LBP-11-16, 73 NRC 660 (2011)
10 C.F.R. Part 100, Appendix A, ¶ V(d)(1)
the plain language of this appendix speaks to the intention of the Commission to address other design conditions such as soil instability due to ground disruption not directly related to surface faulting; LBP-11-16, 73 NRC 660 (2011)
10 C.F.R. Part 100, Appendix A, ¶ V(d)(3)
assurance of adequate cooling water supply for emergency and long-term shutdown decay heat removal shall be considered in the design of the nuclear power plant; LBP-11-16, 73 NRC 671 (2011)
10 C.F.R. Part 100, Appendix A, ¶ VI(b)(3)
design provisions shall be based on an assumption that the design basis for surface faulting can occur in any direction and azimuth and under any part of the nuclear power plant unless evidence indicates this assumption is not appropriate, and shall take into account the estimated rate at which the surface faulting may occur; LBP-11-16, 73 NRC 659-60 (2011)
the design basis for surface faulting shall be taken into account in the design of the nuclear power plant by providing reasonable assurance that in the event of such displacement during faulting certain structures, systems, and components will remain functional; LBP-11-16, 73 NRC 659 (2011)
10 C.F.R. 110.111
petitioner requests a waiver from a 10 C.F.R. 51.22(c)(15); CLI-11-3, 73 NRC 619 (2011)
10 C.F.R. 110.111(a)
a participant may petition that a Commission rule or regulation be waived with respect to the license application under consideration; CLI-11-3, 73 NRC 619 (2011)
10 C.F.R. 110.111(b)
to waive a Part 110 rule or regulation, petitioner must show that because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted; CLI-11-3, 73 NRC 619-20 (2011)
10 C.F.R. 110.111(d)
replies to waiver petitions are allowed; CLI-11-3, 73 NRC 619 (2011)
10 C.F.R. 110.32(f)(5)
NRC will issue a low-level radioactive waste export license if the receiving country has received a description of the equipment or material including the volume, physical and chemical characteristics, route of transit of shipment, and ultimate disposition (including forms of management or treatment) of the waste; CLI-11-3, 73 NRC 627 (2011)
10 C.F.R. 110.41(a)(8)
NRC will issue a low-level radioactive Waste export license if it has been notified by the State Department that it is the judgment of the Executive Branch that the proposed export will not be inimical to the common defense and security; CLI-11-3, 73 NRC 627 (2011)
the Department of State provides the Commission with Executive Branch views on the merits of import/export applications; CLI-11-3, 73 NRC 617 n.11 (2011)
10 C.F.R. 110.41(b)(1)
NRC will issue a low-level radioactive waste export license if it has been notified by the State Department that it is the judgment of the Executive Branch that the proposed export will not be inimical to the common defense and security; CLI-11-3, 73 NRC 627 (2011)
10 C.F.R. 110.42(d)(1)
NRC will issue a low-level radioactive waste export license if it has made an independent judgment that the export will not be inimical to the common defense and security; CLI-11-3, 73 NRC 627 (2011)
10 C.F.R. 110.42(d)(2)
NRC will issue a low-level radioactive waste export license if the receiving country has found it has the administrative and technical capacity and regulatory structure to manage and dispose of the waste and consents to the receipt of the radioactive waste; CLI-11-3, 73 NRC 627 (2011)
NRC will issue a low-level radioactive waste export license if the receiving country has received a description of the equipment or material including the volume, physical and chemical characteristics, route of transit of shipment, and ultimate disposition (including forms of management or treatment) of the waste; CLI-11-3, 73 NRC 627 (2011)

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10 C.F.R. 110.43(d)
the Southeast Compact Commission for Low-Level Radioactive Waste Management had no comments with regard to the import/export applications; CLI-11-3, 73 NRC 618 (2011)
the state reviewed the applications and the authorizations and found no technical reason to prohibit processing of imported waste; CLI-11-3, 73 NRC 618 (2011)
10 C.F.R. 110.45
the Commission considers the adequacy of information in the application as well as written comments from the public in making an import or export licensing decision; CLI-11-3, 73 NRC 624 (2011)
10 C.F.R. 110.50(a)(3)
the key action that will allow incineration of imported low-level-radioactive waste material is the domestic license authorizing such processing, not NRC's grant of an import license; CLI-11-3, 73 NRC 620 (2011)
10 C.F.R. 110.81
the Commission considers the adequacy of information in the application as well as written comments from the public in making an import or export licensing decision; CLI-11-3, 73 NRC 624 (2011)
10 C.F.R. 110.82
intervention petition argues that a hearing should be held to address claimed deficiencies in import/export applications and public health, safety, security impacts and whether the applications set precedent; CLI-11-3, 73 NRC 618-19 (2011)
petitioner filed a timely request for hearing on the import/export license application to allow citizens of the area an opportunity to have their questions answered and raise any concerns in a public forum and to argue that every country should have the capability of processing its own nuclear waste; CLI-11-3, 73 NRC 618 (2011)
10 C.F.R. 110.83(a)
deadline for answer to hearing petition is specified; CLI-11-3, 73 NRC 619 (2011)
import/export license applicant argues that intervention petition should be denied because it was not served on all parties, petitioner does not have standing, and petitioner does not show that a discretionary hearing would be in the public interest or assist the Commission in making its required determinations; CLI-11-3, 73 NRC 618 (2011)
10 C.F.R. 110.83(b)
deadline for reply to an answer to a hearing petition is specified; CLI-11-3, 73 NRC 619 (2011)
10 C.F.R. 110.84(a)
a discretionary hearing on an export or import license is allowed if a hearing would be in the public interest and would assist the Commission in making the statutory determinations required by the AEA; CLI-11-3, 73 NRC 624 (2011)
10 C.F.R. 140.13b
holders of a Part 40/70 uranium enrichment facility license are required to maintain adequate nuclear liability insurance, with proof of such insurance necessary prior to a license being issued; LBP-11-11, 73 NRC 498 (2011)
10 C.F.R. 150.20
except for ownership of NRC-licensed materials outlined in the settlement agreement, licensee will refrain from engaging in conducting radiography or a radiographers duties, or assisting, directing, or supervising such activities in an NRC jurisdiction under an NRC license or an agreement state license; LBP-11-3, 73 NRC 88 (2011)
15 C.F.R. 930.57(a)
applicant is required to submit its certification from the relevant state of jurisdiction, indicating that the project in question will comply with the Coastal Zone Management Act; LBP-11-16, 73 NRC 704 n.364 (2011)
15 C.F.R. 930.60(a)
the state agency's 6-month review period of an applicant's consistency certification begins on the date the state agency receives the consistency certification; LBP-11-16, 73 NRC 704 n.365 (2011)
40 C.F.R. 1501.7
the agency responsible for preparing an environmental impact statement must define the scope of the issues it will address; LBP-11-10, 73 NRC 440 (2011)

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40 C.F.R. 1502.4
agencies shall use the criteria for scope in 40 C.F.R. 1508.25 to determine which proposal shall be the subject of a particular environmental impact statement; LBP-11-10, 73 NRC 440 (2011)

40 C.F.R. 1502.4(a)
proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement; LBP-11-10, 73 NRC 440 (2011)

40 C.F.R. 1502.14
federal agencies must rigorously explore and objectively evaluate all reasonable alternatives and devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits; LBP-11-14, 73 NRC 605 n.92 (2011)

40 C.F.R. 1502.23
weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations; LBP-11-7, 73 NRC 282 n.173 (2011)

40 C.F.R. 1508.7
cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time; LBP-11-7, 73 NRC 301 n.314 (2011)
in implementing its NEPA obligations, NRC expressly adopts certain definitions promulgated by the Council on Environmental Quality; LBP-11-7, 73 NRC 301 n.314 (2011)

40 C.F.R. 1508.8
direct impacts are those caused by the federal action, and occurring at the same time and place as that action, while indirect impacts are caused by the action at a later time or more distant place, yet are still reasonably foreseeable; LBP-11-7, 73 NRC 301 n.314 (2011)
in implementing its NEPA obligations, NRC expressly adopts certain definitions promulgated by the Council on Environmental Quality; LBP-11-7, 73 NRC 301 n.314 (2011)

40 C.F.R. 1508.25
in implementing its NEPA obligations, NRC expressly adopts certain definitions promulgated by the Council on Environmental Quality; LBP-11-7, 73 NRC 301 n.314 (2011)

40 C.F.R. 1508.25(a)(1)
in defining the scope of an environmental impact statement, all connected actions must be analyzed in one statement; LBP-11-10, 73 NRC 440 (2011)

40 C.F.R. 1508.25(a)(1)(iii)
for an environmental impact statement, separate actions may be considered connected if, among other things, they are interdependent parts of a larger action and depend on the larger action for their justification; LBP-11-10, 73 NRC 441 (2011)

40 C.F.R. 1508.25(c)
an environmental impact statement must consider the direct, indirect, and cumulative impacts of an action; LBP-11-7, 73 NRC 301 n.314 (2011)

44 C.F.R. 350.2(g)-(i)
plume and ingestion exposure pathway EPZs for federal emergency management purposes are defined; LBP-11-15, 73 NRC 640 (2011)

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Administrative Procedure Act, § 554(a)
this section applies in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing; LBP-11-8, 73 NRC 354-55 (2011)
Atomic Energy Act, 53, 42 U.S.C. § 2073
this is the general statutory basis under which NRC has adopted the variety of regulations that govern uranium enrichment facility licensing; LBP-11-11, 73 NRC 474 (2011)
Atomic Energy Act, 57, 42 U.S.C. § 2077
because the application for a uranium enrichment facility is governed by AEA §§ 53 and 63, 42 U.S.C. § 2073, 2093, foreign ownership and control issues would be evaluated under sections 57 and 69; LBP-11-11, 73 NRC 488 (2011)
this section prohibits the Commission from granting a license that would be inimical to the common defense and security or the health and safety of the public; LBP-11-11, 73 NRC 488 (2011)
Atomic Energy Act, 63, 42 U.S.C. § 2093
this is the general statutory basis under which NRC has adopted the variety of regulations that govern uranium enrichment facility licensing; LBP-11-11, 73 NRC 474 (2011)
Atomic Energy Act, 69, 42 U.S.C. § 2099
because the application for a uranium enrichment facility is governed by AEA §§ 53 and 63, 42 U.S.C. § 2073, 2093, foreign ownership and control issues would be evaluated under sections 57 and 69; LBP-11-11, 73 NRC 488 (2011)
Atomic Energy Act, 103, 104
the Commission is prohibited from granting a license that would be inimical to the common defense and security or the health and safety of the public, and prohibits the granting of a license if the Commission knows or has reason to believe the applicant is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; LBP-11-11, 73 NRC 488 (2011)
Atomic Energy Act, 189a, 42 U.S.C. § 2239a
the statutory footing for the procedural precepts that apply to uranium enrichment facility licensing is provided; LBP-11-11, 73 NRC 474 (2011)
Atomic Energy Act, 189a(1)(A), 42 U.S.C. § 2239a(1)(A)
an uncontested early site permit proceeding is subject to mandatory hearing requirements; LBP-11-10, 73 NRC 436 (2011)
NRC must grant a hearing, as a matter of right, to any person whose interest may be affected by a proceeding for the granting of any license; CLI-11-3, 73 NRC 621 (2011); LBP-11-6, 73 NRC 168 (2010); LBP-11-8, 73 NRC 358 (2011)
Atomic Energy Act, 193, 42 U.S.C. § 2243
the statutory footing for the procedural precepts that apply to uranium enrichment facility licensing are provided; LBP-11-11, 73 NRC 474 (2011)
Atomic Energy Act, 193(b)(1), 42 U.S.C. § 2243(b)(1)
the Commission shall conduct a single adjudicatory hearing on the record with regard to the licensing or construction and operation of a uranium enrichment facility; LBP-11-11, 73 NRC 471 n.4 (2011)
Atomic Energy Act, 193(f)
the Commission is prohibited from granting a license that would be inimical to the common defense and security or the health and safety of the public, and prohibits the granting of a license if the Commission knows or has reason to believe that the applicant is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; LBP-11-11, 73 NRC 488 (2011)

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Atomic Energy Act, 274c(1), 42 U.S.C. § 2021(c)(1)
NRC has a clear statutory mandate to regulate the construction and operation of a uranium enrichment facility; LBP-11-11, 73 NRC 474 (2011)

Atomic Energy Act, 274c(2), 42 U.S.C. § 2021(c)(2)
NRC is responsible for authorizing the import of byproduct, source, and special nuclear material; CLI-11-3, 73 NRC 626, 627 (2011)

Atomic Energy Act, 42 U.S.C. §§ 2155, 2156, and 2157
these sections do not apply to imports/exports involving waste that is contaminated with byproduct; CLI-11-3, 73 NRC 627 (2011)

Clean Water Act, 316(b), 33 U.S.C. § 1326(b)
a cooling tower and closed-cycle cooling system represent the best available technology and will reduce discharge temperature to the greatest extent possible; LBP-11-14, 73 NRC 597 (2011)

Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A)
applicant is required to submit its certification from the relevant state of jurisdiction, indicating that the project in question will comply with this statute; LBP-11-16, 73 NRC 704 n.364 (2011)

Equal Access to Justice Act, 5 U.S.C. § 504(a)(1)
parties who prevail against the government in certain types of agency proceedings are allowed to recover attorneys' fees and other expenses incurred in connection with the proceeding unless the government's position was substantially justified, or other special circumstances render an award unjust; LBP-11-8, 73 NRC 354 (2011)

Equal Access to Justice Act, 5 U.S.C. § 504(b)(1)(C)
"adversary adjudication" is defined as an adjudication under section 554 of the Administrative Procedure Act in which the position of the United States is represented by counsel or otherwise; LBP-11-8, 73 NRC 354 (2011)
the act applies to any adjudication required by statute to be determined on the record in which the government is represented by counsel; LBP-11-8, 73 NRC 354 (2011)

Freedom of Information Act, 5 U.S.C. § 552(b)(9)
any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions which are exempt; LBP-11-5, 73 NRC 139 n.14 (2011)

Migratory Bird Conservation Act, 16 U.S.C. § 715 (2006)
the federal government could assert an implied water right on behalf of a wildlife refuge; LBP-11-16, 73 NRC 688 (2011)

Migratory Bird Treaty Act, 16 U.S.C. §§ 701-712 (2006)
the federal government could assert an implied water right on behalf of a wildlife refuge; LBP-11-16, 73 NRC 688 (2011)

National Environmental Policy Act, 42 U.S.C. § 4321 (2006)
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National Environmental Policy Act, 42 U.S.C. § 4332
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National Environmental Policy Act, 42 U.S.C. § 4332(2)(C)(i)-(iii)
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among the limited issues within the scope of a license renewal proceeding are alternatives for reducing adverse environmental impacts listed as Category 2 issues in Appendix B to Subpart A of 10 C.F.R. Part 51 including cost-effective alternatives for mitigating severe accidents; LBP-11-2, 73 NRC 45 (2011)

National Environmental Policy Act, 102(2)(E), 42 U.S.C. § 4332(2)(E)
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Tex. Sess. Law Serv. Ch. 939 (West) (codified as Tex. Util. Code Ann. § 39.905(a)(3)(B), (C) (2007)
demand-side management programs require regulated utilities in the region and integrated utilities outside the region to offer DSM programs sufficient to offset 15% of the growth in demand by December 31, 2008, and 20% of the growth in demand by December 31, 2009; LBP-11-7, 73 NRC 286 n.199 (2011)

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Administrative Conference of the United States 1981 and 1985 Model Rules
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Fed. R. Evid. 201(b), (f)
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Hearings Before the Subcommittee on Legislation, Joint Committee on Atomic Energy, 87th Cong. 60 (1962) (letter of AEC Commissioner Loren K. Olsen)
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Congress called upon the Commission to make fundamental changes in its public hearing process to ensure that hearings adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors; LBP-11-6, 73 NRC 171 (2010)

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a lawyer is prohibited from knowingly making a false statement of law or fact to a tribunal; LBP-11-13, 73 NRC 549 (2011)
an attorney who purports to represent a client without authorization is subject to disciplinary proceedings by the state bar association; LBP-11-13, 73 NRC 549 (2011)

S. Rep. No. 1677, 87th Cong., 2d Sess., *reprinted in* 1962 *U.S. Code Cong. & Admin. News* 2207, 2213)
more formal procedures are required in contested cases, especially those involving compliance; LBP-11-8, 73 NRC 357 n.31 (2011)

1 Staff of Joint Committee on Atomic Energy, 87th Cong., 1st Sess., *Improving the AEC Regulatory Process* (Joint Comm. Print 1961)
in cases involving license suspension or revocation, where the Atomic Energy Commission's staff is cast in an accusatory role, the precautions prescribed by the Administrative Procedure Act should be carefully observed; LBP-11-8, 73 NRC 357 n.31 (2011)
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petition falls short of satisfying 10 C.F.R. 2.341(b)(4) if it does not specify the subsections upon which it relies but merely sets forth a series of general grievances fundamentally going to the correctness of the board's decision; CLI-11-2, 73 NRC 333 (2011)
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fees may be awarded in adversary adjudications that are governed by Administrative Procedure Act § 554, but they may not be awarded in adversary adjudications that Congress did not subject to that section; LBP-11-8, 73 NRC 349 (2011)

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in an actuarial sense the cost of the defense, to the extent borne by the insurance company, is a cost that the insured paid for, just as he would have paid a lawyer for his defense had he had no insurance; LBP-11-8, 73 NRC 349 (2011)
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"incur" within the context of Equal Access to Justice Act means that an individual who is a prevailing party meeting the financial qualification of the EAJA is ineligible to receive an EAJA award when that individual was not responsible for the costs of the attorney's fees; LBP-11-8, 73 NRC 349 (2011)
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when a third party who has no direct interest in the litigation pays fees on behalf of a taxpayer, the taxpayer incurs the fees so long as he assumes an absolute obligation to repay the fees or a contingent obligation to pay the fees in the event that he is able to recover them; LBP-11-8, 73 NRC 349 (2011)
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a licensing board's inquiry should not be whether there are plainly better methodologies or whether the severe accident mitigation alternatives analysis can be refined further, but rather whether the SAMA analysis resulted in erroneous conclusions on which SAMAs and SAMDAs are found cost-beneficial to implement; LBP-11-7, 73 NRC 254 (2011)
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NRC Staff is to consider and weigh the environmental, technical, and other costs and benefits of a proposed action and alternatives, and, to the fullest extent practicable, quantify the various factors considered; LBP-11-7, 73 NRC 254 (2011)
NRC Staff may accord substantial weight to the stated purpose of the project, i.e., to provide additional baseload electrical generation capacity for use in the owner's current markets and/or for potential sale on the wholesale market; LBP-11-7, 73 NRC 254 (2011)
petitioners have not established that use of another source term would identify additional cost-beneficial severe accident mitigation alternatives; LBP-11-13, 73 NRC 534 (2011)
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the need-for-power assessment need not precisely identify future market conditions and energy demand, or 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; LBP-11-7, 73 NRC 254 (2011)
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the ultimate concern in a SAMA contention is whether any additional SAMA should have been identified as potentially cost-beneficial, not whether further analysis may refine the details in the SAMA NEPA

analysis; LBP-11-13, 73 NRC 534 (2011)
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although an applicant has the ultimate burden of proof on any issues upon which a hearing is held, hearings are held on only those issues that an intervenor brings to the fore; LBP-11-4, 73 NRC 91 (2011)
if, considering only the summary disposition movant's support for its motion, the board determines that it has met its burden, the board then looks to whether an opponent of the motion has overcome the movant's case by showing a genuine dispute on a material issue of fact; LBP-11-4, 73 NRC 91 (2011)
summary disposition movant bears the initial burden of demonstrating that no genuine issue as to any material fact exists and that it is entitled to judgment as a matter of law; LBP-11-14, 73 NRC 591 (2011)
under the Equal Access to Justice Act, the government bears the burden of establishing that its position was substantially justified; LBP-11-8, 73 NRC 349 (2011)
when the issue on which summary judgment is sought is one on which the nonmoving party bears the burden of proof, the burden on the moving party may be discharged by showing that there is an absence of evidence to support the nonmoving party's case; LBP-11-4, 73 NRC 91 (2011)
CASE MANAGEMENT
boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; LBP-11-6, 73 NRC 149 (2011)
where the board allowed petitioners to file a corrected version of an expert declaration that contained numerous typographical errors, and where some of petitioners' corrections clearly went beyond what the board expected, the board did not try to parse which changes were authorized and did not consider or rely on the corrected version; LBP-11-2, 73 NRC 28 (2011)
CERTIFICATE OF COMPLIANCE
NRC Staff's reference to, and reliance in its draft environmental impact statement on, state issuance of a site certification order and associated certificate of compliance on groundwater use does not dispense with NRC's duty under NEPA to conduct an independent hard look at environmental impacts related to active dewatering during operations at a nuclear plant; LBP-11-1, 73 NRC 19 (2011)
CERTIFICATION
all motions must include a certification that movant has made a sincere effort to contact other parties in the proceeding and resolve the issue raised in the motion, and that the movant's efforts to resolve the issue have been unsuccessful; LBP-11-2, 73 NRC 28 (2011); LBP-11-15, 73 NRC 629 (2011)
applicant is required to submit its certification from the relevant state of jurisdiction, indicating that the project in question will comply with this statute; LBP-11-16, 73 NRC 645 (2011)
the state agency's 6-month review period of an applicant's consistency certification begins on the date the state agency receives the consistency certification; LBP-11-16, 73 NRC 645 (2011)
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CLIMATE CHANGE
- although the combined license application is not expressly required to consider sea level rise, the board decides that the issue is within the scope of a combined license proceeding; LBP-11-6, 73 NRC 149 (2011)
- applicant's environmental report for an early site permit application must address climate change because it is considered an environmental impact; LBP-11-16, 73 NRC 645 (2011)
- if impacts are remote or speculative, the environmental impact statement need not discuss them, including greenhouse gas emissions; LBP-11-7, 73 NRC 254 (2011)

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- an adjudicatory hearing can be closed if the Commission orders it; LBP-11-5, 73 NRC 131 (2011)
- boards may exclude the public from adjudicatory hearings or actions that involve restricted data, defense information, safeguards information protected from disclosure under the authority of Atomic Energy Act § 147, or information protected from disclosure under the authority of section 148; LBP-11-5, 73 NRC 131 (2011)

COASTAL ZONE MANAGEMENT ACT
- applicant is required to submit its certification from the relevant state of jurisdiction, indicating that the project in question will comply with this statute; LBP-11-16, 73 NRC 645 (2011)

COLLATERAL ESTOPPEL
- relitigation of an issue previously decided by a licensing board or the Commission may also be barred by the doctrine of collateral estoppel; LBP-11-10, 73 NRC 424 (2011)

COMBINED LICENSE APPLICATION
- although the COLA is not expressly required to consider sea level rise, the board decides that the issue is within the scope of a combined license proceeding; LBP-11-6, 73 NRC 149 (2011)
- an environmental report must contain an analysis of the cumulative impacts of the activities to be authorized; LBP-11-6, 73 NRC 149 (2011)
- an environmental report must discuss environmental impacts in proportion to their significance; LBP-11-6, 73 NRC 149 (2011)
- an exemption from any part of a referenced design certification rule may be granted if NRC determines that the exemption complies with any exemption provisions of the referenced design certification rule, or with 10 C.F.R. 52.63 if there are no applicable exemption provisions in the referenced rule; LBP-11-10, 73 NRC 424 (2011)
- applicant has described the kinds and quantities of radioactive materials expected to be produced in the operation to the extent its COLA references a standardized design; LBP-11-6, 73 NRC 149 (2011)
- applicant may reference a docketed-but-not-yet-certified design in its application, but does so at its own risk; LBP-11-10, 73 NRC 424 (2011)
- applicant must identify the means for keeping levels of radioactive material in effluents to unrestricted areas as low as is reasonably achievable; LBP-11-6, 73 NRC 149 (2011)
- applicant must include an emergency plan that contains, in the event of a reactor emergency resulting in a radiological release, a range of protective actions for the public located within about a 10-mile radius from the plant; LBP-11-15, 73 NRC 629 (2011)
- applicant will have to demonstrate that the site-specific parameters are bounded by the parameters developed for the certified design; LBP-11-10, 73 NRC 424 (2011)
- applicant will have to determine whether it will adopt in toto the certified design, or whether it will take exemptions thereto and/or departures therefrom; LBP-11-10, 73 NRC 424 (2011)
- applicant's emergency plan must contain and describe adequate provisions for emergency facilities and equipment, including at least one onsite and one offsite communication system, each of which shall have a backup power source; LBP-11-15, 73 NRC 629 (2011)
- applicant's environmental report must describe reasonably foreseeable environmental impacts, discussed in proportion to their significance, and adverse environmental effects that cannot be avoided should the proposal be implemented; LBP-11-6, 73 NRC 149 (2011)
- applicants may incorporate a certified reactor design in a combined license application; LBP-11-10, 73 NRC 424 (2011)
- comments and questions generated by a state agency that is examining a state application to determine compliance with state legal and technical standards do not, in and of themselves, demonstrate a material deficiency in the application; LBP-11-6, 73 NRC 149 (2011)

every COLA must be accompanied by an environmental report to aid the Commission in its preparation of an environmental impact statement; LBP-11-6, 73 NRC 149 (2011)
exemption requests are subjected to the same level of litigation as other issues that could be admissibly raised in a COL proceeding; LBP-11-10, 73 NRC 424 (2011)
factors used for a site geological and seismological evaluation are stated in 10 C.F.R. 100.23(d); LBP-11-10, 73 NRC 424 (2011)
geological, seismological, and engineering characteristics of a site and its environs must be investigated in sufficient scope and detail; LBP-11-10, 73 NRC 424 (2011)
grants of exemptions from referenced design certification rules are conditioned on the Commission's finding that the request complies with section 52.7 and that the special circumstances provided for section 52.7 outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption; LBP-11-10, 73 NRC 424 (2011)
impacts of the possible routes that applicant will use for its transmission lines must be analyzed for applicant to give the NRC the requisite information to make an informed decision on its license application; LBP-11-6, 73 NRC 149 (2011)
mere existence of a letter of intent to ship low-level radioactive waste to a disposal facility does not answer questions as to whether such a plan will ultimately result in a transfer of LLRW title and permanent offsite disposition of the LLRW and whether nontransfer of title will result in environmental impacts; LBP-11-6, 73 NRC 149 (2011)
mere existence of comments and questions generated by NRC Staff do not, in and of themselves, demonstrate a material deficiency in applicant's combined license application; LBP-11-6, 73 NRC 149 (2011)
NRC must address any purported need for additional power during its environmental review of a combined license application; LBP-11-7, 73 NRC 254 (2011)
COMBINED LICENSE PROCEEDINGS
a contention should be deemed resolved during the early site permit proceeding if the subject of the contention was actually litigated and decided during the ESP proceeding, or, although not actually litigated, was decided by the Staff, was necessary for the Staff to resolve in the ESP proceeding, and was within the scope of that proceeding as defined in the *Federal Register* notice of opportunity for a hearing; LBP-11-10, 73 NRC 424 (2011)
a matter resolved in an early site permit proceeding may be revisited in the COL proceeding when new and significant information is presented; LBP-11-10, 73 NRC 424 (2011)
challenges to a combined license applicant's failure to provide information on long-term storage of Greater-Than-Class-C radioactive waste are outside the scope of a combined license proceeding; LBP-11-6, 73 NRC 149 (2011)
contention that wastewater contains chemical contaminants that are not discussed in the environmental report, and that when the wastewater is discharged via deep injection wells, the chemicals might migrate to an aquifer is within the scope of the proceeding; LBP-11-6, 73 NRC 149 (2011)
hearing procedures in Subpart L of 10 C.F.R. Part 2 will ordinarily be used in proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits; LBP-11-6, 73 NRC 149 (2011)
in any COL proceeding referencing an early site permit, contentions may be litigated on whether the nuclear power reactor proposed to be built does not fit within one or more of the site characteristics or design parameters included in the early site permit; LBP-11-10, 73 NRC 424 (2011)
insofar as a contention requests consideration of a dry cooling design alternative, that matter must be considered resolved in the early site permit proceeding; LBP-11-10, 73 NRC 424 (2011)
NRC Staff's creation of a list of site parameters for use in the combined license proceeding cannot cure the absence of a list of site parameters in the technical support document, rendering it impossible to resolve SAMDA issues by rule; LBP-11-7, 73 NRC 254 (2011)
petitioner's demand for compliance with U.S. Army Corps of Engineers requirements is not within the scope of a combined license proceeding, because it is not the province of the NRC to enforce another agency's regulations; LBP-11-6, 73 NRC 149 (2011)
whether the safe shutdown earthquake exceedance in applicant's exemption request does in fact comply with 10 C.F.R. Part 50, Appendix S and 10 C.F.R. 100.23 is a question currently before the NRC Staff

and is thus material to the NRC's licensing decision in this proceeding; LBP-11-10, 73 NRC 424 (2011)
COMBINED LICENSES
an early site permit authorizes the use of a specific site for the construction and operation of a new nuclear power plant, with the actual construction and operation authorized by a subsequently issued COL; LBP-11-10, 73 NRC 424 (2011)
before issuing a combined license, NRC must conclude that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency; LBP-11-6, 73 NRC 149 (2011)
in making the findings required for issuance of a combined license, finality is afforded to those matters resolved in connection with a design certification; LBP-11-7, 73 NRC 254 (2011)
inasmuch as NRC Staff relies on the benefits of proposed units to satisfy an otherwise unmet need for power, the adequacy of the need-for-power assessment is material to granting the proposed combined license; LBP-11-7, 73 NRC 254 (2011)
issuance of an early site permit and the subsequent authorization of construction and operation of a new nuclear power plant qualify as connected actions under 40 C.F.R. 1508.25 and should be evaluated in one environmental impact statement; LBP-11-10, 73 NRC 424 (2011)
licensee who has obtained an early site permit is not required to apply for a combined license or to actually construct and operate a nuclear power plant at the authorized site; LBP-11-10, 73 NRC 424 (2011)
NEPA only requires that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated; LBP-11-7, 73 NRC 254 (2011)
NRC is required to consider severe accident mitigation alternatives in issuing a new operating license; LBP-11-7, 73 NRC 254 (2011)
sheltering must be considered in developing the recommended range of protective actions in an emergency plan; LBP-11-6, 73 NRC 149 (2011)
the final safety analysis report must include information regarding 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; LBP-11-6, 73 NRC 149 (2011)
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materials license regulations contain no express prohibition on foreign ownership, but require Staff to make a finding that license issuance will not be inimical to the common defense and security or the health and safety of the public; LBP-11-11, 73 NRC 455 (2011)
NRC may deny uranium enrichment facility applicant a license based on foreign ownership, control, or domination concerns to the extent it concludes granting such a license would be inimical to the common defense and security or the health and safety of the public; LBP-11-11, 73 NRC 455 (2011)
requesting authorization from the Commission for the board, on its own motion, to examine and decide the serious safety or common defense and security matters underlying contentions is allowed to be used for matters that were initially raised by a party, where that party later withdrew; LBP-11-9, 73 NRC 391 (2011)
the pertinent language in 10 C.F.R. 70.31(d) and 40.32(d) tracks the statutory language identically, i.e., "inimical to the common defense and security or the health and safety of the public"; LBP-11-11, 73 NRC 455 (2011)
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combined license applicant's emergency plan must contain and describe adequate provisions for emergency facilities and equipment, including at least one onsite and one offsite communications system, each of which shall have a backup power source; LBP-11-15, 73 NRC 629 (2011)
COMPLIANCE
although NUREGs are not legally binding, they are guidance documents and applicant's failure to comply with such documents can potentially give rise to an admissible contention; LBP-11-6, 73 NRC 149 (2011)
See also Certificate of Compliance; Procedure Compliance

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COMPUTER CODE
- citation of studies indicating that source terms from the Modular Accident Analysis Progression (MAAP) code are lower than results from Source Term Code Package or NUREG-1150 satisfies the requirements of 10 C.F.R. 2.309(f)(1)(v); LBP-11-2, 73 NRC 28 (2011)
- it is not possible simply to plug in and run a different atmospheric dispersion model in the MACCS2 code; LBP-11-2, 73 NRC 28 (2011)
- petitioners' assertions that the MACCS2 code was not subjected to quality assurance requirements is deficient because a SAMA analysis is not subject to such requirements; LBP-11-2, 73 NRC 28 (2011)
- petitioners did not demonstrate that the issue of whether the MACCS2 was subject to quality assurance is material to the findings the NRC must make under NEPA to support the requested license extension; LBP-11-13, 73 NRC 534 (2011)
- petitioners do not provide any alleged facts or expert support indicating that the river valley is within the geographic area for which applicant was required to model atmospheric dispersion; LBP-11-13, 73 NRC 534 (2011)
- the Gaussian plume model's incorporation in the MACCS2 code and the wide, customary use of the code are not a sufficient grounds to exclude the code's integral dispersion model from all challenge if adequate support is provided for a contention; LBP-11-2, 73 NRC 28 (2011)

CONFIDENTIAL INFORMATION
- petitioners have an affirmative obligation to request confidential and proprietary information that has not been made publicly available in order to support a proposed contention; LBP-11-9, 73 NRC 391 (2011)
- requests for protected documents shall be filed within 60 days of the listing of the document on the privilege log and, in any event, no later than 10 days after the deadline for filing rebuttal testimony; LBP-11-5, 73 NRC 131 (2011)
- the SUNSI policy does not expand upon or create any new category of legally privileged or confidential information that is exempt from discovery or from mandatory disclosure; LBP-11-5, 73 NRC 131 (2011)

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- aesthetic impacts of energy sources may vary according to individual location; LBP-11-4, 73 NRC 91 (2011)
- agencies need only discuss those alternatives that are reasonable and will bring about the ends of the proposed action; LBP-11-13, 73 NRC 534 (2011)
- agency's consideration of three alternative routes is sufficient to meet its NEPA obligations to consider reasonable transmission line route alternatives; LBP-11-6, 73 NRC 149 (2011)
- allegation that multiple, unrelated sources of electricity ought to be evaluated collectively is inadmissible; LBP-11-2, 73 NRC 28 (2011)
- although there are many possible combinations of wind and solar power, storage, and natural gas, it is not necessary to examine every possible combination; LBP-11-4, 73 NRC 91 (2011)
- an alternative that fails to meet the purpose of the project does not need to be further examined in the environmental report; LBP-11-6, 73 NRC 149 (2011)
- an environmental impact statement must describe the potential environmental impact of the proposed action and discuss any reasonable alternatives; LBP-11-7, 73 NRC 254 (2011)
- an environmental report need only consider the range of alternatives that are capable of achieving the goals of the proposed action; LBP-11-13, 73 NRC 534 (2011)
- applicant's alternatives analysis must be sufficiently complete to aid the Commission in developing and exploring appropriate alternatives to the proposed action; LBP-11-13, 73 NRC 534 (2011)
- applicant's alternatives analysis need not discuss every conceivable alternative to the proposed action, but rather only feasible, nonspeculative, and reasonable alternatives; LBP-11-13, 73 NRC 534 (2011)
- applicant's environmental report must discuss appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources; LBP-11-6, 73 NRC 149 (2011)
- applicants must evaluate alternative sites to determine whether there is any obviously superior alternative to the site proposed; LBP-11-16, 73 NRC 645 (2011)
- applicant's obligation is to consider alternatives as they exist and are likely to exist; LBP-11-2, 73 NRC 28 (2011)

because a solely wind- or solar-powered facility could not satisfy the projects purpose, there was no need to compare the impact of such facilities to the impact of the proposed nuclear plant; LBP-11-7, 73 NRC 254 (2011)
discussion of need for power is required in an environmental report, but applicant need not precisely identify future market conditions and energy demand or develop other detailed analyses in order to establish with certainty that construction and operation of a nuclear power plant is the most economical alternative; LBP-11-6, 73 NRC 149 (2011)
energy efficiency alternative is excluded because it would not advance applicant's goal to provide additional baseload electrical generation capacity for use in the owner's current markets and/or for potential sale on the wholesale markets; LBP-11-7, 73 NRC 254 (2011)
federal agencies must rigorously explore and objectively evaluate all reasonable alternatives and devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits; LBP-11-14, 73 NRC 591 (2011)
generation of baseload power is an acceptable purpose for a licensing action and has been determined to be broad enough to permit consideration of a host of energy-generating alternatives; LBP-11-13, 73 NRC 534 (2011)
if the adverse environmental impacts of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs; LBP-11-14, 73 NRC 591 (2011)
license renewal applicant must file an environmental report that includes an alternatives analysis that considers and balances the environmental impacts of alternatives to the proposed action, and alternatives available for reducing or avoiding adverse environmental effects; LBP-11-13, 73 NRC 534 (2011)
merely describing an alternative is insufficient to comply with NEPA; LBP-11-14, 73 NRC 591 (2011)
need for power is a shorthand expression for the benefit side of the cost-benefit balance that NEPA mandates for a proceeding considering the licensing of a nuclear power plant; LBP-11-6, 73 NRC 149 (2011)
NEPA requires that an environmental review provide a sufficient discussion of alternatives to enable the decisionmaker to take a hard look at environmental factors, and to make a reasoned decision; LBP-11-13, 73 NRC 534 (2011)
NEPA's requirement to discuss alternatives to the proposed action does not extend to the construction of transmission line corridors, because it is not "construction" as defined in 10 C.F.R. 50.10; LBP-11-6, 73 NRC 149 (2011)
NEPA's rule of reason would not exclude consideration of demand-side management as part of an alternatives analysis when applicant is a state-regulated utility; LBP-11-6, 73 NRC 149 (2011)
NRC generally defers to an applicant's stated purpose as long as that purpose is not so narrow as to eliminate alternatives; LBP-11-13, 73 NRC 534 (2011)
NRC Staff is to consider and weigh the environmental, technical, and other costs and benefits of a proposed action and alternatives, and, to the fullest extent practicable, quantify the various factors considered; LBP-11-7, 73 NRC 254 (2011)
remote and speculative alternatives need not be addressed in an applicant's environmental report; LBP-11-2, 73 NRC 28 (2011)
the alternatives analysis is the heart of the environmental impact analysis; LBP-11-16, 73 NRC 645 (2011)
the concept of alternatives evolves, and agencies must explore alternatives as they become better known and understood; LBP-11-13, 73 NRC 534 (2011)
the extent to which operation and maintenance costs of a solar facility may present a comparative benefit is immaterial since the four-part combination of alternative energy sources is not environmentally preferable to two new nuclear units; LBP-11-4, 73 NRC 91 (2011)
the record of decision must discuss relevant factors including economic and technical considerations among alternatives; LBP-11-7, 73 NRC 254 (2011)
there exists an obligation to consider alternatives as they exist and are likely to exist; LBP-11-13, 73 NRC 534 (2011)
weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations; LBP-11-7, 73 NRC 254 (2011)

when a contention alleges the need for further study of an alternative, from an environmental perspective, such reasonableness determinations are the merits, and should only be decided after the contention is admitted; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
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any consolidation of multiple parties' presentations of evidence that would prejudice the rights of any party may not be ordered; LBP-11-4, 73 NRC 91 (2011)
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certain "construction" activities are allowed at a reactor site pursuant to a limited work authorization as long as a site redress plan is submitted; LBP-11-11, 73 NRC 455 (2011)
"commencement of construction" is defined to include clearing of land, excavation, or other substantial action that would adversely affect the environment of the site; LBP-11-11, 73 NRC 455 (2011)
for a proposed nuclear materials-related activity, including uranium enrichment, commencement of construction prior to a favorable Staff conclusion regarding the NEPA cost-benefit balance is grounds for denial of the authorization to conduct that activity; LBP-11-11, 73 NRC 455 (2011)
NEPA's requirement to discuss alternatives to the proposed action does not extend to the construction of transmission line corridors, because it is not "construction" as defined in 10 C.F.R. 50.10; LBP-11-6, 73 NRC 149 (2011)
under 10 C.F.R. 40.41(g) and 70.32(k), a uranium enrichment facility cannot be operated until the agency verifies through inspection that the facility has been constructed in accordance with the license; LBP-11-11, 73 NRC 455 (2011)
CONSTRUCTION OF MEANING
boards are to construe intervention petitions in favor of petitioners in determining whether petitioner has demonstrated standing; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
See also Statutory Construction
CONSULTATION DUTY
all motions must include a certification that movant has made a sincere effort to contact other parties in the proceeding and resolve the issue raised in the motion, and that the movant's efforts to resolve the issue have been unsuccessful; LBP-11-2, 73 NRC 28 (2011); LBP-11-15, 73 NRC 629 (2011)
because applicant did not comply with the consultation requirement of 10 C.F.R. 2.323(b), the board does not consider information supplied with applicant's letter in connection with the board's analysis of petitioner's contention; LBP-11-2, 73 NRC 28 (2011)
CONTENTIONS
a board's conclusion that a contention is one of omission is driven by its examination of the contention, including its underlying arguments; LBP-11-6, 73 NRC 149 (2011)
a contention based solely upon omissions from the environmental report is rendered moot when the missing information is supplied; LBP-11-14, 73 NRC 591 (2011)
a contention of omission alleges that an application suffers from an improper omission, whereas a contention of adequacy raises a specific substantive challenge to how particular information or issues have been discussed in the application; LBP-11-6, 73 NRC 149 (2011)
although applicant has the ultimate burden of proof on any issues upon which a hearing is held, hearings are held on only those issues that an intervenor brings to the fore; LBP-11-4, 73 NRC 91 (2011)
an environmental report's adequacy is examined under the auspices of NEPA because the ER is the foundation upon which NRC's environmental impact statement is prepared and contentions that seek compliance with NEPA must be based on that environmental report; LBP-11-13, 73 NRC 534 (2011)
any person or organization seeking to intervene as a party in an NRC adjudicatory proceeding addressing a proposed licensing action must establish standing and proffer at least one admissible contention; LBP-11-13, 73 NRC 534 (2011)
boards may reformulate contentions to consolidate issues for a more efficient proceeding; LBP-11-13, 73 NRC 534 (2011)
if all matters at issue in a contention of omission are addressed by NRC Staff in its draft environmental impact statement through the actual provision of information on all such matters, then no legal interest in that contention remains, and the contention is moot; LBP-11-4, 73 NRC 91 (2011)

in ruling on whether a contention is moot, boards look to whether a justiciable controversy still exists and whether an issue is still live, such that a party still has a legal interest in the issue; LBP-11-4, 73 NRC 91 (2011)
it is possible for a contention to contain an omission component and an inadequacy component; LBP-11-6, 73 NRC 149 (2011)
on issues arising under NEPA, intervenor must file contentions based on the applicant's environmental report, but may amend those contentions or file new contentions; LBP-11-7, 73 NRC 254 (2011)
where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant, the contention is moot; LBP-11-16, 73 NRC 645 (2011)
See also Amendment of Contentions
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a brief explanation of the basis for a contention is required; LBP-11-13, 73 NRC 534 (2011)
a conclusory assertion, even if made by an expert, is inadequate because it deprives the board of the ability to make the necessary, reflective assessment of the opinion; LBP-11-6, 73 NRC 149 (2011)
a contention must be rejected if it attacks applicable statutory requirements or regulations, challenges the basic structure of the regulatory process, merely expresses petitioner's view of policy, seeks to raise an issue improper for adjudication in the proceeding or not applicable to the facility in question, or raises an issue that is not concrete or is otherwise not litigable; LBP-11-6, 73 NRC 149 (2011)
a contention of omission may be summarily rejected as inadmissible if there is no requirement to address the topic allegedly omitted from the application or the topic that allegedly is omitted is in fact included in the application; LBP-11-6, 73 NRC 149 (2011)
a contention should be deemed resolved during the early site permit proceeding if the subject of the contention was actually litigated and decided during the ESP proceeding, or, although not actually litigated, was decided by the Staff, was necessary for the Staff to resolve in the ESP proceeding, and was within the scope of that proceeding as defined in the *Federal Register* notice of opportunity for a hearing; LBP-11-10, 73 NRC 424 (2011)
a contention that was originally admitted as a challenge to the environmental report may be treated as a challenge to the similar section of the draft environmental impact statement; LBP-11-1, 73 NRC 19 (2011)
a late-filed contention is inadmissible both for lack of a good-cause showing and for failure to address the other factors of 10 C.F.R. 2.309(c)(1); LBP-11-6, 73 NRC 149 (2011)
a late-filed contention shall not be considered by a licensing board unless the petitioner demonstrates that a multifactor balancing test weighs in favor of consideration; LBP-11-6, 73 NRC 149 (2011)
a matter resolved in an early site permit proceeding may be revisited in the combined license proceeding when new and significant information is presented; LBP-11-10, 73 NRC 424 (2011)
a newly proffered contention that does not satisfy the timeliness requirements of section 2.309(f)(2) may still be considered for admission if it satisfies section 2.309(c)(1); LBP-11-15, 73 NRC 629 (2011)
a nontimely proposed contention may be admissible if, on balance, it satisfies eight criteria; LBP-11-7, 73 NRC 254 (2011)
a proposed new contention will be considered timely if it is filed within 30 days of the date when the new and material information on which the proposed contention is based first becomes available; LBP-11-7, 73 NRC 254 (2011)
a SAMA contention is admissible only if it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated; LBP-11-13, 73 NRC 534 (2011)
a test for materiality that would require petitioners to demonstrate quantitatively how an alleged defect would result in a violation of pertinent requirements is rejected; LBP-11-7, 73 NRC 254 (2011)
a vague accusation does not rise to the level of an admissible genuine dispute of material fact or law; LBP-11-10, 73 NRC 424 (2011)
absent a waiver, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011); LBP-11-16, 73 NRC 645 (2011)
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allegation of omission, not of inadequacy, in an environmental report's analysis of socioeconomic impacts raises an issue that is not material to any finding NRC must make in an early site permit proceeding; LBP-11-16, 73 NRC 645 (2011)

allegation that applicant's site assessment has inadequately characterized the rate of movement of growth faults at the site, as it relates to its analysis of surface deformation, is admissible; LBP-11-16, 73 NRC 645 (2011)

allegation that multiple, unrelated sources of electricity ought to be evaluated collectively is inadmissible; LBP-11-2, 73 NRC 28 (2011)

allegation that other costs were ignored is not admissible because petitioners presented no facts or expert opinion that show it to be plausible that including them might affect the outcome of the severe accident mitigation alternatives analysis; LBP-11-2, 73 NRC 28 (2011)

alternatives for reducing adverse environmental impacts, including impacts of severe accidents, are among the limited issues within the scope of a license renewal proceeding; LBP-11-13, 73 NRC 534 (2011)

although 10 C.F.R. 2.337(f), by its terms, applies to evidence at hearings, the bounds that this rule places on official notice is also appropriate for the contention admissibility stage of a proceeding; LBP-11-7, 73 NRC 254 (2011)

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-11-16, 73 NRC 645 (2011)

although a licensing board is not required to recast contentions to make them acceptable, it is also not precluded from doing so; LBP-11-13, 73 NRC 534 (2011)

although NRC Staff's argument against contention admission appears to have some weight, the board need not resolve it, because the contention is inadmissible for failing to raise a genuine dispute of material fact or law with the environmental report; LBP-11-6, 73 NRC 149 (2011)

although NUREGs are not legally binding, they are guidance documents, and applicant's failure to comply with such documents could give rise to an admissible contention; LBP-11-6, 73 NRC 149 (2011)

although petitioner proffered a contention within 30 days of events that prompted it, this does not automatically render a newly proffered contention timely; LBP-11-15, 73 NRC 629 (2011)

although the COLA is not expressly required to consider sea level rise, the board decides that the issue is within the scope of a combined license proceeding; LBP-11-6, 73 NRC 149 (2011)

among the limited issues within the scope of a license renewal proceeding are alternatives for reducing adverse environmental impacts listed as Category 2 issues in Appendix B to Subpart A of 10 C.F.R. Part 51; LBP-11-2, 73 NRC 28 (2011)

an admissible contention must satisfy six pleading requirements; LBP-11-2, 73 NRC 28 (2011; LBP-11-13, 73 NRC 534 (2011)

applicant's change of legal position, its claims that such change no longer entails a need for an exemption from the regulations, and its identification of new means/systems to satisfy the regulations are all types of materially different new information that can enable a contention to satisfy the timely new or amended contention requirements of 10 C.F.R. 2.309(f)(2)(i)-(ii); LBP-11-9, 73 NRC 391 (2011)

as a matter of law and logic, if applicant's enhanced program is inadequate, then applicant's unenhanced program is a fortiori inadequate, and intervenor has a regulatory obligation to challenge it in its original petition to intervene; LBP-11-9, 73 NRC 391 (2011)

assertion that a license renewal environmental report must include a discussion of need for power is inadmissible; LBP-11-13, 73 NRC 534 (2011)

at the admission stage, petitioners should provide a minimal showing that material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate; LBP-11-13, 73 NRC 534 (2011)

availability of new information may provide good cause for nontimely filing, but the test for good cause is not simply when the intervenor became aware of the material sought to be introduced but when the information became available and when the intervenor reasonably should have become aware of the information; LBP-11-7, 73 NRC 254 (2011)

basic admissibility criteria that all contentions must satisfy are governed by 10 C.F.R. 2.309(f)(1); LBP-11-9, 73 NRC 391 (2011)

because petitioner's issue of the inadvertent release of radioactivity does not specifically relate to the ability of buried structures to perform their intended functions as defined by 10 C.F.R. 54.4(a)(1)-(3), the contention is not within the scope of a license renewal proceeding; LBP-11-2, 73 NRC 28 (2011)

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board members are not required to comb through the record seeking support for contentions; LBP-11-13, 73 NRC 534 (2011)
boards admit contentions, not their supporting bases; LBP-11-2, 73 NRC 28 (2011)
boards do not adjudicate disputed facts at the contention admission stage; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
boards have authority under 10 C.F.R. 2.316, 2.319, 2.329 to further define petitioners' admitted contentions when redrafting would clarify the scope of the contentions; LBP-11-13, 73 NRC 534 (2011)
boards may reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding; LBP-11-6, 73 NRC 149 (2011)
boards must do more than uncritically accept a party's mere assertion that a particular document supplies the basis for its contention, without even reviewing the document itself to determine if it appears to support a litigable contention; LBP-11-6, 73 NRC 149 (2011)
boards must not adjudicate the merits of allegations at the contention admission stage, but, to be admissible, a contention must provide more than a bare assertion, and must explain the supporting reasons for the dispute; LBP-11-16, 73 NRC 645 (2011)
Category 1 issues are not subject to challenge in a relicensing proceeding because they involve environmental effects that are essentially similar for all plants and need not be assessed repeatedly on a site-specific basis; LBP-11-13, 73 NRC 534 (2011)
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Congress called upon the Commission to make fundamental changes in its public hearing process to ensure that hearings adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors; LBP-11-6, 73 NRC 149 (2011)
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contention challenging the Waste Confidence Rule may not be admitted absent a waiver or exception; LBP-11-16, 73 NRC 645 (2011)
contention claiming that the application insufficiently addresses the safety implications of low water availability is inadmissible for failure to raise a genuine dispute with the application because the contention does not provide specific references to relevant sections of the site safety analysis report that address low-water considerations; LBP-11-16, 73 NRC 645 (2011)
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unplugged oil and gas wells and borings fails to comply with NRC requirements is admissible; LBP-11-16, 73 NRC 645 (2011)
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contention that applicant's severe accident mitigation alternatives analysis improperly ignored radioactive waste disposal is outside the scope of the proceeding because it directly challenges the generic determinations in Table B-1 of Appendix B to Part 51; LBP-11-2, 73 NRC 28 (2011)
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contentions based on new information in a document that was not previously available and that is materially different from a document that was previously available are not untimely simply for not being included in an intervenor's initial hearing request filed at the outset of a proceeding; LBP-11-9, 73 NRC 391 (2011)
contentions challenging the ability of combined license applicants to handle onsite storage of Classes B and C low-level radioactive waste, as well as the attendant potential environmental impacts of such storage in the wake of the closure of the Barnwell facility in South Carolina to states outside of the Atlantic Compact are admissible; LBP-11-6, 73 NRC 149 (2011)
contentions concerning benefits assessment shall not be admitted if the applicant does not address those issues in the early site permit application; LBP-11-16, 73 NRC 645 (2011)
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contentions that address an important security issue regarding Part 74's strict requirements for the proposed facility, which applicant previously admitted it failed to satisfy, are admissible; LBP-11-9, 73 NRC 391 (2011)
criteria that nontimely contentions must address are governed by 10 C.F.R. 2.309(c); LBP-11-9, 73 NRC 391 (2011)
current operating issues are, by their very nature, beyond the scope of license renewal proceedings; CLI-11-2, 73 NRC 333 (2011)
energy efficiency alternative is excluded because it would not advance applicant's goal to provide additional baseload electrical generation capacity for use in the owner's current markets and/or for potential sale on the wholesale markets; LBP-11-7, 73 NRC 254 (2011)
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"good cause" for late filing is defined as a showing that petitioner could not have met the filing deadline and filed as soon as possible thereafter; LBP-11-7, 73 NRC 254 (2011)
hearing petitioners have an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to uncover any information that could serve as the foundation for a specific contention; LBP-11-9, 73 NRC 391 (2011)
if a new contention is not timely filed, it must meet an eight-factor test to be deemed admissible; LBP-11-10, 73 NRC 424 (2011)
if a proposed new contention that is filed after the initial filing period set forth in the hearing notice is not timely under 10 C.F.R. 2.309(f)(2)(iii), then proponent must address the eight criteria of section 2.309(c)(1) and show that a balance of these factors weighs in favor of admitting that contention; LBP-11-9, 73 NRC 391 (2011)
if good cause is not shown, a board may still permit the late filing, but petitioner or intervenor must make a strong showing on the other factors of 10 C.F.R. 2.309(c); LBP-11-9, 73 NRC 391 (2011)
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if, within 60 days after pertinent information supporting a new contention first becomes available, Intervenors submit a particularized and otherwise admissible contention regarding construction of a mixed oxide facility, then the contention will be deemed timely without the need to satisfy the balancing test for late-filing requirements or the requirements for reopening the record; LBP-11-9, 73 NRC 391 (2011)
in addressing the good cause factor for late filing, petitioner must explain not only why it failed to file within the time required, but also why it did not file as soon thereafter as possible; LBP-11-7, 73 NRC 254 (2011)
in analyzing the admissibility of a proffered contention, a licensing board need not turn a blind eye to those portions of a petitioner's exhibits that might militate against admissibility; LBP-11-6, 73 NRC 149 (2011)
in any combined license proceeding referencing an early site permit, contentions may be litigated on whether the nuclear power reactor proposed to be built does not fit within one or more of the site characteristics or design parameters included in the early site permit; LBP-11-10, 73 NRC 424 (2011)
inasmuch as NRC Staff relies on the benefits of proposed units to satisfy an otherwise unmet need for power, the adequacy of the need-for-power assessment is material to granting the proposed combined license; LBP-11-7, 73 NRC 254 (2011)
insofar as a contention requests consideration of a dry cooling design alternative, that matter must be considered resolved in the early site permit proceeding; LBP-11-10, 73 NRC 424 (2011)
intervenor may file a new or amended contention challenging relevant new portions of the draft environmental impact statement that differ from applicant's environmental report; LBP-11-1, 73 NRC 19 (2011)
intervenors' challenges to adequacy of applicant's environmental report with respect to environmental impacts of dewatering associated with the proposed nuclear plant continue to serve as viable challenges to similar sections of Staff's draft environmental impact statement and thus are not moot; LBP-11-1, 73 NRC 19 (2011)
intervenors have demonstrated their ability to contribute to the development of a sound record where they have put forward in support of those contentions the views of a witness whose expertise has been recognized in other NRC proceedings; LBP-11-9, 73 NRC 391 (2011)
intervenors need only demonstrate that the issue raised in the contention is material to a licensing decision, i.e., that the issue would make a difference in the decision; LBP-11-7, 73 NRC 254 (2011)
it is insufficient for petitioner to point to an Internet Web site or article and expect the board on its own to discern what particular issue a petitioner is raising, including what section of the application, if any, is being challenged as deficient and why; LBP-11-6, 73 NRC 149 (2011)
it is not the function of a licensing board to comb through the record searching for arguments in support of a proffered contention; LBP-11-6, 73 NRC 149 (2011)
judges are not like pigs, hunting for truffles buried in briefs; LBP-11-6, 73 NRC 149 (2011)

license renewal is limited to age-related issues, not issues already monitored and reviewed in the ongoing regulatory oversight processes; CLI-11-2, 73 NRC 333 (2011)
licensing boards are bound to admit for litigation contentions that are material and supported by reasonably specific factual and legal allegations; LBP-11-6, 73 NRC 149 (2011)
mere existence of comments and questions generated by NRC Staff do not, in and of themselves, demonstrate a material deficiency in applicant's combined license application; LBP-11-6, 73 NRC 149 (2011)
mere notice pleading is insufficient for contention admission; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011); LBP-11-16, 73 NRC 645 (2011)
merits determination cannot be resolved at the contention admission stage of the proceeding; LBP-11-6, 73 NRC 149 (2011)
new and amended contentions submitted after an intervenor's initial hearing request are evaluated under 10 C.F.R. 2.309(f)(2) for timeliness and, if found timely, their general admissibility is analyzed pursuant to section 2.309(f)(1); LBP-11-10, 73 NRC 424 (2011)
new or amended contentions are considered to be timely if filed within 60 days of any triggering event; LBP-11-9, 73 NRC 391 (2011)
not only must intervenor act promptly after learning of new information, but the information itself must be new information, not information already in the public domain; LBP-11-7, 73 NRC 254 (2011)
NRC adjudicatory hearings are not environmental impact statement editing sessions; LBP-11-2, 73 NRC 28 (2011)
NRC regulations do not allow use of reply briefs to provide, for the first time, the necessary threshold support for contentions; LBP-11-6, 73 NRC 149 (2011)
Part 51's license renewal provisions cover environmental issues relating to onsite spent fuel storage generically and all such issues, including accident risk, fall outside the scope of license renewal proceedings; LBP-11-13, 73 NRC 534 (2011)
parties are expected to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point; LBP-11-6, 73 NRC 149 (2011)
petitioner does not have to prove its contentions at the admission stage; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011); LBP-11-14, 73 NRC 591 (2011)
petitioner impermissibly assumes that applicant will violate applicable state law regarding its treatment of wells at the site; LBP-11-16, 73 NRC 645 (2011)
petitioner lacked good cause for a hearing request filed 7 days after the filing deadline when the argument relied on a misimpression of due dates; LBP-11-9, 73 NRC 391 (2011)
petitioner may not rely on a document generated by a state agency if that document contains nothing more than a request for information; LBP-11-6, 73 NRC 149 (2011)
petitioner may question the practice for severe accident mitigation alternatives analysis to utilize mean consequence values, which results in an averaging of potential consequences; LBP-11-13, 73 NRC 534 (2011)
petitioner need not prove its contentions at the admissibility stage; LBP-11-16, 73 NRC 645 (2011)
petitioner or intervenor may file timely new or amended contentions, with leave of the board, if three requirements are met; LBP-11-9, 73 NRC 391 (2011)
petitioner, having failed in its revised petition to challenge applicant's reliance on the generic environmental impact statement cannot raise that challenge for the first time in its reply; LBP-11-6, 73 NRC 149 (2011)
petitioner's assertion that severe accidents from spent fuel pools must be considered in applicant's SAMA analysis is in direct conflict with NRC regulations; LBP-11-2, 73 NRC 28 (2011)
petitioners' assertions that the MACCS2 code was not subjected to quality assurance requirements is deficient because a severe accident mitigation alternatives analysis is not subject to such requirements; LBP-11-2, 73 NRC 28 (2011)
petitioner's demand for compliance with U.S. Army Corps of Engineers requirements is not within the scope of a combined license proceeding, because it is not the province of the NRC to enforce another agency's regulations; LBP-11-6, 73 NRC 149 (2011)
petitioners did not demonstrate that the issue of whether the MACCS2 was subject to quality assurance is material to the findings the NRC must make under NEPA to support the requested license extension; LBP-11-13, 73 NRC 534 (2011)

petitioners do not provide any alleged facts or expert support indicating that the river valley is within the geographic area for which applicant was required to model atmospheric dispersion; LBP-11-13, 73 NRC 534 (2011)
petitioners have an affirmative obligation to request confidential and proprietary information that has not been made publicly available in order to support a proposed contention; LBP-11-9, 73 NRC 391 (2011)
petitioners have not established that use of another source term would identify additional cost-beneficial severe accident mitigation alternatives; LBP-11-13, 73 NRC 534 (2011)
petitioner's issue will be ruled inadmissible if the petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation; LBP-11-6, 73 NRC 149 (2011)
potential legislative action that might result in a reduction in demand is speculative and therefore does not provide a basis for admission of a contention on need for power; LBP-11-7, 73 NRC 254 (2011)
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referencing an aging management program described in the GALL Report does not insulate a program from an adequately supported challenge at a hearing; LBP-11-2, 73 NRC 28 (2011)
regardless of when filed, all proposed contentions must comply with the general contention admissibility criteria; LBP-11-7, 73 NRC 254 (2011)
relitigation of an issue previously decided by a licensing board or the Commission may also be barred by the doctrine of collateral estoppel; LBP-11-10, 73 NRC 424 (2011)
requiring petitioners to proffer additional and conclusive support for the effect of their proposed contention would improperly require boards to adjudicate the merits of contentions before admitting them; LBP-11-7, 73 NRC 254 (2011)
safety issues that are routinely addressed through the agency's ongoing regulatory oversight are outside the scope of license renewal proceedings because considering them in that context would be unnecessary and wasteful; LBP-11-2, 73 NRC 28 (2011)
severe accident mitigation alternatives contentions are admissible only if it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated; LBP-11-2, 73 NRC 28 (2011)
the Commission toughened its contention admissibility rule in 1989 to ensure that only intervenors with genuine and particularized concerns participate in NRC hearings; LBP-11-6, 73 NRC 149 (2011)
the contention admissibility rule serves to ensure that admitted contentions focus on real disputes that can be resolved in an adjudication, establish a sufficient factual and legal foundation to warrant further inquiry, and put other parties on notice of the disputed issues so they will know precisely those claims they must support or oppose; LBP-11-6, 73 NRC 149 (2011)
the contention admissibility rule should not serve as a fortress to deny intervention; LBP-11-6, 73 NRC 149 (2011)
the contention admissibility test in section 2.309(f)(1) was crafted by the Commission to raise the threshold bar for an admissible contention; LBP-11-6, 73 NRC 149 (2011)
the determination that, for any license renewal of a nuclear power plant, the probability-weighted consequences of a severe accident are small cannot be challenged; LBP-11-2, 73 NRC 28 (2011)
the Gaussian plume model's incorporation in the MACCS2 code and the wide, customary use of the code are not sufficient grounds to exclude the code's integral dispersion model from all challenge if adequate support is provided for a contention; LBP-11-2, 73 NRC 28 (2011)
the intent of 10 C.F.R. 2.309(f)(1) is to focus litigation on concrete issues and result in a clearer and more focused record for decision and to ensure that the Commission expends resources to support the hearing process only for issues that are appropriate for, and susceptible to, resolution in an NRC hearing; LBP-11-16, 73 NRC 645 (2011)
the migration tenet applies where the information in the draft environmental impact statement is sufficiently similar to the information in the environmental report; LBP-11-1, 73 NRC 19 (2011)
the multifactor contention admissibility test in section 2.309(f)(1) is strict by design; LBP-11-6, 73 NRC 149 (2011); LBP-11-16, 73 NRC 645 (2011)
the presiding officer may restrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments; LBP-11-13, 73 NRC 534 (2011)

the scope of an admitted contention is determined by the bases set forth in support of the contention; LBP-11-14, 73 NRC 591 (2011)
the trigger date for a filing period can be especially unclear where both public and nonpublic documents associated with a proceeding are produced and where an applicant's stated compliance with NRC regulations shifts over time; LBP-11-9, 73 NRC 391 (2011)
the ultimate concern in a SAMA contention is whether any additional SAMA should have been identified as potentially cost-beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis; LBP-11-13, 73 NRC 534 (2011)
the ultimate issue on severe accident mitigation alternatives analysis is whether any additional SAMA should have been identified as potentially cost-beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis; LBP-11-2, 73 NRC 28 (2011)
to be admissible, a newly proffered contention must satisfy either the timeliness standards in 10 C.F.R. 2.309(f)(2) or the standards in 10 C.F.R. 2.309(c)(1) for newly proffered nontimely contentions, and the contention admissibility standards in 10 C.F.R. 2.309(f)(1); LBP-11-15, 73 NRC 629 (2011)
to be admissible, all contentions must satisfy the six criteria of 10 C.F.R. 2.309(f)(1); LBP-11-16, 73 NRC 645 (2011)
to participate in a proceeding as an intervenor, petitioner must establish standing and proffer at least one admissible contention; LBP-11-6, 73 NRC 149 (2011); LBP-11-16, 73 NRC 645 (2011)
to show that it is within the realm of reason that the federal government may assert an implied water right, petitioner must provide some indicia of an attempt, plan, or intention; LBP-11-16, 73 NRC 645 (2011)
to the extent a contention is premised on error, it is inadmissible for failing to raise a genuine dispute of fact; LBP-11-6, 73 NRC 149 (2011)
to the extent petitioner seeks to raise a generic challenge to the 10-mile plume exposure pathway EPZ, such an argument constitutes an impermissible challenge NRC regulations; LBP-11-15, 73 NRC 629 (2011)
under 10 C.F.R. 2.309(f)(1), petitioner need only properly allege a defect in meeting materiality requirement; LBP-11-7, 73 NRC 254 (2011)
under the previous contention admissibility rule, a contention could be admitted and litigated based on little more than speculation, with parties attempting to unearth a case through cross-examination; LBP-11-6, 73 NRC 149 (2011)
when a contention alleges the need for further study of an alternative, from an environmental perspective, such reasonableness determinations are the merits, and should only be decided after the contention is admitted; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
when NRC Staff issues the environmental impact statement, intervenors have an opportunity to either amend admitted contentions or proffer new contentions based on data or conclusions in the NRC draft or final EIS or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents; LBP-11-6, 73 NRC 149 (2011)
where applicant deletes a material portion of its application and replaces it with a changed explanation of legal compliance, that replacement is materially different information that was previously unavailable and thus can satisfy the requirements of 10 C.F.R. § 2.309(f)(2)(i)-(ii); LBP-11-9, 73 NRC 391 (2011)
where good cause is not shown for the late filing of a contention, the requestor's demonstration on the other factors must be particularly strong; LBP-11-15, 73 NRC 629 (2011)
where implementation of a building code could not make a difference in the outcome of the proceeding, it cannot be material; LBP-11-7, 73 NRC 254 (2011)
with respect to contentions filed after the initial petition, failure to address the requirements of 10 C.F.R. 2.309(c) and 2.309(f)(2) is reason enough to reject the new contentions; LBP-11-7, 73 NRC 254 (2011)
CONTENTIONS, LATE-FILED
a late-filed contention is inadmissible both for lack of a good-cause showing and for failure to address the other factors of 10 C.F.R. 2.309(c)(1); LBP-11-6, 73 NRC 149 (2011)
a newly proffered contention that does not satisfy the timeliness requirements of section 2.309(f)(2) may still be considered for admission if it satisfies section 2.309(c)(1); LBP-11-15, 73 NRC 629 (2011)
a nontimely proposed contention may be admissible if, on balance, it satisfies eight criteria; LBP-11-7, 73 NRC 254 (2011)

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admission is allowed only upon a showing that information upon which the new contention is based was not previously available and is materially different than information previously available and the new contention has been submitted in a timely fashion based on the availability of the subsequent information; CLI-11-2, 73 NRC 333 (2011)

although petitioner proffered a contention within 30 days of events that prompted it, this does not automatically render a newly proffered contention timely; LBP-11-15, 73 NRC 629 (2011)

applicant's change of legal position, its claims that such change no longer entails a need for an exemption from the regulations, and its identification of new means/systems to satisfy the regulations are all types of materially different new information that can enable a contention to satisfy the timely new or amended contention requirements of 10 C.F.R. 2.309(f)(2)(i)-(ii); LBP-11-9, 73 NRC 391 (2011)

as a matter of law and logic if applicant's enhanced program is inadequate, then applicant's unenhanced program is a fortiori inadequate, and intervenor has a regulatory obligation to challenge it in their original petition to intervene; LBP-11-9, 73 NRC 391 (2011)

availability of new information may provide good cause for nontimely filing, but the test for good cause is not simply when the intervenor became aware of the material sought to be introduced but when the information became available and when the intervenor reasonably should have become aware of the information; LBP-11-7, 73 NRC 254 (2011)

basic admissibility criteria that all contentions must satisfy are governed by 10 C.F.R. 2.309(f)(1); LBP-11-9, 73 NRC 391 (2011)

challenges to an enhanced version of an application alone are insufficient to vitiate intervenors' obligation to file any challenges to the original version of that application at the outset of the proceeding; LBP-11-9, 73 NRC 391 (2011)

contentions based on new information in a document that was not previously available and that is materially different from a document that was previously available are not untimely simply for not being included in an intervenor's initial hearing request filed at the outset of a proceeding; LBP-11-9, 73 NRC 391 (2011)

criteria that nontimely contentions must address are governed by 10 C.F.R. 2.309(c); LBP-11-9, 73 NRC 391 (2011)

documents merely summarizing earlier documents or compiling preexisting, publicly available information into a single source do not render "new" the summarized or compiled information; CLI-11-2, 73 NRC 333 (2011)

factors that timely new or amended contentions must satisfy are governed by are 10 C.F.R. 2.309(f)(2); LBP-11-9, 73 NRC 391 (2011)

failure to comply with pleading requirements for late filings constitutes sufficient grounds for rejecting intervention and hearing requests; LBP-11-7, 73 NRC 254 (2011)

for a newly proffered contention to be timely, it must be based on information that was not previously available; LBP-11-15, 73 NRC 629 (2011)

good cause for failure to file on time is the most important of the late-filing criteria; LBP-11-7, 73 NRC 254 (2011); LBP-11-6, 73 NRC 149 (2011); LBP-11-9, 73 NRC 391 (2011); LBP-11-10, 73 NRC 424 (2011); LBP-11-15, 73 NRC 629 (2011)

"good cause" for late filing is defined as a showing that petitioner could not have met the filing deadline and filed as soon as possible thereafter; LBP-11-7, 73 NRC 254 (2011)

hearing petitioners have an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to uncover any information that could serve as the foundation for a specific contention; LBP-11-9, 73 NRC 391 (2011)

if a new contention is not timely filed, it must meet an eight-factor test to be deemed admissible; LBP-11-9, 73 NRC 391 (2011); LBP-11-10, 73 NRC 424 (2011)

if good cause is not shown, a board may still permit the late filing, but petitioner or intervenor must make a strong showing on the other factors of 10 C.F.R. 2.309(c); LBP-11-7, 73 NRC 254 (2011); LBP-11-9, 73 NRC 391 (2011); LBP-11-15, 73 NRC 629 (2011)

in addressing the good cause factor for late filing, petitioner must explain not only why it failed to file within the time required, but also why it did not file as soon thereafter as possible; LBP-11-7, 73 NRC 254 (2011)

in the context of a new contention filed after the initial petition, 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-11-2, 73 NRC 333 (2011)
new and amended contentions submitted after an intervenor's initial hearing request are evaluated under 10 C.F.R. 2.309(f)(2) for timeliness and, if found timely, their general admissibility is analyzed pursuant to section 2.309(f)(1); LBP-11-10, 73 NRC 424 (2011)
new or amended contentions are considered to be timely if filed within 60 days of any triggering event; LBP-11-9, 73 NRC 391 (2011)
not only must intervenor act promptly after learning of new information, but the information itself must be new information, not information already in the public domain; LBP-11-7, 73 NRC 254 (2011)
NRC generally considers approximately 30-60 days as the limit for timely filings based on new information; CLI-11-2, 73 NRC 333 (2011)
NRC generally disfavors the filing of new contentions at the eleventh hour of an adjudication, a policy that is grounded in the doctrine of finality, which states that at some point, an adjudicatory proceeding must come to an end; CLI-11-2, 73 NRC 333 (2011)
NRC recognizes an exception to the timeliness requirement in rare instances in which petitioner raises an exceptionally grave issue; CLI-11-2, 73 NRC 333 (2011)
petitioner demonstrates that a multifactor balancing test weighs in favor of consideration; LBP-11-6, 73 NRC 149 (2011)
petitioner lacked good cause for a hearing request filed 7 days after the filing deadline when the argument relied on a misimpression of due dates; LBP-11-9, 73 NRC 391 (2011)
petitioner or intervenor may file timely new or amended contentions, with leave of the board, if the three requirements are met; LBP-11-9, 73 NRC 391 (2011)
petitioner who seeks both to reopen the record and to submit a late contention must successfully satisfy two elevated standards; CLI-11-2, 73 NRC 333 (2011)
standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention; CLI-11-2, 73 NRC 333 (2011)
tardy filing of a contention may be excusable only where the facts upon which the amended or new contention is based were previously unavailable; CLI-11-2, 73 NRC 333 (2011)
the trigger date for a filing period can be especially unclear where both public and nonpublic documents associated with a proceeding are produced and where an applicant's stated compliance with NRC regulations shifts over time; LBP-11-9, 73 NRC 391 (2011)
to be admissible, a newly proffered contention must satisfy either the timeliness standards in 10 C.F.R. 2.309(f)(2) or the standards in 10 C.F.R. 2.309(c)(1) for newly proffered nontimely contentions, and the contention admissibility standards in 10 C.F.R. 2.309(f)(1); LBP-11-15, 73 NRC 629 (2011)
understandable misapprehension of the start of the filing period for contentions, leading to inadvertent late filing of new contentions, establishes good cause to excuse missing the filing deadline pursuant to 10 C.F.R. 2.309(c)(1); LBP-11-9, 73 NRC 391 (2011)
where applicant deletes a material portion of its application and replaces it with a changed explanation of legal compliance, that replacement is materially different information that was previously unavailable and thus can satisfy the requirements of 10 C.F.R. 2.309(f)(2)(i)-(ii); LBP-11-9, 73 NRC 391 (2011)
with respect to contentions filed after the initial petition, failure to address the requirements of 10 C.F.R. 2.309(c) and 2.309(f)(2) is reason enough to reject the new contentions; LBP-11-7, 73 NRC 254 (2011)
CONTROL ROOM
applicant need not submit information regarding control room habitability and ventilation system design in the site safety analysis report portion of an early site permit application; LBP-11-16, 73 NRC 645 (2011)
COOLANT
assurance of adequate cooling water supply for emergency and long-term shutdown decay heat removal shall be considered in the design of the nuclear power plant; LBP-11-16, 73 NRC 645 (2011)
COOLING POND
a mere promise by applicant to follow applicable regulations in capping and abandoning active and inactive oil and gas wells in the footprint of the cooling basin and plant is insufficient to satisfy NRC's regulations; LBP-11-16, 73 NRC 645 (2011)
contention claiming that the environmental report's discussion of environmental effects and cumulative impacts of seepage from the cooling basin into groundwater and surface water through undocumented or

unplugged oil and gas wells and borings fails to comply with NRC requirements is admissible; LBP-11-16, 73 NRC 645 (2011)
even though a cooling pond is not a safety-related structure, knowledge of faulting under the pool and the impact this faulting might have on the pool's operation are required; LBP-11-16, 73 NRC 645 (2011)
COOLING SYSTEMS
a cooling tower and closed-cycle cooling system represent the best available technology and will reduce discharge temperature to the greatest extent possible; LBP-11-14, 73 NRC 591 (2011)
insofar as a contention requests consideration of a dry cooling design alternative, that matter must be considered resolved in the early site permit proceeding; LBP-11-10, 73 NRC 424 (2011)
COST-BENEFIT ANALYSIS
See Benefit-Cost Analysis
COSTS
contention that other costs were ignored is not admissible because petitioners presented no facts or expert opinion that show it to be plausible that including them might affect the outcome of the severe accident mitigation alternatives analysis; LBP-11-2, 73 NRC 28 (2011)
COUNCIL ON ENVIRONMENTAL QUALITY
agencies shall use the criteria for scope in 40 C.F.R. 1508.25 to determine which proposal shall be the subject of a particular environmental impact statement; LBP-11-10, 73 NRC 424 (2011)
in implementing its NEPA obligations, NRC expressly adopts certain definitions promulgated by the CEQ; LBP-11-7, 73 NRC 254 (2011)
CRACKING
request for enforcement action to prevent reactor restart until applicable adequate protection standards regarding zero pressure boundary leakage and operation of the reactor have been met is denied; DD-11-2, 73 NRC 323 (2011)
CREDIBILITY
findings concerning personal knowledge are entirely factual and largely dependent on witness credibility; LBP-11-8, 73 NRC 349 (2011)
CRITICALITY CONTROL
adequacy of nuclear criticality safety manager qualifications for uranium enrichment facility is discussed and a license condition is imposed; LBP-11-11, 73 NRC 455 (2011)
CROSS-EXAMINATION
should the agency's administration of its new procedural rules contradict its present representations that cross-examination will be allowed under the rules when required for a full and true disclosure of the facts or otherwise flout this principle, the rules may be subject to future challenges; LBP-11-4, 73 NRC 91 (2011)
CUMULATIVE IMPACTS ANALYSIS
a draft environmental impact statement does not and cannot treat identified environmental concerns in a vacuum; LBP-11-7, 73 NRC 254 (2011)
an environmental impact statement must consider the direct, indirect, and cumulative impacts of an action; LBP-11-7, 73 NRC 254 (2011)
an environmental report must contain an analysis of the cumulative impacts of the activities to be authorized by a combined license; LBP-11-6, 73 NRC 149 (2011)
cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time; LBP-11-7, 73 NRC 254 (2011)
NRC Staff must consider the cumulative impact of greenhouse gas emissions from a proposed facility; LBP-11-7, 73 NRC 254 (2011)
DEADLINES
a proposed new contention will be considered timely if it is filed within 30 days of the date when the new and material information on which the proposed contention is based first becomes available; LBP-11-7, 73 NRC 254 (2011)
deadline for answer to hearing petition is specified; CLI-11-3, 73 NRC 613 (2011)
deadline for reply to an answer to a hearing petition is specified; CLI-11-3, 73 NRC 613 (2011)
if, within 60 days after pertinent information supporting a new contention first becomes available, intervenors submit a particularized and otherwise admissible contention regarding construction of a mixed oxide facility, then the contention will be deemed timely without the need to satisfy the

balancing test for late-filing requirements or the requirements for reopening the record; LBP-11-9, 73 NRC 391 (2011)
motions for reconsideration must be filed within 10 days of a Board's decision; LBP-11-15, 73 NRC 629 (2011)
NRC generally considers approximately 30-60 days as the limit for timely filings based on new information; CLI-11-2, 73 NRC 333 (2011)
requests for protected documents shall be filed within 60 days of the listing of the document on the privilege log and, in any event, no later than 10 days after the deadline for filing rebuttal testimony; LBP-11-5, 73 NRC 131 (2011)
the trigger date for a filing period can be especially unclear where both public and nonpublic documents associated with a proceeding are produced and where an applicant's stated compliance with NRC regulations shifts over time; LBP-11-9, 73 NRC 391 (2011)
DECAY HEAT REMOVAL
assurance of adequate cooling water supply for emergency and long-term shutdown decay heat removal shall be considered in the design of the nuclear power plant; LBP-11-16, 73 NRC 645 (2011)
DECISION ON THE MERITS
boards do not adjudicate disputed facts at the contention admission stage; LBP-11-2, 73 NRC 28 (2011)
boards must not adjudicate the merits of allegations at the contention admissibility stage of an NRC proceeding, but, to be admissible, a contention must provide more than a bare assertion, and must explain the supporting reasons for the dispute raised; LBP-11-16, 73 NRC 645 (2011)
it is rarely appropriate to resolve complex, fact-intensive issues on the initial pleadings; LBP-11-13, 73 NRC 534 (2011)
when a contention alleges the need for further study of an alternative, from an environmental perspective, such reasonableness determinations are the merits, and should only be decided after the contention is admitted; LBP-11-13, 73 NRC 534 (2011)
DECOMMISSIONING
areas of minor radioactive contamination are evaluated and remediated as needed during plant decommissioning; DD-11-1, 73 NRC 7 (2011)
DECOMMISSIONING FUNDING
an annual report on recalculations of decommissioning cost estimates and projected available decommissioning funding must be submitted by a licensee for a plant that has closed before the end of its licensed life; DD-11-4, 73 NRC 713 (2011)
applicant seeks authorization to provide financial assurance for decommissioning funding on a forward-looking, incremental basis; LBP-11-11, 73 NRC 455 (2011)
if NRC Staff makes a finding of no reasonable assurance, NRC reserves the right to take steps to ensure a licensee's adequate accumulation of decommissioning funds; DD-11-4, 73 NRC 713 (2011)
licensee must file an annual report to NRC certifying that financial assurance for decommissioning will be or has been provided in an amount that may be more, but not less, than the amount stated in the regulations, adjusted as appropriate for changes in labor, energy, and waste burial costs; DD-11-3, 73 NRC 375 (2011)
power reactor licensees must report to the NRC at least once every 2 years on the status of their decommissioning funding for each reactor or part of a reactor that they own; DD-11-4, 73 NRC 713 (2011)
request that NRC issue a demand for information from licensee relating to adequacy of financial assurances for decommissioning is denied; DD-11-4, 73 NRC 713 (2011)
the financial qualifications review for decommissioning funding assurance is revisited every year until the license is terminated; DD-11-4, 73 NRC 713 (2011)
DECOMMISSIONING FUNDING PLANS
a licensee that has collected funds based on a site-specific estimate under section 50.75(b)(1) may take credit for projected earnings on the external sinking funds using up to a 2% annual real rate of return from the time of future funds' collection through the decommissioning period, provided that the site-specific estimate is based on a period of safe storage that is specifically described in the estimate; DD-11-4, 73 NRC 713 (2011)
use of the 4.81% forecast interest rate and the 2.81% annual inflation rate is in compliance; DD-11-4, 73 NRC 713 (2011)

SUBJECT INDEX

DEFINITIONS

a contention of omission alleges that an application suffers from an improper omission, whereas a contention of adequacy raises a specific substantive challenge to how particular information or issues have been discussed in the application; LBP-11-6, 73 NRC 149 (2011)

"adversary adjudication" is defined as an adjudication under section 554 of the Administrative Procedure Act in which the position of the United States is represented by counsel or otherwise; LBP-11-8, 73 NRC 349 (2011)

baseload generation is different than peaking power, which provides supplemental power during hours of the day when demand is highest; LBP-11-13, 73 NRC 534 (2011)

"commencement of construction" includes clearing of land, excavation, or other substantial action that would adversely affect the environment of the site; LBP-11-11, 73 NRC 455 (2011)

cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time; LBP-11-7, 73 NRC 254 (2011)

direct impacts are those caused by the federal action, and occurring at the same time and place as that action, while indirect impacts are caused by the action at a later time or more distant place, yet are still reasonably foreseeable; LBP-11-7, 73 NRC 254 (2011)

"disclosing party" means the party required to make mandatory disclosure; LBP-11-5, 73 NRC 131 (2011)

"document" means any medium (electronic, paper, or any other kind) that contains or stores any information, including text, data, audio, video, computer software, or computer modeling information; LBP-11-5, 73 NRC 131 (2011)

"good cause" for late filing is defined as a showing that petitioner could not have met the filing deadline and filed as soon as possible thereafter; LBP-11-7, 73 NRC 254 (2011)

"incur" within the context of Equal Access to Justice Act means that an individual who is a prevailing party meeting the financial qualification of the EAJA is ineligible to receive an EAJA award when that individual was not responsible for the costs of the attorney's fees; LBP-11-8, 73 NRC 349 (2011)

"receiving party" means the party to whom the mandatory disclosure must be made; LBP-11-5, 73 NRC 131 (2011)

"representative" means the attorney or other authorized representative of a party who has entered a notice of appearance; LBP-11-5, 73 NRC 131 (2011)

DELAY OF PROCEEDING

longstanding NRC practice has been to limit orders delaying proceedings to the duration and scope necessary to promote the Commission's dual goals of public safety and timely adjudication; CLI-11-1, 73 NRC 1 (2011)

suspension of licensing proceedings is considered a drastic action that is not warranted absent immediate threats to public health and safety; CLI-11-1, 73 NRC 1 (2011)

the Commission generally has declined to hold proceedings in abeyance pending the outcome of other Commission actions or adjudications; CLI-11-1, 73 NRC 1 (2011)

DEMAND FOR INFORMATION

request that NRC issue a demand for information from licensee relating to adequacy of financial assurances for decommissioning is denied; DD-11-4, 73 NRC 713 (2011)

DEMAND-SIDE MANAGEMENT

applicant who is a state-regulated utility is in a position to implement and promote programs such as energy conservation, efficiency, and load management such that the need for additional generation capacity may be reduced; LBP-11-6, 73 NRC 149 (2011)

energy efficiency alternative is excluded because it would not advance applicant's goal to provide additional baseload electrical generation capacity for use in the owner's current markets and/or for potential sale on the wholesale markets; LBP-11-7, 73 NRC 254 (2011)

NEPA's rule of reason would not exclude consideration of demand-side management as part of an alternatives analysis when applicant is a state-regulated utility; LBP-11-6, 73 NRC 149 (2011)

DESIGN

assurance of adequate cooling water supply for emergency and long-term shutdown decay heat removal shall be considered in the design of the nuclear power plant; LBP-11-16, 73 NRC 645 (2011)

process designs for uranium enrichment facilities should be described in a level of detail in the integrated safety analysis that is sufficient to allow a Staff reviewer to understand the theory of operation for the process; LBP-11-11, 73 NRC 455 (2011)

SUBJECT INDEX

DESIGN BASIS

if evidence subsequently indicates that the design basis of an operating nuclear power plant will not withstand a maximum flooding event, members of the public may file a request to institute a proceeding to modify, suspend, or revoke a license; LBP-11-15, 73 NRC 629 (2011)

NRC Staff ensures that applicant's design basis for the new units will protect public health and safety by verifying that the design basis will withstand maximum flooding events; LBP-11-6, 73 NRC 149 (2011)

NRC Staff, incident to its preparation of the safety evaluation report, is obliged to ensure that applicant's design basis for the new units will protect public health and safety; LBP-11-6, 73 NRC 149 (2011)

DESIGN CERTIFICATION

a combined license applicant may reference a docketed-but-not-yet-certified design in its application, but does so at its own risk; LBP-11-10, 73 NRC 424 (2011)

a combined license applicant will have to demonstrate that the site-specific parameters are bounded by the parameters developed for the certified design; LBP-11-10, 73 NRC 424 (2011)

all environmental issues concerning severe accident mitigation design alternatives associated with the information in NRC's final environmental assessment for certified reactor design are deemed resolved for plants whose site parameters are within those specified in the technical support document; LBP-11-7, 73 NRC 254 (2011)

an exemption from any part of a referenced design certification rule may be granted if NRC determines that the exemption complies with any exemption provisions of the referenced design certification rule, or with 10 C.F.R. 52.63 if there are no applicable exemption provisions in the referenced rule; LBP-11-10, 73 NRC 424 (2011)

applicant has described the kinds and quantities of radioactive materials expected to be produced in the operation to the extent its combined license application references a standardized design; LBP-11-6, 73 NRC 149 (2011)

applicants may incorporate a certified reactor design in a combined license application; LBP-11-10, 73 NRC 424 (2011)

each combined license applicant will have to determine whether it will adopt in toto the certified design, or whether it will take exemptions thereto and/or departures therefrom; LBP-11-10, 73 NRC 424 (2011)

exemption requests are subjected to the same level of litigation as other issues that could be admissibly raised in a COL proceeding; LBP-11-10, 73 NRC 424 (2011)

grants of exemptions from referenced design certification rules are conditioned on the Commission's finding that the request complies with section 52.7 and that the special circumstances provided for section 52.7 outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption; LBP-11-10, 73 NRC 424 (2011)

in making the findings required for issuance of a combined license, finality is afforded to those matters resolved in connection with a design certification; LBP-11-7, 73 NRC 254 (2011)

NRC Staff's creation of a list of site parameters for use in the combined license proceeding cannot cure the absence of a list of site parameters in the technical support document, rendering it impossible to resolve severe accident mitigation design alternatives issues by rule; LBP-11-7, 73 NRC 254 (2011)

DISCLOSURE

any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions that are exempt; LBP-11-5, 73 NRC 131 (2011)

board determination of expert's need to know with regard to a document withheld as safeguards information was reversed; LBP-11-9, 73 NRC 391 (2011)

"disclosing party" means the party required to make mandatory disclosures; LBP-11-5, 73 NRC 131 (2011)

"document" means any medium (electronic, paper, or any other kind) that contains or stores any information, including text, data, audio, video, computer software, or computer modeling information; LBP-11-5, 73 NRC 131 (2011)

each party to a proceeding must disclose all documents relevant to the admitted contentions, except those documents for which a claim of privilege or protected status is made; LBP-11-5, 73 NRC 131 (2011)

NRC Staff and its counsel, like the board and its staff, are federal government employees and are thus subject to stringent sanctions for the unauthorized disclosure of the protected information or protected documents; LBP-11-5, 73 NRC 131 (2011)

NRC Staff is exempted from the obligations of the protective order, even though Staff might hold many documents that are subject to the mandatory disclosure requirements; LBP-11-5, 73 NRC 131 (2011)
parties must list documents claimed to be privileged or protected on a privilege log; LBP-11-5, 73 NRC 131 (2011)
petitioner was denied access to a safeguards-protected design-related document on the basis of his lacking a need to know; LBP-11-9, 73 NRC 391 (2011)
"receiving party" means the party to whom the mandatory disclosure must be made; LBP-11-5, 73 NRC 131 (2011)
"representative" means the attorney or other authorized representative of a party who has entered a notice of appearance; LBP-11-5, 73 NRC 131 (2011)
the principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials; LBP-11-5, 73 NRC 131 (2011)
the SUNSI policy does not expand upon or create any new category of legally privileged or confidential information that is exempt from discovery or from mandatory disclosure; LBP-11-5, 73 NRC 131 (2011)

DISCOVERY
lack of clarity in the terms and application of the agency's newly established SUNSI policy contributed to intervenors' misapprehension that they were required to demonstrate a need for the information in order to request SUNSI documents; LBP-11-9, 73 NRC 391 (2011)
petitioners have an affirmative obligation to request confidential and proprietary information that has not been made publicly available in order to support a proposed contention; LBP-11-9, 73 NRC 391 (2011)
requests for protected documents shall be filed within 60 days of the listing of the document on the privilege log and, in any event, no later than 10 days after the deadline for filing rebuttal testimony; LBP-11-5, 73 NRC 131 (2011)
the SUNSI policy does not expand upon or create any new category of legally privileged or confidential information that is exempt from discovery or from mandatory disclosure; LBP-11-5, 73 NRC 131 (2011)

DISCOVERY AGAINST NRC STAFF
NRC Staff is exempted from the obligations of the protective order, even though Staff might hold many documents that are subject to the mandatory disclosure requirements; LBP-11-5, 73 NRC 131 (2011)

DISMISSAL OF PROCEEDING
the public interest does not require additional adjudication of an enforcement matter and, given that all matters required to be adjudicated as part of the proceeding have been resolved, the proceeding is dismissed; LBP-11-3, 73 NRC 81 (2011)

DOCUMENT PRODUCTION
"document" means any medium (electronic, paper, or any other kind) that contains or stores any information, including text, data, audio, video, computer software, or computer modeling information; LBP-11-5, 73 NRC 131 (2011)
NRC Staff was admonished for having imposed a stricter-than-necessary standard of "need" for access to SUNSI; LBP-11-9, 73 NRC 391 (2011)
rules governing access to SUNSI apply only to potential parties, whereas party access to SUNSI is governed by protective orders and nondisclosure agreements; LBP-11-9, 73 NRC 391 (2011)

DOCUMENTATION
along with the requirement to perform an integrated safety analysis is the requirement for applicant to provide the NRC Staff with an ISA summary, the content of which is specified in 10 C.F.R. 70.65(b); LBP-11-11, 73 NRC 455 (2011)

DOSE, RADIOLOGICAL
challenges to the $2000/person-rem conversion factor, to use of a single dose-rate reduction effectiveness factor, and to evacuation times and assumptions are not admissible because petitioners presented no facts or expert opinion of error; LBP-11-2, 73 NRC 28 (2011)
NRC established reasonable assurance that the dose consequence attributable to tritium in groundwater remains well below the ALARA dose objectives; DD-11-1, 73 NRC 7 (2011)

DRAFT ENVIRONMENTAL IMPACT STATEMENT
a DEIS does not and cannot treat identified environmental concerns in a vacuum; LBP-11-7, 73 NRC 254 (2011)

intervenor may file a new or amended contention challenging relevant new portions of the DEIS that differ from applicant's environmental report; LBP-11-1, 73 NRC 19 (2011)
intervenors' challenges to adequacy of applicant's environmental report with respect to environmental impacts of dewatering associated with the proposed nuclear plant continue to serve as viable challenges to similar sections of Staff's DEIS and thus are not moot; LBP-11-1, 73 NRC 19 (2011)
NRC Staff must consider the economic, technical, and other benefits and costs of the proposed action; LBP-11-7, 73 NRC 254 (2011)
publication of NRC Staff's DEIS may moot a contention challenging the environmental analysis in the applicant's environmental report, if the DEIS dispenses with the issues raised in the original contention challenging the ER; LBP-11-1, 73 NRC 19 (2011)
the DEIS might cure alleged omissions or deficiencies in the environmental report by including additional analysis that addresses such omissions or deficiencies; LBP-11-7, 73 NRC 254 (2011)
the DEIS, like the environmental report, must cover all significant environmental impacts associated with the combined license, including offsite environmental impacts; LBP-11-1, 73 NRC 19 (2011)
DUE PROCESS
health, safety, and environmental concerns do not constitute liberty or property subject to due process protection; LBP-11-4, 73 NRC 91 (2011)
intervenors in reactor licensing proceedings ordinarily cannot raise constitutional due process issues with respect to NRC hearing procedures, inasmuch as intervenors cannot claim government deprivation of life, liberty, or property as a result of the NRC's licensing action; LBP-11-4, 73 NRC 91 (2011)
prospective intervenors must show a direct, substantial, and legally protectable interest, the test for which is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process; LBP-11-4, 73 NRC 91 (2011)
there is no fundamental right to participate in administrative adjudications; LBP-11-4, 73 NRC 91 (2011)
there is nothing in the legislative history of the Equal Access to Justice Act or the pertinent case law to suggest a congressional intent to extend the EAJA to cases in which due process, rather than a statute, requires an Administrative Procedure Act § 554 hearing; LBP-11-8, 73 NRC 349 (2011)
EARLY SITE PERMIT APPLICATION
applicant need not submit information regarding control room habitability and ventilation system design in the site safety analysis report portion of an early site permit application; LBP-11-16, 73 NRC 645 (2011)
applicant's site safety analysis report must provide sufficient data to enable the requisite determination of the potential for surface deformation as a result of growth faults at the site; LBP-11-16, 73 NRC 645 (2011)
climate change is considered an environmental impact that must be addressed; LBP-11-16, 73 NRC 645 (2011)
even though a cooling pond is not a safety-related structure, knowledge of faulting under the pool and the impact this faulting might have on the pool's operation are required; LBP-11-16, 73 NRC 645 (2011)
geologic and seismic siting factors considered for design must include a determination of the safe shutdown earthquake ground motion for the site and the potential for surface tectonic and nontectonic deformations; LBP-11-16, 73 NRC 645 (2011)
EARLY SITE PERMIT PROCEEDINGS
a contention should be deemed resolved during the ESP proceeding if the subject of the contention was actually litigated and decided during the ESP proceeding, or, although not actually litigated, was decided by the Staff, was necessary for the Staff to resolve in the ESP proceeding, and was within the scope of that proceeding as defined in the *Federal Register* notice of opportunity for a hearing; LBP-11-10, 73 NRC 424 (2011)
a matter resolved in an ESP proceeding may be revisited in the combined license proceeding when new and significant information is presented; LBP-11-10, 73 NRC 424 (2011)
an uncontested proceeding is subject to mandatory hearing requirements; LBP-11-10, 73 NRC 424 (2011)
contention claiming that the environmental report's discussion of environmental effects and cumulative impacts of seepage from the cooling basin into groundwater and surface water through undocumented or unplugged oil and gas wells and borings fails to comply with NRC requirements is admissible; LBP-11-16, 73 NRC 645 (2011)

contention that alleges an omission, not an inadequacy, of an environmental report's analysis of socioeconomic impacts raises an issue that is not material to any finding NRC must make; LBP-11-16, 73 NRC 645 (2011)
contentions concerning benefits assessment shall not be admitted if applicant does not address those issues in the ESP application; LBP-11-16, 73 NRC 645 (2011)
insofar as a contention requests consideration of a dry cooling design alternative, that matter must be considered resolved in the ESP proceeding; LBP-11-10, 73 NRC 424 (2011)
EARLY SITE PERMITS
an entity is allowed to bank a site for the possible future construction of a specified number of new nuclear power generation facilities; LBP-11-16, 73 NRC 645 (2011)
an entity may apply for an early site permit authorizing it to resolve key site-related environmental, safety, and emergency planning issues before selecting the design of a nuclear power facility for the subject site; LBP-11-16, 73 NRC 645 (2011)
an ESP authorizes the use of a specific site for the construction and operation of a new nuclear power plant, with the actual construction and operation authorized by a subsequently issued combined license; LBP-11-10, 73 NRC 424 (2011)
an ESP is valid for 20 to 40 years from the date of issuance; LBP-11-16, 73 NRC 645 (2011)
applicant's environmental report must identify and discuss the status of all permits, licenses, and other approvals that are required from federal, state, and local agencies; LBP-11-16, 73 NRC 645 (2011)
applicants must evaluate alternative sites to determine whether there is any obviously superior alternative to the site proposed; LBP-11-16, 73 NRC 645 (2011)
issuance of an ESP and the subsequent authorization of construction and operation of a new nuclear power plant qualify as connected actions under 40 C.F.R. 1508.25 and should be evaluated in one environmental impact statement; LBP-11-10, 73 NRC 424 (2011)
licensee who has obtained an ESP is not required to apply for a combined license or to actually construct and operate a nuclear power plant at the authorized site; LBP-11-10, 73 NRC 424 (2011)
the agency responsible for preparing the environmental impact statement must define the scope of the issues it will address; LBP-11-10, 73 NRC 424 (2011)
to issue an ESP, NRC must comply with the National Environmental Policy Act by including in an environmental impact statement a detailed statement on the environmental impact of the proposed action, any unavoidable adverse environmental effects that cannot be avoided, and alternatives to the proposed action; LBP-11-10, 73 NRC 424 (2011)
EARTHQUAKES
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quibbling over the details of an economic analysis would effectively stand NEPA on its head by asking that the license be rejected not due to environmental costs, but because the economic benefits are not as great as estimated; LBP-11-7, 73 NRC 254 (2011)
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ELECTRONIC FILING
a filing is only complete when the filer performs the last act that it must perform to transmit a document in its entirety; LBP-11-13, 73 NRC 534 (2011)
persistent difficulties with the NRC electronic filing system despite petitioners' good-faith efforts is good cause for late filing; LBP-11-2, 73 NRC 28 (2011)
persons without digital ID certificates may sign electronically by typing "Executed in Accord with 10 C.F.R. 2.304(d)" or its equivalent on the signature line and including the date of signature and the signatory's name, capacity, address, phone number, and e-mail address; LBP-11-2, 73 NRC 28 (2011)

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sheltering must be considered in developing the recommended range of protective actions in an emergency plan; LBP-11-6, 73 NRC 149 (2011)
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the ingestion exposure pathway consists of an area about 50 miles in radius around a plant and its principal concern is ingestion of contaminated water or foods; LBP-11-15, 73 NRC 629 (2011)
the pertinent zone in operating license renewal proceedings and other power reactor license matters is the area within a 50-mile radius of the site; LBP-11-2, 73 NRC 28 (2011)
the plume exposure pathway consists of an area about 10 miles in radius around a plant, the principal concern of which is radiation exposure to the public (whole-body external exposure and inhalation exposure) from a radioactive plume; LBP-11-15, 73 NRC 629 (2011)
to the extent petitioner seeks to raise a generic challenge to the 10-mile plume exposure pathway EPZ, such an argument constitutes an impermissible challenge to this regulation; LBP-11-15, 73 NRC 629 (2011)
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a combined license application must include an emergency plan that contains, in the event of a reactor emergency resulting in a radiological release, a range of protective actions for the public located within about a 10-mile radius from the plant; LBP-11-15, 73 NRC 629 (2011)
a range of protective actions for persons within about a 10-mile radius is required, and guidelines for the choice of protective actions during an emergency, consistent with federal guidance, must be developed and in place; LBP-11-15, 73 NRC 629 (2011)
combined license applicant's emergency plan must contain and describe adequate provisions for emergency facilities and equipment, including at least one onsite and one offsite communication system, each of which shall have a backup power source; LBP-11-15, 73 NRC 629 (2011)
contention that, in the event of a core-melt accident, applicant's emergency plan should order an evacuation of persons within a 10-mile radius of the facility attacks NRC's emergency planning regulation; LBP-11-15, 73 NRC 629 (2011)
in developing the range of protective actions, consideration will be given to evacuation, sheltering, and, as a supplement to these, the prophylactic use of potassium iodide, as appropriate; LBP-11-15, 73 NRC 629 (2011)
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whether exercise frequency is adequate to maintain personnel knowledge and skill to implement emergency responsibilities for proposed uranium enrichment facility is discussed; LBP-11-11, 73 NRC 455 (2011)
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request that NRC issue a demand for information from licensee relating to adequacy of financial assurances for decommissioning is denied; DD-11-4, 73 NRC 713 (2011)
the public interest does not require additional adjudication of an enforcement matter and, given that all matters required to be adjudicated as part of this proceeding have been resolved, the proceeding is dismissed; LBP-11-3, 73 NRC 81 (2011)
upon review of a settlement agreement, the board is satisfied that its terms reflect a fair and reasonable settlement 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); LBP-11-3, 73 NRC 81 (2011)
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if the adverse environmental effects of a proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs; LBP-11-7, 73 NRC 254 (2011)
in enacting NEPA, Congress's twin aims were to require an agency to consider every significant aspect of the environmental impact of a proposed action and ensure that the agency will inform the public that it has considered environmental concerns in its decisionmaking process; LBP-11-6, 73 NRC 149 (2011)
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the DEIS, like the environmental report, must cover all significant environmental impacts associated with the combined license, including offsite environmental impacts; LBP-11-1, 73 NRC 19 (2011)
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a categorical exclusion from the NEPA requirement to prepare an environmental assessment or EIS for issuance of import licenses involving low-level radioactive waste is provided; CLI-11-3, 73 NRC 613 (2011)
a contention that was originally admitted as a challenge to the environmental report may be treated as a challenge to the similar section of the DEIS; LBP-11-1, 73 NRC 19 (2011)
a detailed statement by the responsible agency official on, among other things, the environmental impact of the proposed action, any unavoidable adverse environmental effects that cannot be avoided, and alternatives to the proposed action must be included; LBP-11-10, 73 NRC 424 (2011)
a state public service commission's determination of need for power may be relied on by the NRC in its own analysis, as long as that determination is neither shown nor appears on its face to be seriously defective; LBP-11-6, 73 NRC 149 (2011)
actions requiring an environmental impact statement or a supplement to an EIS are a limited work authorization, construction permit for a nuclear power reactor, testing facility, or fuel reprocessing plant, or an early site permit; LBP-11-10, 73 NRC 424 (2011)
agencies shall use the criteria for scope in 40 C.F.R. 1508.25 to determine which proposal shall be the subject of a particular statement; LBP-11-10, 73 NRC 424 (2011)
although NEPA does not explicitly mention cost-benefit balancing, courts have interpreted the statute as requiring federal agencies to balance the environmental costs against the anticipated benefits of a proposed action; LBP-11-7, 73 NRC 254 (2011)
an environmental impact statement must consider the direct, indirect, and cumulative impacts of an action; LBP-11-7, 73 NRC 254 (2011)
an environmental report's adequacy is examined under NEPA as well as under Part 51 because the ER is the basis upon which NRC's EIS will be prepared; LBP-11-13, 73 NRC 534 (2011); LBP-11-14, 73 NRC 591 (2011)
applicant's environmental report must contain a sufficient analysis of potential environmental consequences and alternatives to enable the NRC Staff to prepare an EIS that fulfills the agency's obligations under NEPA; LBP-11-14, 73 NRC 591 (2011)
as part of NRC's NEPA analysis for licensing a nuclear power plant, the agency must balance the costs and benefits resulting from issuance of a license, but the EIS need not always contain a formal or mathematical cost-benefit analysis; LBP-11-7, 73 NRC 254 (2011)
every combined license application must be accompanied by an environmental report to aid the Commission in its preparation of an EIS; LBP-11-6, 73 NRC 149 (2011)
federal agencies must prepare an EIS for those proposed actions that have the potential to significantly affect the quality of the human environment; LBP-11-7, 73 NRC 254 (2011)
if impacts are remote or speculative, the EIS need not discuss them, including greenhouse gas emissions; LBP-11-7, 73 NRC 254 (2011)
in defining the scope of the EIS, all connected actions must be analyzed in one statement; LBP-11-10, 73 NRC 424 (2011)
intervenor may propose new or amended contentions based on 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 environmental documents; LBP-11-7, 73 NRC 254 (2011)

issuance of an early site permit and the subsequent authorization of construction and operation of a new nuclear power plant qualify as connected actions under 40 C.F.R. 1508.25 and should be evaluated in one EIS; LBP-11-10, 73 NRC 424 (2011)
NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action and ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process; LBP-11-7, 73 NRC 254 (2011)
NEPA requires an agency to take a hard look at the environmental consequences before taking a major action and to report the result of that hard look in an EIS; LBP-11-6, 73 NRC 149 (2011)
NEPA's requirement that federal agencies prepare an EIS when considering a major action serves the statute's action-forcing purpose in two ways; LBP-11-7, 73 NRC 254 (2011)
NRC adjudicatory hearings are not EIS editing sessions; LBP-11-2, 73 NRC 28 (2011)
NRC Staff may accord substantial weight to the stated purpose of the project, i.e., to provide additional baseload electrical generation capacity for use in the owner's current markets and/or for potential sale on the wholesale market; LBP-11-7, 73 NRC 254 (2011)
NRC Staff's NEPA responsibilities for preparing an EIS are described; LBP-11-6, 73 NRC 149 (2011)
NRC Staff's reference to, and reliance in its DEIS on, state issuance of a site certification order and associated certificate of compliance on groundwater use does not dispense with NRC's duty under NEPA to conduct an independent hard look at environmental impacts related to active dewatering during operations at a nuclear plant; LBP-11-1, 73 NRC 19 (2011)
NRC's environmental analysis need only consider environmental impacts that are reasonably foreseeable, and need not consider remote and speculative scenarios; LBP-11-16, 73 NRC 645 (2011)
one important component of an EIS is the discussion of possible actions that might mitigate adverse environmental consequences; LBP-11-7, 73 NRC 254 (2011)
proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single EIS; LBP-11-10, 73 NRC 424 (2011)
separate actions may be considered connected if, among other things, they are interdependent parts of a larger action and depend on the larger action for their justification; LBP-11-10, 73 NRC 424 (2011)
the agency responsible for preparing the EIS must define the scope of the issues it will address; LBP-11-10, 73 NRC 424 (2011)
the alternatives analysis is the heart of the environmental impact analysis; LBP-11-16, 73 NRC 645 (2011)
the EIS must describe the potential environmental impact of the proposed action and discuss any reasonable alternatives; LBP-11-7, 73 NRC 254 (2011)
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under NEPA, NRC Staff must consider the cumulative impact of greenhouse gas emissions from a proposed facility; LBP-11-7, 73 NRC 254 (2011)
when NRC Staff issues the environmental impact statement, intervenors have an opportunity to either amend admitted contentions or proffer new contentions based on data or conclusions in the NRC draft or final EIS or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents; LBP-11-6, 73 NRC 149 (2011)
See also Draft Environmental Impact Statement
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all environmental issues concerning severe accident mitigation design alternatives associated with the information in NRC's final environmental assessment for certified reactor design are deemed resolved

for plants whose site parameters are within those specified in the technical support document; LBP-11-7, 73 NRC 254 (2011)
Category 1 issues are not subject to challenge in a relicensing proceeding because they involve environmental effects that are essentially similar for all plants and need not be assessed repeatedly on a site-specific basis; LBP-11-13, 73 NRC 534 (2011)
health, safety, and environmental concerns do not constitute liberty or property subject to due process protection; LBP-11-4, 73 NRC 91 (2011)
the Commission has codified generic determinations for certain environmental issues, identified as Category 1 issues, for license renewal proceedings; LBP-11-13, 73 NRC 534 (2011)
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a contention that was originally admitted as a challenge to the ER may be treated as a challenge to the similar section of the draft environmental impact statement; LBP-11-1, 73 NRC 19 (2011)
a full discussion of mitigation plans must be included; LBP-11-6, 73 NRC 149 (2011)
a mere promise by applicant to follow applicable regulations in capping and abandoning active and inactive oil and gas wells in the footprint of the cooling basin and plant is insufficient to satisfy NRC's regulations; LBP-11-16, 73 NRC 645 (2011)
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an ER's adequacy is examined under NEPA as well as under Part 51 because the ER is the basis upon which the NRC's environmental impact statement will be prepared; LBP-11-13, 73 NRC 534 (2011); LBP-11-14, 73 NRC 591 (2011)
applicant must describe and discuss reasonably foreseeable environmental impacts in proportion to their significance and adverse environmental effects that cannot be avoided should the proposal be implemented; LBP-11-6, 73 NRC 149 (2011); LBP-11-16, 73 NRC 645 (2011)
applicant must discuss appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources; LBP-11-6, 73 NRC 149 (2011)
applicant must identify and discuss the status of all permits, licenses, and other approvals that are required from federal, state, and local agencies; LBP-11-16, 73 NRC 645 (2011)
applicant 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-11-6, 73 NRC 149 (2011)
applicant must provide an analysis of the cumulative impacts of the activities to be authorized by a combined license; LBP-11-6, 73 NRC 149 (2011)
applicant need only consider the range of alternatives that are capable of achieving the goals of the proposed action; LBP-11-13, 73 NRC 534 (2011)
applicant need only discuss reasonably foreseeable environmental impacts of a proposed action; LBP-11-6, 73 NRC 149 (2011)
applicant's alternatives analysis must be sufficiently complete to aid the Commission in developing and exploring appropriate alternatives to the proposed action; LBP-11-13, 73 NRC 534 (2011)
applicant's alternatives analysis need not discuss every conceivable alternative to the proposed action, but rather only feasible, nonspeculative, and reasonable alternatives; LBP-11-13, 73 NRC 534 (2011)
applicant's ER is not the vehicle for the NRC Staff's safety review; LBP-11-6, 73 NRC 149 (2011)
applicant's ER must contain a sufficient analysis of potential environmental consequences and alternatives to enable the NRC Staff to prepare an environmental impact statement that fulfills the agency's obligations under NEPA; LBP-11-14, 73 NRC 591 (2011)
applicant's ER should contain sufficient data to aid the Commission in its development of an independent analysis; LBP-11-6, 73 NRC 149 (2011)
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boards do not sit to flyspeck environmental documents or to add details or nuances; LBP-11-16, 73 NRC 645 (2011)
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NEPA requires that an environmental review provide a sufficient discussion of alternatives to enable the decisionmaker to take a hard look at environmental factors, and to make a reasoned decision; LBP-11-13, 73 NRC 534 (2011)
NRC must address any purported need for additional power during its environmental review of a combined license application; LBP-11-7, 73 NRC 254 (2011)
NRC Staff's need-for-power analysis may accord an expert, independent agency's forecasts and studies great weight and may give heavy reliance to those forecasts and studies absent a showing they contain a fundamental error; LBP-11-7, 73 NRC 254 (2011)
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an award of attorneys' fees can include fees paid by a third-party liability insurer; LBP-11-8, 73 NRC 349 (2011)
awards in insurance contexts would undermine the dual purposes of EAJA by both maintaining financial deterrents for those who would want to challenge unjust government action and not deterring unreasonable government actions; LBP-11-8, 73 NRC 349 (2011)
because the act operates as a waiver of sovereign immunity it must be narrowly construed to avoid creating a waiver that Congress did not intend; LBP-11-8, 73 NRC 349 (2011)
both a union employee and the insured can be viewed as having incurred legal fees insofar as they have paid for legal services in advance as a component of the union dues or insurance premiums; LBP-11-8, 73 NRC 349 (2011)
claimant with a legally enforceable right to full indemnification of attorney fees from a solvent third party cannot be deemed to have incurred that expense for purposes of the Act, and hence is not eligible for an award of fees under the Act; LBP-11-8, 73 NRC 349 (2011)
Congress did not want the "substantially justified" standard to be read to raise a presumption that the government position was not substantially justified simply because it lost the case; LBP-11-8, 73 NRC 349 (2011)
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in an actuarial sense, the cost of the defense, to the extent borne by the insurance company, is a cost that the insured paid for, just as he would have paid a lawyer for his defense had he had no insurance; LBP-11-8, 73 NRC 349 (2011)
in determining whether the government's position was substantially justified, the board does not make separate determinations regarding each stage but arrives at one conclusion that simultaneously encompasses and accommodates the entire civil action; LBP-11-8, 73 NRC 349 (2011)
"incur" means that an individual who is a prevailing party meeting the financial qualification of the EAJA is ineligible to receive an EAJA award when that individual was not responsible for the costs of the attorney's fees; LBP-11-8, 73 NRC 349 (2011)
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the act applies to any adjudication required by statute to be determined on the record in which the government is represented by counsel; LBP-11-8, 73 NRC 349 (2011)
the act does not apply when an agency merely voluntarily chooses to abide by formal Administrative Procedure Act § 554 procedures, despite lacking a statutory mandate to do so; LBP-11-8, 73 NRC 349 (2011)
the act renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity and any such waiver must be strictly construed in favor of the United States; LBP-11-8, 73 NRC 349 (2011)
the fact that one other court agreed or disagreed with the government does not establish whether its position was substantially justified; LBP-11-8, 73 NRC 349 (2011)
the fee-deterrent-removal purpose of the Act would not be served by an award of fees to an individual whose fees are fully paid by a ineligible organization; LBP-11-8, 73 NRC 349 (2011)
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the government must demonstrate the reasonableness not only of its litigation position, but also of the agency's actions; LBP-11-8, 73 NRC 349 (2011)
the government's position should be considered substantially justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact; LBP-11-8, 73 NRC 349 (2011)
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the underlying purpose of the Act is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of government authority; LBP-11-8, 73 NRC 349 (2011)
there is nothing in the legislative history of the Equal Access to Justice Act or the pertinent case law to suggest a congressional intent to extend the EAJA to cases in which due process, rather than a statute, requires an Administrative Procedure Act § 554 hearing; LBP-11-8, 73 NRC 349 (2011)
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where a pro bono attorney forgives a fee to a client unable to afford legal expenses, that client is eligible for an award on the basis of that arrangement with the attorney; LBP-11-8, 73 NRC 349 (2011)
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equal protection principles require that all persons similarly situated shall be treated alike; LBP-11-15, 73 NRC 629 (2011)
the equal protection component of the Fifth Amendment's Due Process Clause applies to federal action, and the Equal Protection Clause of the Fourteenth Amendment applies to state action; LBP-11-15, 73 NRC 629 (2011)
ERROR
to the extent a contention is premised on error, it is inadmissible for failing to raise a genuine dispute of fact; LBP-11-6, 73 NRC 149 (2011)
EVACUATION
contention that, in the event of a core-melt accident, applicant's emergency plan should order an evacuation of persons within a 10-mile radius of the facility attacks NRC's emergency planning regulation; LBP-11-15, 73 NRC 629 (2011)
EVACUATION TIME ESTIMATES
challenges to the $2000/person-rem conversion factor, to use of a single dose-rate reduction effectiveness factor, and to evacuation times and assumptions are not admissible because petitioners presented no facts or expert opinion of error; LBP-11-2, 73 NRC 28 (2011)

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EVIDENCE
- although 10 C.F.R. 2.337(f), by its terms, applies to evidence at hearings, the bounds this rule places on official notice is also appropriate for the contention admissibility stage of a proceeding; LBP-11-7, 73 NRC 254 (2011)
- any consolidation of multiple parties' presentations of evidence that would prejudice the rights of any party may not be ordered; LBP-11-4, 73 NRC 91 (2011)
- if evidence in favor of the summary disposition opponent is merely colorable or not significantly probative, summary disposition may be granted; LBP-11-4, 73 NRC 91 (2011)
- in establishing the evidentiary standard of "relevant, material, and reliable evidence" being admissible in a hearing, 10 C.F.R. 2.337 thereby establishes the right of all parties to present such admissible evidence; LBP-11-4, 73 NRC 91 (2011)

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- boards are not precluded from considering documents despite their hearsay nature; LBP-11-14, 73 NRC 591 (2011)
- even if a witness's testimony was entirely hearsay, evidence of that character is generally admissible in administrative proceedings; LBP-11-14, 73 NRC 591 (2011)
- in proceedings under Part 2, strict rules of evidence do not apply to written submissions; LBP-11-14, 73 NRC 591 (2011)
- in upholding summary disposition in a proceeding to enforce a suspension order, the Commission ruled that the hearsay nature of a witness's statement did not preclude the licensing board from considering it, at least in the absence of evidence questioning its reliability; LBP-11-14, 73 NRC 591 (2011)
- out-of-court statements offered to prove the truth of a matter asserted are hearsay; LBP-11-14, 73 NRC 591 (2011)

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- the board's determination of whether the government's position was substantially justified is made on the basis of the written record and oral argument; LBP-11-8, 73 NRC 349 (2011)
- when using Subpart L procedures, the board has the primary responsibility for questioning the witnesses at any evidentiary hearing; LBP-11-13, 73 NRC 534 (2011)

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- an exemption from any part of a referenced design certification rule may be granted if NRC determines that the exemption complies with any exemption provisions of the referenced design certification rule, or with 10 C.F.R. 52.63 if there are no applicable exemption provisions in the referenced rule; LBP-11-10, 73 NRC 424 (2011)
- applicant should clearly describe any exemptions or authorizations of an unusual nature and adequately justify them for the NRC's consideration; LBP-11-11, 73 NRC 455 (2011)
- each combined license applicant will have to determine whether it will adopt in toto the certified design, or whether it will take exemptions thereto and/or departures therefrom; LBP-11-10, 73 NRC 424 (2011)
- exemption from a regulation will be granted if application of the regulation in the particular circumstances conflicts with other NRC rules or requirements, would not serve or is not necessary to achieve the underlying purpose of the rule, would result in undue hardship or other costs, would not benefit public health and safety, would provide only temporary relief, or there is present any other material circumstance not considered when the regulation was adopted; LBP-11-10, 73 NRC 424 (2011)
- exemption from a regulation will be granted when the request is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security; LBP-11-10, 73 NRC 424 (2011); LBP-11-11, 73 NRC 455 (2011)
- exemption requests are subjected to the same level of litigation as other issues that could be admissible in a combined license proceeding; LBP-11-10, 73 NRC 424 (2011)
- grants of exemptions from referenced design certification rules are conditioned on the Commission's finding that the request complies with section 52.7 and that the special circumstances provided for section 52.7 outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption; LBP-11-10, 73 NRC 424 (2011)
- NRC Staff is exempted from the obligations of the protective order, even though Staff might hold many documents that are subject to the mandatory disclosure requirements; LBP-11-5, 73 NRC 131 (2011)

uranium enrichment facility applicant seeks an exemption from regulations to permit it to begin certain preconstruction activities at the site before completion of NRC's environmental review under Part 51; LBP-11-11, 73 NRC 455 (2011)
whether the safe shutdown earthquake exceedance in applicant's exemption request does in fact comply with 10 C.F.R. Part 50, Appendix S and 10 C.F.R. 100.23 is a question currently before the NRC Staff and is thus material to the NRC's licensing decision in the proceeding; LBP-11-10, 73 NRC 424 (2011)
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a discretionary hearing may be held on export or import licenses if a hearing would be in the public interest and would assist the Commission in making the statutory determinations required by the Atomic Energy Act; CLI-11-3, 73 NRC 613 (2011)
a discretionary hearing to discuss the adequacy of information provided by applicant in a public forum would not assist the Commission in making its determinations on the export and import license applications because the applicant provided the information required by the Commission's regulations; CLI-11-3, 73 NRC 613 (2011)
formal adjudicatory procedures are inappropriate in export or import licensing proceedings; CLI-11-3, 73 NRC 613 (2011)
no proximity presumption applies in an import/export licensing case because petitioners have not shown that the import or export involves a significant source of radioactivity producing an obvious potential for offsite consequences; CLI-11-3, 73 NRC 613 (2011)
petitioners' claims of potential injury are so speculative, and separate from the import and export license, that they do not amount to cognizable harm for purposes of standing; CLI-11-3, 73 NRC 613 (2011)
request for waiver of 10 C.F.R. 51.22(c)(15) is denied; CLI-11-3, 73 NRC 613 (2011)
the Department of State provides the Commission with Executive Branch views on the merits of import/export applications; CLI-11-3, 73 NRC 613 (2011)
to determine if a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under section 189a, the Commission has long applied contemporaneous judicial concepts of standing; CLI-11-3, 73 NRC 613 (2011)
to waive a Part 110 rule or regulation, petitioner must show special circumstances concerning the subject of the hearing such that application of the rule or regulation would not serve the purposes for which it was adopted; CLI-11-3, 73 NRC 613 (2011)
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even though a cooling pond is not a safety-related structure, knowledge of faulting under the pool and the impact this faulting might have on the pool's operation are required; LBP-11-16, 73 NRC 645 (2011)
FEDERAL EMERGENCY MANAGEMENT AGENCY
in any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability; LBP-11-6, 73 NRC 149 (2011)
FEDERAL RULES OF CIVIL PROCEDURE
in applying the summary disposition standard, it is appropriate for the board to look not only to NRC regulatory and case law, but also to federal court case law on summary judgment under Rule 56; LBP-11-4, 73 NRC 91 (2011); LBP-11-7, 73 NRC 254 (2011)
summary judgment, which is appropriate upon proper showings of the lack of a genuine, triable issue of material fact, is an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action; LBP-11-4, 73 NRC 91 (2011)
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any changes to the facility as described in the final safety analysis report must be either submitted to the NRC for approval through a license amendment or changed in accordance with the appropriate regulations; DD-11-3, 73 NRC 375 (2011)
information about 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 must be included; LBP-11-6, 73 NRC 149 (2011)
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in making the findings required for issuance of a combined license, finality is afforded to those matters resolved in connection with a design certification; LBP-11-7, 73 NRC 254 (2011)
NRC generally disfavors the filing of new contentions at the eleventh hour of an adjudication, a policy that is grounded in the doctrine of finality, which states that at some point, an adjudicatory proceeding must come to an end; CLI-11-2, 73 NRC 333 (2011)
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applicant seeks authorization to provide financial assurance for decommissioning funding on a forward-looking, incremental basis; LBP-11-11, 73 NRC 455 (2011)
licensee must file an annual report to NRC certifying that financial assurance for decommissioning will be or has been provided in an amount that may be more, but not less, than the amount stated in the regulations, adjusted as appropriate for changes in labor, energy, and waste burial costs; DD-11-3, 73 NRC 375 (2011)
request that NRC issue a demand for information from licensee relating to adequacy of financial assurances for decommissioning is denied; DD-11-4, 73 NRC 713 (2011)
the financial qualifications review for decommissioning funding assurance is revisited every year until the license is terminated; DD-11-4, 73 NRC 713 (2011)
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FINANCIAL QUALIFICATIONS REVIEW
assurance of decommissioning funding is revisited every year until the license is terminated; DD-11-4, 73 NRC 713 (2011)
if NRC Staff makes a finding of no reasonable assurance, NRC reserves the right to take steps to ensure a licensee's adequate accumulation of decommissioning funds; DD-11-4, 73 NRC 713 (2011)
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if evidence subsequently indicates that the design basis of an operating nuclear power plant will not withstand a maximum flooding event, members of the public may file a request to institute a proceeding to modify, suspend, or revoke a license; LBP-11-15, 73 NRC 629 (2011)
NRC Staff ensures that applicant's design basis for the new units will protect public health and safety by verifying that the design basis will withstand maximum flooding events; LBP-11-6, 73 NRC 149 (2011)
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an enrichment facility security clearance requires a determination that granting the clearance would not be inconsistent with the national interest, including a finding that the facility is not under foreign ownership, control, or influence to such a degree that a determination could not be made; LBP-11-11, 73 NRC 455 (2011)
because the application for a uranium enrichment facility is governed by Atomic Energy Act §§ 53 and 63, 42 U.S.C. § 2073, 2093, foreign ownership and control issues would be evaluated under sections 57 and 69; LBP-11-11, 73 NRC 455 (2011)
for power reactors, NRC developed a Commission-approved standard review plan to assist in evaluating applications for reactor licenses or applications for the transfer of such licenses; LBP-11-11, 73 NRC 455 (2011)
if after conducting a threshold review, NRC Staff concludes that applicant may be considered to be foreign owned, controlled, or dominated, or that additional action would be necessary to negate the

foreign ownership, control, or domination, applicant shall be promptly advised and requested to submit a negation action plan; LBP-11-11, 73 NRC 455 (2011)
materials license regulations contain no express prohibition on foreign ownership, but require Staff to make a finding that license issuance will not be inimical to the common defense and security or the health and safety of the public; LBP-11-11, 73 NRC 455 (2011)
NRC may deny uranium enrichment facility applicant a license based on foreign ownership, control, or domination concerns to the extent it concludes granting such a license would be inimical to the common defense and security or the health and safety of the public; LBP-11-11, 73 NRC 455 (2011)
relative to the issue of foreign ownership or control, NRC imposes restrictions on the physical security and control of information at licensed facilities to safeguard restricted data and national security information; LBP-11-11, 73 NRC 455 (2011)
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any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions that are exempt; LBP-11-5, 73 NRC 131 (2011)
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all uranium fuel cycle and waste management issues, including low-level waste storage and disposal, mixed waste storage and disposal, onsite spent fuel storage, and transportation, are Category 1 issues with a small impact; LBP-11-2, 73 NRC 28 (2011)
Category 1 issues are not subject to challenge in a relicensing proceeding because they involve environmental effects that are essentially similar for all plants and need not be assessed repeatedly on a site-specific basis; LBP-11-13, 73 NRC 534 (2011)
contention that applicant's SAMA analysis improperly ignored radioactive waste disposal is outside the scope of the proceeding because it directly challenges the generic determinations in Table B-1 of Appendix B to Part 51; LBP-11-2, 73 NRC 28 (2011)
Part 51 license renewal provisions cover environmental issues relating to onsite spent fuel storage generically and all such issues, including accident risk, fall outside the scope of license renewal proceedings; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
to the extent petitioner seeks to raise a generic challenge to the 10-mile plume exposure pathway EPZ, such an argument constitutes an impermissible challenge to NRC regulations; LBP-11-15, 73 NRC 629 (2011)
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geologic and seismic siting factors considered for design must include a determination of the safe shutdown earthquake ground motion for the site and the potential for surface tectonic and nontectonic deformations; LBP-11-16, 73 NRC 645 (2011)
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a governmental body's interest in protecting the individuals and territory that fall under that body's authority establishes an organizational interest for standing purposes; LBP-11-6, 73 NRC 149 (2011)
a municipality is deemed to have standing in a reactor licensing proceeding that involves a facility located within its boundaries; LBP-11-6, 73 NRC 149 (2011)
where a municipality seeks to participate in a reactor licensing proceeding that does not involve a facility within the municipality's boundaries, it can, for purposes of establishing standing, rely on the 50-mile proximity presumption to the same extent as an individual or an organization; LBP-11-6, 73 NRC 149 (2011)
GREENHOUSE GAS EMISSIONS
if impacts are remote or speculative, the environmental impact statement need not discuss them, including greenhouse gas emissions; LBP-11-7, 73 NRC 254 (2011)
under NEPA, NRC Staff must consider the cumulative impact of greenhouse gas emissions from a proposed facility; LBP-11-7, 73 NRC 254 (2011)
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contention claiming that the environmental report's discussion of environmental effects and cumulative impacts of seepage from the cooling basin into groundwater and surface water through undocumented or unplugged oil and gas wells and borings fails to comply with NRC requirements is admissible; LBP-11-16, 73 NRC 645 (2011)
contention that wastewater contains chemical contaminants that are not discussed in the environmental report, and that when the wastewater is discharged via deep injection wells, the chemicals might

migrate to an aquifer is within the scope of a combined license proceeding; LBP-11-6, 73 NRC 149 (2011)
dose limits from tritium in groundwater for individual members of the public were never approached; DD-11-1, 73 NRC 7 (2011)
NRC established reasonable assurance that the dose consequence attributable to tritium in groundwater remains well below the ALARA dose objectives; DD-11-1, 73 NRC 7 (2011)
petitioners' request for cold shutdown because of radiological contamination of groundwater from tritium is denied; DD-11-3, 73 NRC 375 (2011)
HEALTH AND SAFETY
before issuing a combined license, NRC must conclude that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency; LBP-11-6, 73 NRC 149 (2011)
health, safety, and environmental concerns do not constitute liberty or property subject to due process protection; LBP-11-4, 73 NRC 91 (2011)
in any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability; LBP-11-6, 73 NRC 149 (2011)
materials license regulations contain no express prohibition on foreign ownership, but require Staff to make a finding that license issuance will not be inimical to the common defense and security or the health and safety of the public; LBP-11-11, 73 NRC 455 (2011)
NRC may deny uranium enrichment facility applicant a license based on foreign ownership, control, or domination concerns to the extent it concludes granting such a license would be inimical to the common defense and security or the health and safety of the public; LBP-11-11, 73 NRC 455 (2011)
the Atomic Energy Act is designed to regulate the radiological safety aspects involved in the construction and operation of a nuclear plant; LBP-11-6, 73 NRC 149 (2011)
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formal adjudicatory procedures are inappropriate in export or import licensing proceedings; CLI-11-3, 73 NRC 613 (2011)
if the 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 in 10 C.F.R. 2.1400-.1407; LBP-11-13, 73 NRC 534 (2011)
in the absence of any assertion that Subpart G procedures should be used to resolve any of the admitted contentions, the Subpart L hearing procedures will be used to adjudicate each admitted contention; LBP-11-2, 73 NRC 28 (2011)
intervenors in reactor licensing proceedings ordinarily cannot raise constitutional due process issues with respect to NRC hearing procedures, inasmuch as intervenors cannot claim government deprivation of life, liberty, or property as a result of the NRC's licensing action; LBP-11-4, 73 NRC 91 (2011)
NRC may hold an informal hearing in which it requests and considers written materials without providing for traditional trial-type procedures such as oral testimony and cross-examination; LBP-11-4, 73 NRC 91 (2011)
petitioner may address the selection of hearing procedures, taking into account the provisions of 10 C.F.R. 2.310; LBP-11-6, 73 NRC 149 (2011)
petitioner requesting Subpart G procedures must demonstrate by reference to the contention and its bases and the specific procedures in Subpart G that resolving the contention will require resolution of material issues of fact that may be best determined through use of the identified procedures; LBP-11-2, 73 NRC 28 (2011)
selection of hearing procedures for contentions at the outset of a proceeding is not immutable because availability of Subpart G procedures under 10 C.F.R. 2.310(d) depends critically on whether the credibility of eyewitnesses is important in resolving a contention, and witnesses relevant to each contention are not identified, under 10 C.F.R. 2.336(a)(1), until after contentions are admitted; LBP-11-6, 73 NRC 149 (2011); LBP-11-13, 73 NRC 534 (2011)
Subpart G procedures are mandated for certain proceedings and parties are permitted to propound interrogatories, take depositions, and cross-examine witnesses without leave of the board; LBP-11-13, 73 NRC 534 (2011)

Subpart L procedures provide for a more informal proceeding in which discovery is generally prohibited except for specified mandatory disclosures under 10 C.F.R. 2.336 and the mandatory production of the hearing file under 10 C.F.R. 2.1203(a); LBP-11-13, 73 NRC 534 (2011)
Subpart L procedures will ordinarily be used in proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits; LBP-11-6, 73 NRC 149 (2011)
upon admission of a contention in a licensing proceeding, the board must identify the specific hearing procedures to be used to adjudicate the contention; LBP-11-13, 73 NRC 534 (2011)
upon admission of a contention, a board must identify the specific hearing procedure to be used in the adjudication of the admitted contentions; LBP-11-16, 73 NRC 645 (2011)
when using Subpart L procedures, the board has the primary responsibility for questioning the witnesses at any evidentiary hearing; LBP-11-13, 73 NRC 534 (2011)
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a "rational basis review" was applied to intervenor's challenge to the NRC's 2004 changes to its procedural rules, citing cases involving challenges to laws regulating aspects of prisoners' right to access to the courts; LBP-11-4, 73 NRC 91 (2011)
in establishing the evidentiary standard of "relevant, material, and reliable evidence" being admissible in a hearing, 10 C.F.R. 2.337 thereby establishes the right of all parties to present such admissible evidence; LBP-11-4, 73 NRC 91 (2011)
the Commission is required to grant a hearing upon the request of any person whose interest may be affected by certain agency proceedings; CLI-11-3, 73 NRC 613 (2011); LBP-11-8, 73 NRC 349 (2011)
there is no fundamental right to participate in administrative adjudications; LBP-11-4, 73 NRC 91 (2011)
IMMEDIATE EFFECTIVENESS
immediately effective enforcement orders must be based on preliminary investigation or other emerging information that is reasonably reliable and indicates the need for immediate action; LBP-11-8, 73 NRC 349 (2011)
the standard that must be met before NRC Staff can issue an immediately effective enforcement order is one of adequate evidence, which is akin to the test for probable cause; LBP-11-8, 73 NRC 349 (2011)
IMPORT LICENSES
a categorical exclusion from the NEPA requirement to prepare an environmental assessment or environmental impact statement for the issuance of import licenses involving low-level radioactive waste is provided; CLI-11-3, 73 NRC 613 (2011)
a discretionary hearing may be held on export or import licenses if a hearing would be in the public interest and would assist the Commission in making the statutory determinations required by the Atomic Energy Act; CLI-11-3, 73 NRC 613 (2011)
a discretionary hearing to discuss policy issues related to import of foreign low-level radioactive waste and domestic incineration and transportation issues is not warranted because these issues are either challenges to the Commission's regulations or are outside the scope of the proceeding; CLI-11-3, 73 NRC 613 (2011)
a discretionary hearing to discuss the adequacy of information provided by applicant in a public forum would not assist the Commission in making its determinations on the export and import license applications because the applicant provided the information required by the Commission's regulations; CLI-11-3, 73 NRC 613 (2011)
formal adjudicatory procedures are inappropriate in export or import licensing proceedings; CLI-11-3, 73 NRC 613 (2011)
no proximity presumption applies in an import/export licensing case because petitioners have not shown that the import or export involves a significant source of radioactivity producing an obvious potential for offsite consequences; CLI-11-3, 73 NRC 613 (2011)
petitioners' claims of potential injury are also so speculative, and separate from the import and export license, that they do not amount to cognizable harm for purposes of standing; CLI-11-3, 73 NRC 613 (2011)
petitioners' generalized institutional interest in public forums and in preventing processing of foreign waste is insufficient to confer standing; CLI-11-3, 73 NRC 613 (2011)
request for waiver of 10 C.F.R. 51.22(c)(15) is denied; CLI-11-3, 73 NRC 613 (2011)
the Department of State provides the Commission with Executive Branch views on the merits of import/export applications; CLI-11-3, 73 NRC 613 (2011)

the key action that will allow incineration of imported low-level-radioactive waste material is the domestic license authorizing such processing, not NRC's grant of an import license; CLI-11-3, 73 NRC 613 (2011)
the state reviewed the applications and the authorizations and found no technical reason to prohibit processing of imported waste; CLI-11-3, 73 NRC 613 (2011)
to determine if a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under section 189a, the Commission has long applied contemporaneous judicial concepts of standing; CLI-11-3, 73 NRC 613 (2011)
to waive a Part 110 rule or regulation, petitioner must show special circumstances concerning the subject of the hearing such that application of the rule or regulation would not serve the purposes for which it was adopted; CLI-11-3, 73 NRC 613 (2011)
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a discretionary hearing to discuss policy issues related to import of foreign low-level radioactive waste and domestic incineration and transportation issues is not warranted because these issues are either challenges to the Commission's regulations or are outside the scope of the proceeding; CLI-11-3, 73 NRC 613 (2011)
the key action that will allow incineration of imported low-level-radioactive waste material is the domestic license authorizing such processing, not NRC's grant of an import license; CLI-11-3, 73 NRC 613 (2011)
INFORMAL PROCEEDINGS
NRC may hold an informal hearing in which it requests and considers written materials without providing for traditional trial-type procedures such as oral testimony and cross-examination; LBP-11-4, 73 NRC 91 (2011)
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mere potential exposure to minute doses of radiation within regulatory limits does not constitute a distinct and palpable injury on which standing can be founded; CLI-11-3, 73 NRC 613 (2011)
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through the regulatory process, which includes plant inspections, notice and guidance to licensees, and enforcement actions, NRC takes a host of measures to improve the ability to timely detect and correct inadvertent leaks to assure compliance with public dose limits; LBP-11-2, 73 NRC 28 (2011)
under 10 C.F.R. 40.41(g) and 70.32(k), a uranium enrichment facility cannot be operated until the agency verifies through inspection that the facility has been constructed in accordance with the license; LBP-11-11, 73 NRC 455 (2011)
INTEGRATED SAFETY ANALYSIS
along with the requirement to perform an ISA is the requirement for applicant to provide the NRC Staff with an ISA summary, the content of which is specified in 10 C.F.R. 70.65(b); LBP-11-11, 73 NRC 455 (2011)
applicant for a Part 70 license is required to establish and maintain a safety program, which includes performing an ISA; LBP-11-11, 73 NRC 455 (2011)
applicant must consider potential accident sequences caused either by deviations in the processes that will be conducted at the proposed facility or by credible external events, including natural phenomena; LBP-11-11, 73 NRC 455 (2011)
items relied on for safety that are a central focus of the ISA process for a uranium enrichment facility are the subject of three proposed license conditions; LBP-11-11, 73 NRC 455 (2011)
items relied upon for safety in uranium enrichment facilities should be described in sufficient detail to allow a Staff reviewer to understand the IROFS's functions in relation to the performance standards in section 70.61, which specifies limitations on the levels of risk for credible high- and intermediate-consequence accidents and nuclear criticality accidents; LBP-11-11, 73 NRC 455 (2011)
process designs for uranium enrichment facilities should be described in a level of detail sufficient to allow a Staff reviewer to understand the theory of operation for the process; LBP-11-11, 73 NRC 455 (2011)
to perform an appropriate ISA, NUREG-1520 standard review plan guidance for fuel cycle facilities indicates that applicant should identify the process designs, accident sequences, and items relied upon for safety that are associated with the facility; LBP-11-11, 73 NRC 455 (2011)

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INTEREST
a governmental body's interest in protecting the individuals and territory that fall under that body's authority establishes an organizational interest for standing purposes; LBP-11-6, 73 NRC 149 (2011)
prospective intervenors must show a direct, substantial, and legally protectable interest, the test for which is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process; LBP-11-4, 73 NRC 91 (2011)
INTERESTED GOVERNMENTAL ENTITY
a local governmental body that is not admitted as a party shall, upon request, be permitted to participate in a hearing as an interested nonparty; LBP-11-6, 73 NRC 149 (2011)
if at least one petitioner demonstrates standing and proffers an admissible contention so that its petition to intervene is granted, section 2.315(c) allows a local governmental body that has not been admitted as a party to participate in a hearing as an interested nonparty; LBP-11-6, 73 NRC 149 (2011)
such a nonparty may introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, advise the Commission without being required to take a position with respect to the issue, file proposed findings, and petition for review by the Commission; LBP-11-6, 73 NRC 149 (2011)
INTERPRETATION
Commission precedent interprets the term, "severe accidents," to encompass only reactor accidents and not spent fuel pool accidents; LBP-11-2, 73 NRC 28 (2011)
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any person or organization seeking to intervene as a party in an NRC adjudicatory proceeding addressing a proposed licensing action must establish standing and proffer at least one admissible contention; LBP-11-13, 73 NRC 534 (2011)
Congress called upon the Commission to make fundamental changes in its public hearing process to ensure that hearings adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors; LBP-11-6, 73 NRC 149 (2011)
prospective intervenors must show a direct, substantial, and legally protectable interest, the test for which is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process; LBP-11-4, 73 NRC 91 (2011)
the contention admissibility rule should not serve as a fortress to deny intervention; LBP-11-6, 73 NRC 149 (2011)
to become a party, petitioner must establish standing and proffer at least one admissible contention; LBP-11-2, 73 NRC 28 (2011); LBP-11-6, 73 NRC 149 (2011); LBP-11-16, 73 NRC 645 (2011)
See also Standing to Intervene
INTERVENTION PETITIONS
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-11-16, 73 NRC 645 (2011)
boards are to construe intervention petitions in favor of petitioners in determining whether petitioner has demonstrated standing; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
deadline for answer to hearing petition is specified; CLI-11-3, 73 NRC 613 (2011)
NRC is lenient in permitting pro se petitioners the opportunity to cure procedural defects in petitions to intervene regarding standing; LBP-11-13, 73 NRC 534 (2011)
INTERVENTION PETITIONS, LATE-FILED
although an intervention petition itself was timely filed, the board must balance the eight factors to determine whether petitioner's late-filed exhibits are admissible; LBP-11-13, 73 NRC 534 (2011)
an electronic filing is only complete when the filer performs the last act that it must perform to transmit a document in its entirety; LBP-11-13, 73 NRC 534 (2011)
because a pro se first-time filer experienced problems with the NRC E-Filing system, the board concludes that petitioners' efforts demonstrate the requisite good cause for acceptance of the nontimely exhibits for consideration with the timely filed petition; LBP-11-13, 73 NRC 534 (2011)
boards must balance the eight factors to determine whether petitioner's late-filed petition will be considered; LBP-11-2, 73 NRC 28 (2011)
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the ordinary burden to parties in pursuing litigation pending rulemaking does not justify disrupting ongoing license review; CLI-11-1, 73 NRC 1 (2011)

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both the union employee and the insured can be viewed as having incurred legal fees insofar as they have paid for legal services in advance as a component of the union dues or insurance premiums; LBP-11-8, 73 NRC 349 (2011)

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because petitioner's issue of the inadvertent release of radioactivity does not specifically relate to the ability of buried structures to perform their intended functions as defined by 10 C.F.R. 54.4(a)(1)-(3), the contention is not within the scope of a license renewal proceeding; LBP-11-2, 73 NRC 28 (2011)
key functions of buried structures, systems, and components that are the focus of the license renewal safety review under Part 54 do not include the prevention of inadvertent radioactive leaks from buried structures; LBP-11-2, 73 NRC 28 (2011)
petitioners' request for cold shutdown because of radiological contamination of groundwater from tritium is denied; DD-11-3, 73 NRC 375 (2011)
request for enforcement action to prevent reactor restart until applicable adequate protection standards regarding zero pressure boundary leakage and operation of the reactor have been met is denied; DD-11-2, 73 NRC 323 (2011)
through the regulatory process, which includes plant inspections, notice and guidance to licensees, and enforcement actions, NRC takes a host of measures to improve the ability to timely detect and correct inadvertent leaks to assure compliance with public dose limits; LBP-11-2, 73 NRC 28 (2011)

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an award of attorneys' fees under the Equal Access to Justice Act can include fees paid by a third-party liability insurer; LBP-11-8, 73 NRC 349 (2011)
claimant with a legally enforceable right to full indemnification of attorney fees from a solvent third party cannot be deemed to have incurred that expense for purposes of the Equal Access to Justice Act, and hence is not eligible for an award of fees under that Act; LBP-11-8, 73 NRC 349 (2011)

denying Equal Access to Justice Act awards in insurance contexts would undermine the dual purposes of EAJA by both maintaining financial deterrents for those who would want to challenge unjust government action and not deterring unreasonable government actions; LBP-11-8, 73 NRC 349 (2011)
holders of a Parts 40/70 uranium enrichment facility license are required to maintain adequate nuclear liability insurance, with proof of such insurance necessary prior to a license being issued; LBP-11-11, 73 NRC 455 (2011)
in an actuarial sense the cost of the defense, to the extent borne by the insurance company, is a cost that the insured paid for, just as he would have paid a lawyer for his defense had he had no insurance; LBP-11-8, 73 NRC 349 (2011)
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if NRC Staff detects deficiencies in an application before or after a notice of hearing opportunity is issued, applicant will freely be given (outside the adjudicatory process) ample opportunity to amend it; LBP-11-9, 73 NRC 391 (2011)
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the public interest can well be served by revisions to an application that end up "getting it right" and by the Staff's expected thorough analysis of such revisions; LBP-11-9, 73 NRC 391 (2011)
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NRC may impose such additional conditions, requirements, and limitations on a license as may be necessary to effectuate the purposes of the Atomic Energy Act and the agency's regulations; LBP-11-11, 73 NRC 455 (2011)
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the presiding officer may restrict irrelevant, immaterial, unreliable, duplicative, or cumulative evidence and/or arguments; LBP-11-13, 73 NRC 534 (2011)
where the board allowed petitioners to file a corrected version of an expert declaration that contained numerous typographical errors, and where some of petitioners' corrections clearly went beyond what the board expected, the board did not try to parse which changes were authorized and did not consider or rely on the corrected version; LBP-11-2, 73 NRC 28 (2011)
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during a nuclear emergency in the United States, the individual licensee and the appropriate state and local government officials have direct responsibilities for the coordinated response to the event; LBP-11-15, 73 NRC 629 (2011)
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an uncontested early site permit proceeding is subject to mandatory hearing requirements; LBP-11-10, 73 NRC 424 (2011)
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even if no intervention petitions are received, the Commission must still conduct adjudicatory hearing on the record with regard to the licensing of the construction and operation of a uranium enrichment facility; LBP-11-11, 73 NRC 455 (2011)
for uranium enrichment facility licensing, boards should inquire whether the NRC Staff performed an adequate review and made findings with reasonable support in logic and fact; LBP-11-11, 73 NRC 455 (2011)
in uranium enrichment facility licensing proceedings, boards are to make independent environmental judgments with respect to certain NEPA findings; LBP-11-11, 73 NRC 455 (2011)
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licensing boards are to conduct a simple sufficiency review rather than a de novo review on both AEA and NEPA issues for uranium enrichment facility licensing; LBP-11-11, 73 NRC 455 (2011)
licensing boards must narrow their inquiry to topics or sections in Staff documents that they deem most important and should concentrate on portions of the documents that do not on their face adequately explain the logic, underlying facts, and applicable regulations and guidance; LBP-11-11, 73 NRC 455 (2011)
relative to NEPA, in uranium enrichment facility licensing proceedings, boards are to determine whether the review conducted by NRC Staff has been adequate, but they need not rethink or redo every aspect

of the NRC Staff's environmental findings or undertake their own fact-finding activities; LBP-11-11, 73 NRC 455 (2011)
the board's role in mandatory hearings is to carefully probe Staff findings by asking appropriate questions and by requiring supplemental information when necessary, but the NRC Staff's underlying technical and factual findings are not open to board reconsideration unless, after a review of the record, the board finds the NRC Staff review inadequate or its findings insufficient; LBP-11-11, 73 NRC 455 (2011)
the Commission shall conduct a single adjudicatory hearing on the record with regard to the licensing of the construction and operation of a uranium enrichment facility; LBP-11-11, 73 NRC 455 (2011)
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a uranium enrichment facility license must have a condition requiring the licensee to maintain and follow a source material control and accounting program and maintain records of any MC&A program changes made without Commission approval for 5 years from the date of the change; LBP-11-11, 73 NRC 455 (2011)
materials license amendment applications must contain a full description of the applicant's program for control and accounting of special nuclear material to show how it will comply with the 10 C.F.R. Part 74 requirements; LBP-11-9, 73 NRC 391 (2011)
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a test for materiality that would require petitioners to demonstrate quantitatively how an alleged defect would result in a violation of pertinent requirements is rejected; LBP-11-7, 73 NRC 254 (2011)
although NRC Staff's argument against contention admission appears to have some weight, the board need not resolve it, because the contention is inadmissible for failing to raise a genuine dispute of material fact or law with the environmental report; LBP-11-6, 73 NRC 149 (2011)
inasmuch as NRC Staff relies on the benefits of proposed units to satisfy an otherwise unmet need for power, the adequacy of the need-for-power assessment is material to granting the proposed combined license; LBP-11-7, 73 NRC 254 (2011)
intervenors need only demonstrate that the issue raised in the contention is material to a licensing decision, i.e., that it would make a difference in the decision; LBP-11-7, 73 NRC 254 (2011)
under 10 C.F.R. 2.309(f)(1), in meeting materiality requirement, petitioner need only properly allege a defect; LBP-11-7, 73 NRC 254 (2011)
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whether the safe shutdown earthquake exceedance in applicant's exemption request does in fact comply with 10 C.F.R. Part 50, Appendix S and 10 C.F.R. 100.23 is a question currently before the NRC Staff and is thus material to the NRC's licensing decision in this proceeding; LBP-11-10, 73 NRC 424 (2011)
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applicant must provide a full description of its program for control and accounting of special nuclear material to show how it will comply with the 10 C.F.R. Part 74 requirements; LBP-11-9, 73 NRC 391 (2011)
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a materials license suspension proceeding is not an adversarial adjudication for purposes of the Equal Access to Justice Act because the Atomic Energy Act does not require such a hearing to be on the record pursuant to Administrative Procedure Act § 554; LBP-11-8, 73 NRC 349 (2011)
a Pentapartite Agreement between the United States and four European governments to prevent new restricted data from being disseminated to European nationals will be a prerequisite to the NRC Staff issuing a facility clearance; LBP-11-11, 73 NRC 455 (2011)

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along with the requirement to perform an integrated safety analysis is the requirement for applicant to provide the NRC Staff with an ISA summary, the content of which is specified in 10 C.F.R. 70.65(b); LBP-11-11, 73 NRC 455 (2011)
applicant for a Part 70 license is required to establish and maintain a safety program, which includes performing an integrated safety analysis; LBP-11-11, 73 NRC 455 (2011)
applicant must indicate the period of time for which a Part 70 license is requested; LBP-11-11, 73 NRC 455 (2011)
applicant's integrated safety analysis must consider potential accident sequences caused either by deviations in the processes that will be conducted at the proposed facility or by credible external events, including natural phenomena; LBP-11-11, 73 NRC 455 (2011)
regulations contain no express prohibition on foreign ownership, but require Staff to make a finding that license issuance will not be inimical to the common defense and security or the health and safety of the public; LBP-11-11, 73 NRC 455 (2011)
Staff imposed a license condition on a uranium enrichment facility to ensure that clearances are obtained before classified matter is processed, stored, reproduced, transmitted, handled, or accessed; LBP-11-11, 73 NRC 455 (2011)
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a contention based solely upon omissions from the environmental report is rendered moot when the missing information is supplied; LBP-11-14, 73 NRC 591 (2011)
if all matters at issue in a contention of omission are addressed by NRC Staff in its draft environmental impact statement through the actual provision of information on all such matters, then no legal interest in that contention remains, and the contention is moot; LBP-11-4, 73 NRC 91 (2011)
in ruling on whether a contention is moot, boards look to whether a justiciable controversy still exists and whether an issue is still live, such that a party still has a legal interest in the issue; LBP-11-4, 73 NRC 91 (2011)
intervenors' challenges to adequacy of applicant's environmental report with respect to environmental impacts of dewatering associated with the proposed nuclear plant continue to serve as viable challenges to similar sections of Staff's draft environmental impact statement and thus are not moot; LBP-11-1, 73 NRC 19 (2011)
publication of NRC Staff's draft environmental impact statement may moot a contention challenging the environmental analysis in the applicant's environmental report, if the DEIS dispenses with the issues raised in the original contention challenging the ER; LBP-11-1, 73 NRC 19 (2011)
where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant, the contention is moot; LBP-11-16, 73 NRC 645 (2011)
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all motions must include a certification that movant has made a sincere effort to contact other parties in the proceeding and resolve the issue raised in the motion, and that the movant's efforts to resolve the issue have been unsuccessful; LBP-11-2, 73 NRC 28 (2011); LBP-11-15, 73 NRC 629 (2011)
if any portion of a filing is untimely tendered, it must be accompanied by a motion to file out of time; LBP-11-13, 73 NRC 534 (2011)
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bare assertions and speculation do not supply the requisite support; CLI-11-2, 73 NRC 333 (2011)

NRC generally disfavors the filing of new contentions at the eleventh hour of an adjudication, a policy that is grounded in the doctrine of finality, which states that at some point, an adjudicatory proceeding must come to an end; CLI-11-2, 73 NRC 333 (2011)
NRC imposes a deliberately heavy burden on petitioners seeking to reopen a record, even with respect to an existing contention; CLI-11-2, 73 NRC 333 (2011)
petitioner failed to satisfy NRC standards for reopening because its motion was untimely and it failed to demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially; CLI-11-2, 73 NRC 333 (2011)
petitioner who seeks both to reopen the record and to submit a late contention must successfully satisfy two elevated standards; CLI-11-2, 73 NRC 333 (2011)
proponent of a motion to reopen the record must demonstrate that a materially different result would have been likely had the newly proffered evidence been considered initially; CLI-11-2, 73 NRC 333 (2011)
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where a municipality seeks to participate in a reactor licensing proceeding that does not involve a facility within the municipality's boundaries, it can, for purposes of establishing standing, rely on the 50-mile proximity presumption to the same extent as an individual or an organization; LBP-11-6, 73 NRC 149 (2011)
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a categorical exclusion from the NEPA requirement to prepare an environmental assessment or environmental impact statement for the issuance of import licenses involving low-level radioactive waste is provided; CLI-11-3, 73 NRC 613 (2011)
a severe accident mitigation alternatives analysis fulfills the requirement to provide a consideration of alternatives to mitigate severe accidents and therefore is governed by NEPA's rule of reason; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
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agencies are permitted to select their own methodology for mitigation analysis as long as that methodology is reasonable; LBP-11-7, 73 NRC 254 (2011)
agencies have an obligation to consider every significant aspect of the environmental impact of a proposed action and inform the public that it has indeed considered environmental concerns in its decisionmaking process; LBP-11-7, 73 NRC 254 (2011)
agencies must take a hard look at the environmental consequences before taking a major action and to report the result of that hard look in an environmental impact statement; LBP-11-6, 73 NRC 149 (2011)
agencies need only discuss those alternatives that are reasonable and will bring about the ends of the proposed action; LBP-11-13, 73 NRC 534 (2011)
agencies shall use the criteria for scope in 40 C.F.R. 1508.25 to determine which proposal shall be the subject of a particular environmental impact statement; LBP-11-10, 73 NRC 424 (2011)
agency's consideration of three alternative routes is sufficient to meet its NEPA obligations to consider reasonable transmission line route alternatives; LBP-11-6, 73 NRC 149 (2011)

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although NEPA does not explicitly mention cost-benefit balancing, courts have interpreted the statute as requiring federal agencies to balance the environmental costs against the anticipated benefits of a proposed action; LBP-11-7, 73 NRC 254 (2011)
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an environmental impact statement must describe the potential environmental impact of the proposed action and discuss any reasonable alternatives; LBP-11-7, 73 NRC 254 (2011)
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federal agencies must prepare an environmental impact statement for those proposed actions that have the potential to significantly affect the quality of the human environment; LBP-11-7, 73 NRC 254 (2011)
federal agencies must rigorously explore and objectively evaluate all reasonable alternatives and devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits; LBP-11-14, 73 NRC 591 (2011)
generation of baseload power is an acceptable purpose for a licensing action and has been determined to be broad enough to permit consideration of a host of energy-generating alternatives; LBP-11-13, 73 NRC 534 (2011)

if important factors in the cost-benefit balancing cannot be quantified, they may be discussed qualitatively; LBP-11-7, 73 NRC 254 (2011)
if the adverse environmental effects of a proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs; LBP-11-7, 73 NRC 254 (2011); LBP-11-14, 73 NRC 591 (2011)
in defining the scope of the environmental impact statement, all connected actions must be analyzed in one statement; LBP-11-10, 73 NRC 424 (2011)
in enacting NEPA, Congress's twin aims were to require an agency to consider every significant aspect of the environmental impact of a proposed action and ensure that the agency will inform the public that it has considered environmental concerns in its decisionmaking process; LBP-11-6, 73 NRC 149 (2011)
in implementing its NEPA obligations, NRC expressly adopts certain definitions promulgated by the Council on Environmental Quality; LBP-11-7, 73 NRC 254 (2011)
in mandatory hearings on uranium enrichment facility licensing, boards are to determine whether the review conducted by NRC Staff has been adequate, but they need not rethink or redo every aspect of the NRC Staff's environmental findings or undertake their own fact-finding activities; LBP-11-11, 73 NRC 455 (2011)
in mandatory proceedings for uranium enrichment facility licensing, boards are to make independent environmental judgments with respect to certain NEPA findings; LBP-11-11, 73 NRC 455 (2011)
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merely describing an alternative is insufficient to comply with NEPA; LBP-11-14, 73 NRC 591 (2011)
mitigation must be discussed only in sufficient detail to ensure that environmental consequences have been fairly evaluated; LBP-11-7, 73 NRC 254 (2011)
need for power is a shorthand expression for the benefit side of the cost-benefit balance that NEPA mandates for a proceeding considering the licensing of a nuclear power plant; LBP-11-6, 73 NRC 149 (2011)
neither a fully developed plan nor a detailed explanation of specific measures that will be employed to mitigate the adverse impacts of a proposed action is required; LBP-11-7, 73 NRC 254 (2011)
NEPA allows agencies to select their own methodology as long as that methodology is reasonable; LBP-11-2, 73 NRC 28 (2011)
NEPA an environmental review must provide a sufficient discussion of alternatives to enable the decisionmaker to take a hard look at environmental factors, and to make a reasoned decision; LBP-11-13, 73 NRC 534 (2011)
NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act, but only requires that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated; LBP-11-14, 73 NRC 591 (2011)
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NEPA imposes no substantive requirement that mitigation measures actually be taken; LBP-11-14, 73 NRC 591 (2011)
NEPA itself does not mandate a cost-benefit analysis, but the statute is generally regarded as calling for some sort of a weighing of the environmental costs against the economic, technical, or other public benefits of a proposal; LBP-11-6, 73 NRC 149 (2011)
NRC generally defers to an applicant's stated purpose as long as that purpose is not so narrow as to eliminate alternatives; LBP-11-13, 73 NRC 534 (2011)
NRC Staff is to consider and weigh the environmental, technical, and other costs and benefits of a proposed action and alternatives, and, to the fullest extent practicable, quantify the various factors considered; LBP-11-7, 73 NRC 254 (2011)
NRC Staff must consider the cumulative impact of greenhouse gas emissions from a proposed facility; LBP-11-7, 73 NRC 254 (2011)
NRC Staff's NEPA responsibilities for preparing an environmental impact statement are described; LBP-11-6, 73 NRC 149 (2011)

NRC Staff's reference to, and reliance in its draft environmental impact statement on, state issuance of a site certification order and associated certificate of compliance on groundwater use does not dispense with NRC's duty under NEPA to conduct an independent hard look at environmental impacts related to active dewatering during operations at a nuclear plant; LBP-11-1, 73 NRC 19 (2011)
NRC's environmental analysis need only consider environmental impacts that are reasonably foreseeable, and need not consider remote and speculative scenarios; LBP-11-16, 73 NRC 645 (2011)
on issues arising under the NEPA, intervenor must file contentions based on the applicant's environmental report, but may amend those contentions or file new contentions; LBP-11-7, 73 NRC 254 (2011)
one important component of an environmental impact statement is the discussion of possible actions that might mitigate adverse environmental consequences; LBP-11-7, 73 NRC 254 (2011)
proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement; LBP-11-10, 73 NRC 424 (2011)
quibbling over the details of an economic analysis would effectively stand NEPA on its head by asking that the license be rejected not due to environmental costs, but because the economic benefits are not as great as estimated; LBP-11-7, 73 NRC 254 (2011)
remote and speculative alternatives need not be addressed in an applicant's environmental report; LBP-11-2, 73 NRC 28 (2011)
requirement that federal agencies prepare an environmental impact statement when considering a major action serves the statute's action-forcing purpose in two ways; LBP-11-7, 73 NRC 254 (2011)
separate actions may be considered connected if, among other things, they are interdependent parts of a larger action and depend on the larger action for their justification; LBP-11-10, 73 NRC 424 (2011)
the agency responsible for preparing the environmental impact statement must define the scope of the issues it will address; LBP-11-10, 73 NRC 424 (2011)
the alternatives analysis is the heart of the environmental impacts analysis; LBP-11-16, 73 NRC 645 (2011)
the concept of alternatives evolves, and agencies must explore alternatives as they become better known and understood; LBP-11-13, 73 NRC 534 (2011)
the DEIS, like the environmental report, must cover all significant environmental impacts associated with the combined license, including offsite environmental impacts; LBP-11-1, 73 NRC 19 (2011)
the extent to which operation and maintenance costs of a solar facility may present a comparative benefit is immaterial since the four-part combination of alternative energy sources is not environmentally preferable to two new nuclear units; LBP-11-4, 73 NRC 91 (2011)
the principal goals of NEPA's environmental impact statement requirement 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; LBP-11-14, 73 NRC 591 (2011)
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the rule of reason would not exclude consideration of demand-side management as part of an alternatives analysis when applicant is a state-regulated utility; LBP-11-6, 73 NRC 149 (2011)
the statute itself does not mandate particular results, but simply prescribes the necessary process; LBP-11-7, 73 NRC 254 (2011)
there exists an obligation to consider alternatives as they exist and are likely to exist; LBP-11-13, 73 NRC 534 (2011)
to issue an early site permit, NRC must include in an environmental impact statement a detailed statement on the environmental impacts of the proposed action, any unavoidable adverse environmental effects that cannot be avoided, and alternatives to the proposed action; LBP-11-10, 73 NRC 424 (2011)
weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations; LBP-11-7, 73 NRC 254 (2011)
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boards may exclude the public from adjudicatory hearings or actions that involve restricted data, defense information, safeguards information protected from disclosure under the authority of AEA § 147, or

information protected from disclosure under the authority of section 148; LBP-11-5, 73 NRC 131 (2011)
relative to the issue of foreign ownership or control, NRC imposes restrictions on the physical security and control of information at licensed facilities to safeguard restricted data and national security information; LBP-11-11, 73 NRC 455 (2011)
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a state public service commission's determination of need for power may be relied on by the NRC in its own analysis, as long as that determination is neither shown nor appears on its face to be seriously defective; LBP-11-6, 73 NRC 149 (2011)
applicant who is a state-regulated utility is in a position to implement and promote programs such as energy conservation, efficiency, and load management such that the need for additional generation capacity may be reduced; LBP-11-6, 73 NRC 149 (2011)
because a need-for-power assessment necessarily entails forecasting power demands in light of substantial uncertainty and the duty of providing adequate and reliable service to the public, it is inherently conservative; LBP-11-7, 73 NRC 254 (2011)
contention asserting that a license renewal environmental report must include a discussion of need for power is inadmissible; LBP-11-13, 73 NRC 534 (2011)
demand for electricity is of course the justification for building any power plant, and satisfaction of that demand is the principal beneficial factor weighed against the environmental costs in striking the balance that NEPA requires; LBP-11-7, 73 NRC 254 (2011)
discussion of need for power is required in an environmental report, but applicant need not precisely identify future market conditions and energy demand or develop other detailed analyses in order to establish with certainty that construction and operation of a nuclear power plant are the most economical alternative; LBP-11-6, 73 NRC 149 (2011)
given the legal responsibility imposed upon a public utility to provide at all times adequate, reliable service, and the severe consequences that may attend upon a failure to discharge that responsibility, the most that can be required is that the forecast be a reasonable one in light of what is ascertainable at the time made; LBP-11-7, 73 NRC 254 (2011)
in its analysis, NRC Staff may rely on studies and forecasts prepared by expert, independent agencies charged with the duty of ensuring that the utilities within their jurisdiction fulfill the legal obligation to meet customer demands; LBP-11-7, 73 NRC 254 (2011)
inasmuch as NRC Staff relies on the benefits of proposed units to satisfy an otherwise unmet need for power, the adequacy of the need-for-power assessment is material to granting the proposed combined license; LBP-11-7, 73 NRC 254 (2011)
inherent in any forecast of future electric power demands is a substantial margin of uncertainty; LBP-11-6, 73 NRC 149 (2011)
it is sufficient if the analysis is at a level of detail to reasonably characterize the costs and benefits associated with proposed licensing actions; LBP-11-7, 73 NRC 254 (2011)
NRC must address any purported need for additional power during its environmental review of a combined license application; LBP-11-7, 73 NRC 254 (2011)
NRC Staff's need-for-power analysis may accord an expert, independent agency's forecasts and studies great weight and may give heavy reliance to those forecasts and studies absent a showing that they contain a fundamental error; LBP-11-7, 73 NRC 254 (2011)
operating license renewal applications need not discuss the need for power; LBP-11-2, 73 NRC 28 (2011)
potential legislative action that might result in a reduction in demand is speculative and therefore does not provide a basis for admission of a contention on need for power; LBP-11-7, 73 NRC 254 (2011)
regardless of whether NRC itself conducts the need-for-power assessment or relies on another agency's forecasts and studies, that assessment need only be reasonable; LBP-11-7, 73 NRC 254 (2011)
the assessment need not precisely identify future market conditions and energy demand, or 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; LBP-11-7, 73 NRC 254 (2011)
this is a shorthand expression for the benefit side of the cost-benefit balance that NEPA mandates for a proceeding considering the licensing of a nuclear power plant; LBP-11-6, 73 NRC 149 (2011)

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board determination of expert's need to know with regard to a document withheld as safeguards information was reversed; LBP-11-9, 73 NRC 391 (2011)
lack of clarity in the terms and application of the agency's newly established SUNSI policy contributed to intervenors' misapprehension that they were required to demonstrate a need for the information in order to request SUNSI documents; LBP-11-9, 73 NRC 391 (2011)
NRC Staff was admonished for having imposed a stricter-than-necessary standard of "need" for access to SUNSI; LBP-11-9, 73 NRC 391 (2011)
petitioner was denied access to a safeguards-protected design-related document on the basis of his lacking a need to know; LBP-11-9, 73 NRC 391 (2011)
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although boards may give reasonable deference to NRC guidance, such agency guidance does not substitute for regulations, is not binding authority, and does not prescribe NRC requirements; LBP-11-16, 73 NRC 645 (2011)
although NUREGs are not legally binding, they are guidance documents and applicant's failure to comply with such documents could give rise to an admissible contention; LBP-11-6, 73 NRC 149 (2011)
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NRC generally disfavors the filing of new contentions at the eleventh hour of an adjudication, a policy that is grounded in the doctrine of finality, which states that at some point, an adjudicatory proceeding must come to an end; CLI-11-2, 73 NRC 333 (2011)
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Staff and its counsel, like the board and its staff, are federal government employees and are thus subject to stringent sanctions for the unauthorized disclosure of the protected information or protected documents; LBP-11-5, 73 NRC 131 (2011)
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an expert, independent agency's forecasts and studies may be accorded great weight and heavy reliance given to those forecasts and studies absent a showing that they contain a fundamental error; LBP-11-7, 73 NRC 254 (2011)
applicant's environmental report is not the vehicle for the NRC Staff's safety review; LBP-11-6, 73 NRC 149 (2011)
environmental, technical, and other costs and benefits of a proposed action and alternatives are to be considered and weighed, and, to the fullest extent practicable, quantified; LBP-11-7, 73 NRC 254 (2011)
for a proposed nuclear materials-related activity, including uranium enrichment, commencement of construction prior to a favorable Staff conclusion regarding the NEPA cost-benefit balance is grounds for denial of the authorization to conduct that activity; LBP-11-11, 73 NRC 455 (2011)

for power reactors, NRC developed a Commission-approved standard review plan to assist in evaluating applications for reactor licenses or applications for the transfer of such licenses; LBP-11-11, 73 NRC 455 (2011)
if after conducting a threshold review, NRC Staff concludes that the applicant may be considered to be foreign owned, controlled, or dominated, or that additional action would be necessary to negate the foreign ownership, control, or domination, applicant shall be promptly advised and requested to submit a negation action plan; LBP-11-11, 73 NRC 455 (2011)
in its need-for-power analysis, NRC Staff may rely on studies and forecasts prepared by expert, independent agencies charged with the duty of ensuring that the utilities within their jurisdiction fulfill the legal obligation to meet customer demands; LBP-11-7, 73 NRC 254 (2011)
inasmuch as NRC Staff relies on the benefits of proposed units to satisfy an otherwise unmet need for power, the adequacy of the need-for-power assessment is material to granting the proposed combined license; LBP-11-7, 73 NRC 254 (2011)
incident to its preparation of the safety evaluation report, NRC Staff is obliged to ensure that applicant's design basis for the new units will protect public health and safety; LBP-11-6, 73 NRC 149 (2011)
mere existence of comments and questions generated by NRC Staff do not, in and of themselves, demonstrate a material deficiency in applicant's combined license application; LBP-11-6, 73 NRC 149 (2011)
NRC must address any purported need for additional power during its environmental review of a combined license application; LBP-11-7, 73 NRC 254 (2011)
regardless of whether NRC itself conducts the need-for-power assessment or relies on another agency's forecasts and studies, that assessment need only be reasonable; LBP-11-7, 73 NRC 254 (2011)
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the agency responsible for preparing the environmental impact statement must define the scope of the issues it will address; LBP-11-10, 73 NRC 424 (2011)
to issue an early site permit, NRC must comply with the National Environmental Policy Act by including in an environmental impact statement a detailed statement on the environmental impact of the proposed action, any unavoidable adverse environmental effects that cannot be avoided, and alternatives to the proposed action; LBP-11-10, 73 NRC 424 (2011)
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adjudicatory hearings can be closed if the Commission orders it; LBP-11-5, 73 NRC 131 (2011)
even absent an express provision authorizing such relief, the Commission has occasionally considered requests to suspend proceedings or hold them in abeyance in the exercise of its inherent supervisory powers over proceedings; CLI-11-1, 73 NRC 1 (2011)
if the adverse environmental effects of a proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs; LBP-11-7, 73 NRC 254 (2011)
NEPA allows agencies to select their own methodology as long as that methodology is reasonable; LBP-11-2, 73 NRC 28 (2011)
NRC authority to review offsite impacts of transmission lines goes beyond merely factoring them into a final cost-benefit balance and includes as well the authority where necessary to impose license conditions to minimize those impacts; LBP-11-6, 73 NRC 149 (2011)
NRC may hold an informal hearing in which it requests and considers written materials without providing for traditional trial-type procedures such as oral testimony and cross-examination; LBP-11-4, 73 NRC 91 (2011)
NRC may impose such additional conditions, requirements, and limitations on a license as may be necessary to effectuate the purposes of the Atomic Energy Act and the agency's regulations; LBP-11-11, 73 NRC 455 (2011)

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NRC, in its capacity as the federal agency charged with regulating the nuclear industry in a manner that protects public health and safety, monitors nuclear emergencies; LBP-11-15, 73 NRC 629 (2011)
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petitioner's demand for compliance with U.S. Army Corps of Engineers requirements is not within the scope of a combined license proceeding, because it is not the province of the NRC to enforce another agency's regulations; LBP-11-6, 73 NRC 149 (2011)

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promulgation of state regulations falls within the broad reach of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body; LBP-11-7, 73 NRC 254 (2011)
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because petitioner's issue of the inadvertent release of radioactivity does not specifically relate to the ability of buried structures to perform their intended functions as defined by 10 C.F.R. 54.4(a)(1)-(3), the contention is not within the scope of a license renewal proceeding; LBP-11-2, 73 NRC 28 (2011)
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contentions are limited to aging-related issues, not issues already monitored and reviewed in the ongoing regulatory oversight processes; CLI-11-2, 73 NRC 333 (2011)
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severe accident mitigation alternatives contentions are admissible only if it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated; LBP-11-2, 73 NRC 28 (2011)
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the relatively formal procedures in Subpart G of Part 2 govern where the credibility of an eyewitness may reasonably be expected to be at issue and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter; LBP-11-2, 73 NRC 28 (2011)
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Commission directive to treat pro se litigants more leniently than litigants with counsel allows a board to take into account complex procedural hurdles presented to intervenors and to structure its rulings accordingly; LBP-11-9, 73 NRC 391 (2011)
NRC is lenient in permitting pro se petitioners the opportunity to cure procedural defects in petitions to intervene regarding standing; LBP-11-13, 73 NRC 534 (2011)
petitioner was allowed to clarify standing declarations by submitting revised declarations with its reply; LBP-11-13, 73 NRC 534 (2011)
petitioners who are not represented by counsel generally should be extended some latitude, but they are still expected to comply with procedural rules; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
petitioners who are proceeding without counsel should be shown greater leeway on the question of whether they have demonstrated good cause for lateness than petitioners represented by counsel; LBP-11-13, 73 NRC 534 (2011)
PROBABILISTIC RISK ASSESSMENT
analysis of potential volcanic hazard at proposed uranium enrichment facility site raises the question whether the probability of such an event is sufficiently low to be considered "highly unlikely"; LBP-11-11, 73 NRC 455 (2011)
highly site-specific seismic hazard analysis reflects consideration not only of the location and magnitude of historic earthquakes, but also the nature of the bedrock and the style of faulting in the surrounding region; LBP-11-11, 73 NRC 455 (2011)
probability-weighted consequences of a severe accident (risk) are small in the context of a license renewal proceeding; LBP-11-13, 73 NRC 534 (2011)
the determination that, for any license renewal of a nuclear power plant, the probability-weighted consequences of a severe accident are small cannot be challenged; LBP-11-2, 73 NRC 28 (2011)
PROBABLE CAUSE
the standard that must be met before NRC Staff can issue an immediately effective enforcement order is one of adequate evidence, which is akin to the test for probable cause; LBP-11-8, 73 NRC 349 (2011)
PROCEDURE COMPLIANCE
although pro se litigants are expected to comply with procedural rules, they are generally extended some latitude; LBP-11-2, 73 NRC 28 (2011)
PROOF
See Burden of Proof
PROPRIETARY INFORMATION
petitioners have an affirmative obligation to request confidential and proprietary information that has not been made publicly available in order to support a proposed contention; LBP-11-9, 73 NRC 391 (2011)
PROTECTIVE ACTION RECOMMENDATIONS
a combined license application must include an emergency plan that contains, in the event of a reactor emergency resulting in a radiological release, a range of protective actions for the public located within about a 10-mile radius from the plant; LBP-11-15, 73 NRC 629 (2011)
contention that, in the event of a core-melt accident, applicant's emergency plan should order an evacuation of persons within a 10-mile radius of the facility attacks NRC's emergency planning regulation; LBP-11-15, 73 NRC 629 (2011)

emergency plans are to have a range of protective actions for persons within about a 10-mile radius, and guidelines for the choice of protective actions during an emergency, consistent with federal guidance, must be developed and in place; LBP-11-15, 73 NRC 629 (2011)
in developing the range of protective actions, consideration will be given to evacuation, sheltering, and, as a supplement to these, the prophylactic use of potassium iodide, as appropriate; LBP-11-15, 73 NRC 629 (2011)
PROTECTIVE ORDERS
"disclosing party" means the party required to make mandatory disclosure; LBP-11-5, 73 NRC 131 (2011)
"document" means any medium (electronic, paper, or any other kind) that contains or stores any information, including text, data, audio, video, computer software, or computer modeling information; LBP-11-5, 73 NRC 131 (2011)
NRC has a strong policy in favor of openness and transparency; LBP-11-5, 73 NRC 131 (2011)
NRC Staff is exempted from the obligations of the protective order, even though Staff might hold many documents that are subject to the mandatory disclosure requirements; LBP-11-5, 73 NRC 131 (2011)
"receiving party" means the party to whom the mandatory disclosure must be made; LBP-11-5, 73 NRC 131 (2011)
"representative" means the attorney or other authorized representative of a party who has entered a notice of appearance; LBP-11-5, 73 NRC 131 (2011)
rules governing access to SUNSI apply only to potential parties, whereas party access to SUNSI is governed by protective orders and nondisclosure agreements; LBP-11-9, 73 NRC 391 (2011)
the board declines to issue a proposed protective order jointly submitted by all of the parties where it failed to require the privilege claimant to identify the legal basis for the claim that the document should be protected; LBP-11-5, 73 NRC 131 (2011)
the board issues a protective order and nondisclosure agreement that it considers to be clear and legally sound; LBP-11-5, 73 NRC 131 (2011)
the protective order, and the good-faith representation and designation of documents as protected documents, serves in lieu of the requirement for marking and for an affidavit; LBP-11-5, 73 NRC 131 (2011)
the SUNSI policy does not expand upon or create any new category of legally privileged or confidential information that is exempt from discovery or from mandatory disclosure; LBP-11-5, 73 NRC 131 (2011)
PROXIMITY PRESUMPTION
no proximity presumption applies in an import/export licensing case because petitioners have not shown that the import or export involves a significant source of radioactivity producing an obvious potential for offsite consequences; CLI-11-3, 73 NRC 613 (2011)
petitioner is deemed to have standing in reactor licensing proceedings by showing that he or she, or an individual authorizing an organization to represent his or her interests, resides in, or frequents the area within, a 50-mile radius of the facility; LBP-11-2, 73 NRC 28 (2011); LBP-11-2, 73 NRC 28 (2011); LBP-11-6, 73 NRC 149 (2011); LBP-11-13, 73 NRC 534 (2011); LBP-11-16, 73 NRC 645 (2011)
the rationale for proximity-based standing is that in construction permit and operating license cases, persons living within the roughly 50-mile radius of the facility face a realistic threat of harm if a release from the facility of radioactive material were to occur; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
where a municipality seeks to participate in a reactor licensing proceeding that does not involve a facility within the municipality's boundaries, it can, for purposes of establishing standing, rely on the 50-mile proximity presumption to the same extent as an individual or an organization; LBP-11-6, 73 NRC 149 (2011)
PUBLIC DOCUMENT ROOMS
transcript of Atomic Safety and Licensing Board hearings will be available for inspection in the agency's public records system; LBP-11-5, 73 NRC 131 (2011)
PUBLIC HEARINGS
all hearings will be public; LBP-11-5, 73 NRC 131 (2011)
the principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials; LBP-11-5, 73 NRC 131 (2011)

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PUBLIC INTEREST
the public interest can well be served by revisions to an application that end up "getting it right" and by the Staff's expected thorough analysis of such revisions; LBP-11-9, 73 NRC 391 (2011)
QUALIFICATIONS
adequacy of nuclear criticality safety manager qualifications for uranium enrichment facility is discussed and a license condition is imposed; LBP-11-11, 73 NRC 455 (2011)
QUALITY ASSURANCE
petitioners' assertions that the MACCS2 code was not subjected to quality assurance requirements is deficient because a SAMA analysis is not subject to such requirements; LBP-11-2, 73 NRC 28 (2011)
petitioners did not demonstrate that the issue of whether the MACCS2 was subject to quality assurance is material to the findings the NRC must make under NEPA to support the requested license extension; LBP-11-13, 73 NRC 534 (2011)
RADIATION EXPOSURE
See Radiological Exposure
RADIOACTIVE EFFLUENTS
a combined license application must identify the means for keeping levels of radioactive material in effluents to unrestricted areas as low as is reasonably achievable; LBP-11-6, 73 NRC 149 (2011)
because petitioner's issue of the inadvertent release of radioactivity does not specifically relate to the ability of buried structures to perform their intended functions as defined by 10 C.F.R. 54.4(a)(1)-(3), the contention is not within the scope of a license renewal proceeding; LBP-11-2, 73 NRC 28 (2011)
key functions of buried structures, systems, and components that are the focus of the license renewal safety review under Part 54 do not include the prevention of inadvertent radioactive leaks from buried structures; LBP-11-2, 73 NRC 28 (2011)
the final safety analysis report must include information regarding 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; LBP-11-6, 73 NRC 149 (2011)
RADIOACTIVE MATERIALS
applicant has described the kinds and quantities of radioactive materials expected to be produced in the operation to the extent its combined license application references a standardized design; LBP-11-6, 73 NRC 149 (2011)
the final safety analysis report must include information regarding 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; LBP-11-6, 73 NRC 149 (2011)
RADIOACTIVE RELEASES
NRC has analyzed terrorist acts in connection with license renewal and concluded that the core damage and radiological release from such acts would be no worse than the damage and release expected from internally initiated events; LBP-11-2, 73 NRC 28 (2011)
petitioners do not provide any alleged facts or expert support indicating that the river valley is within the geographic area for which applicant was required to model atmospheric dispersion; LBP-11-13, 73 NRC 534 (2011)
RADIOACTIVE WASTE DISPOSAL
contention that applicant's SAMA analysis improperly ignored radioactive waste disposal is outside the scope of the proceeding because it directly challenges the generic determinations in Table B-1 of Appendix B to Part 51; LBP-11-2, 73 NRC 28 (2011)
RADIOACTIVE WASTE MANAGEMENT
all uranium fuel cycle and waste management issues, including low-level waste storage and disposal, mixed waste storage and disposal, onsite spent fuel storage, and transportation, are Category 1 issues with a small impact; LBP-11-2, 73 NRC 28 (2011)
RADIOACTIVE WASTE STORAGE
absent a licensed low-level radioactive waste disposal facility that will accept waste from the proposed facility, it is reasonably foreseeable that low-level radioactive waste generated by normal operations will be stored at the site for a longer term than is currently envisioned in applicant's combined license application; LBP-11-6, 73 NRC 149 (2011)

challenges to a combined license applicant's failure to provide information on long-term storage of Greater-Than-Class-C radioactive waste are outside the scope of a combined license proceeding; LBP-11-6, 73 NRC 149 (2011)
contentions challenging the ability of combined license applicants to handle onsite storage of Classes B and C low-level radioactive waste, as well as the attendant potential environmental impacts of such storage in the wake of the closure of the Barnwell facility in South Carolina to states outside of the Atlantic Compact are admissible; LBP-11-6, 73 NRC 149 (2011)
mere existence of a letter of intent to ship low-level radioactive waste to a disposal facility does not answer questions as to whether such a plan will ultimately result in a transfer of LLRW title and permanent offsite disposition of the LLRW and whether nontransfer of title will result in environmental impacts; LBP-11-6, 73 NRC 149 (2011)
RADIOACTIVE WASTE, HIGH-LEVEL
challenges to a combined license applicant's failure to provide information on long-term storage of Greater-Than-Class-C radioactive waste are outside the scope of a combined license proceeding; LBP-11-6, 73 NRC 149 (2011)
RADIOACTIVE WASTE, LOW-LEVEL
a categorical exclusion from the NEPA requirement to prepare an environmental assessment or environmental impact statement for the issuance of import licenses involving low-level radioactive waste is provided; CLI-11-3, 73 NRC 613 (2011)
a discretionary hearing to discuss policy issues related to import of foreign low-level radioactive waste and domestic incineration and transportation issues is not warranted because these issues are either challenges to the Commission's regulations or are outside the scope of the proceeding; CLI-11-3, 73 NRC 613 (2011)
absent a licensed LLRW disposal facility that will accept waste from the proposed facility, it is reasonably foreseeable that low-level radioactive waste generated by normal operations will be stored at the site for a longer term than is currently envisioned in applicant's combined license application; LBP-11-6, 73 NRC 149 (2011)
contentions challenging the ability of combined license applicants to handle onsite storage of Classes B and C LLRW, as well as the attendant potential environmental impacts of such storage in the wake of the closure of the Barnwell facility in South Carolina to states outside of the Atlantic Compact are admissible; LBP-11-6, 73 NRC 149 (2011)
mere existence of a letter of intent to ship low-level radioactive waste to a disposal facility does not answer questions as to whether such a plan will ultimately result in a transfer of LLRW title and permanent offsite disposition of the LLRW and whether nontransfer of title will result in environmental impacts; LBP-11-6, 73 NRC 149 (2011)
the key action that will allow incineration of imported low-level-radioactive waste material is the domestic license authorizing such processing, not NRC's grant of an import license; CLI-11-3, 73 NRC 613 (2011)
the state reviewed the applications and the authorizations and found no technical reason to prohibit processing of imported waste; CLI-11-3, 73 NRC 613 (2011)
RADIOGRAPHY
except for ownership of NRC-licensed materials outlined in the settlement agreement, licensee will refrain from engaging in conducting radiography or a radiographers duties, or assisting, directing, or supervising such activities in an NRC jurisdiction under an NRC license or an agreement state license; LBP-11-3, 73 NRC 81 (2011)
RADIOLOGICAL CONTAMINATION
areas of minor radioactive contamination are evaluated and remediated as needed during plant decommissioning; DD-11-1, 73 NRC 7 (2011)
dose limits from tritium in groundwater for individual members of the public were never approached; DD-11-1, 73 NRC 7 (2011)
NRC established reasonable assurance that the dose consequence attributable to tritium in groundwater remains well below the ALARA dose objectives; DD-11-1, 73 NRC 7 (2011)
petition requesting that the NRC not allow restart after scheduled refueling outage until completion of all environmental remediation work and relevant reports on leaking tritium at the plant is denied; DD-11-1, 73 NRC 7 (2011)

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RADIOLOGICAL EXPOSURE
dose limits for individual members of the public are 100 millirem in a year the As Low As Is Reasonably Achievable (ALARA) dose objectives specified in 10 C.F.R. 50, Appendix I; DD-11-3, 73 NRC 375 (2011)
dose limits from tritium in groundwater for individual members of the public were never approached; DD-11-1, 73 NRC 7 (2011)
mere potential exposure to minute doses of radiation within regulatory limits does not constitute a distinct and palpable injury on which standing can be founded; CLI-11-3, 73 NRC 613 (2011)
NRC established reasonable assurance that the dose consequence attributable to tritium in groundwater remains well below the ALARA dose objectives; DD-11-1, 73 NRC 7 (2011)
the final safety analysis report must include information regarding 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; LBP-11-6, 73 NRC 149 (2011)
RADIOLOGICAL MONITORING
through the regulatory process, which includes plant inspections, notice and guidance to licensees, and enforcement actions, NRC takes a host of measures to improve the ability to timely detect and correct inadvertent leaks to assure compliance with public dose limits; LBP-11-2, 73 NRC 28 (2011)
REACTOR CONTROL RODS
request for enforcement action to prevent reactor restart until applicable adequate protection standards regarding zero pressure boundary leakage and operation of the reactor have been met is denied; DD-11-2, 73 NRC 323 (2011)
REACTOR DESIGN
a combined license applicant may reference a docketed-but-not-yet-certified design in its application, but does so at its own risk; LBP-11-10, 73 NRC 424 (2011)
a combined license applicant will have to demonstrate that the site-specific parameters are bounded by the parameters developed for the certified design; LBP-11-10, 73 NRC 424 (2011)
all environmental issues concerning severe accident mitigation design alternatives associated with the information in NRC's final environmental assessment for certified reactor design are deemed resolved for plants whose site parameters are within those specified in the technical support document; LBP-11-7, 73 NRC 254 (2011)
an exemption from any part of a referenced design certification rule may be granted if NRC determines that the exemption complies with any exemption provisions of the referenced design certification rule, or with 10 C.F.R. 52.63 if there are no applicable exemption provisions in the referenced design certification rule; LBP-11-10, 73 NRC 424 (2011)
applicant has described the kinds and quantities of radioactive materials expected to be produced in the operation to the extent its combined license application references a standardized design; LBP-11-6, 73 NRC 149 (2011)
applicants may incorporate a certified reactor design in a combined license application; LBP-11-10, 73 NRC 424 (2011)
each combined license applicant will have to determine whether it will adopt in toto the certified design, or whether it will take exemptions thereto and/or departures therefrom; LBP-11-10, 73 NRC 424 (2011)
exemption requests are subject to the same level of litigation as other issues that could be admissible in a combined license proceeding; LBP-11-10, 73 NRC 424 (2011)
grants of exemptions from referenced design certification rules are conditioned on the Commission's finding that the request complies with section 52.7 and that the special circumstances provided for section 52.7 outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption; LBP-11-10, 73 NRC 424 (2011)
REACTOR PRESSURE VESSEL
request for enforcement action to prevent reactor restart until applicable adequate protection standards regarding zero pressure boundary leakage and operation of the reactor have been met is denied; DD-11-2, 73 NRC 323 (2011)

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REASONABLENESS STANDARD
for the purposes of the Equal Access to Justice Act, the government's position should be considered substantially justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact; LBP-11-8, 73 NRC 349 (2011)
justification "in substance or in the main" is equated with the "reasonable basis both in law and fact" standard that has been applied by a majority of federal appellate courts; LBP-11-8, 73 NRC 349 (2011)
the government must demonstrate the reasonableness not only of its litigation position, but also of the agency's actions; LBP-11-8, 73 NRC 349 (2011)
the legal standard governing the determination of substantial justification is separate and distinct from the legal standard used in assessing the merits phase of a proceeding; LBP-11-8, 73 NRC 349 (2011)
REBUTTABLE PRESUMPTION
in any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability; LBP-11-6, 73 NRC 149 (2011)
RECORD OF DECISION
a materials license suspension proceeding is not an adversary adjudication for purposes of the Equal Access to Justice Act because the Atomic Energy Act of 1954, as amended, does not require such a hearing to be on the record pursuant to Administrative Procedure Act § 554; LBP-11-8, 73 NRC 349 (2011)
relevant factors including economic and technical considerations among alternatives must be discussed; LBP-11-7, 73 NRC 254 (2011)
REGULATIONS
applicant seeking an exemption should clearly describe any exemptions or authorizations of an unusual nature and adequately justify them for the NRC's consideration; LBP-11-11, 73 NRC 455 (2011)
dissatisfaction with regulatory requirements of 10 C.F.R. 50.75 are outside an enforcement petition; DD-11-4, 73 NRC 713 (2011)
exemption from a regulation will be granted if application of the regulation in the particular circumstances conflicts with other NRC rules or requirements, would not serve or is not necessary to achieve the underlying purpose of the rule, would result in undue hardship or other costs, would not be a benefit to public health and safety, would provide only temporary relief, or there is present any other material circumstance not considered when the regulation was adopted; LBP-11-10, 73 NRC 424 (2011)
exemption from a regulation will be granted when the request is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security; LBP-11-10, 73 NRC 424 (2011)
in implementing its NEPA obligations, NRC expressly adopts certain definitions promulgated by the Council on Environmental Quality; LBP-11-7, 73 NRC 254 (2011)
no rule or regulation of the Commission is subject to attack in any adjudicatory proceeding unless petitioner first obtains a waiver; LBP-11-2, 73 NRC 28 (2011)
NRC may grant exemptions from the regulatory requirements if it determines such an exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest; LBP-11-11, 73 NRC 455 (2011)
petitioner's demand for compliance with U.S. Army Corps of Engineers requirements is not within the scope of a combined license proceeding, because it is not the province of the NRC to enforce another agency's regulations; LBP-11-6, 73 NRC 149 (2011)
the basic regulatory framework that governs the licensing of an entity to construct and operate an enrichment facility is found in 10 C.F.R. Part 70, but Parts 19, 20, 21, 25, 30, 40, 51, 71, 73, 74, 95, 140, 170, 171, are also applicable; LBP-11-11, 73 NRC 455 (2011)
whether the safe shutdown earthquake exceedance in applicant's exemption request does in fact comply with 10 C.F.R. Part 50, Appendix S and 10 C.F.R. 100.23 is a question currently before the NRC Staff and is thus material to the NRC's licensing decision in this proceeding; LBP-11-10, 73 NRC 424 (2011)
See also State Regulatory Requirements; Waiver of Rule
REGULATIONS, INTERPRETATION
application of 10 C.F.R. 40.38(a) and 70.40 is limited to USEC alone and has no relevance to any other enrichment facility applicant; LBP-11-11, 73 NRC 455 (2011)

because there is no list of site parameters specified in the technical support document, a prerequisite for resolving severe accident mitigation design alternatives issues by 10 C.F.R. Part 52, Appendix A, § VI.B.7 is lacking; LBP-11-7, 73 NRC 254 (2011)
NEPA's requirement to discuss alternatives to the proposed action does not extend to the construction of transmission line corridors, because it is not "construction" as defined in 10 C.F.R. 50.10; LBP-11-6, 73 NRC 149 (2011)
the pertinent language in 10 C.F.R. 70.31(d) and 40.32(d) tracks the statutory language identically, i.e., "inimical to the common defense and security or the health and safety of the public"; LBP-11-11, 73 NRC 455 (2011)
REGULATORY GUIDES
to perform an appropriate integrated safety analysis, NUREG-1520 standard review plan guidance for fuel cycle facilities indicates that applicant should identify the process designs, accident sequences, and items relied upon for safety that are associated with the facility; LBP-11-11, 73 NRC 455 (2011)
See also NRC Guidance Documents
RENEWABLE ENERGY SOURCES
although there are many possible combinations of wind and solar power, storage, and natural gas, it is not necessary to examine every possible combination; LBP-11-4, 73 NRC 91 (2011)
See also Solar Power; Wind Power
REOPENING A RECORD
standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention; CLI-11-2, 73 NRC 333 (2011)
there would be little hope of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings; CLI-11-2, 73 NRC 333 (2011)
See also Motions to Reopen
REPLY BRIEFS
a board refused to consider new bases that were included in an answer to summary disposition motion and were outside the scope of the original contention; LBP-11-4, 73 NRC 91 (2011)
NRC regulations do not allow use of reply briefs to provide, for the first time, the necessary threshold support for contentions; LBP-11-6, 73 NRC 149 (2011)
petitioner was allowed to clarify standing declarations by submitting revised declarations with its reply; LBP-11-13, 73 NRC 534 (2011)
petitioner, having failed in its revised petition to challenge applicant's reliance on the generic environmental impact statement, cannot raise that challenge for the first time in its reply; LBP-11-6, 73 NRC 149 (2011)
petitioner's reply must be narrowly focused on the legal or logical arguments presented in the applicant's or NRC Staff's answer; LBP-11-6, 73 NRC 149 (2011)
replies to waiver petitions are allowed; CLI-11-3, 73 NRC 613 (2011)
the proper method for raising an issue addressed in a motion to strike is to seek leave to file a reply in support of the summary disposition motion; LBP-11-14, 73 NRC 591 (2011)
REPLY TO ANSWER TO MOTION
deadline for reply to an answer to a hearing petition is specified; CLI-11-3, 73 NRC 613 (2011)
petitions, answers, and replies are allowed unless otherwise specified by the Commission or the presiding officer, but no other written answers or replies will be entertained; LBP-11-2, 73 NRC 28 (2011)
REPORTING REQUIREMENTS
an annual report on recalculations of decommissioning cost estimates and projected available decommissioning funding must be submitted by a licensee for a plant that has closed before the end of its licensed life; DD-11-4, 73 NRC 713 (2011)
power reactor licensees must report to the NRC at least once every 2 years on the status of their decommissioning funding for each reactor or part of a reactor that they own; DD-11-4, 73 NRC 713 (2011)
reports to the agency regarding unapproved changes made to the material control and accounting program must be filed within no more than 6 months after the changes; LBP-11-11, 73 NRC 455 (2011)
REPRESENTATION
a duly authorized member or officer may represent his or her partnership, corporation, or unincorporated association even if he or she is not an attorney at law, but the representative's notice of appearance

must state the basis of his or her authority to act on behalf of the party; LBP-11-13, 73 NRC 534 (2011)
although an allegation that a purported representative is acting without his or her organization's authorization, i.e., is acting *ultra vires*, is distinct from a challenge to the organization's standing, petitioner may cure such a defect in representation as well; LBP-11-13, 73 NRC 534 (2011)
an attorney who purports to represent a client without authorization is subject to disciplinary proceedings by the state bar association; LBP-11-13, 73 NRC 534 (2011)
an individual may not intervene in his or her own right while simultaneously being represented by another petitioner in the same proceeding; LBP-11-13, 73 NRC 534 (2011)
an organization's standing can be demonstrated through the interests of its members, but if a member acts or speaks on behalf of the organization, that member must also demonstrate authorization by that organization to represent it; LBP-11-13, 73 NRC 534 (2011)
authority of an officer or attorney to sign a petition is distinguished from an authorization addressed to the organization's standing to intervene; LBP-11-13, 73 NRC 534 (2011)
REQUEST FOR ACTION
any person may file a request to institute a proceeding to modify, suspend, or revoke a license; LBP-11-6, 73 NRC 149 (2011)
if evidence subsequently indicates that the design basis of an operating nuclear power plant will not withstand a maximum flooding event, members of the public may file a request to institute a proceeding to modify, suspend, or revoke a license; LBP-11-15, 73 NRC 629 (2011)
petition requesting that the NRC not allow restart after scheduled refueling outage until completion of all environmental remediation work and relevant reports on leaking tritium at the plant is denied; DD-11-1, 73 NRC 7 (2011)
petitioners' request for cold shutdown because of radiological contamination of groundwater from tritium is denied; DD-11-3, 73 NRC 375 (2011)
request for enforcement action to prevent reactor restart until applicable adequate protection standards regarding zero pressure boundary leakage and operation of the reactor have been met is denied; DD-11-2, 73 NRC 323 (2011)
REQUEST FOR ADDITIONAL INFORMATION
petitioner may not rely on a document generated by a state agency if that document contains nothing more than a request for information; LBP-11-6, 73 NRC 149 (2011)
RESPONSES TO PETITIONS
petitions, answers, and replies are allowed unless otherwise specified by the Commission or the presiding officer, but no other written answers or replies will be entertained; LBP-11-2, 73 NRC 28 (2011)
RESTART
petition requesting that the NRC not allow restart after scheduled refueling outage until completion of all environmental remediation work and relevant reports on leaking tritium at the plant is denied; DD-11-1, 73 NRC 7 (2011)
request for enforcement action to prevent reactor restart until applicable adequate protection standards regarding zero pressure boundary leakage and operation of the reactor have been met is denied; DD-11-2, 73 NRC 323 (2011)
RESTRICTED DATA
relative to the issue of foreign ownership or control, NRC imposes restrictions on the physical security and control of information at licensed facilities to safeguard restricted data and national security information; LBP-11-11, 73 NRC 455 (2011)
REVIEW
See Appellate Review; NRC Staff Review; Standard of Review
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except for ownership of NRC-licensed materials outlined in the settlement agreement, licensee will refrain from engaging in conducting radiography or a radiographers duties, or assisting, directing, or supervising such activities in an NRC jurisdiction under an NRC license or an agreement state license; LBP-11-3, 73 NRC 81 (2011)
RISK-INFORMED PERFORMANCE-BASED PROGRAMS
uranium enrichment facility applicants must ensure that each item relied on for safety will be available and reliable to perform its function when needed; LBP-11-11, 73 NRC 455 (2011)

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RISKS
as a logical proposition, risk equals the likelihood of an occurrence times the severity of the consequences; LBP-11-2, 73 NRC 28 (2011)
RULE OF REASON
a severe accident mitigation alternatives analysis is mandated by NEPA considerations and thus subject to a rule of reason; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
applicant's alternatives analysis need not discuss every conceivable alternative to the proposed action, but rather only feasible, nonspeculative, and reasonable alternatives; LBP-11-13, 73 NRC 534 (2011)
given the legal responsibility imposed upon a public utility to provide at all times adequate, reliable service, and the severe consequences that may attend upon a failure to discharge that responsibility, the most that can be required is that the forecast be a reasonable one in light of what is ascertainable at the time made; LBP-11-7, 73 NRC 254 (2011)
NEPA does not exclude consideration of demand-side management as part of an alternatives analysis when applicant is a state-regulated utility; LBP-11-6, 73 NRC 149 (2011)
regardless of whether NRC itself conducts the need-for-power assessment or relies on another agency's forecasts and studies, that assessment need only be reasonable; LBP-11-7, 73 NRC 254 (2011)
RULEMAKING
because the Commission will have an opportunity to take a fresh look at concerns petitioners have expressed once the particulars of their rulemaking petition have been scrutinized by public comment and agency review, holding up proceedings is not necessary to ensure that the public will realize the full benefit of our ongoing regulatory review; CLI-11-1, 73 NRC 1 (2011)
if petitioner wishes to challenge an NRC regulation, its recourse is to petition for a rule change; LBP-11-15, 73 NRC 629 (2011)
petitioners request that NRC amend 10 C.F.R. 54.17(c) to permit a reactor licensee to file a license renewal application no sooner than 10 years before the expiration of the current license; CLI-11-1, 73 NRC 1 (2011)
the choice between rulemaking and adjudication (i.e., issuing orders or other license revisions) is within the agency's discretion; LBP-11-11, 73 NRC 455 (2011)
the ordinary burden to parties in pursuing litigation pending rulemaking does not justify disrupting ongoing license review; CLI-11-1, 73 NRC 1 (2011)
RULES OF PRACTICE
a brief explanation of the basis for a contention is required; LBP-11-13, 73 NRC 534 (2011)
a contention must be rejected if it attacks applicable statutory requirements or regulations, challenges the basic structure of the regulatory process, merely expresses petitioner's view of policy, seeks to raise an issue improper for adjudication in the proceeding or not applicable to the facility in question, or raises an issue that is not concrete or is otherwise not litigable; LBP-11-6, 73 NRC 149 (2011)
a contention that was originally admitted as a challenge to the environmental report may be treated as a challenge to the similar section of the draft environmental impact statement; LBP-11-1, 73 NRC 19 (2011)
a governmental body's interest in protecting the individuals and territory that fall under that body's authority establishes an organizational interest for standing purposes; LBP-11-6, 73 NRC 149 (2011)
a late-filed contention is inadmissible both for lack of a good cause showing and for failure to address the other factors of 10 C.F.R. 2.309(c)(1); LBP-11-6, 73 NRC 149 (2011)
a late-filed contention shall not be considered by a licensing board unless the petitioner demonstrates that a multifactor balancing test weighs in favor of consideration; LBP-11-6, 73 NRC 149 (2011)
a local governmental body that is not admitted as a party shall, upon request, be permitted to participate in a hearing as an interested nonparty; LBP-11-6, 73 NRC 149 (2011)
a municipality is deemed to have standing in a reactor licensing proceeding that involves a facility located within its boundaries; LBP-11-6, 73 NRC 149 (2011)
a newly proffered contention that does not satisfy the timeliness requirements of section 2.309(f)(2) may still be considered for admission if it satisfies section 2.309(c)(1); LBP-11-15, 73 NRC 629 (2011)
a nontimely proposed contention may be admissible if, on balance, it satisfies eight criteria; LBP-11-7, 73 NRC 254 (2011)
a petition for review may be granted if it presents a substantial question with respect to one or more of the five considerations of 10 C.F.R. 2.341(b)(4); CLI-11-2, 73 NRC 333 (2011)

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a proposed new contention will be considered timely if it is filed within 30 days of the date when the new and material information on which the proposed contention is based first becomes available; LBP-11-7, 73 NRC 254 (2011)

a vague accusation does not rise to the level of an admissible genuine dispute of material fact or law; LBP-11-10, 73 NRC 424 (2011)

absent a waiver, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011); LBP-11-16, 73 NRC 645 (2011)

admission of late-filed contentions is allowed only upon a showing that information upon which the new contention is based was not previously available and is materially different than information previously available and the new contention has been submitted in a timely fashion based on the availability of the subsequent information; CLI-11-2, 73 NRC 333 (2011)

adoption of building code rules by a state presents new and materially different information not previously available, upon which Intervenors may rest their proposed contention; LBP-11-7, 73 NRC 254 (2011)

all material facts set forth in the statement required to be served by summary disposition movant will be considered to be admitted unless controverted by the statement required to be served by the opposing party; LBP-11-4, 73 NRC 91 (2011)

although 10 C.F.R. 2.337(f), by its terms, applies to evidence at hearings, the bounds that this rule places on official notice is also appropriate for the contention admissibility stage of a proceeding; LBP-11-7, 73 NRC 254 (2011)

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-11-16, 73 NRC 645 (2011)

although an intervention petition itself was timely filed, the board must balance the eight factors to determine whether petitioner's late-filed exhibits are admissible; LBP-11-13, 73 NRC 534 (2011)

although it is risky for a nonmoving party to fail to proffer evidence in response to the summary judgment movant's showing, such a failure does not automatically mandate granting of the motion; LBP-11-4, 73 NRC 91 (2011)

although petitioner proffered a contention within 30 days of events that prompted it, this does not automatically render a newly proffered contention timely; LBP-11-15, 73 NRC 629 (2011)

although pro se litigants are expected to comply with procedural rules, they are generally extended some latitude; LBP-11-2, 73 NRC 28 (2011)

an admissible contention must satisfy six pleading requirements; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)

an interested governmental entity may introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, advise the Commission without being required to take a position with respect to the issue, file proposed findings, and petition for review by the Commission; LBP-11-6, 73 NRC 149 (2011)

an officer, member, or attorney representing an organization in a proceeding must file a written notice of appearance stating, among other things, his or her basis for representing the organization; LBP-11-13, 73 NRC 534 (2011)

an organization may base its standing on immediate or threatened injury to its organizational interests; CLI-11-3, 73 NRC 613 (2011)

an organization may establish organizational standing; LBP-11-6, 73 NRC 149 (2011)

an organization that seeks to establish representational standing, must show that at least one of its members would be affected by the proceeding and identify that member by name and address, show that the member would have standing to intervene in his or her own right, and that the identified member has authorized the organization to request a hearing on their behalf; CLI-11-3, 73 NRC 613 (2011); LBP-11-13, 73 NRC 534 (2011); LBP-11-16, 73 NRC 645 (2011)

an organization's standing can be demonstrated through the interests of its members, but if a member acts or speaks on behalf of the organization, that member must also demonstrate authorization by that organization to represent it; LBP-11-13, 73 NRC 534 (2011)

any doubt as to the existence of a genuine issue of material fact is resolved against the summary disposition movant; LBP-11-4, 73 NRC 91 (2011)

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any person may file a request to institute a proceeding to modify, suspend, or revoke a license; LBP-11-6, 73 NRC 149 (2011)
any person or organization seeking to intervene as a party in an NRC adjudicatory proceeding addressing a proposed licensing action must establish standing and proffer at least one admissible contention; LBP-11-13, 73 NRC 534 (2011)
applicant's change of legal position, its claims that such change no longer entails a need for an exemption from the regulations, and its identification of new means/systems to satisfy the regulations are all types of materially different new information that can enable a contention to satisfy the timely new or amended contention requirements of 10 C.F.R. 2.309(f)(2)(i)-(ii); LBP-11-9, 73 NRC 391 (2011)
at issue is not whether evidence unmistakably favors one side or the other, but whether there is sufficient evidence favoring the summary disposition opponent for a reasonable trier of fact to find in favor of that party; LBP-11-4, 73 NRC 91 (2011)
at the admission stage, petitioners should provide a minimal showing that material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate; LBP-11-13, 73 NRC 534 (2011)
at the summary disposition stage, the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for hearing; LBP-11-14, 73 NRC 591 (2011)
availability of new information may provide good cause for nontimely filing, but the test for good cause is not simply when the intervenor became aware of the material sought to be introduced but when the information became available and when the intervenor reasonably should have become aware of the information; LBP-11-7, 73 NRC 254 (2011)
bare assertions and speculation do not supply the requisite support for a motion to reopen; CLI-11-2, 73 NRC 333 (2011)
basic admissibility criteria that all contentions must satisfy are governed by 10 C.F.R. 2.309(f)(1); LBP-11-9, 73 NRC 391 (2011)
because a pro se first-time filer experienced problems with the NRC E-Filing system, the board concludes that petitioners' efforts demonstrate the requisite good cause for acceptance of the nontimely exhibits for consideration with the timely filed petition; LBP-11-13, 73 NRC 534 (2011)
because applicant did not comply with the consultation requirement of 10 C.F.R. 2.323(b), the board does not consider information supplied with applicant's letter in connection with the board's analysis of petitioner's contention; LBP-11-2, 73 NRC 28 (2011)
because the initial burden rests on the summary disposition movant, a licensing board must examine the record in the light most favorable to the nonmoving party and all justifiable inferences must be drawn in favor of the nonmoving party; LBP-11-4, 73 NRC 91 (2011); LBP-11-14, 73 NRC 591 (2011)
board refused to consider new bases that were included in an answer to summary disposition motion and were outside the scope of the original contention; LBP-11-4, 73 NRC 91 (2011)
boards admit contentions, not their supporting bases; LBP-11-2, 73 NRC 28 (2011)
boards are to construe intervention petitions in favor of petitioners in determining whether petitioner has demonstrated standing; LBP-11-2, 73 NRC 28 (2011)
boards do not adjudicate disputed facts at the contention admission stage; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
boards must balance the eight factors to determine whether petitioner's late-filed petition will be considered and good cause for the failure to file on time is the most important; LBP-11-2, 73 NRC 28 (2011)
caution should be exercised in granting summary disposition, which may be denied if there is reason to believe that the better course would be to proceed to a full hearing; LBP-11-7, 73 NRC 254 (2011)
challenges to an enhanced version of an application alone are insufficient to vitiate intervenors' obligation to file any challenges to the original version of that application at the outset of the proceeding; LBP-11-9, 73 NRC 391 (2011)
complex, fact-intensive issues are rarely appropriate for summary disposition, much less for resolution on the initial pleadings; LBP-11-2, 73 NRC 28 (2011)
conclusory allegations about potential radiological harm are insufficient to establish standing; CLI-11-3, 73 NRC 613 (2011)

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Congress called upon the Commission to make fundamental changes in its public hearing process to ensure that hearings adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors; LBP-11-6, 73 NRC 149 (2011)
contemporaneous judicial concepts of standing require a petitioner to allege an injury in fact that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-11-6, 73 NRC 149 (2011)
contentions based on new information in a document that was not previously available and that is materially different from a document that was previously available are not untimely simply for not being included in an intervenor's initial hearing request filed at the outset of a proceeding; LBP-11-9, 73 NRC 391 (2011)
contentions must satisfy six criteria of 10 C.F.R. 2.309(f)(1) to be admissible; LBP-11-16, 73 NRC 645 (2011)
contentions that address an important security issue regarding Part 74's strict requirements for the proposed facility, which applicant previously admitted it failed to satisfy, are admissible; LBP-11-9, 73 NRC 391 (2011)
criteria that nontimely contentions must address are governed by 10 C.F.R. 2.309(c); LBP-11-9, 73 NRC 391 (2011)
"disclosing party" means the party required to make mandatory disclosure pursuant to 10 C.F.R. 2.336; LBP-11-5, 73 NRC 131 (2011)
documents merely summarizing earlier documents or compiling preexisting, publicly available information into a single source do not render "new" the summarized or compiled information; CLI-11-2, 73 NRC 333 (2011)
during summary disposition, it is not appropriate for boards to untangle the expert affidavits and decide which experts are more correct; LBP-11-7, 73 NRC 254 (2011)
each party to a proceeding must disclose all documents relevant to the admitted contentions, except those documents for which a claim of privilege or protected status is made; LBP-11-5, 73 NRC 131 (2011)
essential to establishing standing are findings of injury, causation, and redressability; CLI-11-3, 73 NRC 613 (2011)
even if there are no objections to petitioners' representational standing, boards have an independent obligation to determine whether they have adequately demonstrated standing; LBP-11-2, 73 NRC 28 (2011); LBP-11-16, 73 NRC 645 (2011)
factors that timely new or amended contentions must satisfy are governed by are 10 C.F.R. 2.309(f)(2); LBP-11-9, 73 NRC 391 (2011)
factual support required for a contention at the admission stage is a minimal showing that material facts are in dispute; LBP-11-2, 73 NRC 28 (2011)
factual support required for an admissible contention need not be of the quality necessary to withstand a summary disposition motion, but need only demonstrate that material facts are in dispute; LBP-11-13, 73 NRC 534 (2011); LBP-11-16, 73 NRC 645 (2011)
failure to comply with any of the requirements of 10 C.F.R. 2.309(f)(1) precludes admission of a contention; LBP-11-7, 73 NRC 254 (2011)
failure to comply with pleading requirements for late filings constitutes sufficient grounds for rejecting intervention and hearing requests; LBP-11-7, 73 NRC 254 (2011)
for a newly proffered contention to be timely, it must be based on information that was not previously available; LBP-11-15, 73 NRC 629 (2011)
for a timely filed contention to be admissible, it must satisfy six pleading requirements; LBP-11-6, 73 NRC 149 (2011)
for representational standing, neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit; LBP-11-13, 73 NRC 534 (2011)
"good cause" for late filing is defined as a showing that petitioner could not have met the filing deadline and filed as soon as possible thereafter; LBP-11-7, 73 NRC 254 (2011)
good cause for the failure to file on time is the most important of the late-filing factors; LBP-11-2, 73 NRC 28 (2011); LBP-11-6, 73 NRC 149 (2011); LBP-11-7, 73 NRC 254 (2011); LBP-11-9, 73 NRC 391 (2011); LBP-11-10, 73 NRC 424 (2011); LBP-11-13, 73 NRC 534 (2011); LBP-11-15, 73 NRC 629 (2011)

hearing petitioners have an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to uncover any information that could serve as the foundation for a specific contention; LBP-11-9, 73 NRC 391 (2011)
if a proposed new contention that is filed after the initial filing period set forth in the hearing notice is not timely under 10 C.F.R. 2.309(f)(2)(iii), then proponent must address the eight criteria of section 2.309(c)(1) and show that a balance of these factors weighs in favor of admitting that contention; LBP-11-9, 73 NRC 391 (2011); LBP-11-10, 73 NRC 424 (2011)
if a summary disposition proponent fails to make the requisite showing, the board must deny the motion even if the opposing party chooses not to respond or its response is inadequate; LBP-11-4, 73 NRC 91 (2011)
if any portion of a filing is untimely tendered, it must be accompanied by a motion to file out of time; LBP-11-13, 73 NRC 534 (2011)
if at least one petitioner demonstrates standing and proffers an admissible contention so that its petition to intervene is granted, section 2.315(c) allows a local governmental body that has not been admitted as a party to participate in a hearing as an interested nonparty; LBP-11-6, 73 NRC 149 (2011)
if evidence in favor of the summary disposition opponent is merely colorable or not significantly probative, summary disposition may be granted; LBP-11-4, 73 NRC 91 (2011)
if good cause is not shown, a board may still permit the late filing, but petitioner or intervenor must make a strong showing on the other factors of 10 C.F.R. 2.309(c); LBP-11-9, 73 NRC 391 (2011)
if intervenor fails to show good cause for a late filing, its demonstration on the other late-filing factors must be particularly strong; LBP-11-7, 73 NRC 254 (2011)
if movant makes a proper showing for summary disposition, and if the opposing party does not show that a genuine issue of material fact exists, the board may summarily dispose of all arguments on the basis of the pleadings; LBP-11-4, 73 NRC 91 (2011)
if no genuine dispute remains, then the board may dispose of all arguments based on the pleadings; LBP-11-7, 73 NRC 254 (2011)
if petitioner believes that an application fails to contain information on a relevant matter as required by law, the contention must identify each failure and the supporting reasons for the petitioner's belief; LBP-11-6, 73 NRC 149 (2011)
if reasonable minds could differ as to the import of the evidence, summary disposition is not appropriate; LBP-11-14, 73 NRC 591 (2011)
if summary disposition movant discusses a matter in its statement of undisputed facts, the board may view with skepticism any later argument by that movant that a response regarding that issue is outside the scope of the contention, particularly given the onus that is placed upon an opposing party to respond to such a statement; LBP-11-4, 73 NRC 91 (2011)
if summary disposition movant fails to make the requisite showing to satisfy that initial burden, then the board must deny the motion even if the opposing party chooses not to respond or its response is inadequate; LBP-11-14, 73 NRC 591 (2011)
if summary disposition proponent meets its burden, the party opposing the motion must set forth specific facts showing that there is a genuine issue, and may not rely on mere allegations or denials but no defense to an insufficient showing is required; LBP-11-7, 73 NRC 254 (2011); LBP-11-14, 73 NRC 591 (2011)
if the question is a close one, boards must, in considering summary disposition opponent's submission, carefully ascertain whether any factual disputes asserted are genuine and relate to issues that would affect the outcome of the proceeding under relevant substantive law; LBP-11-4, 73 NRC 91 (2011)
if the summary disposition movant meets its burden, then and only then is the nonmoving party required to proffer evidence that contradicts the moving party's showing and that proves the existence of a genuine issue of material fact; LBP-11-4, 73 NRC 91 (2011)
if the summary disposition proponent does not meet its burden, the nonmoving party is, without making any showing, entitled to a denial of the motion; LBP-11-4, 73 NRC 91 (2011)
if, considering only the moving party's support for its motion, the board determines that it has met its burden, the board then looks to whether an opponent of the motion has overcome the movant's case by showing a genuine dispute on a material issue of fact; LBP-11-4, 73 NRC 91 (2011)
if, within 60 days after pertinent information supporting a new contention first becomes available, intervenors submit a particularized and otherwise admissible contention regarding construction of a

mixed oxide facility, then the contention will be deemed timely without the need to satisfy the balancing test for late-filing requirements or the requirements for reopening the record; LBP-11-9, 73 NRC 391 (2011)
in addressing the good cause factor for late filing, petitioner must explain not only why it failed to file within the time required, but also why it did not file as soon thereafter as possible; LBP-11-7, 73 NRC 254 (2011)
in analyzing the admissibility of a proffered contention, a licensing board need not turn a blind eye to those portions of a petitioner's exhibits that might militate against admissibility; LBP-11-6, 73 NRC 149 (2011)
in applying the summary disposition standard, it is appropriate for the board to look not only to NRC regulatory and case law, but also to federal court case law on summary judgment under Rule 56 of the Federal Rules of Civil Procedure; LBP-11-4, 73 NRC 91 (2011)
in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility is considered to be sufficient to establish standing; LBP-11-16, 73 NRC 645 (2011)
in determining whether an individual member of an organization qualifies for standing in his or her own right, NRC generally applies traditional judicial standing concepts; LBP-11-13, 73 NRC 534 (2011)
in determining whether petitioner has demonstrated standing, the Commission applies contemporaneous judicial concepts of standing; LBP-11-6, 73 NRC 149 (2011)
in establishing the evidentiary standard of "relevant, material, and reliable evidence" being admissible in a hearing, 10 C.F.R. 2.337 thereby establishes the right of all parties to present such admissible evidence; LBP-11-4, 73 NRC 91 (2011)
in reactor licensing proceedings, petitioner is deemed to have standing pursuant to the Commission's proximity presumption rule by showing that he or she resides in, or frequents the area within, a 50-mile radius of the facility; LBP-11-6, 73 NRC 149 (2011)
in ruling on a motion for summary disposition, boards apply the standards of Subpart G; LBP-11-4, 73 NRC 91 (2011)
in Subpart L proceedings, licensing boards must apply the summary disposition standard for Subpart G proceedings; LBP-11-14, 73 NRC 591 (2011)
in the context of a new contention filed after the initial petition, 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-11-2, 73 NRC 333 (2011)
interests a municipality seeks to represent on behalf of its residents are germane to its own purposes in the context or standing; LBP-11-6, 73 NRC 149 (2011)
interests that an organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action; LBP-11-6, 73 NRC 149 (2011)
intervenors have demonstrated their ability to contribute to the development of a sound record where they have put forward in support of those contentions the views of a witness whose expertise has been recognized in other NRC proceedings; LBP-11-9, 73 NRC 391 (2011)
judicial standing concepts are applied in NRC proceedings; LBP-11-2, 73 NRC 28 (2011)
licensing boards are bound to admit for litigation contentions that are material and supported by reasonably specific factual and legal allegations; LBP-11-6, 73 NRC 149 (2011)
licensing boards are to apply the same standards for granting or denying summary disposition as would be applied in proceedings conducted under Subpart G, which are set forth in section 2.710; LBP-11-7, 73 NRC 254 (2011)
mere interest in a problem is not sufficient by itself to render the organization adversely affected or aggrieved within the meaning of the Administrative Procedure Act; CLI-11-3, 73 NRC 613 (2011)
mere notice pleading is insufficient for contention admission; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011); LBP-11-16, 73 NRC 645 (2011)
merits determination cannot be resolved at the contention admissibility stage of the proceeding; LBP-11-6, 73 NRC 149 (2011)
motions for reconsideration must be filed within 10 days of a Board's decision; LBP-11-15, 73 NRC 629 (2011)
motions for reconsideration require a showing of compelling circumstances, such as the existence of a clear and material error in a decision that renders the decision invalid; LBP-11-15, 73 NRC 629 (2011)

movant may obtain summary disposition if the filings in the proceeding, 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; LBP-11-7, 73 NRC 254 (2011); LBP-11-14, 73 NRC 591 (2011)
new and amended contentions submitted after an intervenor's initial hearing request are evaluated under 10 C.F.R. 2.309(f)(2) for timeliness and, if found timely, their general admissibility is analyzed pursuant to section 2.309(f)(1); LBP-11-10, 73 NRC 424 (2011)
new or amended contentions are considered to be timely if filed within 60 days of any triggering event; LBP-11-9, 73 NRC 391 (2011)
no defense to an insufficient showing by summary disposition proponent is required; LBP-11-14, 73 NRC 591 (2011)
no proximity presumption applies in an import/export licensing case because petitioners have not shown that the import or export involves a significant source of radioactivity producing an obvious potential for offsite consequences; CLI-11-3, 73 NRC 613 (2011)
not only must a late-filing intervenor act promptly after learning of new information, but the information itself must be new information, not information already in the public domain; LBP-11-7, 73 NRC 254 (2011)
NRC generally applies traditional judicial standing concepts which require a showing that the individual has suffered or might suffer a concrete and particularized injury that is fairly traceable to the challenged action and likely redressible by a favorable decision; LBP-11-13, 73 NRC 534 (2011); LBP-11-16, 73 NRC 645 (2011)
NRC generally considers approximately 30-60 days as the limit for timely filings based on new information; CLI-11-2, 73 NRC 333 (2011)
NRC generally disfavors the filing of new contentions at the eleventh hour of an adjudication, a policy that is grounded in the doctrine of finality, which states that at some point, an adjudicatory proceeding must come to an end; CLI-11-2, 73 NRC 333 (2011)
NRC imposes a deliberately heavy burden on petitioners seeking to reopen a record, even with respect to an existing contention; CLI-11-2, 73 NRC 333 (2011)
NRC must provide a hearing upon the request of any person whose interest may be affected by the proceeding; LBP-11-6, 73 NRC 149 (2011)
NRC presumes that an individual has standing to intervene without the need to address traditional standing concepts upon a showing that he or she lives within, or otherwise has frequent contacts with, a geographic zone of potential harm; LBP-11-2, 73 NRC 28 (2011)
NRC recognizes an exception to the timeliness requirement in rare instances in which petitioner raises an exceptionally grave issue; CLI-11-2, 73 NRC 333 (2011)
NRC regulations do not allow use of reply briefs to provide, for the first time, the necessary threshold support for contentions; LBP-11-6, 73 NRC 149 (2011)
NRC standards for ruling on summary disposition motions are analogous to the standards for granting summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure; LBP-11-7, 73 NRC 254 (2011)
only disputes over facts that might affect the outcome of a proceeding would preclude summary disposition; LBP-11-4, 73 NRC 91 (2011)
opponent of a summary disposition motion may not raise distinctly new asserted deficiencies; LBP-11-4, 73 NRC 91 (2011)
organizations may represent the interests of members using representational standing if it can show that the interests it seeks to protect are germane to its own purpose, identify by name and address at least one member who qualifies for standing in his or her own right, show that it is authorized by that member to request a hearing on his or her behalf and show that neither the claim asserted nor the relief requested requires an individual member's participation in the organization's legal action; LBP-11-2, 73 NRC 28 (2011)
parties must list documents claimed to be privileged or protected on a privilege log; LBP-11-5, 73 NRC 131 (2011)
persistent difficulties with the NRC electronic filing system despite petitioners' good-faith efforts is good cause for late filing; LBP-11-2, 73 NRC 28 (2011)

petition for review falls short of satisfying 10 C.F.R. 2.341(b)(4) if it does not specify the subsections upon which it relies but merely sets forth a series of general grievances fundamentally going to the correctness of the board's decision; CLI-11-2, 73 NRC 333 (2011)
petitioner does not have to prove its contentions at the admission stage; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011); LBP-11-14, 73 NRC 591 (2011); LBP-11-16, 73 NRC 645 (2011)
petitioner failed to satisfy NRC standards for reopening because its motion was untimely and it failed to demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially; CLI-11-2, 73 NRC 333 (2011)
petitioner lacked good cause for a hearing request filed 7 days after the filing deadline when the argument relied on a misimpression of due dates; LBP-11-9, 73 NRC 391 (2011)
petitioner may address the selection of hearing procedures, taking into account the provisions of 10 C.F.R. 2.310; LBP-11-6, 73 NRC 149 (2011)
petitioner or intervenor may file timely new or amended contentions, with leave of the board, if the three requirements are met; LBP-11-9, 73 NRC 391 (2011)
petitioner who seeks both to reopen the record and to submit a late contention must successfully satisfy two elevated standards; CLI-11-2, 73 NRC 333 (2011)
petitioner's appellate argument must pass regulatory muster under the rigorous standards of 10 C.F.R. 2.326(a)(3); CLI-11-2, 73 NRC 333 (2011)
petitioners' claims of potential injury are also so speculative, and separate from the import and export license, that they do not amount to cognizable harm for purposes of standing; CLI-11-3, 73 NRC 613 (2011)
petitioners' generalized institutional interest in public forums and in preventing processing of foreign waste is insufficient to confer standing; CLI-11-3, 73 NRC 613 (2011)
petitioners must state their name, address, and telephone number, the nature of their right to be made a party, the nature and extent of their 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 their interest; LBP-11-6, 73 NRC 149 (2011)
petitioner's reply must be narrowly focused on the legal or logical arguments presented in the applicant's or NRC Staff's answer; LBP-11-6, 73 NRC 149 (2011)
petitioners who are proceeding pro se should be shown greater leeway on the question of whether they have demonstrated good cause for lateness than petitioners represented by counsel; LBP-11-13, 73 NRC 534 (2011)
petitions, answers, and replies are allowed unless otherwise specified by the Commission or the presiding officer, but no other written answers or replies will be entertained; LBP-11-2, 73 NRC 28 (2011)
prejudice is not a factor in the balancing test for nontimely filings; LBP-11-13, 73 NRC 534 (2011)
pro se litigants generally should be extended some latitude, but they are still expected to comply with procedural rules; LBP-11-13, 73 NRC 534 (2011)
proponent must demonstrate that a materially different result would have been likely had the newly proffered evidence been considered initially; CLI-11-2, 73 NRC 333 (2011)
"receiving party" means the party to whom the mandatory disclosure must be made pursuant to 10 C.F.R. 2.336; LBP-11-5, 73 NRC 131 (2011)
regardless of when filed, all proposed contentions must comply with the general contention admissibility criteria; LBP-11-7, 73 NRC 254 (2011)
requiring petitioners to proffer additional and conclusive support for the effect of their proposed contention would improperly require boards to adjudicate the merits of contentions before admitting them; LBP-11-7, 73 NRC 254 (2011)
standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention; CLI-11-2, 73 NRC 333 (2011)
standing based on the proximity presumption has been found if petitioner or a representative of a petitioner organization resides within approximately 50 miles of the facility in question; LBP-11-13, 73 NRC 534 (2011)
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-11-14, 73 NRC 591 (2011)

summary disposition is particularly inappropriate when a licensing board is presented with conflicting expert testimony, for at that stage of a proceeding it is not the role of licensing boards to untangle the expert affidavits and decide which experts are more correct; LBP-11-14, 73 NRC 591 (2011)
summary disposition movant bears the burden of demonstrating that there is no genuine issue as to any material fact and that it is entitled to a decision in its favor; LBP-11-4, 73 NRC 91 (2011); LBP-11-14, 73 NRC 591 (2011)
summary disposition opponent may not rest upon mere allegations or denials, but must state specific facts showing that there is a genuine issue of fact for hearing; LBP-11-4, 73 NRC 91 (2011)
summary disposition should be granted if filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with statements of parties and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law; LBP-11-4, 73 NRC 91 (2011)
summary disposition, like summary judgment, is an extreme remedy that should be granted with caution especially before the parties have been afforded an opportunity to marshal their evidence; LBP-11-7, 73 NRC 254 (2011)
summary judgment should be awarded only when the truth is quite clear; LBP-11-4, 73 NRC 91 (2011); LBP-11-14, 73 NRC 591 (2011)
tardy filing of a contention may be excusable only where the facts upon which the amended or new contention is based were previously unavailable; CLI-11-2, 73 NRC 333 (2011)
the burden of satisfying the requirement for reopening a record is a heavy one; CLI-11-2, 73 NRC 333 (2011)
the burden of setting forth a clear and coherent argument is on petitioner, and it should not be necessary to speculate about what a pleading is supposed to mean; CLI-11-2, 73 NRC 333 (2011)
the Commission toughened its contention admissibility rule in 1989 to ensure that only intervenors with genuine and particularized concerns participate in NRC hearings; LBP-11-6, 73 NRC 149 (2011)
the Commission will not accept the filing of a vague, unparticularized issue; CLI-11-2, 73 NRC 333 (2011)
the contention admissibility rule serves to ensure that admitted contentions focus on real disputes that can be resolved in an adjudication, establish a sufficient factual and legal foundation to warrant further inquiry, and put other parties on notice of the disputed issues so they will know precisely those claims they must support or oppose; LBP-11-6, 73 NRC 149 (2011)
the contention admissibility rule should not serve as a fortress to deny intervention; LBP-11-6, 73 NRC 149 (2011)
the contention admissibility test in section 2.309(f)(1) was crafted by the Commission to raise the threshold bar for an admissible contention; LBP-11-6, 73 NRC 149 (2011)
the factual support required at the contention admission stage is only a minimal showing that material facts are in dispute; LBP-11-14, 73 NRC 591 (2011)
the intent of 10 C.F.R. 2.309(f)(1) is to focus litigation on concrete issues and result in a clearer and more focused record for decision and to ensure that the Commission expends resources to support the hearing process only for issues that are appropriate for, and susceptible to, resolution in an NRC hearing; LBP-11-16, 73 NRC 645 (2011)
the pertinent zone in operating license renewal proceedings and other power reactor license matters is the area within a 50-mile radius of the site; LBP-11-2, 73 NRC 28 (2011)
the proximity presumption applies if petitioner has frequent contacts with the geographic zone of potential harm his or her interests seeks to establish its representational standing, resides within 50 miles of the proposed facility, or has frequent contacts with the area affected by the proposed facility; LBP-11-13, 73 NRC 534 (2011); LBP-11-16, 73 NRC 645 (2011)
the rationale for proximity-based standing is that in construction permit and operating license cases, persons living within the roughly 50-mile radius of the facility face a realistic threat of harm if a release from the facility of radioactive material were to occur; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
the record must show movant's right to summary judgment with such clarity as to leave no room for controversy, and must demonstrate that his opponent would not be entitled to prevail under any discernible circumstances; LBP-11-4, 73 NRC 91 (2011)
the rules on contention admissibility are strict by design; LBP-11-16, 73 NRC 645 (2011)

the scope of an admitted contention is determined by the bases set forth in support of the contention; LBP-11-14, 73 NRC 591 (2011)
to be admissible, a newly proffered contention must satisfy either the timeliness standards in 10 C.F.R. 2.309(f)(2) or the standards in 10 C.F.R. 2.309(c)(1) for newly proffered nontimely contentions, and the contention admissibility standards in 10 C.F.R. 2.309(f)(1); LBP-11-15, 73 NRC 629 (2011)
to become a party, a petitioner must submit at least one admissible contention; LBP-11-16, 73 NRC 645 (2011)
to demonstrate representational standing, an organization must show that at least one of its members might be affected by the proceeding, identify that member by name and address, and show that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf; LBP-11-6, 73 NRC 149 (2011)
to determine if a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under section 189a, the Commission has long applied contemporaneous judicial concepts of standing; CLI-11-3, 73 NRC 613 (2011)
to determine whether the elements for standing are met, boards are to construe the petition in favor of the petitioner; LBP-11-16, 73 NRC 645 (2011)
to establish standing, an intervention petition must state petitioner's name, address, and telephone number, the nature of the petitioner's right to be made a party, the nature and extent of petitioner's property, financial, or other interest, and the possible effect of any decision or order on petitioner's interest; LBP-11-16, 73 NRC 645 (2011)
to establish standing, petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; CLI-11-3, 73 NRC 613 (2011)
to justify reopening the record, the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition; CLI-11-2, 73 NRC 333 (2011)
to participate in a proceeding as an intervenor, petitioner must establish standing and proffer at least one admissible contention; LBP-11-2, 73 NRC 28 (2011); LBP-11-6, 73 NRC 149 (2011)
to the extent that petitioner challenges the board's decision to apply the reopening standards strictly, its challenge constitutes an improper collateral attack on NRC regulations; CLI-11-2, 73 NRC 333 (2011)
traditional judicial standing concepts require a showing that the individual has suffered or might suffer a concrete and particularized injury that is fairly traceable to the challenged action, is likely redressed by a favorable decision, and is arguably within the zone of interests protected by the governing statutes; LBP-11-2, 73 NRC 28 (2011)
under the previous contention admissibility rule, a contention could be admitted and litigated based on little more than speculation, with parties attempting to unearth a case through cross-examination; LBP-11-6, 73 NRC 149 (2011)
understandable misapprehension of the start of the filing period for contentions, leading to inadvertent late filing of new contentions, establishes good cause to excuse missing the filing deadline pursuant to 10 C.F.R. 2.309(c)(1); LBP-11-9, 73 NRC 391 (2011)
when a contention alleges the need for further study of an alternative, from an environmental perspective, such reasonableness determinations are the merits, and should only be decided after the contention is admitted; LBP-11-2, 73 NRC 28 (2011)
when presented with conflicting expert opinions, licensing boards should be mindful that summary disposition is rarely proper; LBP-11-7, 73 NRC 254 (2011)
when ruling on motions for summary disposition, the Commission applies standards analogous to those used by federal courts when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure; LBP-11-14, 73 NRC 591 (2011)
where a municipality seeks to participate in a reactor licensing proceeding that does not involve a facility within the municipality's boundaries, it can, for purposes of establishing standing, rely on the 50-mile proximity presumption to the same extent as an individual or an organization; LBP-11-6, 73 NRC 149 (2011)
where applicant deletes a material portion of its application and replaces it with a changed explanation of legal compliance, that replacement is materially different information that was previously unavailable and thus can satisfy the requirements of 10 C.F.R. § 2.309(f)(2)(i)-(ii); LBP-11-9, 73 NRC 391 (2011)
where good cause is not shown for the late filing of a contention, the requestor's demonstration on the other factors must be particularly strong; LBP-11-15, 73 NRC 629 (2011)

with respect to contentions filed after the initial petition, failure to address the requirements of 10 C.F.R. 2.309(c) and (f)(2) is reason enough to reject the new contentions; LBP-11-7, 73 NRC 254 (2011)
with respect to contentions filed after the initial petition, Intervenors have the burden to show they meet the criteria of 10 C.F.R. 2.309(f)(2); LBP-11-7, 73 NRC 254 (2011)
RULES OF PROCEDURE
a "rational basis review" was applied to intervenor's challenge to the NRC's 2004 changes to its procedural rules, citing cases involving challenges to laws regulating aspects of prisoners' right to access to the courts; LBP-11-4, 73 NRC 91 (2011)
NRC's action in adopting new procedural rules meets the rational basis test; LBP-11-4, 73 NRC 91 (2011)
should the agency's administration of its new procedural rules contradict its present representations that cross-examination will be allowed under the rules when required for a full and true disclosure of the facts or otherwise flout this principle, the rules may be subject to future challenges; LBP-11-4, 73 NRC 91 (2011)
Subpart G procedures are mandated for certain proceedings and parties are permitted to propound interrogatories, take depositions, and cross-examine witnesses without leave of the board; LBP-11-13, 73 NRC 534 (2011)
Subpart L procedures provide for a more informal proceeding in which discovery is generally prohibited except for specified mandatory disclosures under 10 C.F.R. 2.336 and the mandatory production of the hearing file under 10 C.F.R. 2.1203(a); LBP-11-13, 73 NRC 534 (2011)
SABOTAGE
NEPA imposes no legal duty on NRC to consider intentional malevolent acts in conjunction with commercial power reactor license renewal applications; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
SAFE SHUTDOWN EARTHQUAKE
geologic and seismic siting factors considered for design must include a determination of the SSE ground motion for the site and the potential for surface tectonic and nontectonic deformations; LBP-11-16, 73 NRC 645 (2011)
whether the SSE exceedance in applicant's exemption request does in fact comply with 10 C.F.R. Part 50, Appendix S and 10 C.F.R. 100.23 is a question currently before the NRC Staff and is thus material to the NRC's licensing decision in the proceeding; LBP-11-10, 73 NRC 424 (2011)
SAFEGUARDS INFORMATION
board determination of expert's need to know with regard to a document withheld as safeguards information was reversed; LBP-11-9, 73 NRC 391 (2011)
boards may exclude the public from adjudicatory hearings or actions that involve restricted data, defense information, safeguards information protected from disclosure under the authority of AEA § 147, or information protected from disclosure under the authority of section 148; LBP-11-5, 73 NRC 131 (2011)
NRC Staff and its counsel, like the board and its staff, are federal government employees and are thus subject to stringent sanctions for the unauthorized disclosure of the protected information or protected documents; LBP-11-5, 73 NRC 131 (2011)
petitioner was denied access to a safeguards-protected design-related document on the basis of his lacking a need to know; LBP-11-9, 73 NRC 391 (2011)
SAFETY ANALYSIS
See Integrated Safety Analysis; LBP-11-11, 73 NRC 455 (2011)
SAFETY EVALUATION REPORT
applicant's environmental report is not the vehicle for the NRC Staff's safety review; LBP-11-6, 73 NRC 149 (2011)
NRC Staff ensures that applicant's design basis for the new units will protect public health and safety by verifying that the design basis will withstand maximum flooding events; LBP-11-6, 73 NRC 149 (2011)
NRC Staff, incident to its preparation of the safety evaluation report, is obliged to ensure that applicant's design basis for the new units will protect public health and safety; LBP-11-6, 73 NRC 149 (2011)

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SAFETY ISSUES
- based on Staff's and applicant's written responses to board questions, and on the resumes, CVs, and SPQs admitted as part of the evidentiary record to respond to the questions, the board considers safety issues resolved for the proceeding; LBP-11-11, 73 NRC 455 (2011)
- issues that are routinely addressed through the agency's ongoing regulatory oversight are outside the scope of license renewal proceedings because considering them in that context would be unnecessary and wasteful; LBP-11-2, 73 NRC 28 (2011)
- requesting authorization from the Commission for the board, on its own motion, to examine and decide the serious safety or common defense and security matters underlying contentions is allowed to be used for matters that were initially raised by a party, where that party later withdrew; LBP-11-9, 73 NRC 391 (2011)

SAFETY REVIEW
- active components are not subject to an aging management review because existing regulatory programs, including required maintenance programs, can be expected to directly detect the effects of aging on active functions; LBP-11-2, 73 NRC 28 (2011)
- key functions of buried structures, systems, and components that are the focus of the license renewal safety review under Part 54 do not include the prevention of inadvertent radioactive leaks from buried structures; LBP-11-2, 73 NRC 28 (2011)

SAFETY-RELATED
- buried pipelines, channels, and tanks that fall under aging management provide safety-related functions by maintaining adequate flow and pressure; LBP-11-2, 73 NRC 28 (2011)
- structures and components that are subject to aging management review include those that perform certain safety-related functions without moving parts or without a change in configuration or properties; LBP-11-2, 73 NRC 28 (2011)

SANCTIONS
- NRC Staff and its counsel, like the Board and its staff, are federal government employees and are thus subject to stringent sanctions for the unauthorized disclosure of the protected information or protected documents; LBP-11-5, 73 NRC 131 (2011)

SEA LEVEL RISE
- although the combined license application is not expressly required to consider sea level rise, the board decides that the issue is within the scope of a COL proceeding; LBP-11-6, 73 NRC 149 (2011)

SECURITY
- contentions that address an important security issue regarding Part 74's strict requirements for the proposed facility, which applicant previously admitted it failed to satisfy, are admissible; LBP-11-9, 73 NRC 391 (2011)
- the ability to detect the loss of plutonium in a timely manner, to allow for an effective response, is a crucial security requirement; LBP-11-9, 73 NRC 391 (2011)
- See also Physical Security

SECURITY CLEARANCES
- a Pentapartite Agreement between the United States and four European governments to prevent new restricted data from being disseminated to European nationals will be a prerequisite to the NRC Staff issuing a facility clearance; LBP-11-11, 73 NRC 455 (2011)
- an enrichment facility security clearance requires a determination that granting the clearance would not be inconsistent with the national interest, including a finding that the facility is not under foreign ownership, control, or influence to such a degree that a determination could not be made; LBP-11-11, 73 NRC 455 (2011)
- Staff imposed a license condition on a uranium enrichment facility to ensure that clearances are obtained before classified matter is processed, stored, reproduced, transmitted, handled, or accessed; LBP-11-11, 73 NRC 455 (2011)

SECURITY PROGRAM
- application for a uranium enrichment facility is required to contain a description of the security program to protect against unauthorized disclosure of classified matter in accord with Part 95; LBP-11-11, 73 NRC 455 (2011)

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SEISMIC ANALYSIS
geologic and seismic siting factors considered for design must include a determination of the safe shutdown earthquake ground motion for the site and the potential for surface tectonic and nontectonic deformations; LBP-11-16, 73 NRC 645 (2011)
highly site-specific seismic hazard analysis reflects consideration not only of the location and magnitude of historic earthquakes, but also the nature of the bedrock and the style of faulting in the surrounding region; LBP-11-11, 73 NRC 455 (2011)
SENSITIVE UNCLASSIFIED NONSAFEGUARDS INFORMATION
lack of clarity in the terms and application of the agency's newly established SUNSI policy contributed to intervenors' misapprehension that they were required to demonstrate a need for the information in order to request SUNSI documents; LBP-11-9, 73 NRC 391 (2011)
NRC Staff was admonished for having imposed a stricter-than-necessary standard of "need" for access to SUNSI; LBP-11-9, 73 NRC 391 (2011)
rules governing access to SUNSI apply only to potential parties, whereas party access to SUNSI is governed by protective orders and nondisclosure agreements; LBP-11-9, 73 NRC 391 (2011)
the SUNSI policy does not expand upon or create any new category of legally privileged or confidential information that is exempt from discovery or from mandatory disclosure; LBP-11-5, 73 NRC 131 (2011)
SETTLEMENT AGREEMENTS
the public interest does not require additional adjudication of an enforcement matter and, given that all matters required to be adjudicated as part of this proceeding have been resolved, the proceeding is dismissed; LBP-11-3, 73 NRC 81 (2011)
upon review of a settlement agreement, the board is satisfied that its terms reflect a fair and reasonable settlement 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); LBP-11-3, 73 NRC 81 (2011)
SEVERE ACCIDENT MITIGATION ALTERNATIVES ANALYSIS
a SAMA analysis fulfills the requirement to provide a consideration of alternatives to mitigate severe accidents and therefore is governed by NEPA's rule of reason; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
a SAMA analysis is neither a worst-case nor a best-case impacts analysis; LBP-11-7, 73 NRC 254 (2011)
a SAMA contention is admissible only if it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated; LBP-11-7, 73 NRC 254 (2011); LBP-11-13, 73 NRC 534 (2011)
alternatives for reducing adverse environmental impacts, including impacts of severe accidents, are among the limited issues within the scope of a license renewal proceeding; LBP-11-13, 73 NRC 534 (2011)
alternatives to mitigate severe accidents must be considered for all plants that have not considered such alternatives; LBP-11-2, 73 NRC 28 (2011)
although a SAMA analysis must be provided if not previously performed, applicant must provide this analysis only for those issues identified as Category 2 issues in Appendix B to Subpart A of Part 51; LBP-11-2, 73 NRC 28 (2011)
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-11-7, 73 NRC 254 (2011)
among the limited issues within the scope of a license renewal proceeding are alternatives for reducing adverse environmental impacts listed as Category 2 issues in Appendix B to Subpart A of 10 C.F.R. Part 51; LBP-11-2, 73 NRC 28 (2011)
an environmental report must contain a full discussion of mitigation plans; LBP-11-6, 73 NRC 149 (2011)
applicant need only ensure that the environmental consequences of the project have been fairly evaluated; LBP-11-2, 73 NRC 28 (2011)
applicant's environmental report must contain a sufficient analysis of potential environmental consequences and alternatives to enable the NRC Staff to prepare an environmental impact statement that fulfills the agency's obligations under NEPA; LBP-11-14, 73 NRC 591 (2011)
citation of studies indicating that source terms from the Modular Accident Analysis Progression (MAAP) code are lower than results from Source Term Code Package or NUREG-1150 satisfies the requirements of 10 C.F.R. 2.309(f)(1)(v); LBP-11-2, 73 NRC 28 (2011)

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claim that SAMA analysis is deficient for failing to address potential spent fuel pool accidents falls beyond the scope of NRC SAMA analysis and impermissibly challenges NRC regulations; LBP-11-13, 73 NRC 534 (2011)
contention questioning the accuracy of the SAMA results given the geographic location and variable meteorological conditions at the site and the large population base surrounding the plant is admissible; LBP-11-2, 73 NRC 28 (2011)
contention that applicant's SAMA analysis improperly ignored radioactive waste disposal is outside the scope of the proceeding because it directly challenges the generic determinations in Table B-1 of Appendix B to Part 51; LBP-11-2, 73 NRC 28 (2011)
contention that other costs were ignored is not admissible because petitioners presented no facts or expert opinion that show it to be plausible that including them might affect the outcome of the SAMA analysis; LBP-11-2, 73 NRC 28 (2011)
cost-effective candidate SAMAs are identified by comparing the annualized cost of the mitigation measure with the benefit as determined by the averted cost of severe accidents (consequences), as weighted by the probability of the accidents' occurrence; LBP-11-13, 73 NRC 534 (2011)
it is not possible simply to plug in and run a different atmospheric dispersion model in the MACCS2 code; LBP-11-2, 73 NRC 28 (2011)
license renewal applicant must file an environmental report that includes an alternatives analysis that considers and balances the environmental impacts of alternatives to the proposed action, and alternatives available for reducing or avoiding adverse environmental effects; LBP-11-13, 73 NRC 534 (2011)
license renewal applicants are not required to base their analysis on consequence values at the 95th percentile consequence level; LBP-11-2, 73 NRC 28 (2011)
NEPA allows agencies to select their own methodology as long as that methodology is reasonable; LBP-11-2, 73 NRC 28 (2011); LBP-11-7, 73 NRC 254 (2011)
NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act, but only requires that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated; LBP-11-7, 73 NRC 254 (2011); LBP-11-14, 73 NRC 591 (2011)
NEPA imposes no substantive requirement that mitigation measures actually be taken; LBP-11-14, 73 NRC 591 (2011)
NRC is required to consider severe accident mitigation alternatives in issuing a new operating license; LBP-11-7, 73 NRC 254 (2011)
one important component of an environmental impact statement is the discussion of possible actions that might mitigate adverse environmental consequences; LBP-11-7, 73 NRC 254 (2011)
petitioner may question the practice for severe accident mitigation alternatives analysis to utilize mean consequence values, which results in an averaging of potential consequences; LBP-11-13, 73 NRC 534 (2011)
petitioner's assertion that severe accidents from spent fuel pools must be considered in applicant's SAMA analysis is in direct conflict with NRC regulations; LBP-11-2, 73 NRC 28 (2011)
petitioners' assertions that the MACCS2 code was not subjected to quality assurance requirements is deficient because a SAMA analysis is not subject to such requirements; LBP-11-2, 73 NRC 28 (2011)
petitioners have not established that use of another source term would identify additional cost-beneficial severe accident mitigation alternatives; LBP-11-13, 73 NRC 534 (2011)
possible plant changes, such as hardware modifications and improved training or procedures, that could cost-effectively reduce the radiological risk from a severe accident are identified and assessed; LBP-11-13, 73 NRC 534 (2011)
SAMA contentions are admissible only if it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated; LBP-11-2, 73 NRC 28 (2011)
the Gaussian plume model's incorporation in the MACCS2 code and the wide, customary use of the code are not a sufficient ground to exclude the code's integral dispersion model from all challenge if adequate support is provided for a contention; LBP-11-2, 73 NRC 28 (2011)
the ultimate concern in a SAMA contention is whether any additional SAMA should have been identified as potentially cost-beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis; LBP-11-13, 73 NRC 534 (2011)

the ultimate issue on SAMA analysis is whether any additional SAMA should have been identified as potentially cost-beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis; LBP-11-2, 73 NRC 28 (2011)
whether a SAMA may be worthwhile to implement is based upon a cost-benefit analysis; LBP-11-2, 73 NRC 28 (2011)
SEVERE ACCIDENT MITIGATION DESIGN ALTERNATIVES ANALYSIS
all environmental issues concerning SAMDAs associated with the information in NRC's final environmental assessment for certified reactor design are deemed resolved for plants whose site parameters are within those specified in the technical support document; LBP-11-7, 73 NRC 254 (2011)
NRC Staff's creation of a list of site parameters for use in the combined license proceeding cannot cure the absence of a list of site parameters in the technical support document, rendering it impossible to resolve SAMDA issues by rule; LBP-11-7, 73 NRC 254 (2011)
there is no purpose for further refining a SAMDA analysis, unless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated; LBP-11-7, 73 NRC 254 (2011)
SHELTERING
in developing the recommended range of protective actions in an emergency plan, sheltering must be considered; LBP-11-6, 73 NRC 149 (2011)
SHUTDOWN
assurance of adequate cooling water supply for emergency and long-term shutdown decay heat removal shall be considered in the design of the nuclear power plant; LBP-11-16, 73 NRC 645 (2011)
petitioners' request for cold shutdown because of radiological contamination of groundwater from tritium is denied; DD-11-3, 73 NRC 375 (2011)
SIGNATURE
persons without digital ID certificates may sign electronically by typing "Executed in Accord with 10 C.F.R. 2.304(d)" or its equivalent on the signature line and including the date of signature and the signatory's name, capacity, address, phone number, and e-mail address; LBP-11-2, 73 NRC 28 (2011)
submitted documents must be signed; LBP-11-2, 73 NRC 28 (2011)
SITE CHARACTERIZATION
factors used for a site geological and seismological evaluation are stated in 10 C.F.R. 100.23(d); LBP-11-10, 73 NRC 424 (2011)
geological, seismological, and engineering characteristics of a site and its environs must be investigated in sufficient scope and detail; LBP-11-10, 73 NRC 424 (2011)
NRC Staff's creation of a list of site parameters for use in the combined license proceeding cannot cure the absence of a list of site parameters in the technical support document, rendering it impossible to resolve SAMDA issues by rule; LBP-11-7, 73 NRC 254 (2011)
SITE REMEDIATION
areas of minor radioactive contamination are evaluated and remediated as needed during plant decommissioning; DD-11-1, 73 NRC 7 (2011)
certain "construction" activities are allowed at a reactor site pursuant to a limited work authorization as long as a site redress plan is submitted; LBP-11-11, 73 NRC 455 (2011)
petition requesting that the NRC not allow restart after scheduled refueling outage until completion of all environmental remediation work and relevant reports on leaking tritium at the plant is denied; DD-11-1, 73 NRC 7 (2011)
there is no NRC requirement that applicant submit a redress plan relative to preconstruction activities or, absent state or local requirements, take any remediation action regarding preconstruction activities if it decides not to complete the project or is denied agency authorization to construct and operate the facility; LBP-11-11, 73 NRC 455 (2011)
SITE SAFETY ANALYSIS REPORT
applicant need not submit information regarding control room habitability and ventilation system design in the SSAR portion of an early site permit application; LBP-11-16, 73 NRC 645 (2011)
applicant's SSAR must provide sufficient data to enable the requisite determination of the potential for surface deformation as a result of growth faults at the site; LBP-11-16, 73 NRC 645 (2011)
even though a cooling pond is not a safety-related structure, knowledge of faulting under the pool and the impact this faulting might have on the pool's operation are required; LBP-11-16, 73 NRC 645 (2011)

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SOCIOECONOMIC IMPACTS
contention that alleges an omission, not an inadequacy, of an environmental report's analysis of socioeconomic impacts raises an issue that is not material to any finding NRC must make in an early site permit proceeding; LBP-11-16, 73 NRC 645 (2011)
SOLAR POWER
because a solely wind- or solar-powered facility could not satisfy the projects purpose, there was no need to compare the impact of such facilities to the impact of the proposed nuclear plant; LBP-11-7, 73 NRC 254 (2011)
the extent to which operation and maintenance costs of a solar facility may present a comparative benefit is immaterial since the four-part combination of alternative energy sources is not environmentally preferable to two new nuclear units; LBP-11-4, 73 NRC 91 (2011)
SOURCE TERM
petitioners have not established that use of another source term would identify additional cost-beneficial severe accident mitigation alternatives; LBP-11-13, 73 NRC 534 (2011)
SOVEREIGN IMMUNITY DOCTRINE
because Equal Access to Justice Act operates as a waiver of sovereign immunity it must be narrowly construed to avoid creating a waiver of sovereign immunity that Congress did not intend; LBP-11-8, 73 NRC 349 (2011)
once Congress has waived sovereign immunity over certain subject matter, a court should be careful not to assume the authority to narrow the waiver that Congress intended; LBP-11-8, 73 NRC 349 (2011)
the Equal Access to Justice Act renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity and any such waiver must be strictly construed in favor of the United States; LBP-11-8, 73 NRC 349 (2011)
SPECIAL NUCLEAR MATERIALS
materials license amendment applications must contain a full description of applicant's program for control and accounting of special nuclear material to show how it will comply with the 10 C.F.R. Part 74 requirements; LBP-11-9, 73 NRC 391 (2011)
SPENT FUEL POOLS
Part 51 treats all spent fuel pool accidents, whatever their cause, as generic, Category 1 events not suitable for case-by-case adjudication; LBP-11-2, 73 NRC 28 (2011)
petitioner's assertion that severe accidents from spent fuel pools must be considered in applicant's SAMA analysis is in direct conflict with NRC regulations; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
SPENT FUEL STORAGE
for all plants, onsite dry or pool storage can safely accommodate spent fuel accumulated from a 20-year license extension with small environmental effects; LBP-11-13, 73 NRC 534 (2011)
Part 51's license renewal provisions cover environmental issues relating to onsite spent fuel storage generically and all such issues, including accident risk, fall outside the scope of license renewal proceedings; LBP-11-13, 73 NRC 534 (2011)
STANDARD OF REVIEW
a "rational basis review" was applied to intervenor's challenge to the NRC's 2004 changes to its procedural rules, citing cases involving challenges to laws regulating aspects of prisoners' right to access to the courts; LBP-11-4, 73 NRC 91 (2011)
a licensing board's inquiry should not be whether there are plainly better methodologies or whether the severe accident mitigation alternatives analysis can be refined further, but rather whether the SAMA analysis resulted in erroneous conclusions on which SAMAs and SAMDAs are found cost-beneficial to implement; LBP-11-7, 73 NRC 254 (2011)
for mandatory proceedings on uranium enrichment facility licensing, licensing boards are to conduct a simple sufficiency review rather than a de novo review on both AEA and NEPA issues; LBP-11-11, 73 NRC 455 (2011)
in a mandatory hearing, licensing boards must narrow their inquiry to topics or sections in Staff documents that they deem most important and should concentrate on portions of the documents that do not on their face adequately explain the logic, underlying facts, and applicable regulations and guidance; LBP-11-11, 73 NRC 455 (2011)

in mandatory proceedings for uranium enrichment facility licensing, boards are to make independent environmental judgments with respect to certain NEPA findings; LBP-11-11, 73 NRC 455 (2011)
in mandatory proceedings on uranium enrichment facility licensing, boards should inquire whether the NRC Staff performed an adequate review and made findings with reasonable support in logic and fact; LBP-11-11, 73 NRC 455 (2011)
NRC Staff may accord substantial weight to the stated purpose of the project, i.e., to provide additional baseload electrical generation capacity for use in the owner's current markets and/or for potential sale on the wholesale market; LBP-11-7, 73 NRC 254 (2011)
the board's role in mandatory hearings is to carefully probe Staff findings by asking appropriate questions and by requiring supplemental information when necessary, but the NRC Staff's underlying technical and factual findings are not open to board reconsideration unless, after a review of the record, the board finds the NRC Staff review inadequate or its findings insufficient; LBP-11-11, 73 NRC 455 (2011)
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for power reactors, NRC developed a Commission-approved standard review plan to assist in evaluating applications for reactor licenses or applications for the transfer of such licenses; LBP-11-11, 73 NRC 455 (2011)
if after conducting a threshold review, NRC Staff concludes that the applicant may be considered to be foreign owned, controlled, or dominated, or that additional action would be necessary to negate the foreign ownership, control, or domination, applicant shall be promptly advised and requested to submit a negation action plan; LBP-11-11, 73 NRC 455 (2011)
to perform an appropriate integrated safety analysis, NUREG-1520 standard review plan guidance for fuel cycle facilities indicates that applicant should identify the process designs, accident sequences, and items relied upon for safety that are associated with the facility; LBP-11-11, 73 NRC 455 (2011)
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a municipality is deemed to have standing in a reactor licensing proceeding that involves a facility located within its boundaries; LBP-11-6, 73 NRC 149 (2011)
boards are to construe intervention petitions in favor of petitioners in determine whether petitioner has demonstrated standing; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011); LBP-11-16, 73 NRC 645 (2011)
conclusory allegations about potential radiological harm are insufficient to establish standing; CLI-11-3, 73 NRC 613 (2011)
contemporaneous judicial concepts of standing require a petitioner to allege an injury in fact that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-11-2, 73 NRC 28 (2011); LBP-11-6, 73 NRC 149 (2011)
essential to establishing standing are findings of injury, causation, and redressability; CLI-11-3, 73 NRC 613 (2011)
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in determining whether petitioner has demonstrated standing, the Commission applies contemporaneous judicial concepts of standing; LBP-11-2, 73 NRC 28 (2011); CLI-11-3, 73 NRC 613 (2011); LBP-11-6, 73 NRC 149 (2011)
in reactor licensing proceedings, petitioner is deemed to have standing pursuant to the Commission's proximity presumption rule by showing that he or she resides in, or frequents the area within, a 50-mile radius of the facility; LBP-11-2, 73 NRC 28 (2011); LBP-11-6, 73 NRC 149 (2011)
mere potential exposure to minute doses of radiation within regulatory limits does not constitute a distinct and palpable injury on which standing can be founded; CLI-11-3, 73 NRC 613 (2011)
no proximity presumption applies in an import/export licensing case because petitioners have not shown that the import or export involves a significant source of radioactivity producing an obvious potential for offsite consequences; CLI-11-3, 73 NRC 613 (2011)
NRC generally applies traditional judicial standing concepts which require a showing that the individual has suffered or might suffer a concrete and particularized injury that is fairly traceable to the

challenged action and likely redressible by a favorable decision; LBP-11-13, 73 NRC 534 (2011); LBP-11-16, 73 NRC 645 (2011)
NRC is lenient in permitting pro se petitioners the opportunity to cure procedural defects in petitions to intervene regarding standing; LBP-11-13, 73 NRC 534 (2011)
NRC must provide a hearing upon the request of any person whose interest may be affected by the proceeding; LBP-11-6, 73 NRC 149 (2011)
petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; CLI-11-3, 73 NRC 613 (2011)
petitioner was allowed to clarify standing declarations by submitting revised declarations with its reply; LBP-11-13, 73 NRC 534 (2011)
petitioners must state their name, address, and telephone number, the nature of their right to be made a party, the nature and extent of their 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 their interest; LBP-11-6, 73 NRC 149 (2011); LBP-11-16, 73 NRC 645 (2011)
the proximity presumption applies if petitioner has frequent contacts with the geographic zone of potential harm; LBP-11-13, 73 NRC 534 (2011)
the proximity presumption applies when an individual or organization, or an individual authorizing an organization to represent his or her interests seeks to establish its representational standing, resides within 50 miles of the proposed facility, or has frequent contacts with the area affected by the proposed facility; LBP-11-13, 73 NRC 534 (2011); LBP-11-16, 73 NRC 645 (2011)
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an association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit; LBP-11-2, 73 NRC 28 (2011); LBP-11-6, 73 NRC 149 (2011)
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an organization may derive standing from a member if the organization demonstrates that the individual member has standing to participate and has authorized the organization to represent his or her interests; CLI-11-3, 73 NRC 613 (2011)
an organization may establish organizational standing; LBP-11-6, 73 NRC 149 (2011)
an organization that seeks to intervene in a representative capacity must show that the interests it seeks to protect are germane to its own purpose, identify, by name and address at least one member who qualifies for standing in his or her own right, and show that it is authorized by that member to request a hearing on his or her behalf; LBP-11-13, 73 NRC 534 (2011)
an organization's standing can be demonstrated through the interests of its members, but if a member acts or speaks on behalf of the organization, that member must also demonstrate authorization by that organization to represent it; LBP-11-13, 73 NRC 534 (2011)
mere interest in a problem is not sufficient by itself to render the organization adversely affected or aggrieved within the meaning of the Administrative Procedure Act; CLI-11-3, 73 NRC 613 (2011)
petitioners' claims of potential injury are also so speculative, and separate from the import and export license, that they do not amount to cognizable harm for purposes of standing; CLI-11-3, 73 NRC 613 (2011)

petitioners' generalized institutional interest in public forums and in preventing processing of foreign waste is insufficient to confer standing; CLI-11-3, 73 NRC 613 (2011)
STANDING TO INTERVENE, REPRESENTATIONAL
although an allegation that a purported representative is acting without his or her organization's authorization, i.e., is acting *ultra vires*, is distinct from a challenge to the organization's standing, petitioner may cure such a defect in representation as well; LBP-11-13, 73 NRC 534 (2011)
an association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit; LBP-11-2, 73 NRC 28 (2011); LBP-11-6, 73 NRC 149 (2011)
an individual may not intervene in his or her own right while simultaneously being represented by another petitioner in the same proceeding; LBP-11-13, 73 NRC 534 (2011)
an organization must show that at least one of its members might be affected by the proceeding, identify that member by name and address, and show that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf; LBP-11-6, 73 NRC 149 (2011); LBP-11-13, 73 NRC 534 (2011); LBP-11-16, 73 NRC 645 (2011)
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even if there are no objections to petitioners' representational standing, boards have an independent obligation to determine whether they have adequately demonstrated standing; LBP-11-2, 73 NRC 28 (2011)
in determining whether an individual member of an organization qualifies for standing in his or her own right, NRC generally applies traditional judicial standing concepts; LBP-11-13, 73 NRC 534 (2011)
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neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit; LBP-11-13, 73 NRC 534 (2011)
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comments and questions generated by a state agency that is examining a state application to determine compliance with state legal and technical standards do not, in and of themselves, demonstrate a material deficiency in applicant's combined license application; LBP-11-6, 73 NRC 149 (2011)
NRC Staff's reference to, and reliance in its draft environmental impact statement on, state issuance of a site certification order and associated certificate of compliance on groundwater use does not dispense with NRC's duty under NEPA to conduct an independent hard look at environmental impacts related to active dewatering during operations at a nuclear plant; LBP-11-1, 73 NRC 19 (2011)
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where implementation of a building code could not make a difference in the outcome of the proceeding, it cannot be material; LBP-11-7, 73 NRC 254 (2011)
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it remains open to Congress to consider whether a ruling comports with actual legislative intent and, if appropriate, to enact clarifying legislation that, consistent with legislative history, mandates

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licensing boards are to apply the same standards for granting or denying summary disposition that are set forth in section 2.710; LBP-11-4, 73 NRC 91 (2011); LBP-11-7, 73 NRC 254 (2011)
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the presiding officer must determine by order that a contested matter necessitates resolution of a material issue of fact relating to a past activity where the credibility of an eyewitness and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter may reasonably be expected to be at issue; LBP-11-6, 73 NRC 149 (2011)
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although a court's merits reasoning may be quite relevant to the resolution of the substantial justification question, the inquiry into the reasonableness of the government's position may not be collapsed into an antecedent evaluation of the merits; LBP-11-8, 73 NRC 349 (2011)
Congress did not want the "substantially justified" standard to be read to raise a presumption that the government position was not substantially justified simply because it lost the case; LBP-11-8, 73 NRC 349 (2011)
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in determining whether the government's position was substantially justified, courts must look to the totality of the circumstances; LBP-11-8, 73 NRC 349 (2011)
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the fact that one other court agreed or disagreed with the government does not establish whether its position was substantially justified; LBP-11-8, 73 NRC 349 (2011)
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all material facts set forth in the statement required to be served by movant will be considered to be admitted unless controverted by the statement required to be served by the opposing party; LBP-11-4, 73 NRC 91 (2011)
although it is risky for a nonmoving party to fail to proffer evidence in response to the summary judgment movant's showing, such a failure does not automatically mandate granting of the motion; LBP-11-4, 73 NRC 91 (2011)
any doubt as to the existence of a genuine issue of material fact is resolved against the movant; LBP-11-4, 73 NRC 91 (2011)
at issue is not whether evidence unmistakably favors one side or the other, but whether there is sufficient evidence favoring the summary disposition opponent for a reasonable trier of fact to find in favor of that party; LBP-11-4, 73 NRC 91 (2011)
because the initial burden rests on summary disposition movant, a licensing board must examine the record in the light most favorable to the nonmoving party and all justifiable inferences must be drawn in favor of that party; LBP-11-14, 73 NRC 591 (2011)
board refused to consider new bases that were included in an answer to summary disposition motion and were outside the scope of the original contention; LBP-11-4, 73 NRC 91 (2011)
caution should be exercised in granting summary disposition, which may be denied if there is reason to believe that the better course would be to proceed to a full hearing; LBP-11-7, 73 NRC 254 (2011)
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if evidence in favor of the summary disposition opponent is merely colorable or not significantly probative, summary disposition may be granted; LBP-11-4, 73 NRC 91 (2011)
if movant discusses a matter in its statement of undisputed facts, the board may view with skepticism any later argument by that movant that a response regarding that issue is outside the scope of the contention, particularly given the onus that is placed on an opposing party to respond to such a statement; LBP-11-4, 73 NRC 91 (2011)

if movant fails to make the requisite showing to satisfy that initial burden, then the board must deny the motion even if the opposing party chooses not to respond or its response is inadequate; LBP-11-4, 73 NRC 91 (2011); LBP-11-14, 73 NRC 591 (2011)
if movant makes a proper showing, and if the opposing party does not show that a genuine issue of material fact exists, the board may summarily dispose of all arguments on the basis of the pleadings; LBP-11-4, 73 NRC 91 (2011)
if movant meets its burden, the nonmoving party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation and cannot rely on mere allegations or denials, or the facts in controversy will be deemed admitted; LBP-11-14, 73 NRC 591 (2011)
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like summary judgment, summary disposition is an extreme remedy that should be granted with caution especially before the parties have been afforded an opportunity to marshal their evidence; LBP-11-7, 73 NRC 254 (2011)
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NRC standards for ruling on summary disposition motions are analogous to the standards for granting summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure; LBP-11-7, 73 NRC 254 (2011); LBP-11-14, 73 NRC 591 (2011)
summary disposition, like summary judgment, is an extreme remedy that should be granted with caution especially before the parties have been afforded an opportunity to marshal their evidence; LBP-11-7, 73 NRC 254 (2011)
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along with the requirement to perform an integrated safety analysis is the requirement for applicant to provide the NRC Staff with an ISA summary, the content of which is specified in 10 C.F.R. 70.65(b); LBP-11-11, 73 NRC 455 (2011)

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analysis of potential volcanic hazard at applicant's site raises the question of whether the probability of such an event is sufficiently low to be considered "highly unlikely"; LBP-11-11, 73 NRC 455 (2011)

applicant for a Part 70 license is required to establish and maintain a safety program, which includes performing an integrated safety analysis; LBP-11-11, 73 NRC 455 (2011)

applicant is to provide an items-relied-on-for-safety boundary package to verify that a facility is constructed in accord with all license requirements; LBP-11-11, 73 NRC 455 (2011)

applicant must indicate the period of time for which a Part 70 license is requested; LBP-11-11, 73 NRC 455 (2011)

applicant seeks an exemption from regulations to permit it to begin certain preconstruction activities at the site before completion of NRC's environmental review under Part 51; LBP-11-11, 73 NRC 455 (2011)

applicant seeks authorization to provide financial assurance for decommissioning funding on a forward-looking, incremental basis; LBP-11-11, 73 NRC 455 (2011)

applicant's integrated safety analysis must consider potential accident sequences caused either by deviations in the processes that will be conducted at the proposed facility or by credible external events, including natural phenomena; LBP-11-11, 73 NRC 455 (2011)

application of 10 C.F.R. 40.38(a) and 70.40 is limited to USEC alone, so that they have no relevance to any other enrichment facility applicant; LBP-11-11, 73 NRC 455 (2011)

applications are required to contain a description of the security program to protect against unauthorized disclosure of classified matter in accord with Part 95; LBP-11-11, 73 NRC 455 (2011)

because the application for a uranium enrichment facility is governed by AEA §§ 53 and 63, 42 U.S.C. § 2073, 2093, foreign ownership and control issues would be evaluated under sections 57 and 69; LBP-11-11, 73 NRC 455 (2011)

consequences of loss of offsite power are discussed; LBP-11-11, 73 NRC 455 (2011)

credibility of hazard from wildfires is discussed; LBP-11-11, 73 NRC 455 (2011)

for a proposed nuclear materials-related activity, including uranium enrichment, commencement of construction prior to a favorable Staff conclusion regarding the NEPA cost-benefit balance is grounds for denial of the authorization to conduct that activity; LBP-11-11, 73 NRC 455 (2011)

highly site-specific seismic hazard analysis reflects consideration not only of the location and magnitude of historic earthquakes, but also the nature of the bedrock and the style of faulting in the surrounding region; LBP-11-11, 73 NRC 455 (2011)

holders of a Parts 40/70 uranium enrichment facility license are required to maintain adequate nuclear liability insurance, with proof of such insurance necessary prior to a license being issued; LBP-11-11, 73 NRC 455 (2011)

items relied on for safety that are a central focus of the integrated safety analysis process are the subject of three proposed license conditions; LBP-11-11, 73 NRC 455 (2011)

items relied upon for safety should be described in sufficient detail to allow a Staff reviewer to understand the IROFS's functions in relation to the performance standards in section 70.61, which specifies limitations on the levels of risk for credible high- and intermediate-consequence accidents and nuclear criticality accidents; LBP-11-11, 73 NRC 455 (2011)

license must have a condition requiring licensee to maintain and follow a source material control and accounting program and maintain records of any MC&A program changes made without Commission approval for 5 years from the date of the change; LBP-11-11, 73 NRC 455 (2011)

NRC has a clear statutory mandate to regulate the construction and operation of a uranium enrichment facility; LBP-11-11, 73 NRC 455 (2011)

NRC may deny applicant a license based on foreign ownership, control, or domination concerns to the extent it concludes granting such a license would be inimical to the common defense and security or the health and safety of the public; LBP-11-11, 73 NRC 455 (2011)

process designs should be described in a level of detail in the integrated safety analysis that is sufficient to allow a Staff reviewer to understand the theory of operation for the process; LBP-11-11, 73 NRC 455 (2011)

relative to the issue of foreign ownership or control, NRC imposes restrictions on the physical security and control of information at licensed facilities to safeguard restricted data and national security information; LBP-11-11, 73 NRC 455 (2011)

reports to the agency regarding unapproved changes made to the material control and accounting program must be filed within no more than 6 months after the changes; LBP-11-11, 73 NRC 455 (2011)

Staff imposed a license condition to ensure that clearances are obtained before classified matter is processed, stored, reproduced, transmitted, handled, or accessed; LBP-11-11, 73 NRC 455 (2011)
the basic regulatory framework that governs the licensing is found in 10 C.F.R. Part 70, but Parts 19, 20, 21, 25, 30, 40, 51, 71, 73, 74, 95, 140, 170, 171, are also applicable; LBP-11-11, 73 NRC 455 (2011)
the Commission shall conduct a single adjudicatory hearing on the record with regard to the licensing of the construction and operation of a uranium enrichment facility; LBP-11-11, 73 NRC 455 (2011)
there is no NRC requirement that applicant submit a redress plan relative to preconstruction activities or, absent state or local requirements, take any remedial action regarding preconstruction activities if it decides not to complete the project or is denied agency authorization to construct and operate the facility; LBP-11-11, 73 NRC 455 (2011)
to perform an appropriate integrated safety analysis, NUREG-1520 standard review plan guidance for fuel cycle facilities indicates that applicant should identify the process designs, accident sequences, and items relied upon for safety that are associated with the facility; LBP-11-11, 73 NRC 455 (2011)
under 10 C.F.R. 40.41(g) and 70.32(k), a uranium enrichment facility cannot be operated until the agency verifies through inspection that the facility has been constructed in accordance with the license; LBP-11-11, 73 NRC 455 (2011)
under risk-informed performance-based requirements, applicants must ensure that each item relied on for safety will be available and reliable to perform its function when needed; LBP-11-11, 73 NRC 455 (2011)
whether exercise frequency is adequate to maintain personnel knowledge and skill to implement emergency responsibilities for proposed uranium enrichment facility is discussed; LBP-11-11, 73 NRC 455 (2011)
URANIUM ENRICHMENT FACILITY PROCEEDINGS
based on Staff's and applicant's written responses to board questions, and on the resumes, CVs, and SPQs admitted as part of the evidentiary record to respond to the questions, the board considers safety issues resolved for the proceeding; LBP-11-11, 73 NRC 455 (2011)
even if no intervention petitions are received, the Commission must still conduct adjudicatory hearing on the record with regard to the licensing of the construction and operation of a uranium enrichment facility; LBP-11-11, 73 NRC 455 (2011)
financial qualifications of applicant to fund construction are discussed; LBP-11-11, 73 NRC 455 (2011)
for mandatory proceedings, licensing boards are to conduct a simple sufficiency review rather than a de novo review on both AEA and NEPA issues; LBP-11-11, 73 NRC 455 (2011)
in a mandatory hearing, licensing boards must narrow their inquiry to topics or sections in Staff documents that they deem most important and should concentrate on portions of the documents that do not on their face adequately explain the logic, underlying facts, and applicable regulations and guidance; LBP-11-11, 73 NRC 455 (2011)
in mandatory proceedings for uranium enrichment facility licensing, boards are to make independent environmental judgments with respect to certain NEPA findings; LBP-11-11, 73 NRC 455 (2011)
in mandatory proceedings, boards should inquire whether the NRC Staff performed an adequate review and made findings with reasonable support in logic and fact; LBP-11-11, 73 NRC 455 (2011)
license conditions imposed on applicant as a result of NRC Staff's review process and applicant-requested exemptions from agency regulatory requirements that are granted by Staff have a strong potential to fall into a "non-routine matter" category; LBP-11-11, 73 NRC 455 (2011)
relative to NEPA, in mandatory hearings, boards are to determine whether the review conducted by NRC Staff has been adequate, but they need not rethink or redo every aspect of the NRC Staff's environmental findings or undertake their own fact-finding activities; LBP-11-11, 73 NRC 455 (2011)
the board's role in mandatory hearings is to carefully probe Staff findings by asking appropriate questions and by requiring supplemental information when necessary, but the NRC Staff's underlying technical and factual findings are not open to board reconsideration unless, after a review of the record, the board finds the NRC Staff review inadequate or its findings insufficient; LBP-11-11, 73 NRC 455 (2011)
URANIUM FUEL CYCLE
all uranium fuel cycle and waste management issues, including low-level waste storage and disposal, mixed waste storage and disposal, onsite spent fuel storage, and transportation, are Category 1 issues with a small impact; LBP-11-2, 73 NRC 28 (2011)

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VENTILATION SYSTEMS
applicant need not submit information regarding control room habitability and ventilation system design in the site safety analysis report portion of an early site permit application; LBP-11-16, 73 NRC 645 (2011)
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NRC's adjudicatory process is not the proper forum for investigating alleged violations that are primarily the responsibility of other federal, state, or local agencies; LBP-11-6, 73 NRC 149 (2011)
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analysis of potential volcanic hazard at proposed uranium enrichment facility site raises the question whether the probability of such an event is sufficiently low to be considered "highly unlikely"; LBP-11-11, 73 NRC 455 (2011)
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because the Equal Access to Justice Act operates as a waiver of sovereign immunity, it must be narrowly construed to avoid creating a waiver that Congress did not intend; LBP-11-8, 73 NRC 349 (2011)
once Congress has waived sovereign immunity over certain subject matter, a court should be careful not to assume the authority to narrow the waiver that Congress intended; LBP-11-8, 73 NRC 349 (2011)
the Equal Access to Justice Act renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity, and any such waiver must be strictly construed in favor of the United States; LBP-11-8, 73 NRC 349 (2011)
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a ubiquitous issue that clearly applies to a large class of people or facilities is ineligible for a waiver; LBP-11-16, 73 NRC 645 (2011)
any request for a rule waiver or exception must be accompanied by an affidavit that identifies the subject matter of the proceeding as to which the application of the regulation would not serve the purposes for which the regulation was adopted, and the affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested; LBP-11-16, 73 NRC 645 (2011)
challenge to a Commission rule or regulation is outside the scope of an adjudicatory hearing unless the petitioner first obtains a waiver; LBP-11-2, 73 NRC 28 (2011); LBP-11-13, 73 NRC 534 (2011)
participant may petition that a Commission rule or regulation be waived with respect to the license application under consideration; CLI-11-3, 73 NRC 613 (2011)
replies to waiver petitions are allowed; CLI-11-3, 73 NRC 613 (2011)
request for waiver of 10 C.F.R. 51.22(c)(15) is denied; CLI-11-3, 73 NRC 613 (2011)
to waive a Part 110 rule or regulation, petitioner must show special circumstances concerning the subject of the hearing such that application of the rule or regulation would not serve the purposes for which it was adopted; CLI-11-3, 73 NRC 613 (2011)
where the circumstances on which the proponent relies are common to a large class of applicants or facilities, the waiver will not be granted; LBP-11-16, 73 NRC 645 (2011)
WASTE CONFIDENCE RULE
contention challenging the Waste Confidence Rule may not be admitted absent a waiver or exception; LBP-11-16, 73 NRC 645 (2011)
the Commission believes there is reasonable assurance that sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time; LBP-11-16, 73 NRC 645 (2011)
WASTE PROCESSING
the key action that will allow incineration of imported low-level-radioactive waste material is the domestic license authorizing such processing, not NRC's grant of an import license; CLI-11-3, 73 NRC 613 (2011)
the state reviewed the applications and the authorizations and found no technical reason to prohibit processing of imported waste; CLI-11-3, 73 NRC 613 (2011)
WASTEWATER
contention that wastewater contains chemical contaminants that are not discussed in the environmental report, and that when the wastewater is discharged via deep injection wells, the chemicals might migrate to an aquifer is within the scope of a combined license proceeding; LBP-11-6, 73 NRC 149 (2011)

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WATER POLLUTION
contention claiming that the environmental report's discussion of environmental effects and cumulative impacts of seepage from the cooling basin into groundwater and surface water through undocumented or unplugged oil and gas wells and borings fails to comply with the requirements of this section is admissible; LBP-11-16, 73 NRC 645 (2011)
WATER RIGHTS
the federal government could assert an implied water right on behalf of a wildlife refuge; LBP-11-16, 73 NRC 645 (2011)
to show that it is within the realm of reason that the federal government may assert an implied water right, petitioner must provide some indicia of an attempt, plan, or intention; LBP-11-16, 73 NRC 645 (2011)
WATER SUPPLY
assurance of adequate cooling water supply for emergency and long-term shutdown decay heat removal shall be considered in the design of the nuclear power plant; LBP-11-16, 73 NRC 645 (2011)
contention claiming that the application insufficiently addresses the safety implications of low water availability is inadmissible for failure to raise a genuine dispute with the application because the contention does not provide specific references to relevant sections of the site safety analysis report that address low water considerations; LBP-11-16, 73 NRC 645 (2011)
intervenors' challenges to adequacy of applicant's environmental report with respect to environmental impacts of dewatering associated with the proposed nuclear plant continue to serve as viable challenges to similar sections of Staff's draft environmental impact statement and thus are not moot; LBP-11-1, 73 NRC 19 (2011)
to show that it is within the realm of reason that the federal government may assert an implied water right, petitioner must provide some indicia of an attempt, plan, or intention; LBP-11-16, 73 NRC 645 (2011)
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intervenors' challenges to adequacy of applicant's environmental report with respect to environmental impacts of dewatering associated with the proposed nuclear plant continue to serve as viable challenges to similar sections of Staff's draft environmental impact statement and thus are not moot; LBP-11-1, 73 NRC 19 (2011)
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credibility of hazard to uranium enrichment facility is discussed; LBP-11-11, 73 NRC 455 (2011)
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because a solely wind- or solar-powered facility could not satisfy the projects purpose, there was no need to compare the impact of such facilities to the impact of the proposed nuclear plant; LBP-11-7, 73 NRC 254 (2011)
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findings concerning personal knowledge are entirely factual and largely dependent on witness credibility; LBP-11-8, 73 NRC 349 (2011)
WITNESSES, EXPERT
a conclusory assertion, even if made by an expert, is inadequate because it deprives the board of the ability to make the necessary, reflective assessment of the opinion; LBP-11-6, 73 NRC 149 (2011)
intervenors have demonstrated their ability to contribute to the development of a sound record where they have put forward in support of those contentions the views of a witness whose expertise has been recognized in other NRC proceedings; LBP-11-9, 73 NRC 391 (2011)
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