

January 13, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
Northern States Power Company) Docket No. 72-10-ISFSI-2
)
(Prairie Island Nuclear Generating Plant) ASLBP No. 12-922-01-ISFSI-MLR-BD01
Independent Spent Fuel Storage)

NRC STAFF RESPONSE TO PRAIRIE ISLAND INDIAN COMMUNITY MOTION TO ADMIT
NEW AND AMENDED CONTENTIONS AFTER ISSUANCE OF NRC'S DRAFT
ENVIRONMENTAL ASSESSMENT

INTRODUCTION

The Staff of the Nuclear Regulatory Commission (NRC Staff or Staff) responds to the Prairie Island Indian Community's (PIIC or Intervenors) Motion to Admit New and Amended Contentions After Issuance of NRC's Draft Environmental Assessment, filed on December 12, 2013.¹ For the reasons discussed below, the Staff respectfully asserts that PIIC's new and amended contentions are inadmissible, except for the portions related to waste-confidence that should be held in abeyance as directed by the Commission.

BACKGROUND

On October 19, 1993, the NRC issued a 20-year license to Northern States Power Company d/b/a Xcel Energy, Inc. (NSPM or Applicant) for the Prairie Island (PI) Independent Spent Fuel Storage Installation (ISFSI), which authorizes the storage of spent fuel generated at the Prairie Island Nuclear Generating Plant (PINGP) Units 1 and 2 for up to 48 casks. The

¹ Prairie Island Indian Community Motion to Admit New and Amended Contentions After Issuance of NRC's Draft Environmental Assessment (Dec. 12, 2013) (Motion). On December 16, 2013, the Atomic Safety and Licensing Board (Board) granted the parties' joint motion to extend time for Staff and Applicant's responses until January 13, 2014, and PIIC's reply until January 23, 2014. See Order (Granting Joint Motion to Extend Time) (Dec. 16, 2013) (unpublished).

current license term for the Prairie Island ISFSI was scheduled to expire on October 19, 2013.² NSPM submitted to the NRC an application dated October 20, 2011,³ as supplemented February 29, 2012,⁴ for the renewal of its Special Nuclear Material (SNM) License No. 2506, under the provisions of 10 C.F.R. Part 72. The license authorizes the receipt, possession, storage, and transfer of spent fuel, reactor-related Greater than Class C (GTCC) waste and other radioactive materials associated with spent fuel storage at the Prairie Island ISFSI. The PINGP site is located within the city limits of Red Wing, Minnesota, in Goodhue County. The PI ISFSI is located within PINGP site boundary and approximately 1.6 kilometers southeast of the PIIC reservation. If granted, the renewed license will authorize NSPM to continue to store spent fuel generated at the PINGP in a dry cask storage system at its ISFSI. Pursuant to the provisions of 10 C.F.R. § 72.42, the renewal term of the license for the ISFSI would be up to forty (40) years.

On June 25, 2012, the NRC published a notice of opportunity for hearing on NSPM's application in the *Federal Register*.⁵ In October 2012, NRC and PIIC entered into a Memorandum of Understanding (MOU), which established a cooperating agency relationship between NRC and PIIC for purposes of the Staff's preparation of the Environmental Assessment (EA).⁶ On August 24, 2012, PIIC timely filed a petition containing seven

² Having filed the license renewal application two years prior to the expiration of its current license, NSPM's license is in timely renewal and will not expire until the NRC makes a final decision on NSPM's application. See 10 C.F.R. § 72.42(c).

³ Agencywide Documents Access and Management System (ADAMS) Accession No. ML11304A068.

⁴ ADAMS Accession No. ML12065A073.

⁵ 77 Fed. Reg. 37,937 (June 25, 2012).

⁶ ADAMS Accession No. ML12284A456.

contentions.⁷ On December 20, 2012, the Board issued a Memorandum and Order granting PIIC's Petition, holding one contention in abeyance, and admitting three contentions.⁸ On November 19, 2013, the NRC Staff issued a Draft Environmental Assessment, Draft Finding of No Significant Impact, and Request for Comment concerning the PI ISFSI license renewal.⁹

DISCUSSION

I. Contentions

A. General Requirements for Contentions

The legal standards governing admissibility of contentions are set forth in the NRC's Rules of Practice at 10 C.F.R. § 2.309(f)(1). In order to be admissible, a contention must:

- (i) Provide a specific statement of the legal or factual issue sought to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at the hearing, together with references to the specific sources and documents, which the petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute with the applicant/licensee exists 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,

⁷ Prairie Island Indian Community's Request for Hearing and Petition to Intervene in License Renewal Proceeding for the Prairie Island Independent Spent Fuel Storage Installation (Aug. 24, 2012) (Petition).

⁸ *Northern States Power Company* (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage), LBP-12-24, 76 NRC __ (Dec. 20, 2012) (slip op.) (Board Order).

⁹ 78 Fed. Reg. 69,460 (Nov. 19, 2013).

the identification of each failure and the supporting reasons for the petitioner's belief.¹⁰

B. Standards for New and Amended Contentions

Although contentions must typically be filed at the same time as the initial hearing request, a party may later file new or amended contentions based on subsequently released documents, such as the NRC Staff's draft or final National Environmental Policy Act (NEPA) document.¹¹ Such a contention cannot be admitted, however, unless it meets the following additional requirements in 10 C.F.R. § 2.309(c)(2):

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

C. PIIC's New Contentions

PIIC proffers three new contentions based on the Staff's draft Environmental Assessment (EA).

1. EA Contention 1

The Draft EA Improperly Minimizes Waste Storage Impacts.¹²

Through this contention, PIIC seeks to amend its original Contention 1 to include related waste storage deficiencies in the Staff's draft EA.¹³ PIIC's original Contention 1 asserts that the Applicant's Environmental Report (ER) is flawed because of its reliance on the NRC's Waste Confidence Decision (WCD) and Temporary Storage Rule, which U.S. Court of Appeals for the

¹⁰ 10 C.F.R. § 2.309(f)(1).

¹¹ 10 C.F.R. § 2.309(f)(2); see *also* Order (Amended Initial Scheduling Order) at 7 (Feb. 1, 2013) (unpublished).

¹² Motion at 2.

¹³ Motion at 2-3.

District of Columbia deemed legally insufficient.¹⁴ The Staff argued in its response that PIIC's original Contention 1 should be held in abeyance, consistent with the Commission's order that, as an exercise of its inherent supervisory authority over adjudications, all waste confidence-related contentions filed in the near term be held in abeyance pending further order from the Commission.¹⁵ Accordingly, the Board held the original Contention 1 in abeyance pending the Commission's further order.¹⁶

On September 13, 2013, the NRC issued the Proposed Waste Confidence Rule¹⁷ and Draft Waste Confidence Generic Environmental Impact Statement¹⁸ (GEIS) for public comment. As of this time, the Commission has not issued any additional order concerning the disposition of waste confidence contentions. Therefore, consistent with its original Contention 1, PIIC's EA Contention 1 should be held in abeyance until such time as the Commission orders otherwise.

2. EA Contention 2

The Draft Environmental Assessment Does Not Adequately Address Cumulative Impacts of Related Projects on the PIIC, Its Members and Its Land.¹⁹

Similar to the previous contention, PIIC seeks to amend its previously admitted Contention 2.²⁰ PIIC's original Contention 2 alleges that the Applicant's ER fails to address cumulative impacts of related projects on the PIIC, its members and its lands.²¹ The Board admitted a portion of

¹⁴ See Petition at 24; *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

¹⁵ NRC Staff Response to the Request for Hearing and Petition to Intervene by the Prairie Island Indian Community, at 10 (Sept. 25, 2012) (citing *Calvert Cliffs Nuclear Project, LLC*, (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC __ (Aug. 7, 2012)).

¹⁶ Board Order at __ (slip op. at 5-6).

¹⁷ 78 Fed. Reg. 56,776 (Sept. 13, 2013).

¹⁸ NUREG-2157, *Waste Confidence Generic Environmental Impact Statement* (Sept. 2013) (ADAMS Accession No. ML13224A106).

¹⁹ Motion at 3.

²⁰ *Id.*

²¹ Petition at 26.

PIIC's original Contention 2, and held the portions implicating the Commission's waste confidence decision in abeyance.²²

EA Contention 2 asserts that the draft EA inadequately addresses cumulative impacts related to three areas: (1) long-term waste storage; (2) possible impacts of the potential Prairie Island ISFSI expansion on cultural and historic resources; and (3) potential storage and transportation of high burnup fuel (HBF).²³ The Staff will address each of these in turn.

i. Long-term Waste Storage

With respect to the portion of EA Contention 2 related to long-term waste storage, PIIC cites to the reasoning in its original Contention 2 and the Board's ruling on it.²⁴ The Board declined to admit the long-term waste storage portions of the original Contention 2 as a separate contention, and held them in abeyance in conjunction with the original Contention 1.²⁵ Consistent with the Board's previous ruling, and the reasons discussed *supra* regarding EA Contention 1, the Staff maintains that this portion of EA Contention 2 should be likewise held in abeyance.

ii. Possible Impacts of the Potential Prairie Island ISFSI Expansion on Cultural and Historic Resources

The second portion of EA Contention 2 asserts that the "draft EA fails to adequately address the potential impacts of the reasonably foreseeable expansion of the PI ISFSI on cultural and historic resources."²⁶ Similarly, PIIC argues that the Staff's environmental justice analysis in the EA is inadequate because the Staff did not consider the potential for the ISFSI to expand in the future.

²² Board Order at ___ (slip op. at 8-17).

²³ Motion at 3.

²⁴ Motion at 3.

²⁵ Board Order at ___ (slip op. at 11).

²⁶ Motion at 4.

The Staff's respectfully disagrees with PIIC's assertions. The Commission has stated that:

[C]ontentions that are based on projected changes to a license, not currently before the NRC in any proceeding or application, are not sufficient to support admission of a contention. An NRC proceeding considers the application presented to the agency for consideration and not potential future amendments that are a matter of speculation at the time of the ongoing proceeding.²⁷

In the *McGuire* and *Catawba* decision, the Commission was considering a very similar NEPA-related contention concerning whether the Staff must consider a potential future license amendment request in an Environmental Impact Statement analyzing the cumulative impacts of a license renewal action pending before the Staff.²⁸ The Commission held that "a possible future action must at least constitute a 'proposal' pending before the agency" to be ripe for adjudication.²⁹ Additionally, in order to establish that cumulative impacts must be addressed, a petitioner must first show that any "proposal" the applicant has made is so interdependent with the application at issue that it "would be unwise or irrational to complete one without the other."³⁰

NSPM has not yet filed an application for the expansion of the ISFSI before the NRC. Additionally, the current application for renewal of the license to operate the existing PI ISFSI is not dependent upon any future expansion application. Therefore, consideration of the impacts of the potential ISFSI expansion application is not required in the Staff's EA. Regardless, as discussed more fully below, the Staff voluntarily discussed the cumulative impacts from a

²⁷ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2 and Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294 (2002).

²⁸ *Id.*

²⁹ *Id.* at 295.

³⁰ *Id.*

potential ISFSI expansion in light of PIIC's recommendation in its role as a cooperating agency, and included PIIC's substantive comments throughout the draft EA where relevant.³¹

PIIC's EA Contention 2 alleges that the Staff bases its relevant conclusions solely on the fact that the NRC would require that a future application be submitted and reviewed prior to any expansion of the ISFSI.³² The Staff notes that the draft EA does evaluate the cumulative impacts of a potential expansion of the ISFSI up to 98 casks. Although, the draft EA acknowledges that the analysis is limited because the "NRC staff cannot project with certainty the details of a potential expansion."³³

Further, the Staff notes that, in EA Contention 2, PIIC is principally concerned with cumulative impacts on historic resources. The cumulative impacts section of the draft EA contains a subsection which specifically analyses the "Cumulative Impacts on Historic and Cultural Resources."³⁴ This subsection includes an analysis of the impacts of a potential ISFSI expansion, along with relevant mitigating factors.³⁵ In light of PIIC's input as a cooperating agency on this topic, the Staff "reviewed additional information that was not previously available or considered as part of NRC's 1992 ISFSI construction EA or the 2011 PINGP license renewal SEIS."³⁶ In analyzing the cumulative impacts of the potential ISFSI expansion, the "NRC staff recognizes that based on the number, type and density of known archaeological sites identified, there is a high probability that additional unrecorded resources may exist within the PINGP property."³⁷ Additionally, the Staff considered various mitigating factors. Specifically, as

³¹ See, e.g., EA at 4-23.

³² Motion at 6.

³³ EA at 4-26.

³⁴ EA at 4-34

³⁵ EA at 4-34 to 4-35.

³⁶ *Id.*

³⁷ EA at 4-35.

mentioned *supra*, that Staff will require that NSPM submit an application, which the staff will thoroughly review prior to any expansion of the ISFSI, thereby triggering an additional hearing opportunity and consultation requirements pursuant to the National Historic Preservation Act. Additionally, the draft EA considers the cultural resources management plan (CRMP) implemented by NSPM.³⁸ Based on this analysis, the Staff concludes that it “has confidence that future activities will be conducted in accordance with the CRMP and federal, state, tribal, local agencies and entities.”³⁹

As discussed above, the Staff is not required to analyze the cumulative impacts of the potential ISFSI expansion at this time as there is no ripe and interdependent proposal before the Commission. Working with PIIC as a cooperating agency, however, the Staff evaluated the cumulative impacts of a potential ISFSI expansion to the extent possible based upon currently available information. Therefore, for purposes of the draft EA, the Staff has considered all available information regarding cumulative impacts on cultural and historic resources as they relate to the ISFSI license renewal.

iii. Potential Storage and Transportation of High Burnup Fuel

The third portion of EA Contention 2 asserts that the “draft EA fails to analyze the cumulative environmental impacts of the potential difficulties of transporting [HBF].”⁴⁰ Specifically, PIIC argues that, because the federal government has recognized various

³⁸ “The CRMP includes a detailed overview of existing information regarding the nature and location of known cultural and historic resources within the PINGP property, identifies which types of activities have potential to cause disturbance to these resources, and establishes procedures and practices for proper review, notification, and consultation with concerned parties prior to initiating future construction and excavation projects at the PINGP. NSPM employees are required to notify and consult with a variety of federal, state, tribal, and local agencies and entities depending on the nature and scope of planned activities and applicable laws and regulations. NSPM has agreed to maintain and implement the CRMP as long as NSPM owns or controls the plant site.” EA at 4-11.

³⁹ EA at 4-35.

⁴⁰ Motion at 7.

concerns relating to long term HBF storage and transportation, the Staff's draft EA must evaluate the environmental impacts of long term storage and transportation methods of HBF.⁴¹

Under NEPA, the NRC must take a "hard look" at the environmental impacts of a proposed action.⁴² A "hard look" analysis should use "the best available information at the time the assessment is performed."⁴³ For individual applications, a "NEPA review represents a 'snapshot' in time," and NEPA "does not require that [the NRC] wait until inchoate information matures into something that later might affect [the] review."⁴⁴ The "unavailability of information . . . should not be permitted to halt all government action."⁴⁵

NEPA's "hard look" requirement is tempered by a "rule of reason" that requires agencies to address only impacts that are reasonably foreseeable – not remote and speculative or worst case scenarios.⁴⁶ The Commission explained in this regard that "NEPA does not call for certainty or precision, but an estimate of anticipated (not unduly speculative) impacts."⁴⁷

In the Staff's response to PIIC's original Contention 6 related to HBF storage, the Staff agreed that the contention was admissible in part as a safety contention, and acknowledged technical issues that are material to the Staff's ongoing safety reviews related to Prairie Island.⁴⁸

⁴¹ *Id.*

⁴² See *Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998).

⁴³ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC 301, 341 (2012).

⁴⁴ *Luminant Generation Co. LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4) CLI-12-07, 75 NRC 379, 391-92 (2012).

⁴⁵ *Sierra Club v. Sigler*, 695 F.2d 957, 970 (5th Cir. 1983).

⁴⁶ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-55, 56 NRC 340, 348-49 (2002).

⁴⁷ *Louisiana Energy Servs.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005) (emphasis in original).

⁴⁸ Staff Response to Petition at 19-20 (noting that 10 C.F.R. § 72.122(h)(1) requires protection against cladding degradation *or* that the fuel is otherwise confined as to not cause operational problems).

Additionally, the Staff has recently issued draft guidance intended to assist the Staff in reviewing license applications containing information regarding whether an applicant can demonstrate compliance with NRC's requirements in 10 C.F.R. Part 72.⁴⁹ In the draft guidance document, the Staff states that "there is no evidence to suggest that HBF cannot be safely stored beyond 20 years," but acknowledges that the current state of knowledge regarding the safety of HBF storage beyond 20 years is limited.⁵⁰

The Staff has taken a similar position with respect to the transportation concerns related to HBF, and acknowledges the ongoing development of technical data required to ensure the safe transport of HBF.⁵¹ The Staff reviews the transportation of HBF on a case-by-case basis as part of the cask certification process outlined in 10 C.F.R. Part 71.⁵² NSPM has not applied for transportation approval of any casks currently located at the ISFSI. At such time as an application is received for approval to transport the relevant casks, the Staff's subsequent safety review, under Part 71, would take into consideration any technical issues related to HBF. The Staff conducted a similar review in its evaluation of NSPM's 2008 request to modify their licensed cask design for the storage of HBF.⁵³

⁴⁹ Draft Interim Staff Guidance 24, *The Use of a Demonstration Program as Confirmation of Integrity for Continued Storage of High Burnup Fuel Beyond 20 Years* (Apr. 25, 2013) (ADAMS Accession No. ML13056A516) (ISG-24).

⁵⁰ *Id.* at 1-2.

⁵¹ See Interim Staff Guidance 11, Rev. 3, *Cladding Considerations for the Transportation and Storage of Spent Fuel* (Nov. 17, 2003) (ADAMS Accession No. ML033230335). There are currently multiple research projects concerning HBF storage and transportation being conducted, including the U.S. Department of Energy HBF demonstration project, as well as HBF research at Argonne National Laboratory and Oak Ridge National Laboratory. See Einzinger, R., Slide Presentation, *Status of NRC Research on High Burnup Fuel Issues* (Mar. 13, 2013), available at <http://www.nrc.gov/public-involve/conference-symposia/ric/past/2013/docs/abstracts/sessionabstract-24.html>.

⁵² See ISG-11, Rev. 3, at 1.

⁵³ See *Safety Evaluation Report for the Prairie Island Spent Fuel Storage Installation, Special Nuclear Material License No. 2506, License Amendment Request, Docket No. 72-10* (August 2010) (ADAMS Accession No. ML101590797); *Environmental Assessment for the Amendment of U.S. Nuclear Regulatory Commission License No. SNM-2506 for the Independent Spent Fuel Storage Installation, Docket 72-0010* (Nov. 2009) (ADAMS Accession No. ML093080494).

For purposes of the draft EA, the Staff's evaluation of the storage and transportation of fuel encompasses all types of fuel (including HBF) and does differentiate its analysis due to the Staff's expectation that NSPM will meet the NRC's requirements in both 10 C.F.R. Parts 71 and 72. While the Staff agrees that additional data is needed to evaluate the safe storage of HBF beyond 20 years, as well as the safe transportation of HBF, this evaluation is properly limited to the Staff's technical review. Any potential environmental impacts beyond what have already been considered for lower burnup fuel are too remote and speculative at this time to require an evaluation in the Staff's draft EA. However, if the Staff's safety review reveals any new and significant information relating to the environmental impacts of storage of HBF, the Staff will supplement its environmental analysis as required by NEPA.⁵⁴ With respect to certification of casks for transportation, the Staff does not conduct an environmental review, as the Commission has determined that this action is a categorical exclusion.⁵⁵

3. EA Contention 3

The Draft Environmental Assessment Fails to Satisfy the NRC's Federal Trust Responsibility to Assess and Mitigate the Potential Impacts on the PIIC, its People, and its Land.⁵⁶

Through this contention, PIIC seeks to renew and amend its original Contention 3.⁵⁷ The Board denied the original Contention 3 for failure to raise a genuine dispute with the application.⁵⁸

⁵⁴ See 10 C.F.R. § 51.92(a)(2); see also *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371-373 (1989).

⁵⁵ 10 C.F.R. § 51.22(c)(13). Pursuant to 10 C.F.R. § 51.22(a), this "action belongs to a category of actions which the Commission, by rule or regulation, has declared to be a categorical exclusion, after first finding that the category of actions does not individually or cumulatively have a significant effect on the human environment."

⁵⁶ Motion at 9.

⁵⁷ *Id.*

⁵⁸ Board Order at 18. The Board noted that PIIC was free to raise a similar contention once the Staff issued the draft EA, and it specifically expressed no opinion as to such the admissibility of any such contention. *Id.*

Both PIIC's original Contention 3, and EA Contention 3, state that the federal government has a trust responsibility to Indian tribes.⁵⁹ PIIC asserts that the trust doctrine, originating in *Cherokee Nation v. Georgia*,⁶⁰ imposes "certain substantive duties on the federal government, including the duty to provide services to tribal members (e.g., health care, education), the duty to protect tribal sovereignty, and the duty to protect tribal resources."⁶¹ Further, PIIC states that the trust doctrine requires the federal government to consult with Indian tribes to effectuate those substantive duties.⁶²

In addition, EA Contention 3 asserts that there are two specific deficiencies in the draft EA.⁶³ First, PIIC states that the draft EA inadequately analyzed the cumulative impacts of the potential ISFSI expansion on cultural and historic resources.⁶⁴ Secondly, PIIC argues that the draft EA is deficient because it fails to analyze the likelihood of a terrorist attack on the ISFSI, and any relevant impacts.⁶⁵

The federal government, as trustee for Indian tribes, has a fiduciary duty to act in the tribe's best interest.⁶⁶ The Department of the Interior, which houses the Bureau of Indian Affairs, has a significant fiduciary duty based on its role as manager of "all Indian affairs and all matters arising out of Indian affairs."⁶⁷ It is well-settled that for agencies such as the NRC, which do not manage, control or supervise Indian affairs, "unless there is a specific duty that

⁵⁹ Petition at 36; Motion at 9.

⁶⁰ 30 U.S. 1, 17 (1831).

⁶¹ Petition at 36; Motion at 10 (citing Reid Peyton Chamber, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 *Sta. L. Rev.* 1213 (1975)).

⁶² Petition at 37; Motion at 10.

⁶³ Motion at 9.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

⁶⁷ See 25 U.S.C. §§ 1, 1a, 2.

has been placed on the [agency] with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."⁶⁸ The NRC exercises its trust responsibility in the context of the Atomic Energy Act of 1954, as amended, and NEPA, and affords Indian tribes and their members equal rights as the public under those statutes.⁶⁹ Thus, as long as the NRC complies with its statutory duties, it will have fulfilled its trust responsibility.

PIIC's assertion that the NRC has failed to meet its trust responsibility to adequately consider the cumulative impacts of the potential ISFSI expansion relies on the same arguments as EA Contention 2. As outlined *supra*, given the information available at this time, the Staff is not required to consider the impacts from a potential ISFSI expansion but, nonetheless, has done so throughout the relevant portions of the EA, and the Staff has considered the comments offered by the PIIC in its role as a cooperating agency.

Finally, PIIC's argument that the draft EA is deficient for failing to consider the impacts of a postulated terrorist attack is well settled by Commission precedent. As PIIC mentions in their argument, the Federal Circuit Court of Appeals for the 9th Circuit held that the NRC must consider the possibility of terrorist attacks in its NEPA analysis.⁷⁰ Since that decision, the Commission has maintained the position that "NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks, including aviation attacks, on

⁶⁸ *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998); *accord Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000).

⁶⁹ *Cf. Skokomish Tribe of Indians v. FERC*, 121 F.3d 1303, 1309 (9th Cir. 1997) (stating that FERC was required to exercise its trust responsibility in the context of the Federal Power Act and properly declined to provide the tribe "greater rights than they otherwise have under the FPA and its implementing regulations.").

⁷⁰ *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006).

NRC-licensed facilities.”⁷¹ The Commission’s position was upheld by the Federal Circuit Court of Appeals for the 3rd Circuit.⁷² Accordingly, the Commission acknowledged the split between the Circuit Courts and has held that the *San Luis Obispo Mothers for Peace v. NRC* ruling will only be applied to facilities located within the 9th circuit,⁷³ which the PINGP and PI ISFSI are not. This Commission position on this issue is based upon “carefully-considered decisions” consistent with the NRC’s statutory obligations.⁷⁴ As the NRC’s trust responsibility is fulfilled via its statutory duties, PIIC has not presented a compelling reason why the Staff’s draft EA should depart from the current Commission policy on consideration of hypothetical terrorist attacks on NRC licensed facilities.

⁷¹ See, e.g., *South Carolina Electric and Gas Co. and South Carolina Public Service Authority (Also Referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-01, 71 NRC 1, 27 (2010).

⁷² See *N.J. Dep’t of Env’tl Prot. v. U.S. NRC*, 561 F.3d 132, 142-143 (3rd Cir. 2009).

⁷³ See, e.g., *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 257-58 (2010); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 476 (2010).

⁷⁴ *Summer*, CLI-10-01, 71 NRC at 28.

CONCLUSION

For the reasons discussed above, EA Contention 1 and the long-term waste storage portion of EA Contention 2 should be held in abeyance. Further, the remainder of EA Contention 2 and EA Contention 3 should be denied.

Respectfully submitted,

/Signed (electronically) by/
Joseph S. Gilman
Counsel for NRC Staff

Dated at Rockville, Maryland
this 13th day of January, 2014.