

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

NORTHERN STATES POWER CO.

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

Docket No. 72-10-ISFSI-2

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

April 30, 2014

MEMORANDUM AND ORDER
(Ruling on Motion to Admit New and Amended Contentions)

The Prairie Island Indian Community (PIIC) has moved to admit three new and amended contentions¹ challenging the Nuclear Regulatory Commission's Draft Environmental Assessment (EA).² The Applicant, Northern States Power Company (Northern States), and the Nuclear Regulatory Commission (NRC) Staff each oppose the admission of PIIC's proffered contentions, as set forth in their answers to PIIC's motion, filed on January 13, 2014.³ PIIC filed

¹ [PIIC] Motion to Admit New and Amended Contentions After Issuance of NRC's Draft Environmental Assessment (Dec. 12, 2013) [hereinafter PIIC's Motion to Admit].

² Draft Environmental Assessment for the Proposed Renewal of U.S. Nuclear Regulatory Commission License No. SNM-2506 for the Prairie Island [ISFSI] (Nov. 2013) (ADAMS Accession No. ML13205A120) [hereinafter Draft EA].

³ [Northern States'] Answer Opposing [PIIC's] Motion to Admit New and Amended Contentions (Jan. 13, 2014) [hereinafter Northern States' Answer]; NRC Staff Response to [PIIC's] Motion to Admit New and Amended Contentions After Issuance of NRC's Draft Environmental Assessment (Jan. 13, 2014) [hereinafter NRC Staff's Answer]; see also Erratum to [NRC Staff's Answer] (Jan. 14, 2014).

its reply on January 23, 2014.⁴ On January 28, 2014, Northern States moved to strike portions of PIIC's Reply.⁵ PIIC responded to Northern States' motion to strike on February 4, 2014.⁶

The NRC Staff did not respond to Northern States' motion to strike.

In this Memorandum and Order, we hold in abeyance amended Contention 1, in whole, and amended Contention 2, in part. We also admit amended Contention 2, in part, and a renewed and amended Contention 3, in part.

Additionally, we deny Northern States' motion to strike portions of PIIC's reply.

I. Brief Procedural Background

This proceeding arises from Northern States' application for license renewal,⁷ seeking a forty-year extension of its license to operate the Prairie Island Independent Spent Fuel Storage Installation (ISFSI), and to store as many as forty-eight casks of spent fuel generated at the

⁴ [PIIC's] Reply on Motion to Admit New and Amended Contentions (Jan. 23, 2014) [hereinafter PIIC's Reply].

⁵ [Northern States'] Motion to Strike Portions of [PIIC's] Reply (Jan. 28, 2014) [hereinafter Motion to Strike].

⁶ [PIIC's] Response to [Northern States'] Motion to Strike Portions of PIIC's Reply (Feb. 4, 2014) [hereinafter Response to Motion to Strike].

⁷ See Letter from Mark A. Schimmel, Site Vice President, Prairie Island Nuclear Generating Plant (PINGP), Northern States Power Company – Minnesota, to Director, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards, NRC, Prairie Island [ISFSI] License Renewal Application (Oct. 20, 2011) (ADAMS Accession No. ML11304A068).

Northern States supplemented its application on February 29, 2012. See Letter from Mark A. Schimmel, Site Vice President, [PINGP], Northern States Power Company – Minnesota, to Director, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards, NRC, Responses to Requests for Supplemental Information – Prairie Island [ISFSI] License Renewal Application (TAC No. L24592) (Feb. 29, 2012) (ADAMS Accession No. ML12065A073).

Northern States supplemented its application a second time on April 26, 2012. See Letter from Mark A. Schimmel, Site Vice President, [PINGP], Northern States Power Company – Minnesota, to Director, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards, NRC, Responses to Observations – Prairie Island [ISFSI] License Renewal Application (TAC No. L24592) (Apr. 26, 2012) (ADAMS Accession No. ML121170406).

Prairie Island Nuclear Generating Plant (PINGP) Units 1 and 2.⁸

The PINGP site is located within the city limits of Red Wing in Goodhue County, Minnesota,⁹ and is adjacent to the PIIC Trust lands. The Prairie Island ISFSI itself is located within 548 meters (1,798 ft) of the PIIC Trust lands (see Figure 1).¹⁰

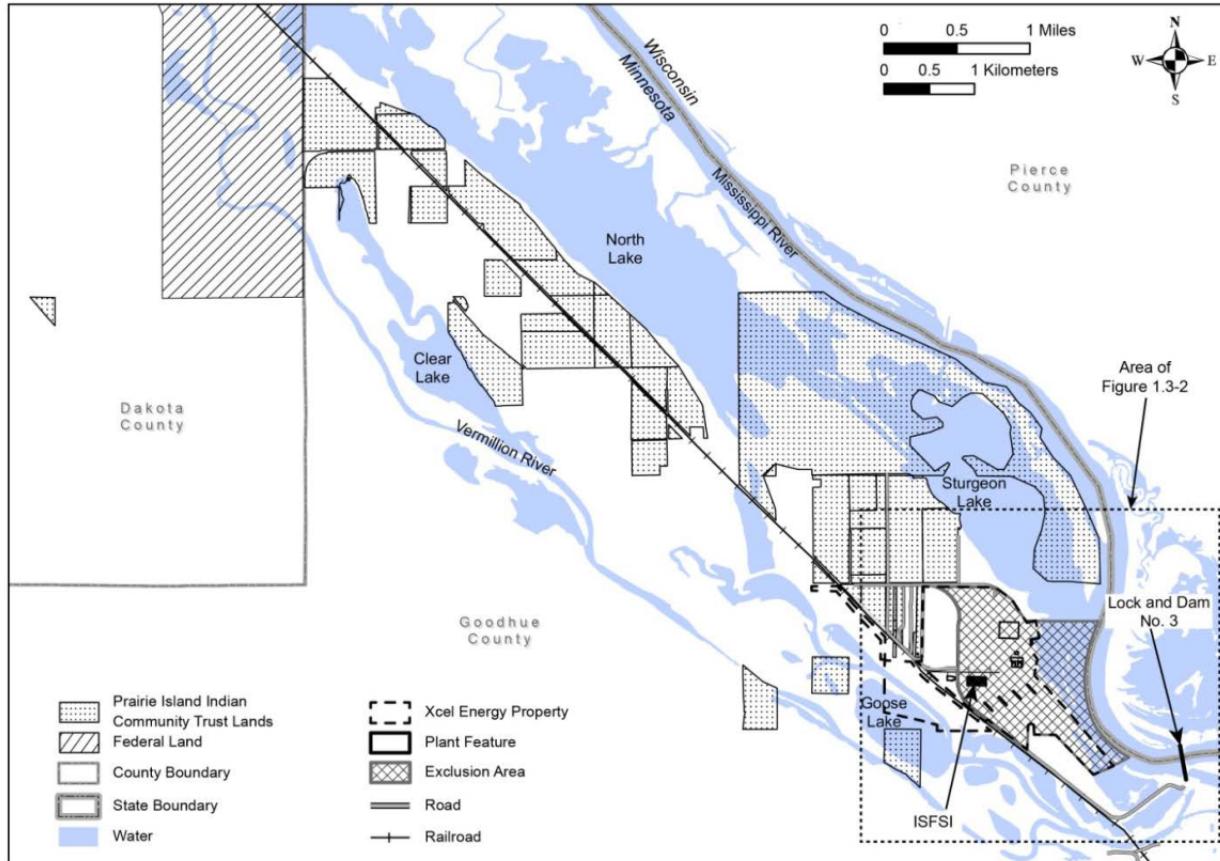


Figure 1. Prairie Island General Site Drawing¹¹

⁸ See Draft EA at 1-2 (“[T]he PI ISFSI is licensed to store spent fuel in up to 48 casks (a total of up to 1,920 spent fuel assemblies) on two seismically qualified concrete pads. Currently there are 29 [transnuclear-40] casks (NSPM, 2011a) and 6 [transnuclear 40-high thermal] casks onsite.”).

⁹ Id.

¹⁰ Id.

¹¹ Id. at 1-4. This figure is labeled as “Figure 1.3-2. Prairie Island General Site Drawing (NMC, 2008; PIIC, 2013a; USCB, 2012)” in the Draft EA. See id.

On June 25, 2012, the NRC published in the Federal Register a notice of opportunity for hearing on Northern States' license renewal application.¹² On August 24, 2012, PIIC timely filed a petition to intervene containing seven contentions.¹³

On December 20, 2012, the Board granted PIIC's petition to intervene, admitted three contentions and held in abeyance a fourth contention, as well as parts of two of the admitted contentions.¹⁴

On November 19, 2013, the NRC published in the Federal Register a notice of its draft EA, as well as of its draft finding of no significant impact.¹⁵

On December 12, 2013, PIIC filed the instant motion to admit and amend contentions based on the NRC's Draft EA.¹⁶

II. Standards Governing Contention Admissibility

A. General Requirements for Contentions

Contentions must meet the admissibility criteria set forth in 10 C.F.R. § 2.309(f)(1), which requires each contention to: (1) provide a specific statement of the issue of law or fact to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised in the contention is within the scope of the proceeding; (4) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the licensing action; (5) provide a concise statement of the alleged facts or expert opinions in support of the petitioner's position on the issue and on which the petitioner intends to rely at

¹² See 77 Fed. Reg. 37,937 (June 25, 2012).

¹³ [PIIC's] Request for Hearing and Petition to Intervene in License Renewal Proceeding for the Prairie Island Independent Spent Fuel Storage Installation (Aug. 24, 2012) [hereinafter Original PIIC Petition].

¹⁴ See LBP-12-24, 76 NRC 503, 530 (2012) ("We further admit Contentions 2, 4, and 6, as narrowed herein, and hold in abeyance Contention 1, as well as those portions of Contentions 2 and 4 that implicate the [Waste Confidence Decision] and the [Temporary Storage Rule].").

¹⁵ See 78 Fed. Reg. 69,460 (Nov. 19, 2013); see also generally Draft EA.

¹⁶ See generally PIIC's Motion to Admit.

hearing; and (6) provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact, with reference to specific disputed portions of the application.¹⁷ A failure to meet any of these criteria renders the contention inadmissible.

B. Additional Requirements for New and Amended Contentions

Once the deadline for filing petitions to intervene has passed, a party may file new or amended contentions based on material information that has subsequently become available. To be admissible, such contentions must not only meet the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1), but must also meet three additional requirements set out in 10 C.F.R. § 2.309(c)(1). Section 2.309(c)(1) requires each new or amended contention: (i) to be based upon information that was not previously available; (ii) to be based upon information that is materially different from previously available information; and (iii) to be submitted in a timely fashion based on the availability of the subsequent information.¹⁸

III. PIIC's Motion to Admit New and Amended Contentions

Contention 1: The Draft Environmental Assessment Improperly Minimizes Waste Storage Impacts.

PIIC's initial Contention¹⁹ was largely based on New York v. NRC, 681 F.3d 471 (D.C. Cir. 2012), which invalidated both the NRC's Waste Confidence Decision Update (Waste Confidence Decision)²⁰ and the NRC's final rule regarding Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation (Temporary Storage Rule).²¹

¹⁷ 10 C.F.R. § 2.309(f)(1)(i) – (vi).

¹⁸ Id. § 2.309(c)(1)(i) – (iii).

¹⁹ See Original PIIC Petition at 23–26.

²⁰ 75 Fed. Reg. 81,037 (Dec. 23, 2010).

²¹ 75 Fed. Reg. 81,032 (Dec. 23, 2010).

On August 7, 2012, the Commission concluded that “as an exercise of our inherent supervisory authority over adjudications, we direct that these [Waste Confidence] contentions—and any related contentions that may be filed in the near term—be held in abeyance pending our further order.”²² The Commission also provided that “[s]hould we determine at a future time that case-specific challenges are appropriate for consideration, our normal procedural rules will apply.”²³

In our December 20, 2012 Order, we declined to admit PIIC’s initial Contention 1 alleging Northern States’ Environmental Report (ER) failed to address the environmental impact of long-term storage; instead, we held the contention in abeyance in accordance with the Commission’s directive.²⁴

In its initial Contention 1, PIIC asserted that, because the Waste Confidence Decision and the Temporary Storage Rule have been vacated, the ER must consider the impacts of long-term storage at the Prairie Island ISFSI.²⁵ In its amended Contention 1, PIIC argues that, for this same reason, the draft EA must consider the impacts of long-term storage at the Prairie Island ISFSI.²⁶

Nevertheless, all three parties agree that PIIC’s amended Contention 1 should be held in

²² Calvert Cliffs Nuclear Project, L.L.C. (Calvert Cliffs Nuclear Power Plant, Unit 3), et al., CLI-12-16, 76 NRC 63, 68–69 (2012).

²³ Id. at 69 n.11.

²⁴ There, we indicated:

In light of the vacatur of the WCD and TSR in New York v. NRC, NRC’s rules require the ER to consider the reasonably foreseeable impacts of permanent storage, which Northern States’ ER clearly fails to do. We agree with the Staff, however, that Contention 1 must be held in abeyance pursuant to the Commission’s direction in CLI-12-16.

LBP-12-24, 76 NRC at 510–11.

²⁵ See Original PIIC Petition at 23–26.

²⁶ See PIIC’s Motion to Admit at 2–3.

abeyance, in accordance with the Commission's Waste Confidence directive, until such time as the Commission orders otherwise.²⁷ We agree. Accordingly, pursuant to the Commission's direction, PIIC's amended Contention 1 must be held in abeyance at this time.

Contention 2: The Draft Environmental Assessment Does Not Adequately Address Cumulative Impacts on Related Projects on the PIIC, Its Members and Its Land.

In its initial Contention 2, PIIC argued that Northern States' ER had not provided an analysis of the cumulative impacts associated with relicensing the Prairie Island ISFSI.²⁸ We admitted a portion of PIIC's initial Contention 2, and held in abeyance the portions implicating the Waste Confidence Decision and the Temporary Storage Rule.²⁹

In the instant motion, PIIC moves to amend its initial contention by alleging that the draft EA does not adequately address three types of cumulative impacts: (1) those resulting from long-term waste storage; (2) those resulting from the potential inability to transport high burn-up (HBU) fuel offsite; and (3) those affecting cultural and historic resources as a result of the reasonably foreseeable expansion of the Prairie Island ISFSI.³⁰

As explained below, we hold in abeyance the long-term waste storage and high burn-up fuel portions of Contention 2, and admit the cultural and historic resources portion of Contention 2.

²⁷ See PIIC's Reply at 1; NRC Staff's Answer at 4–5; Northern States' Answer at 4. Northern States also argues that the “migration tenet” applies to PIIC's amended Contention 1 because PIIC's initial Contention 1 challenged the ER's absence of an evaluation of the environmental impacts of long-term storage and the draft EA does not substantively address long-term storage issues. See Northern States' Answer at 4. Thus, Northern States contends that amended Contention 1 does no more than assert the same omission in the EA that was alleged in the ER and is already covered by initial Contention 1. See *id.* Because all parties agree the contention should be held in abeyance, we need not reach this migration tenet argument.

²⁸ See Original PIIC Petition at 26–36.

²⁹ See LBP-12-24, 76 NRC at 511–18.

³⁰ See PIIC's Motion to Admit at 3.

a. Cumulative Impacts of Long-term Waste Storage

All three parties agree that any ruling by this Board on whether the draft EA fails to address the cumulative impacts of long-term waste storage should be held in abeyance for the same reasons we set forth in holding in abeyance PIIC's initial Contention 2.³¹

We agree. Any consideration of the cumulative impacts of the long-term storage portion of Contention 2 must be held in abeyance in accordance with the Commission's Waste Confidence directive.

b. High Burn-up (HBU) Fuel

PIIC also argues that the draft EA fails to analyze the cumulative environmental impacts of not transporting HBU fuel from the Prairie Island ISFSI, particularly insofar as the increased volume of HBU waste will adversely affect the PINGP community.³² PIIC contends it is reasonably foreseeable that HBU fuel might have to remain on site in the ISFSI indefinitely, and so this Contention is admissible because the proposed Waste Confidence rule focuses on the availability of future storage and disposal options, rather than on the practical difficulties of transporting the fuel from the reactor site.³³ For these reasons, PIIC maintains that the potential site-specific environmental impacts of HBU fuel remaining on site indefinitely must be analyzed now in the draft EA.³⁴

While the NRC Staff agrees that additional data is needed to evaluate the safe storage of HBU fuel for longer than twenty years, as well as the safe transportation offsite of HBU Fuel,

³¹ See id. at 3–4; NRC Staff's Answer at 5–6; Northern States' Answer at 4–5. As it did with Contention 1, Northern States interposed an objection to the admission of Contention 2 based on the migration tenet, but for the same reasons, we need not reach it. See supra n.27.

³² PIIC's Motion to Admit at 7–8.

³³ Id. at 7.

³⁴ Id.

it argues that this type of evaluation is limited to the NRC Staff's technical review.³⁵ The NRC Staff claims that it reviews the transportation of HBU fuel on a case-by-case basis as part of the cask certification process outlined in 10 C.F.R. Part 71³⁶ and points out that Northern States has not applied for approval to transport any casks currently located at the ISFSI.³⁷ Thus, the NRC Staff argues, any potential environmental impacts beyond those already considered for lower burn-up fuel are too remote and speculative at this time to require an evaluation in the NRC Staff's draft EA.³⁸ The NRC Staff promises that if the safety review reveals any new and significant information relating to the environmental impacts of storage of HBU fuel, the NRC Staff will supplement its environmental analysis as required by the National Environmental Policy Act of 1969 (NEPA).³⁹ However, with respect to the certification of casks for transportation per se, the NRC Staff claims it need not conduct an environmental review because the Commission has determined cask certification poses such a minimal environmental impact that it merits a categorical exclusion from NEPA.⁴⁰

Northern States argues that "PIIC is attempting to take another bite of the apple" by amending the high burn-up fuel portion of Contention 2.⁴¹ Northern States contends that PIIC's amendment is nothing more than an attempt to force the NRC Staff, in its draft EA, to evaluate

³⁵ See NRC Staff's Answer at 12.

³⁶ Id. at 11 (citing Interim Staff Guidance 11, Rev. 3, Cladding Considerations for the Transportation and Storage of Spent Fuel at 1 (Nov. 17, 2003) (ADAMS Accession No. ML033230335)).

³⁷ Id.

³⁸ Id. at 12.

³⁹ Id. (citing 10 C.F.R. § 51.92(a)(2)).

⁴⁰ Id. (citing 10 C.F.R. § 51.22(c)(13)). Pursuant to 10 C.F.R. § 51.22(a), this purportedly "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."

⁴¹ Northern States' Answer at 5.

the “possibility of HBU fuel remaining on site”⁴² and that whether this is due to the unavailability of a repository or alleged “transport difficulties,”⁴³ the environmental impacts of this potential long-term storage are solely Waste Confidence issues and should be held in abeyance.⁴⁴ Northern States asserts that the draft Waste Confidence Generic Environmental Impact Statement (GEIS) addresses transportation of HBU fuel as a Waste Confidence issue, further supporting Northern States’ argument that this part of Contention 2 should be held in abeyance.⁴⁵

In its Reply, PIIC maintains that its contention does not involve the safety of transporting HBU fuel, but rather the necessity of HBU fuel remaining in storage onsite at PINGP because it will not be transported off site.⁴⁶ Additionally, PIIC argues that neither the draft GEIS nor the draft EA’s cumulative impacts analysis addresses all aspects of this issue that might apply to the PIIC community.⁴⁷ Therefore, PIIC asserts this issue should be considered now and should not be held in abeyance.

We understand PIIC’s decided preference that the HBU fuel issue be considered now. However, because this subject matter implicates waste confidence, the HBU fuel portion of Contention 2 must also be held in abeyance in accordance with the Commission’s Waste Confidence directive. Of course, in the event the Waste Confidence rule does not ultimately address these HBU fuel issues, then PIIC may reassert this claim at that point in time.

⁴² Id. at 5 (quoting Motion to Amend at 7).

⁴³ Id. (quoting Motion to Amend at 7).

⁴⁴ Id.

⁴⁵ Id. at 5–6.

⁴⁶ PIIC’s Reply at 8.

⁴⁷ Id. at 10.

c. Cultural and Historic Resources

PIIC argues that the draft EA “fails to adequately address [t]he potential impacts of the reasonably foreseeable expansion of the PI ISFSI on cultural and historic resources.”⁴⁸ PIIC contends that, were Northern States to operate PINGP to the end of its licensed life in 2034, the Prairie Island ISFSI must of necessity be expanded to accommodate a total of ninety-eight casks.⁴⁹ Pointing to the NRC Staff statements in the draft EA of a high probability that additional unrecorded cultural resources may exist within the PINGP property,⁵⁰ PIIC argues that this expansion of casks could have an adverse impact on cultural and historic resources.⁵¹

The NRC Staff argues that it need not consider the impacts of the potential ISFSI expansion in the draft EA because the NRC has yet to receive an application from Northern States to expand the ISFSI.⁵² The NRC Staff attempts to justify this narrowed review using language from the Commission’s decision in McGuire: “a possible future action must at least constitute a ‘proposal’ pending before the agency” to be ripe for adjudication,⁵³ and, “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.’”⁵⁴

Aside from its legal position, the NRC Staff suggests that PIIC need not worry about

⁴⁸ PIIC’s Motion to Admit at 4.

⁴⁹ Id.

⁵⁰ Id. at 6 (citing Draft EA at 3-19, 4-10, 4-11).

⁵¹ Id. at 4. Ultimately, PIIC hopes the NRC Staff either will require Northern States to perform additional field investigations before the license is renewed or will impose a license condition on Northern States to ensure that any potential impacts are mitigated, or both. Id. at 4

⁵² See NRC Staff’s Answer at 7.

⁵³ Id. (quoting Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2 and Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295 (2002)).

⁵⁴ Id. (quoting McGuire, CLI-02-14, 55 NRC at 295).

possible damage to its historical and cultural resources because the NRC Staff will require Northern States to submit an application to the NRC prior to any expansion of the ISFSI, and so, at that point, PIIC will be afforded an opportunity for hearing, as well as for consultation pursuant to the National Historic Preservation Act.⁵⁵ Moreover, the NRC Staff continues, the draft EA deems Northern States' Cultural Resources Management Plan (CRMP) to be an effective vehicle for identifying those activities with the potential to cause disturbance to known cultural and historic resources within the PINGP property, as well as for establishing procedures and practices for proper review, notification, and consultation with concerned parties prior to Northern States initiating construction and excavation projects at the PINGP.⁵⁶

Northern States asserts that PIIC's argument fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v), because it lacks a concise statement of the alleged facts or expert opinions supporting its position.⁵⁷ Specifically, Northern States argues that PIIC relies on the NRC Staff's conclusion that "there is a high probability that additional unrecorded cultural resources may exist with the PINGP property,"⁵⁸ but ignores the rest of the NRC Staff's analysis.⁵⁹ Northern States also contends that PIIC does not provide expert opinion or other references to show that the ISFSI expansion will cause a "high and adverse" impact on archaeological and cultural resources because there is a "potential" for unrecorded cultural resources on the PINGP property.⁶⁰

Additionally, Northern States argues that PIIC's contention fails to meet 10 C.F.R.

⁵⁵ Id. at 8–9.

⁵⁶ Id. at 9 (quoting Draft EA at 4-11 and citing Draft EA at 4-35).

⁵⁷ See Northern States' Answer at 7.

⁵⁸ Id. (citing PIIC's Motion to Admit at 6).

⁵⁹ Id.

⁶⁰ Id.

§ 2.309(f)(1)(vi) because it does not show a genuine dispute with the draft EA on a material issue of law or fact.⁶¹ Northern States asserts that PIIC’s position lacks legal support because (1) NEPA does not impose a substantive obligation for a reviewing agency to require or enforce mitigation measures discussed in an EA⁶² and (2) the information presented in the draft EA is sufficient because NEPA does not require further data collection regarding the future ISFSI expansion in order to make a decision on the current proposed action.⁶³

In reply, PIIC disputes the NRC Staff’s and Northern States’ claims that the ISFSI expansion does not rise to the level of a “proposal” under McGuire, and that Northern States’ CRMP will suffice to address any potential future impacts.⁶⁴ In PIIC’s estimation, the possible expansion of the ISFSI is now far beyond the stage at which it could be considered a mere “proposal”—for it is undisputed that Northern States has already submitted an application for a Certificate of Need from the Minnesota Public Utilities Commission (MPUC) to store up to sixteen additional casks for a total of sixty-four casks to store additional spent fuel.⁶⁵ PIIC asserts that the ER’s failure to address potential future impacts is repeated in the draft EA because the draft EA neither requires an archaeological survey of the very area that is slated for future ISFSI expansion nor imposes a mitigating condition on any license granted for this renewal.⁶⁶

In our original Order, we held PIIC had raised an admissible contention that the ER failed to address the cumulative impacts of the reasonably foreseeable expansion of the Prairie

⁶¹ See id.

⁶² Id. at 10 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351, 353 & n.16 (1989)).

⁶³ Id. at 11.

⁶⁴ See PIIC’s Reply at 2–3.

⁶⁵ See id. at 5; see also Draft EA at 1–9.

⁶⁶ See PIIC’s Reply at 6.

Island ISFSI.

The fact that Northern States has applied for a state Certificate of Need to build more pads to house sixteen additional casks strongly suggests that such a future expansion is at least “reasonably foreseeable.” Added to this is the fact, as was acknowledged by counsel for Northern States at oral argument, that if PINGP is to operate to the end of its current operating license, additional spent fuel storage would be required such that “[p]robably in the 2017 timeframe, we would submit an application for expansion of our ISFSI” [quoting Tr. at 88–89]. Thus, being reasonably foreseeable, this expansion must be the subject of a cumulative impacts analysis.⁶⁷

Plainly and simply, the draft EA does not address the potential impacts of the reasonably foreseeable expansion of the Prairie Island ISFSI on cultural and historic resources. This is so despite the fact that Northern States is now even closer to an expansion of the ISFSI than when we admitted the original cumulative impacts contention in 2012.

The dissent, however, claims that, even at this point in the proceeding, Northern States’ ISFSI expansion activities do not constitute a “proposal” under McGuire, and hence that the NRC Staff need not consider the impacts of the potential ISFSI expansion in the draft EA until Northern States submits a license amendment to expand the ISFSI.

In McGuire, the Licensing Board found that the Intervenor

provide[d] a fact-based argument sufficient to show a genuine dispute on the material issue of combined fact and law, of whether future anticipated use of MOX fuel in the

⁶⁷ LBP-12-24, 76 NRC at 514 (citing Strata Energy Inc. (Ross In Situ Uranium Recovery Project), LBP-12-3, 75 NRC 164, 203 (2012) (cumulative impacts analysis required for future facility expansion described in ER)). Since at least as early as 1998, the Commission has recognized that the NRC Staff’s issuance of an environmental report under NEPA does not necessarily moot contentions challenging an applicant’s ER. La. Energy Servs., L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998). In certain instances, contentions challenging an ER are deemed to “migrate” from challenging the ER to challenging the NRC Staff’s environmental report. Progress Energy Fla., Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-1, 73 NRC 19, 26 (2011). “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 [here, the draft EA], and once against the final environmental impact statement [here, the final EA].” Id. at 26. The migration tenet applies where, as here, the information in the DEIS is “sufficiently similar” to the information in the ER. Id.; see also Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 NRC 445, 471 (2012). Had PIIC failed to file a new or amended Contention 2 here, its original contentions would likely have been held to migrate from its challenge to the ER to a challenge to the EA. However, because PIIC filed amended Contention 2, we need not address whether its original contention would have migrated.

Duke plants is sufficiently definite to constitute a “proposal” under the law, with a connection, “cumulative impact,” “interdependence,” or similar relationship to matters at issue in this license renewal proceeding, to warrant being addressed in the SEIS for this proceeding.⁶⁸

The Commission disagreed with the Board, stating:

The Board’s view that license renewal contemplates inquiry into future, inchoate plans of the Licensee would, as a general matter, invite petitioners in license renewal cases to raise safety issues involving a myriad of possible future license amendments. Here, while Duke apparently has a contractual arrangement to purchase MOX fuel, the proposed MOX fuel production facility remains unbuilt and is in the early stages of a contested NRC licensing proceeding. To actually use MOX fuel at Catawba and McGuire, Duke will have to obtain an NRC license amendment, for which Duke has not yet even applied. Nothing in our case law or regulations suggests that license renewal is an occasion for far-reaching speculation about unimplemented and uncertain plans like Duke’s MOX plan.⁶⁹

In other words, the Commission not only disagreed with the Licensing Board that the likelihood of Duke implementing MOX fuel in its nuclear plants was “sufficiently definite to constitute a proposal”, but considered the MOX fuel plan to be “far-reaching speculation.” That is most definitely different from Northern States’ plans to expand the Prairie Island ISFSI.

The use of MOX fuel in a nuclear plant in McGuire was an optional matter because the reactors at issue could continue to operate to the end of their useful life without the use of MOX fuel. Unless and until the operator of those reactors actually submitted an application for the use of MOX fuel, its planned use remained purely speculative.

In contrast to McGuire, there is nothing optional about the expansion of the ISFSI. It is undisputed that if Northern States continues to operate its reactors through the end of their extended life, additional storage space will be required for any additional spent fuel assemblies generated from operating those reactors. This is neither uncertain nor speculative.

This is made even more certain by virtue of Northern States’ application for, and receipt of, a Certificate of Need in 2009 from the State of Minnesota for additional ISFSI storage. The

⁶⁸ McGuire, CLI-02-14, 55 NRC at 292 (emphasis added).

⁶⁹ Id. at 292–93 (emphasis added).

NRC Staff realizes just how certain this is, as evidenced by its acknowledgement that the ISFSI expansion is reasonably foreseeable by discussing the ISFSI expansion in the draft EA Cumulative Effects analysis (Section 4.14 of the draft EA):

The Council on Environmental Quality regulations implementing NEPA define cumulative effects as “the impact on the environment which results from the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions” (40 CFR 1508.7). The NRC staff evaluated whether cumulative environmental impacts could result from the incremental impact of the proposed action when added to the past, present, or reasonably foreseeable future actions in the area. For the purposes of this analysis, past actions are those related to the resources at the time of the PI ISFSI licensing and construction, present actions are those related to the resources at the time of current operation of the PI ISFSI, and future actions are considered to be those that are reasonably foreseeable through the end of the PI ISFSI operation including the proposed action. Therefore, the analysis considers potential impacts through the end of the current license term as well as the proposed 40-year PI ISFSI renewal license term. The geographic area over which past, present and future actions would occur is dependent on the type of action considered and consistent with the affected area described for each resource in Chapter 3 of this draft EA. Actions considered in this cumulative impact include the license renewal for PINGP Units 1 and 2; Lock and Dam 3 navigation safety and embankment improvements on the Mississippi River; the replacement of PINGP Unit 2 steam power generators; and the potential expansion of the PI ISFSI (NSPM, 2013a; NRC, 2011c).⁷⁰

While McGuire held that it was not reasonably foreseeable to utilize MOX fuel at the subject reactors (and so it was appropriate there to postpone a NEPA study until after the utility applied for a license amendment specifically seeking the NRC’s approval to use MOX fuel), the NRC Staff here has reached just the opposite conclusion – finding that the ISFSI expansion is reasonably foreseeable.

PIIC seeks further to distinguish McGuire, arguing that Contention 2 assumes that the NRC is obligated to evaluate the cumulative impact on cultural and historic resources not only of the proposed action (ISFSI relicensing), but as well of a reasonably foreseeable future action (ISFSI expansion).⁷¹ The NRC Staff, on the other hand, asserts that the draft EA need not consider the impacts on cultural and historic resources of the potential ISFSI expansion

⁷⁰ Draft EA at 4-24 (emphasis added).

⁷¹ See PIIC’s Motion to Admit at 4–7.

because the NRC has yet to receive an application from Northern States to expand the ISFSI.⁷² The NRC Staff argues that “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.’”⁷³

We agree with the NRC Staff to the extent it argues that cumulative impact analysis is required only for reasonably foreseeable future actions, not for future actions that are merely speculative. We would have no difficulty concluding, however, that expansion of the Prairie Island ISFSI is reasonably foreseeable. PIIC has alleged there is already an approved proposal for expansion of the Prairie Island ISFSI, in which case that expansion would satisfy the requirement of reasonable foreseeability.⁷⁴

We disagree with the NRC Staff’s argument that NEPA requires cumulative impact analysis only for interdependent actions (i.e., those where it would be unwise or irrational to complete one without the other).⁷⁵ That argument confuses the requirement to evaluate cumulative impacts with the requirement to evaluate all connected actions in one NEPA document (i.e., the requirement to avoid segmentation).⁷⁶ Under regulations promulgated by

⁷² See NRC Staff’s Answer at 7.

⁷³ Id. (quoting McGuire, CLI-02-14, 55 NRC at 294).

⁷⁴ See PIIC’s Motion to Admit at 4–7.

⁷⁵ See NRC Staff’s Answer at 7.

⁷⁶ In O'Reilly v. U.S. Army Corps of Eng'rs, 477 F.3d 225, 236 n.10 (5th Cir. 2007), the court of appeals explained:

Scholars have noted that the “cumulative effects” and “improper segmentation” issues raise separate-but-similar questions:

Federal agencies may plan a number of related actions but may decide to prepare impact statements on each action individually rather than prepare an impact statement on the entire group. This decision creates a “segmentation” or “piecemealing”

the Council of Environmental Quality (CEQ), “cumulative impact” is defined as the “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”⁷⁷ The regulatory definition includes impacts resulting from “individually minor but collectively significant actions taking place over a period of time.”⁷⁸ The NRC has expressly adopted, and is therefore bound by, this definition.⁷⁹ Thus, the NRC Staff’s EIS or EA must include a cumulative impact analysis of reasonably foreseeable future actions that impact the same resources as the proposed action.

Moreover, and contrary to the NRC Staff’s position,⁸⁰ an action can be reasonably foreseeable even if it is not “interdependent” with the proposed action. Interdependence is relevant not to cumulative impacts but to “connected actions” and the related concept of “segmentation.” NRC’s NEPA regulations direct the agency to use the CEQ regulations in defining the scope of its impact statements.⁸¹ Under those regulations, the EIS must include all

problem. . . .

Another related issue is whether an environmental assessment or impact statement on a project or action must discuss the cumulative impacts of that project or action that occur outside the scope of the project or action. The issue here is what environmental impacts must be considered in an impact statement on a particular project or action, not whether a number of projects or actions must be gathered together in a single environmental assessment or impact statement.

Id. (quoting Daniel R. Mandelker, NEPA LAW & LITIGATION § 9:11 (2006)). See also Churchill County v. Norton, 276 F.3d 1060, 1076 (9th Cir. 2001) (distinguishing connected actions from cumulative impacts).

⁷⁷ 40 C.F.R. § 1508.7.

⁷⁸ Id.

⁷⁹ 10 C.F.R. § 51.14(b).

⁸⁰ See NRC Staff’s Answer at 7.

⁸¹ The NRC regulation governing the scope of the EIS states that the agency should use the provisions of CEQ regulation 40 C.F.R. § 1502.4 for that purpose. See 10 C.F.R. § 51.29(a)(1). CEQ regulation 40 C.F.R. § 1502.4 in turn, directs that

“connected actions.”⁸² Under CEQ regulation 40 C.F.R. § 1508.25, separate actions are “connected” if, among other things, they “[c]annot or will not proceed unless other actions are taken previously or simultaneously,” or they “[a]re interdependent parts of a larger action and depend on the larger action for their justification.”⁸³ In general, “connected actions” include those that lack “independent utility.”⁸⁴ The failure to include all connected actions within the scope of the proposed action is generally referred to as “segmentation.” “Segmentation’ or ‘piecemealing’ occurs when an action is divided into component parts, each involving action with less significant environmental effects.”⁸⁵ “Segmentation is to be avoided in order to ‘insure that interrelated projects[,] the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions.’”⁸⁶

Because PIIC’s claim is that that the draft EA does not adequately evaluate the cumulative impact of the proposed ISFSI expansion, it need not show that the proposed relicensing and the proposed expansion are interdependent or otherwise constitute connected actions. The fact that future expansion of the ISFSI is reasonably foreseeable is sufficient to

Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

40 C.F.R. § 1502.4(a).

⁸² Id. § 1508.25(a)(1).

⁸³ Id. § 1508.25(a)(1)(ii) and (iii). NRC’s NEPA regulations specifically adopt this definition. See 10 C.F.R. § 51.14(b).

⁸⁴ See Soc'y Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168, 181 (3d Cir. 2000) (collecting cases); Nw. Res. Info. Ctr. v. Nat'l Marine Fisheries Serv., 56 F.3d 1060, 1067–69 (9th Cir. 1995) (same).

⁸⁵ Town of Huntington v. Marsh, 859 F.2d 1134, 1142 (2d Cir. 1988) (citing City of W. Chi. v. NRC, 701 F.2d 632, 650 (7th Cir. 1983)).

⁸⁶ Id. (quoting Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 298 (D.C. Cir. 1987)).

require that it be included in the cumulative impact analysis. The Eleventh Circuit rejected the argument that cumulative impact analysis is required only for interdependent actions (i.e., those that lack independent utility), noting that “[t]he regulations ask whether future actions are foreseeable, not whether they are interdependent.”⁸⁷ The court of appeals ruled that, rather than being determinative, “[t]he interdependence of proposed actions with potential future actions should be considered alongside other pertinent facts and circumstances to determine whether there is a sufficient likelihood that an action will occur to render that action foreseeable.”⁸⁸ The Ninth Circuit has also held that if “actions are ‘reasonably foreseeable future actions’ within the meaning of [40 C.F.R.] § 1508.7, the [CEQ] regulations require[] that they be included in a cumulative impact analysis.”⁸⁹ The Fifth⁹⁰ and Eighth Circuits⁹¹ also apply the reasonable foreseeability test for cumulative impacts. Thus, in North Cascades Conservation Council v. U.S. Forest Service, the court held that, even though projects were not interdependent, they must be included in the cumulative impact analysis:

The Forest Service confuses the important distinction between “cumulative impacts and actions” and “connected actions.”

. . . .

Since the success or failure of one or all of the projects is not dependent upon the completion of the others, the [off-road trail] projects are not “connected” to one another. Nevertheless, each project proposes “tie-trails.” These tie-trails relate to the same, larger area: the ORV trail system that “consists of the hub of one of the largest and most unique systems of interconnecting trail networks in the northwest.” [] That is, though the three projects are not “connected actions,” they each are physically related to the ORV trail system. They are cumulative actions, as defined in 40 C.F.R.

⁸⁷ City of Oxford v. FAA, 428 F.3d 1346, 1356 n.22 (11th Cir. 2005).

⁸⁸ Id.

⁸⁹ Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1079 (9th Cir. 2002).

⁹⁰ Coliseum Square Ass'n, Inc. v. Jackson, 465 F.3d 215, 237–38 (5th Cir. 2006).

⁹¹ Mo. Coal. for Env't v. F.E.R.C., 544 F.3d 955, 958 (8th Cir. 2008).

§ 1508.25(a)(2), and subject to an examination of cumulative impacts, under 40 C.F.R. § 1508.7.⁹²

Thus, if “actions are ‘reasonably foreseeable future actions’ within the meaning of [40 C.F.R.] § 1508.7, the [CEQ] regulations require[] that they be included in a cumulative impact analysis.”⁹³

Consistent with the prevailing rule, the United States Court of Appeals for the Eighth Circuit—whose jurisdiction includes Minnesota—has held that, because the future expansion of a power plant was reasonably foreseeable, it should have been included in the cumulative impacts analysis for the plant.⁹⁴

The Sierra Club plaintiffs alleged that the Permit Decision underlying the § 404 [of the Clean Water Act, 33 U.S.C. § 1344] permit failed to analyze the cumulative impacts reasonably foreseeable from the expected addition of a second generation unit at the plant. SWEPCO had previously admitted it had planned to add a second unit at the Hempstead County site, and the Permit Decision failed to analyze the possible cumulative impacts from that second unit. As in Davis, the failure to consider these cumulative possibilities together is “one of the most egregious shortfalls of the EA.” 302 F.3d at 1121–22; see also Save Our Sonoran, 408 F.3d at 1121–23 (Corps improperly constrained NEPA analysis). The district court was correct to conclude that the Sierra Club plaintiffs were likely to succeed on the merits of this claim under NEPA.⁹⁵

In the present case, the future expansion of the ISFSI is also reasonably foreseeable. Therefore, its cumulative impact must be analyzed in the draft EA for the relicensing of the ISFSI, whether or not the future expansion of the ISFSI is interdependent with the relicensing.

The NRC Staff relies on McGuire for its argument that cumulative impact analysis is required only for actions that are “so interdependent with the application at issue that it ‘would

⁹² 98 F.Supp.2d 1193, 1198–99 (W.D. Wash. 1999) (internal citations omitted).

⁹³ Kern, 284 F.3d at 1079.

⁹⁴ Sierra Club v. U.S. Army Corps of Eng’rs, 645 F.3d 978, 991 (8th Cir. 2011).

⁹⁵ Id. The case was an appeal from the grant of a preliminary injunction against construction of facilities authorized under a Clean Water Act Section 404 permit, and therefore the question before the court of appeals was whether the plaintiffs had shown a likelihood of success on the merits of their challenge to the permit.

be unwise or irrational to complete one without the other.”⁹⁶ In more recent decisions, however, the Commission has acknowledged that cumulative impact analysis is required for actions covered by CEQ regulation 40 C.F.R. § 1508.7—that is, reasonably foreseeable future actions—without suggesting that the test for connected actions in CEQ regulation 40 C.F.R. § 1508.25 must also be satisfied.⁹⁷ This is consistent with the weight of recent federal authority, as discussed above, including the prevailing rule in the Eighth Circuit.

Moreover, the NRC Staff itself has, in other contexts, conducted cumulative impact analyses of covered actions that were not interdependent with the proposed action. For example, in the Final Environmental Impact Statement for the Vogtle Early Site Permit Site, “the Staff’s water use and quality analysis in fact considered ‘cumulative impacts of the proposed [Vogtle] Units 3 and 4, the existing [Vogtle] Units 1 and 2, the DOE’s Savannah River Site directly across the Savannah River from the [Vogtle] site, and other water users in the region.’”⁹⁸ And here, the NRC Staff evaluated the cumulative impacts of Northern States’ ISFSI expansion, except with regard to historical and cultural resources.⁹⁹

In any event, even were the Board to assume that cumulative impact analysis is required only for actions that satisfy both 40 C.F.R. §§ 1508.7 and 1508.25, PIIC’s cumulative impact contention would still be admissible. Under 40 C.F.R. §1508.25, separate actions are “connected” if they “[c]annot or will not proceed unless other actions are taken previously or simultaneously,”¹⁰⁰ as well as when they “[a]re interdependent parts of a larger action and

⁹⁶ NRC Staff’s Answer at 7 (quoting McGuire, CLI-02-14, 55 NRC at 294).

⁹⁷ See So. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 102 n.60 (Jan. 7, 2010); Hydro Resources, Inc. (P.O. Box 777, Crownpoint, NM 87313), 64 NRC 417, 422 & n.23 (2006).

⁹⁸ So. Nuclear Operating Co., CLI-10-5, 71 NRC 90, 102 n.63.

⁹⁹ See NRC Staff’s Answer at 7–9; see also, e.g., Draft EA at 4-23.

¹⁰⁰ 40 C.F.R. § 1508.25(a)(1)(ii).

depend on the larger action for their justification.”¹⁰¹ Absent relicensing of the ISFSI, the expansion of the ISFSI could not proceed. Even this alternative test for connected actions is therefore satisfied.

Separate and apart from its legal argument that it is not required to examine the cumulative impacts from a potential ISFSI expansion, however, the NRC Staff alleges that it actually did address these cumulative impacts by printing substantive comments in the draft EA that were made by PIIC.¹⁰² In effect, the NRC Staff is saying that by putting a heading of “Cumulative Impacts on Historic and Cultural Resources,” in its draft EA and by quoting the concerns raised by PIIC,¹⁰³ it has discharged its duties under NEPA without actually performing any analysis. PIIC counters that the draft EA merely quoted these concerns and made no effort to evaluate the merits of PIIC’s concerns.¹⁰⁴

The NRC Staff’s claim that it somehow evaluated PIIC’s concerns regarding historical and cultural resources seems in stark contrast with the NRC Staff’s cumulative effects analysis of the ISFSI expansion for all of the identified impacts, save one—the expansion’s impact on cultural and historical resources.¹⁰⁵ Yet the apparent need to study this matter is evidenced by

¹⁰¹ Id.

¹⁰² NRC Staff’s Answer at 7–8 (citing Draft EA at 4-23). In October 2012, the NRC and PIIC entered into a Memorandum of Understanding (MOU), which states that PIIC has “special expertise in the following areas as they relate to the PIIC: (a) Historical and Archaeological Resources, (b) Socioeconomics, (c) Land Use, [and] (d) Environmental Justice.” Memorandum of Understanding Between the U.S. Nuclear Regulatory Commission and the [PIIC] as a Cooperating Agency at 3 (Oct. 3, 2012) (Adams Accession No. ML12284A456). It was in this capacity of a cooperating agency that PIIC provided these substantive comments that were printed in the draft EA.

¹⁰³ Draft EA at 4-34 to -35.

¹⁰⁴ See PIIC’s Reply at 3.

¹⁰⁵ Specifically, the NRC Staff states that

Prior to any licensing activities (expansion or decommissioning), NSPM would submit a license application to the NRC for review. NRC authorization for ISFSI expansion would

the section of the draft EA entitled: “Cumulative Impacts on Historic and Cultural Resources,” which states: “[a]reas around the ISFSI could retain potential for archaeological materials.”¹⁰⁶ Further, elsewhere in the draft EA, the NRC Staff observes “[s]everal recent studies indicate potential for additional unrecorded archaeological resources within the PINGP boundary. First, the results of the 2009 geomorphological study indicate that the island–terrace landform that encompasses the PINGP site has moderate to high potential to contain buried archaeological sites (Hudak, 2009),”¹⁰⁷ that “[a]ny evidence of past human activity that might have occurred on that former surface now lies buried beneath the current surface;”¹⁰⁸ and that, “these buried archaeological deposits would not have been recognized by those [previous] surveyors who only searched the ground surface for evidence of archaeological sites.”¹⁰⁹

In addition, the draft EA mentions two other recent archaeological investigations (Boden et al., 2010; and Schirmer, 2013) that reported previously unknown burial sites within and near the PINGP property. One of them, a 2010 limited archaeological reconnaissance survey, recorded a previously unrecorded mound site, 21GD277 (Boden, et al., 2010). The other study, which employed light detection and ranging remote sensing technology in 2012, identified a group of fifteen previously unreported burial mounds on Prairie Island near the PINGP property (Schirmer, 2013).¹¹⁰

constitute a federal action under NEPA and would be an undertaking under the NHPA. NRC would consult with the Minnesota SHPO, the PIIC, NSPM, and other interested parties to determine whether additional subsurface testing is warranted. Impacts to historic and cultural resources would be assessed at that time.

Draft EA at 4-34 (emphasis added).

¹⁰⁶ Id.

¹⁰⁷ See id. at 3-19.

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ See id.

And yet, even though these studies led the NRC Staff to conclude that “[b]ased 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,”¹¹¹ the NRC Staff does not appear to have made any effort to evaluate the cumulative impact of the ISFSI expansion on them. Such a refusal has been held to be “one of the most egregious shortfalls of the EA.”¹¹²

The dissent’s statement that “requirements for detail in an EIS are extensive when compared to that in an EA,”¹¹³ seems to suggest that it is acceptable for an EA to give short shrift to an analysis of cumulative impacts. Nothing could be further from the truth—as courts emphasize the importance of discussing cumulative effects in EAs.¹¹⁴ For example, the court in Kern v. U.S. Bureau of Land Management stated:

The importance of analyzing cumulative impacts in EAs is apparent when we consider the number of EAs that are prepared. The Council on Environmental Quality has noted that “in a typical year, 45,000 EAs are prepared compared to 450 EISs. . . . Given that so many more EAs are prepared than EISs, adequate consideration of cumulative effects requires that EAs address them fully.”¹¹⁵

Here, in the absence of the NRC Staff conducting an adequate analysis, it would be easy to underestimate the cumulative impacts of the reasonably foreseeable expansion of the ISFSI on

¹¹¹ Id.

¹¹² See Sierra Club, 645 F.3d at 991 (holding that the district court did not abuse its discretion in balancing the harms in favor of an injunction related to an electric utility’s Clean Water Act permit for the construction of a new power plant); see also Davis v. Mineta, 302 F.3d 1104, 1121–22 (10th Cir. 2002) (holding that an agency’s decision to issue a FONSI rather than prepare an EIS was arbitrary because the agency had obligated itself contractually to issue a FONSI before it conducted an EA).

¹¹³ Dissent at 39.

¹¹⁴ See generally Kern, 284 F.3d 1062.

¹¹⁵ Id. at 1078 (quoting Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* at 4 (Jan. 1997)).

cultural and historic resources. Such a restricted analysis would impermissibly subject the decision-making process contemplated by NEPA to “the tyranny of small decisions.”¹¹⁶

It is difficult to reconcile the NRC Staff’s claim that it performed its review “in accordance with the requirements of 10 C.F.R. Part 51 and [S]taff guidance found in NUREG–1748 (NRC, 2003),”¹¹⁷ with the draft EA’s apparent failure to analyze the possible cumulative impact on historical and cultural resources resulting from an expansion of the ISFSI.

PIIC has plead an admissible contention that the draft EA’s cumulative impact analysis is inadequate by meeting the contention admissibility requirements of 10 C.F.R. § 2.309. Specifically, and in accordance with 10 C.F.R. § 2.309(f)(i), PIIC provides a specific statement of law or fact for the basis of Contention 2: “the draft EA fails to adequately address [t]he potential impacts of the reasonably foreseeable expansion of the PI ISFSI on cultural and historic resources.”¹¹⁸

PIIC also provides a brief explanation of the basis for Contention 2 pursuant to 10 C.F.R. § 2.309(f)(ii). Specifically, PIIC maintains that

[t]he NRC staff repeatedly states in the draft EA that there is a high probability that additional unrecorded cultural resources may exist within the PINGP property. In its cumulative impact analysis, the NRC staff finds that it is reasonably foreseeable that the ISFSI may be expanded to accommodate 98 casks. However, the NRC staff does not believe that any action needs to be taken now, in considering this application for license renewal, to ensure that these historic and cultural resources will be protected.¹¹⁹

¹¹⁶ Id. (quoting Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* at 1 (Jan. 1997)).

¹¹⁷ Draft EA at 1-11. The NRC Staff is not alone in staking out such an Alice-In-Wonderland position. Northern States argues that PIIC’s original Contention 2, as admitted, alleged only that Northern States’ ER was deficient because it failed to address the cumulative impacts of the ISFSI expansion on archaeological resources, but that the draft EA, as well as Northern States’ responses to the NRC Staff’s request for additional information, addresses this issue—and hence cures this defect in the ER. Northern States’ Answer at 12 (citing Draft EA at 4-25, 4-35, 4-40 and Northern States’ responses to the NRC Staff’s request for additional information at ADAMS Accession No. ML13073A087).

¹¹⁸ PIIC’s Motion to Admit at 4.

¹¹⁹ Id. at 6 (internal citations omitted).

Moreover, PIIC demonstrates that the issue raised in Contention 2 is within the scope of the proceeding, satisfying the pleading requirements of 10 C.F.R. § 2.309(f)(iii). For instance, PIIC argues that the ISFSI license “should not be renewed until an archeological survey sufficient to identify unrecorded cultural resources is performed by the applicant and/or by imposing a license condition on the any [sic] renewed license that no expansion can be considered as a subject of an amended license until such a survey is performed.”¹²⁰

Satisfying the pleading requirements of 10 C.F.R. § 2.309(f)(iv), PIIC also demonstrates that the issue raised in Contention 2 is material to the findings the NRC must make by specifically stating that “[t]he NRC staff repeatedly states in the draft EA that there is a high probability that additional unrecorded cultural resources may exist within the PINGP property Potential destruction of historic and cultural resources of importance to the PIIC would constitute a disproportionately high and adverse impact on the PIIC.”¹²¹

Furthermore, Contention 2 provides a concise statement of alleged facts and meets the pleading requirements of 10 C.F.R. § 2.309(f)(v).¹²² Again, PIIC relies on the NRC Staff’s conclusions both that “there is a high probability that additional unrecorded cultural resources may exist within the PINGP property”¹²³ and “that it is reasonably foreseeable that the ISFSI may be expanded to accommodate 98 casks.”¹²⁴ These facts, PIIC claims, stand in stark contrast with the NRC Staff’s decision not to conduct a thorough assessment of these impacts

¹²⁰ Id. at 6–7.

¹²¹ See id. at 6; see also id. at 5–7.

¹²² See id. at 4–6.

¹²³ Id. at 6.

¹²⁴ Id. (citing Draft EA at 4–26).

now, but instead to wait until some later date, when Northern States submits an application and ER for the expansion of the ISFSI.¹²⁵

Finally, Contention 2 provides sufficient information to show that a genuine dispute on a material issue of fact exists, meeting the pleading requirements of 10 C.F.R. § 2.309(f)(vi). Specifically, PIIC maintains NEPA obligates the NRC Staff to evaluate the cumulative effects,¹²⁶ arguing that—contrary to the position of the NRC Staff and Northern States—the ISFSI license “should not be renewed until an archeological survey sufficient to identify unrecorded cultural resources is performed by the applicant and/or by imposing a license condition on the any [sic] renewed license that no expansion can be considered as a subject of an amended license until such a survey is performed.”¹²⁷

Accordingly, this portion of amended Contention 2 is admitted.

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.

PIIC first raised its “trust responsibility”¹²⁸ contention in its petition to intervene.¹²⁹ We denied it at that time because Northern States owes no duty to address the federal government’s trust responsibility in its ER, and so the contention at that time failed to raise a genuine dispute with the ER.¹³⁰ However, we also made clear that “[a]lthough we deny Contention 3, PIIC is free to raise a contention challenging the Staff’s compliance with its trust responsibility once the Staff issues its EA or draft EIS. We express no opinion as to whether

¹²⁵ Id. (citing Draft EA at 4-26).

¹²⁶ Id. at 4-6.

¹²⁷ Id. at 6-7.

¹²⁸ See, e.g., Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942).

¹²⁹ Original PIIC Petition at 36–42.

¹³⁰ See LBP-12-24, 76 NRC at 519–20.

such a contention would be admissible.”¹³¹

In its instant motion, PIIC seeks to renew Contention 3, as amended, by challenging, not Northern States, but instead the NRC Staff for its failure to comply with its trust responsibilities to Native American tribes.¹³² Specifically, PIIC maintains there are two significant deficiencies requiring additional NRC action: (1) the draft EA inadequately analyzes the cumulative impacts of a possible expansion of the ISFSI on cultural and historic resources, and wrongly concludes that such an allegedly deficient analysis discharges the NRC’s trust responsibility; and (2) the draft EA fails to address the likelihood of a terrorist attack on the ISFSI, as well as the physical and economic impacts such an attack would cause to the PIIC homeland.¹³³

We turn first to the latter alleged deficiency, regarding the likelihood of terrorist attacks.¹³⁴ While there is a conflict between the United States Courts of Appeals for the Ninth Circuit¹³⁵ and the Third Circuit¹³⁶ on whether the NRC is required to evaluate the likelihood of a terrorist attack, the Commission has ruled in Pilgrim¹³⁷ that only those NRC-regulated facilities located within the Ninth Circuit’s jurisdictional boundaries are required to conduct environmental analyses of possible terrorist acts.¹³⁸ As noted above, Prairie Island’s ISFSI lies within the jurisdiction of the Eighth Circuit, and hence it is outside the Ninth Circuit’s jurisdictional boundaries. Accordingly, pursuant to the Commission’s ruling, this portion of PIIC’s amended

¹³¹ Id. at 520.

¹³² PIIC’s Motion to Admit at 9.

¹³³ See id. at 9–14.

¹³⁴ See id. at 13–14.

¹³⁵ See San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1031 (9th Cir. 2006).

¹³⁶ See N.J. Dep’t of Envtl. Prot. v. NRC, 561 F.3d 132, 142–43 (3d Cir. 2009).

¹³⁷ See generally Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449 (2010).

¹³⁸ See id. at 476–77.

Contention 3 is dismissed.

As to the cumulative impacts of the ISFSI expansion, PIIC points to the draft EA's conclusion that there is a high probability additional unrecorded cultural resources lie within the PINGP property.¹³⁹ PIIC asserts that, even though the NRC Staff's cumulative impact analysis finds it reasonably foreseeable the ISFSI may be expanded to accommodate ninety-eight casks, the NRC Staff nevertheless claims there is no need to take action now to ensure those historic and cultural resources will be protected. Instead, the NRC Staff would postpone any such analysis of the impact of the expansion on these resources until Northern States submits an application for this expansion, at which time the NRC Staff will review and either approve or deny such expansion.¹⁴⁰ The NRC Staff claims that, at that point in time, but no earlier, it would be proper to conduct a thorough assessment of any potential environmental impacts on historic and cultural resources.¹⁴¹ PIIC disputes this, arguing that "[t]his provides little assurance that any unrecorded historic and cultural resources would be protected."¹⁴² PIIC asserts that, pursuant to the trust responsibility it owes PIIC, the NRC has a fiduciary duty to take action now, not later, to determine whether unrecorded cultural resources are present in the expansion area for the ninety-eight casks.¹⁴³

The NRC Staff maintains that for agencies like the NRC, "which do not manage, control or supervise Indian affairs, 'unless there is a specific duty that has been placed on the [agency] with respect to Indians, this responsibility is discharged by the agency's compliance with general

¹³⁹ PIIC's Motion to Admit at 12 (citing Draft EA at 3-19, 4-10, 4-11).

¹⁴⁰ Id.

¹⁴¹ Id. at 12–13 (citing Draft EA at 4-26).

¹⁴² Id. at 13.

¹⁴³ Id.

regulations and statutes not specifically aimed at protecting Indian tribes.”¹⁴⁴ Similarly, Northern States asserts that the NRC’s trust responsibility does not impose a duty on the NRC to take action beyond complying with generally applicable statutes and regulations.¹⁴⁵ Northern States further contends the NRC Staff is not required to take action now to ascertain whether unrecorded cultural resources are present in any future ISFSI expansion area.¹⁴⁶ Northern States also argues that PIIC’s claim the NRC breached its trust responsibility is not supported by the law or facts.¹⁴⁷

PIIC counters that, because the NRC Staff has concluded there is a high probability that unrecorded tribal cultural resources lie within the PINPG property, the NRC’s trust responsibility requires that it go beyond compliance with laws and regulations directed to the public in general.

For the reasons set forth below, we are persuaded that PIIC’s Contention 3 is admissible under 10 C.F.R. § 2.309.

First, this contention provides a specific statement of law or fact pursuant to 10 C.F.R. § 2.309(f)(i), namely, “PIIC does not believe that the NRC has fulfilled the trust responsibility in its . . . analysis and conclusion of the cumulative impacts on historic and cultural resources from the reasonably foreseeable expansion of the ISFSI.”¹⁴⁸

Second, PIIC has provided a brief explanation of the basis for the contention pursuant to

¹⁴⁴ NRC Staff’s Answer at 13–14 (quoting Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 474 (9th Cir. 1998)). The NRC Staff and Northern States repeat here the same argument made earlier that merely quoting PIIC’s concerns in the EA, without evaluating them, represents compliance with NEPA, and that this discharges any trust responsibility the NRC owes. Even if the NRC Staff and Northern States really intend to assert this claim, however, at a minimum there is a genuine factual dispute as to whether such an analysis was actually conducted, and if so, the extent to which that analysis discharges the NRC’s trust responsibility to the Tribes.

¹⁴⁵ Northern States’ Answer at 13 (citing Shosone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995) and Morongo, 161 F.3d at 574).

¹⁴⁶ Id. at 14.

¹⁴⁷ Id. at 13–14.

¹⁴⁸ PIIC’s Motion to Admit at 12.

10 C.F.R. § 2.309(f)(ii). Specifically, PIIC's basis for this contention is that the draft EA finds "there is a high probability that additional unrecorded cultural resources may exist within the PINGP property."¹⁴⁹ PIIC contends that, even though the draft EA's cumulative impact analysis states it is reasonably foreseeable that the ISFSI may be expanded to accommodate ninety-eight casks,¹⁵⁰ the NRC Staff made no attempt to evaluate whether PIIC's historic and cultural resources will be protected if the ISFSI license is renewed.¹⁵¹

Third, Contention 3 is within the scope of the proceeding pursuant to 10 C.F.R. § 2.309(f)(iii).¹⁵² This dispute arises from the NRC Staff's conclusion that there is a high probability of additional unrecorded cultural resources lie within the PINGP property, which PIIC maintains have not been evaluated for cumulative impacts from an expansion of the ISFSI.¹⁵³ It is undisputed that PIIC has alleged a valid concern about such historical and cultural resources, and the NRC Staff's own analysis of the archaeological investigations conducted in the area of the ISFSI suggests there is a high probability those resources lie within the PINGP property¹⁵⁴ and specifically around the ISFSI area.¹⁵⁵ This is the precise concern raised by Contention 3.

¹⁴⁹ Id. (citing Draft EA at 3-19, 4-10, 4-11).

¹⁵⁰ Id. (citing Draft EA at 4-26).

¹⁵¹ See id.

¹⁵² In addition to arguing that Contention 3 is unsupported by law and fact, (see Northern States' Answer at 12–13), Northern States contends that one of PIIC's bases supporting Contention 3 – that the NRC failed to comply with the Nuclear Waste Policy Act (NWPA) with respect to establishing a permanent repository (see PIIC's Motion to Admit at 9) – is immaterial to an ISFSI licensing renewal proceeding. See Northern States' Answer at 13. PIIC counters that whether the NRC failed to comply with the NWPA is material because it is related to the expansion of the Prairie Island ISFSI to accommodate ninety-eight casks. See PIIC's Reply at 12. However, Northern States has provided no authority establishing that the NWPA exempts the NRC from complying with its trust responsibility. See generally Northern States' Answer.

¹⁵³ PIIC's Motion to Admit at 6 (citing Draft EA at 3-19, 4-10, 4-11).

¹⁵⁴ Draft EA at 3-19.

¹⁵⁵ See id. at 4-34 ("The NRC staff evaluated whether ISFSI expansion could affect historic and cultural resources. Areas around the ISFSI could retain potential for archaeological materials.").

Thus, PIIC's Contention 3 satisfies 10 C.F.R. § 2.309(f)(iii).

Fourth, the issue raised in Contention 3 is material to the findings the NRC must make to support the action that is involved in this proceeding pursuant to 10 C.F.R. § 2.309(f)(iv). Again, the NRC Staff recognizes there is a high probability that additional unrecorded resources may lie within the PINGP property¹⁵⁶ and specifically around the ISFSI area.¹⁵⁷ PIIC's Contention 3 alleges that such unrecorded cultural and architectural resources may be adversely affected by the expansion of the ISFSI.¹⁵⁸ Moreover, PIIC claims there are several archaeological sites recorded within the PINGP property that have not been assessed for possible additional unrecorded resources.¹⁵⁹ Thus, PIIC's concern about its additional unrecorded historical and cultural resources lying within the PINGP property designated for the expansion of the ISFSI is material to the finding that the NRC must make.

Fifth, PIIC has alleged facts on which it relies to support Contention 3, as required by 10 C.F.R. § 2.309(f)(v).¹⁶⁰ These facts relate specifically to the NRC Staff's conclusion, on the one hand, that there is a high probability unrecorded resources lie within the PINGP property and around the ISFSI area, but on the other that the draft EA will not evaluate the possible adverse effects on these resources from a likely expansion. It is the NRC Staff's apparent refusal to evaluate these cumulative impacts further that forms the basis for PIIC's claim that the NRC

¹⁵⁶ See id. at 3-19.

¹⁵⁷ See id. at 4-34 ("The NRC staff evaluated whether ISFSI expansion could affect historic and cultural resources. Areas around the ISFSI could retain potential for archaeological materials.") We note this appears to be the only "evaluation" performed in the EA—i.e., whether the expansion may affect the resources. There is no suggestion, however, that the NRC Staff actually evaluated the cumulative impacts upon such resources of the expansion.

¹⁵⁸ See PIIC's Motion to Admit at 9–13.

¹⁵⁹ See id. at 12; see also Draft EA at 3-16 to -19.

¹⁶⁰ See PIIC's Motion to Admit at 12 (citing Draft EA at 3-19, 4-10, 4-11, 4-26).

Staff is violating its trust responsibility.¹⁶¹ This is sufficient support and meets the requirements of section 2.309(f)(v).

Finally, we conclude that Contention 3 presents a genuine dispute between PIIC and the draft EA on a material issue of fact pursuant to 10 C.F.R. § 2.309(f)(vi). PIIC maintains (1) that the NRC Staff, as a federal agency, owes a trust responsibility to PIIC, independent of NEPA, (2) that this trust responsibility prevents the NRC Staff from postponing an analysis of the environmental impacts of expanding the ISFSI—even if NEPA would permit such a postponement, and (3) that this trust responsibility requires the NRC Staff either to perform additional field investigations before the license is renewed or to impose a license condition on Northern States to ensure that any potential impacts are mitigated. The NRC Staff and Northern States dispute PIIC’s claims. This meets the dispute requirements of section 2.309(f)(vi). Of course, whether the Staff has properly discharged its trust responsibility to PIIC—and the extent to which it must undertake specific actions in order to comply with this duty—is a merits determination that the Commission has instructed us cannot be decided at the contention admissibility stage.¹⁶²

Accordingly, this portion of renewed Contention 3 is admissible.

IV. Northern States’ Motion to Strike

On January 28, 2014, Northern States moved to strike portions of PIIC’s Reply.¹⁶³ Specifically, Northern States requests the Board to strike certain statements in PIIC’s Reply regarding (1) Northern States’ CRMP, on the ground that PIIC did not mention Northern States’ CRMP in its motion, and (2) the HBU fuel portion of Contention 2, on the ground that PIIC impermissibly attempts to add a new basis of support that was not alleged in its motion to admit

¹⁶¹ See id. at 12–13 (citing Draft EA at 3-19, 4-10, 4-11, 4-26).

¹⁶² See Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 443 (2011).

¹⁶³ See generally Motion to Strike.

new and amended contentions.¹⁶⁴

PIIC's response, dated February 4, 2014,¹⁶⁵ argues that Northern States' motion should be denied in its entirety because PIIC's reply "contains appropriate arguments that logically flow from, and are narrowly focused on, the legal or logical arguments presented in the original motion supporting [amended] Contention 2, and the NRC Staff or [Northern States] responses on the issues of cumulative impacts on cultural resources or the concerns about [HBU fuel]."¹⁶⁶

We agree with PIIC. A motion to strike may be granted where a pleading or other submission contains information that is irrelevant.¹⁶⁷ In this case, it appears that the statements Northern States seeks to strike from PIIC's reply were based on arguments advanced by the NRC Staff and Northern States in their answers to PIIC's motion.¹⁶⁸ For example, it appears that PIIC refers to the CRMP in its Reply¹⁶⁹ because Northern States refers to the CRMP in its answer in arguing that it will ensure the protection of archaeological and cultural resources on the PINGP property by implementing the CRMP.¹⁷⁰ In regards to PIIC's HBU fuel statements that Northern States seeks to strike, PIIC was addressing the NRC Staff's argument that PIIC's claim about HBU fuel¹⁷¹ is too remote and speculative at this time.¹⁷²

¹⁶⁴ See Motion to Strike at 1–3.

¹⁶⁵ See Response to Motion to Strike.

¹⁶⁶ Id. at 2.

¹⁶⁷ See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-20, 62 NRC 187, 228 (2005) (citing Power Auth. of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 514 (2001)).

¹⁶⁸ See generally Response to Motion to Strike.

¹⁶⁹ See, e.g., PIIC's Reply at 3.

¹⁷⁰ See, e.g., Northern States' Answer at 8.

¹⁷¹ See PIIC's Reply at 9.

¹⁷² See NRC Staff's Answer at 12.

The statements Northern States seeks to strike are neither irrelevant to the contentions nor impermissible in response to arguments made by Northern States and the NRC Staff.¹⁷³ There is nothing that would unfairly surprise the NRC Staff or the Applicant (which cannot file a sur-reply), and so neither is prejudiced by these statements.

For these reasons, we deny Northern States' motion in its entirety.

V. Conclusion

For the reasons stated above, we hold in abeyance amended Contention 1, in whole, and amended Contention 2, in part. We also admit amended Contention 2, in part, and a renewed and amended Contention 3, in part.

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

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael M. Gibson
CHAIRMAN

/RA/

Nicholas G. Trikouras
Administrative Judge

Rockville, Maryland
April 30, 2014

¹⁷³ Additionally, however, we note that we did not rely on any of PIIC's statements that are the subject of Northern States' motion in reaching our decision on the admissibility of contentions.

Dissenting Opinion of Judge Arnold:

Although I agree with some of what is contained in this Order (e.g., the Waste Confidence discussion), I must respectfully disagree with the majority of the board on one significant issue. Original contentions 2, 3 and 4,¹ and revised contentions 2 and 3² all claim among other things that the ER and draft EA are deficient in their consideration of impacts on cultural and historic resources contained within the area of the ISFSI. Contrary to a majority of the Board, I do not believe these parts of the contentions are admissible.

Summary of Original Contentions 2, 3, and 4

Original Contentions 2, 3, and 4³ claimed amongst other things that the ER was deficient in that it did not consider impacts upon the cultural and historic resources. Original Contention 2 claimed that eventual expansion of the ISFSI is inevitable due to relicensing of the two operating reactors, that the ER must consider the cumulative impacts of relicensing the ISFSI with the eventual expansion of the ISFSI, and that this cumulative impact assessment must include impacts upon cultural and historic resources that may be present on the ISFSI site. Original Contention 3⁴ claimed that the NRC's Federal Trust Responsibility to the PIIC requires it to consider impacts upon cultural and historic resources on the site. And finally, original Contention 4 was in regards to the need for the environmental record to include an Environmental Justice review that must include an evaluation of the impacts of the ISFSI relicensing on adjacent minority populations. The PIIC claimed to be such an adjacent minority

¹ See Original PIIC Petition at 26–49.

² See PIIC's Motion to Admit at 3–14.

³ The majority's decision does not address PIIC's original Contention 4, but I believe it should have. This contention alleged the same lack of an assessment of historical and cultural resources, but provides the additional basis of Environmental Justice.

⁴ Original Contention 3 was not admitted by the Board. See LBP-12-24, 76 NRC at 518–20. However since PIIC's Motion to Admit attempts to resurrect it as a challenge to the draft EA, I discuss it here.

population, and that relicensing and eventual expansion of the ISFSI will impact cultural and historic resources within the ISFSI site. In admitting Contention 4, the Board focused the admitted contention on “potential disturbance of historic and archaeological resources” and “skyshine radiation.”⁵ A majority of the Board stated that these impacts “stem from the likely future expansion of the ISFSI that is not examined in the ER.”⁶

Since the ER, in fact, did not contain any evaluation of future expansion of the ISFSI, the information sought by Intervenors would not, and could not have been documented in the ER. These contentions were advanced as contentions of omission and were admitted by the Board solely as allegations of required information missing from the environmental record.

The Environmental Assessment Addresses Contention 2, 3, and 4

The NRC Staff’s environmental assessment is documented in an Environmental Assessment (EA) rather than in an Environmental Impact Statement (EIS). When an EA is appropriate, it need only include a “brief discussion” of “environmental impacts of the proposed action.”⁷ Alternatively, an EIS must include among other things:

Unless excepted in this paragraph or § 51.75, the draft environmental impact statement will include a preliminary analysis that considers and weighs the environmental effects, including any cumulative effects, of the proposed action; the environmental impacts of alternatives to the proposed action; and alternatives available for reducing or avoiding adverse environmental effects. Additionally, the draft environmental impact statement will include a consideration of the economic, technical, and other benefits and costs of the proposed action and alternatives. The draft environmental impact statement will indicate what other interests and considerations of Federal policy, including factors not related to environmental quality, if applicable, are relevant to the consideration of environmental effects of the proposed action identified under paragraph (a) of this section.⁸

⁵ See LBP-12-24, 76 NRC at 522. The skyshine radiation portion of original Contention 4 is not addressed in this dissenting opinion.

⁶ Id.

⁷ 10 C.F.R. § 51.30.

⁸ Id. § 51.71 (2014). This regulation requires that an EIS include an evaluation of cumulative impacts such as that sought by the PIIC. The rules do not specifically require such a cumulative impact analysis to be contained in an EA.

The requirements for detail in an EIS are extensive when compared to that in an EA. Where one would expect to see the entire cumulative impact analysis in an EIS, the EA would only include a brief discussion, which might be as short as a statement that no significant impacts are expected. And here, Intervenors have not contested that the draft EA is inappropriate or that an EIS is required. So we should expect to see in the draft EA only “brief discussions” of the evaluations performed by the NRC Staff, regardless of how extensive those evaluations may have been.

The NRC Staff, in documenting its environmental impact evaluation in its draft EA, addressed the historical and cultural resource omissions alleged in original contentions 2, 3, and 4 as follows:

“Site Location and Description,” section 1.3.1 of the draft EA describes the ISFSI site and its location. It identifies the PIIC as the ISFSI’s nearest residential neighbor. The topography of the site and nearby structures are described.

“Cooperating Agencies,” section 1.5 of the draft EA describes the NRC’s Federal Trust Responsibility and summarizes how it will be met.

“Land Use,” section 3.1 of the draft EA describes current ISFSI land use including the extent to which initial ISFSI construction disturbed the ground beneath it. Current PIIC buildings and land use are described, as well as population.

“Demographics and Socioeconomics,” section 3.3 of the draft EA provides extensive information concerning the PIIC and its relation to the ISFSI.

“Historic and Cultural Resources,” section 3.10 of the draft EA provides a five page discussion focusing on cultural background of the PIIC and an evaluation of historic and cultural resources within the Area of Potential Effect (APE) with a final summarizing statement:

No archaeological sites, potential archaeological resources, or sites determined eligible for listing in the NRHP [National Registry of Historical Places] are within the APE for the ISFSI license renewal.⁹

“Environmental Justice,” section 3.12 of the draft EA provides introductory information concerning the scope of the EJ assessment.

“Environmental Impacts, Land Use,” section 4.1 of the draft EA states that relicensing of the ISFSI “will not result in any construction or expansion of the existing ISFSI footprint or operations.” It also discusses the NRC Staff’s interactions with the PIIC to ensure that the community’s special expertise in historic and cultural resources was considered in the EA.

“Environmental Impacts, Historic and Cultural Resources,” section 4.10 of the draft EA evaluates the impacts of license renewal on historic and cultural resources. Although there are no current indications that such historic and cultural resources exist on the ISFSI site, it does admit:

[T]here remains the potential for unreported archaeological resources to be present in subsurface contexts in portions of the ISFSI that were not completely disturbed by the original construction.¹⁰

“Environmental Justice,” section 4.13 of the draft EA provides an evaluation of EJ issues, and considers as well the impacts of hypothetical¹¹ expansion of the ISFSI to accommodate 98 casks (vice the current capacity of 48 casks) upon EJ issues.

“Cumulative Impacts,” section 4.14 of the draft EA considers the cumulative impacts of relicensing the ISFSI in conjunction with possible future expansion of the ISFSI. This 17-page

⁹ Draft EA at 4-10.

¹⁰ Id.

¹¹ I refer to the expansion of the current ISFSI as “hypothetical” because it is not inevitable. It is simply the most likely current alternative. PINGP could choose to build another ISFSI either under its general or specific license either on site or at some remote location. It might also choose to expand its spent fuel pool storage or even, as in the case with Vermont Yankee, SONGS, Crystal River and Keweenaw, cease operations for as-yet unknown reasons. Expanding storage at the current ISFSI cannot currently be considered inevitable.

evaluation assesses cumulative impacts upon, among other things, historic and cultural resources and environmental justice issues. It includes the statement:

[N]o historic and cultural resources are located within the area of potential effect; however, there remains the potential for unknown historic and cultural resources near the ISFSI.¹²

This statement clearly indicates that the NRC Staff had considered the possible presence of cultural and historical resources both on the ISFSI site and nearby.

Original Contentions 2, 3, and 4 on Cultural and Historic Resources are Moot

Original contentions 2, 3, and 4 were solely challenges concerning omissions from the ER. As the Commission has stated:

If the EIS addresses the concerns alleged in the contention, the original contention becomes moot and the intervenor must raise a new contention if it claims the EIS discussion is still inaccurate or incomplete.¹³

In the current situation the relevant environmental document is the draft EA rather than an EIS. Considering the extensive coverage of the relevant topics in the draft EA, no conclusion can be reached other than that these aspects of original contentions 2, 3, and 4 are now moot. And if Intervenors desire to challenge the adequacy of the NRC Staff's assessment they must raise new contentions.

New Revised Contentions 2 and 3

The PIIC's Motion to Admit seeks, among other things, to revise contentions 2 and 3. Revised Contention 2 challenges the adequacy of the draft EA in three areas:

1) the failure to address the cumulative impacts of long-term waste storage; 2) the failure to adequately address the potential impacts of the reasonably foreseeable expansion of the PI ISFSI on cultural and historic resources; and 3) the failure to address the potential inability to transport high burnup (HBU) fuel off site.¹⁴

¹² Draft EA at 4-34.

¹³ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 130 (2004).

¹⁴ PIIC's Motion to Admit at 3.

Revised contention 3 regards inadequacies alleged in the draft EA reflecting the NRC's Federal Trust Responsibility. Two significant deficiencies are alleged:

The first deficiency concerns the inadequacy of the analysis and conclusion on the cumulative impacts of the ISFSI on cultural and historic resources. The second deficiency concerns the absence of any analysis of the likelihood of a terrorist attack on the ISFSI, and the potentially devastating physical and economic impacts on the PIIC homeland from such an attack.¹⁵

I disagree with the Board's ruling admitting those portions of revised Contentions 2 and 3 regarding cumulative impacts of license renewal with possible future ISFSI expansion on cultural and historic resources. The requirements for admitting a contention for litigation in this case are contained in 10 C.F.R. § 2.309(f)(1) subparagraphs (i) through (vi). I believe that revised Contentions 2 and 3 fail to provide the information required by subparagraphs (iii), (v), and (vi) as discussed below.

Revised Contentions 2 and 3 do not meet 10 C.F.R. § 2.309(f)(1)(iii)

Subparagraph (iii) requires that the contention “[d]emonstrate that the issue raised in the contention is within the scope of the proceeding.”¹⁶ Revised contention 2 is predicated on the need of the environmental review to consider the impact of related actions, and upon the asserted need to expand the ISFSI at some unspecified and hypothetical future date to accommodate additional spent fuel casks. But expansion of the ISFSI would require a licensing amendment,¹⁷ and no such license amendment application has been filed with the NRC. The Commission has provided guidance on when future license amendments are within the scope of a cumulative impact evaluation:

Our collective reading of the post-Kleppe rulings suggests, as the Board indicated, that to bring NEPA into play, a possible future action must at least constitute a “proposal” pending before the agency (i.e., ripeness), and must be in

¹⁵ Id. at 9–10.

¹⁶ 10 C.F.R. § 2.309(f)(1)(iii).

¹⁷ See Draft EA at 4-23 (“Expansion of the ISFSI would require that an application and ER be submitted to the NRC for review and approval of the proposed action.”).

some way interrelated with the action that the agency is actively considering (i.e., nexus).¹⁸

And in the same order the Commission explained what constituted a proposal before the agency:

Taken literally, Kleppe invalidates NIRS's NEPA contention because Duke has submitted no "proposal" (i.e., a license amendment application) to use MOX fuel in the Catawba and McGuire reactors.¹⁹

That is, in order for a future license amendment to be a proposal before the agency, an application for that license amendment must have been submitted. The Commission went further and explained why:

We would, to say the least, have a very difficult time analyzing the environmental effects of a "merely contemplated" license application that we have never seen, and we would have an even more difficult time appraising how those effects would combine with those of another action to create "cumulative impacts."²⁰

Since no license amendment application has been submitted to the NRC for ISFSI expansion, the hypothetical future expansion of the ISFSI is not within the scope of the current cumulative impacts assessment of ISFSI relicensing. Therefore that portion of revised contention 2 regarding cumulative impacts on cultural and historic resources is not within the scope of this proceeding.

Regarding that portion of revised contention 3 concerned with cumulative impacts of the ISFSI on cultural and historic resources, the Intervenors claim that the Federal Trust Responsibility to the PIIC "requires that the Federal Government (and its agencies) protect Indian trust lands from alienation, confiscation, environmental degradation, or the risk of environmental degradation."²¹ The PIIC provides support for their assertion that such a trust

¹⁸ McGuire, CLI-02-14, 55 NRC 278 at 295.

¹⁹ Id. at 294–95 (emphasis added).

²⁰ Id. at 295.

²¹ PIIC's Motion to Admit at 9.

responsibility exists. However they have made no showing that any law, regulation or precedent requires government agencies to consider cumulative impacts of future hypothetical actions that are too vague to be considered in the cumulative impact assessment required under NEPA. The PIIC has not so much as attempted to support that this part of revised contention 3 is within the scope of this proceeding. Thus neither revised contention 2 or 3 is within the scope of the current ISFSI license renewal proceeding.

Revised Contentions 2 and 3 do not meet 10 C.F.R. § 2.309(f)(1)(v)

10 C.F.R. § 2.309(f)(1)(v) requires that a contention

[p]rovide 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.²²

In support for their revised contention 2, the Intervenors provide neither expert opinion nor any alleged facts in support of their claim. Regarding the draft EA evaluation of impacts of ISFSI expansion on cultural and historic resources, Intervenors opine, the "PIIC believes that it is a high and adverse impact – potential destruction of tribal historic and cultural resources is a serious matter – and that the NRC is required to take action now to mitigate the potential impacts of the expansion."²³ However this is not proffered as an expert opinion. And nowhere in the motion is there any claim that this is an expert opinion. This is simply speculative opinion that contradicts the conclusion of the draft EA. The motion presents the illusion that it provides alleged facts by stating:

The NRC staff repeatedly states in the draft EA that there is a high probability that additional unrecorded cultural resources may exist within the PINGP property. In its cumulative impact analysis, the NRC staff finds that it is reasonably foreseeable that the ISFSI may be expanded to accommodate 98 casks. However, the NRC staff does not believe that any action needs to be taken now, in considering this application for license renewal, to ensure that these historic and cultural resources will be protected. The NRC staff bases this

²² 10 C.F.R. § 2.309(f)(1)(v).

²³ PIIC's Motion to Admit at 5.

conclusion on the fact that the NRC would require that an application and an ER be submitted to the NRC for review and approval of the proposed expansion.²⁴

Although these appear to contain facts in support of their contention, they are in fact quotes from the draft EA. Citing draft EA statements does not establish a challenge to the draft EA. The Commission has explained:

The 1989 revisions to the contention rule thus insist upon some factual basis for an admitted contention. The intervenor must be able to identify some facts at the time it proposes a contention to indicate that a dispute exists between it and the applicant on a material issue. These requirements are intended to preclude a contention from being admitted where an intervenor has no facts to support its position and [instead] contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts.²⁵

Citing the facts upon which the NRC Staff assessment in the draft EA is based does not and cannot support a dispute with that assessment. Furthermore, the Commission has stated:

Contentions, however, must be based on a genuine material dispute, not the possibility that petitioners, if they perform their own additional analyses, may ultimately disagree with the application.²⁶

And

Contentions “will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’²⁷

Revised contention 2 is clearly a case where Intervenors, without factual support or opinion other than that contained in the draft EA, and agreeing with those facts in the draft EA, disagree with the conclusions of the draft EA and would like those conclusions replaced with the their own speculative opinion.

²⁴ Id. at 6.

²⁵ Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999) (internal citations and quotations omitted).

²⁶ USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 480 (2006).

²⁷ Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)).

Regarding that portion of revised contention 3 concerning the effects of ISFSI expansion on cultural and historic resources, there is a similar total absence of alleged facts or expert opinions in this contention. The contention makes the unsupported assertion:

The license for the ISFSI should not be renewed until an archeological survey sufficient to identify unrecorded cultural resources is performed by the applicant and/or by imposing a license condition on the any [sic] renewed license that no expansion could be considered as a subject of an amended license until such a survey is performed. The higher duty imposed by the trust responsibility requires such action.²⁸

Similar to revised contention 2, revised contention 3 concerning cultural and historic resources is not admissible because it provides no alleged facts or expert opinions in contravention of 10 C.F.R. § 2.309(f)(1)(v).

Revised Contentions 2 and 3 do not meet 10 C.F.R. § 2.309(f)(1)(vi)

Paragraph (vi) of 10 C.F.R. § 2.309(f)(1) requires that the proposed contention:

- 1) provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact, and
- 2) 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.

As discussed above, Intervenors have provided no expert opinions regarding cultural and historic resources. The only facts provided are excerpts from the draft EA, and these do not establish a dispute with the draft EA. In revised contentions 2 and 3, the only citations to the draft EA are to statements made to support the NRC Staff's evaluation, and Intervenors do not challenge these.

In the end, concerning cultural and historic resources, the PIIC disagrees with nothing except the draft EA conclusion that impacts to cultural and historic resources are small, and asserts without support that these impacts should be considered high and adverse. For failing

²⁸ See PIIC's Motion to Admit at 13.

to meet 10 CFR 2.309(f)(1) iii, v and vi those portions of revised contentions 2 and 3 concerning cumulative impacts of ISFSI relicensing with ISFSI expansion are not admissible.

The majority decision relies heavily on the NRC Staff repeated statement in the EA that, “there is a high probability that additional unrecorded cultural resources may exist within the PINGP property.”²⁹ This dependence on the part of the majority is unconvincing in light of statements contained in the draft EA including:

Although no [historic or cultural resource] sites have been identified within the PI ISFSI boundary or the area of potential effect (APE) for this proposed action . . .³⁰

To identify historic and cultural resources within the APE, NSPM hired Westwood Professional Services, Inc. to conduct a Phase I archaeological survey (Sather, 2010; NRC, 2011c, pp. 4–39). The survey was specifically designed to evaluate the depth of previous ground disturbance within the ISFSI facility and determine whether any archaeological deposits were present within potentially undisturbed buried soil. Eight test pits were excavated to an average depth of 1.8 m [6 ft] below the surface between the PI ISFSI security fence and the earthen berm (NSPM, 2011a). All eight tests were positioned outside the perimeter fence for the cask storage area. No cultural materials were recovered from any of the eight test excavations, and the consulting archaeologists interpreted all but one of the eight exposed soil profiles as significantly disturbed by past construction activities (Sather, 2010, p. 5; NSPM, 2011a).³¹

No archeological sites, potential archaeological resources, or sites determined eligible for listing in the NRHP are within the [area of potential effect] for this ISFSI license renewal.³²

[N]o historic and cultural resources are located within the area of potential effect; however, there remains the potential for unknown historic and cultural resources near the ISFSI.³³

²⁹ This statement occurs twice in the draft EA, on pages 3-19 and 4-35. It is repeated approximately a dozen times in the majority opinion.

³⁰ Draft EA at 3-16.

³¹ Id. at 3-20.

³² Id.

³³ Id. at 4-34.

Essentially the NRC Staff's evaluation of all available archaeological evidence finds that it is unlikely that expansion of the ISFSI will impact any historical or cultural resources, but because the area has not been 100% surveyed, the presence of such resources cannot be definitively ruled out.³⁴

³⁴ See id. at 4-10 to -11.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of **MEMORANDUM AND ORDER (Ruling on Motion to Admit New and Amended Contentions) - LBP- 14-06** have been served upon the following persons by Electronic Information Exchange.

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Prairie Island Nuclear Generating Plant, Independent Spent Fuel Storage Installation,
Docket No. 72-10-ISFSI

**MEMORANDUM AND ORDER (Ruling on Motion to Admit New and Amended Contentions) -
LBP- 14-06**

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

Dated at Rockville, Maryland
this 30th day of April, 2014