

**NUCLEAR REGULATORY COMMISSION
ISSUANCES**

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

July 1, 2014 – December 31, 2014

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PREFACE

This is the eightieth volume of issuances (1–219) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from July 1, 2014, to December 31, 2014.

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

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

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

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

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

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

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of

DTE ELECTRIC COMPANY (Fermi Nuclear Power Plant, Unit 3)	Docket No. 52-033-COL
ENERGY NUCLEAR OPERATIONS, INC. (Indian Point, Units 2 and 3)	Docket Nos. 50-247-LR 50-286-LR
FIRSTENERGY NUCLEAR OPERATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	Docket No. 50-346-LR
FLORIDA POWER & LIGHT COMPANY (Turkey Point Nuclear Generating Plant, Units 6 and 7)	Docket Nos. 52-040-COL 52-041-COL
NEXTERA ENERGY SEABROOK, LLC (Seabrook Station, Unit 1)	Docket No. 50-443-LR
NUCLEAR INNOVATION NORTH AMERICA LLC (South Texas Project, Units 3 and 4)	Docket Nos. 52-012-COL 52-013-COL

PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2)	Docket Nos. 50-275-LR 50-323-LR
PROGRESS ENERGY FLORIDA, INC. (Levy County Nuclear Power Plant, Units 1 and 2)	Docket Nos. 52-029-COL 52-030-COL
TENNESSEE VALLEY AUTHORITY (Bellefonte Nuclear Power Plant, Units 3 and 4)	Docket Nos. 52-014-COL 52-015-COL
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TENNESSEE VALLEY AUTHORITY (Watts Bar Nuclear Plant, Unit 2)	Docket No. 50-391-OL
VIRGINIA ELECTRIC AND POWER COMPANY d/b/a DOMINION VIRGINIA POWER and OLD DOMINION ELECTRIC COOPERATIVE (North Anna Power Station, Unit 3)	Docket No. 52-017-COL July 17, 2014

SUSPENSION OF PROCEEDING

The NRC's rules of practice permit a rulemaking petitioner who is also a participant in a licensing proceeding to request suspension of that proceeding pending the outcome of the rulemaking petition.

SUSPENSION OF PROCEEDING

Suspending a proceeding is a drastic action that the Commission will not take absent immediate threats to public health and safety, or other compelling reason.

SUSPENSION OF PROCEEDING

To determine whether suspension of an adjudication or licensing decision is

warranted, the Commission considers whether moving forward will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes.

MEMORANDUM AND ORDER

Thirteen environmental organizations (collectively, Petitioners) separately filed in the captioned proceedings a joint petition to suspend reactor licensing decisions pending the resolution of their February 18, 2014 petition for rulemaking.¹ For the reasons set forth below, we deny the suspension petitions and provide direction on other related requests.

I. BACKGROUND

As part of the NRC's ongoing, multifaceted approach to drawing lessons from the 2011 accident at Japan's Fukushima Dai-ichi Nuclear Power Plant, the NRC Staff explored whether expediting the transfer of older spent fuel from pools to casks would result in a significant reduction in risk to public health and safety from a spent fuel pool accident.² The Staff had categorized the expedited-transfer issue as a "Tier 3" lessons-learned activity requiring further study.³ The Staff thus

¹ See, e.g., Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014; Fermi combined license docket) (Suspension Petition). See generally Environmental Organizations' Petition to Consider New and Significant Information Regarding Environmental Impacts of High-Density Spent Fuel Storage and Mitigation Alternatives in Licensing Proceedings for New Reactors and License Renewal Proceedings for Existing Reactors and Duly Modify All NRC Regulations Regarding Environmental Impacts of Spent Fuel Storage During Reactor Operation (Feb. 18, 2014) (attached to Suspension Petition) (Rulemaking Petition). A complete list of the suspension petitions and responsive pleadings is provided in an Appendix to this decision.

² See Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor (Oct. 2013) at iii (ADAMS Accession No. ML13256A342) (Consequence Study); "Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling-Water Reactor," Commission Paper SECY-13-0112 (Oct. 9, 2013) (ADAMS Accession No. ML13256A339) (transmitted to the Commission for information).

³ See "Staff Evaluation and Recommendation for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel," Commission Paper COMSECY-13-0030 (Nov. 12, 2013), at 3 (ADAMS Accession No. ML13273A601) (COMSECY-13-0030). The Staff categorizes its Fukushima lessons-learned efforts into three tiers. Tier 1 activities are those "for which sufficient resource flexibility, including availability of critical skill sets, exists" and "should be started without unnecessary delay."

(Continued)

analyzed the likelihood and consequences of a spent fuel pool accident initiated by a severe earthquake with “seismic forces greater than the maximum earthquake reasonably expected to occur at the reference plant location,” a Mark I boiling water reactor modeled after the Peach Bottom Atomic Power Station (although with a less robust spent fuel pool than exists at Peach Bottom or other U.S. plants), as well as ground motion “more challenging for the spent fuel pool structure than that experienced at . . . Fukushima.”⁴ The Staff then compared potential accident consequences from a nearly full pool to one where sufficiently cooled fuel had been removed, under conditions in which accident mitigation measures were both successfully and unsuccessfully deployed.⁵ Based on its analysis, the Staff concluded that “expediting movement of spent fuel from the pool does not provide a substantial safety enhancement.”⁶

Comparing the results of this study with prior spent fuel storage research, the Staff performed a cost-benefit analysis to determine whether further regulatory action is warranted on the expedited-transfer issue.⁷ Ultimately, the Staff concluded that any limited safety benefit achieved by expedited transfer of older spent fuel assemblies to dry casks does not outweigh the expected costs, and it recommended that we close this Tier-3 issue.⁸ We approved the Staff’s recommendation to close the issue and not pursue generic assessments related to expedited transfer, but we also identified additional items related to spent fuel pool management for the Staff’s consideration.⁹

Tier 2 activities are those that do not require long-term study but cannot begin until additional resources or sufficient technical information become available. Tier 3 activities are those that require longer-term study or additional resources. *See* “Prioritization of Recommended Actions to Be Taken in Response to Fukushima Lessons Learned,” Commission Paper SECY-11-0137 (Oct. 3, 2011), at 2-3 (ADAMS Accession No. ML11272A111 (package)); *see generally* Staff Requirements — SECY-11-0137 — Prioritization of Recommended Actions to Be Taken in Response to Fukushima Lessons Learned (Dec. 15, 2011) (ADAMS Accession No. ML113490055).

⁴Consequence Study at iii, 5.

⁵*Id.* at iii, vi-vii, 6. The Staff published a draft of its findings last July, and after considering public comments, issued the final report last October. *See* Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor, 78 Fed. Reg. 39,781 (July 2, 2013); Consequence Study at i.

⁶Consequence Study at iv.

⁷*See* COMSECY-13-0030, at 6-8; Regulatory Analysis for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel (Nov. 2013) at iii (ADAMS Accession No. ML13273A628) (Regulatory Analysis) (Enclosure 1 to COMSECY-13-0030). The Staff issued corrections to the Regulatory Analysis on November 25, 2013, which are available at ADAMS Accession No. ML13329A923. The ADAMS accession number for COMSECY-13-0030 and its enclosures is ML13329A918 (package).

⁸COMSECY-13-0030, at 10.

⁹Staff Requirements — COMSECY-13-0030 — Staff Evaluation and Recommendation for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel (May 23, 2014) at 1-2 (ADAMS

(Continued)

On February 18, 2014, Petitioners, joining twenty-one other organizations, filed a petition for rulemaking pursuant to 10 C.F.R. § 2.802(a). The thirty-four (combined) rulemaking petitioners assert that the Staff's review of the expedited-transfer issue generated "new and significant information" regarding the environmental impacts of spent fuel storage that requires: (1) suspending the application of 10 C.F.R. Part 51, Subpart A, Appendix B in license renewal proceedings, in particular the generic finding that the environmental impacts of high-density spent fuel pool storage are "small" and need not be considered on a site-specific basis; (2) suspending the application of all regulations approving certified designs for new reactors with high-density spent fuel pool storage and all environmental assessments approving severe accident mitigation design alternatives; (3) republishing for public comment the environmental impact statements for all new reactors, the environmental assessments for all certified designs, and the Generic Environmental Impact Statement for License Renewal; and (4) amending NRC regulations accordingly.¹⁰ The rulemaking petitioners also seek suspension of final licensing decisions in *all* pending reactor licensing proceedings, but only the thirteen Petitioners filed separate suspension petitions on the captioned dockets.¹¹ The Staff docketed the rulemaking petition, but stated that it would address the requests for suspension in a separate action.¹²

Accession No. ML14143A360) (directing that the Staff modify its regulatory analysis, and, if necessary, develop an information notice for licensees; consider the implications of the expedited-transfer study on certain ongoing lessons-learned activities; consider and report on a forthcoming, related study by the National Academy of Sciences; and remain cognizant of the Department of Energy's efforts to develop accident-tolerant fuels).

¹⁰ Rulemaking Petition at 4-5.

¹¹ Compare *id.* at 1 & n.1, 5, with Suspension Petition at 2-3 & n.1. The thirteen Petitioners are: Beyond Nuclear (*Davis-Besse* license renewal proceeding and *Fermi* combined license proceeding); Blue Ridge Environmental Defense League (*North Anna* combined license proceeding and *Sequoyah* license renewal proceeding); Don't Waste Michigan (*Fermi* combined license proceeding); Ecology Party of Florida (*Levy County* combined license proceeding); Friends of the Coast (*Seabrook* license renewal proceeding); Hudson River Sloop Clearwater (*Indian Point* license renewal proceeding); National Parks Conservation Association (*Turkey Point* combined license proceeding); New England Coalition (*Seabrook* license renewal proceeding); Nuclear Information and Resource Service (*Levy County* combined license proceeding); Public Citizen (*South Texas* combined license proceeding); San Luis Obispo Mothers for Peace (*Diablo Canyon* license renewal proceeding); SEED Coalition (*South Texas* combined license proceeding) and Southern Alliance for Clean Energy (*Turkey Point* combined license proceeding and *Watts Bar* operating license proceeding). Suspension Petition at 2-3 n.1. The petition does not identify a petitioner for the *Bellefonte* combined license proceeding, see Suspension Petition at 2-3 n.1, but we note that Louis Zeller of the Blue Ridge Environmental Defense League served the petition on the *Bellefonte* docket. See Suspension Petition at 17 (ADAMS Accession No. ML14058A002) (*Bellefonte* combined license proceeding).

¹² We provide direction to the Staff on these collateral requests below. See Environmental Impacts of Spent Fuel Storage During Reactor Operation, 79 Fed. Reg. 24,595, 24,596 (May 1, 2014) (Docket (Continued)

We now have before us these substantively identical petitions to suspend licensing decisions in the captioned proceedings. Petitioners claim that although review of the pending license applications may continue, we must suspend issuance of final decisions on those applications to satisfy our obligation to consider whether “new and significant information” requires the NRC to supplement environmental impact statements prepared under the National Environmental Policy Act (NEPA).¹³ In accordance with the Secretary’s briefing order, we received answers from the Staff and the applicants, all of whom oppose the suspension petitions.¹⁴

II. DISCUSSION

Our rules of practice permit a rulemaking petitioner who is also a participant in a licensing proceeding to request suspension of that proceeding pending the outcome of the rulemaking petition.¹⁵ This provision, 10 C.F.R. § 2.802(d), is similar to the waiver process in 10 C.F.R. § 2.335(b), which allows a participant to request the waiver of a current rule or regulation in a specific proceeding under “special circumstances” as an exception to the prohibition against challenging NRC rules or regulations in adjudicatory proceedings in 10 C.F.R. § 2.335(a).¹⁶

No. PRM-51-31; NRC-2014-0055) (Notice of PRM-51-31). The February 18, 2014 petition is one of four docketed and pending petitions for rulemaking to amend 10 C.F.R. Part 51 based on the Fukushima events. *See* Revise and Integrate All Safety and Environmental Regulations Related to Spent Fuel Storage and Disposal, 79 Fed. Reg. 22,055 (Apr. 21, 2014) (Docket No. PRM-51-30; NRC-2014-0014); Rescinding Spent Fuel Pool Exclusion Regulations, 77 Fed. Reg. 75,065 (Dec. 19, 2012) (Docket No. PRM-51-29; NRC-2012-0215); Taxpayers and Ratepayers United et al.; Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents, 76 Fed. Reg. 70,067 (Nov. 10, 2011) (Docket Nos. PRM-51-14 through PRM-51-28; NRC-2011-0189). The NRC posts the status of rulemaking petitions on its Web site, at <http://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/petitions-by-year/open-petitions-all-years.html> (last visited July 15, 2014).

¹³ Suspension Petition at 4; *see also* 10 C.F.R. § 51.20 (requiring the NRC to prepare environmental impact statements for reactor-licensing proceedings); 10 C.F.R. pt. 51 subpt. A, app. B (noting that the NRC has already resolved many environmental impacts for license renewal through a generic environmental impact statement and that these issues need not be revisited in site-specific environmental impact statements).

¹⁴ *See* Appendix; Order (Mar. 4, 2014) (unpublished).

¹⁵ *See* 10 C.F.R. § 2.802(d). Section 2.802 is itself currently the subject of rulemaking. *See* Proposed Rule: “Revisions to the Petition for Rulemaking Process,” 78 Fed. Reg. 25,886 (May 3, 2013).

¹⁶ *See* Proposed Rule: “Restructuring of Facility License Application Review and Hearing Processes and Consideration of Environmental Statements,” 37 Fed. Reg. 9331, 9333, 9340 (May 9, 1972); Final Rule: “Restructuring of Facility License Application Review and Hearing Processes,” 37 Fed. Reg. 15,127, 15,127 (July 28, 1972); *see also Connecticut Yankee Atomic Power Co.* (Haddam Neck

(Continued)

A successful waiver petition would permit consideration of an issue in an adjudicatory proceeding that would otherwise impermissibly challenge an NRC rule or regulation.¹⁷ Similarly, the suspension provision in section 2.802(d) provides an opportunity for a participant to ensure that a successful rulemaking petition is applied in an ongoing adjudication.¹⁸ Here, Petitioners have requested rulemaking and now seek to suspend decisions in these adjudications to ensure that the information that they present regarding the environmental impacts of spent fuel storage is considered before final licensing decisions are made.¹⁹

Suspending a proceeding is a “drastic action” that we will not take “absent immediate threats to public health and safety, or other compelling reason.”²⁰ To determine whether suspension of an adjudication or licensing decision is warranted, we consider “whether moving forward . . . will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes.”²¹ Petitioners have not provided — nor do we find — any compelling reason to justify suspension here.²²

First, Petitioners do not address whether moving forward with the captioned proceedings will jeopardize public health and safety, and we find no reason to suggest that it will. The Staff’s recent spent fuel pool study concluded that “spent fuel pools are robust structures that are likely to withstand severe earthquakes without leaking.”²³ Indeed, the Staff determined that, consistent with prior studies,

Plant), CLI-03-7, 58 NRC 1, 6 (2003); *cf. Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC 352, 372-75 (2012), *petitions for review denied*, *Massachusetts v. NRC*, 708 F.3d 63 (1st Cir. 2013).

¹⁷ See 10 C.F.R. § 2.335(a)-(b).

¹⁸ See *id.* § 2.802(d).

¹⁹ See Suspension Petition at 4.

²⁰ *Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 158 (2011) (internal quotation marks omitted).

²¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001); see also *Pilgrim*, CLI-12-6, 75 NRC at 373; *Callaway*, CLI-11-5, 74 NRC at 158-59.

²² Because Petitioners do not articulate a compelling reason for suspension, we need not and do not address any procedural arguments, including timeliness, whether Petitioners should have submitted proposed contentions, or whether particular Petitioners qualify as “participants” to seek suspension under 10 C.F.R. § 2.802(d). See, e.g., Nuclear Innovation North America LLC Response to Petition to Suspend Licensing Decisions Pending Completion of Rulemaking (Mar. 21, 2014) at 28-29 (NINA Answer); Applicant’s Response to Petition to Suspend Licensing Decision (Mar. 21, 2014) at 7-8 (Pacific Gas and Electric’s Answer); Dominion’s Answer Opposing Petition to Suspend Licensing Proceedings (Mar. 21, 2014) at 10 (Dominion Answer).

²³ Consequence Study at xii; see also *id.* at x (concluding that the likelihood of a spent fuel pool accident resulting from the postulated seismic event is rare — with a frequency of once in 10 million years or lower).

“high density storage of spent fuel in pools protects public health and safety.”²⁴ Therefore, even had Petitioners addressed this factor, it is not apparent that they would have satisfied it.

In addition, we do not find that moving forward with the proceedings “will prove an obstacle to fair and efficient decisionmaking.” As Petitioners would have it, purported new and significant information from the Staff’s review of expedited spent-fuel transfer “easily” satisfies the standard under NEPA for supplementation of an environmental impact statement.²⁵ Petitioners therefore argue that “refus[al] to stay licensing decisions that are affected by that information would frustrate fair and effective decisionmaking under NEPA.”²⁶

Petitioners’ rulemaking petition is still pending, and as part of its review, the Staff will consider whether Petitioners truly have identified new and significant information.²⁷ Contrary to Petitioners’ assertions, NEPA does not require that we suspend our licensing decisions upon receipt of a “new and significant information” claim.²⁸ Such a requirement would render our decisionmaking “intractable.”²⁹ Rather, our rules provide a process to prepare supplemental draft or final environmental impact statements when the agency identifies new and significant information.³⁰ If, as part of its consideration of Petitioners’ rulemaking petition, the NRC determines that there is new and significant information associated with the expedited-transfer issue that requires supplementation under NEPA, we can address any affected environmental analyses as needed, and appropriately move forward with these proceedings in the meantime.³¹

²⁴ *Id.* at xii.

²⁵ Suspension Petition at 10.

²⁶ *Id.*

²⁷ See Notice, PRM-51-31, at 24,596. Therefore, we need not and do not decide here whether Petitioners have provided new and significant information.

²⁸ See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74 (1989).

²⁹ *Id.* at 373; see also *Massachusetts*, 708 F.3d at 81-82; *Pilgrim*, CLI-12-6, 75 NRC at 376.

³⁰ See 10 C.F.R. §§ 51.72, 51.92. Moreover, our adjudicatory rules are designed to promote fair and efficient resolution of disputes. See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998). Suspending a final decision indefinitely in an adjudicatory proceeding upon receipt of a claim of new and significant information runs counter to that goal. See *Pilgrim*, CLI-12-6, 75 NRC at 374-75 & n.140 (citing 5 U.S.C. § 558(c)); see also NINA Answer at 11; Tennessee Valley Authority’s Answer Opposing Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceedings Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Mar. 21, 2014) at 11-12 (TVA Answer).

³¹ See *Marsh*, 490 U.S. at 373; see also *Callaway*, CLI-11-5, 74 NRC at 175 (“Given that the NRC will have the opportunity to further consider the concerns that the rulemaking petitioners have expressed, and as we further consider actions related to the Japan events, we decline to suspend any proceeding pending resolution of the rulemaking petition.”).

Similarly, we find that moving forward with the proceedings will not “prevent appropriate implementation of any pertinent rule or policy changes.” Each of the captioned proceedings is affected by the suspension that we put in place after the United States Court of Appeals for the D.C. Circuit vacated and remanded our 2010 update to the Waste Confidence Decision and Temporary Storage Rule.³² Therefore, final licensing decisions are not likely for at least a few months.³³ Moreover, final decisions in some of the proceedings might be years down the road.³⁴ As we stated in response to other post-Fukushima suspension petitions, “[i]f the NRC determines that changes to its current environmental assessment rules are warranted, we can revisit whether an individual licensing review or adjudication should be held in abeyance pending the outcome of a relevant rulemaking.”³⁵ At this time, however, Petitioners have not shown compelling circumstances requiring us to suspend final licensing decisions in the captioned proceedings.³⁶

* * * * *

Finally, as noted above, the Staff has stated that it will address separately the rulemaking petitioners’ collateral request to suspend licensing decisions in all pending reactor licensing proceedings beyond those captioned here, as well as the requests to suspend the application of the generic environmental impact finding

³² See *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012); *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 66-67 (2012); see generally Draft Waste Confidence Generic Environmental Impact Statement, 78 Fed. Reg. 56,621 (Sept. 13, 2013).

Petitioners suggest that the situation here is analogous to our waste confidence suspension in CLI-12-16. See Suspension Petition at 4. We disagree. In issuing the suspension of final licensing decisions in those proceedings, we recognized that we could not move forward without first addressing the D.C. Circuit’s remand because the vacatur left a regulatory gap in the Part 51 regulations that undergird licensing reviews in those matters. See *Calvert Cliffs*, CLI-12-16, 76 NRC at 66-67. Here, in contrast, Petitioners seek revision of our existing rules, and no regulatory gap currently exists with regard to those provisions. See 10 C.F.R. § 51.71 (environmental impact statements in general); *id.* pt. 51, subpt. A, app. B (license renewal); see also *id.* § 51.95 (post-construction environmental impact statements).

³³ We expect to complete a final rule addressing long-term storage of spent fuel later this fall. See NRC Waste Confidence Update Schedule, <http://www.nrc.gov/waste/spent-fuel-storage/wcd/schedule.html> (last visited July 15, 2014).

³⁴ As some of the combined license applicants note in their answers, the Staff’s review schedule and projected issuance of final licensing decisions in those matters are to be determined. See, e.g., Dominion Answer at 5 (noting that the Staff “has not yet issued a schedule for further review or estimated the date for issuance of the [North Anna combined license]”); TVA Answer at 4-5 (noting that “review of the [Bellefonte] application is suspended, [so] there has not yet been a draft environmental impact statement issued and there is no target date for doing so”).

³⁵ *Callaway*, CLI-11-5, 74 NRC at 174.

³⁶ See *id.* at 174-75.

for spent fuel storage in 10 C.F.R. Part 51, Subpart A, Appendix B; all regulations approving the certified designs for new reactors with high-density spent fuel pool storage; and all environmental assessments considering severe accident mitigation design alternatives.³⁷ For the reasons set forth above, we exercise our inherent supervisory authority and direct the Staff to deny the request to suspend final decisions in all other pending reactor licensing proceedings. With respect to the remaining suspension requests (which are similar in nature to waiver requests), we direct the Staff to seek our approval if it determines that such suspension is necessary.³⁸

III. CONCLUSION

Petitioners have not shown a compelling reason to suspend the captioned proceedings pending the resolution of their February 18, 2014 rulemaking petition. Accordingly, we *deny* the suspension petitions. We also *direct* the Staff to deny the rulemaking petitioners' collateral request to suspend licensing decisions in all other pending reactor licensing proceedings and *direct* the Staff to seek our approval if it determines that suspension of our rules or the environmental assessments considering severe accident mitigation design alternatives is necessary.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of July 2014.

³⁷ See Notice, PRM-51-31, 79 Fed. Reg. at 24,596.

³⁸ See, e.g., "Generic Environmental Impact Statement for License Renewal of Nuclear Plants — Main Report" (Final Report), NUREG-1437, Vol. 1, Rev. 1 (June 2013), at 1-19 (explaining that, for license renewal reviews, the Staff will seek Commission approval to suspend application of the rule if new, generically applicable information "demonstrates that the analysis of an impact codified in the rule is incorrect").

APPENDIX

I. PETITIONS

1. *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), Beyond Nuclear, Don't Waste Michigan: Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014).
2. *Energys Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Hudson River Sloop Clearwater: Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014).
3. *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), Beyond Nuclear: Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014).
4. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 6 and 7), National Parks Conservation Association, Southern Alliance for Clean Energy: Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014).
5. *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), Friends of the Coast, New England Coalition: Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Mar. 1, 2014).
6. *Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), Public Citizen, SEED Coalition: Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014).
7. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), San Luis Obispo Mothers for Peace: Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-

- Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014).
8. *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), Ecology Party of Florida, Nuclear Information and Resource Service: Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014).
 9. *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant Units 3 and 4) (Louis Zeller of the Blue Ridge Environmental Defense League served the petition on the *Bellefonte* docket): Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014).
 10. *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2), Blue Ridge Environmental Defense League: Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014).
 11. *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), Southern Alliance for Clean Energy: Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014).
 12. *Virginia Electric and Power Co. d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative* (North Anna Power Station, Unit 3), Blue Ridge Environmental Defense League: Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014).

II. RESPONSIVE PLEADINGS

1. Served in all captioned proceedings: NRC Staff Answer Opposing Suspension Petition (Mar. 21, 2014).
2. *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3): DTE Response to Petition to Suspend Licensing Decision (Mar. 21, 2014).
3. *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3): Entergy's

Opposition to Clearwater's Petition to Suspend License Renewal Decision Pending Completion of Rulemaking (Mar. 21, 2014).

4. *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1): FirstEnergy Nuclear Operating Company Response to Petition to Suspend Licensing Decisions Pending Completion of Rulemaking (Mar. 21, 2014).
5. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 6 and 7): Answer of Florida Power & Light Company Opposing Petition to Suspend Licensing Proceedings (Mar. 21, 2014).
6. *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1): Answer of NextEra Energy Seabrook, LLC Opposing Petition to Suspend Licensing Proceedings (Mar. 21, 2014).
7. *Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4): Nuclear Innovation North America LLC Response to Petition to Suspend Licensing Decisions Pending Completion of Rulemaking (Mar. 21, 2014).
8. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2): Applicant's Response to Petition to Suspend Licensing Decision (Mar. 21, 2014).
9. *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2): Answer of Progress Energy Florida, Inc. Opposing Petition to Suspend Licensing Proceedings (Mar. 21, 2014).
10. *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4): Tennessee Valley Authority's Answer Opposing Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Mar. 21, 2014).³⁹
11. *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2): Tennessee Valley Authority's Answer Opposing Petition to Suspend Reactor Licensing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Mar. 21, 2014).
12. *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2): Tennessee Valley Authority's Answer Opposing Petition to Suspend Reactor Licens-

³⁹TVA served the same answer on the *Bellefonte*, *Sequoyah*, and *Watts Bar* dockets.

ing Decisions and Reactor Re-licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Mar. 21, 2014).

13. *Virginia Electric and Power Co. d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative* (North Anna Power Station, Unit 3): Dominion's Answer Opposing Petition to Suspend Licensing Proceedings (Mar. 21, 2014).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Anthony J. Baratta
Dr. Randall J. Charbeneau

In the Matter of

Docket No. 52-033-COL
(ASLBP No. 09-880-05-COL-BD01)

DETROIT EDISON COMPANY
(Fermi Nuclear Power Plant,
Unit 3)

July 7, 2014

This proceeding involves the combined license application of the DTE Electric Company (“Applicant”) to operate a new reactor, designated Unit 3, on its existing Fermi nuclear facility site near Newport City in Monroe County, Michigan. The Licensing Board determines that the following two related issues merit *sua sponte* review, and requests Commission approval, under 10 C.F.R. § 2.340(b), to undertake such review: (1) whether the building of offsite transmission lines intended solely to serve the new Fermi Unit 3 qualifies as a connected action under the National Environmental Policy Act (“NEPA”) and, therefore, requires the Staff to consider its environmental impacts as a direct effect of the construction of Fermi Unit 3; and (2) whether the Staff’s consideration of environmental impacts related to the transmission corridor, performed as a cumulative impact review, satisfied NEPA’s hard look requirement.

REGULATIONS: LIMITED WORK AUTHORIZATION

The NRC’s 2007 limited work authorization (“LWA”) rule revised 10 C.F.R. § 50.10 to narrow the scope of activities requiring permission from the NRC in the

form of an LWA by eliminating the concept of “commencement of construction” formerly described in section 50.10(c) and the authorization formerly described in section 50.10(e)(1). “Instead, under the final LWA rule, NRC authorization would only be required before undertaking activities that have a reasonable nexus to radiological health and safety and/or common defense and security for which regulatory oversight is necessary and/or most effective in ensuring reasonable assurance of adequate protection to public health and safety or common defense and security.” Final Rule: “Limited Work Authorizations for Nuclear Power Plants,” 72 Fed. Reg. 57,416, 57,426 (Oct. 9, 2007). Under the 2007 LWA rule, the building of transmission lines to serve a nuclear power plant is no longer classified as a construction activity and no longer requires authorization from the NRC. The agency’s NEPA regulations (10 C.F.R. Part 51) also exclude the building of transmission lines from the definition of “construction.”

NATIONAL ENVIRONMENTAL POLICY ACT: NRC RESPONSIBILITIES

The NRC Staff must comply with NEPA regardless of whether an intervenor has filed a timely contention challenging NEPA compliance.

RULES OF PRACTICE: *SUA SPONTE* REVIEW

Under 10 C.F.R. § 2.340(b), a licensing board may request Commission approval to consider the merits of a serious environmental issue that has not been put into controversy, even when it was excluded from the proceeding for procedural reasons. The regulation does not define what constitutes a serious environmental issue, leaving that determination to the presiding officer subject to the Commission’s approval.

NATIONAL ENVIRONMENTAL POLICY ACT: ENVIRONMENTAL IMPACT STATEMENT

“The centerpiece of environmental regulation in the United States, NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives.” *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 703 (10th Cir. 2009) (citing 42 U.S.C. § 4331(b)). When an agency proposes a major federal action significantly affecting the quality of the human environment, NEPA requires the preparation of an environmental impact statement (“EIS”) concerning the proposed action. The requirement to prepare an EIS is a procedural mechanism designed to assure that agencies

give proper consideration to the environmental consequences of their actions. However, NEPA does not require agencies to elevate environmental concerns over other appropriate considerations.

NATIONAL ENVIRONMENTAL POLICY ACT: SCOPE OF ENVIRONMENTAL ANALYSIS

The scope of an EIS is defined as “the range of actions, alternatives, and impacts to be considered in an environmental impact statement.” 40 C.F.R. § 1508.25. “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.” *Id.* § 1502.4(a). The proposed action that is the subject of the EIS must, therefore, include all connected actions.

NATIONAL ENVIRONMENTAL POLICY ACT: CONNECTED ACTIONS

The NRC has adopted the Council on Environmental Quality (“CEQ”) regulation (40 C.F.R. § 1508.25(a)(1)) defining connected actions as, in part, those separate actions that “[c]annot or will not proceed unless other actions are taken previously or simultaneously,” or “[a]re interdependent parts of a larger action and depend on the larger action for their justification.” In general, NEPA case law defines “connected actions” as those that lack “independent utility.” Projects lack independent utility when it would be irrational, or at least unwise, to build one without the other.

NATIONAL ENVIRONMENTAL POLICY ACT: SEGMENTATION

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.” *Town of Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988) (citing *City of West Chicago v. NRC*, 701 F.2d 632, 650 (7th Cir. 1983)). “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.’” *Id.* (quoting *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987)).

NATIONAL ENVIRONMENTAL POLICY ACT: RULE OF REASON

The NRC’s evaluation of a proposed action’s environmental effects “must

address all reasonably foreseeable environmental impacts . . . even if the probability of such an occurrence is low.” *Blue Ridge Environmental Defense League v. NRC*, 716 F.3d 183, 188 (D.C. Cir. 2013) (citing 40 C.F.R. § 1502.22(b)). NEPA requirements, however, are subject to a rule of reason, and an EIS need not address “remote and highly speculative consequences.” *Deukmejian v. NRC*, 751 F.2d 1287, 1300 (D.C. Cir. 1984) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)). The impacts that must be considered include both direct impacts, “which are caused by the action and occur at the same time and place,” and indirect impacts, “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8.

NATIONAL ENVIRONMENTAL POLICY ACT: INCOMPLETE AND UNAVAILABLE INFORMATION

When information relevant to a reasonably foreseeable environmental effect is incomplete or unavailable, 40 C.F.R. § 1502.22 requires an agency to obtain the unavailable information and include it in the EIS so long as the costs are not exorbitant. If the cost of obtaining the information is exorbitant, the agency must still include in the EIS a statement that the information is unavailable, the relevance of the unavailable information, a summary of existing credible scientific evidence, and the agency’s evaluation of the impacts that might be caused.

NATIONAL ENVIRONMENTAL POLICY ACT: CONSIDERATION OF ALTERNATIVES

An EIS must include a detailed statement of reasonable alternatives to the proposed action. The alternatives analysis is the “heart of the environmental impact statement.” “The existence of reasonable but unexamined alternatives renders an EIS inadequate.” *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998). The NRC’s NEPA regulation governing preparation of a Draft EIS directs that it “include a preliminary analysis that considers and weighs the environmental effects of the proposed action; the environmental impacts of alternatives to the proposed action; and alternatives available for reducing or avoiding adverse environmental effects” 10 C.F.R. § 51.71(d).

NATIONAL ENVIRONMENTAL POLICY ACT: CUMULATIVE IMPACTS

Activities excluded from the scope of the proposed action may still be relevant to the NRC’s NEPA analysis to the extent they affect the environmental baseline for the evaluation of cumulative impacts. Under CEQ regulations (40 C.F.R.

§ 1508.7), “cumulative impact” is defined as the “impact on the environment that results from the incremental impact of the [proposed] 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.”

NATIONAL ENVIRONMENTAL POLICY ACT: LIMITATION ON ACTION

Under 10 C.F.R. § 51.101(a), when an EIS is prepared under 10 C.F.R. § 51.20, “[n]o action concerning the proposal may be taken by the Commission which would (i) have an adverse environmental impact, or (ii) limit the choice of reasonable alternatives” until a record of decision has been issued. Also, “[a]ny action concerning the proposal taken by an applicant which would (i) have an adverse environmental impact, or (ii) limit the choice of reasonable alternatives may be grounds for denial of the license.” For separate activities, on the other hand, there is no obligation on the Commission to avoid regulatory action before the record of decision is issued that would allow the activity to proceed, regardless of its environmental impact or its effect on the range of alternatives. And the applicant may proceed with (or allow its contractor to proceed with) an activity outside the scope of the proposal that would have an adverse environmental impact or limit the choice of reasonable alternatives even though the NEPA review is ongoing or has not even begun.

NATIONAL ENVIRONMENTAL POLICY ACT: CONNECTED ACTION

In order for construction of the transmission corridor to constitute a connected action under 40 C.F.R. § 1508.25, three requirements must be met. First, the transmission corridor must be a proposed action rather than one that is merely conceivable. Second, the transmission corridor must lack independent utility; that is, its sole purpose must be serving Fermi Unit 3. Third, for an action such as the transmission corridor that will not be constructed by or expressly permitted by the federal agency preparing the EIS, there must be sufficient federal control and responsibility that the action qualifies as a federal action.

NATIONAL ENVIRONMENTAL POLICY ACT: PROPOSED ACTION

Under 40 C.F.R. § 1508.23, the fact that the NRC Staff declares the transmission lines to be a proposed action is significant because “[a] proposal may exist in fact as well as by agency declaration that one exists.”

NATIONAL ENVIRONMENTAL POLICY ACT: FUTURE FEDERAL ACTION

An action with potential impacts subsequent to the initial federal action may not constitute a proposed action if it is insufficiently certain.

NATIONAL ENVIRONMENTAL POLICY ACT: PROPOSED ACTION

Whether a project qualifies as a “proposal” is somewhat intertwined with the “independent utility” question. Section 1508.23 of 40 C.F.R. states that a “[p]roposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal.” Where the granting of a license makes the building of offsite transmission lines inevitable, an evaluation of their direct environmental impacts will only be meaningful if engaged in before the license issuance.

NATIONAL ENVIRONMENTAL POLICY ACT: FEDERAL ACTION

The requirement to prepare an EIS applies to “major Federal actions,” not to private or state actions. Thus, only those activities that have sufficient federal involvement to qualify as federal actions need be included in the scope of the proposed action evaluated in an EIS. But this does not necessarily mean that the action in question must be taken or expressly authorized by a federal agency. “[T]here are two alternative bases for finding that a non-federal project constitutes a ‘major Federal action’ such that NEPA requirements apply: (1) when the non-federal project restricts or limits the statutorily prescribed federal decision-makers’ choice of reasonable alternatives; or (2) when the federal decision-makers have authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project. If either test is satisfied, the non-federal project must be considered a major federal action. Both tests require a situation-specific and fact-intensive analysis.” *Southwest Williamson County Community Ass’n, Inc. v. Slater*, 243 F.3d 270, 281 (6th Cir. 2001).

LICENSE CONDITIONS: ENVIRONMENTAL RESTRICTIONS

The NRC may, consistent with the AEA and NEPA, impose environmental restrictions on transmission lines built to serve nuclear power plants should it

choose to do so. The NRC's regulations, including 10 C.F.R. §§ 50.36(b) and 51.107(a)(3), authorize the agency to impose environmental conditions in a license to prevent or mitigate adverse environmental impacts that might otherwise be caused by the construction or operation of a nuclear power plant.

NATIONAL ENVIRONMENTAL POLICY ACT: AGENCY RESPONSIBILITIES

An agency's narrowed construction of its statutory authority, as distinct from an express prohibition by Congress, may not be used to limit the agency's obligations under NEPA. "NEPA's legislative history reflects Congress's concern that agencies might attempt to avoid any compliance with NEPA by narrowly construing other statutory directives to create a conflict with NEPA. Section 102(2) of NEPA therefore requires government agencies to comply 'to the fullest extent possible.'" *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1213 (9th Cir. 2008) (quoting *Forelaws on Board v. Johnson*, 743 F.2d 677, 683 (9th Cir. 1985)). The Supreme Court has explained that this statutory directive was "neither accidental nor hyperbolic." *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 787 (1976). Thus, courts have held that NEPA obligations supplement existing statutory authority and "must be complied with to the fullest extent, unless there is a clear conflict of statutory authority." *Calvert Cliffs Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). In short, absent clear conflict an agency cannot interpret its way out of its NEPA responsibilities.

NATIONAL ENVIRONMENTAL POLICY ACT: CONNECTED ACTIONS

Multiple projects are often deemed connected actions despite being undertaken by separate entities. In fact, projects undertaken by separate entities may still be considered connected actions even in the absence of formal agreement between the parties. After all, "NEPA mandates a case-by-case balancing judgment on the part of federal agencies," not the private parties seeking federal action.

NATIONAL ENVIRONMENTAL POLICY ACT: ENVIRONMENTAL IMPACT STATEMENT (RESPONSE TO COMMENTS)

While NEPA does not require "an agency preparing an EIS to respond to EPA concerns, [an agency's] failure even to address them in the EIS at the very least brings into question the sufficiency of the agency's analysis." *Hammond v. Norton*, 370 F. Supp. 2d 226, 251 (D.D.C. 2005).

**NATIONAL ENVIRONMENTAL POLICY ACT: NRC
RESPONSIBILITIES**

The NRC Staff is responsible for defining the scope of the proposed action that is to be the subject of an EIS, and is instructed by 10 C.F.R. § 51.29(a)(1) to use 40 C.F.R. § 1502.4 for that purpose, which directs that “[p]roposals 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.” Section 51.45(c) of 10 C.F.R. does not alter that obligation or the obligation to include within the scope of the proposed action all connected actions as defined in 40 C.F.R. § 1508.25.

STATEMENT OF CONSIDERATIONS: STATUS

Courts regularly rely upon the preamble to an agency rule when interpreting that rule. Similarly, the Commission often refers to the NRC’s Statement of Considerations as an aid in interpreting the agency’s regulations. But the preamble, unlike the rule itself, does not have the force of law and, while it may be used to interpret any ambiguous text, it may not be used to expand the reach of the regulations.

**NATIONAL ENVIRONMENTAL POLICY ACT: PURPOSE OF
INQUIRY (TIMING)**

When an activity is excluded from the scope of a proposed action, the effect is to allow construction to begin — or even be completed — before the agency has completed its NEPA review. But NEPA’s purpose “is to influence the decision making process ‘by focusing the [federal] agency’s attention on the environmental consequences of a proposed project,’ so as to ‘ensure . . . that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.’” *Colorado Wild, Inc. v. U.S. Forest Service*, 523 F. Supp. 2d 1213, 1219 (D. Colo. 2007) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). “[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.” *Id.* (emphasis omitted) (quoting *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (Breyer, J.)). Thus, the NEPA analysis of the proposed action must be completed before, not after, construction begins.

NATIONAL ENVIRONMENTAL POLICY ACT: PURPOSE OF INQUIRY (AGENCY RESPONSIBILITIES)

An impact statement cannot fulfill its role of providing “a springboard for public comment” if it defers indefinitely and delegates to other agencies the duty to inform the public of the environmental impacts of the proposed action and potential measures to mitigate those impacts.

NATIONAL ENVIRONMENTAL POLICY ACT: INCOMPLETE AND UNAVAILABLE INFORMATION (INDEPENDENT INQUIRY BY FEDERAL AGENCY)

Section 1502.22 of 40 C.F.R. requires an agency to acquire information that is lacking if it is “essential to a reasoned choice” and “costs of obtaining it are not exorbitant.” If the costs are exorbitant, the regulation still requires the agency to state that the information is unavailable, explain the relevance of the unavailable information, summarize existing credible scientific evidence, and evaluate potential impacts. The regulation “clearly contemplates original research if necessary.” *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1249 (9th Cir. 1984). A determination of minimal environmental impact would make little sense when an agency lacks essential information and has not sought to compile it through independent research. To rule otherwise “would turn NEPA on its head, making ignorance into a powerful factor in favor of immediate action where the agency lacks sufficient data.” *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1334-35 (S.D. Ala. 2002).

NATIONAL ENVIRONMENTAL POLICY ACT: RELIANCE ON ANTICIPATED CERTIFICATIONS

Merely referencing an actual or anticipated certification by another agency fails to satisfy NEPA requirements. “Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment [from that required by NEPA]. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount. Their certification does not mean that they found no environmental damage whatever. In fact, there may be significant environmental damage (e.g., water pollution), but not quite enough to violate applicable (e.g., water quality) standards. Certifying agencies do not attempt to weigh that damage against the opposing benefits. Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh

the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action — the agency to which NEPA is specifically directed.” *Calvert Cliffs*, 449 F.2d at 1123.

NATIONAL ENVIRONMENTAL POLICY ACT: MITIGATION

Courts have held that an EIS must include “a serious and thorough evaluation of environmental mitigation options.” *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 178 (5th Cir. 2000). “Mitigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Id.* at 176-77 (quoting *Robertson*, 490 U.S. at 352).

NATIONAL ENVIRONMENTAL POLICY ACT: SEGMENTATION

The rule against segmentation seeks to avoid the problems that arise “when the environmental impacts of projects are evaluated in a piecemeal fashion and, as a result, the comprehensive environmental impacts of the entire Federal action are never considered or are only considered after the agency has committed itself to continuation of the project.” 72 Fed. Reg. at 57,427-28.

RULES OF PRACTICE: SUA SPONTE REVIEW

“Licensing boards have independent responsibilities in the realm of the enforcement of the NEPA command; *i.e.*, their role is not confined to the arbitration of those environmental controversies as may happen to have been placed before them by the litigants in the particular case.” *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-380, 5 NRC 572, 575 (1977). Though this responsibility has changed — now requiring Commission approval before a board may exercise its responsibility — the authority still exists, as the Commission has made clear.

RULES OF PRACTICE: SUA SPONTE REVIEW

Sua sponte authority cannot reasonably be limited to only a situation which involves a significant environmental impact of a type not considered previously and could destabilize an environmental resource or involves severe adverse environmental impacts. A serious environmental issue also exists when a Final EIS only cursorily deals with important environmental issues and concludes that impacts will be small based largely on unavailable and incomplete information and predicted future certifications from other agencies. A serious issue is also

presented when the Staff’s NEPA analysis significantly understates the scope of the proposed federal action, particularly when it does so on a basis that conflicts with the law of the federal judicial circuit where the new facility will be located.

NATIONAL ENVIRONMENTAL POLICY ACT: FINAL ENVIRONMENTAL IMPACT STATEMENT (LICENSING BOARD DECISION AS AMENDMENT)

When an FEIS is deficient in significant respects, a contested hearing may enable a Licensing Board to cure those deficiencies and thus bring the agency into compliance with NEPA and 10 C.F.R. Part 51. “Boards frequently hold hearings on contentions challenging the Staff’s final environmental review documents In such cases, ‘[t]he adjudicatory record and Board decision (and . . . any Commission appellate decisions) become, in effect, part of the FEIS.’” *Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), CLI-11-6, 74 NRC 203, 208-09 (2011) (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998) and *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705-07 (1985)). Thus, the Staff’s FEIS, along with the adjudicatory record, becomes the relevant record of decision for the environmental portion of the proceeding. Federal courts of appeal have approved of this process in which an EIS is effectively amended through the adjudicatory process.

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MEMORANDUM
(Determining That Issues Related to Intervenors' Proposed
Contention 23 Merit *Sua Sponte* Review Pursuant to
10 C.F.R. § 2.340(b) and Requesting Commission Approval)

Before the Licensing Board is the question we raised in our Order of April 30, 2013: whether Intervenors' proposed Contention 23, although untimely filed,

is appropriate for *sua sponte* Board review pursuant to 10 C.F.R. § 2.340(b).¹ Contention 23 alleged that the Staff’s Draft and Final Environmental Impact Statements for the Fermi Unit 3 project failed to adequately evaluate the environmental impacts of the new high-voltage transmission line corridor that will be constructed to serve the Project. For the reasons explained below, the Board determines that two issues arising from the contention merit *sua sponte* review.² The Board therefore respectfully requests that the Commission approve the Board’s determination that *sua sponte* review is warranted pursuant to section 2.340(b).

I. BACKGROUND

A. The Fermi 3 Transmission Corridor

This combined license (“COL”) contested proceeding involves the application of DTE Electric Company (formerly the Detroit Edison Company) (“Applicant” or “DTE”) under 10 C.F.R. Part 52, Subpart C, to construct and operate a GE-Hitachi Economic Simplified Boiling Water Reactor (“ESBWR”), designated Unit 3, on its existing Fermi nuclear facility site in Monroe County, Michigan.³

Fermi Unit 3 will require the construction and operation of transmission lines to connect it to the grid. The Final Environmental Impact Statement (“FEIS”) explains the current status of plans for the transmission lines and the transmission corridor⁴ in which the lines will be located:

ITC Transmission has not yet formally announced a route for the offsite portion of the proposed new transmission line serving Fermi 3. Detroit Edison expects that the proposed new transmission line would be built within the existing Fermi 2 transmission corridor for approximately 18.6 mi extending outward from the Fermi site boundary. Detroit Edison expects that the remaining 10.8 mi, extending to the Milan Substation, would be built within an undeveloped right-of-way (ROW) possessed but not yet used by ITC Transmission.⁵

¹ Licensing Board Order (Denying Intervenors’ Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or Its Admission as a New Contention, and for Admission of New Contentions 26 and 27), at 22-24 (Apr. 30, 2013) (unpublished) [hereinafter Denial Order].

² The two specific issues are identified *infra* Section II.

³ Letter from Jack M. Davis, DTE, to NRC, Detroit Edison Company Submittal of a Combined License Application for Fermi 3 (NRC Project No. 757) (Sept. 18, 2008) (ADAMS Accession No. ML082730763).

⁴ We will refer to the transmission lines and the corridor in which they will be constructed as “the transmission corridor.”

⁵ Division of New Reactor Licensing, Office of New Reactors, Final Environmental Impact Statement for the Combined Licensed (COL) for Enrico Fermi Unit 3, NUREG-2015, at 2-10 (Jan. 2013) [hereinafter FEIS] (citations omitted).

The FEIS estimates the total acreage to be occupied by the new transmission corridor as 1069.2 acres, assuming a 300-foot-wide corridor.⁶ The FEIS states that the Fermi 3 site includes 1260 acres.⁷ The latter figure includes the entire Fermi tract owned by DTE, including, but not limited to, the land where Fermi Unit 3 would be constructed.⁸ The FEIS further reports:

The western 10.8-mi segment of the proposed transmission corridor, which does not follow previously cleared and regularly maintained corridors, crosses a mosaic of pastures and forest, including forested wetlands, shrub/scrub, cropland, and developed land. Forested and emergent wetlands are present, and three wetlands extend more than 900 ft along the corridor. It is possible that towers may need to be placed in these wetlands in order to construct crossings. The proposed Milan Substation site is located entirely in an area of cropland and planted grassland.⁹

B. The Draft Environmental Impact Statement

On October 28, 2010, the NRC Staff and the U.S. Army Corps of Engineers (“USACE” or “the Corps”) published the Draft Environmental Impact Statement (“DEIS”) for the Fermi Unit 3 COL.¹⁰ The DEIS states that the new transmission corridor for Fermi Unit 3 will be built and operated by ITC Transmission.¹¹ ITC Transmission operated as a wholly owned subsidiary of DTE until 2004.¹²

The DEIS further explained that the NRC categorizes the construction of transmission lines as a “preconstruction activity.”¹³ Preconstruction activities include various actions required to construct a nuclear power plant that, as the result of changes to agency regulatory policy made by the 2007 limited work authorization rule (“2007 LWA Rule”), the NRC now defines as outside its regulatory authority and therefore not part of the NRC action to license the proposed new plant.¹⁴ Such preconstruction activities include, in addition

⁶ FEIS at 2-47 (Table 2-7).

⁷ *Id.* at 2-5.

⁸ *Id.*

⁹ *Id.* at 2-46 to 2-47 (citations omitted).

¹⁰ Office of New Reactors, Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3, NUREG 2015, Vol. 1 (Oct. 2011) (ADAMS Accession No. ML11287A108) [hereinafter DEIS].

¹¹ *Id.* at 2-10.

¹² Applicant’s Brief Opposing Sua Sponte Review of Environmental Impacts in the Offsite Transmission Corridor (May 30, 2013), unnumbered attach. at 2 (Affidavit of Peter Smith on Transmission Corridor Topics (May 30, 2013) [hereinafter Smith Affidavit]) [hereinafter Applicant Brief].

¹³ DEIS at 1-6.

¹⁴ *Id.* (citing Final Rule: “Limited Work Authorizations for Nuclear Power Plants,” 72 Fed. Reg. 57,416 (Oct. 9, 2007)).

to the construction of transmission lines, “clearing and grading, excavating, dredging, discharge of fill, erection of support buildings . . . , and other associated activities.”¹⁵ Because preconstruction activities are no longer included within the scope of the proposed NRC action, the Staff concluded it was not required to evaluate their impacts as a direct effect of the NRC action. “Rather, the impacts of the preconstruction activities are considered in the context of cumulative impacts.”¹⁶

C. The NRC’s Changing Position on Its Authority to Impose Environmental Restrictions on Transmission Lines That Serve Nuclear Power Plants

The Commission’s position on the regulation of transmission lines for nuclear power plants has changed over several decades.

Prior to the 1969 enactment of [the National Environmental Policy Act (“NEPA”)], the Commission perceived its duties under the Atomic Energy Act primarily in terms of protecting the public from radiation hazards. NEPA, however, made “environmental protection a part of the mandate of every federal agency and department (The Commission) is not only permitted, but compelled, to take environmental values into account” in carrying out its regular functions. Under NEPA, federal agencies must “use all practicable means” to avoid environmental “degradation” to the extent consistent with “other essential considerations of national policy.” Thus, in the early 1970’s the Commission began to consider the environmental implications of proposed nuclear facilities.¹⁷

In 1972, following enactment of NEPA,¹⁸ the Commission adopted a major amendment to the definition of construction in 10 C.F.R. § 50.10(c) that generally prohibited, absent an NRC construction permit, “any clearing of land, excavation, or other substantial action that would adversely affect the natural environment of a site and construction of non-nuclear facilities (such as turbogenerators and turbine buildings) for use in connection with the facility. . . .”¹⁹ This prohibition ensured that environmentally damaging activities related to construction of a new nuclear power plant would not occur before the agency’s EIS was completed and the agency had balanced the benefits of all aspects of the project against

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Detroit Edison Co. v. NRC*, 630 F.2d 450, 451 (6th Cir. 1980) (footnote and citations omitted) (quoting *Calvert Cliffs Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) and 42 U.S.C. § 4331(b)).

¹⁸ National Environmental Policy Act of 1969, 42 U.S.C § 4321 (2012).

¹⁹ 37 Fed. Reg. 5745, 5748 (Mar. 21, 1972).

their environmental costs. The Commission explained that this expansion of its permitting authority was

consistent with the direction of the Congress, as expressed in Section 102 of the NEPA, that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in that Act. Since site preparation constitutes a key point from the standpoint of environmental impact, in connection with the licensing of nuclear facilities and materials, these amendments will facilitate consideration and balancing of a broader range of realistic alternatives and provide a more significant mechanism for protecting the environment during the earlier stages of a project for which a facility or materials license is being sought.²⁰

Thus, “[b]y 1974, the Commission had adopted an aggressive approach to its environmental responsibilities in the context of transmission line siting.”²¹ In that year, an Atomic Safety and Licensing Appeal Board, rejecting a legal challenge by Detroit Edison, ruled that the Commission could, as a condition of licensure, insist that offsite transmission lines built solely to serve a nuclear facility be designed to minimize environmental disturbance.²² The United States Court of Appeals for the Sixth Circuit, whose jurisdiction includes Michigan, subsequently upheld the Commission’s policy.²³

In 2007, however, the NRC altered its regulatory approach, stating that changes were needed to allow some non-safety-related activities to begin earlier than allowed under the regulations then in effect.²⁴ The preamble to the 2007 LWA Rule explains:

[T]he nuclear power industry has reviewed the overall construction process based upon lessons learned from the construction and licensing process used for currently operating reactors. The industry submitted what is essentially a petition for rulemaking seeking changes to the LWA process, reflecting those lessons learned and their understanding of the current state of NEPA law. The NRC has reviewed the applicable law, and for the reasons stated elsewhere in this [statement of considerations], agrees with the petitioner that the current definition of construction and the current LWA requirements in § 50.10 are not compelled by NEPA or the Atomic Energy Act (AEA) of 1954, as amended. While the agency’s regulations on construction and LWAs were a reasonable implementation of NEPA as understood in 1972, the NRC believes that, with more than 30 years experience in implementing NEPA and the

²⁰ *Id.* at 5746.

²¹ *Detroit Edison*, 630 F.2d at 451.

²² *Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936 (1974).

²³ *Detroit Edison*, 630 F.2d at 450.

²⁴ 72 Fed. Reg. at 57,426.

evolving jurisprudence, the time is appropriate for reconsideration and revamping of these NRC requirements.²⁵

Accordingly, the 2007 LWA Rule revised 10 C.F.R. § 50.10 and made conforming changes in 10 C.F.R. Parts 2, 51, and 52. The rule narrowed the scope of activities requiring permission from the NRC in the form of an LWA by eliminating the concept of “commencement of construction” formerly described in section 50.10(c) and the authorization formerly described in § 50.10(e)(1).²⁶

Instead, under the final LWA rule, NRC authorization would only be required before undertaking activities that have a reasonable nexus to radiological health and safety and/or common defense and security for which regulatory oversight is necessary and/or most effective in ensuring reasonable assurance of adequate protection to public health and safety or common defense and security.²⁷

Thus, the building of transmission lines to serve a nuclear power plant is no longer classified as a construction activity and no longer requires authorization from the NRC.²⁸ The agency’s NEPA regulations (10 C.F.R. Part 51) also exclude the building of transmission lines from the definition of “construction.”²⁹

An NRC Staff member, commenting on the proposed 2007 LWA Rule, contended that the proposal was inconsistent with NEPA:

The impacts of the construction of a nuclear power plant that NRC now proposes to exclude from NRC regulations are probably 90 percent of the true environmental impacts of construction. Before even talking to the NRC, a power company can clear and grade the land, build roads and railroad spurs, erect permanent and temporary buildings, build numerous plant structures (e.g., cooling water intake and discharge, cooling towers), and build switchyards and transmission lines. After potentially doing all of that, THEN the company would come to the NRC and ask permission to build the power plant for which all of this work was done. How does this comply with NEPA?³⁰

In response, the NRC stated that

the pre-construction private actions of clearing, grading, access road construction, etc., will be considered in the cumulative impacts analysis in the LWA EIS as the

²⁵ *Id.* at 57,420.

²⁶ *Id.* at 57,426.

²⁷ *Id.*

²⁸ 10 C.F.R. § 50.10(a)(2)(vii).

²⁹ *Id.* § 51.4(1)(ii)(G).

³⁰ 72 Fed. Reg. at 57,420.

baseline for analyzing the environmental impacts associated with the Federal action authorizing LWA activities. This information will be used when evaluating the environmental impacts of construction and operation of the proposed nuclear power plant.³¹

D. Contention 23

Intervenors filed a number of proposed new contentions in response to the DEIS. Among these was proposed Contention 23, which alleged that:

The high-voltage transmission line portion of the project involves a lengthy corridor which is inadequately assessed and analyzed in the Draft Environmental Impact Statement.³²

Intervenors claimed that the DEIS's discussion of "the environmental impacts to the approximately 1,000 acres of transmission corridor is deficient in a host of ways."³³ For example, Intervenors emphasized that substantial construction will take place in undeveloped wetlands, forests, and grasslands:

NRC reports that "the final western 10.8 miles of transmission lines would be built in an undeveloped segment of an existing transmission ROW Some transmission tower footings were installed there as part of earlier plans but were never used." NRC reports that the proposed new Fermi 3 transmission line corridor would cross open water, deciduous forest, evergreen forest, mixed forest, grassland, 93.4 acres of woody wetlands, and 13 acres of emergent herbaceous wetland. (Table 2-7, Vegetative Cover Types in the Proposed 29.4-mi Transmission Corridor, page 2-46). This shows what is at stake — major impacts, or perhaps even complete destruction, to irreplaceable habitat, vital for the viability of endangered and threatened species, as well as overall ecosystem health. . . . DEIS Table 4-2 repeats the sensitive vegetative cover forms at risk from the proposed Fermi 3 transmission corridor: 170 acres of deciduous forest, 74 acres of woody wetlands, and 9 acres of herbaceous emergent wetlands.³⁴

Intervenors maintained that the DEIS failed to adequately assess the impacts to these areas. For example, they criticized the DEIS for failing to provide any

³¹ *Id.*

³² Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24, at 41 (Jan. 11, 2012).

³³ *Id.*

³⁴ *Id.* at 44-45.

quantitative information about impacts to wetlands, such as the acreage that will be filled and/or destroyed.³⁵

Intervenors also stressed potential impacts to threatened and endangered species:

NRC's DEIS section 2.4.1.4 Important Terrestrial Species and Habitats — Transmission Lines (page 2-60) also reports the high biological stakes. Important species may occur along transmission lines, "but because the exact route of the corridor has not been finally determined, no surveys have yet been conducted to confirm the presence of any species." . . . [T]able 2-9 (page 2-61) shows state-listed and federally-listed species which inhabit the counties (Monroe, Washtenaw, Wayne) that would be crossed, including over 80 plant species, 8 insect species, 2 amphibian species, 4 reptile species (including the Eastern Fox Snake), a dozen bird species, and 2 mammal species. The Michigan Dept. of Natural Resources (MDNR/now DNRE) has not provided concurrence for the project to proceed, because DTE has provided no details about the transmission line corridor route for determining the damage that would be done to threatened and endangered species and their habitats. MDNR has identified five State-listed species likely present on the Fermi site, which could also be present along the proposed Fermi 3 transmission corridor. In addition to all of the above, the U.S. Fish and Wildlife Service has identified the eastern massasauga snake as a candidate species potentially inhabiting Washtenaw and Wayne Counties, and thus, at risk along the proposed new transmission corridor.³⁶

Intervenors argued that the DEIS failed to provide sufficient information concerning transmission corridor impacts on threatened and endangered species.³⁷

Intervenors further argued that maintenance of the transmission corridor will continue to impact wetlands and other environmental resources after construction is completed. They noted that, according to the DEIS, "[d]uring operation of Fermi 3, the power transmission line system would need to be maintained free of vegetation by ITC Transmission. Vegetation removal activities would include trimming and application of herbicides periodically and on an as-needed basis along the transmission line corridor."³⁸ Intervenors complained of the failure to analyze the environmental consequences of these actions:

It is clear that the deforestation will be an indefinitely long, or even permanent, condition. Although herbicides designed for use in wetlands are mentioned, no specifics are given. The impact of these biocides on species inhabiting the corridor is thus impossible to analyze, given the lack of specificity. The downgrade in the

³⁵ *Id.* at 45.

³⁶ *Id.* at 45-46.

³⁷ *Id.* at 44-48.

³⁸ *Id.* at 49 (quoting DEIS at 3-31).

ecological quality and quantity (or even permanent loss and complete destruction) of forested wetlands in an extended area along the Fermi 3 transmission line corridor is a major ecosystem impact, which currently goes unreflected.³⁹

E. The Board's Ruling on Proposed Contention 23

In its June 12, 2012 Order ruling on the DEIS contentions, the Board agreed with DTE and the Staff that proposed Contention 23 was untimely because the deficiencies intervenors alleged were also present in DTE's Environmental Report. Thus, intervenors had failed to establish that the contention was based on any data or conclusions in the DEIS that are significantly different from those in the ER.⁴⁰

The Board stated, however, that while Contention 23 was untimely, "it raises substantial questions concerning the adequacy of the DEIS that the NRC Staff should carefully consider in preparing the FEIS."⁴¹ Intervenor criticized the DEIS for, among other things, an inadequately defined route for the corridor,⁴² a failure to identify endangered or threatened species along the corridor,⁴³ an inadequate discussion of impacts on wetlands and vegetation,⁴⁴ and a failure to adequately investigate historic or cultural resources that may be affected.⁴⁵ The Board concluded that, "[g]iven the very limited analysis in the DEIS of [the environmental impacts] arising from the transmission line corridor, these claims may have been admissible had they been filed in a timely manner."⁴⁶

The Board further observed that, even though the transmission corridor is a preconstruction activity and therefore not included in the COL application, construction and maintenance of the transmission corridor are sufficiently closely connected with Fermi Unit 3 that its environmental consequences must be fully analyzed in the FEIS as direct impacts of the proposed action.⁴⁷ Because the Staff must comply with NEPA regardless of whether intervenors filed a timely contention, the Board recommended that "the NRC Staff consider the issues raised by intervenors when it prepares the FEIS."⁴⁸

³⁹ *Id.* at 48.

⁴⁰ LBP-12-12, 75 NRC 742, 775-76 (2012).

⁴¹ *Id.* at 776.

⁴² *Id.* at 777-78.

⁴³ *Id.* at 776-77.

⁴⁴ *Id.* at 776-78.

⁴⁵ *Id.* at 778.

⁴⁶ *Id.*

⁴⁷ *Id.* at 778-80.

⁴⁸ *Id.* at 780.

F. EPA Comments on the DEIS

The Board was not alone in recommending that transmission corridor impacts be fully evaluated in the FEIS as direct impacts of the proposed action. Like the Board, the United States Environmental Protection Agency (“EPA”) concluded that, even though the NRC may regard preconstruction activities as outside the scope of the COL application, “these activities are within the scope of the NEPA review because they are all connected actions, per 40 CFR 1508.25(a)(1)(iii).”⁴⁹ Specifically addressing the DEIS’s failure to analyze the construction of the transmission lines and the expansion of the substation as direct impacts of the proposed action, EPA commented:

Transmission Lines and Substation

EPA understands that NRC analyzes impacts from the lengthening of the transmission lines and expansion of the Milan Substation as cumulative impacts and outside the scope of the COL permit application and accompanying NEPA document. However, per NEPA, EPA views these actions as connected to the granting of the license and, therefore, should be analyzed as direct impacts as a result of the proposed-action. The Draft EIS even acknowledges the connectedness of the building of Fermi 3 and the expansion of the Substation on page 3-17, lines 31-21, among other locations: “The 350-ft-by-ft-500-ft Milan Substation may be expanded to an area about 1000 ft by 1000 ft to accommodate the Fermi 3 expansion (Detroit Edison 2011 b).” Therefore, because the lengthening of the transmission lines and the expansion of the Substation are only necessitated by granting the COL license for Fermi 3, the Final EIS should analyze impacts from these two actions as direct impacts.

Recommendation: The Final EIS should analyze the construction of the transmission lines and the expansion of the Substation as actions part of the proposed action; any unavoidable impacts should be accounted and mitigated for.⁵⁰

EPA also expressed concern

about the amount of habitat lost in the transmission corridor and due to the proposed expansion of the Substation, at 1,069 and 21 acres, respectively. As outlined under Transmission Corridor and Substation, EPA views these developments as connected actions. Therefore, estimated impacts should be considered when preparing mitigation plans. This includes wetlands mitigation ratios.⁵¹

⁴⁹Letter from Kenneth Westlake, EPA, to Cindy Bladley, NRC, Re: Draft Environmental Impact Statement for the Combined License (COL) for Enrico Fermi Unit 3, Monroe County, Michigan, CEQ# 20110364, attach. 1, at 2 (Jan. 10, 2012) (ADAMS Accession No. ML12023A034).

⁵⁰*Id.* at 14.

⁵¹*Id.* at 7.

G. The Final Environmental Impact Statement

The FEIS for the Fermi Unit 3 COL was published in January 2013.⁵² As it had done in the DEIS, the Staff defined the construction of the transmission corridor as a “preconstruction activity.”⁵³ Again relying upon the 2007 LWA Rule, the Staff maintained that the NRC lacks regulatory authority over construction of the transmission corridor because it is a preconstruction activity.⁵⁴ The Staff again stated that “[b]ecause the preconstruction activities are not part of the NRC action, their impacts are not reviewed as a direct effect of the NRC action. Rather, the impacts of the preconstruction activities are considered in the context of cumulative impacts.”⁵⁵ With respect to the environmental impacts raised by proposed Contention 23, the analysis in the FEIS is much like that in the DEIS.

In its comments on the FEIS, the EPA reiterated its earlier criticism, stating that “impacts resulting from the construction and maintenance of the new transmission lines and substations should be considered as direct impacts and mitigated for as part of the proposed project. Total impacts are estimated to be over 1000 acres of habitat, including over 93 acres of impacts to forested wetlands.”⁵⁶

H. The Board’s Ruling on Resubmitted Contention 23

On February 19, 2013, Intervenors resubmitted proposed Contention 23, together with various other new and resubmitted contentions filed in response to the FEIS.⁵⁷ Intervenors summarized their claim as follows:

The FEIS for a combined operating license for Fermi 3 fails to satisfy the requirements of NEPA because it does not address the environmental effects of the associated transmission line corridor extending nearly thirty (30) miles from the proposed plant site, despite the fact that the transmission lines are indispensable to completion of the power plant project, and the NRC Staff was ordered to analyze the transmission corridor within the FEIS by the Atomic Safety and Licensing Board. The FEIS fails to disclose what the U.S. Army Corps of Engineers has determined to be the least environmentally damaging practical alternatives (LEDPA) under

⁵² FEIS at i.

⁵³ *Id.* at 1-6.

⁵⁴ *Id.* at 1-6 to 1-7.

⁵⁵ *Id.* at 1-7.

⁵⁶ Letter from Kenneth Westlake, EPA, to Cindy Bladley, NRC, Re: Comments on the Final Environmental Impact Statement for the Combined License for Enrico Fermi Unit 3, Monroe County, Michigan, CEQ No. 20130006, attach. 1, at 1 (Feb. 19, 2013) (ADAMS Accession No. ML13063A434) [hereinafter EPA Comments on FEIS].

⁵⁷ Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of the New Contentions 26 and 27 (Feb. 19, 2013).

the Clean Water Act, for some 30 jurisdictional wetlands and other water bodies within the transmission corridor, and there is no detailed discussion of mitigation measures which would be implemented to compensate for the water resource and upland damage.⁵⁸

The Board again rejected Contention 23 as untimely. But the Board also concluded that, because the FEIS had been issued and the Board had ruled that Contention 23 remains procedurally defective, this was an appropriate point for Board consideration of whether Contention 23 merits *sua sponte* review under 10 C.F.R. § 2.340(b).⁵⁹ The Board allowed the parties to file briefs on the issue. Intervenors supported *sua sponte* review, while DTE and the Staff opposed it.⁶⁰

II. BOARD DETERMINATION, SUPPORTING ANALYSIS, AND REQUEST FOR COMMISSION APPROVAL

The Board has determined that the following two related issues arising from Contention 23 merit *sua sponte* review, and requests Commission approval to undertake such review:

- (1) Whether the building of offsite transmission lines intended solely to serve the new Fermi Unit 3 qualifies as a connected action under NEPA and, therefore, requires the Staff to consider its environmental impacts as a direct effect of the construction of Fermi Unit 3.
- (2) Whether the Staff's consideration of environmental impacts related to the transmission corridor, performed as a cumulative impact review, satisfied NEPA's hard look requirement.

Below, we explain the reasons that support our determination. First, we discuss the regulatory standard for *sua sponte* review. Second, we review the NEPA requirements most relevant to the environmental analysis of the transmission corridor. Next, we analyze the two specific issues and explain why they raise serious legal and factual questions that merit further review by the Board. Finally, we explain why the issues we have determined to be appropriate for *sua sponte* review can be distinguished from those likely to arise in the ordinary case. On

⁵⁸ *Id.* at 22.

⁵⁹ Denial Order at 21-24.

⁶⁰ See Intervenors' Memorandum in Support of Sua Sponte ASLB Referral of Transmission Line Corridor NEPA Compliance Issue at 1 (May 30, 2013). See also Applicant Brief at 1; NRC Staff Response to Board Order Concerning Proposed Sua Sponte Review of Contention 23, at 2 (May 30, 2013) [hereinafter Staff Response].

the basis of this analysis, the Board respectfully requests that the Commission approve its determination.

A. The Standard for *Sua Sponte* Review

Under 10 C.F.R. § 2.340(b), a licensing board may request Commission approval to consider the merits of a serious environmental issue even when, as with Contention 23, it was excluded from the proceeding for procedural reasons.⁶¹ This *sua sponte* regulation provides that the presiding officer shall

make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer⁶²

The regulation does not define what constitutes a serious environmental issue, leaving that determination to the presiding officer subject to the Commission's approval.

Section 2.340(b)'s predecessor, unlike the current version, did not require Commission approval before a presiding officer could exercise *sua sponte* authority. It did, however, instruct presiding officers that their *sua sponte* review authority should only be used "sparingly" and in "extraordinary circumstances."⁶³ These terms were removed from the regulation in 1979.⁶⁴ The Commission subsequently stated, in a 1998 policy statement, that licensing boards should only use *sua sponte* review in extraordinary circumstances,⁶⁵ but the terms "sparingly" and "extraordinary circumstances" have never been reinserted into the regulations.⁶⁶

⁶¹ See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-79, 16 NRC 1116, 1119 (1982).

⁶² 10 C.F.R. § 2.340(b)(1).

⁶³ 10 C.F.R. § 2.760a (1979) ("Matters not put into controversy by the parties will be examined and decided by the presiding officer only in extraordinary circumstances where he determines that a serious safety, environmental, or common defense and security matter exists. This authority is to be used sparingly.")

⁶⁴ See 44 Fed. Reg. 67,088 (Nov. 23, 1979) (stating that the "amended rules eliminate an apparent constraint on boards").

⁶⁵ *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22-23 (1998) (stating that *sua sponte* "authority is to be exercised only in extraordinary circumstances").

⁶⁶ In 1984, the NRC published a series of proposals developed by a Regulatory Reform Task Force that included reinsertion of the word "sparingly" and a requirement that any proposed use of *sua sponte* review be approved by a licensing board established to screen such proposals, though "[t]he

(Continued)

In 2004, the Commission “codif[ie]d] *appropriate* portions of the [1998] Policy Statement,” noting that the statement was developed “as a foundation for possible rule changes.”⁶⁷ The 2004 rule codified the requirement that licensing boards request approval from the Commission prior to conducting *sua sponte* review of a matter not put into controversy.⁶⁸ Notably absent, however, was any requirement that the presiding officer’s determination or the Commission’s approval be limited to issues presenting “extraordinary circumstances.” Evidently the Commission concluded that that particular aspect of the 1998 policy statement was not “appropriate” for inclusion in the new rule.

The 2012 rule revision, which clarified that *sua sponte* authority extends to Board review of combined license applications, states only that review “is limited to . . . serious matters not put into controversy by the parties that concern safety, common defense and security, or the environment that the Commission has approved for review upon the presiding officer’s referral of the matter.”⁶⁹ Again, there is no requirement of “extraordinary circumstances.”

Given the historical development of the *sua sponte* provision and that Commission approval is now required prior to *sua sponte* consideration of an issue, the Commission is not constrained to approve only those issues that arise under “extraordinary circumstances.” Still, a request to engage in *sua sponte* review should not be undertaken lightly. And it has not been. Recent years have seen sparing use of *sua sponte* review.⁷⁰ In 2011, in what would have been the first such request in 20 years, all members of the Licensing Board in *Shaw AREVA MOX Services* determined that extraordinary circumstances existed such that *sua sponte* review would have been warranted had the serious safety issue raised been deemed untimely.⁷¹ Here also, the issues we have determined to be appropriate

individual proposals [were] not Commission proposals.” See 49 Fed. Reg. 14,698, 14,703 (Apr. 12, 1984) (“Section 2.760a is revised to revoke the 1979 relaxation of the *sua sponte* rule for review of uncontested matters by adjudicatory boards. Experience under the relaxed standard has indicated that issues have been raised *sua sponte* which do not warrant such consideration. . . . the *sua sponte* authority of presiding officers to raise new issues will be limited to extraordinary circumstances and is to be used sparingly.”). This document did not, as NRC Staff suggest, constitute a revocation of the 1979 rule change. Staff Response at 6 n.19. Two years later, the Commission published a proposed rule that “identified five proposals which merit continued consideration for possible inclusion in . . . the Commission’s Rules of Practice,” none of which addressed *sua sponte* review. 51 Fed. Reg. 24,365, 24,366 (July 3, 1986).

⁶⁷ 69 Fed. Reg. 2182, 2182, 2186 (Jan. 14, 2004) (emphasis added).

⁶⁸ *Id.* at 2210.

⁶⁹ 77 Fed. Reg. 46,562, 46,584 (Aug. 3, 2012).

⁷⁰ *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-11-9, 73 NRC 391, 422 (2011) (J. McDade, dissenting) (noting that “no Board has attempted to invoke *sua sponte* review in the past 20 years”).

⁷¹ *Id.* at 412, 422.

for *sua sponte* review are “extraordinary” in that they differ from those likely to arise in the ordinary case.⁷²

B. NEPA Requirements

“The centerpiece of environmental regulation in the United States, NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives.”⁷³ When an agency proposes a major federal action significantly affecting the quality of the human environment, NEPA requires the preparation of an EIS concerning the proposed action.⁷⁴ The requirement to prepare an EIS is a procedural mechanism designed to assure that agencies give proper consideration to the environmental consequences of their actions.⁷⁵ However, NEPA does not require agencies to elevate environmental concerns over other appropriate considerations.⁷⁶

The following NEPA requirements are particularly relevant here.

1. The Scope of an EIS

The “scope” of an EIS is defined as “the range of actions, alternatives, and impacts to be considered in an environmental impact statement.”⁷⁷ The NRC regulation governing the scope of the EIS states that the agency should use the provisions of a CEQ regulation, 40 C.F.R. § 1502.4, for that purpose.⁷⁸ Section 1502.4 in turn directs that

[a]gencies 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.⁷⁹

⁷² See *infra* Section II.E.

⁷³ *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 703 (10th Cir. 2009) (citing 42 U.S.C. § 4331(b) (congressional declaration of national environmental policy); *Department of Transportation v. Public Citizen*, 541 U.S. 752, 756-57 (2004); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989); and *Forest Guardians v. U.S. Forest Service*, 495 F.3d 1162, 1172 (10th Cir. 2007)).

⁷⁴ 42 U.S.C. § 4332.

⁷⁵ See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

⁷⁶ *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980).

⁷⁷ 40 C.F.R. § 1508.25.

⁷⁸ 10 C.F.R. § 51.29(a)(1).

⁷⁹ 40 C.F.R. § 1502.4(a).

Under the referenced CEQ regulation, the proposed action that is the subject of the EIS must include all “connected actions.”⁸⁰ The definition of “connected actions” in section 1508.25 is also adopted by 10 C.F.R. § 51.14(b). Under section 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.”⁸¹ Thus, all connected actions as defined in section 1508.25 must be included within the scope of the proposed action evaluated in the NRC’s FEIS.

In general, NEPA case law defines “connected actions” as those that lack “independent utility.”⁸² The Sixth Circuit applies that test.⁸³ Projects lack independent utility when it would be irrational, or at least unwise, to build one without the other.⁸⁴ For example, the Ninth Circuit held that the construction of a road to facilitate logging and the sale of timber from the logging were “connected actions” that had to be addressed in a single EIS.⁸⁵ The court pointed out that “the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales.”⁸⁶

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.”⁸⁷ “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.’”⁸⁸

⁸⁰ *Id.* § 1508.25(a)(1).

⁸¹ *Id.* § 1508.25(a)(1)(ii) and (iii). NRC’s NEPA regulations specifically adopt this definition. *See* 10 C.F.R. § 51.14(b).

⁸² *See Society Hill Towers Owners’ Ass’n v. Rendell*, 210 F.3d 168, 181 (3d Cir. 2000) (collecting cases); *Northwest Resource Information Center, Inc. v. National Marine Fisheries Service*, 56 F.3d 1060, 1067-69 (9th Cir. 1995) (collecting cases).

⁸³ *Communities, Inc. v. Busey*, 956 F.2d 619, 627 (6th Cir. 1992).

⁸⁴ *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

⁸⁵ *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985).

⁸⁶ *Id.*

⁸⁷ *Town of Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988) (citing *City of West Chicago v. NRC*, 701 F.2d 632, 650 (7th Cir. 1983)).

⁸⁸ *Id.* (quoting *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987)).

2. *The FEIS Must Evaluate All Reasonably Foreseeable Environmental Impacts of the Proposed Action*

Once the NRC has properly defined the scope of the proposed action, including any connected actions, the agency's EIS must evaluate the environmental effects of the proposed action.⁸⁹ The NRC uses this information to "[d]etermine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs . . . whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values."⁹⁰ "The EIS must address all reasonably foreseeable environmental impacts . . . even if the probability of such an occurrence is low."⁹¹ NEPA requirements, however, are subject to a rule of reason, and an EIS need not address "remote and highly speculative consequences."⁹²

In 10 C.F.R. § 51.14(b), the NRC adopted the CEQ's definition of "effects" in 40 C.F.R. § 1508.8. Under the CEQ rule, effects include both direct effects, "which are caused by the action and occur at the same time and place," and indirect effects, "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." The CEQ regulation further provides:

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.⁹³

When information relevant to a reasonably foreseeable environmental effect is incomplete or unavailable, CEQ regulations require an agency to obtain the unavailable information and include it in the EIS so long as the costs are not exorbitant.⁹⁴ If the cost of obtaining the information is exorbitant, the agency must still include in the EIS a statement that the information is unavailable, the relevance of the unavailable information, a summary of existing credible scientific evidence, and the agency's evaluation of the impacts that might be caused.⁹⁵

⁸⁹ 10 C.F.R. §§ 51.71(d), 51.90; 40 C.F.R. § 1508.25(a)(1).

⁹⁰ 10 C.F.R. § 51.107(a)(3).

⁹¹ *Blue Ridge Environmental Defense League v. NRC*, 716 F.3d 183, 188 (D.C. Cir. 2013) (citing 40 C.F.R. § 1502.22(b)).

⁹² *Deukmejian v. NRC*, 751 F.2d 1287, 1300 (D.C. Cir. 1984) (quoting *Trout Unlimited*, 509 F.2d at 1283). See also *Blue Ridge Envtl. Def. League*, 716 F.3d at 189.

⁹³ 40 C.F.R. § 1508.8.

⁹⁴ See *id.* § 1502.22(a).

⁹⁵ See *id.* § 1502.22(b).

3. *The FEIS Must Evaluate Alternatives to the Proposed Action, Including Mitigation*

An EIS must include a detailed statement of reasonable alternatives to the proposed action.⁹⁶ When considering alternatives, agencies are to:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits. . . .⁹⁷

The CEQ regulation itself and numerous courts have recognized that the alternatives analysis is the “heart of the environmental impact statement.”⁹⁸ “The existence of reasonable but unexamined alternatives renders an EIS inadequate.”⁹⁹

The NRC’s NEPA regulation governing preparation of a DEIS directs that it “include a preliminary analysis that considers and weighs the environmental effects of the proposed action; the environmental impacts of alternatives to the proposed action; and *alternatives available for reducing or avoiding adverse environmental effects*”¹⁰⁰ The NRC’s regulation governing preparation of a FEIS imposes the same requirement by directing that the NRC Staff “prepare a final environmental impact statement in accordance with the requirements of . . . [10 C.F.R. § 51.71] for a draft environmental impact statement.”¹⁰¹

4. *Cumulative Impacts*

Activities excluded from the scope of the proposed action may still be relevant to the NRC’s NEPA analysis to the extent they affect the environmental baseline for the evaluation of cumulative impacts. Under CEQ regulations, “cumulative impact” is defined as the “impact on the environment that results from the incremental impact of the [proposed] 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.”¹⁰²

⁹⁶ 42 U.S.C. § 4332(2)(C)(iii). See also *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 104 (1998).

⁹⁷ 40 C.F.R. § 1502.14.

⁹⁸ *Id.* See also *Alaska v. Andrus*, 580 F.2d 465, 474 (D.C. Cir.), *vacated in part as moot sub nom. Western Oil & Gas Ass’n v. Alaska*, 439 U.S. 922 (1978).

⁹⁹ *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998).

¹⁰⁰ 10 C.F.R. § 51.71(d) (emphasis added).

¹⁰¹ *Id.* § 51.90.

¹⁰² 40 C.F.R. § 1508.7.

In the FEIS, the Staff treated the construction of the transmission corridor as a separate nonfederal action rather than a connected action. The Staff therefore evaluated the transmission corridor solely as a reasonably foreseeable future action that forms part of the environmental baseline for evaluating the cumulative impact of the proposed action, i.e., the licensing of the construction and operation of Fermi Unit 3.

5. *Limitation on Actions*

An important consequence of the decision whether to include new construction within the scope of the proposed action is that, if it is included, it will be subject to the limitation on actions in 10 C.F.R. § 51.101(a). Under that provision, when the Staff prepares an EIS under 10 C.F.R. § 51.20, then until a record of decision is issued “[n]o action concerning the proposal may be taken by the Commission which would (i) have an adverse environmental impact, or (ii) limit the choice of reasonable alternatives.”¹⁰³ Also, “[a]ny action concerning the proposal taken by an applicant which would (i) have an adverse environmental impact, or (ii) limit the choice of reasonable alternatives may be grounds for denial of the license.”¹⁰⁴ For separate activities, on the other hand, there is no obligation on the Commission to avoid regulatory action before the record of decision is issued that would allow the activity to proceed, regardless of its environmental impact or its effect on the range of alternatives. And the applicant may proceed with (or allow its contractor to proceed with) an activity outside the scope of the proposal that would have an adverse environmental impact or limit the choice of reasonable alternatives even though the NEPA review is ongoing or has not even begun. This was precisely the point that the NRC Staff commenter made about the proposed 2007 LWA Rule.¹⁰⁵

C. *There Is a Serious Question Whether the Building of an Offsite Transmission Corridor Intended Solely to Serve the New Fermi Unit 3 Qualifies as a Connected Action Under NEPA and, Therefore, Requires the Staff to Consider Its Environmental Impacts as a Direct Effect of the Construction of Fermi Unit 3*

Given that the transmission corridor’s sole apparent purpose is to serve the Fermi Unit 3 project and the new nuclear power plant would be useless without the new transmission lines, Intervenors (and the EPA) have raised a serious

¹⁰³ 10 C.F.R. § 51.101(a)(1).

¹⁰⁴ *Id.* § 51.101(a)(2).

¹⁰⁵ 72 Fed. Reg. at 57,420.

question whether the construction of the new transmission corridor should have been analyzed as a connected action in the FEIS.

In order for construction of the transmission corridor to constitute a connected action under 40 C.F.R. § 1508.25, three requirements must be met. First, the transmission corridor must be a proposed action rather than one that is merely conceivable.¹⁰⁶ Second, the transmission corridor must lack independent utility, that is, its sole purpose must be serving Fermi Unit 3.¹⁰⁷ Third, for an action such as the transmission corridor that will not be constructed by or expressly permitted by the federal agency preparing the EIS, there must be sufficient federal control and responsibility that the action qualifies as a federal action.¹⁰⁸ We review each of these issues in turn.

1. Proposed Action

The FEIS states that “ITC Transmission has not yet formally announced a route for the offsite portion of the proposed new transmission line serving Fermi 3,” but it also states that “Detroit Edison expects that the proposed new transmission line would be built” along the corridor identified in the FEIS.¹⁰⁹ The FEIS repeatedly refers to the “proposed” transmission corridor.¹¹⁰ For example, the FEIS includes a map identifying the “*Proposed* Transmission Corridor from Fermi 3 to the Milan Substation.”¹¹¹ The FEIS reports that “[t]hree new 345-kV transmission lines have been *proposed* to serve Fermi 3.”¹¹² The FEIS also refers to “the *proposed* route from the Fermi 3 site in Monroe County to the existing Milan Substation in Washtenaw County.”¹¹³ Furthermore, in response to written questions propounded by the Board, DTE informed the Board that it is unaware of any other transmission corridor route currently under consideration.¹¹⁴ An action with potential impacts subsequent to the initial federal action may not constitute a

¹⁰⁶ See *Kleppe v. Sierra Club*, 427 U.S. 390, 410 & n.20 (1976).

¹⁰⁷ See *Thomas*, 753 F.2d at 759-60 (citing *Trout Unlimited*, 509 F.2d at 1276 (stating that an EIS must address interdependent projects when “[t]he dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.”)).

¹⁰⁸ See *Southwest Williamson County Community Ass’n, Inc. v. Slater*, 243 F.3d 270, 278-80 (6th Cir. 2001).

¹⁰⁹ FEIS at 2-10.

¹¹⁰ See, e.g., *id.* at 2-61, 2-126, and 3-18 to 3-19. The fact that the Staff declares the transmission lines to be a proposed action is significant, as under CEQ regulations “[a] proposal may exist in fact as well as by agency declaration that one exists.” 40 C.F.R. § 1508.23.

¹¹¹ FEIS at 2-11 (emphasis added).

¹¹² *Id.* at 4-8 (emphasis added).

¹¹³ *Id.* at 2-208 (emphasis added).

¹¹⁴ Applicant Brief at 8; Smith Affidavit at 5.

proposed action if it is insufficiently certain.¹¹⁵ Here, by contrast, there is no doubt that offsite transmission lines would be built to serve Fermi 3 and no suggestion of any plan to build them anywhere but along the proposed route identified in the FEIS. Therefore, based on the information now before the Board, it appears that the transmission corridor identified in the FEIS is a proposed action.¹¹⁶

2. *Independent Utility*

The FEIS clearly shows that the purpose of the new transmission corridor is to serve Fermi Unit 3 (i.e., to transmit electrical energy from Fermi Unit 3 to the grid).¹¹⁷ No party has identified any other function that the corridor is intended to serve. Just as the construction of a road to facilitate logging and the sale of timber that would result from that logging were connected actions,¹¹⁸ so too the construction of a new nuclear power plant and the transmission corridor that will transmit the newly generated power to the grid are also connected actions.

DTE stated in response to a question from the Board that the new transmission lines might possibly serve some as yet unidentified source of electrical energy if Fermi 3 is not constructed.¹¹⁹ Absent additional evidence, this theoretical possibility is too speculative to establish that the transmission corridor actually has independent utility. Our view is supported by the Appeal Board's ruling in *Greenwood* upholding the NRC's authority to impose environmental restrictions on new transmission lines intended to serve two new Detroit Edison nuclear power plants.¹²⁰ The Licensing Board had described the new transmission lines "as an integral part of nuclear generating plants, observing that '[a] power plant without transmission lines is like an airplane that can't fly.'" ¹²¹ The Appeal Board

¹¹⁵ See *Webster v. U.S. Department of Agriculture*, 2011 WL 8788223, at *8 (N.D. W. Va. June 13, 2011) (finding that the building of a water treatment plant to serve a proposed dam was not sufficiently certain and any attempt to determine environment impacts would be "speculative and contingent").

¹¹⁶ Whether a project qualifies as a "proposal" is somewhat intertwined with the "independent utility" question. CEQ's regulations state that a "[p]roposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal." 40 C.F.R. § 1508.23. In a situation such as this, where the granting of a license makes the building of offsite transmission lines inevitable, an evaluation of their direct environmental impacts will only be meaningful if engaged in before the license issuance.

¹¹⁷ FEIS at 2-10 to 2-11, 3-17 to 3-19.

¹¹⁸ *Thomas*, 753 F.2d at 758.

¹¹⁹ Applicant Brief at 8; Smith Affidavit at 5-6.

¹²⁰ *Greenwood Energy Ctr.*, ALAB-247, 8 AEC at 936.

¹²¹ *Id.* at 937.

agreed. As in this case, in *Greenwood*, DTE “could not represent that identical power lines along identical routes would be erected irrespective of the Greenwood nuclear facility.”¹²² The Appeal Board therefore had

no hesitation in concurring in the Licensing Board’s assumption that the lines are a foreseeable consequence of licensing construction of the nuclear power units. Indeed, no other conclusion is reasonable. Without transmission lines the Greenwood facility would be little more than a very expensive double boiler serving no discernible purpose. It is scarcely likely that Detroit Edison would embark upon such an enterprise even if given the green light by the regulatory bodies which oversee its operations.¹²³

Here also, the proposed transmission corridor is an integral part of the Fermi 3 project with “no discernible purpose” apart from connecting Fermi 3 to the grid.

3. Federal Control and Responsibility

The FEIS does not refer to any purpose of the new transmission corridor other than serving Fermi 3. But the Staff did not analyze the transmission corridor as a connected action. Instead, it defined the construction of the transmission corridor as a “preconstruction activity,” and excluded it from the scope of the proposed action because of the 2007 LWA Rule narrowing the definition of “construction” and disclaiming NRC regulatory authority over all preconstruction activities.¹²⁴ Thus, the Staff evaluated the impacts of the transmission corridor solely “in the context of cumulative impacts.”¹²⁵ In substance, the Staff concluded that the scope of the proposed federal action should include only the power plant and not the transmission corridor necessary to make the plant serve its intended purpose because, in the Staff’s view, the transmission corridor is outside the scope of the federal action.

The requirement to prepare an EIS applies to “major Federal actions,” not to private or state actions.¹²⁶ Thus, only those activities that have sufficient federal involvement to qualify as federal actions need be included in the scope of the proposed action evaluated in an EIS.¹²⁷ But this does not necessarily mean that the

¹²² *Id.* at 939.

¹²³ *Id.*

¹²⁴ FEIS at 1-6 to 1-7.

¹²⁵ *Id.* at 1-7.

¹²⁶ 42 U.S.C. § 4332(2)(C).

¹²⁷ See *Sw. Williamson Cnty.*, 243 F.3d at 278-80. But see *Colorado Wild, Inc. v. U.S. Forest Service*, 523 F. Supp. 2d 1213, 1224-25 (D. Colo. 2007) (rejecting the U.S. Forest Service’s claim that

(Continued)

action in question must be taken or expressly authorized by a federal agency. In *Southwest Williamson County Community Ass’n, Inc. v. Slater*, the court defined the test for determining when a nonfederal project should be analyzed under NEPA as a major federal action:

With the CEQ regulations and case law in mind, we conclude that there are two alternative bases for finding that a non-federal project constitutes a “major Federal action” such that NEPA requirements apply: (1) when the non-federal project restricts or limits the statutorily prescribed federal decision-makers’ choice of reasonable alternatives; or (2) when the federal decision-makers have authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project. If either test is satisfied, the non-federal project must be considered a major federal action. Both tests require a situation-specific and fact-intensive analysis.¹²⁸

We understand that construction of the transmission corridor has not begun. Therefore, the first test is not satisfied. This is not an instance where, at least thus far, “the non-federal project restricts or limits the statutorily prescribed federal decision-makers’ choice of reasonable alternatives.”¹²⁹ On the other hand, in this case “the federal decision-makers have authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project.”¹³⁰ In *Southwest Williamson County*, the court held that the second test was not satisfied because the authority of the Federal Highway Administration (“FHWA”) was limited to certain interchanges between a federally financed highway project and a state highway. “No part of the statute confers jurisdiction on the FHWA . . . to oversee the construction of the highway corridor that runs between the interchanges unless the state attempts to comply with federal regulations in order to seek federal reimbursement for construction costs.”¹³¹

Here, by contrast, the NRC long interpreted its statutory authority under the Atomic Energy Act (“AEA”)¹³² to include conditioning approval of nuclear power plant licenses on environmentally acceptable routing of transmission lines.¹³³ The United States Court of Appeals for the First Circuit upheld the NRC’s authority

road construction and development planned by a private party seeking access rights-of-way over national forest land “cannot be ‘connected actions’ under NEPA’s regulations because the Forest Service lacks authority to control them”).

¹²⁸ *Sw. Williamson Cnty.*, 243 F.3d at 281 (footnote omitted).

¹²⁹ *Id.* at 281-83.

¹³⁰ *Id.* at 283-84.

¹³¹ *Id.* at 283.

¹³² Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.* (2012).

¹³³ *Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 82 (1st Cir. 1978). *See* discussion *supra* Section I.C.

to regulate offsite transmission lines under the AEA, affirming a licensing board decision conditioning approval of permits to the Seabrook Nuclear Power Station on the rerouting of two offsite transmission lines to avoid environmental impacts on marshlands, tree species, and migratory waterfowl.¹³⁴ Two years later, the Sixth Circuit also upheld the Commission's authority, unequivocally holding that "1) the regulation of off-site transmission lines is within the Commission's authority under Section 101 of the Atomic Energy Act; and 2) that nothing in the Atomic Energy Act precludes the Commission from implementing, through the issuance of conditional licenses, NEPA's environmental mandate."¹³⁵

The holdings of the First and Sixth Circuits continue to be the law in those jurisdictions. Under those rulings, the NRC may consistently with the AEA and NEPA impose environmental restrictions on transmission lines built to serve nuclear power plants should it choose to do so. The NRC's regulations, including 10 C.F.R. §§ 50.36(b) and 51.107(a)(3), authorize the agency to impose environmental conditions in a license to prevent or mitigate adverse environmental impacts that might otherwise be caused by the construction or operation of a nuclear power plant.¹³⁶ "Environmental protection is part of NRC's core mission statement."¹³⁷ Thus, under Sixth Circuit precedent, "the federal decision-makers have authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project."¹³⁸

To be sure, in the 2007 LWA Rule the NRC decided that the building of transmission lines to serve a nuclear power plant would no longer be classified as a construction activity and would no longer require authorization from the NRC.¹³⁹ Intervenors have not challenged the Rule and we would be precluded from hearing such a challenge had they done so, absent a showing of special circumstances.¹⁴⁰ But an agency's narrowed construction of its statutory authority, as distinct from an express prohibition by Congress, may not be used to limit the agency's obligations under NEPA.¹⁴¹ "NEPA's legislative history reflects Congress's concern that agencies might attempt to avoid any compliance with

¹³⁴ *Pub. Serv. Co. of N.H.*, 582 F.2d at 80.

¹³⁵ *Detroit Edison*, 630 F.2d at 452.

¹³⁶ *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-13-4, 77 NRC 107, 217 (2013).

¹³⁷ *Id.*

¹³⁸ *Sw. Williamson Cnty.*, 243 F.3d at 281.

¹³⁹ 10 C.F.R. § 50.10(a)(2)(vii).

¹⁴⁰ 10 C.F.R. § 2.335.

¹⁴¹ *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1213 (9th Cir. 2008); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105 (D.D.C. 2006) (distinguishing agency NEPA responsibilities in situations where "an agency has 'no ability' because of lack of 'statutory authority' to address the impact" with situations where an agency "is only constrained by its own regulation from considering impacts").

NEPA by narrowly construing other statutory directives to create a conflict with NEPA. Section 102(2) of NEPA therefore requires government agencies to comply ‘to the fullest extent possible.’¹⁴² The Supreme Court has explained that this statutory directive was “neither accidental nor hyperbolic.”¹⁴³ Thus, courts have held that NEPA obligations supplement existing statutory authority and “must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority.”¹⁴⁴ In short, absent clear conflict an agency cannot interpret its way out of its NEPA responsibilities.

Also, although the NRC now takes the position that it lacks authority to impose environmental restrictions on transmission corridors, *Border Power Plant Working Group* supports the view that the transmission corridor impacts should have been analyzed as a direct effect of the NRC action even under that new interpretation.¹⁴⁵ In that case, an environmental group challenged two federal agencies’ issuance of permits and rights-of-way allowing two utilities to build electricity transmission lines to connect new power plants in Mexico with the power grid in southern California. The Mexican plants were outside the jurisdiction of the federal agencies. Nevertheless, the district court held that increased air pollution in California resulting from two “export turbines” at one of the Mexican plants was a direct effect of the new transmission lines, and that DOE therefore had to evaluate the air pollution impacts under NEPA.¹⁴⁶ The same analysis applies here. Although the NRC has renounced regulatory jurisdiction over the transmission lines, the construction of the lines and the resulting environmental impacts will be a direct effect of the COL, should it be issued, and must be analyzed as such under NEPA.

Both the Staff and Applicant emphasize that the offsite transmission lines will be owned and operated by ITC Transmission and not by DTE.¹⁴⁷ For this reason, Applicant notes, “Staff relied on publicly available information and reasonable expectations of the configurations that ITC Transmission would likely use for the offsite corridor based on standard industry practice.”¹⁴⁸ But the significance placed on this fact by Staff and Applicant appears misplaced. Multiple projects are

¹⁴² *Ctr. for Biological Diversity*, 538 F.3d at 1213 (quoting *Forelaws on Board v. Johnson*, 743 F.2d 677, 683 (9th Cir. 1985)). See also *Flint Ridge Development Co. v. Scenic Rivers Ass’n of Oklahoma*, 426 U.S. 776, 787 (1976) (quoting House and Senate Conferees, who inserted the “fullest extent possible” language into NEPA, to say that “no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance”).

¹⁴³ *Flint Ridge Dev. Co.*, 426 U.S. at 787.

¹⁴⁴ *Calvert Cliffs*, 449 F.2d at 1115.

¹⁴⁵ See *Border Power Plant Working Group v. U.S. Department of Energy*, 260 F. Supp. 2d 997, 1012-18 (S.D. Cal. 2003).

¹⁴⁶ *Id.*

¹⁴⁷ Staff Response at 10; Applicant Brief at 5.

¹⁴⁸ Applicant Brief at 5.

often deemed connected actions despite being undertaken by separate entities.¹⁴⁹ In fact, projects undertaken by separate entities may still be considered connected actions even in the absence of formal agreement between the parties.¹⁵⁰ After all, “NEPA mandates a case-by-case balancing judgment on the part of federal agencies,” not the private parties seeking federal action.¹⁵¹ If it is established that ITC Transmission’s proposed new transmission corridor lacks independent utility, the Staff should have included it within the scope of the proposed action, analyzed its impacts as direct effects of the NRC action, and evaluated alternatives available for reducing or avoiding any adverse environmental effects.¹⁵²

4. The 2007 LWA Rule and Statement of Considerations

According to DTE, “the Commission has specifically directed, by regulation, that the impacts of ‘preconstruction’ activities be addressed cumulatively with the impacts authorized by a combined license,” and that “[t]his is precisely the approach taken by the NRC Staff.”¹⁵³ That argument would have merit only if the provision cited by DTE, 10 C.F.R. § 51.45(c), repealed, materially altered, or directed the Staff to ignore the NRC and CEQ regulations previously described which require that the proposed action that is the subject of an agency EIS include

¹⁴⁹ See, e.g., *Hammond v. Norton*, 370 F. Supp. 2d 226, 247-53 (D.D.C. 2005) (ruling that the Bureau of Land Management improperly segmented consideration of two pipeline projects being constructed by two separate companies despite evidence that they lacked independent utility and thus qualified as connected actions); *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988) (rejecting as inadequate an FEIS that failed to consider the cumulative impacts on migratory species caused by multiple outer-continent lease sales in the California and Alaska regions).

¹⁵⁰ See *Hammond*, 370 F. Supp. 2d at 245, 251 (making clear that a determination that actions are connected does not rest upon formal agreement between the entities undertaking the actions, and noting EPA’s argument that “CEQ does not require a formal agreement in order for two projects to be defined as connected actions”).

¹⁵¹ *Calvert Cliffs*, 449 F.2d at 1123.

¹⁵² We note, additionally, that nothing in the FEIS suggests that the NRC Staff gave much, if any, consideration to EPA’s suggestion that offsite transmission lines should have been considered as a connected action. See FEIS, App. E, at E-42 to E-43. While NEPA does not require “an agency preparing an EIS to respond to EPA concerns, [an agency’s] failure even to address them in the EIS at the very least brings into question the sufficiency of the agency’s analysis.” *Hammond*, 370 F. Supp. 2d at 251 (citing *Citizens Against Burlington v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991) (stating that an agency “does not have to follow the EPA’s comments slavishly — it just has to take them seriously.”); *Natural Res. Def. Council v. Hodel*, 865 F.2d at 297-99 (stating that the court considered the failure to meaningfully address EPA concerns in its decision that FEIS did not comply with NEPA); and *Alaska v. Andrus*, 580 F.2d at 475 (stating that EPA’s determination that the EIS was unsatisfactory “did give rise to a heightened obligation on [the lead agency’s] part to explain clearly and in detail its reasons for proceeding”).

¹⁵³ Applicant Brief at 12.

all “connected actions” as defined in 40 C.F.R. § 1508.25.¹⁵⁴ Section 51.45(c) contains no language to that effect. Concerning preconstruction activities, it merely provides that

[a]n environmental report prepared at the . . . combined license stage under § 51.50(c) must include a description of impacts of the preconstruction activities performed by the applicant at the proposed site (*i.e.*, those activities listed in paragraph (1)(ii) in the definition of “construction” contained in § 51.4), necessary to support the construction and operation of the facility which is the subject of the . . . combined license application. The environmental report must also contain an analysis of the cumulative impacts of the activities to be authorized by the . . . combined license in light of the preconstruction impacts described in the environmental report.¹⁵⁵

This direction concerns the content of the ER, a document prepared by the applicant. The definition of the scope of the EIS, however, is the responsibility of the NRC Staff.¹⁵⁶ For the purpose of defining the scope of the proposed action that is to be the subject of an EIS, the Staff is instructed to use 40 C.F.R. § 1502.4, which directs that “[p]roposals 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.”¹⁵⁷ Section 51.45(c) does not alter that obligation or the obligation to include within the scope of the proposed action all connected actions as defined in § 1508.25.

DTE also relies on the Statement of Considerations for the 2007 LWA Rule (the “SOC”).¹⁵⁸ Courts regularly rely upon the preamble in interpreting an agency rule.¹⁵⁹ Similarly, the Commission often refers to the Statement of Considerations as an aid in interpreting the agency’s regulations.¹⁶⁰ But the preamble, unlike the rule itself, does not have the force of law and may not be used to expand the reach of the regulations.¹⁶¹ Thus, the SOC, while it may be used to interpret any ambiguous text of the 2007 LWA Rule, cannot add new requirements or prohibitions. As

¹⁵⁴ See *supra* Section II.B.1.

¹⁵⁵ 10 C.F.R. § 51.45(c).

¹⁵⁶ *Id.* §§ 51.28, 51.29.

¹⁵⁷ 40 C.F.R. § 1502.4. Under 10 C.F.R. § 51.29(a)(1), the Staff is directed to use that provision to determine the scope of the proposed action that is the subject of an agency EIS.

¹⁵⁸ See Applicant Brief at 11-12.

¹⁵⁹ See *National Mining Ass’n v. EPA*, 59 F.3d 1351, 1355 n.7 (D.C. Cir. 1995).

¹⁶⁰ *Pa’ina Hawaii, LLC*, CLI-08-3, 67 NRC 151, 163 n.46 (2008) (*quoting Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203, 208 n.12 (2004)).

¹⁶¹ See *A & E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012) (explaining that the preamble “merely explains why the regulations were amended” and did “not expand their reach”). See also *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 98 (1995) (stating that NRC guidance cannot prescribe requirements).

we have explained, section 51.45(c) contains no language modifying the Staff's obligation under NRC and CEQ regulations to include connected actions in the scope of the proposed action, and the SOC cannot interpret what the regulation itself does not contain.

The SOC also does not invalidate the reasoning underlying the decisions of the First and Sixth Circuits that upheld the NRC's authority to impose environmentally protective restrictions on transmission lines. The SOC discusses the Commission's reasons for changing its interpretation of its statutory authority, but it did not address those rulings of the courts of appeal. The Commission acknowledged that its previous broad assertion of regulatory jurisdiction over activities now classified as "preconstruction" was "a reasonable implementation of NEPA as understood in 1972"¹⁶² The SOC also stated that the NRC's broad definition of "construction" in the pre-2007 version of the 10 C.F.R. § 50.10(c) was originally added to Part 50 "due to the interpretation that the enactment of NEPA required the NRC to expand its permitting/licensing authority."¹⁶³ But the Commission stated that "subsequent judicial decisions have made it clear that NEPA is a procedural statute and does not expand the jurisdiction delegated to an agency by its organic statute."¹⁶⁴

Although the NRC concluded it had overestimated NEPA's legal effect, the federal courts of appeal decisions upholding the NRC's authority to impose environmental restrictions on transmission lines were not premised on the theory that NEPA had expanded the jurisdiction delegated to the NRC by its organic statute (the AEA). In *Detroit Edison*, the Sixth Circuit upheld the Commission's authority to regulate transmission lines in order to prevent environmental damage, making clear that this authority was founded upon the AEA:

The Commission is empowered by [the AEA] to regulate off-site transmission lines; in the exercise of that power it must pursue the objectives of the Atomic Energy Act and NEPA simultaneously. Under the Atomic Energy Act, the Commission can issue conditional licenses for regulatory purposes. There can be no objection to its use of the same means to achieve environmental ends as well.¹⁶⁵

In its brief in *Detroit Edison*, the NRC argued that NEPA requires consideration of all significant environmental impacts of a proposed action, including offsite transmission lines that are solely attributable to a proposed nuclear power plant.¹⁶⁶

¹⁶² 72 Fed. Reg. at 57,420.

¹⁶³ *Id.* at 57,427.

¹⁶⁴ *Id.*

¹⁶⁵ *Detroit Edison*, 630 F.2d at 454.

¹⁶⁶ Brief for Respondents at 10, *Detroit Edison*, 630 F.2d 450 (No. 78-3196). The Brief was also filed on behalf of the United States, represented by the Department of Justice.

The NRC also argued that the Commission is required “to administer the Atomic Energy Act in accordance with the ‘national policy of environmental protection’” and, therefore, “must have the authority to use its license conditioning power when necessary to protect the environment.”¹⁶⁷ Additionally, the NRC asserted that the AEA and NEPA provide independent sources of authority to condition licenses based upon the environmental impacts related to offsite transmission lines. But the court of appeals, in ruling that the NRC had appropriately interpreted the AEA to include regulatory authority over attendant transmission lines, made clear that “[w]e need not, and do not, decide whether NEPA is an independent source of substantive jurisdiction.”¹⁶⁸ Thus, the court did not base its holding on the theory that NEPA had expanded the NRC’s jurisdiction beyond that already provided in the AEA.

Similarly, the First Circuit did not assume that NEPA had expanded the NRC’s jurisdiction. Rather, the court of appeals understood that NEPA required the NRC to construe its existing statutory authority consistently with NEPA’s goals:

NEPA’s mandate has been given strict enforcement in the courts, with frequent admonitions that it is insufficient to give mere lip service to the statute and then proceed in blissful disregard of its requirements. Section 102(2)(C) is an “action forcing” provision, which imposes a duty upon federal agencies to act so as to effectuate the purposes of the statute to the fullest possible degree. The directive to agencies to minimize all unnecessary adverse environmental impact obtains *except when specifically excluded by statute or when existing law makes compliance with NEPA impossible*. As stated by the court in *Calvert Cliffs*, “Unless (specific statutory) obligations are plainly mutually exclusive with the requirements of NEPA, the specific mandate of NEPA must remain in force.” Unless there are specific statutory provisions which necessarily collide with NEPA, the Commission was under a duty to consider and, *to the extent within its authority*, minimize environmental damage resulting from Seabrook and its transmission lines.¹⁶⁹

The First Circuit found no “inevitable clash” between the NRC’s broad regulatory authority under the AEA and the action-forcing provisions of NEPA.

Both the Atomic Energy Act of 1954 and the Energy Reorganization Act of 1974 confer broad regulatory functions on the Commission and specifically authorize it to promulgate rules and regulations it deems necessary to fulfill its responsibilities under the Acts. In a regulatory scheme where substantial discretion is lodged with the administrative agency charged with its effectuation, it is to be expected that the

¹⁶⁷ *Id.* at 19.

¹⁶⁸ *Detroit Edison*, 630 F.2d at 452.

¹⁶⁹ *Pub. Serv. Co. of N.H.*, 582 F.2d at 81 (emphasis added) (footnotes and citations omitted) (quoting *Calvert Cliffs*, 449 F.2d at 1125).

agency will fill in the interstices left vacant by Congress. The Atomic Energy Act of 1954 is hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends. The Act's regulatory scheme "is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective." The agency's interpretation of what is properly within its jurisdictional scope is entitled to great deference, and will not be overturned if reasonably related to the language and purposes of the statute.¹⁷⁰

Based on this understanding, the First Circuit upheld the agency's decision to include transmission lines that serve a nuclear power plant within the definition of "utilization facility" in 42 U.S.C. § 2014(cc).¹⁷¹ It further held that the NRC could, consistent with its authority under the AEA, impose permit conditions on the routing of the transmission lines in order to further NEPA's mandate.¹⁷² Thus, the First Circuit's ruling, like that of the Sixth Circuit, was not premised on the theory that NEPA had expanded the jurisdiction delegated to the NRC in the AEA.

The SOC states that "the elimination of the blanket inclusion of site preparation activities [including transmission lines] in the definition of construction . . . does not violate NEPA."¹⁷³ As we have already stated, we have no authority to consider that issue. But we find nothing in either the text of the LWA Rule or the SOC that prohibits inclusion of the construction and maintenance of a specific transmission line within the scope of the proposed NRC action when those activities qualify as a connected action under the applicable regulations and case law, as they likely do in this instance. This may be an appropriate opportunity for the Commission to clarify whether, in the event of a conflict between general statements in the SOC and the specific law that applies in the jurisdiction where the proposed facility will be located, the Staff and licensing boards should follow the controlling law in the jurisdiction when defining or reviewing the scope of the proposed action.

¹⁷⁰ *Id.* at 82 (citations omitted) (quoting *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968)).

¹⁷¹ *See id.* at 82-83.

¹⁷² *Id.* at 86 ("In this instance, the Commission used one of its statutory powers in the furtherance of NEPA, whose mandate the Commission must follow. The Commission is under a dual obligation: to pursue the objectives of the Atomic Energy Act and those of the National Environmental Policy Act. 'The two statutes and the regulations promulgated under each must be viewed in *Para (sic) Materia.*' We find that the Commission correctly discharged its responsibilities here." (citation omitted) (quoting *Citizens for Safe Power, Inc. v. NRC*, 524 F.2d 1291, 1299 (D.C. Cir. 1975))).

¹⁷³ 72 Fed. Reg. at 57427.

5. *Impact of Excluding Transmission Corridor from the Scope of Proposed Action*

DTE and the Staff maintain that the question whether the transmission corridor should have been analyzed as a connected action rather than as part of the cumulative impact analysis is merely of academic interest because, they maintain, the Staff took the required hard look at the corridor's impacts.¹⁷⁴ For several reasons, we are not persuaded that the issue is merely a matter of semantics.

First, excluding the transmission corridor from the scope of the proposed action also removes it from the limitation on actions in 10 C.F.R. § 51.101(a).¹⁷⁵ When an activity is excluded from the scope of the proposed action, the effect is to allow construction to begin — or even be completed — before the agency has completed its NEPA review. But NEPA's purpose "is to influence the decision making process 'by focusing the [federal] agency's attention on the environmental consequences of a proposed project,' so as to 'ensure . . . that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.'"¹⁷⁶ "[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered."¹⁷⁷ Thus, the NEPA analysis of the proposed action must be completed before, not after, construction begins. In this case, the Staff has completed the FEIS for Fermi 3 and, as far as the Board is aware, construction of the transmission corridor has not started. But the record of decision has not been issued and, accordingly, the section 51.101(a) limitation on actions remains in effect. Therefore, excluding the transmission corridor from the scope of the proposed action may allow construction of the corridor to begin before the NRC has balanced the benefits of the Fermi 3 project against all of its environmental costs, despite NEPA's goal of a fully informed agency decision before the proposed action is authorized.

We are also not persuaded that excluding the transmission corridor from the proposed action had no effect on the depth of the environmental analysis. In *Colorado Wild*, where the defendants made the same argument as DTE and the Staff, the district court found "fair grounds for litigation regarding Defendants' assertion that the treatment of the highway interchanges and Village development as cumulative impacts in the FEIS was sufficient under NEPA even if these actions should have been treated as 'connected actions' under the statute's implementing

¹⁷⁴ Applicant Brief at 13; Staff Response at 11.

¹⁷⁵ See *supra* Section II.B.4.

¹⁷⁶ *Colo. Wild, Inc.*, 523 F. Supp. 2d at 1219 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

¹⁷⁷ *Id.* (emphasis omitted) (quoting *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (Breyer, J.)).

regulations.”¹⁷⁸ The administrative record reflected “a heated debate” on that issue, and the court concluded that “this debate would not have occurred unless the label attached to these actions made a difference to the content, scope and/or depth of analysis.”¹⁷⁹ We similarly find that the Staff’s refusal to evaluate the transmission corridor as a connected action may have “made a difference to the content, scope and/or depth of analysis.” As we explain in Section II.D, below, the FEIS provided very limited information concerning the transmission corridor’s impacts to wetlands, streams, threatened and endangered species, and historical and cultural resources. By contrast, the FEIS provides a far more in-depth analysis of the impact of the construction and operation of Fermi Unit 3 on those resources.¹⁸⁰ It is likely that the Staff’s decision to exclude the transmission corridor from the scope of the proposed action influenced the far more limited analysis it received.

6. Conclusion

There is a serious question whether the transmission corridor is a connected action under NEPA and whether the Staff should have evaluated its environmental impacts as a direct effect of the proposed action.

D. There Is a Serious Question Whether the Staff’s Consideration of Environmental Impacts Related to the Transmission Corridor, Performed as a Cumulative Impact Review, Satisfies NEPA’s Hard Look Requirement

Although the Staff did not consider the transmission corridor to be part of the proposed action, it included some information about the corridor’s environmental impacts in its evaluation of cumulative impacts. The Staff and DTE claim that this analysis was sufficient to satisfy NEPA requirements. We find, however, a serious question whether those requirements were satisfied.

“The principal goals of an FEIS are twofold: to force agencies to take a ‘hard look’ at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency’s decision-making process.”¹⁸¹ The FEIS must comply with sections 102(2)(A),

¹⁷⁸ *Colo. Wild, Inc.*, 523 F. Supp. 2d at 1225.

¹⁷⁹ *Id.* at 1225-26.

¹⁸⁰ See, e.g., FEIS at 2-33 to 2-44 and 2-66 to 2-78 (describing impacts on wetlands and aquatic resources); *id.* at 2-48 to 2-59 and 2-82 to 2-125 (describing impacts on terrestrial and aquatic species and habitats); *id.* at 2-195 to 2-207 (describing impacts on historic and cultural resources).

¹⁸¹ *Claiborne*, CLI-98-3, 47 NRC at 87 (citing *Robertson*, 490 U.S. at 349-50; *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996)).

(C), and (E) of NEPA and the agency's Part 51 regulations.¹⁸² NEPA § 102(2)(C) requires that an EIS provide a detailed statement concerning among other things, "the environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided should the proposal be implemented," and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."¹⁸³ The Part 51 regulations impose equivalent requirements.¹⁸⁴ There is a serious question whether the Staff satisfied those requirements regarding transmission corridor impacts on wetlands, streams, threatened and endangered species, and historical and cultural resources. The Staff acknowledged that, in those areas, it lacked the necessary surveys to determine the extent of impacts to federally and state-listed species, wetlands, and other resources. But, rather than obtaining the necessary information or explaining why it could not be obtained, the Staff assumed that the necessary surveys would be conducted by other agencies in their regulatory reviews, that adequate mitigation to prevent environmental damage would be imposed by those other agencies, and that accordingly the environmental impacts would be minimal. In so doing, the Staff effectively deferred the analysis required by NEPA until a later date and delegated the NRC's NEPA responsibilities to other agencies. An impact statement cannot fulfill its role of providing "a springboard for public comment"¹⁸⁵ if it defers indefinitely and delegates to other agencies the duty to inform the public of the environmental impacts of the proposed action and potential measures to mitigate those impacts.

For example, concerning impacts of the transmission lines on "Important Terrestrial Species," the FEIS acknowledges that the United States Fish and Wildlife Service ("FWS") "identified several terrestrial species that are listed under the [Endangered Species Act] or candidates for listing that could occur in the area of the proposed transmission line corridor, some of which are not known to occur at the Fermi site."¹⁸⁶ The FEIS includes a table listing numerous federally and state-listed species that "[m]ay occur with the Transmission Line Corridor."¹⁸⁷ But the FEIS fails to identify the species that do in fact occur within the corridor and the potential impacts to those species. Instead, it states that "[f]ield surveys of the corridor route have not yet been conducted to confirm

¹⁸² See 10 C.F.R. § 51.107(a)(1).

¹⁸³ 42 U.S.C. §§ 4332(2)(C)(i), (ii), (v).

¹⁸⁴ 10 C.F.R. §§ 51.45(b)(1), (2), (5) (listing ER requirements); *id.* § 51.71 (requiring that the DEIS address the matters specified in § 51.45); *id.* § 51.90 (requiring that the Staff prepare the FEIS in accordance with the requirements of section 51.71 for a DEIS).

¹⁸⁵ *Robertson*, 490 U.S. at 349 (citation omitted).

¹⁸⁶ FEIS at 2-61.

¹⁸⁷ *Id.* at 2-62.

the presence of any species,”¹⁸⁸ and that no additional monitoring is planned along the proposed transmission line corridor.¹⁸⁹ The FEIS reports that “[p]rior to installation of the offsite transmission line, FWS and [the Michigan Department of Natural Resources] would need to review detailed information on the transmission line corridor. The agencies may, at that time, require surveys of the proposed transmission line corridor for the presence of important species and habitat.”¹⁹⁰ In other words, the surveys necessary to determine whether the transmission corridor will harm “important species and habitat” were not conducted during preparation of the FEIS, but may be conducted by other agencies at unknown future dates, which may not be until after the NRC has issued the COL. The Staff failed to explain why it did not require such surveys to assist in preparation of the FEIS.

Similarly, with regard to endangered or threatened freshwater species that may occur in streams crossed by the transmission corridor, the FEIS fails to provide the information necessary to determine either the species that will be affected or the extent of the impacts. For example, concerning the northern riffleshell, a federally listed endangered freshwater mussel species, the FEIS explains that “[t]he survival of this species depends on the protection and preservation of suitable habitat host fish species,” but that “it is currently unknown if appropriate habitats are present in stream areas that are crossed by the proposed transmission line corridor.”¹⁹¹ Concerning the purple lilliput, a freshwater mussel species listed as endangered by the State of Michigan, the FEIS reports that “it is currently unknown if appropriate habitats are present in stream areas that are crossed by the proposed transmission line corridor.”¹⁹² As with terrestrial species, the FEIS includes a table (Table 2-16) identifying “Federally and State-listed aquatic species that have a potential to occur along the new transmission line route”¹⁹³ But the Staff reported that “it is not known whether suitable habitat or populations of species identified in Table 2-16 occur in portions of the drainage that would be crossed by the proposed transmission route.”¹⁹⁴ Again, rather than identifying the species that the transmission corridor will impact and the nature of the impacts, the FEIS defers the analysis until some unknown future date, informing the reader that “[t]he [Michigan Department of Environmental Quality (“MDEQ”)] and/or USACE may require surveys of the proposed transmission line corridor to evaluate the presence of important species and habitat.”¹⁹⁵ As with

¹⁸⁸ *Id.* at 2-61.

¹⁸⁹ *Id.* at 2-65.

¹⁹⁰ *Id.* at 2-61.

¹⁹¹ *Id.* at 2-104.

¹⁹² *Id.* at 2-105.

¹⁹³ *Id.* at 2-101, 2-126.

¹⁹⁴ *Id.* at 2-126.

¹⁹⁵ *Id.*

terrestrial species, the Staff failed to explain why it did not require such surveys so that the necessary information could have been included in the FEIS.

The East Lansing Field Supervisor of the FWS, in his comments on the DEIS, was unable to concur in the Staff's conclusions regarding the impact of the transmission corridor on threatened and endangered species:

You have also made a determination of effects for the 29.4 miles of proposed transmission lines associated with the project. We are not able to concur with your effects determinations for the proposed transmission lines at this time. Your evaluation indicates that terrestrial and/or aquatic surveys for listed species will be conducted once the location of the transmission line corridors have been finalized. We will defer concurrence with your determinations until corridor locations are finalized and we have reviewed the results of future surveys. We also recommend that future surveys include those for the Indiana bat and for listed mussel species at stream crossings when the stream bottom is to be disturbed. Future consultation should be completed prior to submission of Michigan Department of Environmental Quality and/or the Army Corps of Engineers permit applications for stream crossings or wetland fill associated with the transmission line towers.¹⁹⁶

The FEIS also states that the NRC, in conjunction with the USACE, chose to comply with the National Historic Preservation Act ("NHPA") through the NEPA process.¹⁹⁷ As the lead federal agency in this process, the NRC has responsibility for determining potential impacts on the cultural environment under NEPA and on historic and cultural resources that may qualify for the National Register of Historic Places ("NRHP") under NHPA § 106.¹⁹⁸ However, as with other impacts, the FEIS fails to fully evaluate the impact of offsite transmission lines on these historic and cultural resources. Despite acknowledgment that "[t]he proposed new approximately 11-mi transmission line route . . . has been assessed as having a moderate to high potential for identifying archaeological resources . . . , no Phase I cultural resource investigations were conducted" during DTE's preparation of the ER.¹⁹⁹ Though NRC subsequently conducted section 106 consultations with interested federal, state, and tribal entities, the NRC did not consult on the impact of offsite transmission lines because it does not consider "the building of transmission lines [to be] an NRC-authorized activity" and considers the "proposed transmission lines to be outside the NRC's [area of potential effects]."²⁰⁰ Thus, the Staff states only that there is an "approximately 11-mi portion of the proposed offsite transmission line route [that] will require a

¹⁹⁶ *Id.*, App. F, at F-23.

¹⁹⁷ *Id.* at 2-193.

¹⁹⁸ *Id.* at 5-91.

¹⁹⁹ *Id.* at 2-207.

²⁰⁰ *Id.* at 2-212.

new transmission line route and may result in impacts on historic and/or cultural resources” that “could be minor” or “could be greater.”²⁰¹

Despite the lack of essential information in these and other areas, the Staff concluded that the environmental impacts of the transmission corridor would be minimal. In large part, it relied on permits and certifications it assumed would be issued and enforced by other federal and state agencies. For example, concerning impacts on federally and state-listed aquatic species, the Staff stated that

[b]uilding of offsite transmission lines could affect Federally and State-listed organisms in the vicinity of stream crossings in the same ways as described in the previous section for commercially and recreationally important species. Additional regulatory review of proposed plans for construction of the needed transmission lines, which would be built, owned, and maintained by ITC Transmission, may be conducted by the MDEQ and/or USACE, and potential impacts on Federally and State-listed aquatic species *are expected to be addressed through mitigation measures and [Best Management Practices (“BMPs”)] required under issued permits.*²⁰²

The Staff’s conclusion that wetland impacts would be “minimal” similarly relied on permits and mitigation it assumed would be required by other agencies:

A conceptual transmission line corridor has been identified, but wetland delineation surveys have not yet been conducted to determine the precise locations and extent of wetlands. Permanent impacts on wetland areas would be mitigated according to a wetland mitigation plan ITC Transmission would develop in coordination with the MDEQ and/or USACE, as necessary. Any mitigation measures required for the impacts *are expected to be determined by ITC Transmission in coordination with applicable regulatory agencies, which may include the MDEQ and/or USACE, at the time permit applications are submitted.*²⁰³

The Staff also stated:

Offsite hydrological alterations are associated with the proposed new or expanded transmission line corridors where the lines cross wetlands and drainages. The impacts of hydrological alterations resulting from both onsite and offsite construction activities would be localized and reduced with the implementation of BMPs and mitigation measures *required by the necessary permits and certifications.* Any impacts on USACE jurisdictional water resources associated with the compensatory mitigation construction activities proposed by Detroit Edison would be evaluated by the USACE *during its permit evaluation process.*²⁰⁴

²⁰¹ *Id.* at 4-101 to 4-102.

²⁰² *Id.* at 4-56 (emphasis added).

²⁰³ *Id.* at 4-44 to 4-45 (emphasis added).

²⁰⁴ *Id.* at 4-15 (emphasis added).

As to impacts on historic and cultural resources, the Staff declared that “any further investigations to identify the presence of cultural and historic resources and to evaluate the NRHP-eligibility of such resources would be the responsibility of ITC Transmission, who would conduct such investigations in accordance with applicable regulatory and industry standards to assess impacts.”²⁰⁵

Based on the foregoing review of the FEIS, the Board has identified the following probable deficiencies.

1. Unavailable or Incomplete Information

The FEIS repeatedly states that the NRC lacked the information necessary to fully evaluate the environmental impacts associated with offsite transmission lines. The FEIS failed to address CEQ’s NEPA regulation requiring an agency to do more than simply state that necessary information is unavailable²⁰⁶ — a regulation that “clearly contemplates original research if necessary.”²⁰⁷ A determination of minimal environmental impact would make little sense when an agency lacks essential information and has not sought to compile it through independent research. To rule otherwise “would turn NEPA on its head, making ignorance into a powerful factor in favor of immediate action where the agency lacks sufficient data.”²⁰⁸ The FEIS makes no effort to explain why the NRC could not obtain the information, spurning analysis in favor of conclusory statements about the lack of environmental impact and assurances that any potential impacts will be remedied in the future. But, as the First Circuit has stated, “[a] conclusory statement unsupported by . . . explanatory information of any kind not only fails to crystallize issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.”²⁰⁹

²⁰⁵ *Id.* at 4-102.

²⁰⁶ 40 C.F.R. § 1502.22. The regulation requires an agency to acquire the information that is lacking if it is “essential to a reasoned choice” and “costs of obtaining it are not exorbitant.” If the costs are exorbitant, the regulation still requires the agency to state that the information is unavailable, explain the relevance of the unavailable information, summarize existing credible scientific evidence, and evaluate potential impacts.

²⁰⁷ *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1249 (9th Cir. 1984) (“Federal agencies routinely either do their own studies or commission studies of the particular area in which a proposed project is to be located. Almost every EIS contains some original research. And, almost every time an EIS is ruled inadequate by a court it is because more data or research is needed.”). The court cited district court interpretations that have imposed the same NEPA requirement to conduct original research, if necessary. *See, e.g., Montgomery v. Ellis*, 364 F. Supp. 517, 528 (N.D. Ala. 1973) (stating that “NEPA requires each agency to undertake research needed adequately to expose environmental harms”).

²⁰⁸ *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1334-35 (S.D. Ala. 2002).

²⁰⁹ *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (citations omitted).

2. *Reliance on Anticipated Certifications*

As previously described, the Staff assumed in the FEIS that because the transmission corridor will require permits from various federal and state agencies, the construction and operation of the transmission corridor will have only small or minimal impacts on wetlands, streams, and endangered or threatened species. There is a significant question whether such blanket reliance on predicted future action by other regulatory agencies is sufficient to satisfy NEPA's hard look requirement.

In *Calvert Cliffs Coordinating Committee, Inc. v. AEC*, the D.C. Circuit explained why merely referencing an actual or anticipated certification by another agency fails to satisfy NEPA requirements:

Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment [from that required by NEPA]. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount. Their certification does not mean that they found no environmental damage whatever. In fact, there may be significant environmental damage (e.g., water pollution), but not quite enough to violate applicable (e.g., water quality) standards. Certifying agencies do not attempt to weigh that damage against the opposing benefits. Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action — the agency to which NEPA is specifically directed.²¹⁰

The D.C. Circuit's analysis is fully applicable to the present case. For example, the Staff assumed that damage to wetlands and other jurisdictional waters of the United States would be minimal because permits from the Corps would be required. But the Corps' regulations do not require that it reduce all impacts to a minimal level. When reviewing an application for a 404 permit under the Clean Water Act, the Corps evaluates whether the issuance of the permit is in the public interest, weighing all relevant factors, including economic, environmental, and aesthetic concerns.²¹¹ The Corps may not issue a permit if there exists a "practicable alternative . . . which would have less adverse impact on the aquatic system," the permit would cause "significant degradation of the water of the United States," or "appropriate and practicable" mitigation has not been

²¹⁰ *Calvert Cliffs*, 449 F.2d at 1123.

²¹¹ 33 C.F.R. §§ 320.4(a)(1), 323.3(g).

undertaken.²¹² However, the regulations governing Corps review do not require that mitigation measures insure minimal environmental impacts, as the FEIS seems to suggest.

Moreover, the NRC's Part 51 regulations prohibit such blanket reliance on Clean Water Act permits:

Compliance with the environmental quality standards and requirements of the Federal Water Pollution Control Act (imposed by EPA or designated permitting states) is not a substitute for, and does not negate the requirement for NRC to weigh all environmental effects of the proposed action, including the degradation, if any, of water quality, and to consider alternatives to the proposed action that are available for reducing adverse effects.²¹³

The Staff's reliance on predicted future regulation is also similar to the argument that the D.C. Circuit rejected in *New York v. NRC*.²¹⁴ The NRC argued that its environmental assessment did not need to deal with the potential impacts of leaks from spent fuel pools because its monitoring and regulatory compliance program would prevent such leaks. The court stated:

That argument . . . amounts to a conclusion that leaks will not occur because the NRC is "on duty." With full credit to the Commission's considerable enforcement and inspection efforts, merely pointing to the compliance program is in no way sufficient to support a scientific finding that spent-fuel pools will not cause a significant environmental impact during the extended storage period.²¹⁵

Similarly, in the FEIS, the Staff relied on compliance programs of other federal and state agencies to support its findings that the impact of the transmission corridor upon environmental resources will be small or minimal. Such blanket reliance is subject to serious question.

3. *Inadequate Analysis of Mitigation*

The FEIS's limited discussion of mitigation suffers from the same problem as its analysis of environmental consequences. Courts have held that an EIS must include "a serious and thorough evaluation of environmental mitigation options."²¹⁶ "Mitigation must be discussed in sufficient detail to ensure that environmental

²¹² 40 C.F.R. §§ 230.10(a), (c), (d).

²¹³ 10 C.F.R. § 51.71(d) & n.3.

²¹⁴ *New York v. NRC*, 681 F.3d at 481.

²¹⁵ *Id.*

²¹⁶ *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 178 (5th Cir. 2000).

consequences have been fairly evaluated.”²¹⁷ Rather than identifying and evaluating potential mitigation options, the FEIS merely assumes that mitigation for the transmission corridor’s impacts to wetlands, streams, and threatened and endangered species will be adequately addressed in permit reviews to be conducted by other agencies. As a result, the FEIS fails to provide a detailed evaluation of potential mitigation measures, as required, but only a series of predictions that the issue will be adequately addressed in other reviews.

4. Conclusion

There is a serious question whether the analysis of transmission corridor impacts in the FEIS satisfies NEPA’s hard look requirement.

E. Sua Sponte Review Is Warranted

We have explained that the two issues the Board has identified raise serious factual and legal questions regarding the Staff’s compliance with NEPA. Those issues can readily be distinguished from those likely to arise in the ordinary case. First, the Staff’s failure to include the transmission corridor as part of the proposed action significantly reduced its scope, both in terms of the total area affected and the environmental resources that would be impacted. The Staff effectively eliminated from the proposal nearly half of the total acreage that will be affected by the entire project.²¹⁸ The Staff’s narrow definition also meant that potential impacts to important environmental resources were excluded from the scope of the proposed federal action. For example, as EPA noted in its comments on the FEIS, the construction and maintenance of the new transmission lines and substations are estimated to impact “over 1000 acres of habitat, including over 93 acres of impacts to forested wetlands.”²¹⁹ The construction and maintenance of the new transmission lines will also potentially impact streams, threatened and endangered species, and historic and cultural resources. Given the size of the transmission corridor and the environmental resources it will affect, the corridor clearly represents a major component of the environmental impact of the Fermi Unit 3 project.

The Staff might have compensated for its narrow definition of the proposed action by including in the FEIS a thorough analysis of the potential environmental

²¹⁷ *Id.* at 176-77 (quoting *Robertson*, 490 U.S. at 352).

²¹⁸ The FEIS estimates the total acreage of the transmission corridor as 1069.2 acres. FEIS at 2-47 (Table 2-7). The Fermi site as defined in the FEIS (which includes the entire property owned by DTE, not just the site of Fermi Unit 3) is 1260 acres. FEIS at 2-5.

²¹⁹ EPA Comments on FEIS at 1.

impacts of the transmission corridor, as the agency committed to do in the SOC.²²⁰ But the Staff instead deferred major components of the required analysis to other agencies that it assumed would eventually undertake the necessary surveys and develop appropriate mitigation — even though such regulatory actions, even if they occur as predicted, may not take place until after the COL is issued. This gives rise to the problem that the rule against segmentation seeks to avoid, “when the environmental impacts of projects are evaluated in a piecemeal fashion and, as a result, the comprehensive environmental impacts of the entire Federal action are never considered or are only considered after the agency has committed itself to continuation of the project.”²²¹

The Appeal Board observed that “in inquiring on its own initiative into the transmission line question, that Board was discharging an important function assigned to it. Licensing boards have independent responsibilities in the realm of the enforcement of the NEPA command; *i.e.*, their role is not confined to the arbitration of those environmental controversies as may happen to have been placed before them by the litigants in the particular case.²²² Though this responsibility has changed — now requiring Commission approval before a board may exercise its responsibility — the authority still exists, as the Commission has made clear.²²³ This authority cannot reasonably be limited to only a situation which “involves a significant environmental impact of a type not considered previously” and “could destabilize an environmental resource or . . . involve[s] severe adverse environmental impacts.”²²⁴ A serious environmental issue also exists when an FEIS only cursorily deals with important environmental issues and concludes that impacts will be small based largely on unavailable and incomplete information and predicted future certifications from other agencies. A serious issue is also presented when the Staff’s NEPA analysis significantly understates the scope of the proposed federal action, particularly when it does so on a basis that conflicts with the law of the federal judicial circuit where the new facility will be located. Moreover, as justification for the agency’s rule change excluding transmission lines and other preconstruction activities from the scope of its proposed action, the NRC committed that “the effects of the non-Federal activities would be considered

²²⁰ 72 Fed. Reg. at 57,417, 57,421.

²²¹ 72 Fed. Reg. at 57,427-28.

²²² *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-380, 5 NRC 572, 575 (1977).

²²³ *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-20, 16 NRC 109 (1982). The Appeal Board has likewise stressed the need for licensing boards to judiciously exercise the *sua sponte* authority when faced with a serious, and unraised, issue. *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1111-12 (1983) (noting that *Zimmer* should not be read to present an “insurmountable barrier” to the exercising of *sua sponte* authority).

²²⁴ Applicant Brief at 9.

during any subsequent ‘cumulative impacts’ analysis.”²²⁵ It is at least questionable whether the Staff’s analysis of the impact of offsite transmission lines satisfies this commitment. The Staff’s alleged failure to live up to a commitment the NRC made to justify a significant change in policy is a serious issue that a board should be permitted to address.

Although the FEIS may be deficient in significant respects, a contested hearing may enable the Board to cure those deficiencies and thus bring the agency into compliance with NEPA and 10 C.F.R. Part 51. “Boards frequently hold hearings on contentions challenging the staff’s final environmental review documents In such cases, ‘[t]he adjudicatory record and Board decision (and . . . any Commission appellate decisions) become, in effect, part of the FEIS.’”²²⁶ Thus, the Staff’s FEIS, along with the adjudicatory record, becomes the relevant record of decision for the environmental portion of the proceeding.²²⁷ Federal courts of appeal have approved of this process in which an EIS is effectively amended through the adjudicatory process.²²⁸ The Board’s review would encompass all pertinent information properly before it, including the FEIS and the witness testimony and exhibits that were received into evidence at the evidentiary hearing. The Board would base its decision on whether the FEIS complies with NEPA on those sources of information, and that decision, along with the rest of the record for this proceeding, would in effect become part of the FEIS.

The Staff and DTE maintain, however, that if any further inquiry needs to be made concerning the issue raised by Contention 23, it should be made by the Commission during the mandatory hearing (also referred to as an “uncontested hearing”) rather than in a contested hearing.²²⁹ But the mandatory hearing ordinarily takes place at the end of the licensing proceeding.²³⁰ If the FEIS is found deficient at that point, the need to cure the deficiencies through amendment of the FEIS could substantially delay the licensing process. The Board, by contrast, can

²²⁵ 72 Fed. Reg. at 57,417.

²²⁶ *Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), CLI-11-6, 74 NRC 203, 208-09 (2011) (citing *Claiborne*, CLI-98-3, 47 NRC at 89 and *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705-07 (1985)).

²²⁷ See, e.g., *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 526 (2008), *petition for review denied on other grounds*, *San Luis Obispo Mothers for Peace v. NRC*, 635 F.3d 1109 (9th Cir. 2011).

²²⁸ *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 93-94 (1st Cir. 1978); *Citizens for Safe Power*, 524 F.2d at 1294 n.5. See also *Ecology Action v. AEC*, 492 F.2d 998, 1001-02 (2d Cir. 1974).

²²⁹ See Staff Response at 3, 12-16; Applicant Brief at 2 n.5.

²³⁰ The Staff’s target for completing the FSER is July 2015, so the mandatory hearing will not take place before mid-2015 at the earliest. Application Review Schedule, <http://www.nrc.gov/reactors/new-reactors/col/fermi/review-schedule.html>.

minimize the potential delay by taking up the issue as soon as the Commission authorizes *sua sponte* review.²³¹

Furthermore, the uncontested hearing, unlike a contested hearing, would make it more difficult to cure deficiencies in the FEIS through the hearing process. Although several federal courts of appeal have accepted that a contested hearing may cure deficiencies in the FEIS,²³² no court of appeals has given the same effect to an uncontested hearing. The function of the uncontested hearing is only to review the adequacy of the Staff's work, not to make a *de novo* inquiry into NEPA issues.²³³ Thus, an uncontested hearing would make it more difficult to cure deficiencies in the FEIS by, for example, developing relevant information on the environmental impacts of the transmission corridor that the Staff omitted.

In addition, the uncontested hearing excludes public participation in the review of the FEIS. Because "[t]he scope of the Intervenor's participation in adjudications is limited to their admitted contentions," they are "barred from participation in the uncontested portion of the hearing."²³⁴ Thus, unlike contested proceedings, there is no public participation in an uncontested (i.e., mandatory) hearing. The only participants would be DTE and the Staff, with no opportunity for the Intervenor to offer evidence or to argue their position. Thus, in substance, the Staff and DTE would limit any further inquiry to a hearing in which they will participate but from which the Intervenor will be excluded.

But public participation is essential to the justification for allowing amendment of an FEIS through an agency hearing. In the *Limerick* licensing proceeding, the Appeal Board had to determine whether the presiding officer's findings and conclusions modified the FEIS in the absence of the agency regulation that had previously required that they be given that effect.²³⁵ The NRC's NEPA regulations require a request for public comment on a DEIS and a supplement to a DEIS distributed in accordance with 10 C.F.R. § 51.74,²³⁶ and on any supplement to the FEIS prepared pursuant to 10 C.F.R. § 51.92(a) or (b).²³⁷ The intervenor in the *Limerick* proceeding therefore argued that "NEPA's purpose in providing the opportunity for public comment on an environmental statement [would be]

²³¹ In *Zimmer*, the Commission ordered a Licensing Board not to exercise *sua sponte* authority because the Commission had already initiated an "ongoing investigation" to deal with the issues raised. *Zimmer*, CLI-82-20, 16 NRC at 110. Here, by contrast, the NRC Staff has completed the FEIS, it has provided no indication of any intent to revise the document, and the Commission has not instructed the Staff to reconsider the transmission line issue.

²³² See *supra* note 228 and accompanying text.

²³³ *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 35-36, 39 (2005).

²³⁴ *Id.* at 49.

²³⁵ *Id.*

²³⁶ 10 C.F.R. § 51.73.

²³⁷ *Id.* § 51.92(f)(1).

thwarted by board amendment of an [FEIS].”²³⁸ The Appeal Board disagreed because the licensing board’s hearing “arguably allows for additional and a more rigorous public scrutiny of the [FEIS] than does the usual ‘circulation for comment.’”²³⁹ Given that the opportunity for rigorous public scrutiny of the FEIS was essential to the Appeal Board’s decision that the FEIS could be amended through the hearing process, eliminating such public participation would weaken the rationale of that determination.

If the FEIS violates NEPA and Part 51, the Intervenor’s failure to file Contention 23 in response to DTE’s ER will not excuse the agency’s violation. The “primary responsibility for compliance with NEPA lies with the Commission.”²⁴⁰ The issues here concern the scope of the FEIS and its failure to adequately assess the environmental impacts of a critical component of the Fermi 3 project, basic issues that the Staff must correctly evaluate whether or not they were raised by Intervenor’s.²⁴¹ Moreover, Intervenor previously notified the NRC of their concern by filing proposed Contention 23 in response to the DEIS. EPA raised the same concern, arguing that the environmental impacts of the transmission corridor should have been evaluated as direct effects of the proposed action. And the Board itself raised the same issue in its ruling holding that the DEIS version of Contention 23 was untimely.²⁴² The Staff therefore had both the legal obligation to correctly define the scope of the FEIS and ample notice that Intervenor’s, the EPA, and the Board questioned whether the Staff had adequately fulfilled that obligation. Thus, if Intervenor’s are correct that the Staff should have analyzed the transmission corridor as a connected action and that the FEIS is materially deficient, Intervenor’s failure to file Contention 23 in response to the Applicant’s ER will not excuse the agency’s potential violation of NEPA and Part 51.²⁴³ It would therefore be in the public interest to address the issues now rather than postponing their resolution indefinitely.

III. CONCLUSION

For these reasons, the Board determines that *sua sponte* review of the two issues

²³⁸ *Limerick*, ALAB-819, 22 NRC at 707.

²³⁹ *Id.*

²⁴⁰ *New York v. NRC*, 681 F.3d at 482 (citing *Pub. Citizen*, 541 U.S. at 764). *Accord Pa’ina Hawaii, LLC*, CLI-10-18, 72 NRC 56, 82 (2010).

²⁴¹ See 10 C.F.R. § 51.29(a)(1).

²⁴² See *supra* Section I.E.

²⁴³ See *Vermont Department of Public Service v. United States*, 684 F.3d 149, 156 (D.C. Cir. 2012) (stating that, in an action under the Hobbs Act for review of an NRC final order, exhaustion of remedies is not a jurisdictional requirement).

previously described is warranted and respectfully requests that the Commission authorize such review.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Dr. Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 7, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
William D. Magwood, IV
William C. Ostendorff

In the Matter of

CALVERT CLIFFS 3 NUCLEAR PROJECT, LLC, and UNISTAR NUCLEAR OPERATING SERVICES, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3)	Docket No. 52-016-COL
DTE ELECTRIC COMPANY (Fermi Nuclear Power Plant, Unit 3)	Docket No. 52-033-COL
DUKE ENERGY CAROLINAS, LLC (William States Lee III Nuclear Station, Units 1 and 2)	Docket Nos. 52-018-COL 52-019-COL
ENTERGY NUCLEAR OPERATIONS, INC. (Indian Point, Units 2 and 3)	Docket Nos. 50-247-LR 50-286-LR
ENTERGY OPERATIONS, INC. (Grand Gulf Nuclear Station, Unit 1)	Docket No. 50-416-LR

ENERGY OPERATIONS, INC. (Grand Gulf Nuclear Station, Unit 3)	Docket No. 52-024-COL
EXELON GENERATION COMPANY, LLC (Limerick Generating Station, Units 1 and 2)	Docket Nos. 50-352-LR 50-353-LR
FIRSTENERGY NUCLEAR OPERATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	Docket No. 50-346-LR
FLORIDA POWER & LIGHT COMPANY (Turkey Point Nuclear Generating Plant, Units 6 and 7)	Docket Nos. 52-040-COL 52-041-COL
LUMINANT GENERATION COMPANY LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4)	Docket Nos. 52-034-COL 52-035-COL
NEXTERA ENERGY SEABROOK, LLC (Seabrook Station, Unit 1)	Docket No. 50-443-LR
NORTHERN STATES POWER COMPANY (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation)	Docket No. 72-10-ISFSI
NUCLEAR INNOVATION NORTH AMERICA LLC (South Texas Project, Units 3 and 4)	Docket Nos. 52-012-COL 52-013-COL
PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2)	Docket Nos. 50-275-LR 50-323-LR

PPL BELL BEND, LLC (Bell Bend Nuclear Power Plant)	Docket No. 52-039-COL
PROGRESS ENERGY CAROLINAS, INC. (Shearon Harris Nuclear Power Plant, Units 2 and 3)	Docket Nos. 52-022-COL 52-023-COL
PROGRESS ENERGY FLORIDA, INC. (Levy County Nuclear Power Plant, Units 1 and 2)	Docket Nos. 52-029-COL 52-030-COL
SOUTH TEXAS PROJECT NUCLEAR OPERATING COMPANY (South Texas Project, Units 1 and 2)	Docket Nos. 50-498-LR 50-499-LR
TENNESSEE VALLEY AUTHORITY (Bellefonte Nuclear Power Plant, Units 3 and 4)	Docket Nos. 52-014-COL 52-015-COL
TENNESSEE VALLEY AUTHORITY (Sequoyah Nuclear Plant, Units 1 and 2)	Docket Nos. 50-327-LR 50-328-LR
TENNESSEE VALLEY AUTHORITY (Watts Bar Nuclear Plant, Unit 2)	Docket No. 50-391-OL
UNION ELECTRIC COMPANY (Callaway Plant, Unit 1)	Docket No. 50-483-LR
VIRGINIA ELECTRIC AND POWER COMPANY d/b/a DOMINION VIRGINIA POWER and OLD DOMINION ELECTRIC COOPERATIVE (North Anna Power Station, Unit 3)	Docket No. 52-017-COL August 26, 2014

GENERIC ENVIRONMENTAL IMPACT STATEMENT, RULEMAKING

Generic determinations regarding the environmental impacts of continued storage of spent nuclear fuel beyond a reactor's licensed operating life have been the subject of extensive public participation in the rulemaking process and, therefore, are excluded from litigation in individual proceedings.

MEMORANDUM AND ORDER

Today we lift the suspension on final licensing decisions that we imposed in CLI-12-16, in view of the issuance of a revised rule codifying the NRC's generic determinations regarding the environmental impacts of continued storage of spent nuclear fuel beyond a reactor's licensed operating life. Further, we provide direction on the disposition of pending contentions associated with continued storage.

I. BACKGROUND

In 2012, the U.S. Court of Appeals for the District of Columbia Circuit found that the NRC failed to comply with the National Environmental Policy Act (NEPA) in issuing its 2010 update to the Waste Confidence Decision and accompanying Temporary Storage Rule.¹ As had previous iterations of the Decision and Rule, the 2010 versions supported generic findings in 10 C.F.R. § 51.23 regarding the impacts of spent fuel storage after the cessation of licensed operation of a nuclear power plant. Section 51.23(a) reflected several findings, including, first, that spent fuel "can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation" and, second, that "there is reasonable assurance that sufficient mined geologic repository capacity will be available . . . when necessary."² Section 51.23(b) relied on these findings, among others, to exclude "discussion of any environmental impact of spent fuel storage . . . [during] the period following the term of the reactor operating license" in any environmental impact statement, environmental assessment, environmental

¹ *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012); *see generally* Final Rule: "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation," 75 Fed. Reg. 81,032 (Dec. 23, 2010); Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

² 10 C.F.R. § 51.23(a) (2011).

report, or other analysis prepared in connection with enumerated power reactor and dry cask licenses.³

The court identified three particular deficiencies in the 2010 analysis. First, related to the Commission’s conclusion that permanent disposal will be available “when necessary,” the court held that the NRC needed to examine the environmental impacts of failing to establish a repository. Second, related to the continued storage of spent fuel, the court held that the Commission had not adequately examined the risk of spent fuel pool leaks. And third, also related to continued storage, the court held that the NRC had not adequately examined the consequences of potential spent fuel pool fires.

In response to the court’s ruling, we determined in CLI-12-16 that the NRC would not issue licenses dependent upon the Decision and Rule, pending completion of action on the remanded proceeding.⁴ In the same decision, we opted to hold in abeyance a number of new contentions and associated filings concerning continued storage of spent nuclear fuel beyond a reactor’s licensed life for operation and prior to ultimate disposal.⁵

We have now approved a final Continued Storage Rule⁶ and associated generic environmental impact statement (GEIS).⁷ In the GEIS, the NRC has assessed generically the environmental impacts of continued storage of spent nuclear fuel and has addressed the issues raised in the D.C. Circuit’s decision. The revised rule, in turn, codifies the environmental impacts reflected in the GEIS and reflects that these impact determinations will inform the decisionmakers in individual licensing proceedings of the impacts of continued storage.⁸ The

³ *Id.* § 51.23(b) (2011).

⁴ CLI-12-16, 76 NRC 63, 67 (2012).

⁵ *Id.* at 68-69.

⁶ The title of the rule has been changed to reflect issuance of a generic environmental impact statement in lieu of a separate Waste Confidence Decision. See “Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel,” NUREG-2157 (Aug. 2014), at xxiii; D-11 to D-12 (discussing public comments on the name change) (ADAMS Accession No. ML14188B749) (GEIS).

⁷ Staff Requirements — SECY-14-0072 — Final Rule, Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20) (Aug. 26, 2014) (ADAMS Accession No. ML14237A092); see “Final Rule: Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20),” Commission Paper SECY-14-0072 (July 21, 2014) (attaching the GEIS and the draft Final Rule, Continued Storage of Spent Nuclear Fuel (Continued Storage Rule)). The Commission paper and its attachments may be found at ADAMS Accession No. ML14177A482 (package).

⁸ Continued Storage Rule at 4, 39-40; see *id.* at 74-75 (setting forth the revised section 51.23). The rule, which adopts the generic impact determinations made in the GEIS, satisfies the NRC’s NEPA obligations with respect to continued storage for initial, renewed, and amended licenses for reactors, independent spent fuel storage installations (ISFSIs), construction permits, and early site permits. Further, consistent with the rule, these determinations generally may not be challenged in individual licensing proceedings. *Id.* at 19-20.

NRC also addressed in the GEIS the three specific deficiencies identified by the court.⁹ Because we have approved this rule today, the time is ripe to address the suspension that we imposed in CLI-12-16.

II. DISCUSSION

A. Suspension of Final Licensing Decisions

Following the court's 2012 remand, substantively identical petitions were filed in conjunction with nineteen pending reactor license applications.¹⁰ The petitioners asked that we suspend final licensing decisions in reactor licensing cases pending the completion of our action on the remanded Waste Confidence proceeding.¹¹ We did so, observing that waste confidence undergirds certain licensing decisions, particularly new reactor licensing and power reactor license renewal.¹² Historically, the Waste Confidence Decision represented the NRC's generic determination (and supporting generic environmental analysis) that spent nuclear fuel can be stored safely and without significant impacts for a period of time past a reactor's licensed life, but before permanent disposal. Because it made this determination generically, the NRC did not need to undertake site-specific identification of the environmental impacts associated with continued storage of spent nuclear fuel.¹³ Vacatur of the Decision and Rule therefore left a gap in the NEPA analyses associated with these licensing reviews.¹⁴

In September 2012, we directed the Staff to develop a generic environmental impact statement to identify the environmental impacts of continued storage,

⁹ Continued Storage Rule at 14. *See generally* GEIS at xxx, 1-4 (explaining that the GEIS includes an analysis of an indefinite time frame, which assumes that a repository does not become available); GEIS, App. E, "Analysis of Spent Fuel Pool Leaks"; GEIS, App. F, "Spent Fuel Pool Fires."

¹⁰ As noted in CLI-12-16, the suspension petition was not filed in the *Indian Point* or *Limerick* matters, or in the then-pending *Victoria County* matter. CLI-12-16, 76 NRC at 68 n.10.

¹¹ CLI-12-16, 76 NRC at 66.

¹² *Id.* at 66 & n.5 (citing 10 C.F.R. § 51.23(b) (2012)).

¹³ Proposed Rule, "Waste Confidence — Continued Storage of Spent Nuclear Fuel," 78 Fed. Reg. 56,776, 56,776 (Sept. 13, 2013) (Proposed Continued Storage Rule).

¹⁴ *See Small Refiner Lead Phase-Down Task Force v. Environmental Protection Agency*, 705 F.2d 506, 545 (D.C. Cir. 1983) (observing that, where the reviewing court vacates a rule without reinstating the old rule, "failure to reinstate the old rule creates a temporary regulatory vacuum"). In this case, even had the court expressly reinstated the prior version of the Waste Confidence Decision, a gap still would have been present — the court identified specific deficiencies in the Staff's analysis; the NRC was obliged to address these deficiencies. *See New York*, 681 F.3d at 478, 481-82 (holding that the NRC must include an evaluation of failure to secure permanent disposal, as well as an improved analysis of spent fuel pool leaks and spent fuel pool fires).

address the issues raised by the court, and support an updated rule.¹⁵ We approved publication of a proposed rule and associated draft generic environmental impact statement the next year.¹⁶ Following a robust public comment period that included an extensive campaign of public meetings across the United States (discussed further below), the Staff has crafted a generic environmental impact statement and revised rule that cure the deficiencies identified by the court. We have adopted that rule today. Upon consideration of the final Continued Storage Rule and associated GEIS, we lift the suspension on all final licensing decisions for affected applications as of the effective date of the final rule. To be sure, the results of the continued storage proceeding must be accounted for before finalizing individual licensing decisions. But once the Staff has otherwise completed its review of the affected applications and has implemented the Continued Storage Rule as appropriate for each affected application, it may make decisions regarding final license issuance.¹⁷

B. Pending Contentions Concerning Continued Storage

In CLI-12-16, we observed that, to the extent that the NRC addressed waste confidence on a case-by-case basis, “litigants can challenge such site-specific agency actions in our adjudicatory process.”¹⁸ Twenty-two continued storage contentions, most filed concurrently with the suspension petitions, are pending before us¹⁹ or before the Atomic Safety and Licensing Boards.²⁰ All but two

¹⁵ See Staff Requirements — COMSECY-12-0016 — Approach for Addressing Policy Issues Resulting from Court Decision to Vacate Waste Confidence Decision and Rule (Sept. 6, 2012) (ADAMS Accession No. ML12250A032) (SRM-COMSECY-12-0016).

¹⁶ See Staff Requirements — SECY-13-0061 — Proposed Rule: Waste Confidence — Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20) (Aug. 5, 2013) (ADAMS Accession No. ML13217A358); Proposed Continued Storage Rule, 78 Fed. Reg. at 56,776; Draft Waste Confidence Generic Environmental Impact Statement, 78 Fed. Reg. 56,621 (Sept. 13, 2013).

¹⁷ Consistent with our direction in CLI-12-16, licensing reviews and adjudications continued apace. See CLI-12-16, 76 NRC at 67; “Implementation of Commission Memorandum and Order CLI-12-16 Regarding Waste Confidence Decision and Rule,” Commission Paper SECY-12-0132 (ADAMS Accession No. ML12276A054) (package) (explaining the Staff’s approach for continuing licensing reviews during the pendency of the rulemaking); Continued Storage Rule at 19-20, 36-37, 39-40 (explaining how the impact determinations in the GEIS will be used in NRC environmental reviews).

¹⁸ CLI-12-16, 76 NRC at 67 (footnote omitted).

¹⁹ The filings before the Commission are listed in an Appendix to this decision.

²⁰ The filings before the Boards are listed in the Appendix to this decision, together with the Board orders implementing our direction in CLI-12-16. The continued storage issue had been raised before the Board in the *Victoria County Station* early site permit proceeding; that proceeding has since been terminated. *Exelon Nuclear Texas Holdings, LLC* (Victoria County Station Site), LBP-12-20, 76 NRC 215 (2012) (granting the motion to withdraw the application without prejudice and terminating the proceeding).

of these contentions are substantively similar. Echoing the court's decision, the petitioners argued in a general way that the environmental review for each proposed facility (the environmental report, draft environmental impact statement, or final environmental impact statement, depending on the status of the application in question) does not satisfy NEPA. To cite one example:

The [draft environmental impact statement] for the proposed Fermi 3 does not satisfy NEPA, because it does not include a discussion of the environmental impacts of spent fuel storage after cessation of operation, including the impacts of spent fuel pool leakage, spent fuel pool fires, and failing to establish a spent fuel repository, as required by the U.S. Court of Appeals in *State of New York v. NRC*, No. 11-1045 (June 8, 2012). Therefore, unless and until the NRC conducts such an analysis, no license may be issued.²¹

At bottom, the petitioners argued that, in view of the court's decision invalidating the 2010 Decision and Rule, the NRC could no longer rely on 10 C.F.R. § 51.23(b), "which relies on those findings to exempt both the agency staff and license applicants from addressing spent fuel storage impacts in individual licensing proceedings."²²

As we acknowledged in CLI-12-16 and again earlier this year, due to the special circumstances presented by waste confidence, we directed that such contentions be held in abeyance pending our further direction.²³ As discussed in the GEIS, the NRC considered addressing the environmental impacts of continued storage in site-specific reviews.²⁴ As part of the analysis underpinning the GEIS, however, we concluded that the impacts of continued storage will not vary significantly across sites; the impacts of continued storage at reactor sites, or at

²¹ Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Proposed Fermi 3 Nuclear Power Plant (July 9, 2012) at 4.

²² *Id.* at 4-5.

²³ *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2), CLI-14-3, 79 NRC 31, 33-34, 37 (2014) (indicating that further direction regarding pending contentions would be provided "concurrent with issuance of the final rule"); CLI-12-16, 76 NRC at 68-69. At the time we directed the Staff to prepare a final rule and environmental impact statement, we expressly reserved the option to conduct some environmental analyses of continued storage issues on a site-specific basis if necessary, although we cautioned the Staff that "such a step should be used only in rare circumstances in which there is an exceptional or compelling need to proceed otherwise and proceeding with the site-specific review would not delay or create inconsistencies with development of the generic [environmental impact statement]." SRM-COMSECY-12-0016 at 2 (unnumbered).

²⁴ GEIS at 1-6 to 1-9 (discussing, among other things, review of impacts on a site-specific basis, preparation of a GEIS whose findings could be used in individual licensing reviews without the binding effect of a rule, or preparation of a policy statement).

away-from-reactor sites, can be analyzed generically.²⁵ Further, “the assumptions used in the analysis are sufficiently conservative to bound the impacts such that variances that may occur between sites are unlikely to result in environmental impact determinations greater than those presented in the GEIS.”²⁶ Because these generic impact determinations have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings.²⁷

We therefore decline to accept for litigation those contentions pending before us.²⁸ The motions pending before us in the *William States Lee, Grand Gulf, Shearon Harris, Comanche Peak*, and *North Anna* combined license matters, and in the *South Texas* and *Grand Gulf* license renewal matters, are dismissed; those proceedings are terminated.²⁹

Likewise, we direct the Atomic Safety and Licensing Boards to reject the contentions pending before them, consistent with our decision today,³⁰ with the exception of the two contentions pending in the *Indian Point* matter. These proposed contentions appear to include issues beyond the scope of the Continued

²⁵ Continued Storage Rule at 15-17. As the final rule acknowledges, the court of appeals endorsed a generic approach. *Id.* at 15 (citing *New York*, 681 F.3d at 480 (“[W]e see no reason that a comprehensive general analysis would be insufficient to examine on-site risks that are essentially common to all plants.”)).

²⁶ GEIS at D-101 to D-102 (response to Comment D.2.11.6); *see also id.* at D-94 to D-109 (providing, *inter alia*, responses to comments requesting site-specific reviews instead of a generic analysis); *id.* at D-68 to D-71 (providing responses to comments expressing concerns related to particular power plants or spent fuel storage facilities).

²⁷ Contentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999) (quoting *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)); *see also* 10 C.F.R. §§ 2.309(f)(1)(iii), 2.335(a); GEIS at 1-7 (“Requiring the NRC to prepare site-specific discussions of generic issues, like those associated with continued storage, would result in the considerable expenditure of public, NRC, and applicant resources. Further, licensing boards could be required to hear nearly identical issues in each proceeding on these generic matters. Adopting the generic impacts of continued storage in a rule, on the other hand, allows the NRC and the participants in its licensing proceedings to focus their limited resources on site-specific issues that are unique to each licensing action.”).

²⁸ As the Staff made clear in the GEIS, the Continued Storage Rule does not address the environmental impacts of spent fuel storage *during the license term*; these impacts are assessed as part of the site-specific environmental review for a proposed action. *See, e.g.*, GEIS at D-95. The site-specific environmental review may be subject to challenge, provided all other procedural requirements are satisfied.

²⁹ *See* the Appendix to this decision for a list of contentions pending before us. Because the proposed continued storage contentions are inadmissible, we need not, and do not, reach the other procedural issues raised by these motions.

³⁰ *See id.*

Storage Rule.³¹ To the extent that Contentions CW-SC-4 and NYS-39/RK-EC-9/CW-EC-10 raise issues resolved by the Continued Storage Rule, the Board is directed to dismiss them consistent with our opinion today. To the extent that these contentions raise other matters, the Board should assess their admissibility under our generally applicable rules of practice.³²

* * * *

One other matter merits mention. The petitioners sought “an opportunity for public comment on any generic determinations that [the Commission] may make in either an environmental assessment . . . or environmental impact statement”³³ In CLI-12-16, we committed that the public “will be afforded an opportunity to comment in advance on any generic waste confidence document that the NRC issues on remand — be it a fresh rule, a policy statement, an [environmental assessment], or an [environmental impact statement].”³⁴ The rulemaking record reflects that the Staff provided a variety of opportunities for public participation over the course of the rulemaking and received extensive public comment.³⁵ Many — if not most — of the petitioners in the captioned matters availed themselves of the opportunity to participate.³⁶ We are satisfied that the Staff amply fulfilled the assurances we made in CLI-12-16.

³¹ See Hudson River Sloop Clearwater, Inc.’s Motion for Leave to Add a New Contention Based Upon New Information and Petition to Add New Contention (July 9, 2012) (Contention CW-SC-4); State of New York, Riverkeeper, and Clearwater’s Joint Motion for Leave to File a New Contention Concerning the On-Site Storage of Nuclear Waste at Indian Point (July 8, 2012); State of New York, Riverkeeper, Inc., and Hudson River Sloop Clearwater’s Joint Contention NYS-39/RK-EC-9/CW-EC-10 Concerning the On-Site Storage of Nuclear Waste at Indian Point (July 8, 2012).

³² See 10 C.F.R. § 2.309(c), (f).

³³ CLI-12-16, 76 NRC at 66.

³⁴ *Id.* at 67.

³⁵ The proposed rule was published for a 75-day comment period on September 13, 2013; the comment period ultimately was extended until December 20, 2013. Proposed Continued Storage Rule, 78 Fed. Reg. at 56,776; Proposed Rule, Waste Confidence — Continued Storage of Spent Nuclear Fuel, 78 Fed. Reg. 66,858 (Nov. 7, 2013) (extension of comment period). During the comment period, the NRC Staff held thirteen public meetings across the country. Overall, the NRC received over 33,000 comment submissions and recorded approximately 1,600 pages of public meeting transcripts. Continued Storage Rule at 52-53; GEIS at 1-12, C-1 to C-18, D-1 to D-3.

³⁶ See, e.g., Comments by Environmental Organizations on Draft Waste Confidence Generic Environmental Impact Statement and Proposed Waste Confidence Rule and Petition to Revise and Integrate All Safety and Environmental Regulations Related to Spent Fuel Storage and Disposal (Dec. 20, 2013, corrected Jan. 7, 2014) (ADAMS Accession No. ML14030A152) (package) (transmitting comments made on behalf of thirty-three organizations); Comments Submitted by the Attorneys General of the States of New York, Vermont, Connecticut, and the Commonwealth of Massachusetts, the Vermont Department of Public Service, and the Prairie Island Indian Community on the Nuclear Regulatory (Continued)

III. CONCLUSION

For the reasons discussed above, and in view of our approval of the final Continued Storage Rule and associated GEIS, we *lift* the suspension on all final licensing decisions for affected applications as of the effective date of the final rule. Further, the proposed “continued storage” contentions referenced herein are inadmissible, and we *decline to accept them* for litigation. As such, we *dismiss* the petitions pending before us in *William States Lee, Grand Gulf, Shearon Harris, Comanche Peak, North Anna, and South Texas* and *terminate* those proceedings. We *direct* the Atomic Safety and Licensing Boards, with the exception of the *Indian Point* Board, to likewise dismiss the contentions pending before them. Finally, we *direct* the *Indian Point* Board to dismiss the “continued storage” contentions pending before it; to the extent that the Board finds that these contentions raise issues outside the scope of the Continued Storage Rule, the Board should assess the admissibility of these contentions under the applicable rules of practice.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of August 2014

Commission’s Draft Waste Confidence Generic Environmental Impact Statement and Proposed Rule (Jan. 2, 2013) (ADAMS Accession No. ML13365A345). *See generally* GEIS at D-554 to D-602 (listing individuals who provided unique comments on the draft GEIS and proposed rule).

APPENDIX

CONTENTIONS PENDING BEFORE THE COMMISSION

1. Motion to Reopen the Record for William States Lee III Units 1 and 2 (July 9, 2012), together with Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at William States Lee III Units 1 and 2 (July 9, 2012).
2. Beyond Nuclear Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Grand Gulf Unit 1 (July 9, 2012).
3. Beyond Nuclear Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Grand Gulf Unit 3 (July 9, 2012).
4. Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Comanche Peak Nuclear Power Plant (July 9, 2012).
5. NC WARN's Motion to Reopen the Record and Admit Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at the Shearon Harris Nuclear Power Plant (July 9, 2012).
6. Petition for Intervention to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at STP Units 1 & 2 (July 9, 2012).
7. Motion to Reopen the Record for North Anna Unit 3 (July 9, 2012), filed with Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at North Anna Unit 3 (July 9, 2012).

CONTENTIONS PENDING BEFORE THE ATOMIC SAFETY AND LICENSING BOARDS

1. Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Proposed Fermi 3 Nuclear Power Plant (July 9, 2012); Order (Holding New Contention in Abeyance) (Aug. 29, 2012) (unpublished).
2. Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Davis-Besse Nuclear

- Power Station (July 9, 2012); Order (Suspending Procedural Date Related to Proposed Waste Confidence Contention) (Aug. 8, 2012) (unpublished).
3. Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Turkey Point Nuclear Power Plant (July 9, 2012) (two motions, one filed by Southern Alliance for Clean Energy, National Parks Conservation Association, Dan Kipnis, and Mark Oncavage, and the other by Citizens Allied for Safe Energy, Inc.); Order (Suspending Deadlines for Submission of Reply Briefs Related to Proposed Waste Confidence Contention) (Aug. 9, 2012) (unpublished).
 4. Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Seabrook Station, Unit 1 (July 9, 2012); Order (Holding Intervenors' Motion for Leave to File a New Contention in Abeyance) (Aug. 15, 2012) (unpublished).
 5. San Luis Obispo Mothers for Peace Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Diablo Canyon Nuclear Power Plant (July 9, 2012); Order (Holding Proposed New Contention in Abeyance) (Aug. 16, 2012) (unpublished).
 6. Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Levy Nuclear Power Plant (July 9, 2012); Order (Holding Proposed New Contention in Abeyance) (Aug. 16, 2012) (unpublished).
 7. Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at South Texas Units 3 & 4 (July 9, 2012).
 8. Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Bellefonte (July 9, 2012); Memorandum and Order (Suspending Date for Submission of Reply Pleading) (Aug. 8, 2012) (unpublished).
 9. Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Watts Bar Unit 2 (July 9, 2012); Order (Holding Waste Confidence Contention in Abeyance) (Aug. 9, 2012) (unpublished).
 10. Intervenor's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Callaway Nuclear Power Plant (July 9, 2012); Memorandum and Order (Suspending Date for Submission of Reply Pleading) (Aug. 8, 2012) (unpublished).

11. Hudson River Sloop Clearwater, Inc.'s Motion for Leave to Add a New Contention Based Upon New Information and Petition to Add New Contention (July 9, 2012); State of New York, Riverkeeper, and Clearwater's Joint Motion for Leave to File a New Contention Concerning the On-Site Storage of Nuclear Waste at Indian Point, filed with State of New York, Riverkeeper, Inc., and Hudson River Sloop Clearwater's Joint Contention NYS-39/RK-EC-9/CW-EC-10 Concerning the On-Site Storage of Nuclear Waste at Indian Point (July 8, 2012); Order (Holding Contentions NYS-39/RK-EC-9/CW-EC-10 and CW-SC-4 in Abeyance) (Aug. 8, 2012) (unpublished).
12. NRDC's Waste Confidence Contention (July 9, 2012); Order (Suspending Procedural Date Related to Proposed Waste Confidence Contention) (Aug. 8, 2012) (unpublished) (suspending briefing in the *Limerick* license renewal proceeding).
13. Prairie Island Indian Community's Request for Hearing and Petition to Intervene in License Renewal Proceeding for the Prairie Island Independent Spent Fuel Storage Installation (Aug. 24, 2012), at 23-26 (Contention 1); LBP-12-24, 76 NRC at 510-11 (2012) (holding Contention 1 in abeyance); Prairie Island Indian Community Motion to Admit New and Amended Contentions after Issuance of NRC's Draft Environmental Assessment (Dec. 12, 2013); Memorandum and Order (Ruling on Motion to Admit New and Amended Contentions) (Apr. 30, 2014), at 5-7 (unpublished) (holding an amended Contention 1, challenging the draft environmental impact statement, in abeyance).
14. Petition for Leave to Intervene and Request for Hearing by the Blue Ridge Environmental Defense League, Bellefonte Efficiency and Sustainability Team, and Mothers Against Tennessee River Radiation (May 6, 2013), at 12-14 (Contention B in the *Sequoyah* license renewal proceeding); LBP-13-8, 78 NRC 1, 15-16 (2013) (holding Contention B in abeyance), *interlocutory appeal denied*, CLI-14-3, 79 NRC 31 (2014).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

E. Roy Hawkens, Presiding Officer

In the Matter of

**Docket No. 50-228-LT
(ASLBP No. 14-931-01-LT-BD01)**

**AEROTEST OPERATIONS, INC.
(Aerotest Radiography and Research
Reactor)**

September 5, 2014

CERTIFICATION OF RECORD TO COMMISSION

This proceeding involves a challenge to the NRC Staff's denial of a license transfer for the Aerotest Radiography and Research Reactor from Aerotest Operations, Inc. to Nuclear Labyrinth, LLC.¹ It is subject to the procedural requirements set forth in 10 C.F.R. Part 2, Subpart M — "Procedures for Hearings on License Transfer Applications" (10 C.F.R. §§ 2.1300-2.1331).

In CLI-14-5 (*supra* note 1), the Commission directed, *inter alia*, that the designated Presiding Officer compile a hearing record using the Subpart M rules, rule on any motions related to developing the record, preside at any oral hearing, and certify the compiled record to the Commission within 25 days after the conclusion of the hearing. *See* CLI-14-5, 79 NRC at 263, 265.

The Presiding Officer held an evidentiary hearing in Rockville, Maryland, on August 12, 2014. Consistent with 10 C.F.R. § 2.1320(b)(3) and the Commission's directions in CLI-14-5, I hereby certify the below record of this proceeding,

¹ *See* CLI-14-5, 79 NRC 254, 265 (2014).

which includes all documents filed after CLI-14-5, to the Commission for its final decision.²

THE ATOMIC SAFETY AND
LICENSING BOARD

E. Roy Hawkens, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 5, 2014

² All of the publicly available documents are accessible via the NRC's Electronic Hearing Docket (EHD) system at <http://ehd1.nrc.gov/ehd/>.

**RECORD OF AEROTEST OPERATIONS, INC. PROCEEDING
COMMENCING WITH THE ISSUANCE OF CLI-14-5**

Accession Number	Document Date	Title	Availability
Commission and Board Orders			
ML14100A094	04/10/2014	Commission Memorandum and Order (CLI-14-5) with corrected Certificate of Service.	Publicly Available
ML14100A558	04/10/2014	SECY Referral Memorandum to the ASLB.	Publicly Available
ML14106A251	04/16/2014	Establishment of Atomic Safety and Licensing Board in the Matter of Aerotest Operations, Inc. (Aerotest Radiography and Research Reactor).	Publicly Available
ML14112A305	04/22/2014	Notice of Conference Call (Scheduling Prehearing Conference to Discuss Matters Relating to Case Scheduling and Management).	Publicly Available
ML14115A165	04/25/2014	Order Memorializing Discussion at April 24, 2014, Pre-Hearing Conference.	Publicly Available
ML14133A564	05/13/2014	Memorandum and Order (Initial Scheduling Order and Administrative Directives).	Publicly Available
ML14142A237	05/22/2014	Memorandum and Order (Ruling on Admissibility of Areas of Controversy).	Publicly Available
ML14184B265	07/03/2014	Order (Denying the NRC Staff's Motion in Limine).	Publicly Available
ML14199A345	07/18/2014	Notice (Scheduling Prehearing Teleconference).	Publicly Available
ML14206A956	07/25/2014	Order (Memorializing Discussion at July 24, 2014 Pre-Hearing Conference in Preparation for August 12, 2014 Evidentiary Hearing).	Publicly Available

Accession Number	Document Date	Title	Availability
Commission and Board Orders (Continued)			
ML14210A414	07/29/2014	Notice of Hearing (Notice of Closed Evidentiary Hearing).	Publicly Available
ML14223B028	08/11/2014	Memorandum and Order (Denying Aerotest Operations, Inc. and Nuclear Labyrinth, LLC's Motion to File Additional Exhibits).	Publicly Available
ML14226A506	08/14/2014	Order (Providing Proposed Questions for Evidentiary Hearing).	Proprietary/ Non-Publicly Available
ML14239A521	08/27/2014	Order (Adopting Transcript Corrections, Denying Companies' Motion to Correct Transcript, and Closing Evidentiary Record).	Publicly Available
ML14240A269	08/28/2014	Order Granting Motion to File Redacted Publicly Available Transcript	Publicly Available
ML14245A212	09/02/2014	Order (Adopting Addition to Joint Transcript Corrections)	Publicly Available
Not Yet Assigned	09/05/2014	Order (Denying Motion to Strike)	Publicly Available
Legal Pleadings & Motions			
ML14129A476	05/09/2014	NRC Staff Response to Aerotest Operations, Inc. and Nuclear Labyrinth, LLC's Statement of Areas of Controversy Regarding Denial of Indirect License Transfer of Aerotest Radiography and Research Reactor.	Proprietary/ Non-Publicly Available
ML14129A479	05/09/2014	NRC Staff Response to Aerotest Operations, Inc. and Nuclear Labyrinth, LLC's Statement of Areas of Controversy Regarding Denial of Indirect License Transfer of Aerotest Radiography and Research Reactor.	Publicly Available

Accession Number	Document Date	Title	Availability
Legal Pleadings & Motions (Continued)			
ML14164A690	06/13/2014	Aerotest Operations, Inc. and Nuclear Labyrinth, LLC Initial Statement of Position in the Hearing on the Denial of Indirect License Transfer Application.	Proprietary/ Non-Publicly Available
ML14164A680	06/13/2014	NRC-001P — Statement of Position (PROPRIETARY)	Proprietary/ Non-Publicly Available
ML14174B051	06/23/2014	NRC Staff Motion in Limine to Exclude Portions of the Companies' Initial Statement of Position and Pre-Filed Direct Testimony.	Publicly Available
ML14181B201	06/30/2014	Aerotest Operations, Inc. and Nuclear Labyrinth, LLC's Response Opposing NRC Staff's Motion in Limine to Exclude Portions of the Companies Initial Statement of Position and Pre-Filed Direct Testimony.	Publicly Available
ML14199A634	07/18/2014	Aerotest Operations, Inc. and Nuclear Labyrinth, LLC, Rebuttal Statement of Position in the Hearing on the Denial of Indirect License Transfer Application.	Proprietary/ Non-Publicly Available
ML14199A734	07/18/2014	NRC-045(P) — Rebuttal Statement of Position.	Proprietary/ Non-Publicly Available
ML14212A708	07/31/2014	NRC Staff Concluding Statement of Position Regarding Denial of the Indirect License Transfer of the Aerotest Radiography and Research Reactor.	Proprietary/ Non-Publicly Available
ML14212A818	07/31/2014	Aerotest Operations Inc., and Nuclear Labyrinth, LLC Concluding Statement of Position in the Hearing on the Denial of Indirect License Transfer Application.	Proprietary/ Non-Publicly Available

Accession Number	Document Date	Title	Availability
Legal Pleadings & Motions (Continued)			
ML14219A739	08/07/2014	Aerotest Operations, Inc. and Nuclear Labyrinth, LLC's Motion to File Additional Exhibits.	Publicly Available
ML14220A537	08/08/2014	NRC Staff's Objection to Aerotest Operations, Inc., and Nuclear Labyrinth, LLC's Motion to File Additional Exhibits.	Proprietary/ Non-Publicly Available
ML14234A223	08/22/2014	Joint Proposed Transcript Corrections.	Publicly Available
ML14234A480	08/22/2014	Motion to Correct Transcript from August 12, 2014 Hearing.	Publicly Available
ML14239A647	08/26/2014	Unopposed Motion to File Redacted, Publicly Available Transcript from August 12, 2014 Hearing.	Publicly Available
ML14239A283	08/27/2014	NRC Staff's Objection to Aerotest Operations, Inc., and Nuclear Labyrinth, LLC's Motion to Correct Transcript from August 12, 2014 Hearing.	Publicly Available
ML14241A245	08/28/2014	Addition to Joint Proposed Transcript Corrections	Publicly Available
ML14241A627	08/29/2014	Aerotest Operations, Inc., and Nuclear Labyrinth, LLC Post-Hearing Statement of Position on the Denial of Indirect License Transfer Application.	Non-Publicly Available
ML14241A649	08/29/2014	NRC Staff Post-Hearing Statement of Position Regarding Denial of the Indirect License Transfer of the Aerotest Radiography and Research Reactor.	Non-Publicly Available

Accession Number	Document Date	Title	Availability
Legal Pleadings & Motions (Continued)			
Not Yet Assigned	09/03/2014	Motion to Strike Portions of Aerotest Operations, Inc. and Nuclear Labyrinth, LLC Post-Hearing Statement of Position on the Denial of Indirect License Transfer Application	Publicly Available
Transcripts and Hearing Files			
ML14119A144	04/24/2014	Transcript of Teleconference Regarding RE Aerotest Operations, Inc. on April 24, 2014 Pages 1-22.	Publicly Available
ML14129A452	05/08/2014	Affidavit of Alexander Adams Jr. Concerning Mandatory Disclosure Requirement of 10 C.F.R. 2.336(b).	Publicly Available
ML14129A451	05/09/2014	Aerotest Operations, Inc. License Transfer Hearing File and Mandatory Disclosures Hearing File Index Initial Disclosures — May 9, 2014.	Publicly Available
ML14129A453	05/09/2014	Hearing File Cover Letter in the Matter of Aerotest Operations, Inc. (Aerotest Radiography and Research Reactor).	Publicly Available
ML14132A268	05/12/2014	Corrected Hearing File Index in the Matter of Aerostest Operations, Inc.	Publicly Available
ML14132A269	05/12/2014	Enclosure — Attachment 1: Hearing File Index (corrected).	Publicly Available
ML14213A328	08/01/2014	Transcript of Aerotest Operations, Inc., Aerotest Radiography and Research Reactor Teleconference July 24, 2014 Pages 23-35.	Publicly Available
ML14225A710	08/12/2014	Transcript of Aerotest Operations, Inc., Aerotest Radiography and Research Reactor Teleconference August 12, 2014, Pages 36-223.	Proprietary/ Non-Publicly Available

Accession Number	Document Date	Title	Availability
Transcripts and Hearing Files (Continued)			
ML14239A647	08/26/2014	Unopposed Motion to File Redacted, Publicly Available Transcript from August 12, 2014 Hearing	Publicly Available
Exhibits (All Identified and Admitted into Evidence on 8/12/2014)			
ML14229A035	07/18/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI000-R-00-BD01 — Aerotest Operations, Inc. Revised Hearing Exhibits List (July 18, 2014).	Non-Publicly Available
ML14229A052	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI002-00-BD01 — Eric Leeds, NRC, Letter to Dario Brisighella, Aerotest, Aerotest Operations, Inc. Proposed Denial of Application for Renewal of Facility License No. R-98 (TAC No. MD8177) (July 9, 2009)	Non-Publicly Available
ML14229A053	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI100-00-BD01 — Prefiled Direct Testimony of M Anderson.	Non-Publicly Available
ML14229A051	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI101-00-BD01 — M Anderson Resume.	Non-Publicly Available
ML14229A055	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI106-00-BD01 — Funding Agreement.	Non-Publicly Available
ML14229A059	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI108-00-BD01 — Figure of Facility.	Non-Publicly Available
ML14229A058	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI109-00-BD01 — Updated Safety Analysis Report (February 28, 2005) (Chapter 1)	Non-Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A056	05/03/2000	OFFICIAL EXHIBIT — NON-PUBLIC — AOI111-00-BD01 — Fax from Aerotest to NRC: Letter Announcing Organizational Changes (May 4, 2000)	Non-Publicly Available
ML14229A054	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI112-00-BD01 — NRC Memorandum, D. Matthews to J. Craig, appended to J. Craig Notice to Commissioner Assistants re: Indirect Transfer of License (October 17, 2000)	Non-Publicly Available
ML14229A057	10/18/2000	OFFICIAL EXHIBIT — NON-PUBLIC — AOI113-00-BD01 — Inspection Report documenting URI (October 18, 2000).	Non-Publicly Available
ML14229A063	01/07/2010	OFFICIAL EXHIBIT — NON-PUBLIC — AOI115-00-BD01 — X-Ray License Transfer Application (January 7, 2010)	Non-Publicly Available
ML14229A062	07/07/2010	OFFICIAL EXHIBIT — NON-PUBLIC — AOI117-00-BD01 — Safety Evaluation by NRR for Indirect Transfer and Conforming Amendment, Proposed Acquisition of Aerotest Operations, Inc. for Aerotest Radiography and Research Reactor by X-Ray Industries, Inc.,	Non-Publicly Available
ML14229A033	04/01/2010	OFFICIAL EXHIBIT — NON-PUBLIC — AOI118-R-00-BD01 — Response to Request for Additional Information Regarding Proposed Indirect License Transfer (TAC No. ME1887) (April 1, 2010).	Non-Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A027	06/06/2010	OFFICIAL EXHIBIT — NON-PUBLIC — AOI119-00-BD01 — Aerotest Operations, Inc. (Aerotest Radiography and Research Reactor), Order Approving Indirect Transfer of Facility Operating License and Conforming Amendment (July 6, 2010)	Non-Publicly Available
ML14229A061	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI120-00-BD01 — Order Extending the Effectiveness of the Approval of the Indirect Transfer of Facility Operating License (September 13, 2010)	Non-Publicly Available
ML14229A060	10/04/2012	OFFICIAL EXHIBIT — NON-PUBLIC — AOI121-00-BD01 — Decommissioning Cost Estimate for the Aerotest Radiography and Research Reactor (October 4, 2012) (Proprietary).	Non-Publicly Available
ML14229A064	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI122-00-BD01 — DOE Contract and Amendment.	Non-Publicly Available
ML14229A082	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI123-00-BD01 — Aerotest Historical Financial Data for Years 2003-2011 (Proprietary).	Non-Publicly Available
ML14229A078	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI124-00-BD01 — Aerotest Sales by Year — 2003-2011 (Proprietary).	Non-Publicly Available
ML14229A079	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI125-00-BD01 — Aerotest Brochure Neutron Radiography.	Non-Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A081	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI200-00-BD01 — Prefiled Direct Testimony Dr. Slaughter.	Non-Publicly Available
ML14229A080	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI201-00-BD01 — Curriculum Vitae of Dr. David Michael Slaughter.	Non-Publicly Available
ML14229A001	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI202-00-BD01 — Picture of ARRR Aluminum Fuel Element.	Non-Publicly Available
ML14229A003	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI203-00-BD01 — Picture of Damaged Fuel Element.	Non-Publicly Available
ML14229A002	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI205-00-BD01 — Core Map 2010.	Non-Publicly Available
ML14229A004	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI206-00-BD01 — Proposed Core Map.	Non-Publicly Available
ML14229A005	05/03/2013	OFFICIAL EXHIBIT — NON-PUBLIC — AOI207-00-BD01 — Core Design Calculation.	Non-Publicly Available
ML14229A026	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI208-00-BD01 — Five Years Projected Income Statement.	Non-Publicly Available
ML14229A025	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI209-00-BD01 — Year 1 Costs for Restarting Reactor.	Non-Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A022	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI210-00-BD01 — NUREG-1577, Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance, Rev. 1 (December 2001)	Non-Publicly Available
ML14229A021	02/29/1996	OFFICIAL EXHIBIT — NON-PUBLIC — AOI212-00-BD01 — NUREG-1537, Guidelines for Preparing and Reviewing Applications for the Licensing on Non-Power Reactors, Format and Content, Part 1 (February 1996) (Chapter 15).	Non-Publicly Available
ML14229A020	01/10/2013	OFFICIAL EXHIBIT — NON-PUBLIC — AOI213-00-BD01 — Centennial Bank Letter of Credit.	Non-Publicly Available
ML14229A023	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI214-00-BD01 — Example Balance Sheet for 2nd Year of Operation.	Non-Publicly Available
ML14229A024	01/31/2013	OFFICIAL EXHIBIT — NON-PUBLIC — AOI216-00-BD01 — Department of Energy, Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste (January 2013).	Non-Publicly Available
ML14229A031	07/17/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI300-00-BD01 — Pre-Filed Rebuttal Testimony of David Michael Slaughter, Ph.D.	Non-Publicly Available
ML14229A034	07/18/2014	OFFICIAL EXHIBIT — NON-PUBLIC — AOI301-00-BD01 — AGNIR Report (Aug. 1966) (Proprietary)	Non-Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A032	11/01/2013	OFFICIAL EXHIBIT — NON-PUBLIC — AOI302-00-BD01 — Letter, M. Slaughter (Aerotest) to L. Kokajko (NRC), re: Response to Apparent Violation in NRC Inspection Report No. 50-228/2012-201; EA-13-108 (Nov. 1, 2013).	Non-Publicly Available
ML14229A068	06/13/2014	OFFICIAL EXHIBIT — NRC-001-00-BD01 — Statement of Position (REDACTED)	Publicly Available
ML14229A045	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — NRC-001P-00-BD01 — Statement of Position (PROPRIETARY)	Non-Publicly Available
ML14229A066	06/13/2014	OFFICIAL EXHIBIT — NRC-002-00-BD01 — Testimony (REDACTED)	Publicly Available
ML14229A043	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — NRC-002P-00-BD01 — Testimony (PROPRIETARY)	Non-Publicly Available
ML14229A073	06/13/2014	OFFICIAL EXHIBIT — NRC-003-00-BD01 — Testimony	Publicly Available
ML14229A069	06/13/2014	OFFICIAL EXHIBIT — NRC-004-00-BD01 — Statement of Professional Qualifications	Publicly Available
ML14229A074	06/13/2014	OFFICIAL EXHIBIT — NRC-005-00-BD01 — Statement of Professional Qualifications	Publicly Available
ML14229A072	06/13/2014	OFFICIAL EXHIBIT — NRC-006-00-BD01 — Statement of Professional Qualifications	Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A067	05/30/2012	OFFICIAL EXHIBIT — NRC-007-00-BD01 — Letter from Dario Brisighella, President, Aerotest Operations, Inc., and Dr. David M. Slaughter, CEO, Nuclear Labyrinth LLC, to NRC DCD, Application for Approval of Indirect Transfer of Control	Publicly Available
ML14229A029	06/13/2014	OFFICIAL EXHIBIT — NRC-008-00-BD01 — Letter from Dario Brisighella, President, Aerotest Operations, Inc., and Dr. David M. Slaughter, CEO, Nuclear Labyrinth LLC, to NRC DCD, Application for Approval of Indirect Transfer (REDACTED)	Publicly Available
ML14229A047	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — NRC-008P-00-BD01 — Letter from Dario Brisighella, President, Aerotest Operations, Inc., and Dr. David M. Slaughter, CEO, Nuclear Labyrinth LLC, to NRC DCD, Application for Approval of Indirect Transfer (PROPRIETARY). . . .	Non-Publicly Available
ML14229A065	10/22/1974	OFFICIAL EXHIBIT — NRC-009-00-BD01 — Aerotest Operations, Inc., Docket No. 50-228, Aerotest Radiography and Research Reactor (ARRR), Amendment to Facility Operating License, Amendment No. 1, License No. R-98 (ARRR License)	Publicly Available
ML14229A071	06/13/2014	OFFICIAL EXHIBIT — NRC-010-00-BD01 — Appendix A to License No. R-98, Technical Specifications for the Aerotest Radiography and Research Reactor (ARRR) (ARRR TS)	Publicly Available

Accession Number	Document Date	Document Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A070	01/29/2004	OFFICIAL EXHIBIT — NRC-011-00-BD01 — Letter from Michael S. Anderson, Vice President for Legal Affairs and General Counsel, Autoliv, Inc., to David Mathews, Director, NRR, and Marvin Mendonca, Senior Project Manager, NRR, Divestiture Plan Regarding	Publicly Available
ML14229A076	04/14/2000	OFFICIAL EXHIBIT — NRC-012-00-BD01 — Letter from Sandra L. Warren, Manager, Aerotest Operations, Inc., to Director, NRR, NRC (Apr. 14, 2000)	Publicly Available
ML14229A075	10/18/2000	OFFICIAL EXHIBIT — NRC-013-00-BD01 — Letter from Ledyard B. Marsh, NRC, to Ray Tsukimura, President, Aerotest Operations, Inc., Transfer of Ownership, (Oct. 18, 2000)	Publicly Available
ML14229A028	06/13/2014	OFFICIAL EXHIBIT — NRC-014-00-BD01 — Letter from David B. Matthews, NRC, to Michael Anderson, General Counsel, Autoliv, and Ray R. Tsukimura, President, Aerotest Operations, Inc., Divestiture Plan Regarding Indirect Transfer of the Aerotest	Publicly Available
ML14229A077	12/04/2003	OFFICIAL EXHIBIT — NRC-015-00-BD01 — Letter from Michael Anderson, Vice President for Legal Affairs and General Counsel, Autoliv, to David Mathews, NRC, RE: Divestiture Plan Regarding Indirect Transfer of the Aerotest Radiography and Research Reactor	Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A094	07/05/2012	OFFICIAL EXHIBIT — NRC-016-00-BD01 — Letter from Jessie Quichocho, NRC, to Dario Brisighella, President, Aerotest Operations, Inc., and David M. Slaughter, Chief Executive Officer, Nuclear Labyrinth, LLC, Request to Aerotest Operations, Inc.	Publicly Available
ML14229A090	06/13/2014	OFFICIAL EXHIBIT — NRC-017-00-BD01 — Enclosure, Required Supplemental Information for the NRC Acceptance Review of the License Transfer Applications Which Was Submitted by Aerotest and Nuclear Labyrinth (July 5, 2012) (RAI #1)	Publicly Available
ML14229A087	07/19/2012	OFFICIAL EXHIBIT — NRC-018-00-BD01 — Letter from Jay Silberg, Counsel, Aerotest Operations, Inc., to NRC DCD, Response to Request to Aerotest Operations, Inc. and Nuclear Labyrinth LLC to Supplement the License Transfer (REDACTED)	Publicly Available
ML14229A030	06/19/2012	OFFICIAL EXHIBIT — NON-PUBLIC — NRC-018P-00-BD01 — Letter from Jay Silberg, Counsel, Aerotest Operations, Inc., to NRC DCD, Response to Request to Aerotest Operations, Inc. and Nuclear Labyrinth LLC to Supplement the License Transfer (PROPRIETARY). . . .	Non-Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A096	08/14/2012	OFFICIAL EXHIBIT — NRC-019-00-BD01 — Letter from Alexander Adams, NRC, to Dario Brisighella, President, Aerotest Operations, Inc., and David M. Slaughter, CEO, Nuclear Labyrinth, LLC, Acceptance of Requested License Transfer Application	Publicly Available
ML14229A091	09/14/2012	OFFICIAL EXHIBIT — NRC-020-00-BD01 — Letter from Alexander Adams, NRC, to Dario Brisighella, President, Aerotest Operations, Inc., and David M. Slaughter, Chief Executive Officer, Nuclear Labyrinth, LLC, RAI Re: Application for Approval	Publicly Available
ML14229A092	06/13/2014	OFFICIAL EXHIBIT — NRC-021-00-BD01 — Enclosure, Request for Additional Information Regarding the Indirect License Transfer Aerotest Radiography and Research Reactor Facility Operating License No. R-98 Docket No. 50-228 (Sep. 14, 2012) (REDACTED)	Publicly Available
ML14229A046	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — NRC-021P-00-BD01 — Enclosure, RAI Regarding the Indirect License Transfer Aerotest Radiography and Research Reactor Facility Operating License No. R-98 Docket No. 50-228 (Sep. 14, 2012) (PROPRIETARY)	Non-Publicly Available
ML14229A084	10/15/2012	OFFICIAL EXHIBIT — NRC-022-00-BD01 — Letter from Jay Silberg, Counsel, Aerotest Operations, Inc., to NRC Document Control Desk, Response to RAI Re: Application for Approval of Indirect Transfer of Control of License of Aerotest (REDACTED)	Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A050	10/15/2012	OFFICIAL EXHIBIT — NON-PUBLIC — NRC-022P-00-BD01 — Letter from Jay Silberg, Counsel, Aerotest Operations, Inc., to NRC DCD, Response to RAI Re: Application for Approval of Indirect Transfer of Control of License of Aerotest (PROPRIETARY)	Non-Publicly Available
ML14229A097	12/10/2012	OFFICIAL EXHIBIT — NRC-023-00-BD01 — Letter from Alexander Adams, NRC, to Dario Brisighella, President, Aerotest Operations, Inc., and David M. Slaughter, Chief Executive Officer, Nuclear Labyrinth, LLC, RAI Re: Application for Approval	Publicly Available
ML14229A083	06/13/2014	OFFICIAL EXHIBIT — NRC-024-00-BD01 — Enclosure, Office of Nuclear Reactor Regulation Request for Additional Information Re: Application for Indirect License Transfer of Aerotest Radiography and Research Reactor Facility Operating (REDACTED)	Publicly Available
ML14229A048	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — NRC-024P-00-BD01 — Enclosure, Office of Nuclear Reactor Regulation RAI Re: Application for Indirect License Transfer of Aerotest Radiography and Research Reactor Facility Operating License (PROPRIETARY)	Non-Publicly Available
ML14229A093	01/18/2013	OFFICIAL EXHIBIT — NRC-025-00-BD01 — Summary of December 19, 2012, Meeting with Aerotest Operations, Inc., and Nuclear Labyrinth, LLC, on the RAI on the Proposed Indirect License Transfer Application of the Aerotest Radiography	Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A089	01/10/2013	OFFICIAL EXHIBIT — NRC-026-00-BD01 — Letter from Jay Silberg, Counsel, Aerotest Operations, Inc., to the NRC DCD, Response to RAI Re: Application for Approval of Indirect Transfer of Control of License of Aerotest (REDACTED)	Publicly Available
ML14229A044	01/10/2013	OFFICIAL EXHIBIT — NON-PUBLIC — NRC-026P-00-BD01 — Letter from Jay Silberg, Counsel, Aerotest Operations, Inc., to the NRC DCD, Response to RAI Re: Application for Approval of Indirect Transfer of Control of License of Aerotest (PROPRIETARY)	Non-Publicly Available
ML14229A085	07/24/2013	OFFICIAL EXHIBIT — NRC-027-00-BD01 — Safety Evaluation by NRR, Indirect License Transfer of Aerotest Radiography and Research Reactor Due to the Proposed Acquisition of Aerotest Operations, Inc. by Nuclear Labyrinth, LLC (REDACTED)	Publicly Available
ML14229A049	06/13/2014	OFFICIAL EXHIBIT — NON-PUBLIC — NRC-027P-00-BD01 — Safety Evaluation by NRR, Indirect License Transfer of Aerotest Radiography and Research Reactor Due to the Proposed Acquisition of Aerotest Operations, Inc. by Nuclear Labyrinth (PROPRIETARY)	Non-Publicly Available
ML14229A088	07/24/2013	OFFICIAL EXHIBIT — NRC-028-00-BD01 — Letter from Eric J. Leeds, NRC, to Michael Anderson, President, Aerotest Operations, Inc., Denial of License Renewal, Denial of License Transfer, and Issuance of Order to Modify License No. R-98 to Prohibit	Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A095	02/29/1996	OFFICIAL EXHIBIT — NRC-029-00-BD01 — NUREG-1537, Part 2, Guidelines for Preparing and Reviewing Applications for the Licensing of Non-Power Reactors Standard Review Plan and Acceptance Criteria (Feb. 1996) (excerpted) (NUREG-1537, Part 2).	Publicly Available
ML14229A086	01/11/2012	OFFICIAL EXHIBIT — NRC-030-00-BD01 — Letter from Sandra Warren, General Manager, Aerotest Operations, Inc., to Spyros Traiforos, NRC (Jan. 11, 2012)	Publicly Available
ML14229A008	01/20/2012	OFFICIAL EXHIBIT — NRC-031-00-BD01 — Letter from Sandra Warren, General Manager, Aerotest Operations, Inc., to Spyros Traiforos, NRC (Jan. 20, 2012)	Publicly Available
ML14229A016	08/14/2012	OFFICIAL EXHIBIT — NRC-032-00-BD01 — Letter from Gregory Bowman, NRC, to Sandra Warren, General Manager, Aerotest Operations, Inc., NRC Non-Routine Inspection Report No. 50-228/2012-204 (Aug. 14, 2012)	Publicly Available
ML14229A010	08/15/2013	OFFICIAL EXHIBIT — NRC-033-00-BD01 — Letter from Sandra Warren, General Manager, Aerotest Operations, Inc., to Spyros Traiforos, NRC (Aug. 15, 2013)	Publicly Available
ML14229A006	06/13/2014	OFFICIAL EXHIBIT — NRC-034-00-BD01 — Aerotest Operations, Inc., Aerotest Radiography and Research Reactor (ARRR), Updated Safety Analysis Report (USAR), Revision 0, Docket No. 50-228, License No. R-98 (excerpted) (ARRR USAR).	Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A007	07/31/2012	OFFICIAL EXHIBIT — NRC-035-00-BD01 — Letter from Alfredo Meren, Reactor Supervisor, Aerotest Operations, Inc., to NRC, Annual Summary of Changes, Tests and Experiments at Aerotest Radiography and Research Reactor (ARRR), Docket No. 50-228	Publicly Available
ML14229A017	01/07/2011	OFFICIAL EXHIBIT — NRC-036-00-BD01 — Letter from Michael Anderson, Secretary, Aerotest Operations, Inc., to NRC Document Control Desk, Docket No. 50-228 Aerotest Radiography and Research Reactor License No. R-98 (Jan. 7, 2011)	Publicly Available
ML14229A012	01/07/2013	OFFICIAL EXHIBIT — NRC-037-00-BD01 — Letter from Gregory Bowman, NRC, to Sandra Warren, General Manager, Aerotest Operations, Inc., NRC Non-Routine Inspection Report No. 50-228/2012-206 (Jan. 7, 2013)	Publicly Available
ML14229A019	05/06/2014	OFFICIAL EXHIBIT — NRC-038-00-BD01 — Email from Tony Veca, General Atomics, to Alexander Adams, NRC, RE: Typical fuel prices (May 6, 2014)	Publicly Available
ML14229A018	06/10/2014	OFFICIAL EXHIBIT — NRC-039-00-BD01 — TRIGA Reactor Fuel Price List (Jan. 2012)	Publicly Available
ML14229A013	08/06/2010	OFFICIAL EXHIBIT — NRC-040-00-BD01 — Letter from Sandra Warren, General Manager of Aerotest Operations, Inc., Closure of Aerotest Operations (Aug. 6, 2010)	Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A014	07/15/2012	OFFICIAL EXHIBIT — NRC-041-00-BD01 — Note to File from Spyros Traiforos, NRC, Summary of the Informal Conference Call of June 21, 2012, Between Aerotest Operations, Inc./Nuclear Labyrinth, and the NRC (July 15, 2012)	Publicly Available
ML14229A011	02/29/1996	OFFICIAL EXHIBIT — NRC-042-00-BD01 — NUREG-1537, Part 1, Guidelines for Preparing and Reviewing Applications for the Licensing of Non-Power Reactors Format and Content (Feb. 1996) (excerpted) (NUREG-1537, Part 1)	Publicly Available
ML14229A015	07/28/2011	OFFICIAL EXHIBIT — NRC-043-00-BD01 — Letter from Alfredo Meren, Reactor Supervisor, Aerotest Operations, Inc., to NRC, Annual Summary of Changes, Tests, and Experiments at Aerotest Radiography and Research Reactor (ARRR), Docket No. 50-228	Publicly Available
ML14229A009	12/06/2012	OFFICIAL EXHIBIT — NRC-044-00-BD01 — Aerotest Operations, Inc., Consideration of Indirect Transfer and Conforming Amendment, 77 Fed. Reg. 72,889 (Dec. 6, 2012)	Publicly Available
ML14229A038	07/18/2014	OFFICIAL EXHIBIT — NON-PUBLIC — NRC-045P-00-BD01 — Rebuttal Statement of Position.	Non-Publicly Available
ML14229A036	07/18/2014	OFFICIAL EXHIBIT — NON-PUBLIC — NRC-046P-00-BD01 — Rebuttal Statement of Position (PROPRIETARY).	Non-Publicly Available

Accession Number	Document Date	Title	Availability
Exhibits (All Identified and Admitted into Evidence on 8/12/2014) (Continued)			
ML14229A037	07/18/2014	OFFICIAL EXHIBIT — — NON-PUBLIC — NRC-047P-00-BD01 — Adams Rebuttal Testimony (PROPRIETARY).	Non-Publicly Available
ML14229A042	09/27/2010	OFFICIAL EXHIBIT — NRC-048-00-BD01 — Letter from Michael S. Anderson, Secretary, Aerotest Operations, Inc. to NRC, Report of Progress Made Toward Completion of the License Transfer (Sept. 27, 2010).	Publicly Available
ML14229A040	10/13/2010	OFFICIAL EXHIBIT — NRC-049-00-BD01 — Letter from Michael S. Anderson, Secretary, Aerotest Operations, Inc. to NRC Report of Progress Made Toward Completion of the License Transfer (Oct. 13, 2010).	Publicly Available
ML14229A039	02/28/1996	OFFICIAL EXHIBIT — NRC-050-00-BD01 — NUREG-1537, Part 1, Guidelines for Preparing & Reviewing Applications for the Licensing of Non-Power Reactors Format and Content, Chapters 4 and 13 (Feb. 1996) (excerpted) (NUREG-1537, Part 1, Chapters 4 & 13).	Publicly Available
ML14229A041	02/28/1996	OFFICIAL EXHIBIT — NRC-051-00-BD01 — NUREG-1537, Part 2, Guidelines for Preparing and Reviewing Applications for the Licensing of Non-Power Reactors Standard Review Plan and Acceptance Criteria, Chapters 4 and 13 (Feb. 1996) (excerpted)	Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits			
ML14164A688	06/13/2014	AOI000 — Aerotest and Nuclear Labyrinth List of Exhibits	Proprietary/ Non-Publicly Available
ML14199A639	07/18/2014	AOI000R — Aerotest Operations, Inc. Revised Hearing Exhibits List (July 18, 2014).	Proprietary/ Non-Publicly Available
ML14219A735	08/07/2014	AOI000R2 — Aerotest Operations, Inc. Revised Hearing Exhibits List (July 18, 2014).	Publicly Available
ML14164A687	07/09/2009	AOI002 — Eric Leeds, NRC, Letter to Dario Brisighella, Aerotest, Aerotest Operations, Inc. Proposed Denial of Application for Renewal of Facility License No. R-98 (TAC No. MD8177) (July 9, 2009) (ADAMS Accession No. ML090830578)	Proprietary/ Non-Publicly Available
ML14164A689	06/13/2014	AOI100 — Prefiled Direct Testimony of M Anderson.	Proprietary/ Non-Publicly Available
ML14164A686	06/13/2014	AOI101 — M Anderson Resume.	Proprietary/ Non-Publicly Available
ML14164A692	06/13/2014	AOI106 — Funding Agreement.	Proprietary/ Non-Publicly Available
ML14164A696	06/13/2014	AOI108 — Figure of Facility.	Proprietary/ Non-Publicly Available
ML14164A695	06/13/2014	AOI109 — Updated Safety Analysis Report (February 28, 2005) (Chapter 1)	Proprietary/ Non-Publicly Available
ML14164A693	05/03/2000	AOI111 — Fax from Aerotest to NRC: Letter Announcing Organizational Changes (May 4, 2000)	Proprietary/ Non-Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14164A691	06/13/2014	AOI112 — NRC Memorandum, D. Matthews to J. Craig, appended to J. Craig Notice to Commissioner Assistants re: Indirect Transfer of License (October 17, 2000) (ADAMS Accession No. ML040430500)	Proprietary/ Non-Publicly Available
ML14164A694	10/18/2000	AOI113 — Inspection Report documenting URI (October 18, 2000).	Proprietary/ Non-Publicly Available
ML14164A701	01/07/2010	AOI115 — X-Ray License Transfer Application (January 7, 2010)	Proprietary/ Non-Publicly Available
ML14164A699	07/07/2010	AOI117 — Safety Evaluation by the Office of Nuclear Reactor Regulation for Indirect Transfer and Conforming Amendment, Proposed Acquisition of Aerotest Operations, Inc. for Aerotest Radiography and Research Reactor by X-Ray Industries, Inc., Facility . . .	Proprietary/ Non-Publicly Available
ML14164A700	04/01/2010	AOI118 — April 1 2010 RAI Response Proprietary.	Proprietary/ Non-Publicly Available
ML14199A637	04/01/2010	AOI118R — Response to Request for Additional Information Regarding Proposed Indirect License Transfer (TAC No. ME1887) (April 1, 2010).	Proprietary/ Non-Publicly Available
ML14164A763	06/06/2010	AOI119 — Aerotest Operations, Inc. (Aerotest Radiography and Research Reactor), Order Approving Indirect Transfer of Facility Operating License and Conforming Amendment (July 6, 2010)	Proprietary/ Non-Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14164A698	06/13/2014	AOI120 — Order Extending the Effectiveness of the Approval of the Indirect Transfer of Facility Operating License (September 13, 2010)	Proprietary/ Non-Publicly Available
ML14164A697	10/04/2012	AOI121 — Decommissioning Cost Estimate for the Aerotest Radiography and Research Reactor (October 4, 2012) (Proprietary).	Proprietary/ Non-Publicly Available
ML14164A702	06/13/2014	AOI122 — DOE Contract and Amendment.	Proprietary/ Non-Publicly Available
ML14164A721	06/13/2014	AOI123 — Aerotest Historical Financial Data for Years 2003-2011 (Proprietary).	Proprietary/ Non-Publicly Available
ML14164A717	06/13/2014	AOI124 — Aerotest Sales by Year — 2003-2011 (Proprietary).	Proprietary/ Non-Publicly Available
ML14164A718	06/13/2014	AOI125 — Aerotest Brochure Neutron Radiography.	Proprietary/ Non-Publicly Available
ML14164A720	06/13/2014	AOI200 — Prefiled Direct Testimony Dr Slaughter.	Proprietary/ Non-Publicly Available
ML14164A719	06/13/2014	AOI201 — Curriculum Vitae of Dr. David Michael Slaughter.	Proprietary/ Non-Publicly Available
ML14164A737	06/13/2014	AOI202 — Picture of ARRR Aluminum fuel element.	Proprietary/ Non-Publicly Available
ML14164A739	06/13/2014	AOI203 — Picture of Damaged Fuel Element.	Proprietary/ Non-Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14164A738	06/13/2014	AOI205 — Core Map 2010.	Proprietary/ Non-Publicly Available
ML14164A740	06/13/2014	AOI206 — Proposed Core Map.	Proprietary/ Non-Publicly Available
ML14164A741	05/03/2013	AOI207 — Core Design Calculation.	Proprietary/ Non-Publicly Available
ML14164A762	06/13/2014	AOI208 — Five Years Projected Income Statement.	Proprietary/ Non-Publicly Available
ML14164A761	06/13/2014	AOI209 — Year 1 Costs for Restarting Reactor.	Proprietary/ Non-Publicly Available
ML14164A758	06/13/2014	AOI210 — NUREG-1577, Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance, Rev. 1 (December 2001) (ADAMS Accession No. ML013330264)	Proprietary/ Non-Publicly Available
ML14164A757	02/29/1996	AOI212 — NUREG-1537, Guidelines for Preparing and Reviewing Applications for the Licensing on Non-Power Reactors, Format and Content, Part 1 (February 1996) (Chapter 15).	Proprietary/ Non-Publicly Available
ML14164A756	01/10/2013	AOI213 — Centennial Bank Letter of Credit.	Proprietary/ Non-Publicly Available
ML14164A759	06/13/2014	AOI214 — Example Balance Sheet for 2nd Year of Operation.	Proprietary/ Non-Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14164A760	01/31/2013	AOI216 — Department of Energy, Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste (January 2013).	Proprietary/ Non-Publicly Available
ML14199A635	07/17/2014	AOI300 — Pre-Filed Rebuttal Testimony of David Michael Slaughter, Ph.D.	Proprietary/ Non-Publicly Available
ML14199A638	07/18/2014	AOI301 — AGNIR Report (Aug. 1966) (Proprietary)	Proprietary/ Non-Publicly Available
ML14199A636	11/01/2013	AOI302 — Letter, M. Slaughter (Aerotest) to L. Kokajko (NRC), re: Response to Apparent Violation in NRC Inspection Report No. 50-228/2012-201; EA-13-108 (Nov. 1, 2013).	Proprietary/ Non-Publicly Available
ML14219A736	02/26/2013	AOI400 — Letter from D. Stoddard, Senior Vice President Nuclear Operations, Dominion Energy Kewaunee, Inc., to NRC, re: Update to Irradiated Fuel Management Plan Pursuant to 10 CFR 50.54(bb), Feb. 26, 2013 (ADAMS Accession No. ML13059A028).	Publicly Available
ML14219A738	04/25/2014	AOI401 — Letter from M. Sartain, Vice President Nuclear Engineering, Dominion Energy Kewaunee, Inc., to NRC, re: Update to Irradiated Fuel Management Plan Pursuant to 10 CFR 50.54(bb), Apr. 25, 2014 (ADAMS Accession No. ML14119A120).	Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14219A737	05/21/2014	AOI402 — Letter from C. Gratton (NRC) to D. Heacock, President and Chief Nuclear Office, Dominion Energy Kewaunee, Inc., re: Exemptions from the Requirements of 10 CFR Part 50, Section 50.82(a)(8)(i)(A) and Section 50.75(h)(1)(iv). . . .	Publicly Available
ML14199A743	07/18/2014	NRC Staff Exhibit List — Revised in the Matter of Aerotest Operations, Inc.	Publicly Available
ML14164A707	06/13/2014	NRC-001 — Statement of Position (REDACTED)	Publicly Available
ML14164A680	06/13/2014	NRC-001P — Statement of Position (PROPRIETARY)	Proprietary/ Non-Publicly Available
ML14164A704	06/13/2014	NRC-002 — Testimony (REDACTED)	Publicly Available
ML14164A678	06/13/2014	NRC-002P — Testimony (PROPRIETARY)	Proprietary/ Non-Publicly Available
ML14164A712	06/13/2014	NRC-003 — Testimony	Publicly Available
ML14164A708	06/13/2014	NRC-004 — Statement of Professional Qualifications	Publicly Available
ML14164A713	06/13/2014	NRC-005 — Statement of Professional Qualifications	Publicly Available
ML14164A711	06/13/2014	NRC-006 — Statement of Professional Qualifications	Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14164A706	05/30/2012	NRC-007 — Letter from Dario Brisighella, President, Aerotest Operations, Inc., and Dr. David M. Slaughter, Chief Executive Officer, Nuclear Labyrinth LLC, to NRC Document Control Desk, Application for Approval of Indirect Transfer of Control. . . .	Publicly Available
ML14167A001	06/13/2014	NRC-008 — Letter from Dario Brisighella, President, Aerotest Operations, Inc., and Dr. David M. Slaughter, Chief Executive Officer, Nuclear Labyrinth LLC, to NRC Document Control Desk, Application for Approval of Indirect Transfer (REDACTED). . . .	Publicly Available
ML14164A682	06/13/2014	NRC-008P — Letter from Dario Brisighella, President, Aerotest Operations, Inc., and Dr. David M. Slaughter, Chief Executive Officer, Nuclear Labyrinth LLC, to NRC Document Control Desk, Application for Approval of Indirect Transfer (PROPRIETARY). . . .	Proprietary/ Non-Publicly Available
ML14164A703	10/22/1974	NRC-009 — Aerotest Operations, Inc., Docket No. 50-228, Aerotest Radiography and Research Reactor (ARRR), Amendment to Facility Operating License, Amendment No. 1, License No. R-98 (ADAMS Accession No. ML12214A481) (ARRR License)	Publicly Available
ML14164A710	06/13/2014	NRC-010 — Appendix A to License No. R-98, Technical Specifications for the Aerotest Radiography and Research Reactor (ARRR) (ADAMS Accession No. ML12214A482) (ARRR TS)	Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14164A709	01/29/2004	NRC-011 — Letter from Michael S. Anderson, Vice President for Legal Affairs and General Counsel, Autoliv, Inc., to David Mathews, Director, NRR, and Marvin Mendonca, Senior Project Manager, NRR, NRC, Divestiture Plan Regarding Indirect Transfer. . . .	Publicly Available
ML14164A715	04/14/2000	NRC-012 — Letter from Sandra L. Warren, Manager, Aerotest Operations, Inc., to Director, NRR, NRC (Apr. 14, 2000) (ADAMS Accession No. ML003704794)	Publicly Available
ML14164A714	10/18/2000	NRC-013 — Letter from Ledyard B. Marsh, NRC, to Ray Tsukimura, President, Aerotest Operations, Inc., Transfer of Ownership (Oct. 18, 2000) (ADAMS Accession No. ML003756103)	Publicly Available
ML14167A000	10/07/2003	NRC-014 — Letter from David B. Matthews, NRC, to Michael Anderson, General Counsel, Autoliv, and Ray R. Tsukimura, President, Aerotest Operations, Inc., Divestiture Plan Regarding Indirect Transfer of the Aerotest Radiography and Research Reactor. . . .	Publicly Available
ML14164A716	12/04/2003	NRC-015 — Letter from Michael Anderson, Vice President for Legal Affairs and General Counsel, Autoliv, to David Mathews, NRC, RE: Divestiture Plan Regarding Indirect Transfer of the Aerotest Radiography and Research Reactor (ARRR). . . .	Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14164A733	07/05/2012	NRC-016 — Letter from Jessie Quichocho, NRC, to Dario Brisighella, President, Aerotest Operations, Inc., and David M. Slaughter, Chief Executive Officer, Nuclear Labyrinth, LLC, Request to Aerotest Operations, Inc. and Nuclear Labyrinth LLC. . . .	Publicly Available
ML14164A729	06/13/2014	NRC-017 — Enclosure, Required Supplemental Information for the NRC Acceptance Review of the License Transfer Applications Which Was Submitted by Aerotest and Nuclear Labyrinth (July 5, 2012) (ADAMS Accession No. ML121740343) (RAI #1)	Publicly Available
ML14164A726	07/19/2012	NRC-018 — Letter from Jay Silberg, Counsel, Aerotest Operations, Inc., to NRC Document Control Desk, Response to Request to Aerotest Operations, Inc. and Nuclear Labyrinth LLC to Supplement the License Transfer (REDACTED). . . .	Publicly Available
ML14170B092	06/19/2012	NRC-018P — Letter from Jay Silberg, Counsel, Aerotest Operations, Inc., to NRC Document Control Desk, Response to Request to Aerotest Operations, Inc. and Nuclear Labyrinth LLC to Supplement the License Transfer (PROPRIETARY). . . .	Proprietary/ Non-Publicly Available
ML14164A735	08/14/2012	NRC-019 — Letter from Alexander Adams, NRC, to Dario Brisighella, President, Aerotest Operations, Inc., and David M. Slaughter, Chief Executive Officer, Nuclear Labyrinth, LLC, Acceptance of Requested License Transfer Application (Aug. 14, 2012). . . .	Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14164A730	09/14/2012	NRC-020 — Letter from Alexander Adams, NRC, to Dario Brisighella, President, Aerotest Operations, Inc., and David M. Slaughter, Chief Executive Officer, Nuclear Labyrinth, LLC, Request for Additional Information Re: Application for Approval. . . .	Publicly Available
ML14164A731	06/13/2014	NRC-021 — Enclosure, Request for Additional Information Regarding the Indirect License Transfer Aerotest Radiography and Research Reactor Facility Operating License No. R-98 Docket No. 50-228 (Sep. 14, 2012) (REDACTED). . . .	Publicly Available
ML14164A681	06/13/2014	NRC-021P — Enclosure, Request for Additional Information Regarding the Indirect License Transfer Aerotest Radiography and Research Reactor Facility Operating License No. R-98 Docket No. 50-228 (Sep. 14, 2012) (PROPRIETARY). . . .	Proprietary/ Non-Publicly Available
ML14164A723	10/15/2012	NRC-022 — Letter from Jay Silberg, Counsel, Aerotest Operations, Inc., to NRC Document Control Desk, Response to Request for Additional Information Re: Application for Approval of Indirect Transfer of Control of License of Aerotest (REDACTED). . . .	Publicly Available
ML14164A685	10/15/2012	NRC-022P — Letter from Jay Silberg, Counsel, Aerotest Operations, Inc., to NRC Document Control Desk, Response to Request for Additional Information Re: Application for Approval of Indirect Transfer of Control of License of Aerotest (PROPRIETARY). . . .	Proprietary/ Non-Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14164A736	12/10/2012	NRC-023 — Letter from Alexander Adams, NRC, to Dario Brisighella, President, Aerotest Operations, Inc., and David M. Slaughter, Chief Executive Officer, Nuclear Labyrinth, LLC, Request for Additional Information Re: Application for Approval. . . .	Publicly Available
ML14164A722	06/13/2014	NRC-024 — Enclosure, Office of Nuclear Reactor Regulation Request for Additional Information Re: Application for Indirect License Transfer of Aerotest Radiography and Research Reactor Facility Operating (REDACTED). . . .	Publicly Available
ML14164A683	06/13/2014	NRC-024P — Enclosure, Office of Nuclear Reactor Regulation Request for Additional Information Re: Application for Indirect License Transfer of Aerotest Radiography and Research Reactor Facility Operating License (PROPRIETARY). . . .	Proprietary/ Non-Publicly Available
ML14164A732	01/18/2013	NRC-025 — Summary of December 19, 2012, Meeting with Aerotest Operations, Inc., and Nuclear Labyrinth, LLC, on the Request for Additional Information on the Proposed Indirect License Transfer Application of the Aerotest Radiography. . . .	Publicly Available
ML14164A728	01/10/2013	NRC-026 — Letter from Jay Silberg, Counsel, Aerotest Operations, Inc., to the NRC Document Control Desk, Response to Request for Additional Information Re: Application for Approval of Indirect Transfer of Control of License of Aerotest (REDACTED). . . .	Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14164A679	01/10/2013	NRC-026P — Letter from Jay Silberg, Counsel, Aerotest Operations, Inc., to the NRC Document Control Desk, Response to Request for Additional Information Re: Application for Approval of Indirect Transfer of Control of License of Aerotest (PROPRIETARY). . . .	Proprietary/ Non-Publicly Available
ML14164A724	07/24/2013	NRC-027 — Safety Evaluation by the Office of Nuclear Reactor Regulation, Indirect License Transfer of Aerotest Radiography and Research Reactor Due to the Proposed Acquisition of Aerotest Operations, Inc. by Nuclear Labyrinth, LLC (REDACTED). . . .	Publicly Available
ML14164A684	06/13/2014	NRC-027P — Safety Evaluation by the Office of Nuclear Reactor Regulation, Indirect License Transfer of Aerotest Radiography and Research Reactor Due to the Proposed Acquisition of Aerotest Operations, Inc. by Nuclear Labyrinth, LLC (PROPRIETARY). . . .	Proprietary/ Non-Publicly Available
ML14164A727	07/24/2013	NRC-028 — Letter from Eric J. Leeds, NRC, to Michael Anderson, President, Aerotest Operations, Inc., Denial of License Renewal, Denial of License Transfer, and Issuance of Order to Modify License No. R-98 to Prohibit Operation of the Aerotest. . . .	Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14164A734	02/29/1996	NRC-029 — NUREG-1537, Part 2, Guidelines for Preparing and Reviewing Applications for the Licensing of Non-Power Reactors Standard Review Plan and Acceptance Criteria (Feb. 1996) (ADAMS Accession No. ML042430048) (excerpted) (NUREG-1537, Part 2).	Publicly Available
ML14164A725	01/11/2012	NRC-030 — Letter from Sandra Warren, General Manager, Aerotest Operations, Inc., to Spyros Traiforos, NRC (Jan. 11, 2012) (ADAMS Accession No. ML12018A336).	Publicly Available
ML14164A744	01/20/2012	NRC-031 — Letter from Sandra Warren, General Manager, Aerotest Operations, Inc., to Spyros Traiforos, NRC (Jan. 20, 2012) (ADAMS Accession No. ML12026A344)	Publicly Available
ML14164A752	08/14/2012	NRC-032 — Letter from Gregory Bowman, NRC, to Sandra Warren, General Manager, Aerotest Operations, Inc., NRC Non-Routine Inspection Report No. 50-228/2012-204 (Aug. 14, 2012) (ADAMS Accession No. ML12213A001)	Publicly Available
ML14164A746	08/15/2013	NRC-033 — Letter from Sandra Warren, General Manager, Aerotest Operations, Inc., to Spyros Traiforos, NRC (Aug. 15, 2013) (ADAMS Accession No. ML13247A668)	Publicly Available
ML14164A742	06/13/2014	NRC-034 — Aerotest Operations, Inc., Aerotest Radiography and Research Reactor (ARRR), Updated Safety Analysis Report (USAR), Revision 0, Docket No. 50-228, License No. R-98 (ADAMS Accession No. ML050680420) (excerpted) (ARRR USAR).	Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14164A743	07/31/2012	NRC-035 — Letter from Alfredo Meren, Reactor Supervisor, Aerotest Operations, Inc., to NRC, Annual Summary of Changes, Tests and Experiments at Aerotest Radiography and Research Reactor (ARRR), Docket No. 50-228. . . .	Publicly Available
ML14164A753	01/07/2011	NRC-036 — Letter from Michael Anderson, Secretary, Aerotest Operations, Inc., to NRC Document Control Desk, Docket No. 50-228 Aerotest Radiography and Research Reactor License No. R-98 (Jan. 7, 2011) (ADAMS Accession No. ML110180463)	Publicly Available
ML14164A748	01/07/2013	NRC-037 — Letter from Gregory Bowman, NRC, to Sandra Warren, General Manager, Aerotest Operations, Inc., NRC Non-Routine Inspection Report No. 50-228/2012-206 (Jan. 7, 2013) (ADAMS Accession No. ML12361A147)	Publicly Available
ML14164A755	05/06/2014	NRC-038 — Email from Tony Veca, General Atomics, to Alexander Adams, NRC, RE: Typical fuel prices (May 6, 2014) (ADAMS Accession No. ML14160B044)	Publicly Available
ML14164A754	06/10/2014	NRC-039 — TRIGA Reactor Fuel Price List (Jan. 2012) (ADAMS Accession No. ML14160B051)	Publicly Available
ML14164A749	08/06/2010	NRC-040 — Letter from Sandra Warren, General Manager of Aerotest Operations, Inc., Closure of Aerotest Operations (Aug. 6, 2010) (ADAMS Accession No. ML14129A199)	Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14164A750	07/15/2012	NRC-041 — Note to File from Spyros Traiforos, NRC, Summary of the Informal Conference Call of June 21, 2012, Between Aerotest Operations, Inc./Nuclear Labyrinth, and the NRC (July 15, 2012) (ADAMS Accession No. ML12200A353)	Publicly Available
ML14164A747	02/29/1996	NRC-042 — NUREG-1537, Part 1, Guidelines for Preparing and Reviewing Applications for the Licensing of Non-Power Reactors Format and Content (Feb. 1996) (ADAMS Accession No. ML042430055) (excerpted) (NUREG-1537, Part 1)	Publicly Available
ML14164A751	07/28/2011	NRC-043 — Letter from Alfredo Meren, Reactor Supervisor, Aerotest Operations, Inc., to NRC, Annual Summary of Changes, Tests, and Experiments at Aerotest Radiography and Research Reactor (ARRR), Docket No. 50-228. . . .	Publicly Available
ML14164A745	12/06/2012	NRC-044 — Aerotest Operations, Inc., Consideration of Indirect Transfer and Conforming Amendment, 77 Fed. Reg. 72,889 (Dec. 6, 2012)	Publicly Available
ML14199A734	07/18/2014	NRC-045(P) — Rebuttal Statement of Position.	Proprietary/ Non-Publicly Available
ML14199A732	07/18/2014	NRC-046(P) — Rebuttal Statement of Position (PROPRIETARY).	Proprietary/ Non-Publicly Available
ML14199A733	07/18/2014	NRC-047(P) — Adams Rebuttal Testimony (PROPRIETARY).	Proprietary/ Non-Publicly Available

Accession Number	Document Date	Title	Availability
Prefiled Exhibits (Continued)			
ML14199A744	09/27/2010	NRC-048 — Letter from Michael S. Anderson, Secretary, Aerotest Operations, Inc. to NRC, Report of Progress Made Toward Completion of the License Transfer (Sept. 27, 2010) (ADAMS Accession No. ML102720404).	Publicly Available
ML14199A741	10/13/2010	NRC-049 — Letter from Michael S. Anderson, Secretary, Aerotest Operations, Inc. to NRC Report of Progress Made Toward Completion of the License Transfer (Oct. 13, 2010) (ADAMS Accession No. ML102880066).	Publicly Available
ML14199A740	02/28/1996	NRC-050 — NUREG-1537, Part 1, Guidelines for Preparing & Reviewing Applications for the Licensing of Non-Power Reactors Format and Content, Chapters 4 and 13 (Feb. 1996) (ADAMS Accession No. ML042430055) (excerpted) (NUREG-1537, Part 1, Chapters 4 & 13).	Publicly Available
ML14199A742	02/28/1996	NRC-051 — NUREG-1537, Part 2, Guidelines for Preparing and Reviewing Applications for the Licensing of Non-Power Reactors Standard Review Plan and Acceptance Criteria, Chapters 4 and 13 (Feb. 1996) (ADAMS Accession No. ML042430048) (excerpted). . . .	Publicly Available
Legal Correspondence/Miscellaneous			
ML14112A162	04/22/2014	Aerotest Operations, Inc., and Nuclear Labyrinth, LLC's Statement of Areas of Controversy Regarding Denial of Indirect License Transfer of Aerotest Radiography and Research Reactor.	Publicly Available

Accession Number	Document Date	Document Title	Availability
Legal Correspondence/Miscellaneous (Continued)			
ML14125A461	05/05/2014	NRC Staff Joint Proposed Schedule in the Matter of Aerotest Operations, Inc.	Publicly Available
ML14127A170	05/07/2014	Letter Addendum to Joint Proposed Schedule.	Publicly Available
ML14129A449	05/09/2014	Notice of Appearance — Jeremy L. Wachutka.	Publicly Available
ML14129A450	05/09/2014	Aerotest Operations, Inc. License Transfer Hearing File and Mandatory Disclosures Privilege Log — Proprietary and Sensitive Information Initial Disclosures — May 9, 2014.	Publicly Available
ML14164A705	06/13/2014	NRC Exhibits List for 2014 Evidentiary Hearing on Aerotest Radiography & Research Reactor.	Publicly Available

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Michael M. Gibson
Dr. Gary S. Arnold

In the Matter of

Docket No. IA-14-025-EA
(ASLBP No. 14-932-02-EA-BD01)
(Enforcement Action)

JAMES CHAISSON

September 8, 2014

This proceeding concerns a July 11, 2014 enforcement order issued by the Director of the U.S. Nuclear Regulatory Commission's Office of Enforcement (Director) against Mr. James P. Chaisson. The order alleges that Mr. Chaisson failed to comply with certain provisions of a confirmatory order issued to him in 2012. Mr. Chaisson requested a hearing and filed an answer denying certain aspects of the 2014 Order. This Notice of Hearing and Initial Scheduling Order (ISO) (1) provides notice of the Licensing Board's intent to conduct a hearing in Salt Lake City, Utah, under 10 C.F.R. Part 2, Subpart G; (2) identifies disputed issues; and (3) establishes an initial schedule for the conduct of this matter, including any discovery pursued by the parties under Subpart G.

ENFORCEMENT ACTIONS: PRO SE LITIGANT

When the target of an enforcement action is unrepresented, the Licensing Board will carefully scrutinize any agreement or consent purporting to waive or abandon any of the individual's substantive or procedural rights to ensure that he is fully informed. NRC counsel should be especially scrupulous in informing him of the nature and extent of the rights they might suggest he waive or abandon.

RULES OF PRACTICE: ETHICAL DUTY OF CANDOR

NRC counsel owes an ethical duty of candor to the tribunal (e.g., the duty to disclose to a tribunal any relevant information and/or legal authority adverse to its position) that is especially important in cases such as this one, where the target of the government’s enforcement action is not represented by counsel.

ENFORCEMENT ACTIONS: 10 C.F.R. PART 2, SUBPART G

Section 2.310(b) of 10 C.F.R. provides that “[p]roceedings on enforcement matters must be conducted under the procedures of subpart G of this part, unless all parties agree [otherwise].”

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.202(a)(3))

Under 10 C.F.R. § 2.202(a)(3), the target of the Director’s enforcement order has the right to demand and receive, not merely request, a hearing.

RULES OF PRACTICE: INITIAL SCHEDULING ORDER

Section 2.329(e) of 10 C.F.R. requires that an ISO set forth “the issues or matters in controversy to be determined in the proceeding. This is important because the scope and content of the adjudication, including mandatory disclosures under 10 C.F.R. §§ 2.704(a)(2) and 2.709(a)(6) and discovery under 10 C.F.R. § 2.705(b)(1), are defined by the issues and matters that are disputed by the parties.

RULES OF PRACTICE: INITIAL SCHEDULING ORDER

In any conflict between an ISO and the general rules of 10 C.F.R. Part 2 (including the model milestones set forth in 10 C.F.R. Part 2, Appendix B), the deadlines specified in the ISO shall govern.

RULES OF PRACTICE: DISCOVERY IN A SUBPART G PROCEEDING

Under 10 C.F.R. § 2.709, the target of a Director’s enforcement action may pursue discovery, in addition to mandatory disclosures, against the Director in the form of written questions (interrogatories), or oral questions under oath posed to a member of the Director’s staff at a prehearing meeting (deposition). Likewise, counsel for the Director may take the deposition of the target of an enforcement action or any other person, under 10 C.F.R. § 2.706(a), file written interrogatories,

under 10 C.F.R. § 2.705(b), or require the target of an enforcement action to provide a copy of any designated relevant document that is within his possession, custody, or control, under 10 C.F.R. § 2.707(a). Neither party is required to pursue such discovery.

NOTICE OF HEARING AND INITIAL SCHEDULING ORDER

I. INTRODUCTION

This proceeding concerns a July 11, 2014 enforcement order issued by Patricia K. Holahan, Acting Director, Office of Enforcement of the U.S. Nuclear Regulatory Commission (Director) against Mr. James P. Chaisson.¹ The Director alleges that Mr. Chaisson failed to comply with certain provisions of a confirmatory order that the Director issued to him in 2012 (2012 Order). *Id.* at 42,058. Mr. Chaisson requested an “expedited hearing”² and filed an answer denying certain aspects of the 2014 Order.³ The Director filed an answer to Mr. Chaisson’s answer.⁴ The Director does not oppose Mr. Chaisson’s request for a hearing. Director’s Answer.

Pursuant to 10 C.F.R. § 2.329(a), on August 26, 2014, this Board conducted the initial scheduling conference in this matter.⁵ Our purpose was to discuss the development of an initial scheduling order (ISO) that would help achieve the just resolution of this dispute as efficiently and expeditiously as possible. The conference was conducted telephonically. The Director was represented in the conference by the NRC’s Office of General Counsel. Mr. Chaisson participated without representation.⁶

¹ In the Matter of James Chaisson, 79 Fed. Reg. 42,057 (July 18, 2014) (2014 Order).

² E-mail from James Chaisson to NRC Hearing Docket (July 18, 2014).

³ Request for Hearing Submitted by James Chaisson (Aug. 4, 2014) (Hearing Request).

⁴ NRC Staff Answer to Request for Hearing (Aug. 15, 2014) (Director’s Answer).

⁵ *See* Order (Scheduling Initial Prehearing Conference) (Aug. 14, 2014) (unpublished).

⁶ Given that Mr. Chaisson is unrepresented, the Board will carefully scrutinize any agreement or consent by him purporting to waive or abandon any of his substantive or procedural rights. *See* Order (Scheduling Initial Prehearing Conference) (Aug. 14, 2014) (unpublished) at 4 n.5. We will look to see if any such consent or waiver is fully informed. Director’s counsel should be especially scrupulous in informing Mr. Chaisson of the nature and extent of the rights that they might suggest that he waive or abandon. We also reminded counsel that their ethical duty of candor (e.g., their duty to disclose to this tribunal any relevant information and/or legal authority that is adverse to the Director’s position) is especially important in cases such as this one, where the target of the government’s enforcement

(Continued)

During the initial scheduling conference, Mr. Chaisson withdrew his request that the hearing be expedited. Tr. at 27, 65-66. Mr. Chaisson's request for expedition was based on his concern that he would not be able to continue working if the 2014 Order went into effect before the hearing.⁷ However, on August 14, 2014, the Director informed Mr. Chaisson that the 2014 Order "is not effective until the Atomic Safety and Licensing Board rules on your hearing." Director's Answer at 1 n.3. During the conference call, counsel for the Director confirmed that Mr. Chaisson's current responsibilities in his current job are not prohibited by the 2014 Order (because it is not in effect) or by the 2012 Order. Tr. at 25. On that basis, Mr. Chaisson withdrew his request to expedite the hearing. Tr. at 27, 65-66.

In addition, during the initial scheduling conference, the parties acknowledged that 10 C.F.R. Part 2, Subpart G (the regulations applicable to enforcement proceedings) govern this adjudication.⁸ Accordingly, this ISO is based, in part, on the Subpart G regulations.

II. NOTICE OF HEARING

The Board grants Mr. Chaisson's request for a hearing and, pursuant to 10 C.F.R. § 2.312, issues this notice of hearing. Indeed, Mr. Chaisson, who is the target of the Director's enforcement order, has the right to demand and receive, not merely request, a hearing. *See* 10 C.F.R. § 2.202(a)(3). The Board intends to conduct the hearing in Salt Lake City, Utah, at a time and place to be determined later. The hearing and this adjudication will be conducted under 10 C.F.R. Part 2, Subpart G.

III. IDENTIFICATION OF DISPUTED ISSUES

NRC regulations require that this ISO set forth "the issues or matters in controversy to be determined in the proceeding." 10 C.F.R. § 2.329(e). This is important because the scope and content of this adjudication, and the evidentiary hearing herein, are defined by the issues and matters that are disputed by the parties. For example, the scope of the mandatory disclosures that the parties must make under Subpart G is defined by the "disputed issues alleged with particularity in the pleadings." 10 C.F.R. §§ 2.704(a)(2), 2.709(a)(6). Likewise, the scope of

action is not represented by counsel. *See* Model Rules of Professional Conduct R. 3.3(a)(3); 10 C.F.R. §§ 2.323(d) and 2.314.

⁷E-mails from James Chaisson to NRC Hearing Docket (Aug 4, 2014, 17:14 EDT; Aug. 6, 2014).

⁸Tr. at 38. *See* 10 C.F.R. § 2.310(b) ("Proceedings on enforcement matters must be conducted under the procedures of subpart G of this part, unless all parties agree [otherwise].").

discovery under Subpart G covers any matter “that is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party.” 10 C.F.R. § 2.705(b)(1).

Based on the written pleadings and the discussion during the initial prehearing conference, the issues and matters in controversy, as we see them now, are defined by the allegations in the Director’s 2014 Order and the responses contained in Mr. Chaisson’s e-mails, answer, and statements during the conference.

A. The Director’s Allegations Include the Following

1. Mr. Chaisson was employed from April 2009 through April 2010 as an area supervisor and lead radiographer for the Wyoming operations of Texas Gamma Ray, LLC (TGR), which, at that time, held a license issued by the NRC pursuant to 10 C.F.R. Part 34. The license authorized TGR to conduct certain radiographic operations. 79 Fed. Reg. at 42,057.

2. On May 15, 2012, the NRC issued an order to Mr. Chaisson prohibiting him from engaging in NRC-licensed activities for a 3-year period. *Id.*

3. The May 15, 2012 order was based on NRC’s claim that Mr. Chaisson “engaged in deliberate misconduct in violation of 10 C.F.R. § 30.10(a)(1). Specifically, the NRC concluded that Mr. Chaisson chose to store a radiographic exposure device at a facility he knew did not comply with applicable NRC security requirements and was not an authorized storage location under TGR’s license.” *Id.*

4. Mr. Chaisson requested alternative dispute resolution (ADR) concerning the May 15, 2012 order. *Id.* A mediation session was conducted on July 26, 2012. *Id.*

5. As a result of the ADR, Mr. Chaisson signed an “Agreement in Principal [sic] . . . in which he agreed to terms and conditions to be memorialized in a Confirmatory Order.” *Id.*

6. On September 10, 2012, NRC issued a “Confirmatory Order based on the Agreement in Principal [sic].” *Id.* [This Confirmatory Order is referred to herein as the “2012 Order.”]

7. Among other things, the 2012 Order prohibited Mr. Chaisson from engaging in NRC-licensed activities for an 18-month period, during which time he was required:

- a. To complete a 40-hour formal training course designed for qualifying radiation safety officers;
- b. To complete a 40-hour formal training course that meets or exceeds the requirements of 10 C.F.R. § 34.43; and
- c. To submit an article to NRC “articulating the importance of compliance

with NRC regulations and providing full and accurate information.” *Id.* at 42,057-58.

8. On March 28, 2014, Mr. Chaisson contacted NRC to determine what kind of training would be acceptable to meet the requirements of the 2012 Order and on March 31, 2014, he requested a 6-month extension to fulfill the requirements of the 2012 Order. *Id.* at 42,058.

9. Contrary to the requirements of the 2012 Order, Mr. Chaisson failed to complete the two 40-hour training courses, and failed to submit the article to NRC within the 18-month period specified in the 2012 Order. *Id.*

10. “Mr. Chaisson’s actions [specified in the previous paragraph 9] constitute a violation of NRC requirements.” *Id.*

11. “Based on the deliberate misconduct on which the May 15, 2012, Order was based, and Mr. Chaisson’s violation of the September 10, 2012 Confirmatory Order, I [the Director] lack the requisite reasonable assurance that Mr. Chaisson can be relied upon, at this time, to comply with the Commission’s requirements and that the health and safety of the public will be protected if Mr. Chaisson were permitted at this time to be involved in NRC-licensed activities.” *Id.*

12. On the foregoing basis, the Director issued the 2014 Order.

B. Mr. Chaisson’s Allegations Include the Following

1. He did not deliberately violate any NRC requirements as alleged in the 2012 Order. E-mail from James Chaisson to NRC Hearing Docket (Aug. 4, 2014, 12:02 EDT).

2. The 2012 Order does not accurately represent what he agreed to in the 2012 mediation process. Tr. at 43.

3. He complied with the provision of the 2012 Order that required him to write and submit an article. Hearing Request.

4. He attempted to comply with the provisions of the 2012 Order that required him to attend two 40-hour training courses, but circumstances beyond his control prevented him from doing so. Hearing Request.

5. He requested that NRC grant him an extension for complying with the requirement of the 2012 Order that he attend two 40-hour training courses. 79 Fed. Reg. at 42,058.

6. He did not deliberately violate the 2012 Order. E-mail from James Chaisson to NRC Hearing Docket (Aug. 4, 2014, 12:02 EDT).

7. The sanctions proposed by the 2014 Order are inappropriate and excessive. Tr. at 41.

8. The 2014 Order should not have been issued and should not be sustained.⁹

C. Board Specification of Issues or Matters in Dispute

The Board concludes that the issues listed in Sections III.A and III.B are the “issues or matters in controversy to be determined in the proceeding.” 10 C.F.R. § 2.329(e). Thus, the scope of the mandatory disclosures, discovery, testimony, exhibits, and any other filings herein will include the foregoing issues and matters.

We note that during the initial prehearing conference, the Director took the position that the scope of the adjudication “should be limited to whether the 2014 Order was justified and appropriate.” Tr. at 41. For example, the Director argued that Mr. Chaisson should not be allowed to dispute whether the 2012 Order accurately reflects the mediated settlement because Mr. Chaisson signed an agreement in principle that covered these points. Tr. at 42. The Director also argued that Mr. Chaisson should not be allowed to dispute the original violations that formed the basis of the 2012 Order, i.e., whether, in 2009-2010, Mr. Chaisson deliberately violated NRC regulations. Tr. at 47. The Director argued that the current dispute should be limited to whether Mr. Chaisson violated the terms of the 2012 Order. *Id.*

We do not agree. First, Mr. Chaisson asserts that the 2012 Order does not accurately reflect what he agreed to in 2012. Tr. at 45. If Mr. Chaisson asserts that he did not agree to undergo the two 40-hour training courses and to submit an article to the NRC within 18 months, then he may present evidence to that effect. Likewise, if the Director (who has the burden of proof herein) has a written agreement in principle, signed by Mr. Chaisson, specifying that he agreed to those terms and conditions, then the Director may present such evidence at the hearing.¹⁰

Second, the 2014 Order explicitly states that the Director’s findings and the sanctions she seeks to impose on Mr. Chaisson, are, in part, “[b]ased on the deliberate misconduct on which the May 15, 2012, Order was based.” 79 Fed. Reg. at 42,058. Meanwhile, Mr. Chaisson disputes that he ever engaged in such

⁹ See Hearing Request; E-mails from James Chaisson to NRC Hearing Docket (July 18, 2014; Aug. 4, 2014, 12:02 EDT; Aug. 4, 2014, 17:14 EDT; Aug. 6, 2014).

¹⁰ The issue — whether or not the 2012 Order accurately reflects what Mr. Chaisson agreed to — focuses on the final *result* of the mediation, not the various *communications* made by the parties or the mediator *during* the mediation *process*. Both parties may present evidence whether the 2012 Order accurately reflects the result of the mediation. But neither party will be allowed to present evidence concerning the back and forth communications that the parties exchanged during the mediation process. We are not going to rehash who said what to whom during the mediation. Likewise, the mediator may not be called as a witness in this proceeding. This comports with Rule 408 of the Federal Rules of Evidence, which states, in part: “Evidence of conduct or statements made in compromise negotiations is . . . not admissible.”

deliberate misconduct. Tr. at 56-57. This issue is clearly within the scope of this proceeding. While this proceeding will not litigate the validity of the 2012 Order (Mr. Chaisson did not challenge that order in 2012),¹¹ the scope of the current proceeding definitely includes the appropriateness of the sanctions specified in the 2014 Order. The appropriateness of the sanctions in the 2014 Order is based, in significant part, on NRC's allegation that he engaged in deliberate misconduct in 2009-2010. This is an issue or matter in dispute in this case, and the Director and Mr. Chaisson are entitled to present evidence on it.

D. Clarification or Simplification of the Disputed Issues

The issues and matters in dispute that are listed in Sections III.A and III.B, above, are subject to modification and adjustment. For example, during the prehearing conference, we encouraged the Director and Mr. Chaisson to communicate with each other to attempt to settle, clarify, or simplify the issues and matters in dispute. Tr. at 85-87. Pursuant to that discussion, Section IV.A of this order instructs the parties to consult with each other by September 30, 2014, and for the Director to submit a report to the Board concerning the results of that consultation by October 10, 2014. That consultation and report should include any jointly proposed modifications or adjustments to the matters listed in Sections III.A and III.B.

IV. SCHEDULE

In addition to the general deadlines and time frames applicable to proceedings under 10 C.F.R. Part 2, the Board establishes the following initial schedule for this matter.¹²

A. Initial Meeting of the Parties

NRC's Subpart G regulations specify that, as soon as practicable after the issuance of the ISO, the parties shall "meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the proceeding or any portion thereof, to make or arrange for the disclosures

¹¹ While we will allow Mr. Chaisson to use this adjudication to argue (and present evidence) that the 2012 Order is *inaccurate* (that is, that it does not correctly reflect what he agreed to in 2012), we will not allow him to use this adjudication to argue that the 2012 Order is *invalid* or should be overturned. If he had wanted to challenge the validity of the 2012 Order, he should have done so in 2012.

¹² In any conflict between this ISO and the general rules of 10 C.F.R. Part 2 (including the model milestones set forth in 10 C.F.R. Part 2, Appendix B), the deadlines specified in the ISO shall govern.

required by § 2.704, and to develop a proposed discovery plan.” 10 C.F.R. § 2.705(f). In accordance with these regulations, the parties shall consult. In addition to the foregoing topics, they shall discuss whether either party claims that confidential or protected information is involved in this proceeding and whether a protective order may be necessary. Specifically,

1. By September 30, 2014, the Director and Mr. Chaisson shall consult (either in person or telephonically) to discuss the matters specified above; and
2. By October 10, 2014, the Director or her representative shall file a brief report with the Board reciting the results of the consultation. This report should
 - a. Identify any jointly proposed amendments, clarifications, or simplifications to the issues and disputed matters listed in Sections III.A and III.B of this ISO;
 - b. Include a proposed discovery plan that comports with the schedule and deadlines set forth in this ISO;
 - c. Specify if either party believes that a protective order is necessary and, if so, submit a proposed protective order;¹³ and
 - d. Specify if the parties wish to pursue settlement or to seek to have a Settlement Judge appointed pursuant to 10 C.F.R. § 2.338(b).
3. By October 17, 2014, Mr. Chaisson may file an answer to the report.
4. Settlement is encouraged, but the parties should be aware that the fact that they are negotiating a possible settlement does not change any of the deadlines set forth in this ISO. *See* 10 C.F.R. § 2.338(f).

B. Mandatory Disclosures

NRC’s Subpart G regulations specify that, unless the Board mandates otherwise, within 45 days of the ISO each party must automatically disclose to the other party certain information and documents. For example, within 45 days the NRC Enforcement Director must provide Mr. Chaisson with a copy of all NRC Staff documents that are “relevant to disputed issues alleged with particularity in the pleadings [i.e., listed in Sections III.A and III.B herein].” 10 C.F.R. § 2.709(a)(6)(i)(A). Likewise, within 45 days Mr. Chaisson must provide certain information and documents to the NRC Enforcement Director. *See* 10

¹³ See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-11-5, 73 NRC 131 (2011) for an example of a protective order.

C.F.R. § 2.704(a). That 45-day deadline, however, conflicts with the timing of the consultation mandated by 10 C.F.R. § 2.705(f) and discussed in Section IV.A, above. Accordingly,

1. In lieu of the 45-day deadline, Mr. Chaisson and the Director shall make their initial mandatory disclosures to each other by November 4, 2014;
2. Mr. Chaisson and the Director shall update their mandatory disclosures monthly, on the second Wednesday of each month; and
3. The monthly updates shall continue until the Board issues its decision after the hearing.

C. Discovery

NRC's Subpart G regulations specify that, in addition to the mandatory disclosures specified above, and within certain constraints, Mr. Chaisson may pursue discovery against the Director. *See* 10 C.F.R. § 2.709 (“Discovery against NRC staff”). For example, Mr. Chaisson (a) may serve written questions (referred to as “interrogatories”) on the Director, (b) must show that the answers to the interrogatories are necessary to a proper decision in this proceeding, and (c) ask the Board to direct the Director to answer those interrogatories. *See* 10 C.F.R. § 2.709(a)(2). If the Board agrees, it will instruct the Director to answer the interrogatories. In addition, Mr. Chaisson may require a member of the NRC Enforcement Director’s staff to attend a prehearing meeting where he can require that staff member to answer questions orally under oath (this is referred to as a “deposition”). *See* 10 C.F.R. § 2.709(a)(1), (3), and (4). Likewise, counsel for the Director may take the deposition of Mr. Chaisson or any other person, *see* 10 C.F.R. § 2.706(a); may file written interrogatories that Mr. Chaisson must answer, *see* 10 C.F.R. § 2.705(b); and may require him to provide the Director with a copy of any designated relevant document that is within his possession, custody, or control, *see* 10 C.F.R. § 2.707(a). Neither party is required to pursue such discovery. However, any such discovery shall proceed as follows:

1. Such discovery may not begin until October 10, 2014 — 10 days after Mr. Chaisson and the Director have held the consultation mandated by 10 C.F.R. § 2.705(f);¹⁴
2. Such discovery must be completed by January 15, 2015.

¹⁴This is the same date on which the Director is to submit her report concerning the results of the consultation, including the submission of any jointly proposed discovery plan.

D. Motions for Summary Disposition

Given the factual nature of the issues and matters in dispute herein, the Board concludes that motions for summary disposition (and any other form of dispositive motion) would be unproductive and would divert Mr. Chaisson and the Director from preparing adequately for the evidentiary hearing. Accordingly, no such motions may be filed.

E. Second Prehearing Conference

The Board contemplates that the prehearing filings that each party must make before the evidentiary hearing can occur will need to be filed by February 20, 2015, and that the evidentiary hearing will occur in mid to late March 2015. At the moment, however, we are not mandating those specific deadlines. Instead, the Board will hold a second prehearing conference before January 30, 2015. The purpose of the second prehearing conference will be to set a specific time, date, and location for the evidentiary hearing and to establish firm deadlines for the prehearing filings that the parties must make.

V. FIFTH AMENDMENT ISSUES

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that no person “shall be compelled in any criminal case to be a witness against himself.” The 2014 Order issued by the Director, and this adjudicatory proceeding, are administrative actions and do not constitute a criminal case. During the initial prehearing conference, however, counsel for the Director stated that there is a “potential” that a criminal case could arise concerning Mr. Chaisson’s alleged violations. Tr. at 91. Given that Mr. Chaisson has no legal representation, it is incumbent on NRC, and this Board, to be alert to such issues and to inform him of his right against self-incrimination in appropriate circumstances. Accordingly, and as ordered during the initial prehearing conference:

- A. On September 10, 2014 the Director shall submit a brief to the Board that specifies:
 1. Whether there is any potential that NRC will pursue criminal charges against Mr. Chaisson;
 2. Whether the NRC is aware that any other federal entity, such as the U.S. Department of Justice, is investigating this matter and/or may pursue criminal charges against Mr. Chaisson;

3. Whether the Director or anyone on the NRC Staff has previously advised Mr. Chaisson of his Fifth Amendment right against self-incrimination, and if so, when and how;
 4. Whether the right against self-incrimination attaches or has attached to Mr. Chaisson in this proceeding;
 5. If so, when did it attach; and
 6. If so, how we should handle this issue and protect Mr. Chaisson's constitutional rights.
- B. On September 17, 2014, Mr. Chaisson may file an answer to the Director's report.

VI. CONCLUSION

This ISO is intended to promote the just resolution of this dispute as efficiently and expeditiously as possible. The deadlines set forth herein are firm, and will not be modified unless a party (in advance of the deadline) petitions this Board for a change and demonstrates to us that there is good cause for such a change. *See* 10 C.F.R. § 2.334(b). Appendix A provides a summary of the deadlines set forth in this ISO. The parties should note that settlement negotiations, while encouraged, will not delay this schedule unless the Board affirmatively grants such a delay.

Objections to this ISO must be filed by September 15, 2014. *See* 10 C.F.R. § 2.329(e).

It is so ORDERED.

THE ATOMIC SAFETY AND LICENSING BOARD

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Michael M. Gibson
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 8, 2014

APPENDIX A

IN THE MATTER OF JAMES CHAISSON: DEADLINES SPECIFIED IN INITIAL SCHEDULING ORDER

Deadline	Action	ISO Section
09/10/14	Director files brief concerning 5th Amendment	ISO V.A
09/15/14	Either party may file objections to ISO	ISO VI
09/17/14	Chaisson may file response concerning 5th Amendment	ISO V.B
09/30/14	Initial meeting or consultation of parties	ISO IV.A.1
10/10/14	Director files report of consultation	ISO IV.A.2
10/10/14	Parties can commence discovery	ISO IV.C.1
10/17/14	Chaisson may file response to Director's report	ISO IV.A.3
11/04/14	Parties make initial mandatory disclosures (to be updated monthly thereafter)	ISO IV.B1
01/15/15	End of discovery. Parties must complete discovery by this date	ISO IV.C.2
Before 1/30/15	Board conducts second prehearing conference with the parties to adjust and finalize plans for the hearing	ISO IV.E
02/20/15*	Each party files its Prehearing Submittals. (These submittals consist of the party's (a) statement of position, (b) written testimony, and (c) exhibits)	ISO IV.E
Mid to late March 2015*	Evidentiary hearing	ISO IV.E

*These dates are subject to change and will be discussed during the second prehearing conference.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
William J. Froehlich
Nicholas G. Trikouros

In the Matter of

Docket No. 50-483-LR
(ASLBP No. 12-919-06-LR-BD01)

UNION ELECTRIC COMPANY
(Callaway Plant, Unit 1)

September 8, 2014

In this 10 C.F.R. Part 54 proceeding regarding the application of Union Electric Company d/b/a Ameren Missouri (Ameren) for the renewal of its 10 C.F.R. Part 50 operating license for the Callaway Plant, Unit 1, that would authorize Ameren to operate that facility in Callaway County, Missouri, for an additional 20 years, in accord with the Commission's direction in *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 79 (2014), the Licensing Board (1) dismisses the sole pending contention of petitioner Missouri Coalition for the Environment (MCE) claiming that Ameren's environmental report fails to comply with the National Environmental Policy Act by not including a discussion of the environmental impacts of spent fuel pool (SFP) leakage, SFP fires, and the lack of a spent fuel repository, as required by the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012); and (2) terminates this proceeding.

MEMORANDUM AND ORDER
(Dismissing Contention and Terminating Proceeding)

In this proceeding, applicant Union Electric Company, d/b/a Ameren Missouri (Ameren), seeks a 20-year extension of the October 18, 2024 expiration date for the 10 C.F.R. Part 50 operating license for its Callaway Plant, Unit 1. In a July 17, 2012 ruling this Licensing Board found inadmissible all three of the contentions proffered in the April 2012 hearing petition of the Missouri Coalition for the Environment (MCE) challenging various aspects of the Ameren environmental report (ER) submitted in support of the Callaway license renewal application. *See* LBP-12-15, 76 NRC 14, 41 (2012). Nonetheless, this proceeding has remained open because of the pendency of another contention, submitted by MCE on July 9, 2012, claiming the Ameren ER fails to comply with the requirements of the National Environmental Policy Act (NEPA). Specifically, MCE's pending issue statement asserts that the Ameren ER must include a discussion of the environmental impacts of spent fuel pool (SFP) leakage, SFP fires, and the lack of a spent fuel repository, as required by the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). *See* Intervenor's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Callaway Nuclear Power Plant (July 9, 2014) at 4.

By order dated August 7, 2012, ruling on the status of similar contentions filed in various power reactor licensing proceedings, the Commission directed the licensing boards presiding over the cases in which such contentions were pending, including this Board, to hold those contentions in abeyance pending further Commission order, which would be issued in conjunction with a then to-be-determined agency response to the District of Columbia Circuit's ruling. *See* CLI-12-16, 76 NRC 63, 68-69 (2012). Subsequently, the Commission decided to act with regard to the issues raised by the District of Columbia Circuit's ruling by instituting a rulemaking to revise the agency's generic determination on the environmental impacts of continued storage of spent nuclear fuel (SNF) found in 10 C.F.R. § 51.23. *See* Memorandum to R. W. Borchardt, Nuclear Regulatory Commission (NRC) Executive Director for Operations (EDO), from Rochelle C. Bavol, NRC Acting Secretary, Subject: Staff Requirements — SECY-13-0061 — Proposed Rule: Waste Confidence — Continued Storage of [SNF] (RIN 3150-AJ20) at 1-2 (Aug. 5, 2013) (ADAMS Accession No. ML13217A358). As a consequence, on September 13, 2013, the NRC published a proposed rule and a draft generic environmental impact statement (GEIS), NUREG-2157, intended to provide a regulatory basis for the rulemaking changes being proposed. *See* Waste Confidence — Continued Storage of [SNF], 78 Fed. Reg. 56,776 (Sept. 13, 2013); Draft Waste Confidence [GEIS], 78 Fed. Reg. 56,621 (Sept. 13, 2013).

After receiving public comment on both the proposed rule and the draft GEIS, on August 26, 2014, the Commission adopted a final rule that (1) revises its generic determination regarding the environmental impacts of the continued storage of SNF beyond a reactor's licensed life for operation and prior to ultimate disposal; and (2) concludes that the GEIS, NUREG-2157, generically determines the environmental impacts of continued storage of SNF beyond the licensed life for operation of a reactor.¹ And contemporaneous with its approval of the final rule on the impacts of continued storage, the Commission entered an order applicable to the various reactor licensing proceedings, including this one, in which a contention was pending that challenged the adequacy of an applicant's ER or the Staff's environmental document based on the District of Columbia Circuit's *New York v. NRC* ruling. In its order, after reviewing the background regarding the continued storage rule that we have synopsized above, the Commission directed "the Atomic Safety and Licensing Boards to reject the contentions pending before them, consistent with our decision today." *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 79 (2014) (footnote omitted).

Thus, acting in accord with that Commission direction, we conclude MCE's July 9, 2012 contention is inadmissible and dismiss it from this proceeding.² Further, there being no other admitted or pending contentions in this proceeding, we close this case.

* * * *

For the foregoing reasons, it is this 8th day of September 2014, ORDERED that:

1. The July 9, 2012 request of petitioner MCE to admit a contention challenging the adequacy of applicant Ameren's ER in light of the June 8, 2012 ruling of the District of Columbia Circuit in *New York v. NRC* is *denied*.

¹ See Memorandum to Mark A. Satorius, NRC EDO, from Annette L. Vietti-Cook, NRC Secretary, Subject: Staff Requirements — Affirmation Session, 10:00 a.m., Tues., Aug. 26, 2014, Commissioners' Conference Room, One White Flint North, Rockville, Maryland (Open to Public Attendance) at 2 (Aug. 26, 2014) (ADAMS Accession No. ML14237A092); see also Memorandum for the Commissioners from Mark A. Satorius, Subject: Final Rule: Continued Storage of SNF (RIN 3150-AJ20), SECY-14-0072 (July 21, 2014) encls. 1-2 (draft Final Rule, Continued Storage of [SNF], and Office of Nuclear Material Safety and Safeguards, NRC, [GEIS] for Continued Storage of [SNF], NUREG-2157 (Aug. 2014)) (ADAMS Accession No. ML14177A482 (package)).

² Given this determination, we need not reach the question whether, with the February 2014 issuance of the NRC Staff's draft supplement to the agency's GEIS for nuclear power plant license renewal, see Office of Nuclear Regulation, NRC, [GEIS] for License Renewal of Nuclear Plants, Supp. 51, Regarding Callaway Plant, Unit 1, Draft Report for Comment, NUREG-1437 (Feb. 2014) (ADAMS Accession No. ML14041A373), MCE's July 9, 2012 contention challenging the adequacy of the Ameren ER would, consistent with the so-called "migration tenet," become a challenge to the Staff's draft GEIS supplement in the absence of a new or amended contention.

2. As a consequence of the foregoing action, and there being no other admitted or pending contentions in this case, this proceeding is *terminated*.

3. As this decision rules upon the only pending unresolved contention in this case and has the effect of closing this proceeding, under the provisions of 10 C.F.R. § 2.341 any appeal to the Commission from this Memorandum and Order must be taken within twenty-five (25) days after this issuance is served.³

THE ATOMIC SAFETY AND
LICENSING BOARD

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

William J. Froehlich
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 8, 2014

³In its July 2012 decision denying the admission of all the contentions proffered with MCE's April 24, 2012 initial hearing request/intervention petition, noting the pendency of MCE's July 9 new contention, the Board advised the parties of the opportunity to take any appeal under section 2.311 from that issuance "that may be appropriate." LBP-12-15, 76 NRC at 41-42 & n.15. The degree to which the pendency of that new contention at the time of the Board's ruling on MCE's initial hearing petition tolled the time for filing any appeals from that decision regarding the admissibility of the contentions submitted with MCE's petition would be a matter for Commission determination. *See Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2), CLI-14-3, 79 NRC 31, 36-37 (2014).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Paul B. Abramson
Dr. Gary S. Arnold

In the Matter of

Docket No. 50-391-OL
(ASLBP No. 09-893-01-OL-BD01)

TENNESSEE VALLEY AUTHORITY
(Watts Bar Nuclear Plant,
Unit 2)

September 9, 2014

MEMORANDUM AND ORDER
(Denying Motion to File New Contention and
Terminating Proceeding)

The background of this proceeding is set forth in earlier orders of the Board.¹ On July 9, 2012, Southern Alliance for Clean Energy (SACE) moved for leave to file a new contention concerning temporary storage and ultimate disposal of nuclear waste.² In accordance with the Commission's direction in CLI-12-16,³ on August 9, 2012, the Board ordered the motion held in abeyance.⁴

¹ See LBP-09-26, 70 NRC 939, 945-46 (2009); Licensing Board Order (Granting TVA's Unopposed Motion to Dismiss SACE Contention 1) at 1 (June 2, 2010) (unpublished).

² Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Watts Bar Unit 2 (July 9, 2012).

³ CLI-12-16, 76 NRC 63, 68-69 (2012).

⁴ See Licensing Board Order (Holding Waste Confidence Contention in Abeyance) (Aug. 9, 2012) (unpublished).

On August 26, 2014, in view of its adoption of a revised rule codifying the NRC's generic determinations regarding the pertinent environmental impacts associated with continued storage of spent nuclear fuel, the Commission issued a memorandum and order (CLI-14-8) directing this Board (among others) to reject pending contentions on this issue.⁵ Accordingly, SACE's motion for leave to file a new contention is *denied*.

The Board previously granted SACE's unopposed motion to withdraw the only then-remaining admitted contention.⁶ Therefore, the adjudicatory proceeding before this Board concerning TVA's application for an operating license for a second nuclear reactor at the Watts Bar Nuclear Plant is terminated. In accordance with 10 C.F.R. § 2.341(b), any petition for review of this Memorandum and Order must be filed within twenty-five (25) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 9, 2014

⁵ *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 79 (2014).

⁶ See Licensing Board Order (Granting Motion to Withdraw Contention 7) (July 17, 2013).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Gary S. Arnold
Dr. Randall J. Charbeneau

In the Matter of

**Docket Nos. 52-12-COL
52-13-COL
(ASLBP No. 09-885-08-COL-BD01)**

**NUCLEAR INNOVATION NORTH
AMERICA LLC
(South Texas Project, Units 3
and 4)**

September 19, 2014

In this proceeding, applicant Nuclear Innovation North America (NINA) seeks combined licenses (COLs) under 10 C.F.R. Part 52 for the construction and operation of two new nuclear reactor units — proposed South Texas Project (STP) Units 3 and 4. On July 9, 2012, Intervenor, the Sustainable Energy and Economic Development Coalition, the South Texas Association for Responsible Energy, and Public Citizen, sought admission of a contention concerning continued storage of spent nuclear fuel. In accordance with the Commission's direction in CLI-12-16, this contention was held in abeyance pending further direction from the Commission. This Order now finds that Intervenor's contention is inadmissible and dismisses it from the proceeding, in accord with the Commission's direction in CLI-14-8. There being no other admitted or pending contentions in this proceeding, the case is terminated.

MEMORANDUM AND ORDER
(Dismissing Contention and Terminating Proceeding)

The background of this proceeding is set forth in LBP-04-3.¹ On July 9, 2012, Intervenors² moved for leave to file a new contention concerning continued storage of spent nuclear fuel.³ In accordance with the Commission's direction in CLI-12-16,⁴ the Board ordered the motion held in abeyance pending further Commission order.⁵

On August 26, 2014, the Commission approved "the issuance of a revised rule codifying the NRC's generic determinations regarding the environmental impacts of continued storage of spent nuclear fuel beyond a reactor's licensed operating life."⁶ Further, the Commission lifted the suspension on final licensing decisions, declined to accept contentions concerning continued storage of spent nuclear fuel, and directed this Board (among others) to reject pending contentions on this issue.⁷ Accordingly, Intervenors' motion for leave to file a new contention is *denied*. Further, there being no other pending contention, the contested adjudicatory hearing before this Board is terminated. This Order shall constitute the final decision of the Commission, unless a petition for review is filed in accordance with 10 C.F.R. § 2.341(b) within twenty-five (25) days of its service.

¹ See LBP-14-3, 79 NRC 267, 271-78 (2014).

² Intervenors are three public interest organizations: the Sustainable Energy and Economic Development Coalition, the South Texas Association for Responsible Energy, and Public Citizen.

³ See Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at South Texas Units 3 & 4 (July 9, 2012).

⁴ *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 68-69 (2012).

⁵ See Licensing Board Order (Holding Waste Confidence Contention in Abeyance) (Mar. 1, 2013) (unpublished).

⁶ *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 74 (2014).

⁷ *Id.* at 74, 79.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

Gary S. Arnold
ADMINISTRATIVE JUDGE

Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 19, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
William C. Ostendorff

In the Matter of

DTE ELECTRIC COMPANY
(Fermi Nuclear Power Plant,
Unit 3)

Docket No. 52-033-COL

DTE ELECTRIC COMPANY
(Fermi Nuclear Power Plant,
Unit 2)

Docket No. 50-341-LR

DUKE ENERGY CAROLINAS, LLC
(William States Lee III Nuclear
Station, Units 1 and 2)

Docket Nos. 52-018-COL
52-019-COL

ENTERGY NUCLEAR
OPERATIONS, INC.
(Indian Point, Units 2 and 3)

Docket Nos. 50-247-LR
50-286-LR

FIRSTENERGY NUCLEAR
OPERATING COMPANY
(Davis-Besse Nuclear Power
Station, Unit 1)

Docket No. 50-346-LR

FLORIDA POWER & LIGHT
COMPANY
(Turkey Point Nuclear Generating
Plant, Units 6 and 7)

Docket Nos. 52-040-COL
52-041-COL

<p>LUMINANT GENERATION COMPANY LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4)</p>	<p>Docket Nos. 52-034-COL 52-035-COL</p>
<p>NEXTERA ENERGY SEABROOK, LLC (Seabrook Station, Unit 1)</p>	<p>Docket No. 50-443-LR</p>
<p>NUCLEAR INNOVATION NORTH AMERICA, LLC (South Texas Project, Units 3 and 4)</p>	<p>Docket Nos. 52-012-COL 52-013-COL</p>
<p>PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2)</p>	<p>Docket Nos. 50-275-LR 50-323-LR</p>
<p>PROGRESS ENERGY FLORIDA, INC. (Levy County Nuclear Power Plant, Units 1 and 2)</p>	<p>Docket Nos. 52-029-COL 52-030-COL</p>
<p>SOUTH TEXAS PROJECT NUCLEAR OPERATING COMPANY (South Texas Project, Units 1 and 2)</p>	<p>Docket Nos. 50-498-LR 50-499-LR</p>
<p>TENNESSEE VALLEY AUTHORITY (Bellefonte Nuclear Plant, Units 3 and 4)</p>	<p>Docket Nos. 52-014-COL 52-015-COL</p>
<p>TENNESSEE VALLEY AUTHORITY (Sequoyah Nuclear Plant, Units 1 and 2)</p>	<p>Docket Nos. 50-327-LR 50-328-LR</p>
<p>TENNESSEE VALLEY AUTHORITY (Watts Bar Nuclear Plant, Unit 2)</p>	<p>Docket No. 50-391-OL</p>

**UNION ELECTRIC COMPANY
(Callaway Plant, Unit 1)**

Docket No. 50-483-LR

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

Docket No. 52-017-COL

October 7, 2014

MEMORANDUM AND ORDER

Recently, we approved the publication of a final rule and generic environmental impact statement to address the environmental impacts associated with the continued storage of spent nuclear fuel after the end of a reactor's licensed life for operation.¹ In response to the publication of the Continued Storage Rule and generic environmental impact statement, several petitioners have filed substantively identical petitions to suspend final licensing decisions and related motions requesting the admission of new contentions in the captioned matters.²

As the filings reflect, the procedural posture of these matters is not uniform. As a result, some filings (together with various procedural requests) were appropriately lodged with the Atomic Safety and Licensing Boards and some with us. In our view, the petition to suspend licensing decisions and the proposed contention are inextricably linked. For this reason and as a matter of sound case management, we exercise our inherent supervisory authority over agency

¹ Final Rule: "Continued Storage of Spent Nuclear Fuel," 79 Fed. Reg. 56,238 (Sept. 19, 2014) and "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel," NUREG-2157, Vols. 1 & 2 (Sept. 2014) (ADAMS Accession Nos. ML14196A105 and ML14196A107).

² See, e.g., Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings (Sept. 29, 2014); Petitioner's Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Licensing Proceeding at North Anna Nuclear Power Plant (Sept. 29, 2014) (filed in the *North Anna* combined license docket). In some proceedings, petitioners also filed motions to reopen the record. See, e.g., Motion to Reopen the Record for North Anna Nuclear Power Plant (Sept. 29, 2014). These petitions and motions were filed on September 29, 2014. Shortly thereafter, Riverkeeper, Inc. filed a substantively identical suspension petition together with a motion transmitting a new contention. Petition to Suspend Final Decision in Indian Point Relicensing Proceeding Pending Issuance of Waste Confidence Safety Findings (Oct. 3, 2014); Riverkeeper Consolidated Motion for Leave to File a New Contention and New Contention RK-10 Concerning the Absence of Required Waste Confidence Safety Findings (Oct. 3, 2014).

adjudications to review the petition and motions ourselves and today set a briefing schedule.

Responses to the petition and motions may be filed no later than Friday, October 31, 2014. Responding parties may, at their discretion, consolidate their responses to the petition and motions. Any replies to the responses may be filed no later than Friday, November 7, 2014.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of October 2014.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Michael F. Kennedy
Dr. William E. Kastenber

In the Matter of

Docket Nos. 50-352-LR
50-353-LR
(ASLBP No. 12-916-04-LR-BD01)

EXELON GENERATION
COMPANY, LLC
(Limerick Generating Station, Units 1
and 2)

October 7, 2014

Applicant Exelon Generation Company, LLC seeks 20-year extensions of the 2024 and 2029 expiration dates for the 10 C.F.R. Part 50 operating licenses for Limerick Generating Station, Units 1 and 2. On July 9, 2012, the Natural Resources Defense Council (NRDC) moved for admission of a contention claiming that Exelon's environmental report fails to comply with the National Environmental Policy Act by not discussing the environmental impacts of spent fuel storage and disposal given the lack of a spent fuel repository, as required by the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). The Board held this contention in abeyance pending further direction from the Commission. Now, following the Commission's issuance in *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71 (2014), this Order finds that NRDC's contention is inadmissible and dismisses it from the proceeding. Because there is no other admitted or pending contention in this proceeding, the case is terminated.

MEMORANDUM AND ORDER
(Denying Motion to File New Contention and
Terminating Adjudicatory Proceeding)

The Natural Resources Defense Council (NRDC) has challenged Exelon Generation Company, LLC's (Exelon's) application to renew for 20 years its operating licenses for both nuclear power reactors at the Limerick Generating Station near Limerick, Pennsylvania.¹ After two published decisions by this Board and two appeals to the Commission, the only remaining contention in this proceeding concerns the storage and disposal of the facility's spent fuel.²

I. BACKGROUND

Exelon received operating licenses for Limerick Generating Station Unit 1 in 1985 and for Unit 2 in 1989.³ As the result of a court challenge during the initial application process, the NRC was ordered to analyze features or actions, currently called "Severe Accident Mitigation Alternatives" (SAMAs), that could prevent a serious accident or mitigate its consequences.⁴ The NRC Staff conducted the SAMA analysis and supplemented the Final Environmental Statement for the Limerick facility in August 1989.⁵

Exelon filed a license renewal application for Limerick Units 1 and 2, which included an environmental report (ER), on June 22, 2011.⁶ NRDC petitioned to intervene and, among several other issues, proffered the contention that Exelon's 2011 ER had overlooked "new and significant" information required by 10 C.F.R. § 51.53(c)(3)(iv) because the report did not discuss new SAMAs addressed in

¹ NRDC's Petition to Intervene and Notice of Intention to Participate (Nov. 22, 2011).

² NRDC's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Limerick (July 9, 2012).

³ See Philadelphia Electric Company, Limerick Generating Station, Unit 1, Docket No. 50-352, Facility Operating License, License No. NPF-39 (Aug. 8, 1985) (ADAMS Accession No. ML011520196); Limerick Generating Station, Unit 2, Docket No. 50-353, Facility Operating License, License No. NPF-85 (Aug. 25, 1989) (ADAMS Accession No. ML052780037).

⁴ See *Limerick Ecology Action v. NRC*, 869 F.2d 719, 722-23 (3d Cir. 1989).

⁵ This review was called a "Severe Accident Mitigation Design Alternatives" analysis. See Office of Nuclear Reactor Regulation, Final Environmental Statement Related to the Operation of Limerick Generating Station, Units 1 and 2, NUREG-0974 Supp. (Aug. 1989) (ADAMS Accession No. ML11221A204).

⁶ Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. NPF-39 and NPF-85 for an Additional 20-Year Period, Exelon Generation Co., LLC, Limerick Generating Station, 76 Fed. Reg. 52,992 (Aug. 24, 2011).

more recent reports for other nuclear power plants of the same or similar Boiling Water Reactor (BWR) Mark II design.⁷ The NRC Staff argued, based on 10 C.F.R. § 51.53(c)(3)(ii)(L), that the regulations do not require Exelon to perform a new SAMA analysis.⁸ Noting the tension between these regulatory sections — one exempts Exelon from conducting a new SAMA analysis, but the other requires Exelon to review all new and significant information — the Board ruled that NRDC had proffered an admissible contention with respect to the significance of these new SAMAs.⁹ The Board admitted NRDC’s contention:

Applicant’s Environmental Report (§ 5.3) erroneously concludes that new information related to its severe accident mitigation design alternatives (“SAMDA”) analysis is not significant, in violation of 10 C.F.R. § 51.53(c)(3)(iv), and thus the ER fails to present a legally sufficient analysis in that:

1. Exelon has omitted from its ER a required analysis of new and significant information regarding potential new severe accident mitigation alternatives previously considered for other BWR Mark II Containment reactors.
2. Exelon’s reliance on data from [Three Mile Island] in its analysis of the significance of new information regarding economic cost risk constitutes an inadequate analysis of new and significant information.¹⁰

Both Exelon and NRC Staff appealed the Board’s decision to the Commission.¹¹

The Commission determined on appeal that NRDC’s contention regarding mitigation alternatives was effectively a collateral attack on section 51.53(c)(3)(ii)(L), the section that exempts applicants from having to reanalyze SAMAs during the renewal process.¹² Therefore, the Commission concluded, NRDC had not offered an admissible contention because intervenors in adjudicatory proceedings are prohibited from challenging regulations unless they first obtain a waiver by showing “special circumstances” under 10 C.F.R. § 2.335(b).¹³ The Commission remanded the proceeding to the Board to consider whether NRDC had satisfied this waiver requirement.¹⁴ Under the test established by the Commission, a waiver may be

⁷ NRDC’s Petition to Intervene and Notice of Intention to Participate (Nov. 22, 2011) at 17.

⁸ NRC Staff’s Answer to NRDC’s Petition to Intervene and Notice of Intention to Participate (Dec. 21, 2011) at 8.

⁹ LBP-12-8, 75 NRC 539, 561 (2012).

¹⁰ *Id.* at 561-62.

¹¹ Exelon’s Notice of Appeal of LBP-12-08 (Apr. 16, 2012); Exelon’s Brief in Support of the Appeal of LBP-12-08 (Apr. 16, 2012); NRC Staff’s Notice of Appeal of LBP-12-08 (Apr. 16, 2012); NRC Staff’s Appeal of LBP-12-08 (Apr. 16, 2012).

¹² CLI-12-19, 76 NRC 377, 385-86 (2012).

¹³ *Id.* at 387.

¹⁴ *Id.* at 388-89.

granted only when all four factors are met: (1) strict application of the rule would not serve the rule's intended purpose, (2) special circumstances exist that were not considered during rulemaking, (3) those circumstances are unique to the facility, and (4) the waiver is necessary to address a significant safety problem.¹⁵

The Board rejected NRDC's request for a waiver on February 6, 2013.¹⁶ The Board concluded, based on the first factor, that NRDC was not entitled to a waiver because the apparent purpose of section 51.53(c)(3)(ii)(L) was to exempt applicants from having to analyze SAMAs again for the same facility and therefore the rule served its purpose.¹⁷ The Commission affirmed our decision on a different ground,¹⁸ explaining that the purpose of the exemption was "to reflect our view that one SAMA analysis, as a general matter, satisfies our . . . obligation to consider measures to mitigate both the risk and the environmental impacts of severe accidents."¹⁹ The Commission thus concluded that unique circumstances might require a new analysis, but determined that NRDC had not met its burden of showing those circumstances here.²⁰ NRDC has appealed the Commission's decision in CLI-13-7 to the United States Court of Appeals for the District of Columbia Circuit.²¹

Meanwhile, in June 2012, while the SAMA analysis contention was pending before the Commission, the United States Court of Appeals for the District of Columbia Circuit vacated 10 C.F.R. § 51.23, a regulation governing the storage and disposal of spent nuclear fuel.²² Based on that decision, in July 2012 NRDC moved to file a new contention concerning the temporary storage and ultimate disposal of Limerick Generating Station's spent fuel.²³ On August 7, 2012, the Commission directed that all such contentions be held in abeyance.²⁴ The Board issued an order holding NRDC's contention in abeyance on August 8, 2012.²⁵

¹⁵ See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005).

¹⁶ LBP-13-1, 77 NRC 57, 60 (2013).

¹⁷ *Id.* at 65-66.

¹⁸ CLI-13-7, 78 NRC 199, 202 (2013).

¹⁹ *Id.* at 210.

²⁰ *Id.* at 216.

²¹ See Initial Opening Brief for Petitioner, *NRDC v. NRC*, No. 13-1311 (D.C. Cir. July 21, 2014).

²² *New York v. NRC*, 681 F.3d 471, 483 (D.C. Cir. 2012).

²³ NRDC's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Limerick (July 9, 2012).

²⁴ CLI-12-16, 76 NRC 63, 68-69 (2012).

²⁵ Licensing Board Order (Suspending Procedural Date Related to Proposed Waste Confidence Contention) (Aug. 8, 2012) at 3 (unpublished).

II. ANALYSIS

On August 26, 2014, after undergoing a 2-year rulemaking process during which public comments were received and considered, the Commission adopted (1) a generic environmental impact statement (GEIS) to identify and analyze the environmental impacts of continued storage of spent nuclear fuel; and (2) associated revisions to the Temporary Storage Rule in 10 C.F.R. § 51.23 (now called the “Continued Storage of Spent Nuclear Fuel” Rule).²⁶ The Commission “concluded that the impacts of continued storage will not vary significantly across sites,” noting that “[b]ecause these generic impact determinations have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings.”²⁷ The Commission directed the Licensing Boards, including this one, to reject the pending waste confidence contentions that had been held in abeyance.²⁸

Following the Commission’s direction in CLI-14-8, we deny the NRDC’s motion seeking to admit a new contention concerning the environmental impacts of the storage and disposal of Limerick Generating Station’s spent nuclear fuel. Even if NRDC disputes that the Commission’s newly adopted Continued Storage of Spent Nuclear Fuel Rule satisfies the requirements of the National Environmental Policy Act or the court’s decision in *New York v. NRC*,²⁹ it cannot challenge the adoption or validity of the rule itself before this Board.³⁰

III. CONCLUSION

Because our denial of NRDC’s motion results in it no longer having any contentions before the Board, this adjudicatory proceeding is terminated.³¹ This

²⁶ Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014); Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263 (Sept. 19, 2014).

²⁷ *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 79 (2014).

²⁸ *Id.*

²⁹ See National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (2012); *New York v. NRC*, 681 F.3d at 483.

³⁰ See 10 C.F.R. § 2.335(a). As the Commission noted, “[c]ontentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings.” CLI-14-8, 80 NRC at 79 n.27.

³¹ We suspended this proceeding before NRDC could reply to NRC Staff’s and Exelon’s Answers to its motion. See Licensing Board Order (Suspending Procedural Date Related to Proposed Waste Confidence Contention) (Aug. 8, 2012) at 3 n.15 (unpublished). In light of the Commission’s decision in CLI-14-8, any reply would now be moot.

Order shall constitute the final decision of the Commission, unless, within twenty-five (25) days of its service, a petition for review is filed in accordance with 10 C.F.R. § 2.341(b).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Dr. William E. Kastenber
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 7, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran
Stephen G. Burns

In the Matter of

Docket No. 52-033-COL

DTE ELECTRIC COMPANY
(Fermi Nuclear Power Plant,
Unit 3)

December 16, 2014

REVIEW, DISCRETIONARY

The Commission will grant a petition for review at its discretion, upon a showing that the petitioner has raised a substantial question as to whether: (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (iii) a substantial and important question of law, policy, or discretion has been raised; (iv) the conduct of the proceeding involved a prejudicial procedural error; or (v) any other consideration that the Commission may deem to be in the public interest.

STANDARD OF REVIEW, FINDINGS OF FACT

The Commission gives substantial deference to licensing board findings of fact, and it will not overturn a board's factual findings unless they are not even plausible in light of the record viewed in its entirety.

RULES OF PRACTICE, FAIRNESS

Regardless of a party's resources, fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations.

STANDARD OF REVIEW

The Commission gives broad discretion to licensing boards in the conduct of NRC adjudicatory proceedings, and it generally defers to board case-management decisions.

LICENSING BOARDS, CASE MANAGEMENT

Licensing boards are expected to set procedures to ensure the case is managed efficiently, in a manner that is fair to all of the parties.

LICENSING BOARDS, AUTHORITY, CASE MANAGEMENT

A board may take disciplinary action against a party that fails to comply with any prehearing order, as long as the action is just.

MEMORANDUM AND ORDER

Intervenors¹ challenge the Atomic Safety and Licensing Board's ruling on the merits of Contention 15A/B in favor of the applicant, DTE Electric Company.² For the reasons set forth below, we deny the petition for review.

I. BACKGROUND

This proceeding concerns DTE's combined license application to construct and operate a GE-Hitachi Economic Simplified Boiling Water Reactor (ESBWR)

¹Intervenors are Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman.

²Intervenors' Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance) (June 17, 2014) (Petition). *See generally* LBP-14-7, 79 NRC 451 (2014).

on the Fermi site in Monroe County, Michigan.³ In November 2009, after they were admitted as parties to the proceeding, Intervenor filed Contention 15, a new contention regarding DTE's quality assurance program.⁴ In June 2010, the Board admitted and reformulated the contention into two subparts, A and B.⁵

In support of their contention, Intervenor relied on an NRC Staff notice of violation that was issued to DTE in October 2009 for failure to comply with the quality-assurance requirements in 10 C.F.R. Part 50, Appendix B from March 2007 to February 2008 while Black and Veatch, a contractor for DTE, performed site-investigation activities for the development of DTE's combined license application.⁶ As reformulated by the Board, the introductory language of Contention 15 referenced the Staff's findings in the October 2009 notice of violation.⁷ In Subpart A of the contention, Intervenor argued that the NRC

³ See Detroit Edison Company; Notice of Hearing, and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for Fermi 3, 74 Fed. Reg. 836 (Jan. 8, 2009). Intervenor petitioned for leave to intervene, proposing fourteen contentions. The Board admitted four: Contentions 3, 5, 6, and 8. *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 306 (2009). In three separate opinions, the Board granted summary disposition of Contentions 3, 5, and 6 in favor of DTE. See Order (Granting Motion for Summary Disposition of Contention 3) (July 9, 2010) (unpublished); Order (Granting Motion for Summary Disposition of Contention 5) (Mar. 1, 2011) (unpublished); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 NRC 445, 452 (2012) (among other things, granting summary disposition of Contention 6). In the decision challenged here, the Board found in favor of the Staff on the merits of Contention 8. LBP-14-7, 79 NRC at 454; see *infra*. We will address in a separate decision the Board's request for *sua sponte* review of issues related to Intervenor's proposed Contention 23. See *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-14-9, 80 NRC 15 (2014).

⁴ Supplemental Petition of Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication (Nov. 6, 2009) (Proposed Contention 15).

⁵ *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-10-9, 71 NRC 493, 499 (2010).

⁶ See Proposed Contention 15, at 1-5.

⁷ LBP-10-9, 71 NRC at 510 ("Detroit Edison (DTE) failed to comply with Appendix B to 10 C.F.R. Part 50 to establish and implement its own quality assurance (QA) program when it entered into a contract with Black and Veatch (B&V) for the conduct of safety-related combined license (COL) application activities and to retain overall control of safety-related activities performed by B&V. This violation began in March 2007 and continued through at least February 2008. Further, DTE failed to complete internal audits of QA programmatic areas implemented for the Fermi 3 COL Application, and DTE also has failed to document trending of corrective actions to identify recurring conditions adverse to quality since the beginning of the Fermi Unit 3 project in March 2007."). The Staff issued a revised notice of violation in April 2010 after a response from DTE. See *id.* at 500-01. The admitted contention, however, focused on the October 2009 notice of violation.

may not issue a combined license for Fermi Unit 3 until DTE either corrects the information obtained from Black and Veatch's site-investigation activities or demonstrates that its quality was not affected by the violation.⁸ And in Subpart B of the contention, Intervenors challenged DTE's general commitment to comply with NRC quality-assurance regulations. Intervenors asserted that the NRC cannot issue a license until DTE demonstrates that it has adopted and implemented a sufficient quality assurance program.⁹

DTE later moved for summary disposition of Contention 15A/B, which the Staff supported.¹⁰ The Board denied DTE's motion, however, and found that genuine issues of material fact remained in dispute between the parties.¹¹ Thus, Contention 15A/B proceeded to an evidentiary hearing along with Intervenors' Contention 8, which challenged the adequacy of the Staff's final environmental impact statement with regard to the effects of construction and operation of Fermi Unit 3 on the eastern fox snake, a state-listed threatened species, as well as the adequacy of the mitigation measures planned for its protection.¹² The Board held the evidentiary hearing on October 30 and 31, 2013.¹³ After weighing the parties' testimony and exhibits, the Board ruled on the merits of both contentions and found in favor of the Staff on Contention 8 and DTE on Contention 15A/B.¹⁴

⁸ *Id.* at 510-11 ("These deficiencies adversely impact the quality of the safety-related design information in the FSAR [(Final Safety Analysis Report)] that is based on B&V's tests, investigations, or other safety-related activities. Because the NRC may base its licensing decision on safety-related design information in the FSAR only if it has reasonable assurance of the quality of that information, it may not lawfully issue the COL until the deficiencies have been adequately corrected by the Applicant, or until the Applicant demonstrates that the deficiencies do not affect the quality of safety-related design information in the FSAR.").

⁹ *Id.* at 511 ("Although DTE claims that in February 2008 it adopted a QA program that conforms to Appendix B, DTE has failed to implement that program in the manner required to properly oversee the safety-related design activities of B&V. This demonstrates an ongoing lack of commitment on the part of DTE's management to compliance with NRC QA regulations. The NRC cannot support a finding of reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety until DTE provides satisfactory proof of a fully implemented QA program that will govern the design, construction, and operation of Fermi Unit 3 in conformity with all relevant NRC regulations.").

¹⁰ Applicant's Motion for Summary Disposition of Contention 15 (Apr. 17, 2012); NRC Staff Answer to Applicant's Motion for Summary Disposition of Contention 15 (May 7, 2012). Intervenors opposed summary disposition. *See* Intervenors' Response in Opposition to Applicant's Motion for Summary Disposition of Contention 15 (May 17, 2012).

¹¹ LBP-12-23, 76 NRC at 480.

¹² *See generally* LBP-09-16, 70 NRC at 285-92 (admitting Contention 8); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-11-14, 73 NRC 591, 604 (2011) (denying DTE's first motion for summary disposition of Contention 8); LBP-12-23, 76 NRC at 465 (denying DTE's second motion for summary disposition of Contention 8).

¹³ Tr. at 271-712.

¹⁴ LBP-14-7, 79 NRC at 454.

Intervenors' petition for review followed. Intervenors challenge only the Board's ruling on the quality-assurance issues in Contention 15A/B; they do not seek review of the Board's ruling on Contention 8.¹⁵ DTE and the Staff oppose the petition for review.¹⁶

II. DISCUSSION

We will grant a petition for review at our discretion, upon a showing that the petitioner has raised a substantial question as to whether

- (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) a substantial and important question of law, policy, or discretion has been raised;
- (iv) the conduct of the proceeding involved a prejudicial procedural error; or
- (v) any other consideration that we may deem to be in the public interest.¹⁷

Intervenors argue that review is warranted here because they have raised a substantial question as to each of these considerations.¹⁸ We disagree. Intervenors

¹⁵ Petition at 1.

¹⁶ Applicant's Answer Opposing Petition for Review of LBP-14-07 (July 14, 2014) (DTE Opposition); NRC Staff's Answer to Intervenors' Petition for Review of LBP-14-07 (July 14, 2014) (Staff Opposition). On July 25, 2014, Intervenors e-mailed a request for an extension of time to file a reply until July 28, 2014, because Intervenors' counsel experienced problems with his computer hard drive. Intervenors' Motion for Enlargement of Time to Reply in Support of Petition for Review (July 30, 2014), at 1-2 & n.1. Intervenors e-mailed their replies on July 28, 2014, and on July 30, 2014, they filed the replies and the motion for extension of time on the electronic hearing docket. Intervenors' Reply to NRC Staff Answer to Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance) (July 30, 2014) at i n.1; Intervenors' Reply to DTE Answer Opposing Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance) (July 30, 2014) at i n.1. Because Intervenors' extension request is unopposed and because Intervenors have shown good cause for the modest extension, we grant the motion. *See* 10 C.F.R. § 2.307(a). In addition, we grant Intervenors an enlargement of the page limit for their petition for review. *See* DTE Opposition at 2; 10 C.F.R. § 2.341(b)(2) (Intervenors' petition exceeded the limit by three pages). *But see infra* note 41.

¹⁷ 10 C.F.R. § 2.341(b)(4)(i)-(v).

¹⁸ *See* Petition at 2. Although Intervenors cite only the considerations in section 2.341(b)(4)(ii) through (v), they also invoke subsection (i) as a basis for review, arguing that the Board "ignored the greater weight of the evidence" with respect to the adequacy of DTE's quality assurance oversight of the safety-related preapplication services performed by its contractor, Black and Veatch. *See id.* at 2-3.

have not presented a substantial question that would justify review of the Board's ruling on Contention 15A/B.

Intervenors argue that the Board erred in finding that DTE demonstrated by a preponderance of the evidence that it appropriately remained responsible for quality assurance over Black and Veatch, DTE's contractor for preapplication, site-investigation activities.¹⁹ But for many of Intervenors' attempts in their petition for review to point to information in the record that supports their view — i.e., that safety-related information in DTE's application is “unreliable” or that DTE lacks a “commitment” to comply with the NRC's quality-assurance requirements — DTE and the Staff point to information in the record that demonstrates that Intervenors may have misinterpreted the evidence or failed to demonstrate its relevance to the issues in dispute.²⁰

For example, Intervenors challenge the reliability of Black and Veatch's subsurface site investigations for DTE during the preapplication period, claiming that those investigations were the “root cause of . . . site characterization issues that continue to plague the Fermi 3 Licensing Project.”²¹ But DTE witnesses explained at the hearing that recent seismic and geotechnical work on the proposed Fermi 3 site is related to ESBWR design changes and lessons-learned activities from the March 11, 2011, Fukushima accident in Japan.²² And Intervenors cite a DTE presentation to an industry working group in response to the October 2009 notice of violation as evidence that DTE's quality assurance program was poorly managed.²³ But DTE witnesses referenced the presentation as evidence of its “willingness to discuss lessons-learned with the industry as well as its continual improvement efforts.”²⁴

We give substantial deference to licensing board findings of fact, and we will not overturn a board's factual findings unless they are “not even plausible in light of the record viewed in its entirety.”²⁵ The Board made extensive factual findings to support its conclusion that DTE satisfied the requirements of 10 C.F.R. Part 50, Appendix B, all of which were supported by the evidence presented by DTE and the Staff. Specifically, the Board noted that DTE used a vendor with an Appendix

¹⁹ *See id.* at 2-3.

²⁰ *Compare id.* at 12-23, with Staff Opposition at 13-17, and DTE Opposition at 8-13.

²¹ Petition at 13 (internal quotation marks omitted).

²² *See* Staff Opposition at 16 (citing Tr. at 541-42).

²³ Petition at 15 (citing Ex. INTS 068, Testimony of Arnold Gundersen Supporting [] Intervenors Contention 15: DTE COLA Lacks Statutorily Required Cohesive QA Program (Apr. 30, 2013), at 35 (Gundersen Testimony)). The testimony of Intervenors' witness on this point referenced an excluded exhibit. *See id.* at 4-5 (citing Ex. INTS 068, Gundersen Testimony at 35); *see also* text accompanying notes 27-43.

²⁴ DTE Opposition at 12.

²⁵ *David Geisen*, CLI-10-23, 72 NRC 210, 224-25 (2010) (internal quotation marks omitted); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003).

B quality assurance program, required by contract that Black and Veatch's work conform with that program, reviewed a prior audit of that program, employed an owner's engineer to oversee Black and Veatch's quality assurance efforts, and ultimately did not accept work from Black and Veatch until DTE established its own quality assurance program.²⁶ Moreover, the Board may reject evidence that it finds unpersuasive or not credible. Therefore, we see nothing that would suggest that the Board's findings were implausible or not supported by the record.

Intervenors also argue that the Board committed prejudicial procedural error by excluding from the record a number of Intervenors' late-filed exhibits.²⁷ Intervenors assert that the Board should have overlooked their late filing because Intervenors' expert relied on the exhibits in his prefiled testimony.²⁸ They claim that this error was prejudicial because the exhibits, which included internal DTE e-mails and presentations, demonstrated that DTE lacked a sufficient quality assurance program during the development of its application.²⁹

But the Board provided Intervenors multiple opportunities to file these exhibits in a timely manner.³⁰ Intervenors requested two extensions of the original filing deadline, which the Board granted.³¹ And after the Board made it clear that no further extensions would be granted, Intervenors nevertheless failed to meet the Board's final exhibit-filing deadline.³² The Board also provided Intervenors an opportunity to seek reconsideration of its decision to exclude the late-filed

²⁶ LBP-14-7, 79 NRC at 485-86.

²⁷ Petition at 2.

²⁸ *Id.* at 2, 6.

²⁹ *See id.* at 3-6.

³⁰ *See* Order (Adopting Transcript Corrections, Denying Intervenors' Post-Hearing Motion for Admission for Excluded Exhibits, and Closing the Record) (Feb. 4, 2014) at 2-5 (unpublished) (Post-Hearing Board Order).

³¹ *See* Order (Granting Intervenors' Motions for Extension of Time, Requesting List of Objections from the NRC Staff, and Explaining Board Procedure in the Event of a Continued Government Shutdown) (Oct. 3, 2013), at 2 (unpublished) (October 3 Board Order); *see generally* Intervenors' Motion for Extension of Time for Submission of Exhibits and Prefiled Testimony with Exhibit References (Sept. 26, 2013); Intervenors' Second Motion for Extension of Time for Submission of Exhibits and Prefiled Testimony with Exhibit References (Oct. 1, 2013). Intervenors originally filed all of their exhibits for Contention 15 as one document. *See* Tr. at 239-41. The Board directed Intervenors to refile them by September 26, 2013, a date that Intervenors' counsel stated could be met "easily." Order (Summarizing Pre-hearing Conference) (Sept. 20, 2013) at 2 (unpublished); Tr. at 241.

³² October 3 Board Order at 2. Although the Board stated that no further extension would be granted past October 4, 2013, Intervenors continued to file their exhibits through October 7, 2013. *See* Post-Hearing Board Order at 3.

exhibits “as soon as possible after the close of the hearing.”³³ Intervenors filed their motion for reconsideration almost 2 months later.³⁴

Although Intervenors claim to have “vastly inferior litigation resources,” they are represented by counsel.³⁵ But even if Intervenors were appearing *pro se*, we would still expect adherence to board directives.³⁶ Regardless of a party’s resources, “[f]airness to all involved in NRC’s adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations.”³⁷

Moreover, we give broad discretion to our licensing boards in the conduct of NRC adjudicatory proceedings, and we generally defer to board case-management decisions.³⁸ Licensing boards are expected to set procedures to ensure the case is managed efficiently, in a manner that is fair to all of the parties.³⁹ And a board may take disciplinary action against a party that “fails . . . to comply with any

³³ Tr. at 649-50; *see also id.* at 709-10.

³⁴ Intervenors’ Post-Hearing Motion for Reconsideration for Admission of Excluded Intervenor Exhibits on Contention 15 (Dec. 27, 2013). DTE and the Staff objected to the timing of the motion for reconsideration due to its arrival during the parties’ preparation of proposed findings of fact and conclusions of law. Applicant’s Response to Intervenors’ Motion to Reconsider Exclusion of Untimely Exhibits (Jan. 6, 2014), at 1-2 & n.5; NRC Staff Answer Opposing Intervenors’ Post-Hearing Motion for Reconsideration of Excluded Exhibits on Contention 15 (Jan. 6, 2014) at 4. Intervenors claimed that they were merely providing the rationale for their timely oral motion at the hearing. Reply in Support of Intervenors’ Post-Hearing Motion for Reconsideration of Admission of Excluded Intervenor Exhibits on Contention 15 (Jan. 13, 2014) at 1. Our rules require motions for reconsideration to be filed within 10 days of the action for which reconsideration is requested. 10 C.F.R. § 2.323(e).

³⁵ Petition at 6.

³⁶ *See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-14, 71 NRC 449, 469 (2010); *accord Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21-22 (1998) (*1998 Policy Statement*) (noting the obligation of all parties to follow the procedures in 10 C.F.R. Part 2 and board scheduling orders).

³⁷ *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981) (*1981 Policy Statement*).

³⁸ *See* 10 C.F.R. § 2.319 (“A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order. The presiding officer has all the powers necessary to those ends”); *Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3)*, CLI-07-28, 66 NRC 275, 275 (2007); *see also* 10 C.F.R. § 2.321(c).

³⁹ 10 C.F.R. § 2.319(k) (authorizing boards to “[s]et reasonable schedules for the conduct of the proceeding and take actions reasonably calculated to maintain overall schedules”); *see also 1998 Policy Statement*, CLI-98-12, 48 NRC at 19 (“Current adjudicatory procedures and policies provide a latitude to the Commission, its licensing boards, and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings.”); *1981 Policy Statement*, CLI-81-8, 13 NRC at 453 (“The Commission’s Rules of Practice provide the board with substantial authority to regulate hearing procedures.”).

prehearing order,” as long as the action is just.⁴⁰ The Board’s actions in this case are consistent with our expectations for orderly case management.⁴¹

In any event, the Board “reviewed the parties’ filings and the [excluded] exhibits . . . and found that they would not add anything of significance to the record.”⁴² We are not persuaded by Intervenors’ arguments on appeal that the excluded evidence would have done otherwise — i.e., that it would have changed the Board’s findings on Contention 15.⁴³ Given all of these considerations, we see no reason to disturb the Board’s decision to exclude Intervenors’ late-filed exhibits.

Finally, Intervenors argue that review is warranted because the Board’s decision constituted a *de facto* exemption or waiver of the NRC’s quality-assurance regulations that “deprived the public of notice and an opportunity to adjudicate the basis for [DTE’s] unprecedented [quality assurance] program model.”⁴⁴ Intervenors’ argument that the Board granted DTE an exemption from the quality-assurance requirements in 10 C.F.R. Part 50, Appendix B, or applicable quality-assurance guidance, is incorrect.⁴⁵ The Board disagreed with Intervenors’ interpretation that Appendix B requires an applicant to have its own in-house quality assurance program in order to satisfy the requirement that an applicant “retain responsibility” over the services of a contractor for certain safety-related activities.⁴⁶ Rather, the Board found that DTE appropriately delegated to Black and Veatch the establishment and implementation of the quality assurance program for preapplication activities and maintained “direct supervision, oversight, and contractual control of [Black and Veatch] and its [quality assurance] program.”⁴⁷

The plain language of Appendix B supports the Board’s view and demonstrates that Intervenors fail to raise a substantial question with respect to the purported exemption. Criterion I of Appendix B expressly authorizes an applicant to

⁴⁰ 10 C.F.R. § 2.320.

⁴¹ In other proceedings we have imposed or upheld disciplinary measures against parties and their representatives when they failed to comply with board directives and procedural rules. *See, e.g., Indian Point*, CLI-07-28, 66 NRC at 275; *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 38-39 (2006); Order of the Secretary (Dec. 19, 2007) (unpublished) (ADAMS Accession No. ML073531806) (*Indian Point* license renewal proceeding).

⁴² Post-Hearing Board Order at 5.

⁴³ *See Pilgrim*, CLI-10-14, 71 NRC at 470-71; *see generally* Petition at 4-6. Furthermore, as a practical matter, the Board had an opportunity to consider the exhibits as part of Intervenors’ prefiled testimony, which quoted or referenced some of the excluded material. *See* Ex. INTS 068, Gundersen Testimony at 26-36.

⁴⁴ Petition at 3.

⁴⁵ Intervenors incorrectly assert that DTE was required to obtain an exemption from NEI 06-14A, which is a nonbinding guidance document. *See id.* at 25.

⁴⁶ LBP-14-7, 79 NRC at 477.

⁴⁷ *Id.* at 486.

“delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility for the . . . program.”⁴⁸ The analysis of whether an applicant has “retained responsibility” is a factual issue, and, as discussed above, Intervenor has not shown that the Board’s resolution of this issue in favor of DTE was “clearly erroneous.”⁴⁹

Moreover, the NRC provided members of the public an opportunity to request a hearing on all safety and environmental issues within the scope of DTE’s combined license application, including quality assurance. Indeed, the Board admitted this very challenge to DTE’s quality assurance program, and provided Intervenor with a full and fair opportunity to question its sufficiency.⁵⁰ We therefore reject Intervenor’s claim that the Board “deprived the public of notice and . . . opportunity to adjudicate”⁵¹ this issue.

III. CONCLUSION

Intervenor has failed to raise a substantial question warranting review of the Board’s ruling on Contention 15A/B. We therefore *deny* the petition for review. IT IS SO ORDERED.⁵²

For the Commission

ROCHELLE C. BAVOL
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of December 2014.

⁴⁸ 10 C.F.R. Part 50, App. B (I. Organization).

⁴⁹ *Id.* § 2.341(b)(4)(i); *see also supra* note 25 and accompanying text.

⁵⁰ In addition, the evidentiary hearing was open to the public. *See Tr.* at 271-712. The Board also held a limited appearance session for members of the public to comment on DTE’s combined license application. *See Tr.* at 1-79 (Oct. 29, 2013); *see generally* 10 C.F.R. § 2.315(a).

⁵¹ Petition at 3.

⁵² During the pendency of this appeal, Intervenor moved to recuse then-Commissioner William D. Magwood, IV from participating in this decision. Intervenor’s Motion for Recusal of Commissioner Magwood from Participating in Deliberations on Petition for Review of LBP-14-07 (June 25, 2014). Commissioner Magwood denied the motion on July 14, 2014. Decision on the Motion of Beyond Nuclear for Recusal from Participation in Deliberations on Petition for Review of LBP-14-07 (July 14, 2014). Commissioner Magwood has since left the agency and did not participate in this decision.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran
Stephen G. Burns

In the Matter of

Docket No. 50-389

**FLORIDA POWER & LIGHT
COMPANY
(St. Lucie Nuclear Power Plant,
Unit 2)**

December 19, 2014

HEARING RIGHTS

Agency approval is a necessary component of Commission action that affords a hearing opportunity under section 189a of the Atomic Energy Act. To determine whether an approval constitutes a *de facto* license amendment, the Commission has articulated two key factors to consider: Whether the approval (1) granted the licensee any greater operating authority or (2) otherwise altered the original terms of a license. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996).

LICENSE AMENDMENTS

NRC Staff oversight activities conducted to gather information about and evaluate plant performance do not alter the conditions of a license and, therefore, do not constitute a *de facto* license amendment.

OPPORTUNITY FOR HEARING

Members of the public may only challenge an action taken by a licensee under 10 C.F.R. § 50.59 by means of a petition for enforcement action under 10 C.F.R. § 2.206. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994).

MEMORANDUM AND ORDER

We rule today on the hearing request of the Southern Alliance for Clean Energy (SACE) on what SACE characterizes as the *de facto* amendment of the operating license held by Florida Power & Light (FPL) for St. Lucie Unit 2 concerning design changes associated with the installation of replacement steam generators.¹ This decision follows our denial of SACE's accompanying request to stay restart of St. Lucie Unit 2 from a refueling outage pending resolution of the hearing request.² We deny SACE's hearing request for the reasons discussed below but refer SACE's safety concerns to the Executive Director for Operations for disposition pursuant to 10 C.F.R. § 2.206.

I. BACKGROUND

SACE's hearing request arises from the replacement of two steam generators at St. Lucie Unit 2 in 2007. FPL replaced the steam generators in accordance with the provisions of 10 C.F.R. § 50.59, which allows licensees to (among other things) make changes to a facility without obtaining a license amendment if certain criteria are satisfied.³ FPL prepared an evaluation pursuant to 10 C.F.R. § 50.59 and concluded that the replacement could be accomplished without a

¹ Southern Alliance for Clean Energy's Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License (Mar. 10, 2014) (Hearing Request).

² *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-4, 79 NRC 249 (2014); Southern Alliance for Clean Energy's Motion to Stay Restart of St. Lucie Unit 2 Pending Conclusion of Hearing Regarding *De Facto* Amendment of Operating License and Request for Expedited Consideration (Mar. 10, 2014) (Stay Request).

³ Section 50.59 sets forth the circumstances under which a licensee may make changes to the facility as described in its Updated Final Safety Analysis Report (UFSAR), make changes in the procedures described in the UFSAR, and conduct tests or experiments not otherwise described in the UFSAR without obtaining a license amendment under 10 C.F.R. § 50.90. *See* 10 C.F.R. § 50.59(c)(1).

license amendment.⁴ The NRC Staff's subsequent review of the steam generator replacement, including FPL's section 50.59 evaluation, identified no findings of significance.⁵

In February 2011, FPL requested a license amendment to increase the licensed core power level of Unit 2 from 2700 megawatts thermal to 3020 megawatts thermal — a so-called “extended power uprate” representing a net increase in core thermal power of approximately 11.85 percent.⁶ Among other things, FPL's amendment request included an evaluation of the impact of the proposed extended power uprate on the replacement steam generators and associated supports.⁷ No hearing requests were submitted.⁸ The NRC Staff reviewed the request and prepared a safety evaluation report, and the license amendment was issued on September 24, 2012.⁹

FPL shut down Unit 2 for a scheduled refueling outage on March 3, 2014. The Unit 2 operating license requires FPL to inspect and verify steam generator

⁴ See Declaration of William A. Cross (Apr. 28, 2014) ¶¶ 4-9 (Attachment 1 to Florida Power & Light Company's Answer Opposing Southern Alliance for Clean Energy's Hearing Request Regarding *De Facto* License Amendment of St. Lucie Unit 2 Operating License (Apr. 28, 2014) (FPL Answer); Johnston, Gordon L., Site Vice President, St. Lucie Plant, Letter to NRC, L-2008-148, “Report of 10 CFR 50.59 Plant Changes” (June 26, 2008), at 8 (ADAMS Accession No. ML081840111). Section 50.59(d)(1) requires that the licensee maintain records of changes in the facility made pursuant to section 50.59(c)(1) that include “a written evaluation which provides the bases for the determination that the change . . . does not require a license amendment pursuant to” section 50.59(c)(2).

⁵ See NRC Staff's Answer to Southern Alliance for Clean Energy's Motion to Stay Restart of St. Lucie Unit 2 Pending Conclusion of Hearing Regarding *De Facto* Amendment of Operating License and Request for Expedited Consideration (Mar. 20, 2014) at 2; Affidavit of Omar R. López-Santiago Concerning SACE's Claims Regarding Staff's Steam Generator Inservice Inspection (Mar. 20, 2014) ¶¶ 7-10 (Attachment 2 to the FPL Answer); St. Lucie Nuclear Plant — NRC Integrated Inspection Report 05000335/2007005, 05000389/2007005, “Unit 2 Steam Generator Replacement Inspection (IP 50001)” (Feb. 1, 2008), § 4OA5.3, at 27-33 (ADAMS Accession No. ML080350408).

⁶ Anderson, Richard L., FPL, Letter to NRC Document Control Desk, “License Amendment Request for Extended Power Uprate” (Feb. 25, 2011), at 1 (ADAMS Accession No. ML110730116). The complete license amendment request is available in ADAMS package ML110730268. Some portions are proprietary and thus not publicly available.

⁷ Licensing Report § 2.2.2.5, “Steam Generators and Supports” (Attachment 5 to the license amendment request) (ADAMS Accession No. ML110730299) (public).

⁸ NRC Staff Answer to Southern Alliance for Clean Energy's Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License (Apr. 28, 2014) at 5 (Staff Answer). See generally Florida Power & Light Company, St. Lucie Plant, Unit 2 License Amendment Request; Opportunity to Request a Hearing and to Petition for Leave to Intervene, and Commission Order Imposing Procedures for Document Access, 76 Fed. Reg. 54,503 (Sept. 1, 2011).

⁹ Orf, Tracy, NRC Letter to Mano Nazar, FPL, “St. Lucie Plant, Unit 2 — Issuance of Amendment Regarding Extended Power Uprate” (Sept. 24, 2012), Enclosure 2, “Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 163 to Facility Operating License No. NPF-16 Florida Power and Light Company St. Lucie Plant, Unit 2 Docket No. 50-389” (ADAMS Accession No. ML12235A463).

tube integrity in accordance with its Steam Generator Program and to submit the inspection results to the NRC.¹⁰ FPL notified the Staff that steam generator inspection activities would be performed during the 2014 refueling outage.¹¹ The Staff completed an inspection that included steam generator tube examinations on March 1, 2014.¹²

SACE now seeks an adjudicatory hearing to challenge the “NRC Staff’s ongoing process for *de facto* approval of significant changes that FPL made to the safety design of the Unit 2 steam generators when it installed replacement steam generators (RSGs) in 2007.”¹³ According to SACE, the steam generator installation caused design alterations that required a license amendment. SACE further claims that the Staff, by permitting FPL to operate with those alterations, has effectively approved an amendment of FPL’s license.¹⁴

SACE claims that its hearing request is timely because it was filed within 60 days of the most recent Staff “regulatory actions” permitting operation with the replacement steam generators.¹⁵ Alternatively, SACE asks that we grant its hearing request on the ground that it has satisfied the standard for admitting untimely filings. In the event that it is not granted a hearing as of right, SACE asks that we grant a discretionary hearing to ensure the airing and resolution of the issues it raises.¹⁶ SACE claims that it has no other means of protecting its interests because a petition under 10 C.F.R. § 2.206 offers no meaningful recourse given that it is the Staff’s actions that SACE challenges.¹⁷

The NRC Staff and FPL oppose SACE’s hearing request.¹⁸ The Staff argues that there has been no actual or *de facto* license amendment proceeding to trigger the opportunity for a hearing under section 189a of the Atomic Energy Act of 1954

¹⁰Docket No. 50-389, St. Lucie Plant, Unit No. 2, Renewed Facility Operating License No. NPF-16 with Technical Specifications at 6.8.4.1.1.a (revised Feb. 7, 2014) (ADAMS Accession No. ML052800077).

¹¹*Id.* at 6-20f. FPL informed the NRC that the inspection performed during this refueling outage (RFO21) included, among other steam generator inspections, a bobbin probe examination of 100% of unplugged tubes. Katzman, E.S., FPL, Letter to NRC Document Control Desk, “SL2-20 Steam Generator Tube Inspection Report RAI Reply” (Nov. 26, 2013), Attachment at 4 (ADAMS Accession No. ML13338A582).

¹²Inspection Report 05000389/2014008 (May 2, 2014) at 509 (enclosed in López-Santiago, Omar, Letter to Mano Nazar, FPL, “St. Lucie Plant Unit 2 — NRC Inspection Report 05000389/2014008” (May 2, 2014) (ADAMS Accession No. ML14122A091)).

¹³Hearing Request at 1.

¹⁴*Id.* at 2.

¹⁵*Id.* at 21-22 (relying upon correspondence from the NRC Staff dated January 27 and February 24, 2014); *see also* Declaration of Arnold Gundersen (Mar. 9, 2014) ¶¶ 56-57 (Attachment 1 to the Hearing Request) (Gundersen Decl.).

¹⁶Hearing Request at 1.

¹⁷*Id.* at 24.

¹⁸*See* Staff Answer; FPL Answer.

(AEA) and that SACE's hearing request does not satisfy the standing, contention admissibility, or timeliness requirements.¹⁹ FPL argues that SACE's hearing request should be denied because (1) there is no proceeding in which SACE may intervene, (2) SACE has failed to demonstrate standing, (3) its hearing request is untimely, and (4) its contentions fail to meet NRC standards for admissibility.²⁰

II. DISCUSSION

To obtain a hearing, a petitioner must show that its hearing request is timely, that it has standing to obtain a hearing, and that it has proposed at least one admissible contention.²¹ For the reasons discussed below, we find SACE's hearing request untimely and deny it on that basis. Because we deny SACE's hearing request on timeliness grounds, we need not address whether SACE has established standing or the admissibility of SACE's proposed contentions.²²

¹⁹ Staff Answer at 2.

²⁰ FPL Answer at 1. The Nuclear Energy Institute (NEI) has requested leave to file a brief *amicus curiae* addressing the process established in 10 C.F.R. § 50.59 for licensee changes, the precedent for resolving challenges to changes made under that process, and whether use of that process for replacement of steam generators at St. Lucie in 2007 constitutes a *de facto* license amendment. Nuclear Energy Institute Motion for Leave to File Amicus Curiae Brief (Apr. 28, 2014), and Amicus Curiae Brief of the Nuclear Energy Institute in Response to Southern Alliance for Clean Energy Hearing Request (Apr. 28, 2014). SACE requests that we reject NEI's arguments. Southern Alliance for Clean Energy's Brief in Response to Nuclear Energy Institute Amicus Brief (May 23, 2014) (SACE Response to NEI). Our regulation in 10 C.F.R. § 2.315(d) provides for the filing of *amicus curiae* briefs when we have taken up a matter pursuant to section 2.341 or *sua sponte*, neither of which is the case here. While our rules do not provide for the filing of *amicus curiae* briefs on motions filed pursuant to 10 C.F.R. § 2.323, as a matter of discretion we have reviewed both NEI's brief and SACE's opposition. See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 556 n.17 (2013).

²¹ 10 C.F.R. § 2.309(a)-(f).

²² SACE filed two amended hearing requests in support of its proffered contentions. Southern Alliance for Clean Energy's Amended Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License (Apr. 25, 2014); Southern Alliance for Clean Energy's Motion for Leave to Amend Hearing Request with Second Supplemental Declaration of Arnold Gundersen (Nov. 6, 2014). Both FPL and the Staff oppose these requests. Florida Power & Light Company's Answer Opposing Southern Alliance for Clean Energy's Motion for Leave to Amend Hearing Request (May 20, 2014); NRC Staff Answer to Southern Alliance for Clean Energy's Motion for Leave to Amend Hearing Request Regarding *De Facto* Amendment of St. Lucie Unit 2 Operating License (May 20, 2014); Florida Power & Light Company's Answer Opposing Southern Alliance for Clean Energy's Second Motion for Leave to Amend Hearing Request (Nov. 26, 2014); NRC Staff Answer to Southern Alliance for Clean Energy's Motion for Leave to Amend Hearing Request with Second Supplemental Declaration of Arnold Gundersen (Dec. 1, 2014). SACE filed replies to FPL's and the Staff's answers. Southern Alliance for Clean Energy's Reply to Answers by Florida Power & Light Co. and NRC Staff

(Continued)

A. SACE's Hearing Request Is Untimely

The NRC standards for timeliness of hearing requests are set forth in 10 C.F.R. § 2.309(b). For proceedings for which a *Federal Register* notice of agency action is published, the hearing request must be filed not later than the time specified in the notice of proposed action.²³ For proceedings in which a *Federal Register* notice is not published, the hearing request shall be filed by the later of (i) 60 days after publication of notice on the NRC web site or (ii) 60 days after the requestor receives actual notice of a pending application, but not more than 60 days after agency action on the application.²⁴

As discussed above, FPL installed the replacement generators in 2007 after performing an evaluation under section 50.59 and determining that the replacement did not require a license amendment. Therefore, there was no associated agency action requiring notice. Nonetheless, SACE argues that its hearing request meets our timeliness standard under the theory that the Staff's approval of a *de facto* amendment has been "ongoing" since 2007, and will continue into the future, with each Staff decision that "implicitly sanctions" the use of the replacement steam generators.²⁵ SACE contends that the Staff has "implicitly sanctioned" the steam generator design changes each time it has reviewed the results of FPL's outage inspections of the steam generators and determined that the results do not warrant regulatory action.²⁶ As examples of these actions, SACE cites two letters from the Staff to FPL, dated November 30, 2010, and January 27, 2014, in which the Staff stated that it had determined, based upon reviews of FPL inspections of the steam generators, that no follow-up action was necessary.²⁷ SACE cites to a third letter

to Amended Hearing Request (May 27, 2014) (SACE Reply to Answers); Florida Power & Light Company's Answer Opposing Southern Alliance for Clean Energy's Second Motion for Leave to Amend Hearing Request (Nov. 26, 2014); NRC Staff Answer to Southern Alliance for Clean Energy's Motion for Leave to Amend Hearing Request with Second Supplemental Declaration of Arnold Gundersen (Dec. 1, 2014). Because we deny SACE's hearing request without reaching a judgment on the admissibility of SACE's proffered contentions, we need not address SACE's amended hearing requests.

²³ 10 C.F.R. § 2.309(b)(3)(i).

²⁴ *Id.* § 2.309(a)-(f).

²⁵ Hearing Request at 21.

²⁶ *Id.*; Gundersen Decl. ¶¶ 52-58. Mr. Gundersen asserts that the "alternating pattern of information-gathering and regulatory decision-making by the NRC shows not only that the NRC has informally amended FPL's operating license on multiple occasions by approving continued operation with equipment that is clearly outside the reactor's design basis; and that the approval process continues as the Staff continues to gather and assess information about the faulty [replacement steam generators]." *Id.* ¶ 58.

²⁷ Hearing Request at 21; Gundersen Decl. ¶¶ 53, 56 (citing Orf, Tracy, NRC, Letter to Mano Nazar, FPL, "St. Lucie Unit 2 — Summary of the Staff's Review of the 2009 Steam Generator Tube
(Continued)

to support its claim that the *de facto* amendment is continuing. Specifically SACE cites a February 24, 2014 letter from the Staff requesting information relating to a then-planned, steam generator tube inspection during the 2014 refueling outage and notifying FPL of a planned Staff baseline inservice inspection during the same outage.²⁸ SACE argues that its hearing request should be considered timely because the request was filed on March 10, 2014, within 60 days of the Staff's January and February 2014 correspondence.²⁹

As an initial matter, we do not accept SACE's premise that each cited Staff communication should be considered as an element of a single, overarching action that dates back to 2007. SACE argues that a *de facto* license amendment has been granted as a result of a series of Staff actions and activities relating to plant oversight dating back to 2007, including the 2012 approval of the extended power uprate amendment and continuing with subsequent routine Staff inspection and oversight activities. But SACE conflates NRC licensing and oversight activities. This distinction between licensing and oversight activities is central to our evaluation of the timeliness of SACE's hearing request because only certain activities trigger the opportunity for a hearing. Specifically, AEA § 189a requires the Commission to afford interested persons an opportunity for a hearing on "the granting, suspending, revoking or amending of any license."³⁰ A licensee cannot amend the terms of its license unilaterally.³¹ Agency approval or authorization is a necessary component of Commission action that affords a hearing opportunity under section 189a, but not all agency approvals granted to licensees constitute *de facto* license amendments.³² To determine whether an approval constitutes a *de facto* license amendment, we have articulated two key factors to consider:

Inservice Inspections (TAC No. ME2969)" (Nov. 30, 2010) (ADAMS Accession No. ML103340040) and Lingam, Siva, NRC, Letter to Mano Nazar, FPL, "St. Lucie Plant, Unit 2 — Review of the 2012 Refueling Outage Steam Generator Tube Inservice Inspection Report (TAC No. MF1786)" (Jan. 27, 2014) (ADAMS Accession No. ML14013A247) (January 2014 Letter)).

²⁸Hearing Request at 21-22. Regarding the activities scheduled for the 2014 refueling outage, SACE cites a Staff statement that FPL had committed to inspect 100% of the steam generator tubes during a February 19, 2014 meeting, a Staff request for information about the inspection, and a notice of its plan to conduct a baseline inservice inspection at Unit 2 during the outage. Gundersen Decl. ¶ 57 (citing López-Santiago, Omar, NRC, Letter to Mano Nazar, FPL, "St. Lucie Nuclear Plant, Unit 2 — Notification of Inspection and Request for Information") (Feb. 24, 2014) (ADAMS Accession No. ML14056A110) (February 2014 Letter)).

²⁹SACE concedes that its hearing request is untimely if timeliness is measured from Staff actions that predate its January and February 2014 correspondence. Hearing Request at 22.

³⁰42 U.S.C. § 2239(a)(1)(A).

³¹See 10 C.F.R. § 50.90 ("Whenever a holder of a license . . . desires to amend the license . . . [,] application for an amendment must be filed with the Commission . . .").

³²*Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996).

Whether the approval (1) granted the licensee any greater operating authority or (2) otherwise altered the original terms of a license.³³

In contrast to the issuance of a license amendment, NRC oversight of a facility does not approve or authorize changes to an NRC license. NRC oversight activities, such as inspections, performance assessments, and enforcement, are conducted to ensure that licensees comply with NRC requirements and license conditions.³⁴ But neither licensee activities nor NRC inspection of (or inquiry about) those activities provides the opportunity for a hearing under the AEA because those activities only concern compliance with the terms of an existing license.³⁵

Applying this distinction to the case at hand, we consider SACE's claim that the Staff approved FPL's installation of the replacement steam generators and, since that time, has engaged in an ongoing process of revisiting and sanctioning that approval. Specifically, SACE claims that the Staff has approved, and is continuing to approve, a *de facto* amendment each time it reviews the condition of the Unit 2 steam generators and makes a regulatory finding that allows FPL to continue operating with the replacement generators.³⁶ SACE relies on Staff correspondence dated January 27 and February 24, 2014, to support its claim that the *de facto* amendment remains ongoing, as the Staff continues to review the

³³ *Id.* We note that SACE cites the recent licensing board decision in *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-7, 77 NRC 307, *vacated as moot*, CLI-13-9, 78 NRC 551 (2013), to support its claims that the Staff's inspection and oversight of FPL's actions are part of an ongoing *de facto* license amendment. Hearing Request at 3 (observing that like the process the Board considered in *San Onofre*, "the NRC Staff's process for amending the Unit 2 operating license is also 'protracted and evolving'"). But prior *de facto* license amendment precedents have examined whether agency actions constituted *de facto* license amendments. *See, e.g., Perry*, CLI-96-13, 44 NRC at 326; *Citizens Awareness Network, Inc. v. NRC*, 59 F.2d 284, 292 (1st Cir. 1995). Thus, to the extent *San Onofre* found that unilateral licensee activities can constitute *de facto* license amendments, *San Onofre*, 77 NRC at 325-26, 338-39 (considering whether the licensee's proposed, unapproved activities constituted a *de facto* license amendment), we decline to adopt that Board's reasoning here.

³⁴ *See* NRC Enforcement Policy (Jan. 28, 2013) § 1.0, at 4 (ADAMS Accession No. ML13228A199).

³⁵ *See Kelley v. Selin*, 42 F.3d 1501, 1515 (6th Cir. 1995); *Massachusetts v. NRC*, 878 F.2d 1516, 1521-22 (1st Cir. 1989) ("Nor is this a case where the NRC has changed Edison's license in such a way that Edison is no longer required to follow NRC's regulations and rules. Rather, this is a case where the NRC has temporarily exempted the licensee, on the basis of an existing rule, from one of many rules made generally applicable by the license. This does not amount to a license amendment."). This distinction with respect to hearing rights was discussed at some length by the Appeal Board considering a challenge to low-power testing performance in *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-940, 32 NRC 225, 234-38 (1990).

³⁶ Hearing Request at 21 (referring to the Staff's review of the "deteriorating condition of the Unit 2 steam generators and issu[ance] of an affirmative finding that no regulatory action was warranted").

condition of the steam generators.³⁷ We decline to ascribe a hearing opportunity to these letters because NRC oversight activities gathering information about and evaluating plant performance, regardless of the findings it makes, do not alter the conditions of a license and, therefore, cannot form the basis for the right to request a hearing.³⁸

Underpinning SACE's argument is the assumption that each time the Staff reviewed the condition of the steam generators and did not take regulatory action, it revisited the installation of replacement steam generators and permitted plant operation despite "the gross mismatch between the requirements of Unit 2's license and technical specifications and the changed design of the [replacement steam generators]."³⁹ We disagree. SACE is not entitled to a hearing concerning a change implemented through the section 50.59 process based upon the theory that this change was somehow ratified by the Staff's January 24 or February 24, 2014, correspondence — the only Staff activities that took place in the 60-day window preceding SACE's petition. The Staff judgment documented in those letters that no regulatory action is necessary does not satisfy our test in *Perry*. Indeed, if a hearing could be invoked each time the NRC engaged in oversight over or inquiry into plant conditions, the NRC's administrative process could be brought to a virtual standstill.⁴⁰

In short, SACE's hearing request was not filed within 60 days of a licensing action that provided the opportunity for a hearing. On that basis, we find SACE's hearing request untimely. Although we base our conclusion on timeliness grounds and, therefore, need not reach the question whether SACE could have sought a hearing at the time of the steam generator replacement, we emphasize that the appropriate means of challenging licensee actions undertaken in accordance with 10 C.F.R. § 50.59 is through a petition under 10 C.F.R. § 2.206.⁴¹

B. SACE Has Not Shown Good Cause for Its Untimely Hearing Request

SACE argues that, even if its hearing request does not satisfy the 60-day timeliness standard in 10 C.F.R. § 2.309(b)(4)(ii), it has shown good cause for its untimely filing. Under our rules, we do not consider hearing requests after the

³⁷ Hearing Request at 22-23; Gundersen Decl. ¶¶ 54, 57; *see* January 2014 Letter; February 2014 Letter.

³⁸ *See Perry*, CLI-96-13, 44 NRC at 326.

³⁹ Hearing Request at 21.

⁴⁰ *See Kelley*, 42 F.3d at 1514 (citing *Bellotti v. NRC*, 725 F.2d 1380, 1382 (D.C. Cir. 1983)).

⁴¹ *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439-40 (2012); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994).

deadline in section 2.309(b) has passed absent a determination that the petitioner has demonstrated good cause by showing the following criteria have been met:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.⁴²

Fundamentally, SACE's good cause arguments are predicated on its claim that it was not provided adequate notice of the Staff's approval of the design changes associated with the 2007 installation of the replacement steam generators at Unit 2. As discussed above, we decline to find an ongoing, *de facto* license amendment proceeding that began with the steam generator replacement. For the same reason, we reject SACE's arguments to the extent they are based upon the assertion that the lack of a hearing on the steam generator replacement in 2007 *itself* constitutes good cause for SACE's untimeliness. We consider, however, SACE's claims that new information supplies justification for its untimely request.

SACE claims that it only recently was able to put together a complete picture of the design changes resulting from FPL's installation of the replacement steam generators because the underlying information was "misrepresented, scattered, or buried."⁴³ Specifically, SACE asserts that FPL provided inaccurate information concerning the scope of the design changes in its section 50.59 evaluation and that SACE did not become aware of the true magnitude of the changes until they became public during a 2013 licensing board proceeding pertaining to the replacement of the steam generators at San Onofre Nuclear Generating Station.⁴⁴ We do not consider these assertions to constitute good cause. As an initial matter, it would be incongruent to find an asserted misrepresentation made in the licensee's section 50.59 analysis — which is properly challenged through a section 2.206 petition rather than via a hearing request — to be a justification for a late hearing request.

Moreover, as noted above, the results of an NRC inspection performed after the steam generator replacement, which included review of FPL's section 50.59

⁴² 10 C.F.R. § 2.309(c)(1).

⁴³ Hearing Request at 23 (citing Gundersen Decl. ¶47 (asserting that FPL misrepresented changes made as part of the steam generator replacement)).

⁴⁴ SACE asserts that the removal of the stay cylinder (a cylindrically shaped structure that provided structural support to the tubesheet in the original steam generators) did not become public information until it was disclosed when the San Onofre steam generator design was compared to other reactors where stay cylinders had been removed. Hearing Request at 23; Gundersen Decl. ¶47; *see San Onofre*, LBP-13-7.

analysis, identified no findings of significance.⁴⁵ Finally, while SACE asserts that it only became aware of the nature of the design modifications associated with the steam generator replacement during the *San Onofre* proceeding, SACE did not file its hearing request until March 2014, more than 10 months after the Board's May 2013 merits ruling in *San Onofre*.⁴⁶ Thus, even if the delayed disclosure of the design of the new steam generators constituted good cause for an untimely filing, SACE has not provided an explanation for waiting until March 2014 to request a hearing with respect to a change implemented more than 7 years earlier.

SACE also argues that the Staff, in approving the extended power uprate amendment, approved the design changes associated with the 2007 steam generator replacement, without providing notice to the public that it did so.⁴⁷ Specifically, SACE asserts that FPL's amendment request included only limited information regarding the design of the replacement steam generators, without identifying, in a comprehensive or systematic way, the design features of the original steam generators that were removed or changed.⁴⁸

We find SACE's argument relating to the extended power uprate amendment misplaced. That amendment did not approve, and did not purport to approve, the installation of the replacement steam generators that had occurred 5 years earlier. We agree with FPL and the Staff that the extended power uprate amendment merely approved operation of St. Lucie Unit 2 at a higher power level with the already-replaced steam generators.⁴⁹

Nor do we find support for SACE's claim that the extended power uprate amendment had the additional, "secret" purpose of approving all the design changes associated with the installation of the steam generators that occurred 5 years earlier.⁵⁰ In particular, we find no merit in SACE's claim that FPL and the Staff effectively conceded as much in their filings. To the contrary, FPL stated that the purpose of the license amendment request was to permit an extended

⁴⁵ See note 5, *supra*.

⁴⁶ See *San Onofre*, LBP-13-7, 77 NRC at 307.

⁴⁷ SACE Reply to Oppositions at 1-2, 5-12; SACE Response to NEI at 1-2; SACE Reply to Answers at 2-4.

⁴⁸ SACE Reply to Oppositions at 7-9.

⁴⁹ Staff Answer at 8-9; FPL Answer at 5, 13. The NRC's safety evaluation included a review of FPL's evaluation of the effects of the proposed extended power uprate on the integrity of replacement steam generators. The Staff concluded that FPL had demonstrated that tube integrity would continue to be maintained and meet the relevant performance and regulatory criteria. "Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 163 to Facility Operating License No. NPF-16 Florida Power and Light Co St. Lucie Plan, Unit No. 2 Docket No. 50-389" (Sept. 24, 2012) at 38-39 (Attachment 2 to Orf, Tracy, NRC, Letter to Mano Nazar, FPL, "St. Lucie Plant, Unit 2 — Issuance of Amendment Regarding Extended Power Uprate (TAC No. ME5843)" (Sept. 24, 2012) (ADAMS Accession No. ML12235A463)).

⁵⁰ SACE Reply to Oppositions at 1-3; SACE Reply to Answers at 1-3.

power uprate at St. Lucie Unit 2.⁵¹ The Staff simply acknowledged that FPL's extended power uprate amendment application requested authorization to use the replacement steam generators at higher power levels.⁵² Neither FPL nor the Staff alluded to any other purpose underlying the extended power uprate amendment, and we find no ulterior motive.⁵³

SACE's assertion that FPL replaced the steam generators under section 50.59 but, 5 years later, effectively requested NRC approval for that action in a license amendment request, also lacks support. Given that FPL replaced the steam generators in 2007 and the Staff's 2008 inspection of FPL's section 50.59 analysis resulted in no findings of significance,⁵⁴ FPL would have had no reason to request retroactive approval when it sought the extended power uprate amendment. Because, as noted above, the extended power uprate amendment request did not seek approval of the installation of the replacement steam generators, there was no requirement that the notice of the proposed amendment disclose, other than as necessary to provide the requisite context for the amendment request, the design changes associated with the replacement of the steam generators.⁵⁵ As a result, we reject SACE's claim that notice of the extended power uprate license amendment was inadequate and that this inadequacy excuses its untimeliness.⁵⁶

For the above reasons, we reject SACE's hearing request on timeliness grounds. Nevertheless, SACE has another avenue for obtaining relief under 10 C.F.R. § 2.206, and we find that action under that provision is warranted below.

⁵¹ FPL Answer at 5.

⁵² Staff Answer at 8-9.

⁵³ Cf. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 29 (2003) ("We have long declined to assume that licensees will refuse to meet their obligations under their licenses or our regulations." (footnote omitted)).

⁵⁴ Staff Answer at 5; FPL Answer at 4.

⁵⁵ Had SACE timely requested a hearing on the extended power uprate amendment request, its contentions would have been limited to matters appropriately within the scope of that application (e.g., challenges to the proposed extended power uprate as they related to the replacement steam generators, which were in place at the time FPL requested the amendment). The scope of an adjudicatory hearing is limited to the notice of hearing, which in licensing matters normally extends only to the application at issue. See, e.g., *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), LBP-09-25, 70 NRC 867, 889 & n.138 (2009) ("Here, the Notice of Hearing establishes that the permissible scope of the hearing is confined solely to the application.").

⁵⁶ For these same reasons, FPL's 2006 license amendment request to amend the technical specifications related to steam generator tube integrity, in line with Revision 4 to Technical Specification Task Force Standard Technical Specification Change Traveler, TSTF-449, "Steam Generator Tube Integrity," did not constitute an approval of the replacement steam generators design and therefore was adequately noticed. Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations, 71 Fed. Reg. 40,742, 40,747-78 (July 18, 2006); see SACE Reply to Answers at 6.

C. Referral Under 10 C.F.R. § 2.206

SACE asks us to take measures necessary to address the harm it asserts has occurred by not allowing a hearing prior to installation of the replacement steam generators. SACE argues that, if the steam generator design changes had been fully vetted in a hearing, it is possible that FPL would not have been allowed to remove or replace “major safety components”⁵⁷ that have resulted, in SACE’s view, in a “high degree of damage” to the Unit 2 steam generator tubes.⁵⁸ SACE asks us to ensure that its concerns are heard and resolved in an informed way.⁵⁹

SACE’s request returns us to its argument that interested persons should have been offered the opportunity to request a hearing before FPL installed the replacement steam generators pursuant to section 50.59. But as we have explained above, hearing opportunities do not attach to licensee changes made under section 50.59 because they do not require NRC approval, and we decline to grant a discretionary hearing under these circumstances.⁶⁰ We have long held that a member of the public may challenge an action taken under section 50.59 only by means of a petition for enforcement action under 10 C.F.R. § 2.206.⁶¹ As we recently observed, this process provides stakeholders a forum to advance concerns and obtain full or partial relief, or written reasons why the requested relief is not warranted.⁶² And as we have explained, we consider a section 2.206 petition a meaningful vehicle through which the public may seek review of safety-related concerns.⁶³ Accordingly, we refer SACE’s safety concerns regarding the replacement steam generators at St. Lucie Unit 2 to the NRC Executive Director for Operations for disposition under 10 C.F.R. § 2.206.

III. CONCLUSION

For the reasons discussed above, we *deny* SACE’s hearing request as untimely and *refer* it to the Executive Director for Operations for disposition under 10 C.F.R. § 2.206.

⁵⁷ SACE states that changes to the design of the steam generators included removal of the stay cylinder, perforation of the central region of the tubesheet, the addition of 588 tubes in the central region, and the substitution of broached trefoil places for a lattice or egg crate support system. Hearing Request at 1-2; SACE Reply to Oppositions at 3-4; Gundersen Decl. ¶¶ 43-44, 59, 62.

⁵⁸ SACE Reply to Oppositions at 3-4; Gundersen Decl. ¶ 63.

⁵⁹ SACE Reply to Oppositions at 3-4.

⁶⁰ In any event, discretionary intervention is permitted under 10 C.F.R. § 2.309(e) only where at least one petitioner has established standing and at least one admissible contention has been admitted.

⁶¹ *Yankee Rowe*, CLI-94-3, 39 NRC at 101 n.7.

⁶² *San Onofre*, CLI-12-20, 76 NRC at 439-40.

⁶³ *Id.*

IT IS SO ORDERED.

For the Commission

ROCHELLE C. BAVOL
Acting Secretary of the
Commission

Dated at Rockville, Maryland,
this 19th day of December 2014

Concurring Opinion of Commissioner Baran

I concur in the majority's result and with the reasoning in this Memorandum and Order. However, I write separately to express my view that footnote 33 is unnecessary to resolve this matter. Although the licensing board decision in the *San Onofre* case was appealed, the Commission vacated the decision prior to the parties briefing the issues.¹ Further, the facts presented here do not require us to assess the merits of LBP-13-7. For these reasons, I would not include footnote 33 in this decision.

¹ *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-7, 77 NRC 307, vacated as moot, CLI-13-9, 78 NRC 551 (2013).

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

Docket No. 72-10-ISFSI-2
(ASLBP No. 12-922-01-ISFSI-MLR-BD01)

**NORTHERN STATES POWER
COMPANY
(Prairie Island Nuclear Generating
Plant Independent Spent Fuel
Storage Installation)**

December 23, 2014

**NATIONAL ENVIRONMENTAL POLICY ACT: CONTINUED
STORAGE OF SPENT FUEL**

Clearly, the Commission's Continued Storage Rule and GEIS preclude any discussion of the environmental impacts of storage of spent nuclear fuel in individual licensing proceedings: NUREG-2157 provides the determinations of the environmental impacts of continued storage to be used in site-specific environmental reviews. No additional analysis of the impacts of continued storage is required.

**NATIONAL ENVIRONMENTAL POLICY ACT: CONTINUED
STORAGE OF SPENT FUEL**

The Commission has repeatedly expressed its preference that generic issues regarding the management of high-level waste be addressed through rulemaking and not through individual adjudications. The Commission maintains that storage

and disposal of high-level waste are a national problem of essentially the same degree of complexity and uncertainty for every renewal application and it would not be useful to have a repetitive reconsideration of the matter.

NATIONAL ENVIRONMENTAL POLICY ACT: CONTINUED STORAGE OF SPENT FUEL

It is apparent that the purpose of 10 C.F.R § 51.23, as updated by 79 Fed. Reg. 56,240, is to restrict repetitive litigation at the Licensing Board level on the continued storage and disposal of spent nuclear fuel.

RULES OF PRACTICE: EXEMPTIONS/WAIVERS OF NRC RULE

Subsequent to *Seabrook*, the Commission's *Millstone* decision set forth a four-part test for granting a waiver under 10 C.F.R. § 2.335(b): "(i) the rule's strict application 'would not serve the purposes for which [it] was adopted'; (ii) the movant has alleged 'special circumstances' that were 'not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived'; (iii) those circumstances are 'unique' to the facility rather than 'common to a large class of facilities'; and (iv) a waiver of the regulation is necessary to reach a 'significant safety [or environmental] problem.'" *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005).

RULES OF PRACTICE: EXEMPTIONS/WAIVERS OF NRC RULE

Although the waiver issue in *Millstone* involved a significant safety concern, subsequent case law makes clear *Millstone* applies equally to significant environmental concerns.

RULES OF PRACTICE: EXEMPTIONS/WAIVERS OF NRC RULE

There has been some discussion as to whether the *Millstone* factors entail more than 10 C.F.R. § 2.335(b)'s sole requirement for "special circumstances." The Commission's view, however, is that all four of the *Millstone* requirements derive from the language and purpose of section 2.335(b), and that all must be met in order for a waiver to be granted.

RULES OF PRACTICE: EXEMPTIONS/WAIVERS OF NRC RULE

A petition for a waiver must be accompanied by an affidavit stating *with*

particularity the special circumstances alleged to justify the waiver or exception requested.

NATIONAL ENVIRONMENTAL POLICY ACT: TRUST RESPONSIBILITY

Apart from the Prairie Island Indian Community's (PIIC's) own communications with the NRC, the agency also considered trust responsibility comments raised by other tribes with regards to the Continued Storage Rule. In particular, a comment lodged by the Santa Ynez Band of Chumash Indians was addressed directly in the Continued Storage GEIS.

NATIONAL ENVIRONMENTAL POLICY ACT: TRUST RESPONSIBILITY

The Commission's recently issued Proposed Tribal Policy Statement, 79 Fed. Reg. 71,136, 71,140 (Dec. 1, 2014), states that it owes a trust responsibility to Indian Tribes: "As an independent agency of the Federal government, the NRC shares the unique trust relationship with, and responsibility to, Indian Tribes." In its Draft Tribal Protocol Manual, the NRC Staff also asserts that the NRC owes a trust responsibility to Indian Tribes.

NATIONAL ENVIRONMENTAL POLICY ACT: TRUST RESPONSIBILITY

While it is possible to demonstrate that a trust responsibility concern is unique to a particular facility, PIIC merely asserts that its adjacency to the Prairie Island independent spent fuel storage installation by itself presents a legitimately unique fact situation. PIIC, however, does not explain why its adjacency to the facility creates a fundamentally different situation from those facing other tribes, which were addressed by the NRC in the Continued Storage GEIS.

**ORDER
(Denying Motion to File a New Contention Concerning
the Continued Storage of Spent Nuclear Fuel)**

The Prairie Island Indian Community (PIIC) has moved to admit a new contention "based on the Nuclear Regulatory Commission's [(NRC's)] recently issued Final Rule on the Continued Storage of Spent Nuclear Fuel (Continued

Storage Rule).”¹ PIIC contends that the NRC owes a “trust responsibility” to Indian Tribes that requires the NRC to go beyond “solely complying with existing statutes and regulations,” by ensuring its actions are in the best interests of PIIC and its members.² According to PIIC, the NRC failed to meet this trust responsibility when it issued the Continued Storage Rule.³ PIIC’s contention challenges aspects of the Continued Storage Rule, and therefore PIIC asks for a waiver of the rule pursuant to 10 C.F.R. § 2.335(b) (2014).⁴

The applicant, Northern States Power Company (Northern States), and the NRC Staff each oppose the admission of PIIC’s proffered contention. Both of these parties argue that PIIC’s contention is beyond the scope of these proceedings because it challenges a Commission rule.⁵ They also argue that a waiver of the Continued Storage Rule is inappropriate in this circumstance because PIIC cannot demonstrate the presence of “special circumstances” for a waiver, which are required under 10 C.F.R. § 2.335(b).⁶ Intervenors filed their reply on November 24, 2014.⁷

In this Order, we conclude that PIIC has failed to demonstrate the special circumstances required to support a waiver of the Continued Storage Rule, and therefore we deny PIIC’s motion to admit the new contention.

I. PROCEDURAL BACKGROUND

This proceeding arises from Northern States’ application for a 40-year extension of its license to operate the Prairie Island Independent Spent Fuel Stor-

¹ Prairie Island Indian Community’s Motion for Leave to File a New Contention After Issuance of the NRC’s Continued Storage of Spent Fuel Final Rule at 1 (Oct. 20, 2014) [hereinafter Motion to Admit CSR Contention].

² *Id.* at 3-4. According to PIIC, under the federal government’s trust responsibility, “the federal government is obligated to protect Indian trust lands from alienation, confiscation, environmental degradation, or the risk of environmental degradation.” *Id.* at 3.

³ *Id.* at 4-5.

⁴ *Id.* at 13.

⁵ See Northern States Power Company’s Answer Opposing Prairie Island Indian Community’s Motion for Leave to File a New Contention After Issuance of the NRC’s Continued Storage of Spent Fuel Final Rule at 2-3 (Nov. 14, 2014) [hereinafter Northern States’ Answer]; NRC Staff’s Answer to Prairie Island Indian Community’s Motion for Leave to File a New Contention After Issuance of the NRC’s Continued Storage of Spent Nuclear Fuel Rule at 3, 7 (Nov. 14, 2014) [hereinafter NRC Staff Answer].

⁶ Northern States’ Answer at 14-15; NRC Staff Answer at 6.

⁷ See Prairie Island Indian Community’s Reply in Support of Motion for Leave to Admit New Contention After Issuance of the NRC’s Continued Storage of Spent Fuel Final Rule (Nov. 24, 2014) [hereinafter Intervenor’s Reply].

age Installation (ISFSI).⁸ On August 24, 2012, PIIC timely filed a petition to intervene challenging Northern States' license renewal application.⁹ PIIC's petition raised seven contentions, including several Waste Confidence¹⁰-based contentions, which are discussed below.¹¹ Shortly after the NRC's publication of its Draft Environmental Assessment and Draft Finding of No Significant Impact,¹² PIIC timely moved to admit three amended contentions based on the Draft Environmental Assessment,¹³ some of which also covered Waste Confidence issues.¹⁴ The Board's April 30, 2014 order reviews the early procedural history of this case,¹⁵ and so it will not be repeated here.

A. Contentions Currently Admitted

This contention is not the only matter pending before this Board. In fact, four admitted contentions are pending in this case: (1) part of amended Contention 2 (The Draft Environmental Assessment Does Not Adequately Address Cumulative Impacts on Related Projects on the PIIC, Its Members and Its Land),¹⁶ (2) part of renewed and amended Contention 3 (The Draft Environmental Assessment Fails to Satisfy the NRC's Federal Trust Responsibility to Assess and Mitigate the

⁸ See Letter from Mark A. Schimmel, Site Vice President, Prairie Island Nuclear Generating Plant, 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).

⁹ See [PIIC's] Request for Hearing and Petition to Intervene in License Renewal Proceeding for the Prairie Island [ISFSI] (Aug. 24, 2012) (ADAMS Accession No. ML12237B193) [hereinafter Petition to Intervene].

¹⁰ The term "Waste Confidence" refers generally to the NRC's rulings on the "degree of assurance" that spent nuclear fuel and related radioactive waste from nuclear power plants can be safely stored and disposed of "past the expiration of existing facility licenses." See Waste Confidence Decision Update, 75 Fed. Reg. 81,037, 81,038 (Dec. 23, 2010).

¹¹ See generally Petition to Intervene at 24-60.

¹² See 78 Fed. Reg. 69,460 (Nov. 19, 2013); Draft Environmental Assessment for the Proposed Renewal of U.S. Nuclear Regulatory Commission License No. SNM-2506 for Prairie Island [ISFSI] (Nov. 7, 2013) (ADAMS Accession No. ML13205A120) [hereinafter Draft Environmental Assessment].

¹³ See [PIIC] Motion to Admit New and Amended Contentions after Issuance of NRC's Draft Environmental Assessment (Dec. 12, 2013) (ADAMS Accession No. ML13347A274) [hereinafter Motion to Admit Amended Contentions].

¹⁴ *Id.* at 2, 4.

¹⁵ See LBP-14-6, 79 NRC 404, 407-09 (2014).

¹⁶ See *id.* at 414-27. The admissible portion of Contention 2 relates to PIIC's argument that the Draft Environmental Assessment "fails to adequately address [t]he potential impacts of the reasonably foreseeable expansion of the [Prairie Island] ISFSI on cultural and historic resources." Motion to Admit Amended Contentions at 4.

Potential Impacts on the PIIC, Its People, and Its Land),¹⁷ (3) part of Contention 4 (Northern States' Environmental Report Does Not Adequately Assess the Impacts of the [Prairie Island] ISFSI on the Adjacent Minority Population),¹⁸ and (4) all of Contention 6 (Northern States' License Renewal Application Is Deficient Because It Did Not Adequately Address the Potential Degradation of High Burnup Fuel Due to Aging During Storage, Subsequent Handling, and Transportation. Section 72.122 of 10 C.F.R. Requires Confinement Barriers and Systems to Protect Degradation of Fuel and to Not Pose Operational Safety Problems).¹⁹

B. The Continued Storage Rule and PIIC's Waste Confidence Contentions

Because PIIC's proposed contention challenges NRC rules relating to management of spent nuclear fuel, we provide below a brief historical summary of those rules. The Commission issued its first generic determination on the safety and environmental impacts of the storage and disposal of spent nuclear fuel in its August 31, 1984 Waste Confidence Decision.²⁰ At that time, the Commission expressed reasonable assurance that safe disposal of spent nuclear fuel and radioactive waste is technically feasible, and "that one or more mined geologic repositories for commercial high-level radioactive waste and spent fuel will be available by the years 2007-2009."²¹ The same day, the Commission issued a final rule, codified as 10 C.F.R. § 51.23, known as the Temporary Storage Rule.²² The Temporary Storage Rule²³ "expressed the Commission's reasonable assurance that a repository was likely to be available by 2007-2009."²⁴ As a result of this determination, the Commission's rule²⁵ instructed that "the agency did not need to assess the site-specific impacts of continuing to store the spent fuel in either

¹⁷ LBP-14-6, 79 NRC at 411, 428. The admissible portion of Contention 3 relates to PIIC's allegation that the Draft Environmental Assessment (1) inadequately analyzes the cumulative impacts of a possible expansion of the ISFSI on cultural and historic resources, and (2) wrongly concludes that such an allegedly deficient analysis can discharge the NRC's trust responsibility. *Id.* at 428.

¹⁸ The admissible portions of Contention 4 concern two alleged disparate impacts on PIIC as a minority population: (1) the disturbance of historic and archaeological resources, and (2) skyshine radiation. *See* LBP-12-24, 76 NRC 503, 520-23 (2012).

¹⁹ *See id.* at 526-28.

²⁰ *See generally* Waste Confidence Decision, 49 Fed. Reg. 34,658 (Aug. 31, 1984).

²¹ *Id.* at 34,658.

²² *See* Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238, 56,240 (Sept. 19, 2014); Requirements for Licensee Actions Regarding the Disposition of Spent Fuel upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34, 688 (Aug. 31, 1984).

²³ 10 C.F.R. § 51.23(a).

²⁴ 79 Fed. Reg. at 56,240.

²⁵ 10 C.F.R. § 51.23(b).

an onsite or offsite storage facility in new reactor licensing EISs [Environmental Impact Statements] or EAs [Environmental Assessments] beyond the expiration dates of reactor licenses.”²⁶

In 2010, the Commission updated its Waste Confidence Decision and Temporary Storage Rule,²⁷ eschewing a specific date for the development of a spent fuel repository and instead concluding that such a repository “will be available . . . when necessary.”²⁸ However, on June 8, 2012, in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), the United States Court of Appeals for the District of Columbia Circuit invalidated the NRC’s Waste Confidence Decision Update and the Temporary Storage Rule, noting that “[a]t this time, there is not even a prospective site for a repository, let alone progress toward the actual construction of one.”²⁹

New York v. NRC precipitated a series of contentions on Waste Confidence matters before Atomic Safety and Licensing Boards in multiple licensing proceedings. Likewise, PIIC, in its August 24, 2012 Petition to Intervene and December 12, 2013 Motion to Admit Amended Contentions, raised a number of contentions concerning Waste Confidence matters:³⁰ amended Contention 1 (The Draft Environmental Assessment Improperly Minimizes Waste Storage Impacts),³¹ part of amended Contention 2,³² and part of Contention 4.³³ While PIIC acknowledged that the Commission, in CLI-12-16,³⁴ had instructed Licensing Boards to hold in abeyance any contentions on Waste Confidence matters until after the Commission’s issuance of a new GEIS, PIIC nevertheless asked for

²⁶ 79 Fed. Reg. at 56,240. The Commission amended the Waste Confidence Decision and Temporary Storage Rule in 1990, extending the expected date of development of a spent fuel repository to 2025. See Waste Confidence Decision Review, 55 Fed. Reg. 38,474, 38,477 (Sept. 18, 1990).

²⁷ See Waste Confidence Decision Update, 75 Fed. Reg. 81,037; Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010).

²⁸ 75 Fed. Reg. at 81,038.

²⁹ See *New York v. NRC*, 681 F.3d at 473-74.

³⁰ See Petition to Intervene at 24-60; Motion to Admit Amended Contentions at 2, 4.

³¹ Motion to Admit Amended Contentions at 2. Amended Contention 1 alleged that the Draft Environmental Assessment must consider the impacts of long-term storage at the Prairie Island ISFSI. See LBP-14-6, 79 NRC at 411.

³² Motion to Admit Amended Contentions at 3. Amended Contention 2 alleged in part that the Draft Environmental Assessment did not adequately address cumulative impacts resulting from (1) long-term waste storage; and (2) the potential inability to transport high-burnup fuel offsite. See LBP-14-6, 79 NRC at 411-13.

³³ Petition to Intervene at 42. Contention 4 alleged in part that Northern States’ Environmental Report did not assess the disparate impact on adjacent minority populations of long-term waste storage. See LBP-12-24, 76 NRC at 520-21.

³⁴ *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 68-69 (2012).

a waiver of the Temporary Storage Rule to allow it to proceed with its contentions.³⁵ Pursuant to the Commission's order in CLI-12-16, this Board held in abeyance PIIC's contentions that implicated Waste Confidence issues³⁶ — which, of necessity, included PIIC's waiver petition.³⁷

On August 26, 2014, the Commission issued CLI-14-8,³⁸ adopting (1) a generic environmental impact statement to identify and analyze the environmental impacts of continued storage of spent nuclear fuel (the Continued Storage GEIS);³⁹ and (2) associated revisions to the Temporary Storage Rule in 10 C.F.R. § 51.23 (now referred to as the Continued Storage Rule).⁴⁰ In CLI-14-8, the Commission noted that “the impacts of continued storage will not vary significantly across sites [and] can be analyzed generically.”⁴¹ In the same order, the Commission further (i) lifted the suspension on final licensing decisions that it had imposed in CLI-12-16,⁴² (ii) declined to accept for litigation the Waste Confidence-based contentions held in abeyance, and (iii) “direct[ed] the Atomic Safety and Licensing Boards to reject the contentions pending before them.”⁴³ On October 2, 2014, consistent with the Commission's instruction in CLI-14-8, this Board dismissed all the contentions in this proceeding, or portions thereof, touching on Waste Confidence issues.⁴⁴ On October 20, 2014, a little over 2 weeks afterwards, PIIC submitted its motion to admit the instant contention concerning the newly promulgated Continued Storage Rule.

II. DESCRIPTION OF THE INSTANT CONTENTION

PIIC's contention states:

The Continued Storage Rule and GEIS Fail to Satisfy the NRC's Federal Trust

³⁵ Petition to Intervene at 56-58, 68.

³⁶ LBP-14-6, 79 NRC at 407; LBP-12-24, 76 NRC at 511, 530.

³⁷ LBP-12-24, 76 NRC at 507 n.6.

³⁸ *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71 (2014).

³⁹ See Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263 (Sept. 19, 2014). The full text of the Continued Storage GEIS is contained in NUREG-2157 (Sept. 2014) (ADAMS Accession Nos. ML14196A105, ML14196A107).

⁴⁰ See Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238.

⁴¹ *Calvert Cliffs*, CLI-14-8, 80 NRC at 78-79.

⁴² *Id.* at 74.

⁴³ *Id.* at 79.

⁴⁴ Order (Dismissing Waste Confidence-Based Contentions in Accordance with CLI-14-08) at 5 (Oct. 2, 2014).

Responsibility to Assess and Mitigate the Potential Impacts on the PIIC, Its People, and Its Land.^[45]

In support of its contention, PIIC asserts that “[t]he ‘trust responsibility’ that the federal government owes to Indian tribes imposes both substantive and procedural duties on the federal government,” such as “the duty to provide services to tribal members (e.g., health care, education), the duty to protect tribal sovereignty, and the duty to protect tribal resources,” as well as a duty to consult with Indian Tribes.⁴⁶ According to PIIC, the government’s “trust responsibility is at its apex” when it comes to managing tribal resources and preventing confiscation or environmental degradation of those resources.⁴⁷

PIIC contends that the NRC failed to give the Tribe the unique, special consideration it is due when the NRC promulgated the Continued Storage Rule and GEIS, and as a consequence, the NRC failed to meet its trust responsibility to the Tribe.⁴⁸ PIIC provides two specific instances in which the NRC failed to meet its trust responsibility. First, PIIC argues the government never evaluated “the reasonably foreseeable event” of a failure of the institutional controls at a site storing spent nuclear fuel, which in turn would threaten PIIC’s trust lands.⁴⁹ PIIC also maintains that the Continued Storage Rule and GEIS do not realistically address the costs associated with construction and replacement of ISFSI spent fuel casks.⁵⁰

Northern States responds that, under the Continued Storage Rule, “[I]censees do not need to consider these impacts in their environmental reports,” and thus, “[n]o additional analysis of the impacts of continued storage is required” beyond what is mentioned in NUREG-2157.⁵¹ The NRC Staff likewise asserts that “PIIC’s new contention is plainly a challenge to the Continued Storage Rule and supporting GEIS.”⁵² Accordingly, both the NRC Staff and Northern States maintain that PIIC’s contention challenges a Commission rule and so, under

⁴⁵ The Board notes that the instant contention is similar to PIIC’s amended Contention 3, which the Board admitted in part. See LBP-14-6, 79 NRC at 411, 428. Contention 3 states:

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.

Although both the instant contention and Contention 3 raise trust responsibility claims, Contention 3 challenges the site-specific Draft Environmental Assessment, while the instant contention challenges the NRC’s Continued Storage Rule and GEIS.

⁴⁶ Motion to Admit CSR Contention at 2-3.

⁴⁷ *Id.* (citing *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)).

⁴⁸ *See id.*

⁴⁹ *See id.* at 5-6.

⁵⁰ *See id.* at 6-7.

⁵¹ Northern States’ Answer at 2-3 (quoting 79 Fed. Reg. at 56,243).

⁵² NRC Staff Answer at 4.

10 C.F.R. § 2.309(f)(1)(iii) (2014), PIIC's contention is beyond the scope of the instant proceeding.⁵³ Northern States and the NRC Staff also reject PIIC's interpretation of the trust responsibility.⁵⁴

III. RULING ON THE INSTANT CONTENTION

A. PIIC's Contention Is a Collateral Attack on the Continued Storage Rule

The primary question before this Board is whether the instant contention is beyond the permissible scope of the current proceeding because it challenges a Commission rule, and thus we need not reach the merits' trust responsibility arguments. The Continued Storage Rule states: "The Commission has generically determined that the environmental impacts of continued storage of spent nuclear fuel beyond the licensed life for operation of a reactor are those impacts identified in NUREG-2157 [the Continued Storage GEIS]."⁵⁵ According to the Commission, the Continued Storage GEIS "satisfies the NRC's [National Environmental Policy Act (NEPA)] obligations with respect to continued storage" of spent nuclear fuel in licensing decisions.⁵⁶

Clearly, the Commission's Continued Storage Rule and GEIS preclude any discussion of the environmental impacts of storage of spent nuclear fuel in individual licensing proceedings: "NUREG-2157 provides the determinations of the environmental impacts of continued storage to be used in site-specific environmental reviews. No additional analysis of the impacts of continued storage is required."⁵⁷ Therefore, in alleging that the Continued Storage Rule and GEIS fail to address the trust responsibility the NRC owes PIIC, the instant

⁵³ Northern States' Answer at 3; NRC Staff Answer at 7.

⁵⁴ Northern States' Answer at 5; NRC Staff Answer at 3. Northern States and the NRC Staff also contend that the instant contention fails to raise a genuine dispute with the application, because PIIC's alleged concerns with the Continued Storage GEIS were either addressed within the document itself, or were separately addressed by the Commission. *See* Northern States' Answer at 7-11; NRC Staff Answer at 8-10. As the Board denies PIIC's motion on other grounds, we need not reach this argument.

⁵⁵ 79 Fed. Reg. at 56,260.

⁵⁶ *Id.* at 46,243; *see also* NUREG-2157 § ES.4.

⁵⁷ *See* 79 Fed. Reg. at 56,243; *see also id.* at 56,260 (Pursuant to the updated 10 C.F.R. § 51.23(b), license applicants "are not required to discuss the environmental impacts of spent nuclear fuel storage in a reactor facility storage pool or an ISFSI for the period following the term of the reactor operating license, reactor combined license, or ISFSI license.").

contention represents a collateral attack on the Continued Storage Rule and GEIS. Indeed, PIIC concedes that it “challenges 10 C.F.R. § 51.23(b).”⁵⁸

B. Requirements for Contentions Challenging an NRC Rule

Federal law allows administrative agencies to address “issues of general applicability” through rulemaking instead of individual adjudications, and ““the choice made between proceeding by general rule or by individual, ad hoc, litigation is one that lies primarily within the informed discretion of the administrative agency.””⁵⁹ In this vein, when the Commission has opted to address an issue through regulation, it has uniformly prohibited litigation of that same issue in a site-specific adjudicatory proceeding: “Contentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings.”⁶⁰ According to 10 C.F.R. § 2.335(a), “no rule or regulation of the Commission, or any provision thereof . . . is subject to attack” in an adjudicatory proceeding unless a waiver is granted by the Commission.⁶¹

A party can petition for a waiver of a specific NRC regulation.⁶² Waiver requests are handled in a two-step process. A Licensing Board initially determines, based on the record, whether a “*prima facie* showing” has been made by the petitioner, at which point the Licensing Board “shall . . . certify the matter directly to the Commission” for a final determination.⁶³ A *prima facie* showing is not a final determination on the merits, and instead “merely requires the presentation of enough information to allow the Board to infer (absent disproof) that special

⁵⁸ Motion to Admit CSR Contention at 13.

⁵⁹ *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 84 (1974) (quoting *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (quoting *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947))).

⁶⁰ *Calvert Cliffs*, CLI-14-8, 80 NRC at 79 n.27 (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999) (citing in turn *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985); *Douglas Point*, ALAB-218, 8 AEC at 85; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998))).

⁶¹ 10 C.F.R. § 2.335(a).

⁶² *Id.* § 2.335(b).

⁶³ *Id.* § 2.335(d).

circumstances exist.”⁶⁴ The Commission then makes the final decision whether or not to grant the waiver request.⁶⁵

Under 10 C.F.R. § 2.335(b), “[t]he sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.”⁶⁶ In *Seabrook*, the Commission clarified that “[s]pecial circumstances are present only if the petition properly pleads one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived.”⁶⁷ The Commission also stated in *Seabrook* that a waiver should not be granted unless the petition relates to a significant safety problem: “It would not be consistent with the Commission’s statutorily mandated responsibilities to spend time and resources on matters that are of no substantive regulatory significance.”⁶⁸

Subsequent to *Seabrook*, the Commission’s *Millstone*⁶⁹ decision set forth a four-part test for granting a waiver under 10 C.F.R. § 2.335(b):

- (i) the rule’s strict application “would not serve the purposes for which [it] was adopted”;
- (ii) the movant has alleged “special circumstances” that were “not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived”;
- (iii) those circumstances are “unique” to the facility rather than “common to a large class of facilities”; and
- (iv) a waiver

⁶⁴ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257, 279 (2010) (citing *Black’s Law Dictionary* 1310 (9th ed. 2009)), *aff’d in part and rev’d in part*, CLI-11-11, 74 NRC 427 (2011); *see also Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), LBP-10-12, 71 NRC 656, 662 n.9 (2010) (“Although the term *prima facie* is not defined in the Commission’s regulations, we interpret it to mean a substantial showing. That is, the affidavits supporting the petition must present each element of the case for waiver in a persuasive manner with adequate supporting facts.”); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 22 (1988) (“We have found that a *prima facie* showing within the meaning of 10 C.F.R. § 2.758(d) is one that is ‘legally sufficient to establish a fact or case unless disproved.’” (quoting *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981) (“Prima facie evidence must be legally sufficient to establish a fact or case unless disproved.”))).

⁶⁵ 10 C.F.R. § 2.335(d); *Diablo Canyon*, LBP-10-15, 72 NRC at 279.

⁶⁶ 10 C.F.R. § 2.335(b).

⁶⁷ *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988), *reconsideration denied*, CLI-89-3, 29 NRC 234, CLI-89-7, 29 NRC 395 (1989).

⁶⁸ *Id.*

⁶⁹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551 (2005).

of the regulation is necessary to reach a “significant safety [or environmental]⁷⁰ problem.”⁷¹

“For a waiver request to be granted, *all four* factors must be met.”⁷²

C. PIIC’s Waiver Request

PIIC requests a waiver of the Continued Storage Rule, specifically, of 10 C.F.R. § 51.23(b), as updated by 79 Fed. Reg. 56,260.⁷³ PIIC contends that a waiver is warranted in order for this Board to “address an issue of great significan[ce] — the NRC’s fulfillment of its trust responsibilities to the PIIC.”⁷⁴ PIIC argues that it “is merely requesting waiver of a PROCEDURAL rule in order for the NRC to fulfill its trust responsibilities to the PIIC.”⁷⁵ PIIC also emphasizes that its unique location near to the ISFSI is relevant for the waiver: “This presents a legitimately unique fact situation. The PIIC’s immediate proximity to the [Prairie Island] ISFSI warrants a harder NEPA review tha[n] the Continued Storage Rule and GEIS would allow.”⁷⁶

⁷⁰ Although the waiver issue in *Millstone* involved a significant safety concern, subsequent case law makes clear *Millstone* applies equally to significant environmental concerns (which is what PIIC seeks here with its waiver request). See *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 209 (2013) (“We clarify now that the fourth *Millstone* factor also may apply to a significant environmental issue.”), *petition for review docketed*, No. 14-1225 (D.C. Cir. filed Nov. 4, 2014); *Diablo Canyon*, LBP-10-15, 72 NRC at 305 n.56 (“Because the rules in question, as well as the contention itself, address compliance with NEPA and not safety issues under the [Atomic Energy Act] . . . the waiver is needed to address a significant *environmental* issue instead of a significant *safety* issue.”).

⁷¹ *Millstone*, CLI-05-24, 62 NRC at 559-60 (footnotes omitted) (quoting *Seabrook*, CLI-88-10, 28 NRC at 597); see also *Limerick*, CLI-13-7, 78 NRC at 205 (“In interpreting section 2.335, we identified four factors — often referred to as the ‘*Millstone* factors’ — that waiver petitioners must satisfy.”).

⁷² *Millstone*, CLI-05-24, 62 NRC at 560. There has been some discussion as to whether the *Millstone* factors entail more than 10 C.F.R. § 2.335(b)’s sole requirement for “special circumstances.” See, e.g., *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), LBP-13-1, 77 NRC 57, 64 (2013) (“It is clear to us that the *Millstone* test establishes an appreciably higher burden for would-be waiver seekers than does 10 C.F.R. § 2.335(b).”), *aff’d on other grounds*, CLI-13-7, 78 NRC 199; *Diablo Canyon*, LBP-10-15, 72 NRC at 279 (noting the difference between the tests established in the regulation versus the case law). The Commission’s view, however, is that “[a]ll four of the *Millstone* requirements derive from the language and purpose of section 2.335(b),” and that all must be met in order for a waiver to be granted. *Limerick*, CLI-13-7, 78 NRC at 205 n.19.

⁷³ Motion to Admit CSR Contention at 14.

⁷⁴ *Id.* at 13.

⁷⁵ *Id.* at 14 (capitalization in original).

⁷⁶ *Id.*

The accompanying declaration by PIIC's counsel, Philip R. Mahowald, however, presents a different argument. In his declaration, Mr. Mahowald states that PIIC is "petitioning for a waiver of 10 CFR Section 51.23(a)," instead of section 51.23(b), "based on the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York v. NRC*."⁷⁷ Relying on *New York v. NRC*, Mr. Mahowald argues that "the necessary safety and environmental review for an ISFSI license renewal would be artificially truncated by application of the Continued Storage Rule and its Generic Environmental Impact Statement."⁷⁸ Mr. Mahowald claims that "there is no hope on the horizon for the siting, licensing, construction, and operation of either an interim centralized storage facility for spent fuel or a repository to dispose of the fuel," much less any plan to move the fuel to a repository once selected.⁷⁹

Both Northern States and the NRC Staff oppose PIIC's waiver request. Northern States asserts that PIIC does not meet the first *Millstone* waiver requirement because "the Government fulfills its trust duties by executing federal law, not by waiving federal law."⁸⁰ Regarding the second *Millstone* factor, Northern States argues that PIIC's concerns were considered and rejected by the Commission as a whole, and that "PIIC's proximity to the [Prairie Island] ISFSI is explicitly recognized in the GEIS."⁸¹ Northern States also takes issue with PIIC's claim that it is in a unique position in accordance with the third *Millstone* factor: "Even 'proximity to a nuclear power facility' or ISFSI is 'hardly unique.'"⁸² Regarding the fourth *Millstone* factor, Northern States claims PIIC's concerns regarding the

⁷⁷ Declaration of Philip R. Mahowald ¶ 4 (Oct. 20, 2014).

⁷⁸ *Id.* ¶ 5.

⁷⁹ *Id.* A petition for a waiver must be accompanied by an affidavit stating "with particularity the special circumstances alleged to justify the waiver or exception requested." 10 C.F.R. § 2.335(b) (emphasis added). Mr. Mahowald's declaration, however, does not appear to meet this requirement. First, although PIIC in its motion petitions for a waiver of 10 C.F.R. § 51.23(b), the declaration accompanying the motion states that "PIIC is petitioning for a waiver of 10 CFR Section 51.23(a)." Compare Motion to Admit CSR Contention at 13 with Declaration of Philip R. Mahowald ¶ 4 (Oct. 20, 2014). Furthermore, the disparate arguments in support of the waiver request made in Mr. Mahowald's declaration, centering on the District of Columbia Circuit's decision in *New York v. NRC*, are unrelated to the trust responsibility arguments made by PIIC in its motion and reply. Notably, Mr. Mahowald's October 20, 2014 declaration appears identical in many respects to his prior, August 24, 2012 declaration supporting PIIC's attempt to seek a waiver of 10 C.F.R. § 51.23(a). Compare Declaration of Philip R. Mahowald ¶¶ 6-7 (Aug. 24, 2012) with Declaration of Philip R. Mahowald ¶¶ 4-6 (Oct. 20, 2014) and Petition to Intervene at 58-60 (all using similar language).

⁸⁰ Northern States' Answer at 14 (citing *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324-25 (2011)).

⁸¹ *Id.* at 14-15.

⁸² *Id.* at 15 (quoting *Millstone*, CLI-05-24, 62 NRC at 562).

loss of institutional controls and radiation barriers have been addressed in the GEIS, and thus “there is no significant safety issue to be addressed.”⁸³

The NRC Staff responds more generally that “PIIC’s request does not explain why the effects of the Continued Storage Rule are unique to the Prairie Island ISFSI as opposed to other ISFSI sites, nor does it discuss whether the NRC’s licensing action in this case would implicate a significant safety problem.”⁸⁴ The NRC Staff also insists it is improper for PIIC to rely solely on the trust responsibility and adjacency to the site in support of its waiver argument: “These points do not amount to a sufficient justification to litigate the Continued Storage Rule and GEIS in this individual licensing proceeding.”⁸⁵

In its reply, PIIC reemphasizes that the risks to the Tribe from the Prairie Island ISFSI are significant: “There is something extraordinary involved in this license renewal application: the immediate adjacency of a dry cask storage facility that could pose a long-term threat to the interests and viability of a federally-recognized Indian Tribe and its reservation homeland.”⁸⁶ PIIC urges that “the significant issues raised in PIIC’s contention warrant a ‘custom tailored approach,’ i.e., the grant of a waiver from a generic finding.”⁸⁷

D. PIIC Fails to Plead the Requisite Special Circumstances for a Waiver of the Continued Storage Rule

The Commission has repeatedly expressed its preference that generic issues regarding the management of high-level waste be addressed through rulemaking and not through individual adjudications.⁸⁸ The Commission maintains that storage and disposal of high-level waste “is a national problem of essentially the same degree of complexity and uncertainty for every renewal application and it would not be useful to have a repetitive reconsideration of the matter.”⁸⁹ In a recent decision, the Commission noted that “the court of appeals endorsed a generic approach.”⁹⁰ As a result, the Commission’s approval of the Continued

⁸³ *Id.*

⁸⁴ NRC Staff Answer at 6.

⁸⁵ *Id.*

⁸⁶ Intervenor’s Reply at 3.

⁸⁷ *Id.* at 4 (citation omitted).

⁸⁸ See *Oconee*, CLI-99-11, 49 NRC at 345 (“The Commission sensibly has chosen to address high-level waste disposal generically rather than unnecessarily to revisit the same waste disposal questions, license-by-license, when reviewing individual applications.”).

⁸⁹ *Id.* (quoting 61 Fed. Reg. 66,537, 66,538 (Dec. 11, 1996)).

⁹⁰ *Calvert Cliffs*, CLI-14-8, 80 NRC at 78-79 n.25 (citing *New York v. NRC*, 681 F.3d at 480 (“[W]e see no reason that a comprehensive general analysis would be insufficient to examine on-site risks that are essentially common to all plants.”)).

Storage Rule and GEIS mandates that contentions discussing the long-term storage of spent nuclear fuel are not to be heard by individual Licensing Boards.⁹¹ As expected, when a series of new challenges to the Continued Storage Rule were lodged in several different license proceedings, the Commission again quickly acted to exercise its “inherent supervisory authority over agency adjudications to review the petition and motions ourselves” in a joint proceeding.⁹²

To whatever extent it might be permissible for PIIC to bring a contention concerning continued storage of high-level waste before this Board, PIIC has not pled the requisite special circumstances under *Millstone* to allow this Board to certify a waiver of the Continued Storage Rule to the Commission.

Looking to the first *Millstone* factor, it is apparent that the purpose of 10 C.F.R. § 51.23, as updated by 79 Fed. Reg. 56,240, is to restrict repetitive litigation at the Licensing Board level on the continued storage and disposal of spent nuclear fuel. As Northern States notes,⁹³ the first line of the Continued Storage Rulemaking *Federal Register* notice states:

The *purpose* of this final rule (rule) is to *preserve the efficiency* of the NRC’s licensing process by adopting into the NRC’s regulations the Commission’s generic determinations of the environmental impacts of the continued storage of spent nuclear fuel (spent fuel) beyond the licensed life for operations of a reactor (continued storage).^[94]

The rule explains that “repetitive site-specific licensing proceedings” on waste storage issues add unnecessary cost to the licensing process.⁹⁵

Turning to the second *Millstone* factor, PIIC has not demonstrated that its “trust responsibility” concern was neglected by the NRC when writing the Continued Storage Rule and GEIS. During the rulemaking process, the NRC “held a government-to-government meeting with the Prairie Island Indian Community in June 2013,” affording PIIC an opportunity to express its concerns.⁹⁶ In addition, PIIC provided “both oral and written comments” during the Continued Storage Rulemaking.⁹⁷ In at least one of those written comments, PIIC discussed in detail its views about the NRC’s trust responsibility with respect to the Prairie Island

⁹¹ *Id.* at 79, 81 (“Because these generic impact determinations have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings.”).

⁹² See *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-9, 80 NRC 147 (2014).

⁹³ Northern States’ Answer at 14.

⁹⁴ 79 Fed. Reg. at 56,239 (emphasis added).

⁹⁵ *Id.* at 56,259.

⁹⁶ NUREG-2157 § ES.9; see also *id.*, App. C.1 (discussing communications with Indian Tribes).

⁹⁷ *Id.*, App. C.1.

ISFSI.⁹⁸ This indicates that the NRC “by necessary implication” considered PIIC’s trust responsibility concerns during its rulemaking.⁹⁹

Apart from PIIC’s own communications with the NRC, the agency also considered trust responsibility comments raised by other tribes with regards to the Continued Storage Rule. In particular, a comment lodged by the Santa Ynez Band of Chumash Indians was addressed directly in the Continued Storage GEIS:

D.2.29.9 — COMMENT: A commenter provided historical background information for the Santa Ynez Band of the Chumash Indians, located 120 km (75 mi) south of the Diablo Canyon Power Plant in Avila, California. The commenter also referenced the NHPA [National Historic Preservation Act], EOs [Executive Orders] 13007 (61 FR 26771) and 13175 (65 FR 67249), the Federal government’s *Tribal Trust Responsibility*, United Nations Declaration on the Rights of Indigenous Peoples, and the Advisory Council on Historic Preservation regulations at 36 CFR Part 800, which require consultation with Tribes prior to proceeding with Federal undertakings.

RESPONSE: The NRC appreciates the comments provided by the Santa Ynez Band of Chumash Indians describing the Federal requirements for government-to-government consultation. *The NRC recognizes that the Federal government owes a general trust responsibility to Federally recognized Indian Tribes.* The NRC also recognizes that there are specific government-to-government consultation responsibilities regarding interactions with Federally recognized Tribal governments due to their status as dependent sovereign nations. As such, the NRC offered Federally recognized Tribes the opportunity for government-to-government consultation consistent with the principles in Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” issued November 9, 2000 (65 FR 67249) during the scoping and draft [Continued Storage] GEIS comment periods.

As discussed in the GEIS, the rulemaking does not authorize the initial or continued operation of any nuclear power plant, nor does it authorize storage of spent fuel. Because the rulemaking does not identify specific sites for NRC licensing actions, this proceeding cannot facilitate an NHPA Section 106 or Executive Order 13007 (61 FR 26771) review. The NRC will comply with NHPA Section 106 requirements and other appropriate laws and orders when an applicant submits a request for a site-specific license (e.g., new reactor licensing, reactor license renewal, away-from-reactor ISFSIs, specifically licensed at-reactor ISFSIs, and DTSs [dry transfer

⁹⁸ See Comments Submitted by the Attorneys General of the States of New York, Vermont, Connecticut, and the Commonwealth of Massachusetts, the Vermont Department of Public Service, and the Prairie Island Indian Community on the Nuclear Regulatory Commission’s Draft Waste Confidence Generic Environmental Impact Statement and Proposed Rule at 4-5, 117-20 (Dec. 20, 2013) (ADAMS Accession No. ML13365A345) (commenting that “[t]he federal government’s role as trustee imposes” a “higher responsibility” on the NRC when considering the storage of spent nuclear fuel near tribal lands and resources).

⁹⁹ *Millstone*, CLI-05-24, 62 NRC at 560 (quotation omitted).

system]). No revisions were made to the GEIS or [Continued Storage] Rule as a result of these comments.^[100]

The text of the Continued Storage GEIS belies PIIC's claim that the NRC failed "either explicitly or by necessary implication" to consider the trust responsibility it owes to Indian Tribes when it issued the Continued Storage Rule.¹⁰¹

Separate and apart from the Continued Storage GEIS, it appears that the Commission has grappled for some time with the trust responsibility it owes Indian Tribes — and to PIIC in particular. In fact, the Commission's recently issued Proposed Tribal Policy Statement states that it owes a trust responsibility to Indian Tribes: "As an independent agency of the Federal government, the NRC shares the unique trust relationship with, and responsibility to, Indian Tribes."¹⁰² In its Draft Tribal Protocol Manual, the NRC Staff also asserts that the NRC owes a trust responsibility to Indian Tribes, and discusses specifically how that responsibility has impacted its relationship with PIIC during the Prairie Island ISFSI license renewal.¹⁰³ While we make no ruling at this time as to the substance of the NRC's trust responsibility due Indian Tribes or PIIC,¹⁰⁴ the record shows

¹⁰⁰ NUREG-2157, App. D.2.29.9 (emphasis added).

¹⁰¹ *Millstone*, CLI-05-24, 62 NRC at 560 (quotation omitted).

¹⁰² NRC Proposed Tribal Policy Statement, 79 Fed. Reg. 71,136, 71,140 (Dec. 1, 2014); *see also* Policy Issue Notation Vote, Tribal Consultation Policy Statement and Protocol, SECY-14-0006, at 5-6, Enclosure 1 at 17 (Jan. 10, 2014), *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2014/2014-0006scy.pdf> (The NRC Staff discusses the development of the Proposed Tribal Policy Statement, and recommends to the Commission that it adopt the following policy statement: "The NRC recognizes the Federal trust relationship and will seek to uphold its trust relationship with Indian Tribes."). The Commission has stated that it intends to fulfill its trust responsibility on a case-by-case basis. 79 Fed. Reg. at 71,137.

¹⁰³ *See* Draft Tribal Protocol Manual, Revision 1, NUREG-2173, § 1.D (Dec. 2014) (ADAMS Accession No. ML14274A014) [hereinafter Draft Manual] According to the Draft Manual, on October 3, 2012, as part of its case-by-case approach to working with Indian Tribes, the NRC signed a memorandum of understanding with PIIC "establishing a cooperating agency relationship between the NRC and the PIIC in preparing an Environmental Assessment for the license renewal of [the Prairie Island ISFSI]." *Id.* § 1.F.

¹⁰⁴ The Commission states in its Proposed Tribal Policy Statement that it "implements its responsibilities through assuring that Tribal members receive the same protections under regulations that are available to other persons." 79 Fed. Reg. at 71,137. The Draft Manual similarly states that "the NRC exercises its fiduciary duty in the context of its authorizing statutes, including the Atomic Energy Act (AEA), and implements any fiduciary responsibility by ensuring that Tribal members receive the same protections under implementing regulations that are available to other persons." Draft Manual § 1.D (citing a decision of the United States Court of Appeals for the Ninth Circuit in *Skokomish v. Federal Energy Regulatory Commission*, 121 F.3d 1303 (9th Cir. 1997)). However, these documents do not represent the final view of the Commission. Moreover, the Proposed Tribal Policy Statement "is intended only to improve the internal management of the Commission, and is not intended to, and

(Continued)

that the Commission considered its trust responsibility owed Indian Tribes when promulgating the Continued Storage Rule and GEIS.

Regarding the third *Millstone* factor, PIIC has not explained sufficiently how its trust responsibility concern is unique to the Prairie Island ISFSI. While it is possible to demonstrate that a trust responsibility concern is unique to a particular facility, PIIC merely asserts that its adjacency to the Prairie Island ISFSI by itself “presents a legitimately unique fact situation.”¹⁰⁵ PIIC, however, does not explain why its adjacency to the facility creates a fundamentally different situation from those facing other tribes, which were addressed by the NRC in the Continued Storage GEIS.¹⁰⁶ For example, the Continued Storage GEIS explains that the NRC in the past examined the environmental consequences of a private fuel storage facility slated to be located on or near the Skull Valley Band of Goshute Indians in Utah.¹⁰⁷ In the GEIS, the Commission also concluded that Native Americans “as a group, experience common conditions with regard to environmental exposure or environmental effects” from storage of spent nuclear fuel.¹⁰⁸ And lastly, PIIC has made no showing that the effects of storing spent fuel at the Prairie Island ISFSI presents impacts unique from those already considered in the GEIS with respect to storing spent fuel at any ISFSI.¹⁰⁹ While the issue PIIC presents is a significant environmental matter (and hence meets that *Millstone* factor), PIIC has otherwise failed to make a *prima facie* showing on the first three *Millstone* factors, and so this Board cannot certify PIIC’s waiver request to the Commission.

We note that PIIC has raised a few other arguments, none of which sway the Board. First, although PIIC claims that it is requesting a waiver of a “PROCEDURAL rule” only,¹¹⁰ we view the Continued Storage Rule to be much more than simply a procedural rule. Second, Mr. Mahowald’s references to *New York v. NRC*, and his claim that the establishment of a future repository is remote and speculative,¹¹¹ are addressed directly by the Continued Storage Rule and GEIS.

does not, grant, expand, create, or diminish any rights, benefits, or trust responsibilities, substantive or procedural, enforceable at law or in equity in any cause of action by any party against the United States, the Commission, or any person.” 79 Fed. Reg. at 71,140 n.2. Similarly, the Draft Manual is “a reference tool” designed to help the NRC Staff “develop and maintain government-to-government relationships with Tribal governments.” Draft Manual at 1.

¹⁰⁵ Motion to Admit CSR Contention at 14.

¹⁰⁶ See also *Millstone*, CLI-05-24, 62 NRC at 562 (noting that proximity to a nuclear power station does not by itself create a “unique” situation warranting a waiver of the Commission’s rules).

¹⁰⁷ NUREG-2157 §§ ES.16.2, 2.1.3. The facility, however, was never constructed. *Id.* § 2.1.3.

¹⁰⁸ *Id.* § 3.3.

¹⁰⁹ The Board does not mean to suggest in any way that it would be impossible for a trust responsibility argument to be “unique,” but only that PIIC has failed to demonstrate that this situation is unique.

¹¹⁰ Motion to Admit CSR Contention at 13-14 (capitalization in original); Intervenor’s Reply at 3.

¹¹¹ Declaration of Philip R. Mahowald ¶¶ 4, 5 (Oct. 20, 2014).

Indeed, the Continued Storage Rule and GEIS were issued in response to *New York v. NRC*.¹¹² The Continued Storage GEIS analyzes in detail both short-term and long-term environmental impacts of spent fuel storage, even were a repository to be delayed indefinitely.¹¹³ Finally, insofar as PIIC argues that the NRC failed to meet its general statutory obligations under NEPA when it promulgated the Continued Storage Rule and GEIS,¹¹⁴ such arguments are similarly rejected as a collateral attack on the Commission's regulations, unsupported by any showing of "special circumstances" warranting a waiver under *Millstone*.¹¹⁵

The Board understands that PIIC views the potential indefinite storage of spent nuclear fuel adjacent to its lands to be a significant concern for the Tribe.¹¹⁶ However, as noted above, the significance of an issue does not by itself support a waiver of the NRC's rules under *Millstone*. All four *Millstone* factors must be met — and PIIC has not done so. PIIC is certainly free to bring a trust responsibility claim before this Board with respect to site-specific issues, such as to challenge portions of an Environmental Assessment.

IV. CONCLUSION

For the reasons stated above, we deny PIIC's motion for leave to file a new contention regarding the Continued Storage Rule and GEIS. A petition for interlocutory review of this Order may be filed within twenty-five (25) days of service of this Order in accordance with 10 C.F.R. § 2.341(f)(2) (2014). Any party supporting or opposing the petition may file an answer pursuant to 10 C.F.R. § 2.341(b)(3).

¹¹² 79 Fed. Reg. at 56,242.

¹¹³ See NUREG-2157 § 4. In addition, as noted by Northern States, the Continued Storage GEIS did address the alleged deficiencies Intervenor raised in its motion. Northern States' Answer at 5-7. The GEIS addressed what would happen if there were a permanent loss of institutional controls and the spent fuel casks ruptured, and determined that there would likely be "catastrophic consequences." NUREG-2157, App. B.3.4. Nonetheless, the Commission determined that the maintenance of institutional controls is a "reasonable" assumption. *Id.* The GEIS also discusses the cost for construction and replacement of ISFSIs. See *id.* §§ 2.1.2.2, 2.1.3, 2.2.1.

¹¹⁴ See, e.g., Motion to Admit CSR Contention at 5 (PIIC claims that "the failure to undertake a complete analysis of a reasonably foreseeable event is inconsistent with the hard look required by NEPA.").

¹¹⁵ See 10 C.F.R. § 2.335(a), (b); *Oconee*, CLI-99-11, 49 NRC at 345.

¹¹⁶ See Motion to Admit CSR Contention at 14; Intervenor's Reply at 4.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 23, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

William M. Dean, Director

In the Matter of

Docket Nos. STN 50-456
STN 50-457
STN 50-454
STN 50-455
(License Nos. NPF-72,
NPF-77,
NPF-37,
NPF-66)

EXELON GENERATION
COMPANY, LLC
(Braidwood Nuclear Power Station,
Units 1 and 2; Byron Nuclear
Power Station, Units 1 and 2)

December 22, 2014

By e-mail to Mr. R. W. Borchardt, dated April 20, 2012 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML-12130A318), Mr. Barry Quigley (the Petitioner) filed a petition under Title 10, "Energy," of the *Code of Federal Regulations* (10 C.F.R.) § 2.206, "Requests for Action Under This Subpart." The Petitioner requested that the U.S. Nuclear Regulatory Commission (NRC or the Commission) immediately shut down Braidwood Station, Units 1 and 2, and Byron Station, Units 1 and 2, until all turbine building (TB) high-energy line break (HELB) concerns were identified and those important to safety were corrected. The Petitioner raised several concerns related to potential consequences of TB HELBs to support his request for immediate shutdown of the Braidwood and Byron plants.

In this Director's Decision, the Director of the Office of Nuclear Reactor Regulation (the Director) denied the Petitioner's request to immediately shut down the Braidwood and Byron Station units. The Director partially granted the

petition in that the Petitioner's concern related to the licensing basis requirements for HELB was addressed during the review of the license amendment request for the Braidwood and Byron Stations' measurement uncertainty recapture (MUR) uprate. The results of that review are documented in the safety evaluation that was issued with the MUR uprate amendment on February 7, 2014 (ADAMS Accession No. ML13281A000).

With regard to the three other concerns raised in the petition, the NRC Staff concluded that there were reasonable expectations of equipment operability for emergency diesel generator operability, high temperature in the engineered safety feature switchgear rooms, and structural limits on the block wall between the engineered safety feature switchgear rooms.

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

I. INTRODUCTION

By e-mail to Mr. R. W. Borchardt dated April 20, 2012 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML-12130A318), Mr. Barry Quigley (the Petitioner) filed a petition under Title 10, "Energy," of the *Code of Federal Regulations* (10 C.F.R.) § 2.206, "Requests for Action Under This Subpart." The Petitioner requested that the U.S. Nuclear Regulatory Commission (NRC or the Commission) immediately shut down Braidwood Station, Units 1 and 2, and Byron Station, Units 1 and 2, until all turbine building (TB) high-energy line break (HELB) concerns were identified and those important to safety were corrected. The bases for the requests were:

- An adequate supply of combustion air for the emergency diesel generators (EDGs) is threatened because the combustion air can be diluted with steam. Although the combustion air is drawn from an air shaft (not the TB), it is also the same air shaft that supplies ventilation for the EDG room. Under certain conditions, the ventilation damper alignment is such that steam that enters the EDG room from the ventilation exhaust can backflow into the inlet air shaft. From there it can be drawn into the engine, potentially starving the engine of air.
- The effects of high temperature in the engineered safeguards feature (ESF) switchgear (SWGR) rooms on the protective relaying setpoints have not been evaluated. The concern is that high temperatures could alter the setpoints such that protective actions occur under normal loading conditions.
- The current method of analysis for TB HELB uses a "lumped volume"

approach wherein the mass and energy (M&E) of the ruptured line mixes instantly with the entire volume before flowing into the areas of concern. Because this substantially reduces the energy flow, it does not always give conservative results. For example, the Petitioner's preliminary assessment using the subdivided volume feature in GOTHIC showed that the structural limits on the block wall between the ESF SWGR rooms would be substantially exceeded.

- There has been no structured and detailed review of the licensing requirements for HELB.

The Petition Review Board met to discuss the request for immediate action on May 4, 2012, and initially decided to deny that request because the Licensee had completed an operability evaluation (OE) and found the equipment addressed in the petition was operable but degraded. On May 14, 2012, the PRB notified the Petitioner that the request for immediate action was denied. The Petitioner participated in an initial teleconference with the PRB on May 16, 2012, to provide the PRB with additional explanation and information in support of the petition. After considering the additional information received on August 23, 2012, the NRC Staff informed the Petitioner by letter (ADAMS Accession No. ML12167A336) that his request for immediate shutdown was denied and that the issues in the petition were being referred to the Division of Safety Systems and the Division of Engineering in the Office of Nuclear Reactor Regulation (NRR) for review. The denial of the immediate shutdown request was based on the NRC Staff's then-current knowledge of Licensee actions on the HELB issue, including a review of Licensee operability evaluations, which found that the equipment was operable but degraded, PRB discussions with the Resident Inspector staff at Byron and Braidwood Stations concerning the OEs, and information in the Licensee's corrective action program documents indicating that the equipment operability issues in the petition had been addressed.

Although the PRB concluded that immediate shutdown of the plants was unwarranted, the PRB determined that additional information was needed. By letter dated August 2, 2012 (ADAMS Accession No. ML12208A338), the NRC Staff requested that the Licensee, Exelon Generation Company, LLC (Exelon, the Licensee), provide a voluntary response to the issues raised in the petition. By letter dated August 31, 2012, Exelon provided its voluntary response consisting of a response letter and seven attachments. The response letter and Attachment 1 are publicly available (ADAMS Accession No. ML12249A063) and Attachments 2 through 7 are proprietary; however Exelon provided the Petitioner access to the entire response, including the proprietary attachments.

The PRB held a second teleconference with the Petitioner on November 15, 2012, to allow the Petitioner to address some PRB questions regarding the Petitioner's preliminary assessment of the TB HELB using the GOTHIC subdivided

volume feature, which provided results that substantially exceeded the block wall structural limit. During this teleconference, the PRB requested additional information regarding the basis for the issues identified in the petition. Specifically, the PRB requested, and the Petitioner agreed to provide, specific information pertaining to the modeling he performed.

The transcripts of the May 16, 2012, teleconference (ADAMS Accession No. ML12145A633) and the November 15, 2012, teleconference (ADAMS Accession No. ML12347A354) were treated as supplements to the petition and are available for inspection in the NRC's Public Document Room (PDR) located at O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 1-800-397-4209 or 301-415-4737 or by e-mail to pdr.resource@nrc.gov.

The NRC sent a copy of the proposed director's decision to the Petitioner and to Exelon for comment on June 18, 2014. The Staff did not receive any comments on the proposed director's decision.

II. DISCUSSION

The Petitioner raised several concerns related to potential consequences of TB HELBs to support his request for immediate shutdown of the Braidwood and Byron plants. After a brief background discussion of HELB nonconformance issues at Byron and Braidwood (Section II.A), each of the Petitioner's concerns is addressed in the subsequent sections.

A. Background

On June 23, 2011, Exelon submitted a license amendment request (LAR, ADAMS Accession No. ML111790030) for measurement uncertainty recapture (MUR) power uprates for the Byron and Braidwood Stations. In an August 25, 2011 supplement to the LAR (ADAMS Accession No. ML11255A332), Exelon identified nonconservative assumptions in the TB HELB calculations for those breaks that could potentially result in higher temperatures and pressures in certain auxiliary building (AB) room locations. Exelon stated that it had evaluated these discrepancies in OEs and concluded that there was reasonable expectation of operability for the Class 1E and safety-related equipment in the identified rooms. Exelon further stated that it intended to modify the plant physical configuration such that the OE would no longer be required.

By letter dated September 19, 2011 (ADAMS Accession No. ML112231574), the NRC Staff accepted the LAR for review. The NRC Staff stated, however, that satisfactory disposition of the known nonconformance with the turbine HELB licensing basis would be required prior to implementation of the MUR uprate should the NRC Staff approve the proposed license amendment request.

B. Emergency Diesel Generator Operability

The Petitioner's first concern is that steam from a nonsafety-related piping failure in the TB can travel to the safety-related AB through ventilation openings in the common wall between the auxiliary and turbine buildings. Under certain conditions, the ventilation damper alignment is such that steam can enter the EDG room from the ventilation exhaust and can back flow into the inlet air shaft and dilute the EDG combustion air supply with steam. From there it could be drawn into the EDGs, potentially starving them of combustion air.

The structures, systems, and components affected are the EDGs. There are two EDGs per unit, one for each ESF division. The EDGs provide an independent emergency source of power in the event of a complete loss of offsite power. The EDG supplies all of the electrical loads which are required for reactor safe shutdown either with or without a loss-of-coolant accident. If the EDGs cannot perform their safety function, the reactor would not be able to be maintained in a safe shutdown condition without restoration of offsite electrical power or another alternating current (AC) source.

The information provided in Attachment 2 of the Licensee's August 31, 2012, voluntary response showed that the Licensee had performed a technical evaluation of high-temperature and high-humidity combustion air on the operation of the EDGs. In the technical evaluation, the Licensee assumed that the steam-air mixture would enter the EDG room from the room ventilation exhaust path. The mixture would then enter the EDG room ventilation supply duct and would flow past the room supply air fan and into the supply air mixing box. The mixture would then flow past the mixing box filters and into the main air intake plenum, where the EDG combustion air intake is located. The Licensee assumed a maximum steam-air temperature in the main air intake plenum of 200 degrees Fahrenheit (°F) and 70% relative humidity before the EDG start. The Licensee also assumed that a TB HELB would coincide with an EDG start demand.

The Licensee stated in the August 31, 2012, voluntary response that the EDGs at Byron and Braidwood Stations are Cooper-Bessemer model KSV 20-cylinder diesel engines. Under a normal loaded operation, the intake-air constant-pressure turbocharging is provided by a turbocharger that is driven by the EDG exhaust gas. The intake air for combustion in the engine cylinders is drawn from the main air intake plenum through the air intake filter and air intake silencer; it then enters the EDG turbocharger. The air is pressurized by the turbocharger,

and its temperature is elevated by the heat of compression from the turbocharger. The higher-temperature air then travels to an intercooler to lower the temperature before entering the manifold to charge each engine cylinder.

When the EDG is started, the turbocharger is inoperative because there is insufficient exhaust gas produced to drive the turbocharger during an EDG start. At this point, the diesel engine behaves like a normally aspirated engine. Therefore, the intake air exiting the turbocharger would be comparable to air at atmospheric pressure and temperature. The intercoolers would have only minor cooling effects because no heat has been added to the air by turbocharger compression.

Theoretically, approximately 14.5 pounds (lb) of air are required for the combustion of 1 lb of fuel oil. When a diesel engine operates at a light load, the actual air/fuel ratio is several times greater than the theoretical value of 14.5 lb. According to Cooper-Bessemer, the minimum excess air above the stoichiometric requirement at 100% load is 40%. The engine's technical data sheet states that the fuel consumption at 100% load (5500 kW) is 2744.5 lb per hour (hr). The estimated fuel consumption at no load is approximately 120 lb/hr. These consumptions are based on an air temperature of 90°F. The Licensee therefore determined that the actual air/fuel ratio when the EDG operates at no load would be much greater than the theoretical value of 14.5 lb.

The Licensee stated that when an EDG receives a start signal, the EDG room supply air fan also receives a start signal. When the EDG starts to use combustion air, air flows from outside into the air plenum, and mixes with the higher temperature and higher humidity air from the HELB in the vicinity of the combustion air intake. This will rapidly lower the temperature and humidity of the combustion air used by the EDG. Also, the EDG room supply air fan would draw the higher temperature and higher humidity air from the plenum and discharge it into the room where it will then exit the room through the ventilation exhaust openings through which it came.

Ignition of the diesel fuel depends on the temperature of the compressed air–fuel mixture and sufficient oxygen. The increased intake-air temperature will encourage ignition of the diesel fuel. The increased temperature and humidity conditions from the steam will result in less dense air to support diesel fuel combustion. Increasing the intake-air temperature from the 90°F standard condition to the assumed temperature of 200°F and 70% humidity will reduce air density from 0.072 lb per cubic foot (lb/ft³) to 0.060 lb/ft³. This is a decrease in air density of approximately 17%. The Licensee determined that because the amount of air available during an EDG start is many times greater than the minimum stoichiometric requirement necessary to support fuel combustion, this decrease in air density will have little effect on an EDG start.

Once fuel combustion initiates to accelerate the engine, the EDG exhaust will accelerate the turbocharger and the intake air supply will increase because of

the turbocharger operation. The outside air entering the plenum to provide the intake air would quickly bring the intake air quality back to ambient conditions. As a result, there would be no steady-state higher intake-air temperature or higher humidity to cause a reduction of engine horsepower or increase in fuel consumption or exhaust-gas temperature. Therefore, the Licensee concluded that the EDGs would be operable to perform their safety functions.

As described above, the flow path for the steam is indirect, and the steam will mix with the air in the TB, the EDG room, the EDG room ventilation air supply duct, the supply air mixing box, the intake-air plenum, and the EDG intake-air ductwork. When the EDG and the EDG room ventilation fan start, the percentage of steam in the combustion air will be small and will only last for a short duration because the room ventilation fan and the EDG intake air will immediately draw outside into the air plenum to replace the higher temperature and higher humidity air that is used by the EDG and removed by the room ventilation fan. Therefore, based on the above information, the NRC Staff's knowledge of and experience with EDGs, and engineering judgment, the Staff concludes that there is reasonable expectation of EDG operability.

C. High Temperature in the Engineered Safety Feature Switchgear Rooms

The second issue raised in the petition is that the effects of high temperature on the protective relaying setpoints in the ESF SWGR rooms have not been evaluated. The Petitioner was concerned that high temperatures could alter setpoints such that protective actions occur under normal loading conditions. To address this concern, the NRC Staff performed an independent review of the Licensee's OE provided in Attachments 3 and 4 to its voluntary response dated August 31, 2012, to determine if the ESF rooms' protective relays should be considered operable using guidance in Inspection Manual Part 9900, "Operability Determination."

The ESF rooms are connected to the TB by a rolling door and a postulated HELB in the TB can cause higher temperature in the ESF SWGR rooms that could alter or change the protective relay setpoints. In Attachment 4 to its voluntary submittal dated August 31, 2012, the Licensee provided its evaluation that determined the maximum peak temperature in ESF rooms caused by TB HELB will be 170°F based on its existing HELB analysis using the Kitty-6 model. The normal operating temperature in the ESF SWGR rooms is 108°F.

In Attachment 3 to the voluntary response dated August 31, 2012, the Licensee used the above maximum peak temperature of 170°F (caused by HELB in the TB) for a maximum time of 2 hours to evaluate the ESF SWGR room protective relays and relay setpoint operability at Braidwood Station, Units 1 and 2, and Byron Station, Units 1 and 2. Based on this evaluation, the Licensee determined there is a reasonable expectation of ESF SWGR room protective relaying operability.

During discussions with the NRC on October 18, 2012, the Licensee provided additional clarification that the Licensee's OEs (11-005 for Byron and 11-006 for Braidwood) are based on a single-failure assumption (i.e., failure of one fusible link within a ventilation fire damper for one ESF SWGR room). This single failure is assumed to result in all the equipment in one ESF SWGR room/train becoming nonfunctional and nonrecoverable. The opposite train located in the other ESF SWGR room is still operable up to 170°F.

The NRC Staff reviewed the Licensee's GOTHIC model temperature graphs for the ESF SWGR rooms, which were provided in Attachments 6 and 7 of Exelon's voluntary submittal dated August 31, 2012. These temperature graphs reflect temperature values of 295°F for the ESF Division 2 room and 260°F for 1200 seconds (sec) in the ESF Division 1 room with an upward trend. These values exceed the 170°F values used in the Licensee's operability evaluations (11-005 for Byron and 11-006 for Braidwood). During a teleconference with the Licensee on October 22, 2012, the NRC Staff asked the Licensee to explain the GOTHIC model temperature values reflected in Attachments 6 and 7 of its August 31, 2012, submittal. The Licensee explained that the primary purpose of these specific GOTHIC model runs was to optimize the pressure results in the ESF SWGR room walls by perturbing the model to intentionally consider higher temperatures that would provide maximum pressure. For example, heat sinks in the ESF SWGR rooms were deliberately not included in the GOTHIC model runs to intentionally keep temperature higher and optimize the pressure. The temperature results would be lower with the addition of heat sinks in the test runs of the GOTHIC model for peak temperature. The Licensee stated that it has not performed GOTHIC model runs specifically for the peak temperature results. Attachment 3 of the Licensee's August 31, 2012, voluntary submittal states that if the final GOTHIC model predicted higher temperatures, it would affect the Licensee's current OEs 11-005 and 11-006. The Licensee stated that when it completed the analyses of the GOTHIC model for peak temperatures, it would review and revise OEs 11-005 and 11-006, if the OEs were still needed. The NRC Staff's review of the TB HELB analysis associated with the power increase from the Braidwood and Byron Stations' MUR power uprate, which is documented in the safety evaluation for MUR uprate (ADAMS Accession No. ML13281A000), revealed that the peak temperatures of 170°F were not exceeded; therefore, the NRC Staff confirmed that the OEs did not need revision.

For the reasons discussed above, the NRC Staff determined that temperature results in the Licensee's GOTHIC model runs for the ESF SWGR rooms in the Licensee's August 31, 2012, voluntary submittal do not reflect realistic temperatures for use in predicting ESF SWGR room protective relaying operability. Therefore, the NRC Staff used the ESF SWGR room's peak temperature value of 170°F, which is based on the results of the Licensee's current licensing basis

Kitty-6 HELB model, to evaluate whether there is a reasonable expectation that the ESF rooms' protective relaying will continue to be operable.

In Attachment 3 of its August 31, 2012, voluntary response, the Licensee identified the following safety-related design functions of equipment and components related to the 4-kV ESF SWGR room protective relays:

1. Initiating a Feed Breaker trip on a 4-kV Bus Degraded Undervoltage (timed). This safety-related design function is supported by Bus Degraded Voltage Relays located in the ESF 4-kV SWGR rooms and is described in the Byron and Braidwood Stations' Technical Specification (TS) 3.3.5, "Loss of Power (LOP) Diesel Generator (DG) Start Instrumentation."
2. Initiating Load Breaker trip and EDG start on a 4-kV Bus Undervoltage. This safety-related design function is supported by LOP Undervoltage Relays located in the 4-kV ESF SWGR rooms and is described in Byron and Braidwood Stations' TS 3.3.5, "Loss of Power (LOP) Diesel Generator (DG) Start Instrumentation."
3. Operation of breakers supplying safety-related loads.
4. Isolation of electrical fault.

For the safety design functions identified above related to the ESF SWGR room protective relays, the Licensee used a maximum peak temperature of 170°F for 2 hours and determined that the equipment and components in the ESF SWGR rooms would be reasonably expected to perform their design function during a TB HELB abnormal event transient.

The Licensee's evaluation provided in Attachment 3 of the Licensee's August 31, 2012, voluntary response stated that Nuclear Logistics, Inc. (NLI) qualified various components, including relays for the ESF SWGR rooms, from a temperature range of 240°F to 320°F for a minimum duration of 4 days, as described in the plant EQ binder EQ-BB-093. Therefore, the tested conditions for the components in the ESF SWGR rooms envelop the HELB event maximum temperature of 170°F for a 2-hour duration in the ESF SWGR rooms.

The Licensee in Attachment 3 of its voluntary response dated August 31, 2012, generically evaluated ESF SWGR room protective relays and their set-points. The Licensee's evaluation determined that the 4-kV ESF SWGR rooms' protective relaying uses magnetic and induction-based overload relays that are not temperature-sensitive.

Based on its review of the above information, the NRC Staff concludes that the ESF SWGR rooms' protective relays are qualified to perform their safety design functions for TB HELB-related maximum peak temperature of 170°F in the ESF SWGR rooms. In addition, the redundant train in the other ESF SWGR room will be available based on the single-failure assumption. Therefore, the Staff finds

that the Licensee's OEs provide reasonable expectation of operability of the ESF SWGR rooms' protective relays.

D. Structural Limits on the Block Wall Between the ESF Switchgear Rooms

The third concern raised in the petition was that the differential pressure (DP) load applied on the ESF SWGR rooms' block walls because of the M&E release from applicable TB HELBs would exceed the structural capacity of the walls.

In its August 31, 2012, voluntary response, the Licensee provided OEs which include computational evaluations, using the GOTHIC computer software, for operability/functionality of the ESF SWGR masonry unreinforced block walls, located in the AB at Elevation (EL) 426'-0", when considering the M&E release from TB HELBs. The Licensee stated that the HELB effect was not previously accounted for in the evaluation of these block walls. The Licensee also stated that additional work was required to finalize the GOTHIC model. Subsequently, the final GOTHIC model was reviewed by the NRC Staff and documented in the safety evaluation of the Braidwood and Byron Stations' MUR power uprate (ADAMS Accession No. ML13281A000) as discussed in Section F, below.

The Petitioner states that the KITTY-6 analysis for the TB HELB uses a "lumped volume" approach which does not give conservative results. The Petitioner claimed that his preliminary GOTHIC analysis with subdivided volumes showed that the structural limits on the block wall between the ESF SWGR rooms were substantially exceeded.

The Licensee, in Attachment 2 of Attachment 6 to its August 31, 2012, voluntary response, provided a detailed evaluation specific to the SWGR block walls located in the AB at EL 426'-0". The Licensee considered the effects of the differential pressure caused by the TB HELB on the masonry block walls. The temperature effect caused by a HELB on the steel columns supporting the block wall and their associated components was not accounted for in these block wall operability evaluations. Attachment 7 to the Licensee's August 31, 2012, voluntary response shows that the temperature can reach approximately 295°F. On October 16, 2012, the NRC held a teleconference with the Licensee in reference to the HELB temperature effect on the block wall steel columns. The Licensee stated that the steel in the SWGR rooms is wrapped in 3-hour-rated fire wrap and, therefore, the temperature effects are very small for the applicable time frames. In addition, the Licensee stated that it would initiate a corrective action to document the issue and implement follow-up actions as required. The Licensee issued action request (AR) Report No. 01427699. The AR shows that the block wall is a 3-hour-rated fire barrier and the steel columns are covered with fireproofing material. The fire temperature is at 1000°F in the first 5 minutes and gets to 1925°F in 3 hours. The Licensee, in AR Report No. 01427699, determined

that the fireproofing material will be sufficient to keep the steel columns from experiencing any negative effect from the HELB because the event duration is shorter and the temperature is considerably lower than that of the fire. From its review of the voluntary response, the NRC Staff also notes that the heatup transient is assumed to end at 2 hours, at which time operator action is credited to restore ventilation. Based on the above, the NRC Staff finds the Licensee's response acceptable regarding the HELB temperature effects on the steel columns supporting the block wall.

In Attachment 2 to its August 31, 2012, voluntary submittal, the Licensee determined that the block walls are subjected to a differential pressure (DP) load of 0.261 psid (pounds per square inch differential). This is the peak pressure differential shown on the plot of Figure 1 in Attachment 1 (of Attachment 6 to the August 31, 2012, voluntary response), from a GOTHIC run of May 25, 2012, and it appears from the plot that the peak pressure buildup occurs within a fraction of a second (approximately 0.48 sec) of the initiation of the HELB event. Therefore, the Attachment 2 calculation appropriately uses a dynamic load factor (DLF) of 2.0 (which the Licensee states is conservative because it has been compared to a DLF from a refined analysis of similar walls evaluated in Reference 11 of the calculation). According to the Licensee, a seismic event concurrent with a HELB is part of the plant's design basis and, therefore, the calculation appropriately combines the DP load caused by a HELB with the load from the safe-shutdown earthquake (SSE). The calculation uses a masonry modulus of rupture (MOR) value of 250 psi, which is based on test data from the Clinton Power Station (CPS). The lower-bound modulus of rupture provided in Byron and Braidwood's Updated Final Safety Analysis Report (UFSAR) Table 3.8-16 is 125 psi.

The NRC Staff performed an independent review, using the peak DP load of 0.261 psi from Attachment 1 (of Attachment 6 to the August 31, 2012, voluntary response), of masonry wall and wall steel column data from Attachment 2 (including DLF of 2.0 and combining a SSE with a HELB) and the Byron and Braidwood's UFSAR MOR of 125 psi with a 1.5 factor of safety. The NRC Staff did not use the CPS MOR value because it is not known whether the CPS value is applicable to the Braidwood and Byron Stations. The Staff's independent review shows that there is reasonable expectation of operability of the AB elevation 426'-0" ESF SWGR block walls and steel columns for the potential TB HELB DP load of 0.26 psi.

The NRC Staff examined the GOTHIC file plot contained in Attachment 7 of the August 31, 2012, voluntary response, related to the SWGR DP. The plot shows that it takes approximately 100 sec for the HELB DP to start applying force to the SWGR block wall, 300 sec to reach 0.25 psid, 450 sec to reach 0.5 psid, and 750 sec to reach 0.66 psid. Because of the slow buildup of pressure on the wall, this DP loading of 0.66 psi can be considered static without requiring the application of a dynamic load factor. The NRC Staff performed an independent

review using a peak DP load of 0.66 psid, masonry wall and wall steel column data from Attachment 2, a DLF of 1.00, a combination of a SSE loading with a HELB DP loading, and the Byron and Braidwood Stations' UFSAR MOR of 125 psi with a factor of safety of 1.5. The Staff's independent review shows that there is reasonable expectation that the AB elevation 426'-0" ESF SWGR block walls and steel columns will remain operable and functional.

The NRC Staff performed an independent review of the ESF SWGR masonry block walls, including the supporting steel columns, for two loading conditions: (1) 0.261-psi dynamic pressure loading (DLF = 2.0) concurrent with an SSE and (2) 0.66-psi static pressure loading concurrent with an SSE. The NRC Staff based its review on available information (as shown above) provided by the Licensee in its voluntary response and in the Licensee's corrective action document AR Report No. 01427699. Based on the above and the NRC Staff review described in Section E, below (which confirms that the GOTHIC models used to determine the 0.261-psi dynamic pressure loading and the 0.66 static pressure loading values were acceptable for the purpose of supporting the OEs), the NRC Staff concludes that there is reasonable expectation of operability for the AB EL 426'-0" ESF SWGR unreinforced masonry block walls for DP loads from the examined postulated HELBs in the TB.

E. Use of the GOTHIC Code and the Subdivided Volume Feature

During the November 15, 2012, teleconference with the Petitioner, the PRB requested that the Petitioner provide the preliminary assessment using the subdivided volume feature in GOTHIC that showed that the structural limits on the block wall between the ESF SWGR rooms would be substantially exceeded as described in the petition. The Petitioner agreed during the teleconference to provide the GOTHIC files he used to perform the preliminary modeling. During subsequent discussions with the Petition Manager, the Petitioner stated he was still working on the model. Although the Petitioner never provided the requested information, the NRC Staff obtained the following information during an inspection of GOTHIC model activities on April 3, 2013 (ADAMS Accession No. ML13213A381).

Exelon performed two sets of analyses to support the then-current operability evaluation of Braidwood Units 1 and 2 and Byron Units 1 and 2. The results of these analyses were submitted to NRC in Attachments 6 and 7 of the August 31, 2012, voluntary response to address the petition. Exelon was also performing a third analysis to address the petition and developing a GOTHIC model (fourth analysis) for the licensing basis analysis based on the modified plant configuration which was then in progress. The following paragraphs summarize information regarding these analyses obtained from discussion with Exelon.

The GOTHIC model for the first analysis used a subdivided approach for a

HELB at the 426-ft elevation to perform structural evaluation of the safety-related switchgear walls. This analysis supported the then-current operability evaluation. Exelon presented its GOTHIC model diagram, subdivided volumes showing blockages, boundary conditions, initial conditions, and the output graphs. Exelon explained the HELB M&E release input used in the GOTHIC model and that M&E input is an important parameter that affects the results. Exelon explained that the model considered M&E input from a realistic break scenario. This break scenario released less M&E than from an instantaneous double-ended guillotine break (DEGB) of a large steam line. Exelon stated that a DEGB occurring instantaneously, or in a very small time on the order of 1 millisecond, is not a realistic break to be considered supporting the OE or a licensing basis analysis. Furthermore, Exelon stated that for such a break, which involves acoustic phenomena, the results would not be valid because of the limitations of GOTHIC code. The NRC Staff reviewed the GOTHIC models for the first analysis and determined that the Licensee had used generally accepted practices in developing the models. The NRC did not identify any unacceptable practices and, therefore, determined that the models were acceptable for the purposes of supporting the OEs.

The GOTHIC models for the second analysis used a lumped volume approach for HELB at the 401-ft, 426-ft, and 451-ft elevations. This analysis was used for structural evaluation of walls in safety-related and nonsafety-related switchgear rooms, miscellaneous electrical equipment rooms, and cable spreading room walls. This analysis used the M&E input from a different scenario than used in the first analysis. The results of this analysis were also submitted to NRC in Exelon's August 31, 2012, voluntary submittal. The NRC Staff reviewed the GOTHIC models for the second analysis and determined that the Licensee had used generally accepted practices in developing the models. The NRC did not identify any unacceptable practices and, therefore, determined that they were acceptable for the purposes of supporting the OEs.

At the time it submitted the voluntary response to this petition in August 2012, Exelon was also developing GOTHIC models for two additional analyses (third and fourth analyses). In its third analysis, Exelon planned to use both subdivided and lumped approach as an "academic exercise" to address the petition. This modeling work was not intended to address the OEs or a licensing basis analysis. Exelon did not present this analysis to the NRC Staff in its August 31, 2012, voluntary submittal because at the time the analysis was incomplete. The NRC did not review these models in addressing this petition because they were not complete, they were not verified, and they were not being used to support OEs or a licensing basis analysis.

In August 2012, Exelon was also developing a GOTHIC model (fourth analysis) for the licensing basis analysis, based on the modified plant configuration without the need for OEs. At the time, Exelon had not decided whether it would

use a subdivided or a lumped volume modeling approach. Exelon did not present this analysis to the NRC Staff because at the time it was incomplete. These models were completed in July 2013, and were reviewed during the NRC's review of the license amendment request for Braidwood and Byron Stations' MUR uprate discussed in Section F, below.

F. High-Energy Line Break Licensing Basis

The fourth issue raised in the petition was that there has been no structured and detailed review of the licensing requirements for HELB. As indicated in Section II.A, above, at the time the petition was submitted, the NRC was aware of the then-current noncompliance with the licensing basis that resulted in the need for the OEs cited in the petition. In its August 2, 2012, request that the Licensee provide a voluntary response to the petition, the NRC asked the Licensee to address the extent-of-condition review of HELB areas other than the TB. In its August 31, 2012, response, the Licensee stated that it was reviewing high-energy line cracks in the AB and that its current reviews did not identify HELB-related issues in areas other than the TB.

In a December 6, 2012 request for additional information (ADAMS Accession No. ML12271A308) related to the Braidwood and Byron Stations' MUR uprate LAR, the NRC Staff requested that the Licensee provide a summary of the results of its extent-of-condition review related to the HELB noncompliance. The Licensee responded in a July 5, 2013, supplement to the LAR (ADAMS Accession No. ML13186A178), and concluded that the supporting HELB analyses for other plant structures containing high-energy lines that could impact safety-related equipment were not impacted by the nonconformances identified in the TB HELB analyses.

By letter dated November 13, 2013 (ADAMS Accession No. ML13318A232), the Licensee confirmed that the physical modifications to restore the licensing basis for the TB HELB had been completed. As a result, the OEs referred to in the petition were no longer necessary.

NRC Staff review of the licensing basis, and the Licensee's compliance with the licensing basis, was accomplished during the review of the LAR for Braidwood and Byron Stations' MUR uprate. On February 7, 2014, the NRC Staff issued Amendment No. 174 for Braidwood Station, Units 1 and 2, and Amendment No. 181 for Byron Station, Unit Nos. 1 and 2, to implement the MUR uprate (ADAMS Accession No. ML13281A000). Regarding the TB HELB analysis, the safety evaluation for the MUR amendments found that: (a) the Licensee used an approved methodology for the TB HELB analysis, (b) the GOTHIC inputs and assumptions are conservative, (c) the output results of the GOTHIC models for the pressure, temperature, and humidity in the AB rooms to be used for EQ are limiting, and (d) the results of differential pressure analysis across the AB

walls are limiting. Therefore, in the SE for the MUR amendments, the NRC Staff concluded that the Licensee had satisfactorily justified that the TB HELB analysis meets the current licensing basis.

III. CONCLUSION

Based on the above, NRR has decided to deny the Petitioner's request to immediately shut down the Braidwood and Byron Station units. NRR has partially granted the petition in that NRR addressed the Petitioner's fourth concern by evaluating the licensing basis requirements for HELB during the review of the LAR for the Braidwood and Byron Stations' MUR uprate. The results of that review are documented in the SE that was issued with the MUR uprate amendment on February 7, 2014.

With regard to the other concerns raised in the petition, the NRC Staff has concluded that there were reasonable expectations of equipment operability for the following issues:

- EDG operability,
- High temperature in the ESF SWGR rooms, and
- Structural limits on the block wall between the ESF SWGR rooms.

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

FOR THE NUCLEAR REGULATORY
COMMISSION

William M. Dean, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 22nd day of December 2014.

CASE NAME INDEX

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- Alaska v. Andrus*, 580 F.2d 465, 474 (D.C. Cir.), *vacated in part as moot sub nom. Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978)
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- Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir.), *vacated in part as moot sub nom. Western Oil & Gas Association v. Alaska*, 439 U.S. 922 (1978)
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- Blue Ridge Environmental Defense League v. NRC*, 716 F.3d 183, 188 (D.C. Cir. 2013)
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- Blue Ridge Environmental Defense League v. NRC*, 716 F.3d 183, 189 (D.C. Cir. 2013)
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- Border Power Plant Working Group v. U.S. Department of Energy*, 260 F. Supp. 2d 997, 1012-18 (S.D. Cal. 2003)
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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 66-67 (2012)
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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 68-69 (2012)
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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 74, 79 (2014)
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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 78-79 (2014)
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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 78-79 n.25 (2014)
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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 79 (2014)
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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 79 n.27 (2014)
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- Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 79, 81 (2014)
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- Calvert Cliffs Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971)
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- Calvert Cliffs Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971)
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- Calvert Cliffs Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1123 (D.C. Cir. 1971)
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- Calvert Cliffs Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1125 (D.C. Cir. 1971)
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- Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1213 (9th Cir. 2008)
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- Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-20, 16 NRC 109 (1982)
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- Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-20, 16 NRC 109, 110 (1982)
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- Citizens Against Burlington v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991)
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- Citizens Awareness Network, Inc. v. NRC*, 59 F.2d 284, 292 (1st Cir. 1995)
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- Citizens for Safe Power, Inc. v. NRC*, 524 F.2d 1291, 1294 n.5 (D.C. Cir. 1975)
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- Citizens for Safe Power, Inc. v. NRC*, 524 F.2d 1291, 1299 (D.C. Cir. 1975)
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- City of West Chicago v. NRC*, 701 F.2d 632, 650 (7th Cir. 1983)
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- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996)
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Commission examines whether agency actions constituted de facto license amendments; CLI-14-11, 80 NRC 174 n.33 (2014)
NRC oversight activities gathering information about and evaluating plant performance, regardless of the findings it makes, do not alter the conditions of a license and therefore cannot form the basis for the right to request a hearing; CLI-14-11, 80 NRC 175 (2014)
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- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-79, 16 NRC 1116, 1119 (1982)
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- Colorado Wild, Inc. v. U.S. Forest Service*, 523 F. Supp. 2d 1213, 1219 (D. Colo. 2007)
NEPA's purpose is to influence the decisionmaking process by focusing the federal agency's attention on the environmental consequences of a proposed project, so as to ensure that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast; LBP-14-9, 80 NRC 56 (2014)
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- Colorado Wild, Inc. v. U.S. Forest Service*, 523 F. Supp. 2d 1213, 1224-25 (D. Colo. 2007)
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- Colorado Wild, Inc. v. U.S. Forest Service*, 523 F. Supp. 2d 1213, 1225 (D. Colo. 2007)
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- Colorado Wild, Inc. v. U.S. Forest Service*, 523 F. Supp. 2d 1213, 1225-26 (D. Colo. 2007)
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- Communities, Inc. v. Busey*, 956 F.2d 619, 627 (6th Cir. 1992)
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- Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-03-7, 58 NRC 1, 6 (2003)
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- Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 98 (1995)
NRC guidance cannot prescribe requirements; LBP-14-9, 80 NRC 52 n.161 (2014)
- David Geisen*, CLI-10-23, 72 NRC 210, 224-25 (2010)
Commission gives substantial deference to licensing board findings of fact, and it will not overturn a board's factual findings unless they are not even plausible in light of the record viewed in its entirety; CLI-14-10, 80 NRC 162 (2014)
- Department of Transportation v. Public Citizen*, 541 U.S. 752, 756-57 (2004)
NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-14-9, 80 NRC 40 (2014)
- Department of Transportation v. Public Citizen*, 541 U.S. 752, 764 (2004)
primary responsibility for compliance with NEPA lies with the Commission; LBP-14-9, 80 NRC 69 (2014)
- Detroit Edison Co. v. NRC*, 630 F.2d 450, 450 (6th Cir. 1980)
NRC can, as a condition of licensure, insist that offsite transmission lines built solely to serve a nuclear facility be designed to minimize environmental disturbance; LBP-14-9, 80 NRC 30 (2014)
- Detroit Edison Co. v. NRC*, 630 F.2d 450, 451 (6th Cir. 1980)
by 1974, NRC had adopted an aggressive approach to its environmental responsibilities in the context of transmission line siting; LBP-14-9, 80 NRC 30 (2014)
under NEPA, federal agencies must use all practicable means to avoid environmental degradation to the extent consistent with other essential considerations of national policy; LBP-14-9, 80 NRC 29 (2014)

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- Detroit Edison Co. v. NRC*, 630 F.2d 450, 452 (6th Cir. 1980)
in ruling that NRC had appropriately interpreted the Atomic Energy Act to include regulatory authority over attendant transmission lines, the court did not decide whether NEPA is an independent source of substantive jurisdiction; LBP-14-9, 80 NRC 54 (2014)
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- Detroit Edison Co. v. NRC*, 630 F.2d 450, 454 (6th Cir. 1980)
under the Atomic Energy Act, NRC can issue conditional licenses for regulatory purposes, and thus there can be no objection to its use of the same means to achieve environmental ends as well; LBP-14-9, 80 NRC 53 (2014)
- Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936 (1974)
NRC can, as a condition of licensure, insist that offsite transmission lines built solely to serve a nuclear facility be designed to minimize environmental disturbance; LBP-14-9, 80 NRC 30 (2014)
NRC's has authority to impose environmental restrictions on new transmission lines intended to serve new nuclear power plants; LBP-14-9, 80 NRC 46 (2014)
- Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936, 937 (1974)
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- Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-247, 8 AEC 936, 939 (1974)
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- Deukmejian v. NRC*, 751 F.2d 1287, 1300 (D.C. Cir. 1984)
NEPA requirements are subject to a rule of reason, and an environmental impact statement need not address remote and highly speculative consequences; LBP-14-9, 80 NRC 42 (2014)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551 (2005)
four-part test for granting a waiver under 10 C.F.R. 2.335(b) is set forth; LBP-14-16, 80 NRC 194 (2014)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005)
rule waivers may be granted only when all four factors in 10 C.F.R. 2.335(b) are met; LBP-14-15, 80 NRC 153-54 (2014)
where the rules in question, as well as the contention itself, address compliance with NEPA and not safety issues under the Atomic Energy Act, the rule waiver is needed to address a significant environmental issue instead of a significant safety issue; LBP-14-16, 80 NRC 195 (2014)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560 (2005)
all four factors must be met for a rule waiver request to be granted; LBP-14-16, 80 NRC 195 (2014)
NRC, by necessary implication, considered Indian tribe's trust responsibility concerns during its rulemaking; LBP-14-16, 80 NRC 199, 200 (2014)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 562 (2005)
even proximity to a nuclear power facility or ISFSI is hardly unique in context of a rule waiver request; LBP-14-16, 80 NRC 196 (2014)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 38-39 (2006)
Commission has imposed or upheld disciplinary measures against parties and their representatives when they failed to comply with board directives and procedural rules; CLI-14-10, 80 NRC 165 n.41 (2014)
- DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-9, 80 NRC 147 (2014)
Commission exercised its inherent supervisory authority over agency adjudications to review petition and motions challenging the Continued Storage Rule; LBP-14-16, 80 NRC 198 (2014)
- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203, 208 n.12 (2004)
NRC often refers to the Statement of Considerations as an aid in interpreting the agency's regulations; LBP-14-9, 80 NRC 52 (2014)

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- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999)
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- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985)
contentions that are the subject of general rulemaking by the Commission may not be litigated in individual licensing proceedings; LBP-14-16, 80 NRC 193 (2014)
- Ecology Action v. AEC*, 492 F.2d 998, 1001-02 (2d Cir. 1974)
federal courts of appeal have approved of the process by which an environmental impact statement is effectively amended through the adjudicatory process; LBP-14-9, 80 NRC 67 (2014)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 469 (2010)
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even if intervenors are appearing pro se, adherence to board directives is expected; CLI-14-10, 80 NRC 164 (2014)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC 352, 372-75 (2012),
petitions for review denied, Massachusetts v. NRC, 708 F.3d 63 (1st Cir. 2013)
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- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC 352, 373 (2012),
petitions for review denied, Massachusetts v. NRC, 708 F.3d 63 (1st Cir. 2013)
to determine whether suspension of an adjudication or licensing decision is warranted, the Commission considers whether moving forward will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes; CLI-14-7, 80 NRC 7 (2014)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC 352, 374-75 & n.140 (2012),
petitions for review denied, Massachusetts v. NRC, 708 F.3d 63 (1st Cir. 2013)
suspending a final decision indefinitely in an adjudicatory proceeding upon receipt of a claim of new and significant information runs counter to the goal of promoting fair and efficient resolution of disputes; CLI-14-7, 80 NRC 8 (2014)
- Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC 352, 376 (2012),
petitions for review denied, Massachusetts v. NRC, 708 F.3d 63 (1st Cir. 2013)
requirement that NRC suspend its licensing decisions upon receipt of a claim of new and significant information would render its decisionmaking intractable; CLI-14-7, 80 NRC 8 (2014)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-07-28, 66 NRC 275, 275 (2007)
Commission has imposed or upheld disciplinary measures against parties and their representatives when they failed to comply with board directives and procedural rules; CLI-14-10, 80 NRC 165 n.41 (2014)
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- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 35-36, 39 (2005)
function of uncontested hearings is only to review the adequacy of NRC Staff's work, not to make a de novo inquiry into NEPA issues; LBP-14-9, 80 NRC 68 (2014)
- Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 35-36, 49 (2005)
because the scope of intervenors' participation in adjudications is limited to their admitted contentions, they are barred from participation in the uncontested portion of the hearing; LBP-14-9, 80 NRC 68 (2014)

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- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 205 (2013), *petition for review docketed*, No. 14-1225 (D.C. Cir. filed Nov. 4, 2014)
rule waiver petitioners must satisfy four factors; LBP-14-16, 80 NRC 195 n.71 (2014)
- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 205 n.19 (2013)
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- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 209 (2013), *petition for review docketed*, No. 14-1225 (D.C. Cir. filed Nov. 4, 2014)
rule waiver test applies equally to safety and significant environmental concerns; LBP-14-16, 80 NRC 195 n.70 (2014)
- Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), LBP-13-1, 77 NRC 57, 64, *aff'd on other grounds*, CLI-13-7, 78 NRC 199 (2013)
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- Exelon Nuclear Texas Holdings, LLC* (Victoria County Station Site), LBP-12-20, 76 NRC 215 (2012)
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- Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 787 (1976)
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- Forelaws on Board v. Johnson*, 743 F.2d 677, 683 (9th Cir. 1985)
government agencies are required to comply with NEPA to the fullest extent possible; LBP-14-9, 80 NRC 50 (2014)
- Forest Guardians v. U.S. Forest Service*, 495 F.3d 1162, 1172 (10th Cir. 2007)
NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-14-9, 80 NRC 40 (2014)
- Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998)
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- Hammond v. Norton*, 370 F. Supp. 2d 226, 245, 251 (D.D.C. 2005)
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- Hammond v. Norton*, 370 F. Supp. 2d 226, 247-53 (D.D.C. 2005)
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- Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996)
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- Kelley v. Selin*, 42 F.3d 1501, 1514 (6th Cir. 1995)
if a hearing could be invoked each time NRC engaged in oversight over or inquiry into plant conditions, NRC's administrative process could be brought to a virtual standstill; CLI-14-11, 80 NRC 175 (2014)
- Kelley v. Selin*, 42 F.3d 1501, 1515 (6th Cir. 1995)
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- Kleppe v. Sierra Club*, 427 U.S. 390, 410 & n.20 (1976)
for construction of a transmission corridor to constitute a connected action under 40 C.F.R. 1508.25, the corridor must be a proposed action rather than one that is merely conceivable; LBP-14-9, 80 NRC 45 (2014)
- Limerick Ecology Action v. NRC*, 869 F.2d 719, 722-23 (3d Cir. 1989)
NRC was ordered to analyze features or actions, currently called severe accident mitigation alternatives, that could prevent a serious accident or mitigate its consequences; LBP-14-15, 80 NRC 152 (2014)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87 (1998)
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- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998)
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- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 104 (1998)
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- Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1111-12 (1983)
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- Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989)
NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-14-9, 80 NRC 40 (2014)
- Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989)
if, as part of its consideration of a rulemaking petition, NRC determines that there is new and significant information associated with the expedited-transfer issue that requires supplementation under NEPA, it can address any affected environmental analyses as needed and appropriately move forward with these proceedings in the meantime; CLI-14-7, 80 NRC 8 (2014)
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- Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74 (1989)
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- Massachusetts v. NRC*, 708 F.3d 63, 81-82 (1st Cir. 2013)
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- Massachusetts v. NRC*, 878 F.2d 1516, 1521-22 (1st Cir. 1989)
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- Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 176-77 (5th Cir. 2000)
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- Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 178 (5th Cir. 2000)
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- Montgomery v. Ellis*, 364 F. Supp. 517, 528 (N.D. Ala. 1973)
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- National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974)
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- Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988)
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- Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 297-99 (D.C. Cir. 1988)
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- New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 93-94 (1st Cir. 1978)
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- New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 703 (10th Cir. 2009)
NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-14-9, 80 NRC 40 (2014)
- New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012)
Commission directed that licensing boards hold waste disposal contentions in abeyance pending further Commission order, which would be issued in conjunction with a then to-be-determined agency response to the District of Columbia Circuit's ruling; LBP-14-12, 80 NRC 139 (2014)
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- New York v. NRC*, 681 F.3d 471, 473-74 (D.C. Cir. 2012)
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- New York v. NRC*, 681 F.3d 471, 478, 481-82 (D.C. Cir. 2012)
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- New York v. NRC*, 681 F.3d 471, 480 (D.C. Cir. 2012)
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- New York v. NRC*, 681 F.3d 471, 481 (D.C. Cir. 2012)
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- New York v. NRC*, 681 F.3d 471, 482 (D.C. Cir. 2012)
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- New York v. NRC*, 681 F.3d 471, 483 (D.C. Cir. 2012)
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- Northwest Resource Information Center, Inc. v. National Marine Fisheries Service*, 56 F.3d 1060, 1067-69 (9th Cir. 1995)
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- Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), CLI-11-6, 74 NRC 203, 208-09 (2011)
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- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981)
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- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 29 (2003)
Commission has long declined to assume that licensees will refuse to meet their obligations under their licenses or NRC regulations; CLI-14-11, 80 NRC 178 n.53 (2014)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257, 279 (2010), *aff'd in part and rev'd in part*, CLI-11-11, 74 NRC 427 (2011)
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- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257, 305 n.56 (2010), *aff'd in part and rev'd in part*, CLI-11-11, 74 NRC 427 (2011)
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- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-11-5, 73 NRC 131 (2011)
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- Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 526 (2008), *petition for review denied on other grounds*, *San Luis Obispo Mothers for Peace v. NRC*, 635 F.3d 1109 (9th Cir. 2011)
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- Pa'ina Hawaii, LLC*, CLI-08-3, 67 NRC 151, 163 n.46 (2008)
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- Pa'ina Hawaii, LLC*, CLI-10-18, 72 NRC 56, 82 (2010)
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- Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705-07 (1985)
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- Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 707 (1985)
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- Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 84 (1974)
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- Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003)
Commission gives substantial deference to licensing board findings of fact, and it will not overturn a board's factual findings unless they are not even plausible in light of the record viewed in its entirety; CLI-14-10, 80 NRC 162 (2014)
- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998)
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- Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-13-4, 77 NRC 107, 217 (2013)
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NRC is authorized to impose environmental conditions on a license to prevent or mitigate adverse environmental impacts that might otherwise be caused by the construction or operation of a nuclear power plant; LBP-14-9, 80 NRC 49 (2014)
- Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 80 (1st Cir. 1978)
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- Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 81 (1st Cir. 1978)
NEPA requires NRC to construe its existing statutory authority consistently with NEPA's goals; LBP-14-9, 80 NRC 54 (2014)
- Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 82 (1st Cir. 1978)
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court found no inevitable clash between NRC's broad regulatory authority under the Atomic Energy Act and the action-forcing provisions of the National Environmental Policy Act; LBP-14-9, 80 NRC 54-55 (2014)
NRC has long interpreted its statutory authority under the Atomic Energy Act to include conditioning approval of nuclear power plant licenses on environmentally acceptable routing of transmission lines; LBP-14-9, 80 NRC 48 (2014)
- Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 82-83 (1st Cir. 1978)
NRC's decision to include transmission lines that serve a nuclear power plant within the definition of "utilization facility" in 42 U.S.C. § 2014(cc) was upheld; LBP-14-9, 80 NRC 55 (2014)
- Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 86 (1st Cir. 1978)
NRC can, consistent with its authority under the Atomic Energy Act, impose permit conditions on the routing of the transmission lines in order to further NEPA's mandate; LBP-14-9, 80 NRC 55 (2014)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 22 (1988)
prima facie showing within the meaning of 10 C.F.R. 2.758(d) is one that is legally sufficient to establish a fact or case unless disproved; LBP-14-16, 80 NRC 194 n.64 (2014)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-940, 32 NRC 225, 234-38 (1990)
where NRC has temporarily exempted the licensee, on the basis of an existing rule, from one of many rules made generally applicable by the license does not amount to a license amendment, and thus provide no hearing rights; CLI-14-11, 80 NRC 174 n.35 (2014)

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- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988), *reconsideration denied*, CLI-89-3, 29 NRC 234, CLI-89-7, 29 NRC 395 (1989)
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- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)
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NEPA's purpose is to influence the decisionmaking process by focusing the federal agency's attention on the environmental consequences of a proposed project, so as to ensure that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast; LBP-14-9, 80 NRC 56 (2014)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989)
principal goals of a final environmental impact statement are to force agencies to take a hard look at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency's decisionmaking process; LBP-14-9, 80 NRC 57 (2014)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)
environmental mitigation options must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated; LBP-14-9, 80 NRC 64-65 (2014)
- Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1249 (9th Cir. 1984)
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almost every EIS contains some original research, and almost every time an environmental impact statement is ruled inadequate by a court, it is because more data or research is needed; LBP-14-9, 80 NRC 62 n.207 (2014)
- Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)
administrative agencies are allowed to address issues of general applicability through rulemaking instead of individual adjudications, and the choice made between proceeding by general rule or by individual, ad hoc, litigation is one that lies primarily within the informed discretion of the administrative agency; LBP-14-16, 80 NRC 193 (2014)
- Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)
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- Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-11-9, 73 NRC 391, 422 (2011)
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- Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968)
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- court found no inevitable clash between NRC's broad regulatory authority under the Atomic Energy Act and the action-forcing provisions of the National Environmental Policy Act; LBP-14-9, 80 NRC 54-55 (2014)
- Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105 (D.D.C. 2006)
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- Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (Breyer, J.)
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- Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1334-35 (S.D. Ala. 2002)
determination of minimal environmental impact would make little sense when an agency lacks essential information and has not sought to compile it through independent research; LBP-14-9, 80 NRC 62 (2014)
- Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973)
conclusory statement in an environmental impact statement unsupported by explanatory information of any kind not only fails to crystallize issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives; LBP-14-9, 80 NRC 62 (2014)
- Skokomish v. Federal Energy Regulatory Commission*, 121 F.3d 1303 (9th Cir. 1997)
NRC exercises its fiduciary duty in the context of its authorizing statutes, including the Atomic Energy Act, and implements any fiduciary responsibility by ensuring that tribal members receive the same protections under implementing regulations that are available to other persons; LBP-14-16, 80 NRC 200 n.104 (2014)
- Small Refiner Lead Phase-Down Task Force v. Environmental Protection Agency*, 705 F.2d 506, 545 (D.C. Cir. 1983)
where the reviewing court vacates a rule without reinstating the old rule, failure to reinstate the old rule creates a temporary regulatory vacuum; CLI-14-8, 80 NRC 76 n.14 (2014)
- Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 181 (3d Cir. 2000)
"connected actions" are defined as those that lack independent utility; LBP-14-9, 80 NRC 41 (2014)
- South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), LBP-09-25, 70 NRC 867, 889 & n.138 (2009)
scope of an adjudicatory hearing is limited to the notice of hearing, which in licensing matters normally extends only to the application at issue; CLI-14-11, 80 NRC 178 n.55 (2014)
- Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439-40 (2012)
appropriate means of challenging licensee actions undertaken in accordance with 10 C.F.R. 50.59 is through a petition under 10 C.F.R. 2.206; CLI-14-11, 80 NRC 175 (2014)
section 2.206 process provides stakeholders a forum to advance concerns and obtain full or partial relief, or written reasons why the requested relief is not warranted; CLI-14-11, 80 NRC 179 (2014)
- Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-9, 78 NRC 551, 556 n.17 (2013)
although NRC rules do not provide for the filing of amicus curiae briefs on motions filed pursuant to 10 C.F.R. 2.323, as a matter of discretion the Commission has reviewed both an amicus brief and the opposition to it; CLI-14-11, 80 NRC 171 n.20 (2014)
- Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-7, 77 NRC 307, vacated as moot, CLI-13-9, 78 NRC 551 (2013)
NRC Staff's inspection and oversight of licensee's actions are part of an ongoing de facto license amendment; CLI-14-11, 80 NRC 174 n.33 (2014)
- Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-7, 77 NRC 307, 325-26, 338-39 vacated as moot, CLI-13-9, 78 NRC 551 (2013)
unilateral licensee activities can constitute de facto license amendments; CLI-14-11, 80 NRC 174 n.33 (2014)

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- Southwest Williamson County Community Ass'n, Inc. v. Slater*, 243 F.3d 270, 278-80 (6th Cir. 2001)
for an action such as a transmission corridor that will not be constructed by or expressly permitted by the federal agency preparing an environmental impact statement, there must be sufficient federal control and responsibility that the action qualifies as a federal action; LBP-14-9, 80 NRC 45 (2014)
only those activities that have sufficient federal involvement to qualify as federal actions need be included in the scope of the proposed action evaluated in an environmental impact statement; LBP-14-9, 80 NRC 47 (2014)
- Southwest Williamson County Community Ass'n, Inc. v. Slater*, 243 F.3d 270, 281 (6th Cir. 2001)
federal decisionmakers have authority to exercise sufficient control or responsibility over the nonfederal projects so as to influence the outcome of the project; LBP-14-9, 80 NRC 49 (2014)
test for determining when a nonfederal project should be analyzed under NEPA as a major federal action is discussed; LBP-14-9, 80 NRC 48 (2014)
- Southwest Williamson County Community Ass'n, Inc. v. Slater*, 243 F.3d 270, 281-83 (6th Cir. 2001)
to be analyzed under NEPA as a major federal action, a nonfederal project must restrict or limit the statutorily prescribed federal decisionmakers' choice of reasonable alternatives; LBP-14-9, 80 NRC 48 (2014)
- Southwest Williamson County Community Ass'n, Inc. v. Slater*, 243 F.3d 270, 283-84 (6th Cir. 2001)
for a nonfederal project to be analyzed under NEPA as a major federal action, federal decisionmakers must have authority to exercise sufficient control or responsibility over the nonfederal project so as to influence the outcome of the project; LBP-14-9, 80 NRC 48 (2014)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998)
current adjudicatory procedures and policies provide a latitude to the Commission, its licensing boards, and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings; CLI-14-10, 80 NRC 164 n.39 (2014)
NRC adjudicatory rules are designed to promote fair and efficient resolution of disputes; CLI-14-7, 80 NRC 8 n.30 (2014)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21-22 (1998)
all parties are obliged to follow the procedures in 10 C.F.R. Part 2 and board scheduling orders; CLI-14-10, 80 NRC 164 n.36 (2014)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22-23 (1998)
licensing boards should only use sua sponte review in extraordinary circumstances; LBP-14-9, 80 NRC 38 n.65 (2014)
- Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 453 (1981)
NRC Rules of Practice provide the board with substantial authority to regulate hearing procedures; CLI-14-10, 80 NRC 164 n.39 (2014)
- Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981)
regardless of a party's resources, fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and NRC regulations; CLI-14-10, 80 NRC 164 (2014)
- Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980)
NEPA does not require agencies to elevate environmental concerns over other appropriate considerations; LBP-14-9, 80 NRC 40 (2014)
- Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987)
segmentation is to be avoided in order to ensure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions; LBP-14-9, 80 NRC 41 (2014)
- Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-380, 5 NRC 572, 575 (1977)
licensing board role is not confined to arbitration of those environmental controversies as may happen to have been placed before them by the litigants in the particular case; LBP-14-9, 80 NRC 66 (2014)

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- Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2), CLI-14-3, 79 NRC 31, 33-34, 37 (2014)
because of special circumstances presented by waste confidence, Commission directs that waste confidence contentions be held in abeyance pending its further direction; CLI-14-8, 80 NRC 78 n.23 (2014)
- Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2), CLI-14-3, 79 NRC 31, 36-37 (2014)
degree to which pendency of a new contention at the time of the board's ruling on an initial hearing petition tolled the time for filing any appeals from that decision regarding the admissibility of the contentions would be a matter for Commission determination; LBP-14-12, 80 NRC 141 n.3 (2014)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), LBP-10-12, 71 NRC 656, 662 n.9 (2010)
"prima facie" is not defined in NRC regulations, but is interpreted to mean a substantial showing; LBP-14-16, 80 NRC 194 n.64 (2014)
- Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985)
construction of a road to facilitate logging and the sale of timber from the logging are "connected actions" that have to be addressed in a single environmental impact statement; LBP-14-9, 80 NRC 41, 46 (2014)
- Thomas v. Peterson*, 753 F.2d 754, 759-60 (9th Cir. 1985)
for construction of a transmission corridor to constitute a connected action under 40 C.F.R. 1508.25, the corridor must lack independent utility, that is, its sole purpose must be serving the proposed nuclear power plant; LBP-14-9, 80 NRC 45 (2014)
- Town of Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988)
failure to include all connected actions within the scope of the proposed action is generally referred to as segmentation; LBP-14-9, 80 NRC 41 (2014)
segmentation or piecemealing occurs when an action is divided into component parts, each involving action with less significant environmental effects; LBP-14-9, 80 NRC 41 (2014)
- Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974)
environmental impact statements must address interdependent projects when the dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken; LBP-14-9, 80 NRC 45 n.107 (2014)
projects lack independent utility when it would be irrational, or at least unwise, to build one without the other; LBP-14-9, 80 NRC 41 (2014)
- Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)
NEPA requirements are subject to a rule of reason, and an environmental impact statement need not address remote and highly speculative consequences; LBP-14-9, 80 NRC 42 (2014)
- Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 158 (2011)
suspending a proceeding is a drastic action that will not be taken absent immediate threats to public health and safety or other compelling reason; CLI-14-7, 80 NRC 7 (2014)
- Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 158-59 (2011)
to determine whether suspension of an adjudication or licensing decision is warranted, the Commission considers whether moving forward will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes; CLI-14-7, 80 NRC 7 (2014)
- Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 174 (2011)
if NRC determines that changes to its current environmental assessment rules are warranted, it can revisit whether an individual licensing review or adjudication should be held in abeyance pending the outcome of a relevant rulemaking; CLI-14-7, 80 NRC 9 (2014)
- Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 174-75 (2011)
petitioners have not shown compelling circumstances requiring NRC to suspend final licensing decisions pending completion of rulemaking; CLI-14-7, 80 NRC 9 (2014)
- Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 175 (2011)
given that NRC will have the opportunity to further consider the concerns that rulemaking petitioners have expressed, and as it further considers actions related to the Fukushima events, it declines to suspend any proceeding pending resolution of the rulemaking petition; CLI-14-7, 80 NRC 8 n.31 (2014)

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- United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324-25 (2011)
government fulfills its trust duties by executing federal law, not by waiving federal law; LBP-14-16, 80 NRC 196 (2014)
- Vermont Department of Public Service v. United States*, 684 F.3d 149, 156 (D.C. Cir. 2012)
in an action under the Hobbs Act for review of an NRC final order, exhaustion of remedies is not a jurisdictional requirement; LBP-14-9, 80 NRC 69 (2014)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)
NEPA requirement to prepare an environmental impact statement is a procedural mechanism designed to ensure that agencies give proper consideration to the environmental consequences of their actions; LBP-14-9, 80 NRC 40 (2014)
- Webster v. U.S. Department of Agriculture*, 2011 WL 8788223, at *8 (N.D. W. Va. June 13, 2011)
action with potential impacts subsequent to the initial federal action may not constitute a proposed action if it is insufficiently certain; LBP-14-9, 80 NRC 45-46 & n.115 (2014)
- Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-94-3, 39 NRC 95, 101 n.7 (1994)
appropriate means of challenging licensee actions undertaken in accordance with 10 C.F.R. 50.59 is through a petition under 10 C.F.R. 2.206; CLI-14-11, 80 NRC 175, 179 (2014)

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- 10 C.F.R. 2.202(a)(3)
target of an enforcement order has the right to demand and receive, not merely request, a hearing;
LBP-14-11, 80 NRC 128 (2014)
- 10 C.F.R. 2.206
hearing request on safety concerns over steam generator replacement is referred to the Executive Director
for Operations for disposition; CLI-14-11, 80 NRC 168 (2014)
request that NRC immediately shut down plants until all turbine building high-energy line break concerns
are identified and those important to safety were corrected is granted in part; DD-14-5, 80 NRC 206-19
(2014)
- 10 C.F.R. 2.307(a)
intervenor's request for extension of time is granted because it is unopposed and intervenors have shown
good cause for the modest extension; CLI-14-10, 80 NRC 161 n.16 (2014)
- 10 C.F.R. 2.309(a)-(f)
for proceedings in which a Federal Register notice is not published, the hearing request shall be filed by
the later of 60 days after publication of notice on the NRC website or 60 days after the requestor
receives actual notice of a pending application, but not more than 60 days after agency action on the
application; CLI-14-11, 80 NRC 172 (2014)
to obtain a hearing, petitioner must show that its request is timely, that it has standing to obtain a
hearing, and that it has proposed at least one admissible contention; CLI-14-11, 80 NRC 171 (2014)
- 10 C.F.R. 2.309(b)(3)(i)
for proceedings for which a Federal Register notice of agency action is published, the hearing request
must be filed not later than the time specified in the notice of proposed action; CLI-14-11, 80 NRC
172 (2014)
- 10 C.F.R. 2.309(c)
to the extent that contentions raise matters other than onsite spent fuel storage, the board should assess
their admissibility under generally applicable rules of practice; CLI-14-8, 80 NRC 80 (2014)
- 10 C.F.R. 2.309(c)(1)
Commission does not consider hearing requests after the deadline in section 2.309(b) has passed absent a
determination that the petitioner has demonstrated good cause by showing the criteria of this section
have been met; CLI-14-11, 80 NRC 175-176 (2014)
- 10 C.F.R. 2.309(e)
discretionary intervention is permitted only where at least one petitioner has established standing and at
least one admissible contention has been admitted; CLI-14-11, 80 NRC 179 (2014)
- 10 C.F.R. 2.309(f)
to the extent that contentions raise matters other than onsite spent fuel storage, the board should assess
their admissibility under generally applicable rules of practice; CLI-14-8, 80 NRC 80 (2014)
- 10 C.F.R. 2.309(f)(1)(iii)
contentions that are the subject of general rulemaking by the Commission may not be litigated in
individual licensing proceedings; CLI-14-8, 80 NRC 79 n.27 (2014); LBP-14-16, 80 NRC 191-92 (2014)
- 10 C.F.R. 2.310(b)
proceedings on enforcement matters must be conducted under the procedures of Subpart G unless all
parties agree otherwise; LBP-14-11, 80 NRC 128 n.8 (2014)

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- 10 C.F.R. 2.314
counsel has an ethical duty of candor to disclose to a tribunal any relevant information and/or legal authority that is adverse to the director's position, especially when the target of the government's enforcement action is not represented by counsel; LBP-14-11, 80 NRC 127-28 n.6 (2014)
- 10 C.F.R. 2.315(d)
amicus curiae briefs may be filed when the Commission has taken up a matter pursuant to section 2.341 or sua sponte; CLI-14-11, 80 NRC 171 n.20 (2014)
- 10 C.F.R. 2.319
broad discretion is given to NRC licensing boards in the conduct of NRC adjudicatory proceedings, and the Commission generally defers to board case management decisions; CLI-14-10, 80 NRC 164 (2014)
presiding officers have the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, and to avoid delay and to maintain order and have all the powers necessary to those ends; CLI-14-10, 80 NRC 164 n.38 (2014)
- 10 C.F.R. 2.319(k)
licensing boards are expected to set procedures to ensure that the case is managed efficiently, in a manner that is fair to all of the parties; CLI-14-10, 80 NRC 164 n.39 (2014)
- 10 C.F.R. 2.320
boards may take disciplinary action against a party that fails to comply with any prehearing order, as long as the action is just; CLI-14-10, 80 NRC 164-165 (2014)
- 10 C.F.R. 2.321(c)
presiding officers have the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, and to avoid delay and to maintain order and have all the powers necessary to those ends; CLI-14-10, 80 NRC 164 n.38 (2014)
- 10 C.F.R. 2.323(d)
counsel has an ethical duty of candor to disclose to a tribunal any relevant information and/or legal authority that is adverse to the director's position, especially when the target of the government's enforcement action is not represented by counsel; LBP-14-11, 80 NRC 127-28 n.6 (2014)
- 10 C.F.R. 2.323(e)
motions for reconsideration must be filed within 10 days of the action for which reconsideration is requested; CLI-14-10, 80 NRC 164 n.34 (2014)
- 10 C.F.R. 2.329(a)
board conducted an initial scheduling conference to discuss development of an initial scheduling order that would help achieve just resolution of a dispute as efficiently and expeditiously as possible; LBP-14-11, 80 NRC 127 (2014)
- 10 C.F.R. 2.329(e)
initial scheduling orders set forth issues or matters in controversy to be determined in the proceeding; LBP-14-11, 80 NRC 128 (2014)
- 10 C.F.R. 2.334(b)
filing deadlines will not be modified unless a party, in advance of the deadline, petitions the board for a change and demonstrates that there is good cause for such a change; LBP-14-11, 80 NRC 136 (2014)
- 10 C.F.R. 2.335
boards are precluded from hearing rule challenge absent a showing of special circumstances; LBP-14-9, 80 NRC 49 (2014)
- 10 C.F.R. 2.335(a)
collateral attacks on NRC regulations, unsupported by any showing of special circumstances warranting a waiver, are rejected; LBP-14-16, 80 NRC 202 (2014)
contentions that are the subject of general rulemaking by the Commission may not be litigated in individual licensing proceedings; CLI-14-8, 80 NRC 79 n.27 (2014)
even if petitioner disputes that the Commission's newly adopted Continued Storage Rule satisfies the requirements of the National Environmental Policy Act or the court's decision, it cannot challenge the adoption or validity of the rule itself before a board; LBP-14-15, 80 NRC 155 (2014)
no NRC rule or regulation or provision thereof is subject to attack in an adjudicatory proceeding unless a waiver is granted by the Commission; LBP-14-16, 80 NRC 193 (2014)

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- participant may request waiver of a current rule or regulation in a specific proceeding under special circumstances as an exception to the prohibition against challenging NRC rules or regulations in adjudicatory proceedings; CLI-14-7, 80 NRC 6 (2014)
- 10 C.F.R. 2.335(b)
- collateral attacks on NRC regulations, unsupported by any showing of special circumstances warranting a waiver, are rejected; LBP-14-15, 80 NRC 153 (2014); LBP-14-16, 80 NRC 202 (2014)
- participant may request the waiver of a current rule or regulation in a specific proceeding under special circumstances as an exception to the prohibition against challenging NRC rules or regulations in adjudicatory proceedings; CLI-14-7, 80 NRC 6 (2014); LBP-14-16, 80 NRC 193 (2014)
- petition for a rule waiver must be accompanied by an affidavit stating with particularity the special circumstances alleged to justify the waiver or exception requested; LBP-14-16, 80 NRC 196 n.79 (2014)
- sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted; LBP-14-16, 80 NRC 194 (2014)
- special circumstances are required for a rule waiver; LBP-14-16, 80 NRC 186 (2014)
- 10 C.F.R. 2.335(d)
- licensing board initially determines, based on the record, whether a prima facie showing has been made by the petitioner for its rule waiver request, and then the board must certify the matter directly to the Commission for a final determination; LBP-14-16, 80 NRC 193, 194 (2014)
- 10 C.F.R. 2.338(b)
- parties pursuing settlement may seek to have a settlement judge appointed; LBP-14-11, 80 NRC 133 (2014)
- 10 C.F.R. 2.338(f)
- settlement is encouraged, but the fact that a possible settlement is being negotiated does not change any of the deadlines set forth in the initial scheduling order; LBP-14-11, 80 NRC 133 (2014)
- 10 C.F.R. 2.340(b)
- because the final environmental impact statement had been issued and the board had ruled that a contention remained procedurally defective, it was an appropriate point for board consideration of whether the contention merited sua sponte review; LBP-14-9, 80 NRC 37 (2014)
- board requests that the Commission approve the board's determination that sua sponte review is warranted; LBP-14-9, 80 NRC 27 (2014)
- licensing boards may request Commission approval to consider the merits of a serious environmental issue even when it was excluded from the proceeding for procedural reasons; LBP-14-9, 80 NRC 38 (2014)
- sua sponte authority of presiding officer is compared under predecessor rule 10 C.F.R. 2.760a; LBP-14-9, 80 NRC 38 (2014)
- untimely filed contention is appropriate for sua sponte board review; LBP-14-9, 80 NRC 26-27 (2014)
- 10 C.F.R. 2.340(b)(1)
- boards may make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer; LBP-14-9, 80 NRC 38 (2014)
- 10 C.F.R. 2.341(b)(2)
- intervenor's motion for an enlargement of the page limit for their petition for review is granted; CLI-14-10, 80 NRC 161 n.16 (2014)
- 10 C.F.R. 2.341(b)(4)(i)
- on appeal intervenors must show that the board's resolution of the contested issue in favor of applicant is clearly erroneous; CLI-14-10, 80 NRC 166 (2014)
- 10 C.F.R. 2.341(b)(4)(i)-(v)
- petition for review will be granted at the Commission's discretion upon a showing that petitioner has raised a substantial question as to any elements of this regulation; CLI-14-10, 80 NRC 161 (2014)
- 10 C.F.R. 2.704(a)
- within 45 days of the initial scheduling order, target of the enforcement order must provide certain information and documents to the NRC enforcement director; LBP-14-11, 80 NRC 133-34 (2014)

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- 10 C.F.R. 2.704(a)(2)
scope of mandatory disclosures that parties must make under Subpart G is defined by the disputed issues alleged with particularity in the pleadings; LBP-14-11, 80 NRC 128 (2014)
- 10 C.F.R. 2.705(b)
NRC Staff counsel may file written interrogatories that the target of an enforcement order must answer; LBP-14-11, 80 NRC 134 (2014)
- 10 C.F.R. 2.705(b)(1)
scope of discovery under Subpart G covers any matter that is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party; LBP-14-11, 80 NRC 128-29 (2014)
- 10 C.F.R. 2.705(f)
as soon as practicable after issuance of the initial scheduling order, parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the proceeding or any portion thereof, to make or arrange for the disclosures required by section 2.704, and to develop a proposed discovery plan; LBP-14-11, 80 NRC 132-33 (2014)
discovery may not begin until 10 days after petitioner and the Director have held the mandatory consultation; LBP-14-11, 80 NRC 134 (2014)
- 10 C.F.R. 2.706(a)
NRC Staff counsel may take the deposition of the target of an enforcement order or any other person; LBP-14-11, 80 NRC 134 (2014)
- 10 C.F.R. 2.707(a)
NRC Staff counsel may require the target of an enforcement order to provide the Director with a copy of any designated relevant document that is within his possession, custody, or control; LBP-14-11, 80 NRC 134 (2014)
- 10 C.F.R. 2.709
within certain constraints, target of an enforcement order may pursue discovery against the NRC Staff; LBP-14-11, 80 NRC 134 (2014)
- 10 C.F.R. 2.709(a)(1)
target of an enforcement order may require NRC Staff to attend a prehearing meeting where he can require that Staff member to answer questions orally under oath; LBP-14-11, 80 NRC 134 (2014)
- 10 C.F.R. 2.709(a)(2)
target of an enforcement order may serve interrogatories on NRC Staff, must show that answers to the interrogatories are necessary to a proper decision in the proceeding, and may ask the board to direct NRC Staff to answer those interrogatories; LBP-14-11, 80 NRC 134 (2014)
- 10 C.F.R. 2.709(a)(3), (4)
target of an enforcement order may require NRC Staff to attend a prehearing meeting where he can require that Staff member to answer questions orally under oath; LBP-14-11, 80 NRC 134 (2014)
- 10 C.F.R. 2.709(a)(6)
scope of mandatory disclosures that parties must make under Subpart G is defined by the disputed issues alleged with particularity in the pleadings; LBP-14-11, 80 NRC 128 (2014)
- 10 C.F.R. 2.709(a)(6)(i)(A)
target of an enforcement order must be provided a copy of all NRC Staff documents that are relevant to disputed issues alleged with particularity in the pleadings; LBP-14-11, 80 NRC 133 (2014)
- 10 C.F.R. 2.760a
matters not put into controversy by the parties will be examined and decided by the presiding officer only in extraordinary circumstances where he determines that a serious safety, environmental, or common defense and security matter exists; LBP-14-9, 80 NRC 38 n.63 (2014)
- 10 C.F.R. 2.802(a)
rulemaking petitioners assert that NRC Staff's review of the expedited-transfer issue generated new and significant information regarding the environmental impacts of spent fuel storage; CLI-14-7, 80 NRC 5 (2014)
- 10 C.F.R. 2.802(d)
rulemaking petitioner who is also a participant in a licensing proceeding may request suspension of that proceeding pending the outcome of the rulemaking petition; CLI-14-7, 80 NRC 6 (2014)

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- suspension provision provides an opportunity for a participant to ensure that a successful rulemaking petition is applied in an ongoing adjudication; CLI-14-7, 80 NRC 7 (2014)
- 10 C.F.R. 2.1320(b)(3)
following an evidentiary hearing, presiding officer certifies the record of the proceeding to the Commission for its final decision; LBP-14-10, 80 NRC 85-86 (2014)
- 10 C.F.R. 30.10(a)(1)
choosing to store a radiographic exposure device at a facility that did not comply with NRC security requirements and was not an authorized storage location under the license is considered deliberate misconduct; LBP-14-11, 80 NRC 129 (2014)
- 10 C.F.R. 50.10
limited work authorization rule narrowed the scope of activities requiring permission from NRC in the form of an LWA by eliminating the concept of commencement of construction formerly described in section 50.10(c) and the authorization formerly described in section 50.10(e)(1); LBP-14-9, 80 NRC 31 (2014)
- 10 C.F.R. 50.10(a)(2)(vii)
in the 2007 limited work authorization rule, NRC decided that the building of transmission lines to serve a nuclear power plant would no longer be classified as a construction activity and would no longer require authorization from NRC; LBP-14-9, 80 NRC 49 (2014)
- 10 C.F.R. 50.10(c)
amendment to the definition of construction generally prohibited, absent an NRC construction permit, any clearing of land, excavation, or other substantial action that would adversely affect the natural environment of a site and construction of nonnuclear facilities such as turbogenerators and turbine buildings for use in connection with the facility; LBP-14-9, 80 NRC 29 (2014)
NRC's broad definition of "construction" in the pre-2007 version of the regulation was originally added to Part 50 because of the interpretation that enactment of NEPA required NRC to expand its permitting/licensing authority; LBP-14-9, 80 NRC 53 (2014)
- 10 C.F.R. 50.36(b)
NRC is authorized to impose environmental conditions on a license to prevent or mitigate adverse environmental impacts that might otherwise be caused by the construction or operation of a nuclear power plant; LBP-14-9, 80 NRC 49 (2014)
- 10 C.F.R. 50.59
licensees are allowed to make changes to a facility without obtaining a license amendment if certain criteria are satisfied; CLI-14-11, 80 NRC 168, 179 (2014)
- 10 C.F.R. 50.59(c)(1)
circumstances under which licensee may make changes to the facility and procedures as described in its Updated Final Safety Analysis Report or conduct tests or experiments not otherwise described in the UFSAR without obtaining a license amendment under 10 C.F.R. 50.90 are described; CLI-14-11, 80 NRC 168 n.3 (2014)
- 10 C.F.R. 50.59(d)(1)
licensee must maintain records of changes in the facility made pursuant to section 50.59(c)(1) that include a written evaluation that provides the bases for the determination that the change does not require a license amendment pursuant to section 50.59(c)(2); CLI-14-11, 80 NRC 169 n.4 (2014)
- 10 C.F.R. 50.90
licensees cannot amend the terms of their license unilaterally; CLI-14-11, 80 NRC 173 (2014)
- 10 C.F.R. Part 50, Appendix B
applicant must establish and implement its own quality assurance program when it enters into a contract for the conduct of safety-related combined license application activities and to retain overall control of safety-related activities performed by the contractor; CLI-14-10, 80 NRC 159 n.7 (2014)
- 10 C.F.R. Part 50, Appendix B, Criterion I
applicant may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility for the program; CLI-14-10, 80 NRC 165-66 (2014)
- 10 C.F.R. 51.4(1)(ii)(G)
building of transmission lines is excluded from the definition of construction; LBP-14-9, 80 NRC 31 (2014)

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- 10 C.F.R. 51.14(b)
definition of “connected actions” in 40 C.F.R. 1508.25 is also adopted by this NRC regulation; LBP-14-9, 80 NRC 41 (2014)
NRC adopted the Council on Environmental Quality’s definition of “effects” in 40 C.F.R. 1508.8; LBP-14-9, 80 NRC 42 (2014)
- 10 C.F.R. 51.20
NRC Staff is required to prepare environmental impact statements for reactor licensing proceedings; CLI-14-7, 80 NRC 6 n.13 (2014)
- 10 C.F.R. 51.23
Commission instituted a rulemaking to revise the agency’s generic determination on the environmental impacts of continued storage of spent nuclear fuel; LBP-14-12, 80 NRC 139 (2014)
generic findings are reflected regarding impacts of spent fuel storage after the cessation of licensed operation of a nuclear power plant; CLI-14-8, 80 NRC 74 (2014)
purpose of the regulation is to restrict repetitive litigation at the licensing board level on the continued storage and disposal of spent nuclear fuel; LBP-14-16, 80 NRC 198 (2014)
regulation governing the storage and disposal of spent nuclear fuel was vacated; LBP-14-15, 80 NRC 154 (2014)
- 10 C.F.R. 51.23(a)
rule expressed the Commission’s reasonable assurance that a repository was likely to be available by 2007-2009; LBP-14-16, 80 NRC 188 (2014)
spent fuel can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation and there is reasonable assurance that sufficient mined geologic repository capacity will be available when necessary; CLI-14-8, 80 NRC 74 (2014)
- 10 C.F.R. 51.23(b)
agency did not need to assess site-specific impacts of continuing to store spent fuel in either an onsite or offsite storage facility in new reactor licensing environmental impact statements or environmental assessments beyond the expiration dates of reactor licenses; LBP-14-16, 80 NRC 188 (2014)
allegation that the Continued Storage Rule and generic environmental impact statement fail to address the trust responsibility the NRC owes an Indian tribe represents a collateral attack on the Continued Storage Rule and GEIS; LBP-14-16, 80 NRC 192-193 (2014)
discussion of any environmental impact of spent fuel storage during the period following the term of the reactor operating license in any environmental impact statement, environmental assessment, environmental report, or other analysis prepared in connection with enumerated power reactor and dry cask licenses is excluded; CLI-14-8, 80 NRC 74, 78 (2014)
license applicants are not required to discuss the environmental impacts of spent nuclear fuel storage in a reactor facility storage pool or an ISFSI for the period following the term of the reactor operating license, reactor combined license, or ISFSI license; LBP-14-16, 80 NRC 192 n.57 (2014)
waste confidence undergirds new reactor licensing and power reactor license renewal; CLI-14-8, 80 NRC 76 (2014)
- 10 C.F.R. 51.28, 51.29
definition of the scope of the environmental impact statement is the responsibility of the NRC Staff; LBP-14-9, 80 NRC 52 (2014)
- 10 C.F.R. 51.29(a)(1)
NRC Staff is directed to use 40 C.F.R. 1502.4 to determine the scope of the proposed action that is the subject of an agency environmental impact statement; LBP-14-9, 80 NRC 40, 52 n.157 (2014)
NRC Staff must correctly evaluate basic issues whether or not they were raised by intervenors; LBP-14-9, 80 NRC 69 (2014)
- 10 C.F.R. 51.45(b)(1), (2), (5)
requirements for environmental reports are listed; LBP-14-9, 80 NRC 58 (2014)
- 10 C.F.R. 51.45(c)
regulation contains no language modifying NRC Staff’s obligation under NRC and CEQ regulations to include connected actions in the scope of the proposed action, and the statement of considerations cannot interpret what the regulation itself does not contain; LBP-14-9, 80 NRC 52-53 (2014)

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- regulation contains no language to the effect that a proposed action that is the subject of an agency environmental impact statement must include all connected actions as defined in 40 C.F.R. 1508.25; LBP-14-9, 80 NRC 52 (2014)
- 10 C.F.R. 51.53(c)(3)(ii)(L)
contention regarding mitigation alternatives is effectively a collateral attack on this regulation, which exempts applicants from having to reanalyze severe accident mitigation alternatives during the renewal process; LBP-14-15, 80 NRC 153 (2014)
- license renewal applicant is not required to perform a new severe accident mitigation alternatives analysis; LBP-14-15, 80 NRC 153 (2014)
- purpose of the exemption is to reflect NRC's view that one severe accident mitigation alternatives analysis, as a general matter, satisfies NRC obligation to consider measures to mitigate both the risk and the environmental impacts of severe accidents; LBP-14-15, 80 NRC 154 (2014)
- 10 C.F.R. 51.53(c)(3)(iv)
environmental reports must discuss new SAMAs addressed in more recent reports for other nuclear power plants of the same or similar boiling water reactor Mark II design; LBP-14-15, 80 NRC 152-53 (2014)
- 10 C.F.R. 51.71
draft environmental impact statement must address matters specified in section 51.45; LBP-14-9, 80 NRC 58 n.184 (2014)
- suspension of proceedings is not appropriate where petitioners seek revision of NRC's existing rules, and no regulatory gap currently exists with regard to those provisions; CLI-14-7, 80 NRC 9 n.32 (2014)
- 10 C.F.R. 51.71(d) & n.3
blanket reliance by NRC Staff on Clean Water Act permits is not permitted; LBP-14-9, 80 NRC 63-64 (2014)
- 10 C.F.R. 51.71(d)
draft environmental impact statement must include a preliminary analysis that considers and weighs the environmental effects of and alternatives to the proposed action and alternatives available for reducing or avoiding adverse environmental effects; LBP-14-9, 80 NRC 43 (2014)
- once NRC has properly defined the scope of the proposed action, including any connected actions, the agency's environmental impact statement must evaluate the environmental effects of the proposed action; LBP-14-9, 80 NRC 42 (2014)
- 10 C.F.R. 51.72
NRC rules provide a process to prepare supplemental draft or final environmental impact statements when the agency identifies new and significant information; CLI-14-7, 80 NRC 8 (2014)
- 10 C.F.R. 51.73
NRC's NEPA regulations require a request for public comment on a draft environmental impact statement and a supplement to a DEIS distributed in accordance with 10 C.F.R. 51.74 and on any supplement to the FEIS prepared pursuant to 10 C.F.R. 51.92(a) or (b); LBP-14-9, 80 NRC 68 (2014)
- 10 C.F.R. 51.90
NRC Staff's final environmental impact statement must be prepared in accordance with the requirements of 10 C.F.R. 51.71 for a draft environmental impact statement; LBP-14-9, 80 NRC 43, 58 n.184 (2014)
- once NRC has properly defined the scope of the proposed action, including any connected actions, the agency's environmental impact statement must evaluate the environmental effects of the proposed action; LBP-14-9, 80 NRC 42 (2014)
- 10 C.F.R. 51.92
NRC rules provide a process to prepare supplemental draft or final environmental impact statements when the agency identifies new and significant information; CLI-14-7, 80 NRC 8 (2014)
- 10 C.F.R. 51.92(f)(1)
NRC's NEPA regulations require a request for public comment on a draft environmental impact statement and a supplement to a DEIS distributed in accordance with 10 C.F.R. 51.74 and on any supplement to the FEIS prepared pursuant to 10 C.F.R. 51.92(a) or (b); LBP-14-9, 80 NRC 68 (2014)
- 10 C.F.R. 51.95
suspension of proceedings is not appropriate where petitioners seek revision of NRC's existing rules, and no regulatory gap currently exists with regard to those provisions; CLI-14-7, 80 NRC 9 n.32 (2014)

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- 10 C.F.R. 51.101(a)
excluding the transmission corridor from the scope of the proposed action also removes it from the limitation on actions; LBP-14-9, 80 NRC 56 (2014)
important consequence of decision whether to include new construction within the scope of the proposed action is that, if it is included, it will be subject to the limitation on actions in this regulation; LBP-14-9, 80 NRC 44 (2014)
- 10 C.F.R. 51.101(a)(1)
when NRC Staff prepares a final environmental impact statement, then, until a record of decision is issued, no action concerning the proposal may be taken by the Commission that would have an adverse environmental impact or limit the choice of reasonable alternatives; LBP-14-9, 80 NRC 44 (2014)
- 10 C.F.R. 51.101(a)(2)
any action concerning applicant's proposal that would have an adverse environmental impact or limit the choice of reasonable alternatives may be grounds for denial of a license; LBP-14-9, 80 NRC 44 (2014)
- 10 C.F.R. 51.107(a)(1)
final environmental impact statements must comply with sections 102(2)(A), (C), and (E) of NEPA and the agency's Part 51 regulations; LBP-14-9, 80 NRC 57-58 (2014)
- 10 C.F.R. 51.107(a)(3)
NRC is authorized to impose environmental conditions on a license to prevent or mitigate adverse environmental impacts that might otherwise be caused by the construction or operation of a nuclear power plant; LBP-14-9, 80 NRC 49 (2014)
NRC uses environmental impact information to determine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values; LBP-14-9, 80 NRC 42 (2014)
- 10 C.F.R. Part 51, Subpart A, App. B
NRC has resolved many environmental impacts for license renewal through a generic environmental impact statement and these issues need not be revisited in site-specific environmental impact statements; CLI-14-7, 80 NRC 6 n.13 (2014)
suspension of proceedings is not appropriate where petitioners seek revision of NRC's existing rules, and no regulatory gap currently exists with regard to those provisions; CLI-14-7, 80 NRC 9 n.32 (2014)
- 33 C.F.R. 320.4(a)(1), 323.3(g)
when reviewing an application for a 404 permit under the Clean Water Act, the Corps of Engineers evaluates whether issuance of the permit is in the public interest, weighing all relevant factors, including economic, environmental, and aesthetic concerns; LBP-14-9, 80 NRC 63 (2014)
- 40 C.F.R. 230.10(a), (c), (d)
Corps of Engineers may not issue a 404 permit if there exists a practicable alternative that would have less adverse impact on the aquatic system, the permit would cause significant degradation of the water of the United States, or appropriate and practicable mitigation has not been undertaken; LBP-14-9, 80 NRC 63 (2014)
- 40 C.F.R. 1502.4
agencies shall use the criteria for scope in 40 C.F.R. 1508.25 to determine which proposal(s) shall be the subject of a particular statement; LBP-14-9, 80 NRC 40 (2014)
proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement; LBP-14-9, 80 NRC 52 (2014)
- 40 C.F.R. 1502.4(a)
proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement; LBP-14-9, 80 NRC 40 (2014)
- 40 C.F.R. 1502.14
alternatives analysis is the heart of the environmental impact statement; LBP-14-9, 80 NRC 43 (2014)
- 40 C.F.R. 1502.14(a)
when considering alternatives, agencies are to rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives that were eliminated from detailed study, briefly discuss the reasons for their having been eliminated; LBP-14-9, 80 NRC 43 (2014)

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- 40 C.F.R. 1502.14(b)
when considering alternatives, agencies are to devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits; LBP-14-9, 80 NRC 43 (2014)
- 40 C.F.R. 1502.22
agency is required to do more than simply state that necessary information is unavailable; LBP-14-9, 80 NRC 62 n.206 (2014)
- 40 C.F.R. 1502.22(a)
when information relevant to a reasonably foreseeable environmental effect is incomplete or unavailable, an agency is required to obtain the unavailable information and include it in the environmental impact statement as long as the costs are not exorbitant; LBP-14-9, 80 NRC 42 (2014)
- 40 C.F.R. 1502.22(b)
environmental impact statements must address all reasonably foreseeable environmental impacts even if the probability of such an occurrence is low; LBP-14-9, 80 NRC 42 (2014)
if the cost of obtaining information is exorbitant, NRC must still include in the environmental impact statement a statement that the information is unavailable, the relevance of the unavailable information, a summary of existing credible scientific evidence, and the agency's evaluation of the impacts that might be caused; LBP-14-9, 80 NRC 42 (2014)
- 40 C.F.R. 1508.7
"cumulative impact" is the impact on the environment that results from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or nonfederal) or person undertakes such other actions; LBP-14-9, 80 NRC 43 (2014)
- 40 C.F.R. 1508.8
"effects" include both direct effects, which are caused by the action and occur at the same time and place, and indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable; LBP-14-9, 80 NRC 42 (2014)
"effects" include ecological, aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative; LBP-14-9, 80 NRC 42 (2014)
when information relevant to a reasonably foreseeable environmental effect is incomplete or unavailable, an agency is required to obtain the unavailable information and include it in the environmental impact statement as long as the costs are not exorbitant; LBP-14-9, 80 NRC 42 (2014)
- 40 C.F.R. 1508.23
preparation of an environmental impact statement on a proposal should be timed so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal; LBP-14-9, 80 NRC 46 n.116 (2014)
proposals may exist in fact as well as by agency declaration that one exists; LBP-14-9, 80 NRC 45 n.110 (2014)
- 40 C.F.R. 1508.25
for construction of a transmission corridor to constitute a connected action, three requirements must be met; LBP-14-9, 80 NRC 45 (2014)
proposed action that is the subject of an agency environmental impact statement must include all connected actions as defined in this regulation; LBP-14-9, 80 NRC 52 (2014)
"scope" of an environmental impact statement is defined as the range of actions, alternatives, and impacts to be considered in an environmental impact statement; LBP-14-9, 80 NRC 40 (2014)
- 40 C.F.R. 1508.25(a)(1)
once NRC has properly defined the scope of the proposed action, including any connected actions, the agency's environmental impact statement must evaluate the environmental effects of the proposed action; LBP-14-9, 80 NRC 42 (2014)
proposed action that is the subject of an environmental impact statement must include all connected actions; LBP-14-9, 80 NRC 41 (2014)
- 40 C.F.R. 1508.25(a)(1)(ii), (iii)
separate actions are "connected" if, among other things, they cannot or will not proceed unless other actions have been taken previously or simultaneously, or they are interdependent parts of a larger action and depend on the larger action for their justification; LBP-14-9, 80 NRC 41 (2014)

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40 C.F.R. 1508.25(a)(1)(iii)

although NRC may regard preconstruction activities as outside the scope of a combined license application, these activities are within the scope of the NEPA review because they are all connected actions; LBP-14-9, 80 NRC 35 (2014)

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STATUTES

- Administrative Procedure Act, 5 U.S.C. § 558(c)
suspending a final decision indefinitely in an adjudicatory proceeding upon receipt of a claim of new and significant information runs counter to the goal of promoting fair and efficient resolution of disputes; CLI-14-7, 80 NRC 8 n.30 (2014)
- Atomic Energy Act, 189a, 42 U.S.C. § 2239(a)(1)(A)
NRC must afford interested persons an opportunity for a hearing on the granting, suspending, revoking, or amending of any license; CLI-14-11, 80 NRC 173 (2014)
- National Environmental Policy Act, 42 U.S.C. § 4331(b)
federal agencies are required to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-14-9, 80 NRC 40 (2014)
federal agencies must use all practicable means to avoid environmental degradation to the extent consistent with other essential considerations of national policy; LBP-14-9, 80 NRC 29 (2014)
- National Environmental Policy Act, 42 U.S.C. § 4332
when an agency proposes a major federal action significantly affecting the quality of the human environment, preparation of an environmental impact statement concerning the proposed action is required; LBP-14-9, 80 NRC 40 (2014)
- National Environmental Policy Act, 102(2), 42 U.S.C. § 4332(2)
government agencies are required to comply with NEPA to the fullest extent possible; LBP-14-9, 80 NRC 50 (2014)
- National Environmental Policy Act, 42 U.S.C. § 4332(2)(C)
requirement to prepare an environmental impact statement applies to major federal actions, not to private or state actions; LBP-14-9, 80 NRC 47 (2014)
- National Environmental Policy Act, 102(2)(C)(i), (ii), (v), 42 U.S.C. § 4332(2)(C)(i), (ii), (v)
environmental impact statements must provide a detailed statement concerning environmental impact of the proposed action, any adverse environmental effects that cannot be avoided should the proposal be implemented, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; LBP-14-9, 80 NRC 58 (2014)
- National Environmental Policy Act, 42 U.S.C. § 4332(2)(C)(iii)
environmental impact statements must include a detailed statement of reasonable alternatives to the proposed action; LBP-14-9, 80 NRC 43 (2014)

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OTHERS**

Black's Law Dictionary 1310 (9th ed. 2009)

prima facie showing on a rule waiver request is not a final determination on the merits, but merely requires presentation of enough information to allow the board to infer (absent disproof) that special circumstances exist; LBP-14-16, 80 NRC 193-94 (2014)

Model Rules of Professional Conduct R. 3.3(a)(3)

counsel has an ethical duty of candor to disclose to a tribunal any relevant information and/or legal authority that is adverse to the director's position, especially when the target of the government's enforcement action is not represented by counsel; LBP-14-11, 80 NRC 127-28 n.6 (2014)

SUBJECT INDEX

ABEYANCE OF CONTENTION

Commission directed that licensing boards hold waste disposal contentions in abeyance pending further Commission order, which would be issued in conjunction with a then to-be-determined agency response to the District of Columbia Circuit's ruling; CLI-14-8, 80 NRC 71 (2014); LBP-14-12, 80 NRC 138 (2014)

licensing boards were instructed to hold in abeyance any contentions on waste confidence matters until after the Commission's issuance of a new generic environmental impact statement; LBP-14-16, 80 NRC 183 (2014)

new contention concerning continued storage of spent nuclear fuel is ordered held in abeyance pending further Commission order; LBP-14-14, 80 NRC 144 (2014)

ABEYANCE OF PROCEEDING

if NRC determines that changes to its current environmental assessment rules are warranted, it can revisit whether an individual licensing review or adjudication should be held in abeyance pending the outcome of a relevant rulemaking; CLI-14-7, 80 NRC 1 (2014)

ADJUDICATORY PROCEEDINGS

administrative agencies are allowed to address issues of general applicability through rulemaking instead of individual adjudications, and the choice made between proceeding by general rule or by individual, ad hoc, litigation is one that lies primarily within the informed discretion of the administrative agency; LBP-14-16, 80 NRC 183 (2014)

current adjudicatory procedures and policies provide a latitude to the Commission, its licensing boards, and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings; CLI-14-10, 80 NRC 157 (2014)

scope of an adjudicatory hearing is limited to the notice of hearing, which in licensing matters normally extends only to the application at issue; CLI-14-11, 80 NRC 167 (2014)

See also Termination of Proceeding

ADMINISTRATIVE PROCEDURE ACT

suspending a final decision indefinitely in an adjudicatory proceeding upon receipt of a claim of new and significant information runs counter to the goal of promoting fair and efficient resolution of disputes; CLI-14-7, 80 NRC 1 (2014)

AFFIDAVITS

petition for a rule waiver must be accompanied by an affidavit stating with particularity the special circumstances alleged to justify the waiver or exception requested; LBP-14-16, 80 NRC 183 (2014)

AMENDMENT

See Operating License Amendments

AMICUS PLEADINGS

although NRC rules do not provide for the filing of amicus curiae briefs on motions filed pursuant to 10 C.F.R. 2.323, as a matter of discretion the Commission has reviewed both an amicus brief and the opposition to it; CLI-14-11, 80 NRC 167 (2014)

amicus curiae briefs may be filed when the Commission has taken up a matter pursuant to section 2.341 or sua sponte; CLI-14-11, 80 NRC 167 (2014)

APPEALS

degree to which pendency of a new contention at the time of the board's ruling on an initial hearing petition tolled the time for filing any appeals from that decision regarding the admissibility of the contentions would be a matter for Commission determination; LBP-14-12, 80 NRC 138 (2014)

SUBJECT INDEX

in an action under the Hobbs Act for review of an NRC final order, exhaustion of remedies is not a jurisdictional requirement; LBP-14-9, 80 NRC 15 (2014)
on appeal intervenors must show that the Board's resolution of the contested issue in favor of applicant is clearly erroneous; CLI-14-10, 80 NRC 157 (2014)

APPELLATE REVIEW

Commission gives substantial deference to licensing board findings of fact, and it will not overturn a board's factual findings unless they are not even plausible in light of the record viewed in its entirety; CLI-14-10, 80 NRC 157 (2014)
petition for review will be granted at the Commission's discretion upon a showing that petitioner has raised a substantial question as to any elements of 10 C.F.R. 2.341(b)(4)(i)-(v); CLI-14-10, 80 NRC 157 (2014)

APPLICANTS

applicant must establish and implement its own quality assurance program when it enters into a contract for the conduct of safety-related combined license application activities and to retain overall control of safety-related activities performed by the contractor; CLI-14-10, 80 NRC 157 (2014)

ATOMIC ENERGY ACT

agency approval or authorization is a necessary component of NRC action that affords a hearing opportunity under AEA § 189a, but not all agency approvals granted to licensees constitute de facto license amendments; CLI-14-11, 80 NRC 167 (2014)
in ruling that NRC had appropriately interpreted the AEA to include regulatory authority over attendant transmission lines, the court did not decide whether NEPA is an independent source of substantive jurisdiction; LBP-14-9, 80 NRC 15 (2014)
National Environmental Policy Act and AEA and the regulations promulgated under each must be viewed in pari materia; LBP-14-9, 80 NRC 15 (2014)
neither licensee activities nor NRC inspection of or inquiry about those activities provides the opportunity for a hearing under the AEA because those activities only concern compliance with the terms of an existing license; CLI-14-11, 80 NRC 167 (2014)
NRC has long interpreted its statutory authority under the AEA to include conditioning approval of nuclear power plant licenses on environmentally acceptable routing of transmission lines; LBP-14-9, 80 NRC 15 (2014)
NRC must afford interested persons an opportunity for a hearing on the granting, suspending, revoking, or amending of any license; CLI-14-11, 80 NRC 167 (2014)
regulation of offsite transmission lines is within NRC's authority under section 101 and nothing in the AEA precludes NRC from implementing, through issuance of conditional licenses, NEPA's environmental mandate; LBP-14-9, 80 NRC 15 (2014)
under AEA, NRC can issue conditional licenses for regulatory purposes, and thus there can be no objection to its use of the same means to achieve environmental ends as well; LBP-14-9, 80 NRC 15 (2014)

BOILING-WATER REACTORS

environmental reports must discuss new SAMAs addressed in more recent reports for other nuclear power plants of the same or similar BWR Mark II design; LBP-14-15, 80 NRC 151 (2014)

BRIEFS, APPELLATE

intervenors' motion for an enlargement of the page limit for their petition for review is granted; CLI-14-10, 80 NRC 157 (2014)

BURDEN OF PERSUASION

case law test for rule waiver establishes an appreciably higher burden for would-be waiver seekers than does 10 C.F.R. 2.335(b); LBP-14-16, 80 NRC 183 (2014)

CASE MANAGEMENT

because petitions to suspend licensing decisions and proposed contentions are inextricably linked, and as a matter of sound case management, the Commission exercises its inherent supervisory authority over agency adjudications to review the petitions and motions itself; CLI-14-9, 80 NRC 147 (2014)
broad discretion is given to NRC licensing boards in the conduct of NRC adjudicatory proceedings, and the Commission generally defers to board case management decisions; CLI-14-10, 80 NRC 157 (2014)
licensing boards are expected to set procedures to ensure the case is managed efficiently, in a manner that is fair to all of the parties; CLI-14-10, 80 NRC 157 (2014)

SUBJECT INDEX

- NRC Rules of Practice provide the board with substantial authority to regulate hearing procedures; CLI-14-10, 80 NRC 157 (2014)
- presiding officers have the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, and to avoid delay and to maintain order, and they have all the powers necessary to those ends; CLI-14-10, 80 NRC 157 (2014)
- CERTIFICATION**
- following an evidentiary proceeding, presiding officer certifies the record of the proceeding to the Commission for its final decision; LBP-14-10, 80 NRC 85 (2014)
- licensing board initially determines, based on the record, whether a prima facie showing has been made by petitioner for its rule waiver request, and then the board must certify the matter directly to the Commission for a final determination; LBP-14-16, 80 NRC 183 (2014)
- CLEAN WATER ACT**
- blanket reliance by NRC Staff on Clean Water Act permits is not permitted; LBP-14-9, 80 NRC 15 (2014)
- when reviewing an application for a 404 permit under the Clean Water Act, the Corps of Engineers evaluates whether issuance of the permit is in the public interest, weighing all relevant factors, including economic, environmental, and aesthetic concerns; LBP-14-9, 80 NRC 15 (2014)
- COMBINED LICENSE APPLICATION**
- although NRC may regard preconstruction activities as outside the scope of a combined license application, these activities are within the scope of the NEPA review because they are all connected actions; LBP-14-9, 80 NRC 15 (2014)
- waste confidence undergirds new reactor licensing and power reactor license renewal; CLI-14-8, 80 NRC 71 (2014)
- COMBINED LICENSE PROCEEDINGS**
- licensing board's hearing arguably allows for additional and a more rigorous public scrutiny of the final environmental impact statement than does the usual circulation for comment; LBP-14-9, 80 NRC 15 (2014)
- COMBINED LICENSES**
- NRC has authority to impose environmental restrictions on new transmission lines intended to serve new nuclear power plants; LBP-14-9, 80 NRC 15 (2014)
- NRC has long interpreted its statutory authority under the Atomic Energy Act to include conditioning approval of nuclear power plant licenses on environmentally acceptable routing of transmission lines; LBP-14-9, 80 NRC 15 (2014)
- NRC is authorized to impose environmental conditions on a license to prevent or mitigate adverse environmental impacts that might otherwise be caused by the construction or operation of a nuclear power plant; LBP-14-9, 80 NRC 15 (2014)
- COMPLIANCE**
- government agencies are required to comply with NEPA to the fullest extent possible; LBP-14-9, 80 NRC 15 (2014)
- merely pointing to the compliance program is in no way sufficient to support a scientific finding that spent fuel pools will not cause a significant environmental impact during the extended storage period; LBP-14-9, 80 NRC 15 (2014)
- no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance with NEPA; LBP-14-9, 80 NRC 15 (2014)
- CONNECTED ACTIONS**
- action with potential impacts subsequent to the initial federal action may not constitute a proposed action if it is insufficiently certain; LBP-14-9, 80 NRC 15 (2014)
- actions that lack independent utility are connected actions; LBP-14-9, 80 NRC 15 (2014)
- although NRC may regard preconstruction activities as outside the scope of a combined license application, these activities are within the scope of the NEPA review because they are all connected actions; LBP-14-9, 80 NRC 15 (2014)
- construction of a road to facilitate logging and the sale of timber from the logging are "connected actions" that have to be addressed in a single environmental impact statement; LBP-14-9, 80 NRC 15 (2014)

SUBJECT INDEX

- definition of “connected actions” in 40 C.F.R. 1508.25 is also adopted by NRC regulations; LBP-14-9, 80 NRC 15 (2014)
- environmental impact statements must address interdependent projects when the dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken; LBP-14-9, 80 NRC 15 (2014)
- failure to include all connected actions within the scope of the proposed action is generally referred to as segmentation; LBP-14-9, 80 NRC 15 (2014)
- for an action such as a transmission corridor that will not be constructed by or expressly permitted by the federal agency preparing an environmental impact statement, there must be sufficient federal control and responsibility that the action qualifies as a federal action; LBP-14-9, 80 NRC 15 (2014)
- for construction of a transmission corridor to constitute a connected action, three requirements must be met; LBP-14-9, 80 NRC 15 (2014)
- grounds were found for litigation regarding defendants’ assertion that treatment of highway interchanges and village development as cumulative impacts in the final environmental impact statement was sufficient under NEPA even if these actions should have been treated as connected actions under the statute’s implementing regulations; LBP-14-9, 80 NRC 15 (2014)
- multiple projects are often deemed connected actions despite being undertaken by separate entities; LBP-14-9, 80 NRC 15 (2014)
- no language is included in 10 C.F.R. 51.45(c) to the effect that a proposed action that is the subject of an agency environmental impact statement must include all connected actions as defined in 40 C.F.R. 1508.25; LBP-14-9, 80 NRC 15 (2014)
- power plants without transmission lines are like airplanes that can’t fly; LBP-14-9, 80 NRC 15 (2014)
- projects lack independent utility when it would be irrational, or at least unwise, to build one without the other; LBP-14-9, 80 NRC 15 (2014)
- proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement; LBP-14-9, 80 NRC 15 (2014)
- separate actions are “connected” if, among other things, they cannot or will not proceed unless other actions have been taken previously or simultaneously, or they are interdependent parts of a larger action and depend on the larger action for their justification; LBP-14-9, 80 NRC 15 (2014)
- CONSIDERATION OF ALTERNATIVES**
- agencies are to rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives that were eliminated from detailed study, briefly discuss the reasons for their having been eliminated; LBP-14-9, 80 NRC 15 (2014)
- alternatives analysis is the heart of the environmental impact statement; LBP-14-9, 80 NRC 15 (2014)
- Corps of Engineers may not issue a 404 permit if there exists a practicable alternative that would have less adverse impact on the aquatic system, the permit would cause significant degradation of the water of the United States, or appropriate and practicable mitigation has not been undertaken; LBP-14-9, 80 NRC 15 (2014)
- draft environmental impact statement must include a preliminary analysis that considers and weighs the environmental effects of and alternatives to the proposed action and alternatives available for reducing or avoiding adverse environmental effects; LBP-14-9, 80 NRC 15 (2014)
- environmental impact statements must include a detailed statement of reasonable alternatives to the proposed action; LBP-14-9, 80 NRC 15 (2014)
- existence of reasonable but unexamined alternatives renders an environmental impact statement inadequate; LBP-14-9, 80 NRC 15 (2014)
- NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-14-9, 80 NRC 15 (2014)
- when NRC Staff prepares a final environmental impact statement, then, until a record of decision is issued, no action concerning the proposal may be taken by the Commission that would have an adverse environmental impact or limit the choice of reasonable alternatives; LBP-14-9, 80 NRC 15 (2014)
- CONSTRUCTION**
- amendment to the definition of construction generally prohibited, absent an NRC construction permit, any clearing of land, excavation, or other substantial action that would adversely affect the natural

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- environment of a site and construction of nonnuclear facilities such as turbogenerators and turbine buildings for use in connection with the facility; LBP-14-9, 80 NRC 15 (2014)
- any action concerning applicant's proposal that would have an adverse environmental impact or limit the choice of reasonable alternatives may be grounds for denial of a license; LBP-14-9, 80 NRC 15 (2014)
- building of transmission lines is excluded from the definition of construction; LBP-14-9, 80 NRC 15 (2014)
- excluding the transmission corridor from the scope of the proposed action also removes it from the limitation on actions; LBP-14-9, 80 NRC 15 (2014)
- important consequence of decision whether to include new construction within the scope of the proposed action is that, if it is included, it will be subject to the limitation on actions in 10 C.F.R. 51.101(a); LBP-14-9, 80 NRC 15 (2014)
- in the 2007 limited work authorization rule, NRC decided that the building of transmission lines to serve a nuclear power plant would no longer be classified as a construction activity and would no longer require authorization from NRC; LBP-14-9, 80 NRC 15 (2014)
- NRC is authorized to impose environmental conditions on a license to prevent or mitigate adverse environmental impacts that might otherwise be caused by the construction or operation of a nuclear power plant; LBP-14-9, 80 NRC 15 (2014)
- NRC's broad definition of "construction" in the pre-2007 version of the regulation was originally added to Part 50 because of the interpretation that enactment of NEPA required NRC to expand its permitting/licensing authority; LBP-14-9, 80 NRC 15 (2014)
- scope of activities requiring permission from NRC in the form of limited work authorization was narrowed by eliminating the concept of commencement of construction formerly described in section 50.10(c) and the authorization formerly described in section 50.10(e)(1); LBP-14-9, 80 NRC 15 (2014)
- CONSTRUCTION OF MEANING**
- "prima facie" is not defined in NRC regulations, but is interpreted to mean a substantial showing; LBP-14-16, 80 NRC 183 (2014)
- CONSTRUCTION PERMITS**
- approval of permits to a nuclear power plant was conditioned on the rerouting of two offsite transmission lines to avoid environmental impacts on marshlands, tree species, and migratory waterfowl; LBP-14-9, 80 NRC 15 (2014)
- CONSULTATION DUTY**
- as soon as practicable after issuance of the initial scheduling order, parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the proceeding or any portion thereof, to make or arrange for the disclosures required by section 2.704, and to develop a proposed discovery plan; LBP-14-11, 80 NRC 125 (2014)
- discovery may not begin until 10 days after petitioner and the Director have held the mandatory consultation; LBP-14-11, 80 NRC 125 (2014)
- CONTENTIONS**
- See Abeyance of Contention
- CONTENTIONS, ADMISSIBILITY**
- after reviewing the background regarding the continued storage rule, the Commission directed licensing boards to reject waste confidence contentions pending before them; LBP-14-12, 80 NRC 138 (2014)
- allegation that the Continued Storage Rule and GEIS fail to address the trust responsibility the NRC owes an Indian tribe represents a collateral attack on the Continued Storage Rule and GEIS; LBP-14-16, 80 NRC 183 (2014)
- because generic impact determinations on impacts of continued storage have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings; LBP-14-15, 80 NRC 151 (2014)
- because petitions to suspend licensing decisions and proposed contentions are inextricably linked, and as a matter of sound case management, the Commission exercises its inherent supervisory authority over agency adjudications to review the petition and motions itself; CLI-14-9, 80 NRC 147 (2014)
- because the final environmental impact statement had been issued and the board had ruled that a contention remained procedurally defective, it was an appropriate point for board consideration of whether the contention merited sua sponte review; LBP-14-9, 80 NRC 15 (2014)

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boards are directed to reject waste storage contentions pending before them; LBP-14-16, 80 NRC 183 (2014)

boards are precluded from hearing rule challenges absent a showing of special circumstances; LBP-14-9, 80 NRC 15 (2014)

collateral attacks on NRC regulations, unsupported by any showing of special circumstances warranting a waiver, are rejected; LBP-14-16, 80 NRC 183 (2014)

Commission approval of the Continued Storage Rule and GEIS mandates that contentions discussing the long-term storage of spent nuclear fuel are not to be heard by individual licensing boards; LBP-14-16, 80 NRC 183 (2014)

Commission exercised its inherent supervisory authority over agency adjudications to review petition and motions challenging the Continued Storage Rule; LBP-14-16, 80 NRC 183 (2014)

Commission lifted suspension on final licensing decisions, declined to accept contentions concerning continued storage of spent nuclear fuel, and directed boards to reject pending contentions on this issue; LBP-14-14, 80 NRC 144 (2014)

contention challenging a Commission rule is beyond the scope of the proceeding; LBP-14-16, 80 NRC 183 (2014)

contention regarding mitigation alternatives is effectively a collateral attack on the regulation that exempts applicants from having to reanalyze severe accident mitigation alternatives during the renewal process; LBP-14-15, 80 NRC 151 (2014)

contention that applicant must include a discussion of environmental impacts of spent fuel pool leakage, fires, and lack of a spent fuel repository is dismissed; LBP-14-12, 80 NRC 138 (2014)

contentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings; CLI-14-8, 80 NRC 71 (2014); LBP-14-15, 80 NRC 151 (2014); LBP-14-16, 80 NRC 183 (2014)

degree to which pendency of a new contention at the time of the board's ruling on an initial hearing petition tolled the time for filing any appeals from that decision regarding the admissibility of the contentions would be a matter for Commission determination; LBP-14-12, 80 NRC 138 (2014)

discretionary intervention is permitted only where at least one petitioner has established standing and at least one contention has been admitted; CLI-14-11, 80 NRC 167 (2014)

even if petitioner disputes that the Commission's newly adopted Continued Storage Rule satisfies the requirements of the National Environmental Policy Act or the court's decision, it cannot challenge the adoption or validity of the rule itself before a board; LBP-14-15, 80 NRC 151 (2014)

grounds were found for litigation regarding defendants' assertion that treatment of highway interchanges and village development as cumulative impacts in the final environmental impact statement was sufficient under NEPA even if these actions should have been treated as connected actions under the statute's implementing regulations; LBP-14-9, 80 NRC 15 (2014)

in view of its adoption of a revised rule codifying NRC's generic determinations regarding the pertinent environmental impacts associated with continued storage of spent nuclear fuel, the Commission directs boards to reject pending contentions on this issue; LBP-14-13, 80 NRC 142 (2014)

intervenor in adjudicatory proceedings are prohibited from challenging regulations unless they first obtain a waiver by showing special circumstances; LBP-14-15, 80 NRC 151 (2014)

it would not be consistent with the NRC's statutorily mandated responsibilities to spend time and resources on matters that are of no substantive regulatory significance; LBP-14-16, 80 NRC 183 (2014)

licensing boards are directed to reject pending waste confidence contentions that had been held in abeyance; LBP-14-15, 80 NRC 151 (2014)

no NRC rule or regulation or provision thereof is subject to attack in an adjudicatory proceeding unless a waiver is granted by the Commission; LBP-14-16, 80 NRC 183 (2014)

NRC has resolved many environmental impacts for license renewal through a generic environmental impact statement and these issues need not be revisited in site-specific environmental impact statements; CLI-14-7, 80 NRC 1 (2014)

participant may request waiver of a current rule or regulation in a specific proceeding under special circumstances as an exception to the prohibition against challenging NRC rules or regulations in adjudicatory proceedings; CLI-14-7, 80 NRC 1 (2014)

scope of an adjudicatory hearing is limited to the notice of hearing, which, in licensing matters, normally extends only to the application at issue; CLI-14-11, 80 NRC 167 (2014)

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to obtain a hearing, petitioner must show that its request is timely, that it has standing to obtain a hearing, and that it has proposed at least one admissible contention; CLI-14-11, 80 NRC 167 (2014)
to the extent that contentions raise matters other than onsite spent fuel storage, the board should assess their admissibility under the generally applicable rules of practice; CLI-14-8, 80 NRC 71 (2014)
waiver petition would permit consideration of an issue in an adjudicatory proceeding that would otherwise impermissibly challenge an NRC rule or regulation; CLI-14-7, 80 NRC 1 (2014)

CONTENTIONS, LATE-FILED

untimely filed contention is appropriate for sua sponte board review; LBP-14-9, 80 NRC 15 (2014)

CONTINUED STORAGE RULE

after reviewing the background regarding the continued storage rule, the Commission directed licensing boards to reject waste confidence contentions pending before them; LBP-14-12, 80 NRC 138 (2014)
agency did not need to assess site-specific impacts of continuing to store the spent fuel in either an onsite or offsite storage facility in new reactor licensing environmental impact statements or environmental assessments beyond the expiration dates of reactor licenses; LBP-14-16, 80 NRC 183 (2014)

allegation that the Continued Storage Rule and GEIS fail to address the trust responsibility the NRC owes an Indian tribe represents a collateral attack on the Continued Storage Rule and GEIS; LBP-14-16, 80 NRC 183 (2014)

because generic impact determinations on impacts of continued storage have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings; LBP-14-15, 80 NRC 151 (2014)

because petitions to suspend licensing decisions and proposed contentions are inextricably linked, and as a matter of sound case management, the Commission exercises its inherent supervisory authority over agency adjudications to review the petition and motions itself; CLI-14-9, 80 NRC 147 (2014)

Commission approval of the Continued Storage Rule and GEIS mandates that contentions discussing the long-term storage of spent nuclear fuel are not to be heard by individual licensing boards; LBP-14-16, 80 NRC 183 (2014)

Commission approved issuance of a revised rule codifying NRC's generic determinations regarding the environmental impacts of continued storage of spent nuclear fuel beyond a reactor's licensed operating life; LBP-14-14, 80 NRC 144 (2014)

Commission exercised its inherent supervisory authority over agency adjudications to review petition and motions challenging the Continued Storage Rule; LBP-14-16, 80 NRC 183 (2014)

Commission instituted a rulemaking to revise the agency's generic determination on the environmental impacts of continued storage of spent nuclear fuel; LBP-14-12, 80 NRC 138 (2014)

Commission lifted suspension on final licensing decisions, declined to accept contentions concerning continued storage of spent nuclear fuel, and directed boards to reject pending contentions on this issue; LBP-14-14, 80 NRC 144 (2014)

even if petitioner disputes that the Commission's newly adopted Continued Storage Rule satisfies the requirements of the National Environmental Policy Act or the court's decision, it cannot challenge the adoption or validity of the rule itself before a board; LBP-14-15, 80 NRC 151 (2014)

generic environmental impact statement was adopted to identify and analyze the environmental impacts of continued storage of spent nuclear fuel; LBP-14-16, 80 NRC 183 (2014)

impacts of continued storage will not vary significantly across sites and can be analyzed generically; LBP-14-16, 80 NRC 183 (2014)

in view of its adoption of a revised rule codifying NRC's generic determinations regarding the pertinent environmental impacts associated with continued storage of spent nuclear fuel, the Commission directs boards to reject pending contentions on this issue; LBP-14-13, 80 NRC 142 (2014)

NRC, by necessary implication, considered Indian tribe's trust responsibility concerns during its rulemaking; LBP-14-16, 80 NRC 183 (2014)

CONTRACTORS

applicant may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility for the program; CLI-14-10, 80 NRC 157 (2014)

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applicant must establish and implement its own quality assurance program when it enters into a contract for the conduct of safety-related combined license application activities and to retain overall control of safety-related activities performed by the contractor; CLI-14-10, 80 NRC 157 (2014)

COSTS

if the cost of obtaining information is exorbitant, NRC must still include in the environmental impact statement a statement that the information is unavailable, the relevance of the unavailable information, a summary of existing credible scientific evidence, and the agency's evaluation of the impacts that might be caused; LBP-14-9, 80 NRC 15 (2014)

when information relevant to a reasonably foreseeable environmental effect is incomplete or unavailable, an agency is required to obtain the unavailable information and include it in the environmental impact statement as long as costs are not exorbitant; LBP-14-9, 80 NRC 15 (2014)

COUNCIL ON ENVIRONMENTAL QUALITY GUIDELINES

definition of "connected actions" in 40 C.F.R. 1508.25 is also adopted by 10 C.F.R. 51.14(b); LBP-14-9, 80 NRC 15 (2014)

NRC adopted the Council on Environmental Quality's definition of "effects" in 40 C.F.R. 1508.8; LBP-14-9, 80 NRC 15 (2014)

NRC should use the provisions of a CEQ regulation, 40 C.F.R. 1502.4, to define the scope of an environmental impact statement; LBP-14-9, 80 NRC 15 (2014)

COUNSEL

counsel has an ethical duty of candor to disclose to a tribunal any relevant information and/or legal authority that is adverse to the director's position, especially when the target of the government's enforcement action is not represented by counsel; LBP-14-11, 80 NRC 125 (2014)

CUMULATIVE IMPACTS ANALYSIS

grounds were found for litigation regarding defendants' assertion that treatment of highway interchanges and village development as cumulative impacts in the final environmental impact statement was sufficient under NEPA even if these actions should have been treated as connected actions under the statute's implementing regulations; LBP-14-9, 80 NRC 15 (2014)

impact on the environment that results from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or nonfederal) or person undertakes such other actions is the cumulative impact; LBP-14-9, 80 NRC 15 (2014)

DEADLINES

filing deadlines will not be modified unless a party, in advance of the deadline, petitions the board for a change and demonstrates that there is good cause for such a change; LBP-14-11, 80 NRC 125 (2014)

for proceedings for which a Federal Register notice of agency action is published, the hearing request must be filed not later than the time specified in the notice of proposed action; CLI-14-11, 80 NRC 167 (2014)

for proceedings in which a Federal Register notice is not published, the hearing request shall be filed by the later of 60 days after publication of notice on the NRC website or 60 days after the requestor receives actual notice of a pending application, but not more than 60 days after agency action on the application; CLI-14-11, 80 NRC 167 (2014)

motions for reconsideration must be filed within 10 days of the action for which reconsideration is requested; CLI-14-10, 80 NRC 157 (2014)

settlement is encouraged, but the fact that a possible settlement is being negotiated does not change any of the deadlines set forth in the initial scheduling order; LBP-14-11, 80 NRC 125 (2014)

within 45 days of the initial scheduling order, target of the enforcement order must provide certain information and documents to the NRC enforcement director; LBP-14-11, 80 NRC 125 (2014)

DECISION ON THE MERITS

prima facie showing on a rule waiver request is not a final determination on the merits, but merely requires presentation of enough information to allow the board to infer (absent disproof) that special circumstances exist; LBP-14-16, 80 NRC 183 (2014)

DEFINITIONS

absent an NRC construction permit, amendment to the definition of construction generally prohibited any clearing of land, excavation, or other substantial action that would adversely affect the natural

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- environment of a site and construction of nonnuclear facilities such as turbogenerators and turbine buildings for use in connection with the facility; LBP-14-9, 80 NRC 15 (2014)
- building of transmission lines is excluded from the definition of construction; LBP-14-9, 80 NRC 15 (2014)
- “connected actions” are those that lack independent utility; LBP-14-9, 80 NRC 15 (2014)
- “cumulative impact” is the impact on the environment that results from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or nonfederal) or person undertakes such other actions; LBP-14-9, 80 NRC 15 (2014)
- “effects” include both direct effects, which are caused by the action and occur at the same time and place, and indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable; LBP-14-9, 80 NRC 15 (2014)
- NRC’s broad definition of “construction” in the pre-2007 version of the regulation was originally added to Part 50 because of the interpretation that enactment of NEPA required NRC to expand its permitting/licensing authority; LBP-14-9, 80 NRC 15 (2014)
- NRC’s decision to include transmission lines that serve a nuclear power plant within the definition of “utilization facility” in 42 U.S.C. § 2014(cc) was upheld; LBP-14-9, 80 NRC 15 (2014)
- separate actions are “connected” if, among other things, they cannot or will not proceed unless other actions have been taken previously or simultaneously, or they are interdependent parts of a larger action and depend on the larger action for their justification; LBP-14-9, 80 NRC 15 (2014)
- DELIBERATE MISCONDUCT**
- choosing to store a radiographic exposure device at a facility that did not comply with NRC security requirements and was not an authorized storage location under the license is considered deliberate misconduct; LBP-14-11, 80 NRC 125 (2014)
- DEMAND FOR HEARING**
- target of an enforcement order has the right to demand and receive, not merely request, a hearing; LBP-14-11, 80 NRC 125 (2014)
- DENIAL OF LICENSE**
- any action concerning applicant’s proposal that would have an adverse environmental impact or limit the choice of reasonable alternatives may be grounds for denial of a license; LBP-14-9, 80 NRC 15 (2014)
- DEPOSITIONS**
- NRC Staff counsel may take the deposition of the target of an enforcement order or any other person; LBP-14-11, 80 NRC 125 (2014)
- target of an enforcement order may require NRC Staff to attend a prehearing meeting where he can require that Staff member to answer questions orally under oath; LBP-14-11, 80 NRC 134 (2014); LBP-14-11, 80 NRC 125 (2014)
- DIESEL GENERATORS**
- equipment operability for emergency diesel generators is discussed; DD-14-5, 80 NRC 205 (2014)
- DIRECTORS’ DECISIONS**
- section 2.206 process provides stakeholders a forum to advance concerns and obtain full or partial relief, or written reasons why the requested relief is not warranted; CLI-14-11, 80 NRC 167 (2014)
- DISCLOSURE**
- counsel has an ethical duty of candor to disclose to a tribunal any relevant information and/or legal authority that is adverse to the director’s position, especially when the target of the government’s enforcement action is not represented by counsel; LBP-14-11, 80 NRC 125 (2014)
- scope of mandatory disclosures that parties must make under Subpart G is defined by the disputed issues alleged with particularity in the pleadings; LBP-14-11, 80 NRC 125 (2014)
- target of an enforcement order must be provided a copy of all NRC Staff documents that are relevant to disputed issues alleged with particularity in the pleadings; LBP-14-11, 80 NRC 125 (2014)
- within 45 days of the initial scheduling order, target of the enforcement order must provide certain information and documents to the NRC enforcement director; LBP-14-11, 80 NRC 125 (2014)
- DISCOVERY**
- discovery may not begin until 10 days after petitioner and the Director have held the mandatory consultation; LBP-14-11, 80 NRC 125 (2014)

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- NRC Staff counsel may require the target of an enforcement order to provide the Director with a copy of any designated relevant document that is within his possession, custody, or control; LBP-14-11, 80 NRC 125 (2014)
- scope of discovery under Subpart G covers any matter that is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party; LBP-14-11, 80 NRC 125 (2014)
- DISCOVERY AGAINST NRC STAFF**
- target of an enforcement order may serve interrogatories on NRC Staff, must show that answers to the interrogatories are necessary to a proper decision in the proceeding, and may ask the board to direct NRC Staff to answer those interrogatories; LBP-14-11, 80 NRC 125 (2014)
- within certain constraints, target of an enforcement order may pursue discovery against the NRC Staff; LBP-14-11, 80 NRC 125 (2014)
- DOCUMENTATION**
- licensee must maintain records of changes in the facility made pursuant to section 50.59(c)(1) that include a written evaluation that provides the bases for the determination that the change does not require a license amendment pursuant to section 50.59(c)(2); CLI-14-11, 80 NRC 167 (2014)
- DRAFT ENVIRONMENTAL IMPACT STATEMENT**
- DEIS must include a preliminary analysis that considers and weighs the environmental effects of and alternatives to the proposed action and alternatives available for reducing or avoiding adverse environmental effects; LBP-14-9, 80 NRC 15 (2014)
- NRC rules provide a process to prepare supplemental draft or final environmental impact statements when the agency identifies new and significant information; CLI-14-7, 80 NRC 1 (2014)
- NRC Staff must address matters specified in 10 C.F.R. 51.45; LBP-14-9, 80 NRC 15 (2014)
- NRC's NEPA regulations require a request for public comment on a DEIS and a supplement to a DEIS distributed in accordance with 10 C.F.R. 51.74 and on any supplement to the FEIS prepared pursuant to 10 C.F.R. 51.92(a) or (b); LBP-14-9, 80 NRC 15 (2014)
- ELECTRICAL DISTRIBUTION SYSTEM**
- See Transmission Lines
- ELECTRICAL EQUIPMENT**
- high temperature in the engineered safety feature switchgear rooms is discussed; DD-14-5, 80 NRC 205 (2014)
- structural limits on the block wall between the engineered safety feature switchgear rooms is discussed; DD-14-5, 80 NRC 205 (2014)
- EMERGENCY BACKUP POWER**
- equipment operability for emergency diesel generators is discussed; DD-14-5, 80 NRC 205 (2014)
- ENFORCEMENT ORDERS**
- target of an enforcement order has the right to demand and receive, not merely request, a hearing; LBP-14-11, 80 NRC 125 (2014)
- ENFORCEMENT PROCEEDINGS**
- as soon as practicable after issuance of the initial scheduling order, parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the proceeding or any portion thereof, to make or arrange for the disclosures required by section 2.704, and to develop a proposed discovery plan; LBP-14-11, 80 NRC 125 (2014)
- board conducted an initial scheduling conference to discuss development of an initial scheduling order that would help achieve just resolution of a dispute as efficiently and expeditiously as possible; LBP-14-11, 80 NRC 125 (2014)
- discovery may not begin until 10 days after petitioner and the Director have held the mandatory consultation; LBP-14-11, 80 NRC 125 (2014)
- initial scheduling orders set forth issues or matters in controversy to be determined in the proceeding; LBP-14-11, 80 NRC 125 (2014)
- NRC Staff counsel may file written interrogatories that the target of an enforcement order must answer; LBP-14-11, 80 NRC 125 (2014)
- NRC Staff counsel may require the target of an enforcement order to provide the Director with a copy of any designated relevant document that is within his possession, custody, or control; LBP-14-11, 80 NRC 125 (2014)

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- NRC Staff counsel may take the deposition of the target of an enforcement order or any other person; LBP-14-11, 80 NRC 125 (2014)
- proceedings must be conducted under the procedures of Subpart G unless all parties agree otherwise; LBP-14-11, 80 NRC 125 (2014)
- scope of discovery under Subpart G covers any matter that is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party; LBP-14-11, 80 NRC 125 (2014)
- scope of mandatory disclosures that parties must make under Subpart G is defined by the disputed issues alleged with particularity in the pleadings; LBP-14-11, 80 NRC 125 (2014)
- settlement is encouraged, but the fact that a possible settlement is being negotiated does not change any of the deadlines set forth in the initial scheduling order; LBP-14-11, 80 NRC 125 (2014)
- target of an enforcement order may require NRC Staff to attend a prehearing meeting where he can require that Staff member to answer questions orally under oath; LBP-14-11, 80 NRC 134 (2014); LBP-14-11, 80 NRC 125 (2014)
- target of an enforcement order may serve interrogatories on NRC Staff, must show that answers to the interrogatories are necessary to a proper decision in the proceeding, and may ask the board to direct NRC Staff to answer those interrogatories; LBP-14-11, 80 NRC 125 (2014)
- target of an enforcement order must be provided a copy of all NRC Staff documents that are relevant to disputed issues alleged with particularity in the pleadings; LBP-14-11, 80 NRC 125 (2014)
- within 45 days of the initial scheduling order, target of the enforcement order must provide certain information and documents to the NRC enforcement director; LBP-14-11, 80 NRC 125 (2014)
- within certain constraints, target of an enforcement order may pursue discovery against NRC Staff; LBP-14-11, 80 NRC 125 (2014)
- ENGINEERED SAFETY FEATURES**
- high temperature in the engineered safety feature switchgear rooms is discussed; DD-14-5, 80 NRC 205 (2014)
- structural limits on the block wall between the engineered safety feature switchgear rooms is discussed; DD-14-5, 80 NRC 205 (2014)
- ENVIRONMENTAL ANALYSIS**
- although NEPA does not require an agency preparing an environmental impact statement to respond to EPA concerns, an agency's failure even to address them in the EIS at the very least brings into question the sufficiency of the agency's analysis; LBP-14-9, 80 NRC 15 (2014)
- discussion of any environmental impact of spent fuel storage during the period following the term of the reactor operating license in any environmental impact statement, environmental assessment, environmental report, or other analysis prepared in connection with enumerated power reactor and dry cask licenses is excluded; CLI-14-8, 80 NRC 71 (2014)
- heated debate would not have occurred unless the label attached to the actions made a difference to the content, scope, and/or depth of environmental analysis; LBP-14-9, 80 NRC 15 (2014)
- ENVIRONMENTAL ASSESSMENT**
- agency did not need to assess site-specific impacts of continuing to store the spent fuel in either an onsite or offsite storage facility in new reactor licensing environmental impact statements or environmental assessments beyond the expiration dates of reactor licenses; LBP-14-16, 80 NRC 183 (2014)
- if NRC determines that changes to its current environmental assessment rules are warranted, it can revisit whether an individual licensing review or adjudication should be held in abeyance pending the outcome of a relevant rulemaking; CLI-14-7, 80 NRC 1 (2014)
- ENVIRONMENTAL EFFECTS**
- any action concerning applicant's proposal that would have an adverse environmental impact or limit the choice of reasonable alternatives may be grounds for denial of a license; LBP-14-9, 80 NRC 15 (2014)
- approval of permits to a nuclear power plant was conditioned on the rerouting of two offsite transmission lines to avoid environmental impacts on marshlands, tree species, and migratory waterfowl; LBP-14-9, 80 NRC 15 (2014)
- because petitions to suspend licensing decisions and proposed contentions are inextricably linked, and as a matter of sound case management, the Commission exercises its inherent supervisory authority over agency adjudications to review the petition and motions itself; CLI-14-9, 80 NRC 147 (2014)

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by 1974, NRC had adopted an aggressive approach to its environmental responsibilities in the context of transmission line siting; LBP-14-9, 80 NRC 15 (2014)

“effects” include both direct effects, which are caused by the action and occur at the same time and place, and indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable; LBP-14-9, 80 NRC 15 (2014)

“effects” include ecological, aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative; LBP-14-9, 80 NRC 15 (2014)

if the cost of obtaining information is exorbitant, NRC must still include in the environmental impact statement a statement that the information is unavailable, the relevance of the unavailable information, a summary of existing credible scientific evidence, and the agency’s evaluation of the impacts that might be caused; LBP-14-9, 80 NRC 15 (2014)

multiple projects are often deemed connected actions despite being undertaken by separate entities; LBP-14-9, 80 NRC 15 (2014)

NEPA does not require agencies to elevate environmental concerns over other appropriate considerations; LBP-14-9, 80 NRC 15 (2014)

NRC adopted the Council on Environmental Quality’s definition of “effects” in 40 C.F.R. 1508.8; LBP-14-9, 80 NRC 15 (2014)

NRC can, as a condition of licensure, insist that offsite transmission lines built solely to serve a nuclear facility be designed to minimize environmental disturbance; LBP-14-9, 80 NRC 15 (2014)

NRC is authorized to impose environmental conditions on a license to prevent or mitigate adverse environmental impacts that might otherwise be caused by the construction or operation of a nuclear power plant; LBP-14-9, 80 NRC 15 (2014)

under NEPA, federal agencies must use all practicable means to avoid environmental degradation to the extent consistent with other essential considerations of national policy; LBP-14-9, 80 NRC 15 (2014)

under the Atomic Energy Act, NRC can issue conditional licenses for regulatory purposes, and thus there can be no objection to its use of the same means to achieve environmental ends as well; LBP-14-9, 80 NRC 15 (2014)

when an action is divided into component parts, each involving action with less significant environmental effects, segmentation or piecemealing occurs; LBP-14-9, 80 NRC 15 (2014)

when information relevant to a reasonably foreseeable environmental effect is incomplete or unavailable, an agency is required to obtain the unavailable information and include it in the environmental impact statement as long as the costs are not exorbitant; LBP-14-9, 80 NRC 15 (2014)

ENVIRONMENTAL IMPACT STATEMENT

action with potential impacts subsequent to the initial federal action may not constitute a proposed action if it is insufficiently certain; LBP-14-9, 80 NRC 15 (2014)

agency did not need to assess site-specific impacts of continuing to store spent fuel in either an onsite or offsite storage facility in new reactor licensing environmental impact statements or environmental assessments beyond the expiration dates of reactor licenses; LBP-14-16, 80 NRC 183 (2014)

agency does not have to follow the Environmental Protection Agency’s comments, just take them seriously; LBP-14-9, 80 NRC 15 (2014)

almost every EIS contains some original research, and almost every time an EIS is ruled inadequate by a court, it is because more data or research is needed; LBP-14-9, 80 NRC 15 (2014)

alternatives analysis is the heart of the EIS; LBP-14-9, 80 NRC 15 (2014)

although NEPA does not require an agency preparing an EIS to respond to Environmental Protection Agency concerns, an agency’s failure even to address them in the EIS at the very least brings into question the sufficiency of the agency’s analysis; LBP-14-9, 80 NRC 15 (2014)

conclusory statement in an EIS unsupported by explanatory information of any kind not only fails to crystallize issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives; LBP-14-9, 80 NRC 15 (2014)

construction of a road to facilitate logging and the sale of timber from the logging are “connected actions” that have to be addressed in a single EIS; LBP-14-9, 80 NRC 15 (2014)

definition of the scope of the EIS is the responsibility of the NRC Staff; LBP-14-9, 80 NRC 15 (2014)

determination of minimal environmental impact would make little sense when an agency lacks essential information and has not sought to compile it through independent research; LBP-14-9, 80 NRC 15 (2014)

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EIS cannot fulfill its role of providing a springboard for public comment if it defers indefinitely and delegates to other agencies the duty to inform the public of the environmental impacts of the proposed action and potential measures to mitigate those impacts; LBP-14-9, 80 NRC 15 (2014)

environmental mitigation options must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated; LBP-14-9, 80 NRC 15 (2014)

Environmental Protection Agency determination that an EIS is unsatisfactory gives rise to a heightened obligation on the lead agency's part to explain clearly and in detail its reasons for proceeding; LBP-14-9, 80 NRC 15 (2014)

excluding the transmission corridor from the scope of the proposed action also removes it from the limitation on actions; LBP-14-9, 80 NRC 15 (2014)

existence of reasonable but unexamined alternatives renders an EIS inadequate; LBP-14-9, 80 NRC 15 (2014)

failure to include all connected actions within the scope of the proposed action is generally referred to as segmentation; LBP-14-9, 80 NRC 15 (2014)

federal courts of appeal have approved of the process by which an EIS is effectively amended through the adjudicatory process; LBP-14-9, 80 NRC 15 (2014)

for an action such as a transmission corridor that will not be constructed by or expressly permitted by the federal agency preparing an EIS, there must be sufficient federal control and responsibility that the action qualifies as a federal action; LBP-14-9, 80 NRC 15 (2014)

if the cost of obtaining information is exorbitant, NRC must still include in the EIS a statement that the information is unavailable, the relevance of the unavailable information, a summary of existing credible scientific evidence, and the agency's evaluation of the impacts that might be caused; LBP-14-9, 80 NRC 15 (2014)

important consequence of decision whether to include new construction within the scope of the proposed action is that, if it is included, it will be subject to the limitation on actions in 10 C.F.R. 51.101(a); LBP-14-9, 80 NRC 15 (2014)

merely referencing an actual or anticipated certification by another agency fails to satisfy NEPA requirements; LBP-14-9, 80 NRC 15 (2014)

NEPA requirements are subject to a rule of reason, and an EIS need not address remote and highly speculative consequences; LBP-14-9, 80 NRC 15 (2014)

NEPA requires each agency to undertake research needed to adequately expose environmental harms; LBP-14-9, 80 NRC 15 (2014)

no language is included in 10 C.F.R. 51.45(c) to the effect that a proposed action that is the subject of an agency environmental impact statement must include all connected actions as defined in 40 C.F.R. 1508.25; LBP-14-9, 80 NRC 15 (2014)

NRC must include an evaluation of failure to secure permanent disposal, as well as an improved analysis of spent fuel pool leaks and spent fuel pool fires; CLI-14-8, 80 NRC 71 (2014)

NRC should use the provisions of a CEQ regulation, 40 C.F.R. 1502.4, to define the scope of an EIS; LBP-14-9, 80 NRC 15 (2014)

NRC Staff is required to do more than simply state that necessary information is unavailable; LBP-14-9, 80 NRC 15 (2014)

NRC Staff is required to prepare EISs for reactor licensing proceedings; CLI-14-7, 80 NRC 1 (2014)

NRC Staff must address all reasonably foreseeable environmental impacts even if the probability of such an occurrence is low; LBP-14-9, 80 NRC 15 (2014)

NRC Staff must include a detailed statement of reasonable alternatives to the proposed action; LBP-14-9, 80 NRC 15 (2014)

NRC Staff must provide a detailed statement concerning environmental impact of the proposed action, any adverse environmental effects that cannot be avoided should the proposal be implemented, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented; LBP-14-9, 80 NRC 15 (2014)

NRC Staff review must address interdependent projects when the dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken; LBP-14-9, 80 NRC 15 (2014)

NRC Staff's reliance in an environmental impact statement on predicted future monitoring and regulatory compliance program to prevent environmental impacts is not permitted; LBP-14-9, 80 NRC 15 (2014)

SUBJECT INDEX

- NRC uses environmental impact information to determine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values; LBP-14-9, 80 NRC 15 (2014)
- once NRC has properly defined the scope of the proposed action, including any connected actions, the agency's EIS must evaluate the environmental effects of the proposed action; LBP-14-9, 80 NRC 15 (2014)
- only those activities that have sufficient federal involvement to qualify as federal actions need be included in the scope of the proposed action evaluated in an EIS; LBP-14-9, 80 NRC 15 (2014)
- preparation of an EIS on a proposal should be timed so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal; LBP-14-9, 80 NRC 15 (2014)
- proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement; LBP-14-9, 80 NRC 15 (2014)
- proposed action that is the subject of an agency environmental impact statement must include all connected actions as defined in 40 C.F.R. 1508.25; LBP-14-9, 80 NRC 15 (2014)
- requirement to prepare an EIS applies to major federal actions, not to private or state actions; LBP-14-9, 80 NRC 15 (2014)
- "scope" of an EIS is defined as the range of actions, alternatives, and impacts to be considered in an environmental impact statement; LBP-14-9, 80 NRC 15 (2014)
- segmentation is to be avoided in order to ensure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions; LBP-14-9, 80 NRC 15 (2014)
- when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered; LBP-14-9, 80 NRC 15 (2014)
- when an agency proposes a major federal action significantly affecting the quality of the human environment, preparation of an EIS concerning the proposed action is required; LBP-14-9, 80 NRC 15 (2014)
- when considering alternatives, agencies are to rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives that were eliminated from detailed study, briefly discuss the reasons for their having been eliminated; LBP-14-9, 80 NRC 15 (2014)
- when information relevant to a reasonably foreseeable environmental effect is incomplete or unavailable, an agency is required to obtain the unavailable information and include it in the EIS as long as the costs are not exorbitant; LBP-14-9, 80 NRC 15 (2014)
- See also Draft Environmental Impact Statement; Final Environmental Impact Statement; Generic Environmental Impact Statement; Supplemental Environmental Impact Statement
- ENVIRONMENTAL ISSUES**
- where the rules in question, as well as the contention itself, address compliance with NEPA and not safety issues under the Atomic Energy Act, the rule waiver is needed to address a significant environmental issue instead of a significant safety issue; LBP-14-16, 80 NRC 183 (2014)
- ENVIRONMENTAL REPORT**
- applicants must discuss new severe accident mitigation alternatives addressed in more recent reports for other nuclear power plants of the same or similar boiling water reactor Mark II design; LBP-14-15, 80 NRC 151 (2014)
- contention that applicant must include a discussion of environmental impacts of spent fuel pool leakage, fires, and lack of a spent fuel repository is dismissed; LBP-14-12, 80 NRC 138 (2014)
- requirements for ERs are listed in 10 C.F.R. 51.45(b)(1), (2), (5); LBP-14-9, 80 NRC 15 (2014)
- ENVIRONMENTAL REVIEW**
- although NRC may regard preconstruction activities as outside the scope of a combined license application, these activities are within the scope of the NEPA review because they are all connected actions; LBP-14-9, 80 NRC 15 (2014)
- although NRC takes the position that it lacks authority to impose environmental restrictions on transmission corridors, those impacts should have been analyzed as a direct effect of the NRC action even under NRC's new interpretation; LBP-14-9, 80 NRC 15 (2014)

SUBJECT INDEX

- blanket reliance by NRC Staff on Clean Water Act permits is not permitted; LBP-14-9, 80 NRC 15 (2014)
- environmental impact statements must address all reasonably foreseeable environmental impacts even if the probability of such an occurrence is low; LBP-14-9, 80 NRC 15 (2014)
- NEPA mandates a case-by-case balancing judgment on the part of federal agencies, not the private parties seeking federal action; LBP-14-9, 80 NRC 15 (2014)
- NEPA obligations supplement existing statutory authority and must be complied with to the fullest extent, unless there is a clear conflict of statutory authority; LBP-14-9, 80 NRC 15 (2014)
- NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-14-9, 80 NRC 15 (2014)
- no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance with NEPA; LBP-14-9, 80 NRC 15 (2014)
- NRC Staff is required to prepare environmental impact statements for reactor licensing proceedings; CLI-14-7, 80 NRC 1 (2014)
- NRC Staff must correctly evaluate basic issues whether or not they were raised by intervenors; LBP-14-9, 80 NRC 15 (2014)
- NRC uses environmental impact information to determine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values; LBP-14-9, 80 NRC 15 (2014)
- rulemaking petitioners assert that NRC Staff's review of the expedited-transfer issue generated new and significant information regarding the environmental impacts of spent fuel storage; CLI-14-7, 80 NRC 1 (2014)
- test for determining when a nonfederal project should be analyzed under NEPA as a major federal action is discussed; LBP-14-9, 80 NRC 15 (2014)
- to be analyzed under NEPA as a major federal action, a nonfederal project must restrict or limit the statutorily prescribed federal decisionmakers' choice of reasonable alternatives; LBP-14-9, 80 NRC 15 (2014)
- when reviewing an application for a 404 permit under the Clean Water Act, the Corps of Engineers evaluates whether issuance of the permit is in the public interest, weighing all relevant factors, including economic, environmental, and aesthetic concerns; LBP-14-9, 80 NRC 15 (2014)
- where increased air pollution in California resulting from two export turbines at a Mexican plants was a direct effect of the new transmission lines, DOE was required to evaluate the air pollution impacts under NEPA; LBP-14-9, 80 NRC 15 (2014)
- ERROR**
- on appeal intervenors must show that the board's resolution of the contested issue in favor of applicant is clearly erroneous; CLI-14-10, 80 NRC 157 (2014)
- ETHICAL ISSUES**
- counsel has an ethical duty of candor to disclose to a tribunal any relevant information and/or legal authority that is adverse to the director's position, especially when the target of the government's enforcement action is not represented by counsel; LBP-14-11, 80 NRC 125 (2014)
- EXCEPTIONS**
- sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted; LBP-14-16, 80 NRC 183 (2014)
- EXEMPTIONS**
- purpose of the exemption from 10 C.F.R. 51.53(c)(3)(ii)(L) is to reflect NRC's view that one severe accident mitigation alternatives analysis, as a general matter, satisfies NRC obligation to consider measures to mitigate both the risk and the environmental impacts of severe accidents; LBP-14-15, 80 NRC 151 (2014)
- where NRC has temporarily exempted the licensee, on the basis of an existing rule, from one of many rules made generally applicable by the license does not amount to a license amendment; CLI-14-11, 80 NRC 167 (2014)

SUBJECT INDEX

EXTENSION OF TIME

filing deadlines will not be modified unless a party, in advance of the deadline, petitions the board for a change and demonstrates that there is good cause for such a change; LBP-14-11, 80 NRC 125 (2014)
intervenor's request for extension of time is granted because it is unopposed and intervenors have shown good cause for the modest extension; CLI-14-10, 80 NRC 157 (2014)

FAIRNESS

current adjudicatory procedures and policies provide a latitude to the Commission, its licensing boards, and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings; CLI-14-10, 80 NRC 157 (2014)
regardless of a party's resources, fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and NRC regulations; CLI-14-10, 80 NRC 157 (2014)
to determine whether suspension of an adjudication or licensing decision is warranted, the Commission considers whether moving forward will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes; CLI-14-7, 80 NRC 1 (2014)

FEDERAL REGISTER

for proceedings for which a Federal Register notice of agency action is published, the hearing request must be filed not later than the time specified in the notice of proposed action; CLI-14-11, 80 NRC 167 (2014)

FINAL ENVIRONMENTAL IMPACT STATEMENT

because the FEIS had been issued and the board had ruled that a contention remained procedurally defective, it was an appropriate point for board consideration of whether the contention merited sua sponte review; LBP-14-9, 80 NRC 15 (2014)
FEIS does not comply with NEPA if it fails to meaningfully address EPA concerns in its decision; LBP-14-9, 80 NRC 15 (2014)
FEIS must comply with sections 102(2)(A), (C), and (E) of NEPA and NRC's Part 51 regulations; LBP-14-9, 80 NRC 15 (2014)
grounds were found for litigation regarding defendants' assertion that treatment of highway interchanges and village development as cumulative impacts in the FEIS was sufficient under NEPA even if these actions should have been treated as connected actions under the statute's implementing regulations; LBP-14-9, 80 NRC 15 (2014)
licensing board's hearing arguably allows for additional and a more rigorous public scrutiny of the FEIS than does the usual circulation for comment; LBP-14-9, 80 NRC 15 (2014)
NRC rules provide a process to prepare supplemental draft or final EISs when the agency identifies new and significant information; CLI-14-7, 80 NRC 1 (2014)
NRC Staff's FEIS must be prepared in accordance with the requirements of 10 C.F.R. 51.71 for a draft environmental impact statement; LBP-14-9, 80 NRC 15 (2014)
principal goals are to force agencies to take a hard look at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency's decisionmaking process; LBP-14-9, 80 NRC 15 (2014)
when NRC Staff prepares an FEIS, then, until a record of decision is issued, no action concerning the proposal may be taken by the Commission that would have an adverse environmental impact or limit the choice of reasonable alternatives; LBP-14-9, 80 NRC 15 (2014)

FINAL SAFETY ANALYSIS REPORT

circumstances under which licensee may make changes to the facility and procedures as described in its Updated FSAR or conduct tests or experiments not otherwise described in the UFSAR without obtaining a license amendment under 10 C.F.R. 50.90 are described; CLI-14-11, 80 NRC 167 (2014)

FINDINGS OF FACT

Commission gives substantial deference to licensing board findings of fact, and it will not overturn a board's factual findings unless they are not even plausible in light of the record viewed in its entirety; CLI-14-10, 80 NRC 157 (2014)

FIRES

contention that applicant must include a discussion of environmental impacts of spent fuel pool leakage, fires, and lack of a spent fuel repository is dismissed; LBP-14-12, 80 NRC 138 (2014)

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- NRC must include an evaluation of failure to secure permanent disposal, as well as an improved analysis of spent fuel pool leaks and spent fuel pool fires; CLI-14-8, 80 NRC 71 (2014)
- FUKUSHIMA ACCIDENT**
given that NRC will have the opportunity to further consider the concerns that rulemaking petitioners have expressed, and as it further considers actions related to the Fukushima events, it declines to suspend any proceeding pending resolution of the rulemaking petition; CLI-14-7, 80 NRC 1 (2014)
- GENERIC ENVIRONMENTAL IMPACT STATEMENT**
because generic impact determinations on impacts of continued storage have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings; LBP-14-15, 80 NRC 151 (2014)
Commission sensibly has chosen to address high-level waste disposal generically rather than unnecessarily to revisit the same waste disposal questions, license by license, when reviewing individual applications; LBP-14-16, 80 NRC 183 (2014)
GEIS was adopted to identify and analyze the environmental impacts of continued storage of spent nuclear fuel; LBP-14-16, 80 NRC 183 (2014)
generic approach to high-level waste disposal has been endorsed by higher courts; LBP-14-16, 80 NRC 183 (2014)
licensing boards were instructed to hold in abeyance any contentions on waste confidence matters until after the Commission's issuance of a new GEIS; LBP-14-16, 80 NRC 183 (2014)
NRC has resolved many environmental impacts for license renewal through a GEIS and these issues need not be revisited in site-specific EISs; CLI-14-7, 80 NRC 1 (2014)
- GENERIC ISSUES**
agency did not need to assess site-specific impacts of continuing to store the spent fuel in either an onsite or offsite storage facility in new reactor licensing environmental impact statements or environmental assessments beyond the expiration dates of reactor licenses; LBP-14-16, 80 NRC 183 (2014)
generic findings are reflected regarding impacts of spent fuel storage after the cessation of licensed operation of a nuclear power plant; CLI-14-8, 80 NRC 71 (2014)
impacts of continued storage will not vary significantly across sites and can be analyzed generically; LBP-14-16, 80 NRC 183 (2014)
- HEALTH AND SAFETY**
to determine whether suspension of an adjudication or licensing decision is warranted, the Commission considers whether moving forward will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes; CLI-14-7, 80 NRC 1 (2014)
- HEARING REQUESTS**
for proceedings for which a Federal Register notice of agency action is published, the hearing request must be filed not later than the time specified in the notice of proposed action; CLI-14-11, 80 NRC 167 (2014)
for proceedings in which a Federal Register notice is not published, the hearing request shall be filed by the later of 60 days after publication of notice on the NRC website or 60 days after the requestor receives actual notice of a pending application, but not more than 60 days after agency action on the application; CLI-14-11, 80 NRC 167 (2014)
hearing request on safety concerns over steam generator replacement is referred to the Executive Director for Operations for disposition; CLI-14-11, 80 NRC 167 (2014)
- HEARING REQUESTS, LATE-FILED**
Commission does not consider hearing requests after the deadline in section 2.309(b) has passed absent a determination that the petitioner has demonstrated good cause by showing the criteria of this section have been met; CLI-14-11, 80 NRC 167 (2014)
- HEARING RIGHTS**
agency approval or authorization is a necessary component of NRC action that affords a hearing opportunity under Atomic Energy Act § 189a, but not all agency approvals granted to licensees constitute de facto license amendments; CLI-14-11, 80 NRC 167 (2014)
if a hearing could be invoked each time NRC engaged in oversight over or inquiry into plant conditions, NRC's administrative process could be brought to a virtual standstill; CLI-14-11, 80 NRC 167 (2014)

SUBJECT INDEX

- neither licensee activities nor NRC inspection of or inquiry about those activities provides the opportunity for a hearing under the Atomic Energy Act because those activities only concern compliance with the terms of an existing license; CLI-14-11, 80 NRC 167 (2014)
- NRC must afford interested persons an opportunity for a hearing on the granting, suspending, revoking, or amending of any license; CLI-14-11, 80 NRC 167 (2014)
- NRC oversight activities gathering information about and evaluating plant performance, regardless of the findings it makes, do not alter the conditions of a license and therefore cannot form the basis for the right to request a hearing; CLI-14-11, 80 NRC 167 (2014)
- target of an enforcement order has the right to demand and receive, not merely request, a hearing; LBP-14-11, 80 NRC 125 (2014)
- to obtain a hearing, petitioner must show that its request is timely, that it has standing to obtain a hearing, and that it has proposed at least one admissible contention; CLI-14-11, 80 NRC 167 (2014)
- HIGH-LEVEL WASTE REPOSITORY**
- NRC's Waste Confidence Decision Update and Temporary Storage Rule were invalidated because there was not even a prospective site for a repository, let alone progress toward the actual construction of one; LBP-14-16, 80 NRC 183 (2014)
- waste confidence rule expressed the Commission's reasonable assurance that a repository was likely to be available by 2007-2009; LBP-14-16, 80 NRC 183 (2014)
- INSPECTION**
- neither licensee activities nor NRC inspection of or inquiry about those activities provides the opportunity for a hearing under the Atomic Energy Act because those activities only concern compliance with the terms of an existing license; CLI-14-11, 80 NRC 167 (2014)
- INTERROGATORIES**
- NRC Staff counsel may file written interrogatories that the target of an enforcement order must answer; LBP-14-11, 80 NRC 125 (2014)
- target of an enforcement order may serve interrogatories on NRC Staff, must show that answers to the interrogatories are necessary to a proper decision in the proceeding, and may ask the board to direct NRC Staff to answer those interrogatories; LBP-14-11, 80 NRC 125 (2014)
- INTERVENORS**
- because the scope of intervenors' participation in adjudications is limited to their admitted contentions, they are barred from participation in the uncontested portion of the hearing; LBP-14-9, 80 NRC 15 (2014)
- INTERVENTION**
- to obtain a hearing, petitioner must show that its request is timely, that it has standing to obtain a hearing, and that it has proposed at least one admissible contention; CLI-14-11, 80 NRC 167 (2014)
- INTERVENTION, DISCRETIONARY**
- discretionary intervention is permitted only where at least one petitioner has established standing and at least one contention has been admitted; CLI-14-11, 80 NRC 167 (2014)
- LEAKAGE**
- contention that applicant must include a discussion of environmental impacts of spent fuel pool leakage, fires, and lack of a spent fuel repository is dismissed; LBP-14-12, 80 NRC 138 (2014)
- NRC must include an evaluation of failure to secure permanent disposal, as well as an improved analysis of spent fuel pool leaks and spent fuel pool fires; CLI-14-8, 80 NRC 71 (2014)
- LICENSE CONDITIONS**
- although NRC takes the position that it lacks authority to impose environmental restrictions on transmission corridors, those impacts should have been analyzed as a direct effect of the NRC action even under NRC's new interpretation; LBP-14-9, 80 NRC 15 (2014)
- NRC can, as a condition of licensure, insist that offsite transmission lines built solely to serve a nuclear facility be designed to minimize environmental disturbance; LBP-14-9, 80 NRC 15 (2014)
- NRC has authority to impose environmental restrictions on new transmission lines intended to serve new nuclear power plants; LBP-14-9, 80 NRC 15 (2014)
- NRC is authorized to impose environmental conditions on a license to prevent or mitigate adverse environmental impacts that might otherwise be caused by the construction or operation of a nuclear power plant; LBP-14-9, 80 NRC 15 (2014)

SUBJECT INDEX

NRC uses environmental impact information to determine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values; LBP-14-9, 80 NRC 15 (2014)

regulation of offsite transmission lines is within NRC's authority under section 101 of the Atomic Energy Act and nothing in the AEA precludes NRC from implementing, through issuance of conditional licenses, NEPA's environmental mandate; LBP-14-9, 80 NRC 15 (2014)

under the Atomic Energy Act, NRC can issue conditional licenses for regulatory purposes, and thus there can be no objection to its use of the same means to achieve environmental ends as well; LBP-14-9, 80 NRC 15 (2014)

LICENSE RENEWALS

See Operating License Renewal

LICENSE TRANSFER PROCEEDINGS

following an evidentiary proceeding, presiding officer certifies the record of the proceeding to the Commission for its final decision; LBP-14-10, 80 NRC 85 (2014)

LICENSEE CHARACTER

Commission has long declined to assume that licensees will refuse to meet their obligations under their licenses or NRC regulations; CLI-14-11, 80 NRC 167 (2014)

LICENSEES

licensees cannot amend the terms of their license unilaterally; CLI-14-11, 80 NRC 167 (2014)

LICENSING BOARD DECISIONS

Commission gives substantial deference to licensing board findings of fact, and it will not overturn a board's factual findings unless they are not even plausible in light of the record viewed in its entirety; CLI-14-10, 80 NRC 157 (2014)

following an evidentiary hearing, presiding officer certifies the record of the proceeding to the Commission for its final decision; LBP-14-10, 80 NRC 85 (2014)

LICENSING BOARD ORDERS

all parties are obliged to follow the procedures in 10 C.F.R. Part 2 and board scheduling orders; CLI-14-10, 80 NRC 157 (2014)

LICENSING BOARDS, AUTHORITY

although Commission approval is required before a board exercises its sua sponte authority, that authority still exists; LBP-14-9, 80 NRC 15 (2014)

boards may make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer; LBP-14-9, 80 NRC 15 (2014)

boards may take disciplinary action against a party that fails to comply with any prehearing order, as long as the action is just; CLI-14-10, 80 NRC 157 (2014)

broad discretion is given to NRC licensing boards in the conduct of NRC adjudicatory proceedings, and the Commission generally defers to board case management decisions; CLI-14-10, 80 NRC 157 (2014)

licensing board role is not confined to arbitration of those environmental controversies as may happen to have been placed before them by the litigants in the particular case; LBP-14-9, 80 NRC 15 (2014)

licensing boards are expected to set procedures to ensure the case is managed efficiently, in a manner that is fair to all parties; CLI-14-10, 80 NRC 157 (2014)

licensing boards must judiciously exercise sua sponte authority when faced with a serious, and unraised, issue; LBP-14-9, 80 NRC 15 (2014)

NRC Rules of Practice provide the board with substantial authority to regulate hearing procedures; CLI-14-10, 80 NRC 157 (2014)

LICENSING PROCEEDINGS

See Abeyance of Proceeding; Combined License Proceedings; Mandatory Hearings; Operating License Renewal Proceedings; Subpart G Proceedings

LIMITED WORK AUTHORIZATION

in the 2007 LWA rule, NRC decided that the building of transmission lines to serve a nuclear power plant would no longer be classified as a construction activity and would no longer require authorization from NRC; LBP-14-9, 80 NRC 15 (2014)

SUBJECT INDEX

scope of activities requiring permission from NRC in the form of LWAs was narrowed by eliminating the concept of commencement of construction formerly described in section 50.10(c) and the authorization formerly described in section 50.10(e)(1); LBP-14-9, 80 NRC 15 (2014)

MANDATORY HEARINGS

because the scope of intervenors' participation in adjudications is limited to their admitted contentions, they are barred from participation in the uncontested portion of the hearing; LBP-14-9, 80 NRC 15 (2014)

function of uncontested hearings is only to review the adequacy of NRC Staff's work, not to make a de novo inquiry into NEPA issues; LBP-14-9, 80 NRC 15 (2014)

MITIGATION PLANS

environmental mitigation options must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated; LBP-14-9, 80 NRC 15 (2014)

MONITORING

NRC Staff's reliance in an environmental impact statement on predicted future monitoring and regulatory compliance program to prevent environmental impacts is not permitted; LBP-14-9, 80 NRC 15 (2014)

MOTIONS FOR RECONSIDERATION

motions must be filed within 10 days of the action for which reconsideration is requested; CLI-14-10, 80 NRC 157 (2014)

MOTIONS TO WITHDRAW

motion to withdraw application without prejudice is granted and proceeding is terminated; CLI-14-8, 80 NRC 71 (2014)

NATIONAL ENVIRONMENTAL POLICY ACT

agencies are not required to elevate environmental concerns over other appropriate considerations; LBP-14-9, 80 NRC 15 (2014)

agency NEPA responsibilities in situations where an agency has no ability because of lack of statutory authority to address the impact is distinguished from situations where an agency is only constrained by its own regulations from considering impacts; LBP-14-9, 80 NRC 15 (2014)

agency's narrowed construction of its statutory authority, as distinct from an express prohibition by Congress, may not be used to limit the agency's obligations under NEPA; LBP-14-9, 80 NRC 15 (2014)

although NEPA does not require an agency preparing an environmental impact statement to respond to EPA concerns, an agency's failure even to address them in the EIS at the very least brings into question the sufficiency of the agency's analysis; LBP-14-9, 80 NRC 15 (2014)

although NRC may regard preconstruction activities as outside the scope of a combined license application, these activities are within the scope of the NEPA review because they are all connected actions; LBP-14-9, 80 NRC 15 (2014)

Atomic Energy Act and NEPA and the regulations promulgated under each must be viewed in pari materia; LBP-14-9, 80 NRC 15 (2014)

environmental impact statements must include a detailed statement of reasonable alternatives to the proposed action; LBP-14-9, 80 NRC 15 (2014)

federal agencies are required to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives; LBP-14-9, 80 NRC 15 (2014)

federal agencies must use all practicable means to avoid environmental degradation to the extent consistent with other essential considerations of national policy; LBP-14-9, 80 NRC 15 (2014)

final environmental impact statement does not comply with NEPA if it fails to meaningfully address EPA concerns in its decision; LBP-14-9, 80 NRC 15 (2014)

government agencies are required to comply with NEPA to the fullest extent possible; LBP-14-9, 80 NRC 15 (2014)

in ruling that NRC had appropriately interpreted the Atomic Energy Act to include regulatory authority over attendant transmission lines, the court did not decide whether NEPA is an independent source of substantive jurisdiction; LBP-14-9, 80 NRC 15 (2014)

merely referencing an actual or anticipated certification by another agency fails to satisfy NEPA requirements; LBP-14-9, 80 NRC 15 (2014)

SUBJECT INDEX

- NEPA mandates a case-by-case balancing judgment on the part of federal agencies, not the private parties seeking federal action; LBP-14-9, 80 NRC 15 (2014)
- NEPA obligations supplement existing statutory authority and must be complied with to the fullest extent, unless there is a clear conflict of statutory authority; LBP-14-9, 80 NRC 15 (2014)
- NEPA requirements are subject to a rule of reason, and an environmental impact statement need not address remote and highly speculative consequences; LBP-14-9, 80 NRC 15 (2014)
- NEPA's legislative history reflects Congress's concern that agencies might attempt to avoid any compliance with NEPA by narrowly construing other statutory directives to create a conflict with NEPA; LBP-14-9, 80 NRC 15 (2014)
- NEPA's purpose is to influence the decisionmaking process by focusing the federal agency's attention on the environmental consequences of a proposed project, so as to ensure that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast; LBP-14-9, 80 NRC 15 (2014)
- no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance with NEPA; LBP-14-9, 80 NRC 15 (2014)
- NRC failed to comply with NEPA in issuing its 2010 update to the Waste Confidence Decision and accompanying Temporary Storage Rule; CLI-14-8, 80 NRC 71 (2014)
- NRC is not required to suspend its licensing decisions upon receipt of a claim of new and significant information; CLI-14-7, 80 NRC 1 (2014)
- NRC is required to construe its existing statutory authority consistently with NEPA's goals; LBP-14-9, 80 NRC 15 (2014)
- NRC is required to undertake research needed to adequately expose environmental harms; LBP-14-9, 80 NRC 15 (2014)
- NRC's decision to include transmission lines that serve a nuclear power plant within the definition of "utilization facility" in 42 U.S.C. § 2014(cc) was upheld; LBP-14-9, 80 NRC 15 (2014)
- regulation of offsite transmission lines is within NRC's authority under section 101 of the Atomic Energy Act and nothing in the AEA precludes NRC from implementing, through issuance of conditional licenses, NEPA's environmental mandate; LBP-14-9, 80 NRC 15 (2014)
- test for determining when a nonfederal project should be analyzed under NEPA as a major federal action is discussed; LBP-14-9, 80 NRC 15 (2014)
- to be analyzed under NEPA as a major federal action, a nonfederal project must restrict or limit the statutorily prescribed federal decisionmakers' choice of reasonable alternatives; LBP-14-9, 80 NRC 15 (2014)
- when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered; LBP-14-9, 80 NRC 15 (2014)
- when an agency proposes a major federal action significantly affecting the quality of the human environment, preparation of an environmental impact statement concerning the proposed action is required; LBP-14-9, 80 NRC 15 (2014)
- where increased air pollution in California resulting from two export turbines at a Mexican plants was a direct effect of the new transmission lines, DOE was required to evaluate the air pollution impacts under NEPA; LBP-14-9, 80 NRC 15 (2014)
- NATIVE AMERICANS**
- allegation that the Continued Storage Rule and generic environmental impact statement fail to address the trust responsibility that NRC owes an Indian tribe represents a collateral attack on the Continued Storage Rule and GEIS; LBP-14-16, 80 NRC 183 (2014)
- government fulfills its trust duties by executing federal law, not by waiving federal law; LBP-14-16, 80 NRC 183 (2014)
- government's trust responsibility is at its apex when it comes to managing tribal resources and preventing confiscation or environmental degradation of those resources; LBP-14-16, 80 NRC 183 (2014)
- NRC considered Indian tribe's trust responsibility concerns during its rulemaking; LBP-14-16, 80 NRC 183 (2014)
- NRC exercises its fiduciary duty in the context of its authorizing statutes, including the Atomic Energy Act, and implements any fiduciary responsibility by ensuring that tribal members receive the same

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protections under implementing regulations that are available to other persons; LBP-14-16, 80 NRC 183 (2014)

NOTICE OF HEARING

for proceedings for which a Federal Register notice of agency action is published, the hearing request must be filed not later than the time specified in the notice of proposed action; CLI-14-11, 80 NRC 167 (2014)

scope of an adjudicatory hearing is limited to the notice of hearing, which in licensing matters normally extends only to the application at issue; CLI-14-11, 80 NRC 167 (2014)

NRC GUIDANCE DOCUMENTS

NRC guidance cannot prescribe requirements; LBP-14-9, 80 NRC 15 (2014)

NRC POLICY

licensing boards should only use sua sponte review in extraordinary circumstances; LBP-14-9, 80 NRC 15 (2014)

to determine whether suspension of an adjudication or licensing decision is warranted, the Commission considers whether moving forward will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes; CLI-14-7, 80 NRC 1 (2014)

NRC STAFF

counsel may file written interrogatories that the target of an enforcement order must answer; LBP-14-11, 80 NRC 125 (2014)

counsel may take the deposition of the target of an enforcement order or any other person; LBP-14-11, 80 NRC 125 (2014)

See also Discovery Against NRC Staff

NRC STAFF REVIEW

blanket reliance by NRC Staff on Clean Water Act permits is not permitted; LBP-14-9, 80 NRC 15 (2014)

definition of the scope of the environmental impact statement is the responsibility of the NRC Staff; LBP-14-9, 80 NRC 15 (2014)

determination of minimal environmental impact would make little sense when an agency lacks essential information and has not sought to compile it through independent research; LBP-14-9, 80 NRC 15 (2014)

NRC must include an evaluation of failure to secure permanent disposal, as well as an improved analysis of spent fuel pool leaks and spent fuel pool fires; CLI-14-8, 80 NRC 71 (2014)

NRC Staff is required to prepare environmental impact statements for reactor licensing proceedings; CLI-14-7, 80 NRC 1 (2014)

NRC Staff must correctly evaluate basic issues whether or not they were raised by intervenors; LBP-14-9, 80 NRC 15 (2014)

NRC Staff's reliance in an environmental impact statement on predicted future monitoring and regulatory compliance program to prevent environmental impacts is not permitted; LBP-14-9, 80 NRC 15 (2014)

rulemaking petitioners assert that NRC Staff's review of the expedited-transfer issue generated new and significant information regarding the environmental impacts of spent fuel storage; CLI-14-7, 80 NRC 1 (2014)

NUCLEAR REGULATORY COMMISSION, AUTHORITY

administrative agencies are allowed to address issues of general applicability through rulemaking instead of individual adjudications, and the choice made between proceeding by general rule or by individual, ad hoc, litigation is one that lies primarily within the informed discretion of the administrative agency; LBP-14-16, 80 NRC 183 (2014)

agency NEPA responsibilities in situations where an agency has no ability because of lack of statutory authority to address the impact is distinguished from situations where an agency is only constrained by its own regulations from considering impacts; LBP-14-9, 80 NRC 15 (2014)

agency's narrowed construction of its statutory authority, as distinct from an express prohibition by Congress, may not be used to limit the agency's obligations under NEPA; LBP-14-9, 80 NRC 15 (2014)

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although NRC rules do not provide for the filing of amicus curiae briefs on motions filed pursuant to 10 C.F.R. 2.323, as a matter of discretion the Commission has reviewed both an amicus brief and the opposition to it; CLI-14-11, 80 NRC 167 (2014)

although NRC takes the position that it lacks authority to impose environmental restrictions on transmission corridors, those impacts should have been analyzed as a direct effect of the NRC action even under NRC's new interpretation; LBP-14-9, 80 NRC 15 (2014)

because petitions to suspend licensing decisions and proposed contentions are inextricably linked, and as a matter of sound case management, the Commission exercises its inherent supervisory authority over agency adjudications to review the petition and motions itself; CLI-14-9, 80 NRC 147 (2014)

Commission exercised its inherent supervisory authority over agency adjudications to review petition and motions challenging the Continued Storage Rule; LBP-14-16, 80 NRC 183 (2014)

NEPA requires NRC to construe its existing statutory authority consistently with NEPA's goals; LBP-14-9, 80 NRC 15 (2014)

NEPA's legislative history reflects Congress's concern that agencies might attempt to avoid any compliance with NEPA by narrowly construing other statutory directives to create a conflict with NEPA; LBP-14-9, 80 NRC 15 (2014)

NRC can, as a condition of licensure, insist that offsite transmission lines built solely to serve a nuclear facility be designed to minimize environmental disturbance; LBP-14-9, 80 NRC 15 (2014)

NRC has authority to impose environmental restrictions on new transmission lines intended to serve new nuclear power plants; LBP-14-9, 80 NRC 15 (2014)

NRC has long interpreted its statutory authority under the Atomic Energy Act to include conditioning approval of nuclear power plant licenses on environmentally acceptable routing of transmission lines; LBP-14-9, 80 NRC 15 (2014)

NRC is authorized to impose environmental conditions on a license to prevent or mitigate adverse environmental impacts that might otherwise be caused by the construction or operation of a nuclear power plant; LBP-14-9, 80 NRC 15 (2014)

regulation of offsite transmission lines is within NRC's authority under section 101 of the Atomic Energy Act and nothing in the AEA precludes NRC from implementing, through issuance of conditional licenses, NEPA's environmental mandate; LBP-14-9, 80 NRC 15 (2014)

NUCLEAR REGULATORY COMMISSION, JURISDICTION

agency's interpretation of what is properly within its jurisdictional scope is entitled to great deference, and will not be overturned if reasonably related to the language and purposes of the statute; LBP-14-9, 80 NRC 15 (2014)

degree to which pendency of a new contention at the time of the board's ruling on an initial hearing petition tolled the time for filing any appeals from that decision regarding the admissibility of the contentions would be a matter for Commission determination; LBP-14-12, 80 NRC 138 (2014)

in ruling that NRC had appropriately interpreted the Atomic Energy Act to include regulatory authority over attendant transmission lines, the court did not decide whether NEPA is an independent source of substantive jurisdiction; LBP-14-9, 80 NRC 15 (2014)

OPERATING LICENSE AMENDMENTS

agency approval or authorization is a necessary component of NRC action that affords a hearing opportunity under Atomic Energy Act § 189a, but not all agency approvals granted to licensees constitute de facto license amendments; CLI-14-11, 80 NRC 167 (2014)

circumstances under which licensee may make changes to the facility and procedures as described in its Updated Final Safety Analysis Report or conduct tests or experiments not otherwise described in the UFSAR without obtaining a license amendment under 10 C.F.R. 50.90 are described; CLI-14-11, 80 NRC 167 (2014)

licensees are allowed to make changes to a facility without obtaining a license amendment if certain criteria are satisfied; CLI-14-11, 80 NRC 167 (2014)

licensees cannot amend the terms of their license unilaterally; CLI-14-11, 80 NRC 167 (2014)

licensees must maintain records of changes in the facility made pursuant to section 50.59(c)(1) that include a written evaluation that provides the bases for the determination that the change does not require a license amendment pursuant to section 50.59(c)(2); CLI-14-11, 80 NRC 167 (2014)

NRC Staff's inspection and oversight of licensee's actions are part of an ongoing de facto license amendment; CLI-14-11, 80 NRC 167 (2014)

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to determine whether an approval constitutes a de facto license amendment, NRC must consider whether the approval granted the licensee any greater operating authority or otherwise altered the original terms of a license; CLI-14-11, 80 NRC 167 (2014)

unilateral licensee activities can constitute de facto license amendments; CLI-14-11, 80 NRC 167 (2014)

where NRC has temporarily exempted the licensee, on the basis of an existing rule, from one of many rules made generally applicable by the license does not amount to a license amendment; CLI-14-11, 80 NRC 167 (2014)

OPERATING LICENSE RENEWAL

environmental reports must discuss new SAMAs addressed in more recent reports for other nuclear power plants of the same or similar boiling water reactor Mark II design; LBP-14-15, 80 NRC 151 (2014)

license renewal applicant is not required to perform a new severe accident mitigation alternatives analysis; LBP-14-15, 80 NRC 151 (2014)

NRC has resolved many environmental impacts for license renewal through a generic environmental impact statement and these issues need not be revisited in site-specific environmental impact statements; CLI-14-7, 80 NRC 1 (2014)

purpose of the exemption from 10 C.F.R. 51.53(c)(3)(ii)(L) is to reflect NRC's view that one severe accident mitigation alternatives analysis, as a general matter, satisfies NRC obligation to consider measures to mitigate both the risk and the environmental impacts of severe accidents; LBP-14-15, 80 NRC 151 (2014)

waste confidence undergirds new reactor licensing and power reactor license renewal; CLI-14-8, 80 NRC 71 (2014)

OPERATING LICENSE RENEWAL PROCEEDINGS

contention regarding mitigation alternatives is effectively a collateral attack on this regulation, which exempts applicants from having to reanalyze severe accident mitigation alternatives during the renewal process; LBP-14-15, 80 NRC 151 (2014)

ORDERS

initial scheduling orders set forth issues or matters in controversy to be determined in the proceeding; LBP-14-11, 80 NRC 125 (2014)

See also Enforcement Orders; Licensing Board Orders

OVERSIGHT

See Regulatory Oversight Process

PAGE LIMITS

intervenor's motion for an enlargement of the page limit for their petition for review is granted; CLI-14-10, 80 NRC 157 (2014)

PERMITS

blanket reliance by NRC Staff on Clean Water Act permits is not permitted; LBP-14-9, 80 NRC 15 (2014)

Corps of Engineers may not issue a 404 permit if there exists a practicable alternative that would have less adverse impact on the aquatic system, the permit would cause significant degradation of the water of the United States, or appropriate and practicable mitigation has not been undertaken; LBP-14-9, 80 NRC 15 (2014)

when reviewing an application for a 404 permit under the Clean Water Act, the Corps of Engineers evaluates whether issuance of the permit is in the public interest, weighing all relevant factors, including economic, environmental, and aesthetic concerns; LBP-14-9, 80 NRC 15 (2014)

See also Construction Permits

PRECONSTRUCTION ACTIVITIES

although NRC may regard preconstruction activities as outside the scope of a combined license application, these activities are within the scope of the NEPA review because they are all connected actions; LBP-14-9, 80 NRC 15 (2014)

PRESIDING OFFICER, AUTHORITY

presiding officers have the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, and to avoid delay and to maintain order, and they have all the powers necessary to those ends; CLI-14-10, 80 NRC 157 (2014)

sua sponte authority of presiding officer is compared under predecessor rule 10 C.F.R. 2.760a; LBP-14-9, 80 NRC 15 (2014)

SUBJECT INDEX

PRESUMPTION OF REGULARITY

Commission has long declined to assume that licensees will refuse to meet their obligations under their licenses or NRC regulations; CLI-14-11, 80 NRC 167 (2014)

PRIMA FACIE SHOWING

licensing board initially determines, based on the record, whether a prima facie showing has been made by the petitioner for its rule waiver request, and then the board must certify the matter directly to the Commission for a final determination; LBP-14-16, 80 NRC 183 (2014)

prima facie showing on a rule waiver request is not a final determination on the merits, but merely requires presentation of enough information to allow the board to infer (absent disproof) that special circumstances exist; LBP-14-16, 80 NRC 183 (2014)

prima facie showing within the meaning of 10 C.F.R. 2.758(d) is one that is legally sufficient to establish a fact or case unless disproved; LBP-14-16, 80 NRC 183 (2014)

term is not defined in NRC regulations, but is interpreted to mean a substantial showing; LBP-14-16, 80 NRC 183 (2014)

PRO SE LITIGANTS

counsel has an ethical duty of candor to disclose to a tribunal any relevant information and/or legal authority that is adverse to the director's position, especially when the target of the government's enforcement action is not represented by counsel; LBP-14-11, 80 NRC 125 (2014)

even if intervenors are appearing pro se, adherence to board directives is expected; CLI-14-10, 80 NRC 157 (2014)

PUBLIC COMMENTS

licensing board's hearing arguably allows for additional and a more rigorous public scrutiny of the final environmental impact statement than does the usual circulation for comment; LBP-14-9, 80 NRC 15 (2014)

NRC's NEPA regulations require a request for public comment on a draft environmental impact statement and a supplement to a DEIS distributed in accordance with 10 C.F.R. 51.74 and on any supplement to the FEIS prepared pursuant to 10 C.F.R. 51.92(a) or (b); LBP-14-9, 80 NRC 15 (2014)

PUBLIC INTEREST

principal goals of a final environmental impact statement are to force agencies to take a hard look at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency's decisionmaking process; LBP-14-9, 80 NRC 15 (2014) when reviewing an application for a 404 permit under the Clean Water Act, the Corps of Engineers evaluates whether issuance of the permit is in the public interest, weighing all relevant factors, including economic, environmental, and aesthetic concerns; LBP-14-9, 80 NRC 15 (2014)

QUALITY ASSURANCE PROGRAMS

applicant may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility for the program; CLI-14-10, 80 NRC 157 (2014)

applicant must establish and implement its own QA program when it enters into a contract for the conduct of safety-related combined license application activities and to retain overall control of safety-related activities performed by the contractor; CLI-14-10, 80 NRC 157 (2014)

RADIOACTIVE WASTE, HIGH-LEVEL

Commission sensibly has chosen to address high-level waste disposal generically rather than unnecessarily to revisit the same waste disposal questions, license by license, when reviewing individual applications; LBP-14-16, 80 NRC 183 (2014)

generic approach to high-level waste disposal has been endorsed by higher courts; LBP-14-16, 80 NRC 183 (2014)

RADIOACTIVE WASTE DISPOSAL

Commission sensibly has chosen to address high-level waste disposal generically rather than unnecessarily to revisit the same waste disposal questions, license by license, when reviewing individual applications; LBP-14-16, 80 NRC 183 (2014)

generic approach to high-level waste disposal has been endorsed by higher courts; LBP-14-16, 80 NRC 183 (2014)

NRC must include an evaluation of failure to secure permanent disposal, as well as an improved analysis of spent fuel pool leaks and spent fuel pool fires; CLI-14-8, 80 NRC 71 (2014)

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RADIOACTIVE WASTE STORAGE

NRC failed to comply with the National Environmental Policy Act in issuing its 2010 update to the Waste Confidence Decision and accompanying Temporary Storage Rule; CLI-14-8, 80 NRC 71 (2014)
waste confidence undergirds new reactor licensing and power reactor license renewal; CLI-14-8, 80 NRC 71 (2014)

RADIOGRAPHIC DEVICE STORAGE

choosing to store a radiographic exposure device at a facility that did not comply with NRC security requirements and was not an authorized storage location under the license is considered deliberate misconduct; LBP-14-11, 80 NRC 125 (2014)

REACTORS

See Boiling-Water Reactors

RECORD OF DECISION

federal courts of appeal have approved of the process by which an environmental impact statement is effectively amended through the adjudicatory process; LBP-14-9, 80 NRC 15 (2014)
when NRC Staff prepares a final environmental impact statement, then, until a record of decision is issued, no action concerning the proposal may be taken by the Commission that would have an adverse environmental impact or limit the choice of reasonable alternatives; LBP-14-9, 80 NRC 15 (2014)

REFERRAL OF RULING

boards may make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer; LBP-14-9, 80 NRC 15 (2014)

REGULATIONS

Atomic Energy Act and National Environmental Policy Act and the regulations promulgated under each must be viewed in pari materia; LBP-14-9, 80 NRC 15 (2014)
boards are precluded from hearing rule challenges absent a showing of special circumstances; LBP-14-9, 80 NRC 15 (2014)
in issuing the suspension of final licensing decisions in proceedings, NRC recognized that it could not move forward without first addressing the D.C. Circuit's remand because the vacatur left a regulatory gap in the Part 51 regulations that undergird licensing reviews in those matters; CLI-14-7, 80 NRC 1 (2014)
NRC guidance cannot prescribe requirements; LBP-14-9, 80 NRC 15 (2014)
scope of activities requiring permission from NRC in the form of limited work authorization was narrowed by eliminating the concept of commencement of construction formerly described in section 50.10(c) and the authorization formerly described in section 50.10(e)(1); LBP-14-9, 80 NRC 15 (2014)

REGULATIONS, INTERPRETATION

no language is included in 10 C.F.R. 51.45(c) to the effect that a proposed action that is the subject of an agency environmental impact statement must include all connected actions as defined in 40 C.F.R. 1508.25; LBP-14-9, 80 NRC 15 (2014)
NRC often refers to the Statement of Considerations as an aid in interpreting the agency's regulations; LBP-14-9, 80 NRC 15 (2014)
NRC's broad definition of "construction" in the pre-2007 version of the regulation was originally added to Part 50 because of the interpretation that enactment of NEPA required NRC to expand its permitting/licensing authority; LBP-14-9, 80 NRC 15 (2014)
preamble of a rule, unlike the rule itself, does not have the force of law and may not be used to expand the reach of the regulations; LBP-14-9, 80 NRC 15 (2014)
prima facie showing within the meaning of 10 C.F.R. 2.758(d) is one that is legally sufficient to establish a fact or case unless disproved; LBP-14-16, 80 NRC 183 (2014)
statement of considerations cannot interpret what the regulation itself does not contain; LBP-14-9, 80 NRC 15 (2014)

REGULATORY OVERSIGHT PROCESS

if a hearing could be invoked each time NRC engaged in oversight over or inquiry into plant conditions, NRC's administrative process could be brought to a virtual standstill; CLI-14-11, 80 NRC 167 (2014)

SUBJECT INDEX

merely pointing to the compliance program is in no way sufficient to support a scientific finding that spent fuel pools will not cause a significant environmental impact during the extended storage period; LBP-14-9, 80 NRC 15 (2014)

neither licensee activities nor NRC inspection of or inquiry about those activities provides the opportunity for a hearing under the Atomic Energy Act because those activities only concern compliance with the terms of an existing license; CLI-14-11, 80 NRC 167 (2014)

NRC oversight activities gathering information about and evaluating plant performance, regardless of the findings it makes, do not alter the conditions of a license and therefore cannot form the basis for the right to request a hearing; CLI-14-11, 80 NRC 167 (2014)

NRC Staff's reliance in an environmental impact statement on predicted future monitoring and regulatory compliance program to prevent environmental impacts is not permitted; LBP-14-9, 80 NRC 15 (2014)

REMAND

in issuing the suspension of final licensing decisions in proceedings, NRC recognized that it could not move forward without first addressing the D.C. Circuit's remand because the vacatur left a regulatory gap in the Part 51 regulations that undergird licensing reviews in those matters; CLI-14-7, 80 NRC 1 (2014)

REQUEST FOR ACTION

appropriate means of challenging licensee actions undertaken in accordance with 10 C.F.R. 50.59 is through a petition under 10 C.F.R. 2.206; CLI-14-11, 80 NRC 167 (2014)

hearing request on safety concerns over steam generator replacement is referred to the Executive Director for Operations for disposition; CLI-14-11, 80 NRC 167 (2014)

request that NRC immediately shut down plants until all turbine building high-energy line break concerns are identified and those important to safety are corrected is granted in part; DD-14-5, 80 NRC 205 (2014)

section 2.206 process provides stakeholders a forum to advance concerns and obtain full or partial relief, or written reasons why the requested relief is not warranted; CLI-14-11, 80 NRC 167 (2014)

REVIEW

See Appellate Review; Environmental Review; NRC Staff Review; Standard of Review

REVIEW, DISCRETIONARY

although NRC rules do not provide for the filing of amicus curiae briefs on motions filed pursuant to 10 C.F.R. 2.323, as a matter of discretion the Commission has reviewed both an amicus brief and the opposition to it; CLI-14-11, 80 NRC 167 (2014)

petition for review will be granted at the Commission's discretion upon a showing that petitioner has raised a substantial question as to any elements of 10 C.F.R. 2.341(b)(4)(i)-(v); CLI-14-10, 80 NRC 157 (2014)

REVIEW, SUA SPONTE

although Commission approval is required before a board exercises its sua sponte authority, that authority still exists; LBP-14-9, 80 NRC 15 (2014)

amicus curiae briefs may be filed when the Commission has taken up a matter pursuant to section 2.341 or sua sponte; CLI-14-11, 80 NRC 167 (2014)

authority of presiding officer is compared under predecessor rule 10 C.F.R. 2.760a; LBP-14-9, 80 NRC 15 (2014)

because the final environmental impact statement had been issued and the board had ruled that a contention remained procedurally defective, it was an appropriate point for board consideration of whether the contention merited sua sponte review; LBP-14-9, 80 NRC 15 (2014)

board must request that the Commission approve the board's determination that sua sponte review is warranted; LBP-14-9, 80 NRC 15 (2014)

boards may make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer; LBP-14-9, 80 NRC 15 (2014)

Commission ordered a licensing board not to exercise sua sponte authority because the Commission had already initiated an ongoing investigation to deal with the issues raised; LBP-14-9, 80 NRC 15 (2014)

licensing boards must judiciously exercise sua sponte authority when faced with a serious, and unraised, issue; LBP-14-9, 80 NRC 15 (2014)

SUBJECT INDEX

licensing boards should only use sua sponte review in extraordinary circumstances; LBP-14-9, 80 NRC 15 (2014)

no board has attempted to invoke sua sponte review in the past 20 years; LBP-14-9, 80 NRC 15 (2014)
untimely filed contention is appropriate for sua sponte board review; LBP-14-9, 80 NRC 15 (2014)

RULE OF REASON

NEPA requirements are subject to a rule of reason, and an environmental impact statement need not address remote and highly speculative consequences; LBP-14-9, 80 NRC 15 (2014)

RULEMAKING

administrative agencies are allowed to address issues of general applicability through rulemaking instead of individual adjudications, and the choice made between proceeding by general rule or by individual, ad hoc, litigation is one that lies primarily within the informed discretion of the administrative agency; LBP-14-16, 80 NRC 183 (2014)

because generic impact determinations on impacts of continued storage have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings; LBP-14-15, 80 NRC 151 (2014)

contentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings; CLI-14-8, 80 NRC 71 (2014); LBP-14-15, 80 NRC 151 (2014); LBP-14-16, 80 NRC 183 (2014)

given that NRC will have the opportunity to further consider the concerns that rulemaking petitioners have expressed, and as it further considers actions related to the Fukushima events, it declines to suspend any proceeding pending resolution of the rulemaking petition; CLI-14-7, 80 NRC 1 (2014)

if NRC determines that changes to its current environmental assessment rules are warranted, it can revisit whether an individual licensing review or adjudication should be held in abeyance pending the outcome of a relevant rulemaking; CLI-14-7, 80 NRC 1 (2014)

NRC, by necessary implication, considered Indian tribe's trust responsibility concerns during its rulemaking; LBP-14-16, 80 NRC 183 (2014)

petitioners assert that NRC Staff's review of the expedited-transfer issue generated new and significant information regarding the environmental impacts of spent fuel storage; CLI-14-7, 80 NRC 1 (2014)

petitioners have not shown compelling circumstances requiring NRC to suspend final licensing decisions pending completion of rulemaking; CLI-14-7, 80 NRC 1 (2014)

rulemaking petitioner who is also a participant in a licensing proceeding may request suspension of that proceeding pending the outcome of the rulemaking petition; CLI-14-7, 80 NRC 1 (2014)

suspension provision provides an opportunity for a participant to ensure that a successful rulemaking petition is applied in an ongoing adjudication; CLI-14-7, 80 NRC 1 (2014)

RULES

where the reviewing court vacates a rule without reinstating the old rule, failure to reinstate the old rule creates a temporary regulatory vacuum; CLI-14-8, 80 NRC 71 (2014)

See also Regulations; Waiver of Rule

RULES OF PRACTICE

all four factors must be met for a rule waiver request to be granted; LBP-14-16, 80 NRC 183 (2014)

all parties are obliged to follow the procedures in 10 C.F.R. Part 2 and board scheduling orders; CLI-14-10, 80 NRC 157 (2014)

although NRC rules do not provide for the filing of amicus curiae briefs on motions filed pursuant to 10 C.F.R. 2.323, as a matter of discretion the Commission has reviewed both an amicus brief and the opposition to it; CLI-14-11, 80 NRC 167 (2014)

amicus curiae briefs may be filed when the Commission has taken up a matter pursuant to section 2.341 or sua sponte; CLI-14-11, 80 NRC 167 (2014)

board conducted an initial scheduling conference to discuss development of an initial scheduling order that would help achieve just resolution of a dispute as efficiently and expeditiously as possible; LBP-14-11, 80 NRC 125 (2014)

board must request that the Commission approve the board's determination that sua sponte review is warranted; LBP-14-9, 80 NRC 15 (2014)

boards are precluded from hearing rule challenges absent a showing of special circumstances; LBP-14-9, 80 NRC 15 (2014)

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boards may make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer; LBP-14-9, 80 NRC 15 (2014)

case law test for rule waiver establishes an appreciably higher burden for would-be waiver seekers than does 10 C.F.R. 2.335(b); LBP-14-16, 80 NRC 183 (2014)

Commission does not consider hearing requests after the deadline in section 2.309(b) has passed absent a determination that petitioner has demonstrated good cause by showing the criteria of this section have been met; CLI-14-11, 80 NRC 167 (2014)

contention challenging a Commission rule is beyond the scope of the proceeding; LBP-14-16, 80 NRC 183 (2014)

current adjudicatory procedures and policies provide latitude to the Commission, its licensing boards, and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings; CLI-14-10, 80 NRC 157 (2014)

even if intervenors are appearing pro se, adherence to board directives is expected; CLI-14-10, 80 NRC 157 (2014)

for proceedings for which a Federal Register notice of agency action is published, the hearing request must be filed not later than the time specified in the notice of proposed action; CLI-14-11, 80 NRC 167 (2014)

for proceedings in which a Federal Register notice is not published, the hearing request shall be filed by the later of 60 days after publication of notice on the NRC website or 60 days after the requestor receives actual notice of a pending application, but not more than 60 days after agency action on the application; CLI-14-11, 80 NRC 167 (2014)

hearing request on safety concerns over steam generator replacement is referred to the Executive Director for Operations for disposition; CLI-14-11, 80 NRC 167 (2014)

intervenors in adjudicatory proceedings are prohibited from challenging regulations unless they first obtain a waiver by showing special circumstances; LBP-14-15, 80 NRC 151 (2014)

intervenors' request for extension of time is granted because it is unopposed and intervenors have shown good cause for the modest extension; CLI-14-10, 80 NRC 157 (2014)

motions for reconsideration must be filed within 10 days of the action for which reconsideration is requested; CLI-14-10, 80 NRC 157 (2014)

NRC adjudicatory rules are designed to promote fair and efficient resolution of disputes; CLI-14-7, 80 NRC 1 (2014)

NRC Rules of Practice provide the board with substantial authority to regulate hearing procedures; CLI-14-10, 80 NRC 157 (2014)

NRC Staff counsel may file written interrogatories that the target of an enforcement order must answer; LBP-14-11, 80 NRC 125 (2014)

NRC Staff counsel may require the target of an enforcement order to provide the Director with a copy of any designated relevant document that is within his possession, custody, or control; LBP-14-11, 80 NRC 125 (2014)

NRC Staff counsel may take the deposition of the target of an enforcement order or any other person; LBP-14-11, 80 NRC 125 (2014)

participant may request the waiver of a current rule or regulation in a specific proceeding under special circumstances as an exception to the prohibition against challenging NRC rules or regulations in adjudicatory proceedings; CLI-14-7, 80 NRC 1 (2014)

parties pursuing settlement may seek to have a settlement judge appointed; LBP-14-11, 80 NRC 125 (2014)

petition for review will be granted at the Commission's discretion upon a showing that petitioner has raised a substantial question as to any elements of 10 C.F.R. 2.341(b)(4)(i)-(v); CLI-14-10, 80 NRC 157 (2014)

regardless of a party's resources, fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and NRC regulations; CLI-14-10, 80 NRC 157 (2014)

rule waivers may be granted only when all four factors in 10 C.F.R. 2.335(b) are met; LBP-14-15, 80 NRC 151 (2014)

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- rulemaking petitioner who is also a participant in a licensing proceeding may request suspension of that proceeding pending the outcome of the rulemaking petition; CLI-14-7, 80 NRC 1 (2014)
- special circumstances are required for a rule waiver; LBP-14-16, 80 NRC 183 (2014)
- sua sponte authority of presiding officer is compared under predecessor rule 10 C.F.R. 2.760a; LBP-14-9, 80 NRC 15 (2014)
- suspension provision provides an opportunity for a participant to ensure that a successful rulemaking petition is applied in an ongoing adjudication; CLI-14-7, 80 NRC 1 (2014)
- target of an enforcement order may require NRC Staff to attend a prehearing meeting where he can require that Staff member to answer questions orally under oath; LBP-14-11, 80 NRC 134 (2014); LBP-14-11, 80 NRC 125 (2014)
- target of an enforcement order may serve interrogatories on NRC Staff, must show that answers to the interrogatories are necessary to a proper decision in the proceeding, and may ask the board to direct NRC Staff to answer those interrogatories; LBP-14-11, 80 NRC 125 (2014)
- target of an enforcement order must be provided a copy of all NRC Staff documents that are relevant to disputed issues alleged with particularity in the pleadings; LBP-14-11, 80 NRC 125 (2014)
- to obtain a hearing, petitioner must show that its request is timely, that it has standing to obtain a hearing, and that it has proposed at least one admissible contention; CLI-14-11, 80 NRC 167 (2014)
- to the extent that contentions raise matters other than onsite spent fuel storage, the board should assess their admissibility under generally applicable rules of practice; CLI-14-8, 80 NRC 71 (2014)
- untimely filed contention is appropriate for sua sponte board review; LBP-14-9, 80 NRC 15 (2014)
- waiver petition would permit consideration of an issue in an adjudicatory proceeding that would otherwise impermissibly challenge an NRC rule or regulation; CLI-14-7, 80 NRC 1 (2014)
- within 45 days of the initial scheduling order, target of the enforcement order must provide certain information and documents to the NRC enforcement director; LBP-14-11, 80 NRC 125 (2014)
- within certain constraints, target of an enforcement order may pursue discovery against the NRC Staff; LBP-14-11, 80 NRC 125 (2014)
- RULES OF PROCEDURE**
- proceedings on enforcement matters must be conducted under the procedures of Subpart G unless all parties agree otherwise; LBP-14-11, 80 NRC 125 (2014)
- SAFETY ISSUES**
- hearing request on safety concerns over steam generator replacement is referred to the Executive Director for Operations for disposition; CLI-14-11, 80 NRC 167 (2014)
- request that NRC immediately shut down plants until all turbine building high-energy line break concerns are identified and those important to safety were corrected is granted in part; DD-14-5, 80 NRC 205 (2014)
- rule waiver should not be granted unless the petition relates to a significant safety problem; LBP-14-16, 80 NRC 183 (2014)
- SAFETY-RELATED**
- applicant must establish and implement its own quality assurance program when it enters into a contract for the conduct of safety-related combined license application activities and to retain overall control of safety-related activities performed by the contractor; CLI-14-10, 80 NRC 157 (2014)
- SANCTIONS**
- boards may take disciplinary action against a party that fails to comply with any prehearing order, as long as the action is just; CLI-14-10, 80 NRC 157 (2014)
- Commission has imposed or upheld disciplinary measures against parties and their representatives when they failed to comply with board directives and procedural rules; CLI-14-10, 80 NRC 157 (2014)
- SCHEDULE, BRIEFING**
- all parties are obliged to follow the procedures in 10 C.F.R. Part 2 and board scheduling orders; CLI-14-10, 80 NRC 157 (2014)
- board conducted an initial scheduling conference to discuss development of an initial scheduling order that would help achieve just resolution of a dispute as efficiently and expeditiously as possible; LBP-14-11, 80 NRC 125 (2014)
- SCHEDULING**
- initial scheduling orders set forth issues or matters in controversy to be determined in the proceeding; LBP-14-11, 80 NRC 125 (2014)

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- settlement is encouraged, but the fact that a possible settlement is being negotiated does not change any of the deadlines set forth in an initial scheduling order; LBP-14-11, 80 NRC 125 (2014)
- SECURITY**
choosing to store a radiographic exposure device at a facility that did not comply with NRC security requirements and was not an authorized storage location under the license is considered deliberate misconduct; LBP-14-11, 80 NRC 125 (2014)
- SEGMENTATION**
failure to include all connected actions within the scope of the proposed action is generally referred to as segmentation; LBP-14-9, 80 NRC 15 (2014)
to ensure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions, segmentation in the environmental impact statement is to be avoided; LBP-14-9, 80 NRC 15 (2014)
when an action is divided into component parts, each involving action with less significant environmental effects, segmentation or piecemealing occurs; LBP-14-9, 80 NRC 15 (2014)
- SETTLEMENT JUDGES**
parties pursuing settlement may seek to have a settlement judge appointed; LBP-14-11, 80 NRC 125 (2014)
- SETTLEMENT NEGOTIATIONS**
settlement is encouraged, but the fact that a possible settlement is being negotiated does not change any of the deadlines set forth in the initial scheduling order; LBP-14-11, 80 NRC 125 (2014)
- SEVERE ACCIDENT MITIGATION ALTERNATIVES ANALYSIS**
contention regarding mitigation alternatives is effectively a collateral attack on regulation that exempts applicants from having to reanalyze SAMAs during the renewal process; LBP-14-15, 80 NRC 151 (2014)
environmental reports must discuss new SAMAs addressed in more recent reports for other nuclear power plants of the same or similar boiling water reactor Mark II design; LBP-14-15, 80 NRC 151 (2014)
license renewal applicant is not required to perform a new SAMA analysis; LBP-14-15, 80 NRC 151 (2014)
NRC was ordered to analyze features or actions that could prevent a serious accident or mitigate its consequences; LBP-14-15, 80 NRC 151 (2014)
purpose of the exemption from 10 C.F.R. 51.53(c)(3)(ii)(L) is to reflect NRC's view that one severe accident mitigation alternatives analysis, as a general matter, satisfies NRC obligation to consider measures to mitigate both the risk and the environmental impacts of severe accidents; LBP-14-15, 80 NRC 151 (2014)
- SHUTDOWN**
request that NRC immediately shut down plants until all turbine building high-energy line break concerns are identified and those important to safety are corrected is granted in part; DD-14-5, 80 NRC 205 (2014)
- SITING**
by 1974, NRC had adopted an aggressive approach to its environmental responsibilities in the context of transmission line siting; LBP-14-9, 80 NRC 15 (2014)
- SPENT FUEL MANAGEMENT**
regulation governing the storage and disposal of spent nuclear fuel was vacated; LBP-14-15, 80 NRC 151 (2014)
- SPENT FUEL POOLS**
contention that applicant must include a discussion of environmental impacts of spent fuel pool leakage, fires, and lack of a spent fuel repository is dismissed; LBP-14-12, 80 NRC 138 (2014)
merely pointing to the compliance program is in no way sufficient to support a scientific finding that spent fuel pools will not cause a significant environmental impact during the extended storage period; LBP-14-9, 80 NRC 15 (2014)
NRC must include an evaluation of failure to secure permanent disposal, as well as an improved analysis of spent fuel pool leaks and spent fuel pool fires; CLI-14-8, 80 NRC 71 (2014)
- SPENT FUEL STORAGE**
agency did not need to assess site-specific impacts of continuing to store the spent fuel in either an onsite or offsite storage facility in new reactor licensing environmental impact statements or

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environmental assessments beyond the expiration dates of reactor licenses; LBP-14-16, 80 NRC 183 (2014)

because generic impact determinations on impacts of continued storage have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings; LBP-14-15, 80 NRC 151 (2014)

because petitions to suspend licensing decisions and proposed contentions are inextricably linked, and as a matter of sound case management, the Commission exercises its inherent supervisory authority over agency adjudications to review the petition and motions itself; CLI-14-9, 80 NRC 147 (2014)

boards are directed to reject waste storage contentions pending before them; LBP-14-16, 80 NRC 183 (2014)

Commission approval of the Continued Storage Rule and generic environmental impact statement mandates that contentions discussing the long-term storage of spent nuclear fuel are not to be heard by individual licensing boards; LBP-14-16, 80 NRC 183 (2014)

Commission instituted a rulemaking to revise the agency's generic determination on the environmental impacts of continued storage of spent nuclear fuel; LBP-14-12, 80 NRC 138 (2014)

Commission lifted suspension on final licensing decisions, declined to accept contentions concerning continued storage of spent nuclear fuel, and directed boards to reject pending contentions on this issue; LBP-14-14, 80 NRC 144 (2014)

discussion of any environmental impact of spent fuel storage during the period following the term of the reactor operating license in any environmental analysis prepared in connection with power reactor and dry cask licenses is excluded; CLI-14-8, 80 NRC 71 (2014)

generic findings are reflected regarding impacts of spent fuel storage after the cessation of licensed operation of a nuclear power plant; CLI-14-8, 80 NRC 71 (2014)

impacts of continued storage will not vary significantly across sites and can be analyzed generically; LBP-14-16, 80 NRC 183 (2014)

in view of its adoption of a revised rule codifying NRC's generic determinations regarding the pertinent environmental impacts associated with continued storage of spent nuclear fuel, the Commission directs boards to reject pending contentions on this issue; LBP-14-13, 80 NRC 142 (2014)

new contention concerning continued storage of spent nuclear fuel is ordered held in abeyance pending further Commission order; LBP-14-14, 80 NRC 144 (2014)

rulemaking petitioners assert that NRC Staff's review of the expedited-transfer issue generated new and significant information regarding the environmental impacts of spent fuel storage; CLI-14-7, 80 NRC 1 (2014)

spent fuel can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation and there is reasonable assurance that sufficient mined geologic repository capacity will be available when necessary; CLI-14-8, 80 NRC 71 (2014)

See also Continued Storage Rule

STANDARD OF REVIEW

Commission gives substantial deference to licensing board findings of fact, and it will not overturn a board's factual findings unless they are not even plausible in light of the record viewed in its entirety; CLI-14-10, 80 NRC 157 (2014)

on appeal intervenors must show that the board's resolution of the contested issue in favor of applicant is clearly erroneous; CLI-14-10, 80 NRC 157 (2014)

STANDING TO INTERVENE

discretionary intervention is permitted only where at least one petitioner has established standing and at least one admissible contention has been admitted; CLI-14-11, 80 NRC 167 (2014)

STATEMENT OF CONSIDERATIONS

NRC often refers to the Statement of Considerations as an aid in interpreting the agency's regulations; LBP-14-9, 80 NRC 15 (2014)

SOC cannot interpret what the regulation itself does not contain; LBP-14-9, 80 NRC 15 (2014)

STATUTORY CONSTRUCTION

agency's interpretation of what is properly within its jurisdictional scope is entitled to great deference, and will not be overturned if reasonably related to the language and purposes of the statute; LBP-14-9, 80 NRC 15 (2014)

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- agency's narrowed construction of its statutory authority, as distinct from an express prohibition by Congress, may not be used to limit the agency's obligations under NEPA; LBP-14-9, 80 NRC 15 (2014)
- in ruling that NRC had appropriately interpreted the Atomic Energy Act to include regulatory authority over attendant transmission lines, the court did not decide whether NEPA is an independent source of substantive jurisdiction; LBP-14-9, 80 NRC 15 (2014)
- NEPA's legislative history reflects Congress's concern that agencies might attempt to avoid any compliance with NEPA by narrowly construing other statutory directives to create a conflict with NEPA; LBP-14-9, 80 NRC 15 (2014)
- no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance with NEPA; LBP-14-9, 80 NRC 15 (2014)
- NRC's broad definition of "construction" in the pre-2007 version of the regulation was originally added to Part 50 because of the interpretation that enactment of NEPA required NRC to expand its permitting/licensing authority; LBP-14-9, 80 NRC 15 (2014)
- NRC's decision to include transmission lines that serve a nuclear power plant within the definition of "utilization facility" in NEPA, 42 U.S.C. § 2014(cc), was upheld; LBP-14-9, 80 NRC 15 (2014)
- STEAM GENERATORS**
- hearing request on safety concerns over steam generator replacement is referred to the Executive Director for Operations for disposition; CLI-14-11, 80 NRC 167 (2014)
- STRUCTURAL ANALYSIS**
- structural limits on the block wall between the engineered safety feature switchgear rooms is discussed; DD-14-5, 80 NRC 205 (2014)
- SUA SPONTE ISSUES**
- although Commission approval is required before a board exercises its sua sponte authority, that authority still exists; LBP-14-9, 80 NRC 15 (2014)
- SUBPART G PROCEDURES**
- proceedings on enforcement matters must be conducted under the procedures of subpart G unless all parties agree otherwise; LBP-14-11, 80 NRC 125 (2014)
- SUBPART G PROCEEDINGS**
- scope of discovery under Subpart G covers any matter that is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party; LBP-14-11, 80 NRC 125 (2014)
- scope of mandatory disclosures that parties must make under Subpart G is defined by the disputed issues alleged with particularity in the pleadings; LBP-14-11, 80 NRC 125 (2014)
- SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT**
- NRC rules provide a process to prepare supplemental draft or final environmental impact statements when the agency identifies new and significant information; CLI-14-7, 80 NRC 1 (2014)
- NRC's NEPA regulations require a request for public comment on a draft environmental impact statement and a supplement to a DEIS distributed in accordance with 10 C.F.R. 51.74 and on any supplement to the FEIS prepared pursuant to 10 C.F.R. 51.92(a) or (b); LBP-14-9, 80 NRC 15 (2014)
- SUSPENSION OF PROCEEDING**
- because petitions to suspend licensing decisions and proposed contentions are inextricably linked, and as a matter of sound case management, the Commission exercises its inherent supervisory authority over agency adjudications to review the petition and motions itself; CLI-14-9, 80 NRC 147 (2014)
- given that NRC will have the opportunity to further consider the concerns that rulemaking petitioners have expressed, and as it further considers actions related to the Fukushima events, it declines to suspend any proceeding pending resolution of the rulemaking petition; CLI-14-7, 80 NRC 1 (2014)
- in issuing the suspension of final licensing decisions in proceedings, NRC recognized that it could not move forward without first addressing the D.C. Circuit's remand because the vacatur left a regulatory gap in the Part 51 regulations that undergird licensing reviews in those matters; CLI-14-7, 80 NRC 1 (2014)
- NEPA does not require that NRC suspend its licensing decisions upon receipt of a claim of new and significant information; CLI-14-7, 80 NRC 1 (2014)
- petitioners have not shown compelling circumstances requiring NRC to suspend final licensing decisions pending completion of rulemaking; CLI-14-7, 80 NRC 1 (2014)

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rulemaking petitioner who is also a participant in a licensing proceeding may request suspension of that proceeding pending the outcome of the rulemaking petition; CLI-14-7, 80 NRC 1 (2014)

suspension provision provides an opportunity for a participant to ensure that a successful rulemaking petition is applied in an ongoing adjudication; CLI-14-7, 80 NRC 1 (2014)

to determine whether suspension of an adjudication or licensing decision is warranted, the Commission considers whether moving forward will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes; CLI-14-7, 80 NRC 1 (2014)

TEMPERATURE LIMITS

high temperature in the engineered safety feature switchgear rooms is discussed; DD-14-5, 80 NRC 205 (2014)

TEMPORARY STORAGE RULE

NRC's Waste Confidence Decision Update and Temporary Storage Rule were invalidated because there was not even a prospective site for a repository, let alone progress toward the actual construction of one; LBP-14-16, 80 NRC 183 (2014)

regulation governing the storage and disposal of spent nuclear fuel was vacated; LBP-14-15, 80 NRC 151 (2014)

TERMINATION OF PROCEEDING

motion to withdraw application without prejudice is granted and proceeding is terminated; CLI-14-8, 80 NRC 71 (2014)

TRANSMISSION LINES

although NRC takes the position that it lacks authority to impose environmental restrictions on transmission corridors, those impacts should have been analyzed as a direct effect of the NRC action even under NRC's new interpretation; LBP-14-9, 80 NRC 15 (2014)

approval of permits to a nuclear power plant was conditioned on the rerouting of two offsite transmission lines to avoid environmental impacts on marshlands, tree species, and migratory waterfowl; LBP-14-9, 80 NRC 15 (2014)

building of transmission lines is excluded from the definition of construction; LBP-14-9, 80 NRC 15 (2014)

by 1974, NRC had adopted an aggressive approach to its environmental responsibilities in the context of transmission line siting; LBP-14-9, 80 NRC 15 (2014)

excluding the transmission corridor from the scope of the proposed action also removes it from the limitation on actions; LBP-14-9, 80 NRC 15 (2014)

for an action such as a transmission corridor that will not be constructed by or expressly permitted by the federal agency preparing an environmental impact statement, there must be sufficient federal control and responsibility that the action qualifies as a federal action; LBP-14-9, 80 NRC 15 (2014)

for construction of a transmission corridor to constitute a connected action, three requirements must be met; LBP-14-9, 80 NRC 15 (2014)

in ruling that NRC had appropriately interpreted the Atomic Energy Act to include regulatory authority over attendant transmission lines, the court did not decide whether NEPA is an independent source of substantive jurisdiction; LBP-14-9, 80 NRC 15 (2014)

in the 2007 limited work authorization rule, NRC decided that the building of transmission lines to serve a nuclear power plant would no longer be classified as a construction activity and would no longer require authorization from NRC; LBP-14-9, 80 NRC 15 (2014)

NRC can, as a condition of licensure, insist that offsite transmission lines built solely to serve a nuclear facility be designed to minimize environmental disturbance; LBP-14-9, 80 NRC 15 (2014)

NRC has authority to impose environmental restrictions on new transmission lines intended to serve new nuclear power plants; LBP-14-9, 80 NRC 15 (2014)

NRC has long interpreted its statutory authority under the Atomic Energy Act to include conditioning approval of nuclear power plant licenses on environmentally acceptable routing of transmission lines; LBP-14-9, 80 NRC 15 (2014)

NRC's decision to include transmission lines that serve a nuclear power plant within the definition of "utilization facility" in NEPA, 42 U.S.C. § 2014(cc), was upheld; LBP-14-9, 80 NRC 15 (2014)

power plants without transmission lines are like airplanes that can't fly; LBP-14-9, 80 NRC 15 (2014)

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regulation of offsite transmission lines is within NRC's authority under section 101 of the Atomic Energy Act and nothing in the AEA precludes NRC from implementing, through issuance of conditional licenses, NEPA's environmental mandate; LBP-14-9, 80 NRC 15 (2014)
where increased air pollution in California resulting from two export turbines at a Mexican plants was a direct effect of the new transmission lines, DOE was required to evaluate the air pollution impacts under NEPA; LBP-14-9, 80 NRC 15 (2014)

TRUST RELATIONSHIP DOCTRINE

allegation that the Continued Storage Rule and generic environmental impact statement fail to address the trust responsibility the NRC owes an Indian tribe represents a collateral attack on the Continued Storage Rule and GEIS; LBP-14-16, 80 NRC 183 (2014)
government fulfills its trust duties by executing federal law, not by waiving federal law; LBP-14-16, 80 NRC 183 (2014)
government's trust responsibility is at its apex when it comes to managing tribal resources and preventing confiscation or environmental degradation of those resources; LBP-14-16, 80 NRC 183 (2014)
NRC considered Indian tribe's trust responsibility concerns during its rulemaking; LBP-14-16, 80 NRC 183 (2014)
NRC exercises its fiduciary duty in the context of its authorizing statutes, including the Atomic Energy Act, and implements any fiduciary responsibility by ensuring that tribal members receive the same protections under implementing regulations that are available to other persons; LBP-14-16, 80 NRC 183 (2014)

TURBINE BUILDING

request that NRC immediately shut down plants until all turbine building high-energy line break concerns are identified and those important to safety were corrected is granted in part; DD-14-5, 80 NRC 205 (2014)

UNCONTESTED ISSUES

because the scope of intervenors' participation in adjudications is limited to their admitted contentions, they are barred from participation in the uncontested portion of the hearing; LBP-14-9, 80 NRC 15 (2014)
licensing board role is not confined to arbitration of those environmental controversies as may happen to have been placed before them by the litigants in the particular case; LBP-14-9, 80 NRC 15 (2014)

UNCONTESTED LICENSE APPLICATIONS

function of uncontested hearings is only to review the adequacy of NRC Staff's work, not to make a de novo inquiry into NEPA issues; LBP-14-9, 80 NRC 15 (2014)

UTILIZATION FACILITY

NRC's decision to include transmission lines that serve a nuclear power plant within the definition of "utilization facility" in NEPA, 42 U.S.C. § 2014(cc), was upheld; LBP-14-9, 80 NRC 15 (2014)

VACATUR

in issuing the suspension of final licensing decisions in proceedings, NRC recognized that it could not move forward without first addressing the D.C. Circuit's remand because the vacatur left a regulatory gap in the Part 51 regulations that undergird licensing reviews in those matters; CLI-14-7, 80 NRC 1 (2014)
regulation governing the storage and disposal of spent nuclear fuel was vacated; LBP-14-15, 80 NRC 151 (2014)
where the reviewing court vacates a rule without reinstating the old rule, failure to reinstate the old rule creates a temporary regulatory vacuum; CLI-14-8, 80 NRC 71 (2014)

WAIVER OF RULE

all four factors in 10 C.F.R. 2.335(b) must be met; LBP-14-15, 80 NRC 151 (2014); LBP-14-16, 80 NRC 183 (2014)
all four of the *Millstone* rule waiver requirements derive from the language and purpose of section 2.335(b); LBP-14-16, 80 NRC 183 (2014)
case law test for rule waiver establishes an appreciably higher burden for would-be waiver seekers than does 10 C.F.R. 2.335(b); LBP-14-16, 80 NRC 183 (2014)
even proximity to a nuclear power facility or independent spent fuel storage installation is hardly unique in context of a rule waiver request; LBP-14-16, 80 NRC 183 (2014)
four-part test for granting a waiver under 10 C.F.R. 2.335(b) is set forth; LBP-14-16, 80 NRC 183 (2014)

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- government fulfills its trust duties by executing federal law, not by waiving federal law; LBP-14-16, 80 NRC 183 (2014)
- intervenor in adjudicatory proceedings are prohibited from challenging regulations unless they first obtain a waiver by showing special circumstances; LBP-14-15, 80 NRC 151 (2014)
- licensing board initially determines, based on the record, whether a prima facie showing has been made by the petitioner for its rule waiver request, and then the board must certify the matter directly to the Commission for a final determination; LBP-14-16, 80 NRC 183 (2014)
- no NRC rule or regulation or provision thereof is subject to attack in an adjudicatory proceeding unless a waiver is granted by the Commission; LBP-14-16, 80 NRC 183 (2014)
- participant may request waiver of a current rule or regulation in a specific proceeding under special circumstances as an exception to the prohibition against challenging NRC rules or regulations in adjudicatory proceedings; CLI-14-7, 80 NRC 1 (2014); LBP-14-16, 80 NRC 183 (2014)
- petition for a rule waiver must be accompanied by an affidavit stating with particularity the special circumstances alleged to justify the waiver or exception requested; LBP-14-16, 80 NRC 183 (2014)
- prima facie showing on a rule waiver request is not a final determination on the merits, but merely requires presentation of enough information to allow the board to infer (absent disproof) that special circumstances exist; LBP-14-16, 80 NRC 183 (2014)
- rule waiver should not be granted unless the petition relates to a significant safety problem; LBP-14-16, 80 NRC 183 (2014)
- rule waiver test applies equally to safety and significant environmental concerns; LBP-14-16, 80 NRC 183 (2014)
- sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted; LBP-14-16, 80 NRC 183 (2014)
- special circumstances for rule waiver are present only if the petition properly pleads one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived; LBP-14-16, 80 NRC 183 (2014)
- waiver petition would permit consideration of an issue in an adjudicatory proceeding that would otherwise impermissibly challenge an NRC rule or regulation; CLI-14-7, 80 NRC 1 (2014)
- where the rules in question, as well as the contention itself, address compliance with NEPA and not safety issues under the Atomic Energy Act, the rule waiver is needed to address a significant environmental issue instead of a significant safety issue; LBP-14-16, 80 NRC 183 (2014)
- WASTE CONFIDENCE RULE**
- Commission directed that licensing boards hold waste disposal contentions in abeyance pending further Commission order, which would be issued in conjunction with a then to-be-determined agency response to the District of Columbia Circuit's ruling; CLI-14-8, 80 NRC 71 (2014); LBP-14-12, 80 NRC 138 (2014)
- licensing boards are directed to reject pending waste confidence contentions that had been held in abeyance; LBP-14-15, 80 NRC 151 (2014)
- licensing boards were instructed to hold in abeyance any contentions on Waste Confidence matters until after the Commission's issuance of a new generic environmental impact statement; LBP-14-16, 80 NRC 183 (2014)
- NRC's Waste Confidence Decision Update and Temporary Storage Rule were invalidated because there was not even a prospective site for a repository, let alone progress toward the actual construction of one; LBP-14-16, 80 NRC 183 (2014)
- rule expressed the Commission's reasonable assurance that a repository was likely to be available by 2007-2009; LBP-14-16, 80 NRC 183 (2014)
- spent fuel can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation and there is reasonable assurance that sufficient mined geologic repository capacity will be available when necessary; CLI-14-8, 80 NRC 71 (2014)
- WATER POLLUTION**
- Corps of Engineers may not issue a 404 permit if there exists a practicable alternative that would have less adverse impact on the aquatic system, the permit would cause significant degradation of the water

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